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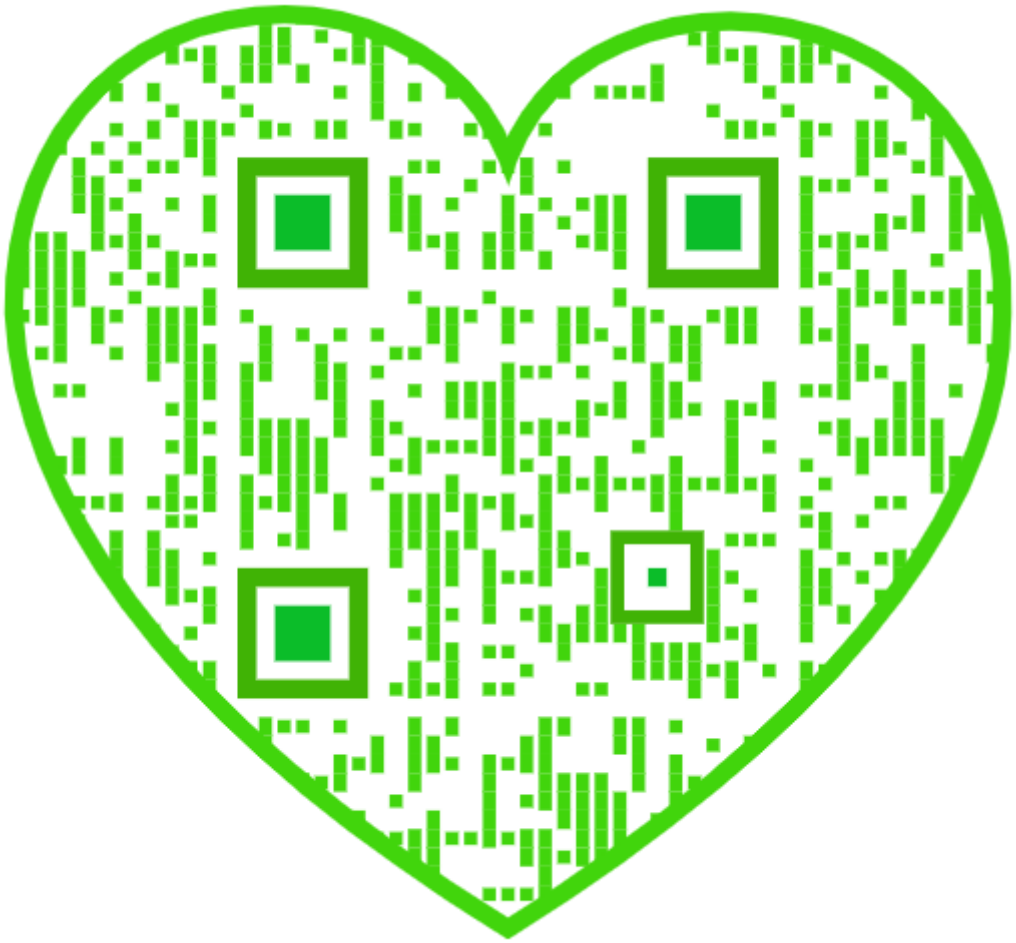

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CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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In General, see COVENANTS, 11 Cyc. 1140.
Of Shipping Contract, see CARRIERS, 6 Cyc. 513.
To Make Improvements, see LANDLORD AND TENANT, 24 Cyc. 845, 1109.
To Repair, see LANDLORD AND TENANT, 24 Cyc. 1096.
Marriage Promise, see BREACH OF PROMISE TO MARRY, 5 Cyc. 1007.
Broker's Commission, see FACTORS AND BROKERS, 19 Cyc. 166, 274.
Cancellation of Instrument, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 324.
Causing Death, see DEATH, 13 Cyc. 340.
Civil Liability of Judge, see JUDGES, 23 Cyc. 572.
Claim Against Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 727.
Compensation:
For Improvement, see IMPROVEMENTS, 22 Cyc. 32.
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For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding For — (*continued*)
Compensation — (*continued*)
For Publication in Official Newspaper, see NEWSPAPERS, 29 Cyc. 703.
Of Architect, see BUILDERS AND ARCHITECTS, 6 Cyc. 47.
Of Factor or Broker, see FACTORS AND BROKERS, 19 Cyc. 166, 274.
Conspiracy, see CONSPIRACY, 8 Cyc. 660.
Contest of:
Election, see ELECTIONS, 15 Cyc. 404.
Mineral Claim, see MINES AND MINERALS, 27 Cyc. 610, 634, 644, 653, 665.
Contribution, see CONTRIBUTION, 9 Cyc. 803, 808.
Conversion:
In General, see TROVER AND CONVERSION.
Against Bailee, see BAILMENTS, 5 Cyc. 216.
Of Property Subject to Landlord's Lien, see LANDLORD AND TENANT, 24 Cyc. 1269.
Criminal Conversation, see HUSBAND AND WIFE, 21 Cyc. 1629.
Damages and Mesne Profits:
For Private Nuisance, see NUISANCES, 29 Cyc. 1262, 1263.
For Public Nuisance, see NUISANCES, 29 Cyc. 1263.
In Ejectment, see EJECTMENT, 15 Cyc. 214.
Damages For:
Breaking of Levee, see LEVEES, 25 Cyc. 199.
Dispossession by Attachment, see ATTACHMENT, 4 Cyc. 672.
Imperfect Abstract, see ABSTRACTS OF TITLE, 1 Cyc. 218.
Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1099, 1188.
Wrongful Execution Sale, see EXECUTIONS, 17 Cyc. 1576.
Wrongs Generally, see DAMAGES, 13 Cyc. 173.
Deportation of Aliens, see ALIENS, 2 Cyc. 123.
Deposit, see DEPOSITARIES, 13 Cyc. 819.
Disbarment, see ATTORNEY AND CLIENT, 4 Cyc. 913.
Distraining Animals, see ANIMALS, 23 Cyc. 408, 411.
Distribution of Proceeds or Surplus on Foreclosure, see MORTGAGES, 27 Cyc. 1772.
Divorce, see DIVORCE, 14 Cyc. 662.
Dower, see DOWER, 14 Cyc. 986.
Ejection of Passenger by Carrier, see CARRIERS, 6 Cyc. 565.
Enforcement of Judgment, see JUDGMENTS, 23 Cyc. 1413.
Enticing Away or Harboring Apprentice, see APPRENTICES, 3 Cyc. 557.
Enticing or Alienating Husband or Wife, see HUSBAND AND WIFE, 21 Cyc. 1623.
Equitable Relief Against Judgment, see JUDGMENTS, 23 Cyc. 1039.
Eviction by Third Person, see LANDLORD AND TENANT, 24 Cyc. 1135.
Failure:
To Deliver Goods by Carrier, see CARRIERS, 6 Cyc. 515.
To Give Possession of Premises Demised, see LANDLORD AND TENANT, 24 Cyc. 1052.
False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 368.
Flowage of Land, see WATERS.
Fraud, see FRAUD, 20 Cyc. 95.

For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding For — (*continued*)
Fraudulent Conveyance or Disposition of Property, see FRAUDULENT CONVEYANCES, 20 Cyc. 726.
Garnishment, see GARNISHMENT, 20 Cyc. 1088, 1093.
Infringement of:
Copyright, see COPYRIGHT, 9 Cyc. 963.
Ferry Franchise, see FERRIES, 19 Cyc. 502.
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Trade-Mark, see TRADE-MARKS AND TRADE-NAMES.
Injunction:
In General, see INJUNCTIONS, 22 Cyc. 924.
Against:
Collection of:
Municipal Tax, see MUNICIPAL CORPORATIONS, 28 Cyc. 1747.
Tax, see TAXATION.
Execution, see EXECUTIONS, 17 Cyc. 1187.
Foreclosure of Mortgage, see MORTGAGES, 27 Cyc. 1457.
Liquor Nuisance, see INTOXICATING LIQUORS, 23 Cyc. 305.
Obstruction or Diversion of Channel or Stream, see NAVIGABLE WATERS, 29 Cyc. 324.
Obstruction or Encroachment in Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 904.
Private Nuisance, see NUISANCES, 29 Cyc. 1241.
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Trespass or Removal of Minerals, see MINES AND MINERALS, 27 Cyc. 665.
Injuries By or From:
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Animal, see ANIMALS, 2 Cyc. 383.
Dangerous or Defective Condition of Demised Premises, see LANDLORD AND TENANT, 24 Cyc. 1123.
Defect or Obstruction in Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 904.
Driving or Rafting Logs, see LOGGING, 25 Cyc. 1579.
Gas, see GAS, 20 Cyc. 1179.
Injury on Highway, see STREETS AND HIGHWAYS.
Injury to:
Animal, see ANIMALS, 2 Cyc. 422.
Animal on Railroad Track, see RAILROADS.
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Person or Property of Tenant, see LANDLORD AND TENANT, 24 Cyc. 1123.
Reversion, see LANDLORD AND TENANT, 24 Cyc. 931.
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Interest, see INTEREST, 22 Cyc. 1574.
Interference With Easement, see EASEMENTS, 14 Cyc. 1220.
Involuntary Bankruptcy, see BANKRUPTCY, 5 Cyc. 301.
Killing Animal, see ANIMALS, 2 Cyc. 422.
Libel and Slander, see LIBEL AND SLANDER, 25 Cyc. 434.
Loss or Injury to:
Goods and Live Stock by Carrier, see CARRIERS, 6 Cyc. 515.
Passenger by Carrier, see CARRIERS, 6 Cyc. 626.
Property of Guest, see INNKEEPERS, 22 Cyc. 1095.

For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding For — (*continued*)
Maintenance, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 887.
Malicious Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 71.
Malpractice, see PHYSICIANS AND SURGEONS, 30 Cyc. 1583, 1601.
Money:
Loaned, see MONEY LENT, 27 Cyc. 828.
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Received, see MONEY RECEIVED, 27 Cyc. 878.
Municipal Tax, see MUNICIPAL CORPORATIONS, 28 Cyc. 1715.
Negligence:
Generally, see NEGLIGENCE, 29 Cyc. 565.
In Condition or Use of Building or Other Property, see MUNICIPAL CORPORATIONS, 28 Cyc. 1465.
In Operation of:
Ferry, see FERRIES, 19 Cyc. 512.
Railroad, see RAILROADS.
Street Railroad, see STREET RAILROADS.
Of Bank in Collection, see BANKS AND BANKING, 5 Cyc. 510.
Of Corporate Director, see CORPORATIONS, 10 Cyc. 838.
Nuisance, see NUISANCES, 29 Cyc. 1241.
Obstruction of:
Easement, see EASEMENTS, 14 Cyc. 1220.
Light and Air, see ADJOINING LANDOWNERS, 1 Cyc. 789.
Partition, see PARTITION, 30 Cyc. 214, 224.
Payment and Distribution of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 647.
Penalty:
In General, see PENALTIES, 30 Cyc. 1352.
For Particular Acts:
Failure to Release or Enter Satisfaction of Mortgage, see MORTGAGES, 27 Cyc. 1424.
False Notice of Copyright, see COPYRIGHT, 9 Cyc. 926.
Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 837.
Peddling Without License, see HAWKERS AND PEDDLERS, 21 Cyc. 377.
Violation of Fish or Game Law or Regulation, see FISH AND GAME, 19 Cyc. 1024.
Violation of Liquor Law, see INTOXICATING LIQUORS, 23 Cyc. 170.
Violation of Police Regulation, see MUNICIPAL CORPORATIONS, 28 Cyc. 794.
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Possession of Demised Premises, see LANDLORD AND TENANT, 24 Cyc. 1052, 1135, 1436.
Price of:
Food Sold, see SALES.
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Liquor Sold, see INTOXICATING LIQUORS, 23 Cyc. 342.
Profits of Joint Adventure, see JOINT ADVENTURES, 23 Cyc. 462.
Protection of Ferry Franchises, see FERRIES, 19 Cyc. 502.
Recovery of Office, see OFFICERS, 29 Cyc. 1418.
Reference, see REFERENCES.

For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding For — (*continued*)
Relief Against:
Assessment For Benefit, see MUNICIPAL CORPORATIONS, 28 Cyc. 1188.
Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 726.
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Replevin, see REPLEVIN.
Seduction, see SEDUCTION.
Separate Maintenance, see HUSBAND AND WIFE, 21 Cyc. 1605.
Services, see MASTER AND SERVANT, 26 Cyc. 1055; WORK AND LABOR.
Slander of Title, see LIBEL AND SLANDER, 25 Cyc. 563, 565.
Specific Performance, see SPECIFIC PERFORMANCE.
Subrogation, see SUBROGATION.
Taking Away and Harboring Child, see PARENT AND CHILD, 29 Cyc. 1681.
Taking or Injuring Property Without Compensation, see EMINENT DOMAIN, 15 Cyc. 1003.
Tort, see TORTS.
Trespass:
In General, see TRESPASS.
By Animal, see ANIMALS, 2 Cyc. 411.
On Mining Property or Claim, see MINES AND MINERALS, 27 Cyc. 634, 650.
Use and Occupation, see USE AND OCCUPATION.
Vacation of Assessment For Benefit, see MUNICIPAL CORPORATIONS, 28 Cyc. 1188.
Wages, see MASTER AND SERVANT, 26 Cyc. 1055.
Wrongful:
Attachment, see ATTACHMENT, 4 Cyc. 832, 851.
Attachment in Justice of the Peace Proceeding, see JUSTICES OF THE PEACE, 24 Cyc. 542.
Discharge of Servant, see MASTER AND SERVANT, 26 Cyc. 1002.
Dispossession of Tenant, see LANDLORD AND TENANT, 24 Cyc. 1135.
Execution, see EXECUTIONS, 17 Cyc. 1576.
Expulsion of Passenger, see CARRIERS, 6 Cyc. 565.
Injunction, see INJUNCTIONS, 22 Cyc. 1061.
Issuance of Marriage License, see MARRIAGE, 26 Cyc. 852, note 83.
Seizure of Property Subject to Chattel Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 30.
Suspension From Labor Union, see LABOR UNIONS, 24 Cyc. 828.
Action or Proceeding on:
Account or Bill For Accounting, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 435.
Account Stated, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 388.
Assignment, see ASSIGNMENTS, 4 Cyc. 103.
Award, see ARBITRATION AND AWARD, 3 Cyc. 780.
Bonds:
Generally, see BONDS, 5 Cyc. 822.
Administration Bond, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1298.

For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding on — (*continued*)
Bonds — (*continued*)
Appeal-Bond Given on Appeal From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 798.
Assignee's Bond, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 287.
Attachment Bond, see ATTACHMENT, 4 Cyc. 761.
Bail-Bond or Recognizance, see BAIL, 5 Cyc. 57.
Bond For Discharge From Arrest, see ARREST, 3 Cyc. 980.
Bond For Release of Debtor From Imprisonment, see ARREST, 3 Cyc. 980.
Bond in Execution Against Person, see EXECUTIONS, 17 Cyc. 1537.
Bond of County Officer, see COUNTIES, 11 Cyc. 452.
Bond or Contract of Indemnity, see INDEMNITY, 22 Cyc. 103.
Cost Bond, see COSTS, 11 Cyc. 197.
County Bond, see COUNTIES, 11 Cyc. 573.
Delivery Bond, see EXECUTIONS, 17 Cyc. 1133.
Forthcoming Bond, see EXECUTIONS, 17 Cyc. 1133.
Guardian's Bond, see GUARDIAN AND WARD, 21 Cyc. 253.
Injunction Bond, see INJUNCTIONS, 22 Cyc. 1144.
Justice's Official Bond, see JUSTICES OF THE PEACE, 24 Cyc. 430.
Liquor Dealer's Bond, see INTOXICATING LIQUORS, 23 Cyc. 146.
Municipal Bond, see MUNICIPAL CORPORATIONS, 28 Cyc. 1654.
Official Bond, see OFFICERS, 29 Cyc. 1466.
Public Ferryman's Bond, see FERRIES, 19 Cyc. 512.
Replevin Bond, see REPLEVIN.
City Warrant, see MUNICIPAL CORPORATIONS, 28 Cyc. 1574.
Claim Against County, see COUNTIES, 11 Cyc. 602.
Claim Against Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 978.
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Composition Agreement, see COMPOSITIONS WITH CREDITORS, 8 Cyc. 460.
Contract, see CONTRACTS, 9 Cyc. 711.
Contract For Exchange of Realty, see EXCHANGE OF PROPERTY, 17 Cyc. 837 note 29, 838 note 32.
County Warrant or Certificate of Indebtedness, see COUNTIES, 11 Cyc. 547.
Foreign Judgment, see JUDGMENTS, 23 Cyc. 1566.
Gambling Contract, see GAMING, 20 Cyc. 959.
Guaranty, see GUARANTY, 20 Cyc. 1486.
Indemnity, see INDEMNITY, 22 Cyc. 103.
Insurance Contract, see ACCIDENT INSURANCE, 1 Cyc. 285; FIDELITY INSURANCE, 19 Cyc. 525; FIRE INSURANCE, 19 Cyc. 917; LIFE INSURANCE, 25 Cyc. 916; LIVE-STOCK INSURANCE, 25 Cyc. 1521; MARINE INSURANCE, 26 Cyc. 718.
Judgment, see JUDGMENTS, 23 Cyc. 1514.
Judgment of State Court in Federal Court, see JUDGMENTS, 23 Cyc. 623.
Justice's Judgment, see JUSTICES OF THE PEACE, 24 Cyc. 615.
Lost Instrument, see LOST INSTRUMENTS, 25 Cyc. 1620.
Municipal Warrant, see MUNICIPAL CORPORATIONS, 28 Cyc. 1574.

For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding on — (*continued*)
Negotiable Instrument, see COMMERCIAL PAPER, 8 Cyc. 96.
Receipt by Attaching Officer, see ATTACHMENT, 4 Cyc. 673.
Recognizances, see BAIL, 5 Cyc. 57, 140; RECOGNIZANCES.
Scire Facias to Revive Judgment, see JUDGMENTS, 23 Cyc. 1456.
Subscription, see SUBSCRIPTIONS.
Action or Proceeding to:
Abate Nuisance, see NUISANCES, 29 Cyc. 1241.
Avoid Transfer or Encumbrance of Homestead, see HOMESTEADS, 21 Cyc. 559.
Cancel Instrument, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 324.
Cancel Mortgage, see MORTGAGES, 27 Cyc. 1132.
Charge Corporate Directors With Statutory Penalty, see CORPORATIONS, 10 Cyc. 891.
Collect Ground-Rent, see GROUND-RENTS, 20 Cyc. 1388.
Compel:
Account by:
Assignee For Creditor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 247.
Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1132.
Partner, see PARTNERSHIP, 30 Cyc. 732.
Reissue or Reëxecution of Lost Instrument, see LOST INSTRUMENTS, 25 Cyc. 1620.
Release or Satisfaction of Mortgage, see MORTGAGES, 27 Cyc. 1424.
Satisfaction or Vacation of Satisfaction of Judgment, see JUDGMENTS, 27 Cyc. 1424.
Construe Will, see WILLS.
Correct or Set Aside Settlement of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1202.
Declare Judgment Satisfied, see JUDGMENTS, 23 Cyc. 1499.
Determine:
Claim in Garnishment Proceeding, see GARNISHMENT, 20 Cyc. 1134.
Controversy With Reference to Advancement, see DESCENT AND DISTRIBUTION, 14 Cyc. 181.
Priority of Mortgage, see MORTGAGES, 27 Cyc. 1167.
Title to Office, see OFFICERS, 29 Cyc. 1418.
Dispute Validity of Gift, see GIFTS, 20 Cyc. 1218.
Enforce:
Charitable Trust, see CHARITIES, 6 Cyc. 970.
Claim Against Homestead, see HOMESTEADS, 21 Cyc. 524.
Contribution, see CONTRIBUTION, 9 Cyc. 808.
Criminal Bail, see BAIL, 5 Cyc. 140.
Dissolution of Corporation or Forfeiture of Franchise, see CORPORATIONS, 10 Cyc. 1310.
Forfeiture:
In General, see FORFEITURES, 19 Cyc. 1360.
For Violation of Customs Law or Regulation, see CUSTOMS DUTIES, 12 Cyc. 1179.
Under Internal Revenue Law, see INTERNAL REVENUE, 22 Cyc. 1683.

For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding to — (*continued*)
Enforce — (*continued*)
Homestead Right, see HOMESTEADS, 21 Cyc. 635.
Judgment, see JUDGMENTS, 23 Cyc. 1514.
Liability of:
Bank Officer, see BANKS AND BANKING, 5 Cyc. 484.
Director For Debts and Acts of Corporations, see CORPORATIONS, 10 Cyc. 891.
Judge, see JUDGES, 23 Cyc. 572.
Officer of Corporation, see BANKS AND BANKING, 5 Cyc. 484.
Lien, see AGRICULTURE, 2 Cyc. 66; ATTORNEY AND CLIENT, 4 Cyc. 1022; LANDLORD AND TENANT, 24 Cyc. 1269; LIENS, 25 Cyc. 684; LOGGING, 25 Cyc. 1596; MARITIME LIENS, 26 Cyc. 811; MASTER AND SERVANT, 26 Cyc. 1074; MECHANICS' LIENS, 27 Cyc. 367; SALES; VENDOR AND PURCHASER.
Right of Exemption, see EXEMPTIONS, 18 Cyc. 1491.
Special Assessment, see MUNICIPAL CORPORATIONS, 28 Cyc. 1232.
Stock Transfer, see CORPORATIONS, 10 Cyc. 607.
Tax, see MUNICIPAL CORPORATIONS, 28 Cyc. 1715; TAXATION.
Escheat Property, see ESCHEAT, 16 Cyc. 555.
Establish:
Boundary, see BOUNDARIES, 5 Cyc. 953.
Highway, see STREETS AND HIGHWAYS.
Lost Instrument, see LOST INSTRUMENTS, 25 Cyc. 1620.
Right as Heir or Distributee, see DESCENT AND DISTRIBUTION, 14 Cyc. 97.
Tax Title, see TAXATION.
Title by Action of Slander to Try Title, see LIBEL AND SLANDER, 25 Cyc. 565.
Title in General, see QUIETING TITLE; TRESPASS TO TRY TITLE.
Trust, see TRUSTS.
Water Right, see WATERS AND WATERCOURSES.
Foreclose:
Chattel Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 98.
Mortgage, see MORTGAGES, 27 Cyc. 1590.
Marshal Assets and Securities, see MARSHALING ASSETS AND SECURITIES, 26 Cyc. 937.
Open and Correct Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 501.
Protect Mining Right, see MINES AND MINERALS, 27 Cyc. 665.
Quiet Title, see QUIETING TITLE.
Recover:
Bounty Money, see BOUNTIES, 5 Cyc. 991.
Customs Duty, see CUSTOMS DUTIES, 12 Cyc. 1163.
Deposit, see DEPOSITARIES, 13 Cyc. 808.
Distributive Share of Widow, see DESCENT AND DISTRIBUTION, 14 160.
Dower, see DOWER, 14 Cyc. 986.
Homestead, see HOMESTEADS, 21 Cyc. 635.
License-Tax, see LICENSES, 25 Cyc. 630, 632.
Money Lost at Gaming, see GAMING, 20 Cyc. 959.

For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding to — (*continued*)
Recover — (*continued*)
Possession:
By Execution Purchaser, see EXECUTIONS, 17 Cyc. 1316.
By Landlord or Lessor, see LANDLORD AND TENANT, 24 Cyc. 1404, 1436.
Of Property, see EJECTMENT, 15 Cyc. 90; ENTRY, WRIT OF, 5 Cyc. 1075; FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1150; REAL ACTIONS; REPLEVIN.
Of Mortgaged Property, see MORTGAGES, 27 Cyc. 1242.
Rent, see LANDLORD AND TENANT, 24 Cyc. 1210.
Redeem From:
Execution Sale, see EXECUTIONS, 17 Cyc. 1336.
Foreclosure Sale and For Accounting, see MORTGAGES, 27 Cyc. 1457, 1590.
Mortgage, see MORTGAGES, 27 Cyc. 1853.
Mortgage Foreclosure and For Accounting, see MORTGAGES, 27 Cyc. 1457, 1519.
Reform Written Instrument, see REFORMATION OF INSTRUMENTS.
Remove:
Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 167.
Guardian, see GUARDIAN AND WARD, 21 Cyc. 58.
Rescind Contract, see SALES.
Review:
Actions Generally, see APPEAL AND ERROR, 2 Cyc. 474; CERTIORARI, 6 Cyc. 730.
Judgment, see JUDGMENTS, 23 Cyc. 1039.
Revive Judgment, see JUDGMENTS, 23 Cyc. 1456.
Revoke:
Letters of Administration, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 167.
Liquor Dealer's License, see INTOXICATING LIQUORS, 23 Cyc. 159.
Set Aside:
Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 280.
Compromise, see COMPROMISE AND SETTLEMENT, 8 Cyc. 533.
Execution Sale, see EXECUTIONS, 17 Cyc. 1284.
Executor's or Administrator's Sale, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 813.
Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 726.
Guardian's Sale, see GUARDIAN AND WARD, 21 Cyc. 143.
Justice's Judgment, see JUSTICES OF THE PEACE, 24 Cyc. 607.
Mortgage, see MORTGAGES, 27 Cyc. 1132.
Sale Under Power in Mortgage, see MORTGAGES, 27 Cyc. 1509.
Subject Homestead, see HOMESTEADS, 21 Cyc. 635.
Surcharge and Falsify Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 461.
Wind Up:
Building and Loan Society, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 163.
Corporation, see CORPORATIONS, 10 Cyc. 1310.

For Matters Relating to — (*continued*)
Pleading in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Actions or Proceedings Under:
Bastardy Law, see BASTARDS, 5 Cyc. 652.
Civil Damage Act, see INTOXICATING LIQUORS, 23 Cyc. 322.
Liquor Law, see INTOXICATING LIQUORS, 23 Cyc. 342.
Poor Law, see PAUPERS, 30 Cyc. 1156.
Admiralty, see ADMIRALTY, 1 Cyc. 853.
Attachment Suit, see ATTACHMENT, 4 Cyc. 705.
Bankruptcy, see BANKRUPTCY, 5 Cyc. 309.
Between Mortgagor and Mortgagee For Possession, see MORTGAGES, 27 Cyc. 1242.
Bill:
In Aid of Assignment For Creditor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 244.
In Equity, see EQUITY, 16 Cyc. 216.
To Set Aside Foreclosure, see MORTGAGES, 27 Cyc. 1717.
Boundary Proceeding, see BOUNDARIES, 5 Cyc. 953.
Civil Action by Attorney-General, see ATTORNEY-GENERAL, 4 Cyc. 1033.
Condemnation or Eminent Domain Proceeding, see EMINENT DOMAIN, 15 Cyc. 850.
Creditor's Suit, see CREDITORS' SUITS, 12 Cyc. 38.
Equity, see EQUITY, 16 Cyc. 216.
Error, see APPEAL AND ERROR, 2 Cyc. 474.
Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1150.
Interpleader, see INTERPLEADER, 23 Cyc. 25.
Mandamus, see MANDAMUS, 26 Cyc. 405.
Particular Form of Action, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 476; ASSUMPSIT, ACTION OF, 4 Cyc. 339; AUDITA QUERELA, 4 Cyc. 1069; CASE, ACTION ON, 6 Cyc. 695; COVENANT, ACTION OF, 11 Cyc. 1140; DEBT, ACTION OF, 13 Cyc. 413; DETINUE, 14 Cyc. 265; EJECTMENT, 15 Cyc. 90; ENTRY, WRIT OF, 15 Cyc. 1075; FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1150; MANDAMUS, 26 Cyc. 425; MONEY LENT, 27 Cyc. 828; MONEY PAID, 27 Cyc. 842; MONEY RECEIVED, 27 Cyc. 877; QUO WARRANTO; REAL ACTIONS; REPLEVIN; SCIRE FACIAS; TRESPASS; TROVER AND CONVERSION; USE AND OCCUPATION; WASTE; WORK AND LABOR.
Quo Warranto, see QUO WARRANTO.
Pleading Necessary to Sustain Judgment, see JUDGMENTS, 23 Cyc. 695, 712.
Plea in Criminal Proceeding, see CRIMINAL LAW, 12 Cyc. 343.
Power of Judge at Chambers or in Vacation Over Pleading, see JUDGES, 23 Cyc. 552.
Privilege as to Matter Contained in Pleading, see LIBEL AND SLANDER, 25 Cyc. 379.
Process, see PROCESS.
Record, see RECORDS.
Record on Appeal, see APPEAL AND ERROR, 2 Cyc. 1056.
Review of Questions Relating to Pleading, see APPEAL AND ERROR, 2 Cyc. 605.
Stipulations, see STIPULATIONS.
Taking Pleadings in Case to Jury Room, see TRIAL.

I. DEFINITIONS.

Pleadings are statements, in logical and legal form, of causes of action and grounds of defense,[1] terminating in a single proposition affirmed on one side and denied on the other.[2] They are intended to form the foundation of the proof to be submitted on the trial,[3] and should advise the parties to an action what the opposite

1. *Illinois.*— Young *v.* Gower, 88 Ill. App. 70, 72; Jensen *v.* Wetherell, 79 Ill. App. 33, 35.

Iowa.— Brainard *v.* Simmons, 58 Iowa 464, 466, 9 N. W. 382, 12 N. W. 484.

Maine.—Burnham *v.* Ross, 47 Me. 456, 459.

Mississippi.— Bowman *v.* McLaughlin, 45 Miss. 461, 489.

Tennessee.— Chattanooga Cotton Oil Co. *v.* Shamblin, 101 Tenn. 263, 265, 47 S. W. 496; Smith *v.* Cottrel, 8 Baxt. 62, 63.

Utah.— Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 499, 45 Pac. 629.

See 39 Cent. Dig. tit. "Pleading," § 1.

Affidavit and pleading distinguished see AFFIDAVITS, 2 Cyc. 4.

2. *Dakota.*— Parliman *v.* Young, 2 Dak. 175, 4 N. W. 139, 143, 711.

Maryland.— Marshall *v.* Haney, 9 Gill 251.

New York.— Buddington *v.* Davis, 6 How. Pr. 401.

North Carolina.— Parsley *v.* Nicholson, 65 N. C. 207.

Utah.— Sling *v.* Scottish Union, etc., Ins. Co., 7 Utah 441, 443, 27 Pac. 170.

Wisconsin.— Tarbox *v.* Adams County Sup'rs, 34 Wis. 558.

United States.— Tucker *v.* U. S., 151 U. S. 164, 14 S. Ct. 299, 38 L. ed. 112.

See 39 Cent. Dig. tit. "Pleading," § 1.

Where by statute the number of pleadings is limited, this result is not always reached. See *infra*, V, A, 2.

Other definitions are: "Pleading is the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action or the defendant's ground of defence. It is the formal mode of alleging that on the record which would be the support or the defence of the party in evidence." Burnham *v.* Ross, 47 Me. 456, 459; Chattanooga Cotton Oil Co. *v.* Shamblin, 101 Tenn. 263, 265, 47 S. W. 496; Smith *v.* Cottrel, 8 Baxt. (Tenn.) 62, 63; Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 499, 45 Pac. 629.

"The written allegations of what is affirmed on the one side, or denied on the other; disclosing to the court or jury, who have to try the cause, the real matter in dispute between the parties." Desnoyer *v.* L'Hereux, 1 Minn. 17, 19.

"Pleadings are presumed to be statements, in legal form, of those facts constituting the charge or defense of the parties by means of which issues between the parties to be tried are defined, and are necessary to inform the court what issues are raised, and which are proper." Cook *v.* Merritt, 15 Colo. 212, 214, 25 Pac. 176.

"The allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issues to be tried and determined between them." Tucker *v.* U. S., 151 U. S. 164, 168, 14 S. Ct. 299, 38 L. ed. 112.

"The science and course of allegation whereby a party in court presents his demand or defense against the demand of the other party to be made a matter of record." Kansas City *v.* O'Connor, 36 Mo. App. 594, 599.

"The formal mode of alleging that on the record, which would be the support or defence of the party on evidence. . . . In pleading, the legal effect of the facts is stated, and not the facts themselves." Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727, 728.

"Pleadings at common law are composed of the written allegations of the parties, terminating in a single proposition, distinctly affirmed on one side and denied on the other, called the issue. If it is a proposition of fact, it is to be tried by a jury upon the evidence adduced, and it must correspond with the allegations and be confined to the point in issue. . . . Pleadings are for the purpose of advising the parties to an action what the opposite party relies upon, that he may be ready to meet it in evidence on trial." Parliman *v.* Young, 2 Dak. 175, 4 N. W. 139, 143, 711; Marshall *v.* Haney, 9 Gill (Md.) 251, 258; Blum *v.* Bruggemann, 58 N. Y. App. Div. 377, 68 N. Y. Suppl. 1065; Hong Sling *v.* Scottish Union, etc., Ins. Co., 7 Utah 441, 443, 27 Pac. 170.

"'The statements of the parties, in legal and proper manner, of the causes of action and grounds of defense. . . . They were formerly made by the parties or their counsel, orally, in open court, under the control of the court.' In other words, pleadings are but the statements of the issues to be tried." Bowman *v.* McLaughlin, 45 Miss. 461, 489 [*quoting* Bouvier L. Dict.].

Statutory definitions are: "The written statements, by the parties, of the facts constituting their respective claims and defenses." Indian Terr. Annot. St. (1899) § 3225; Kan. Gen. St. (1901) § 4518; Okla. Rev. St. (1903) § 4288; Wyo. Rev. St. (1899) § 3531.

"The formal allegations by the parties of their respective claims and defenses for the judgment of the court." Cal. Code Civ. Proc. (1906) § 420; Ida. Code Civ. Proc. (1901) § 3200; Utah Rev. St. (1898) § 2956.

3. Desnoyer *v.* L'Hereux, 1 Minn. 17; Boyce *v.* Brown, 7 Barb. (N. Y.) 80; Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727; Taylor *v.* Coppock, 1 Del. Co. (Pa.) 190.

Conformity of pleading and proof see *infra*, XIII, B, 4.

Variance between pleading and proof see *infra*, XIII, C.

party relies upon either as a cause of action or defense or objection as the case may be.[4]

II. General Principles.

A. Effect of Codes.[5] All of the American codes of civil procedure provide that the mode of pleading in civil actions and the rules by which the sufficiency of the pleadings shall be determined shall be as prescribed by the code. It has been held that the rules of the common law respecting the sufficiency of pleadings are abrogated by the code, and whatever rules of common-law pleading are still applicable derive their authority wholly from the fact that the code has adopted them.[6] Other cases, however, hold that the common-law rules of pleading have been abrogated only in so far as they are inconsistent with the principles of the code; but otherwise they are to be deemed still in force.[7] The most characteristic changes introduced by the codes are the abolition of the common-law forms of action and the establishment of a single civil action for the enforcement of all rights, both legal and equitable, wherein the distinctions between actions at law and suits in equity are abolished.[8] And the general rules which determine the sufficiency of the pleadings are the same, whether the action be to enforce a legal or an equitable right,[9] except where the inherent differences between legal and equitable causes of action make necessary corresponding differences in the pleadings.[10] In certain of the code states separate law and equity dockets are still preserved, but this distinction between legal and equitable actions is scarcely more than nominal, and the rules of pleading are substantially the same as in other code states.[11] The codes do not change the rules as to the facts necessary to constitute a cause of

4. Parliman *v.* Young, 2 Dak. 175, 4 N. W. 139, 711; Blum *v.* Bruggemann, 58 N. Y. App. Div. 377, 68 N. Y. Suppl. 1065; Van Valen *v.* Lapham, 5 Duer (N. Y.) 689; Caldwell *v.* Haley, 3 Tex. 317; Harbord *v.* Monk, 38 L. T. Rep. N. S. 411.

5. Regulation of pleadings as usurpation of judicial functions see Constitutional Law, 8 Cyc. 823.

6. School Sect. 16 *v.* Odlin, 8 Ohio St. 293.

Vested rights in rules of pleading see Constitutional Law, 8 Cyc. 924.

7. *California.*— Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463; Sampson *v.* Shaeffer, 3 Cal. 196.

Indiana.—Jolly *v.* Terre Haute Drawbridge Co., 9 Ind. 421.

Iowa.— Bean *v.* Briggs, 4 Iowa 464; Baltzell *v.* Nosler, 1 Iowa 588, 63 Am. Dec. 466.

Missouri.— Citizens' Bank *v.* Tiger Tail Mill, etc., Co., 152 Mo. 145, 53 S. W. 902; Huston *v.* Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795.

New York.— Cole *v.* Reynolds, 18 N. Y. 74; People *v.* Ryder, 12 N. Y. 433; Knowles *v.* Gee, 8 Barb. 300; Boyce *v.* Brown, 7 Barb. 80; Fry *v.* Bennett, 5 Sandf. 54; Houghton *v.* Townsend, 8 How. Pr. 441; Wooden *v.* Waffle, 6 How. Pr. 145; Rochester City Bank *v.* Suydam, 5 How. Pr. 216.

North Carolina.— Lassiter *v.* Roper, 114 N. C. 17, 18 S. E. 946; Parsley *v.* Nicholson, 65 N. C. 207; Crump *v.* Mims, 64 N. C. 767.

Ohio.— Chapman *v.* Rannells, 2 Ohio Dec. (Reprint) 245, 2 West. L. Month. 142.

Oklahoma.— Casey *v.* Mason, 8 Okla. 665, 59 Pac. 252.

Texas.— See Porter *v.* Miller, 7 Tex. 468.

Utah.— Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

Wisconsin.— Merriman *v.* McCormick Harvesting Mach. Co., 86 Wis. 142, 56 N. W. 743.

See 39 Cent. Dig. tit. "Pleading," § 3.

Under the English judicature acts legal as well as equitable causes of action are to be pleaded in the same way as equitable causes of action under the former practice. Heap *v.* Marris, 2 Q. B. D. 630, 46 L. J. Q. B. 761.

8. *California.*— Whitehead *v.* Sweet, 126 Cal. 67, 58 Pac. 376; Merriman *v.* Walton, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 786; Rogers *v.* Duhart, 97 Cal. 500, 32 Pac. 570; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Bowen *v.* Aubrey, 22 Cal. 566.

Iowa.— Shepard *v.* Ford, 10 Iowa 502.

New York.— Emery *v.* Pease, 20 N. Y. 62.

Oklahoma.— Olson *v.* Thompson, 6 Okla. 74, 48 Pac. 184.

Oregon.— Delay *v.* Chapman, 2 Oreg. 242.

Wisconsin.— Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776.

See 39 Cent. Dig. tit. "Pleading," § 3.

9. McPherson *v.* Weston, 64 Cal. 275, 30 Pac. 842; White *v.* Lyons, 42 Cal. 279; Kramer *v.* Rebman, 9 Iowa 114; Hahl *v.* Sugo, 169 N. Y. 109, 62 N. E. 135, 88 Am. St. Rep. 539, 61 L. R. A. 226; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 14 N. Y. 85; Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Millikin *v.* Cary, 5 How. Pr. (N. Y.) 272.

10. Stevens *v.* New York, 84 N. Y. 296; Goulet *v.* Asselcr, 22 N. Y. 225; Reubens *v.* Joel, 13 N. Y. 488; LeRoy *v.* Briggs, 8 How. Pr. (N. Y.) 373; Anderson *v.* Chilson, 8 S. D. 64, 65 N. W. 435; Draper *v.* Brown, 115 Wis. 361, 91 N. W. 1001.

11. See the codes of the several states.

action or to constitute a defense,[12] and they do not change the rule that in some cases a party must allege matter which he is not compelled to prove.[13]

B. Effect of Practice Acts. The various practice acts do not generally purport to establish a complete and well defined system of pleading, but are designed merely to abolish or modify certain technicalities of the common-law system.[14]

C. What Law Governs. In all matters of procedure courts are governed by the laws of the jurisdiction in which they sit, without any regard to the domicile of the parties, the origin of the right, or the country of the act.[15] In the United States courts the rules of pleading which exist in the State wherein the court sits are followed substantially in all actions at law,[16] but the courts are at liberty to depart therefrom in respect to details which in their judgment would tend to defeat the ends of justice.[17] And such rules of pleading will not be followed to the extent of allowing the union of legal and equitable causes and defenses.[18] A statute altering the rules of pleading is usually construed not to apply to actions pending at the time it takes effect.[19]

D. Necessity For Written Pleadings.[20] Under the ancient common-law practice the pleadings were all made orally in open court, and were transcribed by the officers of the court, upon the record.[21] While it is the almost universal modern practice in courts of record to file written pleadings, nevertheless, in the absence of a statute or rule of court, the parties may dispense with them if they are content to have their case presented and heard without written statements.[22] The essential

And see Meehan *v.* Watson, 65 Ark. 216, 47 S. W. 109; McClure *v.* Dee, 115 Iowa 546, 88 N. W. 1093; McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33; Hodowal *v.* Yearous, 103 Iowa 32, 72 N. W. 294; Leach *v.* Kundson, 97 Iowa 643, 66 N. W. 913; Small *v.* Lutz, 34 Oreg. 131, 55 Pac. 529, 58 Pac. 79; Ming Yue *v.* Coos Bay, etc., R., etc., Co., 24 Oreg. 392, 33 Pac. 641.

12. Dennistoun *v.* Merchants' Bank, 2 Disn. (Ohio) 52.

13. Dennistoun *v.* Merchants' Bank, 2 Disn. (Ohio) 52.

14. Johnson *v.* Quin, 52 Ga. 485; Stirling *v.* Garritee, 18 Md. 468; Cooper *v.* Benson, 28 Miss. 766; Whittenton Mfg. Co. *v.* Memphis, etc., Packet Co., 19 Fed. 273.

In Texas the courts have held that the common-law system of pleading has no authoritative force. Holman *v.* Criswell, 15 Tex. 394; Underwood *v.* Parrott, 2 Tex. 168.

Forms which are printed merely as an appendix to a practice act, but not as statutory enactments, do not have the force of law and are not exclusive of other forms. Connor *v.* Heman, 44 Mo. App. 346.

15. *Connecticut.*— Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562.

Massachusetts.— Pearsall *v.* Dwight, 2 Mass. 84, 3 Am. Dec. 35.

New York.— Smith *v.* Spinolla, 2 Johns. 198; Nash *v.* Tupper, 1 Cai. 402, 2 Am. Dec. 197.

Texas.— Lyons *v.* Texas, etc., R. Co., (Civ. App. 1896) 36 S. W. 1007.

Virginia.— Jones *v.* Hook, 2 Rand. 303, 14 Am. Dec. 783.

United States.— Wilcox *v.* Hunt, 13 Pet. 378, 10 L. ed. 209.

England.—De la Vega *v.* Vianna, 1 B. & Ad. 284, 8 L. J. K. B. O. S. 388, 20 E. C. L. 487; Ferguson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49; General Steam Nav. Co. *v.* Guillon, 13 L. J. Exch. 168, 11 M. & W. 877.

See 39 Cent. Dig. tit. "Pleading," § 4.

16. U. S. Rev. St. (1878) § 914 [U. S. Comp. St. (1901) p. 684].

17. Shepard *v.* Adams, 168 U. S. 618, 18 S. Ct. 214, 42 L. ed. 602; Phelps *v.* Oaks, 117 U. S. 236, 6 S. Ct. 714, 29 L. ed. 883; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. ed. 898.

18. Northern Pac. R. Co. *v.* Paine, 119 U. S. 561, 7 S. Ct. 323, 30 L. ed. 513; Schoolfield *v.* Rhodes, 82 Fed. 153, 27 C. C. A. 95; Davis *v.* Davis, 72 Fed. 81, 18 C. C. A. 438; Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 61 Fed. 199; Young *v.* Mahoning County, 51 Fed. 585; Buller *v.* Sidell, 43 Fed. 116; Doe *v.* Roe, 31 Fed. 97; Parsons *v.* Denis, 7 Fed. 317, 2 McCrary 359. See, generally, COURTS, 11 Cyc. 889.

Joinder of legal and equitable causes generally see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 418.

19. Crump *v.* Wallace, 27 Ala. 277; Potter *v.* Titcomb, 11 Me. 157; Gross *v.* Huberman, 4 Pa. Co. Ct. 340.

20. Before justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 555 *et seq.*

21. 2 Pollock & M. Hist. Eng. L. 602.

22. *Georgia.*— Hicks *v.* Marshall, 67 Ga. 713.

Illinois.— Kelsey *v.* Lamb, 21 Ill. 559; Vider *v.* Chicago, 60 Ill. App. 595.

Kentucky.— See Handley *v.* Travis, Ky. Dec. 138.

Mississippi.— Gwin *v.* Williams, 27 Miss. 324.

Pennsylvania.— Dewey *v.* Dupuy, 2 Watts & S. 553.

South Carolina.— Bailey *v.* Wilson, 1 Bailey 15.

thing is that the issue must appear by the record.[23] But such practice is loose and should not be encouraged.[24] Oral pleadings are governed by the same rules as written pleadings.[25]

E. What Constitute Pleadings. In the broadest sense of the term the pleadings include all proceedings from the complaint until issue is joined.[26] The term has been held to include demurrers,[27] petitions for rehearing,[28] and perhaps bills of particulars.[29] And an admission made in open court becomes a part of the pleading of the party making it.[30] But a petition for discharge of a bankrupt is not a pleading,[31] nor is the writ by which the action is commenced,[32] nor the indorsement on the writ, even where it is required that it consist of a statement of the nature of the claim made.[33] And mere memoranda written at the foot of a declaration form no part of it.[34]

F. Entitling. The name given to a pleading is not controlling, but its character is always to be determined by its allegations.[35]

West Virginia.— Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765.

See 39 Cent. Dig. tit. "Pleading," § 5.

23. Gwin *v.* Williams, 27 Miss. 324.

24. Sevey *v.* Chappuis Co., 113 La. 65, 36 So. 889; Parrish *v.* Sun Printing, etc., Assoc., 6 N. Y. App. Div. 585, 39 N. Y. Suppl. 540. *Compare* Osborn *v.* Osborn, 114 Mass. 515.

25. Michels *v.* West, 109 Ill. App. 418.

26. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921. See also Talbot *v.* Garretson, 31 Oreg. 256, 49 Pac. 978.

Motion for new trial.— Pleadings are defined by Kan. Code, § 84, as "the written statements, by the parties, of the facts constituting their respective claims and defenses." Section 86 limits and defines the only pleadings permissible by the code as follows: "The only pleadings allowed are: First, the petition by the plaintiff; second, the answer or demurrer by the defendant; third, the demurrer or reply by the plaintiff; fourth, the demurrer by the defendant to the reply of the plaintiff." So that a motion for a new trial is not a pleading within such definition. McDermott *v.* Halleck, 65 Kan. 403, 69 Pac. 335.

Notice of special matter in infringement suit.— Notice of special matter in an action for the infringement of a patent is not a "pleading," and, instead of being put in the answer, should be served on the adverse party. Cottier *v.* Stimson, 20 Fed. 906.

Petition to foreclose mortgage.—A petition, Ga. Code, § 3962, to foreclose a mortgage on realty, is a pleading, within the statute of amendment, embraced in Code, § 3479. Ledbetter *v.* McWilliams, 90 Ga. 43, 15 S. E. 634.

27. *Kansas.*— McDermott *v.* Halleck, 65 Kan. 403, 69 Pac. 335.

Kentucky.— Stone *v.* Powell, 13 B. Mon. 342.

Minnesota.— Shepard *v.* Murray County, 33 Minn. 519, 24 N. W. 291.

New Jersey.— Welsh *v.* Blackwell, 14 N. J. L. 344.

New Mexico.— Mulvey *v.* Staab, 4 N. M. 50, 12 Pac. 699.

New York.— Cashman *v.* Reynolds, 123 N. Y. 138, 25 N. E. 162.

United States.— *In re* Glass, 119 Fed. 509; Rosenbach *v.* Dreyfuss, 1 Fed. 391.

See 39 Cent. Dig. tit. "Pleading," § 20.

The codes of procedure enumerate demurrers among the pleadings allowed. But notwithstanding this provision of the code, it was held in Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921, that a demurrer is not, strictly speaking, a pleading. And in State *v.* Ryan, 2 Mo. App. 303, it was said that a demurrer was not a pleading, but merely a refusal to plead.

A stipulation "to plead in ten days" has been construed as not authorizing the filing of a special demurrer within that time. Welsh *v.* Blackwell, 14 N. J. L. 344.

Not a plea to the action.—A demurrer to the declaration is not classed among pleas to action, not only because it may be taken as well to any other part of the pleading as to the declaration but also because it neither affirms nor denies any matter of fact and is not therefore regarded as strictly a plea of any class but rather an excuse for not pleading. Rice *v.* Rice, 13 Oreg. 337, 10 Pac. 495.

28. Baltimore, etc., R. Co. *v.* Conoyer, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452.

29. Davey *v.* Bentinck, [1893] 1 Q. B. 185, 62 L. J. Q. B. 114, 67 L. T. Rep. N. S. 742, 1 Reports 144, 41 Wkly. Rep. 181, per Lopes, L. J.

30. Merchants', etc., Bank *v.* Moninger, 49 Iowa 249.

31. *In re* Jamieson, 120 Fed. 697. See, however, *In re* Glass, 119 Fed. 509, which seems to suggest a different view.

32. Richardson *v.* Milburn, 11 Md. 340; Booth *v.* Hall, 6 Md. 1.

33. Wallis *v.* Jackson, 23 Ch. D. 204, 52 L. J. Ch. 384, 31 Wkly. Rep. 519.

34. Boylston *v.* Sherran, 31 Ala. 538; Campbell *v.* Garratt, 24 Ark. 279; McLellan *v.* Assiniboia, 5 Manitoba 127.

35. *Arkansas.*— Randolph *v.* Nichol, 74 Ark. 93, 84 S. W. 1037.

California.— McDougald *v.* Hulet, 132 Cal. 154, 64 Pac. 278; Matter of Clary, 112 Cal. 292, 44 Pac. 569.

Indiana.— Dreyer *v.* Hart, 147 Ind. 604, 47 N. E. 174; McClanahan *v.* Williams, 136 Ind.

G. Subject-Matter of Allegations Generally — 1. Matters Judicially Noticed.[36] Facts of which the court will take judicial notice need not be alleged.[37] But judicial knowledge cannot aid a pleading unless it contains averments which bring into the case the controversy respecting which the resort to judicial knowledge is sought.[38]

2. Matters of Record.[39] It is not necessary, in pleading, to allege any fact which already appears upon the record in the same cause.[40] Nor can a party plead in contravention of such record.[41] Where a record in a different cause is relied upon it should be pleaded with a *prout patet per recordum*,[42] except where alleged merely as inducement;[43] and this is true whether the record be of the same or another court.[44] No facts can be pleaded against the validity of a record, although there may be against its operation,[45] nor can a defect in a record be supplied by averment.[46] In pleading judicial proceedings, for all ordinary purposes, copies are unnecessary.[47] In pleading the existence of a record in courts of general jurisdiction, the allegations should be certain and specific, and it is not sufficient to allege the same on information and belief.[48]

3. Matters Appearing in Other Pleadings. Facts which are alleged in other pleadings in the same cause may be made a part of a pleading by expressly adopting them.[49] Thus one defendant may adopt the answer of another defendant.[50] An intervener may adopt in his petition the allegations of plaintiff's petition,[51] and a defendant may adopt the allegations of plaintiff's petition in a supplemental cross

30, 35 N. E. 897; Thompson *v.* Voss, 16 Ind. 297; Patterson *v.* State, 10 Ind. 296; Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316.

Kansas.— Freeman *v.* Trickett, 6 Kan. App. 83, 49 Pac. 672.

Kentucky.— Prewitt *v.* Clayton, 5 T. B. Mon. 4.

Missouri.— Lilly *v.* Menke, 92 Mo. App. 354.

South Carolina.— Charlotte, etc., R. Co. *v.* Gibbes, 23 S. C. 370.

South Dakota.— Green *v.* Hughitt School Tp., 5 S. D. 452, 59 N. W. 224.

Wyoming.— Tutty *v.* Ryan, 13 Wyo. 134, 78 Pac. 657, 79 Pac. 920.

See 39 Cent. Dig. tit. "Pleading," §§ 5½, 97.

36. Facts which will be judicially noticed see Evidence, 16 Cyc. 849 *et seq.*

37. *California.*— French *v.* State Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556; *In re* Chope, 112 Cal. 630, 44 Pac. 1066.

Indiana.— Ervin *v.* State, 150 Ind. 332, 48 N. E. 249; Thorntown *v.* Fugate, 21 Ind. App. 537, 52 N. E. 763.

Missouri.— Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778; South Missouri Lumber Co. *v.* Wright, 114 Mo. 326, 21 S. W. 811.

Nebraska.— George *v.* State, 59 Nebr. 163, 80 N. W. 486.

United States.— McDonald *v.* Press Pub. Co., 55 Fed. 264.

See 39 Cent. Dig. tit. "Pleading," § 8.

38. Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 22 S. Ct. 47, 46 L. ed. 144; Mountain View Min., etc., Co. *v.* McFadden, 180 U. S. 533, 21 S. Ct. 488, 45 L. ed. 656.

39. Pleading judgment see Judgments, 23 Cyc. 1523.

40. Tweedy *v.* Jarvis, 27 Conn. 42; Guild *v.* Richardson, 6 Pick. (Mass.) 364; Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778; Castro *v.* Whitlock, 15 Tex. 437. See also Gulf, etc., R. Co. *v.* Griffith, (Tex. Civ. App. 1893), 24 S. W. 362.

41. People *v.* Shaw, 13 Ill. 581.

42. Jarman *v.* Windsor, 2 Harr. (Del.) 162; Chittenden *v.* Catlin, 2 D. Chipm. (Vt.) 22.

43. Philpot *v.* McArthur, 10 Me. 127; Commercial Bank *v.* Sparrow, 2 Den. (N. Y.) 97; Stoddart *v.* Palmer, 3 B. & C. 2, 10 E. C. L. 1; Morse *v.* James, Willes 122.

44. Shafer *v.* Stonebraker, 4 Gill & J. (Md.) 345.

In Texas it has been held that a record of the same court in which the action is pending is sufficiently pleaded if indicated with such certainty to enable it to be used if required. Long *v.* Wortham, 4 Tex. 381.

45. Biddle *v.* Wilkins, 1 Pet. (U. S.) 686, 7 L. ed. 315.

46. Kelley *v.* Adams, 120 Ind. 340, 22 N. E. 317; Raymond *v.* Smith, 1 Metc. (Ky.) 65, 71 Am. Dec. 458; Wood *v.* Com., 4 Rand. (Va.) 329.

47. Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414; Lytle *v.* Lytle, 37 Ind. 281; Shauver *v.* Philips, (Ind. App. 1893) 32 N. E. 1131.

48. Hailey First Nat. Bank *v.* Watt, 7 Ida. 510, 64 Pac. 223.

Denial on information see *infra*, IV, C, 2, g.

49. Day *v.* Clarke, 1 A. K. Marsh. (Ky.) 521.

50. Hooker *v.* Worthington, 134 N. C. 283, 46 S. E. 726; Alliance Milling Co. *v.* Eaton, (Tex. Civ. App. 1893) 23 S. W. 455.

Joint or separate pleas or answers of co-defendants see *infra*, IV, A, 4.

51. Texarkana, etc., R. Co. *v.* Hartford Ins. Co., 17 Tex. Civ. App. 498, 44 S. W. 533.

bill.[52] But an answer cannot be made a part of a reply,[53] nor can the allegations of a pleading in another action be adopted[54] unless they are copied into the pleading.[55]

4. Matters Within Knowledge of Other Party. Where facts are peculiarly within the knowledge of the other party, they may be alleged with less certainty than would otherwise be necessary,[56] or may be alleged on information and belief.[57] They may even be omitted entirely,[58] but this rule does not dispense with the necessity of alleging such facts as are essential to establish an apparent or *prima facie* right;[59] and when facts are omitted from a pleading under this rule, it is necessary for the pleading to show that they are not accessible.[60]

5. Matters of Presumption or Implication. There need be no direct allegation of a fact which otherwise sufficiently appears, or of a fact which is necessarily implied from other averments.[61] So where terms are used which in their legal significance include other terms, the latter will be deemed to appear in the pleading, although only the former are actually used.[62] And it need not in general be alleged that an act was lawfully done, where nothing to the contrary appears, since

52. Olcott *v.* International, etc., R. Co., (Tex. Civ. App. 1894) 28 S. W. 728.

53. Atchinson *v.* Lee, 75 Ind. 132.

54. Russell *v.* Greenwade, 4 S. W. 295, 9 Ky. L. Rep. 163; Teal *v.* Lyons, 30 La. Ann. 1140; Jones *v.* Hook, 2 Rand. (Va.) 303, 14 Am. Dec. 783.

55. Westfield Gas, etc., Co. *v.* Noblesville, etc., Gravel Road Co., 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244.

56. Hartford F. Ins. Co. *v.* King, 106 Ala. 519, 17 So. 707; Van Rensselaer *v.* Jones, 2 Barb. (N. Y.) 643. See Garesche *v.* Garesche, 4 Brit. Col. 444.

57. McDermont *v.* Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779.

58. Griswold *v.* National Ins. Co., 3 Cow. (N. Y.) 96; Hammer *v.* Kaufman, 11 Fed. Cas. No. 5,997, 2 Bond 1. See Gebhart *v.* Sorrels, 9 Ohio St. 461.

Reason for omission should be stated.— Matters which are peculiarly within the knowledge of the other party need not be set out in the pleading, but the reason for their omission should be stated. Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10.

59. Reed *v.* Louisville, etc., R. Co., 104 Ky. 603, 47 S. W. 591, 48 S. W. 416, 20 Ky. L. Rep. 815, 990, 44 L. R. A. 823.

60. Brashear *v.* Madison, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474.

61. *Alabama.*— Wells *v.* Gallagher, 144 Ala. 363, 39 So. 747, 113 Am. St. Rep. 50, 3 L. R. A. N. S. 759; O'Neil *v.* Birmingham Brewing Co., 101 Ala. 383, 13 So. 576.

California.— Richter *v.* Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39; Henke *v.* Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089; Osborne *v.* Clark, 60 Cal. 622.

Connecticut.— Lord *v.* Russell, 64 Conn. 86, 29 Atl. 242; Hartford Screw Co. *v.* Porter Mfg. Co., 24 Conn. 77; Lee *v.* Stiles, 21 Conn. 500; Case *v.* Humphrey, 6 Conn. 130; McClellan *v.* Morris, Kirby 145.

Indiana.— Drum *v.* Stevens, 94 Ind. 181. See Doell *v.* Schrier, 36 Ind. App. 253, 75 N. E. 600.

Kentucky.— Chesapeake, etc., R. Co. *v.* Venable, 111 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427; Terry *v.* Johnson, 109 Ky. 589, 60 S. W. 300, 22 Ky. L. Rep. 1210.

Maryland.— Gardiner *v.* Miles, 5 Gill 94.

Michigan.— McBride *v.* Scott, 125 Mich. 517, 84 N. W. 1079.

Minnesota.—See Brunswick-Balke-Collender Co. *v.* Brackett, 37 Minn. 58, 33 N. W. 214.

Missouri.—MacMurray-Judge Architectural Iron Co. *v.* St. Louis, 138 Mo. 608, 39 S. W. 467; Czezewzka *v.* Benton-Bellefontaine R. Co., 121 Mo. 201, 25 S. W. 911; Weaver *v.* Harlan, 48 Mo. App. 319.

Montana.— Harmon *v.* Fox, 31 Mont. 324, 78 Pac. 517.

Nebraska.— Bishop *v.* Middleton, 43 Nebr. 10, 61 N. W. 129, 26 L. R. A. 445.

Nevada.— See Hirshiser *v.* Ward, (1906) 87 Pac. 171.

New Hampshire.— See Hale *v.* Vesper, Smith 283.

New York.— See Bearns *v.* Gould, 77 N. Y. 455; Barney *v.* Dewey, 13 Johns. 224, 7 Am. Dec. 372, holding that an averment that defendant testified in a previous action brought by a third person against plaintiff is tantamount to an averment of notice of the pendency of that action.

South Carolina.— Flenniken *v.* Buchanan, 21 S. C. 432.

Texas.—International, etc., R. Co. *v.* Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559.

Washington.— Duryee *v.* Friars, 18 Wash. 55, 50 Pac. 583.

Wyoming.— Hartford F. Ins. Co. *v.* Kahn, 4 Wyo. 364, 34 Pac. 895.

England.— Magor *v.* Wilks, 5 L. J. K. B. O. S. 308.

Canada.— Bohaker *v.* Morse, 8 Can. L. T. Occ. Notes 398, 20 Nova Scotia 212; Sherlock *v.* McGee, 6 N. Brunsw. 346.

See 39 Cent. Dig. tit. "Pleading," § 11.

62. *Indiana.*— Syfers *v.* Bradley, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619.

Kansas.— Budd *v.* Kramer, 14 Kan. 101.

Nebraska.— Nicholas *v.* Farwell, 24 Nebr. 180, 38 N. W. 820.

Oregon.— Laurent *v.* Lanning, 32 Oreg. 11, 51 Pac. 80.

it will be presumed to have been done in a lawful manner.[63] But it is not sufficient that a fact may be inferable from the facts pleaded, where it is not necessarily implied.[64] And it has indeed been said that under the codes a fact must be pleaded unless the law raises a conclusive presumption of its existence from the facts stated.[65] In many cases, under a rule of liberal construction, courts have held pleadings sufficient which only inferentially and by reasonable presumption contained material averments, but such inference or presumption does not take the place of a positive averment for all purposes, and if objection to such pleadings is made seasonably and properly, it will be sustained.[66]

6. Matters of Evidence.[67] It is neither necessary nor proper to allege matters of evidence in a pleading; only ultimate facts should be alleged, not the circumstances which tend to prove them.[68]

7. Legal Conclusions — a. General Rules. It is a general rule that facts,

Texas.— Barnard *v.* Moseley, 28 Tex. 543.

See 39 Cent. Dig. tit. "Pleading," § 11.

The words "writing obligatory" imply a sealing, and their use is equivalent to an allegation that the instrument was sealed. Clark *v.* Phillips, 5 Fed. Cas. No. 2,831*a*, Hempst. 294.

The word "indenture" imports a seal, and, where an instrument is described as such, it is unnecessary to aver that it is under seal. Wineman *v.* Hughson, 44 Ill. App. 22.

Implied averment of execution or delivery. — The term "execution" involves delivery, and, where it is averred, an allegation of delivery need not appear. Smith *v.* Waite, 103 Cal. 372, 37 Pac. 232; Le Mesnager *v.* Hamilton, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81; Jacobs *v.* Hogan, 73 Conn. 740, 49 Atl. 202; Ketcham *v.* New Albany, etc., R. Co., 7 Ind. 391; Topping *v.* Clay, 65 Minn. 346, 68 N. W. 34; Rhone *v.* Gale, 12 Minn. 54; Keenan *v.* Keenan, 12 N. Y. Suppl. 747. So also an averment that a written agreement was "made and entered into" includes its delivery. Romans *v.* Langevin, 34 Minn. 312, 25 N. W. 638; Smith *v.* Dennett, 15 Minn. 81. And the same averment includes the allegation of execution. Limerick *v.* Barrett, 3 Kan. App. 573, 43 Pac. 853. An averment that an agreement was "executed" amounts to an averment that it was "subscribed" by the party to be charged. Cheney *v.* Cook, 7 Wis. 413.

A scrawl at the end of a signature to a copy of an instrument set forth in a pleading cannot supply the place of an averment that the instrument was sealed. Stanton *v.* Camp, 4 Barb. (N. Y.) 274.

63. People *v.* Frost, 32 Ill. App. 242; Syfers *v.* Bradley, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619; Over *v.* Greenfield, 107 Ind. 231, 5 N. E. 872; McFarlan *v.* Morris Canal, etc., Co., 44 N. J. L. 471.

64. Pyle *v.* Peyton, 146 Ind. 90, 44 N. E. 925; Malone *v.* Craig, 22 Tex. 609; Alexander *v.* School-Dist. No. 6, 62 Vt. 273, 19 Atl. 995. See also Sellers *v.* West Superior First Presb. Church, 91 Wis. 328, 64 N. W. 1031.

65. Gregory *v.* McFarland, 1 Duv. (Ky.) 59.

66. *Minnesota.*— King *v.* Nichols, etc., Co., 53 Minn. 453, 55 N. W. 604; Farrant *v.* St. Paul, etc., R. Co., 13 Minn. 311; Rhone *v.* Gale, 12 Minn. 54.

Mississippi.— Crawford *v.* Avery, 35 Miss. 205.

Nebraska.— Harris *v.* Roberts, 12 Nebr. 631, 12 N. W. 89, 41 Am. Rep. 779.

New Jersey.— Dreher *v.* Yates, 43 N. J. L. 473.

New York.— Spies *v.* Michelsen, 2 N. Y. App. Div. 226, 37 N. Y. Suppl. 720; Clarke *v.* Meigs, 22 How. Pr. 340.

England.— De Medina *v.* Norman, 2 Dowl. P. C. N. S. 239, 11 L. J. Exch. 320, 9 M. & W. 820.

See 39 Cent. Dig. tit. "Pleading," § 11. See also *infra*, VI, F, 1, j.

67. Pleading evidence as ground for: Demurrer see *infra*, VI, F, 1. Motion to strike see *infra*, XII, C, 2, b, (I), (B). Motion to make definite and certain see *infra*, XII, D.

68. *Arkansas.*— Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657.

California.— Wutchumna Water Co. *v.* Pogue, 151 Cal. 105, 90 Pac. 362; Simons *v.* Bedell, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35; McCaughey *v.* Schuette, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176; Fortain *v.* Smith, 114 Cal. 494, 46 Pac. 381; Ohm *v.* San Francisco, (1890) 25 Pac. 155; Feeney *v.* Howard, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162, 4 L. R. A. 826; Lorenz *v.* Jacobs, (1884) 3 Pac. 654; Thomas *v.* Desmond, 63 Cal. 426; Harris *v.* Hillegass, 54 Cal. 463; Miles *v.* McDermott, 31 Cal. 270; Bowen *v.* Aubrey, 22 Cal. 566; Green *v.* Palmer, 15 Cal. 411, 76 Am. Dec. 492.

Colorado.— Elliott *v.* Greeley First Nat. Bank, 30 Colo. 279, 70 Pac. 421.

Connecticut.— Usher *v.* Waddingham, 62 Conn. 412, 26 Atl. 538.

Georgia.— Woodruff *v.* Hughes, 2 Ga. App. 361, 58 S. E. 551; Cedartown Cotton, etc., Co. *v.* Miles, 2 Ga. App. 79, 58 S. E. 289.

Illinois.— Pike County *v.* Cadwell, 78 Ill. App. 201; Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313.

Indiana.— Atkinson *v.* Wabash R. Co., 143 Ind. 501, 41 N. E. 947; Spurgeon *v.* Smitha, 114 Ind. 453, 17 N. E. 105; Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; King *v.* Enterprise Ins. Co., 45 Ind. 43;

not legal conclusions, should be alleged in pleadings.[69] A conclusion of law does

Lytle *v.* Lytle, 37 Ind. 281; Wills *v.* Wills, 34 Ind. 106; Vanschoiack *v.* Farrow, 25 Ind. 310; State *v.* Leonard, 6 Blackf. 173.

Indian Territory.— Cox *v.* Swofford Bros. Dry-Goods Co., 2 Indian Terr. 61, 47 S. W. 303.

Iowa.— Bennett *v.* Lutz, 119 Iowa 215, 93 N. W. 288; Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791; Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770; Brainard *v.* Simmons, 58 Iowa 464, 9 N. W. 382, 12 N. W. 484; Cowin *v.* Toole, 31 Iowa 513; Pfiffner *v.* Krapfel, 28 Iowa 27; Singleton *v.* Scott, 11 Iowa 589.

Kentucky.— Louisville, etc., Canal Co. *v.* Murphy, 9 Bush 522; Hill *v.* Barrett, 14 B. Mon. 83; Louisville, etc., R. Co. *v.* Beeler, 103 S. W. 300, 31 Ky. L. Rep. 750, 11 L. R. A. N. S. 930; Morehead *v.* Anderson, 100 S. W. 340, 30 Ky. L. Rep. 1137.

Maryland.— Philadelphia, etc., R. Co. *v.* Allen, 102 Md. 110, 62 Atl. 245.

Missouri.— Pier *v.* Heinrichoffen, 52 Mo. 333; See *v.* Cox, 16 Mo. 166.

Nebraska.— Missouri Pac. R. Co. *v.* Hemingway, 63 Nebr. 610, 88 N. W. 673; Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28; Markey *v.* Sheridan County School Dist. No. 18, 58 Nebr. 479, 78 N. W. 932; Coquillard *v.* Hovey, 23 Nebr. 622, 37 N. W. 479, 8 Am. St. Rep. 134; Jaques *v.* Dawes, 3 Nebr. (Unoff.) 752, 92 N. W. 570.

Nevada.— Groves *v.* Tallman, 8 Nev. 178.

New York.— Degraw *v.* Elmore, 50 N. Y. 1; Farron *v.* Sherwood, 17 N. Y. 227; People *v.* Ryder, 12 N. Y. 433; John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475; Ensign *v.* Dickinson, 19 N. Y. Suppl. 438; Kelly *v.* Breusing, 33 Barb. 123; Hyatt *v.* McMahon, 25 Barb. 457; Corwin *v.* Corwin, 9 Barb. 219 [*reversed* on other grounds in 6 N. Y. 342, 57 Am. Dec. 453]; Knowles *v.* Gee, 8 Barb. 300; Pattison *v.* Taylor, 8 Barb. 250; Stone *v.* De Puga, 4 Sandf. 681; Hoard *v.* Garner, 1 Sandf. 614; Cruikshank *v.* Press Pub. Co., 32 Misc. 152, 65 N. Y. Suppl. 678; Badeau *v.* Niles, 9 Abb. N. Cas. 48; Cahill *v.* Palmer, 17 Abb. Pr. 196; Millikin *v.* Cary, 5 How. Pr. 272; Fidler *v.* Delavan, 20 Wend. 57. See also Van De Sande *v.* Hall, 13 How. Pr. 1458.

North Carolina.— Oates *v.* Gray, 66 N. C. 442.

Ohio.— Kerr *v.* Bellefontaine, 59 Ohio St. 446, 52 N. E. 1024; Waller *v.* Robinson, 2 Ohio Dec. (Reprint) 16, 1 West. L. Month. 90.

Oklahoma.— Guthrie *v.* Finch, 13 Okla. 496, 75 Pac. 288.

Oregon.— Cline *v.* Cline, 3 Oreg. 355.

Texas.— McCauley *v.* Long, 61 Tex. 74; Oliver *v.* Chapman, 15 Tex. 400; Van Alstyne *v.* Bertrand, 15 Tex. 177; Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85; Wells *v.* Fairbank, 5 Tex. 582; Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450.

Vermont.— Boyden *v.* Fitchburg R. Co., 70 Vt. 125, 39 Atl. 771; Ralston *v.* Strong, 1 D. Chipm. 287.

Washington.— Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34; Stephens *v.* Spokane, 11 Wash. 41, 39 Pac. 266.

Wisconsin.— McCarville *v.* Boyle, 89 Wis. 651, 62 N. W. 517; Rogers *v.* Milwaukee, 13 Wis. 610; Bird *v.* Mayer, 8 Wis. 362.

Wyoming.— Durell *v.* Abbott, 6 Wyo. 265, 44 Pac. 647.

United States.— Rogers *v.* Virginia-Carolina Chemical Co., 149 Fed. 1, 78 C. C. A. 615; Western Union Tel. Co. *v.* Los Angeles Electric Co., 76 Fed. 178; Tabor *v.* Indianapolis Journal Newspaper Co., 66 Fed. 423; Muser *v.* Robertson, 17 Fed. 500, 21 Blatchf. 368; Hobson *v.* McArthur, 12 Fed. Cas. No. 6,554, 3 McLean 241.

See 39 Cent. Dig. tit. "Pleading," § 31.

69. *Arkansas.*— Lanier *v.* Union Mortg., etc., Co., 64 Ark. 39, 40 S. W. 466.

California.— Moffatt *v.* Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192.

Connecticut.—Bailey *v.* Bussing, 29 Conn. 1.

Georgia.— Furr *v.* Burns, 124 Ga. 742, 53 S. E. 201; Adams *v.* Haigler, 2 Ga. App. 99, 58 S. E. 330.

Illinois.— Alton Light, etc., Co. *v.* Rose, 117 Ill. App. 83; Willard *v.* Zehr, 116 Ill. App. 496 [*affirmed* in 215 Ill. 148, 74 N. E. 107]; Pagames *v.* Chicago, 111 Ill. App. 590; Chicago City R. Co. *v.* Ward, 76 Ill. App. 536; Gerrity *v.* Brady, 44 Ill. App. 203.

Indiana.— Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; Frain *v.* Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; Davis *v.* Clements, 148 Ind. 605, 47 N. E. 1056, 62 Am. St. Rep. 539; Foland *v.* Frankton, 142 Ind. 546, 41 N. E. 1031; Tennison *v.* Tennison, 114 Ind. 424, 16 N. E. 818; McCasland *v.* Ætna L. Ins. Co., 108 Ind. 130, 9 N. E. 119; Holman *v.* Mayhew, 15 Ind. 263.

Iowa.— Robinson *v.* Berkey, 100 Iowa 136, 69 N. W. 434, 62 Am. St. Rep. 549; Homire *v.* Rodgers, 74 Iowa 395, 37 N. W. 972.

Kansas.— Center Tp. *v.* Hunt, 16 Kan. 430.

Kentucky.— Riggs *v.* Stevens, 92 Ky. 393, 17 S. W. 1016, 13 Ky. L. Rep. 631; Randall *v.* Shropshire, 4 Metc. 327; Skillman *v.* Muir, 4 Metc. 282.

Louisiana.— Hodge *v.* Eastin, 5 Mart. N. S. 57; Oldham *v.* Croghan, 3 Mart. N. S. 517.

Minnesota.— Dennis *v.* Nelson, 55 Minn. 144, 56 N. W. 589; Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97; Adams *v.* Corriston, 7 Minn. 456.

Missouri.— Mallinckrodt Chemical Works *v.* Nemnich, 169 Mo. 388, 69 S. W. 355.

Nebraska.— State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235; State *v.* Osborn, 60 Nebr. 415, 83 N. W. 357; Wabaska Electric Co. *v.* Wymore, 60 Nebr. 199, 82 N. W. 626; Woodward *v.* State, 58 Nebr. 598, 79 N. W. 164; Wymore First Nat. Bank *v.* Myers, 44 Nebr. 306, 62 N. W. 459; Blakeslee *v.* Missouri Pac. R. Co., 43 Nebr. 61, 61 N. W. 118.

not aid the pleading.[70] But a pleading is not rendered insufficient because it contains legal conclusions in addition to the facts which properly belong in it.[71] Such a pleading is merely subject to a motion to strike out the conclusion of law,

New Jersey.— Kennedy *v.* North Jersey St. R. Co., 72 N. J. L. 19, 60 Atl. 40.

New Mexico.— Dame *v.* Cochiti Reduction, etc., Co., 79 Pac. 296.

New York.— Sheridan *v.* Jackson, 72 N. Y. 170; Lesser *v.* Steindler, 110 N. Y. App. Div. 262, 97 N. Y. Suppl. 255; Seaeord *v.* Pendleton, 55 Hun 579, 9 N. Y. Suppl. 46; Plant *v.* Schuyler, 7 Rob. 271; Mann *v.* Morewood, 5 Sandf. 557; Pieree *v.* Newlin, 46 Misc. 122, 91 N. Y. Suppl. 377.

North Dakota.— Houghton Implement Co. *v.* Yavrosky, 15 N. D. 308, 109 N. W. 1024.

Oregon.— Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

Pennsylvania.— Camden Bottling Co. *v.* Sidle, 15 York Leg. Rec. 83.

South Carolina.— Livingston *v.* Ruff, 65 S. C. 284, 43 S. E. 678.

Texas.— Milliean *v.* McNeil, 92 Tex. 400, 49 S. W. 219; Western Union Tel. Co. *v.* Mitehell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; Farmers', etc., Nat. Bank *v.* Taylor, 91 Tex. 78, 40 S. W. 876, 966; Gray *v.* Osborne, 24 Tex. 157, 76 Am. Dec. 99; Milburn *v.* Walker, 11 Tex. 329; Carter *v.* Carter, 5 Tex. 93; Morris *v.* Holland, 10 Tex. Civ. App. 474, 31 S. W. 690.

West Virginia.— Thomas *v.* Wheeling Electrieal Co., 54 W. Va. 395, 46 S. E. 217; Longdale Iron Co. *v.* Quesenberry, 50 W. Va. 451, 40 S. E. 487.

Wisconsin.— Connehan *v.* Ford, 9 Wis. 240.

United States.— Cambers *v.* Butte First Nat. Bank, 144 Fed. 717 [*affirmed* in 156 Fed. 482, 84 C. C. A. 292]; W. H. Thomas, etc., Co. *v.* Barnett, 135 Fed. 172 [*affirmed* in 144 Fed. 338, 75 C. C. A. 300].

England.— Hanmer *v.* Flight, 35 L. T. Rep. N. S. 127, 24 Wkly. Rep. 346.

See 39 Cent. Dig. tit. "Pleading," § 12.

Action at law compared to a syllogism.— In New York, etc., R. Co. *v.* Hungerford, 75 Conn. 76, 77, 52 Atl. 487, the eourt used the following language in eomparing an aetion at law to a syllogism: "The major premise is a proposition of law, as, for instanee, whoever does eertain speeified acts to the injury of another is bound to pay that other the damage thus inflicted. This proposition is not pleaded, but is neeessarily involved in stating the facts alleged in the complaint. The minor premise is a statement of faets, as. for instanee, the defendant has done eertain aets (being the aets referred to in the proposition of law) to the damage of the plaintiff. These faets are alleged in the complaint. The eonelusion is the judgment or sentenee of the law, whieh neeessarily follows the establishment of the truth of the two premises."

The distinction between a conclusion of law and a conclusion of fact is thus expressed by the supreme court of Minnesota in Curtiss *v.* Livingston, 36 Minn. 380, 381, 31 N. W. 357: "It is urged that the clause we have quoted from the eomplaint is a statement of a conelusion of law, and not an allegation of fact. It is, for the purpose of pleading, rather a statement of an ultimate faet, or a eonelusion of faet, based on or arrived at by several minor faets, and the rules of law applicable to them. This, to avoid prolixity, is sometimes not only permissible, but necessary, in pleading. Thus, in ejeetment, it is suffieient for plaintiff to allege that he is the owner and entitled to the possession, and that the land is wrongfully withheld, without alleging in detail the partieular faets on which his elaiu of title is based,— Buekholz *v.* Grant, 15 Minn. 406; Wells *v.* Masterson, 6 Minn. 566; McClane *v.* White, 5 Minn. 178 — also that a mortgage was 'duly foreelosed,' without alleging partieulars,— Pinney *v.* Fridley, 9 Minn. 23 — also, in an aetion to enforee a lien for taxes passing under the statute to a purehaser at a void tax sale, that the taxes were 'duly levied and assessed.' Webb *v.* Bidwell, 15 Minn. 479. So an allegation that a party 'conveyed,' or that he 'eontraeted' or 'agreed,' without detailing the particular aets whieh it is elaimed resulted as a eonveyance, eontraet, or agreement, must usually be suffieient in pleading. Where the allegation is so indefinite that the opposite party may not be apprised of what is elaimed, the eourt may, perhaps, on a motion to make more definite and eertain, require a more full and detailed statement; but, as against a demurrer, a general allegation of an ultimate faet or eonelusion of faet is suffieient." See also Spies *v.* Munroe, 35 N. Y. App. Div. 527, 54 N. Y. Suppl. 916.

70. Amerieau Mut. L. Ins. Co. *v.* Mead, 39 Ind. App. 215, 79 N. E. 526.

71. *Colorado.*— Fisk Min., ete., Co. *v.* Reed, 32 Colo. 506, 77 Pac. 240.

Connecticut.— Molineux *v.* Hurlbut, 79 Conn. 243, 64 Atl. 350; Wiggin *v.* Federal Stoek, ete., Co., 77 Conn. 507, 59 Atl. 607.

Iowa.— Nourse *v.* Weitz, 120 Iowa 708, 95 N. W. 251.

New York.— Williamson *v.* Wager, 90 N. Y. App. Div. 186, 86 N. Y. Suppl. 684.

Ohio.— Sehool Seet. 16 *v.* Odlin, 8 Ohio St. 293.

Texas.— Texas, etc., R. Co. *v.* Kirk, 62 Tex. 227.

Washington.— Livingstone *v.* Lovgren, 27 Wash. 102, 67 Pac. 599.

See 39 Cent. Dig. tit. "Pleading," § 29.

Conclusions of fact distinguished.— The rule permitting eonclusions of law to be disregarded when the suffieieney of the faets pleaded to eonstitute a eause of aetion or defense is ealled in question does not apply to conclusions of faet. Western Travelers' Aee. Assoe. *v.* Munson, 73 Nebr. 858, 103 N. W. 688, 1 L. R. A. N. S. 1068.

or a motion to make more definite and certain.[72] While in some cases it is held that a pleading which is made up partly of conclusions of law, instead of averments of facts, is not fatally defective,[73] the more general rule is to the contrary.[74] The question of whether a pleading states a legal conclusion or merely pleads facts according to their legal effect is sometimes difficult to determine.[75] But as a general rule it may be said that a statement is not to be deemed any the less a statement of fact because its ascertainment may depend upon some principles of law applicable to other facts and circumstances.[76]

b. Illustrations — (1) *Claim or Indebtedness.* A mere averment that a party has a claim or demand against another without any facts showing how the same arose is a conclusion of law.[77] So a general allegation that one party is indebted to another, or that a party owes or does not owe certain money, or that money is or is not due, is a mere conclusion of law,[78] as is an averment that a

72. *Georgia.*— Manry *v.* Waxelbaum Co., 108 Ga. 14, 33 S. E. 701.

Iowa.— Cooper *v.* French, 52 Iowa 531, 3 N. W. 538.

Minnesota.— Catheart *v.* Peck, 11 Minn. 45.

Washington.— Harris *v.* Halverson, 23 Wash. 779, 63 Pac. 549; Griffith *v.* Wright, 21 Wash. 494, 58 Pac. 582; Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244.

England.— Stokes *v.* Grant, 4 C. P. D. 25, 40 L. T. Rep. N. S. 36, 27 Wkly. Rep. 397.

See 39 Cent. Dig. tit. "Pleading," §§ 29, 1090.

73. Penrose *v.* Winter, 135 Cal. 289, 67 Pac. 772 [*overruling* Ryan *v.* Holliday, 110 Cal. 335, 42 Pac. 891] (holding that the objection could not be urged after judgment by default); Harris *v.* Halverson, 23 Wash. 779, 63 Pac. 549 (holding that the objection could not be taken by demurrer but should be raised by motion to make more definite and certain).

74. *California.*— Callahan *v.* Broderick, 124 Cal. 80, 56 Pac. 782.

Illinois.— Kilgore *v.* Ferguson, 77 Ill. 213.

Maryland.— Strauss *v.* Denny, 95 Md. 690, 53 Atl. 571.

Minnesota.— Dennis *v.* Nelson, 55 Minn. 144, 56 N. W. 589.

Missouri.— Mallinckrodt Chemical Works *v.* Nemnich, 169 Mo. 388, 69 S. W. 355.

Montana.— Bordeaux *v.* Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600.

New Jersey.— Bloomington Min. Co. *v.* Searles, 66 N. J. L. 373, 49 Atl. 543.

New York.— Bush *v.* Coler, 170 N. Y. 587, 63 N. E. 1115; Rothschild *v.* Rio Grande Western R. Co., 59 Hun 454, 13 N. Y. Suppl. 361.

Ohio.— Keith *v.* New York Cent. R. Co., 2 Ohio Dec. (Reprint) 125, 1 West. L. Month. 451.

Oklahoma.— Smith *v.* Kaufman, 3 Okla. 568, 41 Pac. 722.

See 39 Cent. Dig. tit. "Pleading," §§ 29, 1090.

75. Pleading according to legal effect see *infra*, II, II, 1.

76. Muser *v* Robertson, 17 Fed. 500, 21 Blatchf. 368.

77. Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59; Holgate *v.* Broome, 8 Minn. 243; Louis *v.* Belgard, 17 N. Y. Suppl. 882.

78. *California.*— Penrose *v.* Winter, 135 Cal. 289, 67 Pac. 772; Richards *v.* Lake View Land Co., 115 Cal. 642, 47 Pac. 683; Ryan *v.* Holliday, 110 Cal. 335, 42 Pac. 891.

Delaware.— Reynolds *v.* Fahey, 4 Pennew. 264, 55 Atl. 221.

Kentucky.— Cooper *v.* McKee, 121 Ky. 287, 89 S. W. 203, 28 Ky. L. Rep. 270; Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419, 25 Ky. L. Rep. 795; Aultman, etc., Co. *v.* Mead, 109 Ky. 583, 60 S. W. 294, 22 Ky. L. Rep. 1189; Overley *v.* Given, 52 S. W. 1059, 21 Ky. L. Rep. 760; Camplin *v.* Eads, 24 S. W. 1068, 15 Ky. L. Rep. 1068.

Massachusetts.— Hollis *v.* Richardson, 13 Gray 392; Millard *v.* Baldwin, 3 Gray 484.

Minnesota.— Holgate *v.* Broome, 8 Minn. 243.

Missouri.— Butts *v.* Phelps, 79 Mo. 302; Sapington *v.* Jeffries, 15 Mo. 628.

Nebraska.— Baldwin *v.* Burt, 43 Nebr. 245, 61 N. W. 601.

Nevada.— California State Tel. Co. *v.* Patterson, 1 Nev. 150.

New York.— Tate *v.* American Woolen Co, 114 N. Y. App. Div. 106, 99 N. Y. Suppl. 678; Sampson *v.* Grand Rapids School Furniture Co., 55 N. Y. App. Div. 163, 66 N. Y. Suppl. 815; Nealis *v.* Marks, 96 N. Y. Suppl. 740; Allen *v.* Malcolm, 12 Abb. Pr. N. S. 335; Fosdick *v.* Groff, 22 How. Pr. 158.

North Carolina.— Moore *v.* Hobbs, 79 N. C. 535.

Oregon.— Creecy *v.* Joy, 40 Oreg. 28, 66 Pac. 295.

South Carolina.— Crane *v.* Lipscomb, 24 S. C. 430.

Wisconsin.— State *v.* Egerer, 55 Wis. 527, 13 N. W. 461; Williams *v.* Brunson, 41 Wis. 418.

See 39 Cent. Dig. tit. "Pleading," § 15.

Averments held not to be conclusions.— But the averment that the debt for which a note was given is the same debt for which a prior note was given is not a mere conclusion. Shirley *v.* Stephenson, 104 Ky. 518, 47 S. W. 581, 20 Ky. L. Rep. 767. And allegations in a complaint that at an election duly held the officers of a school-district were authorized to incur an indebtedness to erect a school-house, that a contract was entered into, and that

party became liable,[79] that no attorney's fee is due under a mortgage,[80] that by default in interest the principal of certain bonds became due,[81] that a public fund exists which is applicable to a claim,[82] or that a trust deed is declared due under an option therein.[83]

(II) *Contracts* — (A) *Generally.*[84] An averment that certain writings constitute a contract states a legal conclusion,[85] as does an averment that there was a tacit understanding between parties,[86] that a person assumed and agreed to pay a mortgage debt,[87] or that a person is entitled to certain rights under a contract.[88]

(B) *Promise in Express Contract.* An averment that defendant promised to perform certain stipulations and covenants is an averment of fact.[89]

(C) *Promise in Implied Contract.* Under the code procedure, where facts are alleged from which the law will imply a promise, it is not necessary to allege a promise in terms, such allegation being a mere conclusion of law.[90] But under the common-law rule a promise is deemed an issuable fact and it is essential to allege it.[91] Where facts pleaded are such as to raise an implied contract, the fact that the pleader draws such conclusion from the facts will not cause the pleading to be regarded as averring an express contract.[92]

(D) *Consideration.* An averment that there was or was not a sufficient consideration, or any consideration, for a contract, is a legal conclusion.[93]

(E) *Beneficiary.* An allegation that a contract was entered into for the benefit

the order sued upon was issued in payment of the indebtedness, present issuable facts, and not conclusions of law. Meyer *v.* Minnehaha County School Dist. No. 31, 4 S. D. 420, 57 N. W. 68.

79. Cairo, etc., R. Co. *v.* Dodge, 72 Ill. 253; Rhorer *v.* Middlesboro Town, etc., Co., 103 Ky. 146, 44 S. W. 448, 19 Ky. L. Rep. 1788; Bishop *v.* Williamson, 11 Me. 495; Leland *v.* Goodfellow, 84 Mich. 357, 47 N. W. 591.

80. Tidwell *v.* Wittmeier, 150 Ala. 253, 43 So. 782.

81. Dame *v.* Cochiti Reduction, etc., Co., (N. M. 1905) 79 Pac. 296.

82. Burke *v.* San Francisco Police Relief, etc., Fund, 4 Cal. App. 235, 87 Pac. 421.

83. Jocelyn *v.* White, 201 Ill. 16, 66 N. E. 327.

84. Pleading in action on contracts generally see Contracts, 9 Cyc. 711 *et seq.*

85. Nester *v.* Diamond Match Co., 143 Fed. 72, 74 C. C. A. 266, so holding where it was averred that a draft of a contract and letters between the parties constituted a binding contract.

86. Home Mixture Guano Co. *v.* Tillman, 125 Ga. 172, 53 S. E. 1019.

87. Kreidler *v.* Hyde, 120 Ill. App. 505.

88. Simmons *v.* Lima Oil Co., 71 N. J. Eq. 174, 63 Atl. 258.

89. Witherbee *v.* Meyer, 168 N. Y. 641, 61 N. E. 554.

90. *California.*— Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Indiana.— Cox *v.* Peltier, 159 Ind. 355, 65 N. E. 6. But see Wills *v.* Wills, 34 Ind. 106, where it was held proper to allege the promise as the legal effect of the facts.

Minnesota.— Boston Clothing Co. *v.* Garland, 90 Minn. 520, 97 N. W. 433; Oevermann *v.* Loebertmann, 68 Minn. 162, 70 N. W. 1084.

Missouri.— Warder *v.* Seitz, 157 Mo. 140, 57 S. W. 537; Wetmore *v.* Crouch, 150 Mo. 671, 51 S. W. 738.

Montana.— Conrad Nat. Bank *v.* Great Northern R. Co., 24 Mont. 178, 61 Pac. 1; Voight *v.* Brooks, 19 Mont. 374, 48 Pac. 549; Higgins *v.* Germaine, 1 Mont. 230.

New York.— Jordan, etc., Plank Road Co. *v.* Morley, 23 N. Y. 552; Farron *v.* Sherwood, 17 N. Y. 227; Cropsey *v.* Sweeney, 27 Barb. 310; Glenny *v.* Hitchins, 4 How. Pr. 98.

Oregon.— Waite *v.* Willis, 42 Oreg. 288, 70 Pac. 1034.

South Dakota.— Hurlbut *v.* Leper, 12 S. D. 321, 81 N. W. 631.

91. Kingsley *v.* Bill, 9 Mass. 198; Candler *v.* Rossiter, 10 Wend. (N. Y.) 487; Starke *v.* Cheeseman, 1 Ld. Raym. 538. Chitty says: "In pleading, the supposed promise itself should be alleged, and it is at least untechnical merely to state that which is only evidence of a promise." 1 Chitty Pl. (16th Am. ed.) 309. It is not necessary to allege an implied promise to pay damages for the breach of an express contract, since the law imposes the obligation to pay damages. Keyes *v.* Binkert, 48 Ill. App. 259.

92. Wetmore *v.* Crouch, 150 Mo. 671, 51 S. W. 738.

93. *Alabama.*— Meyer *v.* Bloch, 139 Ala. 174, 35 So. 705.

Colorado.— Winne *v.* Springs Co., 3 Colo. 155.

District of Columbia.— Bryan *v.* Harr, 21 App. Cas. 190.

Indiana.— Mitchell *v.* Stinson, 80 Ind. 324.

Iowa.— Sac County *v.* Hobbs, 72 Iowa 69, 33 N. W. 368.

Kentucky.— Ronsh *v.* Vanceburg, etc., Turnpike Co., 120 Ky. 165, 85 S. W. 735, 27 Ky. L. Rep. 542.

Pennsylvania.— Black *v.* Garrett, 2 Leg. Rec. 251.

See 39 Cent. Dig. tit. "Pleading," § 14.

of the residents and taxpayers within a fire district, where no individual taxpayers are named and it is not alleged that the contract was for their benefit, nor that it was intended to be for their benefit, is a mere legal conclusion.[94]

(F) *Breach.* An allegation that a party has violated the conditions and covenants of a contract,[95] has broken a contract,[96] has not performed according to agreement,[97] has failed to fulfil his obligations,[98] is in default,[99] has refused to carry out the terms of his agreement,[1] that an act constitutes a breach of contract,[2] that goods were different from those which the party agreed to purchase,[3] or that goods were delivered as described in and in conformity with a contract[4] is a mere conclusion of law. But where a contract provided for the giving of estimates as work progressed, an averment that an estimate was given for a less amount than defendant was entitled to, in violation of the contract, was held not to state a conclusion of law.[5]

(III) *CONVERSION.* An averment that defendant converted plaintiff's property to his own use is an averment of a fact, and not a conclusion of law.[6]

(IV) *DUTY.*[7] The general rule is that an allegation of duty, in terms, is a mere legal conclusion, and that the facts showing the existence of the duty should be alleged.[8] There are some authorities, however, which hold that in actions in

Contra.— Towanda First Nat. Bank *v.* Robinson, 105 N. Y. App. Div. 193, 94 N. Y. Suppl. 767.

94. Wainwright *v.* Queens County Water Co., 78 Hun (N. Y.) 146, 28 N. Y. Suppl. 987.

95. Chauvraut *v.* Maillard, 4 N. Y. Suppl. 126.

96. Hearn *v.* Gower, 1 Ga. App. 265, 57 S. E. 916.

97. Coffin *v.* Grand Rapids Hydraulic Co., 61 N. Y. Super. Ct. 51, 18 N. Y. Suppl. 782; Exeter Mach. Works *v.* Ritter, 7 Kulp (Pa.) 558.

98. Van Schaick *v.* Winne, 16 Barb. (N. Y.) 89.

99. Excelsior Sav. Bank *v.* Campbell, 4 Thomps. & C. (N. Y.) 549.

1. Armstrong *v.* Heide, 47 Misc. (N. Y.) 609, 94 N. Y. Suppl. 434.

2. Lawrence *v.* Williams, 1 Duer (N. Y.) 585 [*cited* and said to have been *reversed* in an unreported decision in Wall *v.* Buffalo Water Works Co., 18 N. Y. 119, 122].

3. McAllister-Coman Co. *v.* Matthews, 150 Ala. 167, 43 So. 747.

4. Bogardus *v.* Phœnix Mfg. Co., 120 Ill. App. 46.

5. Ripley County *v.* Hill, 115 Ind. 316, 16 N. E. 156.

6. *California.*— Lowe *v.* Ozmun, 137 Cal. 257, 70 Pac. 87; Daggett *v.* Gray, 110 Cal. 169, 42 Pac. 568.

Indiana.— Reish *v.* Reynolds, 68 Ind. 561.

Massachusetts.— Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159.

Minnesota.— Cordill *v.* Minnesota Elevator Co., 89 Minn. 442, 95 N. W. 306.

Missouri.— McDonald *v.* Mangold, 61 Mo. App. 291.

Montana.— Stevens *v.* Curran, 28 Mont. 366, 72 Pac. 415.

Nebraska.— Sanford *v.* Jensen, 49 Nebr. 766, 69 N. W. 108.

Washington.— Pullman First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460.

Conversion generally see TROVER AND CONVERSION.

7. Pleading negligence see NEGLIGENCE, 29 Cyc. 565.

8. *Connecticut.*— Martin *v.* Sherwood, 74 Conn. 475, 51 Atl. 526; Lang *v.* Brady, 73 Conn. 707, 49 Atl. 199; Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1; McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278; Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Florida.— Milligan *v.* Keyser, 52 Fla. 331, 42 So. 367.

Illinois.— Schueler *v.* Mueller, 193 Ill. 402, 61 N. E. 1044; Ward *v.* Danzeizen, 111 Ill. App. 163; Illinois Steel Co. *v.* McNulty, 105 Ill. App. 594; Wilson *v.* Baillargeon Interior Bldg. Co., 54 Ill. App. 250.

Indiana.— Pittsburgh, etc., R. Co. *v.* Peck, 165 Ind. 537, 76 N. E. 163; Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669; Ft. Wayne *v.* Christie, 156 Ind. 172, 59 N. E. 385.

Missouri.— McPeak *v.* Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. 170.

New Jersey.— Neinaber *v.* Weehawken Tp., 70 N. J. L. 630, 57 Atl. 267; State *v.* Pennsylvania R. Co., 45 N. J. L. 82. See also Long *v.* John Stevens Co., 73 N. J. L. 186, 63 Atl. 910.

Rhode Island.— King *v.* Interstate Consol. R. Co., 23 R. I. 583, 51 Atl. 301, 70 L. R. A. 924.

Tennessee.— Baker *v.* Louisville, etc., Terminal R. Co., 106 Tenn. 490, 61 S. W. 1029, 53 L. R. A. 474.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

England.— Dutton *v.* Powles, 2 B. & S. 174, 7 Jur. N. S. 725, 30 L. J. Q. B. 169, 110 E. C. L. 174 [*affirmed* in 2 B. & S. 191, 8 Jur. N. S. 970, 31 L. J. Q. B. 191, 6 L. T. Rep. N. S. 224, 10 Wkly. Rep. 408, 110 E. C. L. 191]; Brown *v.* Mallett, 5 C. B. 599, 12 Jur. 204, 17 L. J. C. P. 227, 57 E. C. L. 599; Metcalfe *v.* Hetherington, 11 Exch. 257, 24 L. J. Exch. 314.

See 39 Cent. Dig. tit. "Pleading," § 19.

which recovery is sought for the negligence of defendant an allegation of duty is one of fact.[9]

(v) *Exemptions.* It is not sufficient to allege merely that certain property is exempt from taxes or execution. The facts showing the exemption must be alleged.[10]

(vi) *Fraud, Mistake, Undue Influence, Duress, and Conspiracy.*[11] A mere averment of fraud or characterization of an act as fraudulent,[12] or the mere

Duties imposed by statute.— Allegations setting out duties created by statute have been held not to be allegations of fact, but conclusions of law. McGuinness *v.* Alison Realty Co., 46 Misc. (N. Y.) 8, 93 N. Y. Suppl. 267 [*affirmed* in 111 N. Y. App. Div. 926, 97 N. Y. Suppl. 1141].

9. *Iowa.*— Humpton *v.* Unterkircher, 97 Iowa 509, 66 N. W. 85.

Michigan.— Flint, etc., R. Co. *v.* Stark, 38 Mich. 714.

Minnesota.— Berry *v.* Dole, 87 Minn. 471, 92 N. W. 334.

North Carolina.— Burnett *v.* Atlantic Coast Line R. Co., 132 N. C. 261, 43 S. E. 797.

Wisconsin.— Greenman *v.* Chicago, etc., R. Co., 100 Wis. 188, 75 N. W. 998; Lago *v.* Walsh, 98 Wis. 348, 74 N. W. 212; Jones *v.* Burtis, 88 Wis. 478, 60 N. W. 785.

See 39 Cent. Dig. tit. "Pleading," § 19.

Duty implied by law.— Since the law implies a duty not to place or leave explosives in a public highway, it is not necessary in an action for injury resulting from such act to aver such duty in terms. Wells *v.* Gallagher, 144 Ala. 363, 39 So. 747, 113 Am. St. Rep. 50, 3 L. R. A. N. S. 759.

10. *Arkansas.*— Donnelly *v.* Wheeler, 34 Ark. 111.

Iowa.— Pratt *v.* Delavan, 17 Iowa 307.

Nebraska.— Bell *v.* Sherer, 12 Nebr. 409, 11 N. W. 861.

Rhode Island.— McTwiggan *v.* Hunter, 19 R. I. 68, 31 N. W. 693.

United States.— Kennedy *v.* McKee, 142 U. S. 606, 12 S. Ct. 303, 35 L. ed. 1131.

See 39 Cent. Dig. tit. "Pleading," § 25.

11. Pleading fraud generally see Fraud, 20 Cyc. 95 *et seq.*

12. *Alabama.*— Bell *v.* Southern Home Bldg., etc., Assoc., 140 Ala. 371, 37 So. 237, 103 Am. St. Rep. 41; Green *v.* Emens, 135 Ala. 563, 33 So. 540; Seals *v.* Weldon, 121 Ala. 319, 25 So. 1021; McDonald *v.* Pearson, 114 Ala. 630, 21 So. 534; Coal City Coal, etc., Co. *v.* Hazard Powder Co., 108 Ala. 218, 19 So. 392; Porter *v.* Ullman, 105 Ala. 623, 17 So. 111; Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109. But see Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264, holding that an averment, in a bill to set aside an attachment as fraudulent, that the demand upon which the attachment was based was "simulated," is the averment of a fact, and not of a legal conclusion.

Arizona.— Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946.

Arkansas.— Abraham *v.* Gray, 14 Ark. 301.

California.— Mulcahy *v.* Hibernia Sav., etc., Soc., 144 Cal. 219, 77 Pac. 910; Peckham *v.* Watsonville, 138 Cal. 242, 71 Pac. 169; Sukeforth *v.* Lord, (1890) 23 Pac. 296.

District of Columbia.— Peck *v.* Haley, 21 App. Cas. 224.

Florida.— Mickler *v.* Reddick, 38 Fla. 341, 21 So. 286; Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Georgia.— James *v.* Kelley, 107 Ga. 446, 33 S. E. 425, 73 Am. St. Rep. 135; Tolbert *v.* Caledonian Ins. Co., 101 Ga. 741, 28 S. E. 991; Carroll *v.* Hutchinson, 2 Ga. App. 60, 58 S. E. 309.

Idaho.— Picotte *v.* Watt, 3 Ida. 1154, 31 Pac. 805.

Illinois.— Zimmerman *v.* Willard, 114 Ill. 364, 2 N. E. 70; Slack *v.* McLagan, 15 Ill. 242; Weigand *v.* Cannon, 118 Ill. App. 635; Stettauer *v.* Dwight, 54 Ill. App. 194; Fred Miller Brewing Co. *v.* Utz, 46 Ill. App. 443; Ward *v.* Luneen, 25 Ill. App. 160.

Indiana.— Laporte County *v.* Wolff, 166 Ind. 325, 76 N. E. 247; Guy *v.* Blue, 146 Ind. 629, 45 N. E. 1052; Stroup *v.* Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; Lynam *v.* King, 9 Ind. 3; Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 103, 865.

Iowa.— Stephens *v.* Marion, 132 Iowa 490, 107 N. W. 614; Ockendon *v.* Barnes, 43 Iowa 615.

Kansas.— Knox *v.* Pearson, 64 Kan. 711, 68 Pac. 613; Ladd *v.* Nystol, 63 Kan. 23, 64 Pac. 985.

Kentucky.— Ryan *v.* Middlesborough Town-Lands Co., 106 Ky. 181, 52 S. W. 33, 21 Ky. L. Rep. 193; Kuhling *v.* Beidenhorn, 99 S. W. 646, 30 Ky. L. Rep. 811.

Louisiana.— Seghers *v.* Lemaitre, 5 La. Ann. 263.

Maryland.— Pearce *v.* Watkins, 68 Md. 534, 13 Atl. 376.

Michigan.— McMahon *v.* Rooney, 93 Mich. 390, 53 N. W. 539.

Minnesota.— Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; Kelley *v.* Wallace, 14 Minn. 236.

Missouri.— Newman *v.* Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6; Burnham *v.* Boyd, 167 Mo. 185, 66 S. W. 1088; Schiffman *v.* Schmidt, 154 Mo. 204, 55 S. W. 451; Nichols *v.* Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514; Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393; Dorman *v.* Hall, 124 Mo. App. 5, 101 S. W. 161.

Nebraska.— Weckerly *v.* Taylor, 74 Nebr. 84, 103 N. W. 1065; Sutton First Nat. Bank *v.* Grosshans, 61 Nebr. 575, 85 N. W. 542; Kemper, etc., Dry Goods Co. *v.* Renshaw, 58 Nebr. 513, 78 N. W. 1071; Johnston *v.* Spencer, 51 Nebr. 198, 70 N. W. 982; Crosby *v.* Ritchey, 47 Nebr. 924, 66 N. W. 1005;

averment of mistake,[13] or undue influence,[14] or conspiracy,[15] without averring the facts which constitute such fraud, mistake, undue influence, or conspiracy, is a conclusion of law and insufficient. But there are some cases which hold that in a plea or replication it is sufficient to allege fraud generally.[16] An allegation of defense relying on duress must specify the act or acts constituting the duress.[17] So an averment that a husband by threats and intimidations procured certain acts to be done by his wife is a mere conclusion of law.[18]

(VII) *Intent, Motive, Manner, and Other Characterizations of Acts* — (A) *Generally.* Averments that defendant's manner was coarse and brutal and calculated to injure plaintiff,[19] that an action was arbitrary[20] or illegal,[21]

Thomas *v.* Markmann, 43 Nebr. 823, 62 N. W. 206; Rockford Watch Co. *v.* Manifold, 36 Nebr. 801, 55 N. W. 236; Kansas, etc., R. Co. *v.* Fitzgerald, 33 Nebr. 137, 49 N. W. 1100.

New Hampshire.— Blood *v.* Manchester Electric Light Co., 68 N. H. 340, 39 Atl. 335; Bell *v.* Lamprey, 52 N. H. 41; Weld *v.* Locke, 18 N. H. 141.

New Jersey.— Connor *v.* Dundee Chemical Works, 50 N. J. L. 257, 12 Atl. 713.

New York.— Story *v.* Richardson, 181 N. Y. 584, 74 N. E. 1126 [*affirming* 91 N. Y. App. Div. 381, 86 N. Y. Suppl. 843]; Knowles *v.* New York, 176 N. Y. 430, 68 N. E. 860; Smith *v.* Irvin, 102 N. Y. App. Div. 614, 92 N. Y. Suppl. 1146 [*affirming* 45 Misc. 262, 92 N. Y. Suppl. 170]; Wallace *v.* Jones, 83 N. Y. App. Div. 152, 82 N. Y. Suppl. 449; Oelbermann *v.* New York, etc., R. Co., 14 Misc. 131, 36 N. Y. Suppl. 1096.

North Carolina.— Beaman *v.* Ward, 132 N. C. 68, 43 S. E. 545.

Oregon.— Leasure *v.* Forquer, 27 Oreg. 334, 41 Pac. 665.

Pennsylvania.— Bradly *v.* Potts, 155 Pa. St. 418, 26 Atl. 734.

Rhode Island.— Corey *v.* Howard, 19 R. I. 723, 37 Atl. 946.

South Carolina.— Gem Chemical Co. *v.* Youngblood, 58 S. C. 56, 36 S. E. 437.

Texas.— Miller *v.* Lovell, (Civ. App. 1897) 40 S. W. 835.

Utah.— Voorhees *v.* Fisher, 9 Utah 303, 34 Pac. 64.

Vermont.— Wright *v.* Bourdon, 50 Vt. 494.

Virginia.— Mills *v.* Norfolk, etc., R. Co., 90 Va. 523, 19 S. E. 171.

Washington.— Cade *v.* Head Camp W. W., 27 Wash. 218, 67 Pac. 603; West Coast Grocery Co. *v.* Stinson, 13 Wash. 255, 43 Pac. 35; Murray *v.* Shoudy, 13 Wash. 33, 42 Pac. 631; Baker-Boyer Nat. Bank *v.* Hughson, 5 Wash. 100, 31 Pac. 423.

West Virginia.— Billingsley *v.* Mcnear, 44 W. Va. 651, 30 S. E. 61; Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611.

Wisconsin.— Steinberg *v.* Saltzman, 130 Wis. 419, 110 N. W. 198; New Bank *v.* Kleiner, 112 Wis. 287, 87 N. W. 1090; Crowley *v.* Hicks, 98 Wis. 566, 74 N. W. 348.

Wyoming.— Ricketts *v.* Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1; Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

United States.— Chicot County *v.* Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. ed. 546; Schell *v.* Alston Mfg. Co., 149 Fed. 439; Cella *v.* Brown, 144 Fed. 742, 75 C. C. A. 608; Williamson *v.* Beardsley, 137 Fed. 467, 69 C. C. A. 615; Lumley *v.* Wabash R. Co., 71 Fed. 21 [*reversed* on other grounds in 76 Fed. 66, 22 C. C. A. 60]; Murphy *v.* Byrd, 17 Fed. Cas. No. 9,947*b*, Hempst. 221.

England.— Kingston *v.* Corker, L. R. 29 Ir. 364; Byrne *v.* Muzio, L. R. 8 Ir. 396.

See 39 Cent. Dig. tit. "Pleading," § 28½.

13. Mansfield *v.* Barber, 59 Ga. 851; Gaines *v.* Park, 3 B. Mon. (Ky.) 223, 38 Am. Dec. 185; Anderson *v.* Logan, 105 N. C. 266, 11 S. E. 361; Osborn *v.* Ketchum, 25 Oreg. 352, 35 Pac. 972.

The word "mistake" in a bill alleging a contract different from that reduced to writing, and that it was so written by mutual mistake, is the statement of a fact, and not of a conclusion. Smelser *v.* Pugh, 29 Ind. App. 614, 64 N. E. 943.

14. Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45; Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Barber Asphalt Paving Co. *v.* Field, 188 Mo. 182, 86 S. W. 860.

15. Leavenworth, etc., R. Co. *v.* Douglas County Com'rs, 18 Kan. 169.

16. *Indiana.*— Pence *v.* Smock, 2 Blackf 315.

Kentucky.— Ryan *v.* Middlesborough Town-Land Co., 106 Ky. 181, 52 S. W. 33, 21 Ky. L. Rep. 193; Evans *v.* Stone, 80 Ky. 78; Whitehead *v.* Root, 2 Metc. 584.

Missouri.— Edgell *v.* Sigerson, 20 Mo. 494 [*overruled* in Nichols *v.* Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514]; Pemberton *v.* Staples, 6 Mo. 59; Montgomery *v.* Tipton, 1 Mo. 446.

New Hampshire.— Hoitt *v.* Holcomb, 23 N. H. 535; Webb *v.* Steele, 13 N. H. 230.

New York.— Sherwood *v.* Johnson, 1 Wend. 443.

Ohio.— Derby *v.* Corlett, 4 Ohio Dec. (Reprint) 283, 1 Clev. L. Rep. 210.

England.— Tresham's Case, 9 Coke 108*a*, 110, 77 Eng. Reprint 891; Knight *v.* Peachy, T. Raym. 303, 83 Eng. Reprint 157.

See 39 Cent. Dig. tit. "Pleading," § 28½.

17. Pennsylvania Trust Co. *v.* Kline, 192 Pa. St. 1, 43 Atl. 401.

18. Taggart *v.* Kem, 22 Ind. App. 271, 53 N. E. 651.

19. Rylie *v.* Stammire, (Tex. Civ. App. 1903) 77 S. W. 626.

20. Ricketts *v.* Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

21. Ricketts *v.* Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

that a garnishee so answered as to create the conviction that title had not passed to her,[22] that certain conduct conclusively shows an intention not to make certain payments,[23] or that a policy-holder was in good standing with an insurance company [24] are conclusions. So also is an allegation that a provision in a contract was a mere device to evade the usury law,[25] that a certain use was reasonable,[26] and that plaintiff had not given the bond "mentioned" in the contract.[27] But allegations that plaintiff became of ill repute,[28] that an animal was of a fierce and dangerous nature,[29] or was well cared for[30] have been held not to be conclusions. A statement in a complaint that a certain place is a public highway is sufficient, without further averment of the manner in which it became so.[31] And an averment of the unsoundness of a slave, in an action for a breach of warranty of soundness, was held to be a statement of fact, and not of a conclusion.[32]

(B) *Purpose and Intent.* Intention may be alleged directly as a fact.[33] An allegation that an assignment was made for the purpose of defeating creditors is not a conclusion of law.[34]

(C) *Readiness and Willingness.* An allegation of readiness and willingness to perform an act is not a conclusion but an averment of a fact.[35]

(D) *Diligence.* It is, as a rule, not sufficient to allege generally that due diligence has been used, but the facts constituting diligence must be set out.[36]

(E) *Wrongfulness.* A mere allegation that an act was wrongful, or that an act was wrongfully done, is a conclusion of law.[37]

(VIII) *JURISDICTION.* Averments of lack of jurisdiction must set up the facts;[38] and where the jurisdiction of a court of limited or inferior jurisdiction is averred, the facts necessary to show such jurisdiction should be alleged and not the mere conclusion that it existed.[39]

(IX) *NOTICE AND KNOWLEDGE.* An averment that there was or was not due and legal notice, without the facts constituting the notice, is a conclusion and is insufficient,[40] so an averment that a purchaser of trust property was charged

22. Bitzer *v.* Washburn, 121 Iowa 462, 96 N. W. 978.

23. Snyder *v.* McLanahan, 203 Pa. St. 55, 52 Atl. 7.

24. People's Mut. Assur. Fund *v.* Boesse, 92 Ky. 290, 17 S. W. 630, 13 Ky. L. Rep. 660.

25. Hieronymus *v.* New York Nat. Bldg., etc., Assoc., 107 Fed. 1005, 46 C. C. A. 684.

26. Kellogg *v.* New Britain, 62 Conn. 232, 24 Atl. 996.

27. Equitable Mfg. Co. *v.* Howard, 140 Ala. 252, 37 So. 106.

28. Waite *v.* Aborn, 60 N. Y. App. Div. 521, 69 N. Y. Suppl. 967.

29. Guenther *v.* Fohey, 26 Ind. App. 93, 59 N. E. 182.

30. Ash *v.* Beck, (Tex. Civ. App. 1902) 68 S. W. 53.

31. Jackson *v.* Smiley, 18 Ind. 247.

32. Stone *v.* Watson, 37 Ala. 279.

33. Wilcox *v.* Davis, 4 Minn. 197.

34. Brown *v.* Carbonate Bank, 34 Fed. 776.

35. Wilson *v.* Clark, 35 Tex. Civ. App. 92, 79 S. W. 649.

36. Leas *v.* White, 15 Iowa 187.

An averment that a claim has been prosecuted with diligence is a conclusion of law. Wakefield *v.* Georgetown First Nat. Bank, 40 S. W. 921, 19 Ky. L. Rep. 426.

37. *Alabama.*— Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

California.— Miles *v.* McDermott, 31 Cal. 270.

Georgia.— Whaley *v.* Columbus, 89 Ga. 781, 15 S. E. 694.

Massachusetts.— Lothrop Pub. Co. *v.* Lothrop, etc., Co., 191 Mass. 353, 77 N. E. 841, 5 L. R. A. N. S. 1077.

Missouri.— Schiffman *v.* Schmidt, 154 Mo. 204, 55 S. W. 451.

New York.— Thomas *v.* New York, etc., R. Co., 139 N. Y. 163, 34 N. E. 877; Petty *v.* Emery, 96 N. Y. App. Div. 35, 88 N. Y. Suppl. 823; Burdick *v.* Chesebrough, 94 N. Y. App. Div. 532, 88 N. Y. Suppl. 13.

South Dakota.— Boynton *v.* Faulk County, 7 S. D. 423, 64 N. W. 518.

38. Epping *v.* Robinson, 21 Fla. 36; Gum-Elastic Roofing Co. *v.* Mexico Pub. Co., 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700; Wegner *v.* Wiltsie, 23 Ohio Cir. Ct. 302; Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

Pleas to the jurisdiction generally see *infra*, IV, B, 3.

39. Gilchrist *v.* Shackelford, 72 Ala. 7 (holding that a bill which sought to perfect title to land purchased at an administrator's sale must aver the existence of the facts which gave the probate court jurisdiction to order the sale); Grob *v.* Metropolitan Collecting Agency, 30 Misc. (N. Y.) 314, 63 N. Y. Suppl. 513.

Necessity of jurisdiction appearing of record in general see COURTS, 11 Cyc. 695.

40. Rapelye *v.* Bailey, 3 Conn. 438, 8 Am. Dec. 199; Harris *v.* Ross, 112 Ind. 314, 13

with notice is a conclusion,[41] but an averment that there was no notice whatever is an averment of a fact,[42] as is an averment that a person had been notified of a particular fact.[43] An averment of knowledge does not state a conclusion of law.[44]

(x) *Performance of Conditions.* Where the performance of conditions precedent is essential to a right of action or defense, the facts constituting the performance must be stated, and it is not sufficient to allege generally that all the conditions were performed.[45] In a number of states, however, statutes allow the general averment of the performance of conditions precedent in a contract,[46] but such statutes are permissive merely, and it is equally proper in those states to allege the facts showing performance.[47] Such statutes usually apply only to contracts, and not to conditions imposed by law,[48] although in a few states they are not limited to conclusions in a contract.[49]

N. E. 873; American Mut. Aid Soc. *v.* Helburn, 85 Ky. 1, 2 S. W. 495, 8 Ky. L. Rep. 627, 7 Am. St. Rep. 571. *Contra,* Miles *v.* Mutual Reserve Fund Life Assoc., 108 Wis. 421, 84 N. W. 159.

Pleading notice generally see Notice, 29 Cyc. 1124.

41. Luverne Bank *v.* Birmingham Fertilizer Co., 143 Ala. 153, 39 So. 126.

42. Wells County *v.* Gruver, 115 Ind. 224, 17 N. E. 290.

43. Robertson Lumber Co. *v.* Edinburgh State Bank, 14 N. D. 511, 105 N. W. 719.

44. State *v.* Sooy, 39 N. J. L. 135.

45. *California.*— Rhoda *v.* Alameda County, 52 Cal. 350; Burrell *v.* Haw, 40 Cal. 373; People *v.* Jackson, 24 Cal. 630.

Kentucky.— Averbeck *v.* Hall, 14 Bush 505; Read *v.* Cisney, 4 Litt. 137.

Massachusetts.— Murdock *v.* Caldwell, 8 Allen 309.

Minnesota.— Biron *v.* St. Paul Water Com'rs, 41 Minn. 519, 43 N. W. 482.

Montana.— Billings First Nat. Bank *v.* Custer County, 7 Mont. 464, 17 Pac. 551.

Nebraska.— McCullough *v.* Colfax County, 4 Nebr. (Unoff.) 543, 95 N. W. 29.

New York.— Miller *v.* Buffalo, Sheld. 490; Alden Speare's Sons' Co. *v.* Casein Co. of America, 53 Misc. 58, 103 N. Y. Suppl. 1015; Glover *v.* Tuck, 24 Wend. 153.

Pennsylvania.— Zerger *v.* Sailer, 6 Binn. 24.

Virginia.— Smith *v.* Lloyd, 16 Gratt. 295.

Canada.— See Tanner *v.* D'Everado, 3 U. C. Q. B. 154.

See also Contracts, 9 Cyc. 722.

46. See the statutes of the several states. And see the following cases:

California.— Smith *v.* Mohn, 87 Cal. 489, 25 Pac. 696; Griffiths *v.* Henderson, 49 Cal. 566; Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416; California Steam Nav. Co. *v.* Wright, 6 Cal. 258, 65 Am. Dec. 511.

Indiana.— Kenney *v.* Bevilheimer, 158 Ind. 653, 64 N. E. 215; Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129; Columbia Tp. *v.* Pipes, 122 Ind. 239, 23 N. E. 750; American Cent. Ins. Co. *v.* Sweetser, 116 Ind. 370, 19 N. E. 159; Ætna Ins. Co. *v.* Kittles, 81 Ind. 96; Darnell *v.* Keller, 18 Ind. App. 103, 45 N. E. 676.

Iowa.— Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508; Clark *v.* Riddle, 101 Iowa 270, 70 N. W. 207.

Kansas.— Milwaukee Mechanics' Ins. Co. *v.* Winfield, 6 Kan. App. 527, 51 Pac. 567.

Minnesota.— Mosness *v.* German-American Ins. Co., 50 Minn. 341, 52 N. W. 932.

Missouri.— McGannon *v.* Millers' Nat. Ins. Co., 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778; Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19; McNees *v.* Southern Ins. Co., 61 Mo. App. 335; Forse *v.* Supreme Lodge K. H., 41 Mo. App. 106; Roy *v.* Boteler, 40 Mo. App. 213.

Nebraska.— German Ins. Co. *v.* Shader, 68 Nebr. 1, 93 N. W. 972, 60 L. R. A. 918; German-American Ins. Co. *v.* Etherton, 25 Nebr. 505, 41 N. W. 406.

New York.— Case *v.* Phœnix Bridge Co., 55 N. Y. Super. Ct. 25; Rowland *v.* Phalen, 1 Bosw. 43. See also Gansevoort Bank *v.* Empire State Surety Co., 117 N. Y. App. Div. 455, 102 N. Y. Suppl. 544.

Ohio.— Crawford *v.* Satterfield, 27 Ohio St. 421.

Oregon.— Griffin *v.* Pitman, 8 Oreg. 342.

South Dakota.— De Ford *v.* Hyde, 10 S. D. 386, 73 N. W. 265.

Wisconsin.— See South Milwaukee Co. *v.* Murphy, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82; Miles *v.* Mutual Reserve Fund Life Assoc., 108 Wis. 421, 84 N. W. 159; River Falls Bank *v.* German American Ins. Co., 72 Wis. 535, 40 N. W. 506; Scheiderer *v.* Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. St. Rep. 618; Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731; Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417.

See 39 Cent. Dig. tit. "Pleading," §§ 124, 125. See also Contracts, 9 Cyc. 722 text and note 61.

47. Kenney *v.* Bevilheimer, 158 Ind. 653, 64 N. E. 215; Home Ins. Co. *v.* Duke, 43 Ind. 418; Grand Lodge A. O. U. W. *v.* Hall, 31 Ind. App. 107, 67 N. E. 272; Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508; Brock *v.* Des Moines Ins. Co., 96 Iowa 39, 64 N. W. 685.

48. Rhoda *v.* Alameda County, 52 Cal. 350; Himmelman *v.* Danos, 35 Cal. 441; Biron *v.* St. Paul Water Com'rs, 41 Minn. 519, 43 N. W. 482; Parks *v.* Heman, 7 Mo. App. 14; McCullough *v.* Colfax County, 4 Nebr. (Unoff.) 543, 95 N. W. 29.

49. See the statutes of the several states. And see Vail *v.* Pennsylvania F. Ins. Co., 67 N. J. L. 422, 51 Atl. 929.

(xi) *Personal Status and Relationship* — (a) *Settlement.* An averment that a person has no settlement in a borough states a conclusion of law.[50]

(b) *Heirship and Relationship.* Some authorities hold that an allegation that a party is the heir or next of kin of another is a mere conclusion,[51] but others consider it an allegation of fact.[52]

(c) *Capacity.* A general averment of disability is a mere conclusion,[53] as is an averment that a woman was relieved of the disabilities of coverture,[54] and a pleading which proceeds upon the theory that a person was of unsound mind, without stating any facts indicating unsoundness, has been held demurrable.[55]

(d) *Appointment and Authority of Officers.* An averment that certain officers had or had not authority to do designated acts is in some jurisdictions held a mere conclusion,[56] but in others it is deemed an allegation of fact.[57] An averment that an officer was duly appointed has been held to be a conclusion of law.[58] An averment that a judge was disqualified is the mere statement of a legal conclusion.[59]

(xii) *Real Party in Interest.* An averment that a party is or is not the real party in interest, without facts showing whether or not such is the case, is insufficient, being a mere legal conclusion.[60]

(xiii) *Ratification.* A mere averment that a party ratified an act, without facts showing what was done, is a conclusion of law.[61] But a statement that a contract was renewed, ratified, and affirmed has been held not to be a statement of a conclusion.[62]

(xiv) *Release, Waiver, Abandonment, or Forfeiture.* An allegation that one party released another from liability is a mere legal conclusion.[63] In some jurisdictions an allegation that conditions were waived is considered a con-

In Ontario the statute gives general authority to plead the performance of conditions precedent generally. Hennessey *v.* Weir, 11 U. C. C. P. 179; Great Western R. Co. *v.* Grand Trunk R. Co., 25 U. C. Q. B. 37.

50. Juniata County *v.* Mifflintown Borough, 22 Pa. Super. Ct. 187.

51. Daley *v.* O'Brien, 96 S. W. 521, 29 Ky. L. Rep. 811; Craig *v.* Welch-Hackley Coal, etc., Co., 74 S. W. 1097, 25 Ky. L. Rep. 232; Fite *v.* Orr, 1 S. W. 582, 8 Ky. L. Rep. 349; Stephani *v.* Stephani, 75 Hun (N. Y.) 188, 26 N. Y. Suppl. 1039.

52. State Physi-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167; Ricknor *v.* Clabber, 4 Indian Terr. 660, 76 S. W. 271; Evelyn *v.* Evelyn, 42 L. T. Rep. N. S. 248, 28 Wkly. Rep. 531, holding that, under the Judicature Act, order 19, rule 4, requiring a concise statement of the material facts, it was proper to state that a person was the heir at law of another, without stating all the facts through which the heirship could be made out.

53. Machen *v.* Bernheim, 93 S. W. 621, 29 Ky. L. Rep. 427.

54. McDonald *v.* Mobile L. Ins. Co., 56 Ala. 468.

55. Batman *v.* Snoddy, 132 Ind. 480, 32 N. E. 327.

56. Old Wayne Mut. Life Assoc. *v.* Flynn, 31 Ind. App. 473, 68 N. E. 327; Hintrager *v.* Richter, 85 Iowa 222, 52 N. W. 188; Goodhue *v.* Daniels, 54 Iowa 19, 6 N. W. 129; Smith *v.* Kaufman, 3 Okla. 568, 41 Pac. 722; Millican *v.* McNeil, 92 Tex. 400, 49 S. W. 219.

57. Kent *v.* North Tarrytown, 50 N. Y. App. Div. 502, 64 N. Y. Suppl. 178; Bryce *v.* Louisville, etc., R. Co., 73 Hun (N. Y.) 233, 25 N. Y. Suppl. 1043; Smith *v.* Barron County, 44 Wis. 686.

58. Mechan *v.* Flaherty, 119 N. Y. App. Div. 128, 103 N. Y. Suppl. 1058.

59. Milton *v.* Hundley, 52 Fla. 540, 42 So. 185.

60. Hereth *v.* Smith, 33 Ind. 514; Raymond *v.* Pritchard, 24 Ind. 318; Garrison *v.* Clark, 11 Ind. 369; Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316; Lamson *v.* Falls, 6 Ind. 309; Esch *v.* White, 82 Minn. 462, 85 N. W. 238, 718; Russell *v.* Clapp, 7 Barb. (N. Y.) 482; Van Dyke *v.* Gardner, 21 Misc. (N. Y.) 542, 47 N. Y. Suppl. 710; Voisin *v.* Mitchell, 96 N. Y. Suppl. 386; National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902.

61. *Alabama.*— Farley Nat. Bank *v.* Henderson, 118 Ala. 441, 24 So. 428.

Indiana.— Funk *v.* Rentchler, 134 Ind. 68, 33 N. E. 364, 898; Copenrath *v.* Kienby, 83 Ind. 18. *Contra*, Voiles *v.* Beard, 58 Ind. 510.

Missouri.— Drovers' Live Stock Commission Co. *v.* Wilson County Bank, 95 Mo. App. 251, 68 S. W. 967.

Nebraska.— Markey *v.* Sheridan County School Dist. No. 18, 58 Nebr. 479, 78 N. W. 932.

Pennsylvania.— D. B. Martin Co. *v.* Williams, 30 Pa. Super. Ct. 298.

Wisconsin.— Lauenstein *v.* Fond du Lac, 28 Wis. 336.

62. San Antonio Light Pub. Co. *v.* Moore, (Tex. Civ. App. 1907) 101 S. W. 867.

63. Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Corwin *v.* Shoup, 76 Ill. 246; Cairo,

clusion of law.[64] An allegation that a contract was waived, abandoned, and rescinded alleges merely conclusions of law.[65] An averment that property has been abandoned is a mere conclusion.[66]

(xv) *Results and Causal Connection.* Averments that by reason of a certain state of facts certain results followed, or that certain facts caused certain others, are conclusions. The facts showing the causal connection should be alleged.[67]

(xvi) *Right, Title, Ownership, or Possession* — (a) *In General.* Averments that plaintiff is entitled to the proceeds of a sale;[68] that an instrument conferred no right to certain property;[69] that a party was not invested with the legal ownership and control of an instrument;[70] that a party is or is not entitled to the possession of property;[71] that one is or is not an innocent purchaser,[72] or *bona fide* holder;[73] that possession was taken in good faith;[74] that plaintiff has a better title than defendant;[75] that plaintiff is entitled to a right of way;[76] that a party became the owner of an instrument;[77] that one had no right, title, or interest in certain land;[78] that a judgment or certain goods became the property of defendant;[79] that defendant is in open, notorious, continuous, and adverse possession of the premises;[80] that the city took possession of property under a paramount title;[81]

etc., R. Co. *v.* Dodge, 72 Ill. 253; Kelso *v.* Fleming, 104 Ind. 180, 3 N. E. 830; Marshall *v.* Mathers, 103 Ind. 458, 3 N. E. 120; Glasscock *v.* Hamilton, 62 Tex. 143. See also Hatch *v.* Peet, 23 Barb. (N. Y.) 575.

64. *Alabama.*— Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117; Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163.

Indiana.— Crafton *v.* Carmichael, 29 Ind. App. 320, 64 N. E. 627.

Iowa.— Barrett *v.* Des Moines Mut. Hail, etc., Ins. Assoc., 120 Iowa 184, 94 N. W. 473.

Kentucky.— Bishop *v.* Lawrence, 85 Ky. 25, 2 S. W. 499, 8 Ky. L. Rep. 643.

Nebraska.— Macfarland *v.* West Side Imp. Assoc., 56 Nebr. 277, 76 N. W. 584.

New York.— See Pope Mfg. Co. *v.* Rubber Goods Mfg. Co., 110 N. Y. App. Div. 341, 97 N. Y. Suppl. 73.

Ohio.— United Firemen's Ins. Co. *v.* Kukral, 7 Ohio Cir. Ct. 356, 4 Ohio Cir. Dec. 633.

Oregon.— Zorn *v.* Livesley, 44 Oreg. 501, 75 Pac. 1057. *Contra,* Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574.

Washington.— Bay View Brewing Co. *v.* Grubb, 24 Wash. 163, 63 Pac. 1091.

United States.— Phinney *v.* New York Mut. L. Ins. Co., 67 Fed. 493.

See 39 Cent. Dig. tit. "Pleading," § 22.

65. Phinney *v.* New York Mut. L. Ins. Co., 67 Fed. 493.

66. Stannard *v.* Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254, so holding of an averment that a railroad had abandoned its right of way.

67. *Alabama.*— Perry County Com'rs Ct. *v.* Perry County Medical Soc., 128 Ala. 257, 29 So. 586.

District of Columbia.— Anderson *v.* White, 2 App. Cas. 408.

Indiana.— Logansport *v.* Kihm, 159 Ind. 68, 64 N. E. 595.

Kentucky.— Bentley *v.* Bustard, 16 B. Mon. 643, 63 Am. Dec. 561.

Minnesota.— Griggs *v.* St. Paul, 9 Minn. 246.

Missouri.— Dezell *v.* Fidelity, etc., Co., 176 Mo. 253, 75 S. W. 1102.

Vermont.— Sprague *v.* Fletcher, 67 Vt. 46, 30 Atl. 693.

See 39 Cent. Dig. tit. "Pleading," § 13.

68. Moore *v.* Barclay, 18 Ala. 672.

Copy of account see *infra,* X, B.

69. Rice, etc., Dry Goods Co. *v.* Sally, 198 Mo. 682, 96 S. W. 1030.

70. Savage *v.* Walshe, 26 Ala. 619; Gilbert *v.* Covell, 16 How. Pr. (N. Y.) 34; Witherspoon *v.* Van Dolar, 15 How. Pr. (N. Y.) 266. And see Watson *v.* Higgins, 7 Ark. 475, holding that in an action on a certain instrument a plea averring that plaintiff after exhibition of the declaration against defendant assigned the instrument whereby plaintiff transferred his interest and was not the legal holder of it was defective in not averring a delivery to any person.

71. McTaggart *v.* Rose, 14 Ind. 230; Lothrop Pub. Co. *v.* Williams, 191 Mass. 361, 77 N. E. 844; Garner *v.* McCullough, 48 Mo. 318; Sheridan *v.* Jackson, 72 N. Y. 170.

72. Wing *v.* Hayden, 10 Bush (Ky.) 276; Plant *v.* Schuyler, 7 Rob. (N. Y.) 271; Voorhees *v.* Fisher, 9 Utah 303, 34 Pac. 64.

73. Ludlow *v.* Woodward, 117 N. Y. App. Div. 525, 102 N. Y. Suppl. 647.

74. McKie *v.* Simpkins, 1 Tex. App. Civ. Cas. § 278.

75. Gilbert *v.* Cooper, 43 Tex. Civ. App. 328, 95 S. W. 753.

76. Boyden *v.* Achenbach, 79 N. C. 539.

77. S. Blaisdell, Jr., Co. *v.* Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 97 Am. St. Rep. 944, 62 L. R. A. 968.

78. Jones *v.* Sanders, 138 Cal. 405, 71 Pac. 506.

79. Gruen *v.* Peabody Education Fund Trustees, 51 N. Y. App. Div. 605, 64 N. Y. Suppl. 238; Branch *v.* De Blanc, (Tex. Civ. App. 1901) 62 S. W. 134.

80. McCloskey *v.* Barr, 38 Fed. 165.

81. Pabst Brewing Co. *v.* Thorley, 127

that plaintiff has a special ownership in certain property;[82] or that a note is a wife's separate estate[83] are conclusions of law. But a general allegation that plaintiff is the owner of the property is usually held sufficient, at least on demurrer,[84] and the same rule has been applied to an averment that plaintiff is lessee,[85] or that title is derived by gift.[86] So an averment that a way existed appurtenant to certain land has been held an averment of fact,[87] as is an averment that possession is lawful.[88] A vested estate in possession is properly pleaded by alleging the facts showing such possession.[89] In pleading a judicial conveyance the decree and deed must be averred.[90] An averment that a person was invited upon premises is a

Fed. 439 [*reversed* on other grounds in 145 Fed. 117, 76 C. C. A. 87].

82. Schoonover *v.* Birnbaum, 148 Cal. 548, 83 Pac. 999, Mason *v.* Mason, 219 Ill. 609, 76 N. E. 692 (where it was averred that complainant's father was at the time of his death seized in fee simple of certain land, and that complainant was a tenant in common of the land with defendants); Griffing *v.* Curtis, 50 Nebr. 334, 69 N. W. 968; Callanan *v.* Keeseville, etc., R. Co., 48 Misc. (N. Y.) 476, 95 N. Y. Suppl. 513 (where it was held that an allegation that the estate of a deceased partner who owned an undivided half interest in certain bonds, which in fact belonged to the partnership and consequently passed to the surviving partner, was a conclusion of law).

83. Leahy *v.* Leahy, 97 Ky. 59, 29 S. W. 852, 17 Ky. L. Rep. 187.

84. *Alabama.*— Burns *v.* George, 119 Ala. 504, 24 So. 718.

Arkansas.— See Pace *v.* Crandell, 74 Ark. 417, 86 S. W. 812.

California.— Johnson *v.* Vance, 86 Cal. 128, 24 Pac. 863; Souter *v.* Maguire, 78 Cal. 543, 21 Pac. 183; Riddell *v.* Harrell, 71 Cal. 254, 12 Pac. 67.

Colorado.— Logan *v.* Clough, 2 Colo. 323.

Florida.— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160.

Indiana.— Phœnix Ins. Co. *v.* Stark, 120 Ind. 444, 22 N. E. 413; Hays *v.* Muir, Smith 90.

Kansas.— Missouri Pac. R. Co. *v.* Henrie, 63 Kan. 330, 65 Pac. 665.

Kentucky.— Louisville, etc., R. Co. *v.* Scomp, 124 Ky. 330, 98 S. W. 1024, 30 Ky. L. Rep. 487.

Louisiana.— Hart *v.* Connolly, 49 La. Ann. 1587, 22 So. 809.

Massachusetts.— Strickland *v.* Fitzgerald, 7 Cush. 530.

Minnesota.— Buckholz *v.* Grant, 15 Minn. 406.

Montana.— McCauley *v.* Gilmer, 2 Mont. 202.

Nevada.— Hirshiser *v.* Ward, (1906) 87 Pac. 171.

New York.— Levin *v.* Russell, 42 N. Y. 251; Ensign *v.* Sherman, 14 How. Pr. 439.

North Dakota.— Donovan *v.* St. Anthony, etc., Elevator Co., 7 N. D. 513, 75 N. W. 809, 66 Am. St. Rep. 674.

South Carolina.— Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

Washington.— Kemp *v.* Folsom, 14 Wash. 16, 43 Pac. 1100.

United States.— Gage *v.* Kaufman, 133 U. S. 471, 10 S. Ct. 406, 33 L. ed. 725; McAllister *v.* Kuhn, 96 U. S. 87, 24 L. ed. 615; George Adams, etc., Co. *v.* South Omaha Nat. Bank, 123 Fed. 641, 60 C. C. A. 579; O'Keefe *v.* Cannon, 52 Fed. 898.

See 39 Cent. Dig. tit. "Pleading," § 23.

But see Jones *v.* Rogers, 85 Miss. 802, 38 So. 742, holding that an allegation in a bill to remove clouds from title that complainants' ancestor, under an execution sale to whom complainants claim, was at the time of his death seized and possessed in fee simple of certain land, was merely a legal conclusion and a statement of constructive possession, not of actual possession.

An allegation of ownership in the present tense does not render a pleading insufficient where other facts are alleged inferentially showing ownership at time of injury (Pittsburgh, etc., R. Co. *v.* Harper, 11 Ind. App. 481, 37 N. E. 41); and where ownership is alleged on a day prior to the injury, it will be presumed that it continued during the time of the injury (Pittsburgh, etc., R. Co. *v.* Harper, *supra*). See also Gould *v.* Eagle Creek School Dist., 7 Minn. 203, for a somewhat similar holding. In an action against an insurance agent for breach of contract to procure insurance on plaintiff's property, which has been destroyed by fire, where the complaint alleges that plaintiff was, when the contract was made, and "now is" the owner of the property, it sufficiently shows that plaintiff owned the property when the loss occurred especially when the objection is not raised till that fact has been proven without objection. Lindsay *v.* Pettigrew, 5 S. D. 500, 59 N. W. 726.

An averment of ownership as heir is insufficient in the absence of allegations showing the proceedings necessary to the vesting of title. Buttles *v.* De Baun, 116 Wis. 323, 93 N. W. 5. And an allegation that plaintiffs are the only children and heirs of one who died seized of land is not an allegation that plaintiffs own it. Howard *v.* Lock, 22 S. W. 332, 17 Ky. L. Rep. 154.

85. Harris *v.* Halverson, 23 Wash. 779, 63 Pac. 549.

86. McCarty *v.* Tarr, 83 Ind. 444.

87. Cincinnati, etc., R. Co. *v.* Miller, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001.

88. Woodruff *v.* Hughes, 2 Ga. App. 361, 58 S. E. 551.

89. Wise *v.* Wolf, 120 Ky. 263, 85 S. W. 1191, 27 Ky. L. Rep. 610.

90. Hutches *v.* Adams, 3 Ill. App. 42.

conclusion.[91] An averment that a party was ousted and dispossessed by due course of law has been held not to constitute a conclusion of law.[92]

(B) *Character of Holding.* Averments that money [93] or a mortgage was received in trust for a certain purpose,[94] that defendant seized certain goods as sheriff,[95] that defendant received money for use of plaintiff,[96] and that defendant controls an estate as executrix [97] are mere conclusions of law.

(XVII) *Validity or Legality of Acts, Instruments, or Proceedings.* Averments that certain demands are not lawful;[98] that a proceeding was unauthorized,[99] without force and effect,[1] or void;[2] that an act was or was not done as required by law;[3] that certain legal consequences follow from an act or

91. Brown *v.* Thomas Blackwell Coal, etc., Co., 124 Ky. 324, 99 S. W. 299.

92. Hirshiser *v.* Ward, (Nev. 1906) 87 Pac. 171.

93. Francis *v.* Gisborn, 30 Utah 67, 83 Pac. 571.

94. England *v.* Russell, 71 Fed. 818.

95. Dubois *v.* Hutchinson, 40 Mich. 262.

96. Lackmann *v.* Kearney, 142 Cal. 112, 75 Pac. 668; Lienan *v.* Lincoln, 2 Duer (N. Y.) 670.

97. Phinney *v.* Phinney, 17 How. Pr. (N. Y.) 197.

98. Callahan *v.* Broderick, 124 Cal. 80, 56 Pac. 782.

99. *Alabama.*— Savage *v.* Walshe, 26 Ala. 619.

Iowa.— Bogaard *v.* Plain View Independent Dist., 93 Iowa 269, 61 N. W. 859.

Missouri.— Schiffman *v.* Schmidt, 154 Mo. 204, 55 S. W. 451.

New York.— Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081.

Wisconsin.— Pratt *v.* Lincoln County, 61 Wis. 62, 20 N. W. 726.

See 39 Cent. Dig. tit. "Pleading," § 17.

1. Henriques *v.* Miriam Osborn Memorial Home, 22 Misc. (N. Y.) 653, 51 N. Y. Suppl. 133 [*affirmed* in 28 N. Y. App. Div. 354, 51 N. Y. Suppl. 284].

2. Johnson *v.* Kirby, 65 Cal. 482, 4 Pac. 458; Sprague *v.* Parsons, 14 Abb. N. Cas. (N. Y.) 320; Ritchie *v.* McMullen, 159 U. S. 235, 16 S. Ct. 171, 40 L. ed. 133; Naddo *v.* Bardon, 51 Fed. 493, 2 C. C. A. 335.

3. *California.*— Beckett *v.* Morse, 4 Cal. App. 228, 87 Pac. 408.

Colorado.— People *v.* Lothrop, 3 Colo. 428.

Idaho.— Ollis *v.* Orr, 6 Ida. 474, 56 Pac. 162.

Illinois.— See Blake *v.* Ogden, 223 Ill. 204, 79 N. E. 68, holding an allegation that a deed was never lawfully delivered a conclusion.

Indiana.— Landes *v.* State, 160 Ind. 479, 67 N. E. 189; Heavilon *v.* Farmers Bank, 81 Ind. 249; Caskey *v.* Greensburgh, 78 Ind. 233. See Payne *v.* Moore, 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005, holding an allegation that defendants negligently and unlawfully did certain acts insufficient without showing that the acts were unlawfully done.

Iowa.— Cooper *v.* French, 52 Iowa 531, 3 N. W. 538.

Kansas.— Townsend *v.* Burr, 9 Kan. App. 810, 60 Pac. 477.

Minnesota.— Taylor *v.* Blake, 11 Minn. 255.

Missouri.— Martin *v.* Castle, 193 Mo. 183, 91 S. W. 930 (holding that an allegation in a petition in a suit attacking a judgment rendered in the justice's court, that the records and proceedings by which the judgment was procured nowhere showed that defendant therein was served with process as required by law, is a conclusion of law); Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754. But see Lucas *v.* McCann, 50 Mo. App. 638.

Nebraska.— Weston *v.* Meyers, 45 Nebr. 95, 63 N. W. 117; Scroggin *v.* National Lumber Co., 41 Nebr. 195, 59 N. W. 548.

New Jersey.— Ridgway *v.* Forsyth, 7 N. J. L. 98.

Pennsylvania.— Moore *v.* Susquehanna Mut. F. Ins. Co., 196 Pa. St. 30, 46 Atl. 266.

South Dakota.— Iowa, etc., Tel. Co. *v.* Schamber, 15 S. D. 588, 91 N. W. 78.

Texas.— Doherty *v.* Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804.

United States.— Stephenson *v.* Supreme Council A. L. H., 127 Fed. 379.

See 39 Cent. Dig. tit. "Pleading," § 17.

Without authority of law.—It has been held that an allegation that an order directing the opening of a road was without authority of law, without jurisdiction, null and void, was the statement merely of a legal conclusion. Carlson *v.* Spokane County, 38 Wash. 616, 80 Pac. 795.

In setting forth decrees of a court of probate, or an execution from a court of general jurisdiction, it is sufficient to allege its legality generally. Leland *v.* Kingsbury, 24 Pick. (Mass.) 315; Hamilton *v.* Lyman, 9 Mass. 14.

Municipal aid election.— So in an action on railroad aid bonds, a simple allegation in the petition that "an election was duly held" to determine whether the subscription should be made is sufficient; and any irregularities in the mode of holding such election are matters of defense. Breckenridge County *v.* McCracken, 61 Fed. 191, 9 C. C. A. 442.

An allegation that a warrant was duly and legally signed is not a conclusion of law. Stephens *v.* Spokane, 11 Wash. 41, 39 Pac. 266.

Registration of warrants.—An allegation, in a suit to enforce payment of city warrants, that the warrants "were registered for payment according to law by the" city treasurer "at the dates of their respective presentations" was held not to be a conclu-

condition;[4] that certain acts are lawful,[5] or in violation of law;[6] that an instrument is valid,[7] void,[8] or is limited in certain particulars in its legal operation;[9] that a tax or regulation is unequal or unjust,[10] or that a tax was illegally assessed;[11] that

sion of law. Freeman *v.* Huron, 10 S. D. 368, 73 N. W. 260.

Due performance of act.— Several cases have sustained the propriety of alleging that an act was duly performed. Hatheway *v.* Reed, 127 Mass. 136; Newton *v.* Highland Imp. Co., 62 Minn. 436, 64 N. W. 1146; Manley *v.* Rassiga, 13 Hun (N. Y.) 288; McCorkle *v.* Herrmann, 5 N. Y. Suppl. 881; Miles *v.* Mutual Reserve Fund Life Assoc., 108 Wis. 421, 84 N. W. 159. But see Kenneally *v.* Chicago, 220 Ill. 485, 77 N. E. 155, holding that an averment that a patrolman had been duly appointed stated a mere conclusion. So it has been held that an averment that an act has been duly performed, while ordinarily but a legal conclusion, is nevertheless sufficient in the absence of a special demurrer or objection on that ground to authorize evidence on the issues. Pacific Paving Co. *v.* Diggins, 4 Cal. App. 240, 87 Pac. 415. Where the matter is collateral to the essential fact it suffices to allege generally that an election was duly held, or that an officer was duly elected and qualified, assuming to act in the particular capacity involved; but where the fact itself must appear it is insufficient to say that it had been duly performed, without stating how, the allegation being a mere conclusion of law. State *v.* Malheur County Ct., 46 Oreg. 519, 81 Pac. 368.

Determination of board or officer.—By statute in California in pleading a determination of a board or officer it is not necessary to state the facts showing jurisdiction, but such determination may be stated to have been duly given or made. Bituminous Lime Rock Paving, etc., Co. *v.* Fulton, (Cal. 1893) 33 Pac. 1117.

4. *Alabama.*— Troy Grocery Co. *v.* Potter, 139 Ala. 359, 36 So. 12.

California.— Branhan *v.* San Jose, 24 Cal. 585; Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534.

Colorado.— People *v.* Brown, 23 Colo. 425, 48 Pac. 661.

Indiana.— Gum-Elastic Roofing Co. *v.* Mexico Pub. Co., 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700; Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514; Grand Lodge A. O. U. W. *v.* Hall, 31 Ind. App. 107, 67 N. E. 272; Repp *v.* Lesher, 27 Ind. App. 360, 61 N. E. 609.

Indian Territory.— Kemp *v.* Jennings, 4 Indian Terr. 64, 64 S. W. 616.

Iowa.—Gipps Brewing Co. *v.* De France, 91 Iowa 108, 58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386.

Kentucky.— Bennett *v.* Lewis, 66 S. W. 523, 23 Ky. L. Rep. 2037.

Maryland.— Strauss *v.* Denny, 95 Md. 690, 53 Atl. 571; Reddington *v.* Lanahan, 59 Md. 429.

Massachusetts.— Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402.

Missouri.— Mallinckrodt Chemical Works *v.* Nemnich, 169 Mo. 388, 69 S. W. 355; Radcliffe *v.* St. Louis, etc., R. Co., 90 Mo. 127, 2 S. W. 277.

Nebraska.— Bellevue Imp. Co. *v.* Kayser, 1 Nebr. (Unoff.) 63, 95 N. W. 499.

Nevada.— Wheeler *v.* Floral Mill, etc., Co., 9 Nev. 254.

New Jersey.— Bloomington Min. Co. *v.* Searles, 66 N. J. L. 373, 49 Atl. 543.

New York.— Bush *v.* Coler, 170 N. Y. 587, 63 N. E. 1115; Rothschild *v.* Rio Grande Western R. Co., 59 Hun 454, 13 N. Y. Suppl. 361; Hatch *v.* Pelt, 23 Barb. 575; Baldwin *v.* Walsworth, Lalor 340.

North Dakota.— Clyde *v.* Johnson, 4 N. D. 92, 58 N. W. 512.

Ohio.— Pennsylvania Co. *v.* Platt, 47 Ohio St. 363, 25 N. E. 1028.

Oklahoma.— Smith *v.* Kaufman, 3 Okla. 568, 41 Pac. 722.

Rhode Island.— Wilson *v.* Tucker, 9 R. I. 137.

Texas.— Bluntzer *v.* Hirsch, 32 Tex. Civ. App. 585, 75 S. W. 326.

See 39 Cent. Dig. tit. "Pleading," §§ 13, 17.

5. McLane *v.* Leicht, 69 Iowa 401, 29 N. W. 327; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499; State *v.* Western Maryland R. Co., 98 Md. 125, 56 Atl. 394, 103 Am. St. Rep. 388; McCamant *v.* Batsell, 59 Tex. 363.

6. Chicago, etc., R. Co. *v.* Indiana Natural Gas, etc., Co., 161 Ind. 445, 68 N. E. 1008; Payne *v.* Moore, 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005; Heman *v.* Schulte, 166 Mo. 409, 66 S. W. 163; Knapp, etc., Co. *v.* St. Louis, 156 Mo. 343, 56 S. W. 1102; Nalle *v.* Austin, (Tex. Civ. App. 1893) 21 S. W. 375.

But the mere addition of the word "unlawfully" to an allegation which otherwise consists of facts will not vitiate it. Nance *v.* Georgia, etc., R. Co., 35 S. C. 307, 14 S. E. 629.

7. People *v.* Crotty, 93 Ill. 180.

8. Cathcart *v.* Peck, 11 Minn. 45; Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832; Burrall *v.* Bowen, 21 How. Pr. (N. Y.) 378; Shannon *v.* Portland, 38 Oreg. 382, 62 Pac. 50; O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004. See also Vonnoh *v.* Sixty-Seventh St. Atelier Bldg., 55 Misc. (N. Y.) 222, 105 N. Y. Suppl. 155.

9. U. S. Fidelity, etc., Co. *v.* Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344; Bellevue Imp. Co. *v.* Kayser, 1 Nebr. (Unoff.) 63, 95 N. W. 499.

10. Guy *v.* Washburn, 23 Cal. 111; Covington *v.* Herzog, 116 Ky. 725, 76 S. W. 538, 25 Ky. L. Rep. 938; Columbia *v.* Beasly, 1 Humphr. (Tenn.) 232, 34 Am. Dec. 619.

11. Jones *v.* Carnes, 17 Okla. 470, 87 Pac. 652.

a party has or has not certain legal rights;[12] that an act was done in due form,[13] or properly,[14] or under competent authority;[15] that a cause of action set up by amendment is the same as that originally alleged;[16] that an injury occurred as the result of a criminal act;[17] or that a statute has not been complied with[18] have been held to be mere legal conclusions.

(xviii) *What Might or Could Have Been Done, or May or Will Happen.* Averments that a judgment would not have been entered,[19] that an injury could have been cured,[20] that arrangements would have been made,[21] and that benefits would have been lost,[22] if certain things had or had not occurred, are mere conclusions; as is an averment that property was sold for less than the best price that could have been obtained,[23] that a thing is not being done as rapidly as practicable,[24] or that persons can easily and profitably be employed.[25] So it is a mere conclusion to aver that a certain event will happen or is liable to happen,[26] or that a party intends to do an act.[27]

(xix) *Miscellaneous Averments.* Many other illustrations of legal conclusions may be given,[28] such as an allegation that a party is without any other adequate remedy;[29] that a party is estopped by certain facts;[30] that it was necessary,[31] or unnecessary[32] that certain things should be done; that a party was justified in what he did;[33] that a lien did or did not exist, or that it was prior or subsequent to other claims;[34] that it was discharged or removed by a tender of

12. North Birmingham R. Co. *v.* Liddicoat, 99 Ala. 545, 13 So. 18; Clark *v.* Hart, 98 Ky. 31, 32 S. W. 216, 17 Ky. L. Rep. 604; Brown *v.* Phillips, 71 Wis. 239, 36 N. W. 242.

13. Young *v.* Davis, 30 Ala. 213; McEntee *v.* Cook, 76 Cal. 187, 18 Pac. 258.

14. Kipp *v.* Burton, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325.

15. Millville Gas Light Co. *v.* Swecten, 74 N. J. L. 24, 64 Atl. 959.

16. Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367. But an allegation that the debt sued on is the same debt as evidenced by a certain note is not a conclusion of law. Shirley *v.* Stephenson, 104 Ky. 518, 47 S. W. 581, 20 Ky. L. Rep. 767.

17. National Ben. Assoc. *v.* Bowman, 110 Ind. 355, 11 N. E. 316.

18. E. T. Burrowes Co. *v.* Rapid Safety Filter Co., 49 Misc. (N. Y.) 539, 97 N. Y. Suppl. 1048 (so holding of a statement that a foreign corporation had not complied with the statutes regulating such corporations); Mobile Cotton Mills *v.* Smyrna Shirt, etc., Co., 5 Penn. (Del.) 518, 65 Atl. 146 (to the same effect).

19. Harlow *v.* Seymour First Nat. Bank, 30 Ind. App. 160, 65 N. E. 603.

20. Boydston *v.* Giltner, 3 Oreg. 118.

21. Western Union Tel. Co. *v.* Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209.

22. Cleveland, etc., R. Co. *v.* Shrum, 24 Ind. App. 96, 55 N. E. 515. An answer alleging, as a breach of warranty, that the machine, "with proper management . . . would not, and could not, and did not, do as much work, or as good work, as other machines of similar size, for the same purpose" is not bad, as alleging legal conclusions. Robinson *v.* Berkey, 100 Iowa 136, 69 N. W. 434, 62 Am. St. Rep. 549.

23. Bransford *v.* Norwich Union F. Ins. Soc., 21 Colo. 34, 39 Pac. 419.

24. State *v.* Henry, 87 Miss. 125, 40 So. 152, 5 L. R. A. N. S. 340.

25. State *v.* Henry, 87 Miss. 125, 40 So. 152, 5 L. R. A. N. S. 340.

26. Lexington *v.* Lexington Bd. of Education, 65 S. W. 827, 23 Ky. L. Rep. 1663; Nagel *v.* Lindell R. Co., 167 Mo. 89, 66 S. W. 1090; Hand *v.* St. Louis, 158 Mo. 204, 59 S. W. 92; Placke *v.* Union Depot R. Co., 140 Mo. 634, 41 S. W. 915; Bordeaux *v.* Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600; Boyer *v.* Western Union Tel. Co., 124 Fed. 246. See also Montgomery Light, etc., Co. *v.* Citizens Light, etc., Co., 147 Ala. 359, 40 So. 981; Bishop *v.* Owens, 5 Cal. App. 83, 89 Pac. 844; Elliott *v.* Ferguson, 37 Tex. Civ. App. 40, 83 S. W. 56.

Future disability.—An allegation in a suit on an accident insurance policy that "plaintiff became and now is and while he may live will continue to be totally disabled" is an allegation of fact, and not a statement of a legal conclusion. Clark *v.* Brotherhood Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412.

27. Alter *v.* Cincinnati, 7 Ohio S. & C. Pl. Dec. 368, 4 Ohio N. P. 427.

28. See the cases cited in the following notes.

29. Silverman *v.* Doran, 23 Misc. (N. Y.) 96, 51 N. Y. Suppl. 731.

30. Rice, etc., Dry Goods Co. *v.* Sally, 198 Mo. 682, 96 S. W. 1030; Fargo Gas Light, etc., Co. *v.* Greer, 18 Ohio Cir. Ct. 589, 10 Ohio Cir. Dec. 164.

31. Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775.

32. Slaughter *v.* Slaughter, 106 Mo. App. 104, 80 S. W. 3.

33. Sharboro *v.* New York Health Dept., 26 N. Y. App. Div. 177, 49 N. Y. Suppl. 1033.

34. *Alabama.*—Alabama State Fair, etc., Assoc. *v.* Alabama Gas Fixture, etc., Co., 131

money;[35] that an amount called for by a mortgage was tendered;[36] that an execution had been fully satisfied;[37] or that a deed was not constructively delivered.[38] But an averment that an action was begun upon a certain date has been held to state a fact and not a conclusion of law.[39] So also an allegation that an officer levied on certain property,[40] that an administrator has wasted and misappropriated assets,[41] or that a party was obliged to pay a sum stated upon a judgment [42] is one of fact.

8. Written Instruments — a. General Rule. A writing relied upon by the pleader must be set out either by its terms or its legal effect,[43] but as a general rule either method of pleading may be adopted.[44] But the mere recital of an instrument *in hæc verba* is not sufficient unless accompanied by such averments as state

Ala. 256, 31 So. 26; Frazier *v.* Thomas, 6 Ala. 169.

California.— Shea *v.* Johnson, 101 Cal. 455, 35 Pac. 1023.

Colorado.— Farmers' High Line Canal, etc., Co. *v.* Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767.

Kentucky.— McClure *v.* Bigstaff, 37 S. W. 294, 18 Ky. L. Rep. 601.

Minnesota.— Price *v.* Doyle, 34 Minn. 400, 26 N. W. 14.

Nebraska.— Omaha Brewing Assoc. *v.* Tillenburg, 2 Nebr. (Unoff.) 277, 280, 96 N. W. 107; Wymore First Nat. Bank *v.* Myers, 44 Nebr. 306, 62 N. W. 459; Scroggin *v.* National Lumber Co., 41 Nebr. 195, 59 N. W. 548.

Ohio.— Fuher *v.* Buckeye Supply Co., 5 Ohio S. & C. Pl. Dec. 187, 7 Ohio N. P. 420.

Texas.— Farmers', etc., Bank *v.* Taylor, 91 Tex. 78, 40 S. W. 876, 966.

See 39 Cent. Dig. tit. "Pleading," § 24.

35. Harris *v.* Staples, (Tex. Civ. App. 1905) 89 S. W. 801.

36. Wittmeier *v.* Tidwell, 147 Ala. 354, 40 So. 963.

37. Cambers *v.* Butte First Nat. Bank, 144 Fed. 717.

38. Newman *v.* Newman, (Tex. Civ. App. 1905) 86 S. W. 635.

39. Shaw *v.* Foley, 62 Ohio St. 30, 56 N. E. 475.

40. Rohrer *v.* Turrill, 4 Minn. 407. See also Hastings First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239.

41. Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.

42. Travelers' Ins. Co. *v.* Hallauer, 131 Wis. 371, 111 N. W. 527.

43. Dressel *v.* Thompson, 62 Ill. App. 656; White *v.* Guest, 6 Blackf. (Ind.) 228; Scott *v.* Leiber, 2 Wend. (N. Y.) 479; Morris *v.* Fort, 2 McCord (S. C.) 397. See State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822.

Merely stating that a writing complies with the law is not sufficient. Dressel *v.* Thompson, 62 Ill. App. 656.

44. *Alabama.*— Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318.

Arkansas.— See Nordman *v.* Craighead, 27 Ark. 369; Dickerson *v.* Morrison, 5 Ark. 316.

California.— Santa Rosa Bank *v.* Paxton, 149 Cal. 195, 86 Pac. 193.

Illinois.—Dressel *v.* Thompson, 62 Ill. App. 656.

Indiana.— White *v.* Guest, 6 Blackf. 228.

Kentucky.— Hill *v.* Barrett, 14 B. Mon. 83.

Massachusetts.— Churchill *v.* Merchants' Bank, 19 Pick. 532; Dorr *v.* Fenno, 12 Pick. 521; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

Missouri.— Pye *v.* Rutter, 7 Mo. 548.

Nebraska.— Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717.

New Hampshire.— Keyes *v.* Dearborn, 12 N. H. 52.

Vermont.— Maxfield *v.* Scott, 17 Vt. 634.

Washington.— Seal *v.* Cameron, 24 Wash. 62, 63 Pac. 1103.

Wisconsin.— Fairbanks *v.* Isham, 16 Wis. 118.

United States.—Timmonsville Bank *v.* New York Fidelity, etc., Co., 120 Fed. 315; Penrose *v.* Pacific Mut. L. Ins. Co., 66 Fed. 253.

England.— Darbyshire *v.* Leigh, [1896] 1 Q. B. 554, 65 L. J. Q. B. 360, 74 L. T. Rep. N. S. 241, 44 Wkly. Rep. 452; Newborough *v.* Schroeder, 7 C. B. 342, 13 Jur. 611, 18 L. J. C. P. 200, 62 E. C. L. 342; Robertson *v.* Showler, 2 D. & L. 687, 14 L. J. Exch. 120, 13 M. & W. 609.

Canada.—Thornhill *v.* Jones, 12 U. C. Q. B. 231.

See 39 Cent. Dig. tit. "Pleading," § 54.

Deeds.— It is a general rule at common law that deeds should be pleaded according to their legal operation. Moore *v.* Plymouth, 3 B. & Ald. 66, 5 E. C. L. 48; Wilson *v.* Bramhall, 1 Y. & J. 2. But see Ansley *v.* Peters, 4 N. Brunsw. 593, holding that in pleading a grant or a bargain and sale the deed must be set out with an averment of the place where it is enrolled and registered.

A contract in writing may be declared on according to its legal effect or *in hæc verba*. Porter *v.* Allen, 8 Ida. 358, 69 Pac. 105, 236; More *v.* Elmore County Irr. Co., 3 Ida. 729, 35 Pac. 171; Dexter *v.* Manley, 4 Cush. (Mass.) 14; Hopkins *v.* Young, 11 Mass. 302; Nelson *v.* Great Northern R. Co., 28 Mont. 297, 72 Pac. 642; Wooters *v.* International, etc., R. Co., 54 Tex. 294; Magor *v.* Wilks, 5 L. J. K. B. O. S. 308. See Brady *v.* Peck, 99 Ky. 42, 34 S. W. 906, 35 S. W. 623, 17 Ky. L. Rep. 1356; State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep.

a cause of action or defense based thereon; otherwise it is a mere averment of evidence.[45] And it is bad pleading to set out an instrument *in hæc verba* without a statement of its legal effect, where the result is to leave uncertain the issue intended,[46] or where the length of the instrument will render the pleading verbose and redundant.[47] In pleading an instrument according to its legal effect such effect must be correctly stated,[48] although verbal inaccuracy will not vitiate if the instrument is correctly described as to its legal operation.[49] So, where by statute the same legal effect is given to an instrument as if it were sealed, the instrument may be declared on as sealed.[50] Where an instrument is set out in terms, it is for the court to determine its legal effect, and any averments which the pleader adds respecting the legal effect of the instrument will be regarded as surplusage.[51] If the writing declared on contains abbreviations and incomplete terms, extrinsic averments may be employed to make it intelligible.[52] When an instrument is incorporated into a complaint, it must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege had he elected to set it forth by averment.[53] But it is not indispensable that the words of the writing should be accompanied by words of professed recital, for if they appear to be the words of the instrument the court will construe them as such.[54] The recitals in an instrument incorporated into a pleading are not equivalent to averments.[55] At common law, when a statute made writing essential to a matter to which writing was not necessary at common law, it was not necessary to plead that it was in writing.[56] But where a thing was originally made by statute and was required to be in writing, it must be pleaded to have been in writing with all the circumstances required by the act.[57]

b. Exhibits. Another method of pleading a written instrument is to attach it as an exhibit, under statutes authorizing that practice. But this subject will be treated in a subsequent part of this article.[58] At common law a writing could not be referred to and thus be made a part of a declaration, as was the practice in chancery.[59]

822. It is never necessary to declare in the precise words of a written promise. It is always allowable, and often necessary, to declare according to their legal effect and import. Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

Rules and orders of a railroad company may be pleaded according to their legal effect and not set out *in totidem verbis*. Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459.

45. Bean *v.* Ayers, 67 Me. 482.

Under a code provision requiring the facts constituting the cause of action to be stated, it has been held that the setting out of a contract *in hæc verba* is the mere pleading of evidence and not of the ultimate facts. Reilly *v.* Cullen, 159 Mo. 322, 60 S. W. 126; Anderson *v.* Gaines, 156 Mo. 664, 57 S. W. 726; Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316. But when the contract sued upon is copied into and made a part of a petition, it may be considered in connection with the averments in the petition in determining the question whether a cause of action is stated. Blaine *v.* Knapp, 140 Mo. 241, 41 S. W. 787.

46. Reilly *v.* Cullen, 159 Mo. 322, 60 S. W. 126; Anderson *v.* Gaines, 156 Mo. 664, 57 S. W. 726; Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316; Moore *v.* Platte County, 8 Mo. 467.

47. Bean *v.* Ayers, 67 Me. 482; Crawford *v.* Satterfield, 27 Ohio St. 421; First Nat. Bank *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 702, 16 Cinc. L. Bul. 399. See Young *v.* Gower, 88 Ill. App. 70.

48. Higgins *v.* Bogan, 4 Harr. (Del.) 330; Johnson *v.* Carter, 16 Mass. 443.

49. Dickerson *v.* Morrison, 5 Ark. 316.

50. Fish *v.* Brown, 17 Conn. 341.

51. Binz *v.* Tyler, 79 Ill. 248; Illinois Glass Co. *v.* Three States Lumber Co., 90 Ill. App. 599; Miller *v.* Wayne International Bldg, etc., Assoc., 32 Ind. App. 480, 70 N. E. 180; Pye *v.* Rutter, 7 Mo. 548. But *compare* Johnson *v.* Carter, 16 Mass. 443.

52. Jaqua *v.* Witham, etc., Co., 106 Ind. 545, 7 N. E. 314.

53. Joseph *v.* Holt, 37 Cal. 250; More *v.* Elmore County Irr. Co., 3 Ida. 729, 35 Pac. 171.

54. Allis *v.* Jewell, 36 Vt. 547.

55. Omaha Sav. Bank *v.* Rosewater, 1 Nebr. (Unoff.) 723, 96 N. W. 68.

Effect of attaching exhibit see *infra*, IX, B, 3.

56. Morehouse *v.* Cotheal, 21 N. J. L. 480.

57. Morehouse *v.* Cotheal, 21 N. J. L. 480.

58. See *infra*, IX, B.

59. Hanover F. Ins. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386; Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798; Estes *v.* Whipple, 12 Vt. 373.

c. Setting Forth Part of Instrument. Only so much of an instrument need be set forth as relates to the point in question.[60] At common law, if any part of a deed were omitted in the declaration which defendant conceived would, if shown to the court, induce a construction in his favor in point of law, the proper mode was for defendant to pray oyer, and, after setting the deed out *in hæc verba*, demur, as he was thereby enabled to compare one part of the deed with another and show from the whole context the legal effect of it.[61]

d. Connecting Several Instruments. If several instruments are relied upon as constituting one agreement, the pleading must show that they are to be read as one instrument.[62]

e. Date. The date of the instrument should be alleged,[63] and if there is no date it may be declared on as executed on a certain day without stating that it has no date.[64] If the only materiality of the date be that it was after a certain other event, it may be so alleged.[65]

f. Name. The name which the pleader gives to the instrument is not material, and if it is wrongly named the pleading is not thereby rendered insufficient.[66]

g. Statutory Provisions. In some states it is required by statute that a copy of the instrument upon which an action is founded be set out in the pleading, attached thereto, or filed in the case.[67] And in other states the statutes provides that in an action or defense founded on an instrument for the payment of money

60. Henry *v.* Cleland, 14 Johns. (N. Y.) 400; Ambler *v.* Norton, 4 Hen. & M. (Va.) 23.

61. Snell *v.* Snell, 4 B. & C. 741, 7 D. & R. 249, 4 L. J. K. B. O. S. 44, 10 E. C. L. 782; Kempster *v.* Montreal Bank, 32 U. C. Q. B. 87; Boulton *v.* Weller, 3 U. C. Q. B. 372.

Profert and oyer generally see *infra*, IX, A.

62. Dechert *v.* Municipal Electric Light Co., 84 Hun (N. Y.) 575, 32 N. Y. Suppl. 727.

63. Metcalf *v.* Standeford, 1 Bibb (Ky.) 618.

64. Grannis *v.* Clark, 8 Cow. (N. Y.) 36.

65. Kellog *v.* Baker, 15 Abb. Pr. (N. Y.) 286.

66. *California.*— Oroville Bank *v.* Lawrence, (1894) 37 Pac. 936.

Georgia.— Hoops *v.* Atkins, 41 Ga. 109.

Illinois.— Smith *v.* Webb, 16 Ill. 105.

Iowa.— Thornton *v.* Mulquinne, 12 Iowa 549, 79 Am. Dec. 548.

Missouri.— St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.

South Carolina.— Dowie *v.* Joyner, 25 S. C. 123.

Texas.— Salinas *v.* Wright, 11 Tex. 572; English *v.* Helms, 4 Tex. 228; Roberts *v.* Black, 2 Tex. 416.

See 39 Cent. Dig. tit. "Pleading," § 56.

67. See the statutes of the several states. And see the following cases:

Indiana.— Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057; Ferguson *v.* Hull, 136 Ind. 339, 36 N. E. 254; Blackwell *v.* Pendergast, 132 Ind. 550, 32 N. E. 319; Ledbetter *v.* Davis, 121 Ind. 119, 22 N. E. 744; Cunningham *v.* Hoff, 118 Ind. 263, 20 N. E. 756; Douthit *v.* Mohr, 116 Ind. 482, 18 N. E. 449; Blackburn *v.* Crowder, 108 Ind. 238, 9 N. E. 108; Porter *v.* Waltz, 108 Ind. 40, 8 N. E. 705; Northwestern Mut. L. Ins. Co. *v.* Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; Dunkle *v.* Nichols, 101 Ind. 473; Keesling *v.* Watson, 91 Ind. 578; Ashley *v.* Foreman, 85 Ind. 55; Smith *v.* Clifford, 83 Ind. 520; Jones *v.* Parks, 78 Ind. 537; Rogers *v.* State, 78 Ind. 329; Lentz *v.* Martin, 75 Ind. 228; Carper *v.* Kitt, 71 Ind. 24; Petty *v.* Christ Church, 70 Ind. 290; Young *v.* Pickens, 49 Ind. 23; Stafford *v.* Davidson, 47 Ind. 319; Heitman *v.* Schnek, 40 Ind. 93; Van Dorn *v.* Bodley, 38 Ind. 402; Peoria M. & F. Ins. Co. *v.* Walser, 22 Ind. 73; Miller *v.* Rigney, 16 Ind. 327; Bennett *v.* Wainwright, 16 Ind. 211; Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58; Fugit *v.* Ewing, 9 Ind. 345; Schnell *v.* Schnell, 39 Ind. App. 556, 80 N. E. 432; Elwood Natural Gas, etc., Co. *v.* Glaspy, 38 Ind. App. 634, 77 N. E. 956; Harrod *v.* State, 24 Ind. App. 159, 55 N. E. 242; State *v.* Adams, 15 Ind. App. 310, 44 N. E. 47; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305.

Iowa.— National State Bank *v.* Delahaye, 82 Iowa 34, 47 N. W. 999; Harwood, etc., R. Co. *v.* Case, 37 Iowa 692; Barney *v.* Buena Vista County, 33 Iowa 261; Coe *v.* Lindley, 32 Iowa 437; Ruddick *v.* Marshall, 23 Iowa 243; McLott *v.* Savery, 11 Iowa 323.

Massachusetts.— McDonald *v.* Sargent, 171 Mass. 492, 51 N. E. 17; Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151; Clary *v.* Thomas, 103 Mass. 44; Moore *v.* Royce, 10 Allen 556.

Missouri.— Hannibal, etc., R. Co. *v.* Knudson, 62 Mo. 569.

Nebraska.— Chadron First Nat. Bank *v.* Engelbercht, 58 Nebr. 639, 79 N. W. 556; Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276.

Pennsylvania.— Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916; People's St. R. Co. *v.* Spencer, 156 Pa. St. 85, 27 Atl. 113, 36 Am. St. Rep. 22; Vile's Estate, 6 Pa. Dist. 288; Lederer *v.* Greiner, 21 Lanc. L. Rev.

only, it shall be sufficient for the party to give a copy of the instrument and state that there is due him thereon the specified sum that he claims.[68]

9. Falsity, Impertinence, and Scandal. These properly are terms belonging to equity practice, and are not ordinarily used in respect to actions at law.[69] But they are occasionally employed by the courts in states which are under the code procedure.[70] A pleading known to be false when filed is void.[71] A pleading alleging that every allegation of the opposite party is "corruptly false," should be removed from the files.[72]

10. Surplusage. Surplusage is matter which is unnecessary either to the substance or form of the pleading, and which if stricken out would leave a good pleading,[73] or, as otherwise stated, which consists in the allegation of matter so wholly foreign and irrelevant that no allegation whatever upon the subject is necessary.[74] Matter of this nature is deemed not to vitiate a pleading,[75] and will be ordinarily disregarded,[76] and while it may be properly stricken out on

244; Dornenhower *v.* Stevens, 44 Wkly. Notes Cas. 264.

See 39 Cent. Dig. tit. "Pleading," § 54.

Necessity and propriety of exhibits generally see *infra*, IX, B, 1.

Tax list.— Where, in an action of trespass, a county treasurer justified the taking of personal property for the non-payment of taxes under a warrant of the county judge, attached to the tax list, commanding him to collect the taxes therein mentioned, he need not set out, with a copy of the warrant, the tax list nor a copy thereof. An averment in his answer of his readiness to produce the tax list is all that is required. Games *v.* Robb, 8 Iowa 193.

68. Burke *v.* Ashley, 12 Hun (N. Y.) 637; Lord *v.* Chesebrough, 4 Sandf. (N. Y.) 696; Vogle *v.* Kirby, 4 N. Y. Suppl. 99; Butchers', etc., Bank *v.* Jacobson, 15 Abb. Pr. (N. Y.) 218; Nourny *v.* Dubosty, 12 Abb. Pr. (N. Y.) 128; New York *v.* Doody, 4 Abb. Pr. (N. Y.) 127; Geneva Bank *v.* Gulick, 8 How. Pr. (N. Y.) 51; Ives *v.* Strickland, 6 Ohio Dec. (Reprint) 810, 8 Am. L. Rec. 309; Andrews *v.* Wynn, 4 S. D. 40, 54 N. W. 1047; Strunk *v.* Smith, 36 Wis. 631.

Copy of account see *infra*, X, B.

69. See Equity, 16 Cyc. 257. But see Allaire *v.* Ouland, 2 Johns. Cas. (N. Y.) 52, where the term is used respecting a declaration at law, and reporter's note which distinguishes impertinent from immaterial matter.

Impertinence is the same fault in pleadings in equity which is called surplusage at law. Stokes *v.* Farnsworth, 99 Fed. 836.

70. People *v.* Church, 2 Lans. (N. Y.) 459; Cruikshank *v.* Press Pub. Co., 32 Misc. (N. Y.) 152, 65 N. Y. Suppl. 678; Morrison *v.* Snow, 26 Utah 247, 72 Pac. 924. See also Galveston, etc., R. Co. *v.* Appel, 33 Tex. Civ. App. 575, 77 S. W. 635; Rylie *v.* Stammire, (Tex. Civ. App. 1903) 77 S. W. 626.

71. Boyd *v.* Beville, 91 Tex. 439, 44 S. W. 287.

72. Mitchell *v.* Brown, 88 N. C. 156.

Striking scandalous matter generally see *infra*, XII, C, 1, e, (xiv); 2, b, (vi).

73. Bunker *v.* Osborn, 132 Cal. 480, 64 Pac. 853; Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

Striking surplusage see *infra*, XII, C, 2, b, (i).

74. Perrine *v.* Farr, 22 N. J. L. 356.

75. *Alabama.*— Magee *v.* Fisher, 8 Ala. 320.

Arkansas.— Martin *v.* Warren, 11 Ark. 285.

California.— Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788.

Connecticut.— Hoyt *v.* Seeley, 18 Conn. 353; Olmsted *v.* Doty, 2 Root 184; Holbrook *v.* Judd, 1 Root 456.

Indiana.— Rollet *v.* Heiman, 120 Ind. 511, 22 N. E. 666, 16 Am. St. Rep. 340; Helms *v.* Wagner, 102 Ind. 385, 1 N. E. 730; Richardson *v.* Jones, 58 Ind. 240.

Iowa.— Goodpaster *v.* Porter, 11 Iowa 161.

Kentucky.— Pollard *v.* Yoder, 2 A. K. Marsh. 264.

Louisiana.— Rawle *v.* Skipwith, 19 La. 207.

New York.— Corn *v.* Levy, 97 N. Y. App. Div. 48, 89 N. Y. Suppl. 658, 93 N. Y. App. Div. 618, 87 N. Y. Suppl. 768; Commercial Bank *v.* Sparrow, 2 Den. 97.

West Virginia.— Wheeling Mold, etc., Co. *v.* Wheeling Steel, etc., Co., 62 W. Va. 288, 57 S. E. 826; Thomas *v.* Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217; Patton *v.* Elk River Nav. Co., 13 W. Va. 259.

United States.— Wyman *v.* Fowler, 30 Fed. Cas. No. 18,114, 3 McLean 467.

See 39 Cent. Dig. tit. "Pleading," § 76.

76. *Colorado.*— Jenness *v.* Black Hawk, 2 Colo. 578.

Connecticut.— Woodford *v.* Webster, 3 Day 472.

Delaware.— Maclary *v.* Turner, 9 Houst. 281, 32 Atl. 325.

Georgia.— Moore *v.* Kelley, etc., Co., 111 Ga. 371, 36 S. E. 802.

Illinois.— Miller *v.* Blow, 68 Ill. 304; Boone *v.* Stone, 8 Ill. 537; Bond *v.* Betts, 1 Ill. 205.

Indiana.— Jeffersonville, etc., R. Co. *v.* Lyon, 55 Ind. 477; Blackwell *v.* Lawrence County, 2 Blackf. 143; Ochs *v.* M. J. Carnahan Co., (App. 1906) 76 N. E. 788.

Iowa.— Chicago, etc., R. Co. *v.* Phillips, 111 Iowa 377, 82 N. W. 787.

Kentucky.— Ross *v.* Neal, 7 T. B. Mon. 407.

Maine.— Bodge *v.* Hull, 59 Me. 225.

motion,[77] it does not render a pleading subject to a demurrer, either general [78] or special.[79] Nor will surplusage affect other allegations in the pleading which are material and are properly pleaded.[80] Surplusage which is merely matter of inducement will not ordinarily be stricken out.[81] Inconsistent matter, if under a *videlicet*,[82] or if it is nonsense,[83] incorrect descriptions of parties,[84] apparent clerical errors,[85] redundant matter,[86] legal conclusions,[87] evidentiary matter,[88] immaterial matter,[89] facts beyond what are necessary to constitute the statement of a cause of

Massachusetts.— Jones *v.* Dow, 137 Mass. 119.

Missouri.— Brown *v.* Home Sav. Bank, 5 Mo. App. 1.

New Jersey.— Perrine *v.* Farr, 22 N. J. L. 356.

New York.— Byxbie *v.* Wood, 24 N. Y. 607; Lester *v.* Jewett, 11 N. Y. 453; Villias *v.* Stern, 24 Misc. 380, 53 N. Y. Suppl. 267; Keese *v.* Fullerton, 2 Edm. Sel. Cas. 16; Vail *v.* Lewis, 4 Johns. 450, 4 Am. Dec. 300.

North Carolina.— Farrior *v.* Houston, 95 N. C. 578.

Pennsylvania.— Fell *v.* Bennett, 110 Pa. St. 181, 5 Atl. 17; Stoner *v.* Hoffer, 5 Lanc. L. Rev. 325.

South Carolina.— Kennedy *v.* Richey, 1 Strobh. 4; Robinson *v.* Cornwell, 2 Bailey 137.

Texas.— Turner *v.* Brooks, 6 Tex. 205.

Vermont.— Curtis *v.* Watson, 64 Vt. 536, 25 Atl. 478.

Wisconsin.— Kimball *v.* Spicer, 12 Wis. 668.

United States.— Huntington *v.* Laidley, 79 Fed. 865; Murphy *v.* Byrd, 17 Fed. Cas. No. 9,947*b*, Hempst. 221.

Canada.— Lyndsay *v.* Niagara Dist. Mut. F. Ins. Co., 28 U. C. Q. B. 326.

See 39 Cent. Dig. tit. "Pleading," § 76.

77. *California.*— Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602; Stoddard *v.* Treadwell, 26 Cal. 294.

Indiana.— Petree *v.* Fielder, 3 Ind. App. 129, 29 N. E. 271.

Kansas.— Drake *v.* Fort Scott First Nat. Bank, 33 Kan. 634, 7 Pac. 219.

Montana.— McMahon *v.* Thornton, 4 Mont. 46, 1 Pac. 724.

Pennsylvania.— Stoner *v.* Hoffer, 5 Lanc. L. Rev. 325.

Wisconsin.— Williams *v.* Sexton, 19 Wis. 42.

United States.— Fayerweather *v.* United Dressed-Beef Co., 100 Fed. 572; Schiffer *v.* Columbia College, 87 Fed. 166.

England.— Bacon *v.* Ashton, 5 Dowl. P. C. 94.

See 39 Cent. Dig. tit. "Pleading," § 1161.

78. *Alabama.*— Montgomery Mfg. Co. *v.* Thomas, 20 Ala. 473.

Illinois.— Boone *v.* Stone, 8 Ill. 537; Young *v.* Gower, 88 Ill. App. 70.

Indiana.— Ralya *v.* Atkins, 157 Ind. 331, 61 N. E. 726; Helms *v.* Wagner, 102 Ind. 385, 1 N. E. 730; New Albany *v.* Armstrong, 22 Ind. App. 15, 53 N. E. 185.

Iowa.— Gordon *v.* Chicago, etc., R. Co., 129 Iowa 747, 106 N. W. 177.

New Hampshire.— Watson *v.* Walker, 23 N. H. 471.

Pennsylvania.— Reeside *v.* Hadden, 12 Pa. St. 243.

Wisconsin.— Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466.

See 39 Cent. Dig. tit. "Pleading," § 414.

79. Jensen *v.* Wetherell, 79 Ill. App. 33; Pilcher *v.* Hart, 1 Humphr. (Tenn.) 524; Hall *v.* Tapper, 3 B. & Ad. 655, 23 E. C. L. 289; Alderson *v.* Johnson, 2 M. & W. 70.

80. Binz *v.* Tyler, 78 Ill. 248; Illinois Glass Co. *v.* Three States Lumber Co., 90 Ill. App. 599.

81. Hale *v.* Tyler, 104 Fed. 757.

82. Guschnor *v.* Keith, 9 Ill. App. 416; Blackwell *v.* Lawrence County, 2 Blackf. (Ind.) 143; Block *v.* O'Hara, 1 Mo. 145; Lester *v.* Jewett, 11 N. Y. 453; Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

83. Murphy *v.* Byrd, 17 Fed. Cas. No. 9,947*b*, Hempst. 221.

84. *Connecticut.*— Woodford *v.* Webster, 3 Day 472.

Georgia.— Martin *v.* Lamb, 77 Ga. 252, 3 S. E. 10.

Illinois.— Bond *v.* Betts, 1 Ill. 205.

Maryland.— Wilms *v.* White, 26 Md. 380, 90 Am. Dec. 113.

Pennsylvania.— Com. *v.* Haffey, 6 Pa. St. 348. But see Skivington *v.* Palmer, 4 Lack. Jur. 245, holding that where plaintiff complains in an action of trespass against defendant, as executor, the descriptive words cannot, under the act of May 25, 1887, be treated as surplusage by plaintiff's counsel or by the court, as the case develops; at least without amendment.

South Carolina.— Robinson *v.* Cornwell, 2 Bailey 137.

Texas.— Turner *v.* Brooks, 6 Tex. 205.

Wisconsin.— Magee *v.* Waupaca County, 38 Wis. 247; Kimball *v.* Spicer, 12 Wis. 668. See also Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

See 39 Cent. Dig. tit. "Pleading," § 79.

85. Jenness *v.* Black Hawk, 2 Colo. 578.

86. Miller *v.* Blow, 68 Ill. 304; Ross *v.* Neal, 7 T. B. Mon. (Ky.) 407.

87. Hamilton Nat. Bank *v.* Nye, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; Jones *v.* Dow, 137 Mass. 119; Collins *v.* Bryan, 40 Tex. Civ. App. 88, 88 S. W. 432. See Calkins *v.* Worth, 215 Ill. 78, 74 N. E. 81 [*affirming* 117 Ill. App. 478].

88. Farrior *v.* Houston, 95 N. C. 578.

89. *Indiana.*— Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51.

Michigan.— Stange *v.* Clemens, 17 Mich. 402.

Missouri.— Davidson *v.* Hobson, 59 Mo. App. 130.

action,[90] an incorrect legal effect stated respecting an instrument recited in the pleading,[91] or a bad count or defense joined with a good one[92] have been held to constitute surplusage.

H. Form of Allegations — 1. Pleading According to Legal Effect. At common law it is necessary to plead facts according to their legal effect or operation,[93] but the usual provision of the codes is for a plain and concise statement of the facts upon which the pleader relies.[94] This provision, however, is construed to require the pleading of the ultimate facts merely, as distinguished from evidentiary facts.[95] And in most cases the pleader will be permitted to state the facts constituting his cause of action, either as they actually exist or according to their legal effect.[96] Ultimate facts of necessity are conclusions drawn from intermediate and evidentiary facts;[97] but legal conclusions[98] cannot be pleaded as ultimate facts.[99] The rule permitting pleading according to legal effect has been applied, among other instances, to allow the pleading of the legal effect of a verbal contract,[1] or of a written instrument,[2] or the allegation of the act of the servant or agent of a person as the act of the person himself.[3]

New York.— Mechanics', etc., Bank *v.* Dakin, 24 Wend. 411.

Rhode Island.— Bowen *v.* White, 26 R. I. 68, 58 Atl. 252, holding that in a declaration of covenant a concluding phrase "whereby an action hath accrued," etc., being appropriate to an action of debt, may be treated as surplusage.

Texas.— Kottwitz *v.* Bagby, 16 Tex. 656; Day *v.* Dalziel, (Civ. App. 1895) 32 S. W. 377.

Vermont.— Andover *v.* Mount Holly, 58 Vt. 372, 4 Atl. 143.

See 39 Cent. Dig. tit. "Pleading," § 76.

"As a general rule, no allegation which is descriptive of the identity of that which is legally essential to the claim or charge, can ever be rejected; and, if an immaterial allegation limit and confine that which is material, the latter can never be available to any greater extent; for such an averment is always descriptive. 3 Stark. Ev. 1539–1550. State *v.* Copp, 15 N. H. 212. In other words, the substance of the rule is that, unless you may not only reject the immaterial allegation, but every allegation or averment which it goes to identify by description or to limit or define, an immaterial averment can not be rejected as surplusage; so that, if any material averment is thus described, limited or defined, the indictment, declaration or other pleading, must fall without proof of the immaterial averment." Boyce *v.* Cheshire R. Co., 42 N. H. 97, 101.

Unnecessary allegations.—Allegations in a petition which, although unnecessary, so qualify and restrict the other allegations as to show that plaintiff's right to relief is barred or destroyed, cannot be rejected on demurrer as surplusage. Gray *v.* Ulrich, 8 Kan. 112.

90. Hiner *v.* Richter, 51 Ill. 299; Alabama, etc., R. Co. *v.* Hanes, 69 Miss. 160, 13 So. 246.

91. Stoddard *v.* Treadwell, 26 Cal. 294; Hall *v.* Spaulding, 42 N. H. 259.

92. *Arkansas.*—McDaniel *v.* Grace, 15 Ark. 465; Kellogg *v.* Miller, 6 Ark. 468.

Georgia.— Jones *v.* Lavender, 55 Ga. 228.

Indiana.— Westcott *v.* Brown, 13 Ind. 83.

Maryland.— Penniman *v.* Winner, 54 Md. 127.

Washington.— Times Pub. Co. *v.* Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865.

See 39 Cent. Dig. tit. "Pleading," § 80.

93. 1 Chitty Pl. (16th Am. ed.) 260; Stephen Pl. (Andrews' ed.) 390.

94. See the codes of the several states.

95. Haggerty *v.* St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 456; Western Travelers' Acc. Assoc. *v.* Munson, 73 Nebr. 858, 103 N. W. 688, 1 L. R. A. N. S. 1068.

96. New York News Pub. Co. *v.* National Steamship Co., 148 N. Y. 39, 42 N. E. 514; McKee *v.* Jessup, 62 N. Y. App. Div. 143, 70 N. Y. Suppl. 796, holding that an averment that plaintiffs, as assignees of a judgment, claimed the business and assets of a firm as formerly constituted, and as such original and continuing partners, successors, and assignees, were the owners of and entitled to collect a judgment in favor of the firm, was a sufficient averment of ownership. See Page *v.* Freeman, 19 Mo. 421, holding that since the adoption of the code the legal effect need not be stated.

Facts which are inferable with reasonable certainty, when stated according to their legal effect, if so alleged, did not render a pleading bad upon a challenge for insufficiency, although it may be open to a motion made to make more definite and certain. South Milwaukee Co. *v.* Murphy, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82.

97. Western Travelers' Acc. Assoc. *v.* Munson, 73 Nebr. 858, 103 N. W. 688, 1 L. R. A. N. S. 1068.

98. See *supra*, II, G, 7.

99. Washington Dredging, etc., Co. *v.* Cannel Coal Co., 45 Wash. 462, 88 Pac. 836, holding that where it was alleged that a person was entitled to purchase certain tide lands, as owner of the uplands, the uplands of which he was the owner should be stated.

1. Adams *v.* Davis, 16 Ala. 748; Andrews *v.* Williams, 11 Conn. 326.

2. See *supra*, II, G, 8, a.

3. *Connecticut.*— Santo *v.* Maynard, 57 Conn. 157, 17 Atl. 700.

Iowa.— Shull *v.* Arie, 113 Iowa 170, 84

2. Directness and Positiveness — a. In General. The essential facts of a cause of action or defense should be unequivocally alleged, and where the averments are contingent and conjectural, the pleading will be held bad.[4] Facts so alleged are not admitted by failure to deny them.[5] It is not sufficient to allege that facts are alleged to exist.[6] Nor should facts be set forth by innuendo.[7] Matter pleaded with a *videlicet*, when material, is regarded as a direct and positive averment, which may be traversed.[8]

b. Hypothetical Pleading. Hypothetical pleading is generally bad;[9] but in some instances to allow a defendant to plead all his defenses,[10] or where a defendant can conscientiously plead several defenses under oath only in that form,[11] or where he has no knowledge or information concerning the matters alleged in the complaint sufficient to form a belief,[12] it may be permitted. The remedy for hypothetical pleading under the code procedure is a motion to make more definite and certain [13] or a motion to strike,[14] although in some cases a demurrer has been held proper.[15] At common law the remedy was a demurrer.[16]

c. Pleading by Way of Recital. Material facts must be alleged directly and not by way of recital.[17] But facts which are alleged by way of inducement merely, and are not of the gist of the action, may be alleged with a *quod cum*.[18] Nor does it seem to have been deemed a defect in a declaration on contract at common law that the averments were made under a whereas, at least on general demurrer.[19] But the participial form of averment in an affidavit is sufficient.[20]

N. W. 1031; Higbee *v.* Trumbauer, 112 Iowa 74, 83 N. W. 812.

Kentucky.— Chesapeake, etc., R. Co. *v.* Thieman, 96 Ky. 507, 29 S. W. 357, 16 Ky. L. Rep. 611.

Massachusetts.— Livermore *v.* Herschell, 3 Pick. 33.

Michigan.— Sudworth *v.* Morton, 137 Mich. 575, 100 N. W. 769; State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

Missouri.— Page *v.* Freeman, 19 Mo. 421.

New York.— Bennett *v.* Judson, 21 N. Y. 238.

South Carolina.— Wagener *v.* Kirven, 56 S. C. 126, 34 S. E. 18.

Texas.— Wolf *v.* Lachman, (Civ. App. 1892) 20 S. W. 867, holding that where representations were made to an agent they were properly alleged to have been made to the principal.

United States.— Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335.

England.— Turberville *v.* Stampe, 1 Ld. Raym. 264; Brucker *v.* Fromont, 6 T. R. 659, 3 Rev. Rep. 303.

Canada.— Bisaillon *v.* Elliott, 13 Quebec Super. Ct. 289.

4. Atchison, etc., R. Co. *v.* Atchison Grain Co., (Kan. 1902) 70 Pac. 933, where a general demurrer was sustained. See Malott *v.* Sample, 164 Ind. 645, 74 N. E. 245 [*reversing* (App.) 73 N. E. 1135]; South Bend Chilled Plow Co. *v.* Cissne, 35 Ind. App. 373, 74 N. E. 282.

Giving color in pleading is giving to your adversary a title which is defective, but not so obviously so that it would be apparent to one not skilled in the law, it must be such as would perplex a layman; it, therefore, draws the consideration of the question from the jury to the court, which is the object of the pleading. Tate *v.* Southard, 10 N. C. 119, 14 Am. Dec. 578.

5. See *infra*, IV, C, 5, b, (IV), (B).

6. *Ex p.* State, 15 Ark. 263; Byington *v.* Saline County, 37 Kan. 654, 16 Pac. 105.

7. Pike County Ct. C. Pl. *v.* Sergeant, Wright (Ohio) 482.

8. Ladue *v.* Ladue, 16 Vt. 189.

9. Goodman *v.* Robb, 41 Hun (N. Y.) 605; Wies *v.* Fanning, 9 How. Pr. (N. Y.) 543; Cincinnati, etc., R. Co. *v.* Urbana Third Nat. Bank, 1 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 109; Griffiths *v.* Eyles, 1 B. & P. 413.

10. McKasy *v.* Huber, 65 Minn. 9, 67 N. W. 650; Meagher *v.* Meagher, 2 Quebec Pr. 94.

11. Urquhart *v.* Powell, 54 Ga. 29; Dovan *v.* Dinsmore, 33 Barb. (N. Y.) 86; Ketcham *v.* Zerega, 1 E. D. Smith (N. Y.) 553.

12. Dovan *v.* Dinsmore, 33 Barb. (N. Y.) 86; Brown *v.* Ryckman, 12 How. Pr. (N. Y.) 313.

13. See *infra*, XII, D.

14. See *infra*, XII, C.

15. See *infra*, VI, F, 1, f.

16. See *infra*, VI, F, 1, f.

17. Erwin *v.* Central Union Tel. Co., 148 Ind. 365, 46 N. E. 667, 47 N. E. 663; Corbin Oil Co. *v.* Searles, 36 Ind. App. 215, 75 N. E. 293; Klein *v.* Scranton R. Co., 4 Lack. Jur. (Pa.) 325; Groton Bridge, etc., Co. *v.* American Bridge Co., 151 Fed. 871. But see Coffin *v.* Coffin, 2 Mass. 358, wherein a declaration commencing "for that whereas" was held good after verdict.

Demurrer because of pleading by way of recital see *infra*, VI, F, 1, i.

18. Battrell *v.* Ohio River R. Co., 34 W. Va. 232, 12 S. E. 699, 11 L. R. A. 290; Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195; Upper Canada College, etc. *v.* Boulton, 2 U. C. C. P. 326.

19. Ring *v.* Roxbrough, 2 Cromp. & J. 418.

20. Gundersheimer *v.* Earnshaw, 13 App.

d. Argumentative Pleading. Facts should not be alleged argumentatively, for the reason that when so alleged no material issue can be raised respecting them.[21] Pleadings which violate this rule are bad,[22] either on motion,[23] or on general[24] or special demurrer,[25] but not at the trial.[26]

3. Certainty, Definiteness, and Particularity — a. In General. The averments in a pleading must be clear and unequivocal.[27] Material facts should be averred with certainty.[28] A pleader is not at liberty to leave his pleading open to different constructions and then take his choice between them.[29] Such circumstantial accuracy is necessary as will apprise the opposite party of what is intended to be proved on the trial.[30] But no greater particularity is required than the

Cas. (D. C.) 178; Posterne *v.* Hanson, 2 Saund. 51, 85 Eng. Reprint 652.

21. Taylor *v.* Blake, 11 Minn. 255; Williams *v.* Crary, 5 Cow. (N. Y.) 368; Moseley *v.* Hunter, 25 N. C. 543.

22. Moulton *v.* Doran, 10 Minn. 67; Thompson *v.* Munger, 15 Tex. 523, 65 Am. Dec. 176. But see Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551, holding that under the present system of pleading, it is sufficient if the substance of the averments requisite in the old form of declaration may be fairly gathered from the complaint, although the statement of them may be argumentative, and deficient in technical language.

23. See *infra*, XII, C, 1, c, (IV).

24. See *infra*, VI, F, 1, f.

25. See *infra*, VI, F, 1, f.

26. See *infra*, XIV, B.

27. Langsdale *v.* Woollen, 120 Ind. 78, 21 N. E. 541; Sidway *v.* Missouri Land, etc., Co., 163 Mo. 342, 63 S. W. 705.

A complaint which leaves the ground of action conjectural is bad. Cassidy *v.* Richardson, 74 N. H. 221, 66 Atl. 641.

28. *Maryland.*— Scott *v.* State, 2 Md. 284.

New York.— Carpenter *v.* Alexander, 9 Johns. 291; Ward *v.* Clark, 2 Johns. 10, 3 Am. Dec. 383.

Ohio.— Cincinnati, etc., R. Co. *v.* Urbana Third Nat. Bank, 1 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 109.

Pennsylvania.— Clark *v.* Lindsay, 7 Pa. Super. Ct. 43; Busch *v.* Calhoun, 8 Del. Co. 38.

Rhode Island.— Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 106 Am. St. Rep. 691, 66 L. R. A. 478.

Washington.— Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

United States.— Hart *v.* Rose, 11 Fed. Cas. No. 6,154*a*, Hempst. 238.

England.— Molly *v.* Lewers, L. R. 12 Ir. 39.

See 39 Cent. Dig. tit. "Pleading," § 39.

Facts ascertainable by calculation.— The omission to state facts readily ascertainable by a simple mathematical calculation from facts stated in the pleading has been held not to render it uncertain. Ft. Worth, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1907) 101 S. W. 266, so holding where, instead of alleging the amount of damage to property, the value of the property before and after the injury was alleged.

Introduction of writing.—An allegation is not rendered uncertain by the fact that it states that a writing was in the "words following," although the writing contained words, figures, and letters of abbreviation. Smith *v.* Butler, 25 N. H. 521.

29. Langsdale *v.* Woollen, 120 Ind. 78, 21 N. E. 541.

30. Skelton *v.* Fenton Electric Light, etc., Co., 100 Mich. 87, 58 N. W. 609; Van Valen *v.* Lapham, 5 Duer (N. Y.) 689; Caldwell *v.* Haley, 3 Tex. 317. See also Lipscomb *v.* Seaman, (Ala. 1907) 44 So. 46 (holding that a complaint which claimed damages for certain specified acts and for "other wrongs done to said plaintiff by said defendant" was bad); Whitehurst *v.* Jones, 117 Ga. 803, 45 S. E. 49; Coomes *v.* Burt, 22 Pick. (Mass.) 422.

Effect of practice acts.— In Read *v.* Smith, 1 Allen (Mass.) 519, 520, Chapman, J., said: "The rule of pleading was, before the practice act, that the declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; and that the jury may be able to give a complete verdict upon the issue; and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. . . . The practice act has made no change in this respect; for although by this act the facts may be briefly stated, yet all the facts must be stated which are necessary to constitute the cause of action."

Pleadings held uncertain.—For illustrations of pleadings held uncertain with regard to particular allegations see Mays *v.* Carman, 66 S. W. 1019, 23 Ky. L. Rep. 2216 (fixtures); Pullins *v.* Smith, 106 Ky. 418, 50 S. W. 833, 20 Ky. L. Rep. 1993 (claim against decedent); State Bank *v.* Green, 10 Nebr. 130, 4 N. W. 942 (*bona fides* of purchaser of real estate); Ferguson *v.* Western Union Tel. Co., 64 N. J. L. 222, 44 Atl. 849 (injury to plaintiff); Donovan *v.* Cunard Steamship Co., 85 N. Y. Suppl. 1113 (action by servant for injuries); Giroux Amalgamator Co. *v.* White, 21 Oreg. 435, 28 Pac. 390 (money due on stock subscription); Boal *v.* Citizens' Natural Gas Co., 23 Pa. Super. Ct. 339 (damages for breach of gas lease); Miller *v.* Coffin, 19 R. I. 164, 36 Atl. 6 (negligence of common carrier and of ex-

nature of the thing pleaded will conveniently admit.[31] Certainty to a common intent is as a rule all that is necessary in a pleading.[32] If the facts are alleged so as to enable a person of common understanding to know what is intended,[33] or to enable the court to see the meaning of the different allegations,[34] the pleading will not be held uncertain. Where the only matters concerning which the pleading is uncertain are peculiarly within the knowledge of the other party, the latter cannot be heard to complain thereof.[35] And where a subject comprehends a multiplicity of matters, in order to avoid prolixity the law allows general pleading.[36] The fact that a complaint is indefinite is not conclusive as to its uncertainty,[37] as where the averments necessary to certainty are supplied by conclusive inference.[38] Where a word employed in a pleading is capable of two meanings and the sense in which it is used is uncertain, the pleading is ambiguous.[39] At common law, where the power to do an act was originally granted by statute, in pleading such act it must be shown that it was done according to the direction of the statute and of every subsequent statute relative to the subject.[40] Where it is

press company); Hill *v.* Dous, (Tex. Civ. App. 1896) 37 S. W. 638 (settlement of partnership); Randle *v.* Barnard, 99 Fed. 348 (action against surety on bond); Philips *v.* Philips, 4 Q. B. D. 127, 48 L. J. Q. B. 135, 39 L. T. Rep. N. S. 556, 27 Wkly. Rep. 436 (title to land); Sutcliffe *v.* James, 40 L. T. Rep. N. S. 875, 27 Wkly. Rep. 750 (equitable title); Reid *v.* Robertson, 25 U. C. C. P. 568 (breach of contract of sale); Newman *v.* Kissock, 8 U. C. C. P. 41 (damages from fraudulent representations).

Pleadings held sufficiently certain.— For illustrations of pleadings held sufficiently certain with reference to particular matters see Heydenfeldt *v.* Jacobs, 107 Cal. 373, 40 Pac. 492 (age of plaintiff); Kelley *v.* Houts, 30 Ind. App. 474, 66 N. E. 408 (description of land); Solomon *v.* Gardiner, 50 La. Ann. 1293, 23 So. 896 (injury to business from breach of contract); Dalferes *v.* Maurin, 49 La. Ann. 333, 21 So. 517 (action on an account); Coomes *v.* Burt, 22 Pick. (Mass.) 422 (course of stream); Lee *v.* Minneapolis, etc., R. Co., 34 Minn. 225, 25 N. W. 399 (invitation upon premises); Wyse *v.* Dandridge, 35 Miss. 672, 72 Am. Dec. 149 (*bona fides* of purchase); Anderson *v.* Imhoff, 34 Nebr. 335, 51 N. W. 854 (fraud in architect's refusal to make estimates); Magnolia Anti-Friction Metal Co. *v.* Singley, 5 Silv. Sup. (N. Y.) 453, 8 N. Y. Suppl. 463 (allegation as to derivation of title to subject-matter of action); Lancy *v.* Laney, 11 N. Y. Suppl. 319 (allegation of set-off against decree); Durant *v.* East River Electric Light Co., 2 N. Y. Suppl. 389 (right to possession of chattels under a lease); Denithorne *v.* Denithorne, 15 How. Pr. (N. Y.) 232 (application of joint funds to individual use); Smith *v.* Johnson, Lalor (N. Y.) 240 (assumption of mortgage debt); Queens Ins. Co. *v.* Leonard, 9 Ohio Cir. Ct. 46, 6 Ohio Cir. Dec. 49 (allegation of ownership); Block *v.* Standard Distilling, etc., Co., 10 Ohio S. & C. Pl. Dec. 409, 8 Ohio N. P. 245 (performance of contract); Hughes *v.* Austin, 12 Tex. Civ. App. 178, 33 S. W. 607 (averment as to damage to stock part of which was killed and part injured); Saxe *v.* Burlington, 70 Vt. 449, 41 Atl. 438 (description of land); Hatch *v.* Holland, 28 U. C. Q. B. 213 (plea in action for conversion).

31. Stephenson *v.* Southern Pac. R. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407.

32. *Connecticut.*— Stoyel *v.* Westcott, 2 Day 418, 2 Am. Dec. 109.

Massachusetts.— Oystead *v.* Shed, 12 Mass. 506; Coffin *v.* Coffin, 2 Mass. 358.

New York.— Corbin *v.* George, 2 Abb. Pr. 465; Spencer *v.* Southwick, 9 Johns. 314; Hilldreth *v.* Becker, 2 Johns. Cas. 339.

Ohio.— Gibson *v.* Ohio Farina Co., 2 Disn. 499.

Pennsylvania.— Busch *v.* Calhoun, 14 Pa. Super. Ct. 578.

England.— Watling *v.* Oastler, L. R. 6 Exch. 73, 40 L. J. Exch. 43, 23 L. T. Rep. N. S. 815, 19 Wkly. Rep. 388; Rex *v.* Horne, Cowp. 672; Connor *v.* Connor, 2 Wils. C. P. 386.

See 39 Cent. Dig. tit. "Pleading," § 39.

A writ is properly pleaded by its teste, number, and return. Silver *v.* Rhodes, 2 Harr. (Del.) 369.

33. Logansport *v.* Kihm, 159 Ind. 68, 64 N. E. 595; Speeder Cycle Co. *v.* Teeter, 18 Ind. App. 474, 48 N. E. 595; Fraker *v.* St. Paul, etc., R. Co., 30 Minn. 103, 14 N. W. 366.

34. American Book Co. *v.* Kingdon Pub. Co., 71 Minn. 363, 73 N. W. 1089; McDonald *v.* Green, 28 Misc. (N. Y.) 55, 59 N. W. 787.

35. Schaake *v.* Eagle Automatic Can. Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

Pleading facts within knowledge of opposite party see *supra*, II, G, 4.

36. Matthews *v.* Bailey, 25 Miss. 33; Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Shum *v.* Farrington, 1 B. & P. 640; Lord Arlington *v.* Merricke, 2 Saund. 410, 85 Eng. Reprint 1215; Barton *v.* Webb, 8 T. R. 459.

Bill of particulars in case of general pleading see *infra*, X, A.

37. Nelson *v.* St. Croix Boom Corp., 52 Wis. 647, 9 N. W. 923.

38. Nelson *v.* St. Croix Boom Corp., 52 Wis. 647, 9 N. W. 923.

39. Schiller *v.* Canada North-West Coal, etc., Syndicate, 1 N. W. Terr. 421.

40. Moorehouse *v.* Cotheal, 21 N. J. L. 335, holding that in pleading a will it must be

necessary to plead a prosecution it is sufficient to allege that persons were duly prosecuted before a tribunal having jurisdiction.[41] The purpose of a *videlicet* is to indicate that the party does not undertake to prove the precise circumstances as alleged.[42]

b. Alternative Allegations.[43] As a general rule facts should not be alleged in the alternative.[44] But where the facts are of such a nature that the party pleading them cannot well allege them otherwise than in the alternative, the pleading is not thereby rendered bad, at least on general demurrer.[45] By statute in some jurisdictions a party is permitted to allege alternatively the existence of facts, if he states that one of them is true and that he does not know which of them is true.[46] The mere fact that a disjunctive is used will not in all cases cause the

averred that it was in writing and that it was signed and published by the testator in the presence of three subscribers or witnesses.

41. Nelson *v.* Bondurant, 26 Ala. 341.

42. Chicago Terminal Transfer R. Co. *v.* Young, 118 Ill. App. 226.

43. Bill with double aspect see EQUITY, 16 Cyc. 238.

44. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Peck, 165 Ind. 537, 76 N. E. 163; Langsdale *v.* Woollen, 120 Ind. 78, 21 N. E. 541; Indianapolis, etc., Traction Co. *v.* Henderson, 39 Ind. App. 324, 79 N. E. 539; Springfield Second Nat. Bank *v.* Hart, 8 Ind. App. 19, 35 N. E. 302.

Kentucky.— Com. *v.* Abell, 6 J. J. Marsh. 476.

Missouri.— Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131.

New York.— Salters *v.* Genin, 8 Abb. Pr. 253.

Ohio.— Cincinnati, etc., R. Co. *v.* Urbana Third Nat. Bank, 1 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 109.

England.— Cook *v.* Cox, 3 M. & S. 110.

Canada.— Taylor *v.* Adams, 8 Ont. Pr. 66; Bain *v.* McKay, 5 Ont. Pr. 471; Widderfield *v.* Metcalfe, 21 U. C. Q. B. 247.

But see Chaffe *v.* Scheen, 34 La. Ann. 684; Johnson *v.* Mayer, 30 La. Ann. 1203.

See 39 Cent. Dig. tit. "Pleading," § 43.

45. Hasberg *v.* Moses, 81 N. Y. App. Div. 199, 80 N. Y. Suppl. 867; Munn *v.* Cook, 24 Abb. N. Cas. (N. Y.) 314, 8 N. Y. Suppl. 698; Rasmussen *v.* McKnight, 3 Utah 315, 3 Pac. 83, 4 Pac. 526.

Where the pleader has no knowledge as to which of two sets of facts, under either of which the opposite party would be equally liable, exists, he may properly allege them in the alternative. New York Mut. L. Ins. Co. *v.* McCurdy, 118 N. Y. App. Div. 815, 103 N. Y. Suppl. 829, sustaining an allegation that a corporate officer "made or authorized to be made, or knowingly or negligently permitted to be made" an unauthorized and unlawful payment of a portion of the corporation's funds. See Ewing *v.* Duncan, 81 Tex. 230, 16 S. W. 1000; Floyd *v.* Patterson, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; San Antonio *v.* Potter, 31 Tex. Civ. App. 263, 71 S. W. 764; Taylor Cotton-Seed Oil, etc., Co. *v.* Pumphrey, (Tex. Civ. App. 1895) 32 S. W. 225. In Munn *v.* Cook, 8 N. Y. Suppl. 698, 24 Abb. N. Cas. (N. Y.) 314, 332, the rule was stated as follows: "There is a class of cases in which for no fault of his own, and usually by fault of the defendant, the plaintiff does not know which of two absolutely inconsistent grounds he may succeed in proving, either of which will entitle him to recover; as in the case of fraud or mistake, or a case of suspected agency for an undisclosed principal. If it is important to plaintiff's policy, as it usually is, especially in such classes of cases, to obtain a sworn answer, he must make a sworn complaint; and he cannot, even on information and belief, swear to inconsistent facts. Therefore he cannot state such inconsistent grounds of recovery in separate causes of action, each alleged without qualification. He must state them, if at all, in a single cause of action and in the alternative. A rule which allows plaintiff to state essential allegations in the alternative, is obviously capable of much abuse, because by multiplying alternatives he may leave the defendant quite in the dark as to the facts the latter must be prepared to meet. But within limits which will exclude such abuses, the right of the plaintiff to allege alternative grounds is now recognized by the highest authority, and is not without sanction in the lower courts and courts of other jurisdictions."

Demurrer because of alternative pleading see *infra*, VI, F, 1, j.

46. See the statutes of the several states. And see Merschel *v.* Louisville, etc., R. Co., 121 Ky. 620, 85 S. W. 710, 27 Ky. L. Rep. 465; Louisville, etc., R. Co. *v.* Ft. Wayne Electric Co., 108 Ky. 113, 55 S. W. 918, 21 Ky. L. Rep. 1544; Cumberland Valley Bank *v.* Slusher, 102 Ky. 415, 43 S. W. 471, 19 Ky. L. Rep. 1497; Brown *v.* Illinois Cent. R. Co., 100 Ky. 525, 38 S. W. 862, 18 Ky. L. Rep. 974; Wehmhoff *v.* Rutherford, 98 Ky. 91, 32 S. W. 288, 17 Ky. L. Rep. 659; Louisville, etc., R. Co. *v.* Wyatt, 93 S. W. 601, 29 Ky. L. Rep. 437.

But this does not authorize the averment of liability on the part of one or the other of two defendants (Louisville, etc., R. Co. *v.* Ft. Wayne Electric Co., 108 Ky. 113, 55 S. W. 918, 21 Ky. L. Rep. 1544; Brown *v.* Illinois Cent. R. Co., 100 Ky. 525, 38 S. W. 862, 18 Ky. L. Rep. 974), nor that defendant is indebted either in contract or tort (Southern Lumber Co. *v.* Wireman, 41 S. W. 297, 19 Ky. L. Rep. 585).

Both alternative statements must state a cause of action.— Hoffman *v.* Maysville, 123

pleading to be construed as in the alternative.[47] So it has been held that where an act is averred to have been done by a person or by his agent acting within the scope of his authority the pleading is not bad, at least where the objection is not presented by demurrer.[48] Qualifying averments which are legal equivalents may be alleged in the alternative.[49] A motion is the proper remedy,[50] or a special demurrer.[51]

4. Consistency or Repugnancy. The different allegations in a pleading should be consistent with one another,[52] and if inconsistent or repugnant averments appear they may be stricken out on motion.[53] But if the allegations are so utterly repugnant as to destroy one another, so that no cause of action or defense remains, a general demurrer will lie against the pleading.[54] Inconsistent matter laid under a *videlicet* may be rejected.[55] The test of inconsistency is whether the proof of one averment tends to disprove another.[56] The fact that inconsistent allegations as to

Ky. 707, 97 S. W. 360, 29 Ky. L. Rep. 1245. Where any one of several paragraphs of a petition alleged in the alternative is insufficient, a demurrer to the petition must be sustained. Linck *v.* Louisville, etc., R. Co., 107 Ky. 370, 54 S. W. 184, 21 Ky. L. Rep. 1097. See also Beall *v.* January, 62 Mo. 434.

47. See Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545 (holding that an allegation that a defect in a sidewalk was known to defendant, or by the exercise of ordinary care might have been known to it, was not objectionable); Milam *v.* Ed H. Harrell Lumber Co., (Tex. Civ. App. 1906) 97 S. W. 825 (holding that an allegation that an account was not just or true "in whole or in part" was not objectionable).

48. Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402.

49. Mobile, etc., R. Co. *v.* Smith, 146 Ala. 312, 40 So. 763, sustaining a complaint which averred that an act was "wilfully or wantonly done."

50. See *infra*, XII, C, 2, b.

51. See *infra*, VI, F.

52. State *v.* Dickerman, 16 Mont. 278, 40 Pac. 698; Ross *v.* Charleston, etc., Transp. Co., 42 S. C. 447, 20 S. E. 285.

53. See *infra*, XII, C, 2, b, (IV).

54. See *infra*, VI, F.

55. See *supra*, II, G, 10.

56. People's Nat. Bank *v.* Geisthardt, 55 Nebr. 232, 75 N. W. 582. See also *infra*, IV, A, 7, d.

Illustrations.—An averment that plaintiffs are citizens of New York, to wit, of Illinois, where diverse citizenship confers jurisdiction, is repugnant (Leavitt *v.* Cowles, 15 Fed. Cas. No. 8,171, 2 McLean 491), and an allegation that certain judgments were "entered" by confession by the clerk in vacation coupled with an allegation that they were rendered by the court in term-time and subsequently entered in vacation (Abbott *v.* Yuma County, 18 Colo. 6, 30 Pac. 1031), and a declaration which styles the plaintiff "executor" in the commencement and subsequently avers that he took out letters of administration (Rowan *v.* Lee, 3 J. J. Marsh. (Ky.) 97), and a claim to recover a slave as property inherited from plaintiff's mother, or in case the court should consider the slave as community property, a claim to be decreed the owner of one half of the slave (Wood *v.* Harrell, 14 La. Ann. 61). Averments that a transfer of property is a simulation and that it is a donation in disguise are inconsistent (Brown *v.* Brown, 30 La. Ann. 966), as is an allegation alleging indebtedness as executor of the will of a person named, and also as trustee (Brown *v.* Brown, *supra*), or allegations that certain real estate does and does not belong to a community (Bourdette *v.* Burke, 119 La. 478, 44 So. 270). An averment that a note has been given for an entire insurance premium is inconsistent with another averment setting up default in another note for a similar amount given as a premium note. Farmers, etc., Mut. Ins. Co. *v.* Koons, 120 Ill. App. 303. But there is no inconsistency in averring that the grantee of real estate is a fictitious person and that the conveyance was made to such grantee to hinder and defraud creditors (Purkitt *v.* Polack, 17 Cal. 327); nor is an allegation that the charter of a bank was surrendered inconsistent with an allegation that it was continued by virtue of the several acts for the settlement of the bank's affairs (Savage *v.* Walshe, 26 Ala. 619); nor is the allegation of an intervener that he owns a note inconsistent with an allegation that the claim of ownership of plaintiff is fraudulent and simulated (Brown *v.* Brown, 22 La. Ann. 475); nor are allegations of fraud and simulation inconsistent (Chaffe *v.* Scheen, 34 La. Ann. 684; Johnson *v.* Mayer, 30 La. Ann. 1203). Averments that a signature is genuine are not inconsistent with an averment that a party is estopped to deny such signature. Eikenberry *v.* Edwards, 71 Iowa 82, 32 N. W. 183. An averment that plaintiff purchased certain lots designated by number is not inconsistent with another averment that he bought other numbered lots represented as being within the boundaries of those first mentioned. Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432. The fact that where it is obvious that an instrument did not state its full or true consideration, the fact that it is set out does not render it inconsistent with an allegation of the true consideration. Wallace *v.* Skinner, 15 Wyo. 233, 88 Pac. 221. An admission that plaintiffs are universal legatees of a person de-

the cause of an accident are made, it has been held, will not render a complaint for negligence defective.[57]

5. Materiality. Only material facts should be averred in a pleading, although facts alleged by way of inducement are liberally construed in this respect.[58] A material allegation is one which is essential to the cause of action or defense, and which cannot be stricken from the pleading without leaving it insufficient.[59] But in actions brought under the code procedure there is a difference in this respect between those of a legal and those of an equitable nature. In the former the material facts are strictly "issuable," in that the action will fail if any one of them is not proved. But in actions of an equitable nature this is not generally true. The facts proper to be alleged frequently cover a wide range, and are all material, in that each one has some bearing and effect upon the relief to be granted, but they are not "issuable" in the sense that a material issue can be raised by the denial of any one of them.[60]

6. Irrelevance and Redundance. A pleading should be confined to a statement of the facts which the party seeks to prove by evidence at the trial.[61] An irrelevant allegation in a pleading is one which has no substantial relation to the controversy between the parties to the action and cannot affect the decision of the court.[62] In code procedure it corresponds to the impertinency of the old chancery practice.[63] Facts which are clearly irrelevant will be stricken out on motion,[64] but great latitude should be allowed, especially in proceedings of an equitable nature, in setting forth allegations which are in good faith deemed important.[65] Irrelevant matter does not render a pleading demurrable.[66] Facts which properly constitute matter of inducement or introduction are not irrelevant,

ceased are not inconsistent with an averment that another person is testamentary executor and that an agreement exists between such person and defendant, operating as a bar of the action. St. Aubin *v.* Crevier, 7 Quebec Pr. 403.

57. Southern R. Co. *v.* Roach, (Ind. App. 1906) 77 N. E. 606.

58. Pacific Mail Steamship Co. *v.* Irwin, 67 Barb. (N. Y.) 277.

59. Atkinson *v.* Wabash R. Co., 143 Ind. 501, 41 N. E. 947; Culbertson Irr., etc., Co. *v.* Cox, 52 Nebr. 684, 73 N. W. 9; Meyer *v.* Minnehaha County School Dist. No. 31, 4 S. D. 420, 57 N. W. 68. In Lumb *v.* Beaumont, 49 L. T. Rep. N. S. 772, all facts were held to be material which the party was entitled to prove at the trial.

Another definition.— The word "material," as applied to allegations and pleadings in the absence of a statutory definition, must be understood in its ordinary sense as meaning an issue of fact or law, which, so far as relates to the particular cause of action to which the allegation refers, will decide the cause. Newman *v.* Otto, 4 Sandf. (N. Y.) 668, 670.

60. Smith *v.* Smith, 50 S. C. 54, 27 S. E. 545; Lumb *v.* Beaumont, 49 L. T. Rep. N. S. 772.

61. Washington L. Ins. Co. *v.* Scott, 119 N. Y. App. Div. 847, 104 N. Y. Suppl. 898. See Brock *v.* Tew, 18 Can. L. T. Occ. Notes 8; McDonald *v.* Clarke, 8 Can. L. T. Occ. Notes 401.

62. *Minnesota.*— Morton *v.* Jackson, 2 Minn. 219.

Nebraska.— Scofield *v.* State Nat. Bank, 9 Nebr. 316, 2 N. W. 888, 31 Am. Rep. 412.

New York.— Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475; Goodman *v.* Robb, 41 Hun 605, 606 [*citing* Moak Van Santvoord Pl. (3d ed.) p. 772]; Jeffras *v.* McKillop, etc., Co., 2 Hun 351; Fabbricotti *v.* Launitz, 3 Sandf. 743; Struver *v.* Ocean Ins. Co., 2 Hill 475, 476; Struver *v.* Ocean Ins. Co., 9 Abb. Pr. 23; Littlejohn *v.* Greeley, 22 How. Pr. 345; Walker *v.* Hewitt, 11 How. Pr. 395; Seward *v.* Miller, 6 How. Pr. 312, 313; Allaire *v.* Ouland, 2 Johns. Cas. 52.

North Carolina.— Howell *v.* Ferguson, 87 N. C. 113, 114.

South Carolina.— Dent *v.* South-Bound R. Co., 61 S. C. 329, 336, 39 S. E. 527.

United States.— Timmonsville Bank *v.* Fidelity, etc., Co., 121 Fed. 934, 935 [*citing* Pomeroy Rem. §§ 551, 552].

63. People *v.* McCumber, 18 N. Y. 315, 72 Am. Dec. 515; Lee Bank *v.* Kitching, 11 Abb. Pr. (N. Y.) 435; Carpenter *v.* West, 5 How. Pr. (N. Y.) 53, 55.

"Irrelevant or redundant matter was held to be synonymous with matter which could have been expunged as impertinent, in the court of chancery; that which was not material to the decision of the action; matter upon which no issue could be framed or which could not be given in evidence." Littlejohn *v.* Greeley, 22 How. Pr. (N. Y.) 345, 347 [*citing* Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103].

Impertinence in equity pleading see Equity, 16 Cyc. 257.

64. See *infra*, XII, C, 2, b.

65. Deering *v.* Schreyer, 25 Misc. (N. Y.) 618, 56 N. Y. Suppl. 117.

66. See *infra*, VI, F, 1.

although they are not issuable.[67] Redundancy consists in the needless repetition of material allegations or in the insertion of irrelevant matter, so that irrelevant matter is always redundant, although redundant averments may not be irrelevant.[68] The proper remedy for redundancy is a motion to strike.[69] Allegations which are merely evidentiary may be stricken as irrelevant;[70] but matters which are of an elementary as well as an evidentiary character may be properly pleaded.[71] The steps in a transaction may, without irrelevancy or redundancy, be averred instead of pleading the transaction according to its legal effect.[72] An averment in a complaint for the purpose of presenting a federal question cannot be stricken as irrelevant.[73]

7. Language and Clerical Construction — a. Grammatical Errors. Bad grammar will not vititate a pleading if its meaning is clear.[74]

b. Clerical Errors. Mere clerical mistakes, such as the use of one word or one name for another, where there is and can be no doubt as to what word the pleader intended to use, will not render a pleading bad,[75] at least on general demurrer,[76] or after pleading to the merits.[77] But a mistake in the volume and page of a record has been held fatal.[78]

c. Abbreviations. Abbreviations may be employed where they are clear and intelligible.[79] Thus dates and sums may be expressed in figures instead of words,[80] names of months may be abbreviated,[81] and common abbreviations used in legal documents may be employed.[82] But the practice is not to be commended,[83] and where insensible or unusual abbreviations are used they have been held to vitiate the pleading.[84]

67. Pacific Mail Steamship Co. *v.* Irwin, 67 Barb. (N. Y.) 277.

68. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475; Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657; Witherell *v.* Wiberg, 30 Fed. Cas. No. 17,917, 4 Sawy. 232.

69. See *infra*, XII, C, 2, b.

70. Gadsden *v.* Catawba Water Power Co., 71 S. C. 340, 51 S. E. 121, so holding of allegations of the reasons showing that defendant was indifferent and careless.

71. Gadsden *v.* Catawba Water Power Co., 71 S. C. 340, 51 S. E. 121, so holding of facts alleged in aggravation damages.

72. Pope Mfg. Co. *v.* Rubber Goods Mfg. Co., 100 N. Y. App. Div. 353, 91 N. Y. Suppl. 826.

73. McRoy Clay Works *v.* Naughton, 84 N. Y. App. Div. 477, 82 N. Y. Suppl. 979, holding that where plaintiff sought to avoid the application by an act of the legislature, which would defeat his claim, on the ground that it was in violation of the United States constitution, an allegation that the act was unconstitutional could not be stricken as irrelevant.

74. Moore *v.* Beem, 83 Ind. 219; Hovey *v.* Brown, 59 N. H. 114.

75. *Arkansas.*— Trapnall *v.* Merrick, 21 Ark. 503.

Indiana.— Praigg *v.* Western Paving, etc., Co., 143 Ind. 358, 42 N. E. 750; Fry *v.* Colborn, 17 Ind. App. 96, 46 N. E. 351.

Missouri.— Gibbs *v.* Southern, 116 Mo. 204, 22 S. W. 713.

New York.— King *v.* Mail, etc., Co., 113 N. Y. App. Div. 90, 98 N. Y. Suppl. 891 (use of "plaintiff" instead of "plaintiff's intestate"); Burstein *v.* Levy, 49 Misc. 469, 98 N. Y. Suppl. 853 (use of "plaintiff" for defendant).

Texas.— Hall, etc., Co. *v.* Brown, 82 Tex. 469, 17 S. W. 715.

76. Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Indiana, etc., R. Co. *v.* Dailey, 110 Ind. 75, 10 N. E. 631; Evans *v.* Nealis, 69 Ind. 148; Kenney *v.* New York Cent., etc., R. Co., 49 Hun (N. Y.) 535, 2 N. Y. Suppl. 512; Chamberlin *v.* Kaylor, 2 E. D. Smith (N. Y.) 134; German Exch. Bank *v.* Kroder, 13 Misc. (N. Y.) 192, 34 N. Y. Suppl. 133; Crossen *v.* Grandy, 42 Oreg. 282, 70 Pac. 906; Fant *v.* Andrews, (Tex. Civ. App. 1898) 46 S. W. 909.

77. Monmouth Min., etc., Co. *v.* Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187; Cutting *v.* Conklin, 28 Ill. 506; East Dubuque *v.* Burhyte, 74 Ill. App. 99; Kentucky Cent. R. Co. *v.* Carr, 43 S. W. 193, 19 Ky. L. Rep. 1172; State *v.* Rodecker, 145 Mo. 450, 46 S. W. 1083; Johnson *v.* Missouri Pac. R. Co., 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351; Connor *v.* Becker, 62 Nebr. 856, 87 N. W. 1065.

78. Croasdale *v.* Brown, 10 Phila. (Pa.) 12, so holding where the reference was to a book not in the recorder's office.

79. Odd Fellows Bldg. Assoc. *v.* Hogan, 28 Ark. 261; Blood *v.* Crandall, 28 Vt. 396.

80. Medsker *v.* Pogue, 1 Ind. App. 197, 27 N. E. 432; Fulenwider *v.* Fulenwider, 53 Mo. 439; Clark *v.* Stoughton, 18 Vt. 50, 44 Am. Dec. 361; Hyde *v.* Moffat, 16 Vt. 271.

81. Cutting *v.* Conklin, 28 Ill. 506.

82. Smith *v.* Butler, 25 N. H. 521.

83. Rice *v.* Buchanan, 1 Ohio Dec. (Reprint) 56, 1 West. L. J. 395.

84. Thus the words "judg— of said writ" were held to constitute a fatal defect in a

d. Technical Terms. In pleadings drawn under codes of procedure, the terms employed should be those used in the codes, rather than technical common-law terms.[85]

e. English Language. It is the rule in the United States that the pleadings must be in the English language,[86] but it is nevertheless entirely proper to make use of such Latin words or abbreviations as "versus," [87] "vs." [88] "Anno Domini," [89] and "etc." [90] And the use of Arabic figures does not offend against the rule.[91]

f. Erasures and Interlineations. While it is a better practice not to allow pleadings to be defaced by erasures and interlineations, such alterations are made necessary by the hurry of business, and they will not of themselves render a pleading bad.[92]

g. Folioing. Under the statutes or rules of court in some states, when a pleading is in excess of a certain length it must be folioed.[93]

I. Construction of Pleadings [94] **— 1. At Common Law.** The common-law rule which is still in existence where not changed by statute is that a pleading will be construed against the pleader,[95] that is, if the meaning of the words be equivocal

plea in abatement, since the abbreviation "judg" could not be accepted for the word "judgment." Cassidy *v.* Holbrook, 81 Me. 589, 18 Atl. 290. And the words "*actio non*" were rejected as insensible where used in place of "the plaintiff his action ought not to maintain." Berry *v.* Osborn, 28 N. H. 279.

85. Prewitt *v.* Clayton, 5 T. B. Mon. (Ky.) 4; Cohen *v.* Ottenheimer, 13 Oreg. 220, 10 Pac. 20.

86. Dunton *v.* Montoyo, 1 Colo. 99; Generes *v.* Simon, 21 La. Ann. 653 (holding, however, that a pleading was not vitiated because the evidence of the demand was set out in French); Fleming *v.* Conrad, 11 Mart. (La.) 301; Meigs *v.* Guiraud, 3 Ohio Dec. (Reprint) 328.

87. Smith *v.* Butler, 25 N. H. 521.

88. Smith *v.* Butler, 25 N. H. 521.

89. Hale *v.* Vesper, Smith (N. H.) 283.

90. Berry *v.* Osborn, 28 N. H. 279.

91. Clark *v.* Stoughton, 18 Vt. 50, 44 Am. Dec. 361.

92. Garrity *v.* Wilcox, 83 Ill. 159. And see Napper *v.* Short, 17 Ill. 119, where it is said that a pleading must be plainly written and not interlined or blotted to any extent.

93. See the statutes of the several states. And see German American Bank *v.* Champlin, 11 N. Y. Civ. Proc. 452, holding that where an answer and a verification taken together were more than two folios in length, but neither taken alone contained two folios, they were not within a court rule requiring pleadings exceeding two folios in length to be folioed.

94. As question of law for court and not of fact for jury see Trial.

In suits in equity see Equity, 16 Cyc. 237.

On appeal from justice of the peace see Justices of the Peace, 24 Cyc. 725 note 31.

95. *Alabama.*— Woodward Iron Co. *v.* Cook, 124 Ala. 349, 27 So. 455; Western Assur. Co. *v.* McGlathery, 115 Ala. 213, 22 So. 104, 67 Am. St. Rep. 26; Ware *v.* Dudley, 16 Ala. 742.

Arkansas.— Pike *v.* Fraser, 17 Ark. 597, rule now changed by code provision.

California.— The common law still prevails in California notwithstanding the code provision for a liberal construction. McIntyre *v.* Hauser, 131 Cal. 11, 63 Pac. 69; Fox *v.* Mackay, 125 Cal. 54, 57 Pac. 672; California Nav. Co. *v.* Union Transp. Co., 122 Cal. 641, 55 Pac. 591; Siskiyou Lumber, etc., Co. *v.* Rostel, 121 Cal. 511, 53 Pac. 1118; Heller *v.* Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016; Callahan *v.* Loughran, 102 Cal. 476, 36 Pac. 835; Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; Collins *v.* Townsend, 58 Cal. 608; Triscony *v.* Orr, 49 Cal. 612; Herrington *v.* Santa Clara County, 44 Cal. 496; De Castro *v.* Clarke, 29 Cal. 11; Nevada County, etc., Canal Co. *v.* Kidd, 28 Cal. 673; Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Chipman *v.* Emeric, 5 Cal. 49, 63 Am. Dec. 80; Schaadt *v.* New York Mut. L. Ins. Co., 2 Cal. App. 715, 84 Pac. 249.

Connecticut.— Meriden Britannia Co. *v.* Whedon, 31 Conn. 118.

Florida.— Herrin *v.* Brown, 44 Fla. 782, 33 So. 522, 103 Am. St. Rep. 182.

Georgia.— Folsom *v.* Gate City Terminal Co., 128 Ga. 175, 57 S. E. 314; Baggett *v.* Edwards, 126 Ga. 463, 55 S. E. 250; Holbrook *v.* Norcross, 121 Ga. 319, 48 S. E. 922; New York Fidelity, etc., Co. *v.* Van Dyke, 99 Ga. 542, 27 S. E. 709; Bedingfield *v.* Bates Advertising Co., 2 Ga. App. 107, 58 S. E. 320.

Illinois.— Linn *v.* Downing, 216 Ill. 64, 74 N. E. 729 [*affirming* 116 Ill. App. 454]; Lemon *v.* Stevenson, 36 Ill. 49; Halligan *v.* Chicago, etc., R. Co., 15 Ill. 558; Mager *v.* Hutchinson, 7 Ill. 266; Frantz *v.* Patterson, 123 Ill. App. 13; Alton Light, etc., Co. *v.* Oller, 119 Ill. App. 181 [*affirmed* in 217 Ill. 15, 75 N. E. 419, 4 L. R. A. N. S. 399]; Wright *v.* Illinois Cent. R. Co., 119 Ill. App. 132; American Ins. Co. *v.* France, 111 Ill. App. 382; Ward *v.* Danzeizen, 111 Ill. App. 163; Markey *v.* Griffin, 109 Ill. App. 212; Chicago Bd. of Trade *v.* Weare, 105 Ill. App. 289; Osborne *v.* Gaar, 103 Ill. App. 372; Commercial Mut. Acc. Co. *v.* Bates, 74 Ill. App. 335; People *v.* Steele, 7 Ill. App. 20.

and two meanings present themselves that construction is to be adopted which is most unfavorable to the party pleading,[96] on the theory that it will be presumed that the pleader has stated his case as strongly as he can.[97] But this rule does not require such a construction to be given, where the pleading may be construed in two or more different ways, as will make the pleading absurd,[98] nor so as to wrest an averment from the ordinary meaning and acceptation of the language used,[99] the rule being that the pleading must receive a fair and reasonable construction.[1] And the rule does not apply where matters are pleaded that are peculiarly within the knowledge of the other party,[2] nor can a party take advantage of it after pleading over.[3]

2. Under the Codes. The common-law rule as to construing pleadings most strongly against the pleader has been either abrogated or at least much relaxed in the code states by statutes requiring pleadings to be liberally construed.[4] Under this rule a pleading is usually construed, even on demurrer, to allege all the facts

Indiana.— Burrows *v.* Yount, 6 Blackf. 458, 39 Am. Dec. 439.

Kentucky.— Ayer, etc., Tie Co. *v.* Keown, 122 Ky. 580, 93 S. W. 588, 29 Ky. L. Rep. 110, 400; Stevenson *v.* Flourney, 89 Ky. 561, 13 S. W. 210, 11 Ky. L. Rep. 745; Covington *v.* Powell, 2 Metc. 226; Skidmore *v.* Smith, 84 S. W. 1163, 27 Ky. L. Rep. 323; Mays *v.* Carman, 66 S. W. 1019, 23 Ky. L. Rep. 2216; Goff *v.* Marsden Co., 56 S. W. 667, 22 Ky. L. Rep. 49; Friend *v.* Allen, 56 S. W. 418, 21 Ky. L. Rep. 1765.

New Hampshire.— Bartlett *v.* Prescott, 41 N. H. 493.

New Jersey.— Stephens, etc., Transp. Co. *v.* Central R. Co., 33 N. J. L. 229.

New York.—Miller *v.* Moore, 1 E. D. Smith 739.

Pennsylvania.— Hinckley *v.* Shope, 1 Leg. Gaz. 54; Garis *v.* Hopkins, 2 Lehigh Val. L. Rep. 279.

Texas.— Clements *v.* Lee, 8 Tex. 374; Peet *v.* Hereford, 1 Tex. App. Civ. Cas. § 869.

Vermont.— Vaughan *v.* Everts, 40 Vt. 526.

United States.— U. S. *v.* Linn, 1 How. 104, 11 L. ed. 64; Moore *v.* East Tennessee Tel. Co., 142 Fed. 965, 74 C. C. A. 227.

England.— Murphy *v.* Glass, L. R. 2 P. C. 408, 20 L. T. Rep. N. S. 461, 6 Moore P. C. N. S. 1, 17 Wkly. Rep. 592, 16 Eng. Reprint 627; Hobson *v.* Middleton, 6 B. & C. 295, 9 D. & R. 249, 5 L. J. K. B. O. S. 160, 13 E. C. L. 142; Goldham *v.* Edwards, 18 C. B. 389, 2 Jur. N. S. 493, 25 L. J. C. P. 223, 4 Wkly. Rep. 550, 86 E. C. L. 389.

See 39 Cent. Dig. tit. "Pleading," § 66.

Compare Pender *v.* Dicken, 27 Miss. 252.

The same rule is in force in Louisiana.— Hughes *v.* Murdock, 45 La. Ann. 935, 13 So. 182.

Where pleader seeks to amend.— The rule that a pleading must be taken most strongly against the pleader where the language used is ambiguous has no application where the pleader confesses that the pleading is ambiguous and seeks to amend it. Atlanta, etc., R. Co. *v.* Georgia R., etc., Co., 125 Ga. 798, 54 S. E. 753.

96. 1 Chitty Pl. (16th Am. ed.) *261.

97. New York Fidelity, etc., Co. *v.* Van Dyke, 99 Ga. 542, 27 S. E. 709; Cincinnati, etc., R. Co. *v.* Smock, 133 Ind. 411, 33 N. E. 108; Bartlett *v.* Prescott, 41 N. H. 493; Marsh *v.* Marshall, 53 Pa. St. 396.

98. Marshall *v.* Shafter, 32 Cal. 176.

99. Ringo *v.* New Farmers' Bank, 101 Ky. 91, 39 S. W. 701, 19 Ky. L. Rep. 91.

1. Goldham *v.* Edwards, 18 C. B. 389, 2 Jur. N. S. 493, 25 L. J. C. P. 223, 4 Wkly. Rep. 550, 86 E. C. L. 389.

2. Murphy *v.* Glass, L. R. 2 P. C. 408, 20 L. T. Rep. N. S. 461, 6 Moore P. C. N. S. 1, 17 Wkly. Rep. 592, 16 Eng. Reprint 627.

3. Camp *v.* Gainer, 8 Tex. 372; Hobson *v.* Middleton, 6 B. & C. 295, 9 D. & R. 249, 5 L. J. K. B. O. S. 160, 13 E. C. L. 142; Wright *v.* Rex, 3 N. & M. 892. See also *infra*, XIV, B, 3.

4. *Arizona.*— Santa Fe, etc., R. Co. *v.* Hurley, 4 Ariz. 258, 36 Pac. 216.

Arkansas.— St. Louis, etc., R. Co. *v.* Sweet, 63 Ark. 563, 40 S. W. 463; Bushey *v.* Reynolds, 31 Ark. 657.

Idaho.— Gantwell *v.* McPherson, 3 Ida. 721, 34 Pac. 1095.

Indiana.— In this state, where substantial justice will be promoted thereby, a liberal construction is required. Dickensheets *v.* Kaufman, 28 Ind. 251. See Smith *v.* Roseboom, 13 Ind. App. 284, 41 N. E. 552. But the court cannot insert words into a pleading not used by the pleader. Cincinnati, etc., R. Co. *v.* Smock, 133 Ind. 411, 33 N. E. 108. A pleading is to be construed most strongly against the pleader, when its language is uncertain, rendering its theory obscure, but if, on giving the language a fair construction, the complaint states facts sufficient to constitute a cause of action, it will not be demurrable, because so constructed as to render it difficult to determine the theory intended. State *v.* Petersen, 36 Ind. App. 269, 75 N. E. 602.

Iowa.— O'Brien *v.* Chicago, etc., R. Co., 64 Iowa 411, 20 N. W. 738; Foster *v.* Elliott, 33 Iowa 216; Gray *v.* Coan, 23 Iowa 344. When the construction of a pleading assailed by demurrer is doubtful, after giving the language a reasonable intendment, the doubt is to be resolved against the pleader (Stephens *v.* Marion, 132 Iowa 490, 107 N. W. 614; Thompson, etc., Mfg. Co. *v.* Perkins, 97 Iowa 607, 66 N. W. 874). But in Lampman *v.* Bruning, 120 Iowa 167, 94 N. W. 562, this

that can be implied by fair and reasonable intendment from the facts expressly stated,[5] and under such a principle of liberal construction words employed are to

rule was held to apply only when a pleading was attacked by motion or demurrer.

Kansas.— Upham *v.* Head, 74 Kan. 17, 85 Pac. 1017 (holding that where a demurrer is filed to a petition on the ground that it does not state facts sufficient to constitute a cause of action, without first presenting a motion to have the allegations of the petition made more definite and certain, the statements of such petition will be liberally construed in favor of the pleader); Stewart *v.* Balderston, 10 Kan. 131. But see Beadle *v.* Kansas City, etc., R. Co., 48 Kan. 379, 29 Pac. 696. *Compare* Losch *v.* Pickett, 36 Kan. 216, 12 Pac. 822, and Paola Bd. of Education *v.* Shaw, 15 Kan. 33, both of which hold that where contradictory statements are made in a pleading those against the pleader will be accepted as true.

Minnesota.— Dodge *v.* Chandler, 13 Minn. 114.

Missouri.— Sidway *v.* Missouri Land, etc., Co., 163 Mo. 342, 63 S. W. 705; Baird *v.* Citizens' R. Co., 146 Mo. 265, 48 S. W. 78; Vogelgesang *v.* St. Louis, 139 Mo. 127, 40 S. W. 653; Overton *v.* Overton, 131 Mo. 559, 33 S. W. 1; Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754.

Montana.— Conrad Nat. Bank *v.* Great Northern R. Co., 24 Mont. 178, 61 Pac. 1; U. S. *v.* Williams, 6 Mont. 379, 12 Pac. 851; Daniels *v.* Andes Ins. Co., 2 Mont. 78.

Nebraska.— Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722; Hartzell *v.* McClurg, 54 Nebr. 313, 74 N. W. 625; Roberts *v.* Samson, 50 Nebr. 745, 70 N. W. 384; McArthur *v.* H. T. Clarke Drug Co., 48 Nebr. 899, 67 N. W. 861.

Nevada.— Ferguson *v.* Virginia, etc., R. Co., 13 Nev. 184.

New York.— Coatsworth *v.* Lehigh Valley R. Co., 156 N. Y. 451, 51 N. E. 301; Olcott *v.* Carroll, 39 N. Y. 436; Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Clifford *v.* Braun, 71 N. Y. App. Div. 432, 75 N. Y. Suppl. 856; Foote *v.* Ffoulke, 55 N. Y. App. Div. 617, 67 N. Y. Suppl. 368; Booz *v.* Cleveland School Furniture Co., 45 N. Y. App. Div. 593, 61 N. Y. Suppl. 407; Scheuer *v.* Monash, 40 Misc. 668, 83 N. Y. Suppl. 253; Murphy *v.* Gold, etc., Tel. Co., 5 N. Y. St. 902.

North Carolina.— Blackmore *v.* Winders, 144 N. C. 212, 56 S. E. 874; Adams *v.* Hayes, 120 N. C. 383, 27 S. E. 47.

Ohio.— School Sect. 16 *v.* Odlin, 8 Ohio St. 293; People's Ins. Co. *v.* Hart, 5 Ohio Dec. (Reprint) 237, 3 Am. L. Rec. 657; McCulloch *v.* Tapp, 2 Ohio Dec. (Reprint) 678, 4 West. L. Month. 575; Petit *v.* Hudson, 2 Ohio Dec. (Reprint) 660, 4 West. L. Month. 434; Walker *v.* Webb, 2 Ohio Dec. (Reprint) 568, 4 West. L. Month. 32; Powers *v.* Seaton, 2 Ohio Dec. (Reprint) 365, 2 West. L. Month. 532.

Oklahoma.— Blackwell *v.* Hatch, 13 Okla. 169, 73 Pac. 933.

Oregon.— Waggy *v.* Scott, 29 Oreg. 386, 45 Pac. 774.

South Carolina.— Guy *v.* McDaniel, 51 S. C. 436, 29 S. E. 196; Strong *v.* Weir, 47 S. C. 307, 25 S. E. 157; Childers *v.* Verner, 12 S. C. 1.

South Dakota.— Catholican Hot Springs Co. *v.* Ferguson, 8 S. D. 534, 67 N. W. 615.

Tennessee.— See Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. 873.

Texas.— See Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607; Texas, etc., R. Co. *v.* Bayliss, 62 Tex. 570; Black *v.* Drury, 24 Tex. 289; Prewitt *v.* Farris, 5 Tex. 370; Clifton *v.* Armstrong, (Civ. App. 1899) 54 S. W. 611; Johnson *v.* Dowling, 1 Tex. App. Civ. Cas. § 1090.

Utah.— Mangum *v.* Bullion, etc., Min. Co., 15 Utah 534, 50 Pac. 834 [*overruling* Holt *v.* Pearson, 12 Utah 63, 41 Pac. 560].

Washington.— Hall *v.* Woolery, 20 Wash. 440, 55 Pac. 562; Blumenthal *v.* Pacific Meat Co., 12 Wash. 331, 41 Pac. 47; Isaacs *v.* Holland, 4 Wash. 54, 29 Pac. 976.

Wisconsin.— Modern Steel Structural Co. *v.* English Constr. Co., 129 Wis. 31, 108 N. W. 70; Hart *v.* Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. N. S. 952; Manning *v.* Ft. Atkinson School Dist. No. 6, 124 Wis. 84, 102 N. W. 356; Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466; South Bend Chilled Plow Co. *v.* George C. Cribb Co., 97 Wis. 230, 72 N. W. 749; Miller *v.* Bayer, 94 Wis. 123, 68 N. W. 869; Spence *v.* Spence, 17 Wis. 448; Morse *v.* Gilman, 16 Wis. 504; Robson *v.* Comstock, 8 Wis. 372. See also Hamlin *v.* Haight, 32 Wis. 237.

Wyoming.— Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

England.— Redway *v.* McAndrew, L. R. 9 Q. B. 74, 29 L. T. Rep. N. S. 421, 22 Wkly. Rep. 60; Stanton *v.* Austin, L. R. 7 C. P. 651, 41 L. J. C. P. 218; Young *v.* Austen, L. R. 4 C. P. 553, 38 L. J. C. P. 233, 20 L. T. Rep. N. S. 396, 17 Wkly. Rep. 706.

Canada.— Kelly *v.* Isolated Risk, etc., Ins. Co., 26 U. C. C. P. 299; Shannon *v.* Gore Dist. Mut. Ins. Co., 37 U. C. Q. B. 380; McCulloch *v.* White, 33 U. C. Q. B. 331.

See 39 Cent. Dig. tit. "Pleading," § 66.

A demurrer is not a pleading within the statutory rule as to liberal construction of pleadings. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

A construction implying honest and moral conduct of the parties will be preferred to one indicating the reverse. Atchison, etc., R. Co. *v.* Atchison Grain Co., (Kan. 1902) 70 Pac. 933.

5. *Indiana.*— Wagoner *v.* Wilson, 108 Ind. 210, 8 N. E. 925; Williamson *v.* Yingling, 93 Ind. 42; Carroll *v.* Swift, 10 Ind. App. 170, 37 N. E. 1061.

Iowa.— Shank *v.* Teeple, 33 Iowa 189.

Maryland.— See Shipley *v.* Fink, 102 Md. 219, 62 Atl. 360, 2 L. R. A. N. S. 1002.

Missouri.— Hood *v.* Nicholson, 137 Mo. 400,

be given their ordinary and popular meaning.[6] But even under this code rule, while the pleader is to be given the benefit of every allegation made or reasonably implied from the language employed, the principle at the base of the common-law rule that the party is presumed to have stated his case as strongly as the facts will justify still prevails.[7] And a fact is not well pleaded when it is to be inferred only as a conclusion from other facts stated which are not inconsistent with an opposite conclusion.[8] So this provision of the codes is held in some states to apply only in matters of form, and when a pleading is susceptible of two meanings that which is most unfavorable to the pleader must be accepted;[9] and many cases hold that on demurrer or motion a pleading under the code will be strictly construed against the pleader.[10]

38 S. W. 1095; Embree *v.* Patrick, 72 Mo. 173.

Nebraska.— Philadelphia Fire Assoc. *v.* Ruby, 60 Nebr. 216, 82 N. E. 629; Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722; Roberts *v.* Samson, 50 Nebr. 745, 70 N. W. 384.

New York.— Wenk *v.* New York, 171 N. Y. 607, 64 N. E. 509; Coatsworth *v.* Lehigh Valley R. Co., 156 N. Y. 451, 51 N. E. 301; Sage *v.* Culver, 147 N. Y. 241, 41 N. E. 513; Kain *v.* Larkin, 141 N. Y. 144, 36 N. E. 9; Avon Springs Sanitarium Co. *v.* Weed, 119 N. Y. App. Div. 560, 104 N. Y. Suppl. 58 [*reversed* on other grounds in 189 N. Y. 557, 82 N. E. 1123]; Lesser *v.* Bradford Realty Co., 116 N. Y. App. Div. 212, 101 N. Y. Suppl. 571; Treffinger *v.* Groh, 112 N. Y. App. Div. 250, 98 N. Y. Suppl. 291 [*affirmed* in 185 N. Y. 610, 78 N. E. 1114]; Acker *v.* Richards, 63 N. Y. App. Div. 305, 71 N. Y. Suppl. 929; Rosselle *v.* Klein, 42 N. Y. App. Div. 316, 59 N. Y. Suppl. 94; Roth *v.* Palmer, 27 Barb. 652; Richards *v.* Edick, 17 Barb. 260; Maynard *v.* Talcott, 11 Barb. 569; Reno Oil Co. *v.* Culver, 33 Misc. 717, 68 N. Y. Suppl. 303 [*reversed* on other grounds in 60 N. Y. App. Div. 129, 69 N. Y. Suppl. 969]; Hackett *v.* Equitable L. Assur. Soc., 30 Misc. 523, 63 N. Y. Suppl. 847 [*affirmed* in 50 N. Y. App. Div. 266, 63 N. Y. Suppl. 1092]; Meyer *v.* Staten Island R. Co., 7 N. Y. St. 245; Olery *v.* Brown, 51 How. Pr. 92; Graham *v.* Camman, 13 How. Pr. 360.

North Carolina.— Green *v.* Western Union Tel. Co., 136 N. C. 489, 49 S. E. 165; Seaboard Air Line R. Co. *v.* Main, 132 N. C. 445, 43 S. E. 930.

Ohio.— Walker *v.* Webb, 2 Ohio Dec. (Reprint) 568, 4 West. L. Month. 32.

Washington.— Malloy *v.* Benway, 34 Wash. 315, 75 Pac. 869.

Wisconsin.— Miller *v.* Bayer, 94 Wis. 123, 68 N. W. 869; American Buttonhole, etc., Co. *v.* Gurnee, 44 Wis. 49.

United States.— Winters *v.* Drake, 102 Fed. 545; Sommer *v.* Carbon Hill Coal Co., 89 Fed. 54, 32 C. C. A. 156.

See 39 Cent. Dig. tit. "Pleading," § 555.

Construction more liberal on demurrer than on motion.— In Chambers *v.* Hoover, 3 Wash. Terr. 107, 110, 13 Pac. 466, the court said: "A suitor is no longer to be turned out of court, if by making all reasonable intendments in his favor enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced. He may be required on motion to conform his statement to the rules of good pleading, and if he refuse, may be turned out of court; but as against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in his favor."

In Texas every reasonable intendment from the allegations contained, taken as a whole, will be indulged in favor of the pleading, where attacked by a "general" demurrer. Wynne *v.* State Nat. Bank, 82 Tex. 378, 17 S. W. 918; McIlhenny Co. *v.* Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753; Whetstone *v.* Coffey, 48 Tex. 271; Prewitt *v.* Farris, 5 Tex. 370; Whaley *v.* Thomason, 41 Tex. Civ. App. 405, 93 S. W. 212; St. Louis Southwestern R. Co. *v.* Rollins, (Civ. App. 1905) 89 S. W. 1099; El Paso, etc., R. Co. *v.* Kelly, (Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660]; Colorado Canal Co. *v.* Sims, (Civ. App. 1904) 82 S. W. 531; Erwin *v.* Hayden, (Civ. App. 1897) 43 S. W. 610.

Where a demurrer is carried back, the prior pleadings will be construed with the same strictness as if they had been originally attacked by demurrer. Hall *v.* Brownlee, 28 Ind. App. 178, 62 N. E. 457.

6. Mann *v.* Morewood, 5 Sandf. (N. Y.) 557.

7. Witham *v.* Blood, 124 Iowa 695, 100 N. W. 558.

Inconsistent allegations.—Any pleading containing allegations made by the same party, both affirming and denying a particular thing, carries falsehood upon its face; and in such a case the court may consider as true such of the allegations as are against the pleader. Losch *v.* Pickett, 36 Kan. 216, 12 Pac. 822.

8. Coolbaugh *v.* Roemer, 30 Minn. 424, 15 N. W. 869.

9. State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Sidway *v.* Missouri Land, etc., Co., 163 Mo. 342, 63 S. W. 705; Conrad Nat. Bank *v.* Great Northern R. Co., 24 Mont. 178, 61 Pac. 1; Clark *v.* Dillon, 97 N. Y. 370; Spear *v.* Downing, 34 Barb. (N. Y.) 522; Farrell *v.* Amberg, 8 Misc. (N. Y.) 220, 28 N. Y. Suppl. 564 [*affirmed* in 151 N. Y. 670, 46 N. E. 1146].

10. *Kansas.*— Thomas *v.* Sweet, 37 Kan.

3. When Objection Comes After Issue Joined. Pleadings are to be more liberally construed on the trial or after the joinder of issues,[11] and after the trial,[12] especially in an appellate court,[13] than on demurrer or motion before the trial.

183, 14 Pac. 545. But see Atchison, etc., R. Co. *v.* Mason, 4 Kan. App. 391, 46 Pac. 31.

Missouri.— Lochr *v.* Murphy, 45 Mo. App. 519, holding that the rule that, where a pleading is silent or ambiguous, it must be taken most strongly against the pleader, is not inconsistent with the rule that pleadings must be fairly construed so as to reach the real intention of the pleader.

Nebraska.— Cline *v.* Stock, 71 Nebr. 70, 98 N. W. 454, 102 N. W. 265.

New York.— Requa *v.* Guggenheim, 3 Lans. 51 (holding that where the complaint is uncertain as to which of two causes of action the suit is based on, and plaintiff can recover only for one, it should be construed against plaintiff on a demurrer thereto); Beach *v.* Bay State Co., 10 Abb. Pr. 71 (holding that if the place is material, and the pleading is ambiguous as to place, the presumption on demurrer should be against the pleader).

Oregon.— Patterson *v.* Patterson, 40 Oreg. 560, 67 Pac. 664; Mellott *v.* Downing, 39 Oreg. 218, 64 Pac. 393; Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369; Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. 629. *Contra*, Jackson *v.* Jackson, 17 Oreg. 110, 19 Pac. 847.

Utah.— Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

Wisconsin.— Holz *v.* Hanson, 115 Wis. 236, 91 N. W. 663; Hamlin *v.* Haight, 32 Wis. 237.

United States.— Cambers *v.* Butte First Nat. Bank, 144 Fed. 717 [*affirmed* in 156 Fed. 482, 84 C. C. A. 292].

See 39 Cent. Dig. tit. "Pleading," § 66.

11. *Iowa.*—Lampman *v.* Bruning, 120 Iowa 167, 94 N. W. 562.

Kansas.— Barkley *v.* State, 15 Kan. 99. *Compare* Paola Bd. of Education *v.* Shaw, 15 Kan. 33.

Minnesota.— Commonwealth Title Ins., etc., Co. *v.* Dokko, 71 Minn. 533, 74 N. W. 891; Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 39, 59 N. W. 822.

Missouri.— Broyhill *v.* Norton, 175 Mo. 190, 74 S. W. 1024. But see Badger Lumber Co. *v.* Muehlebach, 109 Mo. App. 646, 83 S. W. 546, holding that on a demurrer *ore tenus* at the opening of the trial allegations must be construed most strongly against the pleader.

Nebraska.— National F. Ins. Co. *v.* Eastern Bldg., etc., Assoc., 63 Nebr. 698, 88 N. W. 863; Butts *v.* Kingman, 60 Nebr. 224, 82 N. W. 854; Philadelphia Fire Assoc. *v.* Ruby, 60 Nebr. 216, 82 N. W. 629; Cobleskill First Nat. Bank *v.* Pennington, 57 Nebr. 404, 77 N. W. 1084; Norfolk Beet-Sugar Co. *v.* Hight, 56 Nebr. 162, 76 N. W. 566; Peterson *v.* Hopewell, 55 Nebr. 670, 76 N. W. 451; Johnston *v.* Spencer, 51 Nebr. 198, 70 N. W. 982; Chicago, etc., R. Co. *v.* Spirk, 51 Nebr. 167, 70 N. W. 926; Zug *v.* Forgan, 3 Nebr. (Unoff.) 149, 90 N. W. 1129.

New York.— Giles Lith., etc., Co. *v.* Recamier Mfg. Co., 14 Daly 475.

Oregon.— Patterson *v.* Patterson, 40 Oreg. 560, 67 Pac. 664.

South Dakota.— Whitbeck *v.* Sees, 10 S. D. 417, 73 N. W. 915; Anderson *v.* Alseth, 6 S. D. 566, 62 N. W. 435.

Washington.— Blumenthal *v.* Pacific Meat Co., 12 Wash. 331, 41 Pac. 47.

Wisconsin.— Holz *v.* Hanson, 115 Wis. 236, 91 N. W. 663; Phillips *v.* Carver, 99 Wis. 561, 75 N. W. 432; Winkler *v.* Racine Wagon, etc., Co., 99 Wis. 184, 74 N. W. 793; Werner *v.* Ascher, 86 Wis. 349, 56 N. W. 869; Wittman *v.* Watry, 45 Wis. 491; Johnson *v.* Ashland Lumber Co., 45 Wis. 119; Hazleton *v.* Union Bank, 32 Wis. 34.

See 39 Cent. Dig. tit. "Pleading," § 72.

Demurrer ore tenus on trial.— The rule will be applied with special liberality when a pleading is first attacked by demurrer *ore tenus* on the trial. Missouri, etc., R. Co. *v.* Murphy, 75 Kan. 707, 90 Pac. 290; Simmonds *v.* Richards, 74 Kan. 311, 86 Pac. 452; Cobleskill First Nat. Bank *v.* Pennington, 57 Nebr. 404, 77 N. W. 1084; German Nat. Bank *v.* Kautter, 55 Nebr. 103, 75 N. W. 566, 70 Am. St. Rep. 371; Phillips *v.* Carver, 99 Wis. 561, 75 N. W. 432; Ean *v.* Chicago, etc., R. Co., 95 Wis. 69, 69 N. W. 997.

On motion for judgment on the pleadings made by plaintiff, the allegations of the answer will be liberally construed. Roebuck *v.* Wick, 98 Minn. 130, 107 N. W. 1054.

12. *Indiana.*—Smith *v.* Roseboom, 13 Ind. App. 284, 41 N. E. 552; Citizens' St. R. Co. *v.* Spahr, 7 Ind. App. 23, 33 N. E. 446.

Kansas.— Kansas City, etc., R. Co. *v.* Farnsworth, 39 Kan. 356, 18 Pac. 202; Missouri Pac. R. Co. *v.* Morrow, 36 Kan. 495, 13 Pac. 789; Barrett *v.* Butler, 5 Kan. 355.

Missouri.— State *v.* Renshaw, 166 Mo. 682, 66 S. W. 953; Cobb *v.* Lindell R. Co., 149 Mo. 135, 50 S. W. 310.

Nebraska.— American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Merrill *v.* Equitable Farm, etc., Imp. Co., 49 Nebr. 198, 68 N. W. 365; Milner *v.* Harris, 1 Nebr. (Unoff.) 584, 95 N. W. 682.

Oregon.— Wyatt *v.* Wyatt, 31 Oreg. 531, 49 Pac. 855.

Utah.— Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

Washington.— Carey *v.* Hays, 41 Wash. 580, 84 Pac. 581; Mosher *v.* Bruhn, 15 Wash. 332, 46 Pac. 397; Montesano *v.* Blair, 12 Wash. 188, 40 Pac. 731.

England.— Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21.

See 39 Cent. Dig. tit. "Pleading," § 73.

13. *Colorado.*— Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902;

And even in those states where the common-law rule of construing pleadings against the pleader has not been changed, a liberal construction in favor of the pleading is adopted after verdict.[14]

4. Parts of Pleading Considered.[15] A pleading must be construed as an entirety,[16] including the caption.[17] And where a petition refers to a former petition the court may regard the two as constituting one petition.[18] So where different pleadings have been interposed by a party, allegations in one pleading should be construed together and in connection with allegations in other pleadings of the party.[19] But if an action based on a tort is brought against two defendants, allegations against one only cannot be considered in determining whether the complaint states a cause of action against the other.[20] So the title of the action should not be allowed to control the averments of the complaint.[21] The prayer for relief may be considered,[22] but it is not controlling.[23] So the writ may some-

Brothers *v.* Brothers, 29 Colo. 69, 66 Pac. 901; Phillips County School Dist. No. 15 *v.* Flanigan, 28 Colo. 431, 65 Pac. 24; Black *v.* Bent, 20 Colo. 342, 38 Pac. 387; Mulock *v.* Wilson, 19 Colo. 296, 35 Pac. 532.

Nebraska.— Chicago, etc., R. Co., *v.* Kerr, 74 Nebr. 1, 104 N. W. 49; Omaha Nat. Bank *v.* Kiper, 60 Nebr. 33, 82 N. W. 102; Latenser *v.* Misner, 56 Nebr. 340, 76 N. W. 897; Madison First Nat. Bank *v.* Tompkins, 3 Nebr. (Unoff.) 334, 94 N. W. 717.

New Hampshire.— Rowell *v.* Bruce, 5 N. H. 381.

Oklahoma.— Wass *v.* Tennent-Stribbling Shoe Co., 3 Okla. 152, 41 Pac. 339.

Oregon.— Roseburg R. Co. *v.* Nosler, 37 Oreg. 299, 60 Pac. 904; Fowler *v.* Phœnix Ins. Co., 35 Oreg. 559, 57 Pac. 421.

Wisconsin.— Kelly *v.* Bliss, 54 Wis. 187, 11 N. W. 488.

See 39 Cent. Dig. tit. "Pleading," § 74.

Presumptions on appeal see Appeal and Error, 3 Cyc. 286 *et seq.*

14. Dillon *v.* Cross, 5 Cal. App. 766, 91 Pac. 439; Diamond Glue Co. *v.* Wietzychowski, 227 Ill. 338, 81 N. E. 392 [*reversing* on other grounds 125 Ill. App. 277]; Klawiter *v.* Jones, 219 Ill. 626, 76 N. E. 673; Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455; Worthley *v.* Hammond, 13 Bush (Ky.) 510; Rowell *v.* Bruce, 5 N. H. 381.

15. Bill of particulars or copy of account as part of pleading see *infra*, X.

Construction of exhibits as part of pleading see *infra*, IX, B, 3 a.

Incomplete count in complaint as aided by other counts see *infra*, III, C, 5.

Insufficient plea aided by reference to others see *infra*, IV, A, 7, b, (II).

16. *Connecticut.*— Molineux *v.* Hurlbut, 79 Conn. 243, 64 Atl. 350.

Louisiana.— Howcott *v.* Pettit, 106 La. 530, 31 So. 61.

New York.— Ryle *v.* Harrington, 14 How. Pr. 59.

Oklahoma.— Whiteacre *v.* Nichols, 17 Okla. 387, 87 Pac. 865; McClung *v.* Cullison, 15 Okla. 402, 82 Pac. 499.

Texas.— Altgelt *v.* Elmendorf, (Civ. App. 1905) 86 S. W. 41.

United States.— Prescott, etc., R. Co. *v.* Atchison, etc., R. Co., 73 Fed. 438.

But neither the interrogatories annexed to a pleading nor the answers thereto will make such pleading good if it would otherwise be bad. Lane *v.* Krekle, 22 Iowa 399.

17. McCloskey *v.* Strickland, 7 Iowa 259.

18. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

19. Davies *v.* Bierce, 114 La. 663, 38 So. 488; Leiman *v.* Rosenzweig, 103 N. Y. Suppl. 83; Patterson *v.* Patterson, 40 Oreg. 560, 67 Pac. 664.

The complaint and reply should be read together in determining the intent of the pleader. Deeves *v.* Metropolitan Realty Co., 41 N. Y. Suppl. 647; 25 N. Y. Civ. Proc. 276; Lavery *v.* Arnold, 36 Oreg. 84, 57 Pac. 906, 58 Pac. 524.

20. Klawiter *v.* Jones, 219 Ill. 626, 76 N. E. 673 [*affirming* 110 Ill. App. 31].

21. State *v.* Dehlinger, 46 Mo. 106.

As between a description of a party in the title and an allegation in the body of the pleading, the latter should control. Christy *v.* Libby, 35 How. Pr. (N. Y.) 119 [*affirmed* in 2 Daly 418, 5 Abb. Pr. N. S. 192].

22. *California.*— Nevada County, etc., Canal Co. *v.* Kidd, 37 Cal. 282.

Louisiana.— Howcott *v.* Pettit, 106 La. 530, 31 So. 61; Syer *v.* Bundy, 9 La. Ann. 540.

Nebraska.— Keens *v.* Gaslin, 24 Nebr. 310, 38 N. W. 797; Harral *v.* Gray, 10 Nebr. 186, 4 N. W. 1040.

New York.— O'Brien *v.* Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Swart *v.* Boughton, 35 Hun 281; Rodgers *v.* Rodgers, 11 Barb. 595; Frick *v.* Freudenthal, 45 Misc. 348, 90 N. Y. Suppl. 344.

Wisconsin.— North Side Loan, etc., Soc. *v.* Nakielski, 127 Wis. 539, 106 N. W. 1097; Cobb *v.* Smith, 23 Wis. 261; Gillett *v.* Treganza, 13 Wis. 472.

23. *Indiana.*— State *v.* Ogan, 159 Ind. 119, 63 N. E. 227; McGuffey *v.* McClain, 130 Ind. 327, 30 N. E. 296; Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

Louisiana.— Renshaw *v.* Richards, 30 La. Ann. 398.

Missouri.— Emmert *v.* Meyer, 65 Mo. App. 609.

New York.— O'Brien *v.* Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; Graves *v.* Spier, 58 Barb. 349.

times be looked to in construing a pleading,[24] especially when it is made a part of the declaration by statute.[25] A plea, if defective, cannot be aided by stipulation as to the facts not set out in the plea.[26]

5. THEORY OF PLEADING.[27] Every pleading must be based upon some definite, consistent theory, and where it is doubtful upon what theory the pleading was drawn, the court will construe it according to the theory it deems most in accord with the facts alleged.[28] In construing a declaration, to determine upon what theory it is drawn, all the averments will be considered, and neither the formal parts nor isolated averments of fact will be deemed controlling as against the case substantially made by the general character of the facts alleged.[29] And where a certain theory has been adopted by the parties, it will be followed by the court if supported by the allegations of the pleading.[30] Allegations not in harmony with the theory of the pleading will be considered surplusage,[31] and form

Wisconsin.— Sell *v.* Mississippi River Logging Co., 88 Wis. 581, 60 N. W. 1065.

24. Johnson *v.* Burges, 47 L. J. Ch. 552.

25. Church *v.* Westminster, 45 Vt. 380.

26. Gaston *v.* Modern Woodmen of America, 116 Ill. App. 291.

27. **Theory adopted as to pleadings below as conclusive on appeal** see APPEAL AND ERROR, 2 Cyc. 672, 674.

28. Monnett *v.* Turpie, 132 Ind. 482, 32 N. E. 328; Batman *v.* Snoddy, 132 Ind. 480, 32 N. E. 327; Feder *v.* Field, 117 Ind. 386, 20 N. E. 129; Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338; Thomas *v.* Sweet, 37 Kan. 183, 14 Pac. 545.

29. *Arkansas.*— Gibbs *v.* Dickson, 33 Ark. 107.

California.— Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40; Nevin *v.* Thompson, (1893) 35 Pac. 160.

Colorado.— Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269.

Georgia.— Roberts *v.* Glass, 112 Ga. 456, 37 S. E. 704; Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113; Chattanooga, etc., R. Co. *v.* Palmer, 89 Ga. 161, 15 S. E. 34.

Illinois.— Toledo, etc., R. Co. *v.* McLaughlin, 63 Ill. 389; Ayers *v.* Richards, 12 Ill. 146; Kimbell *v.* Miller, 54 Ill. App. 665.

Indiana.— Mark *v.* North, 155 Ind. 575, 57 N. E. 902; Indianapolis First Nat. Bank *v.* Root, 107 Ind. 224, 8 N. E. 105; Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611; South Bend Chilled Plow Co. *v.* Cissne, 35 Ind. App. 373, 74 N. E. 282.

Iowa.— Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306; Keys *v.* Francis, 28 Iowa 321; Scott *v.* Granger, 3 Iowa 447.

Louisiana.— Brown *v.* Richardson, 1 Mart. N. S. 202.

Massachusetts.— Boston, etc., R. Corp. *v.* Nashua, etc., R. Corp., 157 Mass. 258, 31 Atl. 1067; Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629.

Missouri.— State *v.* Dehlinger, 46 Mo. 106.

New York.— Doyle *v.* American Wringer Co., 60 N. Y. App. Div. 525, 69 N. Y. Suppl. 952; Foote *v.* Ffoulke, 55 N. Y. App. Div. 617, 67 N. Y. Suppl. 368; Wood *v.* Harper, 85 Hun 457, 32 N. Y. Suppl. 880; Veeder *v.* Cooley, 2 Hun 74; Keenan *v.* Keenan, 12 N. Y. Suppl. 747; Brady *v.* Bissell, 1 Abb. Pr. 76.

Ohio.— Tiffin Glass Co. *v.* Stoehr, 54 Ohio St. 157, 43 N. E. 279; Howard *v.* Levering, 8 Ohio Cir. Ct. 614, 4 Ohio Cir. Dec. 236.

Oregon.— Corbett *v.* Wrenn, 25 Oreg. 305, 35 Pac. 658.

Rhode Island.—Collins *v.* Harrison, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156.

Wisconsin.— Kuehn *v.* Wilson, 13 Wis. 104.

United States.— Bailey *v.* Mosher, 63 Fed. 488, 11 C. C. A. 304.

See 39 Cent. Dig. tit. "Pleading," § 108.

"The whole frame-work is in fraud, and the cause of action, as set forth, is based upon the false and fraudulent representations of the defendant. . . . It was error in the court to change the form of the action, by striking out or treating as surplusage the principal allegations — those which characterize and give form to the action — because, perchance, there may be facts stated by way of inducement spelled out, which would, when put in proper form, have sustained an action in assumpsit." Barnes *v.* Quigley, 59 N. Y. 265, 267.

In Louisiana, however, the character of the action depends upon the prayer for relief. Kemper *v.* Hulick, 16 La. 44; Lagay *v.* Chieusse, 5 Rob. 132; Hood *v.* Segrest, 1 Rob. 109.

Construction of particular pleadings see Churchill *v.* Lauer, 84 Cal. 233, 24 Pac. 107; Hubbard *v.* Williamstown, 61 Wis. 397, 21 N. W. 295. In an action for damages to growing cotton, allegations of the petition to the effect that plaintiff was a tenant and that certain acres of cotton were damaged raised an inference that the cotton belonged to plaintiff. St. Louis Southwestern R. Co. *v.* Rollins, (Tex. Civ. App. 1905) 89 S. W. 1099.

30. Bailey *v.* Mosher, 63 Fed. 488, 11 C. C. A. 304.

31. *Alabama.*— Perry *v.* Marsh, 25 Ala. 659.

Kansas.— Kunz *v.* Ward, 28 Kan. 132.

Maryland.— Soper *v.* Jones, 56 Md. 503.

Missouri.— Antonelli *v.* Basile, 93 Mo. App. 138.

New York.— Vedder *v.* Leamon, 70 N. Y. App. Div. 252, 75 N. Y. Suppl. 413.

no ground for a demurrer.[32] In case it is doubtful, from the facts alleged, upon what theory plaintiff seeks to recover, the prayer may be looked to as an aid in determining the question, but it is not conclusive.[33] And it has also been held that the summons should determine the matter in case of doubt.[34] But that a certain theory was evidently contemplated by the person who drew the pleading is of no avail as against the theory shown by the facts alleged.[35] Where it is doubtful whether the cause of action stated is in contract or tort, it is presumed to be the former rather than the latter.[36] Plaintiff cannot try his case on one theory and then, after finding himself unable to prove it, shift to another.[37]

6. Specific Averments Control General. Where both general and specific allegations are made respecting the same matter, the latter control.[38] Thus where there is a general charge of negligence followed by an enumeration of specific facts, it is generally held that the specific facts control, and limit the evidence which is admissible.[39] So also where a written instrument is set out *in hæc verba*, the terms of the instrument as so set forth control general allegations as to its legal effect.[40]

7. Construction Adopted by Parties. Where it is apparent that both parties have placed a certain construction upon a pleading, that construction will usually be adopted by the court if possible.[41]

Canada.— Clarke *v.* Harding, 17 N. Brunsw. 495.

See 39 Cent. Dig. tit. "Pleading," § 108.

32. Lively *v.* Ballard, 2 W. Va. 496. See also *infra*, VI, F, 1, m.

33. See *supra*, II, I, 4.

34. Kewaunee County Sup'rs *v.* Decker, 30 Wis. 624.

35. Garner *v.* Hannibal, etc., R. Co., 34 Mo. 235; Sparman *v.* Keim, 83 N. Y. 245; Wright *v.* Hooker, 10 N. Y. 51; Damon *v.* Leque, 14 Wash. 253, 44 Pac. 261; White *v.* Pulley, 27 Fed. 436; Whalen *v.* Sheridan, 19 Fed. Cas. No. 17,476, 17 Blatchf. 9, 8 Reporter 422.

36. Goodwin *v.* Griffis, 88 N. Y. 629; Bowen *v.* True, 53 N. Y. 640; Elwood *v.* Gardner, 45 N. Y. 349; Foote *v.* Ffoulke, 55 N. Y. App. Div. 617, 67 N. Y. Suppl. 368; McDonough *v.* Dillingham, 43 Hun (N. Y.) 493.

37. Robinson *v.* Rice, 20 Mo. 229; Newell *v.* Nicholson, 17 Mont. 389, 43 Pac. 180. See also *supra*, II, H, 3, a.

38. *Connecticut.*— Mallett *v.* Stevenson, 26 Conn. 428, specific allegations in *videlicet*.

Indiana.— Moyer *v.* Ft. Wayne, etc., R. Co., 132 Ind. 88, 31 N. E. 567; Quick *v.* Taylor, 113 Ind. 540, 16 N. E. 588; McPheeton *v.* Wright, 110 Ind. 519, 10 N. E. 634; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Louisville, etc., R. Co. *v.* Schmidt, 106 Ind. 73, 5 N. E. 684; Boesker *v.* Pickett, 81 Ind. 554; State *v.* Wenzel, 77 Ind. 428; Reynolds *v.* Copeland, 71 Ind. 422.

Minnesota.— Carlson *v.* Presbyterian Bd. of Relief, 67 Minn. 436, 70 N. W. 3; Griggs *v.* St. Paul, 9 Minn. 246; Pinney *v.* Fridley, 9 Minn. 34.

Missouri.— Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343.

Nebraska.— Spargur *v.* Romine, 38 Nebr. 736, 57 N. W. 523.

South Carolina.— Goodwin *v.* Charleston, etc., R. Co., 76 S. C. 557, 57 S. E. 530.

Washington.— Malloy *v.* Benway, 34 Wash. 315, 75 Pac. 869.

Wisconsin.— Lawrence *v.* Janesville, 46 Wis. 364, 1 N. W. 338, 50 N. W. 1102.

United States.— Hayes-Young Tie Plate Co. *v.* St. Louis Transit Co., 137 Fed. 80, 70 C. C. A. 1 [*affirming* 130 Fed. 900]; Boatmen's Bank *v.* Fritzlen, 135 Fed. 650, 68 C. C. A. 288 [*reversing* on other grounds 128 Fed. 608].

See 39 Cent. Dig. tit. "Pleading," § 68.

39. *Illinois.*— Straight *v.* Odell, 13 Ill. App. 232.

Kansas.— Telle *v.* Leavenworth Rapid Transit R. Co., 50 Kan. 455, 31 Pac. 1076.

Minnesota.— Rogers *v.* Truesdale, 57 Minn. 126, 58 N. W. 688.

Missouri.— Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868; McCarty *v.* Rood Hotel Co., 144 Mo. 397, 46 S. W. 172; Dlauhi *v.* St. Louis, etc., R. Co., 139 Mo. 291, 40 S. W. 890; McManamee *v.* Missouri Pac. R. Co., 135 Mo. 440, 37 S. W. 119.

Montana.— Pierce *v.* Great Falls, etc., R. Co., 22 Mont. 445, 56 Pac. 867.

Washington.— Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284, rule limited to cases where the pleading clearly discloses an intention to restrict the proof to the specific facts alleged.

See, generally, Negligence, 29 Cyc. 565 *et seq.*

40. Patrick *v.* Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236; Binz *v.* Tyler, 79 Ill. 248; Minnesota, etc., R. Co. *v.* Hiams, 53 Iowa 501, 5 N. W. 703.

41. Welsh *v.* Bardshar, 137 Cal. 154, 69 Pac. 977; Carroll *v.* Swift, 10 Ind. App. 170, 37 N. E. 1061; Chicago, etc., R. Co. *v.* Kerr, 74 Nebr. 1, 104 N. W. 49; National F. Ins. Co. *v.* Eastern Bldg., etc., Assoc., 63 Nebr. 698, 88 N. W. 863. See also Manning *v.* Ft. Atkinson School Dist. No. 6, 124 Wis. 84, 102 N. W. 356.

8. Facts Not Alleged — a. In General. A material fact, if not alleged, is presumed not to exist.[42]

b. Failure to Allege That Contract Is in Writing. The general rule is that where a complaint is based on a contract or agreement and it is silent as to whether the agreement was oral or written, it will be presumed that it was in writing,[43] although there is authority to the contrary.[44]

9. Averment of Existing Fact Construed as Continuing. Where a fact is averred as existing, and it is continuous in its nature, it is to be construed as continuing unless the contrary is averred.[45]

10. Particular Words and Phrases — a. In General. Particular words and phrases in a pleading should be construed according to their usual meaning in connection with the apparent intention of the pleader.[46]

b. Name of Instrument or Act. Where the character of an instrument appears from the allegations of a pleading, a wrong name given to it will not be construed as rendering the pleading unintelligible.[47] And the name given to an act is of no importance in a pleading.[48] So conclusions as to the legal effect of statutes or

42. *Illinois.*— Frantz *v.* Patterson, 123 Ill. App. 13.

Indiana.— Cannon *v.* Castleman, 162 Ind. 6, 69 N. E. 455.

Louisiana.— Hughes *v.* Murdock, 45 La. Ann. 935, 13 So. 182.

Nebraska.— Chicago, etc., R. Co. *v.* Shepherd, 39 Nebr. 523, 58 N. W. 189; Stillings *v.* Van Alstine, 2 Nebr. (Unoff.) 684, 89 N. W. 756.

New York.— See Winch *v.* Farmers' L. & T. Co., 12 Misc. 291, 33 N. Y. Suppl. 279.

Pennsylvania.— Marsh *v.* Marshall, 53 Pa. St. 396.

Texas.— Mills *v.* Swearingen, 67 Tex. 269, 3 S. W. 268.

See 39 Cent. Dig. tit. "Pleading," § 87.

The allegation of certain specific facts excludes other like material facts not alleged and the latter are presumed not to exist. Cleveland, etc., R. Co. *v.* Baker, 106 Ill. App. 500.

43. Van Idour *v.* Nelson, 60 Mo. App. 523; Kilroy *v.* Simkins, 26 U. C. C. P. 281; Dalgleish *v.* Conboy, 26 U. C. C. P. 254. See also Frauds, Statute of, 20 Cyc. 308.

44. Bucklen *v.* Cushman, 145 Ind. 51, 44 N. E. 6; Hocker *v.* Gentry, 3 Metc. (Ky.) 463; Franklin *v.* Browning, 117 Fed. 226, 54 C. C. A. 258, holding that phrase "understanding and agreement" in a pleading imports an oral agreement. See also Frauds, Statute of, 20 Cyc. 308.

45. Thomasson *v.* Mercantile Town Mut. Ins. Co., 114 Mo. App. 109, 89 S. W. 564, 1135; Kinsman *v.* Page, 22 Vt. 628.

46. See cases cited *infra*, this note.

"At the time of" will be construed as meaning "before," where the context clearly requires it. Funk *v.* Rentchler, 134 Ind. 68, 33 N. E. 364, 898.

"Charge" may mean "allege." Johnson *v.* Helmstaedter, 30 N. J. Eq. 124. An averment that a party "charged" a certain sum for services is not an averment of facts showing an implied or express promise to pay. Farrington *v.* Wright, 1 Minn. 241.

Description of party as "Mrs." implies no disability of coverture. Ballard *v.* St. Albans Advertiser Co., 52 Vt. 325.

"Duly convened," as applied to a meeting, implies all facts necessary to show that it was convened regularly. People *v.* Walker, 23 Barb. (N. Y.) 304.

"Machinery" may include a smokestack. Wreggitt *v.* Barnett, 99 Mich. 477, 58 N. W. 467.

Time to which allegations relate.— The allegation of the complaint, in an action by a creditor of a firm seeking to follow its property into the hands of purchasers, that the firm is insolvent, raises no question as to its insolvency at the time of the sale. Jensen *v.* Montgomery, 29 Utah 89, 80 Pac. 504.

Where the same words are used in a statute, and the declaration under it, the court will construe them as having the same meaning in both cases. Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702. So where the sufficiency of a complaint is brought before an appellate court, they take notice of a public statute, and, if there is a conflict between averments of the complaint and the statutes, it is the court's duty to interpret the former so as to make them read as if set out in connection with the provisions of the statute. Graham *v.* Harford County, 87 Md. 321, 39 Atl. 804.

47. Tregear *v.* Etiwanda Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. Rep. 245; Comstock *v.* North, 88 Miss. 754, 41 So. 374.

48. International, etc., R. Co. *v.* Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559 (in which case it was held that the term "boycott" was of no special significance in construing the averments of fact); Yeates *v.* Illinois Cent. R. Co., 137 Fed. 943 (holding that the question whether a declaration states a joint and not a severable cause of action against two defendants is to be determined from the facts alleged, and is not affected by an allegation that the act complained of was the joint and concurrent act of both defendants). See also Brown *v.* Thomas Blackwell Coal, etc., Co., 124 Ky. 324, 99 S. W. 299.

resolutions will not be considered[49] but reference must be had to the statutes or resolutions themselves.

c. Words of Reference. Neither a pronoun nor the word "said" is to be construed as referring to the last noun preceding it unless the meaning requires it.[50] The word "thereupon," which ordinarily marks the succession of events, does not necessarily exclude the existence of other facts than those previously recited;[51] and the word may be taken to mean "in consideration thereof" where the context would seem to require such a meaning.[52]

d. Words Signifying Contractual Relations. An averment of a "settlement" means that the parties agreed upon a balance;[53] an "arrangement" entered into amounts to the averment of a contract;[54] an "understanding" will be construed to mean a contract;[55] "transfer and assign" a transfer by writing;[56] "indorse," to put a name on the back of a paper;[57] bonds "issued and sold" means negotiated and in the hands of third parties;[58] "bargained and sold" avers a sale.[59]

11. Construction of Reply. The complaint and reply should be construed together when not repugnant,[60] and even on demurrer the complaint and also the answer may be looked to in construing the reply.[61] Although the reply is vague and uncertain, it will be presumed that it was designed to fairly respond to the allegations of the answer, and will be liberally construed on that theory.[62]

J. Conclusiveness of Allegations or Admissions as Against Pleader[63]

—1. In General. The general rule is that parties are bound by, and estopped to controvert, allegations or admissions in their own pleadings.[64] Nor can a party

49. Indianapolis *v.* Holt, 155 Ind. 222, 57 N. E. 966, 988, 1100.

50. Steeple *v.* Downing, 60 Ind. 478; Wilkinson *v.* State, 10 Ind. 372.

51. Dennehey *v.* Woodsum, 100 Mass. 195.

52. Bean *v.* Ayers, 67 Me. 482.

53. Baxter *v.* State, 9 Wis. 38.

54. Boyle *v.* Great Northern R. Co., 13 Wash. 383, 43 Pac. 344.

55. Heichew *v.* Hamilton, 3 Greene (Iowa) 596. *Contra*, Black *v.* Columbia, 19 S. C. 412, 45 Am. Rep. 785.

56. Andrews *v.* Carr, 26 Miss. 577.

57. Hartwell *v.* Hemuenway, 7 Pick. (Mass.) 117.

58. Dunham *v.* Isett, 15 Iowa 284.

59. Barrow *v.* Window, 71 Ill. 214.

60. Molino *v.* Blake, 5 Ariz. 319, 52 Pac. 366.

61. Balz *v.* Underhill, 19 Misc. (N. Y.) 215, 44 N. Y. Suppl. 419 [*affirmed* in 16 N. Y. App. Div. 635, 46 N. Y. Suppl. 1089].

62. Home F. Ins. Co. *v.* Johansen, 59 Nebr. 349, 80 N. W. 1047.

63. Admissions in answer by failure to deny see *infra*, IV, C, 5, b, (IV).

Admissions in pleadings as evidence see Evidence, 16 Cyc. 967–973.

Allegation of tender as admission of indebtedness see Tender.

Effect as evidence in another action see Evidence, 16 Cyc. 1050.

Form of admissions in answer see *infra*, IV, C, 5, b.

Judgment on admissions in pleading see *infra*, XII, B, 3.

64. *Arkansas.*— Goodrum *v.* Ayers, 56 Ark. 93, 19 S. W. 97.

California.— Joshua Hendy Mach. Works *v.* Pacific Cable Constr. Co., 99 Cal. 421, 33 Pac. 1084; Lillis *v.* Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108; Turner *v.* White, 73 Cal. 229, 14 Pac. 794; People *v.* Stockton, etc., R. Co., 49 Cal. 414; Mulford *v.* Estudillo, 32 Cal. 131; Wilcoxson *v.* Burton, 27 Cal. 228, 87 Am. Dec. 66; Blankman *v.* Vallejo, 15 Cal. 638. See also Mitau *v.* Roddan, 149 Cal. 1, 84 Pac. 145, 6 L. R. A. N. S. 275.

Colorado.— Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086; Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152.

Dakota.— Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

District of Columbia.— Cooksey *v.* Bryan, 2 App. Cas. 557.

Georgia.— Wells *v.* Ragsdale, 102 Ga. 53, 29 S. E. 165; Crusselle *v.* Reinhardt, 68 Ga. 619; Alexander *v.* Sutlive, 3 Ga. 27.

Illinois.— Chicago Sanitary Dist. *v.* Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248; Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; Loughridge *v.* Northwestern Mut. L. Ins. Co., 180 Ill. 267, 54 N. E. 153; Robbins *v.* Butler, 24 Ill. 387; Reed *v.* Phillips, 5 Ill. 39; Chicago, etc., R. Co. *v.* People, 120 Ill. App. 306 [*affirmed* in 222 Ill. 427, 78 N. E. 790]; Chicago, etc., R. Co. *v.* Merriman, 95 Ill. App. 628; Glanz *v.* Smith, 76 Ill. App. 630; West Chicago St. R. Co. *v.* Loewe, 58 Ill. App. 606; Fairbanks *v.* Badger, 46 Ill. App. 644. See also Barnes *v.* Drainage Com'rs Dist. No. 1, 221 Ill. 627, 77 N. E. 1124.

Indiana.— Goldthwait *v.* Bradford, 36 Ind. 149; Ogden *v.* Rowley, 15 Ind. 56; Fuller *v.* Exchange Bank, 38 Ind. App. 570, 78 N. E. 206.

Iowa.—Dayton State Bank *v.* Felt, 99 Iowa 532, 68 N. W. 818, 61 Am. St. Rep. 253; Miller *v.* James, 86 Iowa 242, 53 N. W. 227; Russell *v.* Murdock, 79 Iowa 101, 44 N. W.

in subsequent pleadings contradict allegations or admissions in his original plead-

237, 18 Am. St. Rep. 348; Clay Dist. Tp. *v.* Buchanan Independent Dist., 69 Iowa 88, 28 N. W. 449; Kramer *v.* Kramer, 68 Iowa 567, 27 N. W. 757; Rump *v.* Schwartz, 67 Iowa 471, 25 N. W. 736; Lashbrook *v.* Eldridge, 55 Iowa 344, 7 N. W. 584; State *v.* Keokuk, 9 Iowa 438.

Kansas.— Johnston *v.* Winfield Town Co., 14 Kan. 390.

Kentucky.— Durrett *v.* Stewart, 88 Ky. 665, 11 S. W. 773, 11 Ky. L. Rep. 172; Turnbow *v.* Broach, 12 Bush 455; Sandford *v.* Smith, 5 Bush 471; Sievers *v.* Martin, 82 S. W. 631, 26 Ky. L. Rep. 904; Hill *v.* Spaulding, 55 S. W. 204, 21 Ky. L. Rep. 1383.

Louisiana.— Hall *v.* Bossier Levee Dist. Com'rs, 111 La. 913, 35 So. 976; Walker *v.* Walker, 37 La. Ann. 107; State *v.* Judges Orleans Parish Ct. of App., 34 La. Ann. 1220; Gilmer *v.* O'Neal, 32 La. Ann. 979; Durham *v.* Williams, 32 La. Ann. 962; Louisiana Levee Co. *v.* State, 31 La. Ann. 250; Concordia Parish *v.* Hernandez, 31 La. Ann. 158; Fowler *v.* Stevens, 29 La. Ann. 353; Dalton *v.* Viosca, 22 La. Ann. 251; Betat *v.* Mougin, 17 La. Ann. 289; McQueen *v.* Sandel, 15 La. Ann. 140; Dubose *v.* Carroll Parish Levee Com'rs, 11 La. Ann. 165; Webster *v.* Smith, 6 La. Ann. 719; Taylor *v.* Normand, 12 Rob. 240; Krœutler *v.* U. S. Bank, 11 Rob. 213, 12 Rob. 456; Erwin *v.* Bissell, 17 La. 92; Peire *v.* Martin, 14 La. 64. But see Dickson *v.* Dickson, 32 La. Ann. 272, holding that a plaintiff, whose objection to the introduction of evidence to support a certain allegation in defendant's answer is sustained, cannot afterward ask that such allegation be considered as involving an admission by defendant.

Maine.— Barnes *v.* Taylor, 29 Me. 514.

Maryland.— Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488; Mobberly *v.* Mobberly, 60 Md. 376; Armstrong *v.* Fahnestock, 19 Md. 58; Ridgely *v.* Bond, 18 Md. 433.

Massachusetts.— Morton *v.* Clark, 181 Mass. 134, 63 N. E. 409; Washburn Crosby Co. *v.* Boston, etc., R. Co., 180 Mass. 252, 62 N. E. 590; Snowling *v.* Plummer Granite Co., 108 Mass. 100; Boston Acid Mfg. Co. *v.* Moring, 15 Gray 211; Tyler *v.* Mather, 9 Gray 177; Rundlett *v.* Weeber, 3 Gray 263.

Michigan.— Carver *v.* Detroit, etc., Plank-Road Co., 126 Mich. 458, 85 N. W. 1082; Wiesinger *v.* Benton Harbor First Nat. Bank, 106 Mich. 291, 64 N. W. 59.

Minnesota.— Reilly *v.* Bader, 46 Minn. 212, 48 N. W. 909; Bean *v.* Schmidt, 43 Minn. 505, 46 N. W. 72. But see Scarles *v.* Thompson, 18 Minn. 316, where plaintiff alleged false representations and defendant filed such an answer that the falsity was technically admitted, but plaintiff's own evidence showed its truth, plaintiff was not allowed to stand on defendant's admission, and the action was held properly dismissed.

Mississippi.— Torre *v.* Jeanin, 76 Miss. 898, 25 So. 860; Parkhurst *v.* McGraw, 24 Miss. 134.

Missouri.— Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758; Knoop *v.* Kelsey, 102 Mo. 291, 14 S. W. 110, 22 Am. St. Rep. 777; Cole County *v.* Madden, 91 Mo. 585, 4 S. W. 397; Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209; Weil *v.* Posten, 77 Mo. 284; Kuhn *v.* Weil, 73 Mo. 213; Donnan *v.* Intelligencer Printing, etc., Co., 70 Mo. 168; Chapman *v.* Callahan, 66 Mo. 299; Capital Bank *v.* Armstrong, 62 Mo. 59; Bruce *v.* Sims, 34 Mo. 246; Cousins *v.* Bowling, 100 Mo. App. 452, 74 S. W. 168; Bushnell *v.* Farmers' Mut. Ins. Co., 91 Mo. App. 523; McAdow *v.* Miltenberger, 75 Mo. App. 346.

Montana.— Wulf *v.* Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723.

Nebraska.— Faulkner *v.* Gilbert, 61 Nebr. 602, 85 N. W. 843; Knight *v.* Finney, 59 Nebr. 274, 80 N. W. 912; Bradfield *v.* Sewall, 58 Nebr. 637, 79 N. W. 615; Troup *v.* Horbach, 53 Nebr. 795, 74 N. W. 326; Foley *v.* Holtry, 41 Nebr. 563, 59 N. W. 781.

Nevada.— Alexander *v.* Archer, 21 Nev. 22, 24 Pac. 373.

New Jersey.— Schenck *v.* Schenck, 10 N. J. L. 276; McGee *v.* Smith, 16 N. J. Eq. 462; Lippincott *v.* Ridgway, 11 N. J. Eq. 526.

New Mexico.— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

New York.— Ferris *v.* Hard, 135 N. Y. 354, 32 N. E. 129; Quimby *v.* Carhart, 133 N. Y. 579, 30 N. E. 972; Holmes *v.* Jones, 121 N. Y. 461, 24 N. E. 701; Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Potter *v.* Smith, 70 N. Y. 299; Van Dyke *v.* Maguire, 57 N. Y. 429; Cook *v.* Barr, 44 N. Y. 156; Paige *v.* Willet, 38 N. Y. 28; Rosenthal *v.* Rudnick, 65 N. Y. App. Div. 519, 72 N. Y. Suppl. 804; Ballou *v.* Parsons, 11 Hun 602; Hunt *v.* Mitchell, 1 Hun 621; Sheppard *v.* Hamilton, 29 Barb. 156; Van Orman *v.* Phelps, 9 Barb. 500; Simis *v.* Davidson, 54 N. Y. Super. Ct. 235; Bruce *v.* Kelly, 39 N. Y. Super. Ct. 27; Crosbie *v.* Leary, 6 Bosw. 312; Bader *v.* New York, 51 Misc. 358, 101 N. Y. Suppl. 351; Cunningham *v.* Trolan, 37 Misc. 822, 76 N. Y. Suppl. 890; Hong Sing *v.* Wolf Fein, 33 Misc. 608, 67 N. Y. Suppl. 1109; Stuyvesant *v.* Grissler, 12 Abb. Pr. N. S. 6; Donovan *v.* New York Bd. of Education, 55 How. Pr. 176; Ayres *v.* Scribner, 17 Wend. 407. *Compare* Case *v.* Pharis, 106 N. Y. 114, 12 N. E. 431; Woodruff *v.* Cook, 25 Barb. 505.

North Carolina.— Henning *v.* Warner, 109 N. C. 406, 14 S. E. 317; Brooks *v.* Brooks, 90 N. C. 142; Grant *v.* Burgwyn, 88 N. C. 95; Statesville Bank *v.* Pinkers, 83 N. C. 377; Rand *v.* Raleigh State Nat. Bank, 77 N. C. 152; Hardy *v.* Williams, 33 N. C. 499; Pass *v.* Lea, 32 N. C. 410.

Ohio.— Peckham Iron Co. *v.* Harper, 41 Ohio St. 100; Morton *v.* Outland, 18 Ohio St. 383; Carlisle *v.* Foster, 10 Ohio St. 198; Wallace *v.* McMicken, 2 Disn. 564; Fisher *v.*

ings.[65] But matter which constitutes mere *descriptio personæ* does not include

Tryon, 15 Ohio Cir. Ct. 541, 8 Ohio Cir. Dec. 556.

Oklahoma.— Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874.

Oregon.— La Follett *v.* Mitchell, 42 Oreg. 465, 69 Pac. 916, 95 Am. St. Rep. 780.

Pennsylvania.— Youghiogheny River Coal Co. *v.* Hopkins, 198 Pa. St. 343, 48 Atl. 19; Garber *v.* Doerson, 117 Pa. St. 162, 11 Atl. 777; Taylor *v.* Parkhurst, 1 Pa. St. 197; Wills *v.* Kane, 2 Grant 60; Spaulding *v.* Eimers, 3 Pittsb. 306.

South Carolina.— Tant *v.* Guess, 37 S. C. 489, 16 S. E. 472; Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134; Tompkins *v.* Augusta, etc., R. Co., 21 S. C. 420.

South Dakota.— J. I. Case Threshing Mach. Co. *v.* Pederson, 6 S. D. 140, 60 N. W. 747.

Tennessee.— House *v.* Wakefield, 2 Coldw. 325; Latimer *v.* Rogers, 3 Head 692; Pitts *v.* Gilliam, 1 Head 549; Lea *v.* Maxwell, 1 Head 365; Hamilton *v.* Zimmerman, 5 Sneed 39; Taylor *v.* Badoux, (Ch. App. 1899) 58 S. W. 919. *Compare* U. S. Saving, etc., Co. *v.* Miller, (Ch. App. 1897) 47 S. W. 17.

Texas.— Hancock *v.* Dimon, 17 Tex. 369; McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484; Hartz *v.* Owen, (Civ. App. 1894) 27 S. W. 42.

Washington.— Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409; Tingley *v.* Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.

Wisconsin.— Wilson *v.* Groelle, 83 Wis. 530, 53 N. W. 900; Seymour *v.* Seymour, 56 Wis. 314, 14 N. W. 371; Denton *v.* White, 26 Wis 679; Wanzer *v.* Howland, 10 Wis. 8.

Wyoming.— Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

United States.— Balloch *v.* Hooper, 146 U. S. 363, 13 S. Ct. 128, 36 L. ed. 1008; Northern Pac. R. Co. *v.* Paine, 119 U. S. 561, 7 S. Ct. 323, 30 L. ed. 513; Sullivan *v.* Colby, 71 Fed. 460, 18 C. C. A. 193; Kansas, etc., R. Co. *v.* Morton, 61 Fed. 814, 10 C. C. A. 92; Central R. Co. *v.* Stoermer, 51 Fed. 518, 2 C. C. A. 360; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

England.— Bingham *v.* Stanley, 2 Q. B. 117, 1 G. & D. 237, 6 Jur. 389, 10 L. J. Q. B. 319, 42 E. C. L. 598; Vooght *v.* Winch, 2 B. & Ald. 662, 21 Rev. Rep. 446; Needham *v.* Fraser, 1 C. B. 815, 3 D. & L. 190, 9 Jur. 734, 14 L. J. C. P. 256, 50 E. C. L. 815; Lloyd *v.* Walkey, 9 C. & P. 771, 38 E. C. L. 446; Guy *v.* Gregory, 9 C. & P. 584, 38 E. C. L. 342; Edmunds *v.* Groves, 5 Dowl. P. C. 775, 6 L. J. Exch. 203, M. & H. 211, 2 M. & W. 642; Boileau *v.* Rutlin, 2 Exch. 665, 12 Jur. 899; Bonzi *v.* Stewart, 11 L. J. C. P. 228, 4 M. & G. 295, 5 Scott N. R. 1, 43 E. C. L. 158.

See 39 Cent. Dig. tit. "Pleading," §§ 81, 82. See also EVIDENCE, 16 Cyc. 1048, 1049.

Facts admitted are equivalent to findings.— Miller *v.* Head Camp W. W., 45 Oreg. 192, 77 Pac. 83.

The general principle applies on appeal and error, and a party cannot assume a position in the appellate court inconsistent with the allegations in his pleadings. Barbour *v.* Whitlock, 4 T. B. Mon. (Ky.) 180; Payne *v.* Hardesty, 14 S. W. 348, 12 Ky. L. Rep. 336; Candler *v.* Stange, 53 Mich. 479, 19 N. W. 154.

Exceptions to rule.—Where, however, a fact alleged in the complaint is expressly denied in the answer and issue is joined thereon, neither party can rest upon the allegation of the other, but the issue must be decided according to the facts appearing in the case. Groth *v.* Kersting, 23 Colo. 213, 47 Pac. 393; Oneida Steel Pulley Co. *v.* New York Leather Belting Co., 120 N. Y. App. Div. 625, 105 N. Y. Suppl. 534; Winslow *v.* McCall, 32 Barb. (N. Y.) 241. But see Cavender *v.* Cavender, 8 Fed. 641, 3 McCrary 158. So a party is not estopped, it seems, from showing another consideration for a contract than the one stated and relied on in his complaint. Shugars *v.* Shugars, 105 Md. 336, 66 Atl. 273; Day *v.* Perkins, 2 Sandf. Ch. (N. Y.) 359; Russell *v.* Kinney, 1 Sandf. Ch. (N. Y.) 34. The rule will not be applied when it will operate to enforce an illegal contract. Boyett *v.* Standard Chemical, etc., Co., 146 Ala. 554, 41 So. 756.

The rule does not apply to statements in an affidavit subsequently found to be false, where the affidavit is withdrawn. Hammond *v.* Connolly, 63 Tex. 62.

An allegation which is rather of an assertion than of a fact will not estop the pleader. Gillespie *v.* Mather, 10 Pa. St. 28.

Statements in exhibits.— But a printed statement on the fly leaf of a book which is made part of the answer, merely to show the character of the work and to enable the court to determine other issues, that the book is copyrighted, will not preclude defendant from showing that it is not copyrighted. Coffey *v.* Hendrick, 65 S. W. 127, 23 Ky. L. Rep. 1328.

Allegations held not admissions see Livesay *v.* Denver First Nat. Bank, 36 Colo. 526, 86 Pac. 102, 6 L. R. A. N. S. 598; Kreuger *v.* Walker, 80 Iowa 733, 45 N. W. 871; Cunningham *v.* Colonial, etc., Mortg. Co., 57 Kan. 678, 47 Pac. 830; Com. *v.* Moore, 3 Pick. (Mass.) 194; Rosenthal *v.* Rudnick, 65 N. Y. App. Div. 519, 72 N. Y. Suppl. 804; Wysong *v.* Meyer, 58 N. Y. App. Div. 422, 69 N. Y. Suppl. 286; Harris *v.* State Bank, 49 Misc. (N. Y.) 458, 97 N. Y. Suppl. 1044.

65. Estill *v.* Holmes, 3 Rob. (La.) 134; Mason *v.* Mason, 12 La. 589; Vavasseur *v.* Bayon, 11 Mart. (La.) 639.

Consistency.— There is no estoppel where a present claim is entirely consistent with a concession made in a prior pleading. Church *v.* Clapp, 47 Mich. 257, 10 N. W. 362.

the party using it.[66] And the allegations or admissions in one count or defense are not conclusive upon a party on the trial of another and distinct count or defense.[67]

2. Conclusions and Immaterial Matter. A party is not bound by averments or admissions of immaterial facts,[68] even though immaterial only at the stage of the pleadings when made,[69] nor by admissions or averments of legal conclusions.[70] Thus a party is not bound by admissions as to the legal effect of a written instrument,[71] nor by the name given to it.[72]

3. Admissions Through Ignorance or Mistake. Admissions or allegations made inconsiderately by mistake or inadvertence, or in ignorance of the facts, will not operate as an estoppel where no prejudice has resulted, and may be withdrawn or repudiated,[73] unless the ignorance was the result of gross negligence;[74] but this does not apply where the mistake is made respecting the legal effect of facts.[75]

66. Greig *v.* Clement, 20 Colo. 167, 37 Pac. 960; Fryer *v.* Breeze, 16 Colo. 323, 26 Pac. 817.

67. *Iowa.*— Burns *v.* Chicago, etc., R. Co., 110 Iowa 385, 81 N. W. 794.

Maine.— Knox *v.* Silloway, 10 Me. 201.

Massachusetts.— Blackington *v.* Johnson, 126 Mass. 21; Lyons *v.* Ward, 124 Mass. 364. *Contra*, see Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114; Jackson *v.* Stetson, 15 Mass. 48.

New Hampshire.— Hall *v.* Clement, 41 N. H. 166; Kimball *v.* Bellows, 13 N. H. 58; Chapman *v.* Sloan, 2 N. H. 464; Cilley *v.* Jenness, 2 N. H. 89.

New York.— Starkweather *v.* Kittle, 17 Wend. 20.

Texas.— See Pope *v.* American Surety Co., 42 Tex. Civ. App. 152, 93 S. W. 480.

England.— Harington *v.* Macmorris, 1 Marsh. 33, 5 Taunt. 228, 4 E. C. L. 123; Gould *v.* Oliver, 2 M. & G. 208, 2 Scott N. R. 241, 40 E. C. L. 565; Stracey *v.* Blake, 1 M. & W. 168, Tyrw. & G. 528.

See 39 Cent. Dig. tit. "Pleading," § 81 *et seq.*

Compare Farrell *v.* Hennesy, 21 Wis. 632, holding that a general denial in an answer will not put plaintiff upon proof of facts elsewhere admitted in such answer. *Contra*, see Losch *v.* Pickett, 36 Kan. 216, 12 Pac. 822.

68. *Colorado.*— Yates *v.* Hurd, 8 Colo. 343, 8 Pac. 575.

Connecticut.— Havens *v.* Hartford, etc., R. Co., 28 Conn. 69.

Iowa.— Arrison *v.* Supreme Council M. T., 129 Iowa 303, 105 N. W. 580.

Kentucky.— Gentry *v.* McMinnis, 3 Dana 382.

Louisiana.— New Orleans *v.* Sheppard, 10 La. Ann. 268.

New York.— Ferris *v.* Hard, 135 N. Y. 354, 32 N. E. 129.

Ohio.— Crofton *v.* Cincinnati Bd. of Education, 26 Ohio St. 571.

Pennsylvania.— Lash *v.* Spayd, 141 Pa. St. 360, 21 Atl. 641; *In re* Treffeison, 3 Kulp 308.

United States.— Blanks *v.* Klein, 53 Fed. 436, 3 C. C. A. 585; *In re* Kitzinger, 14 Fed. Cas. No. 7,861.

See 39 Cent. Dig. tit. "Pleading," § 85.

An argumentative admission as to matters immaterial to and not in issue will not operate by way of estoppel. Mason *v.* Alston, 9 N. Y. 28, 59 Am. Dec. 515.

In Missouri, however, the pleader is estopped by unnecessary statements or averments. Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758; Bruce *v.* Sims, 34 Mo. 251. But see Henderson *v.* Henderson, 55 Mo. 534.

69. Foley *v.* Holtry, 43 Nebr. 133, 61 N. W. 120, 41 Nebr. 563, 59 N. W. 781.

70. *Illinois.*— Mulvey *v.* Gibbons, 87 Ill. 367.

Massachusetts.— Sullivan *v.* Fall River, 144 Mass. 579, 12 N. E. 553.

Nevada.— Orr Water Ditch Co. *v.* Reno Water Co., 19 Nev. 60, 6 Pac. 72.

New York.— Chatfield *v.* Simonson, 92 N. Y. 209; Union Bank *v.* Bush, 36 N. Y. 631; Brewster *v.* Striker, 2 N. Y. 19; Bowers *v.* Smith, 5 Silv. Sup. 107, 8 N. Y. Suppl. 226; Cutting *v.* Lincoln, 9 Abb. Pr. N. S. 436.

Tennessee.— Verhine *v.* Ragsdale, 96 Tenn. 532, 35 S. W. 556.

The mere statement in a pleading that the claim was due at a certain time is not binding on the pleader, where it appears from the facts that the right of action did not accrue until a later date. Walden *v.* Crafts, 2 Abb. Pr. (N. Y.) 301.

71. Thayer *v.* Arnold, 32 Mich. 336.

Construction of lease.— In an action to reform a lease, in which the complainant dismissed his bill, the construction of the lease in the answer is not conclusive on the latter. Siegel *v.* Colby, 176 Ill. 210, 52 N. E. 917 [*affirming* 61 Ill. App. 315].

72. St. Joseph, etc., R. Co. *v.* St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.

73. Lockhart *v.* Ballard, 113 N. C. 292, 18 S. E. 341; Smith *v.* Fowler, 12 Lea (Tenn.) 163; Brandeis *v.* Neustadtl, 13 Wis. 142.

Where the real fact was within the knowledge of the adverse party the rule is specially applicable. Watkins *v.* Cawthon, 33 La. Ann. 1194.

74. Smith *v.* Cramer, 39 Iowa 413. *Compare* Fagan *v.* Wiley, 49 Oreg. 480, 90 Pac. 910.

75. Wanzer *v.* Howland, 10 Wis. 8.

4. Pleadings Withdrawn, Abandoned, or Amended.[76] Generally averments or admissions in pleadings subsequently withdrawn, abandoned, or stricken out are not conclusive against the pleader.[77] So a party is not concluded in respect to an amended pleading by an allegation or admission in the original pleading,[78] but such admissions may be introduced in evidence against the pleader subject to contradiction or explanation.[79] It follows that a party may, where such an amendment is allowed, contradict, by amendment, allegations in former pleadings,[80] although it has been held that where such allegations constitute distinct items of proof as distinguished from ultimate facts, the party is bound by them notwithstanding his amendment.[81]

5. Persons Bound. Only the pleader and his privies are bound by the allegations and admissions in a pleading.[82] The admissions of an executor or administrator as such bind the estate he represents,[83] but do not bind him personally;[84] and heirs are estopped by admissions of the intestate.[85] Nominal defendants cannot, by their admissions, bind the real defendants.[86] Co-parties not joining

76. See also Evidence, 16 Cyc. 971, 1049.

Whether court will grant leave to amend by denying facts admitted see *infra*, VII, A, 11, d, (II), (B).

77. Pfister *v.* Wade, 69 Cal. 136, 10 Pac. 369; Mecham *v.* McKay, 37 Cal. 154, 165; Mahoney *v.* Butte Hardware Co., 19 Mont. 377, 48 Pac. 545; Wildey Lodge No. 21 I. O. O. F. *v.* Paris, (Tex. Civ. App. 1904) 81 S. W. 99; Marthinson *v.* Winyah Lumber Co., 125 Fed. 633. See also Hammond *v.* Connolly, 63 Tex. 62. And see Evidence, 16 Cyc. 1049. But see Coles *v.* Perry, 7 Tex. 109, where the court said that where a defendant has abandoned his pleas and filed new ones, he is bound as much by the admissions in the abandoned pleas as by those contained in the pleas ultimately relied on. *Compare* Fite *v.* Black, 92 Ga. 363, 17 S. E. 349.

Pleading stricken out on motion of party relying on its conclusiveness.— A party cannot avail himself of admissions in pleadings which have been stricken out on his own motion. Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279.

78. Burns *v.* Chicago, etc., R. Co., 110 Iowa 385, 81 N. W. 794; Reemsnyder *v.* Reemsnyder, 75 Kan. 565, 89 Pac. 1014; Cummings *v.* Hoffman, 113 N. C. 267, 18 S. E. 170.

79. *Georgia.*— Alabama Midland R. Co. *v.* Guilford, 114 Ga. 627, 40 S. E. 794.

Indiana.— Boots *v.* Canine, 94 Ind. 408.

Iowa.— Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

Kansas.— Juneau *v.* Stunkle, 40 Kan. 756, 20 Pac. 473.

Missouri.— Murphy *v.* St. Louis Type Foundry, 29 Mo. App. 541.

New York.— New York, etc., Transp. Co. *v.* Hurd, 44 Hun 17; Fogg *v.* Edwards, 20 Hun 90; Strong *v.* Dwight, 11 Abb. Pr. N. S. 319.

North Carolina.— Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33.

See 39 Cent. Dig. tit. "Pleading," § 86.

Contra.— Wheeler *v.* West, 71 Cal. 126, 11 Pac. 871; Ponce *v.* McElvy, 51 Cal. 222.

80. *California.*— Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076; Ralphs *v.* Hensler, 114 Cal. 196, 45 Pac. 1062.

Georgia.— Alabama Midland R. Co. *v.* Guilford, 114 Ga. 627, 40 S. E. 794.

Massachusetts.— Wilson *v.* Nevers, 20 Pick. 20.

New York.— Houtaling *v.* Lloyd, 15 N. Y. Suppl. 424.

Texas.— Coats *v.* Elliott, 23 Tex. 606.

Wisconsin.— Brandeis *v.* Neustadtl, 13 Wis. 142.

See 39 Cent. Dig. tit. "Pleading," § 81.

Amendment after reversal.— An averment in a petition that defendant received certain moneys "in trust and for the use and benefit of plaintiff" for a specified purpose is not such an admission as will estop plaintiff from amending the pleadings after reversal and proving to the contrary on another trial. Iowa County *v.* Huston, 43 Iowa 485.

An affirmative allegation of negligence in one action will not estop plaintiff to amend his petition in a subsequent action, by alleging his ignorance of defendant's negligence until after the institution of the first action, and that because of such ignorance he was induced to enter into an accord and satisfaction with defendant. Savannah, etc., R. Co. *v.* Pollard, 116 Ga. 297, 42 S. E. 525.

81. Johnson *v.* McGrew, 42 Iowa 555; Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514.

82. Booth *v.* Lenox, 45 Fla. 191, 34 So. 566; Peck *v.* Ingraham, 28 Miss. 246.

Effect of plea or answer of one defendant on rights of others see *infra*, IV, A, 4, c.

Mistake of predecessor in interest.— An administrator is not estopped by a pleading of his predecessor containing mistaken admissions. Lusk *v.* Benton, 30 La. Ann. 686.

A corporation is not estopped by the allegations in pleadings filed by stock-holders individually. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468.

83. Carr *v.* Rowland, 14 Tex. 275.

84. Martin *v.* Boler, 13 La. Ann. 369.

85. Layne *v.* Layne, 90 S. W. 555, 28 Ky. L. Rep. 810.

86. Brown *v.* Madison Police Jury, 4 La. Ann. 180.

in the pleading are not bound,[87] nor is the admission of one partner conclusive upon another.[88]

6. Admissions Considered as an Entirety.[89] A party wishing to avail himself of an admission or averment in a pleading of the opposing party must accept it as an entirety.[90]

III. Declaration, Complaint, Petition, or Statement.

A. In General — 1. Definitions. Various terms are used in the several jurisdictions to designate the first pleading filed by plaintiff. At common law it was called a declaration,[91] under the codes it is in some states called a complaint [92] and in others a petition,[93] while in a few states it is called a statement.[94] An information is the name usually given to a complaint preferred on behalf of the state in a civil cause.[95]

2. Statutory Provisions. In most states there are statutes which define with more or less particularity the form and requisites of the declaration or other pleading which contains the statement of plaintiff's cause of action. Some of these statutes are limited in scope and vary the common-law practice only in certain specified particulars.[96] The codes, so-called, are more radical. The common provision of the codes of procedure is that the complaint shall contain a plain and concise statement of the facts constituting plaintiff's cause of action, without unnecessary repetition.[97] It follows that a pleading which satisfies all the require-

87. *Kentucky.*— Crump *v.* Bennett, 2 Litt. 209.

Maryland.— Reese *v.* Reese, 41 Md. 554.

New York.— Swift *v.* Kingsley, 24 Barb. 541; Woodworth *v.* Bellows, 4 How. Pr. 24, 1 Code Rep. 129.

Texas.— Walton *v.* Talbot, 1 Tex. Unrep. Cas. 511.

Washington.— Graham *v.* Smart, 42 Wash. 205, 84 Pac. 824.

88. Grunenberg *v.* Smith, 58 Ill. App. 281.

89. Use as evidence see Evidence, 16 Cyc. 1049.

90. Schlesinger *v.* McDonald, 106 N. Y. App. Div. 570, 94 N. Y. Suppl. 721; Grant *v.* Pratt, 52 N. Y. App. Div. 540, 65 N. Y. Suppl. 486; Shrady *v.* Shrady, 42 N. Y. App. Div. 9, 58 N. Y. Suppl. 546; Vanderbilt *v.* Schreyer, 21 Hun (N. Y.) 537 [*reversed* on other grounds in 91 N. Y. 392]; Goodyear *v.* De la Vergne, 10 Hun (N. Y.) 537. But see Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715, holding that where the answer admits material allegations of the complaint but accompanies the concession with a statement of affirmative matter in explanation by way of defense, plaintiff may avail himself of the admissions without the qualifications.

91. 1 Chitty Pl. (16th Am. ed.) 264.

92. See the codes and practice acts of the several states. And see Wabash R. Co. *v.* Young, 154 Ind. 24, 55 N. E. 853; McMath *v.* Parsons, 26 Minn. 246, 2 N. W. 703; Talbot *v.* Garretson, 31 Oreg. 256, 49 Pac. 978; Nance *v.* Georgia, etc., R. Co., 35 S. C. 307, 309, 14 S. E. 629 [*quoting* Chalmers *v.* Glenn, 18 S. C. 469, 471].

Does not include verification.— In the ordinary use of these legal terms, a verification forms no part of a complaint. The latter is the first pleading in an action, containing a statement of a cause of action, with a demand for the appropriate relief to which the party may be entitled, while its verification is a separate and distinct proceeding, taken for the purpose of verifying the truth of the statements made in the pleading. If radically defective, the complaint may be made the subject of a demurrer, but its verification never. McMath *v.* Parsons, 26 Minn. 246, 247, 2 N. W. 703 [*citing* Johnson *v.* Jones, 2 Nebr. 126; George *v.* McAvoy, 6 How. Pr. (N. Y.) 200]. Verification generally see *infra*, VIII, B.

93. See the codes and practice acts of the several states. And see Atchison, etc., R. Co. *v.* Rice, 36 Kan. 599, 14 Pac. 229.

94. See Dixon *v.* Sturgeon, 6 Serg. & R. (Pa.) 25.

95. People *v.* McClellan, 54 Misc. (N. Y.) 130, 105 N. Y. Suppl. 844 [*reversed* on other grounds in 119 N. Y. App. Div. 416, 104 N. Y. Suppl. 447]. See, generally, Information in Civil Cases, 22 Cyc. 716.

96. See the statutes of the several states. And see McNamara *v.* McDonald, 69 Conn. 484, 38 Atl. 54, 61 Am. St. Rep. 48; New York Breweries *v.* Baker, 68 Conn. 337, 36 Atl. 785; Sanders *v.* Houston Guano, etc., Co., 107 Ga. 49, 32 S. E. 610; Doebler *v.* Snavely, 5 Watts (Pa.) 225; Meals *v.* Wiley, 12 Serg. & R. (Pa.) 96; Prince *v.* Linderman, 12 Pa. Co. Ct. 402; Brennan *v.* Franey, 5 Pa. Co. Ct. 212.

97. See the statutes in the various code states. And see Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410; Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37; Coleman *v.* Jaggers, 12 Ida. 125, 85 Pac. 894 (holding that under Rev. St. (1887) § 4168, the complaint is only required to contain the title of the court and cause, a statement of the facts constituting the cause of action and the demand

ments of the statute states a good cause of action.[98] Substantial compliance with the statute is sufficient.[99] But the allegations necessary in a given case are generally the same as at common law.[1] And the code rule requiring the allegation of facts is generally held not to render invalid a declaration framed in substantially the common-law form of *indebitatus assumpsit*.[2] Short forms of declarations or complaints on certain written instruments are in many states specially authorized by statute.[3] Where a statute, in prescribing a form of declaration, dispenses with an averment which would otherwise be necessary, the statute is deemed to stand in place of the averment.[4] The mechanical arrangement of the pleading is a matter to be determined by the taste of the pleader, subject only to the express limitations imposed by statute.[5]

3. Caption or Title. The title is a short memorandum at the top of the pleading consisting of the name of the court, the names of the parties, and the name of the pleading. A substantial compliance with the statute as to the title is

for relief, and the district court can grant such relief, whether in equity or at law, as the parties are entitled to under their allegations and proof); Ackerman *v.* Green, 195 Mo. 124, 93 S. W. 255; Tucker *v.* Rushton, 2 Code Rep. (N. Y.) 59 (holding that a complaint might be sufficient, although the facts were informally stated).

Under the Judicature Act, order 19, rule 4, all that is required is a concise statement of the material facts upon which plaintiff relies. Evelyn *v.* Evelyn, 42 L. T. Rep. N. S. 248, 28 Wkly. Rep. 531.

98. Kemper *v.* Lord, 6 Kan. App. 64, 49 Pac. 638.

99. Atlanta, etc., R. Co. *v.* Smith, 119 Ga. 667, 46 S. E. 853.

1. *California.*— Miller *v.* Van Tassel, 24 Cal. 459.

Indiana.— Toledo, etc., R. Co. *v.* Lurch, 23 Ind. 10.

Missouri.— Citizens' Bank *v.* Tiger Tail Mill, etc., Co., 152 Mo. 145, 53 S. W. 902; Huston *v.* Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795.

New Mexico.— Donalson *v.* San Miguel County, 1 N. M. 263.

North Carolina.— Lassiter *v.* Roper, 114 N. C. 17, 18 S. E. 946; Parsley *v.* Nicholson, 65 N. C. 207.

Oklahoma.— Phelps, etc., Co. *v.* Halsell, 11 Okla. 1, 65 Pac. 340; Casey *v.* Mason, 8 Okla. 665, 59 Pac. 252.

Pennsylvania.— Boyd *v.* Gordon, 6 Serg. & R. 53; Emmens *v.* Gebhart, 7 Pa. Co. Ct. 522; Kauffman *v.* Jacobs, 4 Pa. Co. Ct. 462.

Wisconsin.— Sell *v.* Mississippi River Logging Co., 88 Wis. 581, 60 N. W. 1065; Merriman *v.* McCormick Harvesting Mach. Co., 86 Wis. 142, 56 N. W. 743; Williams *v.* Brunson, 41 Wis. 418.

See 39 Cent. Dig. tit. "Pleading," § 96.

Code rule substantially common-law rule.— "Section 3219, Comp. Laws, Utah 1888, declares the rule for stating the cause of action as follows: 'The complaint must contain . . . a statement of the facts constituting the cause of action, in ordinary and concise language.' The above is, in substance, the common-law rule. 'Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense. . . . Facts only are to be stated, and not arguments or inferences, or matter of law.' 1 Chitty Pl. pp. 213, 214." Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 499, 45 Pac. 629.

2. *Arkansas.*— Ball *v.* Fulton County, 31 Ark. 379.

Colorado.— Henry Inv. Co. *v.* Semonian, 40 Colo. 269, 90 Pac. 682; Campbell *v.* Shiland, 14 Colo. 491, 23 Pac. 324; Gale *v.* James, 11 Colo. 540, 19 Pac. 446.

Kansas.— Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476.

Nebraska.— Tessier *v.* Reed, 17 Nebr. 105, 22 N. W. 225.

Nevada.— See McManus *v.* Ophir Silver Min. Co., 4 Nev. 15.

New York.— Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Worthington *v.* Worthington, 100 N. Y. App. Div. 332, 91 N. Y. Suppl. 443.

Wisconsin.— Granness *v.* Hooker, 29 Wis. 65.

Compare Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

3. *Arkansas.*— Gaines *v.* Craig, 24 Ark. 477; Logan *v.* Lee, 10 Ark. 585; Hanly *v.* Mooney, 8 Ark. 461.

Georgia.— Stansell *v.* Corley, 81 Ga. 453, 8 S. E. 868.

Michigan.— Conrad Seipp Brewing Co. *v.* McKittrick, 86 Mich. 191, 48 N. W. 1086; Michael *v.* Tuttle, 37 Mich. 502; Cate *v.* Patterson, 25 Mich. 191.

Nebraska.— Pollock *v.* Stanton County, 57 Nebr. 399, 77 N. W. 1081.

New York.— Broome *v.* Taylor, 76 N. Y. 564; Tooker *v.* Arnoux, 76 N. Y. 397; Prindle *v.* Caruthers, 15 N. Y. 425.

Pennsylvania.— Clark *v.* Dotter, 54 Pa. St. 215; Drake *v.* Philadelphia, etc., R. Co., 5 Pa. Co. Ct. 21.

See 39 Cent. Dig. tit. "Pleading," § 96. See also *supra*, II, G, 8.

Declaration upon note or draft see Commercial Paper, 8 Cyc. 96 *et seq.*

4. Shinloub *v.* Ammerman, 7 Ind. 347.

5. Carter *v.* Penn, 79 Ga. 747, 4 S. E. 896; Lukis *v.* Allen, 45 La. Ann. 1447, 14 So. 186; Shaffer *v.* Maddox, 9 Nebr. 205, 2 N. W. 464.

sufficient.[6] And generally a defect in the title is deemed a merely formal defect,[7] which is waived by answering to the merits.[8] A requirement as to the style of process does not apply to a declaration, even where the action is commenced by service of declaration with rule to plead indorsed.[9] Where a declaration is wrongly entitled, the remedy is by motion.[10] Under the code provisions abolishing the form of distinction between actions at law and suits in equity, it has been held immaterial whether the complaint is entitled as at law or in equity.[11] The caption is no part of a count proper.[12]

4. Designation of Court. The court in which the action is brought should be designated with substantial accuracy,[13] but technical defects will not render the pleading insufficient.[14] It is sufficient to state it in the caption.[15] Where, however, the pleading wholly fails to indicate the court, there is no jurisdiction,[16] and the proceedings will be set aside.[17] And where a pleading is required to be addressed to the court, such address is an essential part of the pleading,[18] and it is a fatal error to address it to a court different from that in which it is filed.[19]

5. Designation of Term. The first pleading filed should be entitled in the term to which the writ is returnable,[20] and after the time when the cause of action accrues.[21]

6. Venue.[22] The rule at common law was that every material and traversable

6. Ammerman *v.* Crosby, 26 Ind. 451.

7. *Indiana.*— Citizens St. R. Co. *v.* Shepherd, 29 Ind. App. 412, 62 N. E. 300.

Iowa.— Smith *v.* Watson, 28 Iowa 218. But see Garretson *v.* Hays, 70 Iowa 19, 29 N. W. 786, where the paper filed was held not to be sufficient.

Missouri.— State *v.* Patton, 42 Mo. 530; Beattie *v.* Lett, 28 Mo. 596.

Nebraska.— Livingston *v.* Coe, 4 Nebr. 379.

Canada.— Williamson *v.* Williamson, 8 Can. L. J. 108; Williston *v.* Pierce, 7 N. Brunsw. 162; Cluxton *v.* Dickson, 7 Ont. Pr. 3; Smith *v.* Thompson, 6 Ont. Pr. 109; Richardson *v.* Ranney, 2 C. L. Chamb. (U. C.) 71; Ross *v.* Cool, 9 U. C. C. P. 94; Bristowe *v.* Pattenson, 6 U. C. Q. B. O. S. 107; Averill *v.* Cameron, 3 U. C. Q. B. O. S. 176.

See 39 Cent. Dig. tit. "Pleading," § 97.

8. Clary's Estate, 112 Cal. 292, 44 Pac. 569.

Waiver of defects by answer generally see *infra*, XIV, B, 3.

9. Penfold *v.* Slyfield, 110 Mich. 343, 68 N. W. 226.

Style of process see Process.

10. People *v.* New York C. Pl., 18 Wend. (N. Y.) 534. See, generally, *infra*, XII, C, 1, c, (v).

11. Hayden *v.* Collins, 1 Cal. App. 259, 81 Pac. 1120; Anderson *v.* Hunn, 5 Hun (N. Y.) 79, holding that the court would grant such relief, legal or equitable, as the allegations in the complaint and proofs on the trial would demand.

12. West Chicago Park Com'rs *v.* Schillinger, 117 Ill. App. 525, so holding of an additional count.

13. Young *v.* Young, 18 Minn. 90; Gassett *v.* Palmer, 10 Fed. Cas. No. 5,265, 3 McLean 105.

Pleadings in territorial and provisional courts see Courts, 11 Cyc. 955.

14. Wolf *v.* Kennedy, 93 Ga. 219, 18 S. E. 433; Clark *v.* Comford, 45 La. Ann. 502, 12 So. 763; Lallande *v.* Terrill, 12 La. 7; Adams *v.* Lewis, 7 Mart. N. S. (La.) 400; Van Benthuysen *v.* Stevens, 14 How. Pr. (N. Y.) 70; Van Namee *v.* Peoble, 9 How. Pr. (N. Y.) 198; Walker *v.* Hubbard, 4 How. Pr. (N. Y.) 154; Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988.

15. Gassett *v.* Palmer, 10 Fed. Cas. No. 5,265, 3 McLean 105.

16. Jordan *v.* Brown, 71 Iowa 421, 32 N. W. 450; Garretson *v.* Hays, 70 Iowa 19, 29 N. W. 786.

17 Teal *v.* Tinney, 2 How. Pr. (N. Y.) 94. But see Smith *v.* Flack, 95 Ind. 116, where it was held merely a formal error, and not subject to demurrer.

18. Lukis *v.* Allen, 45 La. Ann. 1447, 14 So. 186.

19. Wadsworth *v.* Harris, 1 Rob. (La.) 96.

20. Van Alen *v.* Reynolds, 2 How. Pr. (N. Y.) 158; Craig *v.* Murdock, 12 Wend. (N. Y.) 293; Smith *v.* Muller, 3 T. R. 624; Symonds *v.* Parmenter, 1 Wils. C. P. 78; Murphy *v.* Burnham, 2 U. C. Q. B. 261. But see Evans *v.* Bridges, 4 Port. (Ala.) 348, where it was held unnecessary to entitle the declaration of any particular term.

21. People *v.* New York C. Pl., 18 Wend. (N. Y.) 534; Cheetham *v.* Lewis, 3 Johns. (N. Y.) 42; Dickinson *v.* Plaisted, 7 T. R. 474. But it has been held that when an action is commenced by declaration, where the cause of action accrues in vacation and the declaration is filed before the next term, the declaration should be entitled specially as of the preceding term, as, for instance, "Of January term, to wit, the thirteenth day of March, in the term of January, in the year, &c." Paul *v.* Graves, 5 Wend. (N. Y.) 76.

22. Demurrer because of failure to lay venue see *infra*, VI, F, 2, i.

Venue of actions see Venue.

allegation, if affirmative in form, should be laid with a venue; that is, should state the place at which the alleged fact happened.[23] In addition to this venue, which included the parish, town, or hamlet as well as the county, there was another laid in the margin of the declaration at its commencement stating merely the name of the county. But the reasons for the laying of this venue in the body of the declaration having gradually ceased to exist the practice has become, under the modern common-law procedure, a mere matter of form,[24] except in local actions.[25] And by express statutory provision an allegation of place is sometimes made unnecessary unless from the nature of the case place is material or traversable.[26] It is, however, held sufficient at common law to lay the venue in the margin of the declaration,[27] and although the action is local,[28] particularly where there are words of reference,[29] or to lay the venue in the body without stating it in the margin.[30] And it is held further that where there are several facts the venue stated as to the first will apply to all the sentences connected by the conjunction "and."[31] In transitory actions a venue is only necessary to be laid to give a place for trial.[32] The venue for trial is a legal fiction, devised for

23. Reed *v.* Wilson, 41 N. J. L. 29; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80; Cocke *v.* Kendall, 5 Fed. Cas. No. 2,929*b*, Hempst. 236. See Barnes *v.* Matteson, 5 Barb. (N. Y.) 375; Gassett *v.* Palmer, 10 Fed. Cas. No. 5,265, 3 McLean 105, in which a particular averment was held sufficient.

Where causes of action arising in different counties are joined in a local action, it is sufficient, under the statute in Florida, to lay the venue in the county in which the action is brought, so as to make admissible evidence of a cause of action arising in another county. Temple *v.* Florida Land, etc., Co., 23 Fla. 400, 2 So. 773.

24. Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683 (wherein it was said that except in local actions venues should be allowed to become obsolete); Briggs *v.* Nantucket Bank, 5 Mass. 94; Hale *v.* Vesper, Smith (N. H.) 283 (holding a particular allegation sufficient); Reed *v.* Wilson, 41 N. J. L. 29 (holding that the omission of the averment of venue in the body of the declaration was not ground for general demurrer and was within the operation of a provision of the Practice Act that no pleading should be deemed insufficient for any defect which theretofore could be objected to only by special demurrer); Cage *v.* Jeffries, 4 Fed. Cas. No. 2,287, Hempst. 409. See also Bond *v.* Conmee, 15 Ont. 716; Legacy *v.* Pitcher, 10 Ont. 620.

25. Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683.

Transitory and local actions see VENUE.

26. Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226. And see Massachusetts Court Rules at Common Law, 24 Pick. (Mass.) 398.

27. *Alabama.*— Moore *v.* Bradford, 3 Ala. 550.

Arkansas.— Pullen *v.* Chase, 4 Ark. 210.

Florida.— McKay *v.* Lane, 5 Fla. 268.

Indiana.— Capp *v.* Gilman, 2 Blackf. 45.

Missouri.— Benton *v.* Brown, 1 Mo. 393.

United States.— Cage *v.* Jeffries, 4 Fed. Cas. No. 2,287, Hempst. 409; Cocke *v.* Kendall, 5 Fed. Cas. No. 2,929*b*, Hempst. 236.

England.— Duncan *v.* Passenger, 8 Bing. 355, 21 E. C. L. 575.

Rules Hilary Term 4 Wm. IV, rule 8, provided that the name of the county should in all cases be stated in the margin of the declaration and should be taken to be the venue intended by plaintiff, and no venue should be stated in the body of the declaration or in any subsequent pleading; and provided further that in cases where local description was then required such local description should be given.

28. Temple *v.* Florida Land, etc., Co., 23 Fla. 400, 2 So. 773; Noe *v.* Prentice, 18 Fed. Cas. No. 10,284*a*.

29. St. Louis, etc., R. Co. *v.* Thomas, 47 Ill. 116; Rucker *v.* McNeely, 4 Blackf. (Ind.) 179; Duncan *v.* Passenger, 8 Bing. 355, 21 E. C. L. 575. See Hicks *v.* Walker, 2 Greene (Iowa) 440; Slate *v.* Post, 9 Johns. (N. Y.) 81 (holding that reference must be made); Cage *v.* Jeffries, 4 Fed. Cas. No. 2,287, Hempst. 409.

30. Hartford County *v.* Wise, 71 Md. 43, 18 Atl. 31; Dwight *v.* Wing, 8 Fed. Cas. No. 4,219, 2 McLean 580.

31. Cocke *v.* Kendall, 5 Fed. Cas. No. 2,929*b*, Hempst. 236. And see Bowdell *v.* Parsons, 10 East 359, holding that an omission to lay venue could not be taken advantage of by a motion in arrest of judgment.

32. McKenna *v.* Fisk, 1 How. (U. C.) 241, 11 L. ed. 117.

Where the place of trial is determined by statute.— An omission in a declaration to lay the action in the county under a *videlicet* did not affect the court's jurisdiction to try the case. Massucco *v.* Tomassi, 80 Vt. 186, 67 Atl. 551.

Use of videlicet.— When it is deemed necessary or expedient to state where the cause of action actually arose, and the place thus stated is out of the county in which the venue is laid, it is necessary to lay the venue under a *videlicet*. In all other cases the introduction of the *videlicet* in stating the venue is neither necessary nor useful. Duyckinck *v.* Clinton Mut. Ins. Co., 23 N. J. L. 279.

the furtherance of justice, and cannot be traversed.[33] Under the codes the petition is usually required merely to contain a statement of the court and county in which the action is brought,[34] and unless place is a material element in the cause of action it need not be averred.[35]

7. Names and Description of Parties — a. In General. The names of all the parties to the action must appear either in the caption or body of plaintiff's pleading.[36] Where they appear in the caption the parties may subsequently be referred to simply as plaintiffs or defendants,[37] or as the "above named" or "said" plaintiffs or defendants,[38] without naming them. But failure to give the names of the parties in some part of the pleading is a fatal defect.[39] Parties plaintiff are bound to set out their names.[40] It is not sufficient to style parties as "owners,"[41] or "heirs."[42] Nor is it sufficient to describe defendants by a class name without reference to their number or condition.[43] The christian and surname of both plaintiff and defendant should be stated with accuracy;[44] but the absence of the first names amounts only to a misnomer, and forms no ground to strike a petition from the files.[45] When parties have all the same surname, it is unnecessary to repeat it with the christian names.[46] The word "junior" is no part of a man's name, and need not be used in legal proceedings.[47] No objection for misnomer can be taken at the trial.[48]

b. Initials.[49] Parties should sue and be sued by their full christian names. Initial letters are not sufficient.[50] The proper remedy for this defect is a

33. McKenna *v.* Fisk, 1 How. (U. S.) 241, 11 L. ed. 117.

Where a suit is instituted in one county and removed to another, and the declaration is amended, the venue should be laid as of the county in which the suit was instituted. Calvert County *v.* Gibson, 36 Md. 229.

34. See the codes of the several states.

A statement of the county and court in the caption is sufficient to lay the venue. Hall *v.* Johnson, (Tex. Civ. App. 1897) 40 S. W. 46.

In New York the complaint must contain the county in which plaintiff desires the place of trial to be had. Hotchkiss *v.* Crocker, 15 How. Pr. 336; Merrill *v.* Grinnell, 10 How. Pr. 31, both holding that the defect was not cured by the statement of the county in the summons served with the complaint.

The place of trial named in the complaint controls that named in the summons. Fisher *v.* Ogden, 12 N. Y. App. Div. 602, 43 N. Y. Suppl. 111.

The locus of land involved may be shown by reference to a judgment in another suit. Lucas *v.* Carolina Cent. R. Co., 121 N. C. 506, 28 S. E. 265.

35. Sullivan *v.* Jones, 117 Ind. 327, 20 N. E. 242.

36. Collins *v.* Lightle, 50 Ark. 97, 6 S. W. 596; Cosby *v.* Powers, 137 Ind. 694, 37 N. E. 321; Anderson *v.* Wilson, 100 Ind. 402; Smith *v.* Watson, 28 Iowa 218; Bryant *v.* Cheek, 41 S. W. 776, 19 Ky. L. Rep. 749.

37. Chicago, etc., R. Co. *v.* Thomas, 147 Ind. 35, 46 N. E. 73; Cates *v.* McKinney, 48 Ind. 562, 17 Am. Rep. 768; Eiscley *v.* Taggart, 52 Nebr. 658, 72 N. W. 1039; Supreme Commandery O. K. G. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419; Clark *v.* Haney, 62 Tex. 511, 50 Am. Rep. 536.

"Defendant" for "defendants."— The use of the word "defendant" instead of "defendants" is immaterial. Diamond *v.* Smith, 27 Tex. Civ. App. 558, 66 S. W. 141.

38. Madgett *v.* Fleenor, 90 Ind. 517; Deadwood First Nat. Bank *v.* Hattenbach, 13 S. D. 365, 83 N. W. 421.

39. Sherrod *v.* Shirley, 57 Ind. 13; Cooper *v.* Griffin, 13 Ind. App. 212, 40 N. E. 710; Com. *v.* Hoobaugh, 5 Pa. Dist. 502; Wolf *v.* Binder, 10 Pa. Co. Ct. 108; Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 106 Am. St. Rep. 691, 66 L. R. A. 478; Poling *v.* Moore, 58 W. Va. 233, 52 S. E. 99.

40. Revis *v.* Lamme, 2 Mo. 207.

41. Kountz *v.* Brown, 16 B. Mon. (Ky.) 577.

42. Reynolds *v.* May, 4 Greene (Iowa) 283.

43. Reynolds *v.* May, 4 Greene (Iowa) 283.

44. Burge *v.* Burge, 94 Mo. App. 15, 67 S. W. 703.

45. Laws *v.* McCarty, 1 Handy (Ohio) 191, 12 Ohio Dec. (Reprint) 96. See, generally, *infra*, XII, F.

46. Chance *v.* Chambers, 2 N. J. L. 384.

47. Bidwell *v.* Coleman, 11 Minn. 78.

48. Moody *v.* Aslatt, 1 C. M. & R. 771, 1 Gale 47, 4 L. J. Exch. 78, 5 Tyrw. 492. See, generally, *infra*, XIV, E, 2.

49. Initials generally see Names, 29 Cyc. 269.

50. *Indiana.*— Bascom *v.* Toner, 5 Ind. App. 229, 31 N. E. 856.

Louisiana.— Lee *v.* Rice, 12 La. 254.

Michigan.— Fisher *v.* Northrup, 79 Mich. 287, 44 N. W. 610, 7 L. R. A. 629.

Minnesota.— Gardner *v.* McClure, 6 Minn. 250; Knox *v.* Starks, 4 Minn. 20.

Missouri.— Turner *v.* Gregory, 151 Mo. 100, 52 S. W. 234.

Nebraska.— Gillian *v.* McDowall, 66 Nebr. 814, 92 N. W. 991; Nebraska L. & T. Co. *v.*

motion,[51] not a demurrer.[52] The objection is waived by pleading to the merits,[53] and comes too late after judgment.[54] The first christian name is enough, and the middle name may be omitted or indicated by initial letter.[55] If one is in the habit of using only initial letters for his christian name, an action against him by that name is good.[56]

c. Wrong or Assumed Name. In some jurisdictions it is held that, in the absence of fraud, a person may do business and execute contracts in any name he may choose to assume, and may be sued in such name.[57] Some authorities even hold that if a person execute a contract in a wrong or assumed name, he must sue and be sued in that name.[58] On the other hand it is the rule in other jurisdictions that by whatever name a person may contract, he may sue and be sued in his true name.[59] And it has been held that in such case one must sue and be sued in his true name, and the style or description by which he executed the contract should be made to appear under an *alias dictus*.[60]

Kroener, 63 Nebr. 289, 88 N. W. 499; Richardson *v.* Opelt, 60 Nebr. 180, 82 N. W. 377; Small *v.* Sandall, 48 Nebr. 318, 67 N. W. 156; Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867; Enewold *v.* Olsen, 39 Nebr. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573.

New Jersey.— Dittmar Powder Mfg. Co. *v.* Leon, 42 N. J. L. 540; Elberson *v.* Richards, 42 N. J. L. 69.

Oklahoma.— Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388.

South Carolina.— Norris *v.* Graves, 4 Strobh. 32.

United States.— Walton *v.* Marietta Chair Co., 157 U. S. 342, 15 S. Ct. 626, 39 L. ed. 725.

Where a single vowel immediately precedes a surname, the court will understand such vowel to be the christian name of the party. Kinnersley *v.* Knott, 7 C. B. 980, 7 D. & L. 128, 13 Jur. 658, 18 L. J. C. P. 281, 62 E. C. L. 980.

An exception to the rule has been made in some states, where parties are described by initial letters in bills of exchange, promissory notes, or other written instruments. Dittmar Powder Mfg. Co. *v.* Leon, 42 N. J. L. 540; Elberson *v.* Richards, 42 N. J. L. 69. A mortgagee as a party defendant in a suit to foreclose a tax lien cannot be sued by the initial letters of his name; such suit not being a suit upon a written instrument within the meaning of a statute such as above stated. Gillian *v.* McDowall, 66 Nebr. 814, 92 N. W. 991.

51. See *infra*, XII, F.

52. See *infra*, VI, F, 2, e.

53. See *infra*, XIV, E, 2.

54. See *infra*, XIV, J, 3, e.

55. Rooks *v.* State, 83 Ala. 79, 3 So. 720; Shipman *v.* Haynes, 17 La. 503; Turner *v.* Gregory, 151 Mo. 100, 52 S. W. 234.

The law knows of but one christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial. Franklin *v.* Tallmadge, 5 Johns. (N. Y.) 84; McKay *v.* Speak, 8 Tex. 376.

56. Tweedy *v.* Jarvis, 27 Conn. 42; Charleston *v.* King, 4 McCord (S. C.) 487.

One signing a note by his initials cannot complain that he was sued on that note by those initials. Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402. He is estopped by his admission in writing to deny that those initials form his christian name. Woodberry *v.* Dye, 10 Rich. (S. C.) 31.

57. Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. L. Rep. 308, 72 Am. St. Rep. 397; Sheridan *v.* Nation, 159 Mo. 27, 59 S. W. 972; Preiss *v.* Le Poidevin, 19 Abb. N. Cas. (N. Y.) 123; Meredith *v.* Hinsdale, 2 Cai. (N. Y.) 362.

A statute requiring actions to be brought in the name of the real party in interest is no prohibition against suits being brought in a name other than that by which one was christened. Clark *v.* Clark, 19 Kan. 522; Deets *v.* Smith, 6 Kan. App. 601, 51 Pac. 581; Sheridan *v.* Nation, 159 Mo. 27, 59 S. W. 972. But a person in using a name as a party to a suit should use the name of the person intended to be designated, whether that be real or adopted. Parks *v.* Tolman, 113 Mo. App. 14, 87 S. W. 576.

58. Wooster *v.* Lyons, 5 Blackf. (Ind.) 60; Gould *v.* Barnes, 3 Taunt. 504.

59. Wood *v.* Coman, 56 Ala. 283; Northwestern Distilling Co. *v.* Brant, 69 Ill. 658, 18 Am. Rep. 631; State Bd. of Education *v.* Greenbaum, 39 Ill. 609; Steinfeld *v.* Taylor, 51 Ill. App. 399; Lowell *v.* Morse, 1 Metc. (Mass.) 473; Granville Middle Parish Charitable Assoc. *v.* Baldwin, 1 Metc. (Mass.) 359; Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Medway Cotton Manufactory *v.* Adams, 10 Mass. 360.

Where an individual doing business under the style of an association contracts under that style with a company having knowledge thereof, he may sue the latter or its assignees for a breach of the contract in his individual name. Goodsell *v.* Western Union Tel. Co., 130 N. Y. 430, 29 N. E. 969 [*affirming* 58 N. Y. Super. Ct. 26, 9 N. Y. Suppl. 425].

60. Wilson *v.* Shannon, 6 Ark. 196; Pinckard *v.* Milmine, 76 Ill. 453.

A designation of defendant by a certain name "alias" another is proper, where he made the contract sued on in the one name, and owned property sought to be reached by garnishment in the other. O. L. Packard Mach. Co. *v.* Laev, 100 Wis. 644, 76 N. W. 596.

d. Change of Name.[61] At common law a man may lawfully change his name, and may sue or be sued in any name by which he is known or recognized.[62]

e. Party Known by Two Names. It is a sufficient answer to a plea of misnomer that the party was equally well known by either name.[63] But such an answer is good only where plaintiff mistakes defendant's name.[64]

f. Unknown Parties and Use of Fictitious Names.[65] The codes and practice acts commonly provide that a party defendant, whose name is unknown, may be sued by a fictitious name.[66] Such a statute applies only where a cause of action is known to exist against one whose name only is unknown, and not where a cause of action is not known to exist against a person whose name and identity are known.[67] There must be a distinct allegation to the effect that the name is so used by reason of ignorance of defendant's true name.[68] The ignorance of the name must be real, and not wilful, ignorance, or such as might be removed by mere inquiry, or a resort to means of information.[69] A party named in a complaint by a fictitious name is a party to the action from its commencement.[70]

g. Misnomer.[71] Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously, and according to common use, to be the same, although differing in sound, the use of one for the other is not a material misnomer.[72] But if the name

61. **Change of name** generally see NAMES, 29 Cyc. 271.

62. Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489; Cooper *v.* Burr, 45 Barb. (N. Y.) 9; Donaldson *v.* Donaldson, 1 Ohio S. & C. Pl. Dec. 289, 31 Cinc. L. Bul. 102; Linton *v.* Kittanning First Nat. Bank, 10 Fed. 894.

63. *Georgia.*— Selman *v.* Shackelford, 17 Ga. 615.

Illinois.— Parmelee *v.* Raymond, 43 Ill. App. 609.

Indiana.— Conaway *v.* Hays, 7 Blackf. 159.

Maine.— Frye *v.* Hinkley, 18 Me. 320, holding that on misnomer pleaded, and replication that defendant is as well known by one name as the other, the jury may well find the issue for plaintiff, if they are satisfied that defendant was as truly known and called by the name given in the writ as by that given in the plea, although the number of persons who knew and called him by the latter name might be greater than those who knew and called him by the former.

New York.— Petrie *v.* Woodworth, 3 Cai. 219.

Ohio.— Goodenow *v.* Tappan, 1 Ohio 60.

Pennsylvania.— Taylor *v.* Rossiter, 2 Miles 355.

South Carolina.— Miller *v.* George, 30 S. C. 526, 9 S. E. 659.

Texas.— Niagara F. Ins. Co. *v.* Lee, (1892) 19 S. W. 1030.

64. Labat *v.* Ellis, 1 N. C. 92; Norris *v.* Graves, 4 Strobh. (S. C.) 32, holding that a plea in abatement that the christian name of a plaintiff suing as "A. O. Norris" was "Andrew O." is not met by a replication that plaintiff was known as well by one name as by the other, since he is presumed to know his true name and must properly state it.

65. **Amendment by insertion of true name** see *infra*, VII, B, 1, a.

66. *California.*— Morgan *v.* Thrift, 2 Cal. 562.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60.

Massachusetts.— Baxter *v.* Doe, 142 Mass. 558, 8 N. E. 415.

Nebraska.— Davis *v.* Jennings, (1907) 111 N. W. 128.

New York.— Goodwin *v.* Crooks, 58 N. Y. App. Div. 464, 69 N. Y. Suppl. 578 [*affirming* 33 Misc. 39, 68 N. Y. Suppl. 219]; Earle *v.* Scott, 50 How. Pr. 506.

Wisconsin.— Kellam *v.* Toms, 38 Wis. 592.

See 38 Cent. Dig. tit. "Parties," § 114.

Tennessee Code, § 4358, provides that, where the suit is against an unknown defendant, the order of publication should describe him as near as may be by the character in which he is sued, and by reference to his title or interest in the subject-matter of the litigation. Where A devised a contingent remainder to "his heirs," it is not a compliance with the statute to describe them as "the unknown heirs" of A in a bill for partition, since they were sued as devisees. Ferriss *v.* Lewis, 2 Tenn. Ch. 291.

67. Hancock *v.* Oxford First Nat. Bank, 93 N. Y. 82; Crandall *v.* Beach, 7 How. Pr. (N. Y.) 271. See also Reynolds *v.* May, 4 Greene (Iowa) 283.

68. Gardner *v.* Kraft, 52 How. Pr. (N. Y.) 499.

69. Rosencrantz *v.* Rogers, 40 Cal. 489.

Necessity of searching public records.— The objection to a recovery against a person sued in the first instance in the name of John Doe, that plaintiff might have learned his right name by looking up public records, will not be entertained. Hoffman *v.* Keeton, 132 Cal. 195, 64 Pac. 264; Irving *v.* Carpentier, 70 Cal. 23, 11 Pac. 391.

70. Hoffman *v.* Keeton, 132 Cal. 195, 64 Pac. 264; Farris *v.* Merritt, 63 Cal. 118.

71. **Plea in abatement for misnomer** see *infra*, IV, B, 5, b, (VIII).

72. Gordon *v.* Holiday, 10 Fed. Cas. No. 5,610, 1 Wash. 285.

of a party be wholly mistaken, and repugnant to truth, the misnomer is fatal.[73] A mistake in the name of a party, which was amendable in the court below, will be disregarded in the supreme court, as not affecting the substantial rights of the adverse party.[74] Where a misnomer is due to clerical error, and the adverse party is not prejudiced thereby, it will not vitiate.[75]

h. Parties in Particular Capacities. The character in which a party sues must be determined from the body of the pleading and not from the description given in the caption.[76] And where there is a wrong description or no description in the title, the error will be deemed merely formal.[77] A substantial description is sufficient.[78] Where one sues or is sued in a representative capacity, it must be averred that it is as such representative, and a mere statement of the representative character, following the name of the party, will be treated as only *descriptio personæ*.[79] So where the pleadings disclose a cause of action by or against a person in his individual capacity, superadded words, such as "agent," "executor," "trustee," etc., should be rejected as *descriptio personæ*.[80] In actions by or against

73. Gordon *v.* Holiday, 10 Fed. Cas. No. 5,610, 1 Wash. 285.

74. Bauman *v.* Grubbs, 26 Ind. 419.

75. Bulson *v.* People, 31 Ill. 409; Com. *v.* Ruff, 3 Pa. Dist. 562.

76. Bryant *v.* Southern R. Co., 137 Ala. 488, 34 So. 562; Blackman *v.* Moore Handley Hardware Co., 106 Ala. 458, 17 So. 629; Tate *v.* Shackelford, 24 Ala. 510, 60 Am. Dec. 489; Arrington *v.* Hair, 19 Ala. 243.

77. Luff *v.* Thomas, 5 Houst. (Del.) 399; Clift *v.* Newell, 104 Ky. 396, 47 S. W. 270, 20 Ky. L. Rep. 644; Smith *v.* Mingey, 72 N. Y. App. Div. 103, 76 N. Y. Suppl. 194 [*affirmed* in 172 N. Y. 650, 65 N. E. 1122]; Knox *v.* Metropolitan El. R. Co., 58 Hun (N. Y.) 517, 12 N. Y. Suppl. 848 [*affirmed* in 128 N. Y. 625, 28 N. E. 485]; Lehman *v.* Koch, 9 N. Y. Suppl. 302.

78. Kinsella *v.* Cahn, 185 Ill. 208, 56 N. E. 1119; Craighead *v.* Bruff, (Tex. Civ. App. 1900) 55 S. W. 764; Ferrie *v.* Jones, 5 U. C. Q. B. 504.

For example.—A complaint which uses the feminine pronoun when reference is made to complainant sufficiently shows that she is a female. Cosand *v.* Lee, 11 Ind. App. 511, 38 N. E. 1099. But a caption to a pleading, describing certain of the parties as minors, is not a sufficient averment of their minority. Funk *v.* Davis, 103 Ind. 281, 2 N. E. 739.

79. *Alabama.*— Buckley *v.* Wilson, 56 Ala. 393.

Indiana.— Morrow *v.* Shober, 19 Ind. App. 127, 49 N. E. 189.

Minnesota.— Holton *v.* Parker, 13 Minn. 383.

New Mexico.— Curran *v.* W. W. Kendall Boot, etc., Co., 8 N. M. 417, 45 Pac. 1120.

New York.— Plumtree *v.* Dratt, 41 Barb. 333; Hallett *v.* Harrower, 33 Barb. 537; Scrantom *v.* Farmers', etc., Bank, 33 Barb. 527 [*affirmed* in 24 N. Y. 424]; Gould *v.* Glass, 19 Barb. 179; Pentz *v.* Sackett, Lalor 113; Ogdensburgh Bank *v.* Van Rensselaer, 6 Hill 240.

Ohio.— Columbiana County *v.* Watt, Tapp. 284.

Actions by or against persons in particular capacities see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; PRINCIPAL AND AGENT; TRUSTS; and other special titles.

The omission of the word "as," between the name of plaintiff and words descriptive of his representative capacity, does not prevent him from claiming in that capacity, if the complaint otherwise shows that the cause of action, if any, devolved upon him solely in that character. Beers *v.* Shannon, 73 N. Y. 292.

80. *California.*— People *v.* Houghtaling, 7 Cal. 348.

Georgia.— Nutting *v.* Hill, 71 Ga. 557.

Illinois.— Higgins *v.* Halligan, 46 Ill. 173.

Indiana.— Marion Bond Co. *v.* Mexican Coffee, etc., Co., 160 Ind. 558, 65 N. E. 748; Daniels *v.* Richie, 7 Blackf. 391.

Maine.— Clap *v.* Day, 2 Me. 305, 11 Am. Dec. 99.

Massachusetts.— Shepard *v.* Creamer, 160 Mass. 496, 36 N. E. 475; Grew *v.* Burditt, 9 Pick. 265; Talmage *v.* Chapel, 16 Mass. 71; Clark *v.* Lowe, 15 Mass. 476.

Michigan.— Bloom *v.* Sexton, 33 Mich. 181.

Nebraska.—Andres *v.* Kridler, 47 Nebr. 585, 66 N. W. 649; Thomas *v.* Carson, 46 Nebr. 765, 65 N. W. 899.

Nevada.— Champion *v.* Sessions, 1 Nev. 478.

New Jersey.— Terhune *v.* Parrott, 59 N. J. L. 16, 35 Atl. 4.

New York.— Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58; United Press *v.* A. S. Abell Co., 73 N. Y. App. Div. 240, 76 N. Y. Suppl. 692; Bannon *v.* McGrane, 45 N. Y. Super. Ct. 517; Bright *v.* Currie, 5 Sandf. 433; Draper *v.* Salisbury, 11 Misc. 573, 32 N. Y. Suppl. 757; Barley *v.* Roosa, 13 N. Y. Suppl. 209, 20 N. Y. Civ. Proc. 113; Wick *v.* Jewett, 9 N. Y. St. 477.

North Carolina.— Cotten *v.* Davis, 48 N. C. 355.

Ohio.— Waldsmith *v.* Waldsmith, 2 Ohio 156.

Pennsylvania.— Mitchell *v.* Norris, 2 Miles 205.

South Carolina.— Jerkowski *v.* Marco, 56 S. C. 241, 34 S. E. 386.

Tennessee.— Whiteside *v.* Button, 2 Coldw. 94.

officers, the individual name as well as the name of the office should be used.[81] In an action by one for the use of another, the words "for the use of" are unnecessary for any purpose other than to protect the interest of the usee against the nominal plaintiff. They are to be deemed surplusage merely.[82] In an action at law by the holder of a legal title it is not necessary to give the name of the equitable owner,[83] nor need a trustee plaintiff state the name of the beneficiary.[84] Where it is doubtful in what capacity a plaintiff sues, reference may be had to the whole pleading to determine the question.[85] Some cases hold it essential that plaintiff should state whether he sues in person or by attorney.[86] But it is improper to commence a suit in the name of an attorney in fact.[87]

8. Reference to Process.[88] The declaration need not recite the writ,[89] nor show service upon defendant.[90]

B. Statement of Cause of Action — 1. In General. Every material fact which constitutes the ground of plaintiff's action must be alleged in his declaration.[91] When plaintiff's right consists in an obligation in defendant to observe some particular duty, the declaration must state the nature of such duty, which may be

Vermont.— Rich *v.* Sowles, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850; Witters *v.* Sowles, 61 Vt. 366, 18 Atl. 191.

Virginia.— Porter *v.* Nekervis, 4 Rand. 359.

Washington.— McWilliams *v.* Willis, 1 Wash. 199.

Wisconsin.— Bridgeport Sav. Bank *v.* Randall, 15 Wis. 541.

See 37 Cent. Dig. tit. "Parties," § 113; 39 Cent. Dig. tit. "Pleading," § 103.

81. Mount Pleasant State Prison *v.* Rikemam, 1 Den. (N. Y.) 279; Galway *v.* Stimson, 4 Hill (N. Y.) 136.

82. *Georgia.*— Mathis *v.* Fordham, 114 Ga. 364, 40 S. E. 324; Norcross Butter, etc., Mfg. Co. *v.* Summerour, 114 Ga. 156, 39 S. E. 870.

Illinois.— West Chicago St. R. Co. *v.* Lundahl, 183 Ill. 284, 55 N. E. 667; Tedrick *v.* Wells, 152 Ill. 214, 38 N. E. 625; Mutual L. Ins. Co. *v.* Allen, 113 Ill. App. 89 [*affirmed* in 212 Ill. 134, 72 N. E. 200]; Hanchet *v.* Ives, 69 Ill. App. 83 [*affirmed* in 171 Ill. 122, 49 N. E. 206]; Schiff *v.* Supreme Lodge O. M. P., 64 Ill. App. 341.

Iowa.— State *v.* Butterworth, 2 Iowa 158.

Mississippi.— Jones *v.* Kansas City, etc., R. Co., 75 Miss. 913, 23 So. 547.

United States.— Boston Elev. R. Co. *v.* Grace, etc., Co., 112 Fed. 279, 50 C. C. A. 239.

But see Ray *v.* Honeycutt, 119 N. C. 510, 26 S. E. 127, holding that where an action is brought in the name of "G. D. Ray & Son, to the use of Mary E. Young," the latter, being the real party in interest, is to be regarded as the only plaintiff.

83. Cohen *v.* Schulz, 73 Ill. App. 244.

84. Philips *v.* Ward, 51 Mo. 295; Tyler *v.* Hand, 7 How. (U. S.) 573, 12 L. ed. 824. See, generally, Trusts.

85. Hall *v.* Ferguson, 24 Ind. App. 532, 57 N. E. 153.

86. Mouck *v.* Northwood, 2 Can. L. J. N. S. 268; Murphy *v.* Burnham, 2 U. C. Q. B. 261.

87. Adams *v.* Edwards, 115 Pa. St. 211, 8 Atl. 425.

88. Conformity to process see *infra*, III, B, 18.

89. Burton *v.* Waples, 3 Harr. (Del.) 75.

90. McConnell *v.* Worns, 102 Ala. 587, 14 So. 849.

91. *Florida.*— Royal Phosphate Co. *v.* Van Ness, 53 Fla. 135, 43 So. 916; Milligan *v.* Keyser, 52 Fla. 331, 42 So. 367.

Indiana.— Lake Erie, etc., R. Co. *v.* Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948. See Shultz *v.* Shultz, 136 Ind. 323, 36 N. E. 126, 43 Am. St. Rep. 320.

Kentucky.— Kearney *v.* Covington, 1 Metc. 339; Kountz *v.* Brown, 16 B. Mon. 577.

Maryland.— See Cox *v.* Jones, 5 Gill & J. 65.

Massachusetts.— Read *v.* Smith, 1 Allen 519; Drowne *v.* Stimpson, 2 Mass. 441.

Missouri.— Crane *v.* Missouri Pac. R. Co., 87 Mo. 588; Callahan *v.* Caffarata, 39 Mo. 136; Biddle *v.* Boyce, 13 Mo. 532; Story *v.* American Cent. Ins. Co., 61 Mo. App. 534.

New Jersey.— Jurnick *v.* Manhattan Optical Co., 66 N. J. L. 380, 49 Atl. 681; Beardsley *v.* Southmayd, 14 N. J. L. 534.

New York.— Howard *v.* Tiffany, 3 Sandf. 695; Freeman *v.* Fulton F. Ins. Co., 14 Abb. Pr. 398; Lee *v.* Ainslie, 4 Abb. Pr. 463. See Carman *v.* Farmers' L. & T. Co., 70 Hun 283, 24 N. Y. Suppl. 39.

Pennsylvania.— Hutton *v.* McLaughlin, 38 Wkly. Notes Cas. 238.

United States.— World's Columbian Exposition Co. *v.* France, 91 Fed. 64, 33 C. C. A. 333. See Hagood *v.* Blythe, 38 Fed. 76.

See 39 Cent. Dig. tit. "Pleading," § 105.

The declaration will be good if it contains all that would be necessary for plaintiff to prove, under a plea of the general issue, in order to entitle him to recover. Beardsley *v.* Southmayd, 14 N. J. L. 534.

The petition sets out a good cause of action as against a general demurrer where it shows the jurisdiction of the court, that defendant was under a certain duty to plaintiff and the facts from which the duty arose, and that there was a breach thereof, whereby plaintiff was damaged. North Augusta Electric, etc., Co. *v.* Martin, 118 Ga. 622, 45 S. E. 455.

founded either on a contract between the parties or on the obligation of law arising out of defendant's particular character or situation.[92] An allegation in the present tense will be deemed to refer to the time when the action was commenced.[93]

2. TEST OF SUFFICIENCY. The test of sufficiency frequently applied is whether the declaration informs defendant of the nature of the demand so that he may not be misled in the preparation of his defense. If it does this it is sufficient, although inartificially drawn.[94] If facts are alleged which entitle plaintiff to any relief in the court where the action is commenced, the pleading will be held to state a cause of action,[95] even though the pleading contains a demand for relief to which

Amount of claim.— A complaint which omits allegations definitely showing the amount of plaintiff's claim will not support a judgment. Carter *v.* Shotwell, 42 Mo. App. 663.

92. Hollenbeck *v.* Winnebago County, 95 Ill. 148, 35 Am. Rep. 151. This is substantially Chitty's statement. 1 Chitty Pl. (16th Am. ed.)* 397.

One who attacks an act not wrongful per se, but which may be perfectly consistent with good faith and fair dealing, must aver and specify the facts giving to it a different character. Hughes *v.* Murdock, 45 La. Ann. 935, 13 So. 182.

93. Ronnow *v.* Delmue, 23 Nev. 29, 41 Pac. 1074.

94. *Arkansas.*— Keller *v.* Henry, 24 Ark. 575; Moore *v.* Estes, 23 Ark. 152.

California.— Mulliken *v.* Hull, 5 Cal. 245.

Georgia.— Phelan *v.* Vestner, 125 Ga. 825, 54 S. E. 697.

Idaho.— McLean *v.* Lewiston, 8 Ida. 472, 69 Pac. 478.

Illinois.— Grace, etc., Co. *v.* Sanborn, 124 Ill. App. 472 [*affirmed* in 225 Ill. 138, 80 N. E. 88].

Indiana.— Sutton *v.* Todd, 24 Ind. App. 519, 55 N. E. 980. See also Corbin Oil Co. *v.* Searles, 36 Ind. App. 215, 75 N. E. 293, holding that it is essential to the sufficiency of a complaint on demurrer that upon a reasonable construction of the language used it may be seen by an inspection of the pleading that all the facts necessary to a complete right of action are stated in such a manner that such right may be said to arise necessarily from them upon some definite theory; and in such case, defendant being thereby fully informed of the nature of plaintiff's claim, the pleading will be susceptible of denial by answer so that upon being so traversed a distinct issue of fact will be formed for trial.

Kansas.— Crowther *v.* Elliott, 7 Kan. 235.

Louisiana.— Ditto *v.* Barton, 6 Mart. N. S. 127.

Maine.— Holt *v.* Penobscot, 56 Me. 15, 96 Am. Dec. 429; Burnham *v.* Peck, (1886) 7 Atl. 15.

Maryland.— Crichton *v.* Smith, 34 Md. 42.

Missouri.— Butts *v.* Phelps, 90 Mo. 670, 3 S. W. 218; Little *v.* Mercer, 9 Mo. 218.

New York.— See Farcy *v.* Lee, 10 Abb. Pr. 143, holding that in an action for work and labor the complaint should be sufficiently definite and certain as to enable defendant to ascertain from it the nature and character of the claim and the period within which it is alleged to have arisen.

Pennsylvania.— Kauffman *v.* Jacobs, 4 Pa. Co. Ct. 462. See Jones *v.* Rocked, 4 Pa. Co. Ct. 480.

Rhode Island.— Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643.

Virginia.— Sun L. Assur. Co. *v.* Bailey, 101 Va. 443, 44 S. E. 692.

United States.— Coughlin *v.* Blumenthal, 96 Fed. 920.

See 39 Cent. Dig. tit. "Pleading," § 105.

Every petition should set forth the facts on which it is based plainly, fully, and distinctly, and with such certainty that the same may be understood by defendant, who is to answer them, the jury, who are to ascertain the truth, and the court, who is to give judgment. Cedartown Cotton, etc., Co. *v.* Miles, 2 Ga. App. 79, 58 S. E. 289; Lane Bros. Co. *v.* Seakford, 106 Va. 93, 55 S. E. 556.

95. *California.*— Whitehead *v.* Sweet, 126 Cal. 67, 58 Pac. 376; Hulsman *v.* Todd, 96 Cal. 228, 31 Pac. 39; White *v.* Lyons, 42 Cal. 279.

Colorado.— Marriott *v.* Clise, 12 Colo. 561, 21 Pac. 909.

Connecticut.—See Cole *v.* Jerman, 77 Conn. 374, 59 Atl. 425.

Idaho.— Rauh *v.* Oliver, 10 Ida. 3, 77 Pac. 20.

Indiana.— Yorn *v.* Bracken, 153 Ind. 492, 55 N. E. 257; U. S. Saving Fund, etc., Co. *v.* Harris, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; Taylor *v.* Hearn, 131 Ind. 537, 31 N. E. 201; Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069; Wolke *v.* Fleming, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495; Baker *v.* Allen, 92 Ind. 101; Tipton Fire Co. *v.* Barnheisel, 92 Ind. 88; Landers *v.* Beck, 92 Ind. 49; McFall *v.* Howe Sewing Mach. Co., 90 Ind. 148; Hewitt *v.* Powers, 84 Ind. 295; Indianapolis, etc., Traction Co. *v.* Henderson, 39 Ind. App. 324, 79 N. E. 539; Gilman *v.* Fultz, 37 Ind. App. 609, 77 N. E. 746.

Kansas.— Aldrich *v.* Boice, 56 Kan. 170, 42 Pac. 695.

Kentucky.—Hazelden *v.* Thompson, 51 S. W. 1129, 21 Ky. L. Rep. 303; Magee *v.* Frazer, 49 S. W. 452, 20 Ky. L. Rep. 1467.

Minnesota.— Kenaston *v.* Lorig, 81 Minn. 454, 84 N. W. 323; Morey *v.* Duluth, 69 Minn. 5, 71 N. W. 694; Bay View Land Co. *v.* Myers, 62 Minn. 265, 64 N. W. 816; Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030; Leuthold *v.* Young, 32 Minn. 122, 19 N. W. 652.

plaintiff is not entitled.[96] And if sufficient facts are stated to make a good cause of action, the pleading is not vitiated by the further averment of legal conclusions respecting the effect of the facts alleged.[97] Vagueness, uncertainty, or other formal defects will not be deemed fatal under rules permitting liberal interpretation if a good cause of action can be gathered from the pleading.[98] But a declaration containing facts sufficient to constitute a cause of action will be rendered insufficient by the averment of other facts constituting a defense to it.[99]

3. Matter of Inducement. Inducement is the statement of matter which is introductory to the principal subject of the pleading, and which is necessary or suitable to elucidate it and make its purport clear.[1] If such matter is not so related to the constitutive facts of the cause of action it is surplusage, and whether matter is surplusage or proper inducement is to be determined by a sound construction of the entire pleading.[2] Its office being merely explanatory, it does not require exact certainty, nor is it necessary that it be formal. If it substantially suffices to make the principal facts intelligible, that is enough.[3]

4. Right of Plaintiff — a. Necessity That the Right Be Shown. It is incumbent upon plaintiff to allege sufficient facts to show that he is concerned with the cause of action averred, and is the party who has suffered injury by reason of the acts of defendant. In other words, it is not enough that he alleges a cause of action existing in favor of someone; he must show that it exists in favor of himself.[4] The burden should not be placed upon defendant to show that plaintiff is not

Missouri.— Crosby *v.* Farmers' Bank, 107 Mo. 436, 17 S. W. 1004; Ahern *v.* Collins, 39 Mo. 145; Harper *v.* Kemble, 65 Mo. App. 514.

Nebraska.— George *v.* Edney, 36 Nebr. 604, 54 N. W. 986.

New York.— Wisner *v.* Consolidated Fruit Jar Co., 25 N. Y. App. Div. 362, 49 N. Y. Suppl. 500; Goldberg *v.* Kirschstein, 36 Misc. 249, 73 N. Y. Suppl. 358; Thompson *v.* Remsen, 27 Misc. 279, 58 N. Y. Suppl. 424; Bamberger *v.* Oshinsky, 21 Misc. 716, 48 N. Y. Suppl. 139; Vinton *v.* Cattaraugus County, 2 N. Y. Suppl. 367. See Gillespie *v.* Montgomery, 93 N. Y. App. Div. 403, 87 N. Y. Suppl. 701.

South Carolina.— Simon *v.* Sabb, 56 S. C. 38, 33 S. E. 799; Moore *v.* Spurrier, 55 S. C. 292, 33 S. E. 352; Connor *v.* Ashley, 49 S. C. 473, 27 S. E. 473; Strong *v.* Weir, 47 S. C. 307, 25 S. E. 157; Charleston Nat. Banking Assoc. *v.* Dowling, 45 S. C. 677, 23 S. E. 982; Ladson *v.* Mostowitz, 45 S. C. 388, 23 S. E. 49.

West Virginia.— Miller *v.* Hare, 43 W. Va. 647, 28 S. E. 722, 39 L. R. A. 491.

Wisconsin.— Drefahl *v.* Connell, 85 Wis. 109, 55 N. W. 160.

England.— Watson *v.* Hawkins, 24 Wkly. Rep. 884.

See 39 Cent. Dig. tit. "Pleading," § 105.

96. See *infra*, III, B, 16.

97. Tanderup *v.* Hansen, 5 S. D. 164, 58 N. W. 578. See, generally, *supra*, II, G, 7, a.

98. Park *v.* Tinkham, 9 Kan. 615; Winterson *v.* Eighth Ave. R. Co., 2 Hilt. (N. Y.) 389; Roe *v.* Lincoln County, 56 Wis. 66, 13 N. W. 887. See also Shea *v.* Nilima, 133 Fed. 209, 66 C. C. A. 263, where it is said that, where a complaint states the substantial facts which constitute a cause of action, or they can be inferred by reasonable intendment from the matter set forth, it will be held sufficient, in the absence of a motion to make it more definite and certain, notwithstanding imperfections of form or the omission of specific allegations.

Interpretation of pleadings see *supra*, II, I.

99. Anticipating defenses see *infra*, III, B, 15.

Consistency or repugnancy: In general see *supra*, II, H, 4. As ground for demurrer see *infra*, VI, F.

1. Consolidated Coal Co. *v.* Peers, 97 Ill. App. 188, 194 [*affirmed* in 205 Ill. 531, 68 N. E. 1065].

2. Consolidated Coal Co. *v.* Peers, 97 Ill. App. 188, 194 [*affirmed* in 205 Ill. 531, 68 N. E. 1065].

3. 1 Chitty Pl. 296.

4. *Alabama.*— Winnemore *v.* Mathews, 45 Ala. 449.

Florida.— Leon *v.* Kerrison, 47 Fla. 178, 36 So. 173.

Indiana.— Bozarth *v.* Mallett, 11 Ind. App. 417, 39 N. E. 176; Busenbark *v.* Crawfordsville, 9 Ind. App. 578, 37 N. E. 278.

Kentucky.— Harris *v.* Campbell, 4 Dana 586.

Louisiana.— Seghers *v.* Lemaitre, 5 La. Ann. 263; Hatch *v.* New Orleans City Bank, 1 Rob. 470.

Mississippi.— Land *v.* Warner, 6 Sm. & M. 155.

Missouri.— State *v.* Dodson, 63 Mo. 451; Garner *v.* McCullough, 48 Mo. 318.

Nebraska.— Hicklin *v.* Nebraska City Nat. Bank, 8 Nebr. 463, 1 N. W. 135.

New York.— Buffalo Catholic Inst. *v.* Bitter, 87 N. Y. 250; Rayner *v.* Clark, 7 Barb. 581; Weichsel *v.* Spear, 47 N. Y. Super. Ct. 223; Ralli *v.* Equitable Mut. F. Ins. Co., 16 Misc. 357, 38 N. Y. Suppl. 87; Richter *v.* Kramer, 1 N. Y. City Ct. 348.

South Dakota.— Arneson *v.* Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

the aggrieved party and that he has sustained no damages.[5] It must appear that the cause of action had accrued to plaintiff at the time the action was commenced.[6] So the complaint must aver non-payment of the amount sued for.[7] But where the general averments of the complaint show that plaintiff's claim is due and unpaid, it is sufficient without making such averment directly.[8] It is also necessary to allege facts showing that the cause of action alleged accrued to him in the capacity in which he sues,[9] and for this purpose it is necessary to allege his authority.[10] Where there is a mistake in the name of plaintiff in an instrument sued on, there should be an averment of identity in the pleading, to connect plaintiff with the cause of action set up.[11] The fact that an action is brought by a person as next friend of another, instead of in the name of such other by next friend, is an immaterial irregularity.[12]

b. Beneficiary Need Not Be Shown. It is sufficient to allege sufficient facts to show a cause of action in favor of the legal plaintiff, without showing the interest of the person beneficially interested.[13] Nor need the latter be named.[14]

c. Joint Plaintiffs. If several plaintiffs sue jointly, facts should be averred showing a joint right of action existing in all of them.[15] But it need not be so alleged in terms if the fact substantially appears from the allegations.[16]

5. Liability of Defendants. It is necessary that plaintiff allege some wrongful act giving rise to a liability on the part of defendant.[17] It is not sufficient to show

Texas.— Burton *v.* Anderson, 1 Tex. 93.

See 39 Cent. Dig. tit. "Pleading," § 119.

Pleading rights by assignment see Assignments, 4 Cyc. 103.

5. Rayner *v.* Clark, 7 Barb. (N. Y.) 581.

6. Erwin *v.* Central Union Tel. Co., 148 Ind. 365, 46 N. E. 667, 47 N. E. 663; Hepp *v.* Commagere, 10 Rob. (La.) 524; McMaster *v.* Brander, 2 Rob. (La.) 498; Clyde *v.* Johnson, 4 N. D. 92, 58 N. W. 512; McLean *v.* McLean, 17 Ont. Pr. 440. See Tomlinson *v.* Ayres, 117 Cal. 568, 49 Pac. 717, holding that non-payment in mortgage foreclosure proceedings is sufficiently alleged by a statement that the note is wholly owing and unpaid.

7. See the cases cited *infra*, this note.

Sufficiency of averment.— For cases in which the complaint has been held to contain a sufficient averment of non-payment see Rawlinson *v.* Christian Press Assoc. Pub. Co., 139 Cal. 620, 73 Pac. 468 (holding non-payment sufficiently pleaded by an allegation that "defendant has not paid said sum . . . nor any part thereof, but the same is, with interest thereon" from a certain date, "till paid, still due . . . and wholly unpaid"); Rankin *v.* Sisters of Mercy, 82 Cal. 88, 82 Pac. 1134 (holding an averment that defendant has neglected or refused to pay is a sufficient averment of non-payment); Ferguson *v.* McBean, (Cal 1894) 35 Pac. 559; Burns *v.* Cushing, 96 Cal. 669, 31 Pac. 1124; Jaqua *v.* Cordesman, etc., Co., 106 Ind. 141, 5 N. E. 907 (holding an averment that defendant is indebted to plaintiff sufficient); Musselman *v.* Wise, 84 Ind. 248 (holding an allegation that defendant owes a debt not equivalent to an allegation that it is due); Johnson *v.* Kilgore, 39 Ind. 147 (holding an allegation that defendant is indebted to plaintiff sufficient to show that the debt is due and unpaid); Jaqua *v.* Shewalter, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

Where there are several defendants, jointly, or jointly and severally, liable on a penal bond, an averment that the "said defendants have not paid" is sufficient. A performance by one is a performance by all. Hibbard *v.* McKindley, 28 Ill. 240.

An allegation of indebtedness long prior to the filing of the complaint is insufficient to show indebtedness at the time of filing. Fairchild *v.* King, 102 Cal. 320, 36 Pac. 649.

8. Singleton *v.* O'Blenis, 125 Ind. 151, 25 N. E. 154; Aughie *v.* Landis, 95 Ind. 419; Humphrey *v.* Fair, 79 Ind. 410.

9. Tate *v.* Shackelford, 24 Ala. 510, 60 Am. Dec. 488; Engles *v.* Day, 3 Ark. 273; Watkins *v.* McDonald, 3 Ark. 266; Stilwell *v.* Carpenter, 62 N. Y. 639; White *v.* Joy, 13 N. Y. 83; Fowler *v.* Westervelt, 40 Barb. (N. Y.) 374; Gould *v.* Glass, 19 Barb. (N. Y.) 179.

10. Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591; De Nobele *v.* Lee, 47 N. Y. Super. Ct. 372; Holladay *v.* Davis, 5 Oreg. 40; Beale *v.* Batte, 31 Tex. 371.

11. Williams *v.* Dickerson, 8 Blackf. (Ind.) 287; Ft. Wayne *v.* Jackson, 7 Blackf. (Ind.) 36; Smith *v.* Walker, 7 Ind. App. 614, 34 N. E. 843; Farmers' Mut. Ins. Co. *v.* Moore, 48 Nebr. 713, 67 N. W. 764; U. S. *v.* Bradley, 10 Pet. (U. S.) 343, 9 L. ed. 448.

12. Dent *v.* Merriam, 113 Ga. 83, 38 S. E. 334.

13. Peterson *v.* Lothrop, 34 Pa. St. 223.

14. See *supra*, III, A, 7, h.

15. McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Sedwick *v.* Ritter, 128 Ind. 209, 27 N. E. 610.

16. Trueb *v.* New York Asbestos Mfg. Co., 16 Misc. (N. Y.) 482, 38 N. Y. Suppl. 604; Roe *v.* Lincoln County, 56 Wis. 66, 13 N. W. 887.

17. Dunn *v.* Gibson, 9 Nebr. 513, 4 N. W. 244; Cohn-Baer-Myers, etc., Co. *v.* Realty Transfer Co., 117 N. Y. App. Div. 215, 102 N. Y. Suppl. 122 [*affirmed* in 191 N. Y. 533, 84 N. E. 1110]; Tracy *v.* Tracy, 59 Hun

a liability on the part of someone, but such liability must, by apt averments, be shown to rest upon the particular party or parties against whom the action is brought.[18] Thus a declaration alleging the commission of a negligent act by one of the defendants states no cause of action against the other defendant.[19] Some duty or obligation must be shown to rest upon the party sought to be charged, a neglect or breach of which has resulted in the injury complained of.[20] But plaintiff need show only sufficient facts to create a liability, and it is unnecessary to allege any further interest in or connection with the subject of the action,[21] or any further facts relative to the character of defendant.[22] If the averments show a liability on the part of defendant, it is unimportant in what character his liability originated.[23] In case a contract is made by defendant in a wrong name plaintiff must by proper averments show that the obligor in the contract and defendant sued are the same.[24] Where several persons are named as defendants the complaint must contain allegations sufficient to show the relation which they sustain toward each other with regard to the subject of action.[25] But where by statute a liability is joint and several, a complaint against several defendants need not aver a joint liability.[26] Under the provisions of some statutes a complaint against several defendants is, for the purpose of determining its sufficiency, considered as both joint and several.[27]

6. Excusing Non-Joinder of Parties. It is incumbent on the pleader to show on the face of his complaint the proper parties to the action.[28] Where it appears from the facts alleged that other parties should have been joined, the pleading is defective unless it alleges such other facts as satisfactorily account for the non-joinder.[29] A declaration against one of several joint and several obligees is good without an averment that the others are without the jurisdiction of the court.[30]

7. Jurisdictional Facts.[31] The general rule is that where a court has general jurisdiction of the subject-matter of an action it is not necessary to allege the facts showing jurisdiction.[32] But where the court is one of limited jurisdiction,

(N. Y.) 1, 12 N. Y. Suppl. 665; Oelbermann *v.* New York, etc., R. Co., 14 Misc. (N. Y.) 131, 36 N. Y. Suppl. 1096; Flaxman *v.* Rice, 65 Tex. 430; Scull *v.* Roane, 21 Fed. Cas. No. 12,570*c*, Hempst. 103.

18. Andrew *v.* Lynch, 27 Mo. 167; Wing *v.* Campbell, 15 Mo. 275; Ewing *v.* Dampman, 1 Chest. Co. Rep. (Pa.) 443; Williams *v.* Yorkville, 59 Wis. 119, 17 N. W. 546.

19. Jones *v.* Klawiter, 110 Ill. App. 31 [*affirmed* in 219 Ill. 626, 76 N. E. 673].

20. Funkhouser *v.* How, 17 Mo. 225; L. Bauman Jewelry Co. *v.* Bertig, 81 Mo. App. 393; Burrall *v.* Bushwick R. Co., 75 N. Y. 211; McDonough *v.* Houston First Nat. Bank, 34 Tex. 309.

21. McBride *v.* Scott, 125 Mich. 517, 84 N. W. 1079.

In an action in rem against land it is sufficient in making one a party defendant to allege that he has, or claims to have, some interest in the land, without alleging the nature of such interest. Otis *v.* De Boer, 116 Ind. 531, 19 N. E. 317; Indiana, etc., R. Co. *v.* Allen, 113 Ind. 581, 15 N. W. 446; Carver *v.* Carver, 97 Ind. 497; Woodworth *v.* Zimmerman, 92 Ind. 349; Stumph *v.* Reger, 92 Ind. 286; Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Marot *v.* Germania Bldg., etc., Assoc. No. 2, 54 Ind. 37.

22. Adams *v.* Charter, 46 Conn. 551.

23. Pierse *v.* Irvine, 1 Minn. 369.

24. McGregor *v.* Fuller Implement Co., 72 Iowa 143, 33 N. W. 464.

25. Kruger *v.* St. Joe Lumber Co., 11 Ida. 504, 83 Pac. 695; McKee *v.* Kent, 24 Miss. 131.

26. Fellows *v.* Jernigan, 68 Mo. 434; Gates *v.* Watson, 54 Mo. 585.

27. See Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990.

28. Alexander *v.* Gaar, 15 Ind. 89.

29. Sourse *v.* Marshall, 23 Ind. 194; Hansel *v.* Morris, 1 Blackf. (Ind.) 307; Harwood *v.* Roberts, 5 Me. 441; Kent *v.* Holliday, 17 Md. 387; Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59; Bischoff *v.* Engel, 10 N. Y. App. Div. 240, 41 N. Y. Suppl. 815; Walton *v.* Stewart, 16 N. Y. Suppl. 38.

30. Wright *v.* Hicks, Brayt. (Vt.) 22.

31. Averments as to amount in federal courts see Courts, 11 Cyc. 881.

Necessity of pleading jurisdictional facts before justice of the peace see Justices of the Peace, 24 Cyc. 499.

Necessity of pleading showing the amount in controversy to be within jurisdiction see Courts, 11 Cyc. 782.

Showing diverse citizenship as ground of jurisdiction of federal court see Courts, 11 Cyc. 875.

Showing that question arose under United States constitution as ground for jurisdiction of United States circuit court see Courts, 11 Cyc. 862.

32. Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686; Brownfield *v.* Weicht, 9 Ind. 394; Bohart *v.* Republic Inv. Co., 49 Kan.

the complaint must affirmatively show that the case is within the jurisdiction.[33] Where the jurisdiction of a court of limited jurisdiction depends on residence or citizenship, facts showing it should be alleged.[34] Where courts exercise an extra-territorial jurisdiction it is generally held that the facts showing how it arises need not be alleged in the declaration,[35] although other cases have held such allegations necessary.[36] A statutory requirement that the complaint shall show that the value of the property involved is within the prescribed limit does not require any particular form for the jurisdictional averment.[37] A count which by its averments ousts the jurisdiction of the court may be stricken out.[38] In pleading the process of a court of limited jurisdiction, every jurisdictional fact must be plainly and explicitly averred.[39]

8. **Residence.** The residence of a party need not ordinarily be alleged,[40] except where necessary for jurisdictional purposes,[41] but the statutes in some states require it.[42]

9. **Time.**[43] At common law[44] it is held necessary to state in the declaration

94, 30 Pac. 180 (holding that where an action was brought against a non-resident of the state in the district court it was not necessary to allege in the petition that defendant might be found in the county where the action was brought, or that he had property in the county); Gervais *v.* Chicago, etc., R. Co., 13 N. Y. Suppl. 589, 18 N. Y. Civ. Proc. 404 [*affirmed* in 58 Hun 610, 12 N. Y. Suppl. 312, 20 N. Y. Civ. Proc. 95]; Turberville *v.* Long, 3 Hen. & M. (Va.) 309.

33. *Colorado.*— Learned *v.* Tritch, 6 Colo. 432.

Connecticut.— Wooster *v.* Parsons, Kirby 27.

Georgia.— Coney *v.* Horne, 93 Ga. 723, 20 S. E. 213.

Louisiana.— Delisle *v.* Gaines, 4 Mart. 666, holding an allegation sufficient.

Missouri.— Dougherty *v.* Matthews, 35 Mo. 520, 88 Am. Dec. 126.

New York.— Peck *v.* Dickey, 5 Misc. 95, 24 N. Y. Suppl. 834, 23 N. Y. Civ. Proc. 210; Gilbert *v.* York, 12 N. Y. Civ. Proc. 345.

Virginia.— Thornton *v.* Smith, 1 Wash. 81.

Canada.— *Ex p.* Andrews, 34 N. Brunsw. 315.

Compare Slade *v.* His Creditors, 10 Cal. 483.

34. Elliott *v.* Farwell, 44 Mich. 186, 6 N. W. 234; Grand Rapids, etc., R. Co. *v.* Gray, 38 Mich. 468; Denison *v.* Smith, 33 Mich. 157; Gilbert *v.* York, 111 N. Y. 544, 19 N. E. 268; Frees *v.* Ford, 6 N. Y. 176; J. W. Simmons Co. *v.* Costello, 63 N. Y. App. Div. 428, 71 N. Y. Suppl. 577; Judge *v.* Hall, 5 Lans. (N. Y.) 69; Kinloch *v.* Carsten, 5 Rich. (S. C.) 330; Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Brown *v.* Keene, 8 Pet. (U. S.) 112, 8 L. ed. 885; Gracie *v.* Palmer, 8 Wheat. (U. S.) 699, 5 L. ed. 719; Turner *v.* Bank of North America, 4 Dall. (U. S.) 8, 1 L. ed. 718.

Sufficiency of averment.— An averment that the parties have been residents of the state "for one year immediately preceding the commencement of this action" is a sufficient allegation of plaintiff's residence at the commencement of the action. Elliot *v.* Elliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

35. Cody *v.* Raynaud, 1 Colo. 272; Hamilton *v.* Dewey, 22 Ill. 490; Gillilan *v.* Gray, 14 Ill. 416; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439 [*overruling* Haddock *v.* Waterman, 11 Ill. 474; Clark *v.* Clark, 6 Ill. 33; Brown *v.* Bodwell, 5 Ill. 302; Wakefield *v.* Goudy, 4 Ill. 133; Shepard *v.* Ogden, 3 Ill. 257; Van Horn *v.* Jones, 3 Ill. 1; Gillet *v.* Stone, 2 Ill. 539; Key *v.* Collins, 2 Ill. 403]; Eames *v.* Carlisle, 3 N. H. 130.

36. Smith *v.* Bresnahan, 59 Mich. 346, 26 N. W. 536; Bigham *v.* Talbot, 51 Tex. 450; Henry *v.* Fay, 2 Tex. App. Civ. Cas. § 834.

37. Hughes *v.* Brewer, 7 Colo. 583, 4 Pac. 1155.

38. Fitzsimmons *v.* McIntyre, 5 Ont. Pr. 119.

39. Clark *v.* Norton, 6 Minn. 412.

40. Byrd *v.* State, 15 Ark. 175; Dillard *v.* Noel, 2 Ark. 449.

41. See *supra*, III, B, 7.

42. Simpson *v.* Lombas, 14 La. Ann. 103; Perry *v.* Believre, 5 Mart. N. S. (La.) 78; Harper *v.* Nichol, 13 Tex. 151; Warner *v.* Bailey, 7 Tex. 517; Edsall *v.* Wray, 19 Ont. Pr. 245. See Baker *v.* Wofford, 4 Tex. 122.

43. **Failure to state time as ground for:** Demurrer see *infra*, VI, F. Motion for more specific statement see *infra*, XII, D, 1. Demand for bill of particulars see *infra*, X, A, 9, a.

44. *Georgia.*— Bond *v.* Central Bank, 2 Kelly 92.

Maine.— Wellington *v.* Milliken, 82 Me. 58, 19 Atl. 90; Shorey *v.* Chandler, 80 Me. 409, 15 Atl. 223.

New Hampshire.—Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

New Jersey.— Opdycke *v.* Easton, etc., R. Co., 68 N. J. L. 12, 52 Atl. 243; Vanguilder *v.* Stull, 10 N. J. L. 233; Gordon *v.* Myers, 8 N. J. L. 69; Sims *v.* Smith, 4 N. J. L. 92. See also Allen *v.* Smith, 12 N. J. L. 159.

New York.— Timmerman *v.* Morrison, 14 Johns. 369. See also Barnes *v.* Matteson, 5 Barb. 375.

Pennsylvania.— Mooney *v.* Snyder, 7 Del. Co. 335.

Vermont.— Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395.

or complaint a time when every material traversable fact happened generally [45] a similar rule has been applied under the codes and practice acts.[46] But the true time need not ordinarily be stated except where it is of the essence of a contract or constitutes matter of description of an instrument, or is otherwise material.[47] In alleging time, the day, month, and year [48] should be stated,[49] and it is said that a day certain must be alleged even where a *continuando* accompanies the allegation.[50] Allegation in the form of *continuando* [51] is proper where the cause of action consists of repeated or continued acts,[52] especially where the precise dates are wholly within the knowledge of the other party.[53] Time alleged as to one fact applies to every other fact connected conjunctively therewith.[54] The defect is cured by verdict [55] and is not ground for nonsuit [56] or arrest of judgment.[57]

10. Description of Property. The pleading should describe the property with such accuracy that it may be ascertained or located from such description alone.[58] Ownership should be directly and positively averred.[59]

England.— Denison *v.* Richardson, 14 East 291. See also Harrison *v.* Heathorne, 17 L. J. C. P. 158, 5 Man. & G. 322, 6 Scott N. R. 121, 44 E. C. L. 174.

Canada.— St. Louis *v.* O'Callaghan, 13 Ont. Pr. 322.

See 39 Cent. Dig. tit. "Pleading," § 63.

45. In some of the cases it has been held that, although a fact may be material and traversable, if the time of its occurrence is immaterial the allegation may be entirely omitted. Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437. The same opinion was expressed in People *v.* Ryder, 12 N. Y. 433. And in Denny *v.* Northwestern Christian University, 16 Ind. 220, and Sutter *v.* Streit, 21 Mo. 157, this view seems to have been adopted.

46. St. Louis, etc., R. Co. *v.* State, 59 Ark. 165, 26 S. W. 824; Williamson *v.* Joyce, 137 Cal. 151, 69 Pac. 980; Augusta *v.* Marks, 124 Ga. 365, 52 S. E. 539; International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526. See also Bancroft Co. *v.* Haslett, 106 Cal. 151, 39 Pac. 602; Wise *v.* Hogan, (Cal. 1888) 18 Pac. 784.

Sufficiency of statement.— An allegation that a party became indebted in a certain amount, on a certain day stated, is a sufficient allegation of the creation of the indebtedness upon such day as against a general demurrer. Duke *v.* Huntington, 130 Cal. 272, 62 Pac. 510.

Accrual of the right of action before the writ issued need not be shown on the face of the declaration. Owen *v.* Walters, 5 Dowl. P. C. 324, 6 L. J. Exch. 13, 2 M. & W. 91.

47. Howland *v.* Davis, 40 Mich. 545; Delsman *v.* Friedlander, 40 Oreg. 33, 66 Pac. 297. See also Bancroft Co. *v.* Haslett, 106 Cal. 151, 39 Pac. 602; Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437; Opdycke *v.* Easton, etc., R. Co., 68 N. J. L. 12, 52 Atl. 243. *Compare* Price *v.* State, 57 Ark. 165, 20 S. W. 1091, where, under the circumstances, a variance between the date alleged and the date proved was held to be fatal.

Variance between allegation and proof see *infra*, XIII, C, 10.

48. Andrews' Stephen Pl. § 162.

49. Cole *v.* Babcock, 78 Me. 41 2 Atl. 545 ("about" a given day insufficient); Gordon *v.* Myers, 8 N. J. L. 69 ("in the year, 1817" too indefinite). See also St. Louis, etc., R. Co. *v.* State, 59 Ark. 165, 26 S. W. 824; Wise *v.* Hogan, (Cal. 1888) 18 Pac. 784.

A day after commencement of the action constitutes a demurrable defect. Watson *v.* Toronto Gas-Light, etc., Co., 4 U. C. Q. B. 158.

50. Shorey *v.* Chandler, 80 Me. 409, 15 Atl. 223.

51. That is to say, an allegation that the acts took place "from time to time" between specified dates. McConnel *v.* Kibbe, 33 Ill. 175, 85 Am. Dec. 265; International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526.

52. See cases cited in the preceding note.

53. Lincoln *v.* Martin, 5 Pa. Co. Ct. 333.

54. Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395.

55. See *infra*, XIV, J, 3, l.

56. Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

57. Higgins *v.* Highfield, 13 East 407. See, generally, Judgments, 23 Cyc. 827.

58. *California.*— Zeigler *v.* Wells, etc., Co., 23 Cal. 179, 83 Am. Dec. 87.

Connecticut.— Phelps *v.* Sill, 1 Day 315.

Indiana.— Sheffer *v.* Hines, 149 Ind. 413, 49 N. E. 348; Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057; Parke County *v.* Wagner, 138 Ind. 609, 38 N. E. 171; Rosenbaum *v.* Schmidt, 54 Ind. 231.

Iowa.— Citizens' Sav. Bank *v.* Stewart, 90 Iowa 467, 57 N. W. 957.

Montana.—Tracy *v.* Harmon, 17 Mont. 465, 43 Pac. 500.

Oregon.— Kiernan *v.* Terry, 26 Oreg. 494, 38 Pac. 671. But in an action for trover for money it is only necessary to state the aggregate amount. Salem Traction Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 675.

Texas.— Wood *v.* Hollander, 84 Tex. 394, 19 S. W. 551.

Canada.— Brewing *v.* Berryman, 15 N. Brunsw. 515; Mills *v.* Dewitt, 3 N. Brunsw. 486.

See 39 Cent. Dig. tit. "Pleading," § 64.

59. Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207, holding, however, that where aver-

11. Demand. Where a demand is necessary before a right of action accrues, such demand must be alleged by plaintiff.[60] But a demand which is not essential to the cause of action need not of course be alleged.[61] Such an allegation is sufficiently made where plaintiff avers that he requested defendant, etc., and defendant refused,[62] and an allegation that defendant is indebted to plaintiff is sufficient allegation of demand where there could be no indebtedness without a demand.[63] An allegation of defendant's refusal has been held sufficient, since he could not refuse unless he had been asked to perform.[64] A mere averment, "though often requested," is sufficient on demurrer.[65] But even where a demand is a condition precedent to plaintiff's right, if defendant in his answer denies all liability so that it is clear that a demand would have been refused, defendant cannot complain at the lack of demand.[66] The date of the demand should be alleged, and if such date be omitted a motion to make more definite and certain will lie.[67]

12. Performance of Conditions — a. General Rules. Where conditions precedent to the right of action exist, their performance must be alleged by plaintiff in order to state a cause of action,[68] or where there has been no performance

ments were sufficient to show that property was on plaintiff's premises and in his possession, it was sufficient to maintain an action against a wrong-doer for its destruction.

60. *Georgia.*— Montgomery *v.* Evans, 8 Ga. 178.

Indiana.— Thompson *v.* Doty, 72 Ind. 336.

Kentucky.— Letcher *v.* Taylor, Hard. 79; Bridges *v.* Hardgrove, Ky. Dec. 153.

Louisiana.— Hepp *v.* Commagere, 10 Rob. 524; McMaster *v.* Brander, 2 Rob. 498, both holding that in an action for damages for the passive violation of a contract a demand placing defendant in default must be alleged in the petition.

Massachusetts.—Dyer *v.* Rich, 1 Metc. 180; Baker *v.* Fuller, 21 Pick. 318.

New York.— See Miller *v.* Buffalo, Sheld. 490, holding that a complaint on a demand, which by statute cannot be sued upon until a certain time after it has been presented with prescribed proofs for audit, must allege plaintiff's compliance with these statutory requirements.

North Carolina.— Berlin Iron Bridge Co. *v.* Wilkes County, 111 N. C. 317, 16 S. E. 314.

Pennsylvania.— Dewart *v.* Masser, 40 Pa. St. 302.

See 39 Cent. Dig. tit. "Pleading," § 126.

61. Keeton *v.* Scantland, Hard. (Ky.) 149; Grant *v.* Groshon, Hard. (Ky.) 85, 3 Am. Dec. 725 (both holding that when property is payable upon a particular day a demand need not be averred); Solomon *v.* Gardiner, 50 La. Ann. 1293, 23 So. 896; Johnson *v.* Ackerson, 3 Daly (N. Y.) 430.

62. Willets *v.* Ridgway, 9 Ind. 367.

63. Second Ave. R. Co. *v.* Coleman, 24 Barb. (N. Y.) 300.

64. Ferguson *v.* Hull, 136 Ind. 339, 36 N. E. 254; Worth *v.* Wharton, 122 N. C. 376, 29 S. E. 370; Mason *v.* Carter, 8 S. C. 103; Brossard *v.* Williams, 114 Wis. 89, 89 N. W. 832.

65. Hall *v.* Williams, 13 Minn. 260. But see Montgomery *v.* Evans, 8 Ga. 178.

To authorize a judgment by default, an averment "that payment was requested" is not the equivalent of the averment "that payment was demanded." Bayha *v.* Carter, 7 Tex. Civ. App. 1, 26 S. W. 137.

66. Thompson *v.* Whitney, 20 Utah 1, 57 Pac. 429.

67. Rosenthal *v.* Rosenthal, 10 N. Y. Suppl. 455.

68. *Colorado.*— Armor *v.* Fisk, 1 Colo. 148.

Connecticut.— Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 14; Tillotson *v.* Bishop, 1 Root 228.

District of Columbia.—Alexandria R. Co. *v.* National Junction R. Co., 1 MacArthur 203.

Georgia.— Milburn *v.* Glynn County, 109 Ga. 473, 34 S. E. 848; Montgomery *v.* Evans, 8 Ga. 178; Murphy *v.* Lawrence, 2 Ga. 257.

Indiana.— Washington Tp. *v.* Bonney, 45 Ind. 77.

Iowa.—Ary *v.* Chesmore, 113 Iowa 63, 84 N. W. 965; Closz *v.* Miracle, 103 Iowa 198, 72 N. W. 502; Albers *v.* Western Union Tel. Co., 98 Iowa 51, 66 N. W. 1040; Knowlton *v.* Guttenberg, 5 Iowa 383.

Kentucky.— Steadman *v.* Guthrie, 4 Metc. 147.

Minnesota.— Root *v.* Childs, 68 Minn. 142, 70 N. W. 1087.

Mississippi.— Copes *v.* Matthews, 10 Sm. & M. 398.

Montana.— McGlauflin *v.* Wormser, 28 Mont. 177, 72 Pac. 428; Cope *v.* Minnesota Type Foundry Co., 20 Mont. 67, 49 Pac. 387.

Nevada.— Inda *v.* McInnis, 25 Nev. 235, 59 Pac. 3.

New York.— Weeks *v.* O'Brien, 141 N. Y. 199, 36 N. E. 739; Dalzell *v.* Fahy's Watch Case Co., 138 N. Y. 285, 33 N. E. 1071; Tooker *v.* Arnoux, 76 N. Y. 397; U. S. Life Ins. Co. *v.* Gage, 3 N. Y. Suppl. 398; Dodge *v.* Coddington, 3 Johns. 146.

Ohio.— Home Ins. Co. *v.* Lindsey, 26 Ohio St. 348; Lowe *v.* Phillips, 14 Ohio St. 308.

Oregon.— Long Creek Bldg. Assoc *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366; Manaudas *v.* Heilner, 29 Oreg. 222, 45 Pac. 758.

and plaintiff intends to rely upon matter excusing performance such matter must be alleged.[69]

b. Impossible Conditions. When, however, a condition precedent is clearly impossible, it may be disregarded.[70]

c. Concurrent Covenants. In the case of concurrent covenants plaintiff must allege performance or readiness to perform,[71] and an offer to perform.[72]

d. Waiver. A plaintiff may safely assume that conditions which have been waived will not be relied upon, and allegations of waiver to meet a defense based on such conditions are not inconsistent with the statutory allegations that all conditions on the part of plaintiff have been duly performed.[73]

e. Form of Averment. A general averment that plaintiff has performed all the conditions precedent to his right is not sufficient, unless authorized by statute, but the performance of each condition must be specifically shown.[74] But while a general averment of performance is sufficient under these statutes, such an averment will not suffice to avoid ambiguities in the contract, and in case it is not clear what acts were done in performance, the court, especially in an equity case, may hold the pleading insufficient.[75]

13. Allegations on Information and Belief.[76] Facts which are presumptively within the knowledge of the party pleading should be alleged positively, but other facts may be alleged upon information and belief only.[77] Many cases, however, hold that this rule does not allow plaintiff to allege merely that he is informed and believes certain facts to be true. A traverse of such an averment would put in issue only the information or belief, and not the truth of the facts themselves.

Rhode Island.— Baker *v.* Slater Mill, etc., Co., 14 R. I. 531.

Texas.— Reeves *v.* Miller, 28 Tex. 578.

Vermont.— Camp *v.* Barker, 21 Vt. 469.

Wisconsin.— Chas. Baumbach Co. *v.* Laube, 99 Wis. 171, 74 N. W. 96; Boden *v.* Maher, 95 Wis. 65, 69 N. W. 980.

Canada.—Driscoll *v.* Barker, 18 N. Brunsw. 407; Watson *v.* Summers, 4 N. Brunsw. 101.

See 39 Cent. Dig. tit. "Pleading," §§ 123–127. See also Contracts, 9 Cyc. 719.

A test to determine whether a condition is precedent or subsequent was given by the supreme court of Minnesota in Root *v.* Childs, 68 Minn. 142, 146, 70 N. W. 1087. The court said: "Where the obligation of a party to a contract is to pay only upon the happening of a contingency, e. g., the return of an instrument duly recorded, such contingency is in the nature of a condition precedent, and its occurrence must be alleged in the complaint. . . . But, if payment is not to be made if a contingency happens during its continuance, e. g. if the party is enjoined from using the article which is the subject-matter of the contract, he is not to pay the purchase price until the injunction is dissolved, the contingency is in the nature of a condition subsequent, and it is not necessary to allege in the complaint the nonhappening or noncontinuance of the contingency."

69. *Indiana.*—Prather *v.* Ruddell, 8 Blackf. 393.

Missouri.— Basye *v.* Ambrose, 32 Mo. 484; Little *v.* Mercer, 9 Mo. 218; Ricketts *v.* Hart, 73 Mo. App. 647; Beckmann *v.* Phœnix Ins. Co., 49 Mo. App. 604.

New Jersey.— Hillyard *v.* Mutual Ben. L. Ins. Co., 35 N. J. L. 415.

New York.—Hosley *v.* Black, 28 N. Y. 438; Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49.

Virginia.— Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

See 39 Cent. Dig. tit. "Pleading," §§ 123–127. See also Contracts, 9 Cyc. 719.

70. Armor *v.* Fisk, 1 Colo. 148.

71. McCall *v.* Welsh, 3 Bibb (Ky.) 289; Weiner *v.* Lee Shing, 12 Oreg. 276, 7 Pac. 111; Turner *v.* Ogden, 1 Black (U. S.) 450, 17 L. ed. 203. See also Contracts, 9 Cyc. 719.

72. Bourland *v.* Sickles, 26 Ill. 497.

73. German Ins. Co. *v.* Shader, 68 Nebr. 1, 93 N. W. 972, 60 L. R. A. 918.

74. See *supra*, II, G, 7, b, (x).

In Pennsylvania it has been held that under the statute substituting a statement for a common-law declaration, it is unnecessary to allege performance of conditions precedent. Snevely *v.* Jones, 9 Watts 433.

75. Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880.

76. Demurrer because of statement upon information and belief see *infra*, VI, F, 1, l.

77. *Colorado.*— Jones *v.* Pearl Min. Co., 20 Colo. 417, 38 Pac. 700.

Iowa.— Robinson *v.* Ferguson, 119 Iowa 325, 93 N. W. 350.

Minnesota.— State *v.* Cooley, 58 Minn. 514, 60 N. W. 338.

New York.— Radway *v.* Mather, 5 Sandf. 654.

Pennsylvania.— Goldbeck *v.* Brady, 4 Pa. Co. Ct. 169.

Wisconsin.— Steinberg *v.* Saltzman, 130 Wis. 419, 110 N. W. 198; Fairbanks *v.* Isham, 16 Wis. 118.

See 39 Cent. Dig. tit. "Pleading," § 140.

But plaintiff must allege that the facts are true, as he is informed and believes.[78] But other cases permit the allegation that plaintiff is informed and believes the facts to be true.[79] The words "information and belief" added to a positive averment may be disregarded as surplusage.[80] An averment on information and belief is not vitiated by allegations as to the source of the information.[81]

14. Damages. A pleading which does not allege facts showing any damage suffered by plaintiff is bad on general demurrer.[82] Special damages cannot be recovered unless they are alleged.[83] If the facts alleged entitle plaintiff to even nominal damages, a general demurrer cannot be sustained to the pleading, although no special damages be alleged.[84] That is to say, if the acts charged upon defendant are such that their natural and necessary consequence is to injure plaintiff, an allegation of general damages is sufficient, and a failure to allege special damage does not subject the pleading to attack by demurrer.[85] If the only damages shown to have been suffered are too remote, indefinite, or contingent to form the basis for a legal demand, the pleading is bad on general demurrer.[86]

15. Anticipating Defenses. It is a general principle that a pleading need and should not, by its averments, anticipate a defense thereto, and negative or avoid it;[87]

78. *Kentucky.*— Patterson *v.* Caldwell, 1 Mete. 489.

Missouri.— Nichols, etc., Co. *v.* Hubert, 150 Mo. 620, 51 S. W. 1031.

New York.— St. John *v.* Beers, 24 How. Pr. 377.

Ohio.— State Bank *v.* Oliver, 1 Disn. 159, 12 Ohio Dec. (Reprint) 548.

Washington.— Warburton *v.* Ralph, 9 Wash. 537, 38 Pac. 140.

United States.— Bank of North America *v.* Rindge, 57 Fed. 279.

See 39 Cent. Dig. tit. "Pleading," § 140.

79. Robinson *v.* Ferguson, 119 Iowa 325, 93 N. W. 350; McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233; Radway *v.* Mather, 5 Sandf. (N. Y.) 654; Dial *v.* Gary, 24 S. C. 572.

80. Ricketts *v.* Green, 6 Abb. Pr. (N. Y.) 82; Truscott *v.* Dole, 7 How. Pr. (N. Y.) 221. But see to the contrary St. John *v.* Beers, 24 How. Pr. (N. Y.) 377; Warburton *v.* Ralph, 9 Wash. 537, 38 Pac. 140.

81. Borrowe *v.* Milbank, 5 Abb. Pr. (N. Y.) 28.

82. Gould *v.* Allen, 1 Wend. (N. Y.) 182. See, generally, Damages, 13 Cyc. 174 *et seq.*

83. Stevenson *v.* Smith, 28 Cal. 102, 87 Am. Dec. 107; Pepper *v.* Twyman, 5 Ky. L. Rep. 426; Gove *v.* Watson, 61 N. H. 136; Squier *v.* Gould, 14 Wend. (N. Y.) 159. See, generally, Damages, 13 Cyc. 179.

84. McCarty *v.* Beach, 10 Cal. 461; McGee *v.* Bast, 6 J. J. Marsh. (Ky.) 453.

85. *Colorado.*— Herfort *v.* Cramer, 7 Colo. 483, 4 Pac. 896.

Massachusetts.— Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

Michigan.— Shaw *v.* Hoffman, 21 Mich. 151.

New York.— Miller *v.* Barber, 66 N. Y. 558.

Wisconsin.— See Birchard *v.* Booth, 4 Wis. 67.

United States.— Roberts *v.* Graham, 6 Wall. 578, 18 L. ed. 791.

An allegation that work was defective is virtually one that less is due than the contract calls for, and may be proved. Thornton *v.* Linton, 3 La. 253.

86. Harrison *v.* Redden, 53 Kan. 265, 36 Pac. 325.

87. *Alabama.*— Lewis *v.* Bruton, 74 Ala. 317, 49 Am. Rep. 816.

California.— Munson *v.* Bowen, 80 Cal. 572, 22 Pac. 253; Canfield *v.* Tobias, 21 Cal. 349; Paso Robles Bank *v.* Blackburn, 2 Cal. App. 146, 83 Pac. 262.

Connecticut.— Prince *v.* Takash, 75 Conn. 616, 54 Atl. 1003.

Illinois.— Gunton *v.* Hughes, 181 Ill. 132, 54 N. E. 895.

Indiana.— Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936; Western Union Tel. Co. *v.* Henley, 157 Ind. 90, 60 N. E. 682; Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; McDowell *v.* Hendrix, 67 Ind. 513; Wilkinson *v.* Applegate, 64 Ind. 98.

Kentucky.—Depp *v.* Louisville, etc., R. Co., 14 S. W. 363, 12 Ky. L. Rep. 366.

Louisiana.—Lafourche Transp. Co. *v.* Pugh, 52 La. Ann. 1517, 27 So. 958; Mathews *v.* Pascal, 13 La. 47; West *v.* McConnell, 5 La. 424, 25 Am. Dec. 191.

Minnesota.— Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443; Romer *v.* Conter, 53 Minn. 171, 54 N. W. 1052; Jones *v.* Ewing, 22 Minn. 157; Faribault *v.* Hulett, 10 Minn. 30.

Missouri.— Sawyer *v.* Wabash R. Co., 156 Mo. 468, 57 S. W. 108.

Nebraska.— Larson *v.* Pender First Nat. Bank, 66 Nebr. 595, 92 N. W. 729; Massillon Engine, etc., Co. *v.* Prouty, 65 Nebr. 496, 91 N. W. 384.

New Jersey.—Farwell *v.* Smith, 16 N. J. L. 133.

New York.— Metropolitan L. Ins. Co. *v.* Meeker, 85 N. Y. 614; Delaware, etc., R. Co. *v.* Bowns, 36 N. Y. Super. Ct. 126; Van Nest *v.* Talmage, 17 Abb. Pr. 99; Van Demark *v.* Van Demark, 13 How. Pr. 372.

North Carolina.— See Charlotte Bank *v.* Britton, 66 N. C. 365.

Oregon.— Little Nestucca Toll Road Co. *v.* Tillamook County, 31 Oreg. 1, 48 Pac. 465,

but in some cases such a form of pleading is permissible,[88] and there are cases where the facts constituting the cause of action cannot be set up properly without at the same time disclosing the facts which constitute a defense thereto, and in such cases it is proper for plaintiff to allege facts which he deems a reply to the defense thus disclosed.[89] For if facts constituting a defense to the cause of action alleged are set up in the pleading, it will be held bad unless they are denied or their effect avoided by other facts.[90] Any allegations made for the purpose of anticipating defenses are immaterial,[91] unless defendant wishes to rely upon them, in which case he will be relieved from specifically setting up his defense and may accept the issue presented by plaintiff.[92]

16. Prayer For Damages or Other Relief[93]— a. At Common Law. The failure of the declaration, in an action at common law sounding in damages, to claim damages in some sum is fatal.[94] And even in actions not sounding in damages it was usual to lay nominal damages.[95] The claim for damages, usually made in the conclusion of the pleading, is called the *ad damnum* clause.[96]

b. Under the Codes — (I) *General Rules.* The prayer for relief forms no part of the statement of the cause of action;[97] and it is unimportant unless there

65 Am. St. Rep. 802; Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676.

Pennsylvania.— Altoona Second Nat. Bank *v.* Gardner, 171 Pa. St. 267, 33 Atl. 188; Henry *v.* Lynde, 12 Pa. Co. Ct. 189; Drake *v.* Philadelphia, etc., R. Co., 5 Pa. Co. Ct. 21; Smith *v.* Stevenson, 30 Pittsb. Leg. J. N. S. 231.

South Dakota.— Trotter *v.* Mutual Reserve Fund Life Assoc., 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887.

Virginia.— Newport News Pub. Co. *v.* Beaumeister, 104 Va. 744, 52 S. E. 627.

Wisconsin.— Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20.

United States.— Little Rock Water Works Co. *v.* Barret, 103 U. S. 516, 26 L. ed. 523; Gelpeke *v.* Dubuque, 1 Wall. 221, 17 L. ed. 519; Gittings *v.* Loper, 84 Fed. 102; Hammer *v.* Kaufman, 11 Fed. Cas. No. 5,997, 2 Bond 1.

Canada.— Lake Erie, etc., R. Co. *v.* Sales, 26 Can. S. Ct. 663; Hall *v.* Allan, 15 N. Brunsw. 192; Bradey *v.* Western Ins. Co., 17 U. C. C. P. 597.

See 39 Cent. Dig. tit. "Pleading," § 139.

88. Western Travelers' Acc. Assoc. *v.* Thomson, 72 Nebr. 661, 101 N. W. 341, 103 N. W. 695, 105 N. W. 293. See also Amshel *v.* Hosenfeld, 20 Pa. Super. Ct. 376, holding that in an action on a note plaintiff might set out in his statement a former recovery in a suit upon one of other notes in the series, by which his right to recover upon the note in suit was adjudicated.

89. Latta *v.* Miller, 109 Ind. 302, 306, 10 N. E. 100. In this case the court said: "Where, as in this case, the complaint or paragraph thereof counts upon a promissory note, and the anticipated defence to the suit is the written release of the maker from all liability on such note, by the payee and holder thereof, so indorsed on the note as to become in some sense, and to some extent, a part of the cause of action, it seems to us that the plaintiff cannot well avoid the statement, in such complaint or paragraph, of such anticipated defence, and of the facts which show, as claimed by him, that such defence was and is invalid and void."

90. Lake Erie, etc., R. Co. *v.* Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; Latta *v.* Miller, 109 Ind. 302, 10 N. E. 111; Sutton *v.* Todd, 24 Ind. App. 519, 55 N. E. 980; Zane *v.* Zane, 5 Kan. 134; Millette *v.* Mehmke, 26 Minn. 306, 3 N. W. 700; Bonnifield *v.* Price, 1 Wyo. 172. *Compare* Young *v.* Gower, 88 Ill. App. 70.

91. Canfield *v.* Tobias, 21 Cal. 349; Scottish Nat. Ins. Co. *v.* Adams, 122 Ill. App. 471.

92. Eldridge *v.* Pierce, 90 Ill. 474; Williams *v.* Rhodes, 81 Ill. 571; Hall *v.* Fullerton, 69 Ill. 448.

93. Demand for excessive or insufficient relief as ground for demurrer see *infra*, II, F, 2, f, (III).

Dismissal or nonsuit because of prayer for wrong relief see Dismissal and Nonsuit, 14 Cyc. 443.

Limitation of judgment by amount demanded see Judgments, 23 Cyc. 797.

94. Treusch *v.* Kamke, 63 Md. 274; Brownson *v.* Wallace, 4 Fed. Cas. No. 2,042, 4 Blatchf. 465.

Aider of defect by verdict see *infra*, XIV, J, 3.

Demurrer because of failure to claim damages see *infra*, VI, F, 2, f, (I).

95. 1 Chitty Pl. (16th Am. ed.)* 411.

96. *Connecticut.*— Vincent *v.* Mutual Reserve Fund Life Assoc., 75 Conn. 650, 55 Atl. 177.

Indiana.— Swift *v.* Woods, 5 Blackf. 97.

Maine.— Cole *v.* Hayes, 78 Me. 539, 7 Atl. 391; Estes *v.* White, 61 Me. 22.

Massachusetts.— Hapgood *v.* Doherty, 8 Gray 373.

United States.— Winston *v.* U. S., 3 How. 771, 11 L. ed. 823.

Where the claim is estimated in foreign money it should be so stated in the pleading, or it may be stated as so much foreign money of the value of so much domestic money. George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167.

97. Frick *v.* Freudenthal, 45 Misc. (N. Y.)

is ambiguity in such statement.[98] A bad prayer for relief or a prayer for improper relief will not vitiate a pleading which is otherwise sufficient.[99] The facts alleged, and not the relief demanded, are of chief importance, and they determine the relief to be granted.[1] But where the facts leave doubt as to the cause of action which the pleader intended to present the prayer may be resorted to to explain such intent.[2] As a general rule, under the codes, the complainant may ask for general relief as was ordinarily done in equity, and where such a prayer is made the court may grant any relief to which complainant entitled upon the allegations of the complaint and the proofs introduced at the trial.[3] It has been held, however, in some states that the incorporation of a prayer for general relief in an

348, 90 N. Y. Suppl. 344; Balle *v.* Moseley, 13 S. C. 439; North Side Loan, etc., Soc. *v.* Nakielski, 127 Wis. 539, 106 N. W. 1097. See also Emmert *v.* Meyer, 65 Mo. App. 609.

On objection to the introduction of evidence the sufficiency of the complaint does not depend upon the prayer for relief. Woodford *v.* Kelley, 18 S. D. 615, 101 N. W. 1069, so holding under a statute providing that where an answer has been served the court may grant to plaintiff any relief consistent with the case made by the complaint and embraced within the issue.

98. North Side Loan, etc., Soc. *v.* Nakielski, 127 Wis. 539, 106 N. W. 1097.

The prayer will not control and determine the validity of the complaint. West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21, 72 N. E. 879; Comegys *v.* Emerick, 134 Ind. 148, 33 N. E. 899, 39 Am. St. Rep. 245.

Where demand is omitted.— It has been held that, where there is only one relief to which plaintiff can be entitled, the omission of a demand for judgment must be disregarded under a statute providing that errors or defects in the proceedings, which do not affect the substantial rights of the adverse party, must be disregarded. Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458.

99. Mark *v.* Murphy, 76 Ind. 534; Strœbe *v.* Fehl, 22 Wis. 337.

1. *California.*— Dennison *v.* Chapman, 105 Cal. 447, 39 Pac. 61; Johnson *v.* Polhemus, 99 Cal. 240, 33 Pac. 908.

Colorado.— French *v.* Woodruff, 25 Colo. 339, 54 Pac. 1015; McClure *v.* La Plata County Com'rs, 23 Colo. 130.

Indiana.— Sherrin *v.* Flinn, 155 Ind. 422, 58 N. E. 549; Miller *v.* Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693.

Iowa.— Stubblefield *v.* Gadd, 112 Iowa 681, 84 N. W. 917.

Kansas.— Smith *v.* Smith, 67 Kan. 841, 73 Pac. 56.

Minnesota.— Minneapolis, etc., R. Co. *v.* Brown, 99 Minn. 384, 109 N. W. 817.

Montana.— State *v.* Tooker, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315; Kleinschmidt *v.* Steele, 15 Mont. 181, 38 Pac. 827.

Nebraska.— Emanuel *v.* Barnard, 71 Nebr. 756, 99 N. W. 666; Toy *v.* McHugh, 62 Nebr. 820, 87 N. W. 1059.

New York.— Wetmore *v.* Porter, 92 N. Y. 76; Williams *v.* Slote, 70 N. Y. 601; Wright *v.* Wright, 54 N. Y. 437; Emery *v.* Pease, 20 N. Y. 62; Parker *v.* Pullman, 36 N. Y. App. Div. 208, 56 N. Y. Suppl. 734; Frick *v.* Freudenthal, 45 Misc. 348, 90 N. Y. Suppl. 344; Goldberg *v.* Finkelstein, 36 Misc. 809, 74 N. Y. Suppl. 847. See, however, Lamoreux *v.* Atlantic Mut. Ins. Co., 3 Duer 680, where much stress seems to be laid on the prayer for relief.

North Carolina.— Hendon *v.* North Carolina R. Co., 127 N. C. 110, 37 S. E. 155; Gillam *v.* Virginia L. Ins. Co., 121 N. C. 369, 28 S. E. 470; McNeill *v.* Hodges, 105 N. C. 52, 11 S. E. 265. When the cause of action appears sufficient from the complaint and the case is tried upon its merits, the court should enter such judgment as is proper, without regard to an imperfect or improper demand for judgment in the complaint or other pleadings, or whether there be any formal demand therefor. Presson *v.* Boone, 108 N. C. 78, 12 S. E. 897. Under the code system the demand for relief is made wholly immaterial, and it is the case made by the pleadings of the facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. Knight *v.* Houghtalling, 85 N. C. 17.

Oregon.— Rutenic *v.* Hamaker, 40 Oreg. 444, 67 Pac. 196.

South Dakota.— McGillivray *v.* McGillivray, 9 S. D. 187, 68 N. W. 316.

Texas.— Milliken *v.* Smoot, 64 Tex. 171.

Wisconsin.— Topping *v.* Parish, 96 Wis. 378, 71 N. W. 367.

Where a complaint seeks both legal and equitable relief, but the complainant fails to show himself entitled to one branch of such relief, the cause will be retained for the purpose of awarding such relief as complainant is entitled to. New York Ice Co. *v.* Northwestern Ins. Co., 23 N. Y. 357. See, generally, ACTIONS, 1 Cyc. 737.

2. See *supra*, II, I, 4.

3. *Georgia.*— Steed *v.* Savage, 115 Ga. 97, 41 S. E. 272; Hairalson *v.* Carson, 111 Ga. 57, 36 S. E. 319.

Iowa.— Hession *v.* Linastruth, 96 Iowa 483, 65 N. W. 399; Rees *v.* Shepherdson, 95 Iowa 431, 64 N. W. 286.

Kentucky.— McHugh *v.* Louisville Bridge Co., 65 S. W. 456, 23 Ky. L. Rep. 1546.

Montana.— Merk *v.* Bowery Min. Co., 31 Mont. 298, 78 Pac. 519.

Nebraska.— Kelley *v.* Wehn, 63 Nebr. 410, 88 N. W. 682.

Washington.— Yarwood *v.* Johnson, 29

action at law will not supply the place of a specific demand of particular relief which, if sought, gives character to the whole action.[4]

(II) *SUFFICIENCY.* Technical nicety is not required in the demand for damages under the codes and practice acts, and if it substantially informs defendant of the amount of the claim it will be deemed sufficient.[5] A prayer in the form of the *ad damnum* clause at common law is sufficient.[6]

c. Where There Are Several Counts. A single *ad damnum* clause or prayer for relief at the end of a count is usually held sufficient for all the counts which precede it,[7] if the language used is broad enough to include them.[8] Where there is but one conclusion of damages to apply to more than one count, all of the counts are bad if the conclusion is bad.[9] The amount demanded at the end of a declaration consisting of several counts should regularly be the aggregate of all the sums alleged to be due in the different counts.[10]

17. FORMAL CONCLUSION. That part of the declaration which follows the statement of the cause of action and shows the motive or object of plaintiff in suing is termed the conclusion.[11] An informal conclusion is not deemed a material defect,[12] although a ground for special demurrer at common law.[13] A general conclusion applies to each count in the declaration.[14] It is not necessary to con-

Wash. 643, 70 Pac. 123; MacKay *v.* Smith, 27 Wash. 442, 67 Pac. 982; Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

See also JUDGMENTS, 23 Cyc. 797.

General prayer implied.— A general prayer under the code practice need not be expressed in the pleadings, but is always implied. Knight *v.* Houghtalling, 85 N. C. 17.

Alternative prayer.— In some states it is held that a prayer for relief may be in the alternative. Peck *v.* Price, 4 S. W. 306, 9 Ky. L. Rep. 166; Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Clay County Land, etc., Co. *v.* Skidmore, 26 Tex. Civ. App. 472, 64 S. W. 815. But *compare* Durant *v.* Gardner, 19 How. Pr. (N. Y.) 94, holding that a prayer for general relief inconsistent with specific relief would be stricken out.

4. Cobb *v.* Smith, 23 Wis. 261, holding that where the abatement of a nuisance was not prayed for such relief could not be awarded in an action seeking damages only.

5. Colson *v.* Smith, 9 Ind. 8; Harris *v.* Perry, 2 Bush (Ky.) 101; Butts *v.* Phelps, 90 Mo. 670, 3 S. W. 218.

Allegation of indebtedness.— It has been held that a declaration which did not *eo nomine* proceed for damages, but alleged that defendant was indebted to plaintiffs in a certain sum, contained substantially a claim for damages. Garmany *v.* Savannah Guano Co., 80 Ga. 578, 7 S. E. 104.

Where not placed at end of declaration.— The fact that the prayer for relief in a declaration is placed before the last averment in the paragraph relating to the value of services declared upon will not render the declaration insufficient on demurrer. Cannon *v.* Castleman, 24 Ind. App. 188, 55 N. E. 111.

6. Tuolumne County Water Co. *v.* Columbia, etc., Water Co., 10 Cal. 193; Louisville, etc., R. Co. *v.* Smith, 58 Ind. 575.

7. *Connecticut.*— Goodrich *v.* Stanton, 71 Conn. 418, 42 Atl. 74; Baxter *v.* Camp, 71, Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

Illinois.— Enright *v.* Gibson, 119 Ill. App. 411 [*affirmed* in 219 Ill. 550, 76 N. E. 689]; Lake Erie, etc., R. Co. *v.* Wills, 39 Ill. App. 649.

Indiana.— Spears *v.* Ward, 48 Ind. 541; Malady *v.* McEnary, 30 Ind. 273.

Iowa.— Peregoy *v.* Wheeler, 88 Iowa 732, 55 N. W. 462.

Missouri.— Briggs *v.* Missouri Pac. R. Co., 82 Mo. 37. But *compare* Mooney *v.* Kennett, 19 Mo. 551, 61 Am. Dec. 576; Kabrich *v.* State Ins. Co., 48 Mo. App. 393.

Ohio.— Brainard *v.* Rittberger, 4 Ohio Dec. (Reprint) 432, 2 Clev. L. Rep. 154.

Canada.— Marks *v.* Scott, 4 N. Brunsw. 379.

See 39 Cent. Dig. tit. "Pleading," § 144.

But *compare* H. B. Claflin Co. *v.* Simon, 18 Utah 153, 55 Pac. 376.

8. American Bonding, etc., Co. *v.* Milstead, 102 Va. 683, 47 S. E. 853.

9. Goodall *v.* Harrison, 2 Mo. 153.

10. Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126.

11. Abbott L. Dict.; Black L. Dict.

At common law different formulæ for the conclusions of declarations came into use in the different courts, but they were all similar in substance. That common in the king's bench was "to the damage of the plaintiff of £——, and therefore he brings his suit," etc. 1 Chitty Pl. (16th Am. ed.) *436. The form prescribed by the English Common Law Procedure Act of 1852 was "and the plaintiff claimed pounds ——." 2 Chitty Pl. (16th Am. ed.) 4.

12. Paige *v.* Barrett, 151 Mass. 67, 23 N. E. 725.

13. See *infra*, VI, F, 1.

14. Somerville *v.* Grim, 17 W. Va. 803, holding that in case a breach laid in the conclusion to one of the several counts of the declaration was defectively stated it was cured by a sufficient statement in the general conclusion.

clude the statement of a statutory cause of action with the words, "against the form of the statute," etc., except where the statute is penal and not remedial.[15] Where a declaration is founded on an amendatory act, which refers to and continues the provisions of a former act, it is proper for it to conclude against the form of the "statute" and not "statutes."[16]

18. Conformity With Process[17]— a. As to Cause and Form of Action. The declaration or other pleading filed by plaintiff should correspond with the process issued, both as to cause and form of action and as to parties.[18] But plaintiff may state his cause of action more fully and more distinctly in his declaration if he does not depart from the writ.[19] He may declare on any cause of action consistent with his writ.[20] To authorize a court to reject a pleading for a variance between it and the cause of action stated in or indorsed upon the writ, there must be a total departure from it.[21] As for example, where the writ was for trespass and the declaration was in case,[22] and when the writ was in assumpsit and the

15. Hewitt *v.* Harvey, 46 Mo. 368; Jones *v.* Van Zandt, 13 Fed. Cas. No. 7,502, 2 McLean 611; Sears *v.* U. S., 21 Fed. Cas. No. 12,592, 1 Gall. 257; Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Gall. 261. Chief Justice Shaw, in Reed *v.* Northfield, 13 Pick. (Mass.) 94, 99, 23 Am. Dec. 662, in the course of a somewhat exhaustive discussion of this question, said: "The point which has been most elaborately argued, and upon which many authorities have been cited, arises on a motion in arrest of judgment, because the declaration in this case does not aver, that the negligence of the town complained of, and on the ground of which the plaintiff claims damages, was against the form of the statute relied on. The precise point is, whether in an action on the case in which a party claims damages merely, and sets out fully the facts upon which that claim rests, bringing it within the provisions of the statute, this averment in precise terms, or in some expression equivalent, must be made. We think it is not necessary. We think the authorities leading to a contrary conclusion, will be found to apply either to indictments or informations, or to actions, of debt or on the case, for penalties, where the same strictness is required. And where the statute gives a penalty, and the thing sued for is pursued as a penalty, although the right to sue is given only to the party grieved and even though the whole penalty when recovered shall go to the party grieved, still the same rule may apply, because the form of proceeding is still for a penal sum, and the ostensible and real object of the suit, in form at least, is punishment. Some of the elementary works and books of practice lay down the rule, in general terms, without the qualification limiting it in terms to penal actions, but it is believed, that when the cases are examined which are relied on to support the rule, they will be found to be cases of penal actions."

16. Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195.

17. Variance as ground for: Demurrer see *infra*, VI, F, 2, h, (IV). Dismissal see Dismissal and Nonsuit, 14 Cyc. 442. Motion in arrest of judgment see Judgments, 23 Cyc. 831. Motion to strike see *infra*, XII, C, 1, c, (XVI). Plea in abatement see *infra*, IV, B, 5, b, (XI).

Variance between affidavit and pleading and attachment see Attachment, 4 Cyc. 498.

Waiver of variance by going to trial see *infra*, XIV, B, 3.

18. 1 Tidd Pr. (3d Am. ed.) *446.

Variance as to parties see *infra*, XIII, C, 11.

Date of writ.— Statutes sometimes require the date of the writ to be shown in plaintiff's pleading. Halley *v.* Staunton, 9 Can. L. J. 158; Scott *v.* Creighton, 9 Ont. Pr. 253.

Return day.— Variance between the writ and summons as to return-day has been held fatal. Baker *v.* Brown, 18 N. H. 551.

19. Gerrish *v.* Johnson, 46 N. C. 335; Smythe *v.* Martin, 18 Ont. Pr. 227; Huggins *v.* Guelph Barrel Co., 8 Ont. Pr. 170; Sowden *v.* Sowden, 4 Ont. Pr. 276.

20. Holloway *v.* Lowe, 1 Ala. 246; Kirkpatrick *v.* Bethany, 1 Ala. 201; New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542.

21. Morrison *v.* Taylor, 21 Ala. 779; Smith *v.* Wiley, 19 Ala. 216; Tenison *v.* Martin, 13 Ala. 21; Haviland *v.* Tuttle, 1 Sandf. (N. Y.) 668; Nichols *v.* Nichols, 10 Wend. (N. Y.) 629.

For example.— Where the summons commanded defendant to answer concerning the unlawful detention of plaintiff's horse, and the declaration charged an unlawful taking and detention, the variance was held fatal. Barnes *v.* Tannehill, 7 Blackf. (Ind.) 604; Nichols *v.* Nichols, 10 Wend. (N. Y.) 629. So where the declaration contained four counts and the summons but two. Smith *v.* Butler, 25 N. H. 521.

22. Smith *v.* Bradley, 1 How. Pr. (N. Y.) 244; Slater *v.* Fehlberg, 24 R. I. 574, 54 Atl. 383. *Contra*, Hines *v.* Kinnison, 8 Blackf. (Ind.) 119.

But where by statute plaintiff is permitted to recover upon a particular cause of action, either by an action of trespass or of case, it has been held that there is no variance between a writ stating an action of trespass and a declaration sounding in trespass on the case. Barlow *v.* Tierney, 26 R. I. 557, 59 Atl. 930 [*distinguishing* Slater *v.* Fehlberg, 24 R. I. 574, 54 Atl. 383].

declaration in covenant,[23] and where the summons showed an action on contract while the complaint was in tort.[24] A variance between the amounts claimed in the summons and plaintiff's pleading is immaterial,[25] but there is other authority to the contrary.[26] Where there is a difference in the county named as the place of trial in the summons and the complaint, that in the complaint will control.[27] Some cases hold that in case of a variance the discrepancy falls upon the writ, and the defect is cured by appearance.[28] But under the codes and practice acts which render variance between the declaration and the summons amendable,[29] the question of variance has become of little practical importance.[30]

b. As to Parties. The declaration or other pleading filed by plaintiff should be by and against the same party or parties as the writ.[31] So also the character or capacity in which a party sues or is sued must be the same in the writ and in the pleading.[32] If the title of the pleading does not correspond with that given in the writ, the pleading is irregular and may be set aside.[33] But clerical or other formal errors in this respect will not be deemed fatal.[34] Where several defendants are sued by process not bailable, plaintiff may declare against one of them,[35] but not so in bailable actions.[36] It is a departure to issue a writ in the name of one person and to file a declaration in the name of another person to the use of the first.[37] But it is not a departure where the summons is issued in the name of a party and the complaint declares in the name of the state on relation of the same party.[38] It is no objection to a declaration that it states the names of other parties or describes them more fully, if it merely enlarges but does not depart from the

23. Wainwright *v.* Harper, 3 Leigh (Va.) 270.

24. Prudden *v.* Lockport, 43 How. Pr. (N. Y.) 286; Ridder *v.* Whitlock, 12 How. Pr. (N. Y.) 208. *Contra*, Goff *v.* Edgerton, 18 Abb. Pr. (N. Y.) 381; Morse *v.* Clem, 4 Pa. Co. Ct. 118; Altick *v.* Pennsylvania R. Co., 9 Lanc. Bar (Pa.) 62.

25. Mason *v.* Hand, 1 Lans. (N. Y.) 66; Hatcher *v.* Lewis, 4 Rand. (Va.) 152, interest demanded in declaration but not in writ, but otherwise as to costs of protest not claimed in the writ.

In Tennessee this rule has been stated subject to the exception that in bailable actions the bail is discharged in case more is declared for than is claimed in the writ. Matthews *v.* Armstrong, 4 Yerg. 181.

26. Emmons *v.* Bailey, 1 Strobh. (S. C.) 422.

27. Goldstein *v.* Marx, 73 N. Y. App. Div. 545, 77 N. Y. Suppl. 956.

28. Gray *v.* Wolf, 77 Iowa 630, 42 N. W. 504; Frink *v.* Whicher, 4 Greene (Iowa) 382; Fond du Lac *v.* Bonesteel, 22 Wis. 251. In People *v.* Judge Wayne Cir. Ct., 27 Mich. 87, the court held that a declaration could not be set aside for variance from the writ, such variance being wholly immaterial in non-bailable actions, and in bailable actions operating only to discharge the bail and not to render the declaration a nullity.

29. See *infra*, VII, A, 11, v.

30. See the statutes of the several states. And see Sharp *v.* Clapp, 15 N. Y. App. Div. 445, 44 N. Y. Suppl. 451, 4 N. Y. Annot. Cas. 190.

31. Otis *v.* Thorp, 18 Ala. 395; Woolwick Tp. *v.* Forest, 2 N. J. L. 115; Willard *v.* Missani, 1 Cow. (N. Y.) 37.

32. Chapman *v.* Spence, 22 Ala. 588; Cole *v.* Peniwell, 5 Blackf. (Ind.) 175; Pierce *v.* Lacy, 23 Miss. 193. But see Jennings *v.* Cox, 1 Binn. (Pa.) 588 note.

33. Allen *v.* Allen, 14 How. Pr. (N. Y.) 248; Boyd *v.* Baggs, 1 Yeates (Pa.) 505; Brennan *v.* McLamore, Harp. (S. C.) 74.

34. *Arkansas.*— St. Louis, etc., R. Co. *v.* State, 55 Ark. 200, 17 S. W. 806; State Bank *v.* Folsom, 10 Ark. 568.

Indiana.— Jennings County *v.* Verbarg, 63 Ind. 107; Dunkin *v.* Taylor, 10 Ind. 422.

Pennsylvania.—Crotzer v. Russel, 9 Serg. & R. 81; Hartshorne *v.* Mercer, 6 Pa. L. J. 152.

Texas.— Maddox *v.* Craig, 80 Tex. 600, 16 S. W. 328; Cummings *v.* Rice, 9 Tex. 527.

Virginia.— Dabneys *v.* Knapp, 2 Gratt. 354.

See 39 Cent. Dig. tit. "Pleading," § 147.

35. Travis *v.* Tobias, 7 How. Pr. (N. Y.) 90; Coit *v.* Roach, 2 How. Pr. (N. Y.) 192; Bell *v.* Carrell, 1 Cow. (N. Y.) 193. *Contra*, Fitch *v.* Heise, Cheves (S. C.) 185.

36. Watson *v.* Lynch, 4 Munf. (Va.) 94. So where *non est inventus* is returned as to one, plaintiff may declare against the other. Dillman *v.* Schultz, 5 Serg. & R. (Pa.) 35. See also Hull *v.* Joesbury, 1 How. Pr. (N. Y.) 192.

In New Jersey it is held that where only one of several joint debtors sued is served with process, the declaration need not show why all were not served. American Linen Thread Co. *v.* Sheldon, 31 N. J. L. 420.

37. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

38. Burrell *v.* Hughes, 116 N. C. 430, 21 S. E. 971. A similar doctrine was stated in Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. 398.

writ.[39] Where the process and pleading are served together, a misdescription of the parties will not be deemed fatal.[40]

19. Statutory Actions. Where a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute.[41] But since the courts will take judicial notice of statutes [42] it is not necessary to refer specifically to the statute by title and date of passage.[43] In stating a cause of action which is derived from a statute it is not necessary, in alleging the facts which bring plaintiff within it, to use the exact words of the statute. Words of equivalent import are equally proper.[44] The exact words of the statute may, however, be used, and are generally sufficient.[45] But no recovery can be had thereunder unless plaintiff alleges exactly those facts which the statute names as the basis for the right conferred.[46] No greater certainty is required than is found in the statute itself.[47] Where a party relies upon a statute which contains an exception in the enacting clause, such exception must be negatived;[48] but where the exception occurs in a proviso or in a subsequent section of the act, such exception is matter of defense and need not be negatived.[49]

39. Pickins *v.* Garnett, 2 Bay (S. C.) 543.

40. Scudder *v.* Massengill, 88 Ga. 245, 14 S. E. 571; Maddox *v.* Craig, 80 Tex. 600, 16 S. W. 328.

41. Kelly *v.* Northern Pac. R. Co., 35 Mont. 243, 88 Pac. 1009. *Compare* Folsom *v.* District No. 5 School Directors, 91 Ill. 402.

"Pleading the statute is stating the facts which bring the case within it, and counting on it, in the strict language of pleading, is making express reference to it by apt terms to show the source of right relied on." Howser *v.* Melcher, 40 Mich. 185, 189. And see, generally, Statutes.

Pleading statute authorizing assignee to sue in his own name see Assignments, 4 Cyc. 105.

42. See, generally, Evidence, 16 Cyc. 889 *et seq.*

43. Ervin *v.* State, 150 Ind. 332, 48 N. E. 249. See also Camp *v.* Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96, holding that while good pleading would require that the statute should be referred to in general terms, it was sufficient, if the pleading was not questioned before trial, that the party should allege facts bringing his case within the provisions of the statute.

44. Slusher *v.* Simpkinson, 101 Ky. 594, 40 S. W. 570, 43 S. W. 692, 19 Ky. L. Rep. 1184; Jones *v.* Van Zandt, 13 Fed. Cas. No. 7,502, 2 McLean 611. See also Pittsburg, etc., R. Co. *v.* Newsom, 35 Ind. App. 299, 74 N. E. 21.

45. Jarvis *v.* Hamilton, 16 Wis. 574.

46. *California.*—Ricks *v.* Reed, 19 Cal. 551; Dye *v.* Dye, 11 Cal. 163.

Indiana.— Fleming *v.* Indianapolis, 6 Ind. App. 80, 32 N. E. 1135. See Ezra *v.* Manlove, 7 Blackf. 389.

Kentucky.— See Fuqua *v.* Ferrell, 80 Ky. 69.

Maine.— Blake *v.* Russell, 77 Me. 492, 1 Atl. 200.

Michigan.— Bryan *v.* Smith, 10 Mich. 229.

Missouri.— Hewitt *v.* Harvey, 46 Mo. 368.

New Jersey.— Thorpe *v.* Rankin, 19 N. J. L. 36, 38 Am. Dec. 531.

New York.— Smith *v.* Lockwood, 13 Barb. 209.

Ohio.— Haskins *v.* Alcott, 13 Ohio St. 210.

Wisconsin.—Hewitt *v.* Grand Chute, 7 Wis. 282.

See 39 Cent. Dig. tit. "Pleading," § 133.

47. Rock Island County *v.* Union Printing Co., 71 Ill. App. 636. See Rosselle *v.* Klein, 42 N. Y. App. Div. 316, 59 N. Y. Suppl. 94, holding that it is only necessary to allege in a complaint under a statute those facts and acts which the statute itself sets forth as the circumstances under which an action may be brought.

48. *Delaware.*— Silver *v.* Rhodes, 2 Harr. 369.

Illinois.— Toledo, etc., R. Co. *v.* Lavery, 71 Ill. 522; Great Western R. Co. *v.* Hanks, 36 Ill. 281; Galena, etc., R. Co. *v.* Sumner, 24 Ill. 631; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94.

Indiana.— Pittsburg, etc., R. Co. *v.* Newsom, 35 Ind. App. 299, 74 N. E. 21.

Michigan.— Osborn *v.* Lovell, 36 Mich. 246.

Minnesota.— Faribault *v.* Hulett, 10 Minn. 30.

Nebraska.— Hale *v.* Missouri Pac. R. Co., 36 Nebr. 266, 54 N. W. 517.

New Hampshire.— Clough *v.* Shepherd, 31 N. H. 490; Gould *v.* Kelley, 16 N. H. 551.

New York.— Schenectady First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. 313.

Texas.— Carter *v.* Marks, 17 Tex. 539.

Wisconsin.— McGlone *v.* Prosser, 21 Wis. 273.

United States.— St. Louis Street Foundry *v.* U. S., 6 Wall. 770, 18 L. ed. 884.

See 39 Cent. Dig. tit. "Pleading," § 10.

49. *Illinois.*— Great Western R. Co. *v.* Hanks, 36 Ill. 281; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390.

Indiana.— Tomlinson *v.* Bainaka, 163 Ind. 112, 70 N. E. 155; Cleveland, etc., R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675; Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218.

Kansas.— Kansas City *v.* Garnier, 57 Kan. 412, 46 Pac. 707.

20. Theory. A declaration or complaint must proceed upon a definite theory and must be good upon that theory or it will be deemed insufficient.[50] The mingling of inconsistent theories renders the pleading insufficient to sustain a judgment.[51] Where the facts alleged constitute a cause of action on either one of two theories, a general demurrer will not lie,[52] but plaintiff may be required to elect between them.[53] In some cases under the codes pleading in the nature of an equity bill with a double aspect has been permitted.[54] If a plaintiff adopts a wrong theory and fails to prove the cause of action intended, yet if he proves any other cause of action embraced by the allegations in his pleading, he may, according to some cases, recover on that.[55] Under a stricter and better ruling, however, it has been held that the court must determine the theory on which the pleading rests, and unless a good cause of action is stated on that theory a demurrer should be sustained, even though facts are stated sufficient to show that plaintiff has a cause of action of a different character.[56] And under this rule no recovery can be had upon a theory other than the one upon which the pleading proceeds.[57] In addition to the material facts alleged, others which neither show the right in the plaintiffs or a wrong thereto on the part of defendants do not invalidate the cause of action stated.[58] So the character of an action is not changed by mere expressions in the declaration which do not go to the gist thereof.[59]

21. Indorsements. Statutes frequently require the indorsement of certain facts, such as the nature of the issue, or other matters respecting the action, upon plaintiff's pleading, and in such cases a substantial compliance with the statute is necessary.[60]

C. Separate Statement of Causes of Action or Grounds For Recovery[61]

1. General Theory and Requisites of Separate Counts. The question of

Kentucky.— Wolff *v.* Lamann, 108 Ky. 343, 56 S. W. 408, 21 Ky. L. Rep. 1780; Central Kentucky Asylum *v.* Penick, 102 Ky. 533, 44 S. W. 92, 19 Ky. L. Rep. 1583.

Michigan.— Lynch *v.* People, 16 Mich. 472.

Minnesota.— Faribault *v.* Hulett, 10 Minn. 30.

New York.— Rowell *v.* Janvrin, 151 N. Y. 60, 45 N. E. 398.

North Carolina.— Wilmington, etc., R. Co. *v.* Robeson, 27 N. C. 391.

See 39 Cent. Dig. tit. "Pleading," § 10.

50. *California.*— Devore *v.* Devoe, 51 Cal. 543.

Indiana.— Oölitic Stone Co. *v.* Ridge, 169 Ind. 639, 83 N. E. 246 (holding that the theory must be determined from the facts stated and not from the admissions of the party); Yorn *v.* Bracken, 153 Ind. 492, 55 N. E. 257; Pittsburgh, etc., R. Co. *v.* Sullivan, 141 Ind. 83, 40 N. E. 138, 50 Am. St. Rep. 313, 27 L. R. A. 840; Terre Haute, etc., R. Co. *v.* McCorkle, 140 Ind. 613, 40 N. E. 62; Ætna Powder Co. *v.* Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194; Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627; Baker *v.* Ludlam, 118 Ind. 87, 20 N. E. 648; Mescall *v.* Tully, 91 Ind. 96; South Bend Mfg. Co. *v.* Liphart, 12 Ind. App. 185, 39 N. E. 908.

Kansas.— Grentner *v.* Fehrenschield, 64 Kan. 764, 68 Pac. 619.

Nebraska.— Codding *v.* Munson, 52 Nebr. 580, 72 N. W. 846, 66 Am. St. Rep. 524.

New York.— Truesdell *v.* Bourke, 145 N. Y. 612, 40 N. E. 612.

See 39 Cent. Dig. tit. "Pleading," § 107.

51. Illinois Cent. R. Co. *v.* Abrams, 84 Miss. 456, 36 So. 542.

Inconsistency and repugnancy in general see *supra*, II, H, 4.

52. Kreag *v.* Anthus, 2 Ind. App. 482, 28 N. E. 773.

A special demurrer on such ground has been sustained. Garlington *v.* Kennedy, Harp. (S. C.) 424.

53. Saunders *v.* A. C. Phelps Co., 53 S. C. 173, 31 S. E. 54.

Motion to compel election see *infra*, XII, E.

54. Hall *v.* Hall, 38 How. Pr. (N. Y.) 97; Young *v.* Edwards, 11 How. Pr. (N. Y.) 201; Floyd *v.* Patterson, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787. But see Marsh *v.* Webber, 13 Minn. 109, where a complaint framed upon the two theories of false warranty and deceit was condemned.

55. Conaughty *v.* Nichols, 42 N. Y. 83; Emery *v.* Pease, 20 N. Y. 62. See, generally, Judgments, 23 Cyc. 797.

56. See *infra*, VI, F, 2, b.

57. Evansville, etc., R. Co. *v.* Barnes, 137 Ind. 306, 36 N. E. 1092; Green *v.* Groves, 109 Ind. 519, 10 N. E. 401. See Austin *v.* Wilcoxson, 149 Cal. 24, 84 Pac. 417; Foster *v.* Dupre, 5 Mart. (La.) 6, 12 Am. Dec. 466; Sundmacher *v.* Lloyd, 114 Mo. App. 317, 89 S. W. 368; Skilton *v.* Payne, 18 Misc. (N. Y.) 332, 42 N. Y. Suppl. 111.

58. Marquat *v.* Marquat, 12 N. Y. 336. See also Borror *v.* Carrier, 34 Ind. App. 353, 73 N. E. 123.

59. Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. 52.

60. Gainer *v.* Pollock, 96 Ala. 554, 11 So. 539; Camden Bank *v.* Thompson, 46 S. C. 499, 24 S. E. 332.

61. Omnibus count see Assumpsit, Action of, 4 Cyc. 345.

joinder of causes of action is treated under another title,[62] and we shall here consider only the form and general requisites of separate counts in a declaration or complaint, assuming that in the cases discussed the question of misjoinder does not enter. The theory of separate counts is that each is a complete cause of action; as distinct from others as if it stood alone in the pleading.[63] But averments which precede the statement of any cause of action, and constitute what is called the commencement of the pleading, are entirely distinct from the various counts and need not appear in each.[64] And a single averment of breach at the end of a declaration made up of the common counts is sufficient.[65] One cause of action cannot be split up into several parts and each part alleged in a separate count.[66] The use of several counts instead of one does not of itself make a pleading ambiguous and uncertain.[67] The form of the pleading will not control in determining whether it sets up more than one count, but the substance of the averments will be considered, and the evident purpose of the pleader.[68] Where plaintiff mistakenly believes that he has two causes of action and sets them up in separate counts, while all the facts alleged really constitute but one cause of action, he should not be required to elect, but the entire pleading should be construed as setting up a single cause of action, irrespective of the attempted division.[69] A single good count is, as a rule, enough to sustain a verdict,[70] and in case judgment has been rendered it

62. See JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 376.

63. *Alabama.*— Bryant *v.* Southern R. Co., 137 Ala. 488, 34 So. 562.

California.— Hopkins *v.* Contra Costa County, 106 Cal. 566, 39 Pac. 933.

Indiana.— Leabo *v.* Detrick, 18 Ind. 414; Markin *v.* Jornigan, 3 Ind. 548; Swift *v.* Woods, 5 Blackf. 97.

Michigan.—Beecher *v.* Pette, 40 Mich. 181.

New Jersey.— Gilmore *v.* Christ Hospital, 68 N. J. L. 47, 52 Atl. 241.

Oregon.— Moore *v.* Halliday, 43 Oreg. 243, 72 Pac. 801.

United States.— Bailey *v.* Mosher, 63 Fed. 488, 11 C. C. A. 304.

Canada.— McLellan *v.* Assiniboia, 5 Manitoba 127; Crawley *v.* Wilson, 6 N. Brunsw. 704.

See 39 Cent. Dig. tit. "Pleading," §§ 113, 114.

Chitty is quoted by the court in Simmons *v.* Fairchild, 42 Barb. (N. Y.) 404, 409, as follows: "'The separate counts are for all purposes as distinct as if they were in separate declarations; and consequently they must contain all necessary allegations, or the latter must expressly refer to the former.' 1 Chitty's Plead. 413."

Paragraphs are only convenient subdivisions of that larger and more comprehensive statement which the rules of good pleading require to embody the essential elements of fact which lead to a legal conclusion sufficient for the purpose of the pleader. Hill *v.* Fairhaven, etc., R. Co., 75 Conn. 177, 52 Atl. 725. See also Patterson *v.* Watson, 35 Colo. 502, 83 Pac. 958.

64. Clark *v.* Whittaker Iron Co., 9 Mo. App. 446; Abendroth *v.* Boardley, 27 Wis. 555.

An allegation of incorporation appearing in one count need not be repeated or referred to in a subsequent count. Aull Sav. Bank *v.* Lexington, 74 Mo. 104.

65. Somerville *v.* Grim, 17 W. Va. 803. See Green *v.* Thornton, 7 Ark. 383.

66. Langdon *v.* New York, etc., R. Co., 15 N. Y. Suppl. 255, 27 Abb. N. Cas. 166.

67. Demartin *v.* Albert, 68 Cal. 277, 9 Pac. 157.

68. *California.*— Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626.

Iowa.— Chicago, etc., R. Co. *v.* Haywood, 102 Iowa 392, 71 N. W. 358.

Kentucky.— Mitchell *v.* New Farmers' Bank, 60 S. W. 375, 22 Ky. L. Rep. 1291.

Minnesota.— Armstrong *v.* Chicago, etc., R. Co., 45 Minn. 85, 47 N. W. 459; Merrill *v.* Dearing, 22 Minn. 376.

Missouri.— Newton *v.* Miller, 49 Mo. 298; Antonelli *v.* Basile, 93 Mo. App. 138; Johnson *v.* Bedford, 90 Mo. App. 43; Woods *v.* Missouri, etc., R. Co., 51 Mo. App. 500.

New York.— Sigua Iron Co. *v.* Brown, 19 N. Y. App. Div. 143, 45 N. Y. Suppl. 989; Fernandez *v.* Fernandez, 15 N. Y. App. Div. 469, 44 N. Y. Suppl. 499; Elwell *v.* McDonald, 83 Hun 516, 33 N. Y. Suppl. 459; Welch *v.* Platt, 32 Hun 194; Denham *v.* Stilwell, 3 Rob. 653; Woods *v.* Armstrong, 29 Misc. 660, 62 N. Y. Suppl. 759; McKesson *v.* Russian Co., 27 Misc. 96, 57 N. Y. Suppl. 579 [*affirmed* in 42 N. Y. App. Div. 622, 59 N. Y. Suppl. 1109]; Hillman *v.* Hillman, 14 How. Pr. 456.

Wisconsin.— Marston *v.* Dresen, 76 Wis. 418, 45 N. W. 110.

See 39 Cent. Dig. tit. "Pleading," § 113.

69. Waite *v.* Sabel, 44 N. Y. App. Div. 634, 62 N. Y. Suppl. 419; Brown *v.* Calloway, 34 Wash. 175, 75 Pac. 630. See also JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 389.

70. *Illinois.*— Chicago City R. Co. *v.* Leach, 80 Ill. App. 354.

Indiana.— Waugh *v.* Waugh, 47 Ind. 580.

Kansas.— Stewart *v.* Manhattan, etc., R. Co., 27 Kan. 631.

likewise will be sustained when it can be referred to a sufficient count in the declaration or complaint.[71]

2. Each Cause of Action to Be Separately Stated — a. General Rules. Where it is sought to set out several causes of action in the same pleading, each should constitute a separate count, separately stated and numbered.[72] Each count should proceed upon a single, definite theory.[73]

Louisiana.— Wisner *v.* Rohnert, 46 La. Ann. 1234, 15 So. 637.

Missouri.— McKee *v.* Calvert, 80 Mo. 348.

Sufficiency of single good count against general demurrer see *infra*, VI, I, 1, e, (I).

71. Carter *v.* Thomas, 3 Ind. 213.

72. *Alabama.*— Southern R. Co. *v.* McIntyre, (1907) 44 So. 624; Clements *v.* Alabama Great Southern R. Co., 127 Ala. 166, 28 So. 643; Louisville, etc., R. Co. *v.* Cofer, 110 Ala. 491, 18 So. 110; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88.

California.— White *v.* Cox, 46 Cal. 169; McCarty *v.* Fremont, 23 Cal. 196.

Georgia.— Gainesville, etc., R. Co. *v.* Austin, 122 Ga. 823, 50 S. E. 983; Talbottom R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151.

Idaho.— Kruger *v.* St. Joe Lumber Co., 11 Ida. 504, 83 Pac. 695.

Indiana.— Daviess County *v.* Fitzgerald, 40 Ind. App. 24, 79 N. E. 393; State *v.* Petersen, 36 Ind. App. 269, 75 N. E. 602.

Iowa.— Sands *v.* Wood, 1 Iowa 263.

Kansas.— New *v.* Smith, 73 Kan. 174, 84 Pac. 1030; Knight *v.* Dalton, 72 Kan. 131, 83 Pac. 124; Burdick *v.* Carbondale Inv. Co., 71 Kan. 121, 80 Pac. 40; Eisenhouer *v.* Stein, 37 Kan. 281, 15 Pac. 167; Jackson County *v.* Hoaglin, 5 Kan. 558.

Maryland.— See Milske *v.* Steiner Mantel Co., 103 Md. 235, 63 Atl. 471, 115 Am. St. Rep. 354, 5 L. R. A. N. S. 1105.

Massachusetts.— Allen *v.* Codman, 139 Mass. 136, 29 N. E. 537.

Michigan.— Knowles *v.* Cavanagh, 144 Mich. 260, 107 N. W. 1073; Ives *v.* Williams, 53 Mich. 636, 19 N. W. 562; Portage Lake Miners', etc., Benev. Soc. *v.* Phillips, 36 Mich. 22.

Minnesota.— Walsh *v.* Kattenburgh, 8 Minn. 127.

Mississippi.— Yazoo, etc., R. Co. *v.* Wallace, 90 Miss. 609, 43 So. 469.

Missouri.— Casey *v.* St. Louis Transit Co., 205 Mo. 721, 103 S. W. 1146; Clancy *v.* St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509; McHugh *v.* St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853; Sidway *v.* Missouri Land, etc., Co., 187 Mo. 649, 86 S. W. 150; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Henderson *v.* Dickey, 50 Mo. 161; Young *v.* Coleman, 43 Mo. 179; Hoagland *v.* Hannibal, etc., R. Co., 39 Mo. 451; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202; Otis *v.* Mechanics' Bank, 35 Mo. 128; McCoy *v.* Yager, 34 Mo. 134; Linville *v.* Harrison, 30 Mo. 228; Marsh *v.* Richards, 29 Mo. 99; Mooney *v.* Kennett, 19 Mo. 551, 61 Am. Dec. 576; Childs *v.* State Bank, 17 Mo. 213; Zeideman *v.* Molasky, 118 Mo. App. 106, 94 S. W. 754; Waechter *v.* St. Louis, etc., R. Co., 113 Mo. App. 370, 88 S. W. 147; Kabrich *v.* State Ins. Co., 48 Mo. App. 393.

New York.— Robinson *v.* Brown, 166 N. Y. 159, 59 N. E. 775; Fisher *v.* New Yorker Staats-Zeitung, 114 N. Y. App. Div. 824, 100 N. Y. Suppl. 185; Rockey *v.* Haslett, 91 N. Y. App. Div. 181, 86 N. Y. Suppl. 320; Powers *v.* Sherin, 89 N. Y. App. Div. 37, 85 N. Y. Suppl. 89; People *v.* Sheriff, 78 N. Y. App. Div. 46, 79 N. Y. Suppl. 783; De Lery *v.* Rogers, 71 N. Y. App. Div. 99, 75 N. Y. Suppl. 513; Egan *v.* Butterworth, 66 N. Y. App. Div. 480, 73 N. Y. Suppl. 301; Robinson *v.* Brown, 49 N. Y. App. Div. 508, 63 N. Y. Suppl. 413 [*reversed* on other grounds in 166 N. Y. 159, 59 N. E. 775]; Westheimer *v.* Musliner, 46 N. Y. App. Div. 96, 61 N. Y. Suppl. 348; Overbagh *v.* Oathout, 90 Hun 506, 35 N. Y. Suppl. 962; Cohn *v.* Jarecky, 90 Hun 266, 35 N. Y. Suppl. 935; Gunn *v.* Fellows, 41 Hun 257; Harsen *v.* Bayaud, 5 Duer 656; Clark *v.* Farley, 3 Duer 645; People *v.* Koster, 50 Misc. 46, 97 N. Y. Suppl. 829; Ring *v.* Mitchell, 45 Misc. 493, 92 N. Y. Suppl. 749 [*affirmed* in 100 N. Y. App. Div. 515, 91 N. Y. Suppl. 1110]; Barnes *v.* McGuire, 33 Misc. 438, 68 N. Y. Suppl. 485; Blanchard *v.* Jefferson, 17 N. Y. Suppl. 927; Dorr *v.* Mills, 3 N. Y. Civ. Proc. 7; Gardner *v.* Locke, 2 N. Y. Civ. Proc. 252; Adams *v.* Holley, 12 How. Pr. 326; Acome *v.* American Mineral Co., 11 How. Pr. 24; Van Namee *v.* Peoble, 9 How. Pr. 198; Blanchard *v.* Strait, 8 How. Pr. 83; Maxwell *v.* Farnam, 7 How. Pr. 236; Durkee *v.* Saratoga, etc., R. Co., 4 How. Pr. 226; Handy *v.* Chatfield, 23 Wend. 35.

Ohio.— Work *v.* Mitchell, 1 Disn. 506, 12 Ohio Dec. (Reprint) 761; Hall *v.* Cincinnati, etc., R. Co., 1 Disn. 58, 12 Ohio Dec. (Reprint) 485; Robert *v.* Glenn, 4 Ohio Dec. (Reprint) 121, 1 Clev. L. Rep. 46; Byers *v.* Rivers, 3 Ohio Dec. (Reprint) 231, 5 Wkly. L. Gaz. 37; Hathaway *v.* Springfield, etc., R. Co., 2 Ohio Dec. (Reprint) 349, 2 West. L. Month. 481.

Oregon.— Harvey *v.* Southern Pac. Co., 46 Oreg. 505, 80 Pac. 1061; Langell *v.* Langell, 17 Oreg. 220, 20 Pac. 286.

Tennessee.— See Waggener *v.* White, 11 Heisk. 741.

Utah.— H. B. Claflin Co. *v.* Simon, 18 Utah 153, 55 Pac. 376.

Wisconsin.— Harrison *v.* Juneau Bank, 17 Wis. 340. See Kewaunee County Sup'rs *v.* Decker, 30 Wis. 624.

United States.—Eisele *v.* Oddie, 120 Fed. 695; Farmers', etc., Bank *v.* Smith, 77 Fed. 129, 23 C. C. A. 80.

See 39 Cent. Dig. tit. "Pleading," § 113.

73. Dull *v.* Cleveland, etc., R. Co., 21 Ind.

b. Relaxation of Rules. But the rule should not be held to require the separate statement of a large number of causes of action upon identical instruments, thus making the pleading prolix and redundant, when all the instruments could be easily described in one count.[74] And in other cases, where the causes of action are very numerous and based upon similar facts, they may properly be set up in one count.[75] And when a single and continuous purpose runs through an entire transaction made up of various acts, each of which might alone constitute a cause of action, it is proper to set up all the facts in one count as a single cause of action.[76] And by statute in some jurisdictions, where two or more acts of negligence or other wrong are set forth in the complaint as causing or contributing to the injury for which suit is brought, plaintiff will not be required to state such several acts separately.[77]

3. Duplicity — a. In General. Duplicity consists in joining, in one and the same count, different grounds of action, of different natures, or of the same nature, to enforce only a single right of recovery. This is a fault in pleading only because it tends to useless prolixity and confusion, and is therefore only a fault in form, and not in substance.[78] But to allege in a single count several kinds of damage

App. 571, 52 N. E. 1013. See, generally, *supra*, III, B, 20.

74. Sugg *v.* Burgess, 2 Stew. (Ala.) 509; New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542; Godfrey *v.* Buckmaster, 2 Ill. 447; Farrington *v.* Muchmore, 68 N. Y. Suppl. 857. See also Brady *v.* Spurck, 27 Ill. 478; Ball *v.* Nash, 55 Ind. 9; Stadler *v.* Parmlee, 10 Iowa 23.

75. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Hamilton *v.* Plainwell Water-Power Co., 81 Mich. 21, 45 N. W. 648; Longworthy *v.* Knapp, 4 Abb. Pr. (N. Y.) 115. See Chicago West Div. R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350. *Contra*, Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414; Offield *v.* Wabash, etc., R. Co., 22 Mo. App. 607.

Distinct breaches of separate covenants in a deed may be assigned in the same court. Wilcox *v.* Cohn, 29 Fed. Cas. No. 17,640, 5 Blatchf. 346.

76. *California.*— Hoffman *v.* Tuolomne County Water Co., 10 Cal. 413.

Connecticut.— Dawson *v.* Marsh, 74 Conn. 498, 51 Atl. 529.

Indiana.— Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Young *v.* Gentis, 7 Ind. App. 199, 32 N. E. 796.

Kentucky.— Powell County *v.* Kentucky Lumber Co., 24 S. W. 114, 15 Ky. L. Rep. 577.

Massachusetts.— Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

New York.— People *v.* Tweed, 63 N. Y. 194; Powell *v.* Hinkley, 93 N. Y. App. Div. 138, 87 N. Y. Suppl. 2; Brown *v.* Cady, 91 N. Y. App. Div. 415, 86 N. Y. Suppl. 959; Price *v.* Price, 2 Hun 611; Barnes *v.* McGuire, 33 Misc. 438, 68 N. Y. Suppl. 485; Langdon *v.* New York, etc., R. Co., 15 N. Y. Suppl. 965, 966; Newcombe *v.* Chicago, etc., R. Co., 8 N. Y. Suppl. 366; Longworthy *v.* Knapp, 4 Abb. Pr. 115; Jacot *v.* Boyle, 18 How. Pr. 106.

Rhode Island.— Handy *v.* Waldron, 18 R. I. 567, 29 Atl. 143, 49 Am. St. Rep. 794.

Wisconsin.— Merriman *v.* McCormick Harvesting Mach. Co., 86 Wis. 142, 56 N. W. 743.

United States.— Boyce *v.* Odell Commission Co., 107 Fed. 58.

See 39 Cent. Dig. tit. "Pleading," § 113.

In Connecticut the court has laid down the following rule: "Several causes of action may be stated in a single count, when such causes of action are not separate and distinct from each other; that is, separable from each other 'by some distinct line of demarcation.' Craft Refrigerating Mach. Co. *v.* Quinnipiac Brewing Co., 63 Conn. 551, 563, 29 Atl. 76, 25 L. R. A. 856." Maisenbacker *v.* Society Concordia, 71 Conn. 369, 376, 42 Atl. 67, 71 Am. St. Rep. 213.

In Alabama the court said: "The defendants' demurrer raises the question as to whether the two claims as averred can be united in the same count. We are of the opinion that a plaintiff may aver a trespass upon land in a count for trespass upon the person, and recover for both, when the averments are such as to show but one transaction." Henry *v.* Carlton, 113 Ala. 636, 639, 21 So. 225.

77. See the statutes of the several states. And see the cases cited *infra* this note.

Both negligence and wilful misconduct on the part of defendant may be alleged. Schumpert *v.* Southern R. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427; Boggero *v.* Southern R. Co., 64 S. C. 104, 41 S. E. 819. And see, generally, Negligence, 29 Cyc. 565, text and note 77.

78. *Alabama.*— Callison *v.* Lemons, 2 Port. 145.

Connecticut.—Starr *v.* Henshaw, 1 Root 242.

Delaware.— Jarman *v.* Windsor, 2 Harr. 162.

Georgia.— Orr *v.* Cooledge, 117 Ga. 195, 43 S. E. 527; Seifert *v.* Sheppard, 111 Ga. 814, 35 S. E. 673. See Georgia Cent. R. Co. *v.* Banks, 128 Ga. 785, 58 S. E. 352.

Illinois.— Henry *v.* Heldmaier, 226 Ill. 152,

resulting from a single wrongful act is not duplicity.[79] Immaterial matter cannot render a pleading bad for duplicity,[80] nor can matter alleged in aggravation of damages,[81] nor matter alleged as inducement,[82] nor matter not relied on as ground for recovery.[83] Mere diversity of facts alleged in a count will not make it double when all the facts taken together tend to the statement of one point or ground of recovery.[84] And where a single transaction is relied on by plaintiff, the pleading is not double because the facts alleged show a liability both in contract and tort.[85] Nor is a pleading subject to objection on the ground of duplicity when the additional facts alleged in the count are not sufficient to constitute a cause of action.[86] The fact that two theories of recovery are set out in the alternative in a count will not render the count duplicitous unless one theory negatives the other.[87]

b. Distinguished From Misjoinder, Commingling, and Multifariousness. Duplicity is essentially different from misjoinder, for the latter is joining in different counts several different demands which the law does not permit to be joined, to enforce different rights of recovery.[88] And it is to be distinguished also from

80 N. E. 705 [*affirming* 129 Ill. App. 86]; Chicago West Div. R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350; Consolidated Coal Co. *v.* Peers, 97 Ill. App. 188 [*affirmed* in 205 Ill. 531, 68 N. E. 1065]; Haberlau *v.* Lake Shore, etc., R. Co., 73 Ill. App. 261; Louisville, etc., R. Co. *v.* Hill, 29 Ill. App. 582.

Maine.— Platt *v.* Jones, 59 Me. 232.

Massachusetts.— Otis *v.* Blake, 6 Mass. 336.

Mississippi.— State *v.* Commercial Bank, 33 Miss. 474.

Ohio.— Fogle *v.* Hanlin, Tapp. 268.

Pennsylvania.— Com. *v.* Pray, 1 Phila. 58.

Rhode Island.— Bresnahan *v.* Lonsdale Co., (1900) 51 Atl. 624.

Utah.— Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

Vermont.— Devino *v.* Central Vermont R. Co., 63 Vt. 98, 20 Atl. 953.

See 39 Cent. Dig. tit. "Pleading," § 139 *et seq.*

In code pleading.— See, however, Fisk *v.* Tank, 12 Wis. 276, 299, 78 Am. Dec. 737, where Dixon, C. J., speaking for the court said: "It [the complaint] proceeds for damages for several breaches of one contract. It is obvious that in such a case, the plaintiff may, either at common law or under the code, in a single statement or count, allege as many breaches as he chooses, and when he comes to the trial be permitted to give evidence concerning any or all of them." This is probably the correct code rule, but is directly opposed to the common-law doctrine of duplicity.

In Montana Ramsdell *v.* Clark, 20 Mont. 103, 49 Pac. 591, holds that the assignment of several breaches of the same contract constitutes several distinct causes of action.

In Canada the case of Hagel *v.* Starr, 2 Manitoba 92, holds it proper to allege several breaches of the same contract in one count.

79. Wolfe *v.* Beecher Mfg. Co., 47 Conn. 231; Mullin *v.* Blumenthal, 1 Pennew. (Del.) 476, 42 Atl. 175.

80. Booher *v.* Goldsborough, 44 Ind. 490; Shaw *v.* Ayers, 17 Ind. App. 614, 47 N. E. 235; State *v.* Commercial Bank, 33 Miss. 474. See Henry *v.* Heldmaier, 226 Ill. 152, 80 N. E. 705 [*affirming* 129 Ill. App. 86]. In Raymond *v.* Sturges, 23 Conn. 134, 146, the court said: "In order to constitute duplicity, it is not sufficient that a count, in a declaration, shows merely that the plaintiff has various causes of action against the defendant, although the contrary might be inferred from the general and loose definitions of duplicity, in some of the elementary treatises on pleading. It is necessary, further, that those various causes of action, or more than one of them, should be claimed and relied on, as distinct grounds of recovery. Dyer, 42, b; Stephen on Pl. 302. For, if it appears, that the plaintiff seeks to recover upon only one of them, and makes no claim on any of the others, as a distinct, additional, or independent ground of recovery, the mere circumstance that he has other valid claims against the defendant, which he might but does not seek to enforce in the suit, ought not to deprive him of a recovery on the cause of action, on which alone he seeks to recover. And, in such a case, there can be no multiplicity of issues, to avoid which duplicity is discountenanced."

81. Otis *v.* Blake, 6 Mass. 336; Bahr *v.* Boley, 85 Hun (N. Y.) 448, 32 N. Y. Suppl. 881.

82. State *v.* Commercial Bank, 33 Miss. 474.

83. Rushin *v.* Georgia Cent. R. Co., 128 Ga. 726, 58 S. E. 357; King *v.* Estabrooks, 77 Vt. 371, 60 Atl. 84.

84. Mullin *v.* Blumenthal, 1 Pennew. (Del.) 476, 42 Atl. 175. *Compare* J. W. Bishop Co. *v.* Shelhorse, 141 Fed. 643, 72 C. C. A. 337.

85. Rothschild *v.* Grand Trunk R. Co., 14 N. Y. Suppl. 807; Barto *v.* Nix, 15 Wash. 563, 46 Pac. 1033.

86. Shaw *v.* Ayers, 17 Ind. App. 614, 47 N. E. 235; New Home Sewing-Mach. Co. *v.* Wray, 28 S. C. 86, 5 S. E. 603.

87. Douglas *v.* Marsh, 141 Mich. 209, 104 N. W. 624.

88. Gould Pl. c. 4, § 98.

a mere commingling of different causes of action in the same count, which may be joined but should be separately stated. But these distinctions have not always been observed by the courts, and there is considerable confusion in the cases in the use of the term.[89] Some cases seem to use the term "duplicity" in the sense of multifariousness, as employed in equity pleading, which is clearly incorrect.[90]

4. Same Cause of Action Stated in Separate Counts — a. General Rule. Under the common-law procedure it was a common and often a very useful practice to state a single cause of action in different ways, each in a separate count, to meet the possible results of the evidence as it might be developed at the trial, for it is frequently impossible to know beforehand exactly what the evidence may disclose. In this way plaintiff who had a meritorious case might succeed on some one count while failing in all others.[91] The variations between the different counts were required to be substantial, and if the counts were so far identical that the same evidence would support each, and the variation appeared to have been vexatiously inserted, the redundant counts would be stricken out.[92] The same rule still obtains in many jurisdictions, and a plaintiff may set up the same cause of action in different counts to meet the contingencies of proof.[93] Such counts should, according to some authorities, purport to allege different causes of action,[94] but this rule is not universally observed.[95] Under some statutes the joinder of counts in different forms is permitted where they are for the same cause of action.[96] Under such a statute an averment that the counts are for the same cause of

89. *Indiana.*— Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483; Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240.

Kentucky.— Hancock *v.* Johnson, 1 Metc. 242.

Maine.— Patterson *v.* Wilkinson, 55 Me. 42, 92 Am. Dec. 568.

Maryland.— See Milske *v.* Steiner Mantel Co., 103 Md. 235, 63 Atl. 471, 115 Am. St. Rep. 354, 5 L. R. A. N. S. 1105.

Minnesota.— Whelan *v.* Sibley County, 28 Minn. 80, 9 N. W. 175.

New York.— Handy *v.* Chatfield, 23 Wend. 35.

Texas.— Kleinsmith *v.* Hamlin, (Civ. App. 1901) 60 S. W. 994.

West Virginia.— Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563.

See 39 Cent. Dig. tit. "Pleading," § 134 *et seq.*

The true distinction was stated in Higson *v.* Thompson, 8 U. C. Q. B. 561, 562, where the court said: "Duplicity in a count consists in supporting the same claim on several distinct grounds, not in laying several injuries in one count."

90. Whelan *v.* Sibley County, 28 Minn. 80, 9 N. W. 175.

91. See 1 Chitty Pl. 424.

92. Nelson *v.* Griffiths, 2 Bing. 412, 9 E. C. L. 638; Gabell *v.* Shaw, 2 Chit. 299, 18 E. C. L. 645; Cunnack *v.* Gundry, 1 Chit. 709, 18 E. C. L. 386; Frazer *v.* Shaw, 7 D. & R. 383, 16 E. C. L. 290; Newby *v.* Mason, 1 D. & R. 508, 16 E. C. L. 53. See also Gainesville, etc., R. Co. *v.* Austin, 122 Ga. 823, 50 S. E. 983; 1 Chitty Pl. 424; 1 Tidd Pr. (9th ed.) 616.

93. *Delaware.*— Wilmington City R. Co. *v.* White, (1907) 66 Atl. 1009, where it is said that it is no objection that plaintiff's cause of action be stated in several counts if the privilege is fairly and reasonably exercised.

Georgia.— Gainesville, etc., R. Co. *v.* Austin, 122 Ga. 823, 50 S. E. 983; Armstrong *v.* Penn, 105 Ga. 229, 31 S. E. 158.

Maine.— Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696.

Maryland.— Little *v.* Edwards, 69 Md. 499, 16 Atl. 134.

Massachusetts.— Massachusetts Mut. L. Ins. Co. *v.* Green, 185 Mass. 306, 70 N. E. 202; Lynn Safe Deposit, etc., Co. *v.* Andrews, 180 Mass. 527, 62 N. E. 1061; Goodhue *v.* Hartford F. Ins. Co., 175 Mass. 187, 55 N. E. 1039; Lovett *v.* Salem, etc., R. Co., 9 Allen 557.

Michigan.— Hart *v.* Summers, 38 Mich. 399.

See 39 Cent. Dig. tit. "Pleading," § 114.

Another statement.— "One of the objects of inserting two or more counts in one declaration, when in fact there is but one cause of action, is to accommodate the statement of the cause, as far as may be, to the possible state of the proofs to be exhibited on the trial, or to guard, if possible, against the hazard of the proofs varying materially from the statement of the cause of action, so that, if one or more of the several counts should not be adapted to the evidence, some other of these may be so. The plaintiff has in every case a right to insert in his declaration as many counts (each being in itself single) as he pleases." Rawlinson *v.* Shaw, 117 Mich. 5, 9, 75 N. W. 138.

94. Hitchcock *v.* Munger, 15 N. H. 97. See Farquhar *v.* Farquhar, 194 Mass. 400, 80 N. E. 654; 1 Chitty Pl. (16th Am. ed.) *429.

95. Ware *v.* Webb, 32 Me. 41.

96. See the statutes of the several states; and see the cases cited in the following notes.

action is decisive,[97] unless it appears from the declaration that such is not the fact.[98]

b. Under the Codes. Under the codes of procedure, many courts have held that the code requirement that the facts constituting the cause of action should be stated without unnecessary repetition precludes the use of different counts where there is but a single demand,[99] except under peculiar circumstances where, from the nature of the case, it would be clearly inequitable to confine plaintiff to a single statement.[1] Other courts have held, on the other hand, that such restatement in different forms is proper under the code system.[2]

97. Winnie *v.* Pond, 34 Conn. 391, so holding where counts in trespass and case were joined.

98. Sellick *v.* Hall, 47 Conn. 260, so holding where counts in contract and tort were joined.

99. *Colorado.*— Leonard *v.* Roberts, 20 Colo. 88, 36 Pac. 880.

Connecticut.— Finken *v.* Elm City Brass Co., 73 Conn. 423, 47 Atl. 670; Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125; Brown *v.* Wilcox, 73 Conn. 100, 46 Atl. 827; *In re* Freeman, 71 Conn. 708, 43 Atl. 185; Goodrich *v.* Stanton, 71 Conn. 418, 42 Atl. 74; Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514; Bassett *v.* Shares, 63 Conn. 39, 27 Atl. 421.

Idaho.— People *v.* Slocum, 1 Ida. 62.

Kentucky.— Wehmhoff *v.* Rutherford, 98 Ky. 91, 32 S. W. 288, 17 Ky. L. Rep. 659.

Montana.— Reed *v.* Poindexter, 16 Mont. 294, 40 Pac. 596.

Nebraska.— Penn Mut. L. Ins. Co. *v.* Conoughy, 54 Nebr. 123, 74 N. W. 422; Pollock *v.* Whipple, 45 Nebr. 844, 64 N. W. 210.

New York.— Nash *v.* McCauley, 9 Abb. Pr. 159; Whittier *v.* Bates, 2 Abb. Pr. 477; Ford *v.* Mattice, 14 How. Pr. 91; Dickens *v.* New York Cent. R. Co., 13 How. Pr. 228; Dunning *v.* Thomas, 11 How. Pr. 281; Lackey *v.* Vanderbilt, 10 How. Pr. 155; Churchill *v.* Churchill, 9 How. Pr. 552; Stockbridge Iron Co. *v.* Mellen, 5 How. Pr. 439.

Ohio.— Ferguson *v.* Gilbert, 16 Ohio St. 88; Fox *v.* Pennsylvania R. Co., 2 Handy 169, 12 Ohio Dec. (Reprint) 386.

See 39 Cent. Dig. tit. "Pleading," § 114.

Several counts not now necessary.— In Dickens *v.* New York Cent. R. Co., 13 How. Pr. (N. Y.) 228, 229, the court said: "There is not now the same necessity which formerly existed for adding different counts, slightly variant, to meet the evidence as it may come out upon the trial, for the reason that now the court are required to disregard every variance between the proof and pleadings, unless it has actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits."

1. *Colorado.*— Cripple Creek Min. Co. *v.* Brabant, 37 Colo. 423, 87 Pac. 794; Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313; Cramer *v.* Oppenstein, 16 Colo. 504, 27 Pac. 716; Manders *v.* Craft, 3 Colo. App. 236, 32 Pac. 836.

Idaho.— Spotswood *v.* Morris, 10 Ida. 129, 77 Pac. 216, 217, in which case the court said: "We think that the rule is well settled by an overwhelming weight of authority that where a plaintiff has two or more distinct and separate reasons for the relief he asks, or when there is some uncertainty as to the grounds of recovery, he may set forth such claim in several distinct counts or statements in his complaint."

New York.— Longprey *v.* Yates, 31 Hun 432; Birdseye *v.* Smith, 32 Barb. 217; Schuyler *v.* Peck, 8 N. Y. Suppl. 849; Jones *v.* Palmer, 1 Abb. Pr. 442; Velie *v.* Newark City Ins. Co., 65 How. Pr. 1; Doctor *v.* Kendall, 2 How. Pr. 240.

Ohio.— Murphy *v.* Quigley, 21 Ohio Cir. Ct. 313, 11 Ohio Cir. Dec. 638; First Nat. Bank *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 702, 16 Cinc. L. Bul. 399.

Wisconsin.— Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

See 39 Cent. Dig. tit. "Pleading," § 114.

2. *Arizona.*— Willard *v.* Carrigan, 8 Ariz. 70, 68 Pac. 538.

California.— Estrella Vineyard Co. *v.* Butler, 125 Cal. 232, 57 Pac. 774; Stockton Combined Harvester, etc., Works *v.* Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; Bernstein *v.* Downs, 112 Cal. 197, 44 Pac. 557; Rucker *v.* Hall, 105 Cal. 425, 38 Pac. 425; Remy *v.* Olds, (1893) 34 Pac. 216; Cowan *v.* Abbott, 92 Cal. 100, 28 Pac. 213.

Indiana.— Stearns *v.* Dubois, 55 Ind. 257; Toledo, etc., R. Co. *v.* Daniels, 21 Ind. 256; Leiter *v.* Jackson, 8 Ind. App. 98, 35 N. E. 289.

Iowa.— Cawker City State Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494; Jack *v.* Des Moines, etc., R. Co., 49 Iowa 627; Pearson *v.* Milwaukee, etc., R. Co., 45 Iowa 497. But see Hammer *v.* Chicago, etc., R. Co., 61 Iowa 56, 15 N. W. 597, where the practice was criticized as applied to negligence cases.

Kansas.— Edwards *v.* Hartshorn, 72 Kan. 19, 82 Pac. 520, 1 L. R. A. N. S. 1050.

Louisiana.— Montross *v.* Hillman, 11 Rob. 87; Cross *v.* Richardson, 2 Mart. N. S. 323.

Missouri.— Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Landers *v.* Quincy, etc., R. Co., 114 Mo. App. 655, 90 S. W. 117; Hess *v.* Gansz, 90 Mo. App. 439.

Montana.— Blankenship *v.* Decker, 34 Mont. 292, 85 Pac. 1035.

Tennessee.— See Chesapeake, etc., R. Co. *v.* Crews, 113 Tenn. 52, 99 S. W. 368.

Texas.— Loftus *v.* King, 23 Tex. Civ. App. 36, 56 S. W. 109; Gulf, etc., R. Co. *v.* Buford,

5. Aider of Incomplete Counts by Others. A count which is insufficient cannot be aided by averments appearing in other counts,[3] even where, according to some cases, there is an express reference to such averments.[4] But the rule is different as to matters of inducement, and a reference in one count to such matter in another will be sufficient, even though the count containing such matter of inducement be held bad on demurrer.[5] And most authorities allow such aider where express reference is made even as to facts constituting the *gravamen* of the action.[6] Not only may a reference in a count to matter outside it incorporate such matter into the count, but the effect is the same where the reference is out-

2 Tex. Civ. App. 115, 21 S. W. 272. See Dallas *v.* Jones, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377, where it is said that where a petition contains two counts and no exception is taken thereto, plaintiff is entitled to recover on either count. But *compare* Beal *v.* Alexander, 6 Tex. 531.

See 39 Cent. Dig. tit. "Pleading," § 114.

3. *Alabama.*— Wilson *v.* Jackson, Minor 73.

California.— Bidwell *v.* Babcock, 87 Cal. 29, 25 Pac. 752; Baldwin *v.* Ellis, 68 Cal. 495, 9 Pac. 652.

Colorado.— See Patterson *v.* Watson, 35 Colo. 502, 83 Pac. 958.

Illinois.— McAllister *v.* Ball, 24 Ill. 149.

Indiana.— Daly *v.* Gubbins, 35 Ind. App. 86, 73 N. E. 833.

Iowa.— Hitchcock *v.* Chicago, etc., R. Co., 88 Iowa 242, 55 N. W. 337.

Michigan.— Smith *v.* Cowles, 123 Mich. 4, 81 N. W. 916.

Minnesota.— Gertler *v.* Linscott, 26 Minn. 82, 1 N. W. 579.

New York.— People *v.* Koster, 50 Misc. 46, 97 N. Y. Suppl. 829.

South Dakota.— Charles City First Nat. Bank *v.* D. S. B. Johnson Land Mortg. Co., 17 S. D. 522, 97 N. W. 748.

See 39 Cent. Dig. tit. "Pleading," § 117.

4. *Georgia.*— Cooper *v.* Robert Portner Brewing Co., 112 Ga. 894, 38 S. E. 91.

Indiana.— Corbey *v.* Rogers, 152 Ind. 169, 52 N. E. 748; Farris *v.* Jones, 112 Ind. 498, 14 N. E. 484; Ludlow *v.* Ludlow, 109 Ind. 199, 9 N. E. 769; Lynn *v.* Crim, 96 Ind. 89; Smith *v.* Little, 67 Ind. 549; McCarnan *v.* Cochran, 57 Ind. 166; Day *v.* Vallette, 25 Ind. 42, 87 Am. Dec. 353; Little *v.* Hamilton County, 7 Ind. App. 118, 34 N. E. 499.

Kentucky.— Daley *v.* O'Brien, 96 S. W. 521, 29 Ky. L. Rep. 811.

Montana.— Murray *v.* Butte, 35 Mont. 161, 88 Pac. 789; Hefferlin *v.* Karlman, 29 Mont. 139, 74 Pac. 201; McKay *v.* McDougal, 19 Mont. 488, 48 Pac. 988.

Wisconsin.— Abendroth *v.* Boardley, 27 Wis. 555; Curtis *v.* Moore, 15 Wis. 134.

See 39 Cent. Dig. tit. "Pleading," § 116.

But an exhibit referred to and made a part of one count may be made a part of another by reference. Peck *v.* Hensley, 21 Ind. 344.

5. Aulbach *v.* Dahler, 4 Ida. 654, 43 Pac. 322; Waechter *v.* St. Louis, etc., R. Co., 113 Mo. App. 270, 88 S. W. 147; Neier *v.* Missouri Pac. R. Co., 12 Mo. App. 35; Hefferlin *v.* Karlman, 29 Mont. 139, 74 Pac. 201; McKay *v.* McDougal, 19 Mont. 488, 48 Pac. 988; Curtis *v.* Moore, 15 Wis. 134.

6. *Alabama.*— Wolf *v.* Smith, 149 Ala. 457, 42 So. 824, 9 L. R. A. N. S. 338; Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45; Bryant *v.* Southern R. Co., 137 Ala. 488, 34 So. 562; Taylor *v.* Perry, 48 Ala. 240; Mardis *v.* Shackleford, 6 Ala. 433.

California.— Hopkins *v.* Contra Costa County, 106 Cal. 566, 39 Pac. 933; Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20 [*condemning* the contrary rule stated in Pennie *v.* Hildreth, 81 Cal. 127, 22 Pac. 398]; Green *v.* Clifford, 94 Cal. 49, 29 Pac. 331.

Florida.— Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Illinois.— Columbian Acc. Co. *v.* Sanford, 50 Ill. App. 424.

Massachusetts.— Dorr *v.* McKinney, 9 Allen 359.

Minnesota.— Realty Revenue Guaranty Co. *v.* Farm Stock, etc., Pub. Co., 79 Minn. 465, 82 N. W. 857; Gertler *v.* Linscott, 26 Minn. 82, 1 N. W. 579.

Missouri.— St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495; Boeckler *v.* Missouri Pac. R. Co., 10 Mo. App. 448; Clark *v.* Whittaker Iron Co., 9 Mo. App. 446.

New Hampshire.— Hitchcock *v.* Munger, 15 N. H 97.

New York.— Schlieder *v.* Dexter, 114 N. Y. App. Div. 417, 99 N. Y. Suppl. 1000; Marietta *v.* Cleveland, etc., R. Co., 52 Misc. 16, 100 S. W. 1027; Smith *v.* Sage, 5 Misc. 257, 25 N. Y. Suppl. 103; Freeland *v.* McCullough, 1 Den. 414, 43 Am. Dec. 685; Crookshank *v.* Gray, 20 Johns. 344.

Ohio.— Hughs *v.* Farmers' Ins. Co., 4 Ohio Dec. (Reprint) 412, 2 Clev. L. Rep. 125.

Oregon.— Eaton *v.* Oregon, etc., Co., 19 Oreg. 391, 24 Pac. 415.

Rhode Island.— Fellows *v.* Chipman, 26 R. I. 196, 58 Atl. 663.

Vermont.— Curtis *v.* Belknap, 21 Vt. 433, holding such a count good after verdict.

Washington.— Sly *v.* Palo Alto Gold Min. Co., 28 Wash. 485, 68 Pac. 871.

West Virginia.— Beckwith *v.* Mollohan, 2 W. Va. 477.

Wyoming.— Ramsey *v.* Johnson, 7 Wyo. 392, 52 Pac. 1084.

United States.— Wilson *v.* Hoffman, 123 Fed. 984 [*reversed* on other grounds in 130 Fed. 694, 65 C. C. A. 14, 134 Fed. 844, 67 C. C. A. 434].

See 39 Cent. Dig. tit. "Pleading," § 118.

side the count. Thus a single reference in another part of the pleading may aid a number of separate counts each of which would be defective without it.[7] But a reference to be deemed sufficient, must be clear, direct, positive and explicit.[8] Such reference has been recommended as a means of avoiding too great prolixity.[9] Some cases hold that where a reference is made to an averment in a count which is held bad on demurrer, such reference will not aid;[10] but others hold that a defective or abandoned count is still a part of the pleading for purposes of reference.[11]

6. Remedies For Improper Statement. Objections to a complaint or declaration for misjoinder of causes of action or duplicity are available only when seasonably made in the mode prescribed by statute, or by the prevailing practice.[12]

D. Affidavit of Claim or of Merits. Under statutes in several states, a plaintiff may, if he desires, file with his pleading an affidavit of claim or cause of action, the effect of which is to entitle plaintiff to judgment as in case of default unless defendant files with his plea an affidavit of defense or of merits.[13] The

7. Bricker *v.* Missouri Pac. R. Co., 83 Mo. 391.

8. *Alabama.*— Byrne Mill Co. *v.* Robertson, 149 Ala. 273, 42 So. 1008.

California.— Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20.

New Jersey.— Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152; Gilmore *v.* Christ Hospital, 68 N. J. L. 47, 52 Atl. 241; Opdycke *v.* Easton, etc., R. Co., 68 N. J. L. 12, 52 Atl. 243; Crawford *v.* New Jersey R., etc., Co., 28 N. J. L. 479.

New York.— Wallace *v.* Jones, 68 N. Y. App. Div. 191, 74 N. Y. Suppl. 116; Simmons *v.* Fairchild, 42 Barb. 404; Marietta *v.* Cleveland, etc., R. Co., 52 Misc. 16, 100 S. W. 1027; Woods *v.* Armstrong, 29 Misc. 660, 62 N. Y. Suppl. 759.

North Dakota.— Jasper *v.* Hazen, 2 N. D. 401, 51 N. W. 583.

Canada.—Eadus *v.* Dougall, 14 U. C. C. P. 35.

See 39 Cent. Dig. tit. "Pleading," § 118.

Proper and improper reference.—In Bigelow *v.* Drummond, 98 N. Y. App. Div. 499, 502, 90 N. Y. Suppl. 913, the appellate division said: "Nor do we think the complaint was demurrable for realleging in the second and third causes of action distinct paragraphs by number of the first count of the complaint. The authorities cited in condemnation of referring in a pleading to the antecedent allegations are where the repetition is made by reference to folios which creates confusion and upon a review may be unintelligible, as the pleading folioing may not be followed in the printed record. If the reference is to a distinctly numbered paragraph no misapprehension or embarrassment will occur."

9. Phillips *v.* Fielding, 2 H. Bl. 123.

10. Fraternal Tribunes *v.* Hanes, 100 Ill. App. 1; Richardson *v.* Lanning, 26 N. J. L. 130; Nelson *v.* Swan, 13 Johns. (N. Y.) 483.

11. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45; Robinson *v.* Drummond, 24 Ala. 174; Morrison *v.* Spears, 8 Ala. 93; Hutson *v.* King, 95 Ga. 271, 22 S. E. 615; Cleveland, etc., R. Co. *v.* Rice, 48 Ill. App. 51; Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,505, 5 McLean 214.

12. *Alabama.*— Walker *v.* Mobile Mar. Dock, etc., Ins. Co., 31 Ala. 529.

Arkansas.— Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96; Adams *v.* Edgerton, 48 Ark. 419, 3 S. W. 628; Terry *v.* Rosell, 32 Ark. 478; Crawford *v.* Fuller, 28 Ark. 379.

California.— Gray *v.* Dougherty, 25 Cal. 266.

Colorado.— Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822.

Indiana.— Clark *v.* Lineberger, 44 Ind. 223; Watts *v.* McAllister, 33 Ind. 264.

Kentucky.— Whitney *v.* Whitney, 5 Dana 327; Randall *v.* Shropshire, 4 Metc. 327; Pepper *v.* Harper, 47 S. W. 620, 20 Ky. L. Rep. 837.

Michigan.— Ives *v.* Williams, 53 Mich. 636, 19 N. W. 562; Schafer *v.* Boyce, 41 Mich. 256, 2 N. W. 1.

Missouri.— Sumner *v.* Rogers, 90 Mo. 324, 2 S. W. 476 [*affirming* 10 Mo. App. 269]; Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Mead *v.* Brown, 65 Mo. 552.

Nebraska.— Turner *v.* Althaus, 6 Nebr. 54.

New York.— Doherty *v.* Shields, 86 Hun 303, 33 N. Y. Suppl. 497; Bernard *v.* Brown, 17 N. Y. Suppl. 313.

Pennsylvania.— Erie City Iron Works *v.* Barber, 118 Pa. St. 6, 12 Atl. 411; Pennsylvania R. Co. *v.* Bock, 93 Pa. St. 427.

South Carolina.— Field *v.* Hurst, 9 S. C. 277.

Texas.— Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974.

Virginia.— Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

Wisconsin.— Baird *v.* McConkey, 20 Wis. 297; Jones *v.* Hughes, 16 Wis. 683; Mead *v.* Bagnall, 15 Wis. 156; Stilwell *v.* Kellogg, 14 Wis. 461; Jesup *v.* Racine City Bank, 14 Wis. 331; Carey *v.* Wheeler, 14 Wis. 281.

Duplicity as ground for demurrer see *infra*, VI, F, 1, b, (I).

Failure to separately state causes of action as ground for demurrer see *infra*, VI, F, 1, b, (II).

Misjoinder of causes of action as ground for demurrer see *infra*, VI, F, 2, d.

Motion to separately state and number causes of action see *infra*, XII, D, 5, b.

Motion to strike improperly joined causes of action see *infra*, XII, C, 1, c, (XIII).

13. See the statutes of the several states.

affidavit should show the nature of the demand and the amount due,[14] and should consist of positive and certain statements of facts sufficient to entitle plaintiff to judgment.[15] It need not be entitled as of the term of court,[16] but should be entitled in the cause so that it may be identified.[17] A strict compliance with the statute is necessary,[18] but nothing need be done beyond what the statute requires.[19] An affidavit may be sworn to by but one of several plaintiffs,[20] and indeed any person whether a plaintiff or a stranger, who knows the facts, may swear to the affidavit.[21] But when the affidavit is by a stranger to the record, the reason should appear on the face of the affidavit.[22] The affidavit should be filed with the complaint or declaration,[23] but where it is filed within the time limited for the filing of the declaration it will be deemed filed with it,[24] and on good cause shown the time for filing may be extended.[25] It cannot be used to obtain a judgment where no suit is pending.[26]

E. Time For Filing or Service.[27] The time when the first pleading on the part of plaintiff must be filed and served is usually fixed by statute or rule of court.[28] In the absence of a statute, plaintiff is not required to declare until there

And see Haggard *v.* Smith, 76 Ill. 507; Fisher *v.* National Bank of Commerce, 73 Ill. 34; Kern *v.* Strasberger, 71 Ill. 303; Blizzard *v.* Epkens, 105 Ill. App. 117.

Filing affidavit after plea.— Such an affidavit of claim may, by leave of court, be filed after plea filed, and the plea may then be stricken for want of an affidavit of defense. Wells *v.* Mathews, 75 Ill. App. 395.

Affidavit of defense see *infra*, IV, F.

14. Kern *v.* Strasberger, 71 Ill. 303; Gottfried *v.* German Nat. Bank, 1 Ill. App. 224.

15. St. Joseph's Polish Catholic Ben. Soc. *v.* St. Hedwig's Church, 3 Pennew. (Del.) 229, 50 Atl. 535; Foertsch *v.* Germuiller, 2 App. Cas. (D. C.) 340; Ide *v.* Booth, 8 Pa. Co. Ct. 499; Donahue *v.* Keller, 1 Phila. (Pa.) 106; Smith *v.* Bible, 1 Phila. (Pa.) 91.

16. Honore *v.* Home Nat. Bank, 80 Ill. 489.

17. Vinson *v.* Norfolk, etc., R. Co., 37 W. Va. 598, 16 S. E. 802.

18. McKenzie *v.* Penfield, 87 Ill. 38; Commonwealth Bank *v.* Kirkland, 102 Md. 662, 62 Atl. 799; Tombler *v.* Dinan, 5 Pa. Co. Ct. 309; Vinson *v.* Norfolk, etc., R. Co., 37 W. Va. 598, 16 S. E. 802. See also Chicago, etc., R. Co. *v.* Bank of North America, 82 Ill. 493; McMullen *v.* Welsh, 18 York Leg. Rec. (Pa.) 8.

Before whom affidavit may be made.— Such an affidavit may be made before a notary in another state. Hutchins *v.* Manely, 11 App. Cas. (D. C.) 88.

19. Greff *v.* Fickey, 30 Md. 75; Altoona Second Nat. Bank *v.* Gardner, 171 Pa. St. 267, 33 Atl. 188.

20. Haggard *v.* Smith, 71 Ill. 226.

21. Brigham *v.* Atha, 84 Ill. 43; Garrity *v.* Lozano, 83 Ill. 597; Honore *v.* Home Nat. Bank, 80 Ill. 489; Wilder *v.* Arwedson, 80 Ill. 435; Young *v.* Browning, 71 Ill. 44.

The real, even though not the nominal, plaintiff may make the affidavit, where the facts he states are particularly within his own knowledge. Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382.

An attorney may make an affidavit as agent for his client. Harris *v.* Leonhardt, 2 App. Cas. (D. C.) 318.

22. Tombler *v.* Dinan, 5 Pa. Co. Ct. 309.

23. Floyd *v.* McDaniel, 36 Ark. 484. See Walton *v.* Lefever, 17 Lanc. L. Rev. (Pa.) 203.

Where the declaration is amended plaintiff need not file a new affidavit of claim unless in a special case. Cavanaugh *v.* Witte Gas, etc., Co., 123 Ill. App. 571.

24. Goldie *v.* McDonald, 78 Ill. 605.

25. Spradling *v.* Russell, 100 Ill. 522; Healy *v.* Charnley, 79 Ill. 592.

26. Miller *v.* Hart, 3 Pennew. (Del.) 297, 51 Atl. 603.

27. **Filing and service of pleading** generally see *infra*, XI, A.

28. See the statutes of the several states. And see the following cases:

Illinois.— English *v.* Wilkins, 163 Ill. 542, 45 N. E. 287; Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025; Herring *v.* Quimby, 31 Ill. 153; Wells *v.* Knuth, 122 Ill. App. 93.

Michigan.— Reid *v.* Ferris, 112 Mich. 693, 71 N. W. 484, 67 Am. St. Rep. 437.

New Mexico.—*In re* Lewisohn, 9 N. M. 101, 49 Pac. 909.

New York.— Luce *v.* Trempert, 9 How. Pr. 212; Knapp *v.* Pults, 3 How. Pr. 53.

Pennsylvania.— Weigley *v.* Teal, 125 Pa. St. 498, 17 Atl. 454; Hill *v.* Erie R. Co., 5 Lack. Jur. 15.

Tennessee.— Mayfield *v.* Beech, 2 Sneed 443.

Canada.— Winch *v.* Traviss, 18 Ont. Pr. 102. In Ontario under rule 485 the court or a judge may, in a proper case, order a plaintiff to deliver his statement of claim within a limited time shorter than that allowed by rule 369; but an order dismissing the action for failure to deliver the statement within the time so limited is not, having regard to rule 646, to be made until after default. And an order directing that the action should be dismissed for want of prosecution if the statement of claim was not delivered within eight days was amended so as to make it direct only that plaintiff should deliver the statement within eight

has been personal service or an appearance.[29] Under the old English and Canadian practice a plaintiff was deemed out of court if he did not declare within one year after defendant's appearance.[30] But this rule has not been followed by American courts.[31] In construing court rules, reference is to be had to the statute under which the rule was made, to other rules having a bearing upon the subject, and to the common-law principles of practice applicable thereto.[32] Technical objections will not be allowed to defeat a reasonable interpretation.[33] Where the pleading is required to be filed a certain number of days before the term, this means the term at which defendant may be required to plead.[34] The word "term" means either general or special term,[35] and applies to the actual sitting of the court.[36] The general rules for the computation of time apply to the filing of pleadings.[37] Where the statute provides that the pleading must be filed within the time fixed in the writ of process or a certain number of days before the term, the latter alternative may be followed, although it is after the time stated in the writ.[38] If the pleading is not filed at the time required, the suit may ordinarily be dismissed, but the court has considerable discretion in the matter.[39] In some states it is deemed discontinued by statute.[40]

IV. PLEA OR ANSWER, CROSS COMPLAINT, AND AFFIDAVIT OF DEFENSE.

A. In General[41] — 1. Definitions and Classification — a. Pleas Generally.

The word "plea" in its most general sense indicates the formal answer made by a defendant to a demand or charge.[42] The term is used at common law to denote a defense of matters of fact,[43] or more specifically, defendant's answer by matter of fact to plaintiff's declaration.[44] But the term "plea" in its proper sense is not

days. Armstrong *v.* Toronto, etc., St. R. Co., 15 Ont. Pr. 449.

In England under the Judicature Act the filing of the statement of claim may in certain cases be dispensed with where the writ is specially indorsed. See Yeatman *v.* Snow, 42 L. T. Rep. N. S. 502, 28 Wkly. Rep. 574.

29. Hiles *v.* McFarland, 3 Pinn. (Wis.) 365.

30. Murchison *v.* Canada Farmers' Ins. Co., 8 Ont. Pr. 451.

31. Dole *v.* Young, 11 Johns. (N. Y.) 90; Marshall *v.* Franklin Fire Ins Co., 10 Pa. Co. Ct. 480.

The early practice in South Carolina allowed a year and a day. Smith *v.* Parker, 13 Rich. (S. C.) 246; Perry *v.* Aiken, 3 Rich. (S. C.) 60; State Bank *v.* Torre, 2 Speers (S. C.) 501; Kennedy *v.* Smith, 1 Brev. (S. C.) 203.

32. Cook *v.* Cook, 18 Fla. 634. And see, generally, Courts, 11 Cyc. 742.

33. Thus, in Michigan, where the service of a copy of the declaration as commencement of a suit, before entry of a rule to plead, is unauthorized, it was held that when both occur on the same day, and the interval between the service and the entry of the rule is insignificant, and defendant is not misled, he has no cause for complaint. Blanck *v.* Ingham Cir. Judge, 44 Mich. 98, 6 N. W. 204. See also Gorman *v.* Hibernian Bldg, etc., Assoc., 154 Pa. St. 133, 25 Atl. 827.

34. Emig *v.* Medley, 69 Ill. App. 199.

35. Harman *v.* Goodrich, 1 Greene (Iowa) 13.

36. Koon *v.* Moore, 19 Wend. (N. Y.) 95.

37. See Time.

38. Anderson *v.* Kerr, 10 Iowa 233; Chever *v.* Lane, 3 Iowa 296; McCaffree *v.* Guesford, 1 Iowa 80.

39. *Colorado.*— Burkhardt *v.* Haycox, 19 Colo. 339, 35 Pac. 730; Knight *v.* Fisher, 15 Colo. 176, 25 Pac. 78.

Illinois.— Garden City Ins. Co. *v.* Stayart, 79 Ill. 259.

New York.— People *v.* Justices New York Super. Ct., 1 Barb. 478; Stephens *v.* Moore, 4 Sandf. 674; O'Hara *v.* Nieury, 1 Sandf. 655; People *v.* New York Super. Ct., 18 Wend. 675.

North Carolina.—Anderson *v.* Anderson, 3 N. C. 3.

South Carolina.— Higginbottom *v.* Wright, 1 Nott & M. 8.

Tennessee.— Morrow *v.* Malone, 5 Sneed 642.

See 39 Cent. Dig. tit. "Pleading," §§ 94, 95.

40. Clark *v.* Stevens, 55 Iowa 361, 7 N. W. 591; Smith *v.* Shaw, 49 Iowa 294.

41. Answers in equity see Equity, 16 Cyc. 297.

In admiralty procedure see Admiralty, 1 Cyc. 856.

Pleading to assignment of errors see Appeal and Error, 2 Cyc. 1007.

Pleas in equity see Equity, 16 Cyc. 286.

42. Underwood *v.* Thurman, 111 Ga. 325, 36 S. E. 788 [*quoting* Anderson L. Dict.].

Pleas in equity, see Equity, 16 Cyc. 286.

43. Browers *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672.

44. Bates *v.* Colvin, 21 R. I. 57, 41 Atl. 1004.

Whatever is offered by defendant as sufficient to defeat the cause of action stated in

sufficient to include the idea of a demurrer.[45] Pleas are divided most generally into two classes: (1) Dilatory pleas,[46] (2) peremptory pleas,[47] or, as they are more commonly called, pleas in bar.[48]

b. Dilatory Pleas. Dilatory pleas are those which delay plaintiff's remedy. They do not affect the merits of the cause of action, and plaintiff may still seek his remedy by a new action, but they defeat entirely the particular suit in which they are used.[49] Dilatory pleas are commonly divided into (1) pleas to the jurisdiction of the court, (2) pleas to the disability or to the person of plaintiff or defendant, and (3) pleas in abatement of the count, declaration, or writ.[50] Pleas to the person are also called pleas in suspension of the action,[51] and are frequently classed as pleas in abatement;[52] and all dilatory pleas are sometimes called pleas in abatement, in distinction from pleas in bar.[53] Defects in the declaration itself cannot be taken advantage of by plea in abatement. In such cases a demurrer is the proper remedy.[54] Pleas in abatement, properly so called, are founded on some defect in the writ itself, or on some variance or repugnancy between the declaration and the writ.[55] They seek to defeat the proceedings, but do not show that plaintiff is forever concluded, and set forth a better form of action for the redress sought.[56]

c. Pleas in Bar. Pleas in bar of the action are those which show a meritorious ground for wholly defeating it. They differ from all dilatory pleas in that they do not merely divert the proceedings to another jurisdiction, nor suspend them, nor abate the writ or declaration, but they substantially and conclusively impugn the right of action altogether.[57] Pleas in bar are sometimes termed issuable pleas[58] or defenses.[59] Pleas in bar are divided into pleas by way of traverse and pleas by way of confession and avoidance, according to whether they deny the material facts alleged or set up new facts which destroy their legal effect.[60] Under the code they are called answers by way of denial and answers by way of new matter.[61]

d. Distinction Between Dilatory Pleas and Pleas in Bar. The distinction between dilatory pleas and pleas in bar is substantial, and the character of a particular plea is to be determined, in the absence of formal parts to the contrary,[62]

plaintiff's declaration, either by way of denial, justification, or confession, is a plea. Jewett Car Co. *v.* Kirkpatrick Constr. Co., 107 Fed. 622.

45. Welsh *v.* Blackwell, 14 N. J. L. 344.

46. See *infra*, IV, B.

47. See *infra*, IV, C.

48. 3 Blackstone Comm. 301; 1 Chitty Pl. (16th Am. ed.) *457; Gould Pl. (Hamilton ed.) 40; Andrews' Stephen Pl. § 68.

Under the Louisiana practice the term "exception" is used to designate all defenses. Exceptions, like pleas under the common-law procedure, are either dilatory or peremptory. Garland Code Pr. §§ 330, 331.

49. Mayhew *v.* Ford, 61 N. J. L. 532, 39 Atl. 914; Parks *v.* McClellan, 44 N. J. L. 552; Mahoney *v.* New South Bldg., etc., Assoc., 70 Fed. 513; 3 Blackstone Comm. 301; Gould Pl. (Hamilton ed.) 40.

50. 1 Chitty Pl. (16th Am. ed.) *457; Gould Pl. (Hamilton ed.) 41.

51. Andrews' Stephen Pl. § 70.

52. 1 Chitty Pl. (16th Am. ed.) *463.

53. Gould Pl. (Hamilton ed.) 42.

54. Hastrop *v.* Hastings, 1 Salk. 212.

55. Stoddard *v.* Cochran, 6 N. H. 160; New Brunswick Bank *v.* Arrowsmith, 9 N. J. L. 284; Newlin *v.* Palmer, 11 Serg. & R. (Pa.) 98; Young *v.* Gray, 1 McCord (S. C.) 211. See, generally, *infra*, IV, B, 5.

56. Hurst *v.* Everett, 21 Fed. 218, distinguishing pleas in bar.

57. See 1 Chitty Pl. (16th Am. ed.) *486; Gould Pl. (Hamilton ed.) 43; Andrews' Stephen Pl. § 73. And see the following cases:

Georgia.— Palmour *v.* Palmour, 53 Ga. 381; Dougherty *v.* Bethune, 7 Ga. 90.

Indiana.— Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466.

Louisiana.— Sanchez *v.* French Evangelical Church Soc., 8 Mart. N. S. 452.

Maine.— Rawson *v.* Knight, 71 Me. 99.

Missouri.— Wilson *v.* Knox County, 132 Mo. 387, 34 S. W. 45, 477.

New Jersey.— Blackburn *v.* Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. St. Rep. 159.

Oregon.— Norton *v.* Winter, 1 Oreg. 47, 62 Am. Dec. 297.

Virginia.— Mason *v.* Farmers' Bank, 12 Leigh 84.

United States.— Union Mut. L. Ins. Co. *v.* Lewis, 97 U. S. 682, 24 L. ed. 1114; Peyatte *v.* English, 19 Fed. Cas. No. 11,054*a*, Hempst. 24. See Wilson *v.* Winchester, etc., R. Co., 82 Fed. 15.

58. Jordan *v.* Carter, 60 Ga. 443; Watkins *v.* Bensusan, 9 M. & W. 422.

59. Colquitt *v.* Mercer, 44 Ga. 432.

60. See *infra*, IV, C, D.

61. See *infra*, IV, C, 2, a.

62. Mudge *v.* Rinkle, 45 Ill. App. 604;

by what it contains.[63] Statutes abolishing special pleading apply only to pleas in bar, and pleas in abatement may still be filed.[64] Under the code the technical distinctions between the various pleas no longer exist, and answers are in abatement or in bar according to the allegations which they contain.[65]

e. Pleas in Discharge. A plea in discharge is one which admits that plaintiff had a cause of action, but seeks to show that it was discharged by some subsequent or collateral matter.[66]

f. Pleas in Confession and Avoidance. A plea in confession and avoidance is one which admits that plaintiff had a cause of action, but which avers that it has been discharged by some subsequent or collateral matter.[67]

g. Plea of Justification. A plea in justification or excuse admits facts alleged by plaintiff, but in effect denies that plaintiff had at any time a good cause of action, either because the conduct of defendant is justified under some legal right or cause, or because he is excused from liability in the particular case through some act or conduct of plaintiff.[68] It is a plea of confession and avoidance.[69]

h. Plea of Release. A plea of release is a plea which admits the cause of action, but sets forth a subsequently executed release.[70]

i. Pleas to the Action. A plea to the action is one which disputes the cause of action.[71]

2. Matters Relating to Pleas and Answers Generally — a. Necessity.[72] No answer is necessary to a petition which has been stricken from the files.[73] If the complaint is bad, it is not error to overrule a demurrer to a bad answer, a bad answer being good enough for a bad complaint.[74]

b. Waiver of Defenses by Failure to Plead. All defenses not made in the pleadings are considered waived,[75] especially such as are connected with the facts alleged by plaintiff,[76] and those which are dilatory in their nature.[77] But there are certain exceptions to this rule. Thus where the record discloses the invalidity

Schoonmaker *v.* Elmendorf, 10 Johns. (N. Y.) 49; Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312; Hargis *v.* Ayres, 8 Yerg. (Tenn.) 467; Alexander *v.* School-Dist. No. 6, 62 Vt. 273, 19 Atl. 995.

63. *Louisiana.*— Blanchard *v.* Grousset, 1 La. Ann. 96; Castaing *v.* New Orleans Imp., etc., Co., 5 Rob. 177; Sanchez *v.* French Evangelical Church Soc., 8 Mart. N. S. 452.

Maryland.— Thomas *v.* Farmers' Bank, 46 Md. 43.

Pennsylvania.— Engle *v.* Nelson, 1 Penr. & W. 442; Palethorp *v.* Whitaker, 9 Phila. 272.

South Carolina.— Trimmier *v.* Hamilton, 3 McCord 425.

Virginia.— Mautz *v.* Hendley, 2 Hen. & M. 308.

Wisconsin.— Brown County *v.* Van Stralen, 45 Wis. 675.

64. Potter *v.* Titcomb, 13 Me. 36; Gordon *v.* Pierce, 11 Me. 213; Slatteny *v.* Pennsylvania R. Co., 21 Wkly. Notes Cas. (Pa.) 556.

65. Grider *v.* Apperson, 32 Ark. 332; Bond *v.* Wagner, 28 Ind. 462; Thompson *v.* Greenwood, 28 Ind. 327; Sweet *v.* Tuttle, 14 N. Y. 465; Saylor *v.* Commonwealth Inv., etc., Co., 38 Oreg. 204, 62 Pac. 652.

66. Nichols *v.* Cecil, 106 Tenn. 455, 61 S. W. 768.

67. De Lissa *v.* Fuller Coal, etc., Co., 59 Kan. 319, 52 Pac. 886. See, generally, *infra*, IV, D, 1.

68. Nichols *v.* Cecil, 106 Tenn. 455, 61 S. W. 768.

69. Wright *v.* Union R. Co., 21 R. I. 554, 45 Atl. 548; Nichols *v.* Cecil, 106 Tenn. 455, 61 S. W. 768. See, generally, *infra*, IV, D, 1.

70. Landis *v.* Morrissey, 69 Cal. 83, 10 Pac. 258 [*citing* Coles *v.* Soulsby, 21 Cal. 47].

71. Parks *v.* McClellan, 44 N. J. L. 552.

72. Default judgment on failure to plead see Judgments, 23 Cyc. 744 *et seq.*

73. Urlau *v.* Ruhe, 63 Nebr. 883, 89 N. W. 427.

74. Hiatt *v.* Darlington, 152 Ind. 570, 53 N. E. 825; First *v.* Bonewitz, 3 Ind. 546; Bonham *v.* Doyle, 39 Ind. App. 438, 77 N. E. 859, 79 N. E. 458. See also *infra*, VI, I, 3.

75. *Illinois.*— Gray *v.* Merchants' Ins. Co., 125 Ill. App. 370.

Kansas.—Ault *v.* Butcher, 2 Kan. 135.

Kentucky.—Asher *v.* Uhl, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29, 27 Ky. L. Rep. 938, 29 Ky. L. Rep. 396.

Nevada.— *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209.

New York.— Cable *v.* Cooper, 15 Johns. 152.

West Virginia.— Stevens *v.* Friedman, 53 W. Va. 79, 44 S. E. 163.

76. Stewart *v.* Preston, 1 Fla. 10.

77. Stirk *v.* Central R., etc., Co., 79 Ga. 495, 5 S. E. 105; Wright *v.* Fire Ins. Co., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; Nicholson *v.* Golden, 27 Mo. App. 132.

Waiver of dilatory plea see *infra*, IV, B, 6.

of a contract the court will notice it *ex officio*.[78] So a defendant may avail himself of a defense disclosed by plaintiff's proofs.[79] And where a defendant might subject himself to a criminal prosecution by answering the allegations of plaintiff, he may so state in his answer and the allegations will be deemed put in issue without being denied,[80] or without the denial being verified.[81] Nor does the rule apply where the pleading filed by plaintiff is not one on which judgment can be given.[82]

c. Persons Who May Plead Defenses.[83] A defense can be used only by the party in whose favor it exists, and cannot be set up by a defendant in favor of a third person.[84]

d. Entitling Plea or Answer. There is some conflict in authority as to the necessity of entitling a plea. Some cases hold that it is not necessary, as the title of the declaration is deemed to be carried over to the plea.[85] Under this rule it is held that no venue is necessary in a plea except where defendant justifies at a different place and makes the place material, the venue in the declaration drawing to itself everything that is transitory.[86] But other cases hold that the plea must be entitled,[87] and that technical strictness will be required in this respect in the case of dilatory pleas.[88]

e. General Form.[89] A memorandum indorsed by defendant on the back of a complaint, if it contains proper matter, may constitute a valid answer.[90] But mere formless memoranda do not constitute pleas.[91] A plea which has been used on a former trial may be used again if the date be changed to correspond with the defense.[92]

f. Subject-Matter.[93] A plea or answer must consist of allegations or denials of facts, and not of matters of law, the latter being properly grounds for demurrer.[94] Defects appearing on the face of plaintiff's pleading, which are grounds of demurrer, cannot be raised by plea or answer.[95] A defendant cannot, by his pleading, confer rights upon plaintiff which did not exist at the commencement of the action and which would enable plaintiff to recover upon a clause of action different from that alleged in the complaint.[96]

g. Certainty.[97] The statement of defense should be sufficient in substance

78. Gil *v.* Williams, 12 La. Ann. 219, 68 Am. Dec. 767.

79. Salsbury *v.* Ellison, 7 Colo. 167, 303, 2 Pac. 906, 3 Pac. 485, 49 Am. Rep. 347.

80. Hill *v.* Muller, 2 Sandf. (N. Y.) 684.

81. See *infra*, VIII, B, 2, k.

82. Pearce *v.* Mason, 78 N. C. 37.

83. Necessary and proper parties defendant see PARTIES, 30 Cyc. 1.

84. Ducros *v.* Gottschalk, 25 La. Ann. 233; Krebs *v.* Forbriger, 10 Ohio Dec. (Reprint) 506, 21 Cinc. L. Bul. 313. See also Langdon *v.* Conklin, 10 Ohio St. 439.

85. Mattingby *v.* Cline, 7 Mo. 499; Columbia Bank *v.* Ott, 2 Fed. Cas. No. 878, 2 Cranch C. C. 529 [*overruling* Columbia Bank *v.* Jones, 2 Fed. Cas. No. 870, 2 Cranch C. C. 516].

86. Thomas *v.* Rumsey, 6 Johns. (N. Y.) 26.

87. Brinckle *v.* Brinckle, 10 Phila. (Pa.) 339.

88. Fowler *v.* Arnold, 25 Ill. 284.

89. Pleas in abatement see *infra*, IV, B, 5, c.

Pleas in bar see *infra*, IV, C, 1.

90. Didier *v.* Warner, 1 Code Rep. (N. Y.) 42.

91. Webber *v.* Houston, 6 Yerg. (Tenn.) 314.

92. Sigler *v.* Gould, 2 N. J. L. 105.

93. Sham or frivolous pleas see *infra*, XII, B, 3, e; XII, C, 1, c, (III).

94. People *v.* San Francisco, 27 Cal. 655; Clay F. & M. Ins. Co. *v.* Wusterhausen, 75 Ill. 285; Rosenberg *v.* McKain, 3 Rich. (S. C.) 145.

95. Hinman *v.* Eakins, 26 Mich. 80; Bender *v.* Zimmerman, 135 Mo. 53, 36 S. W. 210. See also Jackson *v.* Savage, 109 N. Y. App. Div. 556, 96 N. Y. Suppl. 366.

Distinction between demurrer and plea.—"A demurrer is never founded on matter collateral to the pleading which it opposes, but arises on the face of the statement itself;—a pleading is always founded on matter collateral. This consideration will serve as a guide to determine whether a given objection should be brought forward by way of pleading or of demurrer. Thus, if the declaration in assumpsit omit to mention the day when the promise was made, it is an objection to which that statement on the face of it, is subject and which would consequently be taken by demurrer; but if one of the parties making the promise is omitted, the fact that there was such a party, is one of a collateral nature, not disclosed by the declaration itself, and must be brought forward therefore by way of plea, viz., plea in abatement." Stephen Pl. (8th Am. ed.) *63.

96. Toplitz *v.* Bauer, 26 N. Y. App. Div. 125, 49 N. Y. Suppl. 840.

97. Necessity of certainty in general see *supra*, II, H, 3.

and should be set forth by positive averments in such a way as to be fully understood by the opposite party and by the court.[98] Such a statement will not be wholly rejected, although it contain formal irregularities,[99] or clerical errors.[1] The facts shown in a single plea or defense should be consistent, and where they mutually nullify each other the pleading is bad on demurrer.[2]

h. Short Pleas. If a plea is pleaded "in short by consent" of parties, the consent applies only to matters of form, and it must still be good in substance.[3] Such pleas are to be construed as though set out *in extenso*, and as though they embodied all facts appearing in exhibits and essential to the defense indicated.[4]

i. Pleas Filed by Leave of Court. Where leave of court is necessary to the filing of a plea or answer, it must appear that defendant has a meritorious defense, since otherwise the court will exercise a sound discretion in refusing leave.[5] Sham defenses will be rejected.[6] The record should show the order granting leave, and a recital that leave was granted is not enough.[7] But this rule is not always followed.[8]

j. Disclaimers.[9] A disclaimer is a denial of any claim to or right in the thing demanded,[10] and if not falsified it defeats the action.[11] It should be full and explicit in all respects.[12] When once made it cannot be withdrawn without leave of court.[13] Pleas of disclaimer are sometimes held to be pleas in abatement only and not pleas in bar.[14] By statute provision is frequently made for the substitu-

Pleas in abatement see *infra*, IV, B, 5, c, (I).

98. *Alabama.*— Mead *v.* Hughes, 15 Ala. 141, 1 Am. Rep. 123.

Arkansas.— Davis *v.* Calvert, 17 Ark. 85.

Indiana.— Stonsel *v.* Abrams, 7 Blackf. 516.

Kentucky.— See Lockart *v.* Roberts, 3 Bibb 361.

Michigan.— Porter *v.* Kimball, 1 Mich. 239.

New York.— Elton *v.* Markham, 20 Barb. 343; Gelston *v.* Burr, 11 Johns. 482.

Washington.— Roeder *v.* Brown, 1 Wash. Terr. 112; Meeker *v.* Wren, 1 Wash. Terr. 73.

Canada.— McGilvray *v.* McDonnell, Taylor (U. C.) 139.

The replication cannot be resorted to for the purpose of curing a defect in a plea. Lockwood *v.* Nash, 18 C. B. 536, 86 E. C. L. 536.

99. *Alabama.*— Stewart *v.* Hargrove, 23 Ala. 429.

California.— Espinosa *v.* Gregory, 40 Cal. 58.

Georgia.— Bryan *v.* Gurr, 27 Ga. 378.

Michigan.— Porter *v.* Kimball, 1 Mich. 239.

New York.— Hopkins *v.* Meyer, 76 N. Y. App. Div. 365, 78 N. Y. Suppl. 459; Dovan *v.* Dinsmore, 33 Barb. 86; Fry *v.* Bennett, 5 Sandf. 54.

Pennsylvania.— Brooks *v.* Miller, 1 Grant 202.

Canada.— Voight Brewery Co. *v.* Orth, 5 Ont. L. Rep. 443.

1. Briggs *v.* Mason, 31 Vt. 433. See, generally, *supra*, II, H, 7, b.

2. Ansley *v.* Piedmont Bank, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122; Haas *v.* Selig, 27 Misc. (N. Y.) 504, 58 N. Y. Suppl. 328; McGrath *v.* Pitkin, 26 Misc. (N. Y.) 862, 56 N. Y. Suppl. 398; Freeman *v.* Frank, 10 Abb. Pr. (N. Y.) 370.

Demurrer because of repugnancy see *infra*, VI, F, 3, c.

Pleading inconsistent defenses see *infra*, IV, A, 7, d.

3. Reid *v.* Nash, 23 Ala. 733; Pollard *v.* Stanton, 5 Ala. 451; Gayle *v.* Randle, 4 Port. (Ala.) 232.

4. Steele *v.* Walker, 115 Ala. 485, 21 So. 942, 67 Am. St. Rep. 62; Phleger *v.* Ivins, 5 Harr. (Del.) 118.

5. Hallowell *v.* Page, 24 Mo. 590; Bankers' Reserve Life Assoc. *v.* Finn, 64 Nebr. 105, 89 N. W. 672.

6. Cox *v.* Pruitt, 25 Ind. 90; Burnsides *v.* Smith, 5 T. B. Mon. (Ky.) 464.

7. Pool *v.* Hill, 44 Miss. 306.

8. Conover *v.* Tindall, 20 N. J. L. 513.

9. Appearance by filing disclaimer see APPEARANCES, 3 Cyc. 507.

10. *Indiana.*—Hill *v.* Forkner, 76 Ind. 115; McCarnan *v.* Cochran, 57 Ind. 166.

Maryland.— Bentley *v.* Cowman, 6 Gill & J. 152; Worthington *v.* Lee, 2 Bland 678.

Massachusetts.—Oakham *v.* Hall, 112 Mass. 535.

Minnesota.— Bracket *v.* Gilmore, 15 Minn. 245.

Nebraska.— Carson *v.* Dundas, 39 Nebr. 503, 58 N. W. 141.

Oregon.— Moores *v.* Clackamas County, 40 Oreg. 536, 67 Pac. 662.

Texas.— Snyder *v.* Compton, (Civ. App. 1895) 29 S. W. 73; Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

Virginia.— Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317.

See 39 Cent. Dig. tit. "Pleading," § 162½.

11. Webster *v.* Pierce, 108 Wis. 407, 83 N. W. 938.

12. Worthington *v.* Lee, 2 Bland (Md.) 678.

13. Scanlan *v.* Hitchler, 19 Tex. Civ. App. 689, 48 S. W. 762.

14. Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181.

tion of a party claiming the subject-matter of the suit in lieu of defendant who disclaims any interest therein.[15]

k. Equitable Defenses. Under the common-law practice, equitable defenses are not available in actions at law, but under most of the codes such defenses may be set up without restriction.[16] An equitable defense must be pleaded as such.[17] A plea purporting to set up an equitable defense, which is so uncertain that it cannot be determined whether the defense it sets up is legal or equitable, will be stricken out.[18]

L Defenses Accruing After Suit Brought.[19] In no case is a defendant to be deprived of a defense merely because it accrued after suit brought.[20] Under the common-law rule matter of defense which arises after the commencement of the suit but before plea or answer filed, cannot be pleaded in bar of the action generally, but must be pleaded to the further maintenance of the suit.[21] But where it is pleaded in bar generally, it is good after verdict.[22] Matter of defense which arises after plea or answer filed must be pleaded *puis darrein continuance*.[23] But where matters of defense have arisen after an imparlance, they may be pleaded as regular pleas in bar, and not *puis darrein continuance*.[24] Under the code practice a defendant may set up in his answer any defense which exists at the time such answer is filed, irrespective of when it arose;[25] but matter arising after the action is commenced and before answer must be specially pleaded.[26]

3. Time Within Which to Plead — a. General Rules. The time within which defendant must plead is fixed by statute or rule of court in each jurisdiction.[27]

15. See Kohlman *v.* Meridian First Nat. Bank, 71 Miss. 843, 15 So. 131, holding that in an action against the sheriff for the proceeds of sale in his hands defendant was properly allowed to withdraw his plea and make affidavit that a third person claimed the property and was the real party in interest.

16. See Actions, 1 Cyc. 737.

17. Hogg *v.* Shedd, 17 Nova Scotia 490. An equitable defense should be set forth in defendant's plea as fully in an action at law as in a suit in equity. Ward *v.* Winn, 42 Ga. 323.

18. Rivers *v.* Rivers, 38 Fla. 65, 20 So. 807.

19. Amendment setting up new defense see *infra*, VII, A, 11, d, (II), (F).

Supplemental pleas or answers see *infra*, VII, D, 6.

20. Horne *v.* Rogers, 103 Ga. 649, 30 S. E. 562.

21. *Alabama.*— Lindsay *v.* Barnett, 130 Ala. 417, 30 So. 395; McDougald *v.* Rutherford, 30 Ala. 253; Burns *v.* Hindman, 7 Ala. 531; Sadler *v.* Fisher, 3 Ala. 200.

Connecticut.— Canfield *v.* New-Milford Eleventh School Dist., 19 Conn. 529.

Illinois.— Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401; Kapischke *v.* Koch, 79 Ill. App. 238.

Indiana.— White *v.* Guest, 6 Blackf. 228.

Iowa.— See Allen *v.* Newberry, 8 Iowa 65.

Maine.— Rowell *v.* Hayden, 40 Me. 582.

Maryland.— U. S. Bank *v.* Merchants' Bank, 7 Gill 415; Semmes *v.* Naylor, 12 Gill & J. 358.

Massachusetts.— Andrews *v.* Hooper, 13 Mass. 472.

New Hampshire.— Cutter *v.* Folsom, 17 N. H. 139.

New Jersey.— Hutchinson *v.* Hendrickson, 29 N. J. L. 180.

New York.— Covell *v.* Watson, 20 Johns. 414; Cobb *v.* Curtiss, 8 Johns. 470; Boyd *v.* Weeks, 2 Den. 321, 43 Am. Dec. 749.

Ohio.— Longworth *v.* Flagg, 10 Ohio 300.

United States.— Yeaton *v.* Lynn, 5 Pet. 224, 8 L. ed. 105.

England.—Carlisle *v.* Whaley, L. R. 2 H. L. 391, 16 Wkly. Rep. 229; Le Bret *v.* Papillon, 4 East 502, 7 Rev. Rep. 618.

See 39 Cent. Dig. tit. "Pleading," § 163.

A release given after the commencement of the action may be pleaded in bar generally. Wisheart *v.* Legro, 33 N. H. 177; Kimball *v.* Wilson, 3 N. H. 96, 14 Am. Dec. 342.

Under the English Common Law Procedure Act of 1852, any defense arising after the commencement of the action was required to be pleaded according to the fact, without formal commencement or conclusion, and in the absence of any averment to the contrary a plea was presumed to be a plea of matter arising before action. Jones *v.* Hill, L. R. 5 Q. B. 230, 39 L. J. Q. B. 74, 21 L. T. Rep. N. S. 784, 18 Wkly. Rep. 453.

22. Cobbett *v.* Grey, 4 Exch. 729, 19 L. J. Exch. 137.

23. See *infra*, VII, C, 2.

24. Tillotson *v.* Preston, 3 Johns. (N. Y.) 229.

25. Willis *v.* Chipp, 9 How. Pr. (N. Y.) 568. See Whitsett *v.* Clayton, 5 Colo. 476. But see Ireland *v.* Montgomery, 34 Ind. 174, where it is said that such matter should not be pleaded in bar generally. See also Herod *v.* Snyder, 61 Ind. 453.

26. Allen *v.* Newberry, 8 Iowa 65.

27. See the statutes and rules of court in the several jurisdictions; and see the following cases:

Where the statute fixes it, rules of court in regard thereto must not contravene the statute,[28] and while courts may, in their discretion, extend the time so given, they cannot shorten it.[29] A defendant is never under obligation to plead until he knows or should know that a declaration is on file against him,[30] and usually he need not plead until actual service of the summons or complaint,[31] or until due return of service is made.[32] A plea or answer filed before the filing of the declaration or complaint is irregular,[33] and may be stricken;[34] and a plea filed too late may be stricken from the files.[35] or disregarded.[36] A plea improperly filed cannot be disregarded, and if no motion is made to strike it out, it will stand as a valid plea.[37] Delay or other irregularity in the filing of a plea, under such circumstances as to constitute a fraud upon the practice of the court, will be sufficient ground for allowing plaintiff to take a default, although the plea is served previous to the expiration of the time to plead.[38] The date of the filing of a plea is not changed by the subsequent filing of a more formal jurat.[39]

b. Presumptions. When a plea is found on file in its proper place, the presumption is that it was filed in time, and this presumption is not rebutted by a judgment by default entered in the same case.[40] And where a plea is in the record, filed after the proper term for filing, it will be presumed to have been filed with the permission of the court.[41]

c. Extension of Time[42]**—(i)** *Control of Court Over Extension.* Unless there is an express restriction by statute, it is within the discretion of the court to extend the time for pleading, even after default.[43] If the period of extension

California.— Grewell *v.* Henderson, 5 Cal. 465.

Colorado.— King *v.* Gardner, 25 Colo. 395, 55 Pac. 727.

Georgia.— Cahn *v.* Newhouse, 60 Ga. 50; Wall *v.* McNeil, 20 Ga. 239.

Illinois.— English *v.* Wilkins, 163 Ill. 542, 45 N. E. 287; Corbin *v.* Turrill, 20 Ill. 516.

Indiana.—Runnion *v.* Crane, 4 Blackf. 466.

Iowa.— Brotherton *v.* Brotherton, 41 Iowa 112; Connable *v.* Colvin, 41 Iowa 93.

Louisiana.— Gayarre *v.* Millaudon, 23 La. Ann. 305.

Minnesota.— Universalist Gen. Convention *v.* Bottineau, 42 Minn. 35, 43 N. W. 687; Keyes *v.* Clare, 40 Minn. 84, 41 N. W. 453; Swift *v.* Fletcher, 6 Minn. 550.

Missouri.— Ward *v.* Sherman, 20 Mo. App. 319.

New Jersey.—Shannon *v.* Flood, 13 N. J. L. 30; Whittle *v.* Vanch, 3 N. J. L. 636.

New York.— Orr *v.* McEwen, 16 Hun 625; Tomlinson *v.* Van Vechten, 6 How. Pr. 199; People *v.* Babcock, 1 How. Pr. 5.

North Carolina.—Whitesides *v.* Green, 64 N. C. 307.

Pennsylvania.— Hower *v.* Bennett, 15 Pa. Co. Ct. 530.

Tennessee.—Tiernan *v.* Napier, 5 Yerg. 410.

Texas.— Ryburn *v.* Nail, 4 Tex. 305; Anderson *v.* Nuckles, (Civ. App. 1896) 34 S. W. 184.

West Virginia.—Walls *v.* Zufall, 61 W. Va. 166, 56 S. E. 179.

Wisconsin.— Howard *v.* Boorman, 13 Wis. 123.

United States.— Fidelity Trust, etc., Co. *v.* Newport News, etc., Co., 70 Fed. 403.

Canada.— Pounder *v.* Corner, 6 Brit. Col. 177.

See 39 Cent. Dig. tit. "Pleading," § 172.

28. Norvell *v.* McHenry, 1 Mich. 227; Hower *v.* Bennett, 15 Pa. Co. Ct. 530.

29. Aaron *v.* Anderson, 18 Ark. 268; Cornish *v.* Sargent, 18 Ark. 266; Langdon *v.* Keesee, 10 Ark. 645; North *v.* Davis, 9 Ark. 138; Hixon *v.* Weaver, 9 Ark. 133; Edwards *v.* Shreve, 83 N. Y. App. Div. 165, 82 N. Y. Suppl. 514; Lloyd *v.* Ward, 13 Ont. Pr. 238.

30. Newcomer *v.* Keedy, 9 Gill (Md.) 263.

31. Sayles *v.* Davis, 22 Wis. 225.

32. Callaway *v.* Douglasville College, 99 Ga. 623, 25 S. E. 850. See also Sanders *v.* People's Co-Operative Ice Co., 44 Misc. (N. Y.) 171, 89 N. Y. Suppl. 785.

33. Rodesch *v.* Estey, 71 Ill. App. 482; Pritchard *v.* Huntington, 16 Wis. 569.

34. See *infra*, XII, C, 3, c.

35. See *infra*, XII, C, 3, c, (IX).

36. Flanders *v.* Whittaker, 13 Ill. 707.

37. Price *v.* Sinclair, 5 Sm. & M. (Miss.) 254; Pritchard *v.* Huntington, 16 Wis. 569.

38. Philips *v.* Prescott, 9 How. Pr. (N. Y.) 430; Buffalo Bank *v.* Lowry, 22 Wend. (N. Y.) 630; Anonymous, 22 Wend. (N. Y.) 619.

39. Hart *v.* Bloomfield, 66 Miss. 100, 5 So. 620.

40. Tomlinson *v.* Hoyt, 1 Sm. & M. (Miss.) 515.

41. Price *v.* Sinclair, 5 Sm. & M. (Miss.) 254. But see Wright *v.* Alexander, 11 Sm. & M. (Miss.) 411 [*distinguishing* Price *v.* Sinclair, *supra*], where it was said that the record must affirmatively show that leave of court was obtained.

42. Appearance by application for extension of time to answer see APPEARANCES, 3 Cyc. 507.

43. *Alabama.*— Sally *v.* Gooden, 5 Ala. 78.

Arkansas.— Langdon *v.* Keesee, 10 Ark. 645; Norris *v.* Kellogg, 7 Ark. 112.

allowable by the court is limited by statute, this limit cannot be exceeded.[44] The exercise of this discretion is not subject to revision by the appellate court, where no abuse of discretion is shown.[45] But where an abuse of discretion appears, the case will be reversed.[46] It has been held not an abuse of judicial discretion to refuse to permit defendant to file a denial after the trial has begun;[47] to refuse leave to answer after leave has once been granted and a motion instead of an answer filed;[48] to permit an answer to be filed nine days after a case is set for trial but before entry of default, upon cause shown;[49] to refuse an answer eleven months after the petition was filed and after issues had been found between plaintiff and other defendants;[50] to refuse a plea when all the evidence is admissible under pleas already filed;[51] to refuse a plea of the statute of limitations after plaintiff has closed his case;[52] to allow an answer two years after appearance when the cause has been continued from term to term without objection by plaintiffs;[53] or to allow an answer at the close of the evidence which does not enlarge the issues tried.[54] On the other hand it has been held that refusal to admit a plea to the

Georgia.— Thornton *v.* Coleman, etc., Co., 104 Ga. 625, 30 S. E. 782; Fisher *v.* Savannah Guano Co., 97 Ga. 473, 25 S. E. 477.

Illinois.—Chicago Stamping Co. *v.* Mechanical Rubber Co., 83 Ill. App. 230; Reynolds *v.* Mandel, 73 Ill. App. 379.

Kansas.—Merten *v.* Newforth, 44 Kan. 705, 25 Pac. 204.

Kentucky.—Hardesty *v.* Mt. Eden, 86 S. W. 687, 27 Ky. L. Rep. 745.

Nebraska.— Orr *v.* Seaton, 1 Nebr. 105.

New York.— Mackay *v.* Laidlaw, 13 How. Pr. 129; Allen *v.* Ackley, 4 How. Pr. 5; Dudley *v.* Hubbard, 2 Code Rep. 70; Malcolm *v.* Gardner, 1 Cow. 137; Burrows *v.* Hillhouse, 6 Johns. 132.

North Carolina.— Morgan *v.* Harris, 141 N. C. 358, 54 S. E. 381; Wilmington *v.* McDonald, 133 N. C. 548, 45 S. E. 864; Mauney *v.* Hamilton, 132 N. C. 295, 43 S. E. 901; Gore *v.* Davis, 124 N. C. 234, 32 S. E. 554; Bailey *v.* Mitchell County, 120 N. C. 388, 27 S. E. 28; Byrd *v.* Byrd, 117 N. C. 523, 23 S. E. 324.

Ohio.— Lyons *v.* Fidelity Lodge No. 71 I. O. O. F., 7 Ohio Dec. (Reprint) 313, 2 Cinc. L. Bul. 97.

South Carolina.— Pike *v.* Spartanburg R., etc., Co., 65 S. C. 409, 43 S. E. 869; Regenstein *v.* Pearlstein, 30 S. C. 192, 8 S. E. 850; Trimmier *v.* Hamilton, 3 McCord 425.

Texas.— East Line, etc., R. Co. *v.* Scott, 66 Tex. 565, 1 S. W. 663.

Canada.— Eberts *v.* Larned, 5 U. C. Q. B. 264.

See 39 Cent. Dig. tit. "Pleading," § 174.

Filing nunc pro tunc.— An accidental omission to file a plea, which has been replied to, and upon which trial has been had, may be cured by an order to file *nunc pro tunc.* Vanzant *v.* Jones, 3 Dana (Ky.) 464.

Answer by part of defendants.— In an action to foreclose a mortgage given on property which has been conveyed to the mortgagor by one holding the title as trustee for a nominal consideration, and which, after execution of the mortgage, was reconveyed to the trustee, defendants who are interested in the trust property, although in default, should be permitted to come in and answer where their application is made before the action is at issue as to other defendants. Griswold *v.* Caldwell, 39 N. Y. Suppl. 23.

A party sued under a fictitious name should be allowed to file an answer on discovering that by amendment his real name has been substituted without service of summons upon him. Jones *v.* Brooke, 52 N. Y. App. Div. 421, 65 N. Y. Suppl. 205.

44. Gibson *v.* San Francisco Super. Ct., 83 Cal. 643, 24 Pac. 152; Baker *v.* Shasta County Super. Ct., 71 Cal. 583, 12 Pac. 685.

45. *Alabama.*— Hair *v.* Moody, 9 Ala. 399.

Colorado.— Adamson *v.* Bergen, 15 Colo. App. 396, 62 Pac. 629.

Illinois.— Culver *v.* Chicago Hide, etc., Bank, 78 Ill. 625; Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702.

Missouri.— State *v.* Matlock, 82 Mo. 455.

Nebraska.— Orr *v.* Seaton, 1 Nebr. 105.

North Carolina.— Boddie *v.* Woodard, 83 N. C. 2.

Vermont.—Clemons *v.* Clemons, 69 Vt. 545, 38 Atl. 314.

See 39 Cent. Dig. tit. "Pleading," § 175 *et seq.*

46. Wilson *v.* Flanders, 114 Ky. 534, 71 S. W. 426, 24 Ky. L. Rep. 1302.

47. Hightower *v.* Ogletree, 114 Ala. 94, 21 So. 934; Owensboro, etc., R. Co. *v.* Harrison, 94 Ky. 408, 22 S. W. 545, 15 Ky. L. Rep. 316; Price *v.* Scott, 13 Wash. 574, 43 Pac. 634.

48. Missouri Pac. R. Co. *v.* Linson, 39 Kan. 416, 18 Pac. 498.

49. State *v.* Matlock, 82 Mo. 455.

50. Lexington *v.* Home Constr. Co., 112 Ky. 70, 65 S. W. 1, 23 Ky. L. Rep. 1387.

51. Anderson Transfer Co. *v.* Fuller, 174 Ill. 221, 51 N. E. 251. See also Saltus *v.* Kipp, 5 Duer (N. Y.) 646, 2 Abb. Pr. 382, 12 How. Pr. 342, holding that defendant would not be allowed, after the time for answer had expired, to put in an answer which did not deny the wrong, but set up mitigating circumstances, since any matter in mitigation might be proved on proceedings to assess damages on default.

52. Dulle *v.* Lally, 64 Ill. App. 292.

53. Thompson *v.* Shewalter, 17 Ind. App. 290, 46 N. E. 601.

54. Grand Island, etc., R. Co. *v.* Swinbank, 51 Nebr. 521, 71 N. W. 48.

merits before judgment is reversible error.[55] Where a defendant's default appears to have resulted from no neglect or fault on his part, the court will exercise its discretion in relieving against it.[56] Leave will be refused where granting it would result in confusion and delay.[57] After an extension once granted, further extensions may be granted in the discretion of the court,[58] or leave may be given to file *nunc pro tunc*.[59]

(II) *What Operates as an Extension.* It is a matter of right on the part of a defendant to plead to the declaration when filed, and therefore when plaintiff delays in filing his declaration, defendant may nevertheless plead to it when filed without leave of court.[60] Where oyer is demanded and given the party has the same time in which to plead thereafter as he had at the time of the demand, the time elapsing between the demand and giving not being counted as part of the time allowed for pleading,[61] and the same is true in case of a demand for a bill of particulars,[62] and of security for costs.[63] But a voluntary bill of particulars will not enlarge the time to plead; [64] nor will a stay of proceedings of itself operate as an extension,[65] nor an irregular motion to require production of a power of attorney.[66] Where service is made by publication, the mere fact that a newspaper continues to publish the summons beyond the necessary period does not extend the time for answering.[67] Nor is the time for answering extended by the pendency of a motion by defendant to set aside the service of summons and complaint.[68] A continuance granted at the request of defendant does not extend the time allowed by law for pleading.[69] A defendant is not excused from filing his plea within the time fixed merely because plaintiff has failed to comply with an order of the court.[70] In case the appearance term of court has been illegally adjourned, defendant has until the next regular term of court in which to plead.[71]

(III) *Waiver and Consent of Parties.* Failure on the part of defendant to plead seasonably may be waived by plaintiff and any defense to the merits is in time if offered before default claimed.[72] And plaintiff may voluntarily grant

55. Wagnon *v.* Turner, 73 Ala. 197; Haley *v.* Breeze, 16 Colo. 167, 26 Pac. 343. A plea delivered after the time for pleading expired, but before judgment has actually been signed, is regular. Ampthill *v.* Semple, 2 Cromp. & J. 358, 1 Dowl. P. C. 316, 1 L. J. Exch. 102, 2 Tyrw. 312.

56. May *v.* Wolvington, 69 Md. 117, 14 Atl. 706; Kent *v.* McEldery, 9 Gill (Md.) 493; Newcomer *v.* Keedy, 9 Gill (Md.) 263; Clawson *v.* Clawson, 2 Wkly. Notes Cas. (Pa.) 49; Botts *v.* Pollard, 11 Leigh (Va.) 433.

57. Hallberg *v.* Brosseau, 64 Ill. App. 520.

58. Van Allen *v.* Spadone, 16 Ind. 319; Crandall, etc., Co. *v.* Eddy Confectionery Co., 37 Misc. (N. Y.) 745, 76 N. Y. Suppl. 476 [*affirmed* in 78 N. Y. App. Div. 644, 80 N. Y. Suppl. 1132].

59. Bemis *v.* Homer, 145 Ill. 567, 33 N. E. 869.

60. Turner *v.* Carter, 1 Head (Tenn.) 520.

61. Warren *v.* Camack, 12 N. J. L. 178. *Contra*, McCormick *v.* Fullerton, 2 How. Pr. (N. Y.) 159.

Discretion of court.—Time to plead after oyer is sometimes held to be a matter within the court's discretion. Calvert *v.* Slater, 4 Fed. Cas. No. 2,326, 1 Cranch 44.

62. Anonymous, 16 N. J. L. 346; Plummer *v.* Weil, 15 Wash. 427, 46 Pac. 648. This rule was held to be no longer operative in Platt *v.* Townsend, 3 Abb. Pr. (N. Y.) 9.

63. Reardon *v.* Morrison, 1 N. J. L. J. 157.

64. Webster *v.* Schuyler, 6 Cow. (N. Y.) 595.

65. Sniffen *v.* Peck, 6 N. Y. Civ. Proc. 188; White *v.* Smith, 16 Abb. Pr. (N. Y.) 109 note; McGown *v.* Leavenworth, 3 Code Rep. (N. Y.) 151; Wallace *v.* Wallace, 13 Wis. 224.

66. Duncan *v.* Payette, 7 Quebec Pr. 478.

67. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

68. Shinn *v.* Cummins, 65 Cal. 97, 3 Pac. 133; Garvie *v.* Greene, 9 S. D. 608, 70 N. W. 847.

69. Beacham *v.* Kea, 118 Ga. 406, 45 S. E. 398.

70. Newsom *v.* Ran, 18 Ohio 240, where plaintiff had failed to give security for costs as ordered by the court.

71. Frank *v.* Horkan, 122 Ga. 38, 49 S. E. 800.

72. U. S. Rolling Stock Co. *v.* Weir, 96 Ala. 396, 11 So. 436; Woosley *v.* Memphis, etc., R. Co., 28 Ala. 536; Hightower *v.* Hawthorn, 12 Fed. Cas. No. 6,478*b*, Hempst. 42, See also Foster *v.* Udell, 2 Code Rep. (N. Y.) 30, holding that failure to claim default was equivalent to consent to give defendant further time to plead.

Leave of court may be necessary.—Sieber *v.* Frink, 7 Colo. 148, 2 Pac. 901.

An affidavit of merits is sometimes required. Shoaf *v.* Jones, Smith (Ind.) 397.

defendant an extension of time if not unreasonable. But such action is subject to the approval of the court.[73]

(iv) *Proceedings For Obtaining Extension.* Under the rules of practice an extension of the time to plead will as a rule be granted only in case the application conforms to certain specific requirements.[74] The reasons offered for the extension must be meritorious and sufficient to satisfy the court.[75] Due diligence must also be shown.[76] But the character of the showing required is largely in the discretion of the court.[77] Where no reason for the extension is given, it is not error for the court to refuse an application for more time in which to plead.[78] In some jurisdictions the application is required to be submitted on affidavit of merits.[79] Under some statutes the extension of time may be on *ex parte* application without notice,[80] under others notice to the adverse party is

73. Boddie *v.* Woodard, 83 N. C. 2; Groton Bridge, etc., Co. *v.* American Bridge Co., 137 Fed. 284, holding that a rule providing for the presentation of an affidavit of merits as a condition to an order extending time did not prevent the extension of time to plead by stipulation without order of court. See also Voorman *v.* San Francisco Super. Ct., 149 Cal. 266, 86 Pac. 694; McSween *v.* Windham, 77 S. C. 223, 57 S. E. 847.

74. See the statutes and rules of court in the several jurisdictions. And see Kinley *v.* American Hardware Mfg. Co., 49 Misc. (N. Y.) 334, 99 N. Y. Suppl. 199, holding that a provision extending defendant's time to plead contained in an order requiring plaintiff to file security for costs would be stricken on motion.

Where condition cannot be complied with.— A rule providing that no order extending the time to answer or demur shall be granted unless the party applying therefor shall present a certificate of his attorney, that from the statement to him by defendant he believes defendant has a good defense, does not apply where certain of the defendants are out of the United States and the others are dependent on them for information necessary for their defense. Fishburne *v.* Minott, 72 S. C. 567, 52 S. E. 648.

75. *Arizona.*—Agua Fria Copper Co. *v.* Bashford-Burmister Co., 4 Ariz. 203, 35 Pac. 983.

Georgia.—Western Union Tel. Co. *v.* Lark, 95 Ga. 806, 23 S. E. 118.

Kansas.— Missouri Pac. R. Co. *v.* Linson, 39 Kan. 416, 18 Pac. 498; Swerdsfeger *v.* State, 21 Kan. 475; Neitzel *v.* Hunter, 19 Kan. 221.

Kentucky.— Owensboro, etc., R. Co. *v.* Harrison, 94 Ky. 408, 22 S. W. 545, 15 Ky. L. Rep. 316; Engleman *v.* Lancaster Nat. Bank, 2 Bush 165.

Mississippi.— McAdory *v.* Turner, 56 Miss. 666.

New York.— Dudley *v.* Press Pub. Co., 53 Hun 347, 6 N. Y. Suppl. 388; Watson *v.* Manhattan R. Co., 55 N. Y. Super. Ct. 547. In Lynde *v.* Verity, 3 How. Pr. 350, 351, the court said: "The provisions of the statute must be considered as merely directory. The defendant cannot be let in to make his defence as a matter of course. He must excuse the delay and satisfy the court that he has a probable defence on the merits. That the court may be reasonably satisfied that he has such defence, he must draw and swear to his proposed answer, and serve a copy of it with his copy of motion. He will then be permitted to answer on terms such as the nature of the case may require."

North Carolina.— Mauney *v.* Hamilton, 132 N. C. 295, 43 S. E. 901.

Pennsylvania.—Moore's Est., 19 Pa. Co. Ct. 208.

South Carolina.— McDaniel *v.* Addison, 53 S. C. 222, 31 S. E. 226.

United States.—Bullock *v.* Van Pelt, 4 Fed. Cas. No. 2,131, Baldw. 463; Wetzell *v.* Bussard, 29 Fed. Cas. No. 17,471, 2 Cranch 252.

England.— Stafford *v.* Nichols, Arn. 262, 4 Bing. N. Cas. 693, 6 Scott 577, 33 E. C. L. 928.

76. Wilson *v.* Phillips, 5 Ark. 183; Southern Bell Tel., etc., Co. *v.* Earle, 118 Ga. 506, 45 S. E. 319; Manning *v.* Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963; Mallory *v.* Dawson Cotton Oil Co., 32 Tex. Civ. App. 294, 74 S. W. 953.

77. Briggs *v.* Coffin, 91 Iowa 329, 59 N. W. 259.

78. Main *v.* Ginthert, 92 Ind. 180.

79. Graham *v.* Pinckney, 7 Rob. (N. Y.) 147; Platt *v.* Townsend, 5 Duer (N. Y.) 668; Van Horne *v.* Montgomery, 5 How. Pr. (N. Y.) 238; Salutat *v.* Downes, 1 Code Rep. (N. Y.) 120; Searles *v.* Lawrence, 8 S. D. 11, 65 N. W. 34. If the order allowing further time is made without an affidavit of merits it may be wholly disregarded. Donovan *v.* Cunard Steamship Co., 85 N. Y. Suppl. 1114; Ellis *v.* Van Ness, 14 How. Pr. (N. Y.) 313. But see Campbell *v.* American Zylonite Co., 53 N. Y. Super. Ct. 131, where such an order was held a mere irregularity and not a nullity.

Such an affidavit is not required where time is extended by reason of requiring a plaintiff to give security for costs. Plainfield First Nat. Bank *v.* Ranger, 14 N. Y. Civ. Proc. 1; Worthington *v.* Warner, 19 Abb. N. Cas. (N. Y.) 266.

80. Crandall, etc., Co. *v.* Eddy Confectionery Co., 37 Misc. (N. Y.) 745, 76 N. Y. Suppl. 476 [*affirmed* in 78 N. Y. App. Div. 644, 80 N. Y. Suppl. 1132]; Sisson *v.* Lawrence, 25 How. Pr. (N. Y.) 435; Wilcox *v.* Curtis, 1 Code Rep. (N. Y.) 96; Fishburne

required,[81] together with a copy of the proposed answer.[82] Some statutes have required service of a copy of the order of extension[83] and of the affidavit on which it was granted.[84] After default has been entered for lack of an answer, the proper course is for defendant to apply on notice to be relieved from the default and have leave to answer, and not apply *ex parte* for an extension of time in which to answer.[85] An application for leave to defend on the merits cannot be considered upon a motion of plaintiff for judgment by default.[86] Enlarging the time to plead does not operate as a stay of proceedings.[87] An irregular order extending the time to plead is operative so long as it is not appealed from and no steps have been taken to vacate it.[88] An order extending the time to plead may, on good cause shown, be revoked,[89] and when revoked, defendant must plead within the time which he originally had,[90] except that he has at least the rest of the day on which the order was vacated.[91] The service of an answer after granting of a motion to vacate an order extending the time, but before the settlement and entry of such order, is in time.[92]

d. Computation of Time. The time for answering is usually held to begin to run from the day of actual service of complaint or summons, and not from the day of the filing of proof of service.[93] In computing time the rule is to exclude the first day and count the last or *vice versa*.[94] If a certain number of days in term-time are allowed, it means days on which the court actually sits.[95] If the final day falls on Sunday it is to be excluded.[96] But where a certain number of days are designated without limitation, they need not be secular days.[97] Where time is extended a certain number of days, this is computed from the expiration of the period originally allowed, and not from the date of the extension.[98] A rule extending the time "to" a certain day means until the sitting of the court on that day, and does not include the day.[99] If defendant has a day's time to plead from the

v. Minott, 72 S. C. 567, 52 S. E. 648 (holding that a statute providing that the time within which any proceeding in an action must be had after its commencement might be enlarged and an affidavit therefor to be served with a copy of the order did not require notice of an application to extend time to an answer or demurrer supported by affidavit to be served on the adverse party); Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 60 Fed. 929 (applying South Carolina statute).

81. Hodges *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 673; Fries *v.* Coar, 19 Abb. N. Cas. (N. Y.) 267; Searles *v.* Lawrence, 8 S. D. 11, 65 N. W. 34.

82. Searles *v.* Lawrence, 8 S. D. 11, 65 N. W. 34. In Lynde *v.* Verity, 3 How. Pr. (N. Y.) 350, defendant was required to serve with the motion papers a copy of his proposed answer verified.

83. Cheetham *v.* Lewis, 2 Johns. (N. Y.) 104.

84. Quinn *v.* Case, 2 Hilt. (N. Y.) 467.

85. Petrie *v.* Fitzgerald, 2 Abb. Pr. N. S. (N. Y.) 354.

86. White *v.* Smith, 16 Abb. Pr. (N. Y.) 109 note.

87. Wilcox *v.* Curtis, 1 Code Rep. (N. Y.) 96; Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 60 Fed. 929.

88. Moran *v.* Helf, 52 N. Y. App. Div. 481, 65 N. Y. Suppl. 113.

89. Lucke *v.* Kiernan, 68 N. J. L. 281, 53 Atl. 566.

90. Ritter Lumber Co. *v.* Bacon, 37 Misc. (N. Y.) 781, 76 N. Y. Suppl. 933; Brown *v.* St. John, 19 Wend. (N. Y.) 617; Chapman *v.* Dyett, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598.

91. Lucke *v.* Kiernan, 68 N. J. L. 281, 53 Atl. 566; Evans *v.* Senior, 4 Exch. 818; Mengens *v.* Perry, 10 Jur. 742, 15 L. J. Exch. 307, 15 M. & W. 537.

92. De Pallandt *v.* Flinn, 104 N. Y. App. Div. 501, 93 N. Y. Suppl. 678.

93. Yolhurst *v.* Howard, 94 N. Y. App. Div. 439, 94 N. Y. Suppl. 235; Sayles *v.* Davis, 22 Wis. 225. *Contra*, Callaway *v.* Douglasville College, 99 Ga. 623, 25 S. E. 850.

Service by mail.— The time within which to plead to a pleading served by mail begins to run from the date of mailing and not from the date of receipt thereof. People *v.* West Side Brotherly Love Cong., etc., Soc., 51 Misc. (N. Y.) 82, 99 N. Y. Suppl. 206.

94. Neitzel *v.* Hunter, 19 Kan. 221; Hoffman *v.* Duel, 5 Johns. (N. Y.) 232; Marks *v.* Russell, 40 Pa. St. 372. See, generally, TIME.

95. Wash *v.* Randolph, 9 Mo. 142.

96. Marks *v.* Russell, 40 Pa. St. 372.

97. Wood *v.* Galveston, 76 Tex. 126, 13 S. W. 227.

98. Pattison *v.* O'Connor, 23 Hun (N. Y.) 307; Lane *v.* Parsons, 2 Bing. N. Cas. 264, 5 Dowl. P. C. 359, 2 Hodges 277, 6 L. J. C. P. 26, 3 Scott 652, 32 E. C. L. 129; Aspinall *v.* Smyth, 2 Moore C. P. 655. *Contra*, Simpson *v.* Cooper, 1 Hodges 448, 2 Scott 840, 30 E. C. L. 678.

99. Clark *v.* Ewing, 87 Ill. 344.

happening of an event, he has the whole of the day following that on which the event happens.[1] Where the time to plead is given in months, this means lunar and not calendar months.[2] When a defendant is ordered to plead forthwith he must plead within twenty-four hours.[3] Instanter means on the same day,[4] or within twenty-four hours.[5] After non-resident defendants have once appeared they thereafter come within the rules applicable to resident defendants.[6]

e. Conditions Imposed. The conditions imposed by the court upon granting leave to plead after the time has expired must not be unjust.[7] The court cannot deny defendant the right to set up any particular meritorious defense,[8] nor will it usually restrict him otherwise in the character of the defenses to be pleaded.[9] But he may be required to pay the costs and disbursements of the other party in opposing the motion for leave to plead.[10] Conditions imposed are not judgments conclusively affecting rights and interests of parties, and they may be modified at a subsequent term.[11]

f. Imparlance. An imparlance is time given by the court to a party to plead.[12] Three species of imparlance were recognized at common law. (1) The general imparlance, which reserved to defendant no exceptions and did not allow thereafter the pleading of matter in abatement or any objection to the jurisdiction of the court. (2) The special imparlance, which reserved the right to plead in abatement but not to the jurisdiction. (3) The general-special imparlance, which reserved all exceptions whatsoever, including the right to plead to the jurisdiction, but did not allow the pleading of a tender.[13] The granting of an imparlance is a matter within the discretion of the court.[14] Defendant is entitled to no imparlance in a summary process.[15]

g. Rule to Plead. Under the practice of some states an action may be commenced by filing and serving a declaration with notice that a rule to plead has been entered. Such rule to plead and notice thereof take the place of the customary writ of process, and have nothing directly to do with the pleadings further than is the case with a summons.[16] In other states the rule to plead is a proceeding in addition to the writ of process, and is a prerequisite to defendant's obligation to plead in the cause or to plaintiff's right to take default. The rule and notice inform defendant that he is required to plead within a designated time, and in case

1. Connelly *v.* Bremner, L. R. 1 C. P. 557, Harr. & R. 612, 12 Jur. N. S. 762, 35 L. J. C. P. 319, 14 L. T. Rep. N. S. 520, 14 Wkly. Rep. 781.

2. Tullet *v.* Linfield, 3 Burr. 1455; Soper *v.* Curtis, 2 Dowl. P. C. 237.

3. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34. In Moffat *v.* Dickson, 3 Colo. 313, 314, the court said: "Forthwith has a relative meaning, and will imply a longer or shorter period, according to the nature of the things to be done. . . . It has been defined as meaning 'with all reasonable celerity.' Burgess *v.* Bartefeur, 8 Jur. 621, 13 L. J. M. C. 122, 7 M. & G. 481, 8 Scott N. R. 194, 49 E. C. L. 481. It is synonymous with immediately, and immediately has been construed to mean 'such convenient time as is reasonably requisite for doing the thing.' Pybus *v.* Mitford, 2 Lev. 75, 83 Eng. Reprint 456."

4. Smith *v.* Little, 53 Ill. App. 157; Northrop *v.* McGee, 20 Ill. App. 108.

5. Moffat *v.* Dickson, 3 Colo. 313; State *v.* Clevenger, 20 Mo. App. 626; Champlin *v.* Champlin, 2 Edw. (N. Y.) 329.

6. Orr *v.* Seaton, 1 Nebr. 105.

7. Dewey *v.* Sloan, 9 Ohio Dec. (Reprint) 151, 11 Cinc. L. Bul. 102.

8. Hengehold *v.* Gardner, 6 Ohio Dec. (Reprint) 822, 8 Am. L. Rec. 353; Darnall *v.* Talbot, 6 Fed. Cas. No. 3,578, 2 Cranch C. C. 249.

9. Grant *v.* McCaughin, 4 How. Pr. (N. Y.) 216.

A general issue with notice of special matter may be required instead of a special plea to avoid delay. Coffee *v.* Lawrence, 2 Den. (N. Y.) 195.

10. Crane *v.* Lipscomb, 24 S. C. 430.

11. Woodcock *v.* Merrimon, 122 N. C. 731, 30 S. E. 321.

12. Colby *v.* Knapp, 13 N. H. 175; Bouvier L. Dict.; 1 Chitty Pl. (16th Am. ed.) *452, 453.

13. Vaughan *v.* Robinson, 22 Ala. 519; Fritz *v.* Thompson, 5 Pa. L. J. 423. See also Whitbeck *v.* Shoefelt, 9 Johns. (N. Y.) 265; Mack *v.* Lewis, 67 Vt. 383, 31 Atl. 888; Bouvier L. Dict.; 1 Chitty Pl. 453.

Plea in abatement after imparlance see *infra*, IV, B, 1.

14. Malcom *v.* Gardner, 1 Cow. (N. Y.) 137; Malcom *v.* Rogers, 1 Cow. (N. Y.) 136; Gibbes *v.* Wainwright, 1 Bay (S. C.) 483.

15. Hughes *v.* Phelps, 1 Brev. (S. C.) 81.

16. See the statutes of the several states.

of his failure, default may be taken against him.[17] A rule to plead means pleading to the merits.[18]

4. Joint or Separate Pleas or Answers of Co-Defendants — a. General Right to Join or Sever.[19] In general, where there are several defendants in an action, and the defense is in its nature joint, they may either join in the same plea or they may sever.[20] So in a case where infants and adults are joined as defendants, they may join or sever in their answers.[21] And where two are sued jointly and one suffers a default, the other may plead alone.[22] This rule has been said not to apply to dilatory pleas.[23] If they sever, one defendant may plead in abatement, another in bar, and another may demur.[24] The mere fact that a joint answer is filed is not an admission of joint liability.[25] Defendants who appear jointly by the same attorney may nevertheless plead separately.[26]

b. Necessity That Joint Plea or Answer Be Good as to All Defendants. A joint plea or answer which is bad as to one defendant is bad as to all who join in it.[27] Some

And see Corning *v.* Burton, 102 Mich. 86, 62 N. W. 1040; Menominee *v.* Menominee County Cir. Judge, 81 Mich. 577, 46 N. W. 23; Detroit Free Press Co. *v.* Bagg, 78 Mich. 650, 44 N. W. 149; Ralston *v.* Chapin, 49 Mich. 274, 13 N. W. 588; Ellis *v.* Fletcher, 40 Mich. 321; Begole *v.* Stimson, 39 Mich. 288; Labar *v.* Moyer, 3 How. Pr. (N. Y.) 196; Platt *v.* Torrey, 18 Wend. (N. Y.) 572; Douw *v.* Ricc, 11 Wend. (N. Y.) 178; Frost *v.* Snow, 7 Wend. (N. Y.) 521; Smith *v.* Bush, 2 Wend. (N. Y.) 279.

17. Jelley *v.* Gaff, 56 Ind. 331; Stroop *v.* Gross, 1 Watts & S. (Pa.) 139; Read *v.* Kennedy, 1 Bay (S. C.) 226; Ricard *v.* New Providence Tp., 5 Fed. 433, relating to a New Jersey statute. But see Runnion *v.* Crane, 4 Blackf. (Ind.) 466.

Striking off rule.— Where defendant, not served, files an affidavit of defense, and plaintiff takes a rule on defendant to plead, a rule to strike off the rule to plead, because defendant was not in court, is premature before judgment. Holden *v.* Woodward, 3 Wkly. Notes Cas. (Pa.) 133.

A rule to plead and a rule to arbitrate are inconsistent, and cannot be entered at the same time; and the former will therefore be stricken off on defendant's application. Ersey *v.* Gray, 2 Del. Co. (Pa.) 26.

18. Archer *v.* Claflin, 31 Ill. 306; Coffee *v.* Lawrence, 2 Den. (N. Y.) 195.

A general demurrer may be an issuable plea, within a rule to plead, but a special demurrer is not, at least if it does not go to the merits of the case. Welsh *v.* Blackwell, 14 N. J. L. 344. But see Mulvey *v.* Staab, 4 N. M. 50, 12 Pac. 699, holding that a rule to plead is complied with where a demurrer is filed.

Taking an order giving leave to plead or answer gives defendant an option to plead in abatement. Beattie *v.* Stocking, 70 Mo. 196.

19. In assumpsit see Assumpsit, Action of, 4 Cyc. 351.

Plea in abatement of matter personal to one defendant see Abatement and Revival, 1 Cyc. 126.

20. Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763; Miller *v.* McDonald, 20 Ind. 36; Troutner *v.* Parent, 4 Ind. 232; Aultman *v.* Forgey, 10 Ind. App. 397, 36 N. E. 939; Monroe *v.* Wilson, 6 T. B. Mon. (Ky.) 122; Riggs *v.* Bell, 39 La. Ann. 1030, 3 So. 183; Borne *v.* Porter, 4 Rob. (La.) 57; Arrowsmith *v.* New Orleans, 17 La. 419; Stilwell *v.* Hasbrouck, 1 Hill (N. Y.) 561; Lansing *v.* Montgomery, 2 Johns. (N. Y.) 382; 1 Chitty Pl. (16th Am. ed.) *592. But see Caldwell *v.* May, 1 Stew. (Ala.) 425 (where the rule was laid down that defendants might sever in their pleas in actions on contract, but only when the matter so pleaded applied peculiarly to one of them and that where the matter pleaded went in discharge of all, all must join); Wharton *v.* Chipman, 15 Ind. 434 (where it was held that where several defendants had answered jointly and one had answered separately, and the joint denial covered all that was embraced in the separate answer, there was no error in striking out the latter); Meagher *v.* Bachelder, 6 Mass. 444 (where it was held that defendants cannot sever their pleas except in actions founded on tort).

Where separate pleas of the same nature are filed by co-defendant, the practical result is the same as if they join in one. McGuire *v.* Gerstley, 26 App. Cas. (D. C.) 193 [*affirmed* in 204 U. S. 489, 27 S. Ct. 332, 51 L. ed. 581].

21. Western Lumber Co. *v.* Phillips, 94 Cal. 54, 29 Pac. 328; Powers *v.* New Haven, 120 Ind. 185, 21 N. E. 1083.

22. Shed *v.* Pierce, 17 Mass. 623.

23. Hurley *v.* Second Bldg. Assoc., 15 Abb. Pr. (N. Y.) 206; Shannon *v.* Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262.

Chitty says the practice is quite otherwise. — 1 Chitty Pl. (16th Am. ed.) *592.

24. Caldwell *v.* May, 1 Stew. (Ala.) 425; 1 Chitty Pl. (16th Am. ed.) *592.

25. Livesay *v.* Denver First Nat. Bank, 36 Colo. 526, 86 Pac. 102, 6 L. R. A. N. S. 598; Mau *v.* Stoner, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466.

26. Volensky *v.* Sassenwein, 10 Quebec Super. Ct. 162.

27. *Alabama.*— McCreary *v.* Jones, 96 Ala. 592, 11 So. 600; Overdeer *v.* Wiley, 30 Ala. 709.

Colorado.— Deitsch *v.* Wiggins, 1 Colo. 299.

Georgia.— Mott *v.* Hall, 41 Ga. 117.

cases hold the rule applicable only to pleas of justification,[28] but the true doctrine seems to be that it applies to affirmative defenses generally.[29] But this rule is not applied to equitable defenses under the code.[30] Where a joint plea or answer is held bad for this reason, the court may, in its discretion, allow separate pleas or answers to be filed.[31] A several plea or answer, on the other hand, need be good only as to defendant who files it.[32]

c. Effect of Plea or Answer of One Defendant on Rights of Others. As a general rule one defendant cannot, in his answer, assert, the rights of a co-defendant who does not answer.[33] One defendant may by express adoption make an answer of a co-defendant available as his own,[34] or a part of a co-defendant's answer may be adopted if it is clearly indicated what part.[35] However, the defense pleaded by one defendant may inure to the benefit of another, where it goes to the sufficiency of the writ [36] or to the cause of action.[37] But other defenses, such as the statute of limitations,[38] or incapacity,[39] do not inure to defendants who do not plead them. Where part of the defendants sued upon a joint liability fail to defend, no judgment can be taken until all have had the full time to answer and until the issues tendered by those defending have been tried.[40] One defendant may, by motion, strike out irrelevant allegations from the answer of a co-defendant.[41]

d. Form of Allegations. Where the word "defendants" is used in the plea or answer without limitation, and there is nothing in the previous proceedings to indicate that it applies to less than all, the pleading will be considered as filed by all the defendants jointly.[42] Where one of several joint promisors pleads separately, the denial should be that he and the other defendants did not promise, and a denial that he promised is bad.[43]

e. Admissions in Answer of Co-Defendant. An admission in the plea or

Indiana.— Black *v.* Richards, 95 Ind. 184; Ward *v.* Bennett, 20 Ind. 440; Poulk *v.* Slocum, 3 Blackf. 421; Supreme Council C. B. L. *v.* Boyle, 15 Ind. App. 342, 44 N. E. 56.

Iowa.— Morton *v.* Morton, 10 Iowa 58.

Massachusetts.— Moors *v.* Parker, 3 Mass. 310.

Minnesota.— Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263; Clark *v.* Lovering, 37 Minn. 120, 33 N. W. 776.

New Hampshire.— Marsh *v.* Smith, 18 N. H. 366.

New York.— Tailor *v.* Spaulding, 12 N. Y. Civ. Proc. 123; Shannon *v.* Comstock, 21 Wend. 457, 34 Am. Dec. 262.

Vermont.— Clark *v.* Lathrop, 33 Vt. 140.

See 39 Cent. Dig. tit. "Pleading," § 169.

28. Hayden *v.* Nott, 9 Conn. 367; Higby *v.* Williams, 16 Johns. (N. Y.) 215; Philips *v.* Biron, 1 Str. 509; Duffield *v.* Scott, 3 T. R. 374.

29. See cases cited *supra*, note 27.

30. Wilson *v.* Hawthorne, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290.

31. Robinson *v.* Smith, 14 Cal. 254.

32. Morton *v.* Morton, 10 Iowa 58.

33. Diamond Flint Glass Co. *v.* Boyd, 30 Ind. App. 485, 66 N. E. 479; Cathcart *v.* Peck, 11 Minn. 45; Burnham *v.* Tillery, 85 Mo. App. 453; Hoxie *v.* Farmers', etc., Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637.

But a grantor by warranty deed may defend for his grantees, who are made his co-defendants, in an action attacking their title to the property, since he would be liable to them on his covenant in case of judgment against them. Bausman *v.* Eads, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201.

34. Louisville, etc., R. Co. *v.* Hall, 131 Ala. 161, 32 So. 603; Case *v.* Ingle, 3 Indian Terr. 527, 61 S. W. 994; Bexar Bldg., etc., Assoc. *v.* Lockwood, (Tex. Civ. App. 1899) 54 S. W. 253.

35. Bexar Bldg., etc., Assoc. *v.* Lockwood, (Tex. Civ. App. 1899) 54 S. W. 253.

36. McDonald *v.* Smith, 24 Ark. 614.

37. Morrison *v.* Stoner, 7 Iowa 493; Le Moyne *v.* Anderson, 123 Ky. 584, 96 S. W. 843, 29 Ky. L. Rep. 1017; Rouse *v.* Howard, 1 Duv. (Ky.) 31; Williams *v.* McGrade, 13 Minn. 46; Adderton *v.* Collier, 32 Mo. 507.

38. Falley *v.* Gribling, (Ind. 1889) 22 N. E. 723; Durnford *v.* Clark, 3 La. 199; Gibson *v.* McCormick, 10 Gill & J. (Md.) 65; McCormick *v.* Gibson, 3 Gill & J. (Md.) 12; *In re* Young, 3 Md. Ch. 461; Bridgforth *v.* Payne, 62 Miss. 777.

39. Jung *v.* Doriocourt, 4 La. 175, holding that a legatee's incapacity, if pleaded by only one of the defendants who are coheirs, cannot avail the rest.

40. Catlin *v.* Latson, 4 Abb. Pr. (N. Y.) 248; Jacques *v.* Greenwood, 1 Abb. Pr. (N. Y.) 230; Catlin *v.* Billings, 13 How. Pr. (N. Y.) 511; Bacon *v.* Comstock, 11 How. Pr. (N. Y.) 197.

41. Stibbard *v.* Jay, 26 Misc. (N. Y.) 260, 56 N. Y. Suppl. 777.

42. Kerr *v.* Swallow, 33 Ill. 379. If the defendants use the words "they and each of them" in setting up a defense, the plea is joint and several. Henning *v.* Wren, 32 Tex. Civ. App. 538, 75 S. W. 905.

43. Butman *v.* Abbot, 2 Me. 361; Bennett *v.* Crowell, 7 Minn. 385.

answer of one defendant is not conclusive upon the other defendants,[44] even if the defendants are partners.[45] Each answer stands by itself.[46]

5. Partial Defenses — a. Defenses Generally. Partial defenses, or defenses which apply only to a part of the cause of action alleged, are proper if designated as partial; but where a defense purports to be complete and is in fact but partial, it is bad on demurrer.[47] But it has been held that a plea purporting to answer the whole cause of action, which in fact answers but a part, is nevertheless good

44. Woodworth *v.* Bellows, 1 Code Rep. (N. Y.) 129.

45. Grunenberg *v.* Smith, 58 Ill. App. 281.

46. Swift *v.* Kingsley, 24 Barb. (N. Y.) 541.

47. *Alabama.*— Snedecor *v.* Pope, 143 Ala. 275, 39 So. 318; Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Foster *v.* Napier, 73 Ala. 595; Rodgers *v.* Brazeale, 34 Ala. 512; Livingston *v* Pippin, 31 Ala. 542; Gibson *v.* Marquis, 29 Ala. 668; Traun *v.* Wittick, 27 Ala. 570; Wittick *v.* Traun, 27 Ala. 562, 62 Am. Dec. 778; Bryan *v.* Wilson, 27 Ala. 208; Tomkies *v.* Reynolds, 17 Ala. 109; White *v.* Yarbrough, 16 Ala. 109; Mills *v.* Stewart, 12 Ala. 90; Standifer *v.* White, 9 Ala. 527; Deshler *v.* Hodges, 3 Ala. 509; Adams *v.* McMillan, 7 Port. 73. See also Hoge *v.* Herzberg, 141 Ala. 439, 37 So. 591.

Arkansas.— State *v.* Rives, 12 Ark. 721.

Illinois.— People *v.* McCormack, 68 Ill. 226; Illinois Cent. R. Co. *v.* Leidig, 64 Ill. 151; Harpham *v.* Haynes, 30 Ill. 404; Marsh *v.* Bennett, 22 Ill. 313; Moir *v.* Harrington, 22 Ill. 40; Frink *v.* King, 4 Ill. 144; Snyder *v.* Gaither, 4 Ill. 91; Bloomington Canning Co. *v.* Union Can Co., 94 Ill. App. 62; Marshall *v.* Cleveland, etc., R. Co., 80 Ill. App. 531; Titcomb *v.* Straight, 57 Ill. App. 331; Chicago, etc., R. Co. *v.* Maney, 55 Ill. App. 588.

Indiana.— Clinton County *v.* Davis, 162 Ind. 60, 69 N. E. 680; Walker *v.* Walker, 150 Ind. 317, 50 N. E. 68; Breyfogle *v.* Stotsenburg, 148 Ind. 552, 47 N. E. 1057; United States Sav. Fund, etc., Co. *v.* Harris, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531; Shortle *v.* Terre Haute, etc., R. Co., 131 Ind. 338, 30 N. E. 1084; McLead *v.* Ætna L. Ins. Co., 107 Ind. 394, 8 N. E. 230; Cooper *v.* Jackson, 99 Ind. 566; New Castle First Nat. Bank *v.* Nugen, 99 Ind. 160; Glenn *v.* Dailey, 96 Ind. 472; State *v.* Roche, 94 Ind. 372; Fisse *v.* Katzentine, 93 Ind. 490; Hunt *v.* State, 93 Ind. 311; Robertson *v.* Huffman, 92 Ind. 247; Matlock *v.* Hawkins, 92 Ind. 225; Franklin L. Ins. Co. *v.* Dehority, 89 Ind. 347; Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515; Stahl *v.* Hammontree, 72 Ind. 103; Ellis *v.* Gregory, 70 Ind. 140; Smith *v.* Little, 67 Ind. 549; Price *v.* Sanders, 60 Ind. 310; Reid *v.* Huston, 55 Ind. 173; McMahan *v.* Spinning, 51 Ind. 187; Gordon *v.* Culbertson, 51 Ind. 334; Putnam *v.* Tennyson, 50 Ind. 456; Alvord *v.* Essner, 45 Ind. 156; Yancy *v.* Teter, 39 Ind. 305; Sanders *v.* Sanders, 39 Ind. 207; Trisler *v.* Trisler, 38 Ind. 282; Rogers *v.* Place, 29 Ind. 577; Webster *v.* Metropolitan Washing Mach. Co., 29 Ind. 453; Conger *v.* Parker, 29 Ind. 380; Traster *v.* Snelson, 29 Ind. 96; Feaster *v.* Woodfill, 23 Ind. 493; Richardson *v.* Hickman, 22 Ind. 244; McClintic *v.* Cory, 22 Ind. 170; Louis *v.* Arford, 21 Ind. 235; McDougle *v.* Gates, 21 Ind. 65; Caldwell *v.* Salem Bank, 20 Ind. 294; Free *v.* Haworth, 19 Ind. 404; Johnson *v.* Seymour, 19 Ind. 24; Dayhuff *v.* Saville, 18 Ind. 384; Engler *v.* Davis, 18 Ind. 296; McIntire *v.* Whitney, 17 Ind. 528; Webb *v.* Deitch, 17 Ind. 521; Tyler *v.* Borland, 17 Ind. 298; Miller *v.* Rigney, 16 Ind. 327; Moorman *v.* Barton, 16 Ind. 206; Smith *v.* Baxter, 13 Ind. 151; Brown *v.* Perry, 14 Ind. 32; Conwell *v.* Finnell, 11 Ind. 527; Roedel *v.* Kalb, 11 Ind. 509; Pursell *v.* Pappenheimer, 11 Ind. 327; Rose *v.* North River Bank, 11 Ind. 268; Manly *v.* Hubbard, 9 Ind. 230; Puett *v.* State Bank, 4 Ind. 45; Cornwell *v.* Hungate, 1 Ind. 156; Conard *v.* Dowling, 7 Blackf. 481; Cottingham *v.* State, 7 Blackf. 405; Mahan *v.* Sherman, 7 Blackf. 378; Millikin *v.* State, 7 Blackf. 77; Hickley *v.* Grosjean, 6 Blackf. 351; Cross *v.* Watson, 6 Blackf. 129; Howk *v.* Pollard, 6 Blackf. 108; Culbertson *v.* Stanley, 6 Blackf. 67; Street *v.* Mullin, 5 Blackf. 563; White *v.* Conover, 5 Blackf. 462; Rust *v.* Smith, 5 Blackf. 352; Plant *v.* Wormager, 5 Blackf. 236; Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49; Griffith *v.* Fischli, 4 Blackf. 427; Jonas *v.* Hirshberg, 40 Ind. App. 88, 79 N. E. 1058; Hollingsworth *v.* McColly, 26 Ind. App. 609, 60 N. E. 371; Miami County *v.* Woodring, 12 Ind. App. 173, 40 N. E. 31; Walter A. Wood Mowing, etc., Mach. Co. *v.* Niehause, 8 Ind. App. 502, 35 N. E. 1112; Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130, 28 N. E. 218.

Iowa.— Bowman *v.* Western Fur Mfg. Co., 96 Iowa 188, 64 N. W. 775; Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597.

Kentucky.— Webb *v.* Jeffries, 2 Bush 221; Taylor *v.* Kentucky Bank, 2 J. J. Marsh. 564; Smalley *v.* Anderson, 2 T. B. Mon. 56, 15 Am. Dec. 121; Burch *v.* Young, 3 A. K. Marsh. 417; Farquhar *v.* Collins, 3 A. K. Marsh. 31; McCall *v.* Welsh, 3 Bibb 289.

Maine.— Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181.

Maryland.— Lake *v.* Thomas, 84 Md. 608, 36 Atl. 437; Mitchell *v.* Sellman, 5 Md. 376; Crain *v.* Yates, 2 Harr. & G. 332.

Mississippi.— Holcomb *v.* Mason, 35 Miss. 698.

Missouri.— Price *v.* Perry, 1 Mo. 542.

Nebraska.— Peet *v.* O'Brien, 5 Nebr. 360.

New Hampshire.— Leslie *v.* Harlow, 18 N. H. 518; Tappan *v.* Prescott, 9 N. H. 531.

New Jersey.—Sprague Nat. Bank *v.* Erie

if other pleas accompanying it answer the other portions of the cause of action;[48] and a plea professing to answer a part, without specifying which part is valid, if it deny a particular material allegation of the declaration,[49] but it is bad if there is no way of determining which part it is intended to answer.[50] There is some authority for the rule that a plea is bad unless it answers the whole declaration or count.[51] If defendant has different defenses for different parts of the declaration, the part to which each applies should be specified.[52]

b. Counter-Claim and Set-Off. Some early decisions applied the same rule to a counter-claim or set-off as to defenses generally, and held such answers bad which purported to be counter-claims or set-offs to the entire demand when in

R. Co., 62 N. J. L. 474, 41 Atl. 681; Grafflin *v.* Jackson, 40 N. J. L. 440; Flemming *v.* Hoboken, 40 N. J. L. 270; Conover *v.* Tindall, 20 N. J. L. 513. See also Lord *v.* Brookfield, 37 N. J. L. 552, holding that where, in an action on a sealed instrument, the contract has been executed and has not been rescinded, and the consideration has not entirely failed, the defense of fraud in the consideration cannot be pleaded in bar, as it can be used at the trial only to reduce the amount of plaintiff's recovery.

New York.— Coyle *v.* Ward, 167 N. Y. 240, 60 N. E. 596; Gabay *v.* Doane, 77 N. Y. App. Div. 413, 79 N. Y. Suppl. 312; Loosey *v.* Orser, 4 Bosw. 391; Bernascheff *v.* Roeth, 34 Misc. 588, 70 N. Y. Suppl. 369; Carter *v.* Eighth Ward Bank, 33 Misc. 128, 67 N. Y. Suppl. 300; Silberman *v.* New Amsterdam Gas Co., 30 Misc. 42, 61 N. Y. Suppl. 699; Heaton *v.* Wright, 10 How. Pr. 79; Kneedler *v.* Sternbergh, 10 How. Pr. 67; Houghton *v.* Townsend, 8 How. Pr. 441; Graham *v.* Stone, 6 How. Pr. 15; Williams *v.* Hayes, 5 How. Pr. 470; Hynds *v.* Griswold, 4 How. Pr. 69; Smith *v.* Shufelt, 3 Code Rep. 175; Lattin *v.* Vail, 17 Wend. 188; Gillespie *v.* Thomas, 15 Wend. 464; Loder *v.* Phelps, 13 Wend. 46; Slocum *v.* Despard, 8 Wend. 615; Van Ness *v.* Hamilton, 19 Johns. 349; Hallett *v.* Holmes, 18 Johns. 28; Nevins *v.* Keeler, 6 Johns. 63.

Ohio.— Bettle *v.* Wilson, 14 Ohio 257.

Oregon.— Webb *v.* Nickerson, 11 Oreg. 382, 4 Pac. 1126.

Pennsylvania.— Naglee *v.* Ingersoll, 7 Pa. St. 185; Garrison *v.* Moore, 9 Leg. Int. 2.

Texas.— Thompson *v.* Munger, 15 Tex. 523, 65 Am. Dec. 176.

Vermont.— Lee *v.* Follensby, 80 Vt. 182, 67 Atl. 197; Carpenter *v.* Briggs, 15 Vt. 34; State's Treasurer *v.* Holmes, 4 Vt. 110.

Virginia.—Merriman *v.* Cover, 104 Va. 428, 51 S. E. 817; Hunt *v.* Martin, 8 Gratt. 578.

Washington.— Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763; McDaniel *v.* Pressler, 3 Wash. 636, 29 Pac. 209.

Wisconsin.— Fitzsimmons *v.* City F. Ins. Co., 18 Wis. 234, 86 Am. Dec. 761; Babb *v.* Mackey, 10 Wis. 371.

United States.— United States *v.* Dashiel, 4 Wall. 182, 18 L. ed. 319; Knickerbocker Trust Co. *v.* Coyle, 139 Fed. 792; Stewart *v.* Ashtabula, 107 Fed. 857, 47 C. C. A. 21; Metropolitan Trust Co. *v.* Toledo, etc., R. Co., 107 Fed. 628; Culbertson *v.* Wabash Nav. Co., 6 Fed. Cas. No. 3,464, 4 McLean 544; King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flip. 1; Peyatte *v.* English, 19 Fed. Cas. No. 11,504*a*, Hempst. 24; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678; Tucker *v.* Lee, 24 Fed. Cas. No. 14,221, 3 Cranch C. C. 684.

Canada.— Willett *v.* Lockhart, 19 N. Brunsw. 637; Grattan *v.* Givan, 17 N. Brunsw. 711; Lake *v.* Lawson, 5 Nova Scotia 668; Rees *v.* Dick, 7 U. C. Q. B. 496; Commercial Bank *v.* Reynolds, 3 U. C. Q. B. 360; Rattray *v.* McDonald, 3 U. C. Q. B. 354; Prout *v.* Howard, 3 U. C. Q. B. 38; Wood *v.* Rogers, 2 U. C. Q. B. 399.

See 39 Cent. Dig. tit. "Pleading," § 181.

48. Babb *v.* Mackey, 10 Wis. 371. *Contra*, Cooper *v.* Greeley, 1 Den. (N. Y.) 347.

49. Cottingham *v.* State, 7 Blackf. (Ind.) 405.

50. Sparta School Tp. *v.* Mendell, 138 Ind. 188, 37 N. E. 604.

51. Cooper *v.* Greeley, 1 Den. (N. Y.) 347; Phelps *v.* Sowles, 19 Wend. (N. Y.) 547; Underwood *v.* Campbell, 13 Wend. (N. Y.) 78; Hickok *v.* Coates, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632; Sterling *v.* Sherwood, 20 Johns. (N. Y.) 204; Riggs *v.* Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145; Bebout *v.* Simmonds, Tapp. (Ohio) 222. In Young *v.* Fentress, 10 Humphr. (Tenn.) 151, 152, the court said: "In 1 Chitty on Pl. 554 (Ed. of 1833), the position is laid down, and Sergeant Williams asserts the same doctrine (1 Saund. 28, note 3), that if a plea begin only as an answer to part, and is in truth but an answer to part, the plaintiff cannot demur to the plea, for it is sufficient as far as it extends; but must take his judgment for the part unanswered as by *nil dicit*. . . . But the position assumed by Mr. Chitty is contradicted and denied to be law, by very high authorities, both English and American. . . . We think the plaintiff, in such case, may, at his election, treat the plea as bad, and demur thereto; or he may waive the objection, and take issue thereon, and demand a judgment by default as to so much of the cause of action as remains unanswered."

Where a record is shown forth in the declaration defendant cannot plead *nul tiel record*, but may deny the operation thereof. U. S. *v.* Litle, 26 Fed. Cas. No. 15,608, 3 Cranch C. C. 251.

52. Brown *v.* Wallace, 2 Nova Scotia 264.

fact they only answered a part;[53] but the rule now general is that a set-off or counter-claim is good so far as it goes, no matter whether it purports to answer the whole demand or not.[54] But when a set-off is treated on the trial as an answer in bar, it will be required to conform to the rules respecting such answers, and if it answers but a part of the demand while purporting to answer all, it will be held bad.[55]

6. Defenses to Several Counts. Where the declaration consists of several counts defendant may file a single plea to them all[56] or separate pleas to each.[57] A plea or answer need not answer the whole of the declaration or complaint when it consists of several counts, but where it purports to answer the entire pleading and is bad as to any one count it is bad altogether on demurrer.[58] Where an answer consisting of several defenses is filed to a complaint containing several counts, each defense should designate the count or counts to which it is intended

53. Blew *v.* Hoover, 30 Ind. 450; Conklin *v.* Waltz, 3 Ind. 396; Kershaw *v.* Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70. In Conklin *v.* Waltz, 3 Ind. 396, 397, Justice Blackford, speaking for the court, said: "The matters of set-off in a notice annexed to the general issue, or to a plea of payment, may be for a less sum than that sued for; but a separate plea of set-off stands on the same ground with other special pleas, and it must not profess to be an answer to more than it really does answer." But see *contra*, Hurd *v.* Earl, 4 Blackf. (Ind.) 184, and Indiana cases in following note.

54. Stotsenburg *v.* Fordice, 142 Ind. 490, 41 N. E. 313, 810; Kennedy *v.* Richardson, 70 Ind. 524; Mullendore *v.* Scott, 45 Ind. 113; Law *v.* Vierling, 45 Ind. 25; Dodge *v.* Dunham, 41 Ind. 186; True *v.* Triplett, 4 Metc. (Ky.) 57; Bennett *v.* McCrocklin, 3 Metc. (Ky.) 322; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Peabody *v.* Washington County Mut. Ins. Co., 20 Barb. (N. Y.) 339; Richards *v.* Edick, 17 Barb. (N. Y.) 260; Allen *v.* Haskins, 5 Duer (N. Y.) 332; Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y.) 67; Houghton *v.* Townsend, 8 How. Pr. (N. Y.) 441; Willis *v.* Taggard, 6 How. Pr. (N. Y.) 433; Hill *v.* Butler, 6 Ohio St. 207. In Curran *v.* Curran, 40 Ind. 473, 483, the court said, respecting the rule in New York, Ohio, and Kentucky: "It has been repeatedly held, in all of such states, that an answer setting up a set-off, which assumed to answer the whole complaint, but only answered a part, would not be bad on demurrer. Such rulings are placed on the grounds that a set-off is not strictly a defence, and that from its very nature, it can only be regarded as an answer to so much of the plaintiff's demand as may be proved on the trial." And the cases theretofore decided, holding a contrary view, were expressly overruled. See, however, Shrum *v.* Salem, 13 Ind. App. 115, 39 N. E. 1050, where the court seems to revert to the old rule.

Matter which tends merely to reduce damages is in New York deemed a partial defense, and a counter-claim of this nature is held bad if it purports to be a complete defense to the action. Bernascheff *v.* Roeth, 34 Misc. (N. Y.) 588, 70 N. Y. Suppl. 369.

55. Hancock *v.* Fleming, 85 Ind. 571.

56. Murphy *v.* Farley, 124 Ala. 279, 27 So. 442; Snyder *v.* Witt, 99 Tenn. 618, 42 S. W. 441.

57. Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

58. *Alabama.*— Greenville *v.* Greenville Water Works Co., 125 Ala. 625, 27 So. 764; Mobile Electric Lighting Co. *v.* Elder, 115 Ala. 138, 21 So. 983; Cox *v.* Columbus, etc., R. Co., 91 Ala. 392, 8 So. 824; Wilkinson *v.* Moseley, 30 Ala. 562. See also Hoge *v.* Herzberg, 141 Ala. 439, 37 So. 591.

California.— Wallace *v.* Bear River Water, etc., Co., 18 Cal. 461.

Illinois.— American Ins. Co. *v.* Holly, 81 Ill. 353; Barclay *v.* Ross, 32 Ill. 211; Shunick *v.* Thompson, 25 Ill. App. 619; Gebbie *v.* Mooney, 22 Ill. App. 369; Horan *v.* People, 10 Ill. App. 21. See also Illinois Cent. R. Co. *v.* Swift, 213 Ill. 307, 72 N. E. 737.

Indiana.— Falmouth, etc., Turnpike Co. *v.* Shawhan, 107 Ind. 47, 5 N. E. 408; Petty *v.* Christ Church, 95 Ind. 278; Swihart *v.* Shaffer, 87 Ind. 208; Worley *v.* Moore, 77 Ind. 567; Pickerell *v.* Frankem, 64 Ind. 25; Allen *v.* Randolph, 48 Ind. 496; Mahan *v.* Sherman, 8 Blackf. 63; Ferrand *v.* Walker, 5 Blackf. 424; Davis *v.* Bush, 4 Blackf. 330.

Kentucky.— Clark *v.* Schwing, 1 Dana 333.

Massachusetts.— Brewster *v.* Hobart, 15 Pick. 302.

New Jersey.— Truax *v.* Pennsylvania R. Co., 58 N. J. L. 218, 33 Atl. 278; Brehen *v.* O'Donnell, 34 N. J. L. 408; Elliott *v.* Agricultural Ins. Co., (Sup. 1886) 3 Atl. 171.

New York.— Foster *v.* Hazen, 12 Barb. 547; Loveland *v.* Hosmer, 8 How. Pr. 215; Thumb *v.* Walrath, 6 How. Pr. 196.

South Carolina.— Richland County *v.* Miller, 16 S. C. 244.

United States.— Cook *v.* Tribune Assoc., 6 Fed. Cas. No. 3,165, 5 Blatchf. 352.

Canada.— Robertson *v.* Winnipeg, 6 Manitoba 483; Kelly *v.* Lisk, 18 U. C. Q. B. 418.

See 39 Cent. Dig. tit. "Pleading," § 183.

If a declaration contain inconsistent counts, one charging defendant singly, and another charging him as partner with others, he cannot plead in abatement to part, and in bar to the other part, but must demur to the whole. Jordan *v.* Wilkins, 13 Fed. Cas. No. 7,527, 3 Wash. 110.

to apply,[59] and each defense may be met separately and differently as plaintiff may choose.[60] A defense not expressly limited to one count will be construed to apply to all.[61] And where it is expressly limited to one defense but it is apparent from the averments that it really relates to all, it will be so considered.[62] And conversely, if a plea does not relate to every count, and does not specify the particular counts to which it does refer, but it is clear from the substance of the plea what counts it in fact refers to, this is sufficient.[63] A plea which professes to answer one count and in fact answers another is demurrable.[64] If the same cause of action is set up in two counts, and defendant files two pleas, one applying to both counts and the other applying to but one, plaintiff cannot on the trial abandon the count which is not met by the second plea, in order to avoid that plea.[65]

7. Pleading Different Defenses[66] — a. In General — (i) *The English Practice.* The early practice at common law did not allow more than one plea to the same cause of action.[67] This rule, however, resulted in a general tendency on the part of pleaders to crowd a multitude of facts into their pleas, and to correct this abuse a statute was enacted[68] expressly permitting a party to plead as many defenses as he might have to the same declaration or count thereof, in courts of record and by leave of court.[69] Subsequently, by reason of the custom of pleading the same matter of defense in different forms, a general rule was passed, by the judges,[70] prohibiting the statement of the same subject-matter of defense varying only in manner of statement, description, or circumstances, but the right to plead different matters of defense was not withdrawn.[71] But several defenses will not be allowed where they are merely vexatious.[72]

(ii) *The American Practice.* Under the American practice frequently by express statutory provision a defendant may interpose as many different defenses as he may have to the same cause of action,[73] and if any one of them is estab-

59. Hindman *v.* Edgar, 24 Oreg. 581, 17 Pac. 862.

60. Colby *v.* Everett, 10 N. H. 429.

61. Root *v.* Hibben, 66 Ind. 247; Estill *v.* Jenkins, 4 Dana (Ky.) 75; Poulton *v.* Dalmage, 6 U. C. Q. B. 277.

62. Holcraft *v.* King, 25 Ind. 352; Case *v.* Boughton, 11 Wend. (N. Y.) 106.

63. Green *v.* Hambrick, 118 Ga. 569, 45 S. E. 420; Crasto *v.* White, 52 Hun (N. Y.) 473, 5 N. Y. Suppl. 718; Salinger *v.* Lusk, 7 How. Pr. (N. Y.) 430; Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320.

64. Barclay *v.* Ross, 32 Ill. 211.

65. Driggs *v.* Rockwell, 11 Wend. (N. Y.) 504.

66. Plea and demurrer to same declaration or count see *infra*, VI, G, 3.

67. Gully *v.* Exeter, 5 Bing. 45, 15 E. C. L. 461; 1 Chitty Pl. (16th Am. ed.) *586.

68. St. 4 & 5 Anne, c. 16, §§ 4, 5.

69. See Peters *v.* Ulmer, 74 Pa. St. 402; Slocomb *v.* Powers, 10 R. I. 255; Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146; 1 Chitty Pl. (16th Am. ed.) *586.

70. Rules Hil. T. 4 Wm. IV.

71. See Currie *v.* Almond, Arn. 483, 5 Bing. N. Cas. 224, 7 Dowl. P. C. 249, 3 Jur. 171, 8 L. J. C. P. 103, 7 Scott 172, 35 E. C. L. 128; Thompson *v.* Bradbury, 1 Bing. N. Cas. 326, 27 E. C. L. 660; Truebnerr *v.* Duerr, 1 Bing. N. Cas. 266, 3 Dowl. P. C. 133, 1 Scott 102, 27 E. C. L. 634; Leuckhart *v.* Cooper, 3 Dowl. P. C. 415; 1 Chitty Pl. (16th Am. ed.) *590.

In Canada several defenses may be pleaded together, usually without leave. Belyea *v.* Hatfield, 39 Can. L. J. N. S. 294; Allen *v.* Dickie, 2 Manitoba 61; Wilson *v.* Atkinson, 5 N. Brunsw. 474. But a defendant cannot plead several pleas in a case of the crown. Reg. *v.* Fraser, 11 Nova Scotia 431.

72. Cooling *v.* Great Northern R. Co., 15 Q. B. 486, 14 Jur. 875, 19 L. J. Q. B. 529, 69 E. C. L. 486.

73. *Arkansas.*— Grider *v.* Apperson, 32 Ark. 332; State Bank *v.* Minikin, 12 Ark. 715; Lincoln *v.* Wilamowicz, 7 Ark. 378.

Colorado.— Koll *v.* Bush, 6 Colo. App. 294, 40 Pac. 579.

Illinois.— People *v.* Beach, 15 Ill. App. 659.

Kansas.—Minneapolis Thrashing-Mach. Co. *v.* Currey, 75 Kan. 365, 89 Pac. 688.

Kentucky.— Clark *v.* Fox, 9 Dana 193.

Maine.— Granite State Bank *v.* Otis, 53 Me. 133; Wilton Mfg. Co. *v.* Woodman, 32 Me. 185, holding that leave of court must be obtained.

Massachusetts.— Montague *v.* Boston, etc., Iron Works, 97 Mass. 502; Payson *v.* Macomber, 3 Allen 69; McIntyre *v.* Fuller, 2 Allen 345; Wheaton *v.* Nelson, 11 Gray 15.

Minnesota.— Conway *v.* Wharton, 13 Minn. 158; Booth *v.* Sherwood, 12 Minn. 426.

Mississippi.— Brown *v.* Hamlin, 23 Miss. 392.

New Hampshire.— Watriss *v.* Pierce, 36 N. H. 232.

Ohio.— Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1.

Pennsylvania.— Peters *v.* Ulmer, 74 Pa. St. 402; Yocum *v.* Morice, 4 Phila. 106; McFate *v.* Shallcross, 1 Phila. 75.

lished he will be entitled to judgment.[74] Some old cases hold that several pleas may be filed only by leave of court.[75] The codes of procedure expressly provide that a defendant may set forth in his answer as many defenses and counter-claims as he may have, whether they are legal or equitable.[76] In some instances particular proceedings are expressly excepted from the operation of these provisions,[77] and it has been said that in any event the court has some discretion in excluding defenses not essential to the justice of the case.[78] An enumeration in the statute of certain pleas which may be pleaded together does not prohibit the union of other pleas which might have been joined before the statute.[79] In the absence of a statute permitting it, pleas which tender issues not triable by the same method of trial, cannot properly be joined.[80] Where two defenses are in fact identical in substance, the court may, on motion, compel defendant to elect between them.[81] In case of doubt as to whether defendant has intended to set up one or more than one defense, the court will determine the question from a consideration of the whole answer.[82]

b. Separate Statement of Defenses — (i) *In General.* Each defense should be separately stated, should be complete in itself, and should distinctly indicate that it is a separate defense and where it begins and ends.[83] Substantial

Wyoming.— Lake Shore, etc., R. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724.

United States.— Bachman *v.* Everding, 2 Fed. Cas. No. 708, 1 Sawy. 70; Greathouse *v.* Dunlap, 10 Fed. Cas. No. 5,742, 3 McLean 303.

See 39 Cent. Dig. tit. "Pleading," § 184.

Statute of Anne part of common law.— St. 4 Anne, c. 16, § 4, making it lawful for any defendant or tenant in any action or suit in any court of record to plead as many several matters thereto in several distinct pleas as he should think necessary for his defense is a part of the common law of Vermont. Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

Setting up new defenses: By amendment see *infra*, VII, A, 11, d, (II), (F). By supplemental pleading see *infra*, VII, D, 6, c.

74. People *v.* Beach, 15 Ill. App. 659; Brandon *v.* Judah, 7 Ind. 545; Brown *v.* Hamlin, 23 Miss. 392; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

75. Wilton Mfg. Co. *v.* Woodman, 32 Me. 185; Stewart *v.* McCully, 5 Rich. (S. C.) 80; Miller *v.* Fisk, 1 McCord (S. C.) 50; Van Holten *v.* Lewis, 1 McCord (S. C.) 12; Pickens *v.* Shackelford, 2 Brev. (S. C.) 96.

76. See statutes in the various code states. And see also cases from such states cited *supra*, note, 73.

77. See the codes and practice acts of the several states. And see Houghland *v.* Dent, 52 Mo. App. 237, a case of proceedings in attachment.

78. Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1.

79. State *v.* Morgan, 59 Miss. 349.

80. *Massachusetts.*— Binney *v.* Merchant, 6 Mass. 190.

New Hampshire.— Chapman *v.* Sloan, 2 N. H. 464.

New Jersey.—Parks *v.* McClellan, 44 N. J. L. 552; Riley *v.* Riley, 20 N. J. L. 114.

New York.— Cochran *v.* Webb, 4 Sandf. 653; Trotter *v.* Mills, 6 Wend. 512; Barheydt *v.* Haverly, 1 Wend. 70; Witherwax *v.* Averill, 6 Cow. 589; Le Conte *v.* Pendleton, 1 Johns. Cas. 104.

Vermont.— Card *v.* Sargeant, 15 Vt. 393.

81. See *infra*, XII, E, 3.

82. *Georgia.*— Antignoli, etc., Co. *v.* Miller, 116 Ga. 621, 42 S. E. 1006.

New York.— Jex *v.* New York, 111 N. Y. 339, 19 N. E. 52; Kager *v.* Brenneman, 33 N. Y. App. Div. 452, 54 N. Y. Suppl. 94; Thompson *v.* Kearney, 14 Daly 342, 12 N. Y. St. 682; Blumenfeld *v.* Stine, 42 Misc. 411, 87 N. Y. Suppl. 81 [*affirmed* in 96 N. Y. App. Div. 160, 89 N. Y. Suppl. 85]; Haas *v.* Selig, 27 Misc. 504, 58 N. Y. Suppl. 328; Jorgensen *v.* Reformed Low Dutch Church, 7 Misc. 1, 27 N. Y. Suppl. 318; Myers *v.* Portsmouth Bank, 2 N. Y. St. 125.

Rhode Island.— Westerly Prob. Ct. *v.* Potter, 25 R. I. 204, 55 Atl. 524.

Washington.— Spencer *v.* Terrel, 17 Wash. 514, 50 Pac. 468.

Canada.— Beasley *v.* Hamilton, 9 Ont. 112.

The separate statement and numbering or its absence, the presence or absence of words expressly indicating that there is more than one defense, and the substance and arrangement of the averments and denials, will all be considered, although no one of these elements will necessarily be controlling. Brassington *v.* Rohrs, 3 Misc. (N. Y.) 258, 22 N. Y. Suppl. 761; Dobson *v.* Owens, 5 Wyo. 325, 40 Pac. 442.

83. *Arkansas.*— Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567.

Indiana.—Walker *v.* Walker, 150 Ind. 317, 50 N. E. 68; Lash *v.* Rendell, 72 Ind. 475; Wilson *v.* Evansville, etc., R. Co., 9 Ind. 510.

Iowa.—Martin *v.* Swearengen, 17 Iowa 346; Freeman *v.* Fleming, 5 Iowa 460.

Kansas.— Truitt *v.* Baird, 12 Kan. 420.

New York.— South Dakota *v.* McChesney, 87 Hun 293, 34 N. Y. Suppl. 362; Bridge *v.* Payson, 5 Sandf. 210; Zacharias *v.* French, 10 Misc. 202, 30 N. Y. Suppl. 945; Lippencott *v.* Goodwin, 8 How. Pr. 242; Benediet *v.* Seymour, 6 How. Pr. 298.

compliance with this rule is sufficient.[84] Some of the codes require different defenses to be separately numbered also.[85] But allegations which together constitute but a single defense should not be separated.[86] When a defendant has set up several defenses, and has clearly indicated that they are separate and distinct, he cannot afterward on demurrer assert that they are not so.[87] The same facts may be set up both as a partial and as a full defense if they are separately stated,[88] or by way of defense and recoupment,[89] or otherwise showing different legal conclusions arising out of the same state of facts,[90] but the same defenses should not be repeated in different forms.[91] The code provision requiring the separate statement of defenses has been held not to apply to specific denials, so that denials of several material allegations in a complaint may be made in one division of an answer.[92] Affirmative and negative matter respecting the same portions of the complaint cannot properly be united in the same paragraph;[93] but an answer which confesses certain allegations of the complaint and avoids them by affirmative facts and denies all the others may be stated in one paragraph as a single defense.[94] Where separate defenses are not separately stated, a motion is the proper remedy.[95]

(II) *Aider of Insufficient Plea by Reference to Others.* An insufficient plea cannot derive any aid from other pleas, but must stand or fall by itself,[96]

Ohio.— Smith *v.* Smith, 4 Ohio Dec. (Reprint) 209, 1 Clev. L. Rep. 117.

Oregon.— Gardner *v.* McWilliams, 42 Oreg. 14, 69 Pac. 915.

See 39 Cent. Dig. tit. "Pleading," § 191.

Where complete and partial defenses are mingled the statement of defense is embarrassing. Schweiger *v.* M. Vineberg Co., 15 Manitoba 536.

84. Garfield Nat. Bank *v.* Kirchway, 17 Misc. (N. Y.) 310, 40 N. Y. Suppl. 357.

85. See the codes of the several states. And see Hatch *v.* Matthews, 85 Hun (N. Y.) 522, 33 N. Y. Suppl. 332; Fay *v.* Hauerwas, 26 Misc. (N. Y.) 421, 57 N. Y. Suppl. 155 [*affirmed* in 43 N. Y. App. Div. 621, 60 N. Y. Suppl. 1138]; Zacharias *v.* French, 10 Misc. (N. Y.) 202, 30 N. Y. Suppl. 945.

86. Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490; Botsford *v.* Wallace, 72 Conn. 195, 44 Atl. 10; Pratt *v.* Sparkman, 42 Minn. 448, 44 N. W. 663; Hovland *v.* Burrows, 38 Nebr. 119, 56 N. W. 800; Eisner *v.* Eisner, 89 Hun (N. Y.) 480, 35 N. Y. Suppl. 393; Spencer *v.* Tooker, 21 How. Pr. (N. Y.) 333.

Paragraphing.— The different allegations making up a defense may be paragraphed. Antognoli *v.* Miller, 116 Ga. 621, 42 S. E. 1006; Union F. Ins. Co. *v.* Lyman, 46 U. C. Q. B. 453.

A suitable way of indicating the beginning of a new defense is to use the words, "and for a further defense." Benedict *v.* Seymour, 6 How. Pr. (N. Y.) 298.

87. Recknagel *v.* Steinway, 58 N. Y. App. Div. 352, 69 N. Y. Suppl. 132; Nicoll *v.* Fash, 59 Barb. (N. Y.) 275.

88. Zacharias *v.* French, 10 Misc. (N. Y.) 202, 30 N. Y. Suppl. 945.

89. Troy Grocery Co. *v.* Potter, 139 Ala. 359, 36 So. 12.

90. Currie *v.* Almond, Arn. 483, 5 Bing. N. Cas. 224, 7 Dowl. P. C. 249, 3 Jur. 171, 8 L. J. C. P. 103, 7 Scott 172, 35 E. C. L. 128. But see Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405, where it was held improper to set up the same facts as a legal defense and also as an equitable defense.

91. *Florida.*— Dorman *v.* Jacksonville, etc., Plank Road Co., 7 Fla. 265.

Illinois.— Cook *v.* Moulton, 64 Ill. App. 419.

Iowa.— Martin *v.* Swearengen, 17 Iowa 346.

Kentucky.— Singleton *v.* Lewis, Hard. 258.

Canada.— Johnson *v.* Hunter, 1 U. C. Q. B. 280.

92. Otis *v.* Ross, 8 How. Pr. (N. Y.) 193.

In Canada this is also the rule. Abell *v.* McLaren, 31 U. C. C. P. 517.

93. Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Cronk *v.* Cole, 10 Ind. 485; Carpenter *v.* Mergert, 39 Misc. (N. Y.) 634, 80 N. Y. Suppl. 615; Jaeger *v.* New York, 39 Misc. (N. Y.) 543, 80 N. Y. Suppl. 356; Fay *v.* Hauerwas, 26 Misc. (N. Y.) 421, 57 N. Y. Suppl. 155 [*affirmed* in 43 N. Y. App. Div. 621, 60 N. Y. Suppl. 1138].

94. State *v.* St. Paul, etc., Turnpike Co., 92 Ind. 42; Unger *v.* Mellinger, 37 Ind. App. 639, 77 N. E. 814, 117 Am. St. Rep. 348.

95. See *infra*, XII, D, 5, b.

96. *Alabama.*— Clements *v.* Cribbs, 19 Ala. 241.

Georgia.— Pate *v.* Allison, 114 Ga. 651, 40 S. E. 715; Cooper *v.* Robert Porter Brewing Co., 112 Ga. 894, 38 S. E. 91; Davis *v.* Byrne, 10 Ga. 329.

Indiana.— McComas *v.* Haas, 93 Ind. 276; Potter *v.* Earnest, 45 Ind. 416; Knarr *v.* Conaway, 42 Ind. 260; Mason *v.* Weston, 29 Ind. 561; Day *v.* Vallette, 25 Ind. 42, 87 Am. Dec. 353.

Iowa.— Davis *v.* Robinson, 67 Iowa 355, 25 N. W. 280; Michigan Nat. Bank *v.* Green, 33 Iowa 140.

Maryland.— See Fifer *v.* Clearfield, etc., Coal, etc., Co., 103 Md. 1, 62 Atl. 1122, in which it is said that matter contained in

unless matter in another plea is expressly referred to and adopted.[97] But no allegations can be incorporated into a plea by reference which could not have been properly set up in it.[98] While any fact in another defense may be made available by express reference and adoption, it is better to confine such reference to matters of inducement, making each defense complete so far as the facts constituting the gravamen of the defense are concerned.[99] But some courts criticize the practice of referring to other defenses instead of realleging the necessary facts.[1]

c. Duplicity — (I) *In General.* A plea is bad for duplicity when two or more distinct matters are pleaded in the same plea, either one of which would be a valid answer to the declaration or count.[2] It is a fault which may occur either

other pleas cannot be taken advantage of to vitiate the plea in question.

New York.— Biedler *v.* Malcolm, 121 N. Y. App. Div. 145, 105 N. Y. Suppl. 642; Outcault *v.* Bonheur, 120 N. Y. App. Div. 168, 104 N. Y. Suppl. 1099; Garrett *v.* Wood, 27 N. Y. App. Div. 312, 50 N. Y. Suppl. 950; Ayrault *v.* Chamberlain, 33 Barb. 229; Loosey *v.* Orser, 4 Bosw. 391; Markham *v.* Barnes, 8 N. Y. St. 502; Underwood *v.* Campbell, 13 Wend. 78.

South Carolina.— Harman *v.* Harman, 54 S. C. 100, 31 S. E. 881.

Texas.— Breen *v.* Texas, etc., R. Co., 44 Tex. 302.

Virginia.— Jackson *v.* Marietta Bank, 9 Leigh 240.

Wisconsin.— Kipp *v.* Gates, 126 Wis. 566, 105 N. W. 947; Sabin *v.* Austin, 19 Wis. 421; Catlin *v.* Pedrick, 17 Wis. 88; Durkee *v.* Kenosha City Bank, 13 Wis. 216.

United States.— Hummel *v.* Moore, 25 Fed. 380; Bachman *v.* Everding, 2 Fed. Cas. No. 708, 1 Sawy. 70; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch 546; Martin *v.* Bartow Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320; Pegram *v.* U. S., 19 Fed. Cas. No. 10,906, 1 Brock. 261.

97. *Alabama.*— Clements *v.* Cribbs, 19 Ala. 241.

California.— Yost *v.* Commercial Bank, 94 Cal. 494, 29 Pac. 858; Harron *v.* Wilson, etc., Co., 4 Cal. App. 488, 88 Pac. 512; Bernard *v.* Sloan, 2 Cal. App. 737, 84 Pac. 232.

Colorado.—Weston *v.* Estey, 22 Colo. 334, 45 Pac. 367.

Connecticut.— Simonds *v.* East Windsor El. R. Co., 73 Conn. 513, 48 Atl. 210.

Iowa.— Jackson *v.* Steamboat Rock Independent School Dist., 110 Iowa 313, 81 N. W. 596.

Maryland.— Dent *v.* Scott, 3 Harr. & J. 28.

New York.— Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; Empire Trust Co. *v.* Magee, 117 N. Y. App. Div. 34, 102 N. Y. Suppl. 9; Mott *v.* De Nisco, 106 N. Y. App. Div. 154, 94 N. Y. Suppl. 380; Recknagel *v.* Steinway, 58 N. Y. App. Div. 352, 69 N. Y. Suppl. 132; Sbarboro *v.* New York Health Dept., 26 N. Y. App. Div. 177, 49 N. Y. Suppl. 1033; Ayrault *v.* Chamberlain, 33 Barb. 229; Spencer *v.* Babcock, 22 Barb. 326; Singer *v.* Abrams, 47 Misc. 360, 94 N. Y. Suppl. 7; Barnard *v.* Lawyers' Title Ins. Co., 45 Misc. 577, 91 N. Y. Suppl. 41; Craft *v.* Brandow, 24 Misc. 306, 52 N. Y. Suppl. 1078.

Ohio.— Ketchum *v.* Phillips, 4 Ohio Dec. (Reprint) 81, 1 Clev. L. Rep. 9.

Oregon.— Hindman *v.* Edgar, 24 Oreg. 581, 17 Pac. 862.

South Carolina.— Gilreath *v.* Furman, 57 S. C. 289, 35 S. E. 516; Harman *v.* Harman, 54 S. C. 100, 31 S. E. 881.

98. DeWitt *v.* Brill, 6 Misc. (N. Y.) 44, 25 N. Y. Suppl. 1001.

99. Haskell *v.* Haskell, 54 Cal. 262; Freeland *v.* McCullough, 1 Den. (N. Y.) 414, 43 Am. Dec. 685; Crookshank *v.* Gray, 20 Johns. (N. Y.) 344; Curtis *v.* Moore, 15 Wis. 134. In Gardner *v.* McWilliams, 42 Oreg. 14, 17, 69 Pac. 915, the court said: "The rule is quite well settled that it is unnecessary to restate in a pleading facts contained in a prior count, which constitute matters of inducement, necessary to explain both; in which case the pleader, by referring to the preceding narrative, thereby makes a part of the subsequent count. . . . Matter stated in a pleading constituting a history of the transaction . . . which naturally precedes and logically leads up to the gravamen of the action or defense . . . is denominated inducement."

1. Denison University *v.* Manning, 65 Ohio St. 138, 61 N. E. 706; Eureka F. & M. Ins. Co. *v.* Baldwin, 62 Ohio St. 368, 57 N. E. 57.

2. *Alabama.*— Ellison *v.* Mounts, 12 Ala. 472; Cobb *v.* Miller, 9 Ala. 499; Cobb *v.* Force, 6 Ala. 468. But in the recent cases duplicity is held no longer an available defect. Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Corpening *v.* Worthington, 99 Ala. 541, 12 So. 426; Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658.

Arkansas.— The Napoleon *v.* Etter, 6 Ark. 103.

Georgia.—Rounsaville *v.* Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030.

Illinois.— Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247, 48 N. E. 402; Calhoun *v.* Wright, 4 Ill. 74; Wann *v.* McGoon, 3 Ill. 74; Merriweather *v.* Gregory, 3 Ill. 50; Merriweather *v.* Smith, 3 Ill. 30.

Indiana.— Hand *v.* Taylor, 4 Ind. 409; Benner *v.* Elliott, 5 Blackf. 451; Porter *v.* Brackenridge, 2 Blackf. 385.

Iowa.— Donahue *v.* Prosser, 10 Iowa 276.

Kentucky.— Bryan *v.* Buford, 7 J. J. Marsh. 335.

Maine.— Scott *v.* Whipple, 6 Me. 425.

Massachusetts.— Hooper *v.* Jellison, 22 Pick. 250.

in dilatory pleas or pleas in bar.[3] But defendant may plead several facts in one plea if they together constitute one entire defense or single proposition or transaction.[4] To determine whether or not a plea is double, reference must be had to both the matter and the general frame and structure of the plea.[5]

(II) *Matters Not Within Rule.* Immaterial matter which is alleged in a plea will not make it double,[6] nor will matter which is alleged merely as inducement,[7] nor surplusage.[8] So where one defense, by reason of its insufficiency, may be treated as surplusage, it cannot render the plea double,[9] and where matters inappropriate to the defense pleaded, but proper for some other defense, incidentally appear in a plea, they will be deemed surplusage and will not render the plea bad for duplicity.[10] And a plea is not double which in one paragraph sets up defenses to each of several causes of action in plaintiff's complaint, if only one defense is pleaded to each one.[11] So a defendant may plead several distinct and independent pleas to separate parts of a single count.[12] A plea is not rendered double by an express averment of facts which would otherwise have been implied.[13]

d. Inconsistent Defenses — (I) *Common Law.* At the common law defend-

Mississippi.— Clopton *v.* Spratt, 52 Miss. 251; Taylor *v.* Davis, 38 Miss. 493.

New Hampshire.— Dudley *v.* Spaulding, 50 N. H. 437.

New Jersey.— Wheeler *v.* Essex County Public Road Bd., 40 N. J. L. 138; Star Brick Co. *v.* Ridsdale, 34 N. J. L. 428; Conover *v.* Tindall, 20 N. J. L. 513.

New York.— Connelly *v.* Pierce, 7 Wend. 129; Allegany County *v.* Van Campen, 3 Wend. 48.

Rhode Island.— McAleer *v.* Angell, 19 R. I. 688, 36 Atl. 588.

South Carolina.— Smart *v.* McDonell, 2 Brev. 224.

Tennessee.— Trabue *v.* Higden, 4 Coldw. 620.

Vermont.—Andover *v.* Mount Holly, 58 Vt. 372, 4 Atl. 143; Luce *v.* Hoisington, 55 Vt. 341; Culver *v.* Balch, 23 Vt. 618. *Compare* Vaughan *v.* Everts, 40 Vt. 526, where it is said that it is not necessary that each defense in the plea should be legally sufficient in order to make the plea bad for duplicity.

Virginia.— Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

Canada.— Gilman *v.* Phelan, 18 N. Brunsw. 340; Boyd *v.* McLauchlin, 3 N. Brunsw. 210; Fairbanks *v.* Union Mar. Ins. Co., 2 Nova Scotia 271; Duffy *v.* Higgins, 4 U. C. C. P. 301; Kerby *v.* Grand River Nav. Co., 11 U. C. Q. B. 334; Upper Canada Bank *v.* Robinson, 6 U. C. Q. B. 23; Smith *v.* Oates, 4 U. C. Q. B. 185; West *v.* Bown, 3 U. C. Q. B. 291; Campbell *v.* Burr, 5 U. C. Q. B. O. S. 630.

See 39 Cent. Dig. tit. "Pleading," § 202.

Demurrer because of duplicity see *infra*, VI, F, 1, b, (I).

Motion to strike double plea see *infra*, XII, C, 1, c, (IV), (B).

3. Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480.

4. *Maine.*— Potter *v.* Titcomb, 10 Me. 53.

Maryland.— Stewardson *v.* White, 3 Harr. & M. 455.

Mississippi.— Ellis *v.* Martin, 2 Sm. & M. 187.

Nebraska.— Hovland *v.* Burrows, 38 Nebr. 119, 56 N. W. 800.

New Hampshire.— Dyke *v.* Percival, 14 N. H. 578; Adams *v.* Mack, 3 N. H. 493.

New Jersey.— Harker *v.* Brink, 24 N. J. L. 333.

New York.— Patcher *v.* Sprague, 2 Johns. 462; Currie *v.* Henry, 2 Johns. 433.

North Carolina.— State Bank *v.* Hinton, 12 N. C. 397.

Pennsylvania.— Philadelphia *v.* Wistar, 92 Pa. St. 404; Brown *v.* Young, 1 Phila. 75.

Rhode Island.— McAleer *v.* Angell, 19 R. I. 688, 36 Atl. 588.

South Carolina.— Beckley *v.* Moore, 1 McCord 464.

Vermont.— Torrey *v.* Field, 10 Vt. 353; Waddams *v.* Burnham, 1 Tyler 233.

Virginia.— Reese *v.* Bates, 94 Va. 321, 26 S. E. 865; Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457.

United States.— Miller *v.* Rickey, 123 Fed. 604.

Canada.— Ketchum *v.* Protection Ins. Co., 6 N. Brunsw. 136.

See 39 Cent. Dig. tit. "Pleading," § 204.

5. Vaughan *v.* Everts, 40 Vt. 526.

6. Pooler *v.* Southwick, 126 Ill. App. 264; Stewardson *v.* White, 3 Harr. & M. (Md.) 455.

7. State *v.* Webb, 110 Ala. 214, 20 So. 462; Lord *v.* Tyler, 14 Pick. (Mass.) 156; Dunning *v.* Owen, 14 Mass. 157; Bassini *v.* Brockner, 10 N. J. L. J. 105; Robinson *v.* St. Johnsbury, etc., R. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. N. S. 1249.

8. Richmond, etc., Turnpike Co. *v.* Rife, 2 Ind. 316.

9. Lord *v.* Tyler, 14 Pick. (Mass.) 156.

10. Dalton *v.* Drake, 75 Ga. 115; Sturdivant *v.* Smith, 29 Me. 387. See also Thompson *v.* Oskamp, 19 Ind. 399.

11. State *v.* Newlin, 69 Ind. 108.

12. Weser *v.* Welty, 18 Ind. App. 664, 47 N. E. 639; Parker *v.* Parker, 17 Pick. (Mass.) 236; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

13. Ford *v.* Babcock, 2 Sandf. (N. Y.) 518.

ant could not file two pleas to the same count.[14] To remedy this inconvenience the statute of 5 Anne was passed, which allowed defendant, with leave of the court, to plead as many several matters as he should think necessary for his defense.[15] Under this statute it was the practice at first for the court to refuse leave when the proposed pleas were inconsistent,[16] but in modern practice such pleas, notwithstanding the apparent repugnancy between them, are permitted.[17] The discretion vested in the court by the statute of Anne to refuse leave to put in more than one plea is a legal discretion not to be exercised unless good reason exists.[18] In general a defendant will be allowed to plead as many different grounds of defense as may be thought necessary, although they appear to be contradictory and inconsistent, and the court will deny leave only where the several pleas are clearly repugnant, or will create unjust delay or embarrassment in obtaining a trial.[19] Defendant will not be allowed to plead several pleas which require different trials, and he will in such case be put to an election between his pleas.[20] Nor will the court allow a defendant to set up the same defense by a special plea and by a notice of special matter under the general issue, and when this is sought to be done a motion to strike or to elect will lie.[21] Even if the pleas be consistent the court may rescind the rule to plead several pleas, if defendant has made improper use of his leave for the purpose of delaying plaintiff and throwing difficulties in his way.[22] And if they be inconsistent the court may require an affidavit that they are necessary to the justice of the cause.[23]

(II) *Under Codes and Practice Acts* — (A) *In General.* Under the reformed procedure, as in force in England and in all the states in which the code system prevails, separate and distinct defenses are allowed to be pleaded simultaneously,[24] each being stated in a separate paragraph of the answer,[25] consistent in itself, and sufficient to constitute a defense to the action. As to whether a defendant, thus interposing distinct defenses in separate paragraphs of his answer, may rely upon defenses inconsistent with each other, the authorities are in apparent conflict. Many cases lay down the general rule that defenses inconsistent with

14. See *supra*, IV, A, 7, a, (I).

15. See *supra*, IV, A, 7, a, (I).

16. See Peters *v.* Ulmer, 74 Pa. St. 402.

17. *Arkansas.*— Lincoln *v.* Wilamowicz, 7 Ark. 378.

Iowa.— Grash *v.* Sater, 6 Iowa 301.

Pennsylvania.— Peters *v.* Ulmer, 74 Pa. St. 402; Yocum *v.* Morice, 4 Phila. 106.

Virginia.— Com. *v.* Myers, 1 Va. Cas. 188.

West Virginia.— Nadenbousch *v.* Sharer, 2 W. Va. 285.

England.— Chitty *v.* Hume, 13 East 255; Jenkins *v.* Edwards, 5 T. R. 97.

Rule of strict consistency much relaxed.— Wilson *v.* Ames, 1 Marsh. 74, 5 Taunt. 340, 1 E. C. L. 180.

18. Peters *v.* Ulmer, 74 Pa. St. 402.

19. Parks *v.* McClellan, 44 N. J. L. 552.

Illustrations.— Not guilty and the statute of limitations are pleadable together. Da Costa *v.* Carteret, Str. 889. Non-tenure, nothing in arrear, and infancy may be pleaded together. Wilson *v.* Ames, 1 Marsh, 340, 5 Taunt. 340, 1 E. C. L. 180. But it has been held that a plea of tender to one count and a plea of alien enemy to another cannot be pleaded together, because the first plea expressly admits that the plaintiff has a *locus standi* in court, while the last one denies it. Shombeck *v.* De la Cour, 10 East 326. So *non assumpsit* and alien enemy cannot be pleaded together. Thyatt *v.* Young, 2 B. & P. 72. For the like reason the general issue and tender cannot be pleaded together. Jo Daviess County *v.* Staples, 108 Ill. App. 539; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Williams *v.* Harris, 2 How. (Miss.) 627; Chew *v.* Close, 9 Phila. (Pa.) 211; Baker *v.* Westbrook, Str. 949; Orgill *v.* Kemshead, 4 Taunt. 459, 13 Rev. Rep. 712; Jenkins *v.* Edwards, 5 T. R. 97; Macbellan *v.* Howard, 4 T. R. 194; Dowgall *v.* Bowman, 3 Wils. C. P. 145. So as to *non est factum* and *solvit post diem.* Arnold *v.* Baas, W. Bl. 993; Fox *v.* Chandler, W. Bl. 905. And *non est factum* and plea of condition performed. Pope *v.* Latham, 1 Ark. 66. But *non est factum* and payment may be joined. Merry *v.* Gay, 3 Pick. (Mass.) 388. In trespass pleas of not guilty, jutification, and tender of amends have all been admitted together. Martin *v.* Kesterton, W. Bl. 1089.

20. See *infra*, XII, E. 3.

21. Gilmore *v.* Nowland, 26 Ill. 200; Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474; Wyatt *v.* Dufrene, 106 Ill. App. 214; Brocaw *v.* Marlatt, 8 N. J. L. 89; McCay *v.* Burr, 6 Pa. St. 147, 47 Am. Dec. 441.

22. Gully *v.* Exeter, 5 Bing. 42, 15 E. C. L. 461; Chitty *v.* Hume, 13 East 255.

23. Pleading Several Matters, 3 Bing. 635, 11 E. C. L. 310.

24. See *supra*, IV, A, 7, a.

25. See *supra*, IV, A, 7, b.

each other may be pleaded,[26] and some of the codes expressly allow this.[27] On the other hand the codes of other states expressly forbid the pleading of inconsistent defenses.[28] Even where there is no express prohibition, it is held in many

26. *Alabama.*—Ansley *v.* Piedmont Bank, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122.
Arkansas.— Lincoln *v.* Wilamowicz, 7 Ark. 378.
California.— Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386; Banta *v.* Siller, 121 Cal. 414, 53 Pac. 935; Billings *v.* Drew, 52 Cal. 565; Buhne *v.* Corbett, 43 Cal. 264; Bell *v.* Brown, 22 Cal. 671.
Colorado.— Conrey *v.* Nichols, (1906) 84 Pac. 470; Hill *v.* Groesbeck, 29 Colo. 161, 67 Pac. 167; Carlile *v.* People, 27 Colo. 116, 59 Pac. 48; Pike *v.* Sutton, 21 Colo. 84, 39 Pac. 1084; Tucker *v.* Edwards, 7 Colo. 209, 3 Pac. 233; People *v.* Lothrop, 3 Colo. 428; Koll *v.* Bush, 6 Colo. App. 294, 40 Pac. 579; Duffield *v.* Denver, etc., R. Co., 5 Colo. App. 25, 36 Pac. 622.
Indiana.— Vail *v.* Jones, 31 Ind. 467; Wheeler *v.* Robb, 1 Blackf. 330, 12 Am. Dec. 245; Johnson *v.* Sherwood, 34 Ind. App. 490, 73 N. E. 180.
Iowa.— Bruner *v.* Brotherhood American Yeomen, 136 Iowa 612, 111 N. W. 977; Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 973; Cole *v.* Laird, 121 Iowa 146, 96 N. W. 744; Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176; Burns *v.* Chicago, etc., R. Co., 110 Iowa 385, 81 N. W. 794; Thorson, etc., Co. *v.* Baker, 107 Iowa 49, 77 N. W. 510; Warshawky *v.* Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237.
Maine.— Granite State Bank *v.* Otis, 53 Me. 133; Gordon *v.* Peirce, 11 Me. 213.
Mississippi.— Lay *v.* Filmore, 75 Miss. 493, 23 So. 184; Rowland *v.* Dalton, 36 Miss. 702.
Montana.— Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419; Ball *v.* Gussenhoven, 29 Mont. 321, 74 Pac. 871.
New Hampshire.— True *v.* Huntoon, 54 N. H. 121.
New York.— Societa Italiana di Beneficenza *v.* Sulzer, 138 N. Y. 468, 34 N. E. 193; Goodwin *v.* Wertheimer, 99 N. Y. 149, 1 N. E. 404; Bruce *v.* Burr, 67 N. Y. 237; Schlesinger *v.* Wise, 106 N. Y. App. Div. 587, 94 N. Y. Suppl. 718; Schlesinger *v.* McDonald, 106 N. Y. App. Div. 570, 94 N. Y. Suppl. 721; Wendling *v.* Pierce, 27 N. Y. App. Div. 517, 50 N. Y. Suppl. 509; MacColl *v.* American Union L. Ins. Co., 89 Hun 490, 35 N. Y. Suppl. 364; Mott *v.* Burnett, 2 E. D. Smith 50; Gray Lith. Co. *v.* American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. Suppl. 857; Seeman *v.* Bandler, 25 Misc. 328, 54 N. Y. Suppl. 564 [*affirmed* in 26 Misc. 372, 56 N. Y. Suppl. 210].
North Carolina.— Upton *v.* South Carolina, etc., R. Co., 128 N. C. 173, 38 S. E. 736; McLamb *v.* McPhail, 126 N. C. 218, 35 S. E. 426; Threadgill *v.* Anson County, 116 N. C. 616, 21 S. E. 425; Reed *v.* Reed, 93 N. C. 462. *Compare* Fayetteville Waterworks Co. *v.* Tillinghast, 119 N. C. 343, 25 S. E. 960.
South Carolina.— Millan *v.* Southern R. Co., 54 S. C. 485, 32 S. E. 539.
South Dakota.— Green *v.* Hughitt School Tp., 5 S. D. 452, 59 N. W. 224; Lawrence *v.* Peck, 3 S. D. 645, 54 N. W. 808; Stebbins *v.* Lardner, 2 S. D. 127, 48 N. W. 847.
Tennessee.—Shelby County *v.* Bickford, 102 Tenn. 395, 52 S. W. 772.
Texas.— St. Louis, etc., R. Co. *v.* Whitley, 77 Tex. 126, 13 S. W. 853; Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860; Welden *v.* Texas Continental Meat Co., 65 Tex. 487; Duncan *v.* Magette, 25 Tex. 245; Fowler *v.* Davenport, 21 Tex. 626; Wildey Lodge No. 21 I. O. O. F. *v.* Paris (Civ. App. 1904) 81 S. W. 99; International, etc., R. Co. *v.* Kentle, 2 Tex. App. Civ. Cas. § 303.
Wisconsin.— Kerslake *v.* McInnis, 113 Wis. 659, 89 N. W. 895; South Milwaukee Boulevard Heights Co. *v.* Harte, 95 Wis. 592, 70 N. W. 821.
Wyoming.— Lake Shore, etc., R. Co. *v.* Warren, (1885) 6 Pac. 724.
United States.—Noonan *v.* Bradley, 9 Wall. 394, 19 L. ed. 757; Hummel *v.* Moore, 25 Fed. 380.
England.—Hawkesley *v.* Bradshaw, 5 Q. B. D. 302, 49 L. J. Q. B. 333, 42 L. T. Rep. N. S. 285, 28 Wkly. Rep. 557; Berdan *v.* Greenwood, 3 Ex. D. 251, 47 L. J. Exch. 628, 39 L. T. Rep. N. S. 223, 26 Wkly. Rep. 902; Triebnerr *v.* Duerr, 1 Bing. N. Cas. 266, 3 Dowl. P. C. 133, 1 Scott 102, 27 E. C. L. 634; Wilkinson *v.* Small, 3 Dowl. P. C. 564, 1 Harr. & W. 214; Wilson *v.* Ames, 1 Marsh. 74, 5 Taunt. 340, 1 E. C. L. 180. *Compare* Spurr *v.* Hall, 2 Q. B. D. 615, 46 L. J. Q. B. 693, 37 L. T. Rep. N. S. 313, 26 Wkly. Rep. 78.
See 39 Cent. Dig. tit. "Pleading," § 189.
Reason for the rule.— In Rudd *v.* Dewey, 121 Iowa 454, 458, 96 N. W. 973, the court said: "Absurd as it may seem at first blush to allow defendant, charged with having negligently broken a borrowed kettle, to answer that he never borrowed the kettle, that it was broken when he borrowed it, and that it was sound when returned, nevertheless, when it is reflected that the controversy may be about a kettle borrowed by defendant's servant, as to which defendant had no knowledge whatever and that, the servant having disappeared, defendant will be entirely dependent on such casual evidence as he may be able to scrape up in the neighborhood, the rule is not by any means unreasonable or without support in public policy."
No distinction in this respect between verified and unverified pleadings.— Banta *v.* Siller, 121 Cal. 414, 53 Pac. 935; Buhne *v.* Corbett, 43 Cal. 264.

27. See the codes of the several states. And see Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 973.

28. See the codes of the several states. And see Rooney *v.* Tierney, 82 Ky. 253; Steenerson *v.* Waterbury, 52 Minn. 211, 53 N. W. 1146; Booth *v.* Sherwood, 12 Minn.

jurisdictions that the privilege of pleading as many defenses as may exist is limited by the provision requiring pleadings to be verified by oath,[29] nor can a defendant rely upon two defenses which are absolutely inconsistent with each other, the test of inconsistency being whether the proof of one necessarily disproves the other.[30] It is no test of inconsistency that if one is proved the other is unnecessary.[31] In

426; Derby *v.* Gallup, 5 Minn. 119; Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Grier Commission Co. *v.* Dockstader, 47 Mo. App. 42; Shechan, etc., Transp. Co. *v.* Sims, 36 Mo. App. 224.

29. Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805; Pavey *v.* Pavey, 30 Ohio St. 600; Citizens' Bank *v.* Closson, 29 Ohio St. 78; Burnham *v.* Call, 2 Utah 433.

Uncertainty as to proper defense.— When, from the nature of the case, it is rendered uncertain which of two grounds of defense is the true and proper one, it is competent for defendant, in his answer, to set them both up, provided they will admit of being stated in such form that the answer can be sworn to without falsehood, and in good faith. Citizens' Bank *v.* Closson, 29 Ohio St. 78.

30. *Idaho.*— Murphy *v.* Russell, 8 Ida. 133, 67 Pac. 421.

Kansas.— De Lissa *v.* Fuller Coal, etc., Co., 59 Kan. 319, 52 Pac. 886.

Kentucky.—Smith *v.* Doherty, 109 Ky. 616, 60 S. W. 380, 22 Ky. L. Rep. 1238; Robinson *v.* Hill, 66 S. W. 623, 23 Ky. L. Rep. 2095.

Minnesota.— Rees *v.* Storms, 101 Minn. 381, 112 N. W. 419; Steenerson *v.* Waterbury, 52 Minn. 211, 53 N. W. 1146; Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454; Gammon *v.* Ganfield, 42 Minn. 368, 44 N. W. 125.

Missouri.— Cohn *v.* Lehman, 93 Mo. 574, 6 S. W. 267; Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Grier Commission Co. *v.* Dockstader, 47 Mo. App. 42; McCormick *v.* Kaye, 41 Mo. App. 263; Keane *v.* Kyne, 2 Mo. App. 317.

Nebraska.— Western Travelers' Acc. Assoc. *v.* Tomson, 72 Nebr. 661, 101 N. W. 341, 103 N. W. 695, 105 N. W. 293; Oakes *v.* Ziemer, 61 Nebr. 6, 84 N. W. 409; Cate *v.* Hutchinson, 58 Nebr. 232, 78 N. W. 500; Columbia Nat. Bank *v.* German Nat. Bank, 56 Nebr. 803, 77 N. W. 346; Home F. Ins. Co. *v.* Decker, 55 Nebr. 346, 75 N. W. 841; People's Nat. Bank *v.* Geisthardt, 55 Nebr. 232, 75 N. W. 582; Blodgett *v.* McMurtry, 39 Nebr. 210, 57 N. W. 985.

Nevada.— Clarke *v.* Lyon County, 7 Nev. 75.

Ohio.— Pavey *v.* Pavey, 30 Ohio St. 600; Citizens' Bank *v.* Closson, 29 Ohio St. 78. But inconsistent defenses are now prohibited in Ohio by statute. Bates St. (1903) § 5067.

Oregon.— Fleishman *v.* Meyer, 46 Oreg. 267, 80 Pac. 209; Randall *v.* Simmons, 40 Oreg. 554, 67 Pac. 513; Veasey *v.* Humphreys, 27 Oreg. 515, 41 Pac. 8; Snodgrass *v.* Andross, 19 Oreg. 236, 23 Pac. 969. See also Hall *v.* Austin, 11 Fed. Cas. No. 5,925, Deady 104.

South Dakota.— Lawrence *v.* Peck, 3 S. D. 645, 54 N. W. 808.

Utah.— Burnham *v.* Call, 2 Utah 433.

Vermont.— McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

Washington.— Irwin *v.* Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849; Irwin *v.* Holbrook, 32 Wash. 349, 73 Pac. 360; Lord *v.* Horr, 30 Wash. 477, 71 Pac. 23; Lamberton *v.* Shannon, 13 Wash. 404, 43 Pac. 336; Allen *v.* Olympia Light, etc., Co., 13 Wash. 307, 43 Pac. 55; Seattle Nat. Bank *v.* Carter, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177.

See 39 Cent. Dig. tit. "Pleading," § 189.

In Louisiana inconsistent or contradictory pleas alone are forbidden. Citizens' Bank *v.* Benachi, 38 La. Ann. 376; Northern Bank *v.* Pointe Coupee Police Jury, 25 La. Ann. 185; Elmore *v.* Robinson, 18 La. Ann. 651; Vavasseur *v.* Bayou, 11 Mart. 639; Nagel *v.* Mignot, 8 Mart. 488. See Andrews *v.* Hensler, 6 Wall. (U. S.) 254, 18 L. ed. 737.

An admission of a paragraph of a complaint is not a defense within the rule against inconsistent defenses. Irwin *v.* Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849.

Defenses held consistent.— The following defenses have been held not to be inconsistent: Two wholly unrelated affirmative defenses. Horton *v.* Driskell, 13 Wyo. 66, 77 Pac. 354. Payment and the statute of limitations. Looney *v.* Levy, 35 La. Ann. 1012; Colley *v.* Latourette, 7 La. Ann. 222; Conway *v.* Wharton, 13 Minn. 158. Payment and want of consideration. Myles *v.* Miller, 4 Mart. N. S. (La.) 492. Want of consideration and failure of consideration. Sere *v.* Darby, 118 La. 619, 43 So. 255. Usury, extension of time, and payment. Shed *v.* Augustine, 14 Kan. 282. Two different breaches of warranty. Gammon *v.* Ganfield, 42 Minn. 368, 44 N. W. 125. Breach of warranty and settlement. Robinson *v.* Hill, 66 S. W. 623, 23 Ky. L. Rep. 2095. Wagering contract and counter-claim. Grier Commission Co. *v.* Dockstader, 47 Mo. App. 42. Admission of rent due and counter-claim for repairs made. Hausman *v.* Mulheran, 68 Minn. 48, 70 N. W. 866. In a suit for reformation, that the deed expressed the contract and that there was a mutual mistake entitling defendant to rescind. Lord *v.* Horr, 30 Wash. 477, 71 Pac. 23. Failure to furnish proofs of loss and that plaintiff caused the premises to be burned. Home F. Ins. Co. *v.* Decker, 55 Nebr. 346, 75 N. W. 841. Failure of consideration and payment. Phillips *v.* W. T. Adams Mach. Co., 52 La. Ann. 442, 27 So. 65.

Defenses held inconsistent.— The following defenses have been held to be inconsistent: Accidental shooting and shooting in self-defense. Hollingsworth *v.* Warnock, 112 Ky. 96, 65 S. W. 163, 23 Ky. L. Rep. 1395.

31. Rees *v.* Storms, 101 Minn. 381, 112 N. W. 419; Gammon *v.* Ganfield, 42 Minn. 368, 44 N. W. 125.

many of the cases the decision of the question has been made to turn, not on the right to plead inconsistent defenses, but on the question whether the distinct defenses pleaded are in fact necessarily inconsistent.[32] And even in those states allowing inconsistent defenses to be pleaded, it is doubtful whether a defendant would be allowed to plead and rely on two defenses so inconsistent that if one is true the other must be false.[33] The proper remedy for inconsistent defenses, where they are not allowable, is a motion to strike,[34] or a motion to elect.[35] If no motion is made the objection will be deemed waived.[36]

(B) *Denials and Affirmative Defenses.* Unless forbidden by statute,[37] answers both in denial and in confession and avoidance of the cause of action may be filed together, and both may be relied upon at the same time, and one may not be used to destroy the effect of the other, so long as they are set forth in separate paragraphs.[38] In some jurisdictions, however, denials and affirmative defenses will be allowed to be filed together only when they are not inconsistent, that is, so contradictory that one of them must necessarily be false.[39] Where there is only a seeming and logical inconsistency which arises merely from a denial and a plea in confession and avoidance, such defenses are not held to be incon-

32. See cases cited *supra*, note 30.

33. See Seattle Nat. Bank *v.* Carter, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177; and cases cited *supra*, note 30.

34. See *infra*, XII, C, 1, c, (XII).

35. See *infra*, XII, E, 3.

36. See *infra*, XIV, B, 2.

37. See the cases cited *infra*, this note.

In Canada, under art. 202, Code of Procedure, a general denial of all the allegations of the declaration exeludes any other defense. Chapleau *v.* St. Louis, 20 Quebec Super. Ct. 238; MeLeod *v.* Montreal St. R. Co., 20 Quebec Super. Ct. 8; Rutherford *v.* Macy, 4 Quebec Pr. 326; Gagné *v.* Charpentier, 2 Quebec Pr. 45. A special denial of all the allegations of a declaration amounts to a general denial within this rule. Mallette *v.* Aubrain, 7 Quebec Pr. 390; Denault *v.* Coulson, 2 Quebec Pr. 68; Laprairie Pressed Briek, etc., Co. *v.* Picard, 2 Quebec Pr. 44. *Contra*, Beaulac *v.* Lupien, 21 Quebec Super. Ct. 216. The denial of some, but not of all, the allegations of the deelaration does not exclude any other defense. Palliser *v.* Duff, 5 Quebec Pr. 7; Molleur *v.* Marchand, 2 Quebec Pr. 405. In certain cases a denial in the nature of a general denial may be accompanied by a speeial plea. Huot *v.* Doucet, 3 Quebec Pr. 137; Martel *v.* Martel, 2 Quebec Pr. 11.

38. *Alabama.*— Lehman *v.* Shiver, 129 Ala. 318, 29 So. 698.

Indiana.— Fndge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; Smelser *v.* Wayne, etc., Straight Line Turnpike Co., 82 Ind. 417; Weston *v.* Lumley, 33 Ind. 486.

Iowa.— Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 973; Quigley *v.* Merritt, 11 Iowa 147.

New York.— Sehlesinger *v.* Wise, 106 N. Y. App. Div. 587, 94 N. Y. Suppl. 718, 720, 721; Woods *v.* Reiss, 78 Hun 78, 29 N. Y. Suppl. 263; Taylor *v.* Riehards, 9 Bosw. 679; Burley *v.* German American Bank, 5 N. Y. Civ. Proe. 172; Hollenbeek *v.* Clow, 9 How. Pr. 289.

North Carolina.— Reed *v.* Reed, 93 N. C. 462.

Texas.— Beirne *v.* Kelsey, 21 Tex. 190; Hurt *v.* Blackburn, 20 Tex. 601; Hillebrant *v.* Booth, 7 Tex. 499. *Contra*, MeGregor *v.* Sima, 12 Tex. Civ. App. 105, 33 S. W. 1014.

United States.— Cottier *v.* Stimson, 18 Fed. 689, 9 Sawy. 435.

See 39 Cent. Dig. tit. "Pleading," § 190.

39. *Kansas.*— Leavenworth Light, etc., Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365; De Lissa *v.* Fuller Coal, etc., Co., 59 Kan. 319, 52 Pac. 886; Bird, etc., Map Co. *v.* Jones, 27 Kan. 177.

Kentucky.— Smith *v.* Doherty, 109 Ky. 616, 60 S. W. 380, 22 Ky. L. Rep. 1238.

Minnesota.— Derby *v.* Gallup, 5 Minn. 119.

Missouri.— Fisher *v.* Stevens, 143 Mo. 181, 44 S. W. 799; Ledbetter *v.* Ledbetter, 88 Mo. 60; Darrett *v.* Donnelly, 38 Mo. 492; Adams *v.* Trigg, 37 Mo. 141; Coble *v.* McDaniel, 33 Mo. 363; MeCord *v.* Doniphan Braneh R. Co., 21 Mo. App. 92.

Nebraska.— York County Sehool-Dist. No. 27 *v.* Holmes, 16 Nebr. 486, 20 N. W. 721.

Oregon.— Dutro *v.* Todd, (1907) 91 Pac. 459; Randall *v.* Simmons, 40 Oreg. 554, 67 Pac. 513; Veasey *v.* Humphreys, 27 Oreg. 515, 41 Pac. 8; Snodgrass *v.* Andross, 19 Oreg. 236, 23 Pac. 969; MeDonald *v.* American Mortg. Co., 17 Oreg. 626, 21 Pac. 883.

Washington.— Brown *v.* Porter, 7 Wash. 327, 34 Pac. 1105.

See 39 Cent. Dig. tit. "Pleading," § 190.

Defenses not inconsistent.— The following have been held not to be inconsistent: General denial and payment. Steenerson *v.* Waterbury, 52 Minn. 211, 53 N. W. 1146; Gates *v.* Avery, 112 Wis. 271, 87 N. W. 1091; Lemoine *v.* La Caisse Générale, 23 Quebec Super. Ct. 390; Pratt *v.* Wark, 2 Manitoba 213. But see Davis *v.* Davis, 17 La. 259; Judiee *v.* Brent, 6 Mart. N. S. (La.) 226; Naba *v.* Carlin, 3 Mart. N. S. (La.) 373; Ferguson *v.* Thomas, 3 Mart. N. S. (La.) 75; Dean *v.* Jaekson, 1 Mart. N. S. (La.) 127; York County School-Dist. No. 27 *v.* Holmes, 16 Nebr. 486, 20 N. W. 721. See also Robinson *v.* Landrum, 10 La. Ann. 539.

sistent.[40] An affirmative defense, when joined with a general denial, may be deemed a plea in avoidance simply, without confession,[41] or the confession may be considered as made for the purposes of the defense only, like the confession implied in a demurrer, but not an absolute confession of the truth of the facts alleged.[42] A defendant cannot, however, deny a fact in one part of an answer, and then in an affirmative defense expressly admit that same fact, and still claim the benefit of the denial.[43] But he may so adapt his pleadings as to meet the possible conditions and contingencies of the case that his opponent may prove.[44] Thus

Denial and payment into court. Berdan *v.* Greenwood, 3 Ex. D. 251, 47 L. J. Exch. 628, 39 L. T. Rep. N. S. 223, 26 Wkly. Rep. 902. But see Spurr *v.* Hall, 2 Q. B. D. 615, 46 L. J. Q. B. 693, 37 L. T. Rep. N. S. 313, 26 Wkly. Rep. 78. Denial of value of services and payment. Collins *v.* Fenley, 53 S. W. 667, 21 Ky. L. Rep. 958. General denial and contributory negligence. Leavenworth Light, etc., Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365; Millan *v.* Southern R. Co., 54 S. C. 485, 32 S. E. 539; Pugh *v.* Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547, 689. General denial and justification. Rhine *v.* Montgomery, 50 Mo. 566; McCormick *v.* Kaye, 41 Mo. App. 263; Hackley *v.* Ogmun, 10 How. Pr. (N. Y.) 44; Hollenback *v.* Clow, 9 How. Pr. (N. Y.) 289; Kelly *v.* Craig, 9 Humphr. (Tenn.) 215; McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438; Purcell *v.* Welsh, 5 Ont. Pr. 29. *Contra*, Gambill *v.* Fuqua, 148 Ala. 448, 42 So. 735; Turnbow *v.* Wimberly, 106 La. 259, 30 So. 747; Harrison *v.* Jurgielewiez, 28 La. Ann. 238; Betz *v.* Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207; Schneider *v.* Schultz, 4 Sandf. (N. Y.) 664; Roe *v.* Rogers, 8 How. Pr. (N. Y.) 356. Denial of execution and plea of no consideration. Paducah First Nat. Bank *v.* Wisdom, 111 Ky. 135, 63 S. W. 461, 23 Ky. L. Rep. 530; Smith *v.* Doherty, 109 Ky. 616, 60 S. W. 380, 22 Ky. L. Rep. 1238; Spencer *v.* Shakers Soc., 64 S. W. 468, 23 Ky. L. Rep. 854; Durnford *v.* Ayme, 3 Mart. N. S. (La.) 270; Booco *v.* Mansfield, 66 Ohio St. 121, 64 N. E. 115; Pavey *v.* Pavey, 30 Ohio St. 600; Veasey *v.* Humphreys, 27 Oreg. 515, 41 Pac. 8. *Compare* Brann *v.* Brann, 44 S. W. 424, 19 Ky. L. Rep. 1814. General denial and statute of limitations. Willson *v.* Cleaveland, 30 Cal. 192; Macarty *v.* Bureau, 7 Rob. (La.) 467; Shewell *v.* Raquet, 17 La. 459; Ingram *v.* Croft, 7 La. 82; May *v.* Burk, 80 Mo. 675; McCormick *v.* Kaye, 41 Mo. App. 263; Ostrom *v.* Bixby, 9 How. Pr. (N. Y.) 57; Lawrence *v.* Peck, 3 S. D. 645, 54 N. W. 808; Beirne *v.* Kelsey, 21 Tex. 190. General denial and general release. Kellogg *v.* Baker, 15 Abb. Pr. (N. Y.) 286. General denial and release in bankruptcy. Ruff *v.* Milner, 92 Mo. App. 620. General denial and estoppel. Shafer *v.* Stonebraker, 4 Gill & J. (Md.) 345; Blodgett *v.* McMurtry, 39 Nebr. 210, 57 N. W. 985. Denial of plaintiff's title and license. Booth *v.* Sherwood, 12 Minn. 426. Denial of plaintiff's title and allegation of title in defendants and also that defendants took possession as administrators. Bryant *v.* Bryant, 2 Rob. (N. Y.) 612.

Defenses held inconsistent.— The following have been held to be inconsistent: Denial of execution and allegation that execution was induced by fraud. Vette *v.* Evans, 111 Mo. App. 588, 86 S. W. 504; Marx *v.* Gross, 58 N. Y. Super. Ct. 221, 9 N. Y. Suppl. 719; Baines *v.* Coos Bay Nav. Co., 41 Oreg. 135, 68 Pac. 397. *Contra*, Bird, etc., Map Co. *v.* Jones, 27 Kan. 177; Glencoe Bank *v.* Cain, 89 Minn. 473, 95 N. W. 308. General denial and tender. Hatch *v.* Thompson, 67 Conn. 74, 34 Atl. 770. But see Clarke *v.* Lyon County, 7 Nev. 75. Denial that services were rendered and allegation that they were unskilfully performed. Black *v.* Holloway, 41 S. W. 576, 19 Ky. L. Rep. 694. General denial and special answer denying plaintiff's capacity to sue. Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89. Denial of alleged agreement and defense that agreement made under mistake. Berry *v.* Evans, 89 S. W. 12, 28 Ky. L. Rep. 22. That policy was not in force and want of notice of loss. Omaha F. Ins. Co. *v.* Dierks, 43 Nebr. 473, 61 N. W. 740.

40. Smith *v.* Doherty, 109 Ky. 616, 60 S. W. 380, 22 Ky. L. Rep. 1238; Cohn *v.* Lehman, 93 Mo. 574, 6 S. W. 267; Pavey *v.* Pavey, 30 Ohio St. 600; Irwin *v.* Holbrook, 32 Wash. 349, 73 Pac. 360.

41. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Leavenworth Light, etc., Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365.

42. Bell *v.* Brown, 22 Cal. 671; Ledbetter *v.* Ledbetter, 88 Mo. 60, 61 (where the court said: "Ordinarily, a statement of new facts showing a non-liability, impliedly at least admits a liability, but for such new facts. Hence, it is often said an answer setting up new matter by way of defence should confess and avoid the plaintiff's cause of action. . . . But the confession is not necessarily an absolute one. It need not be made in terms. It is often only implied from the nature of the defence, or assumed for the purpose of the particular defence"); Pavey *v.* Pavey, 30 Ohio St. 600; Beirne *v.* Kelsey, 21 Tex. 190.

43. Fernside *v.* Rood, 73 Conn. 83, 46 Atl. 275; Reiff *v.* Mullholland, 65 Ohio St. 178, 62 N. E. 124; Veasey *v.* Humphreys, 27 Oreg. 515, 41 Pac. 8; Corbitt *v.* Harrington, 14 Wash. 197, 44 Pac. 132; Seattle Nat. Bank *v.* Carter, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177.

44. Leavenworth Light, etc., Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365; Bluett *v.* Wilce, 43 Wash. 492, 86 Pac. 853, holding that the fact that defendant recognized that

it has been held that a defendant may deny a fact, and in a separate defense allege that if the fact previously denied is true, then certain other facts are true which avoid its legal effect.[45]

e. Joinder of Defenses and Cross Demands. A counter-claim or other cross demand may be pleaded in the same plea or answer with other defenses, but it must be separate and distinct. A single plea cannot be both an answer in bar and a cross demand.[46] But it has been held that a cross bill in equity cannot be filed in connection with a full legal defense in an action at law.[47] A cross demand is not evidence against defendant upon the trial of a defense or *vice versa*,[48] nor will it operate as a waiver of the defense.[49] A plea in bar to a part of plaintiff's demand with a set-off to the remainder is good.[50] The rules respecting the pleading of cross demands and defenses which are inconsistent appear to be the same as the rules respecting inconsistent defenses generally.[51]

f. General Issue and Pleas Amounting Thereto. A plea amounting to the general issue is a plea which is in effect a denial of matter which plaintiff alleges or must prove on the general issue to sustain his action.[52] Pleas of this kind

the court might possibly place a different construction upon the transaction than he himself placed upon it, and that he desired to protect his rights in case such construction was placed upon the transaction by the court, did not constitute an inconsistent defense.

45. Urquhart *v.* Powell, 54 Ga. 29; Willard *v.* Giles, 24 Wis. 319.

46. *California.*— Harrison *v.* McCormick, (1885) 9 Pac. 114; O'Connor *v.* Frasher, 53 Cal. 435.

Indiana.— Rausch *v.* United Brethren Christ Church, 107 Ind. 1, 8 N. E. 25; Conger *v.* Miller, 104 Ind. 592, 4 N. E. 300; Stockton *v.* Stockton, 73 Ind. 510; Blakely *v.* Boruff, 71 Ind. 93; McCardle *v.* Barricklow, 68 Ind. 356; Hadley *v.* Prather, 64 Ind. 137; Wilson *v.* Carpenter, 62 Ind. 495; Schee *v.* McQuilken, 59 Ind. 269; Indiana State Bd. of Agriculture *v.* Gray, 54 Ind. 91; Campbell *v.* Routt, 42 Ind. 410; Stout *v.* Harlem, 20 Ind. App. 200, 50 N. E. 492; Huber Mfg. Co. *v.* Busey, 16 Ind. App. 410, 43 N. E. 967.

Iowa.— Bennett *v.* Lutz, 119 Iowa 215, 93 N. W. 288; Pike *v.* King, 16 Iowa 49; Freeman *v.* Fleming, 5 Iowa 460; Bowen *v.* Hale, 4 Iowa 430.

Louisiana.— Powell *v.* Graves, 14 La. Ann. 860.

Montana.— Meyendorf *v.* Frohner, 3 Mont. 282.

Oregon.— Le Clare *v.* Thibault, 41 Oreg. 601, 69 Pac. 552; Farmers,' etc., Nat. Bank *v.* Hunter, 35 Oreg. 188, 57 Pac. 424.

Texas.— Morris *v.* Housley, (Civ. App. 1896) 34 S. W. 659.

Washington.— Davis *v.* Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526.

Wisconsin.— See J. H. Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231.

United States.— Hall *v.* Coppell, 7 Wall. 542, 19 L. ed. 244; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495.

Canada.— Williamson *v.* Dunne, 8 Can. L. J. 110; Elliott *v.* Armstrong, 6 Manitoba 255; Atkins *v.* Clark, 6 U. C. Q. B. O. S. 33.

See 39 Cent. Dig. tit. "Pleading," § 188.

47. Scheland *v.* Erpelding, 6 Oreg. 258; Dolph *v.* Barney, 5 Oreg. 191.

48. Morris *v.* Henderson, 37 Miss. 492.

49. Mull *v.* Walker, 100 N. C. 46, 6 S. E. 685.

50. Taylor *v.* Weister, 1 Litt. (Ky.) 355.

51. *California.*— Meyers *v.* Merillion, 118 Cal. 352, 50 Pac. 662.

Iowa.— Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510; Baird *v.* Morford, 29 Iowa 531.

Kansas.— Ferguson *v.* Prince, 2 Kan. App. 7, 41 Pac. 988.

Ohio.— Hooven, etc., Co. *v.* National Cordage Co., 11 Ohio Dec. (Reprint) 434, 27 Cinc. L. Bul. 18.

United States.— Magowan *v.* St. Louis R. Supplies Mfg. Co., 16 Fed. 738, 5 McCrary 253.

But see Shewalter *v.* Ford, 34 Miss. 417, 419. The Mississippi rule is that inconsistent defenses may be pleaded, but in this case the court said: "Under no rule of practice, known to our laws, can a defendant be permitted, in a case like this, to deny, *in toto*, the plaintiff's right of action, and, at the same time, to set up a substantive and independent cause of action, inconsistent with the plaintiff's claim, and involving the issue, of whether the plaintiff's demand is well-founded or not, and demand judgment, upon the ground that the plaintiff's claim is ill-founded." See also Steele *v.* Etheridge, 15 Minn. 501; Le Clare *v.* Thibault, 41 Oreg. 601, 69 Pac. 552.

52. *Illinois.*— Strader *v.* Snyder, 67 Ill. 404; Johnson *v.* Ewing Female University, 35 Ill. 518; Knoebel *v.* Kircher, 33 Ill. 308.

Indiana.— Page *v.* Prentice, 7 Blackf. 322.

New York.— Collet *v.* Flinn, 5 Cow. 466.

Virginia.— Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. 447; Maggort *v.* Hansbarger, 8 Leigh 532.

England.— Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562; Solly *v.* Neish, 2 C. M. & R. 355.

A plea which gives color, express or implied, to plaintiff's claim can never be said to amount to the general issue. Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759.

being in effect argumentative denials tend to troublesome prolixity in pleading and are bad.[53] A special plea alleging facts admissible in evidence under the general issue does not necessarily amount to the general issue, however,[54] and matter admissible in evidence under the general issue may sometimes be specially pleaded in addition to the general issue,[55] so the mere fact that it is admissible

Want of consideration, alleged in a special plea, amounts to the general issue. Hatch *v.* Hyde, 14 Vt. 25, 39 Am. Dec. 203.

53. *Alabama.*— Dunham *v.* Ridgel, 2 Stew. & P. 402.

Florida.—Atlantic Coast Line R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318; Peacock *v.* Feaster, 51 Fla. 269, 40 So. 74; Hubbard *v.* Anderson, 50 Fla. 219, 39 So. 107.

Illinois.— Strader *v.* Snyder, 67 Ill. 404; Knoebel *v.* Kircher, 33 Ill. 308; Abrams *v.* Pomeroy, 13 Ill. 133; Cook *v.* Scott, 6 Ill. 333; Travelers' Preferred Acc. Assoc. *v.* Moore, 58 Ill. App. 634.

Indiana.— Payton *v.* Secur, 4 Ind. 645.

Maryland.— Hagerstown *v.* Klotz, 93 Md. 437, 49 Atl. 836, 86 Am. St. Rep. 437, 54 L. R. A. 940; Spencer *v.* Patten, 84 Md. 414, 35 Atl. 1097; Miller *v.* Miller, 41 Md. 623.

Massachusetts.— Gardner *v.* Webber, 17 Pick. 407; Thayer *v.* Brewer, 15 Pick. 217.

Mississippi.— Green *v.* McCarroll, 24 Miss. 427; Moore *v.* Mickell, Walk. 231.

New York.— Richards *v.* Cuyler, 2 Hall 222; Collet *v.* Flinn, 5 Cow. 466; Kennedy *v.* Strong, 10 Johns. 289.

Ohio.—Armstrong *v.* Clark, 17 Ohio 495; State *v.* Daily, 14 Ohio 91; Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1.

Vermont.— Kimball *v.* Boston, etc., R. Co., 55 Vt. 95; Blood *v.* Adams, 33 Vt. 52.

Virginia.— Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. 447.

West Virginia.— Richards *v.* Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437.

United States.— Dibble *v.* Duncan, 7 Fed. Cas. No. 3,880, 2 McLean 553; Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72; Van Avery *v.* Phœnix Ins. Co., 28 Fed. Cas. No. 16,829, 5 Biss. 193.

England.— Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562; Morgan *v.* Pebrer, 3 Bing. N. Cas. 457, 3 Hodges 3, 6 L. J. C. P. 75, 4 Scott 230, 32 E. C. L. 215; Solly *v.* Neish, 2 C. M. & R. 355; Warner *v.* Wainsford, Hob. 127, 80 Eng. Reprint 276; Maude *v.* Nesham, 3 M. & W. 502; Regil *v.* Green, 1 M. & W. 328.

Canada.— Truax *v.* Christy, Draper (U. C.) 213; Switzer *v.* Ballinger, 1 U. C. C. P. 338; Hunter *v.* Borst, 13 U. C. Q. B. 210; Nellis *v.* Wilkes, 1 U. C. Q. B. 46; Green *v.* Hamilton, 6 U. C. Q. B. O. S. 79.

See 39 Cent. Dig. tit. "Pleading," § 284.

Although not amounting to the general issue in form a plea which amounts to it in effect is bad. Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447.

Reasons for holding this kind of plea bad have been given as follows: Because it tends to confusion and uncertainty (Cincinnati, etc., R. Co. *v.* Ward, 5 Ohio Dec. (Reprint) 391, 5 Am. L. Rec. 372); useless prolixity (Bennett *v.* Cody, 35 N. Brunsw. 277); unnecessary expense and troublesome prolixity (Kennedy *v.* Strong, 10 Johns. (N. Y.) 289); frivolous (Moore *v.* Mickell, Walk. (Miss.) 231); and argumentative instead of a direct denial (Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562).

Under statutes permitting defendant to enter several pleas it has been held that a plea may be allowed, although it amount to the general issue. Hopkinson *v.* Shelton, 37 Ala. 306, construing Code, § 2237, Pamphl. Acts (1853–1854), p. 60. In Mississippi, however, under a similar statutory provision (Rev. Code, p. 16, § 49) a plea amounting to the general issue has been held bad even though the statute allows defendant to plead as many several matters as he may think necessary to his defense. Moore *v.* Mickell, Walk. (Miss.) 231.

Demurrer to plea amounting to general issue see *infra*, VI, F, 3, b.

54. *Indiana.*— Page *v.* Prentice, 7 Blackf. 322.

New Jersey.— Hagan *v.* Jersey, etc., R. Co., (1899) 43 Atl. 671; Dewees *v.* Manhattan Ins. Co., 34 N. J. L. 244.

Ohio.— Saunders *v.* Stotts, 6 Ohio 380, 27 Am. Dec. 263; Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 1 West. L. Bul. 1.

Vermont.— Hatch *v.* Hyde, 14 Vt. 25, 39 Am. Dec. 203.

Virginia.— Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. 447.

England.— Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562.

See 39 Cent. Dig. tit. "Pleading," § 284.

The two pleas distinguished.— There is a great distinction between the case of a plea which amounts to the general issue and a plea that discloses matter which may be given in evidence under the general issue. Under the latter various things may be given in evidence which may also be proved under the general issue, but it is incorrect to say that these amount to the general issue, for they only defeat the cause of action; but what, correctly, may be said to amount to the general issue is that for some reason specially stated the cause of action does not exist in the form in which it is alleged. Page *v.* Prentice, 7 Blackf. (Ind.) 322 [*quoting* and *approving* decision of Lord Denman in Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562]. This distinction is discussed fully also in Potter *v.* Stanley, 1 D. Chipm. (Vt.) 243.

55. Hagan *v.* Jersey City, etc., R. Co., (N. J. 1899) 43 Atl. 671; Ridenour *v.* Mayo, 29 Ohio St. 138; Dibble *v.* Duncan, 7 Fed. Cas. No. 3,880, 2 McLean 553. See also Hopkinson *v.* Shelton, 37 Ala. 306; Johns *v.* Bolton, 12 Pa. St. 339.

under the general issue does not make the special plea bad, unless it amount to the general issue.[56]

g. Joinder of Pleas in Abatement and Bar — (i) *At Common Law.* Under the common-law practice it is generally held that pleas in abatement and pleas in bar cannot be joined in the same answer, since the former are waived by the latter.[57] But a plea in abatement, which would otherwise be waived, may be

Matter which may be specially pleaded.— The following matter may be specially pleaded, although admissible under the general issue: Matter in confession and avoidance (Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; Duvees *v.* Manhattan Ins. Co., 34 N. J. L. 244; Dibble *v.* Duncan, 7 Fed. Cas. No. 3,880, 2 McLean 553; Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562; Carr *v.* Hinchliff, 4 B. & C. 547, 7 D. & R. 42, 4 L. J. K. B. O. S. 5, 10 E. C. L. 697), fraud (Saunders *v.* Stotts, 6 Ohio 380, 27 Am. Dec. 263), usury (Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447; Maggort *v.* Hansbarger, 8 Leigh (Va.) 532; Barnard *v.* Saul, Str. 498), coverture (Baltimore, etc., R. Co. *v.* Polly, *supra*; Maggort *v.* Hansbarger, *supra*; Carr *v.* Hinchliff, *supra*; Hussey *v.* Jacob, 1 Ld. Raym. 87; James *v.* Fowks, 12 Mod. 101. 88 Eng. Reprint 1193), set-off (Hayselden *v.* Staff, *supra*; Carr *v.* Hinchliff, *supra*), infancy (Baltimore, etc., R. Co. *v.* Polly, *supra*; Maggort *v.* Hansbarger, *supra*; Dibble *v.* Duncan, 7 Fed. Cas. No. 3,880, 2 McLean 553; Carr *v.* Hinchliff, *supra*), accord and satisfaction (Dunham *v.* Riugel, 2 Stew. & P. (Ala.) 402; Page *v.* Prentice, 7 Blackf. (Ind.) 322; Saunders *v.* Stotts, 6 Ohio 380, 27 Am. Dec. 263; Baltimore, etc., R. Co. *v.* Polly, *supra*; Dibble *v.* Duncan, *supra*; Paramore *v.* Johnson, 1 Ld. Raym. 566), payment (Page *v.* Prentice, 7 Blackf. (Ind.) 322; Saunders *v.* Stotts, 6 Ohio 380, 27 Am. Dec. 263; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447; Dibble *v.* Duncan, *supra*; Vanhatton *v.* Morse, 2 Ld. Raym. 787; Brown *v.* Cornish, 1 Ld. Raym. 217), and gaming (Baltimore, etc., R. Co. *v.* Polly, *supra*; Hussey *v.* Jacob, *supra*).

That it tends to narrow the issues is the reason sometimes given for allowing special pleas in addition to the general issue. Ridenour *v.* Mayo, 29 Ohio St. 138; Dibble *v.* Duncan, 7 Fed. Cas. No. 3,880, 2 McLean 553.

The special plea must give color, express or implied, to plaintiff's claim. Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447; Dibble *v.* Duncan, 7 Fed. Cas. No. 3,880, 2 McLean 553; Carr *v.* Hinchliff, 4 B. & C. 547, 7 D. & R. 42, 4 L. J. K. B. O. S. 5, 10 E. C. L. 697.

Matter of fact or of law.— The distinction sometimes laid down is that mere matter of fact which may be given in evidence under the general issue should not be pleaded specially, but matter of law, or matter of fact mixed with matter of law, although they may be given in evidence under the general issue, may also be pleaded specially (Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 1 West. L. Bul. 1; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447; Carr *v.* Hinchliff, 4 B. & C. 547, 7 D. & R. 42, 4 L. J. K. B. O. S. 5, 10 E. C. L. 697; Hussey *v.* Jacob, 1 Ld. Raym. 87), for otherwise plaintiff "should be obliged to commit a point of law to a jury who is ignorant of it, which would be absurd" (Hussey *v.* Jacob, *supra*).

Demurrer to plea see *infra*, VI, F, 3, b.

Motion to strike plea of matter admissible under general issue see *infra*, XII, C, 1, c, (XI).

56. *Maryland.*— Spencer *v.* Patten, 84 Md. 414, 35 Atl. 1097; Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759.

New Jersey.— Hagan *v.* Jersey City, etc., R. Co., (1899) 43 Atl. 671.

Ohio.— Saunders *v.* Stotts, 6 Ohio 380, 27 Am. Dec. 263.

Virginia.— Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320; Maggort *v.* Hansbarger, 8 Leigh 532. See also Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805.

United States.— Dibble *v.* Duncan, 7 Fed. Cas. No. 3,880, 2 McLean 553.

England.— Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562; Carr *v.* Hinchliff, 4 B. & C. 547, 7 D. & R. 42, 4 L. J. K. B. O. S. 5, 10 E. C. L. 697.

In Colorado, under the code, allowing defendant to set forth by answer as many defenses as he may have, it is no objection to a special defense that the matter it covers may be given under the general issue. Stratton *v.* Dines, 126 Fed. 968 [*affirmed* in 135 Fed. 449, 68 C. C. A. 161].

57. *Alabama.*— Hart *v.* Turk, 15 Ala. 675; Cleveland *v.* Chandler, 3 Stew. 489.

Arkansas.— See Johnson *v.* Killian, 6 Ark. 172.

District of Columbia.— Robinson *v.* Parker, 11 App. Cas. 132.

Illinois.— Green *v.* Shaw, 66 Ill. App. 74; Lowry *v.* Kinsey, 26 Ill. App. 309. But it has been held that in an action against several defendants as copartners, a plea in abatement is not waived by filing at the same time a plea of *non assumpsit.* Stillson *v.* Hill, 18 Ill. 262.

Maryland.— Glenn *v.* Williams, 60 Md. 93; Cruzen *v.* McKaig, 57 Md. 454; Deheaulme *v.* Boisneuf, 4 Harr. & M. 413.

Massachusetts.—Morton *v.* Sweetser, 12 Allen 134; Pratt *v.* Sawyer, 4 Gray 84. But in the case of O'Laughlin *v.* Bird, 128 Mass. 600, it was held that a plea in abatement and a plea to the merits, if filed in the proper order, may both appear on the same paper, and earlier cases, so far as they opposed this view, were disapproved.

preserved by an express reservation of the benefit of the plea in abatement contained in the plea in bar.[58] Under a statute providing that defendant may plead both in abatement and in bar at the same time, and that the plea in bar is not a waiver of the plea in abatement, defendant may interpose a plea in abatement independently, and in case it is overruled file a plea in bar.[59]

(II) *UNDER THE CODES.* In the code states, on the contrary, it is almost universally held that the statute allowing the joinder of defenses is broad enough to permit the joinder of pleas in abatement and in bar.[60] The code rule is followed in some other states.[61] Where they may be filed at the same time, the plea in abatement must be tried first, and when defendant goes to trial without objection on the plea in bar he waives the plea in abatement.[62] But even under the code, the same defense cannot at the same time be pleaded both in abatement and in bar.[63]

Mississippi.— Dean *v.* McKinstry, 2 Sm. & M. 213; Pearce *v.* Young, Walk. 259.

New Jersey.— Kerr *v.* Willetts, 48 N. J. L. 78, 2 Atl. 782.

Pennsylvania.— Lindsley *v.* Malone, 23 Pa. St. 24; Southern Bldg., etc., Assoc. *v.* Pennsylvania F. Ins. Co., 23 Pa. Super. Ct. 88; Smith *v.* Maryland Fidelity, etc., 21 Lanc. L. Rev. 321; Gallagher *v.* Thornley, 10 Wkly. Notes Cas. 189.

South Carolina.— Preston *v.* Simons, 1 Rich. 262.

Tennessee.— Southern R. Co. *v.* Brigman, 95 Tenn. 624, 32 S. W. 762; Douglass *v.* Belcher, 7 Yerg. 105.

United States.— Spencer *v.* Lapsley, 20 How. 264, 15 L. ed. 902; Marshall *v.* Otto, 59 Fed. 249; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277; Adams *v.* White, 1 Fed. Cas. No. 68, 2 Pittsb. 21; Dowell *v.* Cardwell, 7 Fed. Cas. No. 4,039, 4 Sawy. 217.

Canada.— Shore *v.* Green, 6 Manitoba 322; Mercer *v.* Cosman, 13 N. Brunsw. 240; Brown *v.* York County, 8 Ont. Pr. 139.

See 39 Cent. Dig. tit. "Pleading," § 186.

In Rhode Island it is held that pleas in abatement and in bar may be filed at the same time provided the latter be subsequent in order to the former. Hayden *v.* Stone, 13 R. I. 106; Gardner *v.* James, 5 R. I. 235.

In Michigan a plea in abatement may be filed with the general issue by rule of court. National Fraternity *v.* Wayne Cir. Judge, 127 Mich. 186, 86 N. W. 540.

In Louisiana the rule as stated in the text prevails. Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108; Mix *v.* Creditors, 39 La. Ann. 624, 2 So. 391; Tupery *v.* Edmondson, 32 La. Ann. 1146; Segrest *v.* Hood, 1 Rob. 108; McGuire *v.* Peck, 14 La. 187.

Waiver of plea in abatement see *infra*, IV, B, 6.

58. McConkey *v.* Peach Bottom Slate Co., 14 Pa. Co. Ct. 514.

59. Thach *v.* Continental Travellers' Mut. Acc. Assoc., 114 Tenn. 271, 87 S. W. 255.

60. *Arkansas.*— Trigg *v.* Ray, 64 Ark. 150, 41 S. W. 55; Union Guaranty, etc., Co. *v.* Craddock, 59 Ark. 593, 28 S. W. 375; Erb *v.* Perkins, 32 Ark. 428.

Minnesota.— Page *v.* Mitchell, 37 Minn. 368, 34 N. W. 896.

Missouri.— Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944; Meyer *v.* Phœnix Ins. Co., 184 Mo. 481, 83 S. W. 479 [*affirming* 92 Mo. App. 392, 69 S. W. 638]; Johnson *v.* Detrick, 152 Mo. 243, 53 S. W. 891; Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96; Byler *v.* Jones, 79 Mo. 261; Norvell *v.* Porter, 62 Mo. 309; McIntire *v.* Calhoun, 27 Mo. App. 513; Roberts *v.* State Ins. Co., 26 Mo. App. 92; Thompson *v.* Bronson, 17 Mo. App. 456. In Missouri there has been a curious fluctuation. In Rippstein *v.* St. Louis Mut. L. Ins. Co., 57 Mo. 86, and Fordyce *v.* Hathorn, 57 Mo. 120, it was held that a plea to the merits waived a dilatory plea. These two cases were expressly overruled in Little *v.* Harrington, 71 Mo. 390. But in Moody *v.* Deutsch, 85 Mo. 237, the old rule is restated, the overruled cases being cited, with no reference to Little *v.* Harrington, *supra*. Finally, in Cohn *v.* Lehman, 93 Mo. 574, 6 S. W. 267, Moody *v.* Deutsch, *supra*, was expressly disapproved. The later cases seem to consistently maintain this rule.

Nebraska.— Templin *v.* Kimsey, 74 Nebr. 614, 105 N. W. 89; Hurlburt *v.* Palmer, 39 Nebr. 158, 57 N. W. 1019.

New York.— Gardner *v.* Clark, 21 N. Y. 399 [*reversing* 6 How. Pr. 449]; Sweet *v.* Tuttle, 14 N. Y. 465; Bridge *v.* Payson, 5 Sandf. 210; Peck *v.* Kirtz, 15 N. Y. St. 598; Groshons *v.* Lyons, Code Rep. N. S. 348. The earlier decisions to the contrary, such as Monteith *v.* Cash, 1 E. D. Smith 412, and Van Buskirk *v.* Roberts, 14 How. Pr. 61 [*affirmed* in 27 How. Pr. 600 note] are no longer of authoritative force.

Ohio.— Allen *v.* Miller, 11 Ohio St. 374.

Wisconsin.— Hooker *v.* Green, 50 Wis. 271, 6 N. W. 816; Dutcher *v.* Dutcher, 39 Wis. 651; Freeman *v.* Carpenter, 17 Wis. 126.

See 39 Cent. Dig. tit. "Pleading," § 186.

Pleas must be good.— The authority to unite pleas in abatement and pleas in bar applies only to pleas that are good. Moffitt *v.* Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45.

61. National Fraternity *v.* Wayne Cir. Judge, 127 Mich. 186, 86 N. W. 540; Cincinnati, etc., R. Co. *v.* McCollum, 105 Tenn. 623, 59 S. W. 136; Hagood *v.* Dial, 43 Tex. 625.

62. Maupin *v.* Scottish Union, etc., Ins. Co., 53 W. Va. 557, 45 S. E. 1003.

63. Hooker *v.* Green, 50 Wis. 271, 6 N. W. 816.

A few code states hold to the common-law rule with regard to the joinder of pleas of this nature.[64]

h. Joinder of Pleas in Abatement. There is a difference in authority as to whether several pleas in abatement may be pleaded together, by reason of differences in the statutes authorizing joinder of pleas. In some jurisdictions joinder is permitted,[65] while in others it is refused.[66] It seems that at common law joinder was not permissible.[67]

8. Responsiveness — a. In General. A plea or answer must respond to the allegations of the declaration or complaint.[68] It is sufficient if it substantially answers the whole charge as laid in the declaration or so much of it as it purports to answer,[69] and insufficient if it does not.[70] If it denies, it must deny precisely what is alleged, and not some different fact.[71] If it sets up an affirmative defense, it must state facts which are related to the facts averred by plaintiff and which constitute a defense thereto.[72] A plea in bar which neither traverses nor

64. Elliott *v.* Kuzek, 2 Alaska 587; Brink *v.* Reid, 122 Ind. 257, 23 N. E. 770; Carpenter *v.* Mercantile Bank, 17 Ind. 253; Keller *v.* Miller, 17 Ind. 206; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89; Huntington Mfg. Co. *v.* Schofield, 28 Ind. App. 95, 62 N. E. 106; Oregon Cascade R. Co. *v.* Baily, 3 Oreg. 164; Oregon Cent. R. Co. *v.* Scoggin, 3 Oreg. 161; Hopwood *v.* Patterson, 2 Oreg. 49; Gager *v.* Harrison, 9 Fed. Cas. No. 5,171. In Kenyon *v.* Williams, 19 Ind. 44, 47, the court said: "Whatever may be the practice in New York, or elsewhere, of pleading in bar and abatement at the same time, the rule has been settled in this State, under the code, that, as at common law, a plea in bar is a waiver of matter in abatement. Matter of abatement can not be answered either after, or concurrently with, matter in bar." In the case of Thompson *v.* Greenwood, 28 Ind. 327, the earlier decisions sustaining the common-law rule were expressly overruled. But a statute was subsequently passed reinstating the old rule. Burns St. § 368. For cases under this statute see Carmien *v.* Cornell, 148 Ind. 83, 47 N. E. 216; Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466; Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; Midland R. Co. *v.* Stevenson, 6 Ind. App. 207, 33 N. E. 254.

65. James *v.* Dowell, 7 Sm. & M. (Miss.) 333; Pharis *v.* Conner, 3 Sm. & M. (Miss.) 87.

66. Culver *v.* Balch, 23 Vt. 618.

67. Stephen Pl. 276. But see 5 Dane Abr. 720, where the contrary is stated.

68. Straus *v.* American Publishers' Assoc., 96 N. Y. App. Div. 315, 89 N. Y. Suppl. 172; Ogdensburg *v.* Lovejoy, 2 Thomps. & C. (N. Y.) 83; U. S. *v.* Girault, 11 How. (U. S.) 22, 13 L. ed. 587; Kinder *v.* Paris, 2 H. Bl. 561; Skinner *v.* Rebow, Str. 919; King *v.* Anderson, 15 Can. L. T. Occ. Notes 203; Lovitt *v.* Snowball, 32 N. Brunsw. 217; Hanington *v.* Bostwick, 31 N. Brunsw. 621; Nevius *v.* Schofield, 18 N. Brunsw. 435; McMarsters *v.* Graham, 3 Nova Scotia 417; Hadly *v.* Sherman, 3 Nova Scotia 416; Doan *v.* Richardson, 13 U. C. Q. B. 527.

Demurrer because of lack of responsiveness see *infra*, VI, F, 3, e.

Judgment on pleadings because of irresponsiveness see *infra*, XII, B, 3, d.

Motion to strike irresponsive plea see *infra*, XII, C, 1, c, (II).

69. De Kalb Nat. Bank *v.* Nicely, 24 Ind. App. 147, 55 N. E. 240; Byrd *v.* Shelley, 2 Tenn. Cas. 33; Barrows *v.* Carpenter, 2 Fed. Cas. No. 1,058, 1 Cliff. 204; Peyatte *v.* English, 19 Fed. Cas. No. 11,054*a*, Hempst. 24; Fergus *v.* Wardlaw, 5 N. Brunsw. 665.

70. *Alabama.*— U. S. Fidelity, etc., Co. *v.* Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

Connecticut.—Pratt *v.* Humphrey, 22 Conn. 317.

Illinois.— Finch *v.* Galigher, 181 Ill. 625, 54 N. E. 611.

Iowa.— Amsden *v.* Dubuque, etc., R. Co., 13 Iowa 132.

Kentucky.— Fowler *v.* Com., 1 Dana 358.

Mississippi.— Fox *v.* Smith, 39 Miss. 350.

New Jersey.— Newark *v.* New Jersey Asphalt Co., 68 N. J. L. 458, 53 Atl. 294.

Rhode Island.— Di Iorio *v.* Di Brasio, 21 R. I. 208, 42 Atl. 1114.

Virginia.— Maggort *v.* Hansbarger, 8 Leigh 532.

Wisconsin.— Webber *v.* Roddis, 22 Wis. 61.

Canada.— Saint John Mechanics' Whale Fishing Co. *v.* Kirby, 4 N. Brunsw. 646.

71. *California.*— Wolff *v.* Wolff, 102 Cal. 433, 36 Pac. 767, 1037.

Colorado.— Buell *v.* Burlingame, 11 Colo. 164, 17 Pac. 509.

Minnesota.— Freeman *v.* Curran, 1 Minn. 169.

New Jersey.— Conover *v.* Tindall, 20 N. J. L. 513.

Pennsylvania.— Strawn *v.* Park, 1 Phila. 178.

Vermont.— Keith *v.* Bradford, 39 Vt. 34.

Canada.— Ketchum *v.* Protection Ins. Co., 6 N. Brunsw. 136.

See 39 Cent. Dig. tit. "Pleading," § 200.

72. Wolff *v.* Wolff, 102 Cal. 433, 36 Pac. 767, 1037; Bassett *v.* Enwright, 19 Cal. 635; Bowers *v.* Bound, 14 Ind. 218; McAllister *v.* Welker, 39 Minn. 535, 41 N. W. 107; Russ *v.* Gulick, 64 N. C. 301. See also Tyler *v.* Coleman, 97 S. W. 373, 29 Ky. L. Rep. 1270.

confesses and avoids the allegations of the declaration is bad.[73] Substantial responsiveness is sufficient, if the meaning is clear;[74] and where the plea substantially meets the case made by plaintiff irrelevant allegations will be deemed surplusage.[75] The facts only, alleged by plaintiff, need be met, not the conclusions of law.[76] The answer must respond to the complaint, and not to the bill of particulars.[77]

b. As to Time. The time alleged respecting the averments or denials in the plea must correspond with the time alleged in plaintiff's pleadings or with the time when suit was commenced, or plea filed.[78] Thus in a plea of alien enemy, it must be averred that such was the character of plaintiff at the commencement of the action;[79] and a plea in abatement that defendant was a resident of another county must refer to the time when the writ was issued,[80] and need not allege that the ground of abatement has continued up to the time of pleading.[81] But a plea of another action pending must show that it is still pending at the time the plea is filed.[82] If facts are characterized as having occurred on a certain date, the plea must, in answering them, refer to the same date.[83] A plea is by some authorities held to speak from the commencement of the action;[84] but other

Matter of set-off.— Matter to be available as a defense must be related to the cause of action alleged in the complaint; it is not sufficient that it be such as would constitute a valid counter-claim or set-off if so pleaded. Clark *v.* Fernoline Chemical Co., 57 N. Y. Super. Ct. 36, 5 N. Y. Suppl. 190; Prosser *v.* Maxon, 52 Misc. (N. Y.) 18, 100 N. Y. Suppl. 815.

Incorrect theory of defense.— Matter is not irrelevant in case it is germane to the theory adopted by defendant, although such theory is not correct. Jones *v.* Jones, 56 N. Y. Super. Ct. 610, 4 N. Y. Suppl. 628, holding that the correctness of defendant's position could not be determined on a motion to strike the matter as irrelevant.

73. *Arkansas.*— Cassady *v.* Clarke, 7 Ark. 123.

Indiana.— Leach *v.* Leach, 10 Ind. 271.

Iowa.— Hutchinson *v.* Sangster, 4 Greene 340.

Kentucky.— Gray *v.* Ayres, 7 Dana 375, 32 Am. Dec. 107.

Missouri.— Mechanics' Bank *v.* Klein, 33 Mo. 559.

Nebraska.— Chicago First Nat. Bank *v.* Stoll, 57 Nebr. 758, 78 N. W. 254.

United States.— Smith *v.* Ely, 22 Fed. Cas. No. 13,043, Fish. Pat. Rep. 339, 5 McLean 76.

Canada.— Hanington *v.* Girouard, 16 N. Brunsw. 151; Saint John Mechanics' Whale Fishing Co. *v.* Kirby, 4 N. Brunsw. 646; Lawson *v.* Halifax, 12 Nova Scotia 168.

An agreement to dismiss the suit cannot be pleaded in bar. Hurlbert *v.* Ellenberg, 65 Ill. 398; Foster *v.* Dailey, 3 Ind. App. 530, 30 N. E. 4; Wriston *v.* Lacy, 7 J. J. Marsh. (Ky.) 219.

74. Wise *v.* Eastham, 30 Ind. 133; Simms *v.* Simms, 88 Ky. 642, 11 S. W. 665, 11 Ky. L. Rep. 131; Wade *v.* Newton, 14 La. Ann. 271.

75. Johnson *v.* Killian, 6 Ark. 172.

76. Broeaw *v.* Gibson County, 73 Ind. 543; Straus *v.* American Publishers' Assoc., 96 N. Y. App. Div. 315, 89 N. Y. Suppl. 172.

77. Kreiss *v.* Seligman, 8 Barb. (N. Y.) 439.

78. See the cases cited in the following notes.

79. Elgee *v.* Lovell, 8 Fed. Cas. No. 4,344, Woolw. 102. See, generally, WAR.

80. Mitchell *v.* Allen, 2 Stew. & P. (Ala.) 247; Moore *v.* Morris, 142 Ind. 354, 41 N. E. 796; Biddleford Sav. Bank *v.* Mosher, 79 Me. 242, 9 Atl. 614; Walker *v.* Walker, 22 Tex. 331.

81. Powers *v.* Bryant, 7 Port. (Ala.) 9.

82. *Illinois.*— Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 860; Bancroft *v.* Eastman, 7 Ill. 259.

Iowa.— Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, 29 N. W. 787.

Maryland.— Lewis *v.* Higgins, 52 Md. 614.

Massachusetts.— Clifford *v.* Cony, 1 Mass. 495.

Michigan.— Pew *v.* Yoare, 12 Mich. 16.

New Jersey.— Hixon *v.* Schooley, 26 N. J. L. 461.

Pennsylvania.— Gardner *v.* Kiehl, 182 Pa. St. 194, 37 Atl. 829.

Rhode Island.— Polsey *v.* White Rose Mfg. Co., 19 R. I. 492, 34 Atl. 997.

Texas.— Oldham *v.* Erhart, 18 Tex. 147.

83. Straus *v.* American Publishers Assoc., 96 N. Y. App. Div. 315, 316, 89 N. Y. Suppl. 172, where the court said: "A defendant should not be permitted to evade the admission of a material allegation of the complaint, by shifting the time in which he addresses himself from the period contemplated in the complaint to a subsequent and much later period."

Residence.—An averment, where the fact of residence is to be traversed "that at the time aforesaid, he did not reside in Charlotte" was held to be well made. Durand *v.* Griswold, 26 Vt. 48.

Omission of year.—An answer referring to the 30th day of July, without naming the year, relates to the year mentioned in the complaint. Heebner *v.* Townsend, 8 Abb. Pr. (N. Y.) 234; Phelan *v.* Fraser, 11 U. C. Q. B. 94.

84. Moore *v.* Moore, 1 N. J. L. 363; Dendy *v.* Powell, 6 Dowl. P. C. 577, 7 L. J. Exch.

cases hold the contrary rule that it ordinarily speaks from the time when it is pleaded.[85]

9. Formal Commencement and Conclusion — a. In General. Under the early common-law rule it was necessary that each plea have its own proper commencement and conclusion.[86] Whether a plea is to be deemed a plea in abatement or a plea in bar is to be determined from its formal parts.[87] A plea which concludes in bar will be taken as a plea in bar, no matter what its commencement or substance.[88] Where the commencement is inconsistent with the conclusion or either is inconsistent with the body of the plea, it will be deemed bad.[89]

b. Pleas to the Jurisdiction. A plea to the jurisdiction has usually no formal commencement, but concludes with the prayer, "whether the court will or ought to take further cognizance of the plea aforesaid."[90] Pleas to the jurisdiction should conclude with a verification.[91] Statutes abolishing the necessity for a formal defense in a plea apply to pleas to the jurisdiction as well as to pleas in bar.[92]

c. Pleas in Abatement — (i) *Common Law.* At common law pleas in abatement were usually pleaded without a characteristic formal commencement, although they had a formal conclusion.[93] The ordinary conclusion for a plea in abatement is, "And this he, the said defendant, is ready to verify. Wherefore he prays judgment of the said writ" or "bill" or "declaration" or "writ and declaration" as the case may be, and that the same may be quashed.[94] A

154, 3 M. & W. 442; Bond *v.* Ives, 6 Nova Scotia 167.

85. Leggatt *v.* Stewart, 5 Mont. 107, 2 Pac. 320; Barker *v.* Remick, 43 N. H. 235; Parker *v.* McKean, 34 N. H. 375; Bowman *v.* Stowell, 21 Vt. 309.

86. Bowyer *v.* Cook, 5 Mod. 145, 87 Eng. Reprint 573. See also Stephen Pl. § 208.

Bad commencement or conclusion as ground for demurrer see *infra*, VI, F, 1, d.

Conclusion of declaration see *supra*, III, B, 17.

87. *Alabama.*—Banks *v.* Lewis, 4 Ala. 599; Casey *v.* Cleveland, 7 Port. 445; Rogers *v.* Smiley, 2 Port. 249. *Contra*, Day *v.* Huckabee, 60 Ala. 425, under the provisions of a statute.

Illinois.—Mudge *v.* Rinkle, 45 Ill. App. 604.

Kentucky.—Wickliffe *v.* Carroll, 14 B. Mon. 169.

Maryland.—McLaughlin *v.* De Young, 3 Gill & J. 4.

New York.—Schoonmaker *v.* Elmendorf, 10 Johns. 49; Jenkins *v.* Pepoon, 2 Johns. Cas. 312.

Tennessee.—Settle *v.* Settle, 10 Humphr. 504.

But *compare* Hamilton *v.* James A. Cushman Mfg. Co., 15 Tex. Civ. App. 338, 39 S. W. 641.

88. Spencer *v.* Dutton, 1 Harr. (Del.) 75; Schoonmaker *v.* Elmendorf, 10 Johns. (N. Y.) 49.

A plea commencing in bar and concluding in abatement is to be considered a plea in bar; and, if it contain no sufficient matter in bar, it may be demurred to as a plea in bar. Lowe *v.* Blair, 6 Blackf. (Ind.) 282; Hargis *v.* Ayres, 8 Yerg. (Tenn.) 467.

89. Pitt Sons' Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Leathers *v.* Meglasson, 2 T. B. Mon. (Ky.) 63; Boswells *v.* Blue, Litt. Sel. Cas. (Ky.) 269.

90. *Alabama.*—Fields *v.* Walker, 23 Ala. 155.

Illinois.—Pooler *v.* Southwick, 126 Ill. App. 264; Goldberg *v.* Harney, 122 Ill. App. 106.

North Carolina.—Moseley *v.* Hunter, 25 N. C. 543.

Virginia.—Hortons *v.* Townes, 6 Leigh 47.

West Virginia.—Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

United States.—Adams *v.* White, 1 Fed. Cas. No. 68, 2 Pittsb. (Pa.) 21.

See 39 Cent. Dig. tit. "Pleading," § 198.

91. Elmes *v.* McKenzie, 5 Ala. 617. See also Goldberg *v.* Harney, 122 Ill. App. 106.

92. Woodell *v.* West Virginia Imp. Co., 38 W. Va. 23, 17 S. E. 386.

93. See Prim *v.* Davis, 2 Ala. 24; National Parlor Furniture Co. *v.* Strauss, 75 Ill. App. 276, 279 (where the court said: "The forms for the commencement of a plea of misnomer of the defendant are almost as varied as the textwriters are numerous"); McLaughlin *v.* De Young, 3 Gill & J. (Md.) 4 (where a plea in abatement was deemed sufficient which began "and defendant comes and says that he is in no wise guilty of the trespass aforesaid"). But see Proskey *v.* West, 8 Sm. & M. (Miss.) 711, where a special demurrer was sustained to a plea in abatement by reason of an informal commencement.

94. See Lycoming F. Ins. Co. *v.* Bush, 1 Marv. (Del.) 181, 40 Atl. 947. See also 1 Burrill Pr. 154; 2 Chitty Pl. (16th Am. ed.) 16; Stephen Pl. (8th Am. ed.) *395.

The form "that the defendant is not bound to answer" has been held sufficient and in harmony with the precedents, instead of "that the writ or declaration be quashed." Blair *v.* Thomas, Dudley (S. C.) 288.

If the plea is to the disability of the party the form is, "prays judgment, if the said plaintiff ought to be answered to his said

proper conclusion is considered essential,[95] but a plea should not be treated as a mere nullity simply because its conclusion is irregular.[96] Where the plea contains no prayer for judgment it is fatally defective.[97] A plea in abatement for matter not apparent on the face of the record may both begin and conclude with a prayer for judgment.[98] But such a plea has been held bad when it sets up new matter.[99] A plea in abatement setting up new matter should conclude with a verification.[1] Where the objection is to the writ, judgment may nevertheless be prayed of the writ and declaration,[2] although it is sufficient to pray judgment of the writ alone.[3] Where the objection is to the declaration, judgment may be prayed of the writ alone in jurisdictions where the declaration is part of the writ.[4] Where the objection is to both the writ and declaration, a plea in abatement of the writ alone is sufficient.[5] A plea based on a variance between the declaration and the writ may pray judgment either of the writ [6] or of the writ and declaration.[7] A plea in abatement of another action pending is sufficient which prays judgment of the writ alone.[8] But there is authority to the contrary.[9] Where suit is commenced by bill, the plea should pray judgment of the bill.[10]

(II) *Under the Codes.* The formal parts of pleas in abatement are not required under the code procedure.[11]

d. Pleas in Suspension. A plea in suspension, like other dilatory pleas, is generally pleaded without a formal commencement.[12] It concludes with the prayer that the action may remain without day until a specified act occurs.[13] Thus the plea of alien enemy prays that the action remain without day until the conclusion of a treaty of peace.[14]

declaration." West Feliciana R. Co. *v.* Johnson, 5 How. (Miss.) 273.

95. *Arkansas.*— Wade *v.* Bridges, 24 Ark. 569; Lownes *v.* Brown, 22 Ark. 359.

Maine.— Fahy *v.* Brannagan, 56 Me. 42; Hazzard *v.* Haskell, 27 Me. 549.

Mississippi.— West Feliciana R. Co. *v.* Johnson, 5 How. 273.

New Hampshire.—Yelverton *v.* Conant, 18 N. H. 123; Clark *v.* Brown, 6 N. H. 434; Pike *v.* Bagley, 4 N. H. 76.

New York.— Harkness *v.* Harkness, 5 Hill 213; Shaw *v.* Dutcher, 19 Wend. 216; Haywood *v.* Chestney, 13 Wend. 495; Jenkins *v.* Pepoon, 2 Johns. Cas. 312.

Rhode Island.— Bullock *v.* Bolles, 9 R. I. 501.

See 39 Cent. Dig. tit. "Pleading," § 197.

96. Brooks *v.* Patterson, 1 Johns. Cas. (N. Y.) 328. In Gray *v.* Flowers, 24 Vt. 533, it was said that an improper conclusion was not fatal.

97. Mitchell *v.* Smith, 74 Conn. 125, 49 Atl. 909; Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588.

98. Knowles *v.* Rowell, 8 N. H. 542. See also Edmondson *v.* Carnall, 17 Ark. 284; 2 Chitty Pl. (16th Am. ed.) 16.

It is no substantial objection to a plea in abatement that in the beginning it prays judgment of the writ that it may abate, and in the conclusion prays judgment of the writ that it may be quashed. Lyman *v.* Dodge, 13 N. H. 197. Note (1) to Foxwist *v.* Tremaine, 2 Saund. 207, 209, 85 Eng. Reprint 996, states the rule as follows: "Where the defendant pleads in abatement of the writ a matter apparent on the face of it, he must both begin and conclude his plea with 'praying judgment of the writ'; but where the plea in abatement is founded on some extrinsic matter out of the writ, such as joint-tenancy, excommunication, non-tenure, misnomer, and the like, it is said not to be formal to begin the plea with praying judgment of the writ, but only to conclude it with that prayer."

99. Waterman *v.* Holmes, 62 Vt. 463, 20 Atl. 729; Smith *v.* Chase, 39 Vt. 89; Holden *v.* Scanlin, 30 Vt. 177; Gray *v.* Flowers, 24 Vt. 533; Landon *v.* Roberts, 20 Vt. 286. *Compare* Wires *v.* Griswold, 26 Vt. 97.

1. Humphrey *v.* Whitten, 17 Ala. 30; Hooper *v.* Jellison, 22 Pick. (Mass.) 250; Holden *v.* Scanlin, 30 Vt. 177; Durand *v.* Griswold, 26 Vt. 48.

2. Edmondson *v.* Carnall, 17 Ark. 284. In Draper *v.* Moriarty, 45 Conn. 476, 478, the court said: "If the writ abates the declaration falls with it, and the fact that the plea prays judgment of the declaration as well as the writ is but a circumstantial defect, if it is a defect at all."

3. Colburn *v.* Tolles, 13 Conn. 524.

4. Brigham *v.* Este, 2 Pick. (Mass.) 420; Ilsley *v.* Stubbs, 5 Mass. 280.

5. Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85.

6. Baker *v.* Brown, 18 N. H. 551.

7. Bonneau *v.* Dickinson, 12 Ala. 475.

8. Buckles *v.* Harlan, 54 Ill. 361.

9. March *v.* Burns, 1 U. C. C. P. 334.

10. Harkness *v.* Harkness, 5 Hill (N. Y.) 213.

11. Dawley *v.* Brown, 9 Hun (N. Y.) 461 [*reversed* on other grounds in 79 N. Y. 390].

12. Stephen Pl. 394.

13. See cases cited in the following note.

14. Hutchinson *v.* Brock, 11 Mass. 119; Parkinson *v.* Wentworth, 11 Mass. 26.

e. Pleas in Bar. At common law the formal commencement of a plea in bar was *actionem non.*[15] But the necessity of a formal commencement is now generally obviated by the practice acts of the several jurisdictions.[16] Formal conclusions or prayers for judgment are usually deemed necessary.[17] All pleas which tender issue should conclude to the country, if they are to be tried by jury,[18] or with other appropriate formula in case of a different mode of trial, as by the record, etc.[19] On the other hand, all pleas which set up new affirmative matter should conclude with a verification.[20] The verification is a formula used in addition to the formal conclusion or prayer for judgment, and usually precedes it.[21] If, however, the new matter set up is purely negative, and in effect but denies a material allegation of the declaration, the conclusion should be to the country.[22] New affirmative matter consisting of inducement merely will not require a verification.[23] The special traverse is of this nature, affirmative matter being set up in what is called the inducement, and the *absque hoc* turning this defense which is affirmative in form into a denial, and hence should conclude to the country.[24]

15. See Lord *v.* Brookfield, 37 N. J. L. 552. See also Stephen Pl. 395.

Form.— The usual form was, "Says that the said [plaintiff] ought not to have or maintain his aforesaid action against him, the said [defendant], because he says," etc. Stephen Pl. (8th Am. ed.) 395.

16. See the statutes of the several states. And see Stafford *v.* Anders, 8 Fla. 34.

In Florida it is held that, although the defense "*actio non*" has been dispensed with by a rule of court, its use will not invalidate a plea in which it occurs. Stafford *v.* Anders, 8 Fla. 34.

In England it was provided by the Rules Hilary Term 4 Wm. IV, rule 9, that the use of an allegation of *actionem non* should not be necessary, and the Common Law Procedure Act (1852), § 66, is to the same effect.

17. Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,674, 9 Blatchf. 513.

Rules Hilary Term 4 Wm. IV, rule 9, obviated the necessity of a prayer of judgment in a plea in bar, but the necessity of a formal conclusion where an estoppel was pleaded was excepted.

18. *Indiana.*— Grimes *v.* Alsop, 7 Blackf. 269.

Kentucky.— Boone *v.* Shackleford, 4 Bibb 67.

Maryland.— Burgess *v.* Lloyd, 7 Md. 178.

Massachusetts.— Sampson *v.* Henry, 11 Pick. 379; Wait *v.* Maxwell, 4 Pick. 87.

New Jersey.— Stevens *v.* Bowers, 16 N. J. L. 16.

Pennsylvania.— Ellis *v.* Imperial F. Ins. Co., 9 Phila. 239; Wallace *v.* Taylor, 1 Phila. 74.

United States.— U. S. *v.* Girault, 11 How. 22, 13 L. ed. 587.

England.— Wilkes *v.* Hopkins, 6 M. & G. 36, 46 E. C. L. 36.

See 39 Cent. Dig. tit. "Pleading," § 196.

When a plea denies allegations not averred in the declaration, it cannot conclude to the country. Conover *v.* Tindall, 20 N. J. L. 513; Keith *v.* Bradford, 39 Vt. 34.

19. Eppes *v.* Smith, 4 Munf. (Va.) 466.

20. *Connecticut.*— Baily *v.* Smith, 1 Root 243.

Maryland.— Shafer *v.* Stonebraker, 4 Gill & J. 345.

New Hampshire.— Chamberlain *v.* Perkins, 51 N. H. 336.

New York.— McClure *v.* Erwin, 3 Cow. 313; Service *v.* Heermance, 1 Johns. 91.

Rhode Island.— Elsbree *v.* Burt, 24 R. I. 322, 53 Atl. 60; Brown *v.* Foster, 6 R. I. 564.

Vermont.— Joslyn *v.* Tracy, 19 Vt. 569.

West Virginia.— Baltimore, etc., R. Co. *v.* Faulkner, 4 W. Va. 180.

See 39 Cent. Dig. tit. "Pleading," § 196.

If the plea is to be proved by the record the verification should read, "he is ready to verify by the writ or record." Durand *v.* Griswold, 26 Vt. 48.

21. The special plea in bar, after setting up the facts constituting the defense, concludes thus: "And this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought . . . to have or maintain his aforesaid action thereof against him." 1 Chitty Pl. (16th Am. ed.) *574. See also Day *v.* Savadge, Hob. 85, 80 Eng. Reprint 235; Vere *v.* Smith, 2 Lev. 5, 83 Eng. Reprint 426; West *v.* Sutton, 1 Salk. 2; May *v.* Spencer, T. Raym. 50, 83 Eng. Reprint 28.

22. Everett *v.* Bartlett, 20 N. J. L. 117; Callicott *v.* Freeman, 9 Phila. (Pa.) 209; Tucker *v.* Lee, 24 Fed. Cas. No. 14,221, 3 Cranch C. C. 684; Cameron *v.* Tarratt, 1 U. C. Q. B. 312. But see Cook *v.* Mair, 3 U. C. Q. B. 478, where it is said that a plea of this nature, setting up new matter amounting to a denial, may conclude with a verification.

A plea of performance is of this nature. Sherwin *v.* Bliss, 4 Vt. 96.

In covenant.— It is said in Krog *v.* Rice, 1 Speers (S. C.) 333, 338, "In covenant, there is no general traverse. All the pleas are special. The plea of performance should have concluded with a verification, and the plaintiff should have replied, and assigned specific breaches." But see Contee *v.* Garner, 6 Fed. Cas. No. 3,139, 2 Cranch C. C. 162, where it is held that a special plea of *non est factum* must conclude with a verification.

23. Sampson *v.* Henry, 11 Pick. (Mass.) 379.

24. Dowding *v.* Eastwood, 4 U. C. Q. B.

But this conclusion does not preclude plaintiff from pleading over to the inducement when the traverse is immaterial.[25] A plea of matter of defense arising after the commencement of the action must conclude with a prayer as to the further maintenance of the action.[26] Under the code there are neither formal commencements nor formal conclusions.[27]

B. Dilatory Pleas and Matter in Abatement — 1. Time to Plead[28] — a. In General. Inasmuch as dilatory pleas are not favored, the time within which they may be filed is often rigidly limited by statute, rule of court, or rule of practice,[29] and a strict compliance with the established practice in this respect is insisted on.[30] But as in the case of other pleas,[31] dilatory pleas may, in the discretion of the court, for cause shown, be received after the time limited has passed,[32]

217; Annis *v.* Corbett, 1 U. C. Q. B. 303; Stratlhy *v.* Crooks, 1 U. C. Q. B. 44.

Under the early common-law practice this traverse concluded with a verification. See Perry Comm. L. Pl. 255; Stephen Pl. 181, 182.

25. Annis *v.* Corbett, 1 U. C. Q. B. 303.

26. Pickering *v.* Pickering, 19 N. H. 389. *Contra*, McKenzie *v.* Kittridge, 24 U. C. C. P. 145.

27. Bridge *v.* Payson, 5 Sandf. (N. Y.) 210.

Texas.— The same rule is true in Texas, which follows many features of the code practice. Richardson *v.* Wells, 3 Tex. 223.

28. See, generally, *supra*, IV, A, 3.

29. See the statutes of the several states. And see the following cases:

Alabama.— Comstock *v.* Meek, 7 Ala. 528.

Arkansas.— State Bank *v.* Whiting, 12 Ark. 119.

Connecticut.— Huntley *v.* Holt, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71; Witter *v.* Mott, 2 Conn. 67; Bulkley *v.* Starr, 2 Day 552.

Georgia.— Hargrove *v.* Webb, 27 Ga. 172.

Indiana.— Haines *v.* Gurley, 5 Blackf. 269; Freeman *v.* Hukill, 4 Blackf. 9.

Kentucky.— Wickliffe *v.* Carroll, 14 B. Mon. 169; Simpson *v.* Shannon, 5 Litt. 322.

Maine.— Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181; Steward *v.* Walker, 58 Me. 299; Brunswick First Nat. Bank *v.* Lime Rock F. & M. Ins. Co., 56 Me. 424; Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529; Stetson *v.* Corinna, 44 Me. 29; Snell *v.* Snell, 40 Me. 307; Eldridge *v.* Preble, 34 Me. 148; Warren *v.* Miller, 33 Me. 220.

Massachusetts.—Coburn *v.* Palmer, 8 Cush. 124; Rathbone *v.* Rathbone, 4 Pick. 89; Thompson *v.* Hatch, 3 Pick. 512; Campbell *v.* Stiles, 9 Mass. 217.

Michigan.— Hake *v.* Grove, 99 Mich. 216, 58 N. W. 62.

Mississippi.— Wilkinson *v.* Patterson, 6 How. 193.

New Hampshire.— Colby *v.* Knapp, 13 N. H. 175.

North Carolina.— McFarland *v.* Harrington, 1 N. C. 475.

Pennsylvania.— Daniels *v.* Sanderson, 22 Pa. St. 443.

Texas.— Davis *v.* Texas, etc., R. Co., 12 Tex. Civ. App. 427, 34 S. W. 144.

West Virginia.— Empire Coal, etc., Co. *v.* Hull Coal, etc., Co., 51 W. Va. 474, 41 S. E. 917; Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827; Flesher *v.* Hasler, 29 W. Va. 404, 1 S. E. 404.

United States.— Adams *v.* White, 1 Fed. Cas. No. 68, 2 Pittsb. (Pa.) 21.

See 39 Cent. Dig. tit. "Pleading," § 208.

Dilatory pleas must be pleaded in limine litis.— Bijou Co. *v.* Lehmann, 118 La. 956, 43 So. 632; Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108; White *v.* Gleason, 15 La. Ann. 479; State *v.* Bradley, 11 La. Ann. 643; McDonogh *v.* Gordon, 10 La. Ann. 794; Landry *v.* Dickson, 7 La. Ann. 238; Benedict *v.* Williams, 4 Rob. (La.) 392; Dwight *v.* Linton, 3 Rob. (La.) 57; Howard *v.* The Columbia, 1 La. 417; Noble *v.* Martin, 7 Mart. N. S. (La.) 282; Davis *v.* Texas, etc., R. Co., 12 Tex. Civ. App. 427, 34 S. W. 144. See also Byrne *v.* Prather, 14 La. Ann. 653, holding that an exception of *lis pendens* filed without objection after a plea of *res adjudicata* was overruled, but before default would be considered as filed *in limine litis*.

30. *Alabama.*— Vaughan *v.* Robinson, 22 Ala. 519; Cobb *v.* Miller, 9 Ala. 499.

Georgia.— Hargrove *v.* Webb, 27 Ga. 172.

Massachusetts.— Thompson *v.* Hatch, 3 Pick. 512.

Mississippi.— Wilkinson *v.* Patterson, 6 How. 193.

New Hampshire.— Kimball *v.* Wellington, 20 N. H. 439.

Tennessee.— Grove *v.* Campbell, 9 Yerg. 7.

Vermont.— Pollard *v.* Wilder, 17 Vt. 48.

United States.— Werthein *v.* Continental R., etc., Co., 11 Fed. 689, 20 Blatchf. 508.

See 39 Cent. Dig. tit. "Pleading," § 208.

31. See, generally, *supra*, IV, A, 3, c.

32. *Alabama.*— Cobb *v.* Miller, 9 Ala. 499. See also Eagle Iron Co. *v.* Malone, 149 Ala. 367, 42 So. 734; Eagle Iron Co. *v.* Baugh, 147 Ala. 613, 41 So. 663; Dozier Lumber Co. *v.* Smith-Isburg Lumber Co., 145 Ala. 317, 39 So. 714.

Connecticut.— Charter Oak Bank *v.* Reed, 45 Conn. 391.

Massachusetts.— Rathbone *v.* Rathbone, 4 Pick. 89.

United States.— Wallace *v.* Clark, 29 Fed. Cas. No. 17,098, 3 Woodb. & M. 359.

England.— Stone *v.* Thomas, L. R. 5 Ch. 219, 39 L. J. Ch. 168, 22 L. T. Rep. N. S. 359, 18 Wkly. Rep. 385.

See 39 Cent. Dig. tit. "Pleading," § 208.

and such action will not be reviewed on appeal,[33] unless, in the exercise of its discretion, the court overrides well recognized rules of law.[34] A dilatory plea must ordinarily be filed at the return term of the writ,[35] if the declaration has been filed,[36] or at the earliest practicable time.[37] It has been held that a dilatory plea is too late after the expiration of the rule to plead,[38] and that ignorance of a cause for abatement will not excuse the filing of the plea after the time limited.[39] A plea in abatement cannot be filed after a general imparlance,[40] or general continuance,[41] nor after a motion for a continuance has been overruled.[42] But it may be filed after a special imparlance entered of record.[43] A statutory continuance is in the nature of a special imparlance and saves defendant's rights.[44] Where time for pleading is extended, with no limitation as to the kind of plea, a plea in abatement may be filed.[45]

b. Plea to the Jurisdiction. The time at which a plea to the jurisdiction of the court must be interposed is controlled primarily by the grounds upon which it is based. The general rule is that a want of jurisdiction in the court over the subject-matter of the proceedings may be taken advantage of at any time.[46] Where, however, the objection is to the jurisdiction of the person or to the form of the proceedings rather than their substance, the objection may be waived.[47] For example, a plea to the jurisdiction based upon lack of or defective service of process, or other matter going to the jurisdiction of the person cannot be urged after a general appearance,[48] or after a plea to the merits,[49] or after a dilatory

33. Massey *v.* Steele, 11 Ala. 340.

34. Hastings *v.* Bolton, 1 Allen (Mass.) 529.

35. *Connecticut.*— Huntley *v.* Holt, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71.

Georgia.— Adams *v.* Branan, 120 Ga. 530, 48 S. E. 128; Horne *v.* Rodgers, 103 Ga. 649, 30 S. E. 562.

Illinois.— Archer *v.* Claflin, 31 Ill. 306; Shepard *v.* Ogden, 3 Ill. 257.

Maine.— Warren *v.* Miller, 33 Me. 220; Wyman *v.* Dorr, 3 Me. 183.

New Hampshire.— Mathewson *v.* Eureka Powder Works, 44 N. H. 289.

Texas.— Atchison, etc., R. Co. *v.* Adams, (Civ. App. 1889) 14 S. W. 1015.

Vermont.— Jennison *v.* Hapgood, 2 Aik. 31.

See 39 Cent. Dig. tit. "Pleading," § 208.

36. Vaughan *v.* Robinson, 22 Ala. 519; Archer *v.* Claflin, 31 Ill. 306; Shepard *v.* Ogden, 3 Ill. 257.

37. *Illinois.*— Fisher *v.* Cook, 125 Ill. 280, 17 N. E. 763; Holloway *v.* Freeman, 22 Ill. 197; Wilson *v.* Nettleton, 12 Ill. 61; Grand Lodge *v.* Ahnstein, 110 Ill. App. 312.

Indiana.— Clark *v.* Hite, 5 Blackf. 167.

Maryland.— Young *v.* Citizens' Bank, 31 Md. 66; Whittington *v.* Farmers' Bank, 5 Harr. & J. 489.

New Hampshire.— Bedford *v.* Rice, 58 N. H. 227.

Pennsylvania.— Fritz *v.* Thompson, 5 Pa. L. J. 423; Williams *v.* Etzell, 4 Pa. L. J. Rep. 38; Fritz *v.* Thompson, 3 Pa. L. J. Rep. 401; Insurance Co. *v.* Michener, 4 Wkly. Notes Cas. 462.

Tennessee.— Decatur Bank *v.* Berry, 3 Humphr. 590; Chambers *v.* Haley, Peck 159.

West Virginia.— Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

See 39 Cent. Dig. tit. "Pleading," § 208.

38. Brooklyn White Lead Co. *v.* Pierce, 4 Fed. Cas. No. 1,940, 4 Cranch C. C. 531.

39. Huntley *v.* Holt, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71; James *v.* Morgan, 36 Conn. 348.

40. Young *v.* Citizens' Bank, 31 Md. 66; Chapman *v.* Davis, 4 Gill (Md.) 166; Coffin *v.* Jones, 5 Pick. (Mass.) 61; Campbell *v.* Stiles, 9 Mass. 217; Martin *v.* Com., 1 Mass. 347; Chamberlin *v.* Hite, 5 Watts (Pa.) 373; Hinckley *v.* Smith, 4 Watts (Pa.) 433; Witmer *v.* Schlatter, 15 Serg. & R. (Pa.) 150; McCarney *v.* McCamp, 1 Ashm. (Pa.) 4; Coates *v.* McCamm, 2 Browne (Pa.) 173; Fritz *v.* Thompson, 5 Pa. L. J. 423. See, generally, *supra*, IV, A, 3, f.

41. Johnson *v.* Staley, 32 Ind. App. 628, 70 N. E. 541; Otis *v.* Ellis, 78 Me. 75, 2 Atl. 851; State *v.* Faust, 7 Coldw. (Tenn.) 109; Shaw *v.* Bowen, 1 Overt. (Tenn.) 249; Stanton *v.* Haverhill Bridge, 47 Vt. 172.

42. Indiana, etc., R. Co. *v.* Cohoon, 95 Ill. App. 92.

43. McCarney *v.* McCamp, 1 Ashm. (Pa.) 4; Coates *v.* McCamm, 2 Browne (Pa.) 173; Fritz *v.* Thompson, 5 Pa. L. J. 423.

44. Robbins *v.* Hill, 12 Pick. (Mass.) 569; Rathbone *v.* Rathbone, 4 Pick. (Mass.) 89.

45. Horn *v.* Noble, 95 Ill. App. 101. But see Grand Lodge B. R. T. *v.* Randolph, 186 Ill. 89, 57 N. E. 882, where general leave to plead was held not to allow an amended plea in abatement while the first plea was undisposed of.

46. Karthaus *v.* Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268 (after plea in bar); Charter Oak Bank *v.* Reed, 45 Conn. 391 (after general appearance); Baker *v.* Louisville, etc., R. Co., 4 Bush (Ky.) 619 (after a defense to merits); Chambers *v.* Feron, etc., Co., 56 N. Y. Suppl. 338. See, generally, COURTS, 11 Cyc. 699.

47. See COURTS, 11 Cyc. 697.

48. See APPEARANCES, 3 Cyc. 515 *et seq.*

49. Baker *v.* Louisville, etc., R. Co., 4 Bush

plea upon other grounds.[50] Although the objection that the court has no jurisdiction of the subject-matter may be raised at any stage of the proceedings, it is nevertheless advisable, where there is *prima facie* jurisdiction, to plead it specially.[51]

2. Order of Pleading — a. In General. The common-law order of pleading which was deemed natural because each subsequent plea admits that there is no foundation for the former, is as follows: (1) To the jurisdiction of the court; (2) to the disability of the person; (3) to the count or declaration; (4) to the writ; (5) to the action itself in bar thereof.[52] Any one of these pleas is a waiver of those preceding it in order.[53] In accordance with this principle, it is too late to file a dilatory plea after pleading to the merits,[54] after the trial has

(Ky.) 619. See Peters *v.* Finney, 12 Sm. & M. (Miss.) 449; Derk P. Yonkerman Co. *v.* C. H. Fuller's Advertising Agency, 135 Fed. 613.

50. See Peters *v.* Finney, 12 Sm. & M. (Miss.) 449.

A plea of misnomer admits the jurisdiction of the court. Babcock *v.* Scott, 1 How. (Miss.) 100.

51. Black *v.* Black, 34 Pa. St. 354.

52. Longueville *v.* Thistleworth, 2 Ld. Raym. 969. See Sherwood *v.* Stevenson, 25 Conn. 431; 1 Chitty Pl. (16th Am. ed.) *456; Coke Litt. 303*a*; Stephen Pl. (8th Am. ed.) *430.

53. *Connecticut.*— Sherwood *v.* Stevenson, 25 Conn. 431.

Indiana.— Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89.

Louisiana.— McAlpine *v.* Jones, 13 La. Ann. 409.

South Carolina.— Blythwood *v.* Everingham, 3 Rich. 285; Newman *v.* Murphy, 1 Hill 153; Edwards *v.* Ford, 2 Bailey 461.

Vermont.— Hill *v.* Morey, 26 Vt. 178.

United States.— U. S. *v.* Four Hundred Twenty-two Casks of Wine, 1 Pet. 547, 27 L. ed. 257.

The withdrawal of a plea will not give defendant the right to file a dilatory plea which he otherwise could not file. Peters *v.* Finney, 12 Sm. & M. (Miss.) 449; Stoekle *v.* Stoekle, 2 Wkly. Notes Cas. (Pa.) 534; Slaughter *v.* Moore, 17 Tex. Civ. App. 233, 42 S. W. 372.

Admission by subsequent plea.— In Denning *v.* Kelly, 9 Ark. 435, 437, the court said: "The law has prescribed and settled the order of pleading, that the defendant is to pursue when brought into court by the plaintiff. That order is, 1st, To the jurisdiction of the court. 2d. To the disability of the plaintiff. 3d. In abatement. He cannot plead successively two pleas of the same kind or grade, and if he pleads a plea belonging to a subsequent order or division, he thereby loses the privilege of all pleas comprehended in any prior order or division; in other words, such subsequent plea is an admission that none of the previous objections exist."

54. *Alabama.*— Karthaus *v.* Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268; Coalter *v.* Bell, 2 Stew. & P. 358.

Arkansas.— Foreman *v.* Gibson, 15 Ark. 206; Odle *v.* Floyd, 5 Ark. 248.

Florida.— Stewart *v.* Bennett, 1 Fla. 437.

Georgia.— Beall *v.* Rust, 68 Ga. 774; Berry *v.* Cooper, 28 Ga. 543.

Illinois.— Keokuk, etc., Bridge Co. *v.* Wetzel, 228 Ill. 253, 81 N. E. 864 [*affirming* 130 Ill. App. 81]; Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613; Mills *v.* Bland, 76 Ill. 381; Thomas *v.* Lowy, 60 Ill. 512; McDavid *v.* Rork, 92 Ill. App. 482; Ricker *v.* Scofield, 28 Ill. App. 32.

Indiana.— Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; Brink *v.* Reid, 122 Ind. 257, 23 N. E. 770; Estep *v.* Larsh, 21 Ind. 190; Kenyon *v.* Williams, 19 Ind. 44; Sowle *v.* Holdridge, 17 Ind. 236; Keller *v.* Miller, 17 Ind. 206.

Kansas.— Green *v.* Dunn, 5 Kan. 254.

Kentucky.— Girty *v.* Logan, 6 Bush 8; Alexander *v.* Reed, 3 T. B. Mon. 246; Ward *v.* Trimble, 3 A. K. Marsh. 311; Meggs *v.* Shaffer, Hard. 65; American Acc. Co. *v.* Fidler, (1896) 35 S. W. 905.

Louisiana.— Mix *v.* Creditors, 39 La. Ann. 624, 2 So. 391; Meaux *v.* Pittman, 35 La. Ann. 360; Chaffe *v.* Ludeling, 34 La. Ann. 962; Tupery *v.* Edmondson, 32 La. Ann. 1146; Wilson *v.* Benjamin, 26 La. Ann. 587; Wiltz *v.* De St. Romes, 18 La. Ann. 187; Dyer *v.* Drew, 14 La. Ann. 657; Cheevers *v.* Burke, 19 La. 429.

Maine.— Powers *v.* Mitchell, 75 Me. 364; Demuth *v.* Cutler, 50 Me. 298; Wilson *v.* Nichols, 29 Me. 566; Clapp *v.* Balch, 3 Me. 216.

Maryland.—Webster *v.* Byrnes, 32 Md. 86.

Massachusetts.— Chamberlayne *v.* Nazro, 188 Mass. 454, 74 N. E. 674; Barry *v.* Page, 10 Gray 398; Seagrave *v.* Erickson, 11 Cush. 89.

Michigan.— People *v.* Smith, 65 Mich. 1, 31 N. W. 599.

Mississippi.— Lewis *v.* State, 65 Miss. 468, 4 So. 429.

Missouri.— Fugate *v.* Glasscock, 7 Mo. 577.

Nebraska.— Baker *v.* Union Stock Yards Nat. Bank, 63 Nebr. 801, 89 N. W. 269, 93 Am. St. Rep. 484; Smith *v.* Spaulding, 40 Nebr. 339, 58 N. W. 952.

New Jersey.— De Camp *v.* Miller, 44 N. J. L. 617; Wittemore *v.* Malcomson, 9 N. J. L. J. 338; Sherley *v.* Elizabeth, 4 N. J. L. J. 58.

New York.— Brown *v.* Jones, 1 Hilt. 204; Palmer *v.* Evertson, 2 Cow. 417; Crygier *v.* Long, 1 Johns. Cas. 393; Palmer *v.* Green, 1 Johns. Cas. 101.

North Carolina.— Morgan *v.* Charlotte First Nat. Bank, 93 N. C. 352.

begun,[55] or after the jury has been sworn.[56] A dilatory plea is likewise too late when it is filed after the filing of an affidavit of merits by defendant.[57] But the matter is largely within the control of the court, and under special circumstances a dilatory plea may be allowed after a plea in bar.[58] Even when the statute permits pleas in abatement and in bar to be pleaded together, defendant cannot, after having pleaded in bar, subsequently plead in abatement.[59] The fact that a defendant in attachment appears and replevies the property does not deprive him of his right to plead in abatement.[60] Matters arising after a plea in bar are, however, available in abatement.[61] A default is equivalent to issue joined on the merits, and no dilatory plea can ordinarily be filed thereafter.[62] If defendant has for-

Oregon.— Hopwood *v.* Patterson, 2 Oreg. 49; Winter *v.* Norton, 1 Oreg. 42.

Pennsylvania.— Smith *v.* People's Mut. Live Stock Ins. Co., 173 Pa. St. 15, 33 Atl. 567; Union Type Foundry *v.* Kittanning Ins. Co., 138 Pa. St. 137, 20 Atl. 841; Findlay *v.* Keim, 62 Pa. St. 112; Green *v.* North Buffalo Tp., 56 Pa. St. 110; Good Intent Co. *v.* Hartzell, 22 Pa. St. 277; Hartz *v.* Com., 1 Grant 359; Engle *v.* Nelson, 1 Penr. & W. 442; Wilson *v.* Hamilton, 4 Serg. & R. 238; Riddle *v.* Stevens, 2 Serg. & R. 537; Lacroix *v.* Macquart, 1 Miles (Pa.) 42; Cunningham *v.* Ocean Coal Co., 28 Pa. Co. Ct. 295; Hoopes *v.* Pusey, 2 Chest. Co. Rep. 306; Long *v.* Zug, 20 Lanc. L. Rev. 52; Holtzner *v.* Byrne, 10 Wkly. Notes Cas. 101; Com. *v.* Wilson, 7 Wkly. Notes Cas. 62.

Rhode Island.— Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649; Potter *v.* James, 7 R. I. 312; Potter *v.* Smith, 7 R. I. 55; Gardner *v.* James, 5 R. I. 235.

South Carolina.— State *v.* Cason, 11 S. C. 392; Ferguson *v.* King, 2 Nott & M. 588.

South Dakota.— Heegaard *v.* Dakota L. & T. Co., 3 S. D. 569, 54 N. W. 656.

Tennessee.— Gilbert *v.* Tramell, 2 Coldw. 282; Brazelton *v.* Brooks, 2 Head 194; Reed *v.* Brewer, Peck 275.

Texas.— Hoffman *v.* Cleburne Bldg., etc., Assoc., 85 Tex. 409, 22 S. W. 154; Trawick *v.* Martin Brown Co., 74 Tex. 522, 12 S. W. 216; Graham *v.* McCarty, 69 Tex. 323, 7 S. W. 342; Allen *v.* Read, 66 Tex. 13, 17 S. W. 115; Compton *v.* Western Stage Co., 25 Tex. Suppl. 67; Ferguson *v.* Wood, 23 Tex. 177; Taylor *v.* Hall, 20 Tex. 211; Moke *v.* Fellman, 17 Tex. 367, 67 Am. Dec. 656; Drake *v.* Brander, 8 Tex. 351; Burchard *v.* Record, (1891) 17 S. W. 241; Brooks *v.* Galveston City R. Co., (Civ. App. 1903) 74 S. W. 330; Texas, etc., R. Co. *v.* Lynch, (Civ. App. 1903) 73 S. W. 65; Price *v.* Garvin, (Civ. App. 1902) 69 S. W. 985; Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881; Meade *v.* Warring, (Civ. App. 1896) 35 S. W. 308; Waco Ice, etc., Co. *v.* Wiggins, (Civ. App. 1895) 32 S. W. 58; Fields *v.* Ft. Worth, etc., R. Co., (Civ. App. 1895) 30 S. W. 255; Luen *v.* Osborne, (Civ. App. 1895) 29 S. W. 414; Logan *v.* Texas Bldg., etc., Assoc., 8 Tex. Civ. App. 490, 28 S. W. 141; Maxwell *v.* Cisco First Nat. Bank, (Civ. App. 1894) 24 S. W. 848; Meyer *v.* Smith, 3 Tex. Civ. App. 37, 21 S. W. 995.

Vermont.— Holdridge *v.* Holdridge, 53 Vt. 546; Stone *v.* Proctor, 2 D. Chipm. 108.

Virginia.— Howard *v.* Rawson, 2 Leigh 733.

United States.— Florida Cent., etc., R. Co. *v.* Bell, 87 Fed. 369, 31 C. C. A. 9; Hewitt *v.* Story, 39 Fed. 158; Wittemore *v.* Malcomson, 28 Fed. 605; Gause *v.* Clarksville, 1 Fed. 353, 1 McCrary 78.

Canada.— Ramsey *v.* Hamburg-American Packet Co., 17 Quebec Super. Ct. 232.

See 39 Cent. Dig. tit. "Pleading," § 212.

Joining with another defendant in a plea in bar is sufficient to waive the right to plead in abatement. Thomas *v.* Lowy, 60 Ill. 512.

Waiver of objections to pleading by plea to merits see *infra*, XIV, B, 3.

55. *Arkansas.*— Jetton *v.* Smead, 29 Ark. 372.

Delaware.— Lycoming F. Ins. Co. *v.* Bush, 1 Marv. 181, 40 Atl. 947.

Louisiana.— Singleton *v.* Smith, 4 La. 430.

New York.— Montfort *v.* Hughes, 3 E. D. Smith 591.

North Carolina.— Montague *v.* Brown, 104 N. C. 161, 10 S. E. 186.

Pennsylvania.— Murphy *v.* Chase, 103 Pa. St. 260.

Texas.— Hall *v.* Howell, (Civ. App. 1900) 56 S. W. 561.

United States.— Bailey *v.* Dozier, 6 How. 23, 12 L. ed. 328.

See 39 Cent. Dig. tit. "Pleading," § 210.

Waiver of objections by going to trial see *infra*, XIV, B, 3.

56. Stiles *v.* Homer, 21 Conn. 507; Cleveland *v.* Welsh, 4 Mass. 591.

57. Walpole *v.* Gray, 11 Allen (Mass.) 149; Whipple *v.* Rogerson, 12 Gray (Mass.) 347; Cole *v.* Ackerman, 7 Gray (Mass.) 38.

58. Riddle *v.* Stevens, 2 Serg. & R. (Pa.) 537; Long *v.* Zug, 20 Lanc. L. Rev. (Pa.) 52.

Withdrawal of plea in bar and interposition of plea in abatement see ABATEMENT AND REVIVAL, 1 Cyc. 134.

59. Delaplain *v.* Armstrong, 21 W. Va. 211.

60. James *v.* Dowell, 7 Sm. & M. (Miss.) 333.

61. Johnson *v.* Killian, 6 Ark. 172; Young *v.* Citizens' Bank, 31 Md. 66; Yancey *v.* Marriott, 1 Sneed (Tenn.) 28.

62. Boone *v.* Carroll, 35 La. Ann. 281; Chaffe *v.* Ludeling, 34 La. Ann. 962; Phipps *v.* Snodgrass, 31 La. Ann. 88; Young *v.* Patterson, 11 Rob. (La.) 7; Welsh *v.* Shields, 6 Rob. (La.) 484; Leeds *v.* Debuys, 4 Rob. (La.) 257; Reynolds *v.* Reynolds, 12 La. 617.

feited his right to plead in abatement to an original declaration, he cannot so plead to an amended declaration.[63]

b. Same Matter Pleadable in Abatement and Bar. Where the same matter may be pleaded either in abatement or in bar, and defendant chooses the latter, he is entitled to all the privileges accorded to a plea in bar, and is not subject to the limitations of a plea in abatement.[64] And where he pleads first in abatement, and his plea is overruled, he is not precluded thereby from subsequently setting up the same matter in bar.[65]

c. Effect of Demand For Bill of Particulars. A demand for a bill of particulars may be made at any time, and does not constitute an appearance nor is it confined to the merits, and hence it does not waive the right to plead to the jurisdiction or in abatement.[66]

d. Plea in Abatement After Demurrer or Motion. There is a conflict of authority as to whether a plea in abatement may be filed after the overruling of a demurrer; some cases holding that it may,[67] others that it may not.[68] It has been held that where the demurrer is withdrawn under leave, matter in abatement may be set up in the answer.[69] After an insufficient motion, the matter contained therein cannot be set up in a plea in abatement.[70]

3. Pleas to the Jurisdiction — a. In General.[71] Under the use of the term pleas in abatement to include all dilatory pleas,[72] pleas to the jurisdiction are frequently termed pleas in abatement;[73] but under the common-law practice they differ from the ordinary plea in abatement in that they must be signed in person and not by attorney[74] and should conclude *si curia cognoscere velit.*[75] In some cases a distinction is made between technical dilatory pleas to the jurisdiction which admit a general jurisdiction of the court but state a special exemption of defendant or a special privilege of place and pleas which deny the existence of a cause of action within the local limits of the jurisdiction.[76] In other cases a plea to the jurisdiction has been classed as a special plea in bar.[77] It is reversible error for a court to treat a plea to the jurisdiction as a demurrer.[78]

b. Grounds. Where facts not of record must be shown to defeat jurisdiction, a plea to the jurisdiction or in abatement is the proper remedy.[79] Where no court

Wrongful default.—A default taken, without reasons assigned, at the moment of filing papers of which defendant has pleaded oyer, cannot defeat his right to the exception of domicile which he may file the next day. Peck *v.* Overton, 7 La. Ann. 70.

63. Chapman *v.* Davis, 4 Gill (Md.) 166; Foster *v.* Gulf, etc., R. Co., 91 Tex. 631, 45 S. W. 376; Slaughter *v.* Moore, 17 Tex. Civ. App. 233, 42 S. W. 372.

64. Benthall *v.* Hildreth, 2 Gray (Mass.) 288. See also Dewey *v.* Brown, 5 Pick. (Mass.) 238; Otis *v.* Warren, 14 Mass. 239.

65. Trinity, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 926.

66. Oates *v.* Clendenard, 87 Ala. 734, 6 So. 359; Watkins *v.* Brown, 5 Ark. 197.

67. Deane *v.* Echols, 2 App. Cas. (D. C.) 522; Bauer *v.* Samson Lodge K. P., 102 Ind. 262, 1 N. E. 571.

68. Butts *v.* Grayson, 14 Ark. 445; McDavid *v.* Rork, 92 Ill. App. 482; Knowlton *v.* Culver, 2 Pinn. (Wis.) 86, 1 Chandl. 214.

69. Wheelock *v.* Lee, 74 N. Y. 495, want of jurisdiction. *Contra*, Heilman *v.* Martin, 2 Ark. 158, holding that by withdrawal of the demurrer defendant is considered as undertaking to plead to the merits.

70. Union Nat. Bank *v.* Centreville First Nat. Bank, 90 Ill. 56.

71. **Verification of plea** see *infra*, VIII, B, 2, b, (I).

72. See *supra*, IV, A, 1, b.

73. Eagle Iron Co. *v.* Baugh, 147 Ala. 613, 41 So. 663; Scott *v.* Waller, 65 Ill. 181; National Fraternity *v.* Wayne Cir. Judge, 127 Mich. 186, 86 N. W. 540 (where it was expressly determined that a plea to the jurisdiction was a plea in abatement); Heyman *v.* Covell, 36 Mich. 157; Guthman *v.* Guthman, 18 Nebr. 98, 24 N. W. 435.

74. See *infra*, VIII, A, 2.

75. Pooler *v.* Southwick, 126 Ill. App. 264; Hortons *v.* Townes, 6 Leigh (Va.) 47.

76. London *v.* Cox, L. R. 2 H. L. 239; Companhia de Mocambique *v.* South African Co., [1892] 2 Q. B. 358, 61 L. J. Q. B. 663, 66 L. T. Rep. N. S. 773, 40 Wkly. Rep. 650.

77. See Smith *v.* McCleod, 22 Fed. Cas. No. 13,073, 1 Cranch C. C. 43; Chumley *v.* Broom, Carth. 402.

78. Gaines *v.* Bankers' Alliance, 113 Ga. 1138, 39 S. E. 502.

79. *Alabama.*— Campbell *v.* Crawford, 63 Ala. 392.

Illinois.—Holloway *v.* Freeman, 22 Ill. 197.

Indiana.— Wilcox *v.* Moudy, 82 Ind. 219.

Iowa.— Meunch *v.* Breitenbach, 41 Iowa 527.

Nebraska.— Kyd *v.* Cortland Exch. Bank,

has jurisdiction, the proper plea is one in bar.[80] Where the objection is that the amount involved is less than the requisite sum, this is a good ground for a plea in abatement according to some authorities,[81] but not according to others.[82] The fact that a transitory action is brought in the wrong place is not ground for a plea in abatement.[83] The fact that a local action is commenced in the wrong county does not oblige defendant to plead the fact in abatement.[84] After a motion to dismiss has been overruled, a plea to the jurisdiction on the same ground ought not to be entertained.[85]

c. Contents. In pleas to the jurisdiction of courts of general jurisdiction, it must be shown not only that the court in which the action is commenced has no jurisdiction but that there is another court which has jurisdiction.[86] An exception to this rule is recognized when the plea presents facts showing that the subject-matter is beyond the general jurisdiction of the courts of the state or of the country,[87] and a further exception is made in some cases where lack of jurisdiction depends upon non-residence or venue.[88] In pleading to the jurisdiction of an inferior court of limited jurisdiction however, it is not necessary to allege the jurisdiction to which the plaintiff should have resorted.[89] The plea must negative every fact from which jurisdiction may be presumed.[90] So a plea of want of juris-

56 Nebr. 557, 76 N. W. 1058; Herbert *v.* Wortendyke, 49 Nebr. 182, 68 N. W. 350.

New York.— Johnson *v.* Adams Tobacco Co., 14 Hun 89; Koenig *v.* Nott, 2 Hilt. 323.

North Carolina.— Newman *v.* Tabor, 27 N. C. 231. See also Green *v.* Mangum, 7 N. C. 39, where it is held that the general issue cannot be availed of to raise the question of the jurisdiction of superior courts, except where the action is in its nature local, as relating to the possession of land, or where the court has no jurisdiction at common law, or where no court in the state has jurisdiction, or where it has been taken away by statute.

Ohio.— Kehnast *v.* Daum, 6 Ohio S. & C. Pl. Dec. 401, 4 Ohio N. P. 366.

Texas.— International, etc., R. Co. *v.* Nicholson, 61 Tex. 550.

Virginia.— Jones *v.* Bradshaw, 16 Gratt. 355.

United States.— Walker *v.* Flint, 7 Fed. 435, 2 McCrary 341; Parsons *v.* Denis, 7 Fed. 317, 2 McCrary 359. See Derk P. Yonkerman Co. *v.* Charles H. Fuller's Advertising Agency, 135 Fed. 613; Draper *v.* Springport, 15 Fed. 328, 21 Blatchf. 240.

80. Rea *v.* Hayden, 3 Mass. 24; Arcot *v.* East India Co., 3 Bro. Ch. 292, 29 Eng. Reprint 544, 4 Bro. Ch. 180, 29 Eng. Reprint 841, 2 Ves. Jr. 56, 30 Eng. Reprint 521, where it is said that a plea that the matters complained of were acts of state not cognizable in any court was not a plea to the jurisdiction at all, but a plea in bar. See also Companhia de Mocambique *v.* South African Co., [1892] 2 Q. B. 358, 61 L. J. Q. B. 663, 66 L. T. Rep. N. S. 773, 40 Wkly. Rep. 650.

81. Bridge *v.* Ballew, 11 Tex. 269; Little *v.* Woodbridge, 1 Tex. App. Civ. Cas. § 152.

82. McNaughton *v.* Hunter, 2 N. C. 454.

83. Otis *v.* Wakeman, 1 Hill (N. Y.) 604, holding that the remedy was by motion.

84. Haskell *v.* Woolwich, 58 Me. 535.

85. Martin *v.* Chicago, etc., R. Co., 220 Ill. 97, 77 N. E. 86; Grand Lodge Brotherhood L. F. *v.* Cramer, 164 Ill. 9, 45 N. E. 165; Union Nat. Bank *v.* Centreville First Nat. Bank, 90 Ill. 56; Holloway *v.* Freeman, 22 Ill. 197.

86. *Alabama.*— Fields *v.* Walker, 23 Ala. 155.

Arkansas.— Heilman *v.* Martin, 2 Ark. 158.

Georgia.— Kahn *v.* Southern Bldg., etc., Assoc., 115 Ga. 459, 41 S. E. 648; Ridling *v.* Stewart, 77 Ga. 539.

Maryland.— Dumoussay *v.* Delevitt, 3 Harr. & J. 151.

Massachusetts.— Lawrence *v.* Smith, 5 Mass. 362; Rea *v.* Hayden, 3 Mass. 24.

Michigan.— Heyman *v.* Covell, 36 Mich. 157.

New Hampshire.— Jones *v.* Winchester, 6 N. H. 497.

New York.— Otis *v.* Wakeman, 1 Hill 604.

Virginia.— North America Guarantee Co. *v.* First Nat. Bank, 95 Va. 480, 28 S. E. 909; Raine *v.* Rice, 2 Patt. & H. 529.

England.— Rex *v.* Johnson, 6 East 583.

87. Hill *v.* Nelson, 70 N. J. L. 376, 57 Atl. 411; London *v.* Cox, L. R. 2 H. L. 239; Companhia de Mocambique *v.* South Africa Co., [1892] 2 Q. B. 358, 61 L. J. Q. B. 663, 66 L. T. Rep. N. S. 773, 40 Wkly. Rep. 650, wherein is noted the distinction between the two senses of a plea to the jurisdiction: (1) the technical dilatory plea which admits the general jurisdiction of the court but states a special exemption of defendant or a special privilege of place; (2) a plea denying the existence of a cause of action within the local limits of the jurisdiction.

88. Midland Pac. R. Co. *v.* McDermid, 91 Ill. 170. And see Prim *v.* Davis, 2 Ala. 24.

89. Sodor *v.* Derby, 2 Ves. 337, 28 Eng. Reprint 217. And see Rex *v.* Johnson, 6 East 583; 1 Chitty Pl. (16th Am. ed.) *461.

90. Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107 [*affirming* 116 Ill. App. 496]; U. S. *v.* U. S. Fidelity, etc., Co., 80 Vt. 84, 66 Atl. 809. See Russell *v.* F. W. Heitman, etc., Co., (Tex. Civ. App. 1905) 86 S. W. 75.

diction of the person must negative every means by which jurisdiction might have been acquired.[91] But where there are exceptions in the statute, only such need be negatived as are applicable to the case.[92] Where jurisdiction is objected to on the ground of non-residence, defendant must allege not only that he is not a resident of the locality which would support the jurisdiction, but must show where his residence is.[93] But reasonable particularity in this respect is sufficient.[94] And where the jurisdiction of an inferior court has been ousted by a superior court, it is sufficient for the plea to allege that proper pleadings have been filed invoking the jurisdiction of the superior court, and that it has assumed the exercise of such jurisdiction.[95]

d. Certainty. Mere general conclusions will not be sufficient in a pleading averring lack of jurisdiction,[96] but the facts showing want of jurisdiction must be positively alleged with the utmost degree of certainty.[97] This requirement of rigid certainty does not, however, mean that courts in construing a plea of this character, will misunderstand or refuse to comprehend the ordinary import of language,[98] and it has been said that pleas to the jurisdiction need not exhibit the same technical strictness as pleas in abatement.[99] A plea to the jurisdiction can derive no help from the writ or declaration, unless referred to in such a way as to make it a part of the plea.[1] Facts appearing upon the record need not be alleged in the plea.[2]

4. Pleas in Suspension. A plea in suspension of the action is one which shows some ground for not proceeding at the present time, and prays that the pleading be stayed until that ground be removed. But the number of these pleas was small

91. *Alabama.*—Montgomery Iron Works *v.* Eufaula Oil, etc., Co., 110 Ala. 395, 20 So. 300; Smith *v.* Gibson, 83 Ala. 284, 3 So. 321.
Arkansas.— Barkman *v.* Hopkins, 11 Ark. 157.
Connecticut.— Colburn *v.* Tolles, 13 Conn. 524.
Illinois.— Funk *v.* Ironmonger, 76 Ill. 506; Scott *v.* Waller, 65 Ill. 181; Humphrey *v.* Phillips, 57 Ill. 132.
Indiana.— Cole *v.* Merchants' Bank, 60 Ind. 350; State *v.* Williams, 7 Blackf. 493; Clarke *v.* Hite, 5 Blackf. 167; Brown *v.* Underhill, 4 Ind. App. 77, 30 N. E. 430.
Maine.— See Hibbard *v.* Newman, 101 Me. 410, 64 Atl. 720.
New York.— Bridge *v.* Payson, 1 Duer 614.
North Carolina.— Stramburg *v.* Heckman, 44 N. C. 250.
Tennessee.— Turley *v.* Hornsby, 3 Lea 264.
Texas.— San Antonio, etc., R. Co. *v.* Cockrill, 72 Tex. 613, 10 S. W. 702; Crawford *v.* Carothers, 66 Tex. 199, 18 S. W. 500; Burchard *v.* Record, (1891) 17 S. W. 241; Stark *v.* Whitman, 58 Tex. 375; Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567; Sites *v.* Lane, (Civ. App. 1903) 72 S. W. 873; Texas, etc., R. Co. *v.* Stell, (Civ. App. 1901) 61 S. W. 980; Moore *v.* Missouri, etc., R. Co., 18 Tex. Civ. App. 561, 45 S. W. 609; Texas, etc., R. Co. *v.* Childs, (Civ. App. 1897) 40 S. W. 41; Tignor *v.* Toney, 13 Tex. Civ. App. 518, 35 S. W. 881.
Vermont.— Cunningham *v.* Caldbeck, 63 Vt. 91, 20 Atl. 974.

92. Cavin *v.* Hill, 83 Tex. 73, 18 S. W. 323; Good *v.* Caldwell, 11 Tex. Civ. App. 515, 33 S. W. 243; Gardner *v.* Hudgins, (Tex. Civ. App. 1894) 29 S. W. 69; Freiberg *v.* Greenlay, 2 Tex. App. Civ. Cas. § 547.

93. Gibbs *v.* Davis, 27 Fla. 531, 8 So. 633; Lester *v.* Stevens, 29 Ill. 155; Hibbard *v.* Newman, 101 Me. 410, 64 Atl. 720; Middleton *v.* Pinnell, 2 Gratt. (Va.) 202.

94. Colburn *v.* Tolles, 13 Conn. 524.

95. Tygh *v.* Dolan, 95 Ala. 269, 10 So. 837.

96. Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107 [*affirming* 116 Ill. App. 496]; Marshall *v.* Gill, 77 Ind. 402; Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

97. *Illinois.*— Dunlap *v.* Turner, 64 Ill. 47; Aird *v.* Haynie, 36 Ill. 174; Diblee *v.* Davison, 25 Ill. 486.
Michigan.— Heyman *v.* Covell, 36 Mich. 157.
New Jersey.— See Birch *v.* King, 71 N. J. L. 392, 59 Atl. 11.
New York.— Kelly *v.* Mullany, 2 Hall 225.
Vermont.— Kenney *v.* Howard, 67 Vt. 375, 31 Atl. 850; Leonard *v.* McArthur, 52 Vt. 439; Durand *v.* Griswold, 26 Vt. 48.
West Virginia.— Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.
Allegation that cause of action arose on navigable water.—A plea to the jurisdiction, averring that the cause of action arose on navigable waters and is exclusively within the courts of the United States, is bad on demurrer for failing to show that the waters were the navigable waters of the United States, as distinguished from navigable waters of the state. Birch *v.* King, 71 N. J. L. 392, 59 Atl. 11.

98. Colburn *v.* Tolles, 13 Conn. 524.

99. Cunningham *v.* Caldbeck, 63 Vt. 91, 20 Atl. 974.

1. U. S. *v.* U. S. Fidelity, etc., Co., 80 Vt. 84, 66 Atl. 809.

2. Humphrey *v.* Phillips, 57 Ill. 132.

at common law, and they are of very infrequent occurrence in practice.[3] A plea of alien enemy is a proper plea in suspension.[4] So a plea that defendant, who is sued on a promissory note, has been garnisheed by creditors of plaintiff's assignor on the identical note in suit, is a plea in suspension.[5]

5. Pleas in Abatement[6]— a. In General. The general rule is that a matter of defense which shows that plaintiff has no cause of action should be pleaded in bar; but that which merely defeats the present suit and does not conclude plaintiff from maintaining an action upon the cause stated, should be pleaded in abatement.[7] Thus a plea of former judgment is in bar, and not in abatement;[8] as is a plea of *non est factum*,[9] or a plea of payment, although pleaded nominally in abatement.[10] Under the codes generally matter in abatement is to be pleaded as a defense.[11] Although in some of the code states pleas in abatement are retained. Some matters are pleadable either in abatement or bar, and in such cases defendant may plead them as he chooses.[12] But he must clearly indicate in which aspect he pleads them.[13] Matter in abatement pleaded in bar is bad,[14] and so is matter in bar

3. Columbia Bank *v.* Bletz, 8 Lanc. Bar (Pa.) 53; Stephen Pl. (8th Am. ed.) *47.

4. Levine *v.* Taylor, 12 Mass. 8. See, generally, War.

5. Evitt *v.* Lowery Banking Co., 96 Ala. 381, 11 So. 442.

6. Dissolution of attachment by plea in abatement see Attachment, 4 Cyc. 800.

Striking frivolous or unverified plea see *infra*, XII, C, 1, c.

7. *Illinois.*— Waterman *v.* Tuttle, 18 Ill. 292.

New York.— Robinson *v.* Fisher, 3 Cai. 99.

North Carolina.— Carroll *v.* Durham, 23 N. C. 36.

Pennsylvania.— *In re* Boyle, 20 Pa. Super. Ct. 1.

Texas.— Hamilton *v.* James A. Cushman Mfg. Co., 15 Tex. Civ. App. 338, 39 S. W. 641.

8. Harvey *v.* State, 94 Ind. 159. See, generally, Judgments, 23 Cyc. 1523 *et seq.*

9. Equitable Mfg. Co. *v.* Martin, 145 Ala. 667, 39 So. 769.

10. Houghland *v.* Dent, 52 Mo. App. 237.

Plea of payment generally see Payment, 30 Cyc. 1253 *et seq.*

11. Peck *v.* Kirtz, 15 N. Y. St. 598; Mayhew *v.* Robinson, 10 How. Pr. (N. Y.) 162; Smith *v.* Smith, 10 Ohio Dec. (Reprint) 494, 21 Cinc. L. Bul. 295.

Effect of codes on pleas in abatement.— In Scottish Union, etc., Ins. Co. *v.* Strain, 70 S. W. 274, 275, 24 Ky. L. Rep. 958, the court, in discussing the effect of the codes upon pleas in abatement, said: "The Code of Practice has virtually abolished pleas in abatement. Defense to an action can be made only by motion, demurrer, or answer. The grounds of demurrer now specifically recited in the Civil Code were, under the old practice, grounds for a plea in abatement; and many other defects and irregularities which were also reached by plea in abatement, such as the want of bond for costs in an action brought by a non-resident, a variance between the writ and declaration, the failure of the plaintiff to file the note sued on with the petition, as required by the statute authorizing suit by petition and summons, the misnomer of the plaintiff or defendant, or the omission of the names of the firm or other person to whom an obligation was given by their title or description only, now must be reached by motion, and not by plea in abatement." In Clark *v.* Oregon Short Line R. Co., 29 Mont. 317, 319, 74 Pac. 734, the court, quoting Pomeroy's Code Remedies, said: "Defenses still exist of the same essential nature as those which were formerly set up by means of a plea in abatement, and a judgment thereon in favor of the defendant does not forever bar the plaintiff from the further prosecution of his demand. They are governed, however, by the same rules of procedure that regulate all the other defenses which may be relied upon by a defendant. . . . All defenses which are analogous to the ancient pleas in abatement — that is, all which are based upon the same facts — are evidently new matter; they cannot be proved under the general denial, but must be specially pleaded."

Defenses under the codes see *infra*, IV, D, 2.

12. Benthall *v.* Hildreth, 2 Gray (Mass.) 288; Plymouth Christian Soc. *v.* Macomber, 3 Metc. (Mass.) 235; Carroll *v.* Durham, 23 N. C. 36; Steer *v.* Steer, 14 Serg. & R. (Pa.) 379; Trimmier *v.* Hamilton, 3 McCord (S. C.) 425. But see Langdon *v.* Potter, 11 Mass. 313.

13. O'Beirne *v.* Lloyd, 6 Abb. Pr. N. S. (N. Y.) 387, 391, where the court said: "Formerly, great strictness was required in pleas of abatement, they being dilatory pleas. Even under the Code sufficient strictness should be required to show whether the defendant relies on the matters pleaded as an abatement to the existing action or as a defense in bar to the cause of action."

14. *Arkansas.*— Brown *v.* Bickle, 7 Ark. 410.

Connecticut.— Church *v.* Smith, 2 Root 138.

Illinois.— Grand Lodge B. R. T. *v.* Randolph, 186 Ill. 89, 57 N. E. 882; Hippach *v.* Makeever, 166 Ill. 136, 46 N. E. 790 [*affirming* 64 Ill. App. 126].

Kentucky.— Wickliffe *v.* Carroll, 14 B. Mon. 169; Jones *v.* Tennessee Bank, 8 B. Mon. 122, 46 Am. Dec. 540.

pleaded in abatement.[15] A plea or answer in abatement is not required to state facts which constitute a defense, but merely facts sufficient to abate the action.[16] A plea in abatement is not an issuable plea,[17] and on such a plea the merits of plaintiff's case are not open to inquiry.[18] Statutes abolishing special demurrers [19] and special pleading [20] do not apply to pleas in abatement. Nor does a statute authorizing brief statements of special matter in defense supersede the use of pleas in abatement.[21]

b. Grounds — (I) *General Rule.* Matter in abatement *de hors* the record is properly presented by a plea in abatement;[22] in case the grounds appear in the complaint the remedy is by demurrer.[23]

(II) *Improper Form of Action.* The fact that the action is misconceived is ground for a plea in abatement,[24] although such a plea is rarely used.

(III) *Prematurity of Action.*[25] In case action is brought before the cause of action accrues the objection may be taken by plea in abatement [26] or at the trial under the general issue,[27] or in case the objection appear on the face of the complaint, by demurrer.[28] Some cases, however, hold that the objection must be urged by plea in abatement when not apparent from the complaint.[29]

Maine.— Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256.

Massachusetts.— Mattel *v.* Conant, 156 Mass. 418, 31 N. E. 487.

Michigan.— Callanan *v.* Port Huron, etc., R. Co., 61 Mich. 15, 27 N. W. 718; Sullings *v.* Goodyear Dental Vulcanite Co., 36 Mich. 313; Near *v.* Mitchell, 23 Mich. 382.

New York.— Stone *v.* Miller, 7 Barb. 368.

Pennsylvania.—Goldsmith *v.* Diekenspiel, 2 Del. Co. 170.

Rhode Island.—Russia Cement Co. *v.* Whitmarsh, (1906) 67 Atl. 450.

Virginia.— Buck *v.* Fouchee, 1 Leigh 64.

See 39 Cent. Dig. tit. "Pleading," § 230.

15. Sloan *v.* Lowder, 23 Ind. App. 118, 54 N. E. 135.

16. Combs *v.* Union Trust Co., 146 Ind. 688, 46 N. E. 16.

17. Davis *v.* Grainger, 3 Johns. (N. Y.) 259; Daniels *v.* Sanderson, 22 Pa. St. 443; Hinton *v.* Ballard, 3 W. Va. 582.

18. Sauerwein *v.* Renard Champagne Co., 68 Mo. App. 29.

19. Elmes *v.* McKenzie, 5 Ala. 617.

20. Fix *v.* Schuylkill Valley R. Co., 5 Pa. Co. Ct. 420.

21. Stewart *v.* Smith, 98 Me. 104, 56 Atl. 401.

22. Burlington Voluntary Relief Dept. *v.* Moore, 52 Nebr. 719, 73 N. W. 15; Schofield *v.* Palmer, 134 Fed. 753; Hurst *v.* Everett, 21 Fed. 218.

23. Hurst *v.* Everett, 21 Fed. 218. See, generally, *infra*, VI, F.

24. Warfield *v.* Walter, 11 Gill & J. (Md.) 80; Woods *v.* Nashua Mfg. Co., 4 N. H. 527.

25. As ground for arrest of judgment see Judgments, 23 Cyc. 826 note 12.

26. *Alabama.*—Jones *v.* Yarborough, 2 Ala. 524; Coalter *v.* Bell, 2 Stew. & P. 358 (holding that such matter is in abatement and not in bar); Collier *v.* Crawford, Minor 100. See Mahoney *v.* O'Leary, 34 Ala. 97.

Arkansas.— Hicks *v.* Branton, 21 Ark. 186.

Kentucky.— Saddler *v.* Glover, 1 B. Mon. 50, holding that a suspension by supersedeas of a decree dissolving an injunction is matter in abatement and not in bar of an action upon the injunction bond.

Tennessee.— Blevins *v.* Alexander, 4 Sneed 583; Reed *v.* Brewer, Peck 275.

Wisconsin.— Millett *v.* Hayford, 1 Wis. 401.

Contra.— Wingate *v.* Smith, 20 Me. 287 (holding that it was a good defense in replevin, under the general issue, that the writ was sued out before the cause of action accrued, and that such fact could not be pleaded in abatement); Owen *v.* Bulkley, Comb. 483, 1 Ld. Raym. 345 (holding that the matter being in bar could not be pleaded in abatement); Faequire *v.* Kynaston, 2 Ld. Raym. 1249 (holding that since the evidence might be given under the general issue it could not be pleaded in abatement).

In Louisiana an exception on this ground is regarded as a dilatory one, which must be pleaded *in limine litis.* Meaux *v.* Pittman, 35 La. Ann. 360; Penniston *v.* Jefferson, 18 La. Ann. 158; McDonough *v.* Gordon, 10 La. Ann. 794; Benedict *v.* Williams, 4 Rob. 392; Howard *v.* The Columbia, 1 La. 417.

27. Rainey *v.* Long, 9 Ala. 754; Hicks *v.* Branton, 21 Ark. 186; Landis *v.* Morrissey, 69 Cal. 83, 10 Pac. 258; Bacon *v.* Schepflin, 185 Ill. 122, 56 N. E. 1123; Daniels *v.* Osborn, 71 Ill. 169; Harlow *v.* Boswell, 15 Ill. 56; Kahn *v.* Cook, 22 Ill. App. 559; Collins *v.* Montemy, 3 Ill. App. 182; McCoy *v.* Babcock, 1 Ill. App. 414. See Wetherell *v.* Evarts, 17 Vt. 219. *Contra*, Jones *v.* Yarborough, 2 Ala. 524, holding that an objection that the writ bore test before the cause of action accrued could not be urged under a plea in bar.

In an action by an indorser against an indorsee, the indorser need not plead in abatement that the suit was commenced before an execution against the maker was returned, the general issue throwing on plaintiff proof of such fact. Woodward *v.* Harbin, 4 Ala. 534, 37 Am. Dec. 753 [*distinguishing* Jones *v.* Yarborough, 2 Ala. 524].

28. See *infra*, VI, F, 2, b, (II).

29. Middaugh *v.* Wilson, 30 Ind. App. 112,

Where, however, a suit is prematurely brought, not because the debt upon which it is based has not matured but because of an agreement for the extension of the time of payment, the agreement must be pleaded in abatement and not in bar.[30] And generally, where the cause of action exists and the time at which action should be brought is deferred, such fact may be pleaded in abatement only.[31]

(iv) *Another Action Pending.* The pendency of another action is properly ground for a plea in abatement.[32] The plea will not lie for the pendency of a prior action not of record.[33]

(v) *Incapacity to Sue.* Matters going to the personal capacity[34] or to the ability[35] of plaintiff to sue must ordinarily be presented by plea in abatement.

65 N. E. 555; Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 103, 865 [*explaining* Scott *v.* Norris, 6 Ind. App. 102, 32 N. E. 332, 33 N. E. 227] (and holding that the fact that a note sued on is not due, a date of maturity earlier than intended having been inserted by mistake, is a plea in abatement and not in bar, although the procuring of the insertion of the earlier date was by fraud); Campbell *v.* Scaife, 1 Phila. (Pa.) 187; Carter *v.* Turner, 2 Head (Tenn.) 52.

30. Adams *v.* Branan, 120 Ga. 530, 48 S. E. 128; Horne *v.* Rodgers, 103 Ga. 649, 30 S. E. 562; Bacon *v.* Schepflin, 185 Ill. 122, 56 N. E. 1123 [*citing* and *explaining* Pitts Sons' Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Culver *v.* Johnson, 90 Ill. 91; Palmer *v.* Gardiner, 77 Ill. 143; Archibald *v.* Argall, 53 Ill. 307; Guard *v.* Whiteside, 13 Ill. 7]; Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316. See also Herndon *v.* Garrison, 5 Ala. 380; Amberg *v.* Nachtway, 92 Ill. App. 608. *Contra*, Franklin Sav. Inst. *v.* Reed, 125 Mass. 365.

31. Amoskeag Mfg. Co. *v.* Barnes, 48 N. H. 25; Kittredge *v.* Folsom, 8 N. H. 98; Clements *v.* Swain, 2 N. H. 475; Copley *v.* Delannoy, 2 Ld. Raym. 1055. See American Acc. Co. *v.* Fidler, 35 S. W. 905, 18 Ky. L. Rep. 161.

Actions against executor or administrator. — Where suit is commenced against an executor or administrator within the statutory period after the grant of letters during which such actions are prohibited the objection must be taken in abatement. Amoskeag Mfg. Co. *v.* Barnes, 48 N. H. 25; Kittredge *v.* Folsom, 8 N. H. 98; Clements *v.* Swain, 2 N. H. 475. But see Troy Nat. Bank *v.* Stanton, 116 Mass. 435 (holding that the objection might be set up by answer and, if proved, was a good defense); Benthall *v.* Hildreth, 2 Gray (Mass.) 288.

Action by foreign corporation before compliance with law.—An answer setting up that a contract sued on was negotiated by a foreign corporation before compliance with a statutory provision as to the conditions upon which foreign corporations may do business within the state, sets up matter which operates as a ground of abatement of the action as prematurely brought. Walter A. Wood Mowing, etc., Mach. Co. *v.* Caldwell, 54 Ind. 270, 23 Am. Rep. 641.

32. Smock *v.* Graham, 1 Blackf. (Ind.) 314; Spencer *v.* Johnston, 58 Nebr. 44, 78 N. W. 482; Sanchez, etc., Co. *v.* Hirsch, 27 Misc. (N. Y.) 202, 57 N. Y. Suppl. 795; Commercial Bank *v.* Jarvis, 6 U. C. Q. B. O. S. 257. The equitable remedy of enjoining the prosecution of one suit until another pending between the same parties and concerning the same subject-matter can be heard cannot be interposed by way of a legal defense to the merits of an action at law. Muth *v.* St. Louis Trust Co., 77 Mo. App. 493.

Effect of pendency of another action as abating particular action see Abatement and Revival, 1 Cyc. 21 *et seq.*

Necessity of presenting ground by plea in abatement see Abatement and Revival, 1 Cyc. 128.

In Louisiana a plea of another action pending is frequently termed a plea *of lis pendens*. Halphen *v.* Guilbeau, 37 La. Ann. 710; Rochereau *v.* Lewis, 26 La. Ann. 581.

33. Bullock *v.* Bolles, 9 R. I. 501; Riddle *v.* Potter, 20 Fed. Cas. No. 11,811, 1 Cranch C. C. 288.

34. *Arkansas.*— Heilman *v.* Martin, 2 Ark. 158.

Maryland.— Albert *v.* Freas, 103 Md. 583, 64 Atl. 282; Wilms *v.* White, 26 Md. 380, 90 Am. Dec. 113; Shivers *v.* Wilson, 5 Harr. & J. 130, 9 Am. Dec. 497.

Massachusetts.— Jaha *v.* Belleg, 105 Mass. 208.

Mississippi.— Talbott *v.* Norager, 23 Miss. 572.

New Hampshire.— Lang *v.* Whidden, 2 N. H. 435.

South Carolina.— Drago *v.* Moss, 1 Speers 212, 40 Am. Dec. 592; Edwards *v.* Ford, 2 Bailey 461.

Right as distinguished from capacity.—The right of a mother under Burns Rev. St. Ind. (1901) § 267, to sue for the wrongful death of her minor child, by reason of her husband, the father of the child, having deserted his family, can be put in issue only by answer in bar, and not by plea in abatement. Chicago, etc., Stone Co. *v.* Nelson, 32 Ind. App. 355, 69 N. E. 705.

Alienage of plaintiff see Aliens, 2 Cyc. 110.

Alien enemies see War.

Coverture see Husband and Wife, 21 Cyc. 1119.

Infancy see Infants, 22 Cyc. 503.

Waiver by failure to plead see *infra*, XIV, E.

35. Gaulden *v.* Kansas City Southern St. R. Co., 106 La. 409, 30 So. 889; Upham *v.* Bradley, 17 Me. 423; Dutcher *v.* Dutcher, 39 Wis. 651.

For example, it should be pleaded in abatement that plaintiff is not in being,[36] is fictitious,[37] that a person suing in a special capacity has no right to do so,[38] that an assignee has no right to sue,[39] that suit has been begun without authority,[40] or that persons suing as husband and wife are not lawfully married.[41] Where a disability exists which does not totally defeat the right of action it must be pleaded in suspension and not in abatement.[42] Where there are two or more plaintiffs a disability of one of them is ground for abatement as to all.[43] But there were some exceptions at common law where the party disabled has been previously summoned and severed.[44] The fact that plaintiff is himself legally liable upon an instrument sued on must be raised in bar and not in abatement.[45] A plea to the merits or of the general issue admits the capacity of plaintiff to sue.[46]

(VI) *Death of Party Before Suit.* The death of plaintiff before suit brought may be pleaded in abatement,[47] if not pleaded in abatement it may be pleaded

The fact that plaintiff is an officer of the court is not ground for a plea in abatement. Ford *v.* Hubinger, 64 Conn. 129, 29 Atl. 129.

36. Bolinger *v.* Fowler, 14 Ark. 27.

37. Doe *v.* Penfield, 19 Johns. (N. Y.) 308 (assumpsit on a foreign judgment in ejectment); Campbell *v.* Galbreath, 5 Watts (Pa.) 423; Boston Type, etc., Foundry *v.* Spooner, 5 Vt. 93.

38. *Connecticut.*— Chapman *v.* Thomas, 1 Root 67, termination of authority of plaintiffs, who are joint trustees, by reason of the death of one of them.

Maine.—Fleming *v.* Courtenay, 95 Me. 128, 49 Atl. 611 (holding that where the first and second counts in a declaration were by plaintiff as executrix, and the other counts were by her individually, a plea in abatement was properly sustained where the counts in the individual capacity contained no averments showing that the cause of action had been assigned to her); Abbott *v.* Chase, 75 Me. 83 (school-fund treasurer); Page *v.* McGlinch, 63 Me. 472 (surviving partner); Strang *v.* Hirst, 61 Me. 9; Kellar *v.* Savage, 20 Me. 199 (town treasurer); Vose *v.* Manly, 19 Me. 331 (judge advocate).

Massachusetts.— Gray *v.* Paxton, Quincy 541, provincial officer. But *compare* Trask *v.* Stone, 7 Mass. 241 (holding that where an infant sues by next friend, having a mother living, it is no cause for abating the writ; and, if this is any objection, it must be made by a motion to stay proceedings); Ruddock *v.* Gordon, Quincy 58 (holding that the want of a power in a collector of taxes to maintain an action to recover them is not matter of abatement, but should be tried on the merits).

Mississippi.— Moore *v.* Knox, 46 Miss. 602 (administrator); Anderson *v.* Tarpley, 6 Sm. & M. 507.

Missouri.— Montgomery *v.* Tipton, 1 Mo. 446, next friend.

Pennsylvania.— Buck *v.* Ehrgood, 4 Pa. Co. Ct. 312, 4 C. Pl. 161, committee of lunatic.

South Carolina.— State Treasurers *v.* Wiggins, 1 McCord 568, successors in office.

West Virginia.— Flesher *v.* Hasler, 29 W. Va. 404, 1 S. E. 580, court commissioners.

Wisconsin.— Plath *v.* Braunsdorff, 40 Wis. 107 (guardian); Milwaukee County *v.* Hackett, 21 Wis. 613 (district attorney).

In Louisiana the exception must be taken *in limine litis.* Lewis *v.* Homer, 23 La. Ann. 254; Wells *v.* Wells, 23 La. Ann. 224; Welman *v.* Connoly, 2 Mart. 245.

39. Commercial Bank *v.* Thompson, 7 Sm. & M. (Miss.) 443. In an action on a note payable to a bank, and assigned by it in violation of statute, the wrongful assignment must be pleaded in abatement. Lanier *v.* Trigg, 6 Sm. & M. (Miss.) 641, 45 Am. Dec. 293.

40. Nelson *v.* Thompson, 7 Cush. (Mass.) 502. See Sénécal *v.* Les Curé, etc., 12 Quebec K. B. 142.

41. Winslow *v.* Gilbreth, 49 Me. 578; Coombs *v.* Williams, 15 Mass. 243. But *compare* Lopez *v.* Mayor, 1 Yeates (Pa.) 551, holding that in ejectment by a husband and wife in the wife's right, defendant, under the general issue, may show that the woman was the wife of another than plaintiff. A plea in abatement is unnecessary.

42. Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

43. Oxnard *v.* Kennebeck Purchase, 10 Mass. 179.

44. Oxnard *v.* Kennebeck Purchase, 10 Mass. 179.

45. Mitchell *v.* Turner, 37 Ala. 660; Stone *v.* Brooks, 6 How. (Miss.) 373. But see Blaisdell *v.* Pray, 68 Me. 269, holding that an objection to a petition for partition that two firms, having a common member, are interested as tenants in common in the estate to be divided, should be taken in abatement.

46. Smith *v.* Allen, 16 Ind. 316; Dyer *v.* Drew, 14 La. Ann. 657; Tuthill *v.* Emerson, 7 La. 593; Simmons *v.* Thomas, 43 Miss. 31, 5 Am. Rep. 470; Yeaton *v.* Lynn, 5 Pet. (U. S.) 224, 8 L. ed. 105; Propagation of Gospel Soc. *v.* Pawlet, 4 Pet. (U. S.) 480, 7 L. ed. 927. But *compare* Carmichael *v.* School Lands Trustees, 3 How. (Miss.) 84, holding that the objection that trustees of school lands have no right to sue need not be raised by a plea in abatement, but can be made under the general issue. See, generally, *infra*, IV, C, 5, c.

47. Crump *v.* Wallace, 27 Ala. 277; Tait *v.* Frow, 8 Ala. 543; Jenks *v.* Edwards, 6

in bar,[48] or it may be urged at the trial.[49] The death of a party defendant before suit brought is ground for a plea in abatement.[50]

(VII) *Marriage of Female Plaintiff.* At common law the marriage of a female plaintiff, after suit is begun, is ground for a plea in abatement;[51] but under the married women's acts[52] and the practice acts of the several states this rule has been generally superseded.[53] Where the marriage has divested plaintiff of all right to sue it may be taken advantage of in bar.[54]

(VIII) *Misnomer and Insufficient Description of Parties.* A plea in abatement is the proper method of presenting an objection to a complaint for misnomer,[55] or for an insufficient description of a party,[56] as by the use of a sur-

Ala. 143; Camden *v.* Robertson, 3 Ill. 507; Hawkins *v.* Bowie, 9 Gill & J. (Md.) 428; Hurst *v.* Fisher, 1 Watts & S. (Pa.) 438; Smith *v.* Hewson, 1 Am. L. Reg. (Pa.) 441. But *compare* Denton *v.* Stephens, 32 Miss. 194 (where an amendment was allowed in the case of a nominal plaintiff); Finlay *v.* Merriman, 39 Tex. 56 (where a plea in abatement was overruled after the administrator of deceased had been made plaintiff by amendment).

48. Crump *v.* Wallace, 27 Ala. 277; Tait *v.* *v.* Frow, 8 Ala. 543; Jenks *v.* Edwards, 6 Ala. 143; Hurst *v.* Fisher, 1 Watts & S. (Pa.) 438. And see Sandback *v.* Quigley, 8 Watts (Pa.) 460. See also Patterson *v.* Brindle, 9 Watts (Pa.) 98, holding that defendant in ejectment may show, under a plea of not guilty, that plaintiff was dead when suit was begun. But *compare* Camden *v.* Robertson, 3 Ill. 507, holding the fact that one of several plaintiffs had died before suit brought was not available in bar.

49. Humphreys *v.* Irvine, 6 Sm. & M. (Miss.) 205, where it is said that it is immaterial at what time the fact of the death of the party is made known to the court, or in what form.

50. Massey *v.* Steele, 11 Ala. 340 (holding that it is no answer to the plea that in the progress of the suit defendant appeared by attorney, as a dead man cannot appear by attorney); McLaughlin *v.* De Young, 3 Gill & J. (Md.) 4; McCabe *v.* U. S., 4 Watts (Pa.) 325.

51. *Alabama.*— Powell *v.* Glenn, 21 Ala. 458.

Arkansas.— Laster *v.* Toliver, 11 Ark. 450, holding that where a suit is brought by a single woman, and she marries while it is pending, her husband may be made a co-plaintiff on motion; and the defendant cannot, on the trial, prove they were never married.

Connecticut.— Northum *v.* Kellogg, 15 Conn. 569.

Maine.— Walker *v.* Gilman, 45 Me. 28.

Massachusetts.— Oxnard *v.* Kennebeck Purchase, 10 Mass. 179; Haines *v.* Corliss, 4 Mass. 659.

Ohio.— Garver *v.* Morgan, 7 Ohio 179.

Pennsylvania.— Wilson *v.* Hamilton, 4 Serg. & R. 238.

Vermont.— Bates *v.* Stevens, 4 Vt. 545, holding that such matters must be pleaded in abatement and cannot be taken advantage of under the general issue. See, however, Campbell *v.* Kathare, Brayt. 21, holding that the suit may be dismissed by the court without a plea in abatement.

United States.— Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. ed. 474.

52. See Husband and Wife.

53. See International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484; Western Cottage Piano, etc., Co. *v.* Anderson, (Tex. Civ. App. 1907) 101 S. W. 1061; Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132.

54. Gatewood *v.* Tunk, 3 Bibb (Ky.) 246, holding a plea in abatement unnecessary.

55. *Alabama.*— Oates *v.* Clendenard, 87 Ala. 734, 6 So. 359; Melvin *v.* Clark, 45 Ala. 285; Lynes *v.* States, 5 Port. 236, 30 Am. Dec. 557.

Georgia.— McIntosh County *v.* Aiken Canning Co., 123 Ga. 647, 51 S. E. 585.

Illinois.— Pond *v.* Ennis, 69 Ill. 341; Moss *v.* Flint, 13 Ill. 570; Salisbury *v.* Gillett, 3 Ill. 290.

Indiana.— McCrory *v.* Anderson, 103 Ind. 12, 2 N. E. 211; Sinton *v.* The R. R. Roberts, 46 Ind. 476.

Iowa.— Davis *v.* Davis, 1 Greene 427.

Louisiana.— Boyer *v.* Aubert, 12 Mart. 655.

Maine.— Baker *v.* Bessey, 73 Me. 472, 40 Am. Rep. 377.

Massachusetts.— Com. *v.* Fredericks, 119 Mass. 199; Trull *v.* Howland, 10 Cush. 109, 57 Am. Dec. 82; Plymouth Christian Soc. *v.* Macomber, 3 Metc. 235; Com. *v.* Lewis, 1 Metc. 151; Jewett *v.* Burroughs, 15 Mass. 464; Smith *v.* Bowker, 1 Mass. 76.

Mississippi.— Hudson *v.* Poindexter, 42 Miss. 304.

Missouri.— Carpenter *v.* State, 8 Mo. 291; Swan *v.* O'Fallon, 7 Mo. 231; Thompson *v.* Elliott, 5 Mo. 118; Hanley *v.* Blanton, 1 Mo. 49.

New Hampshire.— Sunapee *v.* Eastman, 32 N. H. 470.

New York.— Collman *v.* Collins, 2 Hall 569; Mann *v.* Carley, 4 Cow. 148; Utica Bank *v.* Smalley, 2 Cow. 770, 14 Am. Dec. 526.

Pennsylvania.— Freeland *v.* Pennsylvania Cent. Ins. Co., 94 Pa. St. 504; Whittier *v.* Gould, 8 Watts 485.

South Carolina.—Chappell *v.* Proctor, Harp. 49.

Tennessee.— Dixon *v.* Cavenaugh, 1 Overt. 365.

Texas.— Miszner *v.* Siter, 23 Tex. 621.

West Virginia.— Handley *v.* Ludington, 4 W. Va. 53.

What constitutes misnomer see *supra*, III, A, 7, g.

56. Martin *v.* Kelly, Cheves (S. C.) 215, where names of partners were not set out.

name only,[57] or the employment of initials[58] or abbreviations,[59] unless, as is sometimes the case, a statute provides that a misnomer shall not be a ground for abatement.[60] Under the codes, where no plea in abatement is provided for, the objection is ordinarily to be taken advantage of by motion.[61] An *alias dictus* subjoined to a true name is not ground for a plea in abatement.[62]

(IX) *NON-JOINDER OF PARTIES* — (A) *Plaintiffs* — (1) CONTRACTS. In actions *ex contractu* a failure to join as plaintiffs persons who ought to be joined is a ground for a plea in abatement.[63] In some of the code states a defect in parties not appearing on the face of the complaint must be set up in a verified plea in abatement filed and tried before answers in bar are pleaded.[64] Non-joinder of plaintiffs in a real action must be urged by a plea in abatement.[65]

(2) TORTS. In action for torts the non-joinder of persons interested with plaintiff must be pleaded in abatement.[66] But the non-joinder of a plaintiff cannot be pleaded in abatement when the facts upon which the plea is based must also

57. Peden *v.* King, 30 Ind. 181; Seely *v.* Boon, 1 N. J. L. 138; Labat *v.* Ellis, 1 N. C. 92; Chappell *v.* Proctor, Harp. (S. C.) 49.

58. Taylor *v.* Insley, 7 Colo. App. 175, 42 Pac. 1046; Stever *v.* Brown, 119 Mich. 196, 77 N. W. 704; Myers *v.* Sealy, 5 Rich. (S. C.) 473; Wilthaus *v.* Ludecus, 5 Rich. (S. C.) 326.

59. Wilson *v.* Shannon, 6 Ark. 196.

60. See the statutes of the several states. And see Union Bank *v.* Tillard, 26 Md. 446; Hoffman *v.* Dickinson, 31 W. Va. 142, 6 S. E. 53.

Under W. Va. Code, c. 125, § 14, the misnomer of a corporation cannot be taken advantage of by plea in abatement. Credo First Nat. Bank *v.* Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878.

61. See *infra*, XII, F.

62. Reid *v.* Lord, 4 Johns. (N. Y.) 118.

63. *Alabama.*— Garner *v.* Tiffany, Minor 167.

Arkansas.— Hicks *v.* Branton, 21 Ark. 186; Newton *v.* Cocke, 10 Ark. 169; Phillips *v.* Pennywit, 1 Ark. 59.

Connecticut.— Johnson *v.* Ransom, 24 Conn. 531.

Indiana.— See Macy *v.* Combs, 15 Ind. 469, 77 Am. Dec. 103.

Kentucky.— Lillard *v.* Lillard, 5 B. Mon. 340.

Maryland.— Armstrong *v.* Robinson, 5 Gill & J. 412.

Michigan.— Perrin *v.* Lepper, 34 Mich. 292.

New Hampshire.—White *v.* Brooks, 43 N. H. 402.

New Jersey.— Ball *v.* Consolidated Franklinite Co., 32 N. J. L. 102; Hunt *v.* Kearney, 3 N. J. L. 721.

Vermont.— Hilliker *v.* Loop, 5 Vt. 116, 26 Am. Dec. 286.

United States.— Newton *v.* Reardon, 18 Fed. Cas. No. 10,192, 2 Cranch C. C. 491.

But *compare* Manufacturing, etc., Co. *v.* Schoolly, Tapp. (Ohio) 271, holding it to be matter in bar.

Rebuttal of plea.— A plea in abatement which sets up the non-joinder of a party plaintiff, and alleges that the party not joined was living when the action was commenced, is met by evidence that such party was dead at the time of the trial, when his death gives plaintiffs named full right to prosecute the action as the survivors thereto. Grott *v.* Agens, 107 N. Y. 633, 14 N. E. 497.

64. Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 5 L. R. A. N. S. 153; Sheridan Gas, etc., Co. *v.* Pearson, 19 Ind. App. 252, 49 N. E. 357, 65 Am. St. Rep. 402.

65. Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219.

66. *Illinois.*— Chicago, etc., R. Co. *v.* Todd, 91 Ill. 70; Johnson *v.* Richardson, 17 Ill. 302, 63 Am. Dec. 369; Edwards *v.* Hill, 11 Ill. 22; Masonic Temple Safety Deposit Co. *v.* Langfelt, 117 Ill. App. 652.

Kentucky.— Bell *v.* Layman, 1 T. B. Mon. 39, 15 Am. Dec. 83.

Maine.— Hobbs *v.* Hatch, 48 Me. 55; McArthur *v.* Lane, 15 Me. 245.

Massachusetts.— Phillips *v.* Cummings, 11 Cush. 469; Putney *v.* Lapham, 10 Cush. 232; Morley *v.* French, 2 Cush. 130; Thompson *v.* Hoskins, 11 Mass. 419; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

Missouri.— Chouteau *v.* Hewitt, 10 Mo. 131.

New Hampshire.— Pickering *v.* Pickering, 11 N. H. 141.

New York.— Bradish *v.* Schenck, 8 Johns. 151; Brotherson *v.* Hodges, 6 Johns. 108.

Pennsylvania.— Walworth *v.* Abel, 52 Pa. St. 370; Dubois *v.* Glaub, 52 Pa. St. 238; Deal *v.* Bogue, 20 Pa. St. 228, 57 Am. Dec. 702.

South Carolina.— Gordon *v.* Goodwin, 2 Nott & M. 70, 10 Am. Dec. 573.

Tennessee.— Winters *v.* McGhee, 3 Sneed 128.

Texas.— Foster *v.* Gulf, etc., R. Co., 91 Tex. 631, 45 S. W. 376 [*reversing* (Civ. App. 1898) 44 S. W. 198]; Denison, etc., R. Co. *v.* Smith, 19 Tex. Civ. App. 114, 47 S. W. 278.

United States.— Carlock *v.* Tappan, 5 Fed. Cas. No. 2,412.

Curing defect.— A plea in abatement for non-joinder of a cotenant in an action for tort is overcome by the execution of a deed by the tenant in common to plaintiff after the commencement of the suit under verbal agreement between them, made prior to the suit, and at the time of the dissolution of their partnership, whereby the land in question

put an end to any action for the cause.[67] If one of two part-owners bring an action for tort and defendant neglects to plead the non-joinder of the other in abatement, the latter may afterward sue alone and the non-joinder of the owner who has already recovered is not a ground for abatement.[68] If the cause of action is divisible, and plaintiff cannot sue alone for a part, and this does not appear on the face of his writ or declaration, defendant may successfully plead in abatement to such part, and the action will proceed as to the residue.[69]

(B) *Defendants* —(1) CONTRACTS. A plea in abatement is proper on the ground of non-joinder of defendants who ought to be joined in actions *ex contractu*.[70] Where non-joinder of defendants who ought to be joined in an action of contract is not disclosed by the record it must be taken advantage of by a plea in abatement.[71]

was to go to plaintiff. Western Union Tel. Co. *v.* Wofford, (Tex. Civ. App. 1897), 42 S. W. 119.

Where plaintiff has entered a retraxit.— Where there are several plaintiffs in an action of trespass *quare clausum fregit*, and, after the pleadings are made up, one of the plaintiffs comes into court and enters a *retraxit*, although the court may permit the name of such plaintiff to be stricken from the writ and declaration, the court should not suffer defendant to amend his pleadings by pleading in abatement the want of proper parties. Wilkinson *v.* Gilchrist, 27 N. C. 228.

67. Roberts *v.* Heim, 27 Ala. 678.

68. Sedgworth *v.* Overend, 7 T. R. 279.

69. Branch *v.* Doane, 17 Conn. 402.

70. *Alabama.*— Boswell *v.* Morton, 20 Ala. 235; Henderson *v.* Hammond, 19 Ala. 340.

District of Columbia.— Snyder *v.* Finley, 1 MacArthur 220.

Illinois.— Page *v.* Brandt, 18 Ill. 37; Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430; Damron *v.* Sweetser, 16 Ill. App. 339.

Maine.— Hapgood *v.* Watson, 65 Me. 510; Leach *v.* Perkins, 17 Me. 462, 35 Am. Dec. 268.

Maryland.— Merrick *v.* Metropolis Bank, 8 Gill 59.

Massachusetts.—Canfield *v.* Miller, 13 Gray 274; Edler *v.* Thompson, 13 Gray 91; Shelton *v.* Banks, 10 Gray 401; Converse *v.* Symmes, 10 Mass. 377.

Michigan.— Hinman *v.* Eakins, 26 Mich. 80.

Mississippi.— Stevenson *v.* Walton, 2 Sm. & M. 262.

New Hampshire.— Probate Judge *v.* Webster, 46 N. H. 518; Gove *v.* Lawrence, 24 N. H. 128.

New Jersey.— Lieberman *v.* Brothers, 55 N. J. L. 379, 26 Atl. 828; St. Mary's Protestant Episcopal Church *v.* Wallace, 10 N. J. L. 311.

Pennsylvania.— Collins *v.* Smith, 78 Pa. St. 423; Means *v.* Milliken, 33 Pa. St. 517; Potter *v.* McCoy, 26 Pa. St. 458; Grubb *v.* Foltz, 4 Watts & S. 548; Rivers *v.* Fame Judge No. 16, K. P., 11 Pa. Co. Ct. 241.

West Virginia.— Reynolds *v.* Hurst, 18 W. Va. 648; Urton *v.* Hunter, 2 W. Va. 83.

United States.— Minor *v.* Mechanics Bank, 1 Pet. 46, 7 L. ed. 47; Chandler *v.* Byrd, 5 Fed. Cas. No. 2,591*b*, Hempst. 222; Jordan *v.* Wilkins, 13 Fed. Cas. No. 7,527, 3 Wash. 110.

England.— Powell *v.* Layton, 2 B. & P. N. R. 365; Bristow *v.* James, 7 T. R. 257.

71. *Alabama.*— Bonner *v.* Greenlee, 6 Ala. 411; Jones *v.* Pitcher, 3 Stew. & P. 135, 24 Am. Dec. 716.

Arkansas.— Taylor *v.* Auditor Public Accounts, 2 Ark. 174.

Colorado.— Tiger *v.* Lincoln, 1 Colo. 394.

Connecticut.— Johnson *v.* Ransom, 24 Conn. 531; Bradley *v.* Camp, Kirby 77, 1 Am. Dec. 13.

Delaware.— Andrews *v.* Allen, 4 Harr. 452.

Illinois.— Conley *v.* Good, 1 Ill. 135; Swigart *v.* Weare, 37 Ill. App. 258.

Indiana.— Bledsoe *v.* Irvin, 35 Ind. 293; Mason *v.* Fairfield, 2 Ind. 84.

Iowa.— Hine *v.* Houston, 2 Greene 161.

Kentucky.— Allen *v.* Lucket, 3 J. J. Marsh. 164; Brown *v.* Warner, 2 J. J. Marsh. 37; Mackall *v.* Roberts, 3 T. B. Mon. 130; Morgan *v.* Crimm, 1 T. B. Mon. 129; Williams *v.* Royle, 1 Litt. 77; Moore *v.* Russell, 2 Bibb 443.

Louisiana.— Brown *v.* Robinson, 6 La. Ann. 423.

Maine.— Kierstead *v.* Bennett, 93 Me. 328, 45 Atl. 42; Hapgood *v.* Watson, 65 Me. 510; White *v.* Cushing, 30 Me. 267; Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68; Hughes *v.* Littlefield, 18 Me. 400; White *v.* Perley, 15 Me. 470; Winslow *v.* Merrill, 11 Me. 127; Robinson *v.* Robinson, 10 Me. 240.

Maryland.— Sittig *v.* Birkestack, 38 Md. 158; Brown *v.* Warram, 3 Harr. & J. 572.

Massachusetts.— Kendall *v.* Weaver, 1 Allen 277; Bliss *v.* Bliss, 12 Metc. 266; Holmes *v.* Marden, 12 Pick. 169; Barstow *v.* Fossett, 11 Mass. 250; Converse *v.* Symmes, 10 Mass. 377.

Michigan.—Dillenbeck *v.* Simons, 105 Mich. 373, 63 N. W. 438; Porter *v.* Leache, 56 Mich. 40, 22 N. W. 104; Munn *v.* Haynes, 46 Mich. 140, 9 N. W. 136; Bowen *v.* Culp, 36 Mich. 224; Ballou *v.* Hill, 25 Mich. 204.

New Hampshire.— Powers *v.* Spear, 3 N. H. 35.

New Jersey.— Mershon *v.* Hobensack, 22 N. J. L. 372.

New York.— Bank of North America *v.* Hornsey, 13 N. Y. Civ. Proc. 158; Allen *v.* Sewall, 2 Wend. 327; Le Page *v.* McCrea, 1 Wend. 164, 19 Am. Dec. 469; Gay *v.* Cary, 9 Cow. 44; Williams *v.* Allen, 7 Cow. 316; Cumming *v.* Eden, 1 Cow. 70; Robertson *v.* Smith, 18 Johns. 459, 9 Am. Dec. 277; Rob-

The rule applies to certain actions *quasi ex contractu*.[72] And at common law a non-joinder could be availed of otherwise than by plea in abatement only where it appeared from the face of the record that there was another party still living who was jointly liable.[73] But a plea in abatement, it has been held, will not lie where the defendants not joined are without the state and beyond the jurisdiction.[74] In an action upon a joint and several obligation non-joinder of co-parties cannot be pleaded in abatement, and this rule applies to obligations joint in form, but made joint and several in effect by statute.[75] Defendant cannot plead in abatement a secret partnership.[76] Under the statutes in some jurisdictions upon the filing of a plea in abatement for the non-joinder of a defendant the

inson *v.* Fisher, 3 Cal. 99; Ziele *v.* Campbell, 2 Johns. Cas. 382.

North Carolina.— —— *v.* Kenon, 2 N. C. 216.

Ohio.— McArthur *v.* Ladd, 5 Ohio 514.

Pennsylvania.— *In re* Schwartz, 14 Pa. St. 42; Horton *v.* Cook, 2 Watts 40; Wilson *v.* Wallace, 8 Serg. & R. 53.

South Carolina.— Exum *v.* Davis, 10 Rich. 357; Stoney *v.* McNeill, Harp. 156; McCall *v.* Price, 1 McCord 82.

Texas.—Anderson *v.* Chandler, 18 Tex. 436; Ritter *v.* Hamilton, 4 Tex. 325; Stresau *v.* Fidelli, 1 Tex. App. Civ. Cas. § 847.

Vermont.— Hyde *v.* Lawrence, 49 Vt. 361.

Virginia.— Barnett *v.* Watson, 1 Wash. 372; Brown *v.* Belches, 1 Wash. 9.

Wisconsin.— Newhall-House Stock Co. *v.* Flint, etc., R. Co., 47 Wis. 516, 2 N. W. 1123; Markoe *v.* Seaver, 2 Wis. 148.

United States.— North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 8 S. Ct. 266, 31 L. ed. 287; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 3 S. Ct. 322, 27 L. ed. 1003; Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439, 24 L. ed. 506; Barry *v.* Foyles, 1 Pet. 317, 7 L. ed. 157; Clarion First Nat. Bank *v.* Hamor, 49 Fed. 45, 1 C. C. A. 153; Van Dyke *v.* Tinker, 28 Fed. Cas. No. 16,849 [*affirmed* in 23 Fed. Cas. No. 14,058, 1 Flipp. 521]. But see Jordan *v.* Wilkins, 13 Fed. Cas. No. 7,527, 3 Wash. 110, where it is said that the rule that the non-joinder as defendant of a coöbligor is only available on plea in abatement is confined to those species of actions in which plaintiff gives notice to defendant of the nature of his demand, as in actions on bonds, or special actions on the case, and does not extend to actions of general *indebitatus assumpsit*, unless in such suits plaintiff, before plea, furnishes defendant with a copy of the account which he means to offer at the trial.

Non-joinder of partner must be urged by plea in abatement. Page *v.* Brant, 18 Ill. 37; H. E. Mueller *v.* Kinkead, 113 Ill. App. 132; Smith *v.* Cooke, 31 Md. 174, 100 Am. Dec. 58; Schroder *v.* Pinch, 126 Mich. 185, 85 N. W. 454; Coon *v.* Anderson, 101 Mich. 295, 59 N. W. 607; Ela *v.* Rand, 4 N. H. 307; Chorpenning *v.* Royce, 58 Pa. St. 474; Bellas *v.* Fagely, 19 Pa. St. 273; Bacon *v.* Sanders, 4 Whart. (Pa.) 148; Alexander *v.* McGinn, 3 Watts (Pa.) 220; Wilkins *v.* Boyce, 3 Watts (Pa.) 39; McCahan *v.* Gensemer, 3 Kulp (Pa.) 40; Houghton *v.* Puryear, (Tex. Civ. App. 1897) 41 S. W. 371; McDonald *v.* Cole, 46 W. Va. 186, 32 S. E. 1033; Rutter *v.* Sullivan, 25 W. Va. 427; Urton *v.* Hunter, 2 W. Va. 83; Evans, etc., Fire Brick Co. *v.* Hadfield, 93 Wis. 665, 68 N. W. 468; Clementson *v.* Beatty, 5 Fed. Cas. No. 2,884, 1 Cranch C. C. 178. But where there is nothing in the pleadings to advise a defendant of a partnership claim, he is under no obligation, in a suit directed against him individually, to set up the non-joinder of his partners by a plea in abatement. Ernest *v.* Wible, 8 Pa. Super. Ct. 216.

Where joint liability extends only to part of claim the rule is the same notwithstanding joint liability is not claimed to apply to all of the items of plaintiff's demand. Wilson *v.* Wilson, 125 Ill. App. 385.

Objection may be taken to part of count.— The principle that if only a part of the persons who are jointly liable to plaintiff are sued, and it does not appear on the face of the declaration that others so liable, and living, are omitted, those who are sued can take advantage of the non-joinder only by plea in abatement, is not limited to cases where the objection that there is such non-joinder applies, and is taken to the whole of a count to which it is pleaded. Johnson *v.* Ransom, 24 Conn. 531.

72. Allen *v.* Sewall, 2 Wend. (N. Y.) 327; Boson *v.* Sandford, Carth. 58.

73. *Arkansas.*— Taylor *v.* Auditor, 2 Ark. 174.

Illinois.—Sandusky *v.* Sidwell, 173 Ill. 493, 50 N. E. 1003 [*affirming* 73 Ill. App. 491].

Kentucky.— Com. *v.* Davis, 9 B. Mon. 128; Allen *v.* Lucket, 3 J. J. Marsh. 164.

Maine.— Harwood *v.* Roberts, 5 Me. 441.

Michigan.— Ballou *v.* Hill, 25 Mich. 204.

Pennsylvania.— Geddis *v.* Hawk, 10 Serg. & R. 33.

In actions against partnerships the same rule applies as to partners not joined. Sinsheimer *v.* William Skinner Mfg. Co., 165 Ill. 116, 46 N. E. 262 [*reversing* 54 Ill. App. 151]; Thompson *v.* Strain, 16 Ill. 369; Puschel *v.* Hoover, 16 Ill. 340.

74. Hall *v.* Williams, 8 Me. 434; Lillard *v.* Planters' Bank, 3 How. (Miss.) 78. *Contra*, Boykin *v.* Watson, 1 Treadw. (S. C.) 157.

75. McKee *v.* Griffin, 60 Ala. 427.

76. Cammack *v.* Johnson, 2 N. J. Eq. 163; De Mautort *v.* Saunders, 1 B. & Ad. 398, 9 L. J. K. B. O. S. 51, 20 E. C. L. 534; Mullett *v.* Hook, M. & M. 88, 31 Rev. Rep. 716, 22 E. C. L. 480 [not *following* Rice *v.* Shute, 5 Burr. 2611, W. Bl. 695; Dubois *v.* Ludert,

party omitted may be brought in by scire facias.[77] By statute in some jurisdictions, where the common-law procedure otherwise prevails, the action is not abated for defect of parties, but upon defendant's plea in abatement suggesting the names of the necessary parties process issues against them.[78]

(2) TORTS. In actions of tort a non-joinder of defendants is, not as a general rule ground for a plea in abatement.[79] An exception exists in cases where the title to realty is brought in question.[80] And in certain cases, another exception has been recognized with regard to actions *quasi ex contractu*.[81]

(x) *MISJOINDER OF PARTIES*—(A) *Plaintiffs.* Misjoinder of plaintiffs in tort must be pleaded in abatement;[82] and in some jurisdictions, where the misjoinder of parties plaintiff is apparent on the face of the petition, it may be raised by a special exception.[83] A statute providing that when there has been a misjoinder of parties plaintiff or defendant the court may order the proceeding to abate as to any party improperly joined, and to proceed by or against the others, will not operate to prevent the abatement of an action brought at law when it should have been brought in equity.[84]

(B) *Defendants.*[85] Misjoinder of party defendants should be pleaded in abatement,[86] although under the statutes in some states an improper joinder of defendants is not a ground for abatement, but the cause may be prosecuted to final judgment against defendants properly joined.[87] Where a joint liability is alleged, however, an answer showing that the liability is not joint is not in abatement but in bar.[88] It is no ground for a plea in abatement that a person really or nominally interested is made a party defendant instead of being joined as a plaintiff.[89]

(XI) *VARIANCE BETWEEN DECLARATION AND WRIT.* A variance between the declaration and the writ, especially where the statute requires the writ to set out in brief the substance of the declaration,[90] is generally considered ground for

1 Marsh. 246, 5 Taunt. 609, 1 E. C. L. 312]. *Compare* Brealsford *v.* Meade, 1 Yeates (Pa.) 488. *Contra*, Ela *v.* Rand, 4 N. H. 307.

77. See the statutes of the several states. And see Smith *v.* Harris, 12 Ill. 462 (holding such a statute to apply to persons who, by marriage or death, have become necessary parties to the suit, which was originally commenced without them, and they can only be made parties by actual service on them of a scire facias, or by their voluntary appearance); Merrill *v.* Coggill, 12 N. H. 97.

78. See the statutes of the several states. And see Milius *v.* Marsh, 1 Disn. (Ohio) 512, 12 Ohio Dec. (Reprint) 765.

79. Buddington *v.* Shearer, 22 Pick. (Mass.) 427; U. S. *v.* Gumm, 9 N. M. 611, 58 Pac. 398; Low *v.* Mumford, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469; Mitchell *v.* Tarbutt, 5 T. R. 649.

80. Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85; Sumner *v.* Tileston, 4 Pick. (Mass.) 308; Low *v.* Mumford, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469; Mitchell *v.* Tarbutt, 5 T. R. 649. See Fisher *v.* Cook, 23 Ill. App. 621.

81. Allen *v.* Sewall, 2 Wend. (N. Y.) 327; Low *v.* Mumford, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469. See also Patton *v.* Magrath, Rice (S. C.) 162, 33 Am. Dec. 98. But *compare* Orange County Bank *v.* Brown, 3 Wend. (N. Y.) 158.

82. Cheyney *v.* Dallett, 1 Del. Co. (Pa.) 225. See also May *v.* Slade, 24 Tex. 205.

83. Texas Mexican R. Co. *v.* Lewis, (Tex. Civ. App. 1907) 99 S. W. 577.

84. McIlvane *v.* Big Story Lumber Co., 105 Va. 613, 54 S. E. 473.

85. **Dismissal or discontinuance** as to one or more co-defendants see DISMISSAL AND NONSUIT, 14 Cyc. 411.

86. Maynard *v.* Ponder, 75 Ga. 664; Harlem *v.* Emmert, 41 Ill. 319; Gasquet *v.* Fisher, 7 Sm. & M. (Miss.) 313; Urton *v.* Hunter, 2 W. Va. 83. See also Sparks *v.* McHugh, (Tex. Civ. App. 1898) 43 S. W. 1045, holding that misjoinder of defendants must be pleaded, and that it was error for the judge to abate a suit on his own motion after submission of the cause on its merits.

87. See the statutes of the several states. And see Wooten *v.* Nall, 18 Ga. 609.

Death of joint obligor before suit.— Where one of two joint covenantors is sued for breach of the covenant, after the death of one, the survivor may plead in abatement to the action, and the declaration is not rendered sufficient by discontinuance as to the deceased covenantor. Rowan *v.* Woodward, 2 A. K. Marsh. (Ky.) 140.

88. Stafford *v.* Nutt, 51 Ind. 535.

Joint negligence.— Where a declaration in an action of tort alleges as the cause of the action the joint negligence of two or more defendants, an error in the joinder cannot be reached by demurrer or plea in abatement. The proper plea for those not guilty is the general issue. Purington-Kimball Brick Co. *v.* Eckman, 102 Ill. App. 183.

89. Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587 [*citing* Durham *v.* Hall, 67 Ind. 123].

90. See the statutes of the several states. And see Pitman *v.* Perkins, 28 N. H. 90; Stoddard *v.* Cockran, 6 N. H. 160. But in

abatement.[91] But this is not the case where the variance is such as not to mislead,[92] or where it is immaterial.[93] But some cases hold that inasmuch as a plea in abatement must ordinarily rest upon something *de hors* the record, and a variance is apparent upon the record, the defect must be availed of by demurrer and not by plea.[94]

(xii) *Miscellaneous Grounds.*[95] Among other proper grounds of a plea in abatement are the following: Summons issued before note filed, where statute requires its filing;[96] that the promise was made by defendant and plaintiff jointly and not by the defendant severally;[97] an assignment fraudulently made to evade the law as to venue;[98] garnishment of the debt by a third person;[99] or the right to revive a suit against the administrator of the deceased sole defendant.[1] But it is not a proper ground of abatement that the claims of plaintiff are so involved that resort should be had to a court of equity;[2] or that one through whom plaintiff claims is misnamed;[3] or that defendant is imprisoned, since he may defend by counsel while in jail.[4] Nor can it be pleaded in abatement that a defendant administrator's authority has terminated by act of law, for he should have pleaded *plene administravit*;[5] nor that an attachment is pending in a foreign jurisdiction;[6] nor that the controversy has been submitted to arbitrators who have not yet made an award;[7] nor delay in prosecution which might have been terminated at any time by the act of defendant.[8] A plea in abatement based upon an erroneous theory of the action is bad.[9] A plea in abatement which is disproved by the record is bad.[10]

Alabama it is held that the object of an indorsement of the cause of action on the writ is to apprise defendant of the case he must meet, and no variance will give ground for a plea in abatement. Sexton *v.* Rone, 7 Ala. 829; Wharton *v.* Franks, 9 Port. (Ala.) 232.

91. *Alabama.*— Stoddard *v.* Davis, 50 Ala. 21; Turner *v.* Brown, 9 Ala. 866; Curry *v.* Paine, 3 Ala. 154; Findlay *v.* Pruitt, 9 Port. 195.

Arkansas.— Wilson *v.* Shannon, 6 Ark. 196.

Illinois.— Carpenter *v.* Hoyt, 17 Ill. 529; Weld *v.* Hubbard, 11 Ill. 573; Cruikshank *v.* Brown, 10 Ill. 75; Prince *v.* Lamb, 1 Ill. 378.

Kentucky.— White *v.* Walker, 1 T. B. Mon. 34; Morgan *v.* Morgan, 2 Bibb 388.

Mississippi.— Pierce *v.* Lacy, 23 Miss. 193.

New Jersey.— New Brunswick Bank *v.* Arrowsmith, 9 N. J. L. 284.

West Virginia.—Snyder *v.* Philadelphia Co., 54 W. Va. 149, 46 S. E. 366, 102 Am. St. Rep. 941, 63 L. R. A. 896; Swindell *v.* Harper, 51 W. Va. 381, 41 S. E. 117.

United States.— Chaise *v.* Reinicker, 11 Wheat. 280, 6 L. ed. 474; Duvall *v.* Craig, 2 Wheat. 45, 4 L. ed. 180; How *v.* McKinney, 12 Fed. Cas. No. 6,749, 1 McLean 319.

See 39 Cent. Dig. tit. "Pleading," § 225.

Necessity of demanding oyer of writ see *infra*, IX, A, 2, b.

92. Caldwell *v.* Mobile Branch State Bank, 11 Ala. 549; Sexton *v.* Rone, 7 Ala. 829; Adams *v.* Wiggin, 42 N. H. 553.

93. Fulcher *v.* Lyon, 4 Ark. 445, where variance as to the amount of the *ad damnum* was held immaterial, and no ground for abatement.

94. Dawson *v.* Robert, 5 Rich. (S. C.) 258; Sargent *v.* Hayne, 2 Hill (S. C.) 585; Young *v.* Grey, 1 McCord (S. C.) 211.

95. Defective execution and service of process see Process.

Grounds for abatement and revival of actions generally see Abatement and Revival, 1 Cyc. 10.

Privilege from arrest see Arrest, 3 Cyc. 925.

96. Gearhart *v.* Olmstead, 7 Dana (Ky.) 441.

97. Robinson *v.* Fisher, 3 Cai. (N. Y.) 99.

98. McLean *v.* McDugald, 53 N. C. 383.

99. Sargent *v.* Sargent Granite Co., 6 Misc. (N. Y.) 384, 26 N. Y. Suppl. 737; Embree *v.* Hanna, 5 Johns. (N. Y.) 101.

1. Finlayson *v.* Love, 44 Fla. 551, 33 So. 306.

2. Glens Falls Nat. Bank *v.* Cramton, 72 Fed. 734.

3. Robinson *v.* Neal, 5 T. B. Mon. (Ky.) 212.

4. U. S. *v.* Ottman, 27 Fed. Cas. No. 15,977, 1 Hughes 313.

5. Strobhart *v.* Morrall, 7 Rich. (S. C.) 140.

6. Sargent *v.* Sargent Granite Co., 6 Misc. (N. Y.) 384, 26 N. Y. Suppl. 737.

7. Gore *v.* Chadwick, 6 Dana (Ky.) 477.

8. Comrey *v.* East Union Tp., 26 Pa. Co. Ct. 74.

9. Seaboard Air Line R. Co. *v.* Hubbard, 142 Ala. 546, 38 So. 750, so holding where the plea proceeded upon the theory that the action was in tort, when in fact it was upon contract.

10. Gillespie *v.* Redmond, 13 Tex. 9, holding that where a cause was improperly entitled on the docket, and a petition for a scire facias to make the administrator of the deceased defendant a party described the cause as it should have been entitled, a plea in abatement to the scire facias that

c. Form and Construction — (i) *In General.* Matter in abatement must be pleaded with exactness and should be certain to every intent,[11] it cannot be aided by any intendment or inference.[12] A plea of this character must negative every conclusion against the pleader,[13] and all matter which, if alleged on the other side, would defeat the plea.[14] It should be direct and positive, and free from repugnancy or argumentativeness,[15] and should allege facts, not conclusions.[16] But a mere clerical error will not vitiate a plea in abatement.[17] In some jurisdictions, however, this strict rule of construction has been abolished by statute;[18] and generally the court will consider the ground of abatement, and where meritorious, construe the plea with corresponding liberality.[19] If a plea in abatement is inartificially drawn it should not be rejected, but plaintiff should be left to his demurrer.[20] In construing a plea in abatement the words and grammatical construction will be given their most natural interpretation.[21] A plea in abatement cannot be aided by matter in the writ or declaration unless it is expressly referred to.[22] Where bail plead in abatement, the plea must allege the facts authorizing them to defend the suit.[23] A plea in abatement of the writ may be both of the writ and declara-

no such suit as that described was pending in court would not lie.

11. *Alabama.*— Roberts *v.* Heim, 27 Ala. 678.

Arkansas.— Clark *v.* Latham, 25 Ark. 16.

California.—Larco *v.* Clements, 36 Cal. 132.

Connecticut.— Clark *v.* Warner, 6 Conn. 355; Parsons *v.* Ely, 2 Conn. 377; Wadsworth *v.* Woodford, 1 Day 28.

Illinois.— Nixon *v.* Southwestern Ins. Co., 47 Ill. 444; National Parlor Furniture Co. *v.* Strauss, 75 Ill. App. 276; Phœnix Ins. Co. *v.* Hedrick, 73 Ill. App. 601.

Indiana.— Merritt *v.* Richey, 100 Ind. 416; Ward *v.* State, 48 Ind. 289.

Louisiana.— Dicks *v.* Cash, 7 Mart. N. S. 362.

Maine.— Getchell *v.* Boyd, 44 Me. 482; Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85; Hazzard *v.* Haskell, 27 Me. 549.

New York.—Haywood *v.* Chestney, 13 Wend. 495.

Rhode Island.— Ellis *v.* Ellis, 4 R. I. 110.

Tennessee.— Grove *v.* Campbell, 9 Yerg. 7.

Texas.— Osborne *v.* Barnett, 1 Tex. App. Civ. Cas. § 125.

Vermont.— Lincoln *v.* Thrall, 34 Vt. 110; Bowman *v.* Stowell, 21 Vt. 309; Pearson *v.* French, 9 Vt. 349.

United States.— Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123; Anonymous, 30 Fed. Cas. No. 18,224, Hempst. 215.

See 39 Cent. Dig. tit. "Pleading," § 219.

"The highest degree of certainty is required in framing pleas of this description, and the pleader must anticipate what in other pleadings should come from the other side by way of replication." Crane *v.* Warner, 14 Vt. 40.

Record of other proceedings.— A plea in abatement which sets up the dismissal of an action for the same cause is sufficient if it sets forth enough of the record of the dismissed action to enable the court to decide that the two actions were identical. Dougherty *v.* Dougherty, 126 Ga. 33, 54 S. E. 811.

12. New York, etc., R. Co. *v.* Illy, 79 Conn. 526, 65 Atl. 965.

13. Mandel *v.* Peet, 18 Ark. 236; Taylor *v.* Ricards, 9 Ark. 378; Hibbard *v.* Newman, 101 Me. 410, 64 Atl. 720; Webster *v.* Baggs, 6 R. I. 247. See Hays *v.* Barrera, 26 Tex. 78.

A plea averring that the maturity of the liability has been postponed must aver the consent of plaintiff to such postponement. Hoereth *v.* Franklin Mill Co., 30 Ill. 151.

14. Rush *v.* Foos Mfg. Co., 20 Ind. App. 515, 51 N. E. 143; Dubois *v.* Hutchinson, 40 Mich. 262; James *v.* Dowell, 7 Sm. & M. (Miss.) 333; Rutland Bank *v.* Barker, 27 Vt. 293. See also Rotan *v.* Maedgen, 24 Tex. Civ. App. 558, 59 S. W. 585.

15. *Alabama.*—Ellerbe *v.* Troy, 58 Ala. 143.

Arkansas.— Moss *v.* Ashbrooks, 12 Ark. 369.

Connecticut.— Wolcott *v.* Dwight, 2 Day 405.

New Hampshire.—Mendum *v.* Joy, 58 N. H. 140.

Texas.— Runnels *v.* Swan, 20 Tex. 822.

Vermont.— Morse *v.* Nash, 30 Vt. 76; Hill *v.* Powers, 16 Vt. 516.

See 39 Cent. Dig. tit. "Pleading," § 219.

16. Clark *v.* Warner, 6 Conn. 355.

17. Mitchell *v.* Smith, 74 Conn. 125, 49 Atl. 909.

18. Hall *v.* Brazelton, 46 Ala. 359.

19. Campbell *v.* Hudson, 106 Mich. 523, 64 N. W. 483. In Buckles *v.* Harlan, 54 Ill. 361, 362, the court said: "Though pleas in abatement, being usually of a dilatory character, are therefore not favored, the one in question is not precisely of that character. The injustice of entertaining two suits against the same party, at the same time, for the same cause of action, is so glaring as to give to pleas setting up such facts a more favorable position in courts, than one merely dilatory; still such a plea must not, in its frame, omit any of the essential requirements of the law."

20. Arndt *v.* Allard, 1 Pinn. (Wis.) 76.

21. Roberts *v.* McLean, 16 Vt. 608, 42 Am. Dec. 529.

22. Bowman *v.* Stowell, 21 Vt. 309. *Compare* Morse *v.* Nash, 30 Vt. 76.

23. Deforest *v.* Elkins, 2 Ala. 50.

tion; and it must be so where it is intended to plead in abatement only of a part of the writ, and the cause of the abatement arises only on some of the counts in the declaration.[24] Under some statutes it is provided that no dilatory plea shall be received unless the party offering it offers to be filed therewith an affidavit proving the truth thereof, or shows some probable cause to the court to induce them to believe that the matter set forth is true.[25] Pleas in abatement other than to the jurisdiction [26] or for misnomer [27] may be pleaded by attorney.[28]

(II) *Under the Codes.* Pleas in abatement, under the code practice, do not have the formal characteristics requisite at common law. They are not called pleas, but matter in abatement not open to objection by motion or demurrer, is pleaded by answer.[29] But many defenses in abatement exist under the code as at common law, and the general rules applicable to them are substantially the same as the common-law rules.[30]

(III) *Necessity of Giving Better Writ.* A plea in abatement should point out specifically the precise defects in such a way that plaintiff may be enabled to correct them. It should, in other words, give plaintiff a better writ or declaration.[31] But this does not apply to cases where the defect is one of substance and plaintiff cannot have a better writ.[32]

(IV) *Particular Pleas* — (A) *Another Action Pending* — (1) In General. A plea in abatement upon the ground of the pendency of another proceeding must show in what court such action is pending,[33] that the court has jurisdiction,[34]

24. Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85.

25. See the statutes of the several states. And see Mayhew *v.* Ford, 61 N. J. L. 532, 39 Atl. 914, holding that in an action of trespass by tenants in common a special plea that one plaintiff was at the commencement of the suit an infant and is declared by attorney instead of by guardian or next friend was a dilatory plea within the meaning of such a statute.

A certificate of counsel that a plea in abatement is in his opinion well founded is unnecessary in the federal courts. Nelson *v.* Foster, 17 Fed. Cas. No. 10,105, 5 Biss. 44.

26. See *supra*, IV, B, 3, a.

27. See Guild *v.* Richardson, 6 Pick. (Mass.) 364.

28. Guild *v.* Richardson, 6 Pick. (Mass.) 364. See also *infra*, VIII, A, 2.

29. Houghland *v.* Dent, 52 Mo. App. 237; Burlington Voluntary Relief Dept. *v.* Moore, 52 Nebr. 719, 73 N. W. 15; O'Beirne *v.* Lloyd, 1 Sweeny (N. Y.) 19; Whelan *v.* Rio Grande Western R. Co., 111 Fed. 326; Draper *v.* Springport, 15 Fed. 328, 21 Blatchf. 240; Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123.

30. See cases cited from code states *supra*, IV, B, 5, c, (I).

31. *Alabama.*— Mohr *v.* Chaffe, 75 Ala. 387.

Connecticut.— Wadsworth *v.* Woodford, 1 Day 28.

Illinois.— Chicago, etc., R. Co. *v.* Munger, 78 Ill. 300; American Express Co. *v.* Haggard, 37 Ill. 465, 87 Am. Dec. 257.

Indiana.— State *v.* Lannoy, 30 Ind. App. 335, 65 N. E. 1052.

Maine.— Brown *v.* Gordon, 1 Me. 165.

Massachusetts.— Lovell *v.* Doble, Quincy 88.

New York.—Hawkins *v.* Mapes-Reeve Constr. Co., 178 N. Y. 236, 70 N. E. 783; Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147.

Pennsylvania.— Baker *v.* Reese, 150 Pa. St. 44, 24 Atl. 634; Witmer *v.* Schlatter, 15 Serg. & R. 150, where is an excellant discussion of the matter.

Texas.— Texas, etc., R. Co. *v.* Lynch, 97 Tex. 25, 75 S. W. 486.

Virginia.— Hortons *v.* Townes, 6 Leigh 47.

United States.— Computing Scale Co. *v.* Moore, 139 Fed. 197.

Canada.— Athole Lodge *v.* Williamson, 7 Nova Scotia 171.

See 39 Cent. Dig. tit. "Pleading," § 227.

Under the codes.—In Clark *v.* Oregon Short Line R. Co., 29 Mont. 317, 319, 74 Pac. 734, the court said, quoting Phillips Code Pleading: "As at common law a plea in abatement was required to give the plaintiff a better writ or declaration, so, under the new system, such answer must furnish information — such as the true name of defendant, where misnomer is pleaded, and the names of necessary parties, where defect of parties is pleaded — that will enable the plaintiff to cure the defect by amendment, if it be a defect that can be so cured."

32. Guild *v.* Richardson, 6 Pick. (Mass.) 364; Boston Type, etc., Foundry *v.* Spooner, 5 Vt. 93; Warren *v.* Saunders, 27 Gratt. (Va.) 259. In Wilson *v.* Nevers, 20 Pick. (Mass.) 20, 23, Dewey, J., said: "There are many cases where a plea in abatement need not furnish the plaintiff with a better writ; as a plea that no such person exists as the plaintiff, or plea of non-tenure, or plea of disclaimer, and the like." But he went on to say that in all matters of form the rule applied that a better writ must be given.

33. Berger *v.* Moessinger, 5 Ohio Cir. Ct. 432, 3 Ohio Cir. Dec. 212.

34. Carbolineum Wood Preserving, etc., Co.

that the action was pending at the time of the plea,[35] when the action was commenced,[36] and that the court obtained jurisdiction of the defendant,[37] or of the property,[38] or otherwise took jurisdiction of the cause.[39] It need not, however, allege that the action was not discontinued before the plea was filed.[40] The cause of action must be shown to be the same and the parties the same,[41] or in case the parties are not the same, privity must be shown.[42] The second action must be shown to be in the same jurisdiction, for courts of one jurisdiction, not having judicial knowledge of the laws of another, will not dismiss a suitor merely because initiatory steps have been taken elsewhere.[43] If the other action is a pending appeal, the plea must identify the appeal, specify in what court it was instituted, and state who appealed.[44] Where the plea is based on the pendency of another suit which should have been joined, facts must be alleged showing that it might have been joined.[45] Where the plea is based on the submission of the demand to a referee, it should set out his name and allege his acceptance.[46] In the case of a garnishment it must show in whose favor and for what amount.[47] If two suits

v. Meyer, 76 Miss. 586, 25 So. 297; Briggs *v.* Stroud, 58 Fed. 717; *Ex p.* Balch, 2 Fed. Cas. No. 790, 3 McLean 221; Morgan *v.* Ault, 8 Ont. Pr. 429.

Sufficiency of showing.— A plea in abatement, based on the pendency of a former action, which alleges that the court in which the action was brought had jurisdiction of the case under the allegations of the declaration therein filed, sufficiently avers that the court referred to had jurisdiction of the action. Wilson *v.* Atlanta, etc., R. Co., 115 Ga. 171, 41 S. E. 699.

35. See *infra*, IV, B, 5, c, (IV), (A), (2).

36. Eiceman *v.* State, 75 Ind. 46. See also Porter *v.* Fuld, etc., Knitting Co., 114 N. Y. App. Div. 292, 99 N. Y. Suppl. 815; Cassidy *v.* Arnold, 100 N. Y. App. Div. 412, 91 N. Y. Suppl. 570.

37. Carson *v.* Thews, 2 Ida. (Hasb.) 176, 9 Pac. 605.

38. Reynolds *v.* McClure, 13 Ala. 159.

39. Lewis *v.* Higgins, 52 Md. 614.

40. Nelson *v.* Foster, 17 Fed. Cas. No. 10,105, 5 Biss. 44.

41. *Arkansas.*— Bourland *v.* Nixon, 27 Ark. 315.

California.— Vance *v.* Olinger, 27 Cal. 358.

Connecticut.— Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433.

Illinois.— Branigan *v.* Rose, 8 Ill. 123.

Indiana.— Needham *v.* Wright, 140 Ind. 190, 39 N. E. 510; Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107.

Michigan.— Wales *v.* Jones, 1 Mich. 254.

Minnesota.— Wilson *v.* St. Paul, etc., R. Co., 44 Minn. 445, 46 N. W. 909.

New Hampshire.— Bennett *v.* Chase, 21 N. H. 570.

New York.— Gardner *v.* Clark, 21 N. Y. 399; Tyler *v.* Standard Wine Co., 52 Misc. 374, 102 N. Y. Suppl. 65.

South Carolina.— Davis *v.* Hunt, 2 Bailey 412.

Utah.—Beardsley *v.* Morrison, 18 Utah 478, 56 Pac. 303, 72 Am. St. Rep. 795.

Vermont.— Thomas *v.* Freelon, 17 Vt. 138.

United States.— Griswold *v.* Bacheller, 77 Fed. 857; *In re* Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589.

England.— Henry *v.* Goldney, 4 D. & L. 6, 10 Jur. 439, 15 L. J. Exch. 298, 15 M. & W. 494; Harmer *v.* Bell, 7 Moore P. C. 267, 13 Eng. Reprint 884.

See 39 Cent. Dig. tit. "Pleading," § 222.

If the plea state sufficient facts to show that the two actions are the same, an express averment to that effect is unnecessary. McEwen *v.* Broadhead, 11 N. J. Eq. 129.

Parties need not be named.— It is enough to aver that the parties are the same, without naming them. Ward *v.* Dewey, 12 How. Pr. (N. Y.) 193.

42. Calteaux *v.* Mueller, 102 Wis. 525, 78 N. W. 1082.

43. *Massachusetts.*— Colt *v.* Partridge, 7 Metc. 574; Newell *v.* Newton, 10 Pick. 470, where it was questioned whether this rule would be otherwise were it averred in the plea that the court had jurisdiction of the parties and subject-matter and that defendants actually appeared or were duly served.

New York.— Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; Oneida County Bank *v.* Bonney, 101 N. Y. 173, 4 N. E. 332; Mitchell *v.* Bunch, 2 Paige 606, 22 Am. Dec. 669; Walsh *v.* Durkin, 12 Johns. 99; Bowne *v.* Joy, 9 Johns. 221.

Ohio.— Keith *v.* New York Cent. R. Co., 2 Ohio Dec. (Reprint) 125, 1 West. L. Month. 451.

Pennsylvania.— Thomas *v.* Thomas, 4 Leg. Op. 440.

United States.— New York Mut. L. Ins. Co. *v.* Harris, 96 U. S. 588, 24 L. ed. 737; Lyman *v.* Brown, 15 Fed. Cas. No. 8,627, 2 Curt. 559.

England.— Imlay *v.* Ellefsen, 2 East 453; Scott *v.* Seymour, 8 Jur. N. S. 568, 31 L. J. Exch. 457, 6 L. T. Rep. N. S. 607, 10 Wkly. Rep. 739 [*affirmed* in 1 H. & C. 219, 9 Jur. N. S. 522, 32 L. J. Exch. 61, 8 L. T. Rep. N. S. 511, 11 Wkly. Rep. 169]; Bayley *v.* Edwards, 3 Swanst. 703, 19 Rev. Rep. 289, 36 Eng. Reprint 1029; Maule *v.* Murray, 7 T. R. 470.

44. Boswell *v.* Tunnell, 10 Ala. 958; Miller *v.* Rigney, 16 Ind. 327.

45. Parish *v.* Heikes, 14 Ind. 605.

46. Fahy *v.* Brannagan, 56 Me. 42.

47. Crawford *v.* Clute, 7 Ala. 157, 41 Am.

may be prosecuted for the same cause of action with leave of court, the plea must negative leave.[48] The pendency of a bill in equity has not usually been deemed a ground of abatement for an action at law,[49] hence the plea must show whether the action is pending at law or in equity.[50] In construing a plea of this nature the court will particularly consider whether the aim of either of the parties is meritorious or merely vexatious.[51] Under the codes the common-law strictness has been much relaxed.[52]

(2) Reference to Record of Pending Action. A plea of another action pending should allege it "as by the record," or "as by the files and record of said court appears." [53] It is also held that the plea should set out the general character and objects of the former suit,[54] and the relief prayed.[55] And some cases still follow the old English practice of requiring the record of the pending suit to be set out in full in the plea.[56]

(B) *Misnomer.* A plea in abatement for misnomer of defendant must disclose his true name.[57] It must be denied that defendant is known and called by the name employed,[58] or has previously been known or called by that name.[59] In like manner an exception that plaintiff is not suing under his true name must state

Dec. 92; Shealy *v.* Toole, 56 Ga. 210; Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548.

48. Schieck *v.* Donohue, 77 N. Y. App. Div. 321, 79 N. Y. Suppl. 233.

49. See Abatement and Revival, 1 Cyc. 40.

50. Risher *v.* Wheeling Roofing, etc., Co., 57 W. Va. 149, 49 S. E. 1016.

51. In Hatch *v.* Spofford, 22 Conn. 485, 494, 58 Am. Dec. 433, the court said: "It is obvious then, a second suit is not, of course, to be abated and dismissed as vexatious, but all the attending circumstances are to be first carefully considered, and the true question will be, what is the aim of the plaintiff? Is it fair and just, or is it oppressive? Is it possible the defendant may not owe the debt, as the plaintiff claims he does, and may want only to present his defence, in a manner as little expensive and inconvenient as possible,— which right he ought certainly to enjoy; but his plea now is, for delay, and delay only. If the plaintiff, by a second suit, can place his claim in a more favorable condition for obtaining redress, why should he not be permitted to do it? as where he can secure his debt by an attachment, his first suit being a summons,— or where, as in Ward *v.* Curtiss, 18 Conn. 290, the first suit is found to be premature; so where he is apprehensive that, by reason of error or misapprehension, he is not in as good a condition as he could place himself in, by a second suit. What reason can be assigned, why he may not pursue his best remedy?" A plea of this character was held in Robert *v.* Moore, 62 N. J. L. 618, 43 Atl. 582, not to come within the statute requiring that defendant should file with his plea or demurrer an affidavit that it was not interposed for delay, since such a plea is essentially dilatory.

52. Chandler *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 808, 68 N. Y. Suppl. 398.

Sufficiency.—An answer alleging that "there is another action now pending between the same parties for the same identical cause of action mentioned in the complaint in this action" is sufficient, it being neither indefinite nor uncertain. Ward *v.* Dewey, 12 How. Pr. (N. Y.) 193, 196.

53. Com. *v.* Churchill, 5 Mass. 174; Clifford *v.* Cony, 1 Mass. 495; Ladd *v.* Stratton, 59 N. H. 200; Bennett *v.* Chase, 21 N. H. 570; Bullock *v.* Bolles, 9 R. I. 501.

54. Michigan Bank *v.* Williams, Harr. (Mich.) 219; Wilson *v.* St. Paul, etc., R. Co., 44 Minn. 445, 46 N. W. 909; Green *v.* Underwood, 86 Fed. 427, 30 C. C. A. 162.

55. Michigan Bank *v.* Williams, Harr. (Mich.) 219; Green *v.* Underwood, 86 Fed. 427, 30 C. C. A. 162.

56. Brastow *v.* Barrett, 82 Me. 166, 19 Atl. 157; Ladd *v.* Stratton, 59 N. H. 200; Smith *v.* Atlantic Mut. F. Ins. Co., 22 N. H. 21; Trenton Bank *v.* Wallace, 9 N. J. L. 83.

57. Louisville, etc., R. Co. *v.* Hall, 12 Bush (Ky.) 131; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13. See Cantley *v.* Moody, 7 Port. (Ala.) 443 (holding that, where it was contended that the initial of the first name of defendant was set out, the full name must be disclosed); State *v.* Homer, 40 Me. 438 (where it was questioned whether a plea in abatement in which an initial was employed in said defendant's true name was sufficient).

Commencement of plea.—A plea in abatement setting up a misnomer of defendant commencing, "And the said Basil Watson, against whom the said plaintiffs have exhibited their declaration by the name of Baswell Watson, . . . comes and says" is bad on special demurrer, since it should commence "And Basil W." Hyde *v.* Watson, 1 Den. (N. Y.) 670.

Initials.— It is not sufficient to allege that the initials given are not correct and to allege the correct initials; the entire correct name should be alleged. Davis *v.* Philbrick, 87 Me. 196, 32 Atl. 874.

58. Freeman *v.* Pullen, 119 Ala. 235, 24 So. 57.

59. McCrory *v.* Anderson, 103 Ind. 12, 2 N. E. 211; Lyons *v.* Rafferty, 30 Minn. 526, 16 N. W. 420.

under what name he may sue,[60] and it must deny that the name used by plaintiff is his known and recognized name.[61] Where the exception is only to the person of plaintiff the plea must show who is really entitled to be plaintiff.[62] And where it is objected that an action is not brought by the proper officer, exceptions in a statute which permit actions to be brought by others than such officer must be negatived.[63] Where the plea is advanced by one of several defendants it is defective in case it prays judgment generally.[64] The plea must not admit that defendant was the person sued.[65] It must be alleged that the person served was not the correctly named party.[66]

(c) *Defect of Parties.* A plea in abatement upon the ground of non-joinder of plaintiffs must set forth particularly who the persons omitted as plaintiffs are,[67] and describe them so as to enable plaintiff to make a better writ.[68] Where it is alleged that a part-owner has not joined as plaintiff it must be shown that he is not defendant.[69] So a plea of non-joinder of defendants must give plaintiff a better writ and state the names or descriptions of the persons alleged to have been omitted.[70] So it must state their christian and surnames,[71] and must aver that they are living [72] and within reach of process.[73] It must allege the joint obligation; [74] but when such allegation is made it need not also aver that the person

60. Gardiner *v.* Cross, 6 Rob. (La.) 454.

61. Linton *v.* Kittanning First Nat. Bank, 10 Fed. 894.

62. Aulanier *v.* Governor, 1 Tex. 653.

63. McCauley *v.* State, 21 Md. 556.

64. Webb *v.* Samuel, 2 Miles (Pa.) 201.

65. Feasler *v.* Schriever, 68 Ill. 322, holding a plea bad on demurrer for such reason.

66. National Parlor Furniture Co. *v.* Strauss, 75 Ill. App. 276.

67. Wadsworth *v.* Wood, 1 Day (Conn.) 28.

68. Wadsworth *v.* Wood, 1 Day (Conn.) 28.

Non-joinder of co-executors.— Where it is pleaded that co-executors are not joined as plaintiffs the plea must show where the omitted parties reside and that they were co-executors at the commencement of the suit. Beach *v.* Baldwin, 9 Conn. 476.

In an exception for want of proper parties the names of those who should have been joined need not be given if means are given for their designation and identification. De St. Romes *v.* Levee Steam Cotton Press Co., 34 La. Ann. 419. Where a suit is brought in the name of certain parties as composing a commercial firm, defendant in an exception on the ground that all the members of the firm have not been joined in the action need not state the name of the person not joined. Rugely *v.* Gill, 15 La. Ann. 509.

69. Bell *v.* Layman, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83.

70. *Connecticut.*— Tweedy *v.* Jarvis, 27 Conn. 42.

Louisiana.— David *v.* Eloi, 4 La. 106.

Massachusetts.— Wilson *v.* Nevers, 20 Pick. 20.

Michigan.— Hutton *v.* Cuthbert, 51 Mich. 229, 16 N. W. 386.

New Hampshire.— Ela *v.* Rand, 4 N. H. 307, holding that if one of three joint contractors be sued, and he plead in abatement that the second ought to be joined, plaintiff may prove that the third ought also to be joined, and thus falsify the plea.

New Jersey.— Mershon *v.* Hobensack, 22 N. J. L. 372.

New York.— See Schwartz *v.* Wechler, 2 Misc. 67, 20 N. Y. Suppl. 861, 23 N. Y. Civ. Proc. 21, 29 Abb. N. Cas. 332; North America Bank *v.* Hornsey, 13 N. Y. Civ. Proc. 158; Fowler *v.* Kennedy, 2 Abb. Pr. 347; Mechanics', etc., Bank *v.* Dakin, 24 Wend. 411, holding that where a defendant pleads the non-joinder of one as a co-defendant, and there are three persons who should have been joined, plaintiff is entitled to a verdict, although the plea is verified.

United States.— Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11

In a suit against a board of road commissioners for breach of contract a plea in abatement that the contract was made with defendant and certain other persons, naming them, who constituted the board when the contract was made, was sufficient as giving plaintiff a better writ, since it referred him to the proper parties to the suit, although the *personnel* of the board had changed since the contract was entered into. Miller *v.* Ford, 4 Rich. (S. C.) 376, 55 Am. Dec. 687.

71. Tweedy *v.* Jarvis, 27 Conn. 42.

72. Levi *v.* Haverstick, 51 Ind. 236; Goodhue *v.* Luce, 82 Me. 222, 19 Atl. 440; Furbish *v.* Robertson, 67 Me. 35; Lefferts *v.* Silsby, 54 How. Pr. (N. Y.) 193; Reynolds *v.* Hurst, 18 W. Va. 648.

73. Carico *v.* Moore, 4 Ind. App. 20, 29 N. E. 928; Copeland *v.* Hewett, 93 Me. 554, 45 Atl. 824; Goodhue *v.* Luce, 82 Me. 222, 19 Atl. 440 (holding that it was sufficient to state that their residence was within the state at the date of plaintiff's writ); Furbish *v.* Robertson, 67 Me. 35; Mittendorf *v.* New York, etc., R. Co., 58 N. Y. App. Div. 260, 68 N. Y. Suppl. 1094; Lefferts *v.* Silsby, 54 How. Pr. (N. Y.) 193; Cone *v.* Cone, 61 S. C. 512, 39 S. E. 748; Orange Mill-Supply Co. *v.* Goodman, (Tex. Civ. App. 1900) 56 S. W. 700.

74. Reynolds *v.* Hurst, 18 W. Va. 648.

Continuing liability to the date of suit need

jointly liable was omitted, since such fact appears from the record.[75] Possible disabilities of the joint contractors need not be negatived.[76] The place of abode and addition of the party omitted need not be set out,[77] although under an English statute [78] it was provided that a plea in abatement for non-joinder of co-contractors must show the residence of the parties not joined to be within the jurisdiction.[79] A plea which on its face shows that defendant is properly omitted is bad.[80] Where it is pleaded in abatement that defendant has made an assignment for the benefit of creditors it must be alleged that the assignment was *bona fide*.[81] Where it is pleaded in abatement that the action is not properly brought in the name of plaintiff, the facts showing the truth of such averment must be alleged.[82]

(D) *Alienage and Non-Residence.* A plea of alienage must aver that the person was born out of the allegiance of the state and within the allegiance of a foreign state,[83] and a plea of alien enemy must state not only that fact but that he had not the license of the government to remain in the country.[84] An answer in abatement, on the ground that plaintiff has been, and is, engaged in inciting, aiding, and assisting in a rebellion against the United States, must allege specifically the particular acts of rebellion which plaintiff has committed.[85] A plea on the ground that defendant, who was a non-resident, was at the time of the service of the writ in attendance upon the court as a witness, must further allege that he was not within the jurisdiction in any other capacity,[86] and should allege the particular court he was attending, the suit in which he was a witness, and that it was then pending, the parties to the suit and the party for whom he was summoned.[87]

(E) *Variance Between Declaration and Writ.* A plea based upon variance between the declaration and writ should recite the writ.[88]

(F) *Defective Execution and Service of Process.* A plea alleging a defective execution of the writ should allege that it was not executed in any other way.[89] The writ should be set out on oyer.[90] A plea in abatement for defective service should show what the attempted service was, that it was defective, and that the writ was not served in any other way.[91] All facts going to negative a correct ser-

not be alleged. Goodhue *v.* Luce, 82 Me. 222, 19 Atl. 440.

75. Tweedy *v.* Jarvis, 27 Conn. 42.

76. Roberts *v.* McLean, 16 Vt. 608, 42 Am. Dec. 529, so holding with regard to infancy.

77. Ela *v.* Rand, 3 N. H. 95.

78. 3 & 4 Wm. IV, c. 42, § 8.

79. Joll *v.* Lord Curzon, 4 C. B. 249, 4 D. & L. 810, 11 Jur. 737, 16 L. J. C. P. 172, 56 E. C. L. 248.

80. Williams *v.* Royle, 1 Litt. (Ky.) 77, where it appeared that a joint obligor was dead.

81. Lowenheim *v.* Lockhard, 2 Baxt. (Tenn.) 214.

82. National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902, holding that in an action for goods sold an allegation that a trust or combination to which plaintiff corporation belonged was the real party in interest, and that the action should be dismissed unless brought in its name or the name of all its members, was fatally defective as a plea in abatement, since it neither showed that the combination was a partnership or a corporation and so capable of suing or being sued, nor averred that it or any of its members, other than plaintiff, had any interest in the goods sold or the money to be paid for them.

83. Coxe *v.* Gulick, 10 N. J. L. 328.

84. Bagwell *v.* Babe, 1 Rand. (Va.) 272.

85. Meni *v.* Rathbone, 21 Ind. 454.

86. Capwell *v.* Sipe, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890.

87. Baker *v.* Compton, 2 Head (Tenn.) 471.

88. Nichols *v.* Smalley, 7 Blackf. (Ind.) 200.

In New Hampshire it is held that "where an insufficient summons, or one not containing the substance of the writ or declaration, is relied upon as the foundation of a plea in abatement, the defendant must erave oyer of the writ, declaration and officer's return, set them out at large, and also make profert of and enrol the summons." Lary *v.* Evans, 35 N. H. 172, 174. See also Dinsmore *v.* Pendexter, 28 N. H. 18; Smith *v.* Butler, 25 N. H. 521; Colby *v.* Dow, 18 N. H. 557; Baker *v.* Brown, 18 N. H. 551; Goodall *v.* Durgin, 14 N. H. 576.

89. Landon *v.* Roberts, 20 Vt. 286.

90. Garner *v.* Johnson, 22 Ala. 494; Findlay *v.* Pruitt, 9 Port. (Ala.) 195.

91. Budd *v.* Meriden Electric R. Co., 69 Conn. 272, 37 Atl. 683; Rush *v.* Foos Mfg. Co., 20 Ind. App. 515, 51 N. E. 143; Perry *v.* New Brunswick R. Co., 71 Me. 359; Tweed *v.* Libbey, 37 Me. 49; Adams *v.* Hodsdon, 33 Me. 225; Smith *v.* Chase, 39 Vt. 89; Morse *v.* Nash, 30 Vt. 76; Washburn *v.* Hammond, 25 Vt. 648; Gray *v.* Flowers, 24 Vt. 533; Evarts *v.* Georgia, 18 Vt. 15; Pearson *v.* French, 9 Vt. 349. If the writ and return are referred to in the plea and facts are

vice should be alleged,[92] and they should be alleged as of the time of the service, not as of the time of the filing of the plea.[93] But it need not be alleged how the writ should have been served.[94] The plea must allege facts showing that the writ could have been served.[95] Time and place of attempted service must be alleged, and cannot be supplied by reference to the writ.[96] If it is claimed that the copy served was defective, it should be enrolled and made a part of the record.[97] A plea on the ground of no service on one of defendants must allege that defendants were co-promisors.[98] The facts should be fully set up; mere conclusions will not avail.[99]

6. Waiver of Pleas. It has already been pointed out that unless pleas in abatement are filed at the proper time and in the proper order, they will be waived.[1] But assuming that they have been filed at the proper time and in the proper order, there are still certain conditions under which they may be waived. Filing a plea in bar is a waiver of a plea in abatement.[2] This is true even after issue joined on the plea in abatement,[3] or after a demurrer has been sustained to the plea.[4] And even though issue be joined on a plea in abatement, it is nevertheless waived by a plea in bar.[5] So also a demurrer or exception is a waiver of the plea.[6] Obtaining a continuance after filing a plea in abatement waives the plea,[7] but consenting to a continuance will not so operate.[8] So, appearing to the merits after plea filed will be a waiver of it,[9] as will allowing the plea to go by default when the case is called

alleged showing that the person who served it had no authority to do so, it need not be further alleged that no other person served the writ. Ingraham *v.* Leland, 19 Vt. 304.

Abatement of process see Process.

92. Levy *v.* Metropolis Mfg. Co., 73 Conn. 559, 48 Atl. 429.

93. Ohio Oil Co. *v.* Griest, 30 Ind. App. 84, 65 N. E. 534.

94. Brown *v.* Gordon, 1 Me. 165.

95. Bancroft *v.* Damon, 58 N. H. 190.

96. Morse *v.* Nash, 30 Vt. 76.

97. Messer *v.* Smythe, 58 N. H. 312; Lary *v.* Evans, 35 N. H. 172; Lyman *v.* Dodge, 13 N. H. 197; Knowles *v.* Rowell, 8 N. H. 542; Tucker *v.* Perley, 5 N. H. 345.

98. Patten *v.* Starrett, 20 Me. 145.

99. Sumner *v.* Sumner, 36 Vt. 105; Evarts *v.* Georgia, 18 Vt. 15; Crane *v.* Warner, 14 Vt. 40.

1. See *supra*, IV, B, 1, 2.

2. *Alabama.*— Brown *v.* Powell, 45 Ala. 149; Robertson *v.* Lea, 1 Stew. 141; Wilson *v.* Oliver, 1 Stew. 46.

Illinois.— Lindsay *v.* Stout, 59 Ill. 491; Gilmore *v.* Nowland, 26 Ill. 200; Edwards *v.* School Trustees, 30 Ill. App. 528. It is held that this rule does not apply to proceedings in attachment under the statute. Hawkins *v.* Albright, 70 Ill. 87.

Indiana.— Wallace *v.* Furber, 62 Ind. 126.

Iowa.— Hotchkiss *v.* Thompson, Morr. 156.

Kentucky.— Gaines *v.* Park, 3 B. Mon. 223, 38 Am. Dec. 185; Ward *v.* Trimble, 3 A. K. Marsh. 311.

Louisiana.— Knight *v.* Callender, 10 La. 226.

Massachusetts.— Burnham *v.* Webster, 5 Mass. 266.

Minnesota.— Gerrish *v.* Pratt, 6 Minn. 53.

Mississippi.— Duncan *v.* McNeill, 31 Miss. 704; Alliston *v.* Lindsey, 12 Sm. & M. 656; Webster *v.* Tiernan, 4 How. 352.

Missouri.— Moody *v.* Deutsch, 85 Mo. 237; Green *v.* Craig, 47 Mo. 90; Hatry *v.* Shuman, 13 Mo. 547.

New York.— Gardiner *v.* Clark, 6 How. Pr. 449.

Oregon.— Winter *v.* Norton, 1 Oreg. 42.

Pennsylvania.— Potter *v.* McCoy, 26 Pa. St. 458; Smith *v.* Maryland Fidelity, etc., Co., 21 Lanc. L. Rev. 321.

Texas.— Meade *v.* Jones, 13 Tex. Civ. App. 320, 35 S. W. 310; Halbert *v.* San Saba Springs Land, etc., Assoc., (Civ. App. 1895) 34 S. W. 636; Slator *v.* Trostel, (Civ. App. 1892) 21 S. W. 285.

Wisconsin.— Goodrich *v.* Compound School Dist. No. 5, 2 Wis. 102.

United States.— Imperial Refining Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503; Adams *v.* White, 1 Fed. Cas. No. 68, 2 Pittsb. (Pa.) 21; Fenwick *v.* Grimes, 18 Fed. Cas. No. 4,734, 5 Cranch C. C. 603.

See 39 Cent. Dig. tit. "Pleading," § 232. See also Abatement and Revival, 1 Cyc. 136.

Uniting pleas in abatement and bar see *supra*, IV, A, 7, g.

3. Gilpin *v.* Ebert, 2 Colo. 23.

4. Delahay *v.* Clement, 3 Ill. 575; White *v.* Gray, 4 Ill. App. 228.

5. Cruzen *v.* McKaig, 57 Md. 454.

6. Fergerson *v.* Rawlings, 23 Ill. 69; Giraud *v.* Mazier, 13 La. Ann. 147.

7. Peveler *v.* Peveler, 54 Tex. 53. See also Abatement and Revival, 1 Cyc. 135.

8. Simpson *v.* East Tennessee, etc., R. Co., 89 Tenn. 304, 15 S. W. 735; State *v.* Woodville, 13 Tex. Civ. App. 217, 35 S. W. 861.

Where the order of continuance expressly provides that the plea shall not be prejudiced a plea of privilege is not waived by continuance of the case that an issue raised by the plea may be tried by a jury on the trial to the merits. Leahy *v.* Ortiz, 38 Tex. Civ. App. 314, 85 S. W. 824.

9. Simpson *v.* East Tennessee, etc., R. Co., 89 Tenn. 304, 15 S. W. 735.

for trial,[10] asking no ruling on the plea within a reasonable time after it is filed,[11] submitting to the hearing of another issue,[12] or seeking a rule for costs.[13] An express statement in a plea to the merits that defendant does not waive his prior plea in abatement will not avail to avoid the waiver.[14] But the benefit of a dilatory plea may be reserved by agreement.[15] And a party waives nothing by merely declaring himself ready at the call of the calendar.[16]

7. Operation and Effect. Defendant is not estopped by allegations or admissions in a plea in abatement, from showing the truth of the case in a subsequent trial on the merits.[17] While the plea in abatement admits plaintiff's claim, it does not admit the damages.[18] The plea is not evidence of the facts set up in it.[19] A plea to the jurisdiction is a waiver of defenses to the merits, within the discretion of the court.[20]

8. Hearing and Decision of Issues — a. Trial of Issues. An issue raised upon a plea in abatement should ordinarily be heard at the first term,[21] and before the issues on the merits.[22] But defenses in abatement, which really affect the merits, may be tried with the peremptory pleas,[23] and so may any defenses in abatement where the issues are so drawn that they can all be better tried together.[24] Where pleas to the merits and pleas in abatement are permitted to be filed at the same time, the latter should be heard first.[25] A plea in abatement, when properly met, presents an issue to be tried and does not authorize a dismissal upon plaintiff's refusal to confess the plea,[26] but a plea upon which no issue has been taken presents nothing to be tried.[27] A plea in abatement upon grounds available to any party regardless of the others may be acted on, although certain of the parties have not been served with process.[28] Pleas in abatement, like other affirmative pleas, cast the burden of proof upon defendant pleading them.[29] Where a plea of another action pending is filed, plaintiff may elect whether to submit to judgment

10. Stevens *v.* Lee, 70 Tex. 279, 8 S. W. 40.

11. Weekes *v.* Sunset Brick, etc., Co., 22 Tex. Civ. App. 556, 56 S. W. 243; Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. 636; Spencer *v.* James, 10 Tex. Civ. App. 327, 31 S. W. 540, 43 S. W. 556; Green *v.* Brown, (Tex. App. 1890) 15 S. W. 37. But the court's refusal to hear the plea before the jury is impaneled will not operate as a waiver. Hartford F. Ins. Co. *v.* Shook, (Tex. Civ. App. 1896) 35 S. W. 737.

12. Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15; Harrison *v.* Murphy, 106 Mo. App. 465, 80 S. W. 724; Jolly *v.* Pryor, 12 Tex. Civ. App. 149, 33 S. W. 889.

13. Brown *v.* Reed, (Tex. Civ. App. 1901) 62 S. W. 73, plea of privilege to be sued in county of residence.

14. Sheppard *v.* Graves, 14 How. (U. S.) 505, 14 L. ed. 518. *Contra*, Kahn *v.* Southern Bldg., etc., Assoc., 115 Ga. 459, 41 S. E. 648; Cox *v.* Potts, 67 Ga. 521.

15. Murray *v.* Spencer, 46 La. Ann. 452, 15 So. 25; Macon *v.* Willson, 9 La. Ann. 178.

16. Feist *v.* Third Ave. R. Co., 13 Misc. (N. Y.) 240, 34 N. Y. Suppl. 57.

17. Waterman *v.* Merrow, 94 Me. 237, 47 Atl. 157. See also Witmer *v.* Schlatter, 2 Rawle (Pa.) 359.

18. Mechanics', etc., Bank *v.* Dakin, 24 Wend. (N. Y.) 411.

19. Jordan *v.* Carter, 60 Ga. 443.

20. Audenried *v.* East Coast Milling Co., 124 Fed. 697.

21. Brooks *v.* Columbus Water Lot Co., 7 Ga. 101; Calhoun *v.* Grimes, 25 Miss. 47; Dorroh *v.* McKay, (Tex. Civ. App. 1900) 56 S. W. 611.

22. *Alaska.*— Elliott *v.* Kuzek, 2 Alaska 587.

Louisiana.— Flournoy *v.* Flournoy, 29 La. Ann. 737.

Maryland.— Tyler *v.* Murray, 57 Md. 418.

Pennsylvania.— Heatly *v.* Mussi, 2 Browne 175.

Texas.— See Gentry *v.* Bowser, 2 Tex. Civ. App. 388, 21 S. W. 569.

Wisconsin.— Brown County *v.* Van Stralen, 45 Wis. 675.

See 39 Cent. Dig. tit. "Pleading," § 234½. See also Abatement and Revival, 1 Cyc. 134.

23. Hobson *v.* Whittemore, 13 La. 422; Hosea *v.* Miles, 13 La. 107.

24. Lite *v.* Overton, 12 Heisk. (Tenn.) 675.

25. Jernigan *v.* Carter, 51 Ga. 232; Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15; Maupin *v.* Scottish Union, etc., Ins. Co., 53 W. Va. 557, 45 S. E. 1003.

26. McCormick *v.* Blossom, 40 Iowa 256.

27. Sturdivant *v.* Smith, 29 Me. 387.

28. Miller *v.* Drought, (Tex. Civ. App. 1907) 102 S. W. 145.

29. *Louisiana.*— Buckner *v.* Beaird, 32 La. Ann. 226.

Ohio.— Davenport *v.* James, 1 Ohio Dec. (Reprint) 18, 1 West. L. J. 160, holding that where a defendant pleads in abatement a misnomer, alleging that he was baptized and had always been known by another name,

on the plea or dismiss the other suit.[30] If plaintiff confesses the truth of the plea by amending the defects pointed out, defendant is not prejudiced by the court's action in ignoring the plea.[31] A plea in abatement, which is sufficient as a motion to dismiss, may be treated as such.[32] The court will not, on an agreed case, decide whether matter is stated sufficient to abate the writ.[33] Pending the issue of a plea in abatement for non-joinder, it is irregular, upon motion, to grant leave to summon in additional joint promisors.[34] Plaintiff cannot after argument of an exception to the want of capacity on the part of plaintiff to maintain the suit, but before judgment thereon claim the right of making proper parties by amendment, in case the exception should be sustained.[35]

b. Decision.[36] Only the judgment prayed can be given on a plea in abatement: not a proper judgment upon the whole record, as on a plea in bar.[37] If the prayer is too broad, and the writ cannot be abated as prayed the plea should be dismissed.[38] When issue is taken upon the plea and found against defendant, judgment is *quod recuperet*;[39] and the same jury which tries the issue should assess the damages,[40] although the matter may be submitted to another jury.[41] If judgment be found for defendant on an issue either of law or fact, the judgment is that the writ be quashed.[42] If a plea is rejected or stricken out, final judgment cannot be rendered. Defendant has the right to answer over.[43] And under the practice acts in some jurisdictions it is provided that upon overruling the plea in abatement for a matter of fact defendant may answer over at the discretion of the judge.[44] The objection having been once disposed of cannot be raised again in another form,[45] although an order rejecting a plea is not final and the same plea

and issue is taken on the question of baptism, proof that he has always been known by another name will not sustain the plea.

Pennsylvania.— Daley *v.* Iselin, 212 Pa. St. 279, 61 Atl. 919.

South Carolina.— See Miller *v.* George, 30 S. C. 526, 9 S. E. 659.

Texas.— Graves *v.* Bonham First Nat. Bank, 77 Tex. 555, 14 S. W. 163; Mangum *v.* Lane City Rice Milling Co., (Civ. App. 1906) 93 S. W. 605; Hopson *v.* Caswell, 13 Tex. Civ. App. 492, 36 S. W. 312.

United States.— Fowler *v.* Byrd, 9 Fed. Cas. No. 4,999*a*, Hempst. 213.

See also ABATEMENT AND REVIVAL, 1 Cyc. 134; EVIDENCE, 16 Cyc. 929.

The presumption that a second action brought after dismissal of the first for the same cause is vexatious may be overcome by the slightest evidence. Citizens' St. R. Co. *v.* Sheppard, 29 Ind. App. 412, 62 N. E. 300.

Sufficiency of proof.— Where an account, consisting of various items, was filed as a cause of action against A before a justice of the peace; and it was pleaded, in abatement, that the promises, if any, were made jointly with B, proof that one of the articles was on the joint account of defendant and B sustained the plea. Vanslyke *v.* Gilmore, 6 Blackf. (Ind.) 511.

30. Fleitas *v.* Cockrem, 101 U. S. 301, 25 L. ed. 954.

31. Bell *v.* Wallace, 81 Ala. 422, 1 So. 24.

32. Ferris *v.* Ferris, 25 Vt. 100.

33. Morse *v.* Calley, 5 N. H. 222. But see Maddox *v.* Georgia Cent. R. Co., 110 Ga. 301, 34 S. E. 1036.

34. Mahan *v.* Myers, 34 Me. 34.

35. Nesom *v.* D'Armand, 9 La. Ann. 161.

36. **Appealability of judgment** see APPEAL AND ERROR, 2 Cyc. 607.

Effect of judgment: As merger or bar see JUDGMENTS, 23 Cyc. 1151. As to conclusiveness see JUDGMENTS, 23 Cyc. 1231.

Pleading over after ruling on demurrer to plea see *infra*, VI, L, 8.

37. Wade *v.* Bridges, 24 Ark. 569.

38. Bliss *v.* Smith, 42 Vt. 198.

39. See JUDGMENTS, 23 Cyc. 773 text and note 39.

40. *Illinois.*— Italian-Swiss Agricultural Colony *v.* Pease, 194 Ill. 98, 62 N. E. 317.

Indiana.— Neal *v.* Mills, 5 Blackf. 208.

New Hampshire.— Chase *v.* Deming, 42 N. H. 274; Jewett *v.* Davis, 6 N. H. 518; Dodge *v.* Morse, 3 N. H. 232.

New York.— McCartee *v.* Chambers, 6 Wend. 649, 22 Am. Dec. 556.

Pennsylvania.— Mehaffy *v.* Share, 2 Penr. & W. 361.

Tennessee.— Straus *v.* Weil, 5 Coldw. 120.

United States.— Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,615, Wall. Sr. 51.

See 39 Cent. Dig. tit. "Pleading," § 235.

41. Jones *v.* Donnell, 9 Ala. 695.

42. See JUDGMENTS, 23 Cyc. 773 text and note 40.

43. Gibson *v.* Laughlin, Minor (Ala.) 182; Straus *v.* Weil, 5 Coldw. (Tenn.) 120; Arndt *v.* Allard, 1 Pinn. (Wis.) 76.

Where demurrer is sustained see *infra*, VI, L, 8.

44. See the practice acts of the several states. And see Fisher *v.* Fraprie, 125 Mass. 472; People *v.* Holmes, 41 Mich. 417, 49 N. W. 926.

45. Cassidy *v.* Holbrook, 81 Me. 589, 18 Atl. 290; Coxe *v.* Higbee, 11 N. J. L. 395; Witmer *v.* Schlatter, 15 Serg. & R. (Pa.) 150.

may be allowed to be filed at a subsequent term in the court's discretion.[46] An appeal from the decision on a plea in abatement waives defenses to the merits.[47]

C. Traverses or Denials, and Admissions — 1. Traverses at Common Law — a. Definitions and Classification. A traverse is a denial on one side of some matter of fact alleged on the other.[48] There are, generally speaking, three forms or species of traverse at common law, namely, the common traverse, the general issue, and the special traverse or traverse introduced by new matter.[49] The common traverse denies, by express contradiction, the terms of the allegation traversed, and it may be affirmative or negative in form, depending upon the form of the allegation denied.[50] The general issue denies all the material allegations of the declaration or the principal fact on which it is founded, not by express contradiction, but by a formula, different, and characteristic for each form of action.[51] The special traverse is substantially a combination of a special plea with a traverse, although it is essentially negative in its effect.[52]

b. The Common Traverse — (i) *Form and Sufficiency in General.* A traverse should raise an issue of fact, not an issue of law.[53] Where any one material fact is put in issue, this is a defense to the whole cause of action.[54] But a traverse which is aimed at particular allegations must be specific, direct, and unambiguous.[55] Allegations of facts inconsistent with the facts alleged in the declaration are argumentative denials, and are bad on demurrer, at common law,[56] although otherwise under the code.[57] Since an issue can only be raised by a traverse of a material averment, a plea traversing merely matter of inducement is bad.[58] The purpose of a traverse is to put in issue some or all of the material averments of the declaration or complaint, and its scope can, in general, be no greater than plaintiff's averments.[59] No facts need be denied which are not alleged.[60] Nor should a traverse be too large, denying more than is alleged.[61] In case plaintiff has anticipated a defense, an issue may nevertheless be taken upon it.[62] A plea denying the allegations of the declaration, paragraph by paragraph, is a good plea.[63]

46. Amos *v.* Stockert, 47 W. Va. 109, 34 S. E. 821.

Finality of orders on motions generally see Judgments, 23 Cyc. 1224.

Successive pleas in abatement see Abatement and Revival, 1 Cyc. 135.

47. Otis *v.* Ellis, 78 Me. 75, 2 Atl. 851.

48. Gould Pl. (Hamilton ed.) 366. See Siter *v.* Jewett, 33 Cal. 92.

49. Gould Pl. (Hamilton ed.) c. 7; Stephen Pl. (8th Am. ed.) *153–*198.

The "traverse de injuria" occurs only in the replication. Stephen Pl. (8th Am. ed.) *163, *164.

50. Stephen Pl. (8th Am. ed.) *153, *154. See U. S. *v.* Hammond, 26 Fed. Cas. No. 15,292, 4 Biss. 283. See also *infra*, IV, C, 1, b.

51. Stephen Pl. (8th Am. ed.) *155. See, generally, *infra*, IV, C, 1, c.

52. Stephen Pl. (8th Am. ed.) *165–*189. See, generally, *infra*, IV, C, 1, d.

53. Little *v.* Bradley, 43 Fla. 402, 31 So. 342; Johnson *v.* Cobb, 100 Ga. 139, 28 S. E. 72.

54. Maudlin *v.* Mobile Branch Bank, 2 Ala. 502; Lawson *v.* State, 9 Ark. 9; Yatter *v.* Pitkin, 66 Vt. 300, 29 Atl. 370.

55. Story *v.* Richardson, 91 N. Y. App. Div. 381, 86 N. Y. Suppl. 843; Jones *v.* Hamilton, 3 U. C. Q. B. 170. But see Courtebray *v.* Rils, 9 Rob. (La.) 511, where it was held that an allegation "that plaintiff's claim is neither just nor well-founded" puts its justice at issue and denies the statements on which it is based.

56. *Illinois.*— Cobb *v.* Heron, 180 Ill. 49, 54 N. E. 189; Wadhams *v.* Swan, 109 Ill. 46.

Maryland.— Eastern Advertising Co. *v.* McGraw, 89 Md. 72, 42 Atl. 923.

New Jersey.— Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52.

Vermont.— Walker *v.* Wooster, 61 Vt. 403, 17 Atl. 792.

United States.— Mower *v.* Burdick, 17 Fed. Cas. No. 9,890, 4 McLean 7.

Canada.— Harris *v.* Fraser, 12 U. C. Q. B. 402; Rees *v.* Dick, 7 U. C. Q. B. 496; Campbell *v.* Black, 4 U. C. Q. B. 488; Smith *v.* Oates, 4 U. C. Q. B. 185; Monaghan *v.* Hayes, 4 U. C. C. P. 1; Hall *v.* Scarlett, 1 U. C. C. P. 354; Switzer *v.* Ballinger, 1 U. C. C. P. 338. But under circumstances when a direct denial would be embarrassing, an argumentative denial may be allowed. Hutchinson *v.* Munroe, 8 U. C. Q. B. 103.

57. See *infra*, IV, C, 2, b, (II).

58. Clarke *v.* Harding, 17 N. Brunsw. 495.

59. Coles *v.* Soulsby, 21 Cal. 47; State *v.* Campbell, 8 Blackf. (Ind.) 138.

60. Darling *v.* Gillies, 20 Nova Scotia 423.

61. Troop *v.* Union Ins. Co., 32 N. Brunsw. 135; Ketchum *v.* Protection Ins. Co., 6 N. Brunsw. 136.

62. Vogel *v.* People's Mut. F. Ins. Co., 9 Gray (Mass.) 23; Corrigan *v.* Rockefeller, 8 Ohio S. & C. Pl. Dec. 14, 5 Ohio N. P. 338.

63. Kahn *v.* Southern Bldg., etc., Assoc., 115 Ga. 459, 41 S. E. 648; De Soto Planta-

(II) *On Information and Belief or Knowledge and Information.* Under the common-law rule, a traverse not made positively, but on information and belief, will be stricken out.[64] In some states statutes have changed the common-law requirement that a denial must be positive, by permitting a defendant, in case he has not sufficient knowledge to admit or deny a fact, to so state, in connection with, or in substitution for, his denial.[65]

c. The General Issue — (I) *In General.* The various pleas of the general issue at common law are as follows: In assumpsit, *non assumpsit*;[66] in debt on bond or other specialty, *non est factum*;[67] in debt on simple contract, *nil debet*;[68] in detinue, *non detinet*;[69] in trespass, not guilty;[70] in trespass on the case, not guilty.[71] In covenant there is, strictly speaking, no plea of the general issue,[72] although *non est factum* may serve for such a plea in some circumstances.[73] Each of these general issues should be used only in the form of action to which it is adapted.[74] General issues are abolished in some states, and a general denial substituted.[75] Under statutes which abolish the forms of common-law actions but do not expressly or by implication forbid the use of the general issue, that form of plea is admissible.[76] Statutes have in a number of states abolished special pleas. In such states the general issue must always be filed, and a demurrer to it cannot be sustained.[77] A defendant can never be estopped from filing a general issue.[78]

(II) *Sufficiency.* A defense which substantially amounts to the general issue will be so considered.[79] Verbal irregularities will not vitiate it.[80] But it

tion Co. *v.* Hammett, 111 Ga. 24, 36 S. E. 304.

64. Berry *v.* Ferguson, 58 Ala. 314.

65. See the statutes of the several states. And see Angier *v.* Equitable Bldg., etc., Assoc., 109 Ga. 625, 35 S. E. 64; Smith *v.* Champion, 102 Ga. 92, 29 S. E. 160; English *v.* Grant, 102 Ga. 35, 29 S. E. 157.

Under the codes see *infra*, IV, C, 2, g.

It is held in Connecticut that a denial of knowledge or information cannot in any event be deemed a specific denial. Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182.

66. See Assumpsit, Action of, 4 Cyc. 348.

Not guilty as plea in assumpsit see Assumpsit, Action of, 4 Cyc. 349.

67. See Debt, Action of, 13 Cyc. 418.

In action on criminal bail-bond see Bail, 5 Cyc. 145.

68. See Debt, Action of, 13 Cyc. 417.

69. See Detinue, 14 Cyc. 268.

70. See Trespass.

71. See Trespass on the Case.

72. See Covenant, Action of, 11 Cyc. 1031.

73. See Covenant, Action of, 11 Cyc. 1032.

74. *Arkansas.*— Moore *v.* Nichols, 39 Ark. 145.

Illinois.— Cleveland *v.* Skinner, 56 Ill. 500.

Missouri.— Hoover *v.* Hays, 5 Mo. 125.

Tennessee.— Standard Loan, etc., Ins. Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136.

Vermont.— Dyer *v.* Cleaveland, 18 Vt. 241.

Canada.— Abell *v.* Glen, 6 Ont. Pr. 64; Barned's Banking Co. *v.* Reynolds, 36 U. C. Q. B. 256; Small *v.* Strachan, 2 U. C. Q. B. 434; Clute *v.* MacPherson, 6 U. C. Q. B. O. S. 646.

75. See the statutes of the several states. And see Ocean Steamship Co. *v.* Anderson, 112 Ga. 835, 38 S. E. 102; Manson *v.* Arnold, 126 Mass. 399; Brown *v.* Memphis, etc., R. Co., 4 Fed. 37.

In England, under the Judicature Act, the general issue has been abolished and no substitute for it, like the general denial of the American codes, has been provided. Order XIX, rule 17, Rules Sup. Ct. 1883. Adkins *v.* North Metropolitan Tramways Co., 63 L. J. Q. B. 361, 10 Reports 600.

76. Grinstead *v.* Fonte, 32 Miss. 120.

77. Littlefield *v.* Pratt, 8 Metc. (Mass.) 287; Porter *v.* Kimball, 1 Mich. 239; Zion Church Evangelical Assoc. of North America *v.* Light, 7 Pa. Super. Ct. 223.

78. Fry *v.* Cook, 2 Aik. (Vt.) 242.

79. *Alabama.*— Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350, 9 So. 870.

Arkansas.— See Jordan *v.* Newborn, 8 Ark. 502.

California.— See McLarren *v.* Spalding, 2 Cal. 510.

Georgia.— Causey *v.* Cooper, 41 Ga. 409.

Pennsylvania.— Strawn *v.* Park, 1 Phila. 178. But see Scranton *v.* Hull, 3 Lack. Leg. N. 98, where it was held that where no plea has been entered upon a scire facias to enforce a municipal lien, and entry made upon a præcipe filed by counsel for the city that "defendant enters the plea of the general issue" is meaningless and the plea will be stricken off. The proper practice is for counsel to indicate in the præcipe the proper plea to be entered.

Texas.— See McKee *v.* Le Gette, 1 Tex. App. Civ. Cas. § 1114.

Vermont.— Rudd *v.* Darling, 64 Vt. 456, 25 Atl. 479.

Pleading defenses admissible under general issue see *supra*, IV, A, 7, f.

80. Bradley *v.* Barbour, 65 Ill. 431.

must be more than a mere formless memorandum,[81] although in some states merely having counsel's name marked on the docket at appearance term is equivalent to the filing of the general issue.[82] General issues must be positive, not conditional.[83]

(III) *Operation and Effect.*[84] The general issue may generally be said to put in issue all the material allegations made by plaintiff, and goes to show that there is no cause of action.[85] But this is not true without qualification.[86] Matters of inducement are not denied by a plea of the general issue.[87]

(IV) *Specification of Defenses.* Owing to the broad scope of the general issue in many actions, and the multitude of matters that may be shown under it, statutes in some states have made provision for requiring defendant to specify the defenses which he intends to introduce under such a plea, so that plaintiff may be prepared to meet them.[88] Such a specification of defenses does not convert the general issue into a special plea, nor change the burden of proof. Its only effect is to confine the introduction of evidence to the defenses specified.[89]

(V) *Notice of Special Defense Under General Issue.* In a number of states statutes authorize or require as a substitute for special pleas the general issue with notice in connection therewith of any affirmative defense intended to be presented.[90] But the notice does not take the place of the general issue, and must be filed in connection with it.[91] Matters which cannot be set up by special plea, cannot be set up by notice.[92] The notice should fairly apprise plaintiff of the true ground and substance of the defense,[93] but it need not be drawn with the

81. Clough *v.* Crossman, 47 Me. 349; Oates *v.* Gray, 66 N. C. 442.

82. Cunningham *v.* Cureton, 96 Ga. 489, 23 S. E. 420; Barrett *v.* Pascoe, 90 Ga. 826, 17 S. E. 117; Price *v.* Bell, 88 Ga. 740, 15 S. E. 810; Solomon *v.* Creech, 82 Ga. 445, 9 S. E. 165; Simon *v.* Myers, 68 Ga. 74.

83. Oldham *v.* Mt. Sterling Imp. Co., 103 Ky. 529, 45 S. W. 779, 20 Ky. L. Rep. 207.

84. Evidence admissible under general issue see *infra*, XIII, B, 4, l, (II).
Variance between allegations and proof see *infra*, XIII, C.

85. *Alabama.*— McGhee *v.* Cashin, 130 Ala. 561, 30 So. 367; Decatur *v.* White, 109 Ala. 389, 19 So. 428.
Georgia.— Causey *v.* Cooper, 41 Ga. 409.
Massachusetts.—Dudley *v.* Sumner, 5 Mass. 438.
Michigan.— Kinnie *v.* Owen, 1 Mich. 249.
New York.— Simmons *v.* Sisson, 26 N. Y. 264; Rush *v.* Cobbett, 2 Johns. Cas. 256.
Pennsylvania.— Blessing *v.* Miller, 102 Pa. St. 45.
West Virginia.— Travis *v.* Peabody Ins. Co., 28 W. Va. 583.
United States.— Bottomley *v.* U. S., 3 Fed. Cas. No. 1,688, 1 Story 135.
Canada.— Soules *v.* Soules, 35 U. C. Q. B. 334; Nigh *v.* Sowerwine, 12 U. C. Q. B. 67; Honeywell *v.* Davis, 2 U. C. Q. B. 63. In Northern Pac. Express Co. *v.* Martin, 26 Can. Sup. Ct. 135, 141, the court said: "The general issue of never indebted puts in issue all material facts necessary to be proved to establish the plaintiff's right of action and see no reason why any exception should be made in the case of a condition the performance of which must necessarily be considered as impliedly alleged by the common count in the usual form."

The distinctions between half and full defense in a plea of the general issue are obsolete. Lyman *v.* Dodge, 13 N. H. 197.

86. See *infra*, IV, C, 5, b, (III).

87. Cumberland Tel., etc., Co. *v.* Floyd, 112 Tenn. 304, 79 S. W. 795.

88. See the statutes of the several states. And see Granite State Bank *v.* Otis, 53 Me. 133; Hart *v.* Hardy, 42 Me. 196.

89. Oeters *v.* Supreme Lodge K. H., 98 Va. 201, 35 S. E. 356.

90. See the statutes of the several states. And see the following cases:
Connecticut.— Merrill *v.* Everett, 38 Conn. 40.
Illinois.— Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695.
Michigan.— Randall *v.* Baird, 66 Mich. 312, 33 N. W. 506; Johnson *v.* Kibbee, 36 Mich. 269.
Mississippi.— Grayson *v.* Brooks, 64 Miss. 410, 1 So. 482.
New Jersey.— Commonwealth Roofing Co. *v.* Palmer Leather Co., 67 N. J. L. 566, 52 Atl. 389.
Tennessee.— Wilson *v.* Waters, 7 Coldw. 323; West *v.* Tyler, 2 Coldw. 96.
United States.— Teese *v.* Huntingdon, 23 How. 2, 16 L. ed. 479.
Canada.— Ladds *v.* Vernon, 14 N. Brunsw. 350; March *v.* Port Dover, etc., Road Co., 15 U. C. Q. B. 138.
Substitute for special plea.— Notice of an intended defense must be given wherever the common law would require a special plea. Rawlings *v.* Cole, 67 Mich. 431, 35 N. W. 66.

91. Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695.

92. Wilmarth *v.* Babcock, 2 Hill (N. Y.) 194.

93. *Connecticut.*— Merrill *v.* Everett, 38 Conn. 40.

technical accuracy of a special plea.[94] If it contain the substance of a special plea it is sufficient,[95] and a special plea, although abolished by statute, may be allowed to stand as a notice of defense.[96] The sufficiency of the notice may be tested only by a motion to strike.[97] Or at the trial when defendant seeks to introduce evidence under it,[98] where defendant may use either a notice or a special plea, he cannot use both in presenting the same matter of defense.[99] Facts alone need be stated, not evidence nor inferences;[1] but the facts so stated cannot be taken as evidence against defendant,[2] and they must be alleged with such certainty as would be sufficient to withstand a demurrer.[3] Certainty to a common intent is sufficient in a notice.[4] The right to give notice under the general issue applies to the issue of *non est factum,* notwithstanding the narrowness of its scope,[5] but not to the plea of *nul tiel record.*[6] A dilatory defense cannot be made by notice under the general issue, but must be specially pleaded.[7]

(VI) *Brief Statement Filed With General Issue.* Very similar to the notice under the general issue is the "brief statement" of special defense provided for by statute in a number of states.[8] This is a substitute for special pleading, like the notice, and is filed in connection with the general issue.[9] It must contain the substance of a special plea in bar, but is informal.[10] The different

Illinois.— Henrichsen *v.* Mudd, 33 Ill. 476; Sherman *v.* Dutch, 16 Ill. 283.

Massachusetts.—Davis *v.* Maxwell, 12 Metc. 286.

Michigan.— Ismond *v.* Scougale, 120 Mich. 353, 79 N. W. 489; Deerfield *v.* Harper, 115 Mich. 678, 74 N. W. 207; Farmers' Mut. F. Ins. Co. *v.* Crampton, 43 Mich. 421, 5 N. W. 447; McHardy *v.* Wadsworth, 8 Mich. 349; Rosenbury *v.* Angell, 6 Mich. 508.

New Hampshire.— Pike *v.* Taylor, 49 N. H. 124.

New York.— Fuller *v.* Rood, 3 Hill 258; Edwards *v.* Clemons, 24 Wend. 480.

Pennsylvania.— Moatz *v.* Knox, 11 Pa. St. 268.

United States.— McRae *v.* Lonsby, 130 Fed. 17, 64 C. C. A. 385.

Canada.— Lang *v.* Gilbert, 9 N. Brunsw. 359; Le Gal *v.* Duffy, 8 N. Brunsw. 57.

See 39 Cent. Dig. tit. "Pleading," § 241.

94. *Connecticut.*— Merrill *v.* Everett, 38 Conn. 40.

Illinois.— Sherman *v.* Dutch, 16 Ill. 283.

New Hampshire.— Pike *v.* Taylor, 49 N. H. 124; Folsom *v.* Brawn, 25 N. H. 114.

New York.— Chamberlain *v.* Gorham, 20 Johns. 144; Shepard *v.* Merrill, 13 Johns. 475.

Ohio.— McClintock *v.* Inskip, 13 Ohio 21.

Pennsylvania.— Moatz *v.* Knox, 11 Pa. St. 268.

Vermont.— Randall *v.* Preston, 52 Vt. 198; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

95. *Michigan.*— Thompson *v.* Bowers, 1 Dougl. 321.

New Jersey.— Ackerman *v.* Shelp, 8 N. J. L. 125, 129, where the court said: "The substitution was not designed to allow a greater latitude of proof; the test of a good notice being that the matters therein contained can be specially pleaded; its privilege consists in an exemption from the forms and formalities of a plea, but it must contain all the substance and certainty of one as to the facts or matters proposed to be given in evidence."

New York.— Chamberlain *v.* Gorham, 20 Johns. 144; Shepard *v.* Merrill, 13 Johns. 475.

Ohio.— McClintock *v.* Inskip, 13 Ohio 21; Brazee *v.* Blake, 5 Ohio 340.

Vermont.— Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633; Bowdish *v.* Peckham, 1 D. Chipm. 144.

Canada.— Wilson *v.* Street, 7 N. Brunsw. 629; Dowling *v.* Trites, 7 N. Brunsw. 520.

See 39 Cent. Dig. tit. "Pleading," § 241.

96. Benedict *v.* Smith, 48 Mich. 593, 12 N. W. 866. *Contra,* Robinson *v.* Palmer, 7 N. Brunsw. 223.

97. See *infra,* XII, C.

98. Burgwin *v.* Babcock, 11 Ill. 28.

99. Camp *v.* Allen, 12 N. J. L. 1; Stolley *v.* Brooks, 1 Ohio Dec. (Reprint) 316, 7 West. L. J. 235.

1. Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466.

2. See *infra,* IV, C, 5, b, (I).

3. Ackerman *v.* Shelp, 8 N. J. L. 125; Brazee *v.* Blake, 5 Ohio 340; Reynolds *v.* Rogers, 5 Ohio 169.

4. Appleton *v.* Donaldson, 3 Pa. St. 381.

5. Provost *v.* Calder, 2 Wend. (N. Y.) 517; Lawrence *v.* Dole, 11 Vt. 549; Commercial Bank *v.* European Assur. Soc., 13 N. Brunsw. 219.

6. Whiton *v.* Ripley, 1 Ohio Dec. (Reprint) 133, 2 West. L. J. 406.

7. Holdridge *v.* Holdridge, 53 Vt. 546; Thomson *v.* Keith, 11 N. Brunsw. 133.

8. See the statutes of the several states.

9. Washington Bank *v.* Brown, 2 Metc. (Mass.) 293; Taylor *v.* Robinson, 29 Me. 323; Potter *v.* Titcomb, 16 Me. 423; Williams College *v.* Mallett, 16 Me. 84; Folsom *v.* Brawn, 25 N. H. 114. See also Granite State Bank *v.* Otis, 53 Me. 133.

10. Solon Ministerial, etc., Fund *v.* Rowell, 49 Me. 330; Brickett *v.* Davis, 21 Pick. (Mass.) 404; Bangs *v.* Snow, 1 Mass. 181; Pallet *v.* Sargent, 36 N. H. 496; Folsom *v.* Brawn, 25 N. H. 114. In Trask *v.* Patterson, 29 Me. 499, 502, the court said: "One

points raised in it are equivalent to different special pleas.[11] The facts must be alleged with as much certainty and precision as in a special plea.[12] The statute allowing the brief statement applies only to pleas in bar not to pleas in abatement;[13] and it does not apply to a plea *puis darrein continuance*.[14] The brief statement sets up defenses in addition to and not in substitution for the general issue, and if a party fail on the special defense he still may rely on the general issue.[15] The court may, in its discretion, permit the filing of a brief statement after the cause is ready for trial,[16] or otherwise enlarge the time allowed.[17]

(VII) *General Issues by Statute*. Where a statute specially allows, in given cases, the pleading of the general issue and the giving thereunder of special matters in evidence, not admissible under the general rules applicable to the general issue, defendant, if he wishes to avail himself of the statute, must expressly indicate it in his plea, by writing "by statute" in the margin or otherwise. And wherever this form of plea is used no special pleas can be added, but defendant must rely upon the general issue alone.[18] If a statute authorizes the plea, the defenses available may be such as are founded on the statute or defenses wholly independent of the statute.[19] A plea of the general issue "by statute" where no statute is applicable is not demurrable, but the reference to the statute may be stricken.[20] An equitable defense is not admissible under this plea.[21] The particular statute defendant wishes to rely upon should be designated, and other statutes may be referred to besides the one by virtue of which the defense is filed.[22] But if defendant relies on a statute not designated, and no objection is taken during the trial, the objection is waived,[23] and additional statutes may be inserted by amendment.[24]

d. The Special Traverse. The special traverse, or traverse with an inducement of new matter, is in substance an argumentative denial of the facts traversed, but in form a direct denial. Where defendant cannot safely deny directly, by reason of certain facts not appearing in the declaration and not admissible under a direct denial, which it is important should be presented in defense, but which do not constitute a defense by way of confession and avoidance, but rather are merely inconsistent with the facts alleged in the declaration, he may make use of this form of traverse. The new facts are set up in his plea, argumentatively denying plaintiff's allegations, and they are followed by the words *absque hoc* (without this) and a direct denial of the facts already argumentatively denied. The *absque hoc* is thus a connecting link and sign of equality between the argumentative denial

of the important purposes designed to be accomplished by allowing them [brief statements] to be used instead of pleas and replications, was to relieve the parties from the exactness of allegation and denial, by which parties were sometimes so entangled as to prevent a trial upon the merits."

11. Potter *v.* Titcomb, 16 Me. 423.

12. Washburn *v.* Mosely, 22 Me. 160.

13. Wisheart *v.* Legro, 33 N. H. 177; Cocheco Mfg. Co. *v.* Whittier, 10 N. H. 305. *Compare* Plymouth Christian Soc. *v.* Macomber, 3 Mete. (Mass.) 235.

14. Wisheart *v.* Legro, 33 N. H. 177.

15. Corthell *v.* Holmes, 87 Me. 24, 32 Atl. 715; Moore *v.* Knowles, 65 Me. 493; Trask *v.* Patterson, 29 Me. 499; Chase *v.* Fish, 16 Me. 132.

16. Bellows *v.* Copp, 20 N. H. 492.

17. Wisheart *v.* Legro, 33 N. H. 177.

18. Ross *v.* Clifton, 11 A. & E. 631, 39 E. C. L. 340; Mason *v.* Newland, 9 C. & P. 575, 38 E. C. L. 337; Legge *v.* Boyd, 1 M. & G. 898, 39 E. C. L. 1086; Dale *v.* Coon, 2 Ont. Pr. 160; O'Donohoe *v.* Maguire, 1 Ont. Pr. 131; Brown *v.* Shea, 5 U. C. Q. B. 141.

A marginal reference "according to statute" instead of "by statute" is sufficient. Robertson *v.* Cooley, 7 U. C. Q. B. 305.

19. Maund *v.* Monmouthshire Canal Co., C. & M. 606, 41 E. C. L. 330. *Compare* Bond *v.* Conmee, 16 Ont. App. 398; Marsh *v.* Boulton, 4 U. C. Q. B. 354.

20. Cairns *v.* Ottawa Water Com'rs, 25 U. C. C. P. 551.

21. Brown *v.* Blackwell, 35 U. C. Q. B. 239. Nor is the plea available in an action to enforce the specific performance of a contract. Peterborough *v.* Midland R. Co., 12 Ont. Pr. 127.

22. Coy *v.* Forrester, 9 Dowl. P. C. 770, 10 L. J. Exch. 262, 8 M. & W. 312; Van Natter *v.* Buffalo, etc., R. Co., 27 U. C. Q. B. 581. *Compare* Doan *v.* Michigan Cent. R. Co., 18 Ont. 482.

23. Burridge *v.* Nicholetts, 6 H. & N. 383, 30 L. J. Exch. 145, 3 L. T. Rep. N. S. 703, 9 Wkly. Rep. 345.

24. Edwards *v.* Hodges, 15 C. B. 477, 3

which precedes it and the direct denial which follows it.[25] The inducement of the special traverse should always be an indirect and not a direct denial,[26] but a defect in this respect is one of form only.[27] It must on its face give the pleader a good right or title,[28] and must in substance be a sufficient answer to the declaration.[29]

2. Denials Under the Codes — a. In General. The usual provision in the codes, with respect to denials, is that the answer of defendant must contain a general or specific denial of each material allegation of the complaint controverted by defendant, or of any knowledge or information thereof sufficient to form a belief,[30] although in some of the codes provision for a general denial is not made in terms.[31] A distinction is made under the codes between denials and defenses, and a denial should not be designated as a defense, which term is confined to the affirmative statement of new matter,[32] although in some cases the distinction is not recognized.[33] Denials cannot be included as part of an affirmative defense.[34]

b. Form of Denial — (i) *In General.* Defendant should simply deny, and not "say" that he denies, but the use of this form of expression does not render the answer bad.[35] It is not sufficient merely to deny the pleading or a paragraph

C. L. R. 472, 1 Jur. N. S. 91, 24 L. J. M. C. 81, 3 Wkly. Rep. 112, 80 E. C. L. 477.

25. See Andrews' Stephen Pl. 243–261. See also Stevens *v.* Allen, 29 N. J. L. 68.

A special traverse, as originally devised and used, was simply a mode by which the pleader, in the inducement, spread his own right or title upon the record, adding to this implied denial of the opposing claim a direct denial under the *absque hoc.* Fox *v.* Nathans, 32 Conn. 348.

The object of a special traverse is to accompany the direct denial of plaintiff's averment with an explanation of the ground on which that denial is based. Pike *v.* Hunter, 4 Mackey (D. C.) 531.

26. Rogers *v.* Barth, 117 Ill. App. 323; Hubbard *v.* Mutual Reserve Fund Life Assoc., 80 Fed. 681.

Should not be a confession and avoidance.— Rogers *v.* Barth, 117 Ill. App. 323.

Matter of inducement should consist of facts which authorize an inference against the right asserted by plaintiff. Egberts *v.* Dibble, 8 Fed. Cas. No. 4,307, 3 McLean 86.

27. Finley *v.* Woodruff, 8 Ark. 328.

28. Fox *v.* Nathans, 32 Conn. 348.

29. Rogers *v.* Barth, 117 Ill. App. 323; State *v.* Chrisman, 2 Ind. 126.

30. See the codes of the several states.

31. See the codes of the several states. And see Ricknor *v.* Clabber, 4 Indian Terr. 660, 76 S. W. 271.

Among the codes in which such provision is omitted see Sanders & Hill Dig. Ark. § 5722; Burns St. Ind. (1901) § 530; Indian Terr. Annot. St. (1899) § 3238; Ky. Code (1895) § 95; Minn. St. (1894) § 5236; Hill Laws Oreg. § 72.

The English rule is as follows: "It shall not be sufficient for a defendant in his statement of defense to deny generally the grounds alleged by the statement of claim or for a plaintiff in his reply to deny generally the grounds alleged in a defense by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages." Order XIX, Rule 17, Rules Sup. Ct. 1883.

32. Staten Island Midland R. Co. *v.* Hinchliffe, 170 N. Y. 473, 63 N. E. 545 [*citing* Benedict *v.* Seymour, 6 How. Pr. (N. Y.) 298]; Sanford *v.* Rhoads, 39 Misc. (N. Y.) 548, 80 N. Y. Suppl. 404; Pascekwitz *v.* Richards, 37 Misc. (N. Y.) 250, 75 N. Y. Suppl. 291; Cruikshank *v.* Press Pub. Co., 32 Misc. (N. Y.) 152, 65 N. Y. Suppl. 678; Kelly *v.* Sammis, 25 Misc. (N. Y.) 6, 53 N. Y. Suppl. 825; Von Hagen *v.* Waterbury Mfg. Co., 22 Misc. (N. Y.) 580, 49 N. Y. Suppl. 465; Green *v.* Brown, 22 Misc. (N. Y.) 279, 49 N. Y. Suppl. 163; Flack *v.* O'Brien, 19 Misc. (N. Y.) 399, 43 N. Y. Suppl. 854.

33. Donovan *v.* Main, 74 N. Y. App. Div. 44, 77 N. Y. Suppl. 229.

34. White *v.* Koster, 89 Hun (N. Y.) 483, 35 N. Y. Suppl. 369; Leonorovitz *v.* Ott, 40 Misc. (N. Y.) 551, 82 N. Y. Suppl. 880; Carter *v.* Eighth Ward Bank, 33 Misc. (N. Y.) 128, 67 N. Y. Suppl. 300; Cruikshank *v.* Press Pub. Co., 32 Misc. (N. Y.) 152, 65 N. Y. Suppl. 678. *Compare* Nineteenth Ward Bank *v.* Manhattan R. Co., 56 N. Y. App. Div. 618, 67 N. Y. Suppl. 598, holding that negative averments in the statement of new matter which did not controvert any allegations of the complaint did not infringe this rule.

Where an answer purports to plead a defense, but in fact sets up no new matter but only denials, a general demurrer for insufficiency will be sustained in New York. Durst *v.* Brooklyn Heights R. Co., 33 Misc. (N. Y.) 124, 67 N. Y. Suppl. 297.

35. *California.*— Espinosa *v.* Gregory, 40 Cal. 58.

Kansas.— Munn *v.* Taulman, 1 Kan. 254, 81 Am. Dec. 508.

Minnesota.— Moen *v.* Eldred, 22 Minn. 538.

Nebraska.— Reiss *v.* Argubright, 2 Nebr. (Unoff.) 756, 92 N. W. 988.

New York.—Humble *v.* McDonough, 5 Misc. 508, 25 N. Y. Suppl. 965; Chapman *v.* Chap-

thereof; the allegations contained in it must be denied.[36] A call for proof cannot be regarded as a denial under the code.[37] It is not necessary that the denial be expressed in negative words. The averment of the contrary of what is alleged in the complaint is equivalent to an ordinary denial.[38] The answer must meet the substance and not merely the form of the charge;[39] otherwise it will be deemed evasive and for that reason bad.[40] It must be direct and unequivocal,[41] and must clearly identify the allegations sought to be denied.[42] An answer averring that "no allegation of the complaint is true" does not comply with the code requirement;[43] nor does an averment that "these defendants do not admit," etc.;[44] nor an averment that defendant is informed and believes that certain allegations in the complaint are not true.[45] Admissions made in connection with denials limit their effect;[46] but a valid denial is not vitiated by special defenses,[47] legal conclusions,[48] or immaterial matter[49] alleged in connection with it.

(II) *ARGUMENTATIVE DENIALS.*[50] While the answer may deny in the exact language of the complaint if it is not thereby rendered uncertain,[51] it need not deny in express terms if it substantially traverses plaintiff's allegations.[52] An argumentative denial, which merely alleges facts inconsistent with the facts alleged by plaintiff, raises an issue and is good against a demurrer.[53] But merely giving a

man, 34 How. Pr. 281. *Contra*, Arthur *v.* Brooks, 14 Barb. 533; Blake *v.* Eldred, 18 How. Pr. 240.

Washington.— Denver *v.* Spokane Falls, 7 Wash. 226, 34 Pac. 926.

Wisconsin.— Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314.

See 39 Cent. Dig. tit. "Pleading," § 244.

But *compare* Hafner *v.* Enterprise Bank, 24 Ohio Cir. Ct. 652.

But an answer which "alleges and shows" that certain allegations "are denied" constitutes no denial. Feder *v.* Samson, 22 Misc. (N. Y.) 111, 48 N. Y. Suppl. 696.

36. Salyer *v.* Napier, 51 S. W. 10, 21 Ky. L. Rep. 172; People *v.* Banfield, 36 Misc. (N. Y.) 13, 72 N. Y. Suppl. 35; Bidwell *v.* Overton, 13 N. Y. Suppl. 274. *Contra*, Fleming *v.* Supreme Council O. C. F., 32 N. Y. App. Div. 231, 52 N. Y. Suppl. 1001.

37. Bentley *v.* Dorcas, 11 Ohio St. 398. See also Rutter *v.* Tregent, 12 Ch. D. 758, 48 L. J. Ch. 791, 41 L. T. Rep. N. S. 16, 27 Wkly. Rep. 902.

38. Byxbee *v.* Dewey, (Cal. 1896) 47 Pac. 52; Perkins *v.* Brock, 80 Cal. 320, 22 Pac. 194; Miller *v.* Brigham, 50 Cal. 615; Kentucky Female Orphan School *v.* Fleming, 10 Bush (Ky.) 234; Soper *v.* St. Regis Paper Co., 76 N. Y. App. Div. 409, 78 N. Y. Suppl. 782.

An affirmative allegation to the effect that certain facts did not exist is equivalent to a denial that they did exist. Cilley *v.* Preferred Acc. Ins. Co., 109 N. Y. App. Div. 394, 96 N. Y. Suppl. 282 [*affirmed* in 187 N. Y. 517, 79 N. E. 1102].

39. *California.*— De Godey *v.* Godey, 39 Cal. 157.

Minnesota.— Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507.

New York.— Hutchinson *v.* Bein, 104 N. Y. App. Div. 214, 93 N. Y. Suppl. 216.

Wisconsin.—Spence *v.* Spence, 17 Wis. 448; Robbins *v.* Lincoln, 12 Wis. 1.

England.— Rowley *v.* Laffan, L. R. 10 Ir. 9.

40. Norris *v.* Glenn, 1 Ida. 590.

41. West *v.* American Exch. Bank, 44 Barb. (N. Y.) 175; Pfaudler Process Fermentation Co. *v.* Smith, 3 N. Y. Suppl. 609.

42. Mattison *v.* Smith, 19 Abb. Pr. (N. Y.) 288.

43. Flack *v.* Dawson, 69 N. C. 42.

44. Bomberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

45. Bidwell *v.* Overton, 13 N. Y. Suppl. 274, 26 Abb. N. Cas. 402.

46. See *infra*, IV, C, 5, b, (v), (B).

47. See *infra*, IV, C, 5, b, (v), (B).

48. Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378. See, generally, *supra*, II, G, 7, a.

49. Bainbridge *v.* Friedlander, 7 Misc. (N. Y.) 227, 27 N. Y. Suppl. 261. See, generally, *supra*, II, G, 10.

50. Argumentative averments in general see *supra*, II, H, 2, d.

51. Parker *v.* Tillinghast, 1 N. Y. St. 296. Negatives pregnant see *infra*, IV, C, 4.

52. Hill *v.* Smith, 27 Cal. 476; Wahl *v.* Murphy, 9 S. W. 375, 10 Ky. L. Rep. 388; Morrison *v.* O'Reilly, 2 Utah 165.

53. Burris *v.* People's Ditch Co., 104 Cal. 248, 37 Pac. 922; Perkins *v.* Brock, 80 Cal. 320, 22 Pac. 194; Cornett *v.* Smith, 15 Colo. App. 53, 60 Pac. 953; Oren *v.* St. Joseph County, 157 Ind. 158, 60 N. E. 1019; Hiatt *v.* Darlington, 152 Ind. 570, 53 N. E. 825; Childers *v.* Jeffersonville First Nat. Bank, 147 Ind. 430, 46 N. E. 825; Boos *v.* Morgan, 146 Ind. 111, 43 N. E. 947; State *v.* Osborn, 143 Ind. 671, 42 N. E. 921; Mays *v.* Hedges, 79 Ind. 288; Loeb *v.* Weis, 64 Ind. 285; Flanagan *v.* Reitemier, 26 Ind. App. 243, 59 N. E. 389; Huntington *v.* Boyd, 25 Ind. App. 250, 57 N. E. 939; Parker Land, etc., Co. *v.* Reddick, 18 Ind. App. 616, 47 N. E. 848; Kirshbaum *v.* Hanover F. Ins. Co., 16 Ind. App. 606, 45 N. E. 1113; Seiberling *v.* Rodman, 14 Ind. App. 460, 43 N. E. 38; National Wall Paper Co. *v.* McPherson, 19 Mont. 355, 48 Pac. 550. *Contra*, Gallagher *v.* Dunlap, 2 Nev. 326; Smith *v.* Coe, 170 N. Y. 162, 63 N. E. 57; Rodgers *v.* Clement, 162 N. Y. 422,

different version of the matter from that contained in the complaint is not sufficient to put the allegations of the complaint in issue.[54]

c. General Denials. Under the codes there is no general issue,[55] although where an answer is sufficient in substance it is not rendered bad because in the form of the general issue.[56] But a mere plea of the general issue is generally bad under the code as denying a conclusion of law and not the facts alleged in the complaint.[57] The general denial under the codes raises an issue as to each one of the material allegations of plaintiff,[58] with certain local statutory qualifications, requiring verified[59] or special[60] denials. Its form, closely following the statute, is commonly as follows: "The defendant, for answer to the complaint herein, denies each and every allegation thereof."[61] Variations of this, equivalent in substance, have been sustained.[62] In some states a general denial cannot be used where the complaint is verified, but the denial must in such cases be specific.[63] A fact impliedly averred is put in issue by a general denial equally with facts expressly averred.[64] A general denial is limited by specific denials coupled with it pointing out the particulars in which the general denial applies.[65]

56 N. E. 901, 76 Am. St. Rep. 342; Wood *v.* Whiting, 21 Barb. (N. Y.) 190; Jaeger *v.* New York, 39 Misc. (N. Y.) 543, 80 N. Y. Suppl. 356; Swinburne *v.* Stockwell, 58 How. Pr. (N. Y.) 312. But *compare* Pittenger *v.* Southern Tier Masonic Relief Assoc., 15 N. Y. App. Div. 26, 44 N. Y. Suppl. 124.

54. Bernstein *v.* Crow, 22 Misc. (N. Y.) 99, 48 N. Y. Suppl. 531.

55. McIlroy *v.* Buckner, 35 Ark. 555; Dyson *v.* Ream, 9 Iowa 51; Hagan *v.* Burch, 8 Iowa 309; Powell *v.* Flanary, 109 Ky. 342, 59 S. W. 5, 22 Ky. L. Rep. 908.

56. McIlroy *v.* Buckner, 35 Ark. 555; Lyon *v.* Bunn, 6 Iowa 48.

57. Fain *v.* Goodwin, 35 Ark. 109; Lawrence *v.* Meyer, 35 Ark. 104. See Bankers' Union of the World *v.* Favalora, 73 Nebr. 427, 102 N. W. 1013.

58. Paden *v.* Goldbaum, (Cal. 1894) 37 Pac. 759; U. S. *v.* Shoup, 2 Ida. (Hasb.) 459, 21 Pac. 656; Babcock *v.* Milmo Nat. Bank, 1 Tex. App. Civ. Cas. § 817; Hutchinson *v.* Chicago, etc., R. Co., 41 Wis. 541. See Ocean Steamship Co. *v.* Anderson, 112 Ga. 835, 837, 38 S. E. 102 (where the court said with reference to a statute providing for a denial of the allegations of the complaint: "There is quite a difference between the plea of the general issue, which our law prohibits, and the form of plea laid down in the act of 1895, which was followed by the defendant in this case. The plea of the general issue denies no special allegation of the petition. It is simply a conclusion of the pleader that he is not indebted in manner and form as alleged. On the other hand, a denial of the allegations of the petition, whether made in a single sentence or in as many sentences as there are paragraphs in the petition, is specific in its nature, and meets the objections to a plea of the general issue by reducing to an issue each allegation made by the petition"); Schular *v.* Hudson River R. Co., 38 Barb. (N. Y.) 653 (where the court held that a general denial put in issue defendant's liability for the acts of persons causing an injury).

Demurrer to general denial see *infra*, VI, F, 3.

Striking general denial is sham see *infra*, XII, C, 1, c, (III), (C), (2).

59. Necessity of verification in order to place particular facts in issue see *infra*, VIII, B, 2.

60. See *infra*, IV, C, 2, e.

61. See Flack *v.* O'Brien, 19 Misc. (N. Y.) 399, 43 N. Y. Suppl. 854; Kellogg *v.* Church, 4 How. Pr. (N. Y.) 339; Lewis *v.* Coulter, 10 Ohio St. 451. But see Rosenthal *v.* Brush, Code Rep. N. S. (N. Y.) 228, holding the form stated in the text bad under a code provision requiring a specific denial.

62. *Minnesota.*— Kingsley *v.* Gilman, 12 Minn. 515, denial of "each and every statement and averment, and every part of the same, in said amended complaint contained, as therein stated or otherwise."

Nebraska.— Crete *v.* Hendricks, 2 Nebr. (Unoff.) 847, 90 N. W. 215, a denial of "each and every allegation of new matter."

New York.— People *v.* Tunnicliffe, 7 N. Y. Suppl. 91, denying "the said complaint in each and every allegation therein contained."

North Carolina.— Heyer *v.* Beatty, 76 N. C. 28, an allegation "that no allegation of the complaint is true."

Washington.— Denver *v.* Spokane Falls, 7 Wash. 226, 34 Pac. 926 (an answer that defendants "say that they deny each and every allegation"); Penter *v.* Staight, 1 Wash. 365, 25 Pac. 469 ("denies generally each and every allegation" of the complaint).

See 39 Cent. Dig. tit. "Pleading," § 255.

That a general denial is carelessly and inartificially drawn will not render it bad where it indicates with sufficient clearness the pleader's intention to put all the allegations of the complaint in issue. Bodine *v.* White, 98 N. Y. Suppl. 232.

63. See the codes of the several states. And see Paden *v.* Goldbaum, (Cal. 1894) 37 Pac. 759; Garfield *v.* Knight's Ferry, etc., Water Co., 14 Cal. 35; U. S. *v.* Shoup, 2 Ida. (Hasb.) 493, 21 Pac. 656; Power *v.* Gum, 6 Mont. 5, 9 Pac. 575; State *v.* Western Union Tel. Co., 4 Nev. 338.

64. Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534.

65. Hennessy *v.* Metropolitan L. Ins. Co.,

d. Qualified General Denials. A denial of each and every allegation of a complaint not otherwise admitted, qualified, avoided, or referred to is generally held to be a sufficient general denial, at least as against a demurrer.[66] But it has been severely criticized as unsatisfactory because indefinite;[67] and some cases hold that such a denial is neither a general nor a specific denial, and not within the pro-

74 Conn. 699, 52 Atl. 490; White *v.* Jones, 14 La. Ann. 681; New York Mut. L. Ins. Co. *v.* Dingley, 100 Fed. 408, 40 C. C. A. 459, 49 L. R. A. 132 [*reversed* on other grounds in 184 U. S. 695, 22 S. Ct. 937, 46 L. ed. 763]. But *compare* Porter *v.* Grady, 21 Colo. 74, 39 Pac. 1091.

66. *Colorado.*— Bessemer Irr. Ditch Co. *v.* Woolley, 32 Colo. 437, 76 Pac. 1053, 105 Am. St. Rep. 91.

Idaho.— Anderson *v.* War Eagle Consol. Min. Co., 8 Ida. 789, 72 Pac. 671.

Indiana.— Childers *v.* Jeffersonville First Nat. Bank, 147 Ind. 430, 46 N. E. 825; Voss *v.* Prier, 71 Ind. 128.

Iowa.— Comes *v.* Chicago, etc., R. Co., 78 Iowa 391, 43 N. W. 235; Ingle *v.* Jones, 43 Iowa 286.

Minnesota.—Fegelson *v.* Dickerman, 70 Minn. 471, 73 N. W. 144; Davenport *v.* Ladd, 38 Minn. 545, 38 N. W. 622; St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Kingsley *v.* Gilman, 12 Minn. 515.

Nebraska.— Warren *v.* Wales, 1 Nebr. (Unoff.) 446, 95 N. W. 610.

New York.—Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226; Youngs *v.* Kent, 46 N. Y. 672; Pittenger *v.* Southern Tier Masonic Relief Assoc., 15 N. Y. App. Div. 26, 44 N. Y. Suppl. 124; Mingst *v.* Bleck, 38 Hun 358; Calhoun *v.* Hallen, 25 Hun 155; Landesman *v.* Hauser, 45 Misc. 603, 91 N. Y. Suppl. 6; Mason *v.* Dutcher, 33 N. Y. Suppl. 689; Gallatin Nat. Bank *v.* Nashville, etc., R. Co., 4 N. Y. St. 714; Burley *v.* German-American Bank, 5 N. Y. Civ. Proc. 172; Smith *v.* Gratz, 59 How. Pr. 274; Fellows *v.* Muller, 48 How. Pr. 82. *Contra*, see Barton *v.* Griffin, 36 N. Y. App. Div. 572, 55 N. Y. Suppl. 477; Millville Mfg. Co. *v.* Salter, 15 Abb. N. Cas. 305; Miller *v.* McCloskey, 9 Abb. N. Cas. 303; Potter *v.* Frail, 67 How. Pr. 445; McEncroe *v.* Decker, 58 How. Pr. 250.

Ohio.— Reuscher *v.* Hudson, 4 Ohio Dec. (Reprint) 291, 1 Clev. L. Rep. 218.

South Dakota.— State *v.* Pierre, 15 S. D. 559, 90 N. W. 1047; Mattoon *v.* Fremont, etc., R. Co., 6 S. D. 301, 60 N. W. 69.

Washington.— Turner *v.* Turner, 33 Wash. 118, 74 Pac. 55.

Wisconsin.— Althouse *v.* Jamestown, 91 Wis. 46, 64 N. W. 423; Matteson *v.* Ellsworth, 28 Wis. 254.

United States.— Burley *v.* German American Bank, 111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406.

See 39 Cent. Dig. tit. "Pleading," § 258.

It must be clear what is denied.— Griffin *v.* Long Island R. Co., 101 N. Y. 248, 4 N. E. 740; Zimmerman *v.* Meyrowitz, 34 Misc. (N. Y.) 307, 69 N. Y. Suppl. 800; Owens *v.* Hudnut's Pharmacy, 12 N. Y. Suppl. 700; Haines *v.* Herrick, 9 Abb. N. Cas. (N. Y.) 379. Such an answer was held frivolous in Barton *v.* Griffin, 24 Misc. (N. Y.) 453, 53 N. Y. Suppl. 661, where it was difficult to determine what allegations were qualified or explained.

67. Long *v.* Long, 79 Mo. 644; Ritckey *v.* Home Ins. Co., 98 Mo. App. 115, 72 S. W. 44; Crane *v.* Crane, 43 Hun (N. Y.) 309; Clark *v.* Dillon, 11 Daly (N. Y.) 110; Farnsworth *v.* Wilson, 5 N. Y. Civ. Proc. 179 note; Leary *v.* Boggs, 3 N. Y. Civ. Proc. 227; Hammond *v.* Earle, 5 Abb. N. Cas. (N. Y.) 105; Callanan *v.* Gilman, 67 How. Pr. (N. Y.) 464; Hardy *v.* Purington, 6 S. D. 382, 61 N. W. 158. In Snyder *v.* Free, 114 Mo. 360, 367, 21 S. W. 847, the answer consisted of a general denial of every allegation of the petition "except that which may be hereinafter expressly admitted," and the court said of it: "The central idea of code pleading is that an answer should not be evasive, but should meet the allegations of the petition fairly and squarely, thus presenting sharply defined issues for the triers of the facts to pass upon. Revised Statutes (1889), § 2049. On a former occasion this court denounced the method here employed as a 'vicious method of pleading,' and this was an apt characterization of such a faulty way of pleading. It was never the design of the code that a party plaintiff should have to carefully sift each denial of the answer and to carefully compare it with each paragraph of the petition in order to see what is admitted and what is denied. Such denials may be general or they may be special, but in either event the issue must be sharply defined, and not left to surmise or conjecture."

The following forms have been held bad: "Each and every allegation and statement therein, which is or are in any way inconsistent with the allegations in the petition" and "especially denies all new matter pleaded" in the answer. Young *v.* Schofield, 132 Mo. 650, 655, 34 S. W. 497. A general denial "except as qualified by the offer of judgment," but containing no offer of judgment. Malcolm *v.* Lyon, 19 N. Y. Suppl. 210. "Each and every other allegation in said petition not hereinafter specifically admitted." Dezell *v.* New York Fidelity, etc., Co., 176 Mo. 253, 279, 75 S. W. 1102. A denial of "each and every allegation set forth in the plaintiff's complaint not consistent with the foregoing answer." Richardson *v.* Smith, 29 Cal. 529. "Each and every allegation contained in the answer inconsistent with the statements in plaintiff's petition." Gross *v.* Scheel, 67 Nebr. 223, 93 N. W. 418. A denial of "each and every allegation in the complaint, except so far as the court may construe the statements in

visions of the code.[68] On the other hand, a general denial of all facts not expressly admitted has been recommended as a suitable method of making use of a general denial when the answer must be verified,[69] although it has also been held that a qualified general denial in a verified pleading is insufficient. Judicial opinion is much divided on the question.[70] A denial of each and every material allegation in the complaint is evasive, indefinite, and uncertain. The pleader should specify what allegations he deems material.[71] But such an answer is good on demurrer.[72] An answer which admits all of the allegations of the complaint, except "such as are hereinafter denied," ontains no denial where, in addition to such averment, it contains only affirmative defenses.[73]

e. Specific Denials. As has been noted, all of the codes permit and some require a specific denial of the allegations of the complaint.[74] Under a code provision requiring a special denial of each material allegation of the petition controverted by defendant the material facts must be denied specifically and separately.[75] Only such allegations as defendant intends to controvert need be denied,[76] but the answer must point out clearly which allegations are intended to be put in issue,[77] and where it cannot be determined what allegations are denied, all will be taken as admitted.[78] Denials which are as specific as the allegations which they are intended to meet are sufficient.[79] The denial should be as broad as the allegation sought to be traversed,[80] but no broader.[81] The sufficiency of a specific denial must be determined by reference to the particular allegation it is designed to traverse, and if, taken by itself, an issue is fairly made, and there is no admission inconsistent with it, the denial is sufficient.[82] But it is not a sufficient specific denial to "deny specifically each and every matter," [83] or to group the allegations of the complaint and deny them as a whole.[84] So a denial of all the allegations in a particular paragraph of the complaint has been held bad,[85] as has the denial

the answer as admissions." Starbuck *v.* Dunklee, 10 Minn. 168, 88 Am. Dec. 68.

68. Stewart *v.* Street, 10 Cal. 372; Dezell *v.* New York Fidelity, etc., Co., 176 Mo. 253, 75 S. W. 1102; Bellingham *v.* Robb, 12 Quebec Super. Ct. 454; Guimond *v.* Gosselin, 12 Quebec Super. Ct. 178. See also New York cases cited *contra* to text, *supra* note, 66.

69. Parshall *v.* Tillou, 13 How. Pr. (N. Y.) 7.

70. Levinson *v.* Schwartz, 22 Cal. 229.

71. *California.*— Hensley *v.* Tartar, 14 Cal. 508.

Minnesota.— Dodge *v.* Chandler, 13 Minn. 114; Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

Missouri.— Pry *v.* Hannibal, etc., R. Co., 73 Mo. 123; Edmonson *v.* Phillips, 73 Mo. 57.

Montana.— Burke *v.* Inter-State Sav., etc., Assoc., 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416.

New York.— Mattison *v.* Smith, 1 Rob. 706; Moody *v.* Belden, 15 N. Y. Suppl. 119; Hammond *v.* Earle, 5 Abb. N. Cas. 105.

Ohio.— Lewis *v.* Coulter, 10 Ohio St. 451; Thomas *v.* Cline, 4 Ohio Dec. (Reprint) 216, 1 Clev. L. Rep. 123.

South Dakota.— Mead *v.* Pettigrew, 11 S. D. 529, 78 N. W. 945.

United States.— Kimball *v.* Stanton, 4 Fed. 325. But see Goodrich *v.* Union Pac. R. Co., 37 Fed. 182.

See 39 Cent. Dig. tit. "Pleading," § 257.

Contra.— Nix *v.* Gilmer, 5 Okla. 740, 50 Pac. 131; Bailey *v.* Warren, 1 Oreg. 357.

72. Lewis *v.* Coulter, 10 Ohio St. 451; Nix *v.* Gilmer, 5 Okla. 740, 50 Pac. 131.

73. Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444.

74. See *supra*, IV, C, 2, a.

75. Dare *v.* Pacific R. Co., 31 Mo. 480.

76. Newell *v.* Doty, 33 N. Y. 83.

77. White *v.* Koster, 89 Hun (N. Y.) 483, 35 N. Y. Suppl. 369; Wiley *v.* Rouse's Point, 86 Hun (N. Y.) 495, 33 N. Y. Suppl. 773; Miller *v.* McCloskey, 9 Abb. N. Cas. (N. Y.) 303. See also Robinson *v.* Larson, 112 Iowa 173, 83 N. W. 900; Thorp *v.* Holdsworth, 3 Ch. D. 637, 45 L. J. Ch. 406.

78. Williams *v.* Lindblom, 68 Hun (N. Y.) 173, 22 N. Y. Suppl. 678.

79. *Arkansas.*— Arkansas River Packet Co. *v.* Sorrels, 50 Ark. 466, 8 S. W. 683.

Georgia.— De Soto Plantation Co. *v.* Hammett, 111 Ga. 24, 36 S. E. 304.

Kentucky.— Constaus *v.* Newport, 18 S. W. 356, 13 Ky. L. Rep. 802.

Missouri.— Hall *v.* Huffman, 32 Mo. 519.

Montana.— Moore *v.* Murray, 30 Mont. 13, 75 Pac. 515.

80. Buchel *v.* Gray, 115 Cal. 421, 47 Pac. 112; Garrett *v.* Ashcraft, 39 S. W. 51, 19 Ky. L. Rep. 38; Conkling *v.* Manhattan R. Co., 12 N. Y. Suppl. 846.

81. McClave *v.* Gibb, 11 Misc. (N. Y.) 44, 31 N. Y. Suppl. 847.

82. Racouillat *v.* Rene, 32 Cal. 450.

83. Seward *v.* Miller, 6 How. Pr. (N. Y.) 312.

84. Stephens *v.* Wilson, 115 Ky. 27, 72 S. W. 336, 24 Ky. L. Rep. 1832.

85. Stickney *v.* Hanrahan, 7 Ida. 424, 63 Pac. 189.

of each and every allegation in certain numbered paragraphs.[86] The better rule would seem to be that the denial of all the allegations contained in a designated numbered paragraph of the complaint is good.[87] It is not sufficient, however, to deny generally everything between certain words and folios.[88] A specific denial should not, in most cases, deny in the exact words of the allegation.[89] The denial must be direct; it is not sufficient to put facts in issue to admit all facts except those specified.[90] No issue can be raised by a denial of a fact not alleged.[91]

f. Denials of Knowledge or Information — (i) *In General.* In many states it is provided by statute that when defendant has no knowledge or information sufficient to form a belief respecting any or all of the facts alleged in the complaint, he may deny such knowledge or information in his answer, and this denial will, by virtue of the statute, be deemed to put such facts in issue to the same extent as though they were denied.[92] Unless authorized by statute, a denial

86. Pollinger *v.* London Acc. Co., 17 Can. L. T. Occ. Notes 134.

87. Donovan *v.* Main, 74 N. Y. App. Div. 44, 77 N. Y. Suppl. 229; Hoffman *v.* Susemihl, 15 N. Y. App. Div. 405, 44 N. Y. Suppl. 52; N. K. Fairbank Co. *v.* Blaut, 33 N. Y. Suppl. 713 [*distinguishing* and not *following* Baylis *v.* Stimson, 110 N. Y. 621, 17 N. E. 144]; Brown *v.* Cooper, 89 N. C. 237. In Kelly *v.* Sammis, 25 Misc. (N. Y.) 6, 53 N. Y. Suppl. 825, Judge Gaynor strongly recommends the practice of denying each and every allegation of a stated paragraph or subdivision of the complaint, as much simpler and more accurate than the specific negation of particular allegations. Where this cannot be done, by reason of the existence of some allegation that cannot be denied, the same form should be used expressly excepting such allegation.

88. Avery *v.* New York Cent., etc., R. Co., 6 N. Y. Suppl. 547; Collins *v.* Singer Mfg. Co., 53 Wis. 305, 10 N. W. 477. But see Thompson *v.* Wittkop, 184 N. Y. 117, 76 N. E. 108 [*reversing* 97 N. Y. App. Div. 642, 90 N. Y. Suppl. 1116] (holding that a denial of the allegations contained in certain folios of the complaint was not to be commended, but that the proper remedy of plaintiff was to have the answer made more definite and certain); Gassett *v.* Crocker, 9 Abb. Pr. (N. Y.) 39.

89. Nolan *v.* Hentig, 138 Cal. 281, 71 Pac. 440; Mitterwallner *v.* Supreme Lodge K. & L. G. S., 37 Misc. (N. Y.) 860, 76 N. Y. Suppl. 1001.

Negatives pregnant in such denials see *infra*, III, C, 4.

90. Boles *v.* Bennington, 136 Mo. 522, 38 S. W. 306.

91. Grinnell *v.* Church, 65 How. Pr. (N. Y.) 399.

92. See the statutes of the several states. And see the following cases:

Arkansas.— Cary *v.* Ducker, 52 Ark. 103, 12 S. W. 204.

California.— Read *v.* Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131.

Colorado.—Colorado Coal, etc., Co. *v.* John, 5 Colo. App. 213, 38 Pac. 399.

Connecticut.— Sayles *v.* FitzGerald, 72 Conn. 391, 44 Atl. 733.

Iowa.— Provident Bank-Stock Co. *v.* Schafer, 110 Iowa 440, 81 N. W. 689; Beyre *v.* Adams, 73 Iowa 382, 35 N. W. 491; McPhail *v.* Hyatt, 29 Iowa 137.

Minnesota.— Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412.

New Mexico.— Clark *v.* Apex Gold Min. Co., (1906) 85 Pac. 968.

New York.— Warner *v.* U. S. Land, etc., Co., 53 Hun 312, 6 N. Y. Suppl. 411; Tracy *v.* Baker, 38 Hun 263; Nichols *v.* Corcoran, 38 Misc. 671, 78 N. Y. Suppl. 242; Batterman *v.* Journal Co., 28 Misc. 375, 59 N. Y. Suppl. 965; Stockton *v.* Kenny, 24 Misc. 300, 52 N. Y. Suppl. 1006; Hughes *v.* Wilcox, 17 Misc. 32, 39 N. Y. Suppl. 210; Hyde *v.* Kitchen, 21 N. Y. Suppl. 238; Hagadorn *v.* Edgewater, 13 N. Y. Suppl. 687; Johnson *v.* Haberstro, 7 N. Y. St. 225; Duncan *v.* Lawrence, 6 Abb. Pr. 304; Leach *v.* Boynton, 3 Abb. Pr. 1; Flood *v.* Reynolds, 13 How. Pr. 112; Sherman *v.* Bushnell, 7 How. Pr. 171; Temple *v.* Murray, 6 How. Pr. 329; Snyder *v.* White, 6 How. Pr. 321; Genesee Mut. Ins. Co. *v.* Moynihen, 5 How. Pr. 321; Dickerson *v.* Kimball, 1 Code Rep. 49. This form of denial was for a time not authorized in the district and municipal courts of New York. Alexander *v.* Albany, 55 N. Y. App. Div. 238, 66 N. Y. Suppl. 1084; Pennsylvania, etc., Oil Co. *v.* Spitelnik, 27 Misc. 557, 58 N. Y. Suppl. 311; Sanchez, etc., Co. *v.* Hirsch, 27 Misc. 202, 57 N. Y. Suppl. 795; Nicoll *v.* Clark, 13 Misc. 128, 34 N. Y. Suppl. 159; Steinam *v.* Bell, 7 Misc. 318, 27 N. Y. Suppl. 905. But the Municipal Court Act, Laws (1902), p. 1538, put the municipal courts on the same basis as the supreme courts in this regard. Gilmour *v.* Kenny, 84 N. Y. Suppl. 502.

North Carolina.— Farmers', etc., Bank *v.* Charlotte, 75 N. C. 45.

Oregon.— Colburn *v.* Barrett, 21 Oreg. 27, 26 Pac. 1008; Robbins *v.* Baker, 2 Oreg. 52.

South Dakota.— Cumins *v.* Lawrence County, 2 S. D. 452, 50 N. W. 900.

Washington.— Colby *v.* Spokane, 12 Wash. 690, 42 Pac. 112.

Wisconsin.— Pearson *v.* Neeves, 92 Wis. 319, 66 N. W. 357.

See 39 Cent. Dig. tit. "Pleading," § 245.

Denial of facts after denial of knowledge, etc., superfluous.—After denying any knowledge or information sufficient to form a belief, it is superfluous to add a denial of

in this form is insufficient, and constitutes an admission of the facts alleged.[93] This form of pleading is based solely upon statute, and unless the form prescribed by the statute is strictly followed, the answer will be insufficient,[94] although a slight latitude is allowed by some of the cases, in respect to purely unsubstantial variations.[95] A denial of knowledge or information when general, may be qualified as in the case of a positive denial,[96] and made applicable to all facts not otherwise admitted, qualified, or referred to.[97] If defendant denies any knowledge or information respecting facts alleged, he may predicate a defense hypothetically upon those facts.[98] Some codes require defendant, in case the complaint is verified, to deny specifically and positively or according to information and belief.[99] To authorize a denial, a want of belief is sufficient, and it is not improper, where the statute does not authorize a denial of knowledge or information, to state in connection with the denial that defendant has no knowledge or information on which to form a belief.[1] The allegations respecting which defendant has no knowledge or information must be clearly specified.[2] A denial of knowledge or information

the facts. Flood *v.* Reynolds, 13 How. Pr. (N. Y.) 112.

Denial of knowledge and information not permissible in affidavit.— This form of denial in an affidavit is an absolute nullity. It can be used only in a pleading, where it is expressly authorized. Simmons *v.* Craig, 137 N. Y. 550, 33 N. E. 76; Matter of McLean, 62 Hun (N. Y.) 1, 16 N. Y. Suppl. 417.

93. Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560; State *v.* Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574, 32 L. R. A. 697; Montpelier Nat. L. Ins. Co. *v.* Martin, 57 Nebr. 350, 77 N. W. 769; Wilson *v.* Neu, 1 Nebr. (Unoff.) 42, 95 N. W. 502. See Boston Woven Hose, etc., Co. *v.* Jackson, 25 Misc. (N. Y.) 781, 55 N. Y. Suppl. 573.

Formation of issue by defective denial see *infra*, IV, C, 2, f, (II).

Waiver of defect see *infra*, XIV, B, 9, i.

94. *Arkansas.*— Haggart *v.* Ranney, 73 Ark. 344, 84 S. W. 703.

Colorado.— Downing North Denver Land Co. *v.* Burns, 30 Colo. 283, 70 Pac. 413; Grand Valley Irr. Co. *v.* Lesher, 28 Colo. 273, 65 Pac. 44; Jones *v.* Perot, 19 Colo. 141, 34 Pac. 728; Haney *v.* People, 12 Colo. 345, 21 Pac. 39; James *v.* McPhee, 9 Colo. 486, 13 Pac. 535; Solomon *v.* Brodie, 10 Colo. App. 353, 50 Pac. 1045.

Iowa.— Claflin *v.* Reese, 54 Iowa 544, 6 N. W. 729; Manny *v.* French, 23 Iowa 250.

Kentucky.— Corbin *v.* Commonwealth, 2 Metc. 380; Terrill *v.* Jennings, 1 Metc. 450; Gorman *v.* Young, 18 S. W. 369, 13 Ky. L. Rep. 785. See Stevenson *v.* Flournoy, 89 Ky. 561, 13 S. W. 210, 11 Ky. L. Rep. 745.

Missouri.— Watson *v.* Hawkins, 60 Mo. 550; Revely *v.* Skinner, 33 Mo. 98.

New York.— Steinback *v.* Diepenbrock, 52 N. Y. App. Div. 437, 65 N. Y. Suppl. 118; Elton *v.* Markham, 20 Barb. 343; Galbraith *v.* Daily, 37 Misc. 156, 74 N. Y. Suppl. 837; Burkert *v.* Bennett, 35 Misc. 318, 71 N. Y. Suppl. 144; Singer *v.* Effler, 16 Misc. 334, 39 N. Y. Suppl. 720; Hautemann *v.* Gray, 5 N. Y. Civ. Proc. 224; Sheldon *v.* Sabin, 4 N. Y. Civ. Proc. 4; Sayre *v.* Cushing, 7 Abb. Pr. 371; Nichols *v.* Jones, 6 How. Pr. 355; Wood *v.* Staniels, 3 Code Rep. 152.

North Carolina.— Woodcock *v.* Bostic, 128 N. C. 243, 38 S. E. 881; Fagg *v.* Southern Bldg., etc., Assoc., 113 N. C. 364, 18 S. E. 655.

North Dakota.— Massachusetts L. & T. Co. *v.* Twitchell, 7 N. D. 440, 75 N. W. 786; Sigmund *v.* Minot Bank, 4 N. D. 164, 59 N. W. 966.

Oregon.— Law Trust Soc. *v.* Hogue, 37 Oreg. 544, 62 Pac. 380, 63 Pac. 690.

Wisconsin.— Sweet *v.* Davis, 90 Wis. 409, 63 N. W. 1047; Hastings *v.* Gwynn, 12 Wis. 671.

See 39 Cent. Dig. tit. "Pleading," § 245.

95. *Iowa.*— McFarland *v.* Lester, 23 Iowa 260.

Kentucky.— Hutchings *v.* Moore, 4 Metc. 110; Dickinson *v.* Gray, 8 S. W. 876, 9 S. W. 281, 10 Ky. L. Rep. 292.

Minnesota.— Macalester College *v.* Nesbitt, 65 Minn. 17, 67 N. W. 652; Morton *v.* Jackson, 2 Minn. 219.

New York.— Pray *v.* Todd, 71 N. Y. App. Div. 391, 75 N. Y. Suppl. 947; Meehan *v.* Harlem Sav. Bank, 5 Hun 439.

South Carolina.— Gilreath *v.* Furman, 57 S. C. 289, 35 S. E. 516.

South Dakota.— Wilson *v.* Commercial Union Ins. Co., 15 S. D. 322, 89 N. W. 649.

Washington.— Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763.

See 39 Cent. Dig. tit. "Pleading," § 245.

96. See *supra*, IV, C, 2, d.

97. Learned *v.* New York, 21 Misc. (N. Y.) 601, 48 N. Y. Suppl. 142.

98. Dovan *v.* Dinsmore, 33 Barb. (N. Y.) 86; Brown *v.* Ryckman, 12 How. Pr. (N. Y.) 313.

99. San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Curtis *v.* Richards, 9 Cal. 33; Anderson *v.* Parker, 6 Cal. 197; State *v.* Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574, 32 L. R. A. 697.

1. Smith *v.* Allen, 63 Nebr. 74, 88 N. W. 155; McIntosh *v.* Omaha, 3 Nebr. (Unoff.) 408, 91 N. W. 527; State *v.* Hancock County, 11 Ohio St. 183; McKenzie *v.* Washington Ins. Co., 2 Disn. (Ohio) 223.

2. Baylis *v.* Stimson, 110 N. Y. 621, 17

directed to each and every allegation of the complaint,[3] or of each and every allegation in designated paragraphs,[4] is permissible.

(II) *Limitations on the Use of This Form of Denial.* Facts either actually or presumptively within the knowledge of defendant cannot properly be put in issue by a denial of knowledge or information sufficient to form a belief.[5] Nor can facts which are readily accessible by reason of being in the public records or otherwise be put in issue by this form of denial.[6] Such an answer when interposed under these circumstances is considered sham and evasive,[7] but so long as

N. E. 144; Sheldon *v.* Sabin, 12 Daly (N. Y.) 84; N. K. Fairbank Co. *v.* Blaut, 33 N. Y. Suppl. 713; Bidwell *v.* Overton, 13 N. Y. Suppl. 274.

3. Rosensteil *v.* Van Cott, 5 N. Y. App. Div. 128, 39 N. Y. Suppl. 53; Collins *v.* North Side Pub. Co., 1 Misc. (N. Y.) 211, 20 N. Y. Suppl. 892.

But it is not sufficient to allege no knowledge or information sufficient to form a belief as to the truth of all the allegations of the complaint. This is in effect a negative pregnant. Collins *v.* North Side Pub. Co., 1 Misc. (N. Y.) 211, 20 N. Y. Suppl. 892.

In Kentucky it is held that a denial of knowledge or information must be specific. Ward *v.* Edge, 100 Ky. 757, 39 S. W. 440, 19 Ky. L. Rep. 59.

4. Etchas *v.* Orena, 121 Cal. 270, 53 Pac. 798; Hidden *v.* Godfrey, 88 N. Y. App. Div. 496, 85 N. Y. Suppl. 197. See Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763.

5. *California.*— Weill *v.* Crittenden, 139 Cal. 488, 73 Pac. 238; Etchas *v.* Orena, 121 Cal. 270, 53 Pac. 798; Mullally *v.* Townsend, 119 Cal. 47, 50 Pac. 1066; Curtis *v.* Richards, 9 Cal. 33; Hewel *v.* Hogin, 3 Cal. App. 248, 84 Pac. 1002.

Colorado.— Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955; Fravert *v.* Fesler, 11 Colo. App. 387, 53 Pac. 288.

Kentucky.— Nashville, etc., R. Co. *v.* Carrico, 95 Ky. 489, 26 S. W. 177, 16 Ky. L. Rep. 66; Kentucky River Nav. Co. *v.* Com., 13 Bush 435; Barret *v.* Godshaw, 12 Bush 592; Gridler *v.* Farmers', etc., Bank, 12 Bush 333.

Minnesota.—Starbuck *v.* Dunklee, 10 Minn. 168, 88 Am. Dec. 68; Morton *v.* Jackson, 2 Minn. 219. In Minnesota it has been held that the doctrine of presumptive knowledge does not apply. The facts must be necessarily within the party's knowledge to vitiate the denial. Mower *v.* Stickney, 5 Minn. 397.

New York.— McNeeley *v.* Welz, 20 N. Y. App. Div. 566, 47 N. Y. Suppl. 310; Compton *v.* Beecher, 17 N. Y. App. Div. 38, 44 N. Y. Suppl. 887; Richardson *v.* Wilton, 4 Sandf. 708; Schwartz *v.* Ribaudo, 52 Misc. 102, 101 N. Y. Suppl. 599; Singer *v.* Effler, 16 Misc. 334, 39 N. Y. Suppl. 720; Lawrence *v.* Derby, 15 Abb. Pr. 346 note; Wesson *v.* Judd, 1 Abb. Pr. 254; Shearman *v.* New York Cent. Mills, 1 Abb. Pr. 187; Lewis *v.* Acker, 11 How. Pr. 163; Thorn *v.* New York Cent. Mills, 10 How. Pr. 19; Mott *v.* Burnett, Code Rep. N. S. 225.

North Carolina.— Lay Gas Mach. Co. *v.* Falls of Neuse Mfg. Co., 91 N. C. 74.

Oregon.— *In re* Mills, 40 Oreg. 424, 67 Pac. 107.

South Dakota.—Bartow *v.* Northern Assur. Co., 10 S. D. 132, 72 N. W. 86.

Washington.— Raymond *v.* Johnson, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908.

Wisconsin.—Carpenter *v.* Rolling, 107 Wis. 559, 83 N. W. 953.

See 39 Cent. Dig. tit. "Pleading," § 247.

6. *California.*— Mullally *v.* Townsend, 119 Cal. 47, 50 Pac. 1066; Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144; Hewel *v.* Hogin, 3 Cal. App. 248, 84 Pac. 1002; Mendocino County *v.* Peters, 2 Cal. App. 24, 82 Pac. 1122.

Idaho.— Hailey First Nat. Bank *v.* Watt, 7 Ida. 510, 64 Pac. 223; Simpson *v.* Remington, 6 Ida. 681, 59 Pac. 360; Moscow First Nat. Bank *v.* Martin, 6 Ida. 204, 55 Pac. 302.

Kentucky.— Barret *v.* Godshaw, 12 Bush 592; Lucas *v.* Lucas, 37 S. W. 588, 18 Ky. L. Rep. 661; Daisy Realty Co. *v.* Brown, 35 S. W. 637, 18 Ky. L. Rep. 155.

New York.— Hance *v.* Rumming, 2 E. D. Smith 48; Schwartz *v.* Ribaudo, 52 Misc. 102, 101 N. Y. Suppl. 599; Wesson *v.* Judd, 1 Abb. Pr. 254; Thorn *v.* New-York Cent. Mills, 10 How. Pr. 19.

North Dakota.— Van Dyke *v.* Doherty, 6 N. D. 263, 69 N. W. 200.

Ohio.— Wentzel *v.* Zinn, 10 Ohio S. & C. Pl. Dec. 97, 7 Ohio N. P. 512.

South Carolina.— Hall *v.* Woodward, 30 S. C. 564, 9 S. E. 684.

Utah.— Thompson *v.* Skeen, 14 Utah 209, 46 Pac. 1103.

Wisconsin.— Goodell *v.* Blumer, 41 Wis. 436.

Wyoming.— Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015.

United States.— Wallace *v.* Bacon, 86 Fed. 553.

See 39 Cent. Dig. tit. "Pleading," § 248.

But see Mower *v.* Stickney, 5 Minn. 397, where it is held that this does not apply where the record is not in fact known to the party.

Corporate existence is not put in issue by such a denial.— Snow *v.* Hall, 19 Misc. (N. Y.) 655, 44 N. Y. Suppl. 427; Northwestern Cordage Co. *v.* Galbraith, 9 S. D. 634, 70 N. W. 1048.

7. Curtis *v.* Richards, 9 Cal. 33; Raleigh, etc., R. Co. *v.* Pullman Co., 122 Ga. 700, 50 S. E. 1008; Gridler *v.* Farmers', etc., Bank, 12 Bush (Ky.) 333; Austen *v.* Westchester Tel. Co., 8 Misc. (N. Y.) 11, 28 N. Y. Suppl. 77.

it remains on the files it raises an issue, although it might be stricken out.[8] A defendant may use this form of denial, however, if he shows in connection therewith facts which overcome the presumption.[9] A denial of knowledge or information respecting certain facts may be joined with an affirmative defense respecting the same facts.[10]

g. Denials on Information and Belief. A denial upon information and belief is a very different thing from the denial just considered. It is based on the presence of precisely the elements which in the other form of denial are wanting, namely, information and belief.[11] Few of the codes authorize this form of denial in terms,[12] but it was a familiar proceeding under the old chancery practice,[13] from which the codes largely drew their rules, and it has been generally accepted as proper code practice.[14] This form of denial may be made when the facts alleged are not within defendant's positive knowledge, but he has some information or belief concerning them.[15] It cannot be used as to facts which are conclusively presumed within the defendant's knowledge; [16] nor as to facts otherwise presumed within his knowledge,[17] unless he shows in connection therewith why he does not have

8. Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

In Wisconsin it has been held that a denial of knowledge or information respecting a fact which under the statute can be put in issue only by a specific denial raises no issue thereon. Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

9. Brown *v.* Scott, 25 Cal. 189; Starbuck *v.* Dunklee, 10 Minn. 168, 88 Am. Dec. 68; Richardson *v.* Wilton, 4 Sandf. (N. Y.) 708; Singer *v.* Effler, 16 Misc. (N. Y.) 334, 39 N. Y. Suppl. 720.

10. Townsend *v.* Platt, 3 Abb. Pr. (N. Y.) 325.

11. In Edwards *v.* Lent, 8 How. Pr. (N. Y.) 28, 29, Harris, J., said: "There are three forms in which a defendant may put in issue the allegations of the complaint. The first is, when the fact alleged is a matter within the personal knowledge of the defendant. The second is, when the matter alleged is not within the personal knowledge of the defendant, but relying upon his information, he either believes or does not believe the allegation to be true. The third is, when he has no such knowledge or information as will enable him to form a belief, whether the allegation is true or not. These forms of pleading may not be indiscriminately adopted. If the matter alleged is such as must, from its very nature, be within the defendant's own personal knowledge, he can not deny it upon information merely. If it be a matter in respect to which he has no personal knowledge, he must deny it upon his information, if he have such information as enables him to say he believes it to be untrue. When he is unable, either from his own knowledge or upon any information he has received, to say whether the allegation is true or not, he may say so, and this will be sufficient to put the allegation in issue."

12. See the codes of the several states.

13. See EQUITY, 16 Cyc. 307.

14. Jones *v.* Petaluma, 36 Cal. 230; Thompson *v.* Lynch, 29 Cal. 189; Lewis *v.* Weyerhorst, 16 Mont. 267, 40 Pac. 589; Raymond *v.* Wimsette, 12 Mont. 551, 31 Pac. 537, 33 Am. St. Rep. 604; Bennett *v.* Leeds Mfg. Co., 110 N. Y. 150, 17 N. E. 669; Wood *v.* Raydure, 39 Hun (N. Y.) 144; Taylor *v.* Smith, 8 N. Y. Suppl. 519; Richards *v.* Fuechsel, 5 N. Y. Civ. Proc. 430; Henderson *v.* Manning, 5 N. Y. Civ. Proc. 221; Ledgerwood Mfg. Co. *v.* Baird, 14 Abb. N. Cas. (N. Y.) 318; Sackett *v.* Havens, 7 Abb. Pr. (N. Y.) 371 note; Maclay *v.* Sands, 94 U. S. 586, 24 L. ed. 211 [*reversing* 2 Mont. 35]. *Contra*, Solomon *v.* Brodie, 10 Colo. App. 353, 50 Pac. 1045; Pratt Mfg. Co. *v.* Jordan Iron, etc., Co., 33 Hun (N. Y.) 143; Powers *v.* Rome, etc., R. Co., 3 Hun (N. Y.) 285; Therasson *v.* McSpedon, 2 Hilt. (N. Y.) 1; Swinburne *v.* Stockwell, 58 How. Pr. (N. Y.) 312. And see Nelson *v.* Murray, 23 Cal. 338.

15. Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Edwards *v.* Lent, 8 How. Pr. (N. Y.) 28. In Russell *v.* Amundson, 4 N. D. 112, 117, 59 N. W. 477, the court said: "The better rule is that a denial made upon information and belief is sufficient when made in a certain class of cases. In strictness, it is the only proper form of denial in a case where, with reference to the fact sought to be denied, defendant has certain information which induces him to believe that such facts are untrue, and yet has not absolute knowledge that such facts are untrue. Having information inducing a belief, which falls short of knowledge, defendant cannot truthfully deny . . . that he has neither knowledge nor information sufficient to form a belief as to the fact."

16. Pardi *v.* Conde, 27 Misc. (N. Y.) 496, 58 N. Y. Suppl. 410; Edwards *v.* Lent, 8 How. Pr. (N. Y.) 28; Avery *v.* Stewart, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776; Stacy *v.* Bennett, 59 Wis. 234, 18 N. W. 26.

17. McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; Gribble *v.* Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527; Loveland *v.* Garner, 74 Cal. 298, 15 Pac. 844; Brown *v.* Scott, 25 Cal. 189; Hughes *v.* Brewer, 7 Colo. 583, 4 Pac. 1115; Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225; Carpenter *v.* Momsen, 92 Wis. 449, 92 N. W. 1027, 66 N. W. 692.

knowledge of them;[18] nor as to facts which by reason of being on the public records or otherwise, are readily accessible to defendant.[19] But a denial upon information and belief is proper in the joint answer of several defendants when all the facts are not within the knowledge of all the defendants.[20] Where the statute provides for this form of denial, the statutory language must be followed substantially.[21] If some facts are denied positively and some on information and belief, it should clearly appear which facts fall into each group.[22] In some jurisdictions, where the complaint is verified, the denial on information and belief must show why defendant is without knowledge.[23]

3. Allegations Traversed or Denied. Facts, not conclusions of law, should be denied, since denials of conclusions raise no issue.[24] But where plaintiff alleges a conclusion instead of the facts which support it, defendant may treat the allegation

18. Vassault *v.* Austin, 32 Cal. 597; Hensberry *v.* Clark, 23 Misc. (N. Y.) 37, 51 N. Y. Suppl. 308.

19. *Kentucky.*— Herald *v.* Hargis, 54 S. W. 958, 21 Ky. L. Rep. 1287.

Nebraska.— Oakes *v.* Ziemer, 62 Nebr. 603, 87 N. W. 350.

Utah.— Thompson *v.* Skeen, 14 Utah 209, 46 Pac. 1103.

Wisconsin.— Elmore *v.* Hill, 46 Wis. 618, 1 N. W. 235; State *v.* McGarry, 21 Wis. 496; Hathaway *v.* Baldwin, 17 Wis. 616.

United States.— Peacock *v.* U. S., 125 Fed. 583, 60 C. C. A. 389.

See 39 Cent. Dig. tit. "Pleading," § 252.

Incorporation.— A denial on information and belief does not put in issue plaintiff's incorporation. George A. Fuller Co. *v.* Manhattan Constr. Co., 44 Misc. (N. Y.) 219, 88 N. Y. Suppl. 1049.

20. Straus *v.* American Publishers' Assoc., 96 N. Y. App. Div. 315, 89 N. Y. Suppl. 172.

21. Shain *v.* Du Jardin, (Cal. 1894) 38 Pac. 529; Kirstein *v.* Madden, 38 Cal. 158. In Davis *v.* Potter, 4 How. Pr. (N. Y.) 155, a denial on "belief" was held sufficient, although the statute read "knowledge and belief."

22. N. K. Fairbank Co. *v.* Blaut, 33 N. Y. Suppl. 713.

23. Brown *v.* Scott, 25 Cal. 189.

24. *Arkansas.*— Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567; Tyner *v.* Hays, 37 Ark. 599.

California.— Heydenfeldt *v.* Jacobs, 107 Cal. 373, 40 Pac. 492; McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; Bradbury *v.* Cronise, 46 Cal. 287; People *v.* San Francisco, 27 Cal. 655; Nelson *v.* Murray, 23 Cal. 338; Wells *v.* McPike, 21 Cal. 215; Kuhland *v.* Sedgwick, 17 Cal. 123; Curtis *v.* Richards, 9 Cal. 33.

Colorado.— Rhoades *v.* Higbee, 21 Colo. 88, 39 Pac. 1099; Gale *v.* James, 11 Colo. 540, 19 Pac. 446.

Idaho.— Swanholm *v.* Reeser, 3 Ida. 476, 31 Pac. 804.

Kentucky.—Aultman, etc., Co. *v.* Mead, 109 Ky. 583, 60 S. W. 294, 22 Ky. L. Rep. 1189; Greer *v.* Covington, 82 Ky. 410, 2 S. W. 323, 7 Ky. L. Rep. 419; Kentucky River Nav. Co. *v.* Com., 13 Bush 435; Thurston *v.* Oldham, 6 Bush 16; Francis *v.* Francis, 18 B. Mon. 57; Hendrick *v.* Robert Mitchell Furniture Co., 29 S. W. 750, 16 Ky. L. Rep. 769; Conner *v.* Conner, 10 Ky. L. Rep. 317.

Massachusetts.— Jones *v.* Dow, 137 Mass. 119.

Minnesota.— Freeman *v.* Curran, 1 Minn. 169.

Missouri.— Bennett *v.* Martin, 6 Mo. 460.

Nebraska.— Richardson *v.* Doty, 44 Nebr. 73, 62 N. W. 254; Chamberlain Banking House *v.* Noyes, etc., Co., 3 Nebr. (Unoff.) 550, 92 N. W. 175.

New York.— Metzger *v.* Carr, 79 Hun 258, 29 N. Y. Suppl. 410; People *v.* Van Rensselaer, 8 Barb. 189; George A. Fuller Co. *v.* Manhattan Constr. Co., 44 Misc. 219, 88 N. Y. Suppl. 1049; De Forest *v.* Andrews, 27 Misc. 145, 58 N. Y. Suppl. 358; Hoffman *v.* Richter, 7 Misc. 438, 27 N. Y. Suppl. 935; Strauss *v.* Trotter, 6 Misc. 77, 26 N. Y. Suppl. 20; Drake *v.* Cockroft, 10 How. Pr. 377; McMurray *v.* Gifford, 5 How. Pr. 14; Beers *v.* Squire, 1 Code Rep. 84.

Ohio.— Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317. See also Baldwin *v.* Rees, 6 Ohio Dec. (Reprint) 869, 8 Am. L. Rec. 556.

Oklahoma.— Jackson *v.* Green, 13 Okla. 314, 74 Pac. 502; Spencer *v.* Turney, 5 Okla. 683, 49 Pac. 1012.

South Carolina.— Grayson *v.* Harris, 37 S. C. 606, 16 S. E. 154.

Washington.—Abbott *v.* Gaches, 20 Wash. 517, 56 Pac. 28.

Wisconsin.— Schaetzel *v.* Germantown Farmers' Mut. Ins. Co., 22 Wis. 412.

United States.— Selby *v.* New York Mut. L. Ins. Co., 67 Fed. 490; Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541; Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74.

See 39 Cent. Dig. tit. "Pleading," §§ 260, 16.

Denial of indebtedness.— In Westlake *v.* Moore, 19 Mo. 556, and Heath *v.* White, 3 Utah 474, 24 Pac. 762, a denial of indebtedness was held sufficient. Many of the cases cited *supra* this note, however, relate to the denial of indebtedness, treating it as a denial of a conclusion. And see Kent *v.* Holliday, 17 Md. 387, 394 (where the court said: "The declaration neither states in terms, an indebtedness or a promise to pay, but states facts from which both are implied by law, and both were proper subjects of denial by

as a fact, and a denial will raise a material issue.[25] And where conclusions are involved in facts alleged, denials of the facts put them in issue;[26] or where facts are alleged according to their legal effect such effect may be denied.[27] Immaterial matter need not be denied,[28] and if denied raise no issue;[29] but where any material averment is traversed, an issue of fact is created,[30] and the answer cannot be stricken out on motion.[31] A denial which goes only to the damages does not raise a material issue,[32] except where special damages are alleged which are essential to the maintenance of the action.[33] Inasmuch as a pleading is held to allege all facts necessarily implied from facts expressly alleged, such implied facts may be denied by defendant.[34]

4. Negatives Pregnant — a. In General. A negative pregnant is such form of a negative expression as may carry with it an affirmative.[35] It arises from a too literal denial of the allegations of the declaration or complaint,[36] or from a denial which is too large, tendering issue on more than is alleged.[37] A negative pregnant is generally held not to raise a material issue, and the consequences are the same as when, for any other reason, an answer admits plaintiff's allegations without denying or avoiding them.[38] The objection will not be regarded favorably by the court where it is not made before the trial, especially where it does not appear that plaintiff has been misled,[39] and where it clearly appears from other parts of the answer that the allegations formally admitted by reason of the negative pregnant are in fact denied, the answer will be held good;[40] and especially

pleas"); Lewis *v.* Smith, 2 Disn. (Ohio) 434 (where it is said that, although a general denial of indebtedness may not be a "denial of all the material allegations of a petition," within the literal meaning of Code, § 92, yet it would be going too far to entirely disregard such an answer and require no proof from plaintiff).

25. Baldwin *v.* Burt, 43 Nebr. 245, 61 N. W. 601; Anonymous, 2 Code Rep. (N. Y.) 67; McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

26. Evans *v.* Cricket, 2 Ohio Dec. (Reprint) 404, 2 West. L. Month. 603.

27. Bentley *v.* Dorcas, 11 Ohio St. 398.

28. *California.*— Doyle *v.* Franklin, 48 Cal. 537; Jones *v.* Petaluma, 36 Cal. 230.

Idaho.— Pence *v.* Durbin, 1 Ida. 550.

Maryland.— Yingling *v.* Hoppe, 9 Gill 310.

New York.— Burr *v.* Baldwin, 2 Wend. 580.

Wisconsin.— Blossom *v.* Knox, 3 Pinn. 262, 3 Chandl. 295.

United States.— Bay State Silver Min. Co. *v.* Brown, 21 Fed. 167.

See 39 Cent. Dig. tit. "Pleading," § 259.

29. *Arkansas.*— Cassady *v.* Clarke, 7 Ark. 123.

California.— Jones *v.* Petaluma, 36 Cal. 230.

Delaware.— Sydam *v.* Cannon, 1 Houst. 431.

Illinois.— Graham *v.* Dixon, 4 Ill. 115.

Missouri.— Brand *v.* Vanderpool, 8 Mo. 507.

Nebraska.— Hanson *v.* Lehman, 18 Nebr. 564, 26 N. W. 249.

New York.— George A. Fuller Co. *v.* Manhattan Constr. Co., 44 Misc. 219, 88 N. Y. Suppl. 1049.

South Dakota.— Mead *v.* Pettigrew, 11 S. D. 529, 78 N. W. 945.

United States.— Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541.

See 39 Cent. Dig. tit. "Pleading," § 259.

30. Ghirardelli *v.* McDermott, 22 Cal. 539; De Wein *v.* Osborn, 12 Colo. 407, 21 Pac. 189; Lee *v.* Mehew, 8 Okla. 136, 56 Pac. 1046.

31. See *infra*, XII, C, 1, i.

32. Morris *v.* Thomas, 57 Ind. 316; Smith *v.* Thomas, 2 Bing. N. Cas. 372, 4 Dowl. P. C. 333, 1 Hodges 355, 5 L. J. C. P. 52, 29 E. C. L. 578.

33. Perring *v.* Harris, 2 M. & Rob. 5.

34. Higgins *v.* Germaine, 1 Mont. 230; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534.

35. J. I. Porter Lumber Co. *v.* Hill, 72 Ark. 62, 77 S. W. 905; Lemke *v.* Lemke, (Nebr. 1907) 111 N. W. 138. See Charleston, etc., Turnpike Co. *v.* Willey, 16 Ind. 34.

36. Blankman *v.* Vallejo, 15 Cal. 638; Knight *v.* Denman, 64 Nebr. 814, 90 N. W. 863; Shepard *v.* Wood, 116 N. Y. App. Div. 861, 102 N. Y. Suppl. 306; Moody *v.* Belden, 60 Hun (N. Y.) 582, 15 N. Y. Suppl. 119. See also Bourke *v.* Butte Electric, etc., Co., 33 Mont. 267, 83 Pac. 470.

37. McClave *v.* Gibb, 11 Misc. (N. Y.) 44, 31 N. Y. Suppl. 847; Sayles *v.* Davis, 22 Wis. 225.

38. Demurrer because of negative pregnant see *infra*, VI, F, 3, a.

Motion to make more definite and certain see *infra*, XII, D, 4.

Motion to strike see *infra*, XII, C, 1, c.

In Missouri a negative pregnant is treated as an informality only. Merchants' Nat. Bank *v.* Richards, 74 Mo. 77; Law *v.* Crawford, 67 Mo. App. 150.

39. Schnitzer *v.* Gordon, 28 N. Y. App. Div. 341, 51 N. Y. Suppl. 152; Hershey *v.* O'Neill, 36 Fed. 168.

40. Hershey *v.* O'Neill, 36 Fed. 168. See also O'Brien *v.* Seattle Ice Co., 43 Wash. 217, 86 Pac. 399, holding that under a code provision requiring liberal construction of the

is this true when the fact is elsewhere expressly denied.[41] Since a general denial puts in issue every allegation in the complaint it can never be a negative pregnant.[42]

b. Denials of Allegations With Qualifying Circumstances. Where a fact is alleged with qualifying or modifying language, and the words of the allegation are literally denied, it is held that the qualifying circumstances alone are denied while the fact itself is admitted.[43] Thus, where the declaration or complaint alleges facts as taking place at a certain time,[44] or in a certain place,[45] or alleges that property or demands are of a certain value or amount,[46] denials of these facts so qualified as to time, place, value, or amount are negatives pregnant, and are deemed to put in issue only the qualifying circumstances. To deny that an act took place at a certain place or time is to admit that it occurred at some different place or time, and to deny that property or demands are of a certain amount or

pleadings it was sufficient that the intention of the pleader be apparent.

41. Kennedy *v.* Dickie, 27 Mont. 70, 69 Pac. 672.

42. German-American Bank *v.* White, 38 Minn 471, 38 N. W. 361 [*overruling* Dean *v.* Leonard, 9 Minn. 190, and cases following it]; Stone *v.* Quaal, 36 Minn. 46, 29 N. W. 326 (holding that a general denial is the same in effect as a specific denial of each of the allegations in the whole or in part of the pleading so denied, and is a negative pregnant only where a mere specific denial would be); Thompson *v.* Erie R. Co., 45 N. Y. 468. But see Columbia Nat. Bank *v.* Western Iron, etc., Co., 14 Wash. 162, 44 Pac. 145.

43. *California.*— Larney *v.* Mooney, 50 Cal. 610; Feely *v.* Shirley, 43 Cal. 369; Kinsey *v.* Wallace, 36 Cal. 462; Woodworth *v.* Knowlton, 22 Cal. 164.

Colorado.— Grand Valley Irr. Co. *v.* Lesher, 28 Colo. 273, 65 Pac. 44; Brennan *v.* State Bank, 10 Colo. App. 368, 50 Pac. 1076; Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471.

Kentucky.— Hendrick *v.* Robert Mitchell Furniture Co., 29 S. W. 750, 16 Ky. L. Rep. 769.

Mississippi.— Marshall *v.* Hamilton, 41 Miss. 229.

Missouri.— Sœding *v.* Bartlett, 35 Mo. 90.

Montana.—Agle *v.* Standard Drug Co., 29 Mont. 111, 74 Pac. 135; Yank *v.* Bordeaux, 29 Mont. 74, 74 Pac. 77; Toombs *v.* Hornbuckle, 1 Mont. 286; Territory *v.* Rodgers, 1 Mont. 252; Harris *v.* Shontz, 1 Mont. 212.

Nebraska.— Leavitt *v.* Bartholomew, 1 Nebr. (Unoff.) 756, 764, 93 N. W. 856.

New York.— Shepard *v.* Wood, 116 N. Y. App. Div. 861, 102 N. Y. Suppl. 306; Elton *v.* Markham, 20 Barb. 343; Lawrence *v.* Cabot, 41 N. Y. Super. Ct. 122; Kelly *v.* Sammis, 25 Misc. 6, 53 N. Y. Suppl. 825; Moody *v.* Belden, 15 N. Y. Suppl. 119; Davison *v.* Powell, 16 How. Pr. 467.

South Carolina.— See Curmow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74.

Wisconsin.— Spence *v.* Spence, 17 Wis. 448.

United States.— U. S. *v.* Larkin, 153 Fed. 113, 82 C. C. A. 247.

See 39 Cent. Dig. tit. "Pleading," § 261.

44. *California.*— Santa Ana *v.* Brunner, 132 Cal. 234, 64 Pac. 287; Doll *v.* Good, 38 Cal. 287; Caulfield *v.* Sanders, 17 Cal. 569; Kuhland *v.* Sedgwick, 17 Cal. 123.

Indiana.— Wright *v.* State, 7 Blackf. 63.

Minnesota.— Steele *v.* Thayer, 36 Minn. 174, 30 N. W. 758; McMurphy *v.* Walker, 20 Minn. 382; Frasier *v.* Williams, 15 Minn. 288.

Nebraska.— Knight *v.* Denman, 64 Nebr. 814, 90 N. W. 863.

New York.— Baker *v.* Bailey, 16 Barb. 54; Levin, etc., Contracting Co. *v.* Jackson, 46 Misc. 445, 92 N. Y. Suppl. 307; Pascekwitz *v.* Richards, 37 Misc. 250, 75 N. Y. Suppl. 291; Davison *v.* Powell, 16 How. Pr. 467.

South Carolina.— Curnow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74.

Utah.— Rock Springs Coal Co. *v.* Salt Lake Sanitarium Assoc., 7 Utah 158, 25 Pac. 742.

Wisconsin.— Grimm *v.* Washburn, 100 Wis. 229, 75 N. W. 984; Argard *v.* Parker, 81 Wis. 581, 51 N. W. 1012; Schaetzel *v.* Germantown Farmers' Mut. Ins. Co., 22 Wis. 412.

Canada.— Denison *v.* Donnelly, 2 U. C. Q. B. 394.

See 39 Cent. Dig. tit. "Pleading," § 262.

45. Spencer *v.* Turney, 5 Okla. 683, 49 Pac. 1012.

46. *California.*— Doll *v.* Good, 38 Cal. 287; Leffingwell *v.* Griffing, 31 Cal. 231; Reniff *v.* The Cynthia, 18 Cal. 669; Higgins *v.* Wortell, 18 Cal. 330; Caulfield *v.* Sanders, 17 Cal. 569.

Colorado.— James *v.* McPhee, 9 Colo. 486, 13 Pac. 535; Lozier *v.* Hannan, 12 Colo. App. 59, 54 Pac. 399.

Iowa.— Callanan *v.* Williams, 71 Iowa 363, 32 N. W. 383; Sheldon *v.* Middleton, 10 Iowa 17.

Massachusetts.— Whiting *v.* Price, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307.

Minnesota.— Dean *v.* Leonard, 9 Minn. 190; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79; Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507.

Montana.— Edgerton *v.* Power, 18 Mont. 350, 45 Pac. 204.

Oklahoma.— Jackson *v.* Green, 13 Okla. 314, 74 Pac. 502.

Oregon.— Scovill *v.* Barney, 4 Oreg. 288.

Utah.— Rock Springs Coal Co. *v.* Salt Lake Sanitarium Assoc., 7 Utah 158, 25 Pac. 742.

value is to admit them in a different amount or value.[47] The mere addition to the denial of the words "as alleged" has been held to creat a negative pregnant.[48] The addition of the words "or at any other time," [49] "or any part thereof," etc., makes the traverse good.[50] Where, however, the qualifying circumstances is the material part of the averment, as that defendant was engaged in a dangerous business, a literal denial is not a negative pregnant.[51] So where the qualifying language is really surplusage and in fact neither enlarges, abridges, nor qualifies the meaning of the words to which it applies, there is no negative pregnant.[52] And where a written instrument is alleged to have been made in certain words and figures, and this is literally denied, there is no negative pregnant, for the reason that the only admission contained in such a denial is of a writing different from the writing alleged, which is an immaterial admission.[53]

c. Denials of Allegations in the Conjunctive. Where a number of facts are alleged conjunctively by plaintiff, and the answer denies them conjunctively, it is held that the denial goes only to the conjunction and admits the separate existence of each fact, or goes only to certain facts and admits the others.[54] Where a complaint alleges facts conjunctively the answer should deny them disjunctively.[55] But where the existence of several concurrent facts is essential to the cause of

Washington.— Dillon *v.* Spokane County, 3 Wash. Terr. 498, 17 Pac. 889.

Canada.— Commercial Bank *v.* Reynolds, 3 U. C. Q. B. 360.

See 39 Cent. Dig. tit. "Pleading," § 262.

47. Spencer *v.* Turney, 5 Okla. 683, 49 Pac. 1012. See also Bourke *v.* Butte Electric, etc., Co., 33 Mont. 267, 83 Pac. 470; Jackson *v.* Green, 13 Okla. 314, 74 Pac. 502.

48. *Missouri.*— Breckenridge *v.* American Cent. Ins. Co., 87 Mo. 62.

Nebraska.— Phœnix Ins. Co. *v.* Meier, 28 Nebr. 124, 44 N. W. 97; Storey *v.* Kerr, 2 Nebr. (Unoff.) 568, 89 N. W. 601.

New York.— Hutchinson *v.* Bien, 46 Misc. 302, 93 N. Y. Suppl. 189 [*affirmed* in 104 App. Div. 214, 93 N. Y. Suppl. 216]. But *compare* Donovan *v.* Main, 74 N. Y. App. Div. 44, 77 N. Y. Suppl. 229.

North Carolina.— Rumbough *v.* Southern Imp. Co., 106 N. C. 461, 11 S. E. 528.

Ohio.— Lawrence *v.* Cooley, 4 Ohio Dec. (Reprint) 261, 1 Clev. L. Rep. 178; Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

Pennsylvania.— Schuey *v.* Schaeffer, 130 Pa. St. 16, 18 Atl. 544, 549.

South Dakota.— Webster Independent School Dist. Bd. of Education *v.* Prior, 11 S. D. 292, 77 N. W. 106.

Washington.— Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763; Gammon *v.* Dyke, 2 Wash. Terr. 266, 5 Pac. 845.

Wisconsin.— Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

England.— Thorp *v.* Holdsworth, 3 Ch. D. 637, 45 L. J. Ch. 406.

See 39 Cent. Dig. tit. "Pleading," §§ 261, 262.

Contra.— Bradley *v.* Barbour, 65 Ill. 431.

49. Mylius *v.* Jackson, 23 Can. Sup. Ct. 485. See also Wynn *v.* Cory, 43 Mo. 301.

50. McDonald *v.* Lowe, 34 Nova Scotia 531.

51. Donovan *v.* Main, 74 N. Y. App. Div. 44, 77 N. Y. Suppl. 229.

52. Dow *v.* Gould, etc., Min. Co., 31 Cal. 629.

53. Higgins *v.* Graham, 143 Cal. 131, 76 Pac. 898.

54. *California.*—Fish *v.* Redington, 31 Cal. 185; Blood *v.* Light, 31 Cal. 115; Fitch *v.* Bunch, 30 Cal. 208; Kuhland *v.* Sedgwick, 17 Cal. 123; Blankman *v.* Vallejo, 15 Cal. 638.

Montana.— Bach, etc., Co. *v.* Montana Lumber, etc., Co., 15 Mont. 345, 39 Pac. 291.

New York.— Young *v.* Catlett, 6 Duer 437; Shearman *v.* New York Cent. Mills, 1 Abb. Pr. 187; Thorn *v.* New York Cent. Mills, 10 How. Pr. 19; Salinger *v.* Lusk, 7 How. Pr. 430.

South Carolina.— See Curmow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74.

England.— Moore *v.* Boulcot, 1 Bing. N. Cas. 323, 27 E. C. L. 659; Stubbs *v.* Lainson, 5 Dowl. P. C. 162, 2 Gale 122, 5 L. J. Exch. 240, 1 M. & W. 728, Tyrw. & G. 1000; Goram *v.* Sweeting, 2 Saund. 205, 85 Eng. Reprint 991.

Canada.— McDonald *v.* Lowe, 34 Nova Scotia 531; Wright *v.* Benson, 5 U. C. Q. B. 249; Upper *v.* Hamilton, 1 U. C. Q. B. 467; Miller *v.* Hamilton, 1 U. C. Q. B. 428; Gwynne *v.* Brock, 6 U. C. Q. B. O. S. 271.

See 39 Cent. Dig. tit. "Pleading," § 263.

But see O'Brien *v.* Seattle Ice Co., 43 Wash. 217, 86 Pac. 399, holding that under the code provision requiring liberal construction of pleading it was sufficient that the meaning be clear.

55. *California.*— More *v.* Del Valle, 28 Cal. 170.

New York.— Stuber *v.* McEntee, 142 N. Y. 206, 36 N. E. 878; Baker *v.* Bailey, 16 Barb. 54; McClave *v.* Gibb, 11 Misc. 44, 31 N. Y. Suppl. 847; Salinger *v.* Lusk, 7 How. Pr. 430.

Oregon.— Scovill *v.* Barney, 4 Oreg. 288.

Wisconsin.— Robbins *v.* Lincoln, 12 Wis. 1.

Canada.— Turner *v.* Ham, 6 U. C. Q. B. 255.

action, a denial in the conjunctive is not bad,[56] and where synonymous terms are alleged conjunctively they may be denied in the same way.[57]

5. Admissions — a. In General. Specific admissions in detail of the facts alleged by plaintiff should not appear in defendant's pleading,[58] since all facts not denied are deemed admitted.[59] The legal sufficiency of the facts alleged by plaintiff may be admitted by defendant, and an issue raised as to the truth of the facts. Such an admission is made by omitting to file a demurrer.[60]

b. Form — (i) *In General.* Where a fact is alleged with qualifying circumstances, and is literally denied, the denial goes only to the circumstances and the fact itself is admitted.[61] Even a hypothetical admission by defendant is sufficient to relieve plaintiff of the necessity of proof.[62] A statement in a pleading that a certain alleged fact appears to be true is not an admission that it is true.[63] A notice of special matter annexed to the general issue is not binding upon defendant as an admission of the matters contained therein.[64] An answer alleging that the sum due plaintiff is not greater then a named sum is an admission that the designated sum is due.[65] An election to stand upon one defense is an admission against the existence of other defenses.[66] Failure to plead not guilty by statute has been held not to obviate the necessity of proving a notice made by statute necessary to the action.[67]

(ii) *Affirmative Defenses.*[68] Affirmative defenses, whether denominated pleas of confession and avoidance as at common law, or answers by way of new matter under the codes, admit the facts alleged by plaintiff;[69] but they do not admit that the plaintiff has alleged all the facts.[70] An argumentative denial

56. Miller *v.* Tobin, 18 Fed. 609, 9 Sawy. 401.

Conditions precedent.— In an action on a contract, a denial that plaintiff has performed all the conditions precedent is not a negative pregnant. Electrical Equipment Co. *v.* Feuerlicht, 90 N. Y. Suppl. 467.

57. Dowing *v.* Carr, 38 S. W. 1044, 18 Ky. L. Rep. 979.

58. Staten Island Midland R. Co. *v.* Hinchcliffe, 34 Misc. (N. Y.) 49, 68 N. Y. Suppl. 556; Flack *v.* O'Brien, 19 Misc. (N. Y.) 399, 43 N. Y. Suppl. 854; Gould *v.* Williams, 9 How. Pr. (N. Y.) 51.

59. See *infra*, IV, C, 5, b, (IV).

60. Brewer *v.* Strong, 10 Ala. 961, 44 Am. Dec. 514; Reid *v.* Edwards, 7 Port. (Ala.) 508, 31 Am. Dec. 720; Illinois Cent. R. Co. *v.* Johnson, 66 Ill. App. 380.

61. Long *v.* Neville, 36 Cal. 455, 95 Am. Dec. 199; Missouri, etc., R. Co. *v.* Elliott, 2 Indian Terr. 407, 51 S. W. 1067; Smiley *v.* Anderson, 28 Nebr. 100, 44 N. W. 86; Storey *v.* Kerr, 2 Nebr. (Unoff.) 568, 89 N. W. 601; Peterson *v.* Bean, 22 Utah 43, 61 Pac. 213; Podlech *v.* Phelan, 13 Utah 333, 44 Pac. 838. See *supra*, IV, C, 4, b.

But a denial that defendant performed any labor for plaintiff "at his special instance or request" is not an admission that he performed the labor. Anderson *v.* Baird, 40 S. W. 923, 19 Ky. L. Rep. 444.

62. State *v.* Hill, 47 Nebr. 456, 66 N. W. 541.

63. Lawson *v.* Bruen, 29 La. Ann. 866.

64. Smith *v.* Shumway, 2 Tyler (Vt.) 74; Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410.

In Michigan, by Circuit Court Rule 7, statements of facts set forth in the notice are declared to be admissions by defendant which dispense with proof by plaintiff. Brinkerhoff *v.* Peek, 114 Mich. 628, 72 N. W. 621.

65. Carlyon *v.* Lannan, 4 Nev. 156. *Contra*, Dolan *v.* Petty, 4 Sandf. (N. Y.) 673.

66. Hollingsworth *v.* Warnock, 112 Ky. 96, 65 S. W. 163, 23 Ky. L. Rep. 1395.

67. Marsh *v.* Boulton, 4 U. C. Q. B. 354.

68. By plea of set-off or counter-claim see Recoupment, Set-Off, and Counter-Claim.

69. *Arkansas.*— Dickinson *v.* Burr, 7 Ark. 34.

Illinois.— Jo Daviess County *v.* Staples, 108 Ill. App. 539.

Kentucky.— Helm *v.* Jones, 9 Dana 26.

Louisiana.— Bauduc *v.* Nicholson, 2 La. 200.

Massachusetts.— Kent *v.* Willey, 11 Gray 368; Ayer *v.* Spring, 10 Mass. 80.

Mississippi.— Winn *v.* Skipwith, 14 Sm. & M. 14.

Missouri.— Bond *v.* Long, 87 Mo. 266.

New York.— Eells *v.* Dumary, 84 N. Y. App. Div. 105, 82 N. Y. Suppl. 531; Alexander *v.* Albany, 55 N. Y. App. Div. 238, 66 N. Y. Suppl. 1084; Gregory *v.* Trainer, 1 Abb. Pr. 209; Raymond *v.* Wheeler, 9 Cow. 295.

Tennessee.— Rogers *v.* Kincannon, 3 Humphr. 252.

See 39 Cent. Dig. tit. "Pleading," § 267.

If matter is not well pleaded, and is not an answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration. Simonton *v.* Winter, 5 Pet. (U. S.) 141, 8 L. ed. 75.

70. Where, in an action to recover on a contract, the parties are agreed that a contract was made, a plea continuing a tender

when a pleading in such form is permissible is not an admission of the facts against which it is directed.[71]

(III) *General Issue or General Denial.* The general issue or general denial admits plaintiff's authority and capacity and the character in which he sues.[72] It also admits the capacity in which defendant is sued,[73] and under the statutes frequently such a plea or denial admits the execution of an instrument sued on,[74] at least when not verified.[75] So also corporate existence must frequently be questioned by specific denial.[76] A plea of *non est factum* admits all facts alleged except the sealing and delivery of the writing obligatory;[77] and *non cepit* admits the property to be in plaintiff, but denies the taking in the place alleged.[78]

(IV) *Failure to Deny* [79]— (A) *In General.* Matters properly pleaded which

made before such action was brought only admits that a contract of the general nature pleaded was entered into, and does not estop defendant from alleging that there were provisions of the contract other than those pleaded by plaintiff. Young *v.* Borzone, 26 Wash. 4, 66 Pac. 135, 421.

71. Meredith *v.* Lackey, 14 Ind. 529; Ætna L. Ins. Co. *v.* Bockting, 39 Ind. App. 586, 79 N. E. 524. An attempted argumentative denial in an action on a note, which avers the execution of a note to the same payee, bearing the same date, for the same amount, and due at the same time, as the note sued on, amounts to an admission of the execution of the latter note. Mutzenburg *v.* McGowan, 10 Colo. App. 486, 51 Pac. 523.

72. *Alabama.*— Birmingham R., etc., Co. *v.* Moore, 151 Ala. 327, 43 So. 841; Strickland *v.* Burns, 14 Ala. 511.

Arkansas.— Gibson *v.* Williams, 22 Ark. 224.

Colorado.— Wakeman *v.* Norton, 24 Colo. 192, 49 Pac. 283.

Connecticut.— West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66; Brown *v.* Illius, 27 Conn. 84, 71 Am. Dec. 49.

Illinois.— Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Lutcher, etc., Lumber Co. *v.* Eells, 108 Ill. App. 156.

Indiana.— Staats *v.* Burke, 16 Ind. 448; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Downs *v.* McCombs, 16 Ind. 211; Linville *v.* Earlywine, 4 Blackf. 469.

Maine.— Page *v.* McGlinch, 63 Me. 472.

Michigan.— Denver *v.* White River Log, etc., Co., 51 Mich. 472, 16 N. W. 817.

Missouri.— Baxter *v.* St. Louis Transit Co, 198 Mo. 1, 95 S. W. 856; Randolph *v.* Hannibal, etc., R. Co., 18 Mo. App. 609, infancy of plaintiff and appointment of next friend. In State *v.* Samuels, 28 Mo. App. 649, the court said that when a general denial was filed there could be no implied admission of any fact alleged in the petition, but this cannot be considered an accurate statement.

Pennsylvania.— Fritz *v.* Montgomery County Com'rs, 17 Pa. St. 130; Clark *v.* Turnpike Co., 13 Leg. Int. 156. In Pennsylvania, by rule of court, the general issue admits matter alleged by way of inducement. Somerset, etc., R. Co. *v.* Galbraith, 109 Pa. St. 32, 1 Atl. 371.

South Carolina.— Ober, etc., Co. *v.* Blalock, 40 S. C. 31, 18 S. E. 264 (right to sue); Land Mortg. Inv., etc., Co. *v.* Williams, 35 S. C. 367, 14 S. E. 821; Smith *v.* Hamilton, 10 Rich. 44.

73. Walker *v.* Wooster, 61 Vt. 403, 17 Atl. 792.

74. See the statutes of the several states. And see Brooks *v.* Chilton, 6 Cal. 640; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478; Bausman *v.* Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496; Cowing *v.* Peterson, 36 Minn. 130, 30 N. W. 461. *Compare* Hecht *v.* Caughron, 46 Ark. 132.

This is true even if the general denial is verified, where the statute requires a denial of the execution under oath. Bausman *v.* Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496.

Alteration.— Defendant does not, by a general denial, admit that the instrument was in the same form or condition when he signed it. Mahaiwe Bank *v.* Douglass, 31 Conn. 170.

The general denial admits the execution of the body of the note in suit only.— It does not admit a special agreement to renew, which may appear indorsed upon the instrument. Boulin *v.* Rainey, 21 La. Ann. 335.

75. Atchison, etc., R. Co. *v.* Bell, 52 Kan. 134, 34 Pac. 350. See, generally, *infra*, VIII, B, 2, f.

76. Fletcher *v.* Co-operative Pub. Co., 58 Nebr. 511, 78 N. W. 1070; Kelly *v.* Nebraska Exposition Assoc., 52 Nebr. 355, 72 N. W. 356; Chamberlain Banking House *v.* Kemper, etc., Dry Goods Co., 3 Nebr. (Unoff.) 549, 92 N. W. 175; Snow *v.* Hall, 19 Misc. (N. Y.) 655, 44 N. Y. Suppl. 427; Schmidt *v.* Nelke Art. Lith. Co., 17 Misc. (N. Y.) 124, 39 N. Y. Suppl. 353; Standard Sewing Mach. Co. *v.* Henry, 43 S. C. 17, 20 S. E. 790.

77. Allis *v.* Bender, 14 Ark. 625; Cooper *v.* Watson, 10 Wend. (N. Y.) 202; Legg *v.* Robinson, 7 Wend. (N. Y.) 194; Barney *v.* Keith, 6 Wend. (N. Y.) 555; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; McNeish *v.* Stewart, 7 Cow. (N. Y.) 474; Thomas *v.* Woods, 4 Cow. (N. Y.) 173.

78. Simpson *v.* McFarland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602; 1 Chitty Pl. (16th Am. ed.) *533.

79. Effect of failure to verify denial see *infra*, VIII, B, 2.

are not denied stand admitted.[80] But it is only when they are properly pleaded

80. *Alabama.*— Dreyspring *v.* Loeb, 119 Ala. 282, 24 So. 734; Savage *v.* Walshe, 26 Ala. 619; Shackelford *v.* King, 24 Ala. 158.

Arkansas.— Moore *v.* C. F. Luehrmann Hardwood Lumber Co., 82 Ark. 485, 102 S. W. 385; St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357.

California.— Lackmann *v.* Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583; White *v.* Costigan, 138 Cal. 564, 72 Pac. 178; Todhunter *v.* Klemmer, 134 Cal. 60, 66 Pac. 75; Cunningham *v.* Norton, (1895) 40 Pac. 491; Hanson *v.* Fricker, 79 Cal. 283, 21 Pac. 751; Patterson *v.* Sharp, 41 Cal. 113; Himmelmann *v.* Spanagel, 39 Cal. 401; Powell *v.* Oullahan, 14 Cal. 114; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; De Ro *v.* Cordes, 4 Cal. 117. See also Frantz *v.* Harper, (1900) 62 Pac. 603.

Colorado.—Amanda Gold Min., etc., Co. *v.* People's Min., etc., Co., 28 Colo. 251, 64 Pac. 218; Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947; Wilson *v.* Hawthorne, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290; Watson *v.* Lemen, 9 Colo. 200, 11 Pac. 88; Oil Creek Gold Min. Co. *v.* Fairbanks, 10 Colo. App. 142, 74 Pac. 543.

Connecticut.— Scholfield Gear, etc., Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

District of Columbia.— U. S. *v.* Maloney, 4 App. Cas. 505.

Florida.— Supreme Lodge K. P. *v.* Lipscomb, 50 Fla. 406, 39 So. 637.

Georgia.— Hight *v.* Barrett, 94 Ga. 792, 21 S. E. 1008.

Illinois.— Simmons *v.* Jenkins, 76 Ill. 479; Muetze *v.* Procasky, 126 Ill. App. 589; Grand Lodge I. O. F. S. I. *v.* Ohnstein, 110 Ill. App. 312; Rozenski *v.* F. J. Dewes Brewery Co., 93 Ill. App. 370; Potter *v.* Sjorgren, 91 Ill. App. 530; Teutonia Ins. Co. *v.* Beard, 74 Ill. App. 496; Foster *v.* Osborne, 70 Ill. App. 82; McNeal *v.* Calkins, 50 Ill. App. 17.

Indiana.— State *v.* Crowe, 150 Ind. 455, 50 N. E. 471; Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Lassiter *v.* Jackman, 88 Ind. 118; Scott *v.* Dibble, 14 Ind. 17; Norman *v.* Norman, 11 Ind. 288; Warbritton *v.* Cameron, 10 Ind. 302; Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369; Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

Indian Territory.— Turner *v.* Gilliland, 4 Indian Terr. 606, 76 S. W. 253.

Iowa.— Kent *v.* Muscatine, etc., R. Co., 115 Iowa 383, 88 N. W. 935; *In re* Edwards, 58 Iowa 431, 10 N. W. 793; Gregg *v.* Kemp, 55 Iowa 751, 8 N. W. 428; Singer Mfg. Co. *v.* Billings, 39 Iowa 347; Pegram *v.* McCormack, 14 Iowa 141; Walker *v.* Lathrop, 6 Iowa 516.

Kansas.— Felix *v.* Walker, 60 Kan. 467, 57 Pac. 128.

Kentucky.— Louisville, etc., R. Co. *v.* Scomp, 124 Ky. 330, 98 S. W. 1024, 30 Ky. L. Rep. 487; Young *v.* Beckham, 115 Ky. 246, 72 S. W. 1092, 1094; Parks *v.* Doty, 13 Bush 727; Rogers *v.* Aulick, 2 Duv. 419; Barrett *v.* Coburn, 3 Metc. 510; Hartley *v.* Hartley, 3 Metc. 56; Corbin *v.* Com., 2 Metc. 380; Morton *v.* Waring, 18 B. Mon. 72; Oliver *v.* Calvert, 101 S. W. 314, 30 Ky. L. Rep. 1316; Louisville *v.* Hall, 91 S. W. 1133, 28 Ky. L. Rep. 1064; Mahan *v.* Doggett, 84 S. W. 525, 27 Ky. L. Rep. 103; Skinner *v.* Myers, 40 S. W. 919, 19 Ky. L. Rep. 421; Payson *v.* Holden, 4 Ky. L. Rep. 352. But see Wise *v.* Covington, etc., R. Co., 91 Ky. 537, 16 S. W. 351, 13 Ky. L. Rep. 110.

Louisiana.— Clapp *v.* Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Barnett *v.* Cate, 18 La. Ann. 160; Hiestand *v.* New Orleans, 14 La. Ann. 137; St. Helena Police Jury *v.* Fluker, 1 Rob. 389; Featherstone *v.* Robinson, 7 La. 596; Lopez *v.* Bergel, 7 La. 178; Akin *v.* Bedford, 4 Mart. N. S. 615; Kirkman *v.* Wyer, 10 Mart. 126.

Maine.— Day *v.* Frye, 41 Me. 326.

Maryland.—Hartman *v.* Thompson, 104 Md. 389, 61 Atl. 117; Weihenmayer *v.* Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; Union Bank *v.* Ridgely, 1 Harr. & G. 324.

Minnesota.— Dexter *v.* Moodey, 36 Minn. 205, 30 N. W. 667; Wilcox *v.* Davis, 4 Minn. 197; Johnston *v.* Piper, 4 Minn. 192. See also Decker *v.* Chicago, etc., R. Co., 102 Minn. 99, 112 N. W. 901.

Mississippi.— See Chamberlain-Hunt Academy *v.* Port Gibson Brick, etc., Co., 80 Miss. 517, 32 So. 484.

Missouri.— Byington *v.* Hogan, 58 Mo. 509; Lee *v.* Casey, 39 Mo. 383; Wells *v.* Pike, 31 Mo. 590; Curl *v.* Mann, 4 Mo. 272; State *v.* Henderson, 86 Mo. App. 482; Billings *v.* Hirsch Iron, etc., Co., 86 Mo. App. 228.

Nebraska.— Bradfield *v.* Sewall, 58 Nebr. 637, 79 N. W. 615; Lonergan *v.* Lonergan, 55 Nebr. 641, 76 N. W. 16; Maxwell *v.* Higgins, 38 Nebr. 671, 57 N. W. 388; Gillen *v.* Riley, 27 Nebr. 158, 42 N. W. 1054; Harden *v.* Atchison, etc., R. Co., 4 Nebr. 521.

New Jersey.—Phillips *v.* Crosby, 70 N. J. L. 785, 59 Atl. 142.

New Mexico.— Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York.— Clark *v.* Dillon, 97 N. Y. 370 [*affirming* 4 N. Y. Civ. Proc. 245, 15 Abb. N. Cas. 261]; Driscoll *v.* Brooklyn Union El. R. Co., 95 N. Y. App. Div. 146, 88 N. Y. Suppl. 745; Barson *v.* Mulligan, 77 N. Y. App. Div. 192, 79 N. Y. Suppl. 31; Cameron *v.* Tompkins, 72 Hun 113, 25 N. Y. Suppl. 305; Beard *v.* Tilghman, 66 Hun 12, 20 N. Y. Suppl. 736; Fagen *v.* Davison, 2 Duer 153; Newman *v.* Otto, 4 Sandf. 668; Ramsay *v.* Barnes, 16 Daly 478, 12 N. Y. Suppl. 726; Saleeby *v.* New Jersey Cent. R. Co., 40 Misc. 269, 81 N. Y. Suppl. 903; Staten Island Midland R. Co. *v.* Hinchcliffe, 34 Misc. 49, 70 N. Y. Suppl. 601; Finklestein *v.* Barnett, 16 Misc. 488, 38 N. Y. Suppl. 961; Marx *v.* Gross, 2 Misc. 511, 22 N. Y. Suppl. 393; East River Electric Light Co. *v.* Clark, 18 N. Y. Suppl. 463; Hand *v.* Belcher Mosaic Glass Co., 9 N. Y. Suppl. 738; Wiltsie *v.* Greenbush, 4 N. Y. St. 814; Hautemann *v.* Gray, 5 N. Y. Civ. Proc. 224 note; Drake *v.* Cockroft, 1 Abb. Pr. 203.

that a failure to deny admits them.[81] Not only must there be a denial in order to avoid an admission, but the denial must be unambiguous and must answer substantially the facts of each direct allegation in the sense in which it is made.[82] And the denial must be a positive one and not of knowledge or information, in cases where the latter form of denial is not permissible.[83] No admission arises from the failure to deny an allegation which plaintiff has failed to make.[84] In the case of written instruments, statutes commonly provide that unless their genuineness and due execution be denied specifically,[85] they will be deemed admitted. Sometimes a notice that the execution is to be contested is required to be given, in default of which the execution stands admitted.[86]

(B) *Allegations Admitted.* Immaterial allegations are not admitted by failure to deny,[87] nor are allegations of evidence,[88] nor legal conclusions,[89] nor matter of

North Carolina.— Hauser *v.* Harding, 126 N. C. 295, 35 S. E. 586; McMillan *v.* Gambill, 115 N. C. 352, 20 S. E. 474; Jenkins *v.* North Carolina Ore Dressing Co., 65 N. C. 563.

Ohio.— Bryans *v.* Taylor, Wright 245; Maxwell *v.* Griftner, 11 Ohio Cir. Ct. 210, 5 Ohio Cir. Dec. 323.

Oregon.— Davenport *v.* Dose, 40 Oreg. 336, 67 Pac. 112; Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146; Tolmie *v.* Watson, 23 Oreg. 604, 32 Pac. 1036.

Pennsylvania.— Bair *v.* Hubbartt, 139 Pa. St. 96, 21 Atl. 210; Ravenswood Bank *v.* Reneker, 18 Pa. Super. Ct. 192; Jacoby *v.* Westchester F. Ins. Co., 10 Pa. Super. Ct. 171.

South Dakota.— Calkins *v.* Seabury-Calkins Consol. Min. Co., 5 S. D. 299, 58 N. W. 797.

Tennessee.— Cummings *v.* Wagstaff, 1 Baxt. 399.

Texas.— Mentz *v.* Haight, (Civ. App. 1906) 97 S. W. 1076 (holding that an allegation in a petition not denied by the special denials will be deemed admitted where there is no general denial); Western Union Tel. Co. *v.* Carter, 42 Tex. Civ. App. 224, 94 S. W. 205; Kleinsmith *v.* Kempner, 37 Tex. Civ. App. 246, 83 S. W. 409.

Vermont.— Dyer *v.* Dean, 69 Vt. 370, 37 Atl. 1113; Carpenter *v.* Briggs, 15 Vt. 34.

Virginia.— Tabb *v.* Gregory, 4 Call 225. In Tabb *v.* Cabell, 17 Gratt. 160, it was held that this rule did not apply to averments which could not have been within the knowledge of the party pleading them.

Washington.— Lake *v.* Steinbach, 5 Wash. 659, 32 Pac. 767.

Wisconsin.— Harding Paper Co. *v.* Allen, 65 Wis. 576, 27 N. W. 329; Bonnell *v.* Jacobs, 36 Wis. 59.

United States.— McKenzie *v.* Poorman Silver Mines, 88 Fed. 111, 31 C. C. A. 409; Rhodes *v.* Hadfield, 20 Fed. Cas. No. 11,748, 2 Cranch C. C. 566.

England.— Tildesley *v.* Harper, 7 Ch. D. 403, 47 L. J. Ch. 263, 38 L. T. Rep. N. S. 60, 26 Wkly. Rep. 263 [*reversed* on other grounds in 10 Ch. D. 393, 48 L. J. Ch. 495, 39 L. T. Rep. N. S. 552, 27 Wkly. Rep. 249]; Deffell *v.* Brocklebank, 3 Bligh 561, 4 Price 36, 4 Eng. Reprint 706.

Canada.— Guertin *v.* Gosselin, 27 Can. Sup. Ct. 514; Nova Scotia Bank *v.* Morrow, 15 N. Brunsw. 460; Falmouth Churchwardens *v.* Vaughan, 11 Nova Scotia 439. But *compare* Richardson *v.* Junkin, 4 Can. L. T. Occ. Notes 390; Waterloo Mut. Ins. Co. *v.* Robinson, 4 Can. L. T. Occ. Notes 30.

See 39 Cent. Dig. tit. "Pleading," § 270.

Rule applies on appeal from probate court. — Where a cause is tried in a district court on appeal from the probate court, the papers filed in the probate court take the place of pleadings in the district court and the admissions therein have the same effect as in former pleadings. Palmer *v.* Pollock, 26 Minn. 433, 4 N. W. 1113.

An evasive answer admits facts which are peculiarly within the knowledge of defendant. Horne *v.* Peacock, 122 Ga. 45, 49 S. E. 722.

81. Alston *v.* Wilson, 44 Iowa 130; Moulton *v.* Doran, 10 Minn. 67; Oechs *v.* Cook, 3 Duer (N. Y.) 161; Harlow *v.* Hamilton, 6 How. Pr. (N. Y.) 475.

82. Loftus *v.* Fischer, 106 Cal. 616, 39 Pac. 1064; Fellows *v.* Webb, 43 Iowa 133; Felix *v.* Walker, 60 Kan. 467, 57 Pac. 128; Harden *v* Atchison, etc., R. Co., 4 Nebr. 521.

83. Ord *v.* The Uncle Sam, 13 Cal. 369; San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Curtis *v.* Richards, 9 Cal. 33; Felix *v.* Walker, 60 Kan. 467, 57 Pac. 128; Howard *v.* Maysville, etc., R. Co., 70 S. W. 631, 24 Ky. L. Rep. 1051.

Propriety of denial of knowledge see *supra*, IV, C, 2, f.

84. Hepp *v.* Commagere, 10 Rob. (La.) 524; Tarbell *v.* Gray, 4 Gray (Mass.) 444.

85. U. S. *v.* Alexander, 2 Ida. (Hasb.) 386, 17 Pac. 746; Holden *v.* Jenkins, 125 Mass. 446; Manning *v.* Bowman, 26 Nev. 451, 69 Pac. 995. This requirement does not apply to the signature of a witness which is made necessary by statute. Holden *v.* Jenkins, 125 Mass. 446.

86. Great Falls Bank *v.* Farmington, 41 N. H. 32; Hill *v.* Barney, 18 N. H. 607.

87. Siter *v.* Jewett, 33 Cal. 92; Canfield *v.* Tobias, 21 Cal. 349; Wood *v.* The Fleetwood, 19 Mo. 529; Mandigo *v.* Bailey, 64 N. Y. App. Div. 432, 72 N. Y. Suppl. 227; Rochester Distilling Co. *v.* O'Brien, 72 Hun (N. Y.) 462, 25 N. Y. Suppl. 281; Winterson *v.* Hitchings, 13 Misc. (N. Y.) 201, 34 N. Y. Suppl. 183. See also Kansas City Wholesale Grocery Co. *v.* McDonald, 118 Mo. App. 471, 95 S. W. 279.

88. Siter *v.* Jewett, 33 Cal. 92.

89. *Arkansas.*— Lanier *v.* Union Mortg., etc., Co., 64 Ark. 39, 40 S. W. 466.

inducement,[90] nor contingent or conjectural averments.[91] But matters of aggravation must be denied or they will be deemed admitted.[92] Allegations of amount, value, or damages are usually immaterial and are not deemed admitted by defendant's failure to deny them.[93] In some cases, however, they are material, and the same rule applies to them as to other material allegations which defendant fails to deny.[94] When an instrument is declared on according to its legal effect, a failure to deny such legal effect admits it.[95]

(v) *Inconsistent Defenses* — (a) *At Common Law.* Under the statute of Anne the ruling of the English courts has been that inconsistent pleas are admissible,[96] and that the admissions in one plea are not available to plaintiff as against any other.[97] This rule has been followed in those states in which the common law as modified by the statute of Anne still prevails.[98]

California.— Kidwell *v.* Kettler, 146 Cal. 12, 79 Pac. 514.

Missouri.— Dix *v.* German Ins. Co., 65 Mo. App. 34.

Nevada.— Hoopes *v.* Meyer, 1 Nev. 433.

New York.— Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Farrell *v.* Amberg, 8 Misc. 220, 28 N. Y. Suppl. 564; Barton *v.* Sackett, 3 How. Pr. 358.

North Carolina.— Kelly *v.* McCallum, 83 N. C. 563.

South Carolina.— Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136.

90. Fleishman *v.* Meyer, 46 Oreg. 267, 80 Pac. 209.

91. Moulton *v.* Doran, 10 Minn. 67.

92. Manners *v.* Haverhill, 135 Mass. 165. But *compare* Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46.

93. *Arkansas.*— Derrick *v.* Cole, 60 Ark. 394, 30 S. W. 760.

California.— Canfield *v.* Tobias, 21 Cal. 349.

Indiana.— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Shirts *v.* Irons, 28 Ind. 458.

Kentucky.— Baum *v.* Winston, 3 Metc. 127. But see Mahan *v.* Doggett, 84 S. W. 525, 27 Ky. L. Rep. 103. Section 126, of the present code, changes the former rule as to allegations of value. Now, every allegation of value or amount of damage accompanied by an allegation of an express promise, or a statement of facts from which the law implies a promise to pay, will, unless denied, be held as true. Ragsdale *v.* Lander, 80 Ky. 61.

Louisiana.— Stillman *v.* Waterman, 7 La. Ann. 656; McMaster *v.* Brander, 15 La. 206.

Missouri.— Field *v.* Barr, 27 Mo. 416.

Nebraska.— Baker *v.* Peterson, 57 Nebr. 375, 77 N. W. 774; Best *v.* Stewart, 48 Nebr. 859, 67 N. W. 881; Campbell *v.* Brosius, 36 Nebr. 792, 55 N. W. 215.

New York.— Stuart *v.* Binsse, 10 Bosw. 436; De Graaf *v.* Wyckoff, 13 Daly 366; Raymond *v.* Traffarn, 12 Abb. Pr. 52; Tuttle *v.* Smith, 6 Abb. Pr. 329; Rich *v.* Rich, 16 Wend. 663.

England.— Hayward *v.* Radcliffe, 4 F. & F. 500; King *v.* Walker, 3 H. & C. 209, 11 Jur. N. S. 43, 33 L. J. Exch. 325, 13 Wkly. Rep. 232.

Contra.— Adams *v.* Guice, 30 Miss. 397; Smith *v.* Lee, 10 Nev. 208; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

94. Phillips *v.* Scott, 43 Mo. 86, 97 Am. Dec. 369. In Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279, 286, the action was on an indemnity bond, and plaintiff alleged that he had been compelled to pay a certain amount which defendant was bound under the bond to pay. The court said: "We have been unable to see why an allegation of the payment of this sort should not, in the absence of a denial, stand admitted as well as any other allegation of payment. Thus, if a surety in a promissory note should be compelled to pay $500 for his principal, and should, in an action for its recovery, allege the payment as a fact, this allegation, if undenied, must result in a judgment in the surety's behalf. . . . No doubt, there are many cases where allegations of value, amount of damages, &c., are immaterial and need no denial. But the allegation before us is that of a specific and material fact, which becomes none the less specific and material because no denial thereof be interposed."

95. Coffin *v.* Grand Rapids Hydraulic Co., 61 N. Y. Super. Ct. 51, 18 N. Y. Suppl. 782.

96. See *supra*, IV, A, 7, d.

97. Montgomery *v.* Richardson, 5 C. & P. 247, 24 E. C. L. 549; Harington *v.* Macmorris, 1 Marsh. 33, 5 Taunt. 228, 1 E. C. L. 123; Gould *v.* Oliver, 2 M. & G. 208, 2 Scott N. R. 241, 40 E. C. L. 565; Stracy *v.* Blake, 1 M. & W. 168, Tyrw. & G. 528.

98. *Alabama.*— Prince *v.* Puckett, 12 Ala. 832.

Illinois.— Chicago, etc., R. Co. *v.* Newell, 113 Ill. App. 263 [*affirmed* in 212 Ill. 332, 72 N. E. 416]; Barker *v.* Barth, 88 Ill. App. 23; Stuart *v.* Harris, 69 Ill. App. 668; McCormick Harvesting Mach. Co. *v.* Snell, 23 Ill. App. 79.

Mississippi.—Morris *v.* Henderson, 37 Miss. 492.

New Hampshire.— Buzzell *v.* Snell, 25 N. H. 474; Cilley *v.* Jenness, 2 N. H. 87.

New York.—See Hamer *v.* McFarlin, 4 Den. 509.

Pennsylvania.— Rogers *v.* Old, 5 Serg. & R. 404.

West Virginia.— Nadenbousch *v.* Sharer, 2 W. Va. 285.

But see Alderman *v.* French, 1 Pick. (Mass.) 115, 11 Am. Dec. 114; Jackson *v.* Stetson, 15 Mass. 48.

Pleas must be construed separately and distinctly, except when connected by a reference to each other, and plaintiff on the trial

(B) *Under Codes and Practice Acts.* Where inconsistent defenses are allowable,[99] the general rule is laid down that neither can be construed as a waiver of the other, nor can one be used as an admission to destroy the other.[1] Thus when a defendant files a general denial and follows that with a special plea, the matters averred in the special plea are not to be taken as confessed in favor of plaintiff's cause of action, but plaintiff still has the burden of making out his case.[2] Nor is a denial waived or overcome by an averment in a cross complaint of substantially the same facts which the answer denies.[3] But this rule does not apply where the special matter set up is not by way of defense, but for the purpose of enabling defendant to obtain some equitable relief which he prays for.[4] On the other hand, in those jurisdictions where inconsistent defenses are not allowable, defendant is bound by the one least favorable to him.[5] Whatever is admitted in a special defense operates so far as a modification of a general denial, and is to be taken as true without other proof.[6] Some of the cases qualify the rule as thus broadly stated by making an exception as to admissions unavoidably made in order to enable a party to properly present a defense.[7] A party who formally and explicitly admits, by his pleading, that which establishes plaintiff's right, will not be suffered to deny its existence or to prove any state of facts inconsistent with that admission.[8] As between the denial of a fact alleged in the complaint and a direct

of an issue on one plea cannot take advantage of an averment or admission contained in another plea. Clements *v.* Cribbs, 19 Ala. 241.

Confession of judgment for a portion of a cause of action which is divisible cannot be construed as an admission in relation to any portion of the residue thereof in respect to which the general issue is pleaded. McIntire *v.* Randolph, 50 N. H. 94; Pittsfield *v.* Barnstead, 38 N. H. 115.

99. See *supra*, IV, A, 7, d, (II).

1. *California.*— Eppinger *v.* Kendrick, 114 Cal. 620, 46 Pac. 613; Miller *v.* Chandler, 59 Cal. 540; Billings *v.* Drew, 52 Cal. 565; Nudd *v.* Thompson, 34 Cal. 39; Siter *v.* Jewett, 33 Cal. 92.

Iowa.— Heinricks *v.* Terrell, 65 Iowa 25, 21 N. W. 171; Treadway *v.* Sioux City, etc., R. Co., 40 Iowa 526.

Mississippi.—Morris *v.* Henderson, 37 Miss. 492.

New York.— Swift *v.* Kingsley, 24 Barb. 541; Troy, etc., R. Co. *v.* Kerr, 17 Barb. 581; Manhattan Brick, etc., Co. *v.* Clark, 34 Misc. 819, 69 N. Y. Suppl. 649; Brady *v.* Hutkoff, 13 Misc. 515, 34 N. Y. Suppl. 947.

Tennessee.— St. Louis Type Foundry Co. *v.* Wisdom, 4 Lea 695.

Texas.— Hynes *v.* Packard, 92 Tex. 44, 45 S. W. 562; Fowler *v.* Davenport, 21 Tex. 626.

See 39 Cent. Dig. tit. "Pleading," § 266.

2. Meyers *v.* Merillion, 118 Cal. 352, 50 Pac. 662; Miller *v.* Chandler, 59 Cal. 540; Nudd *v.* Thompson, 34 Cal. 39; Rudd *v.* Dewey, 121 Iowa 454, 96 N. W. 738; Quigley *v.* Merritt, 11 Iowa 147; Grash *v.* Sater, 6 Iowa 301; De Waltoff *v.* Third Ave. R. Co., 75 N. Y. App. Div. 351, 78 N. Y. Suppl. 132; Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; Manhattan Brick, etc., Co. *v.* Clark, 34 Misc. (N. Y.) 819, 69 N. Y. Suppl. 649; Kelly *v.* Theiss, 22 Misc. (N. Y.) 530, 49 N. Y. Suppl. 1108; Brady *v.* Hutkoff, 13 Misc. (N. Y.) 515, 34 N. Y. Suppl. 947; Epstein *v.* Hankinson, 84 N. Y. Suppl. 583; Hynes *v.* Packard, 92 Tex. 44, 45 S. W. 562; Bauman *v.* Chambers, 91 Tex. 108, 41 S. W. 471; Fowler *v.* Davenport, 21 Tex. 626; Gillett *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1902) 68 S. W. 61.

3. Meyers *v.* Merillion, 118 Cal. 352, 50 Pac. 662.

4. Morris *v.* Housley, (Tex. Civ. App. 1896) 34 S. W. 659.

5. Mitchell *v.* Ripley, 5 Kan. App. 818, 49 Pac. 153; Adair *v.* Adair, 78 Mo. 630.

6. *Indiana.*— Queens Ins. Co. *v.* Hudnut Co., 8 Ind. App. 22, 35 N. E. 397.

Kansas.— Bierer *v.* Fretz, 32 Kan. 329, 4 Pac. 284; Barnum *v.* Kennedy, 21 Kan. 181; Butler *v.* Kaulback, 8 Kan. 668; Wiley *v.* Keokuk, 6 Kan. 94.

Louisiana.— Lesseps *v.* Wicks, 12 La. Ann. 739; Nagel *v.* Mignot, 8 Mart. 488.

Minnesota.— Hannem *v.* Pence, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717; Scott *v.* King, 7 Minn. 494; Derby *v.* Gallup, 5 Minn. 119; McClung *v.* Bergfeld, 4 Minn. 148.

Missouri.— State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363; McCord *v.* Doniphan Branch R. Co., 21 Mo. App. 92.

Nebraska.— Rohman *v.* Gaiser, 53 Nebr. 474, 73 N. W. 923. See Triska *v.* Miller, 3 Nebr. (Unoff.) 463, 91 N. W. 870.

Washington.— Lamberton *v.* Shannon, 13 Wash. 404, 43 Pac. 336.

See 39 Cent. Dig. tit. "Pleading," § 267.

7. McLaughlin *v.* Alexander, 2 S. D. 226, 49 N. W. 99; Lake Shore, etc., R. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724; Glenn *v.* Sumner, 132 U. S. 152, 10 S. Ct. 41, 33 L. ed. 301; Whitaker *v.* Freeman, 29 Fed. Cas. No. 17,527*a*, 12 N. C. 271.

8. Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852; Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268; Paige *v.* Willet, 38 N. Y. 28.

admission of the same fact in the answer, the admission, and not the denial, will be taken as true.[9]

(c) *Waiver of Admission.* Where allegations are not denied and might therefore be deemed admitted, but are treated as in issue on the trial, the omission of the denial is thereby waived.[10]

c. Scope. The admission of a fact does not carry with it the admission of qualifying circumstances alleged in connection with such fact, where these circumstances are elsewhere in the same defense denied;[11] or where the fact is elsewhere expressly admitted with other and different qualifying circumstances.[12] But where a fact which is alleged with qualifying circumstances is admitted without qualification, the admission will be deemed to include the qualifications.[13] And an admission may be qualified by an express or implied limitation appearing elsewhere in the same defense.[14] Where the doing of an act,[15] such as the giving of notice,[16] or the execution of an instrument,[17] is admitted without qualification, its legal sufficiency is also admitted; but the admission of a fact is not an admission that it has a particular legal effect.[18] An admission as to a part is an admission as to the whole, where the fact admitted necessarily applies equally to both;[19] and where a portion of the damages alleged is admitted, this is an admission of some

9. Willet *v.* Metropolitan Ins. Co., 2 Bosw. (N. Y.) 678; Baines *v.* Coos Bay Nav. Co., 41 Oreg. 135, 68 Pac. 397; Maxwell *v.* Bolles, 28 Oreg. 1, 41 Pac. 661; Veasey *v.* Humphreys, 27 Oreg. 515, 41 Pac. 8; McLaughlin *v.* Alexander, 2 S. D. 226, 49 N. W. 99; Rhinehart *v.* Whitehead, 64 Wis. 42, 24 N. W. 401; Dickson *v.* Cole, 34 Wis. 621; Farrell *v.* Hennesy, 21 Wis. 632; Orton *v.* Noonan, 19 Wis. 350; Miller *v.* Larson, 17 Wis. 624; Hartwell *v.* Page, 14 Wis. 49; Sexton *v.* Rhames, 13 Wis. 99. See also Burns *v.* Chicago, etc., R. Co., 110 Iowa 385, 81 N. W. 794.

10. *Idaho.*— Conant *v.* Jones, 3 Ida. 606, 32 Pac. 250.

Kansas.— Netcott *v.* Porter, 19 Kan. 131.

Missouri.— Granby Min., etc., Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126; Crossland *v.* Admire, 149 Mo. 650, 51 S. W. 463; Turner *v.* Butler, 126 Mo. 131, 28 S. W. 77.

Montana.— Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594, 991.

Nebraska.— Albion Milling Co. *v.* Weeping Water First Nat. Bank, 64 Nebr. 116, 89 N. W. 638; Missouri Pac. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169.

New York.— See Williams *v.* Hayes, 20 N. Y. 58, 61, where the court said: "When a party wishes to avail himself of an implied admission of the pleadings, it should affirmatively appear that the attention of the court or other tribunal has been called to it. In point of fact, causes are tried and disposed of under the present system with little or no reference to the pleadings, unless some question is made upon them at the trial. And when no such question is there made, none ought to be allowed to be afterwards raised. Any other rule would throw the duty of vigilance upon the wrong party."

11. Grimmer *v.* Carlton, 93 Cal. 189, 28 Pac. 1043, 27 Am. St. Rep. 171; Kingsley *v.* Gilman, 12 Minn. 515.

12. Halpin *v.* Manny, 33 Mo. App. 388; Gillespie *v.* Davidge Fertilizer Co., 20 N. Y. Suppl. 833; Claffy *v.* O'Brien, 10 N. Y. Suppl. 103, 25 Abb. N. Cas. 187. See, however, Kinman *v.* Cannefax, 34 Mo. 147, where it was held that an answer which avers that defendant did not make any such note as the one declared on by plaintiff, but that he made a note of the same description, with an additional description and a condition, admits the execution of the note sued on.

13. Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847; Hax *v.* Hax, 84 Mo. App. 306; Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

14. Butlitt *v.* Stewart, 16 La. Ann. 22; Calvit *v.* Compton, 3 Mart. N. S. (La.) 86.

15. *Georgia.*—Wachstein *v.* Germania Bank, 120 Ga. 229, 47 S. E. 586.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221.

New York.— Wiltsie *v.* Greenbush, 4 N. Y. St. 814.

Texas.— Kendrick *v.* Taylor, 27 Tex. 695.

United States.—Plankinton *v.* Gray, 63 Fed. 415, 11 C. C. A. 268.

But see Bayly *v.* Becnel, 35 La. Ann. 778, where it was held that an allegation that property has been transferred to another is not an admission of the validity or completeness of the transferee's title.

16. Denver *v.* Soloman, 2 Colo. App. 534, 31 Pac. 507.

17. Woronieki *v.* Pariskiego, 74 Conn. 224, 50 Atl. 562; Miller *v.* Loverene, etc., Co., 74 Nebr. 557, 105 N. W. 84; Solt *v.* Anderson, 67 Nebr. 103, 93 N. W. 205.

18. Windsor *v.* Collinson, 32 Oreg. 297, 52 Pac. 26; Baker *v.* Warner, 16 S. D. 292, 92 N. W. 393; Berrigan *v.* Fleming, 2 Lea (Tenn.) 271; Cotzhausen *v.* Kaehler, 42 Wis. 332.

19. McLaurin *v.* Parker, 24 Miss. 509.

Dividing an admission.—A judicial admission in an answer cannot be divided against the party pleading it, unless it is in the nature of a confession and avoidance of plaintiff's demand or of some portion of it, as a plea of compensation where the defense pleaded necessarily admits the allegations of

cause of action.[20] An implied admission of the facts alleged by plaintiff does not generally extend to the amount of damages claimed.[21] But a specific admission may be made as to value or amount and it will dispense with proof by plaintiff.[22] The admission of a fact carries with it the admission of other facts necessarily implied from or involved in the one admitted,[23] but the admission will be given a reasonable construction in this respect in the light of all the facts alleged.[24] An answer which refers to property described in the complaint, as "said" property is an admission of the identity of the property;[25] but even where the reference is not so explicit, the admission will be deemed to refer to the same thing as is alleged in the complaint where such would be the natural and reasonable construction.[26] The admissions arising through failure to deny are no broader than the allegations appearing in plaintiff's pleading.[27] Admissions by defendant of facts not alleged by plaintiff cannot avail plaintiff.[28]

d. Construction. In the case of an express admission the apparent intention of the pleader will be followed if possible.[29] An admission, to be available, must be taken with all the qualifying clauses and limitations which the pleader has added to it,[30] and with the facts alleged in connection with it.[31] The whole of a statement must be construed together, and where facts are alleged in connection with an admission, which nullify it, its effect as an admission is destroyed.[32] Where, however, such affirmative allegations are not proved, plaintiff may have the full benefit of the admission.[33] If the alleged admission is apparently at variance with other portions of defendant's plea, it will, in case of ambiguity, be construed in such a way as to make it consistent with the other allegations of defendant.[34]

the petition, but avoids their effect by showing some other matter in bar of the same. Butlitt *v.* Stewart, 16 La. Ann. 22.

20. Dow *v.* Epping, 48 N. H. 75; Corey *v.* Bath, 35 N. H. 530.

21. Hallowell *v.* Fawcett, 30 Iowa 491; Southern Mut. Ins. Co. *v.* Pike, 34 La. Ann. 825.

Although a party admits the rendition of services, he does not thereby admit their value, as pleaded by the opposite party. Stillman *v.* Waterman, 7 La. Ann. 656. An answer to an action for wages does not, by relying upon a special contract only, admit the value alleged by plaintiff. Hyland *v.* Giddings, 11 Gray (Mass.) 232.

22. Carlyon *v.* Lannan, 4 Nev. 156.

23. Blanque *v.* Woods, 11 La. Ann. 103; Burns *v.* Koochinching Co., 68 Minn. 239, 71 N. W. 26; Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007; Battelle *v.* McIntosh, 62 Nebr. 647, 87 N. W. 361.

Previous recognition of liability.—In an action against a town for the expense of supporting an insane pauper at the state hospital, an admission in the answer that defendant had paid for one year's support of the pauper in such hospital is evidence of an admission of liability. Connecticut Insane Hospital *v.* Brookfield, 69 Conn. 1, 36 Atl. 1017.

24. Hackett *v.* Masterson, 88 N. Y. App. Div. 73, 84 N. Y. Suppl. 751. See also Hall *v.* Waddill, 78 Miss. 16, 27 So. 936, 28 So. 831; Browder *v.* Phinney, 37 Wash. 70, 79 Pac. 598.

25. Nininger *v.* Banning, 7 Minn. 274.

26. Johnson *v.* Field, 5 Mart. N. S. (La.) 635; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894.

27. Hoag *v.* Warden, 37 Cal. 522; Leavenworth Light, etc., Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365; Pierce *v.* Northey, 14 Wis. 9.

28. Haldeman *v.* Johnson, 8 Kan. App. 473, 54 Pac. 507; Brandt *v.* Shepard, 39 Minn. 454, 40 N. W. 521.

29. State *v.* Earle, 66 S. C. 194, 44 S. E. 781. See also Strong *v.* Stapp, 74 Cal. 280, 15 Pac. 835; Hope *v.* Scranton, etc., Coal Co., 120 N. Y. App. Div. 595, 105 N. Y. Suppl. 372, holding that an admission that a notice was received or due June 16, 1906, was not an admission that notice was served prior to the commencement of the action.

30. Viall *v.* Missouri Valley First Nat. Bank, 115 Iowa 11, 87 N. W. 733; Young *v.* Katz, 22 N. Y. App. Div. 542, 48 N. Y. Suppl. 187; McKagen *v.* Windham, 59 S. C. 434, 38 S. E. 2. See Uvalde Asphalt Paving Co. *v.* New York, 99 N. Y. App. Div. 327, 91 N. Y. Suppl. 131.

31. Breard *v.* Blanks, 51 La. Ann. 1507, 26 So. 618; Garrie *v.* Schmidt, 25 Misc. (N. Y.) 753, 55 N. Y. Suppl. 703. In Clark *v.* Missouri, etc., R. Co., 179 Mo. 66, 87, 77 S. W. 882, the court said: "An admission of one's adversary must be taken as a whole. The good must go with the bad. One who seeks to use an admission of his adversary, must take the admission *cum onere*."

32. Gildersleeve *v.* Landon, 73 N. Y. 609; Grant *v.* Pratt, 52 N. Y. App. Div. 540, 65 N. Y. Suppl. 486; Hall *v.* Brennan, 64 Hun (N. Y.) 394, 19 N. Y. Suppl. 623; Upton *v.* South Carolina, etc., R. Co., 128 N. C. 173, 38 S. E. 736; Kirby *v.* Scanlan, 8 S. D. 623, 67 N. W. 828.

33. Dwyer *v.* McLaughlin, 31 Misc. (N. Y.) 510, 64 N. Y. Suppl. 380.

34. Cheatham *v.* Rowland, 105 N. C. 218, 10 S. E. 986.

If it is doubtful to what part of a cause of action an admission refers, it will be held to relate to that part which is most natural and reasonable in the light of the pleadings and proofs.[35] An express admission will not be enlarged beyond the scope apparently intended by the pleader,[36] nor, on the other hand, will it be unreasonably restricted.[37] When a defense contains both an admission and a denial respecting the same fact, the admission will prevail;[38] and the same is true of an admission and an affirmative allegation inconsistent therewith, the latter may be stricken out, even though the admission is merely implied by failure to deny.[39]

e. Effect. When a fact is admitted upon the pleadings, no proof respecting it need be introduced,[40] and it may be presented to the jury as part of the evidence in the case.[41] By admitting in the answer a fact alleged by plaintiff, the fact is as well pleaded for the purposes of the answer as though averred therein.[42] An admission on the pleadings is an admission for all the purposes of the cause.[43] Admissions made on the pleadings are conclusive upon the party making them as long as they stand upon the record, and no evidence can be shown to contradict them.[44] But their effect is limited to the action wherein they are made, and they cannot be regarded as conclusive on the trial of other issues even between the same parties.[45] An admission once made remains so long as the answer is not withdrawn, where no other defense is filed inconsistent with it;[46] admissions of legal conclusions are of no force or effect.[47] Where after a specific denial an allegation is inadvertently admitted the effect of such admission is obviated by a consolidation of the action with another by the pleadings in which the allegation is denied.[48]

35. Williams *v.* Hayes, 20 N. Y. 58.

36. Miller *v.* Union Switch, etc., Co., 132 N. Y. 562, 30 N. E. 265; Berrigan *v.* Fleming, 2 Lea (Tenn.) 271; Pan Handle Nat. Bank *v.* Security Co., 18 Tex. Civ. App. 96, 44 S. W. 15; American Copper, etc., Works *v.* Galland-Burke Brewing, etc., Co., 30 Wash. 178, 70 Pac. 236.

For example where the allegation in a complaint that defendant was "the owner of a certain dog" was admitted; but the allegation that defendant's said dog bit plaintiff, and that defendant had previous knowledge of the vicious propensities of the dog, was denied, the answer was held not to admit that defendant was the owner of the dog which bit plaintiff. Lynt *v.* Moore, 5 N. Y. App. Div. 487, 38 N. Y. Suppl. 1095.

37. Keating *v.* Mott, 92 N. Y. App. Div. 156, 86 N. Y. Suppl. 1041; Stansell *v.* Cleveland, 64 Tex. 660.

38. Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Aikens *v.* Frank, 21 Mont. 192, 53 Pac. 538.

39. Smith *v.* Coe, 170 N. Y. 162, 63 N. E. 57; Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 55 Pac. 454, 78 Am. St. Rep. 792.

Argumentative denials see *supra*, IV, C, 2, b, (II).

40. See *infra*, XIII, B, 1, d.

41. Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

42. Gerson *v.* Pool, 31 Ark. 85.

43. Bingham *v.* Stanley, 2 Q. B. 117, 1 G. & D. 237, 6 Jur. 389, 10 L. J. Q. B. 319, 42 E. C. L. 598.

44. *California.*— Gabriel *v.* Tonner, 138 Cal. 63, 70 Pac. 1021.

Illinois.— Jo Daviess County *v.* Staples, 108 Ill. App. 539; Williams *v.* Boyden, 33 Ill. App. 477.

Missouri.— Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391; Call *v.* Moll, 89 Mo. App. 386; State *v.* Henderson, 86 Mo. App. 482; Burnham *v.* Ellmore, 66 Mo. App. 617.

Nevada.— Manning *v.* Bowman, 26 Nev. 451, 69 Pac. 995.

New York.— Fiebiger *v.* Forbes, 43 Misc. 612, 88 N. Y. Suppl. 284; Jaeger *v.* Koenig, 29 Misc. 780, 61 N. Y. Suppl. 505; Alexander Lumber Co. *v.* Abrahams, 19 Misc. 425, 43 N. Y. Suppl. 1139.

Pennsylvania.— Ravenswood Bank *v.* Reneker, 18 Pa. Super. Ct. 192; Patterson *v.* Hausbeck, 8 Pa. Super. Ct. 36.

England.— Needham *v.* Fraser, 1 C. B. 815, 3 D. & L. 190, 9 Jur. 734, 14 L. J. C. P. 256, 50 E. C. L. 815; Lloyd *v.* Walkey, 9 C. & P. 771, 38 E. C. L. 446; Guy *v.* Gregory, 9 C. & P. 584, 38 E. C. L. 342; Boileau *v.* Rutlin, 2 Exch. 665, 12 Jur. 899; Bonzi *v.* Stewart, 11 L. J. C. P. 228, 4 M. & G. 29, 5 Scott N. R. 1, 43 E. C. L. 158.

45. *Re* Walters, 61 L. T. Rep. N. S. 872. *Compare* Laubheimer *v.* Naill, 88 Md. 174, 40 Atl. 888.

Admissions by failure to deny are admissions only for the purposes of the particular action in which they occur, and cannot be used against defendant in another and separate action. Boatman's Sav. Inst. *v.* Holland, 38 Mo. 49; *Re* Walters, 61 L. T. Rep. N. S. 872.

46. Sater *v.* Meadows, 68 Iowa 507, 27 N. W. 481.

47. Twogood *v.* Coopers, 9 Iowa 415; Cutting *v.* Lincoln, 9 Abb. Pr. N. S. (N. Y.) 436; Tiddy *v.* Graves, 126 N. C. 620, 36 S. E. 127, 127 N. C. 502, 37 S. E. 513; Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136.

48. Lockhart *v.* Ballard, 113 N. C. 292, 18 S. E. 341.

f. Protestations. It was anciently the custom to protest facts not denied, instead of admitting them, thus saving to defendant the privilege of contesting them in a subsequent action. This practice was abolished in England by the rules of Hilary Term.[49] A protestation is of no avail in the action wherein it is made, and the facts protested stand admitted in that action;[50] and no protestation can be made of matters of law.[51]

D. Matter in Avoidance[52]**— 1. Confession and Avoidance — a. In General.** At common law pleas in bar which do not traverse must be in confession and avoidance.[53] Under the codes the office of pleas in confession and avoidance is performed by defenses of new matter.[54] A plea in confession and avoidance or of new matter in the nature of such a plea does not deny the allegations of the declaration, but in legal contemplation confesses them and seeks to avoid them by new affirmative matter.[55] Whether or not a defense is to be deemed a confession and avoidance is to be determined from all the matters appearing therein.[56] A plea in confession and avoidance is necessary only when defendant proposes to admit the truth of a material allegation made by plaintiff, and to avoid liability thereon by affirmative proof of matters which destroy the effect of the allegations admitted.[57] Greater strictness is required in framing pleas in bar than in framing declarations,[58] but pleas in bar are construed with less strictness than dilatory pleas.[59] Hypothetical allegations are permissible in a plea or answer to enable defendant to plead all his defenses.[60] A special plea should be certain, at least to a common intent,[61] and its averments should clearly appear to relate to the same matters

49. 1 Chitty Pl. (16th Am. ed.) *646; Stephen Pl. (8th Am. ed.) *218, note.

50. Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347; Briggs *v.* Dorr, 19 Johns. (N. Y.) 95; Burk *v.* Bear, 3 Pa. L. J. Rep. 355.

51. Kennebec Ice, etc., Co. *v.* Wilmington, etc., R. Co., 2 Chest. Co. Rep. (Pa.) 114; Burk *v.* Bear, 3 Pa. L. J. Rep. 355.

52. Matter amounting to general issue or denial pleaded see *supra*, IV, A, 7, f.

53. Goodman *v.* Robb, 41 Hun (N. Y.) 605 (where it is said the same rule has frequently been applied under the code); Merten *v.* San Angelo Nat. Bank, 5 Okla. 585, 49 Pac. 913. But see Bonaffe *v.* Woodberry, 12 Pick. (Mass.) 456, where it is said that such a state of facts may be set forth in a special plea as may be a sufficient bar to the action, although the plea may be incapable of being designated by any technical name known in the law.

54. See *infra*, IV, D, 2.

55. Clark *v.* Holt, 16 Ark. 257; De Lissa *v.* Fuller Coal, etc., Co., 59 Kan. 319, 52 Pac. 886. See Hoffman *v.* Atkins, 11 La. Ann. 172 (holding that a defense implying an admission that plaintiff did have a demand against defendant as a surety, and that such demand had been discharged by the act of plaintiff, was in the nature of an exception *in factum compositæ* which should have been specially pleaded); Johnson *v.* Hesser, 61 Nebr. 631, 85 N. W. 894; Home F. Ins. Co. *v.* Johansen, 59 Nebr. 349, 80 N. W. 1047.

Apparent right of action is conceded.— A plea in confession and avoidance concedes to plaintiff an apparent or *prima facie* right of action and would entitle plaintiff to judgment but for the matters affirmatively alleged in the plea. Staten *v.* Hammer, 121 Iowa 499, 96 N. W. 964.

A plea of waiver is a plea in confession and avoidance. Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843.

56. Carr *v.* Miller-Morris Canal, etc., Co., 105 La. 239, 29 So. 715; Barry *v.* Kimball, 10 La. Ann. 787; Eells *v.* Dumary, 84 N. Y. App. Div. 105, 82 N. Y. Suppl. 531. See also Drefahl *v.* Security Sav. Bank, 132 Iowa 563, 107 N. W. 179.

An answer setting up the statute of limitations is not a technical plea in confession and avoidance. Webber *v.* Ingersoll, 74 Nebr. 393, 104 N. W. 600.

57. Staten *v.* Hammer, 121 Iowa 499, 96 N. W. 964. When a defendant intends to rest his defense on a fact which is not included in the allegations necessary to support plaintiff's case, he must set it up in precise terms in the answer. Supreme Tent K. M. W. *v.* Stensland, 105 Ill. App. 267 [*affirmed* in 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137]; Coburn *v.* Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604.

A person relying upon legal authority to do an act must plead it. Simpson *v.* Kelley, 90 S. W. 241, 28 Ky. L. Rep. 702.

An affidavit of indebtedness, if positive, cannot be contradicted, but it may be confessed and avoided. Jordan *v.* Jordan, 6 Wend. (N. Y.) 524.

58. Allegheny Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724.

59. Desha *v.* Robinson, 17 Ark. 228.

60. See *supra*, II, H, 2, b.

61. *Alabama.*— Powell *v.* Crawford, 110 Ala. 294, 18 So. 302.

Colorado.— Moffat *v.* Dickson, 3 Colo. 313.

Georgia.— Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84.

Illinois.— Merriwether *v.* Gregory, 3 Ill. 50; Morehouse *v.* Fowler, 69 Ill. App. 50.

alleged by plaintiff.[62] It should fairly apprise plaintiff of the facts relied on as a defense.[63] The practice in some jurisdictions requires special pleas to be accompanied by certificates of counsel that they are well founded.[64]

b. Confession or Giving Color. The plea of confession and avoidance, or of new matter, should confess as well as avoid. This confession, arising from an express or implied admission, is termed giving color, and no special plea which does not give color to plaintiff's right is deemed good;[65] and the requirement of an express or implied admission is the same under the codes as at common law.[66] An affirmative defense in the nature of a plea in confession and avoidance, which

Indiana.—Winstandley *v.* Rariden, 110 Ind. 140, 11 N. E. 15.

Louisiana.— Chase *v.* New Orleans Gas Light Co., 45 La. Ann. 300, 12 S. E. 308.

New York.— Van Ness *v.* Hamilton, 19 Johns. 349; Speneer *v.* Southwiek, 9 Johns. 314.

Pennsylvania.— Bakes *v.* Reese, 150 Pa. St. 44, 24 Atl. 634; Strawn *v.* Park, 1 Phila. 178.

Texas.— Henry *v.* McCardell, 15 Tex. Civ. App. 497, 40 S. W. 172.

Washington.— Roeder *v.* Brown, 1 Wash. Terr. 112.

Wisconsin.— Lightfoot *v.* Cole, 1 Wis. 26.

England.— Benham *v.* Mornington, 3 C. B. 133, 4 D. & L. 213, 10 Jur. 618, 15 L. J. C. P. 221, 54 E. C. L. 133.

Canada.— Upper Canada Trust, etc., Co. *v.* Hamilton, 7 U. C. C. P. 98; Murray *v.* Mountjoy, 4 U. C. C. P. 169; Hamer *v.* Laing, 13 U. C. Q. B. 233.

While the code abolished all technical rules of pleading it did not abolish those dictated by good sense and neeessary to earry into effeet its own provisions; and therefore the facts relied on as a defense must be set forth with so mueh eertainty as to enable the court to say that, if true, they eonstitute a bar to the aetion. Gihon *v.* Levy, 2 Duer (N. Y.) 176.

62. Tojo *v.* Illinois, etc., Bridge Co., 13 Ill. App. 589; Pyle *v.* Peyton, 146 Ind. 90, 44 N. E. 925; Shauver *v.* Phillips, 7 Ind. App. 12, 34 N. E. 450; Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905.

63. Ahren *v.* Willis, 6 Fla. 359; Chase *v.* New Orleans Gas Light Co., 45 La. Ann. 300, 12 So. 308; Hivert *v.* Laeaze, 3 Rob. (La.) 357; MeKinnon *v.* McIntosh, 98 N. C. 89, 3 S. E. 840.

A defense based upon a contract must set forth the terms of the eontraet. Hart *v.* Phenix Ins. Co., 113 Ga. 859, 39 S. E. 304.

64. Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,674, 9 Blatehf. 513.

65. *Illinois.*— Wiley *v.* National Wall Paper Co., 70 Ill. App. 543.

New Jersey.— Willets Mfg. Co. *v.* Mercer County, 60 N. J. L. 29, 37 Atl. 609.

Vermont.— Blood *v.* Adams, 33 Vt. 52.

United States.— Dibble *v.* Duncan, 7 Fed. Cas. No. 3,880, 2 MeLean 553; Halstead *v.* Lyon, 11 Fed. Cas. No. 5,968, 2 McLean 226.

England.— Fillieul *v.* Armstrong, 7 A. & E. 557, 1 Jur. 921, 7 L. J. Q. B. 7, 2 N. & P. 406, W. W. & D. 616, 34 E. C. L. 298.

Canada.—Driseoll *v.* Barker, 18 N. Brunsw. 407; Monaghan *v.* Hayes, 4 U. C. C. P. 1; Millard *v.* Kirkpatriek, 4 U. C. Q. B. 248.

But see Taylor *v.* Riehards, 9 Bosw. (N. Y.) 679, where the eourt said that a defendant, in order to avoid, need not eonfess, but the eourt was merely diseussing inconsistent defenses and referred to the right to deny in one defense and avoid in another.

Express color was one of the eurious subtilties belonging to the aneient system of eommon-law pleading. It was used in cases where, from the nature of the defense, there was no implied eolor, was a bare matter of form, was not traversable and served merely to save the plea from amounting to the general issue so as to draw the question upon the substantial parts of the plea from the jury to the court, by compelling plaintiff to demur. Collet *v.* Flinn, 5 Cow. (N. Y.) 466, and note.

66. *Indiana.*— Cooper *v.* Smith, 119 Ind. 313, 21 N. E. 887.

Iowa.— Jaekson *v.* Steamboat Roek Independent Sehool Dist., 110 Iowa 313, 81 N. W. 596; Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712; Morgan *v.* Hawkeye Ins. Co., 37 Iowa 359; Anson *v.* Dwight, 18 Iowa 241.

Montana.— Mauldin *v.* Ball, 5 Mont. 96, 1 Pae. 409.

New York.—Arthur *v.* Brooks, 14 Barb. 533.

Oklahoma.— Merten *v.* San Angelo Nat. Bank, 5 Okla. 585, 49 Pae. 913.

Implied confession.— In Mauldin *v.* Ball, 5 Mont. 96, 100, 1 Pae. 409, the eourt said: "The defense of new matter eontains no denials. It admits that the allegations of the eomplaint are true, and sets up new facts to modify or defeat them. Says Pomeroy (Rem. & Rem. Rights, see. 687): 'A defense of new matter, on the other hand, does not deny any faets. It assumes the averments of the complaint or petition to be true; and, under the aneient system, a plea of confession and avoidanee must give color to thosc averments, or it would be fatally defeetive. The "giving color" was simply the absenee of any denials, and the express or silent admission that the deelaration, as far as it went, told the truth.' . . . And so it may be said generally, that the defense of new matter, neeessarily, either expressly or by implication, admits the averments of the eomplaint, and alleges faets that destroy their effect or defeat them. If what is alleged

contains merely hypothetical admissions, is bad.[67] Thus a plea averring that "the several causes of action, &c., if any such there were, or still are, did not accrue," etc., is bad for not giving color;[68] and so also is a plea referring to the cause of action alleged as the "said supposed" debt, "if any such there be";[69] but a plea merely using the term "supposed," in reference to the causes of action alleged, is good.[70]

c. Avoidance. A plea in confession and avoidance or, as it is frequently called, a special plea, must set up matter which, if true, affords a full and complete answer to the action.[71] A plea which confesses without avoiding is bad,[72] and if the truth of the plea may be admitted and the action is still maintainable, the plea is bad.[73] The avoidance must be as broad as the confession.[74] The general rule is that affirmative matter must go to avoid the cause of action and not simply to the amount,[75] or in mitigation of[76] damages, although in some jurisdictions it is held that under the codes matter in mitigation may be set up as a partial defense.[77] Matter in avoidance should consist of facts, not legal conclusions,[78] nor matters

amounts to a denial, it is not new matter; nor is it new matter if the facts alleged might have been proven under a denial."

67. Goodman *v.* Robb, 41 Hun (N. Y.) 605; Saleeby *v.* New Jersey Cent. R. Co., 40 Misc. (N. Y.) 269, 81 N. Y. Suppl. 903. But *compare* Wiley *v.* Rouse's Point, 86 Hun (N. Y.) 495, 33 N. Y. Suppl. 773; Taylor *v.* Richards, 9 Bosw. (N. Y.) 679.

68. Conger *v.* Johnston, 2 Den. (N. Y.) 96. See Bacon *v.* Johns, 6 N. Brunsw. 257, respecting a very similar averment.

69. Margetts *v.* Bays, 4 A. & E. 489, 5 L. J. K. B. 105, 6 N. & M. 228, 31 E. C. L. 223. *Contra*, Burrowes *v.* De Blaquiere, 34 U. C. Q. B. 498.

70. Eavestaff *v.* Russell, 10 M. & W. 365. *Contra*, Perdue *v.* Chinguacousy, 25 U. C. Q. B. 61.

71. *Alabama.*— Roland *v.* Logan, 18 Ala. 307.

Georgia.— Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84.

Kentucky.— Owensboro, etc., R. Co. *v.* Harrison, 94 Ky. 408, 22 S. W. 545, 15 Ky. L. Rep. 316.

Maryland.— Glenn *v.* Williams, 60 Md. 93.

New York.— Eells *v.* Du Mary, 84 N. Y. App. Div. 105, 82 N. Y. Suppl. 531; Carter *v.* Koezley, 9 Bosw. 583; Saleeby *v.* New Jersey Cent. R. Co., 40 Misc. 269, 81 N. Y. Suppl. 903; Hollister *v.* Kolb, 12 N. Y. Suppl. 613.

South Carolina.— Hughey *v.* Kellar, 34 S. C. 268, 13 S. E. 475; Lynch *v.* Withers, 2 Bay 115.

United States.— Mitchell *v.* Clark, 110 U. S. 633, 4 S. Ct. 170, 28 L. ed. 279.

72. Walter *v.* Hartwig, 106 Ind. 123, 6 N. E. 5; Barnard *v.* Lawyers' Title Ins. Co., 45 Misc. (N. Y.) 577, 91 N. Y. Suppl. 41; Sargeant *v.* Downey, 49 Wis. 524, 5 N. W. 903; Shields *v.* Peak, 8 Can. Sup. Ct. 579. See also McMahon *v.* Berton, 6 N. Brunsw. 706.

Where a special plea is filed in short by consent, such consent is only a waiver of the form and not of the right to have the matter of defense substantially specified. Pollard *v.* Stanton, 5 Ala. 451; Gayle *v.* Randle, 4 Port. (Ala.) 232.

73. Ladd *v.* Stevenson, 1 Cal. 18; Curtis *v.* Central R. Co., 6 Fed. Cas. No. 3,501, 6 McLean 401; Smith *v.* Ely, 22 Fed. Cas. No. 13,043, Fish. Pat. Rep. 339, 5 McLean 76; Atty.-Gen. *v.* Page, 3 Nova Scotia 262.

74. Hathorn *v.* Congress Spring Co., 44 Hun (N. Y.) 608; Strawn *v.* Park, 1 Phila. (Pa.) 178.

75. Keith *v.* New York Cent. R. Co., 2 Ohio Dec. (Reprint) 125, 1 West. L. Month. 451; King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1.

76. Hopple *v.* Higbee, 23 N. J. L. 342; Smith *v.* Waite, 7 How. Pr. (N. Y.) 227; Joy *v.* Hull, 4 Vt. 455, 24 Am. Dec. 625; Wood *v.* Durham, 21 Q. B. D. 501, 57 L. J. Ch. 547, 59 L. T. Rep. N. S. 142, 37 Wkly. Rep. 222.

A special plea in bar, which contains such matter only as should mitigate the damages, is bad on demurrer. Pope *v.* Davidson, 5 J. J. Marsh. (Ky.) 400.

In action for libel or slander see LIBEL AND SLANDER, 25 Cyc. 476.

77. McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403; Pursley *v.* Bennett, 11 Ont. Pr. 64. But *compare* Allis *v.* Nanson, 41 Ind. 154; Smith *v.* Lisher, 23 Ind. 500; Herr *v.* Bamberg, 10 How. Pr. (N. Y.) 128; Weatherbe *v.* Whitney, 30 Nova Scotia 49.

Partial defenses generally see *supra*, IV, A, 5.

78. *Alabama.*—Rodgers *v.* Brazeale, 34 Ala. 512; Reid *v.* Nash, 23 Ala. 733; Hardy *v.* Montgomery Branch Bank, 15 Ala. 722; McKeagg *v.* Collehan, 13 Ala. 828; Mabry *v.* Herndon, 8 Ala. 848.

Arkansas.— Edwards *v.* State, 22 Ark. 303.

California.— McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53.

Georgia.— Graham *v.* Marks, 98 Ga. 67, 25 S. E. 931.

Illinois.— Supreme Lodge K. P. *v.* McLennan, 69 Ill. App. 599.

Indiana.— Kern *v.* Hazlerigg, 11 Ind. 443, 71 Am. Dec. 360; Scott *v.* Brokaw, 6 Blackf. 241.

of evidence.[79] It is sufficient for a defendant to allege facts which constitute a defense, and he is not required to anticipate matter in avoidance of his own allegations.[80]

d. Allegations on Information and Belief. Facts in a plea in confession and avoidance should be alleged positively. It is not in the absence of statute sufficient to allege that defendant is informed and believes that they are true.[81] But under the code practice it has been held that affirmative matter in an answer may be alleged on information and belief with the same effect as in a complaint.[82]

2. New Matter Under the Codes — a. General Rule. The ordinary provision of the codes is that the answer may contain a statement of any new matter constituting a defense.[83] A defense cannot be of facts that may be proved under a general denial, but it must consist of new matter.[84] The answers by way of new matter authorized by the codes are substantially the same as the common-law pleas in confession and avoidance.[85] New matter must always be specially pleaded,[86] except where plaintiff's own proof shows such a defense.[87] The common provision of the codes is that the new matter alleged in the answer should be stated in ordinary and concise language, without repetition.[88] But it should be as full and complete in substance as a special plea at common law,[89] and the facts must be set out with the same precision as the facts in a complaint.[90] Uncertainty, however, may be waived by the failure of plaintiff to file a motion against the answer.[91]

Kentucky.— Jones *v.* Tennessee Bank, 8 B. Mon. 122, 46 Am. Dec. 540; Harrison *v.* Wilson, 2 A. K. Marsh. 547.

Maine.— Bradbury *v.* Tarbox, 95 Me. 519, 50 Atl. 710.

Missouri.— Thomas *v.* Van Doren, 6 Mo. 201.

Pennsylvania.— Weed *v.* Hill, 2 Miles 122.

Rhode Island.— Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649.

Wisconsin.— Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 5 Wis. 173.

United States.—Phinney *v.* New York Mut. L. Ins. Co., 67 Fed. 493.

79. Boyden *v.* Fitchburg R. Co., 70 Vt. 125, 39 Atl. 771; Reg. *v.* Grenier, 6 Quebec Q. B. 31.

80. Grum *v.* Barney, 55 Cal. 254; Lutz *v.* Pender Nat. Bank, 73 Nebr. 314, 102 N. W. 673; Larson *v.* Pender First Nat. Bank, 66 Nebr. 595, 92 N. W. 729.

81. Wright *v.* Evans, 53 Ala. 103; State *v.* Tuffts, 28 Ark. 502.

82. Risdon *v.* Davenport, 4 S. D. 555, 57 N. W. 482.

83. See the codes of the several states.

84. Frank *v.* Miller, 116 N. Y. App. Div. 855, 102 N. Y. Suppl. 277; Cruikshank *v.* Press Pub. Co., 32 Misc. (N. Y.) 152, 65 N. Y. Suppl. 678 [*affirmed* in 59 N. Y. App. Div. 620, 69 N. Y. Suppl. 1133].

Mingling denials and defenses see *supra*, IV, A, 7, d, (II), (B).

Pleading matter equivalent to general denial see *supra*, IV, A, 7, f.

85. *California.*— Coles *v.* Soulsby, 21 Cal. 47.

Indiana.— Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843. See also Crum *v.* Ynndt, 12 Ind. App. 308, 40 N. E. 79.

Iowa.— Staten *v.* Hammer, 121 Iowa 499, 96 N. W. 964.

Kansas.— De Lissa *v.* Fuller Coal, etc., Co., 59 Kan. 319, 52 Pac. 886.

Minnesota.— Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Bond *v.* Corbett, 2 Minn. 248.

Missouri.— State *v.* Williams, 48 Mo. 210.

Ohio.— Evans *v.* Cricket, 2 Ohio Dec. (Reprint) 404, 2 West. L. Month. 603; Corrigan *v.* Rockefeller, 8 Ohio S. & C. Pl. Dec. 14, 5 Ohio N. P. 338.

86. *California.*— Coles *v.* Soulsby, 21 Cal. 47; Terry *v.* Sickles, 13 Cal. 427.

Missouri.— England *v.* Denham, 93 Mo. App. 13.

Nebraska.— Medland *v.* Connell, 57 Nebr. 10, 77 N. W. 437; Atchison, etc., R. Co. *v.* Washburn, 5 Nebr. 117.

New York.— Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396; Cooley *v.* New York, 85 N. Y. App. Div. 107, 82 N. Y. Suppl. 1067; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468 [*reversed* on other grounds in 14 N. Y. 85]; Hopkins *v.* Ensign, 11 N. Y. St. 85.

Texas.— McCartney *v.* Martin, 1 Tex. Unrep. Cas. 143.

Washington.— Meeker *v.* Wren, 1 Wash. Terr. 73.

87. Alfriend *v.* Hughes, 4 Bush (Ky.) 40.

88. See the statutes in the various code states. And see Ludlow *v.* Woodward, 117 N. Y. App. Div. 525, 102 N. Y. Suppl. 647.

Defenses may be pleaded in the alternative if each alternative constitutes a complete defense. Beall *v.* January, 62 Mo. 434. See also Peyman *v.* Bowery Bank, 14 N. Y. App. Div. 432, 43 N. Y. Suppl. 826, holding that a plea alleging two facts in the alternative is good, if either constitutes a defense.

89. Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229.

90. Meeker *v.* Wren, 1 Wash. Terr. 73.

91. Florence Oil, etc., Co. *v.* Farrar, 109

b. What May Be Pleaded [92]— (i) *In General.* New matter means matter extrinsic to the matter which is set up in the complaint as the basis of the cause of action.[93] Hence, where facts are alleged in the complaint which are not germane to the relief asked, they are not thereby divested of their character as new matter should defendant wish to use them as a defense.[94] It is improper to set out evidence, or mere presumptions of facts.[95]

(ii) *Lack of Interest in Suit.* A defense that plaintiff is not the real party in interest and hence has no right to sue must be specially pleaded in bar.[96] Such matter cannot be pleaded in abatement.[97] An allegation that plaintiff is not the real party in interest must set forth the facts showing such to be the case.[98] An averment that a plaintiff is improperly joined because of lack of interest should point out specifically the defect relied upon.[99] The answer must state the facts showing that plaintiff is not the real party in interest,[1] and must show who is the proper party.[2] Evidence that plaintiff is not the real party in interest cannot be given under a general denial,[3] unless the case is one in which the facts showing interest must be established as an essential element of the cause of action.[4]

(iii) *Lack of Capacity or Authority to Sue.* A want of legal capacity to sue, which does not affirmatively appear from the pleadings, should be presented by answer.[5] But an objection that the suit was begun and prosecuted without authority of plaintiff cannot be urged by answer.[6] An allegation that plaintiff is not the real party in interest does not present his lack of legal capacity.[7] Defendant cannot abate a suit properly brought against him by afterward creating a state of facts against the ability of plaintiff to sue.[8]

Fed. 254, 48 C. C. A. 345. See, generally, *infra*, XIV, B, 2.

92. Responsiveness see *supra*, IV, A, 8.

93. Barker *v.* Wheeler, 62 Nebr. 150, 87 N. W. 20; Manning *v.* Winter, 7 Hun (N. Y.) 482; Stoddard *v.* Onondaga Annual Conference M. E. Church, 12 Barb. (N. Y.) 573. See also Swan Lamp Mfg. Co. *v.* Brush-Swan Electric Light Co., 61 N. Y. Super. Ct. 11, 18 N. Y. Suppl. 869. In Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 73, 1 West. L. Month. 317, the court said: "The true construction to be put upon the Code, sec. 92, sec. 85, is, that 'new matter' shall comprehend every fact not appearing in the petition, which defeats the action, and which the plaintiff is not required to prove to make out his case, whether such fact existed concurrently with, or arose subsequent to, the alleged cause of action."

Failure to file a copy of an account sued on cannot be raised by answer. Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444.

94. Petrakion *v.* Arbeely, 26 N. Y. Suppl. 731, 23 N. Y. Civ. Proc. 183.

95. Pattison *v.* Taylor, 8 Barb. (N. Y.) 250; Mackenzie *v.* Davidson, 27 U. C. C. P. 188.

96. Bowser *v.* Mattler, 137 Ind. 649, 35 N. E. 701, 36 N. E. 714; Mathis *v.* Thomas, 101 Ind. 119; Curtis *v.* Gooding, 99 Ind. 45.

97. State *v.* Ruhlman, 111 Ind. 17, 11 N. E. 793; Morningstar *v.* Cunningham, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211.

98. Dryden *v.* Sewell, 2 Alaska 182; Wenk *v.* New York, 82 N. Y. App. Div. 584, 81 N. Y. Suppl. 583, 75 N. Y. Suppl. 1135.

99. Clark *v.* Aldrich, 4 N. Y. App. Div. 523, 40 N. Y. Suppl. 440.

1. Raymond *v.* Pritchard, 24 Ind. 318; Garrison *v.* Clark, 11 Ind. 309; Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316; Hammond *v.* Earle, 58 How. Pr. (N. Y.) 426; Russell *v.* Clapp, 4 How. Pr. (N. Y.) 347; Bentley *v.* Jones, 4 How. Pr. (N. Y.) 202.

2. Smith *v.* State Bank, 18 Ind. 327. See also Garrison *v.* Clark, 11 Ind. 369.

3. Owen *v.* Sell, 13 Misc. (N. Y.) 272, 34 N. Y. Suppl. 176.

4. Owen *v.* Sell, 13 Misc. (N. Y.) 272, 34 N. Y. Suppl. 176.

5. Petty *v.* Malier, 14 B. Mon. (Ky.) 246; Independent Trembowler Young Men's Benev. Assoc. *v.* Somach, 52 Misc. (N. Y.) 538, 102 N. Y. Suppl. 495.

6. Turner *v.* Caruthers, 17 Cal. 431 (holding that if the attorney appearing in a suit has not been authorized by plaintiffs to prosecute it, defendant upon proper affidavits should move for dismissal on the ground that the nominal plaintiffs have not authorized the suit; and if the attorney after notice of such motion failed to show his authority the case may be dismissed; but that a mere suggestion of this objection by the adverse party in the courts of trial should be disregarded); Hall *v.* Southwick, 27 Minn. 234, 6 N. W. 799; Robinson *v.* Robinson, 32 Mo. App. 88; North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171; New York Excise Com'rs *v.* Purdy, 13 Abb. Pr. (N. Y.) 434, 22 How. Pr. 312.

7. Van Zandt *v.* Grant, 67 N. Y. App. Div. 70, 73 N. Y. Suppl. 600 [*affirmed* in 175 N. Y. 150, 67 N. E. 221].

8. Tippecanoe County *v.* Lafayette, etc., R. Co., 50 Ind. 85.

(iv) *Misnomer.* Under the codes a misnomer may be set up as a defense[9] and the correct name alleged.[10] Where a misnomer is pleaded in abatement the court may order the correct name to be substituted in all subsequent proceedings.[11]

(v) *Defect of Parties.* A defect of parties not apparent on the face of the complaint should be taken advantage of by answer.[12] But a defect of parties appearing on the face of the complaint cannot be taken advantage of by answer,[13] but must be urged by demurrer.[14] While it has been held that the objection that there is a defect of parties should be taken advantage of by a separate answer and not united in a general answer with matter in bar,[15] the rule usually adopted under the code provision, that the answer may set forth as many grounds of defense as defendant shall have,[16] is that the non-joinder of a party may be pleaded together with matter in bar.[17] The objection that there is a defect of parties must be presented in the answer in a clear and distinct manner.[18] In analogy to a plea in abatement which must be so specific as to omitted parties as to give plaintiff a better writ,[19] an answer setting up a defect of parties must state the omitted parties precisely and truly,[20] and facts should be alleged showing that they

9. White *v.* Miller, 7 Hun (N. Y.) 427 [*reversed* on other grounds in 71 N. Y. 118, 27 Am. Rep. 13]. *Compare* Elliott *v.* Hart, 7 How. Pr. (N. Y.) 25.

10. White *v.* Miller, 7 Hun (N. Y.) 427 [*reversed* on other grounds in 71 N. Y. 118, 27 Am. Rep. 13].

11. Arbuckle *v.* Bowman, 6 Iowa 70.

12. *California.*— Whitney *v.* Stark, 8 Cal. 514, 68 Am. Dec. 360.

Iowa.— McCormiek *v.* Blossom, 40 Iowa 256; Enders *v.* Beek, 18 Iowa 86.

Kentucky.— Johnson *v.* Chandler, 15 B. Mon. 584.

Missouri.— Markwell *v.* Markwell, 157 Mo. 326, 57 S. W. 1078.

Nebraska.— Maurer *v.* Miday, 25 Nebr. 575, 41 N. W. 395.

Nevada.— Mandlebaum *v.* Russell, 4 Nev. 551.

New York.— Mitehell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. Rep. 699; Haines *v.* Hollister, 64 N. Y. 1; Gibson *v.* Blakley, 85 Hun 305, 32 N. Y. Suppl. 1005; Anderton *v.* Wolf, 41 Hun 571; Risley *v.* Wightman, 13 Hun 163; Wooster *v.* Chamberlin, 28 Barb. 602; Kugelman *v.* Hirsehman, 22 Mise. 533, 49 N. Y. Suppl. 1012 [*affirmed* in 53 N. Y. Suppl. 1107]; Leavitt *v.* Dodge, 16 N. Y. Suppl. 309; Kutz *v.* Riehards, 16 N. Y. Suppl. 99; Botsford *v.* Dodge, 65 How. Pr. 145; Ripple *v.* Gilborn, 8 How. Pr. 456; State *v.* Woran, 6 Hill 33, 40 Am. Dec. 378.

South Carolina.— Lee *v.* Unkefer, 77 S. C. 460, 58 S. E. 343.

Separate answers for each omitted defendant.— Where a plea in abatement alleges that three persons named are neeessary parties, and sets out the same defense for eaeh, it is not neeessary to state in separate answers the plea as to eaeh of said parties. Door County *v.* Keogh, 77 Wis. 24, 45 N. W. 937.

13. *California.*— Andrews *v.* Mokelumne Hill Co., 7 Cal. 330.

Indiana.— Cox *v.* Bird, 65 Ind. 227; Clough *v.* Thomas, 53 Ind. 24; Alexander *v.* Gaar, 15 Ind. 89.

Iowa.— McCormiek *v.* Blossom, 40 Iowa 256.

Minnesota.— Lowry *v.* Harris, 12 Minn. 255.

Missouri.— Walker *v.* Deaver, 79 Mo. 664; Devers *v.* Howard, 88 Mo. App. 253.

New York.— Rhodes *v.* Dymoek, 33 N. Y. Super. Ct. 141; Stelling *v.* Grabowsky, 19 N. Y. Suppl. 280; Matthews *v.* Stietz, 5 N. Y. Civ. Proc. 235; Cunningham *v.* White, 45 How. Pr. 486.

North Carolina.— Lunn *v.* Shermer, 93 N. C. 164.

14. See *infra*, VI, F, 2, e, (i).

15. Van Buskirk *v.* Roberts, 14 How. Pr. (N. Y.) 61; King *v.* Vanderbilt, 7 How. Pr. (N. Y.) 385.

16. See the eodes of the several states.

17. Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Wooster *v.* Chamberlain, 28 Barb. (N. Y.) 602; Bridge *v.* Payson, 5 Sandf. (N. Y.) 210; Coddington *v.* Union Trust Co., 36 Mise. (N. Y.) 396, 73 N. Y. Suppl. 710; Mayhew *v.* Robinson, 10 How. Pr. (N. Y.) 162; Sweet *v.* Tuttle, 10 How. Pr. (N. Y.) 40 [*affirmed* in 14 N. Y. 564].

18. Hawkins *v.* Mapes-Reeves Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794 [*affirmed* in 178 N. Y. 236, 70 N. Y. Suppl. 783]; Bevier *v.* Dillingham, 18 Wis. 529, holding that where a defendant merely alleges in his answer faets whieh show that some other defendant should be joined as a defendant, but does not ask to have him so joined, nor objeet to the further proseeution of the suit on aeeount of the non-joinder, he eannot afterward object to a judgment against himself in the aetion on the ground of such non-joinder.

19. See *supra*, IV, B, 5, c, (iii).

20. Shoekley *v.* Fiseher, 21 Mo. App. 551; Weigand *v.* Sichel, 4 Abb. Dec. (N. Y.) 592, 3 Keyes 120, 33 How. Pr. 174 [*affirming* 34 Barb. 84]; Humbert *v.* Abeel, 7 N. Y. Civ. Proe. 417.

Persons unknown to defendant.—An answer pleading a non-joinder of parties defendant, which sets out that certain parties whose names are stated, and certain others

are necessary parties.[21] It must be alleged that omitted defendants are living and within the jurisdiction of the court.[22] So an answer setting up a non-joinder of plaintiffs must distinctly set up such defense and specifically show wherein the defect consists and who should have been joined as parties.[23] An issue of fact raised by an answer setting up a defect of parties is to be determined as other fact issues.[24] It is not necessary, in order to sustain an averment that certain necessary plaintiffs are omitted, to show that all the persons named in the averment are parties in interest.[25] Under the rule that all defenses whether in abatement or in bar are to be pleaded in the same answer,[26] a plea in abatement for the non-joinder of a joint promisor will not necessitate the abatement of the entire action, where it is true only as to one item of an account sued on.[27]

(VI) *MISJOINDER.* As a general rule, under the codes, the proper remedy for a misjoinder is a motion to strike out the parties improperly joined.[28] A misjoinder of plaintiffs, which does not appear on the face of the complaint, may be urged by answer.[29] But a misjoinder of parties defendant is not new matter constituting a defense which may be so presented.[30] It is not sufficient that an answer show a misjoinder exists, but the fact must be specifically presented as an objection.[31] Under a statute requiring the objection that there is an unnecessary party plaintiff to be raised by answer, when not apparent on the face of the complaint, a general denial is not sufficient to raise the objection,[32] nor can the question be urged on a general demurrer to the evidence.[33]

E. Set-Off, Counter-Claim, and Cross Complaint[34] — 1. In General. While there is some conflict with regard to the matter of recoupment,[35] it seems

whose names are alleged to be unknown to defendant answering, but who are living and residents of the county in which the action was brought, and known to plaintiff, are jointly liable and should have been made parties defendant, is insufficient because it does not state the names of all the persons who should have been made parties. Humbert *v.* Abeel, 7 N. Y. Civ. Proc. 417.

21. Hawkins *v.* Mapes-Reeve Constr. Co., 178 N. Y. 236, 70 N. E. 783; Swift *v.* Washington Bank, 114 Fed. 643, 52 C. C. A. 339.

22. Parmer *v.* Field, 76 Hun (N. Y.) 229, 27 N. Y. Suppl. 736; Holt *v.* Streeter, 74 Hun (N. Y.) 538, 26 N. Y. Suppl. 843. *Contra,* Prosser *v.* Matthiessen, 26 Hun (N. Y.) 527, 63 How. Pr. 157.

Sufficiency of allegation.—An answer setting up the non-joinder of third persons averred to be jointly liable with defendants sufficiently alleges that they are still living, if it alleges that they reside at a place named. Taylor *v.* Richards, 9 Bosw. (N. Y.) 679.

23. Davis *v.* Chouteau, 32 Minn. 548, 21 N. W. 748.

24. Enders *v.* Beck, 18 Iowa 86 (holding that the court cannot dispose of it on motion, after a part of the evidence has been taken); Wyckoff *v.* Anthony, 9 Daly (N. Y.) 417.

25. Fowler *v.* Atlantic Mut. Ins. Co., 8 Bosw. (N. Y.) 322, holding that the defect in proof in not showing that all of those named are parties in interest presents a case of variance only which may be disregarded unless plaintiff has been misled.

26. Bond *v.* Wagner, 28 Ind. 462. See Thompson *v.* Greenwood, 28 Ind. 327.

27. Bond *v.* Wagner, 28 Ind. 462.

28. See *infra,* XII, F.

29. Moody *v.* Newmark, (Cal. 1897) 50 Pac. 758; South Fork, etc., Canal Co. *v.* Snow, 49 Cal. 155; Gillam *v.* Sigman, 29 Cal. 637; Jacks *v.* Cooke, 6 Cal. 164; Anderson *v.* McPike, 41 Mo. App. 328; Ensign *v.* Ensign, 14 N. Y. St. 181.

Demurrer because of misjoinder see *infra,* VI, F, 2, e, (II).

30. Adams *v.* Slingerland, 87 N. Y. App. Div. 312, 84 N. Y. Suppl. 323 [*modifying* 39 Misc. 638, 80 N. Y. Suppl. 635].

31. Donahue *v.* Bragg, 49 Mo. App. 273.

32. Mills *v.* Carthage, 31 Mo. App. 141.

33. Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077.

34. **Admissions by pleading** see Recoupment, Set-Off, and Counter-Claim.

Cross bills in equity see Equity, 16 Cyc. 324.

Dismissal by plaintiff after filing of set-off or counter-claim see Dismissal and Nonsuit, 14 Cyc. 470.

Distinctions between recoupment, set-off, and counter-claim see Recoupment, Set-Off, and Counter-Claim.

In actions before justice of the peace see Justices of the Peace, 24 Cyc. 562.

In admiralty see Admiralty, 1 Cyc. 864.

Judgment as bar to counter-claim not asserted see Judgments, 23 Cyc. 1202.

Notice of plea see *infra,* IV, E, 6, c.

On trial de novo on appeal from justice see Justices of the Peace, 24 Cyc. 732.

Operation and effect of pleading see Recoupment, Set-Off, and Counter-Claim.

Service see *infra,* XI, A.

Subject-matter see Recoupment, Set-Off, and Counter-Claim.

35. See *infra,* XIII, B, 4, m.

to be the accepted rule that a set-off or counter-claim [36] must be specially pleaded.[37] Under the codes it is usually expressly provided that new matter by way of counter-claim may be set up in the answer.[38] The matter by way of counter-claim so provided for is usually regarded as including both recoupment and set-off.[39] Under some codes, in case affirmative relief is sought, the pleading is designated a cross complaint, even where used merely by defendant against a plaintiff.[40] Such a cross complaint is properly part of the answer.[41] The general doctrine relating to equitable defenses in legal actions applies to equitable cross demands, and under the code the latter may be availed of in actions at law.[42] The limitations placed by the statute upon the right to file a counter-claim are liberally construed where equitable rights are in controversy, and the statute will not be deemed to narrow the practice as it formerly existed in equity, unless such a construction is clearly and unavoidably necessary.[43]

36. See *infra*, XIII, B, 4, m.

As a plea in bar.— Matter of set-off may be pleaded in bar (Meriwether *v.* Bird, 9 Ga. 594), although this rule has been limited to cases in which the sum set up is equivalent to plaintiff's demand (McDowell *v.* Tate, 12 N. C. 249, where it is said that if the amount of the set-off is less than the demand it must be availed of by annexing it to some plea which, with the sum set off, amounts to a full defense, and giving notice of set-off).

Under plea of payment.— It is sometimes provided by statute that the benefit of the plea of set-off may be had under the plea of payment. Houston *v.* Smith, 2 Sm. & M. (Miss.) 597.

37. Matter which may be pleaded see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

38. See the codes of the several states.

As a defense.— While, strictly speaking, set-off is not a defense at all, but in the nature of a cross action, it may be designated by statute as a defense and a form prescribed for the plea bringing it forward, although it may not in a given case go to the whole action or rather to the whole amount claimed. Tutwiler *v.* McCarty, 121 Ala. 356, 25 So. 828.

39. Christy *v.* Arnold, 4 Ariz. 263, 36 Pac. 918; St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876; Wilder *v.* Boynton, 63 Barb. (N. Y.) 547.

In England.— In the case of Gathercole *v.* Smith, 7 Q. B. D. 626, 45 J. P. 812, 50 L. J. Q. B. 681, 45 L. T. Rep. N. S. 106, 29 Wkly. Rep. 577, the judges were not in accord as to the relation between set-off and counter-claim. Lord Bramwell thought they were identical. But Lord Bagallay and Lord Lush thought there was a difference between them and held that a set-off was defensive merely, while a counter-claim called for affirmative relief.

Some codes distinguish between set-off and counter-claim, the set-off being confined to demands arising upon contract and available in actions upon contract, the counter-claim embracing the other demands coming within the purview of the broader counter-claim in the other codes. Among the codes in which this distinction is made are: Sandels & H. Dig. Ark. § 5725; Burns Rev. St. Ind. (1901) § 351; Kan. Code (1901), § 98; Ky. Code (1900), § 96; Nebr. Code (1901), § 104; Bates St. Ohio (1903), § 5071; Okla. St. (1893) § 3976; Wis. St. (1898) §§ 4258–4264; Wyo. Rev. St. (1899) § 3548.

40. See the codes of the several states. And see Hall *v.* Cole, (Cal. 1894) 38 Pac. 894; Harrison *v.* McCormick, 69 Cal. 616, 11 Pac. 456; Hunter *v.* Porter, 10 Ida. 72, 86, 77 Pac. 434.

Among the codes in which such provision is found are Cal. Code Civ. Proc. § 442; Ida. Code Civ. Proc. (1901) § 3216; Wis. St. (1898) § 2656.

In case affirmative relief cannot be granted a cross complaint is demurrable where it sets out no facts other than appear elsewhere in the answer. Heilbron *v.* Kings River, etc., Canal Co., 76 Cal. 11, 17 Pac. 933.

41. Haslam *v.* Haslam, 19 Utah 1, 56 Pac. 243; Brighton, etc., Irr. Co. *v.* Little, 14 Utah 42, 46 Pac. 268.

42. Hicksville, etc., R. Co. *v.* Long Island R. Co., 48 Barb. (N. Y.) 355; Hatcher *v.* Briggs, 6 Oreg. 31.

Equitable defenses in actions at law see ACTIONS, 1 Cyc. 737.

No special pleading of facts entitling defendant to equitable relief is necessary, where it accrues as an incident to the action. They may be shown as part of the defense. McKay *v.* O'Neil, 22 Nova Scotia 346.

43. See Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534, 554, 42 N. E. 690, where the court said: "Section 5072, Revised Statutes, in defining a counterclaim seems to make the right of the defendant to recover a several judgment against the plaintiff, an essential characteristic thereof. Upon the peculiar language employed by that section to define a 'counterclaim,' an argument is founded in support of the contention of the plaintiff in error, which would narrow the equity powers of the courts of common pleas of the state to a degree seriously embarrassing their efficiency. If the position taken by plaintiff in error is well founded, the courts of the state would be precluded from listening to any claim asserted by a defendant, unless its character was such that the claimant would be entitled to a 'several judgment' against the plaintiff. . . . From the language of these two sections, alone, the

2. Cross Actions Against Co-Defendants or Third Persons[44] **— a. Right to Maintain.** A number of the codes make special provision for a cross complaint by a defendant against co-defendants or third persons and prescribe how defendants in such cross complaint shall be summoned.[45] Such a cross complaint is closely analogous to a cross bill in equity,[46] and is not embraced within the meaning of the term "counter-claim" as usually employed by the codes.[47] In the absence of such an express authorization, the practice of allowing cross complaints to be filed against co-defendants in analogy to the cross bill of the chancery practice has

contention of plaintiff in error is fairly plausible. But even if these two sections stood alone, it is doubtful if such contention should prevail. It would defeat one well understood purpose of the code of civil procedure, which was to prevent multiplicity of actions, and would absolutely abrogate the former jurisdiction in equity by which those courts administered complete justice between all the parties to an action, defendants as well as plaintiffs, respecting the subject matter thereof. These two sections, however, do not stand alone. . . . When all the provisions of the code of civil procedure are brought into view they clearly demonstrate a purpose to broaden the practice pertaining to the administration of justice as it existed before the code was adopted. . . . We find nothing in the code of civil procedure when considered as an entirety, that narrows the former power of a court of equity to fully adjudicate every question legitimately arising between the parties before it, respecting the subject matter of the action."

44. **Amendment of cross complaint** see *infra*, VII, A, 11, c, (II), (G).

45. See the codes of the several states. And see Ringo *v.* Woodruff, 43 Ark. 469; Mackenzie *v.* Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209; Winter *v.* McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Marriott *v.* Clise, 12 Colo. 561, 21 Pac. 909.

Illustrations of such provisions may be found in the following codes: Sandels & H. Dig. Ark. § 5712; Cal. Code Civ. Proc. § 442; Colo. Code (1880), § 57; Ida. Code Civ. Proc. § 3216; Iowa Code (1897), § 3574; Ky. Code (1900), § 96 (the cross petition in this state may be by a plaintiff against a co-plaintiff); N. Y. Code Civ. Proc. (1902) § 521 (providing for a mere demand for relief against co-defendant to be made in the answer, and a copy to be served on such co-defendant); Bates St. Ohio (1904), § 5069 (embraced within the counter-claim); Utah Rev. St. (1898) § 2974; Wis. St. (1898) § 2556*a*.

Distinction between complaint and cross complaint.— The only real difference between a complaint and a cross complaint is that the first is filed by plaintiff and the second by defendant; both contain a statement of facts, and each demands affirmative relief upon the facts stated. White *v.* Reagan, 32 Ark. 281.

Distinction between a counter-claim and cross complaint.— The difference between a counter-claim and a cross complaint is that in the counter-claim defendant's cause of action is against plaintiff, while in a cross complaint it is against a co-defendant or one not a party to the action. White *v.* Reagan, 32 Ark. 281.

A cross complaint to a complaint in intervention may be filed under such a provision. Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386.

Leave of court may be required for the filing of a cross petition, and the granting or withholding of such leave is within the court's discretion. Bullitt *v.* Eastern Kentucky Land Co., 79 S. W. 217, 25 Ky. L. Rep. 1954. Formal permission to file a cross complaint may be waived where it is regarded by the parties and the court as on file. Syvertson *v.* Butler, 3 Cal. App. 345, 85 Pac. 164.

Revocation of leave to file.— Like other orders, an order authorizing the filing of a cross complaint and the bringing in of new parties may, under a statutory provision relating to orders generally, be vacated or modified without notice to the judge who made it. Alpers *v.* Bliss, 145 Cal. 565, 79 Pac. 171.

Only defendants may take advantage of such a provision.—Cal. Code Civ. Proc. § 442, providing that when defendants seek affirmative relief relating to the contract upon which the action is brought, or affecting the property to which it relates, is primarily applicable to the person whom plaintiff has originally made defendant, and before any other person can take advantage of the statute he must have been made a defendant, and his cross complaint must be such as will warrant the court to order him brought in for the purpose of filing it. East Riverside Irr. Dist. *v.* Holcomb, 126 Cal. 315, 58 Pac. 817.

46. Allen *v.* Tritch, 5 Colo. 222. See Omro First Nat. Bank *v.* Frank, 131 Wis. 416, 111 N. W. 526, where it is said that a statute providing that the relief sought by a cross complaint must involve or in some manner affect the contract, transaction, or property, which is the subject-matter of the action, and that it may be relief against a co-defendant or defendants, or against a co-defendant or plaintiff, or a part of plaintiffs, is in effect an express recognition of the equitable practice relating to cross bills.

Cross bills in equity see Equity, 16 Cyc. 324.

47. Kollock *v.* Scribner, 98 Wis. 104, 73 N. W. 776; *In re* Milan Tramways Co., 22 Ch. D. 122, 52 L. J. Ch. 29, 48 L. T. Rep. N. S. 213, 31 Wkly. Rep. 107 [*affirmed* in 25 Ch. D. 587, 53 L. J. Ch. 1008, 50 L. T. Rep. N. S. 545, 32 Wkly. Rep. 601]; Furness *v.* Booth, 4 Ch. D. 586, 46 L. J. Ch. 112, 25 Wkly. Rep. 267. But see Shephard *v.* Beane,

been sanctioned by the courts in the code states generally as a means of effectuating the provision ordinarily made in the codes, that the judgment rendered may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.[48] A cross action by a defendant against a co-defendant or third party must be in reference to the claim made by plaintiff and based upon an adjustment of that claim. Independent and unrelated causes of action cannot be litigated by cross actions.[49] Under some statutes, while a counter-claim must exist in favor of defendant and against plaintiff, it may in other respects be broader in its scope than a cross complaint, which is restricted to matters which relate to or depend on the contract or transaction on which the main case is founded, or affect the property to which the action relates.[50] Under some statutes an equitable cross complaint in an action at law must state facts requiring the interposition of equity to grant relief.[51]

b. Bringing in New Parties. In analogy to the equity practice [52] new parties may be brought in upon cross complaint where they are necessary to the full determination of the rights of the parties then before the court, touching the matter in litigation, where proper relief cannot be given without their presence.[53] And in some cases the power to bring in such additional parties is held to arise independently of the equity practice from the provision of the codes, that when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in,[54] or may order a cross complaint to be filed and summons thereon to be issued and served.[55] Under such a statute the parties who may be brought in must be persons whose presence is essential to the complete determination of a controversy between parties who are already before the court.[56] One who by cross petition brings in a third person

2 Ch. D. 223, 45 L. J. Ch. 429, 24 Wkly. Rep. 363.

48. Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850; Hill *v.* Marsh, 46 Ind. 218; Fletcher *v.* Holmes, 25 Ind. 458; Hill *v.* Frink, 11 Wash. 562, 40 Pac. 128. *Compare* Darragh *v.* Rowe, 109 N. Y. App. Div. 560, 96 N. Y. Suppl. 666.

Affirmative relief to defendants see JUDGMENTS, 23 Cyc. 802.

Complete determination of issues see JUDGMENTS, 23 Cyc. 771.

Relief as between co-defendants see JUDGMENTS, 23 Cyc. 803.

49. *Arkansas.*— Hays *v.* McLain, 66 Ark. 400, 50 S. W. 1006.

California.— Goodell *v.* Verdugo Canon Water Co., 138 Cal. 308, 71 Pac. 354; Mackenzie *v.* Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209.

Colorado.— Cooper *v.* German Nat. Bank, 9 Colo. App. 169, 47 Pac. 1041, holding that a cross complaint, if allowable, must be against plaintiff, and that an original complaint against an outsider that in no way interposed the right to recover by plaintiff and interposed no defense could not be denominated a cross complaint.

Indiana.— Buscher *v.* Volz, 25 Ind. App. 400, 58 N. E. 269.

Kentucky.— See Brackett *v.* Boreing, 89 S. W. 496, 28 Ky. L. Rep. 386.

Louisiana.— See Lyons *v.* Fry, 112 La. 759, 36 So. 674.

Minnesota.— American Exch. Bank *v.* Davidson, 69 Minn. 319, 72 N. W. 129.

Missouri.— Joyce *v.* Growney, 154 Mo. 253, 55 S. W. 466.

New York.— Kay *v.* Whittaker, 44 N. Y. 565; Bliss *v.* Winters, 40 N. Y. App. Div. 622, 57 N. Y. Suppl. 986; New York L. Ins., etc., Co. *v.* Cuthbert, 87 Hun 339, 34 N. Y. Suppl. 300 [*affirmed* in 148 N. Y. 742, 42 N. E. 1093]; Smith *v.* Hilton, 50 Hun 236, 2 N. Y. Suppl. 820; Bliss *v.* Winters, 26 Misc. 38, 56 N. Y. Suppl. 362.

Texas.— Garrett *v.* Robinson, (Civ. App. 1897) 43 S. W. 288, holding that defendant in an action on a note by an indorsee cannot by cross bill claim that the indorser was still the owner of it and ask to have him substituted as a party plaintiff.

Washington.— Hill *v.* Frink, 11 Wash. 562, 40 Pac. 128.

50. Hunter *v.* Porter, 10 Ida. 72, 86, 77 Pac. 434.

51. Scheiffelin *v.* Weatherred, 19 Oreg. 172, 23 Pac. 898.

52. See EQUITY, 16 Cyc. 329.

53. Lewis *v.* Fox, 122 Cal. 244, 54 Pac. 823; Allen *v.* Tritch, 5 Colo. 222. See also Winter *v.* McMilan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243.

54. Allen *v.* Tritch, 5 Colo. 222; Chalmers *v.* Trent, 11 Utah 88, 39 Pac. 488.

55. Alpers *v.* Bliss, 145 Cal. 565, 79 Pac. 171. See also Arkadelphia Lumber Co. *v.* Mann, 78 Ark. 414, 94 S. W. 46; Goodell *v.* Verdugo Canon Water Co., 138 Cal. 308, 71 Pac. 354; Hailey First Nat. Bank *v.* Bews, 3 Ida. 486, 31 Pac. 816.

56. Alpers *v.* Bliss, 145 Cal. 565, 79 Pac. 171; Syvertson *v.* Butler, 3 Cal. App. 345, 85 Pac. 164; Conklin *v.* Bowman, 11 Ind. 254; Heaton *v.* Lynch, 11 Ind. App. 408, 38 N. E. 224; East Jellico Coal Co. *v.* Carter, 97 S. W.

cannot, after such person has filed an answer, amend so as to deprive the person brought in of the opportunity to establish the allegations of his answer and to obtain the relief to which he is entitled.[57]

3. Same Facts Constituting Both Defense and Counter-Claim. If the same facts constitute both a defense and a counter-claim defendant may use them as either,[58] or he may separately plead them as both, in which case he cannot be compelled to elect upon which he will rely,[59] but the same portion of a single pleading cannot constitute both a defense and a counter-claim.[60] The fact that matter alleged in a counter-claim may be shown also under a general denial which is pleaded does not in itself render the counter-claim bad, since defendant may, under the counter-claim, obtain relief not available under the denial.[61]

4. Time For Pleading. The time for pleading a cross demand is frequently fixed by statute [62] or rule of court,[63] but the trial court has considerable discretion in allowing pleas of this nature to be filed after it is too late to file them of course.[64] As a general rule such a plea may be filed at any time that a plea of the general issue would be proper.[65] It comes too late after the trial of part of the issues in the original action,[66] or at the trial.[67] Where a special plea or notice is necessary, it must be filed in sufficient time to enable plaintiff to prepare to meet it.[68] In no case can it be filed before the declaration or complaint is filed.[69] A counter-claim cannot be pleaded after a nonsuit has been entered, since no action is then pending between the parties.[70]

5. Designation and Misnomer. A counter-claim or set-off should be pleaded as such and its character should be clearly indicated either by the name given it, or by the prayer, or in some other manner.[71] Still more precision is necessary where the question turns upon the want of a reply. In such case defendant must expressly designate his pleading a counter-claim or he will be presumed to intend it merely as a defense,[72] and some cases hold that in any event the counter-claim must be expressly designated as such and affirmative relief prayed, or it

768, 30 Ky. L. Rep. 174. *Compare* Resor *v.* McKenzie, 2 Disn. (Ohio) 210.

57. Spears *v.* Scott, 111 Ga. 745, 36 S. E. 950.

58. Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672.

59. Nollman *v.* Evenson, 5 N. D. 344, 65 N. W. 686.

60. See *supra*, IV, A, 7, e.

61. Gilpin *v.* Wilson, 53 Ind. 443; Aransas Pass Harbor Co. *v.* Manning, (Tex. Civ. App. 1901) 65 S. W. 674.

62. See the statutes of the several states. And see Cooley *v.* Patterson, 49 Me. 570; Pond *v.* Niles, 31 Me. 131; Smith *v.* Winston, 2 How. (Miss.) 601; Talbert *v.* Cason, 1 Brev. (S. C.) 298.

63. Carl Barckhoff Organ Co. *v.* Ecker, 184 Pa. St. 350, 39 Atl. 85; Emmertz *v.* Thurlow, 3 Del. Co. (Pa.) 368; Thorn *v.* Heugh, 5 Pa. L. J. Rep. 169; Ogden *v.* Lukens, 29 Wkly. Notes Cas. (Pa.) 258; Deneale *v.* Young, 7 Fed. Cas. No. 3,786, 2 Cranch C. C. 418; Janney *v.* Baggot, 13 Fed. Cas. No. 7,210, 1 Cranch C. C. 503.

64. Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441; Bever *v.* North, 107 Ind. 544, 8 N. E. 576; Marling *v.* Burlington, etc., R. Co., 67 Iowa 331, 25 N. W. 268. In Wilkins *v.* Bedford, 35 L. T. Rep. N. S. 622, a delay of six months after decree rendered in the original suit was held to deprive defendant of the right to file under leave obtained before the decree.

65. Morrison *v.* Hart, Hard. (Ky.) 150.

66. Helm *v.* Huntington First Nat. Bank, 91 Ind. 44.

67. Gilbert *v.* Adams, 99 Iowa 519, 68 N. W. 883; Finlay *v.* Stewart, 56 Pa. St. 183; Glazer *v.* Lowrie, 8 Serg. & R. (Pa.) 498.

If not filed until the day of trial and plaintiff is not present the judgment rendered on it will be annulled. New Orleans *v.* Le Bourgeois, 50 La. Ann. 591, 23 So. 542.

68. Dermott *v.* Jones, 23 How. (U. S.) 220, 16 L. ed. 442.

69. Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695.

70. Sydnor Pump, etc., Co. *v.* Rocky Mount Ice Co., 125 N. C. 80, 34 S. E. 198.

71. *California.*— Carpenter *v.* Hewel, 67 Cal. 589, 8 Pac. 314; Brannan *v.* Paty, 58 Cal. 330.

Connecticut.— New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

Kentucky.— Russell *v.* Phillips, 22 S. W. 220, 15 Ky. L. Rep. 76.

New York.— Clough *v.* Murray, 19 Abb. Pr. 97.

Wisconsin.— Rylander *v.* Laursen, 113 Wis. 461, 89 N. W. 488; Brauchle *v.* Nothhelfer, 107 Wis. 457, 83 N. W. 653; Woechting *v.* Grau, 55 Wis. 312, 13 N. W. 230; Gunn *v.* Madigan, 28 Wis. 158.

See 39 Cent. Dig. tit. "Pleading," § 291.

72. McAbee *v.* Randall, 41 Cal. 136; Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943;

will not be regarded as a counter-claim.[73] But calling a pleading a counter-claim or cross complaint will not make it one,[74] and, in general, if a pleading is misnamed or has no name, it will nevertheless generally be treated as constituting what its allegations make it,[75] or it will be treated as the parties treat it on the trial.[76] But a stricter rule is laid down in some cases, where it is held that if a defendant designates his answer as a defense merely he is bound thereby and cannot subsequently contend that it is a counter-claim,[77] and conversely where an answer is designated as a counter-claim it cannot be sustained as a defense.[78] But in case matter is pleaded both as a defense and a counter-claim, it may be good as a defense, although bad as to the affirmative relief sought.[79] Where it is doubtful whether or not an answer is to be deemed a counter-claim, the substance and form of the entire answer will be considered so far as it throws any light on the question.[80] Where the answer is susceptible of being construed as setting up a mere defense or of setting up a counter-claim it should be construed as setting up the defense.[81] But where the evident intention of the pleader is to obtain a judgment against plaintiff, his answer will be deemed a counter-claim.[82]

6. Statement of Cross Demand[83] — a. In General. The only substantial difference between an original cause of action and a cross demand is that the first is filed by plaintiff and the second by defendant. Both contain allegations of facts and both ask for relief upon the facts stated. In making up and trying the

Acer *v.* Hotchkiss, 97 N. Y. 395; Equitable L. Assur. Soc. *v.* Cuyler, 75 N. Y. 514; Lafond *v.* Lassere, 26 Misc. (N. Y.) 77, 56 N. Y. Suppl. 459; Morris *v.* Chamberlin, 14 N. Y. Suppl. 702.

73. Carpenter *v.* Hewel, 67 Cal. 589, 8 Pac. 314; Brannan *v.* Paty, 58 Cal. 330; Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183; Stowell *v.* Eldred, 39 Wis. 614.

74. Shain *v.* Belvin, 79 Cal. 262, 21 Pac. 747; Harrison *v.* McCormick, 69 Cal. 616, 11 Pac. 456; Stewart *v.* Gorham, 122 Iowa 669, 98 N. W. 512; True *v.* Triplett, 4 Metc. (Ky.) 57; Nicholls *v.* Hill, 42 S. C. 28, 19 S. E. 1017.

75. *Alabama.*—Thomas *v.* Thomas, 146 Ala. 533, 41 So. 141.

Arkansas.— Key *v.* Henson, 17 Ark. 254.

California.— Hibernia Sav., etc., Soc. *v.* London, etc., F. Ins. Co., 138 Cal. 257, 71 Pac. 334.

Georgia.— Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015.

Illinois.— Heckenkemper *v.* Dingwehrs, 32 Ill. 538.

Indiana.— Porter *v.* Reid, 81 Ind. 569; Jones *v.* Hathaway, 77 Ind. 14; Gilpin *v.* Wilson, 53 Ind. 443; Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208; Johnson *v.* Sherwood, 34 Ind. App. 490; Huber Mfg. Co. *v.* Busey, 16 Ind. App. 410, 43 N. E. 967.

Kentucky.— Hutchings *v.* Moore, 4 Metc. 110.

Minnesota.— Phelps *v.* Compton, 72 Minn. 109, 75 N. W. 19; Farrell *v.* Burbank, 57 Minn. 395, 59 N. W. 485; Griffin *v.* Jorgenson, 22 Minn. 92.

New York.— McElwee Mfg. Co. *v.* Trowbridge, 68 Hun 28, 22 N. Y. Suppl. 674 [*affirmed* in 142 N. Y. 679, 37 N. E. 825]; Cook *v.* Matteson, 11 N. Y. Suppl. 572.

Ohio.— Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31; Klonne *v.* Bradstreet, 7 Ohio St. 322; Hill *v.* Butler, 6 Ohio St. 207; Hathaway *v.* Gordon, 9 Ohio Cir. Ct. 8, 6 Ohio Cir. Dec. 39.

Pennsylvania.— See Bair *v.* Hubartt, 139 Pa. St. 96, 21 Atl. 210.

Texas.— Ware *v.* Bennett, 18 Tex. 794.

Wisconsin.— Burr *v.* Thompson, 78 Wis. 227, 47 N. W. 277; Durkee *v.* Felton, 44 Wis. 467.

Canada.— Torrance *v.* Livingstone, 10 Ont. Pr. 29.

76. Rodgers *v.* Peckham, 120 Cal. 238, 52 Pac. 483; Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405.

77. Bates *v.* Rosekrans, 37 N. Y. 409; Gilsey *v.* Keen, 104 N. Y. App. Div. 427, 93 N. Y. Suppl. 783 [*affirmed* in 185 N. Y. 588, 78 N. E. 1104]; Saratoga Springs First Nat. Bank *v.* Slattery, 4 N. Y. App. Div. 421, 38 N. Y. Suppl. 859; Burrall *v.* De Groot, 5 Duer (N. Y.) 379; Resch *v.* Senn, 31 Wis. 138.

78. Rogers *v.* Morton, 46 Misc. (N. Y.) 494, 95 N. Y. Suppl. 49.

79. Richards *v.* Littell, 16 Misc. (N. Y.) 33, 38 N. Y. Suppl. 73.

80. Cable Flax Mills *v.* Early, 72 N. Y. App. Div. 213, 76 N. Y. Suppl. 191; Hatcher *v.* Dabbs, 133 N. C. 239, 45 S. E. 562.

81. Shain *v.* Belvin, 79 Cal. 262, 21 Pac. 747; Green *v.* Waite, 33 Hun (N. Y.) 191; Burke *v.* Thorne, 44 Barb. (N. Y.) 363; American Dock, etc., Co. *v.* Staley, 40 N. Y. Super. Ct. 539; Bates *v.* Rosekrans, 23 How. Pr. (N. Y.) 98 [*affirmed* in 37 N. Y. 409, 4 Transcr. App. 332, 4 Abb. Pr. N. S. 276]; McConihe *v.* Hollister, 19 Wis. 269.

82. Weaver *v.* Bonnell, 15 Misc. (N. Y.) 456, 37 N. Y. Suppl. 212.

83. Aider by verdict or judgment see *infra*, XIV, J.

Amendment introducing new set-off or counter-claim see *infra*, VII, A, 11, c, (II), (G).

Waiver of objections to pleading see *infra*, XIV.

issues raised, the same principles of law apply to each.[84] The cross demand must be pleaded as fully and distinctly, and with the same substantial requisites, as an original cause of action;[85] it must be sufficient in itself, without recourse to other

84. Ewing *v.* Patterson, 35 Ind. 326; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672; Pine Trec Lumber Co. *v.* McKinley, 83 Minn. 419, 86 N. W. 414; Holzbauer *v.* Heine, 37 Mo. 443.

In Louisiana a reconventional demand, although filed in the same paper as the answer, is not deemed a part of the answer, but an incidental cross action. Powell *v.* Graves, 14 La. Ann. 860.

85. *Alabama.*— Crawford *v.* Simonton, 7 Port. 110.

Arizona.— Daggs *v.* Phœnix Nat. Bank, 5 Ariz. 409, 53 Pac. 201.

California.— Coulthurst *v.* Coulthurst, 58 Cal. 239; Quinn *v.* Smith, 49 Cal. 163; Kreichbaum *v.* Melton, 49 Cal. 50; Bernard *v.* Mullot, 1 Cal. 368.

District of Columbia.— McGuire *v.* Gerstley, 26 App. Cas. 193 [*affirmed* in 204 U. S. 489, 27 S. Ct. 332, 51 L. ed. 581], holding that while in a plea of set-off the technical formality and accuracy of the declaration may not be required, the plea must nevertheless inform plaintiff with reasonable certainty of the particulars of the demand which he is called upon to defend.

Florida.— Gonzales *v.* De Funiak Havana Tobacco Co., 41 Fla. 471, 26 So. 1012.

Georgia.— Whitt *v.* Blount, 124 Ga. 671, 53 S. E. 205; Kahrs *v.* Kahrs, 115 Ga. 288, 41 S. E. 649; Atlanta Glass Co. *v.* Noizet, 88 Ga. 43, 13 S. E. 833; Kinard *v.* Sanford, 64 Ga. 630.

Illinois.— Cobb Chocolate Co. *v.* Crocker-Wheeler Co., 125 Ill. App. 241; Leathe *v.* Thomas, 109 Ill. App. 434 [*affirmed* in 218 Ill. 246, 75 N. E. 810]; Breen *v.* Sullivan, 5 Ill. App. 449.

Indiana.— Indiana Mut. Bldg., etc., Assoc. *v.* Crawley, 151 Ind. 413, 51 N. E. 466; Conger *v.* Miller, 104 Ind. 592, 4 N. E. 300; Stockton *v.* Graves, 10 Ind. 294; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672; Johnson *v.* Tyler, 1 Ind. App. 387, 27 N. E. 643. See also Lupton *v.* Taylor, 39 Ind. App. 412, 78 N. E. 689, 79 N. E. 523.

Kansas.— Allen *v.* Douglass, 29 Kan. 412.

Kentucky.— Bennett *v.* McCrocklin, 3 Metc. 322; Coleman *v.* Coleman, 3 Bibb 14; Com. *v.* Barker, 103 S. W. 303, 31 Ky. L. Rep. 648; Crabtree Coal Min. Co. *v.* Hamby, 90 S. W. 226, 28 Ky. L. Rep. 687.

Louisiana.— Bayly *v.* Stacey, 30 La. Ann. 1210; McMasters *v.* Palmer, 4 La. Ann. 381; Beall *v.* Allen, 2 La. Ann. 932; Wilcox *v.* His Creditors, 11 Rob. 346; Jonau *v.* Ferrand, 2 Rob. 216, 3 Rob. 364; White *v.* Moreno, 17 La. 371.

Missouri.— Fallon *v.* Stahl, 17 Mo. App. 475.

Nevada.— Rose *v.* Treadway, 4 Nev. 455, 97 Am. Dec. 546.

New Jersey.— McCormick *v.* Brookfield, 4 N. J. L. 69.

New York.— Stevens *v.* Orton, 18 Misc. 538, 43 N. Y. Suppl. 792; Ranney *v.* Smith, 6 How. Pr. 420.

Oregon.— Le Clare *v.* Thibault, 41 Oreg. 601, 69 Pac. 552.

Pennsylvania.— Fox *v.* Reed, 3 Grant 81; Carnahan Stamping, etc., Co. *v.* Foley, 23 Pa. Super. Ct. 643.

South Carolina.— Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192.

South Dakota.— McKinney *v.* Sundback, 3 S. D. 106, 52 N. W. 322.

Texas.— Henderson *v.*, Johnson, 22 Tex. Civ. App. 381, 55 S. W. 35; Peet *v.* Hereford, 1 Tex. App. Civ. Cas. § 869.

Vermont.— Tobias *v.* McGregor, 19 Vt. 113.

England.— Holloway *v.* York, 25 Wkly. Rep. 627.

See 39 Cent. Dig. tit. "Pleading," §§ 292, 294.

The common counts are sufficient in a counter-claim. Valley Lumber Co. *v.* Wood, (Cal. 1893) 33 Pac. 343; Clay *v.* Carroll, 67 Cal. 19, 6 Pac. 874.

When founded on a written instrument, the counter-claim should set out a copy of the instrument, in the same way as a complaint, notwithstanding the complaint may be founded on the same contract and may set it out. Goldsberry *v.* Gentry, 92 Ind. 193; Patton *v.* Camplin, 63 Ind. 512; Campbell *v.* Routt, 42 Ind. 410.

Pleadings held sufficient.— For cases in which a cross demand was held sufficiently pleaded see Belote *v.* Wilcox, (Ala. 1906) 41 So. 673 (plea of set-off for work and labor done and money paid together with damages for breach of a prior contract); Birmingham Paint, etc., Co. *v.* Crampton, (Ala. 1905) 39 So. 1020 (cost of completion of work by defendant); Lehow *v.* Simonton, 3 Colo. 346 (holding that a set-off by a promise good in parol by the common law need not show compliance with the requisites of the statute of frauds); Blaney *v.* Postal, 10 Ind. App. 131, 34 N. E. 849 (averment of damage resulting from plaintiff's leaving defendant's employ); Snowden *v.* Snowden, 96 S. W. 922, 29 Ky. L. Rep. 1112 (set-off of indebtedness for labor and services rendered at plaintiff's request); Nicholson *v.* Desobry, 14 La. Ann. 81 (damages for defective execution of a contract for the construction of an engine); Mills *v.* Carrier, 30 S. C. 617, 9 S. E. 350, 741 (indebtedness growing out of an unsettled partnership); Beckham *v.* Hunter, 37 Tex. 551 (plea in reconvention of damages for breach of a cropping contract); Ames *v.* Melendy, 64 Vt. 554, 24 Atl. 1052 (loss of logs held under a special contract of bailment); Hart *v.* Timossi, 3 Quebec Pr. 58 (damages for breach of contract of sale resulting from inferior quality of goods procured elsewhere).

Pleadings held insufficient.— For cases in which a cross demand was held insufficiently pleaded see Dalton *v.* Bunn, (Ala. 1907) 44

parts of the pleading or to other pleadings,[86] unless by express reference.[87] It should be separately stated,[88] and it must show with certainty the character of the claim, including its amount and how it accrued.[89] All facts must be alleged which go to make up the particular cause of action relied on as a cross demand against the claim set up by plaintiff, and which show that it is a proper subject of cross demand, and if defendant fails to show by proper averment any fact essential to the existence, validity, or propriety of his cross demand, his plea will

So. 625 (where there was no averment that the matter pleaded by way of recoupment related to the transaction on which plaintiff's cause of action was based); Harron *v.* Wilson, 4 Cal. App. 488, 88 Pac. 512 (failure to plead specific or substantial damages); Fulghum *v.* Beck Duplicator Co., 121 Ga. 273, 48 S. E. 901 (holding a plea in recoupment defective which nowhere set out an actual loss); Cobb Chocolate Co. *v.* Crocker-Wheeler Co., 125 Ill. App. 241 (holding a set-off defective as not containing a proper allegation of damage); Schnell *v.* Schnell, 39 Ind. App. 556, 80 N. E. 432 (set-off of claim for money obtained by plaintiff in action on note); Shell *v.* Asher, 102 S. W. 879, 31 Ky. L. Rep. 566 (breach of oral agreement cotemporaneous with a written contract sued on); State *v.* Alexander, 115 Tenn. 156, 90 S. W. 20 (appropriation by a county court for the benefit of relator in a suit to recompel payment to relator of certain costs taxed against the county); Houston *v.* Stewart, 40 Tex. Civ. App. 499, 90 S. W. 49 (failure to show whether demand was barred); McGuire *v.* Gerstley, 204 U. S. 489, 27 S. Ct. 332, 51 L. ed. 581 (damage to partnership business); Clement *v.* Dowling, 147 Fed. 929 (failure to secure a contract).

86. *California.*—Kreichbaum *v.* Melton, 49 Cal. 50.

Indiana.— Leach *v.* Rains, 149 Ind. 152, 48 N. E. 858; Conger *v.* Miller, 104 Ind. 592, 4 N. E. 300; Campbell *v.* Routt, 42 Ind. 410; Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672.

Nebraska.— Denver, etc., R. Co. *v.* Hutchins, 31 Nebr. 572, 48 N. W. 398.

New York.— Spencer *v.* Babcock, 22 Barb. 326; Wiggins *v.* Gans, 3 Sandf. 738.

England.— Holloway *v.* York, 25 Wkly. Rep. 627.

See 39 Cent. Dig. tit. "Pleading," § 295.

But see Abernathy *v.* Myer-Bridges Coffee, etc., Co., 100 S. W. 862, 30 Ky. L. Rep. 1236, 99 S. W. 942, 30 Ky. L. Rep. 844, holding that one sued for debt for goods sold by a non-resident may set off an unliquidated demand without averring that plaintiff is a non-resident, where the petition shows that fact.

87. Cragin *v.* Lovell, 88 N. Y. 258; Goldberg *v.* Wood, 45 Misc. (N. Y.) 327, 90 N. Y. Suppl. 427; Stevens *v.* Orton, 18 Misc. (N. Y.) 538, 43 N. Y. Suppl. 792; Roldan *v.* Power, 14 Misc. (N. Y.) 480, 35 N. Y. Suppl. 697; Green *v.* Parsons, 14 N. Y. St. 97; Manning *v.* Ft. Atkinson School Dist. No. 6, 124 Wis. 84, 102 N. W. 356; Groton Bridge, etc., Co. *v.* American Bridge Co., 151 Fed. 871; Birmingham Estates Co. *v.* Smith, 13 Ch. D. 506, 49 L. J. Ch. 251, 42 L. T. Rep. N. S. 111, 28 Wkly. Rep. 666. But *compare* Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672.

88. See *supra*, IV, A, 7, c.

89. *Alabama.*— Finney *v.* Denny, 122 Ala. 449, 25 So. 45.

Arizona.— Christy *v.* Arnold, 4 Ariz. 263, 36 Pac. 918.

Illinois.— Pusey *v.* Peck, 67 Ill. 98; Witter *v.* McNiel, 4 Ill. 433; Moore *v.* Foster, 97 Ill. App. 233.

Indiana.— Peden *v.* Mail, 118 Ind. 556, 20 N. E. 493; Connersville *v.* Hydraulic Co., 86 Ind. 235; Robinson *v.* State, 60 Ind. 26; Ward *v.* Bennett, 20 Ind. 440.

Iowa.— Sample *v.* Griffith, 5 Iowa 376; Chambers *v.* Games, 2 Greene 320.

Kentucky.— Duncan *v.* Duncan, 2 Bibb 284.

Missouri.— Sayers *v.* Craven, 107 Mo. App. 407, 81 S. W. 473.

Nebraska.— Peck *v.* Trumbull, 12 Nebr. 133, 10 N. W. 572.

New York.— Wiggins *v.* Gans, 3 Sandf. 738; Fox *v.* Turner, 2 N. Y. Suppl. 164.

Ohio.— Smead *v.* Chrisfield, 1 Disn. 18, 12 Ohio Dec. (Reprint) 460.

Pennsylvania.— Fox *v.* Reed, 3 Grant 81; Stevens *v.* Hallock, 7 Kulp 260; Reed *v.* Third Reformed Dutch Church, 13 Phila. 58.

South Carolina.— Lipscomb *v.* Lipscomb, 32 S. C. 243, 10 S. E. 929.

Texas.— Michigan Stove Co. *v.* Waco Hardware Co., 24 Tex. Civ. App. 301, 58 S. W. 734; Scott *v.* Texas Constr. Co., (Civ. App. 1900) 55 S. W. 37. See also Peet *v.* Hereford, 1 Tex. App. Civ. Cas. § 869.

Utah.— Center Creek Water, etc., Co. *v.* Lindsay, 21 Utah 192, 60 Pac. 559.

United States.— Magowan *v.* St. Louis R. Supplies Mfg. Co., 16 Fed. 738, 5 McCrary 253.

England.— Crowe *v.* Barnicot, 6 Ch. D. 753, 46 L. J. Ch. 855, 37 L. T. Rep. N. S. 68, 25 Wkly. Rep. 789.

Canada.— Federal Bank *v.* Harrison, 10 Ont. Pr. 271.

See 39 Cent. Dig. tit. "Pleading," §§ 292, 294.

Definiteness as to time.—An allegation that a contract was made on or about a certain day is sufficiently definite, in the absence of a motion. Shelton *v.* Conant, 10 Wash. 193, 38 Pac. 1013.

Where there are several items of damage in a claim of set-off, each item should be averred. Beck Duplicator Co. *v.* Fulghum, 118 Ga. 836, 45 S. E. 675.

be bad.[90] A plea of set-off which purports to answer the entire complaint but in fact answers only a portion of it, is not for that reason bad, since such a plea is not strictly a defense.[91] A cross complaint which contains no allegation in the form of denials cannot be construed as a denial of the allegations of the original complaint.[92] The fact that the allegations relating to a counter-claim are unnecessarily divided and are not all contained in that portion of the answer which relates to the counter-claim does not render such allegations irrelevant.[93]

b. Statutory Provisions. So far as the pleading of cross demands is regu-

A plea of set-off merely pleaded by name, without alleging facts, is wholly insufficient. Shields *v.* Byrd, 15 Ala. 818.

90. *Alabama.*— Raisin Fertilizer Co. *v.* J. J. Barrow, Jr., Co., 97 Ala. 694, 12 So. 388; Sledge *v.* Swift, 53 Ala. 110; Evans *v.* Sims, 37 Ala. 710.

Arkansas.— Robinson *v.* Mace, 16 Ark. 97.

California.— Provident Mut. Bldg.-Loan Assoc. *v.* Davis, 143 Cal. 253, 76 Pac. 1034; Lewis *v.* Fox, 122 Cal. 244, 54 Pac. 823.

Florida.— Livingston *v.* L'Engle, 27 Fla. 502, 8 So. 728.

Georgia.— White *v.* Blitch, 112 Ga. 775, 38 S. E. 80; Walters *v.* Eaves, 105 Ga. 584, 32 S. E. 609; Buffington *v.* Thompson, 98 Ga. 416, 25 S. E. 516; Griffin *v.* Lawton, 54 Ga. 104.

Idaho.— Swanholm *v.* Reeser, 3 Ida. 476, 31 Pac. 804; McGuire *v.* Lamb, 2 Ida. (Hasb.) 378, 17 Pac. 749.

Illinois.— Cairo, etc., R. Co. *v.* Dodge, 72 Ill. 253; Pusey *v.* Peck, 67 Ill. 98; Le Forrest *v.* Oder, 42 Ill. 500; Lemon *v.* Stevenson, 36 Ill. 49.

Indiana.— Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025; Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129; Gregory *v.* Gregory, 89 Ind. 345; Huston *v.* Vail, 84 Ind. 262; Tracewell *v.* Peacock, 55 Ind. 572; Benoit *v.* Schneider, 47 Ind. 13; Wilson *v.* Fleming, 23 Ind. 119; Smith *v.* Baxter, 13 Ind. 151; Shearman *v.* Fellows, 5 Blackf. 459; Francis *v.* Leak, 6 Ind. App. 411, 33 N. E. 807; Johnson *v.* Tyler, 1 Ind. App. 387, 27 N. E. 643.

Iowa.— Bennett *v.* Lutz, 119 Iowa 215, 93 N. W. 288.

Kentucky.— McConnell *v.* Morrison, 1 Litt. 206.

Louisiana.— Winthrop *v.* Jarvis, 8 La. Ann. 434.

Maryland.— Dilley *v.* Roman, 17 Md. 337.

Missouri.— Crane *v.* Murray, 106 Mo. App. 697, 80 S. W. 280; Fallon *v.* Stahl, 17 Mo. App. 475.

Nebraska.— Gurske *v.* Kelpin, 61 Nebr. 517, 85 N. W. 557; Stillings *v.* Van Alstine, 2 Nebr. (Unoff.) 684, 89 N. W. 756.

New York.— Deagan *v.* Weeks, 67 N. Y. App. Div. 410, 73 N. Y. Suppl. 641; Slade *v.* Montgomery, 53 N. Y. App. Div. 343, 65 N. Y. Suppl. 709; International Food Co. *v.* Bickerd, 46 N. Y. App. Div. 356, 61 N. Y. Suppl. 1001; Hirsch *v.* Mayer, 4 N. Y. App. Div. 72, 38 N. Y. Suppl. 633; Wintringham *v.* Whitney, 1 N. Y. App. Div. 219, 37 N. Y. Suppl. 188; Rochester Distilling Co. *v.* O'Brien, 72 Hun 462, 25 N. Y. Suppl. 281; Camp *v.* Redmond, 59 Hun 377, 13 N. Y. Suppl. 103; Merritt *v.* Millard, 5 Bosw. 645; Van Valen *v.* Lapham, 5 Duer 689; Gause *v.* Commonwealth Trust Co., 44 Misc. 46, 89 N. Y. Suppl. 723 [*reversed* on other grounds in 100 App. Div. 427, 91 N. Y. Suppl. 847]; Ennis *v.* Ross, 37 Misc. 160, 74 N. Y. Suppl. 860; Roldan *v.* Power, 14 Misc. 480, 35 N. Y. Suppl. 697; Donihee *v.* Gray, 59 N. Y. Suppl. 778; Gaylord *v.* Beardsley, 19 N. Y. Suppl. 548; Niagara Falls Cider, etc., Co. *v.* Knell, 15 N. Y. Suppl. 781; Boyd *v.* McDonald, 12 N. Y. Suppl. 356; Driscall *v.* Sanderson, 15 N. Y. St. 134; Clute *v.* McCrea, 12 N. Y. St. 647; Venable *v.* Harlin, 1 N. Y. Civ. Proc. 215; Caines *v.* Brisban, 13 Johns. 9 [*affirming* 10 Johns. 45].

Ohio.— Hill *v.* Butler, 6 Ohio St. 207.

Texas.— Evans *v.* Bell, 45 Tex. 553; Boyd *v.* Clark, 21 Tex. 426; Bullock *v.* Dunbar, 17 Tex. 243; Wiley *v.* Traiwick, 14 Tex. 662.

Wisconsin.— Resch *v.* Senn, 31 Wis. 138.

United States.— McDonough *v.* Evans Marble Co., 112 Fed. 634, 50 C. C. A. 403.

England.— Young *v.* Kitchin, 3 Ex. D. 127, 47 L. J. Exch. 579, 26 Wkly. Rep. 403.

A joint cross complaint must in Indiana be good as to all the defendants who join in it or it will be bad on general demurrer, in analogy to the rule respecting complaints. Deane *v.* Indiana Macadam, etc., Co., 161 Ind. 371, 68 N. E. 686.

If a counter-claim based on matters arising since action brought is permissible, it should plead the facts as having so arisen, and if it does not it may be stricken unless amended. Ellis *v.* Munson, 35 L. T. Rep. N. S. 585. *Compare* Ashley *v.* Marshall, 29 N. Y. 494. The fact that the answer stated it to be a "counter-claim and cause of action existing against the plaintiff at and before the commencement of this action" was not a sufficient allegation that the note was indorsed to defendant before the commencement of the suit. Van Valen *v.* Lapham, 5 Duer (N. Y.) 689.

91. See *supra*, IV, A, 5, b.

92. White *v.* Besse, 145 Cal. 223, 78 Pac. 649, holding that a cross complaint for affirmative relief, by a judgment creditor as intervener in an action by a wife against the sheriff to restrain a sale of her land as that of her husband, not being an answer to the complaint in the action, an averment therein that the wife is not and never was the owner of the land could not be deemed a denial of the averment in plaintiff's complaint that she was such owner.

93. Gross *v.* Bock, 11 N. Y. St. 295.

lated by statute, or rule of court, the provisions of the statute or rule should be closely followed,[94] and if followed the pleading is to that extent sufficient.[95]

c. Requisites of Notice of Set-Off. If, instead of a plea of set-off, notice is given under the general issue, this stands in place of the special plea and fills the same office.[96] Some statutes make this method exclusive.[97] But such notice is admissible only under the general issue,[98] or under the plea of payment.[99] A notice of cross demand should describe with certainty defendant's claim.[1] The particular sums claimed and the accounts in which they are due should be specified.[2] It should contain the substance, although it need not have the form, of a declaration.[3] But the notice need not be drawn with the same strictness as a special plea and it is sufficient if it describe the demand with reasonable certainty.[4]

d. Cross Demand in Affidavit of Defense. A set-off in an affidavit of defense need not be pleaded with the formality and technical precision requisite in a special plea, but it is sufficient if it informs plaintiff, with reasonable certainty, of the nature of defendant's demand.[5] But it must exhibit all the elements of a substantial defense and nothing should be left to inference except what will be necessarily inferred.[6] It should show the source and extent of the damage and the items of loss.[7] Mere general averments will be disregarded.[8] If a breach of an independent written contract is relied upon, a copy thereof must be attached to the affidavit of defense.[9]

94. *Alabama.*— Sledge *v.* Swift, 53 Ala. 110; Lang *v.* Waters, 47 Ala. 624.
Indiana.— Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025; Young *v.* Harry, 4 Blackf. 167.
Louisiana.— Bird *v.* Barrow, 3 La. Ann. 143.
Maryland.— Boor *v.* Wilson, 48 Md. 305.
Nebraska.— Gurske *v.* Kelpin, 61 Nebr. 517, 85 N. W. 557.
New York.— Willover *v.* Olean First Nat. Bank, 40 Hun 184; Williams *v.* Crary, 5 Cow. 368.
Pennsylvania.— Thorn *v.* Heugh, 5 Pa. L. J. Rep. 169.
Texas.— Duncan *v.* Magette, 25 Tex. 245.

95. Fox *v.* Cutts, 6 Me. 240.

96. Patterson *v.* Steele, 36 Ill. 272; Miller *v.* Miller, 16 Ill. 296. See also Beesley *v.* Crawford, 19 Ohio 126.

97. Williams *v.* Crary, 5 Cow. (N. Y.) 368; Putnam *v.* Clark, Wright (Ohio) 595; Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1.

98. Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Morgan *v.* Boone, 1 J. J. Marsh. (Ky.) 585.

99. Rodesch *v.* Estey, 71 Ill. App. 482.

1. Morrison *v.* Hart, Hard. (Ky.) 150; Sinker, etc., Co. *v.* Diggins, 76 Mich. 557, 43 N. W. 674; Roethke *v.* Philip Best Brewing Co., 33 Mich. 340.
An itemized account of goods claimed by defendant to have been converted by plaintiff is a sufficient statement of defense under a plea of set-off. Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864.

2. Sheftall *v.* Clay, T. U. P. Charlt. (Ga.) 227; Kerr *v.* Bennett, 109 Mich. 546, 67 N. W. 981; Darrah *v.* Gow, 77 Mich. 16, 43 N. W. 851; Watkins *v.* Ford, 69 Mich. 357, 37 N. W. 300; Ritter *v.* Daniels, 47 Mich. 617, 11 N. W. 409; Ogden *v.* Lukens, 12 Pa. Co. Ct. 588.

3. Delaware, etc., Canal Co. *v.* Roberts, 72 Mich. 49, 40 N. W. 53; Brady *v.* Hill, 1 Mo. 315, 13 Am. Dec. 503; Lewis *v.* Culbertson, 11 Serg. & R. (Pa.) 48.

4. Perrine *v.* Warren, 3 Stew. (Ala.) 151; People *v.* Oneida County Judges Ct. C. Pl., 4 Cow. (N. Y.) 21; Lewis *v.* Culbertson, 11 Serg. & R. (Pa.) 48, 14 Am. Dec. 607.

5. Thornton *v.* Weser, 20 D. C. 233; Hugg *v.* Scott, 6 Whart. (Pa.) 274; Myers *v.* Brice, 2 Wkly. Notes Cas. (Pa.) 262; Balph *v.* Rathburn Co., 75 Fed. 971, 21 C. C. A. 584. See also Brown *v.* Gourley, 214 Pa. St. 154, 63 Atl. 607.

6. Cosgrave *v.* Hammill, 173 Pa. St. 207, 33 Atl. 1045; Terriberry *v.* Broude, 173 Pa. St. 48, 33 Atl. 699; Kaufman *v.* Cooper Iron Min. Co., 105 Pa. St. 537; Markley *v.* Stevens, 89 Pa. St. 279; Loeser *v.* Erie City Rag Warehouse, 10 Pa. Super. Ct. 540; Weston *v.* Killeen, 11 Pa. Co. Ct. 412; Cochran *v.* Emmertz, 3 Del. Co. (Pa.) 433; Kemp *v.* Kemp, 1 Woodw. (Pa.) 154.
Allegation of set-off must be as specific as a statement of claim, for defendant in respect to the set-off is the actor, has the affirmative of the issue, and must aver his set-off in terms incapable of being misunderstood. McFetridge *v.* Megargee, 26 Pa. Super. Ct. 501.

7. Callaghan *v.* Callaghan, 185 Pa. St. 273, 39 Atl. 946; Jillson *v.* Rostein, 15 Pa. Super. Ct. 636; Fleisher *v.* Blackburn, 15 Pa. Super. Ct. 289; Close *v.* Hancock, 3 Pa. Super. Ct. 207; Rathburn Co. *v.* Balph, 76 Fed. 939.
A set-off may be alleged without stating the exact amount, where the amount is positively asserted to be greater than the balance claimed by the plaintiff. Joseph Schlitz Brewing Co. *v.* Rosenbluth, 33 Pa. Super. Ct. 303.

8. Penn Shovel Co. *v.* Phelps, 24 Pa. Super. Ct. 595.

9. Close *v.* Hancock, 3 Pa. Super. Ct. 207.

e. Several Items of Set-Off. The rule against duplicity [10] does not apply to pleas of set-off, and defendant may set up as many demands as he has in the same division of his pleading.[11] Accordingly while it is a general rule that a plea bad in part is bad as to the whole, this is not true of pleas of set-off which contain several distinct matters. Each is to be considered separately and its sufficiency is to be determined without reference to the others.[12]

f. Conclusion and Prayer For Judgment. In some jurisdictions a plea of set-off must conclude with an offer to set off defendant's claim against plaintiff's claim.[13] Where cross demands are pleaded and defendant proves a claim larger than that of plaintiff he will be entitled to judgment for the balance, although he does not pray for judgment.[14] Under the code, any relief to which defendant may properly prove himself entitled will be given, irrespective of the prayer,[15] although some cases hold that no relief can be given not specially prayed for or within the general prayer.[16] Where no issue is taken on a cross demand, no relief can be obtained which is not specifically asked for.[17]

F. Affidavit of Defense or of Merits — 1. Office of Affidavit. Under the practice in some jurisdictions, an affidavit of defense or of merits is required to be filed by defendant in order to prevent the signing of judgment by default,[18] to avoid an inquest,[19] or to enable defendant to file a plea.[20] In some of these jurisdictions the matter is regulated by statute,[21] in others by rule of court.[22] Where such an affidavit is required, failure to file it is a conclusive admission, for the purposes of the suit, of the validity of plaintiff's claim,[23] and a plea filed without it may be treated as a nullity,[24] or may be stricken from the files.[25] A default

10. See *supra*, IV, A, 7, c.

11. Ranney *v.* Smith, 6 How. Pr. (N. Y.) 420. See also Schnell *v.* Schnell, 39 Ind. App. 556, 80 N. E. 432.

12. Shearman *v.* Fellows, 5 Blackf. (Ind.) 459; Ranney *v.* Smith, 6 How. Pr. (N. Y.) 420.

13. Fillmore *v.* Cartwright, 33 N. Brunsw. 621.

14. Hurd *v.* Earl, 4 Blackf. (Ind.) 184; Cowsar *v.* Wade, 2 Brev. (S. C.) 291; Sumter *v.* Welsh, 1 Brev. (S. C.) 539 *Contra*, Baritau *v.* Lefevre, 5 Mart. (La.) 401. *Compare* Finch *v.* Ives, 28 Conn. 115; Scalf *v.* Tompkins, 61 Tex. 476. See, generally, Judgments, 23 Cyc. 802.

15. Wilson *v.* Fairchild, 45 Minn. 203, 47 N. W. 642; Davis *v.* Davis, 9 Mont. 267, 23 Pac. 715; Blaut *v.* Borchardt, 12 Misc. (N. Y.) 197, 33 N. Y. Suppl. 273. See, generally, Judgments, 23 Cyc. 802.

16. Walker *v.* Walker, 93 Iowa 643, 61 N. W. 930.

17. Cox *v.* Fraser, 52 S. W. 796, 21 Ky. L. Rep. 579.

18. Braidwood *v.* Weiller, 89 Ill. 606; Wilder *v.* Arwedson, 80 Ill. 435; Goldie *v.* McDonald, 78 Ill. 605; Young *v.* Browning, 71 Ill. 44; Chicago Stamping Co. *v.* Mechanical Rubber Co., 83 Ill. App. 230; Clark *v.* Dotter, 54 Pa. St. 215; Charlton *v.* Allegheny City, 1 Grant (Pa.) 208; Marlin *v.* Waters, 24 Wkly. Notes Cas. (Pa.) 129; Com. *v.* McCutcheon, 20 Wkly. Notes Cas. (Pa.) 365.

Judgment for want of an affidavit of defense cannot be taken pending a plea in abatement.— Cunningham *v.* Ocean Coal Co., 28 Pa. Co. Ct. 295; Hummel *v.* Meyers, 26 Wkly. Notes Cas. (Pa.) 279.

19. Brown *v.* Cowee, 2 Dougl. (Mich.) 432; Anderson *v.* Hough, 1 Sandf. (N. Y.) 721; Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581.

20. Martin *v.* Skehan, 2 Colo. 614; Honore *v.* Home Nat. Bank, 80 Ill. 489; Keim *v.* Eble, 13 N. J. L. 239.

21. See the statutes of the several states.

In Pennsylvania the affidavit of defense law by the original act of 1835 was made applicable to the district court of Philadelphia only, but was subsequently extended by practice throughout the state. Schoonover *v.* Jones, 11 Pa. Co. Ct. 61.

The constitutionality of such statutes and the authority of courts to make such rules have been sustained. Honore *v.* Home Nat. Bank, 80 Ill. 489; Roberts *v.* Thomson, 28 Ill. 79; Harres *v.* Com., 35 Pa. St. 416; Vanatta *v.* Anderson, 3 Binn. (Pa.) 417; Reynolds *v.* Lawrence, 1 Wkly. Notes Cas. (Pa.) 625.

22. Woodwell *v.* Bluff Min. Co., 25 Pa. St. 365; Umberger *v.* Zearing, 8 Serg. & R. (Pa.) 163; Peebles *v.* Kerr, 1 Pearson (Pa.) 69; Com. *v.* Boult, 1 Browne (Pa.) 237; Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,674, 9 Blatchf. 513.

23. West *v.* Darcy, 20 R. I. 311, 38 Atl. 945, holding, however, that defendant may nevertheless establish a set-off, although he has conclusively admitted plaintiff's claim.

24. Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,674, 9 Blatchf. 513.

But the rule requiring the affidavit will be construed strictly when it is sought to disregard a plea filed without it. Garrett *v.* Teller, 2 Wend. 643.

25. Braidwood *v.* Weiller, 89 Ill. 606; Wilder *v.* Arwedson, 80 Ill. 435; Chicago Bank *v.* Hull, 74 Ill. 106; Original Typewriter Circular Co. *v.* Buehler, 67 Ill. App. 575.

will not be sustained merely because the affidavit of defense is lost.[26] The filing of an affidavit of defense is not an admission that plaintiff has stated a good cause of action.[27] Where the facts constituting the defense are clearly set forth in the affidavit, no other notice of special matter is necessary.[28] No other proceeding in substitution therefor will be allowed. Thus a motion to strike from the files plaintiff's affidavit of claim will not obviate the necessity for an affidavit of defense, notwithstanding such an affidavit on the part of plaintiff is a prerequisite to defendant's obligation to file an affidavit of merits.[29] The facts set up in the affidavit must be assumed by the court to be true, so far as the sufficiency and effect of the affidavit are concerned.[30] But portions of an affidavit denied under oath cannot be received in evidence.[31]

2. Nature of Affidavit. There is a marked distinction between an affidavit of merits and a verified plea.[32] The affidavit precedes [33] or accompanies [34] the plea, and cannot be substituted for it; and it is the plea and not the affidavit which answers plaintiff's pleading.[35] The affidavit of defense is in fact no part of the pleadings.[36] An affidavit of defense may be directed against the legal sufficiency of plaintiff's statement of his cause of action, and in such case it is deemed in the nature of a demurrer and should be disposed of as such.[37] But an affidavit which denies the facts alleged by plaintiff or pleads facts showing a defense cannot be treated as a demurrer.[38] An affidavit is insufficient which purports to set up a defense and in fact merely sets up facts showing a set-off.[39]

3. When Required [40]— a. In General. The affidavit of defense or of merits is usually required only in certain actions on contract, but statutes and rules of court differ in their wording as to the cases in which the affidavit is necessary.[41]

26. O'Brian *v.* Wiggins, 22 Pa. Co. Ct. 236.

27. Heffner *v.* Pennsburg Mut. Horse Ins., etc., Co., 11 Montg. Co. Rep. (Pa.) 35.

28. Lycoming Ins. Co. *v.* Hakes, 12 Leg. Int. (Pa.) 270; Mershon *v.* Anderson, 40 Wkly. Notes Cas. (Pa.) 192.

29. Kassing *v.* Griffith, 86 Ill. 265.

30. In Strauss *v.* Hensey, 7 App. Cas. (D. C.) 289, 294, 36 L. R. A. 92, the court said: "The court cannot question or traverse the truth of the facts stated in the defendant's affidavit. Those facts the court is bound, for the purposes of securing to the defendant the right of trial, to assume as true, and that, too, without reference to what the plaintiff may have stated in his affidavit. If the facts stated by the defendant, by any reasonable or fair construction, will constitute a defence to the action or claim of the plaintiff, within the scope of the pleas pleaded, it is the absolute constitutional right of the defendant to have that defence regularly tried and determined, in due course of judicial investigation."

31. Kaiser *v.* Fendrick, 98 Pa. St. 528.

32. Central City *v.* Wilcoxen, 3 Colo. 566; Van Dyke *v.* Oliphant, 13 N. J. L. 45; Lewis *v.* Watkins, 6 Hill (N. Y.) 230.

33. Central City *v.* Wilcoxen, 3 Colo. 566.

34. Scammon *v.* McKey, 21 Ill. 554; Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,674, 9 Blatchf. 513.

35. Scammon *v.* McKey, 21 Ill. 554.

36. Muir *v.* Preferred Acc. Ins. Co., 203 Pa. St. 338, 53 Atl. 158; Winton *v.* Savage, 4 C. Pl. (Pa.) 47.

37. Byrne *v.* Hayden, 124 Pa. St. 170, 16 Atl. 750; Robinson *v.* Montgomery, 14 Pa. Co. Ct. 106.

38. Heffner *v.* Pennsburg Mut. Horse Ins., etc., Co., 11 Montg. Co. Rep. (Pa.) 35.

39. Knight *v.* Walker Brick Co., 23 App. Cas. (D. C.) 519.

40. In action of assumpsit see Assumpsit, Action of, 4 Cyc. 351.

In action on award see Arbitration and Award, 3 Cyc. 783.

In action on bond see Bonds, 5 Cyc. 834.

41. See the statutes and rules of court in the several states.

In Illinois the statute covers only actions on contract for the payment of money. Actions on appeal-bonds are within this provision. Myers *v.* Shoneman, 90 Ill. 80; Mestling *v.* Hughes, 89 Ill. 389. But an action on a forfeited replevin bond is not an action on a contract for the payment of money. Peck *v.* Wilson, 22 Ill. 205.

In Pennsylvania the affidavit is necessary in all actions on bills, notes, bonds, or other instruments for the payment of money and for the recovery of book debts; in all actions of scire facias on judgments, and on liens of mechanics and material-men; in actions on contract for the loan or advance of money; in actions on bonds or recognizances of bail in error and of special bail, or bonds of sureties for stay of execution, or bonds given by debtors and their sureties; and in actions of assumpsit generally. Hazle Tp. *v.* Markle, 175 Pa. St. 405, 34 Atl. 734; Fidelity Ins., etc., Co. *v.* Miller, 89 Pa. St. 26; Giles *v.* Cavanagh, 2 Pa. Cas. 415, 4 Atl. 205; Wachter's Case, 1 Walk. 267; Heroy Co. *v.* Smith, 5 Pa. Dist. 293; Allen *v.* St. Clair, 3 Pa. Co. Ct. 463; Davis *v.* Dolan, 1 Browne 318. A premium note given to a mutual insurance company is

Where the statute or rule enumerates the cases in which an affidavit of merits is necessary, such enumeration excludes other cases.[42] Executors and administrators, not being privy to the transactions of the deceased, have been held exempt from the operation of these provisions and so also have infants;[43] but an affidavit is required where an executor is sued for a debt lawfully contracted in his representative capacity.[44] The requirement of an affidavit of merits or of defense is not generally applicable to non-resident defendants, or to absent defendants not actually served with process,[45] nor to actions begun by foreign attachment.[46] A provision that an affidavit of merits shall be filed before defendant shall be permitted to plead is an imperative law which admits the exercise of no discretion in respect thereto.[47] Where no affidavit of defense is necessary, it is immaterial whether one filed is good or not.[48]

b. After Default For Plea. When a party is in default for a plea, the court has authority to require the filing of an affidavit of merits as a condition of allowing the plea to be filed, even though it has no authority to require such an affidavit when the plea is filed in time.[49]

4. Sufficiency of Plaintiff's Statement to Require Affidavit. No judgment for want of affidavit of defense will be sustained where plaintiff's statement of his cause of action is insufficient, or where he has waived the want of an affidavit.[50] Under the statutes in some jurisdictions no affidavit of merits is necessary except when plaintiff has filed with his declaration an affidavit of claim.[51] Under such a provision an affidavit must be filed by defendant when the affidavit of claim shows on its face that it conforms fully to the requirements laid down respecting it.[52] Under other statutes,[53] an affidavit of defense is required only when plaintiff files with his declaration a copy of the bill, note, bond, or other instrument or book-account on which the action is founded, or files an affidavit of the amount of

within the act providing for affidavit of defense in actions on written instruments for sums certain. West Branch Ins. Co. *v.* Smith, 3 Leg. Chron. 165. When an action in form assumpsit is in substance tort, an affidavit is not required. United Collieries Co. *v.* Pennsylvania R. Co., 11 Pa. Dist. 300, 27 Pa. Co. Ct. 124; Com. *v.* Harvey, 11 Kulp 139. Where the statement of claim discloses two causes of action, one contract, the other tort, plaintiff is not entitled to judgment for want of a sufficient affidavit of defense. Kinney *v.* Harrison Mfg., etc., Co., 22 Pa. Super. Ct. 601. A terre tenant is not required to file an affidavit of defense see Kelley *v.* Place, 11 Pa. Dist. 608, 26 Pa. Co. Ct. 120.

42. Calder *v.* Lansing, 1 Hill (N. Y.) 212; Woodwell *v.* Bluff Min. Co., 25 Pa. St. 365; Roberts *v.* Hugg, 2 Miles (Pa.) 283; Moody *v.* McDermott, 1 Miles (Pa.) 18; Peebles *v.* Kerr, 1 Pearson (Pa.) 69; Boyd *v.* Turner, 1 Browne (Pa.) 133; Montgomery Lodge No. 59 *v.* Waid, 1 Woodw. (Pa.) 39.

43. Mutual L. Ins. Co. *v.* Tenan, 188 Pa. St. 239, 41 Atl. 539; Umberger *v.* Zearing, 8 Serg. & R. (Pa.) 163; Read *v.* Bush, 5 Binn. (Pa.) 455; Wood *v.* Chamberlain, 7 Pa. Co. Ct. 612.

Where its application becomes purely a technicality the rule that an executor need not make an affidavit of defense does not apply. Schaeffer *v.* Herman, 1 Woodw. (Pa.) 479.

44. Umberger *v.* Zearing, 8 Serg. & R. (Pa.) 165; Reakirt *v.* Flanagan, 6 Pa. Dist. 402, 40 Wkly. Notes Cas. 375; Bayard *v.* Gillaspy, 1 Miles (Pa.) 256; Palairet *v.* Fidelity Co., 16 Wkly. Notes Cas. (Pa.) 146; Dutill *v.* Sully, 9 Wkly. Notes Cas. (Pa.) 573.

45. Chicago, etc., R. Co. *v.* Bank of North America, 82 Ill. 493; Horn *v.* Noble, 95 Ill. App. 101; Roberts *v.* Hugg, 2 Miles (Pa.) 283.

46. Paff *v.* North Bangor Co., 5 Pa. Co. Ct. 543.

47. Martin *v.* Skehan, 2 Colo. 614.

48. Com. *v.* Milnor, 23 Pa. Super. Ct. 1.

49. Moir *v.* Hopkins, 21 Ill. 557; Scammon *v.* McKey, 21 Ill. 554; Calhoun *v.* Grimes, 25 Miss. 47; Stout *v.* Lisinger, Tapp. (Ohio) 241; Wood *v.* Ward, 1 Ohio Dec. (Reprint) 589, 10 West. L. J. 589; Lapham *v.* Kenyon, 7 R. I. 251.

50. McKeone Soap Mfg. Co. *v.* Religious Press Co., 115 Pa. St. 310, 8 Atl. 781; American Bill Posting Co. *v.* Jermon, 27 Pa. Super. Ct. 175; Bill Posting Sign Co. *v.* Jermon, 27 Pa. Super. Ct. 171; Landis *v.* Kirk, 1 Pearson (Pa.) 77.

51. See *supra*, III, D.

52. Hutchinson *v.* Woodwell, 107 Pa. St. 509.

Where an affidavit of claim is a nullity, no affidavit of merits is necessary. Smith *v.* Lyons, 80 Ill. 600.

53. See the statutes of the several states. And see Caruthers *v.* Pierie, 13 Pa. Dist. 780; Orth *v.* Taylor, 11 Phila. (Pa.) 194; Megargee *v.* Danville, etc., R. Co., 2 Wkly. Notes Cas. (Pa.) 535.

Where instruments are on record it is Sufficient for plaintiff to give a full reference to the office, book, and page where the

money loaned or advanced. The copy filed must be full and complete.[54] A mere bill, although it accurately specifies the items of a book-account, is not strictly a copy, and hence its filing will not make necessary the filing of an affidavit of defense.[55] And under these statutes no affidavit is necessary unless the instrument or account filed is admissible in evidence in support of plaintiff's claim.[56] Court rules sometimes require plaintiff to serve notice on defendant to file the affidavit, but where defendant files his affidavit without having received the notice, he is deemed to have waived service of the same.[57]

5. Persons Who May Make — a. Defendant. The affidavit should regularly be made by defendant.[58] Where two or more joint defendants plead jointly, the affidavit of one of them is sufficient;[59] but where several defendants plead severally each plea must be sustained by a separate affidavit.[60] The mere fact that defendant is incompetent to testify in his own behalf does not invalidate his affidavit.[61]

b. Third Person. It is not indispensable, however, that defendant make the affidavit. A third person fully acquainted with the circumstances may make it, when defendant himself is unable to do so by reason of sickness or absence.[62] But it must clearly appear that defendant could not have made the affidavit himself,[63] and the means of knowledge possessed by the affiant should be stated.[64] The affidavit of a third person interested in the event of the suit is sufficient,[65] but the extent of his interest must be stated.[66] So also one who is a party to an instrument sued on, although not the nominal defendant, may make the affidavit;[67] and the affidavit of the real defendant, although not defendant of record, is sufficient.[68] But it must appear that the affidavit, if not made by defendant, was made by someone acting for him;[69] and the reason must be assigned why it is not made by defendant himself.[70] If defendant does not know all the facts, the better practice is to state them in his affidavit as facts of which he is informed, but several affidavits may be filed, each made by a person having actual knowledge of the facts

record may be found. Gottman *v.* Shoemaker, 86 Pa. St. 31.

54. Coates *v.* Vanuxem, 17 Wkly. Notes Cas. (Pa.) 538; Mehring *v.* Commonwealth Bldg. Assoc., 16 Wkly. Notes Cas. (Pa.) 99; Bray *v.* Martin, 13 Wkly. Notes Cas. (Pa.) 385; Dickson *v.* Buchanan, 5 Wkly. Notes Cas. (Pa.) 192.

55. Graff *v.* Crissman, 2 Wkly. Notes Cas. (Pa.) 66. But see Greenfield *v.* Gill, 2 Wkly. Notes Cas. (Pa.) 184, where it was held that a bill was a sufficient copy.

56. Fritz *v.* Hathaway, 135 Pa. St. 274, 19 Atl. 1011; Harbison *v.* Hawkins, 6 Leg. Gaz. (Pa.) 157.

57. Broad *v.* Winsborough, 6 Lanc. L. Rev. (Pa.) 20.

58. Marshall *v.* Witte, 1 Phila. (Pa.) 117; Clymer *v.* Fitler, 1 Wkly. Notes Cas. (Pa.) 626; City *v.* Devine, 1 Wkly. Notes Cas. (Pa.) 358; Gross *v.* Painter, 1 Wkly. Notes Cas. (Pa.) 154.

59. Tyrer *v.* Chew, 7 App. Cas. (D. C.) 175; Smith *v.* Bateman, 79 Ill. 531; Steelman *v.* Mattix, 35 N. J. L. 467; Eaby *v.* Stambaugh, 21 Lanc. L. Rev. (Pa.) 365.

60. Meyers *v.* Davis, 13 App. Cas. (D. C.) 361; Anthony *v.* Ward, 22 Ill. 180; Whiting *v.* Fuller, 22 Ill. 33; Davis *v.* Scarritt, 17 Ill. 202.

61. Robinson *v.* Arnold, 23 Pa. Co. Ct. 558; Reist *v.* Reist, 11 York Leg. Rec. (Pa.) 123.

62. Burkhart *v.* Parker, 6 Watts & S. (Pa.) 480; James *v.* Young, 1 Dall. (Pa.) 248, 1 L. ed. 121; Safety Banking, etc., Co. *v.* Conwell, 28 Pa. Super. Ct. 237; Kramer *v.* Cameron, 17 Wkly. Notes Cas. (Pa.) 223; Beattie *v.* Deichler, 15 Wkly. Notes Cas. (Pa.) 224; City *v.* Peterson, 3 Wkly. Notes Cas. (Pa.) 292; Clymer *v.* Fitler, 1 Wkly. Notes Cas. (Pa.) 626.

63. Phillips *v.* Allen, 32 Pa. Super. Ct. 356; Horsuch *v.* Fry, 23 Pa. Super. Ct. 509; Reiskey *v.* Gilman, 13 Wkly. Notes Cas. (Pa.) 282; Russell *v.* Foran, 1 Wkly. Notes Cas. (Pa.) 470.

The circumstances giving rise to the disability should be shown. Phillips *v.* Allen, 32 Pa. Super. Ct. 356; Horsuch *v.* Fry, 23 Pa. Super. Ct. 509. It is not sufficient to state merely that "defendant is a non-resident of the county." Albright *v.* Fritz, 21 Pa. Co. Ct. 444.

64. Lowry *v.* National Safe, etc., Co., 31 Pittsb. Leg. J. N. S. (Pa.) 240.

65. Hunter *v.* Reilly, 36 Pa. St. 509; Sleeper *v.* Dougherty, 2 Whart. (Pa.) 177; Urich *v.* Zern, 2 Pa. Dist. 55.

66. Blew *v.* Schock, 1 Wkly. Notes Cas. (Pa.) 612.

67. Ontario Bank *v.* Baxter, 6 Cow. (N. Y.) 395.

68. Miller *v.* Hooker, 2 How. Pr. (N. Y.) 124.

69. Niehlowski *v.* Kempenski, 10 Kulp (Pa.) 105; Marshall *v.* Witte, 1 Phila. (Pa.) 117.

70. Bingham *v.* Bingham, 1 N. Y. Civ. Proc. 166; Mason *v.* Bidleman, 1 How. Pr. (N. Y.) 62; Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581; Griel *v.* Buckius, 114 Pa. St. 187, 6

therein stated.[71] The attorney of defendant, if he knows the facts, may make the affidavit;[72] but he cannot make it merely upon the information of his client.[73] The affidavit should state what knowledge he has of the facts, and the source of his knowledge.[74]

6. Time of Filing. The time when the affidavit must be filed is generally determined by statute [75] or rule,[76] and no judgment for want of an affidavit is valid if signed prior to the expiration of the time allowed for the affidavit.[77] Where the statute prescribes the time when the affidavit shall be filed, a court has no power to extend the time so limited,[78] unless the statute gives the court power.[79] But an agreement between the parties to extend the time for filing the affidavit is valid and enforceable.[80] And so long as plaintiff has not signed or moved for judgment, the affidavit may be filed, even though the time set has expired;[81] but the moving for judgment by plaintiff after the law permits him to do so precludes defendant from thereafter filing his affidavit.[82] It is an improvident exercise of the court's discretion to allow an affidavit to be filed, after the cause has been reached for trial, which will materially change the issues.[83] No affidavit can be filed until after plaintiff has filed his declaration; [84] and an affidavit once filed extends through the whole progress of the case, although it be several times noticed for trial.[85] The time for filing the affidavit does not run pending a demurrer to the

Atl. 153; Taylor *v.* Sellers, 12 Pa. Super. Ct. 230; Albright *v.* Fritz, 21 Pa. Co. Ct. 444; Snyder *v.* Haas, 8 Del. Co. (Pa.) 35; Nichlowski *v.* Kempenski, 10 Kulp (Pa.) 105; Clark *v.* Lutes, 10 Kulp (Pa.) 99; Evans *v.* Boon, 27 Wkly. Notes Cas. (Pa.) 574; Cowperthwait *v.* Roney, 10 Wkly. Notes Cas. (Pa.) 482; City *v.* Devine, 1 Wkly. Notes Cas. (Pa.) 358; Stollaker *v.* Lardner, 1 Wkly. Notes Cas. (Pa.) 169; Gross *v.* Painter, 1 Wkly. Notes Cas. (Pa.) 154; Bancroft *v.* Sterr, 1 Wkly. Notes Cas. (Pa.) 132.

71. Watson *v.* Supplee, 15 Wkly. Notes Cas. (Pa.) 91.

72. Brown *v.* Cowee, 2 Dougl. (Mich.) 432; Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581; Safety Banking, etc., Co. *v.* Conwell, 28 Pa. Super. Ct. 237.

73. Crine *v.* Wallace, 1 Wkly. Notes Cas. (Pa.) 293.

74. Safety Banking, etc., Co. *v.* Conwell, 28 Pa. Super. Ct. 237; Creighton *v.* National Safe Co., 10 Pa. Dist. 600; Albright *v.* Fritz, 21 Pa. Co. Ct. 444; Bumgardner *v.* Morris, 25 Pittsb. Leg. J. N. S. (Pa.) 355.

75. See the statutes of the several states. And see the cases cited *infra*, this note.

The Delaware statute requires the affidavit to be filed before the last day of the regular term to which the original process is returnable. Laws (1893), c. 161, § 4.

The Illinois statute provides that the affidavit be filed with the plea. Pr. Act, § 36. But it has been held that it need not be filed until the cause is reached for trial. Barnes *v.* Sisson, 44 Ill. App. 327; Reid *v.* Cisler, 35 Ill. App. 572; Jensen *v.* Fricke, 35 Ill. App. 23; World's Soap Mfg. Co. *v.* Woltz, 27 Ill. App. 302; Martin *v.* Hochstadter, 27 Ill. App. 166.

The New Jersey statute requires the affidavit to be filed within ten days after a copy of plaintiff's declaration has been served upon defendant. Gen. Laws Pr. (1895) § 335; Laufman, etc., Co. *v.* Hope Mfg. Co., 54 N. J. L. 70, 23 Atl. 305.

The Pennsylvania statute provides that if the plaintiff serves upon defendant a copy of his statement not less than fifteen days before the return-day of the writ, defendant must file an affidavit of defense, on or before the return-day. Baughman *v.* Baughman, 13 York Leg. Rec. 19.

The Rhode Island statute requires the affidavit to be filed within ten days after the declaration is filed, if the case is in the common pleas division, or within the time fixed for filing special pleas, if in the district court. Gen. Laws (1896), c. 239, § 14.

76. Duncan *v.* Bell, 28 Pa. St. 516; Com. *v.* McCutcheon, 20 Wkly. Notes Cas. (Pa.) 365.

The District of Columbia rule requires the affidavit to be filed "with the plea." Sup. Ct. Rule 73. The rule is considered satisfied by the filing of an affidavit two days after the plea, where defendant took no intervening action. Meyers *v.* Davis, 13 App. Cas. 361.

The Michigan rule requires it to be filed before the first day of the term. Cir. Ct. Rule 14.

77. Morehead *v.* Payne, 1 Am. L. J. (Pa.) 255.

78. Woodruff *v.* McGaugle, 12 N. J. L. J. 384.

79. Haynes *v.* Saunders, 11 Cush. (Mass.) 537.

80. Muir *v.* Preferred Acc. Ins. Co., 203 Pa. St. 338, 53 Atl. 158.

81. Bloomer *v.* Reed, 22 Pa. St. 51; Gillespie *v.* Smith, 13 Pa. St. 65. *Compare* Sharpless *v.* Schnebly, 4 Pa. L. J. Rep. 32.

82. Meyers *v.* Davis, 13 App. Cas. (D. C.) 361.

83. General Electric R. Co. *v.* Leahy, 85 Ill. App. 526.

84. Geib *v.* Icard, 11 Johns. (N. Y.) 82.

85. Prescott *v.* Roberts, 6 Cow. (N. Y.) 45.

declaration.[86] The serving of the affidavit comes within the general rule that when a party serves a paper on the day when his default may regularly be taken, and the default is taken on that day, in good faith, and without knowing of the service, the default is regular notwithstanding the service may have been made at an earlier hour.[87] On the other hand it has been held that an affidavit is in time if filed on the first day on which plaintiff is entitled to ask for judgment.[88] Where defendant is required to file his affidavit on or before a certain day, he has all of the day named in which to do it.[89]

7. Form and Requisites — a. In General. Although the statute provides what the affidavit shall contain, it need not follow the precise words of the statute, if it is sufficient in substance.[90] It is generally provided that it should disclose the "nature and character of the defense."[91] A reasonable intendment is to be

86. Tradesmen's Sav. Fund *v.* Gilmore, 3 Pa. Dist. 823.

87. Brainard *v.* Hanford, 6 Hill (N. Y.) 368.

88. Duncan *v.* Bell, 28 Pa. St. 516.

89. Porter *v.* Hower, 9 Pa. Co. Ct. 283.

90. Wadsworth *v.* Ætna Nat. Bank, 84 Ill. 272; McCormick *v.* Wells, 83 Ill. 239; Garrity *v.* Wilcox, 83 Ill. 159; Harrison *v.* Willett, 79 Ill. 482; Castle *v.* Judson, 17 Ill. 381; McDonnel *v.* Olwell, 17 Ill. 375; Brown *v.* Masten, 2 How. Pr. (N. Y.) 195.

For illustrations of affidavits held sufficient see the following cases: In action for goods sold and delivered. United Oil Cloth Co. *v.* Dash, 32 Pa. Super. Ct. 155; Kowdy *v.* Savings Fund Loan Assoc., 31 Pa. Super. Ct. 52; Tyler *v.* Gresmer, 12 Pa. Dist. 279; Steelton Planing Mill Co. *v.* Kunkel, 10 Pa. Dist. 289; Nicholson *v.* Longbotham, 9 Del. Co. (Pa.) 330. In actions on negotiable instruments. Garman *v.* Gumbiner, 32 Pa. Super. Ct. 181; Tabor Mfg. Co. *v.* Lovell, 32 Pa. Super. Ct. 177; Freeman *v.* Baras, 31 Pa. Super. Ct. 84; Pennsylvania Iron Works Co. *v.* Greger, 19 Montg. Co. Rep. (Pa.) 110. In actions for breach of contract. Gochnauer *v.* Union Trust Co., 214 Pa. St. 117, 63 Atl. 595; Danby *v.* Penn Iron Co., 20 Lanc. L. Rev. (Pa.) 158; Taylor Bros. Co. *v.* Stambaugh, 17 York Leg. Rec. (Pa.) 153; Heathcote *v.* Strominger, 16 York Leg. Rec. (Pa.) 159. In scire facias to revive tax judgment. Philadelphia *v.* Reader, 31 Pa. Super. Ct. 75. In action on book-account. Scott Fertilizer Co. *v.* Maloney, 5 Pennew. (Del.) 517, 62 Atl. 223. In action on freight judgment. Levison *v.* Blumenthal, 10 Kulp (Pa.) 253. In action to recover car damage. Pennsylvania Co. *v.* Marquis Limestone, etc., Co., 31 Pa. Super. Ct. 198. In action for work, labor, and services. Potomac Laundry Co. *v.* Miller, 26 App. Cas. (D. C.) 230. In action for money had and received. Robbins *v.* Joy, 27 Pa. Super. Ct. 652. In action for sales commission. Corkran *v.* Patterson, 32 Pa. Super. Ct. 399.

For illustrations of affidavits held insufficient see the following cases: In action on promissory note. Knight *v.* Walker Brick Co., 23 App. Cas. (D. C.) 519; Stroheim *v.* Pack, etc., Mfg. Co., 10 Pa. Dist. 668. In action for breach of recognizance. Com. *v.* Snave, 16 York Leg. Rec. (Pa.) 76. In action for goods sold and delivered. Genesee Paper Co. *v.* Bogert, 23 Pa. Super. Ct. 23. In action of covenant on ground-rent deed. Pennsylvania L. Ins., etc., Co. *v.* Scott, 1 Wkly. Notes Cas. (Pa.) 51. In action on contract. Lomasney *v.* Turner, 33 Pa. Super. Ct. 106. In action to recover rent collected. Bakes *v.* Reese, 150 Pa. St. 44, 24 Atl. 634.

91. Melvin *v.* Conner, 5 Pennew. (Del.) 476, 62 Atl. 264; Flag *v.* Taylor, 8 Houst. (Del.) 165, 14 Atl. 26; Gallinger *v.* Hoon, 1 Grant (Pa.) 59; Hill *v.* Bramall, 1 Miles (Pa.) 352.

Illustrations.—An affidavit stating that the defense is payment is sufficient without showing to whom payment was made, how, when, or by whom. Ridings *v.* McMenamin, 1 Pennew. (Del.) 15, 39 Atl. 463. *Contra*, Mallory *v.* Miner, 9 Kulp (Pa.) 166. An affidavit in the following words is sufficient, under the Rhode Island statute: "I have a good and valid defence to a part of the plaintiff's claim; that said defence consists in this, that the account rendered is incorrect and that prices charged for materials furnished are higher than was agreed upon at the time of purchase. I make this affidavit from my best knowledge and belief and that such defence will prevail." New England Steam Brick Co. *v.* Dube, 19 R. I. 397, 37 Atl. 14. The grounds of the defense should be stated. Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382.

A mere denial of indebtedness on a *prima facie* case presented by plaintiff does not disclose with sufficient particularity the nature and character of the defense. Weidman *v.* Frank, 19 Lanc. L. Rev. (Pa.) 30.

In Illinois and Michigan it is not deemed necessary for defendant, in the affidavit of merits, to set up his defense in detail (Beardsley *v.* Gosling, 86 Ill. 58; Hays *v.* Loomis, 84 Ill. 18; McCormick *v.* Wells, 83 Ill. 239), although if he undertakes to do so he will be held to the same strictness in matters of substance as is required in pleadings (McCord *v.* Crooker, 83 Ill. 566). No greater particularity is necessary than in affidavits to set aside defaults, and it is sufficient for defendant to state that he has a good defense to the action on the merits, as he believes or is advised by counsel, without specifying the nature and extent of the defense. Wadsworth *v.* Ætna Nat. Bank, 84 Ill. 272; McCormick *v.* Wells, *supra*;

made in favor of an affidavit of defense,[92] and if there is any doubt as to the sufficiency of an affidavit, judgment will not be given at the first term.[93] This liberal interpretation seems to be required, since summary judgment may be had against defendant in case the affidavit is deemed insufficient.[94] In some cases, however, affidavits of defense seem to be somewhat strictly construed.[95] An affidavit of defense, it has been held, means an affidavit as to the merits, and an affidavit supporting a plea in abatement is not sufficient as an affidavit of defense.[96] The affidavit must not be evasive, but should fairly meet as much of plaintiff's case as it purports to answer.[97] It should be specific, leaving nothing to inference,[98] but it need be no more specific than the statement required of plaintiff in setting up his cause of action.[99] Stating the facts in the participial form instead of in the indicative will not render the affidavit insufficient.[1] The affidavit must be responsive to plaintiff's statement,[2] but it need answer nothing beyond what plaintiff alleges;[3] and it should be in harmony with the plea.[4] Defendant need not, in his affidavit, anticipate plaintiff's reply;[5] nor is a defendant required to reply to matters set up by plaintiff for the purpose of rebutting an anticipated defense.[6] An affidavit which purports to set up a defense to the entire demand when in fact it contains only a partial defense is insufficient.[7]

Hurd *v.* Burr, 22 Ill. 29. An affidavit of defendant that "he has a good and valid defense to the whole of said suit, upon the merits, as he verily believes," has been held to be sufficient. Harrison *v.* Willett, 79 Ill. 482.

92. May *v.* Forbes, 2 Pennew. (Del.) 194, 43 Atl. 839; Potomac Laundry Co. *v.* Miller, 26 App. Cas. (D. C.) 230; Dobbins *v.* Thomas, 26 App. Cas. (D. C.) 157; Brown *v.* Ohio Nat. Bank, 18 App. Cas. (D. C.) 598; Meyers *v.* Davis, 13 App. Cas. (D. C.) 361; Chapman *v.* Natalie Anthracite Coal Co., 11 App. Cas. (D. C.) 386; Pumphrey *v.* Bogan, 8 App. Cas. (D. C.) 449; Strauss *v.* Hensey, 7 App. Cas. (D. C.) 289, 36 L. R. A. 92; Twitchell *v.* McMurtrie, 77 Pa. St. 383; Joseph Schlitz Brewing Co. *v.* Rosenbluth, 33 Pa. Super. Ct. 303; Yearsley *v.* Glaser, 32 Pa. Super. Ct. 141; Silence *v.* Pierce, 1 Wkly. Notes Cas. (Pa.) 154; Kenworthy *v.* Hirst, 124 Fed. 995; White *v.* Safe Harbor Match Co., 106 Fed. 109.

93. Collins *v.* Hansen, 2 Pennew. (Del.) 155, 44 Atl. 624.

94. Pumphrey *v.* Bogan, 8 App. Cas. (D. C.) 449; Joseph Schlitz Brewing Co. *v.* Rosenbluth, 33 Pa. Super. Ct. 303; Yearsley *v.* Glaser, 32 Pa. Super. Ct. 141.

95. Appleby *v.* Barrett, 28 Pa. Super. Ct. 349; Mallory *v.* Miner, 9 Kulp (Pa.) 166.

96. McCarney *v.* McCamp, 1 Ashm. (Pa.) 4.

97. Howe *v.* Hasbrouck, 1 How. Pr. (N. Y.) 68; Singer *v.* Caldwell, 7 Pa. Dist. 583; Keim *v.* Coughlin, 1 Leg. Rec. (Pa.) 80; Hughes *v.* Smart, 19 Wkly. Notes Cas. (Pa.) 450; Winpenny *v.* Winner, 15 Wkly. Notes Cas. (Pa.) 127; Allen *v.* Germantown Nat. Bank, 10 Wkly. Notes Cas. (Pa.) 188; Gill *v.* Cullen, 8 Wkly. Notes Cas. (Pa.) 58.

In an action on a book-account, an affidavit should deny the indebtedness itself, and not merely plaintiff's statement of the indebtedness. Keim *v.* Coughlin, 1 Leg. Rec. (Pa.) 80.

98. Singer *v.* Caldwell, 7 Pa. Dist. 583; Kline *v.* Fitzsimmons, 2 Leg. Rec. (Pa.) 126; Northern Nat. Bank *v.* Hoopes, 98 Fed. 935.

99. Penn Shovel Co. *v.* Phelps, 24 Pa. Super. Ct. 595; Cochran *v.* Emmertz, 3 Del. Co. (Pa.) 433.

1. Gundersheimer *v.* Earnshaw, 13 App. Cas. (D. C.) 178.

2. Ashman *v.* Weigley, 148 Pa. St. 61, 23 Atl. 897.

3. Johnson *v.* Johnson, 1 Wkly. Notes Cas. (Pa.) 248.

After amendment plaintiff cannot take judgment for want of a sufficient affidavit of defense, if the affidavit when filed was sufficient defense to the first declaration. Niagara F. Ins. Co. *v.* Thron, 4 Pa. Co. Ct. 308.

4. Frank *v.* Morris, 57 Ill. 138, 11 Am. Rep. 4.

An affidavit showing a right of set-off is not in harmony with a plea of the general issue. Knight *v.* Walker Brick Co., 23 App. Cas. (D. C.) 519.

5. Meyers *v.* Davis, 13 App. Cas. (D. C.) 361; Bolton *v.* Pennsylvania Co., 88 Pa. St. 261; Orth *v.* Baker, 3 Leg. Chron. (Pa.) 197.

6. Kimball *v.* Grant, 19 Pa. Co. Ct. 96.

7. Ettinger *v.* Miller, 153 Pa. St. 457, 25 Atl. 804.

In Pennsylvania, under the act of May 31, 1893, judgment may be taken for such amounts of plaintiff's claim as are admitted to be due, and execution may issue for such admitted indebtedness, with a right to proceed to trial for the remainder of the claim. Reilly *v.* Daly, 159 Pa. St. 605, 28 Atl. 493; Scott *v.* Damascus Steel Co., 30 Pittsb. Leg. J. N. S. 146.

In Delaware the statute requires defendant to state whether he has a legal defense to the whole or a part of plaintiff's claim, and it is held under this statute that an affidavit is insufficient which does not state whether it purports to answer the whole or a part of the claim. Potts *v.* Wells, 3 Pennew. 11, 50 Atl. 62.

Formal defects will not vitiate an affidavit in case it sets forth substantially a good defense.[8]

b. Caption. The affidavit should be entitled in the court and cause;[9] but this is not necessary if it follows a properly entitled plea upon the same paper,[10] or if it can readily be identified as to court and cause.[11] And where the names of the parties are transposed, as was customary at common law with pleas, the affidavit is sufficient.[12]

c. Denials. Where the defense is negative and consists of denials of plaintiff's allegations, the affidavit must deny material facts,[13] and the denial must be broad enough to constitute a valid defense.[14] If any facts material to plaintiff's cause of action are denied the affidavit shows a good defense.[15] Denials should be direct, not argumentative [16] nor hypothetical.[17] A denial to prevent a judgment must be specific.[18] Facts not denied are to be taken as admitted.[19]

d. Affirmative Defenses. Where the defense is affirmative, all the facts necessary to constitute a substantial defense must be explicitly set forth.[20] Where a written instrument forms the basis of the defense, it should be set out in full in the affidavit,[21] or attached thereto.[22] If the facts alleged constitute a *prima facie* defense, the affidavit is sufficient in substance; [23] but if they do not, the affidavit

8. Allentown First Nat. Bank *v.* Eichelberger, 1 Woodw. (Pa.) 397.

9. Sandland *v.* Adams, 2 How. Pr. (N. Y.) 97; Higham *v.* Hayes, 2 How. Pr. (N. Y.) 27.

10. Cook *v.* Yarwood, 41 Ill. 115.

11. Beardsley *v.* Gosling, 86 Ill. 58; Bowen *v.* Wilcox, etc., Sewing Mach. Co., 86 Ill. 11; Hays *v.* Loomis, 84 Ill. 18; McCormick *v.* Wells, 83 Ill. 239; Wilborn *v.* Blackstone, 41 Ill. 264.

12. Hays *v.* Loomis, 84 Ill. 18; McCormick *v.* Wells, 83 Ill. 239.

13. Tredway *v.* Kennedy, 153 Pa. St. 438, 25 Atl. 644; Terry *v.* Wenderoth, 147 Pa. St. 519, 23 Atl. 763; Pacific, etc., Tel. Co. *v.* Com., 3 Brewst. (Pa.) 517.

14. Murphy *v.* Stanley-Bradley Pub. Co., 155 Pa. St. 25, 25 Atl. 753; Hultz *v.* Gibbs, 66 Pa. St. 360; Deacon *v.* Smaltz, 10 Pa. Super. Ct. 151; Catasauqua Mfg. Co. *v.* Roberts, 2 Pa. Dist. 392; Pittsburgh, etc., R. Co. *v.* Harbaugh, 4 Brewst. (Pa.) 115; Taylor *v.* Bushey, 5 Lanc. L. Rev. (Pa.) 181; Ross *v.* Philadelphia, etc., R. Co., 35 Wkly. Notes Cas. (Pa.) 510.

15. Devers *v.* Sollenberger, 25 Pa. Super. Ct. 64; Williams *v.* Myers, 3 Pa. Super. Ct. 481; Donnely *v.* Robeno, 23 Leg. Int. (Pa.) 117; Clarkson *v.* Templeton, 15 Montg. Co. Rep. (Pa.) 172.

16. Bank *v.* McCracken, 22 Wkly. Notes Cas. (Pa.) 10; Hitner *v.* Finney, 1 Wkly. Notes Cas. (Pa.) 50.

17. Wanner *v.* Emanuel's Church, 174 Pa. St. 466, 34 Atl. 188.

18. Scott *v.* Damascus Steel Co., 30 Pittsb. Leg. J. N. S. (Pa.) 146.

19. Bryan *v.* Harr, 21 App. Cas. (D. C.) 190; Hultz *v.* Gibbs, 66 Pa. St. 360; South Bethlehem Borough *v.* Laufer, 11 Pa. Co. Ct. 65.

Admissions by failure to deny in general see *supra*, IV, C, 5, b, (IV).

20. Marsh *v.* Marshall, 53 Pa. St. 396; Bryar *v.* Harrison, 37 Pa. St. 233; Dewey *v.* Dupuy, 2 Watts & S. (Pa.) 553; Heister *v.* Schwenck, 1 Woodw. (Pa.) 287; Northern Nat. Bank *v.* Hoopes, 98 Fed. 935; Reed *v.* Raymond, 37 Fed. 186.

In Illinois, while it is not necessary for defendant to set forth in his affidavit the details of the defense, yet if he undertakes to do so, he must set them forth fully and explicitly. Eberhart *v.* Page, 89 Ill. 550; Hays *v.* Loomis, 84 Ill. 18.

An affidavit of defense claiming merely a lump sum as expenses incurred for extra work necessitated by imperfect material supplied by plaintiff is not sufficiently explicit; the claim should have been itemized. American Bridge Co. *v.* Foley, 151 Fed. 960.

21. Erie *v.* Brady, 127 Pa. St. 169, 17 Atl. 885; Lucas Coal Co. *v.* Hunt, (Pa. 1887) 8 Atl. 860. See Lecrone Coke Co. *v.* Geisel, 6 Dauph. Co. Rep. (Pa.) 219.

22. Willard *v.* Reed, 132 Pa. St. 5, 18 Atl. 921; Shafer *v.* Keystone Mut. Ben. Assoc., 22 Pa. Co. Ct. 51; Brown *v.* Mutual Reserve Fund L. Assoc., 12 Kulp (Pa.) 30; Detweiler *v.* Kulp, 16 Lanc. L. Rev. (Pa.) 222.

An affidavit of defense alleging fraudulent representations in a prospectus need not be accompanied by a copy of the prospectus, if the affidavit alleges other false representations sufficient to explain it without reference to the paper. Max Meadows Land, etc., Co. *v.* Mendinhall, 4 Pa. Super. Ct. 398.

23. Andrews *v.* Blue Ridge Packing Co., 206 Pa. St. 370, 55 Atl. 1059; Merchants' Nat. Bank *v.* Eckels, 191 Pa. St. 372, 43 Atl. 245; Weixel *v.* Lennox, 179 Pa. St. 457, 36 Atl. 229; Leechburg Foundry, etc., Co. *v.* Jennings, 145 Pa. St. 559, 24 Atl. 910; Teller *v.* Sommer, 132 Pa. St. 33, 18 Atl. 1071; Noble *v.* Kreuzkamp, 111 Pa. St. 68, 2 Atl. 419; Thompson *v.* Clark, 56 Pa. St. 33; Leibersperger *v.* Reading Sav. Bank, 30 Pa. St. 531; Hemphill *v.* Eckfeldt, 5 Whart. (Pa.) 274; Spencer *v.* Keeler, 11 Pa. Super. Ct. 614; Czar Cycle Co. *v.* Holmes, 4 Pa. Super Ct. 548; Hill *v.* Bramall, 1 Miles (Pa.) 352; Bank *v.* Teese, 6 Pa. Co. Ct. 178; Moore *v.* Stanton, 16 Lanc. L. Rev. (Pa.) 414; Paul *v.* Fitch, 1

will not be sustained.[24] Nothing should be left to inference, and what is not stated in the affidavit must be taken not to exist.[25] But where the elements of a valid defense are found by necessary inference from the facts alleged, the affidavit is sufficient.[26] If the declaration is in general terms, as in the case of the common counts, the affidavit may be general.[27] An affidavit not sufficiently specific as to the date of an instrument sued on may be held good when plaintiff has failed to furnish a copy of the instrument as required by rule of court [28]

e. Certainty. The facts constituting the defense should be alleged with certainty, but ordinary certainty is sufficient.[29] Vague, indefinite, and uncertain allegations will not be deemed sufficient to satisfy the requirements of an affidavit of defense,[30] and this is especially true where the facts are within defendant's knowledge.[31] The affidavit should state the facts with sufficient detail to enable the court to say whether they amount to a defense and to inform plaintiff what will be interposed to defeat his claim.[32] It is not necessary to state the manner in which the facts alleged will be proved, nor the evidence by which they will be established,[33] and it has been held unnecessary for the affidavit to state whether an agreement referred to was made orally or in writing.[34] Where defendant has a defense to a part only of the claim set up he should specify particularly what part.[35]

Pa. L. J. 111; Purves *v.* Corfield, 1 Phila. (Pa.) 174; Rice *v.* Abeles, 1 Wkly. Notes Cas. (Pa.) 38.

24. Reilly *v.* Daly, 159 Pa. St. 605, 28 Atl. 493; Willard *v.* Reed, 132 Pa. St. 5, 18 Atl. 921; Morrison *v.* Nevin, 130 Pa. St. 344, 18 Atl. 636; Bryar *v.* Harrison, 37 Pa. St. 233; Davis *v.* Tingley, 2 Mona. (Pa.) 54; Frederici *v.* Pennsylvania Mut. F. Ins. Co., 1 Mona. (Pa.) 493; Ganster *v.* Vickers, 3 Walk. (Pa.) 148; Cochran *v.* Shields, 2 Grant (Pa.) 437; Hand *v.* Russel, 1 Pa. Super. Ct. 165; Deitrich *v.* Singer Mfg. Co., 4 Pa. Dist. 324; People's Natural Gas Co. *v.* Browarsky, 12 Pa. Co. Ct. 215; Neal *v.* Vollrath, 24 Wkly. Notes Cas. (Pa.) 124; City *v.* Devine, 1 Wkly. Notes Cas. (Pa.) 358; Smith *v.* Hazlett, 1 Wkly. Notes Cas. (Pa.) 62; Holt *v.* Holt Electric Storage Co., 79 Fed. 597.

25. Class *v.* Kingsley, 142 Pa. St. 636, 21 Atl. 902; Asay *v.* Lieber, 92 Pa. St. 377; Peck *v.* Jones, 70 Pa. St. 83; Brick *v.* Coster, 4 Watts & S. (Pa.) 494; Wile *v.* Onsel, 10 Pa. Co. Ct. 659; Taylor *v.* Bushey, 3 Lanc. L. Rev. (Pa.) 181; Bronson *v.* Silverman, 32 Leg. Int. (Pa.) 30; Grier *v.* Philadelphia, 29 Leg. Int. (Pa.) 52; Northern Nat. Bank *v.* Hoopes, 98 Fed. 935; Danville Consumers' Gas Co. *v.* American Electric Constr. Co., 50 Fed. 778; Reed *v.* Raymond, 37 Fed. 186.

26. Selden *v.* Neemes, 43 Pa. St. 421.

27. Hurd *v.* Burr, 22 Ill. 29; Com. *v.* Catawissa, etc., R. Co., 1 Pearson (Pa.) 341.

28. Ely *v.* Heiser, 1 Woodw. (Pa.) 454.

29. Dobbins *v.* Thomas, 26 App. Cas. (D. C.) 157; Brown *v.* Ohio Nat. Bank, 18 App. Cas. (D. C.) 598; Bronson *v.* Silverman, 77 Pa. St. 94; Montour Iron Co. *v.* Coleman, 31 Pa. St. 80; Dewey *v.* Dupuy, 2 Watts & S. (Pa.) 553; U. S. Bank *v.* Thayer, 2 Watts & S. (Pa.) 443; Hugg *v.* Scott, 6 Whart. (Pa.) 274; Joseph Schlitz Brewing Co. *v.* Rosenbluth, 33 Pa. Super. Ct. 579; Yearsley *v.* Glaser, 32 Pa. Super. Ct. 141; Davidov *v.* Bail, 23 Pa. Super. Ct. 579; Steiner *v.* Bartlett, 2 Pa. Super. Ct. 4; Harris *v.* Mason, 2 Miles (Pa.) 270; Forney *v.* Ebersole, 18 Lanc. L. Rev. (Pa.) 207; Maule *v.* Ardley, 3 Pa. L. J. Rep. 28; Sundstrom *v.* Smith, 20 Wkly. Notes Cas. (Pa.) 140; Silence *v.* Pierce, 1 Wkly. Notes Cas. (Pa.) 94; Richardson *v.* Osborn, 1 Wkly. Notes Cas. (Pa.) 84; Higel *v.* Quinlan, 1 Wkly. Notes Cas. (Pa.) 83; Kenworthy *v.* Hirst, 124 Fed. 995; White *v.* Safe Harbor Match Co., 106 Fed. 109.

Payment may be alleged generally, without showing to whom, when, how, or by whom it was made. Ridings *v.* McMenamin, 1 Pennew. (Del.) 15, 39 Atl. 463. *Contra*, Malloy *v.* Miner, 9 Kulp (Pa.) 166.

30. Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382; Chapman *v.* Natalie Anthracite Coal Co., 11 App. Cas. (D. C.) 386; Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. St. 624, 51 Atl. 313, 88 Am. St. Rep. 836; Frederici *v.* Pennsylvania Mut. F. Ins. Co., 1 Mona. (Pa.) 493; Anderson *v.* Williams, 10 Pa. Super. Ct. 329; Croxton *v.* Davies Casting Mach. Co., 27 Pa. Co. Ct. 148; Levering *v.* Gerhart, 10 Pa. Co. Ct. 559; Com. *v.* McAndrews, 8 Kulp (Pa.) 335; Bingaman *v.* Lewis, 30 Pittsb. Leg. J. N. S. (Pa.) 369; Ball *v.* Warrington, 87 Fed. 695; Consumers' Gas Co. *v.* American Electric Constr. Co., 50 Fed. 778, 1 C. C. A. 663.

31. Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382; Yearsley *v.* Glaser, 32 Pa. Super. Ct. 141.

32. Marston *v.* Warren State Insane Hospital, 18 Pa. Super. Ct. 547; Killen *v.* Brown, 6 Pa. Super. Ct. 15; Shafer *v.* Keystone Mut. Ben. Assoc., 22 Pa. Co. Ct. 51.

Test of sufficiency.— An affidavit will not be deemed sufficiently certain where the facts are alleged in so vague a manner that the affiant could not be indicted for perjury if they had been falsely stated. Cumberland Bldg., etc., Assoc. *v.* Brown, 4 Wkly. Notes Cas. (Pa.) 494.

33. Bronson *v.* Silverman, 77 Pa. St. 94.

34. McCoy Lime Co. *v.* McCoy, 16 Montg. Co. Rep. (Pa.) 32.

35. McDonnell *v.* Murphy, 20 Ill. 346.

f. Averments on Information and Belief. The party making the affidavit must swear to the facts stated therein from his own knowledge, and not from information [36] or information and belief.[37] But he may state that the facts are true "to the best of his knowledge and belief," such a statement being positive as to their truth.[38] So a statement that defendant has a defense to the action "as he believes" is sufficient,[39] although the rule is otherwise if knowledge of the facts is in his power.[40] However, an affidavit is sufficient which is stated to be on information and belief, if to that statement the party adds the averment that he expects to prove the facts so stated, or sets out specially the sources of his information or the facts upon which his belief rests.[41] Where facts are sworn to as within the affiant's own knowledge, it is unnecessary to state further that the affiant expects to be able to prove them.[42] The usual form of affidavit is that the affiant "verily believes" the facts which he alleges; but it is sufficient to allege their positive existence without alleging belief in them,[43] and a statement in the affidavit that the party expects to prove the facts alleged is sufficient without an averment of belief in their truth.[44] An affidavit which merely states that defendant's counsel is of opinion that defendant has a good and meritorious defense to the suit is insufficient.[45]

g. Legal Conclusions. Facts, not legal conclusions, must be stated in the affidavit.[46]

h. Attestation and Jurat. An affidavit of defense may be sworn to before a notary of another state.[47] But an affidavit attested by defendant's counsel as

36. Cake *v.* Stidfole, 1 Walk. (Pa.) 95; Uhler *v.* Kohler, 2 Wkly. Notes Cas. (Pa.) 67.

37. Brown *v.* Cowee, 2 Dougl. (Mich.) 432; Burdict *v.* Sterr, 2 Wkly. Notes Cas. (Pa.) 123.

38. Alston *v.* Brownell, 4 Ill. App. 17; New England Steam Brick Co. *v.* Dube, 19 R. I. 397, 37 Atl. 14.

39. Irons *v.* Miller, 7 Watts (Pa.) 562.

An affidavit of defense stating that defendant "believes and is able to prove," in an action on a book-account, that the copy filed was not a correct one, and specifying wherein the variance consisted, was sufficient. Wilson *v.* Kahn, 1 Wkly. Notes Cas. (Pa.) 444.

40. Wickersham *v.* Russell, 51 Pa. St. 71.

41. Magruder *v.* Schley, 17 App. Cas. (D. C.) 227; Wolf *v.* Jacobs, 187 Pa. St. 260, 41 Atl. 27; Newbold *v.* Pennock, 154 Pa. St. 591, 26 Atl. 606; Winsor *v.* Farmers', etc., Bank, 81* Pa. St. 304; Clarion First Nat. Bank *v.* Gregg, 79 Pa. St. 384; Thompson *v.* Clark, 56 Pa. St. 33; Black *v.* Halstead, 39 Pa. St. 64; Hagerstown First Nat. Bank *v.* Sollenberger, 2 Del. Co. (Pa.) 57; Brown *v.* Mutual Reserve Fund L. Assoc., 12 Kulp (Pa.) 30; Gowen *v.* McPherson, 10 Phila. (Pa.) 358; Black *v.* Garrett, 2 Leg. Rec. (Pa.) 251; Lewis *v.* Broadbent, 21 Wkly. Notes Cas. (Pa.) 31; Freeman *v.* Hibbs, 16 Wkly. Notes Cas. (Pa.) 456; Hermann *v.* Ramsey, 5 Wkly. Notes Cas. (Pa.) 188; Boothe *v.* Alexander, 4 Wkly. Notes Cas. (Pa.) 492; Pollock *v.* Association, 3 Wkly. Notes Cas. (Pa.) 170.

42. Bateman *v.* Lancaster Gen. Hospital, 20 Lanc. L. Rev. (Pa.) 238; Forney *v.* Ebersole, 18 Lanc. L. Rev. (Pa.) 207; Heist *v.* Kohler, 10 Lanc. L. Rev. (Pa.) 140; McCoy Lime Co. *v.* McCoy, 16 Montg. Co. Rep. (Pa.) 32.

43. Moeck *v.* Littell, 82 Pa. St. 354.

44. Fister *v.* Kline, 1 Woodw. (Pa.) 457.

45. Pettit *v.* Hall, 80 Ill. App. 376. See, however, Watt *v.* Bradley, 95 Cal. 415, 30 Pac. 557, holding that an affidavit of defense stating that defendant is advised by counsel that he has a good, substantial, and complete defense is sufficient, and need not be accompanied by a statement that defendant believes such advice.

46. Friend *v.* Oil Well Supply Co., 165 Pa. St. 652, 30 Atl. 1134; Superior Nat. Bank *v.* Stadelman, 153 Pa. St. 634, 26 Atl. 201; Erie City *v.* Brady, 127 Pa. St. 169, 17 Atl. 885; Mathews *v.* Sharp, 99 Pa. St. 560; International Sav., etc., Co. *v.* Stenger, 31 Pa. Super. Ct. 294; Fox *v.* Magaw, 12 Pa. Dist. 53; Sharpless *v.* Stirman, 4 Pa. Dist. 569; Knox *v.* Reeside, 1 Miles (Pa.) 294; Coon *v.* Moore, 2 Pa. Co. Ct. 246; Com. *v.* McAndrews, 8 Kulp (Pa.) 335; Reynolds *v.* Calendar, 7 Lack. Leg. N. (Pa.) 153; Hinckley *v.* Shope, 1 Leg. Gaz. (Pa.) 54; Garis *v.* Hopkins, 2 Leg. Int. (Pa.) 279; Black *v.* Garrett, 2 Leg. Rec. (Pa.) 251; North *v.* Yorke, 13 Montg. Co. Rep. (Pa.) 38; Wayman *v.* Ochse, 3 Pittsb. (Pa.) 162; Kemp *v.* Kemp, 1 Woodw. (Pa.) 154; Consumer's Gas Co. *v.* American Electric Constr. Co., 50 Fed. 778, 1 C. C. A. 663.

Good and sufficient defense.— An affidavit of defense by the son of defendant that he makes it at his father's request, who is ill, and that there is a good and sufficient defense to the suit with which he is familiar, but that he has been advised by counsel that he was not then required to reveal the nature of the same is insufficient; the averment that there is a good and sufficient defense being a mere conclusion. Rau *v.* Lex, 2 Mona. (Pa.) 87.

47. Champion *v.* Harthill, 1 Wkly. Notes Cas. (Pa.) 331.

notary is null and void,[48] except where the affidavit is in substance nothing more than a demurrer.[49] The mere clerical omission of the officer administering the oath to put his signature to the jurat, after swearing the affiant, does not vitiate the affidavit, when the affiant appears in court and states that he is willing to be resworn.[50]

V. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

A. Replication or Reply — 1. In General.[51] The next fact pleading after the answer is the replication which is usually called a reply in the code states. The office of a reply is to meet matter averred in the answer.[52]

2. Necessity For — a. At Common Law. At common law the necessity for a replication is always governed by the plea, and is required whenever the plea does not conclude to the country.[53]

b. Under Codes and Practice Acts — (i) *In General.* In many jurisdictions the necessity for a reply has been removed or limited by statute.[54] Among the various codes of procedure there is a difference in respect to the necessity for a reply, and in many of the code states different rules have been in force at different times. One group of codes requires a reply in all cases where the answer sets up

48. Geyn *v.* Clark, 14 Wkly. Notes Cas. (Pa.) 423.

49. Ayer *v.* Sternecck, 43 Leg. Int. (Pa.) 162.

50. Maples *v.* Hicks, 3 Pa. L. J. 17.

51. Aider by verdict or judgment see *infra*, XIV.

Amendment of see *infra*, VII, A, 13.

As curing defects in prior pleading see *infra*, XIV, B, 3.

In connection with demurrer see *infra*, VI, G, 3.

In particular actions see ACCORD AND SATISFACTION, 1 Cyc. 347; ACCOUNTS AND ACCOUNTING, 1 Cyc. 394; ADMIRALTY, 1 Cyc. 857; ARBITRATION AND AWARD, 3 Cyc. 784; ASSUMPSIT, ACTION OF, 4 Cyc. 352; ATTACHMENT, 4 Cyc. 803; BAIL, 5 Cyc. 59.

Motions relating to see *infra*, XII.

Supplemental reply see *infra*, VII, D, 8.

To amended pleading see *infra*, VII, A, 16.

To plea puis darrein continuance see *infra*, VII, C, 7.

To supplemental pleading see *infra*, VII, D, 10.

Waiver of objections see *infra*, XIV.

Withdrawal of see *infra*, XI, C.

52. Watson *v.* Ruderman, 79 Conn. 687, 66 Atl. 515.

A reply is a pleading.— Perkins *v.* Irvine, 23 Nova Scotia 250.

53. Evans *v.* St. John, 9 Port. (Ala.) 186; Wheelock *v.* Fitch, 3 Port. (Ala.) 387; Kennedy *v.* Pickering, Minor (Ala.) 137; Cleaton *v.* Chambliss, 6 Rand. (Va.) 86; Lockridge *v.* Carlisle, 6 Rand. (Va.) 20; Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

Issue cannot be reached upon a plea setting up an affirmative defense and concluding with a verification, without a replication. French *v.* Scobey, 108 Ill. App. 606; Lockridge *v.* Carlisle, 6 Rand. (Va.) 20. And see Hamilton *v.* Coons, 5 Dana (Ky.) 317, where it was held irregular to raise an issue upon a plea of payment by a *similiter*.

In Florida, where a plea or subsequent pleading, responsive to a declaration, or former pleading, sets up new matter in avoidance, a reply must be made to, or issue joined on, such pleading, without which it will be error to submit the case to the jury for trial. Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270; Livingston *v.* L'Engle, 22 Fla. 427; Benbow *v.* Marquis, 17 Fla. 441; Miller *v.* Hoc, 1 Fla. 189.

In Illinois the section of the Practice Act which provides for notice of special matters of defense has no application to special matters of reply to special pleas, and such a notice cannot be substituted for a formal replication. Snow *v.* Griesheimer, 120 Ill. App. 516 [*affirmed* in 220 Ill. 106, 77 N. E. 110].

A notice of special defense under the general issue puts nothing in issue, and it need not be replied to. Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Hunt *v.* Weir, 29 Ill. 83. See also Curtis *v.* Gill, 34 Conn. 49.

54. Bremner *v.* Wallace, 12 Nova Scotia 481; Smith *v.* Stewart, 3 Nova Scotia 417. And see the statutes of the several states.

In Iowa a reply is not necessary or allowable except where a counter-claim is alleged or some matter to which plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer. Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa 250, 90 N. W. 746; Kinkead *v.* McCormack Harvesting Mach. Co., 106 Iowa 222, 76 N. W. 663; Taylor *v.* Gilbert, 92 Iowa 587, 61 N. W. 203; Chase *v.* Kaynor, 78 Iowa 449, 43 N. W. 269; Kavaleir *v.* Machula, 77 Iowa 121, 41 N. W. 590; Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228; Williams *v.* Wilcox, 66 Iowa 65, 23 N. W. 266; Cassidy *v.* Caton, 47 Iowa 22; Davis *v.* Payne, 45 Iowa 194; Barger *v.* Farris, 34 Iowa 228; Allison *v.* King, 25 Iowa 56; Finley *v.* Brown, 22 Iowa 538.

In Texas the statute provides that plaintiff need not deny any special matter of

new matter, whether as counter-claim or merely as defense.[55] In a second group of codes and practice acts, a reply is necessary only to a counter-claim; and where the answer merely contains new matter by way of defense, an issue is raised thereon by operation of law.[56] Another group of codes requires a reply in case of a counter-claim, and also, in the discretion of the court, on defendant's application, where new matter in defense is set up in the answer.[57] In another group no reply is authorized in any case.[58] In some jurisdictions an answer of certain defendants,

defense pleaded by defendant but the same shall be regarded as denied unless expressly admitted. Missouri, etc., R. Co. *v.* Avis, 100 Tex. 33, 93 S. W. 424; Brooks *v.* Pegg, (1888) 8 S. W. 595; McDonald *v.* Tinnon, 20 Tex. 245; Gouhenant *v.* Brisbane, 18 Tex. 20; Kuteman *v.* Carroll, (Civ. App. 1902) 70 S. W. 563; Martin *v.* Teal, (Civ. App. 1895) 29 S. W. 691.

Only matter in avoidance need be pleaded specially in reply. Kuteman *v.* Carroll, (Civ. App. 1902) 70 S. W. 563.

55. *Indiana.*— Kennard *v.* Carter, 64 Ind. 31; Stoops *v.* Greensburgh, etc., Plank-Road Co., 10 Ind. 47.

Kansas.— Ballinger *v.* Lantier, 15 Kan. 608; Aiken *v.* Franz, 2 Kan. App. 75, 43 Pac. 306.

Minnesota.— Webb *v.* O'Donnell, 28 Minn. 369, 10 N. W. 140. But see Linn *v.* Rugg, 19 Minn. 181.

Missouri.— Girard *v.* St. Louis Car Wheel Co., 123 Mo. 358, 27 S. W. 648, 45 Am. St. Rep. 556, 25 L. R. A. 514; Huber Mfg. Co. *v.* Hunter, 87 Mo. App. 50; Rich *v.* Donovan, 81 Mo. App. 184; Cordner *v.* Roberts, 58 Mo. App. 440. Under a former statute a reply was necessary only when a set-off or counter-claim was pleaded. Powers *v.* Kueckhoff, 41 Mo. 425, 97 Am. Dec. 281.

Nebraska.— Western Horse, etc., Ins. Co. *v.* Timm, 23 Nebr. 526, 37 N. W. 308; Williams *v.* Evans, 6 Nebr. 216. *Compare* McCann *v.* McLennan, 2 Nebr. 286, under a different statute.

Ohio.— Knauber *v.* Wunder, 5 Ohio Dec. (Reprint) 516, 6 Am. L. Rec. 366.

Oregon.— Minard *v.* McBee, 29 Oreg. 225, 44 Pac. 491; Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676. See Haines *v.* Connell, 48 Oreg. 469, 87 Pac. 265, 88 Pac. 872.

United States.— Hathaway *v.* New York Mut. L. Ins. Co., 99 Fed. 534, Washington practice.

See 39 Cent. Dig. tit. "Pleading," § 321 *et seq.*

56. *Arkansas.*— St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293; George *v.* St. Louis, etc., R. Co., 34 Ark. 613; Watson *v.* Johnson, 33 Ark. 737.

Indian Territory.— Sass *v.* Thomas, 6 Indian Terr. 60, 89 S. W. 656; Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462; Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012.

Kentucky.— Davis *v.* Dycus, 7 Bush 4; Graves *v.* Ward, 2 Duv. 301. The rule is changed by Code (1900), § 98, which makes a reply necessary even to new matter set up merely as a defense.

Massachusetts.— Moore *v.* Northwestern Mut. L. Ins. Co., 192 Mass. 468, 78 N. E. 488.

Montana.— Brophy *v.* Downey, 26 Mont. 252, 67 Pac. 312; Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943.

West Virginia.— Hickman *v.* Painter, 11 W. Va. 386. But see Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

Wisconsin.— Payne *v.* Payne, 129 Wis. 450, 109 N. W. 105; Leslie *v.* Keepers, 68 Wis. 123, 31 N. W. 486; Wood *v.* Lake, 13 Wis. 84.

See 39 Cent. Dig. tit. "Pleading," § 321 *et seq.*

57. *Dakota.*— Gull River Lumber Co. *v.* Keefe, 6 Dak. 160, 41 N. W. 743.

New York.— Keeler *v.* Keeler, 102 N. Y. 30, 6 N. E. 678; Arthur *v.* Homestead F. Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550; Reno *v.* Thompson, 111 N. Y. App. Div. 316, 97 N. Y. Suppl. 744; Steinway *v.* Steinway, 68 Hun 430, 22 N. Y. Suppl. 945; Thomas *v.* Loaners' Bank, 38 N. Y. Super. Ct. 466; Springer *v.* Bien, 16 Daly 275, 10 N. Y. Suppl. 530 [*affirmed* in 128 N. Y. 99, 27 N. E. 1076, 27 Abb. N. Cas. 213]; New York, etc., R. Co. *v.* Robinson, 12 N. Y. Suppl. 208, 25 Abb. N. Cas. 116; Winchester *v.* Browne, 11 N. Y. Suppl. 614, 25 Abb. N. Cas. 148; Avery *v.* New York Cent., etc., R. Co., 6 N. Y. Suppl. 547; Maricle *v.* Brooks, 5 N. Y. Suppl. 210; Jersey City Ins. Co. *v.* Archer, 7 N. Y. St. 326; Nichols *v.* Boerum, 6 Abb. Pr. 290; De Leyer *v.* Michaels, 5 Abb. Pr. 203; Devlin *v.* Bevins, 22 How. Pr. 290; Bracket *v.* Wilkinson, 13 How. Pr. 102; Reilay *v.* Thomas, 11 How. Pr. 266; Simpson *v.* Loft, 8 How. Pr. 234.

North Carolina.— Fishblate *v.* New York Fidelity, etc., Co., 140 N. C. 589, 53 S. E. 354; Smith *v.* Bruton, 137 N. C. 79, 49 S. E. 64; Barnhardt *v.* Smith, 86 N. C. 473.

South Carolina.— Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

South Dakota.— Seiberling *v.* Mortinson, 10 S. D. 644, 75 N. W. 202.

See 39 Cent. Dig. tit. "Pleading," § 321.

58. Holland *v.* Heyman, 60 Ga. 174; McLaren *v.* Birdsong, 24 Ga. 265; Henry *v.* Peters, 5 Ga. 311; Lamorere *v.* Avery, 32 La. Ann. 1008; Bruce *v.* Stone, 5 La. 1; Mead *v.* Buckner, 2 La. 282; Suarez *v.* Duralde, 1 La. 260. See Chattanooga Third Nat. Bank *v.* Foster, 90 Tenn. 735, 18 S. W. 267; Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080.

In California the code provides that the statement of any new matter in the answer, in avoidance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party. Under

not made a cross petition against their co-defendants, need not be replied to by the latter;[59] and in other jurisdictions no answer or reply is required of a defendant on whom a co-defendant has served an answer asking affirmative relief.[60]

(II) *Discretion of Court.* Where occasion demands it, the court has discretion in some jurisdictions to require a reply which would not otherwise be necessary.[61] By statute, in a few states, it rests in the discretion of the court to require a reply to new matter not constituting a counter-claim,[62] but the order can be granted only on the application of defendant.[63] This discretion is a legal one, which should be so exercised as to prevent surprise and promote the interests of justice,[64] although the necessity to prevent surprise is not the only test.[65] This discretion is usually exercised by ordering a reply where the new matter is of such a character as to indicate that if true it will constitute a defense to the action.[66] Where any substantial advantage will accrue to defendant without prejudice to plaintiff by the granting of such an order, it should be granted;[67] but the motion may properly be denied when defendant will not be prejudiced thereby or when plaintiff would be prejudiced by having it granted.[68] So where the matters alleged in the answer do not constitute a defense, the court should not, in the exercise of its discretion, order a reply.[69] Where there are several defenses pleaded, the court may order them to be replied to separately.[70] Where the filing of a reply is a matter within the court's discretion, the pleadings are brought to an issuable conclusion without a reply in the absence of an order

this provision no demurrer is necessary to an answer. Harding *v.* Harding, 148 Cal. 397, 83 Pac. 434; Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369; Wixson *v.* Devine, 67 Cal. 341, 7 Pac. 776; Clark *v.* Child, 66 Cal. 87, 4 Pac. 1058; Herold *v.* Smith, 34 Cal. 122. But another section of the code provides for a cross complaint where defendant seeks affirmative relief, and it is held that a reply must be filed thereto. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630; Doyle *v.* Franklin, 40 Cal. 106; Herold *v.* Smith, 34 Cal. 122. Every averment of new matter in an answer is taken to be denied, except that if the answer recite a written instrument, the genuineness and due execution of the instrument are not to be taken as denied, but, on the contrary, as admitted, unless plaintiff shall expressly deny the same under oath. Clark *v.* Child, 66 Cal. 87, 4 Pac. 1058.

59. Barrett *v.* Gwyn, 88 S. W. 1096, 28 Ky. L. Rep. 101.

60. Havana City R. Co. *v.* Ceballos, 49 N. Y. App. Div. 421, 63 N. Y. Suppl. 422.

Where answer is not served.— If it be conceded that under such a statute a defendant denies new matter alleged against him in the answer of a co-defendant, although he does not answer or reply thereto, the rule is not applicable where the answer setting up the new matter is not served on such co-defendant. Gulling *v.* Washoe County Bank, 28 Nev. 450, 82 Pac. 800.

61. Beard *v.* White, 120 Ga. 1018, 48 S. E. 400. See also Pratt *v.* Knight, 29 Me. 471.

62. Simmons *v.* Simmons, 4 N. Y. Suppl. 469, 21 Abb. N. Cas. 469; Sterling *v.* Metropolitan L. Ins. Co., 6 N. Y. St. 96. See also *supra*, V, A, 2, b, (I).

63. Sterling *v.* Metropolitan L. Ins. Co., 6 N. Y. St. 96, holding that application cannot be made by plaintiff.

64. Mercantile Nat. Bank *v.* Corn Exch. Bank, 73 Hun (N. Y.) 78, 25 N. Y. Suppl. 1068.

65. Cavanagh *v.* Oceanic Steamship Co., 9 N. Y. Suppl. 198, where if it appeared from reply that plaintiff relied only upon certain facts defendant could by demurrer avoid preparing for trial.

66. Cornwall *v.* McKinney, 9 S. D. 213, 68 N. W. 333; Seaton *v.* Garrison, 116 N. Y. App. Div. 301, 101 N. Y. Suppl. 526.

67. Toplitz *v.* Garrigues, 71 N. Y. App. Div. 37, 75 N. Y. Suppl. 678; Hartford Nat. Bank *v.* Beinecke, 15 N. Y. App. Div. 474, 44 N. Y. Suppl. 486; Timble *v.* Russell, 41 Misc. (N. Y.) 577, 85 N. Y. Suppl. 109; Wester *v.* Mutual Reserve Fund Life Assoc., 27 Misc. (N. Y.) 830, 57 N. Y. Suppl. 832; Cavanagh *v.* Oceanic Steamship Co., 9 N. Y. Suppl. 198.

68. Pope Mfg. Co. *v.* Rubber Goods Mfg. Co., 100 N. Y. App. Div. 514, 91 N. Y. Suppl. 831; Zeiner *v.* Mutual Reserve Fund Life Assoc., 51 N. Y. App. Div. 607, 64 N. Y. Suppl. 63; Scofield *v.* Demorest, 55 Hun (N. Y.) 254, 7 N. Y. Suppl. 832; Columbus, etc., R. Co. *v.* Ellis, 11 N. Y. Suppl. 768.

Where the new matter is within the knowledge of defendant, an order for plaintiff to reply thereto will not be granted. Masters *v.* De Zavala, 48 N. Y. App. Div. 269, 62 N. Y. Suppl. 791.

Purpose or reply.— When the only purpose of defendant in moving for an order to compel plaintiff to file a reply is to avoid the necessity of proving the facts alleged in the answer by way of avoidance, the order will be refused. Masters *v.* De Zavala, 48 N. Y. App. Div. 269, 62 N. Y. Suppl. 791.

69. Voisin *v.* Mitchell, 96 N. Y. Suppl. 386.

70. Cauchois *v.* Proctor, 79 Hun (N. Y.) 388, 29 N. Y. Suppl. 770.

requiring it,[71] and evidence may be introduced by plaintiff of affirmative matters tending to avoid the defenses pleaded.[72]

c. Nature of New Matter — (I) *In General.*[73] The new matter which calls for a reply must be material,[74] and such as directly, or by necessary implication, admits the truth of the essential allegations of the complaint, and purports to avoid the same.[75] It must be matter which plaintiff is not bound to prove in the first instance in support of the action.[76] The purported admission of a fact in an answer which is not in fact alleged in the complaint will not be deemed such an affirmative allegation by defendant as to require a reply.[77]

(II) *As Distinguished From Denials.* Whether matter is new or not must be determined by the matter itself, and not by the form in which it is pleaded — the test being whether it operates as a traverse or by way of confession and avoidance.[78] A reply is never necessary to allegations which are in form new matter but in substance amount merely to denials.[79] Likewise, where all the evidence admissible under affirmative allegations in an answer or special plea could have been shown under a general denial or general issue also pleaded, no reply is necessary.[80] And where a special plea, under the common-law system, amounts in substance to no more than the general issue, no replication is necessary.[81] Likewise, no replication is necessary to matter set up by way of notice of special defense under the general issue.[82] But an answer sets up new matter

71. Gilbert *v.* McKenna, 15 Misc. (N. Y.) 25, 36 N. Y. Suppl. 430.

72. New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; Argall *v.* Jacobs, 87 N. Y. 110, 41 Am. Rep. 357; Mercantile Nat. Bank *v.* Corn Exch. Bank, 73 Hun (N. Y.) 78, 25 N. Y. Suppl. 1068.

73. What constitutes new matter in answer in general see *supra*, IV, D, 2.

74. Walrod *v.* Bennett, 6 Barb. (N. Y.) 144.

75. Goddard *v.* Fulton, 21 Cal. 430; Brown *v.* Ready, 20 S. W. 1036, 14 Ky. L. Rep. 583.

76. Huber Mfg. Co. *v.* Hunter, 87 Mo. App. 50; Zeiner *v.* Mutual Reserve Fund Life Assoc., 51 N. Y. App. Div. 607, 64 N. Y. Suppl. 63.

77. Hoisington *v.* Armstrong, 22 Kan. 110.

78. Frisch *v.* Caler, 21 Cal. 71.

79. *California.*— Goddard *v.* Fulton, 21 Cal. 430.

Indiana.— Webb *v.* Corbin, 78 Ind. 403; Ferris *v.* Johnson, 27 Ind. 247.

Iowa.— Ford *v.* Westcott, 3 Iowa 286.

Kansas.— Wilson *v.* Fuller, 9 Kan. 176.

Kentucky.— Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 23 S. W. 652, 15 Ky. L. Rep. 390, 22 L. R. A. 72; Carter *v.* Goodman, 11 Bush 228; Davis *v.* Dycus, 7 Bush 4; Murphy *v.* Illinois Cent. R. Co., 101 S. W. 982, 31 Ky. L. Rep. 148; Wheeler *v.* Davis, 96 S. W. 451, 29 Ky. L. Rep. 730; Morgan *v.* Lewis, 92 S. W. 970, 29 Ky. L. Rep. 197; Simpson *v.* Kelley, 90 S. W. 241, 28 Ky. L. Rep. 702; McKay *v.* Henderson, 71 S. W. 625, 24 Ky. L. Rep. 1484; Deming *v.* Paynter, 42 S. W. 1112, 19 Ky. L. Rep. 1123; West Covington *v.* Ludlow, 15 S. W. 353, 12 Ky. L. Rep. 783.

Minnesota.— King *v.* Burnham, 93 Minn. 288, 101 N. W. 302; Engel *v.* Bugbee, 40 Minn. 492, 42 N. W. 351; Conway *v.* Elgin, 38 Minn. 469, 38 N. W. 370.

Missouri.— Jordan *v.* Buschmeyer, 97 Mo. 94, 10 S. W. 616; Luther *v.* Brown, 66 Mo. App. 227.

Montana.— Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007; Mauldin *v.* Ball, 5 Mont. 96, 1 Pac. 409.

Nebraska.- Peaks *v.* Lord, 42 Nebr. 15, 60 N. W. 349.

New York.— Burr *v.* Union Surety, etc., Co., 86 N. Y. App. Div. 545, 83 N. Y. Suppl. 756; Gilbert *v.* Cram, 12 How. Pr. 455.

Ohio.— Simmons *v.* Green, 35 Ohio St. 104; Hoffman *v.* Gordon, 15 Ohio St. 211; Long *v.* Hoban, 7 Ohio Dec. (Reprint) 688, 4 Cinc. L. Bul. 986; Singer Mfg. Co. *v.* Brill, 6 Ohio Dec. (Reprint) 958, 9 Am. L. Rec. 44.

Oregon.— Kabat *v.* Moore, 48 Oreg. 191, 85 Pac. 506.

Washington.— Frank *v.* Jenkins, 11 Wash. 611, 40 Pac. 220.

Wyoming.— Iba *v.* Central Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

United States.— Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239.

See 39 Cent. Dig. tit. "Pleading," § 322.

80. *Colorado.*— Cuenin *v.* Halbouer, 32 Colo. 51, 74 Pac. 885.

Indiana.— Foust *v.* Gregg, 68 Ind. 399; Butler *v.* Edgerton, 15 Ind. 15.

Michigan.— Craig *v.* Grant, 6 Mich. 447.

Montana.— Babcock *v.* Maxwell, 29 Mont. 31, 74 Pac. 64.

New York.— Johnson *v.* Andrews, 34 Misc. 89, 68 N. Y. Suppl. 764.

Ohio.— Corry *v.* Campbell, 25 Ohio St. 134; Valley R. Co. *v.* Roos, 9 Ohio Cir. Ct. 201, 6 Ohio Cir. Dec. 33.

Texas.— Taylor *v.* Ward, (Civ. App. 1907) 102 S. W. 465.

Wyoming.— Iba *v.* Central Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

See 39 Cent. Dig. tit. "Pleading," § 323.

81. Union Ins. Co. *v.* Murphy, 1 Pa. Cas. 570, 4 Atl. 352.

82. Burt *v.* Wayne County Cir. Judges, 90

requiring a reply, although it merely alleges facts inconsistent with the allegations of the complaint, if such allegations in the complaint are not necessary for plaintiff's cause of action but merely anticipate a defense.[83]

d. Nature of Counter-Claim or Cross Complaint. A counter-claim which makes a reply necessary is one showing matter sufficient to sustain an independent action by defendant against plaintiff.[84] But if defendant asks merely that his demand be used defensively to reduce plaintiff's demand, without seeking an affirmative judgment, such a demand is not a counter-claim requiring a reply.[85] And it has been held that a counter-claim should be so designated, and where facts constituting a counter-claim are pleaded as a defense merely, they do not constitute such a counter-claim as requires a reply.[86] Where an answer may be construed as setting up either a defense merely or a counter-claim, it will, in order to raise an issue, in the absence of a reply, be construed as a defense.[87] Where a cross complaint, as distinguished from a counter-claim, is provided for by statute as a separate pleading,[88] a reply is not necessary where the answer does not in fact contain a cross complaint,[89] and merely naming a pleading a cross complaint does not necessarily make it such so as to require a reply.[90] Likewise a reply may be unnecessary where the cross complaint is irrelevant to the case stated by plaintiff,[91] or where the cross complaint is styled an "answer" by defendant.[92] But a cross complaint directed solely against other parties who are not in court cannot be taken as confessed against plaintiff for failure to reply.[93] So where every fact pleaded in the cross bill is put in issue by the allegations of the complaint and amended answer, no reply need be filed.[94]

e. Defective, Insufficient, Unauthorized, or Unnecessary Answer. Where the allegations of new matter, admitting their truth, do not constitute a defense,[95]

Mich. 520, 51 N. W. 482; West *v.* Tyler, 2 Coldw. (Tenn.) 96.

83. State *v.* Eighth Judicial Dist. Ct., 32 Mont. 37, 79 Pac. 546 (answer alleging contributory negligence); Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676 (answer alleging payment). But see Ermert *v.* Dietz, 44 S. W. 138, 19 Ky. L. Rep. 1639; McArdle *v.* McArdle, 12 Minn. 98. *Compare* Frisch *v.* Caler, 21 Cal. 71.

Answer averring payment where complaint alleges non-payment see PAYMENT, 30 Cyc. 1253.

84. Linn *v.* Rugg, 19 Minn. 181; Vassear *v.* Livingston, 13 N. Y. 248; Nichols *v.* Boerum, 6 Abb. Pr. (N. Y.) 290 [*affirmed* in 16 How. Pr. 576 note]; Van de Sande *v.* Hall, 13 How. Pr. (N. Y.) 458; Lemon *v.* Trull, 13 How. Pr. (N. Y.) 248.

Allegations held not to constitute counter-claims see Prichard *v.* Peace, 98 Ky. 99, 32 S. W. 296, 17 Ky. L. Rep. 662; Davis *v.* Dycus, 7 Bush (Ky.) 4; Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234; Lash *v.* McCormick, 17 Minn. 403; Englebrecht *v.* Rickert, 14 Minn. 140; Walker *v.* American Cent. Ins. Co., 143 N. Y. 167, 38 N. E. 106; Rogers *v.* King, 66 Barb. (N. Y.) 495; Burke *v.* Thorn, 44 Barb. (N. Y.) 363; Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130.

85. Hatzel *v.* Hoffman House, 2 N. Y. App. Div. 120, 37 N. Y. Suppl. 598; American Dock, etc., Co. *v.* Staley, 40 N. Y. Super. Ct. 539; Farrell *v.* Amberg, 8 Misc. (N. Y.) 220, 28 N. Y. Suppl. 564 [*affirmed* in 151 N. Y. 670, 46 N. E. 1146].

86. Broughton *v.* Sherman, 21 Minn. 431; Equitable L. Assur. Soc. *v.* Cuyler, 75 N. Y. 511; Deering *v.* New York, 51 N. Y. App. Div. 402, 64 N. Y. Suppl. 606; Cockerill *v.* Loonam, 36 Hun (N. Y.) 353; Wood *v.* Gordon, 18 N. Y. Suppl. 109; Favilla *v.* Moretti, 13 N. Y. Suppl. 707; Avery *v.* New York Cent., etc., R. Co., 6 N. Y. Suppl. 547; Regan *v.* Jones, 14 N. D. 591, 105 N. W. 613.

A prayer for affirmative relief is not of itself sufficient for such purpose. Wood *v.* Gordon, 13 N. Y. Suppl. 595.

87. Bates *v.* Rosekrans, 23 How. Pr. (N. Y.) 98 [*affirmed* in 37 N. Y. 409, 4 Transcr. App. 332, 4 Abb. Pr. N. S. 270].

88. See *supra*, IV, E.

89. Haight *v.* Tryon, (Cal. 1893) 34 Pac. 712; Goldman *v.* Bashore, 80 Cal. 146, 22 Pac. 82; Harrison *v.* McCormick, 69 Cal. 616, 11 Pac. 456; Doyle *v.* Franklin, 40 Cal. 106.

90. Harrison *v.* McCormick, 69 Cal. 916, 11 Pac. 456; Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369.

91. Royon *v.* Guillée, 62 Cal. 536.

92. Shain *v.* Belvin, 79 Cal. 262, 21 Pac. 747.

93. Scott *v.* Wilson, 2 Bush (Ky.) 603.

94. Medland *v.* Walker, 96 Iowa 175, 64 N. W. 797.

95. *Colorado.*— Hickey *v.* Anheuser-Busch Brewing Assoc., 36 Colo. 386, 85 Pac. 838.

Indiana.— Bragg *v.* State, 30 Ind. 427; Numbers *v.* Bowser, 29 Ind. 491; Debord *v.* La Hue, 26 Ind. 212.

Kansas.— West *v.* Cameron, 39 Kan. 736, 18 Pac. 894; Wilson *v.* Fuller, 9 Kan. 176.

Kentucky.— See Shell *v.* Asher, 102 S. W. 879, 31 Ky. L. Rep. 566.

or counter-claim,[96] a reply is not necessary. So evidence set up in the answer,[97] or a defense defectively pleaded,[98] or a counter-claim insufficiently pleaded,[99] need not be replied to. So no reply is necessary to a plea which, being unauthorized, should be stricken from the files or disregarded by the court;[1] nor to an unnecessary answer which is nevertheless filed.[2]

f. Effect of Dismissal of Part of Complaint. Where the dismissal of a count in a declaration carries with it a plea, no reply is necessary to such plea.[3] So, if a replication contain a *nolle prosequi* as to certain of the counts to which defendant has pleaded, this removes the necessity of replying to so much of defendant's plea as relates to those counts.[4]

g. Successive Replies. Facts alleged by a defendant need be replied to but once, and where defendant again answers after the filing of a supplemental petition, but sets up no new facts, the reply to the original answer is sufficient as a reply to the second answer;[5] but if a new defense is set up in an amended answer, the reply to the original answer cannot stand as a reply to the new defense.[6] Similarly, refiling a reply to an original answer is sufficient to put in issue facts realleged in an amended answer.[7]

3. Right to Reply and Effect of Unnecessary Reply. Generally a plaintiff has no right to file a reply when a reply is not required by statute or order of court,[8] although in some jurisdictions the rule seems to be to the contrary.[9] So, under the common-law system, where the plea concludes to the country, plaintiff cannot reply with any new matter but must either accept it by a *similiter* or demur.[10] Accordingly it is generally held that if a reply is filed in a case where no reply is

Minnesota.— Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712.

Montana.— Babcock *v.* Maxwell, 29 Mont. 31, 74 Pac. 64.

New York.— Johnson *v.* Andrews, 34 Misc. 89, 68 N. Y. Suppl. 764; O'Gorman *v.* Arnoux, 63 How. Pr. 159; Mygatt *v.* Saratoga County Mut. Ins. Co., 9 How. Pr. 488; Richtmyer *v.* Haskins, 9 How. Pr. 481; Rossa *v.* Saugerties, etc., Turnpike Co., 8 How. Pr. 237; Simpson *v.* Loft, 8 How. Pr. 234; Putnam *v.* De Forest, 8 How. Pr. 146; Loomis *v.* Dorshimer, 8 How. Pr. 9; Brown *v.* Spear, 5 How. Pr. 146.

Texas.— Patterson *v.* Goodrich, 3 Tex. 331.

United States.— U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

England.— Clarke *v.* Bradlaugh, 7 Q. B. D. 38, 45 J. P. 485, 50 L. J. Q. B. 342, 44 L. T. Rep. N. S. 667, 29 Wkly. Rep. 516.

See 39 Cent. Dig. tit. "Pleading," § 324.

A frivolous plea need not be replied to. Gist *v.* Steele, 1 Bibb (Ky.) 571.

96. Mallory *v.* Leiby, 1 Kan. 97.

97. Cuenin *v.* Halbouer, 32 Colo. 51, 74 Pac. 51; Helena Nat. Bank *v.* Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628; Steinway *v.* Steinway, 68 Hun (N. Y.) 430, 22 N. Y. Suppl. 945.

98. Sanders *v.* Helfrich Lumber, etc., Mfg. Co., 93 S. W. 54, 29 Ky. L. Rep. 466.

99. Smith *v.* Standard Laundry Mach. Co., 11 Daly (N. Y.) 154; Romano *v.* Irsch, 7 Misc. (N. Y.) 147, 27 N. Y. Suppl. 246.

1. Howlett *v.* Mills, 22 Ill. 341 (duplicate plea); Wilson *v.* Hamilton, 4 Serg. & R. (Pa.) 238.

2. La Grange County *v.* Kromer, 8 Ind. 446.

3. Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626.

4. Carpenter *v.* McClure, 40 Vt. 108.

5. Dreilling *v.* Battle Creek First Nat. Bank, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126; Ruby Carriage Co. *v.* Kremer, 81 S. W. 251, 26 Ky. L. Rep. 274.

6. Stewart *v.* American Exch. Nat. Bank, 54 Nebr. 461, 74 N. W. 865.

7. Crosby *v.* Bastedo, 57 Nebr. 15, 77 N. W. 364.

8. *Arkansas.*— St. Louis Iron Mountain, etc., R. Co. *v.* Higgins, 44 Ark. 293; George *v.* St. Louis, etc., R. Co., 34 Ark. 613.

Dakota.— Gull River Lumber Co. *v.* Keefe, 6 Dak. 160, 41 N. W. 743.

New York.— Dillon *v.* Sixth Ave. R. Co., 46 N. Y. Super. Ct. 21; Simmons *v.* Simmons, 4 N. Y. Suppl. 221, 21 Abb. N. Cas. 469; Sterling *v.* Metropolitan L. Ins. Co., 6 N. Y. St. 96; Bracket *v.* Wilkinson, 13 How. Pr. 102; Simpson *v.* Loft, 8 How. Pr. 234; Williams *v.* Upton, 8 How. Pr. 205; McDonald *v.* Davis, 1 Month. L. Bul. 20. But see Sullivan *v.* Traders' Ins. Co., 169 N. Y. 213, 62 N. E. 146 [*reversing* 45 N. Y. App. Div. 631, 61 N. Y. Suppl. 1149].

South Carolina.— Egan *v.* Bissell, 54 S. C. 80, 32 S. E. 1.

Wisconsin.— Wood *v.* Lake, 13 Wis. 84.

9. Bowen *v.* Laird, 166 Ind. 421, 77 N. E. 852; Moore *v.* Northwestern Mut. L. Ins. Co., 192 Mass. 468, 78 N. E. 488. See also Allen *v.* Allen, 3 Tenn. Ch. 145.

10. Cleaton *v.* Chambliss, 6 Rand. (Va.) 86.

Plaintiff cannot answer a special traverse by filing a replication but only by joining issue thereon. Rogers *v.* Barth, 117 Ill. App. 323; State *v.* Chrisman, 2 Ind. 126.

required, it is to be treated as a nullity;[11] and may be stricken out on motion,[12] except where it appears that defendant will not be embarrassed by such a reply.[13]

4. Time For Filing or Service.[14] The time when a reply must be filed or served is usually fixed by statute or rule of court,[15] but these statutes are given a liberal construction in the interest of justice.[16] Unless leave is first obtained, a reply cannot be filed after the expiration of such time.[17] But an extension of time is permissible in the discretion of the court upon good cause shown,[18] and a reply may be allowed even after the trial is commenced;[19] and even though an extension is granted without a sufficient reason, it is not ground for reversal.[20] It is not, however, an abuse of discretion to refuse leave where plaintiff is many months in default and no reason is given for the failure to plead.[21] Under a statute allowing amendments in furtherance of justice, a party may be allowed to file his reply after resting his case on the evidence.[22] But it has been held that an offer

11. St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293; Gull River Lumber Co. *v.* Keefe, 6 Dak. 160, 41 N. W. 743; Madden *v.* Anderson, 5 Indian Terr. 552, 82 S. W. 904. See also Kabat *v.* Moore, 48 Oreg. 191, 85 Pac. 506.

Its sufficiency will not be inquired into on demurrer.—Avery *v.* New York, etc., R. Co., 6 N. Y. Suppl. 547.

12. Lusk *v.* Perkins, 48 Ark. 238, 2 S. W. 847; Hunt *v.* Johnston, 105 Iowa 311, 75 N. W. 103; Dillon *v.* Sixth Ave. R. Co., 46 N. Y. Super. Ct. 21; Mitnacht *v.* Hawthorne, 31 Misc. (N. Y.) 378, 64 N. Y. Suppl. 493; Gilbert *v.* Cram, 12 How. Pr. (N. Y.) 455.

13. Stegman *v.* Hollingsworth, 16 N. Y. Suppl. 820.

14. Under equity practice see Equity, 16 Cyc. 321.

Waiver of objections see *infra*, XIV.

15. *Florida.*— Flournoy *v.* Munson Bros. Co., 51 Fla. 198, 41 So. 398.

Missouri.— Beach *v.* Curle, 15 Mo. 105.

New York.— Silo *v.* Linde, 30 Misc. 811, 61 N. Y. Suppl. 1103.

South Carolina.— Sanders *v.* Sanders, 31 S. C. 604, 9 S. E. 813.

England.— Rumley *v.* Winn, 22 Q. B. D. 265, 58 L. J. Q. B. 128, 60 L. T. Rep. N. S. 32, 37 Wkly. Rep. 285.

See 39 Cent. Dig. tit. "Pleading," § 334.

It will be presumed that a reply was filed in time until the contrary is proved. Lyon *v.* Tallmadge, 14 Johns. (N. Y.) 501.

16. Burke *v.* Miller, 4 Gray (Mass.) 114, holding that where a reply was required by statute to be filed before trial, plaintiff was entitled, after one trial, to file a reply at any time before another trial.

17. Osgood *v.* Haverty, McCahon (Kan.) 182; Bliss *v.* Burnes, McCahon (Kan.) 91.

After default has been entered against a plaintiff, he cannot file a reply until it is set aside, except by leave of court. Clute *v.* Hazleton, 51 Iowa 355, 1 N. W. 672.

18. *Illinois.*— Geffinger *v.* Klewer, 227 Ill. 598, 81 N. E. 712.

Iowa.— Williams *v.* Niagara F. Ins. Co., 50 Iowa 561.

Missouri.— Beach *v.* Curle, 15 Mo. 105.

Nebraska.— Hartford F. Ins. Co. *v.* Corey, 53 Nebr. 209, 73 N. W. 674.

New York.— Strauss *v.* Edelstein, 48 N. Y. App. Div. 553, 62 N. Y. Suppl. 935; Rose *v.* Hogeboom, 1 How. Pr. 66.

North Carolina.— McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

Washington.— Mounts *v.* Goranson, 29 Wash. 261, 69 Pac. 740.

See 39 Cent. Dig. tit. "Pleading," §§ 335-337.

The inadvertent filing of a copy of a reply instead of the original is good cause for allowing an extension of time for the proper filing of the original. Short *v.* May, 2 Sandf. (N. Y.) 638.

19. *Alabama.*— Louisville, etc., R. Co. *v.* Mothershed, 121 Ala. 650, 26 So. 10.

Arkansas.— Beekman Lumber Co. *v.* Kittrell, 80 Ark. 228, 96 S. W. 988.

Illinois.— McCoy *v.* World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043.

Indiana.— Gilbert *v.* Plant, 18 Ind. 308.

Iowa.— See Tait *v.* Sherman, 10 Iowa 60.

Kansas.— Grant *v.* Pendery, 15 Kan. 236.

Missouri.— Hale *v.* Skinner, 33 Mo. 452.

Nebraska.— Hartford F. Ins. Co. *v.* Corey, 53 Nebr. 209, 73 N. W. 674; Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020.

Canada.— Tobin *v.* Dunn, 3 Nova Scotia 402.

See 39 Cent. Dig. tit. "Pleading," §§ 336, 337.

Even after a cause has been heard by a referee, a reply may be allowed when the meritorious question in the case has not been raised. Merritt *v.* Slocum, 1 Code Rep. (N. Y.) 68. And where a trial has been begun before a referee a reply may be allowed if the granting leave will not cause greater injustice to defendant than the refusal will to plaintiff. Pardee *v.* Foote, 9 Abb. Pr. N. S. (N. Y.) 77.

20. Hall *v.* Cornett, 43 S. W. 706, 19 Ky. L. Rep. 1549; Beach *v.* Curle, 15 Mo. 105.

21. Williams *v.* Cooper, 20 S. W. 229, 14 Ky. L. Rep. 284.

But if the lower court refuses to allow the filing of a reply after the proper time for filing has expired, and it appears that under the circumstances of the case such action was too severe a penalty, the ruling will be reversed. Stuart *v.* Stamper, 18 S. W. 13, 13 Ky. L. Rep. 665.

22. Collins *v.* Glass, 46 Mo. App. 297; Sheehan, etc., Co. *v.* Sims, 36 Mo. App. 224.

to file a reply after the argument to the jury is closed comes too late;[23] and that no issue can be taken on an unanswered plea after trial and judgment.[24] Where, however, both parties try a case upon the theory that the issue sought to be made by the reply was made, leave to file a reply after verdict is not an abuse of discretion.[25] And when leave is given to file a reply after trial and verdict, the court may allow it to be filed *nunc pro tunc*, as of the date of trial.[26] So, where leave is given to file a reply after the trial is in progress, it may be allowed to be filed *nunc pro tunc* as of the time the case was called for trial.[27] Where an affidavit of merits should properly accompany a request for leave to file, it may nevertheless be dispensed with by the court under proper circumstances.[28] Terms may be imposed when the filing of a reply is allowed after the proper time for it.[29]

5. Form and Contents[30] — **a. In General** — (i) *Whether Pleading Is a Reply.* Whether or not a pleading shall be treated as a reply depends upon its allegations, and not upon the name given it.[31] A plea bad in law should regularly be demurred to, but where a reply instead of a demurrer is filed, setting up facts appropriate to a demurrer, and issue is taken thereon, the plea is thereby effectually met.[32] Where, to a proper plea, the mere word "issue" was appended, without any signature of counsel, this was held no replication whatever.[33]

(ii) *Formal Requisites* — (a) *In General.* The formal requisites of a reply or a replication are the same as in case of other pleadings,[34] except that a reply differs from a complaint in that it need contain no prayer for relief.[35]

(b) *Formal Conclusion.*[36] As in the case of pleas, the common-law rule is that the replication should, generally speaking, conclude to the country when it tenders issue, and with a verification when it consists of matter in avoidance.[37]

23. Heflin *v.* Burns, 70 Tex. 347, 8 S. W. 48.

24. Lawrence *v.* Huffer, 15 Ind. 367; Seivers *v.* McCall, 1 Ind. 393; Thompson *v.* Brownlee, 45 S. W. 871, 20 Ky. L. Rep. 235.

25. Whitney *v.* Preston, 29 Nebr. 243, 45 N. W. 619; Strause *v.* Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256.

26. Turner *v.* Butler, 126 Mo. 131, 28 S. W. 77; Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Lockwood *v.* Flanagan, 2 Hall (N. Y.) 545; Neely *v.* Cummins, 8 Ohio Dec. (Reprint) 478, 8 Cinc. L. Bul. 191.

27. McCoy *v.* World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043.

28. Strauss *v.* Edelstein, 48 N. Y. App. Div. 553, 62 N. Y. Suppl. 935.

29. Monteearbole *v.* Mundel, 16 How. Pr. (N. Y.) 141; Merritt *v.* Slocum, 1 Code Rep. (N. Y.) 68.

30. Reply and demurrer in same paper see *infra*, VI, G, 3.

31. Parks *v.* Doty, 13 Bush (Ky.) 727.

32. Britt *v.* Pitts, 111 Ala. 401, 20 So. 484; Hubert *v.* Horter, 81 Pa. St. 39. *Compare* Schlesinger *v.* Thalmessinger, 46 Misc. (N. Y.) 403, 92 N. Y. Suppl. 575, holding that inasmuch as parties must find authority for all pleadings in the code, there was no sanction for a reply setting up matter which should properly appear in a demurrer, and hence such a reply was itself bad on demurrer.

A reply merely denying the inference of law raised by the answer may be regarded as an informal demurrer. Hubert *v.* Horter, 81 Pa. St. 39.

33. Williams *v.* Ledsinger, 7 Baxt. (Tenn.) 429.

34. See *supra*, II, H.

Title.—A replication need not be entitled in the term, the presumption being that all pleadings are filed at the same term. Miller *v.* Blow, 68 Ill. 304.

35. Watson *v.* Ruderman, 79 Conn. 687, 66 Atl. 515.

36. Signature and verification see *infra*, VIII.

37. *Alabama.*— Williams *v.* Spears, 11 Ala. 138.

Illinois.— Blue Island Brewing Co. *v.* Fraatz, 123 Ill. App. 26.

Indiana.— Dougherty *v.* Wilson, 1 Blaekf. 478.

Maryland.— Cappeau *v.* Middleton, 1 Harr. & G. 154.

Massachusetts.—Hampshire Manufaeturers' Bank *v.* Billings, 17 Pick. 87.

New Jersey.— Bradley *v.* Johnson, 45 N. J. L. 487.

New York.— Onondaga County Bank *v.* Carr, 17 Wend. 443; Morris *v.* Wadsworth, 11 Wend. 100; Waterman *v.* Haskins, 7 Johns. 283; Bindon *v.* Robinson, 1 Johns. 516.

Vermont.— Merrow *v.* Huntoon, 25 Vt. 9.

Virginia.— Virginia Fire, etc., Ins. Co. *v.* Saunders, 84 Va. 210, 4 S. E. 584, holding rule not abrogated by code.

West Virginia.— Huffman *v.* Alderson, 9 W. Va. 616.

United States.— Hart *v.* Rose, 11 Fed. Cas. No. 6,154*a*, Hempst. 238; Wilker *v.* Johnson, 29 Fed. Cas. No. 17,074.

See 39 Cent. Dig. tit. "Pleading," § 340.

A special traverse, however, should conclude with a verification, and not to the country.[38] Even where there is no formal negative and affirmative, if the replication substantially disaffirms the plea, it should conclude to the country.[39] If the new matter in the replication is introduced merely to explain and fortify the declaration, the conclusion should nevertheless be with a verification.[40] The verification should be by the record where the replication alleges merely matters of record;[41] but a replication of *nul tiel record*, where the evidence of the record is a matter to be inquired of by a jury, should conclude to the country.[42] The addition of a wrong conclusion is merely a formal defect.[43]

(III) *What May Be Pleaded.* The reply should present matters of fact, not matters of law.[44] At common law the replication may either present matter of estoppel, deny the truth of the matter alleged in the plea in whole or in part, confess and avoid the plea, or, lastly, in the case of an evasive plea, new assign the cause of action.[45] Under the codes and practice acts, the reply may contain a general or specific denial,[46] or new matter constituting a defense to the answer;[47] but generally cannot set up a counter-claim to defendant's counter-claim.[48] In some jurisdictions the statute allows new facts which have occurred since the institution of the action to be set up by reply,[49] but leave of court is often required.[50] All the matters pleaded in the reply must be germane to the allegations of the plea or answer,[51] and a reply which neither denies those allegations

Many refinements upon this rule were developed at common law, and Justice Van Ness, in Patcher *v.* Sprague, 2 Johns. (N. Y.) 462, 466, says: "When a replication ought to conclude to the country, and when with a verification, has frequently embarrassed the ablest special pleaders on this subject, and it is difficult to lay down any general rule. Each case must, in a great measure, depend on its own circumstances." And he says further: "It seems now to be considered, as the best and safest rule, where a defendant cannot take any new or other issue in his rejoinder, than the matter he had pleaded before, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, for the plaintiff to conclude to the country."

The conclusion to the country in a replication should be "this he prays may be inquired of by the country," and not, "of this he puts himself on the country." Hartwell *v.* Hemmenway, 7 Pick. (Mass.) 117.

38. McWilliams *v.* King, 32 N. J. L. 21. *Contra*, by statute, see Virginia F. & M. Ins. Co. *v.* Saunders, 84 Va. 210, 4 S. E. 584.

39. Carthrae *v.* Clarke, 5 Leigh (Va.) 268.

40. Hallett *v.* Slidell, 11 Johns. (N. Y.) 56.

41. Com. *v.* Jackson, 2 Va. Cas. 501. See also Massey *v.* Walker, 8 Ala. 167.

42. Baldwin *v.* Hale, 17 Johns. (N. Y.) 272.

43. Ott *v.* Schroeppel, 4 Barb. (N. Y.) 250; Morris *v.* Wadsworth, 11 Wend. (N. Y.) 100.

44. Calvert *v.* Lowell, 10 Ark. 147; Roberts *v.* Albright, 2 Greene (Iowa) 120; Frost *v.* Hammatt, 11 Pick. (Mass.) 70; Holmes *v.* Seashore Electric R. Co., 57 N. J. L. 502, 31 Atl. 227.

45. *Alabama.*— Roland *v.* Logan, 18 Ala. 307; Gaston *v.* Parsons, 8 Port. 469.

Georgia.— Henry *v.* Peters, 5 Ga. 311.

Mississippi.— McGavock *v.* Whitfield, 45 Miss. 452; Bone *v.* McGinley, 7 How. 671.

New Hampshire.—Austin *v.* Walker, 26 N. H. 456.

Rhode Island.— Hall *v.* Greene, 24 R. I. 286, 52 Atl. 1087.

Tennessee.— Tomlinson *v.* Darnall, 2 Head 538.

Virginia.— Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320.

46. See the statutes of the several states. See also *infra*, V, A, 5, b, (II).

47. Barbaroux *v.* Barker, 4 Metc. (Ky.) 47; Mellor *v.* McConnell, 75 Nebr. 776, 106 N. W. 1012; Mollyneaux *v.* Wittenberg, 39 Nebr. 547, 58 N. W. 205; Cobbey *v.* Knapp, 23 Nebr. 579, 37 N. W. 485; Ansorge *v.* Kaiser, 3 N. Y. Suppl. 785, 22 Abb. N. Cas. 305; Boyett *v.* Vaughan, 79 N. C. 528. See also *infra*, V, A, 5, c.

If the character of the replication is ambiguous, it must be construed adversely to the pleader, and where as a traverse or denial of the plea it would be good, it must be held to be a replication in confession and avoidance, where as such it is clearly bad. Dunklee *v.* Goodenough, 65 Vt. 257, 26 Atl. 988. See also *supra*, II, I.

48. See *infra*, V, A, 5, e, (III).

A counter-claim is not within the provisions of the statute especially providing what the reply may contain. Windecker *v.* Mutual L. Ins. Co., 12 N. Y. App. Div. 73, 43 N. Y. Suppl. 358; Hatfield *v.* Todd, 13 N. Y. Civ. Proc. 265; Cohn *v.* Husson, 66 How. Pr. (N. Y.) 150.

49. St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., 131 Mo. 291, 31 S. W. 908; Ward *v.* Davidson, 89 Mo. 455, 1 S. W. 846; Crawford *v.* Spencer, 36 Mo. App. 78.

50. Schiller *v.* Daoust, 12 Quebec Super. Ct. 185.

51. Keystone Mfg. Co. *v.* Hampton, 141 Ala. 415, 37 So. 552; London, etc., Docks

nor confesses and avoids them is bad.[52] But if the whole reply taken together amounts to a denial or confession and avoidance, it is at most only formally, but not substantially, defective.[53]

(iv) *Scope of Pleading.* The reply should point out precisely to which of several pleas filed it is directed,[54] but it is sufficient if the pleadings, by their nature, indicate which plea the reply is intended to answer.[55] A failure to indicate is not, however, a fatal defect so as to be ground for a judgment on the pleadings.[56] The reply should be a complete answer to the plea to which it is directed, and when, purporting to answer all, it answers but a part, leaving a material part unanswered, it is insufficient.[57] Accordingly, if a plea is double, and, instead of demurring for the duplicity, plaintiff replies, the reply must answer both parts of the plea.[58] But where the plea covers several distinct causes of action set forth in the declaration, the replication may single out one cause of action and make a good answer to the plea in that regard, without answering the plea as to the other causes of action.[59] It is enough to answer the plea itself and the replication should not attempt to put in issue matters alleged in a bill of particulars filed with the plea.[60] A single replication to several pleas must be good as to each one singly.[61] It does not render a reply insufficient that it is directed to the entire answer when parts of the answer do not require a reply.[62] A replication to a single plea to a declaration containing several counts, which applied to only one count, is no answer to the plea as to the other counts.[63] Under the common-law system, where a plea contains affirmative matters and also a special traverse, but the special traverse is bad because it does not go to the point of the action, the replication is complete, although it does not notice the special traverse.[64]

b. Traverses or Denials — (i) *Under Common-Law System* — (a) *In General.* A "general" denial, other than the denial *de injuria,* was not authorized

Co. *v.* Metropolitan R. Co., 35 L. T. Rep. N. S. 733; Ness *v.* Candlish, 17 Quebec Super. Ct. 194.

52. *Alabama.*— Mason *v.* Craig, 3 Stew. & P. 389.

Arkansas.— Calvert *v.* Lowell, 10 Ark. 147.

Illinois.— Blasingame *v.* Royal Circle, 111 Ill. App. 202.

Indiana.— Haas *v.* Shaw, 91 Ind. 384, 46 Am. Rep. 607; Chrisman *v.* Chenoweth, 81 Ind. 401.

Kentucky.— Carlisle *v.* Long, 1 A. K. Marsh. 486.

Missouri.— McCutcheon *v.* Sigerson, 34 Mo. 280.

New Hampshire.— Watriss *v.* Pierce, 36 N. H. 232.

New Jersey.— Gibbons *v.* Ogden, 8 N. J. L. 288.

Virginia.— Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320.

United States.— Shampeau *v.* Connecticut River Lumber Co., 42 Fed. 760.

See 39 Cent. Dig. tit. "Pleading," § 331 *et seq.*

53. Sweeney *v.* Montana Cent. R. Co., 19 Mont. 163, 47 Pac. 791.

54. Culver *v.* Uthe, 7 Ill. App. 468; Burr *v.* Wright, 9 How. Pr. (N. Y.) 542.

55. Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247, 48 N. E. 402; Carey *v.* Hanchet, 1 Cow. (N. Y.) 154.

56. Highlands *v.* Raine, 23 Colo. 295, 47 Pac. 283. See also *infra,* XII, B, 3.

57. *Alabama.*— Owensboro Wagon Co. *v.* Hall, 149 Ala. 210, 43 So. 71; Whitehurst *v.* Boyd, 8 Ala. 375.

Connecticut.— Corsa *v.* Nichols, 1 Root 217.

Indiana.— Bottles *v.* Miller, 112 Ind. 584, 14 N. E. 728; Silvers *v.* Canary, 109 Ind. 267, 9 N. E. 904; Fordice *v.* Scribner, 108 Ind. 85, 9 N. E. 122; American Ins. Co. *v.* Leonard, 80 Ind. 272; Kernodle *v.* Caldwell, 46 Ind. 153. See also Hill *v.* Hill, 121 Ind. 255, 23 N. E. 87.

Vermont.— Carpenter *v.* McClure, 38 Vt. 375.

Canada.— Parlee *v.* Snider, 23 N. Brunsw. 274.

See 39 Cent. Dig. tit. "Pleading," §§ 339, 342.

Mere omission to notice a preliminary uncontroverted statement in the answer, where the reply is otherwise good and fully meets and replies to all the material facts stated in the answer, will not vitiate the reply. Kinsey *v.* State, 98 Ind. 351.

58. Barrett *v.* Ruitt, 3 Ind. 571; Jackson *v.* Pennsylvania R. Co., 69 N. J. L. 79, 54 Atl. 532.

59. Smith *v.* Oliphant, 2 Sandf. (N. Y.) 306.

60. Vanzant *v.* Shelton, 40 Miss. 332; Crosby *v.* Kropf, 33 N. Y. App. Div. 446, 54 N. Y. Suppl. 76.

61. Matthews *v.* Farrell, 140 Ala. 298, 37 So. 325; Lapham *v.* Briggs, 27 Vt. 26.

62. Vaughn *v.* Ferrall, 57 Ind. 182.

63. Wood *v.* Springfield, 43 Vt. 617; Carpenter *v.* McClure, 38 Vt. 375. *Contra,* Perkins *v.* Burbank, 2 Mass. 81.

64. Benner *v.* Elliott, 5 Blackf. (Ind.) 451.

under the common-law system,[65] but this rule has been modified by statute in some of the common-law states.[66] Where it is sought to take issue on the allegations of a plea, the reply should traverse them directly, and not merely set up facts inconsistent with those alleged in the plea.[67] Such a reply is an argumentative traverse, but is sufficient nevertheless to raise an issue.[68] A traverse of a material allegation in the express words of the plea is sufficient,[69] and surplusage in a replication will not render it bad.[70]

(B) *Traverse De Injuria.* The traverse *de injuria* is a special form of replication at common law used chiefly in actions of trespass and case, consisting of a traverse in general and summary terms and not in the words of the allegation traversed.[71] It may, however, be used in actions *ex contraciu.*[72] When the defense alleged in the plea consists of matter of excuse, this form of replication may be used;[73] but it cannot be employed where the plea is in justification,[74] or amounts to a denial of plaintiff's cause of action.[75]

(C) *Special Traverse.*[76] The form of pleading known as the special traverse may be used in the replication, and is sufficient when the inducement amounts in substance to a sufficient answer to the last pleading.[77]

(II) *UNDER THE CODES* — (A) *In General.* Where a reply is proper, one in the form of a general denial is usually deemed sufficient.[78] The use of the denial in a reply is, in the code states, exactly similar to its use in an answer.[79] The form of the denial must be in accordance with the statute,[80] and should be definite

65. Austin *v.* Chittenden, 32 Vt. 168; Crogate's Case, 8 Coke 66*b*, 77 Eng. Reprint 574.

In England a reply to a counter-claim cannot join issue generally but must deal specifically with the statements contained therein. Benbow *v.* Low, 13 Ch. D. 553, 49 L. J. Ch. 259, 42 L. T. Rep. N. S. 14, 28 Wkly. Rep. 384. *Compare* Rolfe *v.* Maclaren, 3 Ch. D. 106, 24 Wkly. Rep. 816.

66. Dibble *v.* Deerfield River Co., 69 Vt. 482, 38 Atl. 161; Austin *v.* Chittenden, 32 Vt. 168.

67. U. S. *v.* Buford, 3 Pet. (U. S.) 12, 7 L. ed. 585.

68. Pottlitzer *v.* Wesson, 8 Ind. App. 472, 35 N. E. 1030; Walker *v.* Johnson, 29 Fed. Cas. No. 17,074, 2 McLean 92.

Averment in answer of diligence in prosecution of suit, and charge of negligence in reply. Walker *v.* Johnson, 29 Fed. Cas. No. 17,074, 2 McLean 92.

69. Austin *v.* Walker, 26 N. H. 456; Stearns *v.* Stearns, 32 Vt. 678.

70. Miller *v.* Blow, 68 Ill. 304.

71. Stephen Pl. 163.

72. Ridgefield Park R. Co. *v.* Ruckman, 38 N. J. L. 98; Paddock *v.* Jones, 40 Vt. 474; Marshall *v.* Aiken, 25 Vt. 327; Griffin *v.* Yates, 2 Bing. N. Cas. 579, 29 E. C. L. 670; Bank of British North America *v.* Fisher, 6 N. Brunsw. 606. *Contra,* Coffin *v.* Bassett, 2 Pick. (Mass.) 357.

73. *Illinois.*—Allen *v.* Scott, 13 Ill. 80.

New Jersey.— Berry *v.* Cahanan, 7 N. J. L. 77.

New York.— Plumb *v.* McCrea, 12 Johns. 491.

Pennsylvania.— Lincoln *v.* Souder, 4 Pa. L. J. 107.

Vermont.— Paddock *v.* Jones, 40 Vt. 474; Marshall *v.* Aiken, 25 Vt. 327.

See 39 Cent. Dig. tit. "Pleading," § 344.

74. Coburn *v.* Hopkins, 4 Wend. (N. Y.) 577; Griswold *v.* Sedgwick, 1 Wend. (N. Y.) 126; Lytle *v.* Lee, 5 Johns. (N. Y.) 112; Hyatt *v.* Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258. *Compare* Berry *v.* Cahanan, 7 N. J. L. 77; Comly *v.* Lockwood, 15 Johns. (N. Y.) 188 (statute); Lincoln *v.* Souder, 4 Pa. L. J. 107.

75. Grafflin *v.* Jackson, 40 N. J. L. 440; Berry *v.* Cahanan, 7 N. J. L. 77; Lincoln *v.* Souder, 4 Pa. L. J. 107; Crogate's Case, 8 Coke 66*b*, 77 Eng. Reprint 574.

76. As to what is a special traverse see *supra,* IV, C, 1, d.

77. Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

78. *Alabama.*— Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844.

Indiana.— Cleveland *v.* Worrell, 13 Ind. 545.

Iowa.—King *v.* Howell, 28 Iowa 65.

Kansas.—Anthony *v.* Stinson, 4 Kan. 211.

New York.— Winchester *v.* Browne, 15 N. Y. Suppl. 51, 26 Abb. N. Cas. 387.

Washington.— Davis *v.* Oldakers, 3 Wash. Terr. 593, 19 Pac. 150.

Wisconsin.— See Modern Steel Structural Co. *v.* English Constr. Co., 129 Wis. 31, 108 N. W. 70.

United States.— Daggs *v.* Phœnix Nat. Bank, 177 U. S. 549, 20 S. Ct. 732, 44 L. ed. 882.

See 39 Cent. Dig. tit. "Pleading," § 346.

79. Kimberling *v.* Hall, 10 Ind. 407; Hammer *v.* Edwards, 3 Mont. 187.

80. See cases cited *infra,* this note.

Forms of traverses held insufficient.—A reply to an answer denying each and every allegation contained therein inconsistent with the statements in plaintiff's petition. Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497; Gross *v.* Scheel, 67 Nebr. 223, 93 N. W. 418; Herdman *v.* Marshall, 17 Nebr. 252,

and certain and indicate precisely what allegations are denied.[81] The traverse should not be made as to mere matters of evidence, but a traverse has been held good where it denies the ultimate fact which the evidence goes to prove.[82] Nor should the reply deny argumentatively, by alleging facts inconsistent with the facts alleged in the answer, although an argumentative denial is good on demurrer,[83] or at the trial,[84] or after verdict and judgment.[85] The remedy for an argumentative denial under the code is a motion to make more definite and certain.[86]

(B) *Denials on Information or of Knowledge or Information.* Except where it is otherwise provided by statute,[87] facts may be put in issue by a denial in the reply on information and belief or of knowledge or information sufficient to form a belief relative thereto, when this form of denial is authorized in general.[88] But a denial of knowledge or on information or belief is not permissible when the facts are within the personal knowledge of plaintiff.[89]

22 N. W. 690. A reply stating that the answer "does not state facts sufficient to constitute a defense to plaintiff's cause of action stated in his petition." Sutton *v.* Sutton, 60 Nebr. 400, 83 N. W. 200. Reply under oath alleging, as to an averment in the answer, "It is not true, as charged in said answer," etc. Verzan *v.* McGregor, 23 Cal. 339. A reply alleging that plaintiff cannot admit or deny the allegations of the answer, but demands proof of the same. Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427, 2 N. E. 846.

Traverses held sufficient.—A reply in the form, "Now comes the plaintiff, Suvigney Godfrey, and denies owing the defendant . . . dollars and thirty-five cents, or any other sum, as alleged by the defendant." Godfrey *v.* Cruise, 1 Iowa 92. A reply denying each and every matter contained in the answer, save as the same may have been stated in the complaint. Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378. Specific denials of all the allegations of the answer. McConnoughey *v.* Weider, 2 Iowa 408. A reply denying each and every allegation set up in the answer as new matter by way of avoidance. Chawviteau *v.* Fay, 54 How. Pr. (N. Y.) 211. A reply to a counter-claim, reciting that "the plaintiff says that he denies each and every allegation," etc. Jones *v.* Ludlum, 74 N. Y. 61. A reply that "plaintiff alleges that he denies, all and singular the allegations in said answer which sets up a counter claim." Perry *v.* Levenson, 82 N. Y. App. Div. 94, 81 N. Y. Suppl. 586 [*affirmed* in 178 N. Y. 559, 70 N. E. 1104]; Pray *v.* Todd, 71 N. Y. App. Div. 391, 75 N. Y. Suppl. 947. A reply stating that plaintiff "replying to the counter-claim, denies the same." Atlantic Phosphate Co. *v.* Sullivan, 34 S. C. 301, 13 S. E. 539. A reply denying each and every allegation of new matter contained in the answer. Crete *v.* Hendricks, (Nebr. 1902) 90 N. W. 215.

81. Train *v.* Gridley, 36 Ind. 241 (reply in which plaintiff, making no reference to the answer, used merely these words, "The plaintiff denies each and every allegation therein contained," is insufficient); Whitaker *v.* Sandifer, 1 Duv. (Ky.) 261 (reply denying the correctness of each and every item of defendant's answer and counter-claim is too vague and uncertain); Fassett *v.* Fassett, 41 Mo. 516 (reply which traverses material allegations in such a way as to indicate with reasonable certainty the issues sought to be raised is sufficient). See also Hatcher *v.* Fitzpatrick, 101 S. W. 933, 31 Ky. L. Rep. 120.

A specific denial of an allegation of knowledge at one time will not be deemed to put in issue a separate allegation of knowledge at another time. Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

A denial of every "material" allegation is sufficient. Miller *v.* Brumbaugh, 7 Kan. 343.

Denial of "new matter."—A reply denying the new matter set out in the answer, without specifying what new matter was referred to, is insufficient. Betz *v.* Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207. But a reply denying each and every allegation "of new matter" in the answer, although conceded to be defective, is not so uncertain as to give occasion for the exclusion of evidence on the trial. Peterson *v.* Ruhnke, 46 Minn. 115, 48 N. W. 768.

82. Moore *v.* Murdock, 26 Cal. 514.

83. Judah *v.* Vincennes University, 16 Ind. 56. See also *infra*, VI, F, 4, a.

84. New York L. Ins. Co. *v.* La Boiteaux, 7 Ohio Dec. (Reprint) 182, 1 Cinc. L. Bul. 278.

85. Meredith *v.* Lackey, 14 Ind. 529.

86. New York L. Ins. Co. *v.* La Boiteaux, 7 Ohio Dec. (Reprint) 182, 1 Cinc. L. Bul. 283. See also *infra*, XII, D.

87. See the statutes of the several states.

In Montana such a denial is allowed in an answer but not in a reply. Floyd-Jones *v.* Anderson, 30 Mont. 351, 76 Pac. 751; McEwen *v.* Union Bank, etc., Co., 35 Mont. 470, 90 Pac. 359.

88. Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642. But see Steinway *v.* Steinway, 74 Hun (N. Y.) 423, 26 N. Y. Suppl. 657.

Where it is shown that a plaintiff is unable to read the English language, he will be permitted to deny the execution of a release pleaded by defendant, and written in English, on information and belief. Kosztelnik *v.* Bethlehem Iron Co., 91 Fed. 606.

89. Wing *v.* Dugan, 8 Bush (Ky.) 583; Fallon *v.* Durant, 60 How. Pr. (N. Y.) 178;

(iii) *Matter to Be Traversed.* Although the replication must answer the whole plea, the traverse in a replication will be sufficient if properly directed against but one material allegation.[90] And where a reply controverts one of several items pleaded in a set-off based on an account, the set-off in its entirety cannot be deemed confessed.[91] But no facts should be denied in the replication which are not material,[92] or are not alleged in the plea.[93] Although whatever is necessarily implied in a plea is traversable equally with facts expressly alleged.[94] So the traverse in a replication should raise an issue of fact and not of law, and hence a traverse of a conclusion of law is bad.[95] It should always be directed to some affirmative matter, and not a negative averment in the plea.[96]

(iv) *Negative Pregnant.* A negative pregnant in a reply is bad, equally with a negative pregnant in a plea,[97] and it puts nothing in issue.[98]

c. New Matter in Avoidance. A plaintiff may plead in his reply new matter,[99] and must specially plead it if he wishes to rely thereon unless a reply is dispensed with by statute.[1] But matter of inducement alleged by defendant should not be answered by new matter in confession and avoidance, since it is not issuable.[2] So a replication avoiding merely an immaterial averment of a plea is insufficient.[3] A reply setting up new matter as a defense under the codes is the same as the plea of confession and avoidance under the common-law system, and the requirements of the common law as to such a plea is not changed by the codes.[4] The new matter pleaded must confess the facts alleged in the answer,[5] and avoid their

Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155; Thompson *v.* Seligman, 90 Fed. 219.

90. *Arkansas.*— Lawson *v.* State, 9 Ark. 9.
Kentucky.— Hood *v.* Winsatt, 1 B. Mon. 208.
New Hampshire.— Watriss *v.* Pierce, 36 N. H. 232.
New York.— Gelston *v.* Burr, 11 Johns. 482.
Vermont.— Stearns *v.* Stearns, 32 Vt. 678.
See 39 Cent. Dig. tit. "Pleading," § 348.

91. Thruston *v.* Oldham, 6 Bush (Ky.) 16.

92. Parish *v.* Stanton, 2 Root (Conn.) 154; Austin *v.* Walker, 26 N. H. 456; Rogers *v.* Burk, 10 Johns. (N. Y.) 400; Stearns *v.* Stearns, 32 Vt. 678; Walker *v.* Sargeant, 14 Vt. 247.

93. Griswold *v.* New York Nat. Ins. Co., 3 Cow. (N. Y.) 96.

94. Haight *v.* Holley, 3 Wend. (N. Y.) 258.

95. Tennessee Bank *v.* Armstrong, 12 Ark. 602; Hale *v.* Dennie, 4 Pick. (Mass.) 501; Ferguson *v.* Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604; Chapman *v.* Smith, 16 How. (U. S.) 114, 14 L. ed. 868.

96. Ryan *v.* Vanlandingham, 25 Ill. 128.

97. *Minnesota.*— Truitt *v.* Caldwell, 3 Minn. 364, 74 Am. Dec. 764.
Missouri.— Ells *v.* Pacific R. Co., 55 Mo. 278.
New Hampshire.— Watriss *v.* Pierce, 36 N. H. 232; Thompson *v.* Fellows, 21 N. H. 425.
Vermont.— Briggs *v.* Mason, 31 Vt. 433.
United States.— U. S. *v.* Larkin, 153 Fed. 113, 82 C. C. A. 247.
See 39 Cent. Dig. tit. "Pleading," § 353.

Asserting, in the very language of the plea, what is denied in the plea, is bad. State *v.* Logan, 33 Md. 1.

A reply in the form of a negative pregnant is good after verdict. Kimberlin *v.* Short, 24 Mo. App. 643.

98. Pigot *v.* McKeever, 32 Misc. (N. Y.) 45, 65 N. Y. Suppl. 380.

99. See *supra*, V, A, 5, a, (III).

1. Allen *v.* Scott, 13 Ill. 80; Kimberling *v.* Hall, 10 Ind. 407; Winchester *v.* Browne, 15 N. Y. Suppl. 51, 26 Abb. N. Cas. 387. See also *infra*, XIII.

In Iowa under a statute dispensing with a reply, but providing that plaintiff might file a written admission of such facts in the answer as he did not wish to controvert, it was held that, in order to avoid a judgment against him on the pleadings, plaintiff should, in connection with such admission, set up facts avoiding the facts admitted. Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

2. Main *v.* Bayard, 9 Phila. (Pa.) 239.

3. Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003.

4. Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 38 N. W. 113; Anson *v.* Dwight, 18 Iowa 241.

5. Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 38 N. W. 113; Meeh *v.* Missouri Pac. R. Co., 61 Kan. 630, 60 Pac. 319; Commercial Bank *v.* Sparrow, 2 Den. (N. Y.) 97.

Mode of confessing.— A reply setting up new matter must confess that, but for the matter pleaded in avoidance, the defense to which it applies would entitle the party pleading the same to succeed thereon; but this confession need not be in terms but may be by implication. It is sufficient if it "give color" to the alleged right of the adverse party and no more than this was required at common law. Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 38 N. W. 113. It is not necessary that a pleading in confession and avoidance should admit the truth of the adverse statement absolutely and to all pur-

effect.[6] All the ultimate facts relied upon to answer the defense pleaded should be alleged,[7] without reference to independent documents.[8] No facts should be alleged in the reply which are inconsistent with the allegations constituting plaintiff's cause of action,[9] nor facts which are already in issue,[10] or already appear upon the record.[11] More general averments are allowed, it seems, in a replication than in a declaration.[12] In jurisdictions where equitable defenses are not permissible in legal actions, an equitable reply cannot be received to a legal defense.[13] Under some codes, allegations in the reply may be made in the alternative, where plaintiff does not know which of two states of facts is true.[14]

d. New Assignment. A new assignment is merely a restatement, in a more minute and circumstantial manner, of the same cause of action, or some part thereof, already alleged in the declaration, and does not profess to be a reply to anything set up by defendant. It was used at common law in those cases where the law allows a general form of pleading on the part of plaintiff, equally applicable to two or more states of facts, which leave it doubtful which was intended. In such cases, if defendant answers a state of facts not intended, plaintiff must new assign.[15] This form of replication is most usually employed in actions of trespass, but it is possible for a new assignment to become appropriate in most forms of action.[16] Whenever it is necessary to new assign, the new assignment, being in the nature of a new declaration, must be as certain as to time, place,

poses. It is sufficient if the pleading gives color, that is, confesses the matter adversely alleged to such an extent, at least, as to admit some apparent right in the opposite party which requires to be encountered and avoided by the allegation of new matter. Dunklee *v.* Goodenough, 65 Vt. 257, 26 Atl. 988.

An admission by reasonable intendment of the facts sought to be avoided is sufficient. Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712.

6. *Illinois.*— Sefton *v.* Mitchell, 120 Ill. App. 256.

Indiana.— Hill *v.* Hill, 121 Ind. 255, 23 N. E. 87; Cooper *v.* Smith, 119 Ind. 313, 21 N. E. 887; Drook *v.* Irvine, 41 Ind. 430; Lewis *v.* Sheaman, 28 Ind. 427; Wilson *v.* Madison, etc., R. Co., 18 Ind. 226.

Maine.— Spring *v.* Russell, 7 Me. 273.

New Hampshire.— Watriss *v.* Pierce, 36 N. H. 232.

New York.— Warfield *v.* Weeks, 12 Misc. 590, 33 N. Y. Suppl. 1093; Averill *v.* Patterson, 10 How. Pr. 85; Baldwin *v.* Walsworth, Lalor 340.

Rhode Island.— Brown *v.* Foster, 6 R. I. 564.

Vermont.— Dunklee *v.* Goodenough, 65 Vt. 257, 26 Atl. 988.

Virginia.— Callis *v.* Waddy, 2 Munf. 511.

Washington.— Boyle *v.* Great Northern R. Co., 13 Wash. 383, 43 Pac. 344.

See 39 Cent. Dig. tit. "Pleading," § 356.

Confession without avoidance.— Where the reply confesses the truth of the plea but does not avoid its effect, it is bad. Jones *v.* Lacey, 3 J. J. Marsh. (Ky.) 543.

7. Flint, etc., Mfg. Co. *v.* Kerr-Murray Mfg. Co., 24 Ind. App. 350, 56 N. E. 858.

Matters of evidence should not be alleged. Hudelson *v.* Tobias First Nat. Bank, 56 Nebr. 247, 76 N. W. 570; Houston, etc., R. Co. *v.* Chandler, 51 Tex. 416.

8. Williamson *v.* London, etc., R. Co., 12 Ch. D. 787, 48 L. J. Ch. 559, 27 Wkly. Rep. 724.

9. Barbaroux *v.* Barker, 4 Metc. (Ky.) 47; Rich *v.* Donovan, 81 Mo. App. 184; Crawford *v.* Spencer, 36 Mo. App. 78; Mollyneaux *v.* Wittenberg, 39 Nebr. 547, 58 N. W. 205; Cobbey *v.* Knapp, 23 Nebr. 579, 37 N. W. 485; Boyett *v.* Vaughan, 79 N. C. 528.

In intervention, where an amended petition sets up a counter-claim to the petition in intervention, such counter-claim need not be consistent with the original petition. Jack *v.* Des Moines, etc., R. Co., 49 Iowa 627.

As constituting departure see *infra*, V, A, 5, e.

10. Ellis *v.* Soper, 111 Iowa 631, 82 N. W. 1041.

11. Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003; Croome *v.* Craig, 53 Hun (N. Y.) 350, 6 N. Y. Suppl. 136; Strickland *v.* Martin, 23 Vt. 484; Migneron *v.* Williams Mfg. Co., 5 Quebec Pr. 226.

12. Durand *v.* New Haven, etc., Co., 42 Conn. 211.

13. Frick *v.* Clements, 31 Fed. 542.

14. Clay City Nat. Bank *v.* Conlee, 106 Ky. 788, 51 S. W. 615, 21 Ky. L. Rep. 419.

15. Louisville, etc., R. Co. *v.* Walker, 128 Ala. 368, 30 So. 738; Herring *v.* Skaggs, 73 Ala. 446; Eskridge *v.* Ditmars, 51 Ala. 246; Porterfield *v.* Butler, 47 Miss. 165, 12 Am. Rep. 329; Jubb *v.* Ellis, 3 D. & L. 364, 9 Jur. 1057, 15 L. J. Q. B. 94; McCulley *v.* Cunard, 4 N. Brunsw. 131; 1 Chitty Pl. (16th Am. ed.) 654.

It is not necessary for plaintiff to new assign, in order to let in proof of an extrinsic fact, which does not contradict, but merely limits, the operation of the record. Williams *v.* Spears, 11 Ala. 138.

16. Jubb *v.* Ellis, 3 D. & L. 364, 9 Jur. 1057, 15 L. J. Q. B. 94; Eberts *v.* Larned, 5 U. C. Q. B. 264; 1 Chitty Pl. (16th Am. ed.) 666.

and other circumstances as an original statement of a cause of action.[17] The new assignment admits the plea, so that where but a single trespass is charged plaintiff's new assignment in effect puts him out of court.[18] Under the codes of procedure it would seem that, inasmuch as the facts are always to be set out fully in plaintiff's complaint, there would seldom be a case where a new assignment would be necessary. The English and Irish codes expressly make it inadmissible,[19] but it has been at least recognized as possible under the code procedure in this country.[20]

e. Departure — (i) *In General.*[21] A departure in pleading is where the party quits or departs from the case or defense which he first made, and has recourse to another — the statement of matter which is not pursuant to the previous pleading of the same party and which does not support and fortify it.[22] It is the abandonment of a previous ground and the assumption of another.[23] The common-law term "departure" embraces and is equivalent to the code provision that the new matter in the reply must not be "inconsistent with the complaint."[24] The reply or replication must not depart from the complaint, petition, or declaration;[25] and it follows that new causes of action cannot be set up in the reply,[26]

17. Price *v.* Perry, 1 Mo. 542.

18. Buckelew *v.* Stults, 28 N. J. L. 150.

19. Earp *v.* Henderson, 3 Ch. D. 254, 45 L. J. Ch. 738, 34 L. T. Rep. N. S. 844 (holding that everything which formerly was alleged by way of new assignment must now be introduced by way of amendment of statement of claim); Byrne *v.* Duckett, L. R. 10 Ir. 24.

20. Davis *v.* Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

21. As defect curable by verdict see *infra*, XIV, J.

As ground for demurrer see *infra*, VI, F, 4, b.

As ground for motion to strike out reply see *infra*, XII, C.

Waiver of objections see *infra*, XIV.

22. *Indiana.*— Kimberlin *v.* Carter, 49 Ind. 111; Wells *v.* Teall, 5 Blackf. 306.

Minnesota.— Hoxsie *v.* Kempton, 77 Minn. 462, 80 N. W. 353; Bishop *v.* Travis, 51 Minn. 183, 53 N. W. 461; Estes *v.* Farnham, 11 Minn. 423.

Missouri.— Cravens *v.* Gillilan, 73 Mo. 524; State *v.* Grimsley, 19 Mo. 171.

Nebraska.— Kearney County Bank *v.* Zimmerman, 5 Nebr. (Unoff.) 556, 99 N. W. 524; Sexton *v.* Shriver, 4 Nebr. (Unoff.) 633, 95 N. W. 594.

Oregon.— Union St. R. Co. *v.* Union First Nat. Bank, 42 Oreg. 606, 72 Pac. 586, 73 Pac. 341.

Pennsylvania.— See Scott *v.* Insurance Co., 9 Phila. 266.

Vermont.— Watson *v.* Joslyn, 29 Vt. 455.

Canada.— Allen *v.* New Brunswick Bank, 17 N. Brunsw. 446.

See 39 Cent. Dig. tit. "Pleading," § 358.

Another definition is: "A departure in pleading takes place, when, in a subsequent pleading, a party deserts the ground taken in his last antecedent pleading and resorts to another." Erickson *v.* McLellan, 46 Wash. 661, 91 Pac. 249.

23. Winter *v.* Mobile Sav. Bank, 54 Ala. 172; McAden *v.* Gibson, 5 Ala. 341; Leland *v.* Neilson, 3 N. J. L. 156; Haley *v.* McPherson, 3 Humphr. (Tenn.) 104.

24. Zehnor *v.* Beard, 8 Ind. 96.

25. *Illinois.*—Collins *v.* Waggoner, 1 Ill. 51.

Kentucky.— Langan, etc., Storage, etc., Co. *v.* Tennelly, 122 Ky. 808, 93 S. W. 1, 29 Ky. L. Rep. 367.

Mississippi.— McGavock *v.* Whitfield, 45 Miss. 452.

New York.— Brown *v.* McCune, 5 Sandf. 224. *Compare* Sullivan *v.* Traders' Ins. Co., 169 N. Y. 213, 62 N. E. 146 [*reversing* 61 N. Y. Suppl. 1149].

South Carolina.— Jamison *v.* Lindsay, 4 McCord 93.

See 39 Cent. Dig. tit. "Pleading," § 358.

The reason is that if parties were permitted to wander from fact to fact, and to supply a new cause of action as often as defendant interpose a legal bar to that which plaintiff first set out, it would lead to useless prolixity and it would even be possible by this means to prevent them from ever coming to issue. Jamison *v.* Lindsay, 4 McCord (S. C.) 93.

The most usual departure is in matters of fact, but it is no less a departure if the party puts the same facts on a new ground or point of law. Porterfield *v.* Butler, 47 Miss. 165, 12 Am. Rep. 329.

Place of trespass.— A replication varying the place of the committing of the trespasses from that alleged in the plea must expressly allege that those newly assigned are other and different trespasses from those mentioned in the plea. Hanna *v.* Rust, 21 Wend. (N. Y.) 149.

26. *Iowa.*— Ellis *v.* Soper, 111 Iowa 631, 82 N. W. 1041; Collins *v.* Gregg, 109 Iowa 506, 80 N. W. 562.

Kentucky.— Mount *v.* Louisville, etc., R. Co., 2 Ky. L. Rep. 221.

Mississippi.— McGavock *v.* Whitfield, 45 Miss. 452.

Nebraska.— Snyder *v.* Johnson, 69 Nebr. 266, 95 N. W. 692; Plummer *v.* Rohman, 61 Nebr. 61, 84 N. W. 600; Wigton *v.* Smith, 46 Nebr. 461, 64 N. W. 1080; Piper *v.* Woolman, 43 Nebr. 280, 61 N. W. 588; Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241; Kliment *v.* Torpin Grain Co., 5 Nebr. (Unoff.) 159, 97 N. W. 587.

nor can the original cause of action be enlarged.[27] When a party's subsequent pleading contains matter which does not fortify his antecedent pleading, there is a departure;[28] but there is no departure when the averments of the second pleading substantiate and are consistent with those of the first,[29] nor when they avoid the new matter set up by the other party, even though they do not affirmatively support the party's former pleading, provided they are not inconsistent with such former pleading.[30] So there is no departure where the facts alleged are inconsistent merely with facts set up in the pleadings of the other party;[31] nor where a reply merely denies a material averment in defendant's plea.[32] Facts do not ordinarily constitute a departure unless they are inconsistent with those formerly alleged.[33] But if the reply is inconsistent with the com-

North Carolina.— See Olmstead *v.* Raleigh, 130 N. C. 243, 41 S. E. 292.

Ohio.— Durbin *v.* Fisk, 16 Ohio St. 533.

Washington.— Osten *v.* Winehill, 10 Wash. 333, 38 Pac. 1123.

United States.— Burdell *v.* Denig, 15 Fed. 397.

England.— Collett *v.* Dickinson, 26 Wkly. Rep. 403.

Canada.— O'Connell *v.* Scallion, 24 Nova Scotia 345.

See 39 Cent. Dig. tit. "Pleading," § 358.

27. Cook *v.* Gallatin R. Co., 28 Mont. 509, 73 Pac. 131; Grattan *v.* Givan, 17 N. Brunsw. 711; American Stoker Co. *v.* Ontario Gen. Engineering Co., 14 Quebec Super. Ct. 479.

28. *Colorado.*— Adams *v.* Warren, 27 Colo. 293, 61 Pac. 609.

Massachusetts.— Paine *v.* Fox, 16 Mass. 129; Keay *v.* Goodwin, 16 Mass. 1; Darling *v.* Chapman, 14 Mass. 101.

New York.—Spencer *v.* Southwick, 10 Johns. 259.

Ohio.— Bowman *v.* Springfield, etc., R. Co., 1 Ohio Cir. Ct. 64, 1 Ohio Cir. Dec. 39.

Washington.— Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68.

United States.— U. S. *v.* Morris, 26 Fed. Cas. No. 15,816, 1 Paine 209.

See 39 Cent. Dig. tit. "Pleading," § 358.

29. *Alabama.*— Culberson *v.* American Trust, etc., Co., 107 Ala. 457, 19 So. 34.

Connecticut.— Conklin *v.* Botsford, 36 Conn. 105; Fowler *v.* Macomb, 2 Root 388.

Illinois.— Chicago *v.* People, 210 Ill. 84, 71 N. E. 816.

Indiana.— Palmer *v.* Hayes, 112 Ind. 289, 13 N. E. 882; Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91.

Minnesota.— Bishop *v.* Travis, 51 Minn. 183, 53 N. W. 461.

Missouri.— Herf, etc., Chemical Co. *v.* Lackawana Line, 70 Mo. App. 274.

New Hampshire.— Breck *v.* Blanchard, 22 N. H. 303.

New York.— Wyman *v.* Mitchell, 1 Cow. 316.

United States.— Wilson *v.* Codman, 3 Cranch 193, 2 L. ed. 408.

See 39 Cent. Dig. tit. "Pleading," § 358.

Plaintiff may introduce new matter to explain and fortify his declaration. Hallett *v.* Slidell, 11 Johns. (N. Y.) 56; Long *v.* Jackson, 2 Wils. C. P. 8. But see Bausman *v.* Woodman, 33 Minn. 512, 24 N. W. 198. *Compare* Fox *v.* Morris, 4 Quebec Pr. 345.

The replication to a plea of misnomer that a party is as well known by one name as another is good. Lucas *v.* Farrington, 21 Ill. 31.

30. *Connecticut.*— Fowler *v.* Macomb, 2 Root 388.

Illinois.— Chicago *v.* People, 210 Ill. 84, 71 N. E. 816.

Indiana.— Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Carter *v.* Carter, 35 Ind. App. 73, 72 N. E. 187; Cox *v.* Hayes, 18 Ind. App. 220, 47 N. E. 844.

Missouri.— State *v.* Bergfeld, 108 Mo. App. 630, 84 S. W. 177; Auchincloss *v.* Frank, 17 Mo. App. 41.

Oregon.— Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

Where the name of a defendant insurance company, as used in the complaint, apparently suggests that it is a fraternal beneficiary association, it is no departure for the reply to set up its charter under a foreign law to show that it is not such an association. Baltzell *v.* Modern Woodmen of America, 98 Mo. App. 153, 71 S. W. 1071.

New matter in the reply which plaintiff is forced to plead in order to meet the allegations of the answer will not constitute departure if it does not contradict the facts stated in the petition, and if it is not adopted for a new basis for relief in place of the cause of action presented by the petition. Hunter Milling Co. *v.* Allen, 74 Kan. 679, 88 Pac. 252, 8 L. R. A. N. S. 291.

In an action on the common counts for the value of wheat delivered, where the answer alleges a special contract, a reply setting up rescission of the special contract does not show a departure. Ankeny *v.* Clark, 1 Wash. 549, 20 Pac. 583.

31. Carpenter *v.* McClure, 38 Vt. 375.

32. Patterson *v.* Humboldt First Nat. Bank, 73 Nebr. 384, 102 N. W. 765; Haley *v.* McPherson, 3 Humphr. (Tenn.) 104; Cooper *v.* Blood, 2 Wis. 62.

Argumentative denial.— Frisbee *v.* Lindley, 23 Ind. 511; Minneapolis, etc., R. Co. *v.* Home Ins. Co., 64 Minn. 61, 66 N. W. 132.

33. Duckworth *v.* McClelland, L. R. 2 Ir. 527; Brine *v.* Great Western R. Co., 2 B. & S. 402, 8 Jur. N. S. 410, 31 L. J. Q. B. 101, 6 L. T. Rep. N. S. 50, 10 Wkly. Rep. 341, 110 E. C. L. 402.

There is a departure where the petition alleged that a judgment was not a lien on certain land because not properly docketed,

plaint,[34] or if it leads to the granting of relief to which plaintiff would not be entitled on the complaint,[35] there is a departure. So there is a departure where a reply shows or admits that some of the facts alleged by plaintiff in his first pleading are not true.[36] If the reply alleges nothing which could not have been given in evidence under the complaint, it is not bad as constituting a departure;[37] and there can be no departure as to merely immaterial matter only,[38] nor as to mere matters of inducement.[39] A reply should not be used as a substitute for an amendment to plaintiff's first pleading.[40] However, to set out a part of the cause of action in the complaint and the balance in the reply is not a departure, however defective the pleadings may otherwise be.[41] A departure in pleading in a suit in equity is less prejudicial to a party than in an action at law, since the court can readily segregate the testimony applicable to the allegations in the prior pleading.[42]

(II) *New Assignment.* A "new assignment," being merely a restatement, with greater particularity and exactness, of the same cause of action already set up in the complaint, is not objectionable as a departure.[43]

(III) *Where Answer Sets Up Counter-Claim or Set-Off.* The reply of a set-off to a set-off is bad as constituting a departure in pleading,[44] as is a plea of payment to a plea of set-off.[45] But there is ordinarily no departure in the reply when the allegations therein are pleaded in defense to a counter-claim[46] or set-off,[47] although there can be no counter-claim to a counter-claim.[48] Where

and the reply pleaded payment of the judgment. Hastings School Dist. *v.* Caldwell, 16 Nebr. 68, 19 N. W. 634. And, in replevin, where the avowry alleged taking the cattle damage feasant on defendant's close, and the replication alleged that the lands of plaintiff and defendant were held in common. Hurlburt *v.* Goodsill, 30 Vt. 146.

34. Hallner *v.* Union Transfer Co., (Nebr. 1907) 112 N. W. 334; Duckworth *v.* McClelland, L. R. 2 Ir. 527.

35. Shaw *v.* Jones, 156 Ind. 60, 59 N. E. 166; Cuppy *v.* O'Shaughnessy, 78 Ind. 245; Hancock *v.* Hancock, 69 S. W. 757, 24 Ky. L. Rep. 664.

To obtain distinct affirmative relief.— A reply may not be used to set up facts to obtain distinct affirmative relief; and, where plaintiff desires relief not prayed for in the complaint, he should amend it. Watson *v.* Ruderman, 79 Conn. 687, 66 Atl. 515.

36. Minor *v.* Woodbridge, 2 Root (Conn.) 274; Fiser *v.* Mississippi, etc., R. Co., 32 Miss. 359; Plummer *v.* Rohman, 61 Nebr. 61, 84 N. W. 600; Griswold *v.* New York Nat. Ins. Co., 3 Cow. (N. Y.) 96.

37. Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314; Estes *v.* Farnham, 11 Minn. 423; Booher *v.* Allen, 153 Mo. 613, 55 S. W. 238; Mayes *v.* Stephens, 38 Oreg. 512, 63 Pac. 760, 64 Pac. 319.

38. Bishop *v.* Travis, 51 Minn. 183, 53 N. W. 461; Thompson *v.* Fellows, 21 N. H. 425.

39. Wiard *v.* Semken, 2 App. Cas. (D. C.) 424.

40. Boyle *v.* Wilson, 9 Manitoba 180.

Where an amended petition has been filed and an objection to it on the ground that it is a departure from the original petition had been waived by pleading over, a reply which is pertinent to the amended petition is not objectionable on the ground that it in effect amends the original petition. Walker *v.* Wabash R. Co., 193 Mo. 453, 92 S. W. 83.

41. Erickson *v.* McLellan, 46 Wash. 661, 91 Pac. 249.

42. Brown *v.* Baker, 39 Oreg. 66, 65 Pac. 799, 66 Pac. 193.

43. Bishop *v.* Travis, 51 Minn. 183, 53 N. W. 461; Stewart *v.* Wallis, 30 Barb. (N. Y.) 344; Zorn *v.* Livesley, 44 Oreg. 501, 75 Pac. 1057; Cederson *v.* Oregon, etc., Co., 38 Oreg. 343, 62 Pac. 637, 63 Pac. 763.

44. Dawson *v.* Dillon, 26 Mo. 395; Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30; Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333. *Contra*, Orr *v.* Leathers, 27 Ind. App. 572, 61 N. E. 941; Miller *v.* Losee, 9 How. Pr. (N. Y.) 356.

Set-off against one defendant.— But a reply setting up a debt or claim of plaintiff in addition to the joint claim sued on, against a several defendant who has set up a several demand against plaintiff as an offset, is not a departure. Mortland *v.* Holton, 44 Mo. 58.

45. Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

46. *Indiana.*— Small *v.* Kennedy, 137 Ind. 299, 33 N. E. 674, 19 L. R. A. 337; Starke *v.* Dicks, 2 Ind. App. 125, 28 N. E. 214.

Minnesota.— Trainor *v.* Worman, 34 Minn. 237, 25 N. W. 401.

Missouri.— B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139; Morrison Mfg. Co. *v.* Roach, 104 Mo. App. 632, 78 S. W. 644.

New York.— Pope Mfg. Co. *v.* Rubber Goods Mfg. Co., 100 N. Y. App. Div. 349, 91 N. Y. Suppl. 828.

Oregon.— Van Bibber *v.* Fields, 25 Oreg. 527, 36 Pac. 526.

South Dakota.— Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323.

See 39 Cent. Dig. tit. "Pleading," § 359.

47. Shirts *v.* Irons, 47 Ind. 445.

48. Collins *v.* Gregg, 109 Iowa 506, 80 N. W. 562; Mount *v.* Louisville, etc., R. Co., 2 Ky. L. Rep. 221; Snyder *v.* Johnson, 69

a counter-claim is based on an alleged failure to perform the contract sued on by plaintiff, a reply alleging an excuse for non-performance is a departure.[49]

(iv) *Particular Illustrations* — (a) *In General.* Whether, in a particular case, a reply is bad as a departure, is to be determined by the rules already laid down, after consideration of all the allegations in both the complaint and the reply.[50] A reply pleading a waiver of conditions alleged in the plea to be

Nebr. 266, 95 N. W. 692; Windecker *v.* New York Mut. L. Ins. Co., 12 N. Y. App. Div. 73, 43 N. Y. Suppl. 358; Wilder *v.* New York Bank Note Co., 15 Misc. (N. Y.) 459, 37 N. Y. Suppl. 203 [*affirmed* in 16 Misc. 355, 38 N. Y. Suppl. 75]; Fitzgerald *v.* Rightmeyer, 12 Misc. (N. Y.) 186, 33 N. Y. Suppl. 593; Cohn *v.* Husson, 66 How. Pr. (N. Y.) 150; Hatfield *v.* Todd, 13 N. Y. Civ. Proc. 265. *Compare* Miller *v.* Losee, 9 How. Pr. (N. Y.) 356. *Contra,* Small *v.* Kennedy, 137 Ind. 299, 33 N. E. 674, 19 L. R. A. 337; Starke *v.* Dicks, 2 Ind. App. 125, 28 N. E. 214.

But the English practice permits a plaintiff, in his reply, to counter-claim against defendant's counter-claim. Toke *v.* Andrews, 8 Q. B. D. 428, 51 L. J. Q. B. 281, 30 Wkly. Rep. 659. If, however, the cause of action so alleged in the reply arose after the issuance of the writ, it can be used only as a defense and not as the basis for affirmative relief. Gibbs *v.* Neville, [1900] 2 Q. B. 181, 69 L. J. Q. B. 514, 82 L. T. Rep. N. S. 446, 48 Wkly. Rep. 532.

49. Trainor *v.* Worman, 34 Minn. 237, 25 N. W. 401; Eidlitz *v.* Rothschild, 87 Hun (N. Y.) 243, 33 N. Y. Suppl. 1047.

50. See cases cited *infra,* this note.

In trespass for removing goods from plaintiff's dwelling-house, where defendant justifies, under a writ of possession, a reply, seeking damages for wrongfully obtaining the issuance of the writ constitutes a departure (Steele *v.* Davis, 75 Ind. 191); and the same is true where a declaration alleges a trespass ten years before, and the replication sets up a continuing trespass for ten years (Shoults *v.* Kemp, 57 Miss. 218).

New consideration.— There is no departure where, after a plea of usury, a reply alleges that there was a new and independent consideration for the rate of interest demanded. Hunter *v.* Rice, 87 Ind. 312. Nor, after a plea alleging that the note sued on was paid and delivered to the maker, where the reply alleges its redelivery by the maker for a new consideration. Bishop *v.* Travis, 51 Minn. 183, 53 N. W. 461.

A reply based upon the law of another jurisdiction is a departure from a complaint based on the law of the forum. Will *v.* Whitney, 15 Ind. 194; Wells *v.* Teall, 5 Blackf. (Ind.) 306; Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240; Midland Steel Co. *v.* Citizens' Nat. Bank, 26 Ind. App. 71, 59 N. E. 211; Brown *v.* Canadian Pac. R. Co., 4 Manitoba 396.

Capacity in which plaintiff sues.— A reply showing that plaintiff is a trustee and has no right to maintain the action in the individual capacity in which he sues (Laws *v.* Carrier, 2 Cinc. Super. Ct. (Ohio) 80), or *vice versa* (Parkhill *v.* Union Bank, 1 Fla. 110), constitutes a departure. But, in conversion, where defendant alleges that plaintiff's only claim was as administrator and that he was without authority, and a reply alleges a title other than as administrator, there is no departure. McFadden *v.* Schroeder, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711.

A reply setting up a ratification of acts alleged by defendant to have been unauthorized does not constitute a departure. German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41; Cravens *v.* Gillilan, 73 Mo. 524; McLachin *v.* Barker, 64 Mo. App. 511.

Reply claiming different relief.— Where a complaint declares on a written contract, a reply asking for a reformation thereof constitutes a departure. Wood *v.* Deutchman, 75 Ind. 148. But see MacLaughlin *v.* Lake Erie, etc., R. Co., 2 Ont. L. Rep. 151. So, in ejectment, where plaintiff demands possession of the whole of the premises, and the replication alleges a claim to only a part in order to avoid a plea to the jurisdiction filed by defendant. Logiodice *v.* Gannon, 60 Conn. 81, 21 Atl. 100. And a replication in mandamus showing that a decree should have its date corrected is a departure from a petition filed for the purpose of compelling the judge to render and record it. State *v.* Williams, 69 Ala. 311. But it has been held that in an action for an accounting, where the answer set up an award, a reply admitting the award and asking judgment thereon is not a departure. Benson *v.* Stein, 34 Ohio St. 294.

Different grounds for relief.— There is a departure where the complaint alleges certain grounds for rescission or reformation and the reply alleges other grounds. Teal *v.* Langsdale, 78 Ind. 339; Boardman *v.* Handley, 4 Northwest. Terr. 266. And in a suit against an administrator for arrears in particular as to the sale of certain real estate, after an answer alleging an accounting had, a reply alleging arrears generally on a subsequent accounting constitutes a departure. Burtch *v.* State, 17 Ind. 506.

In an action by a receiver of an insolvent corporation on a note given for subscription to corporate stock, allegations in the reply counting on a right of action in the creditors only was not a departure from the complaint, which alleged that the note was due "for the benefit of creditors, and that said creditors have no other assets to rely upon for the payment of said claim." Marion Trust Co. *v.* Blish, (Ind. App. 1906) 79 N. E. 415.

Miscellaneous replies as departures.—Where plaintiff's petition alleged that he was a member of a beneficiary association at the time of

unperformed does not constitute a departure,[51] but it is otherwise as to a replication setting up a new and different breach from that alleged in the declaration.[52]

(B) *Change From Tort to Contract or Vice Versa.* Where the complaint alleged fraudulent representations as to goods sold, a reply setting up a promise by defendant to pay the damages claimed is a departure.[53] Likewise a reply based on the theory that plaintiff's original cause of action is in tort when in fact he sues in contract is a departure;[54] as is, in an action on a contract, a reply setting up facts which show that the contract is void and that plaintiff's remedy is in tort.[55]

(C) *Estoppel.* A reply alleging as an estoppel facts not inconsistent with the allegations of the complaint, against the defense set up in the answer, does not constitute a departure from the complaint;[56] but it is otherwise if the facts constituting the estoppel are inconsistent with prior allegations of the party.[57]

(D) *Fraud.* In an action on account for goods sold and delivered, a reply of fraud in obtaining the goods constitutes a departure.[58] On the other hand, a reply alleging fraud in procuring a release, discharge, or settlement, pleaded in the answer, is not a departure.[59] So where a complaint is in assumpsit for goods sold and delivered on a *quantum valebat*, and the answer pleads a specific contract therefor, a reply showing that such contract was a nullity because induced by fraud is no departure.[60] And a reply alleging false representations substantially the same as in the complaint, but with more minuteness, is not bad.[61] But a replication, on equitable grounds, to a plea of infancy, that defendant fraudulently contracted the debt by means of a false and fraudulent representation that he was of age, is a departure.[62]

(E) *Justification or Excuse.* Where plaintiff alleges performance of a contract, and defendant denies it in certain particulars, a reply pleading an excuse for nonperformance is a departure.[63] So where plaintiff alleged delivery, and defendant

his death, and the answer alleged that he had been suspended, a reply alleging facts showing that the suspension was no defense to the action is not a departure. Smith *v.* Sovereign Camp W. W., 179 Mo. 119, 77 S. W. 862. In a suit to foreclose a mortgage, where the answer alleges that plaintiff realized out of the sale of personal property mortgaged an amount greater than the mortgage debt, a reply alleging that the proceeds were applied at defendant's request, to the payment of other debts, does not constitute a departure. Martin *v.* Davis, 15 Ind. 478.

51. *Colorado.*— Standard Acc. Ins. Co. *v.* Friedenthal, 1 Colo. App. 5, 27 Pac. 88.

Florida.— Tillis *v.* Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89.

Indiana.— Sweetser *v.* Odd Fellows Mut. Aid Assoc., 117 Ind. 97, 19 N. E. 722.

Washington.— Commercial Electric Light, etc., Co. *v.* Tacoma, 17 Wash. 661, 50 Pac. 592.

West Virginia.— Levy *v.* Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598.

Contra.— Union Casualty, etc., Co. *v.* Bragg, 63 Kan. 291, 65 Pac. 272; Mohney *v.* Reed, 40 Mo. App. 99; Hanington *v.* Bostwick, 31 N. Brunsw. 621; Calhoun *v.* Union Mut. L. Ins. Co., 19 N. Brunsw. 13.

52. *Alabama.*— Governor *v.* Wiley, 14 Ala. 172.

Kentucky.— Gentry *v.* Barnett, 6 T. B. Mon. 113.

Missouri.— State *v.* Grimsley, 19 Mo. 171.

New Jersey.— Stiers *v.* Henries, 8 N. J. L. 364.

South Carolina.— Richardson *v.* Lorick, 1 McCord 185.

53. McAvoy *v.* Wright, 25 Ind. 22.

54. Frank Brewing Co. *v.* Hammersen, 22 N. Y. App. Div. 475, 48 N. Y. Suppl. 30.

55. Christian *v.* Niagara F. Ins. Co., 101 Ala. 634, 14 So. 374.

56. American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533; Virginia F. & M. Ins. Co. *v.* Saunders, 86 Va. 969, 11 S. E. 794; Commercial Electric Light, etc., Co. *v.* Tacoma, 17 Wash. 661, 50 Pac. 592; Rainsford *v.* Massengale, 5 Wyo. 1, 35 Pac. 774.

57. Flannery *v.* Campbell, 30 Mont. 172, 75 Pac. 1109; Calhoun *v.* Union Mut. L. Ins. Co., 19 N. Brunsw. 13.

58. Allen *v.* Mayson, 3 Brev. (S. C.) 207.

59. Colorado Fuel, etc., Co. *v.* Chappell, 12 Colo. App. 385, 55 Pac. 606; Frisbee *v.* Lindley, 23 Ind. 511; Hoover *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. 480; Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

60. Crown Cycle Co. *v.* Brown, 39 Oreg. 285, 64 Pac. 451.

61. Herring *v.* Skaggs, 73 Ala. 446.

62. Bartlett *v.* Wells, 1 B. & S. 836, 8 Jur. N. S. 762, 31 L. J. Q. B. 57, 5 L. T. Rep. N. S. 607, 10 Wkly. Rep. 229, 101 E. C. L. 836; De Roo *v.* Foster, 12 C. B. N. S. 272, 104 E. C. L. 272.

63. *Kentucky.*— Murray *v.* Bright, 2 A. K. Marsh. 146.

pleaded non-delivery, a replication alleging tender and refusal to receive was held to constitute a departure.[64] But there is no departure where plaintiff sues in trespass, and defendant justifies as an officer under an execution, and the reply alleges that the goods were exempt,[65] or shows that the officer abused the process so as to make him a trespasser *ab initio*;[66] or where defendant justifies as an act of public necessity a reply showing that diligence would have removed the necessity.[67]

(F) *Nature and Character of Contract Sued Upon.* The contract relied on in the complaint must correspond with the one relied on in the reply.[68] A replication which sets up a new and independent promise, different from that alleged in the declaration, is bad as a departure;[69] as where an implied contract is sued on

Massachusetts.— Larned *v.* Bruce, 6 Mass. 57.

Minnesota.— Trainor *v.* Worman, 34 Minn. 237, 25 N. W. 401.

New Jersey.— Potts *v.* Point Pleasant Land Co., 47 N. J. L. 476, 2 Atl. 242.

Pennsylvania.— Burk *v.* Huber, 2 Watts 306; Burk *v.* Bear, 3 Pa. L. J. Rep. 355.

Vermont.— Joslyn *v.* Taylor, 33 Vt. 470.

England.— Perry *v.* Smith, C. & M. 554, 41 E. C. L. 301.

Canada.— Coulthard *v.* Royal Ins. Co., 39 U. C. Q. B. 409.

See 39 Cent. Dig. tit. "Pleading," § 367.

64. Pollard *v.* Taylor, 2 Bibb (Ky.) 234.

65. Duncan *v.* Frank, 8 Mo. App. 286.

66. Breck *v.* Blanchard, 22 N. H. 303; Stoughton *v.* Mott, 25 Vt. 668.

67. Beach *v.* Trudgain, 2 Gratt. (Va.) 219.

68. Gates *v.* O'Gara, 145 Ala. 665, 39 So. 729; Chaplin *v.* Baker, 124 Ind. 385, 24 N. E. 233.

Where plaintiff in his complaint relied for relief upon a trust, and his reply places his right to recover upon a contract of guaranty, there is a departure. Union St. R. Co. *v.* Union First Nat. Bank, 42 Oreg. 606, 72 Pac. 586, 73 Pac. 341.

If a carrier's contract limits the amount of the liability, that need not be stated in the declaration, but if it provides that in respect to certain matters he shall not be liable at all, this must be stated, and it cannot be left for the reply, since it would constitute a departure. Shaw *v.* Canadian Pac. R. Co., 5 Manitoba 334.

An alleged new assignment, after a plea of limitations, setting up another and different contract, constitutes a departure. Leland *v.* Neilson, 3 N. J. L. J. 156.

But there is no departure where a reply avers an agreement in completion of an incomplete contract set up in the complaint (P. C. Hanford Oil Co. *v.* Findlay, 80 Wis. 91, 49 N. W. 19); nor, in an action on an insurance policy, where the answer alleges the destruction of the property prior to the issuance of the policy, and the reply alleges that the policy was issued pursuant to an oral contract made prior to the destruction of the property (Bennett *v.* Connecticut F. Ins. Co., 11 Ohio Dec. (Reprint) 429, 27 Cinc. L. Bul. 15); nor, in an action for the price of goods, where the answer alleged a contract containing other terms in addition to those alleged in the complaint, and the reply admitted the contract set up and alleged that it was a memorandum of the terms of the sale counted on in the complaint (Estes *v.* Farnham, 11 Minn. 423); nor where the answer alleged an agreement to rescind the contract sued on, and the reply alleged that the agreement was conditional and that defendant had not performed the conditions (Houston *v.* Sledge, 98 N. C. 414, 4 S. E. 197, 101 N. C. 640, 8 S. E. 145, 2 L. R. A. 487); nor where defendant sets up a written agreement different from the contract sued on, and the reply alleges facts showing that the writing was not the actual agreement made by the parties (Rosby *v.* St. Paul, etc., R. Co., 37 Minn. 171, 33 N. W. 698); nor where a reply alleges an extension of time for performance made pursuant to the terms of the contract sued on (Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314; Childs Lumber, etc., Co. *v.* Page, 28 Wash. 128, 68 Pac. 373).

69. *Alabama.*— Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658; Smith *v.* Kirkland, 81 Ala. 345, 1 So. 276.

Indiana.— Chaplin *v.* Baker, 124 Ind. 385, 24 N. E. 233.

Maryland.— Hanover F. Ins. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

Massachusetts.— Sibley *v.* Brown, 4 Pick. 137.

Mississippi.— Porterfield *v.* Butter, 47 Miss. 165, 12 Am. Rep. 329; Gildat *v.* Howell, 1 How. 198.

Missouri.— Hill *v.* Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223; Randolph *v.* Frick, 57 Mo. App. 400.

New Jersey.— Holmes *v.* Seashore Electric R. Co., 57 N. J. L. 502, 31 Atl. 227; Wilson *v.* Johnson, (1894) 29 Atl. 419; Miller *v.* Hillsborough Assur. Assoc., 47 N. J. L. 393, 1 Atl. 461.

New York.— Benjamin *v.* De Groot, 1 Den. 151.

South Carolina.— Jamison *v.* Lindsay, 4 McCord 93.

Tennessee.— Bedford *v.* Ingram, 5 Hayw. 155.

Texas.— Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661.

Vermont.— Fletcher *v.* Munroe, 61 Vt. 406, 17 Atl. 799; Houghton *v.* Jewett, 2 Tyler 183.

United States.— Ennis *v.* Case Mfg. Co., 30 Fed. 487.

See 39 Cent. Dig. tit. "Pleading," § 358 *et seq.* See also LIMITATIONS OF ACTIONS, 25 Cyc. 1415 note 12.

and an express contract is admitted or alleged in the reply,[70] where one consideration is alleged in the complaint and a different consideration in the reply,[71] or where a reply sets up an account stated, although the action is brought on an account.[72]

(G) *Title.* Plaintiff's title, as alleged in the complaint and reply, must correspond,[73] and the same rule applies to the allegations as to defendant's title.[74] But there is no departure where, in an action to quiet title, the answer alleges that defendants are tenants in common as to a third interest and the reply alleges a conveyance of that interest.[75] And a reply setting up plaintiff's title, when the complaint has omitted to state it, is not bad as a departure.[76]

(H) *As to Parties.* There is a departure where a replication relates to but one defendant, when the declaration and plea related to several jointly;[77] and also where a replication is in the name of one plaintiff, when the declaration was in the name of two.[78]

(V) *Remedy For.*[79] Generally the objection that a reply constitutes a departure may be urged by a demurrer, but in some jurisdictions a motion to strike is an alternative or exclusive remedy.[80] So it has been held that the objection may

It has been held, however, that, in an action on a contract, where defendant pleads a discharge in bankruptcy, a replication setting up a new promise to pay the debts contracted prior to the discharge does not constitute a departure (Shippey *v.* Henderson, 14 Johns. (N. Y.) 178, 7 Am. Dec. 458; Farmers', etc., Bank *v.* Flint, 17 Vt. 508, 44 Am. Dec. 351. But see Walbridge *v.* Harroon, 18 Vt. 448); nor does a reply alleging a new and valid promise to pay notes alleged by defendant to have been obtained without consideration (Brown *v.* Indianapolis First Nat. Bank, 115 Ind. 572, 18 N. E. 56).

70. Osten *v.* Winehill, 10 Wash. 333, 38 Pac. 1123; Clark *v.* Sherman, 5 Wash. 681, 32 Pac. 771; Distler *v.* Dabney, 3 Wash. 200, 28 Pac. 335. But see Ankeny *v.* Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475.

71. Shank *v.* Fleming, 9 Ind. 189; Brulé *v.* Brulé, 5 Quebec Pr. 263.

72. P. C. Hanford Oil Co. *v.* Findlay, 80 Wis. 91, 49 N. W. 19; Campbell *v.* Mellen, 61 Wis. 612, 21 N. W. 864.

73. Bearss *v.* Montgomery, 46 Ind. 544. *Compare* Lamme *v.* Dodson, 4 Mont. 560, 2 Pac. 298.

For instance, there is a departure where a replication alleges a joint ownership of property which was alleged in the declaration to be held by plaintiffs as partners (Moore *v.* Stevens, 42 N. H. 404); and where a replication alleges title in certain federal officers, when the declaration alleged title in the United States (U. S. *v.* Morris, 26 Fed. Cas. No. 15,816, 1 Paine 209); and where a reply avers a different source of title from that alleged in the declaration (Bearss *v.* Montgomery, 46 Ind. 544; Brown *v.* Baker, 39 Oreg. 66, 65 Pac. 799, 66 Pac. 193. *Contra*, Berney *v.* Steiner, 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 144). So also a reply setting up facts in derogation of plaintiff's title for the purpose of destroying defendants' title constitutes a departure (Etter *v.* Anderson, 84 Ind. 333), and where a declaration counts on title to a note through one indorsement, a reply is bad alleging title through another (Bell *v.* Moffat, 19 N. Brunsw. 261); and so is a reply alleging a right to water in a stream by riparian proprietorship, when the complaint sets up the incompatible right to the water by appropriation (Brown *v.* Baker, 39 Oreg. 66, 65 Pac. 799, 66 Pac. 193).

But there is no departure where plaintiff alleges title in fee to land, and defendant pleads title to the surface, and a replication alleges title to the surface acquired prior to defendant's title (Turner Coal Co. *v.* Glover, 101 Ala. 289, 13 So. 478); nor, in an action to enjoin the cutting of timber on certain land, where the answer pleads title in defendants of timber on part of the land, is there a departure where the reply alleges that defendants had cut all the timber thereon (Davis *v.* Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393).

In an action on a fire insurance policy, where the answer alleges title in another person at the time the policy was issued, a reply averring that a deed purporting to convey such title was void as without consideration, is not a departure. Franklin Ins. Co. *v.* Feist, 31 Ind. App. 390, 68 N. E. 188.

A reply alleging a special ownership as pledgee or mortgagee while the petition alleges ownership generally does not constitue a departure. Merchant's Nat. Bank *v.* Richards, 74 Mo. 77. *Contra*, Johnson *v.* Seneca State Bank, 59 Kan. 250, 52 Pac. 860.

74. Webber *v.* Wannemaker, 39 Colo. 425, 89 Pac. 780.

75. Neve *v.* Allen, 55 Kan. 638, 41 Pac. 966.

76. American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533.

77. Governor *v.* Hanrahan, 11 N. C. 44.

78. Hoxsie *v.* Kempton, 77 Minn. 462, 80 N. W. 353; Graham *v.* Graham, 4 Munf. (Va.) 205.

79. Objection as cured by verdict see *infra*, XIV, J.

80. See *infra*, VI, F, 4, b; XII, C.

be raised by objecting to the introduction of evidence and moving for a nonsuit.[81]

f. Duplicity and Joinder — (I) *At Common Law* — (A) *Duplicity.* A replication should not be double,[82] that is, it should not contain as one ground of reply, two or more distinct allegations[83] or denials,[84] either one of which is a complete answer to the plea So a traverse together with a new assignment makes a replication bad for duplicity.[85] But if one of the two matters alleged in answer to the plea is a good answer and the other not, the replication will not be deemed double, but the latter ground will be treated as surplusage.[86] Several facts, which together constitute but a single point, may be alleged together, without rendering the replication bad for duplicity,[87] or several facts which together make up a single connected proposition may be traversed together.[88]

(B) *Joinder.* Except where allowed by statute,[89] it is equally inadmissible to

81. Johnson *v.* Seneca State Bank, 59 Kan. 250, 52 Pac. 860; Osten *v.* Winehill, 10 Wash. 333, 38 Pac. 1123. But see Erickson *v.* McLellan, 46 Wash. 661, 91 Pac. 249.

82. *District of Columbia.*— National Express, etc., Co. *v.* Burdette, 7 App. Cas. 551.
New Hampshire.— Watriss *v.* Pierce, 36 N. H. 232; Tebbets *v.* Tilton, 24 N. H. 120.
New York.— Roberts *v.* Kelly 2 Hall 333.
Vermont.— Downer *v.* Rowell, 26 Vt. 397.
United States.— Hart *v.* Rose, 11 Fed. Cas. No. 6,154*a*, Hempst. 238.
England.— Cheasley *v.* Barnes, 10 East 73.
See 39 Cent. Dig. tit. "Pleading," § 385.

83. *Michigan.*—People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64.
New Hampshire.— Mooney *v.* Demerrit, 1 N. H. 187.
Pennsylvania.— Watmough *v.* Francis, 4 Pa. L. J. 16.
Rhode Island.— Randall *v.* Carpenter, 25 R. I. 641, 57 Atl. 865.
Tennessee.— Louisville, etc., R. Co. *v.* Sowell, 90 Tenn. 17, 15 S. W. 837.
Vermont.— Downer *v.* Rowell, 26 Vt. 397.
United States.—Andreae *v.* Redfield, 1 Fed. Cas. No. 368; Burnham *v.* Webster, 5 Fed. Cas. No. 2,178, 2 Ware 240; Craig *v.* Brown, 6 Fed. Cas. No. 3,329, Pet. C. C. 443.
See 39 Cent. Dig. tit. "Pleading," § 385.

84. *Illinois.*— Hereford *v.* Crow, 4 Ill. 423.
Massachusetts.— Nichols *v.* Arnold, 8 Pick. 172.
New York.— Tubbs *v.* Caswell, 8 Wend. 129.
Vermont.— Moss *v.* Hindes, 28 Vt. 279.
United States.— Ferguson *v.* Meredith, 1 Wall. 25, 17 L. ed. 604.
See 39 Cent. Dig. tit. "Pleading," § 385.
A simple denial of the facts stated in a plea is not bad for duplicity. Calhoun *v.* Wright, 4 Ill. 74.

85. Buckelew *v.* Stults, 28 N. J. L. 150.

86. Kellogg *v.* Miller, 6 Ark. 468; Hampshire Manufacturers' Bank *v.* Billings, 17 Pick. (Mass.) 87; Day *v.* Abbott, 15 Vt. 632.

87. *Maine.*— Potter *v.* Titcomb, 10 Me. 53.
Massachusetts.— Otis *v.* Blake, 6 Mass. 336.
New Hampshire.— Tebbets *v.* Tilton, 24 N. H. 120.
Tennessee.— Pilcher *v.* Hart, 1 Humphr. 524.
United States.— Jackson *v.* Rundlet, 13 Fed. Cas. No. 7,145, 1 Woodb. & M. 381.
See 39 Cent. Dig. tit. "Pleading," § 385.

88. Holland *v.* Kibbe, 16 Ill. 133; Otis *v.* Blake, 6 Mass. 336; Tebbets *v.* Tilton, 24 N. H. 120; Tucker *v.* Ladd, 7 Cow. (N. Y.) 450; Strong *v.* Smith, 3 Cai. (N. Y.) 160.

89. *Indiana.*— Snodgrass *v.* Hunt, 15 Ind. 274; Zehnor *v.* Beard, 8 Ind. 96; Hurd *v.* Earl, 6 Blackf. 39.
Massachusetts.— Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172.
Mississippi.— Wilmot *v.* Yazoo, etc., R. Co., 76 Miss. 374, 24 So. 701; Joslin *v.* Caughlin, 32 Miss. 104; Slocomb *v.* Holmes, 1 How. 139.
New Hampshire.— Pickering *v.* Pickering, 19 N. H. 389.
New York.— Frisbie *v.* Riley, 12 Wend. 249.
See 39 Cent. Dig. Tit. "Pleading," § 339.
Procedure under statutes.— Leave of court must be obtained. State Bank *v.* Minikin, 12 Ark. 715; Hartford F. Ins. Co. *v.* Green, 52 Miss. 332; Pickering *v.* Pickering, 19 N. H. 389; Ames *v.* West, 4 Wend. (N. Y.) 211; Andreae *v.* Redfield, 1 Fed. Cas. No. 368. The application for leave must set out the matters sought to be replied (Bangs *v.* Avery, 2 How. Pr. (N. Y.) 123), and show that they are true (Hill *v.* Russell, 2 How. Pr. (N. Y.) 129; Flint *v.* Morehouse, 2 How. Pr. (N. Y.) 5; McNair *v.* Bronson, 6 Wend. (N. Y.) 534). Leave will not be denied merely because the replication sought to be pleaded would be bad on demurrer. Hill *v.* Russell, *supra.* Where the statute declares an affidavit necessary as a condition for obtaining leave, the court has no power to dispense with it. Hartford F. Ins. Co. *v.* Green, 52 Miss. 332. Statutes allowing several pleas to be pleaded are not to be taken to authorize the pleading of several replications (Stiles *v.* Lacy, 7 Ala. 17; Gray *v.* White, 5 Ala. 490), except in case of replications to pleas of set-off (Watts *v.* Greenlee, 13 N. C. 87; Worth *v.* Fentress, 12 N. C. 419; Williams *v.* Lenoir, 8 Baxt. (Tenn.) 395; Ridley *v.* Buchanan, 2 Swan (Tenn.) 555).
In North Carolina, by statute, several matters could be replied to a plea of set-off. Watts *v.* Greenlee, 13 N. C. 87; Worth *v.* Fentress, 12 N. C. 419; Holdings *v.* Smith, 5 N. C. 154.

plead two distinct and separate defenses to the plea,[90] and matter of confession and avoidance cannot be joined with a traverse.[91] Where, however, the declaration consists of several counts, and a single plea is filed to all of them, as many replications may be filed as there are counts, each replication being an answer to the plea in so far as it applies to one particular count.[92]

(II) *Under the Codes.* Under the codes plaintiff may, in his reply, tender as many issues as he pleases, so long as they are not inconsistent with the complaint, or frivolous.[93] Plaintiff may both traverse the defense set up in the answer and confess and avoid it;[94] but if the facts set up in confession and avoidance are admissible in evidence under the traverse, the reply by confession and avoidance is bad.[95] Each defense in a reply should be separately stated and numbered.[96] If there are several replications to a plea and any one is good, a good issue is raised,[97] and it is not prejudicial error to sustain a demurrer to one replication when the issue raised thereby is equally well raised by another.[98] Whether or not the several replications should be mutually consistent is a question which seems to be identical with the question of inconsistent defenses in an answer.[99]

6. Admissions — a. In General.[1] Admissions in a reply may be express or implied and are governed by the same rules applicable to admissions in the answer.[2] Where a reply contains a general denial and also affirmative matter, it has been held that the implied admission of the latter does not operate as an admission of the allegations of the answer.[3] So it has been held that an implied admission resulting from a plea of confession and avoidance in a reply does not affect a general denial interposed by operation of law to the matters pleaded in the answer, the effect of which can only be overcome by an express admission in the reply.[4] An express admission in a reply controls a denial of the same fact.[5] To refer to an averment in an answer as "an alleged fact" is not an admission of it.[6] An express admission of a contract is an admission of the consideration on which it rests.[7] A

90. Hazzard *v.* Smith, 1 J. J. Marsh. (Ky.) 66; Sevey *v.* Blacklin, 2 Mass. 541; Frisbie *v.* Riley, 12 Wend. (N. Y.) 249. See also Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320.

91. Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172; Commercial Bank *v.* Sparrow, 2 Den. (N. Y.) 97; Dunklee *v.* Goodenough, 65 Vt. 257, 26 Atl. 988.

92. Little *v.* Blunt, 13 Pick. (Mass.) 473; Howard *v.* Jennison, 1 Salk. 223; Trethewy *v.* Ackland, 2 Saund. 48, 85 Eng. Reprint 649.

93. Snodgrass *v.* Hunt, 15 Ind. 274. See also Moore *v.* Macon Sav. Bank, 22 Mo. App. 684; Gearon *v.* Sacks, 21 N. Y. App. Div. 5, 47 N. Y. Suppl. 264; French *v.* J. P. McConnell, 4 Ohio Dec. (Reprint) 268, 1 Clev. L. Rep. 187.

94. Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955; Snodgrass *v.* Hunt, 15 Ind. 274; Hall *v.* Eve, 4 Ch. D. 341, 46 L. J. Ch. 145, 35 L. T. Rep. N. S. 926, 25 Wkly. Rep. 177.

A reply is not bad for duplicity, under rules of court in some jurisdictions, because denials, although separately paragraphed, are joined with matters in avoidance. Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955.

95. Northrop *v.* Chase, 76 Conn. 146, 56 Atl. 518.

96. Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955; French *v.* J. P. McConnell, 4 Ohio Dec. (Reprint) 268, 1 Clev. L. Rep. 187.

97. Fidelity, etc., Co. *v.* Mobile County, 124 Ala. 144, 27 So. 386; Hurd *v.* Earl, 6 Blackf. (Ind.) 39; Gearon *v.* Sacks, 21 N. Y. App. Div. 5, 47 N. Y. Suppl. 264.

98. Thompson *v.* Stringfellow, 119 Ala. 317, 24 So. 849; Mason *v.* Mason, 102 Ind. 38, 26 N. E. 124.

99. Moore *v.* Macon Sav. Bank, 22 Mo. App. 684. See also *supra*, IV, A, 7, d.

A general denial and a plea of ratification are not inconsistent. Moore *v.* Macon Sav. Bank, 22 Mo. App. 684.

1. As affecting matters necessary to be proved see *infra*, XIII, B, 1, d, (II).

2. See *supra*, IV, C, 5.

3. Schute *v.* Coulthurst, 94 Iowa 418, 62 N. W. 770; McDermott *v.* Iowa Falls, etc., R. Co., 85 Iowa 180, 52 N. W. 181; Shannon *v.* Pearson, 10 Iowa 588; Del Valle *v.* Navarro, 21 Abb. N. Cas. (N. Y.) 136. *Compare* Gaffney *v.* St. Paul, etc., R. Co., 38 Minn. 111, 35 N. W. 728. *Contra*, Dwelling House Ins. Co. *v.* Brewster, 43 Nebr. 528, 61 N. W. 746.

4. Parsons *v.* Grand Lodge A. O. U. W., 108 Iowa 6, 78 N. W. 676; Nichols *v.* Chicago Great Western R. Co., 94 Iowa 202, 62 N. W. 769. See also Stanbrough *v.* Daniels, 77 Iowa 561, 42 N. W. 443.

5. Boyle *v.* Webster, 17 Q. B. 950, 16 Jur. 683, 21 L. J. Q. B. 202, 79 E. C. L. 950.

6. Day *v.* Mill-Owners' F. Ins. Co., 75 Iowa 694, 38 N. W. 113.

7. Blacker *v.* Dunbar, 108 Ind. 217, 9 N. E. 104.

reply which denies the matter set up in a plea, thereby admits the sufficiency of the defense if proved.[8]

b. By Failure to Reply or to Deny Particular Allegations — (i) *In General.* The failure to file a reply when a reply is required, or the failure of a reply to deny certain material facts averred in the answer, is an admission of the truth of the material allegations of the answer not denied.[9] The rule applies to the same extent under the code procedure and practice acts except where special statutes provide that matter appearing in the answer or other pleadings subsequent to the

8. Southern Express Co. *v.* Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385.

9. *Alabama.*— Lucas *v.* Stonewall Ins. Co., 139 Ala. 487, 36 So. 40.

California.— Mulford *v.* Estudillo, 23 Cal. 94.

Illinois.— Simmons *v.* Jenkins, 76 Ill. 479; Lettick *v.* Honnold, 63 Ill. 335; Gruenberg *v.* Smith, 58 Ill. App. 281; Culver *v.* Uthe, 7 Ill. App. 468.

Indiana.— Thompson *v.* Cooper, 10 Ind. 526; Bird *v.* Lanius, 7 Ind. 615; McClure *v.* Pursell, 6 Ind. 330.

Iowa.— Warner *v.* Norwegian Cemetery Assoc., (1907) 112 N. W. 176; Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841; Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 38 N. W. 113; Walker *v.* Sioux City, etc., Co., 65 Iowa 563, 22 N. W. 676; Innes *v.* Krysher, 9 Iowa 295; Lyon *v.* Byington, 7 Iowa 422; Dunsmore *v.* Elliott, 1 Iowa 599.

Kentucky.— Prichard *v.* Peace, 98 Ky. 99, 32 S. W. 296, 17 Ky. L. Rep. 662; Davis *v.* Dyeus, 7 Bush 4; Cook *v.* Gray, 2 Bush 121; Lyle *v.* Poynter, 1 Duv. 357; Taylor *v.* Stowell, 4 Metc. 175; Ashby *v.* Woolfolk, 3 Metc. 540; Stapleton *v.* Ewell, 55 S. W. 917, 21 Ky. L. Rep. 1534; Illinois Cent. R. Co. *v.* Nall, 51 S. W. 168, 21 Ky. L. Rep. 281.

Louisiana.— Bruce *v.* Stone, 5 La. 1; Lewis *v.* Peytavin, 10 Mart. 36.

Massachusetts.— Murphy *v.* People's Equitable Mut. F. Ins. Co., 7 Allen 239.

Minnesota.— Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234; Lash *v.* McCormick, 17 Minn. 403; Englebrecht *v.* Rickert, 14 Minn. 140; Taylor *v.* Bissell, 1 Minn. 225.

Missouri.— Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545.

Nebraska.— Western Travelers' Acc. Assoc. *v.* Tomson, 72 Nebr. 661, 101 N. W. 341, 103 N. W. 695, 105 N. W. 293; Harlan County *v.* Hogsett, 60 Nebr. 362, 83 N. W. 171; Davis *v.* Grinnell First Nat. Bank, 57 Nebr. 373, 77 N. W. 775; North Nebraska Fair, etc., Assoc. *v.* Box, 57 Nebr. 302, 77 N. W. 770; Burnet *v.* Cavanagh, 56 Nebr. 190, 76 N. W. 578; Equitable Trust Co. *v.* O'Brien, 55 Nebr. 735, 76 N. W. 417; Scofield *v.* Clark, 48 Nebr. 711, 67 N. W. 754; Dwelling House Ins. Co. *v.* Brewster, 43 Nebr. 528, 61 N. W. 746; National Lumber Co. *v.* Ashby, 41 Nebr. 292, 59 N. W. 913; Livesey *v.* Brown, 35 Nebr. 111, 52 N. W. 838; Hamilton L. & T. Co. *v.* Gordon, 32 Nebr. 663, 49 N. W. 699; Scofield *v.* State Nat. Bank, 9 Nebr. 316, 2 N. W. 888, 31 Am. Rep. 412; Williams *v.* Evans, 6 Nebr. 216.

New York.— Walker *v.* American Cent. Ins. Co., 143 N. Y. 167, 38 N. E. 106; Carver *v.* Wagner, 51 N. Y. App. Div. 47, 64 N. Y. Suppl. 747; Rogers *v.* King, 66 Barb. 495; Burke *v.* Thorne, 44 Barb. 363; Penn Mut. L. Ins. Co. *v.* Bradley, 21 N. Y. Suppl. 876; Birch *v.* Hall, 3 N. Y. Suppl. 747; Randolph *v.* New York, 53 How. Pr. 68; Bissell *v.* Pearse, 21 How. Pr. 130; Savage *v.* Davis, 7 Wend. 223; Raymond *v.* Wheeler, 9 Cow. 295.

Oregon.— Minard *v.* McBee, 29 Oreg. 225, 44 Pac. 491; Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676; Larsen *v.* Oregon R., etc., Co., 19 Oreg. 240, 23 Pac. 974.

Tennessee.— Duane *v.* Richardson, 106 Tenn. 80, 59 S. W. 135; Tomlinson *v.* Darnall, 2 Head 538.

Texas.— Bruce *v.* Weatherford First Nat. Bank, 25 Tex. Civ. App. 295, 60 S. W. 1006; Gill *v.* First Nat. Bank, (Civ. App. 1898) 47 S. W. 751.

Utah.— Dunham *v.* Travis, 25 Utah 65, 69 Pac. 468.

Virginia.— Briggs *v.* Cook, 99 Va. 273, 38 S. E. 148.

Washington.— Hughes *v.* New York L. Ins. Co., 32 Wash. 1, 72 Pac. 452; Johnson *v.* Maxwell, 2 Wash. 482, 27 Pac. 1071.

West Virginia.— Sansom *v.* Blankenship, 53 W. Va. 411, 44 S. E. 408; State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959.

Wisconsin.— Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232; Moyer *v.* Gunn, 12 Wis. 385.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

England.— Green *v.* Sevin, 13 Ch. D. 589, 41 L. T. Rep. N. S. 724.

See 39 Cent. Dig. tit. "Pleading," §§ 355, 388.

Compare Tams *v.* Bullitt, 35 Pa. St. 308.

Where a reply contains new matter in avoidance, but no denial of the allegations of the facts it seeks to avoid. Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 38 N. W. 113; Murphy *v.* People's Equitable Mut. F. Ins. Co., 7 Allen (Mass.) 239. But allegations in the form of new matter which are substantially mere argumentative denials are not admitted by failure to deny. Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912; Butler *v.* Edgerton, 15 Ind. 15; Netcott *v.* Porter, 19 Kan. 131; Engel *v.* Bugbee, 40 Minn. 492, 42 N. W. 351; State *v.* Williams, 48 Mo. 210; Mauldin *v.* Ball, 5 Mont. 96, 1 Pac. 409; Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239.

complaint shall be deemed denied.[10] Unless within such a statutory exception, new matter pleaded as a set-off or counter-claim will be taken as admitted unless denied.[11] But failure to reply to a counter-claim does not admit the amount of damages claimed therein; that is still a matter to be determined by the jury.[12] But neither legal conclusions,[13] matters of inducement,[14] nor facts pleaded by way of recital,[15] are admitted by failure to deny. So if material matter be denied anywhere in the pleadings of plaintiff or defendant it will not be deemed admitted by a failure to reply.[16] A reply denying the allegations in but one of several defenses admits the facts alleged in the others,[17] but not where another defense is in fact made up merely of repetitions of matter appearing in defenses which have been put in issue.[18]

(II) *EXCEPTIONS TO RULE.* The filing of an agreed case is an abandonment of the pleadings, and therefore the want of a replication in such a case does not admit the facts pleaded.[19] Nor does a plea stand admitted because not answered pending the decision on an issue of law raised on another plea,[20] or pending a motion to reject it.[21] And failure to deny allegations in the separate answer of one defendant

Exception to rule.— The validity of a statute on the ground that it was not passed in the manner required by the constitution is not a matter which plaintiff can admit by failing to deny in a reply the invalidity thereof alleged in defendant's answer. Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.

Extent of admission.— The implied admission by failure to deny is no broader than the particular allegations not denied. Thruston *v.* Oldham, 6 Bush (Ky.) 16.

But omission of a denial in a counter brief statement, of some matter alleged in the brief statement, cannot control or destroy the effect of evidence properly received under it. Trask *v.* Patterson, 29 Me. 499.

Allegations of value, even in the sale and delivery of property, are not required to be denied, unless accompanied by a statement that the party charged with same promised and agreed to pay that amount, or unless facts are stated from which the law will imply such a promise. Chamberlain *v.* Sawyers, 32 S. W. 475, 17 Ky. L. Rep. 716.

10. *Idaho.*—Alspaugh *v.* Reid, 6 Ida. 223, 55 Pac. 300.

Iowa.— Platner *v.* Platner, 66 Iowa 378, 23 N. W. 764.

Kansas.— Hughes *v.* Durein, 3 Kan. App. 63, 44 Pac. 434.

Kentucky.— Graves *v.* Ward, 2 Duv. 301; Fahnestock *v.* Bailey, 3 Metc. 48, 77 Am. Dec. 161.

Massachusetts.— Stevens *v.* Parker, 7 Allen 361.

Nebraska.— Culbertson Irr., etc., Co. *v.* Cox, 52 Nebr. 684, 73 N. W. 9.

New York.— Rochester Distilling Co. *v.* O'Brien, 72 Hun 462, 25 N. Y. Suppl. 281; Eisler *v.* Union Transfer, etc., Co., 16 Daly 456, 12 N. Y. Suppl. 732; Van Doren *v.* Jelliffe, 1 Misc. 354, 20 N. Y. Suppl. 636.

Texas.— Bauman *v.* Chambers, 91 Tex. 108, 41 S. W. 471; Texas Elevator, etc., Co. *v.* Mitchell, 78 Tex. 64, 14 S. W. 275; Meyer *v.* Opperman, 76 Tex. 105, 13 S. W. 174; Fagan *v.* McWhirter, 71 Tex. 567, 9 S. W. 677.

Utah.— Whitney *v.* Richards, 17 Utah 226, 53 Pac. 1122.

Wisconsin.— Roys *v.* Lull, 9 Wis. 324.

United States.— Burlington Ins. Co. *v.* Miller, 60 Fed. 254, 8 C. C. A. 612.

11. National Lumber Co. *v.* Ashby, 41 Nebr. 292, 59 N. W. 913; Carver *v.* Wagner, 51 N. Y. App. Div. 47, 64 N. Y. Suppl. 747; Penn Mut. L. Ins. Co. *v.* Bradley, 21 N. Y. Suppl. 876 [*affirmed* in 142 N. Y. 660, 37 N. E. 569]; Jarvis *v.* Peck, 19 Wis. 74.

The counter-claim must be plainly characterized as such on its face in order to notify the opposite party of the necessity of a reply, or failure to reply thereto does not constitute an admission. Broughton *v.* Sherman, 21 Minn. 431; U. S. Equitable L. Assur. Soc. *v.* Cuyler, 75 N. Y. 511; Favilla *v.* Moretti, 13 N. Y. Suppl. 707; Wood *v.* Gordon, 13 N. Y. Suppl. 595; Gunn *v.* Madigan, 28 Wis. 158. *Contra*, Huron *v.* Meyers, 13 S. D. 420, 83 N. W. 553.

12. Slone *v.* Slone, 2 Metc. (Ky.) 339; McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192; Barber *v.* Gray, 4 Misc. (N. Y.) 193, 23 N. Y. Suppl. 1026.

13. *Colorado.*— Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714.

Kentucky.— Thruston *v.* Oldham, 6 Bush 16.

New York.— Barton *v.* Sackett, 3 How. Pr. 358.

Oregon.— Larsen *v.* Oregon R., etc., Co., 19 Oreg. 240, 23 Pac. 974.

Pennsylvania.— Rostonski's Estate, 7 North. Co. Rep. 214.

United States.— Saling *v.* Bolander, 125 Fed. 701, 60 C. C. A. 469.

See 39 Cent. Dig. tit. "Pleading," §§ 355, 388.

14. Fowler *v.* Clark, 3 Day (Conn.) 231.

15. Nelson *v.* Wheelock, 46 Ill. 25; Adams *v.* Moore, 7 Me. 86.

16. Medland *v.* Walker, 96 Iowa 175, 64 N. W. 797.

17. Stebbens *v.* Lenfesty, 14 Ind. 4.

18. Boucher *v.* Powers, 29 Mont. 342, 74 Pac. 942.

19. Hamilton *v.* Cook County, 5 Ill. 519.

20. People *v.* Weber, 92 Ill. 288.

21. Holt *v.* Smith, 9 Iowa 373.

is not an admission of such facts as to defendants not setting it up.[22] Similarly, where an answer is double, and a reply is filed to one of the defenses pleaded, the other is not admitted by failure to deny.[23]

c. Construction. The scope of a denial will not be enlarged by construction,[24] and where plaintiff denies an allegation which consists of an averment coupled with a qualification, it has been held to put in issue only the qualification.[25] Nor on the other hand will an express admission be held to be any broader than its terms clearly indicate.[26] Where a reply consists of a general denial except as to matters thereafter in the reply admitted, stated, or qualified, if it is doubtful whether an allegation comes within the denial or the exception, it will be deemed to come within the exception and to stand admitted.[27]

7. Failure to Reply.[28] If a reply is necessary in order to produce an issue, it has been held improper to go to trial without it.[29] But a plaintiff who files no reply may nevertheless bring his case on for trial and take the consequences of such a step,[30] and if defendant makes no objection there may be a waiver and the defect is generally held to be cured by verdict.[31] Under the common-law system, where plaintiff fails to file a reply within the time fixed for a reply, defendant may move for a rule to compel plaintiff to reply or suffer a judgment of *non pros*.[32] Under the codes and practice acts, defendant may move for, and is entitled to, judgment on the pleadings.[33] So a motion to dismiss the action before the introduction of evidence but after a witness has been sworn is properly granted,[34] as is a directed verdict after plaintiff rests,[35] or a judgment of nonsuit.[36] However, failure to serve a reply is not ground for striking the cause from the calendar on defendant's motion.[37] So failure to reply to a counter-claim for unliquidated damages does not entitle defendant to a verdict without proof of damages.[38] And

22. Bartholow *v.* Campbell, 56 Mo. 117.

23. Mullikin *v.* Mullikin, 23 S. W. 352, 25 S. W. 598, 15 Ky. L. Rep. 609.

24. Stapleton *v.* Ewell, 55 S. W. 917, 21 Ky. L. Rep. 1534.

25. Durfee *v.* Pavitt, 14 Minn. 424.

26. *Minnesota.*— Thayer *v.* Barney, 12 Minn. 502.

Missouri.— Sawyer *v.* Walker, 204 Mo. 133, 102 S. W. 544; Phillips *v.* Barnes, 105 Mo. App. 421, 80 S. W. 43.

Ohio.— Scofield *v.* Excelsior Oil Co., 27 Ohio Cir. Ct. 318.

Oregon.— Howell *v.* Johnson, 38 Oreg. 571, 64 Pac. 659.

Wyoming.— David *v.* Whitehead, 13 Wyo. 189, 79 Pac. 19, 923.

See 39 Cent. Dig. tit. "Pleading," § 354.

27. Leyde *v.* Martin, 16 Minn. 38.

28. As affecting scope of proof see *infra*, XIII, B, 1, d.

29. *Arkansas.*— Reagan *v.* Irvin, 25 Ark. 86.

Florida.— Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270; Gunning *v.* Heron, 25 Fla. 846, 6 So. 855.

Illinois.— Lindsay *v.* Stout, 59 Ill. 491.

Indiana.— Swope *v.* Ardery, 5 Ind. 213; Huston *v.* McPherson, 8 Blackf. 562; Seivens *v.* McCall, Smith 257.

Pennsylvania.— Daly *v.* Iselin, 10 Pa. Dist. 193; Amheim *v.* Dye Wks., 36 Wkly. Notes Cas. 32. See Maxwell *v.* Beltzhover, 9 Pa. St. 139.

See 39 Cent. Dig. tit. "Pleading," § 387.

But in North Carolina, before the code was adopted, it was held that where no replication was filed a general issue would be understood. Watts *v.* Greenlee, 13 N. C. 87; Worth *v.* Fentress, 12 N. C. 419.

A nunc pro tunc order will not remedy failure to deny allegations of the answer. Skinner *v.* Myers, 40 S. W. 919, 19 Ky. L. Rep. 421.

30. Adams *v.* Roberts, 62 How. Pr. (N. Y.) 253.

31. See *infra*, XIV, J.

32. North Alabama Home Protection *v.* Caldwell, 85 Ala. 607, 5 So. 338; Seavey *v.* Rogers, 69 Ill. 534; Williams *v.* Brunton, 8 Ill. 600; Chicago, etc., R. Co. *v.* Wilcox, 12 Ill. App. 42; Maxwell *v.* Beltzhover, 9 Pa. St. 139.

In New Jersey a plaintiff who neglects to reply to a set-off will be ruled to reply, and in case he refuses, defendant will be allowed to put the case at issue and bring it on for trial. Franklin *v.* Estell, 29 N. J. L. 264.

In England failure to reply authorizes the court to order final judgment to be entered for defendant in respect of both the original claim and any counter-claim interposed in the answer. Lumsden *v.* Winter, 8 Q. B. D. 650, 46 J. P. 487, 51 L. J. Q. B. 413, 30 Wkly. Rep. 751; Elliott *v.* Harris, L. R. 17 Ir. 351; Fussell *v.* O'Boyle, L. R. 14 Ir. 53; Thornton *v.* Clinch, L. R. 10 Ir. 378.

33. See *infra*, XII, B, 3, a.

34. Hamilton L. & T. Co. *v.* Gordon, 32 Nebr. 663, 49 N. W. 699.

35. Cordner *v.* Roberts, 58 Mo. App. 440.

36. Allenspach *v.* Wagner, 9 Colo. 127, 10 Pac. 802.

37. Gilbert *v.* McKenna, 15 Misc. (N. Y.) 25, 36 N. Y. Suppl. 430.

38. Barber *v.* Gray, 4 Misc. (N. Y.) 193, 23 N. Y. Suppl. 1026.

failure to reply does not waive the objection that the matter alleged in the answer does not give a right to a counter-claim, since that is matter of law.[39]

B. Rejoinder — 1. In General.[40] After the reply or replication, the next pleading tendering issues of fact is the rejoinder which is defendant's answer to the reply. The rules respecting rejoinders and subsequent pleadings are in general the same as those respecting the replication, where such pleadings are authorized by the system of pleading in use. Where the reply sets up new matter, an issue can be raised, under the common-law system of pleading, only by a rejoinder.[41] Under the codes of procedure no pleading subsequent to the reply is provided for.[42] There need be no rejoinder to an irrelevant reply.[43] Where the course of the pleadings is interrupted by interlocutory proceedings, a reasonable time must be allowed for the filing of subsequent pleadings.[44] Where a motion for leave to file rejoinders is not made until the case was called for trial the second time and no reason was given for delay in applying for leave, the granting or refusing leave is within the sound discretion of the court.[45]

2. Form and Requisites — a. In General. A rejoinder must answer the replication,[46] and must answer it fully.[47] If it evades the issues tendered by the replication, it will be stricken out on motion.[48] But if the replication in avoidance is bad for duplicity, it is not essential that defendant demur on that ground, but he may take issue on either of the matters set up.[49] A rejoinder is insufficient where it merely puts in issue immaterial facts,[50] or matters of law.[51] Where it denies a material fact it should conclude to the country,[52] and if it sets up facts in avoidance it should conclude with a verification.[53] A rejoinder containing only facts admissible under the plea is insufficient.[54] A rejoinder cannot be said to amount to a general denial because no confession is made in terms, but it is sufficient if the plea of avoidance contain either an express or implied admission that the allegations replied to are true.[55]

b. Duplicity. A rejoinder which alleges several distinct answers to a replication is bad for duplicity,[56] but it may include several facts if they constitute but a single point.[57] Surplusage will not render it double.[58]

c. Several Rejoinders. Nor is it generally allowable to plead more than one

39. Jordan *v.* National Shoe, etc., Bank 74 N. Y. 467, 30 Am. Rep. 319.

40. In particular actions see Arbitration and Award, 3 Cyc. 784; Assumpsit, Action of, 4 Cyc. 352; Bonds, 5 Cyc. 836.

41. Rutherford *v.* Tevis, 5 Ind. 530; Milner *v.* Davis, Litt. Sel. Cas. (Ky.) 436.

42. Paola Bd. of Education *v.* Shaw, 15 Kan. 33; Hughes *v.* Durein, 3 Kan. App. 63, 44 Pac. 434 (reply filed by co-defendant is final pleading); Sidway *v.* Missouri Land, etc., Co., 163 Mo. 342, 63 S. W. 705; Gilchrist *v.* Hore, 34 Mont. 443, 87 Pac. 443; Swain *v.* McMillan, 30 Mont. 433, 76 Pac. 943.

In Kentucky, however, the code makes provision for all the pleadings known to the common law. Dixon *v.* Ford, (1886) 1 S. W. 817.

43. Blackburn *v.* Blackburn, 11 S. W. 712, 11 Ky. L. Rep. 161.

44. Moreland *v.* Citizens' Sav. Bank, 30 S. W. 19, 16 Ky. L. Rep. 860.

45. Glos *v.* Swanson, 227 Ill. 179, 81 N. E. 386.

46. Rust *v.* Wilson, Kirby (Conn.) 364; Otis *v.* Blake, 6 Mass. 336; Peck *v.* Jenness, 16 N. H. 516, 43 Am. Dec. 573; U. S. *v.* Cumpton, 25 Fed. Cas. No. 14,902, 3 McLean 163.

47. Probate Judge *v.* Ordway, 23 N. H. 198.

48. Providence *v.* Adams, 11 R. I. 190. See also *infra*, XII, B, 3, a.

49. Gould *v.* Ray, 13 Wend. (N. Y.) 633.

50. Conard *v.* Dowling, 7 Blackf. (Ind.) 481; Breck *v.* Blanchard, 20 N. H. 323, 51 Am. Dec. 222; Westerly Probate Court *v.* Potter, 26 R. I. 202, 58 Atl. 661.

51. Rixford *v.* Wait, 11 Pick. (Mass.) 339; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639.

52. Bowman *v.* Harper, 17 N. H. 571; Blossburg, etc., R. Co. *v.* Tioga R. Co., 3 Fed. Cas. No. 1,563, 5 Blatchf. 387.

53. Joslyn *v.* Tracy, 19 Vt. 569.

54. Wright *v.* Forgy, 126 Ala. 389, 28 So. 198.

55. Baker *v.* Sherman, 75 Vt. 88, 53 Atl. 330.

56. Boatright *v.* State, 8 Blackf. (Ind.) 8; Tuttle *v.* Smith, 10 Wend. (N. Y.) 386; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639.

57. McClure *v.* Erwin, 3 Cow. (N. Y.) 313; U. S. *v.* Cumpton, 25 Fed. Cas. No. 14,902, 3 McLean 163.

58. State *v.* Jones, 8 Blackf. (Ind.) 270. Surplusage generally see *supra*, II, G, 10.

rejoinder to a replication.[59] But in some states it may be done by leave of court.[60] If, under leave of court, several rejoinders may be pleaded, all but the first will be considered surplusage when leave has not been obtained;[61] but the want of leave may be waived by tendering issue on all of them.[62] A statute allowing the pleading of several pleas or replications does not authorize the pleading of several rejoinders.[63]

d. Departure.[64] The rejoinder may set up any defense to the replication not inconsistent with the plea, but there must be no departure.[65] In other words, defendant must conform his rejoinder to a maintenance of the defense made by his plea.[66] But there is no departure where the rejoinder consists merely of a more minute and circumstantial restatement of the ground of defense set up in the plea.[67] It is a departure, after a plea of performance, to allege an excuse for non-performance in the rejoinder.[68] But there is no departure, after a plea of *plene administravit*, where the rejoinder alleges that defendant had assets but not more than enough to pay a judgment against the estate;[69] nor, after a plea of *liberum tenementum*, when the rejoinder sets up a demise containing a reservation to do the acts complained of as trespasses;[70] nor does a rejoinder setting up the statute of limitations constitute a departure when the replication was the first pleading which disclosed the applicability of such defense.[71]

e. Answer to New Assignment. A new assignment is in the nature of a new declaration and should be pleaded to accordingly.[72] A plea professing to

59. Hazzard *v.* Smith, 1 J. J. Marsh. (Ky.) 66; Slocumb *v.* Holmes, 1 How. (Miss.) 139; Probate Judge *v.* Lane, 50 N. H. 556.

60. Warren *v.* Powers, 5 Conn. 373; Ames *v.* West, 4 Wend. (N. Y.) 211.

61. Ryan *v.* Vanlandingham, 25 Ill. 128.

62. Ryan *v.* Vanlandingham, 25 Ill. 128.

63. Gray *v.* White, 5 Ala. 490; Probate Judge *v.* Lane, 50 N. H. 556.

64. See also *supra*, V, A, 5, e.

65. Cady *v.* Gay, 31 Conn. 395; Racine *v.* Barnes, 6 Wis. 472.

66. Keay *v.* Goodwin, 16 Mass. 1; Darling *v.* Chapman, 14 Mass. 101; McGavock *v.* Whitfield, 45 Miss. 452; Probate Judge *v.* Lane, 50 N. H. 556.

Examples of departures.— In the following cases, it was held that there was a departure: A rejoinder pleading the statute of limitations of a foreign state, where the plea set up limitations of the state of venue. Harper *v.* Hampton, 1 Harr. & J. (Md.) 453. A plea denying any demand or notice and a rejoinder admitting it and making it the basis of a tender. Darling *v.* Chapman, 14 Mass. 101. A rejoinder that plaintiff has not waived a devise, after a plea that plaintiff refused to elect whether to take or refuse the devise. Hapgood *v.* Houghton, 8 Pick. (Mass.) 451. A rejoinder that plaintiff demanded possession of premises and thereupon entered, after a plea of entry upon possession. Price *v.* Sanderson, 18 N. J. L. 426. A rejoinder based on the defense of infancy, where the plea defended on the ground of discharge under an insolvent act. Roberts *v.* Kelly, 2 Hall (N. Y.) 333. A rejoinder in confession and avoidance of the action after a plea of *non damnificatus*. Andrus *v.* Waring, 20 Johns. (N. Y.) 153. After a plea denying an award, a rejoinder impeaching it. Allen *v.* Watson, 16 Johns. (N. Y.) 205. After a plea that a bond was made in New Jersey in pursuance of a corrupt agreement, a rejoinder that it was not made in New York pursuant to a lawful agreement. Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 467. After a plea of money paid on a particular day, a rejoinder alleging payment on a day subsequent and acceptance of such payment in full satisfaction. Tarleton *v.* Wells, 2 N. H. 306. After a plea of no award, a rejoinder alleging that the arbitrators exceeded their authority, thus admitting an award. Joy *v.* Simpson, 2 N. H. 179. After a plea of no consideration, a rejoinder showing a partial failure of consideration. Kilgore *v.* Powers, 5 Blackf. (Ind.) 22. Where plea denies misconduct, and a rejoinder admits it, but alleges insufficient proof and notice to make the misconduct chargeable to defendants. St. John Mechanics' Whale Fishing Co. *v.* Whitney, 5 N. Brunsw. 113. In action on charter-party, where plea sets up false representations in avoidance, and rejoinder alleges substance of representations as part of charter-party. Elliot *v.* Von Glehn, 13 Q. B. 632, 18 L. J. Q. B. 221, 66 E. C. L. 632.

67. Mathews *v.* Hamblin, 28 Miss. 611.

68. Warren *v.* Powers, 5 Conn. 373; McSherry *v.* Askew, 1 Yeates (Pa.) 79; Ordinary *v.* Bracey, 1 Brev. (S. C.) 191; McGowan *v.* Caldwell, 16 Fed. Cas. No. 8,806, 1 Cranch C. C. 481.

69. Burr *v.* Baldwin, 2 Wend. (N. Y.) 580. But see Lord Proprietary *v.* Cockshut, 1 Harr. & M. (Md.) 40.

70. Dutton *v.* Holden, 4 Wend. (N. Y.) 643.

71. Wiard *v.* Semken, 19 D. C. 475.

72. Jones *v.* McNeill, 1 Hill (S. C.) 84. The time within which defendant must plead is determined by local rules of practice. McDonald *v.* McKinnon, 8 Ont. Pr. 13; Unger *v.* Crosby, 3 U. C. Q. B. O. S. 175.

answer the whole of a new assignment, but in fact answering but part, is bad.[73]

3. Admissions by Failure to Deny. Matters alleged in the replication which require a rejoinder must be deemed admitted if not denied.[74] But matters of inducement are not admitted by failure to deny.[75] And the denial constructively made, by virtue of the statute, is as effective as an actual denial.[76]

C. Surrejoinder and Subsequent Pleadings.[77] The surrejoinder is the reply, under the common-law system, to the rejoinder, but is not recognized under the codes. The reply to the surrejoinder is a rebutter, and to the rebutter a surrebutter. An argumentative denial in a rejoinder does not call for a surrejoinder,[78] nor does an irrelevant rejoinder.[79] It amounts to a simple traverse only and should conclude as such.[80] A direct denial of a material averment of the rejoinder should conclude to the country.[81] Double surrejoinders are not allowable,[82] nor is a departure.[83] Where there is no demurrer, a surrejoinder is bad where it does not answer both parts of a double rejoinder.[84] A surrejoinder is insufficient where all that is attempted to be set up thereby can be shown under a traverse.[85] The filing of a surrejoinder may be allowed after the trial has commenced.[86] If it constitutes but a repetition of the replication, the surrejoinder should be stricken,[87] and so with subsequent pleadings.[88]

VI. Demurrer or Exception.[89]

A. Definition,[90] Purpose, and Effect. A demurrer is to rest or pause.[91] It is an allegation that, admitting the facts of the preceding pleading to be true

73. Price *v.* Perry, 1 Mo. 542.

74. *Iowa.*— Merritt *v.* Woodbury, 14 Iowa 299; Plummer *v.* Roads, 4 Iowa 587.

Kentucky.— Gray *v.* U. S. Savings, etc., Co., 116 Ky. 967, 77 S. W. 200, 25 Ky. L. Rep. 1120; Stapleton *v.* Ewell, 55 S. W. 917, 21 Ky. L. Rep. 1534.

New Hampshire.— Bills *v.* Vose, 27 N. H. 212; Cheever *v.* Mirrick, 2 N. H. 376.

New York.— Briggs *v.* Dorr, 19 Johns. 95.

South Carolina.— Porter *v.* Kenny, 1 McCord 205.

See 39 Cent. Dig. tit. "Pleading," § 396.

75. Fowler *v.* Clark, 3 Day (Conn.) 231.

76. Solt *v.* Anderson, 62 Nebr. 153, 86 N. W. 1076.

77. In actions on bonds see Bonds, 5 Cyc. 836.

78. Grigsby *v.* Hart, 18 S. W. 537, 13 Ky. L. Rep. 920.

79. Dixon *v.* Ford, (Ky. 1886) 1 S. W. 817.

80. St. Onge *v.* Winchester F. Ins. Co., 80 Fed. 703.

81. Potter *v.* Titcomb, 10 Me. 53.

82. Oakley *v.* Romeyn, 6 Wend. (N. Y.) 521.

83. Dawes *v.* Winship, 16 Mass. 291.

84. Neff *v.* Powell, 6 Blackf. (Ind.) 420.

85. Leonard *v.* New England Mut. L. Ins. Co., 22 R. I. 130, 46 Atl. 455.

86. Williams *v.* Miller, 10 Iowa 344.

87. Western Assur. Co. *v.* Hall, 120 Ala. 547, 24 So. 936, 74 Am. St. Rep. 48.

88. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35.

89. Aider by verdict or judgment see *infra*, XIV, J.

Arrest of judgment for defects in pleading available on demurrer, or after demurrer is overruled, see Judgments, 23 Cyc. 830.

Equity practice see Equity, 16 Cyc. 261 *et seq.*

In criminal prosecutions see Criminal Law, 12 Cyc. 352, 360.

In justice's court or on trial of cause anew on appeals from justices of peace see Justices of the Peace, 24 Cyc. 562, 738.

In particular actions or pleadings see Abatement and Revival, 1 Cyc. 109; Arbitration and Award, 3 Cyc. 782; Assumpsit, Action of, 4 Cyc. 348; Audita Querela, 4 Cyc. 1070; Bail, 5 Cyc. 144; Cancellation of Instruments, 6 Cyc. 330; Corporations, 10 Cyc. 1355; Debt, Action of, 13 Cyc. 419; Divorce, 14 Cyc. 672; Drains, 14 Cyc. 1070; Ejectment, 15 Cyc. 107; Elections, 15 Cyc. 414; Forcible Entry and Detainer, 19 Cyc. 1161; Guardian and Ward, 21 Cyc. 257; Husband and Wife, 21 Cyc. 1564; Injunctions, 22 Cyc. 934; Interpleader, 23 Cyc. 25; Judgments, 23 Cyc. 1518, 1524; Libel and Slander, 25 Cyc. 467; Mandamus, 26 Cyc. 464; Mechanics' Liens, 27 Cyc. 395; Mortgages, 27 Cyc. 1607; Municipal Corporations, 28 Cyc. 1472, 1768; Officers, 29 Cyc. 1468; Partition, 30 Cyc. 224; Partnership, 30 Cyc. 334; Quieting Title; Quo Warranto; Replevin; Wills.

To assignment of errors see Appeal and Error, 2 Cyc. 1009.

To particular pleas see Accord and Satisfaction, 1 Cyc. 347; Frauds, Statute of, 20 Cyc. 315; Habeas Corpus, 21 Cyc. 320; Limitations of Actions, 25 Cyc. 1413; Payment, 30 Cyc. 1259; Release.

Waiver of objections by failure to demur see *infra*, XIV, B.

Withdrawal of demurrer see *infra*, XI, C.

90. See also Demurrer, 13 Cyc. 784.

91. Rice *v.* Rice, 13 Oreg. 337, 10 Pac. 495.

as stated by the party making it, it has yet shown no cause why the party demurring should be compelled by the court to proceed further;[92] and the import of the demurrer is that the objecting party will not proceed but will await the judgment of the court whether he is bound so to do.[93] Its office is to sweep away a defective pleading,[94] by raising issues of law upon the facts stated in the pleading demurred to.[95] It is not the office of a demurrer to allege facts,[96] and it does not necessarily test the rights of the parties in the suit, but merely the mode of statement in the pleadings demurred to; and the rights of the parties are thus brought in question only in so far as they are correctly stated in the pleadings.[97] It should be used to test the legal sufficiency of a pleading;[98] but when the objection is not to the pleading itself, but to the right to file it, a motion to strike and not a demurrer is the proper remedy.[99] So questions of practice, as distinguished from questions of pleading, cannot be raised by demurrer.[1] There is a difference in the functions performed by a motion to strike out and a demurrer, and one cannot be used interchangeably for the other.[2] But if a demurrer is sustained to a pleading which might have been stricken on motion, such ruling is not prejudicial error.[3] It is generally considered as a pleading,[4] and a compliance with a rule to

92. Reid *v.* Fields, 83 Va. 26, 1 S. E. 395.

As distinguished from demurrer to evidence.—A demurrer in law is the tender of an issue in law, upon the facts which have been established by the pleadings, and a demurrer to the evidence is a tender of an issue in law upon the facts established by the evidence, and by necessity involves the admission of the truth of the facts intended to be proved by the evidence. Hall *v.* Browder, 4 How. (Miss.) 224.

93. Reid *v.* Fields, 83 Va. 26, 1 S. E. 395.

It is in effect a declaration that the party demurring will go no further, because the other has shown nothing against him. Davies *v.* Gibson, 2 Ark. 115 [*quoting* Chitty Pl. vol. 1, p. 17]; Webb *v.* Vanderbilt, 39 N. Y. Super. Ct. 4.

A demurrer is a legal exception to the sufficiency of the opposing plea to which it refers. Mulvey *v.* Staab, 4 N. M. 50, 12 Pac. 699.

94. Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 68, 51 N. E. 410, 68 Am. St. Rep. 749, 43 L. R. A. 854; Morrell *v.* Ball, 45 N. Y. App. Div. 584, 61 N. Y. Suppl. 405.

95. Mulvey *v.* Staab, 4 N. M. 50, 12 Pac. 699; Rice *v.* Rice, 13 Oreg. 337, 10 Pac. 495.

A demurrer merely advances a legal proposition — it forms an issue of law; admitting the facts, so far as well pleaded, for the purpose of taking the opinion of the court preliminarily, its language is, allowing all that is alleged to be true, there is not anything that calls for an answer, plea, or defense. Havens *v.* Hartford, etc., R. Co., 28 Conn. 69 [*quoting* Gould Pl. p. 46, § 43]; Rice *v.* Rice, 13 Oreg. 337, 10 Pac. 495 [*quoting* Gould Pl. § 43, c. 2].

Necessity that facts appear on face of pleading see *infra*, VI, I, 1, b.

96. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

A demurrer neither asserts nor denies any matter of fact; it merely in effect advances a legal proposition, namely, that the pleading demurred to is insufficient in law to maintain the case of the adverse party. Miller *v.* Cross, 73 Conn. 538, 48 Atl. 213.

97. Mobley *v.* Cureton, 6 S. C. 49.

98. *Alabama.*— Troy Grocery Co. *v.* Potter, 139 Ala. 359, 36 So. 12; Dalton *v.* Bunn, 137 Ala. 175, 34 So. 1033; Karter *v.* Fields, 130 Ala. 430, 30 So. 504; Murphy *v.* Farley, 124 Ala. 279, 27 So. 442.

Georgia.— Jones *v.* McNealy, 114 Ga. 393, 40 S. E. 248; Oslin *v.* Telford, 108 Ga. 803, 34 S. E. 168.

Indiana.— Potts *v.* State, 75 Ind. 336.

Massachusetts.— Shawmut *v.* Mut. F. Ins. Co. *v.* Stevens, 9 Allen 332; Batchelder *v.* Batchelder, 2 Allen 105.

New York.— Goodman *v.* Robb, 41 Hun 605; Humble *v.* McDonough, 5 Misc. 508, 25 N. Y. Suppl. 965; Carpenter *v.* Bell, 19 Abb. Pr. 258.

Ohio.— Finch *v.* Finch, 10 Ohio St. 501.

Texas.— Burges *v.* New York L. Ins. Co., (Civ. App. 1899) 53 S. W. 602.

Wyoming.— Holgate *v.* Downer, 8 Wyo. 334, 57 Pac. 918.

United States.— Hobson *v.* McArthur, 12 Fed. Cas. No. 6,554, 3 McLean 241.

See 39 Cent. Dig. tit. "Pleading," § 400 *et seq.*

99. Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517; Hightower *v.* Ogletree, 114 Ala. 94, 21 So. 934; Smith *v.* Champion, 102 Ga. 92, 29 S. E. 160; Parkman *v.* Dent, 101 Ga. 280, 28 S. E. 833; Schweyer *v.* Oberkoetter, 25 Ill. App. 183; Cross *v.* Kemp, 45 N. J. L. 51. See also *infra*, XII, C, 1, c, (XV).

Right to file amended pleading is not reached by a demurrer to such amended pleading. Tecumseh State Bank v. Maddox, 4 Okla. 583, 46 Pac. 563.

1. Page *v.* Austin, 26 U. C. C. P. 110.

2. Hooker *v.* Forrester, 53 Fla. 392, 43 So. 241. See also *infra*, XII.

3. Snell *v.* E. Tosetti Brewing Co., 71 Ill. App. 650; Schweyer *v.* Oberkoetter, 25 Ill. App. 183.

4. See *supra*, II, E.

plead.[5] So a demurrer to the complaint is usually considered as embraced within the term "answer,"[6] and this is so where the word "answer" is used in a statute.[7] A demurrer to a declaration cannot properly be said to be a plea to the merits, except in cases where a judgment on the demurrer in favor of defendant would be a bar to a subsequent suit on the same cause of action;[8] and a special demurrer cannot be deemed an issuable plea.[9] A demurrer is, however, always deemed in the nature of a plea in bar, and cannot partake of the nature of a plea in abatement, even though it assign matter in abatement as a special cause of demurrer.[10] In some states a demurrer is usually called an exception.[11]

B. Kinds of Demurrers[12]— **1. General and Special.** Under the common-law system of pleading, demurrers are either general or special: General, when no particular cause is alleged; special, when the particular imperfection is pointed out and insisted upon as a ground of demurrer. The former is sufficient when the pleading is defective in substance and the latter is requisite where the objection is only to the form of the pleading.[13] An exception to this rule is that a general

5. See *supra*, IV, A, 3, g.

6. Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673. *Contra*, Cashman *v.* Reynolds, 56 Hun (N. Y.) 333, 9 N. Y. Suppl. 614 [*affirmed* in 123 N. Y. 138, 25 N. E. 162].

That demurrer is a "defense" see Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672; Vietor *v.* Halstead, 14 N. Y. Suppl. 516; Jewett Car Co. *v.* Kirkpatrick Constr. Co., 107 Fed. 622.

Demurrer by way of answer.— The codes provide for no such pleading as a "demurrer by way of answer." Smith *v.* Kibling, 97 Wis. 205, 72 N. W. 869.

7. Oliphant *v.* Whitney, 34 Cal. 25; Willis *v.* Marks, 29 Oreg. 493, 45 Pac. 293; Viles *v.* Green, 91 Wis. 217, 64 N. W. 856; Howell *v.* Howell, 15 Wis. 55. *Contra*, Henry *v.* Blackburn, 32 Ark. 445; Kelly *v.* Downing, 42 N. Y. 71.

On failure to raise issue of fact.—A demurrer is a sufficient "answer," within the code provisions, to warrant the granting of relief not prayed for in the complaint. Viles *v.* Green, 91 Wis. 217, 64 N. W. 856. *Contra*, Sinking Fund Com'rs *v.* Mason, etc., Co., 41 S. W. 548, 19 Ky. L. Rep. 771. See also Judgments, 23 Cyc. 798, 799.

8. Quarles *v.* Waldron, 20 Ala. 217; Governor *v.* Lindsay, 14 Ala. 658. See also Lea *v.* Terry, 20 La. Ann. 428.

9. Thames *v.* Richardson, 3 Strobh. (S. C.) 484.

10. Furniss *v.* Ellis, 9 Fed. Cas. No. 5,162, 2 Brock. 14.

11. See cases cited *infra*, this note.

In Texas the office of a general demurrer is similar to that assigned to it in the common-law system of pleading, and the only question which will be entertained under it is whether the pleading demurred to discloses the existence of any cause of action or ground of defense; but the office of exceptions is similar to that of a special demurrer in the English pleadings, namely: not only to question the existence of any cause of action or ground of defense, but to point out particularly wherein the pleading is defective. Warner *v.* Bailey, 7 Tex. 517.

12. Speaking demurrer see *infra*, VI, I, 1, b, (I).

13. *Alabama.*— Sossamon *v.* Gamble, Minor 4.

Arkansas.— Gordon *v.* State, 11 Ark. 12.

Georgia.— Little Rock Cooperage Co. *v.* Hodge, 105 Ga. 828, 32 S. E. 603; Western Union Tel. Co. *v.* Jenkins, 92 Ga. 398, 17 S. E. 620; Atlanta Glass Co. *v.* Noizet, 88 Ga. 43, 13 S. E. 833.

Illinois.— People *v.* Munroe, 227 Ill. 604, 81 N. E. 704; Massachusetts Mut. L. Ins. Co. *v.* Kellogg, 82 Ill. 614; Bogardus *v.* Trial, 2 Ill. 63; Goldberg *v.* Harney, 122 Ill. App. 106.

Maine.— Dodge *v.* Kellock, 10 Me. 266.

Massachusetts.—Whiton *v.* Batchelder, etc., Corp., 179 Mass. 169, 60 N. E. 483; Witt *v.* Potter, 125 Mass. 360; Washington *v.* Eames, 6 Allen 417; Blake *v.* Everett, 1 Allen 248.

Michigan.— Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180.

Mississippi.— Hawkins *v.* Mississippi, etc., R. Co., 35 Miss. 688.

New Jersey.— Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367.

New York.— Delavan *v.* Stanton, 2 Hall 211.

Ohio.— Wood *v.* Funk, 7 Ohio 196.

Pennsylvania.— Com. *v.* Cross Cut R. Co., 53 Pa. St. 62; Boardman *v.* Keystone Standard Watch Case Co., 8 Lanc. L. Rev. 25.

Texas.— Harrington *v.* Galveston County, 1 Tex. App. Civ. Cas. § 792; Lyle *v.* Harris, 1 Tex. App. Civ. Cas. § 71; McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

Virginia.— Reid *v.* Field, 83 Va. 26, 1 S. E. 395.

United States.— Christmas *v.* Russell, 5 Wall. 290, 18 L. ed. 475 [*quoting* 1 Chitty Pl. 663].

See 39 Cent. Dig. tit. "Pleading," §§ 491–520.

In Illinois a special demurrer lies to a fatal defect in the plea which, if called to the attention of the court, can be cured, but if not pointed out, is not fatal to the plea. Leathe *v.* Thomas, 109 Ill. App. 434 [*affirmed* in 218 Ill. 246, 75 N. E. 810].

A demurrer to an entire pleading is sometimes called a general demurrer, in reference to its scope rather than its character, but this is a loose use of the term. See Church-

demurrer to a plea in abatement raises questions of form as well as substance.[14] As to what is form, and what is substance, that without which the right doth sufficiently appear to the court is form, while a defect by reason whereof the right appears not is a defect of substance;[15] or, in other words, if the fault lies in the matter pleaded, it is substantial, but if in the manner of pleading it, it is formal.[16] However, defects of substance which might be availed of under a general demurrer can be taken advantage of on special demurrer, although not specified;[17] and if the pleader attempts to draw a special demurrer, but fails to adequately specify the grounds, it will be deemed a general demurrer.[18] But a demurrer which adds to its special grounds a general one is nevertheless to be regarded as a special demurrer.[19] In some jurisdictions special demurrers have been abolished by statutes which have the effect of making a pleading subject to demurrer only in case of substantial defects,[20] except pleas in abatement which are subject to

ill *v.* Pacific Imp. Co., 96 Cal. 490, 31 Pac. 560; Pryor *v.* Brady, 115 Ga. 848, 42 S. E. 223; May *v.* Western Union Tel. Co., 112 Mass. 90; Lafleur *v.* Douglass, 1 Wash. Terr. 185. An exception to part of a plea may nevertheless be a general exception. Gorham *v.* Dallas, etc., R. Co., 41 Tex. Civ. App. 615, 95 S. W. 551.

Historical.—At the early common law all faults, whether of substance or form, were reached by general demurrer, with the single exception of duplicity. Anonymous, 3 Salk. 122; 1 Chitty Pl. (16th Am. ed.) 694; Gould Pl. (Hamilton ed.) 443. But the abuses to which this practice naturally led caused the enactment of the statute of 27 Eliz. c. 5, which required the judges to render judgment according to the very right of the cause, without regarding any imperfection, defect, or want of form in any pleading, except those only which the party demurring should specifically and particularly set down and express in his demurrer. Doubts having arisen as to what defects were aided by this statute, the statute of 4 & 5 Anne, c. 16, was passed enumerating special defects which were to be deemed within the former statute. Since the passage of these statutes, matters of form can be reached only by special demurrer, while matters of substance may be attacked by general demurrer.

A failure to plead incorporation is not reached by a general demurrer. Hunter *v.* William J. Lemp Brewing Co., (Tex. Civ. App. 1896) 46 S. W. 371.

Mere reasons assigned why a general demurrer should be sustained are not special exceptions. New York L. Ins. Co. *v.* Malone, (Tex. Civ. App. 1906) 95 S. W. 585; Nixon *v.* Malone, (Tex. Civ. App. 1906) 95 S. W. 577.

Form of general demurrer to answer.— "And the plaintiff, by her attorneys . . . says that the second, third, fourth, seventh, eighth and ninth pleas are not sufficient in law." Martin *v.* Bartow Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320, 322.

14. *Alabama.*— Casey *v.* Cleveland, 7 Port. 445.

Illinois.— Finch *v.* Galigher, 181 Ill. 625, 54 N. E. 611; Ross *v.* Nesbit, 7 Ill. 252.

Maine.— Severy *v.* Nye, 58 Me. 246.

New York.— Tyler *v.* Canaday, 2 Barb. 160.

Rhode Island.— Capwell *v.* Sipe, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890; Hoppin *v.* Jenckes, 9 R. I. 102.

England.— Lloyd *v.* Williams, 2 M. & S. 484.

All defects in a plea to the jurisdiction may be reached by general demurrer. U. S. *v.* U. S. Fidelity, etc., Co., 80 Vt. 84, 66 Atl. 809.

15. Heard *v.* Baskerville, Hob. 233, 80 Eng. Reprint 378.

16. Hamilton *v.* Cook County, 5 Ill. 519; Packard *v.* Hill, 7 Cow. (N. Y.) 434.

17. *Kentucky.*— Milroy *v.* Hensley, 2 Bibb 20.

Maine.— Bradbury *v.* Tarbox, 95 Me. 519, 50 Atl. 710.

New York.— Burgess *v.* Abbott, 6 Hill 135; Burnet *v.* Bisco, 4 Johns. 235.

Pennsylvania.— Fisher *v.* Lewis, 1 Pa. E. J. Rep. 422.

South Carolina.— Hale *v.* Hall, 2 Brev. 316.

Texas.— Pryor *v.* Moore, 8 Tex. 250; Warner *v.* Bailey, 7 Tex. 517.

See 39 Cent. Dig. tit. "Pleading," § 511 *et seq.*

18. Roach *v.* Scogin, 2 Ark. 128; Lomax *v.* Bailey, 7 Blackf. (Ind.) 599; Com. *v.* Cross Cut R. Co., 53 Pa. St. 62.

19. The Reveille *v.* Case, 9 Mo. 502.

20. *Alabama.*— Vernon *v.* Wedgeworth, 148 Ala. 490, 42 So. 749; Obercrombie *v.* Knox, 9 Port. 629.

Arkansas.—Dougherty *v.* Edwards, 25 Ark. 84; Jordan *v.* Hart, 14 Ark. 184; Pierson *v.* Wallace, 7 Ark. 282.

Connecticut.—Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 804.

Florida.— Peacock *v.* Feaster, 51 Fla. 269, 40 So. 74; State *v.* Jennings, 47 Fla. 302, 35 So. 986.

Massachusetts.— Bean *v.* Green, 4 Cush. 279.

Mississippi.— Northrop *v.* Flaig, 57 Miss. 754.

New Jersey.— Mehrhof Bros. Brick Mfg. Co. *v.* Delaware, etc., R. Co., 51 N. J. L. 56, 16 Atl. 12; Graffin *v.* Jackson, 40 N. J. L. 440.

Virginia.— Norfolk, etc., R. Co. *v.* Wood,

general demurrer for formal defects.[21] Under the codes and practice acts fixing the grounds of demurrer, demurrers are neither general nor special,[22] and a great number of the objections formerly reachable only by special demurrer can now be urged only by motion.[23] The code ground that the facts stated are not sufficient to constitute a cause of action or defense is substantially the same as the general demurrer at common law,[24] and is commonly designated a general demurrer, and demurrers on other statutory grounds are frequently called special demurrers.[25]

2. Frivolous. A demurrer is frivolous only when it is apparent without argument, from a mere inspection of the pleading, that there was no reasonable ground for interposing it.[26]

C. Right to Demur — 1. In General. A party has a right to demur in a proper case,[27] except where demurrers have been abolished,[28] or in particular courts where demurrers are not recognized.[29]

2. Pleadings to Which Demurrer Lies. A demurrer addresses itself to a pleading which, however defective, or insufficient it may be, is properly in court.[30] Either the complaint,[31] answer,[32] reply,[33] or subsequent pleadings,[34] may be demurred to. So an amended pleading may be demurred to.[35] But there can be no demurrer to a demurrer.[36] A demurrer lies to a supplemental pleading but only to a limited extent.[37]

3. Demurrer as Cumulative Remedy. It is no objection to a demurrer that

99 Va. 156, 37 S. E. 846; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226.

United States.— Chandler *v.* Byrd, 5 Fed. Cas. No. 2,591*b*, Hempst. 222.

Canada.— Chase *v.* Scripture, 14 U. C. Q. B. 493.

See 39 Cent. Dig. tit. "Pleading," § 511 *et seq.*

In the federal courts special demurrers were expressly authorized by the judiciary act of 1789. Cage *v.* Jeffries, 4 Fed. Cas. No. 2,287, Hempst. 409.

A statute of amendments enacting that no process shall be abated, arrested, or reversed for want of form does not operate to abolish special demurrers. Bean *v.* Ayres, 67 Me. 482.

21. Casey *v.* Cleveland, 7 Port. (Ala.) 445; Elmes *v.* McKenzie, 5 Ala. 617; Hoppin *v.* Jenckes, 9 R. I. 102.

22. Johnson *v.* Brown, 130 Ind. 534, 28 N. E. 698; Main *v.* Ginthert, 92 Ind. 180; Graham *v.* Martin, 64 Ind. 567; Estep *v.* Estep, 23 Ind. 114; Renton *v.* St. Louis, 1 Wash. Terr. 215.

Special demurrers have no place in this system of pleading under the codes. Marie *v.* Garrison, 83 N. Y. 14; Bottom *v.* Chamberlain, 21 Misc. (N. Y.) 556, 47 N. Y. Suppl. 733.

In Connecticut, however, special demurrers are still in use. Andrews *v.* Thayer, 40 Conn. 156.

23. Renton *v.* St. Louis, 1 Wash. Terr. 215. See also *infra*, XII.

24. Graham *v.* Camman, 13 How. Pr. (N. Y.) 360.

25. Walton *v.* Washburn, 64 S. W. 634, 23 Ky. L. Rep. 1008.

26. See *infra*, XII, C, 1, c, (II), (C).

27. See *infra*, VI, F.

Calling for a bill of particulars is not a waiver of the right to demur to the complaint. Mulvey *v.* Staab, 4 N. M. 50, 12 Pac. 699.

28. See cases cited *infra*, this note.

Under the present English practice, no demurrer is allowed for any purpose. *In re* Batthyany, 32 Wkly. Rep. 379.

Demurrers are in form abolished, but Ord. XXV takes notice of three forms, in which the object of demurrers may be obtained: (1) By raising on the pleadings a question of law, so that the parties may have it decided quickly: (2) by raising the question on a pleading whether it discloses any reasonable cause of action or answer, in which case the court may order the pleading to be struck out, not necessarily disposing of the whole action; and (3) in case an action or defense is shown by the pleadings to be frivolous or vexatious, then the court or a judge can dismiss the whole action, or order it to be stayed, or judgment to be entered accordingly as may be just. Burstall *v.* Beyfus, 26 Ch. D. 35, 53 L. J. Ch. 565, 50 L. T. Rep. N. S. 542, 32 Wkly. Rep. 418.

29. See cases cited *infra*, this note.

Right to file demurrer in probate court see Leggett *v.* Meyers, 1 Ida. 548; Coleman *v.* Lamar, 40 Miss. 775; Ricard *v.* Smith, 37 Miss. 644.

30. Goodrich *v.* Alfred, 72 Conn. 257, 43 Atl. 1041.

31. See *infra*, VI, F, 2.

32. See *infra*, VI, F, 3.

In federal courts, however, a demurrer to a plea to the jurisdiction is irregular. Alkire Grocery Co. *v.* Richesin, 91 Fed. 79.

33. See *infra*, VI, F, 4.

34. See *infra*, VI, F, 4.

35. See *infra*, VII, A, 17.

36. Davies *v.* Gibson, 2 Ark. 115; Smith *v.* Brown, 6 How. Pr. (N. Y.) 383. See also Mackey *v.* Bierel, 16 Ont. Pr. 148.

37. See *infra*, VII, D, 11.

the defect might have been urged in another way.[38] For instance, the fact that a complaint may be attacked by a motion for a bill of particulars does not impair the right to demur.[39]

D. Who May Demur. Where several defendants are joined and no cause of action is alleged against one of them, he may demur separately;[40] but a joint demurrer cannot be sustained.[41] But one defendant cannot demur on the ground that the complaint shows no jurisdiction over, or cause of action against, another defendant;[42] although he may demur for misjoinder of causes of action if any of the defendants are not affected by all the causes set up.[43] Where misjoinder of parties plaintiff is expressly made ground of demurrer all of the defendants may demur therefor.[44] On the other hand, only the party alleged to have been improperly joined may demur for misjoinder of parties defendant, and this is so without regard to whether the ground of demurrer is misjoinder or failure to state facts sufficient to constitute a cause of action.[45] Whether or not one of the defendants has answered has no effect upon the right of another defendant to demur;[46] and failure to serve one defendant with a summons is not ground for a demurrer by another defendant.[47] Under the code practice, one defendant cannot demur to the answer of a co-defendant unless there is a special statute permitting it.[48] So one made a party at his own request is not entitled to demur.[49]

E. Time For Demurring — 1. In General. Statutes or rules of court usually provide when demurrers must be filed, and they come too late after the time so fixed has expired.[50] A demurrer is usually in time if filed before the

38. Thompson *v.* Haislip, 14 Ark. 220; Wolf *v.* Schofield, 38 Ind. 175; Bausman *v.* Woodman, 33 Minn. 512, 24 N. W. 198.

39. Wolf *v.* Schofield, 38 Ind. 175; Mulvey *v.* Staab, 4 N. M. 50, 12 Pac. 699.

40. Hall *v.* State, 9 Ala. 827; Polack *v.* Runkel, 56 N. Y. App. Div. 365, 67 N. Y. Suppl. 753; Arzbacher *v.* Mayer, 53 Wis. 380, 10 N. W. 440; Willard *v.* Reas, 26 Wis. 540.

41. See *infra*, VI, I, 1, d.

42. Lake Erie, etc., R. Co. *v.* Charman, 161 Ind. 95, 67 N. E. 923; Holzman *v.* Hibben, 100 Ind. 338; Schilling Co. *v.* Reid, 94 App. Div. 500, 87 N. Y. Suppl. 1115; Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. Suppl. 836; Boston Baseball Assoc. *v.* Brooklyn Baseball Club, 37 Misc. (N. Y.) 521, 75 N. Y. Suppl. 1076; Bronson *v.* Markey, 53 Wis. 98, 10 N. W. 166.

43. Nichols *v.* Drew, 94 N. Y. 22; Barton *v.* Speis, 5 Hun (N. Y.) 60; Plankinton *v.* Hildebrand, 89 Wis. 209, 61 N. W. 839. See also Ashby *v.* Winston, 26 Mo. 210.

44. Brownson *v.* Gifford, 8 How. Pr. (N. Y.) 392.

45. *Colorado.*— Empire Land, etc., Co. *v.* Rio Grande County, 21 Colo. 244, 40 Pac. 449; Irwine *v.* Wood, 7 Colo. 477, 4 Pac. 783.

Georgia.— East Rome Town Co. *v.* Nagle, 58 Ga. 474.

Indiana.— Everhart *v.* Hollingsworth, 19 Ind. 138.

Minnesota.— Goncelier *v.* Foret, 4 Minn. 13.

New York.— Phillips *v.* Hagadon, 12 How. Pr. 17.

See 37 Cent. Dig. tit. "Parties," § 152. See also Parties, 30 Cyc. 140.

Compare Foote *v.* Cincinnati, 9 Ohio 31, 34 Am. Dec. 420, holding that where several are sued jointly for a tort which in point of law and fact could not be joint, a demurrer is good as to all.

46. Webb *v.* Vanderbilt, 39 N. Y. Super. Ct. 4.

47. St. Paul Land Co. *v.* Dayton, 37 Minn. 364, 34 N. W. 335.

48. Stuart *v.* Blatchley, 77 Hun (N. Y.) 425, 28 N. Y. Suppl. 800 [*affirming* 8 Misc. 472].

49. Wright *v.* Walker, 30 Ark. 44.

50. *Colorado.*— Rhoads *v.* Gatlin, 2 Colo. App. 96, 29 Pac. 1019.

Florida.— Flournoy *v.* Munson Bros. Co., 51 Fla. 198, 41 So. 398.

Georgia.— Georgia R., etc., Co. *v.* Tice, 124 Ga. 459, 52 S. E. 916; Ford *v.* Fargason, 120 Ga. 708, 48 S. E. 180; Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Calhoun *v.* Mosley, 114 Ga. 641, 40 S. E. 714; Brantly Co. *v.* Lee, 106 Ga. 313, 32 S. E. 101; Cartersville *v.* Maguire, 84 Ga. 174, 10 S. E. 603; Maddox *v.* Randolph County, 65 Ga. 216; Hall *v.* Carey, 5 Ga. 239.

Idaho.— Leggett *v.* Meyers, 1 Ida. 548.

Kentucky.— Pendleton *v.* Kentucky Bank, 1 T. B. Mon. 171.

Missouri.—Alexander *v.* Warrance, 17 Mo. 228.

Ohio.— Carver *v.* Williams, 6 Ohio Dec. (Reprint) 1084, 10 Am. L. Rec. 310.

West Virginia.— Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94.

See 39 Cent. Dig. tit. "Pleading," § 464.

Matter which is ground for abatement cannot be taken advantage of by demurrer after the time has gone by for filing a plea in abatement. Burford *v.* Cunningham, 2 Port. (Ala.) 244.

expiration of the time for pleading, in the absence of any special limitation, and an extension of time to plead is equally an extension of time to demur.[51] Where a judgment is opened at the instance of a party who had no opportunity to demur before it was rendered, he has the same liberty to demur that he should have had in the first instance.[52]

2. After Taking Other Steps — a. In General. The general rule is that a party will not be permitted to demur after he has pleaded to the merits, unless the pleading is first withdrawn.[53] So a party cannot demur of right after he has filed a motion for judgment on the pleadings,[54] after a judgment by default,[55] after the day the cause is set for trial,[56] after issue of fact joined,[57] after the jury is sworn,[58] after the evidence is in,[59] at the trial,[60] or after trial had on an issue of fact.[61] But other cases hold that if the time for demurring has not expired, a party may demur

Presumptions.— Where a demurrer is shown by the record to have been filed on the same day that a default was entered, there is no presumption that it was seasonably filed. Schuh *v.* D'Oench, 51 Ill. 85.

51. Young *v.* Gilles, 113 Mass. 34; Lee *v.* Kame, 6 Gray (Mass.) 495; Brodhead *v.* Brodhead, 4 How. Pr. (N. Y.) 308; Flint *v.* Morehouse, 2 How. Pr. (N. Y.) 173. *Contra,* Newton Tp. *v.* White, 42 Iowa 608.

52. Smith *v.* King, 81 Ind. 217.

53. *Arkansas.*— Frank *v.* Hedrick, 18 Ark. 304; Pike *v.* Galloway, 17 Ark. 90.

Connecticut.— Wooster *v.* Simons, Kirby 89.

Delaware.— MacFarlane *v.* Garrett, 3 Penn. 36, 49 Atl. 175.

Maine.— See Stevens *v.* Webster, 45 Me. 615.

Maryland.— See Turpin *v.* Derickson, 105 Md. 620, 66 Atl. 276.

North Carolina.— Hall *v.* Turner, 111 N. C. 180, 15 S. E. 1037; Finch *v.* Baskerville, 85 N. C. 205.

Pennsylvania.— Heller *v.* Royal Ins. Co., 151 Pa. St. 101, 25 Atl. 83; Wagner *v.* Smith, 10 Kulp 463.

Texas.— Hubbell *v.* Lord, 9 Tex. 472; Moore *v.* Torrey, 1 Tex. 42; Garrison *v.* State, 21 Tex. App. 342, 17 S. W. 351.

See 39 Cent. Dig. tit. "Pleading," § 465.

But see Macklin *v.* Deming, 111 Ala. 159, 20 So. 507. *Contra,* Wade *v.* Doyle, 18 Fla. 630.

Effect of appearance.— Where a general appearance is by statute made equivalent to a plea of the general issue, the rules applicable to demurrers sought to be filed after pleading to the merits applies after general appearance entered. Bates *v.* Colvin, 21 R. I. 57, 41 Atl. 1004.

In Louisiana an exception to the petition comes too late after the lessee has disclaimed title and called in his lessor in warranty. Bayoujon *v.* Criswell, 5 Mart. N. S. 232.

In Texas exceptions which go to the merits of the action may be taken after an answer to the merits. Oliver *v.* Chapman, 15 Tex. 400; Watson *v.* Loop, 12 Tex. 11; Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490.

54. Rhoads *v.* Gatlin, 2 Colo. App. 96, 29 Pac. 1019.

55. Harper *v.* Bell, 2 Bibb (Ky.) 221; Wood *v.* Harispe, 26 La. Ann. 511.

56. State Bank *v.* Brooks, 4 Blackf. (Ind.) 485; Missouri, etc., R. Co. *v.* Doss, (Tex. Civ. App. 1896) 36 S. W. 497.

57. *Connecticut.*— Wooster *v.* Simons, Kirby 89.

Delaware.— Bonwill *v.* Dickson, 1 Harr. 105.

Georgia.— Smith *v.* Simms, 9 Ga. 418.

Illinois.— Toledo, etc., R. Co. *v.* McClannon, 41 Ill. 238; Brush *v.* Blanchard, 19 Ill. 31.

Louisiana.— American Homestead Co. *v.* Linigan, 46 La. Ann. 1118, 15 So. 369; Blaffer *v.* Louisiana Nat. Bank, 35 La. Ann. 251; Legendre *v.* Seligman, 35 La. Ann. 113.

Texas.— Drake *v.* Brander, 8 Tex. 351; Walling *v.* Williams, 4 Tex. 427; Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661.

See 39 Cent. Dig. tit. "Pleading," § 466.

After similiter filed.— Where plaintiff adds a *similiter* to his replication, defendant may demur to the replication without striking out the *similiter.* Auburn Bank *v.* Aikin, 18 Johns. (N. Y.) 137.

58. Bonwill *v.* Dickson, 1 Harr. (Del.) 105.

Amendment after jury sworn.— When a complaint is amended after the jury is sworn, it is not error to refuse defendant permission to demur thereto where no ground for demurrer is stated nor any written demurrer offered, and the complaint seems to be good in substance. Cook *v.* Gallatin R. Co., 28 Mont. 340, 72 Pac. 678.

59. Jones *v.* Lavender, 55 Ga. 228.

60. Fadley *v.* Smith, 23 Mo. App. 87; Safford *v.* Stevens, 2 Wend. (N. Y.) 158; Williams *v.* Bailes, 9 Tex. 61.

61. Fitzgerald *v.* Lorenz, 181 Ill. 411, 54 N. E. 1029; Brown *v.* Illinois Cent. Mut. Ins. Co., 42 Ill. 366; Great Western R. Co. *v.* Helm, 27 Ill. 198, 81 Am. Dec. 226; Murdock *v.* Herndon, 4 Hen. & M. (Va.) 200.

After pleading held good.— Where the court has given its opinion that a plea is good, and plaintiff has excepted to that opinion, it may refuse to receive a demurrer to the plea. Bruce *v.* Mathers, 2 Bibb (Ky.) 294.

Notice of intention to suffer default.— The service of a notice of intention to suffer default is not a bar to a subsequent demurrer. Pitkin *v.* New York, etc., R. Co., 64 Conn. 482, 30 Atl. 772.

even though both parties have noticed the case for trial;[62] and after a rule of reference is entered, it has been held that a demurrer may still be filed, provided the arbitrators are not yet chosen.[63] These rules, however, do not apply to a demurrer for failure to state facts sufficient to constitute a cause of action, as such a demurrer may usually be filed at any time,[64] even after an issue framed and submitted to a master or jury,[65] or after judgment.[66]

b. After Motion. A demurrable objection may still be raised by demurrer notwithstanding it has previously been raised by motion and disallowed.[67] Even where certain allegations are stricken out on motion, it has been held that the party may subsequently demur on the ground that the pleading is defective for want of such allegations.[68]

3. Extension of Time. The time may be extended, or leave granted for filing, on proper terms, for cause shown,[69] the matter being largely within the discretion of the court.[70] But it must appear that the pleading is apparently subject to demurrer on the ground stated, and that some advantage will result from permission to demur.[71] Demurrers going to defects of form are accorded less consideration when not filed seasonably, than those going to defects of substance.[72] The allowance of an amendment will usually operate to extend the time allowed for demurrer to the original pleading,[73] unless the amendment is merely a fuller statement of the same cause of action or defense set up in the original pleading.[74]

F. Grounds — 1. In General — a. Common Law as Distinguished From Statutory Grounds. The grounds of demurrer at common law are much more extensive than under the codes and practice acts, many of the grounds under the common-law system of pleading now being reachable only by motion instead of demurrer.[75] No pleading is demurrable under the codes unless it is subject to one or more of the objections specified in the provisions of the code defining the grounds of demurrer.[76]

62. Brassington *v.* Rohrs, 3 Misc. (N. Y.) 258, 22 N. Y. Suppl. 761.

63. Oberholtzer *v.* Hunsberger, 1 Mona. (Pa.) 543.

64. Frank *v.* Hedrick, 18 Ark. 304; Bothwell *v.* Denver Union Stock Yards Co., 39 Colo. 221, 90 Pac. 1127; Bijou Co. *v.* Lehmann, 118 La. 956, 43 So. 632 (any time before judgment); Oliver *v.* Chapman, 15 Tex. 400; Watson *v.* Loop, 12 Tex. 11. See also *infra*, XIV, B, 9, c.

65. Harvey *v.* Hackney, 35 S. C. 361, 14 S. E. 822; Hull *v.* Young, 29 S. C. 64, 6 S. E. 938.

66. Marriott *v.* Clise, 12 Colo. 561, 21 Pac. 909.

Before verdict.— Where a petition is so defective that there can be no lawful recovery thereon, an oral motion to dismiss in the nature of a general demurrer may be made at any time before verdict. Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280.

67. Gross *v.* Miller, 93 Iowa 72, 61 N. W. 385, 26 L. R. A. 605; Galloway *v.* Galloway, 2 Baxt. (Tenn.) 328. But see Bruce *v.* Mathers, 2 Bibb (Ky.) 294, holding that a party ought not to be allowed to demur after the opinion of the court had been obtained in another mode, and after an exception taken to such opinion.

68. Grout *v.* Cooper, 5 Hun (N. Y.) 423.

69. Davis *v.* South Carolina, etc., R. Co., 107 Ga. 420, 33 S. E. 437; Rumsey *v.* Robinson, 58 Iowa 225, 12 N. W. 243; Stilwell *v.* Kellogg, 14 Wis. 461.

70. Mecklin *v.* Deming, 111 Ala. 159, 20 So. 507; Thornton *v.* Williams, 14 Ind. 518; Brown *v.* J. I. Case Plow Works, 9 Kan. App. 685, 59 Pac. 601.

Abuse of discretion.—A delay of nearly a year from the filing of an answer and until long after the filing of a demurrer thereto has ceased to be a matter of right renders refusal of application to file demurrer no abuse of discretion. Davis *v.* Boyer, 122 Iowa 132, 97 N. W. 1002.

71. Schultz *v.* McLean, 109 Cal. 437, 42 Pac. 557; Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Van Allen *v.* Spadone, 16 Ind. 319.

72. Richmond, etc., R. Co. *v.* Mitchell, 95 Ga. 78, 22 S. E. 124; Roane *v.* Drummond, 6 Rand. (Va.) 182.

73. Schultz *v.* McLean, 109 Cal. 437, 42 Pac. 557 (holding that the matter is within the discretion of the court); Isenburger *v.* Hotel Reynolds Co., 177 Mass. 455, 59 N. E. 120.

74. Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Burke *v.* Wilkes-Barre, etc., R. Co., 5 Lack. Jur. (Pa.) 260.

75. See *infra*, VI, G, 1, b, *et seq.*; XII.

76. *California.*— Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Silva *v.* Spangler, (1896) 43 Pac. 617.

Indiana.— Campbell *v.* Campbell, 121 Ind. 178, 23 N. E. 81; Morrison *v.* Kramer, 58 Ind. 38; Acker *v.* McCullough, 50 Ind. 447; Campbell *v.* Routt, 42 Ind. 410; Cincinnati,

b. Duplicity and Commingling of Counts or Defenses — (1) *DUPLICITY.* Duplicity is, at common law, a ground for special demurrer, but not reachable by general demurrer.[77] But where special demurrers are abolished, this objection cannot be taken by demurrer;[78] a motion to strike being the proper remedy.[79] However, inasmuch as duplicity in a dilatory plea is ground for general demurrer, the abolition of special demurrers does not affect such cases.[80] Duplicity is not

etc., R. Co. *v.* Washburn, 25 Ind. 259; Aurora *v.* Cobb, 21 Ind. 492; Riley *v.* Murray, 8 Ind. 354; Lane *v.* State, 7 Ind. 426; Kenworthy *v.* Williams, 5 Ind. 375.

Indian Territory.— Wolverton *v.* Bruce, 6 Indian Terr. 135, 89 S. W. 1018.

Kansas.— Mayberry *v.* Kelly, 1 Kan. 116.

Minnesota.— Seager *v.* Burns, 4 Minn. 141.

Missouri.— Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142, 65 S. W. 1035.

New York.— Marie *v.* Garrison, 83 N. Y. 14; Bottom *v.* Chamberlain, 21 Misc. 556, 47 N. Y. Suppl. 733; Dunlap *v.* Stewart, 75 N. Y. Suppl. 1085; Harper *v.* Chamberlain, 11 Abb. Pr. 234; Reilay *v.* Thomas, 11 How. Pr. 266.

South Dakota.— Mader *v.* Plano Mfg. Co., 17 S. D. 553, 97 N. W. 843.

Washington.— Renton *v.* St. Louis, 1 Wash. Terr. 215.

Canada.—Ætna L. Ins. Co. *v.* Sharp, 11 Manitoba 141.

See 39 Cent. Dig. tit. "Pleading," § 425.

77. *Alabama.*— Highland Ave., etc., R. Co. *v.* Dusenberry, 94 Ala. 413, 10 So. 274; Duncan *v.* Hargrove, 22 Ala. 150; Garnett *v.* Yoe, 17 Ala. 74; Cobb *v.* Miller, 9 Ala. 499; Vance *v.* Wells, 8 Ala. 399. But see Stiles *v.* Lacy, 7 Ala. 17.

Arkansas.— The Napoleon *v.* Etter, 6 Ark. 103.

Connecticut.— Seymour *v.* Mitchel, 2 Root 145; Smith *v.* Northrup, 1 Root 387; Starr *v.* Henshaw, 1 Root 242.

Illinois.— Chicago Western Div. R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350; Armstrong *v.* Webster, 30 Ill. 333; Brady *v.* Spurck, 27 Ill. 478; Franey *v.* True, 26 Ill. 184; St. Louis Consol. Coal Co. *v.* Peers, 97 Ill. App. 188 [*affirmed* in 205 Ill. 531, 68 N. E. 1065]; Haberlau *v.* Lake Shore, etc., R. Co., 73 Ill. App. 261.

Indiana.— Barrett *v.* Ruitt, 3 Ind. 571; Neff *v.* Powell, 6 Blackf. 420; Benner *v.* Elliott, 5 Blackf. 451; King *v.* Anthony, 2 Blackf. 131.

Kentucky.—Arnold *v.* Com., 8 B. Mon. 109.

Maine.— Briggs *v.* Grand Trunk R. Co., 54 Me. 375.

Maryland.—McCauley *v.* State, 21 Md. 556; State *v.* Green, 4 Harr. & J. 542; Stewardson *v.* White, 3 Harr. & M. 455. The rule now is that the objection may be reached by a general demurrer. Milske *v.* Steiner Mantel Co., 103 Md. 235, 63 Atl. 471, 115 Am. St. Rep. 354, 5 L. R. A. N. S. 1105.

Massachusetts.— Shattuck *v.* Marcus, 182 Mass. 572, 66 N. E. 196; Foster *v.* Leach, 160 Mass. 418, 36 N. E. 69; Downs *v.* Hawley, 112 Mass. 237; Washington *v.* Eames, 6 Allen 417; Clay *v.* Brigham, 8 Gray 161; Otis *v.* Blake, 6 Mass. 336.

Michigan.— Douglas *v.* Marsh, 141 Mich. 209, 104 N. W. 624.

Mississippi.—State *v.* Brown, 34 Miss. 688; Welch *v.* Jamison, 1 How. 160.

New Hampshire.— Little *v.* Perkins, 3 N. H. 469; Mooney *v.* Demerrit, 1 N. H. 187.

New Jersey.— Karnuff *v.* Kelch, 71 N. J. L. 558, 60 Atl. 364; State *v.* Barnes, 67 N. J. L. 80, 50 Atl. 903; Berry *v.* Cahanan, 7 N. J. L. 77.

New York.— Brackett *v.* Simonds, 1 Hall 86.

South Carolina.— Phillips *v.* Willeson, 2 Brev. 477.

Vermont.— Green *v.* Seymour, 59 Vt. 459, 12 Atl. 206; Vaughan *v.* Everts, 40 Vt. 526; Carpenter *v.* McClure, 40 Vt. 108; Downer *v.* Rowell, 26 Vt. 397; Culver *v.* Balch, 23 Vt. 618; Onion *v.* Clark, 18 Vt. 363; Walker *v* Sargeant, 14 Vt. 247.

Virginia.— Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Cunningham *v.* Smith, 10 Gratt. 255, 60 Am. Dec. 333.

United States.— Burnham *v.* Webster, 4 Fed. Cas. No. 2,178, 1 Woodb. & M. 172; Jackson *v.* Rundlet, 13 Fed. Cas. No. 7,145, 1 Woodb. & M. 381.

Canada.— McLachlan *v.* Wilson, 4 N. Brunsw. 368; Duffy *v.* Higgins, 4 U. C. C. P. 301; Filliter *v.* Moodie, 22 U. C. Q. B. 71; Montreal Bank *v.* Humphries, 3 U. C. Q. B. 463; West *v.* Bown, 3 U. C. Q. B. 291.

See 39 Cent. Dig. tit. "Pleading," § 503.

78. *Alabama.*— Corpening *v.* Worthington, 99 Ala. 541, 12 So. 426; Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658; Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692; Wynne *v.* Whisenant, 37 Ala. 46.

Arkansas.— See Blakeney *v.* Ferguson, 18 Ark. 347.

Kentucky.— Bryan *v.* Buford, 7 J. J. Marsh. 335.

Massachusetts.— King *v.* Howard, 1 Cush. 137.

Tennessee.— Waggoner *v.* White, 11 Heisk. 741.

Virginia.— Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457.

West Virginia.— Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563; Poling *v.* Maddox, 41 W. Va. 779, 24 S. E. 999; Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94.

United States.— J. W. Bishop Co. *v.* Shelhorse, 141 Fed. 643, 72 C. C. A. 337, following Virginia practice.

79. See *infra*, XII, C.

80. Cannon *v.* Lindsey, 85 Ala. 198, 3 So.

a ground for demurrer under the codes,[81] nor indeed does it seem a ground for objection of any kind.[82]

(II) *Commingling of Counts or Defenses.* A demurrer seems the proper common-law remedy for intermingling in one count two or more causes of action.[83] But mere commingling in one count or paragraph of several causes of action or defenses which may be joined does not render the pleading bad on demurrer, under the codes,[84] the proper remedy being by motion.[85] If the commingled counts are not such as may be joined, a demurrer for misjoinder will lie.[86] But where two causes of action, which cannot be joined in one complaint, are united in one count, the better remedy, under the code, is, in the first instance,

676, 7 Am. St. Rep. 38; Garner *v.* Johnson, 22 Ala. 494.

81. Mills *v.* Barney, 22 Cal. 240.

82. Richards *v.* Kinsley, 14 Daly (N. Y.) 334, 12 N. Y. St. 125. But see Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861, where the court says that the common-law rule against duplicity is preserved under the code, although it seems that the court is really considering the mingling of different causes of action in the same count.

83. Louisville, etc., R. Co. *v.* Cofer, 110 Ala. 491, 18 So. 110; Verner *v.* Alabama Great Southern R. Co., 103 Ala. 574, 15 So. 872; Richmond, etc., R. Co. *v.* Weems, 97 Ala. 270, 12 So. 186; Pitts *v.* Smith, 108 Ga. 37, 33 S. E. 814; Little *v.* Perkins, 3 N. H. 469.

84. *Alaska.*— Mitchell *v.* Galen, 1 Alaska 339.

California.—Astill *v.* South Yuba Water Co., 146 Cal. 55, 79 Pac. 594; San Francisco Pav. Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255; Sutter County *v.* McGriff, 130 Cal. 124, 62 Pac. 412; City Carpet-Beating, etc., Works *v.* Jones, 102 Cal. 506, 36 Pac. 841; Jacob *v.* Lorenz, 98 Cal. 332, 33 Pac. 119; Fraser *v.* Oakdale Lumber, etc., Co., 73 Cal. 187, 44 Pac. 829; Hagely *v.* Hagely, 68 Cal. 348, 9 Pac. 305; Hayford *v.* Kocher, 65 Cal. 389, 4 Pac. 350; Bernero *v.* South British, etc., Ins. Co., 65 Cal. 386, 4 Pac. 382; Beckman *v.* Waters, 3 Cal. App. 734, 86 Pac. 997.

Idaho.— Fox *v.* Rogers, 6 Ida. 710, 59 Pac. 538.

Indiana.— State *v.* White, 88 Ind. 587; Carter *v.* Ford Plate Glass Co., 85 Ind. 180; Ross *v.* Thompson, 78 Ind. 90; Rielay *v.* Whitcher, 18 Ind. 458; Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483; Judah *v.* Vincennes University, 16 Ind. 56; Schlosser *v.* Fox, 14 Ind. 365; Indianapolis, etc., R. Co. *v.* Taffe, 11 Ind. 458.

Iowa.— Seaton *v.* Grimm, 110 Iowa 145, 81 N. W. 225; Swords *v.* Russ, 13 Iowa 603.

Kansas.— Ellsworth *v.* Rossiter, 46 Kan. 237, 26 Pac. 674; Tootle *v.* Wells, 39 Kan. 452, 18 Pac. 692; Jackson County *v.* Hoaglin, 5 Kan. 558; Walker *v.* Sims, 9 Kan. App. 890, 64 Pac. 81.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 102 Ky. 300, 43 S. W. 458, 19 Ky. L. Rep. 1462, 53 L. R. A. 149; Williams *v.* Langford, 15 B. Mon. 566.

Missouri.— Mulholland *v.* Rapp, 50 Mo. 42; State *v.* Davis, 35 Mo. 406; Otis *v.* Mechanics' Bank, 35 Mo. 128; Wilson *v.* St. Louis, etc., R. Co., 67 Mo. App. 443; Ferguson *v.* Davidson, 65 Mo. App. 193. *Contra*, McCoy *v.* Yager, 34 Mo. 134.

New York.—Bass *v.* Comstock, 38 N. Y. 21; Anderson *v.* Hill, 53 Barb. 238; Badger *v.* Benedict, 1 Hilt. 414; Griffith *v.* Friendly, 30 Misc. 393, 62 N. Y. Suppl. 391 [*affirmed* in 47 N. Y. App. Div. 635, 62 N. Y. Suppl. 1138]; Haynes *v.* McKee, 18 Misc. 361, 41 N. Y. Suppl. 553 [*affirmed* in 19 Misc. 511, 43 N. Y. Suppl. 1126]; Townsend *v.* Coon, 7 N. Y. Civ. Proc. 56; Henderson *v.* Jackson, 40 How. Pr. 168; Cheney *v.* Fisk, 22 How. Pr. 236; Fickett *v.* Brice, 22 How. Pr. 194; Waller *v.* Raskan, 12 How. Pr. 28; Moore *v.* Smith, 10 How. Pr. 361; Peckham *v.* Smith, 9 How. Pr. 436; Robinson *v.* Judd, 9 How. Pr. 378; Gooding *v.* McAlister, 9 How. Pr. 123; Benedict *v.* Seymour, 6 How. Pr. 298; Dorman *v.* Kellam, 4 Abb. Pr. 202; Woodbury *v.* Sackrider, 2 Abb. Pr. 402.

Ohio.— Hartford Tp. *v.* Bennett, 10 Ohio St. 441; Brooker *v.* Grossman, 4 Ohio Dec. (Reprint) 258, 1 Clev. L. Rep. 177.

South Carolina.— Marion *v.* Charleston, 68 S. C. 257, 47 S. E. 140; Cartin *v.* South Bound R. Co., 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829; Jackins *v.* Dickinson, 39 S. C. 436, 17 S. E. 996; Westlake *v.* Farrow, 34 S. C. 270, 13 S. E. 469.

Virginia.— Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459; Southern R. Co. *v.* Blanford, 105 Va. 373, 54 S. E. 1.

Wisconsin.— Sentinel Co. *v.* Thomson, 38 Wis. 489; Riemer *v.* Johnke, 37 Wis. 258; Nichol *v.* Alexander, 28 Wis. 118; Akerly *v.* Vilas, 25 Wis. 703; Baxter *v.* State, 9 Wis. 38.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

United States.— Chamberlain *v.* Mensing, 51 Fed. 669.

See 39 Cent. Dig. tit. "Pleading," § 434.

But see Bandmann *v.* Davis, 23 Mont. 382, 59 Pac. 856, where the court appears to hold a demurrer proper where two causes of action are joined in one count.

85. See *infra*, XII, C, 1, c, (IV), (B).

86. Benson *v.* Battey, 70 Kan. 288, 78 Pac. 844; Haskell County Bank *v.* Santa Fe Bank, 51 Kan. 39, 32 Pac. 624; Lamming *v.* Galusha, 135 N. Y. 239, 31 N. E. 1024; Wiles *v.* Suydam, 64 N. Y. 173; Goldberg *v.* Utley, 60 N. Y. 427; Reed *v.* Livermore, 101 N. Y. App. Div. 254, 91 N. Y. Suppl. 986; Zorn *v.* Zorn, 38 Hun (N. Y.) 67; Taylor *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 299; Adams

by motion to separate them, and then by demurrer to the counts as separated, and not by demurrer to the single count.[87]

c. Failure to Attach Exhibits.[88] Failure to attach proper exhibits to a pleading should be met by a demurrer.[89] But failure to attach as an exhibit an instrument which does not properly form a part of the pleading is not ground for demurrer.[90] A pleading is not demurrable when it alleges that an exhibit is attached when in fact it is not attached, if the exhibit is immaterial.[91]

d. Formal Defects — (i) *Common-Law Rule.* At common law formal defects in pleadings are grounds for a special but not a general demurrer.[92] But

v. Stevens, 7 Misc. (N. Y.) 468, 27 N. Y. Suppl. 993; Harris *v.* Eldridge, 5 Abb. N. Cas. (N. Y.) 278. See also *infra*, VI, F, 2, d.

87. Ludington *v.* Heilman, 9 Colo. App. 548, 49 Pac. 377; Wilson *v.* St. Louis, etc., R. Co., 67 Mo. App. 443; Henderson *v.* Jackson, 40 How. Pr. (N. Y.) 168; Westlake *v.* Farrow, 34 S. C. 270, 13 S. E. 469.

88. Want of profert as ground see *infra*, VI, F, 1, k.

89. Reed *v.* Equitable Trust Co., 115 Ga. 780, 42 S. E. 102; Gise *v.* Cook, 152 Ind. 75, 52 N. E. 454; Strongh *v.* Gear, 48 Ind. 100; King *v.* Enterprise Ins. Co., 45 Ind. 43; Brown *v.* State, 44 Ind. 222; Drook *v.* Irvine, 41 Ind. 430; Little *v.* Vance, 14 Ind. 19; Hillis *v.* Wilson, 13 Ind. 146; Kiser *v.* State, 13 Ind. 80; Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58; Offutt *v.* Rucker, 2 Ind. App. 350, 27 N. E. 589; Johnson *v.* Tostevin, 60 Iowa 46, 14 N. W. 95; Barry *v.* Phœnix Mut. L. Ins. Co., 8 Del. Co. (Pa.) 88.

90. Stilwell *v.* Adams, 29 Ark. 346; Nordman *v.* Craighead, 27 Ark. 369; Heaston *v.* Krieg, 167 Ind. 101, 77 N. E. 805 (holding that where an instrument not properly a part of or an exhibit to a complaint is attached as an exhibit pursuant to an erroneous order of court, questions as to the effect of this instrument are not properly raised by a demurrer to the complaint); Excelsior Draining Co. *v.* Brown, 38 Ind. 384.

Where it does not appear that there was any contract in writing, a demurrer on the ground that a copy of it was not attached as an exhibit was not well founded. Timmerman *v.* Stanley, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. N. S. 379.

91. Walters *v.* Eaves, 105 Ga. 584, 32 S. E. 609.

92. *Georgia.*— South Carolina, etc., R. Co. *v.* Augusta Southern R. Co., 111 Ga. 420; Ordinary *v.* Smith, 55 Ga. 15.

Illinois.— Sheldon *v.* Lewis, 97 Ill. 640.

Indiana.— Dumont *v.* Lockwood, 7 Blackf. 576; Woods *v.* Harris, 5 Blackf. 585; Ferrand *v.* Walker, 5 Blackf. 424.

Iowa.— Coffin *v.* Knott, 2 Greene 582, 52 Am. Dec. 537.

Kentucky.— Boone *v.* Shackleford, 4 Bibb 67; Singleton *v.* Carr, 1 Bibb 554.

Maine.— Hare *v.* Dean, 90 Me. 308, 38 Atl. 227; Cairns *v.* Whittmore, 88 Me. 501, 34 Atl. 404; Mahan *v.* Sutherland, 73 Me. 158. See also Place *v.* Brann, 77 Me. 342.

Maryland.— State *v.* Green, 4 Harr. & J. 542.

Massachusetts.— Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; Dole *v.* Weeks, 4 Mass. 451; Tucker *v.* Randall, 2 Mass. 283.

Michigan.— Day *v.* Cole, 56 Mich. 294, 22 N. W. 811.

Mississippi.— Mississippi Cent. R. Co. *v.* Whitehead, 41 Miss. 225; Mobley *v.* Keys, 13 Sm. & M. 677; Ray *v.* Woolfolk, 1 Sm. & M. 523; Templeton *v.* Planters' Bank, 5 How. 169.

New Jersey.— Dime Sav. Inst. *v.* Hoboken, 42 N. J. L. 283; Goldengay *v.* Smith, (Ch. 1902) 52 Atl. 1116; Boon *v.* Pierpont, 28 N. J. Eq. 7.

New York.— Tyler *v.* Canaday, 2 Barb. 160; Morris *v.* Wadsworth, 11 Wend. 100; Terboss *v.* Williams, 5 Cow. 407; Hawley *v.* Hanchet, 1 Cow. 152.

Ohio.— Lyon *v.* Fish, 20 Ohio 100.

Pennsylvania.— Haldeman *v.* Martin, 10 Pa. St. 369; Day *v.* Hamburgh, 1 Browne 75; Lincoln *v.* Souder, 2 Pa. L. J. Rep. 319.

Tennessee.— McKaimy *v.* Keller, 3 Yerg. 432; Cain *v.* Kersay, 1 Yerg. 443.

Texas.— Erie Tel., etc., Co. *v.* Grimes, 82 Tex. 89, 17 S. W. 831; Green *v.* Dallahan, 54 Tex. 281; Wells *v.* Fairbank, 5 Tex. 582; Perkins *v.* Davidson, 23 Tex. Civ. App. 31, 56 S. W. 121; McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

Vermont.— Belknap *v.* Billings, 76 Vt. 54, 56 Atl. 174; Keith *v.* Bradford, 39 Vt. 34; Stearns *v.* Stearns, 32 Vt. 678; Briggs *v.* Mason, 31 Vt. 433; Hooker *v.* Smith, 19 Vt. 151, 47 Am. Dec. 679.

Virginia.— Cecil *v.* Early, 10 Gratt. 198.

West Virginia.— Trump *v.* Tidewater Coal, etc., Co., 46 W. Va. 238, 32 S. E. 1035; Simmons *v.* Trumbo, 9 W. Va. 358.

United States.— Teese *v.* Phelps, 23 Fed. Cas. No. 13,818, McAllister 17.

Canada.— Woodruff *v.* Davis, 2 U. C. Q. B. 404.

See 39 Cent. Dig. tit. "Pleading," § 499. See also *supra*, VI, B, 1.

The presence of unexplained interlineations in a pleading is ground for special demurrer. Stillwell *v.* Smith, 18 York Leg. Rec. (Pa.) 99.

Exceptions to rule.— A failure to properly entitle a petition or declaration has been held ground for a motion to dismiss it (Blackwell *v.* Montgomery, 1 Handy (Ohio) 40, 12 Ohio Dec. (Reprint) 16), or to set it aside for irregularity (Parker *v.* Burgess, 64 Vt. 442, 24 Atl. 743), but not ground for demurrer (Cunningham *v.* Phillips, Tapp. (Ohio) 184). So it is no ground for special

formal defects in a plea in abatement make the plea bad on general demurrer.[92] Mere clerical errors will not, however, render a pleading bad even on special demurrer.[94] So where a matter is so purely formal that it may be inserted at any time before judgment, even a special demurrer will not lie by reason of its omission.[95] In some jurisdictions, where the common-law system of pleading prevails, special demurrers have nevertheless been abolished and there formal defects do not render a pleading subject to demurrer except pleas in abatement.[96]

(11) *Under the Codes.* Under the codes, formal defects cannot be taken advantage of on demurrer, but only on motion to make more definite and certain, or other appropriate motion.[97] But in a few western code states demurrers are expressly authorized for ambiguity and uncertainty.[98]

e. Frivolousness. At common law a pleading frivolous on its face is bad on demurrer,[99] but under the codes the proper remedy is a motion to strike or for judgment on the pleadings.[1] If, however, the pleading is also bad in substance, a demurrer will reach it.[2]

f. Hypothetical Pleading. At common law the remedy for hypothetical pleading was a demurrer,[3] but under the codes the remedy is by motion and not by demurrer.[4]

g. Legal Conclusions. Under the codes, the allegation of a legal conclusion instead of the facts upon which it is based, does not usually make a pleading bad on general demurrer; but other cases hold that a demurrer on the ground of

demurrer that the pleading is not dated as required by rule, nor that in the commencement plaintiff appears in person and the signature is by his attorney. Murphy *v.* Burnham, 2 U. C. Q. B. 261.

93. *Alabama.*— Humphrey *v.* Whitten, 17 Ala. 30; Hart *v.* Turk, 15 Ala. 675; Casey *v.* Cleveland, 7 Port. 445.

Maine.— Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661.

New York.— Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill 170; Shaw *v.* Dutcher, 19 Wend. 216.

Rhode Island.— Capwell *v.* Sipe, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890; Bullock *v.* Bolles, 9 R. I. 501; Hoppin *v.* Jenckes, 9 R. I. 102.

Vermont.— Landon *v.* Roberts, 20 Vt. 286.

Virginia.— Mantz *v.* Hendley, 2 Hen. & M. 308.

See 39 Cent. Dig. tit. "Pleading," §§ 421, 499.

But see Deshler *v.* Dodge, 16 How. (U. S.) 622, 14 L. ed. 1084.

94. See *infra*, VI, F, 1, m.

95. Baker *v.* Philips, 4 Johns. (N. Y.) 190.

96. State *v.* German Sav. Bank, 103 Md. 196, 63 Atl. 481. See also *supra*, VI, B, 1.

97. *Arkansas.*— Phillips *v.* Southwestern Tel. Co., 72 Ark. 478, 81 S. W. 605; Moore *v.* Rooks, 71 Ark. 562, 76 S. W. 548.

California.—Fay *v.* McKeever, 59 Cal. 307; Otero *v.* Bullard, 3 Cal. 188.

Indiana.— Orr *v.* Miller, 98 Ind. 436; Mulky *v.* Karsell, 31 Ind. App. 595, 68 N. E. 689.

Nebraska.— Grant *v.* Commercial Nat. Bank, 67 Nebr. 219, 93 N. W. 185; Forbes *v.* Petty, 37 Nebr. 899, 56 N. W. 730.

New York.— U. S. National Bank *v.* Homestead Bank, 18 N. Y. Suppl. 758; McCarron *v.* Cahill, 15 Abb. N. Cas. 282.

Ohio.— Everett *v.* Waymire, 30 Ohio St. 308; Blackwell *v.* Montgomery, 1 Handy 40, 12 Ohio Dec. (Reprint) 16; Williams *v.* Burkheimer, 11 Ohio S. & C. Pl. 136, 8 Ohio N. P. 134.

Washington.—Renton *v.* St. Louis, 1 Wash. Terr. 215.

Wisconsin.— Heidenheim *v.* Sprague, 5 Wis. 258.

United States.— Conroy *v.* Oregon Constr. Co., 23 Fed. 71, 10 Sawy. 630.

Canada.— Scane *v.* Duckett, 3 Ont. 370.

See 39 Cent. Dig. tit. "Pleading," § 421.

Where a pleading is illegible it is subject to a motion to strike from the files. Downer *v.* Staines, 5 Wis. 159.

98. See *infra*, VI, F, 1, j.

99. Elliott *v.* Eslava, 3 Ala. 568; Falls *v.* Stickney, 3 Johns. (N. Y.) 541. See Evitt *v.* Lowery Banking Co., 96 Ala. 381, 11 So. 442.

In Alabama a motion to strike, and not a demurrer, is now the proper remedy. Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620.

1. See *infra*, XII.

2. Harlow *v.* Hamilton, 6 How. Pr. (N. Y.) 475.

3. Conger *v.* Johnston, 2 Den. (N. Y.) 96; Margetts *v.* Bays, 4 A. & E. 489, 5 L. J. K. B. 105, 6 N. & M. 228, 31 E. C. L. 223.

4. Wiley *v.* Rouse's Point, 86 Hun (N. Y.) 495, 33 N. Y. Suppl. 773; Taylor *v.* Richards, 9 Bosw. (N. Y.) 679; Daniels *v.* Baxter, 120 N. C. 14, 26 S. E. 635. *Contra*, see Goodman *v.* Robb, 41 Hun (N. Y.) 605; Arthur *v.* Brooks, 14 Barb. (N. Y.) 533; Lewis *v.* Kendall, 6 How. Pr. (N. Y.) 59.

5. *California.*— Santa Barbara *v.* Eldred, 108 Cal. 294, 41 Pac. 410.

Iowa.— Lambe *v.* McCormick, 116 Iowa 169, 89 N. W. 241; Thompson *v.* Cook, 21 Iowa 472.

insufficient facts to constitute a cause of action or defense, will lie to such a pleading.[6]

h. Names.[7] A mistake in a pleading as to the name of a party is not a ground of demurrer,[8] without regard to whether the mistake is as to defendant's or plaintiff's name;[9] the remedy being by plea in abatement,[10] or by motion.[11] So if the identity of persons bearing the same name is to be questioned, it should be by pleading and not by demurrer.[12] That a pleading describes parties by the initials only of their christian name is not a ground of demurrer,[13] nor is the omission of a party's christian name.[14]

i. Pleading by Way of Recital. The averment of facts by way of recital instead of positively may, in some jurisdictions, be reached by demurrer, some cases holding, however, that the demurrer must be a special one,[15] while others hold that the objection may be urged under a general demurrer.[16]

j. Uncertainty and Indefiniteness. At common law, indefiniteness and uncertainty, being defects of form in a pleading, are subject to a special but not a

Kansas.— Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012.

Kentucky.— Newport Light Co. *v.* Newport, 19 S. W. 188, 14 Ky. L. Rep. 55.

Washington.— Livingstone *v.* Lovgren, 27 Wash. 102, 67 Pac. 599; Harris *v.* Halverson, 23 Wash. 779, 63 Pac. 549; Griffith *v.* Wright, 21 Wash. 494, 58 Pac. 582.

See 39 Cent. Dig. tit. "Pleading," § 411.

A pleading containing nothing but conclusions of law will be regarded as irrelevant, interposed for delay only, and may be stricken out on motion. Dennis *v.* Nelson, 55 Minn. 144, 56 N. W. 589.

6. Downing *v.* Agricultural Ditch Co., 20 Colo. 546, 39 Pac. 336; Mallinckrodt Chemical Works *v.* Nemnich, 169 Mo. 388, 69 S. W. 355; Kellogg *v.* Baker, 15 Abb. Pr. (N. Y.) 286; Smith *v.* Kaufman, 3 Okla. 568, 41 Pac. 722.

An objection to the pleading of a written instrument by stating its legal effect, instead of setting forth its contents, can be taken only by demurrer. Kellogg *v.* Baker, 15 Abb. Pr. (N. Y.) 286.

7. See, generally, NAMES, 29 Cyc. 261.

8. *Indiana.*— Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129; Morningstar *v.* Wiles, 96 Ind. 458; Delaware Tp. *v.* Ripley County, 26 Ind. App. 97, 59 N. E. 189.

Mississippi.— Hudson *v.* Poindexter, 42 Miss. 304.

Nebraska.— Lash *v.* Christie, 4 Nebr. 262.

New York.— Empire State Sav. Bank *v.* Beard, 81 Hun 184, 30 N. Y. Suppl. 756 [*reversed* on other grounds in 151 N. Y. 638, 45 N. E. 1131]; Gannon *v.* Myars, 11 N. Y. Civ. Proc. 187.

Ohio.— Slocum *v.* McBride, 17 Ohio 607.

West Virginia.— Handley *v.* Ludington, 4 W. Va. 53.

See 37 Cent. Dig. tit. "Parties," § 157.

But see McLure *v.* Vernon, 2 Hill (S. C.) 420.

9. Hudson *v.* Poindexter, 42 Miss. 304.

10. Moodey *v.* Shaw, Tapp. (Ohio) 280; Roberts *v.* Heisey, 19 Lanc. Bar (Pa.) 285; Shaw *v.* Adams, 2 Tex. App. Civ. Cas. § 177. See also *supra*, IV, B, 5, b, (VIII).

In Louisiana, it is ground for dilatory exception. State *v.* Hendricks, 40 La. Ann. 719, 5 So. 24. Such an exception will be deemed frivolous which does not disclose the true name. Broadwell *v.* Kelly, 14 La. Ann. 456.

11. See *infra*, VII; XII.

12. Johnson *v.* Ellison, 4 T. B. Mon. (Ky.) 526, 16 Am. Dec. 163.

13. *Maryland.*— Union Bank *v.* Tillard, 26 Md. 446.

Minnesota.— Gardner *v.* McClure, 6 Minn. 250.

Ohio.— Slocum *v.* McBride, 17 Ohio 607.

Oklahoma.— McColgan *v.* Territory, 5 Okla. 567, 49 Pac. 1018.

South Carolina.— Wilthaus *v.* Ludecus, 5 Rich. 326.

Texas.— Churchill *v.* Bielstein, 9 Tex. Civ. App. 445, 29 S. W. 392.

Wyoming.— Perkins *v.* McDowell, 3 Wyo. 328, 23 Pac. 71, holding that where the christian name of plaintiff is given as "J. M.," and there is nothing in the petition to show that "J. M." is not his christian name, a demurrer on the ground that the petition does not state the name of plaintiff cannot be sustained.

See 37 Cent. Dig. tit. "Parties," § 155 *et seq.*

Contra.— Bascom *v.* Toner, 5 Ind. App. 229, 31 N. E. 856; Lee *v.* Rice, 12 La. 254.

14. Nelson *v.* Highland, 13 Cal. 74; Hahn *v.* Behrman, 73 Ind. 120.

15. George H. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694; Santa Barbara *v.* Eldred, 108 Cal. 294, 41 Pac. 410; Third Nat. Bank *v.* Angell, 18 R. I. 1, 29 Atl. 500. See also Collier *v.* Moulton, 7 Johns. (N. Y.) 109; Brown *v.* Thurlow, 16 M. & W. 36.

16. Leadville Water Co. *v.* Leadville, 22 Colo. 297, 45 Pac. 362; Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; McElwaine-Richards Co. *v.* Wall, 159 Ind. 557, 65 N. E. 753; Syme *v.* Griffin, 4 Hen. & M. (Va.) 277; Moore *v.* Dawney, 3 Hen. & M. (Va.) 127; Hord *v.* Dishman, 2 Hen. & M. (Va.) 595; Spiker *v.* Bohrer, 37 W. Va. 258, 16 S. E. 575.

general demurrer.[17] In jurisdictions retaining the common-law system, where special demurrers have been abolished, a motion to strike is the proper remedy.[18] Except in a few states where the code enumerates ambiguity, indefiniteness, or uncertainty as a ground of demurrer,[19] no demurrer will lie in the code states for uncertainty or indefiniteness, a motion to make more definite and certain being the proper remedy.[20] But where the averments are so uncertain that the elements

17. *Alabama.*— Steiner *v.* Parsons, 103 Ala. 215, 13 So. 771; Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458.

Florida.— Sealey *v.* Thomas, 6 Fla. 25.

Georgia.— Busby *v.* Marshall, 125 Ga. 645, 54 S. E. 646; Williams *v.* Lancaster, 113 Ga. 1020, 39 S. E. 471; Eastman *v.* Cameron, 111 Ga. 110, 36 S. E. 462; McClendon *v.* Hernando Phosphate Co., 100 Ga. 219, 28 S. E. 152; East Georgia, etc., R. Co. *v.* King, 91 Ga. 519, 17 S. E. 939; Jossey *v.* Stapleton, 57 Ga. 144; Gilmore *v.* Murphy, 56 Ga. 510; Atlantic Coast Line R. Co. *v.* Hart Lumber Co., 2 Ga. App. 88, 58 S. E. 316. See also Southern R. Co. *v.* Ward, 110 Ga. 793, 36 S. E. 78.

Illinois.— Grosvenor *v.* Magill, 37 Ill. 239; People *v.* Shaw, 14 Ill. 476; Murphy *v.* Summerville, 7 Ill. 360.

Maryland.— Mitchell *v.* Williamson, 6 Md. 210.

Massachusetts.— Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126; Steffe *v.* Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137.

Michigan.— McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668; Bettys *v.* Denver Tp., 115 Mich. 228, 73 N. W. 138; Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475; Addison *v.* Lake Shore, etc., R. Co., 48 Mich. 155, 12 N. W. 42.

Pennsylvania.— Thompson *v.* Barkley, 27 Pa. St. 263.

South Carolina.—Ellison *v.* Aiken, 10 Rich. 369.

Texas.— Weatherford, etc., R. Co. *v.* Granger, 85 Tex. 574, 22 S. W. 959; Cooper *v.* Horner, 62 Tex. 356; Williams *v.* Warnell, 28 Tex. 610; Perry *v.* Herbert, 8 Tex. 1; Frosh *v.* Swett, 2 Tex. 485; Cole *v.* Carter, 22 Tex. Civ. App. 457, 54 S. W. 914; Slade *v.* Patton, (Civ. App. 1894) 24 S. W. 845; Bonner *v.* Moore, 3 Tex. Civ. App. 416, 22 S. W. 272; Alamo Mills Co. *v.* Hercules Iron Works, 1 Tex. Civ. App. 683, 32 S. W. 1097. *Compare* Attaway *v.* Carter, 1 Tex. Unrep. Cas. 73.

Vermont.— Catlin *v.* Lyman, 16 Vt. 44.

United States.— Christmas *v.* Russell, 5 Wall. 290, 18 L. ed. 475.

Canada.— Des Brisay *v.* McLeod, 12 N. Brunsw. 122; McKenzie *v.* Fairman, 1 U. C. C. P. 50; Fricsman *v.* Donnelly, 5 U. C. Q. B. O. S. 16.

See 39 Cent. Dig. tit. "Pleading," § 504.

18. See *infra*, XII, C.

19. Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206; Santa Barbara *v.* Eldred, 108 Cal. 294, 41 Pac. 410; Field *v.* Andrada, 106 Cal. 107, 39 Pac. 323; Bennett *v.* Morris, (Cal. 1891) 37 Pac. 929; Bliss *v.* Sneath, 103 Cal. 43, 36 Pac. 1029; Greenebaum *v.* Taylor, 102 Cal. 624, 36 Pac. 957; Henke *v.* Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089; Burns *v.* Cushing, 96 Cal. 669, 31 Pac. 1124; Kirsch *v.* Derby, 96 Cal. 602, 31 Pac. 567; Grant *v.* Sheerin, 84 Cal. 197, 23 Pac. 1094; Doe *v.* Sanger, 78 Cal. 150, 20 Pac. 366; Tehama County *v.* Bryan, 68 Cal. 57, 8 Pac. 673; Hagely *v.* Hagely, 68 Cal. 348, 9 Pac. 305; Hart *v.* Spect, 62 Cal. 187; Jamison *v.* King, 50 Cal. 132; Tomlinson *v.* Munroe, 41 Cal. 94; Crow *v.* Hildreth, 39 Cal. 618; Himmelmann *v.* Spanagel, 39 Cal. 401; Tompkins *v.* Mahoney, 32 Cal. 231; Phelps *v.* Owens, 11 Cal. 22; Bothwell *v.* Denver Union Stock Yard Co., 39 Colo. 221, 90 Pac. 1127; Gutshall *v.* Kornaley, 38 Colo. 195, 88 Pac. 158; Carpenter *v.* Smith, 20 Colo. 39, 36 Pac. 789; Grove *v.* Foutch, 6 Colo. App. 357, 40 Pac. 852; Hollister *v.* State, 9 Ida. 651, 77 Pac. 339; Reed *v.* Poindexter, 16 Mont. 294, 40 Pac. 596.

If the demurrer is placed upon two or more of these grounds conjunctively, it will be overruled if not well taken as to any one. Greenebaum *v.* Taylor, 102 Cal. 624, 36 Pac. 957; Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675; White *v.* Allatt, 87 Cal. 245, 25 Pac. 420; Kraner *v.* Halsey, 82 Cal. 209, 22 Pac. 1137. Although there may be, in the demurrer, a general and conjunctive assignment of ambiguity, unintelligibility and uncertainty, if the only specifications are on the ground of uncertainty it will be treated as a demurrer on that ground alone. Field *v.* Andrada, 106 Cal. 107, 39 Pac. 323.

Matters of inducement only cannot render a pleading bad on demurrer based on any of these grounds. Henke *v.* Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089.

Where objection is that pleading contains contradictory counts, demurrer will not lie. Stockton Combined Harvester, etc., Works *v.* Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565.

Remedy by demurrer is exclusive of the ordinary remedy by motion. McFarland *v.* Holcomb, 123 Cal. 84, 55 Pac. 761.

20. *Arkansas.*— Gates *v.* Solomon, 73 Ark. 8, 83 S. W. 348; Murrell *v.* Henry, 70 Ark. 161, 66 S. W. 647; State *v.* Aetna F. Ins. Co., 66 Ark. 480, 51 S. W. 638; Boone County Bank *v.* Eoff, 66 Ark. 321, 50 S. W. 688; Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657; McFadden *v.* Stark, 58 Ark. 7, 22 S. W. 884; Sweet *v.* Desha Lumber Co., 56 Ark. 629, 20 S. W. 514; Bush *v.* Cella, 52 Ark. 378, 12 S. W. 783; Fordyce *v.* Merrill, 49 Ark. 277, 5 S. W. 329; Henry *v.* Blackburn, 32 Ark. 445; Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Bushey *v.* Reynolds, 31 Ark. 657; Ball *v.* Fulton County, 31 Ark. 379.

Indiana.—Chicago, etc., R. Co. *v.* Lawrence,

of a cause of action or defense are not disclosed a general demurrer will be sus-

169 Ind. 319, 79 N. E. 363, 82 N. E. 768; Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; McFarlan Carriage Co. *v.* Potter, 153 Ind. 107, 53 N. E. 465; State *v.* Workingmen's Bldg., etc., Fund, etc., Assoc., 152 Ind. 278, 53 N. E. 168; Rodgers *v.* Baltimore, etc., R. Co., 150 Ind. 397, 49 N. E. 453; Clow *v.* Brown, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057; Louisville, etc., R. Co. *v.* Lynch, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293; Starkey *v.* Starkey, 136 Ind. 349, 36 N. E. 287; Garard *v.* Garard, 135 Ind. 15, 34 N. E. 442, 809; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Sheeks *v.* Erwin, 130 Ind. 31, 29 N. E. 11; De Hart *v.* Etnire, 121 Ind. 242, 23 N. E. 77; Brazil Block Coal Co. *v.* Gaffney, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. Rep. 422, 4 L. R. A. 850; Ratliff *v.* Stretch, 117 Ind. 526, 20 N. E. 438; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; Pittsburg, etc., R. Co. *v.* Hixon, 110 Ind. 225, 11 N. E. 285; Cincinnati, etc., R. Co. *v.* Gaines, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334; Thomson *v.* Madison Bldg., etc., Assoc., 103 Ind. 279, 2 N. E. 735; Louisville, etc., R. Co. *v.* Shanklin, 98 Ind. 573; Evansville *v.* Worthington, 97 Ind. 282; Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297; Johnston Harvester Co. *v.* Bartley, 94 Ind. 131; Williamson *v.* Yingling, 93 Ind. 42; Weik *v.* Pugh, 92 Ind. 382; Louisville, etc., R. Co. *v.* Krinning, 87 Ind. 351; Wright *v.* Williams, 83 Ind. 421; Grand Rapids, etc., R. Co. *v.* Jones, 81 Ind. 523; Greencastle *v.* Martin, 74 Ind. 449, 39 Am. Rep. 93; Knox *v.* Wible, 73 Ind. 233; Trayser Piano Co. *v.* Kirschner, 73 Ind. 183; Gabe *v.* McGinnis, 68 Ind. 538; Hyatt *v.* Mattingly, 68 Ind. 271; Terrell *v.* State, 68 Ind. 155; Davis *v.* State, 68 Ind. 104; Dale *v.* Thomas, 67 Ind. 570; Jameson *v.* Bartholomew County, 64 Ind. 524; Hampson *v.* Fall, 64 Ind. 382; Goshen *v.* Kern, 63 Ind. 468, 30 Am. Rep. 234; Sibbitt *v.* Stryker, 62 Ind. 41; Fleming *v.* Easter, 60 Ind. 399; Schee *v.* McQuilken, 59 Ind. 269; Holcraft *v.* Mellott, 57 Ind. 539; Hart *v.* Crawford, 41 Ind. 197; Hazzard *v.* Heacock, 39 Ind. 172; Fultz *v.* Wycoff, 25 Ind. 321; Godfrey *v.* Godfrey, 17 Ind. 6, 79 Am. Dec. 448; Evansville, etc., Traction Co. *v.* Broermann, 40 Ind. App. 47, 80 N. E. 972; Nichols *v.* Berning, 37 Ind. App. 109, 76 N. E. 776; Dunkirk *v.* Wallace, (App. 1896) 45 N. E. 614; Hindman *v.* Timme, 8 Ind. App. 416, 35 N. E. 1046; American Wire Nail Co. *v.* Connelly, 8 Ind. App. 398, 35 N. E. 721; Sluyter *v.* Union Central L. Ins. Co., 3 Ind. App. 312, 29 N. E. 608.

Indian Territory.— Minter *v.* Green 3 Indian Terr. 761, 49 S. W. 48; Fletcher *v.* Dulaney, 1 Ind. Terr. 674, 43 S. W. 955.

Iowa.— Dockstader *v.* Young Men's Christian Assoc., (1906) 109 N. W. 906; Koboliska *v.* Swehla, 107 Iowa 124, 77 N. W. 576; Parkyn *v.* Travis, 50 Iowa 436; Simpson Centenary College *v.* Bryan, 50 Iowa 293; McCormick *v.* Basal, 46 Iowa 235; Byington *v.* Robertson, 17 Iowa 562; Byington *v.* Woods, 13 Iowa 17.

Kansas.— Burnette *v.* Elliott, 72 Kan. 624, 84 Pac. 374; Street R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012; McPherson *v.* Kingsbaker, 22 Kan. 646; Western Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 347.

Kentucky.— Riedel *v.* Com., 118 Ky. 926, 82 S. W. 635, 26 Ky. L. Rep. 898; Com. *v.* Ginn, 111 Ky. 110, 63 S. W. 467, 23 Ky. L. Rep. 521; Smoot *v.* Wainscott, 89 S. W. 176, 28 Ky. L. Rep. 233; Ingram *v.* Turner, 51 S. W. 148, 21 Ky. L. Rep. 283.

Minnesota.— Dewey *v.* Leonard, 14 Minn. 153.

Missouri.— McAdam *v.* Scudder, 127 Mo. 345, 30 S. W. 168; Cockerill *v.* Stafford, 102 Mo. 57, 14 S. W. 813; Leu *v.* St. Louis Transit Co., 110 Mo. App. 458, 85 S. W. 137; Ball *v.* Neosho, 109 Mo. App. 683, 83 S. W. 777; Eads *v.* Gains, 58 Mo. App. 586; Hirsch *v.* U. S. Grand Lodge O. B. A., 56 Mo. App. 101.

Nebraska.— Stewart *v.* Bole, 61 Nebr. 193, 85 N. W. 33; Fremont, etc., R. Co. *v.* Harlin, 50 Nebr. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417; Rathburn *v.* Burlington, etc., R. Co., 16 Nebr. 441, 20 N. W. 390; Mills *v.* Rice, 3 Nebr. 76.

New York.— Marie *v.* Garrison, 83 N. Y. 14; Prindle *v.* Caruthers, 15 N. Y. 425; Hadley *v.* Garner, 116 N. Y. App. Div. 68, 101 N. Y. Suppl. 777; Warren *v.* Philips, 30 Barb. 646; Richards *v.* Edick, 17 Barb. 260; Graham *v.* Camman, 5 Duer 697; Smith *v.* Greenin, 2 Sandf. 702; Fleck *v.* Friedman, 49 Misc. 220, 97 N. Y. Suppl. 231; Persons *v.* Gardiner, 26 Misc. 663, 56 N. Y. Suppl. 822 [*affirmed* in 42 N. Y. App. Div. 490, 56 N. Y. Suppl. 822, 59 N. Y. Suppl. 463]; Williams *v.* Williams, 14 Misc. 79, 35 N. Y. Suppl. 263; Graham *v.* Dunnigan, 4 Abb. Pr. 426; Hewit *v.* Mason, 24 How. Pr. 366; Cheney *v.* Fisk, 22 How. Pr. 236; Mead *v.* Mali, 15 How. Pr. 347 [*affirmed* in 25 Barb. 578]; Graham *v.* Camman, 13 How. Pr. 360; Bank of North America *v.* Suydam, Code Rep. N. S. 325.

North Carolina.— Wood *v.* Kincaid, 144 N. C. 393, 57 S. E. 4; Seaboard Air Line R. Co. *v.* Main, 132 N. C. 445, 43 S. E. 930; Allen *v.* Carolina Cent. R. Co., 120 N. C. 548, 27 S. E. 76; Daniels *v.* Baxter, 120 N. C. 14, 26 S. E. 635.

Ohio.—Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; Schrock *v.* Cleveland, 29 Ohio St. 499; Spice *v.* Steinruck, 14 Ohio St. 213; Golley, etc., Iron Works *v.* Callan, 9 Ohio Cir. Ct. 217, 4 Ohio Cir. Dec. 233; Jenkinson *v.* Stoneman, 4 Ohio Dec. (Reprint) 289, 1 Clev. L. Rep. 218; McLain *v.* Chrisman, 2 Ohio Dec. (Reprint) 317, 2 West. L. Month. 417.

Oklahoma.— Guthrie *v.* Shaffer, 7 Okla. 459, 54 Pac. 698.

Oregon.— Jackson *v.* Jackson, 17 Oreg. 110, 19 Pac. 847.

South Carolina.— Pierson *v.* Green, 69 S. C. 559, 48 S. E. 624; Schumpert *v.* Southern R.

tained. And this rule is applicable either under the code or common-law procedure.[21]

k. Want of Profert.[22] Where profert should be made, want of it is ground for demurrer under the common-law procedure.[23] Before the statute of Anne,[24] want of profert was a substantial defect of which advantage might have been taken on general demurrer;[25] but that statute required the objection to be taken by special demurrer,[26] and in this country, while there has been some conflict in the authorities as to the nature of the defect as formal or substantial, and as to the propriety of the remedy by general or special demurrer, it is generally held

Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; Smith *v.* Bradstreet Co., 63 S. C. 525, 41 S. E. 763; Lockwood *v.* Charleston Bridge Co., 60 S. C. 492, 38 S. E. 112, 629; State *v.* Jeter, 59 S. C. 483, 38 S. E. 124; Cave *v.* Gill, 59 S. C. 256, 37 S. E. 817; Sandel *v.* Atlanta L. Ins. Co., 53 S. C. 241, 31 S. E. 230; Garrett *v.* Weinberg, 50 S. C. 310, 27 S. E. 770; Rutherford *v.* Johnson, 49 S. C. 465, 27 S. E. 470; Buist *v.* Melchers, 44 S. C. 46, 21 S. E. 449; Jackins *v.* Dickinson, 39 S. C. 436, 17 S. E. 996; Crocker *v.* Collins, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 752.

Utah.— Nelson *v.* Henrichsen, 31 Utah 191, 87 Pac. 267.

Washington.—Weiser *v.* Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932; Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147; Fares *v.* Gleason, 14 Wash. 657, 45 Pac. 314; McQuesten *v.* Merrill, 12 Wash. 335, 41 Pac. 56.

Wisconsin.—Wilbert *v.* Sheboygan, 121 Wis. 518, 99 N. W. 330; Olson *v.* Phœnix Mfg. Co., 103 Wis. 337, 79 N. W. 409; Doolittle *v.* Laycock, 103 Wis. 334, 79 N. W. 408; Johnston *v.* Northwestern Live-Stock Ins. Co., 94 Wis. 117, 68 N. W. 868; Allen *v.* Chicago, etc., R. Co., 94 Wis. 93, 68 N. W. 873; Young *v.* Lynch, 66 Wis. 514, 29 N. W. 224; Hiles *v.* La Flesh, 59 Wis. 465, 18 N. W. 435; A. C. Conn Co. *v.* Little Suamico Lumber, etc., Co., 55 Wis. 580, 13 N. W. 464; Morse *v.* Gilman, 16 Wis. 504; Newman *v.* Kershaw, 10 Wis. 333; Markwell *v.* Waushara County, 10 Wis. 73; Bateman *v.* Johnson, 10 Wis. 1; Bach *v.* Bell, 7 Wis. 433; Flanders *v.* McVickar, 7 Wis. 372.

Wyoming.— Butler *v.* Conwell, 14 Wyo. 166, 82 Pac. 950.

United States.— Muser *v.* Robertson, 17 Fed. 500, 21 Blatchf. 368; Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

See 39 Cent. Dig. tit. "Pleading," § 409.

Same rule in Canada.— Atty.-Gen. *v.* Midland R. Co., 3 Ont. 511.

If the allegations are susceptible of two constructions, one constituting a valid cause of action and the other not, a motion and not a demurrer is the proper remedy. Stieglitz *v.* Belding, 20 Misc. (N. Y.) 297, 45 N. Y. Suppl. 670.

21. *Alabama.*— Bliss *v.* Anderson, 31 Ala. 612, 70 Am. Dec. 511; Hardy *v.* Montgomery Branch Bank, 15 Ala. 722; Posey *v.* Hair, 12 Ala. 567.

Illinois.— Merriweather *v.* Smith, 3 Ill. 30.

Indiana.—Chicago, etc., R. Co. *v.* Lawrence, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768; Connersville *v.* Connersville Hydraulic Co., 86 Ind. 235; Williamson *v.* Yingling, 80 Ind. 379; Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370.

New York.— Phillips *v.* Sonora Copper Co., 90 N. Y. App. Div. 140, 86 N. Y. Suppl. 200; Spear *v.* Downing, 34 Barb. 522.

Texas.— Millican *v.* McNeil, (Civ. App. 1899) 50 S. W. 428.

22. See also *supra*, VI, F, 1, c.

23. Pickett *v.* Real Estate Bank, 8 Ark. 224; Pryor *v.* Watson, 8 Ark. 111; Beebe *v.* Real Estate Bank, 4 Ark. 124; McCormick *v.* Kenyon, 13 Mo. 131 (where the statute provided that want of profert was a substantial objection); Van Rensselaer *v.* Saunders, 2 How. Pr. (N. Y.) 250; Williams *v.* Bryan, 5 Coldw. (Tenn.) 104 (recognizing the remedy at common law as well as under the statute in Tennessee); Anderson *v.* Allison, 2 Head (Tenn.) 122.

Where special demurrers are abolished and the omission of profert is considered of such formal nature as before could have been raised only by special demurrer, the objection is held to be one which cannot be noticed on demurrer at all. Strange *v.* Powell, 15 Ala. 452; U. S. *v.* Ritchie, 3 Mackey (D. C.) 162. So in Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265, it was held that under the statute of jeofails in Kentucky, an omission to make profert was no cause for general demurrer and that as by statute all defects in form were cured and special demurrers were abolished, want of profert could not thereafter be fatal at any stage; that under the statute of Anne the defect was a formal one in Kentucky; that the discrepancy between Chitty (1 Chitty Pl. 350), in stating that the omission could only be taken advantage of by special demurrer, and the contrary view as expounded in Leyfield's Case, 10 Coke 88, 77 Eng. Reprint 1057, may be reconciled on the statute of Anne, the one stating the law before and the other stating it after the statute; and that Metcalf *v.* Standeford, 1 Bibb (Ky.) 618, is based upon the authority of Leyfield's Case, 10 Coke 94.

24. 4 & 5 Anne, c. 16; Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265.

25. Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265 [*citing* Leyfield's Case, 10 Coke 88, 77 Eng. Reprint 1057].

26. Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265 (where it is shown also that by 16 & 17 Car. II, c. 8, it was enacted "that after verdict, judgment shall not be staid or re-

that the demurrer must be a special one.[27] The code practice does not require profert to be made;[28] but the failure to file or attach a copy of a written instrument sued on, where such filing or attaching is required by statute, is ground for demurrer in some states,[29] although in most of the code states a demurrer does not lie.[30]

l. Want or Insufficiency of Signature or Affidavit. Neither the want of a signature,[31] or of an affidavit or verification,[32] to a pleading, nor its insufficiency,[33] is ground for demurrer, but a motion to strike from the files should be employed.[34] But the sustaining of a demurrer to a pleading which required an affidavit in order to authorize the introduction of evidence is not prejudicial error.[35]

versed for default, of alleging the bringing into court any bond, bill, or other deed mentioned in the pleadings, or of any letters testamentary or of administration"; that this statute did not, in terms, declare that such omission was only a matter of form, although that it was so was the interpretation of the spirit of the statute by the courts, and that this construction, was no doubt questioned, and for good reason; and therefore the statute of Anne, recapitulating the substance of that of Charles, expressly legalized the judicial construction, by declaring that advantage shall not be taken of a lack of profert, except by special demurrer).

27. *Alabama.*— Strange *v.* Powell, 15 Ala. 452; Mallory *v.* Matlock, 7 Ala. 757; Briggs *v.* Greenlee, Minor 123.

Arkansas.— McDermott *v.* Cable, 23 Ark. 200. *Contra*, Alston *v.* Whiting, 6 Ark. 402; Buckner *v.* Real Estate Bank, 4 Ark. 440; Beebe *v.* Real Estate Bank, 4 Ark. 124.

District of Columbia.— U. S. *v.* Ritchie, 3 Mackey 162.

Kentucky.—Anderson *v.* Barry, 2 J. J. Marsh. 265. *Contra*, Metcalf *v.* Standeford, 1 Bibb 618.

Maine.— Philpot *v.* McArthur, 10 Me. 127.

Missouri.— Kearney *v.* Woodson, 4 Mo. 114, statute.

New Hampshire.— Brown *v.* Copp, 5 N. H. 223.

New Jersey.— New York Trap-Rock Co. *v.* Brown, 61 N. J. L. 536, 43 Atl. 100.

Pennsylvania.— Stewart *v.* Dearing, 13 Phila. 175.

Tennessee.— Everly *v.* Marable, 2 Yerg. 113.

Vermont.— Way *v.* Swift, 12 Vt. 390.

United States.— Burnham *v.* Webster, 4 Fed. Cas. No. 2,178, 2 Ware 240.

See 39 Cent. Dig. tit. "Pleading," § 509.

Contra.— Hughes *v.* Sellers, 5 Harr. & J. (Md.) 432. And see McDorman *v.* Jellison, 7 Blackf. (Ind.) 304.

Excuse for failure to make profert.— The want of an averment in the declaration that a sealed instrument sued on is lost, so as to dispense with profert, must be taken by special demurrer. Boyd *v* Com., 36 Pa. St. 355.

28. Welles *v.* Webster, 9 How. Pr. (N. Y.) 251. See also *infra*, IX, A, 2.

29. Seawright *v.* Coffman, 24 Ind. 414; Williamson *v.* Foreman, 23 Ind. 540, 85 Am. Dec. 475. *Contra*, Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

30. Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276; Lash *v.* Christie, 4 Nebr. 262.

31. Prim *v.* Davis, 2 Ala. 24; Crawford *v.* Feder, 34 Fla. 397, 16 So. 287. *Contra*, Grand Lodge B. L. F. *v.* Cramer, 60 Ill. App. App. 212; Com. *v.* Hoobaugh, 5 Pa. Dist. 502.

32. *Arkansas.*— Greenfield *v.* Carlton, 30 Ark. 547; Hicks *v.* Branton, 21 Ark. 186; Allis *v.* Bender, 14 Ark. 625; Bolinger *v.* Fowler, 14 Ark. 27.

California.— Butterfield *v.* Graves, 138 Cal. 155, 71 Pac. 510.

Florida.— State *v.* Maxwell, 19 Fla. 31; Hagler *v.* Mercer, 6 Fla. 342.

Indiana.— Champ *v.* Kendrick, 130 Ind. 549, 30 N. E. 787; State *v.* Ruhlman, 111 Ind. 17, 11 N. E. 793; Vail *v.* Rinehart, 105 Ind. 6, 4 N. E. 218; Swihart *v.* Shaffer, 87 Ind. 208; Lentz *v.* Martin, 75 Ind. 228; Tell City Furniture Co. *v.* Nees, 63 Ind. 245; Dawson *v.* Vaughan, 42 Ind. 395; Wells *v.* Dickey, 15 Ind. 361; Denny *v.* Moore, 13 Ind. 418; J. I. Case Threshing Mach. Co. *v.* Millikan, 28 Ind. App. 686, 63 N. E. 777; Knight *v.* Knight, 6 Ind. App. 268, 33 N. E. 456. But *compare* Parker *v.* State, 8 Blackf. 292.

Kentucky.— Patrick *v.* Conrad, 2 A. K. Marsh. 43.

New York.— Nicholl *v.* Mason, 21 Wend. 339.

Texas.— Gulf, etc., R. Co. *v.* Wilson, 7 Tex. Civ. App. 128, 26 S. W. 131.

Virginia.— Lewis *v.* Hicks, 96 Va. 91, 30 S. E. 466.

See 39 Cent. Dig. tit. "Pleading," § 423.

Contra.— Scottish Union, etc., Ins. Co. *v.* Dangaix, 103 Ala. 388, 15 So. 956; Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138; Hall *v.* Wallace, 25 Ala. 438; Hart *v.* Turk, 15 Ala. 675; Hunt *v.* Test, 8 Ala. 713, 42 Am. Dec. 659; McAlpin *v.* May, 1 Stew. (Ala.) 520; Bellamy *v.* Oliver, 65 Me. 108; Fogg *v.* Fogg, 31 Me. 302; Trenton Bank *v.* Wallace, 9 N. J. L. 83; New York L. Ins. Co. *v.* Malone, (Tex. Civ. App. 1906) 95 S. W. 585; Nixon *v.* Malone, (Tex. Civ. App. 1906) 95 S. W. 577; Nasworthy *v.* Draper, (Tex. Civ. App. 1894) 28 S. W. 564.

33. State Bank *v.* Ward, 8 Ark. 506; Little Rock *v.* State Bank, 8 Ark. 227; Newby *v.* Rogers, 54 Ind. 193; Webb *v.* Clark, 2 Sandf. (N. Y.) 647.

34. See *infra*, XII, C, 1, c, (VI).

35. Snell *v.* E. Tosetti Brewing Co., 71 Ill. App. 650.

m. Miscellaneous Objections. The following have been held not grounds for demurrer: Allegations on information and belief;[36] alternative allegations;[37] argumentativeness;[38] clerical errors;[39] defects in title of pleading;[40] delay in pleading;[41] failure to serve a copy of a pleading, as required by statute;[42] falsity of allegations;[43]

36. Jones *v.* Pearl Min. Co., 20 Colo. 417, 38 Pac. 700; Carpenter *v.* Smith, 20 Colo. 39, 36 Pac. 789; Robinson *v.* Ferguson, 119 Iowa 325, 93 N. W. 350; Ketcham *v.* Zerega, 1 E. D. Smith (N. Y.) 553; Howell *v.* Fraser, 6 How. Pr. (N. Y.) 221; Stoutenburg *v.* Lybrand, 13 Ohio St. 228. *Contra*, State *v.* McGarry, 21 Wis. 496, holding that a denial on information and belief of matter contained in a public record may be attacked by demurrer.

37. *Indiana.*— Indianapolis, etc., Traction Co. *v.* Henderson, 39 Ind. App. 324, 79 N. E. 539.

Iowa.— Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562.

New York.— Everitt *v.* Conklin, 90 N. Y. 645; Marie *v.* Garrison, 83 N. Y. 14; Hasberg *v.* Moses, 81 N. Y. App. Div. 199, 80 N. Y. Suppl. 867.

North Carolina.— Daniels *v.* Baxter, 120 N. C. 14, 26 S. E. 635.

United States.— Matz *v.* Chicago, etc., R. Co., 85 Fed. 180.

Contra.— See Jamison *v.* King, 50 Cal. 132, where demurrer sustained to complaint on ground that it was uncertain and ambiguous.

38. *Indiana.*— Clauser *v.* Jones, 100 Ind. 123; Ford *v.* Griffin, 100 Ind. 85; Dickson *v.* Lambert, 98 Ind. 487; Barkley *v.* Mahon, 95 Ind. 101; State *v.* Wylie, 86 Ind. 396; Hisey *v.* Troutman, 84 Ind. 115; Voss *v.* Prier, 71 Ind. 128; Judah *v.* Vincennes University, 23 Ind. 272; Williams *v.* Port, 14 Ind. 569; French *v.* Howard, 14 Ind. 455; Flanagan *v.* Reitemier, 26 Ind. App. 243, 59 N. E. 389; Brower *v.* Ream, 15 Ind. App. 51, 42 N. E. 824.

Iowa.— Davis *v.* Bonar, 15 Iowa 171.

Nebraska.— Missouri Pac. R. Co. *v.* Hemingway, 63 Nebr. 610, 88 N. W. 673.

New York.— Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 463; Gray *v.* Fuller, 17 N. Y. App. Div. 29, 44 N. Y. Suppl. 883; Thompson *v.* Remsen, 27 Misc. 279, 58 N. Y. Suppl. 424; National Bank of Commerce *v.* New York Bank, 17 Misc. 691, 41 N. Y. Suppl. 471.

North Carolina.— Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351; Daniels *v.* Baxter, 120 N. C. 14, 26 S. E. 635; Smith *v.* Summerfield, 108 N. C. 284, 12 S. E. 997.

See 39 Cent. Dig. tit. "Pleading," § 416.

An argumentative denial is not bad on demurrer, under the code, but is subject to a motion to strike. Oren *v.* St. Joseph County, 157 Ind. 158, 60 N. E. 1019.

At common law, however, the objection could be urged by a special, but not by a general, demurrer. Garnett *v.* Yoe, 17 Ala. 74; Engelke, etc., Milling Co. *v.* Grunthal, 46 Fla. 349, 35 So. 17; Cobb *v.* Heron, 180 Ill. 49, 54 N. E. 189; Wright *v.* Craig, 116 Ill. App. 493; Hurst *v.* Purvis, 5 Blackf. (Ind.) 557; Severy *v.* Nye, 58 Me. 246; Quimby *v.* Melvin, 28 N. H. 250; De Long *v.* Spring Lake Beach Imp. Co., 74 N. J. L. 250, 66 Atl. 591; Dime Sav. Inst. *v.* Hoboken, 42 N. J. L. 283; Salt Like City Bank *v.* Hendrickson, 40 N. J. L. 52; Hawk *v.* Seagraves, 34 N. J. L. 355; Gordon *v.* Mackay, 34 N. J. L. 286; Arthur *v.* Brooks, 14 Barb. (N. Y.) 533; Smith *v.* Oliphant, 2 Sandf. (N. Y.) 306; Spencer *v.* Southwick, 9 Johns. (N. Y.) 314; Snider *v.* Croy, 2 Johns. (N. Y.) 227; Willey *v.* Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; Walker *v.* Wooster, 61 Vt. 403, 17 Atl. 792; Woodward *v.* French, 31 Vt. 337; Catlin *v.* Lyman, 16 Vt. 44; Patchin *v.* Doolittle, 3 Vt. 457; Patterson *v.* Ross, 6 U. C. C. P. 194; Le Mesurier *v.* Sherwood, 7 U. C. Q. B. 530; Barnes *v.* McKay, 5 U. C. Q. B. 246. See also Moseley *v.* Hunter, 25 N. C. 543. Rule applies to argumentative denial. Wallis Iron Works *v.* Coster, 56 N. J. L. 351, 28 Atl. 592; Dime Sav. Inst. *v.* Hoboken, 42 N. J. L. 283.

In those jurisdictions where special demurrers have been abolished, a demurrer will not lie for argumentativeness. Sims *v.* Eiland, 57 Miss. 83.

39. *Maine.*— Wood *v.* Decoster, 66 Me. 542; Penley *v.* Record, 66 Me. 414.

New Hampshire.— Berry *v.* Osborn, 28 N. H. 279.

New York.— Church *v.* Standard R. Signal Co., 30 Misc. 261, 63 N. Y. Suppl. 326 [*reversed* on other grounds in 52 App. Div. 407, 65 N. Y. Suppl. 116].

Texas.— White *v.* Manning, (Civ. App. 1907) 102 S. W. 1160.

Canada.— Hayward *v.* Harper, 4 U. C. Q. B. 489.

See 39 Cent. Dig. tit. "Pleading," § 421.

Compare Meyer *v.* Ross, 119 Ill. App. 485.

40. Gross *v.* Gross, 25 Misc. (N. Y.) 297, 54 N. Y. Suppl. 572 [*affirmed* in 26 Misc. 385, 56 N. Y. Suppl. 219]; Cunningham *v.* Phillips, Tapp. (Ohio) 152; Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

The objection that the petition is not indorsed, "An action to try title as well as for damages," cannot be raised by "general" demurrer. Echols *v.* Jacobs Mercantile Co., 38 Tex. Civ. App. 65, 84 S. W. 1082.

41. Knott *v.* Clements, 13 Ark. 335. Northum *v.* Kellogg, 15 Conn. 569; Thomas *v.* Van Doren, 6 Mo. 201.

42. Ghiradelli *v.* Greene, 56 Cal. 629.

43. McGregor *v.* McGregor, 21 Iowa 441; State *v.* Davenport, 12 Iowa 335; Torrence *v.* Strong, 4 Oreg. 39; Hansen *v.* Yturria, (Tex. Civ. App. 1898) 48 S. W. 797; Walhoefer *v.* Hobgood, 18 Tex. Civ. App. 291, 44 S. W. 566.

But a plea in contravention of the record in the same cause is bad on demurrer. People *v.* Shaw, 13 Ill. 581; Blackwell *v.* Pendergast, 132 Ind. 550, 32 N. E. 319; Lasly *v.*

inconsistent allegations;[44] insufficiency of service of writ;[45] order of pleading;[46] pleading evidence;[47] repugnancy;[48] surplusage, including irrelevant, immaterial, and redundant allegations;[49] unfilled blanks in the pleading unless it is thereby

Booth, 5 T. B. Mon. (Ky.) 378. *Contra*, Watson *v.* Mercer, 9 Lanc. Bar (Pa.) 97.

44. See *infra*, VI, F, 3, c.

45. People *v.* Mt. Morris, 137 Ill. 576, 27 N. E. 757; Robinson *v.* National Stock-Yard Co., 12 Fed. 361, 20 Blatchf. 513.

46. Cleveland *v.* Chandler, 3 Stew. (Ala.) 489.

47. Hickory County *v.* Fugate, 143 Mo. 71, 44 S. W. 789. *Contra*, Hobson *v.* New Mexico, etc., R. Co., 2 Ariz. 171, 11 Pac. 545, special demurrer.

In some cases, however, it has been held that where the ultimate facts constituting the cause of action or defense are not alleged, but only the evidentiary facts which go to prove them, the pleading is bad on demurrer, on the ground that it does not state facts sufficient to constitute a cause of action or defense. Simons *v.* Bedell, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35; McCaughey *v.* Schutte, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176; Corwin *v.* Corwin, 9 Barb. (N. Y.) 219 [*reversed* on other grounds in 6 N. Y. 342, 57 Am. Dec. 453]; Pattison *v.* Taylor, 8 Barb. (N. Y.) 250; Ensign *v.* Dickinson, 19 N. Y. Suppl. 438; Fidler *v.* Delavan, 20 Wend. (N. Y.) 57. See also Brainard *v.* Simmons, 58 Iowa 464, 9 N. W. 382, 12 N. W. 484. *Compare* Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657. But in other cases it has been held that a motion, and not a demurrer, is the proper remedy. Missouri Pac. R. Co. *v.* Hemingway, 63 Nebr. 610, 88 N. W. 673; Jaques *v.* Dawes, 3 Nebr. (Unoff.) 752, 92 N. W. 570; Childers *v.* Verner, 12 S. C. 1. However, if the pleading contains evidence which is merely in addition to, but not in place of, ultimate facts, and sufficient ultimate facts appear to constitute a cause of action or defense, the evidence will be deemed surplusage and will not render the pleading bad on general demurrer (Gulf, etc., R. Co. *v.* Pool, 70 Tex. 713, 8 S. W. 535; Croft *v.* Rains, 10 Tex. 520; Nipp *v.* Parrish, 63 Fed. 677, 11 C. C. A. 398), but the pleading will be held good for only what the evidence proves (Ohm *v.* San Francisco, (Cal. 1890) 25 Pac. 155).

At common law, if a pleading states evidentiary instead of ultimate facts, and the evidentiary matters alleged are sufficient to establish the ultimate facts, the pleading is bad on special but not on general demurrer, but if the evidentiary matters alleged are not sufficient to establish the ultimate facts, the defect is substantial and may be reached by general demurrer. Camp *v.* Hall, 39 Fla. 535, 22 So. 792; Anglin *v.* Barlow, (Tex. Civ. App. 1898) 45 S. W. 827. See also Henslee *v.* Henslee, 5 Tex. Civ. App. 367, 24 S. W. 321.

48. Forst *v.* Elston, 13 Ind. 482; Walters *v.* Chance, 73 Kan. 680, 85 Pac. 779.

Nor is a second complaint, in substitution for the original, subject to demurrer for the reason that its allegations are antagonistic to those of the original. Lemmon *v.* Reed, 14 Ind. App. 655, 43 N. E. 454; Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38; Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351.

But a demurrer lies if the inconsistency is such as to destroy the entire meaning of the pleading. McDonough *v.* Kane, 75 Ind. 181; Forst *v.* Elston, 13 Ind. 482. So where, because of the repugnancy of statements, no cause of action is pleaded, a general demurrer is available. Florida Cent., etc., R. Co. *v.* Ashmore, 43 Fla. 272, 32 So. 832; Mix *v.* People, 92 Ill. 549; Wann *v.* McGoon, 3 Ill. 74; Roberts *v.* Indianapolis St. R. Co., 158 Ind. 634, 64 N. E. 217; Barber *v.* Summers, 5 Blackf. (Ind.) 339; Springfield Second Nat. Bank *v.* Hart, 8 Ind. App. 19, 35 N. E. 302; Rowan *v.* Lee, 3 J. J. Marsh. (Ky.) 97; Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268.

But in California, and in the other states having a similar statute, repugnancy would subject a pleading to a special demurrer on the ground of uncertainty. Heeser *v.* Miller, 77 Cal. 192, 19 Pac. 375.

49. *Alabama.*— Garnett *v.* Yoe, 17 Ala. 74.

California.— Bremner *v.* Leavitt, 109 Cal. 130, 41 Pac. 859.

Colorado.— Dumars *v.* Denver, 16 Colo. App. 375, 65 Pac. 580.

Connecticut.— Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

Florida.— Western Union Tel. Co. *v.* Wells, 50 Fla. 474, 39 So. 838, 111 Am. St. Rep. 129, 2 L. R. A. N. S. 1072.

Georgia.— Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764.

Idaho.— Porter *v.* Allen, 8 Ida. 358, 69 Pac. 105, 236.

Indiana.— Judah *v.* Vincennes University, 23 Ind. 272.

Iowa.— *In re* McMurray, 107 Iowa 648, 78 N. W. 691; Kinyon *v.* Palmer, 18 Iowa 377; Sioux City School Dist. Tp. *v.* Pratt, 17 Iowa 16.

Kansas.— Le Roy Bank *v.* Harding, 1 Kan. App. 389, 41 Pac. 680.

Minnesota.— Daniels *v.* Bradley, 4 Minn. 158; Loomis *v.* Youle, 1 Minn. 175.

Montana.— Plymouth Gold Min. Co. *v.* U. S. Fidelity, etc., Co., 35 Mont. 23, 88 Pac. 565; Butte *v.* Peasley, 18 Mont. 303, 45 Pac. 210.

New Jersey.— Eichlin *v.* Holland Tramway Co., 68 N. J. L. 78, 52 Atl. 210.

New York.— Corn *v.* Levy, 97 N. Y. App. Div. 48, 89 N. Y. Suppl. 658; Hawley *v.* Hawley, 95 N. Y. App. Div. 274, 88 N. Y. Suppl. 606; Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 79 N. Y. Suppl. 244; Coatsworth *v.* Lehigh Valley R. Co., 24 N. Y. App. Div. 273, 48 N. Y. Suppl. 511 [*affirmed* in 156

rendered incomprehensible;[50] and verboseness.[51] So the propriety of permitting an amendment to a pleading should be raised by objection to the allowance of the amendment or by motion to strike, and not by demurrer to the pleading as amended.[52] The remedy at common law for an insufficient venue was a demurrer,[53] and an informal commencement or conclusion of a pleading was a ground for special but not general demurrer.[54] An innuendo is not issuable, and furnishes no warrant for sustaining a demurrer.[55]

2. Demurrer to Complaint[56] — a. Another Action Pending.[57] That a declaration or complaint shows upon its face the pendency of another action between the same parties and for the same cause of action is ground for demurrer, both at common law and under the codes.[58]

b. Failure to State Cause of Action — (i) *In General.*[59] The failure of the complaint to state facts sufficient to constitute a cause of action is a ground for

N. Y. 451, 51 N. E. 301]; Bostwick *v.* Dry Goods Bank, 67 Barb. 449; Watson *v.* Husson, 1 Duer 242 [*affirmed* in 14 N. Y. 60]; Fry *v.* Bennett, 5 Sandf. 54; Smith *v.* Greenin, 2 Sandf. 702; Burghen *v.* Erie R. Co., 53 Misc. 457, 103 N. Y. Suppl. 292 [*affirmed* in 123 N. Y. App. Div. 204, 108 N. Y. Suppl. 311]; Budd *v.* Howard Thomas Co., 40 Misc. 52, 81 N. Y. Suppl. 152; Coddington *v.* Union Trust Co., 36 Misc. 396, 73 N. Y. Suppl. 710; Ward *v.* Ward, 5 Abb. Pr. N. S. 145; People *v.* New York, 17 How. Pr. 56; Bank of North America *v.* Suydam, Code Rep. N. S. 325; Smith *v.* Fowle, 12 Wend. 9. But see Emmons *v.* McMillan Co., 20 Misc. 400, 45 N. Y. Suppl. 1026 [*affirmed* in 21 Misc. 638, 47 N. Y. Suppl. 1099].

North Carolina.— Smith *v.* Summerfield, 108 N. C. 284, 12 S. E. 997.

Ohio.— Blackwell *v.* Montgomery, 1 Handy 40, 12 Ohio Dec. (Reprint) 16.

Pennsylvania.— Jennings *v.* Beale, 158 Pa. St. 283, 27 Atl. 948; Agque *v.* Philadelphia, etc., R. Co., 14 Pa. Co. Ct. 199.

South Carolina.— Bolt *v.* Gray, 54 S. C. 95, 32 S. E. 148.

South Dakota.— Campbell *v.* Equitable L. & T. Co., 14 S. D. 483, 85 N. W. 1015; McGillivray *v.* McGillivray, 9 S. D. 187, 68 N. W. 316.

Utah.— Campbell *v.* Taylor, 3 Utah 325, 3 Pac. 445.

Washington.— Isaacs *v.* Holland, 4 Wash. 54, 29 Pac. 976.

United States.— Cheatham *v.* Edgefield Mfg. Co., 131 Fed. 118; Fletcher *v.* New York L. Ins. Co., 13 Fed. 526, 4 McCrary 440.

See 39 Cent. Dig. tit. "Pleading," §§ 414, 415.

But a wholly irrelevant pleading is demurrable. Lee Bank *v.* Kitching, 7 Bosw. (N. Y.) 664.

"A demurrer complains of too little and not too much matter in a declaration." Bean *v.* Ayers, 67 Me. 482.

In Texas surplusage may be objected to by special exception. Dobbin *v.* Bryan, 5 Tex. 276.

Defective allegations of immaterial matter cannot make a pleading demurrable. Gardner *v.* California Guarantee Inv. Co., 137 Cal. 71, 69 Pac. 844.

50. Knightstown First Nat. Bank *v.* Deitch, 83 Ind. 131.

Remedy is by a motion to make more definite and certain.— Lentz *v.* Martin, 75 Ind. 228; Baugh *v.* Boles, 66 Ind. 376; Smelser *v.* Pugh, 29 Ind. App. 614, 64 N. E. 943.

51. Williams *v.* Sexton, 19 Wis. 42.

52. Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517.

In Louisiana, however, an exception will properly lie in such a case. Angamar *v.* New Orleans Ins. Co., 10 La. Ann. 178.

53. Briggs *v.* Nantucket Bank, 5 Mass. 94; Upper Canada Bank *v.* Owen, 26 U. C. Q. B. 154; Ferguson *v.* Howick Tp., 25 U. C. Q. B. 547.

54. *Arkansas.*— Allis *v.* Bender, 14 Ark. 625; State *v.* Saddler, 6 Ark. 235.

Illinois.— Harding *v.* Horton, 79 Ill. App. 123.

New Hampshire.— Leslie *v.* Harlow, 18 N. H. 518.

New Jersey.— Conover *v.* Tindall, 20 N. J. L. 513.

Tennessee.— Turley *v.* Hornsby, 3 Lea 264; State *v.* Witherspoon, 9 Humphr. 394.

Virginia.— Cecil *v.* Early, 10 Gratt. 198.

Canada.— Hart *v.* Meyers, 7 U. C. Q. B. 416; Simpson *v.* Mode, 6 U. C. Q. B. O. S. 511.

55. Whitsett *v.* Womack, 8 Ala. 466.

56. **Statute of frauds as ground,** see Frauds, Statute of, 20 Cyc. 312.

When action barred by limitations see Limitations of Actions, 25 Cyc. 1396.

57. **What constitutes another action pending** see Abatement and Revival, 1 Cyc. 21 *et seq.*

58. *Indiana.*— Laporte *v.* Scott, 166 Ind. 78, 76 N. E. 878.

Kentucky.— Moore *v.* Sheppard, 1 Metc. 97.

New York.— Garvey *v.* New York L. Ins. Co., 14 N. Y. Civ. Proc. 106; Hornfager *v.* Hornfager, 6 How. Pr. 279.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Mt. Pleasant, etc., R. Co., 76 Pa. St. 481.

United States.— Hurst *v.* Everett, 21 Fed. 218.

See 39 Cent. Dig. tit. "Pleading," § 427.

59. **As affected by prayer for relief** see *infra*, VI, F, 2, f.

demurrer both at common law and under the codes.[60] All that is necessary, however, to sustain the pleading is that a cause of action can be reasonably inferred from the averments of the pleading.[61] The only question is whether the pleading

Cause of action barred by limitations as ground see LIMITATIONS OF ACTIONS, 25 Cyc. 1396.

Oral contract within statute of frauds as ground see FRAUDS, STATUTE OF, 20 Cyc. 311.

60. *Alabama.*— Alabama Great Southern R. Co. *v.* Sanders, 145 Ala. 449, 40 So. 402.

Arizona.— Consolidated Canal Co. *v.* Peters, 5 Ariz. 80, 46 Pac. 74.

Arkansas.— Phillips *v.* Southwestern Tel., etc., Co., 72 Ark. 478, 81 S. W. 605.

Colorado.— Brandenberg *v.* Miles, 7 Colo. 537, 4 Pac. 910; Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314.

Idaho.— Bingham County *v.* Woodin, 6 Ida. 284, 55 Pac. 662.

Indiana.— Postal *v.* Kreps, 23 Ind. App. 101, 54 N. E. 816.

Kansas.— Brown *v.* Galena Min., etc., Co., 32 Kan. 528, 4 Pac. 1013.

Maine.— Smith *v.* Abbott, 40 Me. 442.

Massachusetts.— Thomson *v.* O'Sullivan, 6 Allen 303.

Minnesota.— Dewey *v.* Leonard, 14 Minn. 153.

New York.—Roberts *v.* Bosworth, 107 N. Y. App. Div. 511, 95 N. Y. Suppl. 239; Hotchkiss *v.* Elting, 36 Barb. 38; Spear *v.* Downing, 34 Barb. 522; Budd *v.* Bingham, 18 Barb. 494; White *v.* Brown, 14 How. Pr. 282.

South Carolina.—Booker *v.* Smith, 38 S. C. 228, 16 S. E. 774.

Texas.— Holman *v.* Criswell, 13 Tex. 38.

United States.— Gause *v.* Knapp, 1 Fed. 292, 1 McCrary 75.

See 39 Cent. Dig. tit. "Pleading," § 433.

An intervention complaint may be demurred to for its failure to state a cause of action or ground of intervention, as the case may be. Shepard *v.* Murray County, 33 Minn. 519, 24 N. W. 291.

Where the averments of the pleading do not connect defendant or defendants with the injury alleged, a general demurrer will lie. Lee *v.* Emery, 10 Minn. 187; Reeves *v.* Miller, 28 Tex. 578; Osborne *v.* Holland, 1 Tex. App. Civ. Cas. § 1087; Pietsch *v.* Krause, 112 Wis. 418, 88 N. W. 223.

Where the facts showing laches appear on the face of the complaint, a demurrer will lie on the ground that the complaint does not state facts sufficient to constitute a cause of action. Mott *v.* New York Security, etc., Co., 29 Misc. (N. Y.) 39, 60 N. Y. Suppl. 357; Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765. See also Gay *v.* Havermale, 27 Wash. 390, 67 Pac. 804.

Failure to allege time renders the complaint demurrable. Shorey *v.* Chandler, 80 Me. 409, 15 Atl. 223; Cole *v.* Babcock, 78 Me. 41, 2 Atl. 545. See also Williamson *v.* Joyce, 137 Cal. 151, 69 Pac. 980. But see Denny *v.* Northwestern Christian University, 16 Ind. 220, where it was held that a demurrer would not lie where time was not material. As ground for special demurrer at common law see Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437; Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252, 75 Am. Dec. 200; People *v.* Ryder, 12 N. Y. 433; Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395; Higgins *v.* Highfield, 13 East 407. A merely indefinite allegation is not ground for demurrer, but only for motion to make more definite and certain. People *v.* Ryder, 12 N. Y. 433.

Res judicata.— Where plaintiff's pleading shows on its face that the action is barred by a former adjudication, it is subject to demurrer for want of facts. Monette *v.* Cratt, 7 Minn. 234; Seattle Nat. Bank *v.* School Dist. No. 40, 20 Wash. 368, 55 Pac. 317.

Common counts.— A general demurrer to the common counts cannot be sustained. Ross *v.* Knapp, etc., Co., 77 Ill. App. 424.

That a complaint anticipates a defense makes it subject to a demurrer for ambiguity and certainty, but not for failure to state a cause of action. Munson *v.* Bowen, 80 Cal. 572, 22 Pac. 253.

Objections raised.— A demurrer for failure to state a cause of action has been held to raise the objection of a want of proper presentation of a demand for damages against a municipal corporation. Adams *v.* Modesto, (Cal. 1900) 61 Pac. 957. At common law a general demurrer is sufficient to raise the objection that the declaration is based on an unconstitutional ordinance (Shepherd *v.* Sullivan, 166 Ill. 78, 46 N. E. 720), or that the contract sued on was illegal (Fuqua *v.* Pabst Brewing Co., 90 Tex. 298, 38 S. W. 29, 35 L. R. A. 241).

A motion to dismiss the complaint on the ground that it does not state facts constituting a cause of action has the effect of a demurrer. Rothman *v.* Kosower, 48 Misc. (N. Y.) 538, 96 N. Y. Suppl. 268.

An objection to the admission of evidence under the complaint on the trial on the ground that the complaint does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to such complaint. Harris *v.* Harris, 10 Wis. 467.

61. *Alabama.*— Hartford F. Ins. Co. *v.* King, 106 Ala. 519, 17 So. 707; Roland *v.* Logan, 18 Ala. 307.

Indiana.— Devenbaugh *v.* Nifer, 3 Ind. App. 379, 29 N. E. 923.

Minnesota.— Ramsey County Com'rs *v.* Brisbin, 17 Minn. 451.

Missouri.— Hallock *v.* Brier, 80 Mo. App. 331.

New Jersey.— Taylor *v.* New Jersey Title Guarantee, etc., Co., 70 N. J. L. 24, 56 Atl. 152.

New York.— Delano *v.* Rice, 21 Misc. 714, 48 N. Y. Suppl. 130 [*affirmed* in 23 N. Y. App. Div. 327, 48 N. Y. Suppl. 295].

discloses any cause of action,[62] in favor of the party pleading it.[63] That a defect might be cured by amendment has been held in some cases a test to determine whether a general demurrer will lie.[64] It has been held that the complaint will be sustained if it is good on any theory,[65] even if the action is brought on the wrong theory,[66] especially where there is a general prayer for relief.[67] Other cases hold that the court must determine the theory upon which a pleading rests, and unless a good cause of action is stated on that theory a demurrer should be sustained even though facts are stated sufficient to show that plaintiff has a cause of action of a different character.[68] A pleading which defectively states a good cause of action or defense as distinguished from a good statement of a defective cause of action or defense is good as against a general demurrer.[69] If a pleading states a good cause of action or defense, the presence of additional matters which are open to special demurrer will not make the pleading obnoxious to a general demur-

Ohio.— Crawford *v.* Satterfield, 27 Ohio St. 421.

Texas.— Canales *v.* Perez, 65 Tex. 291; Grimes *v.* Hagood, 19 Tex. 246; Boynton *v.* Tidwell, 19 Tex. 118; Northwestern Nat. Ins. Co. *v.* Woodward, 18 Tex. Civ. App. 496, 45 S. W. 185; Brackenridge *v.* Claridge, (Civ. App. 1897) 42 S. W. 1005; Vielma *v.* International, etc., R. Co., (Civ. App. 1895) 31 S. W. 212.

Vermont.— Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395; State Treasurer *v.* Weeks, 4 Vt. 215.

Washington.— Tumwater *v.* Pix, 15 Wash. 324, 46 Pac. 388.

West Virginia.— Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.

Wisconsin.— Benolkin *v.* Guthrie, 111 Wis. 554, 87 N. W. 466.

United States.— Abraham *v.* Levy, 72 Fed. 124, 18 C. C. A. 469.

Canada.— Bradford *v.* O'Brien, 6 U. C. Q. B. 417.

See 39 Cent. Dig. tit. "Pleading," § 409. See also *supra*, II, I.

Single invalid averment.— A general demurrer to an entire count of a declaration cannot be sustained because of a single invalid averment, where there are sufficient other allegations in the count to state a cause of action. Latham *v.* Staten Island R. Co., 150 Fed. 235.

62. *California.*—Harnish *v.* Bramer, 71 Cal. 155, 11 Pac. 888.

Idaho.— Lewiston First Nat. Bank *v.* Sampson, 7 Ida. 564, 64 Pac. 890.

Indiana.— McAllister *v.* Willey, 60 Ind. 195.

Kansas.—Westervelt *v.* Jones, 5 Kan. App. 35, 47 Pac. 322.

Maryland.— Weems *v.* Millard, 2 Harr. & G. 143.

New York.— Picker *v.* Weiss, 39 Misc. 22, 78 N. Y. Suppl. 761; White *v.* Brown, 14 How. Pr. 282; Graham *v.* Camman, 13 How. Pr. 360.

Texas.— Edgar *v.* Galveston City Co., 46 Tex. 421; Robinson *v.* Davenport, 40 Tex. 333; Warner *v.* Bailey, 7 Tex. 517; Lyle *v.* Harris, 1 Tex. App. Civ. Cas. § 71.

Washington.— McKenzie *v.* Royal Dairy, 35 Wash. 390, 77 Pac. 680.

Wisconsin.— Morrow *v.* Lawrence, 7 Wis. 574; Roberts *v.* White, 3 Wis. 414.

See 39 Cent. Dig. tit. "Pleading," § 491 *et seq.*

63. Farris *v.* Jones, 112 Ind. 498, 14 N. E. 484; Tipton County *v.* Kimberlin, 108 Ind. 449, 9 N. E. 407; Wilson *v.* Galey, 103 Ind. 257, 2 N. E. 736; Willard *v.* Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. Rep. 657.

64. Municipal Ct. *v.* Whaley, 26 R. I. 25, 57 Atl. 1061; Trammell *v.* Trammell, 20 Tex. 406.

65. Holliday *v.* Percy, 38 Ind. App. 588, 78 N. E. 877.

66. Thompson *v.* Mills, (Tex. Civ. App. 1907) 101 S. W. 560.

67. Thompson *v.* Mills, (Tex. Civ. App. 1907) 101 S. W. 560.

68. Langdon *v.* New York, etc., R. Co., 58 Hun (N. Y.) 122, 11 N. Y. Suppl. 514; Kewaunee County Sup'rs *v.* Decker, 30 Wis. 624. See Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562, where there were facts alleged sufficient for a recovery upon a contract, but there were also allegations of fraud in respect thereto, and it was held that plaintiff must recover in tort if at all and could not recover on the contract, since the complaint was evidently framed on the theory of fraud.

69. *California.*— Amestoy *v.* Electric Rapid Transit Co., 95 Cal. 311, 30 Pac. 550; Himmelmann *v.* Spanagel, 39 Cal. 401.

Missouri.— Aurora Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. 946.

New Jersey.— Mehrhof Bros. Brick Mfg. Co. *v.* Delaware, etc., R. Co., 51 N. J. L. 56, 16 Atl. 12.

Texas.— Patterson *v.* Frazer, (Civ. App. 1904) 79 S. W. 1077; Northwestern Nat. Ins. Co. *v.* Woodward, 18 Tex. Civ. App. 496, 45 S. W. 185; Alford *v.* Kilgore, 1 Tex. App. Civ. Cas. § 698.

West Virginia.— Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

In other words a demurrer to a complaint for insufficiency can only be sustained where it appears that, admitting all the facts alleged, it presents no cause of action whatever; it not being sufficient that the facts are imperfectly or improperly averred or that the pleading lacks definiteness and precision or that the material facts are only

rer;[70] and conversely, if a general demurrer is well founded, it should be sustained even though special exceptions assigned in connection therewith are not well taken.[71] So surplusage does not make a pleading subject to demurrer on this ground,[72] nor does any mere defect of form.[73] So where the impossibility of the production of proof to sustain allegations legally sufficient does not appear with certainty, the cause should be sent to trial on its merits, and not dismissed on exception of no cause of action.[74] The complaint is demurrable on this ground where it states facts constituting a defense to the cause of action.[75]

(II) *PREMATURE ACTION.* The objection that an action is prematurely brought may be urged by demurrer if the facts appear on the face of the pleading.[76] If, however, the fault appears to be a mere clerical error, the demurrer under the common-law practice must be a special one.[77]

c. Form of Action. Where the action is brought in assumpsit and the declaration sets out a cause of action in tort, a demurrer will lie at common law.[78] And, in general, objections to the form of the action are deemed substantial and may be taken on general demurrer.[79] In those code states where different dockets are maintained for legal and equitable proceedings, if the wrong kind of proceeding be adopted, the proper remedy is a motion to transfer to the other docket

argumentative. Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; Bottom *v.* Chamberlain, 21 Misc. (N. Y.) 556, 47 N. Y. Suppl. 733.

70. Chicago *v.* Wolf, 86 Ill. App. 286.

71. Bluntzer *v.* Hirsch, 32 Tex. Civ. App. 585, 75 S. W. 326.

72. Samples *v.* Carnahan, 21 Ind. App. 55, 51 N. E. 425. See also *supra*, VI, F, 1, m.

73. Cockerill *v.* Stafford, 102 Mo. 57, 14 S. W. 813; Eads *v.* Gains, 58 Mo. App. 586; Thompson *v.* Fox, 21 Misc. (N. Y.) 298, 47 N. Y. Suppl. 176; O'Brien *v.* Harahy, 1 U. C. Q. B. 475.

Restatement of rule.— Where a general demurrer is filed to a petition, no motion to make it more definite having been presented, the demurrer should be overruled if the facts stated, when all are taken as true, constitute a cause of action, whether well pleaded or not. Bowersox *v.* Hall, 73 Kan. 99, 84 Pac. 557. See also Berry *v.* Geiser Mfg. Co., 15 Okla. 364, 85 Pac. 699.

In an action against an agent by the principal to recover money in his hands, the want of allegation of a demand cannot be taken advantage of by general demurrer, as it must be by a special exception. Dever *v.* Branch, 18 Tex. 615.

74. Bourdette *v.* Sieward, 52 La. Ann. 1333, 27 So. 724.

75. *Alabama.*— Matlock *v.* Mallory, 19 Ala. 694; Renfro *v.* Heard, 14 Ala. 23, 48 Am. Dec. 82.

Georgia.— Dorsey *v.* Columbus R. Co., 121 Ga. 697, 49 S. E. 698.

Indiana.— Behrley *v.* Behrley, 93 Ind. 255; Knauss *v.* Lake Erie, etc., R. Co., 29 Ind. App. 216, 64 N. E. 95.

Iowa.— Clough *v.* Goggins, 40 Iowa 325.

Kentucky.— Favre *v.* Louisville, etc., R. Co., 91 Ky. 541, 16 S. W. 370, 13 Ky. L. Rep. 116.

New York.— Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130.

Texas.— Aiken *v.* Hale, 1 Tex. Unrep. Cas. 318.

76. *Alabama.*— Morrison *v.* Spears, 8 Ala. 93.

Arkansas.— Hicks *v.* Branton, 21 Ark. 186.

California.— Ganceart *v.* Henry, 98 Cal. 281, 33 Pac. 92.

Connecticut.— Dickerman *v.* New York, etc., R. Co., 72 Conn. 271, 44 Atl. 228; Smith *v.* Jewell, 71 Conn. 473, 42 Atl. 657.

Georgia.— Goodrich *v.* Atlanta Nat. Bldg., etc., Assoc., 96 Ga. 803.

Illinois.— American Exch. Nat. Bank *v.* Seaverns, 121 Ill. App. 480.

Indiana.— Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 33 N. E. 679; Trentman *v.* Fletcher, 100 Ind. 105; Middaugh *v.* Wilson, 30 Ind. App. 112, 65 N. E. 555; Jaqua *v.* Shewalter, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

Iowa.— Litchfield Mfg. Co. *v.* Gallagher, 98 Iowa 390, 67 N. W. 371; Moore *v.* State Ins. Co., 72 Iowa 414, 34 N. W. 183, statutory ground that plaintiff is not entitled to the relief claimed.

New York.— Olmstead *v.* Pound Ridge, 71 Hun 25, 24 N. Y. Suppl. 615; Hare *v.* Van Deusen, 32 Barb. 92; Belanewsky *v.* Gallaher, 55 Misc. 150, 105 N. Y. Suppl. 77; Sabin *v.* Wood, 10 Johns. 218; Waring *v.* Yates, 10 Johns. 119; Cheetham *v.* Lewis, 3 Johns. 42; Lowry *v.* Lawrence, 1 Cai. 69. But see Smith *v.* Holmes, 19 N. Y. 271; Walbridge *v.* Simon, 13 Misc. 634, 34 N. Y. Suppl. 939; Niblock *v.* Wright, 2 How. Pr. 251.

South Dakota.— Baton Rouge First Nat. Bank *v.* Dakota F. & M. Ins. Co., 6 S. D. 424, 61 N. W. 439.

Texas.— Pennsylvania F. Ins. Co. *v.* Faires, 13 Tex. Civ. App. 111, 35 S. W. 55.

Wisconsin.— Welsh *v.* Argyle, 85 Wis. 307, 55 N. W. 412; Millett *v.* Hayford, 1 Wis. 401.

See 39 Cent. Dig. tit. "Pleading," § 432.

77. Bemis *v.* Faxon, 4 Mass. 263.

78. Albertson Trust, etc., Co. *v.* Freedley, 18 Montg. Co. Rep. (Pa.) 183.

79. Van Blarcom *v.* Delaware, etc., R. Co.,

and not a demurrer.[80] And it is no ground for demurrer in code states that equitable relief is sought in a legal action or legal relief in an equitable action.[81]

d. Misjoinder of Causes of Action.[82] The joinder, in the same declaration or complaint, of two causes of action which cannot be joined, is ground for demurrer, both at common law,[83] and under the codes.[84] In a few states, however, by statute, this is not a ground for demurrer, but only for a motion to strike out.[85] If a complaint contains several causes of action which are improperly united, the omission to state the causes in separate counts properly numbered will not deprive defendant of the right to demur.[86] But where one of the claims is not well pleaded and does not constitute a cause of action, a demurrer for misjoinder should be overruled.[87] If one cause of action is sustainable and the other not, the facts constituting the latter will be deemed immaterial and irrelevant on demurrer to

49 N. J. L. 179, 6 Atl. 503; Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506.

80. McClure *v.* Dee, 115 Iowa 546, 88 N. W. 1093; McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33; Wright *v.* McCormick, 22 Iowa 545; Byers *v.* Rodabaugh, 17 Iowa 53; Greenup County *v.* Maysville, etc., R. Co., 88 Ky. 659, 11 S. W. 774, 11 Ky. L. Rep. 169; Lebanon *v.* Forrest, 15 B. Mon. (Ky.) 168.

81. See *infra*, VI, F, 2, f.

82. See also *supra*, VI, F, 1, b, (II).

What causes may be joined see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 390 *et seq.*

83. *Alabama.*— Morris *v.* Eufaula Nat. Bank, 122 Ala. 580, 25 So. 499, 82 Am. St. Rep. 95; Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 528, 24 So. 885; Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Wilkinson *v.* Moseley, 30 Ala. 562; Kent *v.* Long, 8 Ala. 44.

Illinois.— Dalson *v.* Bradberry, 50 Ill. 82.

Indiana.— Bodley *v.* Roop, 6 Blackf. 158.

New Jersey.— King *v.* Morris, 73 N. J. L. 279, 62 Atl. 1006; Wilkins *v.* Standard Oil Co., 71 N. J. L. 399, 59 Atl. 14; Topf *v.* West Shore, etc., Terminal Co., 46 N. J. L. 34; American Linen Thread Co. *v.* Sheldon, 31 N. J. L. 420.

New York.— Ferriss *v.* North American F. Ins. Co., 1 Hill 71; Lovett *v.* Pell, 22 Wend. 369 [*reversing* 19 Wend. 546].

Pennsylvania.— Martin *v.* Stille, 3 Whart. 337; Allwein *v.* Brown, 29 Pa. Super. Ct. 331; Denoon *v.* Binus, 2 Pa. L. J. Rep. 397.

Texas.— Hays *v.* Perkins, 22 Tex. Civ. App. 198, 54 S. W. 1071.

West Virginia.— Malsby *v.* Lanark Fuel Co., 55 W. Va. 484, 47 S. E. 358; Knotts *v.* McGregor, 47 W. Va. 566, 35 S. E. 899.

See 39 Cent. Dig. tit. "Pleading," § 435.

Effect of abandonment of one of counts.— Where a complaint is demurred to for misjoinder of causes of action, plaintiff cannot obviate the objection by abandoning one of the counts. King *v.* Morris, 73 N. J. L. 279, 62 Atl. 1006.

84. *Colorado.*— Green *v.* Taney, 7 Colo. 278, 3 Pac. 423.

Connecticut.— Gorham *v.* New Haven, 79 Conn. 670, 66 Atl. 505.

Indiana.— Langsdale *v.* Woollen, 120 Ind. 16, 21 N. E. 659; Burrows *v.* Holderman, 31 Ind. 412; Fritz *v.* Fritz, 23 Ind. 388; Bougher *v.* Scobey, 16 Ind. 151; Thomas *v.* Dabblemont, 31 Ind. App. 146, 67 N. E. 463; Carnahan *v.* Chenoweth, 1 Ind. App. 178, 27 N. E. 332. But see Cargal *v.* Fee, 140 Ind. 572, 39 N. E. 93.

Kentucky.— See Lewis *v.* Taylor Coal Co., 112 Ky. 845, 66 S. W. 1044, 23 Ky. L. Rep. 2218, 57 L. R. A. 447, holding that a motion to require plaintiff to elect is a proper remedy.

Mississippi.— Hazlehurst *v.* Cumberland Tel., etc., Co., 83 Miss. 303, 35 So. 951.

Missouri.— Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Farmers' Bank *v.* Bayliss, 41 Mo. 274; Ashby *v.* Winston, 26 Mo. 210; Ennis *v.* Padgett, 122 Mo. App. 539, 99 S. W. 782.

Nebraska.— Reed *v.* Reed, 70 Nebr. 775, 98 N. W. 76; Hardy *v.* Miller, 11 Nebr. 395, 9 N. W. 475.

New York.— Wells *v.* Betts, 45 N. Y. App. Div. 115, 61 N. Y. Suppl. 231; Nash *v.* Hall Signal Co., 90 Hun 354, 35 N. Y. Suppl. 940; Sanford *v.* New York Fourth Nat. Bank, 60 Hun 484, 15 N. Y. Suppl. 181; Lehnen *v.* Purvis, 55 Hun 535, 9 N. Y. Suppl. 910; People *v.* Koster, 50 Misc. 46, 97 N. Y. Suppl. 829; McKenzie *v.* Hatton, 9 Misc. 16, 29 N. Y. Suppl. 18; Seymour *v.* Lorillard, 8 N. Y. Civ. Proc. 90; Townsend *v.* Coon, 7 N. Y. Civ. Proc. 56.

North Carolina.— Smith *v.* Newberry, 140 N. C. 385, 53 S. E. 234; Street *v.* Tuck, 84 N. C. 605.

United States.— Sullivan *v.* New York, etc., R. Co., 11 Fed. 848, 19 Blatchf. 388; Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,675, 10 Blatchf. 524.

See 39 Cent. Dig. tit. "Pleading," § 435.

But where a petition states but a single cause of action the fact that the pleader unnecessarily numbers the different paragraphs will not render the petition objectionable on demurrer. Minter *v.* Gose, 13 Wyo. 178, 78 Pac. 948.

85. See *infra*, XII, C, 1, c, (XIII).

86. Wiles *v.* Suydam, 64 N. Y. 173; Goldberg *v.* Utley, 60 N. Y. 427; Crowell *v.* Truesdell, 67 N. Y. App. Div. 502, 73 N. Y. Suppl. 1013; Taylor *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 299; Stanton *v.* Missouri Pac. R. Co., 2 N. Y. Suppl. 298; Townsend *v.* Coon, 7 N. Y. Civ. Proc. 56; Harris *v.* Eldridge, 5 Abb. N. Cas. (N. Y.) 278.

87. Sullivan *v.* New York, etc., R. Co., 61

the whole complaint.[88] Mere surplusage cannot make a pleading bad for misjoinder.[89] So also, if by rejecting a portion of one count as surplusage it may be so altered as to make the pleading good as against a demurrer for misjoinder, it should be done.[90] And a prayer for inconsistent forms of relief will not make a pleading bad for misjoinder of causes.[91] If it is doubtful whether or not the allegations are such as to make the pleading demurrable for misjoinder, that construction should be adopted which will sustain the pleading.[92]

e. Objections Relating to Parties — (i) *Defect of Parties.*[93] Under the common-law procedure, the non-joinder in actions *ex contractu* of necessary parties as plaintiffs,[94] or defendants,[95] is ground for demurrer; but in actions *ex delicto* non-joinder cannot be reached by a demurrer.[96] Under the codes and practice acts, a "defect of parties" is expressly enumerated as a ground of demurrer,[97] and such provisions apply equally well to a defect of parties plaintiff,[98] as well as a defect of parties defendant.[99] But non-joinder of a proper, as distinguished

How. Pr. (N. Y.) 490; Jenkins *v.* Thomason, 32 S. C. 254, 10 S. E. 961; New Home Sewing-Mach. Co. *v.* Wray, 28 S. C. 86, 5 S. E. 603; Boyd *v.* Eau Claire Mut. Fire Assoc., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 96 Am. St. Rep. 948, 61 L. R. A. 918; Sullivan *v.* New York, etc., R. Co., 11 Fed. 848, 19 Blatchf. 388. *Contra*, Kent *v.* Long, 8 Ala. 44; Newman *v.* Smith, 77 Cal. 22, 18 Pac. 791 (*semble*); Penter *v.* Staight, 1 Wash. 365, 25 Pac. 469.

For example, where a complaint purported to state three causes of action, but in fact stated but a single cause of action inartificially, it was not demurrable for misjoinder of causes of action. Schlieder *v.* Dexter, 114 N. Y. App. Div. 417, 99 N. Y. Suppl. 1000.

88. Newman *v.* Smith, 77 Cal. 22, 18 Pac. 791; Lord *v.* Vreeland, 24 How. Pr. (N. Y.) 316.

89. Newman *v.* Smith, 77 Cal. 22, 18 Pac. 791; Meyer *v.* Van Collem, 28 Barb. (N. Y.) 230.

90. Pharr *v.* Bachelor, 3 Ala. 237.

91. Colstrum *v.* Minneapolis, etc., R. Co., 31 Minn. 367, 18 N. W. 94.

92. Roth *v.* Palmer, 27 Barb. (N. Y.) 652.

93. See, generally, Parties, 30 Cyc. 1.

94. *Florida.*— Jacksonville *v.* Ætna Steam Fire Engine Co., 20 Fla. 100.

Kentucky.—Allen *v.* Lucket, 3 J. J. Marsh. 164.

New Jersey.— Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39.

New York.— Bentley *v.* Smith, 3 Cai. 170.

Texas.— May *v.* Slade, 24 Tex. 205.

United States.— Van Orden *v.* Nashville, 67 Fed. 331.

See 37 Cent. Dig. tit. "Parties," § 125.

95. *Alabama.*— Watts *v.* Gayle, 20 Ala. 817.

Illinois.— Dinet *v.* Reilly, 2 Ill. App. 316.

Maine.— State *v.* Chandler, 79 Me. 172, 8 Atl. 553; Richmond *v.* Toothaker, 69 Me. 451.

New Jersey.— Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39. *Contra*, Gray *v.* Sharp, 62 N. J. L. 102, 40 Atl. 771; Lieberman *v.* Brothers, 55 N. J. L. 379, 26 Atl. 828.

New York.— Whitaker *v.* Young, 2 Cow. 569.

Vermont.— Needham *v.* Heath, 17 Vt. 223.

See 37 Cent. Dig. tit. "Parties," § 137.

Contra.— Tharp *v.* Farquar, 6 B. Mon. (Ky.) 3.

96. May *v.* Western Union Tel. Co., 112 Mass. 90; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551.

That the code rule is the same see Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81.

97. Lasar *v.* Johnson, 125 Cal. 549, 58 Pac. 161; Burgoyne *v.* Perry, 3 Cal. 50; Snyder *v.* Voorhes, 7 Colo. 296, 3 Pac. 483; Hubbell *v.* Skiles, 16 Ind. 138; Hadley *v.* Hobbs, 12 Ind. App. 351, 39 N. E. 523; Rose *v.* Merchants' Trust Co., 96 N. Y. Suppl. 946.

Where persons who should ordinarily have been made plaintiffs are made defendants but the complaint does not allege that they have refused to join as plaintiffs, it is demurrable for defect of parties. Chicago, etc., R. Co. *v.* Lane, 26 Ind. App. 535, 59 N. E. 341.

An objection that certain interveners were not entitled to file intervening petitions may be raised by demurrer because of an alleged defect of parties; that several causes of action were improperly united; or that such interveners are not necessary parties to a complete determination of the action, as provided by Rev. St. (1899) § 598. Kansas City *v.* Schroeder, 196 Mo. 281, 93 S. W. 405.

98. Brought *v.* Cherokee Nation, 4 Indian Terr. 462, 69 S. W. 937; Brookmire *v.* Rosa, 34 Nebr. 227, 51 N. W. 840; People *v.* McClellan, 119 N. Y. App. Div. 416, 104 N. Y. Suppl. 447 [*reversing* on other grounds 54 Misc. 130, 105 N. Y. 844].

Scope of demurrer.—A demurrer for defect of parties plaintiff goes only to the question whether other persons shall be brought in as such, and not to the right of one already in court. McKenney *v.* Minahan, 119 Wis. 651, 97 N. W. 489.

99. Roop *v.* Seaton, 4 Greene (Iowa) 252; Inman *v.* Corwin, 9 N. Y. Suppl. 195; Eaton *v.* Balcom, 33 How. Pr. (N. Y.) 80; Cox *v.* Gille Hardware, etc., Co., 8 Okla. 483, 58 Pac. 645; Cohen *v.* Ottenheimer, 13 Oreg. 220, 10 Pac. 20.

Prayer for relief as surplusage.—Where a complaint is for relief against several persons not parties, and whose presence is unnecessary to a determination, the prayer for relief may be deemed surplusage and a failure to join them is not cause for demurrer.

from a necessary, party is not ground for demurrer.[1] A "defect of parties" means too few and not too many parties,[2] and hence is not synonymous with misjoinder of parties which means an excess of parties.[3]

(II) *Misjoinder of Parties.*[4] Under the common-law system of pleading, misjoinder of parties is ground for demurrer.[5] Under the codes and practice acts, the misjoinder of parties is generally not enumerated as a ground of demurrer,[6] although in some jurisdictions misjoinder of parties plaintiff is made a ground of demurrer,[7] while in other jurisdictions the statutes expressly authorize a demurrer for misjoinder of either parties plaintiff or defendant.[8] Under the statutes, a misjoinder of parties plaintiff is ground for demurrer in some states,[9] but not in

O'Connor *v.* Virginia Pass., etc., Co., 184 N. Y. 46, 76 N. E. 1082 [*reversing* on other grounds 107 N. Y. App. Div. 630, 95 N. Y. Suppl. 1149].

Where, in the summons and title of the complaint, defendant is named only in his individual capacity, and in the complaint a cause of action is stated against him in his capacity as trustee under the will of a decedent, a demurrer for defect of parties and on the ground that the complaint does not state a cause of action was properly sustained. Leonard *v.* Pierce, 182 N. Y. 431, 75 N. E. 313, 1 L. R. A. N. S. 161 [*affirming* 94 N. Y. App. Div. 266, 87 N. Y. Suppl. 978].

Effect of averments in answer.—A demurrer for want of parties defendant may be disregarded when the answer in which the demurrer is incorporated shows that all the parties really interested are before the court. Craft *v.* Russell, 67 Ala. 9.

Where defendant dies and his name is thereafter omitted from an amended complaint, and it does not appear that he has any personal representatives, the amended complaint is not demurrable for defect of parties. Empire State Sav. Bank *v.* Beard, 81 Hun (N. Y.) 184, 30 N. Y. Suppl. 756 [*reversed* on other grounds in 151 N. Y. 638, 45 N. E. 1131].

1. Wing *v.* Bull, 38 Hun (N. Y.) 291.

2. *Indiana.*— Bennett *v.* Preston, 17 Ind. 291.

Iowa.— Mornan *v.* Carroll, 35 Iowa 22.

Kansas.— Union Pac R. Co. *v.* Smith, 59 Kan. 80, 52 Pac. 102; McKee *v.* Eaton, 26 Kan. 226.

Minnesota.— Hoard *v.* Clum, 31 Minn. 186, 17 N. W. 275.

New York.— Tew *v.* Wolfsohn, 38 Misc. 54, 76 N. Y. Suppl. 919 [*affirmed* in 77 N. Y. App. Div. 454, 79 N. Y. Suppl. 286]; Davy *v.* Betts, 23 How. Pr. 396.

Ohio.— Neil *v.* Ohio Agricultural, etc., College, 31 Ohio St. 15.

South Dakota.— Mader *v.* Plano Mfg. Co., 17 S. D. 553, 97 N. W. 843.

Wisconsin.— Kucera *v.* Kucera, 86 Wis. 416, 57 N. W. 47; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522; Truesdell *v.* Rhodes, 26 Wis. 215.

See 37 Cent. Dig. tit. "Parties," § 122 *et seq.*

A "defect of parties," as the term is used in the code, is the same as non-joinder of a necessary party in an action at law under the common-law system of pleading where a demurrer could be interposed for "want of parties." The language "defect of parties" was taken from the equity branch of the law as administered in the court of chancery and has no reference to the "misjoinder" of parties. Palmer *v.* Davis, 28 N. Y. 242.

3. Kucera *v.* Kucera, 86 Wis. 416, 57 N. W. 47; Read *v.* Sang, 21 Wis. 678.

4. See, generally, Parties, 30 Cyc. 1.

5. *Connecticut.*— White *v.* Portland, 67 Conn. 272, 34 Atl. 1022.

Indian Territory.— Daniels *v.* Miller, 4 Indian Terr. 426, 69 S. W. 925.

Kentucky.— Blakey *v.* Blakey, 2 Dana 460.

New Hampshire.— Stevenson *v.* Cofferin, 20 N. H. 150.

New Jersey.— Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252.

Texas.— O'Neal *v.* Lockhart, 2 Tex. Unrep. Cas. 597.

See 37 Cent. Dig. tit. "Parties," §§ 146, 151.

Contra, in action *ex delicto*, see Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522.

6. *Indiana.*— Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687; Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93.

Iowa.— Hornish *v.* Ringen Stove Co., 116 Iowa 1, 89 N. W. 95.

Minnesota.— Goncelier *v.* Foret, 4 Minn. 13.

North Dakota.— Olson *v.* Shirley, 12 N. D. 106, 96 N. W. 297.

Oklahoma.— Stiles *v.* Guthrie, 3 Okla. 26, 41 Pac. 383.

Canada.— Young *v.* Robertson, 2 Ont. 434.

See 37 Cent. Dig. tit. "Parties," §§ 146, 151. And see the statutes of the several states.

7. See the statutes of the several states.

8. See the statutes of the several states.

9. Tennant *v.* Pfister, 45 Cal. 270; People *v.* Washington County Dist. Ct., 18 Colo. 293, 32 Pac. 819; White *v.* Portland, 67 Conn. 272, 34 Atl. 1022; Havana City R. Co. *v.* Ceballos, 49 N. Y. App. Div. 263, 63 N. Y. Suppl. 417.

An order bringing in new parties plaintiff, under Code Civ. Proc. § 452, "where a complete determination of the controversy cannot be had without the presence of the other parties," cannot be objected to by demurrer for misjoinder, the remedy being by appeal from the order. Sims *v.* Bonner, 60 N. Y. Super. Ct. 70, 16 N. Y. Suppl. 801, 21 N. Y. Civ. Proc. 379.

others,[10] while in a great majority of states misjoinder of defendants is not a specific ground of demurrer.[11] However, in some jurisdictions, the objection of misjoinder may be urged under a general demurrer for failure to state a cause of action.[12]

(III) *Want of Legal Capacity to Sue.* Under the codes and practice

The old rule in New York was that a demurrer would not lie for misjoinder of parties plaintiff. Case *v.* Carroll, 35 N. Y. 385; People *v.* New York, 28 Barb. 240; Peabody *v.* Washington County Mut. Ins. Co., 20 Barb. 339; People *v.* New York, 8 Abb. Pr. 7 [*reversed* on other grounds in 10 Abb. Pr. 111]; New York, etc., R. Co. *v.* Schuyler, 7 Abb. Pr. 41; Churchill *v.* Trapp, 3 Abb. Pr. 306; Pinckney *v.* Wallace, 1 Abb. Pr. 82; Gregory *v.* Oaksmith, 12 How. Pr. 134; Brownson *v.* Gifford, 8 How. Pr. 389.

10. *Indiana.*— Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687; Armstrong *v.* Dunn, 143 Ind. 433, 41 N. E. 540; Redelsheimer *v.* Miller, 107 Ind. 485, 8 N. E. 447; Potts *v.* State, 65 Ind. 273.

Iowa.— Dubuque County *v.* Reynolds, 41 Iowa 454.

Kansas.—Russell First Nat. Bank *v.* Knoll, 7 Kan. App. 352, 52 Pac. 619.

Kentucky.— Dean *v.* English, 18 B. Mon. 132.

Missouri.— Akins *v.* Hicks, 109 Mo. App. 95, 83 S. W. 75.

Nebraska.— Lancaster County *v.* State, 74 Nebr. 211, 104 N. W. 187, 107 N. W. 388; Lancaster County *v.* Rush, 35 Nebr. 119, 52 N. W. 837; Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280; Davey *v.* Dakota County, 19 Nebr. 721, 28 N. W. 276.

North Carolina.— Abbott *v.* Hancock, 123 N. C. 99, 31 S. E. 268; Hargrove *v.* Hunt, 73 N. C. 24. But see McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

Ohio.— Hepworth *v.* Pendleton, 7 Ohio Dec. (Reprint) 215, 1 Cinc. L. Bul. 300.

Oklahoma.— Martin *v.* Clay, 8 Okla. 46, 56 Pac. 715.

Oregon.— Powell *v.* Dayton, etc., R. Co., 13 Oreg. 446, 11 Pac. 222.

South Dakota.— Mader *v.* Plano Mfg. Co., 17 S. D. 553, 97 N. W. 843.

Wisconsin.— Wunderlich *v.* Chicago, etc., R. Co., 93 Wis. 132, 66 N. W. 1144; Geilfuss *v.* Gates, 87 Wis. 395, 58 N. W. 742; Kucera *v.* Kucera, 86 Wis. 416, 57 N. W. 47; Boyd *v.* Beaudin, 54 Wis. 193, 11 N. W. 521; Marsh *v.* Waupaca County, 38 Wis. 250.

See 37 Cent. Dig. tit. "Parties," § 146.

Want of authority in plaintiff to sue in his own name, in behalf of himself and others, cannot be taken advantage of by demurrer, but must be raised by a motion. Martin *v.* Clay, 8 Okla. 46, 56 Pac. 715.

11. *Arkansas.*— Fry *v.* Street, 37 Ark. 39.

Colorado.— Pierson *v.* Fuhrmann, 1 Colo. App. 187, 27 Pac. 1015. The rule is now changed by statute.

Indiana.—Armstrong *v.* Dunn, 143 Ind. 433, 41 N. E. 540; Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93; Clark *v.* Crawfordsville Coffin Co., 125 Ind. 277, 25 N. E. 288; Redelsheimer *v.* Miller, 107 Ind. 485, 8 N. E. 447; Potts *v.* State, 65 Ind. 273; Hill *v.* Marsh, 46 Ind. 218.

Iowa.— Cedar Rapids Nat. Bank *v.* Lavery, 110 Iowa 575, 81 N. W. 775, 80 Am. St. Rep. 325; Dolan *v.* Hubinger, 109 Iowa 408, 80 N. W. 514; White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 44 Iowa 512; King *v.* King, 40 Iowa 120; Beckwith *v.* Dargets, 18 Iowa 303. But see Troy Portable Grain Mill Co. *v.* Bowen, 7 Iowa 465.

Kentucky.— Yeates *v.* Walker, 1 Duv. 84; Dean *v.* English, 18 B. Mon. 132.

Minnesota.— Nichols *v.* Randall, 5 Minn. 304; Seager *v.* Burns, 4 Minn. 141; Lewis *v.* Williams, 3 Minn. 151.

New York.—Adams *v.* Slingerland, 87 N. Y. App. Div. 312, 84 N. Y. Suppl. 323 [*affirming* 39 Misc. 638, 80 N. Y. Suppl. 635]; Hall *v.* Gilman, 77 N. Y. App. Div. 458, 79 N. Y. Suppl. 303; Richtmyer *v.* Richtmyer, 50 Barb. 55; People *v.* New York, 28 Barb. 240; Tew *v.* Wolfsohn, 38 Misc. 54, 76 N. Y. Suppl. 919 [*affirmed* in 77 N. Y. App. Div. 454, 79 N. Y. Suppl. 286, which is *affirmed* in 174 N. Y. 272, 66 N. E. 934]; Paxton *v.* Patterson, 10 N. Y. Suppl. 303, 12 N. Y. Suppl. 563, 26 Abb. N. Cas. 389 [*affirmed* in 12 N. Y. Suppl. 563, 26 Abb. N. Cas. 389].

North Carolina.— Wool *v.* Edenton, 113 N. C. 33, 18 S. E. 76.

Oklahoma.— Stiles *v.* Guthrie, 3 Okla. 26, 41 Pac. 383.

Oregon.— Cohen *v.* Ottenheimer, 13 Oreg. 220, 10 Pac. 20.

South Carolina.— Lowry *v.* Jackson, 27 S. C. 318, 3 S. E. 473.

Virginia.— Lee *v.* Mutual Reserve Fund Life Assoc., 97 Va. 160, 33 S. E. 556.

Wisconsin.— Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522; Great Western Compound Co. *v.* Ætna Ins. Co., 40 Wis. 373.

See 37 Cent. Dig. tit. "Parties," § 151.

In Virginia, where a statute provides that in case of misjoinder of parties, the court may order the action to abate as to the party improperly joined and proceed against the others, misjoinder of parties is not a ground of demurrer, but the remedy is to move for the abatement of the suit as to the parties improperly joined. Riverside Cotton Mills *v.* Lanier, 102 Va. 148, 45 S. E. 875; Lee *v.* Mutual Reserve Fund Life Assoc., 97 Va. 160, 33 S. E. 556.

Effect of omitting parties in substituted complaint.— A demurrer to a complaint on the ground of misjoinder was properly overruled, where the parties and causes of action objected to were omitted in a substituted complaint filed by leave of court, and there was a discontinuance as to them. Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351.

12. See *infra*, VI, F, 2, b.

acts, it is a statutory ground for demurrer that plaintiff has no "legal capacity to sue."[13] There is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court.[14] Incapacity to sue exists when there is some legal disability, such as infancy, lunacy, coverture, or a want of title in plaintiff to the character in which he sues.[15] It means a want of capacity to appear in court and maintain an action regardless of in whom is vested the right of action,[16] and hence does not include the objection that the action is not prosecuted in the name of the real party in interest.[17] The want

13. Petty *v.* Malier, 14 B. Mon. (Ky.) 246; Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522. And see the statutes of the several states.

14. Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522. See also Collins Coal Co. *v.* Hadley, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353.

A defect going to the cause of action itself as regards plaintiff, such as one showing that in no event or under no circumstances, and in no capacity, does plaintiff own or represent the cause of action sought to be enforced, is not a want of legal capacity to sue. McKenney *v.* Minahan, 119 Wis. 651, 97 N. W. 489. It is in case the complaint on its face discloses an interest in the subject-matter of the action and also want of capacity to sue that the question of a want of legal capacity arises; but where the complaint shows that the party plaintiff is not interested in any way in the litigation, or in other words can maintain no such action, the objection can be reached by a general demurrer. For instance, a general demurrer lies where an action is brought by a foreign administrator not authorized by statute to sue outside of the state of his appointment, the rule being that no administrator appointed in a foreign state can maintain an action in another state unless authorized by statute. Louisville, etc., R. Co. *v.* Brantley, 96 Ky. 297, 28 S. W. 477, 16 Ky. L. Rep. 691, 49 Am. St. Rep. 291. See Vincent *v.* Starks, 45 Wis. 458. Where one has neither a legal nor beneficial interest in the controversy either in his own right or as the representative of another, and this appears on the face of the complaint, the objection is properly raised by a general demurrer as the legal capacity to sue is not involved. Louisville, etc., R. Co. *v.* Brantley, 96 Ky. 297, 28 S. W. 477, 16 Ky. L. Rep. 691, 49 Am. St. Rep. 291. A complaint is subject to a general demurrer where it showed on its face that plaintiff to whom defendant is not indebted and to whom the indebtedness claimed is not payable and who is not damaged by a failure to pay it sues to recover in his own name by the direction of a board of supervisors, and not by reason of his having any legal right to recover the claim. Mudge *v.* Rinkle, 45 Ill. App. 604.

15. *Indiana.*— Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694; Campbell *v.* Campbell, 121 Ind. 178, 23 N. E. 81; Brown *v.* Critchell, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486; Tipton County *v.* Kimberlin, 108 Ind. 449, 9 N. E. 407; Pence *v.* Aughe, 101 Ind. 317; Dewey *v.* State, 91 Ind. 173; Dale *v.* Thomas, 67 Ind. 570; Debolt *v.* Carter, 31 Ind. 355.

Kentucky.— Louisville, etc., R. Co. *v.* Brantley, 96 Ky. 297, 28 S. W. 477, 16 Ky. L. Rep. 691, 49 Am. St. Rep. 291.

Montana.— Knight *v.* Le Beau, 19 Mont. 223, 47 Pac. 952; Berkin *v.* Marsh, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565.

Nebraska.— State *v.* Moores, 58 Nebr. 285, 78 N. W. 529.

New York.— Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790; People *v.* Crooks, 53 N. Y. 648.

Ohio.— Zinn *v.* Baxter, 65 Ohio St. 341, 62 N. E. 327; Stang *v.* Newberger, 8 Ohio S. & C. Pl. Dec. 80, 6 Ohio N. P. 60.

South Dakota.— Bem *v.* Shoemaker, 7 S. D. 510, 64 N. W. 544.

Washington.— Birmingham *v.* Cheetham, 19 Wash. 657, 54 Pac. 37.

Wisconsin.— McKenney *v.* Minahan, 119 Wis. 651, 97 N. W. 489; Weirich *v.* Dodge, 101 Wis. 621, 77 N. W. 906; Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522.

See 39 Cent. Dig. tit. "Pleading," § 436.

Substitution of parties.— A mere error of the court in making a substitution of plaintiffs does not go to the legal capacity of such substituted plaintiff to sue. Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922.

Failure to show corporate existence, if required by statute, may be availed of on demurrer on this ground, but does not make a petition bad on general demurrer. Rudd *v.* Owensboro Deposit Bank, 105 Ky. 443, 49 S. W. 207, 971, 20 Ky. L. Rep. 1497.

Right of firm to sue.— If it does not appear on the face of the petition that a partnership plaintiff is within the statute authorizing partnerships to sue, a demurrer will lie on the ground that plaintiff has not legal capacity to sue. Church *v.* Callihan, 49 Nebr. 542, 68 N. W. 932.

Where one plaintiff has capacity to sue.— A demurrer on the ground that plaintiffs have not legal capacity to sue will not be sustained where one of plaintiffs is shown to have legal capacity to sue, as where an action is brought in a firm-name followed by the words "& Co." Brookmire *v.* Rosa, 34 Nebr. 227, 51 N. W. 840.

16. Hunt *v.* Monroe, 32 Utah 428, 91 Pac. 269, 11 L. R. A. N. S. 249.

17. Sinker *v.* Floyd, 104 Ind. 291, 4 N. E. 10; L. T. Dickason Coal Co. *v.* Unverferth,

of capacity must affirmatively appear in the complaint, and it is not enough that the complaint fails to show capacity.[18]

f. Objections Relating to Prayer For Relief — (i) *Absence of Prayer.* The omission to claim damages in some amount is, at common law, in an action sounding in damages, fatal on demurrer.[19] Under the reformed procedure, however, the absence of a prayer for relief does not make the complaint bad on demurrer.[20]

(ii) *Defects in Prayer.* A defect in the prayer for relief is not a ground for demurrer under the codes, but for a motion to make more specific.[21] So the fact that a prayer for relief is objectionable in form does not constitute a ground for demurrer.[22]

(iii) *Demand For Insufficient, Excessive, or Wrong Relief.* Except where otherwise provided by statute,[23] the demand for judgment or prayer for relief is generally not itself subject to demurrer.[24] While in some of the states where the common-law rules have not been abolished a demurrer lies where the claim is in excess of the right disclosed by the declaration,[25] the general rule, even in the common-law states, is to the contrary.[26] Nor is it a ground for demurrer at common

30 Ind. App. 546, 66 N. E. 759; Louisville, etc., R. Co. *v.* Brantley, 96 Ky. 297, 28 S. W. 477, 16 Ky. L. Rep. 691, 49 Am. St. Rep. 291; Boyce *v.* Augusta Camp No. 7,429 M. W. A., 14 Okla. 642, 78 Pac. 322; Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103; Hunt *v.* Monroe, 32 Utah 428, 91 Pac. 269, 11 L. R. A. N. S. 249.

Action for death by wrongful act.— Where plaintiff sues, as administratrix of the estate of one person, for the death of a person of a different name, the question of her right to maintain the action is properly raised by a demurrer to the complaint for want of sufficient facts to constitute a cause of action. Cleveland, etc., R. Co. *v.* Peirce, 34 Ind. App. 188, 72 N. E. 604.

18. See *infra*, VI, I, 1, b, (II).

19. Treusch *v.* Kamke, 63 Md. 274; Robertson *v.* Waters, 1 Yerg. (Tenn.) 200; Brownson *v.* Wallace, 4 Fed. Cas. No. 2,042, 4 Blatchf. 465.

20. Vanatta *v.* Waterhouse, 33 Ind. App. 516, 71 N. E. 159; Fox *v.* Graves, 46 Nebr. 812, 65 N. W. 887; Olin *v.* Arendt, 26 Misc. (N. Y.) 488, 57 N. Y. Suppl. 473; Balle *v.* Moseley, 13 S. C. 439.

21. Mark *v.* Murphy, 76 Ind. 534; Baker *v.* Armstrong, 57 Ind. 189; Bennett *v.* Preston, 17 Ind. 291; Fox *v.* Graves, 46 Nebr. 812, 65 N. W. 887; Oklahoma Gas, etc., Co. *v.* Lukert, 16 Okla. 397, 84 Pac. 1076.

22. McGillivray *v.* McGillivray, 9 S. D. 187, 68 N. W. 316.

23. See the statutes of the several states.

24. Kennon *v.* Western Union Tel. Co., 92 Ala. 399, 9 So. 200; Missouri Valley Land Co. *v.* Bushnell, 11 Nebr. 192, 8 N. W. 389; Lord *v.* Vreeland, 13 Abb. Pr. (N. Y.) 195 [*affirmed* in 15 Abb. Pr. 122, 24 How. Pr. 316]; Oliver *v.* McLaughlin, 24 Ont. 41. See also Davis *v.* Arkansas Southern R. Co., 117 La. 320, 41 So. 587.

The demurrer goes to the right to maintain the action, and not to the question whether the damages claimed are properly recoverable. Kenny *v.* Knight, 119 Fed. 475.

25. Steed *v.* Savage, 115 Ga. 97, 41 S. E. 272; Gould *v.* Atlanta, 60 Ga. 164; Condit *v.* Neighbor, 13 N. J. L. 83, 97 (where the court said: "But the plaintiff's counsel contend, that if they have claimed in the declaration, more than they are entitled to recover, the proper bounds to the recovery will be set on the trial, by the evidence, and that as they have a right to some portion of the rents, the demurrer cannot be sustained. Where the demand exceeds the right, but the fact of excess does not appear by the declaration, there can be no demurrer on this account. But where it is apparent that the plaintiff claims or demands more than his right, there may be a demurrer although some portion of the claim as made, is rightful; for in such case, the rule of good sense as well as of good pleading, is brought into action, that the defendant shall not be compelled to answer or defend for that to which the plaintiff has no lawful right"); Fraser *v.* Johnston, 12 Ont. Pr. 113.

26. *Alabama.*— Georgia Cent. R. Co. *v.* Keyton, (1906) 41 So. 918; Bessemer Sav. Bank *v.* Rosenbaum Grocery Co., 137 Ala. 530, 34 So. 609.

Connecticut.— Hamden *v.* Merwin, 54 Conn. 418, 8 Atl. 670.

Florida.— Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 11 L. R. A. N. S. 560; Cline *v.* Tampa Water Works Co., 46 Fla. 459, 35 So. 8; Tillis *v.* Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89; Jacksonville, etc., R. Co. *v.* Griffin, 33 Fla. 602, 15 So. 336; Borden *v.* Western Union Tel. Co., 32 Fla. 394, 13 So. 876.

Illinois.—Beidler *v.* Chicago Sanitary Dist., 211 Ill. 628, 71 N. E. 118, general demurrer.

Massachusetts.— Colburn *v.* Phillips, 13 Gray 64.

New York.— Leland *v.* Tousey, 6 Hill 328.

United States.— Kenny *v.* Knight, 119 Fed. 475.

A general demurrer will not lie. Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316; Ft. Worth, etc., R. Co. *v.* Jennings, 76 Tex. 373, 13 S. W.

law that plaintiff asks for less than is alleged to be due.[27] And in the code states, if the complaint states a cause of action which entitles plaintiff to some relief, it is not demurrable because insufficient, excessive, or the wrong relief or amount of damages is prayed for.[28] So, in an action at law, if the only relief to which the

270, 8 L. R. A. 180. Where a petition alleged the making of a valid contract, defendant's breach, and consequent injury to plaintiff, with a prayer for general relief, it was not subject to a general demurrer addressed to the entire pleading for failure to allege a specific measure of damages, or by praying for the application of an improper measure of damages, which would only render such part of the petition subject to a special exception. Shropshire *v.* Adams, 40 Tex. Civ. App. 339, 89 S. W. 448.

If the pleading shows that plaintiff is entitled to nominal damages, it is not demurrable. Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841; Elliott *v.* Kitchens, 111 Ala. 546, 20 So. 366, 56 Am. St. Rep. 69, 33 L. R. A. 364; Goldsmith *v.* Sachs, 17 Fed. 726, 8 Sawy. 110. Where a good cause of action is set forth but the complaint also contains a claim for non-recoverable damages, it is not subject to demurrer. Western Union Tel. Co. *v.* Garthright, (Ala. 1907) 44 So. 212; Western Union Tel. Co. *v.* Westmoreland, 150 Ala. 654, 43 So. 790; Hayes *v.* Miller, 150 Ala. 621, 43 So. 818, 11 L. R. A. N. S. 748; Western Union Tel. Co. *v.* Barlow, 51 Fla. 351, 40 So. 491, 4 L. R. A. N. S. 262; Armour Packing Co. *v.* Vietch-Young Produce Co., (Ala. 1903) 39 So. 680.

But if two kinds of relief are sought, one of which must be obtained as a condition precedent to a right to the other, a demurrer will lie at common law. Chicago *v.* People, 210 Ill. 84, 71 N. E. 816.

27. Prince *v.* Takash, 75 Conn. 616, 54 Atl. 1003; Hart *v.* Seixas, 21 Wend. (N. Y.) 40; Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126.

28. *California.*— Matteson *v.* Wagoner, 147 Cal. 739, 82 Pac. 436; Levy *v.* Noble, 135 Cal. 559, 67 Pac. 1033; Pacific Mut. L. Ins. Co. *v.* Shepardson, 77 Cal. 345, 19 Pac. 583.

Colorado.— Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

Indiana.— Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 29 N. E. 1069; Linder *v.* Smith, 131 Ind. 147, 30 N. E. 1073; Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; McLead *v.* Applegate, 127 Ind. 349, 26 N. E. 830; Nysewander *v.* Lowman, 124 Ind. 584, 24 N. E. 355; Rogers *v.* Union Cent. L. Ins. Co., 111 Ind. 343, 12 N. E. 495, 60 Am. Rep. 701; Byard *v.* Harkrider, 108 Ind. 376, 9 N. E. 294; Culbertson *v.* Munson, 104 Ind. 451, 4 N. E. 57; Williamson *v.* Yingling, 93 Ind. 42; Lucas *v.* Hendrix, 92 Ind. 54; Copeland *v.* Copeland, 89 Ind. 29; Anderson *v.* Aekerman, 88 Ind. 481; Anderson *v.* Neal, 88 Ind. 317; Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 317, 43 Am. Rep. 91; Creeelius *v.* Mann, 84 Ind. 147; Nowlin *v.* Whipple, 79 Ind. 481; Mark *v.* Murphy, 76 Ind. 534; Rankin *v.* Walker, 65 Ind. 222; Horton *v.* Thom, 32 Ind. 151; Bennett *v.* Preston, 17 Ind. 291; Thompson *v.* Weaver, 7 Blackf. 552; Gowdy Gas Well, etc., Co. *v.* Patterson, 29 Ind. App. 261, 64 N. E. 485; Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251; Farrell *v.* Lafayette Lumber, etc., Co., 12 Ind. App. 326, 40 N. E. 25; Jessup *v.* Jessup, 7 Ind. App. 573, 34 N. E. 1017.

Kansas.— Walker *v.* Fleming, 37 Kan. 171, 14 Pac. 470.

Minnesota.— Minneapolis, etc., R. Co. *v.* Brown, 99 Minn. 384, 109 N. W. 817; Morey *v.* Duluth, 69 Minn. 5, 71 N. W. 694; Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030; Dye *v.* Forbes, 34 Minn. 13, 24 N. W. 309; Leuthold *v.* Young, 32 Minn. 122, 19 N. W. 652; St. Paul, etc., R. Co. *v.* Rice, 25 Minn. 278; Metzner *v.* Baldwin, 11 Minn. 150; Lockwood *v.* Bigelow, 11 Minn. 113; Connor *v.* St. Anthony Bd. of Education, 10 Minn. 439; Cressey *v.* Gierman, 7 Minn. 398.

Missouri.— Crosby *v.* Farmers' Bank, 107 Mo. 436, 17 S. W. 1004; Easley *v.* Prewitt, 37 Mo. 361; Northcraft *v.* Martin, 28 Mo. 469; Harper *v.* Kemble, 65 Mo. App. 514; Baker *v.* Missouri Pac. R. Co., 34 Mo. App. 98.

Nebraska.— Lederer *v.* Union Sav. Bank, 52 Nebr. 133, 71 N. W. 954; Western Union Tel. Co. *v.* Mullins, 44 Nebr. 732, 62 N. W. 880; George *v.* Edney, 36 Nebr. 604, 54 N. W. 986; Lancaster County *v.* Trimble, 34 Nebr. 752, 52 N. W. 711; Griggs *v.* Le Poidevin, 11 Nebr. 385, 9 N. W. 557.

Nevada.— Williams *v.* Glasgow, 1 Nev. 533.

New York.—McGown *v.* Barnum, 182 N. Y. 547, 75 N. E. 155 [*affirming* 98 N. Y. App. Div. 622, 90 N. Y. Suppl. 1105]; Mathot *v.* Triebel, 98 N. Y. App. Div. 328, 90 N. Y. Suppl. 903; Squiers *v.* Thompson, 73 N. Y. App. Div. 552, 76 N. Y. Suppl. 734 [*affirmed* in 172 N. Y. 652, 65 N. E. 1122]; Hackett *v.* Equitable L. Assur. Soc., 50 N. Y. App. Div. 266, 63 N. Y. Suppl. 1092; Wisner *v.* Consolidated Fruit Jar Co., 25 N. Y. App. Div. 362, 49 N. Y. Suppl. 500; Sing Sing Porous Plaster Co. *v.* Seabury, 43 Hun 611; People *v.* New York, 28 Barb. 240; Meyer *v.* Van Collem, 28 Barb. 230; Beale *v.* Hayes, 5 Sandf. 640; Moses *v.* Walker, 2 Hilt. 536; Burghen *v.* Erie R. Co., 53 Misc. 457, 103 N. Y. Suppl. 292 [*affirmed* in 123 N. Y. App. Div. 204, 108 N. Y. Suppl. 311]; Wessels *v.* Carr, 16 Misc. 440, 38 N. Y. Suppl. 600; Johnson *v.* Girdwood, 7 Misc. 651, 28 N. Y. Suppl. 15 [*affirmed* in 143 N. Y. 660, 39 N. E. 21]; Von Hoffman *v.* Kendall, 17 N. Y. Suppl. 713; Warburton Hall Assoc. *v.* Flannery, 15 N. Y. Suppl. 463; Burke *v.* New York, 4 N. Y. St. 643; Dodge *v.* Johnson, 9 N. Y. Civ. Proc. 339; Brewster *v.* Hatch, 10 Abb. N. Cas. 400; Moran *v.* Anderson, 1 Abb. Pr. 288; Pierson *v.* McCurdy, 61 How.

party shows himself entitled is equitable relief, no demurrer will lie,[29] and conversely.[30] In at least one jurisdiction, however, the rule is that where plaintiff is entitled to no part of the relief prayed for, although he is entitled to some relief under the facts stated, a demurrer will lie for failure to state a cause of action.[31] Where a part of the damages alleged are such as cannot form the basis of a recovery, the remedy is a motion to strike out and not a demurrer.[32]

g. Omission to Obtain Leave to Sue. It is not a ground for demurrer that plaintiff is not shown to have obtained leave to sue, when leave is necessary, a motion to set aside the complaint or summons being the proper remedy.[33]

h. Variance — (i) *Between Declaration and Instrument Sued on.* A variance between the declaration and the deed, bond, or other written instrument sued on, after craving oyer and setting out the instrument, has been held ground for demurrer.[34] But no demurrer will lie on account of a variance in an immaterial

Pr. 134; People *v.* New York, 17 How. Pr. 56.

Oregon.— Crossen *v.* Grandy, 42 Oreg. 282, 70 Pac. 906.

South Carolina.— Gilkerson *v.* Connor, 24 S. C. 321.

South Dakota.— Laird-Norton Co. *v.* Herker, 6 S. D. 509, 62 N. W. 104; Hudson *v.* Archer, 4 S. D. 128, 55 N. W. 1099.

Washington.— Howard *v.* Seattle Nat. Bank, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

Wisconsin.—Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317; Siegel *v.* Liberty, 111 Wis. 470, 87 N. W. 487; Citizens' L. & T. Co. *v.* Witte, 110 Wis. 545, 86 N. W. 173; Allen *v.* Frawley, 106 Wis. 638, 82 N. W. 593; Scheibe *v.* Kennedy, 64 Wis. 564, 25 N. W. 646; Moritz *v.* Splitt, 55 Wis. 441, 13 N. W. 555.

United States.— Erie City Iron Works *v.* Thomas, 139 Fed. 995.

Canada.— Young *v.* Robertson, 2 Ont. 434.

See 39 Cent. Dig. tit. "Pleading," § 439.

In Iowa, however, it is expressly made a ground of demurrer that the facts stated in the complaint "do not entitle plaintiff to the relief demanded." The statutory ground of demurrer formerly was the failure to state "facts sufficient to constitute a cause of action," but under Code, § 2648, the ground of demurrer is changed so that a demurrer lies where the facts stated in the petition do not entitle the plaintiff to the relief demanded, which makes the ground of demurrer broader. For instance, in an action upon a judgment, where the relief demanded in the petition was a judgment upon the record set out by plaintiff, but it is not averred in the petition that plaintiff has obtained leave to prosecute the action as required by statute, a demurrer lies under such code provision, although it would seem that in those states where the code ground is failure to state facts sufficient to constitute a cause of action the petition could not be successfully demurred to. Watts *v.* Everett, 47 Iowa 269. However, it has been held in a later case that a petition is not vulnerable to a demurrer because it claims more than plaintiff is entitled to. Hitchcock *v.* Chicago, etc., R. Co., 88 Iowa 242, 55 N. W. 337.

Demand for legal and equitable relief.— A complaint is not demurrable for want of facts because both legal and equitable relief are demanded when plaintiff is entitled to legal relief only. Doyle *v.* Delaney, 112 N. Y. App. Div. 856, 98 N. Y. Suppl. 468.

No amendment of the prayer will make a petition good which has been held bad on general demurrer. Dawson *v.* Mighton, 4 Ohio Dec. (Reprint) 204, 1 Clev. L. Rep. 115.

29. Mordecai *v.* Seignious, 53 S. C. 95, 30 S. E. 717.

30. Canty *v.* Latterner, 31 Minn. 239, 17 N. W. 385.

31. Hasbrouck *v.* New Paltz, etc., Traction Co., 98 N. Y. App. Div. 563, 90 N. Y. Suppl. 977; Vogt Mfg., etc., Co. *v.* Oettinger, 88 Hun (N. Y.) 83, 34 N. Y. Suppl. 729; Swart *v.* Boughton, 35 Hun (N. Y.) 281; Edson *v.* Girvan, 29 Hun (N. Y.) 422.

32. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810; Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; Treadwell *v.* Tillis, 108 Ala. 262, 18 So. 886; Government St. R. Co. *v.* Hanlon, 53 Ala. 70; Crossen *v.* Grandy, 42 Oreg. 282, 70 Pac. 906.

The objection may also be urged by objections to evidence or requests for instructions to the jury.— Howison *v.* Oakley, 118 Ala. 215, 23 So. 810; Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; Treadwell *v.* Tillis, 108 Ala. 262, 18 So. 886.

33. Leuthold *v.* Young, 32 Minn. 122, 19 N. W. 652; Prince *v.* Cujas, 7 Rob. (N. Y.) 76; Finch *v.* Carpenter, 5 Abb. Pr. (N. Y.) 225. But see Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43, holding that a special, but not a general, demurrer will lie). *Contra*, Watts *v.* Everett, 47 Iowa 269, in which state it is ground for demurrer that the facts stated in the petition do not entitle plaintiff to the relief demanded.

34. *Alabama.*— McDonald *v.* Dodge, 10 Ala. 529.

Connecticut.—Bishop *v.* Quintard, 18 Conn. 395. *Contra*, Danchy *v.* Smith, Kirby 106.

Illinois.— Matthews *v.* Storms, 72 Ill. 316.

Indiana.— Osborne *v.* Fulton, 1 Blackf. 233.

Iowa.— Phillips *v.* Runnels, Morr. 391, 43 Am. Dec. 109, special demurrer only.

Kentucky.— Milroy *v.* Hensley, 2 Bibb 20;

part between the instrument as set out on oyer and the declaration.[35] If the declaration allege the date of the instrument, and the copy thereof put on record by oyer bears no date, this is proper matter for plea and not for demurrer.[36] Setting out the instrument in the declaration will not constitute oyer so as to enable defendant to demur for variance.[37]

(II) *Between Declaration and Record.* A variance between a record and the recital thereof in a pleading is not ground of demurrer, but should be urged by a plea of *nul tiel record*.[38] However, a variance between the docket entry of the action and the declaration may be taken advantage of by demurrer.[39]

(III) *Between Allegations in the Declaration.* It is not a ground of demurrer that there is a variance between the demand made in an action of debt and the amount shown to be due by the note described in the declaration;[40] nor that there is a variance between the debt demanded and the several sums alleged in the different counts to be due;[41] nor that one amount is stated in the caption and another in the body of the declaration;[42] nor in any case where the variance is purely a question of evidence.[43] So an omission, in a complaint whose title describes the plaintiffs as partners, to allege a partnership, is a defect which cannot be reached by demurrer.[44]

(IV) *Between Declaration and Writ.* A variance between the writ and the declaration cannot be taken advantage of by demurrer,[45] although a few cases hold the contrary view.[46] But if oyer is obtained of the writ it is held that a special demurrer will lie.[47]

(V) *Special Demurrer Necessary.* A demurrer for variance, under the common-law practice, must always be special.[48]

i. Want of Jurisdiction. When the defect of jurisdiction over the person of the defendant or the subject of the action appears on the face of the declaration

Palmer *v.* McGinnis, Hard. 505, special demurrer.

Missouri.— Hughes *v.* Tong, 1 Mo. 389.

New York.— Douglass *v.* Rathbone, 5 Hill 143.

Pennsylvania.— Douglass *v.* Beam, 2 Binn. 76.

Tennessee.— Jones *v.* Simmons, 4 Humphr. 314.

United States.— Clark *v.* Phillips, 5 Fed. Cas. No. 2,831*a*, Hempst. 294.

See 39 Cent. Dig. tit. "Pleading," § 419.

35. Potts *v.* Point Pleasant Land Co., 49 N. J. L. 411, 8 Atl. 109; Ross *v.* Parker, 1 B. & C. 358, 2 D. & R. 662, 8 E. C. L. 153.

36. Barrett *v.* Jones, 21 Ark. 455.

37. Hughes *v.* Tong, 1 Mo. 389.

38. Chiles *v.* Beal, 3 Ala. 26.

39. Latimer *v.* Hodgdon, 5 Serg. & R. (Pa.) 514.

40. Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197.

41. Hart *v.* Seixas, 21 Wend. (N. Y.) 40.

42. Young *v.* Chandler, 13 B. Mon. (Ky.) 252.

43. Ray *v.* Quinn, 7 Ohio Dec. (Reprint) 221, 1 Cinc. L. Bul. 314.

44. Jaeger *v.* Hartman, 13 Minn. 55.

45. *Alabama.*— Palmer *v.* Lesne, 3 Ala. 741.

Arkansas.— Stone *v.* Bennett, 4 Ark. 71.

Illinois.— Prince *v.* Lamb, 1 Ill. 378; Rust *v.* Frothingham, 1 Ill. 331.

Iowa.— Culver *v.* Whipple, 2 Greene 365.

Kentucky.— White *v.* Walker, 1 T. B. Mon. 34.

New York.— St. Louis Soldiers' Home *v.* Sage, 11 Misc. 159, 33 N. Y. Suppl. 549 [*affirmed* in 146 N. Y. 379, 41 N. E. 90]; McFarlan *v.* Townsend, 17 Wend. 440.

North Carolina.— Heath *v.* Morgan, 117 N. C. 504, 23 S. E. 489.

Pennsylvania.— Pentz *v.* Pentz, 6 Pa. Dist. 708; Krause *v.* Pennsylvania R. Co., 4 Pa. Co. Ct. 60.

See 39 Cent. Dig. tit. "Pleading," § 420.

A plea in abatement is generally held to be the proper remedy. Palmer *v.* Lesne, 3 Ala. 741; Stone *v.* Bennett, 4 Ark. 71; Rust *v.* Frothingham, 1 Ill. 331; White *v.* Walker, 1 T. B. Mon. (Ky.) 34; Cronly *v.* Brown, 12 Wend. (N. Y.) 271; Duvall *v.* Craig, 2 Wheat. (U. S.) 45, 4 L. ed. 180; How *v.* McKinney, 12 Fed. Cas. No. 6,749, 1 McLean 319; Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 2 Blatchf. 31, 1 Fish. Pat. Rep. 128; Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,675, 10 Blatchf. 524.

46. Christian Bank *v.* Greenfield, 7 T. B. Mon. (Ky.) 290; Pierce *v.* Lacy, 23 Miss. 193; Gilleland *v.* Wilkins, 1 How. (Miss.) 574; Dawson *v.* Robert, 5 Rich. (S. C.) 258; Emmons *v.* Bailey, 1 Strobh. (S. C.) 422; Lamar *v.* Reid, 2 McMull. (S. C.) 346; Fitch *v.* Heise, Cheves (S. C.) 185; Young *v.* Grey, 1 McCord (S. C.) 211; Nashville Ins., etc., Co. *v.* Alexander, 10 Humphr. (Tenn.) 378.

47. Moffet *v.* Wooldridge, 3 Stew. (Ala.) 322; How *v.* McKinney, 12 Fed. Cas. No. 6,749, 1 McLean 319.

48. *Arkansas.*— Pitcher *v.* Morrison, 4 Ark. 74.

Iowa.— Phillips *v.* Runnels, Morr. 391, 43 Am. Dec. 109.

or complaint, and not otherwise, a demurrer on that ground will lie.[49] A demurrer on the ground that the court has no jurisdiction of defendant's person only raises the question whether defendant is such person as can be subjected to the process and jurisdiction of the court.[50] A demurrer for want of jurisdiction over the subject of the action will lie only where, after appearance by defendant, a judgment, if obtained, would be void for want of jurisdiction.[51] If a local action is commenced in the wrong venue, this is ground for demurrer, if the fact appears on the face of the pleading;[52] except that where the court has jurisdiction even where the action is brought in the wrong county, unless a demand for a change is filed, the objection cannot be urged by demurrer.[53] Where an action is brought in a court of general

Kentucky.— Palmer *v.* McGuinis, Hard. 505.

Maine.— Mahan *v.* Sutherland, 73 Me. 158.

Tennessee.—Martin *v.* State Bank, 2 Coldw. 332.

Texas.— Camp *v.* Gainer, 8 Tex. 372.

United States.—How *v.* McKinney, 12 Fed. Cas. No. 6,749, 1 McLean 319.

See 39 Cent. Dig. tit. "Pleading," § 507.

49. *Alabama.*— Campbell *v.* Crawford, 63 Ala. 392; Rose *v.* Thompson, 17 Ala. 628.

Colorado.— Hughes *v.* Cummings, 7 Colo. 138, 203, 2 Pac. 289, 928; Davis *v.* Wannamaker, 2 Colo. 637.

Indiana.— Rudisell *v.* Jennings, 38 Ind. App. 403, 77 N. E. 959, 78 N. E. 263; Delaware Tp. *v.* Ripley County, 26 Ind. App. 97, 59 N. E. 189.

Kentucky.— Baker *v.* Louisville, etc., R. Co., 4 Bush 619; Currie Fertilizer Co. *v.* Krish, 74 S. W. 268, 24 Ky. L. Rep. 2471.

Maine.— Stephenson *v.* Davis, 56 Me. 73.

Maryland.— Legum *v.* Blank, 105 Md. 126, 65 Atl. 1071; Crook *v.* Pitcher, 61 Md. 510.

Minnesota.— Dorman *v.* Ames, 9 Minn. 180; Powers *v.* Ames, 9 Minn. 178.

Mississippi.— Hurt *v.* Southern R. Co., 40 Miss. 391.

New York.— Adams *v.* Lamson Consol. Store Service Co., 59 Hun 127, 13 N. Y. Suppl. 118; Johnson *v.* Adams Tobacco Co., 14 Hun 89; Crowley *v.* Royal Exch. Shipping Co., 10 Daly 409, 2 N. Y. Civ. Proc. 174 [*affirmed* in 89 N. Y. 607]; Fisher *v.* Charter Oak L. Ins. Co., 67 How. Pr. 191 [*affirmed* in 52 N. Y. Super. Ct. 1179]; Wilson *v.* New York, 15 How. Pr. 500.

Texas.— Kansas City, etc., R. Co. *v.* Bermea Land, etc., Co., (Civ. App. 1899) 54 S. W. 324; Johnston *v.* Price, 2 Tex. App. Civ. Cas. § 756.

United States.— Southern Pac. Co. *v.* Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 942; Meyer *v.* Herrera, 41 Fed. 65; Donaldson *v.* Hazen, 7 Fed. Cas. No. 3,984, Hempst. 423; Varner *v.* West, 28 Fed. Cas. No. 16,885, 1 Woods 493.

See 39 Cent. Dig. tit. "Pleading," § 431.

Where jurisdiction depends on amount, the claim of the petition and not the amount of the verdict is conclusive, unless it appears that the claim was fraudulently enlarged for the purpose of securing jurisdiction, in which case the fraud must be specially pleaded and cannot be availed of on demurrer. Dwyer *v.* Bassett, 63 Tex. 274.

When jurisdiction matter of discretion.— But when a court may or may not take jurisdiction of an action, according as it is satisfied or not respecting the reasons therefor, the question whether the court should entertain the action should be taken by motion to dismiss rather than by demurrer, so that affidavits may be filed showing the special facts. Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31.

50. Belden *v.* Wilkinson, 44 N. Y. App. Div. 420, 60 N. Y. Suppl. 1083; Ogdensburgh, etc., R. Co. *v.* Vermont, etc., R. Co., 16 Abb. Pr. N. S. (N. Y.) 249 [*affirmed* in 4 Hun 712]; Continental L. Ins., etc., Co. *v.* Jones, 31 Utah 403, 88 Pac. 229; Sanipoli *v.* Pleasant Valley Coal Co., 31 Utah 114, 86 Pac. 865.

The meaning of the clause "that the court has no jurisdiction of the person" is, that the person is not subject to the jurisdiction of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced, defendant must relieve himself from such irregularity by motion. Nones *v.* Hope Mut. L. Ins. Co., 8 Barb. (N. Y.) 541.

51. Benson *v.* Silvey, 59 Minn. 73, 60 N. W. 847; Dammann *v.* Peterson, 17 Misc. (N. Y.) 369, 40 N. Y. Suppl. 70. See also COURTS, 11 Cyc. 669.

"That the want of jurisdiction for which a demurrer may be interposed under the Code, and which is not waived by an omission to demur or answer . . . is when the cause of action disclosed by the complaint is not properly cognizable by any court of justice to which the provisions of the Code are applicable." De Bussierre *v.* Holladay, 4 Abb. N. Cas. (N. Y.) 111, 121.

Part of complaint within jurisdiction.—A demurrer for want of jurisdiction cannot be sustained if any substantial and essential part of the complaint is within the jurisdiction of the court. Boston Water Power Co. *v.* Boston, etc., R. Corp., 16 Pick. (Mass.) 512.

52. Crook *v.* Pitcher, 61 Md. 510; Vermilya *v.* Beatty, 6 Barb. (N. Y.) 429; Chapman *v.* Wilber, 6 Hill (N. Y.) 475; Berwick *v.* Ewart, W. Bl. 1070; London *v.* Cole, 7 T. R. 583. *Contra*, Bucki *v.* Cone, 25 Fla. 1, 6 So. 160, holding that where an action is brought in the wrong venue, the objection must be taken by plea in abatement and not by demurrer.

53. Gill *v.* Bradley, 21 Minn. 15; Nininger *v.* Carver County, 10 Minn. 133.

jurisdiction, a demurrer for want of jurisdiction over the subject-matter will not lie unless the complaint shows affirmatively that there is no jurisdiction;[54] but in courts of inferior jurisdiction, a complaint is demurrable which does not affirmatively show that the court has jurisdiction.[55] An informal allegation of jurisdictional facts will be sufficient to sustain a pleading as against a general demurrer.[56] A demurrer for want of jurisdiction over the person of defendant will not lie merely for want of a proper service of summons,[57] such defect not being apparent on the face of the pleadings and hence available only on motion or plea in abatement; nor on the ground that, for any other reason, defendant has not been properly brought before the court.[58]

j. Want of, or Defects in, Bill of Particulars. It is not a ground of demurrer that the bill of particulars is defective,[59] nor is a pleading demurrable for the want of a bill of particulars.[60]

3. Demurrer to Answer[61] — a. In General. A defense,[62] or set-off or counterclaim,[63] may be demurred to, but not a denial,[64] except that at common law a denial was subject to a special demurrer.[65] A notice of special defense, filed with the general issue, is not subject to demurrer, and defects therein can be taken advantage

54. Dorman *v.* Ames, 9 Minn. 180; Powers *v.* Ames, 9 Minn. 178; Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695; Foster *v.* Roseberry, 98 Tex. 138, 81 S. W. 521.

55. Gilbert *v.* York, 111 N. Y. 544, 19 N. E. 268.

56. Hart *v.* Stevenson, 25 Conn. 499.

57. Bliss *v.* Burnes, McCahon (Kan.) 91; Belden *v.* Wilkinson, 44 N. Y. App. Div. 420, 60 N. Y. Suppl. 1083; Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468, 3 West. L. Month. 195; Robinson *v.* National Stock-Yard Co., 12 Fed. 361, 20 Blatchf. 513.

58. Van Dyke *v.* State, 24 Ala. 81; Jordan *v.* Hazard, 10 Ala. 221; Winant *v.* Nautical Preparatory School, 70 N. J. L. 366, 57 Atl. 133; Third Nat. Bank *v.* Angell, 18 R. I. 1, 29 Atl. 500.

59. Proctor *v.* Cole, 66 Ind. 576; Brown *v.* College Corner, etc., Gravel Road Co., 56 Ind. 110; Bartholomew County *v.* Ford, 27 Ind. 17; Bougher *v.* Scobey, 16 Ind. 151; Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236; Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

60. McCoy *v.* Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208. But see Turley *v.* Atlanta, etc., R. Co., 127 Ga. 594, 56 S. E. 748, 8 L. R. A. N. S. 695.

61. Grounds common to all pleadings see *supra*, VI, F, 1.

62. See cases cited *infra*, this section.

63. See *infra*, VI, F, 3, f.

64. Allen *v.* Adams, 150 Ind. 409, 50 N. E. 387; Blake *v.* Douglass, 27 Ind. 416; Aetna L. Ins. Co. *v.* Bockting, 39 Ind. App. 586, 79 N. E. 524; Scott *v.* Tell City Bank, 10 Ind. App. 94, 37 N. E. 555; Stuart *v.* Aumiller, 37 Iowa 102; Oleson *v.* Hendrickson, 12 Iowa 222; C. N. Nelson Lumber Co. *v.* Pelan, 34 Minn. 243, 25 N. W. 406; Lund *v.* Seamen's Sav. Bank, 37 Barb. (N. Y.) 129; Galbraith *v.* Daily, 37 Misc. (N. Y.) 156, 74 N. Y. Suppl. 837; Olivella *v.* New York, etc., R. Co., 31 Misc. (N. Y.) 203, 64 N. Y. Suppl. 1086 [*affirmed* in 51 N. Y. App. Div. 612, 64 N. Y. Suppl. 1145]; Maretzek *v.* Cauldwell, 19 Abb. Pr. (N. Y.) 35. But see Hopkins *v.* Everett, 6 How. Pr. (N. Y.) 159.

A defense containing a denial is not demurrable, a denial not being demurrable and no demurrer lying to part of a defense. Sherman *v.* Goodwin, (Ariz. 1907) 89 Pac. 517; Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 79 N. Y. Suppl. 244; Holmes *v.* Northern Pac. R. Co., 65 N. Y. App. Div. 49, 72 N. Y. Suppl. 476; Wintringham *v.* Whitney, 1 N. Y. App. Div. 219, 37 N. Y. Suppl. 188; Fletcher *v.* Jones, 64 Hun (N. Y.) 274, 19 N. Y. Suppl. 47; Blaut *v.* Blaut, 41 Misc. (N. Y.) 572, 85 N. Y. Suppl. 146. See also Ingersoll *v.* Davis, 14 Wyo. 120, 82 Pac. 867. But see Rogers *v.* Morton, 46 Misc. (N. Y.) 494, 95 N. Y. Suppl. 49; Rice *v.* O'Connor, 10 Abb. Pr. (N. Y.) 362. *Contra*, Sukeforth, *v.* Lord, 87 Cal. 399, 25 Pac. 497; Carter *v.* Eighth Ward Bank, 33 Misc. (N. Y.) 128, 67 N. Y. Suppl. 300; Cruikshank *v.* Press Pub. Co., 32 Misc. (N. Y.) 152, 65 N. Y. Suppl. 678 [*affirmed* in 59 N. Y. App. Div. 620, 60 N. Y. Suppl. 1133]; Green *v.* Brown, 22 Misc. (N. Y.) 279, 49 N. Y. Suppl. 163.

In Ohio specific denials may be demurred to. Shillito *v.* Merchants', etc., Ins. Co., 3 Ohio Dec. (Reprint) 120, 3 Wkly. L. Gaz. 296.

The plea of general issue "by statute" is not open to attack by demurrer. Cairns *v.* Ottawa Water Com'rs, 25 U. C. C. P. 551.

65. See cases cited *infra*, this note.

A general denial cannot be reached by a general demurrer. Gallagher *v.* Heidenheimer, 2 Tex. App. Civ. Cas. § 574.

An argumentative denial is subject to special demurrer. Wallis Iron Works *v.* Coster, 56 N. J. L. 35, 28 Atl. 592; Dime Sav. Inst. *v.* Hoboken, 42 N. J. L. 283.

A negative pregnant is bad on special demurrer. Howk *v.* Pollard, 6 Blackf. (Ind.) 108.

Denials too general.—An objection that an answer is not sufficient in that the denials are too general should be taken by special demurrer. People *v.* Chicago Bd. of Trade,

of only by objection to the introduction of evidence thereunder.[66] Under the codes in some of the states the only ground for a demurrer to a defense consisting of new matter is that it is "insufficient in law, on the face thereof," [67] as where a defense pleaded as a complete defense only amounts to a partial one.[68] So where a demurrer lies only to a defense or counter-claim, matter pleaded in mitigation of damages is not demurrable.[69] An answer is subject to demurrer where the defense set up is insufficient in matter of substance.[70] But a general demurrer to the answer will not reach defects of form.[71] At common law omission to crave oyer when oyer should be craved has been held ground for demurrer,[72] as has merely giving notice of special matter when it should be pleaded; [73] and where a short form of plea is allowable only by consent, such a plea is open to special demurrer where the record shows no consent.[74] But if a plea in abatement is joined with a plea in bar, it may, at common law, be stricken out, but it is not subject to demurrer; [75] and where two pleas set up substantially the same defense defendant may be compelled to elect, but the defect cannot be reached by demurrer.[76]

b. Defense Equivalent To, or Provable Under, General Issue or General Denial. A special plea which merely amounts to the general issue or a general denial or sets up matter admissible under the general issue or a general denial is bad on special demurrer at common law,[77] but under the codes and practice acts the

224 Ill. 370, 79 N. E. 611 [*affirming* 125 Ill. App. 20].

Specific denials substantially embraced within a general denial pleaded with them are demurrable. Ensey *v.* Cleveland, etc., R. Co., 10 Ind. 178. See also Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355; Gifford *v.* Hess, 15 Ind. App. 450, 43 N. E. 906.

66. *Illinois.*— Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695..

Mississippi.— New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244.

New Hampshire.— Leslie *v.* Harlow, 18 N. H. 518.

Vermont.— Campbell *v.* Camp, 69 Vt. 97, 37 Atl. 238.

Wisconsin.— Fowler *v.* Colton, 1 Pinn. 331. But see Corthell *v.* Holmes, 87 Me. 24, 32 Atl. 715; Moore *v.* Knowles, 65 Me. 493; Stevens *v.* Doherty, 65 Me. 94. *Contra*, Pulhamus *v.* Pursel, 3 Pa. L. J. 399.

67. See the statutes of the several states.

Meaning of word "insufficient" see Fry *v.* Bennett, 5 Sandf. (N. Y.) 54; Houghton *v.* Townsend, 8 How. Pr. (N. Y.) 441.

What constitutes "new matter" see Tapacio Min. Co. *v.* De Lima, 13 N. Y. St. 543.

Where a so-called defense does not contain new matter, it is "insufficient in law on the face thereof." George *v.* New York, 42 Misc. (N. Y.) 270, 86 N. Y. Suppl. 610.

68. See *infra*, VI, F, 3, d.

69. Prividi *v.* O'Brien, 46 Misc. (N. Y.) 56, 91 N. Y. Suppl. 324; Jones *v.* Bohm, 32 Misc. (N. Y.) 638, 66 N. Y. Suppl. 480.

70. Leathe *v.* Thomas, 109 Ill. App. 434 [*affirmed* in 218 Ill. 246, 75 N. E. 810]; Walker *v.* Pumphrey, 82 Iowa 487, 48 N. W. 928; Hawkins *v.* Mississippi, etc., R. Co., 35 Miss. 688; Merritt *v.* Millard, 5 Bosw. (N. Y.) 645. See Coddington *v.* Union Trust Co., 36 Misc. (N. Y.) 396, 73 N. Y. Suppl. 710; Wightman *v.* Shankland, 18 How. Pr. (N. Y.) 79.

Estoppel.— When facts estopping defendant from setting up a defense appear on the face of the pleadings, the answer pleading such defense is demurrable. French *v.* Blanchard, 16 Ind. 143.

71. Williams *v.* Warnell, 28 Tex. 610.

72. Goldsticker *v.* Stetson, 21 Ala. 401.

73. Pulhamus *v.* Pursel, 2 Pa. L. J. Rep. 141.

74. Haak *v.* Breidenbach, 6 Binn. (Pa.) 12.

75. Cleveland *v.* Chandler, 3 Stew. (Ala.) 489; Wythe *v.* Myers, 30 Fed. Cas. No. 18,119, 3 Sawy. 595.

76. Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238. See also *infra*, XII, E, 3.

77. *Florida.*— Wade *v.* Doyle, 17 Fla. 522.

Illinois.— Ogden *v.* Lucas, 48 Ill. 492; Manny *v.* Rixford, 44 Ill. 129; Governor *v.* Lagow, 43 Ill. 134; Johnston *v.* Ewing Female University, 35 Ill. 518; Knoebel *v.* Kircher, 33 Ill. 308; Abrams *v.* Pomeroy, 13 Ill. 133; Cook *v.* Scott, 6 Ill. 333; Supreme Lodge L. G. *v.* Albers, 106 Ill. App. 85; Ruddy *v.* Philadelphia, etc., Coal, etc., Co., 70 Ill. App. 320; Smith *v.* North, 68 Ill. App. 462; Travelers' Preferred Acc. Assoc. *v.* Moore, 58 Ill. App. 634; Edwards *v.* School Trustees, 30 Ill. App. 528.

Indiana.— Payton *v.* Secur, 4 Ind. 645.

Kentucky.— Surlott *v.* Beddow, 3 T. B. Mon. 109; Abbey *v.* Ferguson, 1 T. B. Mon. 99. Rule changed by statute allowing such form of pleading.

Massachusetts.— Freeport *v.* Edgecumbe, 1 Mass. 459.

Missouri.— Swearingen *v.* Knox, 10 Mo. 31.

New Jersey.— Grafflin *v.* Jackson, 40 N. J. L. 440. But see Noble *v.* Travelers' Ins. Co., (1901) 51 Atl. 622.

New York.— Richards *v.* Cuyler, 2 Hall 222; Hartford Bank *v.* Murrell, 1 Wend. 87.

Ohio.—Armstrong *v.* Clark, 17 Ohio 495; State *v.* Daily, 14 Ohio 91.

rule is generally that a demurrer does not lie.[78] But conceding that no demurrer lies yet the sustaining of a demurrer to such a special defense is harmless error.[79] On the other hand, the refusal of the court to sustain a demurrer on this ground is not available error, as such a plea merely serves to give notice of a defense which might be made under the general issue.[80] In any event, a general demurrer will not lie,[81] although the sustaining of such a demurrer is not reversible error when the general denial is also pleaded in the answer.[82] If a special defense is legally insufficient, it is error to overrule a demurrer thereto, even though such

Rhode Island.— Cole *v.* Lippitt, 23 R. I. 541, 51 Atl. 202.

Vermont.— Boyden *v.* Fitchburg R. Co., 70 Vt. 125, 39 Atl. 771; Hotchkiss *v.* Ladd, 36 Vt. 593, 86 Am. Dec. 679: Blood *v.* Adams, 33 Vt. 52; Hatch *v.* Hyde, 14 Vt. 25, 39 Am. Dec. 203.

Virginia.— Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. 447.

United States.—Van Avery *v.* Phœnix Ins. Co., 28 Fed. Cas. No. 16,829, 5 Biss. 193. *Compare* Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72, holding that a motion was the proper remedy where a second plea was filed after demurrer sustained, which amounted to the general issue.

Canada.—Truax *v.* Christy, Draper (U. C.) 213; Switzer *v.* Ballinger, 1 U. C. C. P. 338; Hunter *v.* Borst, 13 U. C. Q. B. 210; Nellis *v.* Wilkes, 1 U. C. Q. B. 46; Green *v.* Hamilton, 6 U. C. Q. B. O. S. 79. *Contra*, Hammond *v.* Conger, 37 U. C. Q. B. 547.

See 39 Cent. Dig. tit. "Pleading," § 450.

Contra.— Crandall *v.* Gallup, 12 Conn. 365; Whittelsey *v.* Wolcott, 2 Day (Conn.) 431.

Where special demurrers are abolished, it is no ground for demurrer. Little *v.* Bradley, 43 Fla. 402, 31 So. 342 [*overruling* Pensacola Gas Co. *v.* Pebley, 25 Fla. 381, 5 So. 593]; Wade *v.* Doyle, 17 Fla. 522; Merchants', etc., Bank *v.* Calmes, 82 Miss. 603, 35 So. 161; Polkinghorne *v.* Hendricks, 61 Miss. 366.

78. *Colorado.*— Western Union Tel. Co. *v.* Eyser, 2 Colo. 141.

Indiana.— Richardson *v.* Stephenson, 38 Ind. App. 339, 78 N. E. 256; Greenstreet *v.* Norris, Wils. 419. See also Wood *v.* State, 130 Ind. 364, 30 N. E. 309.

New York.— Staten Island Midland R. Co. *v.* Hinchliffe, 170 N. Y. 473, 63 N. E. 545; Kraus *v.* Agnew, 80 N. Y. App. Div. 1, 80 N. Y. Suppl. 518; Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 79 N. Y. Suppl. 244. *Contra*, Levy *v.* Metropolitan St. R. Co., 34 Misc. 220, 68 N. Y. Suppl. 944.

Washington.— Schell *v.* Walla Walla, 44 Wash. 43, 86 Pac. 1114. *Contra*, Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776; Peterson *v.* Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

United States.— Stratton *v.* Dines, 126 Fed. 968 [*affirmed* in 135 Fed. 449, 68 C. C. A. 161].

See 39 Cent. Dig. tit. "Pleading," § 450.

Contra.— Western R. Co. *v.* Russell, 144 Ala. 142, 39 So. 311; Montgomery St. R. Co. *v.* Hastings, 138 Ala. 432, 35 So. 412; Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500; Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432; Jenkins *v.* Chism, 76 S. W. 405, 25 Ky. L. Rep. 736; Baltimore Belt R. Co. *v.* Sattler, 100 Md. 306, 59 Atl. 654; Hopkins *v.* Dipert, 11 Okla. 630, 632, 69 Pac. 883, where the court said: "When a general denial is sufficient to entitle a party to make a complete defense to an action, it is not good practice to attempt to set up a state of facts or defense by way of a second count which can be proven under the general denial. And unless such second defense does contain averments of facts which cannot be proven under the general denial, and which amount to a defense, it does not state facts sufficient to constitute a defense to the action, and a demurrer thereto should be sustained."

79. Colorado Cent. R. Co. *v.* Mollandin, 4 Colo. 154; Millikin *v.* Starr, 79 Ill. App. 443; Story, etc., Organ Co. *v.* Rendleman, 63 Ill. App. 123; Travelers' Preferred Acc. Assoc. *v.* Moore, 58 Ill. App. 634; Wabash, etc., R. Co. *v.* McCasland, 11 Ill. App. 491; Huntington County *v.* Huffman, 134 Ind. 1, 31 N. E. 570; Standard Life, etc., Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105; Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 31 N. E. 956; Toledo, etc., R. Co. *v.* Stephenson, 131 Ind. 203, 30 N. E. 1082; Palmerton *v.* Hoop, 131 Ind. 23, 30 N. E. 874; Craig *v.* Frazier, 127 Ind. 286, 26 N. E. 842; Wallace *v.* Exchange Bank, 126 Ind. 265, 26 N. E. 175; Ralston *v.* Moore, 105 Ind. 243, 4 N. E. 673; Flora *v.* Cline, 89 Ind. 208; Kidwell *v.* Kidwell, 84 Ind. 224; Wedekind *v.* Parsons, 64 Ind. 290; Alvord *v.* Smith, 63 Ind. 58; De Haven *v.* De Haven, 46 Ind. 296; Vaughn *v.* Cushing, 23 Ind. 184; McFarland *v.* Stansifer, 36 Ind. App. 486, 76 N. E. 124; Maris *v.* Masters, 31 Ind. App. 235, 67 N. E. 699; Nowlin *v.* State, 30 Ind. App. 277, 66 N. E. 277; Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239; Whiteley Malleable Castings Co. *v.* Beverington, 25 Ind. App. 391, 58 N. E. 268; Fruits *v.* Elmore, 8 Ind. App. 278, 34 N. E. 829; Joseph *v.* Miller, 1 N. M. 621.

80. Dennis *v.* Jones, 31 Miss. 606.

81. Lair *v.* Abrams, 5 Blackf. (Ind.) 191; Freeport *v.* Edgecumbe, 1 Mass. 459; York *v.* Jones, 2 N. H. 454; Hagan *v.* Jersey City, etc., R. Co., (N. J. 1899) 43 Atl. 671.

In Maryland some cases hold this a defect of substance which is ground for a general demurrer. Spencer *v.* Patten, 84 Md. 414, 35 Atl. 1097; Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; Miller *v.* Miller, 41 Md. 623.

82. Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694.

defense is admissible under a general denial also pleaded;[83] but it is not prejudicial error to improperly sustain a demurrer to such a special defense.[84] A defense of new matter may be tested by demurrer, whether or not the facts alleged are admissible under the general denial.[85]

c. Inconsistent Defenses. The common-law remedy for inconsistent defenses is a demurrer.[86] But, under the codes, where inconsistent defenses are not allowed, the objection must be taken by motion to strike out, and not by demurrer.[87]

d. Partial Defense Pleaded as Complete Defense. A plea or answer that purports to be a defense to the entire complaint or declaration, but which in fact answers only a part thereof, is demurrable.[88] But if it purports to answer but a part and is good to that extent, it is sufficient against a demurrer.[89]

e. Unresponsive Plea. An unresponsive plea is demurrable,[90] especially where it is entirely insufficient as a defense.[91] So if the answer avowedly answers the bill of particulars, and not the complaint, it is held that the remedy is by demurrer and not by motion.[92]

f. Demurrer to Counter-Claim or Set-Off. The sufficiency of a counter-claim, set-off, or other cross demand may be tested by demurrer.[93] A counter-claim may

83. State *v.* Roche, 94 Ind. 372; Charles *v.* Malott, 51 Ind. 350; Kernodle *v.* Caldwell, 46 Ind. 153.

84. Burton *v.* Cochran, 4 Ind. 289.

85. Blumenfeld *v.* Stine, 42 Misc. (N. Y.) 411, 87 N. Y. Suppl. 81.

86. Lyons *v.* Ward, 124 Mass. 364.

87. Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339; Arnold *v.* Dimon, 4 Sandf. (N. Y.) 680. See also *infra*, XII, C, 1, c, (XII). *Compare* Uridias *v.* Morrell, 25 Cal. 31; Klink *v.* Cohen, 13 Cal. 623.

88. *Alabama.*— City Delivery Co. *v.* Henry, 139 Ala. 161, 34 So. 389; Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759; Ladd *v.* Smith, (1892) 10 So. 836.

Indiana.— Pittsburgh, etc., R. Co. *v.* Hosea, 152 Ind. 412, 53 N. E. 419.

Mississippi.— Fox *v.* Hilliard, 35 Miss. 160.

Missouri.— Price *v.* Perry, 1 Mo. 542.

New Jersey.—Grafflin *v.* Jackson, 40 N. J. L. 440.

New York.— See Straus *v.* American Publishers' Assoc., 45 Misc. 251, 92 N. Y. Suppl. 153 [*affirmed* in 103 App. Div. 277, 92 N. Y. Suppl. 1052].

Oklahoma.— Pappe *v.* Trout, 3 Okla. 260, 41 Pac. 397.

United States.— U. S. *v.* Willard, 28 Fed. Cas. No. 16,698, 1 Paine 539.

It will be assumed that facts are pleaded as a complete defense unless they are expressly pleaded as a partial defense. Mott *v.* De Nisco, 106 N. Y. App. Div. 154, 94 N. Y. Suppl. 380; Butler *v.* General Acc. Assur. Corp., 103 N. Y. App. Div. 273, 92 N. Y. Suppl. 1025; Mason *v.* Dutcher, 33 N. Y. Suppl. 689, 67 N. Y. St. 590, 24 N. Y. Civ. Proc. 345.

Where a complaint sets forth two causes of action, and a plea of abatement is filed, which is good as to one cause, and not good as to the other, a demurrer to the plea should be sustained. Pappe *v.* Trout, 3 Okla. 260, 41 Pac. 397.

A plea which fails to justify all of certain trespasses is subject to special demurrer. Rees *v.* Dick, 7 U. C. Q. B. 496.

89. Gearhart *v.* Olmstead, 7 Dana (Ky.) 441.

90. *Indiana.*— Western Union Tel. Co. *v.* Ferris, 103 Ind. 91, 2 N. E. 240; Wilson *v.* Evansville, etc., R. Co., 9 Ind. 510; Rutherford *v.* Tevis, 5 Ind. 530. But see Miller *v.* Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693.

New York.—Arthur *v.* Brooks, 14 Barb. 533.

Vermont.— Keith *v.* Bradford, 39 Vt. 34.

United States.— Peck Colorado Co. *v.* Stratton, 105 Fed. 489.

Canada.— Craig *v.* Glasier, 17 N. Brunsw. 512.

See 39 Cent. Dig. tit. "Pleading," § 200.

91. Harder *v.* Indiana Bituminous Coal Co., 163 Ind. 67, 71 N. E. 138.

92. Scovell *v.* Howell, 2 Code Rep. (N. Y.) 33.

93. Blaut *v.* Blaut, 41 Misc. (N. Y.) 572, 85 N. Y. Suppl. 146; Fox *v.* Reed, 3 Grant (Pa.) 81; Kentucky Refining Co. *v.* Saluda Oil Mill Co., 70 S. C. 89, 48 S. E. 987; Mendelsohn *v.* Banov, 57 S. C. 147, 35 S. E. 499; Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192. See also Miller *v.* Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527, demurrer to brief statement filed with general issue in an action at law, setting up claim for equitable relief.

Cross complaint.— Wis. St. (1898) § 2658, providing that plaintiff may demur to defendant's answer, or any separate defense pleaded therein, gives plaintiff a right to demur to the legal sufficiency of a cross complaint. Ormo First Nat. Bank *v.* Frank, 131 Wis. 416, 111 N. W. 526.

A cross demand is not demurrable merely because inartificially pleaded.— Shobe *v.* Brinson, 148 Ind. 285, 47 N. E. 625; Anglemyer *v.* Blackburn, 16 Ind. App. 352, 45 N. E. 483; Hammond *v.* Earle, 58 How. Pr. (N. Y.) 426; Co-Operative Pub. Co. *v.* Walker, 61 S. C. 315, 39 S. E. 525; Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; Jones *v.* Burtis, 88 Wis. 478, 60 N. W. 785; Durkee *v.* Felton, 44 Wis. 467.

generally be demurred to because it fails to state a cause of action,[94] or because another action is pending for the same cause,[95] or for want of legal capacity to recover on the counter-claim,[96] or on the ground that the counter-claim is not of the character specified in the statute,[97] or on other statutory grounds.[98] It has been held no ground for demurrer that the prayer for relief is omitted,[99] or is insufficient,[1] or that the counter-claim is insufficient to constitute a "defense."[2] Under some statutes the grounds of a demurrer to a counter-claim where defendant does not demand an affirmative judgment are different from when the counter-claim demands an affirmative judgment.[3] Where a counter-claim or set-off is filed in a case where it is not permissible, it has been held not subject to demurrer if it states a cause of action, the remedy being by a motion to strike or an objection to evidence;[4] but under the common-law system such a plea has been held bad on demurrer.[5] And similarly, if a mere defense is set up as a set-off or counter-claim, or a set-off is pleaded as a counter-claim, a demurrer will not lie because thereof.[6] The intermingling of a defense and a counter-claim or set-off is ground for a motion, and not for a demurrer, under the code practice.[7]

4. Demurrer to Reply or Subsequent Pleading — a. In General. The adverse party may where proper grounds therefor exist attack a reply or replication,[8] or a

If a counter-claim states the substantial elements of a cause of action, but fails to definitely state the nature of the damages sustained, the remedy is a motion and not a demurrer. Jennings *v.* Bond, 14 Ind. App. 282, 42 N. E. 957; Schweickhart *v.* Stuewe, 71 Wis. 1, 36 N. W. 605, 5 Am. St. Rep. 190.

94. *Indiana.*— Indiana Mut. Bldg., etc., Assoc. *v.* Crawley, 151 Ind. 413, 51 N. E. 466.

Montana.— Power *v.* Sla, 24 Mont. 243, 61 Pac. 468.

New York.— Bidwell *v.* Shaw, 9 Misc. 214, 29 N. Y. Suppl. 604.

Oregon.— Le Clare *v.* Thibault, 41 Oreg. 601, 69 Pac. 552.

South Carolina.— Kentucky Refining Co. *v.* Saluda Oil Mill Co., 70 S. C. 89, 48 S. E. 987; Mendelsohn *v.* Banov, 57 S. C. 147, 35 S. E. 499.

See 39 Cent. Dig. tit. "Pleading," § 447.

Mistake as to damages.— The fact that a defendant who sets up a counter-claim cannot, on the facts pleaded, recover the damages which he demands, or that the rule of damages is not as he asserts it to be, is not ground for demurrer to the counter-claim if the facts stated show a good cause of action. Isbell-Porter Co. *v.* Heineman, 113 N. Y. App. Div. 79, 98 N. Y. Suppl. 1018.

Defendant as plaintiff.— When an answer sets up a counter-claim, defendant makes himself in respect to such demand a plaintiff in fact, although not in name, and the sufficiency of the facts to constitute a counter-claim is to be determined in the same manner as when a demurrer is interposed to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action. Kentucky Refining Co. *v.* Saluda Oil Mill Co., 70 S. C. 89, 48 S. E. 987.

95. Caine *v.* Seattle, etc., R. Co., 12 Wash. 596, 41 Pac. 904.

96. Weeks *v.* O'Brien, 20 Misc. (N. Y.) 48, 45 N. Y. Suppl. 740 [*reversed* on other grounds in 25 N. Y. App. Div. 206, 49 N. Y. Suppl. 344 (*affirmed* in 38 N. Y. App. Div. 623, 56 N. Y. Suppl. 1119)].

97. Eckert *v.* Gallien, 24 Misc. (N. Y.) 485, 53 N. Y. Suppl. 879 [*reversed* on other grounds in 40 N. Y. App. Div. 525, 58 N. Y. Suppl. 85]; Dietrich *v.* Koch, 35 Wis. 618.

98. See the statutes of the several states.

An objection to a counter-claim that it cannot be determined without the presence of other parties may be urged by a demurrer, although the only statutory ground for demurrer to an answer is that it does not contain a counter-claim or defense. Campbell *v.* Jones, 25 Minn. 155.

99. Blaut *v.* Borchardt, 12 Misc. (N. Y.) 197, 33 N. Y. Suppl. 273.

1. Richards *v.* Littell, 16 Misc. (N. Y.) 339, 38 N. Y. Suppl. 73.

2. Armour *v.* Leslie, 39 N. Y. Super. Ct. 353.

3. Isbell-Porter Co. *v.* Heineman, 113 N. Y. App. Div. 79, 98 N. Y. Suppl. 1018. And see the statutes of the several states.

4. Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313.

5. Bullard *v.* Dorsey, 7 Sm. & M. (Miss.) 9; Anderson *v.* Burke, 6 Sm. & M. (Miss.) 475.

A general demurrer will not lie. A. B. Frank Co. *v.* A. H. Motley Co., (Tex. Civ. App. 1896) 37 S. W. 868.

6. Wait *v.* Ferguson, 14 Abb. Pr. (N. Y.) 379; Schumacher *v.* Seeger, 65 Wis. 394, 27 N. W. 30.

7. Kinney *v.* Miller, 25 Mo. 576; Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344; McCown *v.* McSween, 29 S. C. 130, 7 S. E. 45.

Where answers demurred to are denominated both as defenses and counter-claims or set-offs, the sufficiency of the pleading is to be tested by determining whether the facts pleaded allege any one of the three. Isbell-Porter Co. *v.* Heineman, 113 N. Y. App. Div. 79, 98 N. Y. Suppl. 1018.

8. Galena, etc., R. Co. *v.* Barrett, 95 Ill. 467 (holding that a replication which neither traverses nor confesses and avoids a plea is obnoxious to a general demurrer); Kennerly *v.* Walker, 1 McMull. (S. C.) 117.

rejoinder,[9] by a demurrer. Under the code practice in some states, however, the only ground for demurrer to a reply is that it is insufficient in law upon the face thereof.[10] In cases where the answer is such as to call for no reply, a reply filed should be met by motion to strike, and not by demurrer.[11] So a replication filed to a plea not in the record is not subject to demurrer, but may be stricken from the files.[12] And the erroneous use of the general replication *de injuria* cannot be reached by general demurrer.[13] Repugnancy between a protestation and an averment in a replication is not ground for demurrer.[14]

b. Departure. A departure in pleading is ground for demurrer in the code states,[15] and may be reached by a general demurrer at common law.[16]

G. Form and Contents — 1. In General.[17] No fixed and inflexible form is necessary for a demurrer, either at common law or under the codes.[18] And a plea which is in substance a demurrer, although very informal, will be considered as

Where several replications are made to one plea see Duncan *v.* Hargrove, 22 Ala. 150; Vance *v.* Wells, 8 Ala. 399.

9. Edwards *v.* White, 12 Conn. 28; Neff *v.* Powell, 6 Blackf. (Ind.) 420.

10. See the statutes of the several states.

Partial defense.— Where a reply to a counter-claim is nothing more than an admission and a partial defense and plea in mitigation of damages, but fails to state that it is intended as a partial defense, it is subject to demurrer. Pope Mfg. Co. *v.* Rubber Goods Mfg. Co., 110 N. Y. App. Div. 341, 97 N. Y. Suppl. 73.

Failure to state defense.— It was proper to overrule a demurrer to a reply on the ground that the reply did not state facts sufficient to constitute a defense to the answer; no such grounds for demurring to a reply being recognized by the code. Scott *v.* Collier, 166 Ind. 644, 78 N. E. 184 [*affirming* (App. 1906) 77 N. E. 666].

Allegations of evidence.— Where sufficient probative facts appear, a reply is not demurrable because it also contains allegations as to mere matters of evidence. Fletcher *v.* New York L. Ins. Co., 13 Fed. 526, 4 McCrary 440.

11. Cannon *v.* Davies, 33 Ark. 56.

12. Gardner *v.* Russell, 78 Ill. 292.

13. Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

14. Hapgood *v.* Houghton, 8 Pick. (Mass.) 451.

15. *Indiana.*— Shaw *v.* Jones, 156 Ind. 60, 59 N. E. 166; Etter *v.* Anderson, 84 Ind. 333; Teal *v.* Langsdale, 78 Ind. 339; Cuppy *v.* O'Shaughnessy, 78 Ind. 245; Steele *v.* Davis, 75 Ind. 191; McAroy *v.* Wright, 25 Ind. 22 [*overruling* Reilly *v.* Rucker, 16 Ind. 303, which held, *overruling* Will *v.* Whitney, 15 Ind. 194, that a demurrer would not lie].

Iowa.— Hunt *v.* Johnston, 105 Iowa 311, 75 N. W. 103.

Minnesota.— Bishop *v.* Travis, 51 Minn. 183, 53 N. W. 461; Bausman *v.* Woodman, 33 Minn. 512, 24 N. W. 198.

Montana.— Maddox *v.* Teague, 18 Mont. 512, 46 Pac. 535.

New York.— White *v.* Miles, 11 How. Pr. 36.

Oregon.— Brown *v.* Baker, 39 Oreg. 66, 65 Pac. 799, 66 Pac. 193.

Washington.— Williams *v.* Ninemire, 23 Wash. 393, 63 Pac. 534.

See 39 Cent. Dig. tit. "Pleading," § 454.

16. *Alabama.*— Bridges *v.* Tennessee Coal, etc., Co., 109 Ala. 287, 19 So. 495; George *v.* Mobile, etc., R. Co., 109 Ala. 245, 19 So. 784; Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658.

Connecticut.— Minor *v.* Woodbridge, 2 Root 274.

District of Columbia.— Wiard *v.* Semken, 19 D. C. 475.

Florida.— Tillis *v.* Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89.

Kentucky.— Pollard *v.* Taylor, 2 Bibb 234.

Maine.— Pease *v.* McKusick, 25 Me. 73.

Maryland.— Hanover F. Ins. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

Massachusetts.— Keay *v.* Goodwin, 16 Mass. 1.

Mississippi.— Fiser *v.* Mississippi, etc., R. Co., 32 Miss. 359; Gildart *v.* Howell, 1 How. 198.

New Hampshire.— Joy *v.* Simpson, 2 N. H. 179.

New Jersey.— Smith *v.* Felter, 61 N. J. L. 102, 38 Atl. 746; Miller *v.* Hillsborough Mut. Assur. Assoc., 47 N. J. L. 393, 1 Atl. 461; Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52; Wakeman *v.* Paulmier, 39 N. J. L. 340; Price *v.* Sanderson, 18 N. J. L. 426.

New York.— Spencer *v.* Southwick, 10 Johns. 259 [*reversed* on other grounds in 11 Johns. 573].

Pennsylvania.— Burk *v.* Huber, 2 Watts 306.

South Carolina.—Allen *v.* Mayson, 3 Brev. 207.

Vermont.— Hurlburt *v.* Goodsill, 30 Vt. 146; Houghton *v.* Jewett, 2 Tyler 183.

United States.— U. S. *v.* Morris, 26 Fed. Cas. No. 15,816, 1 Paine 209.

See 39 Cent. Dig. tit. "Pleading," §§ 454, 510.

17. Amendment of see *infra*, VII, A, 14.

Striking out parts of demurrer see *infra*, XII, C, 2, b, (VIII).

18. Summers *v.* Parish, 10 Cal. 347; Buscher *v.* Knapp, 107 Ind. 340, 8 N. E. 263; State *v.* Leach, 10 Ind. 308; Lagow *v.* Neilson, 10 Ind. 183; Miles *v.* Collins, 1

such,[19] and a judgment rendered thereon is valid.[20] The demurrer is entitled the same as pleadings raising questions of fact,[21] and must be signed by counsel,[22] but need not be verified.[23] It should present for decision some distinct question of law,[24] and point out clearly the particular count or defense to which it is directed.[25] All the grounds of demurrer should be stated at once, it being bad

Mete. (Ky.) 308; Smith *v.* Brown, 6 How. Pr. (N. Y.) 383.

The ground of demurrer need not be stated in the precise language used in the code.— Hanna *v.* Hawes, 45 Iowa 437. It is only necessary that the ground of demurrer should be so plainly stated that it may be clearly understood. For instance, a statement that "causes of action upon a contract are joined with a third cause of action for a tort," instead of the statutory phrase "that causes of action have been improperly united," is sufficient. McClure *v.* Wilson, 13 N. Y. App. Div. 274, 43 N. Y. Suppl. 209.

A demurrer must not deny the truth of the facts alleged in the pleading. Selkirk *v.* Sacramento County, 3 Cal. 323.

Objections to facts as surplusage.— If, after alleging that sufficient facts to constitute a cause of action are not stated, the pleader demurs to all of it for that cause, and then specifies his objections to it in parts, the demurrer, although inartificial, is not invalid. Smith *v.* Brown, 6 How. Pr. (N. Y.) 383.

Where a plea commencing in bar concludes in abatement, plaintiff may demur either in bar or in abatement; and if he adopts the former, he must conclude his demurrer in bar, and, on his prayer for damages, the judgment will be final. Roberts *v.* Stewart, 9 Tenn. 390.

In Louisiana peremptory exceptions founded in law need not be in the precise form of a plea at common law. Phillips *v.* Preston, 5 How. 278, 12 L. ed. 152. An exception for substantial insufficiency should aver that the facts averred in the pleading complained of are the same and none other than those mentioned in the exception. Flournoy *v.* Milling, 15 La. Ann. 473. Exceptions of a dilatory nature must be specially pleaded so as to point out the particular defect. Scott *v.* Jackson, 12 La. Ann. 640.

In common-law states, where instruments are pleaded with profert, and the opposing party then craves oyer, the latter who afterward demurs must set forth the instrument *in hæc verba* in his demurrer if he wishes to rely thereon. Lee *v.* Follensby, 80 Vt. 182, 67 Atl. 197.

19. *Arkansas.*— Peck *v.* Rooks, 22 Ark. 221; Davies *v.* Gibson, 2 Ark. 115.

Indiana.— Lagow *v.* Neilson, 10 Ind. 183.

Kentucky.— Miles *v.* Collins, 1 Mete. 308.

Pennsylvania.— Sparks *v.* Flaccus Glass Co., 16 Pa. Super. Ct. 119; Columbia Bank *v.* Bletz, 8 Lanc. Bar 53.

Rhode Island.— Easton *v.* Driscoll, 18 R. I. 318, 27 Atl. 445.

Tennessee.— Roberts *v.* Stewart, 1 Yerg. 390.

England.— Leaves *v.* Bernard, 5 Mod. 131, 87 Eng. Reprint 564; Leicester *v.* Heydon, Plowd. 384, 75 Eng. Reprint 582.

Canada.— Gourley *v.* Carter, 17 Nova Scotia 83.

See 39 Cent. Dig. tit. "Pleading," § 470 *et seq.*

Conversely, an exception which is in substance an answer will be so considered. Mayeur *v.* Bloomfield, 29 La. Ann. 398. What is termed "a plea of no cause of action" ceases to be such, and degenerates into an answer, if it presents an essential averment of fact not stated or admitted in the petition. Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108.

20. Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 27 N. E. 487.

21. Comstock *v.* McEvoy, 52 Mich. 324, 17 N. W. 931, holding, however, that the addition in the caption of the demurrer of superfluous words which cannot mislead is immaterial.

22. Schuyler *v.* Yates, 11 Wend. (N. Y.) 185.

23. Hitchcock *v.* Buchanan, 105 U. S. 416, 26 L. ed. 1078, holding that a statute forbidding defendants in an action on a written instrument from denying their signature, except under a plea verified by affidavit, does not apply to a case in which they demur to an instrument because on its face it appears to be the contract of their principal rather than of themselves.

24. Mathis *v.* Fordham, 114 Ga. 364, 40 S. E. 324.

If it does not do so it is frivolous. Johnston *v.* Pate, 83 N. C. 110.

25. Fidelity, etc., Co. *v.* Robertson, 136 Ala. 379, 34 So. 933; Lane *v.* State, 7 Ind. 426; Drake *v.* Satterlee, 16 N. Y. Suppl. 334; Carey *v.* Hanchet, 1 Cow. (N. Y.) 154.

Substantial compliance.— Even if there is not a technically correct designation of the parts to which the demurrer relates, if it substantially indicates the part it is sufficient. Woolsey *v.* Sunderland, 47 N. Y. App. Div. 86, 62 N. Y. Suppl. 104.

If the answer alleges new matter arising subsequent to the action as a defense, and also denies material allegations of the complaint, the demurrer must not be general but must specifically attack the allegations of new matter. McBride *v.* American Surety Co., 70 Hun (N. Y.) 369, 24 N. Y. Suppl. 371. A demurrer to "each and every defense contained in the answer" has the same effect as if plaintiff had demurred separately to each defense (Kennagh *v.* McGolgan, 4 N. Y. Suppl. 230), but such a demurrer is too indefinite where the answer does not set up the facts as separate defenses but denies plaintiff's right to the money in question and

practice to file successive demurrers to separate parts of a pleading.[26] So where a party wishes to demur on different grounds to the same pleading, all the grounds should be specified in one demurrer, instead of filing different demurrers,[27] it not being necessary that the grounds of demurrer be consistent with each other.[28] In some jurisdictions a demurrer must be accompanied by a certificate of counsel that he believes it good in law and that it is not interposed for delay.[29] Where plaintiff's demurrer to a defense was sufficient, a further demurrer to the same defense, bad in form and insufficient for that reason, may be regarded as mere surplusage.[30]

2. Demurrer Ore Tenus.[31] In some jurisdictions demurrers *ore tenus* are not allowed in courts of record,[32] but they are held proper in others where it is sought to raise substantial objections to the sufficiency of the pleadings.[33]

3. Incorporating Demurrer in Answer or Reply.[34] In some jurisdictions, by statutory provisions, a demurrer may be included in the answer.[35] But where not authorized by statute, such practice is not permissible,[36] although it has been held that if the court fix a time for filing an answer defendant may insert a demurrer in

then alleges that defendant is entitled to the money (Drake *v.* Satterlee, 16 N. Y. Suppl. 334).

Demurrer to "defense."— Where a denial and defense by way of new matter are pleaded in the answer, and a demurrer is interposed to the "defense," this is taken to apply only to the new matter, in those states where the term "defense" does not include denials. Jaeger *v.* New York, 39 Misc. (N. Y.) 543, 80 N. Y. Suppl. 356.

After amended pleading filed, a demurrer purporting to be addressed to the original pleading will be considered addressed to the amended pleading. Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759; Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277.

After a supplemental pleading filed, a demurrer "to the amended and supplemental complaints" will be held taken to both together. Harris *v.* Elliott, 29 N. Y. App. Div. 568, 51 N. Y. Suppl. 1012.

26. Hester *v.* McNeille, 6 Phila. (Pa.) 263.

27. Hackett *v.* Carter, 38 Wis. 394.

28. Feeley *v.* Wurster, 25 Misc. (N. Y.) 544, 54 N. Y. Suppl. 1060.

29. Newton *v.* People's R. Co., 4 Pennew. (Del.) 350, 55 Atl. 2.

Where a mere glance at a demurrer to the complaint was sufficient to show that it was filed in the best of faith, a statement of counsel that it was not interposed for delay was not required. Ballantine *v.* Yung Wing, 146 Fed. 621.

30. Bates *v.* Delaware, etc., R. Co., 109 N. Y. App. Div. 774, 96 N. Y. Suppl. 711.

31. See also *infra*, XIV, I, 3.

32. Washington *v.* Eames, 6 Allen (Mass.) 417; Jenks *v.* Brown, 38 Mich. 651.

In Manitoba, a demurrer *ore tenus* will not be allowed unless there is a demurrer on the record. Wright *v.* Winnipeg, 3 Manitoba 349.

33. *Dakota.*— Stutsman County *v.* Mansfield, 5 Dak. 78, 37 N. W. 304.

Georgia.— Winkler *v.* Scudder, 1 Ga. 108.

Nebraska.— Cobleskill First Nat. Bank *v.* Pennington, 57 Nebr. 404, 77 N. W. 1084.

South Carolina.— State *v.* Corbin, 16 S. C. 533. See also Threatt *v.* Brewer Min. Co., 49 S. C. 95, 26 S. E. 970.

Tennessee.—See West *v.* Tyler, 2 Coldw. 96.

Wisconsin.— Phillips *v.* Carver, 99 Wis. 561, 75 N. W. 432.

See 39 Cent. Dig. tit. "Pleading," §§ 472, 481.

Compare Snodgrass *v.* Ricketts, 13 Cal. 359.

In South Carolina, where judgment is taken by default, an objection that the complaint does not state a cause of action cannot be made by oral demurrer, but the remedy is by motion to set the judgment aside under Code, § 195. Gillian *v.* Gillian, 65 S. C. 129, 43 S. E. 386.

34. **Plea, answer, or reply with demurrer** see *infra*, VI, G, 4.

35. Greenfield *v.* Carlton, 30 Ark. 547; Jones *v.* Minogue, 29 Ark. 637; Hobson *v.* Satterlee, 163 Mass. 402, 40 N. E. 189; Harding *v.* Egin, 2 Tenn. Ch. 39; Hudson *v.* Wheeler, 34 Tex. 356; Alliance Milling Co. *v.* Eaton, (Tex. Civ. App. 1893) 23 S. W. 455.

Demurrer to jurisdiction.—A statutory provision declaring that defendant "may have all the benefit of a demurrer, by relying thereon in his answer" does not apply to an objection for want of jurisdiction, and defendant cannot incorporate in his answer a demurrer to the jurisdiction. Bennett *v.* Wilkins, 5 Coldw. (Tenn.) 240.

36. Taber *v.* Wilson, 34 Mo. App. 89; Camp *v.* Bedell, 52 Hun (N. Y.) 63, 5 N. Y. Suppl. 63; Barnard *v.* Morrison, 29 Hun (N. Y.) 410; Davis *v.* Hines, 6 Ohio St. 473. See Andrews *v.* Mokelumne Hill Co., 7 Cal. 330.

In Pennsylvania, however, the demurrer must be embodied in the answer. Heller *v.* Royal Ins. Co., 151 Pa. St. 101, 25 Atl. 83; Mooney *v.* Snyder, 7 Del. Co. 335. See also Duffy *v.* Mell, 28 Pa. Co. Ct. 365.

Adding to an answer an allegation that there are not sufficient facts stated in the complaint to constitute a cause of action is not to be construed as making the answer include a demurrer. Camp *v.* Bedell, 52

an answer filed within the prescribed time.[37] If the answer contains at the same time a demurrer directed to the same matter, the latter is sometimes treated as surplusage,[38] or a motion may be made to compel defendant to elect.[39]

4. Plea, Answer, or Reply With Demurrer [40] — a. In General. It is not allowable to demur and plead to the same matter at the same time, at any stage of the pleadings,[41] except where authorized so to do by statute,[42] or by leave of court.[43] In such a case, it has been held that a motion lies to strike out either the answer or demurrer,[44] and that plaintiff may disregard both plea and demurrer and take a judgment,[45] although generally the answer or plea is deemed to overrule the demurrer.[46]

Hun (N. Y.) 63, 5 N. Y. Suppl. 63; Barnard *v.* Morrison, 29 Hun (N. Y.) 410.

A demurrer cannot be contained in a reply. — Clark *v.* Van Dusen, 3 Code Rep. (N. Y.) 219.

37. Lee *v.* King, 6 Gray (Mass.) 495.

38. Camp *v.* Bedell, 52 Hun (N. Y.) 63, 5 N. Y. Suppl. 63; Barnard *v.* Morrison, 29 Hun (N. Y.) 410; Higgins *v.* Hoppock, 20 N. Y. Suppl. 386.

39. Camp *v.* Bedell, 52 Hun (N. Y.) 63, 5 N. Y. Suppl. 63; Munn *v.* Barnum, 12 How. Pr. (N. Y.) 563; Davis *v.* Hines, 6 Ohio St. 473; Stahn *v.* Catawba Mills, 53 S. C. 519, 31 S. E. 498.

40. Demurrer incorporated in answer see *supra*, VI, G, 3.

41. *Alabama.*— Taylor *v.* Rhea, Minor 414; Gayle *v.* Smith, Minor 83.

Illinois.— Edbrooke *v.* Cooper, 79 Ill. 582; Dorn *v.* Smith, etc., Co., 106 Ill. App. 91.

Indiana.— Riley *v.* Harkness, 2 Blackf. 34; Hair *v.* Weaver, 1 Blackf. 77.

Massachusetts.— Com. *v.* Dearborn, 15 Mass. 125.

Michigan.— Griffin *v.* Wattles, 119 Mich. 346, 78 N. W. 122.

Mississippi.— Gwin *v.* Mandeville, 9 Sm. & M. 320.

Nebraska.— Fidelity, etc., Co. *v.* Parkinson, 68 Nebr. 319, 94 N. W. 120.

New Hampshire.— Truesdale *v.* Straw, 58 N. H. 207.

New York.— Morey *v.* Ford, 32 Hun 446; Struver *v.* Ocean Ins. Co., 16 How. Pr. 422; Munn *v.* Barnum, 12 How. Pr. 563; Burr *v.* Wright, 9 How. Pr. 542; Spellman *v.* Weider, 5 How. Pr. 5; Slocum *v.* Wheeler, 4 How. Pr. 373; Snyder *v.* Hearman, 2 How. Pr. 279; Rickert *v.* Snyder, 5 Wend. 104.

Ohio.— Calvin *v.* State, 12 Ohio St. 60; Davis *v.* Hines, 6 Ohio St. 473; Craighead *v.* Kemble, Tapp. 246.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Hayes, 13 Pa. Dist. 671; Burke *v.* Railroad Co., 5 Lack. Jur. 260; Com. *v.* Housekeeper, 6 Lanc. Bar 105; McFate *v.* Shallcross, 1 Phila. 75. *Contra*, Heller *v.* Royal Ins. Co., 151 Pa. St. 101, 25 Atl. 83; Mooney *v.* Snyder, 7 Del. Co. 335.

Rhode Island.— Reid *v.* Providence Journal Co., 20 R. I. 120, 37 Atl. 637.

Virginia.— Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; Lang *v.* Lewis, 1 Rand. 277.

See 39 Cent. Dig. tit. "Pleading," §§ 404–407.

Contra.— Muldrow *v.* McCleland, 1 Litt. (Ky.) 1.

42. *Arkansas.*— Greenfield *v.* Carlton, 30 Ark. 547; Jones *v.* Minogue, 29 Ark. 637. But see Lincoln *v.* Wilamowiez, 7 Ark. 378.

California.— People *v.* McClellan, 31 Cal. 101.

Florida.— Wade *v.* Doyle, 18 Fla. 630.

North Carolina.— Lamb *v.* Ward, 114 N. C. 255, 19 S. E. 230.

South Carolina.— Stahn *v.* Catawba Mills, 53 S. C. 519, 31 S. E. 498; Latimer *v.* Sullivan, 30 S. C. 111, 8 S. E. 639.

Tennessee.— Bennett *v.* Wilkins, 5 Coldw. 240; Harding *v.* Egin, 2 Tenn. Ch. 39. But see Martin *v.* State Bank, 2 Coldw. 332.

Texas.— Hudson *v.* Wheeler, 34 Tex. 356; Alliance Milling Co. *v.* Eaton, (Civ. App. 1893) 23 S. W. 455.

Virginia.— Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; Lang *v.* Lewis, 1 Rand. 277; Eppes *v.* Smith, 4 Munf. 466; Syme *v.* Griffin, 4 Hen. & M. 277.

Canada.— Foster *v.* Lansdowne, 12 Manitoba 41; Hanington *v.* Girouard, 16 N. Brunsw. 151; Maekey *v.* Bierel, 16 Ont. Pr. 148.

See 39 Cent. Dig. tit. "Pleading," §§ 404–407.

Demurrer separate.— Where the demurrer and answer may both be filed, each must be distinct. Andrews *v.* Mokelumne Hill Co., 7 Cal. 330.

In Virginia it is held that this privilege extends to a demurrer to no pleading beyond defendant's plea. Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

In Canada, when a party intends to plead and demur at the same time, it is provided by a rule of court that an affidavit must be filed, and leave of the court must be obtained. Mackey *v.* Bierel, 16 Ont. Pr. 148.

43. Tecumseh Salt Co. *v.* Platt, 6 Ont. Pr. 251; Westover *v.* Brown, 5 Ont. Pr. 215; Ross *v.* Tyson, 19 U. C. C. P. 294.

Effect of prior hearing on issue of fact.— Where issues of law and fact are joined on the same plea, and the latter are heard first and the pleas found bad in fact, the issues of law will not be heard. Derbishire *v.* Feehan, 12 U. C. C. P. 502; Macmartin *v.* Thompson, 26 U. C. Q. B. 334.

44. Spellman *v.* Weider, 5 How. Pr. (N. Y.) 5.

45. Gwin *v.* Mandeville, 9 Sm. & M. (Miss.) 320.

46. *Indiana.*— Hosier *v.* Eliason, 14 Ind. 525.

b. Demurrer and Answer to Different Parts of Pleading. It is not allowable to plead and demur at the same time to different parts of an indivisible count or defense.[47] But it is permissible to plead to one count or defense and demur at the same time to another,[48] or, where the matter of a count or defense is divisible, a plea or answer may be filed to a part and a demurrer to the residue.[49] And where a defendant is sued in a single count in two distinct capacities, he may demur in one capacity and plead in another.[50] A plea of set-off, containing several distinct matters, is of this divisible character.[51]

5. Specifying Grounds — a. Necessity. It has been held that a demurrer which specifies no grounds whatever is insufficient;[52] and under the codes it is necessary that the demurrer should always point out the particular statutory grounds upon which it is based.[53] However, at common law, a demurrer which does not specify or adequately specify any grounds will be taken as a general demurrer,[54] and the same rule applies under the codes where the party whose

Nebraska.— Fidelity, etc., Co. *v.* Parkinson, 68 Nebr. 319, 94 N. W. 120.

New York.— Jarvis *v.* Palmer, 11 Paige 650.

Oklahoma.— Ryndak *v.* Seawall, 13 Okla. 737, 76 Pac. 170.

Pennsylvania.— McFate *v.* Shallcross, 1 Phila. 75.

Rhode Island.—Reid *v.* Providence Journal Co., 20 R. I. 120, 37 Atl. 637.

See 39 Cent. Dig. tit. "Pleading," § 407.

Contra.— Gwin *v.* Mandeville, 9 Sm. & M. (Miss.) 320.

47. Karthaus *v.* Owings, 6 Harr. & J. (Md.) 134; Ingraham *v.* Baldwin, 12 Barb. (N. Y.) 9 [*affirmed* in 9 N. Y. 45]; Manchester *v.* Storrs, 3 How. Pr. (N. Y.) 410; Speight *v.* Jenkins, 99 N. C. 143, 5 S. E. 385; Love *v.* Chatham County, 64 N. C. 706; Ransom *v.* McClees, 64 N. C. 17; Citizens' Bank *v.* Wiegand, 11 Phila. (Pa.) 326.

48. Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955; Patterson *v.* Wilkinson, 55 Me. 42, 92 Am. Dec. 568; Griffin *v.* Wattles, 119 Mich. 346, 78 N. W. 122; Richtmyer *v.* Haskins, 9 How. Pr. (N. Y.) 481; Simpson *v.* Loft, 8 How. Pr. (N. Y.) 234; Putnam *v.* De Forest, 8 How. Pr. (N. Y.) 146; Loomis *v.* Dorshimer, 8 How. Pr. (N. Y.) 9.

49. *Indiana.*— Shearman *v.* Fellows, 5 Blackf. 459; Wyant *v.* Smith, 5 Blackf. 293.

Maryland.— Edes *v.* Garey, 46 Md. 24.

Minnesota.— Bass *v.* Upton, 1 Minn. 408.

New Jersey.— Tompkins *v.* Harwood, 24 N. J. L. 425.

Ohio.— Magruder *v.* McCandlis, 3 Ohio Dec. (Reprint) 269, 5 Cinc. L. Gaz. 188.

In **Missouri** defendant "may demur to one part of the petition and answer to another; but the object of demurrer is essentially different from that of an answer, and he cannot do both at the same time and in the same pleading." Taber *v.* Wilson, 34 Mo. App. 89.

50. Kaughran *v.* Kaughran, 73 N. Y. App. Div. 150, 76 N. Y. Suppl. 754.

51. Shearman *v.* Fellows, 5 Blackf. (Ind.) 459.

52. Helvenstein *v.* Higgason, 35 Ala. 259; Burns *v.* Mobile, 34 Ala. 485; Roach *v.* Scogin, 2 Ark. 128; Hessin *v.* Heck, 88 Ind. 449; Jewett *v.* Honey Creek Draining Co., 39 Ind. 245; Hicks *v.* Reigle, 32 Ind. 360; Tootle *v.* Berkley, 57 Kan. 111, 45 Pac. 77. *Contra,* Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468.

In **Florida,** by statute, causes of demurrer must be indicated in the margin of the demurrer. Stephens *v.* Bradley, 24 Fla. 201, 3 So. 415.

In **West Virginia** the statute provides that if nothing be alleged by the demurrant in support of his demurrer, the court, if it overrule the same, shall state that fact in the order, and if final judgment be obtained in the cause by the party whose pleading is demurred to, the same shall not be reversed by reason of any defect in the pleading so demurred to. Koontz *v.* Koontz, 47 W. Va. 31, 34 S. E. 752.

53. *California.*—McDaniel *v.* Yuba County, 14 Cal. 444.

Connecticut.— Miller *v.* Cross, 73 Conn. 538, 48 Atl. 213; Cook *v.* Morris, 66 Conn. 196, 33 Atl. 994.

Indiana.— Hessin *v.* Heck, 88 Ind. 449; Jewett *v.* Honey Creek Draining Co., 39 Ind. 245; Hicks *v.* Reigle, 32 Ind. 360.

Iowa.— Traders' Bank *v.* Alsop, 64 Iowa 97, 19 N. W. 863; McLaughlin *v.* Bascomb, 36 Iowa 593; McKellar *v.* Stout, 13 Iowa 487; Babbitt *v.* Walters, 3 Greene 564; Crittenden *v.* Steele, 3 Greene 538.

Kansas.— Tootle *v.* Berkley, 57 Kan. 111, 45 Pac. 77.

Nebraska.— Colby *v.* Lyman, 4 Nebr. 429.

New York.— Dodge *v.* Colby, 108 N. Y. 445, 15 N. E. 703; Anderton *v.* Wolf, 41 Hun 578; Safford *v.* Snedeker, 67 How. Pr. 264.

South Carolina.— Smith *v.* Smith, 52 S. C. 205, 29 S. E. 549.

See 39 Cent. Dig. tit. "Pleading," § 475.

If the statute requires the grounds to be numbered, this applies only where there is more than one ground. Wolf *v.* Schofield, 38 Ind. 175.

54. Roach *v.* Scogin, 2 Ark. 128; Davies *v.* Gibson, 2 Ark. 115; Lomax *v.* Bailey, 7 Blackf. (Ind.) 599.

The **common-law rule** is that where a special demurrer is filed, the demurrant may take advantage not only of causes specified

pleading is demurred to proceeds to the hearing of such demurrer without objection.[55]

b. Right to Rely on Grounds Not Specified. Grounds not enumerated in the demurrer cannot be relied on,[56] except that at common law the failure to state a cause of action may be urged though not specified in a special demurrer.[57] For instance, a demurrer to a complaint for failure to state facts sufficient to constitute a cause of action does not raise the objection of want of jurisdiction,[58] misjoinder

in his demurrer but also of any cause for which a general demurrer will lie. Fisher *v.* Lewis, 1 Pa. L. J. Rep. 422; Pryor *v.* Moore, 8 Tex. 250.

In Texas the common-law rule is followed. Cheek *v.* Herndon, 82 Tex. 146, 17 S. W. 763; Doan *v.* Osborne, (Civ. App. 1895) 33 S. W. 156.

55. Colby *v.* Lyman, 4 Nebr. 429; McClary *v.* Sioux City, etc., R. Co., 3 Nebr. 44, 19 Am. Rep. 631. See also Mayberry *v.* Kelly, 1 Kan. 116.

56. *Alabama.*— Little *v.* Marx, 145 Ala. 620, 39 So. 517; Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522; Turner Coal Co. *v.* Glover, 101 Ala. 289, 13 So. 478; Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33; Lowry *v.* Newsom, 51 Ala. 570; Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560.

California.— Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Pacific Mut. L. Ins. Co. *v.* Shepardson, 77 Cal. 345, 19 Pac. 583; Mora *v.* Le Roy, 58 Cal. 8.

Colorado.— Green *v.* Taney, 7 Colo. 278, 3 Pac. 423.

Indiana.— Sluss *v.* Shrewsbury, 18 Ind. 79.

Iowa.— Traders' Bank *v.* Alsop, 64 Iowa 97, 19 N. W. 863.

Minnesota.—Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 74 Am. St. Rep. 490, 43 L. R. A. 427.

Montana.— Knight *v.* Le Beau, 19 Mont. 223, 47 Pac. 953.

New York.— Palmer *v.* Roods, 116 N. Y. App. Div. 66, 101 N. Y. Suppl. 186; Carter *v.* De Camp, 40 Hun 258; Berney *v.* Drexel, 33 Hun 419; Wilson *v.* New York, 6 Abb. Pr. 6, 15 How. Pr. 500; Safford *v.* Snedeker, 67 How. Pr. 264.

Oklahoma.— Helm *v.* Briley, 17 Okla. 314, 87 Pac. 595.

Washington.— Church Erection Fund, etc. *v.* Seattle First Presb. Church, 19 Wash. 455, 53 Pac. 671.

Wisconsin.— Arzbacher *v.* Mayer, 53 Wis. 380, 10 N. W. 440.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

Canada.— Lane *v.* O'Shaughnessy, 32 N. Brunsw. 202.

See 39 Cent. Dig. tit. "Pleading," § 520.

On special demurrer under the common-law practice, no other faults in form can be reached than those which are specifically assigned. Casey, etc., Mfg. Co. *v.* Dalton Ice Co., 94 Ga. 407, 20 S. E. 333; Farmers', etc., Ins. Co. *v.* Munz, 63 Ill. 116; Iron Clad Dryer Co. *v.* Chicago Trust, etc., Bank, 50 Ill. App. 461; Crookshank *v.* Kellogg, 8 Blackf. (Ind.) 256; Milroy *v.* Hensley, 2 Bibb (Ky.) 20; Collier *v.* Moulton, 7 Johns. (N. Y.) 109; Snyder *v.* Croy, 2 Johns. (N. Y.) 428; Willey *v.* Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853.

On a demurrer for ambiguity and uncertainty, directed against a complaint containing inconsistent counts, the court will not go on to consider whether either count states a good cause of action. Reed *v.* Poindexter, 16 Mont. 294, 40 Pac. 596.

A demurrer for misjoinder of causes of action does not raise the point that several causes of action which might properly be joined in separate counts have been united in one count. Zeideman *v.* Molasky, 118 Mo. App. 106, 94 S. W. 754.

An objection that a reply should have been pleaded puis darrein continuance cannot be raised by a demurrer for want of sufficient facts. Herod *v.* Snyder, 61 Ind. 453.

Effect of stipulations.— Where it is specially provided by statute that no objection can be taken or allowed which is not distinctly stated in the demurrer, the statutory provision cannot be rendered nugatory by an agreement of counsel that the demurrer is to be deemed to specify every ground which could be urged. Alabama, etc., R. Co. *v.* Watson, 42 Ala. 74.

In the District of Columbia, however, where a court rule requires a substantial ground to be stated for every demurrer, this is held not to exclude the consideration of other grounds not stated. Virginia F. & M. Ins. Co. *v.* Bohnke, 4 App. Cas. 371.

57. See *supra*, VI, B, 1.

58. *Indiana.*— Wabash, etc., R. Co. *v.* Rooker, 90 Ind. 581; Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505; Lowry *v.* Dutton, 28 Ind. 473; Louisville, etc., R. Co. *v.* Johnson, 11 Ind. App. 328, 36 N. E. 766; Lake Erie, etc., R. Co. *v.* Fishback, 5 Ind. App. 403, 32 N. E. 346.

Massachusetts.—Briggs *v.* Nantucket Bank, 5 Mass. 94.

New York.— Drake *v.* Drake, 41 Hun 366.

Ohio.— Saxton *v.* Seiberling, 48 Ohio St. 554, 29 N. E. 179; Hull *v.* Standard Coal, etc., Co., 7 Ohio S. & C. Pl. Dec. 527, 7 Ohio N. P. 157.

South Carolina.— McKibben *v.* Salinas, 36 S. C. 279, 15 S. E. 208, 543.

South Dakota.— Woods *v.* Sheldon, 9 S. D. 392, 69 N. W. 602.

Texas.— Masterson *v.* Cundiff, 58 Tex. 472; McKie *v.* Simpkins, 1 Tex. App. Civ. Cas. § 278.

See 39 Cent. Dig. tit. "Pleading," § 495.

of causes of action,[59] or the pendency of another action,[60] or indefiniteness and uncertainty.[61] So a general demurrer to a complaint at common law, or a code demurrer on the ground that it fails to state a cause of action, does not raise the question of a defect of parties,[62] plaintiff,[63] or defendant.[64] Misjoinder of parties in some jurisdictions is available on a general demurrer or a code demurrer that the complaint does not state facts sufficient to constitute a cause of action,[65] but other

59. *California.*— Cox *v.* Western Pac. R. Co., 47 Cal. 87.

Indiana.— Nesbit *v.* Miller, 125 Ind. 106, 25 N. E. 148; Clay County *v.* Redifer, 32 Ind. App. 93, 69 N. E. 305; Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475; Leak *v.* Thorn, 13 Ind. App. 335, 41 N. E. 602.

Minnesota.— Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 74 Am. St. Rep. 490, 43 L. R. A. 427; Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232.

Missouri.— Ferguson *v.* Davidson, 65 Mo. App. 193.

Nevada.— Ruhling *v.* Hackett, 1 Nev. 360.

Washington.— Ames *v.* Kinnear, 42 Wash. 80, 84 Pac. 629; Marvin *v.* Yates, 26 Wash. 50, 66 Pac. 131.

United States.— Dobbin *v.* Foyles, 6 Fed. Cas. No. 3,492, 2 Cranch C. C. 65.

Contra.— Munter *v.* Rogers, 50 Ala. 283; Wilkinson *v.* Moseley, 30 Ala. 562; Fairfield *v.* Burt, 11 Pick. (Mass.) 244.

60. Basye *v.* Basye, 152 Ind. 172, 52 N. E. 797; Williams *v.* Lewis, 124 Ind. 344, 24 N. E. 733; Aiken *v.* Bruen, 21 Ind. 137.

61. Hunt *v.* Jones, 149 Cal. 297, 86 Pac. 686; Kramm *v.* Bogue, 127 Cal. 122, 59 Pac. 394; Lindley *v.* Fay, 119 Cal. 239, 51 Pac. 333; Santa Barbara *v.* Eldred, 108 Cal. 294, 41 Pac. 410; Yordi *v.* Yordi, 6 Cal. App. 20, 91 Pac. 348; Neves *v.* Costa, 5 Cal. App. 111, 89 Pac. 860; Burgess *v.* Helm, 24 Nev. 242, 51 Pac. 1025.

62. *Arkansas.*— Chrisman *v.* Jones, 34 Ark. 73; Eagle *v.* Beard, 33 Ark. 497.

Georgia.— Hunt *v.* Doyal, 128 Ga. 416, 57 S. E. 489; Ray *v.* Pitman, 119 Ga. 678, 46 S. E. 849.

Indiana.—Boseker *v.* Chamberlain, 160 Ind. 114, 66 N. E. 448; Carskaddon *v.* Pine, 154 Ind. 410, 56 N. E. 844; Whipperman *v.* Dunn, 124 Ind. 349, 24 N. E. 166, 1045; Shirk *v.* Andrews, 92 Ind. 509; Leedy *v.* Nash, 67 Ind. 311; Clough *v.* Thomas, 53 Ind. 24; Greensburgh, etc., Turnpike Co. *v.* Sidener, 40 Ind. 424; Baltimore, etc., R. Co. *v.* McWhinney, 36 Ind. 436; Little *v.* Johnson, 26 Ind. 170; Collins *v.* Nave, 9 Ind. 209; Supreme Tribe of B. H. *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262; Loufer *v.* Stottlemyer, 16 Ind. App. 221, 44 N. E. 1008.

Kentucky.— Lee *v.* Waller, 3 Metc. 61; Gragg *v.* Home Ins. Co., 90 S. W. 1045, 28 Ky. L. Rep. 988.

Minnesota.— Svenburg *v.* Fosseen, 75 Minn. 350, 79 N. W. 4, 74 Am. St. Rep. 490, 43 L. R. A. 427; Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086.

Nebraska.— Holway *v.* American Exch. Bank, 64 Nebr. 67, 89 N. W. 401.

Ohio.—Dunning *v.* Choate, 8 Ohio Dec. (Reprint) 316, 7 Cinc. L. Bul. 77.

Texas.—Mott *v.* Ruenbuhl, 1 Tex. App. Civ. Cas. § 599.

Washington.— Van Horne *v.* Watrous, 10 Wash. 525, 39 Pac. 136.

See 37 Cent. Dig. tit. "Parties," §§ 125, 140.

Contra.— Kent *v.* Holliday, 17 Md. 387.

63. Musselman *v.* Kent, 33 Ind. 452; Beyer *v.* Crandon, 98 Wis. 306, 73 N. W. 771. But see Quisenberry *v.* Artis, 1 Duv. (Ky.) 30, holding that on an obligation to two persons, neither has a separate right of action; and, in an action by one of them, a demurrer would lie on the ground that the petition failed to state a cause of action, unless plaintiff averred an assignment from his co-payee.

64. *Arkansas.*— Chrisman *v.* Jones, 34 Ark. 73.

Indiana.— Leedy *v.* Nash, 67 Ind. 311; Clough *v.* Thomas, 53 Ind. 24; Baltimore, etc., R. Co. *v.* McWhinney, 36 Ind. 436.

Ohio.— Dunning *v.* Choate, 8 Ohio Dec. (Reprint) 316, 7 Cinc. L. Bul. 77.

Washington.— Van Horne *v.* Watrous, 10 Wash. 525, 39 Pac. 136.

Wisconsin.— Burhop *v.* Milwaukee, 18 Wis. 431.

See 37 Cent. Dig. tit. "Parties," § 140.

Contra.— See Gould *v.* Hayes, 19 Ala. 438.

65. *Indiana.*— McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Nicodemus *v.* Simons, 121 Ind. 564, 23 N. E. 521; Debolt *v.* Carter, 31 Ind. 355; Goodnight *v.* Goar, 30 Ind. 418; Berkshire *v.* Shultz, 25 Ind. 523; Halstead *v.* Coen, 31 Ind. App. 302, 67 N. E. 957. See Evans *v.* Schafer, 119 Ind. 49, 21 N. E. 448. *Contra*, Cole *v.* Watertown Merchants' Bank, 60 Ind. 350.

Minnesota.— Lewis *v.* Williams, 3 Minn. 151.

Missouri.—Akins *v.* Hicks, 109 Mo. App. 95, 83 S. W. 75.

New Hampshire.— Stevenson *v.* Cofferin, 20 N. H. 150.

Ohio.— Masters *v.* Freeman, 17 Ohio St. 323; Bartges *v.* O'Neil, 13 Ohio St. 72.

Wisconsin.— Kueera *v.* Kucera, 86 Wis. 416, 57 N. W. 47; Jones *v.* Foster, 67 Wis. 296, 30 N. W. 697; Arzbacher *v.* Mayer, 53 Wis. 380, 10 N. W. 440.

See 37 Cent. Dig. tit. "Parties," § 147.

Joint cause of action.— If the complaint purports to set up a cause of action in favor of several plaintiffs jointly which in its nature cannot be joint, a general demurrer for want of facts will lie. Hellams *v.* Switzer, 24 S. C. 39.

Unless a cause of action is shown in favor of all of joint plaintiffs, a general demurrer

courts refuse to sanction such a rule.[66] A demurrer on the ground of a defect of parties does not include the objection of a misjoinder of parties,[67] and a demurrer for misjoinder of parties does not raise an objection as to defect of parties.[68] A demurrer on the ground that a complaint does not state facts sufficient to constitute a cause of action does not present the question of the legal capacity of plaintiff to sue,[69] and conversely.[70] And a demurrer based on the ground of improper joinder of causes of action does not reach the objection that the court

on the ground that no cause of action is stated will be sustained. State *v.* Holt, 163 Ind. 198, 71 N. E. 653; McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256; Darkies *v.* Bellows, 94 Ind. 64; Headrick *v.* Brattain, 83 Ind. 188; Ætna Ins. Co. *v.* Kittles, 81 Ind. 96; Parker *v.* Small, 58 Ind. 349; Fatman *v.* Leet, 41 Ind. 133; Lipperd *v.* Edwards, 39 Ind. 165; Louisville, etc., R. Co. *v.* Lange, 13 Ind. App. 337, 41 N. E. 609.

66. *Georgia.*— Rusk *v.* Hill, 117 Ga. 722, 45 S. E. 42. *Contra,* Governor *v.* Hicks, 12 Ga. 189.

New York.— Middlebrook *v.* Travis, 66 Hun 510, 21 N. Y. Suppl. 398; Barnes *v.* Blake, 59 Hun 371, 13 N. Y. Suppl. 77, 20 N. Y. Civ. Proc. 17. *Compare* Sanford *v.* New York Fourth Nat. Bank, 60 Hun 484, 15 N. Y. Suppl. 181. *Contra,* Palmer *v.* Davis, 28 N. Y. 242; Mann *v.* Marsh, 21 How. Pr. 372.

South Carolina.— Neal *v.* Bleckley, 51 S. C. 506, 29 S. E. 249.

Texas.— McFadden *v.* Schill, 84 Tex. 77, 19 S. W. 368; Williams *v.* Bradbury, 9 Tex. 487; Detroit Electrical Works *v.* Riverside St. R. Co., (Civ. App. 1895) 29 S. W. 412.

Wisconsin.— Kucera *v.* Kucera, 86 Wis. 416, 57 N. W. 47; Nevil *v.* Clifford, 55 Wis. 161, 12 N. W. 419; Schiffer *v.* Eau Claire, 51 Wis. 385, 8 N. W. 253. See also Willard *v.* Reas, 26 Wis. 540.

See 37 Cent. Dig. tit. "Parties," §§ 147, 152.

For instance, a complaint is not demurrable because it fails to state facts sufficient to constitute a cause of action, where plaintiff attempts to sue in behalf of others as well as himself and does not allege facts necessary to enable them to participate in the action. Carey *v.* Brown, 58 Cal. 180.

67. Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522. See also *supra,* VI, F, 2, e, (1).

68. Mader *v.* Plano Mfg. Co., 17 S. D. 553, 97 N. W. 843.

69. *California.*— Los Angeles R. Co. *v.* Davis, 146 Cal. 179, 79 Pac. 865.

Colorado.— Page Woven Wire Fence Co. *v.* Joslin, 38 Colo. 162, 88 Pac. 142.

Indiana.— Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694.

Iowa.— Hanna *v.* Hawes, 45 Iowa 437.

Kentucky.— Louisville, etc., R. Co. *v.* Brantley, 96 Ky. 297, 28 S. W. 477, 16 Ky. L. Rep. 691, 49 Am. St. Rep. 291.

Minnesota.— Walsh *v.* Byrnes, 39 Minn. 527, 40 N. W. 831; Soule *v.* Thelander, 31 Minn. 227, 17 N. W. 373.

Missouri.— Baxter *v.* St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856.

Nebraska.— Andrews *v.* McCook School Dist., 49 Nebr. 420, 68 N. W. 631; Sanborn *v.* Hale, 12 Nebr. 318, 11 N. W. 302.

New York.— Herbert *v.* Montana Diamond Co., 81 N. Y. App. Div. 212, 80 N. Y. Suppl. 717; Hobart *v.* Frost, 5 Duer 672; F. J. Emmerich Co. *v.* Sloane, 46 Misc. 513, 95 N. Y. Suppl. 39 [*affirmed* in 108 N. Y. App. Div. 330, 95 N. Y. Suppl. 1129] (holding that in an action by a foreign corporation doing business in the state the complaint is not demurrable on the ground that it fails to state a cause of action for failure to allege due authority on the part of plaintiff to do business); Viburt *v.* Frost, 3 Abb. Pr. 119.

Ohio.— Saxton *v.* Seiberling, 48 Ohio St. 554, 29 N. E. 179.

Washington.— James *v.* James, 35 Wash. 650, 77 Pac. 1080.

See 37 Cent. Dig. tit. "Parties," § 119.

"Right of action."— But a demurrer for failure to state facts to constitute a cause of action will raise the objection as to a "right of action" in plaintiff. Kinsley *v.* Kinsley, 150 Ind. 67, 49 N. E. 819; Farris *v.* Jones, 112 Ind. 498, 14 N. E. 484; Wilson *v.* Galey, 103 Ind. 257, 2 N. E. 736; Pence *v.* Aughe, 101 Ind. 317; Rogers *v.* Lafayette Agricultural Wks., 52 Ind. 296; Langsdale *v.* Girton, 51 Ind. 99; Tucker *v.* White, 28 Ind. App. 328, 62 N. E. 758; Saxton *v.* Seiberling, 48 Ohio St. 554, 29 N. E. 179; Willard *v.* Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. Rep. 657. "The right of action is one thing, and capacity to maintain it, is another. The right may be in one, or a class of persons, and the capacity to maintain it in another. This is so as to all wards and *cestuis que trustent,* generally. The cause of action is in the beneficiaries, but the capacity to maintain it is in the trustee; and when want of capacity is relied on by the defendant as an objection to the maintenance of the action by the plaintiff, it should be made by demurrer or answer, and when taken by demurrer it should be specially assigned." Saxton *v.* Seiberling, 48 Ohio St. 554, 559, 29 N. E. 179.

70. Campbell *v.* Campbell, 121 Ind. 178, 23 N. W. 81; Traylor *v.* Dykins, 91 Ind. 229; Dewey *v.* State, 91 Ind. 173.

Legal capacity to sue.— A demurrer to the complaint on the ground that plaintiff is a minor, and has no legally appointed guardian and therefore has no legal capacity to sue, does not raise a question as to the sufficiency of an allegation of appointment of

has no jurisdiction of one of the causes of action.[71] Likewise, the question of misjoinder of parties is not raised by a demurrer on the ground of misjoinder of causes of action, unless there are several causes of action in favor of different plaintiffs,[72] and conversely a demurrer for misjoinder of parties is not equivalent to one for misjoinder of causes of action.[73] So where the demurrer to a counter-claim is for insufficiency the objection cannot be urged that the counter-claim does not disclose a cause of action arising out of the contract set forth in the complaint.[74]

c. Mode of Specifying Grounds — (i) *In General.* At common law objections to matters of form cannot be reached by a special demurrer unless specially pointed out.[75] Under the codes, it is sufficient to set forth certain grounds of demurrer in the words of the statute or words equivalent thereto, while as to other grounds of demurrer the demurrant must go further and point out the specific defect.[76] In other states the rule is more rigid and, with practically no exceptions, it is required that the specific defect relied on be pointed out.[77] In both classes of states, however, it is generally held that a demurrer for argumentativeness must show with precision wherein the pleading exhibits the fault com-

a guardian for such minor. Morrell *v.* Morgan, 65 Cal. 575, 4 Pac. 580.

71. Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 74 Am. St. Rep. 490, 43 L. R. A. 427; Cook *v.* Chase, 3 Duer (N. Y.) 643.

72. Somervaill *v.* McDermott, 116 Wis. 504, 93 N. W. 553.

73. Goff *v.* May, 38 Ind. 267.

74. Safford *v.* Snedeker, 67 How. Pr. (N. Y.) 264.

75. *Illinois.*— Pogue *v.* Clark, 25 Ill. 351; Phœnix Ins. Co. *v.* Hedrick, 73 Ill. App. 601; Iron Clad Dryer Co. *v.* Chicago Trust, etc., Bank, 50 Ill. App. 461.

Massachusetts.— Soper *v.* Manning, 158 Mass. 381, 33 N. E. 516; Steffe *v.* Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137.

Michigan.—Adrian Water-Works *v.* Adrian, 64 Mich. 584, 31 N. W. 529.

New York.— Snyder *v.* Croy, 2 Johns. 428.

Texas.— Gulf, etc., R. Co. *v.* Montier, 61 Tex. 122.

United States.— Martin *v.* Bartow Iron Wks., 16 Fed. Cas. No. 9,157, 35 Ga. 320; Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 2 Blatchf. 511. Fish. Pat. Rep. 387.

The specification of defects should be sufficiently definite to enable the pleader to obviate the objection by amendment. Boynton *v.* Tidwell, 19 Tex. 118.

76. See the statutes of the several states, and also *infra*, VI, G, 5, c, (II) *et seq.*

Although the term "multifariousness" is not used in the code, it will be taken to mean the misjoinder of causes of action when it is alleged as a ground of demurrer. Cohen *v.* Ottenheimer, 13 Oreg. 220, 10 Pac. 20.

77. Francis *v.* Sandlin, 150 Ala. 583, 43 So. 829; Wallace *v.* Markstein, 147 Ala. 262, 40 So. 201; Travis *v.* Rhodes, 147 Ala. 189, 37 So. 804; Wikle *v.* Johnson Laboratories, 132 Ala. 268, 31 So. 715; Alabama State Land Co. *v.* Slaton, 120 Ala. 259, 24 So. 720; Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421; Shahan *v.* Alabama, etc., R. Co., 115 Ala. 181, 22 So. 449, 67 Am. St. Rep. 20; Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620; Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522; Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918; Morris *v.* Beall, 85 Ala. 598, 5 So. 252; Grimmet *v.* Henderson, 66 Ala. 521; Alabama, etc., R. Co. *v.* Watson, 42 Ala. 74; Robbins *v.* Mendenhall, 35 Ala. 722; Helvenstein *v.* Higgason, 35 Ala. 259; Burns *v.* Mobile, 34 Ala. 485; Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243; Harris-Emery Co. *v.* Pitcairn, 122 Iowa 595, 98 N. W. 476; Ft. Madison First M. E. Church *v.* Donnell, 95 Iowa 494, 64 N. W. 412; Minnesota, etc., R. Co. *v.* Hiams, 53 Iowa 501, 5 N. W. 703; Thayer *v.* Hurlbut, 5 Iowa 521. See also Pace *v.* Goodson, 127 Ga. 211, 56 S. E. 363, holding that a demurrer which seeks to bring in question the constitutionality of an act of the legislature, upon the ground that it contains matter in the body not referred to in the title, presents no question for judicial determination, when it fails to point out wherein the body of the act contains matter not referred to in its title.

In Alabama it does not seem to be necessary to go into all the particulars and minutiæ which go to make up the objection but merely to "point out the particular defects or objections" or, in the language of the statute, "specify" them. Wallace *v.* Markstein, 147 Ala. 262, 40 So. 201.

Specifications held insufficient.— That the allegations in the petition "do not state facts but a conclusion." Boynton *v.* Tidwell, 19 Tex. 118. That "there is a misjoinder of causes of action." Georgia Cent. R. Co. *v.* Joseph, 125 Ala. 313, 28 So. 35. That the complaint fails to show enough to entitle plaintiff to a lien on the property. Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918. That a replication "presents immaterial issues" and that it is "no answer to said plea." Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620. That the matters and things set up in the replication are not sufficient in law as an answer to the plea. Browder *v.* Irby, 112 Ala. 379, 21 So. 351.

plained of,[78] a demurrer for lack of proper exhibits show what exhibits should be attached,[79] a demurrer for misjoinder of causes of action show what different causes are improperly joined,[80] a demurrer for variance point out the exact variance complained of,[81] a demurrer on the ground that the pleading is ambiguous, unintelligible, or uncertain specify wherein the pleading is objectionable,[82] a demurrer for duplicity point out specifically in what the duplicity consists,[83] etc. So in some jurisdictions a demurrer on the ground of a former suit pending must point out specifically the alleged defect.[84]

(II) *Demurrer For Failure to State Cause of Action.* At common law, a general demurrer need not allege or point out any particular cause or specific

78. *Georgia.*— Clarke *v.* Parks, 97 Ga. 374, 23 S. E. 839.

Illinois.— Cover *v.* Armstrong, 66 Ill. 267.

Indiana.—Jarrell *v.* Snyder, 7 Blackf. 551; Vance *v.* State, 6 Blackf. 80.

Maine.— Ryan *v.* Watson, 2 Me. 382.

New York.— Tracy *v.* Rathbun, 3 Barb. 543, holding, however, that the demurrer is sufficient without saying, in so many words, that the pleading is argumentative.

Pennsylvania.— Watson *v.* Mercer, 9 Lanc. Bar 97.

Vermont.— Willey *v.* Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; Walker *v.* Wooster, 61 Vt. 403, 17 Atl. 792; Carpenter *v.* McClure, 38 Vt. 375.

See 39 Cent. Dig. tit. "Pleading," § 515.

Compare Davenport Gaslight, etc., Co. *v.* Davenport, 15 Iowa 6.

79. Morgan *v.* Interstate Bldg., etc., Assoc., 108 Ga. 185, 33 S. E. 964.

80. Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125; Lacey *v.* Bentley, 39 Colo. 449, 89 Pac. 789; Stephens *v.* Parvin, 33 Colo. 60, 78 Pac. 688; Henderson *v.* Johns, 13 Colo. 280, 22 Pac. 461; Lilienthal *v.* Betz, 108 N. Y. App. Div. 222, 95 N. Y. Suppl. 849 [*reversed* on other grounds in 185 N. Y. 153, 77 N. E. 1002]; Hodge *v.* Drake, 60 Hun (N. Y.) 577, 14 N. Y. Suppl. 355; Anderton *v.* Wolf, 41 Hun (N. Y.) 571; Isear *v.* McMahon, 16 Misc. (N. Y.) 95, 37 N. Y. Suppl. 1101; Owen *v.* Oviatt, 4 Utah 95, 6 Pac. 527.

Failure to specify causes of action claimed to be improperly joined.—Merely stating that there are several and distinct causes of action set forth in the complaint which do not affect defendant, or that several causes of action therein stated do not belong to any one of the subdivisions of the code section authorizing the joinder of causes of action, or alleging that causes of action upon claims not arising out of the same transaction or transactions connected with the same subject of action are included in the complaint, or alleging that legal and equitable actions not referring to the same persons or the subject-matter are united in the complaint, is insufficient where the causes of action claimed to be improperly united are not themselves specified. Anderton *v.* Wolf, 41 Hun (N. Y.) 571.

Stating reasons why joinder is improper.— A demurrer based on the misjoinder of causes of action is sufficient where it specifically states the causes of action alleged to have been misjoined without further stating the reason why the joinder is improper. Barkley *v.* Williams, 30 Misc. (N. Y.) 687, 64 N. Y. Suppl. 318. But see Hinds *v.* Tweddle, 7 How. Pr. (N. Y.) 278.

81. Veeder *v.* Wright, 6 Ark. 416; Cravens *v.* Mileham, 6 Ark. 215; Bogardus *v.* Trial, 2 Ill. 63; Hackworth *v.* Zollars, 30 Iowa 433; Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 2 Blatchf. 31.

Setting out instrument in hæc verba.—A demurrer to the declaration for a variance between a note set out therein and the copy filed therewith should set out the note *in hæc verba.* Bogardus *v.* Trial, 2 Ill. 63.

82. *Alabama.*— Courts *v.* Happle, 49 Ala. 254.

California.— Yolo County *v.* Sacramento, 36 Cal. 193.

Colorado.— Lacey *v.* Bentley, 39 Colo. 449, 89 Pac. 789; Mitchell *v.* Pearson, 34 Colo. 278, 82 Pac. 446; Stephens *v.* Parvin, 33 Colo. 60, 78 Pac. 688; Canfield *v.* Jeannotte, 31 Colo. 292, 72 Pac. 1062; Baden Baden Gold Min. Co. *v.* Jose, 20 Colo. App. 260, 78 Pac. 313.

Montana.— Jacobs Sultan Co. *v.* Union Mercantile Co., 17 Mont. 61, 42 Pac. 109; Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135.

Utah.— Owen *v.* Oviatt, 4 Utah 95, 6 Pac. 527.

See 39 Cent. Dig. tit. "Pleading," § 518.

83. *Connecticut.*— Havens *v.* Hartford, etc., R. Co., 28 Conn. 69.

Illinois.— Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439; Yeazel *v.* Harber Bros. Co., 106 Ill. App. 408.

Maine.— Ryan *v.* Watson, 2 Me. 382.

Maryland.— Stewardson *v.* White, 3 Harr. & M. 455.

New York.— Currie *v.* Henry, 2 Johns. 433. *Compare* McNulty *v.* Frame, 1 Sandf. 128.

Ohio.— Franklin Bank *v.* Bartlet, Wright 741.

Vermont.—Willey *v.* Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; Carpenter *v.* McClure, 37 Vt. 127; Buell *v.* Warner, 33 Vt. 570.

United States.— Martin *v.* Bartow Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320.

See 39 Cent. Dig. tit. "Pleading," § 516.

84. Mitchell *v.* Pearson, 34 Colo. 278, 82 Pac. 446; Stephens *v.* Parvin, 33 Colo. 60, 78 Pac. 688.

defect in the pleading to which it applies;[85] but if demurrant thinks proper to point out faults, it does not vitiate it.[86] So, under the codes, a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action need not, in most jurisdictions, specify the particular defects complained of, but may assign the defect in the language of the statute,[87] or words equivalent thereto;[88] but where the allegations are not equivalent thereto the demurrer is insufficient.[89] In some jurisdictions, however, it is not sufficient to allege the

85. Northwest Mut. Acc. Assoc. *v.* Tuggle, 138 Ill. 428, 28 N. E. 1066 [*reversing* on other grounds 39 Ill. App. 509].

86. Martin *v.* Bartow Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320.

87. *California.*— Kent *v.* Snyder, 30 Cal. 666.

Colorado.— Henderson *v.* Johns, 13 Colo. 280, 22 Pac. 461.

Louisiana.— Davis *v.* Arkansas Southern R. Co., 117 La. 320, 41 So. 587.

Minnesota.— Monette *v.* Cratt, 7 Minn. 234.

New York.— Haire *v.* Baker, 5 N. Y. 357; Johnson *v.* Wetmore, 12 Barb. 433; Paine *v.* Smith, 2 Duer 298; Durkee *v.* Saratoga, etc., R. Co., 4 How. Pr. 226, 2 Code Rep. 145. *Contra*, Glenny *v.* Hitchins, 4 How. Pr. 98; Hunter *v.* Frisbee, 2 Code Rep. 59; Grant *v.* Lasher, 2 Code Rep. 2.

South Dakota.— O'Rourke *v.* Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789.

See 39 Cent. Dig. tit. "Pleading," § 477.

Where complaint states no cause of action whatever.— A demurrer on the ground that the petition "does not state facts sufficient to constitute a cause of action" is sufficiently specific where the petition states no cause of action whatever; but, where the petition is apparently good, a demurrer directed to some minor imperfection must specifically state it. Morgan *v.* Bouse, 53 Mo. 219.

It is immaterial that averments of particular objections to the complaint follow the statement of the ground of demurrer in the language of the statute, and that such particular objections are insufficient. Howland *v.* Kenosha County, 19 Wis. 247.

In South Carolina, circuit court rule 18 requires the demurrant to state in writing "wherein the pleading objected to is insufficient," but it is a sufficient compliance with this rule to demur in the words of the statute and on the hearing submit in writing the specific grounds of objection. Riggs *v.* Home Mut. F. Protection Assoc., 61 S. C. 448, 39 S. E. 614.

88. State *v.* Younts, 89 Ind. 313; Pace *v.* Oppenheim, 12 Ind. 533 (for that "the complaint does not contain facts enough to entitle the plaintiff to relief"); Johnson *v.* Reed, 136 Mass. 421 (that declaration does not state any "legal" cause of action); De Witt *v.* Swift, 3 How. Pr. (N. Y.) 280. See also Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316.

Examples of specifications held good.—That the complaint does not "contain" facts enough to entitle plaintiff to relief. Pace *v.* Oppenheim, 12 Ind. 533; Hay *v.* Bash, 37 Ind. App. 167, 76 N. E. 644; Leach *v.* Adams, 21 Ind. App. 547, 52 N. E. 813. That the pleading "does not state facts sufficient." Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Petty *v.* Church of Christ, 70 Ind. 290. That "said paragraphs, nor either of them, contain facts sufficient to constitute a cause of action." State *v.* Younts, 89 Ind. 313. "That said complaint does not state a cause of action." Toledo, etc., R. Co. *v.* Beery, 31 Ind. App. 556, 68 N. E. 702. The words "the complaint does not state a sufficient cause of action against the defendant" are equivalent to "does not state facts sufficient to constitute a cause of action." De Witt *v.* Swift, 3 How. Pr. (N. Y.) 280.

89. Grubbs *v.* King, 117 Ind. 243, 20 N. E. 142; Porter *v.* Wilson, 35 Ind. 348. *Compare* Miles *v.* Collins, 1 Metc. (Ky.) 308.

A demurrer on the ground that the facts alleged do not entitle plaintiff to the relief demanded is not equivalent to one on the ground that facts are not alleged sufficient to constitute a cause of action, since plaintiff may, upon the facts stated, be entitled to relief not demanded. Kemp *v.* Mitchell, 29 Ind. 163; Cincinnati, etc., R. Co. *v.* Washburn, 25 Ind. 259.

Examples of specifications held bad.—A demurrer on the ground that it cannot be ascertained from the complaint what the contract is on which the action is based is too indefinite. Sharpleigh Hardware Co. *v.* Knippenberg, 133 Cal. 308, 65 Pac. 621. A demurrer "for the reason that the same does not state facts sufficient to constitute a good and sufficient petition." Grubbs *v.* King, 117 Ind. 243, 20 N. E. 142. That the complaint does not state facts sufficient to constitute a "complaint." Pine Civil Tp. *v.* Huber Mfg. Co., 83 Ind. 121. That the complaint "is not good and sufficient in law." Porter *v.* Wilson, 35 Ind. 348. A demurrer to several paragraphs of the complaint for the reason that neither one of them states facts sufficient to constitute a good paragraph of complaint against either one of said defendants. Jones *v.* Peters, 28 Ind. App. 383, 62 N. E. 1019. That a complaint "does not state facts sufficient to constitute a good ground of complaint." Firestone *v.* Werner, 1 Ind. App. 293, 27 N. E. 623. That "the petition does not state that the alleged imprisonment, and the wrongs and injuries said to have been done [the plaintiff] at the same time and place, were done without authority of law, or unlawfully." Mayberry *v.* Kelly, 1 Kan. 116. That it does not appear that plaintiff has any title to the note sued on. White *v.*

ground of demurrer in the language of the statute or words equivalent thereto but the precise grounds of exception must be stated.[90] It is not sufficient to allege that the complaint is not sufficient in law to entitle plaintiff to the relief demanded,[91] and the demurrer is insufficient where it is ambiguous and uncertain as to whether it is general or several.[92]

(III) *Demurrer For Defect or Misjoinder of Parties.* A demurrer for defect of parties must state whether plaintiff or defendant.[93] So both under the common-law system of pleading and under the codes and practice acts, it must specifically name the persons who should have been but were not made parties.[94]

Low, 7 Barb. (N. Y.) 204. "That the mere allegation of the insufficiency of the levy was not sufficient evidence to dispose of such levy, and to rebut the legal presumption of satisfaction arising from the levy," since a demurrer should go to the allegations of the pleading, not to the evidence. Bomar *v.* Means, 37 S. C. 520, 16 S. E. 537, 34 Am. St. Rep. 772.

90. *Alabama.*— Mountain *v.* Whitman, 103 Ala. 630, 16 So. 15; Morris *v.* Beall, 85 Ala. 598, 5 So. 252; Grimmet *v.* Henderson, 66 Ala. 521; Robbins *v.* Mendenhall, 35 Ala. 722.

Connecticut.— Foote *v.* Brown, 78 Conn. 369, 62 Atl. 667; Lang *v.* Brady, 73 Conn. 707, 49 Atl. 199; Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 804; Cook *v.* Morris, 66 Conn. 196, 33 Atl. 994.

Iowa.— *In re* McMurray, 107 Iowa 648, 78 N. W. 691; Eden Dist. Tp. *v.* Templeton Independent Dist., 72 Iowa 687, 34 N. W. 472; Davidson *v.* Biggs, 61 Iowa 309, 16 N. W. 135; McLaughlin *v.* Bascomb, 36 Iowa 593; Childs *v.* Limback, 30 Iowa 398; Singer *v.* Cavers, 26 Iowa 178; Piper *v.* Newcomer, 25 Iowa 221; Luse *v.* Des Moines, 22 Iowa 590; Crouch *v.* Crouch, 9 Iowa 269; Cole *v.* Porter, 4 Greene 510.

Massachusetts.— Washington *v.* Eames, 6 Allen 417.

North Carolina.—Ball *v.* Paquin, 140 N. C. 83, 52 S. E. 410, 3 L. R. A. N. S. 307; Elam *v.* Barnes, 110 N. C. 73, 14 S. E. 621; Burbank *v.* Beaufort County, 92 N. C. 257; Goss *v.* Waller, 90 N. C. 149; Statesville Bank *v.* Bogle, 85 N. C. 203.

South Carolina.— See Long *v.* Hunter, 58 S. C. 152, 36 S. E. 579.

Statutory provisions.— Section 24 of the Practice Act, which provides that "'at any time before final judgment in a civil suit, amendments may be allowed . . . in any matter, either of form or substance' . . . on such terms as are just and reasonable," was not intended to place formal and substantial errors on the same footing, and require all demurrers thereafter to be special. On the contrary, section 3 of chapter 7 of the Revised Statutes and section 6 of the same chapter, preserve the distinction between general and special demurrers. Northwest Mut. Acc. Assoc. *v.* Tuggle, 138 Ill. 428, 28 N. E. 1066 [*reversing* on other grounds 39 Ill. App. 509].

A demurrer "that the negligence complained of is not sufficiently and legally set out" is sufficiently specific. Conley *v.* Richmond, etc., R. Co., 109 N. C. 692, 14 S. E. 303.

A demurrer to a petition for mandamus to compel the levy of a tax alleged to have been voted in aid of a railroad, on the ground that the certificates of election set out therein, as furnished to the county auditor, did not contain the "conditions upon which said tax is claimed to have been voted," is sufficient, under Code, § 2649, requiring a specification of the ground of objection. Minnesota, etc., R. Co. *v.* Hiams, 53 Iowa 501, 5 N. W. 703.

In Iowa the contrary rule prevails where the petition is in equity. Stokes *v.* Sprague, 110 Iowa 89, 81 N. W. 195.

Courts cannot, by rule, require that general demurrers specify the defects relied on. Pouder *v.* Tate, 111 Ind. 148, 12 N. E. 291.

91. Kemp *v.* Mitchell, 29 Ind. 163; Piper *v.* Newcomer, 25 Iowa 221.

92. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

93. Getty *v.* Hudson River R. Co., 8 How. Pr. (N. Y.) 177.

94. *Alabama.*—Chambers *v.* Wright, 52 Ala. 444; Thornton *v.* Neal, 49 Ala. 590.

California.— Kreling *v.* Kreling, 118 Cal. 413, 50 Pac. 546.

Georgia.— Dawson *v.* Equitable Mortg. Co., 109 Ga. 389, 34 S. E. 668.

Indiana.—Boseker *v.* Chamberlain, 160 Ind. 114, 66 N. E. 448; State *v.* McClelland, 138 Ind. 395, 37 N. E. 799; Dewey *v.* State, 91 Ind. 173; Gardner *v.* Fisher, 87 Ind. 369; Smith *v.* Kirkpatrick, 58 Ind. 254; Durham *v.* Bischof, 47 Ind. 211; Marks *v.* Indianapolis, etc., R. Co., 38 Ind. 440; Gaines *v.* Walker, 16 Ind. 361; Fink *v.* Maples, 15 Ind. 297.

Kansas.— Federal Betterment Co. *v.* Blaes, 75 Kan. 69, 88 Pac. 555.

Minnesota.— Anderson *v.* Dyer, 94 Minn. 30, 101 N. W. 1061; Jaeger *v.* Sunde, 70 Minn. 356, 73 N. W. 171.

New York.— Foley *v.* Mail, etc., Pub. Co., 8 Misc. 91, 28 N. Y. Suppl. 778; Hodge *v.* Drake, 14 N. Y. Suppl. 355. *Contra*, Coe *v.* Beckwith, 31 Barb. 339.

Oregon.— State *v.* Metschan, 32 Oreg. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692.

Wisconsin.— White *v.* White, 132 Wis. 121, 111 N. W. 1116; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522; Baker *v.* Hawkins, 29 Wis. 576.

See 37 Cent. Dig. tit. "Parties," § 140.

But see Huckabee *v.* Newton, 23 S. C. 291, holding a demurrer for a defect of

So a demurrer for misjoinder of parties plaintiff,[95] or defendant,[96] must specify wherein the misjoinder consists. Under the statutes in some states, it is provided that the non-joinder of a party plaintiff cannot be objected to by defendant unless he gives written notice of such objection to plaintiff within a certain number of days after filing his plea or demurrer, and states in such notice the name of the person alleged to have been omitted.[97]

(iv) *Demurrer to Defense in Answer.* While in some jurisdictions it is not sufficient to allege as a ground of demurrer to a defense in an answer that it does not state facts sufficient to constitute a defense, without stating wherein the allegations are deficient,[98] the rule in most of the states is to the contrary, it being sufficient to state the objection in the words of the statute or words equivalent thereto.[99]

parties need not give the names of those who should be joined, but need only indicate the proper amendment. *Contra*, Hudson *v.* Archer, 4 S. D. 128, 55 N. W. 1099.

It is sufficient to say that a firm or partnership should have been joined without giving the christian names of the persons composing such firm or corporation, where the court knows from the pleadings who were intended and their relation to the case. Durham *v.* Bischof, 47 Ind. 211.

A demurrer to a suit brought at the relation of a person, which states that such person has no legal capacity to act, and that certain other persons are the only proper relators, sufficiently raises the objection that there is a defect of parties plaintiff. Maxedon *v.* State, 24 Ind. 370.

95. O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269; Palatine *v.* Canajoharie Water Supply Co., 90 N. Y. App. Div. 548, 86 N. Y. Suppl. 412 [*affirmed* in 184 N. Y. 582, 77 N. E. 1197]; Berney *v.* Drexel, 33 Hun (N. Y.) 419.

96. Gardner *v.* Samuels, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135; Henderson *v.* Johns, 13 Colo. 280, 22 Pac. 461; Irwine *v.* Wood, 7 Colo. 477, 4 Pac. 783.

Stating reasons.— A demurrer to a complaint upon the ground of a misjoinder of parties which designates the defendants who are improperly joined with the demurring party sufficiently calls plaintiff's attention to the objection to the complaint and is sufficient in form. It is not necessary to incorporate into the demurrer an argument in support thereof, or to state therein the reasons why the misjoinder is improper. Gardner *v.* Samuels, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135.

97. Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39.

98. Evitt *v.* Lowery Banking Co., 96 Ala. 381, 11 So. 442; Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243; Timken Carriage Co. *v.* Smith, 123 Iowa 554, 99 N. W. 183. *Compare* Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380 (holding that a demurrer to an "equitable answer" is good in the words of the statute); Darr *v.* Lilley, 11 Iowa 4.

Specifications held sufficient.— That a plea consists of matter of evidence or argument, and is neither in denial or in confession and avoidance. Davenport Gaslight, etc., Co. *v.* Davenport, 15 Iowa 6.

Specifications held insufficient.— "That all the matters and things set forth in said plea show no reason why plaintiff should not recover." Evitt *v.* Lowery Banking Co., 96 Ala. 381, 11 So. 442. That "the matters pleaded furnish no bar to the action." Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275. That a plea "is no answer to the complaint" and "does not set out such facts as constitute a traverse or a confession and avoidance." Cowan *v.* Motley, 125 Ala. 369, 28 So. 70.

99. Funk *v.* Rentchler, 134 Ind. 68, 33 N. E. 364, 898; Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107; Pulse *v.* Osborn, (Ind. App. 1901) 60 N. E. 374; Wade *v.* Huber, 10 Ind. App. 417, 38 N. E. 351; Otis *v.* Shants, 128 N. Y. 45, 27 N. E. 955; Anibal *v.* Hunter, 6 How. Pr. (N. Y.) 255; Hyde *v.* Conrad, 5 How. Pr. (N. Y.) 112, 3 Code Rep. 162; Van Dyke *v.* Doherty, 6 N. D. 263, 69 N. W. 200; Hill *v.* Walsh, 6 S. D. 421, 61 N. W. 440.

Statements held sufficient see Funk *v.* Rentchler, 134 Ind. 68, 33 N. E. 364, 898; Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107. The word "defense" instead of the statutory expression "cause of defense" is sufficient. Lewellen *v.* Crane, 113 Ind. 289, 15 N. E. 515. A demurrer on the ground that the facts stated by an answer do not state a good or valid defense is not rendered insufficient by the use of the word "valid" or "good." Wright *v.* Nipple, 92 Ind. 310; Vincennes *v.* Spees, 35 Ind. App. 389, 74 N. E. 277. A demurrer using the term "matter" where the statute uses the term "facts." Bennett *v.* Shern, 11 Ind. 324. "Ground of defense" is as good as "cause of defense." Durbin *v.* Northwestern Scraper Co., 36 Ind. App. 128, 73 N. E. 297. That the facts stated in the answer are not sufficient to constitute a valid defense. Anibal *v.* Hunter, 6 How. Pr. (N. Y.) 255; Hyde *v.* Conrad, 5 How. Pr. (N. Y.) 112.

Statements held insufficient see Barry Saw, etc., Co. *v.* Campbell, 13 Ind. App. 455, 41 N. E. 955. That an answer "does not state facts sufficient to constitute a good answer." Wintrode *v.* Renbarger, 150 Ind. 556, 50

(v) *Demurrer to Counter-Claim.* Generally a demurrer to a counter-claim demanding an affirmative judgment must distinctly specify the objections to the counter-claim, although the general rule is that the objection may be in the language of the statute,[1] except where the objection is that defendant has not the legal capacity to recover on the counter-claim.[2]

(vi) *Demurrer to Reply.* A demurrer to a reply on the ground of the insufficiency of the facts stated therein must be in the words of the statute or words equivalent thereto,[3] and where the reply contains a general denial and new

N. E. 570; Dawson *v.* Eads, 140 Ind. 208, 39 N. E. 919; Tell City *v.* Bielefeld, 20 Ind. App. 1, 49 N. E. 1090; Wade *v.* Huber, 10 Ind. App. 417, 38 N. E. 351. That an answer does not state facts sufficient to constitute a "cause of action." Hawley *v.* Zigerly, 135 Ind. 248, 34 N. E. 219; Hollis *v.* Roberts, 25 Ind. App. 426, 58 N. E. 502; Noblesville School *v.* Heinzman, 13 Ind. App. 195, 41 N. E. 464. That the facts in an answer are not sufficient "to constitute an answer to plaintiff's complaint." Thomas *v.* Goodwine, 88 Ind. 458. That "neither of said paragraphs constitutes any defence to this action." Reed *v.* Higgins, 86 Ind. 143. That a pleading does not "state facts sufficient to bar the action" or that it does not "state facts enough for a counter-claim." Campbell *v.* Routt, 42 Ind. 410. That the answer "as a defence to plaintiff's cause of action is not sufficient in law." Gordon *v.* Swift, 39 Ind. 212. "That the same is not sufficient in law to enable the defendant to sustain his said defense, or to bar the plaintiff's complaint." Tenbrook *v.* Brown, 17 Ind. 410. That the answer "is insufficient in law to entitle the defendant to defend this suit." Dugdale *v.* Culbertson, 7 Ind. 664. See also Lane *v.* State, 7 Ind. 426. The words "to bar the plaintiff's action" are not equivalent to the statutory phrase "to constitute a cause of defense." Angaletos *v.* Meridian Nat. Bank, 4 Ind. App. 573, 31 N. E. 368. That the answer "does not state facts sufficient to show that the plaintiff is estopped from maintaining the said action." Hill *v.* Walsh, 6 S. D. 421, 61 N. W. 440.

In New York if the demurrer is to new matter set up as a defense it is sufficient to use the words of the statute, that is, "that it is insufficient in law, upon the face thereof." But it is not sufficient to state that the defense "does not state sufficient facts to constitute a defense." McCann *v.* Hazard, 36 Misc. 7, 72 N. Y. Suppl. 45.

1. Power *v.* Sla, 24 Mont. 243, 61 Pac. 468; Weeks *v.* O'Brien, 20 Misc. (N. Y.) 48, 45 N. Y. Suppl. 740 [*reversed* on other grounds in 25 N. Y. App. Div. 206, 49 N. Y. Suppl. 344 (*affirmed* in 38 N. Y. App. Div. 623, 56 N. Y. Suppl. 1119)].

Demurrer to counter-claim should state that it does not state facts sufficient to constitute "a cause of action," not "a good counter-claim." Storrs *v.* Fusselman, 23 Ind. App. 293, 55 N. E. 245. A demurrer to a counter-claim on the ground that it did not state facts "sufficient to constitute a defense or counter-claim," instead of facts "sufficient to constitute a cause of action" is insufficient. Flanagan *v.* Reitemier, 26 Ind. App. 243, 59 N. E. 389. A demurrer to a counter-claim on the ground that it is "not sufficient in law on the face thereof" is insufficient. Hudson River Water Power Co. *v.* Glens Falls Electric Light Co., 90 N. Y. App. Div. 513, 85 N. Y. Suppl. 577 [*affirmed* in 178 N. Y. 611, 70 N. E. 1100].

A demurrer that the "counterclaim is not of the character specified in Code Civ. Proc. § 501," is sufficiently specific. Eckert *v.* Gallien, 40 N. Y. App. Div. 525, 58 N. Y. Suppl. 85 [*reversing* 24 Misc. 485, 53 N. Y. Suppl. 879]; Kneeland *v.* Pennell, 49 Misc. (N. Y.) 94, 96 N. Y. Suppl. 403; Grange *v.* Gilbert, 10 N. Y. Civ. Proc. 98. *Contra*, Weeks *v.* O'Brien, 20 Misc. (N. Y.) 48, 45 N. Y. Suppl. 740 [*reversed* on other grounds in 25 N. Y. App. Div. 206, 49 N. Y. Suppl. 344 (*affirmed* in 38 N. Y. App. Div. 623, 56 N. Y. Suppl. 1119)].

Need not be in exact words of statute.—A demurrer on the ground that the counter-claim "does not state facts sufficient to constitute a counter-claim," although not in the exact words of the statute, sufficiently raises the question whether the facts stated constitute a cause of action. Kissam *v.* Bremerman, 44 N. Y. App. Div. 588, 61 N. Y. Suppl. 75.

Where no affirmative judgment demanded.—In New York a demurrer to a counter-claim is sufficiently specific where merely stating the counter-claim is "insufficient in law upon the face thereof," provided defendant in his answer does not ask any affirmative judgment on his counter-claim. Otis *v.* Shants, 128 N. Y. 45, 27 N. E. 955.

2. Weeks *v.* O'Brien, 20 Misc. (N. Y.) 48, 45 N. Y. Suppl. 740 [*reversed* on other grounds in 25 N. Y. App. Div. 206, 49 N. Y. Suppl. 344 (*affirmed* in 38 N. Y. App. Div. 623, 56 N. Y. Suppl. 1119)].

3. Krathwohl *v.* Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496; Peden *v.* Mail, 118 Ind. 556, 20 N. E. 493 (holding that a demurrer that the reply does not state facts sufficient to constitute a good reply is insufficient); Vaughn *v.* Ferrall, 57 Ind. 182 (holding that where a reply consists of several paragraphs a demurrer alleging that "neither of said paragraphs constitutes a good reply to said answer" is insufficient); Silvers *v.* Junction R. Co., 43 Ind. 435.

Specifications held insufficient.—That the reply does not state facts sufficient to constitute a good reply to defendant's answer,

matter a demurrer for want of facts is bad if not addressed specially to the new matter.[4]

(VII) *Reliance on Objections Not Urged.* Where not only the ground but the specific objection is set forth, the demurrer cannot be sustained if the objection is not tenable, although the pleading is subject to demurrer on the ground stated.[5]

H. Joinder in Demurrer. Under the codes no joinder in demurrer is necessary,[6] but at common law a joinder in demurrer by the party to whom it is tendered is necessary to prevent a discontinuance, the result of a refusal to join in demurrer being the same as of an omission to plead when pleading is necessary.[7] But while such a joinder is necessary to constitute a technical issue, as in the case of a *similiter* to the general issue, a judgment is not invalid merely because rendered on a demurrer without a formal joinder.[8] The joinder in demurrer is a concise contradiction of the demurrer, contains an offer to verify the declaration or plea, and concludes with a prayer for judgment;[9] but no new facts, supplemental to the party's last pleading, can be set up in his joinder.[10] A mere informality in the demurrer will be waived by the joinder,[11] as will a prior discontinuance by the other party,[12] or the objection that the ground of special demurrer was waived.[13]

I. Scope and Effect of — 1. General Consideration[14] — a. Questions Raised or Waived in General. A demurrer to a pleading or portion thereof is

the statute providing for a demurrer on the grounds that facts were not stated "sufficient to avoid the answer." Pritchett *v.* McGaughey, 151 Ind. 638, 52 N. E. 397; Krathwohl *v.* Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496; Peden *v.* Mail, 118 Ind. 556, 20 N. E. 493; Sovereign Camp W. W. *v.* Haller, 30 Ind. App. 450, 66 N. E. 186. Where paragraphs of a reply were directed separately to paragraphs of an answer, a demurrer on the ground that neither of them were sufficient as to "both" paragraphs of the answer was properly overruled. Franklin Ins. Co. *v.* Wolff, 30 Ind. App. 534, 66 N. E. 756.

4. Ordway *v.* Cowles, 45 Kan. 447, 25 Pac. 862.

5. *Alabama.*— Dickerson *v.* Winslow, 97 Ala. 491, 11 So. 918.

Arizona.— Lopez *v.* Central Arizona Min. Co., 1 Ariz. 464, 2 Pac. 748.

California.— Moyle *v.* Landers, 83 Cal. 579, 23 Pac. 798.

Colorado.— See Blakely *v.* Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. 249.

Indiana.— Sluss *v.* Shrewsbury, 18 Ind. 79; Vance *v.* Cowing, 13 Ind. 460.

Iowa.— Hackworth *v.* Zollas, 30 Iowa 433; Scheckner *v.* Milwaukee, etc., R. Co., 21 Iowa 515.

Michigan.— Kellogg *v.* Hamilton, 43 Mich. 269, 5 N. W. 315.

New Jersey.— People's Bank, etc., Co. *v.* Weidinger, 73 N. J. L. 433, 64 Atl. 179; Snyer *v.* New York, etc., Tel. Co., (Sup. 1904) 58 Atl. 90; Davey *v.* Erie R. Co., 69 N. J. L. 50, 54 Atl. 233; French *v.* Millville, 66 N. J. L. 392, 49 Atl. 465; Waker *v.* Booraem, 68 N. J. Eq. 345, 59 Atl. 451.

New York.— Palmer *v.* Roods, 116 N. Y. App. Div. 66, 101 N. Y. Suppl. 186.

See 39 Cent. Dig. tit. "Pleading," § 520.

Contra.— Monette *v.* Cratt, 7 Minn. 234.

But in Virginia it is held that where grounds are unnecessarily assigned in a demurrer based on the failure to state a cause of action, the court may sustain the demurrer on a ground not suggested therein. Granite Bldg. Co. *v.* Saville, 101 Va. 217, 43 S. E. 351.

6. See the statutes of the several states.

Abolished by statute.— Hawkins *v.* Mississippi, etc., R. Co., 35 Miss. 688.

7. Helms *v.* Sisk, 8 Blackf. (Ind.) 503; Thompson *v.* Goudelock, 10 Rich. (S. C.) 49; Morsell *v.* Hall, 13 How. (U. S.) 212, 14 L. ed. 117.

8. Mix *v.* Chandler, 44 Ill. 174; McCracken *v.* West, 17 Ohio 16.

The old rule seems to have been to the contrary. Cabanne *v.* Lavallee, 1 Mo. 394; Fowle *v.* Alexandria Common Council, 11 Wheat. (U. S.) 320, 6 L. ed. 484, demurrer to evidence.

9. After plea in abatement, a joinder in demurrer to a replication should conclude with a prayer for judgment that defendant answer over, and not for judgment in chief, the latter amounting to a discontinuance. Whitford *v.* Flanders, 14 N. H. 371.

A single joinder in demurrer, alleging that the declaration is sufficient in law to entitle plaintiff to a recovery, is insufficient, where the declaration contained four counts, to each of which was filed a special demurrer, each assigning a special and different cause of demurrer. Wilcox *v.* Wilmington City R. Co., (Del. 1898) 42 Atl. 704.

10. Gibson *v.* Todd, 1 Rawle (Pa.) 452.

11. Higginbotham *v.* Brown, 4 Munf. (Va.) 516.

12. Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214.

13. Milroy *v.* Hensley, 2 Bibb (Ky.) 20.

14. **As constituting appearance** see Appearances, 3 Cyc. 506.

a waiver of any objection as to the right to file the same,[15] and of any other irregularities previously committed by the parties or the court.[16] It raises the question of the legal sufficiency of the facts stated,[17] but cannot be used as an instrument or evidence or an issue of fact.[18] Questions as to the admissibility of evidence cannot be determined on demurrer.[19] Although a plea to the merits waives a demurrer, a demurrer does not waive a plea to the merits.[20] A demurrer on the ground that an answer is not sufficient "in law" raises the question of its sufficiency both as to the legal and equitable defenses pleaded.[21] If the pleading to which a demurrer is directed passes out of the record by being superseded, the demurrer passes with it.[22]

b. Facts Not Appearing on Face of Pleading [23] — (i) *In General.* Only facts appearing on the face of the pleading demurred to will be considered on demurrer.[24] New facts cannot be set up by the demurrant as a ground for demur-

As waiver of motion to strike out see *infra*, XII, G, 3, c.

15. Ryan *v.* Vanlandingham, 25 Ill. 112. See also *infra*, XIV, B, 6.

16. Herbert *v.* Spurlock, 26 Miss. 180. See also *infra*, XIV, B, 6.

17. Pease *v.* Phelps, 10 Conn. 62; Hobson *v.* McArthur, 12 Fed. Cas. No. 6,554, 3 McLean 241.

18. Pease *v.* Phelps, 10 Conn. 62. See also *infra*, VI, K.

19. State *v.* Evans, 32 Tex. 200.

20. Marshall *v.* Duke, 4 Ill. 67.

But it has been held that a demurrer waives a demand for assessment of damages. Daniels *v.* Bradley, 4 Minn. 158.

21. Funk *v.* Rentehler, 134 Ind. 68, 33 N. E. 364, 898.

22. Toledo, etc., R. Co. *v.* Rogers, 48 Ind. 427.

23. Exhibit as part of pleading so as to be considered on demurrer see *infra*, IX, B, 2.

24. *Alabama.*— Williams *v.* Fineh, (1906) 41 So. 834; Huss *v.* Central R., etc., Co., 66 Ala. 472; The Farmer *v.* McCraw, 31 Ala. 659.

California.— Gummer *v.* Mairs, 140 Cal. 535, 74 Pac. 26; McDermont *v.* Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779; Hopper *v.* Barnes, 113 Cal. 636, 45 Pac. 874; Kamm *v.* State Bank, 74 Cal. 191, 15 Pac. 765; Cook *v.* De la Guerra, 24 Cal. 237.

Colorado.— Moore *v.* Allen, 26 Colo. 197, 57 Pac. 698, 77 Am. St. Rep. 255; Bassiek Min. Co. *v.* Davis, 11 Colo. 130, 17 Pac. 294.

Georgia.— McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341; Haber, etc., Hat Co. *v.* Southern Bell Tel. Co., 118 Ga. 874, 45 S. E. 696; Danielly *v.* Cheeves, 94 Ga. 263, 21 S. E. 524; Swann *v.* Phœnix Iron, etc., Co., 58 Ga. 199.

Illinois.— Morrison *v.* Silverburgh, 13 Ill. 551; Leathe *v.* Thomas, 109 Ill. App. 434 [*affirmed* in 218 Ill. 246, 75 N. E. 810].

Indiana.— Seymour First Nat. Bank *v.* Greger, 157 Ind. 479, 62 N. E. 21; Cole *v.* Gray, 139 Ind. 396, 38 N. E. 856; Hoosier Stone Co. *v.* Louisville, etc., R. Co., 131 Ind. 575, 31 N. E. 365; Abell *v.* Riddle, 75 Ind. 345; Miller *v.* Wild Cat Gravel Road Co., 57 Ind. 241; Thompson *v.* Greenwood, 28 Ind. 327; Watkins *v.* Jones, 28 Ind. 12; Jones *v.* Bradford, 25 Ind. 305; Daniels *v.* Richie, 7 Blackf. 391; Greenfield *v.* Johnson, 30 Ind. App. 127, 65 N. E. 542; Davis *v.* O'Bryant, 23 Ind. App. 376, 55 N. E. 261; Western Union Tel. Co. *v.* Eskridge, 7 Ind. App. 208, 33 N. E. 238.

Iowa.— Jefferies *v.* Fraternal Bankers' Reserve Soc., 135 Iowa 284, 112 N. W. 786; Judd *v.* Mosely, 30 Iowa 423; Childs *v.* Limbaek, 30 Iowa 398; Scheckner *v.* Milwaukee, etc., R. Co., 21 Iowa 515; Knipper *v.* Chase, 7 Iowa 145.

Kansas.— McCraeken *v.* Todd, 1 Kan. 148; Bliss *v.* Burnes, McCahon 91; Harris *v.* Bell, 9 Kan. App. 706, 59 Pac. 1095; Continental Ins. Co. *v.* Pratt, 8 Kan. App. 424, 55 Pac. 671.

Kentucky.— Kennedy *v.* McElroy, 92 Ky. 72, 17 S. W. 202, 13 Ky. L. Rep. 378.

Louisiana.— Watson *v.* Ledoux, 6 La. Ann. 796.

Massachusetts.— Supreme Commandery U. O. of G. C. *v.* Merrick, 163 Mass. 374, 40 N. E. 183.

Minnesota.— Everett *v.* O'Leary, 90 Minn. 154, 95 N. W. 901; Royal Ins. Co. *v.* Clark, 61 Minn. 476, 63 N. W. 1029.

Mississippi.— Watson *v.* Sawyers, 54 Miss. 64.

Missouri.—Arthur *v.* Riekards, 48 Mo. 298.

Montana.— Knight *v.* Le Beau, 19 Mont. 223, 47 Pac. 952; Foster *v.* Wilson, 5 Mont. 53, 2 Pac. 310.

Nebraska.— Guthrie *v.* Treat, 66 Nebr. 415, 92 N. W. 595, 103 Am. St. Rep. 718.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 44 N. H. 61.

New Jersey.— Brooks *v.* Metropolitan L. Ins. Co., 70 N. J. L. 36, 56 Atl. 168; Mechanies' Mut. Loan Assoc. *v.* Mercer County, 56 N. J. L. 6, 28 Atl. 310.

New York.— Rowe *v.* Rowe, 103 N. Y. App. Div. 100, 92 N. Y. Suppl. 491; Hall *v.* Gilman, 77 N. Y. App. Div. 464, 79 N. Y. Suppl. 307; Payne *v.* Godfrey, 14 N. Y. App. Div. 260, 43 N. Y. Suppl. 543; Hardon *v.* Ongley Electric Co., 89 Hun 487, 35 N. Y. Suppl. 405; Cragin *v.* Quitman, 22 Hun 101 [*reversed* on other grounds in 88 N. Y. 258]; Lindau *v.* Royal Ins. Co., 4 Silv. Sup. 453, 7 N. Y. Suppl. 441; Western Union Tel. Co. *v.* Milliken, 14 Daly 170, 6 N. Y. St. 252;

rer.[25] Such a demurrer is called a "speaking demurrer," and should be overruled,[26] or the demurrer will be deemed a plea or answer.[27] So the scope of the demurrer cannot be extended, even by agreement, to cover facts not appearing on the face of the pleading demurred to.[28] Inasmuch as a bill of particulars is no part of a

Ketcham *v.* Zerega, 1 E. D. Smith 553; Belanewsky *v.* Gallaher, 55 Misc. 150, 105 N. Y. Suppl. 77; Poillon *v.* Poillon, 37 Misc. 729, 76 N. Y. Suppl. 488 [*reversed* on other grounds in 90 N. Y. App. Div. 71, 85 N. Y. Suppl. 689]; Davis *v.* Bingham, 33 Misc. 774, 67 N. Y. Suppl. 1131; National Bank of Commeree *v.* New York Bank, 17 Misc. 691, 41 N. Y. Suppl. 471; Hurliman *v.* Seckendorf, 18 N. Y. Suppl. 756; Mayhew *v.* Robinson, 10 How. Pr. 162; Getty *v.* Hudson River R. Co., 8 How. Pr. 177; Richter *v.* Kramer, 1 N. Y. City Ct. 348.

North Carolina.— Davison *v.* Gregory, 132 N. C. 389, 43 S. E. 916; Cheek *v.* Supreme Lodge K. H., 129 N. C. 179, 39 S. E. 832; Moore *v.* Hobbs, 77 N. C. 65.

Ohio.— Ray *v.* Quinn, 7 Ohio Dec. (Reprint) 221, 1 Cinc. L. Bul. 314; Rehn *v.* North Fairmount, etc., Co., 7 Ohio S. & C. Pl. Dec. 398, 5 Ohio N. P. 314.

Oregon.— Smith *v.* Day, 39 Oreg. 531, 64 Pac. 812, 65 Pac. 1055; North Powder Milling Co. *v.* Coughanour, 34 Oreg. 9, 54 Pac. 223.

Pennsylvania.— Wyoming County *v.* Bardwell, 84 Pa. St. 104; Pittsburg, etc., R. Co. *v.* Mt. Pleasant, etc., R. Co., 76 Pa. St. 481; Williamson *v.* Smith, 4 Pa. Dist. 307.

South Carolina.— Mobley *v.* Cureton, 6 S. C. 49.

South Dakota.— Buckham *v.* Hover, 18 S. D. 429, 101 N. W. 28.

Texas.— Biddle *v.* Terrell, 82 Tex. 335, 18 S. W. 691; Walton *v.* Talbot, 1 Tex. Unrep. Cas. 511; Citizens' Electric Light, etc., Co. *v.* Gonzales Water Power Co., (Civ. App. 1903) 76 S. W. 577; Sabine Tram Co. *v.* Jones, (Civ. App. 1898) 43 S. W. 905.

Vermont.— Whitton *v.* Goddard, 36 Vt. 730; Hill *v.* Powers, 16 Vt. 516.

Virginia.— Morotock Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. 487.

Washington.—Jackson *v.* McAuley, 13 Wash. 298, 43 Pac. 41.

West Virginia.— Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431.

Wisconsin.— Anderson *v.* Douglas County, 98 Wis. 393, 74 N. W. 109; Northwestern Iron Co. *v.* Central Trust Co., 90 Wis. 570, 63 N. W. 752, 64 N. W. 323.

United States.— Hatzel *v.* Moore, 125 Fed. 828; Darrow *v.* H. R. Horne Produce Co., 57 Fed. 463; Sledge *v.* Gayoso Hotel Co., 43 Fed. 463; Rutz *v.* St. Louis, 7 Fed. 438, 2 McCrary 344; Graham *v.* U. S., 1 Ct. Cl. 183.

Canada.— Wadsworth *v.* Townley, 10 U. C. Q. B. 579; Burns *v.* Robertson, 8 U. C. Q. B. 280.

See 39 Cent. Dig. tit. "Pleading," § 426.

Reference to date of summons or verification of complaint.— Reference cannot be made to the date of the summons or the verification of the complaint, in order to support a demurrer to the complaint on the ground that the action was prematurely brought. Belanewsky *v.* Gallaher, 55 Misc. (N. Y.) 150, 105 N. Y. Suppl. 77.

Propriety of amendment.— If it cannot be ascertained from the amended complaint how the cause of action therein set up is connected with the original complaint, this is not cause for demurrer. Pottkamp *v.* Buss, (Cal. 1896) 46 Pac. 169.

Time of filing.— Since a demurrer goes only to the facts apparent on the face of the pleading, the question that the pleading was not filed in time cannot be raised by demurrer. Cobb *v.* Miller, 9 Ala. 499. See, however, Cox *v.* Trent, 1 Tex. Civ. App. 639, 20 S. W. 1118, where a special exeeption was held proper to raise the question.

Facts of which the court will take judicial notice may be considered in passing upon a demurrer. Keene *v.* Newark Watch Case Material Co., 81 N. Y. App. Div. 48, 89 N. Y. Suppl. 859.

Reference to statutes.— The rule that, upon the argument of a demurrer, only the pleadings can be looked at, does not apply where statutes which affect the question raised have to be considered. Winnipeg Protestant School Dist. *v.* Canadian Pac. R. Co., 2 Manitoba 163; Kiely *v.* Kiely, 3 Ont. App. 438.

25. State *v.* Putnam County, 23 Fla. 632, 3 So. 164; Walton *v.* Talbot, 1 Tex. Unrep. Cas. 511.

In Louisiana the exception is broader in its scope than a demurrer, and it may set up new facts which are to be proved by evidence. Holmes *v.* Dabbs, 15 La. Ann. 501; Haynes *v.* Carter, 9 La. Ann. 265. But an exception of no cause of action rests wholly upon the averments of plaintiff's petition (Sample *v.* Scarborough, 43 La. Ann. 315, 8 So. 940), although a supplementary petition filed after the exception may also be looked to (Goldman *v.* North British Mercantile Ins. Co., 48 La. Ann. 223, 19 So. 132).

26. Reid *v.* Caldwell, 120 Ga. 718, 48 S. E. 191; Woods *v.* Colony Bank, 114 Ga. 683, 40 S. E. 720, 56 L. R. A. 929; Oliver *v.* Powell, 114 Ga. 592, 40 S. E. 826; Mathis *v.* Fordham, 114 Ga. 364, 40 S. E. 324; Clarke *v.* East Atlanta Land Co., 113 Ga. 21, 38 S. E. 323; Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113; Beckner *v.* Beckner, 104 Ga. 219, 30 S. E. 622; Southern Express Co. *v.* Briggs, 1 Ga. App. 294, 57 S. E. 1066; Wright *v.* Weber, 17 Pa. Super. Ct. 451; Standard Loan, etc., Ins. Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136; State *v.* Buchanan, (Tenn. Ch. App. 1898) 52 S. W. 480; Cumberland Nursery Co. *v.* Sudberry, (Tex. Civ. App. 1899) 54 S. W. 27.

27. Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108.

28. Augusta, etc., R. Co. *v.* Lark, 97 Ga.

declaration, it cannot be looked to on demurrer to the declaration;[29] nor can an affidavit filed with a pleading,[30] or a copy of an account delivered to the other party on demand pursuant to a statute.[31] However, it has been held, in analogy to the equity practice, that an admission by counsel, during the progress of an argument on a demurrer, as to the facts, may be considered in ruling upon the demurrer.[32] On demurrer for want of facts, the whole pleading must be considered, as well the allegations tending to defeat the pleader as those tending to support him.[33] On demurrer to one defense the sufficiency of other defenses should not be decided,[34] and the defense demurred to, if one of several, cannot be aided by other defenses or denials unless repeated or incorporated by reference in such defenses.[35] However, allegations of the complaint referred to in the answer are considered as incorporated therein for the purpose of a demurrer.[36] Each defense, unless otherwise designated, will be considered as intended as a complete defense and so tested.[37] Craving and obtaining oyer of an instrument makes it a part of the pleading so that a demurrer will reach it.[38]

(II) *Demurrer Raising Objections as to Parties.* For instance a demurrer will not lie for defect of parties unless the defect appears on the face of the complaint.[39] And the same rule applies where the defect is based on the misjoinder of parties.[40] So a demurrer on the ground that plaintiff has no legal

800, 25 S. E. 175; Constitution Pub. Co. *v.* Stegall, 97 Ga. 405, 24 S. E. 33; Columbian Granite Co. *v.* Townsend, 74 Vt. 183, 52 Atl. 432; Hartland *v.* Windsor, 29 Vt. 354. But see Wells *v.* Jackson Iron Mfg. Co., 44 N. H. 61. *Contra*, Kurtz *v.* Graybill, 192 Ill. 445, 61 N. E. 475.

29. Brown *v.* College Corner, etc., Gravel Road Co., 56 Ind. 110; Weston *v.* Luce County, 102 Mich. 528, 61 N. W. 15; Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236.

30. Strawhacker *v.* Ives, 114 Iowa 661, 87 N. W. 669; Smith *v.* Day, 39 Oreg. 531, 64 Pac. 812, 65 Pac. 1055.

31. Creighton *v.* Creighton, 68 S. C. 326, 47 S. E. 439.

32. Wilhite *v.* Skelton, 5 Indian Terr. 621, 82 S. W. 932; Thompson *v.* Marley, 102 Mich. 476, 60 N. W. 976. *Contra*, Keene *v.* Newark Watch Case Material Co., 81 N. Y. App. Div. 48, 80 N. Y. Suppl. 859.

33. Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130; Ranger *v.* Thalmann, 65 N. Y. App. Div. 5, 72 N. Y. Suppl. 451.

34. Metzger *v.* Carr, 79 Hun (N. Y.) 258, 29 N. Y. Suppl. 410.

35. Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118.

36. Cragin *v.* Lovell, 88 N. Y. 258.

37. Garrett *v.* Wood, 57 N. Y. App. Div. 242, 68 N. Y. Suppl. 157.

It will be presumed that it is pleaded as a complete defense where it is not declared to be partial. Garrett *v.* Wood, 57 N. Y. App. Div. 242, 68 N. Y. Suppl. 157; Belden *v.* Wilkinson, 33 Misc. (N. Y.) 659, 68 N. Y. Suppl. 205.

38. Laurens Dist. Poor Com'rs *v.* Gains, 1 Treadw. (S. C.) 459; Smith *v.* Lloyd, 16 Gratt. (Va.) 295; Nybladh *v.* Herterius, 41 Fed. 120. But see Lee *v.* Follensby, 80 Vt. 182, 67 Atl. 197.

39. *Alabama.*— Ramage *v.* Towles, 85 Ala. 588, 5 So. 342.

Colorado.— Cooley *v.* Murray, 11 Colo. App. 241, 52 Pac. 1108.

Illinois.— Dinet *v.* Reilly, 2 Ill. App. 316.

Indiana.—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; American Ins. Co. *v.* Gibson, 104 Ind. 336, 3 N. E. 892; Strecker *v.* Conn, 90 Ind. 469; Cox *v.* Bird, 65 Ind. 277; American Ins. Co. *v.* Henley, 60 Ind. 515; Bledsoe *v.* Irvin, 35 Ind. 293; Carico *v.* Moore, 4 Ind. App. 20, 29 N. E. 928.

Maine.— Delcourt *v.* Whitehouse, 92 Me. 254, 42 Atl. 394.

Minnesota.— Lowry *v.* Harris, 12 Minn. 255.

Nebraska.— Brookmire *v.* Rosa, 34 Nebr. 227, 51 N. W. 840; Hardy *v.* Miller, 11 Nebr. 395, 9 N. W. 475; Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

New York.— Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. Rep. 699 [*affirming* 57 Hun 405, 10 N. Y. Suppl. 682]; Kugelman *v.* Hirschman, 22 Misc. 533, 49 N. Y. Suppl. 1012 [*affirmed* in 23 Misc. 773, 53 N. Y. Suppl. 1107]; Kutz *v.* Richards, 16 N. Y. Suppl. 99; Walton *v.* Stewart, 16 N. Y. Suppl. 38 [*affirmed* in 129 N. Y. 667, 30 N. E. 63]; Daby *v.* Betts, 16 Abb. Pr. 466 note.

North Carolina.— Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241.

South Carolina.— Clark *v.* Tompkins, 1 S. C. 119.

South Dakota.— Union Nat. Bank *v.* Halley, 19 S. D. 474, 104 N. W. 213.

Tennessee.— Brice *v.* King, 1 Head 152.

Texas.— Gulf, etc., R. Co. *v.* White, (Civ. App. 1895) 32 S. W. 322.

Vermont.— Pelton *v.* Place, 71 Vt. 430, 46 Atl. 63.

See 37 Cent. Dig. tit. "Parties," §§ 125, 137.

40. Lothrop *v.* Golden, (Cal. 1899) 57 Pac. 394; Miller *v.* Ahrens, 150 Fed. 644.

capacity to sue cannot be sustained unless it affirmatively appears on the face of the complaint that he has not such capacity.[41] The common-law rule applicable to a plea in abatement based on a defect of parties, that it must show that the persons claimed to be necessary parties were alive at the time of the commencement of the suit,[42] was applied to demurrers by some of the earlier decisions by holding that a demurrer for defect of parties did not lie unless it appeared from the complaint that the person claimed to be a necessary party was alive;[43] but the later decisions repudiate this rule and hold almost unanimously that it need not affirmatively appear from the complaint that the alleged necessary party is alive.[44]

41. *Arizona.*— Miller *v.* Fisher, 1 Ariz. 232, 25 Pac. 651. See also De Amado *v.* Friedman, (1907) 89 Pac. 588.

Arkansas.—See Stillwell *v.* Adams, 29 Ark. 346.

California.— Los Angeles R. Co. *v.* Davis, 146 Cal. 179, 79 Pac. 865, 106 Am. St. Rep. 20; Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675; Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195; San Joaquin County Swamp, etc., Land Dist. No. 110 *v.* Feck, 60 Cal. 403.

Indiana.— Dewey *v.* State, 91 Ind. 173.

Kansas.— Northrup *v.* A. G. Wills Lumber Co., 65 Kan. 769, 70 Pac. 879; Winfield Town Co. *v.* Maris, 11 Kan. 128.

Minnesota.— Minneapolis Harvester Works *v.* Libby, 24 Minn. 327; State *v.* Torinus, 22 Minn. 272.

Nebraska.— Farrell *v.* Cook, 16 Nebr. 483, 20 N. W. 720, 49 Am. Rep. 721.

New York.— Phœnix Bank *v.* Donnell, 40 N. Y. 410; Herbert *v.* Montana Diamond Co., 81 N. Y. App. Div. 212, 80 N. Y. Suppl. 717; People *v.* Eckman, 63 Hun 209, 18 N. Y. Suppl. 654; Barclay *v.* Quicksilver Min. Co., 6 Lans. 25; Independent Trembowler Young Men's Benev. Assoc. *v.* Somach, 52 Misc. 538, 102 N. Y. Suppl. 495.

South Carolina.— Cone Export, etc., Co. *v.* Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289.

South Dakota.— Bem *v.* Shoemaker, 7 S. D. 510, 64 N. W. 544.

Utah.— Crane Bros. Mfg. Co. *v.* Reed, 3 Utah 506, 24 Pac. 1056.

Washington.— See Allen *v.* Baxter, 42 Wash. 434, 85 Pac. 26.

Wisconsin.— Vincent *v.* Starks, 45 Wis. 458.

See 37 Cent. Dig. tit. "Parties," § 118; 39 Cent. Dig. tit. "Pleading," § 436.

If the complaint merely fails to show the facts which confer the capacity to sue, the objection must be taken by answer and not by demurrer. San Joaquin County Swamp, etc., Land Dist. No. 110 *v.* Feck, 60 Cal. 403; Minneapolis Harvester Works *v.* Libby, 24 Minn. 327; State *v.* Torinus, 22 Minn. 272; Barclay *v.* Quicksilver Min. Co., 6 Lans. (N. Y.) 25.

The affidavit of verification is no part of the pleading to which it is annexed; and a complaint is not demurrable on the ground of plaintiffs' want of legal capacity to sue, because of an affidavit of verification, made by plaintiffs' attorney, reciting that neither of plaintiffs is capable of making it. Gage *v.* Wayland, 67 Wis. 566, 31 N. W. 108.

42. See *supra*, IV, B, 5, c, (IV), (C).

43. *Arkansas.*—Hamilton *v.* Buxton, 6 Ark. 24.

Indiana.— Gilbert *v.* Allen, 57 Ind. 524.

Kentucky.—Allen *v.* Lucket, 3 J. J. Marsh. 164.

Nevada.— Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

New Jersey.— Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39.

New York.— Strong *v.* Wheaton, 38 Barb. 616; Scofield *v.* Van Syckle, 23 How. Pr. 97; Brainard *v.* Jones, 11 How. Pr. 569. See also Creed *v.* Hartmann, 29 N. Y. 591, 86 Am. Dec. 341.

Texas.— Davis *v.* Willis, 47 Tex. 154. *Contra*, see Hinchman *v.* Riggins, 1 Tex. App. Civ. Cas. § 294.

Vermont.— Needham *v.* Heath, 17 Vt. 223.

See 37 Cent. Dig. tit. "Parties," §§ 125, 137.

But in actions on recognizances, judgments, and other matters of record, if it appear from the declaration that there is another joint debtor, who is not sued, the non-joinder may be taken advantage of by demurrer, although it is not shown that the other debtor is still living. Needham *v.* Heath, 17 Vt. 223.

Averments held equivalent to allegation that persons not joining were living see Hees *v.* Nellis, 65 Barb. (N. Y.) 440. A declaration which, after stating that two defendants were jointly bound in the contract sued on, proceeds to declare against one only, is demurrable; the joinder of both in the commencement of the declaration sufficiently implying that the other defendant was still living. Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39.

44. Porter *v.* Fletcher, 25 Minn. 493; Sullivan *v.* New York, etc., Cement Co., 119 N. Y. 348, 23 N. E. 820 [*affirming* 1 N. Y. Suppl. 103, 14 N. Y. Civ. Proc. 365]; Sanders *v.* Yonkers, 63 N. Y. 489; Green *v.* Lippincott, 53 How. Pr. (N. Y.) 33. See also Eaton *v.* Balcom, 33 How. Pr. (N. Y.) 80.

Presumptions.— All the other facts sufficient to warrant a demurrer appearing on the face of the complaint and the objection having been made by reason of the non-joinder of plaintiff, the usual presumption of life applies for this purpose. Sullivan *v.* New York, etc., Cement Co., 119 N. Y. 348, 23 N. E. 820 [*affirming* 1 N. Y. Suppl. 103, 14 N. Y. Civ. Proc. 365]; Sanders *v.* Yonkers,

c. Demurrer to Part of Pleading. Under the common-law system of pleading, a demurrer will lie only to the whole of a pleading.[45] But under the codes and practice acts, the general rule is that it can be directed to a particular count or defense.[46] However, a demurrer must go to the whole of a count or defense, where the same is single and entire, and a demurrer to only a part thereof cannot be considered.[47] But if a count or defense is made up of divisible portions as in case of separate breaches, distinct defenses, intermingled counts, and the like, a demurrer may be directed against any one or more of them.[48] However, a demurrer based

63 N. Y. 489; De Puy *v.* Strong, 37 N. Y. 372; Merritt *v.* Walsh, 32 N. Y. 685; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551.

Kind of demurrer.— Where the declaration disclosed that there is another person who ought to be joined as defendant if still living, but does not show whether he is alive or dead, it has been held that the non-joinder may be taken advantage of by special demurrer, but not by general demurrer. Burgess *v.* Abbott, 6 Hill (N. Y.) 135 [*affirming* 1 Hill 476]. *Contra*, Harwood *v.* Roberts, 5 Me. 441; Leftwich *v.* Berkeley, 1 Hen. & M. (Va.) 61.

45. *In re* Freeman, 71 Conn. 708, 43 Atl. 185.

46. *In re* Freeman, 71 Conn. 708, 43 Atl. 185.

47. *Alabama.*— Corpening *v.* Worthington, 99 Ala. 541, 12 So. 426; Hester *v.* Ballard, 96 Ala. 410, 11 So. 427; Alabama, etc., R. Co. *v.* Tapia, 94 Ala. 226, 10 So. 236.

Arkansas.— Norman *v.* Rogers, 29 Ark. 365.

California.— Locke *v.* Peters, 65 Cal. 161, 3 Pac. 657; Ferrier *v.* Ferrier, 64 Cal. 23, 27 Pac. 960.

Connecticut.— Hill *v.* Fair Haven, etc., R. Co., 75 Conn. 177, 52 Atl. 725.

Florida.— Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687.

Indiana.— Voorhees *v.* Hushaw, 30 Ind. 488; O'Haver *v.* Shidler, 26 Ind. 278; Tousey *v.* Bell, 23 Ind. 423.

Iowa.— White Oak Tp. *v.* Oskaloosa Dist. Tp., 44 Iowa 512; Shulte *v.* Hennessy, 40 Iowa 352; Hayden *v.* Anderson, 17 Iowa 158.

Minnesota.— Steenerson *v.* Great Northern R. Co., 64 Minn. 216, 66 N. W. 723; Dean *v.* Howard, 49 Minn. 350, 51 N. W. 1102; Knoblauch *v.* Foglesong, 38 Minn. 459, 38 N. W. 366; Armstrong *v.* Hinds, 9 Minn. 356; Daniels *v.* Bradley, 4 Minn. 158.

Montana.— Plymouth Gold Min. Co. *v.* U. S. Fidelity, etc., Co., 35 Mont. 23, 88 Pac. 565, holding that a demurrer cannot properly be directed to particular lines or paragraphs of the complaint in which special elements of damage are alleged.

New York.— Holmes *v.* Northern Pac. R. Co., 65 N. Y. App. Div. 49, 72 N. Y. Suppl. 476; New Jersey Steel, etc., Co. *v.* Robinson, 60 N. Y. App. Div. 69, 69 N. Y. Suppl. 728; Toplitz *v.* Toplitz, 54 N. Y. App. Div. 630, 66 N. Y. Suppl. 386; Hollingsworth *v.* Spectator Co., 53 N. Y. App. Div. 291, 65 N. Y. Suppl. 812; Dexter *v.* Alfred, 19 N. Y. Suppl. 770; Lord *v.* Vreeland, 13 Abb. Pr. 195 [*affirmed* in 15 Abb. Pr. 122, 24 How. Pr. 316]; Mattoon *v.* Baker, 24 How. Pr. 329; Smith *v.* Brown, 6 How. Pr. 383; Cobb *v.* Frazee, 4 How. Pr. 413; Manchester *v.* Storrs, 3 How. Pr. 410.

North Carolina.— State *v.* Young, 65 N. C. 579.

Rhode Island.— Canning *v.* Owen, 24 R. I. 233, 52 Atl. 1027.

South Carolina.— Sloan *v.* Seaboard, etc., R. Co., 64 S. C. 389, 42 S. E. 197; Lawson *v.* Gee, 57 S. C. 502, 35 S. E. 759; Buist *v.* Salvo, 44 S. C. 143, 21 S. E. 615.

United States.— Gaillard *v.* Cantini, 76 Fed. 699, 22 C. C. A. 493; Montgomery *v.* Northern Pac. R. Co., 67 Fed. 445; Frericks *v.* Coster, 9 Fed. Cas. No. 5,108*a*, 17 Rep. 168; Lewis *v.* Oregon Cent. R. Co., 15 Fed. Cas. No. 8,329, 8 Reporter 358.

Canada.— Sparham *v.* Carley, 8 Manitoba 448.

See 29 Cent. Dig. tit. "Pleading," §§ 489, 490.

Matter of inducement is not an essential part of the cause of action, and hence a demurrer to an answer is not too narrow for not embracing such matter of inducement. Fry *v.* Bennett, 5 Sandf. (N. Y.) 54.

48. *Alabama.*— Botts *v.* Bridges, 4 Port. 274.

Indiana.— Murdock *v.* Cox, 118 Ind. 266, 20 N. E. 786; McFall *v.* Howe Sewing Mach. Co., 90 Ind. 148; Sheetz *v.* Longlois, 69 Ind. 491; Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

Iowa.— Burhans *v.* Squires, 75 Iowa 59, 39 N. W. 181.

Massachusetts.— Montague *v.* Boston, etc., Iron Works, 97 Mass. 502; Minturn *v.* Manufacturers' Ins. Co., 10 Gray 501.

Minnesota.— Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 148, 53 N. W. 1134, 38 Am. St. Rep. 530, 20 L. R. A. 535.

New York.— Brassington *v.* Rohrs, 1 Misc. 12, 20 N. Y. Suppl. 659 [*affirmed* in 1 Misc. 508, 20 N. Y. Suppl. 990 (*affirmed* in 3 Misc. 258, 22 N. Y. Suppl. 761)]; Ogdensburgh Bank *v.* Paige, 2 Code Rep. 75; Glover *v.* Tuck, 24 Wend. 153.

West Virginia.— Wheeling *v.* Black, 25 W. Va. 266.

See 39 Cent. Dig. tit. "Pleading," §§ 489, 490.

Motion to separate.— It is good code practice, in case distinct counts or defenses are not separately stated, to have them separated by motion before demurring to one of them. Buist *v.* Salvo, 44 S. C. 143, 21 S. E. 615.

Construction of demurrer.— A demurrer to

on the ground of misjoinder of causes of action must be to the whole complaint and not merely to the count or cause of action objected to.[49] Whether a demurrer is joint as to a number of paragraphs, counts, or defenses, or several as to each of them, can be determined by no fixed rule, but each demurrer must depend upon its own phraseology.[50] A demurrer to one paragraph, count, or defense goes only

an affirmative defense "set forth in subdivisions third and fourth of said answer," on the ground that "each of the same" is insufficient in law upon the face thereof is not to be construed as a demurrer to each of such subdivisions separately but as a demurrer to the entire defense. Bates *v.* Delaware, etc., R. Co., 109 N. Y. App. Div. 774, 96 N. Y. Suppl. 711.

49. *Alabama.*— Ragsdale *v.* Bowles, 16 Ala. 62.

Arkansas.— Veatch *v.* Greenwood, 23 Ark. 637.

Colorado.— Equitable Securities Co. *v.* Montrose, etc., Canal Co., 20 Colo. App. 465, 79 Pac. 747.

Georgia.— Timmerman *v.* Stanley, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. N. S. 379.

Indiana.— Gillenwaters *v.* Campbell, 142 Ind. 520, 41 N. E. 1041; Bougher *v.* Scobey, 16 Ind. 151; Fletcher *v.* Piatt, 7 Blackf. 522.

Maine.— Fernald *v.* Garvin, 55 Me. 414.

New Jersey.— Dunn *v.* Pennsylvania R. Co., 67 N. J. L. 377, 51 Atl. 465; Topf *v.* West Shore, etc., Terminal Co., 46 N. J. L. 34. *Compare* Harwood *v.* Tompkins, 24 N. J. L. 425.

New York.— Hannahs *v.* Hammond, 28 Abb. N. Cas. 317, 19 N. Y. Suppl. 883; Ferriss *v.* North American Ins. Co., 1 Hill 71; Smith *v.* Merwin, 15 Wend. 184.

Texas.— Ward *v.* Ward, 1 Tex. Unrep. Cas. 123.

Virginia.— Henderson *v.* Stringer, 6 Gratt. 130.

See 39 Cent. Dig. tit. "Pleading," § 435.

50. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

Where a complaint consists of several paragraphs and a demurrer is directed to it as a whole, such demurrer is a joint or general demurrer to the complaint; but if a demurrer is directed against its distinct parts, or separate paragraphs, such demurrer is a separate demurrer to each paragraph. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

Demurrers held joint.— Winamac *v.* Stout, 165 Ind. 365, 75 N. E. 158, 651. Demurrer to "the several pleas." Brown *v.* Duchesne, 4 Fed. Cas. No. 2,003, 2 Curt. 97. Demurrer "to plaintiff's complaint" on the ground "that neither paragraph of said complaint states facts sufficient to constitute a cause of action." Gilmore *v.* Ward, 22 Ind. App. 106, 52 N. E. 810. "The plaintiff demurs to the second, third, and fourth paragraphs of answer on the ground that neither of said paragraphs states facts sufficient to constitute a cause of defense." Hollingsworth *v.* McColly, 26 Ind. App. 609, 60 N. E. 371. Demurrer "to the first and second paragraphs of the complaint, for the reason that the same, and neither one of the same, constitute a cause of action." Cooper *v.* Hayes, 96 Ind. 386. Demurrer to the second, third, fourth, fifth, and sixth paragraphs of the answer of defendant, "upon the ground that" neither of said second, third, fourth, fifth or sixth paragraphs of the answer alleges facts sufficient to constitute a defense to plaintiff's cause of action. Stanford *v.* Davis, 54 Ind. 45. Demurrer "to the second, third, and fourth paragraphs" of the answer for the reason that "said paragraphs nor either of them state facts sufficient, etc." Washington Tp. *v.* Bonney, 45 Ind. 77. "Said plaintiff comes and demurs to the first, second and third paragraphs of defendant's answer, and each of them, for the following grounds of exception, viz: that said paragraphs of defendant's answer do not state facts sufficient to constitute a defence." Barner *v.* Morehead, 22 Ind. 354. Demurrer "to the several paragraphs of plaintiff's complaint, for the reason that said complaint does not state facts sufficient to constitute a cause of action." Baker *v.* Groves, 1 Ind. App. 522, 27 N. E. 640. That neither paragraph of a cross complaint states facts sufficient to constitute a cause of action. Leedy *v.* Nash, 67 Ind. 311. "The plaintiff demurs to the first, second, third and fourth paragraphs of defendants' answer, and assigns for cause of demurrer, that they do not state facts sufficient to constitute a defense to the action." Brown *v.* Gooden, 16 Ind. 444. The following demurrer: "Now come (naming the defendants), and separately and severally demur to the plaintiff's cause of action, and say that said complaint does not state facts sufficient to constitute a cause of action against them jointly or severally," is joint. Hanover School Tp. *v.* Gant, 125 Ind. 557, 25 N. E. 872.

Demurrers held several.— Demurrer to the "declaration and the several counts therein contained." May *v.* Western Union Tel. Co., 112 Mass. 90. Demurrer expressly stating that it is intended as a demurrer to each count of the declaration. Lake St. El. R. Co. *v.* Brooks, 90 Ill. App. 173. "That the court had no jurisdiction over the subject of the action alleged in either paragraph of the complaint." Chicago, etc., R. Co. *v.* Spencer, 23 Ind. App. 605, 55 N. E. 882. Demurrer reciting that "defendants separately and severally demur" to different paragraphs of the complaint, because neither of the paragraphs states a cause of action against them, is separate as to the paragraphs. Armstrong *v.* Dunn, 143 Ind. 433, 41 N. E. 540; Hanover School Tp. *v.* Gant, 125 Ind. 557, 25 N. E. 872; Carver *v.* Carver, 97 Ind. 497; Case *v.* Hursh, 34 Ind. App. 211, 70 N. E. 818. Demurrer "to each and every defense

to the validity of that portion of the pleading, and is to be considered without reference to the rest of the pleading.[51] But in construing one portion of a pleading other portions may sometimes be looked to in determining its meaning.[52] In passing upon a demurrer to an answer or plea addressed to a particular count, only those facts are to be considered as affecting its sufficiency which are relevant to that particular count.[53] A special demurrer to a plea of the general issue cannot be applied to a brief statement filed therewith.[54] A demurrer directed separately to different counts or defenses may be sustained as to some and overruled as to others.[55]

contained in the answer of defendant." Kennagh *v.* McColgan, 4 N. Y. Suppl. 230. Demurrer addressed to each of several paragraphs "separately" or "severally." Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 48 N. E. 862; Terre Haute, etc., R. Co. *v.* Sherwood, 132 Ind. 129, 31 N. E. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339; Indiana, etc., R. Co. *v.* Dailey, 110 Ind. 75, 10 N. E. 631; Clodfelter *v.* Hulett, 92 Ind. 426; Mitchell *v.* Stinson, 80 Ind. 324; Stribling *v.* Brougher, 79 Ind. 328; Glass *v.* Murphy, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545. Demurrer to "each of the paragraphs of the complaint, for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action." Stone *v.* State, 75 Ind. 235. Demurrer separately to the first, second, third, and fourth paragraphs of the answer, because neither of said paragraphs states sufficient facts. Hume *v.* Dessar, 29 Ind. 112. A demurrer in two paragraphs, one directed to "defendant's answer" and the other to "the further answer of the defendant" this being the manner in which defendant's two defenses were by him designated, is several as to each defense. Dobson *v.* Owens, 5 Wyo. 325, 40 Pac. 442. A demurrer in form: "Defendants separately and severally demur to the first and second paragraphs of the plaintiff's complaint, and for cause of demurrer say that neither of said paragraphs states facts sufficient to constitute a cause of action against them" is separate as to each paragraph. Carver *v.* Carver, 97 Ind. 497.

51. *Arkansas.*— Pugh *v.* Harbison, 26 Ark. 162.

Indiana.—American Ins. Co. *v.* Replogle, 114 Ind. 1, 15 N. E. 810; Bougher *v.* Scobey, 16 Ind. 151; Phenix Ins. Co. *v.* Jacobs, 23 Ind. App. 509, 55 N. E. 778.

Kentucky.— Williams *v.* Langford, 15 B. Mon. 566.

New York.— Sample *v.* Lyons, 59 N. Y. App. Div. 456, 69 N. Y. Suppl. 378; Booz *v.* Cleveland School Furniture Co., 45 N. Y. App. Div. 593, 61 N. Y. Suppl. 407; Van Alstyne *v.* Norton, 1 Hun 537; Ritchie *v.* Garrison, 10 Abb. Pr. 246.

Ohio.— Turnbull *v.* Pomeroy Salt Co., 11 Ohio Dec. (Reprint) 19, 24 Cinc. L. Bul. 133.

West Virginia.— Burkhart *v.* Jennings, 2 W. Va. 242.

Wisconsin.— Birdsall *v.* Birdsall, 52 Wis. 208, 8 N. W. 822.

United States.— Hatzel *v.* Moore, 120 Fed. 1015.

See 39 Cent. Dig. tit. "Pleading," §§ 489, 490.

In Canada, however, in case of a demurrer to part of a pleading, under rule 189, if any one or more paragraphs be demurred to, the court will look at any other paragraph or paragraphs bearing on the same matter of defense, and if the whole taken together disclose a sufficient defense, the demurrer must be overruled. Atty.-Gen. *v.* Midland R. Co., 3 Ont. 511.

52. Beach *v.* Berdell, 2 Duer (N. Y.) 327. See also Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

Where a counter-claim and defense are both pleaded, and the defense contains an allegation that the cause of action set up in the counter-claim is the same as that on which defendant is suing plaintiff in another action then pending, such allegation is to be treated as part of the counter-claim, rendering it subject to demurrer. John Douglas Co. *v.* Moler, 22 N. Y. Suppl. 1045, 30 Abb. N. Cas. 293.

53. Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868.

54. Moore *v.* Knowles, 65 Me. 493.

The brief statement and general issue must be so far regarded as distinct and independent pleadings that a fatal defect in the one will not necessarily destroy the others so that a special demurrer based upon a defect in the plea of the general issue does not meet or apply to the brief statement filed therewith. Moore *v.* Knowles, 65 Me. 493.

55. *Arkansas.*— Pugh *v.* Harbison, 26 Ark. 162.

Illinois.— Sanford *v.* Gaddis, 13 Ill. 329.

Indiana.— Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 48 N. E. 862; Fankboner *v.* Fankboner, 20 Ind. 62; Parker *v.* Thomas, 19 Ind. 213, 81 Am. Dec. 385.

Iowa.— Skinner *v.* Chicago, etc., R. Co., 12 Iowa 191.

New York.— Hollingshead *v.* Woodward, 35 Hun 410 [*reversed* on other grounds in 107 N. Y. 96, 13 N. E. 621]; Jaeger *v.* New York, 39 Misc. 543, 80 N. Y. Suppl. 356; Brassington *v.* Rohrs, 1 Misc. 12, 20 N. Y. Suppl. 659 [*affirmed* in 1 Misc. 508, 20 N. Y. Suppl. 990 (*affirmed* in 3 Misc. 258, 22 N. Y. Suppl. 761)].

Virginia.— Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19.

West Virginia.— Burkhart *v.* Jennings, 2 W. Va. 242.

See 39 Cent. Dig. tit. "Pleading," §§ 489, 490.

d. Demurrer by Part or All of Parties.[56] A demurrer may generally be filed by all or more than one co-party,[57] but in such case it will be overruled if not good as to all the parties joining therein.[58] But the mere fact that two or more co-parties unite in a demurrer in the same paper does not necessarily make the demurrer a joint one as parties may demur separately, although they unite in the same paper.[59] Whether a demurrer is joint or several as to the parties uniting therein depends on its phrascology.[60]

e. Pleading Bad in Part — (i) *In General.* A demurrer to an entire declaration or complaint made up of several counts or separable parts must be overruled if any one of the counts or parts is good as against it,[61] except in case of

56. **Who may demur** see *supra*, VI, D.

57. See *supra*, VI, D.

If the demurrer purports on its face to be filed by all the defendants, this is conclusive. Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075.

58. See *infra*, VI, I, 1, e, (II).

59. Whitesell *v.* Strickler, 167 Ind. 602, 78 N. E. 845 [*affirming* (App. 1905) 73 N. E. 153].

60. Armstrong *v.* Dunn, 143 Ind. 433, 41 N. E. 540; Hanover School Tp. *v.* Gant, 125 Ind. 557, 25 N. E. 543; Carver *v.* Carver, 97 Ind. 497.

61. *Alabama.*— Montgomery St. R. Co. *v.* Lewis, 148 Ala. 134, 41 So. 736; Hatcher *v.* Branch, 141 Ala. 410, 37 So. 690; Southern R. Co. *v.* Wilson, 138 Ala. 510, 35 So. 561; Daly *v.* Mallory, 123 Ala. 170, 26 So. 217; Inge *v.* Demouy, 122 Ala. 169, 25 So. 228; Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Howison *v.* Oakley, 118 Ala. 215, 23 So. 810; Louisville, etc., R. Co. *v.* Morgan, 114 Ala. 449, 22 So. 20; Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444; Echols *v.* Orr, 106 Ala. 237, 17 So. 677; Grill *v.* Lomax, 86 Ala. 132, 5 So. 325; Tabler *v.* Sheffield Land, etc., Co., 79 Ala. 377, 58 Am. Rep. 593; Flournoy *v.* Lyon, 70 Ala. 308; Weems *v.* Weems, 69 Ala. 104; Ward *v.* Neal, 35 Ala. 602; Rodgers *v.* Brazeale, 34 Ala. 512; Ferguson *v.* Baber, 24 Ala. 402; Hooks *v.* Smith, 18 Ala. 338; Williams *v.* Spears, 11 Ala. 138; Chamberlain *v.* Darrington, 4 Port. 515; Pettigrew *v.* Pettigrew, 1 Stew. 580.

Arizona.— Palmer *v.* Breed, 5 Ariz. 16, 43 Pac. 219.

Arkansas.— Bagley *v.* Weaver, 72 Ark. 29, 77 S. W. 903; Warner *v.* Capps, 37 Ark. 32; Lane *v.* Levillian, 4 Ark. 76, 37 Am. Dec. 769.

California.—Jones *v.* Iverson, 131 Cal. 101, 63 Pac. 135; Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777; Moyle *v.* Landers, (1889) 21 Pac. 1133; Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369; Fleming *v.* Albeck, 67 Cal. 226, 7 Pac. 659; Griffiths *v.* Henderson, 49 Cal. 566; Weaver *v.* Conger, 10 Cal. 233; Lucas *v.* San Francisco, 7 Cal. 463; Whiting *v.* Heslep, 4 Cal. 327.

Florida.— McDougald *v.* Bass, 53 Fla. 142, 43 So. 778; McKay *v.* Friebele, 8 Fla. 21; Barbee *v.* Jacksonville, etc., Plank Road Co., 6 Fla. 262.

Georgia.— Hay *v.* Collins, 118 Ga. 243, 44 S. E. 1002; Pryor *v.* Brady, 115 Ga. 848, 42 S. E. 223; Lumpkin County *v.* Williams, 89 Ga. 388, 15 S. E. 487; Finney *v.* Cadwallader, 55 Ga. 75.

Idaho.— Carter *v.* Wann, 6 Ida. 556, 57 Pac. 314.

Illinois.— Knapp, etc., Co. *v.* Ross, 181 Ill. 392, 55 N. E. 127; Reece *v.* Smith, 94 Ill. 362; Bills *v.* Stanton, 69 Ill. 51; Nickerson *v.* Sheldon, 33 Ill. 372, 85 Am. Dec. 280; Barber *v.* Whitney, 29 Ill. 439; Tomlin *v.* Tonica, etc., R. Co., 23 Ill. 429; Anderson *v.* Richards, 22 Ill. 217; Bristow *v.* Lane, 21 Ill. 194; Nash *v.* Nash, 16 Ill. 79; Gillilan *v.* Gray, 14 Ill. 416; Walton *v.* Stephenson, 14 Ill. 77; Governor *v.* Ridgway, 12 Ill. 14; Israel *v.* Reynolds, 11 Ill. 218; Young *v.* Campbell, 10 Ill. 80; Williams *v.* Smith, 4 Ill. 524; Cowles *v.* Litchfield, 3 Ill. 356; Lusk *v.* Cook, 1 Ill. 84; Brockmeyer *v.* Chicago Sanitary Dist., 118 Ill. App. 49; Wolf *v.* Alton, 103 Ill. App. 587; Jensen *v.* Wetherell, 79 Ill. App. 33; Phœnix Ins. Co. *v.* Frisch, 29 Ill. App. 265.

Indiana.— Connersville Wagon Co. *v.* McFarlan Carriage Co., 166 Ind. 123, 76 N. E. 294, 3 L. R. A. N. S. 709; Lake Erie, etc., R. Co. *v.* Charman, 161 Ind. 95, 67 N. E. 923; Rownd *v.* State, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395; Raymond *v.* Wathen, 142 Ind. 367, 41 N. E. 815; Brake *v.* Payne, 137 Ind. 479, 37 N. E. 140; Lime City Bldg., etc., Assoc. *v.* Black, 136 Ind. 544, 35 N. E. 829; Plymouth *v.* Milner, 117 Ind. 324, 20 N. E. 235; Burk *v.* Simonson, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304; Poland *v.* Miller, 95 Ind. 387, 48 Am. Rep. 730; Millikan *v.* Temple, 94 Ind. 261; Baddeley *v.* Patterson, 78 Ind. 157; Bayless *v.* Glenn, 72 Ind. 5; Rout *v.* Woods, 67 Ind. 319; Jennings County *v.* Verbarg, 63 Ind. 107; Dehority *v.* Nelson, 56 Ind. 414; Bondurant *v.* Bladen, 19 Ind. 160; Wright *v.* Indianapolis, etc., R. Co., 18 Ind. 168; Urton *v.* Luckey, 17 Ind. 213; Brown *v.* Gooden, 16 Ind. 444; Downs *v.* McCombs, 16 Ind. 211; Webb *v.* Bowless, 15 Ind. 242; Alexander *v.* Gaar, 15 Ind. 89; Indianapolis, etc., R. Co. *v.* Taffe, 11 Ind. 458; State *v.* Clark, 9 Ind. 241; Milnes *v.* Vanhorn, 8 Blackf. 198; James *v.* Nicholson, 6 Blackf. 288; Bishop *v.* Yeazle, 6 Blackf. 127; Horton *v.* Smelser, 5 Blackf. 428; Haworth *v.* Fisher, 3 Blackf. 249; Farnham *v.* Hay, 3 Blackf. 167; Wingate *v.* Ellis, 1 Blackf. 563; Gibson County *v.* Harrington, 1 Blackf. 260; Martin *v.* Ray, 1 Blackf. 201; Hollingsworth *v.* McColly, 26 Ind. App. 609, 60 N. E. 371; Green *v.* Eden,

a demurrer which is based upon the ground of a misjoinder of paragraphs or

24 Ind. App. 583, 56 N. E. 240; Kenney *v.* Wells, 23 Ind. App. 490, 55 N. E. 774; Storrs, etc., Co. *v.* Fusselman, 23 Ind. App. 293, 55 N. E. 245; Colles *v.* Lake Cities Electrie R. Co., 22 Ind. App. 86, 53 N. E. 256; Tell City *v.* Bielefeld, 20 Ind. App. 1, 49 N. E. 1090; Baker *v.* Groves, 1 Ind. App. 522, 27 N. E. 640.

Iowa.— Singer *v.* Cavers, 26 Iowa 178; Zapple *v.* Rush, 23 Iowa 99; Edmonds *v.* Cochran, 12 Iowa 488; Darr *v.* Lilley, 11 Iowa 4; Coon *v.* Jones, 10 Iowa 131; Jarvis *v.* Worick, 10 Iowa 29; Chambers *v.* Lathrop, Morr. 102.

Kentucky.— Com. *v.* Hughes, 8 B. Mon. 400; Turner *v.* Johnson, 7 Dana 435; Rodes *v.* Young, 5 Dana 558; Hood *v.* Hanning, 4 Dana 21; Moor *v.* Dewees, Litt. Sel. Cas. 227; Wier *v.* Bush, 4 Litt. 429; Albin Co. *v.* Kuttner, 77 S. W. 181, 25 Ky. L. Rep. 1100.

Louisiana.— People's State Bank *v.* St. Landry State Bank, 50 La. Ann. 528, 24 So. 14.

Maine.— Thompson *v.* Lewis, 83 Me. 223, 22 Atl. 104; National Exch. Bank *v.* Abell, 63 Me. 346; Concord *v.* Delaney, 56 Me. 201.

Maryland.— Alvey *v.* Hartwig, 106 Md. 254, 67 Atl. 132, 11 L. R. A. N. S. 678; Leonard *v.* Woolford, 91 Md. 626, 46 Atl. 1025; Gunther *v.* Dranbauer, 86 Md. 1, 38 Atl. 33; Spencer *v.* Trafford, 42 Md. 1; Scott *v.* Leary, 34 Md. 389; Gurley *v.* Lee, 11 Gill & J. 395.

Massachusetts.— Sears *v.* Trowbridge, 15 Gray 184; Brown *v.* Castles, 11 Cush. 348.

Mississippi.— Jacobs *v.* Postal Tel. Cable Co., 76 Miss. 278, 24 So. 535; Cummings *v.* Daugherty, 73 Miss. 405, 18 So. 657; Lynn *v.* Illinois Cent. R. Co., 63 Miss. 157; Hines *v.* Potts, 56 Miss. 346; Levey *v.* Dyess, 51 Miss. 501; Newell *v.* Newell, 34 Miss. 385; Field *v.* Weir, 28 Miss. 456.

Missouri.— Missouri Pac. R. Co. *v.* McLiney, 32 Mo. App. 166.

Nebraska.— Alexander *v.* Thacker, 30 Nebr. 614, 46 N. W. 825.

New Jersey.— Peter *v.* Middlesex, etc., Traction Co., 69 N. J. L. 456, 55 Atl. 35; Munnings *v.* Hopkins, (Sup. 1899) 43 Atl. 670; Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367; Belton *v.* Gibbon, 12 N. J. L. 76.

New York.— Hale *v.* Omaha Nat. Bank, 49 N. Y. 626; Climax Specialty Co. *v.* Seneca Button Co., 54 Misc. 152, 103 N. Y. Suppl. 822; Burstein *v.* Levy, 49 Misc. 469, 98 N. Y. Suppl. 853; Grimshaw *v.* Woolfall, 15 N. Y. Suppl. 857; Swords *v.* Northern Light Oil Co., 17 Abb. N. Cas. 115; Martin *v.* Mattison, 8 Abb. Pr. 3; Haight *v.* Brisbin, 1 How. Pr. N. S. 199 [*affirmed* in 36 Hun 579]; Seaver *v.* Hodgkin, 63 How. Pr. 128; Butler *v.* Wood, 10 How. Pr. 222; Cooper *v.* Clason, Code Rep. N. S. 347; Freeland *v.* McCullough, 1 Den. 414, 43 Am. Dec. 685; U. S. *v.* White, 2 Hill 59, 37 Am. Dec. 374; Mumford *v.* Fitzhugh, 18 Johns. 457; Gidney *v.* Blake, 11 Johns. 54; Cuyler *v.* Rochester, 12 Wend. 165; Cochran *v.* Scott, 3 Wend. 229.

North Carolina.— Strange *v.* Manning, 99 N. C. 165, 5 S. E. 900.

Ohio.— Spicer *v.* Giselman, 15 Ohio 338.

Oklahoma.— Hanenkratt *v.* Hamil, 10 Okla. 219, 61 Pac. 1050.

Oregon.— Brown *v.* Baker, 39 Oreg. 66, 65 Pac. 799, 66 Pac. 193; Waggy *v.* Scott, 29 Oreg. 386, 45 Pac. 774; Simpson *v.* Prather, 5 Oreg. 86; Ketchum *v.* State, 2 Oreg. 103.

Pennsylvania.— Evans *v.* Tibbins, 2 Grant 451; Johnson *v.* Weber, 9 Phila. 241.

Rhode Island.— Langley *v.* Metropolitan L. Ins. Co., 16 R. I. 21, 11 Atl. 174.

Tennessee.— Phœnix Ins. Co. *v.* Day, 4 Lea 247.

Texas.— Carson *v.* Cock, 50 Tex. 325; Staples *v.* Llano County, 9 Tex. Civ. App. 201, 28 S. W. 569.

Virginia.— Norfolk, etc., R. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19; Virginia, etc., Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4; Smith *v.* Lloyd, 16 Gratt. 295; Henderson *v.* Stringer, 6 Gratt. 130; Hollingsworth *v.* Milton, 8 Leigh 50; Roe *v.* Crutchfield, 1 Hen. & M. 361.

Washington.— Hindle *v.* Holcomb, 34 Wash. 336, 75 Pac. 873; Chevret *v.* Mechanics' Mill, etc., Co., 4 Wash. 721, 31 Pac. 24; McCartney *v.* Glassford, 1 Wash. 579, 20 Pac. 423.

West Virginia.— Smith *v.* Kanawha County Ct., 33 W. Va. 713, 11 S. E. 1, 8 L. R. A. 82; Newlon *v.* Reitz, 31 W. Va. 483, 7 S. E. 411; Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827; Johnson *v.* Brown, 13 W. Va. 71; Nutter *v.* Sydenstricker, 11 W. Va. 535; Elliott *v.* Hutchinson, 8 W. Va. 452; Thompson *v.* Boggs, 8 W. Va. 63; Standiford *v.* Goudy, 6 W. Va. 364.

Wisconsin.— Boyd *v.* Eau Claire Mut. Fire Assoc., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 96 Am. St. Rep. 948, 61 L. R. A. 918; Pinkum *v.* Eau Claire, 81 Wis. 301, 51 N. W. 550; Plainfield *v.* Plainfield, 67 Wis. 526, 30 N. W. 672; Bronson *v.* Markey, 53 Wis. 98, 10 N. W. 166; Hyde *v.* Kenosha County Sup'rs, 43 Wis. 129; Curtis *v.* Moore, 15 Wis. 134; Lockwood *v.* Rogers, 2 Pinn. 90, 1 Chandl. 21.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

United States.— Dallas County *v.* MacKenzie, 94 U. S. 660, 24 L. ed. 182; Crosby *v.* Lehigh Valley R. Co., 128 Fed. 193 [*affirmed* in 137 Fed. 765, 70 C. C. A. 199]; Weed *v.* U. S., 65 Fed. 399; Stephens *v.* Overstolz, 43 Fed. 465; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639; Parrott *v.* Barney, 18 Fed. Cas. No. 10,773*a*, Deady 405.

Canada.— Robertson *v.* Winnipeg, 6 Manitoba 483; Tobin *v.* Symonds, 6 Nova Scotia 141.

See 39 Cent. Dig. tit. "Pleading," § 486.

Special demurrer.— When the special demurrer is to the whole complaint, the rule should be the same as in the case of a gen-

counts.[62] Similarly, if different kinds of relief are sought, and the facts alleged are sufficient to authorize one but not sufficient to authorize another, a demurrer for want of facts directed to the entire cause of action should be overruled.[63] And where several cumulative negligent or wrongful acts are alleged in one count,[64] or several breaches,[65] or several divisible matters of damage,[66] and any one of them is sufficient, a demurrer to the entire count must be overruled. A plea of set-off or counter-claim is to be construed as a declaration, and the same rules apply.[67] So also if a demurrer be directed generally to an entire plea, answer, reply, or other pleading, which contains several separable parts, and any one of them is good, the

eral demurrer to the whole complaint. If in a portion of the complaint there is stated a good cause of action, free from ambiguity or uncertainty, or which, in short, is not amenable to any of the grounds urged in the special demurrer, it is error to sustain such a special demurrer as to the entire complaint. Jones *v.* Iverson, 131 Cal. 101, 63 Pac. 135.

Whether the ground be, that one of several counts, or that one of several breaches, or that part of plaintiff's demand of a distinct and divisible nature is bad, in every of these cases, defendant should demur to that count, or to that breach, or to that part of the demand, as the case may be, which is bad. In no case can he demur to the whole, and ask that judgment be given in his favor in part only. Henderson *v.* Stringer, 6 Gratt. (Va.) 130.

Where statutes make demurrers both joint and several the above general rule does not apply. Sumner *v.* Ford, 3 Ark. 389; Marshall *v.* Bouldin, 8 Mo. 244.

62. Kent *v.* Long, 8 Ala. 44; Chamberlain *v.* Darrington, 4 Port. (Ala.) 515.

63. *Indiana.*— Migatz *v.* Stieglitz, 166 Ind. 361, 77 N. E. 400; Hodshire *v.* Ewan, 57 Ind. 561; Milnes *v.* Vanhorn, 8 Blackf. 198.

Kansas.— St. Louis, etc., R. Co. *v.* Labette County, (1901) 66 Pac. 1045.

Kentucky.— Bullock *v.* Graham, 87 Ky. 120, 7 S. W. 889, 9 Ky. L. Rep. 1004.

Minnesota.— Kenaston *v.* Lorig, 81 Minn. 454, 84 N. W. 323; Lockwood *v.* Bigelow, 11 Minn. 113.

Mississippi.—Grego *v.* Grego, 78 Miss. 443, 28 So. 817; State Bd. of Education *v.* Mobile, etc., R. Co., 71 Miss. 500, 14 So. 445; Wells *v.* Mitchell, 39 Miss. 800; Leonard *v.* Cameron, 39 Miss. 419.

New York.— People *v.* Ryder, 16 Barb. 370.

Oklahoma.— Savage *v.* Dinkler, 12 Okla. 463, 72 Pac. 366.

South Carolina.— Ferst *v.* Powers, 64 S. C. 221, 41 S. E. 974.

South Dakota.— MacBride *v.* Hitchcock, 11 S. D. 373, 77 N. W. 1021.

Texas.— Lutcher *v.* Norsworthy, (Civ. App. 1894) 27 S. W. 630.

See 39 Cent. Dig. tit. "Pleading," § 486. See also *supra*, VI, F, 2, b.

64. Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489; Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479, 63 N. E. 239; Pennsylvania Co. *v.* Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

65. *Alabama.*— Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746; Williamson *v.* Woolf, 37 Ala. 298; Wilson *v.* Cantrell, 19 Ala. 642; Watt *v.* Sheppard, 2 Ala. 425.

Arkansas.— Blakeney *v.* Ferguson, 18 Ark. 347; Adams *v.* State, 6 Ark. 497.

California.— Storer *v.* Austin, 136 Cal. 588, 69 Pac. 297.

Illinois.— Henrickson *v.* Reinback, 33 Ill. 299; Brady *v.* Spurck, 27 Ill. 478; Stout *v.* Whitney, 12 Ill. 218; People *v.* Gregory, 11 Ill. App. 370.

Indiana.— McFall *v.* Howe Sewing Mach. Co., 90 Ind. 148; State *v.* White, 88 Ind. 587; Armington *v.* State, 45 Ind. 10; State *v.* Scott, 12 Ind. 529; Kintner *v.* State, 3 Ind. 86; Rock *v.* Gordon, 6 Blackf. 192; Harrah *v.* State, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747.

Kentucky.— Bull *v.* McCrea, 8 B. Mon. 422; Craddock *v.* Hundley, 2 B. Mon. 113; Haggin *v.* Williamson, 5 T. B. Mon. 8.

Missouri.— State *v.* Campbell, 10 Mo. 724; Hayden *v.* Sample, 10 Mo. 215.

New York.— People *v.* Brush, 6 Wend. 454.

Tennessee.— Carroll *v.* Foster, 3 Yerg. 468.

Virginia.— Wright *v.* Michie, 6 Gratt. 354; Henderson *v.* Stringer, 6 Gratt. 130; Martin *v.* Sturm, 5 Rand. 693.

See 39 Cent. Dig. tit. "Pleading," §§ 486, 487.

66. *Alabama.*— Buchanan *v.* Larkin, 116 Ala. 431, 22 So. 543.

California.— Guerian *v.* Joyce, 133 Cal. 405, 65 Pac. 972; Nelson *v.* Merced County, 122 Cal. 644, 55 Pac. 421.

Georgia.— Harris County *v.* Brady, 115 Ga. 767, 42 S. E. 71.

New Jersey.— Hendrickson *v.* Pennsylvania R. Co., 43 N. J. L. 464.

South Dakota.— MacBride *v.* Hitchcock, 11 S. D. 373, 77 N. W. 1021.

West Virginia.— Clark *v.* Ohio River R. Co., 34 W. Va. 200, 12 S. E. 505.

See 39 Cent. Dig. tit. "Pleading," § 486.

67. *Illinois.*— Farmers', etc., Ins. Co. *v.* Menz, 63 Ill. 116.

Indiana.— Shearman *v.* Fellows, 5 Blackf. 459.

Maryland.— Hearn *v.* Cullin, 54 Md. 533.

Minnesota.— A. E. Johnson Co. *v.* White, 78 Minn. 48, 80 N. W. 838.

New Jersey.— Dey *v.* Jackson, 39 N. J. L. 535.

See 39 Cent. Dig. tit. "Pleading," § 488.

demurrer must be overruled.[68] If a pleading can be made sufficient by striking out certain objectionable matter, a demurrer going to the whole plea will be overruled.[69] The specification of error in a particular part of a pleading does not narrow a demurrer directed to the entire pleading into a demurrer to that part only.[70]

(II) *As Affected by Parties.* A joint demurrer, filed by two or more parties, cannot be sustained if the pleading is good as to any one of the parties demurring.[71] But where a complaint against several defendants shows a cause

68. *Alabama.*— Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522.

Arkansas.— Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Bruce *v.* Benedict, 31 Ark. 301; Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52; Raines *v.* Dooley, 23 Ark. 329; Hays *v.* Roberts, 23 Ark. 193.

California.— Eich *v.* Greeley, 112 Cal. 171, 44 Pac. 483.

Colorado.— St. Vrain Stone Co. *v.* Denver, etc., R. Co., 18 Colo. 211, 32 Pac. 827; San Miguel County *v.* Long, 8 Colo. 438, 8 Pac. 923.

Florida.— Hooker *v.* Forrester, 53 Fla. 392, 43 So. 241.

Georgia.— Florence *v.* Pattillo, 105 Ga. 577, 32 S. E. 642; King *v.* Johnson, 94 Ga. 665, 21 S. E. 895; Treadaway *v.* Richards, 92 Ga. 264, 18 S. E. 25.

Illinois.— Stacy *v.* Baker, 2 Ill. 417.

Indiana.— Maynard *v.* Waidlich, 156 Ind. 562, 60 N. E. 348; Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296; Crawford *v.* Powell, 101 Ind. 421; Gregory *v.* Gregory, 89 Ind. 345; Lebanon First Nat. Bank *v.* Essex, 84 Ind. 144; Boys *v.* Simmons, 72 Ind. 593; Stanford *v.* Davis, 54 Ind. 45; Nichol *v.* McCalister, 52 Ind. 586; Towell *v.* Pence, 47 Ind. 304; Washington Tp. *v.* Bonney, 45 Ind. 77; Jewett *v.* Honey Creek Draining Co., 39 Ind. 245; Leach *v.* Lewis, 38 Ind. 160; Barner *v.* Morehead, 22 Ind. 354; Adkins *v.* Wiseman, 19 Ind. 90; Dean *v.* Richards, 16 Ind. 114; State *v.* Clark, 9 Ind. 241; Bates *v.* Halliday, 3 Ind. 159; Doremus *v.* Bond, 8 Blackf. 368; Austin *v.* McMains, 14 Ind. App. 514, 43 N. E. 141.

Iowa.— Holbert *v.* St. Louis, etc., R. Co., 38 Iowa 315; Bonney *v.* Bonney, 29 Iowa 448; Sample *v.* Griffith, 5 Iowa 376.

Kansas.— Mollohan *v.* King, (1897) 50 Pac. 881; Flint *v.* Dulany, 37 Kan. 332, 15 Pac. 208; Munn *v.* Taulman, 1 Kan. 254, 81 Am. Dec. 508; Simpson *v.* Collins, (App. 1900) 62 Pac. 719.

Kentucky.— Archer *v.* National Ins. Co., 2 Bush 226; Williams *v.* Langford, 15 B. Mon. 566; Bohannons *v.* Lewis, 3 T. B. Mon. 376; Abby *v.* Ferguson, 1 T. B. Mon. 99. *Compare* Gearhart *v.* Olmstead, 7 Dana 441.

Minnesota.— St. Paul First Nat. Bank *v.* How, 28 Minn. 150, 9 N. W. 626; Armstrong *v.* Hinds, 9 Minn. 356.

Nebraska.— Van Housen *v.* Broehl, 59 Nebr. 348, 78 N. W. 624.

New Jersey.— Carpenter *v.* Spring Garden Ins. Co., (Sup. 1904) 58 Atl. 114.

New York.— McBride *v.* American Surety Co., 70 Hun 369, 24 N. Y. Suppl. 178; Fletcher *v.* Jones, 64 Hun 274, 19 N. Y. Suppl. 47; George A. Fuller Co. *v.* Manhattan Constr. Co., 44 Misc. 219, 88 N. Y. Suppl. 1049; McGrath *v.* Pitkin, 56 N. Y. Suppl. 398; Ross *v.* Duffy, 12 N. Y. St. 584; Cuyler *v.* Rochester, 12 Wend. 165.

Oklahoma.— Guthrie *v.* T. W. Harvey Lumber Co., 5 Okla. 774, 50 Pac. 84; Hurst *v.* Sawyer, 2 Okla 470, 37 Pac. 817.

Oregon.— Toby *v.* Ferguson, 3 Oreg. 27.

South Dakota.— Burgi *v.* Rudgers, 20 S. D. 646, 108 N. W. 253.

Texas.— State *v.* Williams, 8 Tex. 255.

Utah.— Haslam *v.* Haslam, 19 Utah 1, 56 Pac. 243.

United States.—Dallas County *v.* McKenzie, 94 U. S. 660, 24 L. ed. 182; Heid *v.* Ebner, 133 Fed. 156, 66 C. C. A. 222; Whitenack *v.* Philadelphia, etc., R. Co., 57 Fed. 901; Brown *v.* Duchesne, 4 Fed. Cas. No. 2,003, 2 Curt. 97; Vermont *v.* Society for Propagation, etc., 28 Fed. Cas. No. 16,920, 2 Paine 545.

See 39 Cent. Dig. tit. "Pleading," § 488.

69. Woodstock Iron Works *v.* Stockdale, 143 Ala. 550, 39 So. 335; Bain *v.* Wells, 107 Ala. 562, 19 So. 774.

70. Wright *v.* Michie, 6 Gratt. (Va.) 354; Henderson *v.* Stringer, 6 Gratt. (Va.) 130. See Matthews *v.* Beach, 8 N. Y. 173 [*reversing* 5 Sandf. 256].

71. *California.*— Neumann *v.* Moretti, 146 Cal. 25, 79 Pac. 510; Hirshfeld *v.* Weill, 121 Cal. 13, 53 Pac. 402; Rogers *v.* Schulenburg, 111 Cal. 281, 43 Pac. 899; Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777.

Colorado.— People *v.* Stoddard, 34 Colo. 200, 86 Pac. 251; Irwine *v.* Wood, 7 Colo. 477, 4 Pac. 783; Oliver *v.* Denver, 13 Colo. App. 345, 57 Pac. 729.

Georgia.— Howard *v.* Edwards, 89 Ga. 367, 15 S. E. 480; May *v.* Jones, 88 Ga. 308, 14 S. E. 552, 30 Am. St. Rep. 154, 15 L. R. A. 637.

Illinois.— Lancaster *v.* Roberts, 144 Ill. 213, 33 N. E. 27; Kotz *v.* Chicago, 70 Ill. App. 284.

Indiana.— Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687; Miller *v.* Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; Campbell *v.* Martin, 87 Ind. 577; Sanders *v.* Farrell, 83 Ind. 28; Wilcox *v.* Moudy, 82 Ind. 219; Carter *v.* Zenblin, 68 Ind. 436; Price *v.* Sanders, 60 Ind. 310; Wilkerson *v.* Rust, 57 Ind. 172; Trisler *v.* Trisler, 38 Ind. 282; Teter *v.* Hinders, 19 Ind. 93; Estep *v.* Burke, 19 Ind. 87; Pace *v.* Oppenheim, 12 Ind. 533; Benedict *v.* Farlow, 1 Ind. App. 160, 27 N. E. 307.

Michigan.— Burk *v.* Muskegon Mach., etc., Co., 98 Mich. 614, 57 N. W. 804.

Minnesota.— Palmer *v.* Zumbrota Bank, 65 Minn. 90, 67 N. W. 893; Prendergast *v.*

of action against each separately, but not against all jointly, defendants may demur jointly on the ground of misjoinder of causes of action.[72] Where a pleading purports to state a cause of action against two defendants, but it is good as to only one, a demurrer to the whole should be overruled, where judgment may be rendered against one;[73] and a demurrer to the whole complaint is bad if one of the plaintiffs might have judgment separately.[74] On the other hand it has been held that if several defendants join in a plea, which is sufficient as to part but insufficient as to the rest, the entire plea is bad on general demurrer.[75]

2. Admissions — a. In General. A demurrer admits the truth of all material and relevant facts which are well pleaded.[76] But this rule that a demurrer is an

St. Paul Dispatch Printing Co., 40 Minn. 295, 41 N. W. 1036; Petsch *v.* St. Paul Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034; Clark *v.* Lovering, 37 Minn. 120, 33 N. W. 776.

Missouri.— State Bank *v.* Parris, 35 Mo. 371.

Nebraska.— Dunn *v.* Gibson, 9 Nebr. 513, 4 N. W. 244.

New York.— Warner *v.* James, 88 N. Y. App. Div. 567, 85 N. Y. Suppl. 153; Oakley *v.* Tugwell, 33 Hun 357; People *v.* New York, 28 Barb. 240 [*reversed* on other grounds in 10 Abb. Pr. 111]; Mildenberg *v.* James, 31 Misc. 607, 66 N. Y. Suppl. 77 [*affirmed* in 62 N. Y. App. Div. 617, 71 N. Y. Suppl. 1142 [*affirmed* in 175 N. Y. 494, 67 N. E. 1085)]; Moore *v.* Charles E. Monell Co., 27 Misc. 235, 58 N. Y. Suppl. 430; Woodbury *v.* Sackrider, 2 Abb. Pr. 402; Eldridge *v.* Bell, 12 How. Pr. 547; Phillips *v.* Hagadon, 12 How. Pr. 17; Spellman *v.* Weider, 5 How. Pr. 5.

North Carolina.— Conant *v.* Barnard, 103 N. C. 315, 9 S. E. 575. *Compare* Blackmore *v.* Winders, 144 N. C. 212, 56 S. E. 874.

North Dakota.— Dalrymple *v.* Security L. & T. Co., 9 N. D. 306, 83 N. W. 245.

Oklahoma.— Stiles *v.* Guthrie, 3 Okla. 26, 41 Pac. 383.

South Carolina.— Stahn *v.* Catawba Mills, 53 S. C. 519, 31 S. E. 498; Lowry *v.* Jackson, 27 S. C. 318, 3 S. E. 473.

South Dakota.—Rochford *v.* Lyman County School Dist. No. 11, 17 S. D. 542, 97 N. W. 747; Evans *v.* Fall River County, 9 S. D. 130, 68 N. W. 195.

Utah.— Walker *v.* Popper, 2 Utah 96.

Wisconsin.—Boyd *v.* Eau Claire Mut. Fire Assoc., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 96 Am. St. Rep. 948, 61 L. R. A. 918; Mark Paine Lumber Co. *v.* Douglas County Imp. Co., 94 Wis. 322, 68 N. W. 1013; Webster *v.* Tibbits, 19 Wis. 438.

See 39 Cent. Dig. tit. "Pleading," § 463.

Contra.— Wood *v.* Olney, 7 Nev. 109.

The question whether a pleading is good as to any one of defendants should be raised by a several demurrer by him. Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687; Bennett *v.* Preston, 17 Ind. 291; State Bank *v.* Parris, 35 Mo. 371; Polack *v.* Runkel, 56 N. Y. App. Div. 365, 67 N. Y. Suppl. 753.

That a receiver is improperly sued with other defendants without leave of the court that appointed him is no cause for sustaining a joint demurrer by all of the defendants. Farmers' Co-operative Mfg. Co. *v.* Middle Georgia Mfg., etc., Co., 94 Ga. 673, 20 S. E. 117.

72. Hess *v.* Buffalo, etc., R. Co., 29 Barb. (N. Y.) 391; Adams *v.* Stevens, 7 Misc. (N. Y.) 468, 27 N. Y. Suppl. 993. See also Townsend *v.* Brinson, 117 Ga. 375, 43 S. E. 748.

73. Franklin County *v.* White Water Valley Canal Co., 2 Ind. 162; Goncelier *v.* Foret, 4 Minn. 13. See also Lyman County *v.* State, 11 S. D. 391, 78 N. W. 17.

74. Peabody *v.* Washington County Mut. Ins. Co., 20 Barb. (N. Y.) 339; Chevret *v.* Mechanics' Mill, etc., Co., 4 Wash. 721, 31 Pac. 24. But see *supra*, VI, F, 2, e.

Want of capacity to sue of one of plaintiffs.— A demurrer on the ground that plaintiffs have not legal capacity to sue must be overruled if any one of the plaintiffs has capacity to sue. O'Callaghan *v.* Bode, 84 Cal. 489, 24 Pac. 269.

75. Dyer *v.* Cleaveland, 18 Vt. 241.

76. *Alabama.*— Campbell *v.* Lombardo, (1905) 39 So. 573; Barron *v.* Vandvert, 13 Ala. 232.

Arkansas.— Cross *v.* Haldeman, 15 Ark. 200; Pierson *v.* Wallace, 7 Ark. 282.

California.— Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244; Selkirk *v.* Sacramento County, 3 Cal. 323.

Colorado.— Montezuma County *v.* Montezuma Water, etc., Co., 39 Colo. 166, 89 Pac. 794; Williams *v.* Routt County, 37 Colo. 55, 84 Pac. 1109; Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18.

Connecticut.— Durand *v.* New Haven, etc., Co., 42 Conn. 211.

Florida.— Atlantic Coast Line R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318; McDougal *v.* Lea, 2 Fla. 532.

Georgia.— Roberts *v.* State, 14 Ga. 8, 58 Am. Dec. 528; Gilmer *v.* Allen, 9 Ga. 208.

Illinois.— Fish *v.* McGann, 205 Ill. 179, 68 N. E. 761; Jackson *v.* Glos, 144 Ill. 21, 32 N. E. 536; Hanna *v.* Yocum, 17 Ill. 387; Third Nat. Bank *v.* Weaver, 73 Ill. App. 463.

Indiana.— Rowe *v.* Hamberger, 154 Ind. 604, 57 N. E. 534; Barnard *v.* Sherley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 41 Am. St. Rep. 454, 24 L. R. A. 568; Gilmore *v.* McClure, 133 Ind. 571, 33 N. E. 351; Pulaski County *v.* Shields, 130 Ind. 6, 29 N. E. 385; Reid *v.* Mitchell, 93 Ind. 469; Peyton *v.* Kruger, 77 Ind. 486; Schoppenhast *v.* Bollman, 21 Ind. 280; Lane *v.* Ready, 12 Ind. 475; Cutler *v.* Cox, 2 Blackf. 178,

admission of matters of fact does not extend to render it an admission of inferences

18 Am. Dec. 152; State *v.* Callahan, Smith 72; Toledo, etc., R. Co. *v.* Berry, 31 Ind. App. 556, 68 N. E. 702; Kash *v.* Huncheon, 1 Ind. App. 361, 27 N. E. 645.

Iowa.— Iowa Mut. Tornado Ins. Assoc. *v.* Gilbertson, 129 Iowa 658, 106 N. W. 153; American Trading, etc., Co. *v.* Gottstein, 123 Iowa 267, 98 N. W. 770, 101 Am. St. Rep. 319; Smith *v.* Henry County, 15 Iowa 385; Lyon *v.* O'Kell, 14 Iowa 233; Hartford Bank *v.* Green, 11 Iowa 476; Roberts *v.* Waters, 9 Iowa 434; Games *v.* Robb, 8 Iowa 193; Harkins *v.* Edwards, 1 Iowa 426.

Kentucky.— Rogers *v.* Hughes, 87 Ky. 185, 8 S. W. 16, 10 Ky. L. Rep. 68; Morgan *v.* Ballard, 1 A. K. Marsh. 558; Lancaster *v.* Arnold, 45 S. W. 82, 20 Ky. L. Rep. 34; Harrison County Ct. *v.* Wall, 12 S. W. 130, 11 Ky. L. Rep. 223.

Louisiana.— Ramos Lumber, etc., Co. *v.* Labarre, 116 La. 559, 40 So. 898; Watkins *v.* North American Land, etc., Co., 107 La. 107, 31 So. 683; Kird *v.* New Orleans, etc., R. Co., 105 La. 226, 29 So. 729; Bouligny *v.* Gary, 21 La. Ann. 642; Hastings *v.* Brantley, 21 La. Ann. 516; Rooks *v.* Williams, 13 La. Ann. 374; Eulalie *v.* Long, 9 La. Ann. 9; Adams *v.* Moulton, McGloin 210.

Maine.— Bank *v.* Kingsley, 84 Me. 111, 24 Atl. 794; Blanding *v.* Mansfield, 72 Me. 427.

Maryland.— Washington, etc., Turnpike Road *v.* State, 19 Md. 239; Neale *v.* Clautice, 7 Harr. & J. 372. *Compare* Philadelphia, etc., R. Co. *v.* Shipley, 72 Md. 88, 19 Atl. 1.

Massachusetts.— French *v.* Lawrenee, 190 Mass. 230, 76 N. E. 730.

Michigan.— Belden *v.* Blackman, 124 Mich. 667, 83 N. W. 616.

Minnesota.— Kosmerl *v.* Snively, 85 Minn. 228, 88 N. W. 753; Griggs *v.* St. Paul, 9 Minn. 246.

Missouri.— Randolph *v.* Wheeler, 182 Mo. 145, 81 S. W. 419; The Reveille *v.* Case, 9 Mo. 502; Williams *v.* Gerber, 75 Mo. App. 18.

Nebraska.— People *v.* Weston, 3 Nebr. 312.

New Jersey.— Camden *v.* Greenwald, 65 N. J. L. 458, 47 Atl. 458; Chism *v.* Schipper, 51 N. J. L. 1, 16 Atl. 316, 14 Am. St. Rep. 668, 2 L. R. A. 544; Pope *v.* Skinkle, 45 N. J. L. 39; Coxe *v.* Gulick, 10 N. J. L. 328.

New York.— Blum *v.* Whitney, 185 N. Y. 232, 77 N. E. 1159; Schoellkopf *v.* Coatsworth, 166 N. Y. 77, 59 N. E. 710; Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081; Dodge *v.* Colby, 108 N. Y. 445, 15 N. E. 703; Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80; Campbell *v.* Heiland, 55 N. Y. App. Div. 95, 66 N. Y. Suppl. 1116; Wamsley *v.* Horton, 77 Hun 317, 28 N. Y. Suppl. 423; St. Louis Sav. Assoc. *v.* O'Brien, 51 Hun 45, 3 N. Y. Suppl. 764; Bell *v.* Yates, 33 Barb. 627; Hall *v.* Bartlett, 9 Barb. 297; Bishop *v.* Empire Transp. Co., 33 N. Y. Super. Ct. 99; Beresford *v.* Donaldson, 54 Misc. 138, 103 N. Y. Suppl. 600; Barnard *v.* Lawyers' Title Ins. Co., 45 Misc. 577, 91 N. Y. Suppl. 41; Budd *v.* Howard Thomas Co., 40 Misc. 52, 81 N. Y. Suppl. 152; Loeb *v.* Firemen's Ins. Co., 38 Misc. 107, 77 N. Y. Suppl. 106 [*affirmed* in 78 N. Y. App. Div. 113, 79 N. Y. Suppl. 510, 12 N. Y. Annot. Cas. 343]; Searl *v.* American Tobacco Co., 12 Misc. 201, 33 N. Y. Suppl. 271; Charlton *v.* Webster, 17 N. Y. Suppl. 539; Young *v.* Brice, 3 N. Y. Suppl. 123; Groesbeeck *v.* Dunscomb, 41 How. Pr. 302.

North Carolina.—Burnett *v.* Atlantic Coast Line R. Co., 132 N. C. 261, 43 S. E. 797; Sloan *v.* Carolina Cent. R. Co., 126 N. C. 487, 36 S. E. 21.

Oklahoma.—State Bank *v.* Maddox, 4 Okla. 583, 46 Pac. 563.

Oregon.— Wilson *v.* Salem, 24 Oreg. 504, 34 Pac. 9, 691.

Pennsylvania.— Com. *v.* O'Donnell, 188 Pa. St. 14, 41 Atl. 341; Com. *v.* Cross Cut R. Co., 53 Pa. St. 62; Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277; Fisher *v.* Lewis, 1 Pa. L. J. Rep. 422.

South Carolina.— Tarver *v.* Garlington, 27 S. C. 107, 2 S. E. 846, 13 Am. St. Rep. 628; McColough *v.* Cowan, 3 Brev. 420; O'Driscol *v.* McBurney, 2 Brev. 451; Winn *v.* Waring, 2 Brev. 428.

Tennessee.— Mullins *v.* Jones, 1 Head 517; Trezevant *v.* McNeal, 2 Humphr. 352.

Texas.— Catlin *v.* Glover, 4 Tex. 151; Lambeth *v.* Turner, 1 Tex. 364; Smart *v.* Panther, 42 Tex. Civ. App. 262, 95 S. W. 679; New York L. Ins. Co. *v.* Malone, (Civ. App. 1906) 95 S. W. 585; Nixon *v.* Malone, (Civ. App. 1906) 95 S. W. 577; Haney *v.* Atwood, 42 Tex. Civ. App. 270, 93 S. W. 1093; Brown *v.* Houston, (Civ. App. 1898) 48 S. W. 760; Sabin Tram Co. *v.* Jones, (Civ. App. 1898) 43 S. W. 905; Jackson *v.* Browning, 1 Tex. App. Civ. Cas. § 605; Lyle *v.* Harris, 1 Tex. App. Civ. Cas. § 71.

Utah.— Reams *v.* Taylor, 31 Utah 288, 87 Pac. 1089, 8 L. R. A. N. S. 436. See also I. X. L. Furniture, etc., House *v.* Berets, 32 Utah 454, 91 Pac. 279.

Vermont.— Matthews *v.* Tower, 39 Vt. 433; Marshall *v.* Aiken, 25 Vt. 327.

Washington.— Soule *v.* Seattle, 6 Wash. 315, 33 Pac. 384, 1080.

Wisconsin.— Lewis *v.* Stout, 22 Wis. 234.

Wyoming.— State *v.* Irvine, 14 Wyo. 318, 84 Pac. 90.

United States.— Sullivan *v.* Iron Silver Min. Co., 109 U. S. 550, 3 S. Ct. 339, 27 L. ed. 1028; Dallas County *v.* MacKenzie, 94 U. S. 660, 24 L. ed. 182; Lillard *v.* Kentucky Distilleries, etc., Co., 134 Fed. 168, 67 C. C. A. 74; Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651; Smith *v.* Glasgow Inv. Co., 74 Fed. 332, 20 C. C. A. 432; Horsford *v.* Gudger, 35 Fed. 388; Furniss *v.* Ellis, 9 Fed. Cas. No. 5,162, 2 Brock. 14; Postmaster-Gen. *v.* Ustick, 19 Fed. Cas. No. 11,315, 4 Wash. 347.

Canada.— Hollender *v.* Ffoulkes, 26 Ont. 61.

or conclusions drawn therefrom,[77] even if alleged in the pleading,[78] nor mere inferences or conclusions from facts not stated,[79] nor conclusions of law,[80] nor matters of

See 39 Cent. Dig. tit. "Pleading," § 525 *et seq.*

Only facts well pleaded.— A demurrer only admits facts which are well pleaded. Cowell *v.* City Water Supply Co., 130 Iowa 671, 105 N. W. 1016.

The truth of a denial is admitted by a demurrer thereto. Carr *v.* Bosworth, 68 Iowa 669, 27 N. W. 913.

Identity of counts.— An averment that the cause of action set up in one count is the same as that alleged in another is deemed an averment of fact which is admitted by demurrer. Britzell *v.* Fryberger, 2 Ind. 176. But it has been held that an averment in a replication that the cause of action alleged in the amended declaration is the same as those in the original declaration is a conclusion of law which is not admitted on demurrer. Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367.

77. *Colorado.*— People *v.* Cobb, 10 Colo. App. 478, 51 Pac. 523.

Illinois.— Commercial Mut. Acc. Co. *v.* Bates, 74 Ill. App. 335; Ebersole *v.* Morrison First Nat. Bank, 36 Ill. App. 267.

Michigan.— Dubois *v.* Hutchinson, 40 Mich. 262.

Minnesota.— Taylor *v.* Blake, 11 Minn. 255.

New York.— Greeff *v.* Equitable L. Assur. Soc., 160 N. Y. 19, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 288; Burdick *v.* Chesebrough, 94 N. Y. App. Div. 532, 88 N. Y. Suppl. 13; Swan *v.* Mutual Reserve Fund L. Assoc., 20 N. Y. App. Div. 255, 46 N. Y. Suppl. 841 [*affirmed* in 155 N. Y. 9, 49 N. E. 258]; Buckley *v.* Harrison, 10 Misc. 683, 31 N. Y. Suppl. 999.

Texas.— Prokop *v.* Gulf, etc., R. Co., 34 Tex. Civ. App. 520, 79 S. W. 101.

Washington.— Hester *v.* Thomson, 35 Wash. 119, 76 Pac. 734.

Wisconsin.— Stone *v.* Oconomowoc, 71 Wis. 155, 36 N. W. 829.

United States.— Pullman Palace-Car Co. *v.* Missouri Pac. R. Co., 11 Fed. 634, 3 McCrary 645.

See 39 Cent. Dig. tit. "Pleading," § 526½.

Illustrations of rule.— While, in considering a demurrer, allegations in a petition are accepted as true, a mere statement of a conclusion will be controlled by the facts which clearly appear from the entire pleading; and hence an allegation in a petition in an action against a city to recover for the death of plaintiffs' decedent, an experienced man, while reading a water meter placed in the ground so close to a railroad track that cars would extend over the box, that deceased did not know that the place was unsafe, is a legal absurdity, and will not be accepted as a fact. Berry *v.* Kansas City, 128 Mo. App. 374, 107 S. W. 415.

78. State *v.* Stevenson, 2 Ark. 260; Miller *v.* Butler, 121 Ga. 758, 49 S. E. 754; Delaware County Nat. Bank *v.* King, 109 N. Y. App. Div. 553, 95 N. Y. Suppl. 956; Finney *v.* Guy, 189 U. S. 335, 47 L. ed. 839, 23 S. Ct. 558. But see Donaldson *v.* Walker, 101 Tenn. 236, 47 S. W. 417.

79. *Indiana.*— Bowen *v.* Mauzy, 117 Ind. 258, 19 N. E. 526.

Maryland.— Anne Arundel County Com'rs *v.* Baltimore Sugar Refining Co., 99 Md. 481, 58 Atl. 211.

New York.— Johnstown *v.* Rodgers, 20 Misc. 262, 45 N. Y. Suppl. 661; McQueen *v.* New, 10 Misc. 251, 30 N. Y. Suppl. 977.

Pennsylvania.— Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277.

Wisconsin.— Stedman *v.* Berlin, 97 Wis. 505, 73 N. W. 57; Pratt *v.* Lincoln County, 61 Wis. 62, 20 N. W. 726.

80. *Alabama.*— Dickerson *v.* Winslow, 97 Ala. 491, 11 So. 918.

Alaska.— Murray *v.* Farrell, 2 Alaska 360.

Arkansas.— Wood *v.* King, 57 Ark. 284, 21 S. W. 471; State *v.* Stevenson, 2 Ark. 260.

California.— Burling *v.* Newlands, 112 Cal. 476, 44 Pac. 810; Johnson *v.* Kirby, 65 Cal. 482, 4 Pac. 458.

Connecticut.— Coughlin *v.* Knights of Columbus, 79 Conn. 218, 64 Atl. 223.

Delaware.— Thomas *v.* Grand Trunk R. Co., 1 Pennew. 593, 42 Atl. 987.

Georgia.— Edwards *v.* Smith, 102 Ga. 19, 29 S. E. 129.

Illinois.— Ross *v.* Clark, 225 Ill. 326, 80 N. E. 275 [*affirming* 126 Ill. App. 460]; Blake *v.* Ogden, 223 Ill. 204, 79 N. E. 68; Mason *v.* Mason, 219 Ill. 609, 76 N. E. 692; Christian County *v.* Merrigan, 191 Ill. 484, 61 N. E. 479; McPhail *v.* People, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306; Greig *v.* Russell, 115 Ill. 483, 4 N. E. 780; Compher *v.* People, 12 Ill. 290.

Indiana.— Ratliff *v.* Stretch, 130 Ind. 282, 30 N. E. 30; Winstandley *v.* Rariden, 110 Ind. 140, 11 N. E. 15; Read *v.* Yeager, 104 Ind. 195, 3 N. E. 856; Worley *v.* Moore, 77 Ind. 567; Foglesong *v.* Wickard, 75 Ind. 258; Lane *v.* Ready, 12 Ind. 475; Germania F. Ins. Co. *v.* Warner, 13 Ind. App. 466, 41 N. E. 969.

Iowa.— Bogaard *v.* Plain View Independent Dist., 93 Iowa 269, 61 N. W. 859; Freeman *v.* Hart, 61 Iowa 525, 16 N. W. 597.

Kentucky.— Crosdale *v.* Cynthiana, 50 S. W. 977, 21 Ky. L. Rep. 36; Commonwealth Bank *v.* Spilman, 3 Dana 150.

Louisiana.— Southern Chemical, etc., Co. *v.* Wolf, 48 La. Ann. 631, 19 So. 558.

Maryland.— Carroll *v.* Smith, 99 Md. 653, 59 Atl. 131; Ryan *v.* McLane, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501.

Massachusetts.— Jones *v.* Dow, 137 Mass. 119; Millard *v.* Baldwin, 3 Gray 484.

Minnesota.— Griggs *v.* St. Paul, 9 Minn. 246.

Missouri.— Knapp, etc., Co. *v.* St. Louis,

evidence,[81] nor surplusage and irrelevant matter.[82] However, facts reasonably or necessarily inferred or presumed from facts alleged are admitted by demurrer.[83] Dates, even when given under a *videlicet*, are admitted,[84] as are facts which, under the rules of evidence, could not be proved,[85] and also facts alleged by the

156 Mo. 343, 56 S. W. 1102; State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; Blaine *v.* Knapp, 140 Mo. 241, 41 S. W. 787.

Montana.— McCormick *v.* Riddle, 10 Mont. 467, 26 Pac. 202.

Nebraska.— State *v.* Porter, 69 Nebr. 203, 95 N. W. 769; Markey *v.* Sheridan County School Dist. No. 18, 58 Nebr. 479, 78 N. W. 932; State *v.* Ramsey, 50 Nebr. 166, 69 N. W. 758; American Water Works Co. *v.* State, 46 Nebr. 194, 64 N. W. 711, 50 Am. St. Rep. 610, 30 L. R. A. 447.

New Hampshire.— Craft *v.* Thompson, 51 N. H. 536.

New Jersey.— Marples *v.* Standard Oil Co., 71 N. J. L. 352, 59 Atl. 32.

New Mexico.—Albuquerque First Nat. Bank *v.* Lewinson, 12 N. M. 147, 76 Pac. 288.

New York.— Park *v.* National Wholesale Druggists' Assoc., 175 N. Y. 1, 67 N. E. 136; Bonnell *v.* Griswold, 68 N. Y. 294; Petty *v.* Emery, 96 N. Y. App. Div. 35, 88 N. Y. Suppl. 823; Bush *v.* O'Brien, 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685 [*reversed* on other grounds in 164 N. Y. 205, 58 N. E. 106]; Farrar *v.* Lee, 10 N. Y. App. Div. 130, 41 N. Y. Suppl. 672; Armatage *v.* Fisher, 74 Hun 167, 26 N. Y. Suppl. 364; Hall *v.* Bartlett, 9 Barb. 297; E. T. Burrowes Co. *v.* Rapid Safety Filter Co., 49 Misc. 539, 97 N. Y. Suppl. 1048.

Ohio.— Lewis *v.* Taylor, 18 Ohio Cir. Ct. 443, 10 Ohio Cir. Dec. 205; Hamilton, etc., Electric Transit Co. *v.* Hamilton, 4 Ohio S. & C. Pl. Dec. 10, 1 Ohio N. P. 366.

South Carolina.— Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629.

Texas.— Heil *v.* Martin, (Civ. App. 1902) 70 S. W. 430; McLane *v.* Paschal, 8 Tex. Civ. App. 398, 28 S. W. 711; Best *v.* Nix, 6 Tex. Civ. App. 349, 25 S. W. 130.

Virginia.— Trumbo *v.* Fulk, 103 Va. 73, 48 S. E. 525; Newberry Land Co. *v.* Newberry, 95 Va. 119, 27 S. E. 899.

Washington.— Franklin Sav. Bank *v.* Moran, 19 Wash. 200, 52 Pac. 858.

Wisconsin.— Hoyer *v.* Ludington, 100 Wis. 441, 76 N. W. 348; Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733; Peake *v.* Buell, 90 Wis. 508, 63 N. W. 1053, 48 Am. St. Rep. 946; Sherwood *v.* Sherwood, 45 Wis. 357, 30 Am. Rep. 757; Atty.-Gen. *v.* Foote, 11 Wis. 14, 78 Am. Dec. 689; State *v.* Collins, 5 Wis. 339.

United States.— Kent *v.* Lake Superior Ship Canal, etc., Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. ed. 352; Pennie *v.* Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. ed. 426; Lamar *v.* Micou, 114 U. S. 218, 5 S. Ct. 857, 29 L. ed. 94; Davidow *v.* Pennsylvania R. Co., 85 Fed. 943; Lumley *v.* Wabash R. Co., 71 Fed. 21; Taylor *v.* Holmes, 14 Fed. 498.

See 39 Cent. Dig. tit. "Pleading," § 527.

The validity or constitutionality of a statute is not admitted by a demurrer to a complaint relying on it and hence is put in issue by the demurrer. State *v.* Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418; People *v.* Biesecker, 58 N. Y. App. Div. 391, 68 N. Y. Suppl. 1067 [*affirmed* in 169 N. Y. 53, 61 N. E. 990, 88 Am. St. Rep. 534, 57 L. R. A. 178]. See, however, State *v.* Henderson, 120 Ga. 780, 48 S. E. 334, holding that the constitutionality of a statute is not put in issue by a general demurrer to a declaration based upon it.

81. Southern Chemical, etc., Co. *v.* Wolf, 48 La. Ann. 631, 19 So. 558.

82. Georgia Home Ins. Co. *v.* Warten, 113 Ala. 479, 22 So. 288, 59 Am. St. Rep. 129; Riverside County *v.* Yawman, etc., Mfg. Co., 3 Cal. App. 691, 86 Pac. 900.

However, facts alleged in anticipation of a defense are admitted. Frankl *v.* Bailey, 31 Oreg. 285, 50 Pac. 186.

83. *Connecticut.*— Eliot's Appeal, 74 Conn. 586, 51 Atl. 558.

Delaware.— Strattner *v.* Wilmington City Electric Co., 3 Pennew. 453, 53 Atl. 436.

Florida.— Barbee *v.* Jacksonville, etc., Road Co., 6 Fla. 262.

Georgia.— Fulcher *v.* Royal, 55 Ga. 68.

Nebraska.— Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722.

New York.— Greef *v.* Equitable L. Assur. Soc., 160 N. Y. 19, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 288; Ellsworth *v.* Franklin County Agricultural Soc., 99 N. Y. App. Div. 119, 91 N. Y. Suppl. 1040; Hall *v.* Gilman, 77 N. Y. App. Div. 458, 79 N. Y. Suppl. 303; Albany Belting, etc., Co. *v.* Grell, 67 N. Y. App. Div. 81, 73 N. Y. Suppl. 580; Swan *v.* Mutual Reserve Fund Life Assoc., 20 N. Y. App. Div. 255, 46 N. Y. Suppl. 841 [*affirmed* in 155 N. Y. 9, 49 N. E. 258]; Dougan *v.* Evansville, etc., R. Co., 15 N. Y. App. Div. 483, 44 N. Y. Suppl. 503; Wright *v.* Glen Tel. Co., 48 Misc. 192, 95 N. Y. Suppl. 101 [*affirmed* in 112 N. Y. App. Div. 745, 99 N. Y. Suppl. 85]; O'Connor *v.* Virginia Pass., etc., Co., 46 Misc. 530, 92 N. Y. Suppl. 525.

North Carolina.— Green *v.* Western Union Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985.

Vermont.— Hyde *v.* Moffat, 16 Vt. 271.

United States.— Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523.

See 39 Cent. Dig. tit. "Pleading," § 525 *et seq.*

84. Parliament of Prudent Patricians *v.* Marr, 20 App. Cas. (D. C.) 363.

85. State *v.* Freeman, (Kan. App. 1900) 62 Pac. 717.

pleader which the party demurring is estopped to aver;[86] but not facts which the pleader, as appears by the pleading filed, is estopped to assert.[87] So the demurrer admits that the pleading demurred to is properly filed.[88] On a demurrer to a special defense the allegations of the complaint will be taken as true,[89] notwithstanding a separate paragraph of the plea or answer denies such allegations.[90]

b. Facts Not Admitted. The general rule does not apply where the court will take judicial notice that the facts are not true,[91] nor does it apply to legally impossible facts,[92] nor to facts which appear unfounded by a record incorporated in the pleading,[93] or by a document referred to,[94] nor to general averments contradicted by more specific averments.[95] A demurrer does not admit allegations as to the amount of damages sustained,[96] other than the right to nominal damages,[97] except in cases where the establishment of the cause of action necessarily carries with it the right to recover the precise amount alleged.[98] So scandalous matter inserted merely to insult the opposing party is not admitted,[99] nor are allegations of foreign law.[1]

c. Character of Admission. The admissions by demurrer can be used only for the purposes of the argument on the demurrer and they are not evidence for

86. Willson *v.* Glenn, 77 Ind. 585.

87. Scofield *v.* McDowell, 47 Iowa 129; Columbian Granite Co. *v.* Townsend, 74 Vt. 183, 52 Atl. 432.

88. Bobe *v.* Frowner, 18 Ala. 89; Powers *v.* Bryant, 7 Port. (Ala.) 9; Reynolds *v.* Mandel, 175 Ill. 615, 51 N. E. 649; Lewis *v.* Hicks, 96 Va. 91, 30 S. E. 466.

89. Douglas *v.* Coonley, 156 N. Y. 521, 51 N. E. 283, 66 Am. St. Rep. 580; Barnard *v.* Lawyers' Title Ins. Co., 45 Misc. (N. Y.) 577, 91 N. Y. Suppl. 41.

Where defenses set up in an answer insufficiently denied the allegations of the complaint, they must be taken as true on demurrer, and be held insufficient to avoid liability. Saleeby *v.* New Jersey Cent. R. Co., 40 Misc. (N. Y.) 269, 81 N. Y. Suppl. 903.

90. Delaney *v.* Miller, 84 Hun (N. Y.) 244, 32 N. Y. Suppl. 505.

91. *California.*— People *v.* Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305; Ohm *v.* San Francisco, 92 Cal. 437, 28 Pac. 580.

Georgia.— Southern R. Co. *v.* Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253; Griffin *v.* Augusta, etc., R. Co., 72 Ga. 423.

Kentucky.— Commonwealth Bank *v.* Spilman, 3 Dana 150.

New York.— Baxter *v.* McDonnell, 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765.

North Carolina.— Prichard *v.* Morganton, 126 N. C. 908, 36 S. E. 353, 78 Am. St. Rep. 679.

Ohio.— Lewis *v.* Taylor, 18 Ohio Cir. Ct. 443, 10 Ohio Cir. Dec. 205.

Texas.— McLane *v.* Paschal, 8 Tex. Civ. App. 398, 28 S. W. 711.

United States.— Southern Pac. R. Co. *v.* Groeck, 68 Fed. 609.

92. *California.*— Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147.

Georgia.— Southern R. Co. *v.* Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253.

New York.— Freeman *v.* Frank, 10 Abb. Pr. 370.

North Carolina.— Prichard *v.* Morganton, 126 N. C. 908, 36 S. E. 353, 78 Am. St. Rep. 679.

United States.— Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 3 S. Ct. 193, 27 L. ed. 922.

93. Murray *v.* Murphy, 39 Miss. 214.

94. Boardman *v.* Keystone Watch Case Co., 8 Lanc. L. Rev. (Pa.) 25.

95. Williams *v.* Hanly, 16 Ind. App. 464, 45 N. E. 622.

In Kentucky, where there is an inconsistency between an averment and an exhibit, the latter controls, and it, not the averment, is admitted by demurrer. Bush *v.* Madeira, 14 B. Mon. 172.

96. *Arkansas.*— Thompson *v.* Haislip, 14 Ark. 220.

Connecticut.— Sprague *v.* New York, etc., R. Co., 68 Conn. 345, 36 Atl. 791, 37 L. R. A. 638; Havens *v.* Hartford, etc., R. Co., 28 Conn. 69; Chapin *v.* Curtis, 23 Conn. 388.

Iowa.— Buehler *v.* Reed, 11 Iowa 182.

Missouri.— Darrah *v.* The Lightfoot, 15 Mo. 187; The Reveille *v.* Case, 9 Mo. 502; Rosentreter *v.* Brady, 63 Mo. App. 398.

New York.— Thompson *v.* Fox, 21 Misc. 298, 47 N. Y. Suppl. 176.

See 39 Cent. Dig. tit. "Pleading," § 531.

97. Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106; Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88.

98. McAlister *v.* Clark, 33 Conn. 253.

99. W. T. Hanson Co. *v.* Collier, 119 N. Y. App. Div. 794, 104 N. Y. Suppl. 787 [*reversing* on other grounds 51 Misc. 496, 101 N. Y. Suppl. 690].

1. Knickerbocker Trust Co. *v.* Iselin, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863 [*reversing* on other grounds 109 N. Y. App. Div. 688, 96 N. Y. Suppl. 588]; Finney *v.* Guy, 189 U. S. 335, 23 S. Ct. 558, 47 L. ed. 839.

the party alleging the facts demurred to.[2] The admission is confined to the portion of the pleading demurred to.[3] A demurrer to an answer does not constitute such an admission of the facts therein alleged as to make them a part of the petition and thus render the petition bad.[4] If a demurrer is filed by a party who has already filed a prior pleading, the admission of the demurrer, being later in time, must be taken as revoking any allegation of the prior pleading inconsistent with the allegations of the pleading demurred to.[5] When a demurrer is sustained the facts alleged in the pleading demurred to are not in the case,[6] and when the demurrer is overruled they must be proved and may be controverted as if no demurrer had been filed.[7]

3. As Opening Record — a. General Rule. The general rule is that a demurrer opens the whole record so that judgment must be rendered against the first party whose pleadings are defective in substance.[8] For example, a bad plea or answer

2. *Connecticut.*— Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336; Crogan *v.* Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88; Havens *v.* Hartford, etc., R. Co., 28 Conn. 69; Pease *v.* Phelps, 10 Conn. 62.
Indiana.— Lawler *v.* Couch, 80 Ind. 369; Swafford *v.* Kitch, 51 Ind. 78.
Kansas.— Jacobs *v.* Vaill, 67 Kan. 107, 72 Pac. 530.
Kentucky.— Bush *v.* Madeira, 14 B. Mon. 172.
Louisiana.— Bijou Co. *v.* Lehmann, 118 La. 956, 43 So. 632; Boutte *v.* Maillard, 19 La. Ann. 276.
Maryland.— Brooke *v.* Widdicombe, 39 Md. 386.
Massachusetts.—See Boynton *v.* Dalrymple, 16 Pick. 147.
Missouri.— Hill *v.* Gould, 129 Mo. 106, 30 S. W. 181.
New York.— Golden *v.* New York Health Dept., 21 N. Y. App. Div. 420, 47 N. Y. Suppl. 623; Wiley *v.* Rouse's Point, 86 Hun 495, 33 N. Y. Suppl. 773.
Oregon.— Rice *v.* Rice, 13 Oreg. 337, 10 Pac. 495.
Texas.— Perry *v.* Rice, 10 Tex. 367; Chambers *v.* Miller, 9 Tex. 236.
United States.— Anheuser-Busch Brewing Assoc. *v.* Bond, 66 Fed. 653, 13 C. C. A. 665.
See 39 Cent. Dig. tit. "Pleading," § 534.
Equivalent to proof in open court.— An admission of facts by a demurrer is equivalent to proof by a witness in open court. Francis *v.* Wood, 4 Ky. L. Rep. 616.

3. Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Stinson *v.* Gardiner, 33 Me. 94; Rose *v.* Jackson, 40 Mich. 29; Jorgensen *v.* Reformed Low Dutch Church, 7 Misc. (N. Y.) 1, 27 N. Y. Suppl. 318.
A verdict by consent on one plea will not deprive a party of the benefit of the averments in another plea which has been demurred to. Austin *v.* Cummings, 10 Vt. 26.

4. Park *v.* Kelly Axe Mfg. Co., 49 Fed. 618, 1 C. C. A. 395.

5. Boll *v.* New York, etc., R. Co., 33 Misc. (N. Y.) 42, 68 N. Y. Suppl. 139 [*affirmed* in 58 N. Y. App. Div. 625, 69 N. Y. Suppl. 1129].

6. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336.

7. *Indiana.*— Lawler *v.* Couch, 80 Ind. 369.
Iowa.— Standish *v.* Dow, 21 Iowa 363.
Louisiana.— Boutte *v.* Maillard, 19 La. Ann. 276.
New York.— Hudson River Transmission Power Co. *v.* United Traction Co., 98 N. Y. App. Div. 568, 91 N. Y. Suppl. 179.
United States.—Anheuser-Busch Brewing Assoc. *v.* Bond, 66 Fed. 653, 13 C. C. A. 665; Crawford *v.* William Penn, 6 Fed. Cas. No. 3,373, 3 Wash. 484.
See 39 Cent. Dig. tit. "Pleading," § 534.
However, the introduction of evidence to support a pleading is rendered unnecessary, in Kentucky, by a demurrer thereto which is overruled; the demurrant electing to stand thereon. Com. *v.* Hillis, 96 S. W. 873, 29 Ky. L. Rep. 1063.

8. *Alabama.*— Broadwood *v.* Southern Express Co., 148 Ala. 17, 41 So. 769; Williams *v.* Moore, 32 Ala. 506; Patton *v.* Hamner, 28 Ala. 618; Chaudron *v.* Fitzpatrick, 19 Ala. 649; Ogden *v.* Smith, 14 Ala. 428; Hargroves *v.* Cloud, 8 Ala. 173; Rogers *v.* Smiley, 2 Port. 249; Bender *v.* Spencer, Minor 269. *Contra*, Elliott *v.* Holbrook, 33 Ala. 659; Henley *v.* Bush, 33 Ala. 636.
Arkansas.— Bruce *v.* Benedict, 31 Ark. 301; Burke *v.* Stillwell, 23 Ark. 294; Bradley *v.* Hume, 18 Ark. 284; Pickett *v.* Real Estate Bank, 8 Ark. 224; Carlock *v.* Spencer, 7 Ark. 12; Byers *v.* Aiken, 5 Ark. 419; Childress *v.* Foster, 3 Ark. 252; McLaughlin *v.* Hutchins, 3 Ark. 207.
Colorado.—Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221.
Connecticut.—Bishop *v.* Quintard, 18 Conn. 395.
Florida.— State *v.* Louisville, etc., R. Co., 51 Fla. 311, 40 So. 885; Miller *v.* Kingsbury, 8 Fla. 356; Hooker *v.* Gallagher, 6 Fla. 351; Manly *v.* Union Bank, 1 Fla. 110. But see Russ *v.* Mitchell, 11 Fla. 80, holding rule abrogated by act of Feb. 8, 1861.
Illinois.— Hedrick *v.* People, 221 Ill. 374, 77 N. E. 441; Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736; Finch *v.* Galigher, 181 Ill. 625, 54 N. E. 611; Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Barrow *v.* Window, 71 Ill. 214; Haynes *v.* Lucas, 50 Ill. 436; Ward *v.* Stout, 32 Ill. 399; Adams *v.* Hardin, 19 Ill. 273; Peoria,

to a bad declaration or complaint or a bad reply to a bad plea or answer, etc.,

etc., R. Co. *v.* Neill, 16 Ill. 269; Buckmaster *v.* Grundy, 2 Ill. 310; Phœbe *v.* Jay, 1 Ill. 268; Augsbery *v.* Meredith, 101 Ill. App. 629; Frew *v.* Richardson, 97 Ill. App. 18; Wolf *v.* Sterling, 61 Ill. App. 515.

Indiana.— Mitchell *v.* Peru, 163 Ind. 17, 71 N. E. 132; State *v.* Kemp, 141 Ind. 125, 40 N. E. 661; Gray *v.* National Ben. Assoc., 111 Ind. 531, 11 N. E. 477; Wilhite *v.* Hamrick, 92 Ind. 594; Scott *v.* State, 89 Ind. 368; Dorrell *v.* Hannah, 80 Ind. 497; Drook *v.* Irvine, 41 Ind. 430; Hain *v.* Northwestern Gravel Road Co., 41 Ind. 196; Menifee *v.* Clark, 35 Ind. 304; Dunning *v.* Driver, 25 Ind. 269; Ellis *v.* Kenyon, 25 Ind. 134; McEwen *v.* Hussey, 23 Ind. 395; Sugar Creek Tp. *v.* Johnson, 20 Ind. 280; Louchheim *v.* Gill, 17 Ind. 139; State Bank *v.* Lockwood, 16 Ind. 306; Wiley *v.* Howard, 15 Ind. 169; Hayworth *v.* Junction R. Co., 13 Ind. 348; Ferguson *v.* Rhoades, 7 Blackf. 262; Puntenny *v.* Paddock, 1 Blackf. 415; Tillotson *v.* Stipp, 1 Blackf. 77; Hall *v.* Brownlee, 28 Ind. App. 178, 62 N. E. 457; Sulzer-Vogt Mach. Co. *v.* Rushville Water Co., (App. 1901) 60 N. E. 464; Posey County *v.* Stock, 11 Ind. App. 167, 36 N. E. 928; Davis, etc., Bldg., etc., Co. *v.* Booth, 10 Ind. App. 364, 37 N. E. 818; Indiana Live Stock Ins. Co. *v.* Bogeman, 4 Ind. App. 237, 30 N. E. 7. *Contra*, Mason *v.* Toner, 6 Ind. 328.

Indian Territory.— Shrimsher *v.* Newton, 3 Indian Terr. 555, 64 S. W. 534.

Kansas.— Johnson *v.* Wynne, 64 Kan. 138, 67 Pac. 549.

Kentucky.— Young *v.* Duhme, 4 Metc. 239; Martin *v.* McDonald, 14 B. Mon. 544; Mitchell *v.* Vance, 5 T. B. Mon. 528, 17 Am. Dec. 96; McWaters *v.* Draper, 5 T. B. Mon. 494; Williams *v.* Casey, 4 Bibb 300; Jones *v.* Grugett, 1 Bibb 447; Beauchamp *v.* Mudd, Hard. 163; Chesapeake, etc., R. Co. *v.* Riddle, 72 S. W. 22, 24 Ky. L. Rep. 1687; Mackin *v.* Wilson, 45 S. W. 663, 20 Ky. L. Rep. 218.

Maine.— Shelden *v.* Call, 55 Me. 159; Freeman *v.* Freeman, 39 Me. 426.

Maryland.— Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574; Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405; Eastern Advertising Co. *v.* McGraw, 89 Md. 72, 42 Atl. 923; Shertzer *v.* Mutual F. Ins. Co., 46 Md. 506; Washington, etc., Turnpike Road *v.* State, 19 Md. 239; State *v.* Culler, 18 Md. 418; Dilley *v.* Roman, 17 Md. 337; Tucker *v.* State, 11 Md. 322; Yingling *v.* Hoppe, 9 Gill 310; Dorsey *v.* Pannell, 4 Gill & J. 471; Morgan *v.* Morgan, 4 Gill & J. 395; Iglehart *v.* State, 2 Gill & J. 235; Murdock *v.* Winter, 1 Harr. & G. 471.

Massachusetts.— Frost *v.* Hammatt, 11 Pick. 70; Keay *v.* Goodwin, 16 Mass. 1; Dyer *v.* Stevens, 6 Mass. 389; Pearsall *v.* Dwight, 2 Mass. 84, 3 Am. Dec. 35.

Minnesota.— St. Paul First Nat. Bank *v.* How, 28 Minn. 150, 9 N. W. 626; Balcombe *v.* Northup, 9 Minn. 172; Yoss *v.* De Freudenrich, 6 Minn. 95; Smith *v.* Mulliken, 2 Minn. 319; Loomis *v.* Youle, 1 Minn. 175.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 77 Miss. 780, 28 So. 959; State *v.* Washington Steam Fire Co., 76 Miss. 449, 24 So. 877; Miles *v.* Myers, Walk. 379.

Missouri.— Marshall *v.* Platte County, 12 Mo. 88; Clark *v.* Murphy, 1 Mo. 114; Collier *v.* Weldon, 1 Mo. 1.

Nebraska.— Barr *v.* Little, 54 Nebr. 556, 74 N. W. 850; State *v.* Moores, 52 Nebr. 770, 73 N. W. 299; State *v.* Stuht, 52 Nebr. 209, 71 N. W. 941; Oakley *v.* Valley County, 40 Nebr. 900, 59 N. W. 368; Hower *v.* Aultman, 27 Nebr. 251, 42 N. W. 1039; Brown *v.* Houghton, 2 Nebr. (Unoff.) 425, 89 N. W. 251.

New Hampshire.— Claggett *v.* Simes, 31 N. H. 22; Leslie *v.* Harlow, 18 N. H. 518.

New Jersey.— Watkins *v.* Kirby, 74 N. J. L. 34, 64 Atl. 979; Cunningham *v.* Stanford, 68 N. J. L. 7, 52 Atl. 374; Brehen *v.* O'Donnell, 34 N. J. L. 408.

New Mexico.— Pino *v.* Beckwith, 1 N. M. 19.

New York.— Baxter *v.* McDonnell, 154 N. Y. 432, 48 N. E. 816; Peerrot *v.* Mt. Morris Bank, 120 N. Y. App. Div. 247, 104 N. Y. Suppl. 1045; Ganesvoort Bank *v.* Empire State Surety Co., 112 N. Y. App. Div. 500, 98 N. Y. Suppl. 382; John H. Parker Co. *v.* New York, 110 N. Y. App. Div. 360, 97 N. Y. Suppl. 200; Darragh *v.* Rowe, 109 N. Y. App. Div. 560, 96 N. Y. Suppl. 666; Holmes *v.* Northern Pac. R. Co., 65 N. Y. App. Div. 49, 72 N. Y. Suppl. 476; Newman *v.* Livingston County, 1 Lans. 476; Halliday *v.* Noble, 1 Barb. 137 [*reversed* on other grounds in 1 N. Y. 330]; Wehle *v.* Koch, 60 N. Y. Super. Ct. 429, 19 N. Y. Suppl. 189; Wenk *v.* New York, 36 Misc. 496, 73 N. Y. Suppl. 1003; Holmes *v.* Northern Pac. R. Co., 36 Misc. 266, 73 N. Y. Suppl. 332 [*affirmed* in 71 N. Y. App. Div. 618, 76 N. Y. Suppl. 1016]; Goldberg *v.* Kirschstein, 36 Misc. 249, 73 N. Y. Suppl. 358; McCann *v.* Hazard, 36 Misc. 7, 72 N. Y. Suppl. 45; Tuthill *v.* New York, 29 Misc. 555, 61 N. Y. Suppl. 968; Lipe *v.* Becker, 1 Den. 568; U. S. *v.* White, 2 Hill 59, 37 Am. Dec. 374; Gelston *v.* Burr, 11 Johns. 482.

North Dakota.— Tribune Printing, etc., Co. *v.* Barnes, 7 N. D. 591, 75 N. W. 904.

Ohio.— Headington *v.* Neff, 7 Ohio 229.

Pennsylvania.— Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26; Palethorp *v.* Schmidt, 12 Pa. Super. Ct. 214; Hall *v.* Hurford, 4 Pa. L. J. 44; Hildeburn *v.* Nathans, 1 Phila. 567.

Rhode Island.— Murphy *v.* Bates, 21 R. I. 89, 41 Atl. 1011; Railton *v.* Taylor, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246.

South Carolina.— Rosenberg *v.* McKain, 3 Rich. 145; O'Driscol *v.* McBurney, 2 Brev. 451; Ordinary *v.* Bracey, 1 Brev. 191.

Texas.— Slaughter *v.* Buck, 1 Tex. App. Civ. Cas. § 104.

Vermont.— Dunklee *v.* Goodenough, 65 Vt. 257, 26 Atl. 988; Chittenden Dist. Probate Ct. *v.* Saxton, 17 Vt. 623; Adams *v.* Nichols, 1 Aik. 316.

must be held good on demurrer.[9] This general rule applies at common law without regard to whether the demurrer is a general or special one.[10] So it makes no difference whether the pleading demurred to is good or bad, but the first defective pleading will nevertheless be searched out.[11] Under the common-law practice, when the party against whom a demurrer was filed took advantage of this rule to object to his adversary's earlier pleading, the court usually took up this question first, and if the objection was sustained declined to consider the sufficiency of the pleading demurred to.[12]

Virginia.— Roane *v.* Drummond, 6 Rand. 182; Day *v.* Pickett, 4 Munf. 104.

Wisconsin.— Eaton *v.* North, 25 Wis. 514; Babb *v.* Mackey, 10 Wis. 371.

United States.— Townsend *v.* Jemison, 7 How. 706, 12 L. ed. 880; U. S. *v.* Linn, 1 How. 104, 11 L. ed. 64; Gorman *v.* Lenox, 15 Pet. 115, 10 L. ed. 680; U. S. *v.* Arthur, 5 Cranch 257, 3 L. ed. 94; Cooke *v.* Graham, 3 Cranch 229, 2 L. ed. 240; Metropolitan Trust Co. *v.* Toledo, etc., R. Co., 107 Fed. 628; Boggs *v.* Wann, 58 Fed. 681; Illinois Bank *v.* Brady, 2 Fed. Cas. No. 888, 3 McLean 268; Egberts *v.* Dibble, 8 Fed. Cas. No. 4,307, 3 McLean 86; Hart *v.* Rose, 11 Fed. Cas. No. 6,154*a*, Hempst. 238; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639; U. S. *v.* Beard, 24 Fed. Cas. No. 14,551, 5 McLean 441; U. S. *v.* Sawyer, 27 Fed. Cas. No. 16,227, 1 Gall. 86; U. S. *v.* Spencer, 27 Fed. Cas. No. 16,368, 2 McLean 405.

England.—Lockwood *v.* Nash, 18 C. B. 536, 86 E. C. L. 536; Palmer *v.* Stone, 2 Wils. C. P. 96.

Canada.— Brown *v.* Canadian Pac. R. Co., 3 Manitoba 496.

See 39 Cent. Dig. tit. "Pleading," § 540 *et seq.*

In some jurisdictions, however, this rule has never been recognized (Wynn *v.* Lee, 5 Ga. 217), while in other jurisdictions the rule has been held to be abrogated by statute (Russ *v.* Mitchell, 11 Fla. 80). It is held in some states that the code provision that all demurrers shall state the objection relied on, the rule including what was formerly known as general demurrers, abrogates the rule that a demurrer opens the record. Elliott *v.* Holbrook, 33 Ala. 659; Henley *v.* Bush, 33 Ala. 636; Gano *v.* Gilruth, 4 Greene (Iowa) 453; Hobbs *v.* Memphis, etc., R. Co., 12 Heisk. (Tenn.) 526. At present, however, the general rule seems to be in force except in two states. Gano *v.* Gilruth, *supra*; Hobbs *v.* Memphis, etc., R. Co., 12 Heisk. (Tenn.) 526. For earlier decisions in these states see Wile *v.* Matherson, 2 Greene (Iowa) 184; Shelton *v.* Bruce, 9 Yerg. (Tenn.) 24; Ward *v.* Moore, 6 Yerg. (Tenn.) 491.

Whole record to be looked into.— In applying the rule that a general demurrer reaches the first substantial defect, the whole record must be looked into. So where the plea is good upon its face, the replication bad, while the rejoinder contains matter which shows that the plea is not good in fact, judgment upon general demurrer to the rejoinder should be for plaintiff. Dunklee *v.* Goodenough, 65 Vt. 257, 26 Atl. 988.

Request.— That a request must be made to have the demurrer carried back see San Miguel County *v.* Long, 8 Colo. 438, 8 Pac. 923; Cupp *v.* Campbell, 103 Ind. 213, 2 N. E. 565; Evansville *v.* Martin, 103 Ind. 206, 2 N. E. 596; Standley *v.* Northwestern Mut. L. Ins. Co., 95 Ind. 254; Scheible *v.* Slagle, 89 Ind. 323; Haymond *v.* Saucer, 84 Ind. 3.

If, on demurrer to a bad pleading, the demurrer be carried back and sustained to a previous pleading of the same party, this is not reversible error even though the previous pleading is good. Mason *v.* Craig, 3 Stew. & P. (Ala.) 389.

9. *Florida.*— Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480.

Indiana.— State *v.* Wheatley, 160 Ind. 183, 66 N. E. 684; Alexander *v.* Spaulding, 160 Ind. 176, 66 N. E. 694; Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; Ashley *v.* Foreman, 85 Ind. 55; State *v.* Mills, 82 Ind. 126; Ross *v.* Boswell, 60 Ind. 235; Bundy *v.* Hall, 60 Ind. 177; First *v.* Bonewitz, 3 Ind. 546; Whitesell *v.* Strickle, (App.) 73 N. E. 153; Repp *v.* Lesher, 27 Ind. App. 360, 61 N. E. 609; Beckett *v.* Little, 23 Ind. App. 65, 54 N. E. 1069; Western Assur. Co. *v.* Koontz, 17 Ind. App. 54, 46 N. E. 95.

Maryland.— Smith *v.* State, 66 Md. 215, 7 Atl. 49; State *v.* Culler, 18 Md. 418.

Massachusetts.— Frost *v.* Hammatt, 11 Pick. 70.

Mississippi.— See Cole *v.* Harman, 8 Sm. & M. 562.

Ohio.— Trott *v.* Sarchett, 10 Ohio St. 241.

As harmless error.— There is some authority for the rule that, although a bad plea or reply to a bad count or plea is bad, overruling a demurrer thereto is harmless error. Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247, 48 N. E. 402; Phœnix Ins. Co. *v.* Hedrick, 73 Ill. App. 601.

10. Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 240; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639.

11. Corning *v.* Roosevelt, 11 N. Y. Suppl. 758, 18 N. Y. Civ. Proc. 399, 25 Abb. N. Cas. 220. But see Gilbert *v.* Bakes, 106 Ind. 558, 7 N. E. 257.

12. Sommerville *v.* Merrill, 1 Port. (Ala.) 107; Parisen *v.* New York, etc., R. Co., 65 N. J. L. 413, 47 Atl. 477; Savage *v.* Buffalo, 50 N. Y. App. Div. 136, 63 N. Y. Suppl. 941; Rogers *v.* Rogers, 1 Hall (N. Y.) 391; Mc-

b. Pleadings to Which Rule Applies. The rule applies not only to a demurrer to an answer,[13] including a demurrer to a counter-claim,[14] but also to a demurrer to any other pleading including a reply or replication,[15] rejoinder,[16] surrejoinder,[17] etc.

c. To What Pleadings Demurrer Carried Back. A demurrer cannot be carried back to a pleading which the pleading demurred to does not profess to answer and with which it has no connection,[18] but only to pleadings or portions thereof to which the pleading demurred to relates.[19] However, a counter-claim is so related to the complaint that a demurrer thereto may be carried back to the complaint.[20]

d. Limitations of, and Exceptions to, Rule — (i) *In General.* But the court will only consider defects of substance as distinguished from defects of form in the earlier pleadings.[21] Thus, under the code, it can be shown only that the prior pleading does not state facts sufficient to constitute a cause of action, defense,

Keon *v.* Lane, 1 Hall (N. Y.) 319; Mathewson *v.* Weller, 3 Den. (N. Y.) 52; Lipe *v.* Becher, 1 Den. (N. Y.) 568; Utica Ins. Co. *v.* Scott, 8 Cow. (N. Y.) 709; Spencer *v.* Southwick, 11 Johns. (N. Y.) 572.

13. See cases cited *supra*, preceding notes.

14. See *infra*, VI, I, 3, c.

15. See *supra*, VI, F, 4.

A demurrer to a bad replication will not be carried back to a bad plea when the replication shows that plaintiff has no cause of action. Yingling *v.* Hoppe, 9 Gill (Md.) 310.

Even if the replication is held good, defendant may carry the demurrer back to the declaration. Corning *v.* Roosevelt, 11 N. Y. Suppl. 758, 18 N. Y. Civ. Proc. 399, 25 Abb. N. Cas. 220. *Contra*, Dearborn *v.* Kent, 14 Wend. (N. Y.) 183.

16. Tucker *v.* State, 11 Md. 322; Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 240; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639.

17. Ordinary *v.* Bracey, 1 Brev. (S. C.) 191; Egberts *v.* Dibble, 8 Fed. Cas. No. 4,307, 3 McLean 86.

18. Hunter *v.* Bilyeu, 39 Ill. 367.

19. Henderson *v.* Hale, 19 Ala. 154; Knight *v.* Lawrence, 19 Colo. 425, 36 Pac. 242; State *v.* Halter, 149 Ind. 292, 47 N. E. 665; Jenkins *v.* Rice, 84 Ind. 342; Hooker *v.* Smith, 19 Vt. 151, 47 Am. Dec. 679.

20. Little Falls *v.* Cobb, 80 Hun (N. Y.) 20, 29 N. Y. Suppl. 855; Gross *v.* Gross, 26 Misc. (N. Y.) 385, 56 N. Y. Suppl. 219; Reeves *v.* Bushby, 25 Misc. (N. Y.) 226, 55 N. Y. Suppl. 70; Williams *v.* Boyle, 1 Misc. (N. Y.) 364, 20 N. Y. Suppl. 720; Corning *v.* Roosevelt, 11 N. Y. Suppl. 758; Lawe *v.* Hyde, 39 Wis. 345. *Contra*, Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405.

21. *Alabama.*— Rogers *v.* Smiley, 2 Port. 249.

Arkansas.— Norris *v.* State, 22 Ark. 524; State *v.* Allis, 18 Ark. 269; State *v.* Rives, 12 Ark. 721.

Delaware.— Pierson *v.* Springfield F. & M. Ins. Co., 7 Houst. 307, 31 Atl. 966.

Florida.— Myrick *v.* Merritt, 22 Fla. 335.

Illinois.— Massey *v.* People, 201 Ill. 409, 66 N. E. 392; People *v.* Crabb, 156 Ill. 155, 40 N. E. 319; McDonald *v.* Wilkie, 13 Ill. 22, 54 Am. Dec. 423; Snyder *v.* State Bank, 1 Ill. 161.

Indiana.— Gould *v.* Steyer, 75 Ind. 50; Shook *v.* State, 6 Ind. 113.

Kentucky.— Wile *v.* Sweeny, 2 Duv. 161; Bodine *v.* Wade, 1 Bibb 458; Slack *v.* Price, 1 Bibb 272. But see Pryse *v.* Three Forks Deposit Bank's Assignee, 48 S. W. 415, 20 Ky. L. Rep. 1057.

Maine.— Calais *v.* Bradford, 51 Me. 414.

Maryland.— Smith *v.* State, 66 Md. 215, 7 Atl. 49; State *v.* Mayugh, 13 Md. 371; Scott *v.* State, 2 Md. 284; Kilgour *v.* Miles, 6 Gill & J. 268.

Michigan.— Wales *v.* Lyon, 2 Mich. 276.

Mississippi.— Tucker *v.* Hart, 23 Miss. 548; Haynes *v.* Covington, 9 Sm. & M. 470.

Missouri.— Wimer *v.* Shelton, 7 Mo. 266.

Nebraska.— Barr *v.* Little, 54 Nebr. 556, 74 N. W. 850; West Point Water Power, etc., Co. *v.* State, 49 Nebr. 223, 68 N. W. 507.

New Jersey.— Salt Lake City Bank *v.* Hendrickson, 40 N. J. L. 52.

New York.— People *v.* Booth, 32 N. Y. 397; Henriques *v.* Yale University, 28 N. Y. App. Div. 354, 51 N. Y. Suppl. 284; Stoddard *v.* Onondaga Conference, 12 Barb. 573; Williams *v.* Williams, 11 N. Y. Suppl. 753, 25 Abb. N. Cas. 217 [*reversed* on other grounds in 12 N. Y. Suppl. 599]; Tubbs *v.* Caswell, 8 Wend. 129.

Ohio.— Trott *v.* Sarchett, 10 Ohio St. 241.

Rhode Island.— Hull *v.* Sprague, 23 R. I. 188, 49 Atl. 697; Railton *v.* Taylor, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246.

South Carolina.— Phillips *v.* Willeson, 2 Brev. 477.

Texas.— State *v.* Williams, 8 Tex. 255; Burnham *v.* Walker, 1 Tex. App. Civ. Cas. § 899.

Wisconsin.— Lawton *v.* Howe, 14 Wis. 241.

United States.— Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Cooke *v.* Graham, 3 Cranch 229, 2 L. ed. 240; U. S. *v.* Central Nat. Bank, 10 Fed. 612; Jackson *v.* Rundlet, 13 Fed. Cas. No. 7,145, 1 Woodb. & M. 381; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639; Vowell *v.* Lyles, 28 Fed. Cas. No. 17,021, 1 Cranch C. C. 428.

Canada.— Mechanics' Whale Fishing Co. *v.* Whitney, 5 N. Brunsw. 312.

See 39 Cent. Dig. tit. "Pleading," § 544½.

or reply, as the case may be, or that the court has no jurisdiction of the action,[22] all other defects being waived by answering over.[23] Hence the effect of a demurrer upon antecedent pleadings is only that of a general demurrer,[24] and where general demurrers without the specification of grounds are abolished by statute, the demurrer cannot be carried back,[25] unless in some states the prior pleading is so defective that a judgment could not be rendered upon it.[26] Likewise the demurrer can be carried back only so far as the proceedings remain under the control of the court.[27]

(II) *Defects in Prior Pleadings Which Have Been Cured.* A demurrer will not be carried back to a bad pleading which has been cured by a subsequent pleading,[28] nor will it reach any defect which has been in any way cured.[29]

(III) *After Demurrer to Prior Pleading Overruled.* Some cases hold that after a demurrer to a pleading has been overruled, a demurrer to a subsequent pleading cannot be carried back to such pleading, on the ground that by pleading over after demurrer overruled the legal sufficiency of the pleading is admitted.[30] But other cases hold that an overruled demurrer is off the record and a demurrer to a subsequent pleading may be carried back just as though it had not been filed.[31]

(IV) *Effect of Previous Issue Taken.* The rule does not allow the demurrer to be carried back, in favor of the party demurring, to a pleading upon which he has previously taken issue,[32] for the contrary doctrine would in effect allow a party to plead and demur to the same pleading at the same time.[33] Thus, although there is authority to the contrary,[34] the rule is well settled in some jurisdictions that the demurrer cannot be carried over a plea of the general issue,[35]

22. Bausman *v.* Woodman, 33 Minn. 512, 24 N. W. 198; Lockwood *v.* Bigelow, 11 Minn. 113; People *v.* Booth, 32 N. Y. 397; Bigelow *v.* Drummond, 98 N. Y. App. Div. 499, 90 N. Y. Suppl. 913; Schwab *v.* Furniss, 4 Sandf. (N. Y.) 704; Strauss *v.* Trotter, 6 Misc. 77, 26 N. Y. Suppl. 20; Rothweiler *v.* Ryan, 4 Ohio Cir. Ct. 338, 2 Ohio Cir. Dec. 582; Ferson *v.* Drew, 19 Wis. 225.

Cross petition.— A demurrer to a reply to a cross petition puts in issue the question whether the matter set up is the proper subject of a cross petition. Hillier *v.* Stewart, 26 Ohio St. 652.

Some early cases under the codes held that the demurrer could not be carried back for any purpose but to question the jurisdiction of the court. Gimbel *v.* Smidth, 7 Ind. 627; Freeman *v.* Robinson, 7 Ind. 321; Mason *v.* Toner, 6 Ind. 328; Johnson *v.* Stebbins, 5 Ind. 364; Gano *v.* Gilruth, 4 Greene (Iowa) 453.

A defect of parties cannot be taken advantage of on a demurrer to the answer, since a demurrer to the complaint is necessary. McEwen *v.* Hussey, 23 Ind. 395.

23. Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237; Stratton *v.* Allen, 7 Minn. 502. See also *infra*, XIV, B, 3.

24. Henley *v.* Bush, 33 Ala. 636; Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52; Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 240.

25. Zirkle *v.* Jones, 129 Ala. 444, 29 So. 681; Newsom *v.* Huey, 36 Ala. 37; Elliott *v.* Holbrook, 33 Ala. 659; Henley *v.* Bush, 33 Ala. 636; Hobbs *v.* Memphis, etc., R. Co., 12 Heisk (Tenn.) 526.

26. State *v.* Bowen, 45 Miss. 347.

27. Dickson *v.* Wilkinson, 3 How. (U. S.) 57, 11 L. ed. 491.

28. *Arkansas.*— Wallace *v.* Collins, 5 Ark. 41, 39 Am. Dec. 359.

Colorado.— Colorado Fuel, etc., Co. *v.* Chappell, 12 Colo. App. 385, 55 Pac. 606.

Kansas.— Sill *v.* Sill, 31 Kan. 248, 1 Pac. 556.

New York.— Reeves *v.* Bushby, 25 Misc. 226, 55 N. Y. Suppl. 70.

Vermont.— Georgia Dist. Probate Ct. *v.* Vanduzer, 13 Vt. 135.

But see Watkins *v.* Kirby, 74 N. J. L. 34, 64 Atl. 979.

29. McFadden *v.* Fortier, 20 Ill. 509, appearance.

30. Chicago *v.* People, 210 Ill. 84, 71 N. E. 84; Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367; Stearns *v.* Cope, 109 Ill. 340; Carlson *v.* People, 118 Ill. App. 592; Ricknor *v.* Clabber, 4 Indian Terr. 660, 76 S. W. 271.

31. Sykes *v.* Lewis, 17 Ala. 261; Johnson *v.* Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731; Lafayette Bridge Co. *v.* Streator, 105 Fed. 729.

32. Moore *v.* Leseur, 18 Ala. 606.

33. Wear *v.* Jacksonville, etc., R. Co., 24 Ill. 593; McDonald *v.* Orvis, 16 Fed. Cas. No. 8,764, 5 Biss. 183.

34. Ansly *v.* Mock, 8 Ala. 444; Bishop *v.* Quintard, 18 Conn. 395; Shaw *v.* Tobias, 3 N. Y. 188; Auburn, etc., Canal Co. *v.* Leitch, 4 Den. (N. Y.) 65 [*overruling* Wheeler *v.* Curtis, 11 Wend. 653, which was *modified* in Miller *v.* Maxwell, 16 Wend. 9].

35. Supreme Lodge K. P. *v.* McLennan, 171 Ill. 417, 49 N. E. 530; Chestnut *v.* Chestnut,

although if the plea is withdrawn the demurrer may be carried to the declaration as though the general issue had never been filed.[36]

(v) *Dilatory Pleas or Answers.* No demurrer can be carried back over a plea or answer in abatement,[37] including a plea or answer to the jurisdiction.[38]

(vi) *Prior Pleading Good in Part.* Where a plea purports to answer several counts one of which is good,[39] or a reply is directed to several pleas, one of which is good,[40] or where, in carrying back a demurrer, it must be carried over any pleading directed to several replies, pleas, or counts, one of which is good,[41] the demurrer cannot be sustained as to those counts, pleas, or replies which are bad, for the demurrer must be taken as a general demurrer and, so as to be governed by the rule that a pleading good in part is good against a demurrer attacking it as a whole.[42]

J. Waiver or Abandonment of.[43] A party filing a demurrer who fails to secure a ruling on it will be deemed to have abandoned or waived it.[44] Furthermore, the demurrer is waived where the party pleads over to the pleading demurred to before the demurrer is acted on,[45] or the party joins in an issue of

77 Ill. 346; St. Louis, etc., R. Co. *v.* Lurton, 72 Ill. 118; Culver *v.* Chicago Third Nat. Bank, 64 Ill. 528; Claycomb *v.* Munger, 51 Ill. 373; Ward *v.* Stout, 32 Ill. 399; Schofield *v.* Settley, 31 Ill. 515; Wilson *v.* Myrick, 26 Ill. 34; Brawner *v.* Lomax, 23 Ill. 496; Marshall *v.* Cleveland, etc., R. Co., 80 Ill. App. 531; Rice *v.* Aleshire, 72 Ill. App. 455; Shunick *v.* Thompson, 25 Ill. App. 619; McDonald *v.* Orvis, 16 Fed. Cas. No. 8,764, 5 Biss. 183. See also Wade *v.* Doyle, 17 Fla. 522.

36. Mudge *v.* Rinkle, 45 Ill. App. 604.

37. *Alabama.*— Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463.

Arkansas.— Knott *v.* Clements, 13 Ark. 335.

Illinois.— Ryan *v.* May, 14 Ill. 49; Phœnix Ins. Co. *v.* Hedrick, 73 Ill. App. 601.

Indiana.— Goldsmith *v.* Chipps, 154 Ind. 28, 55 N. E. 855; Indiana, etc., R. Co. *v.* Foster, 107 Ind. 430, 8 N. E. 264; Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137.

Kentucky.— Dean *v.* Boyd, 9 Dana 169.

Massachusetts.— Clifford *v.* Cony, 1 Mass. 495.

New York.— Shaw *v.* Dutcher, 19 Wend. 216.

Rhode Island.— Ellis *v.* Ellis, 4 R. I. 110.

Vermont.— Bent *v.* Bent, 43 Vt. 42.

See 39 Cent. Dig. tit. "Pleading," § 548.

Contra.— Bockee *v.* Crosby, 3 Fed. Cas. No. 1,593, 2 Paine 432.

38. Birch *v.* King, 71 N. J. L. 392, 59 Atl. 11.

39. Prather *v.* Vineyard, 9 Ill. 40; New York, etc., R. Co. *v.* Jones, 94 Md. 24, 50 Atl. 423; Coney *v.* Harney, 53 N. J. L. 53, 20 Atl. 736; Smith *v.* Lloyd, 16 Gratt. (Va.) 295.

40. Williams *v.* Moore, 32 Ala. 506.

41. McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639; Brown *v.* Canadian Pac. R. Co., 3 Manitoba 496.

42. See *supra*, VI, I, 1, e.

43. Waiver of rulings on demurrer see *infra*, XIV, F.

44. See *infra*, XIV, F, 3.

45. *Alabama.*— Louisville, etc., R. Co. *v.* Johnson, 135 Ala. 232, 33 So. 661; Grigsby *v.* Nance, 3 Ala. 347.

Arkansas.— McLaughlin *v.* Hutchins, 3 Ark. 207.

California.— Pierce *v.* Minturn, 1 Cal. 470.

Colorado.— Plattner Implement Co. *v.* Bradley, 40 Colo. 95, 90 Pac. 86.

Connecticut.— Jackson *v.* Savage, 79 Conn. 294, 64 Atl. 737.

District of Columbia.— Moses *v.* Taylor, 6 Mackey 255.

Illinois.— Camfield *v.* Plummer, 212 Ill. 541, 72 N. E. 787; Chicago, etc., R. Co. *v.* People, 179 Ill. 441, 53 N. E. 986; Hull *v.* Johnston, 90 Ill. 604; Illinois Cent. R. Co. *v.* Parks, 88 Ill. 373; Grier *v.* Gibson, 36 Ill. 521; American Express Co. *v.* Pinckney, 29 Ill. 392; Wear *v.* Jacksonville, etc., R. Co., 24 Ill. 593; Marshall *v.* Duke, 4 Ill. 67; Wann *v.* McGoon, 3 Ill. 74; Peck *v.* Boggess, 2 Ill. 281; Gilbert *v.* Maggord, 2 Ill. 47; Cobb *v.* Ingalls, 1 Ill. 233; Fidelity, etc., Co. *v.* West Chicago St. R. Co., 99 Ill. App. 486; Bennet *v.* Gilbert, 94 Ill. App. 505; People *v.* Davis, 39 Ill. App. 162.

Indiana.— Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163; Ludlow *v.* Ludlow, 109 Ind. 199, 9 N. E. 769; Washburn *v.* Roberts, 72 Ind. 213; Moss *v.* Witness Printing Co., 64 Ind. 125; De la Hunt *v.* Holdenbaugh, 58 Ind. 285; Jeffersonville *v.* The John Shallcross, 35 Ind. 19; Kile *v.* Chapin, 9 Ind. 150; Keen *v.* Younkman, 8 Ind. 254; Davis *v.* Davis, 6 Blackf. 394.

Iowa.— Smith *v.* Silence, 4 Iowa 321, 66 Am. Dec. 137.

Kentucky.— Kentucky, etc., Mut. Ins. Co. *v.* Southard, 8 B. Mon. 634; Warner *v.* Bledsoe, 4 Dana 73.

Michigan.— Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236.

Mississippi.— Home Ins. Co. *v.* Delta Bank, 71 Miss. 608, 15 So. 932.

Missouri.— Barada *v.* Carondelet, 8 Mo. 644; Billings *v.* Hirsch Iron, etc., Co., 86 Mo. App. 228.

New Jersey.— McDevitt *v.* Connell, 71 N. J. Eq. 119, 63 Atl. 504.

New York.— Hayes *v.* Kedzie, 11 Hun 577;

fact,[46] or proceeds to trial on the merits without a ruling thereon.[47] So joining in a motion for auditors,[48] noticing the issue of fact for trial on the merits,[49] moving in arrest of judgment after trial on the merits,[50] or taking issue or going to trial on an amended pleading,[51] is deemed a waiver or abandonment of the demurrer. Where the pleading demurred to is amended before the demurrer is acted on, the demurrer is not waived by failure to demur to the amended pleading where the amendment is merely formal.[52] On the other hand, an objection based on want of jurisdiction over the subject-matter or want of facts in the pleading is not waived by pleading after demurrer filed,[53] or the withdrawal of the demurrer.[54] So

Nellis *v.* McCarn, 35 Barb. 115; Adams *v.* West Shore, etc., R. Co., 65 How. Pr. 329; Musgrave *v.* Webster, 53 How. Pr. 367.

North Carolina.— Moseley *v.* Johnson, 144 N. C. 257, 274, 56 S. E. 922; Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707.

Ohio.— Calvin *v.* State, 12 Ohio St. 60; Mitchell *v.* McCabe, 10 Ohio 405.

United States.— Miller *v.* Rickey, 123 Fed. 604; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

See 39 Cent. Dig. tit. "Pleading," § 522.

But in those jurisdictions where a demurrer and answer or other pleading may be filed together, a subsequent pleading does not waive a prior demurrer. Curtiss *v.* Bachman, 84 Cal. 216, 24 Pac. 379.

The pleading must have been actually filed in order to operate as a waiver of a prior demurrer. State *v.* Foster, 2 Iowa 559.

A plea to the whole of a declaration is *a fortiori* a waiver of a demurrer to a single count thereof. Illinois Cent. R. Co. *v.* Patterson, 69 Ill. 650; Estill *v.* Jenkins, 4 Dana (Ky.) 75.

An answer filed "subject to the demurrer" previously filed may or may not be held a waiver of the demurrer, in the discretion of the court. Wilson *v.* McIntire, 73 Iowa 711, 36 N. W. 715.

A separate answer will not supersede a joint demurrer.— Travest *v.* Alport, 13 N. Y. Civ. Proc. 161.

46. Eason *v.* Fisher, 1 Ark. 90; Blake *v.* Holley, 14 Ind. 383.

47. *Alabama.*— American Mortg. Co. *v.* Inzer, 98 Ala. 608, 13 So. 507; Kirk *v.* Suttle, 6 Ala. 679; Ladyard *v.* Manning, 1 Ala. 153; Morrison *v.* Morrison, 3 Stew. 444.

Arizona.— Dessart *v.* Bonynge, (1906) 85 Pac. 723.

Colorado.— Danielson *v.* Gude, 11 Colo. 87, 17 Pac. 283.

Connecticut.— Waterbury *v.* Darien, 9 Conn. 252.

Florida.— Judge *v.* Moore, 9 Fla. 269.

Georgia.— Americus Grocery Co. *v.* Brackett, 119 Ga. 489, 46 S. E. 657.

Illinois.— Davis *v.* Ransom, 26 Ill. 100; Putt *v.* Duncan, 2 Ill. App. 461.

Indiana.— Claypool *v.* Jaqua, 135 Ind. 499, 35 N. E. 285; Bell *v.* Hungate, 13 Ind. 382; Lahr *v.* Ulmer, 27 Ind. App. 107, 60 N. E. 1009.

Iowa.— Roberts *v.* Waters, 9 Iowa 434; Paukett *v.* Livermore, 5 Iowa 277; Ayres *v.* Campbell, 3 Iowa 582; Mitchell *v.* Wiscotta Land Co., 3 Iowa 209; Harmon *v.* Chandler, 3 Iowa 150; Daugherty *v.* Bridgman, Morr. 295; Porter *v.* Lane, Morr. 197.

Kentucky.— Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. 119.

Louisiana.—Ashbey *v.* Ashbey, 41 La. Ann. 138, 5 So. 546; St. Romain *v.* Robeson, 12 Rob. 194; Kempe *v.* Hunt, 4 La. 477; Lafon *v.* Riviere, 1 Mart. N. S. 130. *Compare* Macon *v.* Willson, 9 La. Ann. 178.

Michigan.— Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10.

Mississippi.— Wallace *v.* Okolona Sav. Inst., 49 Miss. 616; Smith *v.* Elder, 7 Sm. & M. 507.

Missouri.— Sheridan *v.* Forsee, 106 Mo. App. 495, 81 S. W. 494.

New York.— Fry *v.* Bennett, 9 Abb. Pr. 45 [*affirmed* in 28 N. Y. 324].

Pennsylvania.— Helfrich *v.* Freck, (1886) 6 Atl. 89.

Tennessee.— Johnson *v.* O'Neal, 3 Head 601.

Texas.— Cain *v.* Haas, 18 Tex. 616; Petty *v.* Cleveland, 2 Tex. 404; Merlin *v.* Manning, 2 Tex. 351; Briggs *v.* Rush, 1 Tex. Civ. App. 19, 20 S. W. 771.

Vermont.— Murphy *v.* Lincoln, 63 Vt. 278, 22 Atl. 418.

See 39 Cent. Dig. tit. "Pleading," § 524. See also APPEAL AND ERROR, 2 Cyc. 712.

In Louisiana, however, exceptions to form are waived, but an exception to the cause of action is not waived nor is one which the court may notice of its own motion, by being tried and submitted with the merits. H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862; Ashbey *v.* Ashbey, 41 La. Ann. 138, 5 So. 546.

48. King *v.* Lacey, 8 Conn. 499.

49. Plattner Implement Co. *v.* Bradley, 40 Colo. 95, 90 Pac. 86.

50. Davis *v.* Dickson, 2 Stew. (Ala.) 370.

51. Tierney *v.* Duffy, 59 Miss. 364; Wood *v.* Gibbs, 35 Miss. 559; Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707; Vaiden *v.* Bell, 3 Rand. (Va.) 448.

52. Flood *v.* Templeton, 148 Cal. 374, 83 Pac. 148.

53. Evans *v.* Gerken, 105 Cal. 311, 38 Pac. 725; Orcutt *v.* Hanson, 71 Iowa 514, 32 N. W. 482. *Contra*, Watson *v.* Kent, 35 Wash. 21, 76 Pac. 297.

54. Seydel *v.* Corporation Liquidating Co., 46 Misc. (N. Y.) 576, 92 N. Y. Suppl. 225.

it is only the demurrant, and not the other party, who is concluded by the waiver by pleading over, except where the latter joins issue on the pleading filed.[55] Of course a demurrer is not pending where it has been withdrawn pursuant to leave granted by the court.[56] And consenting that a demurrer should be overruled is tantamount to its withdrawal.[57] A general demurrer waives grounds for special demurrer,[58] but the converse is not true.[59]

K. Hearing. The decision of a demurrer is a question of law for the court and not a question of fact for the jury.[60] A notice of trial or other notice is usually necessary, by statute or rule, to bring on a hearing of the issue raised by a demurrer;[61] but no notice is necessary unless required by statute or rule.[62] The demurrant should bring on the demurrer for hearing,[63] although the other party may notice it for hearing.[64] The time and place for hearing or decision of demurrers are matters largely regulated by statutes or rules of court,[65] but the courts exercise considerable discretion in the matter.[66] Where there are demurrers to different pleadings on file at the same time, they should be heard in the order of the pleadings to which they are directed,[67] since the first demurrer that is sustained makes the consideration of the subsequent pleadings unnecessary.[68] It is irregular to hear a demurrer after a jury has been impaneled to try the cause, but the validity of a judgment rendered on the demurrer is not affected thereby.[69] The decision of a motion for change of venue must precede a ruling on demurrer.[70] An amended pleading properly on the files supersedes the original, and a demurrer to the latter cannot thereafter be heard or passed upon.[71] In arriving at a determination as to whether the demurrer shall be sustained or overruled, the copy of the pleading served on the demurrant rather than the original is to be considered.[72]

See also Rountree *v.* Finch, 120 Ga. 743, 48 S. E. 132.

55. Edbrooke *v.* Cooper, 79 Ill. 582.

56. Wilson *v.* Derrwaldt, 100 Ill. App. 396.

Right to withdraw demurrer see *infra*, XI, C, 4.

57. Santa Rosa Bank *v.* Paxton, 149 Cal. 195, 86 Pac. 193; Evans *v.* Gerken, 105 Cal. 311, 38 Pac. 725.

58. Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, 53 N. E. 1026; Walton *v.* Washburn, 64 S. W. 634, 23 Ky. L. Rep. 1008.

59. Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. Suppl. 836.

60. Hill *v.* Louisville, etc., R. Co., 124 Ga. 243, 52 S. E. 651, 3 L. R. A. N. S. 432.

The rule that negligence is a question for the jury does not preclude the court from passing on a demurrer to a complaint alleging negligence where it is claimed that the complaint does not state facts sufficient to constitute a cause of action. Jarrett *v.* Atlanta, etc., R. Co., 83 Ga. 347, 9 S. E. 681.

Whether two counts set up the same or different causes of action is a question of law for the court to determine and not a question of fact for the jury. Chicago, etc., R. Co. *v.* Ryan, 62 Ill. App. 264.

61. Jordan *v.* Hamlink, 21 D. C. 189; Townsend *v.* Hillmann, 9 N. Y. Suppl. 629.

62. Davis *v.* Peck, 12 Colo. App. 259, 55 Pac. 192.

63. Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216, 20 So. 472; Elyton Land Co. *v.* Morgan, 88 Ala. 434, 7 So. 249; Phœnix Ins. Co. *v.* Boren, 83 Tex. 97, 18 S. W. 484; Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572.

Demurrer book.— The party who files a demurrer should make up the paper or demurrer books (Littlefield *v.* Storey, 3 Johns. (N. Y.) 425), and if both parties demur the one filing the first demurrer should make up the demurrer book (Lisher *v.* Pierson, 3 Cow. (N. Y.) 113).

64. Townsend *v.* Wheeler, 4 Wend. (N. Y.) 196.

65. Johnson *v.* Velve, 86 Minn. 46, 90 N. W. 126; Garland *v.* Van Rensselaer, 71 Hun (N. Y.) 1, 24 N. Y. Suppl. 783 [*affirmed* in 140 N. Y. 638, 35 N. E. 892]; Kissam *v.* Bremmerman, 27 Misc. (N. Y.) 14, 57 N. Y. Suppl. 890 [*affirmed* in 39 N. Y. App. Div. 638, 57 N. Y. Suppl. 1140]; Christy *v.* Kiersted, 47 How. Pr. (N. Y.) 467; Ward *v.* Davis, 6 How. Pr. (N. Y.) 274.

66. Bowman *v.* French, 3 Fed. Cas. No. 1,739, 1 Cranch C. C. 74.

67. Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463; Thompson *v.* Thompson, 4 B. Mon. (Ky.) 502, holding, however, that failure to observe rule is not fatal.

68. Chase *v.* Cox, 64 Ark. 648, 44 S. W. 222.

In Louisiana, an exception to the cause of action may, if defendant so desires, be considered independently of other exceptions filed. Sligo Iron Store Co. *v.* Blanks, 105 La. 663, 30 So. 115; Martin *v.* McMasters, 14 La. 420.

69. Swenson *v.* Walker, 3 Tex. 93.

70. Griffin, etc., Co. *v.* Magnolia, etc., Fruit Cannery Co., 107 Cal. 378, 40 Pac. 495.

71. Hawkins *v.* Massie, 62 Mo. 552. See also *infra*, VII, A, 18, e.

72. Lane *v.* Salter, 4 Rob. (N. Y.) 239; Hunt *v.* Miller, 101 Wis. 583, 77 N. W. 874.

The question of what the party whose pleading is demurred to will be allowed to prove under his pleading cannot be considered,[73] nor can the proof heard at the trial of the cause.[74] The validity of the statute under which relief is sought in the complaint may be considered on a demurrer to the complaint.[75]

L. Decision, Order, or Judgment — 1. In General.[76] After the hearing of the demurrer, the court must decide it either by sustaining or overruling it.[77] But any action of the court having the same effect as sustaining or overruling a demurrer may be so treated.[78] So the failure to enter a formal order overruling a demurrer is not fatal to further proceedings.[79] A formally correct judgment on demurrer should recite the submission of the cause on demurrer to a specified pleading and that the same was considered by the court, and should conclude with a formal statement that it is therefore considered and adjudged by the court that the demurrer be, and the same is hereby, overruled or sustained, as the case may be;[80] but a judgment stating merely that the court renders judgment for a designated party has been held sufficient.[81] A general judgment sustaining a demurrer extends and applies only to the pleading demurred to.[82] It is unnecessary and improper for the court to make a finding of facts on its decision of a demurrer;[83] nor is the court required to specify in the judgment the ground of its ruling, where several causes are assigned.[84] Where a demurrer is carried back from one bad pleading to a prior bad pleading by the other party the form of the judgment is that the pleading demurred to is sufficient.[85] A judgment for an amount in excess of the showing made in the pleadings is erroneous.[86]

73. Vinal *v.* Continental Constr., etc., Co., 53 Hun (N. Y.) 247, 6 N. Y. Suppl. 595.

74. F. H. Earl Mfg. Co. *v.* Summit Lumber Co., 125 Ill. App. 391.

75. State *v.* Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418.

76. Costs on rulings on demurrers see Costs, 11 Cyc. 63-65.

Error in overruling or sustaining demurrer as waived by pleading over see *infra*, XIV, F.

Judgment by default pending decision on demurrer see Judgments, 23 Cyc. 751.

Necessity for exception to preserve ruling on demurrer for review see Appeal and Error, 2 Cyc. 717.

Order overruling or sustaining demurrer as appealable see Appeal and Error, 2 Cyc. 605.

Striking out all or part of a demurrer see *infra*, XII, C, 1, b, (I); XII, C, 2, b, (VIII).

77. See cases cited *infra*, this note.

The confession of a demurrer is a sufficient disposition of it. Field *v.* Hawley, 12 Sm. & M. (Miss.) 320.

Moot case.— But if it appears in the argument that the case presented by the demurrer is a fictitious case, and not the actual case between the parties, the court will not decide the demurrer but remand the pleadings for amendment. Kruze *v.* Hehemann, 7 Ohio Dec. (Reprint) 303, 2 Cinc. L. Bul. 93.

What law governs.— A demurrer will be disposed of according to the law in force when it is argued, where the pleading demurred to does not show on its face that a prior law is applicable. Lewis *v.* Buffalo, 29 How. Pr. (N. Y.) 335.

Notice to counsel before rendering judgment.— Where a decision is rendered after the hearing of a demurrer, the court need not notify counsel before rendering judgment. Morrison-Trammell Brick Co. *v.* McWilliams, 127 Ga. 159, 56 S. E. 306.

78. Thompson *v.* Thompson, 4 B. Mon. (Ky.) 502; McCollum *v.* Lougan, 29 Mo. 451; Hull *v.* Young, 29 S. C. 64, 6 S. E. 938.

A refusal to consider a demurrer is in effect to overrule it, and is not prejudicial error unless the demurrer should have been sustained. New York Fidelity, etc., Co. *v.* Brown, 4 Indian Terr. 397, 69 S. W. 915.

A record which shows a judgment of respondeat ouster, after demurrer filed, shows sufficiently that the demurrer was sustained. Smith *v.* Elder, 7 Sm. & M. (Miss.) 507.

79. Quartier *v.* Dowiat, 219 Ill. 326, 76 N. E. 371.

80. Jasper Mercantile Co. *v.* O'Rear, 112 Ala. 247, 20 So. 583.

81. La Porte *v.* Organ, 5 Ind. App. 369, 32 N. E. 342.

A mere entry "demurrer overruled" is an interlocutory and not a final order. Mobley *v.* Curcton, 6 S. C. 49.

82. Besancon *v.* Shirley, 9 Sm. & M. (Miss.) 457.

83. Dickinson *v.* Kinney, 5 Minn. 409; Cardwell *v.* Stuart, 92 Mo. App. 586; Rowe *v.* Rowe, 103 N. Y. App. Div. 100, 92 N. Y. Suppl. 491; Hunt *v.* Burbank, 73 Vt. 273, 50 Atl. 1058.

84. Johnston *v.* Smith, 86 N. C. 498.

A decision sustaining a demurrer need not state the grounds on which it was sustained. Cleghorn *v.* Cleghorn, 29 N. Y. Suppl. 432.

85. Day *v.* Essex County Bank, 13 Vt. 97.

In New York upon a demurrer to a bad answer the judgment should not be one dismissing a bad complaint, but should merely overrule the demurrer. Gabay *v.* Doane, 66 N. Y. App. Div. 507, 73 N. Y. Suppl. 381.

86. Deane *v.* Echols, 2 App. Cas. (D. C.) 522.

2. Decision as Substitute For Order. In some jurisdictions statutes require a "decision" on the determination of a demurrer,[87] and it has been held thereunder that an "order" is insufficient,[88] while other cases hold that an "order" is a "decision" within the statute.[89] The decision must be in writing,[90] and in some jurisdictions must be filed in the clerk's office within a specified time after the term.[91] The decision need not include any finding of fact but must direct the final or interlocutory judgment to be entered thereon,[92] and the party demurring is not in default until the entry of the interlocutory judgment,[93] and the time given to plead does not begin until such entry.[94]

3. Where There Are Issues of Both Law and Fact. Where issues of fact as well as law are raised, final judgment on disposing of the demurrer should not be rendered until the former are tried,[95] unless it appears, upon the whole, that plaintiff has no cause of action or defendant no defense.[96] It is also error to try a

87. See the statutes of the several states.

88. Palmyra *v.* Wynkoop, 53 Hun (N. Y.) 82, 6 N. Y. Suppl. 62; Thompson *v.* Stanley, 21 N. Y. Suppl. 573, 29 Abb. N. Cas. 11.

Such a decision is not an order, but the basis of a judgment of record. Funson *v.* Philo, 27 Misc. (N. Y.) 262, 58 N. Y. Suppl. 419.

89. Nachod *v.* Hindley, 118 N. Y. App. Div. 658, 103 N. Y. Suppl. 801; Garrett *v.* Wood, 57 N. Y. App. Div. 242, 68 N. Y. Suppl. 157; Garland *v.* Van Rensselaer, 71 Hun (N. Y.) 1, 24 N. Y. Suppl. 783; Vincent *v.* Stearns, 47 Misc. (N. Y.) 95, 93 N. Y. Suppl. 482.

90. Palmyra *v.* Wynkoop, 53 Hun (N. Y.) 82, 6 N. Y. Suppl. 62.

Waiver of statutory provision.— The code provision requiring the decision of a demurrer to be in writing and signed is waived where counsel do not request that it be reduced to writing, and the overruling of a demurrer on the ground of failure to state a cause of action is sufficiently shown where a case is thereafter tried on the merits. Mauldin *v.* Seaboard Air Line R. Co., 73 S. C. 9, 52 S. E. 677.

91. Garrett *v.* Wood, 57 N. Y. App. Div. 242, 68 N. Y. Suppl. 157. And see the statutes of the several states.

92. Rowe *v.* Rowe, 103 N. Y. App. Div. 100, 92 N. Y. Suppl. 491; Brown *v.* Leary, 100 N. Y. App. Div. 421, 91 N. Y. Suppl. 463; Morse *v.* Press Pub. Co., 49 N. Y. App. Div. 375, 63 N. Y. Suppl. 423; Unckles *v.* Hentz, 19 N. Y. App. Div. 165, 45 N. Y. Suppl. 894.

Where a demurrer is sustained with leave to plead over, an interlocutory judgment should be entered directing that if the party does not plead over, final judgment shall be entered. Garland *v.* Van Rensselaer, 71 Hun (N. Y.) 1, 24 N. Y. Suppl. 783 [*affirmed* in 140 N. Y. 638, 35 N. E. 892]; Riggs *v.* Stewart, 14 Daly (N. Y.) 434, 14 N. Y. St. 695, 14 N. Y. Civ. Proc. 141; Thompson *v.* Stanley, 21 N. Y. Suppl. 573, 22 N. Y. Civ. Proc. 421, 29 Abb. N. Cas. 11.

Directing an interlocutory "and" final judgment is improper. Thompson *v.* Stanley, 21 N. Y. Suppl. 573, 22 N. Y. Civ. Proc. 421, 29 Abb. N. Cas. 11.

The decision must definitely fix the terms of the interlocutory judgment to be entered (U. S. Life Ins. Co. *v.* Jordan, 46 Hun (N. Y.) 201), but it need not be in any stated form or prescribed words (Funson *v.* Philo, 27 Misc. (N. Y.) 262, 58 N. Y. Suppl. 419). If the decision does not give leave to enter final judgment, application therefor must be made in case of failure to amend or plead over. Liegeois *v.* McCrackan, 22 Hun (N. Y.) 69.

The interlocutory judgment entered on a demurrer may direct final judgment in case of failure to amend or plead over. Crasto *v.* White, 52 Hun (N. Y.) 473, 5 N. Y. Suppl. 718.

93. See *infra*, VI, L, 7, b.

94. See *infra*, VI, L, 8, f.

95. *Arkansas.*— State *v.* Crow, 11 Ark. 642.

District of Columbia.— Clark *v.* Mutual Reserve L. Ins. Co., 23 App. Cas. 546.

Illinois.— Riley *v.* Loughrey, 22 Ill. 97; Bell *v.* Sheldon, 12 Ill. 372; Merriweather *v.* Gregory, 3 Ill. 50. But see Waters *v.* Simpson, 7 Ill. 570.

Indiana.—Seits *v.* Sinel, 62 Ind. 253; Cook *v.* Brown, 6 Blackf. 220; Fitch *v.* Dunn, 3 Blackf. 142; Patterson *v.* Salmon, 3 Blackf. 131; Hanna *v.* Ewing, 3 Blackf. 34.

Kentucky.— Smith *v.* Coleman, 1 Bibb 488.

Maine.— Corthell *v.* Holmes, 87 Me. 24, 32 Atl. 715; Nye *v.* Spencer, 41 Me. 272.

Missouri.— State *v.* Gaither, 1 Mo. 501.

New York.— Œsterreiches *v.* Jones, 45 Hun 246; Bucking *v.* Hauselt, 9 Hun 633.

Virginia.— Deckert *v.* Chesapeake Western Co., 101 Va. 804, 45 S. E. 799; Waller *v.* Ellis, 2 Munf. 88.

See 39 Cent. Dig. tit. "Pleading," § 553. See also Judgments, 23 Cyc. 773.

But where a demurrer to a plea which is a complete answer to the declaration is overruled and the demurrant elects to stand on the demurrer, the other party is entitled to judgment notwithstanding there are also issues of fact raised. People *v.* Bug River Special Drainage Dist., 189 Ill. 55, 59 N. E. 605.

Where a demurrer to the general issue is sustained, but the brief statement alleges a valid defense, plaintiff is not entitled to judgment. Moore *v.* Knowles, 65 Me. 493.

96. *District of Columbia.*—Clark *v.* Mutual Reserve L. Ins. Co., 23 App. Cas. 546.

cause on the facts while a demurrer to any pleading or portion thereof which has not been waived [97] remains undisposed of upon the record,[98] although there are cases to the contrary.[99] Some cases have held that if the trial is had before the court without a jury, it will be presumed that the demurrer was decided in the general finding.[1] For the purposes of the trial, a count to which a demurrer has been sustained is no longer a part of the declaration.[2]

4. Where There Are Several Counts or Defenses — a. In General. Judgment may go against a plaintiff on one count and in his favor on another,[3] but the usual practice is merely to strike out such counts as are held bad on demurrer.[4] In no case should judgment go against plaintiff on the whole declaration when one or more counts are good,[5] unless plaintiff declines to proceed further in the cause; [6] nor can judgment be rendered against a defendant on a count to which his demurrer has been sustained.[7] If any one plea in bar is held valid on demurrer judgment must go for the defendant though demurrers are sustained to other pleas,[8]

Illinois.— Ward *v.* Stout, 32 Ill. 399; Pike County *v.* Cadwell, 78 Ill. App. 201.

Indiana.— Talbott *v.* Armstrong, 14 Ind. 254.

Maryland.—Thompson *v.* State, 4 Gill 163; O'Brien *v.* Hardy, 3 Harr. & J. 434.

Mississippi.— Armfield *v.* Nash, 31 Miss. 361.

Missouri.— Henley *v.* Henley, 93 Mo. 95, 5 S. W. 701.

New York.— Wightman *v.* Shankland, 18 How. Pr. 79.

United States.— Ferguson *v.* Meredith, 1 Wall. 25, 17 L. ed. 604.

See 39 Cent. Dig. tit. "Pleading," § 553.

When the plea goes to bar the action, and a demurrer thereto is overruled, judgment of *nil capiat* should be entered notwithstanding there may also be one or more issues of fact, because upon the whole it appears that plaintiff has no cause of action. Ward *v.* Stout, 32 Ill. 399; Pike County *v.* Cadwell, 78 Ill. App. 201; O'Brien *v.* Hardy, 3 Harr. & J. (Md.) 434; Ferguson *v.* Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604.

97. See *supra*, VI, J.

98. *Arkansas.*— Greenfield *v.* Carlton, 30 Ark. 547; Jones *v.* Minogue, 29 Ark. 637; Weir *v.* Pennington, 11 Ark. 745; Stone *v.* Robinson, 9 Ark. 469.

Florida.— Florida R., etc., Co. *v.* Rhodes, 23 Fla. 309, 2 So. 621; Nelson *v.* McLaurin, 14 Fla. 45.

Illinois.— Chapman *v.* Wright, 20 Ill. 120; Moore *v.* Little, 11 Ill. 549; Bradshaw *v.* Hoblett, 5 Ill. 53; Weatherford *v.* Wilson, 3 Ill. 253; Nye *v.* Wright, 3 Ill. 222; Ditch *v.* People, 31 Ill. App. 368.

Indiana.— Waldo *v.* Richter, 17 Ind. 634; Anderson *v.* Weaver, 17 Ind. 223; Gray *v.* Cooper, 5 Ind. 506.

Mississippi.— Waterbury *v.* McMillan, 46 Miss. 635; Hatch *v.* Roberts, 41 Miss. 92; Harper *v.* Bondurant, 7 Sm. & M. 397; Marlow *v.* Hamer, 6 How. 189.

Ohio.— State *v.* Cowles, 5 Ohio St. 87, in which case the error was held harmless.

Virginia.— Green *v.* Dulany, 2 Munf. 518.

See 39 Cent. Dig. tit. "Pleading," § 553.

In jurisdictions where pleas and demurrers may be filed together to the same matter the demurrer should be disposed of before considering the pleas. Greenfield *v.* Carlton, 30 Ark. 547; Jones *v.* Minogue, 29 Ark. 637; Muldrow *v.* McCleland, 1 Litt. (Ky.) 1.

This rule does not apply to a demurrer to a plea not filed in time, inasmuch as such a plea is a nullity and need not be answered. Field *v.* Weir, 28 Miss. 56. *Contra*, see Marlow *v.* Hamer, 6 How. (Miss.) 189.

Waiver.— But a failure to object to having the exception heard on the same day as the merits is a waiver of the right to have the exception heard first. Broadwell *v.* Kelly, 14 La. Ann. 456.

Where a demurrer is sustained to one of several counts in the declaration but there remains other counts held good on a former demurrer to which defendants had pleaded and on which plea issue had been joined, judgment against plaintiff in bar of the action cannot be rendered on sustaining the demurrer. Merker *v.* Belleville Distillery Co., 122 Ill. App. 326.

99. Adams *v.* Adams, 64 N. H. 224, 9 Atl. 100. See also Palmer *v.* Smedley, 13 Abb. Pr. (N. Y.) 185; Fry *v.* Bennett, 9 Abb. Pr. (N. Y.) 45 [*affirmed* in 28 N. Y. 324]; Miller *v.* Stocking, 22 Wend. (N. Y.) 623; Johnson *v.* O'Neal, 3 Head (Tenn.) 601.

1. Anderson *v.* Weaver, 17 Ind. 223.

2. North Peoria *v.* Rogers, 98 Ill. App. 355.

3. Barber *v.* Cazalis, 30 Cal. 92.

4. Riddell *v.* Douglas, 60 Md. 337.

5. Deut *v.* Coleman, 10 Sm. & M. (Miss.) 83; Lewis *v.* Alexander, 51 Tex. 578.

Where there are several breaches assigned, some well assigned and some not, and a demurrer is interposed to the whole declaration plaintiff should have judgment for the breaches which are well assigned. Adams *v.* Willoughby, 6 Johns. (N. Y.) 65.

Where all of the complaint excepting the common counts is demurred to and the demurrer is sustained, it is proper for the court to require defendant to plead to the common counts without requiring any amendment of the complaint. West *v.* Grainger, 46 Fla. 257, 35 So. 91.

6. Montgomery Iron Works *v.* Dorman, 78 Ala. 218.

7. Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 291, 51 N. E. 105.

8. Culver *v.* Smart, Smith (Ind.) 50; Can-

unless plaintiff tenders a sufficient replication or there is something else to prevent it.[9] On the other hand, plaintiff will not be entitled to judgment where his demurrer to one plea is sustained, if another plea sets up a good defense.[10]

b. Demurrer For Misjoinder of Causes of Action. The effect of misjoinder, on demurrer, is to separate the causes of action, not to put an end to the suit.[11] The court may, in some jurisdictions, grant leave to withdraw one or more of the causes and overrule the demurrer.[12] In other states, by statute, the court may, in its discretion, direct that the action be divided into as many actions as are necessary for the proper determination of the causes of action therein stated.[13]

5. Where There Are Several Parties. Judgment on a demurrer should be given for or against all the parties that join in it.[14] Ordinarily the demurrer of one of several parties may be passed upon without affecting the rights of the others.[15] If one of several defendants raises an objection by way of demurrer which goes to plaintiff's right to recover, and not merely a personal matter of discharge, judgment rendered on such demurrer will inure to the benefit of all the defendants.[16] If a complaint is held insufficient as to certain defendants, final judgment may be given in their favor where plaintiff fails to amend.[17]

6. Assessment of Damages. Judgment in chief for plaintiff should not be entered without assessing the damages by a jury of inquiry or other proper proceeding,[18] except where the action is brought for a liquidated sum.[19] And where the damages have already been determined on an issue of fact raised, no further hearing on the question of damages is proper after demurrer.[20]

7. Effect of Decision — a. In General. The effect of overruling a demurrer is to declare the pleading good both in law and fact, so long as the demurrant does not plead over.[21] After a demurrer to a pleading has been sustained no

ton Bd. of Education *v.* Walker, 71 Ohio St. 169, 72 N. E. 898; Philadelphia *v.* Wistar, 92 Pa. St. 404.

9. Gearhart *v.* Olmstead, 7 Dana (Ky.) 441.

10. Moore *v.* Knowles, 65 Me. 493.

11. Ashe *v.* Gray, 90 N. C. 137; Finch *v.* Baskerville, 85 N. C. 205; Street *v.* Tuck, 84 N. C. 605.

12. Smaltz *v.* Hancock, 118 Pa. St. 550, 12 Atl. 464.

In Ohio, where causes of action are improperly joined, if the demurrer is filed and sustained, plaintiff may be permitted to separate his causes of action, and docket several causes. Lee *v.* Fraternal Mut. Ins. Co., 1 Handy 217, 12 Ohio Dec. (Reprint) 109.

13. Robinson *v.* Judd, 9 How. Pr. (N. Y.) 378. And see the statutes of the several states.

In New York, where the statute provides that if a demurrer to complaint is allowed because two or more causes of action have been improperly united, the court may in its discretion direct the action to be divided into as many actions as necessary for proper determination, a judgment requiring plaintiff to divide his action into separate actions, without giving him leave to amend, is authorized. Myers *v.* Seff, 117 N. Y. App. Div. 31, 101 N. Y. Suppl. 1090; Myers *v.* Lederer, 117 N. Y. App. Div. 27, 101 N. Y. Suppl. 1088.

14. Tipton *v.* Barron, 5 Blackf. (Ind.) 154.

15. *Arkansas.*— Dyal *v.* Hays, (1890) 12 S. W. 874.

California.— Williamson *v.* Joyce, 140 Cal. 669, 74 Pac. 290; Farwell *v.* Jackson, 28 Cal. 105.

Georgia.— Byrom *v.* Gunn, 111 Ga. 805, 35 S. E. 649.

Mississippi.— Kirk *v.* Seawell, 2 Sm. & M. 571.

Missouri.— Norton *v.* St. Louis, 97 Mo. 537, 11 S. W. 242; National Ins. Co. *v.* Bowman, 60 Mo. 252.

See 39 Cent. Dig. tit. "Pleading," § 557.

16. State *v.* Williams, 17 Ark. 371; Byington *v.* Stone, 51 Iowa 317, 1 N. W. 647; Harrison *v.* Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703.

In Louisiana defendant may call in his vendor in warranty, and may avail himself of exceptions taken by such vendor. Vascocu *v.* Smith, 2 La. Ann. 828.

17. Bobb *v.* Woodward, 42 Mo. 482.

18. Deem *v.* Crume, 46 Ill. 69; Herrington *v.* Stevens, 26 Ill. 298; South Ottawa *v.* Foster, 20 Ill. 296; Graham *v.* State, 6 Blackf. (Ind.) 32; Jones *v.* State, 5 Blackf. (Ind.) 492; Trimble *v.* State, 4 Blackf. (Ind.) 42; McLott *v.* Savery, 11 Iowa 323; Van *v.* Manning, Morr. (Iowa) 491; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

19. Deeme *v.* Crume, 46 Ill. 69; Vanhooser *v.* Logan, 4 Ill. 389, 38 Am. Dec. 90.

In some states the clerk assesses the damages in such cases. Rives *v.* Kumler, 27 Ill. 291; Vanhooser *v.* Logan, 4 Ill. 389, 38 Am. Dec. 90.

20. Atwater *v.* Tupper, 45 Conn. 144, 29 Am. Rep. 674.

21. Louisville Coffin Co. *v.* Rhudy, 111 Ga.

evidence can be admitted to support or rebut such pleading,[22] nor can any issue of fact be raised thereon.[23] A judgment sustaining a demurrer to one portion of a pleading does not itself authorize the exclusion of evidence admissible under the pleading demurred to when such evidence is properly offered under another portion of the pleading.[24]

b. Finality of Ruling on Demurrer.[25] A ruling on a demurrer is not such a final adjudication that the court may not reconsider its action and enter a contrary order;[26] and the overruling of a demurrer does not preclude the same matter being differently decided when subsequently presented by another demurrer,[27] by plea or answer,[28] by motion for judgment on the pleadings,[29] by objection to the admission of any evidence,[30] or by motion for a directed verdict [31] or for a nonsuit.[32] But error cannot be predicated upon an exclusion of evidence admissible only under a pleading to which a demurrer has been wrongly sustained.[33] Other cases hold that no reconsideration can be had after issues of fact have subsequently been formed on the pleading demurred to,[34] at least when no opportunity has been

827, 35 S. E. 632; Miles *v.* Danforth, 37 Ill. 156; Ward *v.* Stout, 32 Ill. 399; Borchsenius *v.* Canutson, 7 Ill. App. 365; Armfield *v.* Nash, 31 Miss. 361.

22. Robinson *v.* Mace, 16 Ark. 97; Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

23. Byers *v.* Baker, 104 Ala. 173, 16 So. 72; Carman *v.* Ross, 64 Cal. 249, 29 Pac. 510; Middleton *v.* Miller, 14 Ind. 537.

24. Hanrick *v.* Andrews, 9 Port. (Ala.) 9.

25. Operation of judgment as bar on dismissal after demurrer sustained see JUDGMENTS, 23 Cyc. 1152.

26. Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243; Huntington First Nat. Bank *v.* Williams, 126 Ind. 423, 26 N. E. 75; Atherton *v.* Sugar Creek, etc., Turnpike Co., 67 Ind. 334; Tyler *v.* Coulthard, 95 Iowa 705, 64 N. W. 681, 58 Am. St. Rep. 452; Burrows *v.* Gonzales County, 5 Tex. Civ. App. 232, 23 S. W. 829. See also Kneale *v.* Thornton, (Tex. Civ. App. 1905) 88 S. W. 298. *Compare* Thomason *v.* Seaboard Air Line R. Co., 142 N. C. 300, 55 S. E. 198. *Contra*, see Georgia Northern R. Co. *v.* Hutchins, 119 Ga. 504, 46 S. E. 659 (holding that so long as the decision stands unreversed the demurrant cannot renew the question by a motion to dismiss); Ellis *v.* Almand, 115 Ga. 333, 41 S. E. 642; Kiser Co. *v.* McLean, 2 Ga. App. 360, 58 S. E. 489; Plaisted *v.* Walker, 77 Me. 459, 1 Atl. 356.

What constitutes change of decision.— Where a demurrer is sustained to a petition and another cause of action is set up by amendment, but evidence is admitted and the jury instructed in accordance with the original cause of action, this will be deemed equivalent to the court recalling its ruling on the demurrer. Gay *v.* Pemberton, (Tex. Civ. App. 1898) 44 S. W. 400.

In Louisiana an overruled dilatory exception, general in its terms, will not be reopened in order to consider points dilatory in their nature, which are to be timely pleaded. Bonin *v.* Jennings, 106 La. 534, 31 So. 64.

Where no order has been entered upon the opinion filed, the court may withdraw the opinion and subsequently pass an order overruling demurrers which were sustained in the opinion. Shipley *v.* Jacob Tome Inst., 99 Md. 520, 58 Atl. 200.

Statutory provisions see Bibbins *v.* Polk County, 100 Iowa 493, 69 N. W. 1007; McClain *v.* Capper, 98 Iowa 145, 67 N. W. 102; Long *v.* Mellet, 94 Iowa 548, 63 N. W. 190.

27. Van Werden *v.* Equitable L. Assur. Soc., 99 Iowa 621, 68 N. W. 892; Dougherty *v.* Duvall, 9 B. Mon. (Ky.) 57; Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142, 65 S. W. 1035 (second demurrer to amended pleading); Schoenleber *v.* Burkhardt, 94 Wis. 575, 69 N. W. 343. *Contra*, see Mauldin *v.* Seaboard Air Line R. Co., 73 S. C. 9, 52 S. E. 677; Long *v.* Hunter, 58 S. C. 152, 36 S. E. 579.

The previous order should be set aside before entering a contrary order on a second demurrer to the same pleading. Dougherty *v.* Duvall, 9 B. Mon. (Ky.) 57.

28. Louisville Bridge Co. *v.* Louisville, 58 S. W. 598, 22 Ky. L. Rep. 703; Smith *v.* Britton, 2 Thomps. & C. (N. Y.) 498; Trinity, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 926. See Haslett *v.* Rodgers, 107 Ga. 239, 33 S. E. 44.

Right to set up overruled ground of demurrer as defense.— After demurrer to a complaint has been overruled, defendant may, where leave to answer has been given, set up the same ground as a defense as that urged in the demurrer. Smith *v.* Britton, 2 Thomps. & C. (N. Y.) 498; Ryan *v.* New York, 42 N. Y. Super. Ct. 202. *Contra*, Wing *v.* Red Oak Dist. Tp., 82 Iowa 632, 48 N. W. 977; Kissinger *v.* Council Bluffs, 73 Iowa 171, 34 N. W. 801.

29. Sherburne *v.* Strawn, 52 Kan. 39, 34 Pac. 405; Sporer *v.* McDermott, 69 Nebr. 533, 96 N. W. 232, 659.

30. Goodrich *v.* Atchison County Com'rs, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113.

31. McClain *v.* Capper, 98 Iowa 145, 67 N. W. 102; Littleton *v.* People's Bank, 95 Iowa 320, 63 N. W. 666. But see American Express Co. *v.* Pinckney, 29 Ill. 392.

32. McConaghy *v.* Clark, 35 Wash. 689, 77 Pac. 1084.

33. Nebraska City *v.* Hydraulic Gas, etc., Co., 9 Nebr. 339, 2 N. W. 870.

34. Feibelman *v.* Manchester F. Assur. Co.,

given the other party to amend.[35] A final judgment for defendant on a demurrer to the complaint is a final determination of the action and no trial of the issues can be had until such judgment is set aside.[36]

8. Amending or Pleading Over — a. In General. Where the issue of law raised by a demurrer to any of the pleadings is found for plaintiff the judgment, at common law, should be *quod recuperet*, that is, that plaintiff "do recover," [37] except that on a successful demurrer to a dilatory plea or plea in abatement the judgment should be "*respondeat ouster*," that is, that defendant "do answer over." [38] When the demurrer is determined in favor of defendant the judgment is final unless leave is granted to amend the pleading, or withdraw the demurrer, as the case may be.[39] If, however, the demurrer be to a pleading in abatement, the judgment for defendant at common law is that the writ be quashed.[40] A judgment by default on overruling or sustaining a demurrer is improper in some jurisdictions, the rule being that there should be final judgment on the demurrer if no leave was given to amend or plead over.[41]

b. Power of Court to Refuse Leave. In some jurisdictions it has been held that the court has no power to render final judgment, against the request of a party to be allowed to amend or plead over, on sustaining [42] or overruling [43] a demurrer. In most jurisdictions, however, the court has the "power" to order final judgment on sustaining [44] or overruling [45] a demurrer. But the court has no power to order a nonsuit on sustaining a demurrer.[46]

108 Ala. 180, 19 So. 540; Tatum *v.* Tatum, 19 Ark. 194.

35. Creek *v.* McManus, 13 Mont. 152, 32 Pac. 675.

36. Martindale *v.* Battey, 73 Kan. 92, 84 Pac. 527.

37. See Judgments, 23 Cyc. 670.

38. *Alabama.*— Cravens *v.* Bryant, 3 Ala. 278; State *v.* Allen, 1 Ala. 442.

Arkansas.— Fulcher *v.* Lyon, 4 Ark. 445; Renner *v.* Reed, 3 Ark. 339.

Connecticut.— Nichols *v.* Heacock, 1 Root 286; Fitch *v.* Lothrop, 1 Root 192.

Delaware.— Spencer *v.* Dutton, 1 Harr. 75.

Illinois.— Bradshaw *v.* Morehouse, 6 Ill. 395.

Indiana.— Clarke *v.* Hite, 5 Blackf. 167; Atkinson *v.* State Bank, 5 Blackf. 84; Lambert *v.* Lagow, 1 Blackf. 388.

Kentucky.— Hay *v.* Arberry, 1 J. J. Marsh. 95; Moore *v.* Morton, 1 Bibb 234.

Maine.— McKeen *v.* Parker, 51 Me. 389.

Massachusetts.— Parks *v.* Smith, 155 Mass. 26, 28 N. E. 1044.

Missouri.— Wilson *v.* Atwood, 4 Mo. 366.

New Hampshire.—Trow *v.* Messer, 32 N. H. 361.

New Jersey.—Garr *v.* Stokes, 16 N. J. L. 403.

North Carolina.— Casey *v.* Harrison, 13 N. C. 244.

Pennsylvania.— McCabe *v.* U. S., 4 Watts 325.

Tennessee.—Strauss *v.* Weil, 5 Coldw. 120; Rainey *v.* Sanders, 4 Humphr. 447; McBee *v.* State, Meigs 122.

Texas.— Ritter *v.* Hamilton, 4 Tex. 325.

Wisconsin.— Anderson *v.* Rountree, 1 Pinn. 115.

See also Judgments, 23 Cyc. 670.

But it is not universally the practice to render this judgment. The sustaining of the demurrer is sometimes entered upon the record, and defendant permitted to plead over if he desires to do so. Massey *v.* Walker, 8 Ala. 167. Such a proceeding cannot prejudice defendant. Branigan *v.* Rose, 8 Ill. 123; Bradshaw *v.* Morehouse, 6 Ill. 395. There are exceptions to the rule where the plea contains matter pleadable only in abatement but commences or concludes in bar, or where matter in abatement is pleaded *puis darrein continuance*. In such cases the judgment is final. Turner *v.* Carter, 1 Head (Tenn.) 520.

39. See Judgments, 23 Cyc. 671. And see *infra*, VI, L, 8, b.

40. Chilton *v.* Harbin, 6 Ala. 171.

41. Pettys *v.* Marsh, 24 Fla. 44, 3 So. 577; L'Engle *v.* L'Engle, 19 Fla. 714; Wade *v.* Doyle, 17 Fla. 522.

42. Gallagher *v.* Delaney, 10 Cal. 410; Thwing *v.* Doye, 2 Okla. 608, 44 Pac. 381. See Drane *v.* Madison County Bd. of Police, 42 Miss. 264; Lee *v.* Dozier, 40 Miss. 477; Randolph *v.* Singleton, 12 Sm. & M. (Miss.) 439; Besancon *v.* Shirley, 9 Sm. & M. (Miss.) 457; Heyfron *v.* Union Bank, 7 Sm. & M. (Miss.) 434; Lang *v.* Fatheree, 7 Sm. & M. (Miss.) 404; Beaty *v.* Harkey, 2 Sm. & M. (Miss.) 563.

In Louisiana a final judgment can be rendered only upon a trial on the merits. Hazard *v.* Boykin, 8 Rob. 254.

43. Chicago, etc., R. Co. *v.* Adams, 12 Ind. App. 317, 39 N. E. 877.

In Texas the judgment on overruling a demurrer should be *respondeat ouster*. Cook *v.* Crawford, 1 Tex. 9, 46 Am. Dec. 93.

44. Philadelphia *v.* Wistar, 92 Pa. St. 404.

A demurrer confessed is not a demurrer "sustained" within the statute providing that where a second demurrer is sustained to a plea final judgment should be entered. State *v.* Morgan, 59 Miss. 349.

45. Bridgeman Bros. Co. *v.* Swing, 205 Pa. St. 479, 55 Atl. 26.

46. Comstock *v.* Davis, 51 Mo. 569.

c. Power of Court to Grant Leave to Amend. The court has power to permit a pleading to be amended after it has been held insufficient on demurrer.[47]

d. Discretion of Court — (i) *In General.* In the absence of statutory provisions to the contrary,[48] in most jurisdictions the granting of leave to amend or plead over, on the sustaining or overruling a demurrer, rests in the discretion of the court,[49] which will not be interfered with unless clearly abused.[50]

(ii) *After Demurrer Sustained.* A refusal of leave to amend is not necessarily erroneous,[51] but ordinarily, after sustaining a demurrer, leave to amend should be granted,[52] except where it appears that under no circumstances can the

But a judgment of nonsuit instead of a final judgment may be given where the latter would embarrass a future suit by other parties entitled to sue for the same breach. Randolph Dist. Prob. Ct. *v.* Brainard, 48 Vt. 620.

47. Hobby *v.* Mead, 1 Day (Conn.) 206; Davis *v.* Burns, 1 Mo. 264; Johnson *v.* Finch, 93 N. C. 205; Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617; Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501. *Contra*, see Giddens *v.* Mirk, 4 Ga. 364; Ellison *v.* Aiken, 10 Rich. (S. C.) 369; Chalk *v.* McAlily, 10 Rich. (S. C.) 92; Bagley *v.* Johnston, 4 Rich. (S. C.) 22; Adams *v.* McMullan, 4 Rich. (S. C.) 9.

48. See the statutes of the several states.

49. *Alabama.*— Wilkinson *v.* Moseley, 30 Ala. 562. But see Chilton *v.* Harbin, 6 Ala. 171.

California.— Stewart *v.* Douglass, 148 Cal. 511, 83 Pac. 699; Barron *v.* Deleval, 58 Cal. 95; Thornton *v.* Borland, 12 Cal. 438.

Connecticut.— Patterson *v.* Farmington St. R. Co., 76 Conn. 628, 57 Atl. 853; White *v.* Strong, 75 Conn. 308, 53 Atl. 654.

Florida.— Hooker *v.* Forrester, 53 Fla. 392, 43 So. 241.

Georgia.— Lamar, etc., Drug Co. *v.* Albany First Nat. Bank, 127 Ga. 448, 56 S. E. 486.

Illinois.— Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124; Clemson *v.* State Bank, 2 Ill. 45. See Ricker *v.* Scofield, 28 Ill. App. 32.

Kansas.— See Wilson *v.* Calder, (App. 1898) 55 Pac. 552.

Kentucky.— Greer *v.* Covington, 83 Ky. 410, 2 S. W. 312, 7 Ky. L. Rep. 419.

Maine.— Mayberry *v.* Brackett, 72 Me. 102; Winthrop Sav. Bank *v.* Blake, 66 Me. 285.

Maryland.— Griffee *v.* Mann, 62 Md. 248; Terry *v.* Bright, 4 Md. 430.

Massachusetts.— Parks *v.* Smith, 155 Mass. 26, 28 N. E. 1044; Fisher *v.* Fraprie, 125 Mass. 472.

Michigan.— People *v.* Holmes, 41 Mich. 417, 49 N. W. 926; Tefft *v.* McNoah, 9 Mich. 201.

Mississippi.— Gwin *v.* McCarroll, 9 Sm. & M. 351.

New Jersey.—Rowan *v.* Johnson, 16 N. J. L. 266.

New York.— Fisher *v.* Gould, 81 N. Y. 228; Simson *v.* Satterlee, 64 N. Y. 657; Brown *v.* Utopia Land Co., 118 N. Y. App. Div. 364, 103 N. Y. Suppl. 50; Higgins *v.* Gedney, 25 Misc. 248, 55 N. Y. Suppl. 59, 28 N. Y. Civ. Proc. 236; Piper *v.* Hoard, 3 N. Y. Suppl. 842; Newell Bros. Mfg. Co. *v.* Grunwald, 1 N. Y. Suppl. 434.

North Carolina.— Fidelity, etc. Co. *v.* Jordan, 134 N. C. 236, 46 S. E. 496; Woodcock *v.* Bostic, 128 N. C. 243, 38 S. E. 881; Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386; Ransom *v.* McClees, 64 N. C. 17.

Ohio.— Beaumont *v.* Herrick, 24 Ohio St. 445.

Oregon.— Saylor *v.* Commonwealth Inv., etc., Co., 38 Oreg. 204, 62 Pac. 652.

Pennsylvania.— Bordentown Banking Co. *v.* Restein, 214 Pa. St. 30, 63 Atl. 451; Bridgeman Bros. Co. *v.* Swing, 205 Pa. St. 479, 55 Atl. 26; Burk *v.* Huber, 2 Watts 306; Weiler *v.* Weiss, 25 Pa. Super. Ct. 247.

South Carolina.— Leesville Mfg. Co. *v.* Morgan Wood, etc., Works, 75 S. C. 342, 55 S. E. 768; Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.

Tennessee.— Kendrick *v.* Davis, 3 Coldw. 524.

Texas.— Andrews *v.* Lemeos, (Civ. App. 1901) 60 S. W. 1004.

Washington.— State *v.* Thurston County Super. Ct., 9 Wash. 366, 37 Pac. 454.

Wyoming.—Bonnifield *v.* Price, 1 Wyo. 172.

United States.— Florence Oil, etc., Co. *v.* Interstate Nat. Bank, 76 Fed. 888, 22 C. C. A. 604; Hodgson *v.* Alexandria Mar. Ins. Co., 12 Fed. Cas. No. 6,566, 1 Cranch C. C. 460.

See 39 Cent. Dig. tit. "Pleading," §§ 570, 575.

A plaintiff is not entitled to a judgment as matter of law on the overruling of a demurrer to the declaration but the court may order the case to be tried on the answer already filed. Hobson *v.* Satterlee, 163 Mass. 402, 40 N. E. 189.

Grounds for refusing.— After a demurrer has been sustained to a pleading on the ground that it does not state a cause of action or defense, leave to amend cannot be refused on the ground that there is nothing left to amend by. Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501. *Contra*, Giddens *v.* Mirk, 4 Ga. 364.

50. See Appeal and Error, 3 Cyc. 328.

51. Wood *v.* Anderson, 25 Pa. St. 407; Burk *v.* Huber, 2 Watts (Pa.) 306.

Refusal to allow amendment of a complaint adding account seven months after the commencement of the action and after two successive demurrers to the complaint had been sustained is not reviewable. Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003.

52. *Arkansas.*— Payne *v.* Bruton, 6 Ark. 278.

California.— Ridgway *v.* Bogan, (1886) 12 Pac. 343; Gallagher *v.* Delaney, 10 Cal. 410.

Colorado.— Cornett *v.* Smith, 15 Colo. App. 53, 60 Pac. 953.

pleading be made good,[53] as where the pleading has been once amended after sustaining a demurrer thereto,[54] or where the legal effect of the amended pleading is identical with the pleading demurred to.[55]

(III) *After Demurrer Overruled.* On overruling a demurrer judgment goes for the party whose pleading was demurred to unless leave is given to the demurrant to plead which is usually done on the payment of costs when the demurrer has been put in in good faith.[56] But where the demurrer is manifestly and

Connecticut.— Hobby *v.* Mead, 1 Day 206.
Florida.— Frier *v.* State, 11 Fla. 300.
Illinois.— Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243 [*affirming* 116 Ill. App. 184]; F. H. Earl Mfg. Co. *v.* Summit Lumber Co., 125 Ill. App. 391.
Indiana.— Dick *v.* Niles, 17 Ind. 239. See Lammers *v.* Lalse, 41 Ind. 218. *Compare* Slagle *v.* Bodmer, 75 Ind. 330, as to effect of submission on the merits.
Iowa.— Winet *v.* Berryhill, 55 Iowa 411, 7 N. W. 681.
Kentucky.— Greer *v.* Covington, 83 Ky. 410, 2 S. W. 323, 7 Ky. L. Rep. 419.
Maine.— Hudson *v.* McNear, 99 Me. 406, 59 Atl. 546.
Massachusetts.— Whitfield *v.* Woolridge, 1 Cush. 183.
Mississippi.—Scharff *v.* Lisso, 63 Miss. 213; Metcalf *v.* Grover, 55 Miss. 145; Besancon *v.* Shirley, 9 Sm. & M. 457.
Missouri.— Davis *v.* Burns, 1 Mo. 264.
Nebraska.— Berrer *v.* Moorhead, 22 Nebr. 687, 36 N. W. 118.
New Jersey.—Hale *v.* Lawrence, 22 N. J. L. 72.
New York.— Rees *v.* New York Herald Co., 112 N. Y. App. Div. 456, 98 N. Y. Suppl. 548; Hallock *v.* Robinson, 2 Cai. 233.
Pennsylvania.— Burk *v.* Huber, 2 Watts 306; Burk *v.* Bear, 5 Pa. L. J. 304.
South Carolina.— Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617; Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501; Macfarland *v.* Dean, Cheves 64.
Tennessee.— Turner *v.* Carter, 1 Head 520.
Texas.— Texas Land, etc., Co. *v.* Winter, 93 Tex. 560, 57 S. W. 39; Jennings *v.* Moss, 4 Tex. 452; Dunson *v.* Nacogdoches County, (Civ. App. 1896) 37 S. W. 978.
Virginia.—Morris *v.* Lyon, (1887) 2 S. E. 515.
See 39 Cent. Dig. tit. "Pleading," § 575 *et seq.*

Where a demurrer for want of necessary parties is sustained, the court should not dismiss the action without giving plaintiff the opportunity to bring in the necessary persons as parties. Alexander *v.* Thacker, 30 Nebr. 614, 46 N. W. 825; Mott *v.* Ruenbuhl, 1 Tex. App. Civ. Cas. § 599.

While ordinarily respondeat ouster is the appropriate judgment where a demurrer to the plea is sustained, this rule does not prevail where a jury is dispensed with and both the law and the facts are referred to the court by consent of the parties. Frier *v.* State, 11 Fla. 300.

But where defendant demurs to only one count and files no answer to the other, plaintiff is entitled to judgment on the latter notwithstanding the demurrer is sustained. Barber *v.* Cazalis, 30 Cal. 92.

Where only part of defendants demur, the complaint should not be dismissed as to the defendants who do not demur, although it fails to state a cause of action against any of the defendants. Sapp *v.* Williamson, 128 Ga. 743, 58 S. E. 447.

A plea in abatement to an affidavit to support an attachment cannot be amended after a demurrer thereto has been sustained. Livengood *v.* Shaw, 10 Mo. 273.

Although a plea is a nullity the judgment of *respondeat ouster* may be entered on sustaining a demurrer thereto, since by demurring the party waives the privilege of treating the plea as a nullity. Walker *v.* Walker, 6 How. (Miss.) 500.

That amendment must go to merits of action see Barker *v.* Glascow, Tapp. (Ohio) 198.

Grant of leave by appellate court see Appeal and Error, 3 Cyc. 458.

53. Snow *v.* New York Fourth Nat. Bank, 7 Rob. (N. Y.) 479; Henriques *v.* Miriam Osborn Memorial Home, 22 Misc. (N. Y.) 653, 51 N. Y. Suppl. 133; Brown *v.* Tracy, 9 How. Pr. (N. Y.) 93.

On the other hand a complaint should not be dismissed on its merits on the sustaining of a demurrer thereto, where the merits of the allegations set out in the complaint could only be determined after a trial of the facts involved, and where it was possible to allege a different state of facts showing a legal liability. Brown *v.* Utopia Land Co., 118 N. Y. App. Div. 364, 103 N. Y. Suppl. 50.

54. Hoker *v.* Forrester, 53 Fla. 392, 43 So. 241; Harrison *v.* Balfour, 5 Sm. & M. (Miss.) 301; Lowry *v.* Inman, 6 Abb. Pr. N. S. (N. Y.) 394 [*affirmed* in 2 Sweeny 117].

After one judgment of respondeat ouster upon sustaining a demurrer to a plea in bar, a like judgment cannot be properly rendered on sustaining a demurrer to a second plea in bar filed in pursuance of the first judgment. Davis *v.* Singleton, 2 How. (Miss.) 673.

In Missouri only two amended petitions can be filed, and if the second is adjudged bad on demurrer final judgment at once follows. Tapana *v.* Shaffray, 97 Mo. App. 337, 71 S. W. 119.

However, although two special demurrers to plaintiff's declaration for matters of form have been sustained, the court will permit plaintiff to amend upon terms, it appearing that the case is important and difficult, and that if the amendment was not allowed a part of plaintiff's remedy would be cut off by an exercise of the discretion from which there is no appeal. Wilbur *v.* Abbot, 6 Fed. 817.

55. Siebe *v.* Heilman Mach. Works, 38 Ind. App. 37, 77 N. E. 300.

56. *California.*— Seale *v.* McLaughlin, 28 Cal. 668.

frivolously put in to obtain time without any intention to rely upon it, it is proper to refuse to allow the demurrant to plead over.[57] Under some decisions leave to plead over cannot be granted after demurrer overruled to a plea in abatement.[58] Other cases hold that, after judgment of *respondeat ouster* on a plea in abatement, no other plea in abatement can be allowed,[59] at least no other of the same degree.[60]

e. Demurrer to Replication. On overruling a demurrer to a replication, the judgment should ordinarily be *respondeat ouster*.[61] On sustaining a demurrer to a replication to a plea which goes to the whole cause of action, a final judgment for defendant has been held proper,[62] where leave to amend or plead over is not sought.[63] But where the declaration contains the averments for the lack of which a demurrer to the replication was sustained, judgment on such demurrer should not dismiss the action but should grant leave to amend.[64]

f. Time For Amending or Pleading Over. The time within which a party may be allowed to amend or plead over, in the absence of a rule or statute, is a matter

Colorado.— Fisher *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303.

Illinois.— Cheney *v.* Cross, 181 Ill. 31, 54 N. E. 564.

Indiana.— Mangeot *v.* Block, 11 Ind. 244; Chicago, etc., R. Co. *v.* Adams, 12 Ind. App. 317, 39 N. E. 877.

Iowa.— Hillis *v.* Ryan, 4 Greene 78.

Kentucky.— Blades *v.* Grant County Deposit Bank, 101 Ky. 163, 40 S. W. 246, 41 S. W. 305, 19 Ky. L. Rep. 340; Com. *v.* Davis, 9 B. Mon. 128; Gerrein *v.* Berry, 99 S. W. 944, 30 Ky. L. Rep. 978; Bond *v.* Logan, 55 S. W. 888, 22 Ky. L. Rep. 3.

Louisiana.— Gughlielhmi *v.* Geismar, 46 La. Ann. 280, 14 So. 501; Eulalie *v.* Long, 9 La. Ann. 9.

Michigan.— Tefft *v.* McNoah, 9 Mich. 201.

Minnesota.— Potter *v.* Holmes, 74 Minn. 508, 77 N. W. 416.

Mississippi.— Lang *v.* Fatheree, 7 Sm. & M. 404.

New York.— Smythe *v.* Greacen, 96 N. Y. App. Div. 182, 89 N. Y. Suppl. 111.

North Carolina.—Matthews *v.* Copeland, 80 N. C. 30; Swepson *v.* Harvey, 66 N. C. 436.

Oklahoma.— Thwing *v.* Doye, 2 Okla. 608, 44 Pac. 381.

Rhode Island.— Providence Municipal Ct. *v.* McElroy, 19 R. I. 40, 31 Atl. 435.

South Carolina.— New Home Sewing-Mach. Co. *v.* Wray, 28 S. C. 86, 5 S. E. 603; Macfarland *v.* Dean, Cheves 64, demurrer to rejoinder.

United States.— Gordon *v.* Yost, 140 Fed. 79; Green *v.* Underwood, 86 Fed. 427, 30 C. C. A. 162; Rochell *v.* Phillips, 20 Fed. Cas. No. 11,974*a*, Hempst. 22.

See 39 Cent. Dig. tit. "Pleading," § 570 *et seq.*

Under some statutes, where a demurrer is overruled, defendant is entitled to answer over as a matter of right if it appears that the demurrer was interposed in good faith. Morgan *v.* Harris, 141 N. C. 358, 54 S. E. 381.

A stipulation assented to by the other party and the court will authorize the granting of leave to plead over, even if without it the court could not grant the leave. Fox *v.* Bennett, 84 Me. 338, 24 Atl. 878.

Joinder of new parties.— In an interlocutory judgment overruling a demurrer to an answer, a provision that plaintiff may withdraw the demurrer, and that thereupon defendant may apply for an order making other persons parties defendant, is not authorized by Code Civ. Proc. § 497, which provides that on the decision of a demurrer the court may "allow the party in fault to plead anew or amend, upon such terms as are just." Drake *v.* Satterlee, 16 N. Y. Suppl. 334.

57. Barron *v.* Deleval, 58 Cal. 95; Seale *v.* McLaughlin, 28 Cal. 668; Thornton *v.* Borland, 12 Cal. 438; Foote *v.* Carpenter, 7 Wis. 395; Farmers', etc., Bank *v.* Sawyer, 7 Wis. 379.

Leave may be granted on the filing of an affidavit of merits.— Appleby *v.* Elkins, 2 Sandf. (N. Y.) 673.

58. Eddy *v.* Brady, 16 Ill. 306; Motherell *v.* Beaver, 7 Ill. 69; McKinstry *v.* Pennoyer, 2 Ill. 319.

59. Houck *v.* Scott, 8 Port. (Ala.) 169; Cook *v.* Yarwood, 41 Ill. 115; Wright *v.* Bundy, 11 Ind. 398.

60. Mitchum *v.* Droze, 11 Rich. (S. C.) 196.

61. Van *v.* Manning, Morr. (Iowa) 491.

62. Henriques *v.* Miriam Osborn Memorial Home, 22 Misc. (N. Y.) 653, 51 N. Y. Suppl. 133.

In Mississippi, where a demurrer is sustained to a replication there should be a final judgment and not *respondeat ouster*.

The statute providing that where a demurrer is sustained to a plea there shall be a judgment of *respondeat ouster* does not include a demurrer to a replication. Memphis, etc., R. Co. *v.* Orr, 52 Miss. 541; Ross *v.* Sims, 27 Miss. 359. But this does not mean that, upon application, leave to further reply may not be given. Scharff *v.* Lisso, 63 Miss. 213.

63. Morris *v.* Lyon, 84 Va. 331, 4 S. E. 734.

Where the replication improperly concludes to the country, instead of with a verification, it is error to render final judgment without giving an opportunity to amend. Metcalf *v.* Grover, 55 Miss. 145. The same rule applies where the replication concludes with a verification instead of to the country. Northrop *v.* Flaig, 57 Miss. 754.

64. Morris *v.* Lyon, (Va. 1887) 2 S. E. 515.

within the discretion of the court.[65] The time should not be left indefinite, and where not fixed otherwise should be definitely fixed by the court.[66] Where, by statute, an amendment, after demurrer sustained, may be made without leave of court, the amended pleading must be filed within a reasonable time.[67] If a certain time is allowed after a demurrer is passed upon in which to plead over or amend, it is error to give final judgment on the demurrer before the expiration of that time,[68] unless there is a waiver;[69] but such judgment may always be rendered as soon as the designated time has expired,[70] except where the time has been extended.[71] Whether, after the lapse of the time fixed, further time shall be given, rests within the discretion of the court.[72] But if there is judgment dismissing the action unless plaintiff amends within a certain time, if no amendment is filed as directed, the court thereupon loses jurisdiction of the case.[73] Other cases, however, hold that an amendment may be allowed after judgment of dismissal, if such judgment is first set aside.[74] In some jurisdictions it is required that when a demurrer to any pleading is sustained or overruled, and time to amend or plead over is given, notice of the decision must be served on the party who is to amend or plead over in order to start the time running.[75] But if the attorney of the party hears the order given in court, this waives the necessity for the notice.[76]

g. Application For Leave — (1) *In General.* To obtain leave of court to amend or plead over, the party should satisfy the court that it is necessary to obtain justice and that it is not for delay.[77] A plea of limitations is not favored,

65. *Colorado.*— Davis *v.* Peck, 12 Colo. App. 259, 55 Pac. 192.

Connecticut.— Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003.

Georgia.— Patton *v.* Lafayette Bank, 124 Ga. 965, 53 S. E. 664, 5 L. R. A. N. S. 592.

Idaho.— Chemung Min. Co. *v.* Hanley, 9 Ida. 786, 77 Pac. 226.

Iowa.— Nelson *v.* Hamilton County, 102 Iowa 229, 71 N. W. 206.

Mississippi.—Warbington *v.* Norris, 3 How. 227, holding that it is discretionary to allow a party to amend and go to trial instanter.

South Carolina.— Cator *v.* Cockfield, 1 Brev. 91.

Wisconsin.— Hunt *v.* Miller, 101 Wis. 583, 77 N. W. 874; Sleep *v.* Heymann, 57 Wis. 495, 16 N. W. 17.

See 39 Cent. Dig. tit. "Pleading," § 579.

Compare Abraham *v.* Southern R. Co., 149 Ala. 547, 42 So. 837.

In New York interlocutory judgment, sustaining a demurrer to a complaint, may properly direct a dismissal of the complaint "on the merits" if plaintiff fail to file and serve an amended complaint and pay costs within twenty days. Hommert *v.* Gleason, 14 N. Y. Suppl. 568.

A mere decision overruling a demurrer not followed by an interlocutory judgment is insufficient to fix the time for pleading over. Quereau *v.* Brown, 63 Hun (N. Y.) 175, 17 N. Y. Suppl. 644; Metropolitan Nat. Bank *v.* Bussell, 14 Abb. N. Cas. (N. Y.) 98.

66. Boyd *v.* Vollmar, 18 Wis. 449.

67. Quinn *v.* Cincinnati, etc., R. Co., 97 S. W. 379, 30 Ky. L. Rep. 15.

68. Elwell *v.* Johnson, 74 N. Y. 80; Morgan *v.* Leland, 1 Code Rep. (N. Y.) 123; Sawyer *v.* Farmers', etc., Bank, 7 Wis. 386.

69. Ætna Ins. Co. *v.* Swift, 12 Minn. 437.

What constitutes waiver.— Where leave to amend is granted on sustaining a demurrer judgment may be entered before the expiration of the time allowed to amend where the pleader's attorney informed the attorney of the opposing party that he did not wish to amend and asked him to enter judgment. Ætna Ins. Co. *v.* Swift, 12 Minn. 437.

70. Cameron *v.* Boyle, 2 Greene (Iowa) 154.

71. Lovelace *v.* Browne, 126 Ga. 802, 55 S. E. 1041.

72. Williams *v.* Clyatt, 53 Fla. 987, 43 So. 441; Lovelace *v.* Browne, 126 Ga. 802, 55 S. E. 1041; Alexander *v.* Sutlive, 3 Ga. 27; Dewey *v.* Sloan, 9 Ohio Dec. (Reprint) 151, 11 Cinc. L. Bul. 102; Martin *v.* Moore, 1 Wyo. 22. See also Barling *v.* Weeks, 4 Cal. App. 455, 88 Pac. 502.

Who may extend.— The recorder has no authority to extend the time given by the court. Van Ness *v.* Hamilton, 20 Johns. (N. Y.) 124.

73. Pratt *v.* Gibson, 96 Ga. 807, 23 S. E. 839.

74. Greeley *v.* Winsor, 3 S. D. 138, 52 N. W. 674.

75. Wall *v.* Heald, 95 Cal. 364, 30 Pac. 551; Chamberlin *v.* Del Norte County, 77 Cal. 150, 19 Pac. 271; Graham *v.* Powers, 3 N. Y. Suppl. 899.

In New York an interlocutory judgment must be entered fixing the time for amending, before the time begins to run. Liegeois *v.* McCracken, 22 Hun 69; Riggs *v.* Stewart, 14 Daly 434, 14 N. Y. St. 695, 14 N. Y. Civ. Proc. 141.

76. Barron *v.* Deleval, 58 Cal. 95. *Contra*, McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139, 21 Pac. 500.

77. *Kansas.*— White *v.* Treon, 25 Kan. 484.

Kentucky.— Violett *v.* Dale, 1 Bibb 144.

New York.—Newell Bros. Mfg. Co. *v.* Grunwald, 1 N. Y. Suppl. 434; Luyster *v.* Sniffen, 2 Edm. Sel. Cas. 458.

and leave may be refused to file such a plea.[78] So if the party offers to file a bad pleading leave may be refused.[79] Strictly speaking, leave to amend a pleading to which a demurrer has been sustained, or to withdraw an overruled demurrer and plead over, should be obtained before judgment is rendered on the demurrer,[80] but it is common practice to permit an amendment thereafter.[81] Unreasonable delay in applying for leave will, in the absence of satisfactory explanations, authorize refusal;[82] but mere lapse of time does not deprive the court of power to grant leave.[83] It has been held too late to amend after judgment sustaining a demurrer and dismissal of the action has been affirmed on appeal;[84] but an amendment may be made after a judgment overruling a demurrer has been reversed on appeal, providing the remittitur has not yet been made the judgment of the trial court.[85] If amending or pleading over will not help the case, leave may be refused and the judgment made final.[86] If the party declines to amend in the lower court, he cannot obtain leave on appeal.[87] Asking leave to amend a pleading which has been demurred to is equivalent to confessing the demurrer.[88]

(II) *AFFIDAVIT OF MERITS.* In some jurisdictions it has been held that an affidavit of merits must be filed as a condition precedent to pleading over,[89] and it is frequently employed to obtain leave of court.[90] Under some statutes of amendments, it is held that the court cannot demand an affidavit showing facts constituting a meritorious defense as a condition of allowing an amendment after demurrer sustained.[91]

h. Terms on Which Leave Granted. The terms upon which a party may be allowed to amend or plead over are generally matters within the discretion of the court.[92] The terms must always be reasonable.[93] It is frequently required that the party wishing to amend or plead over pay costs,[94] in which case payment of

North Carolina.— Swepson *v.* Harvey, 66 N. C. 436.

United States.— Wilbur *v.* Abbot, 6 Fed. 817.

78. Flinn *v.* Elliott, 1 Ohio Dec. (Reprint) 56, 1 West. L. J. 395.

79. Walton *v.* Kindred, 5 T. B. Mon. (Ky.) 388.

80. Davis *v.* Burns, 1 Mo. 264.

81. Davis *v.* Burns, 1 Mo. 264. But see Wells *v.* John G. Butler's Builders' Supply Co., 128 Ga. 37, 57 S. E. 55.

82. Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003; Ralston *v.* Bullitts, 3 Bibb (Ky.) 261; Wood *v.* Anderson, 25 Pa. St. 407; Lewin *v.* Houston, 8 Tex. 94.

83. Grand Prairie Co-operative Grain Assoc. *v.* Riordan, 61 Ill. App. 457.

84. Central R., etc., Co. *v.* Paterson, 87 Ga. 646, 13 S. E. 525 [*overruling* King *v.* King, 45 Ga. 195].

85. Augusta R. Co. *v.* Andrews, 92 Ga. 706, 19 S. E. 713; Stokes *v.* Campbell, 5 Cow. (N. Y.) 21.

86. Ridgway *v.* Bogan, (Cal. 1886) 12 Pac. 343; Brown *v.* Tracy, 9 How. Pr. (N. Y.) 93; State *v.* Wagar, 19 Ohio Cir. Ct. 149, 10 Ohio Cir. Dec. 160.

87. People *v.* Jackson, 24 Cal. 630; Graham *v.* Vining, 1 Tex. 639; Pitts *v.* Ennis, 1 Tex. 604. See also APPEAL AND ERROR, 3 Cyc. 458.

88. Haven *v.* Green, 26 Ill. 252; White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 44 Iowa 512.

89. *Illinois.*— McCord *v.* Crooker, 83 Ill. 556.

Mississippi.—Shaw *v.* Brown, 42 Miss. 309; Ross *v.* Simm, 27 Miss. 359; Johnston *v.* Beard, 7 Sm. & M. 214; Ogden *v.* Glidewell, 5 How. 179.

New Jersey.— Rowan *v.* Johnson, 16 N. J. L. 266.

Ohio.— Manley *v.* Hunt, 1 Ohio 257.

Pennsylvania.— Board of Health *v.* Potts, 2 Pa. L. J. Rep. 52.

Sufficiency of affidavit.— It is sufficient if the affidavit sets out the grounds of a legal defense. Shaw *v.* Brown, 42 Miss. 309. But the affidavit will be construed as strictly as a plea. McCord *v.* Crooker, 83 Ill. 556.

The withdrawal of the demurrer before a ruling is had upon it does not bring defendant within the requirement. Ogden *v.* Glidewell, 5 How. (Miss.) 179.

90. Luyster *v.* Sniffen, 2 Edm. Sel. Cas. (N. Y.) 458.

91. Empire F. Ins. Co. *v.* Real Estate Trust Co., 1 Ill. App. 391. *Contra*, Haggerty *v.* Phelan, 61 N. Y. Super. Ct. 453, 18 N. Y. Suppl. 789.

92. Maumus *v.* Hamblon, 38 Cal. 539; Thomas *v.* Hawkins, 13 Ind. App. 318, 40 N. E. 813; Tefft *v.* McNoah, 9 Mich. 201; Lowry *v.* Jackson, 27 S. C. 318, 3 S. E. 473.

93. Empire F. Ins. Co. *v.* Real Estate Trust Co., 1 Ill. App. 391; Dewey *v.* Sloan, 9 Ohio Dec. (Reprint) 151, 11 Cinc. L. Bul. 102.

94. *Massachusetts.*— Webber *v.* Davis, 5 Allen 393; Coffin *v.* Cottle, 9 Pick. 287; Loring *v.* Gay, 9 Pick. 66; Hartwell *v.* Hemmenway, 7 Pick. 117; Walker *v.* Maxwell, 1 Mass. 104.

New Jersey.— Rowan *v.* Johnson, 16 N. J. L. 266.

costs is a condition precedent to the right to amend or plead.[95] The terms are also sometimes fixed by statutes or rule of court.[96]

1. Effect Where Leave of Court Not Sought or Refused.[97] The party wishing to amend or plead over must make a seasonable motion or offer to that effect, in default of which he cannot object to final judgment going against him.[98] On overruling a demurrer, a final judgment against the demurrant may be entered where he elects to stand on his demurrer or makes no request to plead over or where he refuses leave to plead over or fails to plead over within the time fixed by the court.[99]

New York.— Haggerty *v.* Phelan, 61 N. Y. Super. Ct. 453, 18 N. Y. Suppl. 789; Fidler *v.* Cooper, 19 Wend. 285; Keeler *v.* Shears, 6 Wend. 540; Sands *v.* McClelan, 6 Cow. 582.

North Carolina.— Woodcock *v.* Bostic, 128 N. C. 243, 38 S. E. 881; Davis *v.* Evans, 6 N. C. 202.

Vermont.— Austin *v.* Dills, 1 Tyler 308.

Virginia.— Cooke *v.* Beale, 1 Wash. 313.

See 39 Cent. Dig. tit. "Pleading," §§ 573, 580.

95. Wolf *v.* Luyster, 1 Hall (N. Y.) 247; Sands *v.* McClelan, 6 Cow. (N. Y.) 582; Curtis *v.* Moore, 15 Wis. 134.

96. Colton *v.* Stanwood, 67 Me. 25; Webber *v.* Davis, 5 Allen (Mass.) 393.

97. Judgment by default on failure to plead over see JUDGMENTS, 23 Cyc. 749.

98. *Alabama.*—Ward *v.* Birmingham Waterworks Co., (1907) 44 So. 570.

California.— Williamson *v.* Joyce, 140 Cal. 669, 74 Pac. 290; Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217; Smith *v.* Yreka Water Co., 14 Cal. 201.

Illinois.—Ricker *v.* Scofield, 28 Ill. App. 32.

Indiana.— Giles *v.* Gullion, 13 Ind. 487; Mangeot *v.* Block, 11 Ind. 244.

Kentucky.— Wilson *v.* Com., 99 Ky. 167, 35 S. W. 274, 18 Ky. L. Rep. 51.

Maine.— Furbish *v.* Robertson, 67 Me. 35.

Maryland.— Riddell *v.* Douglas, 60 Md. 337.

Mississippi.— Hardin *v.* Pelan, 41 Miss. 112.

South Dakota.— Iowa, etc., Tel. Co. *v.* Schamber, 15 S. D. 588, 91 N. W. 78.

Texas.— Hollis *v.* Border, 10 Tex. 360; Gaddis *v.* Western Union Tel. Co., 33 Tex. Civ. App. 391, 77 S. W. 37.

Virginia.— Maggort *v.* Hansbarger, 8 Leigh 532.

Wisconsin.—Wentworth *v.* Summit, 60 Wis. 281, 19 N. W. 97.

See 39 Cent. Dig. tit. "Pleading," § 570 *et seq.*

99. *Alabama.*— Terry *v.* Allen, 132 Ala. 657, 32 So. 664; Brown *v.* Commercial F. Ins. Co., 86 Ala. 189, 5 So. 500.

Arkansas.— Deloach *v.* Neal, 5 Ark. 243.

California.— Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218; Thornton *v.* Borland, 12 Cal. 438.

Florida.— Archer *v.* Brown, 1 Fla. 219.

Illinois.— People *v.* Bug River Special Drainage Dist. Com'rs, 189 Ill. 55, 59 N. E. 605; Bissell *v.* Kankakee, 64 Ill. 249, 21 Am. Rep. 554; Keeler *v.* Campbell, 24 Ill. 287; McCormick *v.* Tate, 20 Ill. 334; Weatherford *v.* Wilson, 3 Ill. 253; Godfrey *v.* Buckmaster, 2 Ill. 447.

Iowa.— Minear *v.* Hogg, 94 Iowa 641, 63 N. W. 444; Brown *v.* Mallory, 26 Iowa 469; Simeral *v.* Dubuque Mut. F. Ins. Co., 18 Iowa 319; Bridgman *v.* Wilcut, 4 Greene 563; Cameron *v.* Boyle, 2 Greene 154.

Kentucky.— Bullock *v.* Graham, 87 Ky. 120, 7 S. W. 889, 9 Ky. L. Rep. 1004; Patrick *v.* Conrad, 3 A. K. Marsh. 612; Bell *v.* Morehead, 3 A. K. Marsh. 158.

Michigan.— Boyer *v.* Sowles, 109 Mich. 481, 67 N. W. 530.

Minnesota.— Daniels *v.* Bradley, 4 Minn. 158.

Mississippi.—Washington *v.* McCaughan, 34 Miss. 304.

Missouri.— Henley *v.* Henley, 93 Mo. 95, 5 S. W. 701.

Nebraska.— Brown *v.* Houghton, 2 Nebr. (Unoff.) 425, 89 N. W. 251.

New York.— Whiting *v.* New York, 37 N. Y. 600.

North Carolina.— State *v.* Marietta, etc., R. Co., 108 N. C. 24, 12 S. E. 1041.

Oklahoma.— Potter *v.* Hall, 11 Okla. 173, 65 Pac. 841; Logan County *v.* Harvey, 6 Okla. 629, 52 Pac. 402.

South Carolina.— Moore *v.* Burbage, 2 McMull. 168.

Tennessee.— Cowan *v.* Donaldson, 95 Tenn. 322, 32 S. W. 457.

Texas.— Caruthers *v.* Slaughter, (1886) 2 S. W. 526; State *v.* Williams, 8 Tex. 255.

Virginia.— Morris *v.* Lyon, 84 Va. 331, 4 S. E. 734.

See 39 Cent. Dig. tit. "Pleading," §§ 558, 559.

The necessity for a formal judgment of respondeat ouster is superseded by the express declaration of the demurrant that he would abide by his demurrer. Smith *v.* Harris, 12 Ill. 462.

Where there are several pleas, and a demurrer is overruled to one of them, which answers the whole declaration and is in bar of the action, if plaintiff elects to stand by his demurrer, defendant is entitled to final judgment. Bissell *v.* Kankakee, 64 Ill. 249, 21 Am. Rep. 554.

Where an answer does not go in bar of the whole cause of action it is error to give final judgment for defendant upon overruling a demurrer thereto. Brevoort *v.* Brevoort, 40 N. Y. Super. Ct. 211.

The interposition of a defective answer to which a demurrer was sustained is a failure to plead over within the meaning of the statute providing that the judgment upon overruling a demurrer shall be that the party plead over and if he fails so to do, judgment shall be rendered against him as

An election to stand on a demurrer is equivalent to a refusal to plead over,[1] and a neglect to reasonably file a pleading will be taken as such election.[2] Where the demurrer is sustained, and the party whose pleading is demurred to is not granted, and does not seek, leave to amend or plead over, or fails or refuses to amend or plead over when leave is granted, a final judgment should be entered on the demurrer in favor of demurrant.[3] So where a demurrer is sustained and application to amend is refused, final judgment may be entered.[4] On overruling a demurrer, where the demurrant declines to plead further, a judgment entered against him is on the merits.[5]

9. Error in Ruling as Harmless. No ruling on demurrer can constitute reversible error which does not prejudice the party complaining.[6] For instance, error in sustaining or overruling a demurrer to a portion of a pleading, the allegations of which can be proved under the allegations of another portion or on the assessment of damages, is harmless.[7] So improperly sustaining a demurrer to a pleading or portion thereof which might have been stricken out on motion is not reversible error.[8] And it is immaterial that a demurrer has been sustained to a pleading the averments of which apparently cannot be proved.[9] So also where a pleading has

upon a default. McKinney *v.* State, 101 Ind. 355.

If there is a general issue on file, the election of plaintiff to stand on his overruled demurrer to a special plea is a confession of the general issue and warrants a judgment against him. Andrews *v.* Hall, 132 Ala. 320, 31 So. 356.

1. Gammon *v.* Bunnell, 22 Utah 421, 64 Pac. 958.

2. Marshall *v.* Platte County, 12 Mo. 88.

3. *Alabama.*— Montgomery Iron Works *v.* Dorman, 78 Ala. 218.

California.— Mora *v.* Le Roy, 58 Cal. 8; Smith *v.* Yreka Water Co., 14 Cal. 201.

Illinois.— Ward *v.* Stout, 32 Ill. 399; Clemson *v.* State Bank, 2 Ill. 45.

Indiana.— Giles *v.* Gullion, 13 Ind. 487; Wilson *v.* Ray, 13 Ind. 1.

Iowa.— Bridge *v.* Livingston, 11 Iowa 57.

Maryland.— Riddell *v.* Douglas, 60 Md. 337.

Mississippi.— Gwin *v.* McCarroll, 1 Sm. & M. 351. See Agnew *v.* McElroy, 10 Sm. & M. 552, 48 Am. Dec. 772.

Missouri.— Comstock *v.* Davis, 51 Mo. 569; Bobb *v.* Woodward, 42 Mo. 482.

North Carolina.— State *v.* Marietta, etc., R. Co., 108 N. C. 24, 12 S. E. 1041.

South Dakota.— Iowa, etc., Tel. Co. *v.* Schamber, 15 S. D. 588, 91 N. W. 78.

Texas.— Hollis *v.* Border, 10 Tex. 360; United Benev. Soc. *v.* Shepherd, (Civ. App. 1902) 66 S. W. 577. See also Masterson *v.* Bockel, 20 Tex. Civ. App. 416, 51 S. W. 39.

Wisconsin.— Wentworth *v.* Summit, 60 Wis. 281, 19 N. W. 97.

See 39 Cent. Dig. tit. "Pleading," § 575.

If a demurrer is sustained on one ground and plaintiff declines to amend, it is sufficient to warrant a judgment, although it be overruled as to other grounds. Terry *v.* Allen, 132 Ala. 657, 32 So. 664.

Where replication not allowed.— Under a statute providing that there shall be no reply unless a set-off or counter-claim is pleaded, judgment cannot be entered against plaintiff on refusal to plead further after the sustaining of a demurrer to an answer setting up new matter constituting a defense, but not a set-off or counter-claim. Madden *v.* Anderson, 5 Indian Terr. 552, 82 S. W. 904.

If, however, the demurrer is to some counts only and the demurrer is sustained, plaintiff may amend by the addition of other counts or may stand on counts admitted to be good. Strictly speaking defendant is entitled to judgment on the demurrer to the defective counts but the usual practice is merely to strike out the bad counts unless defendant insists on judgment as to such counts. Riddell *v.* Douglas, 60 Md. 337.

Where demurrers are sustained to replications limited to certain pleas, leaving other pleas not replied to which set up a complete defense to the action and plaintiff declines to plead further and suffers judgment to go against him, such judgment will be referred to the sufficient pleas and the case will not be reversed for the ruling upon the sufficiency of such replication. Tobias *v.* Josiah Morris Co., 132 Ala. 267, 31 So. 498.

4. Gallardo *v.* Reed, 49 Cal. 346.

5. Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

6. Sims *v.* Chance, 7 Tex. 561. But see Seifert *v.* Sheppard, 111 Ga. 814, 35 S. E. 673.

7. *California.*— Brown *v.* Kentfield, 50 Cal. 129.

Colorado.— Colorado Cent. R. Co. *v.* Blake, 3 Colo. 417; Brown *v.* People, 3 Colo. 115; Marr *v.* Wetzel, 3 Colo. 2.

Connecticut.— Coupland *v.* Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

Indiana.— Over *v.* Shannon, 75 Ind. 352; Davis *v.* State, 68 Ind. 104; Hadley *v.* Prather, 64 Ind. 137; McGill *v.* Pressley, 62 Ind. 193; Allis *v.* Nanson, 41 Ind. 154; Rhode *v.* Green, 26 Ind. 83; Story *v.* O'Dea, 23 Ind. 326; Ausem *v.* Byrd, 6 Ind. 475; Check *v.* Glass, 3 Ind. 286.

Kansas.— Cannon *v.* Kreipe, 14 Kan. 324.

8. Dwiggins *v.* Clark, 94 Ind. 49, 48 Am. Rep. 140.

9. Cumberland, etc., R. Co. *v.* Slack, 45 Md. 161.

become irrelevant by an amendment of the pleading to which it was directed, the ruling upon a demurrer thereto is immaterial.[10] Likewise, even if a demurrer is so defective in form as to present no question, it is not reversible error to sustain it, if the pleading to which it is addressed is bad.[11] Furthermore, the party against whom judgment is rendered cannot himself complain that it ought to be *quod recuperet* instead of *respondeat ouster*,[12] and plaintiff is not prejudiced by a failure of the court to render a judgment of *respondeat ouster* if he in fact has an opportunity to plead over.[13]

VII. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

A. Amended Pleadings Generally [14]

1. Definition.[15] The term "amend-

10. Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. 73.

11. Spaulding *v.* Mott, 167 Ind. 58, 76 N. E. 620; Hanson *v.* Cruse, 155 Ind. 176, 57 N. E. 904; Bollman *v.* Gemmill, 155 Ind. 33, 57 N. E. 542; Goldsmith *v.* Chipps, 154 Ind. 28, 55 N. E. 855; Garrett *v.* Bissell Chilled Plow Works, 154 Ind. 319, 56 N. E. 667.

12. Bauer *v.* Roth, 4 Rawle (Pa.) 83.

13. Smith *v.* Harris, 12 Ill. 462; Sage *v.* Matheny, 14 Ind. 369.

14. After change of venue see VENUE.

After removal of cause see REMOVAL OF CAUSES.

After taking deposition as affecting admissibility of deposition see DEPOSITIONS, 11 Cyc. 1001.

Amendment by appellate court to conform to evidence, verdict, or judgment see APPEAL AND ERROR, 3 Cyc. 258.

Amendment by scire facias in general see SCIRE FACIAS.

Amendment in lower court after judgment by appellate court see APPEAL AND ERROR, 3 Cyc. 497.

Amendment of certiorari see CERTIORARI, 6 Cyc. 799.

Amendment of indictment and information see INDICTMENTS AND INFORMATIONS, 22 Cyc. 432.

Amendment of pleading on trial anew in appeal from justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 727.

Amendment of pleadings as waiver of right to appeal see APPEAL AND ERROR, 2 Cyc. 645.

Amendments in particular actions or proceedings see cross-references at the head of this article.

Amendments of new pleadings on trial of cause de novo see APPEAL AND ERROR, 3 Cyc. 257 *et seq.*

Amendments on appeal see APPEAL AND ERROR, 3 Cyc. 257.

Amendments preliminary to hearing on certiorari on review of justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 778.

Appealability of orders on motion to amend see APPEAL AND ERROR, 2 Cyc. 575.

Arrest of judgment for amendable defects in pleadings see JUDGMENTS, 23 Cyc. 831.

As affecting arrest in civil actions see ARREST, 3 Cyc. 953.

As affecting default judgment see JUDGMENTS, 23 Cyc. 741.

Change of venue by amendment of pleading see VENUE.

Discharge of bail in civil action by amendment of pleading see BAIL, 5 Cyc. 28.

Discharge of surety on forthcoming bond on writ of attachment see ATTACHMENT, 4 Cyc. 697.

Effect as to suspension of limitations by commencement of action see LIMITATIONS OF ACTIONS, 25 Cyc. 1005.

Effect of amending complaint after offer of judgment on right to costs see COSTS, 11 Cyc. 81.

Effect of amendment as to time during which notice of lis pendens is operative see LIS PENDENS, 25 Cyc. 1473.

Effect of amendment on notice of trial see TRIAL.

Errors and irregularities in amendments to pleadings as ground for new trial see NEW TRIAL, 29 Cyc. 762.

In admiralty see ADMIRALTY, I Cyc. 859 *et seq.*

In equity see EQUITY, 16 Cyc. 335.

In justice's court see JUSTICES OF THE PEACE, 24 Cyc. 563.

Notice of trial after amendment see TRIAL.

Pleadings on new trial see NEW TRIAL, 29 Cyc. 1033.

Presumptions on appeal as to action of trial court in amendments see APPEAL AND ERROR, 3 Cyc. 291 *et seq.*

Process after amendment of pleading see PROCESS.

Remand by appellate court for amendment see APPEAL AND ERROR, 3 Cyc. 458.

Review of rulings as to amendment on appeal from final judgment see APPEAL AND ERROR, 3 Cyc. 257 *et seq.*

Striking out amended and supplemental pleadings see *infra*, XII, C, 1, b, (III).

Substitutions and amendments as part of record on appeal see APPEAL AND ERROR, 2 Cyc. 1060.

Waiver by amendment of rulings on demurrer see *infra*, XIV, F.

Waiver of objections to amendments and supplemental pleadings and rulings thereon see *infra*, XIV, G.

Withdrawal of amended pleadings see *infra*, XI, C.

Withdrawal of particular counts from see TRIAL.

15. For definition of amendments generally see 2 Cyc. 279.

ment" as applied to pleadings has been defined as the correction of some error or mistake in a pleading already before the court.[16] In a broad sense a pleading is amended when a correction of its faults has been made; when its defects have been cured, whether that change has been brought about by the action of the court in striking out and lopping off improper, irrelevant, and unnecessary matter contained therein, or whether a new frame of words has been filed embodying the good of the original, with the improper, irrelevant, and unnecessary matter left out in obedience to the view of the court expressed in sustaining the motion to strike out.[17]

2. Authority of Court to Allow or Make Amendments, and Law Governing. In order to promote justice, courts in the exercise of their general common-law jurisdiction, in the absence of any prohibitory statute, and independent of any express statutory authority, may, in their discretion, permit pleadings to be amended at any time before verdict found,[18] wherever such amendment is not in violation of some positive rule of law,[19] and does not surprise or prejudice the opposite party.[20] And the fact that an amendment is so framed that, if demurred to, it might be held insufficient is not necessarily fatal to its allowance.[21] To allow amendments is the rule; to refuse them, the exception.[22] Upon the question whether a court may of its own motion, without application by one of the parties, make or order an amendment, the authorities differ, it being held in some decisions that it may,[23] while in others the power of amendment *sua sponte* is

16. Givins *v.* Wheeler, 6 Colo. 149, 151; Woodruff *v.* Dickie, 5 Rob. (N. Y.) 619, 622.

Other definitions are: "The correction of an error committed in the pleading." Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475, 477.

"Amendment of a pleading implies an improvement of it,—the making the pleading better as a pleading—the making good that which before was defective in its form of statement, or in making better the issues presented between the same parties." Billings *v.* Baker, 6 Abb. Pr. (N. Y.) 213, 216.

"An amendment is to add something to or withdraw something from that which has been previously pleaded, so as to perfect that which is or may be deficient, or correct that which has been incorrectly stated by the party making the amendment." Supreme Tent K. M. W. *v.* Cox, 25 Tex. Civ. App. 366, 369, 60 S. W. 971.

What is not an amendment.—An incidental demand whereby a plaintiff claims something which he had omitted to ask for by his action is not in the nature of an amendment and does not need leave to be filed. Scottish Union Assur. Co. *v.* Quinn, 5 Quebec Pr. 262.

17. Lennox *v.* Vandalia Coal Co., 158 Mo. 473, 59 S. W. 242.

18. *Iowa.*— Miller *v.* Perry, 38 Iowa 301.

Louisiana.— Swilley *v.* Low, 13 La. Ann. 412; Penny *v.* Parham, 1 La. Ann. 274.

New York.— Hatch *v.* Central Nat. Bank, 78 N. Y. 487.

North Carolina.— Alamance Com'rs *v.* Blair, 76 N. C. 136.

Virginia.— Anderson *v.* Dudley, 5 Call 529; Tabb *v.* Gregory, 4 Call 225.

West Virginia.— Travis *v.* Peabody Ins. Co., 28 W. Va. 583.

See 39 Cent. Dig. tit. "Pleading," § 191.

19. Conner *v.* Smith, 74 Ala. 115; Miller *v.* Metzger, 16 Ill. 390.

20. *Georgia.*— Camp *v.* Bancroft, 25 Ga. 74.

Idaho.— Krœtch *v.* Empire Mill Co., 9 Ida. 277, 74 Pac. 868.

Iowa.— Hall *v.* Chicago, etc., R. Co., 84 Iowa 311, 51 N. W. 150.

Missouri.— Martin *v.* Martin, 27 Mo. 227.

Nevada.— Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562.

New York.—Cooper *v.* Jones, 4 Sandf. 699; Post *v.* Hitchcock, 1 Wend. 16.

Pennsylvania.— Stainer *v.* Royal Ins. Co., 13 Pa. Super. Ct. 25.

South Carolina.— Sims *v.* Ohio River, etc., R. Co., 56 S. C. 30, 33 S. E. 746.

Texas.— Northern Texas Traction Co. *v.* Mullins, 44 Tex. Civ. App. 566, 99 S. W. 433.

Utah.— McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139, 21 Pac. 500.

West Virginia.— Travis *v.* Peabody Ins. Co., 28 W. Va. 583.

Canada.—Corby *v.* Cotton, 3 Can. L. J. 50; McKenzie *v.* Vansickles, 17 U. C. Q. B. 226.

See 39 Cent. Dig. tit. "Pleading," § 591.

Restatement of doctrine.—Amendments, at common law, independently of a statutory provision on the subject, are in all cases in the discretion of the court for the furtherance of justice. Under statutes in modern practice they are very liberally allowed in all formal and most substantial matters, either without costs to the party amending or upon such terms as the court may think proper to order. 1 Bouvier L. Dict. 138.

21. Pratt *v.* Stoner, 78 Conn. 310, 61 Atl. 1009; Pacific Mill Co. *v.* Inman, (Oreg. 1907) 90 Pac. 1099.

22. Pride *v.* Wormwood, 27 Iowa 257.

23. Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 589; Allen *v.* Carolina Cent. R. Co., 120 N. C. 548, 27 S. E. 76; Martin *v.* Goode, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799; Buie *v.* Brown, 104 N. C. 335, 10 S. E. 465; Turner *v.* Cuthrell, 94 N. C. 239;

denied.[24] Proper application being made, however, it is the duty of the court to allow parties to amend their pleadings so that their cases may be tried on the merits.[25] The practice of the *lex fori* in respect to amendments is controlling where it differs from the practice of the state where the cause of action arose.[26]

3. Statutory Provisions. The whole subject of amendments is controlled largely by statutes, the provisions of which vary in different jurisdictions.[27] All these statutes, however, tend toward liberality in the allowance of amendments, the underlying principle being that amendments shall be permitted in the furtherance of justice whenever the other party is not prejudiced thereby.[28] Certain statutes providing that, if pleadings are defective, it shall be the duty of the court, and the judge is thereby "required" to cause the same to be amended, are held to be mandatory, leaving no discretion to the court.[29] By statute in some states a referee has power concurrent with that of the court to allow amendments.[30] Although under the circumstances of a given case the laws of a state may forbid an amendment, it may be allowable under statutes which govern actions pending in the United States courts.[31] In most jurisdictions having the code procedure it is provided by statute that the court may, either before or after judgment, on such terms as may seem proper, permit the amendment of any pleading by adding or striking out the name of any party, by correcting a mistake in the name of any party, or a mistake in any other respect, by inserting other allegations material to the cause, or, when the amendment does not change substantially the claim or defense, by conforming the pleadings or proceedings to the facts proved.[32] In those states which follow the code procedure, in addition to the general statutes

Roles *v.* Davis, 1 F. & F. 563, 4 H. & N. 484, 28 L. J. Exch. 287; Power *v.* Pringle, 31 Nova Scotia 78. See also Knight *v.* Dunn, 47 Fla. 175, 36 So. 62.

24. Philadelphia Nat. Bank *v.* Morgan, 1 Marv. (Del.) 265, 40 Atl. 1113; Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696 (under statute); Enright *v.* Seymour, 8 N. Y. St. 356. And see Caldwell *v.* King, 76 Ala. 149; Bankston *v.* Farris, 26 Mo. 175; Fagen *v.* Davison, 2 Duer (N. Y.) 153.

25. Chemung Nat. Bank *v.* Elmira, 39 How. Pr. (N. Y.) 373; Jackson *v.* Gunton, 26 Pa. Super. Ct. 203.

26. O'Shields *v.* Georgia Pac. R. Co., 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Selma, etc., R. Co. *v.* Lacey, 49 Ga. 106; Atlanta, etc., R. Co. *v.* Smith, 1 Ga. App. 162, 58 S. E. 106.

27. "Mistakes [in pleading] are also effectually helped by the statutes of amendment and jeofails; so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeofaile*), he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception." 3 Blackstone Comm. 407. These statutes were very numerous, among others being the following: 14 Edw. III, c. 6; 9 Hen. V, c. 4; 4 & 5 Anne, c. 16; 9 Geo. IV, c. 15; 4 Wm. IV, c. 42. Also see the Common Law Procedure Act of 1852. All the American states have in substance re-enacted the most essential provisions of the English statutes of amendment and jeofails. For a typical statute see the Illinois enactments. Amendments and Jeofails, c. 7, Starr & C. Annot. St. Ill. (1896). For a judicial discussion of the statutes see Schueler *v.* Mueller, 193 Ill. 402, 61 N. E. 1044.

28. *District of Columbia.*— Tyler *v.* Mutual Dist. Messenger Co., 13 App. Cas. 267.

Iowa.— Wells *v.* Stombock, 59 Iowa 376, 13 N. W. 339.

Massachusetts.— Boston Overseers of Poor *v.* Otis, 20 Pick. 38, construing statute of jeofails.

New York.— Washington L. Ins. Co. *v.* Scott, 119 N. Y. App. Div. 847, 104 N. Y. Suppl. 898.

United States.— Chapman *v.* Barney, 129 U. S. 677, 9 S. Ct. 426, 32 L. ed. 800; Hodges *v.* Kimball, 91 Fed. 845, 34 C. C. A. 103; McAleer *v.* Clay County, 38 Fed. 707.

See 39 Cent. Dig. tit. "Pleading," § 592.

29. Stephens *v.* Commercial, etc., Bank, 31 Miss. 438; Shields *v.* Taylor, 13 Sm. & M. (Miss.) 127; Wharton *v.* Porter, 10 Sm. & M. (Miss.) 305; Deut *v.* Coleman, 10 Sm. & M. (Miss.) 83; Wood *v.* Shultis, 4 Hun (N. Y.) 309; Buck *v.* Barker, 5 N. Y. St. 826; Zimmerman *v.* Amaker, 10 S. C. 98.

30. See References.

31. Mexican Cent. R. Co. *v.* Duthie, 189 U. S. 76, 23 S. Ct. 610, 47 L. ed. 715; Southern Pac. Co. *v.* Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 942; Phelps *v.* Oaks, 117 U. S. 236, 6 S. Ct. 714, 29 L. ed. 888; McDonald *v.* Nebraska, 101 Fed. 171, 41 C. C. A. 278.

32. Meeks *v.* Meeks, 79 N. Y. App. Div. 49, 79 N. Y. Suppl. 718; Ford *v.* Ford, 35 How. Pr. (N. Y.) 321; Chapman *v.* Webb, 6 How. Pr. (N. Y.) 390, holding that the power of the court is not limited to the time of the trial. And see the codes of the several states.

authorizing amendments, there is usually a section authorizing the courts to disregard, in every stage of the action, any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties.[33] The codes usually provide also that no variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall appear that a party has been misled the court may order the pleading to be amended upon such terms as may be just.[34] While in those which retain the common-law procedure the statutes are not so uniform nor so specific or comprehensive as in those states where the code procedure prevails, they are nevertheless in most instances fully as liberal in their nature. The typical statute of this class confers upon the court, in which any action shall be pending, the power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered.[35] There are numerous modifications of this general provision, respecting the method of making application to the court, the service of the amended pleading on the opposite party, the time when various other steps should be taken, and the like;[36] but on these points the local statutes must be consulted.

4. Necessity For Something to Amend By. In general, before an amendment will be allowed as to a matter of form, there must be something to amend by, that is, there must be something in the record to show that what is sought by the amendment was originally designed, but has been omitted through mistake or oversight.[37] Some cases restrict this rule to amendments as to matters of form, holding that amendments as to matters of substance must conform to the facts, and as to these the record can be no guide.[38] But other cases apply the rule to all classes of amendments, holding that the right to amend presupposes that the pleadings disclose at least the semblance of a subsisting cause of action.[39]

5. Amendments as of Course — a. Right — (i) *In General.* That the pleadings can only be amended by leave of court is an elementary rule of practice, so far as concerns amendments at common law;[40] and in some jurisdictions this rule has been made statutory, so that the power to amend is in the court, not the

33. See the codes of the several states.

34. See the codes of the several states.

35. Mich. Comp. Laws (1897), c. 284, § 1. Section 5, similar in many respects to the New York statute, enumerates thirteen defects in pleading which shall in nowise affect the judgment if not corrected. Mass. Rev. Laws (1902), c. 173, § 48; Starr & C. Annot. St. Ill. (1896), c. 110, § 24. The Illinois statute, like that of several other common-law states, is copied with slight verbal changes from the Massachusetts statute.

36. McGary *v.* De Pedrorena, 58 Cal. 91.

37. *Illinois.*— Lake *v.* Morse, 11 Ill. 587.

Indiana.— State *v.* Hood, 6 Blackf. 260.

Iowa.— Jackson *v.* Fletcher, Morr. 230.

South Carolina.— Brown *v.* Hillegas, 2 Hill 447.

Vermont.— Dean *v.* Swift, 11 Vt. 331.

United States.— Nelson *v.* Barker, 17 Fed. Cas. No. 10,101, 3 McLean 379.

For complaint held sufficient to warrant amendment by insertion of "negligently" see Keeton *v.* St. Louis, etc., R. Co., 116 Mo. App. 281, 92 S. W. 512.

For petition sufficiently stating negligence to authorize an amendment amplifying such allegation see Blackwell *v.* Ramsey-Brisben Stone Co., 126 Ga. 812, 55 S. E. 968.

In Florida it is expressly provided by statute, McClellan Dig. § 97, p. 834, that it shall be the duty of the court to allow amendment whether there is anything in the writing to amend or not. See also Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696.

38. Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494; Jenkins *v.* Hutchison, 2 Hill (S. C.) 626.

39. Bryson *v.* Thurmond, 103 Ga. 463, 30 S. E. 269; Brigham *v.* Este, 2 Pick. (Mass.) 420; Privett *v.* Wilmington, etc., R. Co., 54 S. C. 98, 32 S. E. 75.

40. Covey *v.* Delaware, etc., R. Co., 14 Pa. Dist. 512. See also McCulloch *v.* Tapp, 2 Ohio Dec. (Reprint) 678, 4 West. L. Month. 575, where it is said that the Code, § 135, provides that "at any time within ten days after a demurrer is filed, the adverse party may amend of course," and that this provision may be regarded as evidence that there is no other case where an amendment or additional pleading may be made without leave of court.

Under the established rules of equity practice, plaintiff is not as a matter of right entitled to amend his bill after a demurrer thereto has been sustained. Mercantile Nat.

party.[41] In other jurisdictions, however, the common-law rule of practice has been changed by statutes, giving parties the absolute right, within certain limits, to amend a pleading once as of course.[42]

(II) *Restriction That Amended Pleading Cannot Be Served For Delay.* In one jurisdiction, at least, the right exists by statute to amend a pleading once as of course, either before or after reply to it shall have been made, and this right is absolute and unqualified, with the single restriction that it shall not be exercised for purposes of delay.[43]

(III) *Manner of Exercise.* The right to amend as of course must be exercised in the manner specified in the statute or rule authorizing it.[44]

(IV) *Exhaustion.* The right to amend as of course an amended pleading did not exist at common law,[45] and generally the right to amend as of course, given by the codes and practice acts, is exhausted by one exercise,[46] and all other amendments are addressed to the sound discretion of the court.[47] Thus where a party has a right to amend his pleading as of course, either before or after a response thereto, he cannot amend once before, and again after, such response;[48] but his right to amend his pleading as of course is exhausted by an amendment before a response thereto.[49] So too where plaintiff files an amended complaint after motion

Bank *v.* Carpenter, 101 U. S. 567, 25 L. ed. 815.

41. Covey *v.* Delaware, etc., R. Co., 14 Pa. Dist. 512. See also Hyatt *v.* Kirk, 8 Ind. 178.

A bill of particulars cannot be amended without leave of court. Wager *v.* Chew, 15 Pa. St. 323.

42. *Arkansas.*— State *v.* Jennings, 10 Ark. 428.

California.— Spooner *v.* Cady, (1894) 36 Pac. 104.

Colorado.— King *v.* Gardner, 25 Colo. 395, 53 Pac. 727; McDonald *v.* Hallicy, 1 Colo. App. 303, 29 Pac. 24.

Georgia.— See Ogburn *v.* Elmore, 123 Ga. 677, 51 S. E. 641.

Kentucky.— Champion *v.* Robertson, 4 Bush 17.

Mississippi.— Rowland *v.* Dalton, 36 Miss. 702.

Missouri.— Lumpkins *v.* Collier, 69 Mo. 170.

New Jersey.— Rix *v.* New York Cent., etc., R. Co., 67 N. J. L. 503, 51 Atl. 924.

New York.— Muglia *v.* Erie R. Co., 97 N. Y. App. Div. 532, 90 N. Y. Suppl. 216; Holm *v.* Appelby, 27 Misc. 49, 57 N. Y. Suppl. 266.

South Dakota.— Tripp *v.* Yankton, 10 S. D. 576, 74 N. W. 447.

Texas.— Haynes *v.* Rice, 33 Tex. 167.

West Virginia.— Phelps *v.* Smith, 16 W. Va. 522.

Wisconsin.— Sutton *v.* Wegner, 72 Wis. 294, 39 N. W. 775.

Canada.— Hudon *v.* McDonald, 7 Quebec Pr. 74.

See 39 Cent. Dig. tit. "Pleading," § 594.

The fact that the service of an amended pleading will raise new issues does not affect the party's right to serve it as of course. Muglia *v.* Erie R. Co., 97 N. Y. App. Div. 532, 90 N. Y. Suppl. 216.

It is a right which is conferred on parties equally with that of pleading originally, and cannot be taken from them by the court. Spooner *v.* Cady, (Cal. 1894) 36 Pac. 104.

In Indiana it was formerly held that amendments could be properly made only on leave of court (Hyatt *v.* Kirk, 8 Ind. 178); but the law has been changed in that state by Rev. St. (1894) § 345, providing that a pleading before it is answered may be amended as a matter of course.

43. Cooper *v.* Jones, 4 Sandf. (N. Y.) 699; Mussinan *v.* Hatton, 8 Misc. (N. Y.) 95, 28 N. Y. Suppl. 1006; Ross *v.* Dinsmore, 12 Abb. Pr. (N. Y.) 4; Frank *v.* Bush, 63 How. Pr. (N. Y.) 282.

The fact that an amendment as of course will necessitate the overruling of a pending motion to change the venue does not affect the right to amend, although the statute provides that amendments as of course must be without prejudice to the proceedings already had. Kay *v.* Pruden, 101 Iowa 60, 69 N. W. 1137.

44. Spooner *v.* Cady, (Cal. 1894) 36 Pac. 104.

45. Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447.

46. People *v.* Judges Washtenaw Cir. Ct., 1 Dougl. (Mich.) 434; Mussinan *v.* Hatton, 8 Misc. (N. Y.) 95, 28 N. Y. Suppl. 1006; White *v.* Mayor, 14 How. Pr. (N. Y.) 495; Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447.

If an amended pleading be stricken out on motion, respondent cannot, as a matter of right, file a second amended pleading. Mussinan *v.* Hatton, 8 Misc. (N. Y.) 95, 28 N. Y. Suppl. 1006.

A voluntary pleading will not be counted, where it is served under a statute giving the party a right to amend his pleading as of course, until the court has adjudged third pleadings insufficient. Barton *v.* Martin, 54 Mo. App. 134.

47. Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447.

48. White *v.* Mayor, 14 How. Pr. (N. Y.) 495; Cowles *v.* Coster, 4 Hill (N. Y.) 550.

49. Freyham *v.* Wertheimer, 52 Misc. (N. Y.) 545, 102 N. Y. Suppl. 838; Mus-

by defendant to require amendment, there being no order of court compelling him, his right to amend as of course is exhausted.[50] But a defendant, by serving an amended answer to the original complaint, does not exhaust his right to amend as of course his answer to plaintiff's amended complaint within the prescribed time.[51] Nor is the right to amend as of course exhausted by filing an amendment under compulsion of an order of court.[52] And where the court, on a contested motion, strikes out a portion of the party's pleading, it is the act of the court, and not the act of the party, and cannot be considered an amendment once, so as to exhaust the right of amendment as of course.[53]

(v) *Waiver.* A party may waive his right to amend a pleading as of course, either by an express stipulation or by doing some act inconsistent with an intention to claim his right.[54] By noticing the issues for trial a party's right to amend his pleading as of course is not waived.[55] A party does not waive his right to amend his complaint as of course by examining the adverse party as a witness before trial.[56] The right to amend as of course after answer served is waived by applying for,[57] or obtaining,[58] leave to amend. But where the leave to amend is given to a party on a contested motion to strike out a portion of his pleading, and without his consent, and he serves a notice that he elects not to amend under the leave given, there is no waiver of the right to amend as of course, but only a waiver of the right to amend in the present stage of the action.[59]

b. Time For[60] — (i) *In General.* The statutes authorizing amendments to pleadings as of course generally prescribe the time within which such amendments may be made;[61] and when the statute does so prescribe a period for amend-

sinan *v.* Hatton, 8 Misc. (N. Y.) 98, 28 N. Y. Suppl. 1006; White *v.* Mayor, 14 How. Pr. (N. Y.) 495; Cowles *v.* Coster, 4 Hill (N. Y.) 550.

50. Freyham *v.* Wertheimer, 52 Misc. (N. Y.) 636, 102 N. Y. Suppl. 839.

51. Brooks *v.* Tiffany, 117 N. Y. App. Div. 470, 102 N. Y. Suppl. 626.

52. Lintzenich *v.* Stevens, 3 N. Y. Suppl. 394. See also Ross *v.* Dinsmore, 20 How. Pr. (N. Y.) 328. *Compare* Jeroliman *v.* Cohen, 1 Duer (N. Y.) 629.

53. Ross *v.* Dinsmore, 12 Abb. Pr. (N. Y.) 4.

54. Phillips *v.* Suydam, 6 Abb. Pr. N. S. (N. Y.) 289.

55. Clifton *v.* Brown, 27 Hun (N. Y.) 231 [*overruling* Phillips *v.* Suydam, 6 Abb. Pr. N. S. (N. Y.) 289]. See also Cusson *v.* Whalon, 5 How. Pr. (N. Y.) 302. But see Schwab *v.* Wehrle, 14 N. Y. Wkly. Dig. 529, where the court, in holding that a defendant who, in pursuance of the conditions of an order granting him additional time to answer, waived notice of trial and consented to the placing of the cause on the calendar, and after that had been done, consented to a reference of the issues, thereby waived his right to service as of course of an amended answer raising issues, assigns, as the reason therefor, that by so doing such defendant stands in the same position as if he had noticed the cause for trial upon the original answer, and thereby waived his right to amend, and cites Phillips *v.* Suydam, *supra* [*overruled* in Clifton *v.* Brown, *supra*].

56. Stilwell *v.* Kelly, 37 N. Y. Super. Ct. 417.

57. Hamilton *v.* Carrington, 41 S. C. 385, 19 S. E. 616; Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447. See also People *v.* Judges Washtenaw Cir. Ct., 1 Dougl. (Mich.) 434.

58. Lewis *v.* Watkins, 6 Hill (N. Y.) 230.

59. Ross *v.* Dinsmore, 12 Abb. Pr. (N. Y.) 4.

60. Time for amendments by leave of court see *infra*, VII, A, 10, 11.

61. See the codes and practice acts of the various states.

Where the statute permits an amendment as of course to a pleading after a demurrer thereto, a party may, after motion for judgment, on account of the frivolousness of his pleading, amend as of course, as after a demurrer, since such a motion is equivalent to a demurrer. Burrall *v.* Moore, 5 Duer (N. Y.) 654.

Amendment within forty days.— Under N. Y. Code Civ. Proc. § 798, providing that where service of notice or pleading is by mail the adverse party has double the time specified for the doing of an act by him, and section 542, providing that, within twenty days after a pleading is served, or at any time before the period for answering it expires, it may be once amended by the party of course, where an answer is served by mail defendant may amend it of course within forty days. Schlesinger *v.* Borough Bank, 112 N. Y. App. Div. 121, 98 N. Y. Suppl. 136.

A party may amend his complaint without leave of the court before summons issued, where there has been no appearance by defendant. Allen *v.* Marshall, 34 Cal. 165.

Under Cal. Code Civ. Proc. § 472, providing that any pleading may be amended once by a party as of course at any time before answer or demurrer filed, or after demurrer and before trial of the issues of law thereon,

ment, the right to amend must be exercised within that period,[62] a pleading filed thereafter being subject to the motion to strike it out.[63]

(II) *ABRIDGMENT.* If the statute secures to a party a certain and definite time in which to amend as of course, it is not within the power of the adverse party to abridge it or cut it off entirely at his pleasure.[64]

(III) *EXTENSION* — (A) *In General.* By obtaining an extension of time in which to answer, defendant extends the time of plaintiff to serve an amended complaint.[65] Likewise where a party is relieved from his default in pleading,[66] or, after demurrer sustained, is given leave to plead anew,[67] he is entitled to amend once as of course the pleading served under such leave. But an order extending the time of plaintiff to serve a reply to a counter-claim set up in the answer does not extend the time to amend the complaint as of course.[68]

(B) *Service of Previous Pleading by Mail.* The rule obtains in one jurisdiction at least that a party, by serving his pleading by mail, thereby secures for himself double the time in which to amend it as of course authorized where the service is a personal one;[69] but this rule does not apply where the pleading served by mail is an answer which, in its nature, does not admit of a reply or demurrer.[70]

c. Subjects of Amendment [71] — (I) *IN GENERAL.* The amendment may add new allegations to strengthen and complete the cause of action or defense originally set up,[72] or leave out redundant or irrelevant matter,[73] or strike out a cause of action.[74]

(II) *ALLEGING NEW CAUSES OF ACTION AND DEFENSES.*[75] Under statutes permitting amendments as of course and silent as to the nature of such amendments, it is held that such amendments are not restricted to the matters of the

plaintiff has a right to amend his complaint as of course only while an issue of law on a demurrer is undetermined, or up to the time an answer is filed in case of no demurrer, and defendant has a right to amend his answer as of course only during the time that a demurrer to the answer is undetermined, or up to the time when the right to demur expires. Tingley *v.* Times Mirror Co., 151 Cal. 1, 89 Pac. 1097.

After judgment sustaining a motion for judgment on the pleading defendant is not entitled to amend as of course. Morgan *v.* King, 27 Colo. 539, 63 Pac. 416.

62. Spooner *v.* Cady, (Cal. 1894) 36 Pac. 104; Holm *v.* Appelby, 27 Misc. (N. Y.) 49, 57 N. Y. Suppl. 266; George *v.* Grant, 56 How. Pr. (N. Y.) 244, holding, however, that where the time of amendment begins to run from the time of service, if a complaint be served on one defendant, and, after the period of amendment of course has expired, on another defendant, it may still be amended of course as to the latter, but not as to the former.

Where the time for joining an issue of law and of fact upon the pleadings has expired, and issue so joined, there is no authority for an amendment merely because issues upon subsequent pleading by the same party may not have been concluded. Holm *v.* Appelby, 27 Misc. (N. Y.) 49, 57 N. Y. Suppl. 266.

In Georgia a defendant may amend as of course, even after the time for answering has expired, by making affidavit that the amendment is not interposed for purposes of delay. Wynn *v.* Wynn, 109 Ga. 255, 34 S. E. 341.

63. Rix *v.* New York Cent., etc., R. Co., 67 N. J. L. 503, 51 Atl. 924.

64. Clor *v.* Mallory, 1 Code Rep. (N. Y.) 126.

65. Gates *v.* Canfield, 64 How. Pr. (N. Y.) 81.

66. O'Reilly *v.* Skelly, 56 Misc. (N. Y.) 122, 106 N. Y. Suppl. 1082.

67. Rodkinson *v.* Gantz, 26 Misc. (N. Y.) 268, 56 N. Y. Suppl. 480 [*affirmed* in 39 N. Y. App. Div. 670, 57 N. Y. Suppl. 1146].

68. Dawson *v.* Bogart, 10 N. Y. Civ. Proc. 56.

69. Schlesinger *v.* Borough Bank, 112 N. Y. App. Div. 121, 98 N. Y. Suppl. 136; Binder *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 281, 74 N. Y. Suppl. 54; Bates *v.* Plasmon, 41 Misc. (N. Y.) 16, 83 N. Y. Suppl. 573; Evans *v.* Lichtenstein, 9 Abb. Pr. N. S. (N. Y.) 141; Washburn *v.* Herrick, 4 How. Pr. (N. Y.) 15. *Compare* Armstrong *v.* Phillips, 60 Hun (N. Y.) 243, 14 N. Y. Suppl. 582; Seckel *v.* Tangemann, 53 Misc. (N. Y.) 268, 103 N. Y. Suppl. 77; Toomey *v.* Andrews, 48 How. Pr. (N. Y.) 332.

70. Toomey *v.* Andrews, 48 How. Pr. (N. Y.) 332.

71. By leave of court see *infra*, VII, A, 11.

72. Thompson *v.* Minford, 11 How. Pr. (N. Y.) 273. See also Spencer *v.* Tooker, 12 Abb. Pr. (N. Y.) 353.

73. Smith *v.* Pfister, 39 Hun (N. Y.) 147; Field *v.* Morse, 8 How. Pr. (N. Y.) 47.

74. Watson *v.* Rushmore, 15 Abb. Pr. (N. Y.) 51.

75. By leave of court see *infra*, VII, A, 11, a, (III); VII, A, 11, d.

original pleading,[76] that the complaint may be amended by alleging an entirely new cause of action,[77] subject to the restriction that all of the causes of action set forth in the amended complaint must be of the same class and of the same class to which the summons belongs,[78] and that the answer may be amended by setting up a new and different defense.[79]

(III) *Alleging Matters Occurring Subsequent to Commencement of Action.*[80] The complaint may not be amended as of course by alleging matters occurring subsequent to the commencement of the action.[81]

(IV) *Changing Issue of Law to Issue of Fact.* A provision of law allowing an amendment as of course, within a given time after service of the original pleading does not authorize a defendant who has demurred to the complaint, under pretense of an amendment, to change the issue of law thus presented to one of fact by serving an answer.[82]

d. What Pleadings May Be Amended. A summons by which suit is commenced is process, not pleading, and not within a statute or rule allowing any pleading to be amended as of course.[83] And if the right of amendment as of course given by the statute exists only where the pleading to be amended requires or admits of a response in the shape of an answer, reply, or demurrer, a pleading consisting only of a general denial cannot be amended as of course.[84] But a supplemental complaint is a pleading, and as such may be amended once as of course.[85]

e. Unauthorized Amendments — (I) *In General.* An amendment of a pleading as of course, when not authorized by statute or rule of court, is a mere nullity and may be disregarded by the adverse party,[86] or stricken out on motion.[87] It has been held, however, that if an amendment be proper and in proper time, and the omission to obtain leave has not been the occasion of surprise or prejudice to the adverse party, it will be considered by the court.[88]

(II) *Ratification.* A party may, by consent, ratify the making of an unauthorized amendment.[89]

f. Effect — (I) *On Issues Previously Joined.* The service of an amended pleading, as of course, destroys issues previously joined, and nullifies a notice of trial thereof.[90]

76. Wyman *v.* Remond, 18 How. Pr. (N. Y.) 272; Thompson *v.* Minford, 11 How. Pr. (N. Y.) 273. *Contra*, Hollister *v.* Livingston, 9 How. Pr. (N. Y.) 140.

77. Brown *v.* Leigh, 49 N. Y. 78; Mussinan *v.* Tatton, 8 Misc. (N. Y.) 95, 28 N. Y. Suppl. 1006; Divine *v.* Duncan, 2 Abb. N. Cas. (N. Y.) 328. See also Wyman *v.* Remond, 18 How. Pr. (N. Y.) 272. *Contra*, Hollister *v.* Livingston, 9 How. Pr. (N. Y.) 140. And see Minton *v.* Palmer, (Nebr.) 112 N. W. 610.

78. Lumpkin *v.* Collier, 69 Mo. 170; Brown *v.* Leigh, 49 N. Y. 78; Mussinan *v.* Hatton, 8 Misc. (N. Y.) 95, 28 N. Y. Suppl. 1006. See also Smith *v.* Hilton, 50 Hun (N. Y.) 236, 2 N. Y. Suppl. 820.

79. McQueen *v.* Babcock, 3 Abb. Dec. (N. Y.) 129, 3 Keyes 428; Wyman *v.* Remond, 18 How. Pr. (N. Y.) 272. See also Spencer *v.* Tooker, 12 Abb. Pr. (N. Y.) 353.

80. See, generally, *infra*, VII, A, 8.

81. Hornfager *v.* Hornfager, 6 How. Pr. (N. Y.) 13.

82. Cashman *v.* Reynolds, 123 N. Y. 138, 25 N. E. 162, holding further that such a change of position by the pleader is not an amendment, but an entire change of the line of defense from the law to the facts.

83. McCrane *v.* Moulton, 3 Sandf. (N. Y.) 736.

84. Farrand *v.* Heberson, 3 Duer (N. Y.) 655; Lampson *v.* McQueen, 15 How. Pr. (N. Y.) 345; Plumb *v.* Whipples, 7 How. Pr. (N. Y.) 411; Whitefoot *v.* Leffingwell, 90 Wis. 182, 63 N. W. 82.

85. Divine *v.* Duncan, 2 Abb. N. Cas. (N. Y.) 328.

86. Hopkins *v.* Cothran, 17 Kan. 173; Missouri, etc., R. Co. *v.* Wilson, 10 Kan. 105; Luke *v.* Johnycake, 9 Kan. 511; Ferrand *v.* Herbeson, 3 Duer (N. Y.) 655; Cowles *v.* Coster, 4 Hill (N. Y.) 550; Whitefoot *v.* Leffingwell, 90 Wis. 182, 63 N. W. 82.

87. Allen *v.* Bidwell, 35 Iowa 86; Jeffs *v.* Flickenger, 14 Kan. 308; Johnston *v.* Marshall, 14 Tex. 490.

88. Connell *v.* Chandler, 11 Tex. 249. See also Hopkins *v.* Seay, 94 Tenn. 538, 29 S. W. 899.

89. Jeffs *v.* Flickenger, 14 Kan. 308; Whitefoot *v.* Leffingwell, 90 Wis. 182, 63 N. W. 82.

90. Coler *v.* Lamb, 19 N. Y. App. Div. 236, 46 N. Y. Suppl. 117; Ostrander *v.* Conkey, 20 Hun (N. Y.) 421; Evans *v.* Olmstead, 31 Misc. (N. Y.) 692, 66 N. Y. Suppl. 63; Jones *v.* Seaman, 30 Misc. (N. Y.) 65, 62 N. Y. Suppl. 883; Yates *v.* McAdam,

(II) *On Pending Motion For Bill of Particulars.* The service in good faith of an amended pleading, as of course, after notice of motion for a bill of particulars, supersedes the original pleading, and thus deprives the motion of the basis on which it rests.[91] But the service of an amended pleading will not be permitted to defeat a motion for a bill of particulars, where such pleading throws little or no light on the particulars demanded, and is evidently made only to defeat the motion.[92]

(III) *On Pending Motion to Strike Out Pleading Amended.* The effect of the service of an amendment as of course curing an irregularity in a pleading is to defeat a pending motion to strike out such pleading for the irregularity so cured.[93]

g. Striking Out Pleading Served For Delay. When an amended pleading as of course is served for the purpose of delay, the remedy of the party aggrieved is by motion to strike it out;[94] but, to authorize the striking out of such pleading on the ground that it was interposed for delay, it must appear not only that the pleading was served for that purpose,[95] but that its effect would be to prevent a trial at the ensuing term.[96] And if the amendment is made in good faith, and not for the purpose of delay, the amended pleading cannot be stricken out, although the effect may be to deprive the adverse party of the benefit of a term.[97]

6. Amendments by Leave of Court[98] **— a. In General.** In many jurisdictions it is provided by statute that in addition to voluntary amendments of course, the court may, upon seasonable application, permit an amendment at any time before, and in many of the states, after, judgment, upon such terms as may seem reasonable.[99] Leave to amend will be liberally granted where the proposed amendment will not so change the case as to cause surprise to the other party.[1] Pleadings can

18 Misc. (N. Y.) 295, 42 N. Y. Suppl. 109; Gair *v.* Birmingham, 15 N. Y. Suppl. 147, 20 N. Y. Civ. Proc. 233. See also Langey *v.* Swasey, 54 Misc. (N. Y.) 301, 103 N. Y. Suppl. 1086.

91. Callahan *v.* Gilman, 11 N. Y. App. Div. 522, 42 N. Y. Suppl. 497.

92. Hanser *v.* Luther, 36 Misc. (N. Y.) 730, 74 N. Y. Suppl. 357.

93. Rider *v.* Bates, 66 How. Pr. (N. Y.) 129; Welch *v.* Preston, 58 How. Pr. (N. Y.) 52. *Contra*, Prudden *v.* Lockport, 40 How. Pr. (N. Y.) 46; Williams *v.* Wilkinson, 5 How. Pr. (N. Y.) 357.

94. Ostrander *v.* Conkey, 20 Hun (N. Y.) 421; Evans *v.* Olmstead, 31 Misc. (N. Y.) 692, 66 N. Y. Suppl. 63; Yates *v.* McAdam, 18 Misc. (N. Y.) 295, 42 N. Y. Suppl. 109.

95. Harney *v.* Provident Sav. L. Assur. Soc., 41 N. Y. App. Div. 410, 58 N. Y. Suppl. 822; Conquest *v.* Barnes, 4 N. Y. Suppl. 696, 16 N. Y. Civ. Proc. 268; Griffin *v.* Cohen, 8 How. Pr. (N. Y.) 451.

There is no presumption that the amendment is made for the purpose of delay, where a defendant, sued for the value of goods sold and delivered, amends his answer within the time amendment may be made as of course by setting out a counter-claim for damages caused by the delay of plaintiff in delivering. Beyer *v.* Henry Huber Co., 115 N. Y. App. Div. 342, 100 N. Y. Suppl. 1029.

A proposition to compromise and a threat to delay the action may be shown in support of a motion to strike out an amended pleading on the ground that it was served for the purpose of delay. Naylor *v.* Loomis, 79 N. Y. App. Div. 21, 79 N. Y. Suppl. 1011.

96. Harney *v.* Provident Sav. L. Assur. Soc., 41 N. Y. App. Div. 410, 58 N. Y. Suppl. 822; Conquest *v.* Barnes, 4 N. Y. Suppl. 696, 16 N. Y. Civ. Proc. 268; Griffin *v.* Cohen, 8 How. Pr. (N. Y.) 451.

If the party serving the amended pleading stipulates to try the cause at the term for which it has been noticed for trial, the court has no authority to strike out the amended pleading. Harney *v.* Provident Sav. L. Assur. Soc., 41 N. Y. App. Div. 410, 58 N. Y. Suppl. 822.

97. Griffin *v.* Cohen, 8 How. Pr. (N. Y.) 451.

98. **Time of making** see *infra*, VII, A, 10, 11.

99. Cal. Code Civ. Proc. Pom. (1901) § 473; N. Y. Code Civ. Proc. Stover (1902), § 723. And see statutes of other states generally on this point. It is provided in many of the statutes that no judgment shall be reversed or disturbed by reason of an error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties. N. Y. Code Civ. Proc. Stover (1902), § 721, specifically enumerating twelve classes of errors which, although not corrected by amendment, shall not affect the judgment.

"The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the judiciary act of 1789," now U. S. Rev. St. (1878) § 954 [U. S. Comp. St. (1901) p. 696]. McDonald *v.* Nebraska, 101 Fed. 171, 41 C. C. A. 278.

1. *Colorado.*— Browns *v.* Lutin, 16 Colo. App. 263, 64 Pac. 674.

be amended only in the court where the case is pending,[2] and not in a court having no jurisdiction;[3] and leave to amend should be deemed leave to amend in the existing stage of the action.[4] If an amended pleading be irregularly filed without leave, and the court later overrules a motion to strike such pleading from the files,[5] or recognizes it and embodies it in his instructions to the jury,[6] the irregularity of the filing is cured. Where it would be an abuse of the court's discretion to refuse to allow the amendment upon seasonable application, it must be permitted to stand even though improperly filed without leave.[7]

b. Discretion of the Court.[8] The allowance or refusal of amendments is a matter which is largely within the sound discretion of the trial court.[9] The

Idaho.— Kindall *v.* Lincoln Hardware, etc., Co., 10 Ida. 13, 76 Pac. 992.

Missouri.— Chauvin *v.* Lownes, 23 Mo. 223.

New York.— Van Allan *v.* Gordon, 92 Hun 500, 36 N. Y. Suppl. 987.

Wisconsin.— Gillett *v.* Robbins, 12 Wis. 319.

United States.— Tiernan *v.* Woodruff, 23 Fed. Cas. No. 14,027, 5 McLean 135.

Amendments causing surprise see, generally, *infra*, VII, A, 7.

Severance in offer of amendment.— While one of two persons sued jointly may adopt an answer filed by the other, they have no right to unite in tendering an amendment to an independent answer of one of them. Equitable Bldg., etc., Assoc. *v.* Holloway, 114 Ga. 780, 40 S. E. 742.

2. Camden, etc., R. Co. *v.* Stewart, 18 N. J. Eq. 489; Johnston *v.* Hubbell, Wright (Ohio) 69.

3. Wadsworth *v.* Harris, 1 Rob. (La.) 96; Watson *v.* Pierce, 6 Mart. N. S. (La.) 416; Goff *v.* Robinson, 60 Vt. 633, 15 Atl. 339. *Compare* Wakeman *v.* Throckmorton, 74 Conn. 616, 51 Atl. 554, holding that a grant of a stay of action in a state court, pursuant to the Bankruptcy Act of 1898, section 11, did not prevent such court from allowing an amendment of the complaint.

After withdrawal of a juror.— Where, after commencement of the trial, a juror is withdrawn to permit plaintiff to amend, the trial term loses jurisdiction to authorize the amendment and plaintiff must apply for leave at special term. Wood *v.* McGuire, 26 Misc. (N. Y.) 200, 55 N. Y. Suppl. 746.

4. Ross *v.* Dinsmore, 12 Abb. Pr. (N. Y.) 4.

5. McCollum *v.* Lougan, 29 Mo. 451; Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973; Thomas *v.* Young, 5 Tex. 253; Marion Phosphate Co. *v.* Cummer, 60 Fed. 873, 9 C. C. A. 279.

6. Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710.

7. Miller *v.* Perry, 38 Iowa 301.

8. **Discretion in imposing conditions** see *infra*, VII, A, 6, e, (v), (A).

9. *Alabama.*— Hill *v.* Bishop, 2 Ala. 320; Tate *v.* Gilbert, 2 Port. 386.

Arizona.— Brady *v.* Pinal County, 8 Ariz. 114, 71 Pac. 910.

Arkansas.— King *v.* Caldwell, 26 Ark. 405; Mohr *v.* Sherman, 25 Ark. 7.

California.— San Joaquin Valley Bank *v.* Dodge, 125 Cal. 77, 57 Pac. 687; Smith *v.* Ferries, etc., R. Co., (1897) 51 Pac. 710; Ford *v.* Kenton, (1895) 40 Pac. 1031; Fitzgerald *v.* Neustadt, 91 Cal. 600, 27 Pac. 936; Walsh *v.* McKeen, 75 Cal. 519, 17 Pac. 673; Cheney *v.* O'Brien, 69 Cal. 199, 10 Pac. 479; Jessup *v.* King, 4 Cal. 331; Rose *v.* Doe, 4 Cal. App. 680, 89 Pac. 135. See Bradley *v.* Parker, (1893) 34 Pac. 234, as an authority for the statement that amendments are probably allowed with greater liberality in California than in any other jurisdiction of the United States.

Colorado.— Tanner *v.* Harper, 32 Colo. 156, 75 Pac. 404; Tomboy Gold Mines Co. *v.* Arapahoe County Dist. Ct., 23 Colo. 441, 48 Pac. 537; Dyer *v.* McPhee, 6 Colo. 174.

Connecticut.— Hillyer *v.* Winsted, 77 Conn. 304, 59 Atl. 40; Bulkley *v.* Andrews, 39 Conn. 523; North *v.* Nichols, 39 Conn. 355; Merriam *v.* Langdon, 10 Conn. 460.

District of Columbia.—German Evangelical Soc. *v.* Prospect Hill Cemetery, 3 App. Cas. 310.

Georgia.— Ripley *v.* Eady, 106 Ga. 422, 32 S. E. 343.

Idaho.— Small *v.* Harrington, 10 Ida. 499, 79 Pac. 461; Lowe *v.* Long, 5 Ida. 122, 47 Pac. 93.

Illinois.—Anderson Transfer Co. *v.* Fuller, 174 Ill. 221, 51 N. E. 251; Chicago, etc., R. Co. *v.* Logue, 158 Ill. 621, 42 N. E. 53; Schmidt *v.* Braley, 112 Ill. 48, 1 N. E. 267; Misch *v.* McAlpine, 78 Ill. 507; Phillips *v.* Dana, 2 Ill. 498; Knights Templars, etc., Life Indemnity Co. *v.* Crayton, 110 Ill. App. 648 [*affirmed* in 209 Ill. 550, 70 N. E. 1066]; Chicago Architectural Iron Works *v.* McKey, 93 Ill. App. 244; Berkowsky *v.* Specter, 79 Ill. App. 215; B. F. Sturtevant Co. *v.* Sullivan, 69 Ill. App. 47; Ridgely Nat. Bank *v.* Fairbank, 54 Ill. App. 296.

Indiana.— Nysewander *v.* Lowman, 124 Ind. 584, 24 N. E. 355; Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135; Shropshire *v.* Kennedy, 84 Ind. 111; Musselman *v.* Musselman, 44 Ind. 106; Warden *v.* Nolan, 10 Ind. App. 334, 37 N. E. 821; Peigh *v.* Huffman, 6 Ind. App. 658, 34 N. E. 32.

Iowa.— Weis *v.* Morris, 102 Iowa 327, 71 N. W. 208; Hensinkveld *v.* St. Paul F. & M. Ins. Co., 96 Iowa 224, 64 N. W. 769; Hays *v.* Turner, 23 Iowa 214; State *v.* Keokuk, 18 Iowa 388; Brockman *v.* Berryhill, 16 Iowa 183; Dunton *v.* Thorington, 15 Iowa 217; Hatfield *v.* Gano, 15 Iowa 177.

question of advisability is a question of fact which is to be determined by that

Kansas.— Rogers *v.* Hodgson, 46 Kan. 276, 26 Pac. 732; Tefft *v.* Fiery, 22 Kan. 753; Brokaw *v.* Bartley, 9 Kan. App. 318, 61 Pac. 320; Mitchell *v.* Ripley, 5 Kan. App. 818, 49 Pac. 153.

Kentucky.— Edmonson *v.* Kentucky Cent. R. Co., 105 Ky. 479, 49 S. W. 200, 448, 20 Ky. L. Rep. 1296; Greer *v.* Covington, 83 Ky. 410, 2 S. W. 323, 7 Ky. L. Rep. 419; Goff *v.* Lowe, 80 S. W. 219, 25 Ky. L. Rep. 2176; Guthrie *v.* Guthrie, 78 S. W. 474, 25 Ky. L. Rep. 1701; Burkholder *v.* Farmers' Bank, 67 S. W. 832, 23 Ky. L. Rep. 2449; Bryant *v.* Cooney, 40 S. W. 918, 19 Ky. L. Rep. 423.

Louisiana.— Spencer *v.* Conrad, 9 Rob. 78; Rouzan's Succession, 7 Rob. 436; Tucker *v.* Liles, 4 La. 297; Benoit *v.* Hebert, 1 La. 212.

Maine.— Bolster *v.* China, 67 Me. 551; Fox *v.* Conway F. Ins. Co., 53 Me. 107; Moor *v.* Shaw, 47 Me. 88; Cummings *v.* Buckfield Branch R. Co., 35 Me. 478; Newall *v.* Hussey, 18 Me. 249, 36 Am. Dec. 717; Carter *v.* Thompson, 15 Me. 464; Foster *v.* Haines, 13 Me. 307; Clapp *v.* Balch, 3 Me. 216; Wyman *v.* Dorr, 3 Me. 183.

Maryland.— Hearn *v.* Quillen, 94 Md. 39, 50 Atl. 402; Forrestell *v.* Wood, (1891) 23 Atl. 133; Warren *v.* Twilley, 10 Md. 39; Gordon *v.* Downey, 1 Gill 41.

Massachusetts.— Benjamin *v.* Casey, 181 Mass. 542, 63 N. E. 925; Augur Steel Axle, etc., Co. *v.* Whittier, 117 Mass. 451; Lang *v.* Bunker, 6 Allen 61.

Michigan.— Hoyt *v.* Wayne Cir. Judge, 117 Mich. 172, 75 N. W. 295; Beneway *v.* Thorp, 77 Mich. 181, 43 N. W. 863.

Minnesota.— St. Cloud First Nat. Bank *v.* Lang, 94 Minn. 261, 102 N. W. 700; Osborne *v.* Williams, 37 Minn. 507, 35 N. W. 371; White *v.* Culver, 10 Minn. 192; Butler *v.* Paine, 8 Minn. 324; Morrison *v.* Lovejoy, 6 Minn. 319; Fowler *v.* Atkinson, 5 Minn. 505.

Missouri.— Ensworth *v.* Barton, 67 Mo. 622; Allen *v.* Ranson, 44 Mo. 263, 100 Am. Dec. 282; Chauvin *v.* Lownes, 23 Mo. 223.

Montana.— Bennett *v.* Tillmon, 18 Mont. 28, 44 Pac. 80.

Nebraska.— Dickenson *v.* Columbus State Bank, 71 Nebr. 260, 98 N. W. 813; Chicago, etc., R. Co. *v.* Martelle, 65 Nebr. 540, 91 N. W. 364; Chicago, etc., R. Co. *v.* Shaw, 63 Nebr. 380, 88 N. W. 508, 56 L. R. A. 341; Gage *v.* West, 62 Nebr. 612, 87 N. W. 344; Imhoff *v.* Richards, 48 Nebr. 590, 67 N. W. 483; Omaha, etc., R. Co. *v.* Moschel, 38 Nebr. 881, 56 N. W. 875; Commercial Nat. Bank *v.* Gibson, 37 Nebr. 750, 56 N. W. 616; Johnson *v.* Swayze, 35 Nebr. 117, 52 N. W. 835; Mills *v.* Miller, 3 Nebr. 87; Donovan *v.* Hibbler, 3 Nebr. (Unoff.) 652, 92 N. W. 637.

New Jersey.— Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553; Seymour *v.* Long Dock Co., 17 N. J. Eq. 169.

New York.— Lindblad *v.* Lynde, 81 N. Y. App. Div. 603, 81 N. Y. Suppl. 351; Zinsser *v.* Columbia Cab Co., 66 N. Y. App. Div. 514, 73 N. Y. Suppl. 287; Rice *v.* Coutant, 38 N. Y. App. Div. 543, 56 N. Y. Suppl. 351; Gallagher *v.* Kingston Water Co., 25 N. Y. App. Div. 82, 49 N. Y. Suppl. 250 [*affirmed* in 164 N. Y. 602, 58 N. E. 1087]; Hentz *v.* Havemeyer, 15 N. Y. App. Div. 357, 44 N. Y. Suppl. 58; Durham *v.* Chapin, 13 N. Y. App. Div. 94, 43 N. Y. Suppl. 342; Van Allan *v.* Gordon, 92 Hun 500, 36 N. Y. Suppl. 987; Roth *v.* Schloss, 6 Barb. 308; Nethercott *v.* Kelly, 57 N. Y. Super. Ct. 27, 5 N. Y. Suppl. 259.

North Carolina.— Cantwell *v.* Herring, 127 N. C. 81, 37 S. E. 140; State *v.* Caraleigh Phosphate, etc., Works, 123 N. C. 162, 31 S. E. 373; Turner *v.* Child, 12 N. C. 133, 17 Am. Dec. 555.

Ohio.— McLaughlin *v.* Barnes, 18 Ohio Cir. Ct. 623, 8 Ohio Cir. Dec. 499.

Oregon.— Sears *v.* Dunbar, (1907) 91 Pac. 145; Pacific Mill Co. *v.* Inman, (1907) 90 Pac. 1099; Baines *v.* Coos Bay Nav. Co., 45 Oreg. 307, 77 Pac. 400; Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648; Nunn *v.* Bird, 36 Oreg. 515, 59 Pac. 808; Farmers' Bank *v.* Saling, 33 Oreg. 394, 54 Pac. 190; Brauns *v.* Stearns, 1 Oreg. 367.

Pennsylvania.— Hileman *v.* Hileman, 172 Pa. St. 323, 33 Atl. 575; Young *v.* Com., 6 Binn. 88; Mooney *v.* Snyder, 7 Del. Co. 335; Peart *v.* Prosser, 6 Lanc. Bar 194.

Rhode Island.—Greene *v.* Harris, 11 R. I. 5.

South Carolina.— Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375; Lockwood *v.* Charleston Bridge Co., 60 S. C. 492, 38 S. E. 112, 629; Millan *v.* Southern R. Co., 54 S. C. 485, 32 S. E. 539; Stallings *v.* Barrett, 26 S. C. 474, 2 S. E. 483; Trumbo *v.* Finley, 18 S. C. 305; Mobley *v.* Mobley, 7 Rich. 431; Hester *v.* Hagood, 3 Hill 195.

South Dakota.— Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447.

Tennessee.— Dockerey *v.* Miller, 9 Humphr. 731.

Texas.— Jenn *v.* Spencer, 32 Tex. 657; Teas *v.* McDonald, 13 Tex. 349, 65 Am. Dec. 65; Cartwright *v.* Chabert, 3 Tex. 261, 49 Am. Dec. 742; Hamilton *v.* Bell, 37 Tex. Civ. App. 456, 84 S. W. 289; Lewis *v.* Hoeldtke, (Civ. App. 1903) 76 S. W. 309; Brown *v.* Viscaya, (Civ. App. 1897) 42 S. W. 309.

Vermont.— Lamoille County Nat. Bank *v.* Hunt, 72 Vt. 357, 47 Atl. 1078; Burton *v.* Burton, 58 Vt. 414, 5 Atl. 281.

Virginia.— Stephens *v.* White, 2 Wash. 203.

Wisconsin.— Rice *v.* Ashland County, 114 Wis. 130, 89 N. W. 908; Morgan *v.* Bishop, 61 Wis. 407, 21 N. W. 263; Sweet *v.* Mitchell, 19 Wis. 524; Bean *v.* Moore, 2 Pinn. 392; Fowler *v.* Colton, 1 Pinn. 331.

United States.— Wright *v.* Hollingsworth, 1 Pet. 165, 7 L. ed. 96; Mandeville *v.* Wilson, 5 Cranch 15, 3 L. ed. 23; Moore *v.* Petty, 135 Fed. 668, 68 C. C. A. 306; Alaska Commercial Co. *v.* Williams, 128 Fed. 362, 63 C. C. A. 92; Merchants' Life Assoc. *v.* Yoakum, 98 Fed. 251, 39 C. C. A. 56; Bu-

court,[10] and the determination thereof will be reviewed only in case the court grossly abuses its discretion;[11] but the presumption is always against such abuse.[12] The court, however, must exercise its sound legal discretion, and not its arbitrary will.[13] The improper allowance of an amendment is a more serious ground for complaint than its refusal, because in the former case the issue is more or less affected, while in the latter the parties are left to try the issue they themselves have selected.[14] There is no abuse of the discretion of the court in allowing an amendment where the parties are not prejudiced nor the cause postponed.[15]

c. Proper Exercise of Discretion — (i) *Immaterial Amendments.* It is not error to refuse an amendment that will not materially aid applicant's case;[16]

chanan *v.* Cleveland Linseed Oil Co., 91 Fed. 88, 33 C. C. A. 351; Federal Mfg., etc., Co. *v.* U. S., 41 Ct. Cl. 318.

England.—Cropper *v.* Smith, 26 Ch. D. 700, 53 L. J. Ch. 891, 51 L. T. Rep. N. S. 733, 33 Wkly. Rep. 60; Hemming *v.* Maddick, L. R. 9 Eq. 175; Dillon *v.* Balfour, L. R. 20 Ir. 600; Morgan *v.* Pike, 14 C. B. 473, 2 C. L. R. 696, 23 L. J. C. P. 64, 2 Wkly. Rep. 193, 78 E. C. L. 473; Speeding *v.* Young, 16 C. B. N. S. 824, 111 E. C. L. 824; St. Losky *v.* Green, 9 C. B. N. S. 370, 2 F. & F. 106, 7 Jur. N. S. 394, 30 L. J. C. P. 19, 3 L. T. Rep. N. S. 297, 9 Wkly. Rep. 119, 99 E. C. L. 370; Tennyson *v.* O'Brien, 5 E. & B. 497, 85 E. C. L. 497; Parsons *v.* Alexander, 5 E. & B. 263, 1 Jur. N. S. 660, 3 Wkly. Rep. 510, 85 E. C. L. 263; Ritchie *v.* Van Gelder, 9 Exch. 762, 18 Jur. 385, 2 Wkly. Rep. 418; Holden *v.* Ballantyne, 6 Jur. N. S. 451, 29 L. J. Q. B. 148, 2 L. T. Rep. N. S. 149, 8 Wkly. Rep. 390.

Canada.— Sheerman *v.* Toronto, 34 U. C. Q. B. 451; Montreal Bank *v.* Reynolds, 24 U. C. Q. B. 381; Upper Canada Bank *v.* Ruttan, 22 U. C. Q. B. 451; Guillot *v.* Garant, 11 Quebec K. B. 282.

See 39 Cent. Dig. tit. "Pleading," § 601.

After argument on a demurrer.—After an argument on a demurrer a court is not bound to give the party whose pleadings are attacked an opportunity to amend until the questions raised on demurrer are settled. Ripley *v.* Eady, 106 Ga. 422, 32 S. E. 343.

After demurrer sustained see *supra*, VI, L, 8, d.

After two trials.— The fact that there have been two trials in which the verdicts have been set aside is not controlling in the exercise by a circuit court of discretion in allowing amendments in furtherance of justice. Pickett *v.* Southern R., Carolina Div., 74 S. C. 236, 54 S. E. 375.

10. Jenness *v.* Jones, 68 N. H. 475, 44 Atl. 607; Broadhurst *v.* Morgan, 66 N. H. 480, 29 Atl. 553; Morgan *v.* Joyce, 66 N. H. 476, 30 Atl. 1119; Gage *v.* Gage, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829; Morse *v.* Whitcher, 64 N. H. 590, 15 Atl. 217; Langdon *v.* Buchanan, 62 N. H. 657; Logue *v.* Clark, 62 N. H. 184; Barker *v.* Savage, 58 N. H. 252; Piper *v.* Hilliard, 58 N. H. 198; Baker *v.* Davis, 22 N. H. 27; Wendell *v.* Mugridge, 19 N. H. 109; Hall *v.* Woodward 30 S. C. 564, 9 S. E. 684.

11. See Appeal and Error, 3 Cyc. 327, 328.

12. *California.*— Cheney *v.* O'Brien, 69 Cal. 199, 10 Pac. 479; Jessup *v.* King, 4 Cal. 331.

Illinois.— Schmidt *v.* Braley, 112 Ill. 48, 1 N. E. 267.

Indiana.— Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135.

Iowa.— Heusinkveld *v.* St. Paul F., etc., Ins. Co., 96 Iowa 224, 64 N. W. 769; Wilson *v.* Johnson, 1 Greene 147.

Minnesota.— St. Cloud First Nat. Bank *v.* Lang, 94 Minn. 261, 102 N. W. 700.

See 39 Cent. Dig. tit. "Pleading," § 601.

13. Tomboy Gold Mines Co. *v.* Arapahoe County Dist. Ct., 23 Colo. 441, 48 Pac. 537; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Zimmerman *v.* Amaker, 10 S. C. 98.

14. German Evangelical Soc. *v.* Prospect Hill Cemetery, 2 App. Cas. (D. C.) 310.

15. *Montana.*— Bennett *v.* Tillmon, 18 Mont. 28, 44 Pac. 80.

Nebraska.— Omaha, etc., R. Co. *v.* Moschel, 38 Nebr. 281, 56 N. W. 875; Johnson *v.* Swayze, 35 Nebr. 117, 52 N. W. 835; Mills *v.* Miller, 3 Nebr. 87.

New York.— Roth *v.* Schloss, 6 Barb. 308.

North Carolina.— Cantwell *v.* Herring, 127 N. C. 81, 37 S. E. 140.

Washington.— Biddle Purchasing Co. *v.* Port Townsend Steel Wire, etc., Co., 16 Wash. 681.

England.—*In re* Traufort *v.* Blanc, 53 L. T. Rep. N. S. 498, 34 Wkly. Rep. 56; Clarapede *v.* Commercial Union Assoc., 32 Wkly. Rep. 262.

See 39 Cent. Dig. tit. "Pleading," § 601.

16. *Alabama.*— Nash *v.* Southern R. Co., 136 Ala. 177, 33 So. 932, 96 Am. St. Rep. 19.

Georgia.— Rast *v.* Germania Loan, etc., Co., 115 Ga. 935, 42 S. E. 218.

Indiana.— Gardner *v.* Case, 111 Ind. 494, 13 N. E. 36; Gardner *v.* Jaques, 54 Ind. 566; McDaniel *v.* Graves, 12 Ind. 465.

Iowa.— Maich *v.* Crangle, 80 Iowa 650, 45 N. W. 578; Mansfield *v.* Wilkerson, 26 Iowa 482; Allison *v.* Barrett, 16 Iowa 278.

Kentucky.— Duis *v.* Fisher, 65 S. W. 337, 23 Ky. L. Rep. 1425.

Maine.— Hardy *v.* Nelson, 27 Me. 525.

Missouri.— Steinhauser *v.* Spraul, 114 Mo. 551, 21 S. W. 515, 859.

New York.— Hoard *v.* Garner, 1 Sandf. 614; Thorp *v.* Heyman, 16 Misc. 591, 38

however, it is not reversible error to allow an unnecessary or immaterial amendment.[17]

(II) *Technical Amendments.* It is a proper exercise of the court's discretion to refuse to allow an amendment, introducing technicalities not tending to the promotion of justice.[18]

(III) *Repetition of Original Allegations.* The court may,[19] or may not,[20] in its discretion, allow an amendment setting forth substantially the same facts appearing in the original pleading, and the court may permit an amended pleading to remain on file, although it contain substantially the same matter as an amendment already stricken out.[21]

(IV) *Relation to Evidence.* Where the evidence shows plainly that a party has no right to recover, the court may very properly refuse any request to amend.[22] But after evidence not within the issues has been offered and admitted, without objection, the court should allow the pleadings to be amended even though the facts were known to the party desiring to amend at the time the original pleading was filed.[23]

(V) *Successive Amendments.* If the statute confers discretionary power on the court to allow amendments, without limiting the number thereof, the

N. Y. Suppl. 742; Work *v.* Rexford, 11 N. Y. Suppl. 616; Griswold *v.* Sedgwick, 1 Wend. 126. And see Wehle *v.* Koch, 60 N. Y. Super. Ct. 427, 19 N. Y. Suppl. 189.

Pennsylvania.— Peterson *v.* Pennsylvania R. Co., 195 Pa. St. 494, 46 Atl. 112 (where the evidence disclosed that the desired amendment would have been of no avail); Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

Virginia.— Union Bank *v.* Richmond, 94 Va. 316, 26 S. E. 821.

Wisconsin.— Rice *v.* Ashland County, 114 Wis. 130, 89 N. W. 908; Baxter *v.* State, 15 Wis. 488.

Canada.—Chartrand *v.* Smart, 4 Quebec Pr. 41.

And see *infra*, VII, A, 11, u.

Applications of rule.—An amendment is properly refused where the plea of limitations will be good against the pleading as amended (Patterson *v.* Doe, 130 Cal. 333, 62 Pac. 569), where the amendment embracing matter fully set out in an amendment previously allowed (Wright *v.* Roberts, 116 Ga. 194, 42 S. E. 369), where granting leave will result in allowing the party to amend himself out of court (Skellie *v.* Central R., etc., Co., 81 Ga. 56, 6 S. E. 811), where the proposed amendment will raise a fruitless inquiry (Yorkshire R. Wagon Co. *v.* Maclure, 19 Ch. D. 478, 51 L. J. Ch. 259, 45 L. T. Rep. N. S. 751, 30 Wkly. Rep. 291), where the amendment has no relevancy to the cause of action, but is introduced merely for the purpose of disqualifying a juror (Haney School Furniture Co. *v.* Hightower Baptist Inst., 113 Ga. 289, 38 S. E. 761), where the matter sought to be introduced by amendment does not support the claim or defense (Kahn *v.* Thomson, 113 Ga. 957, 39 S. E. 322; Louisville, etc., R. Co. *v.* Jordan, 112 Ky. 473, 66 S. W. 27, 23 Ky. L. Rep. 1730; Hatler *v.* Hunter, 1 Tex. App. Civ. Cas. § 9). And if not introduced in support of the cause of action but in reply to matter set up in defendant's cross complaint, the amendment may properly be refused. Wood *v.* Brown, 104 Iowa 124, 73 N. W. 608.

Abandoned pleading.—An amendment is properly allowed of a pleading upon which the parties go to trial, but it is not permitted of a pleading that has been abandoned, stricken out, or ruled out of consideration in the case. Renfro *v.* Prior, 22 Mo. App. 403.

17. Nichols *v.* Dedrick, 61 Minn. 513, 63 N. W. 1110; McCready *v.* Staten Island R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl. 996.

18. U. S. *v.* Badeau, 31 Fed. 697.

Thus it is proper to refuse to permit a plea of infancy to be interposed after the close of the evidence (Forrestell *v.* Wood, (Md. 1891) 23 Atl. 133), or an amendment of an answer after the submission of the cause, by adding a plea of limitations (San Joaquin Valley Bank *v.* Dodge, 125 Cal. 77, 57 Pac. 687).

19. Woodley *v.* Coker, 119 Ga. 226, 46 S. E. 89; Georgia Cent. R. Co. *v.* Mosely, 112 Ga. 914, 38 S. E. 350 (amplifying and explaining more fully the original cause of action); Nysewander *v.* Lowman, 124 Ind. 584, 24 N. E. 355.

20. Heilbron *v.* Kings River, etc., Co., 76 Cal. 11, 17 Pac. 933; Klippel *v.* Oppenstein, 8 Colo. App. 187, 45 Pac. 224 (amendment setting up same matter only using more apt words); Mayer *v.* Woodbury, 14 Iowa 57.

21. Martin *v.* Shannon, 101 Iowa 620, 70 N. W. 720.

22. *Alabama.*— Nash *v.* Southern R. Co., 136 Ala. 177, 33 So. 932, 96 Am. St. Rep. 19.

Iowa.— Rock Island Plow Co. *v.* Maynard Sav. Bank, 123 Iowa 640, 99 N. W. 298.

New York.— Johnson *v.* Brooklyn Heights R. Co., 63 N. Y. App. Div. 374, 71 N. Y. Suppl. 568.

Pennsylvania.— Peterson *v.* Pennsylvania R. Co., 195 Pa. St. 494, 46 Atl. 112.

Wisconsin.— Dickson *v.* Pritchard, 111 Wis. 310, 87 N. W. 292.

23. Farmers' Nat. Gold Bank *v.* Stover, 60 Cal. 387.

action of the court, after amendment had, in allowing or refusing a further amendment, is not, in the absence of clear abuse of discretion, subject for review.[24] The rule generally prevailing is that after a party has once amended on demurrer, the court will not grant leave to amend again on a second demurrer,[25] especially after argument and judgment rendered thereon,[26] or where the action is on a statute and the second demurrer turned on the construction of the statute.[27] But where there has been but one demurrer, an amendment will be allowed thereon, although there has been a previous amendment pursuant to leave of court.[28] Upon offering a second amended complaint, a party must show that his proposed amendment is material.[29]

(VI) *Effect of Delay in Application.*[30] Delay in application may be a ground for justly refusing to allow an amendment.[31] It is not an abuse of discretion to refuse an amendment after a motion for nonsuit has been argued, and the court is about to pronounce judgment,[32] nor after a party has once had leave to amend and has failed to do so within the time prescribed in the court's order.[33] It is not an abuse of discretion to refuse to allow an amendment introducing a cross complaint after the trial of the original issues,[34] nor to refuse permission to substantially change any matter after the issues are made up,[35] nor to amend a notice of special matter at the trial,[36] nor when, for any reason, the other party will be prejudiced by the delay.[37]

(VII) *Effect of Stipulation of Parties.* Even though the parties agree in open court to confine the controversy to a single issue made by the pleadings, it is discretionary with the court to permit an amendment which will introduce another issue.[38]

(VIII) *Good Faith of Party Asking Amendment.* A party seeking to amend must show good faith. Where the amendment seeks to delay the action,[39] evade the issues,[40] or vex and harass an opponent,[41] leave to file will be denied.

(IX) *Miscellaneous Amendments.* It is not improper to allow an

24. Smith *v.* Ferries, etc., R. Co., (Cal. 1897) 51 Pac. 710; Frankfort *v.* Chinn, 89 S. W. 188, 28 Ky. L. Rep. 257; Heyler *v.* New York News Pub. Co., 71 Hun (N. Y.) 4, 24 N. Y. Suppl. 499 [*affirmed* in 148 N. Y. 734, 42 N. E. 723]; Nethercott *v.* Kelly, 57 N. Y. Super. Ct. 27, 5 N. Y. Suppl. 259; Jenn *v.* Spencer, 32 Tex. 657; Trammell *v.* Swan, 25 Tex. 473; Alexander *v.* Brown, (Tex. Civ. App. 1895) 29 S. W. 561.

Where, after amendment already had, a further proposed amendment is not tendered to the court for its inspection, it is proper for the court to refuse to allow further amendment. Dukes *v.* Kellogg, 127 Cal. 563, 60 Pac. 44.

In Pennsylvania, where the statute is held to intend the allowance of amendments without stint as to number, the rule is that a second amendment to a complaint will be allowed if the cause of action remains the same. Collins *v.* Brown, 130 Pa. St. 356, 18 Atl. 645; Franklin *v.* Mackey, 16 Serg. & R. 117.

25. Burk *v.* Bear, 5 Pa. L. J. 304; Kinder *v.* Paris, 2 H. Bl. 561. But see Wilber *v.* Abbott, 6 Fed. 817, holding that, after two special demurrers to the declaration for matters of form have been sustained, the court will grant leave to amend on terms, it appearing that the cause is important and difficult and that if the amendment is not allowed a part of plaintiff's remedy will be cut off by an exercise of discretion from which there is no appeal.

26. Burk *v.* Bear, 5 Pa. L. J. 304.

27. Lowry *v.* Inman, 6 Abb. Pr. N. S. (N. Y.) 394 [*affirmed* in 46 N. Y. 119].

28. Hallock *v.* Robinson, 2 Cai. (N. Y.) 233.

29. Harvey *v.* Spaulding, 7 Iowa 423, where it is said the amendment must be substantial.

30. See, generally, *infra*, VII, A, 10.

31. U. S. *v.* Batchelder, 24 Fed. Cas. No. 14,541.

32. Higgins *v.* Wilmington, 3 Pennew. (Del.) 356, 51 Atl. 1.

33. Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446.

34. Kindall *v.* Lincoln Hardware, etc., Co., 10 Ida. 13, 76 Pac. 992.

35. Commercial Nat. Bank *v.* Gibson, 37 Nebr. 750, 56 N. W. 616; Hamilton *v.* Bell, 37 Tex. Civ. App. 456, 84 S. W. 289; Alaska Commercial Co. *v.* Williams, 128 Fed. 362, 63 C. C. A. 92; Buchanan *v.* Cleveland Linseed-Oil Co., 91 Fed. 88, 33 C. C. A. 351.

36. Fowler *v.* Colton, 1 Pinn. (Wis.) 331.

37. Grother *v.* New York, etc., Bridge, 46 N. Y. Suppl. 411.

38. Pettit *v.* Macon, 95 Ga. 645, 23 S. E. 198.

39. Evans *v.* Pettyjohn, 26 Gratt. (Va.) 604.

40. Cawkwell *v.* Russell, 26 L. J. Exch. 34.

41. Toone *v.* Toone, 10 Phila. (Pa.) 174.

amended petition inconsistent with the one originally filed,[42] nor is it improper to refuse to permit an amendment laying a foundation for the reformation of the written contract sued on,[43] or an amendment desired merely on account of the death of a witness.[44] The fact that at a former trial the correction of an error in the pleadings would have resulted in a verdict for defendant does not prevent the court from permitting an amendment to the complaint on a second trial.[45] After the allegations of an amended answer have been found in defendant's favor on the trial, such an amendment will not be declared evasive and insufficient on appeal.[46] It is a matter within the discretion of the court to grant or refuse permission to amend so as to shift the burden of proof.[47]

d. Abuse of Discretion. If the court permits an amendment which the law clearly does not allow,[48] or refuses an amendment which will obviously promote substantial justice,[49] it is error. Where an amendment both in form and substance violates the rules of good pleading it should be rejected.[50] If the court rules as a matter of law that a particular amendment is not allowable, when it is allowable or not, at his discretion,[51] or if the refusal of such amendment is not an act of independent discretion, but based upon an erroneous construction of a previous ruling,[52] in either case the action of the court is erroneous. It is likewise an abuse of discretion to allow an amendment conforming pleadings to proof improperly introduced over the objection of the opposite party.[53] Leave to amend should not be granted where it is apparent that the pleader cannot truthfully do so.[54]

e. Application For Leave to Amend [55] — (i) *Requisites of the Application.* In order to secure leave to amend it is usually necessary to make formal application to the court,[56] setting forth specifically the amendment proposed [57]

42. Keenan *v.* Washington Liquor Co., 8 Ida. 383, 69 Pac. 112; Barclay *v.* Barclay, 206 Pa. St. 307, 55 Atl. 985. But see Aborn *v.* Waite, 30 Misc. (N. Y.) 317, 63 N. Y. Suppl. 399.

43. Morrison *v.* Lovejoy, 6 Minn. 319.

44. Hall *v.* Woodward, 30 S. C. 564, 9 S. E. 684.

45. Parker *v.* Harden, 122 N. C. 111, 28 S. E. 962.

46. Hall *v.* Woodward, 30 S. C. 564, 9 S. E. 684.

47. Louis *v.* Connecticut L. Ins. Co., 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683 [*affirmed* in 172 N. Y. 659, 65 N. E. 1119].

48. Omaha, etc., R. Co. *v.* Moschel, 38 Nebr. 281, 56 N. W. 875; Johnson *v.* Swayze, 35 Nebr. 117, 52 N. W. 835; Roth *v.* Schloss, 6 Barb. (N. Y.) 308; Steward *v.* North Metropolitan Tramways Co., 16 Q. B. D. 556, 50 J. P. 324, 55 L. J. Q. B. 157, 54 L. T. Rep. N. S. 35, 34 Wkly. Rep. 316.

49. *Colorado.*— Tomboy Gold Mines Co. *v.* Arapahoe County Dist. Ct., 23 Colo. 441, 48 Pac. 537.

Georgia.— Adams *v.* Haigler, 123 Ga. 659, 51 S. E. 638.

Nebraska.— Gage *v.* West, 62 Nebr. 612, 87 N. W. 344.

New York.— Pritchard *v.* Nederland L. Ins. Co., 38 N. Y. App. Div. 111, 56 N. Y. Suppl. 604; Wood *v.* Shultis, 4 Hun 309; Bergman *v.* Neidhardt, 37 Misc. 804, 76 N. Y. Suppl. 900; Thedford *v.* Reade, 28 Misc. 563, 59 N. Y. Suppl. 537; Cox *v.* Bates, 27 Misc. 816, 57 N. Y. Suppl. 816; Milch *v.* Westchester F. Ins. Co., 13 Misc. 231, 34 N. Y. Suppl. 15; Buck *v.* Barker, 5 N. Y. St. 826.

Texas.— Ford *v.* Liner, 24 Tex. Civ. App. 353, 59 S. W. 943.

Washington.— Newberg *v.* Farmer, 1 Wash. Terr. 182.

Inconsistent defenses.— In a very recent case (Hardman *v.* Kelley, 19 S. D. 608, 104 N. W. 272), it was held that since under the code system of pleading a defendant may plead as many defenses as he may have, the denial of a motion to amend on the ground that the defenses offered were inconsistent with others previously set up in the answer was an abuse of discretion, entitling defendant to a new trial.

50. Flack *v.* O'Brien, 19 Misc. (N. Y.) 399, 43 N. Y. Suppl. 854.

51. Rowell *v.* Small, 30 Me. 30; Martin *v.* Fayetteville Bank, 131 N. C. 121, 42 S. E. 558.

52. Moran *v.* Bentley, 71 Conn. 623, 42 Atl. 1013.

53. Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478; Guerin *v.* St. Paul F. & M. Ins. Co., 44 Minn. 20, 46 N. W. 138. See also *infra*, VI, A, 11, w, (IV).

54. Henriques *v.* Miriam Osborn Memorial Home, 22 Misc. (N. Y.) 653, 51 N. Y. Suppl. 133; Overton *v.* Crabb, 4 Hayw. (Tenn.) 109; Baxter *v.* State, 15 Wis. 488.

55. **Granting continuance to opposite party on giving leave to amend** see Continuances in Civil Cases, 9 Cyc. 122 *et seq.*

56. Gillespie *v.* Wright, 93 Cal. 169, 28 Pac. 862; Meyer *v.* Anderson, 33 Nebr. 1, 49 N. W. 931; Reynolds *v.* Pascoe, 24 Utah 219, 66 Pac. 1064.

57. *Kansas.*— Kansas Farmers' Mut. F. Ins. Co. *v.* Amick, 37 Kan. 73, 14 Pac. 454.

or presenting a copy of the desired amendment;[58] the form of application necessary in obtaining leave to amend is a matter within the discretion of the court.[59] But it is usual for the application for leave to amend to be made in writing.[60] The motion for leave must not be too broad, and a motion to amend generally will be refused.[61]

(II) *Affidavits in Support of Application.* In most jurisdictions it is discretionary with the court whether it will require a motion to amend a pleading to be accompanied by an explanatory affidavit excusing the failure to incorporate the amendment in the original pleading. Courts very generally exercise their discretion by requiring the affidavit.[62] The affidavit should present plainly

Minnesota.— Barker *v.* Walbridge, 14 Minn. 469.

Missouri.— Allen *v.* Ranson, 44 Mo. 263, 100 Am. Dec. 282; Robinson *v.* Lawson, 26 Mo. 69; Cashman *v.* Anderson, 26 Mo. 67.

Nebraska.— Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231.

New Hampshire.— Parker *v.* Barker, 43 N. H. 35, 80 Am. Dec. 130.

New York.— Meeks *v.* Meeks, 79 N. Y. App. Div. 49, 79 N. Y. Suppl. 718; Stern *v.* Knapp, 52 N. Y. Super. Ct. 14; Aborn *v.* Waite, 30 Misc. 317, 63 N. Y. Suppl. 399; Evers *v.* O'Mara, 13 Misc. 340, 34 N. Y. Suppl. 453; Marquisee *v.* Brigham, 12 How. Pr. 399.

Tennessee.— Slatton *v.* Jonson, 4 Hayw. 197; Overton *v.* Crabb, 4 Hayw. 109.

Texas.— Johnston *v.* Marshall, 14 Tex. 490.

Wisconsin.— State *v.* Homey, 44 Wis. 615.

England.— Newman *v.* Wallis, 2 Bro. Ch. 143, 29 Eng. Reprint 82; Jackson *v.* Rowe, 9 L. J. Ch. O. S. 32, 4 Russ. 514, 28 Rev. Rep. 168, 4 Eng. Ch. 514, 38 Eng. Reprint 899; Wood *v.* Strickland, 2 Ves. & B. 150, 35 Eng. Reprint 276.

See 39 Cent. Dig. tit. "Pleading," § 621.

Where the amendment itself shows that it is essential to a full investigation of the cause, it has been held that it is not necessary to place on record the specific grounds on which the motion is based. Ostrander *v.* Clark, 8 Ind. 211.

58. *Illinois.*— Dilcher *v.* Schorik, 207 Ill. 528, 69 N. E. 807; McFarland *v.* Claypool, 128 Ill. 397, 21 N. E. 587.

Michigan.— Parsons *v.* Copland, 5 Mich. 144.

Nebraska.— Meyer *v.* Anderson, 33 Nebr. 1, 49 N. W. 931.

Tennessee.— Rainey *v.* Sanders, 4 Humphr. 447.

Washington.— Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648.

Wisconsin.— Sweet *v.* Mitchell, 19 Wis. 524.

59. Millan *v.* Southern R. Co., 54 S. C. 485, 32 S. E. 539.

60. Todhunter *v.* Klemmer, 134 Cal. 60, 66 Pac. 75.

61. Allen *v.* Ranson, 44 Mo. 263, 100 Am. Dec. 282; Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231; Stern *v.* Knapp, 52 N. Y. Super. Ct. 14; Crooks *v.* Second Ave. R. Co., 20 N. Y. Suppl. 813.

Applications of rule.—A motion to amend "herein generally, subject to any penalty of costs or otherwise that may be imposed by the courts" (Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231), and one "to amend the complaint to conform to the evidence so far as to allow the plaintiff every possible advantage under the decisions" (Crooks *v.* Second Ave. R. Co., 20 N. Y. Suppl. 813) have each been held too general.

62. *California.*— Todhunter *v.* Klemmer, 134 Cal. 60, 66 Pac. 75.

Illinois.— Jones *v.* Kennicott, 83 Ill. 484.

Kansas.— Kansas Farmers' Mut. F. Ins. Co. *v.* Amick, 37 Kan. 73, 14 Pac. 454; Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446.

New York.— Pratt *v.* Tailer, 99 N. Y. App. Div. 236, 90 N. Y. Suppl. 1023; Fromme *v.* Lisner, 63 Hun 290, 17 N. Y. Suppl. 850; Dunnigan *v.* Crummey, 44 Barb. 528; Diehl *v.* Robinson, 35 Misc. 234, 71 N. Y. Suppl. 752 [*reversed* on other grounds in 72 N. Y. App. Div. 19, 76 N. Y. Suppl. 252]; Aborn *v.* Waite, 30 Misc. 317, 63 N. Y. Suppl. 399; Ruellan *v.* Stillwell, 56 N. Y. Suppl. 344, 28 N. Y. Civ. Proc. 243; Jackson *v.* Smith, 6 Cow. 39.

South Carolina.— Millan *v.* Southern R. Co., 54 S. C. 485, 32 S. E. 539; Jennings *v.* Parr, 54 S. C. 109, 32 S. E. 73.

Tennessee.— Dockery *v.* Miller, 9 Humphr. 731.

See 39 Cent. Dig. tit. "Pleading," § 622.

In Georgia, an affidavit was formerly required by the code, section 5057. Thompson *v.* Mallory, 104 Ga. 684, 30 S. E. 887. Under the act of Dec. 21, 1897, p. 35, amending section 5057 of the code, an affidavit is not a prerequisite to a motion to amend, but whether it shall be required or not is within the discretion of the court. McCall *v.* Wilkes, 121 Ga. 722, 49 S. E. 722; Bass Dry Goods Co. *v.* Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980; Marsh *v.* Hix, 110 Ga. 888, 36 S. E. 230.

In Washington the code provides that an affidavit is necessary unless the amendment is to correct a mere mistake, such as the name of a party, etc. Ballinger Code, § 4953. See Cooke *v.* Cain, 35 Wash. 353, 77 Pac. 682; Daly *v.* Everett Pulp, etc., Co., 31 Wash. 252, 71 Pac. 1014.

That the discretion must be based on some facts justifying its exercise see Bass Dry Goods Co. *v.* Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980, where it is held that if the party seeking amendment is in court it is error to permit amendment without affidavit.

the proposed amendments,[63] should sufficiently explain and excuse the omission of the new matter from the original pleading,[64] and should show the necessity of the amendment.[65] It should state facts instead of conclusions of law,[66] and be verified by the party seeking to amend, and an affidavit by his attorney is insufficient unless the facts are peculiarly within the knowledge of the latter.[67] If, however, the motion must be made before the affidavit of the party can be obtained the affidavit of his attorney may be accepted, upon showing this fact.[68] So also where the facts are peculiarly within the knowledge of counsel.[69] Leave to renew motion to amend answer on perfected papers should be granted, where the original motion papers to amend were defective, in that defendant's affidavit to facts within his knowledge was not submitted, so that appeal from the order denying the motion to amend would have been unavailing.[70] An affidavit has been held unnecessary where the sworn testimony of a party at the trial shows that a mistake has occurred in his pleadings,[71] where the amendment is made at the trial to obviate the objection of a variance,[72] and where there is no laches to excuse.[73] And where, in an action against a corporation, a proposed amended answer merely enlarges the defense in the original answer, an affidavit of an officer of the corporation on the motion for leave to serve the amended answer is unnecessary.[74]

(III) *Hearing and Determination* — (A) *In General.* On motion to amend the court cannot assume the truth of averment without proof.[75] Any amendment may be properly refused if the necessity for it does not appear.[76] No amendment of a pleading the original of which is not presented to the court is permissible because there is nothing by which it can be determined whether an amendment is necessary.[77] Similarly a motion to amend should not be granted unless the proposed amendment be before the court; because the court cannot

Where an amendment does not affect the substantive rights of the parties an omission of the affidavit is not reversible error. Muth v. Erwin, 14 Mont. 227, 36 Pac. 43.

An amended answer inconsistent with and contradictory of the original answer should not be permitted without an affidavit that the original answer was filed under a mistake as to the facts. Reynolds v. West, 32 Ark. 244.

63. Thompson v. Mallory, 104 Ga. 684, 30 S. E. 887; Jones v. Kennicott, 83 Ill. 484; Ruellan v. Stillwell, 56 N. Y. Suppl. 344, 28 N. Y. Civ. Proc. 243.

64. Gross v. Whitely, 128 Ga. 79, 57 S. E. 94; Thompson v. Mallory, 104 Ga. 684, 30 S. E. 887; Jones v. Kennicott, 83 Ill. 484; Pratt v. Tailer, 99 N. Y. App. Div. 236, 90 N. Y. Suppl. 1023; Cocks v. Radford, 13 Abb. Pr. (N. Y.) 207; Dockery v. Miller, 9 Humphr. (Tenn.) 731, holding that the amended plea should be offered so that the court can see that it would as amended be a good defense.

Not for purpose of delay.— It was not error to refuse an amendment to the answer in the trial of a case setting up new matter of defense, notice of which was not given in the original answer, where defendant failed to swear in the affidavit attached to the plea of amendment that the new matter was not omitted from the original answer for purposes of delay. Gross v. Whitely, 128 Ga. 79, 57 S. E. 94; Beacham v. Wrightsville, etc., R. Co., 125 Ga. 362, 54 S. E. 157.

65. Butcher v. Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446; Dunnigan v. Crummey, 44 Barb. (N. Y.) 528; Jackson v. Smith, 6 Cow. (N. Y.) 39.

66. Pemberton v. Hoosier, 1 Kan. 108.

67. Thompson v. Mallory, 104 Ga. 684, 30 S. E. 887; Jones v. Kennicott, 83 Ill. 484; Tompkins v. Continental Nat. Bank, 71 N. Y. App. Div. 330, 75 N. Y. Suppl. 1099; Ryan v. Duffy, 54 N. Y. App. Div. 199, 66 N. Y. Suppl. 649; Diehl v. Robinson, 35 Misc. (N. Y.) 234, 71 N. Y. Suppl. 752 [*reversed* on other grounds in 72 N. Y. App. Div. 19, 76 N. Y. Suppl. 252]; Aborn v. Waite, 30 Misc. (N. Y.) 317, 63 N. Y. Suppl. 399.

68. Fromme v. Lisner, 63 Hun (N. Y.) 290, 17 N. Y. Suppl. 850; Aborn v. Waite, 30 Misc. (N. Y.) 317, 63 N. Y. Suppl. 399.

69. Mossein v. Empire State Surety Co., 112 N. Y. App. Div. 69, 98 N. Y. Suppl. 144.

70. Slattery v. Noble, 95 N. Y. Suppl. 606.

71. Jordan v. Greig, 33 Colo. 360, 80 Pac. 1045; Cooke v. Cain, 35 Wash. 353, 77 Pac. 682.

72. Murdoch v. Finney, 21 Mo. 138; Daly v. Everett Pulp, etc., Co., 31 Wash. 252, 71 Pac. 1014.

73. Kent v. Ætna Ins. Co., 88 N. Y. App. Div. 518, 85 N. Y. Suppl. 164.

74. Murtagh v. Kingsland Brick Co., 119 N. Y. App. Div. 286, 104 N. Y. Suppl. 515.

75. Jordan v. Chicago, etc., R. Co., 105 Mo. App. 446, 79 S. W. 1155.

76. York v. Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

77. Jenkins v. Warren, 25 N. Y. App. Div. 569, 50 N. Y. Suppl. 957.

otherwise determine whether or not the amendment should be allowed.[78] Ordinarily a party will not be allowed to amend a pleading so as to set up facts of which he had full knowledge at the time of interposing his original pleading.[79] And the court may, before allowing an amendment, require an excuse for the defect in the pleading in order to prevent negligence and laxity in pleading.[80]

(B) *Matters Considered.* Upon the hearing of a motion to amend, the court will look not merely at the face of the amended pleading, but also at the extrinsic circumstances of the case;[81] but it will not look to a bill of particulars to determine whether the causes of action set out in the amendment and in the original pleading are the same;[82] and the court will inquire no further into the merits of the amendment than to see that it is not frivolous.[83] The court will not consider whether the pleading proposed for substitution would be sufficient as against a demurrer,[84] and ordinarily will not consider the fact that an amendment similar to the one proposed was denied at a different stage of the proceedings.[85]

(C) *Time of Determination.* Since the parties have a right to know at every stage of the trial the condition of their pleadings, the court should not reserve its ruling as to the propriety of an amendment until the close of the trial.[86]

(IV) *ORDER GRANTING LEAVE* — (A) *Nature and Requisites of the Order.* An order allowing an amended answer to be filed is not an adjudication of the identity of the causes of action in the original and amended declaration.[87] An order granting leave to amend should specify in what particular the amendment is to be made,[88] and should not be too broad. An amendment made under an order that is too broad in its terms may be stricken out,[89] and the order should be adjusted with reference to the several interests of the parties,[90] and made in the presence of,[91] or service on the opposite party directed.[92] It has been held that an order allowing an amendment should have annexed to it a copy of the amended

78. Abbott *v.* Meinken, 48 N. Y. App. Div. 109, 62 N. Y. Suppl. 660.

79. Pratt *v.* Tailer, 99 N. Y. App. Div. 236, 90 N. Y. Suppl. 1023. See also *infra*, VII, A, 10, c.

80. Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Jackson *v.* Rowe, 9 L. J. Ch. O. S. 32, 4 Russ. 514, 28 Rev. Rep. 168, 4 Eng. Ch. 514, 38 Eng. Reprint 899; Wood *v.* Strickland, 2 Ves. & B. 150, 35 Eng. Reprint 276.

But the omission to contradict an allegation in an opponent's pleading, although, in legal effect, an admission of the allegation, is not such an admission that, on amending by inserting a denial, any explanation of the inconsistency will be required. Fielden *v.* Caselli, 16 Abb. Pr. (N. Y.) 289.

81. Nash *v.* Adams, 24 Conn. 33.

82. Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367 [*affirming* 54 Ill. App. 457].

83. Turner *v.* Dexter, 4 Cow. (N. Y.) 555.

84. Miller *v.* McDonald, 13 Phila. (Pa.) 27.

85. Ehlein *v.* Brayton, 21 N. Y. Suppl. 825; Hutchings *v.* Mills Mfg. Co., 68 S. C. 512, 47 S. E. 710; Mobley *v.* Mobley, 7 Rich. (S. C.) 431.

86. Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518.

87. Heffron *v.* Rochester German Ins. Co., 220 Ill. 514, 77 N. E. 262 [*affirming* 119 Ill. App. 566]; Rochester German Ins. Co. *v.* Heffron, 89 Ill. App. 659.

88. Schoonmaker *v.* Blass, 88 Hun (N. Y.) 179, 34 N. Y. Suppl. 424; Wood *v.* McGuire, 26 Misc. (N. Y.) 200, 55 N. Y. Suppl. 746; Gaylord *v.* Beardsley, 19 N. Y. Suppl. 548; Poole *v.* Hayes, 1 N. Y. Suppl. 749; New *v.* Aland, 62 How. Pr. (N. Y.) 185; Shields *v.* Moore, 2 Ohio Dec. (Reprint) 331, 2 West. L. Month. 437; Thompson *v.* Malone, 13 Rich. (S. C.) 252, *dictum*. And see Moore *v.* Christian, 31 S. C. 337, 9 S. E. 981. *Contra*, Wallace *v.* Columbia, etc., R. Co., 37 S. C. 335, 16 S. E. 35.

89. Shields *v.* Moore, 2 Ohio Dec. (Reprint) 331, 2 West. L. Month. 437.

Orders too broad in their terms.— Orders allowing a party to "amend his pleading as he may be advised" (New *v.* Aland, 62 How. Pr. (N. Y.) 185; Gaylord *v.* Beardsley, 19 N. Y. Suppl. 548), to amend by "alleging a cause of action against said defendant" (Schoonmaker *v.* Blass, 88 Hun (N. Y.) 179, 34 N. Y. Suppl. 424), or to "amend generally," have been held too broad. So an order to amend "in any way plaintiff deems proper" is too broad. Wood *v.* McGuire, 26 Misc. (N. Y.) 200, 55 N. Y. Suppl. 746.

90. Grafton Bank *v.* White, 17 N. H. 389.

91. Foster *v.* Easton, 2 N. Y. Suppl. 772.

92. Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. (N. Y.) 74, 85 N. Y. Suppl. 570.

Confirming nunc pro tunc.—An order irregular in that it allows an amendment without notice to the adverse party cannot be confirmed *nunc pro tunc*. Luckey *v.* Mockridge, 112 N. Y. App. Div. 199, 98 N. Y. Suppl. 335.

pleading.[93] Failure to provide, in an order permitting an amendment, permission to defendant to answer an amended complaint is not error where permission is not requested.[94]

(B) *Limitations in the Order as to Time of Amendment.* Generally an order of the court granting permission to amend should limit the time within which the amendment should be made,[95] and the court may allow the amendment to be made, not immediately, but at some future time.[96] However, if the time be not limited, the court still has the power, by subsequent order, to prevent any improper delay.[97] Where time is given to amend the court has jurisdiction before the expiration of the time so given to grant successive orders extending the time.[98] An order extending the time of plaintiff to serve a reply to a counter-claim set up in the answer does not extend to amend the complaint.[99]

(C) *Modification or Vacating of Order.* A court may modify its order granting permission to amend, if circumstances arising later seem to demand it.[1] It has been held, however, that, whenever the time limited in the order has elapsed, the order becomes final and cannot be modified by any other judge extending such time.[2] And where a party obtains leave to amend upon condition that he pay costs, and makes a frivolous amendment, the court will not later modify its order in his favor.[3] If a judge impose unreasonable terms as a condition of granting leave to amend, his successor in office may be forced by a writ of mandamus to set aside the order and hear the motion on the merits.[4] If an order granting leave to amend is vacated the effect is to leave the pleading sought to be amended precisely as though no leave to amend had been granted.[5]

(D) *Conformity of Amendment to Order.*[6] The amendment must be in conformity with the order.[7] And averments going beyond the scope of the order may be stricken out.[8] When a part only of a pleading is demurred to and the party obtains leave to amend, unless the order specifically provides otherwise, he can amend only the part attacked by the demurrer.[9]

(V) *Conditions on Granting Leave* — (A) *Discretion in Imposing Conditions.* The trial court in allowing amendments of pleadings may impose such terms as seem, in the exercise of its sound discretion, to be just and reasonable,[10]

93. Luckey *v.* Mockridge, 112 N. Y. App. Div. 199, 98 N. Y. Suppl. 335.

94. McDaniel *v.* Atlantic Coast Line R. Co., 76 S. C. 15, 56 S. E. 543.

95. Moore *v.* Christian, 31 S. C. 337, 9 S. E. 981.

Where the amendment is of such a nature that it may be easily made, the court may require an amended answer to be filed at once. Ellen *v.* Lewison, 88 Cal. 253, 26 Pac. 109.

96. Ridgely Nat. Bank *v.* Fairbank, 54 Ill. App. 296.

97. Moore *v.* Christian, 31 S. C. 337, 9 S. E. 981. See also Warnock *v.* Potter, 8 Can. L. J. 47.

98. Vestal *v.* Young, 147 Cal. 715, 82 Pac. 381.

99. Dawson *v.* Bogart, 10 N. Y. Civ. Proc. 56.

1. Harney *v.* Provident Sav. L. Assur. Soc., 41 N. Y. App. Div. 410, 58 N. Y. Suppl. 822; Second Ave. R. Co. *v.* Metropolitan El. R. Co., 58 N. Y. Super. Ct. 172, 9 N. Y. Suppl. 734; Moore *v.* Christian, 31 S. C. 337, 9 S. E. 981; Henderson *v.* Louisville, etc., R. Co., 123 U. S. 61, 8 S. Ct. 60, 31 L. ed. 92.

2. Brown *v.* Easterling, 59 S. C. 472, 38 S. E. 118.

3. Bausch *v.* Ingersoll, 16 N. Y. Suppl. 336.

4. Beecher *v.* Wayne Cir. Judges, 70 Mich. 363, 38 N. W. 322. But see, generally, MANDAMUS, 26 Cyc. 204.

5. Corey-Lombard Lumber Co. *v.* Dougherty, 125 Ill. App. 258.

6. Introducing new cause of action under general leave to amend see *infra*, VII, A, 11, a, (III), (B).

7. Decker *v.* Kitchen, 21 Hun (N. Y.) 332; Rowland *v.* Kellogg, 26 Misc. (N. Y.) 498, 57 N. Y. Suppl. 893; Pipe *v.* Spartanburg R., etc., Co., 65 S. C. 409, 43 S. E. 869; Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501.

Leave to amend a replication does not give leave to withdraw it and file a special demurrer. Gore Bank *v.* Chase, 7 U. C. Q. B. 454.

8. Calbeck *v.* McGinty, Ir. R. 6 Eq. 210.

9. Fielden *v.* Caselli, 16 Abb. Pr. (N. Y.) 289.

10. *California.*— Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310; Burns *v.* Scooffy, 98 Cal. 271, 33 Pac. 86; Griffin *v.* Scooffy, (1895) 33 Pac. 88; Clune *v.* Sullivan, 56 Cal. 249.

Connecticut.— Richardson *v.* Hine, 43 Conn. 201.

Delaware.— Wilcox *v.* Wilmington City R. Co., (1898) 42 Atl. 704.

but this discretion must not be abused,[11] nor such terms imposed as would practically amount to a deprivation of the right secured by statute.[12] So the discretion of the court in fixing the terms upon which an amendment may be made includes the power, so long as it is not abused, to allow an amendment without imposing any terms;[13] but if a material amendment of a complaint is made on the suggestion of the court, reasonable terms should be imposed, although plaintiff deems it unnecessary and makes it only in deference to the opinion of the court.[14] The question of terms as a condition of leave to amend may be reserved until the cause is finally disposed of.[15]

(B) *Submitting to a New Trial.* Submission to a new trial may be a condition precedent to granting leave to amend. Permission to amend by increasing the amount of damages claimed to correspond with the amount of the verdict will usually be granted only on condition that plaintiff pay costs, relinquish the verdict, and consent to a new trial.[16] If a party defendant, relying on a variance

Idaho.— Lowe *v.* Long, 5 Ida. 122, 47 Pac. 93.

Iowa.— Seevers *v.* Hamilton, 11 Iowa 66.

Kentucky.— Burkholder *v.* Farmers' Bank, 67 S. W. 832, 23 Ky. L. Rep. 832; McClure *v.* Bigstaff, 37 S. W. 294, 18 Ky. L. Rep. 601.

Maine.— State *v.* Folsom, 26 Me. 209.

Michigan.— Beneway *v.* Thorp, 77 Mich. 181, 43 N. W. 863.

Missouri.— Allen *v.* Ranson, 44 Mo. 263, 100 Am. Dec. 282.

Nebraska.— Suckstorf *v.* Butterfield, 4 Nebr. (Unoff.) 808, 96 N. W. 654.

New York.— Gaspar *v.* Adams, 24 Barb. 287; Coyle *v.* Third Ave. R. Co., 19 Misc. 345, 43 N. Y. Suppl. 499; Hull *v.* Turner, 1 Wend. 72; Webb *v.* Wilkie, 1 Cai. 153.

North Carolina.— Anders *v.* Meredith, 20 N. C. 339, 34 Am. Dec. 376.

South Carolina.— Latimer *v.* Sullivan, 37 S. C. 120, 15 S. E. 798; Mobley *v.* Mobley, 7 Rich. 431.

Texas.— Gulf, etc., R. Co. *v.* Butler, (Civ. App. 1896) 34 S. W. 756; Reagan *v.* Evans, 2 Tex. Civ. App. 35, 21 S. W. 427.

Wisconsin.— Fox River Valley R. Co. *v.* Shoyer, 7 Wis. 365.

England.— Nottage *v.* Jackson, 11 Q. B. D. 627, 52 L. J. Q. B. 760, 49 L. T. Rep. N. S. 339, 32 Wkly. Rep. 106; Foster *v.* Bank of England, 6 Q. B. 878, 2 D. & L. 790, 9 Jur. 107, 14 L. J. Q. B. 178, 51 E. C. L. 878; Nobel's Explosives Co. *v.* Jones, 17 Ch. D. 721, 49 L. J. Ch. 726, 42 L. T. Rep. N. S. 754, 28 Wkly. Rep. 653; King *v.* Corke, 1 Ch. D. 57, 45 L. J. Ch. 190, 33 L. T. Rep. N. S. 375, 24 Wkly. Rep. 23; Levy *v.* Drew, 5 D. & L. 307, 12 Jur. 119, 2 Saund. & C. 141; London, etc., Co. *v.* Elworthy, 18 Wkly. Rep. 246.

Canada.— Hooker *v.* Gamble, 9 Can. L. J. 44; Dunn *v.* Dunn, 1 Can. L. J. N. S. 239; McCurdy *v.* Grant, 32 Nova Scotia 520; Anthony *v.* Blain, 5 Ont. L. Rep. 48, 1 Ont. Wkly. Rep. 841; Murphy *v.* Burnham, 2 U. C. Q. B. 261; Hamilton *v.* Bovril Co., 15 Quebec Super. Ct. 62.

See 39 Cent. Dig. tit. "Pleading," § 626.

Amendments, made necessary by the carelessness of the pleader, should be allowed only upon reasonable terms. Mohr *v.* Sherman, 25 Ark. 7; Chambless *v.* Taber, 26 Ga. 167.

Municipal corporations.— In a recent case where the city of New York desired to amend its answer by introducing new matter which would compel plaintiff to renotice the case for trial and as a result set the hearing back on the calendar two years, the motion was granted on condition that the city agree to apply for a preference of the trial, under a statute giving the city of New York a preference in civil causes. Stemmler *v.* New York, 45 N. Y. App. Div. 573, 61 N. Y. Suppl. 403.

11. Dixon *v.* Risley, 114 Cal. 204, 46 Pac. 5; Misch *v.* McAlpine, 78 Ill. 507; Morgan *v.* Bishop, 61 Wis. 407, 21 N. W. 263; Great Northern R. Co. *v.* Herron, 136 Fed. 49, 68 C. C. A. 599. And see Williams *v.* Myer, 150 Cal. 714, 89 Pac. 972.

12. Misch *v.* McAlpine, 78 Ill. 507.

13. *Maine.*— Bolster *v.* China, 67 Me. 551; Ham *v.* Ham, 37 Me. 261.

New Hampshire.— Gale *v.* French, 16 N. H. 95.

New York.— Becker *v.* New York, etc., R. Co., 10 N. Y. Suppl. 413; Bateman *v.* Forty-Second St., etc., R. Co., 5 N. Y. Suppl. 13.

Pennsylvania.— Hileman *v.* Hileman, 172 Pa. St. 323, 33 Atl. 575.

South Carolina.— Wallace *v.* Columbia, etc., R. Co., 37 S. C. 335, 16 S. E. 35; Green *v.* Iredell, 31 S. C. 588, 10 S. E. 545; Stallings *v.* Barrett, 26 S. C. 474, 2 S. E. 483.

United States.— Lanning *v.* Dolph, 14 Fed. Cas. No. 8,073, 4 Wash. 624.

See 39 Cent. Dig. tit. "Pleading," § 626.

14. Abrahams *v.* Finkelstein, 49 Misc. (N. Y.) 448, 97 N. Y. Suppl. 987.

15. Suckstorf *v.* Butterfield, 4 Nebr. (Unoff.) 808, 96 N. W. 654.

16. *Illinois.*— Brown *v.* Smith, 24 Ill. 196.

New Jersey.— See Excelsior Electric Co. *v.* Sweet, 59 N. J. L. 441, 31 Atl. 721.

New York.— Corning *v.* Corning, 6 N. Y. 97; Decker *v.* Parsons, 11 Hun 295; Allaben *v.* Wakeman, 10 Abb. Pr. 162; Dox *v.* Dey, 3 Wend. 356.

Pennsylvania.— Girard *v.* Stiles, 4 Yeates 1.

South Dakota.— Custer City First Nat. Bank *v.* Calkins, 16 S. D. 445, 93 N. W. 646.

United States.— Elting *v.* Campbell, 3 Fed. Cas. No. 4,422, 5 Blatchf. 183.

England.— Tomlinson *v.* Blacksmith, 7 T. R. 132.

between the declaration and the instrument sued on, does not prepare for trial, and the court, regarding the variance as a mere clerical error, permits plaintiff to take a verdict, he must vacate his verdict before amending.[17]

(c) *Allowing Time For Other Party to Plead.*[18] The court should not allow an amendment substantially changing the nature of the action or adding to it a material element without allowing time for the opposite party to reply to the pleading as amended.[19]

(d) *Imposition of Costs* — (1) Discretion of Court Regarding — (a) In General. The statutes of amendments generally leave the question of costs to the discretion of the court,[20] and when the whole question of costs is so left with the court, it has been repeatedly held that, whatever its action in the premises may be, except where there has been a clear abuse of discretion,[21] its decision is

See 39 Cent. Dig. tit. "Pleading," § 628.

17. Carpenter *v.* Payne, 10 Wend. (N. Y.) 604; Hoffnagle *v.* Leavitt, 7 Cow. (N. Y.) 517.

18. See, generally, Continuances in Civil Cases, 9 Cyc. 122 *et seq.*

19. *Delaware.*— King *v.* Phillips, 1 Houst. 349; Doe *v.* Prettyman, 1 Houst. 334.

New Jersey.—Rogers *v.* Phinney, 13 N. J. L. 1; Boudinot *v.* Lewis, 3 N. J. L. 104.

New York.—Allaben *v.* Wakeman, 10 Abb. Pr. 162; Keese *v.* Fullerton, 1 Code Rep. 52; Jackson *v.* Sanders, 1 Code Rep. 27; Holmes *v.* Lansing, 1 Johns. Cas. 248; Kettletas *v.* Northb, Col. Cas. 54.

Pennsylvania.— Jones *v.* Ross, 2 Dall. 143, 1 L. ed. 324.

South Carolina.— Wallace *v.* Columbia, etc., R. Co., 37 S. C. 335, 16 S. E. 35; Edwards *v.* Cheraw, etc., R. Co., 32 S. C. 117, 10 S. E. 822; Crane *v.* Lipscomb, 24 S. C. 430; Cleveland *v.* Cohrs, 13 S. C. 397.

United States.— Bamberger *v.* Terry, 103 U. S. 40, 26 L. ed. 317; Furniss *v.* Ellis, 9 Fed. Cas. No. 5,162, 2 Brock. 14; Milburne *v.* Kearnes, 17 Fed. Cas. No. 9,545, 1 Cranch C. C. 77.

Canada.— Wolley *v.* Lowenberg, 3 Brit. Col. 197.

See 39 Cent. Dig. tit. "Pleading," § 629.

20. See the codes and practice acts of the various states. And see the following cases:

California.— Gabriel *v.* Tonner, 138 Cal. 63, 70 Pac. 1021; Culverhouse *v.* Crosan, 94 Cal. 544, 29 Pac. 1100.

Colorado.— Coleman *v.* Davis, 13 Colo. 98, 21 Pac. 1018.

Connecticut.— Richardson *v.* Hine, 43 Conn. 201.

Delaware.— Covington *v.* Simpson, 3 Pennew. 269, 52 Atl. 349; Doe *v.* Prettyman, 1 Houst. 334.

Georgia.— Haskens *v.* Throne, 101 Ga. 126, 28 S. E. 611; Gilus *v.* Vandever, 91 Ga. 192, 17 S. E. 115; Renew *v.* Redding, 56 Ga. 311.

Illinois.— Summerville *v.* Penn Drilling Co., 119 Ill. App. 152.

Kansas.— Wands *v.* School Dist. No. 71, 19 Kan. 204.

New York.— Cayuga County Bank *v.* Warden, 6 N. Y. 19; Bruns *v.* Brooklyn Citizen, 98 N. Y. App. Div. 316, 90 N. Y. Suppl. 701; Van Allen *v.* Gordon, 92 Hun 500, 36 N. Y. Suppl. 987; Weichsel *v.* Spear, 47 N. Y. Super. Ct. 223; Coyle *v.* Third Ave. R. Co., 19 Misc. 345, 43 N. Y. Suppl. 499.

South Carolina.— Green *v.* Iredell, 31 S. C. 588, 10 S. E. 545; Martin *v.* Mitchell, Harp. 445.

Wisconsin.— Illinois Steel Co. *v.* Budsisz, 106 Wis. 499, 82 N. W. 534, 80 Am. St. Rep. 54, 48 L. R. A. 830; McIlquham *v.* Barber, 83 Wis. 500, 53 N. W. 902; Smith *v.* Dragert, 65 Wis. 507, 27 N. W. 317; Morgan *v.* Bishop, 61 Wis. 407, 21 N. W. 263.

See 39 Cent. Dig. tit. "Pleading," § 630 *et seq.*

A statute providing, that upon such terms as may be proper the court may allow an amendment, leaves the question of costs to the discretion of the court. Cayuga County Bank *v.* Warden, 6 N. Y. 19.

Suits in forma pauperis.— Notwithstanding the fact that the person desiring amendment has been given leave to sue in *forma pauperis*, the imposition of costs as a condition precedent to amendment rests in the discretion of the court. Coyle *v.* Third Ave. R. Co., 19 Misc. (N. Y.) 345, 43 N. Y. Suppl. 499.

Where the appellate court directs the trial court to permit the amendment the right to amend is absolute, and the trial court cannot require payments of costs as a condition precedent to further proceedings in the cause. Dixon *v.* Risley, 114 Cal. 204, 46 Pac. 5.

Provision of statute as to amendment on payment of costs held not applicable.—Where defendant filed a general demurrer to plaintiff's writ and declaration and the demurrer was sustained, and plaintiff moved to amend his writ, which was allowed, and defendant excepted to the allowance of the amendment, after which defendant filed a general demurrer to the declaration, which was overruled, defendant taking exception thereto, a statute providing that a plaintiff may amend on the payment of costs from the time of filing a demurrer does not apply until after the decision on defendant's exceptions by the law court. Hare *v.* Dean, 90 Me. 308, 38 Atl. 227, where it is said that in the contemplation of law plaintiff had not amended his writ and could not do so until the exceptions were overruled, and it had been finally decided that the proposed amendment was allowed.

21. Casterline *v.* Day, 26 Kan. 306; Gallagher *v.* Dunlap, 2 Nev. 326; Diebold *v.* Walter, 83 N. Y. App. Div. 254, 82 N. Y.

final, and affords no subject for review,[22] whether it imposes, as a condition precedent to amendment, full costs to the time of making such amendment,[23] or part only,[24] or allows the amendment to be made without the payment of any costs whatever.[25] In some instances the court, to which the statute of amendments has left the whole question of costs, adopts rules, subjecting thereto its discretion,[26] and in such case the rules are generally adhered to;[27] but still, in any case, if the court finds its discretion seriously in conflict with the rules, its discretion must prevail, such being the statute;[28] and a departure from the rule, however well established, cannot be the subject of review.[29]

Suppl. 37; Lindblad *v.* Lynde, 81 N. Y. App. Div. 603, 81 N. Y. Suppl. 351; McEntyre *v.* Tucker, 40 N. Y. App. Div. 444, 58 N. Y. Suppl. 146; Van Allan *v.* Gordon, 92 Hun (N. Y.) 500, 36 N. Y. Suppl. 987; Alexander Lumber Co. *v.* Abrahams, 20 Misc. (N. Y.) 674, 46 N. Y. Suppl. 538; Weeks *v.* O'Brien, 13 Misc. (N. Y.) 503, 34 N. Y. Suppl. 687; Walton *v.* Mather, 10 Misc. (N. Y.) 216, 31 N. Y. Suppl. 111 [*affirmed* in 15 Misc. 453, 37 N. Y. Suppl. 26]; Marlett *v.* Doeter, 89 Wis. 347, 61 N. W. 1125; Morgan *v.* Bishop, 61 Wis. 407, 21 N. W. 263.

Where the discretion of the court below has been carried to an unreasonable extent, its action will be reviewed by the appellate court. Van Allan *v.* Gordon, 92 Hun (N. Y.) 500, 36 N. Y. Suppl. 987.

22. Richardson *v.* Hine, 43 Conn. 201; Haskins *v.* Throne, 101 Ga. 126, 28 S. E. 611; Renew *v.* Redding, 56 Ga. 311; Cayuga County Bank *v.* Warden, 6 N. Y. 19; Van Allan *v.* Gordon, 92 Hun (N. Y.) 500, 36 N. Y. Suppl. 987; Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 82 N. W. 534, 80 Am. St. Rep. 54, 48 L. R. A. 830.

23. Coleman *v.* Davis, 13 Colo. 98, 21 Pac. 1018; Bruns *v.* Brooklyn Citizen, 98 N. Y. App. Div. 316, 90 N. Y. Suppl. 701; Coyle *v.* Third Ave. R. Co., 19 Misc. (N. Y.) 345, 43 N. Y. Suppl. 499; Weeks *v.* O'Brien, 13 Misc. (N. Y.) 503, 34 N. Y. Suppl. 687. See also Richardson *v.* Hine, 43 Conn. 201.

Imposing a specific amount of costs as a condition precedent to amendment, where such amount is proportionate to the costs already accrued, is not an abuse of discretion. Van Allan *v.* Gordon, 92 Hun (N. Y.) 500, 36 N. Y. Suppl. 987.

Where the amendment of a bill causes no additional costs except the taking of one witness' evidence, with which plaintiff was charged, the costs accruing to the time of amendment, there should not be taxed to plaintiff costs because of the amendment. Jones *v.* Galbraith, (Tenn. Ch. App. 1900) 59 S. W. 350.

24. Richardson *v.* Hine, 43 Conn. 201; Summerville *v.* Penn Drilling Co., 119 Ill. App. 152; McIlquham *v.* Barber, 83 Wis. 500, 53 N. W. 902.

Payment of costs of term.— If the amendment is such as to require a continuance it will be allowed on condition of paying costs of the term (King *v.* Phillips, 1 Houst. (Del.) 349); but if the amendment does not necessitate a continuance, no costs will be imposed (Doe *v.* Prettyman, 1 Houst. (Del.) 334).

Jury fees, and expense of employing attorneys and of attending trial.—As terms of filing an amendment which would necessitate a continuance, plaintiff may properly be required to repay to defendant fees paid for the *per diem* of jurors empaneled and sworn to try the cause, and also the expense incurred in the employment of attorneys and attending trial, but a repayment to the county of the amount of the *per diem* and mileage of jurors summoned for the trial cannot legally be imposed as a part of the terms of allowing an amendment. Williams *v.* Myer, 150 Cal. 714, 89 Pac. 972.

25. Cayuga County Bank *v.* Warden, 6 N. Y. 19; Green *v.* Iredell, 31 S. C. 588, 10 S. E. 545; Illinois Steel Co. *v.* Budsisz, 106 Wis. 499, 82 N. W. 534, 80 Am. St. Rep. 54, 48 L. R. A. 830; Lanning *v.* Dolph, 14 Fed. Cas. No. 8,073, 4 Wash. 624. See also Richardson *v.* Hine, 43 Conn. 201.

Where there is no prejudice to the adverse party of any kind to be compensated for, it cannot be said on appeal that the failure of the trial court to impose costs was either an abuse of discretion or in violation of any rule of law. Illinois Steel Co. *v.* Budsisz, 106 Wis. 499, 82 N. W. 534, 80 Am. St. Rep. 54, 48 L. R. A. 830.

An order permitting plaintiff to withdraw one of the items constituting a cause of action may be granted, under a statute providing that an amendment may be permitted either with or without payment of costs, without imposing costs on plaintiff as a condition. Latimer *v.* Sullivan, 37 S. C. 120, 15 S. E. 798.

26. Richardson *v.* Hine, 43 Conn. 201.

Although costs do not in general follow interlocutory orders, unless expressly awarded, yet if, by a standing rule of the court, an amendment can be made only on terms of paying the intervening costs, this rule can be avoided only by an express exception from its operation contained in the order allowing the amendment. Dean *v.* Williams, 2 Pinn. (Wis.) 91.

A rule of court providing that no amendment in matters of substance shall be allowed without terms, unless by consent, after the appearance of defendant, does not apply to an amendment of the complaint rendered necessary by facts occurring since the institution of the suit. Goodrich *v.* Bodurtha, 6 Gray (Mass.) 323.

27. Richardson *v.* Hine, 43 Conn. 201.

28. Richardson *v.* Hine, 43 Conn. 201.

29. Richardson *v.* Hine, 43 Conn. 201.

(b) By Requiring Security For Costs. A court invested with authority to impose terms as a condition precedent to amendment may require the party desiring an amendment to file an undertaking for the payment of all costs that might be awarded against him in the action.[30]

(2) Amendment of Declaration or Complaint — (a) Stating New Cause of Action, or Altering Scope of Action — aa. *In General.* The rule in many jurisdictions is that where a complaint is so amended that it states a new cause of action, or materially alters the scope of the action, defendant will be allowed costs up to the time of such amendment,[31] provided he has raised the objection at the first opportunity.[32] But when the litigation has proceeded without objec-

30. Clune *v.* Sullivan, 56 Cal. 249.

31. *Massachusetts.*— Lester *v.* Lester, 8 Gray 437.

New Hampshire.— Clark *v.* Keene First Cong. Soc., 46 N. H. 272.

New Jersey.— Den *v.* Ganoe, 16 N. J. L. 439.

New York.—Dunham *v.* Hastings Pavement Co., 109 N. Y. App. Div. 514, 96 N. Y. Suppl. 313; Thilemann *v.* New York, 71 N. Y. App. Div. 595, 76 N. Y. Suppl. 132; Bates *v.* Salt Springs Nat. Bank, 43 N. Y. App. Div. 321, 60 N. Y. Suppl. 313; McEntyre *v.* Tucker, 40 N. Y. App. Div. 444, 58 N. Y. Suppl. 146; Frisbie *v.* Averell, 87 Hun 217, 33 N. Y. Suppl. 1021; Cramer *v.* Lovejoy, 41 Hun 581; Saltus *v.* Genin, 3 Bosw. 639; Ruellan *v.* Stillwell, 56 N. Y. Suppl. 344, 28 N. Y. Civ. Proc. 243; Brady *v.* Cassidy, 13 N. Y. Suppl. 824; Hare *v.* White, 3 How. Pr. 296; Downer *v.* Thompson, 6 Hill 377. See also Ross *v.* Bayer-Gardner-Himes Co., 92 N. Y. App. Div. 616, 87 N. Y. Suppl. 36; Weeks *v.* O'Brien, 13 Misc. 503, 34 N. Y. Suppl. 687.

Pennsylvania.— Hudson *v.* Springs, 11 Pa. Dist. 116; Carter *v.* Salter, 1 Del. Co. 403.

Texas.—Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Woods *v.* Hoffman, 64 Tex. 98; Kirkland *v.* Little, 41 Tex. 456; Williams *v.* Randon, 10 Tex. 74. See also Woods *v.* Durrett, 28 Tex. 429.

United States.— Sanders *v.* Hamilton, 21 Fed. Cas. No. 12,294, Brunn. Col. Cas. 20, 3 N. C. 403, 458.

Canada.— Madill *v.* Chilvers, 2 U. C. Q. B. 269. See also Smith *v.* Boyd, 18 Ont. Pr. 76.

See 39 Cent. Dig. tit. "Pleading," § 631.

An amendment to the declaration so as to enlarge the term will be allowed on payment of costs. Cockshot *v.* Hopkins, 2 Dall. (Pa.) 97, 1 L. ed. 305.

Increasing demand for damages to correspond with amount of verdict.— The rule in New York is that the supreme court has no power to allow an amendment after verdict by increasing the damages claimed to correspond with the amount of the verdict, except upon condition that plaintiff pay defendant's costs of the trial, relinquish the verdict, and consent to a new trial. Corning *v.* Corning, 6 N. Y. 97; Decker *v.* Parsons, 11 Hun (N. Y.) 295; Dox *v.* Dey, 3 Wend. (N. Y.) 356.

Amendment adding parties.— If plaintiff by leave amend his bill by introducing an additional defendant, costs will be allowed defendant to the time of amendment. McLellan *v.* Osborne, 51 Me. 118. See also Marlett *v.* Docter, 89 Wis. 347, 61 N. W. 1125, holding that it is an abuse of discretion for the court, in allowing such an amendment, to impose on defendant, who objected to the want of proper parties at the first opportunity, costs of the motion.

An amendment rendering change of defense necessary is permitted only on payment of all costs up to the time of amendment. Chapman *v.* Webb, 6 How. Pr. (N. Y.) 390. See also Huntington *v.* Sheldon, 3 Day (Conn.) 497.

Amendment omitting parties.— The court in allowing an amendment of the complaint by towns and their commissioners, so as to rid it of the commissioners, held to have been improperly joined, should impose as a condition the payment by plaintiff towns of not only the taxable costs of the motion, but the accrued taxable costs in the action which have been adjudged against all the plaintiffs. Palatine *v.* Canajoharie Water Supply Co., 116 N. Y. App. Div. 530, 101 N. Y. Suppl. 810.

Amendment adding new count after nonsuit.— Where plaintiff is nonsuited for want of a count or of a substantially sufficient count, he will be permitted to amend on payment of the costs of the plea in the subsequent pleadings and the costs of opposing the motion. Bennett *v.* New York, 1 Sandf. (N. Y.) 658.

Trial before referee.— Where on a trial before a referee he expresses the opinion that an amendment should be allowed to render certain evidence admissible and that application should be made to the special term for permission to amend, and the amendment is granted, plaintiff should, as a condition of being permitted to amend, be required to pay all the costs of the action before trial. Hayes *v.* Kerr, 39 N. Y. App. Div. 529, 7 N. Y. Suppl. 323.

For amendments held not to change cause of action so as to justify taxation of all costs accrued prior to the amendment see Miller *v.* Carpenter, 79 N. Y. App. Div. 130, 80 N. Y. Suppl. 82; Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407; Lancaster *v.* Richardson, (Tex. Civ. App. 1898) 45 S. W. 409.

Amendment after special demurrer.—It has been held that a party applying to amend a declaration after special demurrer to it has been filed must pay costs. Condit *v.* Neighbor, 12 N. J. L. 320.

32. Proctor *v.* Andrew, 1 Sandf. (N. Y.)

tion to the character of the pleading, the costs imposed on the allowance of an amendment are always discretionary with the court,[33] depending on the circumstances of each case;[34] and it may be allowed, in a proper case, upon the payment of costs of opposing motion only.[35]

bb. *After Reversal of Judgment in Favor of Plaintiff.* The rule that, in allowing an amendment to the complaint which introduces a new cause of action or materially alters the scope of the action, costs will be imposed up to the time of such amendment, applies to cases where plaintiff is permitted to amend after a judgment in his favor has been reversed.[36]

(b) Striking Out Counts. Where the statute refers the terms of the amendment to the discretion of the court, the court may without costs allow an amendment of the complaint by striking therefrom counts or parts thereof.[37]

(c) To Cure Variance. If the adverse party objects to a material variance at the first opportunity, an amendment to cure such variance will be allowed on the payment of all costs subsequent to the pleading upon which the issues were taken;[38] but if the case has been litigated throughout without any objection to the character of the pleading, an amendment to cure a material variance will be allowed on

70; Carrier *v.* Dellay, 3 How. Pr. (N. Y.) 173. See also Lesser *v.* Gilbert Mfg. Co., 72 N. Y. App. Div. 147, 75 N. Y. Suppl. 486; Marsh *v.* McNair, 40 Hun (N. Y.) 216; Weeks *v.* O'Brien, 13 Misc. (N. Y.) 503, 34 N. Y. Suppl. 687.

Where the parties in replevin went to trial on the affidavit, no bill of particulars having been filed, and an appeal was perfected and depositions taken, and witnesses summoned for trial in the appellate court, and on the case being called, defendant for the first time raised the point that a bill of particulars should be filed, and the court thereupon ordered such bill, imposing on plaintiff as a condition of filing the same all costs to date, the condition was inequitable and should not have been imposed. Casterline *v.* Day, 26 Kan. 306.

33. Alston *v.* Mechanics' Mut. Ins. Co., 1 How. Pr. (N. Y.) 82. See also Lesser *v.* Gilbert Mfg. Co., 72 N. Y. App. Div. 147, 75 N. Y. Suppl. 486; Marsh *v.* McNair, 40 Hun (N. Y.) 216; Carrier *v.* Dellay, 3 How. Pr. (N. Y.) 173.

34. Alston *v.* Mechanics' Mut. Ins. Co., 1 How. Pr. (N. Y.) 82.

35. Alston *v.* Mechanics' Mut. Ins. Co., 1 How. Pr. (N. Y.) 82.

36. Fox *v.* Davidson, 40 N. Y. App. Div. 620, 58 N. Y. Suppl. 147; McEntyre *v.* Tucker, 40 N. Y. App. Div. 444, 58 N. Y. Suppl. 146, 29 N. Y. Civ. Proc. 185; Bowen *v.* Sweeny, 66 Hun (N. Y.) 42, 20 N. Y. Suppl. 733, 734; Cramer *v.* Lovejoy, 41 Hun (N. Y.) 581; Howard *v.* Moller, 11 Misc. (N. Y.) 719, 31 N. Y. Suppl. 1129; Walton *v.* Mather, 10 Misc. (N. Y.) 216, 31 N. Y. Suppl. 111 [*affirmed* in 15 Misc. 453, 37 N. Y. Suppl. 26]; Ireland *v.* Metropolitan El. R. Co., 8 N. Y. St. 127; McGrane *v.* New York, 19 How. Pr. (N. Y.) 144; Prindle *v.* Aldrich, 13 How. Pr. (N. Y.) 466; Troy, etc., R. Co. *v.* Tibbits, 11 How. Pr. (N. Y.) 168; Downer *v.* Thompson, 6 Hill (N. Y.) 377. See also as sustaining this doctrine Harwood *v.* Baldwin, 6 Ky. L. Rep. 656, where it was held that where the court of appeals reverses a judgment with directions to permit plaintiffs to amend their petition they should be compelled to pay all costs, after the answer of defendant up to the answer of the amended petition, although the court of appeals did not impose terms. But *compare* Dixon *v.* Risley, 114 Cal. 204, 46 Pac. 5, where it was held that where an appellate court directs the trial court to permit an amendment of the complaint the latter cannot impose as a condition of the amendment the payment of costs of the appeal with its accruing costs.

In New Jersey it is held that one of the usual terms on which an amendment introducing a new cause of action is allowed after trial and reversal on appeal is that the party desiring an amendment shall pay to his adversary the costs incurred in pointing out and establishing the error, and where there is uncertainty whether the reversal took place on that ground, but appears to have been one of the matters assigned for error and discussion, and counsel for the moving party candidly states his information that one member of the appellate court rested his decision on the application, leave to amend should be granted only on payment of costs. Dickerson *v.* Miller, 13 N. J. L. 3.

Extra allowance.—Imposition of costs of the trial court and general term as a condition of amending a complaint where the judgment for plaintiff has been reversed does not include an extra allowance. Wardlaw *v.* New York, 23 N. Y. Suppl. 669; Troy, etc., R. Co. *v.* Tibbits, 11 How. Pr. (N. Y.) 168.

37. Cayuga County Bank *v.* Warden, 6 N. Y. 19.

38. Proctor *v.* Andrew, 1 Sandf. (N. Y.) 70; Miller *v.* Watson, 6 Wend. (N. Y.) 506.

In equity an amendment of a bill to conform to the proof will be allowed on payment of the costs that would have been unnecessary if the bill had been properly drawn in the first instance. Miller *v.* Billingham, 184 Pa. St. 583, 39 Atl. 494.

payment of costs only from and after the time the objection for variance is taken.[39] No costs will be allowed because of an amendment to cure an immaterial variance.[40]

(d) As of Course. Under a statute providing that any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering expires, or at any time within twenty days after the service of the answer or demurrer thereto, a party may amend as of course within the time specified, notwithstanding a motion by his adversary in relation to such pleading within the period allowed for amendment.[41]

(e) Matter Inserted or Stricken Out by Court on Its Own Motion. Where the court of its own motion strikes matter out of an affidavit filed in a proceeding before a clerk no costs will be allowed the opposite party.[42]

(3) Amendment of Plea or Answer. An amendment of the answer which raises a substantially different issue,[43] or sets up a defense calculated to defeat the entire action,[44] should be permitted only on payment of the taxable costs to date. So too an amendment of the answer after trial and reversal on appeal which raises an issue substantially different from that litigated upon the trial should be permitted only on payment of the costs to the time of amendment.[45]

(4) Amendment of Formal Defects. Ordinarily an amendment to cure a defect in a mere matter of form is allowed on the payment of the costs of the motion;[46] but the allowance of such an amendment on payment of costs to date,[47]

39. Smith *v.* Proctor, 1 Sandf. (N. Y.) 72; Flower *v.* Garr, 20 Wend. (N. Y.) 668.

40. Sipe *v.* Sipe, 14 Ind. 477; East Boston Timber Co. *v.* Persons, 2 Hill (N. Y.) 126. See also Dempster *v.* Fairbanks, 29 Nova Scotia 456.

By section 4950 of the code it is provided that when the variance is not material, the court may order an immediate amendment without costs. Ernst *v.* Fox, 26 Wash. 526, 67 Pac. 258.

41. Rider *v.* Bates, 66 How. Pr. (N. Y.) 129; Welch *v.* Preston, 58 How. Pr. (N. Y.) 52; Sutton *v.* Wegner, 72 Wis. 294, 39 N. W. 775. But see Aymar *v.* Chase, Code Rep. N. S. (N. Y.) 141. *Contra*, Prudden *v.* Lockport, 40 How. Pr. (N. Y.) 46; Williams *v.* Wilkinson, 5 How. Pr. (N. Y.) 357.

42. People *v.* Murray, 22 N. Y. Suppl. 1051, 23 N. Y. Civ. Proc. 53.

43. Coleman *v.* Davis, 13 Colo. 98, 21 Pac. 1018; Wands *v.* Crawford County School Dist. No. 71, 19 Kan. 204; Sackett *v.* Mulholland, 49 Misc. (N. Y.) 439, 99 N. Y. Suppl. 948 [*affirmed* in 110 N. Y. App. Div. 893, 96 N. Y. Suppl. 1144]; Milburne *v.* Kearnes, 17 Fed. Cas. No. 9,543, 1 Cranch C. C. 77. See also Hurlbert *v.* Sleeth, 25 Nova Scotia 511.

Extra allowance.—It has been held that the court may require defendant to pay an extra allowance as a condition for granting leave to file a supplemental answer, where the motion for leave was not made until after the trial was concluded (Mabie *v.* Adams, 1 Month. L. Bul. (N. Y.) 65), but not where the motion was made before the trial was concluded (Jenkins *v.* Adams, 1 Month. L. Bul. (N. Y.) 65).

Where a demurrer to an amended answer was sustained and leave given to serve another amended answer, which was not acted on, and defendant afterward moved to be allowed to serve a second amended answer just as the cause was to be brought to trial, it was held that the motion should not have been granted, except on condition of the payment of the taxable term fees, and the filing and service of an affidavit of merits. Haggerty *v.* Phelan, 61 N. Y. Super. Ct. 453, 18 N. Y. Suppl. 789.

44. Julio *v.* Equitable L. Assur. Soc., 2 N. Y. City Ct. 301. See also Anonymous, 1 Fed. Cas. No. 476, 2 Wash. 270; O'Leary *v.* Stewart, 9 Can. L. T. Occ. Notes 494.

The allowance of an amendment setting up the statute of limitations, on payment of all taxable costs and disbursements of plaintiff at the time of filing the original answer, is proper (Smith *v.* Dragert, 65 Wis. 507, 27 N. W. 317), but it is an abuse of discretion to allow such an amendment on payment of the costs of the motion only (Morgan *v.* Bishop, 61 Wis. 407, 21 N. W. 263).

45. Richardson, etc., Co. *v.* Gudewill, 37 Misc. (N. Y.) 858, 76 N. Y. Suppl. 1005. See also Bruns *v.* Brooklyn Citizen, 98 N. Y. App. Div. 316, 90 N. Y. Suppl. 701; Alexander Lumber Co. *v.* Abrahams, 20 Misc. (N. Y.) 674, 46 N. Y. Suppl. 538; Ritchie *v.* Hall, 20 Nova Scotia 243.

In Texas where defendant in trespass to try title, after pleading "Not guilty," and after trial and reversal on appeal, files an amended answer claiming only a part of the amount in suit, and recovers such part, he will be adjudged to pay those costs only which accrued before the filing of the amended answer. Keyser *v.* Meusback, 77 Tex. 64, 13 S. W. 967.

46. Tooker *v.* Arnoux, 1 Month. L. Bul. (N. Y.) 54; Weston *v.* Worden, 19 Wend. (N. Y.) 648. See also Weill *v.* Metropolitan R. Co., 10 Misc. (N. Y.) 72, 30 N. Y. Suppl. 833.

47. Mitreaud *v.* Delassize, 13 La. 416; Frye *v.* Atlantic, etc., R. Co., 47 Me. 523.

or without imposing any costs whatever,[48] has been held to be discretionary with the court.

(5) Amendment by Agreement of Counsel. If there was an agreement between counsel in the court below to amend, the appellate court will grant leave to amend without costs.[49]

(6) Waiver of Objection. The decision of the court, at the trial, imposing certain costs, as a condition of granting leave to amend, will be deemed to be acquiesced in, unless exception is then and there taken.[50]

(7) Effect of Offer to Pay Costs as Condition of Amendment. If the proposed amendment is proper, an offer to pay costs, made before moving to amend and to avoid the necessity thereof, is proper to be considered on the question of costs to be imposed as a condition of amendment.[51] Thus, where plaintiff offers to allow the costs to which defendant is entitled, before moving to amend his declaration by adding a special count, defendant will not be allowed costs if he resists the motion.[52] So too, where an objection to an answer filed is a purely technical one, and before motion costs have been offered by the party desiring to amend, and declined, no costs of motion will be allowed.[53]

(8) Non-Compliance With Order to Amend. Non-compliance with an order to amend the complaint does not justify the court in imposing payment of all the costs on plaintiff, without dismissing the case or doing anything else.[54]

(9) Right of Successful Party to Tax Costs Paid as Condition of Amendment. The party eventually successful in an action, who has paid costs as a condition to the allowance of an amendment by him, is not entitled to tax against the adverse party the amount so paid;[55] and where the unsuccessful party pays costs as a condition of making an amendment, such costs cannot again be taxed against him on final judgment.[56]

48. Minton *v.* Home Ben. Soc., 1 N. Y. Suppl. 838. See also Gallagher *v.* Dunlap, 2 Nev. 326.

Where it does not appear that the adverse party has suffered any inconvenience, leave to amend may be granted without costs. Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491.

Where the statute provides that the court shall and may amend all and every defect of form, errors of form are held to be amendable without imposing costs. Tripp *v.* Duffy, 10 R. I. 264; Ellis *v.* Appleby, 4 R. I. 462.

49. Johnson *v.* Chaffant, 1 Binn. (Pa.) 75.

50. Griggs *v.* Howe, 31 Barb. (N. Y.) 100 [*affirmed* in 2 Abb. Dec. 291, 3 Keyes 166, 2 Keyes 574, 1 How. Pr. 639 note].

51. Schiller *v.* Maltbie, 11 N. Y. Civ. Proc. 304.

52. Bell *v.* Judson, 2 How. Pr. (N. Y.) 42.

53. Schiller *v.* Maltbie, 11 N. Y. Civ. Proc. 304.

54. Harvey County *v.* Munger, 24 Kan. 760.

If plaintiff declines to strike out on motion one of two counts for the same cause of action, he will be liable for all the costs if he fails to establish a distinct cause of action for each count. Watson *v.* Bell, 37 Iowa 640.

On the failure of defendant to comply with an order to plead to a complaint within a designated time on reversal of the judgment, the court may require him to pay costs. Roush *v.* Fort, 3 Mont. 175.

55. Melony *v.* Somers, 50 Conn. 520; Richardson *v.* Hine, 43 Conn. 201; Woolsey *v.* Ellenville, 84 Hun (N. Y.) 234, 32 N. Y. Suppl. 546; Skinner *v.* White, 69 Hun (N. Y.) 127, 23 N. Y. Suppl. 384; Seneca Nation *v.* Hawley, 32 Hun (N. Y.) 288 [*overruling* Donovan *v.* Board of Education, 1 N. Y. Civ. Proc. 311 note]. *Contra*, Havemeyer *v.* Havemeyer, 48 N. Y. Super. Ct. 104; Dovale *v.* Ackerman, 11 N. Y. Suppl. 5, 24 Abb. N. Cas. 214.

The theory on which the cases in the New York supreme court are decided is that the order granting the favor on payment of costs constitutes an adjudication that the costs mentioned therein belong to the party to whom they are directed to be paid, and cannot again be taxed by either party to the action (Woolsey *v.* Ellenville, 84 Hun (N. Y.) 234, 32 N. Y. Suppl. 546; Seneca Nation *v.* Hawley, 32 Hun (N. Y.) 288), but the Connecticut cases are decided on the theory that it would be inconsistent on general principles to allow a party to recover costs for the period during which he has been in fault, and has been required to pay costs, by way of damages, for being in fault (Richardson *v.* Hine, 43 Conn. 201).

56. Cahill *v.* New York, 50 N. Y. App. Div. 276, 63 N. Y. Suppl. 1006; Marx *v.* Gross, 2 Misc. (N. Y.) 500, 22 N. Y. Suppl. 387, 23 N. Y. Civ. Proc. 97; Seymour *v.* Ashenden, 13 N. Y. Civ. Proc. 255; Schmidt *v.* Mackie, 9 N. Y. Wkly. Dig. 288. *Compare* Cohu *v.* Husson, 13 Daly (N. Y.) 334; Starr Cash Car Co. *v.* Reinhardt, 6 Misc. (N. Y.) 365, 26 N. Y. Suppl. 746, holding that payment of

(E) *Miscellaneous Conditions Imposed.* The court may require, as a condition, the payment of a definite sum to the other party, to cover costs, expenses incidental to a continuance, etc.[57] Before permitting a plaintiff to amend his complaint so as to conform to the evidence, the court may very properly require that defendant be permitted to serve *nunc pro tunc* an offer of judgment which was technically defective as originally served.[58] Where a defendant asks leave to amend so as to allege that his agent did not have authority to make the contract sued on, it is proper to require, as a condition to granting leave, that the agent be produced for examination.[59] Where a party applies for leave to amend so as to set up usury, he may be required, as a condition to granting leave, to pay into court the unpaid principal with interest at the legal rate.[60] Leave to amend by setting up additional items of account may be granted on condition that a previous offer to allow judgment in a certain sum be increased to correspond with the increased demand.[61] In New York the special term in allowing amendment of the complaint may provide that service of the amendment shall be without prejudice to the position of the case on the general trial term calendar of the court.[62] Where at the conclusion of the evidence defendant asks leave to amend to conform pleadings to proof, and the court takes the application under advisement until final determination of the case and then permits the amendment, it is proper to impose the condition that the allegations of the amendment be considered denied without the filing of any formal pleadings by the opposite party.[63] It is unreasonable to impose as a condition, where the proposed amendment does not change the cause of action, that defendant be allowed to plead the statute of limitations as though the action were commenced at the time application was made for the permission to amend.[64]

(F) *Right to Complain of Conditions Imposed.* Where a party accepts the permission of the court to amend and complies with the conditions imposed he cannot afterward be heard to complain thereof.[65] If a party has a right to complain and considers himself aggrieved by the costs imposed as a condition of leave to amend, he cannot appeal from the condition alone, but must appeal from the entire order.[66] If a party fails upon the trial and so becomes liable for all the

costs by defendant for leave to withdraw a juror and amend his answer contemplates only a compensation to plaintiff, to be measured by the taxable costs, and plaintiff, if finally successful, is still entitled to tax costs of the trial, but that the court which awards the costs in each case is at liberty to construe its own order and to say what is embraced in the award, and its construction thereof disallowing taxation of the trial fee will not be disturbed.

Payment of sum of money equivalent to costs has condition.— If the court, in allowing the amendment, imposes as a compensation to the adverse party the payment of a sum of money equivalent to the taxable costs to date, without designating it as such, it seems that such costs may be taxed by the adverse party as general costs of the action, and that such a course is not subject to the objection that there is a double taxation of the same costs. Cahill *v.* New York, 30 Misc. (N. Y.) 163, 63 N. Y. Suppl. 509 [*affirmed* in 50 N. Y. App. Div. 276, 63 N. Y. Suppl. 1006]; Schmidt *v.* Mackie, 9 N. Y. Wkly. Dig. 288.

Right to costs against party whose name is stricken out.— Wherever a writ is amended by striking out one of plaintiffs' names on terms which have been complied with, defendant is not entitled when judgment is rendered to costs against plaintiff whose name is so stricken out. Richardson *v.* Wolcott, 10 Allen (Mass.) 439.

57. Gabriel *v.* Tonner, 138 Cal. 63, 70 Pac. 1021; Culverhouse *v.* Crosan, 94 Cal. 544, 29 Pac. 1100; Jones *v.* Stoddart, 8 Ida. 210, 67 Pac. 650; Scheuer *v.* Monash, 40 Misc. (N. Y.) 668, 83 N. Y. Suppl. 253.

58. Flynn *v.* Westmayer, 4 N. Y. Suppl. 188.

59. Knauth *v.* Heller, 68 Hun (N. Y.) 570, 23 N. Y. Suppl. 106.

60. Jones *v.* Walker, 22 Wis. 220.

61. Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310.

62. Mossein *v.* Empire State Surety Co., 117 N. Y. App. Div. 820, 102 N. Y. Suppl. 1013.

63. Citizens Ins. Co. *v.* Herpolsheimer, 77 Nebr. 232, 109 N. W. 160.

64. Critelli *v.* Rodgers, 87 Hun (N. Y.) 530, 34 N. Y. Suppl. 479.

65. Supreme Lodge K. H. *v.* Davis, 26 Colo. 252, 58 Pac. 595; Tupper *v.* Kilduff, 26 Mich. 394; Weichsel *v.* Spear, 47 N. Y. Super. Ct. 223; Woods *v.* Durrett, 28 Tex. 429.

66. Havemeyer *v.* Havemeyer, 44 N. Y. Super. Ct. 170. But see Bausch *v.* Ingersoll, 16 N. Y. Suppl. 336, which, although the

costs, he cannot complain because the court taxed him with accrued costs in allowing him to make an amendment before the trial.[67]

(VI) *Compliance With Conditions Imposed* — (A) *Payment of Costs* — (1) In General. Whenever leave is given to amend on payment of costs, the rule in England [68] and Canada [69] is that the payment of such costs is a condition precedent to amendment. In the United States, however, the rule prevails that when leave is given to amend on payment of costs, payment is not a condition precedent to amendment,[70] unless so specially expressed in the order.[71]

(2) Electing to Proceed Without Accepting Leave. A party given leave to amend on condition of the payment of costs may elect to proceed, without accepting the leave, with the burden of the condition;[72] and, in such case, the court will not order him to pay the costs imposed.[73] But after a party has made his election to proceed without accepting the leave, it is within the discretion of the court to require him to abide by it.[74]

(B) *Amendment Within Prescribed Time.* If leave to amend be granted on condition that the amendment be filed before a certain time, failure to comply with the condition, if no exception be taken, is merely an irregularity which will not be considered on appeal.[75] But where an order granting leave to amend specifies that the amendment shall be filed and the taxable costs paid within a certain time, and that, upon failure to comply with the conditions, a judgment shall be entered in favor of the opposite party, a judgment so entered will be sustained.[76] If a party is ordered to amend before the first day of the next term, he may amend any time before the cause is called for trial,[77] but not at the trial except by special leave of court.[78] Where a party fails to amend within a reasonable time the order granting leave may be set aside.[79] It has been held that failure to amend within the prescribed time is an irregularity which can be reviewed only by a motion to set aside the judgment and an appeal from the order overruling the motion.[80]

point was not directly in issue, would seem to indicate a different practice.

67. Keller *v.* Bare, 62 Iowa 468, 17 N. W. 666.

68. Levy *v.* Drew, 5 D. & L. 307, 12 Jur. 119, 2 Saund. & C. 141.

69. Maddock *v.* Corbet, 4 U. C. Q. B. 257.

70. Sturtevant *v.* Fairman, 4 Sandf. (N. Y.) 674; Wigfield *v.* Dyer, 29 Fed. Cas. No. 17,622, 1 Cranch C. C. 403. See also McCabe *v.* Gentes, 18 La. 31 (holding that costs awarded on leave to amend pleadings are not required to be paid before the suit continues, as in cases of nonsuit or discontinuance); Butts *v.* Chapman, 4 Fed. Cas. No. 2,257, 1 Cranch C. C. 570 (where it is held that in suits at law when an amendment is allowed on payment of costs, such payment is not a condition precedent to the amendment, but may be enforced or await the event of the suit).

Where judgment is rendered against a party on demurrer with leave to withdraw the demurrer and plea on payment of costs, he must, it seems, tender the costs before pleading. Sands *v.* McClelan, 6 Cow. (N. Y.) 582.

71. Wigfield *v.* Dyer, 29 Fed. Cas. No. 17,623, 1 Cranch C. C. 403. See also Sturtevant *v.* Fairman, 4 Sandf. (N. Y.) 674, holding that, to have the effect of making the payment of costs a condition precedent to amendment, it must be expressed to be on payment, etc., or in other equivalent terms.

72. Brinkman *v.* Akers, (Kan. 1898) 54 Pac. 688; Smith *v.* Powers, 15 N. H. 546; Field *v.* Sawyer, 6 C. B. 71, 60 E. C. L. 71.

73. Field *v.* Sawyer, 6 C. B. 71, 60 E. C. L. 71. See also Black *v.* Sangster, 1 C. M. & R. 521, 3 Dowl. P. C. 206, 4 L. J. Exch. 4, 5 Tyrw. 171. But see Van Ness *v.* Cantine, 4 Paige (N. Y.) 55, holding that where complainant obtains an order for leave to amend his bill on condition that he shall pay the costs of defendant's answer and the costs of opposing the application to amend, he is not compelled to pay the costs of the answer if he elects to proceed without making the proposed amendment, but he must in that case pay the costs of opposing the application to amend.

74. Brinkman *v.* Akers, (Kan. 1898) 54 Pac. 688.

Thus the court has a right to refuse a party permission to reopen the case, and comply with the terms of an order allowing him to amend his complaint, after an adverse judgment on demurrer. Brinkman *v.* Akers, (Kan. 1898) 54 Pac. 688.

75. Carter *v.* Paige, (Cal. 1889) 20 Pac. 729; Smith *v.* Groverman, 9 Ind. 304.

76. Morris *v.* Thomas, 80 N. Y. App. Div. 47, 80 N. Y. Suppl. 502.

77. Andrews *v.* Richardson, 21 Tex. 287.

78. Hardy *v.* De Leon, 5 Tex. 211.

79. Hutt *v.* Keith, 2 U. C. Q. B. 100; Randall *v.* Taggart, 4 U. C. Q. B. O. S. 2.

80. Carter *v.* Page, (Cal. 1889) 20 Pac. 729.

f. Necessity For Actual Amendment. The rule is well settled that mere leave to amend does not of itself operate as an amendment [81] or raise any presumption that an amendment was made.[82] The reason for this is obvious. A party may have leave to amend and yet not choose to avail himself of it. He is in no wise obliged to exercise the privilege given and make the amendment.[83] So far the decisions are in accord but are not entirely harmonious as to whether and under what circumstances the failure to actually file an amendment may be obviated. In some jurisdictions if the amendment is of a substantial character, an actual amendment is always held necessary, and the fact that the case is tried on the theory that the amendment was made, or that the nature of the proposed amendment and leave to make it appears from the record, does not obviate the necessity for making the amendment and authorize a reviewing court to consider it as having been made.[84] The rule of these decisions is, however, opposed to the weight of authority. While it is very generally conceded that proper practice requires that amendments should actually be made, it is nevertheless held in a large number of decisions that if leave to amend is given, and the cause is tried as though the amendment had been made, the necessity for making it is thereby obviated.[85]

81. *California.*— Kimball *v.* Gearhart, 12 Cal. 27.

Colorado.— Briggs *v.* Bruce, 9 Colo. 282, 11 Pac. 204.

Illinois.— Condon *v.* Schoenfeld, 214 Ill. 226, 73 N. E. 333; Sinsheimer *v.* William Skinner Mfg. Co., 165 Ill. 116, 46 N. E. 262; Wisconsin Cent. R. Co. *v.* Wieczorek, 151 Ill. 579, 38 N. E. 678; Henion *v.* Vavrik, 126 Ill. App. 292; Chicago, etc., R. Co. *v.* Smith, 81 Ill. App. 364.

Indiana.— Chicago, etc., R. Co. *v.* Reyman, (1905) 73 N. E. 587.

Maryland.— Lohnfink *v.* Still, 10 Md. 530.

North Dakota.— Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518.

See 39 Cent. Dig. tit. "Pleading," § 637.

82. Keith *v.* Cliatt, 59 Ala. 408.

83. Wisconsin Cent. R. Co. *v.* Wieczorek, 151 Ill. 579, 38 N. E. 678; East St. Louis *v.* Trustees, 6 Ill. App. 130 (in which it was said that taking leave to amend amounts to nothing more than that the attorney takes time to consider, and if satisfied that the ruling of the court is correct he may amend his answer if possible, and if satisfied that the ruling of the court is erroneous he may decline to answer further and stand by his pleading); Lohrfink *v.* Still, 10 Md. 530; Fox *v.* Crosby, 2 Call (Va.) 1.

84. Condon *v.* Schoenfeld, 214 Ill. 226, 73 N. E. 333; Wisconsin Cent. R. Co. *v.* Wieczorek, 151 Ill. 579, 38 N. E. 678 (holding that, where a plaintiff obtained leave of the trial court to amend his declaration, by adding certain words, which were shown by the bill of exceptions, as well as where they were to be inserted, but he failed to make the amendment, leaving the declaration just as it was, this court could not treat the amendment as being made); Ogden *v.* Lake View, 121 Ill. 422, 13 N. E. 159; Pooler *v.* Southwick, 126 Ill. App. 264 (in which it was said that it is not the office of the clerk of a court to recite in his record that a party has amended a pleading, nor to preserve in his record the language of such amendment. This recital by the clerk was unauthorized, and the record is not affected or enlarged thereby, but remains the same as if this improper recital had not been made. The plea itself, as set out in the record, was not amended, and the clerk certifies that this is a complete transcript of the record, including the pleadings); Landt *v.* McCullough, 103 Ill. App. 668 [*reversed* on other grounds in 206 Ill. 214, 69 N. E. 107] (material variance between pleading and proof); Lohrfink *v.* Still, 10 Md. 530 (failure to allege want of probable cause in an action for malicious prosecution). And see Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518. *Compare* Chicago Great Western R. Co. *v.* Mitchell, 70 Ill. App. 188.

85. *Alabama.*— Carter *v.* Fischer, 127 Ala. 52, 28 So. 376.

California.—Alameda County *v.* Crocker, 125 Cal. 101, 57 Pac. 766.

Colorado.— Faust *v.* Goodnow, 4 Colo. App. 352, 36 Pac. 71.

Iowa.— Kuhn *v.* Gustafson, 73 Iowa 633, 35 N. W. 660; Brantz *v.* Marcus, 73 Iowa 64, 35 N. W. 115.

Kansas.— Excelsior Mfg. Co. *v.* Boyle, 46 Kan. 202, 26 Pac. 408. And see Wilcox, etc., Organ Co. *v.* Lasley, 40 Kan. 521, 20 Pac. 228; Bailey *v.* Bayne, 20 Kan. 657.

Massachusetts.— Hawkes *v.* Davenport, 5 Allen 390.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5.

North Carolina.—Holland *v.* Crow, 34 N. C. 275; Ufford *v.* Lucas, 9 N. C. 214.

Rhode Island.— Eaton *v.* Case, 17 R. I. 429, 22 Atl. 943.

Tennessee.— Lyon *v.* Brown, 6 Baxt. 64; Beeler *v.* Huddleston, 3 Coldw. 201; Eakin *v.* Burger, 1 Sneed 417.

Wisconsin.—Forcy *v.* Leonard, 63 Wis. 353, 24 N. W. 78; Kretser *v.* Cary, 52 Wis. 374, 9 N. W. 161.

Canada.— Crowell *v.* Longard, 28 Nova Scotia 257.

And see Iverson *v.* McDonnell, 36 Wash. 73, 78 Pac. 202.

Applications of rule.— Where a plea in

The course is to consider the order as standing for the amendment itself.[86] And where an amendment is ordered or permitted, and is of such a nature that the record furnishes upon its face all the data for applying it, it may be considered as made, although no verbal changes are made in the pleadings, which are then to be read as if they had been actually amended.[87] But where there is nothing in the record from which it can be inferred that an amendment was allowed and made,[88] or in what way the pleading should be amended,[89] no amendment can be inferred. And where, at the close of the trial, the court asks a party if he desires to amend so as to make his pleading conform to the proof, and he declines to do so, he cannot later treat the announcement of the court that it would of its own motion make the necessary amendments, as an amendment in fact.[90]

g. Mode of Making Amendments — (1) *In General.* There are three ways of amending pleadings subject to the discretion of the court: (1) By interlineation; (2) by writing the amendment, and the amendment only, on a separate piece of paper and referring to the original; and (3) by rewriting the original, and incorporating the amendment in it.[91] Pleadings cannot be amended orally.[92] An amendment should show the date of the original pleading.[93] A statement in the

abatement is confessed and leave given to plaintiff to amend, such amendment should regularly be made, but if it is not made, and defendant proceeds with the cause he will be deemed to have waived it. Carter *v.* Fischer, 127 Ala. 52, 28 So. 376. Where, during the pendency of a suit, leave is obtained to amend the writ and change the form of action, although such amendment be not made on the record, if the suit be tried in its amended form, the reviewing court will consider the amendment as having been actually made. Ufford *v.* Lucas, 9 N. C. 214. Where the case is tried as if the amendment is made the omission to file an amended declaration inserting the name of plaintiff's wife was not sufficient cause for arrest of judgment. Lyon *v.* Brown, 6 Baxt. (Tenn.) 64. Where the court makes an order directing that the complaint be amended by inserting defendant's true name, the order itself is a sufficient amendment. It would have been more regular to have made the amendment in the complaint but the error, if any, is immaterial. Hoffman *v.* Keeton, 132 Cal. 195, 64 Pac. 264. If a plaintiff has had leave to amend his writ by striking out the name of one of defendants, and thereupon discontinued as to him and proceeded to trial against the other alone, without actually amending his declaration, this mode of proceeding, if acquiesced in at the time, furnishes no reason for granting a new trial, after a verdict against the remaining defendant. Hawkes *v.* Davenport, 5 Allen (Mass.) 390. Where a party, when certain testimony is objected to, asks leave to amend a pleading to conform to the facts as stated by his witnesses, and the court reserves its ruling but admits the testimony, and decides the point as if the amendment had been allowed, the appellate court will assume that the amendment was in fact allowed and made. Lazelle *v.* Miller, 40 Oreg. 549, 67 Pac. 307. If the court allows an amendment, suggesting that the trial proceed and the amendment be filed afterward, no objection to this course being made, it is too late, on exceptions, to object that the amendment was not filed until after verdict. Horne *v.* Meakin, 115 Mass. 326; Eaton *v.* Case, 17 R. I. 429, 22 Atl. 943. Where, after the arguments to the jury had been concluded, counsel asked leave to file an amendment to conform his pleadings to the proofs, and the amendment went into the hands of the judge without being filed, and he instructed in accordance therewith, and counsel for defendant knew of it, and knew the purport, and in substance agreed that it might be considered as filed, it was held that defendant could not after verdict, in a motion for a new trial, object for the first time to the amendment. Brantz *v.* Marcus, 73 Iowa 64, 35 N. W. 115.

86. Holland *v.* Crow, 34 N. C. 275.

87. Ballou *v.* Hill, 23 Mich. 60; Underwood *v.* Bishop, 67 Mo. 374. To the same effect see French *v.* McCarthy, 125 Cal. 508, 58 Pac. 154; Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; Waders *v.* Whallon, 74 Hun (N. Y.) 372, 26 N. Y. Suppl. 614.

88. Shearin *v.* Neville, 18 N. C. 3, holding that where suit is brought against defendant in his representative character and it does not appear from the record that the declaration was so amended as to charge defendant personally, a personal judgment against him will be reversed.

89. Ballou *v.* Hill, 23 Mich. 60. And see Keith *v.* Cliatt, 59 Ala. 408.

90. Carpentier *v.* Brenham, 50 Cal. 549.

91. Fitzpatrick *v.* Gebhart, 7 Kan. 35; Turner *v.* Hamilton, 13 Wyo. 408, 80 Pac. 664.

92. Charlton *v.* Rose, 24 N. Y. App. Div. 485, 48 N. Y. Suppl. 1073; Parrish *v.* Sun Printing, etc., Assoc., 6 N. Y. App. Div. 585, 39 N. Y. Suppl. 540, an amendment granted on the trial should be written out and inserted in the proper place in the pleadings, so that the appellate court may determine its effect.

93. Lewis *v.* Alexander, 51 Tex. 578; Walter A. Wood Mowing, etc., Co. *v.* Hancock, 4 Tex. Civ. App. 302, 23 S. W. 384.

complaint that the account sued on was verified need not be repeated when the complaint is amended.[94]

(II) *By Interlineation.* Where amendment by interlineation is prohibited by statute, leave to so amend is properly refused.[95] But it has been held that notwithstanding a statutory requirement that the pleading sought to be amended shall be rewritten, the question whether a particular amendment may be made by interlineation rests largely within the discretion of the court; and that the fact that the amendment was made by interlineation instead of by filing a new petition is not ground for reversal.[96] If authorized by statute,[97] or not prohibited by statute,[98] the court may in its discretion permit amendments by interlineation, especially where the amendment is of a trivial or formal character.[99] Amending by interlineation to obviate a technical objection is proper even though the pleading has been verified.[1] And it has been held that, even though the amendment is of a material defect, the failure to require a new verification is not reversible error.[2]

(III) *By Filing Separate Paper.* Although looked upon with disfavor by the courts, the practice prevails quite generally of making amendments by reference to and adoption of specified portions of previous pleadings, and by adding thereto new averments so as to constitute another and separate pleading.[3] An amendment made on a separate paper need not be physically attached to the original pleading if placed among the files.[4] A pleading may be incorporated in an amendment by reference even though it has been stricken from the files.[5] But an amendment which does not indicate in what part of the pleading it is to be inserted must be disregarded, as it is for the party and not for the court to present the case.[6]

(IV) *By Rewriting Pleading so as to Embody Amendment.* The best method of making an amendment which adds new averments to a pleading is to entirely rewrite the pleading with the proper additions,[7] and the original

94. Fulton *v.* Sword Medicine Co., 145 Ala. 331, 40 So. 393.

95. Simmons *v.* Rust, 39 Iowa 241.

96. South Joplin Land Co. *v.* Case, 104 Mo. 572, 16 S. W. 390.

97. Campbell *v.* Wolfe, 33 Mo. 459.

98. Martin *v.* Stratton-White Co., 1 Indian Terr. 394, 37 S. W. 833; Scarlett *v.* Baltimore Academy of Music, 43 Md. 203; Lohrfink *v.* Still, 10 Md. 530; Underwood *v.* Bishop, 67 Mo. 374. But see Hill *v.* Stone Creek Tp. Road Dist., 10 Ohio St. 621, in which it was held that, where an amendment is to be made by striking out or adding an allegation to a petition, it cannot be done by mutilating or altering the files. The party amending should either file a new petition or answer, or file a statement of the amendment and designate by reference whether new matter is to be inserted, or what is to be considered as stricken out.

In Nebraska it has been said that the practice of amending pleadings by interlineation or erasure is not to be commended and should not be favored. Western Travellers' Acc. Assoc. *v.* Tomson, 72 Nebr. 661, 101 N. W. 341, 103 N. W. 695, 105 N. W. 293.

99. Chamberlain *v.* Loewenthal, 138 Cal. 4, 70 Pac. 932 (changing dates); Fitzpatrick *v.* Gebhart 7 Kan. 35; South Joplin Land Co. *v.* Case, 104 Mo. 572, 16 S. W. 390 (adding or striking out the name of a party, or correcting dates or obvious errors).

1. Meshke *v.* Van Doren, 16 Wis. 319.

2. Consolidated St. R. Co. *v.* Barlage, 6 Ohio Dec. (Reprint) 826, 8 Am. L. Rec. 357, 7 Ohio Dec. (Reprint) 675, 4 Cinc. L. Bul. 910.

3. Birmingham R., etc., Co. *v.* Allen, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457; Caledonia Gold Min. Co. *v.* Noonan, 3 Dak. 189, 14 N. W. 426; Keister *v.* Myers, 115 Ind. 312, 17 N. E. 161; Eigenman *v.* Rockport Bldg., etc., Assoc., 79 Ind. 41; Turner *v.* Hamilton, 13 Wyo. 408, 80 Pac. 664.

4. Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811.

5. Mahaska County State Bank *v.* Crist, 87 Iowa 415, 54 N. W. 450.

6. Bourland *v.* Sickles, 26 Ill. 497.

7. *Alabama.*— Birmingham R., etc., Co. *v.* Allen, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457.

Dakota.— Caledonia Gold Min. Co. *v.* Noonan, 3 Dak. 189, 14 N. W. 426.

Illinois.— Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

Indiana.— Keister *v.* Myers, 115 Ind. 312, 17 N. E. 161.

Kentucky.— Grant *v.* Groshon, Hard. 85, 3 Am. Dec. 725.

North Carolina.— Graham *v.* Skinner, 57 N. C. 94.

North Dakota.— Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518.

Wyoming.— Turner *v.* Hamilton, 13 Wyo. 408, 80 Pac. 664.

See 39 Cent. Dig. tit. "Pleading," § 640.

pleading should either be withdrawn or so dated and arranged as to avoid confusion.[8]

h. Notice of Amendment — (I) *When Notice Necessary* — (A) *In General.* Whatever practice is followed in making a material amendment, it is generally necessary, particularly when the amendment is made of course and without leave of court, that notice of the amendment be given to the opposite party,[9] and especially if such party is in default,[10] or if the amendment substantially changes the cause of action or the nature of the judgment sought.[11] Under statutes providing that the time which an adverse party is allowed in which to do an act shall be doubled if service is made through the post-office, and that a pleading may be once amended as of course at any time before the period for answering it expires, it has been held that the time within which an amended answer may be served is not doubled if the original answer was served by mail.[12]

(B) *Effect of Failure to Give Notice.* If an amendment presents a new cause of action against the same or other defendants, and no notice thereof is given, a judgment based on the matter contained in the amendment is void.[13] But under some circumstances it has been held that the failure to give notice of an amendment, especially where the opposite party is not injured thereby, is but an irregularity such as will not render the judgment void.[14]

(II) *When Notice Unnecessary.* Usually notice is not necessary where the amendment is made in open court in the presence of the parties,[15] where the defect is cured by verdict and the amendment is made merely to render the record consistent and perfect,[16] or where the amendment alleges nothing not already sufficiently stated in the original pleading.[17] And if the amendment be made before any service is had on defendant, the summons may require him to appear

What is considered an amended declaration. — A reproduction of the original declaration with a new count added, entitled "Amended Declaration," and so designated and treated in the order of the court filing it, is deemed an amended declaration, not a new and independent one. Lawson *v.* Williamson Coal, etc., Co., 61 W. Va. 669, 57 S. E. 258.

8. Norwood *v.* State, 45 Md. 68.

9. *California.*— Young *v.* Fink, 119 Cal. 107, 50 Pac. 1060.

Colorado.— McDonald *v.* Hallicy, 1 Colo. App. 303, 29 Pac. 24.

Idaho.— Vermont L. & T. Co. *v.* McGregor, 5 Ida. 320, 51 Pac. 102.

Iowa.— Ogle *v.* Miller, 128 Iowa 474, 104 N. W. 502.

Kansas.— Leavenworth, etc., R. Co. *v.* Van Riper, 19 Kan. 317.

Michigan.— Parsons *v.* Copland, 5 Mich. 144.

Nevada.— Keller *v.* Blasdel, 2 Nev. 162.

New York.— Luckey *v.* Mockridge, 112 N. Y. App. Div. 908, 98 N. Y. Suppl. 337; Kent *v.* Ætna Ins. Co., 88 N. Y. App. Div. 518, 85 N. Y. Suppl. 164; Durham *v.* Chapin, 13 N. Y. App. Div. 94, 43 N. Y. Suppl. 342; Abrahams *v.* Finkelstein, 49 Misc. 448, 97 N. Y. Suppl. 987; Shaw *v.* Bryant, 20 N. Y. Suppl. 785; Fassett *v.* Tallmadge, 15 Abb. Pr. 205.

Pennsylvania.— Comrey *v.* East Union Tp., 202 Pa. St. 442, 51 Atl. 1025.

South Carolina.— Brown *v.* Easterling, 59 S. C. 472, 38 S. E. 118.

Texas.— Pena *v.* Pena, (Civ. App. 1898) 43 S. W. 1027.

United States.— Chapman *v.* Barney, 129 U. S. 677, 9 S. Ct. 426, 32 L. ed. 800; Peterson *v.* Chicago, etc., R. Co., 108 Fed. 561.

Canada.— Dingman *v.* Keegan, 1 Ont. Pr. 135; Lick *v.* Ausman, 1 U. C. Q. B. 399; Hart *v.* Boyle, 6 U. C. Q. B. O. S. 168; Randall *v.* Taggart, 4 U. C. Q. B. O. S. 2.

See 39 Cent. Dig. tit. "Pleading," § 641.

10. Linott *v.* Rowland, 119 Cal. 452, 51 Pac. 687; Schultz *v.* Loomis, 40 Nebr. 152, 58 N. W. 693; Ball *v.* Danforth, 63 N. H. 420.

11. *Iowa.*— Heins *v.* Wicke, 102 Iowa 396, 71 N. W. 345.

Kansas.— Leavenworth, etc., R. Co. *v.* Van Riper, 19 Kan. 317.

New Hampshire.— Ball *v.* Danforth, 63 N. H. 420.

Ohio.— Moorman *v.* Schmidt, 69 Ohio St. 328, 69 N. E. 617.

Texas.— Rabb *v.* Rogers, 67 Tex. 335, 3 S. W. 303.

See 39 Cent. Dig. tit. "Pleading," § 641.

12. Armstrong *v.* Phillips, 60 Hun (N. Y.) 243, 14 N. Y. Suppl. 582; Seckel *v.* Tangemann, 53 Misc. (N. Y.) 268, 103 N. Y. Suppl. 77. *Contra*, Schlesinger *v.* Borough Bank, 112 N. Y. App. Div. 121, 98 N. Y. Suppl. 136.

13. Ogle *v.* Miller, 128 Iowa 474, 104 N. W. 502.

14. Wells *v.* Law, (Cal. 1894) 38 Pac. 523; Carr *v.* Sterling, 114 N. Y. 558, 22 N. E. 37.

15. Naracong *v.* Graves, 8 Nebr. 443, 1 N. W. 127; Spofford *v.* Ritten, 22 Fed. Cas. No. 13,244, 4 McLean 253.

16. Clark *v.* Dales, 20 Barb. (N. Y.) 42.

17. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

and answer the complaint filed without referring to it as an amended complaint.[18] So notice may be waived by the opposite party appearing and moving to strike out the proposed amendment,[19] or moving for a continuance.[20] In Illinois the practice is settled, although not always regarded with favor by the courts, that parties to a suit are bound to take notice of amendments, and no actual notice is required.[21]

7. Amendments Causing Surprise.[22] No party should be called into court prepared to try one issue and then be required to try another, of which he then for the first time has notice; but if an amendment, in other respects proper, does not surprise the adverse party, it may be properly allowed.[23] Whether an amendment will cause surprise or not depends largely upon circumstances.[24]

8. Amendment Setting up Cause of Action Where None Existed Before or Introducing Facts Occurring After Action Commenced. It is a fundamental principle that all pleadings in a suit must primarily relate to the time when the action was commenced and must be based on facts and causes of action as they existed

For example, in an action to foreclose a vendor's lien, defendant is not entitled to service of an amendment giving merely a better description of the land on which the lien is sought to be foreclosed. McConnell *v.* Foscue, (Tex. Civ. App. 1894) 24 S. W. 964.

18. Dowling *v.* Comerford, 99 Cal. 204, 33 Pac. 853.

19. Kimball *v.* Bryan, 56 Iowa 632, 10 N. W. 218.

20. Baker *v.* Kansas City, etc., R. Co., 107 Mo. 230, 17 S. W. 816.

21. After the original summons is served and answered a party is presumed to be before the court for all purposes. Consequently he must take notice from the files in the case of an amendment. In Niehoff *v.* People, 66 Ill. App. 669, the appellate court comments unfavorably on the practice, but on appeal the supreme court, while affirming the decision, takes occasion to justify the practice. Niehoff *v.* People, 171 Ill. 243, 49 N. E. 214.

22. Right to continuance for surprise caused by amendments see Continuances in Civil Cases, 9 Cyc. 122 *et seq.*

23. *California.*— Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560.

Illinois.— B. Shoninger Co. *v.* Mann, 121 Ill. App. 275 [*affirmed* in 219 Ill. 242, 76 N. E. 354, 3 L. R. A. N. S. 1097].

Missouri.— Pinkston *v.* Stone, 3 Mo. 119; Sinclair *v.* Missouri, etc., R. Co., 70 Mo. App. 588.

New York.— Parsons *v.* Sutton, 66 N. Y. 92; Penny *v.* Van Cleef, 1 Hall 165; Moscowitz *v.* Homberger, 19 Misc. 429, 43 N. Y. Suppl. 1130; Charwat *v.* Vopelak, 18 Misc. 601, 42 N. Y. Suppl. 235; Powers *v.* Fox, 11 N. Y. St. 651.

South Carolina.—Adams *v.* South Carolina, etc., Extension R. Co., 63 S. C. 403, 47 S. E. 693.

Washington.— Smith *v.* Michigan Lumber Co., 43 Wash. 402, 86 Pac. 652; Vulcan Iron Works *v.* Burrell Constr. Co., 39 Wash. 319, 81 Pac. 836.

Wisconsin.— Carroll *v.* Fethers, 102 Wis. 436, 78 N. W. 604.

24. See cases cited *infra*, this note.

Amendments not causing surprise.— The correction of a misdescription of property (Smith *v.* Flack, 95 Ind. 116; Ferguson *v.* Ramsey, 41 Ind. 511), or the making of a description more definite (Stacy *v.* Bryant, 73 Wis. 14, 40 N. W. 632), has been held to create no surprise. So it has been held that a party cannot object on the ground of surprise to an amendment changing an action for use and occupation to one for breach of covenant (Bedford *v.* Terhune, 30 N. Y. 453, 86 Am. Dec. 394), nor to an amendment changing the allegation of a reasonable sum, as the consideration for a contract to a fixed and definite sum (Cleaves *v.* Lord, 3 Gray (Mass.) 66). And obviously a party cannot object to an amendment, because of surprise, when the pleadings alleged that a certain sum was due and the proof showed that it was in reality a much less sum (Sogge *v.* Schwartz, 116 Mich. 635, 74 N. W. 1000). When an injury is alleged to have been committed no surprise is occasioned by an amendment changing the date so as to conform to the proof. Sinclair *v.* Missouri, etc., R. Co., 70 Mo. App. 588. An amendment conforming an allegation that a note was given by a firm to evidence showing that it was given by an assignee of the firm cannot be objected to on the ground of surprise. Williston *v.* Camp, 9 Mont. 88, 22 Pac. 501. In like manner a declaration that plaintiff was injured by being struck and cast on the ground by a truck which resulted in the fracture of a leg may be amended at the close of the evidence, so as to allege that the wheel of the truck ran over the leg causing the fracture, since such an averment does not operate as a surprise. Foley *v.* Riverside Storage, etc., Co., 85 Mich. 7, 48 N. W. 154. In an action for fraud an amendment alleging a specific false representation shown by the evidence is not objectionable on the ground of surprise. Rathbun *v.* Parker, 113 Mich. 594, 72 N. W. 31, but see dissenting opinion by Grant, J. Plaintiff cannot be surprised by an amendment at the trial of the separate answer of a defendant, so as to deny allegations of the

then.[25] And as a general rule an amendment cannot allege facts that have arisen since the commencement of the action so as to set up a cause of action, where none before existed,[26] or so as to set up a new cause of action which has accrued since the action was begun,[27] or additional grounds of action.[28] And while ordinarily a supplemental pleading is the most appropriate means of introducing into a case matters which have occurred since the original pleading was filed,[29] in some jurisdictions an exception to this rule exists to the extent, that, where a cause of action existed at the commencement of the action, an amendment may be allowed setting up matters occurring subsequent to the commencement of the action, which have a direct bearing upon the matters in controversy, and do not change the substance of the original complaint; [30] and in at least one jurisdiction an amendment may set up any new matter which does not state a new cause of action inconsistent with that alleged in the original pleading.[31] It has been held that where, in the progress of a suit, new parties are admitted as defendants, it is incumbent on plaintiff to amend his complaint by inserting therein the names of such parties and by making proper averments concerning them.[32] But an order allowing plaintiff to amend so as to bring in new parties does not authorize an amendment so as to include additional grounds of action arising after commencement of the suit.[33]

9. Amendments Introducing Newly Discovered Matter. There is a wide

complaint, when such allegations have already been put in issue by the answer of another defendant. Hoffman *v.* Susemihl, 15 N. Y. App. Div. 405, 44 N. Y. Suppl. 52. A party is not surprised by an amendment alleging nothing which might not have been proved under the original pleading. Thompson *v.* Brown, 106 Iowa 367, 76 N. W. 819.

25. Brown *v.* Galena Min., etc., Co., 32 Kan. 528, 4 Pac. 1013; State *v.* Turner, 96 N. C. 416, 2 S. E. 51.

26. *California.*— Mono County *v.* Flanigan, 130 Cal. 105, 62 Pac. 293.

Iowa.— Randall *v.* Christianson, 84 Iowa 501, 51 N. W. 253.

Kansas.— Brown *v.* Galena Min., etc., Co., 32 Kan. 528, 4 Pac. 1013.

Louisiana.— Bell *v.* Williams, 10 La. 514.

Missouri.— Rice *v.* McClure, 74 Mo. App. 379; Davis *v.* Clark, 40 Mo. App. 515.

New York.— Berford *v.* New York Iron Mine, 57 N. Y. Super. Ct. 404, 8 N. Y. Suppl. 193; Muller *v.* Earle, 37 N. Y. Super. Ct. 388; McCullough *v.* Colby, 4 Bosw. 603.

North Carolina.— Powell *v.* Allen, 103 N. C. 46, 9 S. E. 138; State *v.* Turner, 96 N. C. 416, 2 S. E. 51. See also Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927.

Canada.— Ward *v.* Merchants' Bank, 4 Quebec Pr. 407; Kaine *v.* Matthews, 4 Quebec Pr. 226; Desrosiers *v.* Tellier, 2 Quebec Pr. 88; Brunet *v.* Venne, 12 Quebec Super. Ct. 512.

See 39 Cent. Dig. tit. "Pleading," § 684.

27. *Alabama.*— Jamison *v.* Governor, 47 Ala. 390.

Georgia.— Harris *v.* Moss, 112 Ga. 95, 37 S. E. 123.

Louisiana.— Martin *v.* Hanson, 114 La. 784, 38 So. 560.

Missouri.— Lennox *v.* Vandalia Coal Co., 158 Mo. 473, 59 S. W. 242.

North Carolina.— Powell *v.* Allen, 103 N. C. 46, 9 S. E. 138.

South Carolina.— Correll *v.* Georgia Constr., etc., Co., 37 S. C. 444, 16 S. E. 156.

Wisconsin.— Pape *v.* Carlton, 130 Wis. 123, 109 N. W. 968; Shinners *v.* Brill, 38 Wis. 648.

United States.— Northrop *v.* Mercantile Trust Co., 119 Fed. 969.

See 39 Cent. Dig. tit. "Pleading," § 684.

28. Fickett *v.* Cohu, 14 Daly (N. Y.) 550, 1 N. Y. Suppl. 436.

29. See *infra*, VII, D.

30. *Louisiana.*— Hale *v.* New Orleans, 13 La. Ann. 499; Eastin *v.* Dugat, 4 La. 397.

Massachusetts.— Goodrich *v.* Bodurtha, 6 Gray 323.

New York.— Dunham *v.* Hastings Pavement Co., 95 N. Y. App. Div. 360, 88 N. Y. Suppl. 835; Industrial, etc., Trust Co. *v.* Todd, 93 N. Y. App. Div. 263, 87 N. Y. Suppl. 687; Gaylord *v.* Beardsley, 21 N. Y. Suppl. 840.

Oklahoma.— Randolph *v.* Hudson, 12 Okla. 516, 74 Pac. 946.

Pennsylvania.— Bradford *v.* Downs, 126 Pa. St. 622, 17 Atl. 884.

See 39 Cent. Dig. tit. "Pleading," § 684.

And see King *v.* Wright, 77 Ga. 581; Lawrence *v.* Atchison, etc., R. Co., 61 Mo. App. 62; Teasdale *v.* Jordan, 23 Fed. Cas. No. 13,814, Brunn. Col. Cas. 19, 3 N. C. 281.

A complaint filed before all of several obligations became due may later be amended in the discretion of the court to include the whole demand then due. Warfield *v.* Oliver, 23 La. Ann. 612.

31. Dalton *v.* Rainey, 75 Tex. 516, 13 S. W. 34; Walker *v.* Howard, 34 Tex. 478; Smith *v.* McGaughey, 13 Tex. 464; Galveston, etc., R. Co. *v.* Ryan, (Tex. Civ. App. 1893) 21 S. W. 1013; Galveston, etc., R. Co. *v.* Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011.

32. Levi *v.* Engle, 91 Ind. 330.

33. Fickett *v.* Cohu, 14 Daly (N. Y.) 550, 1 N. Y. Suppl. 436.

difference between facts not occurring until after the action is commenced and matters existing, but not discovered until after the commencement of such action.[34] In the latter case it is usually within the discretion of the court to allow an amendment.[35] The amendment is properly refused, however, where the slightest diligence would have disclosed to the party at the outset the facts which he seeks to set up by amendment,[36] or where he fails to comply with a statutory requirement that an affidavit be filed stating that at the time of filing the original pleading he did not have notice or knowledge of the facts which the amendment seeks to set up,[37] and if the facts alleged in the proposed amendment were not discovered since the original pleading was filed, but were, in fact known at that time, the court may in the exercise of a sound discretion reject the amendment.[38]

10. Time For Amendment[39] — a. In General. The purpose of this chapter is to state only those principles relating to the time of amendment, which are of the most general application. So far as possible, the question of time is considered in relation to the particular kind of amendment sought. This method of treatment is rendered almost indispensable by the fact that the character of the amendment is so frequently of controlling force in determining whether timely application has been made therefor.[40] Within the range of sound judicial discretion, an amendment may be allowed in furtherance of justice, either before the trial or at the trial, or after the trial and before final judgment,[41] and in many jurisdictions the power

34. Seevers *v.* Hamilton, 11 Iowa 66.

35. *California.*— McDougald *v.* Hulet, 132 Cal. 154, 64 Pac. 278. And see Hibernia Sav. Co. *v.* Robinson, 150 Cal. 140, 88 Pac. 720.

Indiana.— Home Ins. Co. *v.* Overturf, 35 Ind. App. 361, 74 N. E. 47.

Louisiana.— Regan's Succession, 12 La. Ann. 116; Bissell *v.* Erwin, 13 La. 143.

Michigan.— Pangborn *v.* Continental Ins. Co., 67 Mich. 683, 35 N. W. 814.

New Jersey.— Kellogg *v.* Scott, 58 N. J. Eq. 344, 44 Atl. 190 [*affirmed* in 62 N. J. Eq. 811, 48 Atl. 1117].

New York.— Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338; Schreyer *v.* New York, 39 N. Y. Super. Ct. 277.

Ohio.— Smith *v.* Newark, etc., R. Co., 8 Ohio Cir. Ct. 583, 4 Ohio Cir. Dec. 356.

36. Woods *v.* Campbell, 87 Miss. 782, 40 So. 874.

37. Newman *v.* Scofield, 102 Ga. 810, 30 S. E. 427.

38. Cavanaugh *v.* Britt, 90 Ky. 273, 13 S. W. 922, 12 Ky. L. Rep. 204; Leggett *v.* Potter, 9 La. Ann. 184; Cocks *v.* Radford, 13 Abb. Pr. (N. Y.) 207.

39. **Adding new defense by an amendment before trial** see *infra*, VII, A, 11, d, (II), (F).

Allegations as to time see *infra*, VII, A, 11, r.

Amendment of demurrer see *infra*, VII, A, 14, b.

Amendment of prayer for relief generally see *infra*, VII, A, 11, n, (I).

Amendments as of course see *supra*, VII, A, 5, b.

Amendments not changing defense see *infra*, VII, A, 11, d, (II), (E).

Changing cause of action see *infra*, VII, A, 11, a.

Changing defense see *infra*, VII, A, 11, d, (II), (E).

Changing form of action from contract to tort and vice versa see *infra*, VII, A, 11, f, (IV).

Changing one form of action ex contractu to another see *infra*, VII, A, 11, f, (II).

Increasing amount of damages claimed see *infra*, VII, A, 11, n, (II), (D).

40. See *infra*, VII, A, 11.

41. *California.*— Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955; Kirstein *v.* Madden, 38 Cal. 158.

Connecticut.— Betts *v.* Hoyt, 13 Conn. 469.

Delaware.— State *v.* Collins, 1 Harr. 216, discussing the English and American views upon the subject.

Florida.— Robinson *v.* Hartridge, 13 Fla. 501.

Georgia.— Hagerstown Steam-Engine Co. *v.* Grizzard, 86 Ga. 574, 12 S. E. 939.

Illinois.— Milwaukee Mechanics' Ins. Co. *v.* Schallman, 188 Ill. 213, 59 N. E. 12; Knefel *v.* Flanner, 166 Ill. 147, 46 N. E. 762 [*affirming* 66 Ill. App. 209]; Great Western Tel. Co. *v.* Mears, 154 Ill. 437, 40 N. E. 298 [*affirming* 54 Ill. App. 667]; McCollom *v.* Indianapolis, etc., R. Co., 94 Ill. 534; Register Gazette Co. *v.* Larash, 109 Ill. App. 236; Winheim *v.* Field, 107 Ill. App. 145; Chicago *v.* Wolf, 86 Ill. App. 286; Chicago *v.* Wood, 24 Ill. App. 40.

Indiana.— Raymond *v.* Wathen, 142 Ind. 367, 41 N. E. 815; Koons *v.* Price, 40 Ind. 164; Consumers' Gas Trust Co. *v.* Corbaley, 14 Ind. App. 549, 43 N. E. 237.

Kentucky.— Rogers *v.* Rogers, 15 B. Mon. 364.

Louisiana.— Fletcher *v.* Cavalier, 4 La. 267; Abat *v.* Bayon, 4 Mart. N. S. 516; Vavasseur *v.* Bayon, 11 Mart. 639. It may be offered on the day of trial before the case is called. Young *v.* Gay, 41 La. Ann. 758, 6 So. 608.

Minnesota.— Gerdtzen *v.* Cockrell, 52 Minn. 501, 55 N. W. 58.

exists by virtue of statute to permit amendments even after the cause has proceeded to judgment.[42]

b. Effect of Stipulation of Parties. In case a party consents to the filing of an amendment out of time his subsequent motion to strike it out because not filed in time may very properly be refused.[43]

c. Effect of Laches. The right to amend a pleading must be claimed in opportune time.[44] Unnecessary delay in applying for leave to amend may be a ground for the court's refusing, in the exercise of its discretion, to allow an amendment.[45] In case there has been delay in presenting an amendment the

Mississippi.— Barker *v.* Justice, 41 Miss. 240.

Missouri.— Dorsey *v.* Atchison, etc., R. Co., 83 Mo. App. 528.

New York.— Naylor *v.* Loomis, 79 N. Y. App. Div. 21, 79 N. Y. Suppl. 1011. See also Ward *v.* Gillies, 11 N. Y. Suppl. 797; Enright *v.* Seymour, 8 N. Y. St. 356.

Pennsylvania.— Van Dusen *v.* Edwards, 3 Pa. Co. Ct. 379; Marqueze *v.* Cresswell, 3 Pa. Co. Ct. 378.

Washington.— Ankeny *v.* Clark, 1 Wash. 549, 20 Pac. 583.

Wisconsin.— Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55.

England.— *Re* Trufort, 53 L. T. Rep. N. S. 498, 34 Wkly. Rep. 56.

See 39 Cent. Dig. tit. "Pleading," § 653.

42. See *infra*, VII, A, 10, x.

43. Radford *v.* Gaskill, 20 Mont. 293, 50 Pac. 854.

44. Mohon *v.* Tatum, 69 Ala. 466; Brock *v.* South Alabama, etc., R. Co., 65 Ala. 79; Bishop *v.* Wood, 59 Ala. 253; Ansley *v.* King, 35 Ala. 278.

45. *Alabama.*— Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

California.— Tingley *v.* Times Mirror Co., 151 Cal. 1, 89 Pac. 1097; Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

Colorado.—Wood *v.* Chapman, 24 Colo. 134, 49 Pac. 136; Owers *v.* Olathe Siver Min. Co., 6 Colo. App. 1, 39 Pac. 980; Buno *v.* Gomer, 3 Colo. App. 456, 34 Pac. 256.

Georgia.— Burch *v.* Swift, 116 Ga. 595, 43 S. E. 64; Dorster *v.* Arnold, 8 Ga. 209.

Illinois.—Wolverton *v.* Taylor, 157 Ill. 485, 42 N. E. 49 [*distinguishing* other Illinois cases]; Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; Chicago, etc., R. Co. *v.* O'Conner, 119 Ill. 586, 9 N. E. 263; Knickerbocker Ins. Co. *v.* McGinnis, 87 Ill. 70; Thompson *v.* Sornberger, 78 Ill. 353; Millikin *v.* Jones, 77 Ill. 372; Adams *v.* Chicago Trust, etc., Bank, 54 Ill. App. 672; Mason *v.* Strong, 51 Ill. App. 482.

Indiana.— Gardner *v.* Case, 111 Ind. 494, 13 N. E. 36; McMakin *v.* Weston, 64 Ind. 270; Burr *v.* Mendenhall, 49 Ind. 496.

Iowa.— Davis *v.* Boyer, 122 Iowa 132, 97 N. W. 1002; Dubuque Lumber Co. *v.* Kimball, 111 Iowa 48, 82 N. W. 458; National Horse Importing Co. *v.* Novak, 105 Iowa 157, 74 N. W. 759. And see Forbes & Mills *v.* Bullard, 107 N. W. 1036.

Kansas.— Dever *v.* Junction City, 5 Kan. App. 180, 47 Pac. 152.

Kentucky.— Marks *v.* Handy, 117 Ky. 663, 78 S. W. 864, 1105, 25 Ky. L. Rep. 1770; Atkeson *v.* Sayler, 64 S. W. 443, 23 Ky. L. Rep. 836; Cornett *v.* Combs, 53 S. W. 32, 21 Ky. L. Rep. 837; Faulkner *v.* Keeney, 52 S. W. 819, 21 Ky. L. Rep. 590; Persifull *v.* Boreing, 22 S. W. 440, 15 Ky. L. Rep. 165.

Louisiana.— Dabbs *v.* Hemken, 3 Rob. 123.

Maryland.— Knickerbocker L. Ins. Co. *v.* Hoeske, 32 Md. 317.

Minnesota.— Minneapolis, etc., R. Co. *v.* Fireman's Ins. Co., 62 Minn. 315, 64 N. W. 902; North *v.* Webster, 36 Minn. 99, 30 N. W. 429.

Mississippi.— National Bldg., etc., Assoc. *v.* Brahan, 80 Miss. 407, 31 So. 840.

Missouri.— Weed Sewing Mach. Co. *v.* Philbrick, 70 Mo. 646; Lottman *v.* Barnett, 62 Mo. 159; Stewart *v.* Glenn, 58 Mo. 486; Henderson *v.* Henderson, 55 Mo. 534.

Montana.— Billings *v.* Sanderson, 8 Mont. 201, 19 Pac. 307; Helena First Nat. Bank *v.* How, 1 Mont. 604.

Nebraska.— Western Assur. Co. *v.* Kilpatrick-Kock Dry-Goods Co., 54 Nebr. 241, 74 N. W. 592.

New Jersey.— See Wilson *v.* Wintermute, 27 N. J. Eq. 63.

New York.—Goldberg *v.* Goldstein, 87 N. Y. App. Div. 516, 84 N. Y. Suppl. 782; Guttentag *v.* Whitney, 82 N. Y. App. Div. 145, 81 N. Y. Suppl. 701; Babbitt *v.* Gibbs, 54 N. Y. App. Div. 634, 66 N. Y. Suppl. 598; Dudley *v.* Broadway Ins. Co., 42 N. Y. App. Div. 555, 59 N. Y. Suppl. 668; Higgins *v.* Gedney, 30 N. Y. App. Div. 481, 52 N. Y. Suppl. 331; Grother *v.* New York, etc., Bridge Co., 18 N. Y. App. Div. 379, 46 N. Y. Suppl. 411; Hentz *v.* Havemeyer, 15 N. Y. App. Div. 357, 44 N. Y. Suppl. 58; Fisher *v.* Ogden, 12 N. Y. App. Div. 602, 43 N. Y. Suppl. 111; O'Neil *v.* Hester, 82 Hun 432, 31 N. Y. Suppl. 510; Johnson *v.* Atlantic Ave. R. Co., 76 Hun 12, 27 N. Y. Suppl. 584; Kavanagh *v.* Barber, 68 Hun 183, 22 N. Y. Suppl. 874 [*affirmed* in 149 N. Y. 608, 44 N. E. 1125]; Sheldon *v.* Adams, 41 Barb. 54; Gowdy *v.* Poullain, 4 Thomps. & C. 545; Johnson *v.* American Writing Mach. Co., 56 N. Y. Super. Ct. 500, 4 N. Y. Suppl. 391; Saltus *v.* Genin, 3 Bosw. 639; Aborn *v.* Waite, 30 Misc. 317, 63 N. Y. Suppl. 399; Stephens *v.* McAlpin, 27 Misc. 832, 58 N. Y. Suppl. 395; Rowland *v.* Kellogg, 26 Misc. 498, 57 N. Y. Suppl. 893; Hurlbut *v.* Interior Conduit, etc., Co., 8 Misc. 100, 28 N. Y. Suppl. 1007; Wooster *v.* Bateman, 25 N. Y. Suppl. 806; Eggleston

court may require the party to offer an excuse for such delay, and upon his failure to do so may refuse permission to amend.[46] Laches will not be excused where

v. Beach, 11 N. Y. Suppl. 525; Bulen *v.* Burdell, 11 Abb. Pr. 381; Egert *v.* Wicker, 10 How. Pr. 193; Malcom *v.* Baker, 8 How. Pr. 301; Allen *v.* Compton, 8 How. Pr. 251; Archer *v.* Douglass, 1 How. Pr. 93. But see Annapolis Farmers' Nat. Bank *v.* Underwood, 15 N. Y. App. Div. 626, 44 N. Y. Suppl. 121.

North Carolina.— Biggs *v.* Williams, 66 N. C. 427.

Oregon.— Osmun *v.* Winters, 30 Oreg. 177, 46 Pac. 780; Garrison *v.* Goodale, 23 Oreg. 307, 31 Pac. 709.

Pennsylvania.— Hoofstitler *v.* Hostetter, 172 Pa. St. 575, 33 Atl. 753; Perdue *v.* Taylor, 146 Pa. St. 163, 23 Atl. 317; Bricker *v.* Dull, 82 Pa. St. 328. But see Beeson *v.* Com., 13 Serg. & R. 249.

Tennessee.— McCarthy *v.* Catholic Knights and Ladies of America, 102 Tenn. 345, 52 S. W. 142.

Texas.— Green *v.* Dunman, 35 Tex. 175; Blanchet *v.* Davis, 10 Tex. 158; Matossy *v.* Frosh, 9 Tex. 610.

Wisconsin.— Rice *v.* Ashland Co., 114 Wis. 130, 89 N. W. 908; St. Clara Female Academy *v.* Northwestern Nat. Ins. Co., 101 Wis. 464, 77 N. W. 893.

United States.— Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; Hardin *v.* Boyd, 113 U. S. 756, 3 S. Ct. 771, 28 L. ed. 1141; Municipal Inv. Co. *v.* Industrial, etc., Trust Co., 89 Fed. 254; Wyler *v.* Union Pac. R. Co., 89 Fed. 41; Rice *v.* Ege, 42 Fed. 658.

England.— Edevain *v.* Cohen, 43 Ch. D. 187, 62 L. T. Rep. N. S. 17, 38 Wkly. Rep. 177; Bierdermann *v.* Seymour, 1 Beav. 594, 17 Eng. Ch. 594, 48 Eng. Reprint 1071; Hammond *v.* Colls, 3 C. B. 212, 54 E. C. L. 212; Welch *v.* Hall, 1 Dowl. P. C. N. S. 365, 11 L. J. Exch. 57, 9 M. & W. 14; Knox *v.* Gye, 9 Jur. N. S. 1227, 9 L. T. Rep. N. S. 573, 12 Wkly. Rep. 145 [*affirmed* in 10 Jur. N. S. 861, 11 L. T. Rep. N. S. 201, 12 Wkly. Rep. 1125]; Altree *v.* Horden, 3 Jur. 816; Rankin *v.* Marsh, 8 T. R. 30; Steel *v.* Sowerby, 6 T. R. 171; Goff *v.* Popplewell, 2 T. R. 707.

Canada.— Shea *v.* O'Connor, 26 Nova Scotia 205.

See 39 Cent. Dig. tit. "Pleading," §§ 654, 766.

Facts showing laches sufficient to authorize refusal.—Amendments have been refused when the application for leave was filed eight years after the commencement of the suit (Wolverton *v.* Taylor, 157 Ill. 485, 42 N. E. 49), nine years after judgment (North *v.* Webster, 36 Minn. 99, 30 N. W. 429), after the cause had been four times noticed for trial (Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Sackett *v.* Thompson, 2 Johns. (N. Y.) 206), two years after the trial (Saltus *v.* Genin, 3 Bosw. (N. Y.) 639), after the action had been pending two years (Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Billings *v.* Sanderson, 8 Mont. 201, 19 Pac. 307; Guiterman *v.* Liverpool, etc., Steamship Co., 9 Daly (N. Y.) 119 [*reversed* on other grounds in 83 N. Y. 358]; Bulen *v.* Burdell, 11 Abb. Pr. (N. Y.) 381. See also Johnson *v.* Atlantic Ave. R. Co., 76 Hun (N. Y.) 12, 27 N. Y. Suppl. 584, where the amendment was refused after the action had been pending three years), eight years after issue joined and after the death of one plaintiff and defendant's attorney (Sheldon *v.* Adams, 41 Barb. (N. Y.) 54), ten years after joinder of issue (Bruise *v.* Peck, 6 N. Y. St. 709), sixteen years after service of the original pleading and five months after service of the last pleading in the case (Wooster *v.* Bateman, 25 N. Y. Suppl. 806), after a delay of twelve years in applying for leave (Bricker *v.* Dull, 82 Pa. St. 328. See also Rice *v.* Ege, 42 Fed. 658, where there was a delay of six years in applying for leave), after a long delay and plaintiff's death which rendered defendant incompetent as a witness (Perdue *v.* Taylor, 146 Pa. St. 163, 23 Atl. 317. See also Rice *v.* Ege, *supra*), two years after verdict for defendant (Blanchet *v.* Davis, 10 Tex. 158), to conform to proof two years after the proof was taken (Egert *v.* Wicker, 10 How. Pr. (N. Y.) 193), two years' delay in replying to a counter-claim (Rowland *v.* Kellogg, 26 Misc. (N. Y.) 498, 57 N. Y. Suppl. 893), ten months after the original pleading was filed in a court of continuous sessions (Spurr *v.* Batchelor, 102 Ky. 606, 44 S. W. 213, 19 Ky. L. Rep. 1641). On the other hand amendments have been allowed after a cause had been twice noticed for trial (Jackson *v.* Tuttle, 6 Cow. (N. Y.) 590), in the supreme court nine years after the commencement of the action, the statute of limitations having meantime run (Miller *v.* Watson, 6 Wend. (N. Y.) 506), after the cause had been at issue two years and twice noticed for trial (Saltus *v.* Bayard, 12 Wend. (N. Y.) 228), two years after filing the original pleading (Knott *v.* Taylor, 96 N. C. 553, 2 S. E. 680; Hollander *v.* Baiz, 43 Fed. 35, where application for leave was made seven months after filing the original pleading). So a slight delay as during the summer vacation of the court does not amount to laches. Everett *v.* Everett, 48 N. Y. App. Div. 475, 62 N. Y. Suppl. 1042.

46. *California.*— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

Florida.— Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

Kansas.— Kansas Farmers' Mut. F. Ins. Co. *v.* Amick, 37 Kan. 73, 14 Pac. 454.

Kentucky.— Persifull *v.* Boreing, 22 S. W. 440, 15 Ky. L. Rep. 165.

Minnesota.— Minneapolis, etc., R. Co. *v.* Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902.

New York.— National Pipe Bending Co. *v.* Fisher, 87 Hun 175, 33 N. Y. Suppl. 1035; Heyler *v.* New York News Pub. Co., 71 Hun

the facts on which the proposed amendment is based must have been known to the pleader at the time he filed his original pleading.[47] And a party may properly be denied permission to amend, where the necessity of the amendment was pointed out by the appellate court after a former trial but no attempt was made to amend until the cause again came to trial.[48] Courts as a rule will not allow an amendment setting up a new ground of recovery after the statute of limitations has run.[49] An amendment may be refused on the ground of laches where in addition to the delay it appears that the right to recover rests on a ground highly technical and not meritorious,[50] or where the amendment is diametrically opposed to the original pleading;[51] but defendant cannot charge plaintiff with inexcusable delay in moving to amend when defendant himself in part occasioned such delay,[52] or where he consented to the filing of the amendment out of time.[53] And if a party applies for leave to amend as soon as the insufficiency of his pleading appears, he is not guilty of laches.[54] A party cannot justify his laches on the ground that the proposed amendment is no surprise to the opposing party; for the latter is justified in believing where no amendment is filed within a reasonable time that his opponent means to stand on his original pleading.[55] The general rule that amendments will not be allowed where the party seeking to amend has been guilty of laches or delay is relaxed in case the party is a municipal corporation.[56]

d. After Motion For Change of Venue. The court may allow an amendment to be filed, pending a motion for a change of venue on the part of the opposite party. Until the motion is actually granted the court retains control over the case.[57]

e. After Plea or Demurrer Filed.[58] Subject to such conditions as the court may in its discretion impose, such as payment of costs and the like, a claim may

4, 24 N. Y. Suppl. 499 [*affirmed* in 148 N. Y. 734, 42 N. E. 723]; Aborn *v.* Wait, 30 Misc. 317, 63 N. Y. Suppl. 399.

North Carolina.— Balk *v.* Harris, 130 N. C. 381, 41 S. E. 940.

Texas.— Lewin *v.* Houston, 8 Tex. 94. See also Lewis *v.* Williams, 41 Tex. Civ. App. 464, 91 S. W. 247.

Wyoming.— Halleck *v.* Bresnahen, 3 Wyo. 73, 2 Pac. 537.

See 39 Cent. Dig. tit. "Pleading," § 655.

An affidavit showing a reasonable excuse for the delay may be required. Fisher *v.* Greene, 95 Ill. 94; Adams *v.* Chicago Trust, etc., Bank, 54 Ill. App. 672; Mason *v.* Strong, 51 Ill. App. 482.

Adequate excuse.— Delay in presenting an amendment has been excused by showing that the original pleading was drawn by the attorney during the client's absence, without an opportunity for consultation, and that such opportunity was first presented when the party came to attend the trial. National Pipe Bending Co. *v.* Fisher, 87 Hun (N. Y.) 175, 33 N. Y. Suppl. 1035.

Inadequate excuse.— See Minneapolis, etc., R. Co. *v.* Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902; Heyler *v.* New York News Pub. Co., 71 Hun (N. Y.) 4, 24 N. Y. Suppl. 499 [*affirmed* in 148 N. Y. 734, 42 N. E. 723].

47. Gowdy *v.* Poullain, 4 Thomps. & C. (N. Y.) 545; Rice *v.* Ashland County, 114 Wis. 130, 89 N. W. 908.

48. Dennison *v.* Musgrave, 26 Misc. (N. Y.) 871, 56 N. Y. Suppl. 381.

49. See *infra*, VII, A, 11, a, (III), (A), (2), (d).

50. Saltus *v.* Genin, 3 Bosw. (N. Y.) 639.

51. Patrick *v.* Crowe, 15 Colo. 543, 25 Pac. 985.

52. Blackburn *v.* American News Co., 89 N. Y. App. Div. 82, 85 N. Y. Suppl. 440; Woolsey *v.* Shaw, 34 N. Y. App. Div. 405, 53 N. Y. Suppl. 436; Farmers' Nat. Bank *v.* Underwood, 15 N. Y. App. Div. 626, 44 N. Y. Suppl. 121 (defendant's delay caused by plaintiff's president); Bomar *v.* Means, 47 S. C. 190, 25 S. E. 60.

53. Radford *v.* Gaskill, 20 Mont. 293, 50 Pac. 854.

54. Hayes *v.* Keer, 39 N. Y. App. Div. 529, 57 N. Y. Suppl. 323.

55. Dennison *v.* Musgrave, 29 Misc. (N. Y.) 627, 61 N. Y. Suppl. 188.

56. Stemmler *v.* New York, 45 N. Y. App. Div. 573, 61 N. Y. Suppl. 403; Seaver *v.* New York, 7 Hun (N. Y.) 331; Greer *v.* New York, 1 Abb. Pr. N. S. (N. Y.) 206; U. S. *v.* Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. ed. 199.

Reason for rule.— Public interests unfortunately are not as sedulously guarded or as thoroughly protected as those affecting individuals, and the most stringent rules of practice cannot for that reason be applied to the litigation involving them; more lenity is required concerning them, for the purpose of avoiding the improper enhancement of public burdens by the allowance of demands having no just foundation. Seaver *v.* New York, 7 Hun (N. Y.) 331.

57. Kay *v.* Pruden, 101 Iowa 60, 69 N. W. 1137; Allen *v.* Bidwell, 35 Iowa 218.

58. **Adding new defense** see *infra*, VII, A, 11, d, (II), (F).

be amended after plea in abatement or demurrer,[59] after plea in bar,[60] after an affidavit of defense is filed,[61] after exceptions to the petition have been overruled,[62] or pending action on such exception.[63] So a plea or answer may usually be amended after demurrer thereto.[64]

f. After Supplemental Pleading Filed. An amended plea of privilege is properly allowed after the opposite party has filed a supplemental petition.[65]

g. After Default.[66] It is within the discretion of the court to allow the amendment of the declaration in the writ, even after default.[67]

h. After Issue Joined. After the issues have been made up, a party cannot amend his pleadings as a matter of right;[68] but upon proper application the court may ordinarily, in its discretion, allow amendments after issue joined where no injury to the adverse party results.[69] After an issue of fact is joined or after

59. *Alabama.*— Foster *v.* Napier, 73 Ala. 595; McBrayer *v.* Cariker, 64 Ala. 50; Burkham *v.* Mastin, 54 Ala. 122.

Arkansas.— Reynolds *v.* Roth, 61 Ark. 317, 33 S. W. 105.

California.— Smith *v.* Yreka Water Co., 14 Cal. 201; Thornton *v.* Borland, 12 Cal. 438; Gallagher *v.* Delaney, 10 Cal. 410. Since leave to amend must be granted after demurrer sustained manifestly, when a party comes forward voluntarily and virtually confesses that his complaint is deficient, thereby obviating the necessity of judicial action on the demurrer leave to amend must likewise be granted. Lord *v.* Hopkins, 30 Cal. 76.

District of Columbia.— Tyler *v.* Mutual Dist. Messenger Co., 13 App. Cas. 267.

Illinois.— Heslep *v.* Peters, 4 Ill. 45.

Kansas.— Leitz *v.* Rayner, 37 Kan. 470, 15 Pac. 571.

Kentucky.— Morton *v.* Smith, 4 T. B. Mon. 313.

Mississippi.— Whitfield *v.* Wooldridge, 23 Miss. 183.

New Hampshire.— Perley *v.* Brown, 12 N. H. 493.

New Jersey.— Lanning *v.* Shute, 5 N. J. L. 778.

New York.— Espino *v.* Nash, 7 Hill 167; Harris *v.* Wadsworth, 3 Johns. 257; Sackett *v.* Thompson, 2 Johns. 206.

Texas.— Hutchins *v.* Wade, 20 Tex. 7.

United States.— Fiedler *v.* Carpenter, 8 Fed. Cas. No. 4,759, 2 Woodb. & M. 211.

See 39 Cent. Dig. tit. "Pleading," § 656.

Pendency of pleas in abatement, the legal effect of which the amendment may obviate, is rather a reason for than an objection to its allowance. Foster *v.* Napier, 73 Ala. 595.

After a plea in abatement, a declaration cannot be amended by adding the name of another defendant against whom another suit has already been brought. Shute *v.* Davis, 2 Johns. Cas. (N. Y.) 336.

After third objection sustained.— Plaintiff demurred to the amended answer. His demurrer was overruled, and he then filed a reply, but at the trial objected to the introduction of any testimony under the answer. The objection was likewise overruled. After a new trial granted, he withdrew his reply by permission of the court and again demurred to the answer. This demurrer was sustained. Defendant was refused leave to amend his answer. It was held error to refuse leave after the answer had twice been held good. Leitz *v.* Rayner, 37 Kan. 470, 15 Pac. 571.

In Minnesota, it was held in a case where there were a number of equitable principles involved, that the court did not abuse its discretion in refusing permission to amend after demurrer sustained where the original action was commenced on the last day within the statute of limitations. Boen *v.* Evans, 72 Minn. 169, 75 N. W. 116.

The fact that a demurrer to the declaration has been overruled and abided by, prior to application to amend it, does not preclude the right to amend. Kistner *v.* Peters, 126 Ill. App. 615 [*affirmed* in 223 Ill. 607, 79 N. E. 311].

60. Foster *v.* Napier, 73 Ala. 595; Crimm *v.* Crawford, 29 Ala. 623.

61. Fels *v.* Loeb, 3 Pa. Co. Ct. 136.

62. Hutchins *v.* Wade, 20 Tex. 7.

63. Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164.

64. Coler *v.* Lamb, 24 N. Y. App. Div. 623, 48 N. Y. Suppl. 223; Doyle *v.* Moulton, 1 Johns. Cas. (N. Y.) 246; Harris *v.* Higden, (Tex. Civ. App. 1897) 41 S. W. 412; Bacon *v.* McBean, 4 U. C. Q. B. 104; Maxwell *v.* Ransom, 1 U. C. Q. B. 281; Counter *v.* Hamilton, 1 U. C. Q. B. 6; Breakenridge *v.* King, 4 U. C. Q. B. O. S. 297.

In Maine it is provided by statute that a plea cannot be amended after demurrer thereto and before such demurrer is ruled upon. Brown *v.* Nourse, 55 Me. 230, 92 Am. Dec. 583; Wakefield *v.* Littlefield, 52 Me. 21.

65. San Antonio, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1900) 57 S. W. 600.

66. Alleging compliance with conditions precedent see *infra*, VII, A, 11, b.

67. Bondur *v.* Le Bourne, 79 Me. 21, 7 Atl. 814.

68. Hoffman *v.* Rothenberger, 82 Ind. 474; Bealle *v.* Schoal, 1 A. K. Marsh. (Ky.) 475.

69. *Indiana.*— Dewey *v.* State, 91 Ind. 173.

Louisiana.— Henderson *v.* Meyers, 45 La. Ann. 791, 13 So. 191; Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25; Merrill *v.* Lattimore, 12 Rob. 138; Rouzan's Succession, 7 Rob. 436; Gasquet *v.* Johnson, 1 La. 425.

Mississippi.— Shropshire *v.* Amite County Prob. Judge, 4 How. 142.

joinder in demurrer the court will not permit the filing of an amended plea or answer which does not go to the merits of the case.[70] After the pleadings are made up and a case is submitted on an agreed statement of facts, the pleadings may be amended to conform to such submission, but not so as to change its terms, or to meet the exigencies of the trial.[71]

i. After Announcement of Readiness For Trial. A statute providing that pleadings may be amended before the parties announce themselves ready for trial, but not thereafter, is directory merely,[72] and the court, after such announcement, may, in the exercise of sound discretion, refuse [73] or allow [74] an amendment. But, apart from the consideration that the statute is directory merely, its prohibition, if any, of amendment after the parties have announced themselves ready for trial must be understood only of an announcement of readiness for trial upon the issues of fact, and not upon the issues of law, which must first be disposed of.[75]

j. After Notice of Trial. The absolute right of a party to amend as of course within a given period is not cut off by the adverse party noticing the cause for trial.[76]

k. After Jury Sworn.[77] After the jury is sworn the court may permit amendments of purely formal defects [78] or amendments which do not change the substance of the issues.[79] Amendments will not be permitted, however, if the justice of the case be against the party asking the amendment,[80] and the refusal of an amendment after the jury is sworn is in any event harmless where the case is tried as if the amendment had been made.[81]

l. After Commencement of Trial.[82] The allowance or refusal of amendments

Nebraska.— Southern Pine Lumber Co. *v.* Fries, 1 Nebr. (Unoff.) 691, 96 N. W. 71.

New York.— Harp *v.* Bull, 3 How. Pr. 45; Chilicothe Bank *v.* Dodge, 2 How. Pr. 42; Warren *v.* Campbell, 1 How. Pr. 61; Heneshoff *v.* Miller, 2 Johns. 295.

Texas.— Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316.

Wisconsin.— Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55; Ball *v.* McGeoch, 78 Wis. 355, 47 N. W. 610.

See 39 Cent. Dig. tit. "Pleading," § 655.

After issue joined substantially changing the parties an amendment will not be allowed. Coffing *v.* Tripp, 1 How. Pr. (N. Y.) 115.

70. Perkins *v.* Turner, 1 Harr. & M. (Md.) 400; Perkins *v.* Burbank, 2 Mass. 81; Golden *v.* Hallagan, 1 Wend. (N. Y.) 302.

71. Richards *v.* Hartford L., etc., Ins. Co., 68 Mo. App. 585. And see Hammontree *v.* Huber, 39 Mo. App. 326.

72. Texas, etc., R. Co. *v.* Goldberg, 68 Tex. 685, 5 S. W. 824; Parker *v.* Spencer, 61 Tex. 155; Whitehead *v.* Foley, 28 Tex. 1.

A rule of court which provides that no change in the pleadings shall be made after the case has been set for trial, without good cause shown, is reasonable, and its enforcement is not an abuse of discretion. Chicago Title, etc., Co. *v.* Core, 126 Ill. App. 272 [*affirmed* in 223 Ill. 58, 79 N. E. 108].

73. Obert *v.* Landa, 59 Tex. 475; Davis *v.* Campbell, 35 Tex. 779; Lewin *v.* Houston, 8 Tex. 94; Altgelt *v.* Alamo Nat. Bank, (Tex. Civ. App. 1904) 79 S. W. 582 [*reversed* on other grounds in 98 Tex. 252, 83 S. W. 6]. See also Contreras *v.* Haynes, 61 Tex. 103.

When the application is made prior to an announcement of readiness for trial, the statute is construed to be mandatory, and a refusal to grant leave to amend is error. Boren *v.* Billington, 82 Tex. 137, 18 S. W. 101.

74. Western Union Tel. Co. *v.* Bowen, 84 Tex. 476, 19 S. W. 554; Radam *v.* Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783; Texas, etc., R. Co. *v.* Goldberg, 68 Tex. 685, 5 S. W. 824; Parker *v.* Spencer, 61 Tex. 155; Whitehead *v.* Foley, 28 Tex. 1; Colorado Canal Co. *v.* McFarland, (Tex. Civ. App. 1906) 94 S. W. 400; Walker *v.* Hernandez, 42 Tex. Civ. App. 543, 92 S. W. 1067; King County Land, etc., Co. *v.* Thomson, 21 Tex. Civ. App. 473, 51 S. W. 890; Austin First Nat. Bank *v.* Sharpe, 12 Tex. Civ. App. 223, 33 S. W. 676. *Compare* Petty *v.* Lang, 81 Tex. 238, 16 S. W. 999; Missouri Pac. R. Co. *v.* Howe, (Tex. 1891) 15 S. W. 198, holding that it is error to allow plaintiff to amend the allegations of his complaint to conform to his proof, since the statute provides that pleadings may be amended before the parties announce themselves ready for trial, but not thereafter.

75. De Witt *v.* Jones, 17 Tex. 620; Croft *v.* Rains, 10 Tex. 520; Jennings *v.* Moss, 4 Tex. 452.

76. Washburn *v.* Herriek, 2 Code Rep. (N. Y.) 2.

77. Adding signature see *infra*, VII, A, 11, g, (II).

Notice of special defense see *infra*, VII, A, 11, d, (II), (II).

78. Knefel *v.* Flanner, 166 Ill. 147, 46 N. E. 762.

79. Garrett *v.* Dickerson, 19 Md. 418.

80. Clarke *v.* Mayfield, 5 Fed. Cas. No. 2,858, 3 Cranch C. C. 353.

81. Shadburne *v.* Daly, 76 Cal. 355, 18 Pac. 403.

82. Adding new defense see *infra*, VII, A, 11, d, (II), (F).

after commencement of the trial is largely within the discretion of the trial court and dependent upon the character of the proposed amendment.[83] Courts are

Adding or correcting verification see *infra*, VII, A, 11, g, (III).
Allegations as to time see *infra*, VII, A, 11, r.
Amending notice of special matter see *infra*, VII, A, 11, d, (II), (II).
Amendment of prayer for relief generally see *infra*, VII, A, 11, (I).
Changing defense see *infra*, VII, A, 11, d, (II), (E).
Changing from legal to equitable action and conversely see *infra*, VII, A, 11, f, (V).
Changing one form of action ex delicto to another see *infra*, VII, A, 11, f, (III).
Correcting formal defects see *infra*, VII, A, 11, g, (I).
Correcting misdescription of property or other subject-matter see *infra*, VII, A, 11, e.
Curing uncertainty and indefiniteness see *infra*, VII, A, 11, t.
Increasing amount of damages claimed see *infra*, VII, A, 11, n, (II), (D).
Introducing set-off or counter-claim see *infra*, VII, A, 11, d, (II), (G).
To cure variances in suits on written instruments see *infra*, VII, A, 11, x, (II).

83. *Alabama.*— Zeigler *v.* David, 23 Ala. 127.

California.— Barnes *v.* Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406; McDougald *v.* Hulet, 132 Cal. 154, 64 Pac. 278; Marr *v.* Rhodes, 131 Cal. 267, 63 Pac. 364; Cowdery *v.* McChesney, 124 Cal. 363, 57 Pac. 221; Siskiyou County *v.* Gamlich, 110 Cal. 94, 42 Pac. 468; Link *v.* Jarvis, (1893) 33 Pac. 206; Jackson *v.* Jackson, 94 Cal. 446, 29 Pac. 957; Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618; Graham *v.* Stewart, 68 Cal. 374, 9 Pac. 555; Kirstein *v.* Madden, 38 Cal. 158; Clark *v.* Phœnix Ins. Co., 36 Cal. 168; Gavitt *v.* Doub, 23 Cal. 78; Lestrade *v.* Barth, 17 Cal. 285.

Colorado.— Gwynn *v.* Butler, 17 Colo. 114, 28 Pac. 466.

Connecticut.— Botsford *v.* Wallace, 69 Conn. 263, 37 Atl. 902; Church Purposes, etc. *v.* Christ Church, 68 Conn. 369, 36 Atl. 797; Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852; Benedict *v.* Nichols, 1 Root 434.

Delaware.— Janvier *v.* Vandever, 3 Harr. 29.

District of Columbia.— Metropolitan R. Co. *v.* Snashall, 3 App. Cas. 420.

Georgia.— Massengale *v.* Pounds, 108 Ga. 762, 33 S. E. 72.

Illinois.— Chicago *v.* Cook, 204 Ill. 373, 68 N. E. 538 [*affirming* 105 Ill. App. 353]; Phenix Ins. Co. *v.* Stocks, 149 Ill. 319, 36 N. E. 408; Haas *v.* Stenger, 75 Ill. 597; Lancashire Ins. Co. *v.* Lyon, 124 Ill. App. 491; Bloomington, etc., R., etc., Co. *v.* Bloomington, 123 Ill. App. 639.

Indiana.— Levy *v.* Chittenden, 120 Ind. 37, 22 N. E. 92; Grand Rapids, etc., R. Co. *v.* Ellison, (1888) 18 N. E. 507; Judd *v.* Small, 107 Ind. 398, 8 N. E. 284; Dewey *v.* State, 91 Ind. 173; Martinsville *v.* Shirley, 84 Ind. 546; Child *v.* Swain, 69 Ind. 230; Leib *v.* Butterick, 68 Ind. 199; Durham *v.* Fechheimer, 67 Ind. 35; Hay *v.* State, 58 Ind. 337; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Gaudy *v.* Durham, 21 Ind. 232; Bennett *v.* Baker, Wils. 158; Citizens' St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107; Smith, etc., Corp. *v.* Byers, 20 Ind. App. 51, 49 N. E. 177; Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266; Sanford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204, 27 N. E. 448.

Iowa.— American L. Ins. Co. *v.* Melcher, 132 Iowa 324, 109 N. W. 805; Snyder *v.* Ward, 125 Iowa 146, 100 N. W. 348; Davis *v.* Boyer, 122 Iowa 132, 97 N. W. 1002; Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857; Pride *v.* Wormwood, 27 Iowa 257; Arnold *v.* Arnold, 20 Iowa 273; Nollen *v.* Wisner, 11 Iowa 190.

Kansas.— Russell *v.* Gregg, 49 Kan. 89, 30 Pac. 185; Hobson *v.* Ogden, 16 Kan. 388.

Kentucky.— Spurr *v.* Batchelor, 102 Ky. 606, 44 S. W. 213, 19 Ky. L. Rep. 1641; Bannister *v.* Weatherford, 7 B. Mon. 271; Pennsylvania F. Ins. Co. *v.* Young, 78 S. W. 127, 25 Ky. L. Rep. 1350; Chesapeake, etc., R. Co. *v.* Riddle, 72 S. W. 22, 24 Ky. L. Rep. 1687; Cassidy *v.* Martin Bank, 62 S. W. 528, 23 Ky. L. Rep. 208; Felton *v.* Dunn, 60 S. W. 298, 22 Ky. L. Rep. 1224. No additional pleas can be filed in this state after the jury is sworn. Thomas *v.* Tanner, 6 T. B. Mon. 52.

Louisiana.— Bussey *v.* Rothschild, 27 La. Ann. 316; Smith *v.* Nash, 5 La. Ann. 575. But see Duval *v.* Kellam, 1 Rob. 58; McKown *v.* Mathes, 19 La. 542. Amendments should be presented before going to trial. The case must be an extraordinary one to justify an amendment after the trial has commenced. Dabbs *v.* Hemken, 3 Rob. 123.

Massachusetts.— Haynes *v.* Morgan, 3 Mass. 208.

Michigan.— People *v.* Sharp, 133 Mich. 378, 94 N. W. 1074; Arndt *v.* Bourke, 120 Mich. 263, 79 N. W. 190; Keystone Lumber, etc., Mfg. Co. *v.* Jenkinson, 69 Mich. 220, 37 N. W. 198.

Missouri.— Glasscock *v.* Glasscock, 8 Mo. 577; Pinkston *v.* Stone, 3 Mo. 119.

Nebraska.— Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811; Undeland *v.* Stanfield, 53 Nebr. 120, 73 N. W. 459; Roberts *v.* Taylor, 19 Nebr. 184, 27 N. W. 87; Burlington, etc., R. Co. *v.* Crockett, 17 Nebr. 570, 24 N. W. 219.

Nevada.— McCausland *v.* Ralston, 12 Nev. 195, 28 Am. Rep. 781.

New York.— Straus *v.* Buchman, 96 N. Y. App. Div. 270, 89 N. Y. Suppl. 226; Ginsburg *v.* Von Seggern, 59 N. Y. App. Div. 595, 69 N. Y. Suppl. 758; McCready *v.* Staten Island Electric R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl. 996; Van Pelt *v.* Chapter Gen. of America K. S. & J. M., 47 N. Y. App. Div. 636, 61 N. Y. Suppl. 1010; Sauer *v.* New York, 44 N. Y. App. Div. 305, 60 N. Y. Suppl. 648; Cauchois *v.* Proctor, 1 N. Y. App. Div. 16, 36 N. Y. Suppl. 957; Bowen

loath to permit amendments at the trial that will either make necessary a continuance [84] or injure the other party if compelled to proceed; [85] and the opposite party will be granted an opportunity to make a showing for a continuance, if surprised by an amendment allowed at the trial.[86] Courts have refused to allow amendments at the trial depriving a party of a right to a removal.[87] So an application to amend made during the trial is properly refused where the necessity for the amendment does not appear,[88] or when the averments of such amendment taken with the averments of the original pleading do not present a cause of action or defense.[89] And after a party has been fully advised early in the proceedings that his pleading is defective, the court does not abuse its discretion in refusing an amendment at the trial.[90] On the other hand, objections made for the first time at the trial that a petition does not state facts sufficient to constitute a cause of action are not to be encouraged, and when the defect can be cured by an amendment the court should permit it to be made instanter and let the trial proceed.[91]

m. After Part of Evidence Introduced.[92] An amendment in no wise changing

v. Sweeney, 63 Hun 224, 17 N. Y. Suppl. 752; Bowman *v.* De Peyster, 2 Daly 203; Diehl *v.* Robinson, 35 Misc. 234, 71 N. Y. Suppl. 752; Baleh *v.* Wurzburger, 9 Misc. 74, 29 N. Y. Suppl. 62 (where the amendment was improperly granted); Miller *v.* Garling, 12 How. Pr. 203.

North Carolina.— Martin *v.* Fayetteville Bank, 131 N. C. 121, 42 S. E. 558; Woodbury *v.* Evans, 122 N. C. 779, 30 S. E. 2; Sams *v.* Price, 119 N. C. 572, 26 S. E. 170; Robeson *v.* Hodges, 105 N. C. 49, 11 S. E. 263; Knott *v.* Taylor, 96 N. C. 553, 2 S. E. 680.

Ohio.— Gilliland *v.* Wallace, Tapp. 168; Scott *v.* Ward, Tapp. 78.

Oregon.— Longfellow *v.* Huffman, 49 Oreg. 486, 90 Pac. 907; Clemens *v.* Hanley, 27 Oreg. 326, 41 Pac. 658.

South Carolina.— Brown *v.* Carolina Midland R. Co., 58 S. C. 466, 36 S. E. 852; Richardson *v.* Wallace, 39 S. C. 216, 17 S. E. 725; Dunsford *v.* Brown, 19 S. C. 560; Trumbo *v.* Finley, 18 S. C. 305.

Tennessee.— Grissom *v.* Fite, 1 Head 332.

Utah.—American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259; Rhemke *v.* Clinton, 2 Utah 230.

Washington.— Crane Co. *v.* Ætna Indemnity Co., 43 Wash. 516, 86 Pac. 849; Ogle *v.* Jones, 16 Wash. 319, 47 Pac. 747.

Wisconsin.— Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55; Withee *v.* Simon, 104 Wis. 116, 80 N. W. 77; Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042.

United States.— Bamberger *v.* Terry, 103 U. S. 40, 26 L. ed. 317; Chamberlain *v.* Mensing, 51 Fed. 511; Allen *v.* Magruder, 1 Fed. Cas. No. 230, 3 Cranch C. C. 6.

See 39 Cent. Dig. tit. "Pleading," §§ 659, 772.

Pennsylvania.— At one time it seems to have been held in Pennsylvania that pleadings could not be amended at the trial. Howard *v.* Pollock, 1 Yeates 509. But under a later statute amendments are allowed at the trial. Cunningham *v.* Day, 2 Serg. & R. 1; Miles *v.* O'Hara, 1 Serg. & R. 32. A material amendment of the claim, however, will not be allowed after petition to strike off or open the judgment by default. Brooks *v.* Miller, 1 Grant 202; Smith *v.* Rutherford, 2 Serg. & R. 358; Reynolds *v.* New York Wood Fibre Co., 19 Pa. Co. Ct. 318. But a pleading may be amended at the trial to make it conform to issues properly raised. Leedom *v.* Zierfuss, 3 Del. Co. 129.

If a defendant neglects to deny matters under oath he is not entitled to amend, as of right, at the trial. Thorne *v.* Fox, 67 Md. 67, 8 Atl. 667.

When the facts were known when the original pleading was filed and no excuse is shown for the delay, an amendment will be refused at the trial. Western Assur. Co. *v.* Kilpatrick-Koch Dry-Goods Co., 54 Nebr. 241, 74 N. W. 592.

Where the opposing attorney makes oath that he is not prepared to meet the proof which such amendment will allow, an amendment at the trial is properly refused. Ginsburg *v.* Von Seggern, 59 N. Y. App. Div. 595, 69 N. Y. Suppl. 758 [*affirmed* in 172 N. Y. 662, 65 N. E. 1116]. But see Foerst *v.* Empire L. Ins. Co., 40 N. Y. App. Div. 631, 57 N. Y. Suppl. 971.

In the absence of a request for adjournment on the ground of surprise, an amendment neither changing the cause of action nor introducing a new one is not erroneous. Straus *v.* Buehman, 96 N. Y. App. Div. 270, 89 N. Y. Suppl. 226 [*affirmed* in 184 N. Y. 545, 76 N. E. 1109].

84. Hancock *v.* Hubbell, 71 Cal. 537, 12 Pac. 618.

85. Landry *v.* Durham, 21 Ind. 232.

86. Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857.

87. Baleh *v.* Wurzburger, 9 Misc. (N. Y.) 74, 29 N. Y. Suppl. 62.

88. York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

89. Bartlett *v.* Scott, 55 Nebr. 477, 75 N. W. 1102.

90. Rhemke *v.* Clinton, 2 Utah 230.

91. Roberts *v.* Taylor, 19 Nebr. 184, 27 N. W. 87; Burlington, etc., R. Co. *v.* Crockett, 17 Nebr. 570, 24 N. W. 219.

92. **Changing cause of action** see *infra*, VII, A, 11, a, (III).

Correcting allegations as to place see *infra*, VII, A, 11, m.

the issues may be allowed even after evidence has been introduced,[93] although an amendment offered after much evidence is introduced may be refused if no good reason is shown why it was not presented earlier.[94] In any case leave to file an amendment will not be granted after the case has been long at issue and testimony has been taken, when the proposed amendment presents matter that is immaterial.[95]

n. After Submission to a Referee.[96] The court may allow an amendment after the case has gone to a referee by adding an item of claim,[97] or by substantially increasing the claim.[98] Likewise an amendment to a plea which does not affect the vital question on which the defense is based may be allowed after commission issued.[99] But an amendment may, in the court's discretion, properly be refused at this stage.[1]

o. After Report of Master, Commissioners, Etc.[2] Amendments which do not change the issues may be made after a report of commissioners has been made.[3] But after auditors have reported an amendment will not be allowed introducing a new claim.[4]

p. After Close of Evidence or Argument of Counsel.[5] It is generally held to be within the discretion of the court to allow or refuse amendments after the evidence is heard or the arguments of counsel closed.[6] Perhaps one of the best illustrations of the propriety of amendments at this stage of the proceedings is an amendment to conform the pleading to the evidence introduced, when it con-

To cure variance see *infra*, VII, A, 11, w, (v).

93. Knowles *v.* Rexroth, 67 Ind. 59; Jarozewski *v.* Allen, 117 Iowa 632, 91 N. W. 941; Bunyan *v.* Loftus, 90 Iowa 122, 57 N. W. 685; Hammond *v.* Sioux City, etc., R. Co., 49 Iowa 450; Phœnix Ins. Co. *v.* Dankwardt, 47 Iowa 432; Caldwell *v.* Bruggerman, 8 Minn. 286.

Issues not changed.— An amendment of the answer changing the word "north" to "south" in a description therein does not change the issues and is properly allowed after the evidence in chief is introduced. Reed *v.* Cheney, 111 Ind. 387, 12 N. E. 717.

94. Louisville, etc., R. Co. *v.* Pointer, 113 Ky. 952, 69 S. W. 1108, 24 Ky. L. Rep. 772.

95. Municipal Inv. Co. *v.* Industrial, etc., Trust Co., 89 Fed. 254.

96. **Increasing amount of damages claimed** see *infra*, VII, A, 11, n, (II), (D).

97. Wilson *v.* Wernwag, 9 Pa. Dist. 86.

98. Wilson *v.* Standard Asphalt Co., 81 N. Y. App. Div. 102, 81 N. Y. Suppl. 8.

99. Buchanan *v.* Trotter, 4 Fed. Cas. No. 2,075.

1. Brady *v.* Nally, 14 N. Y. Suppl. 480.

2. **To cure variance** see *infra*, VII, A, 11, w, (v).

3. Mitchell *v.* Wilson, 70 Iowa 332, 30 N. W. 588.

4. Cureton *v.* Cureton, 120 Ga. 559, 48 S. E. 162; Milner *v.* Mutual Ben. Bldg. Assoc., 104 Ga. 101, 30 S. E. 648; Joy *v.* Walker, 28 Vt. 442.

5. **Adding new defense** see *infra*, VII, A, 11, d, (II), (F).

Alleging waiver of demand and notice see *infra*, VII, A, 11, c, (v).

Amending counter-claim by adding interest see *infra*, VII, A, 11, d, (II), (G).

Amendments as to relief prayed in general see *infra*, VII, A, 11, n, (I).

Changing defense see *infra*, VII, A, 11, d, (II), (E).

Changing one form of action ex contractu to another see *infra*, VII, A, 11, f, (II).

Changing one form of action ex delicto to another see *infra*, VII, A, 11, f, (III).

Correcting description of property or other subject-matter see *infra*, VII, A, 11, e.

To cure variance see *infra*, VII, A, 11, w, (v).

6. *Alabama.*— Russell *v.* Irwin, 38 Ala. 44; Crimm *v.* Crawford, 29 Ala. 623; Godbold *v.* Blair, 27 Ala. 592.

California.— Hibernia Sav., etc., Soc. *v.* Jones, 89 Cal. 507, 26 Pac. 1089; Coubrough *v.* Adams, 70 Cal. 374, 11 Pac. 634.

Illinois.— Phenix Ins. Co. *v.* Caldwell, 187 Ill. 73, 58 N. E. 314 [*affirming* 85 Ill. App. 104]; Mather Electric Co. *v.* Matthews, 47 Ill. App. 557.

Indiana.— Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; Rettig *v.* Newman, 99 Ind. 424; Leib *v.* Butterick, 68 Ind. 199; Durham *v.* Fechheimer, 67 Ind. 35.

Iowa.— Kettering *v.* Eastlack, 130 Iowa 498, 107 N. W. 177; Rosenberger *v.* Marsh, 108 Iowa 47, 78 N. W. 837; National Horse Importing Co. *v.* Novak, 105 Iowa 157, 74 N. W. 759; Larkin *v.* McManus, 81 Iowa 723, 45 N. W. 1061; Chlein *v.* Kabat, 72 Iowa 291, 33 N. W. 771; Thomas *v.* Brooklyn, 58 Iowa 438, 10 N. W. 849; Tiffany *v.* Henderson, 57 Iowa 490, 10 N. W. 884.

Kentucky.— Metropolitan L. Ins. Co. *v.* Smith, 59 S. W. 24, 22 Ky. L. Rep. 868, 53 L. R. A. 817.

Maine.— Topsham *v.* Lisbon, 65 Me. 449; Potter *v.* Titcomb, 7 Me. 302.

Maryland.— Scarlett *v.* Baltimore Academy of Music, 43 Md. 203.

Michigan.— Prochaska *v.* Fox, 137 Mich. 519, 100 N. W. 746.

tains no new allegations tending in any way to surprise or mislead the opposite party.[7] An amendment, however, should be refused when it is nothing more than a repetition of matters previously alleged,[8] where it is purely technical and not in furtherance of justice,[9] where the party desiring to amend knew of the defect in his pleadings early in the proceedings, but neglected to correct it,[10] where there is no evidence on which to base the amendment,[11] where the amendment presents new issues,[12] and where the party asking the amendment has admitted a *prima facie* case in order to obtain the opening and conclusion.[13]

q. After Jury Instructed. It is within the discretion of the trial court to allow [14] or refuse [15] amendments after the jury have been instructed.

r. After Submission to Jury or to Court.[16] An amendment, not materially changing the issues, may be allowed after the cause has been submitted to the court or the jury.[17] In most jurisdictions, however, the issues cannot be changed

Nebraska.— Brown *v.* Rogers, 20 Nebr. 547, 31 N. W. 75.

Nevada.— California State Tel. Co. *v.* Patterson, 1 Nev. 150.

Ohio.— Harper *v.* Dalzell, etc., Co., 11 Ohio Dec. (Reprint) 531, 27 Cinc. L. Bul. 274.

Pennsylvania.— Franklin F. Ins. Co. *v.* Findlay, 6 Whart. 483, 37 Am. Dec. 430.

South Carolina.— Fairy *v.* Kennedy, 68 S. C. 250, 47 S. E. 138; Whitmire *v.* Boyd, 53 S. C. 315, 31 S. E. 306; Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948.

Washington.— Morrissey *v.* Faucett, 28 Wash. 52, 68 Pac. 352; Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244; McDonough *v.* Great Northern R. Co., 15 Wash. 244, 46 Pac. 334; Hulbert *v.* Brackett, 8 Wash. 438, 36 Pac. 264.

United States.— Cronin *v.* Patrick County, 89 Fed. 79; Cotten *v.* Fidelity, etc., Co., 41 Fed. 506; Brewer *v.* Jacobs, 22 Fed. 217, refusing the amendment, however, because of the fact that it would work an injury to defendant.

England.—Amendments offered after the evidence is closed are apt to be regarded with disfavor by the English courts. Rainy *v.* Bravo, L. R. 4 P. C. 287, 27 L. T. Rep. N. S. 249, 20 Wkly. Rep. 873; Hipgrave *v.* Case, 28 Ch. D. 356, 54 L. J. Ch. 399, 52 L. T. Rep. N. S. 242; Jones *v.* Bulkeley, 24 L. T. Rep. N. S. 104; Godbold *v.* Ellis, 23 Wkly. Rep. 333.

See 39 Cent. Dig. tit. "Pleading," §§ 664, 776.

7. Landers *v.* Quincy, etc., R. Co., 114 Mo. App. 655, 90 S. W. 117; Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244.

8. Marsh *v.* Chown, 104 Iowa 556, 73 N. W. 1046.

9. Chlein *v.* Kabat, 72 Iowa 291, 33 N. W. 771; Fox *v.* Foster, 4 Pa. St. 119; Cole *v.* Rankin, (Tenn. Ch. App. 1896) 42 S. W. 72.

10. Phœnix Ins. Co. *v.* Washington, 71 Kan. 777, 81 Pac. 461; Cincinnati, etc., R. Co. *v.* Crabtree, 100 S. W. 318, 30 Ky. L. Rep. 1000; Cotten *v.* Fidelity, etc., Co., 41 Fed. 506; Brewer *v.* Jacobs, 22 Fed. 217.

Failure to show that matters were not known.— The refusal of an amendment attempting to plead a set-off, after the proof had been taken and the case was ready for submission, was not error, where it was not made to appear that the matters then sought to be pleaded were not known to defendants at the time they filed their original answer. Weimer *v.* Smith, 101 S. W. 327, 30 Ky. L. Rep. 1311.

11. Beavers *v.* Hardie, 59 Ala. 570; Louisville, etc., R. Co. *v.* Wade, 11 Ky. L. Rep. 904; Manitowoc Steam Boiler Works *v.* Manitowoc Glue Co., 120 Wis. 1, 97 N. W. 515.

12. Wright *v.* Wilmington City R. Co., 2 Marv. (Del.) 141, 42 Atl. 440; Karstetter *v.* Raymond, 10 Ind. 199.

Changing issues.— After plaintiff has rested and defendant has also put in his evidence under a plea of release, it is too late for plaintiff to amend his replication pleading the general issue so as to allege fraud or duress. Wright *v.* Wilmington City R. Co., 2 Marv. (Del.) 141, 42 Atl. 440.

13. Fisher *v.* Geo. S. Jones Co., 108 Ga. 490, 34 S. E. 172.

14. Prater *v.* Miller, 25 Ala. 320, 60 Am. Dec. 521.

15. Staley *v.* Thomas, 68 Md. 439, 13 Atl. 53.

16. **Changing defense** see *infra*, VII, A, 11, d, (II), (E).

To cure variance see *infra*, VII, A, 11, w, (V).

17. Bryant *v.* Hambrick, 9 Ga. 133; Jenne *v.* Burt, 121 Ind. 275, 22 N. E. 256; Levy *v.* Chittenden, 120 Ind. 37, 22 N. E. 92; Kearney *v.* Covington, 1 Metc. (Ky.) 339; Kennedy *v.* Brown, 50 Mich. 336, 15 N. W. 498. And see Yordi *v.* Yordi, 6 Cal. App. 20, 91 Pac. 348.

Illustrations.— An amendment alleging that money was borrowed "for the joint use and benefit" of defendants may be allowed even after the case has been submitted to the court. Jenne *v.* Burt, 121 Ind. 275, 22 N. E. 256. Although a case has been submitted for decision, a mortgagee may amend so as to allege that the money loaned was a part of the purchase-price of the land mortgaged. Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955. A submission to the court has been set aside in order to allow an amendment correcting a mistake in a notary's certificate. Mattingly

or new ones introduced by amendment after there has been a submission of the cause.[18]

s. After Motion For Judgment. A motion for judgment is ordinarily regarded as in the nature of a demurrer, and pleadings may be amended after such a motion.[19]

t. After Motion For Dismissal or Nonsuit.[20] In harmony with the general rule that a motion to amend is always in season when it immediately follows an objection to the complaint or answer,[21] it is held that a motion to amend a complaint does not come too late because made after motion for a dismissal or nonsuit.[22] But as to whether a motion for leave to amend is in season, when not made immediately after the motion to dismiss or for a nonsuit, but subsequently there is some conflict of authority, it being generally held, however, that leave to amend will not be granted, if the motion is made after argument heard and concluded [23] or the court has announced its opinion.[24]

u. After Mistrial. Amendments are permissible after a mistrial. It does not alter the rights of the parties but leaves the case exactly as if no attempt to try it had been made.[25]

v. After Verdict.[26] It is within the sound discretion of the trial court to grant or to refuse amendments after verdict, and the proper exercise of that dis-

v. Bank of Commerce, 53 S. W. 1043, 21 Ky. L. Rep. 1029.

Laches.— Although immaterial, an amendment, not presented until after the case has gone to the jury, is likely to be open to the objection that the party offering it has been guilty of laches and it may be refused on that ground. Stone *v.* Mattingly, 19 S. W. 402, 14 Ky. L. Rep. 113.

18. *Alabama.*— Watkins *v.* Canterberry, 4 Port. 415.

Georgia.— Dorster *v.* Arnold, 8 Ga. 209; Phillips *v.* Dodge, 8 Ga. 51.

Indiana.— Lewark *v.* Carter, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, 3 L. R. A. 440; Sharpe *v.* Dillman, 77 Ind. 280; Maxwell *v.* Day, 45 Ind. 509; Holcraft *v.* King, 25 Ind. 352; Frees *v.* Eakin, 9 Ind. 554; Matthews *v.* Rund, 27 Ind. App. 641, 62 N. E. 90.

Iowa.— Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558.

Kentucky.— Stone *v.* Mattingly, 19 S. W. 402, 14 Ky. L. Rep. 113.

Mississippi.— Mississippi Cent. R. Co. *v.* Whitehead, 41 Miss. 225.

Missouri.— Garton *v.* Cannada, 39 Mo. 357.

South Carolina.— Reynolds *v.* Quattlebum, 2 Rich. 140; Glenn *v.* McCullough, 2 McCord 212.

See 39 Cent. Dig. tit. "Pleading," §§ 666, 777.

Illustration.— After a case had gone to the jury an amendment seeking to hold "Watkins" instead of "Watson" as the party liable on a note was refused on the ground that such amendment materially changed the issues. Watkins *v.* Canterberry, 4 Port. (Ala.) 415.

19. Chatfield *v.* Williams, 85 Cal. 518, 24 Pac. 839; Bucklen *v.* Cushman, 145 Ind. 51, 44 N. E. 6; Bryant *v.* Davis, 22 Mont. 534, 57 Pac. 143; Burrall *v.* Moore, 5 Duer (N. Y.) 654; Soper *v.* Soper, 5 Wend. (N. Y.) 112.

20. See also *infra*, VII, A, 11, x, (II).

21. Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 589.

22. Kamm *v.* State Bank, 74 Cal. 191, 15 Pac. 765; Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 589; Farmer *v.* Cram, 7 Cal. 135.

23. Flanagan *v.* Wilmington, 4 Houst. (Del.) 548.

24. Morris *v.* Burton, 1 Houst. (Del.) 213.

25. Hester *v.* Hagood, 3 Hill (S. C.) 195; Jude *v.* Syme, 3 Call (Va.) 522.

26. Allegations as to time see *infra*, VII, A, 11, r.

As to relief prayed in general see *infra*, VII, A, 11, n, (I).

Changing defense see *infra*, VII, A, 11, d, (II), (E).

Changing form of action from contract to tort and vice versa see *infra*, VII, A, 11, f, (IV).

Changing from legal to equitable action and conversely see *infra*, VII, A, 11, f, (V).

Changing one form of action ex contractu to another see *infra*, VII, A, 11, f, (II).

Changing one form of action ex delicto to another see *infra*, VII, A, 11, f, (III).

Correcting allegations as to place see *infra*, VII, A, 11, m.

Correcting misdescription of property or other subject-matter see *infra*, VII, A, 11, e.

Excusing profert see *infra*, VII, A, 11, o.

Increasing amount of damages claimed see *infra*, VII, A, 11, n, (II), (D), (2).

Reducing amount of damages claimed see *infra*, VII, A, 11, n, (II), (D), (2).

Right, title, or interest see *infra*, VII, A, 11, p.

To cure variance generally see *infra*, VII, A, 11, w, (V).

To cure variances in suits on written instruments see *infra*, VII, A, 11, x, (II).

To obviate loss of claim by statute of limitations see *infra*, VII, A, 11, c, (II).

cretion will not be disturbed on appeal.[27] But while amendments may be made after verdict in order to sustain it, they cannot be allowed for the purpose of overthrowing it.[28] An amendment will cure error, not create it.[29] In general an amendment that in no wise changes the issues,[30] or which would not have affected the verdict if made before trial,[31] is permissible. So an amendment may be allowed, after verdict, presenting an issue upon which both sides have introduced evidence;[32] but amendments after verdict, changing the issues so as to require a new trial, should be refused.[33] No amendment will be permitted presenting any issue not fairly contested at the trial and submitted to the jury under proper instructions,[34] or changing the nature of the claim.[35] And a party will not be allowed to amend his pleadings after verdict upon a point submitted and already fully covered by the original pleadings.[36] An amendment may be treated as

27. *Alabama.*— Abbott *v.* Mobile, 119 Ala. 595, 24 So. 565; Mahan *v.* Smitherman, 71 Ala. 563.

California.— Richards *v.* Hupp, (1894) 37 Pac. 920.

Illinois.— Milwaukee Mechanics' Ins. Co. *v.* Schallman, 188 Ill. 213, 59 N. E. 12; Postal Tel. Cable Co. *v.* Likes, 124 Ill. App. 459 [*affirmed* in 225 Ill. 249, 80 N. E. 136]; Hansell-Elcock Foundry Co. *v.* Clark, 115 Ill. App. 209 [*affirmed* in 214 Ill. 399, 73 N. E. 787].

Indiana.— Raymond *v.* Wathen, 142 Ind. 367, 41 N. E. 815; Aiken *v.* Bruen, 21 Ind. 137; Redman *v.* Taylor, 3 Ind. 144.

Kansas.— Dunham *v.* Brown, (App. 1899) 58 Pac. 232.

Montana.— Neimick *v.* American Ins. Co., 16 Mont. 318, 40 Pac. 597.

New York.— Israel *v.* Israel, 38 Misc. 335, 77 N. Y. Suppl. 912; Fidler *v.* Cooper, 19 Wend. 285; Hoffnagle *v.* Leavitt, 7 Cow. 517; Hallett *v.* Holmes, 18 Johns. 28.

West Virginia.— Mann *v.* Perry, 3 W. Va. 580.

Wisconsin.— Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55; Ault *v.* Wheeler, etc., Mfg. Co., 54 Wis. 300, 11 N. W. 545.

United States.— Baker *v.* Barber Asphalt Pavement Co., 92 Fed. 117; Cronin *v.* Patrick County, 89 Fed. 79; Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174. See also Post *v.* Wise Tp., 101 Fed. 204.

See 39 Cent. Dig. tit. "Pleading," §§ 667, 778.

28. *Iowa.*— Thyssen *v.* Davenport Ice, etc., Co., 134 Iowa 749, 112 N. W. 177.

Kansas.— Dunham *v.* Brown, (App. 1899) 58 Pac. 232.

Kentucky.— See Asher *v.* Uhl, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29, 29 Ky. L. Rep. 396.

New Hampshire.— Meredith Mechanic Assoc. *v.* American Twist Drill Co., 66 N. H. 539, 30 Atl. 1119.

New York.— Williams *v.* Birch, 6 Bosw. 674 (where many cases on the point are collected and reviewed); Star Steamship Co. *v.* Mitchell, 1 Abb. Pr. N. S. 396; Bowdoin *v.* Coleman, 3 Abb. Pr. 431; Englis *v.* Furniss, 3 Abb. Pr. 82; Eddy *v.* Stanton, 21 Wend. 255.

Vermont.— White River Bank *v.* Downer, 29 Vt. 332.

See 39 Cent. Dig. tit. "Pleading," § 687.

29. White River Bank *v.* Downer, 29 Vt. 332.

30. *Illinois.*— Winterburn *v.* Parlow, 102 Ill. App. 368.

Indiana.— Maxwell *v.* Day, 45 Ind. 509.

Massachusetts.— Aldrich *v.* Aldrich, 143 Mass. 45, 8 N. E. 870. In case a jury bring in a verdict for plaintiff on one count, but state that they cannot agree upon a verdict on the other count of the declaration, the court may allow plaintiff to amend by striking out the later count. Soule *v.* Russell, 13 Metc. 436.

Missouri.— Cagle *v.* Chillicothe Mut. F. Ins. Co., 78 Mo. App. 431.

England.— Edwards *v.* Hodges, 15 C. B. 477, 3 C. L. R. 472, 1 Jur. N. S. 91, 24 L. J. M. C. 81, 3 Wkly. Rep. 112, 80 E. C. L. 477.

Canada.— Perry *v.* Grover, 5 U. C. Q. B. 468.

When no showing is made to support the motion and no excuse offered for not sooner presenting it it will not be allowed. Phenix Ins. Co. *v.* Caldwell, 187 Ill. 73, 58 N. E. 314.

31. Elsher *v.* Hughes, 60 N. H. 469; Roulo *v.* Valcour, 58 N. H. 347.

32. Morrissey *v.* Faucett, 28 Wash. 52, 68 Pac. 352.

After allowing parties to introduce evidence raising a material issue, it is error to refuse an amendment at the close of the trial conforming pleadings thereto. Louisville, etc., R. Co. *v.* Bocock, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, 21 Ky. L. Rep. 383, 896.

33. Bradley *v.* Parker, (Cal. 1893) 34 Pac. 234; Excelsior Electric Co. *v.* Sweet, 59 N. J. L. 441, 31 Atl. 721.

An amendment presenting a new issue, which involves the decision of a contested question of fact, should not be permitted. Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94.

34. Omaha Bottling Co. *v.* Theiler, 59 Nebr. 257, 80 N. W. 821, 80 Am. St. Rep. 673; Huron Dock Co. *v.* Swart, 24 Ohio Cir. Ct. 504.

35. Dietz *v.* Hastings City Nat. Bank, 42 Nebr. 584, 60 N. W. 896; Wood *v.* Morrow, 40 L. T. Rep. N. S. 100.

36. Sears *v.* Collins, 5 Colo. 492.

made before verdict when permission to amend was given, although the amendment was in fact made after verdict.[37]

w. After Motion For New Trial or in Arrest of Judgment.[38] An amendment may be allowed after verdict and argument for a new trial;[39] where the allowance of such amendment does not prejudice the opposite party,[40] although an application for leave to amend after verdict and plaintiff's motion for a new trial overruled has been held too late.[41] It is not erroneous to permit an amendment after motion in arrest, by filing additional counts merely amplifying the averments of the original declaration.[42] But after arrest of judgment because of the insufficiency of the declaration, an amendment will not ordinarily be allowed.[43]

x. After Final Judgment [44] — (i) *In General.* In the absence of statutory authority express or implied amendments of the pleadings cannot be made after judgment.[45] But the power to amend after judgment is now very commonly provided for by statute.[46] This power it is said must be sparingly exercised,[47] and in any event an amendment will be allowed only for the purpose of sustaining the judgment, and not for the purpose of reversing it.[48] The allowance of amendments after judgment is always in the discretion of the court.[49] Whether or not the power to allow amendments will be exercised depends in a large measure on the character of the proposed amendment and the conduct of the party asking the amendment. If he has been guilty of laches, the application should be denied.[50] After final judgment an amendment setting up a new cause of action [51]

37. Cronan *v.* Woburn, 185 Mass. 91, 70 N. E. 38.

38. To cure variance see *infra*, VII, A, 11, w, (v).

39. Federal Life Assoc. *v.* Smith, 86 Ill. App. 427.

40. Chicago, etc., R. Co. *v.* Henderson, 126 Ill. App. 530.

41. Dunham *v.* Brown, (Kan. App. 1899) 58 Pac. 232.

42. Wabash R. Co. *v.* Campbell, 117 Ill. App. 630 [*affirmed* in 219 Ill. 312, 76 N. E. 346, 3 L. R. A. N. S. 1092].

43. Betts *v.* Hoyt, 13 Conn. 469.

44. Amendments as to relief prayed in general see *infra*, VII, A, 11, n, (i).

Changing defense see *infra*, VII, A, 11, d, (ii), (e).

Increasing amount of damages claimed by amendment see *infra*, VII, A, 11, n, (ii), (d), (3).

To cure variance see *infra*, VII, A, 11, w, (v).

45. Southern Mut. Ins. Co. *v.* Turnley, 100 Ga. 296, 27 S. E. 975; Landry *v.* Baugnon, 17 La. 82, 36 Am. Dec. 606; Janes *v.* Richard, 3 La. 486; Sweigart *v.* Lowmarter, 14 Serg. & R. (Pa.) 200; Smith *v.* London, etc., R. Co., 7 C. B. 782, 62 E. C. L. 782.

46. See the statutes of the various states. And see the following cases:

Iowa.— O'Connell *v.* Cotter, 44 Iowa 48.

Massachusetts.— Kendall *v.* Carland, 5 Cush. 74.

Minnesota.— Briggs *v.* Rutherford, 94 Minn. 23, 101 N. W. 954; Adams *v.* Castle, 64 Minn. 505, 67 N. W. 637; North *v.* Webster, 36 Minn. 99, 30 N. W. 429.

Nebraska.— Frey *v.* Owens, 27 Nebr. 862, 44 N. W. 42.

New York.— Egert *v.* Wicker, 10 How. Pr. 193; Field *v.* Hawxhurst. 9 How. Pr. 75.

North Carolina.— Bullard *v.* Johnson, 65 N. C. 436.

South Carolina.— Kitchen *v.* Southern R. Co., 68 S. C. 554, 48 S. E. 4.

Vermont.— Chaffee *v.* Rutland R. Co., 71 Vt. 384, 45 Atl. 750.

Wisconsin.— Nelson *v.* Allen, 117 Wis. 91, 93 N. W. 807.

Wyoming.— Lellman *v.* Mills, 15 Wyo. 149, 87 Pac. 985.

47. North *v.* Webster, 36 Minn. 99, 30 N. W. 429; Field *v.* Hawxhurst, 9 How. Pr. (N. Y.) 75.

Second amendment after judgment.—Where, after demurrer was filed, plaintiff was permitted to amend, he was not entitled to again amend, especially after argument and judgment. Burk *v.* Bear, 3 Pa. L. J. Rep. 355.

48. Kingsland *v.* New York, 42 Hun (N. Y.) 599; Gasper *v.* Adams, 24 Barb. (N. Y.) 287; Chaffee *v.* Rutland R. Co., 71 Vt. 384, 45 Atl. 750. And see Hoatson *v.* McDonald, 97 Minn. 201, 106 N. W. 311.

49. Lamm *v.* Armstrong, 95 Minn. 434, 104 N. W. 304, 111 Am. St. Rep. 479.

50. North *v.* Webster, 36 Minn. 99, 30 N. W. 429, holding that the allowance of an amendment several years after judgment has been satisfied, without any excuse being shown for the delay, is reversible error. And see *supra*, VII, A, 10, c.

51. See *infra*, VII, A, 11, a, (iii).

After judgment.— A decision is not a judgment until drawn up and signed by the court. Consequently, an amendment offered after the decision has been rendered, and dictated to the court stenographer but not drawn up or signed by the judge, is not offered too late. Freeman *v.* Brown, 115 Ga. 23, 41 S. E. 385; Lytle *v.* De Vaughn, 81 Ga. 226, 7 S. E. 281.

or defense,[52] or substantially changing the nature of the action[53] or defense,[54] cannot be allowed. But amendments after judgment to conform the pleadings to the proof are permissible,[55] and so are amendments allowing additional counts upon the same cause of action[56] or adding or striking out the names of parties.[57] A party may be allowed to amend his complaint after default by defendant and a hearing in damages to the court,[58] defendant being given leave to plead anew and offer further evidence. And after judgment entered, the trial court may at the same term vacate the judgment and permit plaintiff to amend.[59] The allowance of a trial amendment after judgment is proper where the order was made before the trial.[60]

(II) *After Judgment of Dismissal or Nonsuit.* No amendment of the pleadings will be permitted after entry of judgment of dismissal or nonsuit,[61] especially where the motion is made after adjournment of the term at which judgment of dismissal was rendered.[62] And the better opinion seems to be that no amendment is permissible after judgment of dismissal or nonsuit has been pronounced,[63] although there are decisions holding that amendment is permissible at any time before the judgment is actually entered.[64]

y. After One or More Trials. It is within the discretion of the court to refuse an amendment after one or more trials have been had,[65] but even after several trials have been had the court may permit an amendment, there being

52. See *infra*, VII, A, 11, d, (II), (E).
53. See *infra*, VI, A, 11, a, (III).
54. See *infra*, VII, A, 11, d, (II), (E).
55. See *infra*, VII, A, 11, w, (V).
56. Kendall *v.* Carland, 5 Cush. (Mass.) 74.
57. Sherman *v.* Fream, 8 Abb. Pr. (N. Y.) 33.
58. La Barre *v.* Waterbury, 69 Conn. 554, 37 Atl. 1068.
59. Higgins *v.* People, 2 Colo. App. 567, 31 Pac. 951.
60. Murphy *v.* Watson, 67 N. J. L. 221, 54 Atl. 100; Foster *v.* Eoff, 19 Tex. Civ. App. 405, 47 S. W. 399.
61. Bryson *v.* Thurmond, 103 Ga. 463, 30 S. E. 269; Bitterling *v.* Deshler, 160 Pa. St. 1, 28 Atl. 445; Shaw *v.* American Tobacco Co., 108 Fed. 842, 48 C. C. A. 68.

When the judgment of nonsuit is set aside, the fact that motion for leave to amend was made after the motion for nonsuit was granted and before the judgment of nonsuit was set aside ought not to affect plaintiff's right to amend, although the motion was not renewed after the nonsuit was vacated. Sibley *v.* Young, 26 S. C. 415, 2 S. E. 314.

Where the nonsuit has been taken off and a new trial granted, plaintiff may have leave to amend his declaration although he did not move to amend before the nonsuit was entered. Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Hill *v.* Haskins, 8 Pick. (Mass.) 83.

62. Craig *v.* Welch-Hackley Coal, etc., Co., 78 S. W. 1122, 25 Ky. L. Rep. 1853; Houston *v.* Kidwell, 14 S. W. 377, 12 Ky. L. Rep. 386.
63. *Delaware.*— Higgins *v.* Wilmington, 3 Pennew. 356, 57 Atl. 1.
Louisiana.— Burbank *v.* Harris, 32 La. Ann. 395.
Nebraska.— Stansbury *v.* Storer, 70 Nebr. 603, 97 N. W. 805.
New York.— See Mea *v.* Pierce, 63 Hun 400, 18 N. Y. Suppl. 293.
Pennsylvania.— Henry *v.* Fisher, 2 Pa. Dist. 71.
South Carolina.— Fant *v.* Gadberry, 5 Rich. 10.

Dismissal or nonsuit for want of cause of action.— A dismissal of the petition on the ground that it shows no cause of action disposes of the case, and no amendment can then be allowed. Raymond *v.* Palmer, 35 La. Ann. 276; Hart *v.* Bowie, 34 La. Ann. 323. After the granting of nonsuit because no cause of action existed at the time of the trial, leave cannot be given to file an amended or supplemental complaint to show a cause of action subsequently arising which did not exist when the action was commenced since an actual cause of action must exist at the time of bringing the suit. Lawrence *v.* Pederson, 34 Wash. 1, 74 Pac. 1011.

64. Freeman *v.* Brown, 115 Ga. 23, 41 S. E. 385; Lytle *v.* De Vaughn, 81 Ga. 226, 7 S. E. 281; Phillips *v.* Brigham, 26 Ga. 617, 71 Am. Dec. 237; Den *v.* Franklin, 5 N. J. L. 850; Schieffelin *v.* Whipple, 10 Wis. 81.
65. Kindall *v.* Lincoln Hardware, etc., Co., 10 Ida. 13, 76 Pac. 992; Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053 (answer tendering issue, which up to time of proposed amendment stood confessed in the case); Lincoln County Bd. of Internal Imp. *v.* Moore, 66 S. W. 417, 23 Ky. L. Rep. 1885.

On the calling of a case for a third trial, it is not an abuse of discretion to refuse to permit an amended answer to be filed. Faulkner *v.* Keeney, 52 S. W. 819, 21 Ky. L. Rep. 590.

Where retrial would be necessary.— A motion to amend presented after the close of a second trial is properly refused where the case had been pending several years and the amendment asked would necessitate a retrial

nothing to show that the opposite party has been misled or that the amendment seeks to introduce a new cause of action.[66]

z. At Subsequent Term. Formerly all amendments were required to be made at the term when the error occurred;[67] but now the fact that a motion for an amendment is applied for at a subsequent term does not of itself prevent the allowance of an amendment,[68] although it has been held an abuse of discretion to allow an amendment several terms after the commencement of the action, where there were other reasons for refusal.[69]

11. Character of Amendments[70] — **a. Cause of Action** — (i) *Curing Faulty or Defective Statement of Cause of Action* — (a) *In General.* Where a cause of action is defectively or insufficiently stated in the complaint, an amendment to perfect the statement of the cause of action is permissible;[71] and such an amendment may be allowed upon the trial,[72] after demurrer to the complaint[73] or evidence,[74] or after motion for a nonsuit.[75] According to the weight of authority, if there is an entire failure to state the cause of action in the original pleading, no amendment so as to state a cause of action is permissible,[76] and *a fortiori* where

of the case. Atchinson Sav. Bank *v.* Means, (Kan.) 58 Pac. 989.

66. Burnap *v.* Halloran, 1 Code Rep. (N. Y.) 51.

67. See Wight *v.* Nicholson, 134 U. S. 146, 10 S. Ct. 487, 33 L. ed. 865; Nelson *v.* Barker, 17 Fed. Cas. No. 10,101, 3 McLean 379.

68. Peck *v.* Bacon, 18 Conn. 377; Solomon *v.* Creech, 82 Ga. 445, 9 S. E. 165; Stanton *v.* Burge, 34 Ga. 435; Lewis *v.* Black, 27 Miss. 425; Wight *v.* Nicholson, 134 U. S. 146, 10 S. Ct. 487, 33 L. ed. 865; Nelson *v.* Barker, 17 Fed. Cas. No. 10,101, 3 McLean 379; Tufts *v.* Tufts, 24 Fed. Cas. No. 14,233, 3 Woodb. & M. 456.

69. Dole *v.* Northrop, 19 Wis. 249.

70. **Amendments as of course** see *supra*, VII, A, 5, c.

Amendments of replication or reply see *infra*, VII, A, 13, b.

Time of amendments generally see *supra*, VII, A, 10.

71. *Connecticut.*— Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372.

Georgia.— Reid *v.* Jones, 127 Ga. 114, 56 S. E. 128; Smith *v.* Georgia R., etc., Co., 87 Ga. 764, 13 S. E. 904; Hardee *v.* Lovett, 83 Ga. 203, 9 S. E. 680; Lemar *v.* Russell, 77 Ga. 307, 2 S. E. 467; Merritt *v.* Bagwell, 70 Ga. 578; Camp *v.* Smith, 61 Ga. 449; Americus Bank *v.* Rogers, 55 Ga. 29.

Illinois.— Mott *v.* Chicago, etc., R. Co., 102 Ill. App. 412.

Indiana.— Hartford City Nat. Gas, etc., Co. *v.* Love, 125 Ind. 275, 25 N. E. 346.

Kansas.— Hobson *v.* Ogden, 16 Kan. 388.

Maine.— Pullen *v.* Hutchison, 25 Me. 249.

Missouri.— Galbreath *v.* Newton, 45 Mo. App. 312.

Nebraska.— Myers *v.* Moore, (1907) 110 N. W. 989; Wallingford *v.* Burr, 17 Nebr. 137, 22 N. W. 350.

North Carolina.— State *v.* Turner, 96 N. C. 416, 2 S. E. 51.

Oregon.— Swift *v.* Mulkey, 14 Oreg. 59, 12 Pac. 76.

Rhode Island.— Barlow *v.* Tierney, 26 R. I. 557, 59 Atl. 930.

South Carolina.— Brown *v.* Carolina Midland R. Co., 58 S. C. 466, 36 S. E. 852; Ruberg *v.* Brown, 50 S. C. 397, 27 S. E. 873; Harvey *v.* Hackney, 35 S. C. 361, 14 S. E. 822.

Texas.— Texas El., etc., Co. *v.* Mitchell, 78 Tex. 64, 16 S. W. 275; Gulf, etc., R. Co. *v.* McGowan, 73 Tex. 355, 11 S. W. 336; International, etc., R. Co. *v.* Irvine, 64 Tex. 529; Smith *v.* Kinney, 33 Tex. 283; Thouvenin *v.* Lea, 26 Tex. 612; Meade *v.* Jones, 13 Tex. Civ. App. 320, 35 S. W. 310; Bremond *v.* Johnson, 1 Tex. App. Civ. Cas. § 609.

Vermont.— Skinner *v.* Gray, 12 Vt. 456.

For example an allegation in the complaint in an action for breach of warranty that "there was and is a breach of defendant's contract of warranty aforesaid" is a defective statement of a good cause of action, in that it does not allege in what the breach consisted, and as a defective statement as distinguished from a statement of a defective cause action is amendable. Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927.

72. Hobson *v.* Ogden, 16 Kan. 388; Swift *v.* Mulkey, 14 Oreg. 59, 12 Pac. 76; Brown *v.* Carolina Midland R. Co., 58 S. C. 466, 36 S. E. 852.

73. Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

74. Hartford City Natural Gas, etc., Co. *v.* Love, 125 Ind. 275, 25 N. E. 346.

75. Ritchie *v.* Waller, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, 27 L. R. A. 161.

76. *District of Columbia.*— *Ex p.* Mansfield, 11 App. Cas. 558.

Georgia.— Sheperd *v.* Southern Pine Co., 118 Ga. 292, 45 S. E. 220; Ledsinger *v.* Central Line Steamers, 75 Ga. 567.

Illinois.— See McAndrews *v.* Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603.

South Carolina.— Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427; Whaley *v.* Lawton, 57 S. C. 256, 35 S. E. 558; Ruberg *v.* Brown, 50 S. C. 397, 27 S. E. 873; Lilly *v.* Charlotte, etc., R. Co., 32 S. C. 142, 10 S. E. 932.

the facts stated show that plaintiff has no cause of action,[77] allowable amendments being those which simply make perfect a cause of action which is imperfectly set forth in the pleading.[78] In some jurisdictions, however, it is held that, although the original pleading does not state facts sufficient to constitute a cause of action, an amendment curing defective or insufficient allegations is allowable,[79] at least where there is no claim of surprise nor showing that defendant will in any wise be prejudiced by the amendment.[80]

(B) *Effect of Statute of Limitations.*[81] The statute of limitations presents no impediment to an amendment to a declaration or complaint which merely enlarges and presents fully the case and cause of action which was undertaken to be stated in the original pleading.[82] In fact, in some jurisdictions it is regarded as a strong reason for allowing an amendment to perfect the statement of the cause of action, that plaintiff is barred by the statute of limitations from commencing another action on the cause of action defectively stated in the original pleading.[83]

Wisconsin.— K—— *v.* H——, 20 Wis. 239, 91 Am. Dec. 397.

United States.— Coker *v.* Monaghan Mills, 119 Fed. 706.

A statement of a defective cause of action cannot be cured by amendment. Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927.

Unless, as it stands, the complaint sets forth a full and complete cause of action, no amendment is allowable. Ellison *v.* Georgia R. Co., 87 Ga. 691, 13 S. E. 809.

Amendment after trial.— Under a code provision authorizing an amendment of a pleading to conform to the facts proved, "where the amendment does not change substantially the claim or defense," the court is not authorized to allow an amendment or complaint after trial so as to state a cause of action, where none was stated in the original pleading. Wheeler *v.* Hall, 54 N. Y. App. Div. 49, 66 N. Y. Suppl. 257.

77. Whaley *v.* Lawton, 57 S. C. 256, 35 S. E. 558.

78. Shepherd *v.* Southern Pine Co., 118 Ga. 292, 45 S. E. 220; Davis *v.* Muscogee Mfg. Co., 106 Ga. 126, 32 S. E. 130; Lilly *v.* Charlotte, etc., R. Co., 32 S. C. 142, 10 S. E. 932; Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

A defective statement of a good cause of action may be cured by amendment. Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927.

79. Poundstone *v.* Baldwin, 145 Ind. 139, 44 N. E. 191; Hobson *v.* Ogden, 16 Kan. 388; Gregg *v.* Gier, 10 Fed. Cas. No. 5,799, 4 McLean 208. See also Frost *v.* Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53, where it is said that the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in such case a new cause of action is for the first time introduced.

80. Lynch *v.* Lynch, 87 Mo. App. 32.

81. Relation back of amendment see LIMITATIONS OF ACTIONS, 25 Cyc. 1305.

82. *Iowa.*— Gordon *v.* Chicago, etc., R. Co., 129 Iowa 747, 106 N. W. 177.

Massachusetts.— Singer *v.* Newton, 134 Mass. 308; Davis *v.* Saunders, 7 Mass. 62.

Missouri.— Goddard *v.* Williamson, 72 Mo. 131.

Nevada.— Tucker *v.* Virginia City, 4 Nev. 20.

New York.— Elting *v.* Dayton, 67 Hun 425, 22 N. Y. Suppl. 154; Wilson *v* Smith, 59 N. Y. Super. Ct. 380, 14 N. Y. Suppl. 628; Deane *v.* O'Brien, 13 Abb. Pr. 11; Tobias *v.* Harland, 1 Wend. 93.

Pennsylvania.— Stoner *v.* Erisman, 206 Pa. St. 600, 56 Atl. 77; Herman *v.* Rinker, 106 Pa. St. 121.

South Carolina.— Jacobs *v.* Gilreath, 41 S. C. 143, 19 S. E. 308, 310.

Texas.— Thouvenin *v.* Lea, 26 Tex. 612; Sherman Oil, etc., Co. *v.* Stewart, 17 Tex. Civ. App. 59, 42 S. W. 241; Tynberg *v.* Cohen, (Civ. App. 1895) 32 S. W. 157.

Wisconsin.— Shieffelin *v.* Whipple, 10 Wis. 61.

At any time during the progress of the cause, such an amendment is allowable. Thouvenin *v.* Lea, 26 Tex. 612.

An amendment alleging the non-residence of defendant, in order to avoid the plea of the statute of limitations, adds no new cause of action, and is allowable. Hardee *v.* Lovett, 83 Ga. 203, 9 S. E. 680.

Charging administrator personally.— In an action against an administrator, a declaration counting on the intestate's promise, to which the statute of limitations is pleaded, may be amended by adding a count alleging a promise by the administrator. Saltar *v.* Saltar, 6 N. J. L. 405.

An amendment changing the name of a party plaintiff does not substantially change the claim so as to make the statute of limitations available as a bar to the allowance of the amendment. Hucklebridge *v.* Atchison, etc., R. Co., 66 Kan. 443, 71 Pac. 814.

Amendment averring new promise.— Where the complaint shows a cause of action on a promissory note, and defendant pleads the statute of limitations, the court will allow plaintiff to amend his complaint by alleging a new promise by defendant, so as to prevent the operation of the statute. Beard *v.* Simmons, 9 Ga. 4.

83. Sanger *v.* Newton, 134 Mass. 308; Tucker *v.* Virginia City, 4 Nev. 20; Elting

(II) *Adding Counts For Same Cause of Action.* It is uniformly held to be within the discretion of the court to allow plaintiff to amend his complaint by adding other counts for the same cause of action; [84] and this may be done after the evidence is closed,[85] after verdict,[86] or after verdict and judgment in plaintiff's favor on one count, plaintiff taking a general verdict on all the counts.[87]

(III) *Introduction of New or Different Cause of Action* — (A) *Power of Court to Allow* — (1) At Common Law. At common law the courts had no power to allow an amendment to an existing pleading, introductive of a new and distinct cause of action.[88]

(2) Under Codes and Practice Acts — (a) In General. In a majority of the states the courts have established the doctrine that the powers conferred upon them, under their codes and practice acts, in respect to amendments which

r. Dayton, 67 Hun (N. Y.) 425, 22 N. Y. Suppl. 154; Tobias *v.* Harland, 1 Wend. (N. Y.) 93; Shieffelin *v.* Whipple, 10 Wis. 81.

In this connection see Rowell *v.* Moeller, 91 Hun (N. Y.) 421, 36 N. Y. Suppl. 223; Eighmie *v.* Taylor, 39 Hun (N. Y.) 366, where it is said that the court having power on motion at special term to allow an amendment introducing a new cause of action, it is a strong reason for allowing such an amendment that the new cause of action thereby sought to be introduced is barred by the statute of limitations.

84. *Alabama.*— Montgomery Traction Co. *v.* Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A. N. S. 851.

Connecticut.— Peck *v.* Bacon, 18 Conn. 377.

Illinois.— Swift *v.* Madden, 165 Ill. 41, 45 N. E. 979; Independent Order of Mut. Aid *v.* Paine, 122 Ill. 625, 14 N. E. 42; Belvidere *v.* Crichton, 81 Ill. App. 595; Meinke *v.* Nelson, 56 Ill. App. 269.

Maine.— Holmes *v.* Robinson Mfg. Co., 60 Me. 201; Cram *v.* Sherburne, 14 Me. 48.

Maryland.— Gisriel *v.* Burrows, 72 Md. 366, 20 Atl. 240.

Massachusetts.— Smith *v.* Palmer, 6 Cush. 513; Kendal *v.* Carland, 5 Cush. 74; Miller *v.* Clark, 8 Pick. 412; Swan *v.* Nesmith, 7 Pick. 220, 19 Am. Dec. 282; Ball *v.* Claflin, 5 Pick. 303, 16 Am. Dec. 407.

Michigan.— Minkley *v.* Springwells Tp., 113 Mich. 347, 71 N. W. 649; People *v.* Circuit Judges, 1 Dougl. 434.

Nevada.— Mendes *v.* Freiters, 16 Nev. 388.

Pennsylvania.— Rodrigue *v.* Curcier, 15 Serg. & R. 81.

Vermont.— Hill *v.* Smith, 34 Vt. 535.

An additional count which contains a mere restatement of the cause of action set up in the original pleading is allowable. Swift *v.* Madden, 165 Ill. 41, 45 N. E. 979.

Common counts may be added to a special count in assumpsit, when not intended to introduce a new cause of action, but merely as declaring on the cause of action declared on in the special count (Mahan *v.* Smitherman, 71 Ala. 563), and *vice versa* (Owensboro Wagon Co. *v.* Hall, 149 Ala. 210, 43 So. 71).

A general count, which is consistent with the original declaration, may be added by way of amendment, if the court is satisfied that plaintiff will offer in evidence under it only some matter for the recovery of which the action was originally brought. And this may be secured by requiring plaintiff to file a specification at the time of the allowance of the amendment. Perley *v.* Brown, 12 N. H. 493.

The original counts may be stricken out and others inserted, if the cause of action be the same, and the form of action can be retained. McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666.

Adding count substantially different.— Plaintiff cannot introduce an entirely new cause of action, but, provided he adheres to the original cause of action, he may add a new count substantially different from that contained in the original pleading. Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385; Cunningham *v.* Day, 2 Serg. & R. (Pa.) 1.

85. Belvidere *v.* Crichton, 81 Ill. App. 595; Cram *v.* Sherburne, 14 Me. 48; Gisriel *v.* Burrows, 72 Md. 366, 20 Atl. 240.

After final submission of the cause it is not an abuse of discretion to refuse leave to amend by adding another count charging defendant in a new capacity. Hays *v.* Turner, 23 Iowa 214.

86. Independent Order Mut. Aid *v.* Paine, 122 Ill. 625, 14 N. E. 42; Meinke *v.* Nelson, 56 Ill. App. 269.

87. Kendall *v.* Carland, 5 Cush. (Mass.) 74.

As of course see *supra*, VII, A, 5, a, (II).

88. *Colorado.*— Givens *v.* Wheeler, 5 Colo. 598.

Georgia.— Venable *v.* Burton, 118 Ga. 156, 45 S. E. 29.

Missouri.— Lumpkin *v.* Collier, 69 Mo. 170.

New York.— Woodruff *v.* Dickie, 31 How. Pr. 164. But see Ford *v.* Ford, 53 Barb. 525, holding that, independently of the code, the court has the power on motion at special term, at any time before verdict, to allow an amendment to the complaint by the insertion of a new cause of action, but that the power of the court to allow such an amendment during the trial of the cause did not exist before the code, nor does it seem to have been conferred thereby.

North Dakota.— Mares *v.* Wormington, 8 N. D. 329, 79 N. W. 441.

Pennsylvania.— Shock *v.* McChesney, 4 Yeates 507, 2 Am. Dec. 415.

Vermont.— Dana *v.* McClure, 39 Vt. 197.

See 39 Cent. Dig. tit. "Pleading," § 686.

set up a new and distinct cause of action, are no greater than that existing at common law, and that they are not authorized to grant such amendments at any stage of the proceedings.[89] In some of the states, however, it is held to be within

89. *Colorado.*— Anthony *v.* Slayden, 27 Colo. 144, 60 Pac. 826; Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086; Givens *v.* Wheeler, 6 Colo. 149.

Georgia.— Venable *v.* Burton, 118 Ga. 156, 45 S. E. 29; Chapman *v.* Americus Oil Co., 117 Ga. 881, 45 S. E. 268; Atwater *v.* Hannah, 116 Ga. 745, 42 S. E. 1007; Dyson *v.* Southern R. Co., 113 Ga. 327, 38 S. E. 749.

Idaho.— Hallett *v.* Larcom, 5 Ida. 492, 51 Pac. 108.

Kansas.— Thompson *v.* Beeler, 69 Kan. 462, 77 Pac. 100.

Maine.— Willoughby *v.* Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612; Jordan *v.* McAllister, 91 Me. 481, 40 Atl. 324; Milliken *v.* Whitehouse, 49 Me. 527; Newell *v.* Hussey, 18 Me. 249, 36 Am. Dec. 717.

Massachusetts.— Silver *v.* Jordan, 139 Mass. 280, 1 N. E. 280.

Michigan.— Musselman Grocer Co. *v.* Casler, 138 Mich. 24, 100 N. W. 997; Angell *v.* Pruyn, 126 Mich. 16, 85 N. W. 258; Connecticut F. Ins. Co. *v.* Monroe Cir. Judge, 77 Mich. 231, 43 N. W. 871, 18 Am. St. Rep. 398; People *v.* Judges Washtenaw Cir. Ct., 1 Dougl. 434.

Missouri.— Ross *v.* Cleveland, etc., Mineral Land Co., 162 Mo. 317, 62 S. W. 984; Heman *v.* Glann, 129 Mo. 325, 31 S. W. 589; Lumpkin *v.* Colyer, 69 Mo. 170; Red Diamond Clothing Co. *v.* Steidmann, 120 Mo. App. 519, 97 S. W. 220; Prnett *v.* Warren, 71 Mo. App. 84.

New Hampshire.— Pearson *v.* Smith, 54 N. H. 65; Lawrence *v.* Langley, 14 N. H. 70.

North Dakota.— Mares *v.* Wormington, 8 N. D. 329, 79 N. W. 441.

Ohio.— Shields *v.* Moore, 2 Ohio Dec. (Reprint) 331, 2 West. L. Month. 437.

Rhode Island.— Thayer *v.* Farrell, 11 R. I. 305.

South Carolina.— Ruberg *v.* Brown, 50 S. C. 397, 27 S. E. 873; Lilly *v.* Railroad Co., 32 S. C. 142, 10 S. E. 932; Kennerty *v.* Etiwan Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669.

Vermont.— Brodek *v.* Hirschfield, 57 Vt. 12; Sumner *v.* Brown, 34 Vt. 194; Carpenter *v.* Gookin, 2 Vt. 495, 21 Am. Dec. 566.

West Virginia.— Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

See 39 Cent. Dig. tit. "Pleading," § 686.

In California the rule is that the introduction of a wholly different cause of action is not allowable by way of amendment. Frost *v.* Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53. And it is held that the rule is not violated by an amendment which does not materially change the cause of action (Lonvall *v.* Gridley, 70 Cal. 510, 11 Pac. 777), or state an essentially different cause of action (Bogart *v.* Crosby, 91 Cal. 278, 27 Pac. 693); nor is it violated by an amendment introducing new matter not entirely foreign to the complaint (Nevada County, etc., Canal Co. *v.* Kidd, 28 Cal. 673).

In Texas, while the general rule is that an amendment which introduces a new and distinct cause of action is not allowable (Williams *v.* Randon, 10 Tex. 74), yet such amendments are allowable under particular circumstances, and under proper limitations (Williams *v.* Randon, *supra*; Mitchell *v.* Lytle, 1 Tex. App. Civ. Cas. § 702). Thus if not prejudicial to the adverse party, an amendment not relating back to the commencement of the suit, but confined to the time of filing the amendment, will be allowed on payment of all costs up to the time of amendment. Williams *v.* Randon, *supra*, disallowing, however, an amendment asked for on the ground that on its face it introduced a new and distinct cause of action barred by the statute of limitations.

The amendments prescribed by the Pennsylvania statute are not discretionary, but mandatory, and therefore subjects of writ of error (Newlin *v.* Palmer, 11 Serg. & R. (Pa.) 98); but these amendments are not to be permitted when they introduce a new cause of action (Tatham *v.* Ramey, 82 Pa. St. 130; Root *v.* O'Neil, 24 Pa. St. 326; Newlin *v.* Palmer, *supra*; Shock *v.* McChesney, 4 Yeates (Pa.) 507, 2 Am. Dec. 415; Good Roads Mach. Co. *v.* Old Lycoming Tp., 25 Pa. Super. Ct. 156; Kester *v.* Stokes, 1 Miles (Pa.) 67), especially when by reason of the statute of limitations it would work an injury to the adverse party (Trego *v.* Lewis, 58 Pa. St. 463).

In Canada the rule is that it is not of itself a sufficient ground for refusing a proposed amendment that it sets up a new cause of action, but the test is whether or not the adverse party would be placed in such a position that he could not be compensated by an allowance for costs or otherwise. Lee *v.* Gallagher, 15 Manitoba 677.

After trial.— After trial an amendment introductive of a new cause of action is not allowable. Cole *v.* Thompson, 134 Iowa 685, 112 N. W. 178. It is not error for the court to refuse leave after trial to amend by introducing a new cause of action, where it appears that the complaint was amended three times during the progress of the trial. Conrad *v.* Adler, 13 N. D. 199, 100 N. W. 722. An amendment filed without leave of court or notice to defendant and after submission of the cause, introducing a new and distinct cause of action, is filed too late to be considered for any purpose. Boardman *v.* Louis Drach Constr. Co., 123 Iowa 603, 99 N. W. 176; Sturman *v.* Sturman, 118 Iowa 620, 92 N. W. 886; Postmaster Gen. *v.* Ridgway, 19 Fed. Cas. No. 11,313, Gilp. 135.

After verdict.— It is too late to amend so as to cure a variance at the hearing of exceptions in the supreme court, where the

the power of the court, before trial, to allow plaintiff to insert in his complaint, by way of amendment, a new and distinct cause of action,[90] provided the result sought to be obtained is the same,[91] and the amendment does not affect the substantial purpose of the action; or provided the amendment is germane to the subject-matter in controversy,[92] or that the amendment does not substantially change plaintiff's claim,[93] or that the form of the action is not changed from one on contract to one sounding in tort, or from one at law to one in equity, or *vice versa*.[94] And, in direct conflict with the decisions of a great majority of the states which hold that courts cannot allow, during trial, an amendment introductive of a new and distinct cause of action,[95] or substantially changing plaintiff's claim,[96]

amendment sets up a different cause of action. Cunningham *v.* Hobart, 7 Gray (Mass.) 423.

After judgment.— An amendment introducing a new cause of action (Bicklin *v.* Kendall, 72 Iowa 490, 34 N. W. 283. See also O'Connell *v.* Cotter, 44 Iowa 48; Smith *v.* New York, 37 N. Y. 518), or substantially changing the cause of action (Wymore First Nat. Bank *v.* Myers, 44 Nebr. 306, 62 N. W. 459; Scott *v.* Spenser, 44 Nebr. 93, 62 N. W. 312), will not be permitted after judgment. A statute permitting a party to amend his pleading at any time does not contemplate the allowance of an amendment after judgment, presenting a new cause of action. Bicklin *v.* Kendall, 72 Iowa 490, 34 N. W. 283. The mandatory amendments specified by the Pennsylvania statute are not to be permitted after judgment, when they introduce a new cause of action. Good Roads Mach. Co. *v.* Old Lycoming Tp., 25 Pa. Super. Ct. 156.

On appeal.— If an amendment substantially changing plaintiff's claim is one which the trial court had no authority to make, it may not on appeal be made by the appellate court *nunc pro tunc*. Storrs *v.* Flint, 46 N. Y. Super. Ct. 498.

90. Lovell *v.* Hammond, 66 Conn. 500, 34 Atl. 511; Theilmann *v.* New York, 71 N. Y. App. Div. 595, 76 N. Y. Suppl. 132; Avery *v.* Popper, (Tex. Civ. App. 1895) 34 S. W. 325.

In a proper case and upon good cause shown by affidavit, it is within the discretion of the court to allow before the trial an amendment introductive of a new cause of action. Shropshire *v.* Kennedy, 84 Ind. 111; Burr *v.* Mendenhall, 49 Ind. 496.

Before answer.— There is nothing in the federal statutes, nor in those of Wisconsin, which precludes the federal court sitting in that state from permitting an amendment of a complaint in an action at law before answer, to introduce an additional cause of action of the same nature and growing out of the same transaction, and which might have been joined with that stated in the original pleading; and such amendment will be allowed, where it will be in furtherance of justice, and tend to prevent a multiplicity of suits. Oliver *v.* Raymond, 108 Fed. 927.

91. Deyo *v.* Morss, 144 N. Y. 216, 39 N. E. 81; Rowell *v.* Moeller, 91 Hun (N. Y.) 421, 36 N. Y. Suppl. 223.

92. Lieuallen *v.* Mosgrove, 37 Oreg. 446, 61 Pac. 1022; Talbot *v.* Garretson, 31 Oreg. 256, 49 Pac. 978.

93. Kerr *v.* Grand Forks, 15 N. D. 294, 107 N. W. 197; Rae *v.* Chicago, etc., R. Co., 14 N. D. 507, 105 N. W. 721.

94. Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55. See also Kewaunee County *v.* Decker, 34 Wis. 378.

95. *Alabama.*— Huggins *v.* Southern R. Co., 148 Ala. 153, 41 So. 856.

Arkansas.— Patrick *v.* Whitely, 75 Ark. 465, 85 S. W. 1179.

California.— Hackett *v.* State Bank, 57 Cal. 335.

Colorado.—Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086.

Georgia.— McKany *v.* Cooper, 81 Ga. 679, 8 S. E. 312.

Indiana.— Proctor *v.* Owens, 18 Ind. 21, 81 Am. Dec. 341.

Michigan.— Musselman Grocer Co. *v.* Casler, 138 Mich. 24, 100 N. W. 997; Angell *v.* Pruyn, 126 Mich. 16, 85 N. W. 258.

Nebraska.— Western Cornice, etc., Works *v.* Meyer, 55 Nebr. 440, 76 N. W. 23; Undeland *v.* Stanfield, 53 Nebr. 120, 73 N. W. 459; Scott *v.* Spencer, 44 Nebr. 93, 62 N. W. 312.

New York.— Freeman *v.* Grant, 132 N. Y. 22, 30 N. E. 247; Ford *v.* Ford, 53 Barb. 525; Mahon *v.* New York, 10 Misc. 664, 31 N. Y. Suppl. 676; Woodruff *v.* Dickie, 31 How. Pr. 164.

North Carolina.— Martin *v.* Fayetteville Bank, 131 N. C. 325, 42 S. E. 558; Nims Mfg. Co. *v.* Blythe, 127 N. C. 325, 37 S. E. 455; Parker *v.* Harden, 122 N. C. 111, 29 S. E. 63.

North Dakota.— Woodward *v.* Northern Pac. R. Co., 16 N. D. 38, 111 N. W. 627; Mares *v.* Wormington, 8 N. D. 329, 79 N. W. 441.

See 39 Cent. Dig. tit. "Pleading," § 686.

It is not error for the court, during the trial of the cause, to refuse leave to amend the complaint, so as to introduce a new cause of action. Bartz *v.* Chicago City R. Co., 116 Ill. App. 554; Wager *v.* Chew, 15 Pa. St. 323.

In England an amendment upon the trial, introductive of a new cause of action, will not be allowed. Bradworth *v.* Foshaw, 10 Wkly. Rep. 760.

After the trial is begun an amendment, designed to make the complaint more certain and specific, but not adding a new cause of action, so as to injure defendant if compelled to proceed, is allowable. Landry *v.* Durham, 21 Ind. 232.

96. Cox *v.* Halloran, 64 N. Y. App. Div. 550, 72 N. Y. Suppl. 302; Storrs *v.* Flint, 46

it is held in a few states that an amendment introductive of a new cause of action is allowable at any stage of the trial,[97] at least where the amendment does not change the form of action from one on contract to one sounding in tort, or from one at law to one in equity, or *vice versa*.[98]

(b) Restriction That Plaintiff's Claim Shall Not Be Substantially Changed. In some code states the power of the court to allow amendments to the complaint in furtherance of justice is restricted to amendments not substantially changing plaintiff's claim.[99] This restriction is generally held to refer to the general identity of the transaction forming the cause of action stated in the original pleading,[1] and not to refer to the form of action or cause of action;[2] and, so long as the general identity of the cause of action remains the same, any amendment germane to the original pleading is allowable.[3]

(c) By Adding Counts. While it is generally held that the court cannot allow a count which states a new cause of action,[4] to be added by way of amendment

N. Y. Super. Ct. 498; Zboynski *v.* Brooklyn City R. Co., 10 Misc. (N. Y.) 7, 30 N. Y. Suppl. 540; Buffalo, etc., Ferry Co. *v.* Allen, 12 N. Y. Civ. Proc. 64; Hazzard *v.* Wallace, 27 Ohio Cir. Ct. 147; Talbot *v.* Garretson, 31 Oreg. 256, 49 Pac. 978; Harrington *v.* Wilson, 10 S. D. 606, 74 N. W. 1055.

97. Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41; De Moss *v.* Thomas, 118 Ill. App. 467; Smith *v.* Barker, 22 Fed. Cas. No. 13,013, Brunn. Col. Cas. 78, 3 Day (Conn.) 312.

In the municipal court of the city of New York no distinction exists between trial and special terms, and the rule observed in courts of record with respect to amendments upon the trial is not followed, an amendment introductive of a new cause of action being allowable in furtherance of substantial justice upon proper terms, under Code Civ. Proc. § 2944. Hawkes *v.* Burke, 34 Misc. 189, 68 N. Y. Suppl. 798; Theford *v.* Reade, 28 Misc. 563, 59 N. Y. Suppl. 537; Milch *v.* Westchester F. Ins. Co., 13 Misc. 231, 34 N. Y. Suppl. 15. *Compare* Dows *v.* Morrison, 2 Misc. 54, 20 N. Y. Suppl. 860.

The court may allow an amendment of the complaint after the proofs have been taken and before final argument had, although the amendment introduces a new cause of action, if it corresponds in character with the original count, is kindred in nature, and might have been included within the original pleading. U. S. *v.* Seventy-Six Thousand One Hundred and Twenty-five Cigars, 18 Fed. 147.

98. Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55.

99. *California.*— Hackett *v.* State Bank, 57 Cal. 335.

Iowa.— Williamson *v.* Chicago, etc., R. Co., 84 Iowa 583, 51 N. W. 60.

Kansas.— Jewett *v.* Malott, 60 Kan. 509, 57 Pac. 100; Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987.

Missouri.— Carter *v.* Dilley, 167 Mo. 564, 67 S. W. 232.

Nebraska.— Wymore First Nat. Bank *v.* Myers, 44 Nebr. 306, 62 N. W. 459; Scott *v.* Spencer, 44 Nebr. 93, 62 N. W. 312.

North Dakota.— Finlayson *v.* Peterson, 11 N. D. 45, 89 N. W. 856.

Ohio.— Spice *v.* Steinruck, 14 Ohio St. 213.

South Dakota.— Harrington *v.* Wilson, 10 S. D. 606, 74 N. W. 1055.

Wisconsin.— Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032.

Only where the amendment is applied for during or after the trial is the right to amend a complaint subject to the restriction that the claim stated therein shall not be substantially changed. McDaniel *v.* Monroe, 63 S. C. 307, 41 S. E. 456.

1. Williamson *v.* Chicago, etc., R. Co., 84 Iowa 583, 51 N. W. 60; Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987; Spice *v.* Steinruck, 14 Ohio St. 213; Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032.

2. Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987; Spice *v.* Steinruck, 14 Ohio St. 213.

3. Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987; Finlayson *v.* Peterson, 11 N. D. 45, 89 N. W. 855; Spice *v.* Steinruck, 14 Ohio St. 213; Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032. See also Jewett *v.* Malott, 60 Kan. 509, 57 Pac. 100.

As the term is used in the statute, the substantial change in the "claim" only stops short of substitution of one cause of action for another. Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032.

Broadly considered the only limit on the power of amendment, within the general scope of the subject of the action, is that it must be in furtherance of justice in the sense that such must be the purpose of the exercise of the power. Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032.

4. *Maine.*— Cooper *v.* Waldron, 50 Me. 80; Eaton *v.* Oyier, 2 Me. 46.

Massachusetts.— Smith *v.* Palmer, 6 Cush. 513; Swan *v.* Nesmith, 7 Pick. 220, 19 Am. Dec. 282; Ball *v.* Claflin, 5 Pick. 303, 16 Am. Dec. 377.

Michigan.— Musselman Grocer Co. *v.* Casler, 138 Mich. 24, 110 N. W. 997; People *v.* Judges Washtenaw Cir. Ct., 1 Dougl. 434.

Missouri.— Red Diamond Clothing Co. *v.* Steidemann, 120 Mo. App. 519, 97 S. W. 220.

Vermont.— Brodek *v.* Hirschfield, 57 Vt. 12; Dewey *v.* Nicholas, 44 Vt. 24; Carpenter *v.* Gookin, 2 Vt. 495, 21 Am. Dec. 566.

At the trial term of a cause it is not competent to allow plaintiff to amend his declaration by adding a count thereto containing a

especially if it could not have been joined with the original cause of action,[5] yet under the statute of amendments in force in some jurisdictions an additional count for a new cause of action may be allowed by amendment on timely application therefor, so long as the cause of action so brought in could have been united with the original cause of action.[6]

(d) New Cause of Action Barred by Limitations.[7] According to the overwhelming weight of authority an amendment introducing a new and distinct cause of action barred by the statute of limitations is not allowable.[8] But it has been held that where a proposed amendment to a complaint will have the effect of introducing a new cause of action barred by limitations, the purpose of the complaint as originally drawn and that of the amendment being, however, substantially the same, the court has power in its discretion to allow the amendment to be made.[9] It has been held also that the statute of limitations is not an obstacle to the allowance of an amendment setting up a new and distinct cause of action, where it appears that a defense of limitations would present considerations depriving it of all right to indulgence by the court.[10]

new and distinct ground of injury not before alleged in the declaration. Pearson *v.* Reid, 10 Ga. 580.

Within the meaning of the statute allowing amendments which do not change the ground of the action, an amendment of a declaration in an action for the breach of a covenant against encumbrances by which a new count is added, setting forth a new and distinct covenant, is not objectionable as changing the ground of the action. Spencer *v.* Howe, 26 Conn. 200.

5. Mitchell *v.* Georgia R. Co., 68 Ga. 644.

Joinder of causes of action see Joinder and Splitting of Actions, 23 Cyc. 376.

6. Freeman *v.* Webb, 21 Nebr. 160, 31 N. W. 656; Bowen *v.* Needles Nat. Bank, 79 Fed. 49; U. S. *v.* Seventy-Six Thousand one Hundred and Twenty-five Cigars, 18 Fed. 147.

It is competent at common law to amend the declaration by a new count introductive of a new cause of action, provided such amendment correspond in character with the original count, is a kindred cause admitting the same pleading and defense, and might have been included within the declaration originally filed, especially where such cause is outlawed by the statute. Tiernan *v.* Woodruff, 23 Fed. Cas. No. 14,027, 5 McLean 135.

After proofs taken.— A new count adding a new cause of action that might have been joined with the original cause of action may be allowed after proofs taken, and before final argument. U. S. *v.* Seventy-Six Thousand One Hundred and Twenty-five Cigars, 18 Fed. 147.

As of course.— Under a statute authorizing amendments to the pleadings as of course within the time therein specified, plaintiff cannot add a cause of action belonging to a different class, retaining those set up in the original complaint, but he may abandon the latter and include in the amended complaint one or more causes of action of a different class, subject only to the restriction that they shall all belong to the same class and be warranted by the summons. Brown *v.* Leigh, 49 N. Y. 78.

7. **Relation back of amendment introducing new cause of action** see Limitations of Actions, 25 Cyc. 1308.

8. *California.*— Peiser *v.* Griffin, 125 Cal. 9, 57 Pac. 690.

Connecticut.— Drake *v.* Watson, 4 Day 37.

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128; Harper *v.* Illinois Cent. R. Co., 74 Ill. App. 74.

Iowa.— Box *v.* Chicago, etc., R. Co., 107 Iowa 660, 78 N. W. 694.

Michigan.— People *v.* Judge Newaygo Cir. Ct., 27 Mich. 138.

Pennsylvania.— Mahoney *v.* Park Steel Co., 217 Pa. St. 20, 66 Atl. 99; Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444; Tyrrill *v.* Lamb, 96 Pa. St. 464; Trego *v.* Lewis, 58 Pa. St. 463; Wright *v.* Hart, 44 Pa. St. 454; Wood *v.* Anderson, 25 Pa. St. 407; Shock *v.* McChesney, 4 Yeates 507, 2 Am. Dec. 415; Sener *v.* McCormick, 15 Pa. Super. Ct. 588.

Tennessee.— Trousdale *v.* Thomas, 3 Lea 715.

Texas.— Thouvenin *v.* Lea, 26 Tex. 612; Williams *v.* Randon, 10 Tex. 74; Pridgin *v.* Strickland, 8 Tex. 427, 58 Am. Dec. 124.

Wisconsin.— O'Connor *v.* Chicago, etc., R. Co., 92 Wis. 612, 66 N. W. 795.

United States.—The Harmony, 11 Fed. Cas. No. 6,081, 1 Gall. 123.

A plaintiff who has been nonsuited on the common counts cannot amend by setting forth a new and distinct cause of action upon a special contract, barred by the statute of limitations since the original declaration was filed. People *v.* Judge Newaygo Cir. Ct., 27 Mich. 138.

9. Rowell *v.* Moeller, 91 Hun (N. Y.) 421, 36 N. Y. Suppl. 223; Eighmie *v.* Taylor, 39 Hun (N. Y.) 366. See also Miller *v.* Watson, 6 Wend. (N. Y.) 506, holding that an amendment of the declaration was properly allowed by adding a count setting forth a special agreement, nine years after the commencement of the suit, and after three trials had at the circuit; the agreement having been proved at each trial without objection to the declaration, and the statute of limitations having run so as to bar a new action.

10. Vunk *v.* Raritan River R. Co., 56 N. J. L. 395, 28 Atl. 593. See also Eggleston *v.* Beach, 11 N. Y. Suppl. 525, where the

(B) *Under General Leave to Amend.* It has been held that under a general leave to amend plaintiff may introduce in his complaint a new cause of action so long as it is kindred to that contained in the original pleading, and might have been joined therewith,[11] or so long as it does not change the action from one in tort to one on contract, or *vice versa*.[12]

(C) *What Constitutes* — (1) IN GENERAL. An amendment is not objectionable as introducing a new cause of action, where it merely varies the mode of stating the cause of action sued on;[13] states the same facts in a different legal aspect;[14] restates the grounds[15] or facts[16] relied on for recovery; strikes out redundant or irrelevant matter;[17] makes it clear that defendants named in the summons are the only parties referred to as defendants in the original complaint;[18] sets out copies of the assignment of the count sued on;[19] or indicates that the action is for the use of a third party.[20] But it is otherwise as regards an amendment changing from an action *ex delicto* to an action *ex contractu*, or *vice versa*;[21] from an action at law to one in equity, or *vice versa*;[22] from a common law to a statutory action, or *vice versa*;[23] from trover to trespass;[24] or from debt to assumpsit.[25] Likewise an amendment is considered as introductive of a new cause of action if it sets up a contract or instrument other than that set forth in the original pleading.[26]

(2) IN ACTIONS EX CONTRACTU. In actions *ex contractu*, so long as plaintiff adheres to the original instrument or contract on which the complaint is founded, an amendment is not objectionable as introductive of a new cause of action, where it merely alters the grounds of recovery on that instrument or contract;[27] or the

court says that it undoubtedly has the power to allow an amendment introducing a new and distinct cause of action barred by the statute of limitations, but that such power will not be exercised unless special circumstances are shown proving it to be inequitable for defendant to rely on the statute of limitations.

11. Bowen *v.* Needles Nat. Bank, 79 Fed. 49.

12. Kewaunee County *v.* Decker, 34 Wis. 378.

13. Chicago, etc., R. Co. *v.* Ryan, 165 Ill. 88, 46 N. E. 208; Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438.

14. Stewart *v.* Spaulding, 72 Cal. 264, 13 Pac. 661.

15. Taylor *v.* Canton Tp., 30 Pa. Super. Ct. 305.

16. Davidson *v.* Fraser, 36 Colo. 1, 84 Pac. 695, 4 L. R. A. N. S. 1126.

17. Field *v.* Morse, 8 How. Pr. (N. Y.) 47; Bailey *v.* Wilson, 34 Oreg. 186, 55 Pac. 973.

18. Wabash R. Co. *v.* Barrett, 117 Ill. App. 315.

19. McCarn *v.* Rivers, 7 Iowa 404.

20. Dilcher *v.* Nellany, 52 Misc. (N. Y.) 364, 102 N. Y. Suppl. 264.

21. Hackett *v.* State Bank, 57 Cal. 335; Ramirez *v.* Murray, 5 Cal. 222; Falkner *v.* Iams, 5 Ind. 200; People *v.* Judge, 13 Mich. 206; Fischer *v.* Laack, 76 Wis. 313, 45 N. W. 104.

22. Anthony *v.* Slayden, 27 Colo. 144, 60 Pac. 826; Darling *v.* Roarty, 5 Gray (Mass.) 71; Hayward *v.* Hapgood, 4 Gray (Mass.) 437.

23. *Georgia.*— Charleston, etc., R. Co. *v.* Miller, 113 Ga. 15, 38 S. E. 338; Baldwin *v.* Western Union Tel. Co., 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194; Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659, 10 S. E. 352; Exposition Cotton Mills *v.* Western, etc., R. Co., 83 Ga. 441, 10 S. E. 113; Parmelee *v.* Savannah, etc., R. Co., 78 Ga. 239, 2 S. E. 686.

Kansas.— Kansas City *v.* Hart, 60 Kan. 684, 57 Pac. 938.

Maine.— Sawyer *v.* Perry, 88 Me. 42, 33 Atl. 660.

Massachusetts.— Peterson *v.* Waltham, 150 Mass. 564, 23 N. E. 236.

Michigan.— People *v.* Judges Washtenaw Cir. Ct., 1 Dougl. 434.

Missouri.— Sears *v.* Missouri Mortg.-Loan Co., 56 Mo. App. 122; Missouri Lumber, etc., Co. *v.* Zeitinger, 45 Mo. App. 114.

Pennsylvania.— Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444.

United States.— Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 15 S. Ct. 877, 39 L. ed. 983; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193.

24. Wilcox *v.* Sherman, 2 R. I. 540.

25. Houghton *v.* Stowell, 28 Me. 215.

26. See *infra*, VII, A, 11, c, (III).

27. Wilhelm's Appeal, 79 Pa. St. 120; Yost *v.* Eby, 23 Pa. St. 327; Stewart *v.* Kelly, 16 Pa. St. 160, 55 Am. Dec. 487; Coxe *v.* Tilghman, 1 Whart. (Pa.) 282. See also Morton *v.* Fairbanks, 11 Pick. (Mass.) 368.

Applications of rule.— Where plaintiff in an action on a contract for sale of property declares on an actual delivery of the property, he may amend by averring a mere readiness to deliver. Stewart *v.* Kelly, 16 Pa. St. 160, 55 Am. Dec. 487; Coxe *v.* Tilghman, 1 Whart. (Pa.) 282.

modes in which defendant has violated it;[28] or where it merely enlarges and states more fully and accurately the facts with reference to the contract or instrument set forth in the original pleading,[29] or changes the alleged date of the contract,[30] the sum due thereunder,[31] or the time or manner of its performance;[32] or where it merely enlarges the averments of the original pleading as to the liability of a warrantor.[33] And again, so long as the matter for which the action was truly and substantially brought is not forsaken, but is adhered to and relied on for recovery, the introduction by way of amendment of a different contract in form is not regarded as introducing a new cause of action.[34] But it is uniformly held that an amendment introducing as a ground of action an instrument or contract other than that set forth in the original complaint is objectionable as introducing a new and distinct cause of action.[35]

28. Stewart *v.* Kelly, 16 Pa. St. 160, 55 Am. Dec. 487; Coxe *v.* Tilghman, 1 Whart. (Pa.) 282. See also Yost *v.* Eby, 23 Pa. St. 327; Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375.

Applications of rule.— Thus in an action of covenant an amendment assigning new breaches of the same instrument is allowable. Wilhelm's Appeal, 79 Pa. St. 120; Coxe *v.* Tilghman, 1 Whart. (Pa.) 282; Shannon *v.* Com., 8 Serg. & R. (Pa.) 444; Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 11 Am. Dec. 610.

29. Miller *v.* Calumet Lumber, etc., Co., 121 Ill. App. 56; Thouvenin *v.* Lea, 26 Tex. 612.

Illustrations.—An amendment only stating an additional stipulation in the agreement between the parties, which was omitted in the original pleading, is proper. Thouvenin *v.* Lea, 26 Tex. 612.

30. Winton *v.* Lackawanna Coal Co., 5 Lack. Jur. (Pa.) 289. See also Stevenson *v.* Mudgett, 10 N. H. 338, 34 Am. Dec. 155; Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375.

31. Tribby *v.* Wokee, 74 Tex. 142, 11 S. W. 1089; Sullivan *v.* Owens, (Tex. Civ. App. 1905) 90 S. W. 690. See also Stevenson *v.* Mudgett, 10 N. H. 338, 34 Am. Dec. 155.

32. Stevenson *v.* Mudgett, 10 N. H. 338, 34 Am. Dec. 155.

33. Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372; Meade *v.* Jones, 13 Tex. Civ. App. 320, 35 S. W. 310.

34. Gunther *v.* Aylor, 92 Mo. App. 161; Robinson *v.* Taylor, 4 Pa. St. 242; Rodrigue *v.* Curcier, 15 Serg. & R. (Pa.) 81; Fels *v.* Loeb, 3 Pa. Co. Ct. 136; Blum *v.* Mays, 1 Tex. App. Civ. Cas. § 475. See also Jacobson *v.* Tallard, 116 Wis. 662, 93 N. W. 841.

Applications of rule.— Where a plaintiff declares on *indebitatus assumpsit* for goods sold and delivered, he may amend by adding a count on a *quantum meruit*. Rodrigue *v.* Curcier, 15 Serg. & R. (Pa.) 81. And an amendment from an implied contract to an express contract is not a change of the cause of action, if plaintiff might have sued on the express contract, instead of the implied contract. Gunther *v.* Aylor, 92 Mo. App. 161.

35. *Arkansas.*— Patrick *v.* Whitley, 75 Ark. 465, 87 S. W. 1179.

Colorado.— Rockwell *v.* Holcomb, 3 Colo. App. 1, 31 Pac. 944.

District of Columbia.— *Ex p.* Mansfield, 11 App. Cas. 558.

Georgia.— Lamar *v.* Lamar, etc., Drug Co., 118 Ga. 850, 45 S. E. 671; Cox *v.* Henry, 113 Ga. 259, 38 S. E. 856; Milburn *v.* Davis, 92 Ga. 362, 17 S. E. 286; Anderson *v.* Pollard, 62 Ga. 46.

Maine.— McAuley *v.* Reynolds, 64 Me. 136; McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666; Perrin *v.* Keene, 19 Me. 355, 36 Am. Dec. 759; Newall *v.* Hussey, 18 Me. 249, 36 Am. Dec. 717.

Massachusetts.— Vancleef *v.* Therasson, 3 Pick. 12.

Michigan.— Angell *v.* Pruyn, 126 Mich. 16, 85 N. W. 258.

New Hampshire.— Mt. Washington Hotel Co. *v.* Redington, 55 N. H. 386; Butterfield *v.* Harvell, 3 N. H. 201.

Oregon.— Foste *v.* Standard L., etc., Ins. Co., 26 Oreg. 449, 38 Pac. 617.

Pennsylvania.— Diehl *v.* McGlue, 2 Rawle 337; Newlin *v.* Palmer, 11 Serg. & R. 98; Farmers', etc., Bank *v.* Israel, 6 Serg. & R. 293; Delaware, etc., Canal Co. *v.* Parker, 4 Yeates 363.

Texas.— East Line, etc., R. Co. *v.* Scott, 75 Tex. 84, 12 S. W. 995.

Vermont.— Brodek *v.* Hirschfield, 57 Vt. 12.

See 39 Cent. Dig. tit. "Pleading," § 701 *et seq.*

Instances.— Where, in an action against the indorser of two promissory notes, it appeared on the trial that the notes sued on were not due, it was held that an amendment introducing five other and different notes was not allowable. Farmers', etc., Bank *v.* Israel, 6 Serg. & R. (Pa.) 293. So where a declaration was laid that defendant was indebted to plaintiff for subscription to a canal company, with interest, a new count was refused, which demanded the penalty of five per cent per month, under the act incorporating the company. Delaware, etc., Canal Co. *v.* Parker, 4 Yeates (Pa.) 363. So where plaintiff has counted for work and labor done, he cannot add a count setting up a claim for not being employed by plaintiff agreeably to a special agreement. Diehl *v.* McGlue, 2 Rawle (Pa.) 337. So where a declaration is based on contract for the purchase of goods which did not bind defendant to pay the freight, an amendment setting up a contract to pay the freight in addition to all that was sued for in the original petition introduces a new cause of

(3) In Actions Ex Delicto. In actions *ex delicto* the cause of action alleged in the original pleading must be adhered to and its identity preserved,[36] and hence a change, by way of amendment, from a cause of action based on negligence to a cause of action based on wilful tort,[37] or from a cause of action for slander to one for malicious prosecution,[38] or pleading a different liability on the part of defendant,[39] is an attempt to introduce a new and distinct cause of action and the amendment will not be allowed. But so long as the facts added by the amendment, however different they may be from those alleged in the original pleading, show substantially the same injury in respect to the same transaction, the amendment is not objectionable as setting up a new and distinct cause of action.[40] For example, an amendment curing defective or insufficient allegations,[41] by particularizing the more general allegations of the original pleading;[42] or more fully describing the nature of the negligence forming the basis of the action;[43] or alleging due care on the part of plaintiff at the time of the injury complained of;[44] or

action, and is not allowable. Lamar *v.* Lamar, etc., Drug Co., 119 Ga. 850, 45 S. E. 671. So a declaration in an action on an account cannot be amended by declaring on a negotiable promissory note, given in settlement of the account, when the common-law rule that a note given for a debt is only a security for the debt, is not recognized, but the note is regarded as evidence of a new and different contract unless the contrary is made to appear. Newhall *v.* Hussey, 18 Me. 249, 36 Am. Dec. 717.

36. *Connecticut.*— Pitkin *v.* New York, etc., R. Co., 64 Conn. 482, 30 Atl. 772.

Illinois.— Bartz *v.* Chicago R. Co., 116 Ill. App. 554.

Missouri.— Peery *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14.

Pennsylvania.— Shock *v.* McChesney, 4 Yeates 507, 2 Am. Dec. 415.

South Carolina.— Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427.

Wisconsin.— Geary *v.* Bennett, 65 Wis. 554, 27 N. W. 335.

37. Pitkin *v.* New York, etc., R. Co., 64 Conn. 482, 30 Atl. 772; Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427.

38. Shock *v.* McChesney, 4 Yeates (Pa.) 507, 2 Am. Dec. 415.

39. Georgia Cent. R. Co. *v.* Williams, 105 Ga. 70, 31 S. E. 134, holding that where under the original pleading the liability of defendant arose out of one relationship, that of master and servant, and the liability charged in the amended pleading arose out of a separate and distinct relation, that of landlord and tenant, there is an alteration of the cause to the action.

40. *Alabama.*— St. Louis, etc., R. Co. *v.* Douglas, (1907) 44 So. 677; Elyton Land Co. *v.* Mingea, 89 Ala. 521, 7 So. 666.

Illinois.— Muren Coal, etc., Co. *v.* Howell, 217 Ill. 190, 75 N. E. 469; Mott *v.* Chicago, etc., El. R. Co., 102 Ill. App. 412.

Iowa.— Gordon *v.* Chicago, etc., R. Co., 129 Iowa 747, 106 N. W. 177.

Kentucky.— Ford *v.* Providence Coal Co., 124 Ky. 517, 99 S. W. 609, 30 Ky. L. Rep. 698.

Missouri.— Riley *v.* St. Louis, etc., R. Co., 124 Mo. App. 278, 101 S. W. 156; Peery *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14; Knight *v.* Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716; Ingwersen *v.* St. Louis, etc., R. Co., 116 Mo. App. 139, 92 S. W. 357.

Nebraska.— Union Pac. R. Co. *v.* Murphy, 76 Nebr. 545, 107 N. W. 757.

Pennsylvania.— Mahoney *v.* Park Steel Co., 217 Pa. St. 20, 66 Atl. 90; Coxe *v.* Tighman, 1 Whart. 282.

South Carolina.— Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375.

Texas.— International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526; International, etc., R. Co. *v.* Irvine, 64 Tex. 529.

41. *Alabama.*— Elyton Land Co. *v.* Mingea, 89 Ala. 521, 7 So. 666.

Arkansas.— Little Rock Traction, etc., Co. *v.* Miller, 80 Ark. 245, 96 S. W. 993.

Illinois.— Evanston *v.* Richards, 224 Ill. 444, 79 N. E. 673; Swift *v.* Gaylord, 126 Ill. App. 281 [*reversed* on other grounds in 229 Ill. 330, 82 N. E. 299]; Chicago, etc., R. Co. *v.* McAndrews, 124 Ill. App. 166 [*affirmed* in 222 Ill. 232, 78 N. E. 603]; Mott *v.* Chicago, etc., R. Co., 102 Ill. App. 412.

Texas.— Gulf, etc., R. Co. *v.* McGowan, 73 Tex. 355, 11 S. W. 336; International, etc., R. Co. *v.* Irvine, 64 Tex. 529.

Washington.— Lampe *v.* Jacobsen, 46 Wash. 533, 90 Pac. 654.

Wisconsin.— Williams *v.* North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589.

42. Postal Tel. Cable Co. *v.* Likes, 124 Ill. App. 459 [*affirmed* in 225 Ill. 249, 80 N. E. 136]; Gordon *v.* Chicago, etc., R. Co., 129 Iowa 747, 106 N. W. 177; Peery *v.* Quincy, etc., R. Co., 122 Mo. App. 177, 99 S. W. 14.

An amendment specifying damages set up in the original pleading is not introductive of a new cause of action. Little Rock Traction, etc., Co. *v.* Miller, 80 Ark. 245, 96 S. W. 993.

43. Elyton Land Co. *v.* Mingea, 89 Ala. 521, 7 So. 666; Smith *v.* Georgia R., etc., Co., 87 Ga. 764, 13 S. E. 904; Mills *v.* Cavanaugh, 94 S. W. 651, 29 Ky. L. Rep. 685; Straus *v.* Buchman, 96 N. Y. App. Div. 270, 89 N. Y. Suppl. 226 [*affirmed* in 184 N. Y. 545, 76 N. E. 1109]; Edwards *v.* Chicago, etc., R. Co., (S. D. 1907) 110 N. W. 832.

44. Smith *v.* Georgia R., etc., Co., 87 Ga. 764, 13 S. E. 904; Madl *v.* Chicago City R. Co., 121 Ill. App. 602.

increasing [45] or diminishing [46] the claim for damages; or amplifying [47] or varying [48] the acts of negligence from which it is alleged the injuries resulted, or stating more fully the several results of such injury; [49] or making it clear that defendants named in the summons are the only parties referred to as defendants in the original pleading; [50] or striking from a complaint, the substance of which charges merely negligence, allegations tending to show a cause of action based on gross negligence.[51]

(4) In Real Actions. In real actions an amendment is objectionable as setting forth a new cause of action where it embraces more land [52] or a different tract of land from that described in the original pleading; [53] otherwise if the amendment merely gives a more particular and certain description of the land sued for.[54]

(D) *Tests For Determining.* For the purpose of determining whether a new cause of action is presented by way of amendment the following tests have been applied: (1) If the cause of action in the suit is regarded as the act or thing done or omitted to be done, whether the amendment sets out a new act or thing as the cause of action, or whether it states in a different form the original act or thing as the cause; [55] (2) whether the intention of plaintiff at the time of instituting the suit and of filing the amendment is the same; [56] (3) whether a recovery on the original pleading would be a bar to a recovery on the amended one, or *vice versa*; [57] (4) whether both the original and amended pleadings are subject to the

45. Augusta *v.* Lombard, 99 Ga. 282, 25 S. E. 772; Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375; Lockwood *v.* Charleston Bridge Co., 60 S. C. 492, 38 S. E. 112, 629; International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526; Tynberg *v.* Cohen, (Tex. Civ. App. 1895) 32 S. W. 157; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

Where the jurisdiction fails solely through the insufficiency of the amount demanded, and the facts pleaded would warrant a money recovery in a proper amount, an amendment merely expanding the amount would not change the cause of action. Knight *v.* Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716.

46. Rhemke *v.* Clinton, 2 Utah 230.

47. *Alabama.*— Alabama Great Southern R. Co. *v.* Chapman, 83 Ala. 453, 3 So. 813.

Georgia.— Georgia R., etc., Co. *v.* Reeves, 123 Ga. 697, 51 S. E. 610; Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318 [*overruling* so far as are conflicting Georgia R., etc., Co. *v.* Roughton, 109 Ga. 604, 34 S. E. 1026; Cox *v.* Murphy, 82 Ga. 623, 9 S. E. 604; Henderson *v.* Central R. Co., 73 Ga. 718; Skidaway Shell Road Co. *v.* O'Brien, 73 Ga. 655; Central R., etc., Co. *v.* Wood, 51 Ga. 515]; Augusta *v.* Lombard, 99 Ga. 282, 25 S. E. 772; Southern States Portland Cement Co. *v.* Helms, 2 Ga. App. 308, 58 S. E. 524.

Iowa.— Thayer *v.* Smoky Hollow Coal Co., 129 Iowa 550, 105 N. W. 1024.

Kentucky.— Ford *v.* Providence Coal Co., 124 Ky. 517, 99 S. W. 609, 30 Ky. L. Rep. 698.

South Carolina.— Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375.

48. King *v.* Seaboard Air-Line R. Co., 1 Ga. App. 88, 58 S. E. 252; Louisville, etc., R. Co. *v.* Beauchamp, 108 Ky. 47, 55 S. W. 716, 21 Ky. L. Rep. 1476.

49. Postal Tel. Cable Co. *v.* Likes, 124 Ill. App. 459 [*affirmed* in 225 Ill. 249, 80 N. E. 136]; International, etc., R. Co. *v.* Irvine, 64 Tex. 529.

50. Wabash R. Co. *v.* Barrett, 117 Ill. App. 315.

51. Williams *v.* North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589.

52. Wyman *v.* Kilgore, 47 Me. 184.

53. Slater *v.* Nason, 15 Pick. (Mass.) 345.

54. Wyman *v.* Kilgore, 47 Me. 184.

55. Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141; Metropolitan L. Ins. Co. *v.* People, 106 Ill. App. 516 [*affirmed* in 209 Ill. 42, 70 N. E. 643].

Same test differently stated.— The true criterion is, whether the alteration in the amendment is a new and distinct matter, or whether it is the same contract or injury, and a mere permission to alter it in a manner which plaintiff considers will best correspond with the nature of his complaint and with his proof and the merits of his case. Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318; Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385; Wilhelm's Appeal, 79 Pa. St. 130; Newlin *v.* Palmer, 11 Serg. & R. (Pa.) 98; Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 11 Am. Dec. 610; Daley *v.* Gates, 65 Vt. 591, 27 Atl. 193.

56. Kuhn *v.* Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700; Snyder *v.* Harper, 24 W. Va. 206; Painter *v.* New River Mineral Co., 98 Fed. 544.

57. *Colorado.*— Messenger *v.* Northcutt, 26 Colo. 527, 58 Pac. 1090; Hinsdale County *v.* Crump, 18 Colo. App. 59, 70 Pac. 159.

Georgia.—Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318; Venable *v.* Burton, 118 Ga. 156, 45 S. E. 29.

Iowa.— Thayer *v.* Smoky Hollow Coal Co., 129 Iowa 550, 105 N. W. 1024.

Michigan.— Angell *v.* Pruyn, 126 Mich. 16, 85 N. W. 258.

New York.— Davis *v.* New York, etc., R. Co., 110 N. Y. 646, 17 N. E. 733; Lustig *v.*

same plea;[58] (5) whether the same measure of damages is applicable to both pleadings;[59] and (6) whether it would require substantially the same evidence to support the action after the amendment as before.[60]

New York, etc., R. Co., 65 Hun 547, 20 N. Y. Suppl. 477; Coby *v.* Ibert, 6 Misc. 16, 25 N. Y. Suppl. 998 [*affirmed* in 141 N. Y. 586, 36 N. E. 739].

South Carolina.— Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375.

South Dakota.—J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. D. 530, 91 N. W. 82.

Utah.— Rhemke *v.* Clinton, 2 Utah 230.

United States.— Painter *v.* New River Mineral Co., 98 Fed. 544.

58. Pitkin *v.* New York, etc., R. Co., 64 Conn. 482, 30 Atl. 772; Venable *v.* Burton, 118 Ga. 156, 45 S. E. 29; Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375; Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427; Painter *v.* New River Mineral Co., 98 Fed. 544. See also Kelly *v.* Bragg, 76 Me. 207.

Applications of test.— The same pleas are not available in both an action based on negligence and an action based on a wilful tort, for the plea of contributory negligence is available in the former, but not in the latter. Pitkin *v.* New York, etc., R. Co., 64 Conn. 482, 30 Atl. 772; Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427.

59. *Colorado.*— Messenger *v.* Northcutt, 26 Colo. 527, 58 Pac. 1090.

Georgia.— Venable *v.* Burton, 118 Ga. 156, 45 S. E. 29.

Missouri.— Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Scovill *v.* Glasner, 79 Mo. 449; Knight *v.* Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716.

South Carolina.— Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375; Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427.

United States.— Kramer *v.* Gilles, 140 Fed. 682; Painter *v.* New River Mineral Co., 98 Fed. 544.

Applications of test.— The same measure of damages does not apply to an action based on negligence and an action based on a wilful tort, for in the former action actual damages alone are recoverable, while in the latter punitive damages as well as actual damages may be recovered. Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427.

It is not material that the quantum of damages may be different, so long as the damages under both pleadings can be determined by the same standard. Schwab Clothing Co. *v.* St. Louis, etc., R. Co., 71 Mo. App. 241. See also Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372, where the court, in allowing an amendment to perfect the description of the cause of action sued on, says that in effect the amendment allowed undoubtedly enlarges the issue and lays the foundation for the recovery of greater damages, but that is immaterial.

60. *California.*— Maionchi *v.* Nicholini, 1 Cal. App. 690, 82 Pac. 1052.

Colorado.— Messenger *v.* Northcutt, 26 Colo. 527, 58 Pac. 1090.

Georgia.— Venable *v.* Burton, 118 Ga. 156, 45 S. E. 29.

Illinois.— Chicago Terminal Transfer Co. *v.* Young, 118 Ill. App. 226; Wabash R. Co. *v.* Barrett, 117 Ill. App. 315.

Indiana.— Levy *v.* Chittenden, 120 Ind. 37, 22 N. E. 92.

Iowa.— Box *v.* Chicago, etc., R. Co., 107 Iowa 660, 78 N. W. 694.

Massachusetts.— But see Swan *v.* Nesmith, 7 Pick. 220, 19 Am. Dec. 282.

Missouri.— Grigsby *v.* Barton County, 169 Mo. 221, 69 S. W. 296; Ross *v.* Cleveland, etc., Land Co., 162 Mo. 317, 62 S. W. 984; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Scovill *v.* Glasner, 79 Mo. 449; Lumpkins *v.* Collier, 69 Mo. 170; Lottman *v.* Barnett, 62 Mo. 159; Knight *v.* Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716; Boeker *v.* Crescent Belting, etc., Co., 101 Mo. App. 429, 74 S. W. 385; Maloney *v.* Real Estate Bldg., etc., Assoc., 57 Mo. App. 384.

New Hampshire.— Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438.

New York.— Reeder *v.* Sayre, 70 N. Y. 180, 26 Am. Rep. 567.

Oregon.— Foste *v.* Standard L., etc., Ins. Co., 26 Oreg. 449, 38 Pac. 617; Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81.

South Carolina.— Pickett *v.* Southern R. Co., 74 S. C. 236, 54 S. E. 375; Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427.

Utah.— Rhemke *v.* Clinton, 2 Utah 230.

United States.— Kramer *v.* Gille, 140 Fed. 682; Painter *v.* New River Mineral Co., 98 Fed. 544.

But see Susquehanna Mut. F., etc., Ins. Co. *v.* Clinger, 10 Pa. Super. Ct. 92, holding that it does not follow that an amended pleading introduces a new cause of action because it alleges a contract in writing while the original pleading alleged a parol contract, and the test is whether the contract, for breach of which suit is brought, is the same, and not whether the evidence of the contract is the same.

It is the character, and not the quantum of the evidence, which must be the same, for if both the quantity and quality of the evidence must be the same there could not be a substantial amendment in any case. Schwab Clothing Co. *v.* St. Louis, etc., R. Co., 71 Mo. App. 241. See also Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372 (where the court, in allowing an amendment perfecting the description of the cause of action sued on, says that it is immaterial that the amendment will lay the foundation for other and further evidence); Lottman *v.* Barnett, 62 Mo. 159 (where it is said that it is no objection that the proofs might not have sustained the original pleading, for the object of the amendment is to obviate such variance); Sims *v.* Fields, 24 Mo. App. 557 (where the court rejected the amendment as altering the cause of action because the proof required to sus-

(E) *Question of Law For Court Whether Amendment Introduces New Cause of Action.* The question whether a proposed amendment introduces a new cause of action, or whether the identity of the original cause of action is preserved by it, is one of law for the court,[61] to be determined by an inspection of the original and amended pleadings,[62] and without the aid of extrinsic evidence.[63]

b. Conditions Precedent. Where the statute prescribes some condition that must be fulfilled before the right to commence an action vests, compliance with such condition may be alleged in an amendment to the original complaint;[64] and it has been held that such amendment may be made even during a hearing in damages after default.[65]

c. Contracts — (I) *In General.* Material amendments in respect of the terms of a contract in suit may be made on timely application for permission to amend, if the opposite party is not surprised or misled thereby.[66]

(II) *Statutes of Limitation and of Frauds.* A plaintiff may amend so as to avail himself of the statute of frauds as against a contract set up in the

tain one pleading was entirely different from that required to support the other, and this difference was as to the character of the proof, and not as to the *quantum* only); Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438; Spice *v.* Steinruck, 14 Ohio St. 213 (holding that an amendment relieving plaintiff from establishing one fact as a part of his case, and imposing on him the duty of proving another not required by the original plea, but still leaving the same gravamen of the original complaint, is properly allowed).

Applications of test.— The same evidence will not support both an action based on negligence and an action based on a wilful tort, for the former is for an injury done inadvertently, while the latter is for an injury done wilfully. Proctor *v.* Southern R. Co., 64 S. C. 491, 42 S. E. 427.

61. Metropolitan L. Ins. Co. *v.* People, 209 Ill. 42, 70 N. E. 643; Chicago, etc., R. Co. *v.* Ryan, 165 Ill. 88, 46 N. E. 208; Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367; Muren Coal, etc., Co. *v.* Howell, 119 Ill. App. 209 [*affirmed* in 217 Ill. 190, 75 N. E. 469].

62. Heffron *v.* Rochester German Ins. Co., 220 Ill. 514, 77 N. E. 262; Metropolitan L. Ins. Co. *v.* People, 209 Ill. 42, 70 N. E. 643; Muren Coal, etc., Co. *v.* Howell, 119 Ill. App. 209 [*affirmed* in 217 Ill. 190, 75 N. E. 469].

63. Heffron *v.* Rochester German Ins. Co., 220 Ill. 514, 77 N. E. 262.

64. La Barre *v.* Waterbury, 69 Conn. 554, 37 Atl. 1068; Snook *v.* Raglan, 89 Ga. 251, 15 S. E. 364; Excelsior Mfg. Co. *v.* Boyle, 46 Kan. 202, 26 Pac. 408; Phalen *v.* Detroit, 126 Mich. 683, 86 N. W. 126.

Applications of rule.— In a jurisdiction where it is prescribed by statute that a plaintiff must give six months' notice before commencing an action against a municipal corporation, after the petition has been filed an amendment may be allowed alleging that the required notice was duly given. Denair *v.* Brooklyn, 5 N. Y. Suppl. 835. A declaration upon a policy of insurance may be amended so as to allege that the notice of loss required by statute was properly given. Lewis *v.* Monmouth Mut. F. Ins. Co., 52 Me. 492. An amendment is proper showing that a demand for an order of reference has been made as required by statute. Ridell *v.* Mullan, 77 Cal. 577, 20 Pac. 91.

65. La Barre *v.* Waterbury, 69 Conn. 554, 37 Atl. 1068.

66. *Alabama.*—Oden *v.* Bonner, 93 Ala. 393, 9 So. 409.

Georgia.— Chattanooga, etc., R. Co. *v.* Davis, 89 Ga. 708, 15 S. E. 626.

Iowa.— Williamson *v.* Chicago, etc., R. Co., 84 Iowa 583, 51 N. W. 60.

Maine.— Cummings *v.* Buckfield Branch R. Co., 35 Me. 478; Loring *v.* Proctor, 26 Me. 18.

Massachusetts.—Augur Steel Axle, etc., Co. *v.* Whittier, 117 Mass. 451; Colton *v.* King, 2 Allen 317; Clarke *v.* Lamb, 6 Pick. 512.

New York.— Oregon Steamship Co. *v.* Otis, 27 Hun 452; Prindle *v.* Aldrich, 13 How. Pr. 466.

Pennsylvania.— Sidwell *v.* Reynolds, 9 Lanc. Bar 25.

Utah.— Walton *v.* Jones, 7 Utah 462, 27 Pac. 580.

Vermont.— Stephens *v.* Thompson, 28 Vt. 77.

See 39 Cent. Dig. tit. "Pleading," § 678½.

Illustrations.—An essential clause of a contract omitted from the allegations of the complaint may be supplied by amendment. *Ex p.* Sullivan, 106 Ala. 80, 17 So. 387. An amendment which seeks recovery of a debt on different evidence is properly allowed. Adams Oil Co. *v.* Christmas, 101 Ky. 564, 41 S. W. 545, 19 Ky. L. Rep. 760. A party suing on a sworn account may file an amended complaint on a note alleging that it was executed in consideration of the goods and merchandise forming the account originally sued on. Blum *v.* Mays, 1 Tex. App. Civ. Cas. § 475. A complaint which sets forth, as a lien on certain premises, a judgment recovered in another suit may be amended by alleging that such judgment was properly docketed. Cady *v.* Allen, 22 Barb. (N. Y.) 388 [*affirmed* in 18 N. Y. 573]. An amendment may be allowed showing the circumstances under which an individual note was taken in discharge of a partnership debt. Greenleaf *v.* Burbank, 13 N. H. 454. Where an individual note was given partly for a firm and partly for a private debt, counts may be added embracing

answer.[67] An amendment will be permitted even after verdict if it be shown that a party will otherwise suffer irretrievable injury, such as loss of his debt under the statute of limitations.[68]

(III) *Additional Terms.* Additional stipulations of the agreement entered into between the parties may be added by amendment.[69]

(IV) *Addition of Counts.* So long as the cause of action remains the same, a count on a special contract may be substituted for, or added to, a declaration containing only the common counts, and *vice versa*.[70] And in case the original declaration implies, although it does not expressly allege, a special contract, an amendment at the trial setting up such contract is properly allowed, although probably not necessary.[71] However, an amendment introducing a count either common or special may be refused if it presents a new cause of action.[72] A party may amend so as to plead the same indebtedness in different counts in different ways,[73] or both a special and a common count may be added to a special declaration seeking to recover for the same cause of action.[74] A declaration containing only a count on an implied contract may be amended by adding a count on a special contract, the cause of action remaining the same;[75] or on the other hand, a count on an implied contract may be added to a declaration on an express contract.[76]

(V) *Demand.* An allegation of a promise to pay a certain sum when requested is amendable by alleging a demand upon the promisor before the suit.[77] An amendment alleging a waiver of demand and notice is permissible after the argument.[78]

(VI) *Tender.* An allegation that a certain sum was tendered in payment of a debt may be amended to show that the entire sum due was tendered,[79] or in

only the debt which was due from the partnership. Barker *v.* Burgess, 3 Metc. (Mass.) 273.

67. Tarleton *v.* Vietes, 6 Ill. 470, 41 Am. Dec. 193.

68. Betts *v.* Hoyt, 13 Conn. 469.

69. *Colorado.*—Adamson *v.* Bergen, 15 Colo. App. 396, 62 Pac. 629.

Kentucky.— Simpson *v.* Carr, 76 S. W. 346, 25 Ky. L. Rep. 849.

Maine.— Freeman *v.* Fogg, 82 Me. 408, 19 Atl. 907.

Michigan.— Cleveland *v.* Rothschild, 138 Mich. 90, 101 N. W. 62.

Texas.— Thouvenin *v.* Lea, 26 Tex. 612; Burnett *v.* Casteel, (Civ. App. 1896) 36 S. W. 782.

Wisconsin.— McHenry *v.* Grant, 84 Wis. 311, 54 N. W. 626; Orton *v.* Scofield, 61 Wis. 382, 21 N. W. 261.

United States.— Bowen *v.* Needles Nat. Bank, 79 Fed. 49.

Illustrations of rule.— A complaint for the value of goods delivered may be amended by alleging that the goods were delivered under an agreement that it should be paid for when accepted by the superintendent of the building. Niven *v.* Craig, 63 Minn. 20, 65 N. W. 86. So a complaint may be amended to show a request and promise to pay in addition to the note sued upon. Herendeen *v.* De Witt, 49 Hun (N. Y.) 53, 1 N. Y. Suppl. 467.

70. *Alabama.*— Armour Packing Co. *v.* Vietch-Young Produce Co., (1903) 39 So. 680; Mahan *v.* Smitherman, 71 Ala. 563.

Georgia.— McDonald *v.* Beall, 52 Ga. 576; Gray *v.* Bass, 42 Ga. 270.

Massachusetts.— Smith *v.* Palmer, 6 Cush. 513.

New Jersey.— Willis *v.* Fernald, 33 N. J. L. 206; Hoboken *v.* Gear, 27 N. J. L. 265.

South Carolina.— Tarrant *v.* Gittelson, 16 S. C. 231.

Vermont.— Bachop *v.* Hill, 54 Vt. 507; Trescott *v.* Baker, 29 Vt. 459; Skinner *v.* Grant, 12 Vt. 456.

Wisconsin.— Kretser *v.* Cary, 52 Wis. 374, 9 N. W. 161.

71. Kretser *v.* Cary, 52 Wis. 374, 9 N. W. 161.

72. Mahon *v.* Smitherman, 71 Ala. 563; Smart *v.* Tetherly, 58 N. H. 310; Burt *v.* Kinne, 47 N. H. 361; Wood *v.* Folsom, 42 N. H. 70; Hall *v.* Dodge, 38 N. H. 346; Thompson *v.* Phelan, 22 N. H. 339; French *v.* Gerrish, 22 N. H. 97; Melvin *v.* Smith, 12 N. H. 462; Goddard *v.* Perkins, 9 N. H. 488; Diehl *v.* McGlue, 2 Rawle (Pa.) 337. And see Semple *v.* Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894.

73. Kimball *v.* Bryan, 56 Iowa 632, 10 N. W. 218; Wood *v.* Shultis, 6 Thomps. & C. (N. Y.) 557; Copeland *v.* Johnson Mfg. Co., 3 N. Y. Suppl. 42.

74. Swank *v.* Barnum, 63 Minn. 447, 65 N. W. 722.

75. Gray *v.* Bass, 42 Ga. 270; Police Jury *v.* Boissier, 8 Mart. N. S. (La.) 321; Gulf, etc., R. Co. *v.* White, (Tex. Civ. App. 1895) 32 S. W. 322.

76. Tucker *v.* Virginia City, 4 Nev. 20.

77. Snook *v.* Raglan, 89 Ga. 251, 15 S. E. 364.

78. Peck *v.* Schick, 50 Iowa 281.

79. Rublee *v.* Tibbetts, 26 Wis. 399.

case plaintiff has failed to aver a necessary tender an amendment may allege facts showing a waiver of tender.[80]

(VII) *Breach.* In an action on a contract additional facts connected with the breach thereof or new breaches may be set forth in an amendment to the original complaint.[81] An assignment of a breach generally,[82] or in terms too large,[83] is amendable. So an alleged breach of a special condition may be stricken out so as to leave only the assignment of the breach general.[84] But in an action for breach of contract plaintiff cannot amend by abandoning the contract first alleged and setting up another and different one.[85]

(VIII) *Performance.* A complaint which is defective because it does not state that plaintiff has performed on his part the conditions of the contract sued on may be amended by inserting such allegations.[86] And a complaint alleging performance of a contract may be amended so as to allege performance in part and excuse the non-performance of the remainder.[87] But where work is performed under an entire contract it is error to permit an amendment designed to allow a recovery upon a *quantum meruit*.[88] An amendment alleging a waiver of performance at the time fixed by the contract is permissible.[89]

(IX) *Varying Written Contract.* A court will not allow an amendment designed to permit the introduction of parol testimony varying the terms of a written contract.[90] But in an action on a written contract an amendment may be allowed which is not variant from the terms of such contract.[91]

80. Martin *v.* Fayetteville Bank, 131 N. C. 121, 42 S. E. 558.

81. *Connecticut.*— Spencer *v.* Howe, 26 Conn. 200.

Georgia.— Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787; Marietta Paper Mfg. Co. *v.* Bussy, 104 Ga. 477, 31 S. E. 415; Hayden *v.* Burney, 89 Ga. 715, 15 S. E. 623; Murphy *v.* Lawrence, 2 Ga. 257.

Maine.— Potter *v.* Lucas, 59 Me. 212.

Massachusetts.— Holman *v.* King, 7 Metc. 384.

Michigan.— Strang *v.* Branch Cir. Judge, 108 Mich. 229, 65 N. W. 969; Brassel *v.* Minneapolis, etc., R. Co., 101 Mich. 5, 59 N. W. 426.

Minnesota.— Rice *v.* Longfellow Bros. Co., 78 Minn. 394, 81 N. W. 207.

Nebraska.— Raley *v.* Raymond Bros. Clark Co., 73 Nebr. 496, 103 N. W. 57.

New Hampshire.— Chase *v.* Corson, 67 N. H. 598, 32 Atl. 775.

New Jersey.— Morris Canal, etc., Co. *v.* Van Voorst, 19 N. J. L. 9.

New York.— Clark *v.* Faxton, 21 Wend. 153; Wood *v.* Jefferson County Bank, 9 Cow. 194.

Pennsylvania.—Coxe *v.* Tilghman, 1 Whart. 282; Shannon *v.* Com., 8 Serg. & R. 144; Kester *v.* Stokes, 1 Miles 67; Perot *v.* Leeds, 13 Phila. 185.

Texas.—Martin County *v.* Gillespie County, 30 Tex. Civ. App. 307, 71 S. W. 421.

Vermont.— Boyd *v.* Bartlett, 36 Vt. 9.

United States.— Northrop *v.* Mercantile Trust, etc., Co., 119 Fed. 969; Johnson *v.* Staenglen, 85 Fed. 603, 29 C. C. A. 369.

Canada.— Ellis *v.* Abell, 10 Ont. App. 226.

Breach of several covenants.— Where several covenants are set out in full but a breach of only one is alleged it is proper to allow an amendment alleging breach of other covenants. Wilson *v.* Widenham, 51 Me. 566. Thus in a special action on the covenants of a deed of warranty containing the usual covenants, setting out all the facts and alleging a breach of the covenant against encumbrances, it is competent to permit an amendment alleging a breach of the covenant for quiet enjoyment (Heath *v.* Whidden, 24 Me. 383), or of a covenant to warrant and defend (Clark *v.* Swift, 3 Metc. (Mass.) 390).

Omission to assign a breach to one of several counts may be amended. Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194.

82. Murphy *v.* Lawrence, 2 Ga. 257.

83. Sharp *v.* Colgan, 4 Mo. 29.

84. Morris Canal, etc., Co *v.* Van Voorst, 19 N. J. L. 9.

85. Lamar *v.* Lamar, etc., Drug Co., 118 Ga. 850, 45 S. E. 671.

86. Winch *v.* Farmers' L. & T. Co., 11 Misc. (N. Y.) 390, 32 N. Y. Suppl. 244.

Leave to amend a complaint for the purchase-price of land, which fails to aver ability and willingness to make and tender a deed, is within the discretion of the court. Woodbury *v.* Evans, 122 N. C. 779, 30 S. E. 2.

Delivery.— An allegation of a delivery, which the proof fails to establish, may be amended so as to aver a willingness to deliver and a refusal to receive. Stewart *v.* Kelly, 16 Pa. St. 160, 55 Am. Dec. 487.

87. Barnum *v.* Williams, 86 N. Y. Suppl. 821.

88. Martin *v.* Massie, 127 Ala. 504, 29 So. 31.

89. Strawn *v.* Kersey, 22 Ga. 586.

90. Fisk *v.* Casey, 119 Cal. 643, 51 Pac. 1077; Dyer *v.* Cranston Print Works, 21 R. I. 63, 41 Atl. 1015.

91. Blewett *v.* Front St. Cable R. Co., 51 Fed. 625, 2 C. C. A. 415.

d. Defenses [92] — (i) *In General.* Courts are particularly liberal in allowing amendments of a plea or answer.[93] As a general rule greater liberality is shown in allowing amendments by defendant than by plaintiff, for the reason that, if plaintiff has misconceived the form or nature of his action, he may discontinue and bring a new action; but defendant must avail himself of his defenses in the action brought against him, and cannot establish his right thereafter if he fails in his defense.[94] Evidence of a defense not set up in the pleadings, if objected to, is not admissible without amendment.[95]

(ii) *What Amendments Permitted* — (a) *In General.* An answer or plea may be amended so as to set out more clearly the defense intended,[96] or to change the mode of stating the defense,[97] or to present matters omitted through oversight,[98] or to cure inconsistencies of averment,[99] or to abandon matters of defense previously pleaded;[1] and if an immaterial issue is tendered in a plea leave may be given to amend or replead.[2] In like manner a plea may be amended in regard to matters in connection with which exceptions have been overruled;[3] and the objection that an amended answer will admit proof of facts that will probably defeat plaintiff's claim is of no force against defendant's right to amend at the trial.[4] Amendments setting up matter admissible under the original pleading are properly refused,[5] so the court should not permit a defendant to alter his plea merely for the purpose of securing the conclusion in the argument [6] or the right both to open and close.[7] If the evidence supporting a new defense is contradictory and inconclusive, the court may properly refuse an amendment alleging such defense.[8] Likewise the court may refuse an amendment which seeks to introduce matters inconsistent with the defense already alleged,[9] especially where the amendment is also an averment of the impossible under the conditions disclosed by the pleadings,[10] and amendments which the court is satisfied are asked merely for purposes of delay are properly refused.[11]

(b) *Amendment Denying Facts Admitted.* As a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings.[12] If it be proper in any case, it must be upon very satisfactory evidence

92. Amendments as of course see *supra*, VII, A, 5.
Limitations see Limitations of Actions, 25 Cyc. 1412.
Usury see Usury.

93. Gould *v.* Stafford, 101 Cal. 32, 35 Pac. 429; Brunskill *v.* Mair, 15 U. C. Q. B. 213.

94. Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494; Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614; Carmichael *v.* Argard, 52 Wis. 607, 9 N. W. 470; Cope *v.* Marshall, Say. 234; Waters *v.* Bovell, 1 Wils. C. P. 223.

95. Winston *v.* Taylor, 28 Mo. 82, 75 Am. Dec. 112; Gill *v.* Rice, 13 Wis. 549.

96. Koons *v.* Price, 40 Ind. 164; Cawthon *v.* Kimbell, 46 La. Ann. 750, 15 So. 101.

97. Woodward *v.* Williamson, 39 S. C. 333, 17 S. E. 778.

98. Filbin *v.* Chesapeake, etc., R. Co., 91 Ky. 444, 16 S. W. 92, 13 Ky. L. Rep. 14; Magill's Appeal, 59 Pa. St. 430; Gill *v.* Rice, 13 Wis. 549.

99. Breunich *v.* Weselman, 100 N. Y. 609, 2 N. E. 385.

1. Parrott *v.* Underwood, 10 Tex. 48.

2. McDaniel *v.* Cater, 21 N. H. 227.

3. Moore *v.* Moore, 73 Tex. 383, 11 S. W. 396.

4. Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042.

5. See *supra*, VII, A, 6, c, (i).

6. Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466.

7. Bannon *v.* Insurance Co. of North America, 115 Wis. 250, 91 N. W. 666.

8. Farr *v.* Ricker, 46 Ohio St. 265, 21 N. E. 354.

9. Wixon *v.* Devine, 91 Cal. 477, 27 Pac. 777; Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284. And see Smith *v.* Marietta First Nat. Bank, 115 Ga. 608, 41 S. E. 983.

10. Townsend *v.* Sullivan, 3 Cal. App. 115, 84 Pac. 435.

11. Fay *v.* Hunt, 190 Mass. 378, 77 N. E. 502. See also Hanson *v.* Stinehoff, 139 Cal. 169, 72 Pac. 913; Haxter *v.* Schneider, 14 Oreg. 184, 12 Pac. 668.

12. *Louisiana.*— Baneker *v.* Marti, 22 La. Ann. 461.
Missouri.— Clark *v.* St. Louis Transfer R. Co., 127 Mo. 255, 30 S. W. 121; Harrison *v.* Hastings, 28 Mo. 346. See Greene *v.* Gallagher, 35 Mo. 226.
New York.— Valentine *v.* Healey, 1 N. Y. App. Div. 502, 37 N. Y. Suppl. 287 [*reversed* on other grounds in 158 N. Y. 369, 52 N. E. 1097, 43 L. R. A. 667]; Smith *v.* Athens, 74 Hun 26, 26 N. Y. Suppl. 180; Miller *v.* Moore, 1 E. D. Smith 739. But see Charlton *v.* Scoville, 68 Hun 348, 22 N. Y. Suppl. 883 [*affirmed* in 144 N. Y. 691, 39 N. E. 394]

that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts.[13] Likewise a court may refuse an amendment contradicting the party's own testimony,[14] and an amended plea may be refused on the ground that it is in reality contradictory to what it purports to be.[15]

(c) *Facts Known When Original Pleading Was Filed.* The court will not ordinarily permit defendant to file an amended plea or answer when the matter of defense proposed by the amendment was known to defendant when he filed his original pleading and no valid excuse is given for not including it therein.[16] This is especially true where he gains some benefit from the omission and makes the omission by agreement with his adversary for the purpose of receiving such benefit.[17]

(holding that, where an answer admitted certain allegations of the complaint, but plaintiff, instead of relying upon such admissions, gave evidence in support of such allegations, and defendant thereupon gave evidence to the contrary, and in contradiction of the admissions in his answer, it was within the discretion of the trial court to permit the answer to be amended so as to conform to the proof); Strong *v.* Dwight, 11 Abb. Pr. N. S. 319 (holding that under the liberal rules of pleading introduced by the code, the court may allow a verified answer to be amended by striking out a material admission and substituting a denial, but that in such a case the original answer may be used as evidence on the trial, to be rebutted by defendant).

Ohio.— Broch *v.* Becher, 5 Ohio Dec. (Reprint) 519, 6 Am. L. Rec. 380.

Washington.— Gould *v.* Gleason, 10 Wash. 476, 39 Pac. 123.

Wisconsin.— Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120. But see Durkee *v.* Felton, 54 Wis. 405, 11 N. W. 588.

See 39 Cent. Dig. tit. "Pleading," § 785.

Where there is no express admission of a fact, but only an implied admission from silence, an amended answer inserting the omitted denial is not necessarily inconsistent. Spencer *v.* Tooker, 21 How. Pr. (N. Y.) 333.

An admission of marriage will not estop defendant from amending his pleadings for the purpose of alleging the nullity of the marriage, since such allegation is not inconsistent with the previous admission. Summerlin *v.* Livingston, 15 La. Ann. 519.

It is within the discretion of the court to refuse an amendment merely withdrawing an admission in the original answer. Iltis *v.* Chicago, etc., R. Co., 40 Minn. 273, 41 N. W. 1040.

13. Miller *v.* Moore, 1 E. D. Smith (N. Y.) 739. See also National Pipe Bending Co. *v.* Fisher, 87 Hun (N. Y.) 175, 33 N. Y. Suppl. 1035, holding that where an answer, which admitted the existence of a contract alleged in the complaint, was interposed by defendant's attorney, in the absence of defendant, upon insufficient information, it might be amended so as to set up facts in avoidance, especially where the amendment sought was not upon a mere matter of technical defect in the execution of the contract, but went to the denial of the contract itself.

14. Chlein *v.* Kabat, 72 Iowa 291, 33 N. W. 771.

15. National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783.

16. *California.*— Tulare Bldg., etc., Assoc. *v.* Coleman, (1896) 44 Pac. 793; Wells *v.* McCarthy, 5 Cal. App. 301, 90 Pac. 203.

Colorado.— Bransford *v.* Norwich Union F. Ins. Soc., 21 Colo. 34, 39 Pac. 419.

Illinois.— Chicago *v.* Cook, 204 Ill. 373, 68 N. E. 538 [*affirming* 105 Ill. App. 353]; Fisher *v.* Greene, 95 Ill. 94; Byerly *v.* Wilson, 123 Ill. App. 662.

Iowa.— Reed *v.* Howe, 44 Iowa 300.

Kansas.—Clark *v.* Spencer, 14 Kan. 398, 19 Am. Rep. 96.

Kentucky.— Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444; Brady *v.* Peck, 99 Ky. 42, 34 S. W. 906, 35 S. W. 623, 17 Ky. L. Rep. 1356; Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176; Newton *v.* Levy, 82 S. W. 259, 26 Ky. L. Rep. 476; Newton *v.* Long, 22 S. W. 159, 13 Ky. L. Rep. 698.

Louisiana.— Case *v.* Watson, 22 La. Ann. 350; Lynch *v.* Crain, 2 La. Ann. 905.

New York.— Jacobs *v.* Mexican Sugar Refining Co., 115 N. Y. App. Div. 499, 101 N. Y. Suppl. 320; Mutual Loan Assoc. *v.* Lesser, 81 N. Y. App. Div. 138, 80 N. Y. Suppl. 1112.

United States.— Jefferson *v.* Burhans, 85 Fed. 924, 29 C. C. A. 487.

See 39 Cent. Dig. tit. "Pleading," § 784.

Excuse held insufficient.— In an action by stock-holders of a company to declare void an agreement canceling a lease from another company, the lessor company asserted in its original answer that the lease was canceled for non-payment of rent. About eighteen months thereafter it sought to amend by averring that it repudiated the lease on the ground of fraud in the making thereof. Its officers had knowledge, at the time of interposing the original answer, of the facts sought to be set up in the amendment. The excuse for failing to set up the facts in the original answer was that the officers did not, prior to the service of the original answer, realize their importance, and did not, until a few months before applying for leave to amend, communicate them to the counsel of the company, who was ignorant thereof. It was held that the court improperly allowed the amendment. Jacobs *v.* Mexican Sugar Refining Co., 115 N. Y. App. Div. 499, 101 N. Y. Suppl. 320.

17. Clark *v.* Spencer, 14 Kan. 398, 19 Am. Rep. 96.

(D) *Dilatory Pleas.* Dilatory pleas are regarded with disfavor and must be pleaded with exactness and diligence. The weight of authority is that a plea in abatement, in the absence of statutory authorization, cannot be amended,[18] and by some statutes amendment is expressly prohibited.[19] There is, however, statutory authority for amending pleas in abatement in some jurisdictions.[20]

(E) *Changing Defense.*[21] There is a conflict of authority in respect of the right at common law to amend an answer by changing the defense.[22] By express provision in many states, however, amendments of the answer which do not substantially change the defense may be permitted at any time;[23] and under some statutes the court may in its discretion permit amendments changing the defense before trial,[24] although a refusal to permit such amendment is not an abuse of discretion where the facts alleged must have been within defendant's knowledge at

18. Getchell *v.* Boyd, 44 Me. 482; Trinder *v.* Durant, 5 Wend. (N. Y.) 72; Anonymous, 30 Fed. Cas. No. 18,224, Hempst. 215; Esdaile *v.* Lund, 1 D. & L. 565, 8 Jur. 109, 13 L. J. Exch. 117, 12 M. & W. 607. And see Tidd Pr. p. 638. *Contra*, Mowry *v.* Kerrins, 11 R. I. 556; Hoppin *v.* Jenckes, 9 R. I. 102, where a number of authorities are cited by counsel but the opinion does not consider the matter very fully.

In South Dakota, it has been held that where the proposed amendment is merely a plea in abatement, and is not offered until the cause has been nearly reached for trial a refusal thereof is not an abuse of the court's discretion. Nerger *v.* Equitable Fire Assoc., 20 S. D. 419, 107 N. W. 531.

19. Bacon *v.* Schepflin, 185 Ill. 122, 56 N. E. 1123; Dunaway *v.* Goodall, 3 Ill. App. 197.

Pleas to the jurisdiction of the person of defendant have been held not within the statutory prohibition against amending pleas in abatement. Safford *v.* Sangamo Ins. Co., 88 Ill. 296; Drake *v.* Drake, 83 Ill. 526; Pooler *v.* Southwick, 126 Ill. App. 264. *Contra*, Midland Pac. R. Co. *v.* McDermid, 91 Ill. 170; Ryan *v.* Lander, 89 Ill. 554.

20. Quillian *v.* Johnson, 122 Ga. 49, 49 S. E. 801 (holding, however, that while a defendant may file a plea in abatement at the first term, he cannot, by way of amendment to the plea at the trial term, set up new and distinct grounds why the action should abate, unless plaintiff has so amended his pleadings as for the first time to make available the matters of defense sought to be urged by an amendment to defendant's plea); Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316.

Res judicata.— A plea of *res judicata* is amendable by adding the judgment claimed to be conclusive, although it was not entered when the verdict was found, but was entered *nunc pro tunc* after the commencement of the action in which it was pleaded. It is not a dilatory plea within the rule requiring such pleas to be filed at the first term. Walden *v.* Walden, 128 Ga. 126, 57 S. E. 323.

21. **Amendments as of course** see *supra*, VII, A, 5.

22. See Woodruff *v.* Dickie, 5 Rob. (N. Y.) 619, 31 How. Pr. 164; Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494.

23. Denzler *v.* Rieckhoff, 97 Iowa 75, 66 N. W. 147; Robertson *v.* Lombard Liquidation Co., 73 Kan. 779, 85 Pac. 528. And see statutory provisions of the various states.

Amendment held not to change defense substantially.— In an action against an officer to recover the value of property sold on execution against another than plaintiff, where the answer denied plaintiff's ownership, defendant was permitted, during the trial, and after plaintiff had proved a sale and transfer of the property to him from the execution defendant, to amend his answer by alleging that such transfer was fraudulent as to creditors of the seller. It was held that the allowance of such amendment was within the discretion of the court, under Hill Annot. Laws, § 101, authorizing the allowance of amendments, in furtherance of justice, where they do not substantially change the cause of action or defense. Davis *v.* Hannon, 30 Oreg. 192, 46 Pac. 785. Where defendant relies on titles which inadvertently omit one of the lots in suit, the error may be alleged in an amendment, since it does not change the defense. Gladdish *v.* Godchaux, 46 La. Ann. 1571, 16 So. 451.

24. Marx *v.* Gross, 58 N. Y. Super. Ct. 221, 9 N. Y. Suppl. 719; Schreyer *v.* New York, 39 N. Y. Super. Ct. 277; Hurlbut *v.* Interior Conduit, etc., Co., 8 Misc. (N. Y.) 100, 28 N. Y. Suppl. 1007; Hall *v.* Woodward, 30 S. C. 564, 9 S. E. 684; Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614. And see *dictum* in Robertson *v.* Springfield, etc., R. Co., 21 Mo. App. 633. See also Stevens *v.* Matthewson, 45 Kan. 594, 26 Pac. 38.

In Louisiana it is held that the statutes prohibit amendments substantially changing the defense. Jamison *v.* Cullom, 110 La. 781, 34 So. 775; King *v.* Gantt, 33 La. Ann. 1148; Boagni *v.* Anderson, 32 La. Ann. 920; Guilbeau *v.* Thibodeau, 30 La. Ann. 1099; Avegno *v.* Fosdick, 28 La. Ann. 109; Babcock *v.* Shirley, 11 La. 73; Calvert *v.* Tunstall, 2 La. 207.

Answer changing defense.— To an answer alleging that an act was a valid sale, an amendment averring that the act was a *donatio inter vivos* is inadmissible as changing the defense. Guilbeau *v.* Thibodeau, 30 La. Ann. 1099.

the commencement of the suit,[25] or where the motion is made the day before the time set for a second trial.[26] In some jurisdictions no amendments at the trial changing the defense are permissible;[27] and in most jurisdictions where the question has been passed upon, it is held that such amendments at the trial may properly be refused;[28] and the doctrine applied in the case of amendments offered at the close of plaintiff's evidence,[29] or after the close of the evidence on both sides,[30] after submission of the case to the court,[31] to conform pleadings to proof,[32] or after verdict.[33] It should be noted, however, that in most of these decisions the power to permit such amendments was not denied, but the refusal thereof held a proper exercise of the court's discretion in the particular case.[34] And in one jurisdiction it has been expressly held that an answer changing entirely the defense may be amended after introduction of plaintiff's evidence; that allowing a new answer creating a new case to be filed at the trial is no ground of exception.[35] It is not an abuse of discretion for the trial court to refuse an amendment changing the defense offered on motion for new trial, where defendant had been permitted to amend twice during trial.[36] And an amendment substantially changing the nature of the defense will not be permitted after judgment.[37]

(F) *Adding New Defenses.* Whether an amendment will be allowed which adds a new defense to that already interposed depends largely upon the time at which it is offered,[38] and whether the granting of it will work an injustice to plaintiff,[39] the matter being within the discretion of the court to which the application

25. Lucas Market Sav. Bank *v.* Goldsoll, 8 Mo. App. 595.

26. Osmun *v.* Winters, 30 Oreg. 177, 46 Pac. 780. And see Bishop *v.* Averill, 19 Wash. 490, 53 Pac. 726.

27. Lindbloom *v.* Kidston, 2 Alaska 292; Seaman *v.* Clarke, 60 N. Y. App. Div. 416, 69 N. Y. Suppl. 1002 [*affirmed* in 170 N. Y. 594, 63 N. E. 1122]; Everard *v.* Mayor, 89 Hun (N. Y.) 425, 35 N. Y. Suppl. 315 (to conform pleadings to proofs); Alden *v.* Clark, 86 Hun (N. Y.) 357, 33 N. Y. Suppl. 454 (to conform pleadings to proofs); Drake *v.* Siebold, 81 Hun (N. Y.) 178, 30 N. Y. Suppl. 697 (at close of evidence); Texier *v.* Gouin, 5 Duer (N. Y.) 389 (to conform pleadings to proofs); McGraw *v.* Godfrey, 14 Abb. Pr. N. S. (N. Y.) 397 [*affirmed* in 56 N. Y. 610, 16 Abb. Pr. N. S. 358]; Pickett *v.* Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629; Cuthbert *v.* Brown, 49 S. C. 313, 27 S. E. 485.

28. *California.*— *In re* Redfield, 116 Cal. 637, 48 Pac. 794.

Illinois.— Phenix Ins. Co. *v.* Caldwell, 187 Ill. 73, 58 N. E. 314 [*affirming* 85 Ill. App. 104].

Iowa.— McIntosh *v.* Coulthard, (1902) 88 N. W. 1067; Gallaher *v.* Head, 108 Iowa 588, 79 N. W. 387; Denzler *v.* Rieckhoff, 97 Iowa 75, 66 N. W. 147; Thoman *v.* Chicago, etc., R. Co., 92 Iowa 196, 60 N. W. 612.

Kansas.—Barrett *v.* Kansas, etc., Coal Co., 70 Kan. 649, 79 Pac. 150.

Michigan.— Walbridge *v.* Tuller, 125 Mich. 218, 84 N. W. 133.

Minnesota.— Pierce *v.* Brennan, 88 Minn. 50, 92 N. W. 507.

Missouri.—Weed Sewing Mach. Co. *v.* Philbrick, 70 Mo. 646 (where from its nature defendant must have been fully cognizant of the defense from the beginning of its existence and there was no evidence of mistake or inadvertence); Gale *v.* Foss, 47 Mo. 276; Corby *v.* Wright, 4 Mo. App. 443.

Wisconsin.— Collins *v.* Sugar Mfg. Co., 53 Wis. 305, 10 N. W. 477.

29. Thoman *v.* Chicago, etc., R. Co., 92 Iowa 196, 60 N. W. 612; Gale *v.* Foss, 47 Mo. 276; Corby *v.* Wright, 4 Mo. App. 443.

30. *In re* Redfield, 116 Cal. 637, 48 Pac. 794; McIntosh *v.* Coulthard, (Iowa 1902) 88 N. W. 1069; Gallaher *v.* Hand, 108 Iowa 588, 79 N. W. 387.

31. Le Mars Bldg., etc., Assoc. *v.* Burgess, 129 Iowa 422, 105 N. W. 641.

32. Scott *v.* Smith, 2 Kan. 438; Irwin *v.* Chiles, 28 Mo. 576; Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614. But see Bowe *v.* Gage, 132 Wis. 441, 112 N. W. 469, 12 L. R. A. N. S. 265, holding that where evidence sustaining a defense not pleaded was received without objection, it was no abuse of discretion after verdict for defendant to permit an amendment of the answer alleging such defense.

33. Shawger *v.* Chamberlain, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411.

34. See cases cited in preceding notes.

35. Howe *v.* Pierson, 12 Gray (Mass.) 26.

36. Wasser *v.* Western Land Securities Co., 97 Minn. 460, 107 N. W. 160.

37. Wymore First Nat. Bank *v.* Myers, 44 Nebr. 306, 62 N. W. 899; Scott *v.* Spencer, 44 Nebr. 93, 62 N. W. 312.

38. See cases cited *infra*, this section.

39. Stevens *v.* Matthewson, 45 Kan. 594, 26 Pac. 38; Bowman *v.* De Peyster, 2 Daly (N. Y.) 203; Stewart *v.* North Metropolitan Tramways Co., 16 Q. B. D. 556, 50 J. P. 324, 55 L. J. Q. B. 157, 54 L. T. Rep. N. S. 35, 34 Wkly. Rep. 316; Williams *v.* Leonard, 16 Ont. Pr. 544.

If plaintiff can be compensated by costs there is no injustice in allowing this amendment. Steward *v.* North Metropolitan Tram-

to amend is made,[40] which discretion will ordinarily not be reviewed by an appellate court unless a clear abuse thereof is shown.[41] When applied for before trial or at the commencement of the trial an amendment adding a new defense is very generally allowed.[42] And where the matter is governed by code or statute, these uniformly allow this amendment to be made at this time in furtherance of justice.[43] Where, however, defendant has unduly delayed in offering his amendment, leave may be refused, even before trial.[44] Where the matter is governed by code or statute, these generally agree in forbidding an amendment upon the trial introducing a new defense or substantially changing the issue.[45] In the absence of statutory regulation the allowance or rejection of this amendment upon the trial rests

ways Co., 16 Q. B. D. 556, 50 J. P. 324, 55 L. J. Q. B. 157, 54 L. T. Rep. N. S. 35, 34 Wkly. Rep. 316; Williams *v.* Leonard, 16 Ont. Pr. 544.

40. *California.*— Gould *v.* Stafford, 101 Cal. 32, 35 Pac. 429.

Connecticut.— Goodale *v.* Rohan, 76 Conn. 680, 58 Atl. 4.

Illinois.— Carlyle *v.* Carlyle Water, etc., Co., 140 Ill. 445, 29 N. E. 556.

Indiana.— Bequette *v.* Lasselle, 5 Blackf. 443; Case *v.* Moorman, 25 Ind. App. 293, 58 N. E. 85.

Nebraska.— Omaha, etc., R. Co. *v.* Moschel, 38 Nebr. 281, 56 N. W. 875.

And see the cases cited in the following notes.

41. *California.*— Harney *v.* Corcoran, 60 Cal. 314.

Connecticut.— Goodale *v.* Rohan, 76 Conn. 680, 58 Atl. 4.

Illinois.— Carlyle *v.* Carlyle Water, etc., Co., 140 Ill. 445, 29 N. E. 556.

Indiana.— Case *v.* Moorman, 25 Ind. App. 293, 58 N. E. 85. See Bequette *v.* Lasselle, 5 Blackf. 443.

Nebraska.— Omaha, etc., R. Co. *v.* Moschel, 38 Nebr. 281, 56 N. W. 875.

Washington.— Van Lehn *v.* Morse, 16 Wash. 672, 48 Pac. 404; Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

Wisconsin.— Brown *v.* Bosworth, 62 Wis. 542, 22 N. W. 521.

42. *Arkansas.*— Stainback *v.* Henderson, 79 Ark. 176, 95 S. W. 786.

Delaware.— National Dredging Co. *v.* Grand Trunk R. Co., 1 Pennew. 446, 41 Atl. 975.

Georgia.— Ford *v.* Williams, 98 Ga. 238, 25 S. E. 416; Barrett *v.* Pascoe, 90 Ga. 826, 17 S. E. 117; Howard *v.* Simpkins, 70 Ga. 322.

Illinois.— Misch *v.* McAlpine, 78 Ill. 507.

Kansas.— Stevens *v.* Matthewson, 45 Kan. 594, 26 Pac. 38.

Louisiana.— Clement *v.* Wafer, 12 La. Ann. 599.

Missouri.— Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7.

New York.— Ford *v.* Ford, 53 Barb. 525; Harrington *v.* Slade, 22 Barb. 161; Diamond *v.* Williamsburgh Ins. Co., 4 Daly 494 [*overruling* Woodruff *v.* Dickie, 5 Rob. 619, 31 How. Pr. 164]; Union Nat. Bank *v.* Bassett, 3 Abb. Pr. N. S. 359; Macqueen *v.* Babcock, 13 Abb. Pr. 268; Van Ness *v.* Bush, 22 How. Pr. 481; Beardsley *v.* Stover, 7 How. Pr. 294.

South Carolina.— Millan *v.* Southern R. Co., 54 S. C. 485, 32 S. E. 539; Jennings *v.* Parr, 54 S. C. 109, 32 S. E. 73.

South Dakota.— Hardman *v.* Kelley, 19 S. D. 608, 104 N. W. 272; Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614.

Washington.— Van Lehn *v.* Morse, 16 Wash. 672, 48 Pac. 404.

Wisconsin.— Rogers *v.* Wright, 21 Wis. 681; Gregory *v.* Hart, 7 Wis. 532.

England.— Cargill *v.* Bower, 4 Ch. D. 78, 46 L. J. Ch. 175, 35 L. T. Rep. N. S. 621, 25 Wkly. Rep. 221.

Canada.— Caughill *v.* Clarke, 3 Ont. 269.

See 39 Cent. Dig. tit. "Pleading," § 794.

Unconscionable pleas may be added by amendment before trial. Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7; Gerdau *v.* Faber, 26 N. Y. App. Div. 606, 50 N. Y. Suppl. 183; Union Nat. Bank *v.* Bassett, 3 Abb. Pr. (N. Y.) 359; Gilchrist *v.* Gilchrist, 44 How. Pr. (N. Y.) 317; Houts *v.* Bartle, 14 S. D. 322, 85 N. W. 591. An unconscionable plea may be refused, however, where the dictates of justice so demand. Wiegel *v.* Mogk, 46 N. Y. App. Div. 190, 61 N. Y. Suppl. 528; Stern *v.* Doheny, 29 Misc. (N. Y.) 711, 62 N. Y. Suppl. 774.

Inconsistency of added plea with the original plea is no ground for refusing to allow it before trial. Hardman *v.* Kelley, 19 S. D. 608, 104 N. W. 272. See, however, Harney *v.* Corcoran, 60 Cal. 314, holding that refusal to permit an amendment inconsistent with and directly contrary to the original answer was not an abuse of discretion with which the appellate court would interfere. And see also Marx *v.* Gross, 58 N. Y. Super. Ct. 221, 9 N. Y. Suppl. 719, holding that when the added defense is inconsistent with the original the latter should be stricken out.

Costs may be imposed as a condition for the amendment before trial. Stevens *v.* Matthewson, 45 Kan. 594, 26 Pac. 38; Hardman *v.* Kelley, 19 S. D. 608, 104 N. W. 272; Cargill *v.* Bower, 4 Ch. D. 78, 46 L. J. Ch. 175, 35 L. T. Rep. N. S. 621, 25 Wkly. Rep. 221. See, however, Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7.

43. See the codes and statutes of the several states.

44. Wilson *v.* Wilson, 125 Ill. App. 385; Bequette *v.* Lasselle, 5 Blackf. (Ind.) 443; St. Clara Female Academy *v.* Northwestern Nat. Ins. Co., 101 Wis. 464, 77 N. W. 893. And see Misch *v.* McAlpine, 78 Ill. 507.

45. See the codes and statutes of the various states.

in the discretion of the court, according to the circumstances of each case,[46] and the amendment is sometimes allowed at this time, where plaintiff is not injured thereby,[47] and sometimes refused.[48] Courts very generally refuse, after the evidence is all in, to allow an amendment adding a new defense,[49] although in rare cases, if the circumstances warrant, the amendment may be allowed even at this stage of the trial.[50] This amendment is very generally allowed before a new trial granted after appeal[51] or after demurrer.[52]

(G) *Set-Off, Counter-Claim, and Other Cross Demands.* An affirmative demand, such as set-off or counter-claim, may be introduced by amendment,[53] although

46. See *supra*, VII, A, 6, c.

47. *California.*— Beronio *v.* Southern Pac. R. Co., 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57.

Minnesota.—Rees *v.* Storms, 101 Minn. 381, 112 N. W. 419.

Nebraska.— Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811.

New Jersey.— Kellogg *v.* Scott, 58 N. J. Eq. 344, 44 Atl. 190.

Pennsylvania.— Stillwell *v.* Rickards, 152 Pa. St. 437, 25 Atl. 831.

Granting continuance if plaintiff surprised. — If an amendment during trial adding a new defense causes plaintiff prejudice or surprise the proceedings already had may be set aside and the case continued to a future time, or the trial suspended till such time as plaintiff may be prepared to continue. Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811; Omaha etc., R. Co. *v.* Moschel, 38 Nebr. 281, 56 N. W. 875.

Additional defenses based on evidence introduced during the trial, without objection, should be allowed. McMurray *v.* Boyd, 58 Ark. 504, 25 S. W. 505; Thorn *v.* Smith, 71 Wis. 18, 36 N. W. 707.

Amendment based on plaintiff's evidence which clearly suggested a new defense not previously known to defendant should be allowed. Kellogg *v.* Scott, 58 N. J. Eq. 344, 44 Atl. 190.

The court may impose terms as a condition of allowing this amendment during trial. Stillwell *v.* Rickards, 152 Pa. St. 437, 25 Atl. 831.

48. *Indiana.*— Kerschbaugher *v.* Slusser, 12 Ind. 453.

Kansas.— Russell *v.* Gregg, 49 Kan. 89, 30 Pac. 185.

Kentucky.— Felton *v.* Dunn, 60 S. W. 298, 22 Ky. L. Rep. 1224.

Missouri.— Levels *v.* St. Louis, etc., R. Co., 196 Mo. 606, 94 S. W. 275.

Oklahoma.— Piper *v.* Choctaw Northern Townsite, etc., Co., 16 Okla. 436, 85 Pac. 965.

Wyoming.— Halleck *v.* Bresnahen, 3 Wyo. 73, 2 Pac. 537.

England.— Collette *v.* Goode, 7 Ch. D. 842, 47 L. J. Ch. 370, 38 L. T. Rep. N. S. 504.

Prior ignorance of the new defense should be shown affirmatively by defendant to entitle him to set a new defense during trial. Halleck *v.* Bresnahen, 3 Wyo. 73, 2 Pac. 537.

49. *Arkansas.*— Hall, etc., Woodworking Mach. Co. *v.* Louisiana, etc., R. Co., 78 Ark. 536, 95 S. W. 799; Norris *v.* Kellogg, 7 Ark. 112.

Connecticut.— Goodale *v.* Rohan, 76 Conn. 680, 58 Atl. 4.

Iowa.— Thoman *v.* Chicago, etc., R. Co., 92 Iowa 196, 60 N. W. 612.

Minnesota.— Lamm *v.* Armstrong, 95 Minn. 434, 104 N. W. 304, 111 Am. St. Rep. 479.

Missouri.— Ryans *v.* Hospes, 167 Mo. 342, 67 S. W. 285.

Pennsylvania.— Ridgely *v.* Dobson, 3 Watts & S. 118.

Rhode Island.— Battey *v.* Warner, 28 R. I. 312, 67 Atl. 63.

South Dakota.— Hahn *v.* Sleepy Eye Milling Co., (1907) 112 N. W. 843; Brown *v.* Edmonds, 9 S. D. 273, 68 N. W. 734.

Washington.— Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

Canada.— Greenizen *v.* Burns, 13 Ont. App. 481.

50. Case *v.* Moorman, 25 Ind. App. 293, 58 N. E. 85; Omaha, etc., R. Co. *v.* Moschel, 38 Nebr. 281, 56 N. W. 875; Hanson *v.* Michelson, 19 Wis. 498.

51. Gould *v.* Stafford, 101 Cal. 32, 35 Pac. 429; Augusta Nat. Bank *v.* Southern Porcelain Mfg. Co., 59 Ga. 157; Hall *v.* Woodward, 30 S. C. 564, 9 S. E. 684; Brown *v.* Bosworth, 62 Wis. 542, 22 N. W. 521.

52. Woodward *v.* Williamson, 39 S. C. 333, 17 S. E. 638, 39 Am. St. Rep. 716. See, however, People *v.* McHatton, 7 Ill. 731.

53. *California.*— Marr *v.* Rhodes, 131 Cal. 267, 63 Pac. 364; Burns *v.* Scooffy, 98 Cal. 271, 33 Pac. 86; Guidery *v.* Green, 95 Cal. 630, 30 Pac. 786; Stringer *v.* Davis, 30 Cal. 321.

Colorado.— Hyman *v.* Jockey Club Wine, etc., Co., 9 Colo. App. 299, 48 Pac. 671.

Delaware.— National Dredging Co. *v.* Grand Trunk R. Co., 1 Pennew. 446, 41 Atl. 975.

Georgia.— Bryant *v.* Hambrick, 9 Ga. 133.

Louisiana.— Boagui *v.* Anderson, 32 La. Ann. 920.

New York.— Beardsley *v.* Stover, 7 How. Pr. 294 (where it was held that the amendment should be allowed even though it changed the defense); Frost *v.* Whitcomb, 2 How. Pr. 194.

Oregon.— Foster *v.* Henderson, 29 Oreg. 210, 45 Pac. 899.

Virginia.— Perkins *v.* Hawkins, 9 Gratt. 649.

Wisconsin.— Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365; Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151.

See 39 Cent. Dig. tit. "Pleading," § 801.

Counter-claim barred by limitations.— The

permission to file such an amendment has in many instances been refused, usually on the ground that a party ought not, at a late date, after filing his original pleadings, to be allowed to introduce an affirmative claim.[54] A defendant will not usually be allowed to introduce a set-off or counter-claim by an amendment filed after the trial has commenced.[55] And leave to file an amendment introducing a counter-claim will be refused when defendant can as readily obtain relief in an independent action.[56] A counter-claim or plea of set-off filed originally may be amended like any other plea,[57] the application to file such amendment being addressed to the sound discretion of the court.[58]

(H) *Notice of Special Defense.* A notice of special matter under the general issue is, in all essentials, a pleading, and therefore amendable;[59] but it has been held that a notice of special matter cannot be amended after the jury is called,[60] or after the evidence is closed.[61]

e. Description of Property or Other Subject-Matter. An amendment may be allowed for the purpose of better describing a contract sued on,[62] or correcting the misdescription of such a contract;[63] and amendments of the description of property in suit are permissible so long as the identity of the subject-matter of the suit is not changed, or a new cause of action or new issues introduced.[64] If,

fact that an amended answer, setting up a counter-claim, shows on its face that the counter-claim is barred by limitations, is no ground for rejecting the amendment, for unless the statute is pleaded the claim is recoverable. Dudley *v.* Stiles, 32 Wis. 371.

54. *Iowa.*— Page *v.* Sackett, 69 Iowa 226, 28 N. W. 567; Brockman *v.* Berryhill, 16 Iowa 183.

New York.— Randrup *v.* McBeth, 116 N. Y. App. Div. 195, 101 N. Y. Suppl. 604 [*affirmed* in 191 N. Y. 531, 84 N. E. 1119]; Abbott *v.* Meinken, 48 N. Y. App. Div. 109, 62 N. Y. Suppl. 660; Mercantile Bank *v.* Anderson, 27 N. Y. App. Div. 94, 50 N. Y. Suppl. 176; McGill *v.* Holmes, 22 Misc. 514, 49 N. Y. Suppl. 1000.

North Carolina.— Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256.

Pennsylvania.— Thorn *v.* Heugh, 1 Phila. 322.

United States.— Jacobus *v.* U. S., 86 Fed. 84.

Canada.— Douglas *v.* Mann, 11 Manitoba 546; Sinclair *v.* Galt, 17 U. C. Q. B. 259.

See 39 Cent. Dig. tit. "Pleading," § 801.

55. Dunton *v.* Dawley, 122 Iowa 512, 98 N. W. 307; Mercantile Bank *v.* Anderson, 27 N. Y. App. Div. 94, 50 N. Y. Suppl. 176; McGill *v.* Holmes, 22 Misc. (N. Y.) 514, 49 N. Y. Suppl. 1000; King County Land, etc., Co. *v.* Thompson, 21 Tex. Civ. App. 473, 51 S. W. 890; Douglas *v.* Mann, 11 Manitoba 546. *Compare* Mitchell *v.* Bunn, 2 Thomps. & C. (N. Y.) 486, holding that defendant might, after the trial was suspended by an order staying proceedings, apply to the special term and obtain an order permitting him to amend his answer by setting up a counter-claim.

56. Allen *v.* Davenport, 115 Iowa 20, 87 N. W. 743; McGill *v.* Holmes, 22 Misc. (N. Y.) 514, 49 N. Y. Suppl. 1000; Jacobus *v.* U. S., 86 Fed. 84; Douglas *v.* Mann, 11 Manitoba 546.

57. *Indiana.*— Ewing *v.* Patterson, 35 Ind. 326.

Kansas.— Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260.

Nebraska.— Jordan *v.* Jackson, 76 Nebr. 15, 106 N. W. 999, 107 N. W. 1047.

Ohio.— Dickason *v.* Grafton Sav. Bank Co., 27 Ohio Cir. Ct. 357.

Pennsylvania.— Yost *v.* Eby, 23 Pa. St. 327.

Utah.— Kelly *v.* Kershaw, 5 Utah 295, 14 N. W. 804.

Canada.— Zwicker *v.* Feindel, 29 Can. Sup. Ct. 516 [*reversing* 31 Nova Scotia 232].

Adding interest.— Interest may be added to the amount of the counter-claim, at the close of the evidence. Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266.

Where an answer fails to set forth the conditions of a bond, made the basis of a cross demand, but there is duly annexed a copy of the bond, the pleading may be amended. Ryder *v.* Thomas, 32 Iowa 56.

Adding new parties.— A counter-claim cannot be amended so as to bring in other parties. Weld *v.* Johnson Mfg. Co., 86 Wis. 532, 57 N. W. 374; Call *v.* Chase, 21 Wis. 511.

58. Barngrover *v.* North, 35 Mont. 448, 90 Pac. 162.

59. Randall *v.* Baird, 66 Mich. 312, 33 N. W. 506; Rosevelt *v.* Gardiner, 3 N. J. L. 694; Turner *v.* Dexter, 4 Cow. (N. Y.) 555.

60. Whitehall *v.* Smith, 24 Ill. 178.

61. Leek *v.* Flint, (Miss. 1903) 33 So. 494.

62. Prescott *v.* Prescott, 65 Me. 478; Wilson *v.* Widenham, 51 Me. 566; Cummings *v.* Buckfield Branch R. Co., 35 Me. 478.

63. Cummings *v.* Buckfield Branch R. Co., 35 Me. 478.

64. *Georgia.*— Allen *v.* Stephens, 107 Ga. 733, 33 S. E. 651.

Indiana.— Johnson *v.* McNabb, 7 Ind. App. 393, 34 N. E. 667.

Kansas.— Sanford *v.* Willetts, 29 Kan. 647.

Maine.— Walker *v.* Fletcher, 74 Me. 142; Bird *v.* Decker, 64 Me. 550.

Massachusetts.— Capron *v.* Thompson, 8 Metc. 59.

however, the amendment substitute different property from that sued for, it cannot be allowed.[65] The description of land involved in the suit may be corrected by amendment,[66] provided it is apparent from the two descriptions that in both instances the pleader had in mind the same tract of land.[67] There is a distinction between an amendment correcting a misdescription of the land in controversy and one which seeks to describe an entirely new tract, which will not be allowed.[68] Amendments correcting descriptions of contracts sued on may be allowed during the trial,[69] after the close of the evidence,[70] or after verdict.[71]

f. Form of Action — (i) *In General.* Some confusion exists in the decisions in respect of amendments changing the form of action which is in a measure due to the difference in the statutes relating to amendments. In a few jurisdictions the rule is that no amendments which change the form of action are permissible.[72] In the greater number of jurisdictions, however, amendments chang-

Michigan.—Alton *v.* Meenwenberg, 108 Mich. 629, 66 N. W. 571; People *v.* Judge Kent Cir. Ct., 30 Mich. 387.

Pennsylvania.— Knapp *v.* Hartung, 73 Pa. St. 290.

Texas.— Thompson *v.* Swearengin, 48 Tex. 555.

England.— Winkley *v.* Winkley, 44 L. T. Rep. N. S. 572, 29 Wkly. Rep. 628.

Canada.— Sage *v.* Callaghan, 20 U. C. Q. B. 266; Matheson *v.* Malloch, 13 U. C. Q. B. 354.

See 39 Cent. Dig. tit. "Pleading," §§ 612, 681.

65. Nickerson *v.* Bradbury, 88 Me. 593, 34 Atl. 521; Wyman *v.* Kilgore, 47 Me. 184; Nugent *v.* Adsit, 93 Mich. 462, 53 N. W. 620; Sams *v.* Price, 121 N. C. 392, 28 S. E. 486. And see Holderness *v.* Welling, 7 N. Brunsw. 572.

66. *Alabama.*— Buchanan *v.* Larkin, 116 Ala. 431, 22 So. 543.

California.— Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Heilbron *v.* Heinlen, 72 Cal. 376, 14 Pac. 24.

Illinois.— Strean *v.* Lloyd, 128 Ill. 493, 21 N. E. 533.

Iowa.— Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306, 32 N. W. 354.

Massachusetts.— Lewis *v.* Jackson, 165 Mass. 481, 43 N. E. 206; Boston Overseers of Poor *v.* Otis, 20 Pick. 38.

Minnesota.— Rau *v.* Minnesota Valley R. Co., 13 Minn. 442.

Mississippi.— Cooper *v.* Granberry, 33 Miss. 117.

Missouri.— Waverly Timber, etc., Co. *v.* St. Louis Cooperage Co., 112 Mo. 383, 20 S. W. 566; Carr *v.* Moss, 87 Mo. 447; Gilmore *v.* Dawson, 64 Mo. 310; Callaghan *v.* McMahan, 33 Mo. 111; Sage *v.* Tucker, 51 Mo. App. 336.

Nebraska.— Fremont, etc., R. Co. *v.* Cram, 30 Nebr. 70, 46 N. W. 217.

New Hampshire.— Gilman *v.* Cate, 56 N. H. 160.

New York.— Truax *v.* Thorn, 2 Barb. 156.

North Carolina.— Sinclair *v.* Western North Carolina R. Co., 111 N. C. 507, 16 S. E. 336.

Oklahoma.— Lookabaugh *v.* La Vance, 6 Okla. 358, 49 Pac. 65.

Pennsylvania.— Leeds *v.* Lockwood, 84 Pa. St. 70.

Texas.— Jones *v.* Burgett, 46 Tex. 284.

See 39 Cent. Dig. tit. "Pleading," §§ 612, 681.

Correcting a mistake in the number of a lot is permissible where the petition otherwise so identifies the property sued for as to make it clear that the amendment offered did not add a new cause of action. Allen *v.* Stephens, 107 Ga. 733, 33 S. E. 651; Rau *v.* Minnesota Valley R. Co., 13 Minn. 442.

67. Venable *v.* Burton, 118 Ga. 156, 45 S. E. 29; Gilman *v.* Cote, 56 N. H. 160.

68. Venable *v.* Burton, 118 Ga. 156; Wyman *v.* Kilgore, 47 Me. 184; Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164.

Applications of rules.— In an action for trespass *quare clausum* (Robinson *v.* Miller, 37 Me. 312), or ejectment (Carter *v.* Branch, 2 N. C. 135), plaintiff cannot amend by enlarging the close first described or by naming an entirely different tract (Wolf *v.* Wolf, 158 Pa. St. 621, 28 Atl. 164).

69. Reed *v.* Cheney, 111 Ind. 387, 12 N. E. 717; Rau *v.* Minnesota Valley R. Co., 13 Minn. 442.

70. *Alabama.*—Russell *v.* Irwin, 38 Ala. 44.

Kentucky.— Dennis *v.* Cock, 50 S. W. 30, 20 Ky. L. Rep. 1866.

Missouri.— Callaghan *v.* McMahan, 33 Mo. 111; State Bank *v.* American Hardwood Lumber Co., 121 Mo. App. 324, 98 S. W. 786.

Nebraska.— Fremont, etc., R. Co. *v.* Cram, 30 Nebr. 70, 46 N. W. 217.

Vermont.— Brown *v.* Haven, 37 Vt. 439.

See 39 Cent. Dig. tit. "Pleading," § 612.

71. Hoffnagle *v.* Leavitt, 7 Cow. (N. Y.) 517, misdescription of note.

72. Mobile, etc., R. Co. *v.* McKellar, 59 Ala. 458; Harris *v.* Hillman, 26 Ala. 380. See also Mahan *v.* Smitherman, 71 Ala. 563. A limitation on the rule is that the code abolishes the distinction, existing at common law, between the actions of debt and assumpsit, and makes the judgment the same for causes of action recoverable in either form; consequently, an amendment of the complaint, which would convert the action from one form into the other, although unnecessary, is allowable. Knapp *v.* Kings-

ing the form of the action are within certain limitations regarded as permissible.[73]

(II) *Changing One Form of Action Ex Contractu to Another.* Except in jurisdictions where it is held that no amendments are permissible which change the form of the action,[74] it is very generally held that so long as the cause of action itself is not changed, it is permissible to change by amendment the form of action in an action *ex contractu* to a different form of action *ex contractu*.[75] Thus an action on implied contract may be changed to one on an express contract and *vice versa*.[76] Assumpsit may be changed to covenant [77] or debt,[78] or the form of action may be changed from covenant to assumpit,[79] or from debt to covenant.[80] So an action begun in assumpsit may be changed to account,[81] or an action on an open account to an account stated.[82] These amendments are permissible at any stage of the proceedings.[83] They may be allowed before trial,[84] after the evidence is closed,[85] or even after verdict,[86] in order to conform the pleadings to the proof.

(III) *Changing One Form of Action Ex Delicto to Another.* Except in jurisdictions where amendments changing the form of action are not permissible,[87] it is held that amendments changing the form of action in an action *ex delicto* to another form of action *ex delicto* are permissible, provided the cause of action

bury, 51 Ala. 563; Knight *v.* Trim, 89 Me. 469, 36 Atl. 912; Flanders *v.* Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410; Lawry *v.* Lawry, 88 Me. 482, 34 Atl. 273; Slater *v.* Fehlberg, 24 R. I. 574, 54 Atl. 383; Wilcox *v.* Sherman, 2 R. I. 540; Dewey *v.* Nicholas, 44 Vt. 24; Carpenter *v.* Gookin, 2 Vt. 495, 21 Am. Dec. 566. And see McDermid *v.* Tinkham, 53 Vt. 615; Green *v.* Starr, 52 Vt. 426.

In Pennsylvania the rule formerly was that no amendment changing the form of action was permissible. McNair *v.* Compton, 35 Pa. St. 23; Strock *v.* Little, 33 Pa. St. 409. The rule has, however, been changed by express statutory provision. Smith *v.* Bellows, 77 Pa. St. 441.

73. See *infra*, VII, A, 11, f, (II), (III), (IV), (V), (VI).

74. See *supra*, VII, A, 11, f, (I).

75. See cases cited in subsequent notes in this section.

76. *California.*— Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

Kansas.— School Dist. No. 2 *v.* Boyer, 46 Kan. 54, 26 Pac. 484.

Louisiana.— Roper *v.* Magee, 10 La. Ann. 61; Police Jury *v.* Boissier, 8 Mart. N. S. 321.

Massachusetts.— Mixer *v.* Howarth, 21 Pick. 205, 32 Am. Dec. 256.

Missouri.— Gunther *v.* Aylor, 92 Mo. App. 161.

Vermont.— Vaughn *v.* Rugg, 52 Vt. 235; Myers *v.* Lyon, 51 Vt. 272.

Wisconsin.— Thomas *v.* Hatch, 53 Wis. 296, 10 N. W. 393; Schieffelin *v.* Whipple, 10 Wis. 81.

77. *Connecticut.*— North *v.* Nichols, 39 Conn. 355.

District of Columbia.— Magruder *v.* Belt, 7 App. Cas. 303.

Maryland.— De Bebion *v.* Gola, 64 Md. 262, 21 Atl. 275.

New Hampshire.— Stebbins *v.* Lancashire Ins. Co., 59 N. H. 143 [*overruling* Brown *v.* Leavitt, 52 N. H. 619; Little *v.* Morgan, 31 N. H. 499].

New York.—Alston *v.* Mechanics' Mut. Ins. Co., 1 How. Pr. 81.

78. North *v.* Nichols, 39 Conn. 355; Magruder *v.* Belt, 7 App. Cas. (D. C.) 303; Bishop *v.* Silver Lake Min. Co., 62 N. H. 455; Stebbins *v.* Lancashire Ins. Co., 59 N. H. 143 [*overruling* Brown *v.* Leavitt, 52 N. H. 619; Little *v.* Morgan, 31 N. H. 499]; Levett *v.* Kibblewhite, 2 Marsh. 185, 6 Taunt. 483, 1 E. C. L. 716; Billing *v.* Flight, 2 Marsh. 124, 6 Taunt. 419, 1 E. C. L. 682.

If the cause of action is changed by an amendment from assumpsit to debt it will not be permitted. Barnes *v.* Gibbs, 31 N. J. L. 317, 86 Am. Dec. 210.

In Alabama where a statute abolishes the distinction existing at common law between actions of debt and assumpsit, an amendment changing from one form to the other is permissible, although unnecessary. Knapp *v.* Kingsbury, 51 Ala. 563.

In Maine where no amendments changing the form of action are permissible such amendment cannot be made. Knight *v.* Trim, 89 Me. 469, 36 Atl. 912.

79. Baltimore F. Ins. Co. *v.* McGowan, 16 Md. 47; U. S. Watch Co. *v.* Learned, 36 N. J. L. 429; Biddle *v.* Stuckey, 3 Pa. Co. Ct. 377.

80. Tyson *v.* Belmont, 24 Fed. Cas. No. 14,315*a*.

81. Garrity *v.* Hamburger Co., 136 Ill. 499, 27 N. E. 11.

82. Newberger *v.* Friede, 23 Mo. App. 631; Hanson *v.* Jones, 20 Mo. App. 595.

83. Stebbins *v.* Lancashire Ins. Co., 59 N. H. 143.

84. Biddle *v.* Stuckey, 3 Pa. Co. Ct. 377.

85. Baltimore F. Ins. Co. *v.* McGowan, 16 Md. 47; Bishop *v.* Silver Lake Min. Co., 62 N. H. 455.

86. Thomas *v.* Hatch, 53 Wis. 296, 10 N. W. 393.

87. See *supra*, VII, A, 11, f, (I).

itself is not changed.[88] Thus trespass may be changed to case and *vice versa*,[89] an action for possession to one for conversion,[90] an action for malicious prosecution to one for false imprisonment,[91] an action of forcible entry and detainer to ejectment,[92] and trespass may be changed to trover.[93] Amendments of this character may be made during the trial,[94] after close of the argument,[95] or even after verdict.[96]

(iv) *Changing From Contract to Tort and Conversely.* At common law, it was not permissible to change by amendment the form of action from *ex contractu* to *ex delicto* and *vice versa*, and this is still the rule in many jurisdictions, both common law or code in respect of methods of procedure.[97] Nor in these jurisdictions is it permissible to amend a declaration or complaint in tort by adding a count in contract, or *vice versa*.[98] In many jurisdictions, however, where the same transaction or state of facts is relied on in both the original and amended pleading, amendments are permissible which change the form of action from one on contract to one in tort and *vice versa*.[99] In furtherance of justice these amend-

88. See *supra*, VII, A, 11, a, (III), (C), (2).

89. Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41; Gammon *v.* Havelock, 40 Ill. App. 268; Morser *v.* Glover, 68 N. H. 119, 40 Atl. 396; Gage *v.* Gage, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829; Chase *v.* Dodge, 59 N. H. 350; Merrill *v.* Perkins, 59 N. H. 343; Hasbrouck *v.* Winkler, 48 N. J. L. 431, 6 Atl. 22; Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229; Lloyd *v.* Wunderlich, 2 Del. Co. (Pa.) 377.

90. Craven *v.* Russell, 118 N. C. 564, 24 S. E. 361.

91. Spice *v.* Steinruck, 14 Ohio St. 213.

92. Rutherford *v.* McDonald, 3 Indian Terr. 512, 61 S. W. 989.

93. Carrier *v.* Dellay, 3 How. Pr. (N. Y.) 173.

94. Hasbrouck *v.* Winkler, 48 N. J. L. 431, 6 Atl. 22.

95. Spice *v.* Steinruck, 14 Ohio St. 213.

96. Merrill *v.* Perkins, 59 N. H. 343; Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229; Carrier *v.* Dellay, 3 How. Pr. (N. Y.) 173; Lloyd *v.* Wunderlich, 2 Del. Co. (Pa.) 377.

97. *Alabama.*— Harris *v.* Hillman, 26 Ala. 380, detinue to trover.

California.— Hackett *v.* State Bank, 57 Cal. 335; Ramirez *v.* Murray, 5 Cal. 222. *Compare* St. Clair *v.* San Francisco, etc., R. Co., 142 Cal. 647, 76 Pac. 485.

Colorado.— Givens *v.* Wheeler, 6 Colo. 149.

Georgia.— Ford *v.* Fargason, 120 Ga. 708, 48 S. E. 180; Gilleland *v.* Louisville, etc., R. Co., 119 Ga. 789, 47 S. E. 336; Croghan *v.* New York Underwriters' Agency, 53 Ga. 109; Williams *v.* Hollis, 19 Ga. 313.

Indiana.— Falkner *v.* Iams, 5 Ind. 200.

Indian Territory.— Crawford *v.* Alexander, 5 Indian Terr. 161, 82 S. W. 707.

Louisiana.— Wood *v.* Foster, 3 La. 338.

Maine.— Flanders *v.* Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410 [*distinguishing* Rand *v.* Webber, 64 Me. 191].

Michigan.— People *v.* Wayne County Cir. Judge, 13 Mich. 206, trover to assumpsit.

Wisconsin.— Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55 (in which the matter is discussed very fully); Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032; Hollehan *v.* Roughan, 62 Wis. 64, 22 N. W. 163; Kewaunee County *v.* Decker, 34 Wis. 378.

United States.— Ten Broeck *v.* Pendleton, 23 Fed. Cas. No. 13,827, 5 Cranch C. C. 464.

See 39 Cent. Dig. tit. "Pleading," § 711.

98. *Alabama.*— Holland *v.* Southern Express Co., 114 Ala. 128, 21 So. 992; Wilson *v.* Stewart, 69 Ala. 302.

Georgia.— Ford *v.* Fargason, 120 Ga. 708, 48 S. E. 180; Gilleland *v.* Louisville, etc., R. Co., 119 Ga. 789, 47 S. E. 336; Cox *v.* Richmond, etc., R. Co., 87 Ga. 747, 13 S. E. 827; Mitchell *v.* Georgia R. Co., 68 Ga. 644; Green *v.* Jackson, 66 Ga. 250; Matthews *v.* Woolfolk, 51 Ga. 618.

Michigan.— Doyle *v.* Pelton, 134 Mich. 398, 96 N. W. 483.

Vermont.— Carpenter *v.* Gookin, 2 Vt. 495, 21 Am. Dec. 566.

United States.— Nicholls *v.* Harrison, 18 Fed. Cas. No. 10,229; Scholfield *v.* Fitzhugh, 21 Fed. Cas. No. 12,474, 1 Cranch C. C. 246.

But see Folsom *v.* Cornell, 150 Mass. 115, 22 N. E. 705.

99. *Illinois.*— May *v.* Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001 (case to assumpsit); Citizens Gas-Light, etc., Co. *v.* Granger, 118 Ill. 266, 8 N. E. 770 (assumpsit to case).

Iowa.— Hunt *v.* Hoover, 24 Iowa 231.

Kansas.— Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987; Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. 857.

Kentucky.— See Southern Lumber Co. *v.* Wireman, 41 S. W. 297, 19 Ky. L. Rep. 585.

Maryland.— Kirwan *v.* Raborg, 1 Harr. & J. 296, assumpsit to trover.

Missouri.— Robertson *v.* Springfield, etc., R. Co., 21 Mo. App. 633.

Nebraska.— Shoemaker *v.* Commercial Union Assur. Co., 72 Nebr. 650, 101 N. W. 335.

New Hampshire.— Fellows *v.* Judge, 72 N. H. 466, 57 Atl. 653 (case to assumpsit); Morse *v.* Whitcher, 64 N. H. 591, 15 Atl. 207 (assumpsit to case); Welcome *v.* Laboutee, 63 N. H. 124 (assumpsit to trover); Cocheco Acqueduct Assoc. *v.* Boston, etc., R. Co., 62 N. H. 345; Gould *v.* Blodgett, 61 N. H. 115 (assumpsit to trover); Elsher

ments may be allowed at any stage of the proceedings.[1] They may be permitted even after verdict where the verdict could not have been affected by the amendment if it had been made before trial.[2] If, however, the change amounts to the setting up of a new cause of action it will not be allowed.[3] In jurisdictions where it is permissible to set up a new cause of action by amendment, it would seem that an amendment changing the form of action from contract to tort and *vice versa* would be permissible, if application were made within the time prescribed by statute whether it sets up a new cause of action or not, and it has been held under the statutes of one state that such an amendment is permissible before [4] but not during or after trial.[5] As to what constitutes a change from an action *ex contractu* to an action *ex delicto*, no general rule can be laid down. The test varies with the circumstances of each individual case.[6]

(v) *Changing From Legal to Equitable Action and Conversely.*[7] In those states where the common-law procedure obtains, it is generally held that an action at law cannot be changed by amendment to a suit in equity.[8] But under many statutes, especially under the codes of civil procedure which have abolished the distinctions between actions at law and suits in equity, changes by amendment from equitable to legal proceedings, and *vice versa*, are allowed, if the facts relied on are the same in both pleadings.[9] However, in a number of the

v. Hughes, 60 N. H. 469; Stebbins *v.* Lancashire Ins. Co., 59 N. H. 143 [*overruling* Brown *v.* Leavitt, 52 N. H. 619; Little *v.* Morgan, 31 N. H. 499, and *explaining* Page *v.* Jewett, 46 N. H. 441].

Pennsylvania.— Smith *v.* Bellows, 77 Pa. St. 441. Before the present statute was passed the rule was otherwise. McNair *v.* Compton, 35 Pa. St. 23.

Texas.— Gulf, etc., R. Co. *v.* Richards, 11 Tex. Civ. App. 95, 32 S. W. 96.

See 39 Cent. Dig. tit. "Pleading," § 711.

1. Morse *v.* Whitcher, 64 N. H. 591, 15 Atl. 207.

2. Elsher *v.* Hughes, 60 N. H. 469.

3. Lumpkin *v.* Collier, 69 Mo. 170; Drake *v.* St. Louis, etc., R. Co., 35 Mo. App. 553; Buerstetta *v.* Tecumseh Nat. Bank, 57 Nebr. 504, 77 N. W. 1094.

4. Eighmie *v.* Taylor, 39 Hun (N. Y.) 366; Hopf *v.* U. S. Baking Co., 21 N. Y. Suppl. 589.

5. Neudecker *v.* Kohlberg, 81 N. Y. 296 (at trial); Smith *v.* Smith, 4 N. Y. App. Div. 227, 38 N. Y. Suppl. 551; Mea *v.* Pierce, 63 Hun (N. Y.) 400, 18 N. Y. Suppl. 293; Whitcomb *v.* Hungerford, 42 Barb. (N. Y.) 177; Ransom *v.* Wetmore, 39 Barb. (N. Y.) 104; Lane *v.* Beam, 19 Barb. (N. Y.) 51; Sanford *v.* American Dist. Tel. Co., 13 Misc. (N. Y.) 88, 34 N. Y. Suppl. 144 [*reversing* 6 Misc. 534, 27 N. Y. Suppl. 142]; James *v.* Cowing, 4 N. Y. St. 73.

6. St. Louis, etc., R. Co. *v.* Dodd, 59 Ark. 317, 27 S. W. 227; Smith *v.* Chicago, etc., R. Co., 49 Wis. 443, 5 N. W. 240.

Illustrative cases.— A complaint based on a contract is not changed to one founded in tort merely by adding allegations of fraud or additional damage. McAffee *v.* Mulkey, 40 Ga. 115; Cavene *v.* McMichael, 8 Serg. & R. (Pa.) 441. A complaint charging that a defendant received goods as a common carrier may be amended so as to charge that he received them as a warehouseman and the cause of action will not be changed from contract to tort. St. Louis, etc., R. Co. *v.* Dodd, 59 Ark. 317, 27 S. W. 227. But see People *v.* Kalamazoo Cir. Judge, 35 Mich. 227. Nor does striking out unnecessary allegations of fraud from a complaint in a contract action change the action from contract to tort. Hitchcock *v.* Baere, 17 Hun (N. Y.) 604.

7. Amended and supplemental pleadings in equity see EQUITY, 16 Cyc. 335 *et seq.*

8. Lullman *v.* Barrett, 18 Ill. App. 573.

9. *California.*— Porter *v.* Fillebrown, 119 Cal. 235, 51 Pac. 322; Walsh *v.* McKeen, 75 Cal. 519, 17 Pac. 673; Blood *v.* Fairbanks, 48 Cal. 171; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Georgia.— McCandless *v.* Inland Acid Co., 115 Ga. 968, 42 S. E. 449.

Iowa.— Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316; Esch *v.* Home Ins. Co., 78 Iowa 334, 43 N. W. 229, 16 Am. St. Rep. 443 (holding that an action at law upon an insurance contract could be changed into an equitable one to reform the policy); Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659; Barnes *v.* Hekla F. Ins. Co., 75 Iowa 11, 39 N. W. 122, 9 Am. St. Rep. 450; Weaver *v.* Kintzley, 58 Iowa 191, 12 N. W. 262.

Kansas.— Curtis *v.* Schmehr, 69 Kan. 124, 76 Pac. 434; Baldwin *v.* Ohio Tp., (1901) 65 Pac. 700.

Massachusetts.— Haupt *v.* Rogers, 170 Mass. 71, 48 N. E. 1080; Merrill *v.* Beckwith, 168 Mass. 72, 46 N. E. 400. For rule before present statute see Hayward *v.* Hapgood, 4 Gray 437.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221.

Nebraska.— Younglove *v.* Liebhardt, 13 Nebr. 557, 14 N. W. 526.

New York.— Truman *v.* Lester, 71 N. Y. App. Div. 612, 75 N. Y. Suppl. 548; Stoddard *v.* Rotton, 5 Bosw. 378; Getty *v.* Hudson River R. Co., 6 How. Pr. 269.

code states such amendments are not permitted.[10] Amendments of this character cannot be filed without leave of court.[11] Nor will the court allow such amendments at the trial,[12] or after trial and verdict.[13]

(vi) *Changing From Common Law to Statutory Action and Conversely.* An amendment shifting from a common-law ground to a statutory ground, or conversely, is not usually allowed, for the reason that it changes the cause of action;[14] nor may a statutory action be amended by adding a common-law

Ohio.— Raymond *v.* Toledo, etc., R. Co., 57 Ohio St. 271, 48 N. E. 1093; Riddle *v.* McBeth, 2 Ohio Dec. (Reprint) 606, 4 West. L. Month. 153; Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 125.

See 39 Cent. Dig. tit. "Pleading," § 712.

Illustrations.— So long as the identity of the cause of action is preserved an action of ejectment may be changed to a suit for foreclosure (Scroggin *v.* Johnston, 45 Nebr. 714, 64 N. W. 236; Robinson *v.* Willoughby, 67 N. C. 84), or to a suit to redeem (McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614), and a suit to quiet title may be changed to ejectment (Homan *v.* Hellman, 35 Nebr. 414, 53 N. W. 369).

Replevin.— Where an action in replevin is begun in good faith an amendment may be allowed later seeking equitable relief. But, if the suit in replevin is begun for the purpose of obtaining possession of the property, with the intention of amending afterward so as to ask equitable relief, the amendment should not be allowed. Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

10. Gibbons *v.* Denver Brokerage, etc., Co., 17 Colo. App. 167, 67 Pac. 913; Maloney *v.* Real Estate Bldg., etc., Assoc., 57 Mo. App. 384; Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55 (this case sets forth clearly the position of this class of states); Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032; Fischer *v.* Laack, 76 Wis. 313, 45 N. W. 104; Brothers *v.* Williams, 65 Wis. 401, 27 N. W. 157; Kavanagh *v.* O'Neill, 53 Wis. 101, 10 N. W. 369; Carmichael *v.* Argard, 52 Wis. 607, 9 N. W. 470.

For amendments held not to change the action from equitable to legal or vice versa see Tewksbury *v.* Bronson, 48 Wis. 581, 4 N. W. 749; Ivinson *v.* Hutton, 1 Wyo. 178.

11. Gray *v.* Brown, 15 How. Pr. (N. Y.) 555.

12. Zoller *v.* Kellogg, 66 Hun (N. Y.) 194, 21 N. Y. Suppl. 226; Bush *v.* Tilley, 49 Barb. (N. Y.) 599; Whittemore *v.* Judd Linseed, etc., Oil Co., 16 Daly (N. Y.) 290, 10 N. Y. Suppl. 737 [*affirmed* in 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708].

13. Nichols *v.* Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561; Waters *v.* Stubbs, 75 N. C. 28.

14. *Georgia.*— Charleston, etc., R. Co. *v.* Miller, 113 Ga. 15, 38 S. E. 338; Baldwin *v.* Western Union Tel. Co., 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194; Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659, 10 S. E. 352; Exposition Cotton Mills *v.* Western, etc., R. Co., 83 Ga. 441, 10 S. E. 113; Parmelee *v.* Savannah, etc., R. Co., 78 Ga. 239, 2 S. E. 686.

Kansas.— Kansas City *v.* Hart, 60 Kan. 684, 57 Pac. 938.

Maine.— Sawyer *v.* Perry, 88 Me. 42, 33 Atl. 660.

Massachusetts.— Peterson *v.* Waltham, 150 Mass. 564, 23 N. E. 236.

Michigan.— People *v.* Judges Washtenaw Cir. Ct., 1 Dougl. 434.

Missouri.— Scars *v.* Missouri Mortg. Loan Co., 56 Mo. App. 122; Missouri Lumber, etc., Co. *v.* Zeitinger, 45 Mo. App. 114 (containing a dissenting opinion); Holliday *v.* Jackson, 21 Mo. App. 660.

Ohio.— U. S. *v.* Collier, 6 Ohio St. 62.

Pennsylvania.— Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444.

Wisconsin.— Newton *v.* Allis, 12 Wis. 378.

United States.— Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 15 S. Ct. 877, 39 L. ed. 983; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193.

Canada.— Rose *v.* Croden, 3 Ont. L. Rep. 383, 1 Ont. Wkly. Rep. 170.

See 39 Cent. Dig. tit. "Pleading," § 691.

A statutory action for treble damages for trespass cannot be changed by amendment into a common-law action for trover (Missouri Lumber, etc., Co. *v.* Zeitinger, 45 Mo. App. 114), nor can a common-law action for trespass be changed by amendment into a statutory action for trespass which permits treble damages (Holliday *v.* Jackson, 21 Mo. App. 660; Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444. See, however, Mitchell *v.* Chase, 87 Me. 172, 32 Atl. 867, in which a declaration in the common-law form in an action of trespass for injuries received by a dog was held amendable by adding an averment that the action was brought under the statute allowing double damages for such injuries, it appearing that the pleader had originally intended to institute an action under the statute.

Filing an amended petition by consent does not alter the operation of the rule as such consent covers only the right to file the amendment, but does not waive defenses thereto when filed. Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 15 S. Ct. 877, 39 L. ed. 983.

For amendments held not to change nature of action see Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41; Carrie *v.* Cloverdale Banking, etc., Co., 90 Cal. 84, 27 Pac. 58; Illinois Trust, etc., Bank *v.* La Touche, 101 Ill. App. 341; Brewer *v.* East Machias, 27 Me. 489; Daley *v.* Boston, etc., R. Co., 147 Mass. 101, 16 N. E. 690; Lustig *v.* New York, etc., R. Co., 65 Hun (N. Y.) 547, 20 N. Y. Suppl. 477.

count, nor a common-law action by adding a statutory count.[15] And the fact that all matters required to be set out in an action under the statute appear in the common-law declaration does not alter the rule.[16] Where, however, a change in the cause of action is not deemed an objection to the allowance of an amendment, such an amendment may be made.[17] The question is merely one phase of the general question of the right to change a cause of action by amendment.[18]

(VII) *MISCELLANEOUS.* Under a statute authorizing amendments changing the form of the action, it has been held permissible to change by amendment, mandamus to trespass on the case.[19] In Louisiana it has been held that a possessory action may be changed by an amendment to a petitory action.[20]

g. Formal Defects — (I) *IN GENERAL.* Mere formal or technical defects may always be corrected by an amendment.[21] Such an amendment may be made during the progress of the trial,[22] after the trial,[23] or even after the overruling of a motion for a new trial.[24]

(II) *SIGNATURE.* Failure by a party or his attorney to sign a complaint or declaration is merely a formal error and may be cured by amendment,[25] even

15. Montague *v.* Chattanooga, etc., R. Co., 94 Ga. 668, 21 S. E. 846; Parmelee *v.* Savannah, etc., R. Co., 78 Ga. 239, 2 S. E. 686; Mason *v.* Waite, 1 Pick. (Mass.) 452; Melvin *v.* Smith, 12 N. H. 462.

16. Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659, 10 S. E. 352; Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 15 S. Ct. 877, 39 L. ed. 983.

17. Deyo *v.* Morss, 144 N. Y. 216, 39 N. E. 81 [*reversing* 74 Hun 224, 26 N. Y. Suppl. 305, and *overruling* in effect Daguerre *v.* Orser, 3 Abb. Pr. (N. Y.) 86]; Mulligan *v.* Erie R. Co., 99 N. Y. App. Div. 499, 91 N. Y. Suppl. 60.

18. See *supra*, VII, A, 11, a.

19. Knight *v.* Thompsonville, 74 Ill. App. 550.

20. Haydel *v.* Bateman, 2 La. Ann. 755; Hoover *v.* Richards, 1 Rob. (La.) 34. But see Copley *v.* Hasson, 4 La. Ann. 531.

21. *Alabama.*—Mobile, etc., R. Co. *v.* Logan, 136 Ala. 173, 33 So. 814, misnomer of plaintiff's intestate.

Arkansas.— McLeran *v.* Morgan, 27 Ark. 148, omission to give style of court in the declaration.

Connecticut.— Phelps *v.* Sanford, Kirby 343, misjoining of issue.

Georgia.— Parish *v.* Davis, 126 Ga. 840, 55 S. E. 1032 (omission of name of court); Montgomery *v.* King, 123 Ga. 14, 50 S. E. 963 (failure to set forth cause of action in orderly and distinct paragraphs consecutively numbered).

Kansas.— American Bonding Co. *v.* Dickey, 74 Kan. 791, 88 Pac. 66 (description of plaintiff); Hastie *v.* Burrage, 69 Kan. 560, 77 Pac. 268 (omission of name of court and county where action pending); Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446 (omission of word "petition" from caption).

Kentucky.— Arthurs *v.* Thompson, 97 Ky. 218, 30 S. W. 628, 17 Ky. L. Rep. 118, misdescription in caption of nature of defendant's claim.

Louisiana.— Chaffe *v.* Thornton, 28 La. Ann. 837 (failure of plaintiff to allege residence); Merrill *v.* Lattimore, 12 Rob. 138.

Maine.— Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491.

Missouri.— Cayce *v.* Ragsdale, 17 Mo. 32, omission of word "not."

Nebraska.— McMurty *v.* State, 19 Nebr. 147, 26 N. W. 915; Ward *v.* Davis, 5 Nebr. (Unoff.) 211, 97 N. W. 437.

New Hampshire.— Berry *v.* Osborn, 28 N. H. 279.

New Jersey.— Crawford *v.* New Jersey R., etc., Co., 28 N. J. L. 479.

New York.— Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. 422, 3 Keyes 497, 6 Abb. Pr. N. S. 46 (misnomer); Harrower *v.* Heath, 19 Barb. 331 (technical informality in method of claiming set-off); Teal *v.* Tinney, 2 How. Pr. 94 (omission of title of court).

Pennsylvania.— Trego *v.* Lewis, 58 Pa. St. 463.

Rhode Island.— Brown *v.* Foster, 6 R. I. 564, plea concluding to the country when it should conclude with a verification.

South Carolina.— Harvey *v.* Hackney, 35 S. C. 361, 14 S. E. 822, faulty statement of facts necessary to constitute a cause of action.

Tennessee.— Trabue *v.* Higden, 4 Coldw. 620; Helm *v.* Rodgers, 5 Humphr. 105.

Virginia.— Anderson *v.* Dudley, 5 Call 529.

Wisconsin.— Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

See 39 Cent. Dig. tit. "Pleading," §§ 644, 762.

22. Glasscock *v.* Glasscock, 8 Mo. 577.

23. Lion *v.* Burtis, 18 Johns. (N. Y.) 510.

24. McCollom *v.* Indianapolis, etc., R. Co., 94 Ill. 534.

25. *Florida.*— Crawford *v.* Feder, 34 Fla. 397, 16 So. 287.

Georgia.— Gillis *v.* Atlantic Coast Line R. Co., 127 Ga. 678, 56 S. E. 1003; Austin *v.* M. Ferst's Sons Co., 2 Ga. App. 91, 58 S. E. 318; Currie *v.* Deaver, 1 Ga. App. 11, 57 S. E. 897.

Indiana.— Sims *v.* Dame, 113 Ind. 127, 15 N. E. 217; Harris *v.* Osenback, 13 Ind. 445.

after the jury is sworn.[26] A motion for leave to amend an unsigned complaint is entitled to precedence over a motion to reject the pleading for want of a signature.[27]

(III) *VERIFICATION.* Failure to verify a pleading,[28] or an insufficient verification,[29] is an amendable defect that may be cured if seasonable application is made for leave to amend. Leave of court is necessary in such a case,[30] at least where the full time for filing the pleading sought to be verified has elapsed;[31] and such leave may be refused where the party has not shown proper diligence in making his application.[32] Such an amendment may be made on the trial,[33] at any time before judgment.[34]

h. Inadvertent Mistakes. Inadvertent defects or omissions may usually be corrected by amendment.[35]

Kansas.— Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

New York.— Laimbeer *v.* Allen, 2 Sandf. 647.

Texas.— Boren *v.* Billington, 82 Tex. 137, 18 S. W. 101.

See 39 Cent. Dig. tit. "Pleading," § 819.

Where the statute requires a pleading to be signed before it is filed, and it is filed without a signature, it has been held that the defect cannot be remedied by amendment, because there is nothing to amend by. Carrington *v.* Hamilton, 3 Ark. 416.

26. Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

27. Sims *v.* Dame, 113 Ind. 127, 15 N. E. 217.

28. *California.*— Lattimer *v.* Ryan, 20 Cal. 628; Angier *v.* Masterson, 6 Cal. 61.

Florida.— Green *v.* King, 17 Fla. 452.

Georgia.— Rodgers *v.* Caldwell, 122 Ga. 279, 50 S. E. 95; Ward *v.* Frick Co., 95 Ga. 804, 22 S. E. 899.

Illinois.— Ennor *v.* Hodson, 28 Ill. App. 445.

Kansas.— Chinberg *v.* Gale Sulky Harrow Mfg. Co., 38 Kan. 228, 16 Pac. 462; Hargrove *v.* Woolf, 34 Kan. 101, 8 Pac. 192; Gaylord *v.* Stebbins, 4 Kan. 42; Manspeaker *v.* Topeka Bank, 4 Kan. App. 768, 46 Pac. 1012.

Missouri.— Anderson *v.* Hance, 49 Mo. 159.

New York.— Laimbeer *v.* Allen, 2 Sandf. 647; Bragg *v.* Bickford, 4 How. Pr. 21.

Ohio.— Meade *v.* Thorne, 2 Ohio Dec. (Reprint) 289, 2 West. L. Month. 313. *Contra,* Boyles *v.* Hoyt, 2 Ohio Dec. (Reprint) 376, 2 West. L. Month. 549; Stevens *v.* White, 2 Ohio Dec. (Reprint) 107, 2 West. L. Month. 394.

Texas.— Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227.

United States.—Edgefield Bank *v.* Farmers' Co-operative Mfg. Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201; Loving *v.* Fairchild, 15 Fed. Cas. No. 8,556, 1 McLean 333.

See 39 Cent. Dig. tit. "Pleading," § 819.

29. Cantwell *v.* Herring, 127 N. C. 81, 37 S. E. 140.

30. Lee *v.* Hamilton, 12 Tex. 413.

31. Missouri River, etc., R. Co. *v.* Wilson, 10 Kan. 105.

32. Moore *v.* Emmert, 21 Kan. 1; Foote *v.* Sprague, 13 Kan. 155.

33. Norton *v.* Scruggs, 108 Ga. 802, 34 S. E. 166; Ward *v.* Frick Co., 95 Ga. 804, 22 S. E. 899; Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227; Edgefield Bank *v.* Farmers' Co-operative Mfg. Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201, construing Ga. Code.

34. Ennor *v.* Hodson, 28 Ill. App. 445.

35. *Alabama.*— Drummond *v.* Wright, 1 Ala. 205.

Colorado.— Mullins *v.* Gilligan, 12 Colo. App. 13, 54 Pac. 1106.

Georgia.— Albany *v.* Cameron, 121 Ga. 794, 49 S. E. 798; Allen *v.* Stephens, 107 Ga. 733, 33 S. E. 651.

Illinois.— Casey *v.* Kimmel, 181 Ill. 154, 54 N. E. 905.

Kansas.— Hastie *v.* Burrage, 69 Kan. 560, 77 Pac. 268; Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446.

Maine.— Hammat *v.* Russ, 16 Me. 171.

Nebraska.— Rosewater *v.* Horton, 4 Nebr. (Unoff.) 205, 93 N. W. 681.

New Jersey.— North River Meadow Co. *v.* Christ Church, 15 N. J. L. 52; Welch *v.* Arnett, 46 N. J. Eq. 548, 22 Atl. 124.

New York.— National Bank of Deposit *v.* Rogers, 166 N. Y. 380, 59 N. E. 922; Bennett *v.* Lake, 47 N. Y. 93; Sun Printing, etc., Assoc. *v.* Abbey Effervescent Salt Co., 62 N. Y. App. Div. 54, 70 N. Y. Suppl. 871. See also Bell *v.* Polymero, 99 N. Y. App. Div. 623, 90 N. Y. Suppl. 923.

Ohio.— Shierberg *v.* Shierberg, 8 Ohio Dec. (Reprint) 115, 5 Cinc. L. Bul. 753.

Oregon.— Wild *v.* Oregon Short Line R. Co., 21 Oreg. 159, 27 Pac. 954.

Pennsylvania.—Cummings *v.* Lebo, 2 Rawle 23, 19 Am. Dec. 615.

South Dakota.— Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614.

Virginia.— American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

Wisconsin.— Chandos *v.* Edwards, 86 Wis. 493, 56 N. W. 1098.

See 39 Cent. Dig. tit. "Pleading," §§ 645, 763.

A mere clerical omission may be corrected by amendment. Martin *v.* Jesse-French Piano, etc., Co., 151 Ala. 289, 44 So. 112; McTiver *v.* Grant Tp., 131 Mich. 456, 91 N. W. 736; Brown *v.* McHugh, 35 Mich. 50; Rogers *v.* Sattler, 28 Misc. (N. Y.) 242, 58 N. Y. Suppl. 1073; Brown *v.* Mitchell, 12 How. Pr. (N. Y.) 408; Briggs *v.* Mason, 31

i. Judgments, Actions on. Matters of description may be corrected after verdict. An erroneous description of the term of court at which a judgment was rendered may be thus corrected,[36] and an amendment praying for a larger remedy is permissible.[37] According to a number of decisions, it is permissible to add by amendment a count on a judgment to a count on the claim on which the judgment was based, and *vice versa*.[38] Other decisions hold that such an amendment is not permissible,[39] and that a count in assumpsit cannot be changed by amendment to debt on a foreign judgment based on the claim which is the foundation of the count in assumpsit.[40] An amendment setting up judgments of different dates and amounts and between different parties is not permissible;[41] nor is an amendment permissible which sets up a second judgment rendered in another jurisdiction.[42]

j. Jurisdictional Matters — (i) *In General.* Courts generally allow amendments showing jurisdictional facts omitted from the original pleadings,[43] although

Vt. 433; Fish *v.* Rivers, 23 L. T. Rep. N. S. 486, 19 Wkly. Rep. 93.

Mistakes of the clerk of court may be amended and set right by another part of the record. Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 11 Am. Dec. 188.

An inadvertently inaccurate description of property (Allen *v.* Stephens, 107 Ga. 733, 33 S. E. 651), or of a transaction (Albany *v.* Cameron, etc., Co., 121 Ga. 794, 49 S. E. 798), may be cured by amendment.

Where the names of the parties are transposed in the commencement of the declaration, the mistake may be amended. Drummond *v.* Wright, 1 Ala. 205.

A complaint for labor performed and materials furnished may be amended so as to seek a recovery merely for the labor performed, where plaintiff never intended to claim for materials furnished. Maney *v.* Hart, 11 Wash. 67, 39 Pac. 268.

Mistake of law.— Under Cal. Code Civ. Proc. § 473, providing that the court may allow an amendment to a pleading to correct certain enumerated mistakes, or "a mistake in any other respect," and "in other particulars," an amendment may be allowed, although it is mainly to correct a mistake of law made by defendant's attorney. Gould *v.* Stafford, 101 Cal. 32, 35 Pac. 429.

36. Kendall *v.* White, 13 Me. 245; McLellan *v.* Crofton, 6 Me. 307.

37. Anderson *v.* Boyd, 64 Tex. 108.

38. Teberg *v.* Swenson, 32 Kan. 224, 4 Pac. 83; Miner Lith. Co. *v.* Wagner, 177 Mass. 404, 58 N. E. 1020; King *v.* Burnham, 129 Mass. 598; Henderson *v.* Staniford, 105 Mass. 504, 7 Am. Rep. 551; Goodrich *v.* Bodurtha, 6 Gray (Mass.) 323; Downer *v.* Shaw, 23 N. H. 125; Thompson *v.* Minford, 11 How. Pr. (N. Y.) 273.

39. Alaska Commercial Co. *v.* Debney, 2 Alaska 303; Latine *v.* Clements, 3 Ga. 426; McDermid *v.* Tinkham, 53 Vt. 615; Green *v.* Starr, 52 Vt. 426.

40. Barnes *v.* Gibbs, 31 N. J. L. 317, 86 Am. Dec. 210.

41. Seymore *v.* Franklin, 92 Fed. 122.

42. Pillsbury *v.* Springfield, 16 N. H. 565.

43. *Alabama.*— Karthaus *v.* Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268.

Minnesota.— Berryhill *v.* Healey, 89 Minn. 444, 95 N. W. 314.

Missouri.— Mier *v.* St. Louis, etc., R. Co., 56 Mo. App. 655.

New York.— Meeks *v.* Meeks, 79 N. Y. App. Div. 49, 79 N. Y. Suppl. 718.

Texas.—Evans *v.* Mills, 16 Tex. 196; Ward *v.* Lathrop, 11 Tex. 287; Piedmont, etc., L. Ins. Co. *v.* Fitzgerald, 1 Tex. App. Civ. Cas. § 1345.

United States.— Northern Pac. R. Co. *v.* Austin, 135 U. S. 315, 10 S. Ct. 758, 34 L. ed. 218; Robertson *v.* Cease, 97 U. S. 646, 24 L. ed. 1057; Morgan *v.* Gay, 19 Wall. 81, 22 L. ed. 100.

See 39 Cent. Dig. tit. "Pleading," § 647.

Jurisdictional amount.—A petition which fails to show that the amount involved is within the jurisdiction of the court may be amended at the trial by increasing such amount or inserting other facts necessary to show jurisdiction. Southwestern Land Co. *v.* Hickory Jackson Ditch Co., 18 Colo. 489, 33 Pac. 275; Dick *v.* Niles, 17 Ind. 239; Wood County *v.* Cate, 75 Tex. 215, 12 S. W. 535; McDannell *v.* Cherry, 64 Tex. 177. But see Hoit *v.* Molony, 2 N. H. 322, refusing an amendment where damages were not demanded.

Venue.— Venue laid in a wrong county may be corrected by amendment (Perry *v.* Milligan, 58 Ga. 479; Evans *v.* Maysville, etc., R. Co., 77 S. W. 708, 25 Ky. L. Rep. 1258), or venue in a transitory action may be changed after general issue is pleaded (Gay *v.* Homer, 13 Pick. (Mass.) 535). So a complaint omitting entirely the venue of the action may be amended. Hastie *v.* Burrage, 69 Kan. 560, 77 Pac. 268; Hotchkiss *v.* Crocker, 15 How. Pr. (N. Y.) 336.

A petition entitled in the wrong court may be amended. Rosewater *v.* Horton, 4 Nebr. (Unoff.) 205, 93 N. W. 681.

Residence of parties.—A complaint may be amended to show that a party resides within the jurisdiction of the court. Hall *v.* Mobley, 13 Ga. 318; Lowery *v.* Kline, 6 La. 380; Hogan *v.* Glueck, 2 N. Y. App. Div. 82, 37 N. Y. Suppl. 522; Jenkins *v.* Hall, 32 N. Y. Suppl. 883; House *v.* Cooper, 16 How. Pr. (N. Y.) 292; Chafee *v.* Postal Tel. Co., 35 S. C. 372, 14 S. E. 764; Kendall *v.* Hackworth, 66 Tex. 499, 18 S. W. 104.

this will not be permitted if the amendment changes the cause of action.[44] A party cannot urge his own non-residence as an objection to the other party's being allowed to amend.[45]

(II) *In the Federal Courts.* In case the citizenship of defendant is such at the commencement of the suit as to give the United States circuit court jurisdiction, failure to allege such citizenship may be cured by an amendment.[46] So it has been held that an application by a defendant for leave to amend so as to raise a jurisdictional question in a suit pending in a federal court must be granted and the issue raised tried at once even after the trial has commenced.[47] But an amendment designed to raise a federal question irrespective of the citizenship of the parties will not be allowed unless it appears that it will be likely to accomplish the result intended.[48] A party may show by amendments that he was an alien when the suit was commenced instead of a citizen as previously alleged.[49] And likewise a party described in an original pleading as a foreign subject may be properly described in an amendment subsequently filed as an alien.[50] A petition filed in a state court may be amended after the trial has commenced, increasing the damages to an amount which in the original petition would have allowed a removal, and defendant cannot complain unless it appear that such amendment was an artifice to prevent removal, and force him to submit to a trial in the state court.[51] But an amendment will not be granted to bring in a necessary party defendant who is outside the jurisdiction.[52] After a motion in arrest of judgment is made on the ground that the complaint does not show a diversity of citizenship, the court may allow the defect to be remedied by amendment.[53] Or where an exception is taken to an averment of jurisdictional facts the court will allow an amendment.[54] A defective averment of the citizenship of the parties may be amended after verdict.[55]

k. Material Allegations, Supplying. It is generally held that a pleading which sufficiently indicates the cause of action or the defense intended to be set out may be amended so as to supply a material allegation.[56] An amendment

Where an allegation of fraud is necessary in order to give the court jurisdiction, it may be inserted for that purpose. Evans *v.* Mills, 16 Tex. 196; Little *v.* Woodbridge, 1 Tex. App. Civ. Cas. § 152.

Alleging unlawful acts.—A complaint on a contract may be amended alleging an unlawful act in connection with the breach thereof, so as to fix the jurisdiction in the circuit instead of the justice's court. Frizzell *v.* Duffer, 58 Ark. 612, 25 S. W. 1111.

44. Gillam *v.* Virginia L. Ins. Co., 121 N. C. 369, 28 S. E. 470.

45. Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517.

46. Halsted *v.* Buster, 119 U. S. 34, 7 S. Ct. 276, 30 L. ed. 462; Continental L. Ins. Co. *v.* Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. ed. 380; Robertson *v.* Cease, 97 U. S. 646, 24 L. ed. 1057; Morgan *v.* Gay, 19 Wall. (U. S.) 81, 22 L. ed. 100; Kelsey *v.* Pennsylvania R. Co., 14 Fed. Cas. No. 7,679, 14 Blatchf. 89.

47. Imperial Refining Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503.

48. Rae *v.* Grand Trunk R. Co., 14 Fed. 401.

49. Betzoldt *v.* American Ins. Co., 47 Fed. 705.

50. Michaelson *v.* Denison, 17 Fed. Cas. No. 9,523, Brunn. Col. Cas. 63, 3 Day (Conn.) 294.

51. Austin *v.* Northern Pac. R. Co., 34 Minn. 473, 26 N. W. 607 [*affirmed* in 135 U. S. 315, 10 S. Ct. 758, 34 L. ed. 218].

52. Swan Land, etc., Co. *v.* Frank, 39 Fed. 456.

53. Maddox *v.* Thorn, 60 Fed. 217, 8 C. C. A. 574.

54. Hilliard *v.* Breevoort, 12 Fed. Cas. No. 6,505, 4 McLean 24.

55. Mexican Cent. R. Co. *v.* Duthie, 189 U. S. 76, 23 S. Ct. 610, 47 L. ed. 715; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699; Tremaine *v.* Hitchcock, 23 Wall. (U. S.) 518, 23 L. ed. 97; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261, stating that it is the general rule in the federal courts to allow such amendments.

56. *California.*— Irwin *v.* McDowell, (1893) 34 Pac. 708.

Colorado.— Tanner *v.* Harper, 32 Colo. 156, 75 Pac. 404; Cooper *v.* Wood, 1 Colo. App. 101, 27 Pac. 884.

Georgia.— Travelers' Ins. Co. *v.* Gray, 115 Ga. 764, 42 S. E. 95; Snook *v.* Raglan, 89 Ga. 251, 15 S. E. 364; Ellison *v.* Georgia R. Co., 87 Ga. 691, 13 S. E. 809; Southwestern R. Co. *v.* Bryant, 67 Ga. 212.

Indiana.— Cleveland, etc., R. Co. *v.* Miles, 162 Ind. 646, 70 N. E. 985.

Kentucky.— Lucile Min. Co. *v.* Fairbanks, 87 S. W. 1121, 27 Ky. L. Rep. 1100.

Massachusetts.— Cogswell *v.* Hall, 185 Mass. 455, 70 N. E. 461.

before issue joined setting forth material allegations is proper, even though the facts alleged are inconsistent with the original pleading,[57] and material averments may be added even after verdict to make the pleadings conform to the proof, where the claim or issue in the case is not substantially changed, and the opposite party is not deceived by the amendment or prejudiced thereby.[58]

l. **Misjoinder of Causes of Action.** A misjoinder of causes of action in the declaration is a formal defect, and may be cured by amendment.[59]

m. **Place, Allegations of.** Amendment may be allowed, in the discretion of the court, to supply an allegation of place when omitted,[60] or to correct an error,[61] or cure a variance [62] in such an allegation. Such amendment may be allowed after introduction of evidence,[63] and even after verdict.[64]

n. **Relief Prayed** — (i) *In General.* As long as the facts alleged as the basis of recovery remain the same, so that a new cause of action is not introduced,[65]

Missouri.— Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204; State *v.* Thompson, 81 Mo. App. 549.

Montana.— Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007.

New York.— National Bank of Deposit *v.* Rogers, 166 N. Y. 380, 59 N. E. 922; Foerst *v.* Empire L. Ins. Co., 44 N. Y. App. Div. 87, 60 N. Y. Suppl. 393.

North Carolina.— Johnson *v.* Finch, 93 N. C. 205.

Oregon.— Baldock *v.* Atwood, 21 Oreg. 73, 26 Pac. 1058.

Pennsylvania.— Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467].

Canada.— Dempster *v.* Fairbanks, 29 Nova Scotia 456; Crowell *v.* Longard, 28 Nova Scotia 257; Pigeon *v.* Moore, 23 Nova Scotia 246.

Amendments supplying material allegations have been allowed to remedy the following omissions: Demand (Snook *v.* Raglan, 89 Ga. 251, 15 S. E. 364; Hulbert *v.* Brackett, 8 Wash. 438, 36 Pac. 264), assignment (Dawson *v.* Peterson, 110 Mich. 431, 68 N. W. 246), part performance (Becker *v.* Patten, 1 Pa. Dist. 24), willingness and ability to make and tender a deed (Woodbury *v.* Evans, 122 N. C. 779, 30 S. E. 2), damage (Sugarman *v.* Atlanta Consolidated St. R. Co., 94 Ga. 604, 21 S. E. 581; Ellison *v.* Georgia R. Co., 87 Ga. 691, 13 S. E. 809; Ogle *v.* Jones, 16 Wash. 319, 47 Pac. 747), the value and location of property (Fix *v.* Koepke, 44 La. Ann. 745, 11 So. 39), that an obligation or contract was in writing (Verdery *v.* Barrett, 89 Ga. 349, 15 S. E. 476), and duly authorized by defendant (Western Assur. Co. *v.* Williams, 94 Ga. 128, 21 S. E. 370), that false representations as to value were in connection with a statement of fact (Ruberg *v.* Brown, 50 S. C. 397, 27 S. E. 873), that a trespass was of a continuing nature (Weill *v.* Metropolitan R. Co., 10 Misc. (N. Y.) 72, 30 N. Y. Suppl. 833), that slanderous words were spoken in the presence of another person (Wolfe *v.* Israel, 102 Ga. 772, 29 S. E. 935), that an alleged false imprisonment was made without a warrant and without authority of law (Craven *v.* Bloomingdale, 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525), showing the manner in which persons alleged to be owners acquired title (Drum's Estate, 22 Pa. Co. Ct. 551), insolvency of a surviving partner in action against a deceased partner's representatives (Wiesenfeld *v.* Byrd, 17 S. C. 106), insolvency of the estate of which defendant was administrator (Eaton *v.* Case, 17 R. I. 429, 22 Atl. 943), that there were funds in an agent's hands to satisfy an order presented (Edson *v.* Hayden, 18 Wis. 627), that defendant is still indebted (Meshke *v.* Van Doren, 16 Wis. 319), and that the note sued on has not been paid (National Bank of Deposit *v.* Rogers, 166 N. Y. 380, 59 N. E. 922).

57. Keenan *v.* Washington Liquor Co., 8 Ida. 383, 69 Pac. 112.

58. Raymond *v.* Wathen, 142 Ind. 367, 41 N. E. 815. But see *dictum* in Rowell *v.* Bruce, 5 N. H. 381.

59. *Connecticut.*— Prosser *v.* Chapman, 29 Conn. 515. But see Phelps *v.* Hurd, 31 Conn. 444.

Georgia.— Georgia R., etc., Co. *v.* Tice, 124 Ga. 459, 52 S. E. 916.

Indiana.— Weirick *v.* Hoover, 8 Blackf. 379.

Massachusetts.— Clark *v.* Holbrook, 146 Mass. 366, 16 N. E. 410.

Rhode Island.— Jackson Bank *v.* Irons, 18 R. I. 718, 30 Atl. 420.

60. Evans *v.* Mayville, etc., R. Co., 77 S. W. 708, 25 Ky. L. Rep. 1258.

61. *Georgia.*— Southern R. Co. *v.* Wells, 103 Ga. 209, 29 S. E. 714.

Iowa.— McCracken *v.* Chicago, etc., R. Co., 91 Iowa 711, 58 N. W. 1085.

Maine.— Haynes *v.* Jackson, 66 Me. 93.

New York.— Bell *v.* Polymero, 99 N. Y. App. Div. 623, 90 N. Y. Suppl. 923.

Pennsylvania.— Clymer *v.* Thomas, 7 Serg. & R. 178.

Texas.— Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653, 36 S. E. 282.

West Virginia.— Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

62. Georgia R., etc., Co. *v.* Smith, 83 Ga. 626, 10 S. E. 235; Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306, 32 N. W. 354; Bannon *v.* Angier, 2 Allen (Mass.) 128; McTiver *v.* Grant Tp., 131 Mich. 456, 91 N. W. 736.

63. San Antonio, etc., R. Co. *v.* Lütke, (Tex. Civ. App. 1894) 26 S. W. 248.

64. Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306, 32 N. W. 354; Bannon *v.* Angier, 2 Allen (Mass.) 128.

65. See *supra*, VII, A, 11, a, (III).

a pleading may be amended so as to vary,[66] enlarge,[67] or modify [68] the nature and extent of the relief sought, or to supply a prayer for relief when omitted.[69] And if relief is prayed for which the facts do not warrant, the pleading may be amended so as to demand appropriate relief.[70] Amendments to the prayer for relief have been permitted before trial,[71] at the beginning of the trial,[72] during the trial,[73] at the close of the evidence,[74] after verdict,[75] after judgment,[76] and upon filing an amended complaint after demurrer.[77]

66. *California.*— Kent *v.* Williams, 146 Cal. 3, 79 Pac. 527.
Colorado.— Waterbury *v.* Fisher, 5 Colo. App. 362, 38 Pac. 846.
Connecticut.— Botsford *v.* Wallace, 72 Conn. 195, 44 Atl. 10.
Georgia.— Jordan *v.* Downs, 118 Ga. 544, 45 S. E. 439.
Indiana.— Cohoon *v.* Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193.
Iowa.— Hogueland *v.* Arts, 113 Iowa 634, 85 N. W. 818.
Louisiana.— King *v.* Wartelle, 14 La. Ann. 740; Turner *v.* Healy, 13 La. Ann. 498; Castille *v.* Dumartrait, 5 Mart. N. S. 69.
New Jersey.— Steen *v.* Steen, 68 N. J. Eq. 472, 59 Atl. 675.
North Carolina.— Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707; Robinson *v.* Willoughby, 67 N. C. 84.
See 39 Cent. Dig. tit. "Pleading," §§ 730, 730½.

67. *Georgia.*— Wells *v.* Wells, 118 Ga. 812, 45 S. E. 669; Wingate *v.* Atlanta Nat. Bank, 95 Ga. 1, 22 S. E. 37; Hooks *v.* Booker, 94 Ga. 712, 20 S. E. 2; Dinkler *v.* Baer, 92 Ga. 432, 17 S. E. 953; Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155.
Iowa.— Hogueland *v.* Arts, 113 Iowa 634, 85 N. W. 818.
Kentucky.— Ashford *v.* Tipton, 53 S. W. 268, 21 Ky. L. Rep. 866.
Louisiana.— Murdock *v.* Browder, 5 Mart. N. S. 677.
North Carolina.— Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707.
Texas.— Western Union Tel. Co. *v.* Brown, 62 Tex. 536; McIlhenny *v.* Lee, 43 Tex. 205; Chapman *v.* Sneed, 17 Tex. 428; Box *v.* Lawrence, 14 Tex. 545.
Wisconsin.— North Side Loan, etc., Soc. *v.* Nakielski, 127 Wis. 539, 106 N. W. 1097.
See 39 Cent. Dig. tit. "Pleading," § 730½.

68. *Georgia.*— Hooks *v.* Booker, 94 Ga. 712, 20 S. E. 2.
Illinois.— Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513.
Indiana.— Rettig *v.* Newman, 99 Ind. 424.
New Hampshire.— Beard *v.* Henniker, 69 N. H. 279, 39 Atl. 1016.
New York.— Flynn *v.* Westmayer, 4 N. Y. Suppl. 188; Furniss *v.* Brown, 8 How. Pr. 591.
Vermont.— Kimball *v.* Ladd, 42 Vt. 747.
Wisconsin.— Slater *v.* Cook, 93 Wis. 104, 67 N. W. 15.
See 39 Cent. Dig. tit. "Pleading," § 730½.

69. Johnson *v.* White Mountain Creamery Assoc., 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610.

70. Cook *v.* Chicago, etc., R. Co., 75 Iowa 169, 39 N. W. 253; Bloch *v.* Koch, 7 Ohio Dec. (Reprint) 54, 1 Cinc. L. Bul. 91. See Botsford *v.* Wallace, 72 Conn. 195, 44 Atl. 10.

71. *Georgia.*— Wells *v.* Wells, 118 Ga. 812, 45 S. E. 669; Jordan *v.* Downs, 118 Ga. 544, 45 S. E. 439; Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155.
Iowa.— Hogueland *v.* Arts, 113 Iowa 634, 85 N. W. 818; Cook *v.* Chicago, etc., R. Co., 75 Iowa 169, 39 N. W. 253.
Louisiana.— King *v.* Wartelle, 14 La. Ann. 740; Murdock *v.* Browder, 5 Mart. N. S. 677; Castille *v.* Dumartrait, 5 Mart. N. S. 69.
North Carolina.— Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707.
Texas.— McIlhenny *v.* Lee, 43 Tex. 205; Box *v.* Lawrence, 14 Tex. 545.
See 39 Cent. Dig. tit. "Pleading," §§ 730, 730½.

72. Mitchell *v.* Chase, 87 Me. 172, 32 Atl. 867; Noble *v.* Portsmouth, 67 N. H. 183, 30 Atl. 419; Dunham *v.* Hastings Pavement Co., 95 N. Y. App. Div. 360, 88 N. Y. Suppl. 835; Tassey *v.* Church, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65.

73. *Georgia.*—Jefferson *v.* Markert, 112 Ga. 498, 37 S. E. 758; Hooks *v.* Booker, 94 Ga. 712, 20 S. E. 2; Kennedy *v.* Vandiver, 55 Ga. 171.
Illinois.— Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513.
Iowa.— Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059.
Nebraska.— Klosterman *v.* Olcott, 25 Nebr. 382, 41 N. W. 250.
New York.— Furniss *v.* Brown, 8 How. Pr. 59.
See 39 Cent. Dig. tit. "Pleading," § 730½.

74. *California.*— Cain *v.* Cody, (1892) 29 Pac. 778.
Indiana.— Rettig *v.* Newman, 99 Ind. 424.
Missouri.— Sprague *v.* Follett, 90 Mo. 547, 2 S. W. 840.
New York.— Knapp *v.* Roche, 37 N. Y. Super. Ct. 395 [*reversed* on other grounds in 62 N. Y. 614]; Flynn *v.* Westmayer, 4 N. Y. Suppl. 188.
Wisconsin.— Slater *v.* Cook, 93 Wis. 104, 67 N. W. 15.

75. Frankfurter *v.* Home Ins. Co., 10 Misc. (N. Y.) 157, 31 N. Y. Suppl. 3; Kimball *v.* Ladd, 42 Vt. 747.

76. Billingsley *v.* Dean, 11 Ind. 331; Hodge *v.* Sawyer, 34 Wis. 397.

77. Waterbury *v.* Fisher, 5 Colo. App. 362, 38 Pac. 846; Botsford *v.* Wallace, 72 Conn.

(II) *DAMAGES* — (A) *In General.* The amount or the items of damages claimed may be modified by amendment,[78] and a complaint which contains no so-called *ad damnum* clause may be amended by adding it.[79] So a claim for damages left blank in the original declaration may be supplied by amendment,[80] and a complaint alleging certain damages may be changed to an action on a *quantum meruit*.[81] A general claim may by means of an amendment be stated in separate items.[82]

(B) *Increasing Damages.* On application seasonably made an original declaration or complaint may be amended so as to increase the amount of damages claimed.[83] Amendments of this character do not set up a new cause of

195, 44 Atl. 10; Robinson *v.* Willoughby, 67 N. C. 84.

78. Wilson *v.* Panne, 1 Kan. App. 721, 41 Pac. 984; McCready *v.* Staten Island Electric R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl. 996; Merchants *v.* New York L. Ins. Co., 2 Sandf. (N. Y.) 669; Cleveland *v.* Tufts, 69 Tex. 580, 7 S. W. 72; Supreme Tent K. M. W. *v.* Cox, 25 Tex. Civ. App. 366, 60 S. W. 971; Dunn *v.* Mayo Mills, 134 Fed. 804, 67 C. C. A. 450. And see *infra*, VII, A, 11, n, (II), (A), (B).

Setting forth debits and credits.—An original complaint claiming a certain sum may be amended so as to set forth all the debits and credits, leaving as a balance the sum first claimed. Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041.

Conforming with findings of referee.—A claim, if not substantially increased, may be amended to correspond with the findings of a referee. Barth *v.* Walther, 4 Duer (N. Y.) 228.

79. Vincent *v.* Mutual Reserve Fund Life Assoc., 75 Conn. 650, 55 Atl. 177.

Where plaintiff fails to allege the value of the services he has performed he may correct his mistake by an amendment. Cowdery *v.* McChesney, 124 Cal. 363, 57 Pac. 221; Danley *v.* Williams, 16 Wis. 581.

80. Burleigh *v.* Merrill, 49 N. H. 35; Eaton *v.* Case, 17 R. I. 429, 22 Atl. 943.

81. Flynn *v.* Westmayer, 4 N. Y. Suppl. 188; Slater *v.* Cook, 93 Wis. 104, 67 N. W. 15.

82. Smith *v.* Connor, (Tex. Civ. App. 1898) 46 S. W. 267.

83. *Alabama.*— Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502.

Arkansas.— Brown *v.* Cribbs, 24 Ark. 248.

California.— Barnes *v.* Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406; French *v.* McCarthy, 125 Cal. 508, 58 Pac. 154; Wells *v.* Law, (1894) 38 Pac. 523; Cain *v.* Cody, (1892) 29 Pac. 778.

Colorado.— Good *v.* Martin, 1 Colo. 406.

Georgia.— Huger *v.* Cunningham, 126 Ga. 684, 56 S. E. 64; Roberts *v.* Leak, 108 Ga. 806, 33 S. E. 995; Danielly *v.* Cheeves, 94 Ga. 263, 21 S. E. 524; Kennedy *v.* Vandiver, 55 Ga. 171.

Illinois.— Morris *v.* Agnew, 57 Ill. App. 229.

Indiana.— Strong *v.* State, 75 Ind. 440; Harris *v.* Mercer, 22 Ind. 329.

Iowa.— Smith *v.* Sioux City, 119 Iowa 50, 93 N. W. 81; McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124, 95 Am. Dec. 114.

Michigan.— Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344.

Mississippi.— Geren *v.* Wright, 8 Sm. & M. 360.

Nebraska.— Klosterman *v.* Olcott, 25 Nebr. 382, 41 N. W. 250.

New Hampshire.— Noble *v.* Portsmouth, 67 N. H. 183, 30 Atl. 419.

New Jersey.— Ten Eyck *v.* Delaware, etc., Canal Co., 19 N. J. L. 5.

New York.— Reed *v.* New York, 97 N. Y. 620; Dunham *v.* Hastings Pavement Co., 95 N. Y. App. Div. 360, 88 N. Y. Suppl. 835; Wilson *v.* Standard Asphalt Co., 81 N. Y. App. Div. 102, 81 N. Y. Suppl. 8; Clark *v.* Brooklyn Heights R. Co., 78 N. Y. App. Div. 478, 79 N. Y. Suppl. 811; Zimmer *v.* Third Ave. R. Co., 36 N. Y. App. Div. 265, 55 N. Y. Suppl. 308; Mahon *v.* New York, 10 Misc. 664, 31 N. Y. Suppl. 676; Frankfurter *v.* Home Ins. Co., 10 Misc. 57, 31 N. Y. Suppl. 3; Klemm *v.* New York Cent., etc., R. Co., 78 Hun 277, 28 N. Y. Suppl. 861; Cargan *v.* Everett, 16 N. Y. Suppl. 668; Bogart *v.* McDonald, 2 Johns. Cas. 219. *Contra*, De Betancourt *v.* Metropolitan St. R. Co., 60 N. Y. Suppl. 987.

Pennsylvania.— Tassey *v.* Church, 4 Watts & S. 141, 39 Am. Dec. 65; Norbeck *v.* Independent Tel. Co., 11 Pa. Dist. 753.

South Carolina.— Pickett *v.* Carolina Div. Southern R. Co., 74 S. C. 236, 54 S. E. 375.

Texas.— International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526; Western Union Tel. Co. *v.* Brown, 62 Tex. 536; Reed *v.* Harris, 37 Tex. 167; Majors *v.* Goodrich, (Civ. App. 1900) 54 S. W. 919.

United States.— Gregg *v.* Gier, 10 Fed. Cas. No. 5,799, 4 McLean 208.

England.— Knowlman *v.* Bluett, L. R. 9 Exch. 1, 43 L. J. Exch. 29, 29 L. T. Rep. N. S. 462, 22 Wkly. Rep. 77; Tebbs *v.* Barron, 12 L. J. C. P. 33, 4 M. & G. 844, 5 Scott N. R. 837, 43 E. C. L. 436.

Canada.— Chevalier *v.* Ross, 3 Ont. L. Rep. 219.

See 39 Cent. Dig. tit. "Pleading," § 732.

Illustrations.— In an action for overflowing land the complaint may be amended so as to claim damages for injury to the crops. Danielly *v.* Cheeves, 94 Ga. 263, 21 S. E. 524; International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526. Pleadings may be amended at the trial so as to show that goods are of a value greater than was originally alleged, thus increasing the damages claimed. Cain *v.* Cody, (Cal. 1892) 29 Pac. 778.

action.[84] Allegations of consequential,[85] exemplary,[86] or special damages [87] may usually be added to an original claim by amendment, but if the amendment operates as a surprise on the opposite party it should not be permitted.[88] A claim may be amended so as to include interest accruing after commencement of the suit.[89] And an amendment which merely introduces an additional element of damages growing out of the same set of circumstances may be allowed.[90] A constitutional provision increasing the liability of those wrongfully causing the death of others is not retroactive in its operation, and a complaint based on an injury inflicted before the provision was adopted cannot be amended by increasing the amount of damages to an amount greater than could be recovered before such provision was adopted.[91]

(c) *Reducing Damages.* An element of the damage or a part of the relief demanded may always be reduced or stricken out,[92] or the claim may be stricken out as to one or more defendants.[93] Under a statute giving treble damages, a complaint may be amended so as to claim single damages only.[94] Likewise an amendment reducing the claim so as to bring the action within the jurisdiction of the court is properly allowed.[95]

(d) *Time of Amendment* [96] — (1) In General. An amendment increasing the *ad damnum* may be made before [97] or during the trial,[98] after the case has been submitted to referees,[99] or even after their report is in,[1] or before verdict.[2]

84. See *supra*, VII, A, 11, a, (III), (C).

85. Wells *v.* Law, (Cal. 1894) 38 Pac. 523.

86. Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059; Mitchell *v.* Chase, 87 Me. 172, 32 Atl. 867.

87. Harris *v.* Mercer, 22 Ind. 329; Hoyt *v.* Wayne Cir. Judge, 117 Mich. 172, 75 N. W. 295; Clemons *v.* Davis, 6 Thomps. & C. (N. Y.) 523; Baldwin *v.* New York, etc., Nav. Co., 4 Daly (N. Y.) 314.

88. Edge *v.* Third Ave. R. Co., 57 N. Y. App. Div. 29, 67 N. Y. Suppl. 1002.

89. Billingsley *v.* Dean, 11 Ind. 331.

90. *Georgia.*— Macon *v.* Milton, 115 Ga. 153, 41 S. E. 499.

Kentucky.— Duckwall *v.* Brooke, 65 S. W. 357, 23 Ky. L. Rep. 1459.

Louisiana.— Banduc *v.* Domingon, 8 Mart. N. S. 434.

Missouri.— Sprague *v.* Follett, 90 Mo. 547, 2 S. W. 840; James *v.* Kansas City, etc., R. Co., 69 Mo. App. 431; Chandler Commission Co. *v.* Nashville, etc., R. Co., 64 Mo. App. 144.

New York.— Dunham *v.* Hastings Paving Co., 95 N. Y. App. Div. 360, 88 N. Y. Suppl. 835; Barth *v.* Walther, 4 Duer 228.

91. Isola *v.* Weber, 147 N. Y. 329, 41 N. E. 704 [*reversing* 13 Misc. 97, 34 N. Y. Suppl. 77, 1 N. Y. Annot. Cas. 384].

92. *Georgia.*— Causey *v.* Causey, 106 Ga. 188, 32 S. E. 138.

Illinois.— Franklin *v.* Krum, 171 Ill. 378, 49 N. E. 513.

Indiana.— Harvey *v.* Ferguson, 10 Ind. 393; Brown *v.* Lewis, 10 Ind. 232.

Maine.— South Thomaston *v.* Friendship, 95 Me. 201, 49 Atl. 1056; Boyd *v.* Eaton, 44 Me. 51, 69 Am. Dec. 83; Wight *v.* Stiles, 29 Me. 164; Bangor Boom Corp. *v.* Whiting, 29 Me. 123; Fogg *v.* Greene, 16 Me. 282.

Nevada.— Carlyon *v.* Lannan, 4 Nev. 156.

New Hampshire.— Beard *v.* Henniker, 69 N. H. 279, 39 Atl. 1016; Whitcomb *v.* Straw, 60 N. H. 117.

New York.— Price *v.* Brown, 112 N. Y. 677, 20 N. E. 381.

Utah.— Rhemke *v.* Clinton, 2 Utah 230.

Washington.— Maney *v.* Hart, 11 Wash. 67, 39 Pac. 268.

See 39 Cent. Dig. tit. "Pleading," § 733.

93. Mulvane *v.* Sedgley, (Kan. App. 1900) 61 Pac. 971.

94. Rhemke *v.* Clinton, 2 Utah 230.

95. Harvey *v.* Ferguson, 10 Ind. 393; Brown *v.* Lewis, 10 Ind. 232.

96. Time of amendment generally see *supra*, VII, A, 10.

97. Reed *v.* New York, 97 N. Y. 620; Eaton *v.* Case, 17 R. I. 429, 22 Atl. 943.

98. Cowdery *v.* McChesney, 124 Cal. 363, 57 Pac. 221; Cain *v.* Cody, (Cal. 1892) 29 Pac. 778; Pence *v.* Gabbert, 70 Mo. App. 201.

When notice necessary.— If a party appears and pleads but fails to appear at the trial, a trial amendment increasing the amount of damages, without notice, is improperly allowed. Work *v.* Tibbits, 133 N. Y. 574, 30 N. E. 1149 [*affirming* 61 Hun 566, 16 N. Y. Suppl. 368]; McCready *v.* Staten Island R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl. 996; Miller *v.* Garling, 12 How. (Pr.) (N. Y.) 203.

99. Ellis *v.* Ridgway, 1 Allen (Mass.) 501.

1. Buno *v.* Gomer, 3 Colo. App. 456, 34 Pac. 256; Harris *v.* Belden, 48 Vt. 478, *ad damnum* increased.

2. *Connecticut.*— Vincent *v.* Mutual Reserve Fund Life Assoc., 75 Conn. 650.

Georgia.— Danielly *v.* Cheeves, 94 Ga. 263, 21 S. E. 524; Dinkler *v.* Baer, 92 Ga. 432, 17 S. E. 953.

Massachusetts.— Graves *v.* New York, etc., R. Co., 160 Mass. 402, 35 N. E. 851.

Nevada.— Shields *v.* Orr Extension Ditch Co., 23 Nev. 349, 47 Pac. 194.

Whether these amendments should be permitted, however, is largely within the discretion of the court, and refusal to permit an amendment enlarging the amount sought to be recovered on each item, after the lapse of three years and just before the case was submitted to the jury, is not an abuse of discretion.[3]

(2) After Verdict.[4] It is commonly held that, after verdict, where the verdict is for a sum larger than the *ad damnum*, the difficulty may be met by entering a remittitur for the excess.[5] In respect of amendments increasing the amount of damages the decisions are not harmonious. In one case in which the nature of the damages sought did not appear, it was held that such amendment was one of form merely and not of substance, and that the amendment should be permitted.[6] In others it is held that if the damages are unliquidated the amendment should not be permitted.[7] According to some decisions if there is a full and fair trial on the merits without either party learning that the *ad damnum* is defective or being misled there may be an amendment in the discretion of the court and judgment rendered without a new trial.[8] But that if it does not appear that defendant had no knowledge of the defect in the *ad damnum* an amendment may be allowed, but a new trial must be granted in order to give him an opportunity to contest the enlarged claim.[9] So it has been held that in actions sounding

New York.— Miaghan *v.* Hartford F. Ins. Co., 24 Hun 58; Dakin *v.* Liverpool, etc., Ins. Co., 13 Hun 122 [*affirmed* in 77 N. Y. 600]; Knapp *v.* Roche, 37 N. Y. Super. Ct. 395 [*reversed* on other grounds in 62 N. Y. 614]; Arrigo *v.* Catalano, 7 Misc. 515, 27 N. Y. Suppl. 995; Bogart *v.* McDonald, 2 Johns. Cas. 219.

See 39 Cent. Dig. tit. "Pleading," § 732.

3. Dubuque Lumber Co. *v.* Kimball, 111 Iowa 48, 82 N. W. 458.

4. Amendments after verdict in general see *supra*, VII, A, 10, v.

5. *Illinois.*— Stephens *v.* Sweeney, 7 Ill. 375.

Michigan.— Kenyon *v.* Woodward, 16 Mich. 326.

New Hampshire.— Hoit *v.* Molony, 2 N. H. 322.

New Jersey.— Excelsior Electric Co. *v.* Sweet, 59 N. J. L. 441, 31 Atl. 721.

New York.— Dox *v.* Dey, 3 Wend. 356; Curtiss *v.* Lawrence, 17 Johns. 111.

North Carolina.— Grist *v.* Hodges, 14 N. C. 198.

Wisconsin.— Pierce *v.* Northey, 14 Wis. 9.

Summary of law on the subject.— The supreme court of New Hampshire, in the well-considered case of Taylor *v.* Jones, 42 N. H. 25, 38, gave the following summary of the law on this question: "From a careful comparison of the various authorities, we are satisfied that the reasonable rule, in relation to amendments after verdict, and one which reconciles most, if not all of the numerous decisions, would be, that where the verdict is for a sum larger than the *ad damnum*, the difficulty may always be remedied by entering a remittitur for the excess; that the *ad damnum* may be amended after verdict, when it is apparent from the declaration itself that it was left blank, or too small a sum inserted, through mistake or inadvertence only; that if there has been a full and fair trial on the merits appearing on the face of the declaration, without any knowledge by either party of the defect, judgment may be rendered without a new trial; but that, if it does not appear that the defendant had no knowledge of the defect, the amendment may be made, but a new trial must be granted, to give him an opportunity to contest the enlarged demand; that, in actions sounding in damages only, where the plaintiff deliberately estimates the injury to himself, and there is only a difference in judgment betwen the jury and himself, as to the nature, extent and aggravation of the injury, no amendment increasing the *ad damnum* to cover the verdict will be allowed, and the only remedy for an excessive verdict is a remittitur; yet, that the court, in their discretion, may allow the *ad damnum* to be increased, in any case, where, after a full and fair trial upon the merits the defendant claims or insists upon an appeal or review."

Formal remittitur unnecessary.—Instead of filing a formal remittitur plaintiff may merely make up the record for the sum claimed in the pleadings. There is no error until he attempts to take more than he originally demanded. Dox *v.* Dey, 3 Wend. (N. Y.) 356.

6. Tomlinson *v.* Earnshaw, 112 Ill. 311.

7. New York Home Ins. Co. *v.* Wagner, 9 Kan. App. 93, 57 Pac. 1049; Excelsior Electric Co. *v.* Sweet, 59 N. J. L. 441, 31 Atl. 721.

8. *Maine.*— McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Luddington *v.* Goodnow, 168 Mass. 223, 46 N. E. 627.

Missouri.— McClannahan *v.* Smith, 76 Mo. 428.

New Hampshire.— Taylor *v.* Jones, 42 N. H. 25; Whittier *v.* Varney, 10 N. H. 291.

New York.— Arrigo *v.* Catalano, 7 Misc. 515, 27 N. Y. Suppl. 995; Davis *v.* Smith, 14 How. Pr. 187; Hoffnagle *v.* Leavitt, 7 Cow. 517.

South Carolina.— Givens *v.* Proteous, 2 McCord 48.

And see Johnson *v.* Crawford, 144 Fed. 905.

9. Kenyon *v.* Woodward, 16 Mich. 326;

in damages only, where plaintiff deliberately estimates the injury to himself, no amendment increasing the *ad damnum* so as to cover the verdict will be allowed.[10] In any event an amendment after verdict increasing damages should not be permitted where there is no evidence on which to base it.[11]

(3) After Judgment.[12] After judgment an unconditional order allowing an amendment increasing the damages is not allowable.[13] The amendment should only be granted on condition of assenting to a new trial if defendant so elected.[14]

o. **Profert and Oyer.** Failure to make profert may be cured by amendment,[15] and failure to crave oyer may be remedied in a like manner.[16] If profert is made and it develops that the instrument cannot be produced, the pleading may be amended, leaving out the profert and inserting an excuse for not making it,[17] and this amendment excusing profert may be made after verdict.[18]

p. **Right, Title, or Interest.** The title or interest which a party has in the subject-matter of the controversy, or the manner in which such title was obtained, when not shown in the original pleadings, may be set forth in an amendment,[19] and if the title or right of action accrues under a statute, such fact may be alleged

Taylor *v.* Jones, 42 N. H. 25; Hoit *v.* Moloney, 2 N. H. 322; Excelsior Electric Co. *v.* Sweet, 59 N. J. L. 441, 31 Atl. 721; Tomlinson *v.* Blacksmith, 7 T. R. 132.

10. Taylor *v.* Jones, 42 N. H. 25; Corning *v.* Corning, Code Rep. N. S. (N. Y.) 351; Curtiss *v.* Lawrence, 17 Johns. (N. Y.) 111.

11. Clark *v.* San Francisco, etc., R. Co., 142 Cal. 614, 76 Pac. 507.

12. Amendments after judgment generally see *supra*, VII, A, 10, x.

13. Kenyon *v.* Woodward, 16 Mich. 326. See also McLellan *v.* Crofton, 6 Me. 307.

14. Kenyon *v.* Woodward, 16 Mich. 326.

15. Ligon *v.* Bishop, 43 Miss. 527; Bowles *v.* Elmore, 7 Gratt. (Va.) 385.

16. State University *v.* Winston, 5 Stew. & P. (Ala.) 17.

17. Meriam *v.* State, 7 Blackf. (Ind.) 245; Jansen *v.* Ball, 6 Cow. (N. Y.) 628.

18. Jansen *v.* Ball, 6 Cow. (N. Y.) 628.

19. *Alabama.*— Lister *v.* Vowell, 122 Ala. 264, 25 So. 564; Lytle *v.* Dothan Bank, 121 Ala. 215, 26 So. 6; Crimm *v.* Crawford, 29 Ala. 623.

Colorado.— Messenger *v.* Northcutt, 26 Colo. 527, 58 Pac. 1090.

Connecticut.— Mechanics' Bank *v.* Woodward, 74 Conn. 689, 51 Atl. 1084; Baldwin *v.* Walker, 21 Conn. 168.

Delaware.—Cirwithin *v.* Mills, 2 Marv. 232, 43 Atl. 151.

Georgia.— McCandless *v.* Inland Acid Co., 115 Ga. 968, 42 S. E. 449; Haralson County *v.* Golden, 104 Ga. 19, 30 S. E. 380; Roush *v.* Charleston First Nat. Bank, 103 Ga. 109, 29 S. E. 144; King *v.* McGhee, 99 Ga. 621, 25 S. E. 849; Jones *v.* Hurst, 95 Ga. 286, 22 S. E. 122; Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517.

Iowa.— McCarn *v.* Rivers, 7 Iowa 404.

Louisiana.— Payne *v.* Burlow, 29 La. Ann. 160; Spencer *v.* Conrad, 9 Rob. 78.

Maine.— Waterman *v.* Dockray, 79 Me. 149, 8 Atl. 685.

Massachusetts.— Boston Overseers of Poor *v.* Otis, 20 Pick. 38; Slater *v.* Nason, 15 Pick. 345; Williams *v.* Higham, etc., Turnpike Corp., 4 Pick. 341.

Michigan.— Pratt *v.* Montcalm Cir. Judge, 105 Mich. 499, 63 N. W. 506; McCammon *v.* Detroit, etc., R. Co., 66 Mich. 442, 33 N. W. 728.

Missouri.— Ross *v.* Cleveland, etc., Land Co., 162 Mo. 317, 62 S. W. 984.

New York.— Lyman *v.* Kurtz, 166 N. Y. 274, 59 N. E. 903; Avery *v.* New York Cent., etc., R. Co., 106 N. Y. 142, 12 N. E. 619; Moore *v.* Moore, 44 N. Y. App. Div. 253, 60 N. Y. Suppl. 653; Richmond *v.* Second Ave. R. Co., 9 Misc. 355, 29 N. Y. Suppl. 588.

Ohio.— Baltimore, etc., R. Co. *v.* Gibson, 41 Ohio St. 145.

Rhode Island.— Prefontaine *v.* Roberge, 20 R. I. 418, 39 Atl. 892.

South Carolina.— Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84; Reams *v.* Spann, 28 S. C. 530, 6 S. E. 325.

Tennessee.— Nance *v.* Thompson, 1 Sneed 321.

Texas.— Becton *v.* Alexander, 27 Tex. 659; Gordon *v.* Mackey, (Civ. App. 1895) 30 S. W. 586; Hastings *v.* Kellogg, (Civ. App. 1894) 24 S. W. 846. Even an amendment adding a new cause of action will be allowed upon payment of costs. Hopkins *v.* Wright, 17 Tex. 30.

Vermont.— Bowman *v.* Stowell, 21 Vt. 309. permitting an amendment averring that plaintiff was bearer of a note and sued in that capacity.

Wisconsin.— Stroebe *v.* Fehl, 22 Wis. 337.

Canada.— Mireault *v.* Parker, 7 Quebec Pr. 450.

See 39 Cent. Dig. tit. "Pleading," § 682.

A party suing on an account as assignee cannot amend so as to declare on an account stated immediately between the parties. Ivy Coal, etc., Co. *v.* Long, 139 Ala. 535, 36 So. 722.

That a party is suing for a municipality not for himself individually may be shown by amendment. People *v.* Fields, 50 How. Pr. (N. Y.) 481.

in an amendment to the original pleadings,[20] provided the amendment does not introduce a new cause of action.[21] Where the ground of plaintiff's claim is possession, an amendment changing the basis of the right from ownership to that of a mortgagee may be allowed after the evidence is closed, where defendant could not be prejudiced or surprised thereby.[22]

q. Statutory Actions.[23] An amendment completely changing the statutory grounds of an action is not permissible;[24] however, where the grounds are essentially the same, an action brought under one section of a statute may be altered so as to bring it under another section.[25] A complaint based on statutory grounds may be amended, like any other, by adding an allegation required by the statute or conforming pleadings to proof.[26]

r. Time, Allegations of. Allegations of time being in general not material,[27] the court may, in the exercise of its discretion, permit amendments altering or correcting errors in such allegations,[28] or supplying omissions therein,[29] or striking

20. *Massachusetts.*— Williams *v.* Hingham, etc., Bridge, etc., Corp., 4 Pick. 341.

New York.— Denair *v.* Brooklyn, 5 N. Y. Suppl. 835.

South Carolina.—Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84.

Texas.— Jacobs *v.* Cunningham, 32 Tex. 774.

United States.—Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282.

See 39 Cent. Dig. tit. "Pleading," § 682.

21. See *supra*, VII, A, 11, a, (III). And see Barron *v.* Walker, 80 Ga. 121, 7 S. E. 272; Royse *v.* May, 93 Pa. St. 454; Whaley *v.* Stevens, 21 S. C. 221; McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

22. Tiffany *v.* Henderson, 57 Iowa 490, 10 N. W. 884.

23. Changing statutory to common-law action and vice versa see *supra*, VII, A, 11, f, (VI).

24. Farmer *v.* Portland, 63 Me. 46; Milliken *v.* Whitehouse, 49 Me. 527; Smith *v.* Prior, 58 Minn. 247, 59 N. W. 1016; Rowell *v.* Janvrin, 69 Hun (N. Y.) 305, 23 N. Y. Suppl. 481.

25. Louisville, etc., R. Co. *v.* Robinson, 141 Ala. 325, 37 So. 431; Gray *v.* Everett, 163 Mass. 77, 39 N. E. 774.

26. Clough *v.* Rocky Mountain Oil Co., 25 Colo. 520, 55 Pac. 809; Arlington *v.* Lyons, 131 Mass. 328; Mitchell *v.* Tibbetts, 17 Pick. (Mass.) 298.

In statutory actions for causing death.— Necessary allegations when omitted from the original complaint may be added by amendment, provided there is enough to amend by (Sugarman *v.* Atlanta Consol. St. R. Co., 94 Ga. 604, 21 S. E. 581; Ellison *v.* Georgia R. Co., 87 Ga. 691, 13 S. E. 809; Haynie *v.* Chicago, etc., R. Co., 9 Ill. App. 105); if, however, there is not enough to amend by the amendment may be refused (Smith *v.* East, etc., R. Co., 84 Ga. 183, 10 S. E. 602; Bell *v.* Central R. Co., 73 Ga. 520).

27. Duffy *v.* Patten, 74 Me. 396; Ripley *v.* Hebron, 60 Me. 379; Little *v.* Blunt, 16 Pick. (Mass.) 359; Critelli *v.* Rodgers, 87 Hun (N. Y.) 530, 34 N. Y. Suppl. 479 [*affirmed* in 151 N. Y. 675, 46 N. E. 1146]; Phillips *v.* Shaw, 4 B. & Ald. 435, 6 E. C. L. 549; Coxon *v.* Lyon, 2 Campb. 307 note. See also Lion *v.* Burtis, 18 Johns. (N. Y.) 510; Mellor *v.* Walker, 2 Saund. 4, 5 note, 85 Eng. Reprint 533.

28. *Delaware.*— E. F. Kirwan Mfg. Co. *v.* Truxton, 1 Pennew. 409, 42 Atl. 988.

Georgia.— Quillian *v.* Johnson, 122 Ga. 49, 49 S. E. 801.

Illinois.— Benson *v.* Arnold, 75 Ill. App. 610.

Indian Territory.— Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

Kansas.— Kansas Pac. R. Co. *v.* Kunkel, 17 Kan. 145; Wilson *v.* Phillips, 8 Kan. 211.

Louisiana.— Bissell *v.* Erwin, 13 La. 143.

Maine.— Ripley *v.* Hebron, 60 Me. 379; Moore *v.* Boyd, 24 Me. 242; Hammat *v.* Russ, 16 Me. 171.

New Hampshire.— Harvey *v.* Northwood, 65 N. H. 117, 19 Atl. 653.

New Jersey.— North River Meadow Co. *v.* Christ Church, 15 N. J. L. 52.

New York.— Ladrick *v.* Green Island, 103 N. Y. App. Div. 71, 92 N. Y. Suppl. 622; Critelli *v.* Rodgers, 87 Hun 530, 34 N. Y. Suppl. 479 [*affirmed* in 151 N. Y. 675, 46 N. E. 1146]; Rogers *v.* Sattler, 28 Misc. 242, 58 N. Y. Suppl. 1073; Lion *v.* Burtis, 18 Johns. 510.

Pennsylvania.— Little *v.* Fairchild, 195 Pa. St. 614, 46 Atl. 133; Beates *v.* Retallick, 23 Pa. St. 288; Bailey *v.* Musgrave, 2 Serg. & R. 219; Coates *v.* Hamilton, 2 Dall. 256, 1 L. ed. 371.

Rhode Island.— Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300.

South Carolina.— Dent *v.* South-Bound R. Co., 61 S. C. 329, 39 S. E. 527; Morrow *v.* Morrow, 2 Mill 109.

Utah.— Walton *v.* Jones, 7 Utah 462, 27 Pac. 580.

Washington.—Morgan *v.* Morgan, 10 Wash. 99, 38 Pac. 1054.

See 39 Cent. Dig. tit. "Pleading," §§ 648, 695.

29. *Colorado.*— Cooper *v.* McKeen, 11 Colo. 41, 17 Pac. 97.

Connecticut.— Nash *v.* Adams, 24 Conn. 33.

Indiana.—Numbers *v.* Browser, 29 Ind. 491.

Maine.— South Thomaston *v.* Friendship, 95 Me. 201, 49 Atl. 1056; Duffy *v.* Patten, 74 Me. 396.

out matters therefrom.[30] A cause of action which, as stated, is barred by the statute of limitations may be amended by changing the date when the cause of action is alleged to have risen, although by doing so it appears that the cause of action is not barred;[31] but a cause of action not barred may not, under pretense of amendment of allegation of time, be substituted for one barred by the statute.[32] A petition to recover for breach of contract covering a certain period may not be amended to include items of an earlier or later date.[33] These amendments may be made before trial,[34] at the commencement of the trial,[35] during the trial,[36] after a finding by the court,[37] or after verdict.[38]

s. Torts.[39] Whether an amendment will be allowed in an action *ex delicto* depends greatly on the particular circumstances in each case, the courts being very liberal in the matter and imposing in general only the limitation that the original cause of action shall not be substantially changed nor a new cause introduced.[40] Within the limits of this condition the grounds of the claim in a tort action may be made more definite and particular.[41]

Michigan.— Niemarck *v.* Schwartz, 51 Mich. 466, 16 N. W. 815.

See 39 Cent. Dig. tit. "Pleading," § 648.

30. Stewart *v.* Thayer, 170 Mass. 560, 49 N. E. 1020.

31. Kansas Pac. R. Co. *v.* Kunkel, 17 Kan. 145; Bremond *v.* Johnson, 1 Tex. App. Civ. Cas. § 609; Longino *v.* Ward, 1 Tex. App. Civ. Cas. § 521.

Amendment changing date relates back to time when the cause of action is declared on, and the statute of limitations does not run in the interim. Bremond *v.* Johnson, 1 Tex. App. Civ. Cas. § 609.

32. Kansas Pac. R. Co. *v.* Kunkel, 17 Kan. 145; Thouvenin *v.* Lea, 26 Tex. 612; Bremond *v.* Johnson, 1 Tex. App. Civ. Cas. § 609.

33. Parkman *v.* Nutting, 59 Me. 398; Lennox *v.* Vandalia Coal Co., 158 Mo. 473, 59 S. W. 242; Governor *v.* Burnett, 27 Tex. 32. See, however, Ripley *v.* Hebron, 60 Me. 379, where an amendment was allowed, although it enlarged the time for which recovery was originally sought.

34. Lion *v.* Burtis, 18 Johns. (N. Y.) 510.

35. Duffy *v.* Patten, 74 Me. 396.

36. Cooper *v.* McKeen, 11 Colo. 41, 17 Pac. 97; Smith *v.* Nash, 5 La. Ann. 575; Morrow *v.* Morrow, 2 Mill (S. C.) 109.

37. Numbers *v.* Bowser, 29 Ind. 491.

38. Bailey *v.* Musgrave, 2 Serg. & R. (Pa.) 219.

39. Actions against public officers see OFFICERS, 22 Cyc. 1466.

Actions for conversion see TROVER AND CONVERSION.

Actions for libel or slander see LIBEL AND SLANDER, 25 Cyc. 470 *et seq.*

Actions for malicious prosecution see MALICIOUS PROSECUTION, 26 Cyc. 82.

Actions for negligence see TORTS.

Actions for penalties see PENALTIES, 30 Cyc. 1356.

40. *California.*—Nevada County, etc., Canal Co. *v.* Kidd, 28 Cal. 673.

Colorado.— Connell *v.* El Paso Gold Min., etc., Co., 33 Colo. 30, 78 Pac. 677.

Connecticut.— Nash *v.* Adams, 24 Conn. 33.

Georgia.— Rome R. Co. *v.* Barnett, 89 Ga. 718, 15 S. E. 639; Van Pelt *v.* Chattanooga, etc., R. Co., 89 Ga. 706, 15 S. E. 622; Skidaway Shell Road Co. *v.* O'Brien, 73 Ga. 655.

Kentucky.— Hackett *v.* Louisville, etc., R. Co., 95 Ky. 236, 24 S. W. 871, 15 Ky. L. Rep. 621; Kehoe *v.* Booe, 54 S. W. 826, 21 Ky. L. Rep. 1181.

Louisiana.— Mitreaud *v.* Delassize, 13 La. 416.

Maine.— Holmes *v.* Gerry, 55 Me. 299.

Massachusetts.—Driscoll *v.* Holt, 170 Mass. 262, 49 N. E. 309 [*citing* Pub. St. (1898) c. 167, § 42].

Michigan.— People *v.* Judge Wayne Cir. Ct., 27 Mich. 164.

Nebraska.— Stratton *v.* Wood, 45 Nebr. 629, 63 N. W. 917; Omaha, etc., R. Co. *v.* Standen, 29 Nebr. 622, 46 N. W. 46; Omaha, etc., R. Co. *v.* Brown, 29 Nebr. 492, 46 N. W. 39; Carmichael *v.* Dolen, 25 Nebr. 335, 41 N. W. 178.

New Hampshire.— Taylor *v.* Duston, 43 N. H. 493. See also 38 N. H. 583, rule 16.

New York.— Dudley *v.* Scranton, 57 N. Y. 424; Simmons *v.* Lyons, 35 N. Y. Super. Ct. 554 [*affirmed* in 55 N. Y. 671]; Waldheim *v.* Sichel, 1 Hilt. 45; Freeman *v.* Grant, 8 N. Y. Suppl. 912.

Pennsylvania.— Fillman *v.* Ryon, 168 Pa. St. 484, 32 Atl. 89; Erie City Iron-Works *v.* Barber, 118 Pa. St. 6, 12 Atl. 411; Tyron *v.* Miller, 1 Whart. 11.

Vermont.— Daley *v.* Gates, 65 Vt. 591, 27 Atl. 193.

West Virginia.— Snyder *v.* Harper, 24 W. Va. 206.

Wisconsin.— Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55; O'Connor *v.* Chicago, etc., R. Co., 92 Wis. 612, 66 N. W. 795.

See 39 Cent. Dig. tit. "Pleading," § 680.

41. *Connecticut.*— Beers *v.* Woodruff, etc., Iron Works, 30 Conn. 308.

Georgia.— Western, etc., R. Co. *v.* Burnham, 123 Ga. 28, 50 S. E. 984; Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

Massachusetts.— Smith *v.* Thomson-Houston Electric Co., 188 Mass. 371, 74 N. E. 664; Hill *v.* Sayles, 12 Metc. 142.

Missouri.— Scoville *v.* Glasner, 79 Mo. 449.

Nebraska.— Carmichael *v.* Dolen, 25 Nebr. 335, 41 N. W. 178.

New Hampshire.— Connell *v.* Putnam, 58

t. Uncertainty and Indefiniteness. In case an original pleading is not sufficiently clear or specific, it is proper to allow an amendment making its allegations more definite and certain.[42] Thus an amendment which merely amplifies and explains more fully the original cause of action is allowable.[43] However, if no amplification of the original pleading is necessary a proposed amendment may be refused.[44] Pleadings may be made more definite and certain by inserting words[45] or counts,[46] by striking out words,[47] or by filing a more detailed statement of the facts.[48] However, an amendment itself may be refused on the ground that it is too indefinite and uncertain,[49] and an amendment which introduces uncertainty into the complaint is properly rejected.[50] Amendments to make more definite and certain may be made at the trial.[51]

u. Useless Amendments. Useless amendments should not be allowed.[52]

N. H. 335; Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438.

Pennsylvania.— Schnable *v.* Koehler, 28 Pa. St. 181.

South Carolina.— Morrow *v.* Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573; Sullivan *v.* Sullivan, 24 S. C. 474.

Texas.— Silberberg *v.* Trilling, 82 Tex. 523, 18 S. E. 591; International, etc., R. Co. *v.* Boykin, 32 Tex. Civ. App. 72, 74 S. W. 93; Gulf, etc., R. Co. *v.* Richards, 11 Tex. Civ. App. 95, 32 S. W. 96.

Vermont.— Houghton *v.* Holt, 51 Vt. 475.

42. *Arkansas.*— Trippe *v.* Du Val, 33 Ark. 811.

Georgia.— Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787; Hayden *v.* Burney, 89 Ga. 715, 15 S. E. 623; Rice *v.* Caudle, 71 Ga. 605; Finney *v.* Cadwallader, 55 Ga. 75.

Illinois.— Chicago, etc., R. Co. *v.* Gillison, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117. See also Hansell-Elcock Foundry Co. *v.* Clark, 115 Ill. App. 209 [*affirmed* in 214 Ill. 399, 73 N. E. 787].

Iowa.— Hintrager *v.* Richter, 85 Iowa 222, 52 N. W. 188.

Louisiana.— Delisle *v.* Bourriague, 105 La. 77, 29 So. 731, 54 L. R. A. 420.

Maine.— Thornton *v.* Townsend, 39 Me. 181.

Massachusetts.— Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115; Gay *v.* Homer, 13 Pick. 535.

Michigan.— Harris *v.* Chamberlain, 126 Mich. 280, 85 N. W. 728.

Montana.— Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007.

Nebraska.— Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28.

New York.— Hauck *v.* Craighead, 4 Hun 561; Vanderbilt *v.* Accessory Transit Co., 9 How. Pr. 352.

Pennsylvania.— Hunter *v.* Land, 81* Pa. St. 296; Smith *v.* Smith, 5 Pa. St. 254; Thompson *v.* Chambers, 13 Pa. Super. Ct. 213; Adam *v.* Moll, 6 Pa. Super. Ct. 380; Com. *v.* Yeisley, 6 Pa. Super. Ct. 273.

Texas.— Hanrick *v.* Hanrick, 63 Tex. 618.

Virginia.— Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

England.— Pratt *v.* Hanbury, 14 Q. B. 190, 13 Jur. 1003, 19 L. J. Q. B. 17, 68 E. C. L. 190; Harris *v.* Jenkins, 22 Ch. D. 481, 52 L. J. Ch. 437, 47 L. T. Rep. N. S. 570, 31 Wkly. Rep. 137; Cocksedge *v.* Metropolitan Coal Consumer's Assoc., 64 L. T. Rep. N. S. 826, 39 Wkly. Rep. 637.

Canada.— Townsend *v.* O'Keefe, 18 Ont. Pr. 147.

See 39 Cent. Dig. tit. "Pleading," § 678.

43. *Colorado.*— Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269.

Georgia.— Woodward *v.* Miller, 119 Ga. 618, 46 S. E. 847, 100 Am. St. Rep. 188, 64 L. R. A. 932; Woodley *v.* Coker, 119 Ga. 226, 42 S. E. 89; Georgia Cent. R. Co. *v.* Mosely, 112 Ga. 914, 38 S. E. 350; Craven *v.* Walker, 101 Ga. 845, 29 S. E. 152.

Missouri.— Hasler *v.* Ozark Land, etc., Co., 101 Mo. App. 136, 74 S. W. 465.

New York.— Rosseau *v.* Rouss, 91 N. Y. App. Div. 230, 86 N. Y. Suppl. 497 [*reversed* on other grounds in 180 N. Y. 116, 72 N. E. 916].

Texas.— Missouri Pac. R. Co. *v.* Foreman, (Civ. App. 1898) 46 S. W. 834.

44. White *v.* Southern R. Co., 123 Ga. 353, 51 S. E. 411. See also Torian *v.* Terrell, 122 Ky. 745, 93 S. W. 10, 29 Ky. L. Rep. 306, holding that refusal of permission to file an amended petition, merely setting forth in more elaborate form matters of evidence stricken from the original petition, is proper.

45. Gay *v.* Homer, 13 Pick. (Mass.) 535.

46. Smith *v.* Smith, 5 Pa. St. 254.

47. Thornton *v.* Townsend, 39 Me. 181.

48. Hanrick *v.* Hanrick, 63 Tex. 618.

49. Byrd *v.* Campbell Printing Press, etc., Co., 90 Ga. 542, 16 S. E. 267.

50. Hughes *v.* Austin, 12 Tex. Civ. App. 178, 33 S. W. 607.

51. Tullock *v.* Mulvane, 61 Kan. 650, 60 Pac. 749 [*distinguishing* Walker *v.* O'Connell, 59 Kan. 306, 52 Pac. 894].

52. *California.*— Shepard *v.* McNeil, 38 Cal. 72; Levinson *v.* Schwartz, 22 Cal. 229.

Georgia.— Malcolm *v.* Dobbs, 127 Ga. 487, 56 S. E. 622.

Indiana.— Crassen *v.* Swoveland, 22 Ind. 427.

Iowa.— Bay *v.* Monroe County, 121 Iowa 302, 96 N. W. 854; Allison *v.* Barrett, 16 Iowa 278.

Missouri.— Steinhauser *v.* Spraul, 114 Mo. 551, 21 S. W. 515, 859.

Thus there is no error in refusing an amended plea or answer which states no matter of defense that could not be made under the original.[53] Refusal to allow an amendment is not error where the same measure of relief is available without it.[54] And an amendment which will still leave the cause of action [55] or defense [56] incomplete should be refused. The court will not consider an amendment to the complaint stating a fact which virtually extinguishes plaintiff's cause of action, but will dismiss the suit.[57] But an amended complaint will not be refused on the ground that it sets out a cause of action which cannot be established unless it appears conclusively that such amendment cannot possibly avail the party asking it.[58]

v. Variance Between Writ and Declaration. Where a variance exists between the declaration and the writ the former may be amended so as to avoid the defect.[59] And it has been held even where there is no variance between the summons and the complaint, both being in the name of plaintiff, without more, that the complaint may be amended to show that plaintiff sues as administrator.[60] But where the writ is bad the declaration cannot be amended by it.[61] In any case, a variance between the declaration and the writ must be corrected in the trial court. The supreme court has no authority to allow such amendment.[62]

Nebraska.— Marshall *v.* Goble, 32 Nebr. 9, 48 N. W. 898.

New York.— Steinhauser *v.* Mason, 19 N. Y. Suppl. 228; Hamilton *v.* Hough, 13 How. Pr. 14.

53. *Arkansas.*— White River R. Co. *v.* Batesville, etc., Tel. Co., 81 Ark. 195, 98 S. W. 721.

California.— Dorn *v.* Baker, 96 Cal. 206, 31 Pac. 37.

Connecticut.— Fogil *v.* Boody, 76 Conn. 194, 56 Atl. 526.

Kentucky.— O'Banion *v.* Goodrich, 62 S. W. 1015, 23 Ky. L. Rep. 313.

Louisiana.— Smith *v.* Rock Island, etc., R. Co., 119 La. 537, 44 So. 290.

Maryland.— Gordon *v.* Downey, 1 Gill 41.

New York.— Recknagel *v.* Steinway, 58 N. Y. App. Div. 624, 69 N. Y. Suppl. 140; Schultz *v.* Greenwood Cemetery, 46 Misc. 299, 93 N. Y. Suppl. 180; Hurlburt *v.* Interior Conduit, etc., Co., 8 Misc. 100, 28 N. Y. Suppl. 1007.

Washington.— Vulcan Iron Works *v.* Burrell Constr. Co., 39 Wash. 319, 81 Pac. 836.

United States.— Gardner *v.* Crossman, 11 Fed. 851.

54. Mansfield *v.* Wilkerson, 26 Iowa 482. See also Gardner *v.* Jaques, 54 Ind. 566.

55. *California.*— Kern Island Irr. Co. *v.* Bakersfield, 151 Cal. 403, 90 Pac. 1052.

Georgia.— Georgia R. Co. *v.* Ellison, 87 Ga. 691, 13 S. E. 809.

Kentucky.— Sydner *v.* Mt. Sterling Nat. Bank, 29 S. W. 326, 16 Ky. L. Rep. 618.

Mississippi.— Sharman *v.* Staten, (1891) 8 So. 851.

New Hampshire.— Gilman *v.* Meredith School Dist., 18 N. H. 215.

Wisconsin.— Smith *v.* Gould, 61 Wis. 31, 20 N. W. 369.

See 39 Cent. Dig. tit. "Pleading," § 734.

If an amended complaint would not be sustained on demurrer it is properly refused (Beavers *v.* Hardie, 59 Ala. 570), and an amended complaint demurrable on its face cannot be served as an amendment to an earlier complaint adjudged insufficient (Tovey *v.* Culver, 54 N. Y. Super. Ct. 404).

After demurrer sustained to the original answer, an amended answer containing no material change should be rejected. Recknagel *v.* Steinway, 58 N. Y. App. Div. 624, 69 N. Y. Suppl. 140.

After a pleading has been adjudged insufficient on demurrer leave should not be given to file it again as an amendment. Pennington *v.* Ware, 16 Ark. 120.

An amended petition containing only the allegations found in the original is properly refused. Woman's College *v.* Horne, (Tenn. Ch. App. 1900) 60 S. W. 609.

56. McGregor *v.* Skinner, (Tex. Civ. App. 1898) 47 S. W. 398.

57. Oakey *v.* Murphy, 1 La. Ann. 372.

58. Campbell *v.* Campbell, 1 Silv. Sup. (N. Y.) 140, 5 N. Y. Suppl. 171.

59. *Alabama.*— Ikelheimer *v.* Chapman, 32 Ala. 676.

Colorado.— Gilpin *v.* Ebert, 2 Colo. 23.

Missouri.— Middleton *v.* Frame, 21 Mo. 412.

New York.— Bannerman *v.* Quackenbush, 11 Daly 529; Fallmer *v.* Steele, 1 Cai. 22.

Pennsylvania.— Sherer *v.* Easton Bank, 33 Pa. St. 134.

Texas.— Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551.

West Virginia.— Courson *v.* Parker, 39 W. Va. 521, 20 S. E. 583.

See 39 Cent. Dig. tit. "Pleading," § 651.

If, in a suit by an administrator, the complaint is in his name individually, and the summons is in his representative capacity, the former may be amended so as to conform with the latter. Ikelheimer *v.* Chapman, 32 Ala. 676.

60. Agee *v.* Williams, 30 Ala. 636.

61. Johnson *v.* Commonwealth Bank, 5 T. B. Mon. (Ky.) 119.

62. Glisson *v.* Herring, 13 N. C. 156.

w. Variance Between Pleading and Proof[63] — (i) *In General.* The common-law rule requiring conformity of allegation and proof has not been materially changed by the codes and modern practice acts. The consequences of a variance, however, are not so prejudicial as under the common-law practice. Then a variance was fatal to the action, but now any amendment necessary in order to make pleadings conform to proof may usually be made upon reasonable terms.[64] In general pleadings, in the absence of any objection to the evidence, may be amended to conform to the proof,[65] where the opposite party

63. As to place see *supra*, VII, A, 11, m. **In suits on written instruments** see *infra*, VII, A, 11, x, (II).

64. Hoben *v.* Burlington, etc., R. Co., 20 Iowa 562.

65. *Alabama.*—Tapscott *v.* Gibson, 129 Ala. 503, 30 So. 23; Burkham *v.* Mastin, 54 Ala. 122, allowing a charge in the terms of the contract alleged so as to make them conform to the evidence produced at the trial.

Arizona.—Consolidated Canal Co. *v.* Peters, 5 Ariz. 80, 46 Pac. 74.

Arkansas.— McNutt *v.* McNutt, 78 Ark. 346, 95 S. W. 778.

California.— Hancock *v.* Santa Barbara Bd. of Education, 140 Cal. 554, 74 Pac. 44; Carter *v.* Lothian, 133 Cal. 451, 65 Pac. 962; Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560; Clark *v.* Phœnix Ins. Co., 36 Cal. 168; Stringer *v.* Davis, 30 Cal. 318; Maionchi *v.* Nicholini, 1 Cal. App. 690, 82 Pac. 1052.

Colorado.— Kilham *v.* Western Bank, etc., Co., 30 Colo. 365, 70 Pac. 409; Gelwicks *v.* Todd, 24 Colo. 494, 52 Pac. 788; Manners *v.* Fraser, 6 Colo. App. 21, 39 Pac. 889.

Georgia.— Martin *v.* Philips, 4 Ga. 203.

Illinois.— Franke *v.* Hanly, 215 Ill. 216, 74 N. E. 130.

Indiana.— New Castle Bridge Co. *v.* Doty, 168 Ind. 259, 79 N. E. 485; Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19; Smith *v.* Flack, 95 Ind. 116; Diltz *v.* Spahr, 16 Ind. App. 591, 45 N. E. 1066; Warden *v.* Nolan, 10 Ind. App. 334, 37 N. E. 821; Sanford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204, 27 N. E. 448.

Indian Territory.— Patrick *v.* Missouri, etc., R. Co., (1904) 88 S. W. 330.

Iowa.— Williams Shoe Co. *v.* Gotzian, 130 Iowa 710, 107 N. W. 807; Johnson *v.* Farmers' Ins. Co., 126 Iowa 565, 102 N. W. 502; Cole *v.* Laird, 121 Iowa 146, 96 N. W. 744; Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249; Weiland *v.* Ehlers, 107 Iowa 186, 77 N. W. 855; Correll *v.* Glasscock, 26 Iowa 83 (amendment allowed at the close of the evidence and not filed until the next day after the verdict); Hoben *v.* Burlington, etc., R. Co., 20 Iowa 562.

Kansas.—Minneapolis Threshing-Mach. Co. *v.* Currey, 75 Kan. 365, 89 Pac. 688; Tullock *v.* Mulvane, 61 Kan. 650, 60 Pac. 749.

Kentucky.— Hobbs *v.* Ray, 96 S. W. 589, 29 Ky. L. Rep. 999; Kleimeir *v.* Covington Perpetual Bldg., etc., Assoc., 70 S. W. 41, 24 Ky. L. Rep. 735; Harris-Seller Banking Co. *v.* Bond, 47 S. W. 764, 20 Ky. L. Rep. 897; Taylor *v.* Arnold, 17 S. W. 361, 13 Ky. L. Rep. 516, permitting a more definite description of a division line, over which the controversy waged, but emphasizing the limitation that the cause of action must not be changed.

Massachusetts.— Manning *v.* Conway, 192 Mass. 122, 78 N. E. 401; Locke *v.* Kennedy, 171 Mass. 204, 50 N. E. 531; Nichols *v.* Prince, 8 Allen 404; Stone *v.* White, 8 Gray 589; Cleaves *v.* Lord, 3 Gray 66.

Michigan.— Harris *v.* Thomas, 140 Mich. 462, 103 N. W. 863; Hathaway *v.* Detroit, etc., R. Co., 124 Mich. 610, 83 N. W. 598; Thomas *v.* Ann Arbor R. Co., 114 Mich. 59, 72 N. W. 40; Rathbun *v.* Parker, 113 Mich. 594, 72 N. W. 31; Ross *v.* Ionia Tp., 104 Mich. 320, 62 N. W. 401; Shearer *v.* Middleton, 88 Mich. 621, 50 N. W. 737.

Minnesota.— Maul *v.* Steele, 95 Minn. 292, 104 N. W. 4; Dougan *v.* Turner, 51 Minn. 330, 53 N. W. 650.

Missouri.— Granby Min., etc., Co. *v.* Davis, 156 Mo. 422, 57 S. W. 126; Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Howell *v.* Stewart, 54 Mo. 400; Stephens *v.* Frampton, 29 Mo. 263; Studenroth *v.* Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487; Howard *v.* Shirley, 75 Mo. App. 150; Sinclair *v.* Missouri, etc., R. Co., 70 Mo. App. 588.

Montana.— Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918.

Nebraska.— German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106; Hanover F. Ins. Co. *v.* Stoddard, 52 Nebr. 745, 73 N. W. 291.

New Hampshire.— Whitten *v.* Stockwell, 68 N. H. 602, 44 Atl. 81.

New Jersey.— Redstrake *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 294; American Popular L. Ins. Co. *v.* Day, 39 N. J. L. 89, 23 Am. Rep. 198.

New York.— Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717 [*affirming* 30 N. Y. App. Div. 498, 52 N. Y. Suppl. 464]; Nichols *v.* Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561 [*affirming* 18 N. Y. Suppl. 623]; Hall *v.* Gould, 13 N. Y. 127; Corning *v.* Corning, 6 N. Y. 97; Martin *v.* Flahive, 112 N. Y. App. Div. 347, 98 N. Y. Suppl. 577; Harris *v.* Harris, 83 N. Y. App. Div. 123, 82 N. Y. Suppl. 568; Schoonmaker *v.* Hillaird, 55 N. Y. App. Div. 140, 67 N. Y. Suppl. 160; Russell *v.* Corning Mfg. Co., 49 N. Y. App. Div. 610, 63 N. Y. Suppl. 640; Charlton *v.* Rose, 24 N. Y. App. Div. 485, 48 N. Y. Suppl. 1073; Shanley *v.* Shanley, 22 N. Y. App. Div. 375, 48 N. Y. Suppl. 32; Tannenbaum *v.* Armeny, 81 Hun 581, 31 N. Y. Suppl. 55; P. H., etc., Roots Co. *v.* New York Foundry Co., 54 Misc. 635, 104 N. Y. Suppl. 785; Scanlon *v.* Wallach, 53 Misc. 104, 102 N. Y. Suppl. 1090; Rein *v.* Brooklyn Heights

is not surprised thereby,[66] and where no new cause of action or defense is

R. Co., 47 Misc. 675, 94 N. Y. Suppl. 636; National Bank of Deposit *v.* Sardy, 26 Misc. 555, 57 N. Y. Suppl. 625; Clokey *v.* International Rubber Clothing, etc., Co., 22 Misc. 518, 49 N. Y. Suppl. 1014 [*affirmed* in 23 Misc. 773, 53 N. Y. Suppl. 1102]; Dermody *v.* Flesher, 22 Misc. 348, 49 N. Y. Suppl. 150; Moscowitz *v.* Homberger, 19 Misc. 429, 43 N. Y. Suppl. 1130; Charwat *v.* Vopelak, 18 Misc. 601, 42 N. Y. Suppl. 235; Flynn *v.* Westmayer, 4 N. Y. Suppl. 188; Corning *v.* Corning, Code Rep. N. S. 351.

North Carolina.— Nims Mfg. Co. *v.* Blythe, 127 N. C. 325, 37 S. E. 455; Waters *v.* Waters, 125 N. C. 590, 34 S. E. 548; North *v.* Bunn, 122 N. C. 766, 29 S. E. 776; Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748; Knott *v.* Taylor, 96 N. C. 553, 2 S. E. 680; Carpenter *v.* Huffsteller, 87 N. C. 273; Reynolds *v.* Smathers, 87 N. C. 24; Gilchrist *v.* Kitchen, 86 N. C. 20; March *v.* Verble, 79 N. C. 19; Battle *v.* Howell, 27 N. C. 378.

North Dakota.—Anderson *v.* Grand Forks First Nat. Bank, 5 N. D. 80, 64 N. W. 114.

Ohio.— Supreme Commandery O. K. G. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419.

Oregon.— Nunn *v.* Bird, 36 Oreg. 515, 59 Pac. 808 (citing Hill Annot. Laws, (1900) § 101); South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5; Davis *v.* Hannon, 30 Oreg. 192, 46 Pac. 785; Foster *v.* Henderson, 29 Oreg. 210, 45 Pac. 899; Clemens *v.* Hanley, 27 Oreg. 326, 41 Pac. 658; Garrison *v.* Goodale, 23 Oreg. 307, 31 Pac. 709; Baldock *v.* Atwood, 21 Oreg. 73, 26 Pac. 1058; Mitchell *v.* Campbell, 14 Oreg. 454, 13 Pac. 190; Hexter *v.* Schneider, 14 Oreg. 184, 12 Pac. 668; Henderson *v.* Morris, 5 Oreg. 24.

Pennsylvania.— Fisher *v.* Fidelity Mut. L. Assoc., 188 Pa. St. 1, 41 Atl. 637; Wall *v.* Royal Soc. G. F., 179 Pa. St. 355, 36 Atl. 748; Com. *v.* Mecklin, 2 Watts 130; Sharp *v.* Sharp, 13 Serg. & R. 444; Elder Tp. School Dist. *v.* Pennsylvania R. Co., 26 Pa. Super. Ct. 112; Hudson *v.* Watson, 11 Pa. Super. Ct. 266; Todd *v.* Quaker City Mut. F. Ins. Co., 9 Pa. Super. Ct. 381; Wright *v.* Warrior Run Min. Co., 8 Kulp 356.

South Carolina.— Adams *v.* South Carolina, etc., Extension R. Co., 68 S. C. 403, 47 S. E. 693; Burns *v.* Southern R. Co., 61 S. C. 404, 39 S. E. 567; Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948; Sullivan *v.* Latimer, 38 S. C. 417, 17 S. E. 221; Wadsworthville Poor School *v.* Bryson, 34 S. C. 401, 13 S. E. 619.

South Dakota.— Babcock *v.* Ormsby, 18 S. D. 358, 100 N. W. 759; Jenkinson *v.* Vermillion, 3 S. D. 238, 52 N. W. 1066.

Utah.— Murphy *v.* Ganey, 23 Utah 633, 66 Pac. 190; Thompson *v.* Whitney, 20 Utah 1, 57 Pac. 429.

Vermont.— Sumner *v.* Brown, 34 Vt. 194.

Virginia.— Alexandria, etc., R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289.

Washington.— Leaman *v.* Thompson, 43 Wash. 579, 86 Pac. 926; Gritman *v.* U. S. Fidelity, etc., Co., 41 Wash. 77, 83 Pac. 6; Irby *v.* Phillips, 40 Wash. 618, 82 Pac. 931.

West Virginia.—Lowson *v.* Williamson Coal, etc., Co., 61 W. Va. 669, 57 S. E. 258.

Wisconsin.— Hopkins *v.* Chicago, etc., R. Co., 128 Wis. 403, 107 N. W. 330; Kleimenhagen *v.* Dixon, 122 Wis. 526, 100 N. W. 826; Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; Thorn *v.* Smith, 71 Wis. 18, 36 N. W. 707; Phillips *v.* Jarvis, 19 Wis. 204; Gregory *v.* Hart, 7 Wis. 532; Brayton *v.* Jones, 5 Wis. 117.

United States.— Mathieson Alkali Works *v.* Mathieson, 150 Fed. 241, 80 C. C. A. 129; Post *v.* Wise Tp., 101 Fed. 204; Mack *v.* Porter, 72 Fed. 236, 18 C. C. A. 527. And where an amendment is made to conform pleadings to proof, the opposite party is not entitled to an order setting aside the submission of the cause for trial. Bamberger *v.* Terry, 103 U. S. 40, 26 L. ed. 317.

England.— Roe *v.* Davies, 2 Ch. D. 729, 23 Wkly. Rep. 606; Ellston *v.* Deacon, L. R. 2 C. P. 20; Betts *v.* Doughty, 5 P. D. 26, 48 L. J. P. D. & Adm. 71, 41 L. T. Rep. N. S. 560; Cater *v.* Wood, 19 C. B. N. S. 286, 115 E. C. L. 286; Metzner *v.* Bolton, 2 C. L. R. 685, 9 Exch. 518, 23 L. J. Exch. 130, 2 Wkly. Rep. 302; May *v.* Footner, 5 E. & B. 505, 1 Jur. N. S. 1019, 22 L. J. Q. B. 32, 4 Wkly. Rep. 9, 85 E. C. L. 505; Hailes *v.* Marks, 7 H. & N. 56, 7 Jur. N. S. 851, 30 L. J. Exch. 389, 4 L. T. Rep. N. S. 805, 9 Wkly. Rep. 808; Saunders *v.* Bate, 1 H. & N. 402.

Canada.— Piche *v.* Quebec. 5 Can. L. J. Occ. Notes 502; Belchler *v.* McDonald, 9 Brit. Col. 377; Lyman *v.* Cain, 8 N. Brunsw. 259; Zwicker *v.* Morash, 34 Nova Scotia 555; Dempster *v.* Fairbanks, 29 Nova Scotia 456; McDonald *v.* McKeen, 28 Nova Scotia 329; Bauld *v.* Challonder, 28 Nova Scotia 205; Gough *v.* Bench, 6 Ont. 699; Huron County *v.* Armstrong, 27 U. C. Q. B. 533.

See 39 Cent. Dig. tit. "Pleading," § 605.

Limitation of rule.— The rule permitting pleadings to be amended to conform to the proof does not apply where the evidence which it is claimed tends incidentally to establish a fact out of the issues was competent and relevant on the actual issues of the case. Unless the record shows that such evidence was offered to the knowledge of both parties to prove the fact foreign to the issues as well as the facts embraced within such issues, it will be presumed that it was introduced for the only purpose for which it was, under the pleadings, proper. Buxton *v.* Sargent, 7 N. D. 503, 75 N. W. 811. See also Spies *v.* Lockwood, 40 N. Y. App. Div. 296, 57 N. Y. Suppl. 1023.

66. *Colorado.*— Gelwicks *v.* Todd, 24 Colo. 494, 52 Pac. 788.

Iowa.— Correll *v.* Glasscock, 26 Iowa 83.

Massachusetts.— Beers *v.* McGinnis, 191 Mass. 279, 77 N. E. 768.

Missouri.— Stephens *v.* Frampton, 29 Mo. 263.

introduced.[67] And unless it appears in the record or can be shown by the party complaining that the amendment conforming the pleadings to the proof was made to his prejudice, it will be presumed that the trial court permitted the amendment for the furtherance of justice.[68] In any court the allowance of an unnecessary amendment to conform a pleading to proof cannot be urged as error.[69] Amendments conforming pleadings to proof will not be permitted for the purpose of making regular proceedings erroneous.[70] Where two or more parties are sued jointly, and a recovery may be had against one or more, according to the proof, the action may be dismissed as to one or more without a formal amendment, if a statute so provides.[71]

(II) *Discretion of Court in Allowing Amendment.* Amending pleadings to conform to proof is largely within the sound discretion of the court.[72] An amendment of a pleading to conform to the proof is properly refused, when the proposed amended pleading, even if clearly proved, constitutes no cause of action or defense,[73] or where the evidence can be introduced under the pleadings as they stood.[74] But it has been held error to refuse a party leave to amend and then grant a nonsuit or direct a verdict on the ground of variance between pleadings and proof.[75] A party should be allowed to amend his pleadings to conform to the proof produced at the trial, especially where his cause of action would otherwise be barred by the statute of limitations.[76]

(III) *Materiality of Variance* — (A) *In General.* Three degrees of variance between allegations and proof are recognized with more or less distinctness, immaterial variance, material variance, and failure of proof. An immaterial variance is one which is so slight that the opposite party is in no way prejudiced or misled by it, and this will either be disregarded or an immediate amendment

Montana.— Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918.

New York.— See Carlisle *v.* Barnes, 102 N. Y. App. Div. 582, 92 N. Y. Suppl. 924 [*affirming* 45 Misc. 6, 90 N. Y. Suppl. 810].

South Dakota.— Jenkinson *v.* Vermillion, 3 S. D. 238, 52 N. W. 1066.

United States.— Mack *v.* Porter, 72 Fed. 236, 18 C. C. A. 527.

See 39 Cent. Dig. tit. "Pleading," § 605. And see cases cited *supra*, preceding note. See also *supra*, VII, A, 10.

67. *Alabama.*— Tapscott *v.* Gibson, 129 Ala. 503, 30 So. 23.

California.— Hancock *v.* Santa Barbara Bd. of Education, 140 Cal. 554, 74 Pac. 44.

Indiana.— Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541; Sharpe *v.* Dillman, 77 Ind. 280; Record *v.* Ketcham, 76 Ind. 482; Maxwell *v.* Day, 45 Ind. 509; Hoot *v.* Spade, 20 Ind. 326; Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477.

Louisiana.— Sevin *v.* Caillouet, 30 La. Ann. 528.

Missouri.— Butcher *v.* Death, 15 Mo. 271.

North Carolina.— Carpenter *v.* Huffsteller, 87 N. C. 273.

Wisconsin.— Allen *v.* Brooks, 88 Wis. 265, 60 N. W. 253.

68. Chicago, etc., R. Co. *v.* Jones, 103 Ind. 386, 6 N. E. 8; Darrell *v.* Hilligoss, etc., Gravel Road Co., 90 Ind. 264; Martinsville *v.* Shirley, 84 Ind. 546; Child *v.* Swain, 69 Ind. 230; Durham *v.* Fechheimer, 67 Ind. 35; Burr *v.* Mendenhall, 49 Ind. 496; Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

69. McCready *v.* Staten Island Electric R. Co., 51 N. Y. App. Div. 338, 64 N. Y. Suppl. 996; Schumaker *v.* Hoeveler, 22 Wis. 43. See also Green *v.* Burr, 131 Cal. 236, 63 Pac. 360; Nichols, etc., Co. *v.* Dedrick, 61 Minn. 513, 63 N. W. 1110.

70. Williams *v.* Birch, 6 Bosw. (N. Y.) 674.

71. Wiggin *v.* Lewis, 12 Cush. (Mass.) 486.

72. *California.*— Hancock *v.* Santa Barbara Bd. of Education, 140 Cal. 554, 74 Pac. 44.

Iowa.— Weiland *v.* Ehlers, 107 Iowa 186, 77 N. W. 855; Ankrum *v.* Marshalltown, 105 Iowa 493, 75 N. W. 360.

Minnesota.— English *v.* Minneapolis, etc., R. Co., 96 Minn. 213, 104 N. W. 886.

Missouri.— Sinclair *v.* Missouri, etc., R. Co., 70 Mo. App. 588.

New York.— Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717; King *v.* Dorman, 26 Misc. 133, 55 N. Y. Suppl. 876.

South Carolina.— Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948.

United States.— Southern Express Co. *v.* Platten, 93 Fed. 936, 36 C. C. A. 46.

73. Bush *v.* Bank of Commerce, 38 Nebr. 403, 56 N. W. 989; Horbach *v.* Marsh, 37 Nebr. 22, 55 N. W. 286; Griswold *v.* Sedgwick, 1 Wend. (N. Y.) 126.

74. Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13.

75. German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106; Todd *v.* Quaker City Mut. F. Ins. Co., 9 Pa. Super. Ct. 381; Fox River Valley R. Co. *v.* Shoyer, 7 Wis. 365.

76. Martin *v.* Philips, 4 Ga. 203.

will be ordered without costs.[77] A material variance is one in which the difference is so considerable that, while the proof is within the general scope of the allegations, it is sufficient to mislead and prejudice the adverse party on the merits; in which case an amendment on terms will generally be allowed.[78] A failure of proof occurs when the evidence, in its whole scope and meaning, so far departs from the allegations as to prove something wholly different from what is alleged; in which case no amendment is allowed.[79] But there is some confusion in the use of these terms, some judges using the term "material variance" to indicate a variance sufficiently important to call for an amendment on terms, while others use it in the sense of failure of proof, rendering an amendment impossible.[80] Frequently a variance of such a nature that it should be regarded as material and corrected by an amendment in the court below if not so corrected will be held immaterial and disregarded on appeal.[81] Whether a variance between pleadings and proof is of such a nature as to require an amendment before the evidence can be considered, or whether it may be disregarded, is a matter that can be determined only by the circumstances of each particular case.[82]

77. *California.*— Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560.

Indiana.— Wright *v.* Johnson, 50 Ind. 454.

Iowa.— Weiland *v.* Ehlers, 107 Iowa 186, 77 N. W. 855; Hunt *v.* Higman, 70 Iowa 406, 30 N. W. 769.

Minnesota.— Wilcox Lumber Co. *v.* Ritteman, 88 Minn. 18, 92 N. W. 472.

Missouri.— Riddles *v.* Aikin, 29 Mo. 453.

New York.— Scott *v.* Lilienthal, 9 Bosw. 224; De Peyster *v.* Wheeler, 1 Sandf. 719; Drexel *v.* Pease, 13 N. Y. Suppl. 774.

South Carolina.— Ahrens *v.* State Bank, 3 S. C. 401.

Plaintiff need not amend in order to cure a variance, where the opposite party is estopped to say that he has been misled thereby. Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867 [*reversed* on other grounds in 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264].

78. Toy *v.* McHugh, 62 Nebr. 820, 87 N. W. 1059; Fay *v.* Grimsteed, 10 Barb. (N. Y.) 321; Meldrum *v.* Kenefick, 15 S. D. 370, 89 N. W. 863; Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68; Post-Intelligencer Pub. Co. *v.* Harris, 11 Wash. 500, 39 Pac. 965.

79. McComber *v.* Granite Ins. Co., 15 N. Y. 495; Chapman *v.* Carolin, 3 Bosw. (N. Y.) 456; Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927; Kron *v.* Smith, 96 N. C. 389, 2 S. E. 532; Carpenter *v.* Huffsteller, 87 N. C. 273; Stowell *v.* Eldred, 39 Wis. 614.

80. St. Louis, etc., R. Co. *v.* State, 59 Ark. 165, 26 S. W. 824; White *v.* Culver, 10 Minn. 192; Spies *v.* Lockwood, 40 N. Y. App. Div. 296, 57 N. Y. Suppl. 1023; Cornwall *v.* Haight, 8 Barb. (N. Y.) 327 [*reversed* on other grounds in 21 N. Y. 462]; Patterson *v.* Patterson, 1 Rob. (N. Y.) 184; Saltus *v.* Genin, 3 Bosw. (N. Y.) 250, 7 Abb. Pr. 193; Crompton, etc., Loom Works *v.* Brown, 27 Misc. (N. Y.) 319, 57 N. Y. Suppl. 823; Egert *v.* Wicker, 10 How. Pr. (N. Y.) 193.

81. Bennett *v.* Judson, 21 N. Y. 238.

82. See cases cited *infra*, this note.

A leading case on the subject of variance between pleadings and proof is probably Shaw *v.* Boston, etc., R. Corp., 8 Gray (Mass.) 45, decided in 1857. The declaration averred that the accident occurred while plaintiff was traveling in the highway, and the proof showed that plaintiff's horse became frightened and ran or was driven out of the highway five or six rods from the railroad crossing entered upon land owned by defendant, and plaintiff was there struck, while attempting to cross the track. In a very elaborate opinion Chief Justice Shaw discussed the whole subject of variance in general and with reference to the particular case. Although the court was divided in its opinion, it was held that the variance between the allegations and the proof was fatal and a new trial was ordered.

Material variances illustrated.— The following variances have been held material and to require an amendment: Where there were certain allegations of fraud in the declaration and the proof showed the fraud to have been for a different purpose and accomplished in a different manner (Christian *v.* Penn, 5 Ga. 482; Rathbun *v.* Parker, 113 Mich. 594, 72 N. W. 31, permitting an amendment alleging specific false representations shown by the evidence); where a party pleaded trespass to his close containing twenty-eight and three-fourths acres, and at the trial it developed that he had legal title to only three acres (Lombard *v.* Brackett, 12 Me. 39, a case in which the general verdict returned by the jury would have confirmed title in plaintiff to the entire close, whereas the proof showed that he owned only one-tenth of it); and a variance between alleged negligence in the operation of a switch and proved negligence in the operation of a car (Hoffman *v.* Third Ave. R. Co., 45 N. Y. App. Div. 586, 61 N. Y. Suppl. 590).

Immaterial variances illustrated.— In a well-considered Iowa case the original answer alleged that plaintiffs received the note in controversy of the Marsh Harvester Company, under an express contract between the parties that it was to be taken in part payment of a debt from defendant to them. By an amendment, after the introduction of the evidence, the allegation of express contract was withdrawn, and a state of facts pleaded

(B) *Total Failure of Proof.* There is a wide difference between a variance such as may be cured by an amendment and a total failure of proof. If the divergence between allegation and proof is total, so that the cause of action or defense as proved is another than that set up in the pleadings, then obviously there is no room for amendment and a dismissal of the complaint or rejection of the defense is the only course open to the court.[83]

(IV) *Effect of Objection to Introduction of Evidence and Failure to Object.* The right to amend pleadings so as to conform to proof proceeds upon the theory that this presents the issues sought to be established by the evidence introduced and admitted without objection;[84] but it is quite generally held that, where the evidence offered has been promptly objected to on the ground that such evidence does not tend to support the allegations of the pleadings, a motion to amend after admission of the evidence so as to conform to proof should not be granted,[85] and if under such circumstances it is granted, it is an abuse of

from which an agreement to take the note would be implied. The amendment was held unnecessary because the evidence that would support the amendment would support the original pleading. Had the allegation of express contract stood, the variance between it and the evidence produced would have been immaterial (Hunt *v.* Higman, 70 Iowa 406, 30 N. W. 769); so variance between allegations of the pleadings and the proof has been held immaterial in a case where an express contract was alleged and facts supporting an implied contract proved (Hunt *v.* Higman, 70 Iowa 406, 30 N. W. 769); where certain premises were described as "lot twelve" and the proof showed that "a portion of lot twelve" was meant (Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957); where pleadings allege that rent was payable quarterly, and the proof disclosed that the payments were to be made annually (Edwards *v.* Clemons, 24 Wend. (N. Y.) 480); where fraud of the principal was alleged and fraud of the agent proved (Bennett *v.* Judson, 21 N. Y. 238); where services were alleged to have been paid for at an agreed rate of compensation and the proof showed that the agreement was to pay what the services were reasonably worth (Scott *v.* Lilienthal, 9 Bosw. (N. Y.) 224); and where a gift *inter vivos* was alleged and a gift *causa mortis* proved (Walsh *v.* Bowery Sav. Bank, 15 Daly (N. Y.) 403, 7 N. Y. Suppl. 669, 8 N. Y. Suppl. 344 [*affirming* 7 N. Y. Suppl. 97]). So in an action for false imprisonment, it is not material what crime was charged to have been committed, so that an amendment alleging that the arrest was for a particular crime is unnecessary (Sandford Tool, etc., Co. *v.* Mullen, 1 Ind. App. 204, 27 N. E. 488); and the variance between an allegation that slanderous words were spoken in English and proof that they were spoken in a foreign language is not material (Charwat *v.* Vopelak, 18 Misc. (N. Y.) 601, 42 N. Y. Suppl. 235).

83. Pomeroy Rem. & Remed. Rights, § 554; St. Louis, etc., R. Co. *v.* State, 59 Ark. 165, 26 S. W. 824; White *v.* Culver, 10 Minn. 192; Walter *v.* Bennett, 16 N. Y. 250; National Bank of Deposit *v.* Rogers, 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155; Roth *v.* Schloss, 6 Barb. (N. Y.) 308; Patterson *v.* Patterson, 1 Rob. (N. Y.) 184; Poirer *v.* Fisher, 8 Bosw. (N. Y.) 258; Saltus *v.* Genin, 3 Bosw. (N. Y.) 250, 7 Abb. Pr. 193; Crompton, etc., Loom Works *v.* Brown, 27 Misc. (N. Y.) 319, 57 N. Y. Suppl. 823; Egert *v.* Wieker, 10 How. Pr. (N. Y.) 193; Grant *v.* Burgwyn, 88 N. C. 95. *Compare* Pollitz *v.* Wickersham, 150 Cal. 238, 88 Pac. 911.

Illustrations.— Proof that a railway company failed to ring a bell on the locomotive of a freight train going north totally fails to support an allegation that the failure occurred on the engine of a passenger train going south. St. Louis, etc., R. Co. *v.* State, 59 Ark. 165, 26 S. W. 824. The variance between an alleged cause of action for a fictitious purchase and sale and proof of a conversion constitutes a failure of proof and is beyond the power of amendment. Saltus *v.* Genin, 3 Bosw. (N. Y.) 250, 7 Abb. Pr. 193. On trial of an issue whether a mortgage was procured by fraud and without consideration, proof that it was given to indemnify a guaranty and the debt has been paid fails totally to support the issue. Spies *v.* Lockwood, 40 N. Y. App. Div. 296, 57 N. Y. Suppl. 1023. Variance between a complaint for the recovery of goods on the ground of a wrongful taking and evidence that the property was obtained through false representations constitutes a failure of proof and cannot be cured by amendment. Shafarman *v.* Jacobs, 15 Misc. (N. Y.) 10, 36 N. Y. Suppl. 428. Proof of negligence in the operation of a car will not support an allegation of negligence in the operation of a switch. Hoffman *v.* Third Ave. R. Co., 45 N. Y. App. Div. 586, 61 N. Y. Suppl. 590.

84. Mendenhall *v.* Harrisburg Water Co., 27 Oreg. 38, 39 Pac. 399.

85. *Indiana.*— Lowrey *v.* Reef, 1 Ind. App. 244, 27 N. E. 626.

Kansas.— Walker *v.* O'Connell, 59 Kan. 306, 52 Pac. 894.

Massachusetts.— Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478.

Minnesota.— Guerin *v.* St. Paul F. & M. Ins. Co., 44 Minn. 20, 46 N. W. 138.

Nebraska.— Curtis *v.* Cutler, 7 Nebr. 315.

New York.— Hill *v.* Weidinger, 110 N. Y.

discretion,[86] and the amendment will not be considered on appeal.[87] If evidence is objected to on the ground of variance, the motion to amend should be made before it is admitted.[88] On the other hand, if a party fails to demur to a defective pleading or evidence showing a good cause of action or defense is admitted without objection, the pleading may be amended to conform to the proofs.[89] And after an erroneous denial of a motion to dismiss a complaint for insufficiency of the evidence, other evidence introduced without objection, followed by

App. Div. 683, 97 N. Y. Suppl. 473; Rowe *v.* Gerry, 86 N. Y. App. Div. 349, 83 N. Y. Suppl. 740; National Bank of Deposit *v.* Rogers, 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155 [*affirming* 26 Misc. 555, 57 N. Y. Suppl. 625]; Beard *v.* Tilghman, 66 Hun 12, 20 N. Y. Suppl. 736; Johnson *v.* McIntosh, 31 Barb. 267; Bjorkegren *v.* Kirk, 53 Misc. 560, 103 N. Y. Suppl. 994; Zeiser *v.* Cohn, 44 Misc. 462, 90 N. Y. Suppl. 66; Mitchell *v.* Miller, 25 Misc. 179, 54 N. Y. Suppl. 180; Reilly *v.* Vought, 87 N. Y. Suppl. 492.

Oregon.— Mendenhall *v.* Harrisburg Water Co., 27 Oreg. 38, 39 Pac. 399.

See 39 Cent. Dig. tit. "Pleading," § 605.

Contra.— Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560; Guidery *v.* Green, 95 Cal. 630, 30 Pac. 786; Clark *v.* Phœnix Ins. Co., 36 Cal. 168; Stringer *v.* Davis, 30 Cal. 318.

Reason for rule.— To allow an amendment under such circumstances would have a tendency to invert the orderly mode of trial and lead to the settling of issues after instead of before trial. Mendenhall *v.* Harrisburg Water Co., 27 Oreg. 38, 39 Pac. 399.

Asking that a case be dismissed is regarded as equivalent to an objection to the introduction of evidence. National Bank of Deposit *v.* Rogers, 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155 [*affirming* 26 Misc. 555, 57 N. Y. Suppl. 625].

86. Guerin *v.* St. Paul F. & M. Ins. Co., 44 Minn. 20, 46 N. W. 138.

87. Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478.

88. Beard *v.* Tilghman, 66 Hun (N. Y.) 12, 20 N. Y. Suppl. 736.

E converso, if permission to amend to obviate an objection on the ground of variance is made before introduction of the evidence it is an abuse of discretion to refuse permission to amend. Greeley-Burnham Grocery Co. *v.* Carter, (Tex. Civ. App. 1895) 30 S. W. 487.

89. *Arizona.*— Consolidated Canal Co. *v.* Peters, 5 Ariz. 80, 46 Pac. 74.

Arkansas.— Sorrels *v.* Self, 43 Ark. 451; Healy *v.* Conner, 40 Ark. 352; Hawkins *v.* Filkins, 24 Ark. 286.

California.— Drew *v.* Hicks, (1894) 35 Pac. 563.

Connecticut.— Camp *v.* Waring, 25 Conn. 520, where both parties voluntarily went into an examination of facts inadmissible under the original pleadings.

Iowa.— Davis *v.* Chicago, etc., R. Co., 83 Iowa 744, 49 N. W. 77.

Massachusetts.— Batchelder *v.* Hutchinson, 161 Mass. 462, 37 N. E. 452.

Minnesota.— Martini *v.* Christensen, 65 Minn. 489, 67 N. W. 1019; Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389, limiting the right to amend, however, to those cases where the opposite party will not be surprised.

Nebraska.— German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106; Whipple *v.* Fowler, 41 Nebr. 675, 60 N. W. 15; Homan *v.* Steele, 18 Nebr. 652, 26 N. W. 472; Catron *v.* Shepherd, 8 Nebr. 308, 1 N. W. 204.

New York.— Davis *v.* New York, etc., R. Co., 110 N. Y. 646, 17 N. E. 733; Reeder *v.* Sayre, 70 N. Y. 180, 26 Am. Rep. 567; Charlton *v.* Rose, 24 N. Y. App. Div. 485, 48 N. Y. Suppl. 1073; Walsh *v.* Bowery Sav. Bank, 15 Daly 403, 7 N. Y. Suppl. 669, 8 N. Y. Suppl. 344; Dermody *v.* Flesher, 22 Misc. 348, 49 N. Y. Suppl. 150; Van Orden *v.* Morris, 19 Misc. 497, 43 N. Y. Suppl. 1108; Charwat *v.* Vopelak, 18 Misc. 601, 42 N. Y. Suppl. 235; Frankfurter *v.* Home Ins. Co., 10 Misc. 157, 31 N. Y. Suppl. 3 [*reversing* 6 Misc. 49, 26 N. Y. Suppl. 81]; Reck *v.* Phœnix F. Ins. Co., 3 N. Y. Civ. Proc. 376; Meyer *v.* Fiegel, 34 How. Pr. 434.

Ohio.— Supreme Commandery O. K. G. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419; Cincinnati St. R. Co. *v.* Fullbright, 8 Ohio Dec. (Reprint) 361, 7 Cinc. L. Bul. 187.

Oregon.— Cook *v.* Croisan, 25 Oreg. 475, 36 Pac. 532.

Pennsylvania.— Christine *v.* Whitehill, 16 Serg. & R. 98.

South Dakota.— Yetzer *v.* Young, 3 S. D. 263, 52 N. W. 1054.

Washington.—Edmunds *v.* Black, 13 Wash. 490, 43 Pac. 330, holding that if a party admits a judgment and that the judgment-roll in evidence is a proper exemplification of it, he cannot afterward object to a pleading made to conform the pleadings to the judgment-roll in question.

Wisconsin.— Miller *v.* Spaulding, 41 Wis. 221; Decker *v.* Trilling, 24 Wis. 610; Neis *v.* Franzen, 18 Wis. 537; Tomlinson *v.* Wallace, 16 Wis. 224; Mead *v.* Bagnall, 15 Wis. 156; Bogert *v.* Phelps, 14 Wis. 88.

See 39 Cent. Dig. tit. "Pleading," § 606.

Gift causa mortis.—A complaint alleging a gift *inter vivos* may be amended to conform to evidence introduced without objection showing a gift *causa mortis.* Walsh *v.* Bowery Sav. Bank, 15 Daly (N. Y.) 403, 7 N. Y. Suppl. 669, 8 N. Y. Suppl. 344.

Where the opposite party has not been heard, error in admitting evidence to support an estoppel not pleaded cannot be cured by an amendment after verdict, on the ground that no objection was offered to the in-

an amendment to conform to proofs, may cure the defect.[90] So objection to the introduction of evidence may be afterward withdrawn and an amendment to conform to proofs then properly allowed.[91]

(v) *Time For Amendment.* Great liberality is exercised in permitting amendments to conform the proofs to the pleadings. They may be allowed after the close of plaintiff's evidence in chief,[92] after close of all the evidence,[93] pending motion for nonsuit,[94] after part of the argument made,[95] after close of the argument,[96] at any time before the case is submitted to the jury,[97] after the case is submitted to the court sitting as a jury without argument,[98] or after the filing of an auditor's report.[99] So amendments may be permitted on motion to direct a verdict reserved till after verdict and motion for new trial,[1] after verdict,[2] or after findings by the court [3] or pending a motion for new trial.[4] And under the statutes in many jurisdictions an amendment conforming pleadings to the evidence may be filed even after judgment,[5] where it appears that the opposite party was not misled or in any way prejudiced thereby.[6] In case a judgment by confession or default entered in vacation is vacated in order to allow defendant

troduction of the evidence. Eikenberry *v.* Edwards, 67 Iowa 14, 24 N. W. 570.

90. Van Orden *v.* Morris, 19 Misc. (N. Y.) 497, 43 N. Y. Suppl. 1108.

91. Lowrey *v.* Reef, 1 Ind. App. 244, 27 N. E. 626.

92. Fitzgerald *v.* Hollan, 44 Kan. 499, 24 Pac. 957.

93. Ennis-Brown Co. *v.* Hurst, 1 Cal. App. 752, 82 Pac. 1056; Hudgins *v.* Bloodworth, 109 Ga. 197, 34 S. E. 364. And see Leib *v.* Butterick, 68 Ind. 199; Larkin *v.* McManus, 81 Iowa 723, 45 N. W. 1061; Thomas *v.* Brooklyn, 58 Iowa 438, 10 N. W. 849; Morrissey *v.* Faucett, 28 Wash. 52, 62 Pac. 352; Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244.

94. Kamm *v.* State Bank, 74 Cal. 191, 15 Pac. 765.

95. Gay *v.* Peacock, 41 Ga. 84.

96. Mather Electric Co. *v.* Matthews, 47 Ill. App. 557.

When the proof has been taken a long time and no excuse is offered for the delay the court may refuse to allow an amendment to conform to proof offered after the argument. Blalock *v.* Copeland, 65 S. W. 349, 23 Ky. L. Rep. 1455.

97. Smith *v.* Barker, 22 Fed. Cas. No. 13,013, Brunn. Col. Cas. 78, 3 Day (Conn.) 312.

98. Doherty *v.* California Nav., etc., Co., 6 Cal. App. 131, 91 Pac. 419.

99. McConnell *v.* Stubbs, 124 Ga. 1038, 53 S. E. 698; Cureton *v.* Cureton, 120 Ga. 559, 48 S. E. 162.

1. Audley *v.* Townsend, 49 Misc. (N. Y.) 23, 96 N. Y. Suppl. 439.

2. *Arkansas.*— McNutt *v.* McNutt, 78 Ark. 346, 95 S. W. 778.

Colorado.— Johnson *v.* Johnson, 30 Colo. 402, 70 Pac. 692.

Iowa.— Winburn *v.* Fidelity Loan, etc., Assoc., 110 Iowa 374, 81 N. W. 682; Bicklin *v.* Kendall, 72 Iowa 490, 34 N. W. 283.

Massachusetts.—Peck *v.* Waters, 104 Mass. 345; Stanwood *v.* Scovel, 4 Pick. 422.

New Hampshire.— Lyman *v.* Brown, 73 N. H. 411, 62 Atl. 650.

New York.— Hoffnagel *v.* Leavitt, 7 Cow. 517.

Ohio.— Barbour *v.* Miles, 14 Ohio Cir. Ct. 628, 7 Ohio Cir. Dec. 682 (citing Bates Annot. St. (1904) § 5114).

United States.— Greene *v.* Freund, 150 Fed. 721, 80 C. C. A. 387.

See 39 Cent. Dig. tit. "Pleading," § 605.

Application of rule.—A petition on an insurance policy should allege ownership of the property in plaintiff at the time of the loss, otherwise it would be fatally defective; but where the case is tried as if the fact of ownership was in issue, the petition may be amended after verdict, since such petition does not alter the issue. Cagle *v.* Chillicothe Town Mut. F. Ins. Co., 78 Mo. App. 431.

Discretion of court.— When made after verdict the application is largely in the discretion of the court, and it is not an abuse of discretion to allow an amendment applied for several days after verdict. Ankrum *v.* Marshalltown, 105 Iowa 493, 75 N. W. 360.

3. Maul *v.* Steele, 95 Minn. 292, 104 N. W. 4. But it is not error to refuse an application to amend at this stage of the proceedings. Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163.

4. McCollom *v.* Indianapolis, etc., R. Co., 94 Ill. 534.

5. *Arkansas.*— McNutt *v.* McNutt, 78 Ark. 346, 95 S. W. 778.

Illinois.— Chicago *v.* Wolf, 86 Ill. App. 236.

Minnesota.— Briggs *v.* Rutherford, 94 Minn. 23, 101 N. W. 954; Adams *v.* Castle, 64 Minn. 505, 67 N. W. 637.

New York.— Egart *v.* Wicker, 10 How. Pr. 193.

North Carolina.— Bullard *v.* Johnson, 65 N. C. 436.

Vermont.— Chaffee *v.* Rutland R. Co., 71 Vt. 384, 45 Atl. 750.

Wisconsin.— Hansen *v.* Allen, 117 Wis. 61, 93 N. W. 805.

See 39 Cent. Dig. tit. "Pleading," § 605.

6. Adams *v.* Castle, 64 Minn. 505, 67 N. W. 637.

to come in and defend, an amendment of the declaration to avoid a variance may then properly be allowed.[7] It has been held that the allowance of an amendment after trial to conform a pleading to the facts proved is equivalent to a finding of fact by the court, and the order will not be reversed on appeal, although it is apparently against the weight of the evidence, if there is some evidence to support it.[8]

x. Written Instruments — (i) *In General.* In general copies of written instruments may be introduced by amendment [9] where a new cause of action is not thereby introduced.[10] Thus a written contract may be set forth in an amended complaint in order to show the facts under which a sale was made [11] or that a condition has not yet happened.[12] Where the pleader in declaring upon a written instrument misdescribes it, he may, by subsequent amendment, correct or amplify the description,[13] so as to show, for instance, that the instrument was under seal.[14] An amendment changing the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, does not, in the accepted meaning of the phrase, change the cause of action.[15] After having declared on a written obligation, a party may file an amendment basing his claim on other grounds or adding additional items, so long as the cause of action is not changed thereby.[16]

(ii) *Variance Between Pleading and Proof.* Variances between instruments sued on and those offered in evidence, where the opposite party is not prejudiced thereby, may be amended on the trial,[17] or even after ver-

7. Carpenter *v.* Joliet First Nat. Bank, 119 Ill. 352, 10 N. E. 18 [*affirming* 19 Ill. App. 549].

8. Missouri Pac. R. Co. *v.* McCally, 41 Kan. 639, 655, 21 Pac. 574. The original petition in this case, an action for damages due to personal injuries, alleged that plaintiff was standing on the steps of the pilot when the accident occurred, and he was allowed to amend so as to allege that he was sitting immediately in front of the boiler head.

9. Atlanta Land, etc., Co. *v.* Haile, 106 Ga. 498, 32 S. E. 606; H. Feltman Co. *v.* Thompson, 58 S. W. 693, 22 Ky. L. Rep. 757.

10. Brunswick *v.* Harvey, 114 Ga. 733, 40 S. E. 754.

In an action for the amount due on interest coupons, one of the coupons may be set up in an amended complaint. Kansas City, etc., R. Co. *v.* Cobb, 102 Ala. 356, 14 So. 763.

11. Tumlin *v.* Bass Furnace Co., 93 Ga. 594, 29 S. E. 44; Florida, etc., R. Co. *v.* Varnedoe, 81 Ga. 175, 7 S. E. 129; Kennedy *v.* Vandiver, 55 Ga. 171.

12. Dowling *v.* Blackman, 70 Ala. 303.

13. M. V. Monarch Co. *v.* Terre Haute First Nat. Bank, 105 Ky. 336, 49 S. W. 32, 20 Ky. L. Rep. 1223; Gosnell *v.* Webster, 70 Nebr. 705, 97 N. W. 1060; Lycoming F. Ins. Co. *v.* Billings, 61 Vt. 310, 17 Atl. 715; Hill *v.* Smith, 34 Vt. 535.

The real relation which parties bear to a written instrument, if not apparent on its face, may be shown by an amendment of the original complaint. Tift *v.* Carlton, 73 Ga. 145.

14. Reed *v.* Scott, 30 Ala. 640; Kelly *v.* Duignan, 3 Blackf. (Ind.) 420.

In an action of covenant the declaration should show that the contract was under seal; but if it does not, the error is amendable. Wing *v.* Chase, 35 Me. 260.

15. State Bank *v.* Johnson, 9 Ala. 367; Stevenson *v.* Mudgett, 10 N. H. 338, 34 Am. Dec. 155; Tribby *v.* Wokee, 74 Tex. 142, 11 S. W. 1089.

Amendments of this character, so long as the identity of the matter upon which the action is founded is preserved, are permissible; the alteration being made, not to enable plaintiff to recover for another matter than that for which he originally brought his action, but to cure an imperfect or erroneous statement of the subject-matter, upon which the action was in fact founded. So long as the form of action is not changed, and the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed, and others superadded, in order to cure imperfections and mistakes in the manner of stating plaintiff's case. Stevenson *v.* Mudgett, 10 N. H. 338, 34 Am. Dec. 155.

16. Verdery *v.* Barrett, 89 Ga. 349, 15 S. E. 476; Clarkson *v.* Morrison, 24 Mo. 134; Fairchild *v.* Dennison, 4 Watts (Pa.) 258; Shannon *v.* Com., 8 Serg. & R. (Pa.) 444; Winton *v.* Lackawanna Coal Co., 5 Lack. Jur. (Pa.) 289.

17. *Alabama.*— *Ex p.* Ryan, 9 Ala. 89.

Indiana.— Hobbs *v.* Cowden, 20 Ind. 310; Perdue *v.* Aldridge, 19 Ind. 290; Case *v.* Wandel, 16 Ind. 459.

Louisiana.— Gasquet *v.* Johnson, 1 La. 425.

Massachusetts.— Kendall *v.* Carland, 5 Cush. 74.

Michigan.—See St. Joseph County *v.* Coffenbury, 1 Mich. 355.

Nebraska.— Ward *v.* Parlin, 30 Nebr. 376, 46 N. W. 529.

dict,[18] and the amendment will, in the appellate court, be deemed to have been made.[19]

12. Amendment of Affidavit of Defense. An affidavit of defense or merits may be amended by filing a supplemental affidavit.[20] The correct date, manner, and amount of a payment may be set forth in this manner.[21] But nevertheless refusal of leave to file an amended affidavit of defense during the trial has been held not the subject of an exception.[22] If the affidavit of defense filed is insufficient, the court will not receive additional conflicting affidavits of defense, but will render judgment for want of the affidavit.[23]

13. Amendment of Replication or Reply — a. Right to Amend. At common law an amendment to the replication is not demandable as of right, but is to be tested by legal discretion.[24] And in many jurisdictions the statute of amendments leaves the amendment of the replication, when the character of the proposed amendment is unobjectionable, to the discretion of the court,[25] in which case the action of the court, in the absence of clear abuse of discretion,[26] in allowing [27]

New York.— Morris *v.* Wadsworth, 17 Wend. 103; Rees *v.* Overbaugh, 4 Cow. 124.

North Carolina.—Allen *v.* Sallinger, 108 N. C. 159, 12 S. E. 896.

Pennsylvania.— Kirkner *v.* Com., 6 Watts & S. 557. But see Dunbar *v.* Jumper, 2 Yeates 74.

But see Bank of British North America *v.* Sherwood, 6 U. C. Q. B. 552, holding a variance between a declaration alleging a deed to plaintiff, a bank, and a deed to one as trustee for plaintiff not amendable.

Where a petition describes an instrument as a lease there may be an amendment after the evidence is introduced to show that such instrument is in fact a mining license. Boone *v.* Stover, 66 Mo. 430.

A variance as to date between an instrument declared on and one introduced in evidence may be cured by amendment. Morris *v.* Wadsworth, 17 Wend. (N. Y.) 103.

In an action to set aside a deed, a pleading may be amended in order to conform the description of the deed to the testimony introduced. Ward *v.* Parlin, 30 Nebr. 376, 46 N. W. 529; Allen *v.* Sallinger, 108 N. C. 159, 12 S. E. 896.

18. Keller *v.* Webb, 126 Mass. 393; Peck *v.* Waters, 104 Mass. 345; Stone *v.* White, 8 Gray (Mass.) 589; Cleaves *v.* Lord, 3 Gray (Mass.) 66; Wilson *v.* Jamieson, 7 Pa. St. 126.

19. Hobbs *v.* Cowden, 20 Ind. 310; Case *v.* Wandel, 16 Ind. 459.

20. West *v.* Simmons, 2 Whart. (Pa.) 261; Singerly *v.* Harrisburg Printing Assoc., 2 Pearson (Pa.) 110; Kemp *v.* Kemp, 1 Woodw. (Pa.) 154. *Compare* Guskey *v.* Sparter, 1 Wkly. Notes Cas. (Pa.) 470.

21. McGuire *v.* Conway, 10 Pa. Co. Ct. 298.

22. Flegal *v.* Hoover, 156 Pa. St. 276, 27 Atl. 162. In Valley Paper Co. *v.* Smalley, 2 Marv. (Del.) 289, 43 Atl. 176, permission to amend an affidavit of defense by adding the notary's seal was denied.

23. Sykes *v.* Anderson, 14 Pa. Co. Ct. 329.

24. Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302, holding further that the statute of amendments in force in that jurisdiction extends only to the declaration or plea, and that an amendment to the replication is to be allowed as at common law.

25. See the codes and practice acts of the various states. And see the following cases:

Colorado.— Horn *v.* Reitler, 15 Colo. 316, 25 Pac. 501.

Florida.— Hartford F. Ins. Co. *v.* Redding, 47 Fla. 228, 37 So. 62, 110 Am. St. Rep. 118, 67 L. R. A. 518.

Indiana.— Sovereign Camp W. W. *v.* Cox, (App. 1905) 75 N. E. 290.

Iowa.— Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059.

Kentucky.— Hubble *v.* Murphy, 1 Duv. 278.

Massachusetts.— Hartwell *v.* Hemmenway, 7 Pick. 117.

Montana.— Gehlert *v.* Quinn, 35 Mont. 451, 90 Pac. 168.

New York.— Griswold *v.* Sedgwick, 1 Wend. 126.

Washington.— Ankeny *v.* Clark, 1 Wash. 549, 20 Pac. 583.

Canada.—Beardsley *v.* Dibblee, 3 N. Brunsw. 642.

See 39 Cent. Dig. tit. "Pleading," § 811 *et seq.*

In Rhode Island if the fault of the replication is a mere fault of form, the court, under the statute of amendments in force there, cannot render judgment against plaintiff, but must amend the replication without terms as soon as the defect is brought to its notice. Ellis *v.* Appleby, 4 R. I. 462.

26. Robinson *v.* O'Brien, 110 Ky. 270, 58 S. W. 820, 22 Ky. L. Rep. 769; Hubble *v.* Murphy, 1 Duv. (Ky.) 278.

The court commits substantial error by refusing, during the trial, to permit plaintiff to so amend his reply as to put in issue the truth of certain portions of defendant's answer. Wright *v.* Bachelle, 16 Kan. 259.

27. *Colorado.*— Horn *v.* Reitler, 15 Colo. 316, 25 Pac. 501.

Florida.— Hartford F. Ins. Co. *v.* Redding, 47 Fla. 228, 37 So. 62, 110 Am. St. Rep. 118, 67 L. R. A. 518.

Indiana.— Sovereign Camp W. W. *v.* Cox, (App. 1905) 75 N. E. 290.

or refusing[28] an amendment is not a subject for review by an appellate court.

b. Subjects of Amendment. It is discretionary with the court to allow an amendment to the replication, where it appears to be necessary to enable plaintiff to fully and fairly present at the trial his defense to the new matter set up in the answer.[29] Likewise it is discretionary with the court to refuse to allow a proposed amendment, where the facts stated therein, if true, do not avoid, or present a defense to, the counter-claim pleaded in the answer;[30] where it is clear from the facts already adduced at the trial that such an amendment will be useless;[31] or where it is clear that if all the facts contained in the proposed amendment had been in evidence, they would have been subject to demurrer.[32] But when the proposed amendment contains matter not authorized by the statute of amendments to be contained in the original reply,[33] as where it sets up a new cause of action,[34] or a counter-claim to defendant's counter-claim,[35] or presents inconsistent defenses to the affirmative allegations of the complaint,[36] it cannot be allowed. Nor can an amendment be allowed in violation of a provision of the statute of amendments as to subjects of amendment, as where the proposed amendment substantially changes plaintiff's claim.[37]

c. Operation and Effect. An amended reply supersedes the original pleading, which, in going out of the record, carries with it all the rulings of the court regarding its sufficiency, and if no demurrer is filed to the amended reply, it will be regarded as sufficient.[38]

14. Amendment of Demurrer[39] — a. In General. A demurrer is regarded as a pleading within the purview of a statute providing for the amendment of any pleading, and may be amended like any other pleading.[40] Where the statute provides for the amendment of pleadings in furtherance of justice, the allowance of an amendatory demurrer is within the discretion of the court.[41] The court will not give leave to amend a demurrer which does not go to the merits

Iowa.— Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059.

Montana.— Gehlert *v.* Quinn, 35 Mont. 451, 90 Pac. 168.

Oregon.— Clemens *v.* Hanley, 27 Oreg. 326, 41 Pac. 658.

See 39 Cent. Dig. tit. "Pleading," § 811 *et seq.*

28. Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857; Blanton *v.* Arnett, 93 S. W. 1043, 29 Ky. L. Rep. 491; Griswold *v.* Sedgwick, 1 Wend. (N. Y.) 126.

29. Horn *v.* Reitler, 15 Colo. 316, 25 Pac. 501; Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432. See also Ankeny *v.* Clark, 1 Wash. 549, 20 Pac. 583.

An amendment putting in issue certain portions of the answer, when applied for in proper time, must be allowed. Wright *v.* Bacheller, 16 Kan. 259.

An amendment omitting a paragraph of the reply is properly allowed. Sovereign Camp W. W. *v.* Cox, (Ind. App. 1905) 75 N. E. 290.

30. Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857.

31. Griswold *v.* Sedgwick, 1 Wend. (N. Y.) 126.

32. Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

33. Brady *v.* Nally, 14 N. Y. Suppl. 480, 26 Abb. N. Cas. 367.

34. Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432, holding, however, that the amendment in question did not set up a new cause of action, but was merely an additional replication to the new matter pleaded in the answer, and its allowance was therefore within the discretion of the court.

35. Brady *v.* Nally, 14 N. Y. Suppl. 480, 26 Abb. N. Cas. 367.

36. Bergman *v.* London, etc., F. Ins. Co., 34 Wash. 398, 75 Pac. 989, holding, however, that where an answer in an action to recover a balance claimed to be due under a fire-insurance policy sets up the payment of a given sum in full settlement of the loss, an amended reply containing a denial of payment in full is not inconsistent with the allegation that the payment was accepted under duress.

37. Laurent *v.* Bernier, 1 Kan. 428.

38. Tague *v.* Owens, 11 Ind. App. 200, 38 N. E. 541.

39. Conditions on granting leave to amend see *supra*, VII, A, 6, e, (v).

40. Hedges *v.* Dam, 72 Cal. 520, 14 Pac. 133.

Instances.— Thus a demurrer comes within the meaning of a statute providing for amendments as of course of any pleading within a specified time (Hedges *v.* Dam, 72 Cal. 520, 14 Pac. 133), or a statute leaving the amendment of any pleading to the discretion of the court (Morrison *v.* Miller, 46 Iowa 84).

41. McClaine *v.* Fairchild, 23 Wash. 758, 63 Pac. 517; Roche *v.* Spokane County, 22 Wash. 121, 60 Pac. 59.

of the cause,[42] or which has been adjudged irregular and frivolous.[43] When upon the death of defendant after demurring his executor is made a defendant the executor may be allowed to amend the demurrer already filed.[44]

b. Time For. A demurrer to an original pleading may be amended after an amendment to such pleading.[45] After a demurrer has been argued and submitted, an amendment thereto should not be allowed until the submission has been set aside, as the party whose pleading has been assailed has a right to be heard upon the question raised by the amendment;[46] but where it appears from the record that submission was practically, if not formally, set aside, and the adverse party had an opportunity to be heard on the amendment, an order sustaining the demurrer as amended will not be reversed on account of such irregularity.[47] Likewise the error of allowing an amendment to a demurrer, after it has been argued and submitted, is regarded as without prejudice, where the amendment in legal effect adds nothing to the original demurrer.[48]

c. Subjects of Amendment. An amendment to a general demurrer by altering it to a special one,[49] or by adding thereto grounds of special demurrer,[50] cannot be allowed. And where the allowance of an amendatory demurrer is within the discretion of the court, it is held to be a proper exercise of such discretion to refuse an amended demurrer stating a different ground from that stated in the original;[51] or to allow an amended demurrer setting up the additional ground that the action is barred by the statute of limitations,[52] when that defense was in existence at the beginning of the action and plaintiff loses no rights by the allowance of the amendment.[53]

d. Operation and Effect. An amended demurrer supersedes the original demurrer, so that an order subsequently entered providing that the demurrer be sustained and time given to amend the complaint relates to the demurrer as amended.[54]

15. Amendment by Annexing Bill of Particulars or Exhibits. Where a complaint contains a count for a balance of account,[55] or on an account annexed,[56] but without a bill of particulars, such count is amendable by annexing such a bill. Likewise where a complaint with the common counts for money had and received, and for money paid, without specification by bill of particulars or otherwise on what account it was specially received or paid out, such defect is amendable.[57] Where the statute of amendments provides that a pleading may be amended in all respects, provided there is enough in the pleading to amend by,

42. Offutt *v.* Beatty, 18 Fed. Cas. No. 10,448, 1 Cranch C. C. 213.

43. Snyder *v.* Hearman, 2 How. Pr. (N. Y.) 279.

44. Belt *v.* Lazemby, 126 Ga. 767, 56 S. E. 81.

45. Wisconsin Lumber Co. *v.* Greene, etc., Tel. Co., 127 Iowa 350, 101 N. W. 742, 109 Am. St. Rep. 387, 69 L. R. A. 968.

46. Poweshiek County *v.* Cass County, 63 Iowa 244, 18 N. W. 895.

47. Poweshiek County *v.* Cass County, 63 Iowa 244, 18 N. W. 895.

48. Hainer *v.* Iowa L. H., 78 Iowa 245, 43 N. W. 185.

49. Smith *v.* Northrup, 1 Root (Conn.) 387.

50. Augusta *v.* Lombard, 101 Ga. 724, 28 S. E. 994.

51. Burrows *v.* McCalley, 17 Wash. 269, 49 Pac. 508.

52. McClaine *v.* Fairchild, 23 Wash. 758, 63 Pac. 517. See also People *v.* Barton, 4 Colo. App. 455, 36 Pac. 299, holding that under a statute which declares that the court may, on motion, amend any pleading by adding or striking out the name of a party, or correcting a mistake, and may also, on affidavit showing good cause, allow an amendment in any other particular, it is reversible error to allow defendant, without any showing by affidavit, to amend a demurrer to the complaint, by adding an additional ground of demurrer, based on the statute of limitations.

53. Roche *v.* Spokane County, 22 Wash. 121, 60 Pac. 59.

54. Estudillo *v.* Security L. & T. Co., 149 Cal. 556, 87 Pac. 19.

55. Butler *v.* Millett, 47 Me. 492.

56. Burgess *v.* Bugbee, 100 Mass. 152; McQueston *v.* Young, 21 N. H. 462.

By annexing thereto a bill of particulars previously filed in the cause, a complaint containing the common counts, including a count on an account annexed, but without any account annexed, may be amended at the trial. Tarbell *v.* Dickinson, 3 Cush. (Mass.) 345.

57. Dill *v.* Jones, 3 Ga. 79.

it is held that a complaint containing a cause of action for the recovery of land may be amended by adding an abstract of plaintiff's title;[58] and likewise a complaint on a promissory note setting out the names of the parties, date, and amount of the note, is amendable by attaching a copy of the note to the complaint.[59]

16. Answering Matter Introduced by Amendment — a. In General. A new plea is necessary where there has been a material amendment to the declaration, unless the denials of the answer to the original complaint sufficiently answer the amendment.[60] New notice of the rule to plead need not be given after amendment of the declaration.[61] Answering anew acts as a withdrawal of the original answer.[62]

b. Right to Answer. Whenever plaintiff is allowed to amend, materially changing the issues already formed, or affecting the substantial rights of the parties, defendant is entitled of right to file additional pleas,[63] and, if the trial court refuses leave to amend, it is reversible error.[64] The exercise of this right cannot be restricted to any particular form of plea,[65] and defendant may set up all defenses which would be open if the suit were commenced at the time of amendment;[66] but he cannot, by filing separate answers to the original and amended

58. Camp *v.* Smith, 61 Ga. 449.

59. Merritt *v.* Bagwell, 70 Ga. 578; Ross *v.* Jordan, 62 Ga. 298.

60. See Judgments, 23 Cyc. 746.

61. Anonymous, 4 Wend. (N. Y.) 197.

62. See *infra*, VII, 18, b.

63. *California.*— Morton *v.* Bartning, 68 Cal. 306, 9 Pac. 146; Harney *v.* Applegate, 57 Cal. 205.

Connecticut.— Bennett *v.* Collins, 52 Conn. 1. But see Monson *v.* Beecher, 45 Conn. 299.

Georgia.— Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764.

Illinois.— Milwaukee Mechanics' Ins. Co. *v.* Schallman, 188 Ill. 213, 59 N. E. 12; Sinsheimer *v.* William Skinner Mfg. Co., 165 Ill. 116, 46 N. E. 262; McCarthy *v.* Neu, 91 Ill. 127; Wilson *v.* King, 83 Ill. 232; Griswold *v.* Shaw, 79 Ill. 449; Ruston *v.* Sonnberg, 107 Ill. App. 575; Brown *v.* Tuttle, 27 Ill. App. 389; Nelson *v.* Akeson, 1 Ill. App. 165.

Iowa.— Logan *v.* Tibbott, 4 Greene 389.

Kentucky.— Bogard *v.* Johnstone, 53 S. W. 651, 21 Ky. L. Rep. 965.

Maryland.— Schulze *v.* Fox, 53 Md. 37.

Massachusetts.— Green *v.* Gill, 5 Mass. 379.

Mississippi.—Shaw *v.* Brown, 42 Miss. 309; Miller *v.* Northern Bank, 34 Miss. 412; Summers *v.* Foote, 28 Miss. 671.

New Hampshire.— Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249.

New York.— Lilianthal *v.* Levy, 4 N. Y. App. Div. 90, 38 N. Y. Suppl. 936; Harriot *v.* Wells, 9 Bosw. 631; Penny *v.* Van Cleef, 1 Hall 184; Low *v.* Graydon, 14 Abb. Pr. 443; Fisher *v.* New York C. Pl., 18 Wend. 608. See Barston *v.* Randall, 5 Hill 556, holding the rule to be contra where plaintiff obtains leave to amend by special motion.

North Carolina.— Gill *v.* Young, 88 N. C. 58.

Ohio.— Supreme Commandery O. K. G. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419.

Pennsylvania.— North *v.* Yorke, 12 Montg. Co. Rep. 211.

South Carolina.— Cleveland *v.* Cohrs, 13 S. C. 397.

Texas.— Speake *v.* Prewitt, 6 Tex. 252.

Wisconsin.— Devereux *v.* Peterson, 126 Wis. 558, 106 N. W. 249.

United States.— Wright *v.* Hollingsworth, 1 Pet. 165, 7 L. ed. 96; American Alkali Co. *v.* Campbell, 113 Fed. 398.

See 39 Cent. Dig. tit. "Pleading," § 746.

Filing a copy of an instrument sued on is a material amendment to give defendant the right to enter an amended answer. McCarthy *v.* Neu, 91 Ill. 127.

Amendment charging individual liability after default of joint defendant.— If one of two joint defendants makes default, and plaintiff amends his declaration so as to charge an individual liability, and enters judgment against the defaulting defendant, it is error to refuse the remaining defendant permission to plead to the amended declaration. Brown *v.* Tuttle, 27 Ill. App. 389.

Withdrawal of original plea unnecessary.— A defendant may amend without withdrawing or asking leave to withdraw his original plea. Adams *v.* Adams, 39 Ala. 603.

64. Morton *v.* Bartning, 68 Cal. 306, 9 Pac. 146; Logan *v.* Tibbott, 4 Greene (Iowa) 389.

65. Fink *v.* Manhattan R. Co., 15 Daly (N. Y.) 479, 8 N. Y. Suppl. 327; Manitowoc Steam Boiler Works *v.* Manitowoc Glue Co., 120 Wis. 1, 97 N. W. 515. See Second Ave. R. Co. *v.* Manhattan El. R. Co., 58 N. Y. Super. Ct. 172, 9 N. Y. Suppl. 734.

66. Gill *v.* Young, 88 N. C. 58. See, however, Moss *v.* Stipp, 3 Munf. (Va.) 159, holding that a defendant cannot plead in abatement to an amended declaration any variance between such declaration and the writ, which equally existed between the writ and the original declaration.

Pleading double.— Upon amendment defendant may not plead double unless the several pleas proposed are necessary to his defense. Green *v.* Gill, 5 Mass. 379.

Confining answer to new allegation.— The court may confine a second answer to the new allegations introduced by amendment of the declaration. Hawthorne *v.* Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291.

complaint, treat the two as separate actions.[67] An amendment to meet an amended claim may be required instanter.[68] The right to plead anew may be waived.[69] An immaterial amendment, not affecting the rights of the parties, nor the issues, does not confer upon defendant the right to plead anew.[70] In any case an amended pleading to meet an amendment should show on its face that it is a substitute for the original pleading.[71]

c. Effect of Failure to Answer — (i) *In General.* Allegations of an amended declaration unanswered by defendant stand as admitted.[72] This rule does not apply, however, to an amendment made after the evidence is in for the purpose of conforming the pleading to the proof,[73] nor to amendments made from time to time during the progress of the trial.[74]

(ii) *Original Plea or Answer Standing as to Plaintiff's Amended Pleading.* A plea to the original declaration will be treated as a plea to an amended declaration, if applicable and responsive thereto;[75] but in order that

67. Megrath *v.* Van Wyck, 2 Sandf. (N. Y.) 651.

68. Wilson *v.* King, 83 Ill. 232.

69. Butler *v.* Thompson, 2 Fla. 9; Lilienthal *v.* Levy, 4 N. Y. App. Div. 90, 38 N. Y. Suppl. 936; Wright *v.* Hollingsworth, 1 Pet. (U. S.) 165, 7 L. ed. 96.

Implied waiver.— By failing to plead anew and going to trial without objection defendant waives his right to answer the amendment. Wright *v.* Hollingsworth, 1 Pet. (U. S.) 165, 7 L. ed. 96. *Contra*, Low *v.* Graydon, 14 Abb. Pr. (N. Y.) 443, holding also that waiver of this right must never be implied.

70. *California.*— Smith *v.* Dorn, 96 Cal. 73, 30 Pac. 1024.

Connecticut.— Santo *v.* Maynard, 57 Conn. 157, 17 Atl. 700.

Illinois.— Milwaukee Mechanics Ins. Co. *v.* Schallman, 188 Ill. 213, 59 N. E. 12; Chicago, etc., R. Co. *v.* Murphy, 99 Ill. App. 126.

Indiana.—Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19.

Kansas.— Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446; Cherokee, etc., Min. Co. *v.* Britton, 3 Kan. App. 292, 45 Pac. 100.

Kentucky.— Colston *v.* Chenault, 45 S. W. 664, 20 Ky. L. Rep. 226.

Missouri.— Weigand *v.* Schriek, 34 Mo. 510.

Oregon.— Wild *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954.

Texas.— Walling *v.* Williams, 4 Tex. 427.

Washington.— Maney *v.* Hart, 11 Wash. 67, 39 Pac. 268.

Wisconsin.— Harris *v.* Wicks, 28 Wis. 198.

See 39 Cent. Dig. tit. "Pleading," § 746.

See, however, Crosby *v.* Hite, 1 Wash. (Va.) 365, holding that defendant could plead *de novo* whether a new plea was necessary to his defense or not.

Illustrations.— Filing a note under a common count as a bill of particulars is not such an amendment of a claim as entitles the opposite party to amend. Monson *v.* Beecher, 45 Conn. 299. Defendant is not entitled to file an amended answer to an amended petition intended only to correct mistakes in the amount sued for. Colston *v.* Chenault, 45 S. W. 664, 20 Ky. L. Rep. 226.

71. Richie *v.* Levy, 69 Tex. 133, 6 S. W. 685.

72. Putnam *v.* Lyon, 3 Colo. App. 144, 32 Pac. 492; Eslich *v.* Mason City, etc., R. Co., 75 Iowa 443, 39 N. W. 700; Clough *v.* Adams, 71 Iowa 17, 32 N. W. 10; Robards *v.* Munson, 20 Mo. 65; Kelly *v.* Bliss, 54 Wis. 187, 11 N. W. 488. See, however, Stevens *v.* Rolfe, 58 N. H. 63, holding that the principle of admission does not apply to the signature of an instrument declared on in an amendment. And see Brenner *v.* Gundersheimer, 14 Iowa 82, holding that if a defendant fails to answer an amended petition after a demurrer thereto has been overruled, a default may be granted notwithstanding an answer to the original petition is on file.

After motion to strike out amended complaint is overruled, if defendant elects to stand upon his exception to the ruling without answering the amendment, the allegations of such amendment are admitted if upon appeal the action of the court in overruling the motion is sustained. Clough *v.* Adams, 71 Iowa 17, 32 N. W. 10.

73. Willets *v.* Ida County Sav. Bank, 117 Iowa 386, 90 N. W. 729.

74. Hudson *v.* Hudson, 119 Ga. 637, 46 S. E. 874.

75. *Arkansas.*— Smith *v.* Halliday, (1890) 13 S. W. 1093.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Butler *v.* Thompson, 2 Fla. 9.

Illinois.— Eames *v.* Morgan, 37 Ill. 260; McAllister *v.* Ball, 28 Ill. 210. See also Bennett *v.* Baird, 67 Ill. App. 422.

Iowa.— Peacock *v.* Gleesen, 117 Iowa 291, 90 N. W. 610. See, however, Eslich *v.* Mason City, etc., R. Co., 75 Iowa 443, 39 N. W. 700, holding that, although an answer to the original declaration contained a general denial of all allegations therein contained, it did not put in issue allegations of additional facts contained in the amended answer.

Michigan.— Marvin *v.* Bowlby, 135 Mich. 640, 98 N. W. 399.

Missouri.— Robards *v.* Munson, 20 Mo. 65.

Texas.— Byers *v.* Carll, 7 Tex. Civ. App. 423, 27 S. W. 190.

Virginia.— Power *v.* Ivie, 7 Leigh 147.

West Virginia.— Clarke *v.* Ohio River R.

it may be so treated it must be responsive to the declaration as amended ; if not responsive it will be treated as a nullity.[76]

d. Time For Answering Amended Pleading. In the absence of statute or a rule of court providing otherwise, it is the usual practice to allow defendant the same time to answer a materially amended complaint as is allowed for answering an original complaint.[77] The matter, however, is largely within the discretion of the court and may be limited or extended accordingly;[78] and in exercising this discretion the court will ordinarily not grant time to answer an immaterial amendment.[79]

17. Demurrer to Amended Pleading — a. Right to Demur. A party has the right to demur to an amended pleading as if it were an original one.[80] If there is an amendment of the pleading to meet the objections pointed out by a demurrer, not only may the adverse party demur to the pleading as amended ;[81] but it is held that no question as to the sufficiency of the amended pleading is raised, without a new demurrer,[82] or the refiling of the former one, if deemed sufficiently

Co., 39 W. Va. 732, 20 S. E. 696; Roderick *v.* Baltimore, etc., R. Co., 7 W. Va. 54.

Wisconsin.— Kelly *v.* Bliss, 54 Wis. 187, 11 N. W. 488; Knips *v.* Stefan, 50 Wis. 286, 6 N. W. 877; Yates *v.* French, 25 Wis. 661.

The plea need not be refiled after amendment of the complaint. Eames *v.* Morgan, 37 Ill. 260. See, however, *dictum* to the contrary in Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41.

An original answer is considered filed to an amended complaint at the time a motion is granted allowing the original answer to stand. Mulford *v.* Estudillo, 32 Cal. 131.

76. Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. 73 (holding also that a motion to strike it out is not necessary, it being treated as if it had not been filed) ; Royal Ins. Co. *v.* Miller, 199 U. S. 353, 26 S. Ct. 46, 50 L. ed. 226.

77. People *v.* Rains, 23 Cal. 127; Brooks Bros. *v.* Tiffany, 117 N. Y. App. Div. 470, 102 N. Y. Suppl. 626; Dickerson *v.* Beardsley, 1 Code Rep. (N. Y.) 37; Cunningham *v.* Mathivet, 4 Ohio Dec. (Reprint) 344, 1 Clev. L. Rep. 341.

78. *California.*— People *v.* Rains, 23 Cal. 127.

Dakota.— Warder *v.* Patterson, 6 Dak. 83, 50 N. W. 484.

Indiana.— Leib *v.* Butterick, 68 Ind. 199.

Kansas.— Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933.

Maryland.— Dashiel *v.* Heron, 1 Harr. & M. 385.

Ohio.— Neininger *v.* State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

South Carolina.— Gadsden *v.* Catawba Water Power Co., 71 S. C. 340, 51 S. E. 121; Lockwood *v.* Charleston Bridge Co., 60 S. C. 492, 38 S. E. 112, 629.

See 39 Cent. Dig. tit. "Pleading," § 748.

Amendment after evidence heard.— It is not error to permit amendment after the evidence is in if the matter it answers was not sooner brought to the notice of the party amending. Brown *v.* Shearon, 17 Ind. 239.

79. Sinnet *v.* Mulhollan, 3 Mart. (La.) 398; Meshke *v.* Van Doren, 16 Wis. 319. And see Sturdevant *v.* Gains, 5 Ala. 435.

Allowing time to answer an immaterial amendment is not error. Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933.

80. Sands *v.* Calkins, 30 How. Pr. (N. Y.) 1; Williams *v.* Randon, 10 Tex. 74. See also Paddock *v.* Barnett, 88 Hun (N. Y.) 381, 34 N. Y. Suppl. 834.

A motion to strike an amended complaint is equivalent to a demurrer to an amended complaint, where the motion to strike is made on the ground that it states the same facts set forth in the original complaint. Hays *v.* Peavey, 43 Wash. 163, 86 Pac. 170.

A plea or answer with demurrer.— It is proper to allow a demurrer to a complaint, as amended, to be interposed, without withdrawing the answer to the original complaint, where by the amendment the cause of action is so materially and radically changed that the answer is not at all applicable thereto. Keller *v.* Bare, 62 Iowa 468, 17 N. W. 666.

81. McIntyre *v.* Griswold, 2 How. Pr. (N. Y.) 113, holding further that the fact that the amendment to the pleading was granted, specially, on application to the court, without leave given in the rule to plead or demur, does not affect defendant's right to demur to the amended pleading.

Right to demur as affected by the character of amendment.— Under the Georgia statute it is held that an amendment which materially changes or varies the cause of action reopens the bill or complaint, as the case may be, to another demurrer, but that an immaterial amendment does not. Gibson *v.* Thornton, 107 Ga. 545, 33 S. E. 895; Griffin *v.* Augusta, etc., R. Co., 72 Ga. 423.

Refiling demurrer after amendment.—If the allowance of an amendment at a given stage of the cause rests in the discretion of the court, and the amendment, as made, does not change the issues, it is an error to refuse to allow the demurrer to such pleading to be refiled after amendment. Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19.

82. Voltz *v.* Voltz, 75 Ala. 555; Hamill *v.* Phenicie, 9 Iowa 525. See also Powell *v.* Cheshire, 70 Ga. 357, 48 Am. Rep. 572

specific, to raise the objection which it is desired to interpose to the new state of the pleading.[83]

b. Time. At what stage of the action, or within what period of time, a demurrer to an amended pleading may be filed, is generally a matter of statutory regulation.[84]

c. Grounds. If it appears on the face of an amended complaint that the action is barred by lapse of time, advantage of the defect may be taken by demurrer.[85] So if plaintiff amends his complaint by striking out the name of the person for whose use the suit is instituted, and the change of the party is stated in the amended pleading, advantage of the irregularity may be taken by demurrer.[86] Whether an amended complaint is a departure from the original cause of action is a question which cannot be raised by demurrer,[87] but only by a motion to strike out.[88] That an amended complaint, adding a new count, sets up a new and additional cause of action is not a ground of demurrer,[89] unless the cause of action in the new count is such that it cannot be joined with that of the original complaint.[90] Where facts which have arisen since the bringing of the action, and therefore could be properly brought into the case by a supplemental complaint, are included in the amended pleading, it is not a ground of demurrer.[91] That a party was surprised by the amendment, and less prepared for trial in consequence thereof, is not a ground of demurrer to the pleading as amended.[92] In conformity to the rule that a demurrer can be available only when the defect is apparent on the face of the pleading demurred to,[93] it is held that an amended complaint is not subject to demurrer on the ground that a prior amended complaint shows

(holding that where, under the statute, an amendment to the complaint in regard to material matters reopens the complaint as amended to demurrer, a complaint having been demurred to and an amendment made in regard to material matters, the original demurrer does not relate forward and cover both complaint and amendment); Kelly *v.* Chicago, etc., R. Co., 93 Iowa 436, 61 N. W. 957 (holding that it was an error to dismiss plaintiff's amended petition, where the demurrer thereto, which was sustained, was filed prior to his second amendment, and plaintiff elected to stand on his petition as amended).

83. Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41; Voltz *v.* Voltz, 75 Ala. 555.

A party desiring the benefit of a demurrer filed prior to amendment of a pleading, against the pleading as amended, should refile it. Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41.

84. See the codes and practice acts of the various states. And see the cases cited *infra*, this note.

A party has twenty days after the service of an amended pleading in which to demur thereto. See N. Y. Code Civ. Proc. § 543. And see Dickerson *v.* Beardsley, 2 Edm. Sel. Cas. (N. Y.) 21.

Notwithstanding the time for filing a demurrer to the original pleading has expired, a party may properly file a demurrer to an amended pleading. Saunders *v.* Whitcomb, 177 Mass. 457, 59 N. E. 192 (citing Pub. St. 167, § 24).

A special demurrer to an amended declaration, on the ground of defects in form, must be filed at the term of the common pleas when the amendment is made. Tinkham *v.* Smith, 9 Pick. (Mass.) 33.

85. Conroy *v.* Oregon Constr. Co., 23 Fed. 71, 10 Sawy. 630.

86. Teer *v.* Sandford, 1 Ala. 525.

87. Curry *v.* Southern R. Co., 148 Ala. 57, 42 So. 447; Turner *v.* Roundtree, 30 Ala. 706; Williams *v.* Williams, 115 Iowa 520, 88 N. W. 1057; Hord *v.* Chandler, 13 B. Mon. (Ky.) 403; Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142, 65 S. W. 1035. But see Hatler *v.* Hunter, 1 Tex. App. Civ. Cas. § 9, holding that any irreconcilable repugnance between the original and amended petitions should be taken advantage of by exception or demurrer.

Under the Georgia statute an amendment to a petition which materially changes the cause of action, made at any stage of the cause, opens the whole petition to demurrer at that time; otherwise, when the amendment makes no material change in the cause of action. Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Hall *v.* Waller, 66 Ga. 483.

88. Turner *v.* Roundtree, 30 Ala. 706; Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142, 65 S. W. 1035.

89. Moore *v.* Florence First Nat. Bank, 139 Ala. 595, 33 So. 777; Springfield F. & M. Ins. Co. *v.* De Jarnett, 111 Ala. 248, 19 So. 995. See also Shotwell *v.* Gilkey, 31 Ala. 724, holding that a misjoinder of counts in the original and amended complaints cannot be reached by demurrer to the amended complaint containing but one count.

90. Springfield F. & M. Ins. Co. *v.* De Jarnett, 111 Ala. 248, 19 So. 995.

91. Null *v.* Jones, 5 Nebr. 500.

92. Wells *v.* Wells, 118 Ga. 812, 45 S. E. 669, holding further that the remedy of the party surprised by the amendment is to move for a continuance on that ground.

93. Budd *v.* Hardenbergh, 36 Misc. (N. Y.) 90, 72 N. Y. Suppl. 537.

another action pending.[94] An amended complaint is not demurrable on the ground that it may require a change in defendant's plea.[95]

d. Scope — (I) *Demurrer Must Be Directed to Amended Pleading Alone.* A demurrer to an amended pleading must be directed to that pleading alone;[96] and if it asks for a consideration of the original pleading, as well as the amended pleading, it will be overruled.[97]

(II) *Demurrer Must Go to Whole Cause of Action or Defense.* New matter inserted by way of amendment cannot be reached by demurrer to that part, but the demurrer must go to the whole cause of action or defense set forth in the amended pleading.[98] But if the original pleading has already been tested by demurrer, the court may, in its discretion, regard a second demurrer as applicable to the amendment alone, and limit it thereto.[99]

e. Effect of Filing. Filing a demurrer to an amended pleading waives a demurrer previously filed to the original pleading.[1] And the filing of a demurrer to a complaint, amended by adding a count on a cause of action accruing after suit instituted, is held to be a waiver of the right to invoke the proper remedy, which is by motion to strike out.[2]

f. Scope of Inquiry and Matter Considered. On demurrer to an amended pleading the question for consideration is the sufficiency of the pleading itself, and not the right of the party to file it.[3] An amended complaint supersedes the original, and a demurrer thereto must be determined on the sufficiency of its averments alone.[4] Hence, on demurrer to an amended complaint, the averments of the original complaint which have been abandoned by the amendment cannot be considered by the court.[5] While an exhibit will not make a bad plea good,

94. Budd *v.* Hardenbergh, 36 Misc. (N. Y.) 90, 72 N. Y. Suppl. 537.

95. Bavington *v.* Pittsburgh, etc., R. Co., 34 Pa. St. 358.

96. Williams *v.* Williams, 115 Iowa 520, 88 N. W. 1057. See also Turner *v.* Roundtree, 30 Ala. 706. But see Williams *v.* Randon, 10 Tex. 74, where it is held that the lower court properly sustained a demurrer extending to both the original and amended complaints, intended to constitute a single plea, although the question whether a demurrer to an amended complaint must be directed to that pleading alone was not raised.

Although issue may have been joined on some of the counts in the original declaration, a demurrer to the whole of the amended pleading will lie. McIntyre *v.* Griswold, 2 How. Pr. (N. Y.) 113.

Demurrer held good in form and substance. — A general demurrer to the "amended second paragraph of defendant's answer for the reason that the same does not state facts sufficient to constitute a good defense to plaintiff's complaint" is not objectionable on the ground that "complaint" is used instead of the words "cause of action," and the demurrer is sufficient in form and substance. Foster *v.* Dailey, 3 Ind. App. 530, 30 N. E. 4.

97. Williams *v.* Williams, 115 Iowa 520, 88 N. W. 1057.

98. Reed *v.* Drais, 67 Cal. 491, 8 Pac. 20; Hackley *v.* Draper, 4 Thomps. & C. (N. Y.) 614 [*affirmed* in 60 N. Y. 88].

Demurrer held to go to entire pleading. — A demurrer having been filed at the return-term of the bill, and at a subsequent term of court an amendment having been made, the demurrer renewed, and notice thereof given, it goes not to the amendment alone, but to the entire bill. Griffin *v.* Augusta, etc., R. Co., 72 Ga. 423.

99. Hawthorne *v.* Siegel, 88 Cal. 159, 35 Pac. 1114, 22 Am. St. Rep. 291.

After a special demurrer to declaration is sustained by the court as being bad for one cause alone and overruled as to others, and leave is granted to amend on the point or cause so adjudged bad, the only part of the amended pleading thereafter subject to new demurrer is the amended part. Bean *v.* Ayers, 69 Me. 122.

1. White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 44 Iowa 512.

2. Farrington *v.* Hawkins, 24 Ind. 253.

3. Williams *v.* Williams, 115 Iowa 520, 88 N. W. 1057.

4. Turner *v.* Roundtree, 30 Ala. 706; Williams *v.* Williams, 115 Iowa 520, 88 N. W. 1057; Null *v.* Jones, 5 Nebr. 500; Mitchell *v.* Sheppard, 13 Tex. 484.

Where an amended pleading neither refers to, nor is made a part of, the original, but is complete in itself, the sufficiency of the amended pleading on demurrer must be determined by its own averments. Norfolk, etc., R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465.

A general demurrer raises the single question whether the amended pleading on its face, and without any reference to extrinsic matter, is legally sufficient, and if it is free from any defect in substance on its face, the demurrer to it will not lie. Turner *v.* Roundtree, 30 Ala. 706.

5. Williams *v.* Williams, 115 Iowa 520, 88 N. W. 1057; State *v.* Simpkins, 77 Iowa

yet, where an exhibit is filed with an amended pleading, the court, in determining a demurrer to the amended pleading, may consider the exhibit against the party filing it.[6]

g. Operation and Effect of Decision Sustaining Demurrer. It has been held that sustaining a demurrer to an amended complaint authorizes a judgment of nonsuit, but not a direction of a verdict in favor of defendant and entry of judgment thereon.[7] After an amended pleading has been held insufficient on demurrer, it is discretionary with the court to refuse another amendment.[8] But if an amended pleading has been held good on demurrer, it is error for the court which, as well as the pleader, has been misled by the allegation of his pleading, to refuse him leave to amend after a demurrer to the pleading has been sustained.[9] And after a good plea has been amended at the suggestion of the court, and a demurrer to the pleading as amended has been sustained, it is error to refuse leave to refile the original pleading.[10] If a demurrer to an amended complaint is sustained, a cross complaint in the case, distinct and complete in all its parts, and an answer thereto, do not fall with the complaint.[11]

18. Effect of Amendment[12] — a. In General. The *prima facie* effect of the amendment of a pleading is an acknowledgment by the pleader that he has been mistaken, and not that a party or pleader has knowingly made a false statement in the pleading amended.[13] It is a well-recognized principle that an amended pleading based on the same cause of action or defense as the original relates back to the date when such original pleading was filed.[14] If, however, the amendment intro-

676, 42 N. W. 516; Null *v.* Jones, 5 Nebr. 500; Mitchell *v.* Sheppard, 13 Tex. 484. *Compare* Georgia R., etc., Co. *v.* Reeves, 123 Ga. 697, 51 S. E. 610.

6. Com. *v.* Licking Valley Bldg. Assoc., 118 Ky. 791, 82 S. W. 435, 26 Ky. L. Rep. 730; Gibson *v.* Ray, 89 S. W. 474, 28 Ky. L. Rep. 444.

7. Exposition Cotton Mills *v.* Western, etc., R. Co., 83 Ga. 441, 10 S. E. 113.

In Mississippi it is held that, on sustaining a demurrer to an amended plea, the judgment should not be final, but a judgment of *respondeat ouster*. Brown *v.* Smith, 5 How. 387. But where defendant pleads bad pleas, to which a demurrer is sustained, and judgment of *respondeat ouster* awarded, and he pleads bad pleas again, this is regarded as amounting to a violation of the rule to plead over, and if demurrer is again sustained, plaintiff is entitled to judgment for want of a plea. Harrison *v.* Balfour, 5 Sm. & M. 301.

8. Lowry *v.* Inman, 37 How. Pr. (N. Y.) 286. *Compare* Reynolds *v.* Roth, 61 Ark. 317, 33 S. W. 105, where it is held that it was error, on sustaining a demurrer, for indefiniteness, to an amended answer alleging that the note sued on was not transferred to plaintiff by a person authorized to transfer it, to refuse defendant the right to further amend by setting out the facts showing that the transfer was unauthorized; but the answer in question contained a good defense, although without proper definiteness and detail, and the decision is based on the theory that a general demurrer to such answer should be treated as a motion to make more definite and certain.

9. Leitz *v.* Rayner, 37 Kan. 470, 15 Pac. 571.

10. Clark *v.* Laumann, 52 Ill. App. 637.

11. Mott *v.* Mott, 82 Cal. 413, 22 Pac. 1140.

12. Of demurrer see *supra*, VII, A, 14, d. Of replication or reply see *supra*, VII, A, 13, c.

13. Elizabethport Mfg. Co. *v.* Campbell, 13 Abb. Pr. (N. Y.) 86.

14. *California.*— White *v.* Soto, 82 Cal. 654, 23 Pac. 210; Easton *v.* O'Reilly, 63 Cal. 305; Barber *v.* Reynolds, 33 Cal. 497; Jones *v.* Frost, 28 Cal. 245.

Florida.— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

Illinois.— Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630.

Indiana.— Chicago, etc., R. Co. *v.* Bills, 118 Ind. 221, 20 N. E. 775; Fleenor *v.* Taggart, 116 Ind. 189, 18 N. E. 606; Monticello School Town *v.* Grant, 104 Ind. 168, 1 N. E. 302; Kirkham *v.* Moore, 30 Ind. App. 549, 65 N. E. 1042.

Kansas.— Long *v.* Hubbard, 6 Kan. App. 878, 50 Pac. 968.

Louisiana.— Lanusse *v.* Massicot, 3 Mart. 40.

New Hampshire.— Gagnon *v.* Connor, 64 N. H. 276, 9 Atl. 631.

New York.— Meeks *v.* Meeks, 87 N. Y. App. Div. 99, 84 N. Y. Suppl. 67; Merz *v.* Interior Conduit, etc., Co., 20 Misc. 378, 46 N. Y. Suppl. 243.

Texas.— Turner *v.* Brown, 7 Tex. 489; Vitkovitch *v.* Kleinecke, 33 Tex. Civ. App. 20, 75 S. W. 544; Longino *v.* Ward, 1 Tex. App. Civ. Cas. § 521.

Vermont.— Dana *v.* McClure, 39 Vt. 197.

United States.— Carter-Crume Co. *v.* Peurrung, 99 Fed. 888, 40 C. C. A. 150 [*affirming* 86 Fed. 439, 30 C. C. A. 174]; Baltimore, etc., R. Co. *v.* McLaughlin, 73 Fed. 519, 19 C. C. A.

duces a new cause of action, setting up some claim or title not previously asserted, it does not relate back to the filing of the original pleading, but is subject to all the defenses that may be made to a new suit instituted at the time the amendment is filed.[15] The effect of an amendment changing substantially the issues is to dismiss the existing action and commence a new suit.[16] A party cannot, by amendment, deprive the other party of substantial rights which have already accrued to him,[17] nor prejudice proceedings already had.[18] No matter how many amendments may be filed, the necessary legal intendment is that the action was originally brought for the cause ultimately declared on.[19] After a party is allowed to amend on his own request he cannot insist that the amendment was unnecessary [20] Immaterial amendments, no matter when made, do not affect the judgment.[21] The mere allowance of an amendment decides nothing as to whether there can be a recovery on the new pleading or not,[22] and the amended pleadings themselves, and not the order of the court granting leave to amend, determine the character of the action.[23] An amendment properly allowed, conforming the pleading to the proof, effectually disposes of the question of a variance.[24] Ordinarily an amendment does not affect the jurisdiction of the court,[25] although an amendment may be made for the express purpose of conferring jurisdiction upon the court.[26] Leave to amend operates as a stay of proceedings within the time allowed for the amendment.[27] An amendment, after having been allowed, becomes a part of the pleadings, even though it might have been refused on proper objection.[28]

b. When Amended Pleading Supersedes Original. An amended pleading, filed as a substitute for the original pleading, supersedes it and the original pleading ceases to be part of the record,[29] except for the purpose of deciding when the

551; Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498; Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248.

Canada.— Cluxton *v.* Dickson, 12 Can. L. J. N. S. 310.

See 39 Cent. Dig. tit. "Pleading," § 736.

15. *Indiana.*— Fleenor *v.* Taggart, 116 Ind. 189, 18 N. E. 606; Monticello School Town *v.* Grant, 104 Ind. 168, 1 N. E. 302; Lagow *v.* Neilson, 10 Ind. 183. *Compare* Pitzele *v.* Reuping, 32 Ind. App. 237, 68 N. E. 603.

Texas.— Littlefield *v.* Fry, 39 Tex. 299; Governor *v.* Burnett, 27 Tex. 32; Williams *v.* Randon, 10 Tex. 74; Henderson *v.* Kissam, 8 Tex. 46; Longino *v.* Ward, 1 Tex. App. Civ. Cas. § 521.

Vermont.— Dana *v.* McClure, 39 Vt. 197.

United States.— Miller *v.* McIntire, 17 Fed. Cas. No. 9,582, 1 McLean 85.

Canada.—Hogaboom *v.* MacCulloch, 17 Ont. Pr. 377.

See 39 Cent. Dig. tit. "Pleading," § 736 *et seq.*

Whether the amendment state a new cause of action is a question of fact. Dana *v.* McClure, 39 Vt. 197 note.

16. Wortham *v.* Boyd, 66 Tex. 401, 1 S. W. 109.

17. Kilts *v.* Seeber, 10 How. Pr. (N. Y.) 270.

18. Rector *v.* Ridgwood Ice Co., 38 Hun (N. Y.) 293 [*affirmed* in 101 N. Y. 656].

19. Cooke *v.* Cooke, 43 Md. 522.

20. Coates *v.* Galena, etc., R. Co., 18 Iowa 277.

21. Rio *v.* Gordon, 14 La. 418.

22. Grier *v.* Northern Assur. Co., 183 Pa. St. 334, 39 Atl. 10.

23. White *v.* Rodemann, 44 N. Y. App. Div. 503, 60 N. Y. Suppl. 971.

24. Ross *v.* Shanley, 185 Ill. 390, 56 N. E. 1105; Wabash Western R. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; Murdoch *v.* Finney, 21 Mo. 138; Child *v.* New York El. R. Co., 89 N. Y. App. Div. 598, 85 N. Y. Suppl. 604; Abernathy *v.* Seagle, 98 N. C. 553, 4 S. E. 542.

25. Walton *v.* Mandeville, (Iowa 1880) 5 N. W. 776.

26. Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248.

27. Taylor *v.* Grand Trunk R. Co., 6 Ont. Pr. 170.

28. Stone *v.* Nix, 101 Ga. 290, 28 S. E. 840.

29. *California.*— Ralphs *v.* Hensler, 114 Cal. 196, 45 Pac. 1062; Kuhland *v.* Sedgwick, 17 Cal. 123.

Connecticut.— Greenthal *v.* Lincoln, 67 Conn. 372, 35 Atl. 266; Atwood *v.* Welton, 57 Conn. 514, 18 Atl. 322.

Florida.— Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

Georgia.—Alabama Midland R. Co. *v.* Guilford, 114 Ga. 627, 40 Pac. 794.

Idaho.— People *v.* Hunt, 1 Ida. 433.

Indiana.— Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759; Weaver *v.* Apple, 147 Ind. 304, 46 N. E. 642; Hedrick *v.* Whitehorn, 145 Ind. 642, 43 N. E. 942; Aydelott *v.* Collings, 144 Ind. 602, 43 N. E. 867; State *v.* Jackson, 142 Ind. 259, 41 N. E. 534; Hunter *v.* Pfeiffer, 108 Ind. 197, 9 N. E. 124; State *v.* Hay, 88 Ind. 274; Britz *v.* Johnson, 65 Ind. 561; Westerman *v.* Foster, 57 Ind. 408; Wyble *v.* McPheters, 52 Ind. 393; Debreuil *v.* Davis, 48 Ind. 396; Specht *v.* Williamson, 46 Ind. 599;

action was in fact commenced, and whether a new cause of action has been introduced.[30] Therefore, after an amended pleading has been filed, the prayer for relief in the original cannot be considered,[31] and a demurrer to the original pleading does not apply,[32] nor can objection to the action of the court in sustaining or overruling the demurrer be raised on appeal.[33] As long as the amended pleading is recognized by the court, no issue based upon the original can be properly submitted to the jury,[34] or considered on appeal.[35] Where a count is struck out of

Byers *v.* Hickman, 36 Ind. 359; Downs *v.* Downs, 17 Ind. 95; Barnes *v.* Pelham, 18 Ind. App. 166, 47 N. E. 648; Andrews *v.* Sellers, 11 Ind. App. 301, 38 N. E. 1101. See Guthrie *v.* Howland, 164 Ind. 214, 73 N. E. 259.

Iowa.— Williams *v.* Williams, 115 Iowa 520, 88 N. W. 1057; Longley *v.* McVey, 109 Iowa 666, 81 N. W. 150; Roane *v.* Hamilton, 101 Iowa 250, 70 N. W. 181; Mowry *v.* Wareham, 101 Iowa 28, 69 N. W. 1128; Lauman *v.* Des Moines County, 29 Iowa 310; Bates *v.* Kemp, 12 Iowa 99; Bell *v.* Byerson, 11 Iowa 233, 77 Am. Dec. 142; White *v.* Hampton, 9 Iowa 181.

Kansas.— Reihl *v.* Likowski, 33 Kan. 515, 6 Pac. 886; Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625; Long *v.* Hubbard, 6 Kan. App. 878, 50 Pac. 968.

Kentucky.— Sanders *v.* Vance, 7 T. B. Mon. 209, 18 Am. Dec. 167.

Louisiana.— Blake *v.* His Creditors, 6 Rob. 520.

Maryland.—Aberdeen *v.* Bradford, 94 Md. 670, 51 Atl. 614; Mitchell *v.* Williamson, 9 Gill 71.

Minnesota.— Hastay *v.* Bonness, 84 Minn. 120, 86 N. W. 896; Hanscom *v.* Herrick, 21 Minn. 9; Oleson *v.* Newell, 12 Minn. 186; Becker *v.* Sandusky City Bank, 1 Minn. 311.

Missouri.— Ross *v.* Cleveland, etc., Mineral Land Co., 162 Mo. 317, 62 S. W. 984; Bobb *v.* Bobb, 89 Mo. 411, 4 S. W. 511; Kortzendorfer *v.* St. Louis, 52 Mo. 204; Tieknor *v.* Voorhies, 46 Mo. 110; Young *v.* Woolfolk, 33 Mo. 110.

Montana.— Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258.

Nebraska.— Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450; Smith *v.* Wigton, 35 Nebr. 460, 53 N. W. 374.

Nevada.— McFadden *v.* Ellsworth Mill, etc., Co., 8 Nev. 57.

New York.— Donovan *v.* Main, 74 N. Y. App. Div. 44, 77 N. Y. Suppl. 229; John W. Simmons Co. *v.* Costello, 63 N. Y. App. Div. 428, 71 N. Y. Suppl. 577; New York Insulated Wire Co. *v.* Westinghouse Electric, etc., Co., 85 Hun 269, 32 N. Y. Suppl. 1127; Fry *v.* Bennett, 3 Bosw. 200; Kanouse *v.* Martin, 3 Sandf. 593; Kapp *v.* Barthan, 1 E. D. Smith 622; Houghtaling *v.* Lloyd, 15 N. Y. Suppl. 424; Sands *v.* Calkins, 30 How. Pr. 1; Seneca County Bank *v.* Garlinghouse, 4 How. Pr. 174.

Ohio.— Raymond *v.* Toledo, etc., R. Co., 57 Ohio St. 271, 48 N. E. 1093; Barnesville First Nat. Bank *v.* Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485; Dunlap *v.* Robinson, 12 Ohio St. 530.

Oregon.— Wells *v.* Applegate, 12 Oreg. 208, 6 Pac. 770.

Pennsylvania.— Kay *v.* Fredrigal, 3 Pa. St. 221.

Texas.— Chicago, etc., R. Co. *v.* Halsell, 98 Tex. 244, 83 S. W. 15; Mitchell *v.* Sheppard, 13 Tex. 484; International, etc., R. Co. *v.* Boykin, 32 Tex. Civ. App. 72, 74 S. W. 93; Gardiner *v.* Griffith, (Civ. App. 1900) 56 S. W. 558; Wilson *v.* Vick, (Civ. App. 1899) 51 S. W. 45; Baxter *v.* New York, etc., R. Co., (Civ. App. 1893) 22 S. W. 1002.

Washington.— Sengfelder *v.* Hill, 16 Wash. 355, 47 Pac. 757, 58 Am. St. Rep. 36; Ward *v.* Ward, 14 Wash. 640, 45 Pac. 312.

West Virginia.— Roderick *v.* Baltimore, etc., R. Co., 7 W. Va. 54.

Wisconsin.— Yates *v.* French, 25 Wis. 661.

United States.— U. S. *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658; Laskey *v.* Newtown Min. Co., 56 Fed. 628; Cramer *v.* Mack, 12 Fed. 803, 20 Blatchf. 479.

See 39 Cent. Dig. tit. "Pleading," § 737½.

Original pleading as evidence.—The original pleading being considered as abandoned the adverse party cannot read it to the jury, or comment upon it in his argument, unless he first offers it in evidence. Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450.

Although an amendment be styled a second paragraph of the complaint, if it differs in matter and form from the original only in the prayer for relief, it may be considered a complete and new complaint. Trisler *v.* Trisler, 54 Ind. 172.

The filing of an "additional plea" after a demurrer to former pleas has been sustained is not an abandonment of such former pleas, it appearing from the language of the amending pleader that no such abandonment was contemplated. Ready *v.* Thompson, 4 Stew. & P. (Ala.) 52.

30. Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40. See Fitzgerald *v.* O'Flaherty, 1 Molloy 347.

31. Westerman *v.* Foster, 57 Ind. 408.

32. Efroymson *v.* Smith, 29 Ind. App. 451, 63 N. E. 328. See Seaboard Air Line R. Co. *v.* Main, 132 N. C. 445, 43 S. E. 930.

33. Hershberger *v.* Kerr, 159 Ind. 367, 65 N. E. 4; Travellers' Ins. Co. *v.* Martin, 131 Ind. 155, 30 N. E. 1071; Hunter *v.* Pfeiffer, 108 Ind. 197, 9 N. E. 124; Berghoff *v.* McDonald, 87 Ind. 549; Trisler *v.* Trisler, 54 Ind. 172; Kirkpatrick *v.* Holman, 25 Ind. 293; Stewart *v.* Knight, etc., Co., (Ind. App. 1904) 71 N. E. 182; Union Pac. R. Co. *v.* Estes, 37 Kan. 229, 15 Pac. 157; Orton *v.* Scofield, 61 Wis. 382, 21 N. W. 261.

34. Hubbard *v.* Quisenberry, 32 Mo. App. 459.

35. Barnes *v.* Union Pac. R. Co., 54 Fed. 87, 4 C. C. A. 199.

a pleading by way of amendment, it should be regarded as never having been introduced,[36] and although an original pleading admits an alleged fact, if an amended pleading is subsequently filed omitting such admission, it will be considered that the fact in question is denied.[37] However, it is the province of the court, not of counsel, to declare on what pleadings a case shall be tried.[38]

c. When Amendment Stands With Original. An amendment which is merely an addition to the form or substance of the original pleading does not supersede the latter, but both the original and the amendment stand together as one pleading.[39] Ordinarily where additional counts are filed, the amendment is not regarded as a substitution for the original declaration, but both old and new counts stand together;[40] and it has been held that an amended pleading will not be taken as a substitute for the original unless it appears to have been so intended,[41] and the allegations of the original petition stand, in so far as they are not withdrawn or modified by amendment.[42] But an amended pleading qualifies or cancels inconsistent allegations in the original.[43] An amendment which introduces no new or material allegations, but merely dismisses as to a party, does not deprive the pleader of the benefit of his verification to the original complaint.[44]

d. Effect in Curing Errors. By filing an amended pleading the pleader waives any irregularity or error in the proceedings prior thereto.[45] And after an amendment is allowed it is too late to move to dismiss the pleading for any defect which the amendments cured.[46] A written instrument is not rendered inadmissible in evidence on the ground of variance, where the misdescription of the instrument has been cured by amendment.[47]

36. Prescott *v.* Tufts, 4 Mass. 146.

37. Alabama Midland R. Co. *v.* Guilford, 114 Ga. 627, 40 S. E. 794; Houghtaling *v.* Lloyd, 15 N. Y. Suppl. 424; Baxter *v.* New York, etc., R. Co., (Tex. Civ. App. 1893) 22 S. W. 1002.

38. Grand Forks First M. E. Church *v.* Fadden, 8 N. D. 162, 77 N. W. 615.

39. *Georgia.*— Stone *v.* Nix, 101 Ga. 290, 28 S. E. 840.

Illinois.— Graver *v.* Nimick, 190 Ill. 471, 60 N. E. 810.

Iowa.— Cooley *v.* Brown, 35 Iowa 475; Pharo *v.* Johnson, 15 Iowa 560.

Kentucky.— Brashears *v.* Letcher County Ct., 61 S. W. 285, 22 Ky. L. Rep. 1763; Nagle *v.* Reutlinger, 40 S. W. 677, 19 Ky. L. Rep. 303; Louisville, etc., R. Co. *v.* Berg, 32 S. W. 616, 17 Ky. L. Rep. 1105.

Maryland.— Abbott *v.* Bowers, 98 Md. 525, 57 Atl. 538.

Massachusetts.— Kellogg *v.* Kimball, 122 Mass. 163.

Minnesota.— Hanscom *v.* Herrick, 21 Minn. 9.

Mississippi.— Parisot *v.* Helm, 52 Miss. 617.

Montana.— A. M. Holter Hardware Co. *v.* Ontario Min. Co., 24 Mont. 184, 61 Pac. 3.

New York.— Berry *v.* Rowley, 11 N. Y. App. Div. 396, 42 N. Y. Suppl. 368.

North Carolina.— Threadgill *v.* Anson County, 116 N. C. 616, 21 S. E. 425.

Texas.— Keith *v.* Keith, 39 Tex. Civ. App. 363, 87 S. W. 384; Krueger *v.* Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087; Gibbs *v.* Petree, 7 Tex. Civ. App. 526, 27 S. W. 685.

Vermont.— Parlin *v.* Bundy, 18 Vt. 582.

Wisconsin.— Lange *v.* Hook, 51 Wis. 132, 7 N. W. 839.

Wyoming.— Turner *v.* Hamilton, 13 Wyo. 408, 80 Pac. 664.

England.— Wich *v.* Parker, 22 Beav. 59, 2 Jur. N. S. 582, 4 Wkly. Rep. 452, 52 Eng. Reprint 1029; Parkhurst *v.* Lowten, 5 L. J. Ch. O. S. 120; Thorpe *v.* Mattingley, 8 L. J. Exch. 9, 2 Y. & C. Exch. 421. But see Plowden *v.* Thorpe, 7 Cl. & F. 137, 7 Eng. Reprint 1019, West 42, 9 Eng. Reprint 415.

See 39 Cent. Dig. tit. "Pleading," § 738.

40. Chappell *v.* Bates, 56 Conn. 568, 16 Atl. 673; Merker *v.* Belleville Distillery Co., 122 Ill. App. 326; Kellogg *v.* Kimball, 122 Mass. 163.

41. Smith *v.* McKitterick, 51 Iowa 548, 2 N. W. 390; State *v.* Finn, 45 Iowa 148; Cooley *v.* Brown, 35 Iowa 475.

42. State *v.* Finn, 45 Iowa 148.

43. Liverpool, etc., Ins. Co. *v.* Ellington, 94 Ga. 785, 21 S. E. 1006.

44. Kennedy *v.* Barker, MacArthur & M. (D. C.) 340.

45. Garanfio *v.* Cooley, 33 Kan. 137, 5 Pac. 766; Long *v.* Hubbard, 6 Kan. App. 878, 50 Pac. 968.

Applications of rule.— Error in overruling a demurrer to a pleading is cured if the party subsequently amends his pleading in the particular to which the demurrer was directed (Walsh *v.* McKeen, 75 Cal. 519, 17 Pac. 673), and an error in refusing to strike out inconsistent matter in the reply is cured by allowing an amendment to the complaint after verdict (Evarts *v.* Smucker, 19 Nebr. 41, 26 N. W. 596).

46. Kennedy *v.* Wofford, 84 Ga. 157, 10 S. E. 722. See also Pettis *v.* Campbell, 47 Ga. 596.

47. Lasseter *v.* Simpson, 78 Ga. 61, 3 S. E. 243.

e. Effect on Pending Demurrer, Motion, or Plea in Abatement. Filing an amendment to the petition after a demurrer has been interposed is in effect a submission to the demurrer.[48] After plea in abatement, leave obtained to amend confesses the plea and disposes of it.[49] An amendment of course may defeat a motion to make more definite and certain.[50]

B. Amendment as to Parties — 1. Parties Generally — a. Misnomer — (i) *Right to Amend.* While in the absence of statute a misnomer of plaintiff [51] or defendant [52] is not as a rule regarded as amendable, under the codes and practice acts of the several jurisdictions the usual rule is that a mistake in the name of a plaintiff [53] or defendant [54] may be amended so long as it does not operate an entire change of parties.[55] In order to justify an amendment as to defendant it should appear that process has been actually served upon the true defendant.[56]

48. White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 44 Iowa 512.

49. Webster *v.* Tiernan, 4 How. (Miss.) 352.

50. Spuyten Duyvil Rolling Mill Co. *v.* Williams, 1 N. Y. Civ. Proc. 280.

51. Thanhauser *v.* Savins, 44 Md. 410; Horbach *v.* Knox, 8 Watts & S. (Pa.) 30.

Addition of "junior."—Plaintiff may amend his declaration by adding "junior" to his name. Kincaid *v.* Howe, 10 Mass. 203.

52. See Thanhauser *v.* Savins, 44 Md. 410.

53. *Alabama.*— Beggs *v.* Wellman, 82 Ala. 391, 2 So. 877.

Georgia.— Jernigan *v.* Carter, 60 Ga. 131; Woodson *v.* Law, 7 Ga. 105.

Indiana.—Woodward *v.* Wous, 18 Ind. 296; Haines *v.* Bottorff, 17 Ind. 348.

Kansas.— Weaver *v.* Young, 37 Kan. 70, 14 Pac. 458.

Louisiana.— McMullen *v.* Jewell, 3 La. Ann. 139.

Michigan.— Barmon *v.* Clippert, 58 Mich. 377, 25 N. W. 371.

Missouri.— Boisse *v.* Langham, 1 Mo. 572.

Nebraska.— Real *v.* Honey, 39 Nebr. 516, 58 N. W. 136.

New Hampshire.— Elliott *v.* Clark, 18 N. H. 421.

New York.— Havana Bank *v.* Magee, 20 N. Y. 355; Barnes *v.* Perine, 9 Barb. 202 [*affirmed* in 12 N. Y. 18]; Fink *v.* Manhattan R. Co., 15 Daly 479, 8 N. Y. Suppl. 327, 18 N. Y. Civ. Proc. 141, 24 Abb. N. Cas. 81; Mitterwallner *v.* Supreme Lodge K. L. G. S., 90 N. Y. Suppl. 1076; Heckemann *v.* Young, 18 Abb. N. Cas. 196; Merriam *v.* Wolcott, 61 How. Pr. 377.

Pennsylvania.— Peart *v.* Prosser, 6 Lanc. Bar 194.

Washington.— Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355.

See 37 Cent. Dig. tit. "Parties," §§ 162, 163.

54. *Alabama.*— Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733.

California.— McDonald *v.* Swett, 76 Cal. 257, 18 Pac. 324.

Georgia.— Pearce *v.* Bruce, 38 Ga. 444.

Indiana.— New Albany, etc., R. Co. *v.* Laiman, 8 Ind. 212; Weaver *v.* Jackson, 8 Blackf. 5.

Iowa.— Thomson *v.* Wilson, 26 Iowa 120.

Louisiana.— Hickman *v.* Boggus, 14 La. Ann. 609.

Maine.— Fogg *v.* Greene, 16 Me. 282.

Michigan.— Tuller *v.* Ginsburg, 99 Mich. 137, 57 N. W. 1099; Webber *v.* Bolte, 51 Mich. 113, 16 N. W. 257.

Minnesota.— Casper *v.* Klippen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604.

Missouri.— Parry *v.* Woodson, 33 Mo. 347, 84 Am. Dec. 51.

Montana.— Ramsey *v.* Cortland Canal Co., 6 Mont. 498, 13 Pac. 247.

Nebraska.— Davis *v.* Jennings, (1907) 111 N. W. 128.

New York.— Herman *v.* Bailey, 20 Misc. 94, 45 N. Y. Suppl. 88 [*affirming* 19 Misc. 709, 43 N. Y. Suppl. 1155].

Pennsylvania.— Porter *v.* Hildebrand, 14 Pa. St. 129; Germond *v.* Gould, 4 Pa. Co. Ct. 117.

South Carolina.— Sentell *v.* Southern R. Co., 67 S. C. 229, 45 S. E. 155.

Virginia.— Martin *v.* Martin, 95 Va. 26, 27 S. E. 810.

United States.— Scull *v.* Briddle, 21 Fed. Cas. No. 12,570, 2 Wash. 200.

See 37 Cent. Dig. tit. "Parties," §§ 162, 163.

55. *Alabama.*— Beggs *v.* Wellman, 82 Ala. 391, 2 So. 877.

Illinois.— Lake *v.* Morse, 11 Ill. 587.

Indiana.—Woodward *v.* Wous, 18 Ind. 296; Haines *v.* Bottorff, 17 Ind. 348; New Albany, etc., R. Co. *v.* Laiman, 8 Ind. 212.

Louisiana.— McMullen *v.* Jewell, 3 La. Ann. 139.

Maryland.— See Dulany *v.* Norwood, 4 Harr. & M. 496.

Michigan.— Tuller *v.* Ginsburg, 99 Mich. 137, 57 N. W. 1099.

New Hampshire.— Elliott *v.* Clark, 18 N. H. 421.

New York.— Fink *v.* Manhattan R. Co., 15 Daly 479, 8 N. Y. Suppl. 327, 18 N. Y. Civ. Proc. 141, 24 Abb. N. Cas. 81.

See 37 Cent. Dig. tit. "Parties," §§ 162, 163.

An entire christian name may be stricken out and the right name inserted, under a statute permitting the christian name or surname of a party to be amended upon affidavit of mistake. Horbach *v.* Knox, 6 Pa. St. 377.

56. Pearce *v.* Bruce, 38 Ga. 444; Weaver

It has been held that a complaint will not be dismissed because parties are designated by their initials,[57] but the proper remedy is a motion to require the complaint to be amended in such respect.[58] Where a defendant has been designated by a supposed name, his real name being unknown, the court should upon a plea in abatement require the pleading and process to be amended by inserting the true name.[59] In some jurisdictions a mistake in the name of a party may be corrected only by motion to correct or by the court of its own motion.[60] It has been held that an amendment as to the name of a plaintiff cannot be made by merely indorsing the alteration on the declaration.[61]

(II) *Time For Amendment.* As a general rule an amendment correcting a misnomer is, under the statutes of the several states, permissible at any time ;[62] as for example, after plea in abatement for misnomer,[63] after trial has commenced,[64] after the evidence has been introduced,[65] after verdict,[66] after default judgment,[67] or after motion in arrest of judgment because of a variance between the evidence and pleadings in the name of defendant.[68] An amendment has even been allowed after the death of a party.[69]

b. Adding New Parties[70] — (I) *At Common Law.* At common law new plaintiffs[71] or new defendants[72] cannot be inserted in a declaration by way of amendment.

v. Jackson, 8 Blackf. (Ind.) 5; Herman *v.* Bailey, 20 Misc. (N. Y.) 94, 45 N. Y. Suppl. 88.

57. Dismissal for misnomer generally see Dismissal and Nonsuit, 14 Cyc. 387.

58. Kenyon *v.* Semon, 43 Minn. 180, 45 N. W. 10.

59. Davis *v.* Jennings, (Nebr. 1907) 111 N. W. 128.

Failure to amend.— Where a person sued under a fictitious name appears and answers, failure to formally amend by inserting his true name is not material. Moore *v.* Lewis, 76 Mich. 300, 43 N. W. 11.

60. Beavers *v.* Baucum, 33 Ark. 722. See also Ketchum *v.* Jones, 5 U. C. Q. B. 460.

61. Boisse *v.* Langham, 1 Mo. 572.

62. See the statutes of the several states. And see Haines *v.* Curry, 36 Ga. 602; Webber *v.* Bolte, 51 Mich. 113, 16 N. W. 257; Havana Bank *v.* Magee, 20 N. Y. 355; Herman *v.* Bailey, 20 Misc. (N. Y.) 94, 45 N. Y. Suppl. 88 [*affirming* 19 Misc. 709, 43 N. Y. Suppl. 1155]; Ward *v.* Stevenson, 15 Pa. St. 21.

63. Morse *v.* Barrows, 37 Minn. 239, 33 N. W. 706; Cartwright *v.* Chabert, 3 Tex. 261, 49 Am. Dec. 742; Nelson *v.* Barker, 17 Fed. Cas. No. 10,101, 3 McLean 379. But see Payen *v.* Hodgson, 19 Fed. Cas. No. 10,853, 1 Cranch C. C. 506, holding that the amendment could not be allowed, except upon payment of costs and the discharge of bail.

64. *Indiana.*— Abshire *v.* Mather, 27 Ind. 381.

Louisiana.— McMullen *v.* Jewell, 3 La. Ann. 139.

Maine.— Fogg *v.* Greene. 16 Me. 282.

New York.— Barnes *v.* Perine, 9 Barb. 202 [*affirmed* in 12 N. Y. 18].

Washington.— Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355.

65. Ramsey *v.* Cortland Cattle Co., 6 Mont. 498, 13 Pac. 247.

66. Scull *v.* Briddle, 21 Fed. Cas. No. 12,570, 2 Wash. 200.

67. McDonald *v.* Swett, 76 Cal. 257, 18 Pac. 324; Parry *v.* Woodson, 33 Mo. 347, 84 Am. Dec. 51. But see Atwood *v.* Landis, 22 Minn. 558, where it was held that, where summons was personally served upon a person under a wrong name, without any suggestion that such name was not his right name, the court acquired no jurisdiction and that a default judgment and subsequent order made on notice, amending the proceedings by substituting the true name of defendant, were void.

68. Thomson *v.* Wilson, 26 Iowa 120.

69. Pearce *v.* Bruce, 38 Ga. 444, holding that the name of a defendant who had actually been served with process and filed his answer may be corrected on the record, even after his death.

70. In particular actions or proceedings see cross-references at the head of this article.

71. *Georgia.*— Neal *v.* Robertson, 18 Ga. 399.

Illinois.— Zukowski *v.* Armour, 107 Ill. App. 663.

Maine.— Ayer *v.* Gleason, 60 Me. 207; Winslow *v.* Merrill, 11 Me. 127.

Missouri.— Chouteau *v.* Hewitt, 10 Mo. 131.

Pennsylvania.— Carskadden *v.* McGhee, 7 Watts & S. 140; Kelly *v.* Eichman, 3 Whart. 419; Chamberlain *v.* Hite, 5 Watts 373; Wilson *v.* Wallace, 8 Serg. & R. 53.

See 37 Cent. Dig. tit. "Parties," § 76.

Under statutes merely declaratory of the common-law practice of permitting amendments in furtherance of justice, new plaintiffs cannot be added by amendment. Chouteau *v.* Hewitt, 10 Mo. 131.

72. *Illinois.*— Zukowski *v.* Armour, 107 Ill. App. 663.

Maine.— Winslow *v.* Merrill, 11 Me. 127.

Missouri.— Chouteau *v.* Hewitt, 10 Mo. 131.

(II) *Statutory Provisions.* In conformity with the general tendency toward liberality in the allowance of amendments,[73] the codes and practice acts of the several states make express provisions for the addition of new parties.[74] For example, it may be provided that before issue joined upon a plea of non-joinder of a party as defendant, plaintiff may be allowed to amend by inserting names of any other persons as defendants,[75] or that additional defendants may be cited to appear upon such notice and payment of costs as the court may prescribe,[76] or that the court may, upon motion of defendant, order other parties to a contract sued on to be made defendants.[77] In some jurisdictions the only limitations upon the right to amend in an action at law is that there cannot be an entire change of parties plaintiff or defendant.[78]

(III) *Parties Necessary to Determination of Cause.* An ordinary provision of the codes is that when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.[79] This provision is a mere adoption of a well-known equi-

New York.— Commission Co. *v.* Russ, 8 Cow. 122.

Pennsylvania.— Kelly *v.* Eichman, 3 Whart. 419; Chamberlin *v.* Hite, 5 Watts 373; Wilson *v.* Wallace, 8 Serg. & R. 53.

73. See *supra*, VII, A, 3.

74. See the codes and practice acts of the several states. And see the following cases:

Illinois.— Blumenthal *v.* Huerter, (1885) 3 N. E. 425; Lockwood *v.* Doane, 107 Ill. 135.

Kentucky.— Carpenter *v.* Miles, 17 B. Mon. 598, holding that where a defect of parties appears from the answer, the court should require the necessary parties to be brought in, and upon failure of compliance should dismiss the suit.

Louisiana.—Stockmeyer *v.* Weidner, 32 La. Ann. 106; Zacharie *v.* Blandin, 4 La. 154.

Massachusetts.— Goddard *v.* Pratt, 16 Pick. 412.

Mississippi.— Stratton *v.* Taylor, 32 Miss. 201.

See also cases cited *infra*, VII, B, 1, b, (III).

Where a short form of pleading is resorted to, it has been held that another and different party cannot be introduced by way of amendment. Dawty *v.* Hansell, 20 Ga. 659.

In Pennsylvania, in all actions and in any stage of the proceedings, the courts have power to permit amendments by changing or adding the name of any party whenever it shall appear to them that a mistake or omission has been made. Patton *v.* Pittsburgh, etc., R. Co., 96 Pa. St. 169; Hite *v.* Kier, 38 Pa. St. 72; Rangler *v.* Hummel, 37 Pa. St. 130; Druckenmiller *v.* Young, 27 Pa. St. 97. An error in omitting the name of one of defendants is amendable. Richter *v.* Cummings, 60 Pa. St. 441. But an amendment will not be allowed which will bring upon the record an entirely different and independent party. McVeigh *v.* New Jersey Cent. R. Co., 8 Kulp (Pa.) 366, holding that a new defendant could not be joined in an action of tort, who was not a joint wrong-doer with the party sued. And an amendment as to parties cannot be permitted where it will deprive the opposite party of any rights. Riley *v.* Prudential Ins. Co., 12 Pa. Super. Ct. 561, holding that a new plaintiff could not be introduced in an action upon a policy of insurance where, as against the original plaintiff, the action was barred by lapse of time.

In Texas an amendment making a new party may be filed under leave of court and upon such terms as the court may prescribe, at any time before the parties announce themselves ready for trial. Sayles Civ. St. Tex. art. 1188. And it is further provided that before a case is called for trial additional parties, when they are necessary or proper parties to the suit, may be brought in by proper process either by plaintiff or defendant. St. Louis Southwestern R. Co. *v.* McKnight, 99 Tex. 289, 89 S. W. 755; New York L. Ins. Co. *v.* Rohrbough, 2 Tex. App. Civ. Cas. § 216; Sayles Civ. St. Tex. art. 1208. However, parties may be brought in during the progress of the cause. Mott *v.* Ruenbuhl, 1 Tex. App. Civ. Cas. § 599.

75. Goddard *v.* Pratt, 16 Pick. (Mass.) 412.

Where no plea of non-joinder has been filed, it has been held that under such a statute as cited in the text an amendment may be permitted. Goddard *v.* Pratt, 16 Pick. (Mass.) 412; Pitkin *v.* Roby, 43 N. H. 138.

76. Hilton *v.* Osgood, 49 Conn. 110 (holding that additional defendants may be cited, although there was no cause of action against the original defendants, and even after the writ has been evaded); Bank of North America *v.* Hornsey, 13 N. Y. Civ. Proc. 158.

77. National Exch. Bank *v.* Galvin, 20 R. I. 159, 37 Atl. 811.

78. Steed *v.* McIntyre, 68 Ala. 407, holding that the non-joinder of plaintiffs or defendants might be cured by amendment.

79. See the codes of the several states. And see the following cases:

Arizona.— Henshaw *v.* Salt River Valley Canal Co., 6 Ariz. 151, 54 Pac. 577.

California.— De Leonis *v.* Hammel, 1 Cal. App. 390, 82 Pac. 349.

Idaho.— Hailey First Nat. Bank *v.* Bews, 3 Ida. 486, 31 Pac. 816; Oro Fino, etc., Min. Co. *v.* Cullen, 1 Ida. 113.

Missouri.— McLeod *v.* Snyder, 110 Mo. 298, 19 S. W. 494; Butler *v.* Lawson, 72 Mo. 227,

table rule [80] and relates primarily to equitable actions,[81] having been held to apply to an action for the recovery of money only.[82] It is mandatory,[83] and to proceed without necessary parties is jurisdictional error which, while it does not render the judgment void, renders it erroneous upon grounds which may be raised at any time while the court, by due process of law, has control of the case.[84] The court may direct a person to be brought in as a party, although his non-joinder has been pleaded as a defense.[85]

(iv) *Persons Who May Be Added* — (a) *In General.* Subject to the general rule that a new cause of action must not be introduced,[86] it is usually permissible under the codes and statutes to bring in new plaintiffs,[87] where no injus-

holding that necessary parties should be brought in either by amendment or by a supplemental petition and a new summons, and that it was error to dismiss the proceeding.

North Carolina.— Walker *v.* Miller, 139 N. C. 448, 52 S. E. 125, 111 Am. St. Rep. 805, 1 L. R. A. N. S. 157 (holding that the order might be made either before or after judgment); Johnston *v.* Neville, 68 N. C. 177.

Washington.— Murne *v.* Schwabacher, 2 Wash. Terr. 130, 3 Pac. 899, holding that in supplemental proceedings a new party may be brought in when, before final order, it appears that there is reason to believe that he owns an interest in the property sought to be subjected to the judgment.

See 37 Cent. Dig. tit. "Parties," § 79.

A statute providing for intervention does not affect the power of a court to bring other parties before it when satisfied that their presence is necessary to a proper determination of the cause. Brown *v.* Brown, 71 Nebr. 200, 98 N. W. 718, 115 Am. St. Rep. 568.

Surrogate's court in New York.— N. Y. Code Civ. Proc. § 452, relating to the introduction of new parties, is inapplicable to surrogates' courts. Tilden *v.* Dows, 2 Dem. Surr. 489.

In an action at law plaintiff may sue whom he pleases and cannot be compelled to bring in other parties. Chapman *v.* Forbes, 123 N. Y. 532, 26 N. E. 3; Westinghouse *v.* Wyckoff, 81 N. Y. App. Div. 294, 81 N. Y. Suppl. 49, so holding, although the merits of the controversy might require further parties to be brought into the action.

80. McDougald *v.* New Richmond Roller Mills Co., 125 Wis. 121, 103 N. W. 244. See, generally, Equity, 16 Cyc. 200.

81. Chapman *v.* Forbes, 123 N. Y. 532, 26 N. E. 3 [*distinguishing* Derham *v.* Lee, 87 N. Y. 599]; Horan *v.* Bruning, 116 N. Y. App. Div. 482, 101 N. Y. Suppl. 986; American Trust, etc., Bank *v.* Thalheimer, 29 N. Y. App. Div. 170, 51 N. Y. Suppl. 813, holding that an action to recover the proceeds of a consignment, brought against the assignee by a third person claiming as owner of the goods, was not included. See also Springfield F. & M. Ins. Co. *v.* Richmond, etc., R. Co., 48 Fed. 360, holding that the provisions of the South Carolina statute being derived from the equitable practice had no application to an action at law in a federal court.

82. Horan *v.* Bruning, 116 N. Y. App. Div. 482, 101 N. Y. Suppl. 986; Heffern *v.* Hunt, 8 N. Y. App. Div. 585, 40 N. Y. Suppl. 914 (holding that the court cannot in an action for personal injuries bring in a new defendant at the instance of plaintiff); Cosgriff *v.* Hudson City Sav. Inst., 24 Misc. (N. Y.) 4, 52 N. Y. Suppl. 189; Romanoski *v.* Union R. Co., 64 N. Y. Suppl. 1147 [*reversing* 30 Misc. 830, 61 N. Y. Suppl. 1097]; Garrick *v.* Menut, 17 N. Y. Suppl. 455; Goodrich *v.* Williamson, 10 Okla. 588, 63 Pac. 974.

83. See *infra*, VII, B, 1, b, (vii).

84. McDougald *v.* New Richmond Roller Mills Co., 125 Wis. 121, 103 N. W. 244 [*citing* Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909]. *Compare* Kinnan *v.* Forty-Second St. R. Co., 1 Misc. (N. Y.) 457, 21 N. Y. Suppl. 789 [*affirmed* in 140 N. Y. 183, 35 N. E. 498], where it was held that the failure to bring in a party did not invalidate the judgment in favor of plaintiff rendered in the proceeding, where the person omitted testified in plaintiff's behalf that she had no claim to the property in suit, and defendant made no objection at the trial because of non-joinder.

85. Smith *v.* Central Trust Co., 7 N. Y. App. Div. 278, 40 N. Y. Suppl. 152 [*affirmed* in 154 N. Y. 333, 48 N. E. 553].

86. See *infra*, VII, B, 1, b, (vi).

87. *California.*—Acquital *v.* Crowell, 1 Cal. 191.

Maryland.— Thillman *v.* Neal, 88 Md. 525, 42 Atl. 242, holding that under a statute allowing the court, if there is a non-joinder or misjoinder of plaintiffs, to permit an amendment by which a plaintiff may be added or stricken out, as the case may require, a complaint in tort, in the name of a married woman by her husband as next friend, may be amended by making him a joint plaintiff.

Mississippi.— Stauffer *v.* Garrison, 61 Miss. 67.

New Hampshire.— Cole *v.* Gilford, 63 N. H. 60.

New Jersey.— See Hasbrouck *v.* Winkler, 48 N. J. L. 431, 6 Atl. 22.

New York.— Dutcher *v.* Slack, 3 How. Pr. 322, 1 Code Rep. 113.

North Carolina.— Mills *v.* Callahan, 126 N. C. 756, 36 S. E. 164; Kron *v.* Smith, 96 N. C. 389, 2 S. E. 532; Green *v.* Deberry, 24 N. C. 344, holding that new plaintiffs might be added under a statute providing that the courts shall have power to amend any process, pleading, or proceeding in any action pending before it for the furtherance of justice.

tice is done defendant,[88] and likewise to add a new party defendant.[89] But in a proceeding at law, one who has a substantial right and beneficial interest as well as the legal title in a cause of action, alone or with others, cannot be compelled to come in and bring or unite in an action as plaintiff.[90] Nor can a person injured by a tort, when unwilling to come in as plaintiff, be joined in an action on the tort as a defendant.[91] A defendant is entitled to require one contesting the title of plaintiff to the subject of the action to be made a party.[92] But a person need not be required to be made a party upon the motion of defendant, where defendant is entitled to urge his defenses as effectually in the absence of such person.[93] Under some statutes it is provided that, where a person not a party to the action makes a demand against defendant for the same debt or property with regard to which the action is pending, and defendant disputes in whole or in part the liability as asserted against him by the different claimants, he may have an order joining the other claimants as co-defendants with him in the action.[94] Unknown persons cannot be brought in as parties upon motion of defendant, under a provision authorizing a plaintiff who is ignorant of the name of a defendant to designate him in the summons by a fictitious name.[95]

88. Mills *v.* Callahan, 126 N. C. 756, 36 S. E. 164; Kron *v.* Smith, 96 N. C. 389, 2 S. E. 532; Lanes *v.* Squyres, 45 Tex. 382.

89. *Alabama.*— Rand *v.* Gibson, 109 Ala. 266, 19 So. 533, holding that parties defendant liable jointly with defendant at the commencement of the action might be added.

Illinois.— Casey *v.* Kimmel, 181 Ill. 154, 54 N. E. 905.

Kentucky.— Brackett *v.* Boreing, 89 S. W. 496, 28 Ky. L. Rep. 386.

North Carolina.— Tucker *v.* Markland, 101 N. C. 422, 8 S. E. 169. But see Camlin *v.* Barnes, 50 N. C. 296.

Oregon.— Good *v.* Smith, 44 Oreg. 578, 76 Pac. 354.

Canada.— Smith *v.* Boyd, 18 Ont. Pr. 296.

But see Rousseau *v.* Daysson, 8 Mart. N. S. (La.) 273 (holding that one sued for fraud cannot bring in another party to the transaction as a co-defendant); Farrand *v.* Kavanaugh, 132 Mich. 436, 93 N. W. 1083 (where it is said that as a general rule new parties cannot be brought in by amendment in actions of tort).

Under N. Y. Code Civ. Proc. § 723, there has been some conflict as to in what proceedings and in what cases a new defendant may be added. The section is construed not to permit of an entire change of the defendant by the substitution of another or entirely different defendant. New York State Monitor Milk Pan Assoc. *v.* Remington Agricultural Works, 89 N. Y. 22 [*reversing* 25 Hun 475]; Horan *v.* Bruning, 116 N. Y. App. Div. 482, 101 N. Y. Suppl. 986. In actions upon contract, where plaintiff has erroneously sued but one or more of a greater number of parties liable on the contract jointly, the other persons liable may be brought in as defendants by amendment. Haskell *v.* Moran, 118 N. Y. App. Div. 810, 103 N. Y. Suppl. 667; Lewin *v.* Wright, 31 Hun 327. With regard to tort actions it has been held that a new defendant cannot be brought in. Heffern *v.* Hunt, 8 N. Y. App. Div. 585, 40 N. Y. Suppl. 914; Hinds *v.* Bonner, 52 Misc. 461, 102 N. Y. Suppl. 484. *Contra*, Schun *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 560, 81 N. Y. Suppl. 859.

Where it appears that the question who should be defendants should be decided in an action in which all are bound by the decision, it is proper to allow a third person to be joined as defendant by an amendment. Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547, where it is said, however, that the trilateral controversy must be such as may be conveniently tried in one suit.

90. Springfield F. & M. Ins. Co. *v.* Richmond, etc., R. Co., 48 Fed. 360. See also Frisbie *v.* McFarlane, 196 Pa. St. 116, 46 Atl. 358, 79 Am. St. Rep. 696, holding that while the absence of plaintiffs might be pleaded in abatement, defendant had no way by which he could put them upon the record against their will and enter judgment against them.

91. Springfield F. & M. Ins. Co. *v.* Richmond, etc., R. Co., 48 Fed. 360.

92. Melvin *v.* Chaney, 8 Tex. Civ. App. 252, 28 S. W. 241, so holding with regard to one contesting the title of plaintiff to land upon which timber stood, in an action on a contract for the price of the timber.

93. Hall *v.* Murphy, 14 Tex. 637.

94. See the statutes of the several states. And see Sullivan *v.* Crowe, 72 N. Y. App. Div. 5, 76 N. Y. Suppl. 98 (holding that such an application should be granted only where the question to be determined is as to the right of the rival claimants to money or property in the hands of defendant, and not in a case where the right of each one of the claimants to recover depends upon a state of facts which does not affect the other claimant); Montague *v.* Jewelers', etc., Co., 41 N. Y. App. Div. 530, 58 N. Y. Suppl. 715 (holding that a person could not be made a co-defendant where it did not appear that he challenged plaintiff's rights or made any claim except in subordination to that of plaintiff).

Substitution of adverse claimant as defendant see INTERPLEADER, 23 Cyc. 35.

95. Tyrrel *v.* Seaman's Sav. Bank, 57 N. Y. App. Div. 381, 68 N. Y. Suppl. 275.

(B) *Necessity of Interest.* Although broad provisions are contained in the statutes for the addition of new parties, the existence in such parties of some privity with or interest in the pending action is required.[96]

(C) *Persons Against Whom Defendant May Recover* — (1) IN GENERAL. Under a statute allowing the bringing in of necessary or proper parties, it is held that persons against whom defendant would have a right of action in case judgment is rendered against him may be made defendants upon his application.[97] But a defendant has not a right in all cases to implead other parties who might become liable to him as a result of a judgment against him, regardless of other considerations,[98] and has not the absolute right to bring in another defendant in order to try along with the cause of action a different one depending on a different issue.[99]

(2) CALLING IN WARRANTY. In Louisiana it is specially provided by statute that a defendant wishing to call one in warranty may in his answer pray the court to decree against his warrantor the same judgment which may be rendered against him on the principal demand.[1] Under this statute the right to call in a warrantor does not depend upon the question of privity between the warrantor and plaintiff in the main action.[2] But as a basis for the exercise of such right there must be a contract of warranty between defendant and the person so called in.[3] A third person cannot be brought into a suit to warrant and defend the interests of a plaintiff.[4] Nor can the right to call in warranty be extended beyond the cases enumerated by law.[5]

(D) *Transferees Pendente Lite.* Although it has been held that a transfer of the cause of action *pendente lite* does not necessitate the bringing in of the transferee by amendment,[6] it is proper for the court to allow new parties, who have become interested in the subject-matter since the commencement of the suit, to be brought in in such manner.[7]

96. U. S. Fidelity, etc., Co. *v.* Fossati, 97 Tex. 497, 80 S. W. 74. And see Hurlock *v.* Reinhart, 41 Tex. 580; Eccles *v.* Hill, 13 Tex. 65; Burditt *v.* Glasscock, 25 Tex. Suppl. 45.

One against whom a complaint states no cause of action or ground of relief cannot be brought in as a defendant upon the motion of plaintiff. Penfield *v.* Wheeler, 27 Minn. 358, 7 N. W. 364.

97. Boyer *v.* St. Louis, etc., R. Co., (Tex. Civ. App. 1903) 72 S. W. 1038 [*reversed* on other grounds in 97 Tex. 107, 76 S. W. 441]; Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; New York L. Ins. Co. *v.* Rohrbough, 2 Tex. App. Civ. Cas. § 216; Blum *v.* Root, 2 Tex. App. Civ. Cas. § 98. But *compare* Booth *v.* Manhattan St. R. Co., 73 N. H. 527, 63 Atl. 577, holding that in an action for negligence a defendant is not entitled to have a third person brought in upon the ground that any negligence which would entitle plaintiff to recover against defendant was also the negligence of such third person, since such third person upon a notice to appear and defend, which defendant had the right to give, would be bound by all the facts determined in the suit, which were material to defendant's claim against him.

98. U. S. Fidelity, etc., Co. *v.* Fossati, 97 Tex. 497, 80 S. W. 74; Frey *v.* Ft. Worth, etc., R. Co., 86 Tex. 465, 25 S. W. 609; Thomas *v.* Chapman, 62 Tex. 193; Coutlett *v.* U. S. Mortgage Co., (Tex. Civ. App. 1900) 60 S. W. 820.

99. U. S. Fidelity, etc., Co. *v.* Fossati, 97 Tex. 497, 80 S. W. 74 [*distinguishing* Skipwith *v.* Hurt, 94 Tex. 322, 60 S. W. 423; San Antonio *v.* Smith, 94 Tex. 266, 59 S. W. 1109; Philadelphia Underwriters *v.* Ft. Worth, etc., R. Co., 31 Tex. Civ. App. 104, 71 S. W. 419, as cases in which plaintiff had a cause of action against the party impleaded by defendant, to which cause of action defendant was entitled to be subrogated, and the party impleaded was in justice primarily liable].

1. La. Code Pr. art. 382.

2. Muntz *v.* Algiers, etc., R. Co., 114 La. 437, 38 So. 410.

3. Muntz *v.* Algiers, etc., R. Co., 114 La. 437, 38 So. 410 [*citing* and *harmonizing* Levy *v.* Louisville, etc., R. Co., 35 La. Ann. 615; Butler *v.* Stewart, 18 La. Ann. 554; Oliver *v.* Bry, 7 La. Ann. 590; Foster *v.* Baer, 6 La. Ann. 442; McClure *v.* Copley, 1 Rob. (La.) 133; Brown *v.* Copley, 19 La. 473; Kirkpatrick *v.* McMillen, 14 La. 497; Anslem *v.* Wilson, 8 La. 35; Lafonta *v.* Poultz, 6 Mart. N. S. (La.) 391].

4. Payne *v.* Katz, McGloin (La.) 18.

5. Payne *v.* Katz, McGloin (La.) 18. See also Lusk *v.* Swon, 9 La. Ann. 367.

6. Matthews *v.* Boydstun, (Tex. Civ. App. 1895) 31 S. W. 814; B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219; Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20.

7. Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350. See also Wellman *v.* Dismukes, 42 Mo. 101 (holding that where it appears at the trial that defendant has assigned all his interest in the matter in controversy to another, the assignee

(E) *Persons Necessary to Determination of Cause.* Persons necessary to the complete determination of the controversy are persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined.[8] Where the controversy between the original parties may be fully adjudicated and determined without prejudice to them or the parties of record new parties should not be brought in.[9] A new party should not be made merely for the purpose of settling matters between him and defendant.[10] While in some cases it has been held that the persons who may be brought in must have been necessary or proper parties at the beginning of the action,[11] the general rule is that a purchaser *pendente lite* may be brought in.[12] Where the debtor is under an apparent

may be added as a party to the record); Averill *v.* McCook, 86 Mo. App. 346 (holding that where in an action against the receivers of a railroad company it appears that they have been discharged, the company succeeding the receivers, if in fact liable for injuries during the receivership, may be brought in as a defendant).

As plaintiff or defendant.—Under a statute providing that in the furtherance of justice the court may amend any proceeding by adding or striking out the name of a party, an assignee *pendente lite* may be made a defendant by order of court. McGown *v.* Leavenworth, 2 E. D. Smith (N. Y.) 24; Packard *v.* Wood, 17 Abb. Pr. (N. Y.) 318, holding that under such provision a defendant is not entitled to compel one who takes an assignment of the cause of action pending the suit to become a plaintiff without his consent.

In an action to recover possession of specific property, a fraudulent vendee of defendant *pendente lite* may be brought in by amendment. Coats *v.* Elliott, 23 Tex. 606.

Supplemental complaint or answer see *infra*, VII, D.

8. Chapman *v.* Forbes, 123 N. Y. 532, 26 N. E. 3; McMahon *v.* Allen, 12 How. Pr. (N. Y.) 39 [*affirmed* in 1 Hilt. 103, 3 Abb. Pr. 89]; Bankers' Nat. Bank *v.* Security Trust Co., 19 S. D. 418, 103 N. W. 654. See Hasberg *v.* Moses, 81 N. Y. App. Div. 199, 80 N. Y. Suppl. 867; Sturtevant *v.* Brewer, 4 Bosw. (N. Y.) 628; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267 [*affirmed* in 24 N. Y. 607]; Davis *v.* New York, 2 Duer (N. Y.) 663 [*reversed* on other grounds in 14 N. Y. 506, 67 Am. Dec. 186]; Carroll *v.* Fethers, 82 Wis. 67, 51 N. W. 1128; Burr *v.* C. C. Thompson, etc., Co., 78 Wis. 227, 47 N. W. 277.

In an action against an officer and his sureties the sureties, upon a petition showing that they have a right either to have recovery against them postponed until exhaustion of plaintiff's remedy against others primarily liable, or to be subrogated to plaintiff's rights against such others, are entitled to have such others made parties. Washburn *v.* Lee, 128 Wis. 312, 107 N. W. 649.

In an action to declare a resulting trust, one having an interest in the subject-matter must be brought in. O'Conner *v.* Irvine, 74 Cal. 435, 16 Pac. 236.

Parties to a joint contract sued upon, who have been omitted, must be brought in. Harrison *v.* McCormick, 69 Cal. 616, 11 Pac. 456.

The executor must be a party in proceedings to reach the assets of a testator's estate. Duane *v.* Paige, 82 Hun (N. Y.) 139, 31 N. Y. Suppl. 310.

The mortgagee of exempt personalty must be made a party in an action by the mortgagor against one who has seized it on execution. Evans *v.* St. Paul Harvester Works, 63 Iowa 204, 18 N. W. 881.

9. *Indiana.*— Fischer *v.* Holmes, 123 Ind. 525, 24 N. E. 377.

Iowa.— Bannister *v.* McIntire, 112 Iowa 600, 84 N. W. 707.

Minnesota.— Clay County Land Co. *v.* Alcox, 88 Minn. 4, 92 N. W. 464.

New York.— Brush *v.* Levy, 54 N. Y. App. Div. 296, 66 N. Y. Suppl. 700; Muller *v.* Wahler, 1 N. Y. App. Div. 245, 37 N. Y. Suppl. 140.

North Dakota.— Bolton *v.* Donavan, 9 N. D. 575, 84 N. W. 357; Northwestern Tel. Exch. Co. *v.* Northern Pac. R. Co., 9 N. D. 339, 83 N. W. 215.

Where no issue was raised by the pleadings, the trial court's refusal to permit other parties to be made defendants was not error. Burns *v.* Chicago, etc., R. Co., 110 Iowa 385, 81 N. W. 794.

10. Heaton *v.* Lynch, 11 Ind. App. 408, 38 N. E. 224; Clay County Land Co. *v.* Alcox, 88 Minn. 4, 92 N. W. 464; Bankers' Nat. Bank *v.* Security Trust Co., 19 S. D. 418, 103 N. W. 654.

11. Callanan *v.* Keeseville, etc., R. Co., 48 Misc. (N. Y.) 476, 95 N. Y. Suppl. 513; Griswold *v.* Caldwell, 14 Misc. 299, 35 N. Y. Suppl. 1057, 25 N. Y. Civ. Proc. 122, 2 N. Y. Annot. Cas. 211.

12. Matteson *v.* Wagoner, 147 Cal. 739, 82 Pac. 436; Peoples' Ditch Co. *v.* Seventy-Six Land, etc., Co., (Cal. 1896) 44 Pac. 176, where one who had purchased defendant's rights in the property in controversy subsequently to issue joined on the original complaint was brought in as a defendant.

Purchasers at a partition sale of the property designated may be brought into an action to enforce the statutory liability of the heirs of a deceased debtor, where they purchased with notice of the pending action. Rogers *v.* Patterson, 87 Hun (N. Y.) 219, 33 N. Y. Suppl. 1022.

In New York where there is a mere grant of the property so that the interests of the original plaintiff and the new owner or grantee are several and distinct, then in the exercise of a sound discretion a motion to bring in such grantees should be denied.

liability to two different parties for or on account of the same debt or duty, and only one of them is before the court, the other should be brought in.[13] Parties necessary to the complete determination of the suit may be ordered to be brought in, although they are not within the jurisdiction of the court.[14]

(v) *Entire Change of Parties.* Under a statutory provision permitting the adding or correction of the name of a party, an entire change in parties plaintiff or defendant cannot be permitted.[15] A statute permitting amendments as to form will not permit an amendment making new parties plaintiff in order to sustain an action that was originally brought without authority.[16] An amendment which adds other usees technically speaking does not change the party plaintiff.[17]

(vi) *Limitation to Original Cause of Action.* Amendments with regard to parties are subject to the rule applicable to amendments with regard to other matters,[18] that an entirely new cause of action must not be introduced.[19] So where a complaint fails to state a cause of action in plaintiff, it cannot be amended by adding other parties as plaintiffs in whose favor a cause of action is shown to exist.[20] In determining whether an amendment changing or adding a party states a new cause of action, the rule has been applied that if the same evidence will support both complaints, and the same measure of damages will apply to both, no new cause is stated.[21] The addition of a new party, or even a change of the capacity in which one of a number of plaintiffs sues, does not in itself amount to the statement of a new cause of action.[22] An amendment which adds other usees does not introduce a new cause of action.[23] One who has a right to sue in

Welde *v.* New York, etc., R. Co., 108 N. Y. App. Div. 286, 95 N. Y. Suppl. 728; Pope *v.* Manhattan R. Co., 79 N. Y. App. Div. 583, 80 N. Y. Suppl. 316, so holding in an action to recover damages resulting from the operation of an elevated railroad in which plaintiff had transferred his property *pendente lite*. Where, however, there is a reservation in the deed and the question is presented as to the rights which the original plaintiff may have reserved to himself in the land, for the complete determination of which the presence of the grantee is proper, he may be brought in. Pope *v.* Manhattan R. Co., 79 N. Y. App. Div. 583, 80 N. Y. Suppl. 316, in which a further qualification of the rule is made, that the purchaser must join in the application The lessee of defendant may be brought in where necessary to the complete determination of the action. Farley *v.* Manhattan R. Co., 117 N. Y. App. Div. 248, 102 N. Y. Suppl. 330, holding that in an action to enjoin the operation of an elevated railroad, and incidentally for damages, the lessee of defendant *pendente lite* might be brought in since the injunctive relief should not be granted without the lessee being made a party; and in case plaintiff could not obtain the injunctive relief he might be relegated to an action at law for damages which, as well as a new action for the relief sought in the original complaint, might be barred by limitation.

13. Fowler *v.* Doyle, 16 Iowa 534.

14. Sturtevant *v.* Brewer, 9 Abb. Pr. (N. Y.) 414, 17 How. Pr. 571.

15. Hallett *v.* Larcom, 5 Ida. 492, 51 Pac. 108; Little *v.* Virginia, etc., Water Co., 9 Nev. 317; New York State Monitor Milk Pan Assoc. *v.* Remington Agricultural Works, 89 N. Y. 22 [*reversing* 25 Hun 475]; Horan *v.* Bruning, 116 N. Y. App. Div. 482, 101 N. Y. Suppl. 986; Wright *v.* Storms, 3 Code Rep. (N. Y.) 138. See also *infra*, VII, B, 1, c, (II).

16. Lusk *v.* Kimball, 87 Fed. 545.

17. Glenn *v.* Black, 31 Ga. 393.

18. See *supra*, VII, A, 11, a, (III).

19. *Alabama.*— Steed *v.* McIntyre, 68 Ala. 407.

California.— Stewart *v.* Spaulding, 72 Cal. 264, 13 Pac. 661, holding that it did not constitute the adding of a new cause of action to plead the same facts with regard to a different legal aspect.

Georgia.— Williams *v.* Hall, 103 Ga. 796, 30 S. E. 660; Neal *v.* Robertson, 18 Ga. 399.

Idaho.— Hallett *v.* Larcom, 5 Ida. 492, 51 Pac. 108.

New York.— Peck *v.* Ward, 3 Duer 647.

North Carolina.— State *v.* Turner, 96 N. C. 416, 2 S. E. 51.

20. State *v.* Rottaken, 34 Ark. 144.

21. Hume *v.* Kelly, 28 Oreg. 398, 43 Pac. 380; Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81.

An amendment making additional defendants parties to a cause of action stated in the original complaint does not change the cause of action, where the same evidence will be required to support the complaint and the same judgment is to be rendered. Grigsby *v.* Barton County, 169 Mo. 221, 69 S. W. 296.

22. Laughlin *v.* Tips, 8 Tex. Civ. App. 649, 28 S. W. 551.

An amendment adding a new plaintiff does not present a new cause of action, where the claim remains the same. Wyman *v.* Wilcox, 63 Vt. 487, 21 Atl. 1103.

The addition of the name of another partner as plaintiff does not set up a new cause of action. McIlhenny *v.* Lee, 43 Tex. 205; Laughlin *v.* Tips, 8 Tex. Civ. App. 649, 28 S. W. 551.

23. Glenn *v.* Black, 31 Ga. 393, so holding of an amendment adding other execution

his own name upon a contract for damages sustained by himself and other beneficiaries may, without changing the cause of action, amend his complaint by making the other beneficiaries parties plaintiff.[24]

(VII) *PROCEDURE* — (A) *In General.* In case the specific procedure for the addition of a new party to the record is prescribed by statute, such procedure must be followed.[25] The court is not bound to expressly tender an opportunity for amendment.[26] Under provisions requiring persons necessary to the complete determination of the controversy to be made parties, the court must act on its own motion and refuse to enter judgment without the presence of such persons,[27] and it is not necessary that an objection should have been taken.[28]

(B) *Time.* An amendment adding a party must be made within the time fixed by statute or by rule of court, in case a provision as to time is made.[29] In case the right to bring in new parties exists it must be exercised with diligence after notice of its necessity.[30] By the express provisions of some statutes the right to amend must be exercised at such time and in such manner as not unreasonably to delay the trial.[31] It has been held under the circumstances of particular cases and in the construction of particular statutes that an amendment may be made at any stage of the proceedings,[32] after change of venue,[33] after plea in abatement,[34] after jury sworn,[35] at any time pending the trial,[36] at any time before final judgment,[37]

creditors in an action by a sheriff for the use of execution creditors to recover the price of land sold under an execution.

24. Galveston, etc., R. Co. *v.* House, 4 Tex. Civ. App. 263, 23 S. W. 332.

25. Houser *v.* Smith, 19 Utah 150, 56 Pac. 683. See Louisville, etc., Consol. R. Co. *v.* Surwald, 34 Ill. App. 525 (holding that a person not originally a party to a suit cannot be made a party on the mere suggestion of defendant's counsel); Carr *v.* Collins, 27 Ind. 306.

Suggestion of death.— Where certain heirs of a party in interest are also parties in their own right, a mere suggestion on the record of the death of such party without issue is sufficient to show that such heirs have succeeded to his interests. Stevens *v.* Melcher, 3 Silv. Sup. (N. Y.) 364, 6 N. Y. Suppl. 811.

26. Mohon *v.* Tatum, 69 Ala. 466.

27. People *v.* McClellan, 119 N. Y. App. Div. 416, 104 N. Y. Suppl. 447 [*reversing* 54 Misc. 130, 105 N. Y. Suppl. 844]; McDougald *v.* New Richmond Roller Mills Co., 125 Wis. 121, 103 N. W. 244.

28. *Arkansas.*—Arkadelphia Lumber Co. *v.* Mann, 78 Ark. 414, 94 S. W. 46.

California.— O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236; Robinson *v.* Gleason, 53 Cal. 38.

New York.—Continental Trust Co. *v.* Nobel, 10 Misc. 325, 30 N. Y. Suppl. 994.

South Carolina.— Young *v.* Garlington, 31 S. C. 290, 9 S. E. 960.

Wisconsin.— McDougald *v.* New Richmond Roller Mills Co., 125 Wis. 121, 103 N. W. 244.

29. Chamberlin *v.* Noyes, 7 Hill (N. Y.) 145.

30. Sundberg *v.* Goar, 92 Minn. 143, 99 N. W. 638. See also Peck *v.* Peck, 33 Colo. 421, 80 Pac. 1063. See Starr Cash, etc., Car Co. *v.* Starr, 69 Conn. 440, 37 Atl. 1057 (holding that two years after defendant's default, and on the eve of trial granted at his request, it was too late for him to move that another be cited in as a co-defendant); Hilton Bridge Constr. Co. *v.* New York Cent., etc., R. Co., 84 Hun (N. Y.) 225, 32 N. Y. Suppl. 514 [*modified* in 145 N. Y. 390, 40 N. E. 86]. But *compare* Stockton *v.* Mengel, 1 Woodw. (Pa.) 344.

31. See the statutes of the several states. And see Reagan *v.* Copeland, 78 Tex. 551, 14 S. W. 1031; Mitchell *v.* Adams, 1 Tex. Unrep. Cas. 117; Land *v.* Klein, (Tex. Civ. App. 1895) 29 S. W. 657; Pacific Express Co. *v.* Williams, 2 Tex. App. Civ. Cas. § 810.

32. See Patton *v.* Pittsburgh, etc., R. Co., 96 Pa. St. 169; Rangler *v.* Hummel, 37 Pa. St. 130.

Under a statute providing for the bringing in of parties without whom a complete determination of the controversy cannot be had, a motion should be considered, although made after demurrers have been sustained to the complaint, which have been interposed by certain of the defendants, and other defendants have answered. De La Beckwith *v.* Colusa County Super. Ct., 146 Cal. 496, 80 Pac. 717, so holding where no final judgment had been entered in favor of defendants whose demurrers have been sustained, although the time had elapsed within which plaintiff might have amended his complaint under the order sustaining the demurrer, and no excuse was offered as a condition of relief from such order.

33. Fears *v.* Riley, 148 Mo. 49, 49 S. W. 836.

34. Powell *v.* Myers, 1 Barb. (N. Y.) 427.

35. Brazelton *v.* Turney, 7 Coldw. (Tenn.) 267.

36. Guilbeau *v.* Melancon, 28 La. Ann. 627. But *compare* Noll *v.* Swineford, 6 Pa. St. 187.

37. See Blumenthal *v.* Huerter, (Ill. 1885) 3 N. E. 425; Lockwood *v.* Doane, 107 Ill. 235.

after all the evidence has been given,[38] after the cause has been reopened for further evidence,[39] after judgment,[40] after reversal on appeal,[41] and in vacation.[42] But it has been held that an amendment is properly refused after a nonsuit.[43] Where an action is brought in behalf of plaintiffs and of all other persons in like status who choose to join, a third person cannot ask to be joined after the parties to the original controversy have settled it.[44] Where it is provided by statute that action must be commenced by the voluntary appearance of, and joinder of issues by, the parties, or by service of summons, an amendment after trial, adding the name of a person who has not appeared or been served with summons, cannot be made.[45]

(c) *Leave of Court.* The right of defendant to amend as of course depends upon the particular statute invoked.[46] A leave to amend generally has been held to permit of an amendment joining new defendants.[47] Under some statutes a new party plaintiff may be added, as of course, before defendant has answered.[48] Where plaintiff is given a general privilege to file an amended complaint, he cannot be permitted thereunder to make an entire change of parties plaintiff.[49]

(d) *Discretion of Court.* As a general rule, the question of whether a new party shall be brought in is to be determined in the sound discretion of the trial court,[50] which is reviewable only for abuse.[51] Such discretion should be exercised for the full protection of those who are absent from the record.[52] The question of whether a party should or should not be brought in as necessary to the complete determination of the controversy is within the discretion of the court.[53] But where it is shown that the controversy cannot be determined as between the parties without

38. Atty.-Gen. *v.* New York, 3 Duer (N. Y.) 119.

39. Jordan *v.* Greig, 33 Colo. 360, 80 Pac. 1045.

40. Sage *v.* Mosher, 17 How. Pr. (N. Y.) 367; Tucker *v.* Markland, 101 N. C. 422, 8 S. E. 169; Dedrick *v.* Charrier, 15 N. D. 515, 108 N. W. 38, holding that the right to bring in proper parties after judgment is one of the inherent powers of the court to control their own judgments. *Contra*, Schmidt *v.* Louisville, etc., R. Co., 99 Ky. 143, 35 S. W. 135, 36 S. W. 168, 18 Ky. L. Rep. 65.

Bringing in parties after judgment generally see JUDGMENTS, 23 Cyc. 870.

41. Clodfelter *v.* Hulett, 92 Ind. 426.

42. Bowman *v.* Venice, etc., R. Co., 102 Ill. 459.

43. Shell *v.* West, 130 N. C. 171, 41 S. E. 65.

44. Wilson *v.* Lexington Bank, 77 N. C. 47, so holding where the settlement was evidenced by proper docket entries.

45. Kest *v.* Kimmel, 37 Misc. (N. Y.) 826, 76 N. Y. Suppl. 949.

46. See the statutes of the several states. And see Denike *v.* Denike, 44 N. Y. App. Div. 621, 60 N. Y. Suppl. 110 [*affirmed* in 167 N. Y. 585, 60 N. E. 1110] (holding that where, on the trial of a cause, it appears that a person not a party to the action has an interest in the subject-matter, and that a complete determination of the controversy cannot be had without the joinder of such other person, the court should direct her to be brought in as a party; but it is error to require plaintiff to apply to the special term for leave to join such party as defendant); Russell *v.* Spear, 5 How. Pr. (N. Y.) 142, 3 Code Rep. 189 (holding that there must be an application for leave); Mead *v.* Bagnall, 15 Wis. 156 (holding that new defendants might be added as of course).

47. Louvall *v.* Gridley, 70 Cal. 507, 11 Pac. 777.

Entry.— Where, in an action by a husband on a fire-insurance policy covering community property, an amended complaint, joining the wife as a party plaintiff, is filed, it will be assumed that the court was satisfied to grant the amendment, whether leave was formally entered before or after the amended complaint. Hedican *v.* Pennsylvania F. Ins. Co., 21 Wash. 488, 58 Pac. 574.

48. See Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687.

49. Salt Lake County *v.* Golding, 2 Utah 319, where it is said that new parties are not to be brought into court in this way, but that the complaint should be amended in this respect upon order of court.

50. *Alabama.*— Gayle *v.* Bancroft, 22 Ala. 316.

Colorado.— Colorado Mfg. Co. *v.* McDonald, 15 Colo. 516, 25 Pac. 712.

Indiana.— Stewart *v.* Ludwick, 29 Ind. 230.

Nebraska.— Cahn *v.* Lipson, 39 Nebr. 776, 58 N. W. 280.

North Carolina.— Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800; State *v.* Candler, 118 N. C. 888, 24 S. E. 709; Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328; Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466.

South Carolina.— Hellams *v.* Prior, 64 S. C. 543, 43 S. E. 25, 64 S. C. 296, 42 S. E. 106.

See 37 Cent. Dig. tit. "Parties," § 80.

51. See APPEAL AND ERROR, 3 Cyc. 327.

52. Frank *v.* Union Cent. L. Ins. Co., 130 Fed. 224.

53. Pope *v.* Manhattan R. Co., 79 N. Y.

the addition of other persons as defendants, the application must be granted.[54] It will be presumed, where nothing to the contrary appears, that new parties made parties to an amended complaint were brought in with their consent.[55] Where after a demurrer has been sustained because of the failure of a complaint to state a cause of action, plaintiff moves to amend his complaint and to add a new defendant, the ruling as to the admission of the new defendant is dependent upon the decision as to the right to amend as to the cause of action.[56]

(E) *Notice of Motion or Application.* Under some statutes notice to the opposite party of a motion to bring in other parties is necessary.[57]

(F) *Showing as to Grounds.* In order that additional parties may be brought in, the necessity for making them parties must be clearly shown.[58] A motion or application to the court for the bringing in of a new party must show a sufficient reason therefor.[59] Upon scire facias to bring in a party defendant according to the practice in some jurisdictions,[60] the only issue which may be raised by answer is the question of whether respondent is a proper party to the cause.[61] Upon a motion to bring in parties necessary to the complete determination of the cause, it cannot be urged as an objection that there is collusion between the moving party and the party whom he seeks to bring in.[62]

(G) *Withdrawal of Application.* In case defendants, after having sought to have additional parties brought in, but before service on such parties, agree that judgment shall be entered in favor of plaintiff, it is equivalent to a withdrawal of the application.[63]

(H) *Terms.* Under the statutes the court is usually authorized to impose terms [64] such as the imposition of costs,[65] or requirement that the moving party shall assume responsibility for increased costs in case of lack of success,[66] upon adding a new party. But such terms should be reasonable,[67] and it is proper to allow plaintiff to amend without imposing terms, when defendant has delayed making an objection.[68]

(I) *Order.* The order may be specific as to the course which is to be pursued to bring in the new parties, or it may simply provide that they be allowed to be brought in.[69] The order is not binding upon a person not within the jurisdiction

App. Div. 583, 80 N. Y. Suppl. 316, holding that this was the rule partieularly as respecting real property or title thereto.

54. McDonald *v.* McDonald, 120 N. Y. App. Div. 367, 105 N. Y. Suppl. 277, holding that it was error to deny a motion made by plaintiffs after serviee of summons, complaint, and answer, but before the time for amendment of the complaint had expired.

55. Weese *v.* Barker, 7 Colo. 178, 2 Pac. 919.

56. Boen *v.* Evans, 72 Minn. 169, 75 N. W. 116.

57. See the statutes of the several states. And see Gale *v.* Shillock, 4 Dak. 182, 29 S. W. 661; Young *v.* Rollins, 90 N. C. 134.

58. Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13; Lee *v.* Eure, 92 N. C. 283. See also Hawkins *v.* Collier, 101 Ga. 145, 28 S. E. 632.

59. Atlanta Trust, etc., Co. *v.* Nelms, 115 Ga. 53, 41 S. E. 247; Caggar *v.* Sholtes, 82 Hun (N. Y.) 378, 31 N. Y. Suppl. 250, 1 N. Y. Annot. Cas. 215 (holding that a petition to bring in new defendants alleged to have acquired rights since the action was commenced would not be granted, where the only evidence of such interest was a statement to that effect in the petition, on information and belief, which was denied by affidavits); Bailey *v.* Hix, 49 Tex. 536; Annett *v.* Garland, 8 Utah 150, 30 Pac. 365.

Affidavit of party.—An affidavit in support of a motion to join a person as defendant made by plaintiff's attorney only, without showing that the affidavit of plaintiff could not have been readily obtained, is insufficient. Haskell *v.* Moran, 117 N. Y. App. Div. 251, 102 N. Y. Suppl. 388.

60. See the statutes of the several states.

61. Perkins *v.* Castleberry, 112 Ga. 626, 37 S. E. 873.

62. Williams *v.* Edison Electric Illuminating Co., 16 N. Y. Suppl. 857.

63. Gray *v.* Wiekes, (Tex. Civ. App. 1897) 39 S. W. 318.

64. See the statutes of the several states. And see the eases eited *infra*, notes 65–68.

65. Sage *v.* Mosher, 17 How. Pr. (N. Y.) 367.

66. Weed *v.* Saratoga Springs First Nat. Bank, 117 N. Y. App. Div. 340, 101 N. Y. Suppl. 1045.

67. See Jenks *v.* Vandolah, 29 Ill. App. 163.

68. People *v.* Brooklyn, 6 N. Y. App. Div. 202, 39 N. Y. Suppl. 809.

69. Walkinshaw *v.* Perzel, 7 Rob. (N. Y.) 606, 32 How. Pr. 310. *Compare* Grand Lodge K. P. *v.* Creswell, 128 Ga. 775, 58 S. E. 163.

of the court who has not voluntarily appeared and has not been served with process.[70]

(J) *Revocation of Order.* It has been held that an order requiring the addition of a party may be vacated at a subsequent term; [71] and, where it has been granted *ex parte*, by an associate of the judge making the order.[72]

(K) *Amendment to Conform to Order.* An order granting leave to bring in a new party must be strictly complied with,[73] and the pleadings must be amended [74] or supplemental pleadings filed [75] in accordance with its terms. But failure to make a formal amendment may be rendered harmless by the actual appearance of the party added and his rejoinder in the proceedings,[76] although the order authorizing the bringing in of a party makes no specific provision for an amendment; such amendment is incidental to the relief granted.[77] A defendant who has answered the original complaint is entitled to an order providing for the service upon him of the amended complaint on bringing in a new party.[78]

(L) *Rights and Liabilities of Parties Brought in* — (1) IN GENERAL. A person who is brought in under an order of court acquires the standing of a party by appearance, and although his pleading discloses such an interest in the subject-matter as would have entitled him to become a party on application, the fact that such application was not made is immaterial.[79] Where a person has been permitted to intervene as plaintiff upon consent of the parties, he is entitled to the same rights as though he had jointly originally instituted the action.[80] A party who has been brought in as a defendant, who has been duly served, or who has entered his voluntary appearance, cannot move to dismiss the action as to himself, where it is regularly pending and he is a necessary party thereto.[81] The fact that, after plea in abatement for the non-joinder of defendants, plaintiff amends, will not prevent him from denying the fact of their joint liability.[82]

(2) NECESSITY AND TIME TO PLEAD. Where a person is admitted as co-plaintiff upon a petition averring his interest, he need not file an original pleading but may adopt the original plaintiff's pleadings as his own, where his right is founded upon an identical obligation.[83] Where the merits of the cause have not been changed by the introduction of a new party plaintiff, defendant is not entitled

70. Tom Boy Gold Mines Co. *v.* Green, 11 Colo. App. 447, 53 Pac. 845.

71. Peeples *v.* Mims, 64 S. C. 226, 42 S. E. 155.

72. Bannister *v.* McIntire, 112 Iowa 600, 84 N. W. 707, holding that the application to revoke the order was nothing more than a request to dismiss as to the person brought in.

73. Blakeley *v.* Frazier, 20 S. C. 144.

74. Lazarus *v.* Metropolitan El. R. Co., 14 N. Y. App. Div. 438, 43 N. Y. Suppl. 873; Lehrer *v.* Walcoff, 47 Misc. (N. Y.) 112, 93 N. Y. Suppl. 540; Blakely *v.* Frazier, 20 S. C. 144.

75. Lazarus *v.* Metropolitan El. R. Co., 14 N. Y. App. Div. 438, 43 N. Y. Suppl. 873, holding that a supplemental complaint must be served.

76. Noonan *v.* Caledonia Gold Min. Co., 121 U. S. 393, 7 S. Ct. 911, 30 L. ed. 1061.

A mere entry of an order at the close of plaintiff's case that a third person may be made a party defendant, without any actual amendment of the pleadings or allegations therein relating to him, or any appearance on the record, or issue joined as to him, is ineffective to make him a party. Lehrer *v.* Walcoff, 47 Misc. (N. Y.) 112, 93 N. Y. Suppl. 540.

Amendment of caption.— In an action by a married woman an amended petition, the body of which named the husband as a co-plaintiff, made him a party to the proceeding, although his name was not inserted in the caption. Fidelity Trust, etc., Co. *v.* Ryan, 109 Ky. 240, 58 S. W. 610, 22 Ky. L. Rep. 734.

77. Walkinshaw *v.* Perzel, 7 Rob. (N. Y.) 606, 32 How. Pr. 310.

78. Dattlebaum *v.* Tannenbaum, 51 N. Y. App. Div. 567, 64 N. Y. Suppl. 824, holding further that he was entitled to have provision made giving him time to answer.

79. Tom Boy Gold Mines Co. *v.* Green, 11 Colo. App. 447, 53 Pac. 845.

80. Weed *v.* Saratoga Springs First Nat. Bank, 117 N. Y. App. Div. 340, 101 N. Y. Suppl. 1045.

81. Redlon *v.* Fish-Keck Co., 7 Kan. App. 473, 54 Pac. 285.

82. Wilson *v.* Nevers, 20 Pick. (Mass.) 20, so holding where, after summoning in persons named in the plea in abatement, plaintiff discontinued as to them.

83. Hamilton *v.* Lamphear, 54 Conn. 237, 7 Atl. 19, holding that the fact that a sole interest is alleged in the original pleading does not render invalid a judgment rendered upon proof of a joint interest, since the

to an opportunity to plead to the amended complaint.[84] One who has been brought in as a co-defendant is not bound to plead until a declaration has been filed against him.[85] When an order bringing in third persons as parties defendant upon a defendant's motion provides for the service of the answer upon them, and gives them time to plead thereto, they are not entitled to plead to the complaint.[86]

c. Striking Out Parties[87] — (i) *In General.* It would seem that at common law the courts have inherent power in the furtherance of substantial justice to permit amendments by which plaintiffs may strike out the name of a defendant or defendants,[88] but such power appears not to have been extended to striking the names of plaintiffs.[89] Under the codes and practice acts of the several states the striking out of a party by amendment is as a general rule permitted.[90] So, it is usually within the power of a plaintiff to amend by striking out a co-plaintiff,[91] either in actions upon contract [92] or in tort; [93] and likewise by striking out defend-

original pleading is modified by the averment of interest.

84. Wellman *v.* Dismukes, 42 Mo. 101. See also Eversberg *v.* Miller, (Tex. Civ. App. 1900) 56 S. W. 223, holding that where, in response to the allegation of the answer that certain other persons than plaintiff are interested in his demand, such persons make themselves plaintiffs in an amended original petition, substantially repeating the allegations of the original petition, and alleging that they jointly own the money demanded, and that the original plaintiff had acted as their agent in the transaction out of which the demand arose and in bringing the suit, and they join in the prayer for relief, there is not a new suit, so as to excuse defendant from answering till notice.

85. Smith *v.* Little, 53 Ill. App. 157, holding that upon leave given to file an amended declaration, although defendants were ruled to plead *instanter*, a defendant who was added was entitled to the time allotted to an original defendant upon commencement of the action in which to plead.

86. Manufacturers', etc., Bank *v.* Winslow, 9 N. Y. Suppl. 589, so holding where the complaint was in a simple action at law to recover from the original defendants the amount of a judgment which they had undertaken to pay in the event of affirmance by the court of appeals, and their defense was affirmative to the effect that property and credits of certain third persons, in the hands of plaintiff, were applicable to the payment of the judgment; and the order bringing in such third persons as parties was apparently made on the theory that they might be interested to deny the allegations of the answer and make common cause with plaintiff in resisting the application of property and credits belonging to them to the payment or discharge of the liability of the original defendants.

87. In particular actions or proceedings see cross-references at the head of this article.

88. Stewart *v.* Bennett, 1 Fla. 437. But see Cooper *v.* Whitehouse, 6 C. & P. 545, 25 E. C. L. 568, holding that plaintiff could not amend at the trial by striking out one of several defendants in debt.

Where joint contract has been alleged.— At common law it has been held not proper to allow plaintiff to amend at the trial by striking out the name of a defendant improperly made a party, where he has alleged a joint contract. Burr *v.* Ross, 19 Ark. 250.

89. Roach *v.* Randall, 45 Me. 438; Kelly *v.* Eichman, 3 Whart. (Pa.) 419 (holding that to do so would change the whole ground of the controversy); Moores *v.* Carter, 17 Fed. Cas. No. 9,782*a*, Hempst. 64.

90. See the codes and practice acts of the several states. And see the following cases:

Idaho.— Oro Fino, etc., Min. Co. *v.* Cullen, 1 Ida. 113.

Mississippi.— Stratton *v.* Taylor, 32 Miss. 201.

Missouri.— Thompson *v.* Mosely, 29 Mo. 477.

Oregon.— Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81.

Pennsylvania.— Rangler *v.* Hummel, 37 Pa. St. 130. Under the act of 1858 and prior acts parties may strike off the names of plaintiffs or defendants when there is an allegation of mistake either in fact or law. Cochran *v.* Arnold, 58 Pa. St. 399; Peart *v.* Prosser, 6 Lanc. Bar 194.

See 37 Cent. Dig. tit. "Parties," § 101.

91. Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88; Smith *v.* Hanie, 74 Ga. 324; Davis *v.* Ritchie, 85 Mo. 501; Neher *v.* Armizo, 9 N. M. 325, 54 Pac. 236.

After a demurrer has been sustained because of misjoinder, in case leave to amend is granted, plaintiff may amend by striking out the name of a co-plaintiff. Butcher *v.* Carleton, 11 Iowa 47.

92. Finney *v.* Bedford Commercial Ins. Co., 8 Metc. (Mass.) 348, 41 Am. Dec. 515; Tyson *v.* Belmont, 24 Fed. Cas. No. 14,315*a*.

93. *Georgia.*— Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139; Parker *v.* Chambers, 24 Ga. 518.

Iowa.— Hinkle *v.* Davenport, 38 Iowa 355.

Kansas.— Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494.

New Hampshire.— Emerson *v.* Shaw, 57 N. H. 223.

Pennsylvania.— Rangler *v.* Hummel, 37 Pa. St. 130.

Washington.— Dean *v.* Oregon R., etc., Co., 38 Wash. 565, 80 Pac. 842.

See 37 Cent. Dig. tit. "Parties," § 101.

ants, either in actions upon contract [94] or in tort.[95] But an amendment will not be allowed which will deprive the opposite party of a valuable right.[96] Under a statute providing that persons who have been misjoined as parties may be dropped by order of court at any stage of the cause, the name of a plaintiff cannot be struck from a complaint, upon the motion of defendants, against the will of plaintiff.[97] Where persons have been made parties defendant to a proceeding, because of their character as testamentary trustees, they cannot upon their own motion be struck from the proceedings upon their renunciation of the trust.[98]

(II) *Complete Change of Parties.* Under the statutes of amendment, however, a complete change of parties cannot be allowed.[99] So where a plaintiff has been permitted to bring in a new plaintiff, the name of the original plaintiff cannot subsequently be struck out by amendment,[1] and likewise where a new party defendant has been added the original defendant cannot be struck out.[2]

94. *Alabama.*— Eagle Iron Co. *v.* Baugh, 147 Ala. 613, 41 So. 663; Huntsville Belt Line, etc., R. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295. An amendment should be allowed striking a defendant, whenever it does not make an entire change of the parties or change the form of action, or substitute an entirely new cause of action. Engelhardt *v.* Clanton, 83 Ala. 336, 3 So. 380 (holding that in an action upon a joint contract against a partnership, the complaint may be amended to conform with proof that one of defendants is not a partner); Jones *v.* Engelhardt, 78 Ala. 505. In an action upon a joint contract, where there is no non-joinder or misjoinder of parties, an amendment striking out a party operates as a discontinuance of the action, unless the amendment is made in consequence of a defense interposed by the party whose name is stricken out, of such personal character as would authorize a discontinuance as to him without effecting a discontinuance of the entire action. Mock *v.* Walker, 42 Ala. 668.

Arkansas.— King *v.* Caldwell, 26 Ark. 405.

Illinois.— Metz *v.* Wood, 39 Ill. App. 131; McDermott *v.* Gubbing, 25 Ill. App. 541.

Kansas.— Mulvane *v.* Sedgley, (App. 1900) 61 Pac. 971.

Michigan.— Holdridge *v.* Farmers', etc., Bank, 16 Mich. 66.

Mississippi.— Solomon *v.* City Compress Co., 69 Miss. 319, 10 So. 446, 12 So. 339. But see Miller *v.* Northern Bank, 34 Miss. 412, holding that, where a contract has been treated as joint, plaintiff must prove his contract as alleged and cannot amend by striking out part of the defendants, since it is in effect a change of the cause of action.

New Hampshire.— Perley *v.* Brown, 12 N. H. 493.

New Jersey.— Lambeck *v.* Stiefel, 70 N. J. L. 180, 56 Atl. 132. But see Fleming *v.* Freese, 26 N. J. L. 263.

New York.— Bonsteel *v.* Vanderbilt, 21 Barb. 26; Bemis *v.* Bronson, 1 Code Rep. 27.

Oregon.— See Fiske *v.* Henarie, 14 Oreg. 29, 13 Pac. 193.

Pennsylvania.— Jackson *v.* Lloyd, 44 Pa. St. 82.

See 37 Cent. Dig. tit. "Parties," §§ 100, 101.

95. *Alabama.*— Pool *v.* Devers, 30 Ala. 672.

Indiana.— Trees *v.* Eakin, 9 Ind. 554, holding that a motion under 2 Rev. St. p. 48, § 99, after the evidence had been closed and the arguments concluded, but before the jury had retired, to enter a *nol. pros.* as to two minor defendants who had appeared without a guardian, and to amend the complaint accordingly, was in effect a motion to strike out said defendants' names, and allowable under such section.

Massachusetts.— Fifty Associates *v.* Howland, 5 Cush. 214.

Missouri.— Weathers *v.* Kansas City Southern R. Co., 111 Mo. App. 315, 86 S. W. 908.

New Hampshire.— Smith *v.* Brown, 14 N. H. 67.

Pennsylvania.— Sturzebecker *v.* Inland Traction Co., 211 Pa. St. 156, 60 Atl. 583.

Wisconsin.— Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777.

United States.— Sels *v.* Greene, 88 Fed. 127; Atlantic, etc., R. Co. *v.* Laird, 58 Fed. 760, 7 C. C. A. 489.

See 37 Cent. Dig. tit. "Parties," §§ 100, 101.

96. Hettinger *v.* Lemberger, 1 Pa. Co. Ct. 665, holding that an amendment striking the name of a defendant would not be allowed where the effect would be to deprive the remaining defendant of the right to plead a statute of limitations.

97. Hurd *v.* Hotchkiss, 72 Conn. 472, 45 Atl. 11.

98. Rothschild *v.* Goldenberg, 58 N. Y. App. Div. 293, 68 N. Y. Suppl. 1095 [*reversing* 33 Misc. 646, 68 N. Y. Suppl. 955].

99. Rarden Mercantile Co. *v.* Whiteside, 145 Ala. 617, 39 So. 576; Vinegar Bend Lumber Co. *v.* Chicago Title, etc., Co., 131 Ala. 411, 30 So. 776; Reynolds *v.* Caldwell, 80 Ala. 232; McKay *v.* Broad, 70 Ala. 377; Tarver *v.* Smith, 38 Ala. 135; Pickens *v.* Oliver, 32 Ala. 626; Brooks *v.* Collier, 3 Indian Terr. 468, 58 S. W. 559; Wray *v.* Jamison, 10 Humphr. (Tenn.) 186.

1. Reynolds *v.* Caldwell, 80 Ala. 232; McKay *v.* Broad, 70 Ala. 377; Tarver *v.* Smith, 38 Ala. 135; Pickens *v.* Oliver, 32 Ala. 626; Brooks *v.* Collier, 3 Indian Terr. 468, 58 S. W. 559.

2. Rarden Mercantile Co. *v.* Whiteside, 145 Ala. 617, 39 So. 576.

(III) *Changing Cause of Action.* An amendment striking out a party cannot be allowed when an entirely new cause of action is introduced.[3] But an amendment dismissing one of two joint tort-feasors made defendants, and alleging that the injury complained of was occasioned solely by the remaining defendant, does not introduce a new cause of action where the nature of the action is not changed.[4]

(IV) *Striking Names of Nominal or Use Plaintiffs.* Where an action is brought by one for the use of another, it is usually held that an amendment striking the name of the nominal plaintiff may be permitted,[5] and conversely, that the name of the usee may be struck.[6]

(V) *Party Deceased.* In case a plaintiff [7] or defendant [8] is deceased at the time suit is brought, an amendment may be allowed striking out his name. And where pending an action of ejectment brought by the trustee of a married woman the husband of the beneficiary dies, the name of the trustee may be stricken by amendment.[9]

(VI) *Discretion of Court.* As a general rule the allowance of an amendment striking the name of a party is within the discretion of the court;[10] and in the absence of abuse such discretion cannot be reviewed.[11] A co-plaintiff who has compromised an action is not entitled, as a matter of course, to have his name struck out as a co-plaintiff.[12]

(VII) *Time.* As a general rule an amendment striking a party may be per-

3. Englehardt *v.* Clanton, 83 Ala. 336, 3 So. 380.

4. Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 17 S. Ct. 120, 41 L. ed. 485, action by passenger against two railroads.

5. *Alabama.*—Dwyer *v.* Kennemore, 31 Ala. 404.

Delaware.— McColley *v.* Collins, 5 Harr. 391.

Florida.— Hamburg *v.* Liverpool, etc., Ins. Co., 42 Fla. 86, 27 So. 872.

Georgia.— McEachern *v.* Edmondson, 122 Ga. 80, 49 S. E. 798. See also Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 591, 15 S. E. 676, holding that an amendment to a declaration which shows that the legal right of action is not in the nominal plaintiffs, but in the persons for whose use they sue, should not be allowed, without a further amendment striking from the declaration the names of the nominal plaintiffs.

Illinois.— McDowell *v.* Town, 90 Ill. 359.

Ohio.— Ansonia India Rubber Co. *v.* Wolf, 1 Handy 236, 12 Ohio Dec. (Reprint) 119.

Pennsylvania.— Miller *v.* Pollock, 99 Pa. St. 202 (holding that where a suit is instituted by one to the use of another, and on the trial it appears that plaintiff is both the legal and equitable owner, an amendment to accord with the fact is properly allowed); Kaylor *v.* Shaffner, 24 Pa. St. 489 (holding that where one brings an action for his own use in the name of another who has no title to support the action, but the declaration contains the names of the proper parties to the action, an amendment may be made under a statute authorizing an amendment to correct a mistake in the name of a party).

Texas.— Martel *v.* Somers, 26 Tex. 551; Heard *v.* Lockett, 20 Tex. 162.

United States.— Whitaker *v.* Pope, 29 Fed. Cas. No. 17,528, 2 Woods 463, holding that where an action was brought in the name of A for the use of B, and it appeared on the trial that before suit brought A had assigned the claim to B, who therefore held the legal title, an amendment striking out the name of A might be allowed after verdict, under the Georgia code.

6. Swilley *v.* Hooker, 126 Ga. 353, 55 S. E. 31; Anderson *v.* Robertson, 32 Miss. 241; McDaniel *v.* Atlantic Coast Line R. Co., 76 S. C. 15, 56 S. E. 543.

But at common law such an amendment could not be made. Teer *v.* Sandford, 1 Ala. 525.

7. Jemison *v.* Smith, 37 Ala. 185; Fink *v.* Manhattan R. Co., 15 Daly (N. Y.) 479, 8 N. Y. Suppl. 327, 18 N. Y. Civ. Proc. 141, 24 Abb. N. Cas. 81; Holt *v.* Thacher, 52 Vt. 592, holding that where it was pleaded to an action by a partnership, that one of the partners was dead when the action was brought, a plaintiff might amend by omitting the name of such partner.

8. Winn *v.* Averill, 24 Vt. 283.

9. Childers *v.* Adams, 42 Ga. 352.

10. *Indiana.*— Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19; Dearmond *v.* Dearmond, 12 Ind. 455.

Massachusetts.— Gwynn *v.* Globe Locomotive Works, 5 Allen 317.

New York.— St. John *v.* Northrup, 23 Barb. 25.

North Carolina.— Jarrett *v.* Gibbs, 107 N. C. 303, 12 S. E. 272; Brown *v.* Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

Pennsylvania.— Locke *v.* Daugherty, 43 Pa. St. 88.

See 37 Cent. Dig. tit. "Parties," § 102.

11. See Appeal and Error, 3 Cyc. 327.

12. *In re* Mathews, [1905] 2 Ch. 460, 74 L. J. Ch. 656, 93 L. T. Rep. N. S. 158, 54 Wkly. Rep. 75.

mitted, under the statutes, at any time.[13] For example, under particular statutes it has been permitted after all the parties have appeared and pleaded,[14] after plea in abatement for misjoinder,[15] after demurrer for misjoinder,[16] after issue has been joined and the case has been opened for trial,[17] after the jury has been impaneled [18] or sworn,[19] after the evidence is closed,[20] after verdict,[21] or after a new trial granted.[22]

(VIII) *Application and Permission For Amendment.* Where the statute provides that names included by mistake may be stricken out, permission to strike should not be given in the absence of a showing as to mistake.[23] Defendants will be presumed to have consented to a change in plaintiffs, where no objection appears from the record.[24] So where an amended pleading is treated by the court and parties as having been properly filed, it will be regarded as having been made after proper permission.[25] In case the court improperly grants leave to a defendant to withdraw, plaintiff's remedy is by appeal from the judgment rendered in the case.[26]

(IX) *Terms.* Under some statutes terms may be imposed as a condition for amendment.[27] Where the provision is that amendment shall be on such terms as may be proper, the terms are within the discretion of the trial court,[28] which will not be reviewed in the absence of abuse.[29]

(X) *Necessity of Actual Amendment.* While it is the proper practice to file a new pleading upon amendment, striking out a party,[30] it has been held that an order specifically directing an amendment operates in itself as an amendment, without the making of the amendment in point of fact.[31]

(XI) *Further Proceedings in Cause.* Where the court has acquired jurisdiction of defendant, the fact that plaintiff amends striking out a co-plaintiff

13. See the statutes of the several states. And see Wiesner *v.* Young, 50 Minn. 21, 52 N. W. 390.

14. King *v.* Caldwell, 26 Ark. 405.

15. Morrissey *v.* Schindler, 18 Nebr. 672, 26 N. W. 476; Beall *v.* Territory, 1 N. M. 507.

16. Little *v.* Bradley, 43 Fla. 402, 31 So. 342.

17. Beaman *v.* Whitney, 20 Me. 413. But see Fleming *v.* Freese, 26 N. J. L. 263, holding that the New Jersey Practice Acts of 1855, § 10, give the court no power to amend the declaration upon the joinder of too many defendants after going to trial.

18. Morrissey *v.* Schindler, 18 Nebr. 672, 26 N. W. 476.

19. Smith *v.* Brown, 1 Yeates (Pa.) 513.

20. Henry *v.* State Bank, 3 Ind. 216; Wilson *v.* King, 6 Yerg. (Tenn.) 493.

21. Cogshall *v.* Beesley, 76 Ill. 445; Ganzer *v.* Fricke, 57 Pa. St. 316. But see Habel *v.* Union Depot R. Co., 140 Mo. 159, 41 S. W. 459 (holding that under a statute prohibiting any amendment after verdict, affecting prejudicially the rights of the adverse party, an amendment striking out a husband's name so as to allow a joint judgment to stand in the wife's name alone could not be allowed); Norfolk, etc., R. Co. *v.* Dougherty, 92 Va. 372, 23 S. E. 777 (holding that under a statute providing that in case there has been a misjoinder of parties the court may order the action to abate as to any party improperly joined, and to proceed as if such misjoinder had not been made, such action could not be taken after the action had been decided).

22. Heath *v.* Lent, 1 Cal. 410.

23. Walter *v.* Kensinger, 13 Pa. Co. Ct. 222.

24. Richards *v.* Smith, 98 N. C. 509, 4 S. E. 625.

25. Hamburg *v.* Liverpool, etc., Ins. Co., 42 Fla. 86, 27 So. 872.

26. Cunningham *v.* Spillman, 72 Ind. 62.

27. See the statutes of the several states. And see Tormey *v.* Pierce, 49 Cal. 306; Turner *v.* Hillerline, 6 Abb. Pr. (N. Y.) 215 note, 14 How. Pr. 231, holding that upon striking the name of a defendant upon plaintiff's motion, the terms should be such as to indemnify the remaining defendants for the expense to which they would be subjected by the amendment.

28. Tormey *v.* Pierce, 49 Cal. 306.

29. See Appeal and Error, 3 Cyc. 366.

30. King *v.* Caldwell, 26 Ark. 405 (holding that where the action is dismissed as to all but one of several joint defendants, plaintiff cannot proceed against the one without amending the record); Doane *v.* Houghton, 75 Cal. 360, 17 Pac. 426 (holding, however, that the fact that upon dismissal as to certain defendants amendment was made by simply striking out of the caption the names of such defendants, such proceeding, while irregular, was not fatal as it did not appear that defendants dismissed were ever served).

31. Palmer *v.* Lesne, 3 Ala. 741; Tormey *v.* Pierce, 49 Cal. 306.

Suggestion of death.— If the death of a party is suggested upon the record, it be-

will not oust the court of jurisdiction.[32] Where an amendment striking an improper plaintiff has been allowed, the declaration need not be refiled,[33] nor need there be any further plea.[34] Where one of two defendants in an action of tort is stricken from the declaration by amendment, without otherwise altering the language of the declaration, all the substantial allegations are therefore to be read and understood as if there had been but one defendant originally,[35] although it has been held that where an amended and substituted complaint striking out one of the original defendants has been filed, the original complaint and answer cannot be considered as pleadings in the case;[36] and that upon amendment of a complaint brought for the use of plaintiff and another so as to make it appear that the complaint is brought for the use of plaintiff alone, the amendment operates as an abandonment of the original complaint, and as a consequence an abandonment of the pleas of defendant therefor.[37] In case the statute authorizes the amendment of the complaint by striking out parties plaintiff, the fact that certain plaintiffs jointly interested with those who remain plaintiffs were struck in a complaint does not entitle defendant to a verdict as against the remaining plaintiffs.[38]

d. Substitution of Parties[39]— (i) *In General.* The general rule, even under the codes and practice acts, is that it is not permissible to substitute by amendment a new plaintiff[40] or defendant[41] in place of an original sole plaintiff

comes a part of the judgment-roll and no amendment is necessary. People *v.* Seventh Cir. Judge, 41 Mich. 3, 2 N. W. 179.

32. Dickson *v.* Chicago, etc., R. Co., 81 Ill. 215.

33. Dickson *v.* Chicago, etc., R. Co., 81 Ill. 215.

34. Dickson *v.* Chicago, etc., R. Co., 81 Ill. 215.

35. Seaboard Air-Line R. Co. *v.* Randolph, 126 Ga. 238, 55 S. E. 47; Chattanooga, etc., R. Co. *v.* Whitehead, 89 Ga. 190, 15 S. E. 44.

36. Indianapolis, etc., R. Co. *v.* Center Tp., 143 Ind. 63, 40 N. E. 134.

37. Anderson *v.* Robertson, 32 Miss. 241.

38. Birmingham R., etc., Co. *v.* Oden, 146 Ala. 495, 41 So. 129.

39. In particular actions or proceedings see cross-references at the head of this article.

40. *Alabama.*— Stodder *v.* Grant, 28 Ala. 416; Leaird *v.* Moore, 27 Ala. 326.

Georgia.— Tillman *v.* Banks, 116 Ga. 250, 42 S. E. 517.

Illinois.— Zukowski *v.* Armour, 107 Ill. App. 663.

Indiana.—Baltimore, etc., R. Co. *v.* Gillard, 34 Ind. App. 339, 71 N. E. 58, so holding where one cause of action was substituted for another. The substitution of different plaintiffs from those who brought the suit may be made, however, if the amendment does not substantially change the claim or defense. Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620.

Louisiana.— Curacel *v.* Coulon, 2 Mart. 143.

Maryland.— Wright *v.* Gilbert, 51 Md. 146.

Massachusetts.— Silver *v.* Jordan, 139 Mass. 280, 1 N. E. 280, holding that an amendment is not to be allowed for the purpose of enabling the action to be maintained in another person's name on a different cause of action.

New Hampshire.— Elliott *v.* Clark, 18 N. H. 421.

Rhode Island.— Thayer *v.* Farrell, 11 R. I. 305.

South Carolina.— See Johnson *v.* Mayrant, 1 McCord 484.

Texas.— See Armstrong *v.* Bean, 59 Tex. 492, holding that the filing of an amended petition substituting an entirely different plaintiff was an irregularity and could have no effect other than the filing of an original petition.

Washington.— Liebmann *v.* McGraw, 3 Wash. 520, 28 Pac. 1107.

See 37 Cent. Dig. tit. "Parties," §§ 88, 89.

Contra, see Harper *v.* Hendricks, 49 Kan. 718, 31 Pac. 734 (holding that a trial court, in the furtherance of justice, may permit a new party to be substituted in the place of plaintiff); Farrier *v.* Schroeder, 40 N. J. L. 601 (holding that a right conferred by statute to amend at all times extends to amending the record at the trial after a motion to nonsuit by striking out the name of plaintiff wherever it occurs in the process and pleadings, and inserting the name of another person as plaintiff); Reynolds *v.* Smathers, 87 N. C. 24.

Before answer has been filed, it has been held that an amendment substituting an entirely different person as plaintiff may be made without leave of court. Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476.

41. *Georgia.*— Hunnicutt *v.* Stone, 85 Ga. 435, 11 S. E. 663.

Illinois.— Zukowski *v.* Armour, 107 Ill. App. 663.

Missouri.— Jordan *v.* Chicago, etc., R. Co., 105 Mo. App. 446, 79 S. W. 1155 (where it is said that the substitution of another defendant instead of the one before the court is the substitution of a different cause of action); Hall *v.* School Dist. No. 4, 36 Mo. App. 21.

Nebraska.— Burlington Voluntary Relief

or defendant, except in a case where there is a privity or succession of interest.[42] However, it is usually regarded as permissible to substitute as plaintiff the person who has the right to sue, where an action has been brought originally in the name of one having no right, in case the cause of action and the amount of recovery remain the same, and defendant is deprived of no defense available to him at the beginning of the suit,[43] although in some jurisdictions it is held that a person who is the real party in interest at the time the suit was begun cannot be substituted in place of a person who brought the action.[44] It is usually regarded as proper to

Dept. *v.* Moore, 52 Nebr. 719, 73 N. W. 15.

New York.— New York State Monitor Milk Pan. Assoc. *v.* Remington Agricultural Works, 89 N. Y. 22 [*reversing* 25 Hun 475].

Pennsylvania.— Fischer *v.* Pennsylvania R. Co., 2 Pa. Co. Ct. 245.

See 37 Cent. Dig. tit. "Parties," §§ 88, 89.

Person who has agreed to satisfy judgment.— A court has no power to dismiss a defendant against whom a cause of action is alleged and substitute in his stead a stranger to the record on the sole ground that the latter has agreed to satisfy the judgment of the court. Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557.

Where a plaintiff has a claim against the real owner of certain property, whoever he might be, he may substitute such owner in place of a defendant originally sued, where it appears that he was the proper party to be sued in the first instance. Adams *v.* Weeks, 174 Mass. 45, 54 N. E. 350, so holding under a statute authorizing an amendment for the purpose of bringing in a necessary party plaintiff or defendant at any time before final judgment.

A statute permitting persons interested in the subject-matter involved to unite with defendant in resisting the claim does not permit such a person to be substituted for defendant. Britton *v.* Des Moines, etc., R. Co., 59 Iowa 540, 13 N. W. 710.

42. Zukowski *v.* Armour, 107 Ill. App. 663.

Substitution of transferee pendente lite see ABATEMENT AND REVIVAL, 1 Cyc. 123.

43. *Florida.*— Neal *v.* Spooner, 20 Fla. 38.

Illinois.— Congress Constr. Co. *v.* Farson, etc., Co., 199 Ill. 398, 65 N. E. 357 [*affirming* 101 Ill. App. 279], holding that the court has power to permit the name of an assignor for creditors suing in behalf of a transferee of a claim in suit, to be substituted by amendment for that of the assignee for creditors, the transfer having been made by the assignee for creditors after suit brought upon the claims.

Indiana.— Meyer *v.* State, 125 Ind. 335, 25 N. E. 351; Fleenor *v.* Taggart, 116 Ind. 189, 18 N. E. 606.

Iowa.— Wells *v.* Stombock, 59 Iowa 376, 13 N. W. 339. See Hook *v.* Garfield Coal Co., 112 Iowa 210, 83 N. W. 963.

Kansas.— Hudson *v.* Barratt, 62 Kan. 137, 61 Pac. 737.

Maine.— Waterman *v.* Dockray, 79 Me. 149, 8 Atl. 685.

New Hampshire.— Contoocook Fire Precinct *v.* Hopkington, 71 N. H. 574, 53 Atl. 797.

New York.— Heckemann *v.* Young, 18 Abb. N. Cas. 196.

North Carolina.— Brooks *v.* Holton, 136 N. C. 306, 48 S. E. 737. Where an action is commenced in the name of a lessor of a term of years, for rent accrued after he has assigned the reversion, the court may amend by striking out the name of the assignor and inserting that of the assignee as plaintiff. Bullard *v.* Johnson, 65 N. C. 436.

Ohio.— Lake Shore, etc., R. Co. *v.* Elyria, 69 Ohio St. 414, 69 N. E. 738.

United States.— McDonald *v.* Nebraska, 101 Fed. 171, 41 C. C. A. 278; Nebraska *v.* Hayden, 89 Fed. 46.

But see Smith *v.* Andrews, 70 Ga. 708 (holding that the declaration in a suit upon an administrator's bond, commenced by an attorney who was also ordinary of the county having jurisdiction of the administration, could not be amended by substituting the name of another attorney *nunc pro tunc*, since there was no suit before the court); Thayer *v.* Farrell, 11 R. I. 305 (holding that a declaration in assumpsit upon alleged promises to plaintiff, described therein as assignee of a certain firm, cannot be amended by substituting as plaintiffs the members of such firm as trustees for plaintiffs, since the effect would be to substitute a new action).

Substitution of heirs for administrator.— Where the parties are all before the court, the heirs at law may be properly substituted as plaintiffs instead of an administrator who has no right to sue. Farrell *v.* Puthoff, 13 Okla. 159, 74 Pac. 96 [*citing* Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573].

Action by attorney in fact.— Where a suit is improperly brought in the name of certain persons by another as their attorney in fact, the mistake is merely a technical one which may be amended. Adams *v.* Edwards, 115 Pa. St. 211, 8 Atl. 425.

Where a plaintiff sues upon a claim which he has already assigned, and upon objection being made the assignee offers to renounce all interest in the claim, plaintiff should be allowed to amend so as to show an action by himself upon his own claim. Kelly *v.* Continental Casualty Co., 87 Miss. 438, 40 So. 1.

The objection that plaintiff is not the real party in interest cannot be presented by a motion to substitute another as plaintiff. Horton *v.* Shepherd, 1 N. Y. Civ. Proc. 26.

44. Willamette Tent, etc., Co. *v.* West Coast Grocery Co., 2 Alaska 4; Dubbers *v.* Goux, 51 Cal. 153; Hallett *v.* Larcom, 5 Ida. 492, 51 Pac. 108; Wilson *v.* Kiesel, 9 Utah 397, 35 Pac. 488, so holding where a wholly new or different issue would be presented.

amend by substituting one merely formal party for another.[45] Amendments substituting parties should, where permitted, always be in furtherance of a determination of the true merits of the controversy.[46]

(II) *Representative Actions.* Where an action has been brought by a person in behalf of himself and others, permission to discontinue such action may be refused and other plaintiffs may be substituted, where the circumstances under which the original plaintiffs attempt to discontinue are such as to warrant suspicion of collusion with defendants.[47] In case an action is brought by one person in behalf of a large number of persons similarly situated, a substitution of plaintiffs sought for the purpose of having the action discontinued and defeating its object will not be permitted.[48] In a representative action a new plaintiff who has been permitted to come in cannot, before trial, be allowed to make motions by his own attorney, which are not joined in by the attorneys for the original plaintiff.[49] But in case the original plaintiff unreasonably delays the trial, a new plaintiff may conduct the suit upon giving bond to the original plaintiff to secure payment to him of a ratable share of the entire expenses of the action when it shall be determined.[50]

(III) *Time For Substitution.* A right to the substitution of parties may be lost by laches.[51] After judgment has been entered the court has no power to substitute another defendant in the place of the original one.[52] But it has been held that after trial an amendment of an action brought by an undisclosed principal in his own name may be made to substitute the principal upon the record, when neither the course nor the result of the trial would have been disturbed by such amendment if made before trial.[53]

(IV) *Application and Proceedings Thereon.* A mere statement by counsel that they will ask for a substitution of plaintiffs is not a sufficient application to present the question for a ruling of the court.[54] In case the right to amend as to parties is, under the statute, based upon the existence of a mistake, an application for an amendment changing the name of plaintiff must show that there is error in using the name proposed to be changed.[55]

45. Madison County *v.* Candler, 123 N. C. 682, 31 S. E. 858, holding that where pending an action by the state upon the relation of a county commissioner to recover taxes of a defaulting collector, the legislature changed the law requiring such actions to be brought on the relation of the board of education, it was proper to allow a substitution of the board of education as relator. And see Denton *v.* Stephens, 32 Miss. 194, holding that a plaintiff may substitute the name of one nominal plaintiff for another.

46. Shaw *v.* Alexander, 32 Miss. 229.

47. Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851; State *v.* Ludwig, 106 Wis. 226, 82 N. W. 158.

Right of plaintiff to discontinue in general see Dismissal and Nonsuit, 14 Cyc. 398.

48. Hirshfeld *v.* Bopp, 5 N. Y. App. Div. 202, 39 N. Y. Suppl. 24.

49. Manning *v.* Mercantile Trust Co., 26 Misc. (N. Y.) 440, 57 N. Y. Suppl. 467.

50. Manning *v.* Mercantile Trust Co., 37 Misc. (N. Y.) 215, 75 N. Y. Suppl. 168.

51. Switzer *v.* Eadie, 71 Kan. 859, 80 Pac. 961 (holding that it was no abuse of discretion to refuse to permit the owner of a note to be substituted as a plaintiff in an action thereon, which had been commenced in the name of another and continued for a year after the attorney for the owner had known thereof, and where no excuse for delay was made); Hunt *v.* O'Leary, 78 Minn. 281, 80 N. W. 1120; Burrus *v.* Fisher, 27 Miss. 418 (holding that leave to strike out the name of one of the usees in an action and to insert the name of the assignee in bankruptcy of such usee was properly refused after the evidence had been closed); Galloway *v.* Chicago, etc., R. Co., 68 Mo. App. 496 (holding that one cannot after the term in which the judgment was rendered be substituted as plaintiff, on the ground that he has purchased the subject-matter of the action). See Kerrigan *v.* Peters, 108 N. Y. App. Div. 292, 95 N. Y. Suppl. 723, holding that a motion made a year and a half after filing of defendants' answer, for permission to amend the complaint by changing the action from one against defendants representatively to one against them individually, would not be denied on the ground of laches where the case was never put upon the calendar and was not moved by either party.

52. Tilley *v.* Beverwyck Towing Co., 33 Misc. (N. Y.) 380, 67 N. Y. Suppl. 461.

53. Boudreau *v.* Eastman, 59 N. H. 467.

54. Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397.

55. Reynolds *v.* Industrial Ins. Co., 19 Pa. Co. Ct. 295.

(v) *Objections.* An objection to an amended petition substituting a new plaintiff must be urged at the time leave to file such amended pleading is asked.[56] Error of the court in making a substitution of plaintiffs cannot be presented upon a demurrer, upon the ground of lack of legal capacity to sue.[57] Where a female plaintiff marries pending suit, irregularities in an order substituting her new name should be corrected by amendment.[58]

(vi) *Subsequent Proceedings.* Where a complete substitution of plaintiffs is allowed, defendant should be allowed a reasonable time to answer the complaint as it stands in the name of the new plaintiff.[59] In case of a substitution of defendants the substituted defendant has the right to treat pleadings filed by the original defendant as his own,[60] and to avail himself of all rulings made, and of all exceptions reserved by such original defendant prior to the substitution,[61] as fully as the original defendant might have done if there had been no substitution. Where, upon a transfer of interest, an order of substitution is granted to plaintiff's transferee upon due notice to defendant, the question as to title in the substituted plaintiff is determined by the order and may not be raised on the trial.[62]

e. Changing Defendants to Plaintiffs. Under a statute providing that the court may allow an amendment of the pleading to strike out and also to add the name of a party, an amendment changing a party defendant to a party plaintiff may be permitted;[63] but the change should not be made without notice to co-defendants.[64]

f. Excusing Non-Joinder. An amendment showing the reason for failing to join a party is properly permitted.[65]

2. Artificial and Associated Persons — a. In General. Where a suit is brought in a name which is neither that of a natural person, a corporation, nor a partnership, it is a mere nullity, and the complaint cannot be amended by inserting the name of a natural person.[66]

b. Corporations[67] — (i) *Correction of Misnomer and Substitution of Parties.* As a general rule, under the statutes, a misnomer of a plaintiff[68]

56. Ansonia India Rubber Co. *v.* Wolf, 1 Handy (Ohio) 236, 12 Ohio Dec. (Reprint) 119.

57. Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922.

58. Mapes *v.* Snyder, 59 N. Y. 450 [*affirming* 2 Thomps. & C. 318].

59. Coleman *v.* Heller, 13 S. C. 491.

60. Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23 (holding that where a person for whom defendant was acting as agent is substituted in his stead as defendant, the answers filed by the original defendant may stand as those of the substituted defendants without any change of name or refiling); Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 265, 32 N. E. 881 (so holding where, after the institution of a suit, defendant company consolidated with other companies and the consolidated company was made the party defendant).

61. Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 265, 32 N. E. 881.

62. Smith *v.* Zalinski, 94 N. Y. 519.

63. Liggett *v.* Ladd, 23 Oreg. 26, 31 Pac. 81. See also Bullion Min. Co. *v.* Croesus Gold, etc., Min. Co., 2 Nev. 168, 90 Am. Dec. 526 (holding that one of several co-defendants in an ejectment suit, each being in possession of a distinct part of the property sued for, who had purchased plaintiff's interest in the subject-matter of the suit might be substituted as plaintiff); Medlin *v.* Simpson, 144 N. C. 397, 57 S. E. 24 (holding that where one of two executors, plaintiffs in suit, was joined as a defendant in his capacity as an administrator for another, a motion to transfer him to plaintiff's side of the case should be allowed); Keokuk Falls Imp. Co. *v.* Kingsland, etc., Mfg. Co., 5 Okla. 32, 47 Pac. 484 (holding that such substitution might be made on a proper application after the jury had been impaneled, in case the cause of action was not changed, all parties submitted to the jurisdiction of the court, and there was no showing made for a continuance).

64. McLean *v.* Tompkins, 18 Abb. Pr. (N. Y.) 24, so holding, although as a general rule defendants on whom primary process has been served, and who do not appear, are concluded from all proceedings in the action.

65. State *v.* Lorenz, 22 Wash. 289, 60 Pac. 644, holding that it was proper to allow plaintiff to amend by alleging the death of a person who was a necessary party.

66. Western, etc., R. Co. *v.* Dalton Marble Wks., 122 Ga. 774, 50 S. E. 978.

67. Amendments in case of failure to plead corporate existence see Corporations, 10 Cyc. 1362.

68. Wilcox *v.* American Sav. Bank, 21 Colo. 348, 40 Pac. 881; Maher *v.* Interstate Switch Co., (Kan. 1897) 51 Pac. 286; Lowell First Freewill Baptist Church *v.* Bancroft, 4 Cush.

or defendant [69] is amendable unless the amendment is such as to effect an entire change of parties.[70] But where the right corporation has been sued by the wrong name and service has been made upon the right party, although by a wrong name, an amendment substituting the true name of the corporation may be permitted.[71] So where a corporation was sued as created under the laws of a particular state, an amendment showing it to be a corporation of another state [72] or of the United States [73] may be allowed. A corporation which has succeeded to the liabilities of a defendant corporation may be substituted as a defendant.[74] Where the names of members of a plaintiff corporation are set out a misnomer may be corrected,[75] or they may be struck out as surplusage.[76] Where a corporation is

(Mass.) 281; First State Bank *v.* Noel, 94 Mo. App. 498, 68 S. W. 235.

69. *Alabama.*— Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, 3 So. 764.

California.— Nisbet *v.* Clio Min. Co., 2 Cal. App. 436, 83 Pac. 1077.

Colorado.— Solmonovieh *v.* Denver Consol. Tramway Co., 39 Colo. 282, 89 Pac. 57.

Georgia.— Maddox *v.* Georgia Cent. R. Co., 110 Ga. 301, 34 S. E. 1036; Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109; Central R. Co. *v.* Rogers, 66 Ga. 251.

Indiana.— Wilkinson Co-operative Glass Co. *v.* Dickinson, 35 Ind. App. 230, 73 N. E. 957.

Massachusetts.— Sherman *v.* Connecticut River Bridge, 11 Mass. 338.

Missouri.— Green *v.* Supreme Lodge N. R. A., 79 Mo. App. 179.

New Hampshire.— Burnham *v.* Strafford County Sav. Bank, 5 N. H. 573.

New York.— New York *v.* Union R. Co., 31 Misc. 451, 64 N. Y. Suppl. 483.

South Carolina.— Sentell *v.* Southern R. Co., 67 S. C. 229, 45 S. E. 155.

Tennessee.— East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652.

West Virginia.— Ceredo First Nat. Bank *v.* Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878.

Wisconsin.— Parks *v.* West Side R. Co., 82 Wis. 219, 52 N. W. 92.

United States.— Noblet *v.* Ohio, etc., R. Co., 18 Fed. Cas. No. 10,283.

See 37 Cent. Dig. tit. "Parties," § 164.

A change from railroad to railway in the name of a railroad company may be permitted (Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, 3 So. 764; East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652; Noblet *v.* Ohio, etc., R. Co., 18 Fed. Cas. No. 10,283), as may a change from railway to railroad (Parks *v.* West Side R. Co., 82 Wis. 219, 52 N. W. 92).

70. *Alabama.*— Vinegar Bend Lumber Co. *v.* Chicago Title, etc., Co., 131 Ala. 411, 30 So. 776; Alabama Western R. Co. *v.* McCall, 89 Ala. 375, 7 So. 650; Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, 3 So. 764.

Colorado.— Denver, etc., R. Co. *v.* Loveland, 16 Colo. App. 146, 64 Pac. 381.

Georgia.— Nashville, etc., R. Co. *v.* Edwards, 91 Ga. 24, 16 S. E. 347.

New York.— Levick *v.* Niagara Falls Home Tel. Co., 52 Misc. 290, 102 N. W. Suppl. 150.

South Carolina.— Stewart *v.* Walterboro, etc., R. Co., 64 S. C. 92, 41 S. E. 827, holding that where an action for tort is commenced against a railroad company, which, after commission of the tort but before action brought, has consolidated with another, the complaint cannot be amended by inserting the name of the new corporation for that of the consolidating company.

See 37 Cent. Dig. tit. "Parties," § 164. See also CORPORATIONS, 10 Cyc. 1362.

71. Solmonovich *v.* Denver Consol. Tramway Co., 39 Colo. 282, 89 Pac. 57 (holding that where after consolidation of two corporations suit was brought against one of the original corporations and service was made on the person who was its president, who was also the president of the new company, an amendment substituting the new company might be permitted); Ward *v.* Terry, etc., Constr. Co., 118 N. Y. App. Div. 80, 102 N. Y. Suppl. 1066 [*affirmed* in 189 N. Y. 542, 82 N. E. 1134] (holding that where suit was begun against a defendant corporation in the name of a corporation to which it was the virtual successor, an amendment might be allowed changing the name to that of the new corporation, where service had been made upon the proper officer thereof, and defendant had answered and had notice which corporation it was intended to sue).

72. Stuart *v.* New York Herald Co., 73 N. Y. App. Div. 459, 77 N. Y. Suppl. 216; Caldwell Furnace Foundry Co. *v.* Peck-Williamson Heating, etc., Co., 27 Ohio Cir. Ct. 665; Bainum *v.* American Bridge Co., 141 Fed. 179 [*reversed* on other grounds in 146 Fed. 367].

73. Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 17 S. Ct. 120, 41 L. ed. 485.

74. Abbott *v.* Jewett, 25 Hun (N. Y.) 603. See also McLaughlin *v.* West End St. R. Co., 186 Mass. 150, 71 N. E. 317, holding, under a statute permitting any amendment which may enable plaintiff to sustain the action for the cause for which it was intended to be brought, that where plaintiff leased its property to another corporation which assumed all obligations and liabilities of defendant, plaintiff might amend by substituting the lessee corporation.

75. Carey *v.* Cranston, 99 Ga. 77, 24 S. E. 869; Tousey *v.* Butler, 9 Tex. 525.

76. Yocum *v.* Waynesville, 39 Ill. 220; Botkin *v.* Osborne, 39 Ill. 101; Shoudy *v.* School Dist. No. 1, 32 Ill. 290.

known by several names and is sued under one of them, an amendment placing the fact of the identity of the corporations in issue is proper.[77]

(II) *Changing Character in Which Party Sues or Is Sued.*[78] As a general rule an amendment substituting a corporation for an individual plaintiff cannot be permitted.[79] But it has been held even that where an action was begun in the name of the holders of stock of a corporation, an amendment substituting the corporation as plaintiff might be permitted.[80] An amendment charging defendant as a partnership instead of as a corporation may be allowed;[81] and the converse has been held.[82] Likewise it has been held that where an action is brought by plaintiffs as copartners instead of as a corporation, through a mistake of facts concerning their incorporation, they may be permitted to amend by making the corporation plaintiff.[83]

c. Partnerships.[84] A misnomer with regard to the individual members of a plaintiff[85] or defendant[86] partnership may be corrected by amendment. A cause of action in favor of one member of the firm cannot be substituted by way of amendment for one in favor of the firm.[87] And conversely, an action by an individual cannot be changed into one by a partnership,[88] although where a petition is in effect by one of the members of the firm, for the benefit of the firm, it may be amended so as to make the members of the firm plaintiffs.[89] An action by a plaintiff individually may be amended by describing him as a surviving partner.[90]

77. Langhorne *v.* Richmond City R. Co., 91 Va. 364, 22 S. E. 357.

78. Substitution of association for corporation see *infra*, VII, B, 2, d.

79. Steiner *v.* Stewart, 134 Ala. 568, 33 So. 343 (holding that where an action was brought against certain persons doing business as S. Bros., the words "doing business as S. Bros." were merely *descriptio personæ*, and that the action was against individuals and not a partnership, and that the complaint could not be amended to substitute in their stead S. Bros., a corporation); Licausi *v.* Ashworth, 78 N. Y. App. Div. 486, 79 N. Y. Suppl. 631; Weil *v.* Nevin, 1 Mona. (Pa.) 65 (holding that in a tort action against individuals, the name of a corporation composed of such individuals cannot be substituted after the action against the corporation is barred by statute). But see Prairie Lodge No. 87 A. F. & A. M. *v.* Smith, 58 Miss. 301, holding that a declaration against certain persons as trustees for a fraternal organization may be amended so as to charge them in their true character as a corporation.

80. Hackett *v.* Van Frank, 119 Mo. App. 648, 653, 96 S. W. 247, where the court said: "Technically regarded, it might be said that a cause of action in favor of a corporation is entirely distinct from one in favor of two persons who are the only shareholders, even though the subject-matter of the demand is the same. If the question is to be tested by whether the same evidence will support both demands, the propriety of an amendment substituting a corporation as plaintiff instead of its shareholders, might be dubious, because the evidence which would prove a demand due to the shareholders would not prove one due to the corporation. It is difficult to discern the reason of this test, in view of the spirit of the Code, which allows amendments in order to let in evidence otherwise inadmissible, or to conform to evidence already received."

81. Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Anglo-American Packing, etc., Co. *v.* Turner Casing Co., 34 Kan. 340, 8 Pac. 403 (holding that where defendant has been sued by a title as a corporation, and has put in an answer alleging the partnership and giving the names of its members, it is proper to allow an amendment substituting their names); Teets *v.* Snider Heading Mfg. Co., 120 Ky. 653, 87 S. W. 803, 27 Ky. L. Rep. 1061 (holding that under a statute permitting a pleading to be amended by adding or striking the name of a party, it is proper, where it has been pleaded in abatement that defendant sued as a corporation was a partnership, to amend, making the principals of the partnership defendants); Haggarty *v.* Strong, 10 S. D. 585, 74 N. W. 1037 (holding that where persons are sued under a firm-name as a corporation, and they answer alleging that they are partners, the complaint may be amended accordingly).

82. Lewis Lumber Co. *v.* Camody, 137 Ala. 578, 35 So. 126.

83. Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532.

84. Parties in actions by or against partnership generally see PARTNERSHIP, 30 Cyc. 560.

Substitution of corporation for partnership see *supra*, VII, B, 2, b, (II).

85. Dwyer Brick Works *v.* Flanagan, 87 Mo. App. 340.

86. Welch *v.* Hull, 73 Mich. 47, 40 N. W. 797, so holding where instead of the given name of a non-resident member that of a resident brother was erroneously inserted.

87. York *v.* Nash, 42 Oreg. 321, 71 Pac. 59.

88. Blackwell *v.* Pennington, 66 Ga. 240.

89. Estlin *v.* Ryder, 20 La. Ann. 251.

90. Gratz *v.* Phillips, 1 Binn. (Pa.) 588.

A declaration against a foreign joint stock association as a partnership may be amended, proper service having been made so as to permit a statutory action against the president or treasurer of the association.[91]

d. Associations. Where an action is begun in the name of an unincorporated association which is incompetent to sue, it has been held proper to allow an amendment substituting certain of its members as plaintiffs.[92] Where an action is brought against the members of a voluntary association, the names of members who are not liable upon the contract sued on may be properly stricken out.[93] Where a defendant is styled a corporation, plaintiff may amend by averring that defendant is an unincorporated association and bringing the suit against an individual named as president,[94] or the persons constituting the association.[95] However, if an unincorporated association be mistakenly sued for a claim against a corporation, the proper party cannot be substituted by amendment at the commencement of the trial.[96]

3. Changing Character or Capacity in Which Party Sues — a. In General. Where a new cause of action is not introduced, it is as a rule permissible to change by amendment the character and capacity in which a party sues.[97] A party may

91. Messler *v.* Schwarzkopf, 35 Misc. (N. Y.) 72, 71 N. Y. Suppl. 241.

92. Lilly *v.* Tobbein, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887 (1890) 13 S. W. 1060, so holding under a statute providing that the court may order persons to be brought in, without whom a complete determination of the controversy cannot be had.

93. Bartholomae *v.* Kauffmann, 47 N. Y. Super. Ct. 552 [*affirmed* in 91 N. Y. 654], so holding where the effect of the amendment was to leave as sole defendant the treasurer of the association who had, without authority, taken a lease sued upon.

94. Munzinger *v.* Courier Co., 82 Hun (N. Y.) 575, 31 N. Y. Suppl. 737, 24 N. Y. Civ. Proc. 175, 1 N. Y. Annot. Cas. 32, holding that where a plaintiff named defendant as The Courier Company, and alleged on information and belief that it was a domestic corporation, an amendment of the summons and complaint by changing the title of defendant to "George Bleistein, as President of the Courier Company," and by changing the allegation that defendant was a corporation to one that it was an unincorporated association, was permissible and did not substitute a new defendant.

95. Evoy *v.* Expressmen's Aid Soc., 21 N. Y. Suppl. 641.

96. Hajek *v.* Bohemian-Slavonian Benev. Soc., 66 Mo. App. 568.

97. *Alabama.*— Henry *v.* Frohlichstein, 149 Ala. 330, 43 So. 126; Mobile, etc., R. Co. *v.* Logan, 136 Ala. 173, 33 So. 814; Hallmark *v.* Hooper, 119 Ala. 78, 24 So. 563, 72 Am. St. Rep. 900; Lucas *v.* Pitman, 94 Ala. 616, 10 So. 603 [*overruling* Christian *v.* Morris, 50 Ala. 585; Taylor *v.* Taylor, 43 Ala. 649]; Longmire *v.* Pilkington, 37 Ala. 296; Crimm *v.* Crawford, 29 Ala. 623.

Colorado.— Durkee *v.* Conklin, 13 Colo. App. 313, 57 Pac. 486.

Georgia.— Hodges *v.* Wheeler, 126 Ga. 848, 56 S. E. 76; La Pierre *v.* Webb, 113 Ga. 820, 39 S. E. 344; Atlanta Brewing, etc., Co. *v.* Blumenthal, 101 Ga. 541, 28 S. E. 1003; Georgia R., etc., Co. *v.* Smith, 83 Ga. 626, 10 S. E. 235; Water Lot Co. *v.* Leonard, 30 Ga. 560.

Illinois.— Stream *v.* Lloyd, 128 Ill. 493, 21 N. E. 533; Chicago, etc., R. Co. *v.* Murphy, 99 Ill. App. 126 [*affirmed* in 198 Ill. 462, 64 N. E. 1011].

Indiana.— Boyd *v.* Caldwell, 95 Ind. 392; Huff *v.* Walker, 1 Ind. 193.

Iowa.— Paine *v.* Waterloo Gas Co., 69 Iowa 211, 28 N. W. 560; Hunt *v.* Collins, 4 Iowa 56.

Kansas.— Hanlin *v.* Baxter, 20 Kan. 134.

Kentucky.— Hume *v.* Langston, 6 J. J. Marsh. 254.

Maine.— Fleming *v.* Courtenay, 95 Me. 128, 49 Atl. 611.

Michigan.— Stever *v.* Brown, 119 Mich. 196, 77 N. W. 704; Merrill *v.* Kalamazoo, 35 Mich. 211.

Minnesota.— Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923.

Missouri.— Middleton *v.* Frame, 21 Mo. 412.

Nebraska.— Burlington Voluntary Relief Assoc. *v.* Moore, 52 Nebr. 16, 73 N. W. 15.

New Jersey.— Cosgrove *v.* Metropolitan Constr. Co., 71 N. J. L. 106, 58 Atl. 82.

New York.—Schoonmaker *v.* Blass, 88 Hun 179, 34 N. Y. Suppl. 424; Risley *v.* Wightman, 13 Hun 163; Bannerman *v.* Quackenbush, 11 Daly 529; Mt. Pleasant State Prison *v.* Rikeman, 1 Den. 279. But see Zimmer *v.* Chew, 34 N. Y. App. Div. 504, 54 N. Y. Suppl. 685.

Oklahoma.— Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573; Mulhall *v.* Mulhall, 3 Okla. 252, 41 Pac. 577.

Pennsylvania.—Megargell *v.* Hazleton Coal Co., 8 Watts & S. 342; Boas *v.* Christ, 20 Pa. Co. Ct. 196. See also Mineral R., etc., Co. *v.* Flaherty, 24 Pa. Super. Ct. 236.

Texas.— Jacobs *v.* Cunningham, 32 Tex. 774; Whitehead *v.* Herron, 15 Tex. 127, 65 Am. Dec. 145; McIlhenny *v.* Planters', etc., Nat. Bank, (Civ. App. 1898) 46 S. W. 282.

Vermont.— Bowman *v.* Stowell, 21 Vt. 309.

United States.— Franklin *v.* Conrad-Stan-

show by amendment that he sues as assignee,[98] guardian,[99] trustee for remaindermen,[1] or for creditors;[2] as heir of a deceased heir;[3] as next friend;[4] or the name of an assignor may be added after verdict.[5] So where the pleading is filed in the name of one suing in his individual capacity, it may be so amended as to make the suit stand in his capacity of executor and administrator and *vice versa*,[6] and a party who sues originally as an agent may amend so as to maintain the suit in his own right.[7] A defect in a suit by an infant by his guardian *ad litem*, in that the infant is not named first and the guardian afterward, may be corrected by amendment.[8]

b. Nominal and Use Plaintiffs. When an action is brought by a person beneficially interested, an amendment may be allowed making it the suit of one having authority to sue for the use of the original plaintiff.[9] So where a complaint is brought by one not having the beneficial interest, the pleading may be amended so as to show the person so interested.[10] But the amendment may be

ford Co., 137 Fed. 737, 70 C. C. A. 171; McDonald *v.* Nebraska, 101 Fed. 171, 41 C. C. A. 278; Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282.

See 39 Cent. Dig. tit. "Pleading," § 682.

98. *Indian Territory.*— Martin *v.* Stratton-White Co., 1 Indian Terr. 394, 37 S. W. 833.

Michigan.— Farnam *v.* Doyle, 128 Mich. 696, 87 N. W. 1026; Harris *v.* Chamberlain, 126 Mich. 280, 85 N. W. 728; Dawson *v.* Peterson, 110 Mich. 431, 68 N. W. 246; Donovan *v.* Halsey Fire Engine Co., 58 Mich. 38, 24 N. W. 819.

New York.— Union Bank *v.* Mott, 19 How. Pr. 114.

Ohio.— Baltimore, etc., R. Co. *v.* Gibson, 41 Ohio St. 145.

United States.— New York, etc., R. Co. *v.* McHenry, 17 Fed. 414, 21 Blatchf. 400.

See 39 Cent. Dig. tit. "Pleading," § 682.

Compare Ivy Coal, etc., Co. *v.* Long, 139 Ala. 535, 36 So. 722.

Copies of assignment.— A plaintiff may amend by setting out copies of an assignment. McCarn *v.* Rivers, 7 Iowa 404.

99. Longmire *v.* Pilkington, 37 Ala. 296; Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923.

1. Humphries *v.* Dawson, 38 Ala. 199.

2. Schneider-Davis Co. *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 108.

3. Reams *v.* Spann, 28 S. C. 530, 6 S. E. 325.

4. Woodram *v.* Cincinnati, etc., R. Co., 38 S. W. 703, 18 Ky. L. Rep. 945.

A complaint by a person as guardian of an infant plaintiff cannot be amended so as to make it the suit of the infant plaintiff by the original plaintiff as next friend. Fowlkes *v.* Memphis, etc., R. Co., 38 Ala. 310, holding that the effect of the amendment was the striking out of the sole plaintiff and the substitution of another person.

5. Felty *v.* Deaven, 166 Pa. St. 640, 31 Atl. 333.

6. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 681.

7. See PRINCIPAL AND AGENT.

8. Proweeder *v.* Lewis, 11 Misc. (N. Y.) 109, 31 N. Y. Suppl. 996, 24 N. Y. Civ. Proc. 299.

9. *Alabama.*— American Union Tel. Co. *v.* Daughtery, 89 Ala. 191, 7 So. 660; Johnson *v.* Martin, 54 Ala. 271; Harris *v.* Plant, 31 Ala. 639.

Colorado.— Rawles *v.* People, 2 Colo. App. 501, 31 Pac. 941.

Delaware.— See Waples *v.* Adkins, 5 Harr. 381.

Georgia.— Germania Bank *v.* Collins, 113 Ga. 1010, 39 S. E. 421; Wheeler *v.* Stapleton, 99 Ga. 731, 27 S. E. 724; Estes *v.* Thompson, 90 Ga. 698, 17 S. E. 98 (holding that such an amendment does not make a new cause of action and is not demurrable because of want of privity between the user and the usee); Adams *v.* Barlow, 69 Ga. 302; Atlantic Coast Line R. Co. *v.* Hart Lumber Co., 2 Ga. App. 88, 58 S. E. 316.

Mississippi.— McCue *v.* Massey, 90 Miss. 544, 43 So. 2; Montague *v.* King, 37 Miss. 441.

Pennsylvania.— Walthour *v.* Spangler, 31 Pa. St. 523; Schmucker *v.* Bertrand, 1 Woodw. 443.

But *compare* Morris *v.* Barney, 17 Fed. Cas. No. 9,826, 1 Cranch C. C. 245, where it was held that in an action upon a note by the indorsee the name of the payee for the use of the indorsee could not be added.

10. Maryland Fidelity, etc., Co. *v.* Nisbet, 119 Ga. 316, 46 S. E. 444 (holding that where a petition for use stated a cause of action in plaintiff against defendants, an objection to the amendment in inserting the names of the usees, on the ground that there was not enough in the petition to amend by, was without merit); Westchester Fire Ins. Co. *v.* Jennings, 70 Ill. App. 539; Birmingham *v.* Griffin, 42 Tex. 147; National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826. See Cowan *v.* Campbell, 131 Ala. 211, 31 So. 429; Missouri, etc., R. Co. *v.* White, 2 Indian Terr. 23, 47 S. W. 351 (holding that where an action is commenced by W and B, the only parties in interest, it may be amended by changing it to "W. to the use of and for the benefit of B." But *compare* Henry *v.* Central R., etc., Co., 89 Ga. 815, 15 S. E. 757, holding that in an action against a carrier for injury to goods which plaintiff had sold, and by injury to which he was consequently not damaged, the declaration was not amendable by introducing the buyer as a usee.

refused where the effect will be to deprive defendant of a substantial right.[11] So where the interest of plaintiff is transferred pending suit, the transferee may be added as a use plaintiff.[12] But where a suit is begun by certain individuals in the name of an organization having no capacity to sue, the complaint cannot be amended by making such individuals plaintiffs for the use of the organization.[13]

4. Changing Character or Capacity in Which Party Is Charged — a. In General. Changes in the mode of charging defendant are permissible so long as the ground of the action remains the same.[14] But where such amendment would amount to the setting up of a wholly different cause of action it will be denied.[15] Plaintiff cannot be compelled to change the character in which defendant is sued.[16]

b. Joint or Several Character of Liability. Under modern statutes of amendment it has been held proper to permit an amendment changing a declaration charging defendants jointly to one charging them jointly and severally,[17] or severally,[18] or if the parties be originally charged jointly and severally the amend-

Under a statute providing that the court in furtherance of justice may allow a complaint to be amended by adding the name of a party, an action instituted by an officer to recover in behalf of the county may be amended by adding the county as a plaintiff. Hume *v.* Kelly, 28 Oreg. 398, 43 Pac. 380.

11. Morrow *v.* Merchants, etc., Bank, 35 Ga. 267, so holding where the effect of an amendment would have been to deprive defendant of the benefit of setting off bank-notes issued by plaintiff, an unincorporated bank.

12. Gate City Cotton Mills *v.* Cherokee Mills, 128 Ga. 170, 57 S. E. 320.

13. New York Mut. L. Ins. Co. *v.* Inman Park Presb. Church, 111 Ga. 677, 36 S. E. 880.

14. McAdam *v.* Orr, 4 Watts & S. (Pa.) 550. And see cases cited *infra*, this note.

Applications of rule.—A defendant originally charged as bailiff of plaintiff's land may be charged as a tenant in common with plaintiff (McAdam *v.* Orr, 4 Watts & S. (Pa.) 550), or a party charged as joint maker of a note may subsequently be charged as a surety (Smith *v.* Harrell, 16 La. Ann. 190). Parties declared against as trustees under a will may be charged in an amendment as devisees under such will. Dodson *v.* Taylor, 56 N. J. L. 11, 28 Atl. 316. Likewise a complaint for conversion may be amended so as to allege that defendant received the money as trustee. Parker *v.* Harden, 121 N. C. 57, 28 S. E. 20. In an action against an alleged partnership on a note signed by one of the members, plaintiff may amend his original complaint in order to charge defendants on the theory of principal and agent. Moore *v.* Williams, 26 Tex. Civ. App. 142, 62 S. W. 977. An action upon a policy of insurance executed by an attorney in fact, which is brought against the attorney individually, may be amended so as to change the action to one as attorney in fact. Alker *v.* Rhoads, 73 N. Y. App. Div. 158, 76 N. Y. Suppl. 808. An action begun against defendants as trustees may be turned into one against them individually. Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385; Boyd *v.* U. S. Mortgage, etc., Co., 84 N. Y. App. Div. 466, 82 N. Y. Suppl. 1001; Southack *v.* Gleason, 49 Misc. (N. Y.) 445, 98 N. Y. Suppl. 859.

Words which are merely descriptive of defendant may be added. Lister *v.* Vowell, 122 Ala. 264, 25 So. 564.

15. Heins *v.* Savannah, etc., R. Co., 114 Ga. 678, 40 S. E. 710 (holding that a complaint against a railroad company seeking to charge it as lessor for injuries resulting from the negligent acts of a lessee cannot at the trial be amended so as to charge the same defendant as a common carrier for inflicting the injury through its own servants); Georgia Cent. R. Co. *v.* Williams, 105 Ga. 70, 31 S. E. 134; Arnett *v.* Decatur County, 75 Ga. 782 (holding that a declaration in an action against a board of county commissioners by name, but which is clearly an action against the county, cannot be amended by changing the action into one against the commissioners individually); United Press *v.* A. S. Abel Co., 73 N. Y. App. Div. 240, 76 N. Y. Suppl. 692 (holding that a summons and complaint cannot be amended after trial so as to change the action originally brought against a defendant individually into one against him in his representative capacity); Keating *v.* Stevenson, 21 N. Y. App. Div. 604, 47 N. Y. Suppl. 847; Smith *v.* Stagg, 47 N. Y. Super. Ct. 514 (holding that a party originally charged as a surety cannot by amendment at the trial be charged as a principal); Peters *v.* Chamberlain, 13 N. Y. Suppl. 457 (holding that a party charged as guarantor cannot be charged as indorser by amendment).

16. Jones *v.* Norwood, 37 N. Y. Super. Ct. 276 [*affirmed* in 66 N. Y. 616].

17. Pfefferkorn *v.* Haywood, 65 Minn. 429, 68 N. W. 68.

18. King *v.* Caldwell, 26 Ark. 405; Metz *v.* Wood, 39 Ill. App. 131. But see Martin *v.* Russell, 4 Ill. 342 (holding that a declaration charging the joint slander of a husband and wife cannot be amended so as to charge the wife alone, where the writ was against the two, without naming them as husband and wife); Slaughter *v.* Davenport, 151 Mo. 26, 51 S. W. 471 (holding that where plaintiffs in an action before a justice are joint

ment may charge them severally.[19] But a several cause of action cannot be joined by amendment to a joint cause of action.[20] And an amendment will not be allowed during the trial changing the action from one against defendant to one against defendant and another party jointly.[21]

C. Pleas Puis Darrein Continuance[22] — **1. Nature and Office.** As a general rule, at common law, matters of defense arising after the commencement of an action and after issue joined, or matter which has come to the knowledge of the party pleading it subsequently to such joinder, can be pleaded only by a plea *puis darrein continuance*.[23] If the new matter arises after the commencement of the suit, but before plea or continuance, it cannot be pleaded in bar of the action generally, but may be pleaded against the further maintenance thereof.[24] Such plea is either in abatement or bar,[25] and is governed by the rules applicable to pleas in general.[26] A statutory provision abolishing special pleading generally and allowing matter which formerly could have been so pleaded to be given in evidence under a brief statement does not abolish this plea.[27] Nor is it abolished by a

obligees in the contract sued on, an amendment striking out the name of all the plaintiffs except one and consequently changing the cause of action from a joint to a several one is not allowable on appeal).

19. Franklin *v.* Mackey, 16 Serg. & R. (Pa.) 117.

20. Miller *v.* Northern Bank, 34 Miss. 412.

21. Petterson *v.* Stockton, etc., R. Co., 134 Cal. 244, 66 Pac. 304.

22. Before justice of peace see Justices of the Peace, 24 Cyc. 565.

Pleading after revival or continuance see Abatement and Revival, 1 Cyc. 115.

Supplemental pleadings introducing new matter see *infra*, VII, D.

23. *Alabama.*— Feagin *v.* Pearson, 42 Ala. 332; Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474; McDougald *v.* Rutherford, 30 Ala. 253; Burns *v.* Hindman, 7 Ala. 531; Sadler *v.* Fisher, 3 Ala. 200.

Arkansas.— Costar *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311.

California.— Jessup *v.* King, 4 Cal. 331.

Connecticut.— Canfield *v.* New-Milford Eleventh School Dist., 19 Conn. 529.

Illinois.— Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271 [*reversing* 41 Ill. App. 238]; Chicago, etc., R. Co. *v.* Lowry, 85 Ill. App. 533; Straight *v.* Hanchett, 23 Ill. App. 584.

Maine.— Rowell *v.* Hayden, 40 Me. 582.

Maryland.— U. S. Bank *v.* Merchants' Bank, 7 Gill 415; Semmes *v.* Naylor, 12 Gill & J. 358; Agnew *v.* Gettysburg Bank, 2 Harr. & G. 478.

Michigan.— Johnson *v.* Kibbee, 36 Mich. 269, holding that Comp. Laws, § 5792, abolishing special pleas, does not abrogate the practice of pleading matter which arises after issue joined by a plea *puis darrein continuance*.

Mississippi.— Irion *v.* Hume, 50 Miss. 419.

New Hampshire.— Pemigewasset Bank *v.* Brackett, 4 N. H. 557; Kimball *v.* Wilson, 3 N. H. 96, 14 Am. Dec. 342.

New York.— Hart *v.* Meeker, 1 Sandf. 623; Kingston Bank *v.* Swift, 1 How. Pr. 12; Tuffs *v.* Gibbons, 19 Wend. 639; Jackson *v.* Ramsay, 3 Cow. 75, 15 Am. Dec. 242; Jackson *v.* McConnel, 11 Johns. 424; Jackson *v.* Rich, 7 Johns. 194.

Ohio.— Tilton *v.* Morgaridge, 12 Ohio St. 98; Longworth *v.* Flagg, 10 Ohio 300.

Pennsylvania.— Brownfield *v.* Braddee, 9 Watts 149.

South Carolina.— Elms *v.* Beers, 3 McCord 1.

United States.— Yeaton *v.* Lynn, 5 Pet. 224, 8 L. ed. 105.

England.— Prince *v.* Nicholson, 1 Marsh. 280, 5 Taunt. 665, 15 Rev. Rep. 612, 1 E. C. L. 342; Vaughan *v.* Browne, 2 Str. 1106.

Canada.— Vittum *v.* Stevens, 13 N. Brunsw. 217; Godard *v.* Fredericton Boom Co., 11 N. Brunsw. 448; Gordon *v.* Robinson, 3 Ont. Pr. 366; McDonough *v.* L'Institution Catholique, etc., 5 Quebec Pr. 436.

See 39 Cent. Dig. tit. "Pleading," § 823.

Pleas puis darrein continuance are unknown to the Louisiana practice.— There the same result is accomplished by amendment and continuance, in case the opposite party be surprised. Dufour *v.* Camfrancq, 8 Mart. 235.

24. See *supra*, IV, A, 2, l.

25. Grosslight *v.* Crisup, 58 Mich. 531, 25 N. W. 505.

A plea puis darrein continuance that defendant has been garnished as plaintiff's debtor since the beginning of the suit is in abatement. Grosslight *v.* Crisup, 58 Mich. 531, 25 N. W. 505.

Such a plea is not necessarily what is technically called a dilatory plea.— It is in the nature of a dilatory plea but there is this difference between them: A plea *puis darrein continuance* cannot be filed without leave of the court but no such leave is necessary in case of a dilatory plea which is not a plea *puis darrein continuance*. Morrow *v.* Morrow, 1 Treadw. (S. C.) 455, 3 Brev. 394.

26. Gould Pl. 355.

27. Wisheart *v.* Legro, 33 N. H. 177, holding that Comp. St. c. 199, § 3, abolishing special pleading and allowing matters of defense not embraced in the general issue to be embraced in a brief statement instead of

statute permitting defendant to plead as many new matters of fact in several pleas as he may deem necessary and to file additional pleas at any time before final judgment.[28]

2. Subject-Matter and Grounds in General. Defendant may, and generally must, file a plea *puis darrein continuance* in order to take advantage of accord and satisfaction,[29] performance accepted in satisfaction of a breach of contract,[30] a release,[31] a receipt in full,[32] payment,[33] an agreement to submit to arbitration,[34] a discharge in bankruptcy,[35] or a decree or judgment disposing of the same claim in another action,[36] and satisfaction thereof,[37] when any of these matters of defense arise after commencement of the suit and after issue joined; or in order to take advantage of a discontinuance of the action as to part of several defendants.[38] In some jurisdictions matters in bar arising after issue joined may but need not be pleaded *puis darrein continuance*.[39] Matters occurring previous to the commencement of the suit,[40] or previous to the filing of any plea or issue joined,[41] or matters within the knowledge of defendant at the time of the first continuance,[42] even though his knowledge of the legal effect thereof is derived subsequently,[43] cannot be pleaded *puis darrein continuance*. Matters arising after issue joined, which are not essentially matters of defense, are not the proper subject for such a plea;[44] as that defendant had become an insolvent debtor,[45] or that plaintiff made an assignment after suit was brought.[46] It has been held, however, that an action on the case is an exception to the general rule and that in such an action defendant is permitted to give in evidence, under the general issue, a release, a former recovery, a satisfaction or any other subsequent matter which shows that the cause of action

a special plea does not abolish a plea *puis darrein continuance*.

28. Straight *v.* Hanchett, 23 Ill. App. 584.

29. Cook *v.* Georgia Land Co., 120 Ga. 1068, 48 S. E. 378. And see Accord and Satisfaction, 1 Cyc. 346.

30. Evans *v.* Cincinnati, etc., R. Co., 78 Ala. 341.

31. Cook *v.* Georgia Land Co., 120 Ga. 1068, 48 S. E. 378; Ryan *v.* Baltimore, etc., R. Co., 60 Ill. App. 612; Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

In an action by one joint owner of property, a release of the action by the other joint owner to be of any avail should be pleaded *puis darrein continuance*. Godard *v.* Fredericton Boom Co., 11 N. Brunsw. 448.

A general release given after the commencement of an action need not be pleaded *puis darrein continuance* unless a plea has been before filed in the action. Wisheart *v.* Legro, 33 N. H. 177; Kimball *v.* Wilson, 3 N. H. 96, 14 Am. Dec. 342.

32. Wade *v.* Emerson, 17 Mo. 267.

33. Toppan *v.* Jenness, 21 N. H. 232.

34. Ressequie *v.* Brownson, 4 Barb. (N. Y.) 541.

35. Cook *v.* Georgia Land Co., 120 Ga. 1068, 48 S. E. 378; Wheelock *v.* Rice, 1 Dougl. (Mich.) 267; Wyatt *v.* Richmond, 4 Humphr. (Tenn.) 365.

One of several defendants may plead severally, *puis darrein continuance*, his discharge in bankruptcy after issue joined upon the merits. Wheelock *v.* Rice, 1 Dougl. (Mich.) 267.

A discharge in bankruptcy may be pleaded puis darrein continuance together with a denial of fraud charged in the declaration. Harrington *v.* Witter, 14 Nova Scotia 183.

36. Straight *v.* Hanchett, 23 Ill. App. 584; McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223; Lawrence *v.* Bush, 3 Wend. (N. Y.) 305.

37. Bowne *v.* Joy, 9 Johns. (N. Y.) 221.

38. Carlon *v.* Ruffner, 12 W. Va. 297, holding that upon a discontinuance of an action as to part of defendants, the remaining defendants may put in a plea in abatement *puis darrein continuance*, that those persons, as to whom the action had been discontinued, were jointly bound with them.

39. Woods *v.* White, 97 Pa. St. 222; May *v.* North Carolina State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726, holding that matters *de facto* abating, arising during the progress of the action, may be, but need not be, so pleaded, and when apparent or made known to the court, will be declared by its order in any stage of the suit.

In Pennsylvania, since the Act of Amendments, March 21, 1806, which allows defendant to alter his plea on or before the trial of the cause by a special pleading, matters arising during the progress of the cause need not be pleaded as a plea *puis darrein continuance*. Johns *v.* Bolton, 12 Pa. St. 339; South Easton *v.* Norton, 2 Pa. Co. Ct. 187.

40. Knapp *v.* Hoboken, 39 N. J. L. 394, although filed by way of amendment, by permission of the court.

41. Dryer *v.* Lewis, 57 Ala. 551; Kenyon *v.* Sutherland, 8 Ill. 99; Clark *v.* Fox, 9 Dana (Ky.) 193.

42. Lee *v.* Dozier, 40 Miss. 477.

43. Lee *v.* Dozier, 40 Miss. 477.

44. Hall *v.* Hall, 47 Ala. 290; Lawrence *v.* Sample, 97 Ind. 53.

45. Tanner *v.* Roberts, 1 Mo. 416.

46. Davis *v.* Davis, 93 Ala. 173, 9 So. 736; Moon *v.* Harder, 38 Mich. 566.

has been discharged or that in equity and good conscience plaintiff ought not to recover.[47]

3. Time to Plead and Leave of Court. Such plea should regularly be put in at or before the next continuance;[48] and although it is generally held that it cannot be filed without leave,[49] if it is offered at a proper time and is not insufficient or offered for delay,[50] it is usually allowed as a matter of right.[51] But if it is not offered at the next term after the new matter arises, it is within the discretion of the court either to reject it, or, to prevent injustice or for special reasons, to allow it to be filed *nunc pro tunc*, and upon such conditions as the court may impose.[52] It has been held that the court may, in its discretion, allow the plea at any time before trial,[53] even after the cause has been remanded from the court of appeals and before a second trial;[54] but ordinarily it will not be allowed to be filed after a verdict or its equivalent,[55] or the report of a referee,[56] or after judgment.[57] It cannot properly be served in vacation.[58] But defendant may be allowed to plead *puis darrein continuance* where any issue remains to be tried, even though he has already obtained judgment on other issues.[59] If two such pleas are filed, and no motion to strike out is made, the court on appeal will consider only the first if it presents a good defense.[60] Matters in the record may estop one from filing a plea *puis darrein continuance*.[61]

4. Form and Sufficiency.[62] A plea *puis darrein continuance* must allege facts showing that the matter of defense happened after the last continuance,[63] the date

47. Kapischki *v.* Koch, 180 Ill. 44, 54 N. E. 179 [*affirming* 79 Ill. App. 238] (holding that a former recovery and satisfaction may be shown under the general issue in an action of trespass, although the defense arose after the suit was brought and was not separately pleaded *puis darrein continuance*); Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271 [*reversing* 41 Ill. App. 238]; Lyon *v.* Marclay, 1 Watts (Pa.) 271.

48. Tuffs *v.* Gibbons, 19 Wend. (N. Y.) 639; Field *v.* Goodman, 3 Wend. (N. Y.) 310 (holding that matters of defense arising after issue joined either in term or circuit, must be pleaded at the circuit); Tilton *v.* Morgaridge, 12 Ohio St. 98; Hostetter *v.* Kaufman, 11 Serg. & R. (Pa.) 146; Vittum *v.* Stevens, 13 N. Brunsw. 217 (before the end of the term next following after notice of trial has been given).

49. Morrow *v.* Morrow, 1 Treadw. (S. C.) 455, 3 Brev. 394.

50. Bate *v.* Fellowes, 4 Bosw. (N. Y.) 638.

51. Stevens *v.* Thompson, 15 N. H. 410 (holding that the court cannot refuse to receive it); Bate *v.* Fellowes, 4 Bosw. (N. Y.) 638; Day *v.* Hamburgh, 1 Browne (Pa.) 75 (holding that if a plea is properly verified the court cannot reject it); State *v.* Moses, 20 S. C. 465.

52. *Maine.*— Cummings *v.* Smith, 50 Me. 568, 79 Am. Dec. 629.

Michigan.— Souvais *v.* Leavitt, 53 Mich. 577, 19 N. W. 261.

Missouri.— Thomas *v.* Van Doren, 6 Mo. 201; Nettles *v.* Sweazea, 2 Mo. 100.

New Hampshire.— Stevens *v.* Thompson, 15 N. H. 410; Rangely *v.* Webster, 11 N. H. 299.

New York.— Medbury *v.* Swan, 46 N. Y. 200; Tuffs *v.* Gibbons, 19 Wend. 639; Field *v.* Goodman, 3 Wend. 310; Morgan *v.* Dyer, 10 Johns. 161.

Ohio.— Tilton *v.* Morgaridge, 12 Ohio St. 98. See Crutchfield *v.* Carman, Tapp. 54.

Pennsylvania.— Lyon *v.* Marclay, 1 Watts 271; Hostetter *v.* Kaufman, 11 Serg. & R. 146.

See 39 Cent. Dig. tit. "Pleading," §§ 824, 826.

53. Robinson *v.* Burkeil, 3 Ill. 278.

54. McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223.

55. Palmer *v.* Hutchins, 1 Cow. (N. Y.) 42; Alexander *v.* Fink, 12 Johns. (N. Y.) 218; Grumble *v.* Perley, 6 N. Brunsw. 512.

56. Alexander *v.* Fink, 12 Johns. (N. Y.) 218.

57. Gowen *v.* Jones, 20 Ala. 128; Wallace *v.* Bossom, 2 Can. Sup. Ct. 488; Gordon *v.* Robinson, 3 Ont. Pr. 366, holding that it cannot be pleaded on an issue of fact on which a judgment on demurrer has been rendered.

58. Field *v.* Goodman, 3 Wend. (N. Y.) 310.

59. Wagner *v.* Imbrie, 6 Exch. 380, 15 Jur. 405, 20 L. J. Exch. 235, L. M. & P. 335.

Such plea may be pleaded after demurrer filed or even after judgment on the demurrer so long as there are other issues remaining on the record for trial, particularly where the judgment does not relate to the remaining issues. Gordon *v.* Robinson, 3 Ont. Pr. 366.

60. East St. Louis *v.* Renshaw, 153 Ill. 491, 38 N. E. 1048.

61. Gaines *v.* Conn, 2 Dana (Ky.) 231, holding that the death of a party suggested on the record at one term cannot be pleaded in abatement at a subsequent term by a plea *puis darrein continuance*.

62. Verification of plea puis darrein continuance see *infra*, VIII, B, 2, b, (III).

63. Ross *v.* Nesbit, 7 Ill. 252; Straight *v.* Hanchett, 23 Ill. App. 584; Jackson *v.* Rich,

of the continuance,[64] or the time and place where the defense arose;[65] and should conclude "that the plaintiff should not further maintain his action";[66] and these facts must be set forth with precision and fullness, the highest degree of certainty being required.[67] But where a plea is by reason of the subject-matter substantially a plea *puis darrein continuance*, it should be so treated even though it is denominated a plea in bar generally;[68] but if it professes to be "offered in bar of the action" it must answer the whole declaration.[69] It is not necessary in such a plea to offer to pay the costs that have accrued.[70] Where such plea has been filed with leave of the court, it will be presumed that satisfactory proof had been given to the court or that it was consented to by the opposite party.[71]

5. Operation and Effect. As a general rule, in the absence of statute, a plea *puis darrein continuance* of matters of defense waives all preceding pleas[72]

7 Johns. (N. Y.) 194; Morrow *v.* Morrow, 1 Treadw. (S. C.) 455, 3 Brev. 394. See McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223, holding a failure to aver that the matter pleaded occurred since the last continuance not sufficient to sustain a demurrer.

64. Ross *v.* Nesbit, 7 Ill. 252; Field *v.* Cappers, 81 Me. 36, 16 Atl. 328, 10 Am. St. Rep. 237; Augusta *v.* Moulton, 75 Me. 551; Jewett *v.* Jewett, 58 Me. 234; Vicary *v.* Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323.

65. Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401; Ross *v.* Nesbit, 7 Ill. 252; Field *v.* Cappers, 81 Me. 36, 16 Atl. 328, 10 Am. St. Rep. 237; Cummings *v.* Smith, 50 Me. 568, 79 Am. Dec. 629.

In pleading a former judgment puis darrein continuance, the term of the court at which it was recovered or the exact date of the entry of the judgment should be stated, and when taken in vacation the time of its entry by the clerk should be stated. Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401.

66. Gibson *v.* Bourland, 13 Ill. App. 352; McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223. See Hallowes *v.* Lucy, 3 Lev. 120, 83 Eng. Reprint 608.

67. *Alabama.*— Henry *v.* Porter, 29 Ala. 619.

Illinois.— Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401; Donley *v.* Dougherty, 97 Ill. App. 544; Miller *v.* McCormick Harvesting Mach. Co., 84 Ill. App. 571; Straight *v.* Hanchett, 23 Ill. App. 584; Gibson *v.* Bourland, 13 Ill. App. 352.

Indiana.— Prather *v.* Ruddell, 8 Blackf. 393.

Maine.— Hilliker *v.* Simpson, 92 Me. 590, 43 Atl. 495, where all the essentials were set out with great fulness and the plea was held sufficient both in substance and form.

Pennsylvania.— Vicary *v.* Moore, 2 Watts 451, 27 Am. Dec. 323.

See 39 Cent. Dig. tit. "Pleading," § 827.

Motions to strike or to make more definite and certain see *infra*, XII.

A plea puis darrein continuance of the recovery of a judgment since the last continuance, in another action, should allege that the former judgment was the result of a trial upon its merits and that at the time the plea was filed the judgment was not appealed from, reversed, or vacated, but remained in full force and effect. Miller *v.* McCormack Harvesting Mach. Co., 84 Ill. App. 571.

68. State *v.* Webb, 110 Ala. 214, 20 So. 462; Straight *v.* Hanchett, 23 Ill. App. 584.

A plea puis darrein continuance setting up facts amounting to a bar of further maintenance of the suit need not contain the word "further," if it contains no averment inconsistent with the relief which the facts entitle the party to. Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474.

69. Stein *v.* Ashby, 30 Ala. 363.

70. State *v.* Webb, 110 Ala. 214, 20 So. 462, under Code, § 2848.

71. Morrow *v.* Morrow, 1 Treadw. (S. C.) 455, 3 Brev. 394.

72. *Arkansas.*— Burton *v.* Hynson, 7 Ark. 502.

Illinois.— Elder *v.* Prussing, 101 Ill. App. 655; Donley *v.* Dougherty, 97 Ill. App. 544; Rork *v.* McDavid, 91 Ill. App. 262; Horning *v.* Frank, 88 Ill. App. 87; Chicago, etc., R. Co. *v.* Lowry, 85 Ill. App. 533; Miller *v.* McCormick Harvesting Mach. Co., 84 Ill. App. 571; Ripley *v.* Leverenz, 83 Ill. App. 603 [*reversed*, but this point not controverted, in 183 Ill. 519, 56 N. E. 166]; Harding *v.* Horton, 79 Ill. App. 123; Ryan *v.* Baltimore, etc., R. Co., 60 Ill. App. 612.

Indiana.— Prather *v.* Ruddell, 8 Blackf. 393; Scott *v.* Brokaw, 6 Blackf. 241.

Maine.— Hilliker *v.* Simpson, 92 Me. 590, 43 Atl. 495; Morse *v.* Small, 73 Me. 565.

Mississippi.— Pool *v.* Hill, 44 Miss. 306. See Heyfron *v.* Mississippi Union Bank, 7 Sm. & M. 434.

New Hampshire.— True *v.* Huntoon, 54 N. H. 121; Webb *v.* Steele, 13 N. H. 230; Pemigewasset Bank *v.* Brackett, 4 N. H. 557.

New Jersey.—Price *v.* Sanderson, 18 N. J. L. 426.

New York.—Bate *v.* Fellowes, 4 Bosw. 638; Culvert *v.* Barney, 14 Wend. 161; Kimball *v.* Huntington, 10 Wend. 675, 25 Am. Dec. 590; Rayner *v.* Dyett, 2 Wend. 300.

Ohio.— Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 1 West. L. J. 1.

Pennsylvania.— Lyon *v.* Marclay, 1 Watts 271.

Rhode Island.— Westerly Prob. Ct. *v.* Potter, 25 R. I. 204, 55 Atl. 524.

South Carolina.— Simonton *v.* Younge, 1 Strobh. 17.

even the general issue,[73] and notice of special matter filed with it,[74] and forces defendant to stand on that plea alone, except where it is stricken from the files on motion,[75] and by operation of law it has the effect to cause all preceding pleas to be stricken from the files,[76] and the cause of action to be admitted, and everything confessed, except the matter contested by it.[77] Thereafter the parties proceed to settle their pleadings *de novo* just as though no pleas had previously been filed in the case; [78] and no evidence on the merits can be submitted on either side.[79] In some jurisdictions, however, the statutes expressly provide that such a plea is not a waiver of any plea to the merits previously pleaded; [80] or the same result has been accomplished by other statutory restrictions.[81] The above general rule does not apply, however, where the matter of the plea affects the remedy only and not the cause of action.[82] So it has been held that where the plea goes only to one or more particular counts, or to some particular part of an entire claim it does not act as a waiver beyond what it professes to answer.[83] In case the plea is held bad, nothing is left to be determined except the amount of

Vermont.— Lincoln *v.* Thrall, 26 Vt. 304.

Wisconsin.— Alder *v.* Wise, 4 Wis. 459.

United States.— Good *v.* Davis, 10 Fed. Cas. No. 5,530*a*, Hempst. 16; Spafford *v.* Woodruff, 22 Fed. Cas. No. 13,198, 2 McLean 191; Wisdom *v.* Williams, 30 Fed. Cas. No. 17,904, Hempst. 460.

Canada.— Ruggles *v.* Victoria Beach R. Co., 35 Nova Scotia 553.

See 39 Cent. Dig. tit. "Pleading," §§ 828, 828½.

73. Chicago, etc., R. Co. *v.* Lowry, 85 Ill. App. 533; Morse *v.* Small, 73 Me. 565; Lincoln *v.* Thrall, 26 Vt. 304; Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410. And see cases cited in preceding note.

Where no plea has been previously filed, a plea *puis darrein continuance* may be properly pleaded with the general issue. True *v.* Huntoon, 54 N. H. 121.

74. Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410.

75. Dinet *v.* Pfirshing, 86 Ill. 83.

76. Horning *v.* Franke, 88 Ill. App. 87; Harding *v.* Horton, 79 Ill. App. 123; Lincoln *v.* Thrall, 26 Vt. 304. And see cases cited *supra*, note 72.

77. Elder *v.* Prussing, 101 Ill. App. 655; Harding *v.* Horton, 79 Ill. App. 123; Webb *v.* Steele, 13 N. H. 230; Culver *v.* Barney, 14 Wend. (N. Y.) 161; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410. And see cases cited *supra*, note 72.

78. Donley *v.* Dougherty, 97 Ill. App. 544.

79. Chicago, etc., R. Co. *v.* Lowry, 85 Ill. App. 533.

Where, in an action for personal injuries, a plea *puis darrein continuance* is filed, plaintiff is not required to show an affirmative case of negligence or to show due care on his part and defendant is precluded from presenting evidence as to the merits of his defense. Chicago, etc., R. Co. *v.* Lowry, 85 Ill. App. 533.

80. See the statutes of the several states.

Under Ala. Code (1907), § 5336, and corresponding sections in earlier Alabama codes so providing see Wright *v.* Evans, 53 Ala. 103; Dolberry *v.* Trice, 49 Ala. 207; Lacy *v.* Rockett, 11 Ala. 1002. But see Sadler *v.* Fisher, 3 Ala. 200, prior to the statutes.

See Tenn. Code, § 4633. But see Sanderlin *v.* Dandridge, 3 Humphr. (Tenn.) 99, prior to such provision.

81. Parkhill *v.* Union Bank, 1 Fla. 110 (construing Act, Nov. 23, 1828, § 26); Shirley *v.* Shattuck, 13 Metc. (Mass.) 256 (construing St. (1836) c. 273); Susong *v.* Jack, 1 Heisk. (Tenn.) 415 (construing Code, § 4607 (2892)).

In Pennsylvania, under Act of Amendments, March 21, 1806, matter arising during the progress of the case may be pleaded as a special and additional plea and this does not waive pleas previously interposed. Johns *v.* Bolton, 12 Pa. St. 339; South Easton *v.* Norton, 2 Pa. Co. Ct. 187.

82. Bate *v.* Fellowes, 4 Bosw. (N. Y.) 638; Culver *v.* Barney, 14 Wend. (N. Y.) 161; Davis *v.* Burgess, 18 R. I. 85, 25 Atl. 848.

A plea puis darrein continuance of a discharge under an act abolishing imprisonment for debt in certain cases is not a waiver of a plea in bar before put in. Rayner *v.* Dyett, 2 Wend. (N. Y.) 300.

83. Bennet *v.* Gilbert, 94 Ill. App. 505 [*affirmed* in 194 Ill. 403, 62 N. E. 847], holding that where there are two parties beneficially interested and the plea *puis darrein continuance* is limited to the interest of one of them, it acts as a waiver of former pleas only to that extent. But see Sanderlin *v.* Dandridge, 3 Humphr. (Tenn.) 99, where it was held that a plea since the last continuance was a waiver of all prior defenses, whether the plea went to the whole or only part of plaintiff's demand, although it is now otherwise by the statute under Shannon Code (1886), § 4633.

A plea of title to a portion of the premises claimed in an action of ejectment put in *puis darrein continuance*, after a plea of the general issue, is not a waiver of the general issue so as to authorize plaintiff on neglect of defendant to rejoin to a replication, to take judgment for the whole premises, but is a waiver of only so much of the general issue as is covered by such plea. Morris *v.* Cook, 19 Wend. (N. Y.) 699.

the damages.[84] A judgment on such plea, whether on demurrer or on trial, should be *quod recuperet*, or final, and not *respondeat ouster*,[85] except where there is a statutory provision to the contrary.[86] Nor can there be a judgment of nonsuit after such plea is interposed, defendant being put to the proof of the new matter he has suggested.[87]

6. Payment of Costs. In granting leave to file a plea *puis darrein continuance* the court will, as a general rule, place the burden of the costs that have accrued prior to such filing, upon defendant.[88]

7. Reply to Plea. A plea *puis darrein continuance* may, like any other affirmative plea, be met by a reply or replication.[89] And if a reply is not forthcoming, defendant may enter a rule of course to reply or that plaintiff be dismissed.[90] Even though the plea is not pleaded in due time plaintiff cannot treat it as a nullity but must reply or move the court to set the plea aside.[91]

8. Demurrer[92] or Motion to Plea.[93] The sufficiency of a plea *puis darrein continuance* if properly verified can be determined only by demurrer;[94] but a motion to strike or set aside the plea and not demurrer is the proper form of objecting that the plea was not filed at the proper time,[95] that it was accompanied by another plea,[96] that it was not properly verified,[97] or that defendant was not entitled to a trial on the pleadings he filed originally.[98] A verified plea *puis darrein continuance* cannot be set aside as false.[99]

9. Amendment or Abandonment of Plea.[1] If through misapprehension or inadvertence of defendant's attorney, a mistake is made in a plea *puis darrein continuance*, the party may amend, at the trial, on such terms as the court may in the exercise of its discretion impose,[2] usually on the payment of costs which have accrued since the plea was interposed.[3] Under a rule of course to amend, defendant may alter the plea so as to modify or vary entirely the ground of defense taken by the original plea.[4] Leave may also be given to the party by the court to

84. Ryan *v.* Baltimore, etc., R. Co., 60 Ill. App. 612; Morse *v.* Small, 73 Me. 565.

85. McKeen *v.* Parker, 51 Me. 389; Waldo *v.* Mitchell, 24 N. H. 229; Culver *v.* Barney, 14 Wend. (N. Y.) 161; Renner *v.* Marshall, 1 Wheat. (U. S.) 215, 4 L. ed. 74. But see Augusta *v.* Moulton, 75 Me. 551, and Field *v.* Cappers, 81 Me. 36, 16 Atl. 328, 10 Am. St. Rep. 237, where it was held that the judgment might be, at the discretion of the court *respondeat ouster*, in furtherance of justice.

86. McDugald *v.* Mississippi Union Bank, 6 Sm. & M. (Miss.) 333, under Howard & H. St. p. 615, § 8.

87. Lincoln *v.* Thrall, 26 Vt. 304; Alder *v.* Wise, 4 Wis. 159.

88. Peck *v.* Karter, 141 Ala. 668, 37 So. 920 [*overruling* State *v.* Webb, 110 Ala. 214, 20 So. 462, so far as it conflicts with this principle]; Nettles *v.* Sweazea, 2 Mo. 100; State *v.* Moses, 20 S. C. 465 (holding that leave to so plead should always be on condition of payment of costs); Wisdom *v.* Williams, 30 Fed. Cas. No. 17,904, Hempst. 460.

On verdict for defendant under an issue joined on a plea *puis darrein continuance*, defendant is only entitled to costs which have accrued since the plea was interposed. Dolberry *v.* Trice, 49 Ala. 207.

Where such plea is put in at the next term after it arises, the court cannot require costs as terms of a leave to plead it, although if the court permits it to be pleaded at a subsequent term it may require the payment of costs. Stevens *v.* Thompson, 15 N. H. 410.

89. Kingston Bank *v.* Swift, 1 How. Pr. (N. Y.) 12.

90. Jackson *v.* Peer, 4 Cow. (N. Y.) 418. See Wallen *v.* Smith, 9 A. & E. 505, 8 L. J. Q. B. 122, 1 P. & D. 374, 2 W. W. & H. 79, 36 E. C. L. 274.

91. Morgan *v.* Dyer, 9 Johns. (N. Y.) 255, 10 Johns. 161.

92. Demurrer generally see *supra*, VI.

93. Motion to strike generally see *infra*, XII, C.

94. Day *v.* Hamburgh, 1 Browne (Pa.) 75.

95. Rowell *v.* Hayden, 40 Me. 582; Pool *v.* Hill, 44 Miss. 306; Ludlow *v.* McCrea, 1 Wend. (N. Y.) 228.

96. Nicholl *v.* Mason, 21 Wend. (N. Y.) 339.

97. Wright *v.* Evans, 53 Ala. 103; McCall *v.* McRae, 10 Ala. 313; McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223; Pool *v.* Hill, 44 Miss. 306. And see *infra*, XII, C, 1, c, (VI).

98. Lacy *v.* Rockett, 11 Ala. 1002.

99. Gilbert *v.* Graham, 14 N. Brunsw. 202. See also *infra*, XII, C, 1, c, (III), (C), (3).

1. Amendment of plea puis darrein continuance of accord and satisfaction see Accord and Satisfaction, 1 Cyc. 346.

2. Jackson *v.* Peer, 4 Cow. (N. Y.) 418; Heye *v.* Lieman, 12 Fed. Cas. No. 6,445*a*; Holroyd *v.* Reed, 5 Q. B. 594, Dav. & M. 483, 8 Jur. 81, 13 L. J. Q. B. 130, 48 E. C. L. 594.

3. Heye *v.* Lieman, 12 Fed. Cas. No. 6,445*a*; Holroyd *v.* Reed, 5 Q. B. 594, Dav. & M. 483, 8 Jur. 81, 13 L. J. Q. B. 130, 48 E. C. L. 594.

4. Jackson *v.* Peer, 4 Cow. (N. Y.) 418.

reinstate the former pleas by amendment and abandon the plea *puis darrein continuance*.[5]

D. Supplemental Pleadings[6]— **1. In General.** Supplemental pleadings belong primarily to equity practice,[7] but in many states it is provided by statute that supplemental pleadings may be filed, on leave of court, and such statutes apply irrespective of the legal or equitable nature of the litigation.[8] The rules adopted in the application of these statutes are generally the same as those formerly employed in the chancery courts,[9] combined, in the case of supplemental answers, in legal actions, with the common-law rules respecting pleas *puis darrein continuance*.[10] Supplemental pleadings may be amended like other pleadings.[11]

2. Nature and Office. The rights of parties to an action are ordinarily to be determined by the state of facts existing at the time of its commencement.[12] If new matter subsequently arises, it cannot ordinarily be introduced under the original pleadings,[13] or be brought in by amendment;[14] but should be taken advantage of by a supplemental pleading.[15] And although the facts occur before the commencement of the suit, if a party does not learn of their existence until after he has filed his pleading, he may usually file a supplemental pleading.[16] A

5. Ripley *v.* Leverenz, 183 Ill. 519, 56 N. E. 166 [*reversing* 83 Ill. App. 603]; Horning *v.* Frank, 88 Ill. App. 87; Smith *v.* Strange, 2 Manitoba 101.

After judgment a plea *puis darrein continuance* cannot be withdrawn and the party allowed to plead over any previously existing matter. Tanner *v.* Roberts, 1 Mo. 416.

6. Objections to rulings on supplemental pleadings see *infra*, XIII, F.

Supplemental bill in a suit in equity for an accounting see Accounts and Accounting, 1 Cyc. 440.

Supplemental complaint in bastardy proceedings see Bastards, 5 Cyc. 657.

Supplemental complaint on death of party for purpose of revival see Abatement and Revival, 1 Cyc. 101.

Supplemental libel in admiralty see Admiralty, 1 Cyc. 855.

Supplemental pleading of judgments see Judgments, 23 Cyc. 1525.

Supplemental pleadings in action to foreclose mortgage see Mortgages, 27 Cyc. 1608.

Supplemental pleadings in suits for injunctions see Injunctions, 22 Cyc. 936.

7. See, generally, Equity, 16 Cyc. 352 *et seq.*, 357 *et seq.*

8. See Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Johnson *v.* Briscoe, 92 Ind. 367; Allen *v.* Davenport, 115 Iowa 20, 87 N. W. 743; Peoples *v.* Carrol, 11 Heisk. (Tenn.) 417. And see the statutes of the several states.

9. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373, 17 S. W. 954; Hoyt *v.* Sheldon, 4 Abb. Pr. (N. Y.) 59 [*affirmed* in 19 N. Y. 207]; Swedish-American Nat. Bank *v.* Dickinson Co., 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285.

10. Harding *v.* Minear, 54 Cal. 502; Johnson *v.* Briscoe, 92 Ind. 367; Kimble *v.* Seal, 92 Ind. 276; Holyoke *v.* Adams, 59 N. Y. 233. And see *supra*, VII, C.

11. Divine *v.* Duncan, 52 How. Pr. (N. Y.) 446; Merchant *v.* Bowyer, 3 Tex. Civ. App. 367, 22 S. W. 763. See, generally, *supra*, VII, A.

12. Styles *v.* Fuller, 101 N. Y. 622, 4 N. E. 348.

13. Guptill *v.* Red Wing, 76 Minn. 129, 78 N. W. 970.

14. See *supra*, VII, A, 8.

15. *California.*— Moulton *v.* Parks, 64 Cal. 166, 30 Pac. 613.

Colorado.— Sylvester *v.* Jerome, 19 Colo. 128, 34 Pac. 760.

Indiana.— Musselman *v.* Manly, 42 Ind. 462.

Iowa.— Seevers *v.* Hamilton, 11 Iowa 66.

Minnesota.— Guptill *v.* Red Wing, 76 Minn. 129, 78 N. W. 970.

New York.— Styles *v.* Fuller, 101 N. Y. 622, 4 N. E. 348; Galm *v.* Sullivan, 117 N. Y. App. Div. 235, 101 N. Y. Suppl. 1060; Hastings *v.* McKinley, 1 E. D. Smith 273 [*affirmed* in Seld. 173]; Le Boeuf *v.* Gray, 42 Misc. 632, 87 N. Y. Suppl. 597; Bostwick *v.* Menck, 8 Abb. Pr. N. S. 169 [*reversed* on other grounds in 4 Daly 68]; Williams *v.* Hernon, 16 Abb. Pr. 173; Hornfager *v.* Hornfager, 6 How. Pr. 13.

Ohio.— Lake Shore, etc., R. Co. *v.* Hutchins, 37 Ohio St. 282; Cook *v.* Gilpin, 7 Ohio Dec. (Reprint) 291, 2 Cinc. L. Bul. 82.

Oklahoma.— Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11.

South Carolina.— McCaslan *v.* Latimer, 17 S. C. 123.

South Dakota.— Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614, 20 S. D. 178, 105 N. W. 245.

Washington.— Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

See 39 Cent. Dig. tit. "Pleading," § 832.

16. Reynolds *v.* Ætna L. Ins. Co., 16 N. Y. App. Div. 74, 44 N. Y. Suppl. 691; Hoyt *v.* Sheldon, 4 Abb. Pr. (N. Y.) 59 [*affirmed* in 19 N. Y. 207]. See Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614, 20 S. D. 178, 105 N. W. 245, where the court discusses a number of cases in other jurisdictions and concludes that matter occurring before trial is commenced, but not known to the parties until afterward, should be introduced by amendment instead of a supplemental plead-

supplemental pleading must be a special pleading showing facts which occurred or came to the pleader's knowledge after the former pleadings were filed;[17] and must strengthen the allegations of the original pleadings and supply the facts which may be necessary to a complete determination of the rights of the parties touching the subject-matter of the suit, upon the facts existing at the time of the rendition of the judgment.[18] Mere misnomer in designating a pleading as a supplemental pleading instead of an amended pleading or *vice versa* will have no effect, where the substantial rights of the parties are not affected thereby,[19] and an additional pleading may be treated according to the matter it contains as an amended pleading, although it be styled a supplementary pleading or *vice versa*.[20]

3. Right to File and Leave of Court.[21] The consent of the opposite party,[22] or leave of court, must be had in order to file a supplemental pleading, and the granting or refusal of such leave is a matter largely within the discretion of the court.[23] But such discretion is not arbitrary;[24] and upon good cause shown, the court cannot refuse to allow such supplemental pleading without an abuse of its discretion.[25] Although leave to file a supplemental pleading may be refused where the new matter offered is clearly frivolous or inequitable in its nature,[26] it should be granted, almost as a matter of course, in the interest of justice and for the protection of the party's rights, where the material facts alleged in the supplemental pleading have occurred since the commencement of the action and relate thereto.[27] The exercise

ing, where it is sought to be substituted for and not as supplemental of the original pleading.

"Knowledge" within the meaning of a statute providing that either party may, by leave of court, file supplemental pleadings, allege material facts which happened or had come to his knowledge, etc., means actual and not constructive knowledge. Peoples *v.* Carrol, 11 Heisk. (Tenn.) 417. But see Western Union Tel. Co. *v.* Wofford, (Tex. Civ. App. 1897) 42 S. W. 119.

17. Johnson *v.* Briscoe, 92 Ind. 367.

18. Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11; Noonan *v.* Orton, 21 Wis. 283.

19. Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

20. Seevers *v.* Hamilton, 11 Iowa 66; Howard *v.* Johnston, 82 N. Y. 271; Cincinnati *v.* Cameron, 33 Ohio St. 336.

21. Right to file and leave of court in respect to a supplemental answer see *infra*, VII, D, 6, b.

22. Callaway *v.* Webster, 1 Rob. (La.) 553; Rost *v.* St. Francis' Church, 5 Mart. N. S. (La.) 191.

23. *California.*— Jacob *v.* Lorenz, 98 Cal. 332, 33 Pac. 119.

Illinois.— Davis *v.* Lang, 153 Ill. 175, 38 N. E. 635.

Indiana.— Pouder *v.* Tate, 132 Ind. 327, 30 N. E. 880; Johnson *v.* Briscoe, 92 Ind. 367; Musselman *v.* Manly, 42 Ind. 462.

Iowa.— Little *v.* Pottawattamie County, 127 Iowa 376, 101 N. W. 752.

Kansas.— Goodacre *v.* Skinner, 47 Kan. 575, 28 Pac. 705; Rogers *v.* Hodgson, 46 Kan. 276, 26 Pac. 732.

Louisiana.— Callaway *v.* Webster, 1 Rob. 553; Baines *v.* Higgins, 2 La. 220; Rost *v.* St. Francis' Church, 5 Mart. N. S. 191.

Minnesota.— Stacy *v.* Stephen, 78 Minn. 480, 81 N. W. 391.

New Mexico.— U. S. *v.* Rio Grande Dam, etc., Co., (1906) 85 Pac. 393, holding that the granting of leave to file a supplemental complaint is in the discretion of the federal courts.

New York.— Medbury *v.* Swan, 46 N. Y. 200; Stokes *v.* Manhattan R. Co., 47 N. Y. App. Div. 58, 62 N. Y. Suppl. 333; Otten *v.* Manhattan R. Co., 24 N. Y. App. Div. 130, 48 N. Y. Suppl. 945; Bank of Metropolis *v.* Lissner, 6 N. Y. App. Div. 378, 40 N. Y. Suppl. 201; Stewart *v.* James, 38 N. Y. Super. Ct. 366 [*reversing* 38 N. Y. Super. Ct. 56]; Rio Tinto Copper Min. Co. *v.* Black, 85 N. Y. Suppl. 1116.

Oklahoma.— Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11.

South Carolina.— Copeland *v.* Copeland, 60 S. C. 135, 38 S. E. 269.

South Dakota.— Schouweiler *v.* Hough, 7 S. D. 163, 63 N. W. 776.

Washington.— Long *v.* Eisenbeis, 23 Wash. 556, 63 Pac. 249.

Wisconsin.— Matteson *v.* Curtis, 14 Wis. 436.

United States.— Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699.

See 39 Cent. Dig. tit. "Pleading," § 833.

24. Jacob *v.* Lorenz, 98 Cal. 332, 33 Pac. 119.

25. Peoples *v.* Carrol, 11 Heisk. (Tenn.) 417.

Showing good cause implies a showing both of material facts that have happened or come to the pleader's knowledge since the former pleading, and of a reasonable excuse for any apparent delay in offering the supplemental pleading. Peoples *v.* Carrol, 11 Heisk. (Tenn.) 417.

26. Holyoke *v.* Adams, 59 N. Y. 233; Hoyt *v.* Sheldon, 4 Abb. Pr. (N. Y.) 59 [*affirmed* in 19 N. Y. 207].

27. Schouweiler *v.* Hough, 7 S. D. 163, 63 N. W. 776.

of the court's discretion may be reviewed on appeal and, if erroneous, may be set aside;[28] but unless there has been a clear abuse of such discretion or the applicant's rights have been prejudiced, the court's ruling will not be disturbed.[29] In the exercise of its discretion, the court may impose such conditions upon the leave to file a supplemental pleading, as appear, under the circumstances, reasonable,[30] such as the payment of costs to the date of the order.[31] In general the substantial rights of the parties should not be decided on a mere motion for leave to file a supplemental pleading.[32] The court cannot give general leave to serve a supplemental pleading setting up any new matter that may thereafter occur in the action.[33]

4. Application and Notice. To entitle a party to an order permitting the filing of a supplemental pleading, he must make application therefor with reasonable diligence,[34] and if he neglects to do so for an unreasonable length of time, his application may be denied on the ground of laches.[35] However, mere delay in moving for leave does not of itself preclude the court from allowing a supplemental pleading to be filed on the ground of laches,[36] unless it appears that the delay has caused a substantial injury to some party to the action.[37] As long as the suit continues undisposed of, leave may be granted to parties to file supplemental pleadings provided of course they bring themselves within the provisions of the statute.[38] It has been held that leave to file a supplemental pleading may be granted *ex parte*;[39] but it is more usual to require that notice of the motion be served on the opposite party and an opportunity given to hear his objections.[40] A copy of the proposed

28. *California.*— Seehorn *v.* Big Meadows, etc., Road Co., 60 Cal. 240.

Kansas.— Austin *v.* Jones, 47 Kan. 565, 28 Pac. 621.

New York.— Otten *v.* Manhattan R. Co., 24 N. Y. App. Div. 130, 48 N. Y. Suppl. 945. *Compare* Medbury *v.* Swan, 46 N. Y. 200.

South Carolina.— Moon *v.* Johnson, 14 S. C. 434.

Washington.— Davis *v.* Erickson, 3 Wash. 654, 29 Pac. 86.

See 39 Cent. Dig. tit. "Pleading," § 833.

An order refusing leave to file a supplemental complaint is reviewable on appeal without any formal exceptions, where it is embodied in a written order and journal entry in the cause. Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855.

29. Rogers *v.* Hodgson, 46 Kan. 276, 26 Pac. 732; Pickett *v.* Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629; Schouweiler *v.* Hough, 7 S. D. 163, 63 N. W. 776; McDaniels *v.* Gowey, 30 Wash. 412, 71 Pac. 12; Long *v.* Eisenbeis, 23 Wash. 556, 63 Pac. 249

30. Austin *v.* Jones, 47 Kan. 565, 28 Pac. 621; Pickrell *v.* Mendel, 87 N. Y. App. Div. 163, 84 N. Y. Suppl. 70; Myers *v.* Metropolitan El. R. Co., 16 Daly (N. Y.) 410, 12 N. Y. Suppl. 2, 19 N. Y. Civ. Proc. 448 (holding it proper to grant leave on terms that no new notice of trial need be served, and that the issue retain its original date, its number on the calendar, and its place on the day calendar, where the case had been on the calendar more than a year); Staunton *v.* Swann, 10 N. Y. Civ. Proc. 12. And see *infra*, VII, D, 6, b.

31. Guiliano *v.* Whitenack, 3 Misc. (N. Y.) 54, 22 N. Y. Suppl. 560. *Compare* Duncan *v.* Cravens, 55 Ind. 525.

32. Central Trust Co. *v.* West India Imp. Co., 109 N. Y. App. Div. 517, 96 N. Y. Suppl. 519; Conreid *v.* Witmark, 73 N. Y. App. Div. 185, 76 N. Y. Suppl. 690; Bate *v.* Fellowes, 4 Bosw. (N. Y.) 638.

33. Stranksy *v.* Harris, 22 Misc. (N. Y.) 691, 49 N. Y. Suppl. 1123.

34. Stacy *v.* Stephen, 78 Minn. 480, 81 N. W. 391.

The motion papers must at least make a prima facie showing of facts material to the case or defense which have occurred after the former pleading or of which the party was ignorant when the former pleading was made. Pickett *v.* Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629.

35. Stacy *v.* Stephen, 78 Minn. 480, 81 N. W. 391; Medbury *v.* Swan, 46 N. Y. 200; Morel *v.* Garelly, 16 Abb. Pr. (N. Y.) 269; Davis *v.* Erickson, 3 Wash. 654, 29 Pac. 86.

36. Central Trust Co. *v.* West India Imp. Co., 109 N. Y. App. Div. 517, 96 N. Y. Suppl. 519; Rio Tinto Copper Min. Co. *v.* Black, 85 N. Y. Suppl. 1116; Sparks *v.* Green, 69 S. C. 198, 48 S. E. 61 (holding that a supplemental pleading may be served on proper notice under an order of court more than two years after action begun); Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

37. Central Trust Co. *v.* West India Imp. Co., 109 N. Y. App. Div. 517, 96 N. Y. Suppl. 519.

38. Austin *v.* Jones, 47 Kan. 565, 28 Pac. 621, even four years or more.

39. Fisk *v.* Albany, etc., R. Co., 8 Abb. Pr. N. S. (N. Y.) 309.

40. *Kansas.*— Goodacre *v.* Skinner, 47 Kan. 575, 28 Pac. 705.

Nebraska.— Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

New Mexico.— U. S. *v.* Rio Grande Dam, etc., Co., (1906) 85 Pac. 393.

New York.— Stewart *v.* James, 38 N. Y. Super. Ct. 366 [*reversing* 38 N. Y. Super. Ct. 56]. *Compare* Fish *v.* Albany, etc., R. Co.,

supplemental pleading should be submitted with the motion for leave to file,[41] unless the facts to be set out fully appear in the motion for leave.[42]

5. Supplemental Petition or Complaint[43] — a. In General. A supplemental complaint cannot be filed without leave of the court or consent of the opposite party,[44] although no answer has been put in.[45] But as a general rule leave will be granted to file a supplemental complaint which alleges any material fact which has happened or come to plaintiff's knowledge, since the original complaint was filed,[46] including a decree or judgment of a competent court rendered after the commencement of the action,[47] or damages that have accrued during the pendency of the action.[48] Leave will not ordinarily be granted to file a supplemental complaint alleging facts known to plaintiff at the time of commencing the action,[49] or which

8 Abb. Pr. N. S. 309, holding that while the court may direct notice of motion for leave to file a supplemental complaint to be given, it is not usual to do so unless an injunction or some other relief is sought.

Washington.— Davis *v.* Erickson, 3 Wash. 654, 29 Pac. 86.

Failure to give notice is not reversible error where the application is presented in open court in the presence of the other party or his attorney of record, and the order is granted without any objection being raised that service of notice was not made. Flagg *v.* Flagg, 39 Nebr. 229, 58 N. W. 109.

41. Diehl *v.* Beck, 61 N. Y. App. Div. 570, 70 N. Y. Suppl. 818; Stokes *v.* Manhattan R. Co., 47 N. Y. App. Div. 58, 62 N. Y. Suppl. 333.

42. Diehl *v.* Lambart, 9 N. Y. Civ. Proc. 347.

43. Supplemental complaint as means of revival see Abatement and Revival, 1 Cyc. 101.

44. Callaway *v.* Webster, 1 Rob. (La.) 553; Rost *v.* St. Francis Church, 5 Mart. N. S. (La.) 191. And see cases cited *supra*, VII, D, 3.

45. Baines *v.* Higgins, 2 La. 220.

46. *California.*— Baker *v.* Brickell, 102 Cal. 620, 36 Pac. 950 (where the supplemental complaint was rejected on the ground that the facts set up therein were not material); Van Maren *v.* Johnson, 15 Cal. 308.

Indiana.— Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Richwine *v.* Noblesville Presby. Church, 135 Ind. 80, 34 N. E. 737; Pouder *v.* Tate, 132 Ind. 327, 30 N. E. 880; Kimble *v.* Seal, 92 Ind. 276; Musselman *v.* Manly, 42 Ind. 462.

Iowa.— Citizens' State Bank *v.* Jess, 127 Iowa 450, 103 N. W. 471; Christie *v.* Iowa L. Ins. Co., 111 Iowa 177, 82 N. W. 499; Davenport *v.* Mitchell, 15 Iowa 194. See Troupe *v.* Eade, 42 Iowa 552, where the supplemental complaint was held bad on demurrer.

Kansas.— Crane *v.* Lowe, 59 Kan. 606, 54 Pac. 666; Austin *v.* Jones, 47 Kan. 565, 28 Pac. 621; Williams *v.* Moorehead, 33 Kan. 609, 7 Pac. 226.

Louisiana.— Wright *v.* White, 14 La. Ann. 583.

Massachusetts.— Graef *v.* Bernard, 162 Mass. 300, 38 N. E. 503.

Missouri.— Cohn *v.* Souders, 175 Mo. 455, 75 S. W. 413; Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373, (1891) 17 S. W. 954.

New Mexico.— U. S. *v.* Rio Grande Dam, etc., Co., (1906) 85 Pac. 393.

New York.—Lawrence *v.* Church, 128 N. Y. 324, 28 N. E. 499 [*reversing* 57 Hun 585, 10 N. Y. Suppl. 566]; Horowitz *v.* Goodman, 112 N. Y. App. Div. 13, 98 N. Y. Suppl. 53; Central Trust Co. *v.* West India Imp. Co., 109 N. Y. App. Div. 517, 96 N. Y. Suppl. 519; Bell Tel. Co. *v.* Home Tel. Co., 52 N. Y. App. Div. 13, 64 N. Y. Suppl. 821; Moore *v.* Moore, 44 N. Y. App. Div. 253, 60 N. Y. Suppl. 653; Harris *v.* Elliott, 24 N. Y. App. Div. 133, 48 N. Y. Suppl. 1020; New York Cent., etc., R. Co. *v.* Haffen, 23 N. Y. App. Div. 377, 48 N. Y. Suppl. 316; Diehl *v.* Lambart, 9 N. Y. Civ. Proc. 347; Bostwick *v.* Menck, 8 Abb. Pr. N. S. 169 [*reversed* on other ground in 4 Daly 68].

Ohio.— Scofield *v.* Excelsior Oil Co., 27 Ohio Cir. Ct. 347.

South Dakota.— Kirby *v.* Muench, 12 S. D. 616, 82 N. W. 93.

Texas.— Jackson *v.* Deslonde, 1 Tex. Unrep. Cas. 674; Burleson *v.* Tinnin, (Civ. App. 1907) 100 S. W. 350; Grand Lodge A. O. U. W. *v.* Bollman, 22 Tex. Civ. App. 106, 53 S. W. 829; Hatch *v.* Rodgers, (Civ. App. 1897) 40 S. W. 819; Duer *v.* Endres, 1 Tex. App. Civ. Cas. § 322; Bean *v.* McQuiddy, 1 Tex. App. Civ. Cas. § 51.

Utah.— Lowell *v.* Parkinson, 4 Utah 64, 6 Pac. 58, where, however, a supplemental complaint was held unnecessary, as to substitution of party.

Washington.— Hodges *v.* Price, 38 Wash. 1, 80 Pac. 202; Long *v.* Eisenbeis, 23 Wash. 556, 63 Pac. 249.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

See 39 Cent. Dig. tit. "Pleading," §§ 836–837½.

Several parties may join in a supplemental petition where the matters alleged therein are common to all. Texarkana, etc., R. Co. *v.* Hartford Ins. Co., 17 Tex. Civ. App. 498, 44 S. W. 533.

47. Lawrence *v.* Church, 128 N. Y. 324, 28 N. E. 499 [*reversing* 57 Hun 585, 10 N. Y. Suppl. 566]. And see, generally, Judgments, 23 Cyc. 1525.

48. Schmoe *v.* Cotton, 167 Ind. 364, 79 N. E. 184; De Lisle *v.* Hunt, 36 Hun (N. Y.) 620.

49. McMahon *v.* Allen, 12 How. Pr. (N. Y.)

were in existence at the time of the filing of the original complaint.[50] A supplemental complaint may add or substitute a party plaintiff or defendant, if the facts upon which his rights or liability depend have occurred since the original complaint was filed,[51] or facts may be set up showing a change in the relations of parties.[52] If parts of a complaint are stricken out as irrelevant, plaintiff will not be allowed to repeat the rejected allegations in a supplemental complaint, while the order striking them out is in force.[53] A supplemental complaint required by statute need not be filed when it will amount to nothing more than a compliance with a useless form;[54] nor should it be allowed where it is unnecessary.[55]

b. Alleging New Cause of Action.[56] A supplemental complaint must be consistent with and in aid of the cause of action set forth in the original complaint, and a new and independent cause of action cannot be set up by such complaint,[57] although it may have arisen out of the same contract or transaction that forms the basis of the suit,[58] especially where the new cause of action is one to which plaintiff was not entitled when he commenced the action.[59] But a supplemental com-

39 [*affirmed* in 1 Hilt. 103, 3 Abb. Pr. 89]; Houghton *v.* Skinner, 5 How. Pr. (N. Y.) 420.

50. Chapman *v.* Jones, 149 Ind. 434, 47 N. E. 1065; Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

51. Pouder *v.* Tate, 132 Ind. 327, 30 N. E. 880; Stokes *v.* Manhattan R. Co., 47 N. Y. App. Div. 58, 62 N. Y. Suppl. 333; Standifer *v.* Bond Hardware Co., (Tex. Civ. App. 1906) 94 S. W. 144.

52. Dennison *v.* Willcut, 3 Ida. 793, 35 Pac. 698; Stocking *v.* Hanson, 22 Minn. 542; Moore *v.* Moore, 44 N. Y. App. Div. 253, 60 N. Y. Suppl. 653; Hughes *v.* Hodges, 94 N. C. 56.

Marriage of a single woman, defendant, pending a suit and motion to have her husband joined therein, should be presented by a supplemental complaint, not by amendment. Van Maren *v.* Johnson, 15 Cal. 308.

53. Cambeis *v.* McDonald, 2 N. Y. St. 129.

54. Hughes *v.* Hodges, 94 N. C. 56.

55. Sage *v.* Mosher, 17 How. Pr. (N. Y.) 367, holding this to be true where another suit is already pending of such a nature that if the supplemental complaint is filed defendant will be entitled to have the other one discontinued.

56. Introduction of new matter in a bill of revival see ABATEMENT AND REVIVAL, 1 Cyc. 108.

57. *California.*— Brown *v.* Valley View Min. Co., 127 Cal. 630, 60 Pac. 424; Jacob *v.* Lorenz, 98 Cal. 332, 33 Pac. 119.

Connecticut.— Dickerman *v.* New York, etc., R. Co., 72 Conn. 271, 44 Atl. 228; Goodrich *v.* Stanton, 71 Conn. 418, 42 Atl. 74.

Indiana.— Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4. See Ellis *v.* Indianapolis, 148 Ind. 70, 47 N. E. 218.

Iowa.— Citizens' State Bank *v.* Jess, 127 Iowa 450, 103 N. W. 471; Leach *v.* Germania Bldg. Assoc., 102 Iowa 125, 70 N. W. 1090.

Kansas.— Dever *v.* Junction City, 5 Kan. App. 180, 47 Pac. 152.

Louisiana.— Daupbin's Succession, 112 La. 103, 36 So. 287; Beard *v.* Call, 4 Rob. 466; Curtis *v.* Graham, 1 Mart. N. S. 583.

Massachusetts.— Coffing *v.* Dodge, 167 Mass. 231, 45 N. E. 928.

Minnesota.—Eastman *v.* St. Anthony Falls Water Power Co., 17 Minn. 48.

Missouri.— Payne *v.* School Dist. No. 3-25-10, 87 Mo. App. 415.

New York.— Horowitz *v.* Goodman, 112 N. Y. App. Div. 13, 98 N. Y. Suppl. 53; Smith *v.* Bach, 82 N. Y. App. Div. 608, 81 N. Y. Suppl. 1057; Hunt *v.* Provident Sav. L. Assur. Soc., 77 N. Y. App. Div. 338, 79 N. Y. Suppl. 74; Bush *v.* O'Brien, 58 N. Y. App. Div. 118, 68 N. Y. Suppl. 651; Lindenheim *v.* New York El. R. Co., 28 N. Y. App. Div. 170, 50 N. Y. Suppl. 886; New England Water Wks. Co. *v.* Farmers' L. & T. Co., 23 N. Y. App. Div. 571, 48 N. Y. Suppl. 948; New York Cent., etc., R. Co. *v.* Haffen, 23 N. Y. App. Div. 377, 48 N. Y. Suppl. 316; Holly *v.* Graf, 29 Hun 443; Tiffany *v.* Bowerman, 2 Hun 643; Buchanan *v.* Comstock, 57 Barb. 582; Staunton *v.* Swann, 10 N. Y. Civ. Proc. 12; Wattson *v.* Thibou, 17 Abb. Pr. 184. See Robbins *v.* Wells, 18 Abb. Pr. 191, 26 How. Pr. 15.

North Dakota.— Swedish-American Nat. Bank *v.* Dickinson Co., 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285.

Ohio.—McGuire *v.* Louis Snider Paper Co., 6 Ohio S. & C. Pl. Dec. 392, 4 Ohio N. P. 262.

South Carolina.— Moon *v.* Johnson, 14 S. C. 434.

Texas.— Simpson *v.* Thompson, 43 Tex. Civ. App. 273, 95 S. W. 94; Parker *v.* Panhandle Nat. Bank, 11 Tex. Civ. App. 702, 34 S. W. 196. See also Grand Lodge A. O. U. W. *v.* Bollman, 22 Tex. Civ. App. 106, 53 S. W. 829.

Washington.— Davis *v.* Erickson, 3 Wash. 654, 29 Pac. 86; Andrews *v.* Andrews, 3 Wash. Terr. 286, 14 Pac. 68.

See 39 Cent. Dig. tit. "Pleading," § 838.

58. Payne *v.* School Dist. No. 3-25-10, 87 Mo. App. 415.

59. Tiffany *v.* Bowerman, 2 Hun (N. Y.) 643; McGuire *v.* Louis Snider Paper Co., 6 Ohio S. & C. Pl. Dec. 392, 4 Ohio N. P. 262.

Assignment.— Leave to file a supplemental complaint should not be granted where its object is to allege an assignment of the cause

plaint which does not alter the substance of the original demand does not change the cause of action within the meaning of this rule,[60] as where it merely seeks additional relief, or relief which is different in degree only from that asked for in the original complaint;[61] or where it demands instalments not due when the original petition was filed;[62] but it has been held that instalments of rent accruing after the action is commenced cannot thus be recovered, because each instalment, as it becomes due, is regarded as constituting a new cause of action.[63]

c. Insufficient Cause of Action Cannot Be Cured. An original complaint which states no cause of action cannot be remedied by a supplemental pleading setting up matters that have occurred since the commencement of the suit.[64]

d. Action Prematurely Brought. If an action be prematurely brought the original complaint is of no effect and the court does not err in refusing to allow a supplemental complaint to be filed.[65] In such a case plaintiff cannot, after the cause of action accrues, as a matter of right, file a supplemental complaint or petition showing that fact;[66] although, where the circumstances are such as to excuse the premature commencement of the action and to show that the interests of justice require a change, rather than the dismissal of the supplemental petition and the commencement of a new action, the court may, in its discretion, allow it to be filed.[67]

e. Time For Filing. In general a supplemental complaint may be filed before, or during, the trial in the discretion of the court,[68] but it cannot be filed after final judgment unless such judgment is set aside.[69]

f. Sufficiency and Effect. Except where the statute provides that a supplemental complaint may be served in the place of the original complaint, and it is so served,[70] supplemental complaint is not a substitute for and does not supersede

of action set out in the written complaint subsequent to the commencement of the action. Staunton *v.* Swann, 10 N. Y. Civ. Proc. 12.

60. Dauphin's Succession, 112 La. 103, 36 So. 287; Rochelle *v.* Alvarez, 8 Mart. N. S. (La.) 171; U. S. *v.* Rio Grande, etc., Co., (N. M. 1906) 85 Pac. 393; Bryce *v.* Massey, 35 S. C. 127, 14 S. E. 768. See Grand Lodge A. O. U. W. *v.* Bollman, 22 Tex. Civ. App. 106, 53 S. W. 829; Parker *v.* Panhandle Nat. Bank, 11 Tex. Civ. App. 702, 34 S. W. 196; Gulf, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 26 S. W. 644.

61. Jacob *v.* Lorenz, 98 Cal. 332, 33 Pac. 119; U. S. *v.* Rio Grande Dam, etc., Co., (N. M. 1906) 85 Pac. 393; Hunt *v.* Provident Sav. L. Assur. Soc., 77 N. Y. App. Div. 338, 79 N. Y. Suppl. 74; Grabenheimer *v.* Blum, 63 Tex. 369.

Restriction of claim.— Where a cause is remanded, plaintiff may, by a supplemental petition, restrict his claim to damages, although the original petition was for the recovery of the premises. Curtis *v.* Graham, 1 Mart. N. S. (La.) 583.

In an action to recover land, a supplemental complaint alleging defendant's continued possession of the property and demanding that he account for the rents and profits, which have accrued since the commencement of the suit, does not set up a new cause of action. Leach *v.* Germania Bldg. Assoc., 102 Iowa 125, 70 N. W. 1090.

In an action for waste a supplementary complaint may very properly set up a continuance of the acts complained of since the filing of the original complaint. Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 17 S. W. 954, 23 S. W. 373.

62. Mader *v.* Fox, 15 La. 132; Fincke *v.* Rourke, 20 Hun (N. Y.) 264; Knapp *v.* Order of Pendo, 36 Wash. 601, 79 Pac. 209.

63. Bull *v.* Rothschild, 4 N. Y. Suppl. 826, 16 N. Y. Civ. Proc. 356.

64. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Chapman *v.* Jones, 149 Ind. 434, 47 N. E. 1065; Dillman *v.* Dillman, 90 Ind. 585; Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777; Lowry *v.* Harris, 12 Minn. 255; Horowitz *v.* Goodman, 112 N. Y. App. Div. 13, 98 N. Y. Suppl. 53; Berford *v.* New York Iron Mine, 57 N. Y. Super. Ct. 404, 8 N. Y. Suppl. 193; Muller *v.* Earle, 37 N. Y. Super. Ct. 388; McCullough *v.* Colby, 4 Bosw. 603; South Shore Traction Co. *v.* Brookhaven, 53 Misc. (N. Y.) 392, 102 N. Y. Suppl. 1074; Davis *v.* Erickson, 3 Wash. 654, 29 Pac. 86.

65. Morse *v.* Steele, 132 Cal. 456, 64 Pac. 690.

66. Smith *v.* Smith, 22 Kan. 699.

67. Smith *v.* Smith, 22 Kan. 699.

68. Kimble *v.* Seal, 92 Ind. 276; Musselman *v.* Manly, 42 Ind. 462; Central Trust Co. *v.* West India Imp. Co., 109 N. Y. App. Div. 517, 96 N. Y. Suppl. 519.

69. Martindale *v.* Battey, 73 Kan. 92, 84 Pac. 527.

70. Horowitz *v.* Goodman, 112 N. Y. App. Div. 13, 98 N. Y. Suppl. 53; Latimer *v.* McKinnon, 85 N. Y. App. Div. 224, 83 N. Y. Suppl. 315, holding that an order under code of civil procedure, section 544, directing a "supplemental complaint to contain an allegation of the bankruptcy of defendants and

the original complaint; but it assumes that the original complaint is to stand and both together constitute the complaint in the action,[71] whether it expressly refers to the original or not.[72] If at the time the supplemental complaint is filed the original has been rejected on demurrer, or otherwise fully disposed of, the pleadings, as they then stand, present no ground for recovery, as there is no complaint to which it can be supplemental, and the supplemental complaint cannot of itself be made the foundation of an action.[73] The only purpose of the supplemental complaint is to show how plaintiff's rights have changed since he commenced his action and to what relief he is entitled at the time the supplemental complaint is filed.[74] It must appear on its face that it is supplemental and relates to matters which have accrued subsequent to the commencement of the action.[75] Hence a supplemental complaint must aver matters which go to strengthen or prove the allegations of the original, or to show more conclusively that plaintiff is entitled to the relief then asked,[76] although it is not necessary that it should set up all the facts constituting plaintiff's cause of action,[77] nor need it set out instruments or copies thereof, when it makes express reference to the original where the instruments are set out.[78] But the fact that the supplemental complaint states the same cause of action as the original does not render it invalid, if it asks other relief.[79]

g. Bringing in New Parties.[80] The general rule is that, when a third person becomes interested in a pending litigation by assuming the liabilities of defendant in respect to the claim which plaintiff proceeds to enforce, it is proper to allow a supplemental complaint bringing in such third person as a defendant in the action.[81] But where a person is substituted as a plaintiff upon a transfer of interest, it would seem by the weight of authority that no supplemental pleading is necessary.[82]

the appointment and qualification of a trustee" and other proper and necessary allegations, grants leave to serve a supplemental complaint in addition to and not in place of the original complaint.

71. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Chapman *v.* Jones, 149 Ind. 434, 47 N. E. 1065; Big Creek Stone Co. *v.* Seward, 144 Ind. 205, 42 N. E. 464, 43 N. E. 5; Pouder *v.* Tate, 132 Ind. 327, 30 N. E. 880; Kimble *v.* Seal, 92 Ind. 276; Musselman *v.* Manly, 42 Ind. 462; Weyman *v.* Cater, 13 La. 492; Latimer *v.* McKinnon, 85 N. Y. App. Div. 224, 83 N. Y. Suppl. 315; Harris *v.* Elliott, 29 N. Y. App. Div. 568, 51 N. Y. Suppl. 1012; Haywood *v.* Hood, 44 Hun (N. Y.) 128; McRoberts *v.* Pooley, 1 N. Y. St. 725.

72. Gibbon *v.* Dougherty, 10 Ohio St. 365.

73. Ellis *v.* Indianapolis, 148 Ind. 70, 47 N. E. 218; Robbins *v.* Wells, 1 Rob. (N. Y.) 666, 18 Abb. Pr. 191, 26 How. Pr. 15; Appollo Bldg., etc., Co. *v.* Leedom, 6 Ohio S. & C. Pl. Dec. 189, 3 Ohio N. P. 297.

74. Chapman *v.* Jones, 149 Ind. 434, 47 N. E. 1065; McRoberts *v.* Pooley, 1 N. Y. St. 725.

It is the function of a supplemental petition to supply the facts which may be necessary to complete the determination of the rights of plaintiff and defendant touching the subject-matter of the suit upon the facts existing at the time of the rendition of the judgment and which would vary the relief to which plaintiff would have been entitled at the commencement of the action. Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11.

75. Musselman *v.* Manly, 42 Ind. 462.

76. Lowry *v.* Harris, 12 Minn. 235; Noonan *v.* Orton, 21 Wis. 283.

77. McRoberts *v.* Pooley, 1 N. Y. St. 725.

78. Earle *v.* Peterson, 67 Ind. 503.

79. Christie *v.* Iowa L. Ins. Co., 111 Iowa 177, 82 N. W. 499.

80. Amendments bringing in parties see *supra*, VII, B, 1, b.

81. Prouty *v.* Lake Shore, etc., R. Co., 85 N. Y. 272; Winters *v.* King, 51 N. Y. App. Div. 80, 64 N. Y. Suppl. 496. See also Hilton Bridge Constr. Co. *v.* Gouverneur, etc., R. Co., 90 Hun (N. Y.) 584, 35 N. Y. Suppl. 976; Schuyler *v.* Schlicht, 17 N. Y. Suppl. 930; Packard *v.* Wood, 17 Abb. Pr. (N. Y.) 318.

82. Crary *v.* Kurtz, (Iowa 1906) 105 N. W. 590 (so holding where the transfer of interest was not disputed); Campbell *v.* Irvine, 17 Mont. 476, 43 Pac. 626; Virgin *v.* Brubaker, 4 Nev. 31. But *compare* Ford *v.* Bushard, 116 Cal. 273, 48 Pac. 119 (holding that where one is substituted as plaintiff on the ground of an assignment of the cause of action by the original plaintiff, the assignment must be alleged in the supplemental complaint, and if put in issue must be proved); Campbell *v.* West, 93 Cal. 653, 29 Pac. 219.

Substitution of parties on transfer of title see, generally, ABATEMENT AND REVIVAL, 1 Cyc. 116 *et seq.*

Assignee in bankruptcy.— Where, pending a suit to set aside certain fraudulent conveyances, the debtor is declared a bankrupt, and a trustee appointed, it is not necessary to the proper substitution of such trustee as plaintiff that a supplemental petition be

6. Supplemental Answer [83]— a. In General. As a general rule defendant may, with leave of court, file a supplemental answer alleging any facts which have arisen or become known since the commencement of the suit and which may have a material bearing on the final determination of the suit,[84] such as a settlement between the parties,[85] or a discharge in bankruptcy.[86] Such new matter must be in addition to, or in continuation of, the original matter alleged; [87] and the court may refuse to file a proposed supplemental answer when the allegations contained therein are not material, or do not show a defense to plaintiff's claim,[88] or are of facts

filed, since the order permitting him to be substituted determines his legal capacity to sue, and in the absence of any subsequent question as to the correctness of such rule it will be regarded as final. Crary *v.* Kurtz, (Iowa 1906) 105 N. W. 590.

83. Amendment of plea or answer see *supra*, VII, A.

Supplemental answer setting up insolvency see Insolvency, 22 Cyc. 1353 note 48.

84. *California.*— Keech *v.* Beatty, 127 Cal. 177, 59 Pac. 837; Bolander *v.* Gentry, 36 Cal. 105, 95 Am. Dec. 162.

Colorado.— Sylvester *v.* Jerome, 19 Colo. 128, 34 Pac. 760.

Kentucky.— Asher *v.* Uhl, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29, 27 Ky. L. Rep. 938.

Louisiana.— Koerber *v.* New Orleans Levee Bd., 51 La. Ann. 523, 25 So. 415; State *v.* Pilsbury, 31 La. Ann. 1.

Massachusetts.— Graef *v.* Bernard, 162 Mass. 300, 38 N. E. 503.

Minnesota.— Guptill *v.* Red Wing, 76 Minn. 129, 78 N. W. 970.

Nebraska.— Flagg *v.* Flagg, 39 Nebr. 229, 58 N. W. 109.

New York.— Holyoke *v.* Adams, 59 N. Y. 233; Mulligan *v.* O'Brien, 119 N. Y. App. Div. 355, 104 N. Y. Suppl. 301 [*affirming* 53 Misc. 4, 102 N. Y. Suppl. 911]; Conried *v.* Witmark, 73 N. Y. App. Div. 185, 76 N. Y. Suppl. 690; New York *v.* East Bay Land, etc., Co., 41 N. Y. App. Div. 567, 58 N. Y. Suppl. 724; Pollmann *v.* Livingston, 17 N. Y. App. Div. 528, 45 N. Y. Suppl. 704; Reilly *v.* Sicilian Asphalt Paving Co., 14 N. Y. App. Div. 242, 43 N. Y. Suppl. 536; Philadelphia Gas-Works Constr. Co. *v.* Standard Gaslight Co., 47 Hun 255, 13 N. Y. Civ. Proc. 405; Hall *v.* Olney, 65 Barb. 27; Cothran *v.* Hanover Nat. Bank, 40 N. Y. Super. Ct. 401; Hastings *v.* McKinley, 1 E. D. Smith 273 [*affirmed* in Seld. 173]; Purdy *v.* Manhattan R. Co., 11 Misc. 394, 32 N. Y. Suppl. 275; Genovese *v.* Matelli, 8 Misc. 493, 28 N. Y. Suppl. 754; Rio Tinto Copper Min. Co. *v.* Black, 85 N. Y. Suppl. 1116; Williams *v.* Hayes, 5 N. Y. Suppl. 666; Hoyt *v.* Sheldon, 4 Abb. Pr. 59 [*affirmed* in 19 N. Y. 207]; Radley *v.* Houghtaling, 4 How. Pr. 251. See Burke *v.* Rhoads, 39 Misc. 208, 79 N. Y. Suppl. 407 [*affirmed* in 82 N. Y. App. Div. 325, 79 N. Y. Suppl. 407, 81 N. Y. Suppl. 1045]; Dempsey *v.* Baldwin, 15 Misc. 455, 37 N. Y. Suppl. 28.

South Dakota.— Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614.

Texas.— Tomson *v.* Heidenheimer, 16 Tex. Civ. App. 114, 40 S. W. 425.

Wisconsin.— Matteson *v.* Curtis, 14 Wis. 436.

See 39 Cent. Dig. tit. "Pleading," § 843.

Filing of a second supplemental answer may be allowed. Greenwood *v.* Adams, 80 Cal. 74, 21 Pac. 1134; Stith *v.* Fullinwider, 40 Kan. 73, 19 Pac. 314.

Comparison with plea puis darrein continuance.— The supplemental answer under the code is a substitute for the old plea *puis darrein continuance*; but it differs from that plea in this respect: that the supplemental answer may be allowed on motion, whenever the facts forming the ground of the answer have occurred since the answer was put in, or where defendant was ignorant of them at the time of pleading the first answer; whereas the plea *puis darrein* could strictly be pleaded only before or at the next continuance, after the facts transpired. Graef *v.* Bernard, 162 Mass. 300, 38 N. E. 503; Holyoke *v.* Adams, 59 N. Y. 233; Medbury *v.* Swan, 46 N. Y. 200; Drought *v.* Curtiss, 8 How. Pr. (N. Y.) 56.

85. Varriale *v.* Metropolitan St. R. Co., 54 N. Y. App. Div. 633, 66 N. Y. Suppl. 559 (holding that defendant should be allowed to set up by way of supplemental answer a settlement made with plaintiff where the case has not reached trial, and there is no evidence that any injury has been sustained in consequence of defendant's delay in making a motion for such privilege); Christy *v.* Perkins, 6 Daly (N. Y.) 237.

86. Lyon *v.* Isett, 11 Abb. Pr. N. S. (N. Y.) 353, 42 How. Pr. 155; Hellman *v.* Licher, 9 Abb. Pr. N. S. (N. Y.) 288. And see Bankruptcy, 5 Cyc. 406, 407.

87. Fortunato *v.* New York, 42 N. Y. App. Div. 14, 58 N. Y. Suppl. 683.

88. *Colorado.*— Pollard *v.* Lathrop, 12 Colo. 171, 20 Pac. 251.

New York.— Jones *v.* Jones, 99 N. Y. App. Div. 267, 90 N. Y. Suppl. 1002; Citizens' Nat. Bank *v.* Weston, 81 Hun 84, 30 N. Y. Suppl. 619; Hasbrouck *v.* Disbrow, 1 Silv. Sup. 290, 5 N. Y. Suppl. 310; Schmohl *v.* Fusco, 13 N. Y. Suppl. 583 [*affirmed* in 16 N. Y. Suppl. 862].

South Carolina.— Pickett *v.* Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629.

Washington.— Hanna *v.* Savage, 7 Wash. 414, 35 Pac. 127, 36 Pac. 269.

Wisconsin.— Dodge *v.* Hopkins, 14 Wis. 630.

See 39 Cent. Dig. tit. "Pleading," § 843.

After having obtained a change of venue for the convenience of witnesses the court will not allow defendant to file a supplemental answer raising issues on which the evidence

which occurred previous to the filing of the original answer.[89] Any defense which defendant could as a matter of right have pleaded *puis darrein continuance* under the old procedure, should be allowed under the code as a supplemental answer.[90] If the sufficiency of a supplemental answer is doubtful, the court will not determine on a motion the validity of the defense set up by it, but will allow it to stand.[91] A plea in abatement may be filed as a supplemental pleading, when the grounds for abatement arise after joinder of issue.[92]

b. Right to File and Leave of Court. The right to file a supplemental answer is not an absolute and positive right, but as a general rule the court may exercise its discretion in granting or refusing leave to file such an answer,[93] taking into consideration all the circumstances of the case and imposing such terms as may seem reasonable and just,[94] such as the payment of costs to the date of the application or order.[95] As a general rule, however, if a supplemental answer contains

of the witnesses would have no bearing. Citizens' Nat. Bank *v.* Weston, 81 Hun (N. Y.) 84, 30 N. Y. Suppl. 619.

89. Harrison *v.* Mock, 16 Ala. 616; Murphy *v.* Plankinton Bank, 18 S. D. 317, 100 N. W. 614.

90. Holyoke *v.* Adams, 59 N. Y. 233; Medbury *v.* Swan, 46 N. Y. 200; Bate *v.* Fellowes, 4 Bosw. (N. Y.) 638; Morel *v.* Garelly, 16 Abb. Pr. (N. Y.) 269; Hoyt *v.* Sheldon, 4 Abb. Pr. (N. Y.) 59 [*affirmed* in 19 N. Y. 207].

91. Tifft *v.* Bloomberg, 49 N. Y. Super. Ct. 323.

92. Kokomo City St. R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ind. App. 335, 58 N. E. 211.

93. *California.*—Harding *v.* Minear, 54 Cal. 502.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276; Stith *v.* Fullinwider, 40 Kan. 73, 19 Pac. 314.

Massachusetts.— Graet *v.* Bernard, 162 Mass. 300, 38 N. E. 503.

Nebraska.— Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

New York.— Holyoke *v.* Adams, 59 N. Y. 233; Galm *v.* Sullivan, 117 N. Y. App. Div. 235, 101 N. Y. Suppl. 1060; Tucker *v.* Dudley, 104 N. Y. App. Div. 191, 93 N. Y. Suppl. 355; Latimer *v.* McKinnon, 72 N. Y. App. Div. 290, 76 N. Y. Suppl. 40; Haffey *v.* Lynch, 46 N. Y. App. Div. 160, 61 N. Y. Suppl. 736; Vanderbeck *v.* Rochester, 46 Hun 87 [*affirmed* in 122 N. Y. 285, 25 N. E. 408]; Stransky *v.* Harris, 22 Misc. 691, 49 N. Y. Suppl. 1123; Guliano *v.* Whitenack, 3 Misc. 54, 22 N. Y. Suppl. 560.

South Carolina.— Pickett *v.* Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629; Copeland *v.* Copeland, 60 S. C. 135, 38 S. E. 269; Avery *v.* Wilson, 47 S. C. 78, 25 S. E. 286.

Washington.— Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855; McDaniels *v.* Gowey, 30 Wash. 412, 71 Pac. 12.

Wisconsin.— Damp *v.* Dane, 33 Wis. 430.

See 39 Cent. Dig. tit. "Pleading," § 842.

94. Pollmann *v.* Livingston, 17 N. Y. App. Div. 528, 45 N. Y. Suppl. 704.

Leave to serve a supplemental answer will not be denied for laches in applying therefor whereby plaintiff was put to the expense of a trial, but defendant will be required to indemnify plaintiff for such expense as a condition. Pollmann *v.* Livingston, 17 N. Y. App. Div. 528, 45 N. Y. Suppl. 704.

95. Greenwood *v.* Adams, 80 Cal. 74, 21 Pac. 1134; Varriale *v.* Metropolitan St. R. Co., 54 N. Y. App. Div. 633, 66 N. Y. Suppl. 559; Rosenbaum *v.* Breslauer, 54 Misc. (N. Y.) 76, 104 N. Y. Suppl. 506; Guliano *v.* Whitenack, 3 Misc. (N. Y.) 54, 22 N. Y. Suppl. 560; Damp *v.* Dane, 33 Wis. 430.

Where there have been two trials and a reversal it is improper to require defendant to pay all the accrued costs as a condition to filing a supplemental pleading at a new trial, but defendant should be required only to pay the costs accruing after the time when the supplemental pleading could have been filed, and to stipulate to waive all costs previously awarded to plaintiff if he finally recover, and to further stipulate that plaintiff if so advised may discontinue the action without costs. Haffey *v.* Lynch, 46 N. Y. App. Div. 160, 61 N. Y. Suppl. 736.

Costs and leave to discontinue.— Leave to set up in a supplemental answer new matter, which has arisen after the case has been placed on the day calendar and has been set down for trial upon a particular day, should not be granted simply upon the payment of a specified sum as costs, but defendant should be required to pay the costs and disbursements of the action up to the time of making the motion; and the order granting the motion should also provide that plaintiff have leave to discontinue the action if he so desires, without costs. Pickrell *v.* Mendel, 87 N. Y. App. Div, 163, 84 N. Y. Suppl. 70.

Where a trial is not concluded when a motion is made for leave to serve a supplemental answer, the court has no power to order that an extra allowance should be paid by defendant as a condition for permitting defendant to serve a supplemental answer. Jenkins *v.* Adams, 1 Month. L. Bul. (N. Y.) 65. But where the trial is concluded and the referee's report delivered before such motion is made, the court will grant an extra allowance and will require defendants to pay the same as a condition for granting such leave. Mabie *v.* Adams, 1 Month. L. Bul. (N. Y.) 65.

the substance of a good defense and is put in in proper time, leave to file or serve the same should be granted almost as a matter of course,[96] unless the facts disclosed show a case calling for the exercise of the court's discretion.[97] The court may, in the exercise of its discretion, deny leave to file a supplemental answer, although the defense sought to be interposed is strictly legal, where defendant has been guilty of laches,[98] where the matter alleged is clearly frivolous,[99] where it clearly appears that it would not constitute a defense,[1] or where there is reasonable ground to believe that injustice will be done by granting such leave.[2] Application for leave to file a supplemental answer must generally be made on motion or order to show cause,[3] and should be accompanied by a copy of the proposed answer, or should at least contain a specification of the facts which defendant desires to introduce,[4] and notice thereof should be given to the opposite party.[5] In addition to a showing of material facts, in some jurisdictions, an affidavit is required stating that the defense occurred or came to the knowledge of defendant after the original answer was interposed.[6] But if application for leave to file a supplemental answer be refused on the ground that material facts do not appear with sufficient certainty in such answer or the moving affidavit, it should be with leave to renew, so as to give an opportunity for correcting the defect.[7] If upon application for leave, the court rules that it is not necessary to file a supplemental answer and defendants desire to insist on their right to file such pleading, they should appeal instead of making a second application for leave.[8]

c. Pleading New Defense. A supplemental answer cannot set up matters constituting a new and independent defense.[9]

96. Grady *v.* Bramlet, 59 Cal. 105; Holyoke *v.* Adams, 59 N. Y. 233; West *v.* Simmons, 2 Whart. (Pa.) 261 [*reversing* 1 Miles 165].

To entitle defendant to put in a supplemental answer as a matter of right, the answer must be true and contain a good defense, and the truth of the answer may be inquired into on a motion for leave to interpose it. Morel *v.* Garelly, 16 Abb. Pr. (N. Y.) 269.

The fact that a proposed supplemental answer is not sufficiently full and particular to conform to the rules of good pleading is not a justification for refusing leave to file it where it contains the substance of a good defense. Burnett *v.* Ewing, 39 Wash. 45, 80 Pac. 855.

97. Holyoke *v.* Adams, 59 N. Y. 233; Dusty *v.* Lansing, 3 N. Y. St. 699.

98. See *infra*, VII, D, 6, d.

99. Hoyt *v.* Sheldon, 4 Abb. Pr. (N. Y.) 59 [*affirmed* in 19 N. Y. 207].

1. Rio Tinto Copper Min. Co. *v.* Black, 85 N. Y. Suppl. 716.

2. Holyoke *v.* Adams, 59 N. Y. 233; Latimer *v.* McKinnon, 72 N. Y. App. Div. 290, 76 N. Y. Suppl. 40; Haas *v.* Colton, 12 Misc. 308, 34 N. Y. Suppl. 35; Schmohl *v.* Fusco, 13 N. Y. Suppl. 583 [*affirmed* in 16 N. Y. Suppl. 862]; Hoyt *v.* Sheldon, 4 Abb. Pr. (N. Y.) 59 [*affirmed* in 19 N. Y. 207].

3. Harding *v.* Minear, 54 Cal. 502.

In order that defendant may put in a supplemental answer, he must apply to the court by motion for leave to do so, so that the opposite party may be heard and the court may determine whether there has been inexcusable laches or whether any of the reasons appear which are recognized as giving authority for denying the exercise of the general right in the particular instance. Holyoke *v.* Adams, 59 N. Y. 233.

4. Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994; Newell *v.* Newell, 27 Misc. (N. Y.) 117, 7 N. Y. Suppl. 403.

5. Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994; Flagg *v.* Flagg, 39 Nebr. 229, 58 N. W. 109; Avery *v.* Wilson, 47 S. C. 78, 25 S. E. 286, holding that a motion for leave to file a supplemental answer cannot be granted without four days' notice to the opposite party.

Filing of the supplemental answer is sufficient notice. Fluker *v.* De Grange, 117 La. 331, 41 So. 591.

6. Reynolds *v.* Ætna L. Ins. Co., 11 N. Y. App. Div. 99, 42 N. Y. Suppl. 1058; Newell *v.* Newell, 27 Misc. (N. Y.) 117, 7 N. Y. Suppl. 403, required by rule 23 of general rules of practice.

An affidavit by defendant's attorney is sufficient under N. Y. Code Civ. Proc. § 544, where it alleges that the facts have come to the affiant's knowledge or to the knowledge of defendant since the original answer was served, and that none of them were known to him or to defendant when such answer was served. Reynolds *v.* Ætna L. Ins. Co., 16 N. Y. App. Div. 74, 44 N. Y. Suppl. 691; Rosenbaum *v.* Breslauer, 54 Misc. (N. Y.) 76, 104 N. Y. Suppl. 506.

7. Reynolds *v.* Ætna L. Ins. Co., 11 N. Y. App. Div. 99, 42 N. Y. Suppl. 1058; Newell *v.* Newell, 27 Misc. (N. Y.) 117, 7 N. Y. Suppl. 403.

8. Jones *v.* Jones, 99 N. Y. App. Div. 267, 90 N. Y. Suppl. 1002.

9. Montague *v.* Selb, 106 Ill. 49; Allen *v.* Davenport, 115 Iowa 20, 87 N. W. 743; Fortunato *v.* New York, 42 N. Y. App. Div. 14, 58 N. Y. Suppl. 683.

d. Time For Filing. Ordinarily a supplemental answer should be offered at the earliest opportunity after the matter contained therein comes to the knowledge of defendant.[10] After an unreasonable delay the court may, in the exercise of its discretion, refuse leave to file such answer even though the matter it contains be meritorious.[11] Under varying circumstances leave to file a supplemental answer has been refused on the day the cause was set down for trial,[12] after the evidence was closed,[13] after the case had been submitted to a referee,[14] after a verdict had been rendered,[15] thirteen months after issue was joined,[16] and also when the application was not made until two months after judgment in defendant's favor had been reversed.[17] But it has been held that if the facts sought to be pleaded by supplemental answer amount to an entire satisfaction of the cause of action, and if established would utterly extinguish plaintiff's right to prosecute it, it is the duty of the court to allow the motion whether the application was made at the earliest day or not;[18] and it has been held not error to allow a supplemental answer two years after the action was brought,[19] or after judgment.[20]

e. Operation and Effect. It has been held that the filing of such an answer operates as a waiver of all previous answers.[21] But the better view regards the supplemental answer as standing together with former pleas or answers not inconsistent with it.[22] But although the putting in of a supplemental answer does not, under the code, necessarily waive the former answer, yet, where the matter sought to be introduced thereby would, before the code, have required a plea *puis*, which would have waived such former answer, the court may, where the new defense is of doubtful sufficiency and of doubtful equity, require defendant to waive his former answer, and rest solely on such new matter, as a condition of granting leave to file such supplemental answer.[23]

10. French *v.* Edwards, 9 Fed. Cas. No. 5,097, 4 Sawy. 125.

11. Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276; Voak *v.* National Inv. Co., 51 Minn. 450, 53 N. W. 708; Haas *v.* Colton, 12 Misc. (N. Y.) 308, 34 N. Y. Suppl. 35; Morel *v.* Garelly, 16 Abb. Pr. (N. Y.) 269; Hoyt *v.* Sheldon, 4 Abb. Pr. (N. Y.) 59 [*affirmed* in 19 N. Y. 207]; French *v.* Edwards, 9 Fed. Cas. No. 5,097, 4 Sawy. 125. But see Drought *v.* Curtiss, 8 How. Pr. (N. Y.) 56.

Where the application is made after several trials and the facts constituting the new defense are not fully and definitely stated and no satisfactory reason is given for the delay in presenting the application, its refusal is not error. Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276.

There is no abuse of discretion in refusing leave to file a supplemental answer during the course of the trial where no reason appears for not making the application before trial. Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

Where the case, although "ready," has not been reached and it does not appear that plaintiff has been prejudiced by the delay, leave to serve a supplemental answer will not be denied because of laches on the part of defendant in not proceeding sooner. Rosenbaum *v.* Breslauer, 54 Misc. (N. Y.) 76, 104 N. Y. Suppl. 506.

12. Chalmers *v.* Stow, 3 Mart. N. S. (La.) 307.

13. U. S. *v.* U. S. Bank, 11 Rob. (La.) 418, holding that under no circumstances can a supplemental answer be permitted after the evidence is concluded.

14. Barlow *v.* Sing Sing First Nat. Bank, 6 N. Y. St. 708, holding it then too late to make a supplemental answer which adds nothing by way of a defense.

15. Marshall *v.* Merritt, 13 Allen (Mass.) 274.

16. Abram French Co. *v.* Shapiro, 11 Misc. (N. Y.) 633, 33 N. Y. Suppl. 9.

17. Sinclair *v.* Hollister, 16 N. Y. Suppl. 529.

18. Drought *v.* Curtiss, 8 How. Pr. (N. Y.) 56.

19. Sparks *v.* Green, 69 S. C. 198, 48 S. E. 61.

20. State *v.* Ramsey County Dist. Ct., 91 Minn. 161, 97 N. W. 581.

21. Kortzendorfer *v.* St. Louis, 52 Mo. 204; Rubelman *v.* McNichol, 13 Mo. App. 584, holding that a supplemental answer abandons the first answer and all matters alleged therein not restated in the supplemental answer.

22. Hamlin *v.* Kinney, 2 Oreg. 91. "The supplemental answer takes the place of the former plea *puis darrein continuance*; but it is not like that, a waiver of defences before interposed, and is not confined to matters arising since the last continuance." Medbury *v.* Swan, 46 N. Y. 200, 203. See Holyoke *v.* Adams, 59 N. Y. 233.

A plea puis darrein continuance, when treated, by leave of court, not as a substituted but as a supplemental plea, does not waive former pleas. Thacher *v.* Rockwell, 4 Colo. 375.

23. Bate *v.* Fellowes, 4 Bosw. (N. Y.) 638.

7. Supplemental Affidavit of Defense. Under the statutes in some states a supplemental affidavit of defense may be allowed if the court deems the defense to be probably good but defectively stated in the original affidavit;[24] and a second or even a third supplemental affidavit may be allowed,[25] the extent of the indulgence being largely within the discretion of the court;[26] and the court may, of its own motion, direct a supplemental affidavit to be filed in such a case.[27] Such supplemental affidavit need not be confined to an explanation of the original, but it may also set up a new and different defense, although such a course requires that the new defense should be closely scrutinized,[28] especially where the two affidavits are contradictory.[29] The original and supplemental affidavits are to be construed as one;[30] and therefore when, without explanation, the supplemental affidavit contradicts the averments of the original in matters essential to a valid defense, the court is warranted in holding that they are insufficient to prevent a judgment.[31] A supplemental affidavit, however, cannot be said to be contradictory of the original affidavit where the supplemental affidavit is fuller and more specific than the original and it appears that the facts averred in it are not irreconcilable with the facts expressly averred in the original, or the necessary inferences to be drawn therefrom.[32] Application to file a material supplemental affidavit may be made at any time before judgment is entered.[33] And where leave to file a supplemental affidavit is granted, it must be filed within a reasonable time thereafter;[34] and the court must also allow defendant a reasonable time within which to prepare the supplemental affidavit.[35]

8. Supplemental Reply. Although the necessity for such a pleading infrequently arises, a supplemental reply may be made by leave of court, alleging facts that have arisen since the former replication.[36]

9. Answer to Supplemental Complaint. Where plaintiff has filed a supplemental complaint, after answer, defendant may stand on his original answer;[37]

24. Andrew *v.* Blue Ridge Packing Co., 206 Pa. St. 370, 55 Atl. 1059; Loeper *v.* Haas, 24 Pa. Super. Ct. 184; Boettner *v.* Stegmaier, 3 Kulp (Pa.) 338. See Gordon *v.* Jones, 45 Leg. Int. (Pa.) 256; Cumberland Bldg., etc., Assoc. *v.* Brown, 4 Wkly. Notes Cas. (Pa.) 494; Hoke *v.* Martin, 7 York Leg. Rec. (Pa.) 65. *Compare* Yaryan Co. *v.* Pennsylvania Glue Co., 180 Pa. St. 480, 36 Atl. 1080, holding that under the rules of court in Allegheny county an affidavit of defense cannot be supplemented at the trial.

Where an affidavit of defense is filed and a rule obtained for judgment, and notwithstanding the affidavit and pending the rule, defendant deposits in the prothonotary's office a supplemental affidavit, it is admissible and if sufficient, judgment should not be entered against defendant. West *v.* Simmons, 2 Whart. (Pa.) 261 [*reversing* 1 Miles 165].

Where the names of parties defendant joined by mistake are stricken out by amendment after the real party has filed an affidavit of defense, he is not entitled to an opportunity to file a new affidavit of defense in case nothing has been added to the original declaration. Kidney *v.* Beemer, 27 Pa. Super. Ct. 558.

25. Andrew *v.* Blue Ridge Packing Co., 206 Pa. St. 370, 55 Atl. 1059; Loeper *v.* Haas, 24 Pa. Super Ct. 184.

Where two supplemental affidavits are contradictory of each other on material matter leave to file them will be refused. Sykes *v.* Anderson, 14 Pa. Co. Ct. 329.

26. Andrew *v.* Blue Ridge Packing Co., 206 Pa. St. 370, 55 Atl. 1059; Flegal *v.* Hoover, 156 Pa. St. 276, 27 Atl. 162; Lash *v.* Von Neida, 109 Pa. St. 207; Loeper *v.* Haas, 24 Pa. Super. Ct. 184.

27. Damm *v.* Ortlieb, 1 Wkly. Notes Cas. (Pa.) 576; Johnson *v.* Fenner, 1 Wkly. Notes Cas. (Pa.) 472.

28. Callan *v.* Lukens, 89 Pa. St. 134; Port Kennedy Slag Works *v.* Krause, 5 Pa. Super. Ct. 622.

29. Port Kennedy Slag Works *v.* Krause, 5 Pa. Super. Ct. 622.

30. Penrose *v.* Caldwell, 29 Pa. Super. Ct. 550.

31. Penrose *v.* Caldwell, 29 Pa. Super. Ct. 550; Susquehanna Mut. F. Ins. Co. *v.* Sprenkle, 13 York. Leg. Rec. (Pa.) 121.

32. Penrose *v.* Caldwell, 29 Pa. Super. Ct. 550; Loeper *v.* Haas, 24 Pa. Super. Ct. 184.

33. Bloomer *v.* Reed, 22 Pa. St. 51, holding that a supplemental affidavit stating a sufficient defense may be filed at any time after the argument of the rule of court authorizing plaintiff to enter judgment and before judgment has been entered. See Susquehanna Mut. F. Ins. Co. *v.* Sprenkle, 13 York Leg. Rec. (Pa.) 121.

34. Close *v.* Hancock, 3 Pa. Super. Ct. 207.

35. Lash *v.* Von Neida, 109 Pa. St. 207.

36. Graef *v.* Bernard, 162 Mass. 300, 38 N. E. 503; Ormsbee *v.* Brown, 50 Barb. (N. Y.) 436.

37. McRoberts *v.* Pooley, 1 N. Y. St. 725,

and if he stands on his original answer and does not answer the supplemental complaint, he cannot later complain because such complaint contains new matter upon which no issue has been joined.[38] He may, however, file a new answer to the supplemental complaint,[39] but he cannot, without special leave of court, answer anew or further the original complaint.[40]

10. Reply to Supplemental Answer. If defendant is allowed to file a supplemental answer, plaintiff has the usual time in which to reply thereto.[41]

11. Demurrer to Supplemental Pleading. Since a supplemental pleading is usually regarded as merely an addition to the original pleading, as a general rule a demurrer should be directed to both the supplemental and original pleadings considered as one, and separate demurrers should not be directed to the original and supplemental pleadings; nor will a demurrer lie to a supplemental pleading alone,[42] except where the supplemental pleading sets up a new and independent cause of action or defense and purports to be a substitute for the original.[43]

E. Repleader — 1. Nature of Repleader. A judgment of repleader will in general be awarded by the court in order to do justice between the parties, where there is such a defect in the form or manner of pleading that there is no issue, or that the issue joined and tried is on an immaterial point, so that it cannot be told to whom judgment should be given.[44] Awarding a repleader amounts substantially to granting a new trial, with leave to amend the pleadings.[45]

2. When Granted. A repleader cannot be allowed until after issue is joined,[46] and it will not be awarded on motion after the pleading is filed,[47] nor after demurrer.[48] And as a general rule a court will never grant a repleader except where justice cannot otherwise be obtained.[49] Ordinarily it will not be awarded where there is one material issue in the case, although others be immaterial,[50]

holding further that if plaintiff proves no cause of action against him, defendant will have judgment dismissing both complaints.

38. Kimble *v.* Seal, 92 Ind. 276.

39. Dann *v.* Baker, 12 How. Pr. (N. Y.) 521.

40. Dann *v.* Baker, 12 How. Pr. (N. Y.) 521.

41. Radley *v.* Houghtaling, 4 How. Pr. (N. Y.) 251, twenty days under Code Civ. Proc. § 177.

If defendant pleads a judgment in bar of plaintiff's claim, the latter may file a replication setting up the fact that the judgment has been vacated. Graef *v.* Bernard, 162 Mass. 300, 38 N. E. 503.

42. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; Lewis *v.* Rowland, 131 Ind. 37, 30 N. E. 796; Peters *v.* Banta, 120 Ind. 416, 22 N. E. 95; Farris *v.* Jones, 112 Ind. 498, 14 N. E. 484; Derry *v.* Derry, 98 Ind. 319; Morey *v.* Ball, 90 Ind. 450; Harris *v.* Elliott, 29 N. Y. App. Div. 568, 51 N. Y. Suppl. 1012; Hayward *v.* Hood, 44 Hun (N. Y.) 128; Myers *v.* Metropolitan El. R. Co., 16 Daly (N. Y.) 410, 12 N. Y. Suppl. 2, 19 N. Y. Civ. Proc. 448; Frericks *v.* Coster, 9 Fed. Cas. No. 5,108*a*, 17 Reporter 168. But see Goddard *v.* Benson, 15 Abb. Pr. (N. Y.) 191.

43. Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; Stearns *v.* Lichtenstein, 48 N. Y. App. Div. 498, 62 N. Y. Suppl. 949.

44. *Alabama.*— *Ex p.* Pearce, 80 Ala. 195; Masterson *v.* Gibson, 56 Ala. 56; Shippey *v.* Eastwood, 9 Ala. 198.

Massachusetts.— Magoun *v.* Lapham, 19 Pick. 419; Gerrish *v.* Train, 3 Pick. 124; Eaton *v.* Stone, 7 Mass. 312.

New Hampshire.— Jenness *v.* Peck, 15 N. H. 20.

New York.— Gould *v.* Ray, 13 Wend. 633; Otis *v.* Hitchcock, 6 Wend. 433; Stafford *v.* Albany, 6 Johns. 1.

North Carolina.— Brown *v.* Cooper, 85 N. C. 477; Sumner *v.* Young, 65 N. C. 579; Trice *v.* Turrentine, 32 N. C. 543.

Tennessee.— Coleson *v.* Blanton, 3 Hayw. 152.

Vermont.— Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94.

Virginia.— Dimmett *v.* Eskridge, 6 Munf. 308; Taylor *v.* Huston, 2 Hen. & M. 161; Kerr *v.* Dixon, 2 Call 379; Baird *v.* Mattox, 1 Call 257.

England.— Doogood *v.* Rose, 9 C. B. 132, 19 L. J. C. P. 246, 67 E. C. L. 132.

Canada.— Melancon *v.* Comeau, 2 Nova Scotia 373.

See 39 Cent. Dig. tit. "Pleading," § 851.

45. *Ex p.* Pearce, 80 Ala. 195.

46. Jenness *v.* Peck, 15 N. H. 20.

47. Jenness *v.* Peck, 15 N. H. 20.

48. Jenness *v.* Peck, 15 N. H. 20.

49. Bonsack *v.* Roanoke County, 75 Va. 585.

It is not error to refuse a repleader after verdict to a party who joined in an issue tendered him in sufficient form, and not so narrowed as to exclude any of his evidence, where the verdict responds to the issue joined. Crosby *v.* Hutchinson, 53 Ala. 5.

50. Payne *v.* Barnet, 2 A. K. Marsh. (Ky.) 312; Gallego *v.* Moore, 4 Munf. (Va.) 60;

where the only material fact in the case has been passed upon by the jury;[51] or where it is apparent that no manner of pleading the matter embraced in the defective pleadings will make it available.[52] Although the issues may be immaterial, if it appears that a fair trial was had, that all the facts and circumstances were inquired into, and that the decision, in any event must have been the same, a repleader will not be granted.[53] A repleader should not be granted after a general verdict on all the issues, because one is immaterial, unless it appears clearly that the verdict is based on the immaterial issue only.[54]

3. Who May Obtain. A repleader will not ordinarily be awarded in favor of the party who commits the first fault in pleading,[55] even though the verdict against him be on an immaterial issue.[56] But the rule has been held to apply only where the issues are found against the party committing the first fault, and not where it is against him.[57]

F. Intervention[58]**—1. Definition and Origin.** Intervention is a proceeding of purely statutory origin[59] unknown to courts of common law,[60] but apparently derived from the civil law,[61] by which a third person is permitted of his own volition to become a party to an action or proceeding between other persons,[62] and which results merely in the addition of a new party or parties to an

Hartfield *v.* Patton, 11 Fed. Cas. No. 6,158*a*, Hempst. 268.

51. Jenkins *v.* Stanley, 10 Mass. 226.

52. Hyer *v.* Vaughn, 18 Fla. 647; Triee *v.* Turrentine, 32 N. C. 543.

53. Gray *v.* Kemp, 88 Va. 201, 16 S. E. 225; Bonsack *v.* Roanoke County, 75 Va. 585.

54. Mudge *v.* Treat, 57 Ala. 1.

55. *Georgia.*— Stephen *v.* State, 11 Ga. 225.

Indiana.— Conrad *v.* Dowling, 8 Blackf. 38; Andre *v.* Johnson, 6 Blackf. 375.

Kentucky.— Harrison *v.* Farmers', etc., Bank, 4 Litt. 275; Joice *v.* Handley, 3 Bibb 225.

Michigan.— Whittmore *v.* Stephens, 48 Mich. 573, 12 N. W. 858.

Tennessee.— Bledsoe *v.* Chouning, 1 Humphr. 85.

Virginia.— Kirtley *v.* Deck, 3 Hen. & M. 388.

United States.— Hartfield *v.* Patton, 11 Fed. Cas. No. 6,158*a*, Hempst. 268.

England.— Doogood *v.* Rose, 9 C. B. 132, 19 L. J. C. P. 246, 67 E. C. L. 132.

See 39 Cent. Dig. tit. "Pleading," § 852.

56. Andre *v.* Johnson, 6 Blackf. (Ind.) 375.

57. Gorham *v.* Reeves, Smith (Ind.) 239.

58. Bringing in new parties or change of parties in actions by or against husband or wife see Husband and Wife, 21 Cyc. 1551.

Intervention by executor or administrator see Executors and Administrators, 18 Cyc. 967.

Intervention by married woman see Husband and Wife, 21 Cyc. 1551–2.

Intervention in equity see Equity, 16 Cyc. 201.

Intervention in particular actions or proceedings: Actions against executor or administrator see Executors and Administrators, 18 Cyc. 967. Divorce see Divorce, 14 Cyc. 655. Foreclosure see Mortgages, 27 Cyc. 1580. Partition see Partition, 30 Cyc. 229. Proceedings to set aside fraudulent conveyances see Fraudulent Conveyances, 20 Cyc. 717. Summary proceedings to recover possession of demised property see Landlord and Tenant, 24 Cyc. 1433.

Limitation of actions as to interveners see Limitations of Actions, 25 Cyc. 1301.

Right of infant to conduct proceedings after arriving at majority see Infants, 22 Cyc. 671.

Rights and liabilities as to costs see Costs, 11 Cyc. 94.

Sequestration in case of intervention see Sequestration.

Substitution of assignee in insolvency as party see Insolvency, 22 Cyc. 1333.

59. Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303; Vanmeter *v.* Fidelity Trust, etc., Co., 107 Ky. 108, 53 S. W. 10, 21 Ky. L. Rep. 744.

60. Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303; Dent *v.* Ross, 35 Pa. St. 337; Massachusetts L. & T. Co. *v.* Brown, 17 R. I. 568, 23 Atl. 761, holding that an attaching creditor has no right to intervene in an action and be heard in respect of the judgment, if any, to be entered therein, where his petition is based simply on a claim of right as an attaching creditor. See *Ex p.* Proskauer, 59 Ala. 194; Frink *v.* King, 4 Ill. 144.

In New Hampshire any person who can satisfy the court that he has any rights involved in the trial of a case may be admitted to prosecute or defend the action, but such admission has no effect upon the rights or principles which govern the case; it still remains the action of the original plaintiff against the original defendant. Parsons *v.* Eureka Powder Wks., 48 N. H. 66; Carleton *v.* Patterson, 29 N. H. 580.

61. See Lannes *v.* Courege, 31 La. Ann. 74; Hazard *v.* Mississippi Agricultural Bank, 11 Rob. (La.) 326; Le Blanc *v.* Dashiell, 14 La. 274.

62. See Reay *v.* Butler, (Cal. 1885) 7 Pac. 669; Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303; Gale *v.* Frazier, 4 Dak. 196, 30 N. W. 138.

original action, for the purpose of hearing and determining at the same time all conflicting claims which may be made to the subject-matter in litigation.[63] As a general rule, under the codes, a person may become a party to a pending action only by intervention or by an order of court.[64]

2. NECESSITY OF INTERVENING. The code provisions authorizing intervention permit, but do not compel, such intervention.[65] The mere fact that a person has notice of a pending action concerning a subject-matter in which he is interested will not require him to intervene in such action under penalty of otherwise being bound by the judgment therein, unless he is in privity with a party or bound to indemnify him.[66]

3. RIGHT TO INTERVENE — a. Power to Permit in General. As a general rule the authority of a court to permit intervention is founded upon express statutory provisions;[67] but in some jurisdictions it has been implied from a provision that the court must require parties to be joined without whom a complete determination of the controversy cannot be had.[68] Under a statute providing that all persons having an interest in the subject of the action may be joined as plaintiffs, the court has the power to allow proper parties to be made to an action already pending.[69]

b. Effect of Existence of Other Remedy. A person who has otherwise a right to intervene may be permitted to do so, although he might amply protect his rights in some other way.[70]

c. Proceedings in Which Intervention Is Authorized. Under some statutes the right to intervene is not limited to any particular kind or class of actions or proceedings, but is general;[71] but the right being derived from statute,[72] it may be exercised only in those cases which are within the scope of the statute in case any limitations are imposed.[73] Under a statute providing that where a person not a party has an interest in the subject of the action, or in real property the title to which may be affected by the judgment, and makes application to be made a party, the court must direct him to be brought in; intervention cannot be had in

Intervention in modern practice is the proceeding taken by a person not a party, by which he obtains induction into a pending action between other parties against their will. Draper *v.* Pratt, 43 Misc. (N. Y.) 406, 89 N. Y. Suppl. 356.

A petition in intervention is a petition to become a party to a suit, as either plaintiff or defendant. Logan *v.* Greenlaw, 12 Fed. 10.

63. Reay *v.* Butler, (Cal. 1885) 7 Pac. 669.

64. See the codes of the several states. And see Stockton Bldg., etc., Assoc. *v.* Chalmers, 75 Cal. 332, 17 Pac. 229, 7 Am. St. Rep. 173.

Bringing in additional parties by order of court see *supra*, VII, B, 1, b.

Substitution of parties by leave of court see *supra*, VII, B, 1, d.

65. Lannes *v.* Courege, 31 La. Ann. 74; Hazard *v.* Mississippi Agricultural Bank, 11 Rob. (La.) 326. See also Bennett *v.* Kiber, 76 Tex. 385, 13 S. W. 220; Le Blanc *v.* Dashiell, 14 La. 274.

66. See JUDGMENTS, 23 Cyc. 1252.

67. See the codes of the several states.

68. Cambria Iron Co. *v.* Union Trust Co., 154 Ind. 291, 55 N. E. 745, 56 N. E. 665; Kirschbaum *v.* Hanover F. Ins. Co., 16 Ind. App. 606, 45 N. E. 1113.

69. Dobson *v.* Southern R. Co., 129 N. C. 289, 40 S. E. 42, holding that insurance companies who had paid losses on the property destroyed were properly allowed to come in as parties plaintiff in an action by the owner of the property against a railroad company alleged to have occasioned the fire by its negligence.

70. Coffey *v.* Greenfield, 55 Cal. 382; Taylor *v.* Volga Bank, 9 S. D. 572, 70 N. W. 834; Muhlenberg *v.* Tacoma, 25 Wash. 36, 64 Pac. 925; Bowen *v.* Needles Nat. Bank, 76 Fed. 176. But *compare* Scheidt *v.* Sturgis, 10 Bosw. (N. Y.) 606.

71. Robinson *v.* Crescent City Mill, etc, Co., 93 Cal. 316, 28 Pac. 950.

72. See *supra*, VII, F, 1.

73. Draper *v.* Pratt, 43 Misc. (N. Y.) 406, 89 N. Y. Suppl. 356. See Scheidt *v.* Sturgis, 10 Bosw. (N. Y.) 606; Goodrich *v.* Williamson, 10 Okla. 588, 617, 63 Pac. 974, holding that under a provision that any person may be made a defendant who claims any interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination of the question involved, a person cannot be permitted to intervene in order to set up an equitable issue in an action for the recovery of money only.

Where bill of interpleader would lie.— It has been held that a provision that in actions for the recovery of real or personal property third persons having an interest in the subject-matter may be brought in as parties upon their own application, is intended only to extend the power formerly possessed by courts of equity in this respect to the legal actions designated, and its ap-

an action in which only a money judgment is sought, and in which the title to no real specific or tangible personal or real property is involved.[74] Such a statute applies to all actions, whether at law or in equity.[75]

d. Persons Entitled to Intervene — (i) *In General.* In order that a person may intervene, he must bring himself within the provisions of the statute under which he applies.[76] A person may intervene, although he is not a necessary party.[77] But persons whose interests are already represented will not be permitted to intervene.[78]

(ii) *Necessity of Interest.* A person to be entitled to intervene must in all cases be interested in the litigation.[79] Under some codes the provision is that any person may intervene who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both.[80] Under other codes

plication is confined to the class of cases in which a bill of interpleader would have accomplished the same end. Hornby *v.* Gordon, 9 Bosw. (N. Y.) 656.

An action to recover wharfage is not for the recovery of real or personal property. Kelsey *v.* Murray, 18 Abb. Pr. (N. Y.) 294, 28 How. Pr. 243.

Enforcement of chattel mortgage.— Under a statute providing for intervention in actions for the recovery of real or personal property, or for the subjection thereof to the demand of a plaintiff under a judgment or other lien, intervention may be had in a proceeding to enforce the lien of a chattel mortgage. Vanmeter *v.* Fidelity Trust, etc., Co., 107 Ky. 108, 53 S. W. 10, 21 Ky. L. Rep. 744.

Laborers cannot intervene in an action against railroad contractors for work performed by plaintiff as subcontractor, although the contract between plaintiff and defendant required plaintiff to pay laborers when payments were made to him, and provided that on default defendant should have the right to make payments direct to such laborers, and that before right to sue defendant should accrue plaintiff must furnish evidence that the work was free from lien. McCarthy *v.* Kirksley, 70 Ark. 444, 69 S. W. 53, so holding under a statute providing that in an action for real or personal property any person having an interest in the property may intervene.

74. Bauer *v.* Dewey, 166 N. Y. 402, 60 N. E. 30 [*reversing* 56 N. Y. App. Div. 67, 67 N. Y. Suppl. 262, and *explaining* and *limiting* Hilton Bridge Constr. Co. *v.* New York Cent., etc., R. Co., 145 N. Y. 390, 40 N. E. 86; Rosenberg *v.* Salomon, 144 N. Y. 92, 38 N. E. 982]; Long *v.* Burke, 105 N. Y. App. Div. 457, 94 N. Y. Suppl. 277; Callanan *v.* Keeseville, etc., R. Co., 48 Misc. (N. Y.) 476, 95 N. Y. Suppl. 513 (holding such a statute not applicable to an action for damages); Draper *v.* Pratt, 43 Misc. (N. Y.) 406, 89 N. Y. Suppl. 356; Judd *v.* Young, 7 How. Pr. (N. Y.) 79 (holding that a statute of a similar nature, limited to actions for the recovery of real or personal property, did not apply where the action was on a contract, express or implied, for the recovery of money). See Goodrich *v.* Williamson, 10 Okla. 588, 63 Pac. 974. But see Merchants' Nat. Bank *v.* Hagemeyer, 4 N. Y. App. Div. 52, 38 N. Y. Suppl. 626, holding that a person is interested in the subject of the action if a judgment obtained therein will be binding, either *prima facie* or conclusively, upon him, and that under this rule the general assignee of the maker is interested in the subject of an action upon a note.

An action by an assignee of a bond and mortgage to foreclose, in which defendants alleged payment and denied the assignment to plaintiff, does not involve title to property. Draper *v.* Pratt, 43 Misc. (N. Y.) 406, 89 N. Y. Suppl. 356.

75. Rosenberg *v.* Salomon, 144 N. Y. 92, 38 N. E. 982; Montague *v.* Jewelers', etc., Co., 44 N. Y. App. Div. 224, 60 N. Y. Suppl. 680; Graves Elevator Co. *v.* Olean Masonic Temple Assoc., 85 Hun (N. Y.) 496, 33 N. Y. Suppl. 362; Draper *v.* Pratt, 43 Misc. (N. Y.) 406, 89 N. Y. Suppl. 356. But *compare* Britton *v.* Bohde, 85 Hun (N. Y.) 449, 32 N. Y. Suppl. 882.

76. Bank of Commerce *v.* Timbrell, 113 Iowa 713, 84 N. W. 519.

77. Carter *v.* Mills, 30 Mo. 432.

78. McLaughlin *v.* McLaughlin, 16 Mo. 242.

79. Jemison *v.* Barrow, 24 La. Ann. 171; Norris *v.* Ogden, 11 Mart. (La.) 455 (holding that a stranger cannot intervene to aid defendants); Boyer *v.* Maginnis, 10 Ohio Dec. (Reprint) 378, 20 Cinc. L. Bul. 471 (holding that a person having no interest in the subject of a pending action cannot become a party for the sole purpose of asserting title to property which is therein attached); Burditt *v.* Glasscock, 25 Tex. Suppl. 45 (holding that an intervener cannot seek merely to enforce a contract with defendant to which plaintiff had no privity); Melvin *v.* Chancy, 8 Tex. Civ. App. 252, 28 S. W. 241 (holding that one who contests the title of plaintiff to land upon which the timber stood cannot intervene in an action upon a contract for the price of the timber, since he is not privy to the contract).

80. See the statutes of the several states. And see the following cases:

California.— Dennis *v.* Kolm, 131 Cal. 91, 63 Pac. 141 (holding that in an action against a firm, one who claimed to own money attached therein as the property of one who denied that he was a member, and

the provision is that the intervener must have an interest in the subject of the action,[81] or in real property,[82] the title to which may be affected by the judgment.

(III) *Character of Interest.* The right or interest which will authorize a third person to intervene must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation of the judgment.[83]

who alleged that the money was the proceeds of a note and mortgage which he had assigned to her, might intervene); Robinson *v.* Crescent City Mill, etc., Co., 93 Cal. 316, 28 Pac. 950 (holding that in trespass on land, one claiming a right of way through the land and alleging that the acts complained of were performed by defendant while employed by him to construct the way, might intervene).

Colorado.— Morey *v.* Lett, 18 Colo. 128, 31 Pac. 857, holding that one who aids a broker in selling real estate, upon an understanding both with the broker and the owner that commissions were to be divided, may intervene in an action for the commissions.

Iowa.— Brown *v.* Bryan, 31 Iowa 556.

Montana.— Maddox *v.* Teague, 18 Mont. 593, 47 Pac. 209; Maddox *v.* Rader, 9 Mont. 126, 22 Pac. 386, both holding that the holder of a note secured by a mortgage might intervene in an action by a mortgagee on a sheriff's bond for misconduct in the mortgage sale.

Nebraska.— McConniff *v.* Van Dusen, 57 Nebr. 49, 77 N. W. 348 (holding that one claiming ownership of a portion of the property involved might intervene in proceedings to foreclose a chattel mortgage); Moline, etc., Co. *v.* Hamilton, 56 Nebr. 132, 76 N. W. 455 (holding that a mere denial of plaintiff's right is insufficient to give an intervener a standing in court); Omaha South R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557 (holding that a mere contingent liability to answer over to defendant, without any privity with plaintiff, was not sufficient to warrant intervention).

South Dakota.— Taylor *v.* Volga Bank, 9 S. D. 572, 70 N. W. 834.

Washington.— McNamara *v.* Crystal Min. Co., 23 Wash. 26, 62 Pac. 81, holding that one cannot intervene to quiet title to a mining claim, where it is not shown that the claim of the original plaintiff conflicted with the intervener's claim.

81. See the codes of the several states. And see Hosmer *v.* Darrah, 85 N. Y. App. Div. 485, 83 N. Y. Suppl. 413 [*reversing* 39 Misc. 204, 79 N. Y. Suppl. 390] (holding that a large stock-holder in a corporation, whose rights are to be determined by a judgment to be entered in the action, and who is also a large creditor of the corporation, has such an interest as will permit him to intervene); MacArdell *v.* Olcott, 62 N. Y. App. Div. 127, 70 N. Y. Suppl. 930; Kinney *v.* Reid Ice Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Suppl. 325; Washington Sav. Bank *v.* Fletcher, 55 N. Y. App. Div. 580, 67 N. Y. Suppl. 365; Montague *v.* Jewelers', etc., Assoc., 44 N. Y. App. Div. 224, 60 N. Y. Suppl. 680 (holding that the beneficiary of a life policy whose rights are subject to a debt secured by the policy is interested in an action thereon by the creditor); Graves Elevator Co. *v.* Masonic Temple Assoc., 85 Hun (N. Y.) 496, 33 N. Y. Suppl. 362; Feinburg *v.* American Surety Co., 33 Misc. (N. Y.) 458, 67 N. Y. Suppl. 868 [*reversing* 32 Misc. 755, 65 N. Y. Suppl. 796] (holding that in an action against a surety company on an undertaking in attachment, plaintiff in the attachment action who did not join in the undertaking, but who contracted to indemnify the company for any liability thereon, and who had been notified by the company to defend, was entitled to intervene); Uhlfelder *v.* Tamsen, 18 Misc. (N. Y.) 173, 41 N. Y. Suppl. 438 [*reversed* on other grounds in 15 N. Y. App. Div. 436, 44 N. Y. Suppl. 484] (holding that an execution debtor has an interest in the subject of an action by claimant to recover from the sheriff the goods levied on); Nevins *v.* Fidelity, etc., Co., 12 Misc. (N. Y.) 77, 33 N. Y. Suppl. 43 (holding that where an action is brought against the surety alone, on a bond given to secure certain agreed payments by the principal to plaintiff, the principal may intervene).

82. See the statutes of the several states. And see Russ *v.* Stratton, 8 Misc. (N. Y.) 6, 28 N. Y. Suppl. 392 (holding that a title insurance company, by virtue of having insured the title to the property, was not entitled to intervene in an action to set aside the sale of a leasehold); Lewisohn *v.* Anaconda Copper Min. Co., 29 N. Y. App. Div. 552, 51 N. Y. Suppl. 1089 (holding that in an action against a mining corporation and its directors to restrain a sale of its lands to a certain third person, such person who had merely made an offer for the land and deposited the purchase-price was not entitled to intervene).

83. *California.*— Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

Colorado.— Wood *v.* Denver City Water Works Co., 20 Colo. 253, 38 Pac. 239, 46 Am. St. Rep. 288; Henry *v.* Travelers' Ins. Co., 16 Colo. 179, 26 Pac. 318; Curtis *v.* Lathrop, 12 Colo. 169, 20 Pac. 250.

Dakota.— Gale *v.* Frazier, 4 Dak. 196, 30 N. W. 138 [*affirmed* in 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521].

Kentucky.— Vanmeter *v.* Fidelity Trust, etc., Co., 107 Ky. 108, 53 S. W. 10, 21 Ky. L. Rep. 744.

Louisiana.— Gasquet *v.* Johnson, 1 La. 431.

Minnesota.— Dennis *v.* Spencer, 51 Minn. 259, 53 N. W. 631, 38 Am. St. Rep. 499; Bennett *v.* Whitcomb, 25 Minn. 148.

Nebraska.— Kansas, etc., R. Co. *v.* Fitzgerald, 33 Nebr. 137, 39 N. W. 1100.

Under a provision that when a complete determination of an action cannot be had without other parties the court must have them joined as proper parties, the intervention as plaintiff of a person whose interests are hostile to plaintiff's cannot be allowed.[84]

(iv) *Creditors.* A mere creditor of one of the parties has no right to intervene, although he may have an indirect interest in the result of the suit,[85] especially

Nevada.— State *v.* Wright, 10 Nev. 167; Harlan *v.* Eureka Min. Co., 10 Nev. 92.

North Dakota.— Dickson *v.* Dows, 11 N. D. 407, 92 N. W. 798; Bray *v.* Booker, 6 N. D. 526, 72 N. W. 933.

Utah.— West Point Irr. Co. *v.* Moroni, etc., Irr. Ditch Co., 14 Utah 127, 46 Pac. 762.

In California the interest must be that created by a claim to the demand, or some part thereof in suit, or a claim to, or lien upon, the property or some part thereof which is the subject of litigation. Stich *v.* Dickinson, 38 Cal. 608; Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569. See also Bowen *v.* Needles Nat. Bank, 76 Fed. 176, holding that the receivers of a national bank may intervene in a suit against the bank to recover a debt.

In Louisiana the right to intervene must arise from the principal action or be one specially conferred by law. Moreau *v.* Moreau, 25 La. Ann. 214; Bryan *v.* Atchison, 2 La. Ann. 462; O'Brien *v.* Concordia Police Jury, 2 La. Ann. 355. See also Cleveland *v.* Comstock, 22 La. Ann. 597, holding that a party cannot by way of intervention compel other parties to litigate for his benefit or gratification. A demand made by the intervener must be incidental to, or necessarily connected with, the action between the parties. Webb *v.* Keller, 26 La. Ann. 596. In order to intervene it is only necessary to have an interest in the success of either party. Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714. The party intervening may join with plaintiff in claiming the same thing. Boyd *v.* Heine, *supra*.

In North Carolina it has been said that, while a person may intervene who has an interest in the controversy, he cannot intervene when he claims an interest in the thing which is the subject. Asheville Division No. 15 S. T. *v.* Aston, 92 N. C. 588 (holding that a claimant under another title to land in dispute between parties to a suit cannot intervene); Keathly *v.* Branch, 84 N. C. 202; Wade *v.* Sanders, 70 N. C. 277.

In Texas under the statute any person may be allowed to intervene under leave of court. Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796; Claflin *v.* Pfeifer, 84 Tex. 23, 19 S. W. 297; State *v.* Farmers' L. & T. Co., 81 Tex. 530, 17 S. W. 60; Sullivan *v.* Cleveland, 62 Tex. 677; Pool *v.* Sanford, 52 Tex. 621; Mayes *v.* Woodall, 35 Tex. 687; Mussina *v.* Goldthwaite, 34 Tex. 125, 7 Am. Rep. 281; Graves *v.* Hall, 27 Tex. 148; Eccles *v.* Hill, 13 Tex. 65; Jones *v.* Holliday, 11 Tex. 412, 62 Am. Dec. 487; Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188; Legg *v.* McNeill, 2 Tex. 428; Hanna *v.* Drennan, 2 Tex. Unrep. Cas. 536; Polk *v.* King, 19 Tex. Civ. App. 666, 48 S. W. 601; Boltz *v.* Engelke, (Civ. App. 1897) 43 S. W. 47; Earnest *v.* Moline Plow Co., 8 Tex. Civ. App. 159, 27 S. W. 734; Reavis *v.* Moore, (Civ. App.) 1892) 20 S. W. 955. To confer upon a person the right to intervene he must have such an interest in the subject-matter of litigation as makes it necessary or proper for him to come into the case for the protection of such right. Jones *v.* Smith, 55 Tex. 383 (holding that in case of a dispute between the vendee of a purchaser at a sheriff's sale and the sole legatee of the vendor at the sheriff's sale, the purchaser at the sheriff's sale might intervene); Graves *v.* Hall, 27 Tex. 148 (holding that the fact that the fund to which an intervener sets up a claim has been placed in the hands of a receiver, if it has any effect, will be to strengthen the right to intervene); Bangs *v.* Sullivan, 33 Tex. Civ. App. 30, 73 S. W. 74. But see McKee *v.* Coffin, 66 Tex. 304, 1 S. W. 276, holding that an attaching creditor, who has indemnified the officer, has no right to intervene in an action against the officer for the wrongful levy of the attachment. In other words, his interest in the subject-matter involved must be such that had the original action never been commenced, the intervener, by a suit in his own name, would have had the right to recover at least a part of the relief sought, or had the action been first brought against him as a defendant he would have been able to defeat the recovery in part at least. Bangs *v.* Sullivan, 33 Tex. Civ. App. 30, 73 S. W. 74. The mere fact that the result of a suit will incidentally affect the liability of the intervener upon a contract to which the parties to the suit are strangers gives him no right to intervene. Wilson *v.* Tyler Coffin Co., 28 Tex. Civ. App. 172, 66 S. W. 865. A person is not entitled to intervene for the purpose of setting up an independent cause of action involving subject-matter distinct and entirely foreign to that involved in the original suit, and upon which he might have brought and prosecuted a suit to judgment, without regard to the result or disposition of the suit between plaintiffs and defendants. Bangs *v.* Sullivan, 33 Tex. Civ. App. 30, 73 S. W. 74.

84. Union Trust Co. *v.* Boker, 26 Misc. (N. Y.) 85, 56 N. Y. Suppl. 550.

85. Westcott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021 (holding that a simple judgment creditor of the assignor of a note cannot intervene in an action thereon by the assignee); Pierre *v.* Masse, 7 Mart. N. S. (La.) 196; Brown *v.* Saul, 4 Mart. N. S. (La.) 434, 16 Am. Dec. 175; Kansas, etc., R. Co. *v.* Fitzgerald, 33 Nebr. 137, 49 N. W.

where no fraud or collusion between the parties is charged.[86] So it has been held that a person cannot intervene to show that an amount which it was sought to recover in an action was not due from defendant to plaintiff, but was due to a third person who was a judgment debtor of the intervener;[87] nor can a creditor who has attached certain property of his debtor intervene in opposition to the appointment of a receiver in an action by other creditors of the same debtor.[88] But creditors of a third person, who have garnished defendant in an action on a note upon the ground that the third person is the real owner of the note, and not plaintiff, may be allowed to intervene.[89]

(v) *Purchasers and Assignees.* It is usually held that a purchaser of the property involved *pendente lite* has such an interest as will permit him to intervene.[90] But one to whom the cause of action has been absolutely assigned by the original plaintiff should not be allowed to intervene, but should be substituted as plaintiff in place of the original one.[91] In an action for an accounting with regard to the proceeds of a sale of land, one claiming an interest in certain of the lands under an unrecorded deed from plaintiff, prior to his deed to defendant, is entitled to intervene.[92] Under a statute which permits any person to intervene who has an interest in the matter in litigation, a person claiming as an assignee of a portion of a fund deposited in court, but claiming no interest in the original subject-matter of the suit, may be entitled to intervene.[93]

(vi) *Legatees.* A residuary legatee has an interest permitting him to intervene in a proceeding involving title to personal property of the estate.[94] Where legacies are specific liens upon the real property of an estate, legatees may intervene in a proceeding to compel the conveyance of such realty as the subject of a parol gift.[95] It has been held that, although a complaint is defective in not being brought against persons upon whom title to land has apparently devolved, legatees have the right to intervene if they have any lien upon the land.[96]

(vii) *Persons in Representative Capacity.* Subject to the rules applicable to intervention generally, an executor or administrator may intervene in a

1100; Welborn *v.* Eskey, 25 Nebr. 193, 40 N. W. 959. And see Askew *v.* Carswell, 63 Ga. 162; Rhoades *v.* Pennsylvania L. Ins., etc., Co., 93 Fed. 533.

86. Lincoln *v.* New Orleans Express Co., 45 La. Ann. 729, 12 So. 937.

87. Dennis *v.* Spencer, 51 Minn. 259, 53 N. W. 631, 38 Am. St. Rep. 499.

88. State *v.* Snohomish County Super. Ct., 7 Wash. 77, 34 Pac. 430. See, generally, Receivers.

89. Capera *v.* Mignon, (Tex. Civ. App. 1896) 33 S. W. 882.

90. Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; Brooks *v.* Hager, 5 Cal. 281; Marigny *v.* Nivet, 2 La. 498; Ladd *v.* Stevenson, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; Pope *v.* Manhattan R. Co., 79 N. Y. App. Div. 583, 80 N. Y. Suppl. 316; Fleming *v.* Seeligson, 57 Tex. 524. See also Union Bank *v.* Bowman, 15 La. Ann. 271. But *compare* Israel *v.* Metropolitan El. R. Co., 58 N. Y. App. Div. 266, 69 N. Y. Suppl. 218.

91. Bank of Commerce *v.* Timbrell, 113 Iowa 713, 84 N. W. 519 [*distinguishing* Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318; Dunham *v.* Greenbaum, 56 Iowa 303, 9 N. W. 220] (holding that such a person was not interested in the subject-matter in litigation, in the success of either of the parties, or against both); Todd *v.* Crutsinger, 30 Mo. App. 145 (holding, however, that there was no prejudicial error in permitting such a person to be joined as a co-plaintiff instead of being substituted).

Substitution of plaintiff see *supra*, VII, B, 1, d.

92. Sprague *v.* Bond, 113 N. C. 551, 18 S. E. 701.

93. Pence *v.* Sweeney, 3 Ida. 181, 28 Pac. 413, so holding where, in an action to quiet title, the land involved was sold and the proceeds deposited with the clerk of court, under a stipulation that it should be subject to the adjudication of the question as to the party entitled to it, an intervener demanded no relief as to the land, but alleged that one half of the money deposited had been assigned to him by defendants.

94. Guili *v.* Lenihan, 5 Silv. Sup. (N. Y.) 448, 8 N. Y. Suppl. 453. But *compare* Bump *v.* Gilchrist, 52 Hun (N. Y.) 6, 4 N. Y. Suppl. 737 [*affirmed* in 127 N. Y. 668, 28 N. E. 254], where it was held that a general legatee had no such interest in a specific note, which was the property of the estate, as to entitle him to intervene in an action by the assignee of such note, on the ground that the estate was being mismanaged and that the note had been assigned without consideration.

95. Sherwood *v.* Harbeck, 13 N. Y. App. Div. 133, 42 N. Y. Suppl. 1045.

96. Sherwood *v.* Harbeck, 13 N. Y. App. Div. 133, 42 N. Y. Suppl. 1045.

pending action.[97] When a supplemental complaint discloses facts making necessary a substitution of the representatives of a deceased defendant a motion on the part of such representative to be made a party is improperly denied.[98]

(VIII) *Persons Interested in Commercial Paper.* As a general rule the owner or one claiming to be the owner of a note is entitled to intervene in an action thereon.[99] One who claims as assignee of a draft sued on may intervene to protect his rights.[1] So a person claiming to be the owner of a certificate of deposit may intervene in an action thereon by the holder.[2]

e. Purpose. An intervener cannot change the nature of the action in which he intervenes,[3] hence he cannot intervene to litigate concerning the subject of the action and also with regard to an additional subject.[4] But he is not prevented from showing fraud or collusion between the original parties whereby his interests are affected.[5] An intervention to set up an equitable claim in a proceeding at law will not be allowed in the federal courts, although it might be permitted under the practice of a state court.[6] And the same rule has been applied under the codes where the distinction between law and equity is retained.[7] A person

97. See Stafford *v.* Davidson, 47 Ind. 319; Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714; Matter of Smith, 68 Hun (N. Y.) 530, 23 N. Y. Suppl. 87. See, generally, Executors and Administrators, 18 Cyc. 967.

98. Amsterdam First Nat. Bank *v.* Shuler, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep. 601 [*reversing* 89 Hun 303, 35 N. Y. Suppl. 171].

99. *California.*— Stich *v.* Dickinson, 38 Cal. 603.

Georgia.— See Rust *v.* Woolbright, 54 Ga. 310, holding that where in defense to an action in ejectment against a vendee, defendant asserted that he was entitled to a title to the land involved, the assignee of a portion of the purchase-money notes, which has been executed under an agreement that title should not be made until their payment, was entitled to intervene.

Indiana.— Kastner *v.* Pibilinski, 96 Ind. 229.

Iowa.— Taylor *v.* Adair, 22 Iowa 279, holding that the equitable owner of a note might intervene in an action by the holder of the legal title as a person claiming adversely to both plaintiff and defendant.

Nebraska.— Holland *v.* Commercial Bank, 22 Nebr. 585, 36 N. W. 112.

Texas.— Jackson *v.* Fawlkes, (1892) 20 S. W. 136 (holding that a transferee of a note as collateral for a debt of less amount than the note may intervene); Converse *v.* Sorley, 39 Tex. 515 (holding that where a note has been sued on by the payee who, pending the suit, assigns it, the assignee may intervene, although defendant may have died before the purchase of his note); Field *v.* Gantier, 8 Tex. 74.

But see Hillier *v.* Stewart, 26 Ohio St. 652, where it was held improper to allow a person to be made a party to contest the *bona fides* of plaintiff's title to the note, and to assert therein an equity to the intervener, derived through plaintiff's assignor.

1. Jones *v.* Jenkins, 9 Rob. (La.) 180. See also Bremont *v.* Manley, 31 Tex. 6, holding that in an action on a draft, where it does not disclose who is the owner, being indorsed in blank, any person may intervene to establish his ownership thereof.

2. Dunn *v.* Canton Nat. Bank, 11 S. D. 305, 77 N. W. 111.

3. Carraby *v.* Morgan, 5 Mart. N. S. (La.) 499. *Compare* Fleming *v.* Seeligson, 57 Tex. 524, holding that where the entire interest in certain property is in controversy in an action, a person who is permitted to intervene may litigate his right to the entire property.

4. Ragland *v.* Wisrock, 61 Tex. 391, holding that one who claims a small undivided interest in land involved in trespass to try title, and also an interest in the survey of which it forms a part, but which is not involved, and in which plaintiff claims no interest, could not be allowed to intervene. See also Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585, holding that where in an action by plaintiff to restrain the town-site commissioners from selling certain lots in which he was interested, an Indian nation claiming the fee to such lots was allowed to intervene, allegations by the intervener relating to other lots similarly situated, except that plaintiff had or claimed no interest therein, should be stricken out.

5. Mussina *v.* Goldthwaite, 34 Tex. 125, 7 Am. Rep. 281. But see Welch *v.* Mandeville, 29 Fed. Cas. No. 17,371, 2 Cranch C. C. 82 [*affirmed* in 1 Wheat. 233, 4 L. ed. 79], where it was held that a person for whose benefit an action is brought, but who does not appear to be a party on the record, nor to be interested in the cause, cannot come in and, in his own name, reply fraud and collusion between the legal plaintiff and defendant to defeat the action, and such a replication is bad on demurrer.

6. Clark *v.* Eureka County Bank, 116 Fed. 534; Gravenberg *v.* Laws, 100 Fed. 1, 40 C. C. A. 240.

7. Kassing *v.* Walter, (Iowa 1896) 65 N. W. 832 (holding that in an action for goods sold an intervener cannot by tendering an equitable issue change the form of procedure); Van Gordon *v.* Ormsby, 55 Iowa 657, 8 N. W. 625. *Compare* Goodrich *v.* Williamson, 10 Okla. 588, 63 Pac. 974.

cannot be allowed to intervene for the mere purpose of objecting to a trial of the action or moving to dismiss it.[8] The grounds of intervention may have arisen subsequent to the institution of the original suit.[9] Where the ground for intervention has ceased to exist, the motion therefor is properly denied,[10] and a leave to intervene may be refused when the intervention would be unavailing.[11]

f. Leave of Court. As a general rule, under the statutes, leave of court for the filing of a petition of intervention is required.[12] But in some jurisdictions leave of court is not required.[13]

g. Discretion of Court. As a general rule, when the facts disclosed by the intervener's petition show that the right to intervene exists, the court has no right to refuse his application.[14] But where it appears that the applicant has been guilty of laches, permission to intervene may be denied or granted upon terms.[15] The decision of the question whether the pleadings or the particular facts established by the proofs sustain the application rests largely within the discretion of the court.[16] It is the general rule that an intervention will not be allowed when it will have the result of retarding the principal suit,[17] or require that the case shall be reopened for further evidence,[18] delay the trial of the

8. Hunt *v.* O'Leary, 84 Minn. 200, 87 N. W. 611. See also *infra*, VII, F, 4, c.

9. Baum's Succ., 11 Rob. (La.) 314, holding that where plaintiff's creditors, alleging that he is about to abandon the suit to defraud them, intervene to prosecute it, they may amend and allege their subsequent purchase of his rights. The substance of the original demand is not changed, but only the parties to the proceedings.

10. Muller *v.* Philadelphia, 49 Misc. (N. Y.) 322, 99 N. Y. Suppl. 194 [*reversed* on other grounds in 113 N. Y. App. Div. 92, 99 N. Y. Suppl. 93].

11. People *v.* Anglo-American Sav., etc., Assoc., 66 N. Y. App. Div. 9, 72 N. Y. Suppl. 1021 [*affirmed* in 163 N. Y. 606, 62 N. E. 1099], holding that an application for leave to intervene, merely to obtain a modification or vacation of an approval of a receiver's sale, was properly denied when the court refused to change or vacate the order of approval.

12. See the statutes of the several states. And see Bradley *v.* Trousdale, 15 La. Ann. 206 (holding that a judgment could not be rendered on a petition of intervention which had been filed without leave of court and had not been served or put in issue); McLaughlin *v.* McLaughlin, 16 Mo. 242; Kortjohn *v.* Seimers, 29 Mo. App. 271; Dietrick *v.* Steam Dredge, etc., 14 Mont. 261, 36 Pac. 81.

Presumption as to leave.— Under Colo. Civ. Code, § 22, declaring that an intervention takes place where a third person is permitted to become a party to an action between other parties, such permission is presumed where nothing to the contrary appears. Grove *v.* Foutch, 6 Colo. App. 357, 40 Pac. 852. Where one voluntarily becomes a party to a proceeding, and is so treated by his adversary and the court, a formal order declaring him a party is not necessary. Tallahassee Falls Mfg. Co. *v.* Jones, 128 Ala. 424, 29 So. 448.

Overruling a motion to strike a petition of intervention is tantamount to granting leave to file it. Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318.

13. Spaulding *v.* Murphy, 63 Nebr. 401, 88 N. W. 489 (holding that any person who can, by proper averments, show that he has an interest in the matter in litigation, may become a party to the suit); State *v.* Holmes, 60 Nebr. 39, 82 N. W. 109.

14. Johnson *v.* Donvan, 106 N. Y. 269, 12 N. E. 594; Winfield *v.* Stacom, 40 N. Y. App. Div. 95, 57 N. Y. Suppl. 563; Uhlfelder *v.* Tamsen, 15 N. Y. App. Div. 436, 44 N. Y. Suppl. 484 [*reversing* 18 Misc. 173, 41 N. Y. Suppl. 438 (*reversing* 17 Misc. 296, 40 N. Y. Suppl. 372)]; Lawton *v.* Lawton, 54 Hun (N. Y.) 415, 7 N. Y. Suppl. 556; Van Loon *v.* Squires, 51 Hun (N. Y.) 360, 4 N. Y. Suppl. 371; Earle *v.* Hart, 20 Hun (N. Y.) 75; Draper *v.* Pratt, 43 Misc. (N. Y.) 406, 89 N. Y. Suppl. 356; Hunt *v.* Rooney, 77 Wis. 258, 45 N. W. 1084; Carney *v.* Gleissner, 62 Wis. 493, 22 N. W. 735. But *compare* Scheidt *v.* Sturgis, 10 Bosw. (N. Y.) 606.

Where the right does not appear, it is discretionary with the court to grant permission to a person to come in as a party. Hart *v.* Kohn, 12 Misc. (N. Y.) 648, 33 N. Y. Suppl. 272.

15. Gale *v.* Frazier, 4 Dak. 196, 30 N. W. 138 [*affirmed* in 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521]; Koehler *v.* Brady, 82 N. Y. App. Div. 279, 81 N. Y. Suppl. 695; MacArdell *v.* Olcott, 62 N. Y. App. Div. 127, 70 N. Y. Suppl. 930; Wall *v.* Beach, 20 N. Y. App. Div. 480, 47 N. Y. Suppl. 33; Earle *v.* Hart, 20 Hun (N. Y.) 75; Callanan *v.* Keeseville, etc., R. Co., 48 Misc. (N. Y.) 476, 95 N. Y. Suppl. 513; Draper *v.* Pratt, 43 Misc. (N. Y.) 406, 89 N. Y. Suppl. 356; Allen *v.* Coe, 109 Wis. 635, 85 N. W. 492.

16. Mooney *v.* New York El. R. Co., 163 N. Y. 242, 57 N. E. 496; Pope *v.* Manhattan R. Co., 79 N. Y. App. Div. 583, 80 N. Y. Suppl. 316; Draper *v.* Pratt, 43 Misc. (N. Y.) 406, 89 N. Y. Suppl. 356.

17. Hibernia Sav., etc., Soc. *v.* Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73; Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714.

18. Hibernia Sav., etc., Soc. *v.* Churchill,

action,[19] or change the position of the original parties.[20] Where an order refusing an intervention is proper under the circumstances of the case at the time of the application, the ruling is not made incorrect by a subsequent change in the circumstances.[21]

h. Waiver of Objections. Objections to the filing of a petition of intervention may be waived.[22]

4. Procedure — a. Time For Intervention. It is usually provided by the statutes authorizing intervention that the intervention must be made before trial.[23] Under such a statute a motion comes too late after the cause has been submitted to the court,[24] or after a default has been entered.[25] Under other statutes an intervention may be filed at any stage of the case, whether before or after issue joined, provided the intervention does not retard the principal suit.[26] In any event the action must be still pending,[27] and an intervention cannot be allowed after a cause has been settled by the parties,[28] or after judgment.[29] An

128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73.

19. Hibernia Sav., etc., Soc. *v.* Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73; Keehn *v.* Keehn, 115 Iowa 467, 88 N. W. 957; Teachout *v.* Des Moines Broad-Gauge St. R. Co., 75 Iowa 722, 38 N. W. 145; Van Gorden *v.* Ormsby, 55 Iowa 657, 8 N. W. 625; Ragland *v.* Wisrock, 61 Tex. 391.

20. Hibernia Sav., etc., Soc. *v.* Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73; Cahn *v.* Ford, 42 La. Ann. 965, 8 So. 477; Mayer *v.* Stahr, 35 La. Ann. 57; Lincoln *v.* Ball, 6 La. 685.

21. Cleveland *v.* Comstock, 22 La. Ann. 597.

22. Lee *v.* Hickson, 40 Tex. Civ. App. 632, 91 S. W. 636, holding that where, in an action to set aside a judgment, plaintiff in open court agreed that certain parties might intervene, they were properly permitted to do so. And see Vanmeter *v.* Fidelity Trust, etc., Co., 107 Ky. 108, 53 S. W. 10, 21 Ky. L. Rep. 744 (holding that the withdrawal of objection to the filing of a petition of intervention does not give consent to the filing, but leaves the parties in the same position as if there had been no objection); Steele *v.* Taylor, 1 Minn. 274 (holding that on an application by purchasers of land at an execution sale, to be made parties to a suit in regard to the same, the failure of plaintiff to appear was not evidence of consent that such purchasers might be made parties).

23. See the statutes of the several states.

24. Seligman *v.* Santa Rosa, 81 Fed. 524, where the case had been submitted upon bill and answer. See also Teachout *v.* Des Moines Broad-Gauge R. Co., 75 Iowa 722, 38 N. W. 145.

25. Hibernia Sav., etc., Soc. *v.* Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73; Safely *v.* Caldwell, 17 Mont. 184, 42 Pac. 766, 52 Am. St. Rep. 693. But see Floyd *v.* Sellers, 7 Colo. App. 491, 44 Pac. 371, holding that where defendant had failed to appear, and his default was added by the clerk in vacation, an intervening petition presented on the first day of the preceding term was properly granted.

After motion for default.— It has been held that an intervening complaint need not be filed before motion for judgment by default. Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

26. Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714; Perkins *v.* Perkins, 20 La. Ann. 257; Moran *v.* Le Blanc, 6 La. Ann. 113, holding that where, after notification of a third person's interest in the note sued on, defendant prays that the latter may be cited, and he intervenes, plaintiff cannot urge that the intervention is filed too late, and when he was about to try the suit which it delayed, particularly where by a decision on the intervener's pretensions an earlier settlement of the estate of which plaintiff is administrator will be secured. But *compare* Lincoln *v.* Ball, 6 La. 685.

27. Keehn *v.* Keehn, 115 Iowa 467, 88 N. W. 957.

After demurrer sustained.— In case the cause is continued with leave to amend, a third person may intervene. Wright *v.* Neathery, 14 Tex. 211.

28. Leon First Nat. Bank *v.* Gill, 50 Iowa 425, holding further that where the parties had agreed upon a settlement they were not required to take notice of the petition of intervention until notice of the filing of such petition was served upon them. See Lambie *v.* Wibert, (Tex. Civ. App. 1895) 31 S. W. 225, holding that, where a suit has been settled and the parties have agreed to a dismissal, it is too late for others claiming an interest in the property to file a plea of intervention without leave of court.

29. Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303; Morton *v.* Royal Council R. L., 100 Mo. App. 76, 73 S. W. 259; Campbell *v.* Upson, (Tex. Civ. App. 1904) 81 S. W. 358. See also Dunbar *v.* American Casket Co., 19 Ohio Cir. Ct. 585, 10 Ohio Cir. Dec. 684; Davy *v.* Hyde Park, 16 Ohio Cir. Ct. 506, 507, 8 Ohio Cir. Dec. 371, 9 Ohio Cir. Dec. 400.

Discretion of court.— Pending an appeal from a judgment in a suit brought to determine the equitable ownership of a trust fund the trial court may, without abuse of discretion, refuse to permit a third person to intervene for the purpose of setting up a claim to the fund. Brennan *v.* Hall, 131 N. Y. 160, 29 N. E. 1009 [*affirming* 14 N. Y. Suppl. 864].

application to intervene must be presented in time to enable the parties to the cause to meet and contest the issue which may be presented by the intervener.[30] And a petition will not be permitted to be filed where it will operate as a surprise and manifest injustice,[31] or where the issues have been practically determined.[32]

b. Application and Proceedings Thereon. The proceeding by intervention is purely statutory and the provisions of the statute must be strictly and literally followed.[33] It is usually provided that intervention shall be by petition,[34] which must be served upon the parties to the action,[35] who may answer or demur as if it were an original complaint.[36] The petition for intervention must by proper averments show the interest of the applicant in the litigation,[37] and should contain facts sufficient to show that the intervener is entitled to the relief demanded.[38]

30. Smith *v.* Allen, 28 Tex. 497.

31. Van Bibber *v.* Geer, 12 Tex. 15.

32. Pinkard *v.* Willis, 24 Tex. Civ. App. 69, 57 S. W. 891.

33. Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303.

34. See the statutes of the several states. And see Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303; Johnson *v.* New Orleans, 105 La. 149, 29 So. 355 (holding that under Code Civ. Proc. art. 393, prescribing that an intervention can only be by petition and citation, there cannot be an intervening answer by a third person in a cause pending between others); Dietrich *v.* Steam Dredge, etc., 14 Mont. 261, 36 Pac. 81 (holding that one does not become a party to the action by the filing, without leave of court, of a demurrer to the complaint); Nevins *v.* Fidelity, etc., Co., 12 Misc. (N. Y.) 77, 33 N. Y. Suppl. 43. *Compare* Spencer *v.* Goodman, 33 La. Ann. 898, where a cross bill was regarded as in effect an intervention.

Signature.—A petition of intervention signed merely by an agent of the intervener is not sufficient. Rosenbaum *v.* Adams, 61 Iowa 382, 16 N. W. 290.

Intervention in distinct actions cannot be effected by one petition. Rosenbaum *v.* Adams, 61 Iowa 382, 16 N. W. 290.

35. Chase *v.* Evoy, 58 Cal. 348; Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303; Johnson *v.* New Orleans, 105 La. 149, 29 So. 355 (holding that an intervener should ask timely service of his petition and citation on plaintiff and defendant, and where an intervention has been filed in ample time for service on the other parties litigant, and for expiration of the legal delay for citation, prior to calling the case for trial, and there has been no demand for such citation and service, and none made, the intervener has not the right at the last moment when the case is called for trial to obtain time to effect such service); Cain *v.* Pullen, 34 La. Ann. 511; Bradley *v.* Trousdale, 15 La. Ann. 206; Dietrich *v.* Steam Dredge, etc., 14 Mont. 261, 36 Pac. 81. See Lapp *v.* Hildreth, etc., Lumber Co., 21 Ohio Cir. Ct. 191, 11 Ohio Cir. Dec. 628.

In Texas every party who has appeared in the case before a petition of intervention is filed is charged with notice of the petition in the same manner and to the same extent as if he were specially cited to answer it. Deering *v.* Hurt, (1886) 2 S. W. 42. So an answer by defendant binds him to take notice of the intervening petition. Bryan *v.* Lund, 25 Tex. 98; American Surety Co. *v.* San Antonio L. & T. Co., (Civ. App. 1906) 98 S. W. 387. And it has been held that where defendants have filed a written waiver of process and judgment has gone against them by default, subsequent pleas of intervention will not be stricken for want of service of process upon such defendants. Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653. But where defendant has not appeared, notice of a petition in intervention by which a liability to the intervener is asserted against defendant, or a right or claim to the property in controversy adverse to the right of such defendant is alleged by the intervener, must be given him. Roller *v.* Ried, 87 Tex. 69, 26 S. W. 1060; Rush *v.* Davenport, (Civ. App. 1896) 34 S. W. 380.

Effect of going to trial without service.—The court acquires jurisdiction of a matter set up by intervention when the complaint is filed, and if, before it has been served, the court irregularly proceeds to trial on the issues between plaintiff and defendant, it does not thereby lose its jurisdiction of the intervention. Ah Goon *v.* San Francisco Super. Ct., 61 Cal. 555.

36. *California.*— Chase *v.* Evoy, 58 Cal. 348.

Colorado.— Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303.

Kentucky.—See Vanmeter *v.* Fidelity Trust, etc., Co., 107 Ky. 108, 53 S. W. 10, 21 Ky. L. Rep. 744, holding that, although an order has been made that interveners shall be made defendants, and that their petition shall be taken as an answer, the sufficiency of the petition may be tested by demurrer.

Minnesota.— Shepard *v.* Murray County, 33 Minn. 519, 24 N. W. 291, holding that the complaint of an intervener may be demurred to for its failure to state a cause of action or ground for intervention.

Montana.— Dietrich *v.* Steam Dredge, etc., 14 Mont. 261, 36 Pac. 81.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

37. Coffey *v.* Greenfield, 62 Cal. 602; Phares *v.* Buser, (Iowa 1899) 79 N. W. 120; Smith *v.* Allen, 28 Tex. 497; Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521 [*affirming* 4 Dak. 196, 30 N. W. 138].

38. Bechtol *v.* Bechtol, 2 Alaska 397; Chielovich *v.* Krauss, (Cal. 1886) 11 Pac. 781; Smith *v.* Allen, 28 Tex. 497. See also

An objection that the petition does not state facts sufficient to constitute a cause of intervention may be taken at any time.[39] But any informality or imperfection in the statement of facts may be waived as in the case of an ordinary complaint.[40] In determining whether an application to intervene should be allowed, the averments of the petition, so far as the same are well pleaded, must be taken as true.[41] Where an application for a leave to intervene is made, the parties all being before the court, questions in reference to the propriety of intervention may be considered as if raised on motion to strike out the intervener's complaint.[42]

c. Operation and Effect. When a person intervenes in an action he becomes, to the extent of his intervention, a plaintiff against the parties to the original action against whom his claim is made.[43] He is subject to all the rules of pleading and practice which govern plaintiffs and defendants generally.[44] An

Bouden *v.* Long Acre Square Bldg. Co., 92 N. Y. App. Div. 325, 86 N. Y. Suppl. 1080; Bird *v.* Gilliam, 125 N. C. 76, 34 S. E. 196.

39. Harlan *v.* Eureka Min. Co., 10 Nev. 92.

Motion to strike.— Where the cause of action set up in the petition of intervention is on its face a good one, but does not authorize intervention in the particular case, a motion to strike it out is proper and should be allowed. Ragland *v.* Wisrock, 61 Tex. 391.

40. Harlan *v.* Eureka Min. Co., 10 Nev. 92.

41. Wood *v.* Denver City Water Works Co., 20 Colo. 253, 38 Pac. 239, 46 Am. St. Rep. 288; Henry *v.* Travelers' Ins. Co., 16 Colo. 179, 26 Pac. 318.

42. Bennett *v.* Whitcomb, 25 Minn. 148, so holding where application was made, although not required by statute.

43. Clapp *v.* Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133. See also Townsend *v.* Driver, 5 Cal. App. 581, 90 Pac. 1071 (holding that where the only relief sought by intervention in a suit to quiet title was that plaintiff should take nothing and that the interveners should recover costs, the position of the interveners was that of plaintiff in intervention uniting with defendant in resisting the demands of plaintiff in the cause); St. Charles St. R. Co. *v.* Maryland Fidelity, etc., Co., 109 La. 491, 33 So. 574 (holding that a plaintiff in intervention, who unites with defendant in resisting the demand of plantiff in a suit, does not thereby become a defendant in the suit, nor can that status be conferred upon him by the court; plaintiff having the right to determine whom he will sue); Besson *v.* Donaldsonville, 49 La. Ann. 273, 21 So. 262 (holding that interveners in an action of slander of title, who have joined plaintiff in resisting defendant's claims and its attempt to sell the property in controversy *pendente lite*, but at the same time set up title in themselves adverse to that of plaintiff, cannot be said to have adopted the allegations of plaintiff's petition, estopping them from afterward bringing a new suit adversely thereto); Wilson *v.* Munday, 5 La. 483; Brown *v.* Mitchell, 1 Tex. Unrep. Cas. 373.

Effect of default of defendant.— The inaction of a defendant resulting in a default judgment against him does not preclude an intervener from obtaining relief. Greenberg *v.* California Bituminous Rock Co., (Cal. 1893) 33 Pac. 192; Townsend *v.* Driver, 5 Cal. App. 581, 90 Pac. 1071.

44. Townsend *v.* Driver, 5 Cal. App. 581, 90 Pac. 1071 (holding that an order granting leave to intervene in a suit to quiet title is a determination that intervener has an interest in the matter in litigation, and under Code Civ. Proc. § 387, he is entitled as a party to avail himself of the procedure and remedy to which defendant is entitled); Trompen *v.* Yates, 66 Nebr. 525, 92 N. W. 647; Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133. See also Eastmore *v.* Bunkley, 113 Ga. 637, 39 S. E. 105, holding that persons who have been allowed to intervene as defendants may file pleadings denying plaintiff's allegations, and setting up reasons why he should not have the relief sought by his petition.

Sufficiency of petition.—A plea of intervention in the nature of a creditor's bill should contain all the necessary allegations within itself, and the interpleader should not be allowed to refer to, and make a part of, his plea of intervention, portions of the original petition; but, where such reference is made and trial had on such pleadings, if the supreme court can determine that the judgment is right, it will not be disturbed. Blackwell *v.* Hatch, 13 Okla. 169, 73 Pac. 933.

Inconsistent pleas.—An intervener occupying the position of a defendant may plead inconsistent pleas, provided they are pertinent and in due order. Smith *v.* Sublett, 28 Tex. 163.

Motion to strike.—After issue is joined, a motion to strike a claim for damages in intervention comes too late. Cain *v.* Pullen, 34 La. Ann. 511.

Amendments.—An intervener is entitled to amend under the same circumstances that a plaintiff is, restricted always by the condition that he shall not retard the principal suit. Gillis *v.* Carter, 29 La. Ann. 698.

Necessity of issue.— The intervener cannot proceed without citation to the other parties and without his case having been put at issue. Chism *v.* Ong, 33 La. Ann. 702; Baker *v.* Texarkana Nat. Bank, 74 Fed. 598, 20 C. C. A. 545.

Waiver of issue.— It is too late for a party to a suit to plead the want of issue joined upon a petition of intervention, after he has gone into trial without answering it, unless

intervener by intervening submits to the jurisdiction of the court;[45] he must take the case as he finds it[46] and cannot urge matters which would go to the dismissal of the suit,[47] or complain of the mode of procedure,[48] or make defenses which are personal to defendant,[49] or retard the cause.[50] But he may interpose a general demurrer or exceptions which go to the merits of the action.[51] He is not bound by previous rulings as to questions of law.[52]

d. Dismissal or Withdrawal of Intervention.[53] Where no affirmative relief is sought against the intervener,[54] or no counter-claim has been interposed,[55] or where it will not otherwise materially prejudice the rights of the original parties,[56] he may voluntarily dismiss his intervention. An involuntary dismissal of the petition for intervention may be had upon the grounds applicable to proceedings

he can show that he was ignorant before going to trial of the existence of intervention in the record. McCoy *v.* Sanson, 13 La. Ann. 455.

45. Jack *v.* Des Moines, etc., R. Co., 49 Iowa 627; Hoover's Succession *v.* York, 30 La. Ann. 752; Kenner's Syndic *v.* Holliday, 19 La. 154; Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133; Bowdoin College *v.* Merritt, 59 Fed. 6.

46. Seaboard Air Line R. Co. *v.* Knickerbocker Trust Co., 125 Ga. 463, 54 S. E. 138 (holding that where the relief prayed arose out of a decree rendered before the filing of the petition for intervention, the intervener cannot attack the decree on any ground which might properly have been the subject-matter of a plea by defendant); Charleston, etc., R. Co. *v.* Pope, 122 Ga. 577, 50 S. E. 374; Kenner's Syndic *v.* Holliday, 19 La. 154. See also Tompkins *v.* Continental Nat. Bank, 71 N. Y. App. Div. 330, 75 N. Y. Suppl. 1099.

47. Cahn *v.* Ford, 42 La. Ann. 965, 8 So. 477.

Laches.—A person who comes in voluntarily for the purpose of contesting plaintiff's adverse claim to land cannot assert laches upon their part. Hunt *v.* O'Leary, 84 Minn. 200, 87 N. W. 611.

48. Cahn *v.* Ford, 42 La Ann. 965, 8 So. 477.

49. Cahn *v.* Ford, 42 La. Ann. 965, 8 So. 477. See also Honegger *v.* Wettstein, 94 N. Y. 252, holding that, in an action for the price of goods, the receiver of the buyer cannot intervene and set up the defense that the goods were sold and shipped into the country in violation of the revenue laws, so as to prevent a judgment against the buyer, such defense not having been pleaded by him.

50. Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318 (holding that Code, § 3595, relating to intervention, providing that the court shall determine on the intervention at the same time the action is decided, and the intervener has no right to delay, refers to a delay of trial, and not to such delay as may result from an immediate trial; and where intervener, by his action, does not occasion any postponement, he is not within the prohibition of the statute); Kassing *v.* Walter, (Iowa 1896) 65 N. W. 832; Walker *v.* Dunbar, 7 Mart. N. S. (La.) 586, 18 Am. Dec. 248.

Time for service.—An intervener is entitled to the time necessary to have his intervention served and put at issue before the case can be tried. White Castle Lumber, etc., Co. *v.* Hart, 48 La. Ann. 1034, 20 So. 201; Silbernagel *v.* Silbernagel, 32 La. Ann. 765; Sandel *v.* Douglas, 25 La Ann. 564. Where plaintiff has treated the intervening parties as properly in court he must allow them the usual delays to bring in the answers of all the necessary parties. Ardry *v.* Ardry, 16 La. 264.

Readiness to plead.—An intervener is presumed to be always in court ready to plead. Thompson *v.* Mylne, 4 La. Ann. 206, holding that he cannot complain of a want of notice of an order in open court between the original parties. But *compare* Townsend *v.* Driver, 5 Cal. App. 581, 90 Pac. 1071, holding that where, in a suit to quiet title, the court granted leave for one to intervene, and the issues of fact tendered by the complaint in intervention was undetermined, the determination of such issues could not be had, in the absence of the parties in intervention, without previous service of the notice prescribed in Code Civ. Proc. § 594, unless notice was waived.

51. Hanchett *v.* Gray, 7 Tex. 549.

52. Castle *v.* Madison, 113 Wis. 346, 89 N. W. 156, holding that riparian owners on a lake, who intervene in a suit for the abatement of a dam at the outlet of such lake, on the ground that they have acquired a prescriptive right to have the artificial level of the lake created by the dam maintained, are not obliged to take the case as they find it, but may plead in abatement for defect of parties.

53. **Right of original parties to dismiss** see DISMISSAL AND NONSUIT, 14 Cyc. 410.

54. Sheldon *v.* Gunn, 56 Cal. 582; Schaetzel *v.* Huron, 6 S. D. 134, 60 N. W. 741; Noble *v.* Meyers, 76 Tex. 280, 13 S. W. 229. See Buckner *v.* Baker, 11 La. 459, where it is held that an intervention is not discontinued by the fact that the intervener consents to the discharge of a rule for the payment of money subject to contest in the sheriff's hands. But *compare* Fulton *v.* Methow Trading Co., 45 Wash. 136, 88 Pac. 117.

55. Schaetzel *v.* Huron, 6 S. D. 134, 60 N. W. 741.

56. Morrison *v.* New Haven, etc., Min. Co., 143 N. C. 250, 55 S. E. 611; Schaetzel *v.* Huron, 6 S. D. 134, 60 N. W. 741.

generally.[57] A motion to dismiss should be specific as to the ground upon which it is made.[58] Where a person has been allowed to intervene he should not be afterward dismissed without a fair and sufficient reason, and cannot be dismissed at the mere discretion of the court.[59]

e. Decision and Judgment. As a general rule, under the statutes, it is provided that the intervention must be decided with the principal suit,[60] and such judgment may be rendered as would be proper in an ordinary action upon the issues raised.[61]

VIII. SIGNATURE AND VERIFICATION.

A. Signature — 1. Necessity — a. In General. Generally speaking all pleadings filed in courts of record should be signed either by the party or by his attorney.[62] Many statutes, especially in the code states, expressly require such signature.[63]

b. Amended Pleadings. An amendment may be written in above the signature or may be written below and again subscribed;[64] or, if the latter method is used, a subscription may be deemed unnecessary for the reason that the added

57. **Grounds for dismissal** in general see DISMISSAL AND NONSUIT, 14 Cyc. 431 *et seq.*

Time at which motion may be made.— In the absence of a statute limiting the time within which a motion to dismiss a complaint in intervention may be made, it is within the sound discretion of the court to entertain a motion to dismiss such a complaint filed in pursuance of leave obtained by an *ex parte* order, although made several months after leave to file the complaint had been granted and at a subsequent term. Ainsworth *v.* Evans, (Ariz. 1905) 80 Pac. 344.

58. Poehlmann *v.* Kennedy, 48 Cal. 201.

59. Fertel *v.* Sampliner, 18 Ohio Cir. Ct. 740, 4 Ohio Cir. Dec. 166.

60. See the statutes of the several states. And see Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303; State *v.* Holmes, 59 Nebr. 503, 81 N. W. 512, holding that the court may properly pass on a petition of intervention filed without leave or notice, and without motion for the allowance of such intervention immediately prior to or at the time of a decision or judgment on an issue in the cause. But see McMillen *v.* Gibson, 10 La. 517 (holding that an intervention is a separate demand, and so the trial between the original parties may be had without waiting for it); Massie *v.* Stradford, 17 Ohio St. 596 (holding that where the party under whom defendant in an action of trespass claims comes in by cross petition, the action of trespass will be stayed until the decision on the petition).

61. Thompson *v.* Chauveau, 7 Mart. N. S. (La.) 331, 18 Am. Dec. 246 (holding that where an intervener adopts and defends the acts of one of the parties as his agent, the same judgment should be rendered against him on the issue joined as if an original party to the suit); Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133 (holding that defendant may recover an affirmative judgment against the intervener, either because of matters growing out of the intervener's claim, or by establishing a counter-claim); Muhlenberg *v.* Tacoma, 25 Wash. 36, 64 Pac. 925 (holding that where a pledgee of city warrants, claiming to have acquired absolute ownership, sues the city to recover thereon, and the receiver of the insolvent pledger intervenes, claiming the warrants and proceeds thereof, subject to plaintiff's rights as pledgee, the court may fully determine the respective rights and interest of all the parties in the action).

Judgment against intervener and defendant.— A suit against a sheriff for trespass in taking possession of goods is not changed as to its character by an intervention of a foreign corporation, alleging that the sheriff had acted under its direction and admitting the facts, pleaded by the sheriff in justification, that his acts were done by the direction of such corporation, and seeking a removal to a federal court; but the sheriff is still a necessary party, and the judgment, if in favor of plaintiff, must be a joint judgment against all defendants. Thorn Wire Hedge Co *v.* Fuller, 122 U. S. 535, 7 S. Ct. 1265, 30 L. ed. 1235.

Where a petition in intervention seeks no affirmative relief it cannot be treated as a cross bill, and a finding of the issues for plaintiff necessarily finds against the intervener. Baer *v.* Pfaff, 44 Mo. App. 35.

62. *Indiana.*— Riley *v.* Murray, 8 Ind. 354.

New York.— Laimbeer *v.* Allen, 2 Sandf. 648.

Texas.— Hemming *v.* Zimmerschitte, 4 Tex. 159.

England.— Duckitt *v.* Jones, 33 L. T. Rep. N. S. 777; Barford *v.* Barford, 3 Wkly. Rep. 41.

Canada.— Marcopostolon *v.* Fouriesos, 5 Quebec Pr. 315.

See 39 Cent. Dig. tit. "Pleading," § 853.

63. See the statutes of the several states. And see Ashbrook *v.* Roberts, 82 Ky. 298; German American Bank *v.* Champlin, 11 N. Y. Civ. Proc. 452; Com. *v.* Hoobaugh, 5 Pa. Dist. 502; Morcland *v.* Marion County, 17 Fed. Cas. No. 9,794, 1 N. Y. Wkly. Dig. 326.

Such a statutory provision is mandatory.— Perras *v.* Denver, etc., R. Co., 5 Colo. App. 21, 36 Pac. 637.

64. Nicodemus *v.* Simons, 121 Ind. 564, 23 N. E. 521.

portion would be a part of the pleading as amended which is sufficiently subscribed by the original subscription.[65]

c. Copies Served. Copies of pleadings served need not be signed,[66] unless signature is required by statute or rule.[67]

d. Effect of Omission of Signature. The omission of a proper signature is by some decisions held to be ground for demurrer;[68] by others a ground for motion to strike from the files.[69] But a failure to sign a pleading, not being a defect in substance, does not render a judgment void.[70]

2. Who May or Must Sign. Certain pleadings must be signed by the party in person. Thus a plea of coverture should be so signed,[71] and so as to a plea to the jurisdiction,[72] since, if signed by an attorney, who is an officer of the court, it is supposed to have been signed by leave of court, and the asking of leave is a tacit admission of jurisdiction. But pleas in abatement may be signed either by the party in person or by counsel.[73] In the absence of statute or rule, a plea, replication, or other pleading which contains a denial merely need not be signed by counsel.[74] But special,[75] and double,[76] pleas must be so signed. Generally speaking an attorney-at-law who signs a pleading will be presumed to have authority so to do, unless the contrary appears;[77] but in the case of a public corporation which has a regular official attorney, appointed by law, there can be no presumption that any other attorney has authority to represent it, and a subscription by attorney in such a case should profess to be made by one having lawful authority.[78] One who is neither an attorney-at-law nor an attorney for that particular purpose cannot subscribe pleadings.[79]

3. Requisites and Sufficiency — a. In General. The ordinary legal meaning of the word "signature" is that the person's name has been written at the end of the instrument, and as used in the codes and practice acts the words "sign" and "subscribe" have the same import.[80] Therefore a pleading having no signature at its close, but bearing on the outside, below the indorsement on its back, the name of the attorney, is not "signed."[81] But a pleading signed "defendant" has been held sufficient, where the name of defendant appeared in the title.[82] Signing by means of a rubber stamp has been held sufficient,[83] but a printed name at the end of a pleading is not a signature.[84] If the person whose signature should

65. Payne *v.* Crawford, 97 Ala. 604, 11 So. 725.

66. Wilson *v.* Fine, 38 Fed. 789; Crooks *v.* Davis, 5 U. C. Q. B. O. S. 141.

67. Allen *v.* Bagnell, 12 N. Y. Civ. Proc. 426.

68. See *supra*, VI, F, 1, l.

69. See *infra*, XII, C, 1, c, (VI).

70. Phillips *v.* Malone Minor (Ala.) 110; Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6.

71. Keddeslin *v.* Meyer, 2 Miles (Pa.) 295.

72. *Illinois.*—Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Vermont.— Kenney *v.* Howard, 67 Vt. 375, 31 Atl. 850.

Virginia.— Hortons *v.* Townes, 6 Leigh 47.

West Virginia.— Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

United States.— Adams *v.* White, 1 Fed. Cas. No. 68, 2 Pittsb. (Pa.) 21; Teasdale *v.* Rambler, 23 Fed. Cas. No. 13,815, Bee 9.

But see State Bank *v.* Anderson, 3 Sneed (Tenn.) 669, holding that the signature of an attorney to a plea to the jurisdiction was sufficient if the plea purported to be made by defendant in proper person. *Contra*, Prim *v.* Davis, 2 Ala. 24, holding that plea could be signed by counsel and verified by a third person.

73. Prim *v.* Davis, 2 Ala. 24; Colburn *v.* Tolles, 13 Conn. 524; Holloway *v.* Freeman, 22 Ill. 197; Grand Lodge B. L. F. *v.* Cramer, 60 Ill. App. 212.

A plea of misnomer in abatement is an exception to this rule. Guild *v.* Richardson, 6 Pick. (Mass.) 364.

74. Pumpelly *v.* Crosby, 8 Johns. (N. Y.) 322; Hubert *v.* Weymouth, W. Bl. 816.

75. Dubois *v.* Philips, 5 Johns. (N. Y.) 235.

76. Satterlee *v.* Satterlee, 8 Johns. (N. Y.) 327.

77. Moreland *v.* Marion County, 17 Fed. Cas. No. 9,794.

78. Moreland *v.* Marion County, 17 Fed. Cas. No. 9,794.

79. Dixey *v.* Pollock, 8 Cal. 570.

80. Ashbrook *v.* Roberts, 82 Ky. 298.

81. Ashbrook *v.* Roberts, 82 Ky. 298; Schiller *v.* Maltbie, 11 N. Y. Civ. Proc. 304. *Contra*, Wood *v.* Holden, 45 Me. 374.

82. Wilcox *v.* Chambers, 34 Conn. 179.

83. Streff *v.* Colteaux, 64 Ill. App. 179.

84. Nightingale *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,264, 2 Sawy. 338.

be subscribed request another to sign his name in his presence, such signing is sufficient.[85] Attorneys may sign in their firm-name;[86] and it is sufficient if an attorney signs his name only, without describing himself as attorney.[87]

b. Office Address of Counsel. Statutes or rules frequently require the office address of counsel to be indorsed upon certain pleadings,[88] and a failure in this regard makes the pleading invalid.[89]

c. Signature to Verification as Signature to Pleading. A signature to an affidavit required to be annexed to a pleading has been held a sufficient signature to the pleading.[90]

B. Verification — 1. Definition. A verification as used in this title is a statement under oath, that a pleading is true.[91]

2. Necessity — a. In General. In actions at law pleadings need not in general be verified by oath, where no verification is required by statute.[92] But statutes or rules in many states have made it necessary to verify certain pleadings or pleadings setting up certain causes of action or defenses.[93] Under some statutes all pleadings must be verified;[94] in others, if any pleading is verified, all subsequent pleadings of fact must be verified,[95] which implies that, where a pleading is unveri-

85. Dixey *v.* Pollock, 8 Cal. 570.

86. Zimmerman *v.* Wead, 18 Ill. 304; Nave *v.* Lebanon First Nat. Bank, 87 Ind. 204.

87. Merrell *v.* Lattimore, 12 Rob. (La.) 138.

88. Feist *v.* New York, 15 N. Y. App. Div. 495, 44 N. Y. Suppl. 497; Allen *v.* Bagnell, 12 N. Y. Civ. Proc. 426; German American Bank *v.* Champlin, 11 N. Y. Civ. Proc. 452.

89. Drucker *v.* McCallum, 21 Abb. N. Cas. (N. Y.) 209.

90. Zollicoffer *v.* Briggs, 3 Rob. (La.) 236; Johnson *v.* Johnson, Walk. (Mich.) 309; Barrett *v.* Joslynn, 9 Misc. (N. Y.) 407, 29 N. Y. Suppl. 1070; Harrison *v.* Wright, 1 N. Y. St. 736; Hubbell *v.* Livingston, 1 Code Rep. (N. Y.) 63. See also *infra*, VIII, B, 7.

91. Orr, etc., Hardware Co. *v.* Needham Co., 169 Ill. 100, 48 N. E. 444, 61 Am. St. Rep. 151; McDonald *v.* Rosengarten, 134 Ill. 126, 25 N. E. 429; Dorn *v.* Tyler, 64 Ill. App. 110; Patterson *v.* Brooklyn, 6 N. Y. App. Div. 127, 40 N. Y. Suppl. 581; De Witt *v.* Hosmer, 3 How. Pr. (N. Y.) 284.

An affidavit that defendant has a good defense on the merits is not an affidavit that the plea of *non assumpsit* is true. Reed *v.* Fleming, 102 Ill. App. 668 [*reversed* on other grounds in 209 Ill. 390, 70 N. E. 667].

92. *Georgia.*—Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; Farmers' Alliance Warehouse, etc., Co. *v.* McElhannon, 93 Ga. 394, 25 S. E. 558; Hagerstown Steam-Engine Co. *v.* Grizzard, 86 Ga. 574, 12 S. E. 939.

Illinois.— Robertson *v.* Burkell, 3 Ill. 278.

Louisiana.— Bingey *v.* Cox, 2 Mart. N. S. 473.

Maine.— Miller *v.* Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527.

Missouri.— Hilton *v.* St. Louis, 99 Mo. 199, 12 S. W. 657.

New York.— Bancker *v.* Ash, 9 Johns. 250.

Pennsylvania.— *In re* Towanda Bridge Co., 91 Pa. St. 216.

Tennessee.— McKinney *v.* Patterson, 10 Humphr. 493.

Texas.—Ash *v.* Beck, (Civ. App. 1902) 68 S. W. 53.

See 39 Cent. Dig. tit. "Pleading," §§ 860, 861.

93. See the statutes of the several states. And see the following cases:

Arkansas.— McGuire *v.* Cook, 13 Ark. 448.

California.— Stockton *v.* Dahl, 66 Cal. 377, 5 Pac. 682.

Georgia.— Columbia Drug Co. *v.* Goodman, 119 Ga. 474, 46 S. E. 647; Cherry *v.* Rawson, 49 Ga. 338.

Illinois.— Ryan *v.* Lander, 89 Ill. 554; Martin *v.* Nelson, 53 Ill. App. 517; Garland *v.* Peeney, 1 Ill. App. 108; Davison *v.* Hill, 1 Ill. App. 70.

Kentucky.— Matthews *v.* Jones, 2 Metc. 254.

Maryland.— E. J. Codd Co. *v.* Parker, 97 Md. 319, 55 Atl. 623.

Minnesota.— McMath *v.* Parsons, 26 Minn. 246, 2 N. W. 703.

Mississippi.— Oglesby *v.* Stribling, 67 Miss. 666, 7 So. 463.

Missouri.— Barret *v.* Browning, 8 Mo. 689.

New York.— Buffalo City *v.* Scranton, 20 Wend. 676.

Tennessee.—Caldwell *v.* Richmond, 1 Heisk. 468; Baker *v.* Ammon, 2 Head 393.

Texas.— Gass *v.* Sanger, (Civ. App. 1893) 30 S. W. 502.

Virginia.— Watkins *v.* Hopkins, 13 Gratt. 743.

See 39 Cent. Dig. tit. "Pleading," §§ 860, 861.

94. Halliburton *v.* Nance, 40 Ark. 161. See O'Bryan *v.* Langley, 59 S. W. 523, 22 Ky. L. Rep. 1030, holding that all pleadings not within the exceptions of the statute must be verified.

95. *California.*— Benham *v.* Connor, 113 Cal. 168, 45 Pac. 258; San Francisco *v.* Itsell, 80 Cal. 57, 22 Pac. 74; Brooks *v.* Chilton, 6 Cal. 640.

Colorado.— Perras *v.* Denver, etc., R. Co., 5 Colo. App. 21, 36 Pac. 637.

Iowa.— Harper *v.* Drake, 15 Iowa 157.

Minnesota.— Smith *v.* Mulliken, 2 Minn. 319.

New York.— Morris *v.* Fowler, 99 N. Y.

fied, each subsequent pleading may be unverified.[96] Where service of a copy is necessary the party served may presume that the original is like the copy in respect to the presence or absence of a verification.[97] The chancery rule requiring verification applies to pleadings in an equity suit, and not to statutory equitable pleadings in a law action.[98]

b. Pleas and Answers — (i) *Dilatory Pleas.* A statute of Anne [99] provided that all dilatory pleas should be verified by oath, and this rule has been followed with more or less strictness in many American jurisdictions.[1] Thus pleas in abatement are frequently required by statute or rule to be verified;[2]

App. Div. 245, 90 N. Y. Suppl. 1106; Wendt *v.* Peyser, 14 Hun 114; Jones *v.* Seaman, 30 Misc. 65, 62 N. Y. Suppl. 883; Hamilton *v.* Gibbs, 10 N. Y. Suppl. 521; Levi *v.* Jakeways, 4 How. Pr. 126; Lin *v.* Jaquays, 2 Code Rep. 29.

North Carolina.— Lindsay *v.* Beaman, 128 N. C. 189, 38 S. E. 811; Reynolds *v.* Smathers, 87 N. C. 24; Haywood *v.* Bryan, 63 N. C. 521.

South Carolina.— Farmers', etc., Mfg. Co. *v.* Smith, 70 S. C. 160, 49 S. E. 226.

Wisconsin.— Knowles *v.* Fritz, 58 Wis. 216, 16 N. W. 621.

See 39 Cent. Dig. tit. "Pleading," § 885.

Such a provision is mandatory.— Perras *v.* Denver, etc., R. Co., 5 Colo. App. 21, 36 Pac. 637.

The word "subsequent" means subsequent in order, not subsequent in time. Hempstead *v.* Hempstead, 7 How. Pr. (N. Y.) 8.

A counter-claim is a subsequent pleading within the meaning of this rule, and must be verified when the complaint or petition is verified. Yarger *v.* Chicago, etc., R. Co., 78 Iowa 650, 43 N. W. 469 [*overruling* Innes *v.* Krysher, 9 Iowa 295].

If it is necessary for a plaintiff to verify a demand of a certain character, it is generally necessary for a defendant to verify a similar demand when set up by way of counter-claim or set-off. Warfield *v.* Gardner, 3 Ky. L. Rep. 423.

96. Brooks *v.* Tiffany, 117 N. Y. App. Div. 470, 102 N. Y. Suppl. 626; Beglin *v.* People's Trust Co., 48 Misc. (N. Y.) 494, 95 N. Y. Suppl. 910; Jones *v.* Seaman, 30 Misc. (N. Y.) 65, 62 N. Y. Suppl. 883.

97. Peyser *v.* McCormack, 7 Hun (N. Y.) 300; Barker *v.* Cook, 40 Barb. (N. Y.) 254; Trowbridge *v.* Didier, 4 Duer (N. Y.) 448; Klenert *v.* Iba, 17 Misc. (N. Y.) 69, 39 N. Y. Suppl. 836; Knowles *v.* Fritz, 58 Wis. 216, 16 N. W. 621.

98. Miller *v.* Waldoborough Packing Co., 88 Me. 605, 34 Atl. 327.

99. St. 4 Anne, c. 16, § 11.

1. See the statutes of the several states. And see Mayhew *v.* Ford, 61 N. J. L. 532, 39 Atl. 914; Casporus *v.* Jones, 7 Pa. St. 120; Day *v.* Hamburgh, 1 Browne (Pa.) 75.

In Kentucky the statute of Anne requiring all dilatory pleas to be sworn to is not in force. Ingraham *v.* Arnold, 1 J. J. Marsh. 406.

2. *Alabama.*—Hall *v.* Wallace, 25 Ala. 438; Hart *v.* Turk, 15 Ala. 675; Coalter *v.* Bell, 2 Stew. & P. 358.

Arkansas.— White *v.* Yell, 12 Ark. 139; Town *v.* Wilson, 8 Ark. 464; Heard *v.* Lowry, 5 Ark. 522.

Florida.— Stewart *v.* Bennett, 1 Fla. 437.

Georgia.— Macon, etc., R. Co. *v.* Davis, 27 Ga. 113.

Illinois.— Grand Lodge B. R. T. *v.* Randolph, 186 Ill. 89, 57 N. E. 882; Life Assoc. of America *v.* Fassett, 102 Ill. 315; King *v.* Haines, 23 Ill. 340; Ricker *v.* Scofield, 28 Ill. App. 32.

Indiana.— Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466; Dawson *v.* Vaughan, 42 Ind. 395; Knoefel *v.* Williams, 30 Ind. 1; Indianapolis, etc., R. Co. *v.* Summers, 28 Ind. 521; Smith *v.* Moore, 1 Ind. 548.

Iowa.— Saum *v.* Jones County, 1 Greene 165.

Maine.— Bellamy *v.* Oliver, 65 Me. 108; Fogg *v.* Fogg, 31 Me. 302.

Maryland.— Graham *v.* Fahnestock, 5 Gill 215; Deheaulme *v.* Boisneuf, 4 Harr. & M. 413.

Mississippi.—Moore *v.* Knox, 46 Miss. 602; Beck *v.* Beck, 36 Miss. 72; Lillard *v.* Planters' Bank, 3 How. 78.

New Jersey.— Trenton Bank *v.* Wallace, 9 N. J. L. 83.

New York.— Richmond *v.* Tallmadge, 16 Johns. 307: St. Croix *v.* Sands, 1 Johns. 328; Marston *v.* Lawrance, 1 Johns. Cas. 397.

Pennsylvania.— Rapp *v.* Elliot, 2 Dall. 184, 1 L. ed. 341; Thomas *v.* Thomas, 4 Leg. Op. 440.

Tennessee.— Grove *v.* Campbell, 9 Yerg. 7; Young *v.* Stringer, 5 Hayw. 30.

Texas.— Roane *v.* Ross, 84 Tex. 46, 19 S. W. 339; Allen *v.* Pannell, 51 Tex. 165; Bishop *v.* Honey, 34 Tex. 245; Whittenberg *v.* Newton, 31 Tex. 474; Cook *v.* Thornhill, 16 Tex. 177; Leigh *v.* Wagenbuhr, 2 Tex. Unrep. Cas. 295; Cook *v.* Roberson, (Civ. App. 1898) 46 S. W. 866; Mullaly *v.* Springer Lith. Co., (Civ. App. 1895) 29 S. W. 167; Turmam *v.* Robertson, 3 Tex. App. Civ. Cas. § 215; Gulf, etc., R. Co. *v.* France, 2 Tex. App. Civ. Cas. § 701; Strohl *v.* Pinkerton, 1 Tex. App. Civ. Cas. § 470.

Wisconsin.— Knowlton *v.* Culver, 1 Pinn. 86.

United States.— Wittemore *v.* Malcomson, 28 Fed. 605; Fenwick *v.* Grimes, 8 Fed. Cas. No. 4,734, 5 Cranch C. C. 641.

See 39 Cent. Dig. tit. "Pleading," § 883.

Contra.— Colburn *v.* Tolles, 13 Conn. 524; Smith *v.* Atlantic Mut. F. Ins. Co., 22 N. H. 21; National Niantic Bank *v.* Adams Express Co., 16 R. I. 343, 15 Atl. 763.

and the same is true of pleas to the jurisdiction.[3] But where the truth of a dilatory plea appears of record, no affidavit is necessary.[4]

(II) *Pleas in Bar.* Pleas of the general issue or general denial, or pleas amounting to the same, need not be verified, unless it is required by statute;[5] and so generally with pleas in bar.[6]

(III) *Pleas Puis Darrein Continuance.* Previous to the passage of the statute of 4 and 5 Anne, c. 16, the law of England did not require pleas *puis darrein continuance* to be verified.[7] Under this statute, however, which required every dilatory plea to be verified by affidavit, it was held that all pleas *puis darrein continuance* must be so verified.[8] And the same holding has been made in this country.[9] Some of the cases make a distinction between pleas *puis darrein continuance* pleaded in abatement, and such pleas pleaded in bar. In the former case verification is held necessary;[10] in the latter case, not.[11] In some states such a plea is expressly required to be verified.[12]

c. Pleadings Denying Agency or Authority or Non-Existence Thereof.[13] The statutes of some states provide that an allegation of agency or authority shall be taken as true unless the denial thereof be verified.[14] But this rule does

A plea of privilege, by an attorney, in abatement does not require an affidavit of its truth. Brooks *v.* Patterson, 1 Johns. Cas. (N. Y.) 328.

3. Bass *v.* Stevens, 17 Ga. 573; Wittemore *v.* Malcomson, 9 N. J. L. J. 338; Taylor *v.* Hall, 20 Tex. 211; Teasdale *v.* Rambler, 23 Fed. Cas. No. 13,815, Bee 9.

Under Ill. Rev. St. (1874) c. 1, § 1, a plea to the jurisdiction of the court need not be verified. Drake *v.* Drake, 83 Ill. 526; Howe *v.* Thayer, 24 Ill. 246; Pooler *v.* Southwick, 126 Ill. App. 264.

4. Wilson *v.* Shannon, 6 Ark. 196; Brown *v.* Peevey, 6 Ark. 37; Heard *v.* Lowry, 5 Ark. 522; Lillard *v.* Planters' Bank, 3 How. (Miss.) 78; Keabadour *v.* Weir, 20 Tex. 254; Johnston *v.* Price, 2 Tex. App. Civ. Cas. § 756.

5. Kansas City, etc., R. Co. *v.* Henson, 132 Ala. 528, 31 So. 590; Decatur *v.* White, 109 Ala. 389, 19 So. 428; Batterman *v.* Journal Co., 28 Misc. (N. Y.) 375, 59 N. Y. Suppl. 965.

6. McDougal *v.* Brazil, 83 Ind. 211.

In pleadings relating to written instruments see *infra*, VIII, B, 2, f.

A plea of former suit is in the nature of a plea in bar, and therefore need not be sworn to. Green *v.* Neal, 2 Heisk. (Tenn.) 217.

A plea of ne unques executor is a plea in bar and not in abatement, and puts plaintiff on proof of his representative character, without being verified by affidavit. Sorrell *v.* Craig, 15 Ala. 789.

Under a statute in Tennessee any plea must be under oath if required in the declaration. Baker *v.* Ammon, 2 Head 393.

7. Hawkins *v.* Moor, Cro. Jac. 261, 79 Eng. Reprint 225; Peirce *v.* Paxton, 2 Salk. 519. See also Cockaine *v.* Witnam, Cro. Eliz. 49, 78 Eng. Reprint 311.

8. Martin *v.* Wyvill, Str. 492; Paris *v.* Salkeld, 2 Wils. C. P. 137.

9. Day *v.* Hamburgh, 1 Browne (Pa.) 75; Morrow *v.* Morrow, 1 Treadw. (S. C.) 455, 3 Brev. 394 (holding, however, that the affidavit is to inform the court and not to give validity to the plea; when, therefore, such a plea has been filed with leave of court, it will be presumed that satisfactory proof had been given to the court, or that it was consented to by the opposite party); Gordon *v.* Robinson, 3 Ont. Pr. 366; McDonough *v.* L'Institution Catholique, etc., 5 Quebec Pr. 436.

10. Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401; Donley *v.* Dougherty, 97 Ill. App. 544; Harding *v.* Horton, 79 Ill. App. 123; Gibson *v.* Bourland, 13 Ill. App. 352; Crutchfield *v.* Carman, Tapp. (Ohio) 54.

11. Robinson *v.* Burkell, 3 Ill. 278; Jackson *v.* Peer, 4 Cow. (N. Y.) 418; Bancker *v.* Ash, 9 Johns. (N. Y.) 250; Crutchfield *v.* Carman, Tapp. (Ohio) 54.

12. Lindsay *v.* Barnett, 130 Ala. 417, 30 So. 395; Chattanooga *v.* Neely, 97 Tenn. 527, 37 S. W. 281; Caldwell *v.* Richmond, 1 Heisk. (Tenn.) 468.

Matter of defense arising after suit brought, but before issue joined, is not proper matter for a plea *puis darrein continuance*, and a plea setting up such matter need not be verified. Lindsay *v.* Barnett, 130 Ala. 417, 30 So. 395.

A plea of the statute of limitations does not fall within a statute requiring pleas *puis darrein continuance* to be sworn to. Chattanooga *v.* Neely, 97 Tenn. 527, 37 S. W. 281.

13. **In relation to written instruments** see *infra*, VIII, B, 2, f, (I), (B), (1).

14. Missouri Pac. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951; Moore *v.* Emmert, 21 Kan. 1; Arkansas City Bank *v.* McDowell, 7 Kan. App. 568, 52 Pac. 56; Swofford Bros. Dry Goods Co. *v.* Berkowitz, 7 Kan. App. 24, 51 Pac. 796; Terry *v.* Anderson, (App. 1897) 51 Pac. 800; Hughes *v.* Carlton, 5 Kan. App. 386, 48 Pac. 444; McCabe, etc., Constr. Co. *v.* Wilson, 17 Okla. 355, 87 Pac. 320; Hamilton *v.* Bell, 37 Tex. Civ. App. 456, 84 S. W. 289; J. B. Watkins Land Mortg. Co. *v.* Campbell, (Tex. Civ. App. 1904) 81 S. W. 560; Edinburgh American Land Mortg. Co. *v.* Briggs, (Tex. Civ. App. 1897) 41 S. W.

not prevail in respect to an allegation of a want of authority.[15] In order to bring an allegation of agency within this rule, there must be a specific allegation of the appointment of some person to do the act which is the foundation of the suit. It is not sufficient to say that the other party did the act by its agents and servants duly appointed thereto.[16]

d. Pleadings Denying Incorporation or Partnership. Under many statutes an allegation of incorporation or partnership in a pleading is admitted unless denied by the opposite party under oath.[17]

e. Pleadings Denying Capacity to Sue — (i) *In General.* Under the statutes of several states a plea or answer setting up that plaintiff has not legal capacity to sue,[18] or is not entitled to recover in the capacity in which he sues,[19] will not be considered unless verified.

(ii) *Representative Character.* Under a statute providing that plaintiff need not prove a description of character unless specially denied by verified plea, failure to deny plaintiff's representative capacity not only relieves plaintiff from proving it, but precludes defendant from showing that plaintiff is not entitled to sue in a representative capacity.[20] Plaintiff is not, however, relieved against the necessity of maintaining the cause of action, which is put in issue by the plea.[21]

f. Pleadings Relating to Written Instruments — (i) *Denial of Execution* — (a) *In General.* It is a common provision of the statutes that no person shall be permitted to deny on trial the execution of any instrument in writing, whether sealed or not, which is the foundation of the action or defense, unless the person so denying the same shall verify his plea by affidavit.[22]

1036. *Compare* Texas, etc., R. Co. *v.* Byers, (Tex. Civ. App. 1903) 73 S. W. 427, holding that the mere fact of agency, in the absence of allegations charging the execution of an instrument in writing, need not be denied on oath.

15. Winfield Land, etc., Co. *v.* Burger, 49 Kan. 233, 30 Pac. 476; Atchison, etc., R. Co. *v.* Walz, 40 Kan. 433, 19 Pac. 787.

16. Swofford Bros. Dry Goods Co. *v.* Berkowitz, 7 Kan. App. 24, 51 Pac. 796.

17. See the statutes of the several states. And see Bradley *v.* Spickardsville, 90 Mo. App. 416; Drumm Flato Commission Co. *v.* Summers, 89 Mo. App. 300; Richards *v.* McNemee, 87 Mo. App. 396; Reed *v.* Brewer, 90 Tex. 144, 37 S. W. 418; Davis *v.* Bingham, (Tex. Civ. App. 1900) 56 S. W. 132; Lago *v.* Walsh, 98 Wis. 348, 74 N. W. 212; Martin *v.* American Express Co., 19 Wis. 336; Goodrich *v.* Compound School Dist. No. 5, 2 Wis. 102.

18. See the statutes of the several states. And see Mullaly *v.* Springer Lith. Co., (Tex. Civ. App. 1895) 29 S. W. 167; Gulf, etc., R. Co. *v.* France, 2 Tex. App. Civ. Cas. § 701.

Denial of ownership of instrument.— Under such a statute, a plea denying the right of plaintiff to sue on account of his lack of property in the instrument sued on does not require verification. Miller *v.* Houston City St. R. Co., 55 Fed. 366, 5 C. C. A. 134.

19. Gulf, etc., R. Co. *v.* France, 2 Tex. App. Civ. Cas. § 701.

20. Thompson *v.* Jackson First Nat. Bank, 85 Miss. 261, 37 So. 645.

21. Anderson *v.* Leland, 46 Miss. 290.

22. See the statutes of the several states. And see the following cases:

Alabama.— Easley *v.* Boyd, (1905) 39 So. 988; Dexter *v.* Ohlander, 89 Ala. 262, 7 So. 115; Hooper *v.* Strahan, 71 Ala. 75; Rich *v.* Thornton, 69 Ala. 473; Drake *v.* Flewellen, 33 Ala. 106; Moore *v.* Leseur, 18 Ala. 606.

Arkansas.— Missouri Pac. R. Co. *v.* Yarnell, 65 Ark. 320, 46 S. W. 943; Weaver *v.* Carnall, 35 Ark. 198, 37 Am. Rep. 22.

California.— Cutten *v.* Pearsall, 146 Cal. 690, 81 Pac. 25; Knight *v.* Whitmore, 125 Cal. 198, 57 Pac. 891; Fox *v.* Stockton Harvester, etc., Works, 73 Cal. 273, 15 Pac. 430; Clark *v.* Child, 66 Cal. 87, 4 Pac. 1058; Sloan *v.* Diggins, 49 Cal. 38; Newsom *v.* Woollacott, 5 Cal. App. 722, 91 Pac. 347.

Colorado.— Parkison *v.* Boddiker, 10 Colo. 503, 15 Pac. 806.

Connecticut.— New York, etc., R. Co. *v.* Hunt, 39 Conn. 75; Canfield *v.* Squire, 2 Root 300, 1 Am. Dec. 71.

Georgia.— Anderson *v.* Blair, 121 Ga. 120, 48 S. E. 951; Heath *v.* Achey, 96 Ga. 438, 23 S. E. 396; Strange *v.* Barrow, 65 Ga. 23.

Idaho.— U. S. *v.* Alexander, 2 Ida. (Hasb.) 386, 17 Pac. 746.

Illinois.— Chicago *v.* Peck, 196 Ill. 260, 63 Pac. 711; Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 Pac. 695; McCarthy *v.* Neu, 91 Ill. 127; Dewey *v.* Warriner, 71 Ill. 198, 22 Am. Rep. 91; Lee *v.* Mendel, 40 Ill. 359; Griswold *v.* Peoria University, 26 Ill. 41, 79 Am. Dec. 361; Linn *v.* Buckingham, 2 Ill. 451; Reed *v.* Fleming, 102 Ill. App. 668 [*reversed* on other grounds in 209 Ill. 390, 70 N. E. 667]; Murray *v.* Doud, 63 Ill. App. 247; Soaps *v.* Eichberg, 42 Ill. App. 375; Aultman *v.* Henderson, 32 Ill. App. 331.

Indiana.— Allen *v.* Studebaker Bros. Mfg. Co., 152 Ind. 406, 53 N. E. 422; Hunter *v.*

(B) *Applicability of Rule* — (1) IN GENERAL. The general rule above stated, that a denial under oath is necessary to put in issue the execution of a written

Probst, 47 Ind. 359; Belton *v.* Smith, 45 Ind. 291; Hicks *v.* Reigle, 32 Ind. 360; Stebbins *v.* Goldthwait, 31 Ind. 159; Evans *v.* Southern Turnpike Co., 18 Ind. 101; Patterson *v.* Crawford, 12 Ind. 241; Magee *v.* Sanderson, 10 Ind. 261; Unthank *v.* Henry County Turnpike Co., 6 Ind. 125; Van Camp *v.* Huntington, 39 Ind. App. 28, 78 N. E. 1057.

Iowa.— An unverified denial admits the genuineness of the signature to a written instrument. Thompson *v.* Leuth, 94 Iowa 455, 62 N. W. 842; Lake *v.* Cruikshank, 31 Iowa 395; Hall *v.* Ætna Mfg. Co., 30 Iowa 215. A proper denial of the execution of an instrument is sufficient to put in issue the genuineness of the signature. Smith *v.* King, 88 Iowa 105, 55 N. W. 88; Ashworth *v.* Grubbs, 47 Iowa 353.

Kansas.—National Mortg., etc., Co. *v.* Lash, 60 Kan. 141, 55 Pac. 846; Case Threshing Mach. Co. *v.* Peterson, 51 Kan. 713, 33 Pac. 470; Mays *v.* Foster, 26 Kan. 518; Missouri River, etc., R. Co. *v.* Wilson, 10 Kan. 105; Westervelt *v.* Jones, 7 Kan. App. 70, 52 Pac. 194.

Kentucky.— Wells *v.* Lewis, 4 Metc. 269; Haney *v.* Tempest, 3 Metc. 95.

Maryland.— Fifer *v.* Clearfield, etc., Coal, etc., Co., 103 Md. 1, 62 Atl. 1122; Commonwealth Bank *v.* Kirkland, 102 Md. 662, 62 Atl. 799.

Massachusetts.—Warner *v.* Brooks, 14 Gray 109.

Michigan.—Ryerson *v.* Tourcotte, 121 Mich. 78, 79 N. W. 933; Union Cent. L. Ins. Co. *v.* Howell, 101 Mich. 332, 59 N. W. 599; Peoria Mar., etc., Ins. Co. *v.* Perkins, 16 Mich. 380.

Minnesota.— Mast *v.* Matthews, 30 Minn. 441, 16 N. W. 155.

Mississippi.— Sumpter *v.* Geron, 4 How. 263.

Missouri.— Brown Mfg. Co. *v.* Gilpin, 120 Mo. App. 130, 96 S. W. 669; Stark *v.* Hicklin, 112 Mo. App. 419, 87 S. W. 106; Love *v.* Central L. Ins. Co., 92 Mo. App. 192; Wells *v.* Hobson, 91 Mo. App. 379; Mitchell *v.* Tinsley, 83 Mo. App. 586.

New Mexico.— Oak Grove, etc., Cattle Co. *v.* Foster, 7 N. M. 650, 41 Pac. 522.

North Carolina.— Hargrove *v.* Adcock, 111 N. C. 166, 16 S. E. 16.

Oklahoma.— Lilly *v.* Russell, 4 Okla. 94, 44 Pac. 212.

Pennsylvania.— Ahrns *v.* Charitiers Valley Gas Co., 188 Pa. St. 249, 41 Atl. 739; Lancaster County Nat. Bank *v.* Henning, 171 Pa. St. 399, 33 Atl. 335; Medary *v.* Cathers, 161 Pa. St. 87, 28 Atl. 1012.

Tennessee.— McKinney *v.* Patterson, 10 Humphr. 493; Jones *v.* Walker, 5 Yerg. 427.

Texas.— Montgomery *v.* Culton, 18 Tex. 736; Kelly *v.* Kelly, 12 Tex. 452; Drew *v.* Harrison, 12 Tex. 279; Armstrong *v.* Lipscomb, 11 Tex. 649; Fisher *v.* Bowser, 1 Tex. Unrep. Cas. 346; Home Circle Soc. No. 1 *v.* Shelton, (Civ. App. 1904) 81 S. W. 84; Hunt *v.* Siemers, 22 Tex. Civ. App. 94, 53 S. W. 387; Bond *v.* National Exch. Bank, (Civ. App. 1899) 53 S. W. 71; Hurt *v.* Wallace, (Civ. App. 1899) 49 S. W. 675; Childress *v.* Smith, (Civ. App. 1896) 37 S. W. 1076; Pullman Palace-Car Co. *v.* Booth, (Civ. App. 1894) 28 S. W. 719; Freiberg *v.* Brunswick-Balke-Collender Co., (App. 1890) 16 S. W. 784.

Vermont.— Bickford *v.* Travelers' Ins. Co., 67 Vt. 418, 32 Atl. 230.

West Virginia.— Loverin, etc., Co. *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000.

Wisconsin.— Nielson *v.* Schuckman, 53 Wis. 638, 11 N. W. 44; State *v.* Homey, 44 Wis. 615.

United States.— Apache County *v.* Barth, 177 U. S. 538, 20 S. Ct. 718, 44 L. ed. 878; Miller *v.* Houston City St. R. Co., 55 Fed. 366, 5 C. C. A. 134; Benedict *v.* Maynard, 3 Fed. Cas. No. 1,296, 6 McLean 21; McClintock *v.* Johnston, 15 Fed. Cas. No. 8,700, 1 McLean 414.

See 39 Cent. Dig. tit. "Pleading," § 864.

But *compare* Clark *v.* Cochran, 3 Mart. (La.) 353.

The Arizona statute does not have the effect of shifting the burden of proof, but merely provides that the plea must be sworn to in order to admit evidence controverting the execution of the instrument. Apache County *v.* Barth, 6 Ariz. 13, 53 Pac. 187.

In Pennsylvania a denial in the affidavit of defense is sufficient. Lancaster County Nat. Bank *v.* Henning, 171 Pa. St. 399, 33 Atl. 335; Hogg *v.* Orgill, 34 Pa. St. 344.

Rule applies to instruments executed in another state.— McDougald *v.* Rutherford, 30 Ala. 253.

A waiver of answer under oath will not affect the application of the rule. Elmslie *v.* Thurman, 87 Miss. 537, 40 So. 67; Wanita Woolen Mills *v.* Rollins, 75 Miss. 253, 22 So. 819.

Necessity of producing instrument.— Such a provision is not intended to dispense with the production of the instrument declared on in evidence. New York, etc., R. Co. *v.* Hunt, 39 Conn. 75; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Hooker *v.* Johnson, 10 Fla. 198; Fosdick *v.* Starbuck, 4 Blackf. (Ind.) 417. But see Holt County *v.* Scott, 53 Nebr. 176, 73 N. W. 681, holding that a written instrument, the making and contents whereof are admitted by the pleadings, may be excluded from evidence.

Instruments not filed with pleadings.— Under some decisions such a provision does not apply to instruments not actually filed with the pleadings; the execution of an instrument not filed must be proved. McCarthy *v.* Neu, 91 Ill. 127. See also Benedict *v.* Swain, 43 N. H. 33. Where the written instrument is not set out, but only an open account, with an affidavit thereto, the answer need not be sworn to. Pilling *v.* St. Louis Refrigerator, etc., Co., 5 Ariz. 377, 52 Pac. 1125.

instrument,[23] usually applies only where the instrument is the foundation of the action and not to a case where it is involved only collaterally.[24] It must appear that the written instrument is declared on or set forth as the cause of action.[25] Furthermore, the instrument must show an apparent execution on its face.[26] The rule equally applies, in most states, to written instruments forming the basis for counter-claims, set-offs, and cross actions;[27] but under some statutes it is held otherwise.[28] In some states no distinction is made between instruments executed by parties to the action and those executed by third persons,[29] but in others the rule applies only to instruments executed by parties to the action,[30] or by their authority.[31] The rule does not apply to instruments executed by both parties to the suit.[32] It usually applies only to parties who are alleged to have executed the instrument, so that a personal representative or heir need not deny under oath the execution by the deceased of the instrument sued on.[33] And a party may, without a sworn denial, show that he signed an instrument in a capacity which did not make it his personal obligation.[34] The rule does not apply to writings set up in connection with purely defensive matter alleged by defendant.[35] The validity of the pleading in other respects is not affected by the want of a verification. The omission of the verification merely relieves the other party

23. See *supra*, VIII, B, 2, f, (I), (A).

24. See the statutes of the several states. And see Shrimpton *v.* Brice, 102 Ala. 655, 15 So. 452; Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44; Teitig *v.* Boesman, 12 Mont. 404, 31 Pac. 371; Bateman *v.* Ward, (Tex. Civ. App. 1906) 93 S. W. 508; Laux *v.* Laux, 19 Tex. Civ. App. 693, 50 S. W. 213; Macdonnell *v.* De los Fuentes, 7 Tex. Civ. App. 136, 26 S. W. 792.

25. Bryant *v.* Abington Sav. Bank, 196 Mass. 254, 81 N. E. 997.

If plaintiff sues upon a written instrument by means of the common counts, it has been held that no denial under oath is necessary to put in issue its execution for the reason that no execution is alleged on the face of the pleadings. Johnson *v.* Glover, (Ill. 1887) 10 N. E. 214.

26. Peoria Mar., etc., Ins. Co. *v.* Walser, 22 Ind. 73.

It is sufficient if the name be written anywhere in the body of the instrument, if written for the purpose of giving it validity. Fulshear *v.* Randon, 18 Tex. 275, 70 Am. Dec. 281.

27. Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138; Walker *v.* Bentley, 64 Ala. 92; Black *v.* Crouch, 3 Litt. (Ky.) 226; Mast *v.* Matthews, 30 Minn. 441, 16 N. W. 155.

28. Hamilton *v.* Phelps, Wright (Ohio) 689.

29. Robinson *v.* Dix, 18 W. Va. 528; Parroski *v.* Goldberg, 80 Wis. 339, 50 N. W. 191.

30. Lane *v.* Harris, 16 Ga. 217; Wells *v.* Lewis, 4 Metc. (Ky.) 269; Haney *v.* Tempest, 3 Metc. (Ky.) 95; Mast *v.* Matthews, 30 Minn. 441, 16 N. W. 155.

31. *Alabama.*— Gainesville Female Academy *v.* Brown, 3 Ala. 326.

Colorado.— Barrett Min. Co. *v.* Tappan, 2 Colo. 124.

Illinois.— Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711.

Indiana.— Vannoy *v.* Duprez, 72 Ind. 26.

Kansas.— Barnum *v.* Kennedy, 21 Kan. 181.

Pennsylvania.— Montour Iron Co. *v.* Coleman, 31 Pa. St. 80.

Texas.— International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Herndon *v.* Ennis, 18 Tex. 410; Fulshear *v.* Randon, 18 Tex. 275, 70 Am. Dec. 281; Austin *v.* Townes, 10 Tex. 24; Pioneer Sav., etc., Co. *v.* Nall, (Civ. App. 1896) 36 S. W. 322; Pullman Palace-Car Co. *v.* Booth, (Civ. App. 1894) 28 S. W. 719; International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691; International, etc., R. Co. *v.* Campbell, 1 Tex. Civ. App. 509, 20 S. W. 845.

See 39 Cent. Dig. tit. "Pleading," § 877.

Act applies to agents of corporation.— Gainesville Female Academy *v.* Brown, 3 Ala. 326; Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711.

32. Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300.

33. Heath *v.* Lent, 1 Cal. 410; Swales *v.* Grubbs, 126 Ind. 106, 25 N. E. 877; Wells *v.* Wells, 71 Ind. 509; Mahon *v.* Sawyer, 18 Ind. 73; Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 740; Schulte *v.* Coulthurst, 94 Iowa 418, 62 N. W. 770; Smith *v.* King, 88 Iowa 105, 55 N. W. 88; Ashworth *v.* Grubbs, 47 Iowa 353; Neil *v.* Case, 25 Kan. 510, 37 Am. Rep. 259. *Contra*, Martin *v.* Dortch, 1 Stew. (Ala.) 479; Ellis *v.* Planters' Bank, 7 How. (Miss.) 235; Soulard *v.* Pratte, 1 Mo. 571.

In Alabama it has been held that such a statutory provision, liberally construed, applies where, by privity of law or estate, the obligations of an instrument are cast on a party, although he did not sign the paper in person. Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

34. Frankland *v.* Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234; Kripner *v.* Rad Lincoln Cis. 52 C. S. P. S., 54 Ill. App. 675. *Contra*, Drake *v.* Flewellen, 33 Ala. 106.

35. Stevens *v.* Equitable Mfg. Co., 29 Tex. Civ. App. 168, 67 S. W. 1041.

from the necessity of proving the execution of the instrument; all other legal defenses of which a party can avail himself are open to him.[36] Thus defenses in avoidance, such as fraud in procuring the execution,[37] payment,[38] or illegality,[39] may be presented in an unverified pleading.

(2) Particular Instruments. The rule as stated with reference to the necessity of denials under oath applies to articles of association,[40] promissory notes,[41] the cancellation of a revenue stamp necessary to the validity of an instrument,[42] an order to pay money,[43] bonds,[44] bills of lading,[45] guaranties,[46] deeds,[47]

36. *Alabama.*— Montgomery First Nat. Bank *v.* Nelson, 106 Ala. 535, 18 So. 154.

California.— Brooks *v.* Johnson, 122 Cal. 569, 55 Pac. 423; Newsom *v.* Woollacott, 5 Cal. App. 722, 91 Pac. 347.

Illinois.— Longley *v.* Norvall, 2 Ill. 389.

Indiana.— Evans *v.* Southern Turnpike Co., 18 Ind. 101; Moorman *v.* Barton, 16 Ind. 206; Hill *v.* Jones, 14 Ind. 389; McNeer *v.* Dipboy, 14 Ind. 18; Collins *v.* Makepeace, 13 Ind. 448; Magee *v.* Sanderson, 10 Ind. 261; Buchanan *v.* Port, 5 Ind. 264.

Iowa.— Sawin *v.* Union Bldg., etc., Assoc., 95 Iowa 477, 64 N. W. 401.

Maryland.— Fifer *v.* Clearfield, etc., Coal, etc., Co., 103 Md. 1, 62 Atl. 1122.

Missouri.— Snowden *v.* McDaniel, 7 Mo. 313.

Wisconsin.— Low *v.* Merrill, 1 Pinn. 340.

United States.— Ætna Indemnity Co. *v.* J. R. Crowe Coal, etc., Co., 154 Fed. 545, 83 C. C. A. 431 (construing Missouri statute); McClintick *v.* Johnston, 15 Fed. Cas. No. 8,700, 1 McLean 414.

37. *California.*— Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630.

Idaho.— Cox *v.* Northwestern Stage Co., 1 Ida. 376.

Illinois.— Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. 318.

Indiana.— Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869.

Kansas.— St. Louis Jewelry Co. *v.* Bennett, 75 Kan. 743, 90 Pac. 246; Missouri Pac. R. Co. *v.* McGrath, 3 Kan. App. 220, 44 Pac. 39.

Texas.— Dewees *v.* Bluntzer, 70 Tex. 406, 7 S. W. 820.

Canada.— Peloquin *v.* Genser, 14 Quebec Super. Ct. 538.

38. Nutt *v.* Humphrey, 32 Kan. 100, 3 Pac. 787.

39. Alexander *v.* Barker, 64 Kan. 396, 67 Pac. 829; Burton *v.* Emerine, 1 Litt. (Ky.) 409.

40. Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36.

41. *Alabama.*— Drake *v.* Flewellen, 33 Ala. 106.

California.— San Luis Obispo County Bank *v.* Greenberg, 127 Cal. 26, 59 Pac. 139.

Colorado.— Watson *v.* Lemen, 9 Colo. 200, 11 Pac. 88.

Illinois.— Dick *v.* Globe Nat. Bank, 64 Ill. App. 366.

Iowa.— Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216, 12 N. W. 601.

Kentucky.— Harrison *v.* Rees, 41 S. W. 431, 19 Ky. L. Rep. 658.

Mississippi.— Wanita Woolen Mills *v.* Rollins, 75 Miss. 253, 22 So. 819.

Texas.— Dial *v.* Taylor, 8 Tex. 267.

Wisconsin.— Low *v.* Merrill, 1 Pinn. 340.

United States.— Thomas *v.* Clark, 23 Fed. Cas. No. 13,894, 2 McLean 194.

See 39 Cent. Dig. tit. "Pleading," § 866.

42. Latham *v.* Smith, 45 Ill. 25.

43. Early *v.* Patterson, 4 Blackf. (Ind.) 449; Continental Ins. Co. *v.* Pratt, 8 Kan. App. 424, 55 Pac. 671.

44. *Alabama.*— Kansas City, etc., R. Co. *v.* Cobb, 100 Ala. 228, 13 So. 938; Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746.

California.— See Perris Irr. Dist. *v.* Thompson, 116 Fed. 832, 54 C. C. A. 336.

Colorado.— Lux *v.* McLeod, 19 Colo. 465, 36 Pac. 246.

Illinois.— Herrick *v.* Swartwout, 72 Ill. 340; Horner *v.* Boyden, 27 Ill. App. 573.

Indiana.— Boden *v.* Dill, 58 Ind. 273; Wilson *v.* Merkle, 6 Blackf. 118.

Iowa.— Curry *v.* Sioux City Dist. Tp., 62 Iowa 102, 17 N. W. 191.

Michigan.— People *v.* Cotteral, 115 Mich. 43, 73 N. W. 19, 74 N. W. 183.

New Mexico.— Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

Ohio.— McMurtry *v.* Campbell, 1 Ohio 262; Carrington *v.* Davis, Wright 735; Baker *v.* Spangler, Tapp. 210.

Texas.— Poer *v.* Brown, 24 Tex. 34; Burleson *v.* Burleson, 15 Tex. 423.

United States.— Harper County *v.* Rose, 140 U. S. 71, 11 S. Ct. 710, 35 L. ed. 344; Chambers County *v.* Clews, 21 Wall. 317, 22 L. ed. 517; Bradford *v.* Williams, 4 How. 576, 11 L. ed. 1109.

See 39 Cent. Dig. tit. "Pleading," § 866½.

45. Barrow *v.* Philleo, 14 Tex. 345; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 7 S. Ct. 1132, 30 L. ed. 1077.

46. Martin *v.* Hazzard Powder Co., 2 Colo. 596; Martin *v.* Culver, 87 Ill. 49; Johnson *v.* Glover, 19 Ill. App. 585.

47. *Alabama.*— Winston *v.* Moffet, 9 Port. 518.

California.— Rosenthal *v.* Merced Bank, 110 Cal. 198, 42 Pac. 640; Carpenter *v.* Shinners, 108 Cal. 359, 41 Pac. 473.

Iowa.— Savery *v.* Browning, 18 Iowa 246.

Ohio.— Baker *v.* Spangler, Tapp. 210.

Texas.— House *v.* Robertson, (Civ. App. 1896) 34 S. W. 640.

See 39 Cent. Dig. tit. "Pleading," § 869.

Administrator's deed.— Failure to deny execution of an administrator's deed under oath does not admit the validity of the pro-

leases,[48] mortgages,[49] subscription papers,[50] insurance policies,[51] receipts,[52] releases and contracts of settlement,[53] tax-sale certificates and tax deeds,[54] and assignments and indorsements.[55] It does not apply to a decree of a court,[56] nor to an account for merchandise,[57] nor to an unprobated will,[58] nor to entries on the stock books of a corporation.[59]

(II) *Denial of Ownership of Instrument Sued on.* Under some statutes a plea denying the ownership of the instrument sued on must be verified by affidavit, or the allegations of ownership in the complaint will be admitted.[60] Under others an unverified denial is sufficient to put the ownership of the paper in issue unless the execution of a written indorsement of the same is alleged in the petition.[61]

(III) *General Issue or Denial.* Pleas of *non est factum*, or amounting thereto, are commonly required to be verified, or they will be of no force and effect.[62] In some jurisdictions, however, a plea of *non est factum* is considered

ceedings on which it is based. O'Keefe *v.* Behrens, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. N. S. 354.

48. Shufeldt *v.* Henderson, 26 Ill. App. 593.

49. Keller *v.* Boatman, 49 Ind. 104; Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850; Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216, 12 N. W. 601; Brewer *v.* Crow, 4 Greene (Iowa) 520; Handley *v.* Harris, 48 Kan. 606, 29 Pac. 1145, 30 Am. St. Rep. 322, 17 L. R. A. 703; Nutt *v.* Humphrey, 32 Kan. 100, 3 Pac. 787; St. Johns State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312; Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250.

50. Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Willard *v.* Methodist Episcopal Church, 66 Ill. 55; Johnston *v.* Ewing Female University, 35 Ill. 518; Denny *v.* Northwestern Christian University, 16 Ind. 220.

51. Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267; Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236; Helbig *v.* Citizens' Ins. Co., 120 Ill. App. 58; Weber *v.* Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650.

52. Sawyer *v.* Dulany, 30 Tex. 479; May *v.* Pollard, 28 Tex. 677; Maxwell *v.* Burbridge, 44 W. Va. 248, 28 S. E. 702.

53. Peterson *v.* Taylar, (Cal. 1893) 34 Pac. 724; Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869; Hill *v.* Jones, 14 Ind. 389; Buchanan *v.* Port, 5 Ind. 264; Chicago, etc., R. Co. *v.* Imhoff, 3 Kan. App. 765, 45 Pac. 627; Stewart *v.* Conrad, 100 Va. 128, 40 S. E. 624. *Contra*, Clark *v.* Faulkner, 1 Blackf. (Ind.) 218.

54. Walker *v.* Fleming, 37 Kan. 171, 14 Pac. 470.

55. *Arizona.*— Daggs *v.* Phœnix Nat. Bank, 5 Ariz. 409, 53 Pac. 201.

Arkansas.— Prewett *v.* Vaughn, 21 Ark. 417; Sanger *v.* Sumner, 13 Ark. 280; Sevier *v.* Wilson, 8 Ark. 496.

California.— McDonald *v.* Poole, 113 Cal. 437, 45 Pac. 702. *Contra*, Youngs *v.* Bell, 4 Cal. 201; Grogan *v.* Ruckle, 1 Cal. 158.

Illinois.— Shufeldt *v.* Henderson, 26 Ill. App. 593.

Indiana.— Belton *v.* Smith, 45 Ind. 291; Stebbins *v.* Goldthwait, 31 Ind. 159; Rich *v.* Savacool, 11 Ind. 148; Patterson *v.* Crawford, 12 Ind. 241; Hooker *v.* State, 7 Blackf. 272.

Iowa.— Edmonds *v.* Montgomery, 1 Iowa 143.

Kansas.— Nutt *v.* Humphrey, 32 Kan. 100, 3 Pac. 787; Morris *v.* Case, 4 Kan. App. 691, 46 Pac. 54.

Kentucky.— Jones *v.* Cromwell, 1 Dana 385; Cope *v.* Arberry, 2 J. J. Marsh. 296; Black *v.* Crouch, 3 Litt. 226; Dodge *v.* Commonwealth Kentucky, 2 A. K. Marsh. 610.

Minnesota.— Mast *v.* Matthews, 30 Minn. 441, 16 N. W. 155.

Texas.— Crescent Ins. Co. *v.* Camp, 64 Tex. 521; Lindley *v.* Nunn, 17 Tex. Civ. App. 70, 42 S. W. 310.

United States.— Jones *v.* Shapera, 57 Fed. 457, 6 C. C. A. 423; Thomas *v.* Clark, 23 Fed. Cas. No. 13,894, 2 McLean 194.

See 39 Cent. Dig. tit. "Pleading," § 872.

56. Castle *v.* Hickman, (Cal. 1895) 41 Pac. 1036.

57. Ross *v.* Yeatman 2 Swan (Tenn.) 144.

58. *In re* Christensen, 135 Cal. 674, 68 Pac. 112.

59. Pine *v.* Western Nat. Bank, 63 Kan. 462, 65 Pac. 690.

60. Howle *v.* Edwards, 113 Ala. 187, 20 So. 956; Scottish Union, etc., Ins. Co. *v.* Dangaix, 103 Ala. 388, 15 So. 956; Boit *v.* Maybin, 52 Ala. 252.

61. Southern Kansas Farm Loan, etc., Co. *v.* Barnes, 63 Kan. 548, 66 Pac. 638.

62. *Alabama.*— Garnett *v.* Roper, 10 Ala. 842; Martin *v.* Dortch, 1 Stew. 479; Parks *v.* Greening, Minor 178; Tindal *v.* Bright, Minor 103.

Arkansas.— McFarland *v.* State Bank, 4 Ark. 44, 37 Am. Dec. 761.

Colorado.— Heaton *v.* Myers, 4 Colo. 59; Anderson *v.* Sloan, 1 Colo. 484.

Georgia.— Fowler *v.* Gate City Nat. Bank, 88 Ga. 29, 13 S. E. 831.

Indiana.— Parker *v.* State, 8 Blackf. 292; Ferrand *v.* Walker, 5 Blackf. 424; Barber *v.* Summers, 5 Blackf. 339.

Kentucky.— Kentucky Female Orphan School *v.* Fleming, 10 Bush 234.

Maryland.— Union Bank *v.* Ridgely, 1 Harr. & G. 324.

a good plea, although not verified, and under it defendant may avail himself of any legal defense except denying or disproving the execution of the instrument sued on.[63] So in some jurisdictions *nil debet*, if not sworn to, may be stricken out.[64] In others *nil debet* may be pleaded either with or without oath; if the plea be sworn to, the execution of the instrument declared on must be proved, otherwise not.[65]

(IV) *WANT OR FAILURE OF CONSIDERATION.* In many states pleas of want or failure of consideration of an instrument sued on must be supported by affidavit.[66]

(V) *ALTERATION.* Under a statute providing that a written instrument, the foundation of the suit, must be received in evidence unless its execution is denied by a sworn plea, a plea in an action on such an instrument setting up the defense of a material alteration must be verified.[67]

(VI) *FORGERY.* Under the statutes of some states evidence that a written instrument is a forgery is not admissible under an unverified answer in denial.[68]

g. Actions on Accounts. It is provided by statute in many states that the correctness of a verified account shall be deemed admitted unless denied under oath.[69] The correctness of the account should be alleged by the party pleading

Pennsylvania.— McAdams *v.* Stilwell, 13 Pa. St. 90.

Texas.— Persons *v.* Frost, 25 Tex. Suppl. 129; Bowles *v.* Boydstun, (Civ. App. 1897) 41 S. W. 368; Elwell *v.* Tatum, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434.

See 39 Cent. Dig. tit. "Pleading," § 879.

Executors and administrators, as well as others, when they plead *non est factum* to an instrument made by their intestate, must verify the plea by affidavit. Martin *v.* Dortch, 1 Stew. (Ala.) 479.

A replication of non est factum need not be verified. Parks *v.* Greening, Minor (Ala.) 178.

63. Longley *v.* Norvall, 2 Ill. 389; Snowden *v.* McDaniel, 7 Mo. 313.

64. Sevier *v.* Wilson, 8 Ark. 496.

65. Scribner *v.* Bullitt, 1 Blackf. (Ind.) 112; Bates *v.* Hunt, 1 Blackf. (Ind.) 67.

66. Williams *v.* Miller, 21 Ark. 469; Alexander *v.* Foster, 16 Ark. 660; Williams *v.* Williams, 13 Ark. 421; Langdon *v.* Keesee, 10 Ark. 645; Patrick *v.* Conrad, 2 A. K. Marsh. (Ky.) 43; Pickett *v.* Abney, 84 Tex. 645, 19 S. W. 859; Roane *v.* Ross, 84 Tex. 46, 19 S. W. 339; Barnard *v.* Blum, 69 Tex. 608, 7 S. W. 98; Vineyard *v.* Smith, 34 Tex. 454; Pierce *v.* Wright, 33 Tex. 631; Wimbish *v.* Holt, 26 Tex. 673; Phillips *v.* Patillo, 18 Tex. 518; Boyd *v.* Boyce, (Tex. Civ. App. 1899) 53 S. W. 720; McCormick Harvesting Mach. Co. *v.* Slover, (Tex. Civ. App. 1891) 16 S. W. 105; Gulf, etc., R. Co. *v.* Wright, 1 Tex. Civ. App. 402, 21 S. W. 80; Ascue *v.* Aultman, 2 Tex. App. Civ. Cas. § 497.

In Florida the statute is deemed to cover want, not failure, of consideration. Hagler *v.* Mercer, 6 Fla. 342.

67. Smith *v.* Hiles-Carper Co., 107 Ala. 272, 18 So. 37; Collins *v.* Makepeace, 13 Ind. 448, holding, however, that where a complaint counted upon a note and an account stated, a defense alleging that the note was given by defendant and received by plaintiff in payment of the account, is good, although it also charged an alteration of the note, and was not verified. *Contra*, Kansas Mut. L. Ins. Co. *v.* Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388; Ruiz *v.* Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295, both holding that a plea admitting the execution of a written instrument, but setting up a material alteration, is not such a plea as is required to be verified.

68. Woollen *v.* Whitacre, 73 Ind. 198.

Under Ga. Code, § 2674, a registered deed is admissible in evidence without further proof, with the exception that when the maker of the deed, or one of his heirs, or the opposite party in the cause, will file an affidavit that said deed is a forgery, it becomes the duty of the court to suspend the case, until the issue as to the genuineness of the alleged deed is tried. This is a cumulative remedy. A party alleging a deed to be a forgery is not obliged to make the affidavit. After the deed has been admitted, he may introduce any competent evidence t impeach it. If he can successfully attack the deed without making the affidavit, it is his right to do so. Doe *v.* Roe, 36 Ga. 463.

Under the Texas statute it is only when a recorded instrument is sought to be used in evidence, by filing and giving notice three days before the trial, that an affidavit of forgery is necessary. Brown *v.* Perez, (Civ. App. 1894) 25 S. W. 980. If the instrument is not so filed but is introduced during the trial, an affidavit of forgery is unnecessary, and, if filed, can have no effect. Sartor *v.* Bolinger, 59 Tex. 411; Brown *v.* Perez, (Civ. App. 1894) 25 S. W. 980; McGee *v.* Berrien, (Civ. App. 1894) 28 S. W. 462; Macdonnell *v.* De Los Fuentes, 7 Tex. Civ. App. 136, 26 S. W. 792.

69. See the statutes of the several states. And see the following cases:

Alabama.— Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239.

Georgia.— Rockmore *v.* Cullen, 94 Ga. 648, 21 S. E. 845.

it, else a verification of the truth of the facts alleged will not be such a verification of the correctness of the account as to make necessary a denial under oath.[70] Furthermore, a denial under oath is not required except where the original correctness of the account, or of some of its items, is attacked. An answer merely setting up some affirmative defense need not be verified.[71] And the rule does not apply where an account is involved only incidentally and is not the foundation of the action.[72] The affidavit may be dispensed with where, for suitable reasons, there is no one in position to swear to the account.[73]

h. Actions By or Against Executors and Administrators. Certain classes of defendants, such as executors and administrators, are often exempted from the necessity of swearing to defenses in actions brought against them in their representative capacity.[74]

i. Exhibits. An exhibit attached to a pleading needs no separate verification when the pleading itself is sworn to.[75]

j. Amended Pleadings. If a pleading requires a verification any material amendment of it must also be verified.[76] But it is immaterial error to allow

Mississippi.— Bower *v.* Henshaw, 53 Miss. 345.

Texas.— McCamant *v.* Batsell, 59 Tex. 363; Wood *v.* Kieschbaum, (Civ. App. 1895) 31 S. W. 326; Blakeley *v.* Wimberly, (Civ. App. 1890) 15 S. W. 119; Carder *v.* Wilder, 1 Tex. App. Civ. Cas. § 14. Under the old statute in Texas (Act, April 2, 1874) evidence to rebut a sworn account sued on was admissible, although its truth was not denied under oath. Rives *v.* Habermacher, 1 Tex. App. Civ. Cas. § 747.

United States.— Cold Blast Transp. Co. *v.* Kansas City Bolt, etc., Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, construing Kansas statute.

See 39 Cent. Dig. tit. "Pleading," § 880.

The word "account," as used in such a statute, has its popular, rather than a technical, signification, and applies to transactions between persons, in which, by sale upon the one side and purchase upon the other, the relation of debtor and creditor is created by general course of dealing, and does not apply to one or more isolated transactions resting upon special contract. McCamant *v.* Batsell, 59 Tex. 363.

The account must be verified by affidavit, or the rule requiring denial under oath is not applicable. McDermott *v.* Woods, 147 Pa. St. 356, 23 Atl. 435.

A mere statement of the items claimed to constitute the damage suffered by reason of the failure of plaintiff to carry out his contract is not a verified account which must be taken as true by failure to deny under oath. Kauter *v.* Fritz, 5 Kan. App. 756, 47 Pac. 187.

Oath must be in writing.— Rockmore *v.* Cullen, 94 Ga. 648, 21 S. E. 845.

An account set up in a counter-claim must be denied under oath in exactly the same way as in case of an account pleaded by plaintiff. Cahn *v.* Salinas, 2 Tex. App. Civ. Cas. § 104.

Effect of denial under oath.— Where the correctness of a verified account is denied under oath, the *prima facie* proof made by the sworn account is destroyed, and this result cannot be obviated by filing a sworn supplemental petition under oath, reiterating the allegations of the original petition. Olive *v.* Hester, 63 Tex. 190.

70. McMath *v.* Beal, 4 Kan. App. 565, 45 Pac. 1103; Sawyer, etc., Lumber Co. *v.* Champlin Lumber Co., 16 Okla. 90, 84 Pac. 1093.

71. Pattie *v.* Wilson, 25 Kan. 326; Washington *v.* Hobart, 17 Kan. 275; Aaron *v.* Podesta, 60 Miss. 82; Sawyer, etc., Lumber Co. *v.* Champlin Lumber Co., 16 Okla. 90, 84 Pac. 1093.

The maturity of an account may be questioned by an unverified pleading. Johnston *v.* Johnson, 44 Kan. 666, 24 Pac. 1098.

A plea of set-off, recoupment, or counter-claim may be set up without first denying the account under oath, for such defenses are consistent with the justness of the account. Briggs *v.* Montgomery, 3 Heisk. (Tenn.) 673; Bach *v.* Ginacchio, 1 Tex. App. Civ. Cas. § 1315; Galveston, etc., R. Co. *v.* Schwartz, 2 Tex. App. Civ. Cas. § 758.

72. Boone *v.* Goodlett, 71 Ark. 577, 76 S. W. 1059.

73. Weis *v.* Ahrenbeck, 5 Tex. Civ. App. 542, 24 S. W. 356, where the affidavit was not required for the reason that the party became insane and his guardian had not sufficient knowledge of the truth of the account to swear to it.

74. Edwards *v.* Ewing, 4 Yeates (Pa.) 235.

In actions on written instrument made by decedent see *supra*, VIII, B, 2, f, (I), (B), (1).

75. Ely *v.* Frisbie, 17 Cal. 250.

76. *Arkansas.*— McGuire *v.* Cook, 13 Ark. 448.

District of Columbia.—Kennedy *v.* Barker, MacArthur & M. 340.

Illinois.— McCabe *v.* Porter, 73 Ill. 244.

North Carolina.— Rankin *v.* Allison, 64 N. C. 673.

Ohio.— State *v.* Wolfe, 11 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 118.

Pennsylvania.— Pennsylvania R. Co. *v.* Walsh, 1 Pa. Dist. 121; Ickenger *v.* R. Co., 20 Wkly. Notes Cas. 333.

trivial amendments without requiring them to be sworn to.[77] In some states it is provided by statute that an amendment must be verified only when it adds a new cause of action or defense.[78] The court may in its discretion allow an amended pleading to be verified, although the original was not,[79] and when so provided by statute may permit an amendment without verification to previous pleadings which have been verified.[80]

k. Exceptions to Rules Requiring Verification. There are usually certain statutory exceptions to the rules requiring verification of pleadings. Thus pleadings on the part of the state need not be verified, nor answers by guardians defending for infants or persons of unsound mind, and no verification is required in cases where the party might, by his admission of the truth of an allegation, subject himself to a criminal prosecution, nor as to matters concerning which he would be privileged from testifying as a witness.[81] Under this last exemption it has been held that if any part of pleading is such as to excuse any one of the parties from testifying, even if such matter would merely aid in forming a chain of testimony tending to convict the party, no verification need be made.[82] The exemption applies only to denials of matters alleged by the other party, and not to new matters alleged by the party seeking to avoid the verification,[83] unless the latter are expressly included by the statute.[84] But the party seeking the exemption

Texas.— Bland *v.* State, (Civ. App. 1896) 36 S. W. 914.

See 39 Cent. Dig. tit. "Pleading," § 862.

77. Buell *v.* Beckwith, 59 Cal. 480; Livingston *v.* Marshall, 82 Ga. 281, 11 S. E. 542; McCabe *v.* Porter, 73 Ill. 244; Matthews *v.* Roundtree, 20 Mo. 282.

78. See the statutes of the several states. And see Halliburton *v.* Nance, 40 Ark. 161; Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; Thompson *v.* Brown, 106 Iowa 367, 76 N. W. 819; Boos *v.* Dulin, 103 Iowa 331, 72 N. W. 533.

79. Ruffatti *v.* Societe Anonyme des Mines de Lexington, 10 Utah 386, 37 Pac. 591.

80. Tegeler *v.* Shipman, 33 Iowa 194, 11 Am. Rep. 118.

81. See the statutes of the several states. And see cases cited *infra*, this section.

Under N. Y. Code, § 529, an exception to the privilege of filing an unverified answer is made where a defendant is charged with any fraud whatever affecting a right or the property of another. Beckley *v.* Chamberlin, 65 Hun 37, 19 N. Y. Suppl. 745. See also Wolcott *v.* Winston, 8 Abb. Pr. 422. But see Frist *v.* Climm, 6 N. Y. Civ. Proc. 30, holding that section 529 is limited in its application simply to fraudulent transfers of property.

Action for libel.— It is not necessary to verify the answer in an action for libel even though the complaint be verified. Wilson *v.* Bennett, 2 N. Y. Civ. Proc. 34.

Cruelty to animals and intoxication in a public place are both crimes, and a defendant charged therewith may file an unverified answer. Rutherford *v.* Krause, 8 Misc. (N. Y.) 547, 29 N. Y. Suppl. 787.

82. Clapper *v.* Fitzpatrick, 3 How. Pr. (N. Y.) 314.

Where only a part tends to incriminate.— In Blaisdell *v.* Raymond, 5 Abb. Pr. (N. Y.) 144, 149 [*affirmed* in 6 Abb. Pr. 148], the rule was stated as follows: "Where the statute, as in 1849, required a verified answer, and made no provision for omitting the verification when the answer under oath might criminate the party, the court might require a compliance with the statute by directing the answer to be verified so far as it was not of that character, and might protect the constitutional rights of the party by excusing him from answering the parts which were of that character, and treating an averment that, by answering on oath the particular allegations specified he might subject himself to a criminal prosecution, as a denial of them. This course was adopted by analogy to the former practice, as was stated in Hill *v.* Muller, 2 Sandf. 684, 685. But where the law makes express provision on the subject of the verification of an answer, in such a case the terms of the statute must be complied with. Now, by the act of 1854, the verification may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading. If, therefore, there was any matter denied in the defendant's answers, to the truth of which they would have been privileged from testifying as witnesses, the verification was properly omitted." See also White *v.* Cummings, 3 Sandf. (N. Y.) 716; Martin *v.* Bernheim, 34 N. Y. Suppl. 784, 24 N. Y. Civ. Proc. 441.

Tendency to convict.— The party need not prove that a sworn pleading would subject him to punishment in order that he may be relieved from the necessity of verification; it is enough if it would have that tendency. Moloney *v.* Dows, 2 Hilt. (N. Y.) 247. See also Dehn *v.* Mandeville, 68 Hun (N. Y.) 335, 22 N. Y. Suppl. 984.

83. Fredericks *v.* Taylor, 52 N. Y. 596; Scovill *v.* New, 12 How. Pr. (N. Y.) 319.

84. Dixon *v.* Woodward, 103 N. Y. 638, 8 N. E. 653; Gadsen *v.* Woodward, 103 N. Y. 242, 8 N. E. 653.

must make it affirmatively appear that his case falls within the statute,[85] unless this is already disclosed by the pleadings.[86] Answers in penal actions are also sometimes excluded from the operation of the general statutes requiring verification of pleadings.[87]

1. FAILURE TO VERIFY — (I) *EFFECT.* A pleading which, under the law, should be verified, cannot be considered filed until it is verified; or, if it be considered filed at all, it cannot be taken as a complete pleading until it is verified,[88] or the verification waived by the adverse party.[89] Failure to verify an unnecessary pleading is immaterial.[90] And when an answer admits all the material allegations of the complaint, plaintiff is not prejudiced by the failure of defendant to verify it.[91]

(II) *HOW TAKEN ADVANTAGE OF.* Where verification is required, an unverified pleading may, in some jurisdictions, be treated as a nullity.[92] It may be stricken from the files,[93] or judgment by default may be taken, as if no plea has been filed.[94] Under some decisions, an unverified pleading is bad on demurrer.[95]

3. PERSONS WHO MAY OR MUST VERIFY — a. In General. Unless otherwise provided by statute,[96] a verification may be made by one not a party to the record if he has sufficient knowledge of the facts,[97] a satisfactory reason being stated for the failure of the party to verify.[98] This rule is found as a statutory provision in some states.[99] A statute requiring generally that the verification of a pleading must be made by the party filing it does not include infant parties; in such a case the next friend may verify.[1] The oath supporting the denial of the execution of a written instrument must be made by the party whose execution it purports to be.[2]

85. Dehn *v.* Mandeville, 68 Hun (N. Y.) 335, 22 N. Y. Suppl. 984; Lynch *v.* Todd, 13 How. Pr. (N. Y.) 546.

An affidavit showing that the case falls within the statute would be a proper method to employ. Blaisdell *v.* Raymond, 5 Abb. Pr. (N. Y.) 144 [*affirmed* in 6 Abb. Pr. 148].

86. Blaisdell *v.* Raymond, 5 Abb. Pr. (N. Y.) 144 [*affirmed* in 6 Abb. Pr. 148]; Wheeler *v.* Dixon, 14 How. Pr. (N. Y.) 151; Springsted *v.* Robinson, 8 How. Pr. (N. Y.) 41.

87. Rogers *v.* Decker, 131 N. Y. 490, 30 N. E. 571; Gadsen *v.* Woodward, 103 N. Y. 242, 8 N. E. 653.

88. Park *v.* McReynolds, 111 Ky. 651, 64 S. W. 517, 23 Ky. L. Rep. 894; Griffith *v.* Adams, 95 Md. 170, 52 Atl. 66.

89. Park *v.* McReynolds, 111 Ky. 651, 64 S. W. 517, 23 Ky. L. Rep. 894.

90. Askew *v.* Koonce, 118 N. C. 526, 24 S. E. 218; Harper County *v.* Rose, 140 U. S. 71, 11 S. Ct. 710, 35 L. ed. 344.

91. Innes *v.* Krysher, 9 Iowa 295.

92. *Florida.*— Stewart *v.* Bennett, 1 Fla. 487.

New Jersey.— Trenton Bank *v.* Wallace, 9 N. J. L. 83.

New York.— Richmond *v.* Tallmadge, 16 Johns. 307.

Tennessee.— Trabue *v.* Higden, 4 Coldw. 620; Young *v.* Stringer, 5 Hayw. 30; Tyler *v.* E. G. Bernard Co., (Ch. App. 1899) 57 S. W. 179.

United States.— Fenwick *v.* Grimes, 8 Fed. Cas. No. 4,734, 5 Cranch C. C. 603.

Contra.— Guthrie *v.* Guthrie, 84 Iowa 372, 51 N. W. 13; Rush *v.* Rush, 46 Iowa 648, 26 Am. Rep. 179.

93. See *infra*, XII, C, 1, c, (VI).

94. Schwarz *v.* Oppenheimer, 90 Ala. 462, 8 So. 36; Griffin *v.* Asheville Light Co., 111 N. C. 434, 16 S. E. 423; Hartman *v.* Farrior, 95 N. C. 177; Alford *v.* McCormac, 90 N. C. 151; Trabue *v.* Higden, 4 Coldw. (Tenn.) 620. *Contra*, Mallory *v.* Sailing, 48 Iowa 699; Wolff *v.* Hagensick, 10 Iowa 590.

95. See *supra*, VI, F, 1, l.

96. Bancroft *v.* Eastman, 7 Ill. 259.

97. Prim *v.* Davis, 2 Ala. 24; Lefevre *v.* Latson, 5 Sandf. (N. Y.) 650; Solomon *v.* Huey, 1 Tex. Unrep. Cas. 265.

One who is the real party in interest may verify a pleading to which he is not a record party. Taber *v.* Gardner, 6 Abb. Pr. N. S. (N. Y.) 147.

98. Pence *v.* Durbin, 1 Ida. 550; Goldbeck *v.* Brady, 4 Pa. Co. Ct. 169.

99. See the statutes of the several states. And see Yoe *v.* Nichols, 51 Iowa 330, 1 N. W. 664; Kerr *v.* Hedge, 12 Iowa 426.

1. Turner *v.* Cook, 36 Ind. 129.

2. Warman *v.* Akron First Nat. Bank, 185 Ill. 60, 57 N. E. 6, 49 L. R. A. 412; Walker *v.* Sleight, 30 Iowa 310; La Plant *v.* Pratt-Ford Greenhouse Co., 102 Minn. 93, 112 N. W. 889; Moore *v.* Holmes, 68 Minn. 108, 70 N. W. 872; McCormick Harvesting Mach. Co. *v.* Doucette, 61 Minn. 40, 63 N. W. 95; Johnston Harvester Co. *v.* Clark, 30 Minn. 308, 15 N. W. 252.

As a rule of pleading the verification of such a denial by an agent is sufficient to put the execution in issue, but as a rule of evidence the execution is admitted unless denied under the oath of defendant who is alleged to have executed it. Moore *v.* Holmes, 68 Minn. 108, 70 N. W. 872.

b. Where Several Parties Join in a Pleading. Where several parties join in a pleading, it is held as a rule, in the absence of any statutory provision to the contrary, that a verification thereof by one of them is sufficient.[3] Some of the codes, however, provide that the verification by one of the parties shall be sufficient only when they are united in interest,[4] and this is held to apply even where the parties joining in the pleading are husband and wife.[5] Where husband and wife are sued for a debt of the wife when sole, her oath and not that of her husband is required to support the pleading.[6]

c. Agent or Attorney. If no statutory restriction exists,[7] verification of a pleading may be made by agent or attorney, if such agent or attorney has the requisite knowledge of the facts.[8] Statutes frequently give express sanction to verification of pleadings in certain cases by agent or attorney.[9] Thus it is some-

3. *Alabama.*— Brown *v.* Jones, 3 Port. 420.

California.— Butterfield *v.* Graves, 138 Cal. 155, 71 Pac. 510; Claiborne *v.* Castle, 98 Cal. 30, 32 Pac. 807.

Iowa.— Kerr *v.* Hedge, 12 Iowa 426.

Kentucky.— Harrison *v.* Lebanon Waterworks, 91 Ky. 255, 15 S. W. 522, 12 Ky. L. Rep. 822, 34 Am. St. Rep. 180.

Missouri.— Ruch *v.* Jones, 33 Mo. 393.

Texas.— Jones *v.* Austin, 6 Tex. Civ. App. 505, 26 S. W. 144.

See 39 Cent. Dig. tit. "Pleading," § 888.

But see Ferguson *v.* State Bank, 8 Ark. 416, holding that in an action of debt on a note, the plea of *nil debet* sworn to by one of several defendants does not put in issue the execution of the note by the others.

Where several are sued upon an instrument in writing and they wish to deny their joint liability as well as the execution of the writing, the joint liability of all will be admitted who do not join in the affidavit denying the execution of the writing. Warman *v.* Akron First Nat. Bank, 185 Ill. 60, 57 N. E. 6, 49 L. R. A. 412; Davis *v.* Scarritt, 17 Ill. 202; Warren *v.* Chambers, 12 Ill. 124.

But the court may require any of the other parties to swear to the pleading where it is made to appear that they know that the pleading filed contains untrue statements. Harrison *v.* Lebanon Waterworks, 91 Ky. 255, 15 S. W. 522, 12 Ky. L. Rep. 822, 34 Am. St. Rep. 180.

In Maryland the verification of one party is good if it purports to be made in behalf of all. Deved *v.* Carrington, 98 Md. 376, 56 Atl. 818.

4. Gray *v.* Kendall, 5 Bosw. (N. Y.) 666; Lefevre *v.* Latson, 5 Sandf. (N. Y.) 650; Ballard *v.* Lockwood, 1 Daly (N. Y.) 158; Hull *v.* Ball, 14 How. Pr. (N. Y.) 305. See also Holmes *v.* Moore, 63 S. C. 182, 41 S. E. 90.

The verification need not allege that the parties are united in interest; it is enough if the pleading shows that this is the case. Paddock *v.* Palmer, 32 Misc. (N. Y.) 426, 66 N. Y. Suppl. 743.

5. Reed *v.* Butler, 2 Hilt. (N. Y.) 589; Hartley *v.* James, 18 Abb. Pr. (N. Y.) 299. See Huntington *v.* House, 22 Mo. 365, holding that in a suit by husband and wife under the Missouri practice act of 1849, the affidavit of the husband is a sufficient verification of the petition.

6. Hudgins *v.* Nix, 10 Ala. 575.

7. See the statutes of the several states.

Dilatory pleas are sometimes required to be verified by defendant himself. Bancroft *v.* Eastman, 7 Ill. 259.

Denial of the execution of a written instrument is usually required to be sworn to by the person executing such instrument. See *supra*, VIII, B, 2, f.

8. *Alabama.*— Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

Maine.—Atwood *v.* Higgins, 76 Me. 423.

Maryland.— My Maryland Machinists Lodge No. 186 *v.* Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752.

Missouri.— Taylor *v.* White, 86 Mo. App. 526; Knapp *v.* Standley, 45 Mo. App. 264.

New Mexico.— Geck *v.* Shepherd, 1 N. M. 346.

Pennsylvania.— Reid *v.* Christy, 2 Phila. 144.

Tennessee.— Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080; Carlisle *v.* Cowan, 85 Tenn. 165, 2 S. W. 26; Klepper *v.* Powell, 6 Heisk. 503; Tennessee Bank *v.* Anderson, 3 Sneed 669; Tennessee Bank *v.* Jones, 1 Swan 391.

Texas.— Bowles *v.* Glasgow, 36 Tex. 94; Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227.

See 39 Cent. Dig. tit. "Pleading," § 890.

On the contrary, it was held in Plant *v.* Mutual L. Ins. Co., 92 Ga. 636, 19 S. E. 719, that a mere attorney at law, who is not defendant's agent in any other capacity, cannot verify an answer, in the absence of any statute authorizing it. In Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297, the court condemned the practice of attorneys verifying for their clients and declared that it should be discouraged.

If the affidavit shows on its face that the attorney making it does not have knowledge of the facts or does not state the truth concerning them, a verification in person may properly be required. Jaillard *v.* Tomes, 3 Abb. N. Cas. (N. Y.) 24.

9. See the statutes of the several states. And see Wright *v.* Parks, 10 Iowa 342; Johnson *v.* Woodbury Trust Co., (Kan. 1901) 64 Pac. 1030; Imlay *v.* New York, etc., R. Co.,

times provided that an agent or attorney may verify a pleading when the facts are within his personal knowledge;[10] when plaintiff is an infant, or of unsound mind, or imprisoned;[11] when the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney;[12] or when the party is not a resident of, or is absent from, the county.[13] Where the party is a domestic corporation, it is sometimes provided that verification of a pleading must be made by an officer thereof,[14] and where a foreign corporation it may be made by the agent of or attorney for such party.[15]

1 Sandf. (N. Y.) 732; Tallmadge *v.* Lounsbury, 23 Abb. N. Cas. (N. Y.) 331; Hill *v.* Thacter, 3 How. Pr. (N. Y.) 407.

If the statute provides several grounds upon which the affidavit of an agent or attorney shall be allowable, the existence of any one will authorize the agent or attorney to make the affidavit. Gibson *v.* Shorb, 7 Kan. App. 732, 52 Pac. 579.

10. *Iowa.*— Brady *v.* Otis, 40 Iowa 97.

Kansas.— Johnson *v.* Woodbury Trust Co., (App. 1899) 57 Pac. 134.

New York.— Boston Locomotive Works *v.* Wright, 15 How. Pr. 253; Mason *v.* Brown, 6 How. Pr. 481; Hunt *v.* Meacham, 6 How. Pr. 400.

North Carolina.— Hammerslaugh *v.* Farrior, 95 N. C. 135; Cowles *v.* Hardin, 79 N. C. 577.

Pennsylvania.— Johnson *v.* Smith, 158 Pa. St. 568, 28 Atl. 144.

South Carolina.— Bray Clothing Co. *v.* Shealy, 53 S. C. 12, 30 S. E. 620.

Texas.— Hunt *v.* Atchison, etc., R. Co., (Civ. App. 1894) 28 S. W. 460.

West Virginia.— Quesenberry *v.* Peoples' Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73.

See 39 Cent. Dig. tit. "Pleading," § 890.

11. See Johnson *v.* Woodbury Trust Co., (Kan. App. 1899) 57 Pac. 134.

12. *Nebraska.*— Cropsey *v.* Wiggenhorn, 3 Nebr. 108.

New York.— Kirkland *v.* Aiken, 66 Barb. 211; Wheeler *v.* Chesley, 14 Abb. Pr. 441; Myers *v.* Gerrits, 13 Abb. Pr. 106; Boston Locomotive Works *v.* Wright, 15 How. Pr. 253; Stannard *v.* Mattice, 7 How. Pr. 4; Mason *v.* Brown, 6 How. Pr. 481.

North Carolina.— Hammerslaugh *v.* Farrior, 95 N. C. 135.

Ohio.— Cincinnati Second Nat. Bank *v.* Hemingray, 31 Ohio St. 168; Rose *v.* Creutz, 3 Ohio Dec. (Reprint) 109, 3 Wkly. L. Gaz. 251; Kerns *v.* Roberts, 2 Ohio Dec. (Reprint) 537, 3 West. L. Month. 604.

South Carolina.— Bray Clothing Co. *v.* Shealy, 53 S. C. 12, 30 S. E. 620; Hecht *v.* Freisleben, 28 S. C. 181, 5 S. E. 475.

Wisconsin.— Bates *v.* Pike, 9 Wis. 224.

See 39 Cent. Dig. tit. "Pleading," § 890.

A mortgage securing the payment of a note is not a "written instrument for the payment of money only" within such a code provision, and a pleading in an action on such mortgage cannot be verified by an agent or attorney of the party. Cincinnati Second Nat. Bank *v.* Hemingray, 31 Ohio St. 168 [*affirming* 1 Cinc. Super. Ct. 435]; Kerns *v.* Roberts, 2 Ohio Dec. (Reprint) 537, 3 West. L. Month. 604.

A petition for the collection of money rent, under a written lease in the possession of plaintiff's attorney, may be verified by him. Rose *v.* Creutz, 3 Ohio Dec. (Reprint) 109, 3 Wkly. L. Gaz. 245.

Turning a note over to an attorney for the purpose of bringing suit thereon does not deprive an agent of the possession so as to preclude him from verifying the complaint under this statute. Carolina Grocery Co. *v.* Moore, 63 S. C. 184, 41 S. E. 88.

13. Fowler *v.* Gate City Nat. Bank, 88 Ga. 29, 13 S. E. 831; Poullain *v.* Pigg, 60 Ga. 263; Colquitt *v.* Mercer, 44 Ga. 432; Lefevre *v.* Latson, 5 Sandf. (N. Y.) 650; Clark's Cove Fertilizer Co. *v.* Stever, 29 Misc. (N. Y.) 571, 62 N. Y. Suppl. 249; Pardi *v.* Conde, 26 Misc. (N. Y.) 202, 55 N. Y. Suppl. 1004 [*reversed* on other grounds in 27 Misc. 496, 58 N. Y. Suppl. 410]; Levey *v.* Duff, 90 N. Y. Suppl. 410; Drevert *v.* Appsert, 2 Abb. Pr. (N. Y.) 165; Stannard *v.* Mattice, 7 How. Pr. (N. Y.) 4.

Officers of corporation absent.— Such a statute applies when the officers of a domestic corporation are absent from the county where the attorney resides. Climax Specialty Co. *v.* Smith, 31 Misc. (N. Y.) 275, 64 N. Y. Suppl. 42; High Rock Knitting Co. *v.* Bronner, 18 Misc. (N. Y.) 627, 43 N. Y. Suppl. 725 [*affirmed* in 29 N. Y. App. Div. 627, 52 N. Y. Suppl. 1143].

That a party cannot be found in the city does not authorize a verification by attorney on the statutory ground that the party is not within the county. Lyons *v.* Murat, 54 How. Pr. (N. Y.) 23.

14. See the statutes of the several states. And see Quesenberry *v.* Peoples' Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73.

An officer of a corporation is deemed a party to the suit in making affidavits, and his verification is sufficient if it conforms to the requirements imposed upon parties who swear to their own pleadings. Henry *v.* Brooklyn Heights R. Co., 43 Misc. (N. Y.) 589, 89 N Y Suppl. 525; Standard Fashion Co. *v.* Dean, 8 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 127.

Where a voluntary association is sued by its treasurer, the answer must be verified by him, and if another officer of the association makes the verification, he must do so as agent or attorney of the treasurer. Tallmadge *v.* Lounsbury, 23 Abb. N. Cas. (N. Y.) 331.

15. See the statutes of the several states.

Under some statutes the petition of a county must be verified by its chief officer residing in the county, or, if there is no such officer residing in the county, it may be verified by its attorney.[16] An attorney or agent who is authorized to verify one pleading may properly verify the subsequent pleadings of the same party.[17]

4. Time. While it is customary and in accordance with good practice to file the verification with the pleading to be verified,[18] it is usually held competent for the court, in the exercise of a sound discretion, to permit a verification to be made at any time before the entry of judgment,[19] unless the time when the affidavit shall be filed is regulated by statute.[20] Such leave will not ordinarily be granted after the other party or the court has acted on the basis of the pleading being unverified.[21] If a pleading is verified too soon, the effect is to nullify the verification, and leave the pleading as though it had never been verified.[22]

5. Form. The common form of a verification of a pleading as prescribed by the codes and practice acts is that the pleading is true of the affiant's own knowledge, except as to those matters stated on information and belief, and as to these the affiant believes it to be true.[23] The verification is, however, only required to be adapted to and be appropriate to the mode of statement in the pleading. If the mode of statement in the pleading is absolute, then the verification should be absolute; but if the mode of statement is qualified, then the verification should be qualified.[24] In some classes of cases the verification is required to be positive. Thus, facts in a dilatory plea must be sworn to positively, and a verification is not sufficient which is made on belief or information and belief.[25] So also the verification of a petition on an account must be sworn to positively.[26]

The secretary of a foreign corporation is an agent thereof within this provision. Robinson *v.* Ecuador Development Co., 32 Misc. (N. Y.) 106, 65 N. Y. Suppl. 427.

16. See the statutes of the several states. And see the cases cited *infra*, this note.

The chief officer referred to is the county judge, who must verify the petition, if there be such judge residing in the county (Combs *v.* Breathitt County, 38 S. W. 138, 39 S. W. 33, 18 Ky. L. Rep. 809; Estill County *v.* Richmond, etc., R. Co., 91 Ky. 349, 15 S. W. 862, 12 Ky. L. Rep. 906), if not, then the county attorney may verify the same (Estill County *v.* Richmond, etc., R. Co., 91 Ky. 349, 15 S. W. 862, 12 Ky. L. Rep. 906).

17. Kirkland *v.* Aiken, 66 Barb. (N. Y.) 211.

18. Quesenberry *v.* Peoples' Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73; Fenwick *v.* Grimes, 8 Fed. Cas. No. 4,734, 5 Cranch C. C. 603.

19. Arrington *v.* Tupper, 10 Cal. 464; Quesenberry *v.* Peoples' Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73; Griffin *v.* U. S., 13 Ct. Cl. 257. See also Hunter *v.* Snyder, 11 W. Va. 198. But see Rapp *v.* Elliot, 2 Dall. (Pa.) 184, 1 L. ed. 341.

After oral announcement of judgment in plaintiff's favor, the court may properly refuse to allow defendant to verify his plea, notwithstanding judgment had not then been actually signed and entered upon the minutes. Fisher *v.* Savannah Guano Co., 97 Ga. 473, 25 S. E. 477.

20. Johnson *v.* Woodbury Trust Co., (Kan. 1901) 64 Pac. 1030 (with pleading); Atwood *v.* Higgins, 76 Me. 423; Lancaster County Nat. Bank *v.* Henning, 171 Pa. St. 399, 33 Atl. 335.

21. Phœnix Assur. Co. *v.* Fristoe, 53 W. Va. 361, 44 S. E. 253. But see Wilson *v.* Preston, 15 Iowa 246.

22. Ronnow *v.* Delmue, 23 Nev. 29, 41 Pac. 1074; Pettit *v.* Seligman, 54 Misc. (N. Y.) 249, 104 N. Y. Suppl. 397.

Prior to entry of action.— In Bellamy *v.* Oliver, 65 Me. 108, the affidavit to a plea in abatement was dated prior to the return-day of the writ sought to be abated, and was held bad. But by a subsequent statute in that state it was enacted that such an affidavit might be made at any time before the entry of the action or before filing the same. Atwood *v.* Higgins, 76 Me. 423.

23. See the statutes of the several states.

24. Orvis *v.* Goldschmidt, 64 How. Pr. (N. Y.) 71. See also *infra*, VIII, B, 6, b.

25. *Illinois.*— King *v.* Haines, 23 Ill. 340.

Maine.— Fogg *v.* Fogg, 31 Me. 302.

Pennsylvania.— Day *v.* Hamburgh, 1 Browne 75.

Tennessee.— Wrompelmeir *v.* Moses, 3 Baxt. 467; Freidlander *v.* Pollock, 5 Coldw. 490; State Bank *v.* Jones, 1 Swan 391; Seifreid *v.* People's Bank, 2 Tenn. Ch. 17.

Texas.— Graham *v.* McCarty, 69 Tex. 323, 7 S. W. 342; Davis *v.* Campbell, 35 Tex. 779; Wilson *v.* Adams, 15 Tex. 323.

West Virginia.— Quarrier *v.* Peabody Ins Co., 10 W. Va. 507, 27 Am. Rep. 582.

United States.— Adams *v.* White, 1 Fed. Cas. No. 68, 2 Pittsb. (Pa.) 21.

See 39 Cent. tit. "Pleading," § 896.

The affidavit supporting a denial of notice of claim for damages must be positive. Missouri, etc., R. Co. *v.* Pietzsch, 10 Tex. Civ. App. 572, 30 S. W. 1083.

26. Tripp, etc., Boot, etc., Co. *v.* Martin, 45 Kan. 765, 26 Pac. 424.

6. Requisites and Sufficiency — a. In General. The substantial requirements of affidavits of verification are largely matters of statutory regulation.[27] The statute often prescribes the form to be used, but it is unnecessary to employ the exact language of the statute,[28] if the words used substantially comply with it.[29] The object of the verification is to insure good faith in the averments of the parties,[30] and hence it is construed with some liberality.[31] The verification should, in general, clearly identify the allegations to which it refers;[32] but a general unrestricted verification has been held to apply to all the causes of action or defenses set up in the pleading.[33] If the verification is broader than required, the superfluous words may be rejected as surplusage.[34] But the omission of any substantial requirement renders the verification fatally defective.[35] A mere certificate, following a pleading, to the effect that the pleading was subscribed and sworn to before a proper officer, has been held a sufficient affidavit;[36] but other cases have held it insufficient.[37] The verification should designate the affiant;[38] hence where an affidavit does not indicate which member of a firm swore to it, it is fatally defective.[39] By the weight of authority an affidavit of verification should contain a venue, or it will be treated as a nullity;[40] but it need not be entitled in the term.[41]

b. Knowledge, Information, and Belief. The great object enforced by the statute in prescribing what is essential to verification is to make it appear on the face of a pleading and its verification what matters therein contained are set forth according to the knowledge of the party making such pleading, and what

27. See the statutes of the several states. See also Gamble *v.* Beattie, 4 How. Pr. (N. Y.) 41.

28. Abbott *v.* Campbell, 69 Nebr. 371, 95 N. W. 591; Sexauer *v.* Bowen, 3 Daly (N. Y.) 405; Harnes *v.* Tripp, 4 Abb. Pr. (N. Y.) 232; Bowghen *v.* Nolan, 53 How. Pr. (N. Y.) 485.

"While it is not necessary to follow the exact words of the statute, it is always safe to do so, and we would strongly advise such a course in preference to mere experimental practice, which is always dangerous." Cole *v.* Boyd, 125 N. C. 496, 498, 34 S. E. 557.

29. *California.*— Fleming *v.* Wells, 65 Cal. 336, 4 Pac. 197; Ely *v.* Frisbie, 17 Cal. 250.

Colorado.— Perras *v.* Denver, etc., R. Co., 5 Colo. App. 21, 36 Pac. 637.

Georgia.— Bishop *v.* Exchange Bank, 114 Ga. 962, 41 S. E. 43.

Kentucky.— Peak *v.* Grover, 12 Ky. L. Rep. 189.

Nebraska.— Abbott *v.* Campbell, 69 Nebr. 371, 95 N. W. 591.

New York.— Radway *v.* Mather, 5 Sandf. 654; Sexauer *v.* Bowen, 10 Abb. Pr. N. S. 335; Harnes *v.* Tripp, 4 Abb. Pr. 232; Bowghen *v.* Nolan, 53 How. Pr. 485; Waggoner *v.* Brown, 8 How. Pr. 212.

North Carolina.— McLamb *v.* McPhail, 126 N. C. 218, 35 S. E. 426; Alspaugh *v.* Winstead, 79 N. C. 526.

Washington.— Cady *v.* Case, 11 Wash. 124, 39 Pac. 375.

See 39 Cent. Dig. tit. "Pleading," § 892.

30. Patterson *v.* Ely, 19 Cal. 28; Wilson *v.* Preston, 15 Iowa 246.

31. Hunt *v.* Test, 8 Ala. 713, 42 Am. Dec. 659; Seattle Coal, etc., Co. *v.* Thomas, 57 Cal. 197; McCormick *v.* Bay City, 23 Mich. 457.

32. Brewer, etc., Brewing Co. *v.* Boddie, 59 Ill. App. 45.

33. Harris *v.* Castleberry, 3 Indian Terr. 576, 64 S. W. 541.

34. Ross *v.* Longmuir, 15 Abb. Pr. (N. Y.) 326; Market Nat. Bank *v.* Hogan, 21 Wis. 317.

35. Columbus Show Case Co. *v.* Brinson, 128 Ga. 487, 57 S. E. 871; Wagoner *v.* Wagoner, 76 Md. 311, 25 Atl. 338.

36. Powers *v.* Bryant, 7 Port. (Ala.) 9; State *v.* Middleton, 5 Port. (Ala.) 484.

Necessity of special exception.—A pleading containing several pleas, at the end of which were the words, "Subscribed and sworn to before me, this the 5th day of March, 1896," signed by the clerk of the court, has been held sufficiently verified in the absence of a special exception directed to the defect. Bowles *v.* Boydston, (Tex. Civ. App. 1897) 41 S. W. 368.

37. Martin *v.* Martin, 130 N. C. 27, 40 S. E. 822; Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490; Trabue *v.* Higden, 4 Coldw. (Tenn.) 620.

38. See cases cited *infra*, this and following note.

Where it is not stated that the person swearing to a verification is plaintiff, it will be presumed that he is plaintiff, if the names in the petition and the affidavit are the same. Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393, 2 West. L. Month. 588.

39. Seley *v.* Whitfield, (Tex. Civ. App. 1898) 46 S. W. 865; Seley *v.* Parker, (Tex. Civ. App. 1898) 45 S. W. 1026.

40. American Book Co. *v.* Watson, 24 Misc. (N. Y.) 524, 53 N. Y. Suppl. 974; Lane *v.* Morse, 6 How. Pr. (N. Y.) 394. *Contra*, Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393, 2 West. L. Month. 588. See, generally, Affidavits, 2 Cyc. 21.

41. Haines *v.* Gurley, 5 Blackf. (Ind.) 269.

matters are stated according to information and belief only. Any mode of verification that does not accomplish this end defeats the object of the statute, and accordingly must be held defective as to matter of substance.[42] If a pleading shows distinctly what allegations are made on personal knowledge and what on information and belief, it is sufficient for the verification to state that the pleading is true, of plaintiff's own knowledge, except as to those matters stated on information and belief, and as to these the affiant believes it to be true.[43] But this form of affidavit is not sufficient where the pleading does not make this distinction.[44] Thus if all matters pleaded are set forth to be according to the knowledge of the party pleading, it is unnecessary to add to the verification the words "except as to those matters stated on information and belief, and as to those matters he believes it to be true."[45] So, on the other hand, if it appears by the pleading that all matters pleaded are on information and belief only, he may omit the statement that the same is true of his own knowledge.[46] In both of these cases of omission it must appear distinctly on the face of the pleading whether the matters are so pleaded according to knowledge, or information and belief.[47] Any matter set forth in a pleading requiring verification which is not stated on the face of the pleading to be so pleaded according to information and belief must be supported by the affidavit of the party, affirming two distinct propositions: (1) That he has knowledge of the matters pleaded; and (2) that they are pleaded truly, according to that knowledge.[48] If the statute requires the affidavit to

42. Burmester *v.* Moseley, 33 S. C. 251, 11 S. E. 786; Smalls *v.* Wilder, 6 S. C. 402.

43. *California.*— Christopher *v.* Condogeorge, 128 Cal. 581, 61 Pac. 174; Kirk *v.* Rhoads, 46 Cal. 398; Patterson *v.* Ely, 19 Cal. 28.

Florida.— State *v.* Anderson, 26 Fla. 240, 8 So. 1.

New York.— Kinkaid *v.* Kipp, 1 Duer 692; Ross *v.* Longmuir, 15 Abb. Pr. 326; Orvis *v.* Goldschmidt, 64 How. Pr. 71; Ladue *v.* Andrews, 54 How. Pr. 160; Williams *v.* Riel, 11 How. Pr. 374.

North Carolina.— McLamb *v.* McPhail, 126 N. C. 218, 35 S. E. 426; Alspaugh *v.* Winstead, 79 N. C. 526.

South Carolina.— State *v.* Port Royal, etc., R. Co., 45 S. C. 470, 23 S. E. 383.

United States.— Robinson *v.* Gregg, 57 Fed. 186.

See 39 Cent. Dig. tit. "Pleading," § 894.

The use of the words "in substance and in fact" adds nothing to the statement that the allegations of a pleading "are true." Armstrong *v.* State, 101 Tenn. 389, 47 S. W. 492.

In some states a verification need only show that the affiant believes the pleading to be true. Cady *v.* Case, 11 Wash. 124, 39 Pac. 375.

44. Payne *v.* Boyd, 125 N. C. 499, 34 S. E. 631; Cole *v.* Boyd, 125 N. C. 496, 34 S. E. 557; Phifer *v.* Travelers' Ins. Co., 123 N. C. 410, 31 S. E. 716; Addison *v.* Sujette, 50 S. C. 192, 27 S. E. 631; Burmester *v.* Moseley, 33 S. C. 251, 11 S. E. 786; Armstrong *v.* Friesleben, 28 S. C. 605, 5 S. E. 479; Hecht *v.* Friesleben, 28 S. C. 181, 5 S. E. 475; Riley *v.* Treanor, (Tex. Civ. App. 1894) 25 S. W. 1054.

No presumption as to mode of statement. — Where some or all of the allegations of a pleading are not expressly specified as made either on personal knowledge or on information and belief it cannot be presumed that they are of one kind rather than the other, and hence a verification to the effect that the facts stated by the pleader of his own knowledge are true and that those stated on information and belief affiant believes to be true, is bad, inasmuch as it does not embrace such undesignated allegations. Carroll *v.* McMillan, 133 N. C. 140, 45 S. E. 530; Cole *v.* Boyd, 125 N. C. 496, 34 S. E. 557; Phifer *v.* Travelers' Ins. Co., 123 N. C. 410, 31 S. E. 716; Hecht *v.* Friesleben, 28 S. C. 181, 5 S. E. 475. But an affidavit that all the facts alleged are true to the knowledge of affiant except such as are stated to be alleged on information and belief, where no facts are so alleged, is equivalent to an affidavit that all the facts alleged are true to the knowledge of the affiant. Christopher *v.* Condogeorge, 128 Cal. 581, 61 Pac. 174; State *v.* Anderson, 26 Fla. 240, 8 So. 1; Kieley *v.* Barron, etc., Heating, etc., Co., 87 N. Y. App. Div. 317, 84 N. Y. Suppl. 306.

45. Patterson *v.* Ely, 19 Cal. 28; Kinkaid *v.* Kipp, 1 Duer (N. Y.) 692; Ross *v.* Longmuir, 15 Abb. Pr. (N. Y.) 326; Smalls *v.* Wilder, 6 S. C. 402; Morley *v.* Guild, 13 Wis. 576.

46. Harnes *v.* Tripp, 4 Abb. Pr. (N. Y.) 232; Orvis *v.* Goldschmidt, 64 How. Pr. (N. Y.) 71; Smalls *v.* Wilder, 6 S. C. 402; Morley *v.* Guild, 13 Wis. 576.

47. Smalls *v.* Wilder, 6 S. C. 402; Robinson *v.* Gregg, 57 Fed. 186.

48. Smalls *v.* Wilder, 6 S. C. 402.

An affidavit that a pleading is true implies a knowledge of its contents and the affiant need not state that he has read it or heard it read. Patterson *v.* Ely, 19 Cal. 28.

show that the pleading is true "to the knowledge" of the affiant, it is not enough to state merely that it is "true." [49] A verification purporting to be made positively has been held not to be vitiated by adding the words "to the best of affiant's knowledge and belief," [50] but there are decisions to the contrary; [51] and adding "as the affiant believes" to an affidavit destroys it as a positive verification.[52] An affidavit that a plea is true to the best of defendant's remembrance is defective.[53] Nor is it a sufficient verification that the party knows the pleading to be "substantially" true.[54]

c. Verification by One Not Party to Record — (i) *In General.* An attorney or agent who verifies a pleading for a party must, in some states, verify positively,[55] although in others he may in certain cases verify on information and belief.[56]

(ii) *Knowledge, Information, and Belief.* When the verification of a pleading is made by an agent or attorney, he should specifically set forth therein, when the verification is positive, his knowledge of each material fact stated in the pleading verified, and what knowledge he has,[57] or the source of his information

49. Sexauer *v.* Bowen, 3 Daly (N. Y.) 405; Tibballs *v.* Selfridge, 12 How. Pr. (N. Y.) 64; Williams *v.* Riel, 11 How. Pr. (N. Y.) 374. *Contra*, Southworth *v.* Curtis, 6 How. Pr. (N. Y.) 271.

50. Brooks *v.* Fassett, 19 Ark. 666; Deering Harvester Co. *v.* Peugh, 17 Ind. App. 400, 45 N. E. 808; Pratt *v.* Stevens, 94 N. Y. 387; People *v.* Campbell, 88 Hun (N. Y.) 544, 34 N. Y. Suppl. 801; Jackson *v.* Webster, 6 Munf. (Va.) 462.

51. Fogg *v.* Fogg, 31 Me. 302; Frazer *v.* Taylor, 2 How. Pr. (N. Y.) 77; Day *v.* Hamburgh, 1 Browne (Pa.) 75; Graham *v.* McCarty, 69 Tex. 323, 7 S. W. 342; Davis *v.* Campbell, 35 Tex. 779; Wilson *v.* Adams, 15 Tex. 323; Cates *v.* Mass, (Tex. Civ. App. 1890) 14 S. W. 1066.

52. Adamson *v.* Wood, 5 Blackf. (Ind.) 448; Adams *v.* White, 1 Fed. Cas. No. 68, 2 Pittsb. (Pa.) 21.

53. Moore *v.* Morris, 26 Ga. 649.

54. Burton *v.* Brooks, 25 Ark. 215; Waggoner *v.* Brown, 8 How. Pr. (N. Y.) 212.

55. Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297; Newman *v.* Bird, 60 Cal. 372; *In re* Hotchkiss, 58 Cal. 39.

56. See the statutes of the several states. And see Johnson *v.* Woodbury Trust Co., (Kan. App. 1899) 57 Pac. 134; Gibson *v.* Shorb, 7 Kan. App. 732, 52 Pac. 579; Knapp *v.* Standley, 45 Mo. App. 264; Lefevre *v.* Latson, 5 Sandf. (N. Y.) 650; Pardi *v.* Conde, 26 Misc. (N. Y.) 202, 55 N. Y. Suppl. 1004 [*reversed* on other grounds in 27 Misc. 496, 58 N. Y. Suppl. 410]; Soutter *v.* Mather, 14 Abb. Pr. (N. Y.) 440; People *v.* Allen, 14 How. Pr. (N. Y.) 334; Treadwell *v.* Fassett, 10 How. Pr. (N. Y.) 184; Stannard *v.* Mattice, 7 How. Pr. (N. Y.) 4; Morley *v.* Guild, 13 Wis. 576.

Where a party would be required to verify positively, an agent or attorney must also verify positively. Warman *v.* Akron First Nat. Bank, 70 Ill. App. 181; Pardi *v.* Conde, 27 Misc. (N. Y.) 496, 58 N. Y. Suppl. 410.

57. *Iowa.*— Clute *v.* Hazleton, 51 Iowa 355, 1 N. W. 672; Brady *v.* Otis, 40 Iowa 97; Leach *v.* Keach, 7 Iowa 232.

Kansas.— Aiken *v.* Franz, 2 Kan. App. 75, 43 Pac. 306.

Missouri.— Bridgeford *v.* The Elk, 6 Mo. 356.

New York.— People *v.* Allen, 14 How. Pr. 334; Meads *v.* Gleason, 13 How. Pr. 309; Hubbard *v.* National Protection Ins. Co., 11 How. Pr. 149; Treadwell *v.* Fassett, 10 How. Pr. 184; Stannard *v.* Mattice, 7 How. Pr. 4; Van Horne *v.* Montgomery, 5 How. Pr. 238; Fitch *v.* Bigelow, 5 How. Pr. 237; Dixwell *v.* Wordsworth, 2 Code Rep. 1.

North Carolina.— Hammerslaugh *v.* Farrior, 95 N. C. 135; Cowles *v.* Hardin, 79 N. C. 577.

Pennsylvania.— Johnson *v.* Smith, 158 Pa. St. 568, 28 Atl. 144.

South Carolina.— Armstrong *v.* Friesleben, 28 S. C. 605, 5 S. E. 479; Hecht *v.* Friesleben, 28 S. C. 181, 5 S. E. 475.

Wisconsin.— Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124; Morley *v.* Guild, 13 Wis. 576; Gillett *v.* Houghton, 8 Wis. 311.

See 39 Cent. Dig. tit. "Pleading," § 899.

Under Iowa Code, § 2673, providing that when verification of a pleading is made by a person other than a party, it must contain averments showing affiant competent to make the same, it has been held that the competency of the affiant may be shown by a general averment that the affiant has knowledge of the statements of the pleadings, and knows them to be true. Searle *v.* Richardson, 67 Iowa 170, 25 N. W. 113; Yoe *v.* Nichols, 51 Iowa 330, 1 N. W. 664; Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412.

Actual knowledge of the facts is not shown by a statement that they are more fully known to the affiant than to the party, where it does not appear how much the party knows. Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297; Boston Locomotive Works *v.* Wright, 15 How. Pr. (N. Y.) 253.

When facts show lack of knowledge.—A general statement that the affiant has personal knowledge of the facts alleged, accompanied by further statements showing that he does not have such knowledge, is unavailing. Morris *v.* Fowler, 99 N. Y. App.

and the grounds of his belief, when the affidavit is made on information and belief,[58] and should usually state the reason why the affidavit was not made by the party himself.[59] Moreover, when the right of a stranger to the record to verify the pleadings depends upon his relation to the party to the record or other extrinsic facts, such relation or facts should be stated or recited in the affidavit.[60] But

Div. 245, 90 N. Y. Suppl. 918; Moran *v.* Helf, 52 N. Y. App. Div. 481, 65 N. Y. Suppl. 113. But see Beyer *v.* Wilson, 46 Hun (N. Y.) 397.

Where a verification by attorney contradicts a statement in the pleading verified, the party may properly be required to verify in person. Jaillard *v.* Tomes, 3 Abb. N. Cas. (N. Y.) 24.

Client's knowledge need not be shown.— If an attorney shows in his affidavit that the facts alleged are personally known to him, it is unnecessary to show that his client knows anything about them. Bowles *v.* Glasgow, 36 Tex. 94.

Reasonable certainty in the affidavit relative to affiant's means of knowledge or ground of belief is sufficient. Duparquet *v.* Fairchild, 49 Hun (N. Y.) 471, 2 N. Y. Suppl. 264. "The law does not require that the affidavit shall be certain to a certain intent in every particular." Bellaire First Nat. Bank *v.* Mason, 57 Iowa 105, 10 N. W. 294.

58. Eldridge *v.* The William Campbell, 27 Mo. 595; Neuberger *v.* Webb, 24 Hun (N. Y.) 347; Soutter *v.* Mather, 14 Abb. Pr. (N. Y.) 440; People *v.* Allen, 14 How. Pr. (N. Y.) 334; Maine Bank *v.* Buel, 14 How. Pr. (N. Y.) 311; Meads *v.* Gleason, 13 How. Pr. (N. Y.) 309; Hubbard *v.* National Protection Ins. Co., 11 How. Pr. (N. Y.) 149; Treadwell *v.* Fassett, 10 How. Pr. (N. Y.) 184; Stannard *v.* Mattice, 7 How. Pr. (N. Y.) 4; Cowles *v.* Hardin, 79 N. C. 577; Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198; Kirst *v.* Wells, 47 Wis. 56, 1 N. W. 357; Taylor *v.* Robinson, 26 Wis. 545.

The verification of pleadings by an officer of a corporation is the certification of the corporation itself and need not state the grounds of belief or sources of information. Commercial Nat. Bank *v.* Hutchison, 87 N. C. 22.

Representations of his client have been held to form sufficient grounds for an attorney's belief. Dixwell *v.* Wordsworth, 2 Code Rep. (N. Y.) 1.

An affidavit by an attorney stating that his "knowledge" is derived from certain information sufficiently states that such information is "the ground of his belief," where all the allegations of the pleading are on information and belief. High Rock Knitting Co. *v.* Bronner, 18 Misc. (N. Y.) 627, 43 N. Y. Suppl. 725 [*affirmed* in 29 N. Y. App. Div. 627, 52 N. Y. Suppl. 1143].

Where defendant by its agent denies any knowledge or information sufficient to form a belief, it is not necessary that he should state the grounds of his belief. American Audit Co. *v.* Industrial Federation of America, 84 N. Y. App. Div. 304, 82 N. Y. Suppl. 642.

59. *Idaho.*— Pence *v.* Durbin, 1 Ida. 550.

New York.— Neuberger *v.* Webb, 24 Hun 347; Meads *v.* Gleason, 13 How. Pr. 309; Stannard *v.* Mattice, 7 How. Pr. 4; Van Horne *v.* Montgomery, 5 How. Pr. 238; Fitch *v.* Bigelow, 5 How. Pr. 237. In Imlay *v.* New York, etc., R. Co., 1 Sandf. 732, decided under an old statute, it was held that no reason for an attorney's verification need be stated, and no facts showing his knowledge.

Ohio.— Jirava *v.* Brieska, 4 Ohio Dec. (Reprint) 296, 1 Clev. L. Rep. 227.

Oklahoma.— Garfield County *v.* Isenberg, 10 Okla. 378, 61 Pac. 1067.

Pennsylvania.— Johnson *v.* Smith, 158 Pa. St. 568, 28 Atl. 144; Goldbeck *v.* Brady, 4 Pa. Co. Ct. 169.

South Carolina.— Armstrong *v.* Friesleben, 28 S. C. 605, 5 S. E. 479; Hecht *v.* Friesleben, 28 S. C. 181, 5 S. E. 475.

Wisconsin.— Gillett *v.* Houghton, 8 Wis. 311.

See 39 Cent. Dig. tit. "Pleading," § 899.

Thus if an attorney verifies because of the non-residence of the party, it is held in some cases that he should so state in his affidavit (Burgess *v.* Jacobs, 14 B. Mon. (Ky.) 415); and the statement should be made positively (Stickney *v.* Wolf, 2 Ohio Dec. (Reprint) 403, 2 West. L. Month. 602). Other cases hold that a mere statement that the party is a non-resident or is absent from the county is in itself a sufficient statutory reason for the verification by attorney, without a further statement that it is for that reason that the verification is made by the attorney. Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83; Stephens *v.* Parrish, 83 Cal. 561, 23 Pac. 797.

Where the facts are within the personal knowledge of an attorney, some cases hold that he need not state in his affidavit the reason why the party himself did not verify (Matter of Mahoney, 88 N. Y. App. Div. 140, 84 N. Y. Suppl. 329; Gourney *v.* Wersuland, 3 Duer (N. Y.) 613; Betts *v.* Kridell, 20 Abb. N. Cas. (N. Y.) 1; The Senorita *v.* Simonds, 1 Oreg. 274); and others hold that the statement that the facts are within the personal knowledge of the attorney is itself a sufficient reason why the affidavit is made by the attorney instead of by the party (Newman *v.* Bird, 60 Cal. 372; Jirava *v.* Brieska, 4 Ohio Dec. (Reprint) 296, 1 Clev. L. Rep. 227).

60. Phonoharp Co. *v.* Stobbe, 20 Misc. (N. Y.) 698, 46 N. Y. Suppl. 678; Carolina Grocery Co. *v.* Moore, 63 S. C. 184, 41 S. E. 88.

there need not be a formal averment of agency when a person verifies a pleading as agent, if it is reasonably clear, from the affidavit, that it was made in that capacity.[61]

(III) *Possession of Instrument on Which Action or Defense Based.* When the pleading is founded upon a written instrument for the payment of money only and such instrument is in the possession of the attorney, he may, according to some decisions, verify the pleading without setting forth any further facts respecting his means of knowledge or the grounds of his belief,[62] or the reason why the party did not verify.[63] On the other hand other cases hold that in such a case the knowledge of the attorney or the grounds of his belief must be set forth.[64] The word instrument imports a writing.[65] Hence a verification by an attorney in an action upon an instrument for the payment of money only is not defective because it fails to state expressly that the instrument is in writing.[66]

7. Signature. Either the pleading or the affidavit of verification should be subscribed by the person verifying, but both need not be subscribed in order to make the affidavit sufficient.[67]

8. Jurat — a. In General. The jurat should conform to the local statutory requirements and to the general rules governing affidavits.[68] It should be made by a properly authorized officer,[69] and should show on its face the officer's authority.[70] Ordinarily the officer's seal is not essential to its validity,[71] unless required by statute.[72] An unattested jurat showing that the affidavit was made in open court is sufficient.[73]

b. Who May Administer Oath. Statutes usually designate what officers may take affidavits.[74] If the statute does not designate any particular officer, a

61. Myers *v.* Gerrits, 13 Abb. Pr. (N. Y.) 106; The Senorita *v.* Simonds, 1 Oreg. 274.

Failure to state and swear to the fact of agency is not fatal where it is added by way of description thus: "A. B., agent for plaintiff, makes oath and says." Remington Sewing Mach. Co. *v.* Cushen, 8 Mo. App. 528.

Where one verifies as an attorney, his license and the fact that he assumes to act as such is sufficient to show his authority to act. O'Brien *v.* Yare, 88 Mo. App. 489.

62. Smith *v.* Mulliken, 2 Minn. 319; Matthews *v.* Smith, 9 N. Y. Civ. Proc. 165; Griffin *v.* Asheville Light Co., 111 N. C. 434, 16 S. E. 423.

The phrase "written instrument for the payment of money only" refers to and comprehends bills of exchange, notes, bonds, contracts, or any instrument the creature of contracting parties, for the payment of money only, but does not include judgments. Smith *v.* Mulliken, 2 Minn. 319.

Possession of the instrument sued on is sufficient "knowledge or grounds of belief" to enable an attorney to make the affidavit. Griffin *v.* Asheville Light Co., 111 N. C. 434, 16 S. E. 423.

63. Hyde *v.* Salg, 27 Hun (N. Y.) 369; Gillett *v.* Houghton, 8 Wis. 311.

64. Boston Locomotive Works *v.* Wright, 15 How. Pr. (N. Y.) 253; Johnson *v.* Maxwell, 87 N. C. 18; Crane *v.* Wiley, 14 Wis. 658.

"Possession alone of the instrument on which the action or defense is founded is a sufficient statutory ground of belief to enable the attorney to make the affidavit." Market Nat. Bank *v.* Hogan, 21 Wis. 317.

65. Abbott *v.* Campbell, 69 Nebr. 371, 95 N. W. 591.

66. Abbott *v.* Campbell, 69 Nebr. 371, 95 N. W. 591.

67. Smith *v.* Benton, 15 Mo. 371; People *v.* Campbell, 88 Hun (N. Y.) 544, 34 N. Y. Suppl. 801; Laimbeer *v.* Allen, 2 Code Rep. (N. Y.) 15. See also *supra*, VIII, A, 3, c. See, generally, Affidavits, 2 Cyc. 26.

68. See the statutes of the several states. See, generally, Affidavits, 2 Cyc. 27 *et seq.*

69. Fowler *v.* Eyer, 2 Ohio Dec. (Reprint) 49, 1 West. L. Month. 210; Edgefield Bank *v.* Farmers' Co-operative Mfg. Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201.

70. Matter of Hotchkiss, 17 Misc. (N. Y.) 670, 41 N. Y. Suppl. 431; Williamson *v.* Williamson, 64 How. Pr. (N. Y.) 450; Fellows *v.* Menasha, 11 Wis. 558. See, generally, Affidavits, 2 Cyc. 31.

Official description.— An officer signing a verification should add some designation of the office in virtue of which he is acting. Bruce *v.* Gibson, 8 Ohio Dec. (Reprint) 31, 5 Cinc. L. Bul. 101.

71. Venneman *v.* Sievering, 9 Ohio Dec. (Reprint) 459, 14 Cinc. L. Bul. 5; Fowler *v.* Eyer, 2 Ohio Dec. (Reprint) 49, 1 West. L. Month. 210. See, generally, Affidavits, 2 Cyc. 32.

72. Jones *v.* Jones, 3 Pennew. (Del.) 14, 50 Atl. 212, holding that under Rev. Code, p. 240, requiring notaries public to use seals in the transaction of official business, an action for divorce will be dismissed where the certificate of the notary to the affidavit annexed to the petition did not bear the seal of the notary.

73. Stanton *v.* Burge, 34 Ga. 435.

74. See the statutes of the several states. See, generally, Affidavits, 2 Cyc. 9 *et seq.*

verification may be made before any officer within the state authorized to administer oaths.[75] Unless forbidden by statute,[76] an attorney, who is a notary public, may administer an oath to his client in the verification of a pleading.[77] Such practice is, however, generally discouraged by the courts. But the proceeding cannot be treated as a nullity, and the failure of the other party to take advantage of it in apt time will operate as a waiver of the irregularity.[78]

9. Amendment.[79] An affidavit of verification may usually be amended *nunc pro tunc*, in respect to the jurat,[80] or venue,[81] or in respect to any other matter either of form,[82] or substance,[83] within the discretion of the court,[84] where the allowance of the amendment tends to a fair trial of the case on the merits and the adverse party is given a reasonable time to meet the amended pleading.[85] Where no verification has been attached to a pleading, or one which is a nullity, the deficiency may be supplied by amendment.[86] Since the verification is no part of the pleading, the statutes respecting the amendment of pleadings do not apply.[87]

10. Effect — a. In General. Verification in a case not provided for by statute does not improve or impair the efficacy of a pleading; the verification is mere surplusage.[88] Nor will a verification aid a pleading which is insufficient,[89] or save it from being deemed frivolous.[90] But a verified pleading cannot be stricken out on the ground of falsity.[91]

b. Defective Verification. A defective verification should not, under some decisions, be treated as a nullity unless the opposite party is given an opportunity to correct the defect.[92] A motion to strike should first be made.[93] Other cases

Clerk of court.— Hinton *v.* Virginia L. Ins. Co., 116 N. C. 22, 21 S. E. 201; Fowler *v.* Eyer, 2 Ohio Dec. (Reprint) 49, 1 West. L. Month. 210. The authority of a clerk to take an affidavit extends also to his deputy. Walthew *v.* Milby, 3 Tex. App. Civ. Cas. § 119.

75. Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080; Carlisle *v.* Cowan, 85 Tenn. 165, 2 S. W. 803; Martin *v.* Porter, 4 Heisk. (Tenn.) 407.

District attorney.— Haile *v.* Smith, 128 Cal. 415, 60 Pac. 1032.

76. Tootle *v.* Smith, 34 Kan. 27, 7 Pac. 577; Warner *v.* Warner, 11 Kan. 121.

77. Yeagley *v.* Webb, 86 Ind. 424; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; Smith *v.* Ponath, 17 Mo. App. 262; Broemer *v.* Nordhoff, 8 Ohio Dec. (Reprint) 211, 6 Cinc. L. Bul. 289; Kosminsky *v.* Raymond, 20 Tex. Civ. App. 702, 51 S. W. 51. But see Meade *v.* Thorne, 2 Ohio Dec. (Reprint) 289, 2 West. L. Month. 313.

An attorney's clerk who is a notary public may also administer an oath to verify a pleading prepared by the attorney. Schuyler Nat. Bank *v.* Bollong, 24 Nebr. 821, 40 N. W. 411.

78. Phillips *v.* Phillips, 185 Ill. 629, 57 N. E. 796; Hollenbeck *v.* Detrick, 162 Ill. 388, 44 N. E. 732; Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123; Smith *v.* Ponath, 17 Mo. App. 262; Anonymous, 4 How. Pr. (N. Y.) 290; Gilmore *v.* Hempstead, 4 How. Pr. (N. Y.) 153. See, generally, Affidavits, 2 Cyc. 12.

79. Amendment of affidavits in general see Affidavits, 2 Cyc. 33, 34.

80. *Missouri.*— Bergesch *v.* Keevil, 19 Mo. 127.

Nebraska.— Johnson *v.* Jones, 2 Nebr. 126.

New York.— Rogers *v.* McLean, 11 Abb. Pr. 440 [*affirmed* in 34 N. Y. 536, 31 How. Pr. 279].

Ohio.— Venneman *v.* Sievering, 9 Ohio Dec. (Reprint) 459, 14 Cinc. L. Bul. 5; Stevens *v.* White, 2 Ohio Dec. (Reprint) 107, 1 West. L. Month. 394.

Texas.— Arnold *v.* Kreissler, 22 Tex. 580.

See 39 Cent. Dig. tit. "Pleading," § 907.

81. Yellow Pine Co. *v.* Atlantic Lumber Co., 21 Misc. (N. Y.) 164, 47 N. Y. Suppl. 79 [*affirmed* in 22 N. Y. App. Div. 629, 50 N. Y. Suppl. 1135].

82. Baker *v.* Wahrmund, 5 Tex. Civ. App. 268, 23 S. W. 1023.

83. Kerns *v.* Roberts, 2 Ohio Dec. (Reprint) 537, 3 West. L. Month. 604.

84. Heintzelman *v.* L'Amoroux, 3 Nev. 377; Blanchard *v.* Bennett, 1 Oreg. 328; Trabue *v.* Higden, 4 Coldw. (Tenn.) 620.

85. Best *v.* Dunn, 126 N. C. 560, 36 S. E. 126.

86. Meade *v.* Thorne, 2 Ohio Dec. (Reprint) 289, 2 West. L. Month. 313. *Contra*, Stevens *v.* White, 2 Ohio Dec. (Reprint) 107, 1 West. L. Month. 394.

87. Fusco *v.* Adams, 19 N. Y. Civ. Proc. 48.

88. Mosser *v.* Mosser, 29 Ala. 313; Porter *v.* Richard, 1 Ariz. 87, 25 Pac. 530.

Verification of a superfluous pleading does not add to or diminish the rights and obligations existing under the previous pleadings. Silliman *v.* Eddy, 8 How. Pr. (N. Y.) 122.

89. Farrington *v.* Wright, 1 Minn. 241.

90. Thorn *v.* New York Cent. Mills, 10 How. Pr. (N. Y.) 19 [*affirmed* in 1 Abb. Pr. 187].

91. See *infra*, XII, C, 1, c, (II), (C), (3).

92. Laimbeer *v.* Allen, 2 Code Rep. (N. Y.) 15.

93. Penee *v.* Durbin, 1 Ida. 550; Gilmore *v.* Hempstead, 4 How. Pr. (N. Y.) 153.

hold that a substantially defective verification is a nullity,[94] and the pleading may be treated as unverified.[95] A defective verification furnishes, however, no ground for setting aside the pleading.[96] Nor is the validity of a judgment thereby impaired.[97] If one who has no authority to do so verifies a pleading, it may still be deemed good as an unverified pleading.[98]

IX. PROFERT, OYER, AND EXHIBITS.

A. Profert and Oyer — 1. Definition and General Nature — a. Profert. Profert is that formula in pleading whereby the pleader professes to bring into court a writing to be shown to the court and to his adversary.[99]

b. Oyer. Oyer is the counterpart of profert.[1] To crave oyer originally, in the time of oral pleading, meant demanding to hear read the instrument of which profert was made;[2] but since the day of written pleading it has meant demanding to have a copy,[3] that he may, if necessary, spread it upon the record, to enable him to make his defense,[4] or that the instrument be filed for inspection.[5]

2. Necessity, Propriety, and Sufficiency[6] — a. Profert — (i) *In General.* At common law, when a cause of action or defense is founded upon a deed, or where an action was brought by an executor or administrator, the pleader is

94. Quin *v.* Tilton, 2 Duer (N. Y.) 648; Sexauer *v.* Bowen, 3 Daly (N. Y.) 405; Trabue *v.* Higden, 4 Coldw. (Tenn.) 620.

95. Smith *v.* Mulliken, 2 Minn. 319; Hughes *v.* Wood, 5 Duer (N. Y.) 603 note; Quin *v.* Tilton, 2 Duer (N. Y.) 648; People *v.* Allen, 14 How. Pr. (N. Y.) 334; Maine Bank *v.* Buel, 14 How. Pr. (N. Y.) 311; Meads *v.* Gleason, 13 How. Pr. (N. Y.) 309; Tibballs *v.* Selfridge, 12 How. Pr. (N. Y.) 64; Williams *v.* Riel, 11 How. Pr. (N. Y.) 374; Hubbard *v.* National Protection Ins. Co., 11 How. Pr. (N. Y.) 149; Treadwell *v.* Fassett, 10 How. Pr. (N. Y.) 184; Strauss *v.* Parker, 9 How. Pr. (N. Y.) 342; Waggoner *v.* Brown, 8 How. Pr. (N. Y.) 212; Lane *v.* Morse, 6 How. Pr. (N. Y.) 394; Fitch *v.* Bigelow, 5 How. Pr. (N. Y.) 237; Reichert *v.* Lonsberg, 87 Wis. 543, 58 N. W. 1030; Crane *v.* Wiley, 14 Wis. 658.

96. Strauss *v.* Parker, 9 How. Pr. (N. Y.) 342.

97. Quin *v.* Tilton, 2 Duer (N. Y.) 648.

98. Williams *v.* Empire Woolen Co., 7 N. Y. App. Div. 345, 39 N. Y. Suppl. 941.

99. 1 Chitty Pl. (16th Am. ed.) 378.

The import and practical meaning of this was that the party had the deed itself ready to give the opponent over thereof. Insurance Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136 [*citing* 1 Chitty Pl. (16th Am. ed.) 480]. And the deed is by the intendment of the law in the actual possession of the court. Powers *v.* Ware, 2 Pick. (Mass.) 451. It is said that as originally understood, perhaps, the term implied that as a fact the written instrument pleaded was produced in court and read or a copy thereof annexed to the pleading. Germain *v.* Wilgus, 67 Fed. 597, 14 C. C. A. 561. And in Wymark's Case, 5 Coke 74*b*, 77 Eng. Reprint 165, it is said that when the deed is shown in court, by judgment of law it remains in court all of the term in which it is shown, but that at the end of the term, if the deed be not denied, then the law adjudges it to be in the custody of the party to whom it belongs.

The object is: (1) For the inspection of the court, that it might see whether the instrument is duly executed and without erasure or interlineation; (2) for the benefit of the adverse party, that he may know whether it be his seal and signature; whether there be any indorsements or addenda, or references to other instruments, which may vary the covenants, or show that they have been in part or wholly fulfilled; and particularly that he may compare it with the declaration and incorporate a correct transcript of it with the record, that the judgment rendered upon it may be pleaded in bar to any future action. Austin *v.* Dills, 1 Tyler (Vt.) 308.

Under code.— Profert and oyer, as employed at common law, are not used under the code practice. Livingston County *v.* White, 30 Barb. (N. Y.) 72; Bright *v.* Currie, 5 Sandf. (N. Y.) 433; Welles *v.* Webster, 9 How. Pr. (N. Y.) 251.

1. See *infra*, IX, A, 2, b, (I).

2. Renner *v.* Reed, 3 Ark. 339; Chicago Bldg., etc., Co. *v.* Talbottom Creamery, etc., Co., 106 Ga. 84, 31 S. E. 809.

3. Renner *v.* Reed, 3 Ark. 339; Smith *v.* Alworth, 18 Johns. (N. Y.) 445.

4. Renner *v.* Reed, 3 Ark. 339.

5. Chicago Bldg., etc., Co. *v.* Talbottom Creamery, etc., Co., 106 Ga. 84, 31 S. E. 809. In Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265, it was said that the usual practice in modern pleading has been, to insert the profert as a matter of form, and file the deed with the declaration, to be read or copied by defendant; that this effects all the purposes of the antiquated ceremonial of praying in court, that the deed be read, and then having it read, before the plea was filed.

6. **Aider by verdict** see *infra*, XIV, J.

Curing by subsequent pleading see *infra*, XIV, B, 3.

Demurrer see *supra*, VI, F, 1, k.

required to make profert of the deed, letters testamentary, or letters of administration,[7] the deed being not merely the inducement but the foundation of the action, or the right of action being created by the act of the party and not merely by operation of law,[8] but other instruments not deeds do not require it.[9] It is required only where oyer may be demanded.[10] These rules have been modified by statute, and under the judicial systems in some states it is required that profert be made of any note or other written instrument which forms the foundation of the action or defense,[11] if the pleader has it in his possession,[12] or plaintiff is not required to lay profert in form;[13] but it necessarily exists by implication,[14] because whether laid or not defendant is entitled to the same benefit of oyer and the same production on the trial.[15] It need not be made of any instrument which is not the

7. *Alabama.*— Worthington *v.* Roberts, 7 Ala. 814.

Kentucky.— Rhodes *v.* Maraman, 2 T. B. Mon. 81; Williams *v.* Casey, 4 Bibb 300; Sook *v.* Knowles, 1 Bibb 283.

Maryland.— Hughes *v.* Sellers, 5 Harr. & J. 432.

Massachusetts.— Bender *v.* Sampson, 11 Mass. 42.

Mississippi.— Matthews *v.* Bailey, 25 Miss. 33.

New Jersey.—Patten *v.* Heustis, 26 N. J. L. 293.

New York.— Commercial Bank *v.* Sparrow, 2 Den. 97.

Ohio.— Bettle *v.* Wilson, 14 Ohio 257.

Tennessee.— Lowenheim *v.* Lockhard, 2 Baxt. 214.

Vermont.—Austin *v.* Dills, 1 Tyler 308.

See 39 Cent. Dig. tit. "Pleading," § 910.

Before and after delivery of deed.— In Taylor *v.* Browder, 1 Ohio St. 225, it was said that looking at the reasons for a profert in pleading, they will be found to apply with as much force to a plea of tender of a deed as to a pleading vouching a deed that has been delivered.

As to letters testamentary or of administration see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 988.

Declaring on altered deeds see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 226.

Excuse see *infra*, IX, A, 2, a, (II).

8. Austin *v.* Dills, 1 Tyler (Vt.) 308.

A deed under which the pleader claims no benefit need not be pleaded with profert. Thus a lessee sued in debt for rent and pleading an assignment and acceptance of the rent by the lessor from the assignee, need not make profert of the assignment. McCulloch *v.* Jarvis, 8 U. C. Q. B. 267.

9. State University *v.* Detroit Young Men's Soc., 12 Mich. 138; Grubbs *v.* National L. Maturity Ins. Co., 94 Va. 589, 27 S. E. 464; Langhorne *v.* Richmond City R. Co., 91 Va. 369, 22 S. E. 159.

It is unnecessary in the case of: *Unsealed instruments generally.* Hinsdale *v.* Miles, 5 Conn. 331; Commercial Ins. Co. *v.* Mehlman, 48 Ill. 313, 95 Am. Dec. 543; Gatton *v.* Dimmitt, 27 Ill. 400; Mason *v.* Buckmaster, 1 Ill. 27; Pumphrey *v.* Coleman, 1 Blackf. (Ind.) 199; Riley *v.* Yost, 58 W. Va. 213, 52 S. E. 40, 1 L. R. A. N. S. 777.

Records.— Adams *v.* State, 6 Ark. 497; Deem *v.* Crume, 46 Ill. 69; Hanna *v.* Yocum, 17 Ill. 387; Capp *v.* Gilman, 2 Blackf. (Ind.) 45 [*citing* Rex *v.* Amery, 1 T. R. 149] (holding that the *prout patet per recordum* is sufficient on special demurrer); Hall *v.* Williams, 8 Me. 434; Butler *v.* State, 5 Gill & J. (Md.) 511; Slayton *v.* Chester, 4 Mass. 478; Commercial Bank *v.* Sparrow, 2 Den. (N. Y.) 97; Nybladh *v.* Herterius, 41 Fed. 120; Burnham *v.* Webster, 4 Fed. Cas. No. 2,178, 2 Ware 240. But see Philpot *v.* McArthur, 10 Me 127; Thomas *v.* Thomas, 4 Leg. Op. (Pa.) 440. And as to profert of copy see *infra*, IX, A, 2, a, (III).

A judgment is not pleaded with profert but profert is rendered in reply to the plea or replication of *nul tiel record.* Burnham *v.* Webster, 4 Fed. Cas. No. 2,178, 2 Ware 240.

Grant of franchise.— Dulaney *v.* Starke, 7 Sm. & M. (Miss.) 375.

Writs.— Renner *v.* Reed, 3 Ark. 339 (either party may procure copy, since the writ is part of the record); McFarlan *v.* Townsend, 17 Wend. (N. Y.) 440; Cronly *v.* Brown, 12 Wend. (N. Y.) 271.

10. Commercial Bank *v.* Sparrow, 2 Den. (N. Y.) 97.

11. *Arkansas.*— McDermott *v.* Cable, 23 Ark. 200 (contract for sale of land); Duncan *v.* Clements, 17 Ark. 279; Hynson *v.* Ruddell, 11 Ark. 33; Beebe *v.* Real Estate Bank, 4 Ark. 124.

Georgia.— Chicago Bldg., etc., Co. *v.* Talbottom Creamery, etc., Co., 106 Ga. 84, 31 S. E. 809; Smith *v.* Simms, 9 Ga. 418.

Illinois.— People *v.* Pace, 57 Ill. App. 674.

Missouri.— McCormick *v.* Kenyon, 13 Mo. 131.

Tennessee.— Hunter *v.* Anderson, 1 Heisk. 1; Gardner *v.* Henry, 5 Coldw. 458; Anderson *v.* Allison, 2 Head 122; Everly *v.* Marable, 2 Yerg. 113.

See 39 Cent. Dig. tit. "Pleading," § 910.

Profert in actions on notes generally see COMMERCIAL PAPER, 8 Cyc. 144.

12. Anderson *v.* Allison, 2 Head (Tenn.) 122.

Excuse see *infra*, IX, A, 2, a, (II).

13. Briggs *v.* Greenlee, Minor (Ala.) 123; Coleman *v.* Wolcott, 1 Conn. 285; Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265.

14. Coleman *v.* Wolcott, 1 Conn. 285.

15. See *infra*, IX, A, 2, b, (I).

foundation of the action or defense,[16] and if made unnecessarily it is held to be mere surplusage which in no way affects the rights of the parties.[17]

(II) *Excuse For Failure to Make* — (A) *In General.* A stranger to an instrument, being presumed not to have it in his control,[18] or a party who is not entitled to the custody of the deed, is not bound to plead it with profert.[19] And so no profert need be made, nor can oyer be demanded, when the instrument is accessible to both parties equally,[20] or is in the possession or control of the adverse party, or is lost or destroyed,[21] or even when it is in the possession of a third for the benefit of the parties, if the pleader cannot produce it.[22]

(B) *Pleading Excuse.* When profert is necessary except for the existence of facts excusing it, such facts must be alleged as an excuse;[23] and if profert is made the party will not be permitted to introduce evidence of its loss or destruction or its being in the possession of the other party so as to let in secondary evidence.[24]

(III) *Scope and Sufficiency.* It is held to be insufficient to set out the instrument substantially or even *verbatim et literatim,* in the declaration, consistently with the purpose of a profert, but the pleader must give notice that he

16. Thus in an action upon coupons of a bond, profert of the bond is unnecessary. New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542; Nashville *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296.

17. Kirk *v.* Williams, 24 Fed. 437.

Oyer when profert unnecessarily made see *infra,* IX, A, 2, b, (I), note 33.

18. Van Rensselaer *v.* Poucher, 24 Wend. (N. Y.) 316.

19. Birney *v.* Haim, 2 Litt. (Ky.) 262.

20. See *supra,* IX, A, 2, a, (I), note 9.

21. *Alabama.*— Robinson *v.* Curry, 6 Ala. 842, where it was held that the allegation that defendant had wrongfully and illegally obtained possession of the bill single sued on showed sufficient excuse, and that plaintiff in such a case is not driven to an action of trover to recover damages for the conversion.

Arkansas.— Beebe *v.* Real Estate Bank, 4 Ark. 124.

Illinois.— People *v.* Pace, 57 Ill. App. 674.

Indiana.— State *v.* Stewart, 7 Blackf. 9.

Kentucky.— Birney *v.* Haim, 2 Litt. 262; Francis *v.* Hazlerigg, 1 A. K. Marsh. 93; Barbour *v.* Archer, 3 Bibb 8, which cases are as to deeds to which the pleader has not the right to possession or which are in the possession of the adverse party. *Contra,* Metcalf *v.* Standeford, 1 Bibb 618, upon the necessity of profert of a lost deed, as to which case, however, see Anderson *v.* Barry, 2 J. J. Marsh. 265.

Massachusetts.— Powers *v.* Ware, 2 Pick. 451.

Pennsylvania.— Respublica *v.* Coates, 1 Yeates 2.

United States.— Rockhill *v.* Hanna, 20 Fed. Cas. No. 11,979, 4 McLean 200.

See 39 Cent. Dig. tit. "Pleading," §§ 911, 912.

A specialty on file in the same count need not be pleaded with profert. Moore *v.* Paul, 2 Bibb (Ky.) 330.

A bond required to be deposited with a public officer need not be pleaded with profert. Garson *v.* Pearl, 4 J. J. Marsh. (Ky.) 92; Anderson *v.* Barry, 2 J. J. Marsh. (Ky.) 265; Butler *v.* State, 5 Gill & J. (Md.) 511; McNutt *v.* Lancaster, 9 Sm. & M. (Miss.) 570; Com. *v.* Pray, 1 Phila. (Pa.) 58; U. S. *v.* Ritchie, 3 Mackey (D. C.) 162.

Where the instrument has been proferted in another action in the same or another court, and remains in court, and such former profert is averred, no other profert is necessary. Moore *v.* Paul, 2 Bibb (Ky.) 330; Wymark's Case, 5 Coke 74*b*, 77 Eng. Reprint 165, as to a deed shown in another court.

Lost instruments generally see Lost Instruments, 25 Cyc. 1607.

22. Wheeler *v.* Miller, 2 Den. (N. Y.) 172, holding, however, that it is not sufficient excuse merely that at the time the deeds were executed they were delivered to such third person for the benefit of the parties, unless they still remain in his hands and the pleader cannot produce them.

23. Dugger *v.* Oglesby, 99 Ill. 405; Rhodes *v.* Maraman, 2 T. B. Mon. (Ky.) 81. See also cases cited *supra,* note 21.

The fact is traversable and the particular excuse must therefore be stated according to the fact, as that "the deed has been lost," or "destroyed," "by accident," or that it "is in the possession of the defendant," because of which "the plaintiff cannot produce the same to the court." 1 Chitty Pl. (16th Am. ed.) 481.

A mutilated instrument should not be declared on with a profert, but the fact of mutilation should be set up as an excuse for not making profert. Powers *v.* Ware, 2 Pick. (Mass.) 451.

Altered instruments sued on generally see Alterations of Instruments, 2 Cyc. 137.

24. Dugger *v.* Oglesby, 99 Ill. 405, where there is a plea of *non est factum.* The same rule has been held to apply where profert is implied by law instead of being required to be formally made. Coleman *v.* Wolcott, 1 Conn. 285. But where profert is not required, evidence of these matters may be shown without pleading them. Coleman *v.* Wolcott, 1 Conn. 285; Wooten *v.* Dunlap, 20 Tex. 183. See also Olive *v.* Bevil, 55 Tex. 423; McGehee *v.* Minter, (Tex. Civ. App.

has the instrument ready to be shown.[25] But an allegation that the writing declared on is filed with the declaration, although an informal mode of making profert, is deemed sufficient for every substantial purpose;[26] and if the statute prescribes a form for suing on an instrument by copying it in the pleading, compliance with the statute is held to be sufficient and equivalent to profert, and oyer may be demanded.[27] If the declaration states the condition and assigns the breach of a bond, it is not necessary to make a separate profert of the condition.[28] Profert of a duly authenticated copy may be made when the original is accessible to but not in the possession of the party, as in case of the bond of a public officer,[29] or a recorded instrument,[30] or an instrument on file in another court.[31]

b. Oyer—(i) *In General.* Oyer is the counterpart of profert, and can be demanded of any instrument of which profert must be made.[32] But upon the question whether oyer can be demanded when profert is not made the practice has not been uniform. In some jurisdictions and under particular statutes it has been held that it is demandable,[33] while in other cases it is held that profert

1894) 25 S. W. 718. But see Smith *v.* Lloyd, 16 Gratt. (Va.) 295.

25. Austin *v.* Dills, 1 Tyler (Vt.) 308. See also *supra*, IX, A, 1, a, note 99. *Compare* State University *v.* Detroit Young Men's Soc., 12 Mich. 138 (where the declaration, before setting out the instrument in its words and figures, alleged that "the said plaintiffs and defendant entered into their certain contract or obligation in writing, which said contract in writing the said plaintiffs now bring here into court, sealed by the several parties," etc., "and which contract in writing," etc., "is in the words and figures following," setting it forth, and it was held that not only was proper profert made but oyer was granted in advance, and that any further profert or oyer would be but an idle ceremony); Taylor *v.* Browder, 1 Ohio St. 225 (where a plea of tender of a deed was held bad on demurrer assigning that it did not set forth a copy of the deed, the court saying that the plea should have set out the deed or made profert of it).

The formula is, after referring to the writing, "which is here to the court shown" (Chicago Bldg., etc., Co. *v.* Talbotton Creamery, etc., Co., 106 Ga. 84, 31 S. E. 809); or that the pleader "brings here into court the said writing obligatory" or other instrument (Gould Pl. (Hamilton ed.) 421); or, following the statement of the time of the making the deed "which said writing obligatory (or 'indenture,' or 'articles of agreement'), sealed with the seal of the defendant, the plaintiff now brings here into court," etc. (1 Chitty Pl. (16th Am. ed.) 481). See also for form, Adams *v.* State, 6 Ark. 497. An averment that the patent and specification are "ready in court to be produced" is equivalent to a profert in its most formal terms. Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. Rep. 128.

Profert of a copy where no profert is necessary, as in the case of a deed the custody of which the pleader is not entitled to, ought not to render the pleading bad. Birney *v.* Haim, 2 Litt. (Ky.) 262.

26. Rhodes *v.* Maraman, 2 T. B. Mon. (Ky.) 81.

Annexing copy.— So under a statute making a copy of a contract sued on a part of the pleading when annexed thereto and referred to therein as so annexed, formal profert is not necessary of a contract so annexed. Harper *v.* Essex County Park Commission, 73 N. J. L. 1, 62 Atl. 384. And such filing is deemed sometimes to make the paper a part of the record. See *infra*, IX, A, 3.

27. Hanly *v.* Mooney, 8 Ark. 461.

28. U. S. *v.* Spalding, 27 Fed. Cas. No. 16,365, 2 Mason 478. So where profert is made of a certified copy of a bond. Adams *v.* State, 6 Ark. 497.

Pleading in action on bonds generally see Bonds, 5 Cyc. 721.

29. Adams *v.* State, 6 Ark. 497 (holding that in an action on a sheriff's bond profert must be made of a certified copy, since under statute such copy is evidence); Carson *v.* Pearl, 4 J. J. Marsh. (Ky.) 92; Brents *v.* Sthal, 3 Bibb (Ky.) 482; Thatcher *v.* Lyman, 5 Mass. 260; Probate Judge *v.* Merrill, 6 N. H. 256.

30. Clark *v.* Nixon, 5 Hill (N. Y.) 36.

31. Waller *v.* Ellis, 2 Munf. (Va.) 88.

32. Hatton *v.* Jordan, 29 Ala. 266; Matthews *v.* Bailey, 25 Miss. 33; Hammer *v.* Klein, 11 Fed. Cas. No. 5,998, 1 Bond 590.

Oyer of an instrument can be demanded but once in the same suit. Taylor *v.* Commonwealth Bank, 2 J. J. Marsh. (Ky.) 564; Darlington *v.* Groverman, 6 Fed. Cas. No. 3,576, 1 Cranch C. C. 416; Offutt *v.* Beatty, 18 Fed. Cas. No. 10,448, 1 Cranch C. C. 213.

Claims arising by operation of law.—There are cases where a deed is the gist of the action and as such necessary to be set forth and pleaded, and yet oyer is not demandable, as instance of deeds of conveyances to uses and other cases where the claims are by operation of law. Coleman *v.* Wolcott, 1 Conn. 285.

33. *Alabama.*— Briggs *v.* Greenlee, Minor 123.

Connecticut.— Paddock *v.* Higgins, 2 Root 316; Kelley *v.* Riggs, 2 Root 126; Branch *v.* Riley, 1 Root 541.

Kentucky.— Anderson *v.* Barry, 2 J. J. Marsh. 265.

must be made before oyer can be demanded.[34] It may be demanded only of the very instrument on which the suit or defense is founded,[35] and generally will not be granted of a record or recognizance which are the proceedings of a court.[36] Where profert is properly made oyer cannot be denied.[37] If oyer is not craved,

Louisiana.— Lee *v.* Lacoste, 3 La. Ann. 223 (under statute); Maxwell *v.* Walker, 2 Mart. N. S. 211.

Virginia.— Smith *v.* Lloyd, 16 Gratt. 295, by statute.

See 39 Cent. Dig. tit. "Pleading," § 919.

34. *Maine.*— Hall *v.* Williams, 8 Me. 434.

New York.— Van Rensselaer *v.* Saunders, 2 How. Pr. 250.

Ohio.— Bettle *v.* Wilson, 14 Ohio 257.

Tennessee.— Williams *v.* Bryan, 5 Coldw. 104.

Vermont.— Story *v.* Kimball, 6 Vt. 541.

United States.—Campbell *v.* Strong, 4 Fed. Cas. No. 2,367*a*, Hempst. 265.

See 39 Cent. Dig. tit. "Pleading," § 919.

Instruments not under seal.— Oyer cannot be demanded of instruments not under seal under the common-law rule. Commercial Ins. Co. *v.* Mehlman, 48 Ill. 313, 95 Am. Dec. 543; Gatton *v.* Dimmitt, 27 Ill. 400; Norfolk, etc., R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465; Anderson *v.* Prince, 60 W. Va. 557, 55 S. E. 656. But it is sometimes otherwise by statute. Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375.

Where profert is unnecessarily made defendant is not on that account entitled to oyer, but should plead without. Knott *v.* Clements, 13 Ark. 335; Adams *v.* State, 6 Ark. 497; Van Rensselaer *v.* Poueher, 24 Wend. (N. Y.) 316; Sneed *v.* Wistar, 8 Wheat. (U. S.) 690, 5 L. ed. 717; Atherton Mach. Co. *v.* Atwood-Morrison Co., 102 Fed. 949, 43 C. C. A. 72. *Contra*, Hammer *v.* Klein, 11 Fed. Cas. No. 5,998, 1 Bond 590.

Where the instrument is not in the possession or control of the pleader oyer is not demandable. Cincinnati Ins. Co. *v.* Harrison, 25 La. Ann. 1 (holding that the provisions of the code of practice in that state relating to oyer did not apply to a document which had been filed in the same court); Smith *v.* Lloyd, 16 Gratt. (Va.) 295 (where by statute oyer is demandable without profert, the court holding that in an action on a bond, excuse for its non-production on oyer that it was filed in another court, that plaintiff applied to that court for it, and that his application was opposed by defendant and refused by the court is sufficient); Roekhill *v.* Hanna, 20 Fed. Cas. No. 11,979, 4 McLean 200 (bond on file in clerk's office and recorded). So oyer is not demandable in an action on a lost instrument. Paddock *v.* Higgins, 2 Root (Conn.) 316; Kelley *v.* Riggs, 2 Root (Conn.) 126. But under a statute making a copy evidence it is no objection to a demand of oyer that the party has not the original in his possession. Matthews *v.* Bailey, 25 Miss. 33, action on sheriff's bond. See also *infra*, IX, A, 2, b, (IV).

35. Tuskaloosa *v.* Lacy, 3 Ala. 618; Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; Clark *v.* State, 7 Blackf. (Ind.) 570 (holding that defendant was not entitled to oyer of the approval by the judges of an official bond, the approval being no part of the bond); Langhorne *v.* Richmond City R. Co., 91 Va. 369, 22 S. E. 159; Gould Pl. (Hamilton ed.) 426.

Bond to perform covenants in another deed. — In an action upon a bond, for performance of covenants in another deed, oyer of such deed cannot be craved, by defendant, and not plaintiff, must show it, or the counterpart, with a profert of it, or an excuse for the omission. Sneed *v.* Wister, 8 Wheat. (U. S.) 690, 5 L. ed. 717.

36. *Illinois.*— Giles *v.* Shaw, 1 Ill. 219, in action on judgment recovered in another state, holding that the statute in Illinois limited the right to demand oyer of instruments signed by the party and could not apply to judgments; that the proper course is to plead *nil debet* or *nul tiel record.*

Indiana.— Capp *v.* Gilman, 2 Blackf. 45 [*citing* Rex *v.* Amery, 1 T. R. 149], action on a judgment recovered in another state.

Massachusetts.— Thatcher *v.* Lyman, 5 Mass. 260.

Mississippi.— Matthews *v.* Bailey, 25 Miss. 33.

United States.— Sneed *v.* Wistar, 8 Wheat. 690, 5 L. ed. 717; Nybladh *v.* Herterius, 41 Fed. 129, as to rule in Illinois against the right to demand oyer of a judgment.

See 39 Cent. Dig. tit. "Pleading," § 921.

Compare Adams *v.* Olive, 57 Ala. 249.

Oyer of copy see *infra*, IX, A, 2, b, (IV).

Profert unnecessary see *supra*, IX, A, 2, a, (I).

37. Wheeler *v.* Miller, 2 Den. (N. Y.) 172.

It is error to deny oyer when it should be granted (Osborne *v.* Reed, 1 Blackf. (Ind.) 126); but not conversely (State *v.* Hicks, 2 Blaekf. (Ind.) 336, 20 Am. Dec. 118).

Entry of prayer on record and proceedings thereon.— If denied when it ought to be granted, the party making the claim should move the court to have the prayer of oyer entered on the record, which entry is in the nature of a plea, and the other party may counterplead the right to oyer, or strike out the rest of the pleading following the oyer, and demur; upon which the judgment of the court is that he have oyer or that he answer without it. Williams *v.* Bryan, 5 Coldw. (Tenn.) 104, holding that where profert is made demurrer is not proper merely because the instrument is not produced. See also Birney *v.* Haim, 2 Litt. (Ky.) 262.

Refusal to plead.—A defendant who is entitled to oyer cannot be compelled to plead

the instrument must be taken as alleged in the pleading in determining its sufficiency,[38] and to set up in a plea provisions of an instrument of which profert is made which are not recited in the declaration defendant should crave oyer of the instrument and set out the portions of it which are essential to the purpose of the plea.[39] So to take advantage of a variance between the declaration and the instrument sued on, oyer must be craved and a demurrer filed for the variance.[40] In those jurisdictions where oyer of the writ has been the practice, a plea based on a defect in the writ, or in an affidavit for an attachment, should crave oyer thereof,[41] and advantage of a variance between the writ and declaration could be taken until oyer had been obtained of the writ;[42] but in those jurisdictions where profert is not required of the writ or affidavit, because it is a part of the record, oyer need not be craved.[43]

without it. Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368; Fletcher *v.* Cavalier, 4 La. 274; Smith *v.* Alworth, 18 Johns. (N. Y.) 445; Elliott *v.* Duggan, 1 Ont. Pr. 147.

Waiver by pleading over see *infra*, XIV, B, 3.

38. Wriston *v.* Lacy, 7 J. J. Marsh. (Ky.) 219; Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264; Gathwright *v.* Callaway County, 10 Mo. 663; Harley *v.* Lebanon Mut. Ins. Co., 120 Pa. St. 182, 13 Atl. 833. So in an action on a promissory note a plea that the note was given for the last payment of land which plaintiff sold to defendant; that plaintiff gave defendant a bond for a fee-simple title deed; that the deed was to be made and delivered to defendant upon the payment of said purchase-money and that no deed was tendered, was bad on demurrer because it fails to show that the bond contained mutual and dependent covenants, the bond not being set out or stated in substance, or brought upon the record by oyer, although profert of it was made in the plea. Farish *v.* Jones, 23 Ark. 323.

Effect of oyer as making instrument part of record see *infra*, IX, A, 3.

39. Snow *v.* Horgan, 18 R. I. 289, 27 Atl. 338.

Where there is an extrinsic question of fact involved, oyer should be craved and the facts alleged in the plea after setting up the instrument. Gift *v.* Hall, 1 Humphr. (Tenn.) 480 (holding that where the words "Brandon money" were written in brackets at the bottom and on the face of a bill single payable in dollars, and it did not appear that they were there at the time of the execution, to raise the objection that such words are a part of the bill so that debt will not lie but that being payable in currency different from gold or silver but the action sounds in damages, defendant should set forth the words "Brandon money" upon oyer, and plead that they were a part of the contract, and thus raise the question of fact, and cannot crave oyer of the note, and, without noticing the words, set it out and demur); Bacon *v.* Parker, 2 Overt. (Tenn.) 55 (holding that in an action on a bond, defendant who wishes to plead in abatement that at the time of the suing out of the writ the demand had been reduced below the jurisdictional amount by credits indorsed on the bond, should crave oyer and show the indorsements on the record).

40. *Alabama.*— Lee *v.* Adkins, Minor 187.

Illinois.— Harlow *v.* Boswell, 15 Ill. 56; Bogardus *v.* Trial, 2 Ill. 63; Taylor *v.* Kennedy, 1 Ill. 91.

Kentucky.— Jones *v.* Cromwell, 1 Dana 385; Gist *v.* Steele, 1 Bibb 571; Shepherd *v.* Hubbard, 1 Bibb 494; Marshall *v.* Red, 1 Bibb 327; Brown *v.* McConnel, 1 Bibb 265; McClean *v.* Lillard, 1 Bibb 146; Finnie *v.* Martin, 1 Bibb 41.

Missouri.—Gathwright *v.* Callaway County, 10 Mo. 663.

South Carolina.— Killian *v.* Herndon, 4 Rich. 196.

Tennessee.—Martin *v.* State Bank, 2 Coldw. 332; Steele *v.* McKinnie, 5 Yerg. 449.

Vermont.— Denton *v.* Adams, 6 Vt. 40.

Virginia.— Duval *v.* Malone, 14 Gratt. 24; Sterrett *v.* Teaford, 4 Gratt. 84.

United States.— Hobson *v.* McArthur, 12 Fed. Cas. No. 6,554, 3 McLean 241.

See 39 Cent. Dig. tit. "Pleading," § 923.

41. Tommey *v.* Gamble, 66 Ala. 469; Tucker *v.* Perley, 5 N. H. 345; Nelson *v.* Swett, 4 N. H. 256.

42. Findlay *v.* Pruitt, 9 Port. (Ala.) 195; Evans *v.* Morton, 2 Ind. 244; Nichols *v.* Smalley, 7 Blackf. (Ind.) 200; Chapman *v.* Davis, 4 Gill (Md.) 166; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 6 L. ed. 474; Triplet *v.* Warfield, 24 Fed. Cas. No. 14,177, 2 Cranch C. C. 237.

Variance between the writ and affidavit, or between the writ and the affidavit and bond, in attachment, cannot be pleaded without oyer and setting them out. Richards *v.* Bestor, 90 Ala. 352, 8 So. 30; Goldsticker *v.* Stetson, 21 Ala. 404.

43. *Arkansas.*— Renner *v.* Reed, 3 Ark. 339.

Illinois.— Eddy *v.* Brady, 16 Ill. 306.

Kentucky.— Pendleton *v.* Commonwealth Bank, 1 T. B. Mon. 171.

Massachusetts.— Guild *v.* Richardson, 6 Pick. 364; Slayton *v.* Chester, 4 Mass. 478, where it was said that upon a plea in abatement of the writ defendant alleges matter repugnant to the return; that regularly plaintiff should pray oyer of the return before demurring to the plea and that if the estoppel had been by matter of record in another court, or in another cause in this

(II) *Time to Demand.* It is the settled rule of practice at common law that oyer cannot be craved after the first term, or after the rule for pleading has expired, since the deed is not supposed to be in court after that time;[44] but it is demandable at any period before the time for pleading is out, although that has been extended, unless the order except the right to demand oyer.[45] Oyer must precede the matter of defense whether that be by plea[46] or demurrer;[47] and regularly it should precede the entry of imparlance. A party cannot, after interposing a general demurrer to the whole declaration, crave oyer, set forth the deed, and then assign special causes of demurrer to one of the counts.[48]

(III) *Scope and Sufficiency.* Oyer is properly craved by a prayer entered on the record, to which the opposite party may counter plead.[49] If oyer is desired of both a bond and its condition, it must be expressly demanded of both, for a bond and its condition are deemed separate things.[50] So craving oyer of an instrument does not include oyer of an assignment or indorsement thereon.[51] But oyer of a writ includes the declaration where the latter is incorporated into the writ.[52] Where different counts are set up, and each one is met by a separate plea, oyer craved in any plea affects that count only to which the plea is directed;[53] but if a general plea be made to all the counts, oyer craved and granted is available as to all the counts to which the instrument is applicable.[54]

(IV) *Compliance.* Defendant is held to be entitled to oyer of the original deed.[55] But where the bond is a public record in another court it is not to be

court, the objection must have prevailed; but that as the record relied on as an estoppel is a return on the same writ, against which the plea is pleaded, the court can, *ex officio*, take notice of it.

Mississippi.— Pierce *v.* Lacy, 23 Miss. 193.

Tennessee.— Kincaid *v.* Francis, Cooke 49.

See 39 Cent. Dig. tit. "Pleading," § 924.

Variance not available.—And so because oyer of the writ cannot be demanded, it is held that a variance between the writ and declaration in replevin cannot be pleaded in abatement. McFarlan *v.* Townsend, 17 Wend. (N. Y.) 440; Cronly *v.* Brown, 12 Wend. (N. Y.) 271.

44. McKnight *v.* Wilkins, 1 Mo. 308; Wymark's Case, 5 Coke 74*b*, 77 Eng. Reprint 165.

After day set for trial.— It is too late to crave oyer of the writ after the day on which the cause is first set for trial. Layman *v.* Waynick, 6 Blackf. (Ind.) 189.

Oyer of the writ, anciently, could be demanded at any stage of the cause. Pendleton *v.* Commonwealth Bank, 1 T. B. Mon. (Ky.) 171.

45. Goodricke *v.* Turley, 2 C. M. & R. 694.

46. Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368; McKnight *v.* Wilkins, 1 Mo. 308; Dufau *v.* Wright, 25 Wend. (N. Y.) 636. But see Goodricke *v.* Turley, 2 C. M. & R. 694, holding that the right is not waived unless the plea be to the bond or other instrument of which oyer is demanded.

47. Auditor *v.* Woodruff, 2 Ark. 73.

48. Dufau *v.* Wright, 25 Wend. (N. Y.) 636.

49. Pendleton *v.* Commonwealth Bank, 1 T. B. Mon. (Ky.) 171; Mabry *v.* Cowan, 6 Heisk. (Tenn.) 295; Williams *v.* Bryan, 5 Coldw. (Tenn.) 104; Anderson *v.* Allison, 2 Head (Tenn.) 122.

But if the instrument is already on file a mere statement that oyer is craved and given, if unobjected to, will be sufficient. Pendleton *v.* Commonwealth Bank, 1 T. B. Mon. (Ky.) 171.

50. State University *v.* Winston, 5 Stew. & P. (Ala.) 17 (holding, however, that omission to crave oyer of the condition at the proper time is harmless if, on craving oyer of the bond, both bond and condition are read); U. S. *v.* Sawyer, 27 Fed. Cas. No. 16,227, 1 Gall. 86; Cook *v.* Remington, 6 Mod. 237, 87 Eng. Reprint 986.

If oyer of the condition only is prayed that will not entitle the party to oyer of the bond, but plaintiff may bring the bond on the record by praying in his replication that it be enrolled. U. S. *v.* Sawyer, 27 Fed. Cas. No. 16,227, 1 Gall. 86.

51. McLain *v.* Onstott, 3 Ark. 478; Dillard *v.* Noel, 2 Ark. 449; Tuggle *v.* Adams, 3 A. K. Marsh. (Ky.) 429; Erb *v.* Pindall, 5 Leigh (Va.) 109. But in Van Rensselaer *v.* Poucher, 24 Wend. (N. Y.) 316, it is held that if one is bound to give oyer of a deed, he must furnish not only a true copy of the instrument itself, but of all indorsements and memoranda upon it and of all papers attached to it. And in Cook *v.* Remington, 6 Mod. 237, 87 Eng. Reprint 986, it is held that an indorsement on a deed made at the time it was sealed and delivered is a part of the deed, and oyer of the deed without oyer of the indorsements is not complete oyer.

52. Lyman *v.* Dodge, 13 N. H. 197; Knowles *v.* Rowell, 8 N. H. 542. Oyer may be craved of the writ, declaration, and return, in one paragraph. Pitman *v.* Perkins, 28 N. H. 90.

53. Hughes *v.* Moore, 7 Cranch (U. S.) 176, 3 L. ed. 307.

54. Estill *v.* Jenkins, 4 Dana (Ky.) 75.

55. Frick *v.* Hugle, 1 Pa. Co. Ct. 572.

brought into court unless upon the trial of an issue of *non est factum*, in all other cases a copy being sufficient.[56] If a copy is furnished it should be a full and complete copy of the whole instrument pleaded,[57] and if profert has been made of the original, a copy will not suffice on demand of oyer.[58] Oyer may be amended in the discretion of the court upon a proper showing made.[59]

3. Effect of Profert and Oyer. Profert alone, without oyer, does not make the instrument part of the record,[60] so that the court is necessarily confined, in its consideration of a general demurrer, to the statement of the cause of action, and cannot look to any supposed paper as a foundation of the action.[61] But the effect of obtaining oyer is to make the instrument part of the record and parcel of the pleading which contains the profert, to the same extent as though it were set out verbatim therein,[62] and the party obtaining oyer may then demur to his adver-

In Louisiana under the code of practice providing for the filing of documents declared on upon view or oyer prayed it was held that the time for producing an instrument of which oyer has been demanded may be fixed by the court. Maillon *v.* Boyce, 14 La. Ann. 621.

56. Thatcher *v.* Lyman, 5 Mass. 260. See also Williams *v.* Perry, 2 Root (Conn.) 462 (requiring exemplified copy on oyer, and distinguishing the practice in the king's bench where the records were kept in the place where the court sat so that both parties had access to them); Wilford *v.* Rose, 2 Root (Conn.) 172. And see *supra*, IX, A, 2, a, (III), note 3.

57. Osborne *v.* Reed, 1 Blackf. (Ind.) 126 (full copy including attestation and names of witnesses); Van Rensselaer *v.* Poucher, 24 Wend. (N. Y.) 316; Smith *v.* Alworth, 18 Johns. (N. Y.) 445 (party entitled on oyer to attestation and names of witnesses, but if he elects to answer it is a waiver of the objection that the names of the witnesses were not given).

Objection at trial.— In Brooks *v.* Brooks, 6 N. J. L. 404, it was held that the proper time to take advantage of an insufficient compliance with the demand for oyer is at the trial.

Perfect copy on the trial.— In Graves *v.* Hemken, 12 Rob. (La.) 103, it is held that if an imperfect copy be filed on oyer, which is intended only to give such information as to aid defendant in shaping his defense, this will not prevent the party filing it from introducing a true and authentic copy in evidence on the trial.

Waiver of objections see *infra*, XIV, B.

58. Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368 (action on official bond); Carson *v.* Pearl, 4 J. J. Marsh. (Ky.) 92 (action on an injunction bond); Wellford *v.* Miller, 29 Fed. Cas. No. 17,381, 1 Cranch C. C. 514 (action on bond said to have been in defendant's possession, which fact, however, was not alleged). But see Young *v.* State, 7 Gill & J. (Md.) 253; Butler *v.* State, 5 Gill & J. (Md.) 511 (both of which hold that if profert is made of a bond filed as a public record, plaintiff need not produce the original on oyer, but a certified copy will be sufficient); Elliott *v.* Duggan, 1 Ont. Pr. 147 (holding that a copy is sufficient, and if defendant required inspection he should apply for a summons for that purpose).

Evidence on trial.— And in an action of debt against the securities of a sheriff on his official bond, a certified copy of the bond, produced in evidence, under statute providing for such evidence, was held enough to satisfy profert of it in the declaration. Treasurers *v.* Witsall, 1 Speers (S. C.) 220.

59. Seymour *v.* Rogers, 2 How. Pr. (N. Y.) 28; Daley *v.* Atwood, 7 Cow. (N. Y.) 483.

60. *Florida.*— Comerford *v.* Cobb, 2 Fla. 418, holding that the fact that a copy is set out in the pleading does not make it a part of the record without oyer.

Kentucky.— King *v.* McLean, 1 J. J. Marsh. 32; Gist *v.* Steele, 1 Bibb 571; Adams *v.* Macey, 1 Bibb 328; Palmer *v.* McGinnis, Hard. 505.

Pennsylvania.— Mansley *v.* Smith, 6 Phila. 223.

South Carolina.— Charleston *v.* Mortimer, 4 Rich. (S. C.) 271.

Tennessee.— Standard Loan, etc., Ins. Co. *v.* Thornton, 97 Tenn. 1, 4 S. W. 136.

West Virginia.— Riley *v.* Yost, 58 W. Va. 213, 52 S. E. 40, 1 L. R. A. N. S. 777.

United States.— Nybladh *v.* Herterius, 41 Fed. 120.

See 39 Cent. Dig. tit. "Pleading," § 923 *et seq.*

See, however, Knott *v.* Burleson, 2 Greene (Iowa) 600, where it was said that by making profert of a release in a plea it became a part of the plea, but it appears that oyer was demanded and the release appeared of record.

61. Insurance Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136. See also *supra*, IX, A, 2, b, (I), note 35.

Where profert is made of a recorded instrument it is held that it is for all purposes presented to the court as a part of the pleading. Germain *v.* Wilgus, 67 Fed. 597, 14 C. C. A. 561 (letters patent); American Bell Tel. Co. *v.* Southern Tel. Co., 34 Fed. 803; Bogart *v.* Hinds, 25 Fed. 484, assignment of patent.

Under statute making an annexed copy of an instrument, referred to as so annexed, a part of the pleading, oyer is not necessary. Loeb *v.* Barris, 50 N. J. L. 382, 13 Atl. 602. See also *infra*, IX, B, 2, a.

62. *Indiana.*— Russell *v.* Drummond, 6

sary's pleading if the instrument is insufficient on its face or if there is a variance between the instrument as recited on oyer and the description of it in the pleading containing the profert, or avail himself of any proper defense by plea,[63] although it is held that if an essential averment be omitted from the pleading containing profert and oyer is craved and the instrument spread upon the record the defect will be cured if the instrument supplies the omission.[64] The practice is for the party who obtains oyer to recite the instrument in his pleading and then proceed, in the same pleading, as though the recital just made was in fact in the pleading containing the profert.[65]

Ind. 216; Chapman *v.* Harper, 7 Blackf. 333; McDorman *v.* Jellison, 7 Blackf. 304.

Maryland.— Tucker *v.* State, 11 Md. 322.

Missouri.— Payne *v.* Snell, 4 Mo. 238.

South Carolina.— Rantin *v.* Robertson, 2 Strobh. 366.

Tennessee.— Insurance Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136.

Vermont.— Morrill *v.* Catholic Order of Foresters, 79 Vt. 479, 65 Atl. 526.

Virginia.— Vanmeter *v.* Giles, 1 Rob. 328.

United States.— Western Springs *v.* Collins, 98 Fed. 933, 40 C. C. A. 33.

See 39 Cent. Dig. tit. "Pleading," § 929.

Where the contract, which was the foundation of the action, was neither embodied in the petition, nor exhibited thereto, nor was a technical profert of the same made, but it appeared from the record, that on the hearing an oral profert of the contract was made; that it was produced; that it was read; that counsel for both parties argued the case upon the theory that the contract was a part of the pleadings and that the ruling by the court was also based upon this assumption; while it did not come before the court and become a part of the record in compliance with the technical rules of profert and oyer as they existed at common law since the day of written pleading, yet under the liberal, and loose, practice which was said to be allowable in Georgia, it was held that the contract was properly before the court, became a part of the petition, and was therefore properly considered by the court in passing upon the demurrer. Chicago Bldg., etc., Co. *v.* Talbotton Creamery, etc., Co., 106 Ga. 84, 31 S. E. 809.

Even though oyer be improperly demanded, if it is granted and availed of it is effective for all purposes. Russell *v.* Drummond, 6 Ind. 216; Chapman *v.* Harper, 7 Blackf. (Ind.) 333; Deming *v.* Bullitt, 1 Blackf. (Ind.) 241; Columbiana Bank *v.* Dixon, Tapp. (Ohio) 327; Morrill *v.* Catholic Order of Foresters, 79 Vt. 479, 65 Atl. 526; Story *v.* Kimball, 6 Vt. 541. But on the other hand it is held that an instrument not under seal cannot be made a part of the declaration by oyer. Norfolk, etc., R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465; Anderson *v.* Prince, 60 W. Va. 557, 55 S. E. 656.

63. Chicago Bldg., etc., Co. *v.* Talbotton Creamery, etc., Co., 106 Ga. 84, 31 S. E. 809; Douglass *v.* Rathbone, 5 Hill (N. Y.) 143; Morrill *v.* Catholic Order of Foresters, 79 Vt. 479, 65 Atl. 526; Boulton *v.* Weller, 3 U. C. Q. B. 372, holding that if plaintiff sets out the deed declared on untruly, defendant may plead *non est factum*, or may pray oyer and upon setting out the instrument demur for the variance. See also the cases cited *supra*, note 62.

A variance is an erroneous description of the instrument. Dixon *v.* U. S., 7 Fed. Cas. No. 3,934, 1 Brock. 177. A variance as to the date of the instrument (Comparet *v.* State, 7 Blackf. (Ind.) 553; Bennett *v.* Giles, 6 Leigh (Va.) 316; Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 240), its character as a sealed or unsealed instrument (Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368; Clark *v.* Phillips, 5 Fed. Cas. No. 2,831*a*, Hempst. 294), the name of the signer (Semon *v.* Hill, 7 Ark. 70; Wells *v.* Jackson, 6 Blackf. (Ind.) 40), the time at when payment is due under it (McDorman *v.* Jellison, 7 Blackf. (Ind.) 304; Osborne *v.* Fulton, 1 Blackf. (Ind.) 233), its character as a joint or joint and several obligation (Sherry *v.* Foresman, 6 Blackf. (Ind.) 56), the time of performing the condition of a bond (McKay *v.* Craig, 6 Blackf. (Ind.) 168), the absolute or contingent character of a payment called for in the condition of a bond (Irish *v.* Irish, 6 Blackf. (Ind.) 438), the recitals contained in a bond (Thornhill *v.* Jones, 12 U. C. Q. B. 231), or the payee or obligee of a bond (Fort Wayne *v.* Jackson, 7 Blackf. (Ind.) 36; Baltimore Cemetery Co. *v.* First Independent Church, 13 Md. 117; Kemp *v.* McGuigin, Tapp. (Ohio) 18), is fatal on demurrer. But an immaterial difference does not constitute a fatal variance, as in spelling names which are *idem sonans* (Semon *v.* Hill, 7 Ark. 70; Irvin *v.* Sebastian, 6 Ark. 33), so it is no variance to declare on a bond according to its face and show on oyer the same bond but with a credit indorsed (Wiggins *v.* Fisher, 21 Ark. 521), and it is held that the variance must be in some particular not merely of substance as regards the effect of the deed, but some particular material to the action which has been brought on the deed (Boles *v.* McCarty, 6 Blackf. (Ind.) 427; Boulton *v.* Weller, 3 U. C. Q. B. 372. See also Kingkendall *v.* Perry, 25 Miss. 228).

Demurrer generally see *supra*, VI.

64. Edwards *v.* Wiester, 2 A. K. Marsh. (Ky.) 382.

65. Chicago Bldg., etc., Co. *v.* Talbotton Creamery, etc., Co., 106 Ga. 84, 31 S. E. 809.

Craving oyer without setting up the instrument is of no avail. Young *v.* Campbell, 10 Ill. 80; Daniels *v.* Richie, 7 Blackf. (Ind.) 391. If the party seeks to avail himself of

B. Exhibits [66]— **1. Necessity or Propriety of Filing or Annexing Exhibits** — **a. In General.** In the absence of statute an instrument cannot be brought upon the record in an action at law by mere reference thereto in the pleadings or by filing it as an exhibit.[67] In many states it is required that when a pleading is founded upon a written instrument the original or a copy thereof must be attached to or filed with the pleading.[68] But no contract or other instrument need or should be filed or annexed which is not the foundation of the action or defense.[69] Therefore instruments which are merely to be used as evidence do

the benefit of the condition of a bond after oyer given, he must set it forth in his plea, otherwise it is no part of the record. Allen *v.* Bishop, 25 Wend. (N. Y.) 414.

A party who has obtained oyer may waive the benefit of it if he pleases, but if he professes to set out the instrument he must do it correctly and entirely. Rudisill *v.* Sill, 4 Blackf. (Ind.) 282, holding that if the party misrecite the instrument, his adversary, by the usual English practice, may either sign judgment for want of a plea, or he may make the misrecited deed a part of the record by enrolment and demur, the latter method, however, being applicable only to a plea and not to a demurrer containing false recitals.

66. In equity generally see Equity, 16 Cyc. 236.

67. Charleston *v.* Mortimer, 4 Rich. (S. C.) 271; Saxe *v.* Burlington, 70 Vt. 449, 41 Atl. 438; Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798; Riley *v.* Yost, 58 W. Va. 213, 52 S. E. 40, 1 L. R. A. N. S. 777.

68. *Illinois.*— Parker *v.* Brooks, 16 Ill. 64.

Indiana.— Miller *v.* Bottenberg, 144 Ind. 312, 41 N. E. 804; Rairden *v.* Winstandley, 99 Ind. 600; Busch *v.* Columbia City German Bldg., etc., Assoc., 75 Ind. 348; Jerrell *v.* Etchison Ditching Assoc., 62 Ind. 200; Wilson *v.* Vance, 55 Ind. 584; Montgomery *v.* Gorrell, 51 Ind. 309; Strough *v.* Gear, 48 Ind. 100; King *v.* Enterprise Ins. Co., 45 Ind. 43; Brown *v.* State, 44 Ind. 222; Galbreath *v.* McNeily, 40 Ind. 231; Alsop *v.* Hutchings, 25 Ind. 347; Coleman *v.* Hart, 25 Ind. 256; Sayres *v.* Linkhart, 25 Ind. 145; Seawright *v.* Coffman, 24 Ind. 414; Harker *v.* Glidewell, 23 Ind. 219; Peoria Mar., etc., Ins. Co. *v.* Walser, 22 Ind. 73; Reveal *v.* Conner, 21 Ind. 289; Nill *v.* Brooks, 21 Ind. 178; Little *v.* Vance, 14 Ind. 19; Hillis *v.* Wilson, 13 Ind. 146; Kiser *v.* State, 13 Ind. 80; Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58; Offutt *v.* Rucker, 2 Ind. App. 350, 27 N. E. 589.

Iowa.— Dunning *v.* Rumbaugh, 36 Iowa 566; Barney *v.* Buena Vista County, 33 Iowa 261; Nosler *v.* Hunt, 18 Iowa 212; Vannice *v.* Green, 14 Iowa 262; McLott *v.* Savery, 11 Iowa 323; Dean *v.* White, 5 Iowa 266; Latterett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

Kentucky.— Haney *v.* Tempest, 3 Metc. 95; Dodd *v.* King, 1 Metc. 430; Day, etc., Lumber Co. *v.* Mack, 69 S. W. 712, 24 Ky. L. Rep. 640.

Missouri.— Sexton *v.* Monks, 16 Mo. 156; Wyman *v.* Ferguson, 66 Mo. App. 525.

Ohio.— Only instruments for the unconditional payment of money only should be made exhibits. Crawford *v.* Satterfield, 27 Ohio St. 421; Gwynne *v.* Jones, 5 Ohio Cir. Ct. 298, 3 Ohio Cir. Dec. 143; Woodbridge *v.* Brophy, 2 Ohio Dec. (Reprint) 279, 2 West. L. Month. 274.

Oklahoma.— Arkansas City First Nat. Bank *v.* Jones, 2 Okla. 353, 37 Pac. 824.

Pennsylvania.— Knapp *v.* Duck Creek Valley Oil Co., 53 Pa. St. 185. A statute of this character is mandatory not merely directory. Acme Mfg. Co. *v.* Reed, 181 Pa. St. 382, 37 Atl. 552; White *v.* Sperling, 24 Pa. Super. Ct. 120. Defendant is required to "file with his plea sworn copies of any instrument of writing, book accounts." Dill *v.* Knapp, 24 Wkly. Notes Cas. 258.

Texas.— Ward *v.* Ward, 1 Tex. Unrep. Cas. 123.

See 39 Cent. Dig. tit. "Pleading," § 931 *et seq.*

If the instrument be in a foreign language it need not be filed (Christenson *v.* Gorsch, 5 Iowa 374), or, if it be mere evidence of a demand, no translation need be attached (Clark *v.* Farrar, 3 Mart. (La.) 247).

69. *Georgia.*— Horne *v.* Mullis, 119 Ga. 534, 46 S. E. 663.

Illinois.— Deere *v.* Lewis, 51 Ill. 254; Parker *v.* Brooks, 16 Ill. 64.

Indiana.— Coffinberry *v.* McClellan, 164 Ind. 131, 73 N. E. 97; Indiana Natural Gas, etc., Co. *v.* Hinton, 159 Ind. 398, 64 N. E. 224; Jester *v.* Gustin, 158 Ind. 287, 63 N. E. 471; Davis *v.* Talbot, 137 Ind. 235, 36 N. E. 1098; Dukes *v.* Cole, 129 Ind. 137, 28 N. E. 441; Jewett *v.* Perrette, 127 Ind. 97, 26 N. E. 685; Bryant *v.* Richardson, 126 Ind. 145, 25 N. E. 807; Watts *v.* Fletcher, 107 Ind. 391, 8 N. E. 111; Wilson *v.* Wilson, 86 Ind. 472; State *v.* Hauser, 63 Ind. 155; Schori *v.* Stephens, 62 Ind. 441; Bryson *v.* Kelley, 53 Ind. 486; Mitchell *v.* American Ins. Co., 51 Ind. 396; Strain *v.* Huff, 45 Ind. 222; Law *v.* Vierling, 45 Ind. 25; Nelson *v.* Myers, 34 Ind. 431; Crane *v.* Buchanan. 29 Ind. 570; Winship *v.* Clendenning, 24 Ind. 439; Bray *v.* Hussey, 24 Ind. 228; Emmons *v.* Kiger, 23 Ind. 483; Siegmund *v.* Kellogg-Mackay-Cameron Co., 38 Ind. App. 95, 77 N. E. 1096; Warner *v.* Jennings, 37 Ind. App. 394, 76 N. E. 1013; Stauffer *v.* Cincinnati, etc., R. Co., 33 Ind. App. 356, 70 N. E. 543; Evansville, etc., R. Co. *v.* Huffman, 32 Ind. App. 425, 70 N. E. 173; Buckeye Mfg. Co. *v.* Woolley Foundry, etc., Works, 26 Ind. App. 7, 58 N. E. 1069; Gilmore *v.* Ward, 22 Ind. App. 106, 52 N. E. 810; Hardison *v.* Mann, 20 Ind. App. 404, 50 N. E. 899; Huber Mfg. Co. *v.* Busey, 16 Ind. App. 410, 43 N. E. 907; Woodruff *v.* Noble County Com'rs, 10 Ind. App. 179, 37 N. E.

not generally fall within the statute.[70] Instruments other than those contemplated by the statute need not and cannot be set up as exhibits under the statute.[71]

732; Williams *v.* Frybarger, 9 Ind. App. 558, 37 N. E. 302; Chicago, etc., R. Co. *v.* Ross, 8 Ind. App. 188, 35 N. E. 290; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; Duffy *v.* Carman, 3 Ind. App. 207, 29 N. E. 454.

Iowa.— Jackson *v.* Independent School Dist., (1899) 77 N. W. 860; Stadler *v.* Parmlee, 10 Iowa 23.

Missouri.— Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

Oklahoma.— Grimes *v.* Cullison, 3 Okla. 268, 41 Pac. 355.

See 39 Cent. Dig. tit. "Pleading," § 931 *et seq.*

In an action to set aside a written instrument for fraud it is the fraud and not the instrument on which the action is based, and no exhibit of the instrument is necessary. Heckelman *v.* Rupp, 85 Ind. 286; Stout *v.* Stout, 77 Ind. 537. See also Smith *v.* Summerfield, 108 N. C. 284, 12 S. E. 997.

Plans and specifications referred to in a contract to construct a building are not parts of the contract in such a sense as to require that they should be filed as exhibits in an action on the contract. Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129.

A newspaper account of the transaction alleged in the pleading filed as an exhibit is unauthorized and improper because it could not be read to the jury without producing an effect distinct from and in addition to the mere statement of the case which plaintiff intends to offer proofs in support of, and it would produce an effect which should come from proofs adduced in the manner which the law directs, viz., from witnesses giving their testimony under oath, and liable to cross-examination. Comitez *v.* Parkerson, 50 Fed. 170.

A contract which has never been reduced to writing is not within the statute. Trench *v.* Hardin County Canning Co., 168 Ill. 135, 48 N. E. 64 (contract consisting of proposal contained in letter, and acceptance by telegram, the court holding that it was not necessary to file the correspondence, plaintiff properly declaring on a parol contract); St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 33 N. E. 113.

If only a portion of the contract has been reduced to writing such portion need not be filed. Deere *v.* Lewis, 51 Ill. 254 (copy of order which expresses merely the number and quality but not the price, in action for breach of contract to deliver a certain number of agricultural implements); Kingsland, etc., Mfg. Co. *v.* St. Louis Malleable Iron Co., 29 Mo. App. 526 (order partly in writing and partly oral, a suit for the price of the articles ordered is not founded on an instrument in writing, and written order need not be filed); Malone *v.* Philadelphia, etc., R. Co., 157 Pa. St. 430, 27 Atl. 756 (written contract subsequently modified by parol need not be filed before trial to render it admissible).

70. *Arkansas.*— Greer *v.* Laws, 56 Ark. 37, 18 S. W. 1038.

Illinois.— Mueller *v.* Kinkead, 113 Ill. App. 132.

Indiana.— Vanschoiack *v.* Farrow, 25 Ind. 310; Draper *v.* Vanhorn, 12 Ind. 352.

Missouri.— Gitt *v.* Watson, 18 Mo. 274.

Ohio.— Nathan *v.* Lewis, 1 Handy 239, 12 Ohio Dec. (Reprint) 121.

See 39 Cent. Dig. tit. "Pleading," § 937.

Evidence of title to land.— This is subject, of course, to particular statutory control. Thus, in Arkansas the statute required plaintiff to set forth and exhibit by copies his evidences of title, and that defendant in his answer set forth his exceptions to any of the documentary evidence so filed, in an action for the recovery of land. It was held that this was an anomalous practice but was to be more easily harmonized with the general system of practice in Arkansas by assimilating the record to one in chancery, thus making such exhibits parts of the record but not of the pleadings. Jacks *v.* Chaffin, 34 Ark. 534.

71. Wilson *v.* Vance, 55 Ind. 584; Shauver *v.* Philips, (Ind. App. 1893) 32 N. E. 1131.

Illustrations.— Contracts generally (Elwood Natural Gas, etc., Co. *v.* Kullman, 39 Ind. App. 39, 78 N. E. 1056, contract for furnishing gas to plaintiff, in action to enjoin threatened disconnection of his service pipe); deeds (Ross *v.* Boswell, 60 Ind. 235; Galbreath *v.* McNeily, 40 Ind. 231; Coleman *v.* Hart, 25 Ind. 256), notes (see COMMERCIAL PAPER, 8 Cyc. 142), bonds (Brown *v.* State, 44 Ind. 222), wills (Hillis *v.* Wilson, 13 Ind. 146), mortgages (Nill *v.* Brooks, 21 Ind. 178), recognizances (Kiser *v.* State, 13 Ind. 80), assessments (Smith *v.* Clifford, 83 Ind. 520; Jerrell *v.* Etchison Ditching Assoc., 62 Ind. 200), leases (Ashley *v.* Foreman, 85 Ind. 55), and contracts of insurance (Brennan *v.* Franey, 5 Pa. Co. Ct. 212), are instruments within the purview of the statute. But a tax duplicate (Hazzard *v.* Heacock, 39 Ind. 172), a judgment (Lake Shore, etc., R. Co. *v.* Smith, (Ind. 1892) 29 N. E. 1075; Conwell *v.* Conwell, 100 Ind. 437; Parsons *v.* Milford, 67 Ind. 489; Morrison *v.* Fishel, 64 Ind. 177; White *v.* Webster, 58 Ind. 233; Kelley *v.* Houts, 30 Ind. App. 474, 66 N. E. 408; Indianapolis First Nat. Bank *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054; Evansville, etc., R. Co. *v.* Frank, 3 Ind. App. 96, 29 N. E. 419); the resolution or minutes of a common council (Over *v.* Greenfield, 107 Ind. 231, 5 N. E. 872; State *v.* Hauser, 63 Ind. 155), articles of association (Excelsior Draining Co. *v.* Brown, 38 Ind. 384), a resolution of a board of directors (Van Riper *v.* American Cent. Ins. Co., 60 Ind. 123, in suit on a subscription to capital stock), a subscription paper signed by a great number of subscribers

Accordingly it has been held that an instrument need be filed as an exhibit only when specially declared upon, but not when relied on under the common counts.[72]

b. Failure to Annex or File, and Excuse Therefor. A failure to attach or file the instrument in a case falling within the statute must be accompanied by a sufficient excuse therefor, or the pleading will be deemed defective.[73] It is usually deemed a sufficient excuse that the instrument is lost,[74] is in the possession of the other party,[75] is on file in the same court [76] or in another court,[77] or is held in escrow.[78] The parties may by mutual consent waive the provisions of the statute relative to filing copies of instruments.[79] In some states it is held that the other party may refuse to plead until the copy is filed,[80] or may move to dismiss.[81] But it is also held that an instrument is not rendered inadmissible in evidence because of a failure to attach or file it as an exhibit.[82] Failure to file a copy of an instrument is immaterial where the execution of the instrument is admitted.[83] The filing of a copy of the instrument may be allowed at a subsequent stage of the proceedings.[84]

2. Requisites and Sufficiency of Annexation or Filing and of Copies.[85] A mere reference to an instrument, with a prayer or statement that it be taken as part of the pleading, is not sufficient without filing or annexing the original or a copy,[86] and even when an exhibit is properly filed the pleading should by express

(Workman *v.* Campbell, 46 Mo. 305, because if such paper must be filed in any suit against one delinquent, and remain with the court during the litigation, then but one suit can be prosecuted at the same time, and that one might be so long in court that an action against the other subscribers would be barred; and because if the subscribers should live in different counties, to require the instrument to be filed in every suit would practically amount to a denial of the process of the law), the itemized statement of account showing the expenses of constructing a fence on a railroad right of way, which the statute requires to be presented to the agent of the company, in an action for such expenses (Vandalia R. Co. *v.* Kanarr, 38 Ind. App. 146, 77 N. E. 1135), a will, in a partition suit, upon the construction of which the controversy turned (Shetterly *v.* Axt, 37 Ind. App. 687, 76 N. E. 901, 77 N. E. 865), and the record of a county board (Logansport *v.* La Rose, 99 Ind. 117) have been held not to be written instruments within the meaning of the statute.

Contract executed by both parties is held not to come within the provision of a statute requiring the filing of written instruments on which a pleading is founded and which were executed by the other party. Withers *v.* Wabash R. Co., 122 Mo. App. 282, 99 S. W. 34.

72. Parker *v.* Brooks, 16 Ill. 64.

73. Vannice *v.* Green, 14 Iowa 262; Chadron First Nat. Bank *v.* Engelbrecht, 57 Nebr. 270, 77 N. W. 685.

74. Blasingame *v.* Blasingame, 24 Ind. 86.

75. Walter A. Wood Mowing, etc., Mach. Co. *v.* Irons, 10 Ind. App. 454, 36 N. E. 862, 37 N. E. 1046. But where the opposite party is bound by law to keep the instrument open to public inspection, a copy of the instrument must be filed. Anderson School Tp. *v.* Thompson, 92 Ind. 556.

76. Black *v.* Lackey, 2 B. Mon. (Ky.) 257.

77. State *v.* Engelke, 6 Mo. App. 356.

78. Missouri Pac. R. Co. *v.* Atkinson, 17 Mo. App. 484.

79. Jenkins *v.* Adams, 71 Tex. 1, 8 S. W. 603.

80. Waterman *v.* Mattair, 5 Fla. 211; Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269; Smith *v.* Blunt, 2 La. 132; Stewart *v.* Big Sund Iron Co., 2 Ohio Dec. (Reprint) 150, 1 West. L. Month. 583.

81. Graham *v.* Morstadt, 40 Mo. App. 333. *Contra*, Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269, holding that upon failure to produce documents which should be exhibited he will not be required to answer the demand and dismissal of the suit may follow as the penalty of plaintiff's failure to produce.

82. *Iowa.*— Peterson *v.* Allen, 12 Iowa 366, where the object of the code provision requiring copies of notes or other instruments sued upon to be attached to the pleading was to advise the opposite party fully of plaintiff's claim and to prevent surprise at the trial, and it was held that where defendant referred fully to the note in his answer and claimed to have paid it he could not thereafter object that it was not filed.

Kentucky.— Haney *v.* Tempest, 3 Metc. 95.

Maine.— Hatch *v.* Bates, 54 Me. 136.

Missouri.— Graham *v.* Morstadt, 40 Mo. App. 333; Belt *v.* Brooklyn L. Ins. Co., 12 Mo. App. 100.

Pennsylvania.—Athens Car, etc., Co. *v.* Elsbee, 19 Pa. Super. Ct. 618.

Texas.— McGehee *v.* Munter, (Civ. App. 1894) 25 S. W. 718.

83. Cummings *v.* Kohn, 12 Mo. App. 585.

84. McCarthy *v.* Neu, 91 Ill. 127.

85. **Form of complaint held sufficient** see Walburn *v.* Chenault, 43 Kan. 352, 353, 23 Pac. 657; State *v.* Chautauqua County School Dist., 34 Kan. 237, 238, 8 Pac. 208.

86. People *v.* De la Guerra, 24 Cal. 73; Hanover F. Ins. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

reference identify such exhibit as a part thereof,[87] and in no event can an exhibit be considered on demurrer unless it is referred to in the declaration or complaint in such a way as to make it a part of the pleading.[88] But it also held that an exhibit need not be marked by an identifying letter or character, although it is good practice to do so,[89] and that it is sufficient to name or describe it in the pleading and state that it is filed "herewith."[90] An averment that an instrument is attached as an exhibit, when in fact it is not attached, is surplusage.[91] An exhibit attached to or filed with the original pleading will not aid an amended pleading,[92] unless the amended pleading expressly refers to it and states that it is made a part of such pleading.[93] But a defendant filing an answer, a counter-claim, or cross complaint based upon a written instrument need not set out the instrument as an exhibit if plaintiff has already done so, provided sufficient reference is made.[94] If suit is brought on a number of identically similar instruments, a copy of one with an allegation as to the distinguishing marks of the others is sufficient.[95] Setting

A mere statement that the original is "on file" is too indefinite. Stadler *v.* Parmlee, 10 Iowa 23.

Court files.— Sometimes a pleading may refer to and incorporate therein portions of the court files by specific averment, and such practice has been approved, where no confusion can result, as tending to abbreviate the record. Sutherland *v.* Sutherland, 102 Iowa 535, 71 N. W. 424, 63 Am. St. Rep. 477 (reference to will as part of answer in proceeding by widow to have dower set apart); Wishard *v.* McNeil, 78 Iowa 40, 42 N. W. 578 (reference in petition for new trial to motion to set aside default and affidavit supporting it).

87. *Alabama.*— Pike County *v.* Hanchey, 119 Ala. 36, 24 So. 751.

Indiana.— Smith *v.* Clifford, 83 Ind. 520; Peoria Mar., etc., Ins. Co. *v.* Walser, 22 Ind. 73.

Iowa.— Miller *v.* Miller, 63 Iowa 387, 19 N. W. 251, proper reference to and averment of truth of recitals in exhibit required.

Louisiana.— Nott *v.* Brander, 14 La. 368.

New Jersey.— Shelmerdine *v.* Lippincott, 69 N. J. L. 82, 54 Atl. 237; Melick *v.* Foster, 64 N. J. L. 394, 45 Atl. 911; Metzger *v.* Canadian, etc., Credit System Co., 59 N. J. L. 340, 36 Atl. 661; Brown *v.* Warden, 44 N. J. L. 177; Harrison *v.* Vreeland, 38 N. J. L. 366.

New York.— Booz *v.* Cleveland School Furniture Co., 45 N. Y. App. Div. 593, 61 N. Y. Suppl. 407; Mutual L. Ins. Co. *v.* Robinson, 24 N. Y. App. Div. 570, 49 N. Y. Suppl. 887; Taylor *v.* MacLea, 11 N. Y. Suppl. 640.

Ohio.— Sargent *v.* Moore, 1 Disn. 99, 12 Ohio Dec. (Reprint) 511.

Oregon.— Caspary *v.* Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

See 39 Cent. Dig. tit. "Pleading," § 940.

An express statement making an exhibit part of the pleading was held unnecessary in San Diego County Sav. Bank *v.* Burns, 104 Cal. 473, 38 Pac. 102.

88. Anderson *v.* Hilton, etc., Lumber Co., 110 Ga. 263, 34 S. E. 365; Marley *v.* National Bldg., etc., Assoc., 28 Ind. App. 369, 62 N. E. 1023; Brown *v.* Wharton, 5 N. J. L. J. 145; Hill *v.* Powers, 16 Vt. 516.

89. McCormick Harvesting Mach. Co. *v.* Glidden, 94 Ind. 447.

90. Reed *v.* Broadbelt, 68 Ind. 91 (where a copy of a note similar to the one described in the complaint was filed therewith, and was referred to therein as "a copy of which is filed herewith and made a part of this complaint"); Glass *v.* Murphy, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545; Totten *v.* Cooke, 2 Metc. (Ky.) 275.

An instrument following a pleading referring to it will be presumed to be the one referred to. McCormick Harvesting Mach. Co. *v.* Glidden, 94 Ind. 447.

Omission of mark referred to.— If it is referred to by letter or date of filing and there is in fact no such exhibit, the pleading will nevertheless be held good if the exhibit can be identified in other ways. Wall *v.* Galvin, 80 Ind. 447; Peveler *v.* Peveler, 54 Tex. 53.

91. Lyon *v.* Kempinski, 1 Tex. App. Civ. Cas. § 79. But under the practice act in Connecticut it is held that it is unnecessary to actually file or attach an exhibit in order to make it a part of the pleading. "If the adverse party desires to inspect an exhibit pleaded as annexed, but not annexed in fact, his remedy is by motion to the court." New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

92. McEwen *v.* Hussey, 23 Ind. 395.

93. Stockham Bank *v.* Alter, 61 Nebr. 359, 85 N. W. 300, holding that in such a case the exhibit becomes part of the amended pleading even though not physically attached thereto.

94. Isgrigg *v.* Schooley, 125 Ind. 94, 25 N. E. 151; Wadkins *v.* Hill, 106 Ind. 543, 7 N. E. 253; Grubbs *v.* Morris, 103 Ind. 166, 2 N. E. 579; Anderson *v.* Wilson, 100 Ind. 402; Gardner *v.* Fisher, 87 Ind. 369; Crowder *v.* Reed, 80 Ind. 1; Sidener *v.* Davis, 69 Ind. 336; Pattison *v.* Vaughan, 40 Ind. 253; Nichols, etc., Co. *v.* Berning, 37 Ind. App. 109, 76 N. E. 776.

Reference to answer in counter-claim.— Nor is it necessary that an instrument properly made an exhibit in an answer be repeated as an exhibit in a counter-claim, by recopying, but the exhibit as made by the answer may be referred to. Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716.

95. Tarbell *v.* Stevens, 7 Iowa 163.

up an instrument in full in the body of the pleading is held to be the full equivalent of attaching or filing it as an exhibit,[96] and attaching an exhibit to a pleading is equivalent to separately filing it,[97] and conversely.[98] If the instrument is made up of separate parts, copies of all of them must be filed.[99] One copy filed with the pleading will serve for any number of counts based on the same instrument, if properly referred to in each;[1] but if different counts are founded on different, although similar, instruments, each must be filed with the count declaring on it.[2] The copy filed is sufficient if it show enough to disclose the legal effect alleged.[3]

3. Effect of Filing or Attaching Exhibits — a. As Part of Pleading Generally. The rules in the various jurisdictions as to the effect of an exhibit annexed to and filed with the pleading are not uniform. Strictly and in the absence of a statute providing otherwise such an exhibit is no part of a pleading in an action at law or under the code,[4] and this method of pleading cannot take

96. *Arkansas.*— Bostwick *v.* Flemming, 2 Ark. 462; Yeates *v.* Heard, 2 Ark. 459.

California.— Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327.

Georgia.— Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250; Mercier *v.* Copelan, 73 Ga. 636. See also Howard Mfg. Co. *v.* Water Lot Co., 53 Ga. 689.

Illinois.— Phenix Ins. Co. *v.* Stocks, 149 Ill. 319, 36 N. E. 408; Benjamin *v.* Delahay, 3 Ill. 574.

Indiana.— Colchen *v.* Ninde, 120 Ind. 88, 22 N. E. 94; Adams *v.* Dale, 29 Ind. 273; Miller *v.* Wayne International Bldg., etc., Assoc., 32 Ind. App. 480, 70 N. E. 180.

Kansas.— Budd *v.* Kramer, 14 Kan. 101, holding that an omission to attach a copy of a note sued on is not such error as to require a reversal, under a statute requiring a copy to be "attached to and filed with the pleading."

Maryland.— Smith *v.* Hallwood Cash Register Co., 97 Md. 354, 55 Atl. 525.

Minnesota.— Minneapolis, etc., R. Co. *v.* Grethen, 86 Minn. 323, 90 N. W. 573.

Nebraska.— Holt County Bank *v.* Holt County, 53 Nebr. 827, 74 N. W. 259; Barnes *v.* Van Keuren, 31 Nebr. 165, 47 N. W. 848; Gage *v.* Roberts, 12 Nebr. 276, 11 N. W. 306.

Ohio.— Rouse *v.* Groninger, 2 Ohio Dec. (Reprint) 277, 2 West. L. Month. 272.

Texas.— Lignoski *v.* Crooker, 86 Tex. 324, 24 S. W. 278, 788; Lyon *v.* Kempinski, 1 Tex. App. Civ. Cas. § 79.

See 39 Cent. Dig. tit. "Pleading," §§ 939, 940.

Different counts.— But if the instrument is set out in one count and not referred to in another count, the second count cannot be deemed good because the instrument appears in full in the first. Petty *v.* Muncie Christ Church, 70 Ind. 290.

97. Lay *v.* Cardwell, (Tex. Civ. App. 1896) 33 S. W. 595.

98. Thompson *v.* Recht, 158 Ind. 302, 63 N. E. 569. But see Sargent *v.* Moore, 1 Disn. (Ohio) 99, 12 Ohio Dec. (Reprint) 511, holding that filing a bond and referring to it as an exhibit was of no avail unless it was attached to the pleading or the substance recited in the petition.

99. Potts *v.* Hartman, 101 Ind. 359; Jillson *v.* Restein, 15 Pa. Super. Ct. 636.

Only the parts of the contract relied upon need be set out. Joy *v.* Glidden Varnish Co., 83 Fed. 90.

1. Hochstedler *v.* Hochstedler, 108 Ind. 506, 9 N. E. 467; Scotten *v.* Randolph, 96 Ind. 581; Maxwell *v.* Brooks, 54 Ind. 98; Hornbrook *v.* Hetzel, 27 Ind. App. 79, 60 N. E. 965; Milwaukee Mechanics' Ins. Co. *v.* Stewart, 13 Ind. App. 640, 42 N. E. 290; Farr *v.* Bach, 13 Ind. App. 125, 41 N. E. 393; Glass *v.* Murphy, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545.

2. Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515.

3. Lee *v.* Mendel, 40 Ill. 359; Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286.

In Rhode Island the purpose of the statute is simply to notify the other party of the particular claim in suit, hence an exact copy is not necessary; it need only be sufficiently accurate to identify the claim. West *v.* Darcy, 20 R. I. 311, 38 Atl. 945.

4. *Colorado.*— Brooks *v.* Paddock, 6 Colo. 36; Buck *v.* Fischer, 2 Colo. 182.

Florida.— Royal Phosphate Co. *v.* Van Ness, 53 Fla. 135, 43 So. 916; Milligan *v.* Keyser, 52 Fla. 331, 42 So. 367 (which cases are under the act of 1902 requiring the cause of action to be filed with the declaration); Hooker *v.* Gallagher, 6 Fla. 351.

Illinois.— Harlow *v.* Boswell, 15 Ill. 56; Hart *v.* Tolman, 6 Ill. 1 (holding that in an action on a bond if neither bond nor conditions are set forth, the court cannot go out of the pleadings to ascertain the character of the obligation); Pearsons *v.* Lee, 2 Ill. 193; Bogardus *v.* Trial, 2 Ill. 63; Green *v.* People, 14 Ill. App. 364. A bill of exceptions is necessary to bring on the record a copy of an account attached to and filed with the declaration. Thompson *v.* Kimball, 55 Ill. App. 249.

Mississippi.—Marshal *v.* Hamilton, 41 Miss. 229 (holding that under a statute requiring copy of instrument upon which action is founded to be annexed, whatever of the instrument is material to the cause of action must be set out in the pleading by proper averment); Blackwell *v.* Reid, 41 Miss. 102.

Missouri.— Hickory County *v.* Fugate, 143 Mo. 71, 44 S. W. 789; Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19; Peake *v.* Bell, 65 Mo. 224; Phillips *v.* Evans, 64 Mo. 17; Kern

the place of allegations of the terms of the instrument according to its legal effect or *in hæc verba*.[5] On the other hand, in many jurisdictions under the various provisions governing pleading, by annexing an exhibit as a part of the pleading by proper reference, the effect is as if the instrument sued on were set out in the pleading;[6] the instrument so annexed is sufficiently pleaded and whatever is contained or properly recited therein is regarded as if it had been expressly averred in the pleading,[7] and in considering the allegations the exhibit may be considered as a part of the pleading and in aid and explanation thereof.[8] Again, the extent

v. South St. Louis Mut. Ins. Co., 40 Mo. 19; Bowling *v.* McFarland, 38 Mo. 465; Baker *v.* Berry, 37 Mo. 306; Curry *v.* Lackey, 35 Mo. 389; Deitz *v.* Corwin, 35 Mo. 376; Chambers *v.* Carthell, 35 Mo. 374; Hadwin *v.* Home Mut. Ins. Co., 13 Mo. 473; Bick *v.* Halberstadt, 110 Mo. App. 441, 85 S. W. 127; Glencoe Lime, etc., Co. *v.* Wind, 86 Mo. App. 163; Emmert *v.* Meyer, 65 Mo. App. 609; Merrill *v.* Central Trust Co., 46 Mo. App. 236; State *v.* Samuels, 28 Mo. App. 649; Poulson *v.* Collier, 18 Mo. App. 583; Cassatt *v.* Vogel, 14 Mo. App. 317.

Ohio.— Olney *v.* Watts, 43 Ohio St. 499, 3 N. E. 354; McEwing *v.* James, 36 Ohio St. 152 (holding that the date of items in a copy of an account pleaded as a set-off and filed with the answer does not conclude the pleader on an issue as to the statute of limitation so as to justify a judgment for plaintiff on the pleadings, the evidence not being in the record); West *v.* Dodsworth, 1 Disn. 161, 12 Ohio Dec. (Reprint) 549. But see Coldham *v.* American Casualty, etc., Co., 8 Ohio Cir. Ct. 620, 4 Ohio Cir. Dec. 548.

South Carolina.— Nichols *v.* Montgomery, 68 S. C. 332, 47 S. E. 373, holding that grounds of demurrer cannot be based on an exhibit.

Wyoming.— Hartford F. Ins. Co. *v.* Kahn, 4 Wyo. 364, 34 Pac. 895; Johnson *v.* Home Ins. Co., 3 Wyo. 140, 6 Pac. 729.

See 39 Cent. Dig. tit. "Pleading," §§ 538, 93.

5. Penrose *v.* Pacific Mut. L. Ins. Co., 66 Fed. 253, in Montana.

6. Georges *v.* Kessler, 131 Cal. 183, 63 Pac. 466; San Diego County Sav. Bank *v.* Burns, 104 Cal. 473, 38 Pac. 102; Whitby *v.* Rowell, 82 Cal. 635, 23 Pac. 40, 382; Ward *v.* Clay, 82 Cal. 502, 23 Pac. 50, 227; Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657; Realty Revenue Guaranty Co. *v.* Farm Stock, etc., Pub. Co., 79 Minn. 465, 82 N. W. 857; Elliot *v.* Roche, 64 Minn. 482, 67 N. W. 539.

Suggestion of defect in bond.—Under a statute providing that whenever an official bond does not contain the substantial matter or conditions required by law, or there are any defects in the approval or filing thereof, it is not void so as to discharge such officer and his sureties; but they are equitably bound to the state or party interested; and the state or such party may, by action in any court of competent jurisdiction, suggest the defect in the bond, approval, or filing, and recover the proper and equitable demand or damages from such officer and the persons who intended to become and were included as sureties in such bond, it is a sufficient suggestion of such defect in the bond, approval or filing, if the copy of the bond is attached to and made a part of the complaint. People *v.* Huson, 78 Cal. 154, 20 Pac. 369; Hubert *v.* Mendheim, 64 Cal. 213, 30 Pac. 633.

7. Porter *v.* Allen, 8 Ida. 358, 69 Pac. 105, 236; More *v.* Elmore County Irr. Co., 3 Ida. 729, 35 Pac. 171; Sutherland *v.* Sutherland, 102 Iowa 535, 71 N. W. 424, 63 Am. St. Rep. 477 (reference to exhibit in answer as showing that the defense is not good); Wells *v.* Wilcox, 68 Iowa 708, 28 N. W. 29 (in support of the sufficiency of a petition in replevin on demurrer).

But the truth of such recitals, it is held, must be alleged in the pleading. Miller *v.* Miller, 63 Iowa 387, 19 N. W. 251 (necessity of such allegation in order that the recital may aid the pleading on demurrer); Sprague *v.* Wells, 47 Minn. 504, 50 N. W. 535 [*distinguished* in Elliot *v.* Roche, 64 Minn. 482, 67 N. W. 539, where the matter considered a part of the pleading was allegation of fact in the exhibit, whereas the former case involved mere recitals in the exhibit]. In Union Sewer Pipe Co. *v.* Olson, 82 Minn. 187, 84 N. W. 756, it is held that an exhibit is not permitted to supply the place of an essential allegation unless the pleading is expressly framed for that purpose.

A statement of claim in Pennsylvania was held sufficient without repeating any of the matters which appear in the copy of the contract filed. Drake *v.* Philadelphia, etc., R. Co., 5 Pa. Co. Ct. 21.

8. *Indiana.*— Heaston *v.* Krieg, 167 Ind. 101, 77 N. E. 805; Thompson *v.* Recht, 158 Ind. 302, 63 N. E. 569; Seymour First Nat. Bank *v.* Greger, 157 Ind. 479, 62 N. E. 21; Murphy *v.* Branaman, 156 Ind. 77, 59 N. E. 274; Miller *v.* Bottenberg, 144 Ind. 312, 41 N. E. 804; Fuller *v.* Cox, 135 Ind. 46, 34 N. E. 822; Dukes *v.* Cole, 129 Ind. 137, 28 N. E. 441; Blount *v.* Rick, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; Rausch *v.* Christ Church United Brethren, 107 Ind. 1, 8 N. E. 25; West *v.* Hayes, 104 Ind. 251, 3 N. E. 932; Fee *v.* State, 74 Ind. 66; Clodfelter *v.* Hulett, 72 Ind. 137; Cassaday *v.* American Ins. Co., 72 Ind. 95; Friddle *v.* Crane, 68 Ind. 583; State *v.* Hauser, 63 Ind. 155; Mercer *v.* Herbert, 41 Ind. 459; Blossom *v.* Ball, 32 Ind. 115; Kunkler *v.* Turnting, 10 Ind. 418; Albany Furniture Co. *v.* Merchants' Nat. Bank, 17 Ind. App. 93, 46 N. E. 479; Jaqua *v.* Woodbury, 3 Ind. App. 289, 29 N. E. 573.

Kansas.— See Henley *v.* Wheatley, 68 Kan. 271, 74 Pac. 1125.

to which an exhibit will be considered in many cases is to aid a merely defective

Louisiana.— McClellan Dry-Dock Co. *v.* Farmers' Alliance Steam-Boat Line, 43 La. Ann. 258, 9 So. 630 (where the defect in the pleading was held cured by the exhibit, by defendants, answering without exception, and by the administration of proof without objection); Johnson *v.* Gennison, 18 La. Ann. 273; D'Invilliers *v.* New Orleans Second Municipality, 5 Rob. 123.

Nebraska.— Stockham Bank *v.* Alter, 61 Nebr. 359, 85 N. W. 300; Chadron First Nat. Bank *v.* Engelbercht, 57 Nebr. 270, 77 N. W. 685; Lincoln Mortg., etc., Co. *v.* Hutchins, 55 Nebr. 158, 75 N. W. 538; Holt County Bank *v.* Holt County, 53 Nebr. 827, 74 N. W. 259; McArthur *v.* H. T. Clark Drug Co., 48 Nebr. 899, 67 N. W. 861; Barnes *v.* Van Keuren, 31 Nebr. 165, 47 N. W. 848; Pefley *v.* Johnson, 30 Nebr. 529, 46 N. W. 710.

New Jersey.— The statute provides for an exhibit in the place of the former profert, and where such copy is annexed to the declaration and referred to therein as so annexed the statute makes it a part of the declaration, but not otherwise. Harper *v.* Essex County Park Commission, 73 N. J. L. 1, 62 Atl. 384; Shelmerdine *v.* Lippincott, 69 N. J. L. 82, 54 Atl. 237; Mershon *v.* Williams, 63 N. J. L. 398, 44 Atl. 211; Loeb *v.* Barris, 50 N. J. L. 382, 13 Atl. 602; Brown *v.* Warden, 44 N. J. L. 177.

New York.— Bonnell *v.* Griswold, 68 N. Y. 294 (holding that a demurrer does not admit an allegation that defendant signed an instrument which is annexed as a part of the pleading and contains other signatures); Cupples Envelope Co. *v.* Lackner, 99 N. Y. App. Div. 231, 90 N. Y. Suppl. 954; Taylor *v.* MacLea, 11 N. Y. Suppl. 640.

North Carolina.— Davison *v.* Gregory, 132 N. C. 389, 43 S. E. 916; Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94.

North Dakota.— Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

Oklahoma.— Whiteacre *v.* Nichols, 17 Okla. 387, 87 Pac. 865; Grimes *v.* Cullison, 3 Okla. 268, 41 Pac. 355; Dunham *v.* Holloway, 3 Okla. 244, 41 Pac. 140, in support of verdict as within scope of pleading.

South Dakota.— Cranmer *v.* Kohn, 11 S. D. 245, 76 N. W. 937 (on motion to strike out exhibit); Baton Rouge First Nat. Bank *v.* Dakota F. & M. Ins. Co., 6 S. D. 424, 61 N. W. 439 [*overruling* Rust-Owen Lumber Co. *v.* Fitch, 3 S. D. 213, 52 N. W. 879; Aultman *v.* Siglinger, 2 S. D. 442, 50 N. W. 911] (on demurrer).

Texas.— Milliken *v.* Callahan County, 69 Tex. 205, 6 S. W. 681 (where a paper is made an exhibit and its verity is alleged); Macdonell *v.* International, etc., R. Co., 60 Tex. 590; Frazier *v.* Robertson, 39 Tex. 513; Peters *v.* Crittenden, 8 Tex. 131; Williams *v.* McNeil, 5 Tex. 381; Sherwood *v.* La Salle County, (Civ. App. 1894)) 26 S. W. 650.

Utah.—Stephens *v.* American F. Ins. Co., 14 Utah 265, 47 Pac. 83, under the system of pleading permitting an instrument to be set out *in hæc verba* or annexed as an exhibit and by proper reference made a part of the pleading.

Virginia.— Wright *v.* Smith, 81 Va. 777, under statute requiring an account, showing the several items of claim, to be filed with the declaration, unless it be plainly described in the declaration.

Washington.—Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147; Hays *v.* Dennis, 11 Wash. 360, 39 Pac. 658.

Wisconsin.— Peck *v.* Cheney, 4 Wis. 249; Markoe *v.* Seaver, 2 Wis. 148; Cooper *v.* Blood, 2 Wis. 62, which cases are under a statute permitting a plaintiff to declare on the common counts and serve a copy of a note with the declaration as his only cause of action.

United States.— Nauvoo *v.* Ritter, 97 U. S. 389, 24 L. ed. 1050 (under a statute in Illinois requiring plaintiff to file copy of the instrument upon which the suit is founded); Seebass *v.* Mutual Reserve Fund Life Assoc., 82 Fed. 792 (under New Jersey statute).

See 39 Cent. Dig. tit. "Pleading," §§ 538, 93.

Instrument for unconditional payment of money.— Sometimes the distinction is between provision simplifying pleadings founded on instruments for the unconditional payment of money, by declaring in effect that it shall be sufficient to attach a copy and allege that a certain amount is due thereon, etc., and another provision for attaching instruments as evidence of indebtedness. Under the first provision the instrument is a part of the pleading (State *v.* Chautauqua County School Dist. No. 3, 34 Kan. 237, 8 Pac. 208; McArthur *v.* H. T. Clark Drug Co., 48 Nebr. 899, 67 N. W. 861; Pefley *v.* Johnson, 30 Nebr. 529, 46 N. W. 710), but only such instrument as is for the unconditional payment of money (Chadron First Nat. Bank *v.* Engelbercht, 57 Nebr. 270, 77 N. W. 685; Lincoln Mortg., etc., Co. *v.* Hutchins, 55 Nebr. 158, 75 N. W. 538). The second provision is designed as a substitute for the common-law petition of oyer, and it is held that it is not good pleading to copy or incorporate the instrument or attach it as a part of the pleading, and if attached it will not form a part of the pleading, although the adverse party is entitled to have it attached. Chadron First Nat. Bank *v.* Engelbercht, 57 Nebr. 270, 77 N. W. 685 (holding that in a foreclosure suit only the note need be attached and is not a part of the pleading); Holt County Bank *v.* Holt County, 53 Nebr. 827, 74 N. W. 259. But if the instrument is attached as a part of the pleading under the latter provision, the purpose of the statute to furnish the opposite party with notice of the instrument for inspection and to enable him to prepare his defense is subserved. Chadron First Nat. Bank *v.* Engelbercht, 57 Nebr. 270, 77 N. W. 685; Lincoln Mortg., etc., Co. *v.* Hutchins, 55 Nebr. 158, 75 N. W. 538. Similar construc-

allegation,[9] or for the purpose of furnishing particulars of description or items of values stated,[10] but never for the purpose of supplying the substantial allegations essential to the statement of the cause of action or defense,[11] unless as sometimes said, the pleading is framed for that purpose and with that end in view.[12]

b. Variance. Generally in the case of a variance between the allegations

tion of like provisions are found in Byers *v.* Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623; Crawford *v.* Satterfield, 27 Ohio St. 421; Gwynne *v.* Jones, 5 Ohio Cir. Ct. 298, 3 Ohio Cir. Dec. 148; Lynd *v.* Caylor, 1 Handy 576, 12 Ohio Dec. (Reprint) 298; Nathan *v.* Lewis, 1 Handy 239, 12 Ohio Dec. (Reprint) 121.

Evidence or foundation of action.— In Arkansas copies of deeds which either party, in an action for the recovery of lands, relies upon as evidence of his title, and which the statute requires to be filed as exhibits with his pleading, are held to be no part of the pleadings, but the deeds themselves must be produced and read to the jury or the next best evidence must be produced when that cannot be done. Richardson *v.* Williams, 37 Ark. 542; Jacks *v.* Chaffin, 34 Ark. 534. But an exhibit which is the foundation of the action is a part of the record and it is held will explain or even control an averment in the pleading. Beavers *v.* Baucum, 33 Ark. 722, in equity. If, however, the exhibit is not the foundation of the action, although the statute requires it to be filed, it cannot be noticed on demurrer any further than to explain allegations and not to supply or contradict them. Abbott *v.* Rowan, 33 Ark. 593; Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131. See also Oliphant *v.* Malone, (Ark. 1891) 15 S. W. 363.

Memoranda indorsed on an instrument which are no part thereof do not become a part of the record when the instrument is made an exhibit. Hall *v.* Bonville, 36 Ark. 491, holding that if plaintiff relies on partial payments to remove the bar of limitation, or a defendant to reduce the debt, the evidence of such payment must be brought on the record by bill of exceptions.

9. *In re* Cook, 137 Cal. 184, 69 Pac. 968; Combs *v.* Breathitt County, 38 S. W. 138, 39 S. W. 33, 18 Ky. L. Rep. 809 [*citing* Totten *v.* Cooke, 2 Metc. (Ky.) 275]; Realty Revenue Guaranty Co. *v.* Farm Stock, etc., Pub. Co., 79 Minn. 465, 82 N. W. 857.

10. McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491 [*citing* Riley *v.* Pearson, 21 Oreg. 15, 26 Pac. 849; Caspary *v.* Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842]; Macdonell *v.* International, etc., R. Co., 60 Tex. 590; Burks *v.* Watson, 48 Tex. 107; Miles *v.* Mays, (Tex. App. 1890) 16 S. W. 540; Fitch *v.* Applegate, 24 Wash. 30, 64 Pac. 147; Hays *v.* Dennis, 11 Wash. 360, 39 Pac. 658.

To ascertain contract.— The exhibit may be examined to ascertain the contract of the parties. San Gabriel Valley Bank *v.* Lake View Town Co., 4 Cal. App. 630, 89 Pac. 360.

11. *Arizona.*— McPherson *v.* Hattich, (1906) 85 Pac. 731.

California.— *In re* Cook, 137 Cal. 184, 69 Pac. 968; Hibernia Sav., etc., Soc. *v.* Thornton, 117 Cal. 481, 49 Pac. 573; Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; Ward *v.* Clay, 82 Cal. 502, 23 Pac. 50, 227; Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327; Los Angeles *v.* Signoret, 50 Cal. 298.

Connecticut.— New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

Kentucky.— Green *v.* Page, 80 Ky. 368; Gebhard *v.* Garnier, 12 Bush 321, 23 Am. Rep. 721; Murphy *v.* Estes, 6 Bush 532; Allen *v.* Shortridge, 1 Duv. 34; Riggs *v.* Maltby, 2 Metc. 88; Dodd *v.* King, 1 Metc. 430; Collins *v.* Blackburn, 14 B. Mon. 252; Hill *v.* Barrett, 14 B. Mon. 83; Altemus *v.* Asker, 74 S. W. 245, 24 Ky. L. Rep. 2416.

Oregon.— McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491.

South Carolina.— Cave *v.* Gill, 59 S. C. 256, 37 S. E. 817.

Texas.— Miles *v.* Mays, (1890) 16 S. W. 540; Longley *v.* Caruthers, 64 Tex. 287; Burks *v.* Watson, 48 Tex. 107.

See 39 Cent. Dig. tit. "Pleading," § 944.

Matters of substance which are preliminary or collateral to the instrument cannot be supplied by exhibits. Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327; Stephens *v.* American F. Ins. Co., 14 Utah 265, 47 Pac. 83. So on demurrer a petition for the enforcement of a mechanic's lien which does not allege that anything is due when the action is commenced is not aided by an exhibit of the statement of lien which shows only that something was due at some time prior to the commencement of the action. Stubbs *v.* Clarinda, etc., R. Co., 62 Iowa 280, 17 N. W. 530.

Exhibit considered as against pleader.— In several cases in Kentucky it is held that an exhibit cannot make a bad pleading good, but it will be considered by the court as against the pleader when filed by him. Com. *v.* Licking Valley Bldg. Assoc. No. 3, 118 Ky. 791, 82 S. W. 435, 26 Ky. L. Rep. 730; Hudson *v.* Scottish Union, etc., Co., 110 Ky. 722, 62 S. W. 513, 23 Ky. L. Rep. 116; Hawkins *v.* Nicholas County, 89 S. W. 484, 28 Ky. L. Rep. 479; Gardiner *v.* Continental Ins. Co., 75 S. W. 283, 25 Ky. L. Rep. 426. See also Covington Gas Light Co. *v.* Covington, 101 S. W. 923, 31 Ky. L. Rep. 124, where the exhibit showing that plaintiff had no cause of action controlled as against the pleading. But see Green *v.* Page, 80 Ky. 368, where it is said that the exhibit cannot be considered either to support or defeat the pleading.

12. Union Sewer Pipe Co. *v.* Olson, 82 Minn. 187, 84 N. W. 756. See also *supra*, note 7

of the pleading and the term of the instrument set out as an exhibit, the exhibit will control,[13] and no objection can be made on the trial that there is such a variance, because the exhibit cures any misrecital of the instrument in the pleading.[14]

c. Unnecessary or Insufficient Exhibit. An insufficient exhibit will not injure the body of the pleading,[15] and an unauthorized or unnecessary exhibit is surplusage, and has no effect upon the consideration of the sufficiency of the pleading,[16]

13. *Arkansas.*—Beavers *v.* Baucum, 33 Ark. 722, exhibits which are foundation of action.

Indiana.— Huber Mfg. Co. *v.* Wagner, 167 Ind. 98, 78 N. E. 329; Harrison Bldg., etc., Co. *v.* Lackey, 149 Ind. 10, 48 N. E. 254; Blackburn *v.* Crowder, 108 Ind. 238, 9 N. E. 108; Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 695; Lentz *v.* Martin, 75 Ind. 228; Glenn *v.* Porter, 72 Ind. 525; Liberty Tp. Draining Assoc. *v.* Watkins, 72 Ind. 459; Hurlburt *v.* State, 71 Ind. 154; Stroup *v.* State, 70 Ind. 495; Cotton *v.* State, 64 Ind. 573; Daily *v.* Columbus, 49 Ind. 169; Blossom *v.* Ball, 32 Ind. 115; Clark *v.* Trueblood, 16 Ind. App. 98, 44 N. E. 679; Dunlap *v.* Eden, 15 Ind. App. 575, 44 N. E. 560.

Kentucky.— Bush *v.* Madeira, 14 B. Mon. 212; Dodd *v.* King, 1 Metc. 430; Covington Gas Light Co. *v.* Covington, 101 S. W. 923, 31 Ky. L. Rep. 124 (but only in so far as the instrument set up in the exhibit is shown by the petition to be the foundation of the claim); Chicago, etc., R. Co. *v.* Wilson, 76 S. W. 138, 25 Ky. L. Rep. 525 (variance cured by exhibit).

Louisiana.— Matthews *v.* Williams, 25 La. Ann. 585 (where the exhibit is made a part of the pleading); Powell *v.* Aiken, 18 La. 321; Nott *v.* Brander, 14 La. 368; Compton *v.* Woolfolk, 6 La. 272; Hughes *v.* Harrison, 7 Mart. N. S. 227. But a plat annexed as an exhibit cannot control a description by metes and bounds. Remy *v.* Municipality No. 2, 12 La. Ann. 500.

Mississippi.— House *v.* Gumble, 78 Miss. 259, 29 So. 71, under a code provision that exhibits filed with a bill shall be considered as a part thereof.

New Jersey.— Dick *v.* McPherson, 72 N. J. L. 332, 62 Atl. 383, under statute providing that a copy of a writing annexed to a pleading shall cure any defect therein.

North Dakota.— Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588, exhibit part of pleading, and contradictory averments in pleading disregarded on demurrer.

Texas.— Belham *v.* Ghio, 75 Tex. 87, 13 S. W. 8; Freiberg *v.* Magale, 70 Tex. 116, 7 S. W. 684; Longley *v.* Caruthers, 64 Tex. 287; Beals *v.* Alexander, 6 Tex. 531; Pyron *v.* Grinder, 25 Tex. Suppl. 159; Morrison *v.* Keese, 25 Tex. Suppl. 154; Hooks *v.* Bramlette, 1 Tex. App. Civ. Cas. § 863.

United States.— Willard *v.* Davis, 122 Fed. 363, bill in equity.

See 39 Cent. Dig. tit. "Pleading," § 943.

Demurrer for uncertainty and ambiguity.— In Palmer *v.* Lavigne, 104 Cal. 30, 37 Pac. 775, it is held that where the allegations of complaint are inconsistent with the exhibit attached, a demurrer for uncertainty and ambiguity should be sustained.

Exhibit considered as against pleader see *supra*, note 11.

14. Carothers *v.* Green, Morr. (Iowa) 429 (as to variance between the note as deciared on and the true copy attached); Madera *v.* Jones, Morr. (Iowa) 204; Walker *v.* Ayres, Morr. (Iowa) 200; Matthews *v.* Williams, 25 La. Ann. 585 (description of note); Beham *v.* Ghio, 75 Tex. 87, 12 S. W. 996; Spencer *v.* McCarty, 46 Tex. 213; Peters *v.* Crittenden, 8 Tex. 131; Pyron *v.* Grinder, 25 Tex. Suppl. 159. See also Compton *v.* Woolfolk, 6 La. 272; Lake Erie Commercial Bank *v.* Norton, 1 Hill (N. Y.) 501.

15. Doremus *v.* People, 161 Ill. 26, 43 N. E. 701.

16. Seymour First Nat. Bank *v.* Greger, 157 Ind. 479, 62 N. E. 21; Indiana Mut. Bldg., etc., Assoc. *v.* Plank, 152 Ind. 197, 52 N. E. 991; Fitch *v.* Byall, 149 Ind. 554, 49 N. E. 455; Hoover *v.* Weesner, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; State *v.* Helms, 136 Ind. 122, 35 N. E. 893; Fuller *v.* Cox, 135 Ind. 46, 34 N. E. 822; Price *v.* Bayless, 131 Ind. 437, 31 N. E. 88; Armstrong *v.* Farmers' Nat. Bank, 130 Ind. 508, 30 N. E. 695; Lake Shore, etc., R. Co. *v.* Smith, (Ind. 1892) 29 N. E. 1075; Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Platt *v.* Brickley, 119 Ind. 333, 21 N. E. 906; Over *v.* Greenfield, 107 Ind. 231, 5 N. E. 872; Huseman *v.* Sims, 104 Ind. 317, 4 N. E. 42; Jackson *v.* State, 103 Ind. 250, 2 N. E. 742; Western Union Tel. Co. *v.* Ferris, 103 Ind. 91, 2 N. E. 240; Logansport *v.* La Rose, 99 Ind. 117; Black *v.* Richards, 95 Ind. 184; Mendenhall *v.* Clugish, 84 Ind. 94; Smith *v.* King, 81 Ind. 217; Robards *v.* Marley, 80 Ind. 185; Auburn *v.* Eldridge, 77 Ind. 126; Briscoe *v.* Johnson, 73 Ind. 573; Cress *v.* Hook, 73 Ind. 177; Jones *v.* Levi, 72 Ind. 586; Clodfelter *v.* Hulett, 72 Ind. 137; Stahl *v.* Hammontree, 72 Ind. 103; Bayless *v.* Glenn, 72 Ind. 5; Parsons *v.* Milford, 67 Ind. 489; Locke *v.* Merchants' Nat. Bank, 66 Ind. 353; Ryan *v.* Curran, 64 Ind. 345, 31 Am. Rep. 123; State *v.* Boyd, 63 Ind. 428; State *v.* Hauser, 63 Ind. 155; Wharton *v.* Wilson, 60 Ind. 591; Van Riper *v.* American Cent. Ins. Co., 60 Ind. 123; Watkins *v.* Brunt, 53 Ind. 208; Armstrong *v.* McLaughlin, 49 Ind. 370; Knight *v.* Flatrock, etc., Turnpike Co., 45 Ind. 134; Mercer *v.* Herbert, 41 Ind. 459; Excelsior Draining Co. *v.* Brown, 38 Ind. 384; Blossom *v.* Ball, 32 Ind. 115; Kunkler *v.* Turnting, 10 Ind. 418; Shetterly *v.* Axt, 37 Ind. App. 687, 76 N. E. 901, 77 N. E. 865; Corbinoil Co. *v.* Searles, 36 Ind. App. 215, 75 N. E. 293; Indiana Natural Gas Co. *v.* Lee, 34 Ind. App. 119, 72 N. E. 492; Noah *v.* German-American Assoc., 31 Ind. App. 504, 68 N. E. 615; Smith *v.* Tate, 30 Ind. App.

and may be stricken out.[17] But if the instrument does not show on its face everything necessary to make it a valid obligation, the pleading must supply the defect.[18] An exhibit may be amended in the discretion of the court.[19]

X. BILL OF PARTICULARS AND COPY OF ACCOUNTS.[20]

A. Bill of Particulars — 1. Nature and Office. The proper office of a bill of particulars is to inform the opposite party and the court of the precise nature and character of the cause of action or defense for which the pleader contends in respect to any material or issuable fact in the case and which is not specifically set out in his pleadings,[21] and which cannot, in many cases, be given in the pleading without great prolixity.[22] It is properly an amplification of the pleading, designed to make more specific general allegations appearing therein,[23] and

367, 66 N. E. 88; Hornbrook *v.* Hetzel, 27 Ind. App. 79, 60 N. E. 965; Farmers' Co-operative Ins. Assoc. *v.* Nolan, 26 Ind. App. 514, 60 N. E. 163; Allen *v.* Toner, 24 Ind. App. 121, 56 N. E. 250; Drake *v.* Grout, 21 Ind. App. 534, 52 N. E. 775; Mann *v.* Barkley, 21 Ind. App. 152, 51 N. E. 946; Clark *v.* Trueblood, 16 Ind. App. 98, 44 N. E. 679; Indianapolis First Nat. Bank *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054; Bozarth *v.* Mallett, 11 Ind. App. 417, 39 N. E. 176; Cloud County *v.* Vickers, 62 Kan. 25, 61 Pac. 391.

17. Noah *v.* German-American Bldg. Assoc., 31 Ind. App. 504, 68 N. E. 615; U. S. *v.* Davenport, 93 Fed. 170.

18. Ellison *v.* Towne, 34 Ind. App. 22, 72 N. E. 270.

19. Chapman *v.* Skellie, 65 Ga. 124; Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264; Stevens *v.* Campbell, 6 Iowa 538, where the copy of a note as first filed with the pleading contained the name of defendant which had become defaced and illegible by handling, and the court permitted an amendment on the trial to make it conform to the original.

20. Aider by verdict or judgment see *infra*, XIV, J.

Amendment by annexing bill of particulars or copy of account see *supra*, VII, A, 15.

As part of record on appeal see Appeal and Error, 2 Cyc. 1058.

Evidence admissible under bill of particulars see *infra*, XIII, B, 4, n.

In justice's court see Justices of the Peace, 24 Cyc. 565, 566.

Objections to bill of particulars and waiver thereof see *infra*, XIV, D.

Objections to evidence as not within or on ground of insufficiency of bill of particulars or copy of account see *infra*, XIV, I, 4.

21. *Connecticut.*— Vila *v.* Weston, 33 Conn. 42.

Delaware.— Maxwell *v.* Devalinger, 2 Penew. 504, 47 Atl. 381.

Illinois.— Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025 [*affirming* 37 Ill. App. 278.

Maryland.— Black *v.* Woodrow, 39 Md. 194.

Michigan.— Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236; Davis *v.* Freeman, 10 Mich. 188.

Mississippi.— Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288; Nevitt *v.* Rabe, 5 How. 653.

New York.— Matthews *v.* Hubbard, 47 N. Y. 428; Stern *v.* Wabash R. Co., 98 N. Y. App. Div. 619, 90 N. Y. Suppl. 299; Hamilton *v.* American Vote Registering Mach. Co., 24 N. Y. App. Div. 544, 49 N. Y. Suppl. 595; Moses *v.* Hatch, 22 N. Y. App. Div. 21, 47 N. Y. Suppl. 781; Bender *v.* Bender, 88 Hun 448, 34 N. Y. Suppl. 876; Murray *v.* Mabie, 55 Hun 38, 8 N. Y. Suppl. 289; Newell *v.* Butler, 38 Hun 104; Higenbotam *v.* Green, 25 Hun 214; Diossy *v.* Rust, 46 N. Y. Super. Ct. 374; Drake *v.* Thayer, 5 Rob. 694; Mullen *v.* Hall, 51 Misc. 59, 99 N. Y. Suppl. 841; Rice *v.* Rockefeller, 2 N. Y. Suppl. 867; Enright *v.* Seymour, 8 N. Y. St. 356; Bangs *v.* Ocean Nat. Bank, 53 How. Pr. 51; People *v.* Monroe Ct. C. Pl., 4 Wend. 200; Gay *v.* Cary, 9 Cow. 44.

Ohio.— Gibson *v.* Ohio Farina Co., 2 Disn. 499.

Vermont.— Hicks *v.* Cottrill, 25 Vt. 80.

Virginia.— Richmond *v.* Leaker, 99 Va. 1, 37 S. E. 348 (construing Code, § 3249); Columbia Acc. Assoc. *v.* Rockey, 93 Va. 678, 25 S. E. 1009; Richmond, etc., R. Co. *v.* Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849.

Washington.— Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34.

West Virginia.— Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

United States.— Garfield *v.* Paris, 96 U. S. 557, 24 L. ed. 821.

Canada.— Ashton *v.* Nova Scotia Cotton Co., 22 Nova Scotia 309.

See 39 Cent. Dig. tit. "Pleading," § 949.

The real purpose of ordering a bill of particulars is to reach justice between the parties by evolving the truth from their discordant statements, and to give the parties every reasonable facility for coming to the trial fully prepared for all that may be produced by the other side, and this is just as important whether the matter is set up as a bare defense or as a basis for a demand for affirmative relief. Liscomb *v.* Agate, 51 Hun (N. Y.) 288, 4 N. Y. Suppl. 167.

22. Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288.

23. *Alabama.*— Morrisette *v.* Wood, 128 Ala. 505, 30 So. 630.

thus avoid a surprise at the trial.[24] Hence it has no application, and generally will be refused where the cause of action or defense is specifically set forth in the pleadings with sufficient definiteness to give the opposite party notice thereof.[25] It is not the office of a bill of particulars to supply material allegations necessary to the validity of a pleading,[26] or to change a cause of action or defense stated in the pleading,[27] or to state a cause of action or defense other than the one stated.[28] Nor is it the office of such a bill to furnish to defendant facts whereon to found an affirmative defense,[29] or which constitutes a defense or offset for the other party.[30]

California.— Freeborn *v.* Glazer, 10 Cal. 337; Ames *v.* Bell, 5 Cal. App. 1, 89 Pac. 619.

Connecticut.— Puritan Mfg. Co. *v.* Bouteiller, 79 Conn. 255, 64 Atl. 227; Vila *v.* Weston, 33 Conn. 42; Dean *v.* Mann, 28 Conn. 352.

Kentucky.— Brown *v.* Calvert, 4 Dana 219.

Louisiana.— Lockhart *v.* Morey, 41 La. Ann. 1165, 4 So. 581.

Michigan.— Knop *v.* National F. Ins. Co., 101 Mich. 359, 59 N. W. 653; Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681.

New York.— Dwyer *v.* Slattery, 118 N. Y. App. Div. 345, 103 N. Y. Suppl. 433; St. Albans Beef Co. *v.* Aldridge, 112 N. Y. App. Div. 803, 99 N. Y. Suppl. 398; Messer *v.* Aaron, 101 N. Y. App. Div. 169, 91 N. Y. Suppl. 921; Niemoller *v.* Duncombe, 33 N. Y. App. Div. 536, 53 N. Y. Suppl. 872; Higenbotam *v.* Green, 25 Hun 214; Drake *v.* Thayer, 5 Rob. 694; Vischer *v.* Conant, 4 Cow. 396; Ryckman *v.* Haight, 15 Johns. 222; Mercer *v.* Sayre, 3 Johns. 248.

West Virginia.— West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

See 39 Cent. Dig. tit. "Pleading," § 949.

24. *Alabama.*— Morrissette *v.* Wood, 128 Ala. 505, 30 So. 630.

District of Columbia.— Vansant *v.* Lindsley, 2 App. Cas. 421.

Michigan.— Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236; Mason *v.* Scio Fractional School Dist. No. 1, 34 Mich. 228.

New York.— Messer *v.* Aaron, 101 N. Y. App. Div. 169, 91 N. Y. Suppl. 921; Niemoller *v.* Duncombe, 33 N. Y. App. Div. 536, 53 N. Y. Suppl. 872; Jackman *v.* Lord, 56 Hun 192, 9 N. Y. Suppl. 200; Drake *v.* Thayer, 5 Rob. 694; Lowenthal *v.* Philadelphia Rubber Works, 18 N. Y. Suppl. 523.

West Virginia.— West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

See 39 Cent. Dig. tit. "Pleading," § 949.

25. *Connecticut.*— Vila *v.* Weston, 33 Conn. 42.

Indiana.— Brooklyn Gravel Road Co. *v.* Slaughter, 33 Ind. 185; Cannon *v.* Castleman, 24 Ind. App. 188, 55 N. E. 111; McCoy *v.* Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208.

Iowa.— Cain *v.* Devitt, 8 Iowa 116.

Maryland.— Black *v.* Woodrow, 39 Md. 194.

Mississippi.— Nevitt *v.* Rabe, 5 How. 653.

New York.— Ingraham *v.* International Salt Co., 114 N. Y. App. Div. 791, 100 N. Y. Suppl. 192; Spitz *v.* Heinze, 77 N. Y. App. Div. 317, 79 N. Y. Suppl. 187; Hamilton *v.* American Vote Registering Mach. Co., 24 N. Y. App. Div. 544, 49 N. Y. Suppl. 595; Hattermann *v.* Siemann, 1 N. Y. App. Div. 486, 37 N. Y. Suppl. 405; Mertage *v.* Bennett, 59 N. Y. Super. Ct. 572, 15 N. Y. Suppl. 141; Drake *v.* Thayer, 5 Rob. 694; Reichardt *v.* Plaut, 98 N. Y. Suppl. 195; Ross *v.* Willett, 11 N. Y. Suppl. 621; Cook *v.* Matteson, 11 N. Y. Suppl. 572, 19 N. Y. Civ. Proc. 321; Rice *v.* Rockefeller, 2 N. Y. Suppl. 867; Bangs *v.* Ocean Nat. Bank, 53 How. Pr. 51; Ives *v.* Shaw, 31 How. Pr. 54; People *v.* Monroe Ct. C. Pl., 4 Wend. 200.

Pennsylvania.— Kemmerer *v.* Hoffman, 7 Pa. Co. Ct. 429.

Virginia.— Blue Ridge Light, etc., Co. *v.* Tutwiler, 106 Va. 54, 55 S. E. 539; Newport News, etc., R., etc., Co. *v.* Bickford, 105 Va. 182, 52 S. E. 1011; Richmond *v.* Leaker, 99 Va. 1, 37 S. E. 348; Richmond, etc., R. Co. *v.* Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849.

West Virginia.— Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

Wisconsin.— Conover *v.* Knight, 84 Wis. 639, 59 N. W. 1002.

Canada.— Bigras *v.* Montreal Water, etc., Co., 15 Quebec Super. Ct. 145.

See 39 Cent. Dig. tit. "Pleading," § 949.

Where the necessary information is contained in a special count, a bill of particulars cannot be required. Vila *v.* Weston, 33 Conn. 42.

26. Kelsey *v.* Punderford, 76 Conn. 271, 56 Atl. 579; Ingraham *v.* International Salt Co., 114 N. Y. App. Div. 791, 100 N. Y. Suppl. 192; Niemoller *v.* Duncombe, 33 N. Y. App. Div. 536, 53 N. Y. Suppl. 872; Murray *v.* Mabie, 55 Hun (N. Y.) 38, 8 N. Y. Suppl. 289; West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

27. St. Albans Beef Co. *v.* Aldridge, 112 N. Y. App. Div. 803, 99 N. Y. Suppl. 398; Dixon *v.* Bunnell, 52 Misc. (N. Y.) 560, 102 N. Y. Suppl. 775.

28. Haley *v.* Hobson, 68 Me. 167; St. Albans Beef Co. *v.* Aldridge, 112 N. Y. App. Div. 803, 99 N. Y. Suppl. 398.

29. Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681; Sands *v.* Holland Torpedo Boat Co., 115 N. Y. App. Div. 151, 100 N. Y. Suppl. 684; Bender *v.* Bender, 88 Hun (N. Y.) 448, 34 N. Y. Suppl. 876; Fullerton *v.* Gaylord, 7 Rob. 551.

30. Hamilton *v.* Peck, 84 Mich. 393, 47

2. Right to Particulars in General. There is no fixed and inflexible rule as to when a party is entitled to a bill of particulars; but generally it is held that in any case where, from any cause, a party is placed in such a situation that he cannot properly plead, or prepare for trial or that justice cannot be done at the trial unless he is apprised of the particulars and circumstances of his opponent's case with more particularity than is required by the rules of pleading, the court may direct that information as to such matters shall be seasonably furnished.[31] A bill of particulars can be required only in those cases where the declaration or plea is allowably of so general a nature as not to apprise the party of the real cause of action or defense which he is to meet.[32] But no particulars will be ordered when

N. W. 681; Giles *v.* Betz, 15 Abb. Pr. (N. Y.) 285; Williams *v.* Shaw, 4 Abb. Pr. (N. Y.) 209; John S. Way Mfg. Co. *v.* Corn, 66 How. Pr. (N. Y.) 152; Ryckman *v.* Haight, 15 Johns. (N. Y.) 222. See King *v.* McGovern, 1 La. Ann. 172, where a credit was acknowledged.

31. *Illinois.*— American Rolling Mill Co. *v.* Ohio Iron, etc., Co., 120 Ill. App. 614.

Kentucky.—Brown *v.* Calvert, 4 Dana 219; Oregon Gold Min. Co. *v.* Schmidt, 60 S. W. 530, 22 Ky. L. Rep. 1330.

Massachusetts.— Com. *v.* Snelling, 15 Pick. 321.

Michigan.— State *v.* Hosmer, (1905) 104 N. W. 637; Hamilton *v.* Ingham Cir. Judge, 84 Mich. 393, 47 N. W. 681.

New York.— Cunard *v.* Francklyn, 111 N. Y. 511, 19 N. E. 92; Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Baker *v.* New York City R. Co., 116 N. Y. App. Div. 858, 102 N. Y. Suppl. 276; Breslauer Realty Co. *v.* Cohen, 115 N. Y. App. Div. 360, 100 N. Y. Suppl. 775; Sands *v.* Holland Torpedo Boat Co., 115 N. Y. App. Div. 151, 100 N. Y. Suppl. 684; Fruin-Bambrick Constr. Co. *v.* Marks, 48 N. Y. App. Div. 51, 62 N. Y. Suppl. 621; Kennedy *v.* Mostert, 48 N. Y. App. Div. 49, 62 N. Y. Suppl. 577; Macdonough *v.* Hayman, 23 N. Y. App. Div. 575, 48 N. Y. Suppl. 663; Constable *v.* Hardenbergh, 76 Hun 434, 27 N. Y. Suppl. 1022; Jackman *v.* Lord, 56 Hun 192, 9 N. Y. Suppl. 200; Burnell *v.* Coles, 25 Misc. 794, 54 N. Y. Suppl. 568; Loewenstein *v.* Schiff, 8 Misc. 70, 28 N. Y. Suppl. 528; Faxon *v.* Ball, 21 N. Y. Suppl. 737; Loewenthal *v.* Philadelphia Rubber Works, 18 N. Y. Suppl. 523; Williams *v.* Folsom, 13 N. Y. Suppl. 712; Lewis *v.* Joiner, 5 N. Y. St. 301; Vischer *v.* Conant, 4 Cow. 396.

Pennsylvania.— Stell *v.* Moyer, 9 Pa. Dist. 516.

Virginia.— Blue Ridge Light, etc., Co. *v.* Tutwiler, 106 Va. 54, 55 S. E. 539; Driver *v.* Southern R. Co., 103 Va. 650, 59 S. E. 1000.

West Virginia.— Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

England.— Early *v.* Smith, 12 Ir. C. L. Appendix xxxv.

If a pleading consists largely of legal conclusions it is proper to require the facts to be set forth in a bill of particulars. Baldwin *v.* Nesmyth, 33 N. Y. App. Div. 634, 56 N. Y. Suppl. 318; Guichon *v.* Fisherman's Cannery Co., 4 Brit. Col. 516.

The granting of a bill of particulars does not depend upon the actual facts, or the knowledge of the opposite party concerning them, but is dependent upon the facts claimed to exist. Dwyer *v.* Slattery, 118 N. Y. App. Div. 345, 103 N. Y. Suppl. 433. And whether a plaintiff should serve a bill of particulars of his complaint must be determined by an examination of the complaint and does not depend upon the fact that defendants have served a bill of particulars of a counter-claim contained in their answer. Fickinger *v.* Ives, 109 N. Y. App. Div. 684, 96 N. Y. Suppl. 396.

A bill of particulars concerning a counter-claim will not be ordered for the purpose of enabling plaintiff to prepare for trial, until an issue upon the counter-claim has been raised by the service of a reply. Fidelity Glass Co. *v.* Thatcher Mfg. Co., 88 N. Y. App. Div. 287, 85 N. Y. Suppl. 8. But the rule is otherwise as to new matter set up in the answer by way of defense which does not require a reply. Fidelity Glass Co. *v.* Thatcher Mfg. Co., *supra*.

A bill of particulars may be required to make an answer more definite, whether the general averments constitute an adverse claim or merely matter effectual as a defense. Kelsey *v.* Sargent, 100 N. Y. 602, 3 N. E. 795.

32. West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

If the declaration or plea is more general or indefinite than is allowed by law, a demurrer or objection should be interposed, and a demand for particulars will not take the place of a demurrer. Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696. And see, generally, *supra*, VI.

That a reply is very loosely drawn is no reason for refusing an order directing defendant to furnish a bill of particulars of his counter-claim, since such a reply cannot be treated as a nullity. Ennis *v.* Hoxford, 2 N. Y. Suppl. 639.

Unless it be reasonably clear that plaintiff or defendant could be more precise in his allegations, or that it be necessary to a fair trial that the opposite party should be apprised of what he has to meet with more certainty than is contained in the pleading, a motion for a bill of particulars should be refused. Vansant *v.* Lindsley, 2 App. Cas. (D. C.) 321.

it appears that the information sought is not necessary to enable the other party to plead or prepare for trial,[33] as where it is for the sole purpose of limiting a party's evidence.[34] A party's right to a bill of particulars is not affected by the fact that the information sought might come out in testimony to be taken before a referee or commission.[35]

3. Causes in Which Particulars May Be Required. A bill of particulars is not required in a suit in equity, since the forms of pleading in such a court are such as to furnish in most cases all the information necessary to prepare for trial.[36] Formerly it seems that the right to a bill of particulars was confined to actions for demands for money.[37] But at the present time it is generally held to extend to all descriptions of actions at law when justice demands that a party shall be apprised of the matter for which he is to be put to trial with more particularity than is required by the rules of pleading.[38] Thus a bill of particulars has been held proper in actions based on the common counts,[39] for money paid,[40] or money had or received;[41] in actions on accounts,[42] under special counts in assumpsit,[43] and on accounts stated.[44] It has been ordered in actions of libel and slander;[45] ejectment:[46] trover;[47] trespass;[48] in suits for divorce;[49] for criminal conversation;[50]

33. Hicks *v.* Eggleston, 95 N. Y. App. Div. 162, 88 N. Y. Suppl. 528; Fidelity Glass Co. *v.* Thatcher Mfg. Co., 88 N. Y. App. Div. 287, 85 N. Y. Suppl. 8; Keyes *v.* George C. Flint Co., 69 N. Y. App. Div. 141, 74 N. Y. Suppl. 483; Wolff *v.* Kaufman, 65 N. Y. App. Div. 29, 72 N. Y. Suppl. 500; Reed *v.* Marks, 56 N. Y. App. Div. 272, 67 N. Y. Suppl. 735; Baxter *v.* Corrigan, 40 N. Y. App. Div. 614, 57 N. Y. Suppl. 1118; McClellan *v.* Duncombe, 26 N. Y. App. Div. 353, 49 N. Y. Suppl. 679; Phalen *v.* Roberts, 21 N. Y. App. Div. 603, 47 N. Y. Suppl. 780; Davidow *v.* Auerbach, 15 N. Y. App. Div. 424, 44 N. Y. Suppl. 461; Constable *v.* Hardenbergh, 76 Hun (N. Y.) 434, 27 N. Y. Suppl. 1022; Hoeninghaus *v.* Chaleyer, 4 N. Y. Suppl. 814.

Lord Mansfield said, in Millwood *v.* Walter, 2 Taunt. 224, that "the bill of particulars must not be made the instrument of injustice which it is intended to prevent" and refused to confine plaintiff to an erroneous date.

34. Messer *v.* Aaron, 101 N. Y. App. Div. 169, 91 N. Y. Suppl. 921; Cochrane Carpet Co. *v.* Howells, 81 Hun (N. Y.) 610, 30 N. Y. Suppl. 1029; Faxon *v.* Ball, 21 N. Y. Suppl. 737.

35. Dempsey *v.* Gazzam, 77 N. Y. App. Div. 633, 79 N. Y. Suppl. 330. *Compare* Mellen *v.* Mellen, 17 N. Y. Suppl. 866, 22 N. Y. Civ. Proc. 39.

36. See Cornell *v.* Bostwick, 3 Paige (N. Y.) 160.

37. See Liscomb *v.* Agate, 51 Hun (N. Y.) 288, 4 N. Y. Suppl. 167; Ives *v.* Shaw, 31 How. Pr. (N. Y.) 54.

38. Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Liscomb *v.* Agate, 51 Hun (N. Y.) 288, 4 N. Y. Suppl. 167; Lewis *v.* Joiner, 5 N. Y. St. 301; Claflin *v.* Smith, 66 How. Pr. (N. Y.) 168.

39. Prince *v.* Takash, 75 Conn. 616, 54 Atl. 1003; Dill *v.* Jones, 3 Ga. 79; Wetmore *v.* Jennys, 1 Barb. (N. Y.) 53; Cregier *v.* Smyth, 1 Speers (S. C.) 298; Barton *v.* Dunlap, 2 Mill (S. C.) 140; Smyth *v.* Lehie, 1 Mill (S. C.) 240. And see Assumpsit, Action of, 4 Cyc. 347.

In Indiana the practice does not require a bill of particulars in an action on the common counts; a motion to make more certain and specific should be used. McCoy *v.* Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208.

40. See Money Paid, 27 Cyc. 843.

41. See Money Received, 27 Cyc. 880.

42. Harrington *v.* Tuttle, 64 Me. 474; Beard *v.* Orr, etc., Shoe Co., (Miss. 1891) 8 So. 512; Barkley *v.* Rensselaer, etc., R. Co., 27 Hun (N. Y.) 515; Moore *v.* Belloni, 42 N. Y. Super. Ct. 184; Hunter *v.* Stender, 10 N. Y. Suppl. 147.

43. Wetmore *v.* Jennys, 1 Barb. (N. Y.) 53.

44. See Accounts and Accounting, 1 Cyc. 451.

A bill of particulars in an action on account stated generally as amounting to a certain sum should give the particular items of the account so that the opposite party may determine the correctness of the account, as to what items he will admit, and as to what he will insist upon plaintiff proving affirmatively, and also as to what he may have to contend with on the trial; and also that the general pleading aided by the bill of particulars will, in the event of a subsequent action between the same parties, show what items were disposed of in the former action. Fullerton *v.* Gaylord, 7 Rob. (N. Y.) 551.

45. See Libel and Slander, 25 Cyc. 466, 467.

46. See Ejectment, 15 Cyc. 111.

47. Robinson *v.* Comer, 13 Hun (N. Y.) 291; Humphrey *v.* Cottleyou, 4 Cow. (N. Y.) 54.

48. Johnson *v.* Birley, 5 B. & Ald. 540, 1 D. & R. 174, 7 E. C. L. 296.

49. See Divorce, 14 Cyc. 678, 679.

50. Vansant *v.* Lindsley, 2 App. Cas. (D. C.) 421; Gary *v.* Eaton Cir. Judge, 132 Mich. 105, 92 N. W. 774; Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337.

for an escape;[51] for negligence,[52] partition,[53] conspiracy,[54] malicious prosecution,[55] or fraud;[56] to recover for professional services;[57] on commercial paper;[58] on life-insurance policies;[59] to set aside fraudulent conveyances,[60] or assignments;[61] and in election contests.[62] But while a bill of particulars may be ordered in a tort action, its use is largely confined to actions on contract, for if a pleading in an action of tort is not sufficiently specific the remedy by demurrer is usually adequate;[63] and under some statutes it cannot be ordered in an action for tort.[64] Some cases have held that it is inappropriate in an action for personal injuries,[65] in an action on the cause for consequential damages,[66] or in a suit on a depositary's bond.[67] It has also been held proper in indictments and informations,[68] for barratry,[69] and for libel and slander.[70]

4. Parties Who May Demand Bill of Particulars. The power of the court to order bills of particulars may be exercised in behalf of either plaintiff or defendant,[71] and the same principles apply no matter which party makes the application;[72] and the power has been exercised, even in a criminal case, in favor of the commonwealth and against the prisoner.[73]

5. Scope of Bill. A bill of particulars may be asked for in respect to one or all of the counts;[74] and as a general rule, unless restricted to a particular count, it applies to all or any of the counts which are of such a nature as to require such aid.[75]

51. Davies *v.* Chapman, 6 A. & E. 767, 6 L. J. K. B. 142, 1 N. & P. 699, W. W. & D. 273, 33 E. C. L. 403.

52. Heslin *v.* Lake Champlain, etc., R. Co., 109 N. Y. App. Div. 814, 96 N. Y. Suppl. 761; Gallerstein *v.* Manhattan R. Co., 26 Misc. (N. Y.) 852, 57 N. Y. Suppl. 394 [*reversed* on other grounds in 27 Misc. 506, 58 N. Y. Suppl. 374]; Lachenbruch *v.* Cushman, 87 N. Y. Suppl. 476; Lawrence *v.* Keim, 19 Phila. (Pa.) 351; Hanson *v.* Anderson, 90 Wis. 195, 62 N. W. 1055; McFarland *v.* Consolidated Gas Co., 125 Fed. 260.

"Great caution should be exercised by the courts in requiring parties to furnish particulars in actions for damages resulting from negligence. It is usually impossible for a plaintiff to know with any degree of precision what his proof will be, and the bill of particulars would in most cases of that character be an instrument of embarrassment and injustice." Muller *v.* Bush, etc., Mfg. Co., 15 Abb. N. Cas. (N. Y.) 88, 91 [*quoted* with approval in MacDonald *v.* New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795]. To the same effect see Villiers *v.* Third Ave. R. Co., 22 Misc. (N. Y.) 17, 48 N. Y. Suppl. 614.

53. See Partition, 30 Cyc. 220, 229.

54. See Conspiracy, 8 Cyc. 676.

55. See Malicious Prosecution, 26 Cyc. 82.

56. Douthitt *v.* Nassau F. Ins. Co., 115 N. Y. App. Div. 902, 101 N. Y. Suppl. 94; Patton *v.* Whitney, 5 N. Y. St. 845.

57. Davis *v.* Johnson, 96 Minn. 130, 104 N. W. 766. And see Attorney and Client, 4 Cyc. 999 note 84.

58. See Commercial Paper, 8 Cyc. 151.

59. See Life Insurance, 25 Cyc. 923.

60. See Fraudulent Conveyances, 20 Cyc. 747, 748.

61. See Assignments for Benefit of Creditors, 4 Cyc. 280.

62. See Elections, 15 Cyc. 413.

63. Anti-Kalsomine Co. *v.* Grove, 119 Mich. 434, 78 N. W. 467; Shadock *v.* Alpine Plank-Road Co., 79 Mich. 7, 44 N. W. 158; Harding *v.* Bunnell, 14 Pa. Co. Ct. 417; Richmond, etc., R. Co. *v.* Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Central Lunatic Asylum *v.* Flanagan, 80 Va. 110; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

In actions ex delicto a bill of particulars is granted only by grace. Harding *v.* Bunnell, 14 Pa. Co. Ct. 417.

64. McDonald *v.* Barnhill, 58 Iowa 669, 12 N. W. 717 (construing Code, § 2713); Mower County *v.* Smith, 22 Minn. 97 (under Gen. St. (1866) c. 66, § 88).

65. Plymouth *v.* Fields, 125 Ind. 323, 25 N. E. 346; Shadock *v.* Alpine Plank-Road Co., 79 Mich. 7, 44 N. W. 158. But see Blue Ridge Light, etc., Co. *v.* Tutwiler, 106 Va. 54, 55 S. E. 539.

66. Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801; People *v.* Marquette Cir. Judge, 39 Mich. 437; Commercial Nat. Bank *v.* Hand, 9 N. Y. App. Div. 614, 41 N. Y. Suppl. 823.

67. See Depositaries, 13 Cyc. 820.

68. See Indictments and Informations, 22 Cyc. 371.

69. See Barratry, 5 Cyc. 619.

70. See Libel and Slander, 25 Cyc. 580.

71. Cunard *v.* Francklyn, 111 N. Y. 511, 19 N. E. 92; Dwight *v.* Germania L. Ins. Co., 84 N. Y. 493; Constable *v.* Hardenbergh, 76 Hun (N. Y.) 434, 27 N. Y. Suppl. 1022; Liscomb *v.* Agate, 51 Hun (N. Y.) 288, 4 N. Y. Suppl. 167; Faxon *v.* Ball, 21 N. Y. Suppl. 737; Claflin *v.* Smith, 66 How. Pr. (N. Y.) 168; Mercer *v.* Sayre, 3 Johns. (N. Y.) 248.

72. Spitz *v.* Heinze, 77 N. Y. App. Div. 317, 79 N. Y. Suppl. 187.

73. Com. *v.* Snelling, 15 Pick. (Mass.) 321. See Liscomb *v.* Agate, 51 Hun (N. Y.) 288, 4 N. Y. Suppl. 167. And see Indictments and Informations, 22 Cyc. 371.

74. Vila *v.* Weston, 33 Conn. 42.

75. *Connecticut.*— Dean *v.* Mann, 28 Conn. 352.

If it is furnished voluntarily and generally, it will be applied to the count or counts to which in its nature it is applicable.[76]

6. Effect of Bill. The effect of a bill of particulars is to enlarge or limit the scope of the complaint or counter-claim or other defense,[77] and in the absence of proof that there is a defense to one or an answer to the other, a bill of particulars will not be ordered.[78] As a general rule after a bill of particulars is filed the party furnishing the same is limited in his proofs to the particular cause of action or defense therein specified,[79] and, under some statutes, also operates to strike from the pleadings all counts or paragraphs not particularly applicable thereto.[80] But it is not itself to be considered or used as evidence against the party furnishing it.[81] It is generally held that a bill of particulars does not become a part of the pleading except to the extent of restricting the proof to matters therein specified,[82] although some cases hold the contrary view.[83] A bill of particulars cannot be withdrawn

Florida.— Columbia County *v.* Branch, 31 Fla. 62, 12 So. 650.

Maryland.—Black *v.* Woodrow, 39 Md. 194; Scott *v.* Leary, 34 Md. 389; Carter *v.* Tuck, 3 Gill 248.

Massachusetts.— Taylor *v.* Dexter Engine Co., 146 Mass. 613, 16 N. E. 462.

New Hampshire.— Currier *v.* Boston, etc., R. Co., 31 N. H. 209.

Vermont.— Hicks *v.* Cottrill, 25 Vt. 80.

76. Vila *v.* Weston, 33 Conn. 42.

77. Bender *v.* Bender, 88 Hun (N. Y.) 448, 34 N. Y. Suppl. 876. *Compare* Pickering *v.* De Rochemont, 45 N. H. 67.

78. Bender *v.* Bender, 88 Hun (N. Y.) 448, 34 N. Y. Suppl. 876.

79. *Alabama.*— Morrisette *v.* Wood, 128 Ala. 505, 30 So. 630.

Connecticut.— Vila *v.* Weston, 33 Conn. 42.

Florida.— Columbia County *v.* Branch, 31 Fla. 62, 12 So. 650.

Illinois.— Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025 [*affirming* 37 Ill. App. 278]; Colwell *v.* Brown, 103 Ill. App. 22.

Kentucky.— Brown *v.* Calvert, 4 Dana 219.

Massachusetts.— Com. *v.* Snelling, 15 Pick. 321.

Michigan.— Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236.

Mississippi.— Ware *v.* McQuillan, 54 Miss. 703.

New Jersey.— Kent *v.* Phenix Art Metal Co., 69 N. J. L. 532, 55 Atl. 256.

New York.— Matthews *v.* Hubbard, 47 N. Y. 428; St. Albans Beef Co. *v.* Aldridge, 112 N. Y. App. Div. 803, 99 N. Y. Suppl. 398; Murray *v.* Mabie, 55 Hun 38, 8 N. Y. Suppl. 289; Higenbotam *v.* Green, 25 Hun 214; Brittingham *v.* Stevens, 1 Hall 421.

West Virginia.— Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

See 39 Cent. Dig. tit. "Pleading," § 994.

A stipulation limiting the scope of the evidence to be offered may be made in lieu of requiring a bill of particulars. Kearns *v.* Coney Island, etc., R. Co., 49 Hun (N. Y.) 608, 1 N. Y. Suppl. 906.

Where a bill of particulars is required and ordered for all the counts in a declaration, it limits the right of plaintiff to give evidence in respect to all. Vila *v.* Weston, 33 Conn. 42.

80. Dunn *v.* Foley, 78 Conn. 670, 63 Atl. 122, construing Gen. St. (1902) § 627.

81. Brittingham *v.* Stevens, 1 Hall (N. Y.) 421. But see American Copper, etc., Works *v.* Galland-Burke Brewing, etc., Co., 30 Wash. 178, 70 Pac. 236.

82. *California.*— Chamberlain *v.* Loewenthal, 138 Cal. 47, 70 Pac. 932.

Florida.— Royal Phosphate Co. *v.* Van Ness, 53 Fla. 135, 43 So. 916, holding that under Rev. St. (1892) § 1057, and circuit court rule 14, a bill of particulars does not become a part of the declaration and it cannot be resorted to on demurrer to supply allegations omitted from the declaration.

Michigan.— Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236.

New York.— Dixon *v.* Bunnell, 52 Misc. 560, 102 N. Y. Suppl. 775. But see Prince *v.* Currie, 2 How. Pr. 119.

South Carolina.— Vidal *v.* Clarke, 2 Rich. 359.

Virginia.— Chesapeake, etc., R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161; Columbia Acc. Assoc. *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

Washington.— Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68.

West Virginia.— Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696; Abell *v.* Penn Mut. Ins. Co., 18 W. Va. 400.

Where a bill of particulars has not been made a part of the declaration by apt words in the declaration and both parties have not treated it as a part of the declaration, neither the trial court nor the appellate court is warranted in treating such bill as a part of the declaration. Royal Phosphate Co. *v.* Van Ness, 53 Fla. 135, 43 So. 916.

83. *Kansas.*— Underwood *v.* Scott, 43 Kan. 714, 23 Pac. 942.

Maryland.— Attrill *v.* Patterson, 58 Md. 226. *Compare* Ingalls *v.* Crouch, 35 Md. 296, 6 Am. Rep. 417, holding that an account filed with a declaration, under Act (1864), c. 6, does not become a part of the pleading, although verified by affidavit.

New Hampshire.— Pickering *v.* De Rochemont, 45 N. H. 67; Benedict *v.* Swain, 43 N. H. 33.

Texas.— See Laredo Electric Light, etc., Co.

without an order of court.[84] A pleading and bill, however, should be construed together and the facts set up in a bill of particulars may be looked to in explanation of uncertainties in the pleading and *vice versa*;[85] and as between the pleading and the bill of particulars, the latter will in many cases control in case of inconsistency.[86] If a party voluntarily gives a bill of particulars, as he may properly do, its effect is exactly the same as though the bill had been demanded and ordered.[87] If a bill of particulars is filed in a case where it is unnecessary, it may be treated as surplusage.[88] The abandonment of the counts to which a bill of particulars refers is an abandonment of the bill;[89] and where a bill of particulars is abandoned, the party is no longer restricted in his proof to the cause of action or defense set forth in such bill.[90] Where a bill of particulars is not required at all, the party thereby waives, or rather does not exercise his right,[91] and if required in respect to one or more of part of the counts or paragraphs the right is waived as to the others.[92]

7. Power and Discretion of Court. Granting or refusing a demand for a bill of particulars is usually a matter within the sound discretion of the court under the particular facts of the case;[93] but in many states particulars are

v. U. S. Electric Lighting Co., (Civ. App. 1894) 26 S. W. 310, so far as referred to that purpose.

United States.— Snyder *v.* Pharo, 25 Fed. 398.

84. Benedict *v.* Swain, 43 N. H. 33.

85. *California.*— Ames *v.* Bell, 5 Cal. App. 1, 89 Pac. 619.

Georgia.— Chattanooga, etc., R. Co. *v.* Palmer, 89 Ga. 161, 15 S. E. 34.

Indiana.— U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88; Blount *v.* Rick, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; Jaqua *v.* Shewalter, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072; Green *v.* McIntire, 2 Ind. App. 278, 28 N. E. 555.

Maine.— Eaton *v.* Cole, 10 Me. 137.

New York.— Hentz *v.* Miner, 18 N. Y. Suppl. 880.

Texas.— Texas, etc., R. Co. *v.* Ross, 62 Tex. 447; Hays *v.* Samuels, 55 Tex. 560.

86. Blount *v.* Rick, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; Stewart *v.* Knight, etc., Co., (Ind. App. 1904) 71 N. E. 182; Arcana Gas Co. *v.* Moore, 8 Ind. App. 482, 36 N. E. 46; Snyder *v.* Pharo, 25 Fed. 398. See Laredo Electric Light, etc., Co. *v.* U. S. Electric Lighting Co., (Tex. Civ. App. 1894) 26 S. W. 310. *Compare* Chapman *v.* Elgin, etc., R. Co., 11 Ind. App. 632, 39 N. E. 289; Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103.

Effect of repugnancy of a bill of particulars to a plea of accord and satisfaction see Accord and Satisfaction, 1 Cyc. 346.

87. Vila *v.* Weston, 33 Conn. 42.

88. Clark *v.* Ford, 41 Ill. App. 199.

89. Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025 [*affirming* 37 Ill. App. 278].

90. Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025 [*affirming* 37 Ill. App. 278].

91. Vila *v.* Weston, 33 Conn. 42.

92. Vila *v.* Weston, 33 Conn. 42.

93. *District of Columbia.*— Vansant *v.* Lindsley, 2 App. Cas. 421.

Illinois.— American Rolling Mill Corp. *v.* Ohio Iron, etc., Co., 120 Ill. App. 614.

New Jersey.—Reynolds *v.* Britton, 18 N. J. L. 304.

New York.— Cunard *v.* Francklyn, 111 N. Y. 511, 19 N. E. 92; Kelsey *v.* Sargent, 100 N. Y. 602, 3 N. E. 795; Messer *v.* Aaron, 101 N. Y. App. Div. 169, 91 N. Y. Suppl. 921; Spencer *v.* Ft. Orange Paper Co., 74 N. Y. App. Div. 74, 77 N. Y. Suppl. 251; Van Olinda *v.* Hall, 82 Hun 357, 31 N. Y. Suppl. 495; Higenbotam *v.* Green, 25 Hun 214; Cluff *v.* Thompson, 54 N. Y. Super. Ct. 398; Fullerton *v.* Gaylord, 7 Rob. 551; Blackie *v.* Neilson, 6 Bosw. 681; Webster *v.* Fitchburg R. Co., 32 Misc. 442, 66 N. Y. Suppl. 220; Keteltas *v.* Gilmour, 10 Misc. 788, 30 N. Y. Suppl. 1064; Weiler *v.* Mooney, 9 N. Y. St. 651; Patton *v.* Whitney, 5 N. Y. St. 845; Passavant *v.* Sickle, 14 N. Y. Civ. Proc. 57; Butler *v.* Mann, 9 Abb. N. Cas. 49.

North Carolina.— Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461, holding the motion should be liberally construed.

Oregon.— Davis *v.* Hofer, 38 Oreg. 150, 63 Pac. 56.

Virginia.— Blue Ridge Light, etc., Co. *v.* Tutwiler, 106 Va. 54, 55 S. E. 539; Driver *v.* Southern R. Co., 103 Va. 650, 49 S. E. 1000; Richmond, etc., R. Co. *v.* Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849.

Washington.— Turner *v.* Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883.

United States.— U. S. *v.* Tilden, 28 Fed. Cas. No. 16,521, 10 Ben. 547.

Canada.— Ashton *v.* Nova Scotia Cotton Mfg. Co., 22 Nova Scotia 309.

See 39 Cent. Dig. tit. "Pleading," § 951.

The exercise of this discretion may be reviewed on appeal. Tilton *v.* Beecher, 59 N. Y. 156, 17 Am. Rep. 337; Ashton *v.* Nova Scotia Cotton Mfg. Co., 22 Nova Scotia 309. But see Kelsey *v.* Sargent, 100 N. Y. 602, 3 N. E. 795. But the court's action in granting or denying a motion for a bill of particulars will not be disturbed on appeal unless it appears that substantial injury resulted therefrom (Vansant *v.* Lindsley, 2 App. Cas. (D. C.) 421), or unless its action was clearly erroneous (Blue Ridge Light, etc., Co. *v.* Tutwiler, 106 Va. 54, 55 S. E. 539;

demandable of right in actions on accounts,[94] where there are general counts in the declaration.[95] This power of the court is incident to its general authority in the administration of justice.[96] It is the same power in kind that courts have to grant a new trial on the ground of surprise.[97]

8. Statutory Provisions. Codes of procedure usually provide for bills of particulars and the practice relative thereto is in general the same as at common law,[98] and in some jurisdictions they are provided for by rules of court.[99] Under some statutes the courts are vested with very liberal powers in ordering bills of particulars; and such bills should be liberally allowed,[1] unless they are clearly useless,[2] and are sought merely for the purpose of annoyance.[3] Under some codes a motion to make more definite and certain is sometimes held proper in cases where a bill of particulars will not be ordered;[4] but it is improper, under the code practice, both to order a bill of particulars and to direct that the pleading be made more definite as to the same matters.[5]

9. What Particulars May Be Had — a. In General. In accordance with the above rules, a bill of particulars may be required to set forth the details of time, place, and circumstances of the acts or transactions alleged, as constituting the cause of action or defense,[6] and details as to the character and amount of items

Driver *v.* Southern R. Co., 103 Va. 650, 59 S. E. 1000).

94. *Alabama.*— Morrisette *v.* Wood, 128 Ala. 505, 30 So. 630.

Iowa.—McDonald *v.* Barnhill, 58 Iowa 669, 12 N. W. 717.

Minnesota.— St. Louis County *v.* American Loan, etc., Co., 75 Minn. 489, 78 N. W. 113; Mower County *v.* Smith, 22 Minn. 97.

New York.— Fullerton *v.* Gaylord, 7 Rob. 551; Webster *v.* Fitchburg R. Co., 32 Misc. 442, 66 N. Y. Suppl. 220.

Washington.— Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34, construing Ballinger Code, § 130.

"Account" does not include items sued for as money had and received, within the meaning of Gen. St. (1894) § 5246, entitling defendant to a bill of particulars as a matter of right in actions on account. Jones *v.* Northern Trust Co., 67 Minn. 410, 69 N. W. 1108.

Only where an account is set forth in the pleading — that is alleged as a cause of action, counter-claim or set-off — is the adverse party entitled to a bill of particulars as a matter of right on demand. St. Louis County Com'rs *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

Cutting Nev. St. Comp. Laws, § 3151, providing that in an action upon several accounts, it shall not be necessary to set out the items of such accounts, but that a bill of particulars may be demanded, has no application to a complaint setting up a number of separate causes of action in tort. Eisele *v.* Oddie, 120 Fed. 695.

95. Vila *v.* Weston, 33 Conn. 42.

96. Liscomb *v.* Agate, 51 Hun (N. Y.) 288, 4 N. Y. Suppl. 167; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

97. Liscomb *v.* Agate, 51 Hun (N. Y.) 288, 4 N. Y. Suppl. 167.

98. See the statutes of the several states. And see Walker *v.* Fuller, 29 Ark. 448; Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Winslow *v.* Kierski, 2 Sandf. (N. Y.) 304; Butler *v.* Mann, 9 Abb. N. Cas. (N. Y.) 49; Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696, construing Code (1891), c. 130, § 46.

99. Stell *v.* Moyer, 9 Pa. Dist. 516, construing 69th rule of court.

1. Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Duffy *v.* Ryer, 17 N. Y. Suppl. 843; Claflin *v.* Smith, 66 How. Pr. (N. Y.) 168; Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461; Drivers *v.* Southern R. Co., 103 Va. 650, 49 S. E. 1000; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696. See Fry *v.* Manhattan Trust Co., 4 Misc. (N. Y.) 611, 24 N. Y. Suppl. 573.

2. Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461; Boyer *v.* Robison, 43 Wash. 97, 86 Pac. 385.

3. Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461.

4. McDonald *v.* Barnhill, 58 Iowa 669, 12 N. W. 717; St. Louis County *v.* American L. & T. Co., 75 Minn. 489, 78 N. W. 113.

As distinguished from motion to make more definite and certain see *infra*, XII, D, 2.

5. Lahey *v.* Kortright, 55 N. Y. Super. Ct. 156, 12 N. Y. St. 71, 13 N. Y. Civ. Proc. 352.

Motion in the alternative, to make a pleading more definite and certain or to serve a bill of particulars, is condemned as bad practice. Kavanaugh *v.* Commonwealth Trust Co., 45 Misc. (N. Y.) 201, 91 N. Y. Suppl. 967 [*affirmed* in 99 N. Y. App. Div. 620, 91 N. Y. Suppl. 1099 (*affirmed* in 181 N. Y. 121, 73 N. E. 562)].

6. Gary *v.* Eaton Cir. Judge, 132 Mich. 105, 92 N. W. 774; Coolidge *v.* Stoddard, 120 N. Y. App. Div. 641, 105 N. Y. Suppl. 544; Knickerbocker Trust Co. *v.* Packard, 109 N. Y. App. Div. 421, 96 N. Y. Suppl. 412; Moses *v.* Hatch, 22 N. Y. App. Div. 21, 47 N. Y. Suppl. 781; New York Edison Co. *v.* McDonald, 54 Misc. (N. Y.) 63, 104 N. Y. Suppl. 606; Smith *v.* Irvin, 45 Misc. (N. Y.) 262, 92 N. Y. Suppl. 170 [*reversed* on other grounds in 108 N. Y. App. Div. 218, 95 N. Y.

of loss or special damage alleged.[7] If the pleading alleges only general damages, no bill of particulars will be ordered respecting the items;[8] but if both general and special damages are alleged, the bill may be ordered as to the latter but denied as to the former.[9] If it appears that the allegations of the pleadings cover a much wider scope than the party actually intends to avail himself of at the trial, he may be compelled to show by bill of particulars what portions of his claim he will in fact rely upon.[10] Nothing can be demanded in a bill of particulars which is inconsistent with the scope and tenor of the pleading,[11] or concerning which the party called upon for particulars could not legally introduce evidence,[12] or which is not relevant to the issue,[13] or of facts not necessary to be proved or unnecessarily alleged.[14] Nor should a bill of particulars be required of minute or unnecessary particulars;[15] nor of a general course of conduct indicating a relation between the

Suppl. 731]; Kavanaugh *v.* Commonwealth Trust Co., 45 Misc. (N. Y.) 201, 91 N. Y. Suppl. 967 [*affirmed* in 99 N. Y. App. Div. 620, 91 N. Y. Suppl. 1099 (*affirmed* in 181 N. Y. 121, 73 N. E. 562)]; Kelly *v.* Kelly, 12 Misc. (N. Y.) 457, 34 N. Y. Suppl. 255; Reiner *v.* Jones, 3 Misc. (N. Y.) 406, 23 N. Y. Suppl. 185; Durant *v.* East River Electric Light Co., 2 N. Y. Suppl. 389; Kersh *v.* Rome, etc., R. Co., 14 N. Y. Civ. Proc. 167; Lucas *v.* Carolina Cent. R. Co., 121 N. C. 506, 28 S. E. 265.

In mentioning dates, it is not necessary that the exact date shall be given, but it may be stated as "on or about a certain day," and in that case the party is not restricted to proof of that special day. Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681.

7. *Louisiana.*— Davis *v.* Arkansas Southern R. Co., 117 La. 320, 41 So. 587.

New York.— Cunard *v.* Francklyn, 111 N. Y. 511, 19 N. E. 92; Gross *v.* Conner, 114 N. Y. App. Div. 32, 99 N. Y. Suppl. 569; Stern *v.* Wabash R. Co., 98 N. Y. App. Div. 619, 90 N. Y. Suppl. 299; Price *v.* Ryan, 96 N. Y. App. Div. 607, 88 N. Y. Suppl. 984; Hopper *v.* Weber, 84 N. Y. App. Div. 266, 82 N. Y. Suppl. 567; Fruin-Bambrick Constr. Co. *v.* Marks, 48 N. Y. App. Div. 51, 62 N. Y. Suppl. 621; McGirr *v.* Campbell, 47 N. Y. App. Div. 621, 62 N. Y. Suppl. 24; Roberts *v.* Safety Buggy Co., 1 N. Y. App. Div. 14, 36 N. Y. Suppl. 1094; Post-Express Printing Co. *v.* Adams, 55 Hun 35, 8 N. Y. Suppl. 276, 24 Abb. N. Cas. 246; U. S. Land Inv. Co. *v.* Mercantile Trust Co., 54 Hun 417, 7 N. Y. Suppl. 534; Cockroft *v.* Atlantic Mut. Ins. Co., 9 Bosw. 681; McIntosh *v.* Pullman Co., 53 Misc. 286, 103 N. Y. Suppl. 223; Henry *v.* Talcott, 26 Misc. 79, 56 N. Y. Suppl. 684 [*affirmed* in 71 N. Y. App. Div. 616, 76 N. Y. Suppl. 1032 (*reversed* on other grounds in 175 N. Y. 385, 67 N. E. 617)]; Marco *v.* Bird, 24 Misc. 377, 53 N. Y. Suppl. 411; Engineer Co. *v.* Senn, 86 N. Y. Suppl. 1115; Potter *v.* U. S. Nat. Bank, 22 N. Y. Suppl. 453; Whitner *v.* Perhaes, 11 N. Y. Suppl. 756, 25 Abb. N. Cas. 130; McKenzie *v.* Fox, 8 N. Y. Suppl. 460.

Pennsylvania.—O'Connell *v.* Citizens' Pass. R. Co., 2 Pa. Co. Ct. 312.

Washington.— Turner *v.* Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883.

Wisconsin.— Hanson *v.* Anderson, 90 Wis. 195, 62 N. W. 1055; Conover *v.* Knight, 84 Wis. 639, 54 N. W. 1002; Barney *v.* Hartford, 73 Wis. 95, 40 N. W. 581.

8. Breslauer Realty Co. *v.* Cohen, 115 N. Y. App. Div. 360, 100 N. Y. Suppl. 775; Bolognesi *v.* Hirzel, 58 N. Y. App. Div. 530, 69 N. Y. Suppl. 534; Stokes *v.* Stokes, 72 Hun (N. Y.) 372, 25 N. Y. Suppl. 405.

9. Bell *v.* Heatherton, 66 N. Y. App. Div. 603, 73 N. Y. Suppl. 242.

10. Macdonough *v.* Hayman, 23 N. Y. App. Div. 575, 48 N. Y. Suppl. 663.

11. Foley *v.* Jennings, 9 Misc. (N. Y.) 105, 29 N. Y. Suppl. 24; Richmond *v.* Second Ave. R. Co., 19 N. Y. Suppl. 597.

12. Byrnes *v.* Lewis, 83 Hun (N. Y.) 310, 31 N. Y. Suppl. 1028.

13. Matthews *v.* Hubbard, 47 N. Y. 428; Toomey *v.* Whitney, 81 N. Y. App. Div. 441, 80 N. Y. Suppl. 826; Hopkins *v.* Rathburn, 45 N. Y. App. Div. 123, 60 N. Y. Suppl. 1080; Solomon *v.* McKay, 49 N. Y. Super. Ct. 138; Reichardt *v.* Plaut, 98 N. Y. Suppl. 195; Levy *v.* New York City R. Co., 96 N. Y. Suppl. 399; Rochester *v.* McDowell, 12 N. Y. Suppl. 414; Kemmerer *v.* Hoffman, 7 Pa. Co. Ct. 429.

14. Romona Oolitic Stone Co. *v.* Tate, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529 (holding a bill of particulars unnecessary as to a part of the pleading abandoned at the trial); Wilks *v.* Greacen, 120 N. Y. App. Div. 311, 105 N. Y. Suppl. 246; Niemoller *v.* Duncombe, 33 N. Y. App. Div. 536, 53 N. Y. Suppl. 872; New York Edison Co. *v.* McDonald, 54 Misc. (N. Y.) 63, 104 N. Y. Suppl. 606; People *v.* Howell, 13 N. Y. Suppl. 217.

15. Shepard *v.* Wood, 116 N. Y. App. Div. 861, 102 N. Y. Suppl. 306; Excelsior Terra Cotta Co. *v.* Harde, 68 N. Y. App. Div. 633, 74 N. Y. Suppl. 163.

In an action for damages resulting from a single act the party is not entitled to a bill of particulars which requires the opposite party to resolve the damage into its constitutive elements. Home Maker Co. *v.* Alley, 2 Misc. (N. Y.) 111, 20 N. Y. Suppl. 870.

A motion to require a party to furnish his address will not be entertained except on proof that his attorney refused the information desired. Goodness *v.* Metropolitan St.

parties;[16] nor as to the defense of the bar of the statute of limitations.[17] Nor need it contain a copy of an instrument properly referred to in an account pleaded,[18] nor a copy of any writing or record which is not the foundation of the suit or claim.[19]

b. Particulars Respecting Contract Relations. Where rights or liabilities arising out of contract relations are set up as a cause of action or defense, in accordance with the above rules, a bill of particulars may be required as to the details of the making of the contract,[20] as to services rendered thereunder,[21] or in what

R. Co., 27 Misc. (N. Y.) 11, 57 N. Y. Suppl. 100.

16. Carrie *v.* Davis, 41 N. Y. App. Div. 520, 8 N. Y. Suppl. 820.

17. Rosenstock *v.* Dessar, 40 N. Y. App. Div. 620, 68 N. Y. Suppl. 145.

18. Howard *v.* Behn, 27 Ga. 174.

19. Marryott *v.* Young, 33 N. J. L. 336.

20. Rhodes *v.* Adams, 113 N. Y. App. Div. 304, 98 N. Y. Suppl. 913; Knickerbocker Trust Co. *v.* O'Rourke Engineering Constr. Co., 110 N. Y. App. Div. 865, 97 N. Y. Suppl. 116 (holding that where an agreement is alleged in defense, plaintiff is entitled to a bill of particulars as to whether the agreement referred to is in writing and if not in writing then a statement to that effect); Riggs *v.* Buckley, 2 N. Y. App. Div. 618, 37 N. Y. Suppl. 1095 (character of consideration).

Copy of contract.— Where in an action on a written contract defendant denies the making of such a contract or any knowledge thereof on a motion for a bill of particulars he is entitled to a copy of the contract. U. S. Paper Co. *v.* De Haven, 115 N. Y. App. Div. 403, 100 N. Y. Suppl. 796.

Terms, character, and date of a contract, and the name of the officer or agent who made it, may be required in a bill of particulars. Treadwell *v.* Greene, 87 N. Y. App. Div. 289, 84 N. Y. Suppl. 354; Allegheny Iron Co. *v.* Chesapeake, etc., R. Co., 69 N. Y. App. Div. 87, 74 N. Y. Suppl. 514.

Details as to the items making up merely the consideration of a contract sued on need not be required. Crane *v.* Crane, 82 Ind. 459.

21. *Illinois.*—Shober, etc., Lith. Co. *v.* Kerting, 107 Ill. 344.

Louisiana.— Hyland *v.* Rice, 20 La. Ann. 65; Shields *v.* Richardson, 7 La. Ann. 535.

New York.— Rhodes *v.* Adams, 113 N. Y. App. Div. 304, 98 N. Y. Suppl. 913; Dempsey *v.* Gazzam, 77 N. Y. App. Div. 633, 79 N. Y. Suppl. 330; Dempsey *v.* Bergen County Traction Co., 74 N. Y. App. Div. 474, 77 N. Y. Suppl. 456; McGuire *v.* Hall, 61 N. Y. App. Div. 571, 70 N. Y. Suppl. 795; Rhinelander *v.* Haan, 66 N. Y. App. Div. 505, 73 N. Y. Suppl. 253; Cantine *v.* Russell, 57 N. Y. App. Div. 315, 68 N. Y. Suppl. 94; Fruin-Bambrick Constr. Co. *v.* Marks, 48 N. Y. App. Div. 51, 62 N. Y. Suppl. 621; Hocy *v.* National Shoe, etc., Bank, 33 N. Y. App. Div. 543, 53 N. Y. Suppl. 857; Nicmoller *v.* Duncombe, 33 N. Y. App. Div. 536, 53 N. Y. Suppl. 872; Nash *v.* Spann, 13 N. Y. App. Div. 226, 42 N. Y. Suppl. 964; Rafalsky *v.* Boehm, 1 Misc. 87, 20 N. Y. Suppl. 374; McLaughlin *v.* Kelly, 6 N. Y. Suppl. 574, 22 Abb. N. Cas. 286.

Pennsylvania.— Barnes *v.* Wood, 16 Lanc. L. Rev. 126.

Wisconsin.— Horn *v.* Ludington, 28 Wis. 81.

Specifications as to the particular portions of the work alleged to have been done in a careless and unworkmanlike manner (Cunningham *v.* Massena Springs, etc., R. Co., 3 N. Y. Suppl. 98, 16 N. Y. Civ. Proc. 244), or contrary to directions (Rafalsky *v.* Boehm, 1 Misc. (N. Y.) 87, 20 N. Y. Suppl. 374), may be required.

Where a piece of work is completed by numerous successive acts of service, all contributing to such completion, it is not necessary to set out in a bill of particulars each service so contributing and its character. Shaffer *v.* Cross, 13 La. Ann. 110; Johnson *v.* Mallory, 2 Rob. (N. Y.) 681; Donohue *v.* Pomeroy, 19 N. Y. Suppl. 569; Thompson *v.* Knickerbocker Ice Co., 2 N. Y. Suppl. 18; Albright *v.* Snyder, 11 Pa. Co. Ct. 255. Whenever therefore the efforts of a party are directed to the accomplishment of a work to which they all contribute, and there is no ordinary mode of measuring the compensation for each act or series of acts bringing about or tending to do so the final result, it is not necessary to furnish a bill of particulars of the services. Johnson *v.* Mallory, *supra.*

Where the contract provides for a fixed price to be paid for services, no bill of particulars will be ordered. Stilwell *v.* Hernandez, 7 Daly (N. Y.) 485; White *v.* West, 27 Misc. (N. Y.) 397, 58 N. Y. Suppl. 841; Fry *v.* Manhattan Trust Co., 24 N. Y. Suppl. 573.

In an action by an attorney to recover for professional services, where defendants deny the employment and rendition of services, they are entitled to particulars specifying: (1) Whether the agreement was verbal or in writing, and if in writing, a copy thereof, and, if oral, the terms and names of the persons claimed to have acted as agents of the defendants; (2) an itemized statement of the services rendered; and (3) the name or names of the person or persons at whose instance the services were rendered, and a copy of the request for such services if in writing, and if oral, the terms thereof, together with the time and place of making the same. Dempsey *v.* Bergen County Traction Co., 74 N. Y. App. Div. 474, 77 N. Y. Suppl. 456. If the attorney enumerates in his complaint the specific items of legal investigation made by him and suits brought and proceedings instituted, he should be re-

respects a contract for services was broken;[22] details as to goods bought or sold;[23] money paid;[24] the quantity and nature of a cargo for the loss of which recovery is sought;[25] details of errors in a settled account sought to be reopened;[26] the items of an account,[27] including the dates, names of parties to the transactions, and the character and amount of the items,[28] and statement of both debits and

quired to give a bill of particulars stating the charges in each of the suits or proceedings; but a statement of the valuation of each detail in each proceeding is not required, but he should specify the lump sum charged for each suit or proceeding or other services rendered with such particularity as to indicate the method of computing the bill. Shaffer *v.* Cross, 13 La. Ann. 110; Anb *v.* Hoffman, 120 N. Y. App. Div. 50, 104 N. Y. Suppl. 913. Under Minn. Gen. St. (1894) § 5246, a bill of particulars is demandable in an action for legal services, although the same degree of detail is not required as in an action to recover for merchandise sold. Davis *v.* Johnson, 96 Minn. 130, 104 N. W. 766.

22. Caziare *v.* Abram French Co., 36 N. Y. Suppl. 971.

Illustrations.— A bill of particulars may be required to specify details of the false entries, errors, omissions, and erasures of a book-keeper by reason of which he was discharged (Clemons *v.* Wortmann, 89 N. Y. App. Div. 611, 85 N. Y. Suppl. 444); the names of customers alleged to have been lost through the agent's or servant's misconduct (Bell *v.* Heatherton, 66 N. Y. App. Div. 603, 73 N. Y. Suppl. 242; Kraft *v.* Dingee, 38 Hun (N. Y.) 345; Reichardt *v.* Plaut, 98 N. Y. Suppl. 195; Peabody *v.* Cortado, 18 N. Y. Suppl. 622); or in what other respects an agent or servant disregarded his instructions or was guilty of misconduct for which he was discharged (Burhans *v.* Hudson River Wood Pulp Mfg. Co., 116 N. Y. App. Div. 132, 101 N. Y. Suppl. 271; Spitz *v.* Heinze, 77 N. Y. App. Div. 317, 79 N. Y. Suppl. 187). But where, in an action for a servant's wrongful discharge, defendants claimed that plaintiff improperly and improvidently employed persons who were unsuited for the work required, defendants were not required to file a bill of particulars giving the addresses of persons alleged to have been improvidently employed. Reichardt *v.* Plaut, *supra*.

Other employment.— Where, in an action for a servant's alleged wrongful discharge, the answer merely alleges that plaintiff was not diligent in searching for other employment and does not allege any employment or salary that plaintiff might have secured, defendants need not furnish a bill of particulars stating in detail the names and addresses of persons from whom plaintiff could have secured employment, the nature thereof, and the salary he could have earned. Reichardt *v.* Plaut, 98 N. Y. Suppl. 195.

23. Martin *v.* Fyffe, Dudley (Ga.) 16; Nash *v.* Spann, 13 N. Y. App. Div. 226, 42 N. Y. Suppl. 964; Roberts *v.* Safety Buggy Co., 1 N. Y. App. Div. 74, 36 N. Y. Suppl. 1094; Rouget *v.* Haight, 57 Hun (N. Y.) 119, 10 N. Y. Suppl. 751; Thoesen *v.* Crowe, 10 N. Y. Suppl. 177, 19 N. Y. Civ. Proc. 74; Dyett *v.* Seymour, 8 N. Y. St. 429; St. John *v.* Beers, 24 How. Pr. (N. Y.) 377; Wayne *v.* Jones, 3 Ohio Dec. (Reprint) 348.

The persons to whom and the prices for which certain sales were made may be required to be stated in such a bill of particulars. U. S. Paper Co. *v.* De Haven, 115 N. Y. App. Div. 403, 100 N. Y. Suppl. 796; Ziegler *v.* Garvin, 84 N. Y. App. Div. 281, 82 N. Y. Suppl. 769; Ross *v.* Willett, 11 N. Y. Suppl. 621.

24. Newman *v.* West, 101 N. Y. App. Div. 288, 91 N. Y. Suppl. 740; Pruyn *v.* Ecuadorian Assoc., 94 N. Y. App. Div. 195, 87 N. Y. Suppl. 970; Rosenberg *v.* Hammerstein, 12 N. Y. App. Div. 575, 42 N. Y. Suppl. 42; Horn *v.* Ludington, 28 Wis. 81.

25. Cockroft *v.* Atlantic Mut. Ins. Co., 9 Bosw. (N. Y.) 681.

26. Coit *v.* Goodhart, 5 N. Y. App. Div. 444, 39 N. Y. Suppl. 48.

27. Bay *v.* Saulspaugh, 74 Ind. 397; Keyes *v.* Geo. C. Flint Co., 69 N. Y. App. Div. 141, 74 N. Y. Suppl. 483; Byrnes *v.* Lewis, 83 Hun (N. Y.) 310, 31 N. Y. Suppl. 1028; Miller *v.* Kent, 23 Hun (N. Y.) 657; Fullerton *v.* Gaylord, 7 Rob. (N. Y.) 551.

Items of account of business done under a contract for division of profits may be required. Elting *v.* Gillette Clipping Mach. Co., 96 N. Y. App. Div. 632, 89 N. Y. Suppl. 252; Loewenthal *v.* Philadelphia Rubber Works, 19 N. Y. Suppl. 574; Ross *v.* Willett, 11 N. Y. Suppl. 621.

Where the conceded relation between the parties is such as to entitle plaintiff to an accounting by defendant, plaintiff should not be required to furnish a bill of particulars of the items for which he claims defendant had failed to account. Heidenreich *v.* Hirsh, 85 N. Y. App. Div. 319 83 N. Y. Suppl. 366.

Production of books, etc.— In an action against a treasurer of a corporation for a settlement of his account, plaintiff may be required to furnish as particulars all the stub books, receipts, checks, and memoranda from which defendant may make a statement of his account, such articles being in possession of plaintiff. Oregon Gold Min. Co. *v.* Schmidt, 60 S. W. 530, 22 Ky. L. Rep. 1330.

28. *Connecticut.*— Hatch *v.* Boucher, 77 Conn. 347, 59 Atl. 422.

Michigan.— Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681.

Missouri.— Brierre *v.* Cereal Sugar Co., 102 Mo. App. 622, 77 S. W. 111.

New Jersey.— Morgan *v.* Burrough, (Sup. 1887) 8 Atl. 517.

New York.— Washburn *v.* Graves, 117 N. Y. App. Div. 343, 101 N. Y. Suppl. 1043.

credits;[29] the items making up a balance sued for;[30] the particulars on which a counter-claim set up as a defense is founded;[31] the particular respects wherein there has been an alleged failure to perform a contract;[32] the specific defects claimed to have existed in the title to land as constituting a breach of contract;[33] the names and addresses of parties with whom contracts were made or might have been made, the loss of which, by reason of breach of contract, caused damage;[34] and the names of customers to whom discounts have been made in the resale of goods, together with the amounts thereof and expenses of the resale,[35] the dates, amounts, and form of advances and names of persons to whom made;[36] and items of specific or partial payments,[37] although no bill will be ordered where payment in full is alleged.[38]

c. Particulars Respecting Torts. In an action respecting negligence or other tort, a party may be required to show by bill of particulars, the times, places, and circumstances of the particular acts alleged as constituting the tort,[39] such as

29. Ledoux *v.* Goza, 2 La. Ann. 395; Badger *v.* Gilroy, 21 Misc. (N. Y.) 466, 47 N. Y. Suppl. 669 [*affirming* 20 Misc. 730, 46 N. Y. Suppl. 1089]; Candee *v.* Daying, 66 How. Pr. (N. Y.) 452 [*disapproving* Williams *v.* Shaw, 4 Abb. Pr. (N. Y.) 209].

30. Thillman *v.* Shadrick, 69 Md. 528, 16 Atl. 138; Boardman *v.* Trotter, 15 Daly (N. Y.) 265, 6 N. Y. Suppl. 519, 17 N. Y. Civ. Proc. 284; Ralston *v.* Aultman, (Tex. Civ. App. 1894) 26 S. W. 746.

31. Dorgan *v.* Scheer, 31 Misc. (N. Y.) 829, 64 N. Y. Suppl. 383 [*affirming* 62 N. Y. Suppl. 1030]; Smith *v.* Welch, 99 N. Y. Suppl. 873; Fuchs *v.* Morris, 18 N. Y. Suppl. 898; Peabody *v.* Cortado, 18 N. Y. Suppl. 622; Clegg *v.* American Newspaper Union, 7 Abb. N. Cas. (N. Y.) 59; Smith *v.* McGehee, 1 Tex. App. Civ. Cas. § 940. But see Lewis *v.* Jewett, 51 Vt. 378.

32. Breslauer Realty Co. *v.* Cohen, 115 N. Y. App. Div. 360, 100 N. Y. Suppl. 775; Gross *v.* Conner, 114 N. Y. App. Div. 32, 99 N. Y. Suppl. 569; Hopper *v.* Weber, 84 N. Y. App. Div. 266, 82 N. Y. Suppl. 567; Excelsior Terra Cotta Co. *v.* Harde, 68 N. Y. App. Div. 633, 74 N. Y. Suppl. 163; Smith *v.* Molleson, 18 N. Y. Suppl. 558.

33. Gross *v.* Conner, 114 N. Y. App. Div. 32, 99 N. Y. Suppl. 569; Lahey *v.* Kortright, 55 N. Y. Super. Ct. 156, 12 N. Y. St. 71, 13 N. Y. Civ. Proc. 352; Markowitz *v.* Teichman, 52 Misc. (N. Y.) 458, 102 N. Y. Suppl. 469.

34. Van Vranken *v.* Wayne County Cir. Judge, 85 Mich. 140, 48 N. W. 499; Royle *v.* Goodwin, 98 N. Y. App. Div. 95, 90 N. Y. Suppl. 142; Henry *v.* Talcott, 26 Misc. (N. Y.) 79, 56 N. Y. Suppl. 684 [*affirmed* in 71 N. Y. App. Div. 616, 76 N. Y. Suppl. 1032 (*reversed* on other grounds in 175 N. Y. 385, 67 N. E. 617)]; Baltimore Mach. Works *v.* McKelvey, 71 N. Y. App. Div. 340, 75 N. Y. Suppl. 1090; Mussinan *v.* Willner Wood Co., 69 N. Y. App. Div. 448, 74 N. Y. Suppl. 1026; Excelsior Terra Cotta Co. *v.* Harde, 68 N. Y. App. Div. 633, 74 N. Y. Suppl. 163; Jacobs *v.* Water Overflow Preventive Co., 25 N. Y. Suppl. 346; Williams *v.* Folsom, 13 N. Y. Suppl. 712.

35. Henry *v.* Talcott, 26 Misc. (N. Y.) 79, 56 N. Y. Suppl. 684.

36. Witkowski *v.* Paramore, 93 N. Y. 467.

37. Coolidge *v.* Stoddard, 120 N. Y. App. Div. 641, 105 N. Y. Suppl. 544; Klock *v.* Brennan, 13 N. Y. Suppl. 171, 20 N. Y. Civ. Proc. 139; Shanklin *v.* Crisamore, 4 W. Va. 134. But see Watt *v.* Watt, 2 Rob. (N. Y.) 685, 688, where the court said: "Partial payments of money, to be applied to an account generally, do not constitute a defense either to the whole or any part of the items composing it; they merely mitigate the damages, and therefore need not be pleaded, or they may amount to an offset. If pleaded, they would not give the plaintiff any more right to a bill of particulars than he would have had if they had not been pleaded."

If the payment was not made to plaintiff but to his assignor, a bill of particulars may be ordered. Baremore *v.* Taylor, 52 N. Y. Super. Ct. 448.

38. Barone *v.* O'Leary, 44 N. Y. App. Div. 418, 60 N. Y. Suppl. 1131; Swan *v.* Swan, 44 Misc. (N. Y.) 163, 89 N. Y. Suppl. 794.

39. Wells *v.* Van Aken, 39 Hun (N. Y.) 315.

In an action for criminal conversation alleged to have occurred at divers times, defendant is entitled to a bill of particulars specifying the times and places of the criminal acts. Gary *v.* Eaton Cir. Judge, 132 Mich. 105, 92 N. W. 774; Shaffer *v.* Holm, 28 Hun (N. Y.) 264. But a bill will not be ordered for the purpose of requiring a party to state times and places of alleged repetitions of the act principally charged. Vansant *v.* Lindsley, 2 App. Cas. (D. C.) 421.

On a plea of fraud and consequent repudiation by defendant, he may be compelled to give particulars of the acts of fraud and repudiation. Liscomb *v.* Agate, 51 Hun (N. Y.) 288, 4 N. Y. Suppl. 167.

In an action for an assault upon a passenger by an electric railway company's servants, where the company operates many cars and employs many men, it is entitled to a bill of particulars specifying the place and the exact time of day that the injury occurred, the direction the car was going, the number of the car, the line, the badge numbers of the motorman and conductor, the length of time plaintiff was confined to the bed and house, the amount paid for doctor's bills and medicine, the nature of his business, his average earnings and the time of his detention from work, or specifying inability to give such particulars. Ferris *v.*

the dates and amounts of money received and converted;[40] the description of securities converted,[41] or property fraudulently disposed of, or encumbered;[42] the number, description, and value of articles sought to be recovered;[43] details as to "gifts, threats, arts and wiles" alleged to have been used in alienating a wife's affections;[44] the times, places, and manner of giving rebates, and the persons to whom they were given;[45] the names of persons with whom alleged fraudulent dealings were had,[46] or who were unlawfully influenced by defendant to plaintiff's damage;[47] the time, place, and manner of the making of false representations, and by whom and to whom made,[48] the particulars in which certain property, machinery, or appliances were out of repair,[49] or negligently constructed, operated, or maintained;[50] the nature of an accident causing injury,[51] and the time, place, and circumstances under which it occurred;[52] a description, as complete as possible, of the particular servants and property concerned in an accident;[53] the nature and extent of personal injuries sustained,[54] except where they are not permanent;[55] a specification of what injuries are permanent;[56] and items as to expenses, time

Brooklyn Heights R. Co., 116 N. Y. App. Div. 892, 102 N. Y. Suppl. 463.

40. Orden Germania *v.* Devender, 12 Daly (N. Y.) 500, 6 N. Y. Civ. Proc. 161; Marks *v.* Greenwald, 12 Misc. (N. Y.) 554, 34 N. Y. Suppl. 20.

41. Allen *v.* Stead, 11 N. Y. Suppl. 536.

42. Harding *v.* Bunnell, 14 Pa. Co. Ct. 417.

43. Chisolm *v.* Straus, 110 N. Y. App. Div. 552, 97 N. Y. Suppl. 258; Ottman *v.* Griffin, 53 Hun (N. Y.) 164, 6 N. Y. Suppl. 95, 17 N. Y. Civ. Proc. 184; Texas, etc., R. Co. *v.* Weatherby, 41 Tex. Civ. App. 409, 92 S. W. 58.

44. Wood *v.* Gledhill, 12 N. Y. Suppl. 764, 20 N. Y. Civ. Proc. 155. See Van Olinda *v.* Hall, 82 Hun (N. Y.) 357, 31 N. Y. Suppl. 495, where, however, the court refused to order a bill, where defendant's affidavit did not deny the charges in the complaint.

45. Madden *v.* Underwriting Printing, etc., Co., 10 Misc. (N. Y.) 27, 30 N. Y. Suppl. 1052, rebates to procure insurance.

46. Williams *v.* Folsom, 13 N. Y. Suppl. 712 [*reversing* 14 N. Y. Suppl. 443, 26 Abb. N. Cas. 374].

47. Justum *v.* Bricklayers, etc., Union, 78 Hun (N. Y.) 503, 29 N. Y. Suppl. 621.

48. Pruyn *v.* Ecuadorian Assoc., 94 N. Y. App. Div. 195, 87 N. Y. Suppl. 970; Riker *v.* Erlanger, 87 N. Y. App. Div. 137, 84 N. Y. Suppl. 69; H. B. Claflin Co. *v.* Knapp, 60 N. Y. App. Div. 9, 69 N. Y. Suppl. 665; Deimel *v.* Olney, 18 Abb. N. Cas. (N. Y.) 248.

49. Heslin *v.* Lake Champlain, etc., R. Co., 109 N. Y. App. Div. 814, 96 N. Y. Suppl. 761; Burke *v.* Frenkel, 95 N. Y. App. Div. 89, 88 N. Y. Suppl. 517; Robinson *v.* Stewart, 84 N. Y. App. Div. 594, 82 N. Y. Suppl. 928; Daly *v.* Bloomingdale, 71 N. Y. App. Div. 563, 76 N. Y. Suppl. 131; Wilson *v.* American Steel, etc., Co., 56 N. Y. App. Div. 527, 67 N. Y. Suppl. 508; McCarthy *v.* Lehigh Valley R. Co., 6 Misc. (N. Y.) 422, 27 N. Y. Suppl. 295; Keairns *v.* Coney Island, etc., R. Co., 1 N. Y. Suppl. 906.

50. Waller *v.* Degnon Contracting Co., 120 N. Y. App. Div. 389, 105 N. Y. Suppl. 203; Dwyer *v.* Slattery, 118 N. Y. App. Div. 345, 103 N. Y. Suppl. 433; Neuwelt *v.* Consolidated Gas Co., 94 N. Y. App. Div. 312, 87 N. Y. Suppl. 1003; King *v.* Brookfield, 72 N. Y. App. Div. 483, 76 N. Y. Suppl. 604; Wilson *v.* American Steel, etc., Co., 56 N. Y. App. Div. 527, 67 N. Y. Suppl. 508; Myers *v.* Albany R. Co., 5 N. Y. App. Div. 596, 39 N. Y. Suppl. 446; Loeber *v.* Roberts, 58 N. Y. Super. Ct. 582, 9 N. Y. Suppl. 718; O'Hara *v.* Ehrich, 58 N. Y. Super. Ct. 250, 11 N. Y. Suppl. 52, 19 N. Y. Civ. Proc. 72; McCarthy *v.* Lehigh Valley R. Co., 6 Misc. (N. Y.) 422, 27 N. Y. Suppl. 295; Tiffany *v.* Nicholson Borough, 11 Pa. Dist. 601; Niden *v.* Wolfenden, 12 Pa. Co. Ct. 398.

51. Daly *v.* Bloomingdale, 71 N. Y. App. Div. 563, 76 N. Y. Suppl. 131.

52. Bogard *v.* Illinois Cent. R. Co., 116 Ky. 429, 76 S. W. 170, 25 Ky. L. Rep. 624; Dwyer *v.* Slattery, 118 N. Y. App. Div. 345, 103 N. Y. Suppl. 433.

53. Dwyer *v.* Slattery, 118 N. Y. App. Div. 345, 103 N. Y. Suppl. 433; Field *v.* New York Cent., etc., R. Co., 35 Misc. (N. Y.) 111, 71 N. Y. Suppl. 220; Lachenbruch *v.* Cushman, 87 N. Y. Suppl. 476.

54. Curtin *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 610, 72 N. Y. Suppl. 580; Schweit *v.* Metropolitan St. R. Co., 24 Misc. (N. Y.) 409, 53 N. Y. Suppl. 545. But see Shadock *v.* Alpine Plank-Road Co., 79 Mich. 7, 44 N. W. 158.

55. Ferris *v.* Brooklyn Heights R. Co., 116 N. Y. App. Div. 892, 102 N. Y. Suppl. 463 (holding that, where there is no allegation of permanent injury, plaintiff cannot be required to give an exact statement of the injuries claimed to have been sustained by him or the nature, extent, or effects of the same); English *v.* Westchester Electric R. Co., 69 N. Y. App. Div. 576, 75 N. Y. Suppl. 45; Steinau *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 126, 71 N. Y. Suppl. 256.

56. O'Neill *v.* Interurban St. R. Co., 87 N. Y. App. Div. 556, 84 N. Y. Suppl. 505; Cavanagh *v.* Metropolitan St. R. Co., 70 N. Y. App. Div. 1, 74 N. Y. Suppl. 1107; Lachenbruch *v.* Cushman, 87 N. Y. Suppl. 476.

confined to home and earnings lost, as the result of the injury sued on.[57] But a bill of particulars need not contain an invoice of a stock of goods upon which a trespass is charged to have been committed.[58]

d. Evidence and Arguments. A party cannot be compelled to disclose his evidence in a bill of particulars,[59] nor the names of his witnesses,[60] nor to adduce the arguments or legal reasons in support of this position.[61] Nor is a bill of particulars the proper remedy, where discovery is sought of facts in possession of the opposite party material to his cause of action or defense,[62] for the discovery of which a remedy is provided by statute, by interrogatories served and to be answered before trial.[63]

e. Denials or Admissions. Where the pleading contains no specific allegations, but merely the general issue or general denial, or matter amounting thereto, no bill of particulars can be had by the opposite party;[64] but the party

57. Ziadi *v.* Interurban St. R. Co., 97 N. Y. App. Div. 137, 89 N. Y. Suppl. 606; O'Neill *v.* Interurban St. R. Co., 87 N. Y. App. Div. 556, 84 N. Y. Suppl. 505; Steinau *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 126, 71 N. Y. Suppl. 256; Levy *v.* New York City R. Co., 96 N. Y. Suppl. 399, holding that in an action for injuries, a bill of particulars may be required showing in detail how long plaintiff has been prevented from attending to business and deprived of earnings, giving the nature of his business, the amount of income derived therefrom, or if employed, the amount of his salary. See Romona Oolitic Stone Co. *v.* Tate, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529.

58. Walker *v.* Fuller, 29 Ark. 448.

59. *Michigan.*— Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681.

New York.— Ingraham *v.* International Salt Co., 114 N. Y. App. Div. 791, 100 N. Y. Suppl. 192; Dunn *v.* Dunn, 108 N. Y. App. Div. 308, 95 N. Y. Suppl. 719; Stern *v.* Wabash R. Co., 98 N. Y. App. Div. 619, 90 N. Y. Suppl. 299; Pruyn *v.* Ecuadorian Assoc., 94 N. Y. App. Div. 195, 87 N. Y. Suppl. 970; Spitz *v.* Heinze, 77 N. Y. App. Div. 317, 79 N. Y. Suppl. 187; Rhinelander *v.* Haan, 66 N. Y. App. Div. 505, 73 N. Y. Suppl. 253; Barone *v.* O'Leary, 44 N. Y. App. Div. 418, 60 N. Y. Suppl. 1136; Carrie *v.* Davis, 41 N. Y. App. Div. 520, 58 N. Y. Suppl. 820; Werner *v.* Franklin Nat. Bank, 40 N. Y. App. Div. 485, 58 N. Y. Suppl. 107; Niemoller *v.* Duncombe, 33 N. Y. App. Div. 536, 53 N. Y. Suppl. 872; Hamilton *v.* American Vote Registering Mach. Co., 24 N. Y. App. Div. 544, 49 N. Y. Suppl. 595; Moses *v.* Hatch, 22 N. Y. App. Div. 21, 47 N. Y. Suppl. 781; Morrill *v.* Kazis, 8 N. Y. App. Div. 304, 40 N. Y. Suppl. 954; Hayes *v.* St. Mary's Lodging House, 89 Hun 27, 34 N. Y. Suppl. 996; Black *v.* McAleenan, 78 Hun 426, 29 N. Y. Suppl. 148; Isaac *v.* Wilisch, 69 Hun 339, 23 N. Y. Suppl. 589; Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 66 Hun 38, 20 N. Y. Suppl. 749; Hazard *v.* Birdsall, 61 Hun 208, 16 N. Y. Suppl. 30, 21 N. Y. Civ. Proc. 304; Passavant *v.* Cantor, 48 Hun 546, 1 N. Y. Suppl. 574; Newell *v.* Butler, 38 Hun 104; Higenbotam *v.* Green, 25 Hun 214; Drake *v.* Thayer, 5 Rob. 694; Seaman *v.* Low, 4 Bosw. 337; Home Maker Co. *v.* Alley, 2 Misc. 111, 20 N. Y. Suppl. 870; Caziare *v.* Abram French Co., 36 N. Y. Suppl. 971; Richmond *v.* Woolfolk, 22 N. Y. Suppl. 1049.

Virginia.— Richmond, etc., R. Co. *v.* Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849.

Washington.— Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34; Blackburn *v.* Washington Gold Min. Co., 19 Wash. 361, 53 Pac. 369.

West Virginia.— West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

United States.— Garfield *v.* Paris, 96 U. S. 557, 24 L. ed. 821.

60. Cairnes *v.* Pelton, 103 Md. 40, 63 Atl. 105; Knipe *v.* Brooklyn Daily Eagle, 101 N. Y. App. Div. 43, 91 N. Y. Suppl. 872; Barone *v.* O'Leary, 44 N. Y. App. Div. 418, 60 N. Y. Suppl. 1131; Moses *v.* Hatch, 22 N. Y. App. Div. 21, 47 N. Y. Suppl. 781; Newell *v.* Butler, 38 Hun 104.

That a bill of particulars will necessarily disclose the names of witnesses is no objection to ordering it, if the party is otherwise entitled to it. Guichon *v.* Fisherman's Cannery Co., 4 Brit. Col. 516.

61. Constable *v.* Hardenbergh, 76 Hun (N. Y.) 434, 27 N. Y. Suppl. 1022; Hazard *v.* Birdsall, 61 Hun (N. Y.) 208, 16 N. Y. Suppl. 30, 21 N. Y. Civ. Proc. 304.

62. Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34.

63. Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34. And see, generally, DISCOVERY, 14 Cyc. 339 *et seq.*

64. Humphreys *v.* Bridgman, Morr. (Iowa) 167; Wilks *v.* Graecen, 120 N. Y. App. Div. 311, 105 N. Y. Suppl. 246; Newman *v.* West, 101 N. Y. App. Div. 288, 91 N. Y. Suppl. 740; Brandt *v.* New York, 99 N. Y. App. Div. 260, 90 N. Y. Suppl. 929; O'Rourke *v.* U. S. Mortgage, etc., Co., 95 N. Y. App. Div. 518, 88 N. Y. Suppl. 926; Reitmayer *v.* Crombie, 94 N. Y. App. Div. 303, 87 N. Y. Suppl. 973; Barreto *v.* Rothschild, 93 N. Y. App. Div. 211, 87 N. Y. Suppl. 553; Stanley *v.* Block, 56 N. Y. App. Div. 549, 67 N. Y. Suppl. 471; King *v.* Ross, 21 N. Y. App. Div. 475, 47 N. Y. Suppl. 562; Constable *v.* Hardenbergh, 76 Hun (N. Y.) 434, 27 N. Y. Suppl. 1022;

so pleading is not thereby deprived of his right to the particulars.[65] Where an answer amounts to a negative pregnant with the truth of the facts necessary to sustain the complaint, and therefore is no denial at all in pleading, defendant cannot demand a bill of particulars.[66]

10. Knowledge of Parties as Affecting Right to Particulars — a. In General. Ordinarily a bill of particulars is appropriate where the information sought, if otherwise proper for a bill of particulars, is peculiarly within the knowledge of the party filing the pleading.[67] But as a general rule a party will not be required to furnish information which is equally or peculiarly within the knowledge of the party demanding the particulars,[68] as where it appears from the nature of the pleadings and from the facts shown upon the application for a bill of particulars that the party demanding it has presumably a better knowledge of the matters than his adversary.[69] But even though the adverse party has full knowledge of the acts or transactions, a pleader whose allegations are very general may be

Talman *v.* Dorthy, 68 Hun (N. Y.) 329, 22 N. Y. Suppl. 888; Goddard *v.* Pardee Medicine Co., 52 Hun (N. Y.) 85, 5 N. Y. Suppl. 119, 16 N. Y. Civ. Proc. 379; Bainbridge *v.* Friedlander, 7 Misc. (N. Y.) 227, 27 N. Y. Suppl. 261; Strebell *v.* J. H. Furber Co., 2 Misc. (N. Y.) 450, 21 N. Y. Suppl. 1032; Gray *v.* Shepard, 13 N. Y. Suppl. 27. *Compare* Stell *v.* Moyer, 9 Pa. Dist. 516.

65. Newman *v.* West, 101 N. Y. App. Div. 288, 91 N. Y. Suppl. 740.

66. Shepherd *v.* Wood, 116 N. Y. App. Div. 861, 102 N. Y. Suppl. 306.

67. Excelsior Terra Cotta Co. *v.* Harde, 68 N. Y. App. Div. 633, 74 N. Y. Suppl. 163; Stillman *v.* Brush Electric Light Co., 92 Hun (N. Y.) 504, 37 N. Y. Suppl. 49; Isaac *v.* Wilisch, 69 Hun (N. Y.) 339, 23 N. Y. Suppl. 589.

68. *California.*—Auzerais *v.* Naglee, 74 Cal. 620, 15 Pac. 371.

Illinois.— Yawger *v.* Backs, 119 Ill. App. 61.

New York.— Messer *v.* Aaron, 101 N. Y. App. Div. 169, 91 N. Y. Suppl. 921; American Transfer Co. *v.* Borgfeldt, 99 N. Y. App. Div. 470, 91 N. Y. Suppl. 209; Brandt *v.* Burke, 99 N. Y. App. Div. 260, 91 N. Y. Suppl. 929; Elting *v.* Gillette Clipping Mach. Co., 96 N. Y. App. Div. 632, 89 N. Y. Suppl. 252; Belasco *v.* Klaw, 96 N. Y. App. Div. 268, 89 N. Y. Suppl. 208; Reitmayer *v.* Crombie, 94 N. Y. App. Div. 303, 87 N. Y. Suppl. 973; Gowans *v.* Jobbins, 90 N. Y. App. Div. 429, 86 N. Y. Suppl. 312; Ziegler *v.* Garvin, 84 N. Y. App. Div. 281, 82 N. Y. Suppl. 769; Wait *v.* Dauchy, 77 N. Y. App. Div. 646, 79 N. Y. Suppl. 114; Ahrens *v.* Moadinger, 41 N. Y. App. Div. 355, 58 N. Y. Suppl. 497; Niemoller *v.* Duncombe, 33 N. Y. App. Div. 536, 53 N. Y. Suppl. 872; Manning *v.* International Nav. Co., 24 N. Y. App. Div. 143, 49 N. Y. Suppl. 182; Phalen *v.* Roberts, 21 N. Y. App. Div. 603, 47 N. Y. Suppl. 780; Hayes *v.* St. Mary's Lodging House, 89 Hun 27, 34 N. Y. Suppl. 96; Bender *v.* Bender, 88 Hun 448, 34 N. Y. Suppl. 876, 2 N. Y. Annot. Cas. 196; Powell *v.* Schenck, 88 Hun 185, 34 N. Y. Suppl. 768; Cochrane Carpet Co. *v.* Howells, 81 Hun 610, 30 N. Y. Suppl. 1029; Cohn *v.* Baldwin, 74 Hun 346, 26 N. Y. Suppl. 457; Isaac *v.* Wilisch, 69 Hun 339, 23 N. Y. Suppl. 589; Childs *v.* Tuttle, 48 Hun 228, 15 N. Y. Civ. Proc. 182; Fink *v.* Jetter, 38 Hun 163; Hayes *v.* Davidson, 33 Hun 446, 6 N. Y. Civ. Proc. 330, 15 Abb. N. Cas. 85; Wygand *v.* Dejonge, 18 Hun 405; People *v.* Tweed, 5 Hun 353; Young *v.* De Mott, 1 Barb. 30; Bien *v.* Hellman, 60 N. Y. Super. Ct. 467, 18 N. Y. Suppl. 860; Loeber *v.* Roberts, 58 N. Y. Super. Ct. 582, 9 N. Y. Suppl. 718; Powers *v.* Hughes, 39 N. Y. Super. Ct. 482; Blackie *v.* Neilson, 6 Bosw. 681; Depew *v.* Leal, 5 Duer 663; Stevens *v.* Webb, 12 Daly 88, 4 N. Y. Civ. Proc. 64; New York Edison Co. *v.* McDonald, 54 Misc. 63, 104 N. Y. Suppl. 606; Pelonsky *v.* Pierson Mfg. Co., 32 Misc. 778, 66 N. Y. Suppl. 485; Henry *v.* Talcott, 26 Misc. 79, 56 N. Y. Suppl. 684; Hawes *v.* Foote, 9 Misc. 203, 29 N. Y. Suppl. 680; Phillips *v.* Ehrman, 4 Misc. 285, 23 N. Y. Suppl. 1030; Slingerland *v.* International Contracting Co., 60 N. Y. Suppl. 1148; Faxon *v.* Ball, 21 N. Y. Suppl. 737; Lusbie *v.* Meares, 19 N. Y. Suppl. 586; Donohue *v.* Meares, 19 N. Y. Suppl. 585; Husson *v.* Oppenheimer, 19 N. Y. Suppl. 135; Moody *v.* Belden, 15 N. Y. Suppl. 119, 21 N. Y. Civ. Proc. 89; Passavant *v.* Sickle, 14 N. Y. Civ. Proc. 57; Masterson *v.* New York, 4 N. Y. Civ. Proc. 317; Train *v.* Friedman, 4 N. Y. Civ. Proc. 109; Butler *v.* Mann, 9 Abb. N. Cas. 49; Ryckman *v.* Haight, 15 Johns. 222.

Pennsylvania.— Murdock *v.* Martin, 132 Pa. St. 86, 18 Atl. 1114; Crew *v.* Pennsylvania R. Co., 1 Pa. Dist. 82.

Washington.— Ferry *v.* King County, 2 Wash. 337, 26 Pac. 537.

United States.— Church *v.* Spiegelberg, 33 Fed. 158; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,521, 10 Ben. 547.

England.— Waynes Merthyr Co. *v.* Radford, [1896] 1 Ch. 29, 65 L. J. Ch. 140, 73 L. T. Rep. N. S. 624, 44 Wkly. Rep. 103.

Canada.— School Sec. 34 *v.* Thomas, 23 Nova Scotia 210.

See 39 Cent. Dig. tit. "Pleading," § 972.

Where the facts are within the knowledge of the party's attorney, the same rule applies. Stevens *v.* Webb, 12 Daly (N. Y.) 88, 4 N. Y. Civ. Proc. 64.

69. Powell *v.* Schenck, 88 Hun (N. Y.) 185, 34 N. Y. Suppl. 768; Pelonsky *v.* C. L. Pierson Mfg. Co., 66 N. Y. Suppl. 485.

required to furnish a bill of particulars in order that the opposite party may know upon what specific demand or defense to prepare his pleadings.[70] And although the party demanding the bill of particulars has more information than the other, an order for the bill may be given, conditioned upon the former producing books, etc., for the inspection of the latter.[71]

b. Ability to Furnish Particulars. While as a general rule a party cannot be required to furnish a bill of particulars of facts concerning which, for satisfactory reasons, he is unable to give more particulars than is stated in the pleadings or original bill of particulars,[72] as of facts of which he swears he has no knowledge or means of knowledge,[73] or in respect to any matter about which he is not and cannot be expected to be informed,[74] and of which he is not shown to have knowledge,[75] nor where the party demanding the particulars has by his own act made it impossible for him to furnish them;[76] yet ordinarily he should, when requested or ordered, file a bill containing a statement of such particulars as he is able to furnish,[77] and if he is unable to furnish the particulars requested, he should state his lack of knowledge or inability as a substitute for the information required.[78] The excuse of ignorance will not be accepted as to matters which are necessary to make out a sufficient *prima facie* cause of action or defense,[79] nor will the negligence of the party in not keeping books of account excuse him from furnishing particulars.[80] The fact that the pleader is an executor or administrator without personal knowledge of his cause of action or defense,[81] or is an assignee,[82] will not excuse him from

70. Dunn *v.* Dunn, 108 N. Y. App. Div. 308, 95 N. Y. Suppl. 719, holding that in an action for money loaned where the complaint alleges a loan of money generally, plaintiff should be required to furnish a bill of particulars specifying the date and the amount of the loan relied on, notwithstanding defendant's knowledge of the transaction in question.

71. Young *v.* De Mott, 1 Barb. (N. Y.) 30 (holding that a bill of particulars will not be required of a plaintiff until after he has obtained, or had opportunity to obtain, a discovery from defendant where the knowledge of the facts, from the nature of the case, lies more with defendant than plaintiff); Allen *v.* Stead, 11 N. Y. Suppl. 536; Prince *v.* Currie, 2 How. Pr. (N. Y.) 119.

72. King *v.* McGovern, 1 La. Ann. 172; Kindberg *v.* Chapman, 115 N. Y. App. Div. 153, 100 N. Y. Suppl. 685; Steinau *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 126, 71 N. Y. Suppl. 256; Johnson *v.* Mallory, 2 Rob. (N. Y.) 681; Blackie *v.* Neilson, 6 Bosw. (N. Y.) 681; Armstrong *v.* Heide, 45 Misc. (N. Y.) 344, 90 N. Y. Suppl. 372; Hall *v.* Gerken, 89 N. Y. Suppl. 171; Handy *v.* J. B. Orcutt Co., 75 N. Y. Suppl. 385; Mosheim *v.* Pawn, 18 N. Y. Suppl. 166; La Scala *v.* Lyon, 11 N. Y. Suppl. 31, 19 N. Y. Civ. Proc. 71; Train *v.* Friedman, 4 N. Y. Civ. Proc. 109; Muller *v.* Bush, etc., Mfg. Co., 15 Abb. N. Cas. (N. Y.) 88; Sullivan *v.* Waterman, 21 R. I. 72, 41 Atl. 1006.

73. Farwell *v.* Boody, 112 N. Y. App. Div. 493, 98 N. Y. Suppl. 385; Fickinger *v.* Ives, 109 N. Y. App. Div. 684, 96 N. Y. Suppl. 396; Carrie *v.* Davis, 41 N. Y. App. Div. 520, 58 N. Y. Suppl. 820; Stillman *v.* Brush Electric Light Co., 92 Hun (N. Y.) 504, 37 N. Y. Suppl. 49; Mosheim *v.* Pawn, 18 N. Y. Suppl. 166; La Scala *v.* Lyon, 11 N. Y. Suppl. 31, 19 N. Y. Civ. Proc. 71.

74. Bogard *v.* Illinois Cent. R. Co., 116 Ky. 429, 76 S. W. 170, 25 Ky. L. Rep. 624; Hoey *v.* National Shoe, etc., Bank, 33 N. Y. App. Div. 543, 53 N. Y. Suppl. 857; Stillman *v.* Brush Electric Light Co., 92 Hun (N. Y.) 504, 37 N. Y. Suppl. 49; Wigand *v.* Dejonge, 18 Hun (N. Y.) 405; Ammidown *v.* Century Rubber Co., 59 N. Y. Super. Ct. 460, 14 N. Y. Suppl. 769; United Bldg., etc., Bank *v.* Bartlett, 2 Misc. (N. Y.) 479, 22 N. Y. Suppl. 172; Mendelson *v.* Frankel, 84 N. Y. Suppl. 586; Rochester *v.* McDowell, 12 N. Y. Suppl. 414; Sullivan *v.* Waterman, 21 R. I. 72, 41 Atl. 1006; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,521, 10 Ben. 547.

75. Werner *v.* Franklin Nat. Bank, 40 N. Y. App. Div. 485, 58 N. Y. Suppl. 107.

76. People *v.* Tweed, 5 Hun (N. Y.) 353.

77. Rochester *v.* McDowell, 12 N. Y. Suppl. 414 (holding this to be true, although the party files an affidavit that he cannot furnish more particulars than appear in his pleading); Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835 (holding that where plaintiff, because of the destruction of his books by fire, is unable to render an exact bill of particulars, it is his duty to furnish the most specific statement he can).

78. Ferris *v.* Brooklyn Heights R. Co., 116 N. Y. App. Div. 892, 102 N. Y. Suppl. 463; Worden *v.* New York City R. Co., 48 Misc. (N. Y.) 626, 96 N. Y. Suppl. 180.

79. Burke *v.* Frenkel, 95 N. Y. App. Div. 89, 88 N. Y. Suppl. 517; Schwartz *v.* Green, 14 N. Y. Suppl. 833, 20 N. Y. Civ. Proc. 431.

80. Plummer *v.* Weil, 15 Wash. 427, 46 Pac. 648.

81. Waller *v.* Degnon Contracting Co., 120 N. Y. App. Div. 389, 105 N. Y. Suppl. 203; Heslin *v.* Lake Champlain, etc., R. Co., 109 N. Y. App. Div. 814, 96 N. Y. Suppl. 761.

82. Fuchs *v.* Morris, 18 N. Y. Suppl. 898.

the necessity of furnishing a proper bill of particulars when demanded or ordered.

11. Failure to Furnish Bill of Particulars and Defective Bill[83] — a. In General. On an entire failure to furnish a bill of particulars when ordered, the court may order a stay until it is furnished,[84] or it may strike out the pleading respecting which the particulars are required and not given;[85] or such failure may be cured by amendment,[86] but it is not ground for setting aside a judgment.[87] In those jurisdictions in which a bill of particulars is not considered as a part of the pleading, no defect in the bill can be reached by demurrer,[88] or answer or plea,[89] nor by a motion to strike the bill or any of its items.[90] Nor will a motion to make the pleading more specific reach the want of a bill of particulars.[91]

b. Further and Additional Bill. The ordinary practice where the specifications in a bill of particulars do not accord substantially with the facts or when they omit essential matters, and the adverse party deems the bill insufficient, is a motion for a further or more specific bill, upon the trial;[92] or the adverse party may return the bill and demand a compliance with the former order,[93] in which case the party who furnished it may move the court to compel its acceptance and thereby have the question of its insufficiency or defectiveness determined before the trial.[94] But if the adverse party does not apply for a further or more specific bill, he can-

83. Failure to file or produce bill of particulars as grounds for dismissal or nonsuit see Dismissal and Nonsuit, 14 Cyc. 443.

84. Lawrence *v.* Keim, 19 Phila. (Pa.) 351.

85. Gross *v.* Clark, 87 N. Y. 272; Wilson *v.* Fowler, 44 Hun (N. Y.) 89. *Compare* Mollison *v.* Hoffman, 33 Can. L. J. N. S. 445.

Motion for judgment of nol. pros. was the proper remedy, in New York, under the older cases, for failure to furnish a bill of particulars, but the filing of the bill even after motion defeated the application for judgment. Symonds *v.* Craw, 5 Cow. (N. Y.) 279. But the code does not authorize such a judgment. Winslow *v.* Kierski, 2 Sandf. (N. Y.) 304.

86. See Wilson *v.* Stricker, 66 Ga. 575. And see *infra*, X, A, 15.

87. Wilson *v.* Stricker, 66 Ga. 575.

88. *Connecticut.*— Vila *v.* Weston, 33 Conn. 42.

Florida.— Barbee *v.* Jacksonville, etc., Plank Road Co., 6 Fla. 262.

Michigan.— Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236.

Virginia.—Columbia Acc. Assoc. *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

Washington.— Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68.

West Virginia.— Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696; Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

Compare Underwood *v.* Scott, 43 Kan. 714, 23 Pac. 942; Snyder *v.* Pharo, 25 Fed. 398.

89. Chamberlain *v.* Loewenthal, 138 Cal. 47, 70 Pac. 932.

90. Voorhees *v.* Barr, 59 N. J. L. 123, 35 Atl. 651; Matthews *v.* Hubbard, 47 N. Y. 428.

91. Louisville, etc., R. Co. *v.* Henly, 88 Ind. 535.

92. *Arkansas.*— Deal *v.* Beck, (1907) 103 S. W. 736.

California.— Providence Tool Co. *v.* Prader, 32 Cal. 634, 91 Am. Dec. 598.

Connecticut.— Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998; Vila *v.* Weston, 33 Conn. 42.

Illinois.— McCarthey *v.* Mooney, 41 Ill. 300.

Indiana.— Goodwin *v.* Walls, 52 Ind. 268.

Michigan.— State *v.* Hosmer, (1905) 104 N. W. 637; Knop *v.* National F. Ins. Co., 101 Mich. 359, 59 N. W. 653; Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681.

Minnesota.— Davis *v.* Johnson, 96 Minn. 130, 104 N. W. 766; Minneapolis Envelope Co. *v.* Vanstrom, 51 Minn. 512, 53 N. W. 768.

New Jersey.— Voorhees *v.* Barr, 59 N. J. L. 123, 35 Atl. 651.

New York.— Beirne *v.* Sanderson, 83 N. Y. App. Div. 62, 82 N. Y. Suppl. 493; Romer *v.* Kensico Cemetery, 79 N. Y. App. Div. 100, 80 N. Y. Suppl. 38; Mueller *v.* Tenth St., etc., Ferry Co., 38 N. Y. App. Div. 622, 56 N. Y. Suppl. 310; Dueber Watch Case Mfg. Co. *v.* American, etc., Watch Co., 22 N. Y. Suppl. 69, 29 Abb. N. Cas. 412; Mathushek Piano Co. *v.* Pearce, 21 N. Y. Suppl. 920; Virtue *v.* Beacham, 17 N. Y. Suppl. 450 [*affirmed* in 18 N. Y. Suppl. 949]; Gas-Works Constr. Co. *v.* Standard Gas-Light Co., 1 N. Y. Suppl. 265; Bates *v.* Wotkyns, 2 How. Pr. 18; Barnes *v.* Henshaw, 21 Wend. 426; Purdey *v.* Warden, 18 Wend. 651; James *v.* Goodrich, 1 Wend. 289.

Pennsylvania.— Rohrbach *v.* Heckman, 12 Pa. Super. Ct. 64.

Virginia.— Columbia Acc. Assoc. *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

Washington.— Plummer *v.* Weil, 15 Wash. 427, 46 Pac. 648.

Canada.— Ouchterloney *v.* Palgrave Gold Min. Co., 29 Nova Scotia 59.

See 39 Cent. Dig. tit. "Pleading," § 990.

93. Ward *v.* Littlejohn, 2 Silv. Sup. (N. Y.) 589, 6 N. Y. Suppl. 170, 17 N. Y. Civ. Proc. 178.

94. Faller *v.* Ranger, 99 N. Y. App. Div. 374, 91 N. Y. Suppl. 205 [*reversing* 44 Misc. 424, 90 N. Y. Suppl. 55].

not ignore the bill furnished and proceed as if none had been rendered,[95] unless bad faith is shown in respect to the original bill.[96] The granting or refusing of an order for a more specific bill is a matter addressed to the sound discretion of the trial court under all the facts and circumstances of the case.[97] In a further or more specific bill of particulars, a party is only required to set out matter not sufficiently alleged in the bill furnished.[98]

e. Objections to Evidence. If a bill of particulars is not deemed sufficiently specific, the remedy is a demand for a more specific bill, and not the exclusion of all evidence.[99] But the adverse party may, upon the trial, object to the admission of evidence where there is a failure to file a bill of particulars when requested or ordered,[1] unless the demand for such bill was not seasonably made;[2] where the specifications do not accord with the pleadings or the facts;[3] or where matters essential to the party's case are omitted from the bill.[4] But the mere fact that the bill is not served within the proper or statutory period does not give the adverse party an absolute right to have the evidence thereon rejected at the trial; but its admission is within the discretion of the court under the circumstances.[5] An objection to evidence, however, extends only to that portion of the cause of action or defense upon which a bill of particulars was asked and not given.[6]

95. McCarthey *v.* Mooney, 41 Ill. 300; Davis *v.* Johnson, 96 Minn. 130, 104 N. W. 766.

96. Purdy *v.* Warden, 18 Wend. (N. Y.) 671; Bates *v.* Wotkyns, 2 How. Pr. (N. Y.) 18.

97. Ward *v.* Littlejohn, 2 Silv. Sup. (N. Y.) 589, 6 N. Y. Suppl. 170, 17 N. Y. Civ. Proc. 178; Langdon *v.* Brown, 51 N. Y. Super. Ct. 367, 7 N. Y. Civ. Proc. 130; Schile *v.* Brokhahne, 41 N. Y. Super. Ct. 353; Boughton *v.* Scott, 36 Misc. (N. Y.) 838, 74 N. Y. Suppl. 931; Redmund *v.* Buckley, 20 N. Y. Suppl. 969.

98. Reichart *v.* Plaut, 98 N. Y. Suppl. 195.

99. Hart *v.* Spect, 62 Cal. 187; Price *v.* Lancaster County, 24 Pa. Co. Ct. 225; Buckner *v.* Meredith, 1 Brewst. (Pa.) 306.

In Iowa it is ground for demurrer that no bill of particulars is attached when required, and by failing to demur a party waives the defect. Farwell *v.* Tyler, 5 Iowa 535.

N. Y. Code Civ. Proc. § 531, authorizing an order for a bill of particulars and providing that in case of "default" the court shall preclude the party from giving evidence as to matters which should have been covered by the bill, does not authorize an order precluding evidence where a bill supposed by the party to have been sufficient has been furnished and not returned and no attempt has been made to secure a further bill. Cerra de Pasco Tunnel, etc., Co. *v.* Haggin, 114 N. Y. App. Div. 116, 99 N. Y. Suppl. 683; Reader *v.* Haggin, 114 N. Y. App. Div. 115, 99 N. Y. Suppl. 684; Reader *v.* Haggin, 114 N. Y. App. Div. 112, 99 N. Y. Suppl. 681. Under this section also providing that a party may be precluded from giving evidence of the part or parts of the "affirmative allegations" of which particulars have not been delivered, the court cannot direct in an order directing defendants to furnish a bill of particulars, that in case defendants default they should be precluded from giving evidence of their "defenses." Reichardt *v.* Plaut, 98 N. Y. Suppl. 195.

Uncertainty in the items is not ground for the exclusion of evidence. East Texas, etc., Lumber Co. *v.* Barnwell, 78 Tex. 328, 14 S. W. 782.

1. Graham *v.* Harmon, 84 Cal. 181, 23 Pac. 1097; Early *v.* Long, 89 Miss. 285, 42 So. 348; D'Anglemont *v.* Fischer, 87 N. Y. Suppl. 505.

Notice of the order must appear to have been brought to the party or his attorney before the court will exclude evidence for failure to furnish the required bill. Kramer *v.* Northwestern Elevator Co., 91 Minn. 346, 98 N. W. 96.

2. De Gregori *v.* Saitta, 50 N. Y. App. Div. 476, 64 N. Y. Suppl. 10, exclusion of evidence, on the ground of failure to serve a bill of particulars, refused, where motion for such bill was not made until trial.

3. Chamberlain *v.* Loewenthal, 138 Cal. 47, 70 Pac. 932; Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681; Matthews *v.* Hubbard, 47 N. Y. 428; Vidal *v.* Clarke, 2 Rich. (S. C.) 359; Davis *v.* Hunt, 2 Bailey (S. C.) 412.

A motion prior to trial to exclude all evidence on the ground of a variance between the bill and the pleadings is premature. Chamberlain *v.* Lowenthal, 138 Cal. 47, 70 Pac. 932.

4. Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681; Matthews *v.* Hubbard, 47 N. Y. 428.

If the bill fails to disclose a legal claim or to constitute a defense at law, motion should be made, if the issue is tried by jury, to exclude any evidence offered in respect to the matter contained in the bill, or if evidence has been admitted to strike it out, or to correct its effect by appropriate instructions. Columbia Acc. Assoc. *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

5. Silva *v.* Bair, 141 Cal. 599, 75 Pac. 162.

6. Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263 (holding that where plaintiff sued for an accounting as well as on an account for labor performed, his failure to deliver a required bill of items of the account would not pre-

d. Time of Objecting and Waiver. Objection to the lack or insufficiency of a bill of particulars must be seasonably made, or it will be deemed waived.[7] But the waiver of the bill of particulars does not avoid the necessity of proof of all items by the other party.[8]

e. Immaterial Variance or Mistake. No variance between the pleading and the bill of particulars,[9] and no omission or mistake in the latter,[10] will be deemed material unless it is calculated to mislead or deceive the adverse party; and the party filing the bill may be permitted to explain the matters in the bill and show that certain errors therein occurred by mistake.[11] A mere discrepancy between the amount sworn to as due and the amount stated in a bill of particulars does not necessarily impeach the good faith with which the affidavit was made.[12]

12. Demand or Application For Bill — a. Demand.[13] Where a party is entitled to a bill of particulars as a matter of right, as in some jurisdictions in actions on account, a mere demand therefor is sufficient without an order from the court,[14] and the party wishing the particulars may refuse to plead until they are filed.[15] A demand for a bill of particulars may be made after the pleading to which it relates is filed.[16] If it is wanted as an aid to drawing a pleading it may be demanded before appearance,[17] but not after a plea to the merits.[18] If unreasonably delayed the demand may be struck out on motion.[19] Or if the demand is made in a case where the opposite party deems it unauthorized, he may obtain a ruling on the propriety of the demand by a motion to strike out or nullify the demand.[20] A statute making it necessary in certain cases for a party to deliver a bill of particulars without demand is directory only, and may be waived.[21]

b. Application to the Court — (I) *In General.* Unless a bill of particulars is made necessary by statute, in most cases, an application to the court must be made for an order requiring it.[22] The service in good faith of an amended plead-

clude him from testifying with reference to his cause of action for an account); Fischer-Hensen *v.* Stierngranat, 65 N. Y. App. Div. 162, 72 N. Y. Suppl. 593.

7. See *infra*, XIV, D.

8. Martin *v.* Fyffe, Dudley (Ga.) 16. See McLeod *v.* Windsor, etc., R. Co., 23 Nova Scotia 69.

9. *Illinois.*— Moline Water Power, etc., Co. *v.* Nichols, 26 Ill. 90.

Indiana.— Stewart *v.* Knight, (App. 1905) 74 N. E. 1131, 166 Ind. 498, 76 N. E. 743; Vannoy *v.* Klein, 122 Ind. 416, 23 N. E. 526; Wellington *v.* Howard, 5 Ind. App. 539, 31 N. E. 852.

Mississippi.— Ware *v.* McQuillan, 54 Miss. 703.

Nebraska.— McPherson *v.* Commercial Nat. Bank, 61 Nebr. 695, 85 N. W. 895.

Texas.— Hays *v.* Samuels, 55 Tex. 560.

Wisconsin.— Cudworth *v.* Gaynor, 76 Wis. 296, 44 N. W. 1103.

10. *Arkansas.*— Jacobi *v.* Pfar, 25 Ark. 4.

California.— Graham *v.* Harmon, 84 Cal. 181, 23 Pac. 1097.

Michigan.— Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681.

New Jersey.— Stothoff *v.* Dunham, 19 N. J. L. 181; Tillou *v.* Hutchinson, 15 N. J. L. 178.

United States.—Ames *v.* Quimby, 106 U. S. 342, 1 S. Ct. 116, 27 L. ed. 100.

11. Graham *v.* Harmon, 84 Cal. 181, 23 Pac. 1097.

12. Jones *v.* Barnett, 35 Md. 258.

13. Demand for copy of account alleged in pleading see *infra*, X, B.

14. Dowdney *v.* Volkening, 37 N. Y. Super. Ct. 313; Clegg *v.* American Newspaper Union, 7 Abb. N. Cas. (N. Y.) 59.

15. Waterman *v.* Mattair, 5 Fla. 211; Davis *v.* Hunt, 2 Bailey (S. C.) 412.

16. Watkins *v.* Brown, 5 Ark. 197.

17. Roosevelt *v.* Gardinier, 2 Cow. (N. Y.) 463.

18. Waterman *v.* Mattair, 5 Fla. 211.

19. Perzel *v.* Shook, 50 N. Y. Super. Ct. 206.

20. Main *v.* Pender, 88 N. Y. App. Div. 237, 85 N. Y. Suppl. 428; Stone *v.* Hudson Valley R. Co., 47 Misc. (N. Y.) 5, 95 N. Y. Suppl. 220, holding that, where a motion for a bill of particulars to be served within ten days is improper, the fact that the motion to strike out was heard after the expiration of the ten days is not ground for refusing the motion.

21. Waterman *v.* Mattair, 5 Fla. 211; Philadelphia, etc., R. Co. *v.* State, 58 Md. 372. See Scott *v.* Leary, 34 Md. 389.

22. Jacobs *v.* Friedman, 28 Misc. (N. Y.) 441, 59 N. Y. Suppl. 382; Kearns *v.* New York, etc., R. Co., 86 N. Y. Suppl. 179; Lambert *v.* Perry, 1 N. Y. Suppl. 152, 14 N. Y. Civ. Proc. 274; Clegg *v.* American Newspaper Union, 7 Abb. N. Cas. (N. Y.) 59; Hanson *v.* Lindstrom, 15 N. D. 584, 108 N. W. 798, holding that under Rev. Code (1899), § 5282,

ing after notice of a motion for a bill of particulars deprives the motion of its basis,[23] except where the amended pleading is not served in good faith or where it is served merely for the purpose of defeating the motion and throws little or no light on the particulars demanded.[24] The filing of a motion for a bill of particulars operates to extend the time for pleading.[25] The merits of the case cannot be inquired into on a motion for a bill of particulars.[26]

(II) *Time For Application.* The application for an order directing a bill of particulars must be seasonably made, and if a party delays so long that granting the application would prejudice the other party, it will be refused.[27] The application should ordinarily be made before pleading to the merits,[28] and when made after issue joined it is a suspicious circumstance, and the court should be satisfied that the object is not delay, before granting an order;[29] but where the particulars are sought not to enable the applicant to plead, but for the purpose of enabling him to prepare for trial, a motion for such a bill is premature if made before issue joined.[30] An order will not ordinarily be granted during the course of a trial.[31] But there is no fixed rule upon the subject, and the question of laches in making the application is merely one of the matters which the court will take into consideration in exercising its discretion to grant or refuse an order;[32] and ordinarily the order will not be refused where the other party has not been prejudiced by the delay,[33] and a good excuse is shown for the delay.[34]

(III) *Character of Application.* The application should be special, pointing out the specific facts respecting which the particulars are wanted,[35] and the purpose for which the particulars are desired;[36] but it should not ask for minute

a party is not bound to furnish a bill of particulars on mere demand and that, before delivery thereof can be compelled or penalties for the failure to do so be inflicted, the court must order that the bill of particulars be furnished.

The district courts of the city of New York not being courts of record, a demand for a bill of particulars cannot be made therein as a matter of right under Code Civ. Proc. § 531; but the proper practice in such courts under Code Civ. Proc. § 2942 requires some formal determination and direction of the court in the matter. Rosen *v.* Rosenthal, 22 Misc. (N. Y.) 143, 48 N. Y. Suppl. 790.

Proof of application.— Delivery of a bill of particulars is in itself sufficient proof that an application or notice thereof will be made. Clinton *v.* Lyon, 3 N. J. L. 1036.

23. Callahan *v.* Gilman, 11 N. Y. App. Div. 522, 42 N. Y. Suppl. 497.

24. Hanser *v.* Luther, 36 Misc. (N. Y.) 730, 74 N. Y. Suppl. 357.

25. Plummer *v.* Weil, 15 Wash. 427, 46 Pac. 648.

26. Matthews *v.* Hubbard, 47 N. Y. 428.

27. De Gregori *v.* Saitta, 50 N. Y. App. Div. 476, 64 N. Y. Suppl. 10; Masterson *v.* New York, 4 N. Y. Civ. Proc. 317, refused after case was on day calendar of the court.

28. Peacock *v.* Feaster, 51 Fla. 269, 40 So. 74; Stevenson *v.* Anderson, 12 Nebr. 83, 10 N. W. 552; American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

29. Hazard *v.* Birdsall, 61 Hun (N. Y.) 208, 16 N. Y. Suppl. 30, 21 N. Y. Civ. Proc. 304; Cadwell *v.* Goodenough, 28 How. Pr. (N. Y.) 479, 2 Rob. 706, 3 Rob. 633; Andrews *v.* Cleveland, 3 Wend. (N. Y.) 437.

30. Foster *v.* Curtis, 120 N. Y. App. Div. 874, 105 N. Y. Suppl. 362; Paul *v.* Nahl, 119 N. Y. App. Div. 880, 104 N. Y. Suppl. 233; New York Mut. L. Ins. Co. *v.* Granniss, 118 N. Y. App. Div. 830, 103 N. Y. Suppl. 835 (holding that a motion for a bill of particulars before answer, the bill not being shown to be necessary to enable defendant to plead, is premature); Standard Materials Co. *v.* Thomas P. Bowne, etc., Co., 118 N. Y. App. Div. 91, 103 N. Y. Suppl. 12; Hicks *v.* Eggleston, 95 N. Y. App. Div. 162, 88 N. Y. Suppl. 528; American Credit Indemnity Co. *v.* Bondy, 17 N. Y. App. Div. 328, 45 N. Y. Suppl. 267; Bell's Asbestos Co. *v.* H. W. Johns Mfg. Co., 4 N. Y. App. Div. 611, 38 N. Y. Suppl. 902; Watertown Paper Co. *v.* West, 3 N. Y. App. Div. 451, 38 N. Y. Suppl. 229; Jacobs *v.* Friedman, 28 Misc. (N. Y.) 41, 59 N. Y. Suppl. 382; Saalfield *v.* Cutting, 25 Misc. (N. Y.) 661, 56 N. Y. Suppl. 343.

31. De Gregori *v.* Saitta, 50 N. Y. App. Div. 476, 64 N. Y. Suppl. 10; Cadwell *v.* Goodenough, 2 Rob. (N. Y.) 706, 28 How. Pr. 479, 3 Rob. 633; McLaughlin *v.* Kelly, 6 N. Y. Suppl. 574, 22 Abb. N. Cas. 286, even when the trial is before a referee.

Taking a deposition by consent is not a "beginning of the trial" so as to prevent a party from thereafter moving for a bill of particulars. McLaughlin *v.* Kelly, 6 N. Y. Suppl. 574, 22 Abb. N. Cas. 286.

32. Klock *v.* Brennan, 13 N. Y. Suppl. 171, 20 N. Y. Civ. Proc. 139; American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

33. Smith *v.* Johnston, 5 N. Y. Suppl. 128.

34. Andrews *v.* Cleveland, 3 Wend. (N. Y.) 437.

35. Depew *v.* Leal, 5 Duer (N. Y.) 663.

36. Watertown Paper Co. *v.* West, 3 N. Y. App. Div. 451, 38 N. Y. Suppl. 229.

or unnecessary particulars.[37] A bill of particulars may be desired either for the purpose of pleading or to prepare for trial,[38] and the denial of an application based on the first ground will not preclude a subsequent application based on the second.[39] A motion for a bill of particulars irregularly made may be refused.[40]

(IV) *ACCOMPANYING AFFIDAVIT* — (A) *In General.* In some jurisdictions the application for an order for a bill of particulars must be based upon affidavits showing the necessity for such an order,[41] except where the party is entitled to a bill of particulars as of right.[42] Such affidavit should state specially the grounds for it,[43] and is insufficient if it states no facts, but merely that the facts asked for are necessary to enable the party to plead or prepare for trial.[44] It should allege substantially that the party has no knowledge or information respecting the matters designated, and has no means of obtaining information in regard thereto, and that it is necessary to have such knowledge as is within the possession of the other party in order to plead or prepare for trial, as the case may be.[45] Furthermore, it has been held that the affidavit must show that the allegations concerning which particulars are asked are denied by the party applying for the order.[46] Answering affidavits may be filed by the other party, but in default thereof the order will be made if a proper *prima facie* case is shown.[47] A new ground for relief cannot be injected into a motion for a bill of particulars by the service of an affidavit setting up such new ground.[48]

(B) *By Whom Made.* As a general rule such affidavit should be made by the party, and is insufficient if made by his attorney alone,[49] unless it shows some

37. Shepard *v.* Wood, 116 N. Y. App. Div. 861, 102 N. Y. Suppl. 306.

38. See Bowman Cycle Co. *v.* Dyer, 23 Misc. (N. Y.) 620, 52 N. Y. Suppl. 159.

39. Bullock *v.* Bullock, 85 Hun (N. Y.) 373, 32 N. Y. Suppl. 1009.

40. Goupille *v.* Chaput, 43 Wash. 702, 86 Pac. 1058.

41. Cohn *v.* Baldwin, 74 Hun (N. Y.) 346, 26 N. Y. Suppl. 457; Depew *v.* Leal, 5 Duer (N. Y.) 663; Webster *v.* Fitchburg R. Co., 32 Misc. (N. Y.) 442, 66 N. Y. Suppl. 220; Sawyer *v.* Bennett, 18 N. Y. Suppl. 24; Willis *v.* Bailey, 19 Johns. (N. Y.) 268. See Ashton *v.* Nova Scotia Cotton Mfg. Co., 22 Nova Scotia 309.

Authentication of affidavit.— Under N. Y. Code Civ. Proc. § 723, requiring the court to disregard errors or defects in the pleadings not affecting the substantial rights of the adverse party, it is no objection to a motion for a bill of particulars that the certificate of a clerk of court of another state attached to an affidavit or deposition accompanying the motion described the affidavit as an "acknowledgment." Spencer *v.* Ft. Orange Paper Co., 74 N. Y. App. Div. 74, 77 N. Y. Suppl. 251.

The strict rules applicable to affidavits necessary to sustain a provisional remedy need not in every case be applied to an application for a bill of particulars. But if the court can see from all the circumstances that the granting of the bill of particulars will tend to promote fairness and justice and can do the opposite party no harm or prejudice any just claim he may have, there is no reason to be astute to find defects in the moving affidavits. Canonico *v.* Cunard Steamship Co., 49 Misc. (N. Y.) 92, 96 N. Y. Suppl. 499.

42. Badger *v.* Gilroy, 21 Misc. (N. Y.) 466, 47 N. Y. Suppl. 669 [*affirming* 20 Misc. 730, 46 N. Y. Suppl. 1089].

43. Depew *v.* Leal, 5 Duer (N. Y.) 663.

44. Constable *v.* Hardenbergh, 76 Hun (N. Y.) 434, 27 N. Y. Suppl. 1022.

That the party has fully stated the case to his counsel and giving the name and address of such counsel need not be averred by such party in his moving affidavit for an order directing a bill of particulars. Worden *v.* New York City R. Co., 48 Misc. (N. Y.) 626, 96 N. Y. Suppl. 180.

45. Coolidge *v.* Stoddard, 120 N. Y. App. Div. 641, 105 N. Y. Suppl. 544; Constable *v.* Hardenbergh, 76 Hun (N. Y.) 434, 27 N. Y. Suppl. 1022; Webster *v.* Fitchburg R. Co., 32 Misc. (N. Y.) 442, 66 N. Y. Suppl. 220; Dorgan *v.* Scheer, 31 Misc. (N. Y.) 801, 62 N. Y. Suppl. 1030 [*affirmed* in 31 Misc. 829, 64 N. Y. Suppl. 383]; Bowman Cycle Co. *v.* Dyer, 23 Misc. (N. Y.) 620, 52 N. Y. Suppl. 159; Villiers *v.* Third Ave. R. Co., 22 Misc. (N. Y.) 17, 48 N. Y. Suppl. 614; Wales Mfg. Co. *v.* Lazzaro, 19 Misc. (N. Y.) 477, 43 N. Y. Suppl. 1110 [*reversing* 18 Misc. 352, 41 N. Y. Suppl. 1134]; Garfield Nat. Bank *v.* Peck, 1 Misc. (N. Y.) 126, 20 N. Y. Suppl. 650; Gridley *v.* Gridley, 7 N. Y. Civ. Proc. 215; Orvis *v.* Dana, 1 Abb. N. Cas. (N. Y.) 268.

46. Talmadge *v.* Sanitary Security Co., 2 N. Y. App. Div. 43, 37 N. Y. Suppl. 177; Webster *v.* Fitchburg R. Co., 32 Misc. (N. Y.) 442, 66 N. Y. Suppl. 220.

Denials in a verified pleading need not be repeated in the affidavit. Newman *v.* West, 101 N. Y. App. Div. 288, 91 N. Y. Suppl. 740.

47. Frankel *v.* Keller Printing Co., 92 N. Y. Suppl. 282.

48. Lambert *v.* Perry, 1 N. Y. Suppl. 152, 14 N. Y. Civ. Proc. 274.

49. Toomey *v.* Whitney, 81 N. Y. App. Div. 441, 80 N. Y. Suppl. 826; Mungall *v.* Bursley,

well-stated reasons why it is not made by the party,[50] and that the attorney has personal knowledge of the facts alleged in the affidavit.[51] It is not a sufficient excuse for failure to have the affidavit made by the party himself that he was absent from the state or county,[52] and that there was no time to procure his affidavit.[53]

13. Order Requiring Bill. An order for a bill of particulars should direct the party of whom the particulars are required to file or serve a bill by a certain day or on such day to show cause why he has not done so,[54] after expiration of which time, if no good cause is shown, the rule may be made absolute.[55] When the order becomes absolute the party requiring the bill may then move for a rule that the bill be furnished within a certain time or that judgment of *non pros.* be entered.[56] The order should indicate the precise particulars which are to be furnished;[57] may order them in part and deny them in part, if they cannot be ordered as asked;[58] and should state that unless the required particulars are furnished the party will be precluded from giving evidence upon the trial.[59] If the order is oppressive in that it is too broad or requires too great particularity, application may be made to the court by motion for a modification,[60] or to vacate the order,[61] and mandamus may lie to compel a vacation of the order,[62] or it may

51 N. Y. App. Div. 380, 64 N. Y. Suppl. 674; Stevens *v.* Smith, 38 N. Y. App. Div. 119, 56 N. Y. Suppl. 540; Mayer *v.* Mayer, 29 N. Y. App. Div. 393, 51 N. Y. Suppl. 1079; Van Olinda *v.* Hall, 82 Hun (N. Y.) 357, 31 N. Y. Suppl. 495; Gallerstein *v.* Manhattan R. Co., 27 Misc. (N. Y.) 506, 58 N. Y. Suppl. 374 [*reversing* 26 Misc. 852, 57 N. Y. Suppl. 394]; Mori *v.* Pearsall, 14 Misc. (N. Y.) 251, 35 N. Y. Suppl. 829; Groff *v.* Hagan, 13 Misc. (N. Y.) 322, 34 N. Y. Suppl. 462; Hoeninghaus *v.* Chaleyer, 4 N. Y. Suppl. 814; Dueber Watch Case Mfg. Co. *v.* Keystone Watch Case Co., 21 N. Y. Suppl. 342, 50 N. Y. St. 417, 23 N. Y. Civ. Proc. 44. But see Sanders *v.* Soutter, 54 Hun (N. Y.) 310, 7 N. Y. Suppl. 549.

Statutes providing for the verification of pleadings by attorney or agent do not apply to affidavits in support of applications of this character. Cohn *v.* Baldwin, 74 Hun (N. Y.) 346, 26 N. Y. Suppl. 457.

50. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 112 N. Y. App. Div. 775, 98 N. Y. Suppl. 572; Mayer *v.* Mayer, 29 N. Y. App. Div. 393, 51 N. Y. Suppl. 1079; Cohn *v.* Baldwin, 74 Hun (N. Y.) 346, 26 N. Y. Suppl. 457; Field *v.* New York Cent., etc., R. Co., 35 Misc. (N. Y.) 111, 71 N. Y. Suppl. 220; Webster *v.* Fitchburg R. Co., 32 Misc. (N. Y.) 442, 66 N. Y. Suppl. 220; Jacobs *v.* Friedman, 28 Misc. (N. Y.) 441, 59 N. Y. Suppl. 382; Talbert *v.* Storum, 21 N. Y. Suppl. 719; Blake *v.* Harrigan, 11 N. Y. Suppl. 209, 19 N. Y. Civ. Proc. 207.

An attorney for a corporation may make an affidavit as to the necessity for a bill of particulars where he gives a sufficient reason why an officer of the corporation did not make it. Field *v.* New York Cent., etc., R. Co., 35 Misc. (N. Y.) 111, 71 N. Y. Suppl. 220.

51. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 112 N. Y. App. Div. 775, 98 N. Y. Suppl. 572; Toomey *v.* Whitney, 81 N. Y. App. Div. 441, 80 N. Y. Suppl. 826; Mungall *v.* Bursley, 51 N. Y. App. Div. 380, 64 N. Y. Suppl. 674; Canonico *v.* Cunard Steamship Co., 49 Misc. (N. Y.) 92, 96 N. Y. Suppl. 499.

The affidavit of an attorney will only be received when it is shown that he is the only person who has knowledge of the subject-matter of the litigation, and that it was not possible to obtain an affidavit of the party, and that the attorney has received from the party full information of the subject-matter and makes full disclosure of what the information consists. Mungall *v.* Bursley, 51 N. Y. App. Div. 380, 64 N. Y. Suppl. 674.

52. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 112 N. Y. App. Div. 775, 98 N. Y. Suppl. 572; Toomey *v.* Whitney, 81 N. Y. App. Div. 441, 80 N. Y. Suppl. 826; Wolff *v.* Kaufman, 65 N. Y. App. Div. 29, 72 N. Y. Suppl. 500.

53. Toomey *v.* Whitney, 81 N. Y. App. Div. 441, 80 N. Y. Suppl. 826.

54. Jacobs *v.* Friedman, 28 Misc. (N. Y.) 441, 59 N. Y. Suppl. 382; Hazard *v.* Henry, 2 Cow. (N. Y.) 587; Roosevelt *v.* Gardinier, 2 Cow. (N. Y.) 463; Brewster *v.* Sackett, 1 Cow. (N. Y.) 571.

55. May *v.* Richardson, 4 Cow. (N. Y.) 56; Brewster *v.* Sackett, 1 Cow. (N. Y.) 571.

56. May *v.* Richardson, 4 Cow. (N. Y.) 56; Brewster *v.* Sackett, 1 Cow. (N. Y.) 571.

57. Conner *v.* Hutchinson, 17 Cal. 279; Cheseborough *v.* Kimberly, 6 N. Y. Suppl. 623.

58. Riker *v.* Erlanger, 87 N. Y. App. Div. 137, 84 N. Y. Suppl. 69; Bell *v.* Heatherton, 66 N. Y. App. Div. 603, 73 N. Y. Suppl. 242.

59. Oatman *v.* Watrous, 99 N. Y. App. Div. 254, 90 N. Y. Suppl. 940.

60. Dwight *v.* Germania L. Ins. Co., 84 N. Y. 493; Cruikshank *v.* Cruikshank, 30 N. Y. App. Div. 381, 51 N. Y. Suppl. 926.

61. Brown *v.* Thorley, 30 Misc. (N. Y.) 809, 61 N. Y. Suppl. 921.

62. Van Vranken *v.* Wayne County Cir. Judge, 85 Mich. 140, 48 N. W. 499; Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681. And see, generally, Mandamus, 26 Cyc. 183.

be modified on appeal;[63] but if it is not warranted by the decision authorizing it, the remedy is a motion to resettle the order, and not an appeal.[64] If an order is suffered to be made by default, it stands as a binding adjudication and cannot thereafter be questioned.[65] Upon a proper application, the court may grant time to procure particulars necessary, the time to be allowed depending upon the circumstances of the case.[66] But a peremptory order for a bill requires that it be furnished immediately — that is, within twenty-four hours.[67] An order for a bill of particulars is not in itself a stay of proceedings,[68] but it should direct a stay if such a result is desired.[69] Where there is an interlocutory order for a bill of particulars, and that in the meantime all proceedings stay and a peremptory order is afterward made, the adverse party cannot proceed in the suit until he delivers a bill.[70] But the stay ceases to be operative if a peremptory order is not obtained at the expiration of the time allowed.[71] An order for a bill of particulars is duly served by delivery of a copy thereof; the original need not be shown.[72]

14. Form and Requisites of Bill — a. In General. A bill of particulars need not be technically accurate;[73] nor need it be as formal or precise as a pleading,[74] and mere formal defects in it will be disregarded;[75] but it must in substance inform the opposite party of the nature of the pleader's claim or defense, and generally will be held sufficient if it fairly and in substance gives the opposite party the information to which he is entitled,[76] as required by the terms of the order in

63. Alleghany Iron Co. *v.* Chesapeake, etc., R. Co., 69 N. Y. App. Div. 87, 74 N. Y. Suppl. 514; Ellison *v.* Healy, 60 N. Y. App. Div. 613, 69 N. Y. Suppl. 662; Schmitt *v.* Mutual Reserve L. Ins. Co., 97 N. Y. Suppl. 294; Ross *v.* Willett, 13 N. Y. Suppl. 103; Ross *v.* Hamlin, 13 N. Y. Suppl. 102.

64. Schweit *v.* Metropolitan St. R. Co., 24 Misc. (N. Y.) 409, 53 N. Y. Suppl. 545.

65. Quinn *v.* Fitzgerald, 87 N. Y. App. Div. 539, 84 N. Y. Suppl. 728.

66. Brauer *v.* Oceanic Steam Nav. Co., 26 N. Y. App. Div. 623, 49 N. Y. Suppl. 937; Baremore *v.* Taylor, 53 N. Y. Super. Ct. 119.

67. Harman *v.* Glover, 10 Wend. (N. Y.) 617.

A motion for a judgment non pros. before the expiration of that time should be denied with costs. Harman *v.* Glover, 10 Wend. (N. Y.) 617.

68. Vermont Academy of Medicine *v.* Landon, 2 Wend. (N. Y.) 620; Platt *v.* Townsend, 3 Abb. Pr. (N. Y.) 9.

69. Jacobs *v.* Friedman, 28 Misc. (N. Y.) 441, 59 N. Y. Suppl. 382; Platt *v.* Townsend, 3 Abb. Pr. (N. Y.) 9.

An order staying the proceedings absolutely until a bill is delivered is irregular, but it nevertheless operates to stay the proceedings until vacated. Roosevelt *v.* Gardinier, 2 Cow. (N. Y.) 463.

70. Rowan *v.* Merritt, 9 Wend. (N. Y.) 443.

71. Fassett *v.* Dorr, 11 Wend. (N. Y.) 177.

72. Bridgman *v.* Gregory, 19 Wend. (N. Y.) 9.

73. Vila *v.* Weston, 33 Conn. 42.

74. Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681; Smith *v.* Hicks, 5 Wend. (N. Y.) 48; Murdock *v.* Martin, 132 Pa. St. 86, 18 Atl. 1114; Columbia Acc. Assoc. *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

75. Scott *v.* Leary, 34 Md. 389.

76. *Alabama.*— Boykin *v.* Persons, 95 Ala. 626, 11 So. 67.

California.— Ames *v.* Bell, 5 Cal. App. 1, 89 Pac. 619.

Connecticut.— Vila *v.* Weston, 33 Conn. 42.

Florida.— Columbia County *v.* Branch, 31 Fla. 62, 12 So. 650.

Indiana.— Leib *v.* Butterick, 68 Ind. 199; Pierce *v.* Wilson, 48 Ind. 298.

Kentucky.— Morehead *v.* Anderson, 100 S. W. 340, 30 Ky. L. Rep. 1137.

Maryland.— Scott *v.* Leary, 34 Md. 389.

Michigan.— Snell *v.* Gregory, 37 Mich. 500.

New Jersey.— Voorhees *v.* Barr, 59 N. J. L. 123, 35 Atl. 651.

New York.—Matthews *v.* Hubbard, 47 N. Y. 428; Kindberg *v.* Chapman, 115 N. Y. App. Div. 153, 100 N. Y. Suppl. 685; Baker *v.* Sutton, 86 Hun 588, 33 N. Y. Suppl. 1072; Moss *v.* Crimmins, 30 Misc. 300, 63 N. Y. Suppl. 416; Redmond *v.* Buckley, 20 N. Y. Suppl. 969; Donohue *v.* Pomeroy, 19 N. Y. Suppl. 569; Duffy *v.* Ryer, 17 N. Y. Suppl. 843; Stanley *v.* Millard, 4 Hill 50; Smith *v.* Hicks, 5 Wend. 48.

Rhode Island.— MacDonald *v.* New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795.

Virginia.— Columbia Acc. Assoc. *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

Wisconsin.— Burnham *v.* Milwaukee, 69 Wis. 379, 34 N. W. 389.

United States.—Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. 541, 9 L. ed. 222; Church *v.* Spiegelberg, 33 Fed. 158; Whitaker *v.* Pope, 29 Fed. Cas. No. 17,528, 2 Woods 463.

Canada.— Perkins *v.* Irvine, 23 Nova Scotia 250.

See 39 Cent. Dig. tit. "Pleading," §§ 982, 983.

A bill of particulars should be sufficiently specific and definite to give notice to the opposite party of the claims intended to be made upon the trial and to enable him to confine the pleader's proof to the matters

cases where an order is made.[77] It need not state the grounds on which plaintiff claims, but only the items and particulars.[78] It should be made as accurate and definite as the means of information at the command of the party serving it will allow,[79] or as the nature of the case permits; [80] and it has been held that it should not be less specific than the pleading in aid of which it is given.[81] But it must not contain particulars not within the scope of the pleading to which it is furnished; [82] nor need it state more than the party is bound to prove.[83] If an action is founded upon a written instrument, a copy of the instrument is a sufficient bill of particulars; [84] and an account once delivered and referred to in the bill of particulars need not be restated therein.[85] So where a copy of an account showing all items of debit and credit is annexed to a complaint and referred to therein, no separate bill of particulars is necessary.[86] An amended pleading which is improperly filed as such may be deemed and held an amplification of a bill of particulars previously filed; [87] and a party's bank-book is a sufficient bill of particulars, as to his account.[88]

b. Verification. Ordinarily a bill of particulars need not be verified unless it is required by statute.[89] Under some statutes a bill of particulars should be verified where the pleading itself is verified.[90] It has been held that the bill of

specified. Matthews *v.* Hubbard, 47 N. Y. 428.

A bill of particulars has been held insufficient where it states merely: To item "cash" without specifying whether lent, paid, etc. (Stanley *v.* Millard, 4 Hill (N. Y.) 50); "to the first special count, damages $5000," "balance due on settlement, &c., $5000" and "money received at New-Orleans on account of plaintiff, $5000" (Wetmore *v.* Jennys, 1 Barb. (N. Y.) 53); "to amount advanced, $200" (Moran *v.* Morrissey, 18 Abb. Pr. (N. Y.) 131, 28 How. Pr. 100); "to a balance due on the purchase money of nine houses . . . $365.00" (Thillman *v.* Shadrick, 69 Md. 528, 16 Atl. 138); "to balance due in cash, $600" (Ralston *v.* Aultman, (Tex. Civ. App. 1894) 26 S. W. 746); or "general loss of labor, $150" (Polley *v.* Fray, 38 Conn. 544).

Where a bill is filed, which standing alone would be insufficient, it will be deemed sufficient if taken together with all the other documentary evidence in the case it supplies all needful information. American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 45 S. E. 705.

The sufficiency of a bill of particulars to a declaration or complaint cannot be determined by the allegations of the answer. Matthews *v.* Hubbard, 47 N. Y. 428.

In an action against one of several joint debtors a bill of particulars may run against defendant alone, without mentioning his co-debtors. Gay *v.* Cary, 9 Cow. (N. Y.) 44.

77. Quinn *v.* Fitzgerald, 87 N. Y. App. Div. 539, 84 N. Y. Suppl. 728; Mueller *v.* Tenth St., etc., Ferry Co., 38 N. Y. App. Div. 622, 56 N. Y. Suppl. 310; People *v.* Cox, 23 Hun (N. Y.) 269; Mason *v.* Ring, 10 Bosw. (N. Y.) 598

78. Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681.

79. Baremore *v.* Taylor, 53 N. Y. Super. Ct. 119; Mason *v.* Ring, 10 Bosw. (N. Y.) 598; Humphry *v.* Cottleyou, 4 Cow. (N. Y.) 54; Sullivan *v.* Waterman, 21 R. I. 72, 41 Atl. 1006; Long *v.* Kinard, Harp. (S. C.) 47.

Where a party is unable to give minute particulars he may be excused from giving them, if the substantial rights of the other party may be guarded. Baremore *v.* Taylor, 53 N. Y. Super. Ct. 119.

An attorney's statement that his client is away is not a sufficient excuse for furnishing a vague bill of particulars. Baremore *v.* Taylor, 53 N. Y. Super. Ct. 119.

80. Vansant *v.* Lindsley, 2 App. Cas. (D. C.) 421.

81. Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288; Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720, holding that it should state the gist of the action as clearly as a special count.

82. Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288.

If none of the items stated in the bill of particulars are admissible under the allegations of the pleading, it is insufficient. Spruance *v.* Myerdirck, 2 Pennew. Del.) 205, 43 Atl. 479.

83. Matthews *v.* Hubbard, 47 N. Y. 428.

84. Dean *v.* Mann, 28 Conn. 352; Smith *v.* Wilson, 58 Ga. 322.

85. Boody *v.* Pratt, 68 N. J. L. 295, 53 Atl. 470; James *v.* Goodrich, 1 Wend. (N. Y.) 289.

86. Liebmann's Sons Brewing Co. *v.* Cody, 21 N. Y. App. Div. 235, 47 N. Y. Suppl. 669.

87. Ontario Powder Works *v.* Powell, 132 Mich. 451, 93 N. W. 1075.

88. Chicago Bank *v.* Hull, 74 Ill. 106.

89. See Jones *v.* Barnett, 35 Md. 258. And see the statutes of the several states.

In Pennsylvania if a bill of particulars amounts to an amended statement it must be sworn to. Crew *v.* Pennsylvania R. Co., 1 Pa. Dist. 82. But where the facts alleged in the bill are such as lay largely within the knowledge of the opposite party, it is not such an amended statement as is required to be supported by affidavit. Crew *v.* Pennsylvania R. Co., *supra*.

90. Manning *v.* Benedict, 31 N. Y. App. Div. 51, 52 N. Y. Suppl. 530; Brauer *v.* Oceanic Steam Nav. Co., 26 N. Y. App. Div. 623, 49 N. Y. Suppl. 937; McCarron *v.* Sire,

particulars need not be verified where the original claim is verified and filed upon the institution of the action.[91]

15. Amendment of Bill.[92] A bill of particulars may be amended,[93] by leave of court,[94] for the purpose of increasing the amount claimed,[95] simplifying the bill,[96] correcting the title or heading,[97] stating additional facts, not changing the cause of action or defense,[98] showing the capacity in which the party sues,[99] or striking out certain items.[1] But such amendment cannot set forth a new cause of action or defense.[2] The general rules as to amendment of pleadings apply to the amendment of bills of particulars.[3] The allowance or refusal of such an amendment rests within the discretion of the trial court, as in case of other amendments;[4] and the court may, in its discretion, impose certain conditions, such as the payment of costs, to the allowance of the amendment.[5] Such an amendment may be allowed at the trial where the other party is not prejudiced by reason of surprise, but not otherwise.[6] But unreasonable delay in making application will operate to cause a refusal of leave to amend unless it is satisfactorily excused.[7] An amended bill

3 N. Y. Suppl. 659, 14 N. Y. Civ. Proc. 252; Whithers *v.* Toulmin, 10 N. Y. St. 704, 13 N. Y. Civ. Proc. 1.

An order requiring the service of a bill of particulars should direct that it be verified whenever the pleadings are verified, unless the case is an exceptional one. Manning *v.* Benedict, 31 N. Y. App. Div. 51, 52 N. Y. Suppl. 530. *Compare* Shankland *v.* Bartlett, 49 Hun (N. Y.) 605, 1 N. Y. Suppl. 458, 15 N. Y. Civ. Proc. 24, holding that a bill of particulars served under an order of court need not be verified unless the court direct its verification, although the pleadings are verified.

91. Jones *v.* Barnett, 35 Md. 258.

92. Amendment of bill of particulars in criminal prosecutions see Indictments and Informations, 22 Cyc. 445.

93. *Arkansas.*— Odle *v.* Floyd, 5 Ark. 248.

Illinois.— Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025 [*affirming* 37 Ill. App. 278].

Massachusetts.— Babcock *v.* Thompson, 3 Pick. 446, 15 Am. Dec. 235.

Michigan.—Hamilton *v.* Peck, 84 Mich. 393, 47 N. W. 681; Cummin *v.* Wilcox, 47 Mich. 501, 11 N. W. 289.

New Jersey.— Tillou *v.* Hutchinson, 15 N. J. L. 178.

See 39 Cent. Dig. tit. "Pleading," § 986.

A party cannot stand upon the terms of a bill of particulars and at the same time ask an amendment thereof. Columbia County *v.* Branch, 31 Fla. 62, 12 So. 650.

If an amended declaration or other pleading is filed setting forth the requisite facts, this will make an amended bill of particulars unnecessary. Feiertag *v.* Feiertag, 80 Mich. 489, 45 N. W. 188.

94. Grether *v.* Klock, 39 Conn. 133; Morton *v.* McClure, 22 Ill. 257; Wager *v.* Chew, 15 Pa. St. 323.

95. Grether *v.* Klock, 39 Conn. 133; Morton *v.* McClure, 22 Ill. 257. *Compare* Haviland *v.* Fidelity Ins., etc., Co., 3 Pa. Co. Ct. 222.

96. Fielder *v.* Collier, 13 Ga. 496.

97. Bowe *v.* Gress Lumber Co., 86 Ga. 17, 12 S. E. 177.

98. Ames *v.* Bell, 5 Cal. App. 1, 89 Pac. 619; Teberg *v.* Swenson, 32 Kan. 224, 4 Pac. 83; Missouri Pac. R. Co. *v.* Piper, 26 Kan. 58; St. Louis, etc., R. Co. *v.* Bryan Fruit Co., 1 Kan. App. 551, 42 Pac. 267; Anderson Carriage Co. *v.* Pungs, 127 Mich. 543, 86 N. W. 1040; Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893.

99. Reed *v.* Cooper, 30 Kan. 574, 1 Pac. 822.

1. Towle *v.* Blake, 38 Me. 528; Hopkins *v.* Stefan, 77 Wis. 45, 45 N. W. 676.

2. Singer Mfg. Co. *v.* Armstrong, 91 Ga. 745, 17 S. E. 1036; Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288.

3. See Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025 [*affirming* 37 Ill. App. 278]; Melvin *v.* Wood, 3 Abb. Dec. (N. Y.) 272, 3 Transcr. App. 297, 4 Abb. Pr. 438; Laflin *v.* Shackleford, 98 Fed. 372, 39 C. C. A. 102.

Amendments generally see *supra*, VII, A.

4. Brownell Imp. Co. *v.* Critchfield, 96 Ill. App. 84 [*affirmed* in 197 Ill. 61, 64 N. E. 332]; Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Marion County School Dist. No. 73 *v.* Dudley, 28 Kan. 160; Gardner *v.* Gardner, 2 Gray (Mass.) 434.

5. Felter *v.* Manville, 23 Kan. 191. *Compare* Tate *v.* Hamilton, 81 Mich. 221, 45 N. W. 822.

6. *Georgia.*— Fielder *v.* Collier, 13 Ga. 496.

Kansas.— Reed *v.* Cooper, 30 Kan. 574, 1 Pac. 822.

Maine.— Towle *v.* Blake, 38 Me. 528.

Michigan.— Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893; Mead *v.* Glidden, 79 Mich. 209, 44 N. W. 596; Collins *v.* Beecher, 45 Mich. 436, 8 N. W. 97.

Pennsylvania.— Haviland *v.* Fidelity Ins., etc., Co., 3 Pa. Co. Ct. 222.

Vermont.— Lewis *v.* Jewett, 51 Vt. 378.

Wisconsin.— Hopkins *v.* Stefan, 77 Wis. 45, 45 N. W. 676.

See 39 Cent. Dig. tit. "Pleading," § 986.

7. Goforth *v.* Stingley, 79 Miss. 398, 30 So. 690.

Where the issue as made up on the pleadings and bill of particulars has been fully tried and correctly settled, no amendment having been applied for in the court below,

of particulars ordered by the court supersedes former bills;[8] but it does not change the issue.[9]

B. Copy of Account Alleged in Pleading — 1. In General. In some jurisdictions it is required by statute that, where a pleading is founded on an account, the original or a copy thereof must be filed with the pleading or delivered on demand.[10] Such original or copy when filed or served is merely a special form of a bill of particulars, and except where special rules supersede, the general rules respecting bills of particulars apply.[11] It is not necessary that the account filed should be such as to constitute evidence *per se*;[12] but if it is sufficiently definite to apprise the other party of the nature and amount of the claim,[13] and is made as detailed as the nature of the case and the ability of the party will admit, it will be sufficient.[14] But mere general aggregates will not suffice.[15] An account filed which does not contain the items but which refers to a bill of items actually rendered is sufficient.[16] If the account furnished is not deemed sufficient, the proper course is not to wait until the trial, but to demand or move for a more specific account.[17] But so far as the time is limited within which the account must be furnished, the statute is only directory,[18] and the suit should not be dismissed for failure to conform.[19]

2. Verification. The statutes frequently require that the account filed or served shall be verified, in which case the terms of the verification should substantially conform to the verification called for by the statute.[20] An objec-

the court of review will not permit plaintiff in error to amend the bill of particulars in order to bring about a reversal of the judgment and a new trial upon a different issue. Kent *v.* Phenix Art Metal Co., 69 N. J. L. 532, 55 Atl. 256.

8. Ames *v.* Bell, 5 Cal. App. 1, 89 Pac. 619.

9. Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236.

10. See Accounts and Accounting, 1 Cyc. 477 *et seq.*

11. See *supra*, X, A.

If the account exhibited is incompatible with the allegations of the pleading, no evidence in support of it can be admitted. Fogg *v.* Fogg, Ky. Dec. 66.

12. Black *v.* Chesser, 12 Ohio St. 621 (holding it sufficient for plaintiff, without having previously made any entries in an account-book, to set down in writing in the form of an account, the items thereof and file it with his petition); McLaughlin *v.* Turner, 16 Fed. Cas. No. 8,875, 1 Cranch C. C. 476. *Contra*, Wall *v.* Dovey, 60 Pa. St. 212.

13. Wills *v.* Churchill, 78 Me. 285, 4 Atl. 693; Seed *v.* Fairchild, 83 N. Y. App. Div. 629, 82 N. Y. Suppl. 490; Murdock *v.* Martin, 132 Pa. St. 86, 18 Atl. 1114; Hays *v.* Samuels, 55 Tex. 560.

14. Conner *v.* Hutchinson, 17 Cal. 279; Leimer *v.* Pacific R. Co., 26 Mo. 26; Kellogg *v.* Paine, 8 How. Pr. (N. Y.) 329.

In an action for goods sold and delivered, an account giving the names of the parties, the place, and date of the transaction and the amount and price of the goods sold is a sufficient statement to admit evidence in its support. Brierre *v.* Cereal Sugar Co., 102 Mo. App. 622, 77 S. W. 111.

15. Goodheart *v.* Powers, 1 Handy (Ohio) 559, 12 Ohio Dec. (Reprint) 288; Dow *v.* Williams, 4 Pa. Dist. 659, 17 Pa. Co. Ct. 388; Weatherford, etc., R. Co. *v.* Granger, (Tex. Civ. App. 1893) 22 S. W. 70.

16. Robinson *v.* Burks, 12 Leigh (Va.) 378.

17. Nash *v.* Denton, (Kan. 1898) 51 Pac. 896; Gfeller *v.* Graefemann, 64 Mo. App. 162; McKinney *v.* McKinney, 12 How. Pr. (N. Y.) 22; Yates *v.* Bigelow, 9 How. Pr. (N. Y.) 186.

An order requiring a further account made under Cal. Pr. Act, § 56, is defective and insufficient unless the particulars in respect to which a further specification is required are stated in the order. Conner *v.* Hutchinson, 17 Cal. 279. When the court or judge orders a further account when the one delivered is too general or is defective in some particular the further or amended account is to be construed as an amended pleading for certain purposes. Ames *v.* Bell, 5 Cal. App. 1, 89 Pac. 619.

18. Robbins *v.* Butler, 13 Colo. 496, 22 Pac. 803.

19. Bryant *v.* J. C. Harris Lumber Co., 70 Miss. 683, 12 So. 585.

20. *Alabama.*— Enis *v.* Harris, 103 Ala. 330, 15 So. 834; Schwartz *v.* Baird, 100 Ala. 154, 13 So. 947.

Michigan.— McGowan *v.* Lamb, 66 Mich. 615, 33 N. W. 881.

New York.— Whithers *v.* Toulmin, 10 N. Y. St. 704, 13 N. Y. Civ. Proc. 1.

Oregon.— Robbins *v.* Benson, 11 Oreg. 514, 6 Pac. 69.

Texas.— Sims *v.* Howell Bros. Shoe Co., (App. 1890) 15 S. W. 120.

See 39 Cent. Dig. tit. "Pleading," § 998.

That an account is "just, due, and unpaid" is substantially equivalent to the statutory requisite "justly owing and due." McGowan *v.* Lamb, 66 Mich. 615, 33 N. W. 881.

A formal error in the verification may be

tion to a defective verification will be deemed waived if it is not taken seasonably.[21]

XI. FILING AND SERVICE; LOST OR DESTROYED PLEADINGS; WITHDRAWAL OF PLEADINGS.

A. Filing[22] and Service — 1. What Constitutes Filing.[23] Filing a pleading under the modern practice consists simply in placing it in the hands of the proper officer, usually the clerk of the court, to be preserved and kept by him, in his official custody, as a public record.[24] It is deemed filed when delivered to and received by the proper officer to be kept on file.[25] It is the duty of the officer receiving it to make the proper indorsement and entry,[26] but this is merely evidence of the filing and is not essential to the validity thereof.[27] Nor will the memorandum or indorsement alone constitute conclusive evidence of the filing.[28] But merely putting a paper into the files or leaving it in the clerk's office without handing it to the clerk is not filing it,[29] nor is it filed by merely stating on another paper that it is filed "herewith."[30] A statute making the payment of a fee a prerequisite to filing a pleading is directory only, and a failure to pay the fee does not render the filing invalid;[31] and the same is true of an order conditioning leave to file on payment of costs.[32] Failure to properly file is waived unless seasonably objected to.[33] The answer in an action to set aside a judgment, on the ground that it was

corrected. Tilley *v.* Tharp, 23 Fed. Cas. No. 14,047, 3 Cranch C. C. 290.

21. Robbins *v.* Benson, 11 Oreg. 514, 6 Pac. 69.

22. **Entry of pleadings on docket** see Justices of the Peace, 24 Cyc. 635.

23. **"File," "Filed," and "Filing" defined** see 19 Cyc. 528 *et seq.*

24. *California.*— Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501, filed when delivered to clerk for that purpose and his fees paid, if demanded.

Georgia.— Jolley *v.* Rutherford, 112 Ga. 342, 37 S. E. 358.

Illinois.— Hamilton *v.* Beardslee, 51 Ill. 478, the pleading must pass into the clerk's exclusive custody and remain within his power.

Indiana.— Lamson *v.* Falls, 6 Ind. 309.

Mississippi.— Meridian Nat. Bank *v.* Hoyt, etc., Co., 74 Miss. 221, 21 So. 12, 60 Am. St. Rep. 504, 36 L. R. A. 796.

Wisconsin.— Witt *v.* Meyer, 69 Wis. 595, 35 N. W. 25.

Canada.— Reg. *v.* Gould, 6 U. C. Q. B. O. S. 26.

See 39 Cent. Dig. tit. "Pleading," § 1015.

Handing a paper to the clerk outside his office and obtaining his indorsement thereon that it is filed does not constitute a filing in his office. Schulte *v.* Minneapolis First Nat. Bank, 34 Minn. 48, 24 N. W. 320.

25. *Georgia.*— Floyd *v.* Chess-Carley Co., 76 Ga. 752; Peterson *v.* Taylor, 15 Ga. 483, 60 Am. Dec. 705.

Indiana.— Powers *v.* State, 87 Ind. 144.

Kansas.— Wilkinson *v.* Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158.

Louisiana.— State *v.* Lewis, 49 La. Ann. 1207, 22 So. 327; Wheeling Pottery Co. *v.* Levi, 48 La. Ann. 777, 19 So. 752.

Michigan.— Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

Tennessee.— Fanning *v.* Fly, 2 Coldw. 486.

Utah.— Wescott *v.* Eccles, 3 Utah 258, 2 Pac. 525.

26. Meridian Nat. Bank *v.* Hoyt, etc., Co., 74 Miss. 221, 21 So. 12, 60 Am. St. Rep. 504, 36 L. R. A. 796.

27. *Florida.*— Jacksonville St. R. Co. *v.* Walton, 42 Fla. 54, 28 So. 59.

Georgia.— Latimer *v.* Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

Indiana.— Hartford Security Co. *v.* Arbuckle, 123 Ind. 518, 24 N. E. 329.

Maryland.—Newcomer *v.* Keedy, 9 Gill 263.

Montana.— *In re* Dewar, 10 Mont. 426, 25 Pac. 1026.

New Mexico.— *In re* Lewisohn, 9 N. M. 101, 49 Pac. 909.

Ohio.— Myers *v.* Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613; King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84; Nimmons *v.* Westfall, 33 Ohio St. 213.

Oregon.—See *In re* Conant, 43 Oreg. 530, 73 Pac. 1018.

Utah.— Wescott *v.* Eccles, 3 Utah 258, 2 Pac. 525.

Contra.— Johnson *v.* Berdo, 131 Iowa 524, 106 N. W. 609, (construing Code, § 291); Winkleman *v.* Winkleman, 79 Iowa 319, 44 N. W. 556; Nickson *v.* Blair, 59 Iowa 531, 13 N. W. 641; Love *v.* McIntyre, 3 Tex. 10; Mutual L. Ins. Co. *v.* Phinney, 76 Fed. 617, 22 C. C. A. 425.

28. Dorn *v.* Bradner, 106 Ill. App. 91.

29. Jolley *v.* Rutherford, 112 Ga. 342, 37 S. E. 358; Lamson *v.* Falls, 6 Ind. 309; Monroe *v.* McMicken, 8 Mart. N. S. (La.) 510.

30. Montpelier Light, etc., Co. *v.* Stephenson, 22 Ind. App. 175, 53 N. E. 444.

31. Clemens Electric Mfg. Co. *v.* Walton, 168 Mass. 304, 47 N. E. 102.

32. McGreevey *v.* Lapalme, 15 Quebec Super. Ct. 61.

33. Snell *v.* Dubuque, etc., R. Co., 88 Iowa 442, 55 N. W. 310; Winkleman *v.* Winkleman, 79 Iowa 319, 44 N. W. 556.

procured by the false and fraudulent testimony of one of defendant's witnesses, may be filed and presented by defendant's attorney.[34] While all the parties to an action are bound to take notice of pleadings properly filed within the time required by law,[35] unless actual notice is required by statute or rule of court,[36] yet where a party in default obtains leave of court to file a pleading affecting other parties, the parties so affected should be notified of the filing of such pleading, unless such persons or their attorneys are present when the order is made.[37]

2. Necessity For Filing. According to modern practice, all pleadings are required to be filed, in order to become a part of the record.[38] Filing the pleading containing a statement of plaintiff's cause of action is sometimes necessary for the commencement of suit;[39] and sometimes it must be first filed where service by publication is made.[40] Where words are inserted in a pleading merely to make it conform to the proof, it need not be filed as an amended pleading.[41] If a replication is necessary it must be filed, and a mere minute on the record that a replication has been filed, if the replication itself does not appear, is not sufficient.[42]

3. Right to File. A party has an absolute right to have his pleading filed if tendered in due time and in proper manner, and the other party has no right to

Pleading to the declaration is an admission that the declaration was filed. Arthur *v.* Broadnax, 3 Ala. 557, 37 Am. Dec. 707; Wheeler *v.* Bullard, 6 Port. (Ala.) 352.

Arguing a demurrer is an admission that it was filed. Myers *v.* Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613.

34. Lee *v.* Hickson, 40 Tex. Civ. App. 632, 91 S. W. 636.

35. Mudge *v.* Hull, 56 Kan. 314, 43 Pac. 242; Curry *v.* Janicke, 48 Kan. 168, 29 Pac. 319; Kimball *v.* Connor, 3 Kan. 414; Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873.

When a party files a pleading in obedience to an order, under N. Y. Code, § 416, requiring him to do so, he is not bound to notify the party obtaining the order that the pleading is filed. Douoy *v.* Hoyt, Code Rep. N. S. (N. Y.) 286.

Notice of set-off unnecessary.— No formal notice need be given by defendant to plaintiff of the filing of a plea of set-off. Simon *v.* Myers, 68 Ga. 74. In Pennsylvania a rule of court requires notice of plea of set-off. See Carl Barckhoff Church Organ Co. *v.* Ecker, 184 Pa. St. 350, 39 Atl. 85; E. S. Higgins Carpet Co. *v.* Latimer, 165 Pa. St. 617, 30 Atl. 1050. *Compare* Jacks *v.* Moore, 1 Yeates 391.

No notice of filing of plea of reconvention need be given. Wood *v.* Lenox, 5 Tex. Civ. App. 318, 23 S. W. 812.

Answer of co-defendant.— Where one is made a defendant in an action, and is duly served with process, he is charged with notice of whatever answer any of his co-defendants may file only where such answer is filed within the time required by law. Kochler *v.* Reed, 68 Nebr. 152, 96 N. W. 380; Havemeyer *v.* Paul, 45 Nebr. 373, 63 N. W. 932; Arnold *v.* Badger Lumber Co., 36 Nebr. 841, 55 N. W. 269.

Notice to third persons.— Where a person procures judgment to be set aside as to him, upon the ground that no sufficient service of summons was ever made upon him, and afterward files an answer setting up new matter and grounds for affirmative relief affecting the rights and interests of other parties, such parties must be given notice, or opportunity to appear and defend. Clay *v.* Hildebrand, 44 Kan. 481, 24 Pac. 962.

Pleadings filed in vacation.—Although there is no statutory provision authorizing it, the court may permit additional pleadings to be filed in vacation; but, when an additional pleading is so filed, the counsel of the adverse party ought to be given notice of the application therefor and an opportunity to resist it, or to procure leave to file other pleadings and make up the issue. Norfolk, etc., R. Co. *v.* Coffey, 104 Va. 665, 51 S. E. 729, 52 S. E. 367.

36. Limbird *v.* Book, 30 Mo. App. 477; Carl Barckhoff Church Organ Co. *v.* Ecker, 184 Pa. St. 350, 39 Atl. 85; E. S. Higgins Carpet Co. *v.* Latimer, 165 Pa. St. 617, 30 Atl. 1050.

37. Cockle Separator Mfg. Co. *v.* Clark, 23 Nebr. 702, 37 N. W. 628.

38. See the statutes and court rules of the different jurisdictions. And see Calhoun *v.* Citizens' Banking Co., 113 Ga. 621, 38 S. E. 977; Walker *v.* Cameron, 2 Manitoba 95.

The English practice does not seem to require a declaration to be filed but only to be served on the other side. Walker *v.* Cameron, 2 Manitoba 95.

39. See the statutes and court rules of the different jurisdictions. And see Bailey *v.* Palmer, 5 Ark. 208; Roth *v.* Way 2 Hill (N. Y.) 385 (in actions commenced without writ, the filing and service of a declaration is in the nature of process to bring defendant into court); Baldwin *v.* Baer, 10 Wash. 414, 37 Pac. 117.

40. See the statutes and court rules of the different jurisdictions. And see Waffle *v.* Goble, 53 Barb. (N. Y.) 517.

41. Stewart *v.* Knight, etc., Co., (Ind. App. 1904) 71 N. E. 182.

42. Patrick *v.* Conrad, Litt. Sel. Cas. (Ky.) 508.

object, nor the court authority to listen to his objections to the filing;[43] therefore no objection to the sufficiency of a pleading can be taken by an objection to its being filed.[44]

4. Service Generally. Only when required by statute is service of copies of the pleadings on the other party or on co-plaintiffs or co-defendants necessary.[45] But the court has considerable discretion in the matter, and may, by order, dispense with the necessity of service in a proper case.[46] And the party entitled to the copy may waive service of it.[47] When service of a copy of a pleading is necessary a copy of an accompanying affidavit or exhibit must also be served if it forms a part of the pleading,[48] otherwise not.[49] In some states a copy of a pleading may be had by making seasonable demand,[50] but such demand will not be effective

43. Turner *v.* New Farmers' Bank, 102 Ky. 473, 43 S. W. 721, 19 Ky. L. Rep. 1522; Collins *v.* Fenley, 53 S. W. 667, 21 Ky. L. Rep. 958.

44. Anthony *v.* Masters, 28 Ind. App. 239, 62 N. E. 505; Turner *v.* New Farmers' Bank, 102 Ky. 473, 43 S. W. 721, 19 Ky. L. Rep. 1522; Holland *v.* Lowe, 101 Ky. 98, 39 S. W. 834, 41 S. W. 9, 19 Ky. L. Rep. 97; Ringo *v.* New Farmers' Bank, 101 Ky. 91, 39 S. W. 701 19 Ky. L. Rep. 91.

45. See the statutes of the different jurisdictions. And see the following cases:

California.— Galliano *v.* Kilfoy, 94 Cal. 86, 29 Pac. 416; Sacramento Sav. Bank *v.* Spencer, 53 Cal. 737.

Michigan.— Turrill *v.* Walker, 4 Mich. 177.

New York.— Knickerbocker Trust Co. *v.* Onconta, etc., R. Co., 116 N. Y. App. Div. 78, 101 N. Y. Suppl. 241 [*affirmed* in 188 N. Y. 38, 80 N. E. 568]; Balch *v.* Utica, 42 N. Y. App. Div. 567, 59 N. Y. Suppl. 516; Metcalf *v.* Moses, 35 N. Y. App. Div. 596, 55 N. Y. Suppl. 179; Weston *v.* Stoddard, 60 Hun 290, 14 N. Y. Suppl. 580 [*affirmed* in 137 N. Y. 119, 33 N. E. 62, 33 Am. St. Rep. 697, 20 L. R. A. 624]; Farjeon *v.* Grant, 54 N. Y. Super. Ct. 535; Jackson *v.* Clow, 13 Johns. 157.

Washington.— Baldwin *v.* Baer, 10 Wash. 414, 39 Pac. 117; Walla Walla Printing, etc., Co. *v.* Budd, 2 Wash. Terr. 336, 5 Pac. 602.

Canada.— Wallace *v.* Frazer, 2 Can. L. J. 184; Watkins *v.* Fenton, 8 U. C. C. P. 289.

See 39 Cent. Dig. tit. "Pleading," § 1005.

Service of cross complaint.— In some states there is an express statutory requirement that the cross complaint shall be served upon the parties affected thereby. See the statutes of the different states. And see Winter *v.* McMilan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243. Where a cross complaint sets up new matter not embraced in defensive pleading, the cross defendants are not required to take notice of the pleading, and judgment cannot be entered against them without service of the cross complaint in the absence of their appearance. Southward *v.* Jamison, 66 Ohio St. 290, 64 N. E. 135; Harris *v.* Schlinke, 95 Tex. 88, 65 S. W. 172; Johnston *v.* Fraser, (Tex. Civ. App. 1906) 92 S. W. 49. *Compare* Kollock *v.* Scribner, 98 Wis. 104, 117, 73 N. W. 776, in which the court said: "The provisions of law permitting defendants to litigate between themselves matters germane to the subject of the complaint, carries with it the right of the defendant seeking relief in that regard to serve an answer in the action in the nature of a cross bill, setting up the facts and claiming such relief. Such an answer, however, is essentially a code pleading, and though the court may require it to be served on the defendant affected thereby, such service is not necessary unless so ordered to preserve the right of the party to have the questions presented by such answer tried and settled by the decree, if the co-defendant affected is before the court."

Co-defendants, one of whom practically co-operates with plaintiff, and joins in the prayer of the complaint, need not serve their separate answers on each other. Egan *v.* Bissell, 54 S. C. 80, 32 S. E. 1.

Where an interlocutory order for a bill is made, and that proceedings stay in the meantime, and a peremptory order is afterward made, plaintiff cannot proceed until he delivers the bill; defendant is not obliged to serve the final order. Rowan *v.* Merritt, 9 Wend. (N. Y.) 443.

A pleader filed by a defendant against a co-defendant without separate service may be disregarded. Holt *v.* Chandler, (Tex. Civ. App. 1895) 29 S. W. 532.

In Louisiana an answer containing a demand in reconvention need not be served. Huppenbauer *v.* Durlin, 26 La. Ann. 540; Hunter *v.* Spurlock, 3 La. 97, 22 Am. Dec. 165.

46. Sanders *v.* Sanders, 31 S. C. 604, 9 S. E. 813; Kinney *v.* Beaver, 140 Fed. 792, holding that the court may, in its discretion, relieve a party from the consequence of his failure to serve a copy of a pleading filed by him on the opposite party or his attorney as required by rule of court, where a reasonable excuse is shown, as that it was through inadvertence of his counsel, and where the pleading was subsequently served.

47. Carter *v.* Penn, 79 Ga. 747, 4 S. E. 896.

Payment of costs as a condition precedent to the right to file and serve a pleading may be waived by the party. Pierce *v.* Palmer, 12 Ont. Pr. 275.

48. Wolf *v.* Binder, 10 Pa. Co. Ct. 108.

49. Osborn *v.* Chambers, 4 La. Ann. 296; Hadwin *v.* Home Mut. Ins. Co., 13 Mo. 473.

50. See the statutes of the different states. And see Stokes *v.* Schildknecht, 85 N. Y. App. Div. 602, 83 N. Y. Suppl. 358.

unless a place is designated where the service shall be made.[51] If a demand is made too late the court may, nevertheless, order service in its discretion upon proper application made.[52] Where due service has been made upon a party, his attorney cannot subsequently, by filing a notice of retainer, obtain a duplicate service upon himself.[53] A subsequent change of venue does not invalidate a service once properly made.[54] The fact that no original is on file does not necessarily invalidate the service of a copy,[55] unless there is a statute or rule to the contrary.[56] In default of service when required, the party may move to dismiss the action,[57] or may move for an order of reference to assess damages.[58]

5. Service of Amended Pleadings.[59] A copy of an amended pleading should ordinarily be served in cases where service of a copy of the original is necessary,[60] unless the amendment is a mere matter of form,[61] or is made with the consent of the opposite party,[62] or at the trial.[63] Statutes frequently contain an express requirement that copies of amended pleadings shall be served on the adverse party or his attorney;[64] but such a requirement only applies to substantial amendments,[65] and it does not apply to amendments made by order of the court.[66] In the absence of an affirmative showing to the contrary it will be presumed when such service is necessary, that an amended pleading was properly served.[67] Service of an amended pleading is not rendered invalid because of a previous failure to serve the original,[68] but service of an amendment constitutes no substitute for service

51. Lyon *v.* Cloud, 7 Iowa 1; Stokes *v.* Schildknecht, 85 N. Y. App. Div. 602, 83 N. Y. Suppl. 358; Van Zandt *v.* Van Zandt, 10 N. Y. Suppl. 200, 23 Abb. N. Cas. 328; Skinner *v.* Skinner, 9 N. Y. Suppl. 60, 23 Abb. N. Cas. 327; Walsh *v.* Kursheedt, 8 Abb. Pr. (N. Y.) 418; Ferris *v.* Soley, 23 How. Pr. (N. Y.) 422; Bennett *v.* Dellicker, 3 Code Rep. (N. Y.) 117.

52. Stokes *v.* Schildknecht, 85 N. Y. App. Div. 602, 83 N. Y. Suppl. 358; Bennett *v.* Dellicker, 3 Code Rep. (N. Y.) 117.

53. Kleecke *v.* Styles, 3 Johns. (N. Y.) 250.

54. Prescott *v.* Roberts, 6 Cow. (N. Y.) 45.

55. Irwin *v.* Deyo, 7 Cow. (N. Y.) 153; Smith *v.* Wells, 6 Johns. (N. Y.) 286. And see Procter *v.* Young, 1 U. C. Q. B. 391, holding this to be an irregularity which was waived by failure to make prompt objection.

56. Brackett *v.* Simonds, 1 Hall (N. Y.) 86.

57. Luce *v.* Trempert, 9 How. Pr. (N. Y.) 212; Baker *v.* Curtiss, 7 How. Pr. (N. Y.) 478.

58. Skinner *v.* Skinner, 23 Abb. N. Cas. (N. Y.) 327.

59. Service or notice of amended pleadings before default taken see Judgments, 23 Cyc. 742.

60. *California.*— Thompson *v.* Johnson, 60 Cal. 292.

Louisiana.— State *v.* Burke, 37 La. Ann. 196; Clark *v.* Holbrook, 14 La. Ann. 573; Levy *v.* Weber, 8 La. Ann. 439; Ursuline Nuns *v.* Depassau, 7 Mart. N. S. 645.

New York.— Meyer *v.* North River Constr. Co., 53 N. Y. Super. Ct. 387.

South Carolina.— Gness *v.* Southern R. Co., 73 S. C. 264, 53 S. E. 421.

Texas.— Erskine *v.* Wilson, 27 Tex. 117; De Watt *v.* Snow, 25 Tex. 320.

See 39 Cent. Dig. tit. "Pleading," § 1107.

In Georgia it is unnecessary to serve copies of amendments to pleadings. Miller *v.* Georgia R. Bank, 120 Ga. 17, 47 S. E. 525.

61. Curtis *v.* Bunnell, etc., Inv. Co., 6 Ida. 298, 55 Pac. 659; Swilley *v.* Low, 13 La. Ann. 412; Merrill *v.* Lattimore, 12 Rob. (La.) 138; Sinnet *v.* Mulhollan, 3 Mart. (La.) 398; Lewis *v.* Dennis, 54 Tex. 487.

62. Freeland *v.* Lanfear, 2 Mart. N. S. (La.) 257.

63. Lane *v.* Hayward, 28 Hun (N. Y.) 583; Mashke *v.* Van Doren, 16 Wis. 319.

64. See the statutes of the different states. And see McDonald *v.* Hallicy, 1 Colo. App. 303, 29 Pac. 24; Mercier *v.* Pearlstone, 7 Abb. Pr. (N. Y.) 325; Nodine *v.* Richmond, 48 Oreg. 527, 87 Pac. 775; Western Union Telegraph Co. *v.* Campbell, 41 Tex. Civ. App. 204, 91 S. W. 312.

65. McVey *v.* Security Mut. L. Ins. Co., 118 N. Y. App. Div. 466, 103 N. Y. Suppl. 1056 (holding that where plaintiff, with his motion papers and in his notice of motion, stated fully the exact language of the prayer for equitable relief which he desired to have inserted in the complaint in the place of a prayer for a money judgment, the only purpose of the amendment being to get the case on the equity calendar for trial and to remove it from the law calendar, he is not required to serve a copy of the proposed amended complaint with his motion papers); Waltham Mfg. Co. *v.* Brady, 67 N. Y. App. Div. 102, 73 N. Y. Suppl. 540.

66. Maionchi *v.* Nicholini, 1 Cal. App. 690, 82 Pac. 1052; J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. D. 530, 91 N. W. 82. See also McDaniel *v.* Atlantic Coast Line R. Co., 76 S. C. 15, 56 S. E. 543.

67. San Diego Sav. Bank *v.* Goodsell, 137 Cal. 420, 70 Pac. 299.

68. Field *v.* Morse, 8 How. Pr. (N. Y.) 47. But *compare* Powers *v.* Braly, 75 Cal. 237, 17 Pac. 197.

of the pleading itself.[69] Default in answering the original pleading will not excuse failure to serve a copy of an amended pleading.[70]

6. Method of Service — a. In General. The method of serving pleadings is usually regulated by statute.[71]

b. On Attorney of Adverse Party. It is commonly provided by statute that when a party has an attorney in the action, service may or shall be made upon him.[72] If the attorney sought to be served is present in his office, a valid service can be made only by delivering him a copy personally.[73] If he is absent the statutes frequently allow the pleading to be left in a conspicuous place in his office,[74] or with his clerk.[75] If an unlawful entry into the office be made after office hours, and the pleading left therein, this does not constitute a good service.[76]

c. Service by Mail. Service by mail is usually provided for by statute.[77] The paper must be mailed in an envelope or sealed wrapper,[78] directed to the proper person and place,[79] and the postage prepaid,[80] or the service will be invalid. Where the paper is deposited in the post-office designated by statute, correctly addressed and the postage paid, the service is deemed complete, and the party to whom it is addressed takes the risks of the failure of the mail; [81] but where the paper is deposited in some other post-office than the one designated the attorney making the service takes the risks of its being received in time.[82] Where the paper actually comes to the hands of the person to be served within the time required by law, it is immaterial where it is mailed.[83] The day the paper is mailed and not the day it is received is the day of service,[84] and the service is good as of that day even if the paper is deposited in the post-office after the mail has closed.[85] A direction on the envelope to return to the sender if not called for within a cer-

69. Beutell *v.* Oliver, 89 Ga. 246, 15 S. E. 307.

70. Palmer *v.* Salisbury, 38 N. Y. App. Div. 139, 56 N. Y. Suppl. 637.

71. See the statutes of the different jurisdictions. And see January *v.* Sacramento County Super. Ct., 73 Cal. 537, 15 Pac. 108; Cochran *v.* Pyle, 10 Pa. Co. Ct. 198.

Where the prescribed method cannot be followed the best practicable substitute may be resorted to. Beattie *v.* Horan, 13 Pa. Co. Ct. 665; Falconer *v.* Ucoppell, 2 Code Rep. (N. Y.) 71.

72. See the statutes of the different jurisdictions. And see Mercier *v.* Pearlstone, 7 Abb. Pr. (N. Y.) 325; Lord *v.* Vandenburgh, 15 How. Pr. (N. Y.) 363; O'Neill *v.* Everett, 3 Ont. Pr. 98; Clemow *v.* Her Majesty's Ordnance, 5 U. C. Q. B. 458.

Where three plaintiffs appeared by one attorney and a fourth by another attorney, both of whom signed the complaint, service of the answer upon one of the attorneys was sufficient as to all plaintiffs. Muller *v.* Philadelphia, 114 N. Y. App. Div. 138, 99 N. Y. Suppl. 618.

Appearance before service.— But a valid service cannot be had on an attorney before he has appeared in the cause. Powers *v.* Braly, 75 Cal. 237, 17 Pac. 197.

One who appears by the record to be the attorney of a party may properly be served as such. Roussin *v.* Stewart, 33 Cal. 208; Roush *v.* Fort, 3 Mont. 175.

73. Union Nat. Bank *v.* Benjamin, 61 Wis. 512, 21 N. W. 523.

74. January *v.* Sacramento County Super. Ct., 73 Cal. 537, 15 Pac. 108; Mies *v.* Thompson, 53 Minn. 273, 55 N. W. 44.

75. Smith *v.* Aylesworth, 24 How. Pr. (N. Y.) 33.

76. Vail *v.* Lane, 67 Barb. (N. Y.) 281.

77. See the statutes of the different jurisdictions. And see Bucklin *v.* Buffalo, etc., R. Co., 41 Misc. (N. Y.) 557, 85 N. Y. Suppl. 114 [*affirmed* without opinion in 93 N. Y. App. Div. 607, 87 N. Y. Suppl. 1129]; Whitney *v.* Haggerty, 7 N. Y. St. 766.

78. Fitzgerald *v.* Dakin, 101 N. Y. App. Div. 261, 91 N. Y. Suppl. 1003.

79. Woodward *v.* Whitescarver, 6 Iowa 1; Ferriss *v.* Merrill, 3 How. Pr. (N. Y.) 20.

80. Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246; Woods *v.* Hartshorn, 2 How. Pr. (N. Y.) 71; Bross *v.* Nicholson, 1 How. Pr. (N. Y.) 158; Anonymous, 1 Hill (N. Y.) 217.

81. Van Aernam *v.* Winslow, 37 Minn. 514, 35 N. W. 381; Hurd *v.* Davis, 13 How. Pr. (N. Y.) 57; Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246.

82. Peebles *v.* Rogers, 5 How. Pr. (N. Y.) 208 [*distinguishing* Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246].

83. Van Aernam *v.* Winslow, 37 Minn. 514, 35 N. W. 381; Peebles *v.* Rogers, 5 How. Pr. (N. Y.) 208 [*distinguishing* Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246].

84. Schenck *v.* McKie, 4 How. Pr. (N. Y.) 246; Radcliff *v.* Van Benthuysen, 3 How. Pr. (N. Y.) 67; Brown *v.* Briggs, 1 How. Pr. (N. Y.) 152; Lawler *v.* Saratoga Mut. F. Ins. Co., 2 Code Rep. (N. Y.) 114; Gibson *v.* Murdock, 1 Code Rep. (N. Y.) 103; Smith *v.* Durkee, 20 Wend. (N. Y.) 684; Clyde *v.* Johnson, 4 N. D. 92, 58 N. W. 512.

85. Noble *v.* Trotter, 4 How. Pr. (N. Y.) 322.

tain number of days does not invalidate the service unless it is shown that by a return in obedience to the direction the party failed to receive the paper.[86]

7. Sufficiency of Copy Served — a. In General. The copy served must be a correct one.[87] If the original has the seal of the court, the copy served must show that fact;[88] if the original is verified by affidavit, the copy must contain the complete affidavit, including the name of the officer before whom it was taken;[89] and the copy must contain the proper caption.[90] A party has a right to consider the copy served upon him as correct, and it is that, and not the original filed, which he is called upon to answer.[91] An attested copy need not be served unless expressly required.[92] If service of an original paper is required, service of a copy will not suffice.[93] The court may in its discretion sustain an application for leave to serve an amended copy of a pleading, if the one served is imperfect.[94]

b. Remedy For Failure to Serve Sufficient Copy. By rule of court if a copy is served which is deemed insufficient, it must be returned immediately, or a notice given that it will not be accepted, so as to give the opposite attorney the opportunity of correcting the mistake,[95] and the objections to the pleading must be pointed out specifically.[96] But if the attorney upon whom it is served retains it and gives no notice of the defect, he is to be considered as waiving the objection and electing to consider it as properly amended.[97] Where papers are to be returned for irregularity, if there is no attorney's name on them, they should be returned to the party unless the attorney is known.[98] A paper once returned need not be returned again if it is again served.[99] If the paper is improperly refused and returned, a motion to require an acceptance of service may be made.[1]

8. Proof of Service. The return or affidavit of service should show all the facts making the service sufficient under the statute,[2] and it should sufficiently

86. Gaffney *v.* Bigelow, 2 Abb. N. Cas. 311 [*reversing* 48 How. Pr. 475].

87. Lambeth *v.* Dosson, 16 La. 346. See also Gould *v.* Smith, 30 Conn. 88.

A mere clerical error in the copy served which does not mislead the party or affect his substantial rights will not vitiate the service. Fraser *v.* Oakdale Lumber, etc., Co., 73 Cal. 187, 14 Pac. 829.

The omission of the attorney's signature on the copy served does not invalidate the service. Crooks *v.* Davis, 5 U. C. Q. B. O. S. 141.

The court may allow an amendment to correct a defective copy. Thomas *v.* Baillo, 7 La. 410.

A motion to set aside the service of a complaint is proper where there is a variance between the copy and the summons and original complaint. Bark *v.* Carroll, 33 Misc. (N. Y.) 694, 68 N. Y. Suppl. 1051.

88. Stegman *v.* Wills, 3 Pa. Dist. 252.

89. Graham *v.* McCoun, 5 How. Pr. (N. Y.) 353.

90. Lukis *v.* Allen, 45 La. Ann. 1447, 14 So. 186.

91. Guarino *v.* Fireman's Ins. Co., 44 Misc. (N. Y.) 218, 88 N. Y. Suppl. 1044; Welsbach Commercial Co. *v.* Popper, 59 N. Y. Suppl. 1016; Hunt *v.* Miller, 101 Wis. 583, 77 N. W. 874.

92. Rand *v.* Rand, 4 N. H. 267.

93. Robinson *v.* Sinclair, 1 How. Pr. (N. Y.) 106; McCartney *v.* Betts, 1 How. Pr. (N. Y.) 73; Wirts *v.* Norton, 25 Wend. (N. Y.) 699.

94. Heyward *v.* Williams, 48 S. C. 564, 26 S. E. 797.

95. Williams *v.* Sholto, 4 Sandf. (N. Y.) 641; Wilkin *v.* Gilman, 13 How. Pr. (N. Y.) 225; Levi *v.* Jakeways, 4 How. Pr. (N. Y.) 126; Cortland County Mut. Ins. Co. *v.* Lathrop, 2 How. Pr. (N. Y.) 146; Wright *v.* Forbes, 1 How. Pr. (N. Y.) 240; Sands *v.* Bullock, 20 Wend. (N. Y.) 680.

A delay of two months (Wright *v.* Forbes, 1 How. Pr. (N. Y.) 240), of a week (Stillman *v.* Whitney, 1 How. Pr. (N. Y.) 243), of nineteen days (White *v.* Cummings, 3 Sandf. (N. Y.) 716), of five days (Paddock *v.* Palmer, 32 Misc. (N. Y.) 426, 66 N. Y. Suppl. 743), or of three days after accepting payment of costs (Lange *v.* Hirsch, 38 N. Y. App. Div. 176, 56 N. Y. Suppl. 649) is too long.

96. Snape *v.* Gilbert, 13 Hun (N. Y.) 494; Wilkin *v.* Gilman, 13 How. Pr. (N. Y.) 225.

97. Williams *v.* Sholto, 4 Sandf. (N. Y.) 641.

98. Taylor *v.* New York, 11 Abb. Pr. (N. Y.) 255.

If the party is a municipality having a corporation counsel the papers should be returned to such counsel. Taylor *v.* New York, 11 Abb. Pr. (N. Y.) 255.

99. Jacobs *v.* Marshall, 6 Duer (N. Y.) 689; Richardson *v.* Brooklyn City, etc., R. Co., 22 How. Pr. (N. Y.) 368.

1. Howard *v.* Curran, 8 N. Y. Civ. Proc. 262.

2. Harris *v.* Alexander, 1 Rob. (La.) 30, holding that service of a copy of the petition must appear of record and that no other evidence than the sheriff's return can be received to prove it. Hogs Back Consol. Min. Co. *v.* New Basil Consol. Min. Co., 63 Cal. 121; Woodward *v.* Whitescarver, 6 Iowa 1.

identify the papers served.[3] It must be certain and unequivocal,[4] but mere clerical errors will not vitiate it.[5] A written acceptance of service is sufficient to show that proper service was made.[6]

9. Time For Filing and Service. The time when pleadings must be filed and served is a matter which is usually regulated in each jurisdiction by statute or rule of court.[7] If the time is not fixed by statute or rule, the pleading must be filed within a reasonable time, and what is reasonable is a question addressed to the discretion of the court.[8] Such a statute or rule is merely directory, and the time limited may be extended by the court within its discretion on terms, good cause being shown.[9] But unless done with the court's consent a pleading is filed or served too late after the expiration of the time prescribed by statute or rule,[10]

3. Board *v.* Board, 4 Abb. Pr. (N. Y.) 295.
4. Auten *v.* Fen, 10 N. J. L. 237.
5. Hammond *v.* Baker, 39 Mich. 472.
6. Coby *v.* Ibert, 6 Misc. (N. Y.) 16, 25 N. Y. Suppl. 998 [*affirmed* in 141 N. Y. 586, 36 N. E. 739]; Jewett *v.* Miller, 19 Tex. 290.
7. See the statutes and court rules of the different jurisdictions. And see the following cases:

Alabama.— Trammell *v.* Vane, 62 Ala. 301.

Illinois.— Johnson *v.* Noble, 37 Ill. App. 314.

Michigan.— Reid *v.* Benzie Cir. Judge, 115 Mich. 418, 73 N. W. 391; Howe *v.* Maltz, 35 Mich. 500.

New Jersey.—Hoffman *v.* Lowell, 58 N. J. L. 553, 34 Atl. 750.

New York.— Muller *v.* Philadelphia, 114 N. Y. App. Div. 138, 99 N. Y. Suppl. 618; Bucklin *v.* Buffalo, etc., R. Co., 41 Misc. 557, 85 N. Y. Suppl. 114 [*affirmed* in 93 N. Y. App. Div. 607, 87 N. Y. Suppl. 1129]; Sweet *v.* Sanderson Bros. Steel Co., 6 N. Y. Civ. Proc. 69; Richardson *v.* McDougall, 19 Wend. 80; Hughes *v.* Patton, 12 Wend. 234; Sabin *v.* Wood, 10 Johns. 218.

Pennsylvania.— Ogden *v.* Lukens, 12 Pa. Co. Ct. 588; Wayne *v.* Duffy, 1 Phila. 367.

Canada.— Barber *v.* Grand Trunk R. Co., 8 Quebec Pr. 8.
8. Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.
9. *California.*— Wood *v.* Fobes, 5 Cal. 62.

Missouri.— Byers *v.* Jacobs, 164 Mo. 141, 64 S. W. 156; Austin *v.* Boyd, 28 Mo. App. 52.

New York.— Martin *v.* McCurdy, 120 N. Y. App. Div. 665, 105 N. Y. Suppl. 474; Tracy *v.* Lichtenstadter, 113 N. Y. App. Div. 754, 99 N. Y. Suppl. 331.

Oregon.— McFarlane *v.* McFarlane, 45 Oreg. 360, 77 Pac. 837.

Pennsylvania.— American Mfg. Co. *v.* S. Morgan Smith Co., 25 Pa. Super. Ct. 176.

South Dakota.— Scarles *v.* Lawrence, 8 S. D. 11, 65 N. W. 34.

Utah.— Cutler *v.* Haycock, 32 Utah 354, 90 Pac. 897.

Wisconsin.— Wallis *v.* White, 58 Wis. 26, 15 N. W. 767.

England.—Gibbings *v.* Strong, 26 Ch. D. 66, 50 L. T. Rep. N. S. 578, 32 Wkly. Rep. 757; Eaton *v.* Storer, 22 Ch. D. 91, 48 L. T. Rep. N. S. 204, 31 Wkly. Rep. 488; Higginbottom *v.* Aynsley, 3 Ch. D. 288, 24 Wkly. Rep. 782; Grant *v.* Ridley, 7 Jur. 883, 12 L. J. C. P. 151, 5 M. & G. 201, 6 Scott N. R. 176, 44 E. C. L. 114; Canadian Oil Works *v.* Hay, 38 L. T. Rep. N. S. 549; Deakin *v.* Praed, 4 Taunt. 825.

Canada.— Miller *v.* Archibald, 33 Nova Scotia 189; Newcombe *v.* McLuhan, 11 Ont. Pr. 461; Filion *v.* Mussen, 5 Quebec Pr. 284.

See 39 Cent. Dig. tit. "Pleading," §§ 1011, 1012.

An order entered on the motion of one party allowing both parties additional time in which to plead is binding on the other party unless he excepts to it. Mecke *v.* Valleytown Mineral Co., 122 N. C. 790, 29 S. E. 781.

Leave obtained before expiration of time.— A rule of court requiring that leave to file after the time limited must be obtained before such time has expired is reasonable and within the power of the court. Rigdon *v.* Ferguson, 172 Mo. 49, 72 S. W. 504.

Leave to file a pleading containing allegations contradictory to evidence already introduced is properly refused. Kelly *v.* Burke, 132 Ala. 235, 31 So. 512.

An ex parte application is not sufficient to obtain an extension of time. Wigle *v.* Harris, 9 Ont. Pr. 276.

After an unreasonable delay in applying for leave to file or serve a pleading for which the time has expired, the application will be refused. Wilkins *v.* Bedford, 35 L. T. Rep. N. S. 622.
10. *Georgia.*— Moses *v.* Kittle, 103 Ga. 806, 30 S. E. 687.

Illinois.— Hamilton *v.* Beardslee, 51 Ill. 478; Kelley *v.* Inman, 4 Ill. 28.

Missouri.— Byers *v.* Jacobs, 164 Mo. 141, 64 S. W. 156.

New York.— McGown *v.* Leavenworth, 2 E. D. Smith 24; O'Brien *v.* Catlin, Code Rep. N. S. 273.

South Carolina.— Crane *v.* Lipscomb, 24 S. C. 430.

England.— Meehan *v.* Meehan, L. R. 14 Ir. 300; Webb *v.* Kerr, L. R. 14 Ir. 294.

Canada.— Snider *v.* Snider, 11 Ont. Pr. 34.

See 39 Cent. Dig. tit. "Pleading," §§ 1011, 1012.

Excusable delay.— Under N. Y. Code, § 128, requiring an answer to be served on plaintiff's attorney, if the attorney's office is closed and his dwelling-house is closed on the last day when service can be made, a service on him the next day, with notice of

and may be stricken out or set aside,[11] or judgment may be moved for,[12] unless the time has been extended by consent of the parties.[13] If an order is made extending the time to plead, and is subsequently vacated as irregular, the order affords no protection whatever, and the situation is the same as though no order had ever been made.[14] An order that a party plead "forthwith" means within twenty-four hours.[15] When the rule or statute does not prescribe the time within which a copy of the pleadings must be furnished after demand, it must be served within a reasonable time.[16] In computing the time for filing a pleading intervening Sundays are to be counted,[17] unless the time limited is less than a week,[18] or unless the last day falls on Sunday or a holiday.[19] The time of filing a pleading may be proved by the indorsement of the clerk thereon.[20]

10. Taking Pleadings From Files.[21] Pleadings when filed become a part of the record of the court and cannot be taken from the files without leave of court.[22] And it has been held that leave of court will not suffice, but that both parties to the action must consent thereto.[23] Leave to withdraw a pleading does not authorize the party to actually take it off the files; the effect of the order is simply to eliminate it as a pleading affecting the issue in the cause.[24] Notes annexed to a petition cannot be taken from the files without leaving copies, which will form part of the record.[25] A pleading once filed is presumed to remain on file and a withdrawal must be affirmatively shown.[26]

B. Lost or Destroyed Pleadings — 1. In General. When the original pleadings filed in a cause are lost or destroyed it is necessary that copies of such pleadings should be substituted.[27] And the court has the power to establish and

the facts, will be deemed regular. Lord *v.* Vandenburg, 15 How. Pr. (N. Y.) 363.

11. Tucker *v.* Carson, 110 Ga. 908, 36 S. E. 217; Wilson *v.* Noble, L. R. 11 Ir. 546; Clarke *v.* McEwing, 9 Ont. Pr. 281.

12. Norfolk, etc., R. Co. *v.* Coffey, 104 Va. 665, 51 S. E. 729, 52 S. E. 367; Potts *v.* Deane, L. R. 11 Ir. 396; Montagu *v.* England Land Corp., 56 L. T. Rep. N. S. 730.

Changing order of dismissal.— An order was made dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered, it was held that the action was at an end and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim. Whistler *v.* Hancock, 3 Q. B. D. 83, 47 L. J. Q. B. 152, 37 L. T. Rep. N. S. 639, 26 Wkly. Rep. 211. See also King *v.* Davenport, 4 Q. B. D. 402, 48 L. J. Q. B. 606, 27 Wkly. Rep. 798; Burke *v.* Rooney, 4 C. P. D. 226, 48 L. J. C. P. 601, 27 Wkly. Rep. 915.

If the pleading is actually delivered before the notice of motion for judgment, the party is not entitled to judgment. Graves *v.* Terry, 9 Q. B. D. 170, 51 L. J. Q. B. 464, 30 Wkly. Rep. 748; O'Connell *v.* O'Connell, L. R. 6 Ir. 470.

13. Goodrich *v.* Alfred, 72 Conn. 257, 43 Atl. 1041; Ambroise *v.* Evelyn, 11 Ch. D. 759, 48 L. J. Ch. 686, 27 Wkly. Rep. 639.

Consent by part of the defendants to an extension of time will deprive the other defendants of the right to have the action dismissed as to them. Ambroise *v.* Evelyn, 11 Ch. D. 759, 48 L. J. Ch. 686, 27 Wkly. Rep. 639.

14. W. M. Ritter Lumber Co. *v.* Bacon, 36 Misc. (N. Y.) 862, 74 N. Y. Suppl. 923.

15. Moffat *v.* Dickson, 3 Colo. 313.

16. Littlefield *v.* Murin, 4 How. Pr. (N. Y.) 306, holding that twenty-four hours is a reasonable time.

Twenty days is a reasonable time. Luce *v.* Trempert, 9 How. Pr. (N. Y.) 212; Munson *v.* Willard, 5 How. Pr. (N. Y.) 263; Colvin *v.* Bragden, 5 How. Pr. (N. Y.) 124.

17. Heard *v.* Phillips, 101 Ga. 691, 31 S. E. 216, 44 L. R. A. 369.

18. Caupfield *v.* Cook, 92 Mich. 626, 52 N. W. 1031; Drake *v.* Andrews, 2 Mich. 203.

19. Carothers *v.* Wheeler, 1 Oreg. 194. See also Conklin *v.* Marshalltown, 66 Iowa 122, 23 N. W. 294; Reynolds *v.* Palen, 13 N. Y. Civ. Proc. 200, 20 Abb. N. Cas. 11.

If the last day falls on a holiday, the time will be deemed to include the first day thereafter when the court is open. McKibbin *v.* McClelland, [1894] 2 Ir. 654.

20. Powers *v.* Wright, 39 Mo. App. 205.

21. See Records.

22. O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 6 L. R. A. 719, 5 L. R. A. 364. And see Jeffries *v.* McLean, 12 Mo. 538.

After exception taken to answer.— An answer cannot be taken from the files after exception is taken to it. Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

23. Coles *v.* Perry, 7 Tex. 109.

24. Wade *v.* Doyle, 17 Fla. 522; Wyles *v.* Berry, 116 Ky. 377, 76 S. W. 126, 25 Ky. L. Rep. 601.

25. Gray *v.* Commercial Bank, 1 Rob. (La.) 533.

26. Thomas *v.* Brown, 1 Stew. (Ala.) 412.

27. *Alabama.*— Glover *v.* Rainey, 2 Ala. 727.

Georgia.— Hicks *v.* Marshall, 67 Ga. 713, entire trial illegal.

substitute copies and proceed with the cause,[28] or to allow the parties to plead *de novo*.[29] And the substitution of a copy by agreement, without any order from the court is equally proper,[30] but a substitute filed without either leave or agreement is no part of the record.[31] Subsequent approval of the substitution of a copy is, however, as effective as previous authority.[32] A substituted pleading takes the place of the original as of the date of the original filing.[33]

2. TIME FOR SUBSTITUTION. The substitution may be made at any time, even at the close of the evidence and argument,[34] or *nunc pro tunc* after judgment at the same term, while the cause remains in the same court.[35]

3. PROCEDURE TO EFFECT SUBSTITUTION. The substitution of copies for original pleadings which have been lost or destroyed is sometimes provided for and regulated by statute.[36] In some jurisdictions notice of the application for leave to file a substituted pleading must be given to the opposite party,[37] but in others such notice is not required.[38] The court must be satisfied of the existence of the original files before making an order of substitution.[39] If both parties do not

Mississippi.— Armstrong *v.* Barton, 42 Miss. 506.

Missouri.— Brown *v.* King, 39 Mo. 380.

Nebraska.— Feder *v.* Solomon, 34 Nebr. 313, 51 N. W. 825; Grimison *v.* Russell, 11 Nebr. 469, 9 N. W. 647, both holding that it was reversible error for the court to allow a case to be tried where all the pleadings were lost.

See 39 Cent. Dig. tit. "Pleadings," § 1026.

Reinstatement of judgment.— The papers and pleadings in a case, and the record of the judgment, were stolen from the files of the court. It was held that, in reinstating the judgment, it was not necessary to reinstate the pleadings or to perpetuate the evidence of their existence or contents. Cox *v.* Stout, 85 Ind. 422.

28. *Alabama.*— Glover *v.* Rainey, 2 Ala. 727; Dozier *v.* Joyce, 8 Port. 303.

Georgia.—Allen *v.* Mutual Loan, etc., Co., 86 Ga. 74, 12 S. E. 265; Ætna Ins. Co. *v.* Sparks, 62 Ga. 187; Eagle, etc., Mfg. Co. *v.* Bradford, 57 Ga. 249; Beall *v.* Blake, 13 Ga. 217, 58 Am. Dec. 513.

Illinois.— Hartford F. Ins. Co. *v.* Vanduzor, 49 Ill. 489.

Indiana.— Sidner *v.* Mitchell, 18 Ind. 224.

Kentucky.— See Suggett *v.* Commonwealth Bank, 8 Dana 201.

Louisiana.— Moulton *v.* Hodges, 13 La. Ann. 38.

Mississippi.— Bowman *v.* McLaughlin, 45 Miss. 461.

Missouri.— Brown *v.* King, 39 Mo. 380; Dutro *v.* Walter, 31 Mo. 516.

New Mexico.— Lund *v.* Ozanne, (1906) 84 Pac. 710.

Texas.— Turner *v.* Lambeth, 2 Tex. 365.

Virginia.— See Dismal Swamp Land Co. *v.* McCauley, 85 Va. 16, 6 S. E. 697.

See 39 Cent. Dig. tit. "Pleading," § 1027.

But see Kinne *v.* Plumb, 1 Tyler (Vt.) 20, holding that the court cannot require a party to appear to a new writ and declaration after the loss of the original.

Refusal to supply.— If a defendant, who is furnished with the opportunity to supply his own pleadings, fails or refuses to do so, the court may permit plaintiff to do it, and proceed to trial, and defendant in such case shall not be heard to complain. Bowman *v.* McLaughlin, 45 Miss. 461.

In Texas, under the system there employed of amending by substitution, a lost pleading cannot be supplied by mere amendment, without affidavit or certificate. Newman *v.* Dodson, 61 Tex. 91.

29. Archer *v.* Spillman, 2 Ill. 553.

30. Chappell *v.* Bates, 56 Conn. 568, 16 Atl. 673.

31. Burkam *v.* McElfresh, 88 Ind. 223.

32. Rice *v.* Bolton, 126 Iowa 654, 100 N. W. 634, 102 N. W. 509.

33. Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

34. Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

35. Williams *v.* Powell, 9 Port. (Ala.) 493; Cox *v.* Brackett, 41 Ill. 222; Chambers *v.* Astor, 1 Mo. 327. *Compare* Sharpe *v.* Dillman, 77 Ind. 280.

36. See the statutes of the different states. And see the following cases:

Florida.— Florida Cent. R. Co. *v.* Bostwick, 53 Fla. 124, 44 So. 31.

Kentucky.— Tolle *v.* Alley, (1893) 24 S. W. 113.

Ohio.— Marks *v.* Harris, 9 Ohio Dec. (Reprint) 332, 12 Cinc. L. Bul. 184.

Tennessee.— Bates *v.* Russell, 5 Sneed 222.

West Virginia.— Stewart *v.* Stewart, 40 W. Va. 65, 20 S. E. 862.

37. People *v.* Cazalis, 27 Cal. 522 [*distinguishing* Benedict *v.* Cozzens, 4 Cal. 381]; Harley *v.* Harley, 67 Ill. App. 138; Brown *v.* King, 39 Mo. 380. *Compare* St. Louis, etc., R. Co. *v.* Holladay, 131 Mo. 440, 33 S. W. 49.

38. Wilkerson *v.* Branham, 5 Ala. 608; Williams *v.* Powell, 9 Port. (Ala.) 493 (holding that it would be proper to require notice); Marks *v.* Harris, 9 Ohio Dec. (Reprint) 332, 12 Cinc. L. Bul. 184.

39. Strange *v.* Barrow, 65 Ga. 23, 25 (in which the court said: "We are not authorized to say what shall or shall not be sufficient evidence to satisfy the judge that an office paper existed and has been lost, but we do not think, under the broad and liberal rule upon that subject, that either an entry upon the bench docket or an order on the

concede that the substituted copies are substantially accurate, the court will hear testimony on the question and determine from the evidence whether the proposed copies should be allowed on the files.[40] Under the court's power to authorize amendments, a substituted pleading may be allowed with an additional count.[41] But if new issues are presented time should be given to meet them.[42] Parol evidence of the contents of a lost pleading filed in a former suit is admissible.[43]

C. Withdrawal of Pleadings — 1. In General. Where a party to an action has pleaded, his pleadings cannot ordinarily be withdrawn without leave of court first obtained.[44] The matter is largely within the discretion of the court,[45] and the application should be made with due diligence,[46] and good reasons for granting the same presented.[47]

minutes are the only methods of showing that an amendment existed and was filed"); Armstrong *v.* Barton, 42 Miss. 506 (holding that the mere statement of the clerk that the pleadings have been filed and lost is not sufficient evidence of their existence).

40. Gates *v.* Bennett, 3 Ark. 475; Brashear *v.* Rouse, 14 Bush (Ky.) 295; Hamilton, etc., Co. *v.* Western Union Tel. Co., 35 Tex. Civ. App. 602, 81 S. W. 58.

Proof required.— "The court should, in the first place, propose to the parties to permit such a paper to be filed as they may agree on — if they will not, or cannot agree, then the court should have recourse to such proof as may satisfy it that the paper offered, corresponded so nearly with the paper lost, that the adverse party could not be prejudiced; but in no case should a substitute be allowed, where this proof cannot be made." Williams *v.* Powell, 9 Port. (Ala.) 493, 496.

A clerical error or misdescription in the substituted copy is immaterial. Pickett *v.* Doe, 74 Ala. 122.

In case the original is found it may be treated as a separate count if it differs from the copy substituted. Catherwood *v.* Kohn, 7 Pa. St. 392.

41. Turner *v.* Lambeth, 2 Tex. 365. But *compare* Bishop *v.* Hampton, 19 Ala. 792, holding that when the petition upon which a sale of land belonging to a decedent was decreed by the orphans' court is lost, and the record shows that the grounds upon which the sale was decreed were that the estate was solvent, and that it would be of infinite benefit to the heirs to sell the land, a petition, alleging the additional ground that the land could not be equally, fairly, and beneficially divided among the heirs at law, cannot be substituted for that which is lost.

42. Fremont, etc., R. Co. *v.* Marley, 25 Nebr. 138, 40 N. W. 948, 13 Am. St. Rep. 482.

43. Schwartz *v.* Osthimer, 4 Ind. 109.

44. Conradi *v.* Evans, 3 Ill. 185; Cutler *v.* Wright, 22 N. Y. 472; Smith *v.* Laird, 44 Hun (N. Y.) 530; Cooke *v.* Richards, 11 Heisk. (Tenn.) 711. See also Tudor *v.* Ebner, 109 N. Y. App. Div. 521, 96 N. Y. Suppl. 392.

A demurrer cannot be withdrawn without leave of court and whether such leave shall be granted or not is within the discretion of the trial court. National Contracting Co. *v.* Hudson River Water Power Co., 110 N. Y. App. Div. 133, 97 N. Y. Suppl. 92, 35 N. Y. Civ. Proc. 285.

Notice of application for leave to withdraw. — Under Colo. Code, §§ 397, 398, 399, notice of the withdrawal of a demurrer and the filing of an answer and cross demand is necessary. Mallan *v.* Higenbotham, 10 Colo. 264, 15 Pac. 352. An order permitting plaintiff to withdraw one of the items constituting his cause of action, being more in the nature of an order to amend than an order to discontinue, may be granted without notice of motion to defendant. Latimer *v.* Sullivan, 37 S. C. 120, 15 S. E. 798.

Withdrawal before issue joined.— A plea may be withdrawn by the party pleading, before issue joined, of course, without leave of the court. Billings *v.* Cook, 1 How. Pr. (N. Y.) 67.

If defendant has put in several pleas, he may withdraw one of them without leave at any time. Vuyton *v.* Brenell, 28 Fed. Cas. No. 17,026, 1 Wash. 467.

Abandonment.— A pleading, delivered to the clerk, but never actually filed, may be abandoned. Grand Lodge A. O. U. W. *v.* Bollman, 22 Tex. Civ. App. 106, 53 S. W. 829.

45. *Alabama.*— Wager Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949.

Illinois.— New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221.

Indiana.— Aurora *v.* Cobb, 21 Ind. 492; Burroughs *v.* Hunt, 13 Ind. 178; Sanders *v.* Johnson, 6 Blackf. 50, 36 Am. Dec. 564.

Iowa.— Gross *v.* Feehan, 110 Iowa 163, 81 N. W. 235; Bowman *v.* Chicago, etc., R. Co., 86 Iowa 490, 53 N. W. 327.

Maryland.— Mitchell *v.* Smith, 4 Md. 403.

Nebraska.— Edney *v.* Baum, 70 Nebr. 159, 97 N. W. 252.

Pennsylvania.— Russel *v.* Skipwith, 1 Serg. & R. 310.

Rhode Island.— O'Connell *v.* King, 26 R. I. 544, 59 Atl. 926; O'Reilly *v.* New York etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719.

South Carolina.— Bell *v.* Hutchinson, 2 McCord 409.

Texas.— Puckett *v.* Waco Abstract, etc., Co., 16 Tex. Civ. App. 329, 40 S. W. 812.

See 39 Cent. Dig. tit. "Pleading," § 1038.

46. Harrison *v.* Tillinghast, 3 Kulp (Pa.) 270.

47. Patterson *v.* Mercer, 23 Ind. 16; Brown *v.* Fish, 40 Misc. (N. Y.) 573, 82 N. Y.

2. Conditions on Granting Leave. Leave to withdraw a pleading will usually be given, where the other party will not be prejudiced,[48] upon such terms as may be just.[49] Thus, it may be made a condition of granting leave that the accrued costs, in whole or in part be paid,[50] that defects in a prior pleading be corrected,[51] that a valid plea be filed,[52] or that the party agree to be ready for trial at a certain time.[53]

3. Time of Withdrawal. As to the time when a pleading may be withdrawn there is no fixed rule.[54] The withdrawal of a pleading has been allowed on the trial[55] after the other party has demurred to it;[56] after the report of an auditor has been filed,[57] and after the cause has been remanded by the appellate

Suppl. 939; Finch *v.* Pindon, 19 Abb. Pr. (N. Y.) 96; Baltimore, etc., R. Co. *v.* Camp, 81 Fed. 807, 26 C. C. A. 626.

48. Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395.

49. McKay *v.* Hamilton, 2 Nova Scotia 153.

50. Rixford *v.* Wait, 11 Pick. (Mass.) 339; Tudor *v.* Ebner, 109 N. Y. App. Div. 521, 96 N. Y. Suppl. 392; Napier *v.* Lipman, Riley (S. C.) 295; Krouse *v.* Sprogell, 14 Fed. Cas. No. 7,940, 1 Cranch C. C. 78. See also Taylor *v.* Pope, 3 Ala. 190.

51. Williams *v.* Casey, 4 Bibb (Ky.) 300.

52. Surlott *v.* Pratt, 3 A. K. Marsh. (Ky.) 174.

53. Atkins *v.* Gladwish, 27 Nebr. 841, 44 N. W. 37.

54. *Alabama.*— Crescent Brewing Co. *v.* Handley, 90 Ala. 486, 7 So. 912 (pending a trial by the court without a jury plaintiff should be allowed to withdraw his replication and to demur to the plea); Brown *v.* Massey, 3 Stew. 226 (plaintiff may be permitted at any time before the jury retire to withdraw his replication and demur to the plea).

Illinois.— Ayres *v.* Kelley, 11 Ill. 17 (a party to an action can, at any time before verdict, abandon any distinctive part or the whole of his cause of action, and as to this right the court has no discretion); Leigh *v.* Hodges, 4 Ill. 15 (where the general issue and several special pleas are pleaded, the general issue may be withdrawn after issue joined on that and the special pleas).

Iowa.— Byington *v.* Stone, 51 Iowa 317, 1 N. W. 647, holding that it is discretionary with the court to allow an answer which has been on file for two years to be withdrawn and a demurrer filed in its stead.

Kansas.— Bowen *v.* Pickett, 26 Kan. 219, by statute defendant has the right, at any time before the final submission of the cause, to withdraw a counter-claim or set-off.

Missouri.— Boatman's Sav. Inst. *v.* Forbes, 52 Mo. 201, a party to a suit may at any time withdraw a defense made by him thereto.

New Jersey.— Vanpelt *v.* Whitlock, 5 N. J. L. 810, after a cause, brought up by habeas corpus, has been noticed and carried to the circuit, but not tried, the plea of justification in slander may be withdrawn on motion, and the issue left on a plea of not guilty.

South Carolina.— Reynolds *v.* Quattlebum, 2 Rich. 140 (after a case has gone to the jury on the evidence, a defendant will not be allowed to withdraw his plea); Fisher *v.* Condy, 4 McCord 344 (the general issue cannot be withdrawn after a case has been on the issue docket for three years and *ne unques* executor pleaded); Lawrin *v.* Hanks, 3 McCord 558 (holding that a defendant who pleads a discount may, at any time before the verdict is read by the clerk, withdraw his discount).

See 39 Cent. Dig. tit. "Pleading," §§ 1039, 1040.

Time for withdrawing plea in bar and filing plea in abatement see Hawkins *v.* Armour Packing Co., 105 Ala. 545, 17 So. 16; Vaughan *v.* Robinson, 22 Ala. 519; Myers *v.* Wogan, 5 Pa. Co. Ct. 266 (holding that a delay of eight months is too long, when the case is docketed for trial); Yeatman *v.* Henderson, 30 Fed. Cas. No. 18,132, 1 Pittsb. (Pa.) 20 (holding that a plea in bar cannot be withdrawn, after the case has been prepared for trial, in order to file a plea in abatement).

Withdrawal at subsequent term.— After pleas are filed and an issue made up, the court ought not at a subsequent term to permit the withdrawal of them, without good cause. Robbins *v.* Treadway, 2 J. J. Marsh. (Ky.) 540, 19 Am. Dec. 152. See also Roberts *v.* Tennell, 4 Litt. (Ky.) 286. But the court has authority at the next term to correct an irregularity at rules, by allowing plaintiff to withdraw a defective replication and reply. Southall *v.* Exchange Bank, 12 Gratt. (Va.) 312.

55. *Iowa.*— Tribord *v.* Chicago, etc., R. Co., 82 Iowa 759, 48 N. W. 730.

Louisiana.— Walden *v.* Peters, 2 Rob. 331, 38 Am. Dec. 213.

Massachusetts.— Brown *v.* Woodbury, 183 Mass. 279, 67 N. E. 327.

New York.— Brown *v.* Butler, 58 Hun 511, 12 N. Y. Suppl. 810; Whitman *v.* Horton, 46 N. Y. Super. Ct. 531 [*affirmed* in 94 N. Y. 644].

Rhode Island.— O'Connell *v.* King, 26 R. I. 544, 59 Atl. 926.

See 39 Cent. Dig. tit. "Pleading," § 1039.

But see Flemming *v.* Reading R. Co., 12 Phila. (Pa.) 342, holding that after the case was called for trial on a plea it was too late to withdraw it and file a demurrer.

56. Rixford *v.* Brown, 10 Pick. (Mass.) 30.

57. Merrill *v.* Mellen, 24 N. H. 258.

court to the trial court.[58] A useless and inapplicable plea may be withdrawn at any time.[59] An application to withdraw a pleading usually comes too late after judgment.[60]

4. What Pleadings May Be Withdrawn. The court may permit a party to withdraw a pleading and file a demurrer,[61] to withdraw a demurrer and plead,[62] if the demurrer is not frivolous,[63] at least when the party swears to the pleading and it sets up an apparently valid defense.[64] But one party cannot obtain an order from the court withdrawing the other party's demurrer,[65] nor can the court compel the withdrawal of a demurrer.[66] A party demurring may be allowed to withdraw his demurrer and plead after it has been overruled [67] or improperly sus-

58. Woodruff *v.* State, 7 Ark. 333; Van Dyke *v.* Van Dyke, 19 N. J. L. 1; Hamtramck *v.* Selden, 12 Gratt. (Va.) 28.

59. Sanford *v.* Cloud, 17 Fla. 532.

60. *Georgia.*— Lane *v.* Morris, 8 Ga. 468.

Kentucky.— Holland *v.* Bouldin, 4 T. B. Mon. 147.

Missouri.— Tanner *v.* Roberts, 1 Mo. 416.

New York.— Fisher *v.* Gould, 9 Daly 144.

United States.— Mandeville *v.* Wilson, 5 Cranch 15, 3 L. ed. 23.

61. *Alabama.*— Buxbaum *v.* McCorley, 99 Ala. 537, 13 So. 5; Crawford *v.* Chandler, 5 Ala. 61.

Connecticut.— Hotchkiss *v.* Hoy, 41 Conn. 568.

Iowa.— Byington *v.* Stone, 51 Iowa 317, 1 N. W. 647.

Massachusetts.— Fogg *v.* Price, 145 Mass. 513, 14 N. E. 741.

Missouri.— Buford *v.* Byrd, 8 Mo. 240.

Pennsylvania.— Payran *v.* McWilliams, 9 Watts & S. 154; Com. *v.* Housekeeper, 6 Lanc. Bar 105.

South Carolina.— Treasury Com'rs *v.* Brevard, 1 Brev. 11.

Tennessee.— Cooke *v.* Richards, 11 Heisk. 711.

West Virginia.— Lazier *v.* Nevin, 3 W. Va. 622.

United States.— Baltimore, etc., R. Co. *v.* Camp, 81 Fed. 807, 26 C. C. A. 626; Deakin *v.* Lee, 7 Fed. Cas. No. 3,697, 1 Cranch C. C. 442.

See 39 Cent. Dig. tit. "Pleading," § 1038.

The application will be denied where the demurrer is based on a merely technical ground and will only delay the trial on the merits. Barnes *v.* Western Union Tel. Co., 120 Fed. 550.

62. *Illinois.*— Weatherford *v.* Fishback, 4 Ill. 170; Heslep *v.* Peters, 4 Ill. 45.

New York.— Osgood *v.* Whittelsey, 10 Abb. Pr. 134, 20 How. Pr. 72; Boltons *v.* Lawrence, 7 Wend. 461.

North Carolina.— Keais *v.* Sheppard, 3 N. C. 218; Hostler *v.* Roan, 3 N. C. 138.

Pennsylvania.— Atwater *v.* Loyd, 3 Pa. L. J. 232.

Rhode Island.— O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719.

Tennessee.— Cooke *v.* Richards, 11 Heisk. 711.

United States.— Suckley *v.* Slade, 23 Fed. Cas. No. 13,587, 5 Cranch C. C. 123.

See 39 Cent. Dig. tit. "Pleading," § 1041.

In New York under Code Civ. Proc. § 542, providing for the amendment of a pleading, a party cannot as a matter of right withdraw a demurrer and file an answer. He may on application to the court be permitted to substitute an answer but such a change may not be made as a matter of right. Cashman *v.* Reynolds, 123 N. Y. 138, 25 N. E. 162 [*affirming* 56 Hun 333, 9 N. Y. Suppl. 614]; Smith *v.* Laird, 44 Hun 530. See also Bleecker *v.* Bellinger, 11 Wend. 179. *Contra*, Robostelli *v.* Noxon, 1 Silv. Sup. 369, 5 N. Y. Suppl. 315; Carpenter *v.* Adams, 34 Hun 429; Betts *v.* Kridell, 20 Abb. N. Cas. 1; People *v.* Whitwell, 62 How. Pr. 383; Robertson *v.* Bennett, 52 How. Pr. 287.

63. Kane *v.* Scofield, 2 Cai. (N. Y.) 368.

64. Terry *v.* Moore, 12 N. Y. App. Div. 396, 42 N. Y. Suppl. 51; Osgood *v.* Whittlesey, 10 Abb. Pr. (N. Y.) 134, 20 How. Pr. 72.

65. Kaulbach *v.* Magnus, 40 N. Y. App. Div. 366, 57 N. Y. Suppl. 985.

66. Gammon *v.* Bunnell, 22 Utah 421, 64 Pac. 958.

67. *Kentucky.*— Bruce *v.* Mathers, 2 Bibb 294; Hancock *v.* Vawter, Hard. 510.

Mississippi.— Vicksburg Waterworks, etc., Co. *v.* Washington, 1 Sm. & M. 536; Gwin *v.* McCarroll, 1 Sm. & M. 351.

New York.— Miller *v.* Heath, 7 Cow. 101. See also Nachod *v.* Hindley, 118 N. Y. App. Div. 658, 101 N. Y. Suppl. 801.

North Carolina.— Norwood *v.* Harris, 69 N. C. 204.

Tennessee.— Blackmore *v.* Phill, 7 Yerg. 452.

United States.— See Woodrow *v.* Coleman, 30 Fed. Cas. No. 17,983, 1 Cranch C. C. 192.

See 39 Cent. Dig. tit. "Pleading," § 1041.

Application before final judgment.— The application to withdraw should be made before final judgment rendered. Lane *v.* Morris, 8 Ga. 468; Berry *v.* McDonald, 7 Blackf. (Ind.) 371; Mandeville *v.* Wilson, 5 Cranch (U. S.) 15, 3 L. ed. 23.

Judgment without leave to plead.— As a general rule leave to withdraw a demurrer and plead to the merits will not be granted after there has been judgment overruling the demurrer without the leave to plead, or with leave not availed of. Fisher *v.* Gould, 81 N. Y. 228.

Leave to withdraw in order.— An order overruling a demurrer should give leave not merely to answer but to withdraw the demurrer as well. Garner *v.* Harmony Mills, 6 Abb. N. Cas. (N. Y.) 212 [*affirmed* in

tained.[68] Permission may be given to withdraw one plea or replication and rely on or file another;[69] to withdraw any pleading and file an amended pleading;[70] to withdraw an amended pleading ;[71] to withdraw an unnecessary pleading,[72] one filed without authority,[73] inadvertently,[74] or under a misapprehension of facts;[75] to withdraw a pleading which cannot be supported by evidence because of inability to give a bill of particulars,[76] to withdraw a pleading and file a motion,[77] or to withdraw a part of a pleading.[78] But it seems that ordinarily the court will not permit the withdrawal of a plea in bar and the filing of a plea in abatement.[79]

5. WHO MAY WITHDRAW. One of several co-parties cannot be allowed to withdraw a pleading filed by all jointly, if the others wish to rely upon it.[80]

6. WHAT AMOUNTS TO A WITHDRAWAL. The filing of a new pleading or an amended pleading operates as a withdrawal of the pleading on file;[81] but the filing of an additional plea is not a withdrawal of a prior plea.[82] A motion to transfer a cause to the equity side of the court operates as a withdrawal of the legal answer,[83] and a failure to offer evidence in support of a pleading is in effect a withdrawal of it.[84] Demurring to a special defense after having filed a reply will be deemed a withdrawal of the latter as to such defense.[85] An agreement that all matters may be shown in evidence under one plea does not operate to withdraw other pleas which were on file at the time the agreement was made.[86] A demurrer may be withdrawn by a statement in open court that the demurrant waives it.[87]

7. EFFECT OF WITHDRAWAL. The withdrawal of an appearance carries with

45 N. Y. Super. Ct. 148]. But this is not necessary when no further pleading is required in order to proceed to trial upon a substantial issue. U. S. *v.* Leverich, 9 Fed. 481.

68. Mallory *v.* Matlock, 7 Ala. 757.

69. Gaines *v.* Tombeckbee Bank, Minor (Ala.) 50; Waggoner *v.* Line, 3 Binn. (Pa.) 589; McClure *v.* Williamson, 1 Phila. (Pa.) 121. See also Reiff *v.* Pennsylvania R. Co., 1 Pa. Co. Ct. 443.

It will not be allowed where no substantial advantage will be gained thereby. Cotton *v.* Lake, 2 Mass. 540; Rauschmeyer *v.* Scranton City Bank, 1 C. Pl. (Pa.) 17.

70. Miles *v.* Buchanan, 36 Ind. 490.

71. Ranney *v.* Templin, 54 Iowa 240, 6 N. W. 296; Mayer *v.* Walker, 82 Tex. 222, 17 S. W. 505.

72. Hacker *v.* Stevens, 11 Fed. Cas. No. 5,888, 4 McLean 540.

73. Deutsch Romisch Katholischer Cent. Verein *v.* Lartz, 192 Ill. 485, 61 N. E. 487; Bell *v.* Ursury, 4 Litt. (Ky.) 334.

74. Simpson *v.* Foster, 46 Tex. 618. See also Harrison *v.* Tillinghast, 3 Kulp (Pa.) 270.

75. Tally *v.* Hamilton, 1 Hall (N. Y.) 249.

Where statements or admissions in a pleading against his interest were made by a party or his counsel under an honest mistake as to the facts, and he desires to be relieved of the effects thereof, he should apply to the trial court for leave to withdraw such admission and make a showing of good faith in support of his application. Rogers *v.* Brown, 15 Okla. 524, 86 Pac. 443.

76. Knauth *v.* Wertheim, 14 N. Y. Suppl. 391, 26 Abb. N. Cas. 369.

77. Gross *v.* Feehan, 110 Iowa 163, 81 N. W. 235; Bowman *v.* Chicago, etc., R. Co., 86 Iowa 490, 53 N. W. 327.

78. Louisville, etc., R. Co. *v.* Worley, 107 Ind. 320, 7 N. E. 215; Burroughs *v.* Hunt, 13 Ind. 178; Brown *v.* Woodbury, 183 Mass. 279, 67 N. E. 327; Latimer *v.* Sullivan, 37 S. C. 120, 15 S. E. 798.

79. Little Bros. Fertilizer, etc., Co. *v.* Wilmott, 44 Fla. 166, 32 So. 808; Anonymous, 3 Cai. (N. Y.) 102; Columbia Bank *v.* Scott, 2 Fed. Cas. No. 880, 1 Cranch C. C. 134. See also Brink *v.* Reid, 122 Ind. 257, 23 N. E. 770; State *v.* Ruhlman, 111 Ind. 17, 11 N. E. 793; Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; Field *v.* Malone, 102 Ind. 251, 1 N. E. 507, all construing Rev. St. (1881) § 365. *Compare* Harrison *v.* Tillinghast, 3 Kulp (Pa.) 270, holding that it is in the discretion of the court to permit a plea in bar, filed inadvertently and by mistake, to be withdrawn and a plea in abatement entered. But see Morgan *v.* White, 101 Ind. 413.

80. Reeder *v.* Lockwood, 30 Misc. (N. Y.) 531, 62 N. Y. Suppl. 713; Travest *v.* Alport, 13 N. Y. Civ. Proc. 161; Fisher *v.* Camp, 26 W. Va. 576.

81. Mitchell *v.* Williamson, 9 Gill (Md.) 71. See also Kern *v.* Huidekoper, 103 U. S. 485, 26 L. ed. 354.

Leave to file an amended pleading includes the right to withdraw the first. White *v.* Hampton, 9 Iowa 181. But see Kelly *v.* Downing, 2 Brev. (S. C.) 302, holding that this is true only when so stated in the order.

82. Gardiner *v.* Miles, 5 Gill (Md.) 94.

83. Harreld *v.* Howard, 80 Ky. 51.

84. Galveston, etc., R. Co. *v.* Schlather, (Tex. Civ. App. 1904) 78 S. W. 953.

85. Henley *v.* Henley, 93 Mo. 95, 5 S. W. 701.

86. Capital Nat. Bank *v.* Reid, 154 Ind. 54, 55 N. E. 1023.

87. Hull *v.* Johnston, 90 Ill. 604.

it the plea or answer filed,[88] but the converse is not true.[89] The withdrawal of any pleading withdraws a demurrer or plea directed against it.[90] Withdrawing a demurrer waives the defect upon which the demurrer was founded,[91] and the withdrawal of a plea or answer is an admission of the traversable facts in the declaration or complaint.[92] A pleading which has been withdrawn may nevertheless constitute a part of another pleading which has previously adopted its allegations.[93] A party having once solemnly admitted a fact by his pleading, is estopped from afterward denying the truth of such admission by the withdrawal of such pleading.[94] A withdrawal of a pleading or a portion thereof cannot put the court in error as to an order previously made.[95] Where a demurrer has been waived by answering, a subsequent withdrawal of the answer reinstates the demurrer,[96] and refiling a pleading once withdrawn restores the issue to the condition in which it stood when the withdrawal was made.[97] The withdrawal of a pleading after a demurrer to it has been overruled is not equivalent to a confession of judgment.[98] A withdrawal is not necessarily final and the court may allow the pleading to be refiled.[99] Where defendant filed a demurrer to the declaration, and the records show that he afterward withdrew his plea and no plea appears of record, this is an abandonment of the demurrer.[1] Under a statute providing that a pleading shall not be withdrawn from the files when a pleading stated to be a substitute therefor is filed, the withdrawal of a substituted petition reinstates the original petition.[2]

XII. MOTIONS.

A. In General.[3] Motions relating to pleadings which are treated of in this subdivision include motions for judgment on the pleadings;[4] motions to strike out an entire pleading, count, defense, or separate paragraph;[5] motions to strike out particular allegations in a pleading;[6] motions to make a pleading more definite and certain,[7] including a motion to compel the pleader to separate and number his causes of action or defenses;[8] motions to compel an election between

88. Sloan *v.* Wittbank, 12 Ind. 444.

89. Watson *v.* Hinchman, 41 Mich. 716, 3 N. W. 202.

90. George *v.* Bischoff, 68 Ill. 236.

91. McFadden *v.* Fortier, 20 Ill. 509.

92. Price *v.* Page, 24 Mo. 65.

93. Giraud *v.* Ellis, (Tex. Civ. App. 1894) 24 S. W. 967.

94. McDonald *v.* Grice, 9 Kan. App. 657, 58 Pac. 1035; Carr *v.* Huffman, 1 Kan. App. 713, 41 Pac. 982. But see Baldwin *v.* Gregg, 13 Metc. (Mass.) 253.

95. U. S. Fidelity, etc., Co. *v.* Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

96. Jordan *v.* Kavanaugh, 63 Iowa 152, 18 N. W. 851.

97. Henderson *v.* McClain, 102 Ky. 402, 43 S. W. 700, 19 Ky. L. Rep. 1450, 39 L. R. A. 349.

98. Frazier *v.* Todd, 4 Tex. 461.

99. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

1. Peacock *v.* Banks, Minor (Ala.) 387; Brahan *v.* Collins, Minor (Ala.) 169.

2. Thayer *v.* Smoky Hollow Coal Co., 129 Iowa 550, 105 N. W. 1024.

3. Appealability of decisions on motions see APPEAL AND ERROR, 2 Cyc. 606.

Errors and irregularities in rulings on motions as ground for new trial see NEW TRIAL, 29 Cyc. 761, 762.

General rules relating to motions see MOTIONS, 28 Cyc. 1.

In justices' courts see JUSTICES OF THE PEACE, 24 Cyc. 562.

In proceedings before a referee see REFERENCE.

In particular proceedings see INTERPLEADER, 23 Cyc. 26; MANDAMUS, 26 Cyc. 463.

Particular motions: To be allowed to amend see *supra*, VII, A, 6, e. To file supplemental pleading see *supra*, VII, D, 4. To withdraw pleading or demurrer see *supra*, XI, C. For dismissal or nonsuit because of objections relating to pleading see DISMISSAL AND NONSUIT, 14 Cyc. 440.

Pendency of as precluding judgment by default see JUDGMENTS, 23 Cyc. 751.

Raising question of res judicata by motion see JUDGMENTS, 23 Cyc. 1525.

Review of ruling on motion where objection not urged as ground for new trial see NEW TRIAL, 29 Cyc. 753, 757.

Waiver of objections to rulings on motion see *infra*, XIV.

4. See *infra*, XII, B.

5. See *infra*, XII, C, 1.

6. See *infra*, XII, C, 2.

A so-called demurrer which is in effect a motion to strike certain clauses from the pleading will be so treated, notwithstanding the name given thereto, and determined as such motion and not as a demurrer. Frazer *v.* Andrews, 134 Iowa 621, 112 N. W. 92, 11 L. R. A. N. S. 593.

7. See *infra*, XII, D.

8. See *infra*, XII, D, 5, b.

causes of action or defenses;[9] and motions relating to parties.[10] Such motions are, to a considerable extent, a substitute for a special demurrer as used in the common-law procedure. They are generally not regarded with favor,[11] and will be granted only in a clear case,[12] the exercise of the power being a matter of discretion with the court.[13] Two or more motions based upon substantially the same grounds cannot be filed without leave of court.[14] The fact that a party has a remedy by demurrer does not necessarily preclude a motion.[15] A motion calling attention to a defective statement in a pleading does not present an issue of fact or of law and hence cannot be classed as an answer.[16]

B. For Judgment on the Pleadings[17] — **1. Power and Discretion of Court.** Judgment on the pleadings is provided for by statute in many jurisdictions,[18] but even where there is no statute it has been held that the power is inherent in every court of record when the facts shown and admitted by the pleadings entitle one party to such judgment.[19] However, in some jurisdictions, a motion for judgment on the pleadings is not deemed a proper method of objecting to the "sufficiency" of a pleading.[20] And the granting of judgment upon the pleadings upon motion is not looked upon with favor by the courts,[21] and on

9. See *infra*, XII, E.

10. See *infra*, XII, F.

11. See *infra*, XII.

12. See *infra*, XII.

13. See *infra*, XII.

14. Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

A motion to set aside a counter-claim and a motion for judgment upon admissions of fact in the defense cannot be entertained simultaneously. Church Temporalities Com'rs *v.* McIvor, L. R. 3 Ir. 433.

15. Lee Bank *v.* Kitching, 7 Bosw. (N. Y.) 664.

16. Brownell *v.* Salem Flouring Mills Co., 48 Oreg. 525, 87 Pac. 770.

17. See also Judgments, 23 Cyc. 769.

In ejectment see Ejectment, 15 Cyc. 112.

In action by landlord for unlawful detainer see Landlord and Tenant, 24 Cyc. 1444.

Judgment non obstante veredicto see Judgments, 23 Cyc. 779.

On answer of garnishee see Garnishment, 20 Cyc. 1115.

Peremptory writ of mandamus on pleadings see Mandamus, 26 Cyc. 488.

Where both answer and demurrer are filed see *supra*, VI, G, 4, a.

18. See the statutes of the several states.

Where a statute provides that "where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party," the court has power thereunder to render judgment on the pleadings even before a judgment has been rendered. Kime *v.* Jesse, 52 Nebr. 606, 72 N. W. 1050; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. 356, 10 C. C. A. 415.

19. Stratton *v.* Dines, 126 Fed. 968 [*affirmed* in 135 Fed. 449, 68 C. C. A. 161]. And see Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291; James River Nat. Bank *v.* Purchase, 9 N. D. 280, 83 N. W. 7; Hubenthal *v.* Spokane, etc., R. Co., 43 Wash. 677, 86 Pac. 955. *Compare* Bowles *v.* Doble, 11 Oreg. 474, 5 Pac. 918.

In Nebraska it has been held that the only remedies for a faulty answer under the code are a demurrer, a motion to make more definite and certain, and a motion to strike as frivolous. Hedges *v.* Roach, 16 Nebr. 673, 21 N. W. 404. But in Kime *v.* Jesse, 52 Nebr. 606, 72 N. W. 1050, it was held that, although the earlier case outlined the proper practice, a motion for judgment on the pleadings was an additional remedy, under the statute.

20. Stromberg-Carlson Tel. Mfg. Co. *v.* Bisbee, 115 Ga. 346, 41 S. E. 573; Hollis *v.* Nelms, 115 Ga. 5, 41 S. E. 263. See also Richmond *v.* Brookings, 48 Fed. 241, where a motion to dismiss was denied.

In Washington it was stated that a judgment on the pleadings is allowed when there is an entire lack of a pleading, but not where a pleading filed is defective. Davis *v.* Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393. See also Redding *v.* Puget Sound Iron, etc., Works, 36 Wash. 642, 79 Pac. 308. But this view is not reconcilable with a later case in which the court uses the following language: "The practice of objecting to the introduction of testimony, or moving for judgment on the pleadings, because of some formal defect in the pleadings which may be cured by amendments is not to be commended. But where the motion for judgment goes to the substance of the action or defense and not to the mere form of allegation, there is no reason why the practice should not receive the sanction of the courts. If there is no cause of action or no defense, and no defect curable by amendment, the time of the court should not be taken up in hearing testimony that can avail nothing." Hubenthal *v.* Spokane, etc., R. Co., 43 Wash. 677, 684, 86 Pac. 955.

Important questions of law should not be settled by the summary method of motions. Jones *v.* Proctor, 24 Ohio Cir. Ct. 80; Illinois Cent. R. Co. *v.* Adams, 180 U. S. 28, 21 S. Ct. 251, 45 L. ed. 410.

21. James River Nat. Bank *v.* Purchase, 9 N. D. 280, 83 N. W. 7.

such a motion, at any stage of the case, the court will not declare a pleading defective if it can be sustained by the most liberal construction,[22] since every reasonable intendment is to be taken in favor of the pleading claimed to be defective,[23] especially when the motion for judgment is made at the trial.[24] Pure questions of fact or mixed questions of law and fact cannot be determined on the motion.[25]

2. NATURE OF MOTION. A motion for judgment upon the pleadings is in the nature of a demurrer.[26] It is in substance both a motion and a demurrer. It is a demurrer for the reason that it attacks the sufficiency of the pleadings; and it is a motion for the reason that it is an application for an order for judgment.[27] Like a demurrer it admits the truth of all well pleaded facts in the pleadings of the opposing party,[28] it may be carried back and sustained against a prior pleading of the party making the motion,[29] and the court will consider the whole record and give judgment for the party who, on the whole, appears entitled to it.[30] But

22. Holmes *v.* Campbell, 12 Minn. 221. See also *supra*, II, I.

23. Holmes *v.* Campbell, 12 Minn. 221.

Such liberal construction as would be given a pleading if attacked by general demurrer is proper when it is attacked by motion for judgment. Wicker *v.* Messinger, 22 Ohio Cir. Ct. 712, 12 Ohio Cir. Dec. 425.

24. McAllister *v.* Welker, 39 Minn. 535, 41 N. W. 107; Malone *v.* Minnesota Stone Co., 36 Minn. 325, 31 N. W. 170; Butts *v.* Kingman, 60 Nebr. 224, 82 N. W. 854. See also *supra*, II, I.

25. Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372.

26. Taylor *v.* Palmer, 31 Cal. 240; Bergerow *v.* Parker, 4 Cal. App. 169, 87 Pac. 248.

27. Floyd *v.* Johnson, 17 Mont. 469, 43 Pac. 631; Power *v.* Gum, 6 Mont. 5, 9 Pac. 575; Haug *v.* Great Northern R. Co., 102 Fed. 74, 42 C. C. A. 167.

As part of record on appeal see APPEAL AND ERROR, 2 Cyc. 1057.

28. *California.*— Hibernia Sav., etc., Soc. *v.* Thornton, 117 Cal. 481, 49 Pac. 573; People *v.* Johnson, 95 Cal. 471, 31 Pac. 611; Fleming *v.* Wells, 65 Cal. 336, 4 Pac. 197; Taylor *v.* Palmer, 31 Cal. 240.

Colorado.— Rice *v.* Bush, 16 Colo. 484, 27 Pac. 720.

Idaho.— Chemung Min. Co. *v.* Hanley, 9 Ida. 786, 77 Pac. 226; Walling *v.* Bown, 9 Ida. 184, 72 Pac. 960.

Kentucky.— Miller *v.* Hart, 122 Ky. 494, 91 S. W. 698, 29 Ky. L. Rep. 73.

Michigan.— Fields *v.* Colby, 102 Mich. 449, 60 N. W. 1048.

Minnesota.— Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372.

Missouri.— State *v.* Goffee, 192 Mo. 670, 91 S. W. 486; Sternberg *v.* Levy, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438; Butler *v.* Lawson, 72 Mo. 227; Kemper *v.* Berkley, 79 Mo. App. 578.

Montana.— Floyd *v.* Johnson, 17 Mont. 469, 43 Pac. 631.

Nebraska.— Webster *v.* Hastings, 56 Nebr. 669, 77 N. W. 127; Van Etten *v.* Kosters, 48 Nebr. 152, 66 N. W. 1106.

New York.— Eaton *v.* Wells, 82 N. Y. 576.

Pennsylvania.— Morrison *v.* Warner, 197 Pa. St. 59, 46 Atl. 1030; Merchants' Nat. Bank *v.* Eckels, 191 Pa. St. 372, 43 Atl. 245; Johnston *v.* Callery, 173 Pa. St. 129, 33 Atl. 1036; Souder's Appeal, 169 Pa. St. 249, 32 Atl. 418; Hicks *v.* Northern Liberties Nat. Bank, 168 Pa. St. 638, 32 Atl. 63; Knerr *v.* Bradley, 105 Pa. St. 190.

Texas.— Floyd *v.* Turner, 23 Tex. 292.

Washington.— Fishburne *v.* Merchants' Bank, 42 Wash. 473, 85 Pac. 38.

United States.— Seligman *v.* Santa Rosa, 81 Fed. 524.

See 39 Cent. Dig. tit. "Pleading," § 1053.

Conclusions not admitted.— Where, in an action on a note, the answer merely stated that the cause of action was barred by limitations, a motion for judgment on the pleadings did not admit the truth of the allegation that the cause of action was barred. Daniels *v.* Daniels, 3 Cal. App. 294, 85 Pac. 134.

Extent of admission.—When a party moves for judgment on the pleadings he not only for the purposes of his motion admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary (Walling *v.* Bown, 9 Ida. 184, 72 Pac. 960), and this rule extends to all such denials as the statute gives plaintiff to any matter of defense set up by defendant (Chemung Min. Co. *v.* Hanley, 9 Ida. 786, 77 Pac. 226).

29. *Colorado.*— People *v.* Brown, 23 Colo. 425, 48 Pac. 661.

Missouri.— Hart *v.* Harrison Wire Co., 91 Mo. 414, 4 S. W. 123.

New York.— Van Alstyne *v.* Freday, 41 N. Y. 174; McMoran *v.* Lange, 25 N. Y. App. Div. 11, 48 N. Y. Suppl. 1000; Goldstein *v.* Michelson, 45 Misc. 601, 91 N. Y. Suppl. 33. *Contra*, Corn Exch. Bank *v.* Western Transp. Co., 15 Abb. Pr. 319 note.

South Carolina.— Reynolds *v.* Torrance, 3 Brev. 49.

Texas.— Kimmarle *v.* Houston, etc., R. Co., 76 Tex. 686, 12 S. W. 698.

Washington.— Rockford Shoe Co. *v.* Jacob, 6 Wash. 421, 33 Pac. 1057.

See 39 Cent. Dig. tit. "Pleading," § 1054.

30. Susquehanna F. Ins. Co. *v.* Leib, 8 Del. Co. (Pa.) 103.

averments in the pleadings of the moving party are not necessarily to be taken as true.[31] It is wholly immaterial upon whom rests the burden of proof.[32]

3. GROUNDS — a. Failure to Reply. The proper practice, where a reply is necessary and there is no reply, is to render judgment for defendant.[33] So, where defendant sets up a counter-claim, and no reply is filed, as the statute requires, an affirmative judgment may be rendered for defendant on the counter-claim.[34]

b. Defective Pleadings in General. The pleading must be clearly bad in order to justify a judgment in favor of the other party, and if there is any reasonable doubt as to its sufficiency judgment on the pleadings will not be rendered.[35] So the defect must be substantial and not merely formal or technical.[36] Thus a a clerical error,[37] the want of a necessary verification [38] or a defective verification,[39] the want of a signature to a pleading,[40] or mere indefiniteness or uncertainty [41] will not authorize such a judgment. So if a defective pleading is cured by a subsequent pleading,[42] by verdict,[43] or by the evidence [44] it will not warrant

31. Bannister *v.* Michigan Mut. L. Ins. Co., 111 N. Y. App. Div. 765, 97 N. Y. Suppl. 843.

32. Boldt *v.* West Point First Nat. Bank, 59 Nebr. 283, 80 N. W. 905.

33. *Alabama.*— Gaston *v.* Parsons, 8 Port. 469.

Illinois.— Hunter *v.* Bilyeu, 39 Ill. 367; Pearl *v.* Wellman, 8 Ill. 311.

Indiana.— Shirts *v.* Irons, 28 Ind. 458; Needham *v.* Webb, 20 Ind. 213; Kern *v.* Saul, 14 Ind. App. 72, 42 N. E. 496; Adams *v.* Tuley, 1 Ind. App. 490, 27 N. E. 991.

Kentucky.— Thomas *v.* Com., 8 B. Mon. 371; Norton *v.* Norton, 25 S. W. 750, 27 S. W. 85, 15 Ky. L. Rep. 872.

Missouri.—Cordner *v.* Roberts, 58 Mo. App. 440.

New York.— Thomas *v.* Loaners' Bank, 38 N. Y. Super. Ct. 466; Comstock *v.* Hallock, Code Rep. N. S. 200. See also Comstock *v.* Hallock, 2 Edm. Sel. Cas. 69.

Oregon.— Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676.

Utah.— Dunham *v.* Trains, 25 Utah 65, 69 Pac. 468.

Washington.— See Hester *v.* Stine, 46 Wash. 469, 90 Pac. 594.

West Virginia.— Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

United States.— See Watkinds *v.* Southern Pac. R. Co., 38 Fed. 711, 4 L. R. A. 239.

See 39 Cent. Dig. tit. "Pleading," § 1049.

A reply withdrawn by leave of court before motion for judgment has the same effect as the total lack of a reply. Gale *v.* James, 11 Colo. 540, 19 Pac. 446.

But where a demurrer to a plea of limitations is overruled, and plaintiff does not answer the same, but files an amended declaration which is held not to set up a different cause of action, but avoids the objection to the prior declaration, defendant is not entitled to judgment. George B. Swift Co. *v.* Gaylord, 126 Ill. App. 281 [*reversed* on other grounds in 229 Ill. 330, 82 N. E. 299].

34. *Arkansas.*— Heer Dry Goods Co. *v.* Shaffer, 51 Ark. 368, 11 S. W. 517.

Minnesota.— Schurmeier *v.* English, 46 Minn. 306, 48 N. W. 1112.

Missouri.— Hart *v.* Missouri State Mut. F. & M. Ins. Co., 21 Mo. 91.

New York.— Thomas *v.* Loaners' Bank, 38 N. Y. Super. Ct. 466.

North Carolina.— McLamb *v.* McPhail, 126 N. C. 218, 35 S. E. 426; Rountree *v.* Britt, 94 N. C. 104.

South Dakota.— Huron *v.* Meyers, 13 S. D. 420, 83 N. W. 553.

Wisconsin.— Jarvis *v.* Peck, 19 Wis. 74.

See 39 Cent. Dig. tit. "Pleading," § 1049.

35. Giles Lith., etc., Co. *v.* Recamier Mfg. Co., 14 Daly (N. Y.) 475, 15 N. Y. St. 354; Lloyd *v.* Ballantine, 20 Misc. (N. Y.) 141, 45 N. Y. Suppl. 809; McMurray *v.* Gifford, 5 How. Pr. (N. Y.) 14; Chilton *v.* London Corp., 7 Ch. D. 735, 47 L. J. Ch. 433, 38 L. T. Rep. N. S. 498, 26 Wkly. Rep. 474.

36. Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654, 849; Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; Rice *v.* Bush, 16 Colo. 484, 27 Pac. 720; Saunders *v.* Pendleton, 19 R. I. 292, 36 Atl. 89.

If the defect can be remedied by amendment a judgment on the pleadings ought not to be rendered. Harris *v.* Harris, 9 Colo. App. 211, 47 Pac. 841; Michener *v.* Springfield Engine, etc., Co., 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59.

37. Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654, 849; Brown *v.* McHugh, 35 Mich. 50; Williams *v.* Sholto, 4 Sandf. (N. Y.) 641.

38. Wells *v.* Dickey, 15 Ind. 361. See also Limerick *v.* Barrett, 3 Kan. App. 573, 43 Pac. 853. *Contra*, Hearst *v.* Hart, 128 Cal. 327, 60 Pac. 846; Bergerow *v.* Parker, 4 Cal. App. 169, 87 Pac. 248; Stockton Lumber Co. *v.* Blodgett, 3 Cal. App. 94, 84 Pac. 441; Speer *v.* Craig, 16 Colo. 478, 27 Pac. 891.

Ground for striking out pleading see *infra*, XII, C, 1, c, (VI).

39. Bryant *v.* Davis, 22 Mont. 534, 57 Pac. 143.

40. Ashbrook *v.* Roberts, 82 Ky. 298.

41. Burlington, etc., R. Co. *v.* Marchand, 5 Iowa 468; Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372.

42. James *v.* McPhee, 9 Colo. 486, 13 Pac. 535; Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269.

43. Doyal *v.* Landes, 119 Ind. 479, 20 N. E. 719, 21 N. E. 1108.

44. Clement *v.* Hughes, 17 S. W. 285, 13 Ky. L. Rep. 352.

a judgment on the pleadings in favor of the other party. After a pleading has been held bad on general demurrer and the party refuses to plead over, judgment on the pleadings may be rendered;[45] but if a demurrer to the pleadings is overruled this is conclusive against demurrants' right to judgment on the pleadings.[46] Furthermore, if the allegations of the pleadings of plaintiff, the moving party, independent of any other facts, are insufficient to support a judgment for damages, no such judgment can be rendered on the pleadings.[47]

c. Insufficiency of Complaint or Counter-Claim. Where the complaint fails to state a cause of action it is demurrable;[48] but the objection is not waived by failure to urge the objection by demurrer,[49] and a motion raising such objection may be made before or during the trial.[50] This motion is variously termed by courts, even in the same jurisdiction, a motion to dismiss, to strike out the complaint, or for judgment on the pleadings, the terms apparently being used interchangeably. Under the codes, a complaint which states any cause of action whatever, whether legal or equitable, is good as against a motion for judgment on the pleadings.[51] If a counter-claim is clearly insufficient, judgment thereon may be rendered against defendant on the pleadings.[52]

d. Failure of Answer or Reply to Deny or Set Up New Matter. Where a material issue is tendered by the pleadings, judgment on the pleadings is improper.[53] But if the answer or reply admits by failure to deny or sets up new matter which is no defense, judgment may be rendered on the pleadings.[54] So judgment may

45. See *supra*, VI, L, 8, i.

46. McCown *v.* Meoween, 29 S. C. 130, 7 S. E. 45. *Contra*, see De Courcey *v.* Cox, 94 Cal. 665, 30 Pac. 95.

47. Hart *v.* Harrison Wire Co., 91 Mo. 414, 4 S. W. 123; Van Alstyne *v.* Freday, 41 N. Y. 174. See also *supra*, XII, B, 2.

48. See *supra*, VI, F, 2, b.

49. See *infra*, XIV, B, 9, e.

50. *Arizona.*— Consolidated Canal Co. *v.* Peters, 5 Ariz. 80, 16 Pac. 74.

California.— Hibernia Sav., etc., Soc. *v.* Kain, 117 Cal. 478, 49 Pac. 578; Kelley *v.* Kriess, 68 Cal. 210, 9 Pac. 129; Harniss *v.* Bulpitt, 1 Cal. App. 140, 81 Pac. 1022.

Kansas.— Powers *v.* Badger Lumber Co., 75 Kan. 687, 90 Pac. 254.

New York.— Tooker *v.* Arnoux, 76 N. Y. 397.

North Dakota.— James River Nat. Bank *v.* Purchase, 9 N. D. 280, 83 N. W. 7.

Oklahoma.— St. Louis, etc., R. Co. *v.* Phillips, 17 Okla. 264, 87 Pac. 470.

See 39 Cent. Dig. tit. "Pleading," § 1055. See also DISMISSAL AND NONSUIT, 14 Cyc. 440.

If the necessary facts are contained in the complaint, the objection that they are defectively set forth, or are in an ambiguous or uncertain form, is not tenable. Hibernia Sav., etc., Soc. *v.* Thornton, 117 Cal. 481, 49 Pac. 573.

51. Greenleaf *v.* Egan, 30 Minn. 316, 15 N. W. 254; Gee *v.* Pendas, 66 N. Y. App. Div. 566, 73 N. Y. Suppl. 247; Hawkins *v.* Overstreet, 7 Okla. 277, 54 Pac. 472.

52. Miller *v.* Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527.

53. *Alabama.*— Travis *v.* Tartt, 8 Ala. 574.

Colorado.— Perrin *v.* Smith, 39 Colo. 404, 89 Pac. 648. But see Combs *v.* Farmers' High Line Canal, etc., Co., 38 Colo. 420, 88 Pac. 396.

Idaho.— Mills Novelty Co. *v.* Dunbar, 11 Ida. 671, 83 Pac. 932.

Kansas.— McCready *v.* Dennis, 73 Kan. 778, 85 Pac. 531.

North Dakota.— Viets *v.* Silver, 15 N. D. 51, 106 N. W. 35.

Oregon.— Pacific Mill Co. *v.* Inman, (1907) 90 Pac. 1099.

See 39 Cent. Dig. tit. "Pleading," § 1055 *et seq.*

Findings.—A motion for judgment on pleadings cannot be sustained, unless under the admitted facts the moving party is entitled to judgment without regard to what the findings might be on the facts on which issue is joined. Perrin *v.* Smith, 39 Colo. 404, 89 Pac. 648.

Admissions as overcoming denials.—A judgment on the pleadings is not authorized if the answer deny the material allegations of the complaint, although in a special defense separately stated the allegations formerly denied are admitted. Botto *v.* Vandament, 67 Cal. 332, 7 Pac. 753.

Burden of proof.— A judgment will not be rendered on the pleadings where they present an issue of fact, although the party upon whom the burden of proof rests refuses to introduce any evidence; the remedy in such a case is to move the court to direct a verdict. Willis *v.* Holmes, 28 Oreg. 265, 42 Pac. 989.

54. *Arizona.*— Goldwater *v.* Bowen, 7 Ariz. 200, 62 Pac. 691; Finley *v.* Tueson, 7 Ariz. 108, 60 Pac. 872.

California.— Schoonover *v.* Birnbaum, 148 Cal. 548, 83 Pac. 999; San Francisco *v.* Staude, 92 Cal. 560, 28 Pac. 778; Botto *v.* Vandament, 67 Cal. 332, 7 Pac. 753; Hicks *v.* Lovell, 64 Cal. 14, 27 Pac. 942, 49 Am. Rep. 679; Felch *v.* Beaudry, 40 Cal. 439; Prost *v.* More, 40 Cal. 347; Fitzgibbon *v.* Calvert, 39 Cal. 261.

be rendered for plaintiff on the pleadings when the answer is not responsive to the complaint.[55] Where the cause of action against several defendants is severable, judgment on motion may be taken against any defendant who admits plaintiff's case.[56]

e. Frivolous Pleading or Demurrer — (i) *Power to Disregard.* A frivolous pleading or demurrer may be treated as a nullity, and judgment may be rendered on the pleadings, on motion, in most jurisdictions, as if no such pleading or demurrer had been filed,[57] or such judgment may be rendered upon overruling

Colorado.— Rensberger *v.* Britton, 31 Colo. 77, 71 Pac. 379; Stevens *v.* Andrews, 10 Colo. 402, 15 Pac. 616.

Iowa.— See Modern Steel Structural Co. *v.* Van Buren County, 126 Iowa 606, 102 N. W. 536.

Montana.— State *v.* Votaw, 13 Mont. 403, 34 Pac. 315.

Rhode Island.— Norman *v.* Sylvia, 26 R. I. 438, 59 Atl. 112.

Washington.— Port *v.* Parfit, 4 Wash. 369, 30 Pac. 328.

Wisconsin.— Wiesmann *v.* Donald, 125 Wis. 600, 104 N. W. 916.

United States.— Patterson *v.* Wade, 115 Fed. 770, 53 C. C. A. 1; Western Ranches *v.* Custer County, 89 Fed. 577.

England.— Showell *v.* Bouron, 52 L. J. Q. B. 284, 48 L. T. Rep. N. S. 613, 31 Wkly. Rep. 550.

See 39 Cent. Dig. tit. "Pleading," § 1048 *et seq.* See also Judgments, 23 Cyc. 731.

Contra.— Hedges *v.* Roach, 16 Nebr. 673, 21 N. W. 404.

The failure of a reply to properly answer the allegations of a defense will entitle defendant to a judgment on the pleadings. Patterson *v.* Wade, 115 Fed. 770, 53 C. C. A. 1; Elliott *v.* Harris, L. R. 17 Ir. 351.

Confession and avoidance.— No judgment will be rendered where the pleading avoids as well as confesses the facts alleged by the other party. Stevens *v.* Overturf, 62 Ind. 331.

Where plaintiff's own pleadings show that a certain sum is due to defendant, the latter may have judgment for such amount. Gilly *v.* Roumieu, 11 La. Ann. 746.

Admission of legal effect.— Although the execution of a contract may be admitted by failure to plead, the fact of the execution only is admitted and not the legal effect of the contract as claimed by the party pleading it. Bowring *v.* Wabash R. Co., 90 Mo. App. 324.

Infant defendants cannot make admissions in pleadings upon which judgment may be rendered. Byrne *v.* Byrne, L. R. 5 Ir. 134.

A defense in bar, pleading an order void on its face, will entitle plaintiff to judgment on the pleadings. Barnard *v.* Haworth, 9 Ind. 103.

55. *Colorado.*— Gale *v.* James, 11 Colo. 540, 19 Pac. 446.

Florida.— Huling *v.* Florida Sav. Bank, 19 Fla. 695.

Kentucky.— Hadden *v.* Mannin, 21 S. W. 38, 14 Ky. L. Rep. 652.

New York.— East River Electric Light Co. *v.* Clark, 18 N. Y. Suppl. 463; Walker *v.* Hewitt, 11 How. Pr. 395.

Washington.— King *v.* Ilwaco R., etc., Co., 1 Wash. 127, 23 Pac. 924.

Wisconsin.— Risto *v.* Harris, 18 Wis. 400.

See 39 Cent. Dig. tit. "Pleading," § 1058.

56. Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. 356, 10 C. C. A. 415; Parsons *v.* Harris, 6 Ch. D. 694, 25 Wkly. Rep. 410; Jenkins *v.* Davies, 1 Ch. D. 696, 24 Wkly. Rep. 690; Macmillan *v.* Australasian Territories, 76 L. T. Rep. N. S. 182; *In re* Smith, 24 Wkly. Rep. 392.

57. *Alabama.*— Stanley *v.* Hill, 9 Port. 368.

California.— Hemme *v.* Hays, 55 Cal. 337.

New York.— Manning *v.* Tyler, 21 N. Y. 567; Anderson *v.* McNeely, 120 N. Y. App. Div. 676, 105 N. Y. Suppl. 278; Reese *v.* Walworth, 61 N. Y. App. Div. 64, 69 N. Y. Suppl. 1115; Manufacturers' Nat. Bank *v.* Russell, 6 Hun 375; Hoffaring *v.* Grove, 42 Barb. 548; Currie *v.* Baldwin, 4 Sandf. 690; Collis *v.* Alburtis, 13 Daly 425; Pettigrew *v.* Chave, 2 Hilt. 546; Galbraith *v.* Daily, 37 Misc. 156, 74 N. Y. Suppl. 837; Siriani *v.* Deutsch, 12 Misc. 213, 34 N. Y. Suppl. 26; Sweetzer *v.* Kembert, 11 Misc. 107, 31 N. Y. Suppl. 995; Mixer *v.* Schreiner, 15 N. Y. Suppl. 782; Deerman *v.* Smith, 9 N. Y. Suppl. 91; Colt *v.* Davis, 16 N. Y. Civ. Proc. 180; Platt, etc., Refining Co. *v.* Hepworth, 13 N. Y. Civ. Proc. 122; Plant *v.* Schuyler, 4 Abb. Pr. N. S. 146; Lattimer *v.* New York Metallic Spring Co., 9 Abb. Pr. 207 note; Phelps *v.* Ferguson, 9 Abb. Pr. 206; Kamlah *v.* Salter, 6 Abb. Pr. 226; Roblin *v.* Long, 60 How. Pr. 200; Tompkins *v.* Acer, 10 How. Pr. 309; Edson *v.* Dillaye, 8 How. Pr. 273; Beers *v.* Squire, 1 Code Rep. 84; Noble *v.* Trowbridge, 2 Edm. Sel. Cas. 24.

North Carolina.— Johnson City First Nat. Bank *v.* Pearson, 119 N. C. 494, 26 S. E. 46; Brogden *v.* Henry, 83 N. C. 274; Erwin *v.* Lowery, 64 N. C. 321.

South Dakota.— Fargo *v.* Vincent, 6 S. D. 209, 60 N. W. 858.

Wisconsin.— Gillmore *v.* Woolcock, 13 Wis. 589; Foote *v.* Carpenter, 7 Wis. 395; Farmers', etc., Bank *v.* Sawyer, 7 Wis. 379; Grubb *v.* Remington, 7 Wis. 349.

See 39 Cent. Dig. tit. "Pleading," § 1060.

In New York the statute authorizing judgment where the pleadings of the other party are frivolous applies only where affirmative relief can be awarded to the party against whom the frivolous pleading is filed, and hence a frivolous reply to a mere defense of new matter does not warrant such a

a frivolous demurrer.[58] The whole plea or answer is to be treated as an entirety and no judgment on the pleadings can be rendered because a part of it is frivolous.[59] If any one defense is good the entire pleading cannot be deemed frivolous.[60]

(II) *What Constitutes Frivolousness* — (A) *In General.* A frivolous pleading is one which, assuming the truth of its allegations, is so clearly and palpably bad as to require no argument to convince the court thereof, and which would be pronounced by the court indicative of bad faith in the pleader on a mere inspection.[61] An answer is frivolous where, conceding it to be true, it does not contain any defense to any part of plaintiff's cause of action, and its insufficiency as a defense is so glaring that the court can determine it upon a bare inspection, without argument.[62] If argument is necessary to convince the court of the bad faith of the pleader or the insufficiency of the plea, it cannot be held to be frivolous.[63] A pleading is not to be deemed frivolous merely because it would probably

judgment. Henriques *v.* Trowbridge, 27 N. Y. App. Div. 18, 50 N. Y. Suppl. 108. *Compare* Lloyd *v.* Ballantine, 20 Misc. 141, 45 N. Y. Suppl. 809.

58. Seale *v.* McLaughlin, 28 Cal. 668; Farmers', etc., Bank *v.* Sawyer, 7 Wis. 379.

59. Strong *v.* Sproul, 53 N. Y. 497; Reese *v.* Walworth, 61 N. Y. App. Div. 64, 69 N. Y. Suppl. 1115; Siriani *v.* Deutsch, 12 Misc. (N. Y.) 213, 34 N. Y. Suppl. 26; Van Valen *v.* Lapham, 13 How. Pr. (N. Y.) 240 [*affirmed* in 5 Duer 689]; American Buttonhole, etc., Co. *v.* Hill, 27 S. C. 164, 3 S. E. 82; Boylston *v.* Crews, 2 S. C. 422; Peacock *v.* Williams, 110 Fed. 915.

60. Lockwood *v.* Salhenger, 18 Abb. Pr. (N. Y.) 136.

61. Strong *v.* Sproul, 53 N. Y. 497; Henriques *v.* Garson, 26 N. Y. App. Div. 38, 49 N. Y. Suppl. 1076; Merritt *v.* Gouley, 58 Hun (N. Y.) 372, 12 N. Y. Suppl. 132; Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; Vass *v.* Brewer, 122 N. C. 226, 29 S. E. 352; Brogden *v.* Henry, 83 N. C. 274; Dail *v.* Harper, 83 N. C. 4; Erwin *v.* Lowery, 64 N. C. 321; Bank of Commerce *v.* Humphrey, 6 S. D. 415, 61 N. W. 444; Oregonian R. Co. *v.* Oregon R., etc., Co., 22 Fed. 245, 10 Sawy. 464; Witherell *v.* Wilberg, 30 Fed. Cas. No. 17,917, 4 Sawy. 232.

"It is a pleading interposed for delay, and its frivolous character indicates bad faith in the pleading." Farmers', etc., Bank *v.* Sawyer, 7 Wis. 379 [*quoted* in Lerdall *v.* Charter Oak L. Ins. Co., 51 Wis. 426, 430, 8 N. W. 280].

Whenever it is necessary, before awarding judgment, to examine all the pleadings, it is not proper to grant a motion for judgment on account of the frivolousness of the last pleading. Henriques *v.* Trowbridge, 27 N. Y. App. Div. 18, 50 N. Y. Suppl. 108.

62. *California.*— Hemme *v.* Hays, 55 Cal. 337.

Indiana.— Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248.

Minnesota.— St. Cloud First Nat. Bank *v.* Lang, 94 Minn. 261, 102 N. W. 700; Morton *v.* Jackson, 2 Minn. 219.

New York.— Brown *v.* Jenison, 3 Sandf. 732; Struver *v.* Ocean Ins. Co., 9 Abb. Pr. 23; Nichols *v.* Jones, 6 How. Pr. 355.

North Carolina.— Howell *v.* Ferguson, 87 N. C. 113.

See 39 Cent. Dig. tit. "Pleading," § 1061.

Another definition.— "One that raises no issue or question of fact or law pertinent and material in the action." Weil *v.* Uzzell, 92 N. C. 515, 517.

Frivolous defense.— A frivolous defense is one which at first glance can be seen to be merely pretensive, setting up some ground which cannot be sustained by argument. Dominion Nat. Bank *v.* Olympia Cotton Mills, 128 Fed. 181, 182.

Redundancy.— A paragraph of a defense will not be adjudged frivolous merely because redundant. Kosztelnik *v.* Bethlehem Iron Co., 91 Fed. 606.

The question whether an answer was interposed in good faith is immaterial in determining whether it is frivolous. Thorn *v.* New York Cent. Mills, 10 How. Pr. (N. Y.) 19 [*affirmed* in 1 Abb. Pr. 187]. *Contra*, Darrow *v.* Miller, 5 How. Pr. (N. Y.) 247.

63. *Minnesota.*— Morton *v.* Jackson, 2 Minn. 219.

New Jersey.— Hogencamp *v.* Ackerman, 24 N. J. L. 133.

New Mexico.— Mills *v.* Territory, (1905) 81 Pac. 447.

New York.— Cook *v.* Warren, 88 N. Y. 37; Zimmerman *v.* Meyrowitz, 77 N. Y. App. Div. 329, 79 N. Y. Suppl. 159; Bedlow *v.* Stillwell, 45 N. Y. App. Div. 557, 61 N. Y. Suppl. 371; Henriques *v.* Trowbridge, 27 N. Y. App. Div. 18, 50 N. Y. Suppl. 108; Henriques *v.* Garson, 26 N. Y. App. Div. 38, 49 N. Y. Suppl. 1076; Exchange F. Ins. Co. *v.* Norris, 74 Hun 527, 26 N. Y. Suppl. 823; Carpenter *v.* Adams, 34 Hun 429; Chatham Nat. Bank *v.* Shipman, 20 Hun 543; Lindon *v.* Beach, 6 Hun 200; Wyckoff *v.* Andrews, 50 N. Y. Super. Ct. 196; Halliday *v.* Barber, 38 Misc. 116, 77 N. Y. Suppl. 98 [*reversing* 37 Misc. 840, 76 N. Y. Suppl. 991]; Lloyd *v.* Ballantine, 20 Misc. 141, 45 N. Y. Suppl. 809; Metzger *v.* Metropolitan El. R. Co., 21 N. Y. Suppl. 676; Hagadorn *v.* Edgewater, 13 N. Y. Suppl. 687; Barney *v.* King, 13 N. Y. Suppl. 685; National Broadway Bank *v.* Swift, 13 N. Y. Suppl. 526; Schoonmaker *v.* New York, 7 N. Y. St. 430; Webb *v.* Van Zandt, 16 Abb. Pr. 190; Smith *v.* Mead, 14 Abb. Pr. 262; Littlejohn *v.* Greeley, 13

be held bad on demurrer,[64] nor because it is sham.[65] Nor does mere vagueness and uncertainty make a pleading frivolous,[66] nor the pleading of evidence or legal conclusions.[67] No plea or answer which presents a defense or an issue as to any material allegation in the declaration or complaint,[68] or as to any fact essential to plaintiff's recovery,[69] is frivolous. Ordinarily a general denial or general issue cannot be deemed frivolous,[70] nor can a special denial putting in issue any material allegation;[71] and a denial in the conjunctive form is not frivolous.[72] But a denial not of any facts but that plaintiff has a cause of action is frivolous,[73] as is one which constitutes a negative pregnant,[74] or which is evasive and does not squarely meet the allegations of the pleading to which it is directed,[75] or one which takes issue

Abb. Pr. 311; Shearman *v.* New York Cent. Mills, 1 Abb. Pr. 187; Deuel *v.* Sanford, 67 How. Pr. 354; Griffin *v.* Todd, 48 How. Pr. 15; Kelly *v.* Barnett, 16 How. Pr. 135; Sixpenny Sav. Bank *v.* Sloan, 12 How. Pr. 543; Rae *v.* Washington Mut. Ins. Co., 6 How. Pr. 21; Darrow *v.* Miller, 5 How. Pr. 247.

North Carolina.— Western Carolina Bank *v.* Atkinson, 113 N. C. 478, 18 S. E. 703.

South Carolina.— Gray *v.* Gidiere, 4 Strobh. 438; Winn *v.* Waring, 2 Brev. 428.

Wisconsin.— Cottrill *v.* Cramer, 40 Wis. 555; Moyer *v.* Strahl, 10 Wis. 83; Martin *v.* Weil, 8 Wis. 220; Farmers', etc., Bank *v.* Sawyer, 7 Wis. 379; Van Slyke *v.* Carpenter, 7 Wis. 173.

England.—Papineau *v.* King, 2 Dowl. P. C. N. S. 226, 6 Jur. 539, 12 L. J. Exch. 32, 10 M. & W. 216.

Canada.— Holmes *v.* Taylor, 32 Nova Scotia 191. See also Woods *v.* Tees, 5 Manitoba 256.

See 39 Cent. Dig. tit. "Pleading," §§ 1061, 1098.

If a defense can be spelled out from the pleading, or any part of it, judgment will not be given because it is frivolous. Moody *v.* Belden, 15 N. Y. Suppl. 119.

64. Youngs *v.* Kent, 46 N. Y. 672; National Bank of Metropolis *v.* Orcutt, 48 Barb. (N. Y.) 256; Halliday *v.* Barber, 37 Misc. (N. Y.) 840, 76 N. Y. Suppl. 991 [*reversed* on other grounds in 38 Misc. 116, 77 N. Y. Suppl. 98]; Aitken *v.* Clark, 15 Abb. Pr. (N. Y.) 319; Davis *v.* Adams, 4 Cow. (N. Y.) 142; Brayley *v.* Pickett, 28 Wis. 598. But see Collins *v.* Suau, 7 Rob. (N. Y.) 623, holding that an answer is frivolous if there is a decision in point adverse to its sufficiency.

A fortiori it cannot be frivolous if it is good as against a demurrer. Gray *v.* Gidiere, 4 Strobh. (S. C.) 438.

A special plea which amounts to the general issue is not for that reason frivolous. Melville *v.* Hazelett, 18 Wend. (N. Y.) 680.

65. Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; Chipman *v.* Ritchie, 5 Nova Scotia 710. See also *infra*, XII, B, 3, e, (II), (D).

66. Jackson Sharp Co. *v.* Holland, 14 Fla. 384; Kelly *v.* Barnett, 16 How. Pr. (N. Y.) 135; Buie *v.* Brown, 104 N. C. 335, 10 S. E. 465; Yerkes *v.* Crum, 2 N. D. 72, 49 N. W. 422.

The mere fact that an answer is stated to be "to the complaint" instead of "to the amended complaint" does not make it frivolous. Donovan *v.* Main, 74 N. Y. App. Div. 44, 77 N. Y. Suppl. 229.

67. Halliday *v.* Barber, 38 Misc. (N. Y.) 116, 77 N. Y. Suppl. 98.

68. Roblee *v.* Secrest, 28 Minn. 43, 8 N. W. 904; Trumbull *v.* Ashley, 26 N. Y. App. Div. 356, 49 N. Y. Suppl. 786; Klots *v.* Fincke, 2 Thomps. & C. (N. Y.) 580; Metropolitan Bank *v.* Lord, 4 Duer (N. Y.) 630; Jones *v.* Brown, 29 Misc. (N. Y.) 517, 61 N. Y. Suppl. 972; Austen *v.* Westchester Tel. Co., 8 Misc. (N. Y.) 11, 28 N. Y. Suppl. 77; Andreae *v.* Bandler, 56 N. Y. Suppl. 614; Selover *v.* Lockwood, 21 N. Y. Suppl. 661; Mather *v.* Union L. & T. Co., 7 N. Y. Suppl. 213; Newton *v.* Gould, 14 N. Y. St. 397; Stent *v.* Continental Nat. Bank, 5 Abb. N. Cas. (N. Y.) 88; Richter *v.* McMurray, 15 Abb. Pr. (N. Y.) 346; Morrow *v.* Cougan, 3 Abb. Pr. (N. Y.) 328; Williams *v.* Richmond, 9 How. Pr. (N. Y.) 522; Temple *v.* Murray, 6 How. Pr. (N. Y.) 329; Davis *v.* Potter, 4 How. Pr. (N. Y.) 155; Western Carolina Bank *v.* Atkinson, 113 N. C. 478, 18 S. E. 703; Randall *v.* Simmons, 40 Oreg. 554, 67 Pac. 513.

An answer averring that plaintiff is not, but that another person named is, the real party in interest in the action, is not frivolous. Tamisier *v.* Cassard, 17 Abb. Pr. (N. Y.) 187.

69. Lord *v.* Chesebrough, 4 Sandf. (N. Y.) 696.

70. Brooks *v.* Chilton, 6 Cal. 640; Byrne *v.* Hegeman, 24 N. Y. App. Div. 152, 48 N. Y. Suppl. 788; Belsena Coal Min. Co. *v.* Liberty Dredging Co., 26 Misc. (N. Y.) 846, 55 N. Y. Suppl. 747; Sifton *v.* Sifton, 5 N. D. 187, 65 N. W. 670; Black River Imp. Co. *v.* Holway, 85 Wis. 344, 55 N. W. 418.

71. Dinsmore *v.* New York, 67 Barb. (N. Y.) 341; Andreae *v.* Bandler, 56 N. Y. Suppl. 614; Wood *v.* New York, 3 Abb. Pr. N. S. (N. Y.) 467; American Button-Hole, etc., Co. *v.* Hill, 27 S. C. 164, 3 S. E. 82.

72. Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670 [*overruling* Shearman *v.* New York Cent. Mills, 1 Abb. Pr. (N. Y.) 187].

73. Mullen *v.* Kearney, 2 Code Rep. (N. Y.) 18.

74. Laurie *v.* Duer, 30 Misc. (N. Y.) 154, 61 N. Y. Suppl. 930.

75. Hale *v.* Swinburne, 66 How. Pr. (N. Y.) 387; Nichols *v.* Jones, 6 How. Pr. (N. Y.) 355.

An answer denying the allegations "as alleged" in certain paragraphs of the com-

on an immaterial matter.[76] So a plea concluding with a verification which ought to conclude to the country is frivolous.[77] The verification of a pleading may save it from being held false, but it cannot afford protection from the charge of frivolousness.[78]

(B) *Denials on Information and Belief or of Knowledge or Information.* A denial of any knowledge or information sufficient to form a belief as to a material matter, if authorized by statute, cannot be held frivolous;[79] and such a denial, even as to matters presumptively within defendant's knowledge, while it is evasive and sham, is not frivolous.[80] So the mere denial of facts on information and belief, where in proper form, does not make an answer frivolous.[81]

(C) *Frivolous Demurrer.* A demurrer, to be held frivolous, must be so clearly without merit, founded in bad faith, and filed for delay, that the infirmity appears on mere inspection, without any argument.[82] The mere fact that a demurrer is

plaint limited such denial to the form of the allegations of the complaint, instead of denying the substance, and warrants judgment on the pleadings. Hutchinson *v.* Bien, 104 N. Y. App. Div. 214, 93 N. Y. Suppl. 216 [*affirming* 46 Misc. 302, 93 N. Y. Suppl. 189].

76. Goldstein *v.* Krause, 2 Ida. (Hasb.) 294, 13 Pac. 232; Howe *v.* Lawrence, 22 N. J. L. 99; Edson *v.* Dillaye, 8 How. Pr. (N. Y.) 273.

77. Copperthwait *v.* Dummer, 18 N. J. L. 258.

78. Thorn *v.* New-York Cent. Mills, 10 How. Pr. (N. Y.) 19 [*affirmed* in 1 Abb. Pr. 187].

79. Bennett *v.* Leeds Mfg. Co., 110 N. Y. 150, 17 N. E. 669; Barrie *v.* Yorston, 35 N. Y. App. Div. 404, 54 N. Y. Suppl. 841; Trumbull *v.* Ashley, 26 N. Y. App. Div. 356, 49 N. Y. Suppl. 786; Byrne *v.* Hogeman, 24 N. Y. App. Div. 152, 48 N. Y. Suppl. 788; Sheldon *v.* Heaton, 78 Hun (N. Y.) 50, 29 N. Y. Suppl. 275; Warner *v.* U. S. Land, etc., Co., 53 Hun (N. Y.) 312, 6 N. Y. Suppl. 411; Robert Gere Bank *v.* Inman, 51 Hun (N. Y.) 97, 5 N. Y. Suppl. 457 [*affirmed* in 115 N. Y. 650, 21 N. E. 1118]; Grocers' Bank *v.* O'Rorke, 6 Hun (N. Y.) 18; Rourke *v.* Regnault, 11 Misc. (N. Y.) 622, 32 N. Y. Suppl. 794; Hagadorn *v.* Edgewater, 13 N. Y. Suppl. 687; Sherman *v.* Bushnell, 7 How. Pr. (N. Y.) 171.

If it denies information but not knowledge it is unauthorized and may be held frivolous. Sigmund *v.* Minot Bank, 4 N. D. 164, 59 N. W. 966.

80. Stockton *v.* Kenney, 24 Misc. (N. Y.) 300, 52 N. Y. Suppl. 1006; Hecker *v.* Mitchell, 5 Abb. Pr. (N. Y.) 453; Morrow *v.* Cougan, 3 Abb. Pr. (N. Y.) 328; Leach *v.* Boynton, 3 Abb. Pr. (N. Y.) 1. *Contra*, see Austen *v.* Westchester Tel. Co., 8 Misc. (N. Y.) 11, 28 N. Y. Suppl. 77; Fales *v.* Hicks, 12 How. Pr. (N. Y.) 153; Thorn *v.* New-York Cent. Mills, 10 How. Pr. (N. Y.) 19 [*affirmed* in 1 Abb. Pr. 187].

81. Gallagher *v.* Merrill, 13 N. Y. App. Div. 182, 43 N. Y. Suppl. 303; Bidwell *v.* Sullivan, 10 N. Y. App. Div. 135, 41 N. Y. Suppl. 770. See also Sammed *v.* Monsheimer, 27 N. Y. Suppl. 279; Kosztelnik *v.* Bethlehem Iron Co., 91 Fed. 606. But see Pratt Mfg. Co. *v.* Jordan Iron, etc., Co., 67 How. Pr. (N. Y.) 230; Flammer *v.* Kline, 9 How. Pr. (N. Y.) 216; Fleury *v.* Roger, 9 How. Pr. (N. Y.) 215.

82. *Minnesota.*— Olsen *v.* Cloquet Lumber Co., 61 Minn. 17, 63 N. W. 95; Hatch, etc., Co. *v.* Schusler, 46 Minn. 207, 48 N. W. 782; Perry *v.* Reynolds, 40 Minn. 499, 42 N. W. 471; Hurlburt *v.* Schulenburg, 17 Minn. 22.

New York.—Cook *v.* Warren, 88 N. Y. 37; Hildreth *v.* Mercantile Trust Co., 112 N. Y. App. Div. 916, 98 N. Y. Suppl. 582; Shaw *v.* Feltman, 99 N. Y. App. Div. 514, 91 N. Y. Suppl. 114; Rankin *v.* Bush, 93 N. Y. App. Div. 181, 87 N. Y. Suppl. 539; Vlasto *v.* Varelopoulos, 73 N. Y. App. Div. 145, 76 N. Y. Suppl. 771; Schaffer *v.* Holwill, 46 N. Y. App. Div. 93, 61 N. Y. Suppl. 399; Kirkbride *v.* Wilgus, 37 Misc. 519, 75 N. Y. Suppl. 1036; Barkley *v.* Williams, 28 Misc. 459, 59 N. Y. Suppl. 1038; Hopper *v.* Ersley, 3 Misc. 340, 22 N. Y. Suppl. 1050; Campbell *v.* Friedlander, 29 N. Y. Suppl. 790; Neefus *v.* Kloppenburgh, 2 Code Rep. 76. See also Gannon *v.* Myars, 11 N. Y. Civ. Proc. 187.

North Carolina.— See Morgan *v.* Harris, 141 N. C. 358, 54 S. E. 381.

Wisconsin.— Cottrill *v.* Cramer, 40 Wis. 555; Sage *v.* McLean, 37 Wis. 357; Eaton *v.* Gillet, 17 Wis. 435; Ferguson *v.* Troop, 16 Wis. 571; McConihe *v.* McClurg, 13 Wis. 454; Cahoon *v.* Wisconsin Cent. R. Co., 10 Wis. 290; Farmers', etc., Bank *v.* Sawyer, 7 Wis. 379; Van Slyke *v.* Carpenter, 7 Wis. 173.

United States.— Keasbey, etc., Co. *v.* Philip Carey Mfg. Co., 110 Fed. 748.

Canada.— Ross *v.* Bucke, 14 Ont. Pr. 63; Brice *v.* Munro, 10 Ont. Pr. 548.

See 39 Cent. Dig. tit. "Pleading," § 1060 *et seq.*

A frivolous demurrer is one "which raises no serious question of law."— Morgan *v.* Harris, 141 N. C. 358, 54 S. E. 381; Johnston *v.* Pate, 83 N. C. 110.

Motion in effect a motion to strike.— A motion for judgment on the pleadings because of a frivolous demurrer is in effect a motion to strike out the demurrer. Guth *v.* Lubach, 73 Wis. 131, 40 N. W. 681.

A frivolous exception may be overruled

based on a doubtful question of law,[83] or even that it clearly is not well taken on authority,[84] is not enough to condemn it as frivolous. And an unauthorized demurrer, filed through misapprehension, is not for that reason frivolous.[85]

(D) *Distinction Between Frivolous and Sham Pleadings.* While the courts sometimes use the terms "frivolous" and "sham" as meaning the same thing, and a motion to strike is often based on the ground that a plea is both frivolous and sham, there is nevertheless a clear distinction between the two in that a sham plea is good on its face but false in fact, while a frivolous plea is one which on its face sets up no defense, although it may be true.[86] A frivolous pleading is always assumed to be true, while a sham pleading must be proved to be false; the character of the former is determined by mere inspection while that of the latter is usually determined by proof *aliunde*.[87]

f. Incomplete Defense. If any actionable part of the declaration remains admitted or unanswered, judgment on the pleadings for that portion may be rendered.[88] Thus, if a plea purports to answer the whole declaration and is sufficient as to only one count, judgment may be rendered for plaintiff after that count has been stricken out.[89] And if defendant denies only a portion of the indebtedness, judgment on the pleadings for the amount admitted is proper.[90] Where an answer sets up a sufficient counter-claim, plaintiff's motion for judgment on the pleadings is properly denied,[91] but not where the counter-claim is for merely nominal damages.[92]

g. Inconsistent Defenses. It is not ground for a judgment on the pleadings that a pleading contains inconsistent counts or defenses,[93] as for example

without argument thereon. Orleans Bank *v.* Rice, 13 La. 277. But it cannot prevent a cause from being put at issue when an answer has been filed with the exception. Broadwell *v.* Kelly, 14 La. Ann. 456.

83. People *v.* McClellan, 53 Misc. (N. Y.) 469, 105 N. Y. Suppl. 223; Chauncey *v.* Lawrence, 15 Abb. Pr. (N. Y.) 106; Eaton *v.* Gillet, 17 Wis. 435; Cahoon *v.* Wisconsin Cent. R. Co., 10 Wis. 290.

84. Wilmington Bank *v.* Barnes, 4 Abb. Pr. (N. Y.) 226.

85. Quin *v.* Chambers, 1 Duer (N. Y.) 673.

86. Bedlow *v.* Stillwell, 45 N. Y. App. Div. 557, 61 N. Y. Suppl. 371; Hill *v.* Warner, 39 N. Y. App. Div. 424, 57 N. Y. Suppl. 355; Perkins *v.* Squier, 1 Thomps. & C. (N. Y.) 620; Brown *v.* Jenison, 3 Sandf. (N. Y.) 732; National Knitting Co. *v.* Brouner, 20 Misc. (N. Y.) 125, 45 N. Y. Suppl. 714; Andreae *v.* Bandler, 56 N. Y. Suppl. 614; Hecker *v.* Mitchell, 5 Abb. Pr. (N. Y.) 453; Lefferts *v.* Snediker, 1 Abb. Pr. (N. Y.) 41; Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46; Hull *v.* Smith, 8 How. Pr. (N. Y.) 149; Erwin *v.* Lowery, 64 N. C. 321; Kerr *v.* Cochran, 29 S. C. 61, 6 S. E. 905. See also Southern California Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345; Stewart *v.* Forst, 15 Misc. (N. Y.) 621, 37 N. Y. Suppl. 215; Collis *v.* Alburtis, 9 N. Y. Civ. Proc. 80.

87. Metraz *v.* Pearsall, 5 Abb. N. Cas. (N. Y.) 90; Hecker *v.* Mitchell, 5 Abb. Pr. (N. Y.) 453; Winne *v.* Sickles, 9 How. Pr. (N. Y.) 217; Nichols *v.* Jones, 6 How. Pr. (N. Y.) 355.

88. Hunt *v.* Mansur, 5 Blackf. (Ind.) 214; Kerr *v.* Force, 14 Fed. Cas. No. 7,730. 3 Cranch C. C. 8; United Tel. Co. *v.* Donohoe, 31 Ch. D. 399, 55 L. J. Ch. 480, 54 L. T. Rep. N. S. 34, 34 Wkly. Rep. 326; Andrews *v.* Patriotic Assur. Co., L. R. 18 Ir. 115; Hanmer *v.* Flight, 35 L. T. Rep. N. S. 127, 24 Wkly. Rep. 346. See also JUDGMENTS, 23 Cyc. 731.

89. Hogan *v.* Ross, 13 How. (U. S.) 173, 14 L. ed. 100.

90. *Georgia.*— Purity Ice Works *v.* Rountree, 104 Ga. 676, 30 S. E. 885.

Illinois.— Mayberry *v.* Van Horn, 83 Ill. 289; Allen *v.* Watt, 69 Ill. 655.

Indiana.— Hunt *v.* Mansur, 5 Blackf. 214.

Kentucky.— National Surety Co. *v.* Arterburn, 110 Ky. 832, 62 S. W. 862, 23 Ky. L. Rep. 281; Johnson *v.* Ward, 53 S. W. 21, 21 Ky. L. Rep. 783.

Mississippi.— McLaurin *v.* Parker, 24 Miss. 509.

Nebraska.— Omaha L. & T. Co. *v.* Kitton, 58 Nebr. 113, 78 N. W. 374; McConnell *v.* Lincoln First Nat. Bank, 38 Nebr. 252, 56 N. W. 1013.

See 39 Cent. Dig. tit. "Pleading," § 1057.

Under a statute providing that where the answer expressly, or by not denying, admits a part of plaintiff's claim to be just, the court may order judgment for the amount admitted, does not apply where defendant pleads a counter-claim if the answer in addition contains a general denial. Burgess *v.* House, 49 N. Y. App. Div. 383, 63 N. Y. Suppl. 512.

91. Cummings *v.* Taylor, 21 Minn. 366.

92. Hitchcock *v.* Turnbull, 44 Minn. 475, 47 N. W. 153.

93. Botto *v.* Vandament, 67 Cal. 332, 7 Pac. 753; Gartley *v.* People, 24 Colo. 155, 49 Pac. 272; Spaulding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486; Lyons *v.* Ward, 124 Mass. 364.

where a defense admits allegations which have been denied in another part of the pleading.[94]

h. Want or Insufficiency of Affidavit of Defense. In those jurisdictions where affidavits of defense must be filed in certain cases, the failure to file such affidavit, or a sufficient affidavit, when required, will entitle plaintiff to judgment;[95] but not where plaintiff's statement of claim is fatally defective [96] or does not comply with the rules.[97] The question to be determined on the motion is whether the affidavit is sufficient to send the case to the jury,[98] and if an investigation of facts *dehors* the record is necessary, no judgment will be rendered,[99] since the sufficiency of the affidavit will be determined by what appears on its face.[1] Judgment for want of a sufficient affidavit of defense will be refused if a valid defense is disclosed,[2] or in case of doubt as to the legal sufficiency of the affidavit of defense.[3] The averments in the affidavit of defense are taken as true,[4] and are to be construed in a spirit of fair liberality.[5] But the words of the affidavit are not to be taken as implying more than they express,[6] and what is not stated must be considered not to exist.[7] All the facts necessary to constitute a substantial

But see Monett Bank *v.* Stone, 93 Mo. App. 292.

94. Botto *v.* Vandament, 67 Cal. 332, 7 Pac. 753; Amador County *v.* Butterfield, 51 Cal. 526; Nudd *v.* Thompson, 34 Cal. 39. But see Fremont *v.* Seals, 18 Cal. 433. *Contra*, Burns *v.* Chicago, etc., R. Co., 110 Iowa 385, 81 N. W. 794; Monett Bank *v.* Stone, 93 Mo. App. 292.

95. Peter Adams Paper Co. *v.* Cassard, 208 Pa. St. 267, 57 Atl. 564; Reilly *v.* Daly, 159 Pa. St. 605, 28 Atl. 493; Bartoe *v.* Guckert, 158 Pa. St. 124, 27 Atl. 845; People's St. R. Co. *v.* Spencer, 156 Pa. St. 85, 27 Atl. 113, 36 Am. St. Rep. 22; Brennan *v.* Prudential Ins. Co., 148 Pa. St. 199, 23 Atl. 901; Rising *v.* Patterson, 5 Whart. (Pa.) 316; West *v.* Simmons, 2 Whart. (Pa.) 261; Com. *v.* Coovert, 1 Pearson (Pa.) 163; Taylor *v.* Nyce, 3 Wkly. Notes Cas. (Pa.) 433.

Where no affidavit necessary.— Judgment will not be granted for want of an affidavit of defense where, while plaintiff's suit is in form assumpsit, it appears from an examination of his statement that the real cause of action is in tort, in which form of action no affidavit of defense is required. Kinney *v.* Rice, 140 Fed. 793; Kinney *v.* Beaver, 140 Fed. 792. An "insufficient" affidavit will not entitle plaintiff to judgment in a case where no affidavit is required. Brady *v.* Osborn Engineering Co., 132 Fed. 412.

96. Ferguson *v.* Anglo-American Tel. Co., 151 Pa. St. 211, 25 Atl. 40; Bill Posting Sign Co. *v.* Jermon, 27 Pa. Super. Ct. 171; Com. *v.* Magee, 24 Pa. Super. Ct. 329; Reynolds *v.* New York Wood Fibre Co., 19 Pa. Co. Ct. 318; Susquehanna F. Ins. Co. *v.* Leib, 8 Del. Co. (Pa.) 103.

97. Com. *v.* National Safety Ins. Co., 1 Pearson (Pa.) 336; Broad *v.* Winsborough, 6 Lanc. L. Rev. (Pa.) 20.

98. Frishmuth *v.* Barker, 159 Pa. St. 549, 28 Atl. 368; Ætna Ins. Co. *v.* Confer, 158 Pa. St. 598, 28 Atl. 153.

99. Scott Mfg. Co. *v.* Morgan, 217 Pa. St. 367, 66 Atl. 566; Gallice *v.* Crilly, 134 Fed. 983.

1. Kemp *v.* Kemp, 1 Woodw. (Pa.) 154.

2. Hostetter *v.* United Brethren Mut. Aid Soc., 166 Pa. St. 636, 31 Atl. 333; Barrett *v.* Bemelmans, 155 Pa. St. 204, 26 Atl. 307; Lee *v.* Taylor, 154 Pa. St. 95, 26 Atl. 253; Fox *v.* Rentschler, 147 Pa. St. 240, 23 Atl. 803; Neely *v.* Bair, 144 Pa. St. 250, 22 Atl. 673; Fritz *v.* Hathaway, 135 Pa. St. 274, 19 Atl. 1011; Betz *v.* Shepperson, 5 Pa. Cas. 218, 8 Atl. 175; Hatboro Nat. Bank *v.* Stevenson, 33 Pa. Super. Ct. 144; Downer *v.* Miller, 2 Pearson (Pa.) 285; Manufacturing Co. *v.* Harding, 3 Pa. Co. Ct. 150; Watson *v.* Supplee, 15 Wkly. Notes Cas. (Pa.) 91; Ohman *v.* Winsmore, 3 Wkly. Notes Cas. (Pa.) 157; Kemp *v.* Bernhart, 1 Woodw. (Pa.) 152.

Facts showing a valid defense in abatement are sufficient. Billington *v.* Gautier Steel Co., 7 Pa. Cas. 574, 9 Atl. 35.

3. Tallman *v.* Whitaker, 2 Houst. (Del.) 72.

4. St. Clair *v.* Conlon, 12 App. Cas. (D. C.) 161; Scott Mfg. Co. *v.* Morgan, 217 Pa. St. 367, 66 Atl. 566; American Alkali Co. *v.* Huhn, 209 Pa. St. 238, 58 Atl. 283; Morrison *v.* Warner, 197 Pa. St. 59, 46 Atl. 1030; Wood Co. *v.* Berry Co., 4 Pa. Dist. 141.

5. Philadelphia Warehouse Co. *v.* Colonial Biscuit Co., 33 Pa. Super. Ct. 134, holding that in disposing of a rule for judgment for want of a sufficient affidavit of defense, the sufficiency of the affidavit is not to be determined by applying to it the same rules of refined and technical criticism that were formerly thought necessary to be applied in passing on the validity of a bill of indictment or a demurrer at common law. On the contrary, its language is to be given the same meaning it would be given in the ordinary speech of the people, and all of the statements of fact therein appearing, when thus regarded, must be accepted as true.

6. Blackburn *v.* Ormsby, 41 Pa. St. 97; Com. *v.* Snyder, 1 Pa. Super. Ct. 286.

7. Kaufman *v.* Cooper Iron Co., 105 Pa. St. 537; Marsh *v.* Marshall, 53 Pa. St. 396; Lord *v.* Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728; Kelly *v.* Shillingsburg, 2 Pa. Super. Ct. 576; Com. *v.* Snyder, 1 Pa. Super. Ct. 286.

defense must be stated,[8] and alleged with reasonable precision and distinctness [9]— legal conclusions are not sufficient.[10] But mere lack of definiteness will not warrant a judgment.[11] If the affidavit is sufficient as to part of the claim, and insufficient as to the residue, judgment may be directed for the part insufficiently denied,[12] but the entire affidavit is not rendered bad by an insufficient portion.[13]

i. Failure to Comply With Rule of Court. Failure to comply with the rule of court requiring a memorandum of pleadings to be filed by the clerk in a cause to be made in a book kept for that purpose has been held ground for judgment on the pleadings.[14]

j. Pleading Filed Without Authority. A pleading filed without authority is ground for such a judgment the same as the want of a pleading.[15]

4. Waiver of Right to Move. The right to move for judgment is not waived by answering the frivolous or defective pleading.[16] But if the parties go to trial and introduce evidence as though an issue were properly raised, it is then too late to ask for judgment for want of a reply.[17] Where plaintiff sets forth two causes of action, his right to judgment on the pleadings as to one of them is not waived by anything he may do respecting the other.[18] The right to move for judgment for want or insufficiency of an affidavit of defense may be waived by plaintiff. Thus plaintiff's notice or motion for a plea or the entry of a rule to plead,[19] plaintiff's referring the cause to arbitrators and taking an award,[20] the placing the case upon the trial list by counsel for plaintiff,[21] or taking any steps subsequent to the affidavit calculated to mislead defendant,[22] constitutes a waiver.

C. To Strike — 1. Entire Pleadings or Paragraphs — a. In General.[23] While there is no doubt that the power to strike a pleading or separate part

8. Kaufman *v.* Cooper Iron Co., 105 Pa. St. 537; Com. *v.* Snyder, 1 Pa. Super. Ct. 286; Nugent *v.* Schrægan, 4 Pa. Co. Ct. 297; Gabell *v.* Thompson, 1 Phila. (Pa.) 113; Gustine *v.* Cummings, 1 Wkly. Notes Cas (Pa.) 105.

9. Hiestand *v.* Williamson, 128 Pa. St. 122, 18 Atl. 427; Bronson *v.* Silverman, 77 Pa. St. 94; Com. *v.* Snyder, 1 Pa. Super. Ct. 286; Cremerieux *v.* Kessler, 20 Wkly. Notes Cas. (Pa.) 296; O'Donnell *v.* May, Wilcox (Pa.) 113.

A copy of an instrument relied on must be fully set forth in the affidavit. Anewalt *v.* Brown, 2 Lehigh Val. L. Rep. (Pa.) 239.

10. Erie City *v.* Brady, 127 Pa. St. 169, 17 Atl. 885; Kaufman *v.* Cooper Iron Co., 105 Pa. St. 537; Com. *v.* Snyder, 1 Pa. Super. Ct. 286; Ball *v.* Warrington, 87 Fed. 695.

"The affidavit must be a specific statement of facts.— The nature and character of the defense must be set forth. It has invariably been held that affidavits merely argumentative or containing only inferences or conclusions of law, are bad. So if the averments are only general, especially where they use words which raise mixed questions of law and fact, such as payment, warranty, surrender, etc., and allegations of fraud. In all these cases it is necessary to set out the facts as to when, how and to whom the payment, surrender, etc., was made, and the specific acts of fraud, etc., relied upon." Hertz *v.* Sidle, 20 Pa. Super. Ct. 88, 91.

11. Lengert *v.* Chamnel, 205 Pa. St. 280, 54 Atl. 889.

12. Stedman *v.* Poterie, 139 Pa. St. 101, 21 Atl. 219; Drake *v.* Irvine, 10 Pa. Co. Ct. 486. See, however, Freemansburg Bldg., etc., Assoc. *v.* Reinbold, 1 Lack. Leg. N. (Pa.) 260; International Contracting Co. *v.* McNichol, 105 Fed. 553.

Under the act of May 31, 1893, this was allowable only as to portions of the claim admitted to be due, but not as to portions insufficiently answered. New Castle *v.* New Castle Electric Co., 2 Pa. Super. Ct. 228; Muir *v.* Shinn, 2 Pa. Super. Ct. 24.

13. Lulley *v.* Morgan, 21 D. C. 88.

14. Crump *v.* People, 2 Colo. 316.

15. Riddle *v.* Backus, 36 Iowa 430.

16. Soper *v.* St. Regis Paper Co., 76 N. Y. App. Div. 409, 78 N. Y. Suppl. 782; Place *v.* Bleyl, 45 N. Y. App. Div. 17, 60 N. Y. Suppl. 800; Stokes *v.* Hagar, 1 Code Rep. (N. Y.) 84. *Contra*, Cox *v.* Capron, 10 Mo. 691.

17. Lovell *v.* Wentworth, 39 Ohio St. 614. And see *infra*, XIV, B, 9, d.

18. Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715.

19. O'Neal *v.* Rupp, 22 Pa. St. 395; Hamer *v.* Humphreys, 2 Miles (Pa.) 28; Auburn Bolt, etc., Works *v.* Schultz, 6 Pa. Co. Ct. 346; Fuoss *v.* Schleines, 15 Wkly. Notes Cas. (Pa.) 192; Johnston *v.* Ballentine, 1 Wkly. Notes Cas. (Pa.) 626; Edison Gen. Electric Co. *v.* Johnstown Electric Light Co., 56 Fed. 456.

20. Duncan *v.* Bell, 28 Pa. St. 516. *Contra*, when defendant obtains a rule to submit to arbitrators. Taggart *v.* Fox, 1 Grant (Pa.) 190.

21. Brown *v.* Headly, 3 Pa. Co. Ct. 76.

22. O'Neal *v.* Rupp, 22 Pa. St. 395.

23. In ejectment see Ejectment, 15 Cyc. 112.

Pleading stricken out as part of record on appeal see Appeal and Error, 2 Cyc. 1059.

thereof is inherent in the court, the codes and practice acts often expressly authorize such a motion in particular cases as where the pleading is sham, irrelevant, or frivolous.[24] Like a demurrer, the motion to strike a pleading admits the truth of all facts well pleaded for the purposes of the motion,[25] except where the motion is to strike a pleading as sham.[26] Motions to strike out pleadings for any cause are not to be encouraged;[27] and will be granted only in a clear case,[28] the granting or refusing of the motion being a matter within the discretion of the court.[29] A motion to strike out a pleading as an entirety cannot be sustained where one or more of the counts, defenses, or paragraphs therein are sufficient.[30] So a motion to strike a paragraph for irregularity should be denied if any portion of it is relevant or responsive.[31]

b. Pleadings or Particular Parts Thereof Which May Be Stricken — (i) *In General.*[32] Either the complaint, answer, reply, or subsequent pleadings may be stricken out in a proper case.[33] So a plea *puis darrein continuance* may be stricken out,[34] as may a cross complaint.[35] So a partial defense pleaded as a complete defense may be stricken out.[36] And an insufficient or improper notice of special matter under the general issue may be reached by a motion to strike.[37] So a substituted answer filed after the death of defendant may be stricken out where it is in conflict with the original and sets up no defense.[38] But generally the general issue or general denial, if authorized and in proper form, cannot be stricken out,[39] although it is otherwise if not in proper form.[40] An intervening

Right to file pleading as question to be urged by motion to strike out rather than demurrer see *supra*, VI, A.

Remedy for hypothetical pleading by motion or demurrer see *supra*, VI, F, 1, f.

24. See the statutes of the several states.

25. Faylor *v.* Brice, 7 Ind. App. 551, 34 N. E. 833; State *v.* Purcell, 31 W. Va. 44, 5 S. E. 301.

26. See *infra*, XII, C, 1, c, (III).

27. Hart *v.* Scott, 168 Ind. 530, 81 N. E. 481; Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248; Power *v.* Pringle, 31 Nova Scotia 78. See also Clark *v.* Miller, 35 N. Brunsw. 42, holding that a defect available by demurrer cannot be presented in a summary manner by motion.

28. Corlies *v.* Delaplaine, 2 Code Rep. (N. Y.) 117.

To strike out a pleading which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defense to an action, is a harsh proceeding, and should only be resorted to in extreme cases. Burns *v.* Scooffy, 98 Cal. 271, 33 Pac. 86.

29. *Arkansas.*— Goodwin *v.* Robinson, 30 Ark. 535.

California.— Lybecker *v.* Murray, 58 Cal. 186; Bowers *v.* Dickerson, 18 Cal. 420.

Iowa.— Schoenhofen Brewing Co. *v.* Armstrong, 89 Iowa 673, 57 N. W. 436; Smith *v.* Harrington, 89 Iowa 603, 57 N. W. 413; Searles *v.* Lux, 86 Iowa 61, 52 N. W. 327.

Kansas.— Burr *v.* Honeywell, 6 Kan. App. 783, 51 Pac. 235.

Maryland.—Horner *v.* Plumley, 97 Md. 271, 54 Atl. 971.

England.— Golding *v.* Wharton Saltworks Co., 1 Q. B. D. 374, 34 L. T. Rep. N. S. 474, 24 Wkly. Rep. 423; Davy *v.* Garrett, 7 Ch. D. 473, 47 L. J. Ch. 218, 38 L. T. Rep. N. S. 77, 26 Wkly. Rep. 225.

30. Herf, etc., Chemical Co. *v.* Lackawanna Line, 78 Mo. App. 305; Philbert, etc., Mfg. Co. *v.* Dawson, 77 Mo. App. 122; Gilbert *v.* Loberg, 86 Wis. 661, 57 N. W. 982; Bachman *v.* Everding, 2 Fed. Cas. No. 708, 1 Sawy. 70.

An entire answer will not be stricken out as frivolous because one of the several pleas is frivolous. Bachman *v.* Everding, 2 Fed. Cas. No. 708, 1 Sawy. 70.

31. Thompson *v.* Williamson, (N. J. Ch. 1903) 54 Atl. 453.

32. **As sham** see *infra*, XII, C, 1, c, (III), (C).

33. See *infra*, XII, C, 1, c.

34. Pool *v.* Hill, 44 Miss. 306, holding that the objection that a plea *puis* was accompanied by another plea must be taken by a motion to set aside.

35. Campbell *v.* Patterson, 58 Ind. 66.

36. Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597.

37. Folsom *v.* Brawm, 25 N. H. 114; Story *v.* Baird, 14 N. J. L. 262; Ackerman *v.* Shelp, 8 N. J. L. 125; West *v.* Tyler, 2 Coldw. (Tenn.) 96. *Contra*, McMullen *v.* Erwin, 69 Vt. 338, 38 Atl. 62.

Such a motion is in the nature of a demurrer.— Camp *v.* Allen, 12 N. J. L. 1.

Motion or objection to evidence.—An insufficient or improper notice of special matter may be objected to either by a motion to strike it out or by objecting to the admission of any evidence under it. Whiton *v.* Ripley, 1 Ohio Dec. (Reprint) 133, 2 West. L. J. 406.

38. Cleveland *v.* Cozart, 72 Ark. 514, 83 S. W. 316.

39. Woolfolk *v.* Beach, 61 Ga. 67; Babcock *v.* Milmo Nat. Bank, 1 Tex. App. Civ. Cas. § 817.

Striking out as frivolous see *infra*, XII, C, 1, c, (II), (C).

Striking out as sham see *infra*, XII, C, 1, c, (III), (C), (2).

40. Lawrence *v.* Cooley, 4 Ohio Dec. (Reprint) 261, 1 Clev. L. Rep. 178.

petition which a person has a right to file is improperly stricken out without a hearing.[41] In the federal courts it seems that no motion lies to strike from the files a plea to the jurisdiction.[42]

(II) *Counter-Claim.*[43] If a pleading contains a counter-claim which is wholly unauthorized, a motion to strike will lie;[44] but the question whether a counter-claim is valid is one to be raised by demurrer or motion on the trial and not by motion to strike.[45] A counter-claim cannot be stricken out under a statute authorizing the striking out of a "defense."[46]

(III) *Amended and Supplemental Pleadings.*[47] Even after leave has been granted to file an amended or supplemental pleading, it may be stricken out, in a proper case, after it is filed.[48] For instance, if the amendment is one not allowable as where it sets forth a new cause of action or defense,[49] adds new parties after the issues are made up,[50] is contrary to the order of the court per-

41. Nathan C. Dow Co. *v.* Deist, 123 Ill. App. 364.

42. Alkire Grocery Co. *v.* Richesin, 91 Fed. 79.

43. Striking out as frivolous see *infra*, XII, C, 1, c, (II), (C).

Striking out as sham see *infra*, XII, C, 1, c, (III), (C).

44. Hatfield *v.* Todd, 13 N. Y. Civ. Proc. 265, counter-claim in reply.

Thus if it is for an amount beyond the jurisdiction of the court it may be stricken out. Tucker *v.* Napier, 1 Tex. App. Civ. Cas. § 670.

45. Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012; Fettretch *v.* McKay, 47 N. Y. 426; Cooper *v.* Howe, 16 Hun (N. Y.) 502; Whitehall Lumber Co. *v.* Edmans, 4 N. Y. Suppl. 721; Stewart *v.* Travis, 10 How. Pr. (N. Y.) 148; Slade *v.* Doolittle, 4 Ohio Dec. (Reprint) 42, Clev. L. Rec. 54.

Effect of striking other allegations.— A counter-claim being wholly dependent on allegations previously made in the answer, and which were properly stricken, was necessarily subject to the same disposition. Brooks *v.* Boyd, 1 Ga. App. 65, 57 S. E. 1093.

46. Fettretch *v.* McKay, 47 N. Y. 426.

47. Plea puis darrein continuance see *supra*, VII, C.

Refusal to strike as equivalent to consent to filing see *supra*, VII, A, 6, a.

Striking amended pleading filed as a matter of course because filed in bad faith or for delay see *supra*, VII, A, 5, g.

48. Wilson *v.* Wichita County, 67 Tex. 647, 4 S. W. 67; Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72. See also Bemis *v.* Homer, 145 Ill. 567, 33 N. E. 869; Long *v.* Furnas, 130 Iowa 504, 107 N. W. 432. *Compare* Palmer *v.* Shepherd, 12 Ark. 685.

It is no ground for striking an amended complaint that it appears to permit plaintiff to recover on either of two theories which are dependent on the same evidence. Security Nat. Bank *v.* Latimer, 51 Nebr. 498, 71 N. W. 38.

An amendment to a pleading allowed by a referee on trial cannot properly be stricken out on motion at special term. Quimby *v.* Claflin, 77 N. Y. 270. See also References.

The fact that the pleading offered is unduly prolix or contains allegations of mere evidence or matter which is irrelevant or redundant is good ground for a motion to prune it to proper proportions; but so long as it contains any new issuable averments, it is not ground for an order striking the amendment from the files. Bruner *v.* Brotherhood American Yeomen, 136 Iowa 612, 111 N. W. 977.

Amendment to conform to proof.— An amendment filed with leave for the purpose of conforming the pleading to the proof should not be stricken out for unsubstantial variances. Blandon *v.* Glover, 67 Iowa 615, 25 N. W. 830.

A supplemental pleading which is not properly supplemental, in that it states a new and different case, may be stricken out. Brooks *v.* Kager, 23 Kan. 114.

If a party fails to object to the granting of general leave to amend, he cannot subsequently have the amendment stricken out because setting up an unconscionable defense. State *v.* Rodney, 1 Houst. (Del.) 442; Duncan *v.* Cravens, 55 Ind. 525.

Failure to amend summons.—If the amendment in the complaint requires a corresponding change in the summons and such change is not made, the amended pleading may be stricken out. Follower *v.* Laughlin, 12 Abb. Pr. (N. Y.) 105.

In Missouri, where a statute provides that only three amended petitions may be filed, the amendments referred to are those made necessary by demurrer or motion and do not include voluntary amendments. Antonelli *v.* Basile, 93 Mo. App. 138.

49. Nelson *v.* Hays, 75 Iowa 671, 37 N. W. 177; Harkins *v.* Edwards, 1 Iowa 296; Stilley *v.* Stilley, 20 La. Ann. 53; Shields *v.* Moore, 2 Ohio Dec. (Reprint) 331, 2 West. L. Month. 437; Oglesby *v.* Attrill, 14 Fed. 214, 4 Woods 114. See also State Bank *v.* Johnson, 9 Ala. 367; Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269; Chicago, etc., R. Co. *v.* Totten, 1 Kan. App. 558, 42 Pac. 269.

Several counts.— If one count of a complaint is sufficient to support an amendment, it is immaterial, so far as a motion to strike out the amendment is concerned, whether a second count is also sufficient. Moore *v.* Florence First Nat. Bank, 139 Ala. 595, 36 So. 777.

50. Rout *v.* Woods, 67 Ind. 319.

mitting the amendment,[51] was filed without necessary leave,[52] or was filed too late[53] it may be stricken out. So an amended pleading which is substantially a repetition of a former pleading may be stricken from the files,[54] especially if the former pleading has already been held bad on demurrer.[55] The fact that a demurrer was filed to an original pleading does not operate as a waiver of the right to strike the amended pleading.[56]

c. Grounds — (i) *In General.* A pleading required to be under oath, which shows that it has been altered and filled up after being sworn to, may be stricken,[57] as may a pleading no copy of which has been served on the other party.[58] So a plea which alleges facts improperly varying the terms of the written instrument sued on will be stricken out.[59] And inasmuch as a plea *puis darrein continuance* is a waiver of other pleas previously filed, such other pleas are subject to a motion to strike.[60] But want of evidence in support of a pleading is no ground for striking it.[61] So mere misconduct of an attorney, not participated in by his

51. Crump *v.* Thomas, 89 N. C. 241; Long *v.* Hunter, 48 S. C. 179, 26 S. E. 228.

If the pleading has been served and retained until it is too late to return it, such portions as do not conform to the order may be stricken out. Lange *v.* Hirsch, 38 N. Y. App. Div. 176, 56 N. Y. Suppl. 649.

52. Hyatt *v.* Kirk, 8 Ind. 178; Schoenhofen Brewing Co. *v.* Armstrong, 89 Iowa 673, 57 N. W. 436; Sullivan Sav. Inst. *v.* Copeland, 71 Iowa 67, 32 N. W. 95. See also Allen *v.* Bidwell, 35 Iowa 86.

53. Herrstrom *v.* Newton, etc., R. Co., 129 Iowa 507, 105 N. W. 436; Hayward *v.* Goldsbury, 63 Iowa 436, 19 N. W. 307; Sollenberger *v.* Schnader, 4 Lanc. Bar (Pa.), Dec. 14, 1872; Frosh *v.* Holmes, 8 Tex. 29. *Compare* Godding *v.* Colorado Springs Live-Stock Co., 4 Colo. App. 14, 34 Pac. 942; Heiss *v.* Corcoran, 15 La. Ann. 694.

Surprise.— This objection should not prevail unless the delay operates as a surprise upon the other party and no continuance can be granted. Phillips *v.* Patillo, 18 Tex. 518; Hobbs *v.* Big Springs First Nat. Bank, 15 Tex. Civ. App. 398, 39 S. W. 331. Delay in filing an amendment to a pleading until the case is called for trial does not authorize the court of its own motion to strike the amendment from the files merely because the replication of the opposite party operates as a surprise and continuance of the cause, where amendment has been filed in such manner as not to operate as a surprise to the opposite party and there is no objection to its filing. Zollars *v.* Snyder, 43 Tex. Civ. App. 120, 94 S. W. 1096.

54. *Iowa.*— Robinson *v.* Erickson, 25 Iowa 85.

Kansas.— Grand Lodge I. O. O. F. *v.* Troutman, 73 Kan. 35, 84 Pac. 567.

Missouri.— See Holt County *v.* Cannon, 114 Mo. 514, 21 S. W. 851, where the amendment was allowed to stand, different relief being asked for.

Nebraska.— Loghry *v.* Fillmore County, 75 Nebr. 158, 106 N. W. 170.

New York.— Snyder *v.* White, 6 How. Pr. 321.

See 39 Cent. Dig. tit. "Pleading," § 1113.

But where the amended pleading contains some additional facts, as well as fuller and more explicit statements of those set forth in the original pleading, and where the amendments are apparently made in an honest effort to state a cause of action and meet objections previously made to the original pleading, a motion to strike out the amended one will not lie. Grand Lodge I. O. O. F. *v.* Troutman, 73 Kan. 35, 84 Pac. 567.

55. *Arkansas.*— McWhorter *v.* Andrews, 53 Ark. 307, 13 S. W. 1099; Goodwin *v.* Robinson, 30 Ark. 535.

Colorado.— Enright *v.* Midland Sampling, etc., Co., 33 Colo. 341, 80 Pac. 1041; Rittmaster *v.* Richner, 14 Colo. App. 361, 60 Pac. 189.

Florida.— Holland *v.* Webster, 43 Fla. 85, 29 So. 625.

Iowa.— McKee *v.* Illinois Cent. R. Co., 121 Iowa 550, 97 N. W. 69; Waukon *v.* Strouse, 74 Iowa 547, 38 N. W. 408; Epley *v.* Ely, 68 Iowa 70, 25 N. W. 934; Phenix Ins. Co. *v.* Findley, 59 Iowa 591, 13 N. W. 738.

Washington.— Hays *v.* Peavey, 43 Wash. 163, 86 Pac. 170; Noyes *v.* Loughead, 9 Wash. 325, 37 Pac. 452.

Wyoming.— Columbia Sav., etc., Assoc. *v.* Clause, 13 Wyo. 166, 78 Pac. 708.

See 39 Cent. Dig. tit. "Pleading," § 1113.

Former pleading withdrawn.— And this is true even though the former pleading has been withdrawn. Hoyt *v.* Beach, 104 Iowa 257, 73 N. W. 492, 65 Am. St. Rep. 461.

56. Wisconsin Lumber Co. *v.* Greene, etc., Tel. Co., 127 Iowa 350, 101 N. W. 742, 109 Am. St. Rep. 387, 69 L. R. A. 968.

57. Holloway *v.* Freeman, 22 Ill. 197.

58. Boston Nat. Bank *v.* Armour, 50 Hun (N. Y.) 176, 3 N. Y. Suppl. 22.

By rule of court, in Iowa, a pleading may be stricken for failure to file a copy for the use of the adverse party. Smith *v.* Harrington, 89 Iowa 603, 57 N. W. 413; Searles *v.* Lux, 86 Iowa 61, 52 N. W. 327.

59. Roberts *v.* Mathews, 77 Ga. 458; Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428.

60. East St. Louis *v.* Renshaw, 153 Ill. 491, 38 N. E. 1048; Harding *v.* Horton, 79 Ill. App. 123.

61. Walden *v.* Walden, 124 Ga. 145, 52 S. E. 322; Millhiser *v.* McAllister, 103 Ga. 798, 30 S. E. 661; Andrews *v.* Andrews, 85 Ga. 276, 11 S. E. 771; Baker *v.* Sherman, 73 Vt. 26, 50 Atl. 633; Wheeling Mold, etc., Co. *v.*

client, is ordinarily not ground for striking out his pleading.[62] Where the issues presented by the allegations of an answer have been previously adjudicated by the ruling of the court upon a demurrer to plaintiff's petition, the answer may properly be stricken out on motion.[63]

(II) *Substantial Insufficiency* — (A) *In General.* The precise line of demarcation between the functions of a demurrer and a motion to strike out a pleading or a separate part thereof, in so far as the objection sought to be urged is the failure to state a cause of action or defense, is difficult to determine, inasmuch as in many jurisdictions the decisions do not make it clear whether a pleading or separate part thereof may always be stricken out where it fails to state a cause of action or defense, whether the rule is directly to the contrary and that in no case can the motion to strike take the place of a demurrer for insufficiency, or whether the intermediate rule applies, which is that the motion to strike will not lie except where the insufficiency is so obvious and manifest that the court can determine on mere inspection and without argument. In some jurisdictions the decisions seem to be sufficiently broad to authorize the statement that in all cases such a motion lies, thereby making the motion practically the equivalent of a demurrer for insufficiency.[64] Most of the decisions, however, lay down the broad rule that the motion does not lie to determine whether a cause of action or defense is stated[65] — since such a motion is not usually regarded as a substitute for a

Wheeling Steel, etc., Co., 62 W. Va. 288, 57 S. E. 826.

But where a party admits that he has no evidence under certain counts, such counts may be stricken out on motion of the adverse party. Stephens *v.* Jackson, 2 How. Pr. (N. Y.) 250.

62. Chenault *v.* Norton, 99 S. W. 899, 30 Ky. L. Rep. 875.

63. Wing *v.* Red Oak Dist. Tp., 82 Iowa 632, 48 N. W. 977.

64. *Georgia.*— Walden *v.* Walden, 124 Ga. 145, 52 S. E. 323; Reynolds *v.* Howard, 113 Ga. 349, 38 S. E. 849; Faulkner *v.* Ware, 34 Ga. 498.

Idaho.— Cowen *v.* Harrington, 5 Ida. 329, 48 Pac. 1059.

Missouri.— Phillips *v.* Evans, 38 Mo. 305; Ming *v.* Suggett, 34 Mo. 364, 86 Am. Dec. 112; Sapington *v.* Jeffries, 15 Mo. 628. See also Mumford *v.* Keet, 71 Mo. App. 535.

Texas.— Wilson *v.* Wichita County, 67 Tex. 647, 4 S. W. 67; Pridgen *v.* Andrews, 7 Tex. 461.

West Virginia.— State *v.* Purcell, 31 W. Va. 44, 5 S. E. 301.

See 39 Cent. Dig. tit. "Pleading," § 1092 *et seq.*

Compare Mitchell *v.* Guthrie, 1 Pennew. (Del.) 4, 39 Atl. 454.

A plea at common law which does not fully answer plaintiff's case so far as defendant intends to answer is defective and should be stricken out. Mason *v.* Croom, 24 Ga. 211. So where defendant denies only the facts alleged in a part of the paragraphs of the complaint and does not undertake to deny other distinct allegations which are entirely inconsistent with the truth of the denial set up in the answer, it is proper to strike the answer after giving defendant ample opportunity to amend it. Burns *v.* Condon, 108 Ga. 794, 33 S. E. 907.

In New Jersey, where defendant, by leave of court, may plead several pleas, but where as a matter of fact leave of court is never asked, the court should strike out all such pleas as it would, if it had been consulted, have refused leave to file. Copperthwait *v.* Dummer, 18 N. J. L. 258.

65. *Arkansas.*— Wade *v.* Bridges, 24 Ark. 569; Sanger *v.* State Bank, 14 Ark. 411.

California.— Burns *v.* Scooffy, 98 Cal. 271, 33 Pac. 86; Pacific Factor Co. *v.* Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; Swain *v.* Burnette, 76 Cal. 299, 18 Pac. 394. But see Wood *v.* Brush, 72 Cal. 224, 13 Pac. 627.

Florida.— Wilson *v.* Marks, 18 Fla. 322.

Illinois.— Bemis *v.* Homer, 145 Ill. 567, 33 N. E. 869; Orne *v.* Cook, 31 Ill. 238. *Compare* Beam *v.* Laycock, 3 Ill. App. 43.

Indiana.— McCoy *v.* Stockman, 146 Ind. 668, 46 N. E. 21 (failure of cross complaint to state cause of action); Burk *v.* Taylor, 103 Ind. 399, 3 N. E. 129; State *v.* Newlin, 69 Ind. 108; Port *v.* Williams, 6 Ind. 219. But see Campbell *v.* Patterson, 58 Ind. 66.

Iowa.— Jackson *v.* Steamboat Rock Independent School Dist., (1899) 77 N. W. 860; Wattels *v.* Minchen, 93 Iowa 517, 61 N. W. 915; Walker *v.* Pumphrey, 82 Iowa 487, 48 N. W. 928; Childs *v.* Griswold, 15 Iowa 438. But see Peterson *v.* Ball, 121 Iowa 544, 97 N. W. 79.

Kansas.— Armstead *v.* Neptune, 56 Kan. 750, 44 Pac. 998 (question whether answer and cross petition states facts sufficient to establish any cause for relief); Savage *v.* Challiss, 4 Kan. 319.

New York.— Kelly *v.* Ernest, 26 N. Y. App. Div. 90, 49 N. Y. Suppl. 896; Smith *v.* American Turquoise Co., 77 Hun 192, 28 N. Y. Suppl. 329; Eaton *v.* Burnett, 48 N. Y. Super. Ct. 548; Collins *v.* Suau, 7 Rob. 94; Miln *v.* Vose, 4 Sandf. 660; New York *v.* Mason, 4 E. D. Smith 142; Burkert *v.* Bennett, 35 Misc. 318, 71 N. Y. Suppl. 144; Lowe *v.* Bennett, 27 Misc. 356, 58 N. Y. Suppl. 88; Mason *v.* Dutcher, 33 N. Y. Suppl. 689; Ingersoll *v.*

demurrer[66] — although in many of the jurisdictions where such rule prevails a motion to strike does lie where the insufficiency is obvious and manifest, thereby rendering the pleading or paragraph frivolous.[67]

Dixon, 20 N. Y. Suppl. 810; People *v.* New York Cent. Under-Ground R. Co., 15 N. Y. Suppl. 225, 245; Whitehall Lumber Co. *v.* Edmans, 4 N. Y. Suppl. 721; Littlejohn *v.* Greeley, 13 Abb. Pr. 311; Howell *v.* Knickerbocker L. Ins. Co., 24 How. Pr. 475; Stewart *v.* Travis, 10 How. Pr. 148; White *v.* Kidd, 4 How. Pr. 68; Martin *v.* Wilson, 3 How. Pr. 195.

North Dakota.— Gjerstadengen *v.* Hartzell, 8 N. D. 424, 79 N. W. 872.

Ohio.— Finch *v.* Finch, 10 Ohio St. 501; Cleveland Second Nat. Bank *v.* Marbach, 4 Ohio Dec. (Reprint) 524, 2 Clev. L. Rep. 313; Slade *v.* Doolittle, 4 Ohio Dec. (Reprint) 42, Clev. L. Rec. 54; Wentzel *v.* Zinn, 10 Ohio S. & C. Pl. Dec. 97, 7 Ohio N. P. 512.

Oklahoma.— Pond Creek First Nat. Bank *v.* Cochran, 17 Okla. 538, 87 Pac. 855, complaint.

Oregon.— Cline *v.* Cline, 3 Oreg. 355.

Pennsylvania.— Ralph *v.* Brown 3 Watts & S. 395.

Washington.— Wilkeson Coal, etc., Co. *v.* Driver, 9 Wash. 177, 37 Pac. 307.

United States.— Hale *v.* Conant, 111 Fed. 890; McKnight *v.* Dudley, 103 Fed. 918; Tyler *v.* Hyde, 24 Fed. Cas. No. 14,310, 2 Blatchf. 399; U. S. *v.* Spencer, 27 Fed. Cas. No. 16,368, 2 McLean 405.

Canada.— Clark *v.* Miller, 35 N. Brunsw. 42; Glass *v.* Grant, 12 Ont. Pr. 480.

See 39 Cent. Dig. tit. "Pleading," § 1093. See also DISMISSAL AND NONSUIT, 14 Cyc. 440.

Whether matters stated in an answer constitute a justification or not cannot be determined by a motion to strike. Hanson Co. *v.* Collier, 119 N. Y. App. Div. 794, 104 N. Y. Suppl. 787 [*reversing* on other grounds 51 Misc. 496, 101 N. Y. Suppl. 690].

In Alabama, under a statute providing that pleadings may be stricken out on motion when unnecessarily prolix, irrelevant, or frivolous, a pleading cannot be stricken out merely because it does not set up a valid cause of action or defense. Wefel *v.* Stillman, (1907) 44 So. 203; Owensboro Wagon Co. *v.* Hall, 149 Ala. 210, 43 So. 71; Troy Fertilizer Co. *v.* State, 134 Ala. 333, 32 So. 618; Brooks *v.* Continental Ins. Co., 125 Ala. 615, 29 So. 13; Williamson *v.* Mayer, 117 Ala. 253, 23 So. 3. *Compare* Dicks *v.* Belsher, 80 Ala. 369; Mead *v.* Hughes, 15 Ala. 141, 1 Am. Rep. 123; Carpenter *v.* Jeter, 4 Stew. & P. (Ala.) 326.

In Florida the demurrer goes to the pleading as a whole for insufficiency, while the motion to strike is applicable where the pleading as a whole or any part of it is irrelevant or improper and impedes a fair trial. State *v.* Atlantic Coast Line R. Co., 53 Fla. 711, 44 So. 230.

In Indiana it is well established that it is error to strike out a complaint on the ground that it does not state facts sufficient to constitute a cause of action. McCoy *v.* Stockman, 146 Ind. 668, 46 N. E. 21; Fletcher *v.* Crist, 139 Ind. 121, 38 N. E. 472; State *v.* Newlin, 69 Ind. 108; Indianapolis Piano Mfg. Co. *v.* Caven, 53 Ind. 258; Port *v.* Williams, 6 Ind. 219. The reason of the rule is, that if the facts stated are not sufficient to constitute a cause of action plaintiff has a right to amend his complaint so it will state a cause of action. This he could not do if the pleading was stricken out. The same rule applies to a cross complaint. McCoy *v.* Stockman, 146 Ind. 668, 46 N. E. 21.

Plea in legal effect a confession of cause of action.— Where no other defense is made than by a plea which plaintiff conceives to be in legal effect a confession of the cause of action, he should move for judgment on the pleadings, and not to strike out. Bachman *v.* Everding, 2 Fed. Cas. No. 708, 1 Sawy. 70.

66. *Alabama.*— Davis *v.* Louisville, etc., R. Co., 108 Ala. 660, 18 So. 687.

Illinois.— Consolidated Coal Co. *v.* Peers, 166 Ill. 361, 365, 46 N. E. 1105, 38 L. R. A. 624, where the court said: "To substitute a motion to strike a pleading from the files in place of a demurrer to such pleading is to abrogate the rules of common law pertaining to pleading and practice, and to introduce a new and dangerous rule of procedure, and one that would tend to deprive parties litigant of the statutory right of amendment."

Indiana.— Hart *v.* Scott, 168 Ind. 530, 81 N. E. 481; Atkinson *v.* Wabash R. Co., 143 Ind. 501, 41 N. E. 947; Burk *v.* Taylor, 103 Ind. 399, 3 N. E. 129; McCammack *v.* McCammack, 86 Ind. 387; Port *v.* Williams, 6 Ind. 219; Faylor *v.* Brice, 7 Ind. App. 551, 34 N. E. 833.

New York.— Stewart *v.* Travis, 10 How. Pr. 148; Harlow *v.* Hamilton, 6 How. Pr. 475; Benedict *v.* Dake, 6 How. Pr. 352; Hornfager *v.* Hornfager, 6 How. Pr. 279.

United States.— Bates *v.* Clark, 95 U. S. 204, 206, 24 L. ed. 471, where it was said: "This mode of disposing of a plea [striking it out] which fairly raises a most important issue of law seems to be growing in favor in the territorial courts. It is an unscientific and unprofessional mode of raising and deciding a pure issue of law. This should always be done, when it can, by a demurrer, which is the recognized and appropriate mode in the common law; or by exception, which amounts to the same thing in the civil law, as it is applied to answers in chancery practice. A motion to strike out a plea is properly made when it has been filed irregularly, is not sworn to, if that is required, or wants signature of counsel, or any defect of that character; but if a real and important issue of law is to be made, that issue should be raised by demurrer."

Canada.— Babineau *v.* La Forest, 37 N. Brunsw. 77.

See 39 Cent. Dig. tit. "Pleading," § 1078 *et seq.*

67. See *infra*, XII, C, 1, c, (II), (C).

(B) *Whether Pleading Demurrable as Test.* A pleading, count, or defense which would be held good on demurrer cannot be stricken out for insufficiency;[68] nor, on the other hand, will it be stricken out merely because it is insufficient as against a demurrer,[69] although error in striking out from the files a pleading subject to demurrer is generally considered harmless.[70]

(C) *Frivolous and Irrelevant Pleadings* — (1) IN GENERAL. Where a pleading or separate part thereof is so far insufficient as to be frivolous,[71] a motion lies in most jurisdictions to strike out the pleading if entirely frivolous, or the separate part deemed frivolous,[72] and also a demurrer if frivolous.[73] So where an entire

68. Johnson *v.* McLaughlin, 9 Ala. 551; Wilson *v.* Lineberger, 82 N. C. 412. But see Illinois Cent. R. Co. *v.* Johnson, 34 Ill. 389, holding that a special plea amounting to the general issue may be stricken out, although a demurrer to it has been overruled.

69. Heddy *v.* Driver, 6 Ind. 350; Bloomfield *v.* New York, etc., Tel. Co., 68 N. J. L. 207, 52 Atl. 240; Boaler *v.* Holder, 54 L. T. Rep. N. S. 298; Daley *v.* Byrne, 15 Ont. Pr. 4; Glass *v.* Grant, 12 Ont. Pr. 480.

70. See *infra*, XII, G, 13.

71. What constitutes frivolousness see *supra*, XII, B, 3, e, (II).

72. *Alaska.*— Ebner *v.* Heid, 2 Alaska 600.

Arkansas.— Crary *v.* Ashley, 4 Ark. 203.

Idaho.— Goldstein *v.* Krause, 2 Ida. (Hasb.) 294, 13 Pac. 232.

Minnesota.— St. Cloud First Nat. Bank *v.* Lang, 94 Minn. 261, 102 N. W. 700. But see Morton *v.* Jackson, 2 Minn. 219.

Mississippi.—Garrett *v.* Beaumont, 24 Miss. 377.

Missouri.— State Bank *v.* Smith, 33 Mo. 364.

Nevada.— Lehane *v.* Keyes, 2 Nev. 361.

New Jersey.—Howe *v.* Lawrence, 22 N. J. L. 99; Copperthwait *v.* Dummer, 18 N. J. L. 258; Coxe *v.* Higbee, 11 N. J. L. 395; Anonymous, 7 N. J. L. 160. See also Elliott *v.* Agricultural Ins. Co., (Sup. 1886) 3 Atl. 171; Camp *v.* Allen, 12 N. J. L. 1; North Brunswick Tp. *v.* Booracm, 10 N. J. L. 257. *Compare* Brain *v.* Snyder, 30 N. J. L. 56.

New Mexico.— Mills *v.* Territory, (1905) 81 Pac. 447.

North Carolina.— Walters *v.* Starnes, 118 N. C. 842, 24 S. E. 713; Howell *v.* Ferguson, 87 N. C. 113.

Ohio.— Fosdick *v.* King-Dodds, 7 Ohio S. & C. Pl. Dec. 413, 5 Ohio N. P. 330; Christie *v.* Drennen, 1 Ohio S. & C. Pl. Dec. 374, power inherent.

Rhode Island.— Crafts *v.* Sweeney, 18 R. I. 730, 30 Atl. 658.

South Carolina.— Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444.

United States.— Oregonian R. Co. *v.* Oregon R., etc., Co., 22 Fed. 245, 10 Sawy. 464; Burrow *v.* Dickson, 4 Fed. Cas. No. 2,203, Brunn. Col. Cas. 101, 1 Overt. (Tenn.) 366.

England.—Reichel *v.* Magrath, 14 App. Cas. 665, 54 J. P. 196, 59 L. J. Q. B. 159; Metropolitan Bank *v.* Pooley, 10 App. Cas. 210, 49 J. P. 756, 54 L. J. Q. B. 449, 53 L. T. Rep. N. S. 163, 33 Wklv. Rep. 709; Whitworth *v.* Darbishire, 68 L. T. Rep. N. S. 216, 5 Reports 198, 41 Wklv. Rep. 317.

Canada.— McEwen *v.* Northwestern Coal, etc., Co., 1 Northwest. Terr. 203; O'Connell *v.* Scallion, 24 Nova Scotia 345.

See 39 Cent. Dig. tit. "Pleading," § 1096 *et seq.*

Denials.— A specific denial not in the form prescribed by the statute is properly stricken out. Downing North Denver Land Co. *v.* Burns, 30 Colo. 283, 70 Pac. 413; Pratt Mfg. Co. *v.* Jordan Iron, etc., Co., 33 Hun (N. Y.) 143. An argumentative denial is subject to a motion to strike. Irwin *v.* Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849.

A notice of special matter clearly insufficient as a defense may be stricken out. Story *v.* Baird, 14 N. J. L. 262. But such a motion will not be sustained where the matter set up may be plausibly urged as a defense. Lowry *v.* Hall, 1 Hill (N. Y.) 663.

A plea concluding with a verification which ought to conclude to the country may be stricken out as frivolous. Copperthwait *v.* Dummer, 18 N. J. L. 258.

A counter-claim cannot, however, be stricken out as frivolous. Cooper *v.* Howe, 16 Hun (N. Y.) 502. Where the code provision permits only sham and irrelevant "answers" or "defenses" to be stricken out, a counter-claim cannot be stricken out since it is not a defense and does not constitute the whole answer. Collins *v.* Suau, 7 Rob. (N. Y.) 94.

In Georgia a pleading may be stricken out after a demurrer to it is ruled on and in connection therewith. Mathis *v.* Fordham, 114 Ga. 364, 40 S. E. 324.

In England and some parts of Canada, by statute or rule of court, a motion lies to strike out the complaint where it alleges "no reasonable cause of action." The latter phrase means something more than that the complaint is so insufficient as to be demurrable and a motion lies thereunder only in plain and obvious cases where the court can clearly see that plaintiff has no cause of action. Hubbuck *v.* Wilkinson, [1899] 1 Q. B. 86, 68 L. J. Q. B. 34, 79 L. T. Rep. N. S. 429; Peru *v.* Peruvian Guano Co., 36 Ch. D. 489, 56 L. J. Ch. 1081, 57 L. T. Rep. N. S. 337, 36 Wkly. Rep. 217; Bank of British North America *v.* Munro, 9 Manitoba 151; McEwen *v.* North Western Coal, etc., Co., 1 Northwest. Terr. 203; Power *v.* Pringle, 31 Nova Scotia 78; Hamilton Bank *v.* George, 16 Ont. Pr. 418.

73. Allen *v.* Wheeler, 21 N. J. L. 93; Anderson *v.* Allison, 2 Head (Tenn.) 122; Beggs *v.* Beggs, 50 Wis. 443, 7 N. W. 339. See Porter *v.* Grimsley, 98 N. C. 550, 4 S. E. 529, where the demurrer was merely overruled on the ground that it was frivolous.

pleading or separate paragraph thereof is irrelevant, a motion to strike is authorized, by statute or otherwise, in many jurisdictions;[74] the decisions generally holding that the terms "frivolousness" and "irrelevancy" mean practically the same thing.[75] But a motion to strike on such grounds should not be granted if there is any question as to the validity of the pleading.[76]

(2) New York Rule. In New York, by statute, the remedy for frivolousness is a motion for judgment on the pleadings,[77] and a motion to strike out does not lie.[78]

In Wisconsin there is no distinction between striking out a demurrer as frivolous and overruling it, since the privilege of answering is allowed in either case. Geilfuss *v.* Gates, 87 Wis. 395, 58 N. W. 742; Malone *v.* Roby, 62 Wis. 459, 22 N. W. 575.

Where a demurrer to a complaint lacked the required certificate of counsel, plaintiff's remedy was to attack such irregularity by motion to strike. Ballantine *v.* Yung Wing, 146 Fed. 621.

A demurrer to one paragraph on the ground of misjoinder of causes of action in different paragraphs may be stricken. Bougher *v.* Scobey, 16 Ind. 151.

74. *Alabama.*—Armour Packing Co. *v.* Vietch-Young Produce Co., (1903) 39 So. 680 (statute); Eslava *v.* De Peyster, 47 Ala. 468; Carpenter *v.* Jeter, 4 Stew. & P. 326.

Arkansas.— Hershy *v.* MacGreevy, 46 Ark. 498; Badgett *v.* Martin, 12 Ark. 730.

California.— Davis *v.* Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270.

Colorado.— Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291 (where the statute provides that answers may be demurred to for insufficiency and that sham and irrelevant answers and so much of any pleading as may be irrelevant, redundant, immaterial, or insufficient may be stricken out on motion); Rand *v.* Pantagraph Stationery Co., 1 Colo. App. 270, 28 Pac. 661.

Florida.— Russ *v.* Mitchell, 11 Fla. 80.

Minnesota.— Morton *v.* Jackson, 2 Minn. 219.

Montana.— Owensboro Bank of Commerce *v.* Fuqua, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 588.

Ohio.— State *v.* Harper, 6 Ohio St. 607, 67 Am. Dec. 363. *Contra*, Cleveland Second Nat. Bank *v.* Marbach, 4 Ohio Dec. (Reprint) 524, 2 Clev. L. Rep. 313.

Texas.— Brewer *v.* West, 2 Tex. 376.

Wisconsin.— National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902.

See 39 Cent. Dig. tit. "Pleading," § 1094.

Compare Hatch *v.* Tacoma, etc., R. Co., 6 Wash. 1, 32 Pac. 1063.

If an answer is so palpably irrelevant that it is manifest that it could not be so amended as to make the facts therein stated in any wise germane to the controversy, it may be stricken out on motion. Hart *v.* Scott, 168 Ind. 530, 81 N. E. 481.

75. Colt *v.* Davis, 50 Hun (N. Y.) 366, 3 N. Y. Suppl. 354; Lee Bank *v.* Kitching, 7 Bosw. (N. Y.) 664; Howell *v.* Ferguson, 87 N. C. 113. *Compare* Littlejohn *v.* Greeley, 22 How. Pr. (N. Y.) 345. *Contra*, Fasnacht *v.* Stehn, 53 Barb. (N. Y.) 650; Carpenter *v.* Bell, 1 Rob. (N. Y.) 711.

An irrelevant answer is defined as one which has no substantial relation to the controversy between the parties to the action. Morton *v.* Jackson, 2 Minn. 219; Carpenter *v.* Bell, 1 Rob. (N. Y.) 711; Kurtz *v.* Mcguire, 5 Duer (N. Y.) 660; Jeffras *v.* McKillop, 2 Hun (N. Y.) 351; Walker *v.* Hewett, 11 How. Pr. (N. Y.) 395; Smith *v.* Smith, 50 S. C. 54, 27 S. E. 545. Irrelevancy, as the term was used in the old code provision authorizing the striking out of sham and irrelevant defenses, meant the impertinency of the old chancery system, that is, either prolixity or needless details of material matter or something out of which no cause of action or defense could arise between the parties in the particular suit. Lee Bank *v.* Kitching, 7 Bosw. (N. Y.) 664.

A denial in verbis of the allegation to the complaint cannot be objected to as irrelevant, although the allegations are of immaterial facts. Dovan *v.* Dinsmore, 33 Barb. (N. Y.) 86.

An answer that is irrelevant is of course insufficient, within a code provision that answers may be demurred to for "insufficiency," but it may be insufficient without being irrelevant. Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

Leave of court.—An answer is not irrelevant because it was filed without obtaining the required leave of court. Carpenter *v.* Bell, 1 Rob. (N. Y.) 711.

76. Walter *v.* Fowler, 85 N. Y. 621; Baer *v.* Seymour, 12 N. Y. St. 166; Littlejohn *v.* Greeley, 13 Abb. Pr. (N. Y.) 311; Corlies *v.* Delaplaine, 2 Code Rep. (N. Y.) 117; Cooper *v.* Comfort, 1 Phila. (Pa.) 112; Glass *v.* Grant, 12 Ont. Pr. 480.

77. See *supra*, XII, B, 3, e.

78. Reese *v.* Walworth, 61 N. Y. App. Div. 64, 69 N. Y. Suppl. 1115; Carpenter *v.* Bell, 1 Rob. (N. Y.) 711; Hull *v.* Smith, 1 Duer (N. Y.) 649; Siriani *v.* Deutsch, 12 Misc. (N. Y.) 213, 34 N. Y. Suppl. 26; Farmers', etc., Nat. Bank *v.* Rogers, 3 N. Y. Suppl. 50.

Change in statutes.— Under the practice before the adoption of the code, a plea could be stricken out as frivolous. Daniels *v.* Hallenbeck, 19 Wend. (N. Y.) 408. The code formerly authorized the striking out of sham and "irrelevant" pleas, and thereunder frivolous pleas were generally stricken out as irrelevant. Commonwealth Bank *v.* Pryor, 11 Abb. Pr. N. S. (N. Y.) 227; Carpenter *v.* Bell, 19 Abb. Pr. (N. Y.) 258; Littlejohn *v.* Greeley, 13 Abb. Pr. (N. Y.) 311; Lee Bank *v.* Kitching, 11 Abb. Pr. (N. Y.) 435; Hecker

(D) *Pleading Legal Conclusions.* If a pleading consists of nothing but legal conclusions or tenders merely an issue of law, it may be stricken out on motion;[79] but the mere presence of a legal conclusion will not warrant striking a whole paragraph.[80]

(E) *Miscellaneous Objections.* A pleading taking issue on immaterial matter only,[81] or an unauthorized equitable defense to a legal cause of action,[82] or an equitable plea consisting of matter which is a defense at law,[83] or an answer which is in effect a demurrer,[84] may be stricken out. But if any material fact is traversed by the answer or reply it cannot be stricken.[85]

(III) *SHAM PLEADINGS* [86]— (A) *Definition.* A sham pleading is one good in form but false in fact.[87] In defining a sham answer, in addition to stating that

v. Mitchell, 5 Abb. Pr. (N. Y.) 453; Farmers', etc., Bank *v.* Smith, 15 How. Pr. (N. Y.) 329; Herr *v.* Bamberg, 10 How. Pr. (N. Y.) 128; Stiles *v.* Comstock, 9 How. Pr. (N. Y.) 48; Harlow *v.* Hamilton, 6 How. Pr. (N. Y.) 475. But the code was amended by striking out the word "irrelevant" on the theory that it was equivalent to frivolous, and since then a pleading or defense cannot be stricken out as irrelevant. Hanson Co. *v.* Collier, 119 N. Y. App. Div. 794, 104 N. Y. Suppl. 787 [*reversing* on other grounds 51 Misc. 496, 101 N. Y. Suppl. 690]; Wm. H. Frank Brewing Co. *v.* Hammersen, 22 N. Y. App. Div. 475, 48 N. Y. Suppl. 30; Colt *v.* Davis, 50 Hun (N. Y.) 366, 3 N. Y. Suppl. 354; Goodman *v.* Robb, 41 Hun (N. Y.) 605; Fasnacht *v.* Stehn, 53 Barb. (N. Y.) 650; Collins *v.* Coggill, 7 Rob. (N. Y.) 81; Noval *v.* Haug, 48 Misc. (N. Y.) 198, 96 N. Y. Suppl. 708; Cardeza *v.* Osborn, 32 Misc. (N. Y.) 46, 65 N. Y. Suppl. 450 [*affirmed* in 54 N. Y. App. Div. 626, 66 N. Y. Suppl. 1128]; Whitehall Lumber Co. *v.* Edmans, 4 N. Y. Suppl. 721; Howell *v.* Knickerbocker L. Ins. Co., 24 How. Pr. (N. Y.) 475; Benedict *v.* Dake, 6 How. Pr. (N. Y.) 352. *Contra*, see Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 79 N. Y. Suppl. 310; Putnam *v.* De Forest, 8 How. Pr. (N. Y.) 146.

79. *Colorado.*— Tennis *v.* Barnes, 11 Colo. App. 196, 52 Pac. 1038.

Indiana.— Hawes *v.* Coombs, 34 Ind. 455.

Minnesota.— Dennis *v.* Nelson, 55 Minn. 144, 56 N. W. 589.

New Jersey.— Camden *v.* Greenwald, 66 N. J. L. 186, 48 Atl. 1009.

United States.— Gilchrist *v.* Helena, etc., R. Co., 47 Fed. 593; Denver R., etc., Co. *v.* Union Pac. R. Co., 34 Fed. 386.

See 39 Cent. Dig. tit. "Pleading," § 1090.

Frivolous.—An answer setting forth only conclusions of law may be treated as frivolous and stricken out. Dennis *v.* Nelson, 55 Minn. 144, 56 N. W. 589.

In an action on an accident policy, a plea which, instead of setting out a provision in the policy relied on to defeat recovery, simply states in an argumentative way the pleader's idea of its meaning is bad, and will be struck out. Noble *v.* Travelers' Ins. Co., (N. J. Sup. 1901) 51 Atl. 622.

80. Pierce *v.* Seaboard Air-Line R. Co., 122 Ga. 664, 50 S. E. 468.

81. *Idaho.*— Goldstein *v.* Krause, 2 Ida. (Hasb.) 294, 13 Pac. 232.

Illinois.— Consolidated Coal Co. *v.* Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; McClure *v.* Williams, 65 Ill. 390; Hitchcock *v.* Haight, 7 Ill. 604.

Minnesota.— Cathcart *v.* Peck, 11 Minn. 45; Freeman *v.* Curran, 1 Minn. 169.

New Jersey.— Howe *v.* Lawrence, 22 N. J. L. 99.

Washington.— Williams *v.* Ninemire, 23 Wash. 393, 63 Pac. 534.

82. Buller *v.* Sidell, 43 Fed. 116.

83. Carlsen *v.* Ziehme, 53 Fla. 235, 44 So. 181; Robeson *v.* Orlando First Nat. Bank, 42 Fla. 504, 29 So. 325; Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Johnston *v.* Allen, 22 Fla. 224, 1 Am. St. Rep. 173; Spratt *v.* Price, 18 Fla. 289.

84. Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649; Denver R., etc., Co. *v.* Union Pac. R. Co., 34 Fed. 386.

85. Herf, etc., Chemical Co. *v.* Lackawanna Line, 78 Mo. App. 305; Philbert, etc., Mfg. Co. *v.* Dawson, 77 Mo. App. 122; Gross *v.* Bock, 11 N. Y. St. 295.

86. **Falsity as ground for demurrer** see *supra*, VI, F, 1, m.

Interposing false pleadings as contempt of court see CONTEMPT, 9 Cyc. 8 text and note 21.

87. *California.*— Continental Bldg., etc., Assoc. *v.* Boggess, 145 Cal. 30, 78 Pac. 245; Arata *v.* Tellurium Gold, etc., Min. Co., 65 Cal. 340, 4 Pac. 195; Greenbaum *v.* Turrill, 57 Cal. 285; Gostorfs *v.* Taaffe, 18 Cal. 385; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692.

Colorado.— Patrick *v.* McManus, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253; Cochrane *v.* Parker, 5 Colo. App. 527, 39 Pac. 361.

Idaho.—Goldstein *v.* Krause, 2 Ida. (Hasb.) 294, 13 Pac. 32.

Kansas.— *In re* Bartholomew, 41 Kan. 273, 21 Pac. 275.

Nebraska.— Upton *v.* Kennedy, 36 Nebr. 66, 53 N. W. 1042.

New York.— People *v.* McCumber, 18 N. Y. 315, 72 Am. Dec. 515; Roome *v.* Nicholson, 8 Abb. Pr. N. S. 343; Struver *v.* Ocean Ins. Co., 9 Abb. Pr. 23; Littlejohn *v.* Greeley, 22 How. Pr. 345; Walker *v.* Hewit, 11 How. Pr. 395. See also Westervelt *v.* Morrelle, 26 Misc. 870, 56 N. Y. Suppl. 377.

North Carolina.— Howell *v.* Ferguson, 87 N. C. 113.

North Dakota.— Gjerstadengen *v.* Hartzell, 8 N. D. 424, 79 N. W. 872.

United States.— Bachman *v.* Everding, 2

it is one shown to be false, the additional element is often added that it is one which appears to have been interposed in bad faith or for the purpose of delay;[88] but it has been expressly decided that the power of the court to strike out such a pleading is not limited to cases where bad faith affirmatively appears and that a sham pleading may be stricken out, although interposed in the belief of its truth.[89] A pleading is not sham merely because legally insufficient,[90] or demurrable for insufficiency,[91] nor because insufficiently setting forth a valid claim or defense,[92] nor because of the omission of material facts,[93] nor because it contains inconsistent averments.[94]

(B) *Power to Strike.* At common law, the courts had power to strike out a pleading as false or sham.[95] Under the codes and practice acts the power is gen-

Fed. Cas. No. 708, 1 Sawy. 70; Witherell *v.* Wiberg, 30 Fed. Cas. No. 17,917, 4 Sawy. 232.

See 39 Cent. Dig. tit. "Pleading," § 1120.

For instance a plea of limitations may be stricken out as sham in an action to foreclose, where, because of the answer not being verified, it admits the due execution of the note and mortgage, copies of which are set out in the complaint, and it appears therefrom that the action is commenced within the period fixed by the statute of limitations. Shasta Bank *v.* Boyd, 99 Cal. 604, 34 Pac. 337.

Sham and false mean the same thing.— People *v.* McCumber, 18 N. Y. 315, 72 Am. Dec. 515; Farnsworth *v.* Halstead, 10 N. Y. Suppl. 763.

An answer setting up the pendency of another action may be stricken out as false (Hallett *v.* Hallett, 10 Misc. (N. Y.) 304, 30 N. Y. Suppl. 946), although true at the time the answer was served (Clark *v.* Clark, 7 Rob. (N. Y.) 276).

Allegations on information and belief.— The allegation upon information and belief of facts presumptively within the knowledge of the party pleading makes the answer sham. Frey *v.* Sylvester, 24 Misc. (N. Y.) 167, 53 N. Y. Suppl. 527. But pleading facts on information and belief should not be stricken out as sham, unless it clearly appears that there could not have been any information or belief. Kelly *v.* Kelly, 12 Misc. (N. Y.) 457, 34 N. Y. Suppl. 255.

88. *California.*— Shasta Bank *v.* Boyd, 99 Cal. 604, 34 Pac. 337; Gostorfs *v.* Taaffe, 18 Cal. 385.

Colorado.— Cochrane *v.* Parker, 5 Colo. App. 527, 39 Pac. 361.

Idaho.— Goldstein *v.* Krause, 2 Ida. (Hasb.) 294, 13 Pac. 232.

Indiana.— Lowe *v.* Thompson, 86 Ind. 503; Beeson *v.* McConnaha, 12 Ind. 420; Smith *v.* Webb, 5 Blackf. 287.

Minnesota.— State *v.* Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630; Fletcher *v.* Byers, 55 Minn. 419, 57 N. W. 139.

Montana.— Sweetman *v.* Ramsey, 22 Mont. 323, 56 Pac. 361.

New York.— Reese *v.* Walworth, 61 N. Y. App. Div. 64, 69 N. Y. Suppl. 1115; Caswell *v.* Bushnell, 14 Barb. 393; McCarty *v.* O'Donnell, 7 Rob. 431; Brown *v.* Jenison, 3 Sandf. 732; Hadden *v.* New York Silk Mfg. Co., 1 Daly 388; Crandell *v.* Bickerd, 32 Misc. 258, 66 N. Y. Suppl. 352; Andreae *v.* Bandler, 56 N. Y. Suppl. 614; Roome *v.* Nicholson, 8 Abb. Pr. N. S. 343; Kiefer *v.* Thomass, 6 Abb. Pr. N. S. 42; Benedict *v.* Tanner, 10 How. Pr. 455; Ostrom *v.* Bixby, 9 How. Pr. 57; Nichols *v.* Jones, 6 How. Pr. 355; Seward *v.* Miller, 6 How. Pr. 312; Darrow *v.* Miller, 3 Code Rep. 241.

Oregon.— Randall *v.* Simmons, 40 Oreg. 554, 67 Pac. 513; Foren *v.* Dealey, 4 Oreg. 92.

United States.— Wythe *v.* Myers, 30 Fed. Cas. No. 18,119, 3 Sawy. 595.

See 39 Cent. Dig. tit. "Pleading," § 1120.

89. State *v.* Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630; Roome *v.* Nicholson, 8 Abb. Pr. N. S. (N. Y.) 343. See Cochrane *v.* Parker, 5 Colo. App. 527, 39 Pac. 361.

Ordinarily bad faith will be presumed from the fact that the answer is false and untrue. But it is clear that the court has the power to strike out such an answer even though in fact interposed in the belief of its truth and in good faith, in all cases where the falsity is clearly and unquestionably disclosed. State *v.* Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630.

90. Nichols *v.* Jones, 6 How. Pr. (N. Y.) 355.

91. Kelly *v.* Ernest, 26 N. Y. App. Div. 90, 49 N. Y. Suppl. 896.

92. Jackson Sharp Co. *v.* Holland, 14 Fla. 384 (indefinite and uncertain); Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248; Struver *v.* Ocean Ins. Co., 2 Hilt. (N. Y.) 475; Seward *v.* Miller, 6 How. Pr. (N. Y.) 312; Alfred *v.* Watkins, Code Rep. N. S. (N. Y.) 343.

93. Zimmerman *v.* Meyrowitz, 77 N. Y. App. Div. 329, 79 N. Y. Suppl. 159.

94. Smith *v.* Wells, 20 How. Pr. (N. Y.) 158.

95. Smith *v.* Webb, 5 Blackf. (Ind.) 287; Rudisill *v.* Sill, 4 Blackf. (Ind.) 282; Henderson *v.* Reed, 1 Blackf. (Ind.) 347; Morton *v.* Jackson, 2 Minn. 219; Anonymous, 7 N. J. L. 160; Shadwell *v.* Berthoud, 5 B. & Ald. 750 note, 7 E. C. L. 409; Richley *v.* Proone, 1 B. & C. 286, 8 E. C. L. 123; Balmanno *v.* Thompson, 6 Bing. N. Cas. 153, 37 E. C. L. 557; Bones *v.* Bunter, 1 Chit. 565, 18 E. C. L. 308; Vincent *v.* Groome, 1 Chit. 182, 18 E. C. L. 109; Nutt *v.* Rush, 7 D. & L. 192, 4 Exch. 490, 19 L. J. Exch. 54; Blewitt *v.* Marsden, 10 East 237; Phillips *v.* Bruce, 6 M. & S. 134; Penfold *v.* Hawkins, 2 M. & S.

erally conferred by express provisions;[96] but the power conferred by statute is usually only that exercised at common law,[97] and the power to strike is inherent in the court where not authorized by statute.[98] The fact that a defense is demurrable does not preclude a motion to strike it out as sham.[99]

(c) *What Pleadings or Parts Thereof May Be Stricken Out as Sham* — (1) In General.[1] It is generally held that neither a complaint,[2] demurrer,[3] or counterclaim [4] can be stricken out as sham where the statute merely authorizes the striking out of sham "answers and defenses." But a complaint may be stricken as sham where the statute authorizes the striking of an answer "or other pleading" as sham.[5] And at common law it seems that a demurrer, where false, should be stricken out.[6]

(2) Denials. At common law the general issue cannot be stricken as sham.[7] And under the codes and practice acts, the general rule is that an answer containing a sufficient general or specific denial of all or a part of the material allega-

606; Bradbury *v.* Emans, 5 M. & W. 595; Pierce *v.* Blake, 2 Salk. 515.

From time immemorial, courts have stricken false pleas and frivolous counts from the record, in order to prevent the records from being unnecessarily encumbered. Anonymous, 7 N. J. L. 160.

Under the old English practice, plaintiff was permitted to treat a sham plea as a nullity and sign judgment as for want of a plea. Rudisill *v.* Sill, 4 Blackf. (Ind.) 282; Morton *v.* Jackson, 2 Minn. 219; Smith *v.* Backwell, 4 Bing. 512, 13 E. C. L. 612; Blewitt *v.* Marsden, 10 East 237. But under the more recent practice, such pleas are merely stricken out on motion. Morton *v.* Jackson, 2 Minn. 219.

In Manitoba a false plea cannot, for that reason alone, be stricken out as "embarrassing," if there are other valid pleas. Woods *v.* Tees, 5 Manitoba 256.

96. *California.*— Shasta Bank *v.* Boyd, 99 Cal. 604, 34 Pac. 337; Gostorfs *v.* Taaffe, 18 Cal. 385.

Colorado.—Cochrane *v.* Parker, 5 Colo. App. 527, 39 Pac. 361.

Idaho.— Goldstein *v.* Krause, 2 Ida. (Hasb.) 294, 13 Pac. 232.

Indiana.— Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248.

Montana.— McDonald *v.* Pincus, 13 Mont. 83, 32 Pac. 283.

New York.— Saratoga Springs First Nat. Bank *v.* Slattery, 4 N. Y. App. Div. 421, 38 N. Y. Suppl. 859; Blakely *v.* Jacobson, 9 Bosw. 140; Brown *v.* Jenison, 3 Sandf. 732; Schiller *v.* Maltbie, 11 N. Y. Civ. Proc. 304.

United States.— Buller *v.* Sidell, 43 Fed. 116; Wythe *v.* Myers, 30 Fed. Cas. No. 18,119, 3 Sawy. 595.

England.— Remmington *v.* Scoles, [1897] 2 Ch. 1, 66 L. J. Ch. 526, 76 L. T. N. S. 667, 45 Wkly. Rep. 580.

Canada.—Holmes *v.* Taylor, 32 Nova Scotia 191; Chipman *v.* Ritchie, 5 Nova Scotia 710.

See 39 Cent. Dig. tit. "Pleading," § 1120. And see the statutes of the several states.

In New York the old code provided for the striking out of "sham and irrelevant" answers and defenses, but the word "irrelevant" was stricken out of the statute on the ground that it was equivalent to "frivolous."

Defense sham as to part of defendants.— Where the answer of two of defendants is sham, it may be stricken out, although as to the other defendant it is good where the latter does not complain. Bardwell-Robinson Co. *v.* Brown, 57 Minn. 140, 58 N. W. 872.

97. Wertheimer *v.* Morse, 10 Ohio Dec. (Reprint) 814, 23 Cinc. L. Bul. 455.

98. Barker *v.* Foster, 29 Minn. 166, 12 N. W. 460; Upton *v.* Kennedy, 36 Nebr. 66, 53 N. W. 1042; Larson *v.* Winder, 14 Wash. 647, 45 Pac. 315.

99. Lee Bank *v.* Kitching, 7 Bosw. (N. Y.) 664.

1. Denials see *infra*, XII, C, 1, c, (III), (C), (2).

2. Lowe *v.* Thompson, 86 Ind. 503.

3. Larco *v.* Casaneuava, 30 Cal. 560; Kain *v.* Dickel, 46 How. Pr. (N. Y.) 208.

4. Schlesinger *v.* Wise, 106 N. Y. App. Div. 587, 94 N. Y. Suppl. 718; Saratoga Springs First Nat. Bank *v.* Slattery, 4 N. Y. App. Div. 421, 38 N. Y. Suppl. 859; Baum's Castorine Co. *v.* Thomas, 92 Hun (N. Y.) 1, 37 N. Y. Suppl. 913; Collins *v.* Suau, 7 Rob. (N. Y.) 94; Briggs *v.* Freedman, 9 N. Y. Civ. Proc. 73; Whitford *v.* Zinc, 28 Nova Scotia 531. *Contra*, Patrick *v.* McManus, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253; Monitor Drill Co. *v.* Moody, 93 Minn. 232, 100 N. W. 1104.

5. Tilden *v.* Louisville, etc., Ferry Co., 157 Ind. 532, 62 N. E. 31; Lowe *v.* Thompson, 86 Ind. 503; Stars *v.* Hammersmith, 31 Ind. App. 610, 67 N. E. 554.

6. Rudisill *v.* Sill, 4 Blackf. (Ind.) 282.

7. Greenbaum *v.* Turrill, 57 Cal. 285; Robertson *v.* Moir, 88 Ill. App. 355; Walter *v.* Walter, 35 N. J. L. 262; Wayland *v.* Tysen, 45 N. Y. 281; Mier *v.* Cartledge, 8 Barb. (N. Y.) 75; Farmers, etc., Bank *v.* Smith, 15 How. Pr. (N. Y.) 329; Broome County Bank *v.* Lewis, 18 Wend. (N. Y.) 565; Pierson *v.* Evans, 1 Wend. (N. Y.) 30. *Contra*, Coykendall *v.* Robinson, 39 N. J. L. 98.

In New Jersey, under the statute providing that every plea or demurrer shall be pleaded as nullity unless accompanied by the affidavit that it is not intended for the purpose of delay and that the applicant verily believes that defendant has a just and legal defense to the action on the merits of the case, a plea of the

tions of the complaint cannot be stricken as sham,[8] especially if verified;[9] but some courts refuse to make any distinction between a general denial and defenses consisting of new matter.[10] In some jurisdictions a denial upon information

general issue may be stricken out as sham. Walter *v.* Walter 35 N. J. L. 262.

8. *California.*—Lybecker *v.* Murray, 58 Cal. 186; Fay *v.* Cobb, 51 Cal. 313. See Shasta Bank *v.* Boyd, 99 Cal. 604, 34 Pac. 337. But see Gay *v.* Winter, 34 Cal. 153.

Dakota.— Samuel Cupples Wooden Ware Co. *v.* Jensen, 4 Dak. 149, 27 N. W. 206, 28 N. W. 193.

Kansas.— *In re* Bartholomew, 41 Kan. 273, 21 Pac. 275.

Nebraska.— Upton *v.* Kennedy, 36 Nebr. 66, 53 N. W. 1042.

New York.— Thompson *v.* Erie R. Co., 45 N. Y. 468; Wayland *v.* Tysen, 45 N. Y. 281; Schlesinger *v.* Wise, 106 N. Y. App. Div. 587, 94 N. Y. Suppl. 718; Blum *v.* Bruggemann, 58 N. Y. App. Div. 377, 68 N. Y. Suppl. 1065; Robertson *v.* Rockland Cemetery Imp. Co., 54 N. Y. App. Div. 191, 66 N. Y. Suppl. 632; Barrie *v.* Forston, 35 N. Y. App. Div. 404, 54 N. Y. Suppl. 841; Albany County Bank *v.* Rider, 74 Hun 349, 26 N. Y. Suppl. 490; Wilson *v.* Eastman, etc., Co., 56 Hun 194, 9 N. Y. Suppl. 189; Robert Gere Bank *v.* Inman, 51 Hun 97, 5 N. Y. Suppl. 457; Martin *v.* Erie Preserving Co., 48 Hun 81; Claflin *v.* Jaroslauski, 64 Barb. 463; Caswell *v.* Bushnell, 14 Barb. 393; Ward *v.* Waterhouse, 2 Rob. 653; Schmidt *v.* McCaffrey, 34 Misc. 693, 70 N. Y. Suppl. 1011; Fromme *v.* Schwoerer, 30 Misc. 825, 61 N. Y. Suppl. 1108; Belsena Coal Min. Co. *v.* Liberty Dredging Co., 26 Misc. 846, 55 N. Y. Suppl. 747; Meurer *v.* Brinkman, 25 Misc. 12, 53 N. Y. Suppl. 770; Zivi *v.* Einstein, 2 Misc. 177, 21 N. Y. Suppl. 583; Reynolds *v.* Craus, 16 N. Y. Suppl. 792; Schultze *v.* Rodewald, 1 Abb. N. Cas. 365; Miller *v.* Hughes, 13 Abb. Pr. 93 note; Goëdel *v.* Robinson, 1 Abb. Pr. 116; Fellows *v.* Muller, 48 How. Pr. 82; Butterfield *v.* Macomber, 22 How. Pr. 150; Farmers, etc., Bank *v.* Smith, 15 How. Pr. 329; Grant *v.* Power, 12 How. Pr. 500; Benedict *v.* Tanner, 10 How. Pr. 455; Winne *v.* Sickles, 9 How. Pr. 217; Livingston *v.* Finkle, 8 How. Pr. 485; Sherman *v.* Bushnell, 7 How. Pr. 171; White *v.* Bennett, 7 How. Pr. 59; Seward *v.* Miller, 6 How. Pr. 312. *Contra*, People *v.* McCumber, 18 N. Y. 315, 72 Am. Dec. 515; Mier *v.* Cartledge, 8 Barb. 75; Claflin *v.* Griffin, 5 Bosw. 689; Cavanagh *v.* Ocean Steam Nav. Co., 11 N. Y. Suppl. 547; Corbett *v.* Eno, 13 Abb. Pr. 65.

North Dakota.— Gjerstadengen *v.* Hartzell, 8 N. D. 424, 79 N. W. 872 (holding, however, that a specific denial may be stricken where its falsity is apparent from a bare inspection of the pleadings, and without the aid of extrinsic proof); Sifton *v.* Sifton, 5 N. D. 187, 65 N. W. 670.

South Carolina.— Standard Sewing Mach. Co. *v.* Henry, 43 S. C. 17, 20 S. E. 790; Ransom *v.* Anderson, 9 S. C. 438.

South Dakota.— King *v.* Waite, 10 S. D. 1, 70 N. W. 1056; Loranger *v.* Big Missouri Min. Co., 6 S. D. 478, 61 N. W. 686; Green *v.* Hughitt School Tp., 5 S. D. 452, 59 N. W. 224.

Washington.— Larson *v.* Winder, 14 Wash. 647, 45 Pac. 315.

Canada.— Woods *v.* Tees, 5 Manitoba 256.

See 39 Cent. Dig. tit. "Pleading," § 1121.

General denial of part of complaint.— Where an answer contained a general denial of several allegations of the complaint, as to those allegations the answer is as fully a general denial as is an answer denying the whole complaint. New York Mut. L. Ins. Co. *v.* Toplitz, 58 N. Y. App. Div. 188, 68 N. Y. Suppl. 680.

It is immaterial that the answer is not verified.— Ransom *v.* Anderson, 9 S. C. 438.

Where falsity admitted.—A denial will not be stricken out as sham even where defendant on examination before trial admitted the allegations of the complaint. Schultze *v.* Rodewald, 1 Abb. N. Cas. (N. Y.) 365. So the fact that defendant makes admissions in his opposing affidavit inconsistent with his answer and which seem to sustain plaintiff's case does not authorize the striking out of a denial as sham. King *v.* Waite, 10 S. D. 1, 70 N. W. 1056.

An answer which is in effect a general denial cannot be stricken out as sham. Loranger *v.* Big Missouri Min. Co., 6 S. D. 478, 61 N. W. 686.

A specific denial cannot be stricken out as sham even where inconsistent with a separate defense set up in the answer. Schlesinger *v.* Wise, 106 N. Y. App. Div. 587, 94 N. Y. Suppl. 718; Schlesinger *v.* McDonald, 106 N. Y. App. Div. 570, 94 N. Y. Suppl. 721.

9. Samuel Cupples Wooden Ware Co. *v.* Jensen, 4 Dak. 149, 27 N. W. 206, 28 N. W. 193; Gregory *v.* Wright, 11 Abb. Pr. (N. Y.) 417; Gregg *v.* Reader, 15 How. Pr. (N. Y.) 371; Sherman *v.* Bushnell, 7 How. Pr. (N. Y.) 171; Catlin *v.* McGroarty, Code Rep. N. S. (N. Y.) 291. See also *infra*, XII, C, 1, c, (III), (C), (3).

10. *Minnesota.*— St. Cloud First Nat. Bank *v.* Lang, 94 Minn. 261, 102 N. W. 700; Bardwell-Robinson Co. *v.* Brown, 57 Minn. 140, 58 N. W. 872; Stevens *v.* McMillin, 37 Minn. 509, 35 N. W. 372; C. N. Nelson Lumber Co. *v.* Richardson, 31 Minn. 267, 17 N. W. 388. See McDermott *v.* Deither, 40 Minn. 86, 41 N. W. 544, where, however, the motion was denied because it was not clearly shown that the answer was interposed in bad faith or was clearly and indisputably sham. But see Morton *v.* Jackson, 2 Minn. 219.

New Jersey.— Coykendall *v.* Robinson, 89 N. J. L. 98.

North Carolina.— See Schehan *v.* Malone, 71 N. C. 440.

Ohio.— Wertheimer *v.* Morse, 10 Ohio Dec. (Reprint) 814, 23 Cinc. L. Bul. 455. *Compare* Werk *v.* Christie, 9 Ohio Cir. Ct. 439, 6 Ohio Cir. Dec. 255.

Wisconsin.— Pfister *v.* Wells, 92 Wis. 171, 65 N. W. 1041, statute.

and belief,[11] or of knowledge or information sufficient to form a belief,[12] may be stricken out as sham where the matter is actually or presumptively within the knowledge of defendant, as where the subject of denial is a matter of record which could be easily seen by defendant;[13] while in other jurisdictions a denial on information and belief or of knowledge or information sufficient to form a belief cannot be stricken as sham under any circumstances.[14]

(3) VERIFIED PLEADING. In some jurisdictions a verified pleading cannot be stricken as sham,[15] while in other jurisdictions the right to strike out is independent of whether the pleading is verified or unverified.[16]

United States.— Oregonian R. Co. *v.* Oregon R., etc., Co., 22 Fed. 245, 10 Sawy. 464.

England.—See Remmington *v.* Scoles, [1897] 2 Ch. 1, 66 L. J. Ch. 526, 76 L. T. Rep. N. S. 667, 45 Wkly. Rep. 580.

See 39 Cent. Dig. tit. "Pleading," § 1112.

Compare Jackson Sharp Co. *v.* Holland, 14 Fla. 384.

A denial of indebtedness in an action on a judgment will be stricken out. Buller *v.* Sidell, 43 Fed. 116.

11. Moscow First Nat. Bank *v.* Martin, 6 Ida. 204, 55 Pac. 302.

12. *California.*— Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

Minnesota.— Wheaton *v.* Briggs, 35 Minn. 470, 29 N. W. 170.

North Dakota.— Gjerstadengen *v.* Hartzell, 8 N. D. 424, 79 N. W. 872.

South Dakota.— See Loranger *v.* Big Missouri Min. Co., 6 S. D. 478, 61 N. W. 686.

United States.— Buller *v.* Sidell, 43 Fed. 116; Oregonian R. Co. *v.* Oregon R., etc., Co., 22 Fed. 245, 10 Sawy. 464.

See 39 Cent. Dig. tit. "Pleading," § 1122.

Illustrations.—A denial of knowledge or information sufficient to form a belief as to the recovery of the judgment sued upon will be stricken out as sham where it appears by defendant's own papers that they entered a general appearance by attorney in the action in which the judgment was recovered. Buller *v.* Sidell, 43 Fed. 116. A denial as to matters of record in judicial proceedings without any knowledge as to whether the answer was true and without any effort to ascertain whether it was false or true is properly stricken as sham. Wertheimer *v.* Morse, 10 Ohio Dec. (Reprint) 814, 24 Cinc. L. Bul. 455.

Alternative remedies.— When a denial of knowledge concerning a matter alleged in the complaint is followed by a direct averment necessarily implying such knowledge, either the denial may be stricken out as sham or the averment as redundant. Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277.

13. Moscow First Nat. Bank *v.* Martin, 6 Ida. 204, 55 Pac. 302; Wheaton *v.* Briggs, 35 Minn. 470, 29 N. W. 170; Gjerstadengen *v.* Hartzell, 8 N. D. 424, 79 N. W. 872; Wentzel *v.* Zinn, 10 Ohio S. & C. Pl. Dec. 97, 7 Ohio N. P. 512. *Contra*, see Oregonian R. Co. *v.* Oregon R., etc., Co., 22 Fed. 245, 10 Sawy. 464.

14. Schlesinger *v.* McDonald, 106 N. Y. App. Div. 570, 94 N. Y. Suppl. 721; Hopkins *v.* Meyer, 76 N. Y. App. Div. 365, 78 N. Y. Suppl. 459; Ginnel *v.* Stayner, 71 N. Y. App. Div. 540, 75 N. Y. Suppl. 887; Alexander *v.* Aronson, 65 N. Y. App. Div. 174, 72 N. Y. Suppl. 640; Howe *v.* Elwell, 57 N. Y. App. Div. 357, 67 N. Y. Suppl. 1108; Robert Gere Bank *v.* Inman, 51 Hun (N. Y.) 97, 5 N. Y. Suppl. 457 [*affirmed* in 115 N. Y. 650, 21 N. E. 1118]; Colt *v.* Davis, 50 Hun (N. Y.) 366, 3 N. Y. Suppl. 354; Martin *v.* Erie Preserving Co., 48 Hun (N. Y.) 81; Grocers' Bank *v.* O'Rorke, 6 Hun (N. Y.) 18; Caswell *v.* Bushnell, 14 Barb. (N. Y.) 393; Humble *v.* McDonough, 5 Misc. (N. Y.) 508, 25 N. Y. Suppl. 965; Zivi *v.* Einstein, 2 Misc. (N. Y.) 177, 21 N. Y. Suppl. 583 [*reversing* 1 Misc. 212, 20 N. Y. Suppl. 893, 894]; Macauley *v.* Bromell, etc., Printing Co., 5 N. Y. Civ. Proc. 431; Roby *v.* Hallock, 5 Abb. N. Cas. (N. Y.) 86; Davis *v.* Potter, 4 How. Pr. (N. Y.) 155. *Contra*, Sherman *v.* Boehn, 13 Daly (N. Y.) 42; Commonwealth Bank *v.* Pryor, 11 Abb. Pr. N. S. (N. Y.) 227.

15. Greenbaum *v.* Turrill, 57 Cal. 285; Gostrofs *v.* Taaffe, 18 Cal. 385; Samuel Cupples Wooden Ware Co. *v.* Jensen, 4 Dak. 149, 27 N. W. 206, 28 N. W. 193; Wayland *v.* Tysen, 45 N. Y. 281; Rochester Cent. Bank *v.* Thein, 76 Hun (N. Y.) 571, 28 N. Y. Suppl. 232; Mier *v.* Cartledge, 8 Barb. (N. Y.) 75 [*reversing* 4 How. Pr. 115]; Williams *v.* Sholto, 4 Sandf. (N. Y.) 641; Smith *v.* Homer, 15 Misc. (N. Y.) 403, 36 N. Y. Suppl. 1089; Barney *v.* King, 13 N. Y. Suppl. 685. See also Pacific Mill Co. *v.* Inman, (Oreg. 1907) 90 Pac. 1099; Loranger *v.* Big Missouri Min. Co., 6 S. D. 478, 61 N. W. 686. *Compare* Continental Bldg., etc., Assoc. *v.* Boggess, 145 Cal. 30, 78 Pac. 245. *Contra*, People *v.* McCumber, 18 N. Y. 315, 72 Am. Dec. 515; Claflin *v.* Griffin, 8 Bosw. (N. Y.) 689; Henry *v.* Fowler, 3 Daly (N. Y.) 199; Lawrence *v.* Derby, 24 How. Pr. (N. Y.) 133; Manufacturers' Bank *v.* Hitchcock, 14 How. Pr. (N. Y.) 406.

In Wisconsin it is provided by statute that no defense shall be deemed sham when the truth thereof is supported by the affidavit of a single witness, either by way of verification to the pleadings, or in opposing a motion to strike out. Moore *v.* May, 117 Wis. 192, 94 N. W. 45; Pearson *v.* Neeves, 92 Wis. 319, 66 N. W. 357; Pfister *v.* Wells, 92 Wis. 171, 65 N. W. 1041.

16. State *v.* Webber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630; Pfaender *v.* Winona, etc., R. Co., 84 Minn. 224, 87 N. W. 618; Stevens *v.* McMillin, 37 Minn. 509, 35 N. W. 372; Wheaton *v.* Briggs, 35

(4) Defense Sham in Part. The motion to strike a pleading as sham can be directed only against an entire answer or an entire defense,[17] and an entire answer will not be stricken out upon a showing that a separable part of it is sham.[18] However, if a part of an answer is false and a part true, but the part that is true, standing alone, does not constitute a defense, the whole answer may be stricken as sham.[19]

(D) *Propriety of Granting Motion.* The motion to strike out a pleading or defense as sham is not looked on with favor and will be granted only where the falsity clearly appears,[20] since the truth or falsity of a pleading is ordinarily to be tried by a jury with full opportunity for producing, examining, and cross-examining witnesses.[21] But a pleading may be stricken as sham where the moving

Minn. 470, 29 N. W. 170; C. N. Nelson Lumber Co. *v.* Richardson, 31 Minn. 267, 17 N. W. 388; Barker *v.* Foster, 29 Minn. 166, 12 N. W. 460; Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Conway *v.* Wharton, 13 Minn. 158; Coykendall *v.* Robinson, 39 N. J. L. 98. But see Morton *v.* Jackson, 2 Minn. 219.

As affecting measure of proof.— The fact of a verification does not affect the question whether a pleading should be stricken as sham except, perhaps, as to the measure of proof which the court should require. Barker *v.* Foster, 29 Minn. 166, 12 N. W. 460.

17. Winslow *v.* Ferguson, 1 Lans. (N. Y.) 436. See also Scofield *v.* State Nat. Bank, 9 Nebr. 316, 2 N. W. 888, 31 Am. Rep. 412.

18. Schmitt *v.* Cassilius, 31 Minn. 7, 16 N. W. 453; Ransom *v.* Anderson, 9 S. C. 438; Jarvis *v.* McBride, 18 Wis. 316.

An answer which consists in part of a denial of the complaint cannot be stricken out as sham. Colt *v.* Davis, 50 Hun (N. Y.) 366, 3 N. Y. Suppl. 354.

19. Winslow *v.* Ferguson, 1 Lans. (N. Y.) 436.

20. *California.*— Continental Bldg., etc., Assoc. *v.* Boggess, 145 Cal. 30, 78 Pac. 245; Gostorfs *v.* Taaffe, 18 Cal. 385.

Minnesota.— Brown-Forman Co. *v.* Peterson, 101 Minn. 53, 111 N. W. 733; State *v.* Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630; St. Cloud First Nat. Bank *v.* Lang, 94 Minn. 261, 102 N. W. 700; Pfaender *v.* Winona, etc., R. Co., 84 Minn. 224, 87 N. W. 618; White *v.* Moquist, 61 Minn. 103, 63 N. W. 255; McDermott *v.* Deither, 40 Minn. 86, 41 N. W. 544; City Bank *v.* Doll, 33 Minn. 507, 24 N. W. 300; Wright *v.* Jewell, 33 Minn. 505, 24 N. W. 299; Barker *v.* Foster, 29 Minn. 166, 12 N. W. 460; Morton *v.* Jackson, 2 Minn. 219.

New Jersey.— Walter *v.* Walter, 35 N. J. L. 262.

New York.— Zimmerman *v.* Meyrowitz, 77 N. Y. App. Div. 329, 77 N. Y. Suppl. 159; Wait *v.* Getman, 32 N. Y. App. Div. 168, 52 N. Y. Suppl. 965; MacColl *v.* American Union L. Ins. Co., 89 Hun 490, 35 N. Y. Suppl. 364; Webb *v.* Foster, 45 N. Y. Super. Ct. 311; Collins *v.* Coggill, 7 Rob. 81; Kelly *v.* Kelly, 12 Misc. 457, 34 N. Y. Suppl. 255; Martens *v.* Burton Co., 7 Misc. 244, 27 N. Y. Suppl. 260; Andreae *v.* Bandler, 56 N. Y. Suppl. 614; Hyde *v.* Kitchen, 21 N. Y. Suppl. 238; Morey *v.* Safe Deposit Co., 7 Abb. Pr. N. S. 199; Lockwood *v.* Sahlenger, 18 Abb. Pr. 136; Fosdick *v.* Groff, 22 How. Pr. 158; Seward *v.* Miller, 6 How. Pr. 312.

Ohio.— Wentzel *v.* Zinn, 10 Ohio S. & C. Pl. Dec. 97, 7 Ohio N. P. 512.

South Carolina.— Gray *v.* Gidiere, 4 Strobh. 438; Ransom *v.* Anderson, 9 S. C. 438.

Wisconsin.— Cottrill *v.* Cramer, 40 Wis. 555.

United States.— Bachman *v.* Everding, 2 Fed. Cas. No. 708, 1 Sawy. 70.

England.— Levy *v.* Railton, 14 Q. B. 418, 14 Jur. 19, 19 L. J. Q. B. 16, 68 E. C. L. 418.

Canada.— Merchants' Ins. Co. *v.* Schofield, 32 N. Brunsw. 2; Holmes *v.* Taylor, 32 Nova Scotia 191; Davis *v.* Code, 7 Ont. Pr. 2; Waltenberger *v.* McLean, 4 U. C. Q. B. 350.

See 39 Cent. Dig. tit. "Pleading," § 1120.

Under the early practice, a plea would not be stricken out as false unless it was apparent that it was intended to entrap the opposing party, being of a doubtful character and calling for a course of special pleading which might compromise his rights. Tucker *v.* Ladd, 4 Cow. (N. Y.) 47.

Omitting material facts contained in original pleading.— It is not enough that a material fact contained in the original answer which was held bad on demurrer was omitted from an amended answer. Zimmerman *v.* Meyrowitz, 77 N. Y. App. Div. 329, 79 N. Y. Suppl. 159.

Although admissions or averments in one defense cannot be used against a party in the trial of issues raised by other defenses, they may very properly be considered by the court in determining whether other defenses are sham. Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; Conway *v.* Wharton, 13 Minn. 158. Inconsistency between two defenses may prove one of them sham. Noonan *v.* Bradley, 9 Wall. (U. S.) 394, 19 L. ed. 757; Conway *v.* Wharton, 13 Minn. 158. *Contra*, Bachman *v.* Everding, 2 Fed. Cas. No. 708, 1 Sawy. 70.

An allegation on information and belief cannot be stricken as sham unless it is clearly shown that there could be no information or belief. Webb *v.* Foster, 45 N. Y. Super. Ct. 311.

21. St. Cloud First Nat. Bank *v.* Lang, 94 Minn. 261, 102 N. W. 700.

affidavits clearly show the falsity thereof and there are no counter affidavits,[22] or where the opposing affidavits fail to state any fact showing or tending to show the truth of the pleading,[23] or are incomplete or evasive.[24] But ordinarily where the opposing affidavits or testimony aver the truth of the pleading the court will not try the question of fact but will deny the motion.[25]

(iv) *Defects Relating to Form* — (a) *In General.* The general rule is that defects of form in the manner of stating a cause of action or defense,[26] such

22. *California.*— Gostorfs *v.* Taaffe, 18 Cal. 385.

Colorado.— Simpson *v.* Langley, 23 Colo. 69, 46 Pac. 119.

Florida.— Jackson Sharp Co. *v.* Holland, 14 Fla. 384.

Minnesota.— Van Loon *v.* Griffin, 34 Minn. 444, 26 N. W. 601; Barker *v.* Foster, 29 Minn. 166, 12 N. W. 460.

New York.— Slack *v.* Cotton, 2 E. D. Smith 398; Beebe *v.* Marvin, 17 Abb. Pr. 194; Miller *v.* Hughes, 13 Abb. Pr. 93 note. But see Albany County Bank *v.* Rider, 74 Hun 349, 26 N. Y. Suppl. 490, holding that there should appear some fact or facts outside of affidavits showing or tending to show the falsity of the answer and indicating bad faith.

Verified answer.— It is proper to strike an answer as sham, it seems, where the moving affidavits are minute and specific and there are no opposing affidavits, although the answer is verified by the attorney who, however, may have had no personal knowledge of the facts. White *v.* Moquist, 61 Minn. 103, 63 N. W. 255.

Compelling affidavit.— Where the material averments of the complaint are directly supported by affidavits positive in form, defendant has no right to complain of an order requiring him to support his verified answer by an affidavit of merits and upon failure to comply therewith to have his pleading stricken from the files. Patrick *v.* McManus, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253.

In Nova Scotia a party is not called upon to prove his defense by affidavit but merely to satisfy the judge that he has a defense which should be investigated by a trial in the ordinary way. Holmes *v.* Taylor, 32 Nova Scotia 191.

23. Patrick *v.* McManus, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253; Agawam Bank *v.* Egerton, 10 Bosw. 669; Henry Hubber Co. *v.* McAllester, 1 Misc. (N. Y.) 483, 21 N. Y. Suppl. 767. See also Stevens *v.* McMillin, 37 Minn. 509, 35 N. W. 372.

24. Hertz *v.* Hartmann, 74 Minn. 320, 77 N. W. 232; Thul *v.* Ochsenreiter, 72 Minn. 111, 75 N. W. 4; Dobson *v.* Hallowell, 53 Minn. 98, 54 N. W. 939; Frey *v.* Sylvester, 24 Misc. (N. Y.) 167, 53 N. Y. Suppl. 527; Bailey *v.* Lane, 13 Abb. Pr. (N. Y.) 354; Bailey *v.* Lane, 21 How. Pr. (N. Y.) 475; Manufacturers' Bank *v.* Hitchcock, 14 How. Pr. (N. Y.) 406.

A counter affidavit merely in general terms and on information will not save an answer as against an affidavit of falsity made positively and in detail. Corbett *v.* Eno, 22 How. Pr. (N. Y.) 8. Where a defense is shown to be false by positive testimony, the affidavit of defendant that he "believes" it to be true is no answer to a motion to strike as sham. Slack *v.* Cotton, 2 E. D. Smith (N. Y.) 398.

A minute and detailed affidavit meeting all the allegations in the affidavits of the moving party will not be required as to matters not presumptively within defendants' knowledge. Wirgman *v.* Hicks, 6 Abb. Pr. (N. Y.) 17.

25. *California.*— Gostorfs *v.* Taaffe, 18 Cal. 385.

Colorado.— Patrick *v.* McManus, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253.

Minnesota.— Smith *v.* Betcher, 34 Minn. 218, 25 N. W. 347; Wright *v.* Jewell, 33 Minn. 505, 24 N. W. 299.

New Jersey.— Coykendall *v.* Robinson, 39 N. J. L. 98.

New York.— McCarty *v.* O'Donnell, 7 Rob. 431; Hadden *v.* New York Silk Mfg. Co., 1 Daly 388; Gardenier *v.* Eldred, 4 Misc. 505, 25 N. Y. Suppl. 870; Farmers', etc., Bank *v.* Smith, 15 How. Pr. 329; Nichols *v.* Jones, 6 How. Pr. 355; Miller *v.* Miller, 1 How. Pr. 162; Tucker *v.* Ladd, 4 Cow. 47.

Canada.— Milner *v.* McKenzie, 18 N. Brunsw. 383; Banks *v.* Batton, 30 Nova Scotia 386; Du Caen *v.* Dunne, 3 Nova Scotia 77.

See 39 Cent. Dig. tit. "Pleading," §§ 1138, 1139.

Mere affidavits of the moving party simply denying the facts alleged in the answer and asserting their falsity are insufficient foundation for an order striking out the pleading as sham. St. Cloud First Nat. Bank *v.* Lang, 94 Minn. 261, 102 N. W. 700; City Bank *v.* Doll, 33 Minn. 507, 24 N. W. 300.

If verified, a plea or answer will seldom be stricken out as sham. Smith *v.* Webb, 5 Blackf. (Ind.) 287; City Bank *v.* Doll, 33 Minn. 507, 24 N. W. 300; Upton *v.* Kennedy, 36 Nebr. 66, 53 N. W. 1042; Miln *v.* Vose, 4 Sandf. 660; Tripp *v.* Daball, 11 N. Y. Civ. Proc. 112; Kellogg *v.* Baker, 15 Abb. Pr. (N. Y.) 286; Munn *v.* Barnum, 1 Abb. Pr. (N. Y.) 281; Bowen *v.* Bissell, 6 Wend. (N. Y.) 511.

A general affidavit of merits may be enough to save a plea from being stricken as sham. Bowen *v.* Bissell, 6 Wend. (N. Y.) 511.

Excuse for not verifying.— If a party fails to verify an answer to a verified complaint, and a motion is made to strike it as sham, the excuse for not verifying should be presented by affidavit. Roache *v.* Kivlin, 25 Hun (N. Y.) 150.

26. *Alabama.*— Morgan *v.* Rhodes, 1 Stew. 70.

as indefiniteness or uncertainty,[27] or the inclusion of material, irrelevant, or redundant [28] allegations, or surplusage,[29] is not ground for striking out the entire pleading, count, or defense. In some jurisdictions, however, where the common-law practice is retained to a greater or less extent and special demurrers have been abolished, the method of taking advantage of such defects of form is by motion to strike out the pleading.[30]

(B) *Commingling Causes of Action or Defenses in One Count.* In some jurisdictions, commingling different causes of action or defenses in the same paragraph authorizes a motion to strike all the pleading or all but one of them,[31] while in other jurisdictions the motion does not lie in such a case,[32] the remedy generally

Arkansas.— Wade *v.* Bridges, 24 Ark. 569; Sillivant *v.* Reardon, 5 Ark. 140.

California.— Greenfield *v.* The Gunnell, 6 Cal. 67.

Florida.— Hubbard *v.* Anderson, 50 Fla. 219, 39 So. 107, holding that plea cannot be stricken out merely because informal and bad unless wholly irrelevant.

Georgia.— Printup *v.* Rome Land Co., 90 Ga. 180, 15 S. E. 764.

Illinois.— Orne *v.* Cook, 31 Ill. 238; Whitehall *v.* Smith, 24 Ill. 178.

Mississippi.— Johnston *v.* Beard, 7 Sm. & M. 214; Smith *v.* Commercial Bank, 6 Sm. & M. 83.

Nebraska.— Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

New Jersey.— Shotwell *v.* Dennis, 14 N. J. L. 501.

New York.— Simmons *v.* Eldridge, 19 Abb. Pr. 296.

Texas.— Holliman *v.* Rogers, 6 Tex. 91.

See 39 Cent. Dig. tit. "Pleading," § 1102.

Compare Trabue *v.* Higden, 4 Coldw. (Tenn.) 620.

Matter of form expressly required by statute.— But if the pleading is defective in some matter of form expressly required by the statute, a motion to strike will lie. Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

The fact that an objectionable count in a pleading is joined with an unobjectionable one, or that two counts are based upon different states of fact, does not render the pleading liable to a motion to strike. Jack *v.* Des Moines, etc., R. Co., 49 Iowa 627.

27. *Florida.*— Jackson Sharp Co. *v.* Holland, 14 Fla. 384.

Georgia.—Atlanta Suburban Land Corp. *v.* Austin, 122 Ga. 374, 50 S. E. 124; Printup *v.* Rome Land Co., 90 Ga. 180, 15 S. E. 764; Bailey, etc., Buggy Co. *v.* Guthrie, 1 Ga. App. 350, 58 S. E. 103.

Iowa.— Keeney *v.* Lyon, 10 Iowa 546.

New York.— Fasnacht *v.* Stehn, 53 Barb. 650; Kucher *v.* Carrl, 23 Misc. 250, 51 N. Y. Suppl. 168; Simmons *v.* Eldridge, 29 How. Pr. 309.

Ohio.— Smead *v.* Chrisfield, 1 Disn. 17.

South Carolina.— Computing Scales Co. *v.* Long, 66 S. C. 379, 44 S. E. 963, 65 L. R. A. 294.

Tennessee.— Mynatt *v.* Mynatt, 6 Heisk. 311.

Texas.— McCarty *v.* Squyres, (Civ. App. 1896) 34 S. W. 356.

United States.— Gager *v.* Harrison, 9 Fed. Cas. No. 5,171.

In Pennsylvania, in any case where the *narr.* or statement is so defective as to be insufficient to fully inform defendant of the nature, character, or extent of plaintiff's claim, the court will strike it off on motion or direct an amended statement to be filed. Kauffman *v.* Jacobs, 4 Pa. Co. Ct. 462.

28. Newman *v.* Ligonier Bldg., etc., Assoc., 97 Ind. 295; Persch *v.* Weideman, 106 N. Y. App. Div. 553, 94 N. Y. Suppl. 800; Fasnacht *v.* Stehn, 53 Barb. (N. Y.) 650; Collins *v.* Coggill, 7 Rob. (N. Y.) 81; Nordlinger *v.* McKim, 14 N. Y. Suppl. 515; Simmons *v.* Eldridge, 29 How. Pr. (N. Y.) 309; Howell *v.* Knickerbocker L. Ins. Co., 24 How. Pr. (N. Y.) 475; Blake *v.* Eldred, 18 How. Pr. (N. Y.) 240; Harlow *v.* Hamilton, 6 How. Pr. (N. Y.) 475; Nichols *v.* Jones, 6 How. Pr. (N. Y.) 355; Benedict *v.* Dake, 6 How. Pr. (N. Y.) 352; Du Clos *v.* Batcheller, 17 Wash. 389, 49 Pac. 483; Witherell *v.* Wiberg, 30 Fed. Cas. No. 17,917, 4 Sawy. 232, decided under Oregon code.

29. Newman *v.* Ligonier Bldg., etc., Assoc., 97 Ind. 295.

30. Brooks *v.* Continental Ins. Co., 125 Ala. 615, 29 So. 13; Harper *v.* Essex County Park Commission, 73 N. J. L. 1, 62 Atl. 384; Malberti *v.* United Electric Co., 69 N. J. L. 55, 54 Atl. 251; Minnuci *v.* Philadelphia, etc., R. Co., 68 N. J. L. 432, 53 Atl. 229; Ferguson *v.* Western Union Tel. Co., 64 N. J. L. 222, 44 Atl. 849; Polak *v.* Hudson, (N. J. Sup. 1886) 6 Atl. 499; Elliott *v.* Agricultural Ins. Co., (N. J. Sup. 1886) 3 Atl. 171; Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52; Buckelew *v.* Stults, 28 N. J. L. 150; Ackerman *v.* Shelp, 8 N. J. L. 125. See also Mead *v.* Hughes, 15 Ala. 141, 1 Am. Rep. 123; Folsom *v.* Brawm, 25 N. H. 114.

A motion for a more detailed bill of particulars has been held proper in Florida. Marion Phosphate Co. *v.* Cummer, 60 Fed. 873, 9 C. C. A. 279.

31. Mitchell *v.* Galen, 1 Alaska 239 (statute); Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280; Western Union Tel. Co. *v.* McClelland, 38 Ind. App. 578, 78 N. E. 672; St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045. See Brooker *v.* Grossman, 4 Ohio Dec. (Reprint) 258, 1 Clev. L. Rep. 177.

32. Strauss *v.* Parker, 9 How. Pr. (N. Y.) 342; High *v.* Southern Pac. Co., 49 Oreg. 98, 88 Pac. 961; Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95. *Contra,*

being by motion to compel a separate statement,[33] or, in some jurisdictions, a motion to compel an election.[34] So generally duplicity is not ground for striking out a pleading,[35] except in those common-law states where special demurrers have been abolished.[36]

(v) *Formal Defects.*[37] Failure to number the folios of a pleading as required by a rule of court is not ground for striking the pleading;[38] nor is the fact that the parties are not designated as plaintiff and defendant in the caption,[39] that the caption omits the name of the pleading,[40] or that initials are used in place of a full christian name.[41] But in some jurisdictions it is held that a wholly inappropriate conclusion, such as a conclusion with a verification, when it should be to the contrary,[42] or *vice versa*,[43] is ground for striking a plea, as is, it has been held, the omission to entitle a pleading.[44]

(vi) *Absence of Signature or Affidavit.* If an affidavit is required in support of a plea, and none is filed, the plea may be stricken from the files.[45] Likewise, if a pleading is not signed as required, a motion to strike will lie.[46] And the want of a required affidavit of verification is ground for striking a pleading,[47]

Blanchard *v.* Strait, 8 How. Pr. (N. Y.) 83; West *v.* Tyler, 2 Coldw. (Tenn.) 96.

Motion to strike part of count.— Commingling several causes of action or defenses in one paragraph is no ground for a motion to strike part of the paragraph. Booher *v.* Goldsborough, 44 Ind. 490; Hendry *v.* Hendry, 32 Ind. 349; Sutton *v.* Wood, 120 Ky. 23, 85 S. W. 201, 27 Ky. L. Rep. 412 (motion to compel election proper remedy); Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95. But see Neresheimer *v.* Bowe, 11 Daly (N. Y.) 306, where, in an action against a sheriff, the complaint contained allegations sufficient to charge him as bail and also for an escape, the allegations with relation to the escape were stricken out on motion.

33. See *infra*, XII, D, 5, b.

34. See *infra*, XII, E, 1, b.

35. State *v.* Mississippi, etc., R. Co., 20 Ark. 495; State *v.* Brown, 34 Miss. 688.

36. Watson *v.* Kirby, 116 Ala. 557, 23 So. 61; Dunean *v.* Hargrove, 22 Ala. 150; Karniff *v.* Keleh, 71 N. J. L. 558, 60 Atl. 364; Ordinary *v.* Barnes, 67 N. J. L. 80, 50 Atl. 903; Buckelew *v.* Stults, 28 N. J. L. 150; Waggoner *v.* White, 11 Heisk. (Tenn.) 741. See also Trabue *v.* Higden, 4 Coldw. (Tenn.) 620, statute.

37. **Omission of formal requisites in pleading as ground for dismissal or nonsuit** see Dismissal and Nonsuit, 14 Cyc. 441.

38. Strauss *v.* Parker, 9 How. Pr. (N. Y.) 342.

39. Hogan *v.* Capener, 4 Ohio Dec. (Reprint) 256, 1 Clev. L. Rep. 174.

40. Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446.

41. Taylor *v.* Insley, 7 Colo. App. 175, 42 Pac. 1046; Laws *v.* McCarty, 1 Handy (Ohio) 191, 12 Ohio Dec. (Reprint) 96.

42. Copperthwait *v.* Dummer, 18 N. J. L. 258.

43. Elliott *v.* Agricultural Ins. Co., (N. J. Sup. 1886) 3 Atl. 171.

44. Niblock *v.* Wright, 2 How. Pr. (N. Y.) 251.

45. Braidwood *v.* Weiller, 89 Ill. 606; Goldie *v.* McDonald, 78 Ill. 605; Priee *v.* Marks, 103 Va. 18, 48 S. E. 499; Scott *v.* Stockholders' Oil Co., 135 Fed. 892.

An objection that a plea puis was not accompanied by a proper affidavit must be taken by motion to set aside. Pool *v.* Hill, 44 Miss. 306.

46. *Arkansas.*— Carrington *v.* Hamilton, 3 Ark. 416.

Illinois.— Holloway *v.* Freeman, 22 Ill. 197; Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Indiana.—Fankboner *v.* Fankboner, 20 Ind. 62.

Kentucky.— Voorheis *v.* Eiting, 22 S. W. 80, 15 Ky. L. Rep. 16.

Nebraska.— Fritz *v.* Barnes, 6 Nebr. 435.

Texas.— Boren *v.* Billington, 82 Tex. 137, 18 S. W. 101.

United States.— Moreland *v.* Marion County, 17 Fed. Cas. No. 9,794, 1 N. Y. Wkly. Dig. 326.

Authority for signature.— But if the signature of an attorney appears at the foot of the pleading the court will not try the question whether it was done by authority of the party. Willson *v.* Cleaveland, 30 Cal. 192.

47. *Alabama.*— Davis *v.* Louisville, etc., R. Co., 108 Ala. 660, 18 So. 687; Gaston *v.* State, 88 Ala. 459, 7 So. 340.

Arkansas.— Williams *v.* Miller, 21 Ark. 469; Prewett *v.* Vaughn, 21 Ark. 417; Fowler *v.* Bender, 18 Ark. 262; Sanger *v.* Sumner, 13 Ark. 280; Langdon *v.* Keesee, 10 Ark. 645; Sevier *v.* Wilson, 8 Ark. 496; Sillivant *v.* Reardon, 5 Ark. 140.

California.— Drum *v.* Whiting, 9 Cal. 422.

Colorado.— Speer *v.* Craig, 16 Colo. 478, 27 Pac. 891.

Florida.— Ropes *v.* Snyder Harris Bassett Co., 37 Fla. 529, 20 So. 535; State *v.* Maxwell, 19 Fla. 31; Hagler *v.* Mereer, 6 Fla. 342; Stewart *v.* Bennett, 1 Fla. 487.

Georgia.— Columbia Drug Co. *v.* Goodman, 119 Ga. 474, 46 S. E. 647; Hamilton *v.* Conyers, 28 Ga. 276.

Illinois.— Grand Lodge B. R. T. *v.* Randolph, 186 Ill. 89, 57 N. E. 882; Ryan *v.* Lander, 89 Ill. 554; Rowe *v.* People, 96 Ill. App. 438.

Indiana.— Moore *v.* Sargent, 112 Ind. 484,

or if certain counts or defenses are verified and others are not, those unverified may be stricken.[48] A defective jurat will not cause a pleading to be stricken if it appears by affidavit that the pleading was in fact properly sworn to.[49] Where the affidavit is not absolutely necessary, and may be required or not in the discretion of the court, as in case of an affidavit to a plea *puis darrein continuance*,[50] or where verification is subject to the discretion of the pleader,[51] the pleading cannot be stricken out where the truth of the pleading is not questioned.

(VII) *Disobedience to Order of Court.* Pleadings are frequently stricken out as a penalty for disobedience to orders of court.[52] If the court makes an order requiring a pleading of a specified character to be filed, and the pleading filed does not conform to the order, it may be stricken from the files;[53] or if an ordered amendment is not made, the original pleading may be stricken.[54] And where the court orders money to be brought into court on a plea of tender, a refusal will justify the court in striking the plea from the files.[55] If an answer is filed which makes necessary another party and the court orders such party brought in, the continued failure of defendant to make him a party to the suit will justify striking out the answer.[56] So an answer may be stricken out because of defendant's failure to appear as a witness for plaintiff when served with a proper subpœna,[57] or because of his failure to answer a proper question put to him on his examination as a witness before trial.[58] But failure to observe an order as

14 N. E. 466; Indianapolis, etc., R. Co. *v.* Summers, 28 Ind. 521; Ferrand *v.* Walker, 5 Blackf. 424; Barber *v.* Summers, 5 Blackf. 339.

Iowa.— Newburn *v.* Lucas, 126 Iowa 85, 101 N. W. 730; Guthrie *v.* Guthrie, 84 Iowa 372, 51 N. W. 13; Rush *v.* Rush, 46 Iowa 648, 26 Am. Rep. 179; Harper *v.* Drake, 15 Iowa 157.

Kentucky.— Chenault *v.* Norton, 99 S. W. 899, 30 Ky. L. Rep. 875; Payne *v.* Trigg, 41 S. W. 4, 19 Ky. L. Rep. 801.

Mississippi.— Prewitt *v.* Bennett, 7 Sm. & M. 101.

Nebraska.— Fritz *v.* Barnes, 6 Nebr. 435.

Nevada.— Lehane *v.* Keyes, 2 Nev. 361.

New York.— Tibballs *v.* Selfridge, 12 How. Pr. 64; Davis *v.* Fitzmanville, 3 How. Pr. 108; Richmond *v.* Tallmadge, 16 Johns. 307.

Tennessee.— Trabue *v.* Higden, 4 Coldw. 620.

Wisconsin.— Hackes *v.* Katzenstein, 26 Wis. 363.

See 39 Cent. Dig. tit. "Pleading," § 1103.

Where offer to verify is made.— But a pleading legally sufficient should not be stricken out for want of a verification if the party offers to swear to it. Wheeler *v.* Wales, 3 Bush (Ky.) 225.

Insufficient verification of pleading is ground for a motion to strike out the pleading. Butterfield *v.* Graves, 138 Cal. 155, 71 Pac. 510.

Under statutes providing that where a copy of a pleading is served without a copy of a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity provided he gives notice with due diligence to the attorney of the opposing party that he elects so to do, notice of such allegation must be given before entering judgment and the notice must specifically point out the defects complained of. Bigelow *v.* Whitehall Mfg. Co., 1 N. Y. City Ct. 138.

48. Nichols *v.* Jones, 14 Colo. 61, 23 Pac. 89.

49. Green *v.* King, 17 Fla. 452.

50. *Kentucky.*— McGowan *v.* Hoy, 4 J. J. Marsh. 223; Baxter *v.* Knox, 31 S. W. 284, 17 Ky. L. Rep. 489.

New York.— Jackson *v.* Peer, 4 Cow. 418; Bancker *v.* Ash, 9 Johns. 250.

Rhode Island.— Smith *v.* Carroll, (1890) 20 Atl. 227.

South Carolina.— Morrow *v.* Morrow, 1 Treadw. 455, 3 Brev. 394.

England.— Hawkins *v.* Moore, Cro. Jac. 261, 79 Eng. Reprint 225.

See 39 Cent. Dig. tit. "Pleading," § 1103.

51. Kripner *v.* Rad Lincoln C. S. P. S., 54 Ill. App. 675; Strauss *v.* Parker, 9 How. Pr. (N. Y.) 342; Reynolds *v.* Smathers, 87 N. C. 24.

52. Bates *v.* Salt Springs Nat. Bank, 46 N. Y. App. Div. 633, 62 N. Y. Suppl. 1100; Miller *v.* Salt Springs Nat. Bank, 46 N. Y. App. Div. 633, 62 N. Y. Suppl. 415; Gray *v.* Gray, 84 Hun (N. Y.) 347, 32 N. Y. Suppl. 355.

53. *Iowa.*— O'Conner *v.* Chicago, etc., R. Co., 75 Iowa 617, 34 N. W. 795.

New York.— Craig *v.* James, 80 N. Y. App. Div. 16, 80 N. Y. Suppl. 235.

North Carolina.— Crump *v.* Thomas, 89 N. C. 241.

South Carolina.— Long *v.* Hunter, 48 S. C. 179, 26 S. E. 228.

United States.— Fuller *v.* Claflin, 93 U. S. 14, 23 L. ed. 785.

See 39 Cent. Dig. tit. "Pleading," § 1080.

54. Finney *v.* Cadwallader, 55 Ga. 75. But see Fuller *v.* Claflin, 93 U. S. 14, 23 L. ed. 785.

55. Knox *v.* Light, 12 Ill. 86.

56. Elliott *v.* Stevenson, 21 Ind. 359.

57. Nelson *v.* Neely, 63 Ind. 194, under a statutory provision.

58. Richards *v.* Judd, 15 Abb. Pr. N. S. (N. Y.) 184.

to one defense should not subject defendant to having his entire answer stricken out.[59]

(VIII) *EMBARRASSING PLEADING.* In England and some parts of Canada, statutes have been enacted authorizing the striking out of a pleading or separate part thereof where it is so framed as to "prejudice, embarrass, or delay" the fair trial of the action.[60] So in at least one state in this country a similar statute has been enacted.[61] "Embarrassing" means that a matter is pleaded which the party has no right to plead,[62] and is apparently practically the same as a frivolous pleading.[63] A pleading or paragraph is not embarrassing merely because indefinite,[64] or false,[65] or set out at unnecessary length.[66] The rule as to embarrassing pleas applies, it seems, only to affirmative pleas.[67]

(IX) *FAILURE TO FILE OR SERVE IN TIME.*[68] A pleading not filed in apt time may be stricken.[69] This is true after default, even when the pleading was filed by leave of court.[70] Likewise a pleading not filed in due order of pleading,[71] as where a plea in abatement is filed at the same time with, or after, a plea in bar has been filed,[72] may be stricken out. So a pleading may be stricken out where

59. Raff *v.* Koster, 37 N. Y. App. Div. 534, 56 N. Y. Suppl. 292.

60. Ætna L. Ins. Co. *v.* Sharp, 11 Manitoba 141; Woods *v.* Tees, 5 Manitoba 256; Dibblee *v.* Fry, 35 N. Brunsw. 109; McEwen *v.* Northwestern Coal, etc., Co., 1 Northwest. Terr. 203; Leonard *v.* Sweet, 33 Nova Scotia 197; Power *v.* Pringle, 31 Nova Scotia 78; Mahon *v.* Laurence, 21 Nova Scotia 284.

There is no authority for striking a pleading out unless it can be said to be embarrassing or seandalous or tending to prejudice or delay the clear trial of the aetion. Ryan *v.* Fish, 10 Ont. Pr. 187.

61. Malberti *v.* United Electrie Co., 69 N. J. L. 55, 54 Atl. 251.

62. Stokes *v.* Grant, 4 C. P. D. 25, 40 L. T. Rep. N. S. 36, 27 Wkly. Rep. 397; Heugh *v.* Chamberlain, 25 Wkly. Rep. 742; McEwen *v.* Northwestern Coal, etc., Co., 1 Northwest Terr. 203; Leonard *v.* Sweet, 33 Nova Seotia 197.

63. See Power *v.* Pringle, 31 Nova Scotia 78; Arthur *v.* Yeadon, 29 Nova Scotia 379.

A defense which is bad in law may also be struck out as embarrassing. Leonard *v.* Sweet, 33 Nova Scotia 197.

A plea which seeks to raise an immaterial issue is embarrassing. Schweiger *v.* M. Vineberg Co., 15 Manitoba 536.

64. Power *v.* Pringle, 31 Nova Seotia 78.

65. Woods *v.* Tees, 5 Manitoba 256.

A false plea cannot, merely on the ground of its falsity, be assumed to have been filed for embarrassment or delay if there be other valid pleas upon the record. But if the only pleas pleaded are clearly false in fact, the inference that they were pleaded for the purpose of embarrassment or delay is natural. Woods *v.* Tees, 5 Manitoba 256.

66. McDonald *v.* Clarke, 20 Nova Scotia 254.

67. Woods *v.* Tees, 5 Manitoba 256.

68. As ground for dismissal or nonsuit see DISMISSAL AND NONSUIT, 14 Cyc. 442.

69. *Arkansas.*— Crow *v.* State, 23 Ark. 684.

California.— Davis *v.* Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270 (demurrer); Acoek *v.* Halsey, 90 Cal. 215, 27 Pac. 193; Bowers *v.* Dickerson, 18 Cal. 420.

Georgia.— Gordon *v.* Hudson, 120 Ga. 698, 48 S. E. 131 (holding that it would be stricken only when the case has been marked "in default"); Cowart *v.* Stanton, 104 Ga. 520, 30 S. E. 743.

Illinois.— Holloway *v.* Freeman, 22 Ill. 197. But see Bemis *v.* Homer, 145 Ill. 567, 33 N. E. 869, where leave had been granted to file *nunc pro tunc.*

Iowa.— Hayward *v.* Goldsbury, 63 Iowa 436, 19 N. W. 307.

Mississippi.— Pool *v.* Hill, 44 Miss. 306, plea *puis darrein continuance.*

Missouri.— Rigdon *v.* Ferguson, 172 Mo. 49, 72 S. W. 504.

New York.— McGowan *v.* Leavenworth, 3 Code Rep. 151.

Texas.— Frosh *v.* Holmes. 8 Tex. 29; El Paso Electrie R. Co. *v.* Galliher, 34 Tex. Civ. App. 126, 78 S. W. 7.

See 39 Cent. Dig. tit. "Pleading," § 1104.

But the court should not, on its own motion, strike a pleading merely because not filed in time. Keeney *v.* Lyon, 10 Iowa 546; Heiss *v.* Corcoran, 15 La. Ann. 694.

Effect of leave of court.— Where a defendant, under leave of court, filed a supplemental answer, another judge could not order it stricken from the files because not filed in apt time, nor because the case was set for trial before the leave was granted and the answer filed. Godding *v.* Colorado Springs Live-Stock Co., 4 Colo. App. 14, 34 Pac. 942.

It is too late at a subsequent term to strike a pleading filed by leave of court at a prior term. Lanier *v.* Byrd, 115 Ga. 198, 41 S. E. 683; McCandless *v.* Conley, 115 Ga. 48, 41 S. E. 256.

An answer filed after default for failure to answer has been entered will not be stricken from the files, the proper practice being to move to set aside the default, tendering the answer with the motion. Mantle *v.* Casey, 31 Mont. 408, 78 Pac. 591.

70. Brayton *v.* Delaware County, 16 Iowa 44.

71. Scoggins *v.* Thompson, (Tex. Civ. App. 1898) 45 S. W. 216.

72. Hawkins *v.* Armour Packing Co., 105 Ala. 545, 17 So. 16; Beitler *v.* Study, 10

filed too soon.[73] But mere delay in "serving" a pleading will not warrant striking it from the files if it has been "filed" in due time.[74]

(x) *Failure to Obtain Necessary Leave of Court.* Where leave of court is necessary for the filing of a pleading or an additional count or defense, it may be stricken out if it is filed without leave.[75] The same rule applies to a demurrer filed without leave where leave is necessary.[76]

(xi) *Identical Causes of Action or Defenses and Superfluous Defenses.* Where a party pleads a number of causes of action, pleas, or replications, which are identically or substantially the same, the other party may have all but one stricken out on motion;[77] but if they are merely similar, differing however, in a material matter, such a motion cannot be sustained.[78] So specific denials, in addition to a general denial, are deemed redundant and may be stricken out.[79] Likewise, if a defense sets up nothing which cannot be shown under another defense or plea in the answer, or a general or special denial pleaded, it may be stricken out.[80] And if the matter alleged as a counter-claim against one not a

Pa. St. 418; Ralph *v.* Brown, 3 Watts & S. (Pa.) 395; Douglass *v.* Belcher, 7 Yerg. (Tenn.) 105.

But this is not true when it is in form a plea in bar.— Machette *v.* Musgrave, 1 Phila. (Pa.) 186.

73. Roberts *v.* Buffalo, etc., R. Co., 5 Pa. Dist. 124.

A plea or answer filed before the filing of the declaration or complaint may be stricken. Rodesch *v.* Estey, 71 Ill. App. 482.

74. Lybecker *v.* Murray, 58 Cal. 186.

75. Cook *v.* Norwood, 106 Ill. 558; Gilmore *v.* Nowland, 26 Ill. 200; Conradi *v.* Evans, 3 Ill. 185; Hyatt *v.* Kirk, 8 Ind. 178; Sullivan Sav. Inst. *v.* Copeland, 71 Iowa 67, 32 N. W. 95; Allen *v.* Bidwell, 35 Iowa 86; Rigdon *v.* Ferguson, 172 Mo. 49, 72 S. W. 504.

76. Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481.

77. *Alabama.*— Wefel *v.* Stillman, (1907) 44 So. 203.

Illinois.— People *v.* Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; Parks *v.* Holmes, 22 Ill. 522; Howlett *v.* Mills, 22 Ill. 341.

Indiana.— Aurora *v.* Cobb, 21 Ind. 492; Hunt *v.* Bailey, 4 Ind. 630; Lomax *v.* Bailey, 7 Blackf. 599.

Nebraska.— Pollock *v.* Whipple, 45 Nebr. 844, 64 N. W. 210.

New Jersey.— Hill *v.* Craig, 14 N. J. L. 577.

New York.— Hepburn *v.* Babcock, 9 Abb. Pr. 159 note; Lackey *v.* Vanderbilt, 10 How. Pr. 155; Woodruff *v.* Brice, 18 Wend. 512. See also Dows *v.* Davis, 5 Hill 512.

United States.— Varnam *v.* Campbell, 28 Fed. Cas. No. 16,887, 1 McLean 313.

See 39 Cent. Dig. tit. "Pleading," § 1088.

But see Babineau *v.* La Forest, 37 N. Brunsw. 77.

A special plea and the general issue with notice of special defense cannot be pleaded together, and if it is sought to do this one may be stricken. Gilmore *v.* Nowland, 26 Ill. 200.

But when the complaint contains three statements of the same cause of action, although a motion to require plaintiff to elect which cause or causes of action he will rely on, and that the residue be struck out, might be granted in whole or in part, it is not error to deny a motion to strike out the first and second. Cramer *v.* Oppenstein, 16 Colo. 504, 27 Pac. 716.

78. Little *v.* Blunt, 13 Pick. (Mass.) 473; Dows *v.* Davis, 5 Hill (N. Y.) 512.

79. York County School Dist. No. 27 *v.* Holmes, 16 Nebr. 486, 20 N. W. 721; Wies *v.* Fanning, 9 How. Pr. (N. Y.) 543; Dennison *v.* Dennison, 9 How. Pr. (N. Y.) 246; Lippencott *v.* Goodwin, 8 How. Pr. (N. Y.) 242.

80. *Florida.*— Peacock *v.* Feaster, 51 Fla. 269, 40 So. 74; Hubbard *v.* Anderson, 50 Fla. 219, 39 So. 107; Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797; Little *v.* Bradley, 43 Fla. 402, 31 So. 342; Buesing *v.* Forbes, 33 Fla. 495, 15 So. 209; Coffee *v.* Groover, 20 Fla. 64; Neal *v.* Spooner, 20 Fla. 38; Wade *v.* Doyle, 17 Fla. 522 (holding also that the special plea may be stricken out by the court *sua sponte*); Davis *v.* Shuler, 14 Fla. 438.

Illinois.— Illinois Cent. R. Co. *v.* Johnson, 34 Ill. 389.

Indiana.— Mason *v.* Roll, 130 Ind. 260, 29 N. E. 1135; Colchen *v.* Ninde, 120 Ind. 88, 22 N. E. 94; Davis *v.* Davis, 119 Ind. 511, 21 N. E. 1112; Columbus, etc., R. Co. *v.* Braden, 110 Ind. 558, 11 N. E. 357; Boyce *v.* Graham, 91 Ind. 420; Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515; Hill *v.* Hagaman, 84 Ind. 287; Gerard *v.* Jones, 78 Ind. 378; Land *v.* Sparks, 75 Ind. 278; Shellenbarger *v.* Blake, 67 Ind. 75; Evansville *v.* Thayer, 59 Ind. 324; Brown *v.* College Corner, etc., Road Co., 56 Ind. 110; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Aurora *v.* Colshire, 55 Ind. 484; Marshall *v.* Becber, 53 Ind. 119; Western Union Tel. Co. *v.* Meek, 49 Ind. 53; Allen *v.* Randolph, 48 Ind. 496; McCabe *v.* Raney, 32 Ind. 309; Dice *v.* Morris, 32 Ind. 283; Neal *v.* Scott, 25 Ind. 440; Holcraft *v.* King, 25 Ind. 352; Aurora *v.* Cobb, 21 Ind. 492; Stevens *v.* Campbell, 21 Ind. 471; Coquillard *v.* French, 19 Ind. 274; Anthony *v.* Slonaker, 18 Ind. 273; Westcott *v.* Brown, 13 Ind. 83; Page *v.* Ford, 12 Ind. 46; Wood *v.* Commons, 3 Ind.

party is admissible in evidence under a defense pleaded, the counter-claim may be stricken.[81] A copy filed after the loss of the original pleading should be stricken when the original is found.[82] But where two actions are consolidated in which there are identical answers, neither answer can be stricken out on motion.[83]

(XII) *Inconsistent Causes of Action or Defenses.* Generally the proper way to raise the objection that causes of action or defenses are inconsistent is by motion to compel the pleader to elect between them;[84] but in some jurisdictions a motion lies to strike out the one or the other,[85] or the entire pleading.[86]

(XIII) *Misjoinder of Causes of Action.* Usually misjoinder of causes of action is not a ground for motion to strike out,[87] but is to be reached by demurrer;[88] but in some jurisdictions, by statute or otherwise, a motion lies to strike one or more of the causes of action,[89] or the objection is made available by a

418; Crookshank *v.* Kellogg, 8 Blackf. 256; Jackson *v.* Yandes, 7 Blackf. 526; Clodfelter *v.* Lucas, 7 Ind. App. 379, 34 N. E. 828; Bash *v.* Young, 2 Ind. App. 297, 28 N. E. 344.

Iowa.— Scott *v.* Hardin Independent Dist., 91 Iowa 156, 59 N. W. 15; Cate *v.* Gilman, 41 Iowa 530.

Kentucky.— Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1510; Robards *v.* Robards, 85 S. W. 718, 27 Ky. L. Rep. 494; Royer Wheel Co. *v.* Dunbar, 76 S. W. 366, 25 Ky. L. Rep. 746; Simpson *v.* Carr, 76 S. W. 346, 25 Ky. L. Rep. 849.

Mississippi.— Moore *v.* Mickell, Walk. 231. *Contra*, Smith *v.* Rodney Commercial Bank, 6 Sm. & M. 83.

Missouri.— Bolton *v.* Missouri Pac. R. Co., 172 Mo. 92, 72 S. W. 530; Sargent *v.* St. Louis, etc., R. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460; Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518.

New York.— Cooley *v.* New York, 85 N. Y. App. Div. 107, 82 N. Y. Suppl. 1067; Rost *v.* Harris, 12 Abb. Pr. 446 (redundant); Dennison *v.* Dennison, 9 How. Pr. 246 (redundant); Ripley *v.* Burgess, 2 Hill 360. *Contra*, Hollenbeck *v.* Clow, 9 How. Pr. 289.

Ohio.— Campen *v.* Murray, 3 Ohio Cir. Ct. 93, 2 Ohio Cir. Dec. 54; Cincinnati, etc., R. Co. *v.* Ward, 5 Ohio Dec. (Reprint) 391, 5 Am. L. Rec. 372; Stolley *v.* Brooks, 1 Ohio Dec. (Reprint) 316, 7 West. L. J. 235; Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1.

Pennsylvania.— Patterson *v.* Clyde, 6 Phila. 391.

Rhode Island.— Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649.

Texas.— Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

Virginia.— George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167; Philadelphia Fire Assoc. *v.* Hogwood, 82 Va. 342, 4 S. E. 617; Crews *v.* Farmers' Bank, 31 Gratt. 348; Reed *v.* Hanna, 3 Rand. 56.

West Virginia.— Richards *v.* Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437; Dillon Beebe's Son *v.* Fakle, 43 W. Va. 502, 27 S. E. 214; Hale *v.* West Virginia Oil, etc., Co., 11 W. Va. 229.

United States.— Fabric Fire Hose Co. *v.* Bibb Mfg. Co., 39 Fed. 98. See also U. S. *v.* Spencer, 27 Fed. Cas. No. 16,368, 2 McLean 405.

See 39 Cent. Dig. tit. "Pleading," §§ 1088, 1088½, 1162.

But a notice of special defense will not necessarily be stricken out because the defense is admissible under the general issue. Bennett *v.* Cody, 35 N. Brunsw. 277.

An argumentative denial pleaded in the same answer with a general denial may be stricken out on motion (Niblack *v.* Goodman, 67 Ind. 174), and if a demurrer is sustained to it this is not prejudicial error (Milford School Town *v.* Powner, 126 Ind. 528, 26 N. E. 484; Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; Henderson *v.* Henderson, 110 Ind. 316, 11 N. E. 432; McCallam *v.* Pleasants, 67 Ind. 542).

A notice of special matter may properly be stricken out which gives notice only of such matters as are admissible under the general issue alone. Little *v.* Bolles, 12 N. J. L. 171; U. S. *v.* Stone, 106 U. S. 525, 1 S. Ct. 287, 27 L. ed. 163.

81. Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209.

82. Sweet *v.* Brown, 61 Iowa 669, 17 N. W. 44.

83. Colt *v.* Davis, 50 Hun (N. Y.) 366, 3 N. Y. Suppl. 354.

84. See *infra*, XII, E.

85. Buhne *v.* Corbett, 43 Cal. 264; Adams *v.* Trigg, 37 Mo. 141; Cohrs *v.* Fraser, 5 S. C. 351; Noonan *v.* Bradley, 9 Wall. (U. S.) 394, 19 L. ed. 757. See also Keens *v.* Gaskin, 24 Nebr. 310, 38 N. W. 797. *Contra*, Conway *v.* Wharton, 13 Minn. 158.

86. See Bedingfield *v.* Bates Advertising Co., 2 Ga. App. 107, 58 S. E. 320 (striking on demurrer); Adams *v.* Trigg, 37 Mo. 141. *Contra*, Green *v.* Hughitt School Tp., 5 S. D. 452, 59 N. W. 284.

87. Fritz *v.* Fritz, 23 Ind. 388; Burkholder *v.* Beetem, 65 Pa. St. 496. See also Switzer *v.* Cohorn, 19 Ky. L. Rep. 323.

88. See *supra*, VI, F, 1, b.

89. Jett *v.* Theo. Maxfield Co., 80 Ark. 167, 96 S. W. 143; Adams *v.* Edgerton, 48 Ark. 419, 3 S. W. 638; Riley *v.* Norman, 39 Ark. 158; Crawford *v.* Fuller, 28 Ark. 370. See Dragoo *v.* Levi, 2 Duv. (Ky.) 520, holding that plaintiff may be required to elect and if he declines one of the causes of action may be stricken out.

motion to compel the pleader to elect between the causes which have been improperly joined.[90]

(XIV) *SCANDALOUS MATTER.* A pleading may be stricken from the files where it contains scandalous matter.[91]

(XV) *UNAUTHORIZED PLEADINGS.* Where a party files a pleading which is wholly unauthorized, it may be stricken on motion.[92] Thus a common-law pleading in a special statutory proceeding where different pleadings are provided for may be stricken.[93] So an unauthorized plea in short may be stricken out.[94]

(XVI) *VARIANCE.*[95] A material variance between the writ or summons and declaration or complaint, when the defect is in the latter, has been held ground for striking the pleading from the files;[96] but the motion will not be sustained when the variance is not such as to mislead or prejudice defendant.[97]

2. ALLEGATIONS IN PLEADINGS — a. In General.[98] A motion to strike certain allegations or averments from a pleading, as distinguished from a motion to strike out a pleading or a separate count or defense therein, lies where improper matter is included in any of plaintiff's or defendant's pleadings, a motion to strike and not a demurrer being the proper remedy.[99] On the other hand a motion to strike

Demurrer considered as motion.— Where a motion to strike out any cause or causes is given as the remedy for a misjoinder of causes, if defendant demurs for misjoinder instead, the proper practice is for the court to consider the demurrer as a motion to strike out. Fordyce *v.* Nix, 38 Ark. 136, 23 S. W. 967.

90. See *infra*, XII, E, 1.

91. Chenault *v.* Norton, 99 S. W. 899, 30 Ky. L. Rep. 875; W. T. Hanson Co. *v.* Collier, 119 N. Y. App. Div. 794, 104 N. Y. Suppl. 787 [*reversing* on other grounds 51 Misc. 496, 101 N. Y. Suppl. 690]; Persch *v.* Weideman, 106 N. Y. App. Div. 553, 94 N. Y. Suppl. 800; Wuensch *v.* Morning Journal Assoc., 4 N. Y. App. Div. 110, 38 N. Y. Suppl. 605; Armstrong *v.* Phillips, 60 Hun (N. Y.) 243, 14 N. Y. Suppl. 582; Wadleigh *v.* Newhall, 136 Fed. 941. *Contra*, Herndon *v.* Campbell, 86 Tex. 168, 23 S. W. 980.

Purpose merely insult.— Where scandalous matter has been inserted in a pleading solely to insult the opposing party and not to protect the pleader, such pleading may be stricken as scandalous. W. T. Hanson Co. *v.* Collier, 119 N. Y. App. Div. 794, 104 N. Y. Suppl. 787 [*reversing* on other grounds 51 Misc. 496, 101 N. Y. Suppl. 690].

92. Abbott *v.* Rowan, 33 Ark. 593 (reply); Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345 (counter-claim); Gilbert *v.* Cram, 12 How. Pr. (N. Y.) 455 (reply); Putnam *v.* De Forest, 8 How. Pr. (N. Y.) 146 (reply). See also *supra*, V, A, 3.

93. Langdon *v.* Wilcox, 107 Ill. 606.

But a complaint in the form of the common counts in assumpsit, even though demurrable under the code practice, will not be stricken out. Laws *v.* McCarty, 1 Handy (Ohio) 191, 12 Ohio Dec. (Reprint) 96.

94. Grant *v.* Jennings, 1 Coldw. (Tenn.) 53.

95. **Variance between writ and declaration as ground for dismissal or nonsuit** see DISMISSAL AND NONSUIT, 14 Cyc. 442.

96. Chapman *v.* Spence, 22 Ala. 588; Morrison *v.* Taylor, 21 Ala. 779; Smith *v.* Wiley, 19 Ala. 216; Turner *v.* Brown, 9 Ala. 866; Turner *v.* Kelley, 10 Iowa 573; Stapp *v.* Thomason, 2 Litt. (Ky.) 214; Bender *v.* Comstock, 4 Rob. (N. Y.) 644; Campbell *v.* Wright, 21 How. Pr. (N. Y.) 9; Boington *v.* Lapham, 14 How. Pr. (N. Y.) 360; Rogers *v.* Rogers, 4 Johns. (N. Y.) 485. But see New Brunswick Bank *v.* Arrowsmith, 9 N. J. L. 284, holding that the proper practice was a motion to set aside the proceedings for irregularity. *Contra*, Ball *v.* Utica Bank, 6 Cow. (N. Y.) 70.

If the declaration or complaint is required to be filed before the summons issues, the variance is a defect in the summons and not in the pleading. Stoddard *v.* Davis, 50 Ala. 21.

97. Sharman *v.* Jackson, 47 Ala. 329; Blaisdell *v.* Whiteford, 6 Thomps. & C. (N. Y.) 462; Dunn *v.* Bloomingdale, 14 How. Pr. (N. Y.) 474.

98. **Waiver of objections by failure to urge by motion** see *infra*, XIV, B, 2.

Commingling causes of action or defenses in one count as ground see *supra*, XII, C, 1, c, (IV), (B).

99. *Georgia.*— Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764.

Iowa.— Bolinger *v.* Henderson, 23 Iowa 165.

Montana.— Butte *v.* Peasley, 18 Mont. 303, 45 Pac. 210.

Oregon.— Brownell *v.* Salem Flouring Mills Co., 48 Oreg. 525, 87 Pac. 770; The Victorian, 24 Oreg. 121, 32 Pac. 1040, 41 Am. St. Rep. 838.

South Carolina.— Bolt *v.* Gray, 54 S. C. 95, 32 S. E. 148.

South Dakota.— Campbell *v.* Equitable L. & T. Co., 14 S. D. 483, 85 N. W. 1015; McGillivray *v.* McGillivray, 9 S. D. 187, 68 N. W. 316.

Wisconsin.— Horton *v.* Arnold, 17 Wis. 139.

United States.— Latham *v.* Staten Island R. Co., 150 Fed. 235.

Canada.— Smith *v.* Traders Bank, 11 Ont.

out certain allegations as irrelevant does not lie to test the validity of a defense.[1] So allegations will not be stricken out merely because the averments are defective.[2] Allegations in a pleading constituting part of a paragraph will not be stricken out because they do not themselves disclose a reasonable cause of action.[3] As between co-defendants, if one files an answer containing matter outside the domain of controversy, the other may move to have it stricken out, although no demurrer is permitted between co-defendants.[4] The only advantage in moving to strike out matter deemed irrelevant is in finding out beforehand whether the court also deems it to be such and whether it is necessary to prepare to meet it by evidence on the trial.[5] Irrelevant matter not stricken out becomes mere surplusage and must be treated as such on the trial of the case.[6]

b. What May Be Stricken — (i) *Immaterial, Irrelevant, or Redundant Allegations* — (a) *In General.* Immaterial, irrelevant, or redundant allegations in a pleading may be stricken out on motion,[7] where prejudicial to the

L. Rep. 24, 6 Ont. Wkly. Rep. 748, construing rules of court.

See 39 Cent. Dig. tit. "Pleading," § 1147 *et seq.*

But see Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263, holding that portions of a declaration cannot be stricken out on motion.

"A demurrer is not a pruning hook, and cannot be used to trim out immaterial and irrelevant matter. This must be done by motion." *In re* McMurray, 107 Iowa 648, 78 N. W. 691.

1. Rankin *v.* Bush, 108 N. Y. App. Div. 295, 95 N. Y. Suppl. 718; Rankin *v.* Bush-Brown, 108 N. Y. App. Div. 294, 95 N. Y. Suppl. 719.

2. Swain *v.* Burnette, 76 Cal. 299, 18 Pac. 394.

3. McEwen *v.* Northwestern Coal, etc., Co., 1 Northwest Terr. 203.

4. Stibbard *v.* Jay, 26 Misc. (N. Y.) 260, 56 N. Y. Suppl. 777.

5. Specht *v.* Spangenberg, 70 Iowa 488, 30 N. W. 875.

6. Specht *v.* Spangenberg, 70 Iowa 488, 30 N. W. 875.

Incompetent evidence cannot be rendered competent by being alleged in the pleadings, even though no motion is made to strike it out. Ireton *v.* Ireton, 59 Kan. 92, 52 Pac. 74.

7. *Alabama.*— King *v.* Woodstock Iron Co., 143 Ala. 632, 42 So. 27; Vandiver *v.* Waller, 143 Ala. 411, 39 So. 136; Louisville, etc., R. Co. *v.* Quick, 125 Ala. 553, 28 So. 14.

California.— Green *v.* Palmer, 15 Cal. 411, 76 Am. Dec. 492.

Connecticut.— Bell *v.* Hartford, etc., St. R. Co., 79 Conn. 722, 65 Atl. 600; Garfield *v.* Hartford, etc., St. R. Co., 79 Conn. 458, 65 Atl. 598; Donovan *v.* Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; Pitkin *v.* New York, etc., R. Co., 64 Conn. 482, 30 Atl. 772. But see Freeman's Appeal, 71 Conn. 708, 43 Atl. 185, holding, under a statute which provides only for motions to strike out on the ground of scandal and impertinence, that it is rarely that objections on the ground that matter is irrelevant can justify the delay and expense incident to a proceeding for a correction of the pleading, and that except when it is clear that there was no reasonable ground for inserting such allegation, it should be allowed to stand and the party permitted to put the case before the court in his own way rather than that in which his antagonist may prefer.

Georgia.— Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764.

Indiana.—Atkinson *v.* Wabash R. Co., 143 Ind. 501, 41 N. E. 947; Evans *v.* White, 53 Ind. 1; Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843.

Iowa.— Frazer *v.* Andrews, 134 Iowa 621, 112 N. W. 92, 11 L. R. A. N. S. 593; *In re* McMurray, 107 Iowa 648, 78 N. W. 691; Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61; Specht *v.* Spangenberg, 70 Iowa 488, 30 N. W. 875; Amsden *v.* Dubuque, etc., R. Co., 13 Iowa 132. But see Walker *v.* Pumphrey, 82 Iowa 487, 48 N. W. 928.

Kansas.— Gray *v.* Ulrich, 8 Kan. 112; Roe *v.* Elk County, 1 Kan. App. 219, 40 Pac. 1082.

Minnesota.— Brisbin *v.* American Express Co., 15 Minn. 43.

Missouri.— Chicago, etc., R. Co. *v.* Mertens, 78 Mo. App. 74.

Montana.— Butte *v.* Peasley, 18 Mont. 303, 45 Pac. 210.

Nebraska.— Reed *v.* Reed, 70 Nebr. 779, 98 N. W. 73.

New Jersey.—Ackerman *v.* Shelp, 8 N. J. L. 125, stricken from a notice of special matter.

New York.— Bradley *v.* Sweeny, 120 N. Y. App. Div. 315, 318, 105 N. Y. Suppl. 296, 298; Acardo *v.* New York Contracting, etc., Co., 116 N. Y. App. Div. 793, 102 N. Y. Suppl. 7; Chase *v.* Deering, 104 N. Y. App. Div. 192, 93 N. Y. Suppl. 434; Murray *v.* National Biscuit Co., 96 N. Y. App. Div. 609, 88 N. Y. Suppl. 1001; Philippines Co. *v.* Kimball, 57 N. Y. App. Div. 19, 67 N. Y. Suppl. 970; MacColl *v.* American Union L. Ins. Co., 89 Hun 490, 35 N. Y. Suppl. 364; Buffalo Lubricating Oil Co. *v.* Everest, 30 Hun 586; Burke *v.* New York, etc., R. Co., 59 N. Y. Super. Ct. 569, 15 N. Y. Suppl. 148; Benjamin *v.* White, 55 Misc. 530, 105 N. Y. Suppl. 991; Blaut *v.* Blaut, 41 Misc. 572, 85 N. Y. Suppl. 146; Brown *v.* Fish, 37 Misc. 367, 75 N. Y. Suppl. 460 [*reversed* on other grounds in 76 N. Y. App. Div. 329, 78 N. Y. Suppl. 414]; Farrington *v.* Muchmore, 68 N. Y. Suppl. 857; Schroeder *v.* Young, 63 N. Y. Suppl. 110; Morgan *v.* Bennett, 59

moving party,[8] it being expressly provided by the codes in many of the states that irrelevant, redundant, or scandalous matter contained in a pleading may be stricken out on the motion of a person aggrieved thereby.[9] Allegations will be stricken out as irrelevant when they cannot in any aspect of the case be or become material,[10] or where they contain only facts which cannot affect the decision of the

N. Y. Suppl. 825; Hyde *v.* Kitchen, 21 N. Y. Suppl. 238; Weber *v.* Schwarz, 12 N. Y. St. 621; Fasnacht *v.* Stehn, 5 Abb. Pr. N. S. 338; Harris *v.* Hammond, 18 How. Pr. 123; Farmers, etc., Bank *v.* Smith, 15 How. Pr. 329; Stewart *v.* Bouton, 6 How. Pr. 71; Rensselaer, etc., Plank Road Co. *v.* Wetsel, 6 How. Pr. 68; Carpenter *v.* West, 5 How. Pr. 53; Spencer *v.* Tabele, 9 Johns. 130.

Ohio.— First Nat. Bank *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 702, 16 Cinc. L. Bul. 399; Wachs *v.* Gawne, 11 Ohio S. & C. Pl. Dec. 222, 8 Ohio N. P. 383.

Oklahoma.— Berry *v.* Geiser Mfg. Co., 15 Okla. 364, 85 Pac. 699.

Oregon.— Miser *v.* O'Shea, 37 Oreg. 231, 62 Pac. 491, 82 Am. St. Rep. 751; Cline *v.* Cline, 3 Oreg. 355.

South Carolina.—Alexander *v.* Du Bose, 73 S. C. 21, 52 S. E. 786; Lawson *v.* Gee, 57 S. C. 502, 35 S. E. 759; Bolt *v.* Gray, 54 S. C. 95, 32 S. E. 148; Smith *v.* Smith, 50 S. C. 54, 27 S. E. 545.

South Dakota.— Campbell *v.* Equitable L. & T. Co., 14 S. D. 483, 85 N. W. 1015; McGillivray *v.* McGillivray, 9 S. D. 187, 68 N. W. 316.

Texas.— Sabine, etc., R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374.

Washington.— Jordan *v.* Coulter, 30 Wash. 116, 70 Pac. 257.

Wisconsin.— Brighton, etc., Joint School-Dist. No. 7 *v.* Kemen, 65 Wis. 282, 27 N. W. 31; Carpenter *v.* Reynolds, 58 Wis. 666, 17 N. W. 300; Horton *v.* Arnold, 17 Wis. 139.

United States.— Timmonsville Bank *v.* New York Fidelity, etc., Co., 121 Fed. 934 [*reversed* on other grounds in 139 Fed. 101, 71 C. C. A. 299].

England.— Bristow *v.* Wright, Dougl. (3d ed.) 665.

Canada.— Perkins *v.* Irvine, 23 Nova Scotia 250; Lefrancois *v.* Dominion Bridge Co., 7 Quebec Pr. 338.

See 39 Cent. Dig. tit. "Pleading," § 1156.

"Irrelevancy" and "redundancy" are not the same (see *supra*, II), redundant matter not being necessarily irrelevant and *vice versa* (Sweetman *v.* Ramsey, 22 Mont. 323, 56 Pac. 361. See also *supra*, II), although oftentimes the terms are used as synonymous in ruling on motions to strike. Superfluity and excess is the meaning given to the term redundancy in some of the cases (Brown *v.* Fish, 37 Misc. (N. Y.) 367, 75 N. Y. Suppl. 460 [*reversed* on other grounds in 76 N. Y. App. Div. 329, 78 N. Y. Suppl. 414]; Fasnacht *v.* Stehn, 5 Abb. Pr. N. S. (N. Y.) 338; Carpenter *v.* West, 5 How. Pr. (N. Y.) 53; Carpenter *v.* Reynolds, 58 Wis. 666, 17 N. W. 300), while in others it is said that redundancy is repetition (Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657).

Surplusage may be stricken out on motion. Wheeler *v.* West, 78 Cal. 95, 20 Pac. 45; Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602; Equitable Securities Co. *v.* Montrose, etc., Canal Co., 20 Colo. App. 465, 79 Pac. 747; Ohio, etc., R. Co. *v.* Clutter, 82 Ill. 123; Sac County *v.* Hobbs, 72 Iowa 69, 33 N. W. 368; Bevans *v.* McGlocklin, 9 Md. 476; Ryan *v.* Riddle, 109 Mo. App. 115, 82 S. W. 1117; McMahon *v.* Thornton, 4 Mont. 46, 1 Pac. 724; Camp *v.* Bedell, 52 Hun (N. Y.) 63, 5 N. Y. Suppl. 63. Where a plea contained a surplusage consisting of a protestation of a matter of law, but the plea, divested of such surplusage, was simply "not guilty," the case will be tried on the plea, without striking the surplusage; it not being of sufficient importance. Kennebec Ice, etc., Co. *v.* Wilmington, etc., R. Co., 2 Chest. Co. Rep. (Pa.) 114.

However, if redundant or irrelevant matter in a pleading is such that to strike it out would leave the pleading an unintelligible fragment, raising no issue, the proper remedy is not a motion to strike out but a motion for judgment on account of its frivolousness. Cochrane *v.* Parker, 5 Colo. App. 527, 39 Pac. 361; Day *v.* Day, 95 N. Y. App. Div. 122, 88 N. Y. Suppl. 504.

8. See *infra*, XII, C, 2, c.

9. See the statutes of the several states.

Motion as substitute for exceptions for impertinency in chancery.—A motion to strike out irrelevant or redundant matter is a substitute for exceptions for impertinence under the former practice in chancery. Benedict *v.* Dake, 6 How. Pr. (N. Y.) 352; Carpenter *v.* West, 5 How. Pr. (N. Y.) 53.

10. Cahill *v.* Palmer, 17 Abb. Pr. (N. Y.) 196; Gadsden *v.* Catawba Water Power Co., 71 S. C. 340, 51 S. E. 121; Sabine, etc., R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374; Brighton, etc., Joint School Dist. No. 7 *v.* Wemen, 65 Wis. 282, 27 N. W. 31.

An immaterial allegation is one which can be stricken from the pleading without leaving it insufficient and which need not be proved or disproved. Green *v.* Palmer, 15 Cal. 411, 76 Am. Dec. 492.

An irrelevant allegation is one which has no substantial relation to the controversy between the parties to the suit and which cannot affect the decision of the court because it has no bearing upon the subject-matter of the controversy. John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475; Noval *v.* Haug, 48 Misc. (N. Y.) 198, 96 N. Y. Suppl. 708.

Admissibility of evidence as test.—Allegations of an answer in support of which evidence would not be admitted on the trial will be stricken out on motion. Noval *v.* Haug, 48 Misc. (N. Y.) 198, 96 N. Y. Suppl. 708.

court;[11] but no fact which affects or is material to the cause of action or defense,[12] or which in any event can affect it or become material thereto,[13] may be so stricken

Allegations of fraud may be stricken out as irrelevant in an action on contract. Nealis *v.* Lissner, 52 Hun (N. Y.) 503, 5 N. Y. Suppl. 682; Sellar *v.* Sage, 12 How. Pr. (N. Y.) 531; McCauley *v.* Long, 61 Tex. 74.

Allegations of personal injuries may be stricken out as irrelevant in an action for injury to personalty. Trenndlich *v.* Hall, 7 N. Y. Civ. Proc. 62.

Allegations as to motives.—Allegations showing defendant's reasons for pleading a certain defense (Nichols *v.* Briggs, 18 S. C. 473), or plaintiff's motives for bringing suit (Persch *v.* Weideman, 106 N. Y. App. Div. 553, 94 N. Y. Suppl. 800), may be stricken out as irrelevant.

Matters declared by statute to be improper in a pleading may be stricken out. Jones *v.* Reilly, 61 N. Y. Suppl. 67.

11. Bell *v.* Clarke 45 Misc. (N. Y.) 275, 92 N. Y. Suppl. 411.

12. *California.*— Jackson *v.* Lebar, 53 Cal. 255.

Connecticut.— Broekett *v.* Fair Haven, etc., R. Co., 73 Conn. 428, 47 Atl. 763.

Indiana.— Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248.

Iowa.— White *v.* Adams, 77 Iowa 295, 42 N. W. 199.

Louisiana.— Welsh *v.* Barrow, 9 Rob. 535.

Minnesota.— Tierney *v.* Minneapolis, etc., R. Co., 31 Minn. 234, 17 N. W. 377.

Montana.— Knox *v.* Gerhauser, 3 Mont. 267.

Nebraska.— Hovland *v.* Burrows, 38 Nebr. 119, 56 N. W. 800; Scofield *v.* State Nat. Bank, 9 Nebr. 316, 2 N. W. 888, 31 Am. Rep. 412.

New York.— Hoffman *v.* Wight, 137 N. Y. 621, 33 N. E. 554 [*reversing* on other grounds 21 N. Y. Suppl. 912]; Dinkelspiel *v.* New York Evening Journal Pub. Co., 91 N. Y. App. Div. 96, 86 N. Y. Suppl. 375; New York First Presby. Church *v.* Kennedy, 72 N. Y. App. Div. 82, 76 N. Y. Suppl. 284; Starkweather *v.* Bronner, 18 Hun 346; Dovan *v.* Dinsmore, 33 Barb. 86; Citizens' Cent. Nat. Bank *v.* Munn, 49 Misc. 319, 99 N. Y. Suppl. 191 [*affirmed* in 100 N. Y. Suppl. 1110]; Barney, etc., Car Co. *v.* Syracuse Rapid Transit R. Co., 24 Misc. 169, 53 N. Y. Suppl. 528; Hall *v.* Strong, 102 N. Y. Suppl. 161; Sexton *v.* Bennett, 9 N. Y. Suppl. 394; Cambeis *v.* McDonald, 2 N. Y. St. 130; Doctor *v.* Guggenheim, 1 N. Y. City Ct. 81.

See 39 Cent. Dig. tit. "Pleading," § 1156.

A paragraph of an answer stating a good denial will not be stricken out as redundant or irrelevant. Ebling Brewing Co. *v.* Adler, 103 N. Y. Suppl. 93.

Allegations of special damage should not be stricken as irrelevant (Fox *v.* Chapman, 117 N. Y. App. Div. 127, 102 N. Y. Suppl. 378, holding that where a complaint in an action to recover damages for death by wrongful act alleged that the widow of the deceased spent large sums of money for hospital room and board and for care and medical attendance, the right to recover such items cannot be decided upon a motion to strike the allegations from the complaint; Pavenstedt *v.* New York L. Ins. Co., 103 N. Y. App. Div. 36, 92 N. Y. Suppl. 853; Molony *v.* Dows, 15 How. Pr. (N. Y.) 261 [*affirmed* in 2 Hilt. 247]), unless they are clearly too remote (Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841). *Contra*, Vandiver *v.* Waller, 143 Ala. 411, 39 So. 136. Where the petition in a suit to set aside a conveyance did not set forth facts entitling plaintiff to relief by way of damages if he succeeded in securing the relief by way of cancellation, and there was no allegation on which damages by way of alternative relief in the event that cancellation was denied could be awarded, the court properly struck from the petition the allegations relating to damages. Hall *v.* Kary, 133 Iowa 465, 110 N. W. 930.

Allegations which may bear on the question of costs should not be stricken out. Dunkirk *v.* Lake Shore, etc., R. Co., 75 Hun (N. Y.) 366, 27 N. Y. Suppl. 105.

A contract set up in hæc verba in a pleading cannot be stricken out as irrelevant or redundant merely because a copy is also attached as an exhibit. Post *v.* Garrow, 18 Nebr. 682, 26 N. Y. 580.

In an action for injuries, an order striking out from the complaint allegations involved in a common-law action, unless plaintiff serve an amended complaint separately stating his common-law action and action under the Employers' Liability Act, was not authorized by N. Y. Code Civ. Proc. § 545, authorizing the striking out of irrelevant and redundant matter. Acardo *v.* New York Contracting, etc., Co., 116 N. Y. App. Div. 793, 102 N. Y. Suppl. 7.

Allegations immaterial as to part of defendants.— One defendant cannot have allegations stricken from the complaint on the ground that they are immaterial against him, if they are material against some other defendant. Hoffman *v.* Wright, 137 N. Y. 621, 33 N. E. 554; Brown *v.* Fish, 76 N. Y. App. Div. 329, 78 N. Y. Suppl. 414.

Referring to other counts.— In determining the question whether certain matter is irrelevant, reference can be had to that count or defense alone in which such matter appears, and not to any other count or defense. Berry *v.* E. L. Moore Co., 69 S. C. 317, 48 S. E. 249. But allegations which are irrelevant and immaterial in one count or defense may in others be material so that striking them out from one count or defense does not preclude their being included in another. Edison *v.* Press Pub. Co., 85 N. Y. App. Div. 376, 83 N. Y. Suppl. 174.

13. Hansen *v.* St. Paul Gaslight Co., 82 Minn. 84, 84 N. W. 727; Oertel *v.* Jacoby, 42 How. Pr. (N. Y.) 218; Averill *v.* Taylor, 5 How. Pr. (N. Y.) 476.

out as may denials intermingled with affirmative defenses.[14] So mere epithets may be stricken out as irrelevant,[15] as may superfluous phrases which tend to confuse the issues.[16] So an express admission in an answer or reply may be stricken out, since all allegations not denied are deemed admitted.[17] Where plaintiff unnecessarily pleads facts not essential to his cause of action, he cannot move to strike allegations answering them;[18] and where a party has treated certain matters as sufficiently important to require them to be made more definite and certain, he is estopped to thereafter have them stricken out.[19]

(B) *Allegations of Evidence.* Matters of evidence set up in a pleading may be stricken out.[20] But in some cases the court has refused to strike out such allegations on the ground that the moving party was not prejudiced thereby.[21] And where evidence of facts pleaded in allegations sought to be stricken out has any bearing on the subject-matter, the motion should be denied.[22] So it has been held that a motion to strike out of the petition evidential facts forming no part of the cause of action, but which are pleaded as aggravation of damages, is properly denied.[23]

(C) *Anticipating Defenses.* Matter alleged in a pleading in anticipation of a defense thereto, where improper, may be stricken out on motion.[24]

(D) *Repetition of Allegations.* Allegations or denials which are mere repeti-

14. Uggla *v.* Brokaw, 77 N. Y. App. Div. 310, 79 N. Y. Suppl. 244; Waltham Mfg. Co. *v.* Brady, 67 N. Y. App. Div. 102, 73 N. Y. Suppl. 540; Stieffel *v.* Tolhurst, 55 N. Y. App. Div. 542, 67 N. Y. Suppl. 274; Benjamin *v.* White, 55 Misc. (N. Y.) 530, 105 N. Y. Suppl. 991; Blaut *v.* Blaut, 41 Misc. (N. Y.) 572, 85 N. Y. Suppl. 146; Staten Island Midland R. Co. *v.* Hinchcliffe, 34 Misc. (N. Y.) 49, 68 N. Y. Suppl. 556; Benedict *v.* Seymour, 6 How. Pr. (N. Y.) 298.

So allegations which by reference make denials appearing elsewhere part of affirmative defenses may be stricken. Stieffel *v.* Tolhurst, 55 N. Y. App. Div. 532, 67 N. Y. Suppl. 274; Burkert *v.* Bennett, 35 Misc. (N. Y.) 318, 71 N. Y. Suppl. 144.

15. Harlow *v.* Seymour First Nat. Bank, 30 Ind. App. 160, 65 N. E. 603.

16. Dollner *v.* Gibson, 3 Code Rep. (N. Y.) 153; Block *v.* Standard Distilling, etc., Co., 10 Ohio S. & C. Pl. Dec. 409, 8 Ohio N. P. 236.

17. Collins *v.* Coggill, 7 Rob. (N. Y.) 81.

18. McIntyre *v.* Ogden, 17 Hun (N. Y.) 604; Brennan *v.* Griffiths, 18 N. Y. Suppl. 145. *Contra*, Mayer Co. *v.* Goldenberg, 1 Ohio S. & C. Pl. 222, 1 Ohio N. P. 189.

A denial of immaterial allegations, made in traversable form, will not be stricken out. King *v.* Utica Ins. Co., 6 How. Pr. (N. Y.) 485.

19. Banks *v.* Ocean Nat. Bank, 53 How. Pr. (N. Y.) 51.

20. *California.*— Miles *v.* McDermott, 31 Cal. 370; Willson *v.* Cleaveland, 30 Cal. 192; Bowen *v.* Aubrey, 22 Cal. 566.

Connecticut.— New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122; Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675.

Indiana.— Petree *v.* Fielder, 3 Ind. App. 127, 29 N. E. 271.

Iowa.— Bennett *v.* Lutz, 119 Iowa 215, 93 N. W. 288; Kelley *v.* Fejervary, 111 Iowa 693, 83 N. W. 791; Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 768; Hall *v.* Harris, 61 Iowa 500, 13 N. W. 665, 16 N. W. 535.

Kentucky.— Torian *v.* Terrell, 122 Ky. 745, 93 S. W. 10, 29 Ky. L. Rep. 306.

Montana.— Sweetman *v.* Ramsey, 22 Mont. 323, 56 Pac. 361.

Nebraska.— Coquillard *v.* Hovey, 23 Nebr. 622, 37 N. W. 479, 8 Am. St. Rep. 134.

New York.— Bankers' Surety Co. *v.* Rothschild, 111 N. Y. App. Div. 130, 96 N. Y. Suppl. 1113; Parsons *v.* McDonald, 88 N. Y. App. Div. 552, 85 N. Y. Suppl. 190; Schroeder *v.* Young, 49 N. Y. App. Div. 640, 63 N. Y. Suppl. 110; John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475; Schroeder *v.* Post, 3 N. Y. App. Div. 411, 38 N. Y. Suppl. 677; Ring *v.* Mitchell, 45 Misc. 493, 92 N. Y. Suppl. 749; Witherbee *v.* Slayback, 14 N. Y. St. 425; Badeau *v.* Niles, 9 Abb. N. Cas. 48; Cahill *v.* Palmer, 17 Abb. Pr. 196; Millikin *v.* Cary, 5 How. Pr. 272; Floyd *v.* Dearborn, 2 Edm. Sel. Cas. 91. But see Bell *v.* Clark, 45 Misc. 275, 92 N. Y. Suppl. 411.

South Carolina.— Gadsden *v.* Catawba Water Power Co., 71 S. C. 340, 51 S. E. 121; Bolt *v.* Gray, 54 S. C. 95, 32 S. E. 148.

Texas.— McCauley *v.* Long, 61 Tex. 74.

United States.— Tabor *v.* Indianapolis Newspaper Co., 66 Fed. 423.

See 39 Cent. Dig. tit. "Pleading," § 1159.

21. Vogt *v.* Vogt, 86 N. Y. App. Div. 437, 83 N. Y. Suppl. 677; Rockwell *v.* Day, 84 N. Y. App. Div. 437, 82 N. Y. Suppl. 993; Tradesmen's Nat. Bank *v.* U. S. Trust Co., 49 N. Y. App. Div. 362, 63 N. Y. Suppl. 526.

22. Dalziel *v.* Press Pub. Co., 52 Misc. (N. Y.) 207, 102 N. Y. Suppl. 909.

23. Sramek *v.* Sklenar, 73 Kan. 450, 85 Pac. 566.

24. Brooks *v.* Bates, 7 Colo. 576, 4 Pac. 1069; Friek Co. *v.* Carson, 3 Kan. App. 478, 43 Pac. 820; Singleton *v.* Pacific R. Co., 41 Mo. 465; Stone *v.* De Puga, 4 Sandf. (N. Y.) 681.

tions of others appearing elsewhere in the pleading may be stricken out,[25] as may averments which amount merely to a denial of facts which are already denied,[26] or which set up facts admissible under denials also pleaded.[27] So the court may strike out matter in a reply which is merely a repetition of the averments of the complaint.[28]

(E) *Averments Raising Issues of Law.* Averments by which it is sought to raise questions of law properly the subject of motion or demurrer may be stricken.[29]

(F) *Legal Conclusions.* Legal conclusions, when alleged in pleadings, may be stricken out;[30] and a denial which is a mere legal conclusion may be stricken.[31]

(G) *Matter of Inducement.* Matter of inducement will not ordinarily be stricken out on the ground of irrelevancy and immateriality.[32]

(H) *Allegations Not Supported by Evidence.* The fact that a party fails to introduce any evidence in support of certain allegations is not ground for striking out such allegations.[33]

(I) *False or Frivolous Allegations.* Separate allegations, not constituting entire counts or defenses, cannot be stricken out as sham or false,[34] and the same appears to be true of allegations deemed frivolous.[35]

(J) *Inconsistent Allegations.*[36] Allegations which are absolutely inconsistent with the rest of the pleading or with the party's prior pleading,[37] or are contradicted by previous admissions,[38] may be stricken out. So a motion to strike out matter in a reply constituting a departure is proper.[39]

(K) *Prayer For Relief.* It is usually held improper to strike out parts

25. Hartman Steel Co. *v.* Hoag, 104 Iowa 269, 73 N. W. 611; Hall *v.* Harris, 61 Iowa 500, 13 N. W. 665, 16 N. W. 535; Gray *v.* Ulrich, 8 Kan. 112; Dinkelspiel *v.* New York Evening Journal Pub. Co., 91 N. Y. App. Div. 96, 86 N. Y. Suppl. 375; Burnham *v.* Franklin, 44 Misc. (N. Y.) 299, 89 N. Y. Suppl. 917 [*affirmed* in 103 N. Y. App. Div. 595, 92 N. Y. Suppl. 1118]; Blaut *v.* Blaut, 41 Misc. (N. Y.) 572, 85 N. Y. Suppl. 146; Zimmerman *v.* Meyrowitz, 34 Misc. (N. Y.) 307, 69 N. Y. Suppl. 800; Cruikshank *v.* Press Pub. Co., 32 Misc. (N. Y.) 152, 65 N. Y. Suppl. 678 [*affirmed* in 59 N. Y. App. Div. 620, 69 N. Y. Suppl. 1133]; Holbrook *v.* Page, 3 Oreg. 374.

26. Burke *v.* Shannon, 43 S. W. 223, 19 Ky. L. Rep. 1170.

27. Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884. *Contra*, Cate *v.* Gilman, 41 Iowa 530.

28. West *v.* West, 144 Mo. 119, 46 S. W. 139.

29. Wheeler *v.* West, 78 Cal. 95, 20 Pac. 45; Kelley *v.* Cosgrove, 83 Iowa 229, 48 N. W. 979, 17 L. R. A. 779; Sac County *v.* Hobbs, 72 Iowa 69, 33 N. W. 368; Camp *v.* Bedell, 52 Hun (N. Y.) 63, 5 N. Y. Suppl. 63; Gassett *v.* Crocker, 10 Abb. Pr. (N. Y.) 133.

30. Manry *v.* Waxelbaum Co., 108 Ga. 14, 33 S. E. 701; Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140; Sac County *v.* Hobbs, 72 Iowa 69, 33 N. W. 368; Parsons *v.* McDonald, 88 N. Y. App. Div. 552, 85 N. Y. Suppl. 190; Holbrook *v.* Page, 3 Oreg. 374.

31. Lynch *v.* Walsh, 11 N. Y. Civ. Proc. 446; Williams *v.* Burkheimer, 11 Ohio S. & C. Pl. Dec. 136, 8 Ohio N. P. 134.

32. McGarahan *v.* Sheridan, 106 N. Y. App. Div. 532, 94 N. Y. Suppl. 708; Hale *v.* Tyler, 104 Fed. 757. But see Casto *v.* Murray, 47 Oreg. 57, 81 Pac. 388, 883.

33. Richmond, etc., R. Co. *v.* Worley, 92 Ga. 84, 18 S. E. 361.

34. Matter of Lord, 81 Hun (N. Y.) 590, 30 N. Y. Suppl. 1117; Collins *v.* Coggill, 7 Rob. (N. Y.) 81; Slack *v.* Cotton, 2 E. D. Smith (N. Y.) 398; Brown *v.* Baker, 39 Oreg. 66, 65 Pac. 799, 66 Pac. 193; Spensley *v.* Janesville Cotton Mfg. Co., 62 Wis. 549, 22 N. W. 574.

In the federal courts, however, it has been held that averments may be stricken out on the ground that they are sham and evasive, ambiguous or uncertain. Peacock *v.* U. S., 125 Fed. 583, 60 C. C. A. 389.

35. Gray *v.* Gidiere, 4 Strobh. (S. C.) 438. But see Wythe *v.* Myers, 30 Fed. Cas. No. 18,119, 3 Sawy. 595.

36. Motion to compel election see *infra*, XII, E, 1, 3.

Striking out inconsistent defenses see *supra*, XII, C, 1, c, (XII).

37. *California.*— Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602.

Montana.— State *v.* Dickerman, 16 Mont. 278, 40 Pac. 698.

Nebraska.— Keens *v.* Gaslin, 24 Nebr. 310, 38 N. W. 797.

New York.— Wm. H. Frank Brewing Co. *v.* Hammersen, 22 N. Y. App. Div. 475, 48 N. Y. Suppl. 30.

Washington.— Davis *v.* Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

Canada.— Destrousmaisons *v.* Dominion Ice Co., 4 Quebec Pr. 368.

See 39 Cent. Dig. tit. "Pleading," § 1153.

38. Tabor *v.* Commercial Nat. Bank, 62 Fed. 383, 10 C. C. A. 429.

39. Logiodice *v.* Gannon, 60 Conn. 81, 21 Atl. 100; Merrill *v.* Suing, 66 Nebr. 404, 92 N. W. 618; Leland *v.* Neilson, 3 N. J. L. J. 156.

of the prayer for relief, since the other party cannot be prejudiced by it,[40] but some decisions sanction the practice.[41]

(vi) *Scandalous Matter.*[42] Scandalous matter will be stricken out on motion.[43] But matters which are proper to be shown in evidence and must be pleaded in order to be admissible cannot be deemed scandalous.[44] But while matter constituting a defense cannot be stricken out as scandalous, yet facts pleaded as a complete defense, which would be demurrable as constituting only a partial defense or as being merely in mitigation of damages, may, it has been held, be stricken as scandalous;[45] although strictly speaking it is submitted that such matter does not come within the term scandalous.[46]

(vii) *Matter Tending to Prejudice, Embarrass, or Delay Trial.* By statute or rules of court in England and some parts of Canada, matter may be stricken out of a pleading where it may tend to "prejudice, embarrass, or delay" the fair trial of the action.[47]

(viii) *Parts of Demurrer.* Parts of a demurrer cannot be stricken out.[48]

c. Necessity That Moving Party Be Prejudiced by Retention of Allegations. In most jurisdictions the codes provide that matter may be stricken out on the motion of a person aggrieved thereby, and hence the mere fact that matter is irrelevant or redundant is not of itself sufficient to authorize the granting of the motion, but in addition it must appear on the face of the pleading that harm or injustice will be done to the moving party if such matter is allowed to remain in the pleading,[49] especially in equity suits where more details are set up than actually

40. Smith *v.* Hilton, 50 Hun (N. Y.) 236, 2 N. Y. Suppl. 820; Averill *v.* Taylor, 5 How. Pr. (N. Y.) 476; State *v.* Smith, 14 Wis. 564.

41. Reagan *v.* Hadley, 57 Ind. 509.

Allegations as to attorney's fees.— A motion to strike from a declaration in replevin that portion seeking to recover attorney's fees as an element of damage is the proper method of attack, and should be granted. Gregory *v.* Woodbery, 53 Fla. 566, 43 So. 504.

42. **What constitutes** in general see *supra*, II, G, 9.

What constitutes, and remedy, under equity practice, see Equity, 16 Cyc. 257, 317.

43. *Connecticut.*— Freeman's Appeal, 71 Conn. 708, 43 Atl. 185.

Iowa.— Speers *v.* Fortner, 6 Iowa 553.

New York.— Stokes *v.* Leary, 54 N. Y. App. Div. 631, 66 N. Y. Suppl. 822; Armstrong *v.* Phillips, 60 Hun 243, 14 N. Y. Suppl. 582; Carpenter *v.* West, 5 How. Pr. 53; Floyd *v.* Dearborn, 2 Code Rep. 17.

North Carolina.— Powell *v.* Cobb, 56 N. C. 1.

Texas.— Herndon *v.* Campbell, 86 Tex. 168, 23 S. W. 980.

Utah.— Morrison *v.* Snow, 26 Utah 247, 72 Pac. 924.

United States.— Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,674, 9 Blatchf. 513.

See 39 Cent. Dig. tit. "Pleading," § 1157.

44. Wuensch *v.* Morning Journal Assoc., 4 N. Y. App. Div. 110, 38 N. Y. Suppl. 605.

45. Persch *v.* Weideman, 106 N. Y. App. Div. 553, 94 N. Y. Suppl. 800.

46. See *supra*, II, G, 9.

47. Long *v.* Barnes, 14 Manitoba 427; Leonard *v.* Sweet, 33 Nova Scotia 197; Power *v.* Pringle, 31 Nova Scotia 78; Brock *v.* Tew, 18 Ont. Pr. 30; Snider *v.* Snider, 11 Ont. Pr. 140.

48. Smith *v.* Brown, 6 How. Pr. (N. Y.) 383; Cohen *v.* Ottenheimer, 13 Oreg. 220, 10 Pac. 20. But see Davis *v.* Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270.

49. *Idaho.*— Porter *v.* Allen, 8 Ida. 358, 69 Pac. 105, 236.

Iowa.— Cate *v.* Gilman, 41 Iowa 530.

Kansas.— See Stockton State Bank *v.* Showers, 65 Kan. 431, 70 Pac. 332.

Missouri.— Monson *v.* Ray, 123 Mo. App. 1, 99 S. W. 475.

New York.— McGarahan *v.* Sheridan, 106 N. Y. App. Div. 532, 94 N. Y. Suppl. 708; Pope Mfg. Co. *v.* Rubber Goods Mfg. Co., 100 N. Y. App. Div. 353, 91 N. Y. Suppl. 826; Dinkelspiel *v.* New York Evening Journal Pub. Co., 91 N. Y. App. Div. 96, 86 N. Y. Suppl. 375; Vogt *v.* Vogt, 86 N. Y. App. Div. 437, 83 N. Y. Suppl. 677; Rockwell *v.* Day, 84 N. Y. App. Div. 437, 82 N. Y. Suppl. 993; Howard *v.* Mobile Co. of America, 75 N. Y. App. Div. 23, 77 N. Y. Suppl. 957; Stokes *v.* Star Co., 69 N. Y. App. Div. 21, 74 N. Y. Suppl. 528; Bogardus *v.* Metropolitan St. R. Co., 62 N. Y. App. Div. 376, 70 N. Y. Suppl. 1094; Stieffel *v.* Tolhurst, 55 N. Y. App. Div. 532, 67 N. Y. Suppl. 274; Stokes *v.* Leary, 54 N. Y. App. Div. 631, 66 N. Y. Suppl. 822; Meyer *v.* Young, 49 N. Y. App. Div. 639, 63 N. Y. Suppl. 143; Tradesmen's Nat. Bank *v.* U. S. Trust Co., 49 N. Y. App. Div. 362, 63 N. Y. Suppl. 526; Ring *v.* Mitchell, 45 Misc. 493, 92 N. Y. Suppl. 749; Palmer *v.* Day, 44 Misc. 579, 90 N. Y. Suppl. 133; Baer *v.* Seymour, 12 N. Y. St. 166; Molony *v.* Dows, 15 How. Pr. 261 [*affirmed* in 2 Hilt. 247]; Clark *v.* Harwood, 8 How. Pr. 470.

Oklahoma.— Berry *v.* Geiser Mfg. Co., 15 Okla. 364, 85 Pac. 699.

If the matter cannot be made the subject of a material issue, or affect the question of an injunctions or costs, or other relief to be

necessary;[50] and that the striking it out will not harm the pleader.[51] Where the right of the moving party to demur to a defense set up is seriously affected by the presence of denials therein, he is so aggrieved that a motion to strike out such denials should be granted.[52] And some cases hold that a party is aggrieved if called upon to answer an irrelevant or redundant statement,[53] or even where merely compelled to read many pages of redundant matter to ascertain whether it is matter which ought to encumber the record.[54]

d. Discretion of Court. The striking out of irrelevant, redundant, or other allegations is generally not an absolute right but rests in the discretion of the court;[55] and as the motion is not favored,[56] especially in an equity cause,[57] the power to strike such matter should be exercised with reluctance and caution.[58] If there is any doubt as to the improper character of the allegations objected to, the motion should be overruled.[59] It is not the province of the court, on the hearing of the motion, to decide whether the evidence would be material or the weight or effect to be given to it upon the trial.[60] But it is no ground for refusing to strike that the pleading will thereby be left so imperfect as to be demurrable,[61] nor that the portions sought to be stricken are made parts of other counts or defenses by reference.[62] But when the striking out of allegations will measurably weaken the force of material facts sought to be stated,[63] or will render what is left unintelligible,[64] the motion will usually be denied.

granted, and will embarrass the opposite party and the court, it should be stricken out. Martin *v.* Kanouse, 2 Abb. Pr. (N. Y.) 330.

50. John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475; Williams *v.* Folsom, 57 Hun (N. Y.) 128, 10 N. Y. Suppl. 895; Bell *v.* Clarke, 45 Misc. (N. Y.) 275, 92 N. Y. Suppl. 411; Palmer *v.* Day, 44 Misc. (N. Y.) 579, 90 N. Y. Suppl. 133; Van Derveer *v.* Woodworth, 18 N. Y. Suppl. 274.

51. Palmer *v.* Day, 44 Misc. (N. Y.) 579, 90 N. Y. Suppl. 133.

52. Stieffel *v.* Tolhurst, 55 N. Y. App. Div. 532, 67 N. Y. Suppl. 274; Benjamin *v.* White, 55 Misc. (N. Y.) 530, 105 N. Y. Suppl. 991.

53. Brown *v.* Fish, 37 Misc. (N. Y.) 367, 75 N. Y. Suppl. 460 [*reversed* on other grounds in 76 N. Y. App. Div. 329, 78 N. Y. Suppl. 414]; Marrone *v.* New York Jockey Club, 17 N. Y. Suppl. 936; Isaac *v.* Velloman, 3 Abb. Pr. (N. Y.) 464.

54. Putnam *v.* De Forest, 8 How. Pr. (N. Y.) 146.

55. Abott *v.* Striblen, 6 Iowa 191; Sramek *v.* Sklenar, 73 Kan. 450, 85 Pac. 566; Howard *v.* Mobile Co. of America, 75 N. Y. App. Div. 23, 77 N. Y. Suppl. 957; Matter of New York, 48 Misc. (N. Y.) 602, 96 N. Y. Suppl. 554 [*affirmed* in 114 N. Y. App. Div. 912, 100 N. Y. Suppl. 1149]; Deering *v.* Schreyer, 25 Misc. (N. Y.) 618, 56 N. Y. Suppl. 117; Emmens *v.* McMillan Co., 21 Misc. (N. Y.) 638, 47 N. Y. Suppl. 1099; Baer *v.* Seymour, 12 N. Y. St. 166.

Failure of the pleader to appear at the hearing of the motion to strike out does not entitle him to have the motion granted as a matter of course. Homan *v.* Byrne, 14 N. Y. Wkly. Dig. 175.

56. Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248; Dinkelspiel *v.* New York Evening Journal Pub. Co., 91 N. Y. App. Div. 96, 86 N. Y. Suppl. 375.

57. Bell *v.* Clarke, 45 Misc. (N. Y.) 275, 92 N. Y. Suppl. 411; Palmer *v.* Day, 44 Misc. (N. Y.) 579, 90 N. Y. Suppl. 133.

58. Howard *v.* Mobile Co. of America, 75 N. Y. App. Div. 23, 77 N. Y. Suppl. 957; Dunkirk *v.* Lake Shore, etc., R. Co., 75 Hun (N. Y.) 366, 27 N. Y. Suppl. 105; Matter of New York, 48 Misc. (N. Y.) 602, 96 N. Y. Suppl. 554 [*affirmed* in 114 N. Y. App. Div. 912, 100 N. Y. Suppl. 1149]; Bell *v.* Clarke, 45 Misc. (N. Y.) 275, 92 N. Y. Suppl. 411; Palmer *v.* Day, 44 Misc. (N. Y.) 579, 90 N. Y. Suppl. 133; Bradstreet *v.* Bradstreet Co., 14 N. Y. St. 260.

There is little benefit in motions of this kind and there may be much harm. Essex *v.* New York, etc., R. Co., 8 Hun (N. Y.) 361.

59. Freeman's Appeal, 71 Conn. 708, 43 Atl. 185; Whitney *v.* Cady, 71 Conn. 166, 41 Atl. 550; John Church Co. *v.* Parkinson, 86 N. Y. App. Div. 163, 83 N. Y. Suppl. 175; American Farm Co. *v.* Rural Pub. Co., 78 N. Y. App. Div. 268, 79 N. Y. Suppl. 911; Lynch *v.* Second Ave. R. Co., 7 N. Y. App. Div. 164, 39 N. Y. Suppl. 1103; Gaylord *v.* Beardsley, 25 N. Y. Suppl. 598; Whitehall Lumber Co. *v.* Edmans, 4 N. Y. Suppl. 721; Baer *v.* Seymour, 12 N. Y. St. 166; Astrich *v.* Girard F. & M. Ins. Co., 6 Dauph. Co. Rep. (Pa.) 238.

60. Michigan Steamship Co. *v.* American Bonding Co., 109 N. Y. App. Div. 55, 95 N. Y. Suppl. 1034.

61. Page *v.* Ford, 12 Ind. 46; Waller *v.* Raskan, 12 How. Pr. (N. Y.) 28.

62. Palmer *v.* Smith, 21 Minn. 419.

63. See Gowans *v.* Jobbins, 90 N. Y. App. Div. 429, 86 N. Y. Suppl. 312.

64. Day *v.* Day, 95 N. Y. App. Div. 122, 88 N. Y. Suppl. 504.

D. To Make More Definite and Certain [65] — **1. Motion as Proper Remedy.** Under the common-law procedure, indefiniteness and uncertainty in a pleading was ground for a special demurrer.[66] But except in a few states where indefiniteness and uncertainty is expressly made a ground of demurrer by statute,[67] the remedy, under the codes and practice acts, when a pleading is indefinite and uncertain, is to move to make it more definite and certain,[68] such motion being

65. Necessity that pleadings be definite and certain see *supra*, II, H, 3.
Demurrer as remedy see *supra*, VI, F, 1, j.
Defect as cured by verdict see *infra*, XIV, J, 3, a.
Waiver of objections see *infra*, XIV, B.
On appeals from justice of the peace see Justices of the Peace, 24 Cyc. 734.
More definite bill of particulars or copy of account sued on see *supra*, X, A, 11, b.

66. See *supra*, VI.
In Texas the remedy is by special exception. Malin *v.* McCutcheon, 33 Tex. Civ. App. 387, 76 S. W. 586.

67. See *supra*, VI, F, 1, j.

68. *Arkansas.*— Roberts *v.* Jones, 82 Ark. 188, 101 S. W. 165; Nelson *v.* Cowling, 77 Ark. 351, 91 S. W. 773, 113 Am. St. Rep. 155; Murrell *v.* Henry, 70 Ark. 161, 66 S. W. 647; McFadden *v.* Stark, 58 Ark. 7, 22 S. W. 884; McIlroy *v.* Adams, 32 Ark. 315.

Indiana.— Shirk *v.* Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490; Baltimore, etc., R. Co. *v.* State, 159 Ind. 510, 65 N. E. 508; Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; Sheeks *v.* State, 156 Ind. 508, 60 N. E. 142; Cleveland, etc., R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 48 L. R. A. 33; Frain *v.* Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; Clow *v.* Brown, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057; Garard *v.* Garard, 135 Ind. 15, 34 N. E. 442, 809; Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45; Blanchard-Hamilton Furniture Co. *v.* Colvin, 32 Ind. App. 398, 69 N. E. 1032; Hammond *v.* Meyers, 23 Ind. App. 235, 55 N. E. 102. See also Kelsay *v.* Chicago, etc., R. Co., (App. 1907) 81 N. E. 522; Grau *v.* Grau, 37 Ind. App. 635, 77 N. E. 816.

Iowa.— Seeley *v.* Seeley-Howe-Le Van Co., 128 Iowa 294, 105 N. W. 380; Newburn *v.* Lucas, 126 Iowa 85, 101 N. W. 730; Hurd *v.* Ladner, 110 Iowa 263, 81 N. W. 470; Burlington, etc., R. Co. *v.* Marchand, 5 Iowa 468.

Kansas.— Thompson *v.* Harris, 64 Kan. 124, 67 Pac. 456, 91 Am. St. Rep. 187; Street R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012.

Kentucky.— Posey *v.* Green, 78 Ky. 162; Snowden *v.* Snowden, 96 S. W. 922, 29 Ky. L. Rep. 1112.

Minnesota.— Mower County *v.* Smith, 22 Minn. 97.

Missouri.— McAdam *v.* Scudder, 127 Mo. 345, 30 S. W. 168; Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67; Ruebsam *v.* St. Louis Transit Co., 108 Mo. App. 437, 83 S. W. 984; C. H. Burke Mfg. Co. *v.* The A. Saltzman, 42 Mo. App. 85.

Nebraska.— Western Travelers' Acc. Assoc. *v.* Munson, 73 Nebr. 858, 103 N. W. 688, 1 L. R. A. N. S. 1068; Sandford *v.* Litchenberger, 62 Nebr. 501, 87 N. W. 305; Stewart *v.* Bole, 61 Nebr. 193, 83 N. W. 33; Kyd *v.* Cook, 56 Nebr. 71, 76 N. W. 524, 71 Am. St. Rep. 661; Chicago, etc., R. Co. *v.* Shepherd, 39 Nebr. 523, 58 N. W. 189; Dorchester First Nat. Bank *v.* Smith, 36 Nebr. 199, 54 N. W. 254.

New York.— Viner *v.* James, 92 N. Y. App. Div. 542, 87 N. Y. Suppl. 257; People *v.* Buell, 85 N. Y. App. Div. 141, 83 N. Y. Suppl. 143; Spangehl *v.* Spangehl, 39 N. Y. App. Div. 5, 57 N. Y. Suppl. 7; King *v.* Bierschenk, 32 N. Y. App. Div. 626, 52 N. Y. Suppl. 498; Chesbrough *v.* New York, etc., R. Co., 26 Barb. 9; Citizens' Cent. Nat. Bank *v.* Munn, 49 Misc. 319, 99 N. Y. Suppl. 191 [*affirmed* in 114 N. Y. App. Div. 902, 100 N. Y. Suppl. 1110 (*reversed* on other grounds in 115 N. Y. App. Div. 471, 101 N. Y. Suppl. 435)]; Huber *v.* Wilson, 11 N. Y. Suppl. 377; Corbin *v.* George, 2 Abb. Pr. 465.

North Carolina.— Allen *v.* Carolina Cent. R. Co., 120 N. C. 548, 27 S. E. 76.

Oklahoma.— Guthrie *v.* Shaffer, 7 Okla. 459, 54 Pac. 698.

Pennsylvania.— See Bradly *v.* Potts, 155 Pa. St. 418, 26 Atl. 734.

South Carolina.— Morgan *v.* Sammons, 66 S. C. 388, 44 S. E. 966; Smith *v.* Bradstreet Co., 63 S. C. 525, 41 S. E. 763; Lockwood *v.* Charleston Bridge Co., 60 S. C. 492, 38 S. E. 112, 629; State *v.* Jeter, 59 S. C. 483, 38 S. E. 124; Garrett *v.* Weinberg, 50 S. C. 310, 27 S. E. 770; Rutherford *v.* Johnson, 49 S. C. 465, 27 S. E. 470.

Washington.— Goupille *v.* Chaput, 43 Wash. 702, 86 Pac. 1058; Berg *v.* Humptulips Boom, etc., Imp. Co., 38 Wash. 342, 80 Pac. 528; Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147; Fares *v.* Gleason, 14 Wash. 657, 45 Pac. 314.

Wisconsin.— Olson *v.* Phœnix Mfg. Co., 103 Wis. 337, 79 N. W. 409; Johnston *v.* Northwestern Live-Stock Ins. Co., 94 Wis. 117, 68 N. W. 868; Allen *v.* Chicago, etc., R. Co., 94 Wis. 93, 68 N. W. 873; Grannis *v.* Hooker, 29 Wis. 65; Learmonth *v.* Veeder, 11 Wis. 138.

See 39 Cent. Dig. tit. "Pleading," § 1173 *et seq.*

Statutes.— In order that the allegations of a pleading be so indefinite and uncertain as to be subject to motion to make more definite, it is usually provided by statute that the allegation must be so indefinite or uncertain "that the precise meaning or application thereof is not apparent." Mutual L. Ins. Co. *v.* Grannis, 118 N. Y. App. Div. 830, 103 N. Y. Suppl. 835. And see the statutes of the several states. If the court can see with reasonable certainty the meaning of the allegations and the cause of action intended

a substitute for a special demurrer at common law;[69] but the motion is not a demurrer and should not be so treated,[70] and cannot be used to test the substantial sufficiency of a pleading,[71] nor can it be used to compel an election between causes of action.[72] The office of the motion is not to cure fatal defects in pleadings but to secure definite statements in pleading which are sufficient in substance but not in form.[73] If an answer is bad in substance, as a negative pregnant, the motion should be for judgment instead of to make it more definite and certain.[74] The motion will lie only when the uncertainty and indefiniteness appears on the face of the pleading,[75] and even then the granting of the motion rests in the discretion of the court.[76]

2. Distinction Between Motion and Demand For Bill of Particulars.[77] The decisions relating to motions to make a pleading definite and certain and motions to direct the service of a bill of particulars are conflicting and confusing, but all distinctions between such motions, it has been held, should not be abandoned;[78] but in some jurisdictions no distinction is drawn between the function of the two motions.[79] In some jurisdictions where the distinction is observed, a bill of particulars and not an order to make more definite and certain is the proper remedy where the moving party does not require the details demanded for the purpose of pleading, but what is really wanted is a mere particular statement of the claim or defense with a view of protection against surprise and limiting the issues at the trial.[80] In at least one jurisdiction it is only where the "precise meaning or application" of an allegation of a pleading is indefinite and uncertain that the

therein to be set forth, the motion will be denied. Cook *v.* Matteson, 11 N. Y. Suppl. 572, 19 N. Y. Civ. Proc. 321. The remedy by motion is to enable a party before pleading to ascertain the charge made against him with sufficient definiteness to enable him to properly plead. Mutual L. Ins. Co. *v.* Granniss, *supra*.

Action for slander.— Where it reasonably appears from allegations contained in two separate causes of action that scandalous words therein counted upon were spoken in the same conversation, defendant is entitled upon motion to have the petition made more definite and certain, so as to show clearly the exact facts relating thereto so that it can be determined whether there is in reality more than one cause of action. Thompson *v.* Harris, 64 Kan. 124, 67 Pac. 456, 91 Am. St. Rep. 187.

If a cross demand is stated too indefinitely it may be required to be stated with more particularity. Deringer *v.* Deringer, 5 Houst. (Del.) 520.

69. Prindle *v.* Caruthers, 15 N. Y. 425; Kellogg *v.* Baker, 15 Abb. Pr. (N. Y.) 286.

70. Cerussite Min. Co. *v.* Anderson, 19 Colo. App. 307, 75 Pac. 158; Ellis *v.* Reddin, 12 Kan. 306; Griffith *v.* Wright, 21 Wash. 494, 58 Pac. 582; Smith *v.* Kibling, 97 Wis. 205, 72 N. W. 869.

71. Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526; American Book Co. *v.* Kingdom Pub. Co., 71 Minn. 363, 73 N. W. 1089.

The motion cannot be denied as a motion and then sustained as a demurrer.— Ellis *v.* Reddin, 12 Kan. 306.

72. Seymour *v.* Warren, 71 N. Y. App. Div. 421, 75 N. Y. Suppl. 903.

73. Chicago, etc., R. Co. *v.* Shepherd, 39 Nebr. 523, 58 N. W. 189.

74. Kelly *v.* Sammis, 25 Misc. (N. Y.) 6, 53 N. Y. Suppl. 825. But see Moody *v.* Belden, 15 N. Y. Suppl. 119.

75. See *infra*, XII, G, 7, b, (I).

76. Cathcart *v.* Peck, 11 Minn. 45; Kelsey *v.* Sargent, 100 N. Y. 602, 3 N. E. 795; Boyer *v.* Robison, 43 Wash. 97, 86 Pac. 385.

77. See also *supra*, X, A, 1.

78. Harrington *v.* Stillman, 120 N. Y. App. Div. 659, 105 N. Y. Suppl. 75; Dumar *v.* Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Suppl. 669.

Where the distinction clearly exists, it should be observed even though the result of either application would be the same. Harrington *v.* Stillman, 120 N. Y. App. Div. 659, 105 N. Y. Suppl. 75.

One reason for observing the distinction is that a motion for a bill of particulars may be opposed with affidavits, whereas a motion to make a pleading definite and certain can be determined on the pleading alone. Another reason is that the insertion in a pleading of unnecessary details violates the rule of brevity, clearness, and conciseness, which is not only commendable but is also commanded. Harrington *v.* Stillman, 120 N. Y. App. Div. 659, 105 N. Y. Suppl. 75.

79. Conover *v.* Knight, 84 Wis. 639, 642, 54 N. E. 1002, in which case the court said: "We are not disposed to draw any nice distinction between the functions of an order for a bill of particulars and an order requiring a pleading to be made more definite and certain, for we think such distinction has no tangible existence in reason or law."

80. Pigone *v.* Lauria, 115 N. Y. App. Div. 286, 100 N. Y. Suppl. 976; Dumar *v.* Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Suppl. 669; Jackman *v.* Lord, 56 Hun (N. Y.) 192, 9 N. Y. Suppl. 200; Mullen *v.* Hall, 51 Misc. (N. Y.) 59, 99 N. Y. Suppl. 841;

court can require the pleading to be amended, so that if the meaning and application of the allegation can be seen with reasonable certainty, the order should not be granted; [81] and matters of time, place, and circumstances, unless they constitute material parts of a cause of action or a defense, are strictly within the province of a bill of particulars and must be obtained by that method and not by a motion to make more definite and certain.[82] For instance, items of damage will not be ordered specified on motion to make a complaint more definite and certain, but a bill of particulars should be asked for; [83] and the same is true of items of account and the particulars in regard thereto.[84]

3. When Motion Does Not Lie. A pleading will not be ordered to be made more definite and certain where the requisite information is not within reach of the pleader; [85] nor where the uncertainty is removed by allegations appearing in a subsequent part of the pleading; [86] nor if the pleading is rendered certain by reason of a presumption which the law authorizes respecting it; [87] nor where it appears that the moving party already has sufficient information, [88] or as much information as the pleader; [89] nor where the facts are peculiarly within the knowledge of the moving party; [90] nor where the details desired pertain to the case or defense of the moving party; [91] nor merely in order to allow the moving party to demur to the pleading; [92] nor where it is sought merely to have the party state conclusions of law, [93] or unnecessary facts, [94] or make more definite allegations which are irrele-

Citizens' Cent. Nat. Bank *v.* Munn, 49 Misc. (N. Y.) 319, 99 N. Y. Suppl. 191 [*affirmed* in 114 N. Y. App. Div. 902, 100 N. Y. Suppl. 1110 (*reversed* on other grounds in 115 N. Y. App. Div. 471, 101 N. Y. Suppl. 435)]; Loewenthal *v.* Philadelphia Rubber Works, 18 N. Y. Suppl. 523. See also *supra*, X.

81. Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Dumar *v.* Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Suppl. 669.

82. Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Dumar *v.* Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Suppl. 669; McGehee *v.* Cooke, 55 Misc. (N. Y.) 40, 105 N. Y. Suppl. 60; Kavanaugh *v.* Commonwealth Trust Co., 45 Misc. (N. Y.) 201, 91 N. Y. Suppl. 967 [*affirmed* in 99 N. Y. App. Div. 620, 91 N. Y. Suppl. 1099].

83. Rouget *v.* Haight, 57 Hun (N. Y.) 119, 10 N. Y. Suppl. 751; Cockroft *v.* Atlantic Mut. Ins. Co., 9 Bosw. (N. Y.) 681; Whitner *v* Perhaes, 11 N. Y. Suppl. 756, 25 Abb. N. Cas. 130; McKenzie *v.* Fox, 8 N. Y. Suppl. 460; Hanson *v.* Anderson, 90 Wis. 195, 62 N. W. 1055; Barney *v.* Hartford, 73 Wis. 95, 40 N. W. 581. See Dooley *v.* Missouri Pac. R. Co., 36 Mo. App. 381.

84. Clegg *v.* American Newspaper Union, 7 Abb. N. Cas. (N. Y.) 59; St. John *v.* Beers, 24 How. Pr. (N. Y.) 377. *Contra*, MacAdam *v.* Scudder, 127 Mo. 345, 30 S. W. 168; Meyer *v.* Chambers, 68 Mo. 626; Gfeller *v.* Graefemann, 64 Mo. App. 162.

85. Corns *v.* Clouser, 137 Ind. 201, 36 N. E. 848; Louisville, etc., R. Co. *v.* Balch, 105 Ind. 93, 4 N. E. 288; Wheelock *v.* Barney, 27 Ind. 462; Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265; Atchison, etc., R. Co. *v.* Davis, 70 Kan. 578, 79 Pac. 130; Orth *v.* St. Paul, etc., R. Co., 43 Minn. 208, 45 N. W. 151; Kellogg *v.* Baker, 15 Abb. Pr. (N. Y.) 286.

In such a case the allegations objected to should be stricken out if too indefinite and general. Pugh *v.* Winona, etc., R. Co., 29 Minn. 390, 13 N. W. 189.

86. Barron *v.* Pittsburg Plate Glass Co., 10 Ohio S. & C. Pl. Dec. 114, 7 Ohio N. P. 528.

87. Burkert *v.* Bennett, 35 Misc. (N. Y.) 318, 71 N. Y. Suppl. 144, holding that a motion to make an answer more definite by stating whether each defense is a partial or complete defense should be denied, since the code provides that if a defense is not pleaded as a partial defense it is to be taken as a complete defense.

88. St. Louis, etc., R. Co. *v.* French, 56 Kan. 584, 44 Pac. 12; West *v.* O'Neill, 14 Misc. (N. Y.) 235, 35 N. Y. Suppl. 714; People *v.* New York City Cent. Under-Ground R. Co., 15 N. Y. Suppl. 225.

89. Dr. Blair Medical Co. *v.* U. S. Fidelity, etc., Co., (Iowa 1902) 89 N. W. 20; Booco *v.* Mansfield, 66 Ohio St. 121, 64 N. E. 115; Herklotz *v.* Chase, 32 Fed. 433.

Rule does not apply to a corporation party. — Texas Standard Cotton Oil Co. *v.* Mutual F. Ins. Co., 58 Hun (N. Y.) 560, 12 N. Y. Suppl. 900.

Public records. — A pleading will not be required to be made more definite and certain in respect to matters which are public records equally accessible to both parties. Port Townsend *v.* Trumbull, 40 Wash. 386, 82 Pac. 715.

90. Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 69 Pac. 600; Barron *v.* Pittsburg Plate Glass Co., 10 Ohio S. & C. Pl. Dec. 114, 7 Ohio N. P. 528; Steelman *v.* Quaker City F. Ins. Co., 10 Pa. Co. Ct. 362.

91. Vanderveer *v.* Moran, (Nebr. 1907) 112 N. W. 581; Anonymous, 4 Ohio Dec. (Reprint) 234, 1 Clev. L. Rep. 148.

92. Johnson *v.* Wilcox, etc., Sewing-Mach. Co., 25 Fed. 373.

93. People *v.* New York City Cent. Under-Ground R. Co., 15 N. Y. Suppl. 245.

94. McDuffie *v.* Bentley, 27 Nebr. 380, 43

vant and redundant and surplusage,[95] or immaterial;[96] nor where it is already as definite and specific as the laws of pleading require,[97] or the nature of the case allows.[98] Nor will the motion be granted when the result would be to compel the party to plead or disclose his evidence.[99] So the motion will not reach the omission to attach an instrument as an exhibit,[1] nor for indefiniteness in the prayer for relief,[2] nor for indefiniteness in any other respect which does not cause prejudice to the other party.[3] Likewise the motion will not be granted where it is not directed against vague or uncertain allegations of a pleading but seeks merely to require defendants to insert in the answer new and independent allegations prepared and framed by the movant.[4]

4. Denials as Subject to Motion. If a denial is indefinite, a motion lies to make it more definite and certain,[5] as where the answer does not clearly show which allegations are denied and which admitted.[6] For instance a general denial of each and every allegation not admitted or otherwise qualified, may be so uncertain in particular pleadings as to be subject to a motion to make more definite by specifically showing what allegations are admitted and what denied.[7] And a

N. W. 123; Miller *v.* Caskey, 4 Ohio Dec. (Reprint) 236, 1 Clev. L. Rep. 148; Door County *v.* Keogh, 77 Wis. 24, 45 N. W. 937.

95. *Arkansas.*— Choctaw, etc., R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870.

Indiana.— Knox *v.* Trafalet, 94 Ind. 346; Indiana Stone Co. *v.* Stewart, 7 Ind. App. 563, 34 N. E. 1019.

Iowa.— Schoonover *v.* Hinckley, 46 Iowa 207.

New York.—Davidson *v.* Seligman, 51 N. Y. Super. Ct. 47; Pearce *v.* Weidemeyer, 52 Misc. 456, 102 N. Y. Suppl. 505; Cook *v.* Matteson, 11 N. Y. Suppl. 572; Parshall *v.* Tillou, 13 How. Pr. 7.

Ohio.— Shoemaker *v.* Dayton, etc., R. Co., 10 Ohio Dec. (Reprint) 252, 19 Cinc. L. Bul. 322.

Wisconsin.— McCarville *v.* Boyle, 89 Wis. 651, 62 N. W. 517; Spensley *v.* Janesville Cotton Mfg. Co., 62 Wis. 549, 22 N. W. 574.

See 39 Cent. Dig. tit. "Pleading," § 1176.

96. Smith *v.* Trafton, 3 Rob. (N. Y.) 709; Maretzek *v.* Cauldwell, 2 Rob. (N. Y.) 715.

Matter in mitigation, if immaterial, is not subject to a motion to make more definite and certain. Smith *v.* Trafton, 3 Bosw. (N. Y.) 709. But if material it is so subject. Hatch *v.* Matthews, 9 Misc. (N. Y.) 307, 30 N. Y. Suppl. 309 [*affirmed* in 85 Hun 522, 33 N. Y. Suppl. 332].

Where the names of persons who performed certain acts were immaterial to the cause of action, the complaint will not be required to be made more definite and certain by inserting such names. Kabat *v.* Moore, 48 Oreg. 191, 85 Pac. 506.

Contributory negligence as a defense can be shown under the general denial in some states, but if the defendant in fact attempts to plead it, a motion to make more definite and certain will lie if it is not sufficiently specific. McQuade *v.* Chicago, etc., R. Co., 68 Wis. 616, 32 N. W. 633.

97. Walker *v.* Larkin, 127 Ind. 100, 26 N. E. 684; Brown *v.* Chillicothe, 122 Iowa 640, 98 N. W. 502; Newcom *v.* Dubois, 95 Iowa 194, 63 N. W. 677; Christie *v.* Missouri Pac. R. Co., 94 Mo. 453, 7 S. W. 567; MacDonald *v.* Winchester Repeating Arms Co., 102 N. Y. App. Div. 375, 92 N. Y. Suppl. 618; Warner *v.* James, 94 N. Y. App. Div. 257, 87 N. Y. Suppl. 976; Warsawer *v.* Hotchkiss, 27 N. Y. Suppl. 491; Stern *v.* Ladew, 22 N. Y. Suppl. 116.

98. Cleveland, etc., R. Co. *v.* Snow, 37 Ind. App. 646, 74 N. E. 908; Fletcher Bros. Co. *v.* Hyde, 36 Ind. App. 96, 75 N. E. 9; Orth *v.* St. Paul, etc., R. Co., 43 Minn. 208, 45 N. W. 151; Tierney *v.* Minneapolis, etc., R. Co., 31 Minn. 234, 17 N. W. 377.

99. Commonwealth Co. *v.* Nunn, 17 Colo. App. 117, 67 Pac. 342; Cantner *v.* Auerbach, 20 Misc. (N. Y.) 6, 44 N. Y. Suppl. 601 [*affirmed* in 20 Misc. 281, 45 N. Y. Suppl. 846]; Hatch *v.* Matthews, 9 Misc. (N. Y.) 307, 30 N. Y. Suppl. 309 [*affirmed* in 85 Hun 522, 33 N. Y. Suppl. 332].

1. Safford *v.* Merrell, 4 Ohio Dec. (Reprint) 233, 1 Clev. L. Rep. 146. But see Gibson *v.* Ray, 89 S. W. 474, 28 Ky. L. Rep. 444.

2. J. F. Sieberling Co. *v.* Dujardin, 38 Iowa 403.

3. Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912.

4. Multnomah County *v.* Willamette Towing Co., 49 Oreg. 294, 89 Pac. 389.

5. Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847; Pfaudler Process Fermentation Co. *v.* McPherson, 3 N. Y. Suppl. 609; Burley *v.* German American Bank, 5 N. Y. Civ. Proc. 172.

Where there is anything indefinite or uncertain about a denial that raises a question in the mind of the opposing party as to what was meant by it, a motion lies to make more definite and certain. O'Brien *v.* Seattle Ice Co., 43 Wash. 217, 86 Pac. 399.

6. Borsuk *v.* Blauner, 93 N. Y. App. Div. 306, 87 N. Y. Suppl. 851; Morgan *v.* Sammons, 66 S. C. 388, 44 S. E. 966.

7. Hintrager *v.* Richter, 85 Iowa 222, 52 N. W. 188; Ritchey *v.* Home Ins. Co., 98 Mo. App. 115, 72 S. W. 44; Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209; Zimmerman *v.* Meyrowitz, 34 Misc. (N. Y.) 307, 69 N. Y. Suppl. 800; Creighton *v.* Kellermann, 1 Disn. (Ohio) 548, 12 Ohio Dec. (Reprint) 788. But see Kidder County *v.* Foye, 10 N. D. 424, 87 N. W. 984.

denial of each and every "material" allegation is subject to such a motion in order that it may be shown what allegations the pleader deems material.[8] So also a denial of knowledge or information respecting matters presumptively within the knowledge of the pleader has been held subject to attack by such a motion.[9]

5. Joinder or Commingling of Causes of Action or Defenses — a. In General. Where causes of action which cannot be united are joined in one complaint a motion will not lie to make it more definite and certain,[10] but a demurrer is the proper remedy.[11] If different causes of action or defenses which may be joined in different counts or paragraphs are intermingled in one count or paragraph, a motion will generally lie to make the pleading more definite and certain,[12] by compelling a separate statement of the causes of action or defenses.[13]

b. Motion to Separately State and Number.[14] When a pleading contains more than one cause of action or defense and they are mingled together in one count or paragraph, a motion will lie in most jurisdictions to require them to be separately stated and numbered.[15] But the motion will be denied when only one of the causes of action or defenses is well pleaded,[16] and also generally when it is fairly doubtful whether the pleading sets up a single cause of action or defense or several.[17] A demurrer and not a motion is the proper method of raising the objec-

8. Moody *v.* Belden, 15 N. Y. Suppl. 110; Mattison *v.* Smith, 19 Abb. Pr. (N. Y.) 288; Lewis *v.* Coulter, 10 Ohio St. 451; Thomas *v.* Cline, 4 Ohio Dec. (Reprint) 216, 1 Clev. L. Rep. 123; Kimball *v.* Stanton County, 4 Fed. 325.

9. Winchester *v.* Browne, 11 N. Y. Suppl. 614, 25 Abb. N. Cas. 148; Hardman *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 544, 14 Cinc. L. Bul. 346.

10. Jones *v.* Hughes, 16 Wis. 683.

11. See *supra*, VI, F, 1, b.

12. Ebling Brewing Co. *v.* Adler, 103 N. Y. Suppl. 93; Jackins *v.* Dickinson, 39 S. C. 436, 17 S. E. 996; Austin, etc., Mfg. Co. *v.* Heiser, 6 S. D. 429, 61 N. W. 445; Clark *v.* Langworthy, 12 Wis. 441.

13. See *infra*, XII, D, 5, b.

14. Duplicity as ground for demurrer see *supra*, VI, F, 1, b, (II).

15. *California.*— City Carpet Beating, etc., Works *v.* Jones, 102 Cal. 506, 36 Pac. 841.

Indiana.— Pittsburgh, etc., R. Co. *v.* Beck, 152 Ind. 421, 53 N. E. 439; Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93; Wabash, etc., R. Co. *v.* Rooker, 90 Ind. 581; Booher *v.* Goldsborough, 44 Ind. 490; Hendry *v.* Hendry, 32 Ind. 349; Schenck *v.* Butsch, 32 Ind. 338; Conwell *v.* Connersville, 8 Ind. 358; Western Union Tel. Co. *v.* McClelland, 38 Ind. App. 578, 78 N. E. 672.

Kansas.—Shrigley *v.* Black, 59 Kan. 487, 53 Pac. 477; Atchison, etc., R. Co. *v.* Sumner County, 51 Kan. 617, 33 Pac. 312; Pierce *v.* Bicknell, 11 Kan. 262; Provident Trust Co. *v.* Coron, 5 Kan. App. 431, 49 Pac. 345.

Nebraska.— Chicago, etc., R. Co. *v.* O'Neill, 58 Nebr. 239, 78 N. W. 521; Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46; Dakota Bldg., etc., Assoc. *v.* Cameron, 48 Nebr. 124, 66 N. W. 1109; Schuyler Nat. Bank *v.* Bolong, 24 Nebr. 821, 40 N. W. 411. See McDuffie *v.* Bentley, 27 Nebr. 380, 43 N. W. 123, holding it unnecessary to separately state a defense and counter-claim.

New York.— People *v.* Tweed, 63 N. Y. 194; Stern *v.* Marcuse, 119 N. Y. App. Div. 478, 103 N. Y. Suppl. 1026 (separating denials from defense of new matter); Christenson *v.* Pincus, 117 N. Y. App. Div. 810, 102 N. Y. Suppl. 1041; Hatch *v.* Matthews, 85 Hun 522, 33 N. Y. Suppl. 332; Commercial Bank *v.* Pfeiffer, 22 Hun 327 [*affirmed* in 108 N. Y. 242, 15 N. E. 311]; Anderson *v.* Hill, 53 Barb. 238; Burke *v.* New York, etc., R. Co., 59 N. Y. Super. Ct. 569, 15 N. Y. Suppl. 148; Foley *v.* Mercantile Nat. Bank, 33 N. Y. Suppl. 414, 24 N. Y. Civ. Proc. 249; Blanchard *v.* Jefferson, 17 N. Y. Suppl. 927, 28 Abb. N. Cas. 236. See also Zacharias *v.* French, 10 Misc. 202, 30 N. Y. Suppl. 945.

Ohio.— Magruder *v.* McCandlis, 3 Ohio Dec. (Reprint) 269, 5 Wkly. L. Gaz. 188.

Oregon.— High *v.* Southern Pac. Co., 49 Oreg. 98, 88 Pac. 961.

South Carolina.— Sahlman *v.* Mutual Reserve Fund Life Assoc., 53 S. C. 183, 31 S. E. 50; Glover *v.* Remley, 52 S. C. 492, 30 S. E. 405; Ross *v.* Jones, 47 S. C. 211, 25 S. E. 59; Reed *v.* Northeastern R. Co., 37 S. C. 42, 16 S. E. 289.

Washington.— Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

See 39 Cent. Dig. tit. "Pleading," § 1194.

Compare Atlantic Coast Line R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318. *Contra*, Dooley *v.* Missouri Pac. R. Co., 36 Mo. App. 381, holding that the proper and only practice in such cases is by motion to require the pleader to elect.

16. Trenndlich *v.* Hall, 7 N. Y. Civ. Proc. 62; Ridenour *v.* Mayo, 29 Ohio St. 138. *Contra*, Miskimmons *v.* Moore, 10 Wyo. 41, 65 Pac. 1000.

17. Weed *v.* First Nat. Bank, 106 N. Y. App. Div. 285, 94 N. Y. Suppl. 681; Pope *v.* Kelly, 30 N. Y. App. Div. 253, 51 N. Y. Suppl. 557; Smith *v.* Irvin, 45 Misc. (N. Y.) 262, 92 N. Y. Suppl. 170; Woods *v.* McClure, 42 Misc. (N. Y.) 8, 85 N. Y. Suppl. 549. *Contra*, Oakley *v.* Tuthill, 7 N. Y. Civ. Proc. 339.

tion that different causes of action are stated against different defendants,[18] or that no cause of action whatever is stated.[19] Irrelevant matter should be stricken out, and not required to be separately stated and numbered.[20] Unless made by seasonable motion, the objection is waived,[21] and inasmuch as the objection is deemed technical, prompt action is required.[22] Whether or not a motion to separately state and number different causes of action should be granted rests within the sound discretion of the court.[23] The pleader may be granted leave to amend so as to eliminate all allegations not relevant to a single cause of action;[24] or the motion may be sustained unless the pleader files a stipulation to the effect that he intends to rely upon but one cause of action, pointing out what it is.[25] Where the question of misjoinder of causes of action is fairly before the court on motion to separately state and number, and the court decides that only one cause of action is stated, such decision does not conclude plaintiff from subsequently raising the question of misjoinder by demurrer.[26] Refusal to obey an order to separately state and number several causes of action will authorize the court to dismiss the action, without prejudice to a future one.[27] An order requiring an amended complaint separately stating and numbering the causes of action set forth in the original complaint is complied with where the amended complaint merely sets up one cause of action.[28]

6. Application of Rules. The rules already set forth as to when a motion to make more definite and certain is proper have been applied by requiring an amendment where the pleading was vague and confusing,[29] where it contained

18. O'Brien *v.* Blunt, 5 N. Y. App. Div. 223, 39 N. Y. Suppl. 218.

19. Powell *v.* Hinkley, 93 N. Y. App. Div. 138, 87 N. Y. Suppl. 2.

20. Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Toledo Lumber Mfg. Co. *v.* Gross, 1 Ohio S. & C. Pl. Dec. 83, 3 Ohio N. P. 322.

21. Krower *v.* Reynolds, 99 N. Y. 245, 1 N. E. 775; Freer *v.* Denton, 61 N. Y. 492; Bass *v.* Comstock, 38 N. Y. 21.

22. French *v.* Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Wood *v.* Anthony, 9 How. Pr. (N. Y.) 78.

23. People *v.* Tweed, 63 N. Y. 194.

Error in refusing is ground for reversal of judgment. Provident Trust Co. *v.* Coron, 5 Kan. App. 431, 49 Pac. 345. *Contra*, Mansfield *v.* Shipp, 128 Ind. 55, 27 N. E. 427; Wabash, etc., R. Co. *v.* Rooker, 90 Ind. 581; Pierce *v.* Walton, 20 Ind. App. 66, 50 N. E. 309. But error in refusing to sustain such a motion is without prejudice when the court instructs the jury that recovery can be had on but one of the causes of action pleaded. St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Nebr. 351, 53 N. W. 137.

24. Blake *v.* Barnes, 9 N. Y. Suppl. 933.

25. Daly *v.* Wolaneck, 29 Misc. (N. Y.) 162, 60 N. Y. Suppl. 162.

26. O'Connor *v.* Virginia Pass., etc., Co., 184 N. Y. 46, 76 N. E. 1082 [*reversing* 107 N. Y. App. Div. 630, 95 N. Y. Suppl. 1149].

27. Eisenhouer *v.* Stein, 37 Kan. 281, 15 Pac. 167; Miskimmons *v.* Moore, 10 Wyo. 41, 65 Pac. 1000.

28. O'Reilly *v.* Skelly, 117 N. Y. App. Div. 559, 562, 102 N. Y. Suppl. 884, 886.

29. *Indiana.*— Wallace *v.* Brooker, 105 Ind. 598, 5 N. E. 175.

Missouri.— MacAdam *v.* Scudder, 127 Mo. 345, 30 S. W. 168.

New York.— Neftel *v.* Lightstone, 77 N. Y. 96; Seeley *v.* Engell, 13 N. Y. 542; Viner *v.* James, 92 N. Y. App. Div. 542, 87 N. Y. Suppl. 257; Rockey *v.* Haslett, 91 N. Y. App. Div. 181, 86 N. Y. Suppl. 320; New York First Presb. Church *v.* Kennedy, 72 N. Y. App. Div. 82, 76 N. Y. Suppl. 284; Cooper *v.* Fiske, 44 N. Y. App. Div. 531, 60 N. Y. Suppl. 944; Singer *v.* Weber, 44 N. Y. App. Div. 134, 60 N. Y. Suppl. 641; Persch *v.* Allison, 85 Hun 429, 32 N. Y. Suppl. 885; Saalfield *v.* Cutting, 25 Misc. 661, 56 N. Y. Suppl. 343; Landon *v.* New York, etc., R. Co., 15 N. Y. Suppl. 255.

Ohio.— Cincinnati, etc., R. Co. *v.* Urbana Third Nat. Bank, 1 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 109; Creighton *v.* Kellermann, 1 Disn. 548, 12 Ohio Dec. (Reprint) 788; Block *v.* Standard Distilling, etc., Co., 10 Ohio S. & C. Pl. Dec. 409, 8 Ohio N. P. 236.

Virginia.— Chesnut *v.* Chesnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. N. S. 879.

United States.— Gause *v.* Knapp, 1 Fed. 292, 1 McCrary 75.

Fraud.— Where it appears to be necessary to enable plaintiff to prepare his case, the facts constituting fraud as set up in a defense should be required to be set forth on a motion to make the pleading more specific. Craft *v.* Barron, 121 Ky. 129, 88 S. W. 1099, 28 Ky. L. Rep. 98.

Where a complaint for conversion is indefinite in respect to whether it is claimed that property was converted by a single act or transaction or many acts at different times remote and disconnected from one another, the complaint should be required to be made more certain. Mutual L. Ins. Co. *v.* Raymond, 118 N. Y. App. Div. 828, 103 N. Y. Suppl. 839.

Where the allegation is the execution of a written instrument on which a cause of ac-

inconsistent allegations,[30] or alternative averments;[31] was argumentative or hypothetical;[32] was indefinite and uncertain as to material matters of description;[33] failed to show in what an alleged failure of consideration consisted;[34] omitted the names of persons referred to who might be necessary parties to the action;[35] did not show the nature or source of a title relied upon;[36] set forth mere legal conclusions;[37] or failed to show whether a contract was oral or in writing.[38] So where the pleading does not clearly disclose the nature of the charge or claim,[39] does not point out specifically the character of defects complained of,[40] fails to show clearly in what character the defendant is sued,[41] does not specify the specific acts or omissions constituting the negligence complained of,[42] or the circumstances and surroundings attending a negligent injury,[43] a motion to make more definite and certain will lie. So where allegations as to time or place are indefinite a more definite statement may be ordered if such allegations are material parts of the cause of action or

tion or a defense is based, the facts in relation to such an instrument will be required, on motion, to be set forth in the pleading rather than to be specified in a bill of particulars. Pigone *v.* Lauria, 115 N. Y. App. Div. 286, 100 N. Y. Suppl. 976.

Illustrations of proper refusal of motion see Pope Mfg. Co. *v.* Rubber Goods Mfg. Co., 100 N. Y. App. Div. 353, 91 N. Y. Suppl. 826; People *v.* Tweed, 5 Hun (N. Y.) 353; Kavanaugh *v.* Commonwealth Trust Co., 45 Misc. (N. Y.) 201, 91 N. Y. Suppl. 967 [*affirmed* in 99 N. Y. App. Div. 620, 91 N. Y. Suppl. 1099]; Ekstrand *v.* Barth, 41 Wash. 321, 83 Pac. 305.

30. Edwards *v.* Daller, 10 Ohio S. & C. Pl. Dec. 531, 8 Ohio N. P. 73.

31. Hasberg *v.* Moses, 81 N. Y. App. Div. 199, 80 N. Y. Suppl. 867; Corbin *v.* George, 2 Abb. Pr. (N. Y.) 465.

32. Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657; Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351; Daniels *v.* Baxter, 120 N. C. 14, 26 S. E. 635. See also Emison *v.* Owyhee Ditch Co., 37 Oreg. 577, 62 Pac. 13.

33. Bryan *v.* Moore, 81 Ind. 9; Blackie *v.* Neilson, 6 Bosw. (N. Y.) 681; Gustaveson *v.* Otis, 27 N. Y. Suppl. 280; Martin *v.* Garwood, 4 Ohio Dec. (Reprint) 525, 2 Clev. L. Rep. 313; Savage *v.* Sanders, 51 S. C. 495, 29 S. E. 248.

34. Griffith *v.* Wright, 21 Wash. 494, 58 Pac. 582.

35. Smith *v.* Irvin, 45 Misc. (N. Y.) 262, 92 N. Y. Suppl. 170; Kyes *v.* Wilcox, 13 S. D. 228, 83 N. W. 93.

36. Livingston *v.* Ruff, 65 S. C. 284, 43 S. E. 678; Waldo *v.* Milroy, 19 Wash. 156, 52 Pac. 1012.

37. Crewdson *v.* Middleton, 57 Iowa 335, 10 N. W. 679; Lane *v.* Burlington, etc., R. Co., 52 Iowa 18, 2 N. W. 531.

38. New York First Presb. Church *v.* Kennedy, 72 N. Y. App. Div. 82, 76 N. Y. Suppl. 284.

39. *Arkansas.*— Conant *v.* Stortlz, 69 Ark. 209, 62 S. W. 415.

Kansas.— Water Power Co. *v.* McMurray, 24 Kan. 62.

New York.— Day *v.* Day, 98 N. Y. App. Div. 314, 90 N. Y. Suppl. 680; Rochevot *v.* Wolf, 96 N. Y. App. Div. 506, 89 N. Y. Suppl. 142; Scheftel *v.* Virginia Hot Springs, 71 N. Y. App. Div. 616, 77 N. Y. Suppl. 610; Arrieta *v.* Morrissey, 1 Abb. Pr. N. S. 439.

Ohio.— New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326, 64 N. E. 130.

Wisconsin.— Spence *v.* Spence, 17 Wis. 448.

See 39 Cent. Dig. tit. "Pleading," § 1174 *et seq.*

Several items.— The same is true where the claim consists of several items. Wallace *v.* Brooker, 105 Ind. 598, 5 N. E. 175.

40. King *v.* Nichols, etc., Co., 53 Minn. 453, 55 N. W. 604; Byers *v.* Rivers, 3 Ohio Dec. (Reprint) 231, 5 Wkly. L. Gaz. 37.

41. Seasongood *v.* Fleming, 74 Hun (N. Y.) 639, 26 N. Y. Suppl. 831.

42. *Arkansas.*— Choctaw, etc., R. Co. *v.* Doughty, 77 Ark. 1, 91 S. W. 768.

Indiana.— Tipton Light, etc., Co. *v.* Newcomer, 156 Ind. 348, 58 N. E. 842; Hawley *v.* Williams, 90 Ind. 160.

Kansas.— Price *v.* Atchison Water Co., 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625.

New York.— Dexter *v.* Fulton, 86 Hun 433, 33 N. Y. Suppl. 901.

Oregon.— Wild *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954.

Wisconsin.— Young *v.* Lynch, 66 Wis. 514, 29 N. W. 224.

United States.— McInerney *v.* Virginia-Carolina Chemical Co., 118 Fed. 653.

See 39 Cent. Dig. tit. "Pleading," § 1184.

Allegations as to the rules and regulations which defendant is claimed to have disregarded and which constitute the alleged negligence may be required to be made more definite and certain where it does not appear what such rules and regulations were and by what authority they were promulgated. Harrington *v.* Stillman, 120 N. Y. App. Div. 659, 105 N. Y. Suppl. 75.

Allegations as to signals and rate of speed held not subject to motion. Harrington *v.* Stillman, 120 N. Y. App. Div. 659, 105 N. Y. Suppl. 75.

43. Peerless Stone Co. *v.* Wray, 143 Ind. 574, 42 N. E. 927; Tolles *v.* Meyers, 65 Nebr. 704, 91 N. W. 505.

When motion properly denied see Diamond Block Coal Co. *v.* Cuthbertson, 166 Ind. 290, 76 N. E. 1060, (1905) 73 N. E. 818; Louisville, etc., Traction Co. *v.* Leaf, 40 Ind. App.

defense,[44] but if not material the particulars can be obtained only by a motion for a bill of particulars.[45]

7. Effect of Refusal to Obey Order. Refusal to comply with an order, properly granted, to make a complaint more definite and certain is a contempt and the action may be dismissed,[46] the whole or the defective portion of any pleading objected to may be stricken out,[47] the court may preclude the party from introducing evidence respecting the insufficient allegations,[48] or the moving party may plead to the remaining portions of the pleading and go to trial thereon.[49] However, substantial compliance with the order is sufficient.[50]

E. To Compel Election[51] — 1. Between Different Causes of Action — a. Improper Joinder in Separate Counts. No election can ordinarily be had when the several counts are properly based upon different causes of action.[52] And of course the doctrine of election cannot apply where there is in fact but one state-

214, 79 N. E. 1066; Shaver *v.* Grendel Mills, 74 S. C. 430, 54 S. E. 610.

44. Pierce *v.* Baird, 48 Ind. 378; Melvin *v.* St. Louis, etc., R. Co., 89 Mo. 106, 1 S. W. 286; People *v.* Ryder, 12 N. Y. 433; Mutual L. Ins. Co. *v.* Raymond, 118 N. Y. App. Div. 828, 103 N. Y. Suppl. 839; Pigone *v.* Lauria, 115 N. Y. App. Div. 286, 100 N. Y. Suppl. 976; Cerro De Pasco Tunnel, etc., Co. *v.* Haggin, 106 N. Y. App. Div. 401 (action for libel); Warner *v.* James, 94 N. Y. App. Div. 257, 87 N. Y. Suppl. 976; Dumar *v.* Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Suppl. 669; Bennett *v.* Lawrence, 71 N. Y. App. Div. 413, 75 N. Y. Suppl. 902; Dexter *v.* Fulton, 86 Hun (N. Y.) 433, 33 N. Y. Suppl. 901; Barlow *v.* Pease, 5 Hun (N. Y.) 564; McGehee *v.* Cooke, 55 Misc. (N. Y.) 40, 105 N. Y. Suppl. 60; Rosenthal *v.* Rosenthal, 10 N. Y. Suppl. 455; Lynch *v.* Walsh, 11 N. Y. Civ. Proc. 446.

45. Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Smith *v.* Irvin, 102 N. Y. App. Div. 614, 92 N. Y. Suppl. 1146 [*affirming* 45 Misc. 262, 92 N. Y. Suppl. 170]; Dumar *v.* Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Suppl. 669; Kavanaugh *v.* Commonwealth Trust Co., 45 Misc. (N. Y.) 201, 91 N. Y. Suppl. 967 [*affirmed* in 99 N. Y. App. Div. 620, 91 N. Y. Suppl. 1099]; Johnson *v.* Great Northern R. Co., 12 N. D. 420, 97 N. W. 546.

Actions ex delicto.— The particular time of an act complained of in actions *ex delicto* is generally immaterial and will not be required to be made definite and certain. Critelli *v.* Rodgers, 87 Hun (N. Y.) 530, 34 N. Y. Suppl. 479.

The dates or amounts of payments which are not specifically recoverable but are merely evidence of the damages sought to be recovered will not be required to be stated on a motion to make more definite and certain. Mutual L. Ins. Co. *v.* Granniss, 118 N. Y. App. Div. 830, 103 N. Y. Suppl. 835.

Date of payment as distinguished from date of execution and delivery of instrument.—The date of one of several payments set out to defeat in whole or in part plaintiff's claim should be furnished by bill of particulars, but the date of the execution and delivery of an instrument upon which a claim or defense is based is a part of the instrument itself and thus a part of the claim or defense and when that is indefinite the pleading should be made definite in that particular. Pigone *v.* Lauria, 115 N. Y. App. Div. 286, 100 N. Y. Suppl. 976.

46. Howard *v.* Western Union Tel. Co., 76 S. W. 387, 25 Ky. L. Rep. 828; MacAdam *v.* Scudder, 127 Mo. 345, 30 S. W. 168. But see Givens *v.* Crawshaw, 55 S. W. 905, 21 Ky. L. Rep. 1618, holding that it was error to dismiss plaintiff's petition upon his failure to comply with an order requiring him to make its allegations more specific, there being specific statements therein upon which he was entitled to a hearing.

47. Saalfield *v.* Cutting, 49 N. Y. App. Div. 640, 63 N. Y. Suppl. 337; Cooper *v.* Fiske, 44 N. Y. App. Div. 531, 60 N. Y. Suppl. 944.

48. Lynch *v.* Walsh, 11 N. Y. Civ. Proc. 446.

49. Ritchey *v.* Home Ins. Co., 98 Mo. App. 115, 72 S. W. 44.

50. Ross *v.* Willett, 14 N. Y. Suppl. 192.

51. In action for assault and battery see Assault and Battery, 3 Cyc. 1083.

52. *Georgia.*—Southern R. Co. *v.* Chambers, 126 Ga. 404, 55 S. E. 37, 7 L. R. A. N. S. 926.

Illinois.— Hueni *v.* Freehill, 125 Ill. App. 345.

Iowa.— Reed *v.* Howe, 28 Iowa 250.

Kentucky.— Hargan *v.* Purdy, 93 Ky. 424, 20 S. W. 432, 14 Ky. L. Rep. 383; Turner *v.* Johnson, (1895) 31 S. W. 1027.

Minnesota.— Walsh *v.* Kattenburgh, 8 Minn. 127.

Missouri.— Brinkman *v.* Hunter, 73 Mo. 172, 39 Am. Rep. 492; Bird *v.* Hannibal, etc., R. Co., 30 Mo. App. 365.

Ohio.— Pittsburgh, etc., R. Co. *v.* Hedges, 41 Ohio St. 233.

South Dakota.— See also Hahn *v.* Sleepy Eye Milling Co., (1907) 112 N. W. 843.

See 39 Cent. Dig. tit. "Pleading," § 1199.

The court will not compel a party to elect between several causes of action properly pleaded, although it appears probable that on the trial but one cause of action will be presented by the pleader. Smith *v.* Douglass, 15 Abb. Pr. (N. Y.) 266.

Statutory provisions.— Where plaintiff joins in the same action a cause of action for negligence under the common law and under the statute, he cannot be required, under

ment of a single cause of action in a single count.[53] But an election may be compelled when two counts are so inconsistent that the proof of one necessarily disproves the other.[54] Generally, in case of a misjoinder of causes of action, a motion to compel an election does not lie in the first instance,[55] except in a few jurisdictions;[56] but on sustaining a demurrer on that ground the court may allow plaintiff to choose

S. C. Code Civ. Proc. (1902) § 186*a*, providing that where two or more acts of negligence are set forth in the same complaint, plaintiff shall not be required to elect on which he will go to trial, to elect between the two causes of action stated. Rountree *v.* Atlantic Coast Line R. Co., 73 S. C. 268, 53 S. E. 424.

53. *Kentucky.*— Eversole *v.* Virginia Iron, etc., Coke Co., 92 S. W. 593, 29 Ky. L. Rep. 151. See also Pryor *v.* Warford, 54 S. W. 838, 21 Ky. L. Rep. 1311; Northern Bank *v.* Farmers' Nat. Bank, 111 Ky. 350.

Louisiana.— McNair *v.* Gourrier, 40 La. Ann. 353, 4 So. 310. See also Smith *v.* Donnelly, 27 La. Ann. 98.

Missouri.— Griffith *v.* Missouri Pac. R. Co., 98 Mo. 168, 11 S. W. 559.

New York.— Magar *v.* Hammond, 95 N. Y. App. Div. 249, 88 N. Y. Suppl. 796 [*reversed* on other grounds in 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. N. S. 1038]; Nealis *v.* Lissner, 5 N. Y. Suppl. 682.

Washington.— Saunders *v.* U. S. Marble Co., 25 Wash. 475, 65 Pac. 782.

In an action on an account plaintiff cannot be required to elect on which items he will rely. Elgin *v.* Mathis, 9 Ind. App. 277, 36 N. E. 650.

Where only one cause of action is set forth in the complaint, plaintiff will not be required to allege whether he will seek to recover upon the alleged breach of contract or for a tort. Gray *v.* Linton, 38 Colo. 175, 88 Pac. 749.

Trespass or nuisance.— Plaintiff cannot be compelled to elect whether he will try his action as one for a nuisance or as one to restrain continuing trespasses. Follett *v.* Brooklyn El. R. Co., 91 Hun (N. Y.) 296, 36 N. Y. Suppl. 200; Ottinger *v.* New York El. R. Co., 17 N. Y. Suppl. 912. But see Libmann *v.* Manhattan R. Co., 59 Hun (N. Y.) 428, 13 N. Y. Suppl. 378. The use of the word "nuisance" may be regarded as surplusage. Ottinger *v.* New York El. R. Co., 17 N. Y. Suppl. 912.

54. *Colorado.*— Equitable Securities Co. *v.* Montrose, etc., Canal Co., 20 Colo. App. 465, 79 Pac. 747. See Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313.

Idaho.— Murphy *v.* Russell, 8 Ida. 133, 67 Pac. 421.

Kentucky.— E. H. Taylor, etc., Co. *v.* Taylor, 85 S. W. 1085, 27 Ky. L. Rep. 625.

Michigan.— Snore *v.* Hammond, 140 Mich. 416, 103 N. W. 834.

Minnesota.— Hause *v.* Hause, 29 Minn. 252, 13 N. W. 43.

Missouri.— Marx *v.* Marx, 89 Mo. App. 455; Enterprise Soap Works *v.* Sayers, 51 Mo. App. 310; Roberts *v.* Quincy, etc., R. Co., 43 Mo. App. 287. See also Gossett *v.* Devorss, 98 Mo. App. 641, 73 S. W. 731.

New York.— Gowans *v.* Jobbins, 90 N. Y. App. Div. 429, 86 N. Y. Suppl. 312; Faulks *v.* Kamp, 40 N. Y. Super. Ct. 70; Hollenbeck *v.* Clow, 9 How. Pr. 289. See Franke *v.* N. W. Taussig Co., 48 Misc. 169, 95 N. Y. Suppl. 212.

Wisconsin.— Martin *v.* Eastman, 109 Wis. 286, 85 N. W. 59.

See 39 Cent. Dig. tit. "Pleading," §§ 1199, 1201.

A motion to strike is held to be the proper remedy for inconsistent counts instead of a motion to elect in some states. Fox *v.* Graves, 46 Nebr. 812, 65 N. W. 887. Where an amended petition is filed, the second and third counts of which are in conflict with the first, the proper motion is to strike out the inconsistent matter, or require plaintiff to elect upon which cause of action he will proceed. Keens *v.* Gaslin, 24 Nebr. 310, 38 N. W. 797.

In jurisdictions where inconsistent claims are permitted, no election can of course be ordered on that ground. Craft Refrigerating Mach. Co. *v.* Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856; Lyon *v.* Phillips, 20 S. D. 607, 108 N. W. 554.

The object of requiring plaintiffs to elect between inconsistent causes of action is to simplify the issues of fact so that they may be intelligibly and fairly tried. Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348, 35 N. Y. Suppl. 226.

Where the theories presented by two different counts are inconsistent, an election is properly required. Ehrsam, etc., Mfg. Co. *v.* Jackman, 73 Kan. 435, 85 Pac. 559.

Causes of action held not inconsistent see Lyon *v.* Phillips, 20 S. D. 607, 108 N. W. 554.

Where only one cause of action stated.— So where allegations in different counts are inconsistent, although but one cause of action is stated, an election may be required. Behen *v.* St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346; Drolshagen *v.* Union Depot R. Co., 186 Mo. 258, 85 S. W. 344. What constitutes inconsistent allegations see White *v.* St. Louis, etc., R. Co., 202 Mo. 539, 101 S. W. 14.

Where plaintiff is entitled to recover either actual or statutory damages, but the complaint claims both, he may be required to elect between the two at the commencement of the trial. Galbraith *v.* Carmode, 43 Wash. 456, 86 Pac. 624.

55. Burkholder *v.* Beetem, 65 Pa. St. 496; Field *v.* Hurst, 9 S. C. 277.

56. Jett *v.* Theo. Maxfield Co., 80 Ark. 167, 96 S. W. 143; Hilton *v.* Hilton, 110 Ky. 522, 62 S. W. 6, 22 Ky. L. Rep. 1934; Fergusons *v.* Terry, 1 B. Mon. (Ky.) 96. See also McCormick *v.* McCormick, 5 S. W. 573, 9 Ky. L. Rep. 519.

which cause of action he shall proceed to trial on.[57] And where the fact of misjoinder does not affirmatively appear on the face of the pleading, but such fact is for the first time disclosed by plaintiff's evidence, plaintiff may be required to elect at the conclusion of the testimony against which of several defendants he will proceed.[58] If evidence has been introduced under one count only, there is no occasion for requiring an election.[59]

b. Where Commingled in One Count. Where two or more causes of action are set forth in a complaint but not separately stated and numbered, the proper procedure in most jurisdictions is a motion to require them to be separately stated and numbered,[60] and a motion to compel an election does not lie.[61] In some jurisdictions, however, if two causes of action are improperly mingled in the same count, plaintiff may be compelled to elect upon which he will proceed,[62] while in other states the only remedy is by demurrer.[63]

2. Between Different Counts or Paragraphs Stating Same Cause of Action. While at common law a single cause of action could be set forth in two or more different forms or counts,[64] the code practice does not generally authorize such a form of pleading.[65] And where one cause of action is set forth in different counts, a motion to compel an election between the counts is proper and will generally be granted.[66] However, this rule is subject to an important exception in that it is generally held that an election will not be compelled when a plaintiff has two or more counts upon which he has a single cause of action and there is some

57. Alexander *v.* Thacker, 30 Nebr. 614, 46 N. W. 825; Shanks *v.* Mills, 25 S. C. 358.

58. French *v.* Central Constr. Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. N. S. 669.

59. Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

60. See *supra*, XII, D, 5, b.

61. Watson *v.* Bartholomew, 106 Iowa 576, 76 N. W. 858; Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712; Austin, etc., Mfg. Co. *v.* Heiser, 6 S. D. 429.

62. Giacomo *v.* New York, etc., R. Co., 196 Mass. 192, 81 N. E. 899; Gainey *v.* Parkman, 100 Mass. 316; Clancy *v.* St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509; McHugh *v.* St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853; Ennis *v.* Padgett, 122 Mo. App. 539, 99 S. W. 782; Zeideman *v.* Molasky, 118 Mo. App. 106, 94 S. W. 754; Foster-Cherry Commission Co. *v.* Davis, 115 Mo. App. 65, 90 S. W. 734; Harris *v.* Wabash R. Co., 51 Mo. App. 125; Hill *v.* Missouri Pac. R. Co., 49 Mo. App. 520; Kern *v.* Pfaff, 44 Mo. App. 29; Ross *v.* Jones, 47 S. C. 211, 25 S. E. 59; Ruff *v.* Columbia, etc., R. Co., 42 S. C. 114, 20 S. E. 27; Reed *v.* Northeastern R. Co., 37 S. C. 42, 16 S. E. 289; Wirth *v.* Bartell, 84 Wis. 209, 54 N. W. 399. See also High *v.* Southern Pac. R. Co., 49 Oreg. 98, 88 Pac. 961.

An alternative order may be made for a separation of counts or an election. Ross *v.* Jones, 47 S. C. 211, 25 S. E. 59; Reed *v.* Northeastern R. Co., 37 S. C. 42, 16 S. E. 289.

In South Carolina, when two or more causes of action, which should be separately stated, are blended together, defendant had the right either to have the complaint made more definite and certain by having said causes of action separately stated, or to move the court to require plaintiff to elect on which cause of action he will proceed to trial. Sahlman *v.* Mutual Reserve Fund L. Assoc., 53 S. C. 183, 31 S. E. 50.

63. Lewis *v.* Crane, 78 Vt. 216, 62 Atl. 60. See also Craft Refrigerating Mach. Co. *v.* Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856.

64. See *supra*, III, C, 4, a.

65. See *supra*, III, C, 4, b.

66. *Colorado.*— Spaulding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486.

Iowa.— Reed *v.* Howe, 28 Iowa 250, statute. The statute has been repealed and now the common-law rule prevails which permits the same cause of action to be pleaded in different counts. Pearson *v.* Milwaukee, etc., R. Co., 45 Iowa 497.

Kentucky.— Alsop *v.* Central Trust Co., 100 Ky. 375, 38 S. W. 510, 18 Ky. L. Rep. 830; Muldraugh's Hill, etc., Turnpike Co. *v.* Maupin, 79 Ky. 101, statute. *Contra*, Newton *v.* Cecil, 43 S. W. 734, 19 Ky. L. Rep. 1430.

Missouri.— Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373. But see St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045.

New Hampshire.— Hutt *v.* Hickey, 67 N. H. 411, 29 Atl. 456.

New York.— McLaughlin *v.* Engelhardt, 62 N. Y. Suppl. 428; Fern *v.* Vanderbilt, 13 Abb. Pr. 72; Lackey *v.* Vanderbilt, 10 How. Pr. 155.

Oregon.— Harvey *v.* Southern Pac. Co., 46 Oreg. 505, 80 Pac. 1061.

Wisconsin.— Muzzy *v.* Ledlie, 23 Wis. 445.

See 39 Cent. Dig. tit. "Pleading," §§ 1199, 1201.

But see Strickland *v.* Parlin, 118 Ga. 213, 44 S. E. 997. *Contra*, Austin, etc., Mfg. Co. *v.* Heiser, 6 S. D. 429, 61 N. W. 445.

Motion to strike.— In some states it is held that a motion to strike, not to elect, is the

uncertainty as to which he will be able to establish at the trial.[67] And according to some cases the rule would seem to be that plaintiff may in all cases plead his cause of action in different forms to meet the exigencies of proof and no election can be compelled.[68] For instance, a motion to compel an election between counts based on an express contract and a *quantum meruit* will not be granted.[69] So

proper remedy. Pollock *v.* Whipple, 45 Nebr. 844, 64 N. W. 210.

Concurrent acts of negligence.— If, in an action for a single injury, several concurrent acts of negligence are set up as constituting separate causes of action, plaintiff may be required to elect upon which he will proceed. Wiley *v.* Cleveland, etc., R. Co., 3 Ohio N. P. 242, 4 Ohio S. & C. Pl. Dec. 269.

In South Carolina, by statute, no election can be required between two or more acts of negligence set forth in the complaint as causing the injury to plaintiff. Sloan *v.* Seaboard, etc., R. Co., 64 S. C. 389, 42 S. E. 197.

67. *Arizona.*—Willard *v.* Carrigan, 8 Ariz. 70, 68 Pac. 538.

California.— Wilson *v.* Smith, 61 Cal. 209.

Colorado.— Leonard *v.* Roberts, 20 Colo. 88, 36 Pac. 880; Rucker *v.* Omaha, etc., Refining Co., 18 Colo. App. 487, 72 Pac. 682.

Massachusetts.— Beauregard *v.* Webb Granite, etc., Co., 160 Mass. 201, 35 N. E. 555.

New York.— Blank *v.* Hartshorn, 37 Hun 101; Frieze *v.* Alabama Great Southern R. Co., 91 N. Y. Suppl. 81. See also Mulligan *v.* Erie R. Co., 99 N. Y. App. Div. 499, 91 N. Y. Suppl. 60; Franke *v.* N. W. Taussig Co., 48 Misc. 169, 95 N. Y. Suppl. 212.

Ohio.— See First Nat. Bank *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 702, 16 Cinc. L. Bul. 399.

Utah.— Oberndorfer *v.* Moyer, 30 Utah 325, 84 Pac. 1102.

Wisconsin.— Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

See 39 Cent. Dig. tit. "Pleading," § 1199.

Restatement of rule.—A motion to compel an election between two counts stating the same cause of action may be denied where it appears that such pleading may be necessary to meet the possible proofs which will for the first time fully appear at the trial. Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313. Where a party cannot well anticipate what the testimony will develop he may state his cause of action in different counts and a motion to require him to elect will not be granted. Edwards *v.* Hartshorn, 72 Kan. 19, 82 Pac. 520, 1 L. R. A. N. S. 1050. Plaintiff may set out a cause of action in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only. Wilson *v.* Smith, 61 Cal. 209.

68. *Connecticut.*— Brockett *v.* Fair Haven, etc., R. Co., 73 Conn. 428, 47 Atl. 763.

Indiana.— Snyder *v.* Snyder, 25 Ind. 399; Wilstach *v.* Hawkins, 14 Ind. 541; McMasters *v.* Cohen, 5 Ind. 174.

Iowa.— Watters *v.* Waterloo, 126 Iowa 199, 101 N. W. 871; Cawker City State Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494; Pearson *v.* Milwaukee, etc., R. Co., 45 Iowa 497.

Kansas.— Woodman *v.* Davis, 32 Kan. 344, 4 Pac. 262.

Massachusetts.—Whiteside *v.* Brawley, 152 Mass. 133, 24 N. E. 1088; Sullivan *v.* Fitzgerald, 12 Allen 482; Sheffill *v.* Van Deusen, 15 Gray 485, 77 Am. Dec. 377. But see Clapp *v.* Campbell, 124 Mass. 50.

Missouri.— Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Brinkman *v.* Hunter, 73 Mo. 172, 39 Am. Rep. 492; Bussell *v.* Quincy, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613; Waechter *v.* St. Louis, etc., R. Co., 113 Mo. App. 270, 88 S. W. 147; Maguire *v.* St. Louis Transit Co., 103 Mo. App. 459, 78 S. W. 838; Nolan *v.* Bedford, 89 Mo. App. 172; Straub *v.* Eddy, 47 Mo. App. 189.

New York.— Lansing *v.* Wiswall, 5 Den. 213.

Texas.— Texas Brewing Co. *v.* Walters, (Civ. App. 1894) 43 S. W. 548.

United States.— American Nat. Bank *v.* National Wall Paper Co., 77 Fed. 85, 23 C. C. A. 33.

See 39 Cent. Dig. tit. "Pleading," § 1199.

In an action for personal injuries, it is proper to rely in the same count on common law, statutory, and ordinance negligence, so long as the violated duty produced the injury and the one damage constituting the subject-matter of the action, and a motion to compel an election will not be granted. White *v.* St. Louis, etc., R. Co., 202 Mo. 539, 101 S. W. 14; Rapp *v.* St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865. *Contra,* Clancy *v.* St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509; McHugh *v.* St. Louis Transit R. Co., 190 Mo. 85, 88 S. W. 853. Where a cause of action for injuries to a servant is within Employers' Liability Act, Laws (1902), p. 1748, c. 600, and also exists at common law, plaintiff may allege both a statutory and common-law right of action, and recover upon either, and cannot be compelled to elect between the two before trial. Kleps *v.* Bristol Mfg. Co., 107 N. Y. App. Div. 488, 95 N. Y. Suppl. 337 [*affirmed* in 189 N. Y. 516, 81 N. E. 765, 12 L. R. A. N. S. 1038].

69. *Arizona.*— Willard *v.* Carrigan, 8 Ariz. 70, 68 Pac. 538.

California.— Wilson *v.* Smith, 61 Cal. 209.

Illinois.— Utter *v.* Buck, 120 Ill. App. 120.

Iowa.— Tuffree *v.* Binford, 130 Iowa 532, 107 N. W. 425.

New York.— Blank *v.* Hartshorn, 37 Hun 101; Longprey *v.* Yates, 31 Hun 432; American Encaustic Tiling Co. *v.* Reich, 11 N. Y. Suppl. 776. See also McLaughlin *v.* Engelhardt, 62 N. Y. Suppl. 428.

See 39 Cent. Dig. tit. "Pleading," § 1199.

Contra.— Muzzy *v.* Ledlie, 23 Wis. 445.

where one cause of action is against defendant as common carrier and another as warehouseman, claiming to recover only the amount of one of the causes of action, plaintiff cannot be compelled to elect.[70]

3. Between Defenses. It has been held that where defendant files several pleas in defense substantially the same,[71] or a general denial and specific denials of the same facts,[72] he may be required to elect. So where inconsistent defenses are improperly pleaded, an election between them may be compelled.[73] Ordinarily a defendant will not be compelled to elect between a defense and a counter-claim,[74] even where based on the same facts,[75] unless they are mutually inconsistent.[76] An election will not be required when one of the defenses is obviously insufficient.[77] An election between inconsistent defenses requires an election between the defenses as a whole and not merely between their inconsistent portions.[78]

4. Between Replications. Under the common-law practice, when plaintiff improperly files several replications, defendant may either demur generally, or may call on plaintiff to elect which one he will retain, and move the court to strike out the others.[79]

5. Ambiguous Counts. If the allegations of a pleading are equally appropriate to two different causes of action, plaintiff may be required to elect upon which he will go to trial.[80] This is especially true when the two causes are to be tried in different ways, one by the court and the other by a jury.[81]

There is nothing inconsistent in the two claims that defendant agreed to pay a certain price, and that the work is worth the same price. American Encaustic Tiling Co. *v.* Reich, 11 N. Y. Suppl. 776.

Election between common and special counts in assumpsit see Assumpsit, Action of, 4 Cyc. 358.

70. Rockville Bank *v.* American Express Co., 4 Ohio Dec. (Reprint) 46, Clev. L. Rec. 60.

71. State *v.* Washington Bank, 18 Ark. 554; Davis *v.* Calvert, 17 Ark. 85; Sumpter *v.* Tucker, 14 Ark. 185; McClintic *v.* Cory, 22 Ind. 170. *Compare* English *v.* Scott, 1 Mo. 408.

72. York County School Dist. No. 27 *v.* Holmes, 16 Nebr. 486, 20 N. W. 721.

73. *Idaho.*— Murphy *v.* Russell, 8 Ida. 133, 67 Pac. 421; Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339.

Kansas.— De Lissa *v.* Fuller Coal, etc., Co., 59 Kan. 319, 52 Pac. 886; Auld *v.* Butcher, 2 Kan. 135.

Kentucky.— Hollingsworth *v.* Warnock, 112 Ky. 96, 65 S. W. 163, 23 Ky. L. Rep. 1395; Lane *v.* Bryant, 100 Ky. 138, 37 S. W. 584, 18 Ky. L. Rep. 658, 36 L. R. A. 709; Black *v.* Holloway, 41 S. W. 576, 19 Ky. L. Rep. 694.

Minnesota.— Conway *v.* Wharton, 13 Minn. 158.

Nebraska.— Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811; McCormick Harvesting Mach. Co. *v.* Hiatt, 4 Nebr. (Unoff.) 587, 95 N. W. 627; Bollinger *v.* Knox, 3 Nebr. (Unoff.) 811, 92 N. W. 994.

New York.— Kelly *v.* Bernheimer, 1 Hun 112, bolding that defenses must be so inconsistent that both cannot exist in the same transaction.

Ohio.— Pavey *v.* Pavey, 30 Ohio St. 600.

Pennsylvania.— Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432.

United States.— Noonan *v.* Bradley, 9 Wall. 394, 19 L. ed. 757.

See 39 Cent. Dig. tit. "Pleading," § 1201.

Contra.— Jewett *v.* Locke, 6 Gray (Mass.) 233, holding that objection can be reached only by demurrer.

Under Ky. Code, § 113, a party filing a pleading containing inconsistent statements shall be required to elect which shall be stricken from the pleading. Owensboro City R. Co. *v.* Hill, 56 S. W. 21, 21 Ky. L. Rep. 1638.

In South Dakota inconsistent defenses are permissible, and hence defendant will not upon motion be compelled to elect between them. Lawrence *v.* Peck, 3 S. D. 645, 54 N. W. 808.

In New York inconsistent defenses may be set forth, but a defendant is sometimes required to elect upon which of two inconsistent defenses he will rely, but only where from the very nature of the case it is impossible for him to avail himself of both. Wendling *v.* Pierce, 27 N. Y. App. Div. 517, 50 N. Y. Suppl. 509.

When defenses are inconsistent see *supra*, IV, A, 7, d.

74. Clonan *v.* Thornton, 21 Minn. 380.

75. Nollman *v.* Evenson, 5 N. D. 344, 65 N. W. 686.

76. Societa Italiana di Beneficenza *v.* Sulzer, 61 N. Y. Super. Ct. 325, 19 N. Y. Suppl. 824.

77. Norris Safe, etc., Co. *v.* Clark, 28 Wash. 268, 68 Pac. 718, 70 Pac. 129.

78. Black *v.* Holloway, 41 S. W. 576, 19 Ky. L. Rep. 694.

79. Duncan *v.* Hargrove, 22 Ala. 150.

80. Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Cartin *v.* South Bound R. Co., 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829.

81. Libmann *v.* Manhattan R. Co., 59 Hun (N. Y.) 428, 13 N. Y. Suppl. 378.

6. Pleading and Demurring to Same Matter. If a defendant at the same time pleads and demurs to the same count, in those jurisdictions where such procedure is not permissible, he may be compelled to elect on which he will rely, as the two cannot stand together;[82] but if the demurrer and answer are directed to different portions of the same cause of action, the proper remedy is a motion to strike out the demurrer.[83]

7. Discretion of Court. The question of the granting or refusing a motion to require an election is largely within the discretion of the trial judge, and his ruling will not be disturbed except where abuse is shown.[84] As affecting the exercise of the discretion, one consideration is whether or not prosecution of both causes of action at one time and in one proceeding will embarrass defendant in his defense, when no such consequence would follow and no embarrassment to plaintiff's legal remedy would happen if he were obliged to bring two actions.[85] The court may properly deny a motion to compel an election if made before the case has developed to such a point that the matter can be intelligently passed upon.[86] It is prejudicial error to compel a defendant to elect between two defenses on the ground that they are inconsistent when in fact they are not so.[87]

8. What Constitutes Election. Trying a case in accordance with only one of the causes of action alleged amounts to an election,[88] or an election may be made by stipulation.[89] The fact that plaintiff making an election between different counts claimed a reservation that he might by subsequent pleadings recover under the count he elects to dispense with does not render his election any the less a final one,[90] and hence the court may permit him to withdraw such latter count after verdict.[91]

9. Effect of Election. An election which excludes one count does not waive the right to introduce in evidence any facts in the rejected count which are admissible under the allegations of the count retained.[92] After an election is made, an excluded count may nevertheless, in the discretion of the court, be allowed to remain as an amendment of the count retained so far as it would properly operate

82. Bernard *v.* Morrison, 2 N. Y. Civ. Proc. 399. See also *supra*, VI, G, 4.

83. McKesson *v.* Russian Co., 27 Misc. (N. Y.) 96, 57 N. Y. Suppl. 579 [*affirmed* in 42 N. Y. App. Div. 622, 59 N. Y. Suppl. 1109].

84. *Colorado.*— Possell *v.* Smith, 39 Colo. 127, 88 Pac. 1064.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 10 Ill. App. 359.

Massachusetts.—Brady *v.* Ludlow Mfg. Co., 154 Mass. 468, 472, 28 N. E. 901 (in which the court said: "In some cases a jury may be able to deal with different counts, founded on the same facts, presenting different issues, and involving different liabilities in damages, at the same time without great difficulty, and it may be just to both parties to submit them to the jury together. In other cases, the presiding judge may see that such a mode of trial would be likely to lead to confusion, and to prevent the jury from reaching a correct result. Much must be left to the discretion of the presiding judge in determining what is conducive to an orderly trial and an intelligent verdict"); Carlton *v.* Pierce, 1 Allen 26.

Michigan.— McLennan *v.* McDermid, 50 Mich. 379, 15 N. W. 518.

Minnesota.— Plummer *v.* Mold, 22 Minn. 15; Hawley *v.* Wilkinson, 18 Minn. 525; Caldwell *v.* Bruggerman, 8 Minn. 286.

Missouri.— Fulkerson *v.* State, 14 Mo. 49.

New York.— People *v.* Tweed, 63 N. Y. 194; Seymour *v.* Lorillard, 51 N. Y. Super. Ct. 399; Nadelman *v.* Pichel, 34 Misc. 829, 71 N. Y. Suppl. 1142; Taylor *v.* Arnoux, 13 N. Y. St. 148.

Oregon.— Harvey *v.* Southern Pac. Co., 46 Oreg. 505, 80 Pac. 1061.

See 39 Cent. Dig. tit. "Pleading," § 1206.

85. Seymour *v.* Lorillard, 51 N. Y. Super. Ct. 399.

The fact that to compel plaintiffs to make an election before trial would place them at a disadvantage and give defendant an unfair advantage in preparing and presenting the evidence at the trial is to be considered in favor of denying the motion. Franke *v.* N. W. Taussig Co., 48 Misc. (N. Y.) 169, 95 N. Y. Suppl. 212.

86. Rosenberg *v.* Heidelberg, 98 N. Y. App. Div. 17, 90 N. Y. Suppl. 684.

87. Grier Commission Co. *v.* Dockstader, 47 Mo. App. 42.

88. Lewis *v.* Utah Constr. Co., 10 Ida. 214, 77 Pac. 336; Utter *v.* Buck, 120 Ill. App. 120; Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

89. State Bank *v.* Ensminger, 7 Blackf. (Ind.) 105.

90. Gorham *v.* New Haven, 79 Conn. 670, 66 Atl. 505.

91. Gorham *v.* New Haven, 79 Conn. 670, 66 Atl. 505.

92. Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274.

as such.[93] An election once made may be changed when it results in no prejudice to the opposite party,[94] but not otherwise.[95] Where a party has been compelled to elect between certain counts in his complaint, such election does not preclude his proceeding on other counts on a new trial after a reversal.[96]

10. Refusal to Obey Order of Court. If a party refuses to obey an order requiring an election, the court may strike out all but one cause of action or defense[97] or may refuse to try the cause or order a nonsuit.[98]

F. Motions Relating to Parties. While objections relating to parties are not generally raised by motion, yet under some statutes a misjoinder of parties, either plaintiffs[99] or defendants,[1] is to be taken advantage of by a motion to strike out the name of the party improperly joined. For instance, it has been held that where there is an improper joinder of parties defendant, the remedy, if any, of one who is a proper party defendant is by motion;[2] and that a motion to strike out a co-defendant improperly joined as a party is the proper remedy where the misjoinder is not apparent upon the face of the complaint so as to warrant a demurrer.[3] But a co-defendant cannot ask that his name be stricken as that of an unnecessary party.[4] In some jurisdictions the lack of legal capacity to sue, in one of several plaintiffs, may be presented by a motion to strike out such plaintiff.[5] Inasmuch as the codes usually make no provision for a plea in abatement, an objection to a mistake in the name of plaintiff or defendant may be taken advantage of by motion.[6] Where an action is brought by parties by the initials of their christian name, the remedy of the adverse party is by motion to require the full christian names to be set out in the pleading.[7]

G. Application For Relief and Proceedings Thereon — 1. In General.[8] Motions relating to pleadings, except where it is otherwise provided by statute or rule of court, are ordinarily governed by the rules relating to motions in civil actions in general.[9] Ordinarily a motion is necessary. Where an adversary's pleading is clearly insufficient, the opposing party cannot disregard it and enter up judgment as if such pleading had not been filed but must proceed by a motion seeking the necessary relief.[10] But improper matter, if not stricken out, may

93. Hill *v.* Hill, 51 S. C. 134, 28 S. E. 309.

94. McLennan *v.* McDermid, 52 Mich. 468, 18 N. W. 222.

95. Bowsky *v.* Metropolitan St. R. Co., 36 Misc. (N. Y.) 820, 74 N. Y. Suppl. 863.

96. Gott *v.* Judge Super. Ct., 42 Mich. 625, 4 N. W. 529.

97. Hilton *v.* Hilton, 110 Ky. 522, 62 S. W. 6, 22 Ky. L. Rep. 1934; Sheppard *v.* Stephens, 2 S. W. 548, 8 Ky. L. Rep. 603. See also *supra*, XII, C, 2.

98. French *v.* Central Constr. Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. N. S. 669 (dismissal without prejudice); Gould *v.* Crawford, 2 Pa. St. 89. See also Hilton *v.* Hilton, 110 Ky. 522, 62 S. W. 6, 22 Ky. L. Rep. 1934.

99. Hot Springs R. Co. *v.* Tyler, 36 Ark. 205; Dean *v.* English, 18 B. Mon. (Ky.) 132; Matney *v.* Gregg Bros. Grain Co., 19 Mo. App. 107. See also Lillard *v.* Rucker, 9 Yerg. (Tenn.) 64. *Contra*, McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

1. Fry *v.* Street, 37 Ark. 39; Yeates *v.* Walker, 1 Duv. (Ky.) 84; Dean *v.* English, 18 B. Mon. (Ky.) 132. See Gates *v.* Nash, 6 Cal. 192 (holding that where there was evidence before the jury connecting a defendant on whom no process had been served with the trespass for which the suit was brought, a motion by the other defendant to strike his name from the record was properly overruled); Turner *v.* Hillerline, 6 Abb. Pr. (N. Y.) 215 note, 14 How. Pr. 231; Bailey *v.* Easterly, 7 How. Pr. (N. Y.) 495.

2. Lewis *v.* Williams, 3 Minn. 151; Brownson *v.* Gifford, 8 How. Pr. (N. Y.) 389.

3. Bailey *v.* Easterly, 7 How. Pr. (N. Y.) 495.

4. Sœding *v.* Bartlett, 35 Mo. 90, holding that he must demur to the petition.

5. White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 44 Iowa 512.

6. Davis *v.* Jennings, (Nebr. 1907) 111 N. W. 128.

7. Walgamood *v.* Randolph, 22 Nebr. 493, 35 N. W. 217.

8. Orders as appealable see Appeal and Error, 2 Cyc. 606, 607.

9. See Motions, 28 Cyc. 1.

A rule of court prescribing when and how actions may be set on the trial docket has no application to a motion for judgment, for an amount not controverted. National Surety Co. *v.* Arterburn, 110 Ky. 832, 62 S. W. 862, 23 Ky. L. Rep. 281.

Enumerated motions.—A motion for judgment on a frivolous demurrer is an enumerated motion. McCabe *v.* McKay, 2 Cai. (N. Y.) 100, Col. & C. Cas. 366.

10. Bergman *v.* Howell, 3 Abb. Pr. (N. Y.) 329; Oulton *v.* Palmer, 7 N. Brunsw. 364.

nevertheless be disregarded, but by moving to strike it the party avoids the risk of disregarding matter which the court may consider material.[11] The burden is not on one party to move to have the pleading of his adversary corrected, but if it is so defective in form that it is legally insufficient, it may be attacked in any suitable manner as substantially defective.[12] The court may, on its own motion, order a pleading made more definite and certain,[13] or may strike out any improper pleading,[14] or scandalous matter.[15] But it has been held that the court cannot of its own motion strike out of any pleading redundant or irrelevant matter.[16]

2. Who May Make Application.[17] Only a party who is aggrieved may make a motion in regard to the pleading,[18] except that where the statute authorizes a motion by "any person aggrieved" the motion may be made by an attorney for a party where the attorney is the person injured.[19]

3. Time For Application — a. In General.[20] Statutes or rules of court frequently fix the time within which application must be made,[21] and a motion filed after the expiration of such period comes too late.[22] Where the time to move is not fixed by statute or rule of court the motion must generally be made promptly,[23] but there is no fixed and definite rule determining when the motion is seasonable. Generally speaking the application will not be refused when the delay is not unreasonable and does not appear to have been so great as to prejudice the other party.[24] Whenever a party is apparently guilty of laches in filing his motion the delay should be explained.[25] A motion with reference to the pleadings which is made as soon as the occasion for it is discovered,[26] or at the earliest practi-

Power of prothonotary.—A plea which answers the declaration cannot be treated as a nullity and stricken by the prothonotary, but plaintiff, if dissatisfied, must seek his remedy in open court. Altick *v.* Pennsylvania R. Co., 9 Lanc. Bar (Pa.) 62.

11. Specht *v.* Spangenberg, 70 Iowa 488, 492, 30 N. W. 875, where the court says: "The only advantage of moving to strike out is to enable the party who deems himself aggrieved by an averment which he considers irrelevant to know in advance whether he must be prepared to meet the averment, and disprove it by evidence. If he does not move to strike out, and goes to trial without evidence to disprove the averment he does so at his peril. He may think that the averment is irrelevant, and therefore that no evidence will be admitted in support of it, but the court may think the averment relevant. He has a right therefore, to have the view of the court in advance, that he may know what, upon a trial in that court, he must be prepared to meet."

12. Sidway *v.* Missouri Land, etc., Co., 163 Mo. 342, 63 S. W. 705; Clark *v.* Dillon, 97 N. Y. 370; Feder *v.* Samson, 22 Misc. (N. Y.) 111, 48 N. Y. Suppl. 696.

13. Williams *v.* Burkheimer, 11 Ohio S. & C. Pl. Dec. 136, 8 Ohio N. P. 134.

14. Mt. Pleasant Cemetery Co. *v.* Erie R. Co., 74 N. J. L. 100, 65 Atl. 192.

Where legally insufficient.— The court may order a plea stricken of its own motion, at any time during the progress of the trial, where it is legally insufficient in the matter of substance. Gainesville, etc., Electric R. Co. *v.* Austin, 127 Ga. 120, 56 S. E. 254.

15. Haley *v.* Duquette, 13 Colo. App. 427, 59 Pac. 227.

16. Savage *v.* Challiss, 4 Kan. 319.

17. See also *supra*, XII, C, 2, e.

18. Hagerty *v.* Andrews, 94 N. Y. 195.

One of two defendants is not entitled to have redundant and irrelevant allegations stricken out of the complaint, which relate only to his co-defendant. People *v.* New York Cent. Under-Ground R. Co., 15 N. Y. Suppl. 245.

19. Wehle *v.* Loewy, 2 Misc. (N. Y.) 345, 21 N. Y. Suppl. 1027.

20. **Effect of filing demurrer with or before motion** see *infra*, XII, G, 3, c.

Waiver by pleading over after overruling of motion see *infra*, XIV, H.

21. Borsuk *v.* Blauner, 93 N. Y. App. Div. 306, 87 N. Y. Suppl. 851; McDonald *v.* Green, 28 Misc. (N. Y.) 55, 59 N. Y. Suppl. 787; Whaley *v.* Lawton, 53 S. C. 580, 31 S. E. 660.

22. Siriani *v.* Deutsch, 12 Misc. (N. Y.) 213, 34 N. Y. Suppl. 26.

23. British Linen Co. *v.* McEwan, 8 Manitoba 214.

24. Tibballs *v.* Selfridge, 12 How. Pr. (N. Y.) 64.

A delay of five months during which time a reply and notice of trial have been served is too long. Belsena Coal Min. Co. *v.* Liberty Dredging Co., 26 Misc. (N. Y.) 846, 55 N. Y. Suppl. 747 [*affirmed* in 27 Misc. 191, 57 N. Y. Suppl. 739].

A delay of six weeks in midsummer has been held not to be unreasonable. Wilgus *v.* Wilkinson, 50 N. Y. App. Div. 1, 63 N. Y. Suppl. 517 [*affirmed* in 167 N. Y. 618, 60 N. E. 1122].

25. Mumma *v.* McKee, 10 Iowa 107.

26. Skidaway Shell Road Co. *v.* O'Brien, 73 Ga. 655.

A motion to strike an amendment made at the term of court when the amendment was discovered, where the amendment had not been allowed by the court, is made in time. Skidaway Shell Road Co. *v.* O'Brien, 73 Ga. 655.

cable opportunity,[27] is ordinarily regarded as having been interposed in time.

b. Motion For Judgment on the Pleadings. Application may be made at any time before or after verdict,[28] and statutory provisions authorizing a motion after verdict do not preclude a motion before verdict.[29] However, no judgment on the pleadings can be rendered pending an objection to the jurisdiction of the court.[30] If a verdict has been rendered and not set aside, the ordinary remedy would be a motion for judgment *non obstante veredicto*, which must be made before judgment.[31] It may be made before the time allowed for amendment has expired.[32]

c. Motion to Strike Pleading or Defense. After the pleadings are at issue a motion to strike will usually be overruled.[33] But the question depends somewhat upon the character of the motion. If the motion to strike is based upon a purely formal defect, the court will insist with greater stringency upon promptness than when founded upon a substantial infirmity.[34] A motion to strike based on formal defects must, in some jurisdictions, be made before the trial term,[35] and in others all motions to strike out pleadings must be made within the time allowed for filing pleas in abatement.[36] On the other hand, it has been held that a motion to strike

27. French *v.* Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Reddy *v.* Wilson, 9 How. Pr. (N. Y.) 34.

28. Hurt *v.* Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; Kime *v.* Jesse, 52 Nebr. 606, 72 N. W. 1050; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. 356, 10 C. C. A. 415; Brown *v.* Pearson, 21 Ch. D. 716, 46 L. T. Rep. N. S. 411, 30 Wkly. Rep. 436.

Judgment may be had at the appearance term.— Johnson City First Nat. Bank *v.* Pearson, 119 N. C. 494, 26 S. E. 46.

In Iowa it is held that inasmuch as fatal defects in a pleading are waived unless objected to by demurrer, judgment on the pleadings cannot be had after the case is at issue. Fulmer *v.* Mahaska County, 92 Iowa 20, 60 N. W. 207.

In Georgia, it is proper to grant a motion to dismiss a petition containing no cause of action, although made orally, and not until the trial term. Weathers *v.* McFarland, 97 Ga. 266, 22 S. E. 988; Ryan *v.* Fulghum, 96 Ga. 234, 22 S. E. 940.

In New York a motion for a final judgment on the pleadings should be made at the trial, and not previously. Durham *v.* Durham, 99 N. Y. App. Div. 450, 91 N. Y. Suppl. 295, 34 N. Y. Civ. Proc. 141.

Waiver of right to move by answering over see *supra*, XII, B, 3, b.

29. Kime *v.* Jesse, 52 Nebr. 606, 72 N. W. 1050; Humboldt Min. Co. *v.* American Mfg., etc., Co., 62 Fed. 356, 10 C. C. A. 415.

30. Kinney *v.* Mitchell, 136 Fed. 773, 69 C. C. A. 493.

31. Hurt *v.* Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823.

32. Currie *v.* Baldwin, 4 Sandf. (N. Y.) 690.

33. Star Loan Assoc. *v.* Moore, 4 Pennew. (Del.) 308, 55 Atl. 946; Cross *v.* Howe, 62 L. J. Ch. 342, 3 Reports 218; Hackett *v.* Lalor, L. R. 12 Ir. 44. See also Goch *v.* Marsh, 8 How. Pr. (N. Y.) 439.

Amended pleading.— Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269.

A motion to strike a plea for want of a copy of account comes too late after a replication has been filed. Howe *v.* Frazer, 17 Ill. App. 219.

Noticing a cause for trial waives the right to move to strike out a part of a pleading. Esmond *v.* Van Benschoten, 5 How. Pr. (N. Y.) 44.

The right to move to strike amended answers is not waived because demurrers have been filed to the original answers. Wisconsin Lumber Co. *v.* Green, etc., Tel. Co., 127 Iowa 350, 101 N. W. 742, 109 Am. St. Rep. 387, 69 L. R. A. 908.

In New Jersey, however, pleading over does not deprive the party of a right to move to strike out the pleading and answer provided the motion was made at the earliest opportunity. Hogencamp *v.* Ackerman, 24 N. J. L. 133.

34. Freeman *v.* Curran, 1 Minn. 169, 174 (in which it was said: "It is urged that the motion to strike out the answer, and for judgment, was improperly made, as it was not within twenty days after the service of the answer, and not until the cause was noticed for trial. . . . But it would be difficult to give any reason for sending a cause to the jury, when there is nothing for them to pass upon. When the objections to the answer are merely formal, or when something is left besides the part included in the motion, or when error is of such a nature that it does not necessarily vitiate the pleadings, and may be waived, the rule [that the motion is too late after notice of trial] is a very proper one, but if the answer is good for nothing, if there is nothing in it upon which the defendant can rely, it is as if there was no answer, and there can be no reason given why the plaintiff should not have judgment. Delay can never make a radically defective answer good"). See also Sawyer *v.* Schoonmaker, 8 How. Pr. (N. Y.) 198.

35. Green *v.* Hambrick, 118 Ga. 569, 45 S. E. 420.

36. Stoddard *v.* Davis, 50 Ala. 21.

a sham plea or answer may be made at any time before trial;[37] but it should be made before other inconsistent steps are taken, such as a motion to make more definite and certain;[38] and the motion has been denied before trial because of laches.[39] A false or frivolous plea or demurrer may be stricken after the filing of a demurrer or replication,[40] or joinder in demurrer,[41] or after the case has been noticed for trial, provided the time allowed for the motion has not expired.[42] So if the court wholly exceeds its power and authority in allowing a pleading to be filed,[43] or if it is filed without any authority when such authority is necessary,[44] it may be stricken at any time. After the trial has begun, however, a pleading will seldom be stricken out on any ground,[45] unless it is so defective that it presents no issue to be tried.[46] But a party who has sought by his manipulation of the pleadings to entrap his adversary cannot complain of delay even though the motion to strike is not made until after a writ of error is brought.[47] A party need not wait until after the time for amending a pleading as of course has expired before moving to strike it out.[48]

d. Motion to Strike Matter From Pleading. A motion to strike out parts of a pleading is generally held to be too late after the movant has pleaded or demurred to it,[49] or at the trial,[50] or after the trial.[51] So the general rule is that noticing a cause for trial is a waiver of the right to move to strike out redundant matter.[52]

37. Barker *v.* Foster, 29 Minn. 166, 12 N. W. 460; Miln *v.* Vose, 4 Sandf. (N. Y.) 660.

The right to strike out paragraphs in a statement of defense as false, frivolous, or capricious is not lost by replying to other paragraphs. Mahon *v.* Laurence, 21 Nova Scotia 284.

But where a copy of a proposed amended pleading has been served and no objections made thereto and a motion made for leave to substitute such pleading for the original, it is too late to thereafter object to its falsity by motion to strike it as sham. Mussina *v.* Stillman, 13 Abb. Pr. (N. Y.) 93.

38. Kellogg *v.* Baker, 15 Abb. Pr. (N. Y.) 286.

39. Belsena Coal Min. Co. *v.* Liberty Dredging Co., 26 Misc. (N. Y.) 846, 55 N. Y. Suppl. 757 [*affirmed* in 27 Misc. 191, 57 N. Y. Suppl. 739].

40. Hogencamp *v.* Ackerman, 24 N. J. L. 133; Stokes *v.* Hagar, 1 Code Rep. (N. Y.) 84; Anonymous, 7 Hill (N. Y.) 146; Broome County Bank *v.* Lewis, 18 Wend. (N. Y.) 565; Brewster *v.* Hall, 6 Cow. (N. Y.) 34; Bedham *v.* Brabham, 54 S. C. 400, 32 S. E. 444; Bank of British North America *v.* Yetman, 26 Nova Scotia 481. See also Grant *v.* Jennings, 1 Coldw. (Tenn.) 53.

41. Allen *v.* Wheeler, 21 N. J. L. 93.

42. Brassington *v.* Rohrs, 3 Misc. (N. Y.) 258, 22 N. Y. Suppl. 761.

43. Church *v.* Syracuse Coal etc., Co., 32 Conn. 372.

44. Baines *v.* Higgins, 2 La. 220.

45. Martin *v.* McLaughlin, 9 Colo. 153, 10 Pac. 806; Johnson *v.* McCullough, 59 Ga. 212; Neal *v.* Moultrie, 12 Ga. 104; Smith *v.* Countryman, 30 N. Y. 655; Moss *v.* Witteman, 4 Misc. (N. Y.) 81, 23 N. Y. Suppl. 854.

After evidence closed.— A pleading will not be stricken out after the evidence is closed. Johnson *v.* McCullough, 59 Ga. 212.

After jury sworn.— A pleading should not be stricken from the files after the jury is sworn. Mumma *v.* McKee, 10 Iowa 107.

46. Freeman *v.* Curran, 1 Minn. 169; Garrett *v.* Beaumont, 24 Miss. 377; Zinsser *v.* Columbia Cab Co., 66 N. Y. App. Div. 514, 73 N. Y. Suppl. 287; Duval *v.* Malone, 14 Gratt. (Va.) 24.

47. Wyatt *v.* Headrick, 21 Ill. 158.

48. Ross *v.* Ross, 25 Hun (N. Y.) 642.

49. Savage *v.* Challiss, 4 Kan. 319; Sheehan, etc., Transp. Co. *v.* Sims, 36 Mo. App. 224; Roosa *v.* Saugerties, etc., Turnpike Road Co., 8 How. Pr. (N. Y.) 237; Corlies *v.* Delaplaine, 2 Code Rep. (N. Y.) 117. But see Little *v.* Bolles, 12 N. J. L. 171.

In New York, by rule of court, a motion to strike irrelevant, redundant, or scandalous matter from a pleading must be made before demurring or answering the pleading and within twenty days from the service thereof. Bowman *v.* Sheldon, 5 Sandf. 657; New York Ice Co. *v.* Northwestern Ins. Co., 12 Abb. Pr. 74; Roosa *v.* Saugerties, etc., Turnpike Road Co., 8 How. Pr. 237. And retention of the notice of motion by the attorney on whom served is not a waiver of delay in moving. Gibson *v.* Gibson, 68 Hun 381, 22 N. Y. Suppl. 813.

50. Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406; State *v.* Price, 15 Mo. 375; Sheehan, etc., Transp. Co. *v.* Sims, 36 Mo. App. 224.

Effect of mistrials.— If a motion to strike is in time if made before trial the fact that several mistrials have occurred will not make it too late. Lenhardt *v.* French, 68 S. C. 297, 47 S. E. 382. But see Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136.

51. Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136; Nockles *v.* Eggspieler, 53 Iowa 730, 6 N. W. 67; Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253.

But the matter is largely in the discretion of the court.— Osmun *v.* Winters, 30 Oreg. 177, 46 Pac. 780.

52. Freeman *v.* Curran, 1 Minn. 169.

But a motion to strike out allegations in a pleading is not waived by filing an answer after the motion has been noticed for hearing.[53]

e. Motion to Make More Definite and Certain. A motion to make a pleading more definite and certain must be made before trial,[54] and generally before issue joined on the pleading to which the motion relates.[55] So it is too late to move after having twice gone to trial upon the pleadings.[56] In some states, the motion, by statute or rule of court, must be made before demurring or answering and within twenty days from the service of the pleading.[57] An extension of time to answer, without reservation of any right to make a motion in respect to the complaint, does not extend the time to move to make the complaint more definite and certain,[58] but is a waiver of the right to move,[59] although of course, if the extension of time to answer includes the privilege to defendants to make any motion which they may be advised, a motion to make the complaint more definite and certain is thereafter proper.[60]

f. Motion to Compel Election. A motion to compel an election must generally be made before issue is joined on the merits,[61] or at least before trial,[62] although in some jurisdictions it may be granted at the trial, in a proper case, in the discretion of the court.[63]

g. Motion to Compel Separate Statement. A motion to compel the separate

53. Allen *v.* Cooley, 60 S. C. 353, 38 S. E. 622.

54. St. Louis, etc., R. Co. *v.* Snaveley, 47 Kan. 637, 28 Pac. 615; Grabbe *v.* St. Louis Drayage Co., 42 Mo. App. 522; Burley *v.* German American Bank, 111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406.

55. Hart *v.* Walker, 77 Ind. 331; Doman *v.* Bedunnah, 57 Ind. 219; Marr *v.* Barnes, 1 Rob. (La.) 190; De Carrillo *v.* Carillo, 53 Hun (N. Y.) 359, 6 N. Y. Suppl. 305; Gidley *v.* Gridley, 7 N. Y. Civ. Proc. 215. *Compare* Beaumond *v.* Diecks Pharmaceutical Extract Co., 5 N. Y. Civ. Proc. 274, 14 Abb. N. Cas. 100.

But where, by leave of court, the answer is withdrawn, defendant may move to have the complaint made more specific. Hart *v.* Walker, 77 Ind. 331.

After a general demurrer has been filed and overruled, a motion to make a petition more definite cannot be made. Caldwell *v.* Brown, 9 Ohio Cir. Ct. 691, 6 Ohio Cir. Dec. 694.

In Kansas a motion to make a petition more definite and certain is too late when made long after the issues were joined, and only when the case is called for trial, where the petition is fully traversed, has not been otherwise assailed, and is not clearly misleading. Phœnix Ins. Co. *v.* Arnoldy, 5 Kan. App. 174, 47 Pac. 178.

56. Nischke *v.* Wirth, 66 Wis. 319, 28 N. W. 342.

57. Borsuk *v.* Blaumer, 93 N. Y. App. Div. 306, 87 N. Y. Suppl. 851; McDonald *v.* Green, 28 Misc. (N. Y.) 55, 59 N. Y. Suppl. 787; Whaley *v.* Lawton, 53 S. C. 580, 31 S. E. 660. And see the statutes of the several states.

58. Post *v.* Blazewitz, 13 N. Y. App. Div. 124, 43 N. Y. Suppl. 59; Brooks *v.* Hanchett, 36 Hun (N. Y.) 70; McDonald *v.* Green, 28 Misc. (N. Y.) 55, 59 N. Y. Suppl. 787; Whaley *v.* Lawton, 53 S. C. 580, 31 S. E. 660. But see Young *v.* Lynch, 66 Wis. 514, 29 N. W. 224.

59. Post *v.* Blasewitz, 13 N. Y. App. Div. 124, 43 N. Y. Suppl. 59; Brooks *v.* Hanchett, 36 Hun (N. Y.) 70; Restorff *v.* Ehrich, 1 Month. L. Bul. (N. Y.) 33. *Contra*, Young *v.* Lynch, 66 Wis. 514, 29 N. W. 224.

But where the order extending defendant's time to answer forms a part of the order to show cause why the complaint should not be made more definite and certain, the rule does not apply. McDonald *v.* Green, 28 Misc. (N. Y.) 55, 59 N. Y. Suppl. 787.

60. Peart *v.* Peart, 48 Hun (N. Y.) 79; Hammond *v.* Earle, 5 Abb. N. Cas. (N. Y.) 105.

61. Kenton Ins. Co. *v.* Osborne, 51 S. W. 306, 21 Ky. L. Rep. 330; Diamond Coal Co. *v.* Carter Dry Goods Co., 49 S. W. 438, 20 Ky. L. Rep. 1444.

A motion to compel an election between two inconsistent defenses comes too late after joinder of issue by filing a reply. Vernon *v.* Union L. Ins. Co., 58 Nebr. 494, 78 N. W. 929.

62. *Connecticut.*— Bassett *v.* Shares, 63 Conn. 39, 27 Atl. 421.

Louisiana.— Gribble *v.* McKleroy, 14 La. Ann. 793; Cuny *v.* Brown, 12 Rob. 82. *Contra*, Montross *v.* Hillman, 11 Rob. 87, holding that it may be made at any time before judgment.

Missouri.— Wilson *v.* St. Louis, etc., R. Co., 67 Mo. App. 443.

New York.— American Dock, etc., Co. *v.* Staley, 40 N. Y. Super. Ct. 539; Whitbeck *v.* Kehr, 10 Daly 403.

Oregon.— Harvey *v.* Southern Pac. Co., 46 Oreg. 505, 80 Pac. 1061.

Pennsylvania.— Dives *v.* Fidelity, etc., Co., 206 Pa. St. 199, 55 Atl. 950.

South Carolina.— Ruff *v.* Columbia, etc., R. Co., 42 S. C. 114, 20 S. E. 27.

See 39 Cent. Dig. tit. "Pleading," § 1205.

63. Crafts *v.* Belden, 99 Mass. 535; Rhodes *v.* Pray, 36 Minn. 392, 32 N. W. 86; Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308; Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E.

statement and numbering of causes of action or defenses, being based on a technical objection, must be made promptly and at the first opportunity,[64] and cannot be made at or after the trial.[65]

4. Place For Motion. It must be made in the same county in which the venue of the action is laid, unless by consent of parties.[66]

5. Order of Proceedings.[67] Until one motion is disposed of another cannot be made covering the same ground.[68] As to whether a demurrer and motion to strike may be filed together against the same pleading, the better rule seems to be that the demurrer waives the motion,[69] but there is some authority to the contrary.[70] Under some decisions a party must first have a defective pleading stricken from the files before moving for judgment on the pleadings,[71] while in other jurisdictions the party may move to strike out the pleading and at the same time move for judgment on the pleadings;[72] or he may move for judgment on the pleadings, or move to strike out the answer and for judgment for want of an answer.[73] If no reply is filed, it is necessary, under some decisions, for defendant to obtain a rule to reply before he can take judgment on the pleadings.[74]

6. Notice of Motion.[75] Notice of the motion must ordinarily be given to the party or his attorney.[76] If the statute or court rule prescribes the length

348; Rochevot *v.* Wolf, 96 N. Y. App. Div. 506, 86 N. Y. Suppl. 142; Stokes *v.* Behrens, 23 Misc. (N. Y.) 442, 52 N. Y. Suppl. 251.

In New York, where a complaint sets forth two inconsistent causes of action, and defendant waits until the trial and then moves that plaintiff be compelled to elect between them, the court may decline to decide the motion until part or all of the evidence is taken, and a denial of the motion is so far discretionary that it will not be reviewed when it appears that defendant was not harmed. Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348; Einson *v.* North River Electric Light, etc., Co., 34 Misc. 191, 68 N. Y. Suppl. 836. Refusal, before evidence taken, to compel an election between alternative causes of action is not legal error. The motion for an election should be renewed after the evidence is in. Cram *v.* Springer Lith. Co., 10 Misc. 660, 31 N. Y. Suppl. 679.

64. French *v.* Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Wood *v.* Anthony, 9 How. Pr. (N. Y.) 78.

65. Krower *v.* Reynolds, 99 N. Y. 245, 1 N. E. 775.

66. Spiehler *v.* Asiel, 83 Hun (N. Y.) 223, 31 N. Y. Suppl. 584.

67. **Right to demur after filing motion for judgment on the pleadings** see *supra*, VI, E, 2, a.

68. Kellogg *v.* Baker, 15 Abb. Pr. (N. Y.) 286.

69. Cobb *v.* Ingalls, 1 Ill. 233; Wyman *v.* Hayes, 4 Ohio Dec. (Reprint) 262, 1 Clev. L. Rep. 178. See also Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258.

70. Alexander *v.* Foster, 16 Ark. 660.

Rule not inflexible.—The rule that a motion to strike out is barred by the interposition of a previous demurrer is not inflexible, as the object of the rule is protection to the court and to litigants from the interposition of purely dilatory pleas, and it will not operate to deprive the court of the power to protect itself from being overwhelmed by irrelevant and useless averments. Rabenstein *v.* Chicago Cottage Organ Co., 11 Ohio S. & C. Pl. Dec. 22, 8 Ohio N. P. 315.

71. Stromberg-Carlson Tel. Mfg. Co. *v.* Bisbee, 115 Ga. 346, 41 S. E. 573; Pritchard *v.* Huntington, 16 Wis. 569.

Under the Pennsylvania practice exceptions to the affidavit of defense must be filed before judgment can be rendered. Traders' Nat. Bank *v.* Wood, 6 Kulp 482.

72. Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

73. Hearst *v.* Hart, 128 Cal. 327, 60 Pac. 846.

74. Keokuk Falls Imp. Co. *v.* Kingsland, etc., Mfg. Co., 5 Okla. 32, 47 Pac. 484. See also *supra*, V, A, 2.

75. See, generally, Motions, 28 Cyc. 1.

76. *California.*— Arata *v.* Tellurium Gold, etc., Min. Co., 65 Cal. 340, 4 Pac. 195; Stevens *v.* Ross, 1 Cal. 94.

Kansas.— Cooper *v.* Condon, 15 Kan. 572.

Minnesota.—Farrington *v.* Wright, 1 Minn. 241.

New Jersey.— Darrow *v.* Van Scriver, 10 N. J. L. J. 284.

New York.— Rice *v.* Ehele, 55 N. Y. 518; Bates *v.* United L. Ins. Assoc., 68 Hun 144, 22 N. Y. Suppl. 626 [*affirmed* in 142 N. Y. 677, 37 N. E. 824]; Rogers *v.* Rathbone, 6 How. Pr. 66; Bigelow *v.* Whitehall Mfg. Co., 1 N. Y. City Ct. 138.

South Carolina.— Jackins *v.* Dickinson, 39 S. C. 436, 17 S. E. 996.

Texas.— Herndon *v.* Campbell, 86 Tex. 168, 23 S. W. 980.

Wisconsin.— Foote *v.* Carpenter, 7 Wis. 395.

See 39 Cent. Dig. tit. "Pleading," § 1070 *et seq.*

A notice of assessment and inquiry may be served with the notice of motion. Smith *v.* Rogers, 18 Wend. (N. Y.) 671.

Sufficiency.— A notice of motion for judgment on the pleadings specifying that the

of notice, the notice must be served in accordance therewith,[77] and when so fixed the court has no power to shorten it; [78] but if there is no such provision, reasonable notice is sufficient.[79] If the first notice is defective a supplementary notice may be served.[80]

7. Motion Papers — a. In General. A motion relating to the pleadings must generally be in writing.[81] The motion papers must specify the grounds upon which it rests and the defects complained of,[82] and only the grounds mentioned can be considered by the court.[83] So relief other than that specifically prayed for cannot be granted,[84] except where there is a prayer for general relief.[85] And a motion is properly denied where it is too broad in its scope and cannot be sustained as an entirety.[86] A motion to strike out a part of a pleading should designate with

motion would be made "upon the pleadings, papers, files, and records in said action, and upon the ground that the answer on file herein constitutes no defense to the cause of action, or any portion thereof, stated in said complaint" sufficiently states the grounds of the motion. Hearst *v.* Hart, 128 Cal. 327, 60 Pac. 846.

77. Reynolds *v.* Geraghty, 10 N. J. L. J. 301; Darrow *v.* Van Sciver, 10 N. J. L. J. 284; Gibson *v.* Gibson, 68 Hun (N. Y.) 381, 22 N. Y. Suppl. 813; Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657; Singleton *v.* Thornton, 9 N. Y. St. 600; Beal *v.* Union Paper Box Co., 4 N. Y. Civ. Proc. 18; New York Ice Co. *v.* Northwestern Ins. Co., 12 Abb. Pr. (N. Y.) 74; Lefferts *v.* Snediker, 1 Abb. Pr. (N. Y.) 41; Foote *v.* Carpenter, 7 Wis. 395.

78. Foote *v.* Carpenter, 7 Wis. 395.

79. Stevens *v.* Ross, 1 Cal. 94; Bash *v.* Christian, 84 Ind. 180.

80. Standard Sewing Mach. Co. *v.* Henry, 43 S. C. 17, 20 S. E. 790.

81. White *v.* St. Louis, etc., R. Co., 202 Mo. 539, 101 S. W. 14. But see Swinney *v.* Nave, 22 Ind. 178, holding that a motion to strike out a part of a pleading need not be in writing unless required by a rule of the court in which it is made.

82. *Florida.*— Hubbard *v.* Anderson, 50 Fla. 219, 39 So. 107.

Indiana.— Murphy *v.* Teter, 56 Ind. 546; Lucas *v.* Smith, 54 Ind. 530.

Minnesota.— Truesdell *v.* Hull, 35 Minn. 468, 29 N. W. 72.

Missouri.— Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

Montana.— Maddox *v.* Teague, 18 Mont. 512, 46 Pac. 535.

New Jersey.— Board of Home Missions *v.* Davis, (Ch. 1903) 55 Atl. 466.

Tennessee.— Johnson *v.* Brice, 112 Tenn. 59, 83 S. W. 791.

Motion for judgment on the pleadings must indicate the specific defect complained of. Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Holcraft *v.* King, 25 Ind. 352; Bigelow *v.* Whitehall Mfg. Co., 1 N. Y. City Ct. 138.

The notice of motion must fully inform the party of the character of the motion and if the notice assigns one ground, the motion cannot be made on another. Maury *v.* Van Arnum, 1 Hill (N. Y.) 370.

If leave has been granted to file a pleading, and it is filed in accordance therewith, a mere motion to strike such pleading should not be made but the motion should be to rescind the order granting leave and to strike the pleading. Horner *v.* Plumley, 97 Md. 271, 54 Atl. 971.

Where a petition contains inconsistent counts, the motion, in some states, should be in the alternative to strike from the petition one of the counts or to require plaintiff to elect as to the one upon which he will proceed to trial. Fox *v.* Graves, 46 Nebr. 812, 65 N. W. 887.

83. American Hardwood Lumber Co. *v.* Nickey, 89 Mo. App. 270; Maury *v.* Van Arnum, 1 Hill (N. Y.) 370. See also *infra*, XII, G, 8.

84. Ebling Brewing Co. *v.* Adler, 103 N. Y. Suppl. 93; Rae *v.* Washington Mut. Ins. Co., 6 How. Pr. (N. Y.) 21; Darrow *v.* Miller, 5 How. Pr. (N. Y.) 247, separate stating and numbering of defenses will not be ordered on a motion to strike redundant and irrelevant matter.

85. Thompson *v.* Erie R. Co., 45 N. Y. 468; Hecker *v.* Mitchell, 5 Abb. Pr. (N. Y.) 453, on a motion for judgment on the pleadings upon the ground of frivolousness of the answer, defense may be stricken out as frivolous under the prayer for other relief.

86. *Indiana.*— Corns *v.* Clouser, 137 Ind. 201, 36 N. E. 848, holding that if a motion to make more specific is addressed jointly to two or more paragraphs of a pleading, the motion will be denied if either paragraph is not subject to such motion.

Iowa.— Burlington Nat. State Bank *v.* Delahaye, 82 Iowa 34, 47 N. W. 999.

Missouri.— Jones *v.* Murray, 167 Mo. 25, 66 N. W. 981.

Nebraska.— Smith *v.* Meyers, 54 Nebr. 1, 74 N. W. 277; Chicago, etc., R. Co. *v.* Spirk, 51 Nebr. 167, 70 N. W. 926; German Ins. Co. *v.* Stiner, 2 Nebr. (Unoff.) 308, 96 N. W. 12?.

New York.— People *v.* Bell Tel. Co., 11 N. Y. St. 66. But see De Santes *v.* Searle, 11 How. Pr. 477.

Ohio.— Ambush *v.* Ford, 4 Ohio Dec. (Reprint) 238, 1 Clev. L. Rep. 149.

Tennessee.— Johnson *v.* Brice, 112 Tenn. 59, 83 S. W. 791.

Texas.— Graham *v.* Stephen, 15 Tex. 88; San Antonio Traction Co. *v.* Bryant, 30 Tex. Civ. App. 437, 70 S. W. 1015.

Wisconsin.— Gilbert *v.* Loberg, 86 Wis. 661, 57 N. W. 982; Jarvis *v.* McBride, 18 Wis. 316.

particularity the precise portions of the pleading which it is sought to have stricken,[87] and no other matter aside from that designated can be stricken out.[88] A motion to make more definite and certain should point out the specific defects of which complaint is made.[89] A motion to separately state and number causes of action or defenses should assign the reason for the separation,[90] and should point out wherein more than one cause of action or defense is stated.[91] On a motion to strike out portions of a pleading, it is not necessary for the moving papers to show that the motion was made in time, but the adverse party must show the negative if he relies thereon.[92] It is no objection to a motion that it attacks a pleading as both false and frivolous without pointing out which defense is false and which defense is frivolous.[93] A motion to strike out a paragraph on the ground that it is "incompetent, irrelevant, immaterial, and no defense" is sufficiently specific.[94] A motion to strike an answer as sham should not demand judgment, but if the motion is granted and nothing remains presenting an issue for trial and leave to amend is not given, judgment may be rendered at once.[95] A motion may contain a demand for different kinds of relief, as, for instance, that one defense be stricken as sham and for judgment on another as frivolous,[96] or that one defense be stricken out and another be made definite and certain.[97] But a motion to make a complaint more definite and certain or in the alternative for a bill of particulars is an improper joinder because one can only be made before and the other ordinarily only after pleading.[98] There is ordinarily no occasion for a motion to be verified.[99]

b. Affidavits — (i) *In General.* Affidavits in support should accompany the motion when it is based upon facts which are not apparent on the record,[1]

87. *Alabama.*— Adair *v.* Stone, 81 Ala. 113, 1 So. 768.

Colorado.— Colorado Springs Electric Co. *v.* Soper, 38 Colo. 141, 88 Pac. 165, holding that a motion to strike out "the latter part" of the foregoing answer was too indefinite.

Georgia.— Elder *v.* Johnson, 115 Ga. 691, 42 S. E. 51.

Iowa.— Keairnes *v.* Durst, 110 Iowa 114, 81 N. W. 238.

Missouri.— State *v.* Fleming, 147 Mo. 1, 44 S. W. 758; Pearce *v.* McIntyre, 29 Mo. 423; Anderson *v.* Stapel, 80 Mo. App. 115.

Nebraska.— Chicago, etc., R. Co. *v.* Spirk, 51 Nebr. 167, 70 N. W. 926; Stuht *v.* Sweesy, 48 Nebr. 767.

New York.— Bryant *v.* Bryant, 2 Rob. 612; Blake *v.* Eldred, 18 How. Pr. 240.

Ohio.— Osseforth *v.* Schroder, 6 Ohio S. & C. Pl. Dec. 447.

Tennessee.— Johnson *v.* Brice, 112 Tenn. 59, 83 S. W. 791.

See 39 Cent. Dig. tit. "Pleadings," § 1166.

A reference to the line and page of the pleading does not sufficiently specify the portion referred to. Lindley *v.* Kemp, 38 Ind. App. 355, 76 N. E. 798; Patterson *v.* Hollister, 32 Mo. 478.

88. Mott *v.* Burnett, 2 E. D. Smith (N. Y.) 50. But see Williamson *v.* London, etc., R. Co., 12 Ch. D. 787, 48 L. J. Ch. 559, 27 Wkly. Rep. 724, where, on motion to strike designated portions of a pleading, the entire pleading was stricken.

89. *Kansas.*— Kerr *v.* Reece, 27 Kan. 338; Gilmore *v.* Norton, 10 Kan. 491.

Minnesota.— Truesdell *v.* Hull, 35 Minn. 468, 29 N. W. 72.

Missouri.— O'Connor *v.* Koch, 56 Mo. 253.

Nebraska.— Fischer *v.* Coons, 26 Nebr. 400, 42 N. W. 417.

New York.— Bryant *v.* Bryant, 2 Rob. 612; Nineteenth Ward Bank *v.* Manhattan R. Co., 67 N. Y. Suppl. 598; Rathbun *v.* Markham, 43 How. Pr. 271.

Oklahoma.— Grimes *v.* Cullison, 3 Okla. 268, 41 Pac. 355.

South Carolina.— Long *v.* Hunter, 48 S. C. 178, 26 S. E. 228. *Contra*, where the defects are patent. Savage *v.* Sanders, 51 S. C. 495, 29 S. E. 248.

See 39 Cent. Dig. tit. "Pleadings," § 1189.

90. Hay *v.* State, 58 Ind. 337.

91. Ambrose *v.* Parrott, 28 Kan. 693; Western Union Tel. Co. *v.* Simpson, 10 Kan. App. 473, 62 Pac. 901.

92. Barber *v.* Bennett, 4 Sandf. (N. Y.) 705.

93. Bailey *v.* Lane, 21 How. Pr. (N. Y.) 475.

94. Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

95. Tharin *v.* Seabrook, 6 S. C. 113.

96. People *v.* McCumber, 18 N. Y. 315, 72 Am. Dec. 515.

97. National Distilling Co. *v* Cream City Importing Co., 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902.

98. Mutual L. Ins. Co. *v.* Granniss, 118 N. Y. App. Div. 830, 103 N. Y. Suppl. 835.

99. Bash *v.* Christian, 84 Ind. 180.

1. See *infra*, XII, G, 8.

An affidavit of defendant's attorney that he was informed by the clerk, and therefore believed, that the complaint was amended without leave of court, was not sufficient to support a motion to strike the amended complaint from the files on that ground. Smissaert *v.* Prudential Ins. Co., 15 Colo. App. 442, 62 Pac. 967.

In New Hampshire, where a plea appears sufficient on its face, so that a demurrer

but not otherwise.[2] Most of the motions relating to pleadings, including a motion for judgment on the pleadings,[3] a motion to strike out particular allegations in a pleading,[4] and a motion to make allegations more definite and certain,[5] are to be determined solely from an examination of the pleadings, and therefore affidavits are ordinarily improper,[6] except where the objection is that the plea is sham.[7] But where a pleading is attacked as evasive, the moving party may produce proof outside of the pleading to satisfy the court that the allegations are intended to evade a direct averment.[8] The fact that the moving papers on a motion to make more definite and certain contain an affidavit of merits does not require a denial of the motion on the ground that the detailed information is obviously unnecessary.[9]

(II) *To Show Pleading False.* It has been held that the falsity must appear on the face of the pleading or must be conceded by the party filing it,[10]

would not lie, yet there may be such facts connected with the plea, or with the issue to be tried upon it, as would render it proper, on a motion to reject the plea, to allow evidence to be taken and furnished to the court, and might warrant the court in rejecting the plea when a demurrer could not be sustained Wells *v.* Jackson Iron Mfg. Co., 44 N. H. 61.

2. Mast *v.* Wells, 110 Iowa 128, 81 N. W. 230 (construing statute); Ford *v.* Mattice, 14 How. Pr. (N. Y.) 91.

Identity of counts.— On a motion to set aside a complaint because several distinct causes of action for the same indebtedness are set forth in different counts and it appears on the face of the complaint that the several counts are really for the same thing, no affidavit by defendant is required as proof that there is really but one cause of action against him. Ford *v.* Mattice, 14 How. Pr. (N. Y.) 91.

3. Dancel *v.* Goodyear Shoe Mach. Co., 67 N. Y. App. Div. 498, 73 N. Y. Suppl. 875; Platt, etc., Refining Co. *v.* Hepworth, 13 N. Y. Civ. Proc. 122; Beal *v.* Union Paper Box Co., 4 N. Y. Civ. Proc. 18; Darrow *v.* Miller, 5 How. Pr. (N. Y.) 247; Sigmund *v.* Minot Bank, 4 N. D. 164, 59 N. W. 966.

4. Noval *v.* Haug, 48 Misc. (N. Y.) 198, 96 N. Y. Suppl. 708.

5. *Colorado.*— Commonwealth Co. *v.* Nunn, 17 Colo. App. 117, 67 Pac. 342.

Minnesota.— Todd *v.* Minneapolis, etc., R. Co., 37 Minn. 358, 35 N. W. 5.

New York.— Hopkins *v.* Hopkins, 28 Hun 436; Cook *v.* Matteson, 11 N. Y. Suppl. 572, 19 N. Y. Civ. Proc. 321; Brown *v.* Southern Michigan R. Co., 6 Abb. Pr. 237.

Ohio.— Caldwell *v.* Brown, 9 Ohio Cir. Ct. 691, 6 Ohio Cir. Dec. 694; Block *v.* Standard Distilling, etc., Co., 10 Ohio S. & C. Pl. Dec. 409, 8 Ohio N. P. 236.

Wisconsin.— Orton *v.* Noonan, 18 Wis. 447.

See 39 Cent. Dig. tit. "Pleading," § 1175.

In Kentucky, however, on motion to make a pleading more definite and certain, it has been held that the moving party must show, by affidavit or otherwise, that the required information is not in his possession. Howard *v.* Western Union Tel. Co., 76 S. W. 387, 25 Ky. L. Rep. 828.

6. Beasley *v.* Huyett, etc., Mfg. Co., 92 Ga. 273, 18 S. E. 420; Stewart *v.* Forst, 15 Misc. (N. Y.) 621, 37 N. Y. Suppl. 215.

In Vermont, however, on motion to dismiss an amended count in the declaration on the ground that it introduced a new cause of action, it is error to refuse to receive extrinsic evidence. Geroux *v.* Graves, 62 Vt. 280, 19 Atl. 987.

7. See *infra*, XII, G, 7, b, (II).

8. Colter *v.* Greenhagen, 3 Minn. 126.

9. McGehee *v.* Cooke, 55 Misc. (N. Y.) 40, 105 N. Y. Suppl. 60.

10. Sweetman *v.* Ramsey, 22 Mont. 323, 56 Pac. 361. See also Upton *v.* Kennedy, 36 Nebr. 66, 53 N. W. 1042.

Verified pleading.— The court will not determine on affidavits whether a pleading is sham where it is verified by affidavit. Pacific Mill Co. *v.* Inman, (Oreg. 1907) 90 Pac. 1099.

In Indiana the code of 1881 authorizes the striking of an answer or other pleading as sham either when it plainly appears on its face to be false in fact and intended merely for delay, or when shown to be so by the answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false. Tilden *v.* Louisville, etc., Ferry Co., 157 Ind. 532, 62 N. E. 31; Lowe *v.* Thompson, 86 Ind. 503. Prior to the enactment of this statute, the cases established a different rule. Mooney *v.* Musser, 34 Ind. 373; Boggess *v.* Davis, 34 Ind. 82; Beeson *v.* McConnaha, 12 Ind. 420; Brown *v.* Lewis, 10 Ind. 232; Walpole *v.* Cooper, 7 Blackf. 100; Burns Rev. St. (1901) § 385, providing that a pleading shall be rejected as sham when shown to be so by answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false, does not authorize the court to strike out a pleading as sham upon answers of the party to interrogatories propounded to him upon his examination before trial, under Burns Rev. St. (1901) § 517, providing for examination of an adverse party as a witness before trial. Stars *v.* Hammersmith, 31 Ind. App. 610, 67 N. E. 554. Such statute does not authorize the court to reject a pleading upon answers to interrogatories tending to show that the facts averred in the pleading were false, where the court could only reach the conclusion that the allegations were false by weighing and balancing the probabilities arising from certain inferences to be drawn from physical facts stated in such answer. Pittsburgh, etc., R. Co. *v.* Fraze, 150 Ind. 576, 50 N. E. 576, 65 Am. St. Rep. 377.

and that it cannot be established merely by affidavits.[11] Inasmuch, however, as a sham defense is sufficient in form, it is usually good upon its face, and, as some courts have pointed out, it is difficult to see how its sham character can be shown except from something outside of itself.[12] The general rule seems to be that affidavits may be employed in support of the motion, when it rests upon facts *dehors* the record,[13] but that affidavits are not necessary when the record fully discloses the grounds and occasion for the motion.[14]

8. Scope of Inquiry. On a motion for judgment on the pleadings, the only facts to be considered are those appearing in the pleadings themselves.[15] On a motion to set aside the complaint for failure to state a cause of action made at the opening of the trial all the pleadings may be looked into and examined for the purpose of seeing whether a cause of action has been set forth.[16] The same questions are presented to the court on motion to strike a pleading as on a motion for leave to file it.[17] Upon a motion to strike a plea the court will not inquire into the sufficiency of the replication,[18] and all or part of a pleading may be stricken irrespective of defects in a prior pleading, since a motion to strike does not raise the question of the sufficiency of former pleadings, that is, it does not search the record like a demurrer.[19] Similarly a motion to make more definite and certain does not search the record.[20] However, if the fault in the pleading sought to be

11. Brown *v.* Lewis, 10 Ind. 232; Walpole *v.* Cooper, 7 Blackf. (Ind.) 100; McDonald *v.* Pincus, 13 Mont. 83, 32 Pac. 283; Webb *v.* Foster, 45 N. Y. Super. Ct. 311; Farnsworth *v.* Halstead, 10 N. Y. Suppl. 763, 18 N. Y. Civ. Proc. 227. See City Bank *v.* Doll, 33 Minn. 507, 24 N. W. 300.

12. Cochrane *v.* Parker, 5 Colo. App. 527, 39 Pac. 361; Duffield *v.* Denver, etc., R. Co., 5 Colo. App. 25, 36 Pac. 622.

In England the court may receive evidence on a motion to strike out a pleading as sham for the purpose of showing that it is an abuse of the process of the court. Remmington *v.* Scoles, [1897] 2 Ch. 1, 66 L. J. Ch. 526, 76 L. T. Rep. N. S. 667, 45 Wkly. Rep. 580.

13. Patrick *v.* McManus, 14 Colo. 65, 23 Pac. 90, 20 Am. St. Rep. 253; People *v.* Mccumber, 18 N. Y. 315, 72 Am. Dec. 515; Martin *v.* Erie Preserving Co., 48 Hun (N. Y.) 81; Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670; Wirgman *v.* Hicks, 6 Abb. Pr. (N. Y.) 17; Tucker *v.* Ladd, 4 Cow. (N. Y.) 47; Wertheimer *v.* Morse, 10 Ohio Dec. (Reprint) 814, 23 Cinc. L. Bul. 455; Tharin *v.* Seabrook, 6 S. C. 113.

Compelling affidavit.— Where a defendant has filed an answer, good in form, to which a reply has also been filed, he cannot be compelled at the instance of plaintiff to give an affidavit or deposition before a notary public, to be used on the hearing of a motion to strike from the files the answer, upon the ground that it is false, and therefore a sham. *In re* Bartholomew, 41 Kan. 273, 21 Pac. 275.

14. Lawrence *v.* Derby, 24 How. Pr. (N. Y.) 133.

15. *Arizona.*— Miles *v.* McCallan, 1 Ariz. 491, 3 Pac. 610.

California.— Hibernia Sav., etc., Soc. *v.* Thornton, 117 Cal. 481, 49 Pac. 573.

Colorado.— Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241.

Pennsylvania.— See Kerr *v.* Culver, 209 Pa. St. 14, 57 Atl. 1105.

United States.— Daggs *v.* Phœnix Nat. Bank, 177 U. S. 549, 20 S. Ct. 732, 44 L. ed. 882.

But a stipulation filed may be looked to, in connection with the pleadings, in passing upon the motion. Kendall *v.* San Juan Silver Min. Co., 9 Colo. 349, 12 Pac. 198.

Even after verdict the motion must be decided in accordance with the record, without any reference to the evidence. Hurt *v.* Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823.

Upon a motion by defendant for judgment upon the pleading on the ground that the complaint fails to state a cause of action, the court cannot consider any matter outside of the complaint or any defense thereto in the answer, but the motion is to be determined upon the same principles as would be a demurrer to the complaint upon the same ground. Hibernia Sav., etc., Soc. *v.* Thornton, 117 Cal. 481, 49 Pac. 573.

16. Youmans *v.* Paine, 86 Hun (N. Y.) 479, 35 N. Y. Suppl. 50 [*reversed* on other grounds in 153 N. Y. 214, 47 N. E. 265].

17. Pool *v.* Hill, 44 Miss. 306.

Oral statement of counsel.— Where a motion is made to strike out a plea, the sufficiency thereof must be determined upon a consideration of the actual contents of the plea and not an oral statement by counsel as to the contents thereof. Bates *v.* Dalton First Nat. Bank, 111 Ga. 756, 36 S. E. 949.

18. Broome County Bank *v.* Lewis, 18 Wend. (N. Y.) 565.

19. Polak *v.* Hudson, (N. J. Sup. 1886) 6 Atl. 499; Hogencamp *v.* Ackerman, 24 N. J. L. 133; Thomas *v.* Loaners' Bank, 38 N. Y. Super. Ct. 466; Kidder County *v.* Foye, 10 N. D. 124, 87 N. W. 984; Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320. But see Winne *v.* Sickles, 9 How. Pr. (N. Y.) 217; McPherson *v.* Melhinch, 20 Wend. (N. Y.) 671. *Contra*, Smith *v.* Mulliken, 2 Minn. 319; Paxon *v.* Talmage, 87 Mo. 13.

20. Smith *v.* Kibling, 97 Wis. 205, 72 N. W. 869.

stricken is due to the prior fault of the moving party, this may justify the court in overruling the motion.[21] Upon a motion to strike out a portion of a pleading,[22] or to make it more definite and certain,[23] the question of the legal sufficiency of the pleading cannot be raised. If a motion to strike out portions of a pleading applies to all but an insignificant portion thereof it will be considered as aimed at the pleading as a whole.[24] If a pleading is amended after a motion to strike has been filed, the motion must be renewed if the pleading is still deemed objectionable, since the original motion no longer applies.[25] If a ruling is correct when made, it cannot be made erroneous by a subsequent alteration of the pleading which has been attacked.[26]

9. Order. An order to strike out portions of a pleading should specify particularly the matter to be stricken,[27] while an order to make a pleading more definite and certain should state in what particulars the pleading is to be amended.[28] An order which effects a radical reformation of a pleading by striking out certain parts thereof should provide for the service of the reformed pleading.[29] An order is equally erroneous whether it strikes out too much or too little.[30] Where a motion to make more definite and certain is sustained and an amendment is ordered, together with the payment of costs by the party whose pleading is held defective, the payment of costs is not a condition precedent to the right to file the amended pleading, unless expressly so stated.[31] An order requiring a complaint to be made more definite and certain, where the pleading contains allegations other than the indefinite ones, constituting a good cause of action, should not provide that on the failure of plaintiff to remedy the defect the entire complaint is to be stricken out, but should order that upon failure to comply such indefinite allegations should be stricken out.[32] The striking out of a separate count in a complaint does not include a claim for damages at the conclusion of the entire complaint and following the count stricken out, where such demand is applicable to the entire complaint.[33] If an amended pleading is improperly filed without leave, and a motion to strike it is overruled, this is equivalent to granting leave to file it.[34] A court cannot be permitted to change its ruling after years have intervened, to the prejudice of parties who have relied on the first ruling.[35]

21. McPherson *v.* Melhinch, 20 Wend. (N. Y.) 671.

22. Brisbin *v.* American Express Co., 15 Minn. 43; Hagerty *v.* Andrews, 94 N. Y. 195; Brien *v.* Clay, 1 E. D. Smith (N. Y.) 649; McGregor *v.* McGregor, 35 How. Pr. (N. Y.) 385; Kidder County *v.* Foye, 10 N. D. 424, 87 N. W. 984; Kizer *v.* Canfield, 17 Wash. 417, 49 Pac. 1064.

23. Jackson County *v.* Nichols, 139 Ind. 611, 38 N. E. 526; American Book Co. *v.* Kingdom Pub. Co., 71 Minn. 363, 73 N. W. 1089.

24. Cardeza *v.* Osborn, 32 Misc. (N. Y.) 46, 65 N. Y. Suppl. 450 [*affirmed* in 54 N. Y. App. Div. 626, 66 N. Y. Suppl. 1128].

25. Protection L. Ins. Co. *v.* Foote, 79 Ill. 361.

26. Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

27. Mullen *v.* Wine, 9 Colo. 167, 11 Pac. 54.

Illustrations.—A motion to strike out parts of answer specifically quoted the parts of the pleading attacking the validity of insolvency proceedings sought to be struck out, and the order was that the motion "be and the same is hereby granted as to all those portions of the answer which attack the validity of the insolvency proceedings referred to therein." It was held that, although it would have been better if the order had quoted in full the parts ordered stricken out, or referred to them by line and page, still it clearly indicated what was meant and in the absence of proof of prejudice, it would be presumed harmless. Riego *v.* Foster, 125 Cal. 178, 57 Pac. 896.

Construction of order.—An order of court authorizing the striking out of a pleading on the ground that it discloses no reasonable cause of action or answer, or where the pleading is frivolous or vexatious, does not apply so as to authorize the striking out of part of the pleading. Smith *v.* Traders Bank, 11 Ont. L. Rep. 24, 6 Ont. Wkly. Rep. 748.

28. Hubbard *v.* Anderson, 50 Fla. 219, 39 So. 107; Long *v.* Hunter, 48 S. C. 179, 26 S. E. 228; Nischke *v.* Wirth, 66 Wis. 319, 28 N. W. 342.

29. Waltham Mfg. Co. *v.* Brady, 67 N. Y. App. Div. 102, 73 N. Y. Suppl. 540.

30. Collins *v.* Coggill, 7 Rob. (N. Y.) 81.

31. Sturtevant *v.* Fairman, 4 Sandf. (N. Y.) 674.

32. Harrington *v.* Stillman, 120 N. Y. App. Div. 659, 105 N. Y. Suppl. 75.

33. Baltimore, etc., R. Co. *v.* Whitehill, 104 Md. 295, 64 Atl. 1033.

34. McCollum *v.* Lougan, 29 Mo. 451.

35. Brannan *v.* Paty, 58 Cal. 330.

10. Effect of Sustaining or Overruling Motion. The granting of leave to strike out a pleading constitutes a striking out;[36] and it is not necessary that allegations which have been ordered stricken should be literally taken out of the pleading, but they may be treated as though they did not appear there.[37] After a pleading has been stricken from the files it ceases to be a part of the record and is to be considered as though it had never been filed;[38] in which respect it differs from a pleading which has been held bad on demurrer,[39] or on motion for judgment on the pleadings.[40] It can be made a part of the record only by a bill of exceptions.[41] If only a portion is stricken the party may go to trial on what is left.[42] Where an amended pleading is stricken from the files the original pleading is restored,[43] and where a plea *puis darrein continuance* is stricken, the former pleas are restored.[44] Where a petition has been stricken for want of verification, the suit is dismissed and on verifying the petition a new summons issues together with a new service thereof.[45] Where a claim of set-off is pleaded to a count of a declaration, and such count is dismissed, the dismissal carries with it the claim for set-off, as each count and the defense thereto constitutes a separate and distinct cause of action.[46] But if one plea of the general issue is stricken, a notice of new matter thereunder may be considered a notice under another plea which remains.[47] After a plea has been stricken out as false, another plea setting up the same defense in different form cannot be received.[48] A party at whose instance a pleading is stricken from the files is estopped to assert that the motion was not well taken.[49] The rendering of judgment on the pleadings is in effect a denial of permission to intervene when a petition of intervention is on file without leave of court.[50] A motion once overruled is not subject to be called up again and reheard until the order overruling it has been set aside on motion.[51]

11. Amending and Pleading Over. The court may, in its discretion, allow a party to plead anew or plead over after a pleading or demurrer has been stricken from the files,[52] or after a motion for judgment on the pleadings,[53] if a merito-

36. Sinsheimer *v.* William Skinner Mfg. Co., 54 Ill. App. 151.

37. King *v.* Bell, 13 Nebr. 409, 14 N. W. 41; Jaekson *v.* Belknap, 7 Johns. (N. Y.) 300.

38. Wyatt *v.* Headriek, 21 Ill. 158.

Perfecting judgment.— When a pleading is stricken, the opposite party proeeeds to perfeet judgment precisely as if no pleading had been put in. De Forest *v.* Baker, 1 Rob. (N. Y.) 700; Farmers', etc., Bank *v.* Sawyer, 7 Wis. 379.

39. Colter *v.* Greenhagen, 3 Minn. 126.

When a demurrer is sustained to a pleading, the party has a right to amend, but when a pleading is stricken out it eannot be amended for it is out of the record. Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248.

40. Briggs *v.* Bergen, 23 N. Y. 162; Colt *v.* Davis, 50 Hun (N. Y.) 366, 3 N. Y. Suppl. 354; Carpenter *v.* Bell, 1 Rob. (N. Y.) 711; Halliday *v.* Barber, 38 Mise. (N. Y.) 116, 77 N. Y. Suppl. 98.

41. Baker *v.* Arctic Ditchers, 54 Ind. 310. See also Appeal and Error, 3 Cyc. 159.

42. Mumford *v.* Keet, 154 Mo. 36, 55 S. W. 271.

Striking one of the counts from the complaint, where the eomplaint sets up a cause of action in two or more separate counts, is not a bar to the prosecution of the suit upon the other counts. Gainesville, etc., Electric R. Co. *v.* Austin, 127 Ga. 120, 56 S. E. 254.

43. Spooner *v.* Cady, (Cal. 1894) 36 Pac. 104; Bealle *v.* Day, 28 Ga. 435; Hill *v.* Jamieson, 16 Ind. 125, 79 Am. Dec. 414; Frank *v.* Bush, 63 How. Pr. (N. Y.) 282.

44. Dinet *v.* Pfirshing, 86 Ill. 83.

45. Stevens *v.* White, 2 Ohio Dec. (Reprint) 107, 1 West. L. Month. 107.

46. Martin *v.* MeLean, 49 Mo. 361.

47. Whitehall *v.* Smith, 24 Ill. 178.

48. Upper Canada Bank *v.* Ketehum, 4 Can. L. J. 69.

49. Herrod *v.* Smith, 12 Ind. App. 21, 38 N. E. 870.

50. Westeott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021.

51. Townsend *v.* Wisner, 62 Iowa 672, 18 N. W. 304; Home Missions Bd. *v.* Davis, (N. J. Ch. 1903) 55 Atl. 466.

52. Guth *v.* Lubaeh, 73 Wis. 131, 40 N. W. 681, statute. *Compare* Morrison-Trammell Brick Co. *v.* MeWilliams, 127 Ga. 159, 56 S. E. 306.

53. Fitzgerald *v.* Neustadt, 91 Cal. 600, 27 Pac. 936; Bergerow *v.* Parker, 4 Cal. App. 169, 87 Pac. 248; Snyder *v.* Phillips, 66 Iowa 484, 24 N. W. 7; Fales *v.* Hicks, 12 How. Pr. (N. Y.) 153; Morgan *v.* Harris, 141 N. C. 358, 54 S. E. 381.

If it is evident that no amendment can help the party's ease the motion may be granted at once. Baxter *v.* State, 17 Wis. 588.

If the amendment cures the defect the motion for judgment will be denied. Currie *v.* Baldwin, 4 Sandf. (N. Y.) 690.

rious cause of action or defense is shown.[54] But statutes authorizing pleading over after demurrer sustained have been held not applicable where the pleading is stricken out on motion.[55] Failure to apply for leave to amend will be deemed a waiver of the privilege and judgment will be entered.[56]

12. Judgment on Pleadings. Inasmuch as this species of judgment, like a judgment on demurrer, rests upon the pleadings, there can be no finding of facts where such a judgment is rendered.[57] The judgment is a judgment on the merits.[58] At common law such a judgment is called *nil dicit*,[59] and when plaintiff fails to file any pleading which he is required to file, judgment of *non prosequitur*, or "*non pros*" may be rendered against him.[60] If the damages sought are liquidated, a judgment on the pleadings will be for such sum, but when unliquidated, the judgment can be for only nominal damages,[61] unless proceedings to determine the damages are had,[62] or the judgment may be in the form proper where nothing is left to be ascertained but the amount of damages.[63]

13. Error in Rulings as Ground For Reversal.[64] An erroneous refusal to strike out a pleading has been held not available error.[65] So the erroneously striking out a pleading which is bad on demurrer is not reversible error,[66] nor is

54. Cooney *v.* Murdock, 54 Mo. 349; Burrall *v.* Bowen, 21 How. Pr. (N. Y.) 378; Aymar *v.* Chase, Code Rep. N. S. (N. Y.) 141; Geilfuss *v.* Gates, 87 Wis. 395, 58 N. W. 742.

But one whose answer has been struck out as frivolous should not afterward be permitted to state another defense known to him when he filed his frivolous answer, and purposely withheld. Stedeker *v.* Bernard, 10 Daly (N. Y.) 466.

55. Guthrie *v.* Howland, 164 Ind. 214, 73 N. E. 259.

In Missouri, under a statute providing that if a third petition, answer, or reply is filed or adjudged insufficient on demurrer or the whole or some part thereof is stricken out, the party filing such pleading shall pay treble costs and no further petition, answer or reply shall be filed but judgment shall be rendered, does not apply where a motion to strike out portions of a third amended petition is sustained, leaving sufficient allegations to constitute a cause of action, since the statute applies only when a motion or demurrer destroys the pleading. B. Roth Tool Co. *v.* Champ Spring Co., 122 Mo. App. 603, 99 S. W. 827.

56. Chase *v.* Wright, 116 Iowa 555, 90 N. W. 357; Schmid *v.* Arguimban, 46 How. Pr. (N. Y.) 105.

57. Miles *v.* McCallan, 1 Ariz. 491, 3 Pac. 610; Eaton *v.* Wells, 82 N. Y. 576.

58. Mills *v.* Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291. *Compare* Hackett *v.* Masterson, 88 N. Y. App. Div. 73, 84 N. Y. Suppl. 751.

Mo. Rev. St. (1889) § 2068, providing that, where a party has filed three defective petitions, he shall pay treble costs, and no further petition shall be filed, "but judgment shall be rendered," authorizes judgment only for treble costs, and not on the merits. Gordon *v.* Burris, 125 Mo. 39, 28 S. W. 191.

Equivalent to confession of judgment.—A judgment rendered on the pleadings for want of a sufficient affidavit of defense is equivalent to a confession of judgment so far as the sufficiency of plaintiff's statement is concerned. Applegate *v.* Cohn, 38 Wkly. Notes Cas. (Pa.) 259.

59. Hunt *v.* Mansur, 5 Blackf. (Ind.) 214; Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347; Cox *v.* Capron, 10 Mo. 691; Briggs *v.* Sholes, 14 N. H. 262. See also Judgments, 23 Cyc. 734.

60. Gaston *v.* Parsons, 8 Port. (Ala.) 469; Wade *v.* Doyle, 17 Fla. 522; Pearl *v.* Wellman, 8 Ill. 311; People *v.* Reuter, 88 Ill. App. 586; Henderson *v.* Maryland Home F. Ins. Co., 90 Md. 47, 44 Atl. 1020. See also Dismissal and Nonsuit, 14 Cyc. 442, 443; Judgments, 23 Cyc. 735.

61. Scribner *v.* Levy, 4 N. Y. Suppl. 918; Shattuc *v.* McArthur, 25 Fed. 133.

Judgment will not be given for an unconscionable amount such as one thousand dollars attorney's fees for collecting fifty dollars. Bay *v.* Trusdell, 92 Mo. App. 377.

Under the English practice, where plaintiff's liquidated demand is admitted and a counter-claim for an unliquidated demand is filed an order on defendants to pay the amount of plaintiff's demand into court pending the result of the action will be made only when the counter-claim is frivolous. Mersey Steamship Co. *v.* Shuttleworth, 11 Q. B. D. 531, 52 L. J. Q. B. 522, 48 L. T. Rep. N. S. 625, 32 Wkly. Rep. 245.

62. Cordner *v.* Roberts, 58 Mo. App. 440.

63. Guilhon *v.* Lindo, 9 Bosw. (N. Y.) 605.

64. Waiver of error in rulings by pleading over see *infra*, XIV, H.

Sustaining demurrer to petition which should have been stricken on motion as harmless error see *supra*, VI, A.

65. Duncan *v.* Hargrove, 22 Ala. 150; Hart *v.* Scott, 168 Ind. 530, 81 N. E. 481; Brickley *v.* Edwards, 131 Ind. 3, 30 N. E. 708; Crawford *v.* Anderson, 129 Ind. 117, 28 N. E. 314; Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784; Missouri Glass Co. *v.* Copeland Sewing Mach. Co., 88 Mo. 57.

66. *Arkansas.*— Mitchell *v.* Real Estate Bank, 4 Ark. 513.

erroneously striking a replication where the declaration fails to state a cause of action,[67] or erroneously striking material allegations where the evidence to support them was in fact admitted;[68] but it is ordinarily reversible error to strike out a material allegation which is properly pleaded.[69] Erroneously refusing to grant a motion to strike out portions of a pleading,[70] or to make it more definite and certain,[71] is not reversible error, where the party suffers no prejudice thereby. For instance there is no prejudicial error in striking out allegations of facts which are admissible in evidence under other portions of the pleading,[72] or in refusing to strike out such allegations.[73] But if the error is manifest,[74] and prejudice results, refusal to sustain such a motion in a proper case is reversible error.[75] It is not reversible error to strike out a demurrer unless the pleading demurred to was in fact demurrable.[76] Error in refusing judgment on the pleadings is immaterial if the party applying for it subsequently obtains a judgment on the evidence.[77]

XIII. ISSUES, PROOF, AND VARIANCE.[78]

A. Issue — 1. Definition and General Considerations. Issues are the questions in dispute between the parties to an action.[79] They may be issues of law or

Illinois.— Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263.

Indiana.— Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248.

Iowa.— McIntosh *v.* Coulthard, (1902) 88 N. W. 1069; Rhoadabeck *v.* Blair Town Lot, etc., Co., 62 Iowa 368, 17 N. W. 582.

Wisconsin.— Moore *v.* May, 117 Wis. 192, 94 N. W. 45.

See 39 Cent. Dig. tit. "Pleading," § 1144.

Where a demurrer is sustained to a plea, a motion thereafter made to strike such plea from the files is superfluous and the sustaining thereof cannot injure defendant. Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263.

67. Moffet *v.* Brown, 16 Ill. 91.

68. Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679.

69. Dill *v.* O'Ferrell, 45 Ind. 268; Murray *v.* Haldorn, 25 Mont. 218, 64 Pac. 511, 69 Pac. 835.

70. *Alabama.*— Marx *v.* Miller, 134 Ala. 347, 32 So. 765; Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432; Columbus, etc., R. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58.

Indiana.— Petree *v.* Brotherton, 133 Ind. 692, 32 N. E. 300; Lewis *v.* Godman, 129 Ind. 359, 27 N. E. 563; Walker *v.* Larkin, 127 Ind. 100, 26 N. E. 684; Aetna L. Ins. Co. *v.* Deming, 123 Ind. 384, 24 N. E. 86, 375; Hudson *v.* Houser, 123 Ind. 309, 24 N. E. 243; Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514; Crawfordsville *v.* Brundage, 57 Ind. 262; Koehring *v.* Aultman, 7 Ind. App. 475, 34 N. E. 30; Garn *v.* Working, 5 Ind. App. 14, 34 N. E. 821.

Iowa.— Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235.

Nebraska.— German Ins. Co. *v.* Stiner, 2 Nebr. (Unoff.) 308, 96 N. W. 122.

Washington.— Davis *v.* Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

See 39 Cent. Dig. tit. "Pleading," § 1172.

Surplusage.— There is no available error in denying a motion to strike mere surplusage from a pleading. Rout *v.* Woods, 67 Ind. 319.

An error committed in overruling a motion to strike out matter from a pleading can be corrected by objecting and excepting to the admission of the evidence tending to establish such issues, and also requesting an instruction not to consider such evidence, which, if denied, will be reviewed on appeal. Brownell *v.* Salem Flouring Mills Co., 48 Oreg. 525, 87 Pac. 770.

71. Romona Oolitic Stone Co. *v.* Tate, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529; Dwelle *v.* Dwelle, 1 Kan. App. 473, 40 Pac. 825.

72. Hallock *v.* Iglehart, 30 Ind. 327.

73. Cate *v.* Gilman, 41 Iowa 530; Citizens' Bank *v.* Emley, (Nebr. 1906) 107 N. W. 1014.

74. Lombard *v.* Citizens' Bank, 107 La. 183, 31 So. 654.

75. *Indiana.*— Tipton Light, etc., Co. *v.* Newcomer, 156 Ind. 348, 58 N. E. 842.

Indian Territory.— Tishomingo Electric Light, etc., Co. *v.* Burton, 6 Indian Terr. 445, 98 S. W. 154.

Iowa.— Hurd *v.* Ladner, 110 Iowa 263, 81 N. W. 470.

Kansas.— Roe *v.* Elk County, 1 Kan. App. 219, 40 Pac. 1082.

Washington.— Griffith *v.* Wright, 21 Wash. 494, 58 Pac. 582.

But see McDuffie *v.* Bentley, 27 Nebr. 380, 43 N. W. 123.

76. Wood *v.* Meyer, (Miss. 1890) 7 So. 359; Hurlburt *v.* Marshall, 62 Wis. 590, 22 N. W. 852; Hoffman *v.* Wheelock, 62 Wis. 434, 22 N. W. 713, 716.

77. Holmes *v.* Wood, 88 N. Y. 650.

78. As to conformity of judgment with pleading see JUDGMENTS, 23 Cyc. 816.

As to issues, proof and variance in actions on bonds see BONDS, 5 Cyc. 836.

As to issues, proof and variance in actions by servants for personal injuries see MASTER AND SERVANT, 26 Cyc. 1405.

79. Wolcott *v.* Wigton, 7 Ind. 44; New

of fact.[80] An issue of law ordinarily arises upon a demurrer.[81] An issue of fact arises upon a denial of an allegation made by the opposite party.[82] As a general rule issues arise upon the pleadings in a cause.[83] But it is not necessary in order to present a good issue that the pleadings shall be in every respect regular.[84] When an issue is once reached the cause is deemed at issue notwithstanding the right to amend still exists.[85]

2. NECESSITY FOR ISSUE. It is necessary that the parties, in the course of their pleadings, should finally come to issue on some single, certain, and material point in order that they may come to trial prepared with their evidence, and not be taken by surprise, and that the time of the court may not be consumed and the jury misled by the introduction of various irrelevant matters.[86]

York, etc., Land Co. *v.* Votaw, 16 Tex. Civ. App. 585, 42 S. W. 138; Barnes *v.* Dow, 59 Vt. 530, 10 Atl. 258; Hollister *v.* Young, 42 Vt. 403.

Issue defined.— An issue is a single, certain, and material point arising out of the allegations or pleadings of the parties to an action, and ordinarily affirmed on one side and denied on the other. Simonton *v.* Winter, 5 Pet. (U. S.) 141, 8 L. ed. 75. And see Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653; Seller *v.* Jenkins, 97 Ind. 430; Richardson *v.* Smith, 80 Md. 94, 30 Atl. 570; McCart *v.* Regester, 68 Md. 429, 13 Atl. 361; Barth *v.* Rosenfeld, 36 Md. 604; Marshall *v.* Haney, 9 Gill (Md.) 251; Solomons *v.* Chesley, 57 N. H. 163; People *v.* Slauson, 85 N. Y. App. Div. 166, 83 N. Y. Suppl. 107; Riggs *v.* Chapin, 7 N. Y. Suppl. 765; Hays *v.* Hays, 23 Wend. (N. Y.) 363; Hong Sling *v.* Scottish Union, etc., Ins. Co., 7 Utah 441, 27 Pac. 170; Malcolm *v.* Race, 16 Ont. Pr. 330; Hare *v.* Cawthrope, 11 Ont. Pr. 353; Weller *v.* Proctor, 10 Ont. Pr. 323; Schneider *v.* Proctor, 9 Ont. Pr. 11.

Blackstone in speaking of an issue says: "When in the course of pleading they [the parties] come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue." 3 Blackstone Comm. 313.

Several issues.—There may be several issues in a case. McKagen *v.* Windham, 59 S. C. 434, 38 S. E. 2.

80. Schumacher *v.* Mehlberg, 96 Mo. App. 598, 70 S. W. 910.

81. *Kansas.*— McDermott *v.* Halleck, 65 Kan. 403, 69 Pac. 335.

Massachusetts.—Foster *v.* Leach, 160 Mass. 418, 36 N. E. 69.

Missouri.— State *v.* Brown, 63 Mo. 439.

New York.— Pach *v.* Gilbert, 9 N. Y. Suppl. 546.

Washington.— J. F. Hart Lumber Co. *v.* Rucker, 17 Wash. 600, 50 Pac. 484.

82. Burton *v.* Johnson, 2 Ind. 339.

Necessity for denial.— No issue of fact can arise without a denial, but an issue of law may arise upon allegations which have not been denied. Hartley *v.* McGee, 111 Ga. 882, 36 S. E. 926; State *v.* Brown, 63 Mo. 439.

Issuable facts.— An issue can be raised only upon issuable facts. Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659. And see *supra*, II, H, 5.

83. Allen *v.* Newberry, 8 Iowa 65; Lummery *v.* Braddy, 8 Iowa 33.

Statements in the verification cannot be considered in ascertaining the issues. Nickerson *v.* Canton Marble Co., 35 N. Y. App. Div. 111, 54 N. Y. Suppl. 705.

Similiter unnecessary.— Issue is joined, for the purposes of review, when the pleadings have reached such stage that one of the parties may, by concluding to the country, refer the trial to a jury, even though the opposite party may neglect to add the *similiter*. Solomons *v.* Chesley, 57 N. H. 163.

Necessity for affirming and denying.— It is essential that the precise point forming the issue be affirmed on one side and denied on the other. Burton *v.* Johnson, 2 Ind. 339.

Allegations in answers setting up equities between defendants do not raise proper issues. Ogden *v.* Glidden, 9 Wis. 46.

84. *Colorado.*— Greig *v.* Clement, 20 Colo. 167, 37 Pac. 960.

Indiana.— Smith *v.* Baxter, 13 Ind. 151; Swift *v.* Hetfield, 4 Ind. 623.

Kansas.— Wichita Nat. Bank *v.* Maltby, 53 Kan. 567, 36 Pac. 1000, issue raised by unverified answer.

Kentucky.— Berry *v.* Kenney, 5 B. Mon. 120.

New Hampshire.— Solomons *v.* Chesley, 57 N. H. 163.

Pennsylvania.— Stoever *v.* Weir, 10 Serg. & R. 25.

See 39 Cent. Dig. tit. "Pleading," § 1210.

85. Cusson *v.* Whalon, 5 How. Pr. (N. Y.) 302.

Amendments may set up new facts without changing the issue. Kline *v.* Stein, 38 Wash. 124, 80 Pac. 278.

86. Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47. See also Webster *v.* Mutual Relief Soc., 20 Nova Scotia 347.

A trial without an issue is erroneous. Wilbridge *v.* Case, 2 Ind. 36; Shuff *v.* Stilwell, 11 N. J. L. 282; State *v.* Brookover, 42 W. Va. 292, 26 S. E. 174. See also Smith *v.* Baxter, 13 Ind. 151; Swift *v.* Hetfield, 4 Ind. 623.

Questions of law may of course be raised without a formal joining of issue, as by motion for nonsuit, or by motion for a directed verdict or a motion for judgment in the pleadings, etc. The question of the constitutionality of a statute may be raised without joining issue on it. Schenck *v.* Union Pac. R. Co., 5 Wyo. 430, 40 Pac. 840.

3. Tender and Joinder of Issue.[87] When a pleading concludes to the country, it is customary, under the common-law system of pleading, for the other party to file a *similiter*,[88] whose office is to join in the issue tendered by the opposite party.[89] This may be either a common *similiter*, directed to the entire pleading, or a special *similiter* directed to certain portions of it.[90] The *similiter* is deemed a merely formal step in accepting issue, and its omission is not cause for reversal,[91] nor judgment by *nil dicit*.[92] But it is a form which should be observed, and it has been held that an issue is not joined until the *similiter* is added.[93] A more liberal rule holds that where material averments are directly controverted, no other formal joining of issue can be legally required,[94] and the *similiter* may be put in after proceeding to trial,[95] or may be dispensed with.[96] And very informal *similiters* have been held sufficient.[97] If the replication conclude to the country, plaintiff may add the *similiter* for defendant.[98] But a *similiter* added without a party's consent may be stricken out.[99] An issue well tendered by the traverse of a material allegation must be accepted;[1] and this is equally true of a special traverse.[2] Joining issue upon the allegations of a pleading makes them material even if not inherently so.[3] Unless the formal issues are waived,[4] no trial can be had until issue formed.[5]

4. Materiality of Issue. It is not only necessary that issues should be presented by the pleadings but such issues must be material.[6] But a trial is not rendered erroneous by the fact that immaterial issues were presented along with

Waiver.— Where a party is forced to trial without issues joined, he waives none of his rights (French *v.* Scobey, 108 Ill. App. 606), but parties may voluntarily go to trial without formally joining issues (French *v.* Scobey, *supra*). *Contra*, Vance *v.* Goudy, Wright (Ohio) 307). And in such a case irregularities in the pleadings are waived. Godfrey *v.* Wingert, 110 Ill. App. 563.

87. **Issues defined and classified** see Issue, 23 Cyc. 368.

88. 1 Chitty Pl. (16th Am. ed.) *682; Stephens Pl. (8th Am. ed.) *237, *238.

89. Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

90. 1 Chitty Pl. (16th Am. ed.) *626.

Under the English Rules of the supreme court the form is simply, "The plaintiff joins issue." Hare *v.* Cawthrope, 11 Ont. Pr. 353.

91. Massie *v.* Byrd, 87 Ala. 672, 6 So. 145; Evans *v.* St. John, 9 Port. (Ala.) 186; Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270; Huling *v.* Florida Sav. Bank, 19 Fla. 695; McCoy *v.* World's Columbian Exposition, 87 Ill. App. 605. *Contra*, Ferris *v.* Dyer, 4 U. C. Q. B. O. S. 6.

The **old rule** was that if a party refused to join issue by filing a *similiter*, his previous pleadings would be rejected and judgment rendered (Wyatt *v.* Woodlief, 1 Leigh (Va.) 473), or a repleader might be awarded (Hite *v.* Wilson, 2 Hen. & M. (Va.) 268).

92. Wooster *v.* Clarke, 2 Ark. 101.

93. Dickerson *v.* Stoll, 24 N. J. L. 550.

94. Potter *v.* Titcomb, 16 Me. 423.

An **entry on the docket** by plaintiff, of "issue joined" on a plea of *non est factum*, is a sufficient joinder of issue. McCart *v.* Regester, 68 Md. 429, 13 Atl. 361.

95. Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328; Davis *v.* Ransom, 26 Ill. 100; Stumps *v.* Kelley, 22 Ill. 140.

96. Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Swan *v.* Rary, 2 Blackf. (Ind.) 291; Adams *v.* Bradshaw, Hard. (Ky.) 555; Williamson *v.* Nigh, 58 W. Va. 629, 53 S. E. 124.

97. Everitt *v.* De Groff, 1 Cow. (N. Y.) 213.

98. 1 Chitty Pl. (16th Am. ed.) *682. See also Irwin *v.* Turner, 16 Ont. Pr. 349.

99. Wooster *v.* Clarke, 2 Ark. 101; Irwin *v.* Turner, 16 Ont. Pr. 349. See also Nadenbousch *v.* McRea, Gilmer (Va.) 228.

1. Hapgood *v.* Houghton, 8 Pick. (Mass.) 451; Dawes *v.* Winship, 16 Mass. 291; Dyer *v.* Stevens, 6 Mass. 389.

A demurrer, it has been held, may be filed instead of accepting issue. Gordon *v.* Cleghorn, 7 U. C. Q. B. 171.

2. State *v.* Chrisman, 2 Ind. 126.

3. Wikle *v.* Johnson Laboratories, 132 Ala. 268, 31 So. 715.

4. Modern Woodmen of America *v.* Wieland, 109 Ill. App. 340.

5. Hurd *v.* Bostwick, 16 Ont. Pr. 121; Garner *v.* Tune, 12 Ont. Pr. 280.

6. *Indiana.*— Western Union Tel. Co. *v.* Fenton, 52 Ind. 1; Frisbee *v.* Lindley, 23 Ind. 511; Ramsey *v.* Kochenour, 8 Blackf. 325.

Kentucky.— Lowry *v.* Drake, 1 Dana 46; Shields *v.* Henderson, 1 Litt. 239.

Massachusetts.— Gerrish *v.* Train, 3 Pick. 124.

North Carolina.— Cedar Falls Co. *v.* Wallace, 83 N. C. 225.

Ohio.— Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

United States.— Garland *v.* Davis, 4 How. 131, 11 L. ed. 907.

See 39 Cent. Dig. tit. "Pleading," § 1211.

An immaterial issue is one taken upon some matter, the trial of which will not determine the merits of the cause. Wooden *v.* Waffle, Code Rep. N. S. (N. Y.) 392; Gould *v.* Ray,

material issues,[7] if the trial of the latter were not injuriously affected by the trial of the former.[8] An immaterial issue should be eliminated from the pleadings;[9] but it is not the duty of the court on its own motion to perform this task,[10] although the court should exclude evidence offered in support of issues which are wholly foreign to the merits of the controversy.[11]

5. Scope of Issue — a. In General. As a general rule issues should be confined to such matters as are affirmatively alleged on the one side and sufficiently denied on the other.[12] But this rule will not be applied with undue strictness, and any controverted matter substantially within the pleadings may raise an issue.[13] However the court will not go entirely outside the pleadings in order to consider matters that cannot fairly be said to be within the issues,[14] and a wholly different issue from the one indicated by the pleadings should not be submitted to the jury.[15] It is not proper for the court to direct any matter of fact to be put in issue which is not written within the pleadings.[16] A denial of any matter by one party will not create an issue unless the same matter has been alleged by the other party.[17] Denials of conclusions of law from the pleaded facts raise no issues of fact.[18] When a replication ignores certain facts contained in a plea taking issue only on certain other facts therein, and defendant files a general rejoinder to the replication, the facts so ignored cease to be issues of the case.[19] Where defendant pleads as a defense the making of a written contract between himself and

13 Wend. (N. Y.) 633; Garland *v.* Davis, 4 How. (U. S.) 131, 11 L. ed. 907; Bennett *v.* Holbeck, 2 Saund. 317, 85 Eng. Reprint 1113. See also Cedar Falls Co. *v.* Wallace, 83 N. C. 225. Thus an issue may be immaterial because it does not go to the whole cause of action (Shields *v.* Henderson, 1 Litt. (Ky.) 239); or because formed on an irrelevant fact or a legal conclusion (Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317); or on matter of inducement (Garland *v.* Davis, 4 How. (U. S.) 131, 11 L. ed. 907).

Formal defects.—Immateriality in the issue relates to matter of substance and does not result from a mere defect in form or manner of statement. Blackman *v.* Nichols, 2 Root (Conn.) 243; Garrard *v.* Willet, 4 J. J. Marsh. (Ky.) 628; Richardson *v.* Learned, 10 Pick. (Mass.) 261; White *v.* Spencer, 14 N. Y. 247; Jacobs *v.* Lieberman, 51 N. Y. App. Div. 542, 64 N. Y. Suppl. 953 [*affirming* 29 Misc. 354, 60 N. Y. Suppl. 493]; Klyce *v.* Black, 7 Baxt. (Tenn.) 277.

Effect of taking issue upon immaterial questions.— The fact that a defendant takes issue, in his answer, upon an immaterial question of fact does not prevent him from insisting at the trial that the allegation thus denied is immaterial. Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

In Alabama it has been held that if a party voluntarily goes to trial upon an immaterial issue, he thereby makes such issue material, and cannot thereafter make objection to it. Wellman *v.* Jones, 124 Ala. 580, 27 So. 416; Marbury Lumber Co. *v.* Westbrook, 121 Ala. 179, 25 So. 914; Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Winter *v.* Poole, 100 Ala. 503, 14 So. 411.

7. Robbins *v.* Wolcott, 19 Conn. 356.

8. Frisbee *v.* Lindley, 23 Ind. 511.

9. Dalrymple *v.* Craig, 76 Mo. App. 117.

10. Burlingame *v.* Turner, 2 Ill. 588.

11. White *v.* Spencer, 14 N. Y. 247; Corning *v.* Corning, 6 N. Y. 97; De Hihns *v.* Free, 70 S. C. 344, 49 S. E. 841.

12. Finley *v.* Kirk, 9 Minn. 194, 86 Am. Dec. 93; Bankston *v.* Farris, 26 Mo. 175.

For illustrations of this rule see Smith *v.* Hine, 14 Ala. 201; McMeehan *v.* Hoyt, 16 Ark. 303; Landers *v.* Bolton, 26 Cal. 393; Dooley *v.* Burlington, etc., R. Co., 89 Iowa 450, 56 N. W. 543; Dodge *v.* Davis, 85 Iowa 77, 52 N. W. 2; Ehrlich *v.* Ætna L. Ins. Co., 103 Mo. 231, 15 S. W. 530; Moore *v.* Otis, 20 Mo. 153; Harden *v.* Atchison, etc., R. Co., 4 Nebr. 521; Simms *v.* Wallace, 11 N. Y. St. 57; Cowart *v.* Edwards, 4 Tex. Civ. App. 276, 23 S. W. 569; U. S. *v.* Northern Pac. R. Co., 177 U. S. 435, 20 S. Ct. 706, 41 L. ed. 836 [*affirming* 95 Fed. 864, 37 C. C. A. 290].

13. Knight *v.* Whitmore, 125 Cal. 198, 59 Pac. 891; Enright *v.* American Belgian Lamp Co., 36 N. Y. App. Div. 431, 55 N. Y. Suppl. 397; Fitzhugh *v.* Connor, (Tex. Civ. App. 1903) 74 S. W. 83; Gray *v.* Edwards, 3 Tex. Civ. App. 344, 22 S. W. 536. See also Townsend *v.* Hagar, 72 Fed. 949, 19 C. C. A. 256, construing N. Y. Code Civ. Proc. § 1207.

14. Russell *v.* Berkstresser, 77 Mo. 417.

15. Taylor *v.* Combs, 50 S. W. 64, 20 Ky. L. Rep. 1828.

16. Bankston *v.* Farris, 26 Mo. 175.

17. Fry *v.* Whitinghill, Litt. Sel. Cas. (Ky.) 181; Lexington Nat. Exch. Bank *v.* Bright, 36 S. W. 10, 38 S. W. 135, 18 Ky. L. Rep. 588.

18. Schoonover *v.* Birnbaum, 148 Cal. 548, 83 Pac. 999; Townsend *v.* Sullivan, 3 Cal. App. 115, 84 Pac. 435; Southern R. Co. *v.* Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429.

19. New York L. Ins. Co. *v.* Mills, 51 Fla. 256, 41 So. 603.

plaintiff, but specifies no consideration, the law imports one, and, if the defense is only controverted in the reply by a general denial, the issue of consideration is not raised.[20] Evidence received without objection does not have the effect of enlarging the pleadings where admissible thereunder.[21] Special damages may, however, be recovered, when not declared on in the complaint, if the evidence in regard to such special damages is given to the jury without objection.[22]

b. Plea or Answer. An answer containing a general denial of all the allegations of the complaint or petition places in issue all the allegations contained therein.[23] But in jurisdictions where code pleading prevails, other issues can be raised only by defenses affirmatively pleaded.[24] And defenses not embraced within the general issue at common law must also be affirmatively pleaded to raise issues.[25] And where a special affirmative defense is pleaded, only the substantial issue raised thereby will be considered.[26] A general rejoinder to a replication only puts in issue the facts stated in the replication.[27] The only proper issue upon a traverse is whether the inquisition is true or not.[28] If, where there is no declaration, defendant voluntarily pleads in writing he will be confined to the issue on his plea.[29] The same facts alleged in an answer may constitute both a defense and a counter-claim, and if put in issue for one purpose they are in issue as well for both.[30] An answer does not put in issue new matter set up in an answer of a co-defendant subsequently filed, especially where such co-defendant was not mentioned in the former answer.[31] Where special pleas set up new matter in defense and there is a joinder of issue thereon, such joinder creates an issue as to the truth of the new matter, but does not furnish the basis for avoiding the effect of the new matter by other new matter.[32]

B. Proof — 1. What Must Be Proved — a. In General. Although a party is not bound to prove all the allegations in his pleadings,[33] he must prove every material allegation necessary to establish his cause of action or defense.[34] But

20. Avery Mfg. Co. *v.* Lambertson, 74 Kan. 304, 86 Pac. 456.

21. Rogers *v.* Southern Fiber Co., 119 La. 714, 44 So. 442, 121 Am. St. Rep. 537.

22. Atkinson *v.* Harran, 68 Wis. 405, 32 N. W. 756.

23. Sloan *v.* Webster Co., 61 Iowa 738, 17 N. W. 168; Nunnemacker *v.* Johnson, 38 Minn. 390, 38 N. W. 351; Hassett *v.* Curtis, 20 Nebr. 162, 29 N. W. 295. And see *infra*, XIII, B, 3.

In New York the general denial provided for by the statute puts all the allegations of the complaint in issue, whether express or implied. Bellinger *v.* Craigue, 31 Barb. 534.

In assumpsit a denial of all the allegations of a plea in the same words in which they are pleaded generally puts in issue the material facts pleaded by the other party the same as when the general issue is pleaded to a declaration. Austin *v.* Chittenden, 32 Vt. 168.

24. MeConnico *v.* Stallworth, 43 Ala. 389; Antonelli *v.* Basile, 93 Mo. App. 138; Schwartz Brothers Commission Co. *v.* Vanstone, 62 Mo. App. 241; George *v.* Williams, 58 Mo. App. 138; Sayers *v.* Crane, 107 Mo. App. 407, 81 S. W. 473. And see *infra*, XIII, B, 4, l, (III).

25. Crockett *v.* Moore, 3 Sneed (Tenn.) 145; Gibson *v.* Harris, 8 C. & P. 378, 34 E. C. L. 790. And see *infra*, XIII, B, 4, l, (II).

26. Byrd *v.* Nunn, 7 Ch. D. 284, 47 L. J. Ch. 1, 37 L. T. Rep. N. S. 585, 26 Wkly. Rep. 101; Collette *v.* Goode, 7 Ch. D. 842, 47 L. J. Ch. 370, 38 L. T. Rep. N. S. 504.

27. Hannon *v.* State, 2 Gill (Md.) 42.

28. Boueher *v.* Williamson, 1 Dana (Ky.) 227.

29. Davis *v.* Young, 3 T. B. Mon. (Ky.) 381.

30. Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344.

31. Gulling *v.* Washoe County Bank, 28 Nev. 450, 82 Pac. 800.

32. Atlantie Coast Line R. Co. *v.* Mallard, 54 Fla. 143, 44 So. 366.

33. Phœnix Mut. L. Ins. Co. *v.* Hinesley, 75 Ind. 1; Morgan *v.* Wattles, 69 Ind. 260; Antonelli *v.* Basile, 93 Mo. App. 138; Palmer *v.* Kinloch Tel. Co., 91 Mo. App. 106; Niemoller *v.* Duncombe, 59 N. Y. App. Div. 614, 69 N. Y. Suppl. 88 [*affirmed* in 172 N. Y. 621, 65 N. E. 1120].

34. *California.*— Frantz *v.* Harper, (1900) 62 Pac. 603.

Connecticut.— Shepard *v.* Palmer, 6 Conn. 95.

Illinois.—Godfrey *v.* Wingert, 110 Ill. App 563; Chicago *v.* Rustin, 99 Ill. App. 47.

Indiana.— Morgan *v.* Wattles, 69 Ind. 260; Spaulding *v.* Harvey, 7 Ind. 429; Way *v.* Simmons, 8 Blackf. 559; Smith *v.* Brown, 3 Blackf. 22.

Iowa.— Iowa County *v.* Huston, 39 Iowa 323.

Kentucky.— Skillman *v.* Muir, 4 Metc. 282; Waggener *v.* Bells, 4 T. B. Mon. 7 (upon

substantial proof of such material allegations is, however, all that is necessary.[35]

b. Separate Counts and Defenses. Separate counts are considered as statements of distinct causes of action, and a plaintiff is entitled to recover, if he proves any one count, although he may fail to establish the others.[36] The same rule obtains respecting several pleas, and the establishment of the truth of one good plea in bar entitles defendant to judgment, although he fail on all the rest.[37]

c. Surplusage and Unnecessary Allegations. Although all the allegations essential to a complete cause of action or defense must be established in order to justify a recovery, on the other hand unnecessary allegations in pleadings need not be proved.[38] Proof will not be required of unnecessary matters of induce-

issue joined that the heirs of B are of full age, proof that one of them is a minor defeats the affirmant); McCrackin *v.* Samuels, Litt. Sel. Cas. 12.

Louisiana.— Marionneaux *v.* Edwards, 4 La. Ann. 103; State *v.* Briscoe, 2 La. Ann. 383; Mackin *v.* Rowley, 1 Rob. 82.

New Jersey.— Murphy *v.* North Jersey St. R. Co., 71 N. J. L. 5, 58 Atl. 1018.

New York.— Robinson *v.* Weil, 45 N. Y. 810; Sniffen *v.* Parker, 8 N. Y. Civ. Proc. 393; Davidson *v.* Remington, 12 How. Pr. 310; Boyd *v.* Townsend, 4 Hill 183; Mitchell *v.* Ostrom, 2 Hill 520; Panton *v.* Holland, 17 Johns. 92, 8 Am. Dec. 369.

South Carolina.— Bell *v.* Lakin, 1 McMull. 364.

Texas.— Schulz *v.* Tessman, 92 Tex. 488, 49 S. W. 1031 [*reversing* (Civ. App. 1898) 48 S. W. 207].

Vermont.— Downer *v.* Woodbury, 19 Vt. 329.

Virginia.— Turberville *v.* Self, 4 Call 580.

See 39 Cent. Dig. tit. "Pleading," §§ 1217, 1218.

Illustrations.— Thus title to real property (Indianapolis, etc., R. Co. *v.* Center Tp., 143 Ind. 63, 40 N. E. 134); a special contract sued upon (Shepard *v.* Palmer, 6 Conn. 95; Cremer *v.* Miller, 56 Minn. 52, 57 N. W. 318); and a scienter, when material and not presumed by law (Bell *v.* Lakin, 1 McMull. (S. C.) 364) must be proved as alleged. Where the declaration sets up a joint undertaking (Mitchell *v.* Ostrom, 2 Hill (N. Y.) 520) or two considerations for a simple contract (Stone *v.* White, 8 Gray (Mass.) 589) plaintiff must prove the allegations he has made.

If the plea relied on by several defendants is joint, its allegations must be proved as to all. Monson *v.* Meyer, 93 Ill. App. 94 [*affirmed* in 195 Ill. 142, 62 N. E. 827].

Under a plea of set-off, it is essential that defendant shall prove the same facts that he would be required to prove if he had brought an original action on his demand. Russell *v.* Excelsior Stove, etc., Co., 120 Ill. App. 23.

The pleadings in a case are not evidence of the matters pleaded. Wilmington City R. Co. *v.* White, (Del. 1907) 66 Atl. 1009.

35. Phœnix Mut. L. Ins. Co. *v.* Hinesley, 75 Ind. 1; Texas, etc., R. Co. *v.* Kirk, 62 Tex. 227.

Illustration.— The substance of the issue only need be proved in an action against a railroad company for personal injuries, where the complaint alleges that a car was thrown from the track by a defective rail broken several days before. That is, it is sufficient to prove that the track was unsafe by reason of a defective rail. Texas, etc., R. Co. *v.* Kirk, 62 Tex. 227.

36. *Alabama.*— Maupay *v.* Holley, 3 Ala. 103.

Illinois.— Chicago, etc., R. Co. *v.* Redmond, 171 Ill. 347, 49 N. E. 541; Jones *v.* Hunter, 99 Ill. App. 413. See also Joliet R. Co. *v.* McPherson, 193 Ill. 629, 61 N. E. 1061.

Indiana.— Culbertson *v.* Townsend, 6 Ind. 64.

Kentucky.— Shatzell *v.* Hart, 2 A. K. Marsh. 191.

Maryland.— Consolidated Coal Co. *v.* Shannon, 34 Md. 144.

Massachusetts.— Manilla *v.* Houghton, 154 Mass. 465, 28 N. E. 784.

Missouri.— Allen *v.* Wabash, etc., R. Co., 84 Mo. 653.

New York.— Colton *v.* Jones, 7 Rob. 164; Scheu *v.* New York, etc., R. Co., 12 N. Y. St. 99.

United States.—Ames *v.* LeRue, 1 Fed. Cas. No. 327, 2 McLean 216; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

See 39 Cent. Dig. tit. "Pleading," § 1221.

Where legal and equitable causes of action are joined under the code, and plaintiff fails to establish his legal claim, he may nevertheless recover upon his equitable grounds. Scheu *v.* New York, etc., R. Co., 12 N. Y. St. 99.

If plaintiff fails to prove a special contract he may recover on a common count also pleaded. Shatzell *v.* Hart, 2 A. K. Marsh. (Ky.) 191.

If two causes of action are mingled in a single count, it is sufficient if plaintiff prove either one of them. Franklin Printing, etc., Co. *v.* Behrens, 80 Ill. App. 313; Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

37. State *v.* Brantley, 27 Ala. 44; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8. And see *supra*, IV, A, 7.

38. *Alabama.*— Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024.

Arkansas.— Strange *v.* Bodcaw Lumber Co., 79 Ark. 490, 96 S. W. 152, 116 Am. St. Rep. 92.

California.— Cahill *v.* Colgan, (1892) 31 Pac. 614; Peters *v.* Foss, 20 Cal. 586; Darst *v.* Rush, 14 Cal. 81.

ment.[39] Merely technical words may be rejected as surplusage, if not necessary to a full apprehension of the material facts of the case.[40] And it has been held that an immaterial allegation need not be proved, even though issue is joined thereon.[41] A distinction has been recognized, however, between allegations which are both unnecessary and irrelevant, and those allegations, which, although unnecessary, are relevant.[42] Thus it has been held that in a case where defendant's liability may be stated in general terms, if plaintiff alleges such liability, with unnecessary fulness and particularity, he may be forced to prove the allegations as laid.[43] Although not the gist of the action, a contract set out in a declaration must nevertheless be proved as alleged, unless the whole of it is so impertinent that it may be struck out as surplusage.[44]

d. Admissions — (i) *EXPRESS ADMISSIONS.* A fact admitted by the pleadings of an opponent need not be proved.[45] An admission made in pleading is

Connecticut.—Alling *v.* Forbes, 68 Conn. 575, 37 Atl. 390.

Indiana.— Hobbs *v.* Eaton, 38 Ind. App. 628, 78 N. E. 333; Burton *v.* Figg, 18 Ind. App. 284, 47 N. E. 1081.

Iowa.— Kerr *v.* Topping, 109 Iowa 150, 80 N. W. 321; Reizenstein *v.* Clark, 104 Iowa 287, 73 N. W. 588; Baxter *v.* Chicago, etc., R. Co., 87 Iowa 488, 54 N. W. 350; Way *v.* Chicago, etc., R. Co., 73 Iowa 463, 35 N. W. 525; Maichen *v.* Clay, 62 Iowa 452, 17 N. W. 658; Billingham *v.* Bryan, 10 Iowa 317.

Kansas.— See St. Louis, etc., R. Co. *v.* Johnson, 74 Kan. 83, 86 Pac. 156.

Kentucky.— Dorsey *v.* Swann, 43 S. W. 692, 19 Ky. L. Rep. 1387; Keller *v.* Gleason, 39 S. W. 706, 19 Ky. L. Rep. 154, holding that when plaintiff has made out a *prima facie* case under his petition he need not go further and prove matters set up in his reply.

Maine.— Neal *v.* Smith, 89 Me. 596, 36 Atl. 1058; Maxwell *v.* Maxwell, 31 Me. 184, 50 Am. Dec. 657; Bean *v.* Simpson, 16 Me. 49.

Maryland.— Ferguson *v.* Tucker, 2 Harr. & G. 182.

Minnesota.— The War Eagle *v.* Nutting, 1 Minn. 256.

Missouri.— Palmer *v.* Kinloch Tel. Co., 91 Mo. App. 106.

Nevada.— Gillson *v.* Price, 18 Nev. 109, 1 Pac. 459.

New Hampshire.— Fisk *v.* Hicks, 31 N. H. 535; Titus *v.* Ash, 24 N. H. 319.

New York.— Niemoller *v.* Duncombe, 59 N. Y. App. Div. 614, 69 N. Y. Suppl. 88 [*affirmed* in 172 N. Y. 621, 65 N. E. 1120]; Yates *v.* Alden, 41 Barb. 172; Quintard *v.* Newton, 5 Rob. 72.

South Carolina.— Bell *v.* Lakin, 1 McMull. 364. But see Treasury Com'rs *v.* Brevard, 1 Brev. 11.

Texas.— Selman *v.* Gulf, etc., R. Co., (Civ. App. 1907) 101 S. W. 1030; Collins *v.* Chipman, 41 Tex. Civ. App. 563, 95 S. W. 666; Aycock *v.* Baker, (Civ. App. 1900) 60 S. W. 273.

Vermont.— Hutchinson *v.* Granger, 13 Vt. 386.

United States.— Lake County *v.* Keene Five Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464; Geer *v.* Ouray County, 97 Fed. 435, 38 C. C. A. 250; Scanlan *v.* Hodges, 52 Fed. 354, 3 C. C. A. 113.

England.— Williamson *v.* Allison, 2 East 446; Peppin *v.* Solomons, 5 T. R. 496.

See 39 Cent. Dig. tit. "Pleading," § 1224.

Illustrations.— Unnecessary averments of fraud (Quintard *v.* Newton, 5 Rob. (N. Y.) 72), demand (Bean *v.* Simpson, 16 Me. 49. See also U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443), or breach of contract (Ferguson *v.* Tucker, 2 Harr. & G. (Md.) 182) need not be proved, and may be stricken out as surplusage.

Where proof of a portion of the facts alleged will support a recovery, a failure of proof as to the rest is immaterial. Congregation B'nai Abraham *v.* Voigt, 67 Ill. App. 227; Lake Erie, etc., R. Co. *v.* Christison, 39 Ill. App. 495; Marquet *v.* La Duke, 96 Mich. 596, 55 N. W. 1006; Connor *v.* Philo, 117 N. Y. App. Div. 349, 102 N. Y. Suppl. 427; Thompson *v.* Williams, Tapp. (Ohio) 2; Hammond *v.* North Eastern R. Co., 6 S. C. 130, 24 Am. Rep. 467.

39. Ward *v.* The Little Red, 7 Mo. 582.

40. Darst *v.* Rush, 14 Cal. 81.

41. Billingham *v.* Bryan, 10 Iowa 317. And see *supra*, XIII, A, 3.

42. Maltman *v.* Chicago, etc., R. Co., 72 Ill. App. 378; Lindsay *v.* Davis, 30 Mo. 406; Conn *v.* Gano, 1 Ohio 483, 13 Am. Dec. 639; Treasury Com'rs *v.* Brevard, 1 Brev. (S. C.) 11. See also State *v.* Crow, 11 Ark. 642.

Immaterial averments, which must be proved when alleged, are those which enter into the foundation of the action. Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302.

43. *Alabama.*— Dexter *v.* Ohlander, 89 Ala. 262, 7 So. 115.

Florida.— Wilkinson *v.* Pensacola, etc., R. Co., 35 Fla. 82, 17 So. 71.

Illinois.— Gridley *v.* Bloomington, 68 Ill. 47; Faulkner *v.* Birch, 120 Ill. App. 281; Maltman *v.* Chicago, etc., R. Co., 72 Ill. App. 378; Lake Shore, etc., R. Co. *v.* Beam, 11 Ill. App. 215. See also West Chicago St. R. Co. *v.* Lups, 74 Ill. App. 420.

Indiana.—Dickenshects *v.* Kaufman, 28 Ind. 251.

Missouri.— Lindsay *v.* Davis, 30 Mo. 406. See 39 Cent. Dig. tit. "Pleading," § 1224.

44. Maine *v.* Bailey, 15 Conn. 298.

45. *Alabama.*—Smith *v.* Kaufman, 100 Ala. 408, 14 So. 111.

binding on the party making it and any evidence introduced thereafter contrary

California.— Murphy *v.* Coppieters, 136 Cal. 317, 68 Pac. 970; Hall *v.* Polack, 42 Cal. 218; Peters *v.* Foss, 20 Cal. 586; Swift *v.* Muygridge, 8 Cal. 445; Townsend *v.* Sullivan, 3 Cal. App. 115, 84 Pac. 435. See also Grijalva *v.* Southern Pac. Co., 137 Cal. 569, 70 Pac. 622.

Colorado.— Persse *v.* Gaffney, 23 Colo. 245, 47 Pac. 293. See also Hamill *v.* Copeland, 26 Colo. 178, 56 Pac. 901.

Florida.— Patrick *v.* Kirkland, 53 Fla. 768, 43 So. 969.

Georgia.— East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; Parker *v.* Lanier, 82 Ga. 216, 8 S. E. 57.

Illinois.— Dawson *v.* Edwards, 189 Ill. 60, 59 N. E. 590; Millard *v.* Millard, 123 Ala. App. 264 [*affirmed* in 221 Ill. 86, 77 N. E. 595]; Miller *v.* Payne, 4 Ill. App. 112.

Indiana.— Johnson *v.* Kent, 9 Ind. 252; Ayres *v.* Foster, 25 Ind. App. 99, 57 N. E. 725.

Iowa.— Clapp *v.* Cunningham, 50 Iowa 307; Hambell *v.* O'Neal, 39 Iowa 562; Hypfner *v.* Walsh, 3 Greene 509.

Kansas.— See McWilliams *v.* Piper, 7 Kan. App. 289, 53 Pac. 837.

Kentucky.— Trabue *v.* North, 2 A. K. Marsh. 361; Skinner *v.* Myers, 40 S. W. 919, 19 Ky. L. Rep. 421; Com. *v.* Lewis, 39 S. W. 438, 19 Ky. L. Rep. 170. See also Middleton *v.* Com., 1 Litt. 347.

Louisiana.— Barry *v.* Kimball, 10 La. Ann. 787; Lacoste *v.* Sellick, 1 La. Ann. 336; Diggs *v.* Parish, 18 La. 6; Rost *v.* Byrne, 14 La. 372; Jones *v.* Bishop, 12 La. 397.

Maryland.— Weihenmayer *v.* Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; Newman *v.* Young, 30 Md. 417; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Minnesota.—Evenson *v.* Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 8.

Missouri.— Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354, 78 S. W. 579; Mexico First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332; State *v.* Fleming, 19 Mo. 607.

Montana.— See Harrington *v.* Butte, etc., Min. Co., 35 Mont. 530, 90 Pac. 748; Arnold *v.* Passavant, 19 Mont. 575, 49 Pac. 400; Gregg *v.* Garrett, 13 Mont. 10, 31 Pac. 721.

Nebraska.— Kannow *v.* Farmers' Co-operative Shipping Assoc., 76 Nebr. 330, 107 N. W. 563; McCullough *v.* Dovey, 61 Nebr. 675, 85 N. W. 893; Knight *v.* Finney, 59 Nebr. 274, 80 N. W. 912; Hiersche *v.* Scott, 1 Nebr. (Unoff.) 48, 95 N. W. 494.

Nevada.— Carlyon *v.* Lannan, 4 Nev. 156.

New York.—White *v.* Smith, 46 N. Y. 418; Pennacchio *v.* Greco, 107 N. Y. App. Div. 225, 94 N. Y. Suppl. 1061; Browne *v.* Stecher Lith. Co., 24 N. Y. App. Div. 480, 48 N. Y. Suppl. 1038; McQueen *v.* Lockwood, 29 N. Y. Suppl. 370. See also Hoes *v.* Nagele, 28 N. Y. App. Div. 374, 51 N. Y. Suppl. 233.

Oklahoma.— Rogers *v.* Brown, 15 Okla. 524, 86 Pac. 443.

Oregon.— Jennings *v.* Oregon Land Co., 48 Oreg. 287, 86 Pac. 367; Davenport *v.* Dose, 40 Oreg. 336, 67 Pac. 112; Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

South Carolina.— Littlejohn *v.* Richmond, etc., R. Co., 45 S. C. 181, 22 S. E. 789; Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

South Dakota.— Commercial Bank *v.* Jackson, 9 S. D. 605, 70 N. W. 846.

Tennessee.—See Nichols *v.* Cecil, 106 Tenn. 455, 61 S. W. 768, where the doctrine of admissions is qualified with respect to a plea in confession and avoidance.

Texas.— League *v.* State, 93 Tex. 553, 57 S. W. 34; Bauman *v.* Chambers, 91 Tex. 108, 41 S. W. 471; Graham *v.* Henry, 17 Tex. 164; Emerson *v.* Kneezell, (Civ. App. 1900) 62 S. W. 551; Gann *v.* Shaw, 2 Tex. App. Civ. Cas. § 255.

United States.— Simonton *v.* Winter, 5 Pet. 141, 8 L. ed. 75.

Canada.— See Ritchie *v.* Hall, 20 Nova Scotia 243.

See 39 Cent. Dig. tit. "Pleading," § 1225.

Where defendant pleads by way of confession and avoidance this rule applies. Parker *v.* Lanier, 82 Ga. 216, 8 S. E. 57; Ray *v.* Moore, 24 Ind. App. 480, 56 N. E. 937; Clapp *v.* Cunningham, 50 Iowa 307; Barry *v.* Kimball, 10 La. Ann. 787; Simpson *v.* South Carolina Mut. Ins. Co., 59 S. C. 195, 37 S. E. 18, 225; Simonton *v.* Winter, 5 Pet. (U. S.) 141, 8 L. ed. 75. But see Stoughton *v.* Mott, 25 Vt. 668.

An admission of a fact on record amounts merely to a waiver of requiring proof of that fact; but if the other party seeks to have any inference drawn by the jury from the fact so admitted, he must prove it like any other fact. Edmunds *v.* Groves, 5 Dowl. P. C. 175, 6 L. J. Exch. 203, M. & H. 211, 2 M. & W. 642.

Agreement after demurrer overruled.— Where, after the entry of an order overruling a demurrer to a pleading, the parties agree that the allegations of the pleading shall be taken as true, the introduction of evidence to support the pleading is unnecessary. Com. *v.* Hillis, 96 S. W. 873, 29 Ky. L. Rep. 1063.

Amendment.— An admission in defendant's answer that the allegations in a certain paragraph of plaintiff's petition are true does not apply to an amendment to such paragraph containing additional allegations which is offered after the answer has been filed, nor does a failure of defendant to reply to the amendment relieve plaintiff of the necessity of supporting the allegations at the trial. Watson *v.* Barnes, 125 Ga. 733, 54 S. E. 723.

General issue.— In an action on the case, the plea of the general issue admits ownership and operation as alleged in the declaration where the case is tried on the theory of ownership and operation by defendant. Chicago Union Tract. Co. *v.* Lundahl, 117

to such admission should be disregarded.[46] The rule holds true, even though the pleading which contains the admission is not sworn to.[47] A party taking advantage of an admission must accept it in its entirety.[48] If defendant makes a general denial, plaintiff, according to some decisions, cannot take advantage of an admission contained in a special plea filed at the same time;[49] but other decisions hold that such an admission is available to plaintiff.[50] An admission by a party that he executed the instrument sued on renders any other proof than the production of the instrument by the other side unnecessary.[51] But such an admission cannot be held to cover more than by its plain terms it expressly purports to cover.[52] An amended pleading supersedes the original, and admissions made in the original pleading cannot thereafter properly be introduced in evidence against the party who made them.[53]

(II) *Admissions by Failure to Deny.* Both at common law and under code procedure material allegations in the pleadings of the opposite party, which are properly pleaded and not denied, are deemed admitted and therefore need not be proved.[54]

2. Burden of Proof. The party who has the affirmative of an issue has the burden of proof.[55] Thus, if an answer contains both a denial of the allegations contained in the complaint and affirmative matters of defense as well, the burden rests upon plaintiff as to the allegations put in issue by the denial, but it is upon defendant so far as the new matter of the answer is concerned.[56] Under a plea of

Ill. App. 220 [*affirmed* in 215 Ill. 289, 74 N. E. 155].

46. *California.*—Hall *v.* Polack 42 Cal. 218.
Illinois.— Wheatley *v.* Chicago Trust, etc., Bank, 64 Ill. App. 612.
Iowa.— Shaffer *v.* Warren, (1905) 102 N. W. 497; Hartman Steel Co. *v.* Hoag, 104 Iowa 269, 73 N. W. 611.
Louisiana.— Rawitzky *v.* Louisville, etc., R. Co., 40 La. Ann. 47, 3 So. 387.
New York.— Traitel *v.* Dwyer, 61 N. Y. Suppl. 1100 [*affirmed* in 31 Misc. 832, 65 N. Y. Suppl. 1148].
North Carolina.— Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.
Washington.— Charlton *v.* Markland, 36 Wash. 40, 78 Pac. 132; Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409.

47. Miller *v.* Payne, 4 Ill. App. 112.

48. Albro *v.* Figuera, 60 N. Y. 630; De Waltoff *v.* Third Ave. R. Co., 75 N. Y. App. Div. 351, 78 N. Y. Suppl. 132; Shrady *v.* Shrady, 42 N. Y. App. Div. 9, 58 N. Y. Suppl. 546; Oakley *v.* Oakley, 69 Hun (N. Y.) 121, 23 N. Y. Suppl. 267 [*affirmed* in 144 N. Y. 637, 39 N. E. 494].

49. De Waltoff *v.* Third Ave. R. Co., 75 N. Y. App. Div. 351, 78 N. Y. Suppl. 132; Sutliff *v.* Gilbert, 8 Ohio 405. See also Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076; Billings *v.* Drew, 52 Cal. 565; Silliman *v.* Gano, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391; Ft. Worth, etc., R. Co. *v.* McAnulty, 7 Tex. Civ. App. 321, 26 S. W. 414, holding that the admissions of inconsistent pleas shall not be used to destroy each other.

50. *Dakota.*— Gale *v.* Shillock, 4 Dak. 182, 29 N. W. 661.
Iowa.— Curl *v.* Watson, 25 Iowa 35, 95 Am. Dec. 763.
Kansas.—Barnum *v.* Kennedy, 21 Kan. 181.
Minnesota.— Derby *v.* Gallup, 5 Minn. 119.
Wisconsin.— Hartwell *v.* Page, 14 Wis. 49.

In Nebraska under the rule of practice which governs in actions at law in a federal court in that state, a general denial in an answer is treated as qualified by admissions made in other defenses; and where, in an action on school-district bonds, the answer contains a general denial, but also an admission of the execution and genuineness of the bonds, and pleads their invalidity, the admission governs, and plaintiff is not required to prove their execution and genuineness. Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35.

51. Wills *v.* McKinney, 30 N. J. Eq. 465; O'Brien *v.* Commercial F. Ins. Co., 38 N. Y. Super. Ct. 517 [*reversed* on another point in 63 N. Y. 108]; Veasey *v.* Humphreys, 27 Oreg. 515, 41 Pac. 8; Ft. Worth, etc., R. Co. *v.* McAnulty, 7 Tex. Civ. App. 321, 26 S. W. 414.

52. Carroll County Sav. Bank *v.* Strother, 22 S. C. 552.

53. Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076.

54. Wade *v.* Goza, 78 Ark. 7, 96 S. W. 388; Escondido Lumber, etc., Co. *v.* Baldwin, 1 Cal. App. 606, 84 Pac. 284; Henry *v.* Henry, 73 Nebr. 746, 103 N. W. 441, 107 N. W. 789; McEvoy *v.* New York, 56 N. Y. App. Div. 222, 67 N. Y. Suppl. 593. And see *supra*, IV, C, 5, b, (IV).

55. See Evidence, 16 Cyc. 928 *et seq.*
Allegations neither proved nor admitted.— "If the material allegations of the petition are neither proved nor admitted, a plaintiff cannot recover because of the failure of defendant to prove the allegation of his answer." Iowa County *v.* Huston, 39 Iowa 323, 328.
As to rule where issue is immaterial see Moss *v.* Moseley, 148 Ala. 168, 41 So. 1012.

56. Magness *v.* Arnold, 31 Ark. 103; Davidson *v.* Remington, 12 How. Pr. (N. Y.) 310.

non est factum, the burden is on defendant to prove that an alteration was made in a note subsequent to its execution and delivery,[57] or that a bond was delivered in escrow, on a condition not performed.[58] The rule applies to matter in avoidance set up in the answer, where the burden is always upon defendant.[59] Likewise the burden of proving a set-off or counter-claim is on defendant.[60]

3. EFFECT OF DENIAL. The plea of the general issue or a general denial makes it necessary for plaintiff to prove every material allegation of his cause of action.[61] But the general denial may be qualified in such terms as to render unnecessary a full and complete proof of all the material allegations of plaintiff's cause of action.[62] A general denial does not put in issue all the allegations of the petition, where it is not necessary to establish all such allegations in order to justify a recov-

See also Cumberland Tel., etc., Co. *v.* Barnes, 101 S. W. 301, 30 Ky. L. Rep. 1290.

57. Gist *v.* Gans, 30 Ark. 285.

58. Pankey *v.* Raum, 51 Ill. 88; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Day *v.* Raguet, 14 Minn. 273.

59. Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Gibson *v.* McCormick, 10 Gill & J. (Md.) 165; Wells *v.* Pike, 31 Mo. 590; Gillson *v.* Price, 18 Nev. 109, 1 Pac. 459.

60. Mitchell *v.* Wells, 54 Mich. 127, 19 N. W. 777; Vail *v.* Wright, 3 N. J. L. 681; Hamilton Coal Co. *v.* Bernhard, 16 N. Y. Suppl. 55.

61. *Illinois.*— Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94.

Indiana.— McGill *v.* Pressley, 62 Ind. 193; Lafayette, etc., R. Co. *v.* Ehman, 30 Ind. 83; Littler *v.* Robinson, 38 Ind. App. 104, 77 N. E. 1145. See also Butler *v.* Edgerton, 15 Ind. 15; Spaulding *v.* Harney, 7 Ind. 429.

Iowa.— Sloan *v.* Webster, 61 Iowa 738, 17 N. W. 168; Doolittle *v.* Greene, 32 Iowa 123; Grash *v.* Sater, 6 Iowa 301.

Kansas.— Hayner *v.* Eberhardt, 37 Kan. 308, 15 Pac. 168.

Kentucky.— Orchard *v.* Williamson, 6 J. J. Marsh. 558, 22 Am. Dec. 102; Owings *v.* Smith, (1893) 22 S. W. 446, 954, 15 Ky. L. Rep. 137.

Louisiana.— Farwell *v.* Harris, 12 La. Ann. 50; Meunier *v.* Couet, 2 Mart. 56.

Massachusetts.— Van Buren *v.* Swan, 4 Allen 380; Boston Relief, etc., Co. *v.* Burnett, 1 Allen 410.

Minnesota.— Nunnemacker *v.* Johnson, 38 Minn. 390, 38 N. W. 351; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Bond *v.* Corbett, 2 Minn. 248.

Missouri.— Gerding *v.* Walter, 29 Mo. 426.

Nebraska.—Hassett *v.* Curtis, 20 Nebr. 162, 29 N. W. 295; Ruth *v.* Ruth, 12 Nebr. 594, 12 N. W. 108.

New Hampshire.—Bump *v.* Smith, 11 N. H. 48, although a brief statement is filed by defendant, plaintiff is bound to make out his case, independent of any facts in such statement as though the trial was on the general issue merely.

New Jersey.— See Sheppard *v.* Wardell, 1 N. J. L. 452, holding that under issue joined on a plea of *ne unques seisin*, the demandant need not prove the marriage nor the death of the husband.

North Carolina.— Parsley *v.* Nicholson, 65 N. C. 207.

Texas.— Galveston, etc., R. Co. *v.* Henry, 65 Tex. 685.

Wisconsin.— Sexton *v.* Rhames, 13 Wis. 99; Robbins *v.* Lincoln, 12 Wis. 1.

United States.—Strong Mfg. Co. *v.* Meridan Britannia Co., 23 Fed. Cas. No. 13,546.

See 39 Cent. Dig. tit. "Pleading," § 1232.

Illustration.— In a suit to enjoin the obstruction of a street, a general denial of allegations that the land was dedicated to a public use at a certain time, and that pursuant to the dedication it was opened as a street and used by the public, was sufficient to put the truth of the allegations in issue. Mobile *v.* Fowler, 147 Ala. 403, 41 So. 468.

Where the general issue is pleaded to a special count plaintiff, in order to recover under it, must prove all the allegations of such count. Godfrey *v.* Wingert, 110 Ill. App. 563.

Corporate existence.— A general denial does not put in issue the corporate existence of plaintiff. Wiles *v.* Philippi Church, 63 Ind. 206.

Representative capacity.— In Louisiana, where a party claims in a representative capacity conferred by contract, the general issue puts him to a proof of such capacity; but if created by law, a special plea is necessary. Suydam *v.* Kinney, 7 La. Ann. 621; McDonald *v.* Millaudon, 5 La. 403. In Iowa under the statute (Code, §§ 3627, 3628) providing that a plaintiff suing in any way implying representative or other than individual capacity need not state the facts constituting such capacity, but may aver the same generally, and that, if the allegation is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated, where the allegation of citizenship of plaintiff in a denial as to a statement of consent for the sale of liquor is not controverted except by a denial, no issue is raised thereon, and no proof thereof required. Dye *v.* Augur, (Iowa 1907) 110 N. W. 323.

In Louisiana an answer which neither denies nor admits any of the allegations of the petition, but submits the case to determination, throws on plaintiff the burden of proof as fully as though each averment had been specially denied. Bayhi *v.* Bayhi, 35 La. Ann. 527.

62. *California.*— Feely *v.* Shirley, 43 Cal. 369.

ery.[63] A denial of particular facts alleged by the other party requires proof of such facts only.[64] Thus *non est factum* merely puts the execution of the instrument in issue; plaintiff need not go further and prove other allegations in his declaration.[65] New matter pleaded in the answer and denied must be established by proof, if its truth is not apparent on the face of the pleadings,[66] and defendant must establish any item of his counter-claim which plaintiff denies.[67]

4. Conformity of Pleadings and Proof[68] — **a. In General.** It is a well-settled principle that no proof can be offered of matters not put in issue by the pleadings,[69] and that on the other hand evidence which tends to prove or disprove an

Massachusetts.— Boston Relief, etc., Co. *v.* Burnett, 1 Allen 410.

Nevada.— Banta *v.* Savage, 12 Nev. 151.

South Dakota.— Mattoon *v.* Fremont, etc., R. Co., 6 S. D. 301, 60 N. W. 69.

Wisconsin.— Sexton *v.* Rhames, 13 Wis. 99.

See 39 Cent. Dig. tit. "Pleadings," § 1232.

63. Winey *v.* Chicago, etc., R. Co., 92 Iowa 622, 61 N. W. 218, holding that where a complaint alleged in one count an injury to plaintiff's wagon, and in another injuries to his person, by a collision with defendant's train at a highway crossing, it was error to charge that plaintiff must establish all the allegations of his complaint, because there might be a recovery for the personal injuries, although none of the allegations respecting injury to the wagon were established.

64. Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471; Lewis *v.* Weyerhorst, 16 Mont. 267, 40 Pac. 589; Sawyer *v.* Warner, 15 Barb. (N. Y.) 282; Heyward *v.* Farmers' Min. Co., 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702, 28 L. R. A. 42.

65. Valentine *v.* Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Gardner *v.* Gardner, 10 Johns. (N. Y.) 47.

66. Rosa *v.* Holm, 11 Iowa 282.

67. Martin *v.* Hammond, 78 Iowa 754.

68. In action for separate maintenance see Husband and Wife, 21 Cyc. 1606.

In action of assumpsit see Assumpsit, 4 Cyc. 352.

In action on guardian bond see Guardian and Ward, 21 Cyc. 257.

In action to set aside guardian sale see Guardian and Ward, 21 Cyc. 143.

69. *Alabama.*— Dalton *v.* Bunn, (1907) 44 So. 625; Sellers *v.* Malone-Pilcher Co., (1907) 44 So. 414; Jones *v.* Adkins, (1907) 44 So. 53.

Arkansas.— State Bank *v.* Arnold, 12 Ark. 180.

California.— Todhunter *v.* Klemmer, 134 Cal. 60, 66 Pac. 75; Spader *v.* McNell, 130 Cal. 500, 62 Pac. 828; People *v.* Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305; Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299; Hicks *v.* Murray, 43 Cal. 515.

Colorado.— Colorado Springs *v.* Colorado, etc., Co., 38 Colo. 107, 89 Pac. 820; Larsh *v.* Boyle, 36 Colo. 18, 86 Pac. 1000; Grant *v.* Dreyfus, (1898) 52 Pac. 1074; Rico First Nat. Bank *v.* Killgore, 10 Colo. App. 536, 51 Pac. 1023.

Connecticut.— Southey *v.* Dowling, 70 Conn. 153, 39 Atl. 113; Dennely *v.* O'Connell, 66 Conn. 175, 33 Atl. 920.

Florida.—Atlantic Coast Line R. Co. *v.* Crosby, (1907) 43 So. 318.

Georgia.— Insurance Co. of North America *v.* Leader, 121 Ga. 260, 48 S. E. 972; Pirkle *v.* Cooper, 113 Ga. 828, 39 S. E. 289 (it is proper to reject irrelevant testimony which does not throw any light on the issues made by the pleadings); Collins Park, etc., R. Co. *v.* Ware, 112 Ga. 663, 37 S. E. 975 (the rule is different where light is thrown on the issues); Hanesley *v.* Monroe, 97 Ga. 471, 25 S. E. 321; Brown *v.* Patterson, 51 Ga. 229. *Compare* Strawn *v.* Kersey, 22 Ga. 586, construing Short Form Act of 1847.

Illinois.— Mix *v.* White, 36 Ill. 484; Beloit Second Nat. Bank *v.* Woodruff, 113 Ill. App. 6; Kearney *v.* Ætna L. Ins. Co., 109 Ill. App. 609. See also Carr *v.* Brennon, 166 Ill. 108, 47 N. E. 721, 57 Am. St. Rep. 119.

Indiana.— Highfill *v.* Monk, 81 Ind. 203; Graydon *v.* Gaddis, 20 Ind. 515; Prather *v.* Ross, 17 Ind. 495; Marion, etc., R. Co. *v.* Ward, 9 Ind. 123; State *v.* O'Haver, 8 Ind. 282. See also Judah *v.* Vincennes University, 16 Ind. 56.

Iowa.— Martinek *v.* Swift, 122 Iowa 611, 98 N. W. 477; Stillman *v.* Wickham, 106 Iowa 597, 76 N. W. 1008; Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107; Ransom *v.* Stanberry, 22 Iowa 334.

Kansas.— Hartford F. Ins. Co. *v.* Warbritton, 66 Kan. 93, 71 Pac. 278; Frazier *v.* Ebenezer Baptist Church, 60 Kan. 404, 56 Pac. 752; Westchester F. Ins. Co. *v.* Coverdale, 9 Kan. App. 651, 58 Pac. 1029.

Kentucky.— Bolling *v.* Doneghy, 1 Duv. 220; Phœnix Ins. Co. *v.* Lawrence, 4 Metc. 9, 81 Am. Dec. 521; Anderson *v.* Baird, (1897) 40 S. W. 923, 19 Ky. L. Rep. 444; Louisville, etc., R. Co. *v.* Tarter, (1897) 39 S. W. 698, 19 Ky. L. Rep. 229. See also Patton *v.* Robinson, 1 Bibb 285; Shacklett *v.* Henderson County Sav. Bank, 100 S. W. 241, 30 Ky. L. Rep. 1128; Weisiger *v.* Mills, 91 S. W. 689, 28 Ky. L. Rep. 1208.

Louisiana.— Lawler *v.* Cosgrove, 39 La. Ann. 488, 2 So. 34; Lyons *v.* Jackson, 4 Rob. 465; Colsson *v.* Consolidated Assoc. Bank, 12 La. 105; Nicholes *v.* Hansc, 9 La. 268; Dixon *v.* Emerson, 9 La. 104; Benoit *v.* Hebert, 1 La. 212; Palfrey *v.* Francois, 8 Mart. N. S. 260; Ponsony *v.* Debaillon, 6 Mart. N. S. 238; Dumartrait *v.* Deblanc, 5 Mart. N. S. 38; Trudeau *v.* Trudeau, 1 Mart. N. S. 128; Conrad *v.* Louisiana Bank, 10 Mart. 700; Williamson *v.* His Creditors, 5 Mart. 618. And see Hope *v.* Howard, 19 La. Ann. 465.

Maine.— Lincoln *v.* Fitch, 42 Me. 456.

issue presented by the pleadings should not be excluded.[70] And where evidence sustains a material allegation in the pleadings, it is not to be excluded because it

Maryland.— Burch *v.* State, 4 Gill & J. 444.

Massachusetts.— Foye *v.* Patch, 132 Mass. 105. *Compare* De Montague *v.* Bacharach, 187 Mass. 128, 72 N. E. 938.

Michigan.— Hosken *v.* Carr, 147 Mich. 633, 111 N. W. 201.

Minnesota.— Hall *v.* Skahen, 101 Minn. 460, 112 N. W. 865; Lamm *v.* Armstrong, 95 Minn. 434, 104 N. W. 304, 111 Am. St. Rep. 479; Payette *v.* Day, 37 Minn. 366, 34 N. W. 592; Clonan *v.* Thornton, 21 Minn. 380.

Missouri.— Weil *v.* Posten, 77 Mo. 284; Brooks *v.* Blackwell, 76 Mo. 309. See also Avil Printing Co. *v.* Kaiser Pub. Co., (App. 1905) 89 S. W. 900.

Nebraska.— Tower *v.* McFarland, 1 Nebr. (Unoff.) 893, 96 N. W. 172.

New Jersey.— Shuff *v.* Stilwell, 11 N. J. L. 282.

New York.— Collister *v.* Fassitt, 163 N. Y. 281, 57 N. E. 490; Holroyd *v.* Sheridan, 53 N. Y. App. Div. 14, 65 N. Y. Suppl. 442; Chu Pawn *v.* Irwin, 82 Hun 607, 31 N. Y. Suppl. 724; Cowenhoven *v.* Brooklyn, 38 Barb. 9; New York Cent. Ins. Co. *v.* Nat. Protective Ins. Co., 20 Barb. 468 [*reversed* on other grounds in 14 N. Y. 85]; Wilder *v.* Moffat, 33 Misc. 777, 67 N. Y. Suppl. 1001; Bloomingdale *v.* National Butchers', etc., Bank, 33 Misc. 594, 68 N. Y. Suppl. 35; Taylor *v.* Taylor, 13 N. Y. Suppl. 55.

North Carolina.— Gwyn-Harper Mfg. Co. *v.* Cloer, 140 N. C. 128, 52 S. E. 305; Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179; Bizzell *v.* McKinnon, 121 N. C. 186, 28 S. E. 271; Christmas *v.* Haywood, 119 N. C. 130, 25 S. E. 861; Graves *v.* Trueblood, 96 N. C. 495, 1 S. E. 918; McLaurin *v.* Cronly, 90 N. C. 50; Young *v.* Greenlee, 82 N. C. 346.

Oregon.— Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30, holding that evidence cannot be introduced to support a reply which constitutes a departure from the ground taken in the complaint.

Pennsylvania.— Jacoby *v.* German American Ins. Co., 10 Pa. Super. Ct. 193; Jacoby *v.* Providence Washington Ins. Co., 10 Pa. Super. Ct. 185; Coble *v.* Zook, 9 Pa. Super. Ct. 465.

South Carolina.— Bowick *v.* American Pipe Mfg. Co., 69 S. C. 360, 48 S. E. 276; McGee *v.* Wells, 37 S. C. 365, 16 S. E. 29.

South Dakota.— Sykes *v.* First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

Texas.— Bender *v.* Friedrich, 39 Tex. 276; Denison *v.* League, 16 Tex. 399; Ruis *v.* Chambers, 15 Tex. 586; Kelly *v.* Kelly, 12 Tex. 452; Thompson *v.* Thompson, 12 Tex. 327; Rivers *v.* Foote, 11 Tex. 662; Guess *v.* Lubbock, 5 Tex. 535; Keeble *v.* Black, 4 Tex. 69; Caldwell *v.* Haley, 3 Tex. 317; Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661; Smith *v.* Sherwood, 2 Tex. 460; Mims *v.* Mitchell, 1 Tex. 443; San Antonio Traction Co. *v.* Lambkin, (Civ. App. 1907) 99 S. W. 574; Western Union Co. *v.* Byrd, 34 Tex. Civ. App. 594, 76 S. W. 40; Neitch *v.* Hillman, 29 Tex. Civ. App. 544, 69 S. W. 494; Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

Vermont.— Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462.

Washington.— Jacobs *v.* First Nat. Bank, 15 Wash. 358, 46 Pac. 396; Tilzie *v.* Haye, 8 Wash. 187, 35 Pac. 583. See also Wheeler *v.* Aberdeen, 45 Wash. 63, 87 Pac. 1061.

West Virginia.— Mann *v.* Perry, 3 W. Va. 580.

Wisconsin.— Gall *v.* Gall, 120 Wis. 270, 97 N. W. 938; James *v.* Carson, 94 Wis. 632, 69 N. W. 1004.

United States.— Rucker *v.* Bolles, 133 Fed. 858, 67 C. C. A. 30; King *v.* Bender, 116 Fed. 813, 54 C. C. A. 317; Bowen *v.* Hart, 101 Fed. 376, 41 C. C. A. 390; Taylor *v.* Luther, 23 Fed. Cas. No. 13,796, 2 Sumn. 228. See also Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,501, 2 McLean 596.

See 39 Cent. Dig. tit. "Pleading," § 1237.

"Proofs without averments and averments without proofs are equally unavailing." Castle *v.* Persons, 117 Fed. 835, 843, 54 C. C. A. 133. See also McLaurin *v.* Cronly, 90 N. C. 50.

Different cause of action.— A party will not be allowed to introduce evidence to prove a cause of action different from the one set out in his complaint. Richards *v.* Green, (Ariz. 1890) 32 Pac. 266.

Where plaintiff's own witness proves his disqualification to sue, although the evidence may not be pertinent to the issue, the court is bound to notice it. Susan *v.* Wells, 3 Brev. (S. C.) 11.

In Maryland where in a suit brought under the rule day acts, defendant appears and complies with the provisions necessary to avoid a judgment by default, the case then proceeds as an ordinary action *ex contractu*, and neither the affidavit nor the cause of action filed controls the nature and character of the proof plaintiff may offer. He is at liberty to claim anything recoverable under his declaration and defendant may avail himself of any defense and any evidence admissible under his plea. Legum *v.* Blank, 105 Md. 126, 65 Atl. 1071.

70. Leon *v.* Kerrison, 47 Fla. 178, 36 So. 173; Cane *v.* Lieberman, 103 N. Y. Suppl. 728. See also Kelly *v.* McKenna, 18 Mich. 381.

Proof where non-joinder of parties pleaded. — Where in a suit by the manager and part-owner of a mine to recover for ore alleged to have been sold to defendant, the answer set up the non-joinder of parties plaintiff, and alleged who the true owners of the ore were, it was held that defendant was entitled at the trial to show who such owners were. Goodspeed *v.* Wasatch Silver Lead Works, 2 Utah 263. On an answer setting up the non-joinder of other persons as co-defendants, articles of copartnership are admissible to prove a partnership between defendants and the persons omitted. Kayser *v.*

also tends to prove matters not alleged.[71] If admissible under any issue the evidence must be received, although it is inadmissible under other issues.[72] Evidence which is admissible under the pleadings of one party should not be excluded merely because it is the opposite party who offers it.[73] Failure to object to the introduction of evidence unauthorized by the pleadings is a waiver of the objection.[74]

b. Statutory Provisions. Where, owing to statutory provisions as to the right or duty to file pleadings,[75] it is impossible or unnecessary for a party to file a reply, rejoinder or other pleading setting up new facts upon which he relies, evidence of such facts may be introduced without being pleaded.[76]

c. Sufficiency of Allegations to Admit Proof. Where a cause of action or defense can be reasonably inferred from the averments of the pleading evidence will not be excluded at the trial,[77] because of an imperfect statement of such cause of defense;[78] but where averments are so uncertain that the elements of a cause of action or defense cannot be inferred, evidence may be excluded at the trial.[79] As a general rule where the evidence offered tends to prove any fact substantially embraced within the allegations, whether expressly or by clear inference, it should be admitted.[80] And evidence which tends to throw light upon the acts, facts, or situation alleged, is properly admissible.[81] On the other hand, where the evi-

Sichel, 34 Barb. (N. Y.) 84 [*affirmed* in 4 Abb. Dec. 592, 3 Keyes 120, 33 How. Pr. 174].

71. Plourd *v.* Jarvis, 99 Me. 161, 58 Atl. 774.

72. Mulhall *v.* Mulhall, 3 Okla. 252, 41 Pac. 577.

73. Delphine *v.* Guillet, 11 La. Ann. 424.

74. See *infra*, XIV, I.

75. See the statutes of the different states.

76. *California.*— Sterling *v.* Smith, 97 Cal. 343, 32 Pac. 320; Williams *v.* Dennison, 94 Cal. 540, 29 Pac. 946; Grangers' Business Assoc. *v.* Clark, 84 Cal. 201, 23 Pac. 1081; Colton Land, etc., Co. *v.* Raynor, 57 Cal. 588.

Georgia.— McLendon *v.* Frost, 57 Ga. 448; Inferior Ct. Justices *v.* Woods, 1 Ga. 84.

Iowa.— Smith *v.* Milburn, 17 Iowa 30; Davenport Sav. Fund Assoc. *v.* North American F. Ins. Co., 16 Iowa 74.

Louisiana.— Craig *v.* Lambert, 44 La. Ann. 885, 11 So. 464; Riley *v.* Wilcox, 12 Rob. 648; Holliday *v.* Marionneaux, 9 Rob. 504; Segond *v.* Landry, 1 Rob. 335; Muse *v.* Yarborough, 11 La. 521; Bruce *v.* Stone, 5 La. 1; Daquin *v.* Coiron, 3 La. 387; Planters' Bank *v.* Allard, 8 Mart. N. S. 136; Skilliman *v.* Jones, 3 Mart. N. S. 686; Flood *v.* Shamburgh, 3 Mart. N. S. 622.

Michigan.— Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347; Caldwell *v.* Gates, 11 Mich. 77.

Missouri.— Dempsey *v.* Schawacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100.

Nebraska.— Martins *v.* Pittock, 3 Nebr. (Unoff.) 770, 92 N. W. 1038.

New York.— Keeler *v.* Keeler, 102 N. Y. 30, 6 N. E. 678; Arthur *v.* Homestead F. Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550; Johnson *v.* White, 6 Hun 587; Durant *v.* Abendroth, 15 N. Y. St. 339.

Utah.— Whitney *v.* Richards, 17 Utah 226, 53 Pac. 1122.

United States.— Cheang Kee *v.* U. S., 3 Wall. 320, 11 L. ed. 72; Burlington Ins. Co. *v.* Miller, 60 Fed. 254, 8 C. C. A. 612.

See 39 Cent. Dig. tit. "Pleading," §§ 1274, 1275, 1277.

77. Mini *v.* Mini, (Cal. 1896) 45 Pac. 1044; Skelton *v.* Fenton Electric Light, etc., Co., 100 Mich. 87, 58 N. W. 609.

78. Delaney *v.* Bowman, 82 Mo. App. 252.

79. *In re* Sprowl, 109 La. 352, 33 So. 365; Pargoud *v.* Guice, 6 La. 75, 25 Am. Dec. 202.

80. *Alabama.*— Wainright *v.* Townsley, 1 Stew. 29.

Arkansas.— Holland *v.* Rogers, 33 Ark. 251.

Illinois.— Baltimore, etc., R. Co. *v.* Slanker, 180 Ill. 357, 54 N. E. 309.

Louisiana.— Brugnot *v.* Louisiana State Mar., etc., Ins. Co., 12 La. 326; Ory *v.* Winter, 4 Mart. N. S. 277; Chretien *v.* Theard, 2 Mart. N. S. 582.

Massachusetts.— Taylor *v.* Jaques, 106 Mass. 291; Knapp *v.* Slocomb, 9 Gray 73.

Michigan.— Busch *v.* Wilcox, 82 Mich. 315, 46 N. W. 940.

New York.— Wager *v.* Link, 150 N. Y. 549, 44 N. E. 1103; Scholey *v.* Mumford, 64 N. Y. 521; Gleitsmann *v.* Gleitsmann, 60 N. Y. App. Div. 371, 70 N. Y. Suppl. 1007; Cady *v.* Allen, 22 Barb. 388; Miller *v.* Zeimer, 12 Daly 126. See also McMahon *v.* Sherman, 14 N. Y. St. 637.

South Carolina.— McKagen *v.* Windham, 59 S. C. 434, 38 S. E. 2.

Texas.— Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

See 39 Cent. Dig. tit. "Pleading," § 1238.

81. *Alabama.*— Williams *v.* Haney, 3 Ala. 371.

Illinois.— Cicero, etc., R. Co. *v.* Richter, 85 Ill. App. 591.

Louisiana.— Pascal *v.* Ducros, 8 Rob. 112, 41 Am. Dec. 294.

Massachusetts.— Crowell *v.* Porter, 106 Mass. 80.

Texas.— San Antonio Tract. Co. *v.* Lambkin, (Civ. App. 1907) 99 S. W. 574, in an action for insulting conduct offered by a street car conductor to a passenger it is proper to permit proof of the presence of others on the car at the time.

dence offered does not tend to support any of the facts in issue, but goes to prove facts entirely outside the issues, it will be rejected.[82] Evidence is not inadmissible because it goes beyond or falls short of an allegation in the pleading, if it includes a part or all of such allegation.[83]

d. Several Counts or Defenses. The same evidence may be available for more than one count or defense.[84] As a general rule evidence is admissible, if it sustains one count or defense, although not appropriate to all.[85] But evidence

Washington.— Smith *v.* Kennedy, 1 Wash. Terr. 55.

Rule specially applicable in negligence cases. — Chicago City R. Co. *v.* Jennings, 157 Ill. 274; 41 N. E. 629; Chicago City R. Co. *v.* Iverson, 108 Ill. App. 433; Cicero, etc., R. Co. *v.* Richter, 85 Ill. App. 591. *Compare* Ackman *v.* Third Ave. R. Co., 52 N. Y. App. Div. 483, 65 N. Y. Suppl. 97.

82. *California.*—Roche *v.* Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; Todhunter *v.* Klemmer, 134 Cal. 60, 66 Pac. 75; Porter *v.* Lassen County Land, etc., Co., 127 Cal. 261, 59 Pac. 563; Santa Anna *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

Connecticut.— Bierce *v.* Sharon Electric Light Co., 73 Conn. 300, 47 Atl. 324.

Georgia.— Harrell *v.* Blount, 112 Ga. 711, 38 S. E. 56, holding that a defendant is not entitled to any defense, concerning which his answer is silent.

Indiana.— Bane *v.* Ward, 77 Ind. 153.

Kansas.— Robieson *v.* Royce, 63 Kan. 886, 66 Pac. 646.

Kentucky.— Taylor *v.* Combs, 50 S. W. 64, 20 Ky. L. Rep. 1828; Howard *v.* Dietrick, 13 Ky. L. Rep. 539; Patton *v.* Robinson, 1 Bibb 285.

Louisiana.— Martin Davie *v.* Carville, 110 La. 862, 34 So. 807.

Maryland.— Burgess *v.* Lloyd, 7 Md. 178.

Massachusetts.—Eastern R. Co. *v.* Benedict, 10 Gray 212.

Missouri.— New England L. & T. Co. *v.* Browne, 157 Mo. 116, 57 S. W. 760; Hunleth *v.* Leahy, 146 Mo. 408, 48 S. W. 459; Spaulding *v.* Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; Fechley *v.* Springfield Tract. Co., 119 Mo. App. 358, 96 S. W. 421; C. H. Brown Banking Co. *v.* Baker, 99 Mo. App. 660, 74 S. W. 454; St. Joseph School Bd. *v.* Hull, 72 Mo. App. 403; Butchers', etc., Bank *v.* Pulitzer, 11 Mo. App. 594.

Nebraska.— Ayers *v.* Wolcott, 62 Nebr. 805, 87 N. W. 906; Chicago, etc., R. Co. *v.* Williams, 61 Nebr. 608, 85 N. W. 832, 55 L. R. A. 289.

New York.— Van Dyke *v.* Maguire, 57 N. Y. 429; Becker *v.* Krank, 75 N. Y. App. Div. 191, 77 N. Y. Suppl. 665 [*affirmed* in 176 N. Y. 545, 68 N. E. 1114]; Ackman *v.* Third Ave. R. Co., 52 N. Y. App. Div. 483, 65 N. Y. Suppl. 97; Commercial Bank *v.* Foltz, 35 N. Y. App. Div. 237, 54 N. Y. Suppl. 764; Harrell *v.* Bonfils Imp. Co., 17 N. Y. App. Div. 405, 45 N. Y. Suppl. 227; Donovan *v.* Wheeler, 67 Hun 68, 22 N. Y. Suppl. 54; Brett *v.* Brooklyn First Universalist Soc., 63 Barb. 610.

North Carolina.— Greer *v.* Herren, 99 N. C. 492, 6 S. E. 257.

Oregon.— Haines *v.* Cadwell, 40 Oreg. 229, 66 Pac. 910.

Texas.— Davidson *v.* Edgar, 5 Tex. 492; Hurst *v.* Benson, 27 Tex. Civ. App. 227, 65 S. W. 76; Hurd *v.* Texas Brewing Co., 21 Tex. Civ. App. 296, 51 S. W. 883, 57 S. W. 573.

Washington.— Kennedy *v.* Snohomish County School Dist. No. 1, 20 Wash. 399, 55 Pac. 567.

United States.— Baltimore, etc., R. Co. *v.* Camp, 105 Fed. 212, 44 C. C. A. 451.

Admissions of party.— Admissions drawn from plaintiff when on the witness' stand in his own behalf, if they go to the foundation of the case, are pertinent to the issue, no matter what the form of the pleadings may be. Tyler *v.* Gilmore, 3 Mackey (D. C.) 189. And a plaintiff who has made admissions favorable to defendant when made a witness may avoid them by other statements, without the necessity of formally pleading them. McCorkle *v.* Lawrence, 21 Tex. 731.

Illustrations.— Evidence excusing non-performance is not admissible under an issue joined on an allegation of performance (Patton *v.* Robinson, 1 Bibb (Ky.) 285; La Chicotte *v.* Richmond R., etc., Co., 15 N. Y. App. Div. 380, 44 N. Y. Suppl. 75; Goodwin *v.* Cobe, 24 Misc. (N. Y.) 389, 53 N. Y. Suppl. 415; Warren *v.* Bean, 6 Wis. 120); nor under an allegation that plaintiff has observed due diligence in the prosecution of an action can it be shown that such diligence would have been unavailing (Woolsey *v.* Williams, 34 Iowa 413). Abandonment of contract or failure to perform conditions precedent (Laraway *v.* Perkins, 10 N. Y. 371), or failure of consideration (Ragsdale *v.* Thom, 1 McMull. (S. C.) 335), cannot be shown under *non est factum*. Evidence that an instrument was void on one account cannot be introduced under an allegation that it was void for a wholly different reason. Cleveland *v.* Comstock, 22 La. Ann. 597. Insanity of the maker of an instrument sued on cannot be proved under a plea of non-delivery. Dearmond *v.* Dearmond, 12 Ind. 455. Under an allegation that a contract was broken by a certain act of defendant, plaintiff cannot show that another person did the act in question. Arndt *v.* Boyd, (Tex. Civ. App. 1898) 48 S. W. 771.

83. Trimble *v.* Plesant, 35 La. Ann. 874; Thornton *v.* Linton, 3 La. 253.

84. Dayton *v.* Monroe, 47 Mich. 193, 10 N. W. 196. See also Rogers *v.* Mexico City Banking Co., (Tex. Civ. App. 1907) 103 S. W. 461.

85. *Connecticut.*— Munson *v.* Munson, 24 Conn. 115.

appropriate to only one count or defense cannot be introduced in support of an issue based entirely on another.[86] It is error to allow the introduction of evidence appropriate only to a count that is fatally defective,[87] or one that has been quashed.[88] And evidence is not admissible in support of a count or portion of a pleading abandoned or stricken out.[89]

e. Probative Facts. Only ultimate, not probative, facts, should be alleged; hence if the proof of an ultimate fact requires the prior proof of one or more probative facts, evidence thereof cannot be excluded on the ground that such facts are not alleged.[90] Any evidentiary fact which bears directly upon the issues raised by the pleadings is admissible without being pleaded;[91] and if a party states only matters of evidence in his pleadings and not the ultimate fact on which he relies, the court will not allow proof of the fact relied on, unless it follows as a necessary legal consequence from the evidentiary facts stated.[92]

f. Matters Arising After Commencement of Action. Evidence cannot be given of matters arising after the commencement of the action, unless a foundation has been laid by the proper pleadings;[93] but if the proper foundation has been laid in the pleadings, a deed executed after the commencement of the suit may be introduced without further pleading to show the nature of the agreement existing between the parties.[94]

g. Immaterial Allegations. No evidence should be admitted in support of immaterial allegations,[95] but a party who has himself tendered an immaterial issue cannot object to the admission of evidence in respect thereto.[96]

h. Written Instruments. The law does not require parties to allege that their evidence is in writing and so written evidence of a contract is admissible

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 148.

Kansas.— Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52.

Maine.— Irving *v.* Thomas, 18 Me. 418.

Massachusetts.— Hodges *v.* Holland, 16 Pick. 395.

Mississippi.— Gibson *v.* Powell, 5 Sm. & M. 712.

Pennsylvania.— Eckman *v.* Pfautz, 21 Lanc. L. Rev. 117.

See 39 Cent. Dig. tit. "Pleading," § 1239.

86. Florence Cotton, etc., Co. *v.* Field, 104 Ala. 471, 16 So. 538; McLaurin *v.* Cronly, 90 N. C. 50 (defense not set forth in the plea, but set up *ore tenus*); Duncan *v.* Magette, 25 Tex. 245.

87. Terry *v.* St. Louis, etc., R. Co., 89 Mo. 586, 1 S. W. 746.

88. Matlock *v.* Purefoy, 18 Ark. 492.

89. Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; Parrott *v.* Underwood, 10 Tex. 48.

90. Wenzel *v.* Schultz, 100 Cal. 250, 34 Pac. 696; Grewell *v.* Walden, 23 Cal. 165; Green *v.* Palmer, 15 Cal. 411, 76 Am. Dec. 492; Halsey *v.* Hobbs, 32 S. W. 415, 17 Ky. L. Rep. 741; Van Alstyne *v.* Bertrand, 15 Tex. 177; Defrance *v.* Hazen, 2 Pinn. (Wis.) 228.

Fraud may be shown in evidence without being pleaded if it is not the ultimate fact to be proved, but is merely evidence to prove some other fact properly put in issue. Whitney *v.* Lehmer, 26 Ind. 503; State *v.* Stock, 38 Kan. 154, 16 Pac. 106; Herbert *v.* Duryea, 34 N. Y. App. Div. 478, 54 N. Y. Suppl. 311 [*affirmed* in 164 N. Y. 596, 58 N. E. 1088].

91. *Colorado.*— Rocky Ford Canal, etc., Co. *v.* Simpson, 5 Colo. App. 30, 36 Pac. 638.

Minnesota.— Siebert *v.* Leonard, 21 Minn. 442.

Missouri.— Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188.

New York.— Hunt *v.* Griffen, 19 N. Y. Suppl. 135.

Washington.— Dillon *v.* Folsom, 5 Wash. 439, 32 Pac. 216.

See 39 Cent. Dig. tit. "Pleading," § 1246.

Ratification.— Ratification is equivalent to prior authorization and is deemed evidence thereof. Hence it may be proved under an allegation of the doing of the act by the principal through the agent. Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998; Long *v.* Osborn, 91 Iowa 160, 59 N. W. 14; Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255; Hoyt *v.* Thompson, 19 N. Y. 207; Hubbard *v.* Williamstown, 61 Wis. 397, 21 N. W. 295.

92. Waller *v.* Robinson, 2 Ohio Dec. (Reprint) 16, 1 West. L. Month. 90.

93. Hegler *v.* Eddy, 53 Cal. 597; Allen *v.* Newberry, 8 Iowa 65; Campbell *v.* Fulmer, 39 Kan. 409, 18 Pac. 493.

94. Schiffer *v.* Adams, 13 Colo. 572, 22 Pac. 964.

95. *Colorado.*— St. Vrain Stone Co. *v.* Denver, etc., R. Co., 18 Colo. 211, 32 Pac. 827.

Connecticut.— Allen *v.* Ruland, 79 Conn. 405, 65 Atl. 138.

New York.—White *v.* Spencer, 14 N. Y. 247.

South Carolina.— De Hihns *v.* Free, 70 S. C. 344, 49 S. E. 841.

Texas.— Powell *v.* Davis, 19 Tex. 380.

Vermont.— Drew *v.* Chamberlin, 19 Vt. 573.

See 39 Cent. Dig. tit. "Pleading," § 1244. And see *supra*, XIII, B, 1, c.

96. Smith *v.* Meyers, 54 Nebr. 1, 74 N. W.

without an allegation that the contract has been reduced to writing.[97] But evidence of a parol agreement is inadmissible under a petition or complaint counting on a written instrument.[98] A written instrument may be admissible under the common money counts,[99] even though inadmissible under a special count because of variance.[1] Before deeds misdescribing land can be introduced along with evidence to correct the error in the description, proper ground therefor must be laid in the pleadings, by alleging the mistake and praying a reformation.[2]

i. Fraud and Mistake.[3] Except where evidence of fraud is admissible under the general issue,[4] where fraud is not pleaded evidence thereof is not admissible.[5] And where a particular species of fraud is alleged, proof of a different species is inadmissible.[6] Fraud cannot be alleged generally, but the facts constituting the fraud must be set up in order to let in evidence.[7] Evidence tending to prove a rescission of a contract is inadmissible under a plea attempting to avoid the contract on the ground of fraud.[8] Mistake must also be pleaded if a party desires to introduce evidence thereof,[9] and such evidence cannot be introduced under a plea

277; Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323.

97. Brown *v.* Caves, 19 La. Ann. 438; Hamilton *v.* Lau, 24 Nebr. 59, 37 N. W. 688; Texas, etc., R. Co. *v.* Logan, 3 Tex. App. Civ. Cas. § 186.

98. Browning *v.* Walbrun, 45 Mo. 477; Wheeler *v.* Schad, 7 Nev. 204.

99. Mercer County *v.* Hubbard, 45 Ill. 139.

1. Jamieson *v.* Alexander, 13 Fed. Cas. No. 7,203, 1 Cranch C. C. 6.

2. Cain *v.* Hunt, 41 Ind. 466.

3. See FRAUD, 20 Cyc. 104 *et seq.*

4. Jenkins *v.* Long, 19 Ind. 28, 81 Am. Dec. 374. And see *infra*, XIII, B, 4, l, (II).

5. *California.*— Harrison *v.* McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Wilson *v.* White, 84 Cal. 239, 24 Pac. 114. See also Hayne *v.* Hermann, 97 Cal. 259, 32 Pac. 171.

Colorado.— Winchester *v.* Joslyn, 31 Colo. 220, 72 Pac. 1079, 102 Am. St. Rep. 30; Arapahoe Cattle, etc., Co. *v.* Stevens, 13 Colo. 534, 22 Pac. 823; Tucker *v.* Parks, 7 Colo. 62, 298, 1 Pac. 427, 3 Pac. 486; Mosier *v.* Kershow, 16 Colo. App. 453, 66 Pac. 449.

Illinois.— Anderson *v.* Jacobson, 66 Ill. 522, under express statute.

Indiana.— Farmer *v.* Calvert, 44 Ind. 209; Jenkins *v.* Long, 19 Ind. 28, 81 Am. Dec. 374.

Louisiana.— Gay *v.* Nicol, 28 La. Ann. 227.

Minnesota.— Daly *v.* Proetz, 20 Minn. 411. See also Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

New Hampshire.— See Brewer *v.* Hyndman, 18 N. H. 9.

New York.— See Tallman *v.* Kimball, 74 Hun 279, 26 N. Y. Suppl. 811.

Pennsylvania.— Clark *v.* Lindsay, 7 Pa. Super. Ct. 43.

Texas.— Keating Implement, etc., Co. *v.* Terre Haute Carriage, etc., Co., 11 Tex. Civ. App. 216, 32 S. W. 556; Houx *v.* Blum, 9 Tex. Civ. App. 588, 29 S. W. 1135. See also Smitheal *v.* Smith, 10 Tex. Civ. App. 446, 31 S. W. 422.

United States.— McCraeken *v.* Robison, 57 Fed. 375, 6 C. C. A. 400.

But see Higgins *v.* Cartwright, 25 Mo. App. 60.

Illustration.— Where merely the existence of an alleged contract is in issue, evidence that the contract was procured through fraud is not admissible. Bray *v.* Loomer, 61 Conn. 456, 23 Atl. 831; Chu Pawn *v.* Irwin, 82 Hun (N. Y.) 607, 31 N. Y. Suppl. 724.

Affirmative relief.— Fraud cannot be shown for the purpose of obtaining affirmative relief unless it is pleaded. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

Fraud on the jurisdiction of the court in making allegations as to value must be specially pleaded. Hamilton *v.* Peek, (Tex. Civ. App. 1896) 38 S. W. 403.

In an action of replevin, fraud in the acquisition of plaintiff's title may be proved by defendant under the general denial. Young *v.* Glascock, 79 Mo. 574; Greenway *v.* James, 34 Mo. 326; Stern Auction, etc., Co. *v.* Mason, 16 Mo. App. 473.

6. Palfrey *v.* Francois, 8 Mart. N. S. (La.) 260.

Proof of constructive fraud will not support allegations of actual fraud. Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653; Haynes *v.* McKee, 19 Misc. (N. Y.) 511, 43 N. Y. Suppl. 1126.

7. Burris *v.* Adams, 96 Cal. 664, 31 Pac. 565; Green *v.* Hayes, 70 Cal. 276, 11 Pac. 716; Dwertman *v.* Sipe, 62 Ill. App. 115; Hale *v.* Walker, 31 Iowa 344, 7 Am. Rep. 137; Reed *v.* Clark Cove Guano Co., 47 Hun (N. Y.) 410. *Compare* Miller *v.* Bedell, 21 La. Ann. 573.

Where a specific allegation of certain false representations is followed by a general allegation of "other false and fraudulent representations," no proof of any but those pleaded will be admitted. Reed *v.* Clark Cove Guano Co., 47 Hun (N. Y.) 410.

Introducing proof by cross-examination.— Where a special plea setting up the defense of fraud was properly stricken out as not sufficiently specific, defendant is not entitled to introduce such defense under the plea of general issue by cross-examination of plaintiff's witnesses. Payne *v.* Kniekerboeker Trust Co., 153 Fed. 176, 82 C. C. A. 350.

8. Fogg *v.* Griffin, 2 Allen (Mass.) 1.

9. *Indiana.*— Free *v.* Meikel, 39 Ind. 318.

Kentucky.— Berry *v.* Evans, 89 S. W. 12, 28 Ky. L. Rep. 22.

of fraud[10] since there is a well defined distinction between a fraud and a mistake.

j. Title, Ownership, and Possession.[11] A general allegation of title is sufficient to admit evidence pertaining thereto, without setting up the facts showing its character;[12] but if a particular source or kind of title is pleaded it must be proved as alleged.[13] Under a denial of title, evidence may be introduced showing the insufficient character of the instrument under which title is claimed,[14] or showing that the title is in another.[15] An allegation of ownership does not authorize evidence of possession.[16] Evidence of a mutual assignment among plaintiffs for the purposes of bringing a joint suit cannot be shown where such assignment is not averred in the declaration.[17]

k. Declaration or Complaint. A plaintiff cannot be permitted to establish by proof a cause of action not alleged in his complaint or declaration, but must state the facts constituting his cause of action and make out his case by giving evidence to support the facts he has stated.[18] Under the code system, however, plaintiff is

Missouri.— Scott *v.* Chicago, etc., R. Co., 57 Mo. App. 345.

North Carolina.— Anderson *v.* Logan, 105 N. C. 266, 11 S. E. 361; Graves *v.* Trueblood, 96 N. C. 495, 1 S. E. 918.

Pennsylvania.— Clark *v.* Lindsay, 7 Pa. Super. Ct. 43.

Texas.— Rowe *v.* Horton, 65 Tex. 89.

West Virginia.— Burley *v.* Weller, 14 W. Va. 264.

10. Leighton *v.* Grant, 20 Minn. 345.

11. See EJECTMENT, 15 Cyc. 113 *et seq.*; QUIETING TITLE; TRESPASS TO TRY TITLE.

12. *Alabama.*— Williams *v.* Haney, 3 Ala. 371.

Connecticut.— Bennett *v.* Lathrop, 71 Conn. 613, 42 Atl. 634, 71 Am. St. Rep. 222.

Indiana.— Peoria, etc., R. Co. *v.* Attica, etc., R. Co., 154 Ind. 218, 56 N. E. 210.

Louisiana.— Jones *v.* Elliott, 2 La. Ann. 1009; Boatner *v.* Walker, 4 La. 313; Shiff *v.* Wilson, 3 Mart. N. S. 91; Livingston *v.* Heerman, 9 Mart. 656.

Minnesota.— McArthur *v.* Clark, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333; Atwater *v.* Spaulding, 86 Minn. 101, 90 N. W. 370, 91 Am. St. Rep. 331.

Missouri.— Mexico First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 N. W. 987, 81 Am. St. Rep. 332.

Nebraska.— Reed *v.* McRill, 41 Nebr. 206, 59 N. W. 775; Kavanaugh *v.* Oberfelder, 37 Nebr. 647, 56 N. W. 316.

New York.— See Loeb *v.* Chur, 3 Silv. Sup. 147, 6 N. Y. Suppl. 296 [*affirmed* in 125 N. Y. 726, 26 N. E. 756].

North Dakota.— Fisher *v.* Bouisson, 3 N. D. 493, 57 N. W. 505.

Oregon.— Carter *v.* Wakeman, 42 Oreg. 147, 70 Pac. 393.

Texas.— Fowler *v.* Stonum, 6 Tex. 60.

Utah.— Hague *v.* Nephi Irr. Co., 16 Utah 421, 52 Pac. 765, 67 Am. St. Rep. 643, 41 L. R. A. 311.

Washington.— Osborne *v.* Stevens, 15 Wash. 478, 46 Pac. 1027; Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123.

13. *Iowa.*— Smith *v.* Runnels, 97 Iowa 55, 65 N. W. 1002.

Louisiana.— Nicholls *v.* His Creditors, 9 Rob. 476; Delogny *v.* Smith, 3 La. 418.

Missouri.— Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444.

Nebraska.— Randall *v.* Persons, 42 Nebr. 607, 60 N. W. 898.

Texas.— Osborne *v.* Tillman, (Civ. App. 1896) 28 S. W. 131; Walker *v.* Houston, (Civ. App. 1895) 29 S. W. 1139.

See 39 Cent. Dig. tit. "Pleading," § 1251.

But see Davis *v.* Leeper, 56 S. W. 712, 22 Ky. L. Rep. 116, where title by inheritance was alleged and title by possession proved.

14. Wenzel *v.* Schultz, 100 Cal. 250, 34 Pac. 696.

15. Beard *v.* Minneapolis First Nat. Bank, 41 Minn. 153, 43 N. W. 7, 8.

16. McGrew *v.* Lamb, 31 Wash. 485, 72 Pac. 100. And see Sterling *v.* Sterling, 43 Oreg. 200, 72 Pac. 741. *Compare* Layton *v.* Menard, 2 Mart. N. S. (La.) 505.

17. Cilley *v.* Van Patten, 58 Mich. 404, 25 N. W. 326.

18. *Alabama.*— Florence Cotton, etc., Co. *v.* Field, 104 Ala. 471, 16 So. 538.

California.— Eastlick *v.* Wright, 121 Cal. 309, 53 Pac. 654; Owen *v.* Meade, 104 Cal. 179, 37 Pac. 923; Burke *v.* Levy, 68 Cal. 32, 8 Pac. 527. See also Swain *v.* Naglee, 17 Cal. 416.

Colorado.— Levy *v.* Spencer, 18 Colo. 532, 33 Pac. 415, 36 Am. St. Rep. 303.

Connecticut.— Rossiter *v.* Downs, 4 Conn. 292.

Illinois.— Maxwell *v.* Longenecker, 89 Ill. 102; Chicago *v.* O'Brennan, 65 Ill. 160.

Indiana.— Louisville, etc., R. Co. *v.* Godman, 104 Ind. 490, 4 N. E. 163; Sims *v.* Smith, 99 Ind. 469, 50 Am. Rep. 99; Hackler *v.* State, 81 Ind. 430.

Kansas.— Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686; Kingman, etc., R. Co. *v.* Quinn, 45 Kan. 477, 25 Pac. 1068.

Kentucky.— Morris *v.* Hazelwood, 1 Bush 208; Richardson *v.* Talbot, 2 Bibb 382; Mize *v.* Godsey, 36 S. W. 169, 18 Ky. L. Rep. 287; Howard *v.* Dietrick, 13 Ky. L. Rep. 539.

Louisiana.— Abat *v.* Penny, 19 La. Ann. 289; Pascal *v.* Ducros, 8 Rob. 112, 41 Am. Dec. 294; Pritchard *v.* McKinstry, 12 La. 224; Seal *v.* Erwin, 2 Mart. N. S. 245.

Maryland.— McTavish *v.* Carroll, 17 Md. 1.

permitted to recover on proof of any cause of action embraced within the facts alleged in his complaint, and if he proves enough facts to entitle him to relief, he will have judgment notwithstanding he may have failed to prove the cause of action apparently intended.[19]

1. Plea or Answer — (i) *In General.* The general rule is that under the general issue or a general denial any evidence is admissible which contradicts, or directly tends to contradict, the allegations which plaintiff must prove in order to sustain his case.[20] It should be noted in this connection that while there are statements in the cases to the effect that general denial is the equivalent of the general

Michigan.— Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485; Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165; Green *v.* Green, 26 Mich. 437.

Minnesota.— State *v.* Segel, 60 Minn. 507, 62 N. W. 1134.

Mississippi.— Wells *v.* Alabama Great Southern R. Co., 67 Miss. 24, 6 So. 737.

Missouri.— Milliken *v.* Thyson Commission Co., 202 Mo. 637, 101 S. W. 604; Springfield, etc., R. Co. *v.* Calkins, 90 Mo. 538 (holding that arbitration as a new matter in bar cannot be shown unless pleaded); Thompson *v.* Irwin, 76 Mo. App. 418; James *v.* Hicks, 58 Mo. App. 521; Kabrich *v.* Des Moines State Ins. Co., 48 Mo. App. 393; Murphy *v.* Bedford, 18 Mo. App. 279.

Nebraska.— McLain *v.* Maricle, 60 Nebr. 359, 83 N. W. 829.

New Hampshire.— Brewer *v.* Hyndman, 18 N. H. 9.

New York.— Bristol *v.* Rensselaer, etc., R. Co., 9 Barb. 158; Brown *v.* McCune, 5 Sandf. 224; Garvey *v.* Fowler, 4 Sandf. 665; Johnson *v.* American Writing Mach. Co., 56 N. Y. Super. Ct. 500, 4 N. Y. Suppl. 391; Rosen *v.* Brodskey, 26 Misc. 816, 57 N. Y. Suppl. 99 (under a complaint for conversion, no recovery can be had on a contract); Parsons *v.* Hughes, 16 N. Y. Suppl. 702 [*affirmed* in 137 N. Y. 629, 33 N. E. 745]; Riggs *v.* Chapin, 7 N. Y. Suppl. 765.

Oregon.— Hannan *v.* Greenfield, 36 Oreg. 97, 58 Pac. 888; Farmers', etc., Nat. Bank *v.* Hunter, 35 Oreg. 188, 57 Pac. 424.

Pennsylvania.— Moses *v.* Powers, 7 Pa. Dist. 401.

Rhode Island.— Prefontaine *v.* Roberge, 20 R. I. 418, 39 Atl. 892.

Tennessee.— Foster *v.* Jackson, 8 Baxt. 433; Hunter *v.* Anderson, 1 Heisk. 1.

Texas.— Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150; Dunlap *v.* Yoakum, 18 Tex. 582 (a general allegation that plaintiff has a ferry imports a public and not a private ferry and will authorize proof of a public license); Thornton *v.* Stevenson, (Civ. App. 1895) 31 S. W. 232.

Vermont.— Sills Stove Works *v.* Brown, 71 Vt. 478, 45 Atl. 1040 (after alleging a partnership in his declaration, plaintiff cannot offer evidence showing that a partnership does not exist); Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415 (an allegation that a request was made does not admit of evidence excusing such request).

Washington.— Faulkner *v.* Seattle, 19 Wash. 320, 53 Pac. 365; Seattle *v.* Parker, 13 Wash. 450, 43 Pac. 369; Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124; Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, 21 Pac. 32.

Wisconsin.— Dolph *v.* Rice, 18 Wis. 397; Eilert *v.* Oshkosh, 14 Wis. 586; Tait *v.* Foster, 1 Pinn. 514.

United States.— Mexia *v.* Oliver, 148 U. S. 664, 13 S. Ct. 754, 37 L. ed. 602; Lovejoy *v.* Wilson, 15 Fed. Cas. No. 8,551, 1 Cranch C. C. 102.

England.— Richards *v.* Easto, 3 D. & L. 515, 10 Jur. 195, 15 L. J. Exch. 163, 15 M. & W. 244.

See 39 Cent. Dig. tit. "Pleading," § 1252.

19. Fulps *v.* Mock, 108 N. C. 601, 13 S. E. 92; Jones *v.* Mial, 82 N. C. 252.

20. *Alabama.*— Georgia Cent. R. Co. *v.* Montmollen, 145 Ala. 468, 39 So. 820, 117 Am. St. Rep. 58.

California.— McLarren *v.* Spalding, 2 Cal. 510; Gavin *v.* Annan, 2 Cal. 494.

District of Columbia.— Metropolitan R. Co. *v.* Snashall, 3 App. Cas. 420, 22 Wash. L. Rep. 377.

Georgia.— See Central R., etc., Co. *v.* Avont, 80 Ga. 195, 5 S. E. 78.

Indiana.— Leary *v.* Moran, 106 Ind. 560, 7 N. E. 236; Blizzard *v.* Applegate, 61 Ind. 368; Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15; Fowler *v.* Burget, 16 Ind. 341.

Indian Territory.— Brown *v.* McNair, 5 Indian Terr. 67, 82 S. W. 677.

Iowa.— Chrisman *v.* Omaha, etc., R., etc., Co., 125 Iowa 133, 100 N. W. 63; Johnson *v.* Pennell, 67 Iowa 669, 25 N. W. 874.

Louisiana.— Budreaux *v.* Tucker, 10 La. Ann. 80.

Maryland.— McAllister *v.* State, 94 Md. 290, 50 Atl. 1046; Eastern Advertising Co. *v.* McGaw, 89 Md. 72, 42 Atl. 923.

Massachusetts.— Gwynn *v.* Globe Locomotive Works, 5 Allen 317; Snow *v.* Lang, 2 Allen 18; Howard *v.* Hayward, 16 Gray 354; Parker *v.* Green, 8 Metc. 137; Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356.

Minnesota.— Loftus-Hubbard Elevator Co. *v.* Smith-Alvord Co., 90 Minn. 418, 97 N. W. 125; Hanson *v.* Diamond Iron Min. Co., 87 Minn. 505, 92 N. W. 447.

Mississippi.— Grayson *v.* Brooks, 64 Miss. 410, 1 So. 482. *Compare* Candiff *v.* Thighen, 30 Miss. 180.

Missouri.— Jacobs *v.* Moseley, 91 Mo. 457, 4 S. W. 135; Westbay *v.* Milligan, 74 Mo. App. 179.

Nebraska.— Wiedcrman *v.* Hedges, 63 Nebr. 103, 88 N. W. 170; Broadwater *v.* Jacoby, 19 Nebr. 77, 26 N. W. 629.

New York.— Weaver *v.* Barden, 49 N. Y.

issue at common law,[21] there is a radical difference between them.[22] The broader general issues, in fact, go to the cause of action as a whole or to the legal effect or operation of the facts alleged.[23] But the general denials go merely to the precise facts alleged by the opposite party, and no evidence is in general admissible under them which does not tend directly to negative the allegations of the pleadings to which they are directed.[24] But the cases are not always consistent in adhering strictly to this distinction.[25] Under the stipulation of the parties to an action

286; Wheeler *v.* Billings, 38 N. Y. 263; McManus *v.* Western Assur. Co., 43 N. Y. App. Div. 550, 48 N. Y. Suppl. 820, 60 N. Y. Suppl. 1143; Schermerhorn *v.* Van Allen, 18 Barb. 29; Andrews *v.* Bond, 16 Barb. 633.

Tennessee.— Standard Loan, etc., Ins. Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136; Beaty *v.* McCorkle, 11 Heisk. 593; McGavock *v.* Puryear, 6 Coldw. 34; Rush *v.* Moore, (Ch. App. 1897) 48 S. W. 90.

Texas.— Silliman *v.* Gano, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391; Galveston, etc., R. Co. *v.* Henry, 65 Tex. 685; Altgelt *v.* Emilienburg, 64 Tex. 150; Boynton *v.* Tidwell, 19 Tex. 118; Branch *v.* De Blane, (Civ. App. 1901) 62 S. W. 134; Pitt *v.* Elser, 7 Tex. Civ. App. 47, 32 S. W. 146; Haley *v.* Manning, 2 Tex. Civ. App. 17, 21 S. W. 711.

Vermont.— Thrall *v.* Wright, 38 Vt. 494.

Virginia.— Richmond Union Pass. R. Co. *v.* New York Seabeach R. Co., 95 Va. 386, 38 S. E. 573.

Washington.— Carkeek *v.* Boston Nat. Bank, 16 Wash. 399, 47 Pac. 884; Penter *v.* Staight, 1 Wash. 365, 25 Pac. 469.

Wisconsin.— Beeker *v.* Howard, 75 Wis. 415, 44 N. W. 755.

United States.— Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,493, 4 Wash. 86; Watson *v.* Bayley, 29 Fed. Cas. No. 17,276, 2 Cranch C. C. 67.

England.— Raikes *v.* Todd, 8 A. & E. 846, 8 L. J. Q. B. 35, 1 P. & D. 138, 1 W. W. & H. 619, 35 E. C. L. 873; Benett *v.* Peninsular, etc., Steamboat Co., 6 C. B. 775, 60 E. C. L. 775; Kirtley *v.* Copeland, 1 C. & K. 319, 47 E. C. L. 319.

See 39 Cent. Dig. tit. "Pleading," § 1280.

Under the rules of Hilary Term many defenses required special pleas which had been unnecessary under the common-law system. Hemming *v.* Trenery, 9 A. & E. 926, 8 L. J. Q. B. 160, 1 P. & D. 661, 36 E. C. L. 480; Davidson *v.* Cooper, 1 D. & L. 377, 12 L. J. Exch. 467, 11 M. & W. 778; Alcock *v.* Taylor, 2 Harr. & W. 58, 1 Jur. 513, 6 N. & M. 296, 36 E. C. L. 639. These rules have been abolished in England by the English Judicature Acts. And they never obtained in some of the states of the American Union. Allianee Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155.

Where it is sought to establish a joint liability against two, alleged to be as individuals, it is competent to prove, without pleading, that defendants were not partners as tending merely to negative the joint liability. McKissack *v.* Witz, 120 Ala. 412, 25 So. 21.

21. White *v.* Moses, 11 Cal. 69; Brooks *v.* Chilton, 6 Cal. 640; McLarren *v.* Spalding, 2 Cal. 510; Perkins *v.* Ermel, 2 Kan. 325.

22. Benedict *v.* Seymour, 6 How. Pr. (N. Y.) 298, 302 (in which it is said: "But this general traverse is not equivalent in all eases to a plea of the general issue at common law; because under the latter a defendant was frequently permitted to give in evidenee matters of defence which did not go directly to eontrovert any allegation in the deelaration — as, for instanee, infaney — aeeord and satisfaetion, &c. But a general traverse, under the Code, authorizes the introduetion of no evidence on the part of a defendant, exeept sueh as tends directly to disprove some fact alleged in the complaint"); Walker *v.* Flint, 11 Fed. 31, 3 McCrary 507.

23. See *infra*, XIII, B, 4, l, (II).

24. *California.*— Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692.

Indiana.— Pfaffenberger *v.* Platter, 98 Ind. 121; Moorman *v.* Barton, 16 Ind. 206; Baker *v.* Kistler, 13 Ind. 63.

Iowa.— Seott *v.* Morse, 54 Iowa 732, 6 N. W. 68, 7 N. W. 15.

Minnesota.— Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Caldwell *v.* Bruggerman, 4 Minn. 270.

Missouri.— Huber Mfg. Co. *v.* Hunter, 87 Mo. App. 50.

Nebraska.— Keens *v.* Robertson, 46 Nebr. 837, 65 N. W. 897; Winkler *v.* Roeder, 23 Nebr. 706, 37 N. W. 607, 8 Am. St. Rep. 155.

New York.— Weaver *v.* Barden, 49 N. Y. 286; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; John Church Co. *v.* Clarke, 77 Hun 467, 28 N. Y. Suppl. 870; Wemple *v.* McManus, 59 N. Y. Super. Ct. 418, 15 N. Y. Suppl. 86; Schaus *v.* Manhattan Gaslight Co., 36 N. Y. Super. Ct. 262.

South Carolina.— Lyles *v.* Bolles, 8 S. C. 258.

Texas.— Guess *v.* Lubbock, 5 Tex. 535.

United States.— Mack *v.* Laneashire Ins. Co., 1 Fed. 193, 1 McCrary 20.

25. See Dodge *v.* McMahan, 61 Minn. 175, 176, 63 N. W. 487 (in which it is said: "Authorities may be found, even in some of the code states, to the effect that, under a mere denial, evidence of any fact may be given in evidence that would go to the original validity of the contract sued on,— that is, which, although admitting the making of the contract, would show that, when made, it was, for some reason invalid; as, for example, that it was made on Sunday, or that it was a gambling or wagering contract. But this rule is not in accordance with either the spirit of the reformed procedure or the decisions of this court. The

evidence otherwise inadmissible under defendant's pleadings may be introduced.[26] Defenses to the jurisdiction or in abatement cannot generally be proved under the general issue or general denial.[27]

(II) *General Issue*[28]— (A) *In General.* The various general issues at common law differ widely in their scope, some being very broad and allowing the introduction of almost any defense, others being very narrow. The issues raised by them and the evidence admissible under them are matters which have assumed a somewhat arbitrary form, due to historical rather than logical reasons, so that the scope of any given general issue is to be determined by a recourse to the precedents and not by anything observable in the nature of the plea.[29] Under the general issue matter in justification cannot be proved; it must be pleaded specially.[30]

correct rule is that, under a denial, the defendant is at liberty to give only such evidence as tends to disprove the existence of facts, as facts, alleged by the plaintiff, but not of any matter *aliunde*, which, although admitting such facts, would tend to avoid their legal effect and operation"); Greenway *v.* James, 34 Mo. 326; Feeney *v.* Chapman, 89 Mo. App. 371; Hardwick *v.* Cox, 50 Mo. App. 509; Hoffman *v.* Parry, 23 Mo. App. 20; Hogen *v.* Klabo, 13 N. D. 319, 100 N. W. 847.

26. *Alabama.*— Converse Bridge Co. *v.* Collins, 119 Ala. 534, 24 So. 561; Burns *v.* Campbell, 71 Ala. 271.

Illinois.— Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298, 21 N. E. 789; State Ins. Co. *v.* Manchester F. Assur. Co., 77 Ill. App. 673.

Kentucky.— Bagby *v.* Lewis, 2 T. B. Mon. 76.

Mississippi.— Cole *v.* Harman, 8 Sm. & M. 562.

New York.— Ackerman *v.* Cobb Lime Co., 51 Hun 310, 3 N. Y. Suppl. 892 [*reversed* on other grounds in 125 N. Y. 361, 26 N. E. 455].

See 39 Cent. Dig. tit. "Pleading," § 1285

Practice not favored by appellate courts.— Main *v.* Radney, (Ala. 1905) 39 So. 981; Alabama, etc., R. Co. *v.* Watson, 42 Ala. 74.

27. *Georgia.*— Goodrich *v.* Atlanta Nat. Bldg., etc., Assoc., 96 Ga. 803, 22 S. E. 585.

Illinois.— Bacon *v.* Schepflin, 185 Ill. 132, 56 N. E. 1123; Culver *v.* Johnson, 90 Ill. 91; American Merchants' Mfg. Co. *v.* Kantrowitz, 77 Ill. App. 155.

Louisiana.— Edwards *v.* Ricks, 30 La. Ann. 926; Tucker *v.* Lisle, 4 La. 328; Moorhead *v.* Thompson, 1 La. 281; Harper *v.* Destrehan, 2 Mart. N. S. 389; Blake *v.* Morgan, 3 Mart. 375.

Maine.— Stewart *v.* Smith, 98 Me. 104, 56 Atl. 401; Elm City Club *v.* Howes, 92 Me. 211, 42 Atl. 392.

Massachusetts.— Coombs *v.* Williams, 15 Mass. 243.

Michigan.— Near *v.* Mitchell, 23 Mich. 382.

Texas.— Wilson *v.* Adams, 15 Tex. 323.

Wisconsin.— Milwaukee County *v.* Hackett, 21 Wis. 613.

United States.— Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 16 L. ed. 73; Evans *v.* Gee, 11 Pet. 80, 9 L. ed. 639; Yeaton *v.* Lynn, 5 Pet. 224, 8 L. ed. 105; Draper *v.* Springport, 15 Fed. 328, 21 Blatchf. 240.

That plaintiff is not a corporation may be shown under the general issue. Carmichael *v.* School Lands Trustees, 3 How. (Miss.) 84.

Attorney's authority.— The general issue pleaded is a waiver of any objection to the authority of the attorney of plaintiff to bring the suit. Lucas *v.* Georgia Bank, 2 Stew. (Ala.) 147.

28. Accord and satisfaction see ACCORD AND SATISFACTION, 1 Cyc. 341.

Alteration of instruments see ALTERATION OF INSTRUMENTS, 2 Cyc. 227.

Assumption of risk see MASTER AND SERVANT, 26 Cyc. 1402.

Consideration see COMMERCIAL PAPER, 8 Cyc. 199 *et seq.*; CONTRACTS, 9 Cyc. 737 *et seq.*

Contributory negligence see NEGLIGENCE, 29 Cyc. 581 *et seq.*

Corporate existence see CORPORATIONS, 10 Cyc. 1353.

Custom see CUSTOMS AND USAGES, 12 Cyc. 1097.

Estoppel see ESTOPPEL, 16 Cyc. 809 *et seq.*

Fellow servant see MASTER AND SERVANT, 26 Cyc. 1402.

Former recovery see JUDGMENTS, 23 Cyc. 1530.

Gaming see GAMING, 20 Cyc. 962.

Illegality of contract see CONTRACTS, 9 Cyc. 740 *et seq.*

Modification of contract see CONTRACTS, 9 Cyc. 734.

Payment see PAYMENT, 30 Cyc. 1261.

Release from liability for debt or demand see RELEASE.

Rescission of contract see CONTRACTS, 9 Cyc. 734.

Statute of limitations see LIMITATIONS OF ACTIONS, 25 Cyc. 1401.

Usury see USURY.

29. See *infra*, XIII. B. 4, l, (II), (D).

In discussing the broad general issue of non assumpsit, Chitty says: "It may appear singular, that under the general issue, which in terms only denies a valid contract, the defendant should be permitted to avail himself of a ground of defence which admits a valid contract, but insists that it has been performed, or that there is an excuse for the non-performance of it, or that it has been discharged; it is, as observed by Lord Holt, a practice which has crept in improperly, but is now perhaps too settled to be altered." 1 Chitty Pl. (1809 ed.) 472.

30. Brown *v.* Bennett, 5 Cow. (N. Y.) 181;

Where matter of total or partial defense cannot be pleaded, it may be given in evidence under the general issue.[31] A plea or notice of set-off or of other special defenses does not affect defendant's right to introduce under his general issue any matters which would be admissible without a special plea or notice.[32] And evidence is admissible to establish special defenses set up in an answer in conjunction with the plea of the general issue.[33] Statutes in some of those states which still retain the common-law procedure have restricted the scope of the general issues as they were understood at common law, and have made them more nearly equivalent to the code general denials.[34]

(B) *Matters Arising After Issue Joined or Suit Commenced.* It is a general rule of the common law that a matter of defense which arises after the commencement of the suit and before plea must be pleaded to the further maintenance of the action; and that a matter of defense which arises after suit brought and also after plea filed, and either before replication or after issue joined, must be pleaded *puis darrein continuance,* and that such matters cannot be shown under the general issue.[35] An action on the case is an exception to this rule. In such an action defendant is permitted under the general issue to give in evidence a release, a former recovery, a satisfaction, or any other matter *ex post facto* which shows that the cause of action has been discharged, or that in equity and conscience plaintiff ought not to recover.[36] A defendant may, under the general issue or any plea which puts the amount of recovery in dispute, prove partial or complete satisfaction since the suit was commenced,[37] and matters in mitigation of damages, occurring subsequent to the commencement of the action, may be shown without being specially pleaded.[38]

(C) *Parties.*[39] The general rule that a defect of parties can be taken advantage of by plea in abatement only [40] is subject to exceptions; [41] thus where it does not appear on the face of the pleadings,[42] in an action *ex contractu,* that there are other persons who should have been joined as plaintiffs, defendant may take advantage

Bush *v.* Parker, 1 Bing. N. Cas. 72, 27 E. C. L. 549; Barker *v.* Braham, W. Bl. 869, 3 Wils. C. P. 396. See also Raynor *v.* Wilmington Seacoast R. Co., 129 N. C. 195, 39 S. E. 821.

31. Wilmarth *v.* Babcock, 2 Hill (N. Y.) 194. And see ASSAULT AND BATTERY, 3 Cyc. 1084; LIBEL AND SLANDER, 25 Cyc. 475 *et seq.*

32. Blank *v.* Illinois Cent. R. Co., 182 Ill. 332, 55 N. E. 332; National Time Recorder Co. *v.* Iowa Mantel Mfg. Co., 108 Ill. App. 95; Derby Cycle Co. *v.* White, 64 Ill. App. 245; Schwartz *v.* Southerland, 51 Ill. App. 175; Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14.

33. Hawkins *v.* New Orleans Printing, etc., Co., 29 La. Ann. 134.

34. See the statutes of the different states. And see American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644; Behrman *v.* Newton, 103 Ala. 525, 15 So. 838; McConnico *v.* Stallworth, 43 Ala. 389; Jacobus *v.* Wood, 84 Ga. 638, 10 S. E. 1099; Ocean Steamship Co. *v.* Williams, 69 Ga. 251; Jones *v.* Lavender, 55 Ga. 228; Longstreet *v.* Reeside, Ga. Dec. 39; Anderson *v.* Jacobson, 66 Ill. 522 (fraud must be pleaded in defense to an action on a promissory note); New York Bank Note Co. *v.* Kidder Press Mfg. Co., 192 Mass. 391, 78 N. E. 463; Grinnell *v.* Spink, 128 Mass. 25; Ward *v.* Bartlett, 12 Allen (Mass.) 419; Snow *v.* Chatfield, 11 Gray (Mass.) 12; Putze *v.* Saginaw Valley Mut. F. Ins. Co., (Mich. 1901) 86 N. W. 814; Bryant *v.* Kenyon, 123 Mich. 151, 81 N. W. 1093; Dean *v.* Chapin, 22 Mich. 275.

35. *Alabama.*— Feagin *v.* Pearson, 42 Ala. 332.

Illinois.— Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401.

Maine.— Clark *v.* Pratt, 55 Me. 546.

Maryland.— Agnew *v.* Gettysburg Bank, 2 Harr. & G. 478.

New Hampshire.— Child *v.* Eureka Powder Works, 44 N. H. 354.

United States.—Yeaton *v.* Lynn, 5 Pet. 224, 8 L. ed. 105.

See 39 Cent. Dig. tit. "Pleading," § 1286.

36. Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Lyon *v.* Marclay, 1 Watts (Pa.) 271.

37. Indiana, etc., R. Co. *v.* Adams, 112 Ind. 302, 14 N. E. 80; Burdell *v.* Denig, 92 U. S. 716, 23 L. ed. 746.

38. Williams *v.* Tappan, 23 N. H. 385; Moore *v.* McNairy, 12 N. C. 319.

Reduction to nominal sum.— When evidence sought to be introduced in mitigation would reduce the recovery to a mere nominal sum, the defense will be deemed substantially in bar and not in mitigation. Bolton *v.* Cummings, 25 Conn. 410.

39. See ASSUMPSIT, ACTION OF, 4 Cyc. 337 *et seq.*

40. Holliman *v.* Rogers, 6 Tex. 91.

41. Holliman *v.* Rogers, 6 Tex. 91.

42. Hicks *v.* Branton, 21 Ark. 186.

of the non-joinder under the general issue.[43] But in actions *ex delicto* the non-joinder of parties plaintiff cannot be taken advantage of under the plea of the general issue, except in so far as the amount of the recovery is concerned.[44] The non-joinder of parties defendant must be pleaded in abatement, and cannot be taken advantage of under the general issue.[45] Misjoinder of parties plaintiff, or joining those who have not a joint legal interest in the suit with those who have, in actions *ex contractu*, need not be pleaded in abatement but may be taken advantage of under the general issue.[46] An objection that plaintiff has not legal capacity to sue cannot be urged under the general issue.[47] The right of a person substituted as plaintiff to maintain the suit may be raised by a plea in abatement, or possibly taken advantage of under the general issue, but not upon a rule to quash or abate the summons.[48] The want of authority of the agent or attorney of an absent and foreign plaintiff to sue in the name of such plaintiff is never to be taken advantage of at the trial by way of nonsuit. It ought to be on a rule to show cause why the action should not be dismissed.[49]

(D) *Particular General Issues* — (1) NIL DEBET.[50] The plea of *nil debet* puts in

43. *Arkansas.*— Duval *v.* Mayson, 23 Ark. 30.

Illinois.— Lasher *v.* Colton, 225 Ill. 234, 80 N. E. 122 [*affirming* 126 Ill. App. 119]; Snell *v.* De Land, 43 Ill. 323; Fairbanks *v.* Badger, 46 Ill. App. 644; McKone *v.* Williams, 37 Ill. App. 591.

Maine.— White *v.* Curtis, 35 Me. 534.

Maryland.— Smith *v.* Crichton, 33 Md. 103.

Massachusetts.— Tuttle *v.* Cooper, 10 Pick. 281; Halliday *v.* Doggett, 6 Pick. 350; Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162; Austin *v.* Walsh, 2 Mass. 401.

North Carolina.— See Clancy *v.* Dickey, 9 N. C. 497.

Texas.— Holliman *v.* Rogers, 6 Tex. 91.

Vermont.— Hilliker *v.* Loop, 5 Vt. 116, 26 Am. Dec. 286.

United States.— Coffee *v.* Eastland, 5 Fed. Cas. No. 2,945, Brunn. Col. Cas. 216, Cooke (Tenn.) 159.

But *compare* Anderson *v.* Tarpley, 6 Sm. & M. (Miss.) 507.

Defect appearing on face of pleading.— The objection of non-joinder of parties plaintiff cannot be raised for the first time by motion to dismiss, after the evidence has been introduced, where the defect appears on the face of the petition. McGuire *v.* Glass, (Tex. App. 1890) 15 S. W. 127.

In actions of tort arising ex contractu, non-joinder of a party may be taken advantage of by motion in arrest of judgment, writ of error, or on the trial under the general issue. Scott *v.* Brown, 48 N. C. 541, 67 Am. Dec. 256.

In Alabama, in an action for rent, the general issue under the provisions of Code (1896), § 3295, puts in issue only the truth of the allegations of the complaint, and the question of non-joinder of plaintiff's husband as a necessary party plaintiff can only be raised by a plea in abatement. Morningstar *v.* Querens, 142 Ala. 186, 37 So. 825.

In New Jersey it is provided by statute that the non-joinder of a party plaintiff cannot be objected to by defendant unless he gives notice. See King *v.* Holbrook, 58 N. J. L. 369, 33 Atl. 965; Brown *v.* Fitch, 33 N. J. L. 418.

44. Masonic Temple Safety Deposit Co. *v.* Langfelt, 117 Ill. App. 652; Abbe *v.* Clark, 31 Barb. (N. Y.) 238.

45. *Florida.*— Hurly *v.* Roche, 6 Fla. 746.

Illinois.— Pearce *v.* Pearce, 67 Ill. 207.

Maine.— White *v.* Perley, 15 Me. 470.

Maryland.— Smith *v.* Cooke, 31 Md. 174, 100 Am. Dec. 58.

Michigan.— Bowen *v.* Culp, 36 Mich. 224.

New Jersey.— Lieberman *v.* Brothers, 55 N. J. L. 379, 26 Atl. 828.

New York.— Williams *v.* Allen, 7 Cow. 316.

Pennsylvania.— Means *v.* Milliken, 33 Pa. St. 517.

South Carolina.— Exum *v.* Davis, 10 Rich. 357.

Vermont.— Armour *v.* Ward, 78 Vt. 60, 61 Atl. 765; Hyde *v.* Lawrence, 49 Vt. 361; McGregor *v.* Balch, 17 Vt. 562; Ives *v.* Hulet, 12 Vt. 314; Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

United States.— Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11.

In an action on book-account, the non-joinder as defendant of one of the contracting parties is not waived by not being pleaded in abatement, but may be taken advantage of at the hearing before the auditor. Bailey *v.* Hodges, 19 Vt. 618; Loomis *v.* Barrett, 4 Vt. 450.

46. Snell *v.* De Land, 43 Ill. 323; Fairbanks *v.* Badger, 46 Ill. App. 644; Ulmer *v.* Cunningham, 2 Me. 117. But see Bartels *v.* Redfield, 16 Fed. 336, holding that a misjoinder of parties plaintiff cannot be availed of by defendant under a plea of *non assumpsit*.

47. Talbott *v.* Norager, 23 Miss. 572; Crouch *v.* Posey, (Tex. Civ. App. 1902) 69 S. W. 1001. See Drago *v.* Moso, 1 Speers (S. C.) 212, 40 Am. Dec. 592.

48. Buck *v.* Ehrgood, 4 Pa. Co. Ct. 312, 4 C. Pl. 161.

49. Bacon *v.* Smith, 1 Brev. (S. C.) 426.

50. See BONDS, 5 Cyc. 838; DEBT, ACTION OF, 13 Cyc. 420.

issue the existence of the debt claimed, and anything may be given in evidence under it, which shows there is nothing due at the time of pleading.[51]

(2) Non Assumpsit.[52] Under *non assumpsit* any evidence may be introduced tending to show that plaintiff had no subsisting cause of action at the time action was commenced.[53]

(3) Non Cepit.[54] Under this issue, in replevin, defendant can show only that he did not take the goods or did not take them in the place alleged.[55]

(4) Non Est Factum.[56] Under this general issue defendant can show only that he did not execute the deed or that its execution was absolutely void.[57]

(5) Not Guilty in Case.[58] This is a broad issue, like *non assumpsit*, and permits the introduction of almost any defense which shows that plaintiff has no right of action,[59] such as justification or excuse, former recovery, release or satisfaction,[60] or settlement.[61]

(6) Not Guilty in Trespass. This is a narrow issue and permits defendant to show only that he did not do the act alleged, that the goods did not belong to plaintiff, or that the close was not his or in his possession.[62] All other defenses, such as justification, must be specially pleaded.[63]

(7) Not Guilty in Trover.[64] Under not guilty in trover defendant may show any defense except the statute of limitations.[65]

(8) Nul Tiel Record.[66] The plea of *nul tiel record* puts in issue only the record recited in the writ, and therefore is proper only where there is no record at all or one different from that upon which plaintiff has declared.[67]

51. Fidler *v.* Hershey, 90 Pa. St. 363.

"There is hardly any matter of defense to an action of debt to which the plea of *nil debet* may not be applied, because almost all defenses resolve themselves into a denial of the debt." Andrews Stephens Pl. § 114.

Whether partial failure of consideration cannot be shown under this plea see Wallace *v.* Boston, 10 Mo. 660.

52. See Assumpsit, Action of, 4 Cyc. 353.

53. O'Brien *v.* O'Brien, 75 Ill. App. 263; Maverick *v.* Gibbs, 3 McCord (S. C.) 315; Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,674, 9 Blatchf. 513. *Compare* Barnett *v.* Glossop, 1 Bing. N. Cas. 633, 3 Dowl. P. C. 625, 4 L. J. C. P. 174, 1 Scott 621, 27 E. C. L. 796, holding that in assumpsit for the price of a copyright bargained and sold a defense that the copyright was not as signed in writing must be specially pleaded.

54. See Replevin.

55. Mackinley *v.* McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; Andrews Stephens Pl. § 119; 1 Chitty Pl. (1809 ed.) 490.

56. See Bonds, 5 Cyc. 838; Contracts, 9 Cyc. 733; Covenants, 11 Cyc. 1032; Deeds, 13 Cyc. 725.

57. *Colorado.*— Peddie *v.* Donnelly, 1 Colo. 421.

Massachusetts.— Anthony *v.* Wilson, 14 Pick. 303; Phelps *v.* Decker, 10 Mass. 267.

Missouri.— Stapleton *v.* Benson, 8 Mo. 13.

New York.— Dorr *v.* Munsell, 13 Johns. 430.

South Carolina.— Freer *v.* Walker, 1 Bailey 184.

United States.— Greathouse *v.* Dunlap, 10 Fed. Cas. No. 5,742, 3 McLean 303.

England.— James *v.* Fowks, 12 Mod. 101.

Fraud.— Where the alleged fraud pertains to the execution of an instrument proof thereof is admissible under the plea of *non est factum*. Kingman *v.* Shawley, 61 Mo. App. 54; Van Valkenburgh *v.* Rouk, 12 Johns. (N. Y.) 337.

A release cannot be shown under this plea. Goldstein *v.* Reynolds, 190 Ill. 124, 60 N. E. 65.

"Where an instrument is executed by an agent the plea puts in issue the authority of the agent to do the act, and if a municipal corporation can only execute an instrument in a certain form, it puts in issue whether it was executed in such legal form; but if the proof shows the execution of the instrument by the parties, the power to make it cannot be questioned under the plea, and any other defense which would make it void or voidable must be specially pleaded." Chicago *v.* English, 180 Ill. 476, 479, 54 N. E. 609.

58. See Case, Action on, 6 Cyc. 698.

59. Andrews Stephens Pl. § 118.

60. 1 Chitty Pl. (1809 ed.) 486. See also Cincinnati, etc., R. Co. *v.* Goodson, 101 Ill. App. 123.

61. O'Donnell *v.* Brinks Express Co., 95 Ill. App. 411.

62. Andrews Stephens Pl. § 116; 1 Chitty Pl. (1809 ed.) 492.

The pendency of another suit cannot be shown under the general issue. Percival *v.* Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210.

63. Drake *v.* Barrymore, 14 Johns. (N. Y.) 166; Butterworth *v.* Soper, 13 Johns. (N. Y.) 443.

64. See Trover.

65. 1 Chitty Pl. (1809 ed.) 490. See also Dawson *v.* Shepherd, 15 N. C. 497; Weaver *v.* Cryer, 12 N. C. 337. *Compare* Alliance Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155.

66. See Judgments, 23 Cyc. 1518 *et seq.*

67. Palmer *v.* Wilkinson, 73 Pa. St. 339.

(E) *Notice Under General Issue.* In some states where the common-law system of pleading is retained, special pleas have in terms been abolished or made optional by statutes providing that defendant may give notice to plaintiff of specific matters of defense by filing a notice thereof, with the plea of general issue.[68] Evidence may then be introduced which could formerly be presented under a special plea only.[69] A failure, however, to give the required notice renders evidence of a special defense inadmissible.[70]

(III) *DENIALS UNDER THE CODE* — (A) *In General.* Under the code system of pleading, new matter of avoidance or defense cannot be given in evidence under a general denial, but it must be specially pleaded.[71] It is to be observed, however, that under such a denial defendant may properly introduce evidence of affirmative

68. See *supra*, IV, C, 1, c, (V).

69. Clark *v.* Harrington, 4 Vt. 69; Lyon *v.* Pollard, 20 Wall. (U. S.) 403, 22 L. ed. 361. See also Bly *v.* Brady, 113 Mich. 176, 71 N. W. 521.

The Massachusetts statute abolishing special pleading in civil actions applies to complaints for flowing, and the respondent may, under a specification thereof filed with the general issue, give in evidence an agreement to maintain his dam, in whole or in part, for a fixed price. Howard *v.* Proprietors Merrimac River Locks, etc., 12 Cush. (Mass.) 259.

New York decisions before code adopted.— Van Epps *v.* Harrison, 1 Den. 246; Fuller *v.* Rood, 3 Hill 258; Edwards *v.* Clemons, 24 Wend. 480; Chamberlain *v.* Gorham, 20 Johns. 746 [*reversing* 20 Johns. 144].

70. Bolton *v.* Cummings, 25 Conn. 410; Thomas *v.* Mann, 28 Pa. St. 520; Moatz *v.* Knox, 11 Pa. St. 268; Mehaffy *v.* Lytle, 1 Watts (Pa.) 314. See also Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439, decided before code procedure adopted.

71. *Arkansas.*— Tyner *v.* Hays, 37 Ark. 599.

California.— Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700; Yosemite Valley, etc., Big Tree Grove Com'rs *v.* Barnard, 98 Cal. 199, 32 Pac. 982; Pico *v.* Kalisher, 55 Cal. 153; Smith *v.* Owens, 21 Cal. 11; Bridges *v.* Paige, 13 Cal. 640; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692; Kendall *v.* Vallejo, 1 Cal. 371; Bernard *v.* Mullot, 1 Cal. 368; Walton *v.* Minturn, 1 Cal. 362; Grogan *v.* Ruckle, 1 Cal. 193; Ladd *v.* Stevenson, 1 Cal. 18.

Colorado.— Penn Mut. L. Ins. Co. *v.* Ornauer, 39 Colo. 498, 90 Pac. 846; Weaver *v.* Canon Sewer Co., 18 Colo. App. 242, 70 Pac. 953; Gomer *v.* Stockdale, 5 Colo. App. 489, 39 Pac. 355.

Connecticut.— Kellogg *v.* New Britain, 62 Conn. 232, 24 Atl. 996.

Indiana.— Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358; Norris *v.* Amos, 15 Ind. 365; Millhollin *v.* Jones, 7 Ind. 715.

Iowa.— Shaffer Bros. *v.* Warren, (1905) 102 N. W. 497; Alborn *v.* Alborn, 100 Iowa 382, 69 N. W. 678; Benson *v.* Haywood, 86 Iowa 107, 53 N. W. 85, 23 L. R. A. 335; Bartlett *v.* Gaines, 11 Iowa 95; Hagan *v.* Burch, 8 Iowa 309; Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451.

Kansas.— Fuller *v.* Jackson County, 2 Kan. 445.

Kentucky.— Hopkins *v.* Virgin, 11 Bush 677; Denton *v.* Logan, 3 Metc. 434.

Minnesota.— Roberts *v.* Nelson, 65 Minn. 240, 68 N. W. 14; Iselin *v.* Simon, 62 Minn. 128, 64 N. W. 143; Stebbins *v.* Hall, 53 Minn. 169, 54 N. W. 1110; Leighton *v.* Grant, 20 Minn. 345.

Missouri.— Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Reid *v.* Mullins, 43 Mo. 306; Currier *v.* Lowe, 32 Mo. 203; Cowden *v.* Cairns, 28 Mo. 471; Lynch *v.* Morrow, 28 Mo. 357; Winston *v.* Taylor, 28 Mo. 82, 75 Am. Dec. 112; Missouri Edison Electric Co. *v.* Lewis, 86 Mo. App. 612; Cooke *v.* Kansas City, etc., R. Co., 57 Mo. App. 471; Evers *v.* Shumaker, 57 Mo. App. 454; Hardwick *v.* Cox, 50 Mo. App. 509; Phister *v.* Grove, 48 Mo. App. 455.

Nebraska.— Denney *v.* Stout, 59 Nebr. 731, 82 N. W. 18; Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237; Keens *v.* Robertson, 46 Nebr. 837, 65 N. W. 897; Home F. Ins. Co. *v.* Berg, 46 Nebr. 600, 65 N. W. 780; Phenix Ins. Co. *v.* Bachelder, 39 Nebr. 95, 57 N. W. 996; Walton Plow Co. *v.* Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 48; Bishop *v.* Stevens, 31 Nebr. 786, 48 N. W. 827; Quick *v.* Sachsse, 31 Nebr. 312, 47 N. W. 935; Mordhorst *v.* Nebraska Tel. Co., 28 Nebr. 610, 44 N. W. 469; Jones *v.* Seward County, 10 Nebr. 154, 4 N. W. 946; Atchison, etc., R. Co. *v.* Washburn, 5 Nebr. 117.

Nevada.— Horton *v.* Ruhling, 3 Nev. 498.

New York.— Read *v.* Attica Bank, 124 N. Y. 671, 27 N. E. 250; Brennan *v.* New York, 62 N. Y. 365; Codd *v.* Rathbone, 19 N. Y. 37; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Ubart *v.* Baltimore, etc., R. Co., 117 N. Y. App. Div. 831, 102 N. Y. Suppl. 1000 (non-residence as a defense must be specially pleaded); Hamblen *v.* German, 93 N. Y. App. Div. 464, 87 N. Y. Suppl. 642, Beard *v.* Tilghman, 66 Hun 12, 20 N. Y. Suppl. 736; Hall *v.* U. S. Reflector Co., 30 Hun 375 [*affirmed* in 96 N. Y. 629]; Dennis *v.* Snell, 50 Barb. 95; Button *v.* McCauley, 38 Barb. 413 [*reversed* on other grounds in 1 Abb. Dec. 282, 4 Transcr. App. 447, 5 Abb. Pr. N. S. 29]; Harter *v.* Crill, 33 Barb. 283; Beaty *v.* Swarthout, 32 Barb. 293; Dillaye *v.* Parks, 31 Barb. 132; Pier *v.* Finch, 29 Barb. 170; Ryder *v.* Jenny, 2 Rob. 56; Sanford *v.* Travers, 7 Bosw. 498; Simons *v.* Martin, etc., Mfg. Co., 25 Misc. 788, 54 N. Y. Suppl. 560; Linton *v.* Unexcelled Fire-Works Co., 13

matters if its tendency is to contradict the facts alleged by plaintiff;[72] and a party may sometimes be allowed to introduce affirmative matters under a denial when by reason of the improper pleading or improper evidence of his adversary, he would otherwise be deprived of a just defense,[73] or a party may be precluded by his own conduct from objecting to the introduction of affirmative evidence when only a denial has been pleaded.[74] Even though a pleading might have been sufficient if certain of its allegations had been omitted, a denial of such allegations nevertheless makes proper the introduction of evidence to prove or disprove them.[75] When both a general denial and specific denials are employed in an answer, the scope of the general denial is limited to the issues raised by the specific denials,[76]

N. Y. Suppl. 495 [*affirmed* in 124 N. Y. 533, 27 N. E. 406]; Sawyer *v.* Gates, 14 N. Y. St. 236; Healy *v.* Clark, 12 N. Y. St. 685; Sawyer *v.* Thurber, 14 N. Y. Civ. Proc. 204.

Oregon.— Mellott *v.* Downing, 39 Oreg. 218, 64 Pac. 393.

South Carolina.— Lipscomb *v.* Tanner, 31 S. C. 49, 9 S. E. 733; McClendon *v.* Wells, 20 S. C. 514.

Texas.— Willis *v.* Hudson, 63 Tex. 678; Marley *v.* McAnelly, 17 Tex. 658; Love *v.* McIntyre, 3 Tex. 10; Mims *v.* Mitchell, 1 Tex. 443; McDannell *v.* Horrell, 1 Tex. Unrep. Cas. 521; McCartney *v.* Martin, 1 Tex. Unrep. Cas. 143; Chambers *v.* Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118; Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284; Hoffman *v.* Cleburne, etc., Assoc., 2 Tex. Civ. App. 688, 22 S. W. 155; Ft. Worth, etc., R. Co. *v.* Lillard, (Civ. App. 1890) 16 S. W. 654. See also Winn *v.* Gilmer, 81 Tex. 345, 16 S. W. 1058. *Compare* Ft. Worth, etc., R. Co. *v.* Travis, (Civ. App. 1907) 99 S. W. 1141.

Washington.— Bruce *v.* Foley, 18 Wash. 96, 50 Pac. 935.

Wisconsin.— Russell *v.* Andrae, 84 Wis. 374, 54 N. W. 972; Kilbourn *v.* Pacific Bank, 11 Wis. 230.

England.— Scott *v.* Sampson, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. N. S. 412, 30 Wkly. Rep. 541, under judicature acts.

See 39 Cent. Dig. tit. "Pleading," §§ 1261, 1282.

Affirmative matter which should be set up in the reply is waived by a failure. Winton, etc., State Bank *v.* Harris, 54 Mo. App. 156.

The Louisiana code provides for a general denial quite similar in its nature to the ordinary general denial of the code procedure. Garland Rev. Code Proc. (1894) § 323. And see Wood *v.* Nicholls, 33 La. Ann. 744; Sherman *v.* New Orleans, 18 La. Ann. 660; O'Dowd *v.* Boyle, 18 La. Ann. 303; Bludworth *v.* Hunter, 9 Rob. 256; New Orleans Gas Light, etc., Co. *v.* Hudson, 5 Rob. 486; Petit *v.* Laville, 5 Rob. 117; Hodge *v.* Moore, 3 Rob. 400; Bonnabel *v.* Bouligny, 1 Rob. 292; McKown *v.* Mathes, 19 La. 542; White *v.* Moreno, 17 La. 371; Davis *v.* Davis, 17 La. 259; Landry *v.* Baugnon, 17 La. 82, 36 Am. Dec. 606; Mortimer *v.* Trappan, 9 La. 108; Erwin *v.* Fenwick, 6 Mart. N. S. 229; Abat *v.* Bayou, 4 Mart. N. S. 516; Bayou *v.* Mollere, 4 Mart. 621.

72. *Colorado.*— Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1058.

Connecticut.— Alpert *v.* Bright, 74 Conn. 614, 51 Atl. 521.

Indiana.— Hess *v.* Union State Bank, 156 Ind. 523, 60 N. E. 305; Jeffersonville Water Supply Co. *v.* Riter, 146 Ind. 521, 45 N. E. 697.

Iowa.— Parsons *v.* Wright, 102 Iowa 473, 71 N. W. 351.

Kansas.— Phelps *v.* Skinner, 63 Kan. 364, 65 Pac. 667.

Minnesota.— Hanson *v.* Diamond Iron Min. Co., 87 Minn. 505, 92 N. W. 447; McDermott *v.* Deither, 40 Minn. 86, 41 N. W. 544.

Missouri.— Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118.

Nebraska.— Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295.

Nevada.— Ferguson *v.* Rutherford, 7 Nev. 385.

New York.— Kunitzer *v.* Cummings, 20 Misc. 700, 46 N. Y. Suppl. 378.

Oregon.— Multnomah County *v.* Willamette Towing Co., 49 Oreg. 204, 89 Pac. 389.

South Carolina.— Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91; Reeves *v.* Sims, 10 S. C. 308.

Texas.— Tisdale *v.* Mitchell, 12 Tex. 68. And see Greathouse *v.* Martin, (1906) 94 S. W. 322.

Washington.— Trumbull *v.* Jackman, 9 Wash. 524, 37 Pac. 680.

Thus it may be shown that a contract, alleged as unconditional, in fact contained conditions precedent which were unperformed (Bien *v.* Abbey, 13 N. Y. Suppl. 286. And see Wall *v.* Provident Sav. Inst., 3 Allen (Mass.) 96), or it may be shown that the contract was, in other respects, a different contract from the one alleged (Clemens *v.* Knox, 31 Mo. App. 185). It may be shown that an injury alleged to have been caused by the negligence of the master was in fact caused by the negligence of a fellow servant. Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91.

73. Ellingsen *v.* Cooke, 37 Minn. 400, 34 N. W. 747; Arnold *v.* Angell, 62 N. Y. 508; Milbank *v.* Jones, 57 N. Y. Super. Ct. 135, 5 N. Y. Suppl. 914; Hewitt *v.* Morris, 37 N. Y. Super. Ct. 18; Heyman *v.* Schmidt, 19 N. Y. Suppl. 215.

74. Wilmot *v.* McPadden, 78 Conn. 276, 61 Atl. 1069.

75. Rustin *v.* Merchants', etc., Tunnel Co., 23 Colo. 35, 47 Pac. 300.

76. Reed *v.* Hayt, 51 N. Y. Super. Ct. 121; Philip Schneider Brewing Co. *v.* American

and if specific defenses are affirmatively pleaded, even though they might have been admissible under a general denial, this is notice to the other party that only the enumerated defenses will be relied upon, and others cannot be proved.[77] Evidence discrediting the testimony of plaintiff may be shown by defendant under general denial.[78] Where plaintiff replies with a general denial any evidence may be given which controverts the facts denied.[79] The scope of the general denial is often expressly broadened by statute in particular kinds of actions.[80] Thus in actions to recover possession of real estate, some statutes permit the introduction of any defense, equitable or legal, under the general denial.[81] In many code states a defect of parties plaintiff must be taken advantage of by demurrer or answer or it will be deemed to have been waived by defendant.[82]

(B) *Particular Defenses*[83]— (1) JUSTIFICATION. Under a general denial matter in justification cannot be proved, it must be specially pleaded.[84]

(2) PARTIAL DEFENSES OR MATTER IN MITIGATION. Matter constituting a partial defense or in mitigation of damages must be specially pleaded and cannot be proved under a general denial.[85]

Ice Mach. Co., 77 Fed. 138, 23 C. C. A. 89. *Compare* McGrew *v.* Armstrong, 5 Kan. 284.

77. Ball *v.* Beaumont, 63 Nebr. 215, 88 N. W. 173.

78. Dillon *v.* Folsom, 5 Wash. 439, 32 Pac. 216.

79. Electric R., etc., Co. *v.* Brickell, 73 Kan. 274, 85 Pac. 297.

80. See the statutes of the different states.

81. Tracy *v.* Kelley, 52 Ind. 535; Woodruff *v.* Garnor, 20 Ind. 174; Sowle *v.* Holdridge, 17 Ind. 236; Vail *v.* Halton, 14 Ind. 344; Harris *v.* Carmody, 131 Mass. 51, 41 Am. Rep. 188; Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600; Franklin *v.* Kelley, 2 Nebr. 79.

82. See *infra*, XIV, E.

83. **Accord and satisfaction** see ACCORD AND SATISFACTION, 1 Cyc. 341.

Alteration of instruments see ALTERATION OF INSTRUMENTS, 2 Cyc. 228.

Another action pending see LIS PENDENS, 25 Cyc. 1486.

Assumption of risk see MASTER AND SERVANT, 26 Cyc. 1402.

Consideration see COMMERCIAL PAPER, 8 Cyc. 199 *et seq.*; CONTRACTS, 9 Cyc. 737 *et seq.*

Contributory negligence see NEGLIGENCE, 29 Cyc. 581 *et seq.*

Corporate existence see CORPORATIONS, 10 Cyc. 1353.

Custom see CUSTOMS AND USAGES, 12 Cyc. 1097.

Estoppel see ESTOPPEL, 16 Cyc. 809 *et seq.*

Fellow servant see MASTER AND SERVANT, 26 Cyc. 1402.

Forfeiture of mining claim see MINES AND MINERALS, 27 Cyc. 600.

Former recovery see JUDGMENTS, 23 Cyc. 1530.

Gaming see GAMING, 20 Cyc. 962.

Illegality of contract see CONTRACTS, 9 Cyc. 740 *et seq.*

Modification of contract see CONTRACTS, 9 Cyc. 734.

Payment see PAYMENT, 30 Cyc. 1261.

Release from liability for debt or demand see RELEASE.

Rescission of contract see CONTRACTS, 9 Cyc. 734.

Statute of limitations see LIMITATIONS OF ACTIONS, 25 Cyc. 1401.

Usury see USURY.

Validity of judgment see JUDGMENTS, 23 Cyc. 1520.

Ownership.— Where plaintiff alleges ownership to property in himself, and this is negatived by a general denial, it is competent for defendant to introduce evidence of ownership in himself, for in so doing he is merely controverting a fact which plaintiff is bound to prove in order to sustain his action. Caldwell *v.* Bruggerman, 4 Minn. 270; Dieckman *v.* Young, 87 Mo. App. 530. *Contra*, Dyson *v.* Ream, 9 Iowa 51.

Bona fide purchaser.— If defendant claims, by way of defense, that he is a *bona fide* purchaser for value, he must specially plead it. Holdsworth *v.* Shannon, 113 Mo. 508, 21 S. W. 85, 35 Am. St. Rep. 719; Weaver *v.* Barden, 49 N. Y. 286. And see SALES; VENDOR AND PURCHASER.

Right or capacity to sue.— Under the general denial the right or capacity of plaintiff to sue is not put in issue. White *v.* Moses, 11 Cal. 69; Mendoza *v.* Steimer, 95 N. Y. Suppl. 603; Blackwell *v.* British-American Mortg. Co., 65 S. C. 105, 43 S. E. 395. See also Kyner *v.* Laubner, 3 Nebr. (Unoff.) 370, 91 N. W. 491; Smith *v.* Hall, 67 N. Y. 48; Saunders *v.* Chamberlain, 13 Hun (N. Y.) 568. But *compare* Wetmore *v.* San Francisco, 44 Cal. 294 (holding that defendant might show under the general denial that plaintiff was not the owner of the claim sued upon); Lawrence R. Co. *v.* O'Harra, 50 Ohio St. 667, 36 N. E. 14.

The defense of leave, license, or consent is new matter which must be pleaded. Cone *v.* Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

84. Pico *v.* Kalisher, 55 Cal. 153; Gomer *v.* Stockdale, 5 Colo. App. 489, 39 Pac. 355; Donohue *v.* Syracuse, etc., R. Co., 11 N. Y. App. Div. 525, 42 N. Y. Suppl. 808; Raynor *v.* Wilmington Seacoast R. Co., 129 N. C. 195, 39 S. E. 821. And see ASSAULT AND BATTERY, 3 Cyc. 1084; LIBEL AND SLANDER, 25 Cyc. 475 *et seq.*

85. *Iowa.*— Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621.

(3) Waiver. The defense of waiver is an affirmative one and should be pleaded to make evidence thereof admissible.[86]

(4) Want or Failure of Consideration. Where an action is based upon an agreement which upon its face imports a consideration, it is necessary to plead specially a want of consideration, as under a general denial proof thereof cannot be introduced.[87] But where the consideration must be averred in the complaint this rule does not apply, and a general denial is sufficient to allow the introduction of such evidence.[88] Failure of consideration must be specially pleaded.[89]

(5) Illegality. Where the illegality of a contract or transaction on which an action is based does not appear on the face thereof, or from the evidence introduced to prove it, evidence of illegality cannot be introduced under a general denial;[90] but where the illegality does so appear the rule is otherwise.[91]

(6) Act of God. This is new matter of a defense which cannot be shown under a denial.[92]

(7) Champerty. This defense cannot be shown under the general denial.[93]

(8) Ultra Vires. The defense of *ultra vires* cannot be shown under the general denial.[94]

Nebraska.— Atchison, etc., R. Co. *v.* Washburn, 5 Nebr. 117, 125; Smith *v.* Bowers, 2 Nebr. (Unoff.) 611, 89 N. W. 596.

New York.— McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696 (partial payment in mitigation of damages must be specially pleaded); Toop *v.* New York, 13 N. Y. Suppl. 280. *Compare* O'Brien *v.* McCann, 58 N. Y. 373.

South Carolina.— Latimer *v.* York Cotton Mills, 66 S. C. 135, 44 S. E. 559.

Utah.— Reed *v.* Union Cent. L. Ins. Co., 21 Utah 295, 61 Pac. 21.

But see Allis *v.* Nanson, 41 Ind. 154; Smith *v.* Lisher, 23 Ind. 500.

86. Rasmussen *v.* Levin, 28 Colo. 448, 65 Pac. 94; Swearingen *v.* Lahner, 93 Iowa 147, 61 N. W. 431, 57 Am. St. Rep. 261, 26 L. R. A. 765; Williams *v.* Philadelphia Fire Assoc., 119 N. Y. App. Div. 573, 104 N. Y. Suppl. 100; Supreme Tent K. M. W. *v.* Hilliker, 29 Can. Sup. Ct. 397.

87. Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; Smith *v.* Flack, 95 Ind. 116; Bingham *v.* Kimball, 17 Ind. 396; Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136; Nunn *v.* Jordan, 31 Wash. 506, 72 Pac. 124; Griffith *v.* Wright, 21 Wash. 494, 58 Pac. 582. But see Evans *v.* Williams, 60 Barb. (N. Y.) 346.

88. Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; Butler *v.* Edgerton, 15 Ind. 15; Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136; Nunn *v.* Jordan, 31 Wash. 506, 72 Pac. 124; Griffith *v.* Wright, 21 Wash. 494, 58 Pac. 582.

89. Dubois *v.* Hermance, 56 N. Y. 673 (partial or entire failure); Derry *v.* Holman, 27 S. C. 621, 2 S. E. 841; Nunn *v.* Jordan, 31 Wash. 506, 72 Pac. 124; Murray *v.* O'Kanogan Live Stock, etc., Co., 12 Wash. 259, 40 Pac. 942. But see Brooks *v.* Chilton, 6 Cal. 640.

Partial failure under plea of total failure.— A party may generally, under a defense of a total failure of consideration, introduce evidence showing a partial failure as a defense to the extent of his proof. Sinex *v.* Toledo, etc., R. Co., 27 Ind. 365; Landry *v.* Durham, 21 Ind. 232; National Tube Works Co. *v.* Ring Refrigerating, etc., Co., 201 Mo. 30, 98 S. W. 620; Willis *v.* Bullitt, 22 Tex. 330.

90. *Minnesota.*— Woodbridge *v.* Sellwood, 65 Minn. 135, 67 N. W. 799.

Missouri.— McDearmott *v.* Sedgwick, 140 Mo. 172, 39 S. W. 776 [*overruling* Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505]; Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406.

Nebraska.— Kelly *v.* Nebraska Exposition Assoc., 52 Nebr. 355, 72 N. W. 356; Dillon *v.* Darst, 48 Nebr. 803, 67 N. W. 783.

New York.— Boyer *v.* Fenn, 19 Misc. 128, 43 N. Y. Suppl. 533.

Oregon.— Ah Doon *v.* Smith, 25 Oreg. 89, 34 Pac. 1093; Buchtel *v.* Evans, 21 Oreg. 309, 28 Pac. 67.

South Carolina.— Durham Fertilizer Co. *v.* Pagett, 39 S. C. 69, 17 S. E. 563.

Washington.— Maitland *v.* Zanga, 14 Wash. 92, 44 Pac. 117.

The defense that services rendered were contrary to public policy so far as pleading is concerned is not unlike that of champerty, gaming, usury, and the like. It is an affirmative defense and should be clearly and distinctly stated. Musser *v.* Adler, 86 Mo. 445.

91. Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406; McClure *v.* Ullman, 102 Mo. App. 697, 77 S. W. 325.

92. Chicago, etc., R. Co. *v.* Shaw, 63 Nebr. 380, 88 N. W. 508; New Haven, etc., Co. *v.* Quintard, 1 Sweeny (N. Y.) 89, 6 Abb. Pr. N. S. 128; Pengra *v.* Wheeler, 24 Oreg. 532, 34 Pac. 354, 21 L. R. A. 726.

93. Disbrow *v.* Cass County, 119 Iowa 538, 93 N. W. 585; Kelerher *v.* Henderson, 203 Mo. 498, 101 S. W. 1083; Musser *v.* Adler, 86 Mo. 445; Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285. But see Keaton *v.* Sublett, 109 Ky. 106, 58 S. W. 528, 22 Ky. L. Rep. 631.

94. Williams *v.* Verity, 98 Mo. App. 654,

m. Counter-Claim, Set-Off, and Recoupment. A counter-claim or set-off must under code procedure always be specially pleaded.[95] And under the common-law system of pleading also a set-off must be specially pleaded,[96] and the plea

73 S. W. 732; Lewis *v.* Clyde Steamship Co., 131 N. C. 652, 42 S. E. 969; U. S. Mortgage Co. *v.* McClure, 42 Oreg. 190, 70 Pac. 543. And see MUNICIPAL CORPORATIONS, 28 Cyc. 1769.

95. *Arkansas.*— Quinn *v.* Sewell, 50 Ark. 380, 8 S. W. 132. *Compare* Shinn *v.* Tucker, 37 Ark. 580.

California.— Perkins *v.* West Coast Lumber Co., (1897) 48 Pac. 982; *In re* Gouts, 100 Cal. 400, 34 Pac. 865; Stoddard *v.* Treadwell, 26 Cal. 294; Hicks *v.* Green, 9 Cal. 74.

Colorado.— Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209.

Indiana.— Brown *v.* College Corner, etc., Gravel Road Co., 56 Ind. 110.

Iowa.— Zion Church Evangelical Assoc. of North America *v.* Parker, 114 Iowa 1, 86 N. W. 60.

Kansas.— Marley *v.* Smith, 4 Kan. 183.

Missouri.— Neosho City Water Co. *v.* Neosho, 136 Mo. 498, 38 S. W. 89; Strother *v.* McMullen Lumber Co., 110 Mo. App. 552, 85 S. W. 650; Sayers *v.* Craven, 107 Mo. App. 407, 81 S. W. 473; Spink *v.* Mueller, 77 Mo. App. 85.

Nebraska.— Waller *v.* Deranleau, 4 Nebr. (Unoff.) 497, 94 N. W. 1038.

New York.— Beers *v.* Waterbury, 8 Bosw. 396; Nelson *v.* Wellington, 5 Bosw. 178; Pinckney *v.* Keyler, 4 E. D. Smith 469; Simons *v.* Martin, etc., Mfg. Co., 25 Misc. 788, 54 N. Y. Suppl. 560; Montanye *v.* Montgomery, 19 N. Y. Suppl. 655; Foulks *v.* White, 4 N. Y. Suppl. 95; Mullenbrinck *v.* Pooler, 4 N. Y. St. 127.

North Dakota.— Hogan *v.* Klabo, 13 N. D. 319, 100 N. W. 847.

Oregon.— Crawford *v.* Hutchinson, 38 Oreg. 578, 65 Pac. 84.

South Carolina.— McGee *v.* Wells, 37 S. C. 365, 16 S. E. 29; Humbert *v.* Brisbane, 25 S. C. 506.

South Dakota.— Harrison *v.* State Banking, etc., Co., 15 S. D. 304, 89 N. W. 477.

Wisconsin.— Conway *v.* Mitchell, 97 Wis. 290, 72 N. W. 752; Kenyon *v.* Kenyon, 72 Wis. 234, 39 N. W. 361.

See 39 Cent. Dig. tit. "Pleading," §§ 1294, 1296.

In Louisiana under the statute a set-off or counter-claim must be pleaded. See Porche *v.* Le Blanc, 12 La. Ann. 778; Kathman *v.* New Orleans, 11 La. Ann. 146; McKown *v.* Mathes, 19 La. 542; White *v.* Moreno, 17 La. 371; Cotton *v.* Union Bank, 15 La. 369; Robinson *v.* Williams, 3 Mart. N. S. 665.

In Texas by express statute (Rev. St. (1895) art. 1266) counter-claim or set-off must be specially pleaded. See Davidson *v.* Edgar, 5 Tex. 492; Richey Grocery Co. *v.* Warnell, (Civ. App. 1907) 103 S. W. 419; Hillman *v.* Edwards, (Civ. App. 1903) 74 S. W. 787; Stagg *v.* Piland, 31 Tex. Civ. App. 245, 71 S. W. 762; Scott *v.* Farmers', etc., Nat. Bank, (Civ. App. 1902) 66 S. W. 485; Henderson *v.* Johnson, 22 Tex. Civ. App. 381, 55 S. W. 35.

The recovery can only be on the precise counter-claim alleged. Vernon *v.* J. W. O'Bannon Co., 71 N. Y. App. Div. 618, 75 N. Y. Suppl. 737; Frothingham *v.* Satterlee, 70 N. Y. App. Div. 613, 75 N. Y. Suppl. 21; Rood *v.* Taft, 94 Wis. 380, 69 N. W. 183.

96. *Alabama.*—Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790; Odum *v.* Rutledge, etc., R. Co., 94 Ala. 488, 10 So. 222; Kannady *v.* Lambert, 37 Ala. 57.

Florida.— Lucas *v.* Wade, 43 Fla. 419, 31 So. 231. But *compare* Howe *v.* Hyer, 36 Fla. 12, 17 So. 925, in garnishment proceedings under a special statute no special plea is necessary.

Illinois.— Wilson *v.* Wilson, 125 Ill. App. 385; Meyer *v.* Johnson, 122 Ill. App. 87; Lloyd *v.* Manufacturers, etc., Warehouse Co., 102 Ill. App. 551; Kingman Plow Co. *v.* Peoria Scrap Iron Co., 96 Ill. App. 445; Jockisch *v.* Hardtke, 50 Ill. App. 202; Theodorson *v.* Ahlgren, 37 Ill. App. 140; Clause *v.* Bullock Printing Press Co., 20 Ill. App. 113 [*affirmed* in 118 Ill. 612, 9 N. E. 201].

Indiana.— See Coe *v.* Givan, 1 Blackf. 367.

Maine.— Wilson *v.* Russ. 20 Me. 421.

Massachusetts.— Skinner *v.* King, 4 Allen 498; Rider *v.* Ocean Ins. Co., 20 Pick. 259; Grew *v.* Burditt, 9 Pick. 265; Braynard *v.* Fisher, 6 Pick. 355; Sargent *v.* Southgate, 5 Pick. 312, 16 Am. Dec. 409; Clark *v.* Leach, 10 Mass. 51.

Michigan.—Mead *v.* Harris, 101 Mich. 585, 60 N. W. 284; Ferguson *v.* Millikin, 42 Mich. 441, 4 N. W. 185.

Missouri.— Oldham *v.* Henderson, 4 Mo. 295.

New Jersey.— Sawyer *v.* Van Deren, 74 N. J. L. 673, 66 Atl. 396; Ball *v.* Consolidated Franklinite Co., 32 N. J. L. 102; Robbins *v.* Aikins, 3 N. J. L. 745; Freeman *v.* Marsh, 3 N. J. L. 473.

New York.— See Holden *v.* Gilbert, 7 Paige 208.

North Carolina.— Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699.

Pennsylvania.— Glamorgan Iron Co. *v.* Rhule, 53 Pa. St. 93; Thorn *v.* Heugh, 1 Phila. 322.

Tennessee.—Scatchard *v.* Memphis Towing, etc., Co., 102 Tenn. 282, 52 S. W. 153.

Vermont.— Stanley *v.* Turner, 68 Vt. 315, 35 Atl. 321.

Virginia.— Richmond City, etc., R. Co. *v.* Johnson, 90 Va. 775, 20 S. E. 148; Botetourt County *v.* Burger, 86 Va. 530, 10 S. E. 264. But *compare* Langhorne *v.* McGhee, 103 Va. 281, 49 S. E. 44, construing Code (1887), § 3298.

But see Buckingham *v.* Burgess, 4 Fed. Cas. No. 2,087, 3 McLean 364.

Plea of payment.—A set-off cannot be proved under a plea of payment. Glamorgan Iron

must show all facts necessary to constitute a legal set-off of the nature sought to be proved,[97] although it has been held that a set-off may be proved under the general issue when defendant seeks to use it merely as a defense and not as a ground for affirmative relief.[98] If pleaded in bar only it cannot be used as a basis for an affirmative judgment.[99] The general rules regarding the introduction of evidence under a counter-claim or plea of set-off are the same as those regulating the introduction of evidence under a complaint or declaration.[1] There is a sharp conflict in the cases as to whether evidence in recoupment of damages may be shown under the general issue, some holding that it may be shown,[2] others that the defense must be specially pleaded or notice given.[3] It is always proper to specially plead it.[4] Where notice is required, recoupment must be confined to the specific transactions in dispute, unless the notice thereof alleges damages in other matters.[5] Recoupment of damages cannot be shown under a denial but must be specially

Co. *v.* Rhule, 53 Pa. St. 93. But see Coe *v.* Givan, 1 Blackf. (Ind.) 367; Balsbaugh *v.* Frazer, 19 Pa. St. 95; Calvin *v.* McClure, 17 Serg. & R. (Pa.) 385. But it may be shown under a plea of payment with leave. Lazarus *v.* George, 3 Luz. Leg. Reg. (Pa.) 143.

Plea of discount.—A set-off cannot be proved under a plea of discount. Glazier *v.* McCallister, 5 Harr. (Del.) 41.

Mutual subsisting assumpsits for the payment of money may, under notice, be given in evidence under the general issue. Morrison *v.* Furnham, 1 A. K. Marsh. (Ky.) 41.

Where, in a suit for an accounting, the bill involved mutual accounts, defendant, without pleading, is entitled to prove the items constituting his offsets and expenses, provided they are directly connected with the matters alleged in the bill. Dettering *v.* Nordstrom, 148 Fed. 81, 78 C. C. A. 157.

97. Choen *v.* Guthie, 15 W. Va. 100.

98. O'Brien *v.* O'Brien, 75 Ill. App. 263.

99. Chaplin *v.* Currier, 49 Vt. 48.

1. Berkowsky *v.* Specter, 79 Ill. App. 215; Gragg *v.* Frye, 32 Me. 283; Blaut *v.* Gross, 47 Misc. (N. Y.) 685, 94 N. Y. Suppl. 324.

The evidence will be confined to the scope of the claim as pleaded. Bell *v.* Davis, 8 Barb. (N. Y.) 210; Leibert *v.* Heitz, 193 Pa. St. 590, 44 Atl. 915; Finlay *v.* Stewart, 56 Pa. St. 183; Rentzheimer *v.* Bush, 2 Pa. St. 88; Latimer *v.* Hodgdon, 5 Serg. & R. (Pa.) 514; Rogers *v.* Old, 5 Serg. & R. (Pa.) 404.

Note given by plaintiff after action begun.—Under a plea of set-off, defendant may give in evidence a note given by plaintiff for the amount of the set-off after the action commenced. Marshall *v.* Sheridan, 10 Serg. & R. (Pa.) 268.

2. *Alabama.*— English *v.* Wilson, 34 Ala. 201; Hatchett *v.* Gibson, 13 Ala. 587.

Illinois.— Wadhams *v.* Swan, 109 Ill. 46; Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560; Higgins *v.* Lee, 16 Ill. 495; Register Gazette Co. *v.* Larash, 109 Ill. App. 236; Forbis *v.* Reeves, 109 Ill. App. 98; Lloyd *v.* Warehouse Co., 102 Ill. App. 551; Smith *v.* George Adams, etc., Co., 79 Ill. App. 250; McCormick Harvesting Mach. Co. *v.* Robinson, 60 Ill. App. 253; Hoerner *v.* Giles, 53 Ill. App. 540.

Kentucky.— Tevebaugh *v.* Reed, 5 T. B. Mon. 179.

Maryland.— Lee *v.* Rutledge, 51 Md. 311; Stone *v.* Rafter, 1 Harr. & J. 364.

Vermont.— Gregory *v.* Tomlinson, 68 Vt. 410, 35 Atl. 350; Keyes *v.* Western Vermont Slate Co., 34 Vt. 81.

Virginia.—Columbia Acc. Assoc. *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

See 39 Cent. Dig. tit. "Pleading," §§ 1294, 1296.

"However distinct and independent the several stipulations or covenants of the parties may be, if they are contained in the same instrument, the defendant may reduce the plaintiff's recovery by showing the damages he has sustained by the non-performance on the part of the plaintiff; and this under the general issue." Wilson *v.* Greensboro, 54 Vt. 533, 543.

Breach of warranty.— "It has been repeatedly held that under the general issue the defendant might show that the plaintiff made a warranty that had been broken, and reduced the plaintiff's recovery to the extent that he had sustained loss by the breach of the warranty." Wilson *v.* Greensboro, 54 Vt. 533, 542.

3. *Arkansas.*— Daniel *v.* Guy, 19 Ark. 121; McLure *v.* Hart, 19 Ark. 119.

Indiana.— Estep *v.* Morton, 6 Ind. 489.

New Hampshire.— Simonds *v.* Cross, 63 N. H. 123.

New York.— Barber *v.* Rose, 5 Hill 76.

Ohio.— Upton *v.* Julian, 7 Ohio St. 95; The Wellsville *v.* Geisse, 3 Ohio St. 333.

See 39 Cent. Dig. tit. "Pleading," §§ 1294, 1296.

Plea or notice required by statute or rule of court see Fraser *v.* Ross, 1 Pennew. (Del.) 348, 41 Atl. 204; Port Kennedy Slag Works *v.* Mitchell, 1 Pennew. (Del.) 220, 40 Atl. 190; Scatchard *v.* Memphis Towing, etc., Derrick Co., 102 Tenn. 282, 52 S. W. 153; Frederick Mfg. Co. *v.* Devlin, 127 Fed. 71, 62 C. C. A. 53.

Where special damages are sought the matter constituting the recoupment must be specially pleaded. Simmons *v.* Haas, 56 Md. 153.

4. Campbell *v.* Trunnell, 67 Ga. 518; McCarthy *v.* Neu, 91 Ill. 127.

5. McKevitte *v.* Feige, 57 Mich. 374, 24 N. W. 109.

pleaded.[6] Where the contract sued on expressly provides for deductions, such items need not be pleaded as counter-claims, even though it would be otherwise if the contract were silent about them.[7] Consent cannot authorize the court to render judgment on cross demands not pleaded, evidence of which is not admissible under general pleas filed. The cross demands should be filed by way of amendment to support a judgment.[8]

n. Bills of Particulars. The filing of a bill of particulars or copy of account operates as a limitation of proof and restricts the recovery to the matters or items set forth therein.[9] It does not operate as a portion of the declaration as regards subsequent pleadings.[10] But evidence in rebuttal may be introduced, although not specified in the bill of particulars.[11] And proof may be offered of the aggregate of the amount claimed, and the party is not confined to proof of the details separately.[12] If the other party himself introduces evidence or makes admissions showing that the party filing the bill of particulars is entitled to recover for items not set forth in his bill, a verdict for such items may stand.[13] A bill of particulars describing generally the character of a claim is sufficient to admit evidence of the contents thereof if no more specific bill is called for.[14] If the filing of a bill of particulars or copy of account becomes necessary, failure to file it will preclude the introduction of evidence touching the matters sought to be covered by such bill of particulars or copy of account,[15] and the same result is held to follow from

6. Crane *v.* Hardman, 4 E. D. Smith (N. Y.) 448.

7. Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

8. Whitcomb *v.* Stringer, 160 Ind. 82, 66 N. E. 443.

9. *Alabama.*— Morrisette *v.* Wood, 128 Ala. 505, 30 So. 630.

Illinois.— Morton *v.* McClure, 22 Ill. 257; American Rolling Mill Corp. *v.* Ohio Iron, etc., Co., 120 Ill. App. 614.

Indiana.— Harding *v.* Griffin, 7 Blackf. 462.

Maine.— Starbird *v.* Curtis, 43 Me. 352.

Maryland.— Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 46 Atl. 328, 1063; Hall *v.* Sewell, 9 Gill 146.

Massachusetts.— Blake *v.* Everett, 1 Allen 248.

Michigan.— Stoner *v.* Riggs, 128 Mich. 129, 87 N. W. 109. *Compare* Gubbins *v.* Ashley, 146 Mich. 453, 109 N. W. 841.

New Jersey.— Graham *v.* Whitely, 26 N. J. L. 254.

New York.— Wait *v.* Borne, 123 N. Y. 592, 25 N. E. 1053; Matthews *v.* Hubbard, 47 N. Y. 428; Bowman *v.* Earle, 3 Duer 691; Lester *v.* Clark, 40 Misc. 688, 83 N. Y. Suppl. 168; Enright *v.* Seymour, 8 N. Y. St. 356; Starkweather *v.* Kittle, 17 Wend. 20. *Compare* Scott *v.* Haines, 3 Misc. 153, 22 N. Y. Suppl. 711.

Rhode Island.— Tourgee *v.* Rose, 19 R. I. 432, 37 Atl. 9.

South Carolina.— Davis *v.* Hunt, 2 Bailey 412.

Vermont.— Lapham *v.* Briggs, 27 Vt. 26.

Washington.— Howells *v.* North American Transp., etc., Co., 24 Wash. 689, 64 Pac. 786.

United States.— Hanson *v.* Smith, 94 Fed. 960, 36 C. C. A. 581; Williams *v.* Sinclair, 29 Fed. Cas. No. 17,737, 3 McLean 289.

See 39 Cent. Dig. tit. "Pleading," § 1299.

A bill of particulars can specify but not enlarge the cause of action stated in the declaration or complaint, and unless evidence sought to be introduced under the bill is proper under the declaration or complaint it will be excluded. American Broom, etc., Co. *v.* Addickes, 19 Misc. (N. Y.) 36, 42 N. Y. Suppl. 871; Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366.

If a single item is specified evidence cannot be introduced showing several smaller items making up the one named. McQueston *v.* Young, 19 N. H. 307.

Items of credit and debit.— The pleader is restricted to the items set forth, as well in items of credit as in items of debit. Saunders *v.* Osgood, 46 N. H. 21.

A bill of particulars voluntarily given has the same force and effect as one obtained pursuant to a rule or order of the court. Williams *v.* Allen, 7 Cow. (N. Y.) 316.

A so-called bill of particulars furnished before action brought will not limit the evidence admissible. Deveney *v.* Head, 64 N. Y. App. Div. 615, 72 N. Y. Suppl. 248.

A special contract may be proved under the short form of pleading when the complaint has attached to it a bill of particulars as special, as required under the old rule of pleading. Roberts *v.* Harris, 32 Ga. 542.

10. Lapham *v.* Briggs, 27 Vt. 26.

11. Robertson *v.* Emerich, 88 Ill. App. 522; Brown *v.* Denison, 2 Wend. (N. Y.) 593.

12. Stephens *v.* Green Hill Cemetery Co., 1 Houst. (Del.) 26; Calhoun *v.* Akeley, 82 Minn. 354, 85 N. W. 170.

13. Williams *v.* Allen, 7 Cow. (N. Y.) 316; Greenwood *v.* Smith, 45 Vt. 37.

14. Hayes *v.* Wilson, 105 Mass. 21; Jackson *v.* Hall, 14 Pick. (Mass.) 151; Grady *v.* Sullivan, 112 Mich. 458, 70 N. W. 1040; Tanner *v.* Page, 106 Mich. 155, 63 N. W. 993.

15. Scott *v.* Frost, 4 Colo. App. 557, 36 Pac. 910.

the filing of an insufficient account or bill of particulars after objection has been made.[16]

C. Variance Between Allegations and Proof[17] — **1. In General.** Proofs, to be effectual, must correspond substantially with the allegations; hence, if there is a variance between the nature and elements of plaintiff's cause of action as alleged and as proved, it is fatal.[18] And if there is a substantial departure from the

16. Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835.

17. **In actions by or against married women** see HUSBAND AND WIFE, 21 Cyc. 1568.

In actions for criminal conversation see HUSBAND AND WIFE, 21 Cyc. 1630.

In actions with regard to community property see HUSBAND AND WIFE, 21 Cyc. 1691.

In proceedings to enforce homestead see HOMESTEADS, 21 Cyc. 638.

18. *Alabama.*—McGehee *v.* Roberts, 90 Ala. 534, 8 So. 46; North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105; Alabama Great Southern R. Co. *v.* Thomas, 83 Ala. 343, 3 So. 802; Conner *v.* Smith, 74 Ala. 115; Meadors *v.* Askew, 56 Ala. 584; Wharton *v.* Cunningham, 46 Ala. 590; Roundtree *v.* Turner, 36 Ala. 555.

Arkansas.—Atkinson *v.* Cox, 54 Ark. 444, 16 S. W. 124.

California.— Hayes *v.* Fine, 91 Cal. 391, 27 Pac. 772; Thompson *v.* Lyon, 14 Cal. 39; Ellis *v.* Doherty, 1 Cal. App. 472, 82 Pac. 545.

Colorado.— Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063.

Connecticut.— Willoughby *v.* Raymond, 4 Conn. 130.

Florida.— Walter *v.* Parry, 51 Fla. 344, 40 So. 69; Louisville, etc., R. Co. *v.* Guyton, 47 Fla. 188, 36 So. 84; Hinote *v.* Brigman, 44 Fla. 589, 33 So. 303; Wilkinson *v.* Pensacola, etc., R. Co., 35 Fla. 82, 17 So. 71.

Georgia.— Lowry Nat. Bank *v.* Fickett, 122 Ga. 489, 50 S. E. 396; Loyd *v.* Anderson, 119 Ga. 875, 47 S. E. 208; Brunswick Grocery Co. *v.* Spencer, 97 Ga. 764, 25 S. E. 764; Lea *v.* Harris, 84 Ga. 137, 10 S. E. 599; Montezuma *v.* Wilson, 82 Ga. 206, 9 S. E. 17, 14 Am. St. Rep. 150; Bennett *v.* Walker, 64 Ga. 326.

Illinois.— Calkins *v.* Worth, 215 Ill. 78, 74 N. E. 81 [*affirming* 117 Ill. App. 478]; Lake St. El. R. Co. *v.* Shaw, 203 Ill. 39, 67 N. E. 374; Jewett *v.* Sweet, 178 Ill. 96, 52 N. E. 962; Moss *v.* Johnson, 22 Ill. 633; A. M. Rothschild *v.* Levy, 118 Ill. App. 78; Gilman *v.* Ferguson, 116 Ill. App. 347; Cassem *v.* Williams, 104 Ill. App. 504; Myers *v.* American Steel Barge Co., 64 Ill. App. 187; New Home Life Assoc. *v.* Hagler, 23 Ill. App. 457.

Indiana.— Clinton County *v.* Hill, 122 Ind. 215, 23 N. E. 779; Brown *v.* Will, 103 Ind. 71, 2 N. E. 283; Cleveland, etc., R. Co. *v.* Wynant, 100 Ind. 160; Coal *v.* McDill, 38 Ind. App. 621, 78 N. E. 679; Perkins Windmill, etc., Co. *v.* Yeoman, 23 Ind. App. 483, 55 N. E. 782; Trueblood *v.* Shellhouse, 19 Ind. App. 91, 49 N. E. 47; Becker *v.* Baumgartner, 5 Ind. App. 576, 32 N. E. 786.

Iowa.— Hurlbut *v.* Bagley, 99 Iowa 127, 68 N. W. 585.

Kentucky.— Helm *v.* Jones, 3 Dana 86; Rudd *v.* Thomas, 1 J. J. Marsh. 299; Frankfort Water Co. *v.* Gaines, 51 S. W. 599, 21 Ky. L. Rep. 460. See also Coombs *v.* Breathitt County, 46 S. W. 505, 20 Ky. L. Rep. 529.

Louisiana.— Bedford *v.* Urquhart, 8 La. 241; Hall *v.* Marshall, 6 La. 49; Alford *v.* Hancock, McGloin 280. *Compare* Colsson *v.* Consolidated Assoc. Bank, 12 La. 105.

Maine.— Hackett *v.* Lane, 61 Me. 31.

Maryland.— Shields *v.* Miller, 4 Harr. & J. 1.

Massachusetts.— Chapin *v.* White, 102 Mass. 139; Bowker *v.* Childs, 3 Allen 434; Hill *v.* Haskins, 8 Pick. 83; Emerson *v.* Wiley, 7 Pick. 68. See also Pease *v.* Brown, 104 Mass. 291.

Minnesota.— Downs *v.* Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Ward *v.* Haws, 5 Minn. 440.

Mississippi.— Chism *v.* Alcorn, 71 Miss. 506, 15 So. 73.

Missouri.— Jones *v.* Louderman, 39 Mo. 287; Link *v.* Vaughn, 17 Mo. 585; Ingwerson *v.* St. Louis, etc., R. Co., 116 Mo. App. 139, 92 S. W. 357; Ficklin *v.* Wabash R. Co., 115 Mo. App. 633, 92 S. W. 347; Sundmacher *v.* Lloyd, (App. 1905) 89 S. W. 368; York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968; Halliwell Cement Co. *v.* Stewart, 103 Mo. App. 182, 77 S. W. 124; Mason *v.* St. Louis, etc., R. Co., 75 Mo. App. 1.

New Hampshire.— Hart *v.* Lockwood, 66 N. H. 541, 23 Atl. 367; Hart *v.* Chesley, 18 N. H. 373.

New Jersey.— Mulford *v.* Bowen, 9 N. J. L. 315.

New York.— Piper *v.* Hoard, 107 N. Y. 67, 12 N. E. 632, 1 Am. St. Rep. 785; Neudecker *v.* Kohlberg, 81 N. Y. 296; Brown *v.* Wolfe, 119 N. Y. App. Div. 777, 104 N. Y. Suppl. 573; Child *v.* New York El. R. Co., 89 N. Y. App. Div. 598, 85 N. Y. Suppl. 604; Coverly *v.* Terminal Warehouse Co., 70 N. Y. App. Div. 82, 75 N. Y. Suppl. 145; Cox *v.* Halloran, 64 N. Y. App. Div. 550, 72 N. Y. Suppl. 302; Bowen *v.* Webster, 3 N. Y. App. Div. 86, 38 N. Y. Suppl. 917; Woolsey *v.* Ellenville, 69 Hun 489, 23 N. Y. Suppl. 410; Remington *v.* Walker, 21 Hun 322; Gasper *v.* Adams, 28 Barb. 441; Delevan *v.* Simonson, 35 N. Y. Super. Ct. 243; Clarke *v.* Meigs, 10 Bosw. 337; Burnham *v.* Wilbur, 7 Bosw. 169; Saltus *v.* Genin, 3 Bosw. 250, 7 Abb. Pr. 193; Palmer *v.* Great West Ins. Co., 10 Misc. 167, 30 N. Y. Suppl. 1044 [*affirmed* in 153 N. Y. 660, 48 N. E. 1106]; Brady *v.* Nally, 8 Misc. 9, 28 N. Y. Suppl. 64 [*reversed* on other grounds in 151 N. Y. 258, 45 N. E. 547]; Heela Powder Co. *v.* Hudson River Ore, etc.,

issues formed by the pleadings in regard to some matter material to the claim or defense, this constitutes a material variance.[19] There must be a departure as to kind, not merely as to quantity or degree.[20] A variance results from a discrepancy between the allegations and proof of the same party, not between the allegations of one party and the evidence of the opposite party.[21] If the evidence can be reasonably construed to support the pleading, there is no variance,[22] for a variance does not result from mere uncertainty or inconsistencies in the allegations,[23] or the proof.[24] In determining whether there is a variance between the evidence and the allegations, the whole scope of the pleading [25] and evidence [26] should be considered. There is no variance if the proofs sustain a portion of the allegations of the plead-

Co., 7 Misc. 630, 28 N. Y. Suppl. 34 [*affirmed* in 152 N. Y. 619, 46 N. E. 1148]; Muller *v.* Schumann, 19 N. Y. Suppl. 213; Philips *v.* Rose, 8 Johns. 392. See also Walter *v.* Bennett, 16 N. Y. 250.

North Carolina.— Abernathy *v.* Seagle, 98 N. C. 553, 4 S. E. 542. See also Brem *v.* Carrington, 104 N. C. 589, 10 S. E. 706; Thigpen *v.* Staton, 104 N. C. 40, 10 S. E. 89.

Ohio.— Hough *v.* Young, 1 Ohio 504.

Oregon.— Bender *v.* Bender, 14 Oreg. 353, 12 Pac. 713.

Pennsylvania.— Parke *v.* Kleeber, 37 Pa. St. 251; Hennessy *v.* Anstock, 19 Pa. Super. Ct. 644.

Rhode Island.— Stearns *v.* Drake, 24 R. I. 272, 52 Atl. 1082.

South Carolina.— Fitzsimons *v.* Guanahani Co., 16 S. C. 192; Simkins *v.* Montgomery, 1 Nott & M. 589.

Tennessee.— Johnson *v.* Luckado, 12 Heisk. 270; State *v.* Stony, (Ch. App. 1897) 47 S. W. 1103.

Texas.— Milmo *v.* Adams, 79 Tex. 526, 15 S. W. 690; Adams *v.* Hicks, 41 Tex. 239; Texas Bldg., etc., Assoc. *v.* Keer, (1890) 13 S. W. 1020; McFaddin *v.* Sims, 43 Tex. Civ. App. 598, 97 S. W. 335; Smith *v.* Flatonia First Nat. Bank, 43 Tex. Civ. App. 495, 95 S. W. 1111; Robinson *v.* National Surety Co., 31 Tex. Civ. App. 629, 73 S. W. 26; Karthoghian *v.* Harboth, (Civ. App. 1900) 56 S. W. 79; Wynne *v.* Admire, 4 Tex. Civ. App. 45, 23 S. W. 418; Donovan *v.* Ladner, 3 Tex. Civ. App. 203, 22 S. W. 61; Miles *v.* Butler, (Civ. App. 1891) 16 S. W. 108; Texas, etc., R. Co. *v.* Hamm, 2 Tex. App. Civ. Cas. § 491.

Vermont.— Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102. See also West *v.* Emery, 17 Vt. 583, 44 Am. Dec. 356.

West Virginia.— Dresser *v.* West Virginia Transp. Co., 8 W. Va. 553.

United States.— Little *v.* District of Columbia, 19 Ct. Cl. 323.

Canada.— Moore *v.* Hannan, 3 Nova Scotia 291.

See 39 Cent. Dig. tit. "Pleading," §§ 1300, 1333.

The test to be applied is the tendency of evidence to substantially prove the allegations, not the literal identity of the facts alleged and the facts proved. Terre Haute Electric R. Co. *v.* Lauer, 21 Ind. App. 466, 52 N. E. 703; De Lay *v.* Carney, 100 Iowa 687, 69 N. W. 1053; Powers *v.* Smith. (Ky. 1897) 38 S. W. 1045, 18 Ky. L. Rep. 983; Livingstone *v.* Heerman, 9 Mart. (La.) 656; Planters' Bank *v.* George, 6 Mart. (La.) 670, 12 Am. Dec. 487; Rumbolz *v.* Bennett, 86 Mo. App. 174; Devlin *v.* Boyd, 69 Hun (N. Y.) 328, 23 N. Y. Suppl. 523; Hauck *v.* Craighead, 4 Hun (N. Y.) 561; West *v.* Eley, 39 Oreg. 461, 65 Pac. 798; Michon *v.* Ayalla, 84 Tex. 685, 19 S. W. 878; Durkee *v.* Vermont Cent. R. Co., 29 Vt. 127; Pilling *v.* Morse, 5 Wash. 797, 32 Pac. 748; Wallace *v.* Souther, 9 Can. L. T. 210.

Alleging and proving details.— Where the pleader may choose whether or not to set forth certain details of the cause of action relied upon, if he alleges them he is then bound to prove them as laid. Webster *v.* Hodgkins, 25 N. H. 128, details of fraud.

The omission of an allegation in a complaint may be cured by the answer so as to avoid a variance. Price *v.* Patron's, etc., Home Protection Co., 77 Mo. App. 236.

Tort and contract.— There cannot be a recovery for a tort when a contract is counted on. White River R. Co. *v.* Hamilton, 76 Ark. 333, 88 S. W. 978. And a recovery on a cause of action *ex contractu* cannot be had on a count pleading a cause of action *ex delicto*. Butler *v.* Collins, 11 Cal. 391; Lake Shore, etc., R. Co. *v.* Bennett, 89 Ind. 457; Neudecker *v.* Kohlberg, 81 N. Y. 296; Tacoma Mill Co. *v.* Perry, 40 Wash. 44, 82 Pac. 140.

19. Keiser *v.* Topping, 72 Ill. 226; Frazer *v.* Smith, 60 Ill. 145; Sattley Mfg. Co. *v.* Wendt, 116 Ill. App. 375.

20. Peasley *v.* Hart, 65 Cal. 522, 4 Pac. 537; Plate *v.* Vega, 31 Cal. 383.

21. Norcross *v.* Welton, 59 Vt. 50, 7 Atl. 714; Curtis *v.* Burdick, 48 Vt. 166.

22. Pelberg *v.* Gorham, 23 Cal. 349; Toledo, etc., R. Co. *v.* Harnsberger, 41 Ill. App. 494; Norton *v.* Huxley, 13 Gray (Mass.) 285; Ware *v.* Gay, 11 Pick. (Mass.) 106; Whitworth *v.* Alston, 65 Tex. 528.

23. Blackman *v.* Wheaton, 13 Minn. 326; Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348; Huey *v.* Macon County, 35 Fed. 481.

24. Franklin Printing, etc., Co. *v.* Behrens, 181 Ill. 340, 54 N. E. 896; Bexar Bldg., etc., Assoc. *v.* Newman, (Tex. Civ. App. 1893) 25 S. W. 461.

25. Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433; Schimmelpennick *v.* Turner, 6 Pet. (U. S.) 1, 8 L. ed. 297.

26. Del Piano *v.* Caponigri, 20 Misc. (N. Y.) 541, 46 N. Y. Suppl. 452.

ing, provided such portion amounts to a cause of action,[27] according to the general principle that if the pleader alleges more than is necessary, the additional allegations need not be proved.[28] Evidence of the actual facts will support a pleading which sets up the same facts according to their legal effect.[29] A party cannot take advantage of a variance which is caused by his own wrongful acts.[30] The tendency of modern cases is to abolish the technical refinements which once prevailed in regard to variances and with a view to substantial justice to require much less strictness in proof than formerly.[31] If the proof substantially supports the allegations it is sufficient.[32]

2. Materiality of Variance — a. In General. A variance which does not affect the gist of the action as alleged is immaterial.[33] And material variance cannot be predicated upon immaterial or superfluous allegations,[34] nor upon immaterial matter

27. *Colorado.*— Rollins *v.* Board of Com'rs, 15 Colo. 103, 25 Pac. 1083.

Illinois.— Morris *v.* Chicago Union Traction Co., 119 Ill. App. 527; Comer *v.* McDonnell, 117 Ill. App. 450.

Kentucky.— See Crump *v.* Hubbard, Litt. Sel. Cas. 222; Hanks *v.* Evans, Hard. 45.

Oregon.— Hough *v.* Grants Pass Powder Co., 41 Oreg. 531, 69 Pac. 655.

Texas.—Bergman *v.* Blackwell, (Civ. App. 1893) 23 S. W. 243.

England.—Swinfen *v.* Chelmsford, 5 H. & N. 890, 6 Jur. N. S. 1035, 29 L. J. Exch. 382, 2 L. T. Rep. N. S. 406, 8 Wkly. Rep. 545.

28. Young *v.* Gormley, 119 Iowa 541, 93 N. W. 565; Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874; Gannon *v.* Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505.

29. Sumner *v.* Tileston, 7 Pick. (Mass.) 198 (pleading possession and showing actual possession of tenant at will); Silver *v.* Kendrick, 2 N. H. 160; New York News Pub. Co. *v.* National Steamship Co., 148 N. Y. 39, 42 N. E. 514 (pleading a money indebtedness and proving an agreement to perform work for payment in steamship tickets, the performance of the work and the refusal to deliver the tickets); Standish *v.* Chandler, 23 Wend. (N. Y.) 511; Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867; Hayes *v.* Walker, 70 S. C. 41, 48 S. E. 989 (pleading settlement with party and proving settlement with the party's agent).

30. Crosby *v.* Watts, 41 N. Y. Super. Ct. 208.

31. Allen *v.* Jarvis, 20 Conn. 38.

32. *Alabama.*— Wilson *v.* Smith, 111 Ala. 170, 20 So. 134.

Colorado.— Oligarchy Ditch Co. *v.* Farm Inv. Co., 40 Colo. 291, 88 Pac. 443.

Delaware.— Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114.

Illinois.— Comer *v.* McDonnell, 117 Ill. App. 450; Ellinger *v.* Caspery, 76 Ill. App. 523.

Kansas.— Benton *v.* Yurann, 8 Kan. App. 305, 55 Pac. 676.

Massachusetts.— Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

Michigan.— Erickson *v.* Milwaukee, etc., R. Co., 93 Mich. 414, 53 N. W. 393.

New York.— Graney *v.* Berrie, 31 N. Y. App. Div. 285, 52 N. Y. Suppl. 775.

Texas.— Cotton *v.* Rand, (Civ. App. 1899) 51 S. W. 55.

United States.— Black *v.* Henry G. Allen Co., 56 Fed. 764.

Canada.—Colbert *v.* Hicks, 5 Ont. App. 571.

33. *Colorado.*— Walsh *v.* Hastings, 20 Colo. 243, 38 Pac. 324.

Illinois.— Postal Tel.-Cable Co. *v.* Likes, 225 Ill. 249, 80 N. E. 136 [*affirming* 124 Ill. App. 459]; Mills *v.* Larrance, 120 Ill. App. 83 [*affirmed* in 217 Ill. 446, 75 N. E. 555].

Michigan.— Smith *v.* Detroit Loan, etc., Assoc., 115 Mich. 340, 73 N. W. 395, 69 Am. St. Rep. 575, 39 L. R. A. 410; McCaslin *v.* Lake Shore, etc., R. Co., 93 Mich. 553, 53 N. W. 724; Detroit, etc., R. Co. *v.* McKenzie, 43 Mich. 609, 5 N. W. 1031.

New York.— Palmer *v.* Great Western Ins. Co., 10 Misc. 167, 30 N. Y. Suppl. 1044 [*affirmed* in 153 N. Y. 660, 48 N. E. 1106].

Texas.— Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63.

34. *Alabama.*— Dickson *v.* Bachelder, 21 Ala. 699.

California.— Lee *v.* Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 58 Am. St. Rep. 140, 38 L. R. A. 71; Mulliken *v.* Hull, 5 Cal. 245.

Connecticut.— Starr *v.* Anderson, 19 Conn. 338.

Illinois.— Chicago, etc., R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500; Crone *v.* Crone, 170 Ill. 494, 49 N. E. 217.

New York.— Booth *v.* Englert, 105 N. Y. App. Div. 284, 94 N. Y. Suppl. 700; Bradley *v.* Field, 3 Wend. 272.

South Carolina.— Walker *v.* Briggs, 8 Rich. 440; McCool *v.* McCluny, Harp. 486.

Texas.— Wheeler *v.* Bellville First Nat. Bank, (Civ. App. 1897) 41 S. W. 376.

Virginia.— Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

Washington.— Carroll *v.* Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431.

United States.— Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

Statement of rule.— "It is sufficient if the proofs correspond with the allegations in respect of those facts and circumstances which are, in point of law, essential to the cause of action. The *allegata* and *probata* need have only a legal identity, and this consists in their agreement in all the particulars legally essential to support the claim preferred. Im-

of inducement,[35] nor upon unessential matters of detail.[36] But every allegation in an inducement which is material, and not impertinent and foreign to the cause, and which, consequently, cannot be rejected as surplusage, must be proved as alleged, and a variance is fatal.[37]

b. Adverse Party Surprised or Misled. It has been decided in a number of cases that a variance to be material must be such as to mislead [38] or surprise [39] the adverse party. And it is expressly provided by statute in a number of states that no variance between pleading and proof shall be deemed material unless it shall have actually misled the adverse party to his prejudice.[40] And under such statutes it is not enough for a party to allege merely that he has been misled, but it must

material allegations, such as probative facts not descriptive of some essential averment, need not be proved as laid." James *v.* Goodenough, 7 Nev. 324, 327, per Garber, J.

35. *Connecticut.*— Swan *v.* Bridgeport, 70 Conn. 143, 39 Atl. 110.

Massachusetts.— Baylies *v.* Fettyplace, 7 Mass. 325; Cunningham *v.* Kimball, 7 Mass. 65.

Missouri.— Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

New Jersey.— French *v.* Shreeve, 18 N. J. L. 147.

Pennsylvania.— Repsher *v.* Shane, 3 Yeates 575.

Texas.— Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

But see Randel *v.* Wright, 1 Harr. (Del.) 34.

36. *Connecticut.*— House *v.* Metcalf, 27 Conn. 631.

District of Columbia.— District of Columbia *v.* Haller, 4 App. Cas. 405, an allegation that plaintiff slipped into a hole and proof that he stepped into it, not a material variance.

Illinois.— Chicago *v.* Seben, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245 (an allegation that plaintiff fell into a sewer inlet to a catch-basin, and evidence that he fell into a hole over and into a certain catch-basin is not a material variance); National Enameling, etc., Co. *v.* Vogel, 115 Ill. App. 607.

Kansas.— Bailey *v.* Gatewood, 68 Kan. 231, 74 Pac. 1117; Cherryvale First Nat. Bank *v.* Montgomery County Nat. Bank, 64 Kan. 134, 67 Pac. 458, an allegation that stock was acquired in a certain manner and proof that it was acquired in a different manner is immaterial.

Texas.— Houston, etc., R. Co. *v.* Summers, (Civ. App. 1899) 49 S. W. 1106.

Wisconsin.— Hodge *v.* Smith, 130 Wis. 326, 110 N. W. 192.

37. Wabash Western R. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111.

38. *District of Columbia.*— Washington, etc., R. Co. *v.* Grant, 11 App. Cas. 107.

Michigan.— O'Neil *v.* Newman, 132 Mich. 489, 93 N. W. 1064; Barnhard *v.* White Cloud, 108 Mich. 508, 66 N. W. 387; Mason *v.* Scio Fractional School Dist. No. 1, 34 Mich. 228.

New Jersey.— Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268; Allen *v.* Bunting, 18 N. J. L. 299.

New York.— McNair *v.* Gilbert, 3 Wend. 344.

Texas.— Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Mast *v.* Nacogdoches County, 71 Tex. 380, 9 S. W. 267; Wiebusch *v.* Taylor, 64 Tex. 53; Hays *v.* Samuels, 55 Tex. 560; McClelland *v.* Smith, 3 Tex. 210; Kirby Lumber Co. *v.* Poindexter, (Civ. App. 1907) 103 S. W. 439; Thornburgh *v.* Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054; Gunter *v.* Lillard, 1 Tex. Civ. App. 325, 21 S. W. 118.

See 39 Cent. Dig. tit. "Pleading," § 1338.

39. Smith *v.* Hicks, 5 Wend. (N. Y.) 48; McNair *v.* Gilbert, 3 Wend. (N. Y.) 344; Wiebusch *v.* Taylor, 64 Tex. 53; Hays *v.* Samuels, 55 Tex. 560; McClelland *v.* Smith, 3 Tex. 210; Gunter *v.* Lillard, 1 Tex. Civ. App. 325, 21 S. W. 118.

40. See the statutes of the different states. And see the following cases:

Arkansas.— Molen *v.* Orr, 44 Ark. 486.

California.— Foster *v.* Carr, 135 Cal. 83, 67 Pac. 43; Lyles *v.* Perrin, 134 Cal. 417, 66 Pac. 472; Moore *v.* Douglas, 132 Cal. 399, 64 Pac. 705; Duke *v.* Huntington, 130 Cal. 272, 62 Pac. 510; Herman *v.* Hecht, 116 Cal. 553, 48 Pac. 611; Cockins *v.* Cook, (1895) 41 Pac. 406; Carter *v.* Baldwin, 95 Cal. 475, 30 Pac. 595; Hitchcock *v.* McElrath, 72 Cal. 565, 14 Pac. 305; Peters *v.* Foss, 20 Cal. 586; Star Mill, etc., Co. *v.* Porter, 4 Cal. App. 470, 88 Pac. 497.

Colorado.— Rio Grande Western R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

Idaho.— Lewis *v.* Utah Constr. Co., 10 Ida. 214, 77 Pac. 336.

Indiana.— Consolidated Stone Co. *v.* Williams, 26 Ind. App. 131, 57 N. E. 558, 84 Am. St. Rep. 278; Cummings *v.* Girton, 19 Ind. App. 248, 49 N. E. 360.

Kansas.— People's Nat. Bank *v.* Myers, 65 Kan. 122, 69 Pac. 164.

Kentucky.— Fox *v.* Pearcy, 50 S. W. 983, 20 Ky. L. Rep. 2031; Grinstead *v.* Phœnix Nat. Bank, 44 S. W. 952, 19 Ky. L. Rep. 1914.

Minnesota.— Wilcox Lumber Co. *v.* Ritteman, 88 Minn. 18, 92 N. W. 472; Blackman *v.* Wheaton, 13 Minn. 326; Short *v.* McRea, 4 Minn. 119.

Missouri.— Evans *v.* Evans, (1899) 52 S. W. 12; Fischer *v.* Max, 49 Mo. 404; Rumbolz *v.* Bennett, 86 Mo. App. 174; Toppass *v.* Kellogg Syrup Mfg. Co., 74 Mo. App. 402; James *v.* Hicks, 58 Mo. App. 521.

Montana.— Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

be proved to the satisfaction of the court.[41] An affidavit should ordinarily be filed showing in what respect the party has been surprised and misled.[42]

3. Bills of Particulars and Notices Under the General Issue. The same strictness as to variance is not observed in regard to notices of special matters under the general issue as in case of special pleas.[43] And it has been held that items in a bill of particulars are not *allegata* which must be proved as laid.[44] But the general rule appears to be that a substantial departure from the specifications of the bill of particulars will constitute a variance,[45] although formal and technical variations will not do so.[46] Variances will not be deemed material which have not misled the opposite party to his prejudice.[47] The time specified in a bill of particu-

Nebraska.— Toy *v.* McHugh, 62 Nebr. 820, 87 N. W. 1059.

New York.— Horst *v.* Lovdal, 113 N. Y. App. Div. 277, 98 N. Y. Suppl. 996; Spring *v.* Bowne, 89 Hun 10, 35 N. Y. Suppl. 46; Craig *v.* Ward, 36 Barb. 377 [*affirmed* in 1 Abb. Dec. 454, 3 Keyes 387; 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235]; Barrick *v.* Austin, 21 Barb. 241; Poirer *v.* Fisher, 8 Bosw. 258; Seaman *v.* Low, 4 Bosw. 337; Chapman *v.* Carolin, 3 Bosw. 456; Milbank *v.* Dennistoun, 1 Bosw. 246; Willis *v.* Orser, 6 Duer 322; Dunn *v.* Durant, 9 Daly 389; Cotheal *v.* Talmadge, 1 E. D. Smith 573 [*affirmed* in 9 N. Y. 551, 61 Am. Dec. 716]; Palmer *v.* Great Western Ins. Co., 10 Misc. 167, 30 N. Y. Suppl. 1044 [*affirmed* in 153 N. Y. 660, 48 N. E. 1106]; McKeever *v.* Dady, 18 N. Y. Suppl. 439; Paisley *v.* Casey, 18 N. Y. Suppl. 102.

North Carolina.— Mode *v.* Penland, 93 N. C. 292; Lawrence *v.* Hester, 93 N. C. 79.

North Dakota.— Robertson *v.* Moses, 15 N. D. 351, 108 N. W. 788; Halloran *v.* Holmes, 13 N. D. 411, 101 N. W. 310.

Ohio.— Ralston *v.* Kohl, 30 Ohio St. 92; Gaines *v.* Union Transp., etc., Co. 28 Ohio St. 418; Toledo *v.* Willinger, 27 Ohio Cir. Ct. 512.

Oregon.— West *v.* Eley, 39 Oreg. 461, 65 Pac. 798; Denn *v.* Peters, 36 Oreg. 486, 59 Pac. 1109; Hill *v.* Mellon, 3 Oreg. 542.

South Dakota.— Woodford *v.* Kelley, 18 S. D. 615, 101 N. W. 1069; Meldrum *v.* Kenefick, 15 S. D. 370, 89 N. W. 863; Herminston *v.* Green, 11 S. D. 81, 75 N. W. 819; North Star Boot, etc., Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

Utah.— Hecla Gold Min. Co. *v.* Gisborn, 21 Utah 68, 59 Pac. 518; Holman *v.* Pleasant Grove City, 8 Utah 78, 30 Pac. 72; Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515.

Washington.—Griffith *v.* Ridpath, 38 Wash. 540, 80 Pac. 820; Meals *v.* De Soto Placer Min. Co., 33 Wash. 302, 74 Pac. 470; Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68; Ernst *v.* Fox, 26 Wash. 526, 67 Pac. 258; Olson *v.* Snake River Valley R. Co., 22 Wash. 139, 60 Pac. 156; Post-Intelligencer Pub. Co. *v.* Harris, 11 Wash. 500, 39 Pac. 965.

Wisconsin.—Thayer *v.* Jarvis, 44 Wis. 388; Herrick *v.* Graves, 16 Wis. 157.

Wyoming.— Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

United States.— Salt Lake City *v.* Smith, 104 Fed. 457, 43 C. C. A. 637.

See 39 Cent. Dig. tit. "Pleading," § 1338.

41. *Arkansas.*— Molen *v.* Orr, 44 Ark. 486.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326; Short *v.* McRea, 4 Minn. 119.

Missouri.— Rumbolz *v.* Bennett, 86 Mo. App. 174; James *v.* Hicks, 58 Mo. App. 521.

New York.—Poirer *v.* Fisher, 8 Bosw. 258; Chapman *v.* Carolin, 3 Bosw. 456; Milbank *v.* Dennistoun, 1 Bosw. 246; Dunn *v.* Durant, 9 Daly 389; Cotheal *v.* Talmadge, 1 E. D. Smith 573 [*affirmed* in 9 N. Y. 551, 61 Am. Dec. 716].

North Carolina.— Mode *v.* Penland, 93 N. C. 292.

North Dakota.— Halloran *v.* Holmes, 13 N. D. 411, 101 N. W. 310.

Ohio.— Toledo *v.* Willinger, 27 Ohio Cir. Ct. 512.

Oregon.— West *v.* Eley, 39 Oreg. 461, 65 Pac. 798; Denn *v.* Peters, 36 Oreg. 486, 59 Pac. 1109; Hill *v.* Mellon, 3 Oreg. 542.

South Dakota.— Meldrum *v.* Kenefick, 15 S. D. 370, 89 N. W. 863; North Star Boot, etc., Co. *v.* Stebbins, 3 S. D. 540, 54 N. W. 593.

Washington.— Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68; Ernst *v.* Fox, 26 Wash. 526, 67 Pac. 258; Olson *v.* Snake Valley R. Co., 22 Wash. 139, 60 Pac. 156.

Wisconsin.— Thayer *v.* Jarvis, 44 Wis. 388.

Wyoming.— Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

See 39 Cent. Dig. tit. "Pleading," § 1338.

42. Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; White *v.* Farmers' Mut. F. Ins. Co., 97 Mo. App. 590, 71 S. W. 707; Rumbolz *v.* Bennett, 86 Mo. App. 174; Allen *v.* Bunting, 18 N. J. L. 299; Willis *v.* Orser, 6 Duer (N. Y.) 322; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288.

43. Manion *v.* Creigh, 37 Conn. 462.

44. Moline Water Power, etc., Co. *v.* Nichols, 26 Ill. 90; Vidal *v.* Clarke, 2 Rich. (S. C.) 359; Cregier *v.* Smyth, 1 Speers (S. C.) 298; Davis *v.* Hunt, 2 Bailey (S. C.) 412.

45. Flynn *v.* Manhattan R. Co., 1 Misc. (N. Y.) 188, 20 N. Y. Suppl. 652.

46. Bucki *v.* McKinnon, 37 Fla. 391, 20 So. 540; Collins *v.* Beecher, 45 Mich. 436, 8 N. W. 97; Hoag *v.* Weston, 10 N. Y. Civ. Proc. 92.

47. Mason *v.* Scio Fractional School Dist. No. 1, 34 Mich. 228; Allen *v.* Bunting, 18 N. J. L. 299; Seaman *v.* Low, 4 Bosw. (N. Y.) 337; Smith *v.* Hicks, 5 Wend. (N. Y.) 48; McNair *v.* Gilbert, 3 Wend. (N. Y.) 344.

lars need not be strictly sustained by the proof.[48] A variance in the proof from the bill of particulars as to the amount claimed by plaintiff is immaterial, provided, it seems, that the amount proved does not exceed that stated in the bill of particulars.[49] A bill of particulars cannot enlarge a cause of action so as to make a variance when the evidence supports the allegations of the complaint.[50]

4. Set-Off and Counter-Claim. The rule as to variance in case of a set-off or counter-claim is the same as in case of a declaration or complaint.[51] Matter pleaded as a counter-claim may be sustained as a set-off if proved at the trial,[52] but a plea merely defensive cannot be used as the basis for an affirmative judgment.[53]

5. Allegations Under Videlicet. The proper office of a *videlicet* is to particularize or explain what goes before it,[54] or to state time, place, or manner, which are not of the essence of the matter in issue, so that they need not be proved strictly as laid.[55] But it is only when matters alleged under a *videlicet* are not essential and material that the party is relieved from the necessity of proving them strictly,[56] and therefore material matters must be proved with equal strictness whether laid under a *videlicet* or not.[57]

6. Matters of Description. Every averment which the pleadings make material as a descriptive part of a cause of action must be proved as alleged, and any variance which destroys the legal identity of the matter or thing averred with the matter or thing proved is fatal.[58] But a departure even in matters of description, if not such as to create uncertainty in the identity of the subject-matter described, cannot cause a material variance.[59]

48. Maxwell *v.* Devalinger, 2 Pennew. (Del.) 504, 47 Atl. 381; Levy *v.* Gillis, 1 Pennew. (Del.) 119, 39 Atl. 785. But see Quin *v.* Astor, 2 Wend. (N. Y.) 577.

49. Edwards *v.* Ford, 2 Bailey (S. C.) 461.

50. Sichel *v.* Baron, 96 N. Y. Suppl. 186.

51. Bevens *v.* Barnett, (Ark. 1893) 22 S. W. 160; Rotan *v.* Nichols, 22 Ark. 244; Downs *v.* Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488. See also Henry *v.* Walker, 11 Heisk. (Tenn.) 194.

52. Lawrence *v.* Vilas, 20 Wis. 381.

53. Johnson *v.* Collins, 1 Blackf. (Ind.) 166.

54. Com. *v.* Quinlan, 153 Mass. 483, 27 N. E. 8; Buck *v.* Lewis, 9 Minn. 314; Gleason *v.* McVickar, 7 Cow. (N. Y.) 42; Clark *v.* Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639.

55. Trench *v.* Harden County Canning Co., 168 Ill. 135, 48 N. E. 64 [*affirming* 67 Ill. App. 269]; Prescott *v.* Guyler, 32 Ill. 312; Chicago Terminal Transfer Co. *v.* Young, 118 Ill. App. 226; Galt *v.* Woliver, 103 Ill. App. 71; State *v.* Heck, 23 Minn. 549; Sullivan *v.* State, 67 Miss. 346, 7 So. 275; St. Charles *v.* Stookey, 154 Fed. 772, 85 C. C. A. 494.

56. *Alabama.*— Pharr *v.* Bachelor, 3 Ala. 237.

Illinois.— Brown *v.* Berry, 47 Ill. 175.

Massachusetts.— Thompson *v.* Crocker, 9 Pick. 59.

Michigan.— Lothrop *v.* Southworth, 5 Mich. 436.

New Jersey.— Rollins *v.* Atlantic City R. Co., 73 N. J. L. 64, 62 Atl. 929.

Virginia.— Taylor *v.* Alexandria Bank, 5 Leigh 471.

England.— Bynner *v.* Russell, 1 Bing. 23, 7 Moore C. P. 267, 8 E. C. L. 383.

See 39 Cent. Dig. tit. "Pleading," § 1306.

57. Dawkins *v.* Smithwick, 4 Fla. 158; Foster *v.* Pennington, 32 Me. 178; Gleason *v.* McVickar, 7 Cow. (N. Y.) 42; Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 255; Clark *v.* Employer's Liability Assur. Co., 72 Vt. 458, 48 Atl. 639; Derragon *v.* Rutland, 58 Vt. 128, 3 Atl. 332; Ladue *v.* Ladue, 16 Vt. 189.

The description of a written instrument must be proved even where laid under a *videlicet.* Watson *v.* Osborne, 8 Conn. 363.

58. *Alabama.*— Gibson *v.* Clark, 132 Ala. 370, 31 So. 472.

Florida.— Burrett *v.* Doggett, 6 Fla. 332.

Illinois.— Wabash Western R. Co. *v.* Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; Beaver *v.* Slanker, 94 Ill. 175; Jacksonville, etc., R. Co. *v.* Brown, 67 Ill. 201; Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77.

Kansas.— Clark *v.* Ellithorpe, 7 Kan. App. 337, 51 Pac. 940.

New York.— Alder *v.* Griner, 13 Johns. 449.

Tennessee.— Morelock *v.* Barnard, (1886) 2 S. W. 32.

Texas.— Terry *v.* Hooker, (Civ. App. 1896) 37 S. W. 233.

Vermont.— Derragon *v.* Rutland, 58 Vt. 128, 3 Atl. 332; Gates *v.* Bowker, 18 Vt. 23; Allen *v.* Goff, 13 Vt. 148.

United States.— Sheehy *v.* Mandeville, 7 Cranch 208, 3 L. ed. 317.

England.— Mostyn *v.* Fabrigas, Cowp. 161.

Literal proof necessary.—"A distinction is now established between allegations of substance and allegations of matter of description. The former require to be substantially, the latter must be literally proved." Randel *v.* Wright, 1 Harr. (Del.) 34.

59. *Arkansas.*— Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829.

California.— Zeigler *v.* Wells, etc., Co., 28 Cal. 263.

7. Excess of Proof. An excess of proof will not constitute a material variance, if proof of the matters alleged is embraced within it.[60]

8. Damages.[61] No variance results from a failure to prove one or more of the items of damage alleged,[62] or from proving a partial loss when a total loss is alleged.[63]

9. Prayer For Relief. A prayer for greater or less relief than that to which the party proves himself entitled does not constitute a material variance.[64]

10. Time and Place. Time is usually immaterial, and need not be proved as laid;[65] but when material, as matter of description, strict proof is neces-

Colorado.— Lux *v.* McLeod, 19 Colo. 465, 36 Pac. 246.

Georgia.— Whitlock *v.* Crew, 28 Ga. 289.

Illinois.— Plumleigh *v.* Cook, 13 Ill. 669.

Indiana.— Ross *v.* Thompson, 78 Ind. 90; Brown *v.* Markland, 22 Ind. App. 652, 53 N. E. 295; Goodbub *v.* Scheller, 3 Ind. App. 318, 29 N. E. 610.

Kentucky.— McClean *v.* Lillard, 1 Bibb 146.

Maine.— Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491; Dodge *v.* Barnes, 31 Me. 290.

Michigan.— Lee *v.* Wisner, 38 Mich. 82.

Oregon.— Baker *v.* State Ins. Co., 31 Oreg. 41, 48 Pac. 699, 65 Am. St. Rep. 807.

Texas.—Thompson *v.* Dunn, 44 Tex. 88; McIlhenny *v.* Planters', etc., Nat. Bank, (Civ. App. 1898) 46 S. W. 282; Ellis *v.* Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687; Halbert *v.* Carroll, (Civ. App. 1894) 25 S. W. 1102; Murat *v.* Micaud, (Civ. App. 1894) 25 S. W. 312; Eakin *v.* Home Ins. Co., 1 Tex. App. Civ. Cas. § 1234.

Washington.—Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571; Post-Intelligencer Pub. Co. *v.* Harris, 11 Wash. 500, 39 Pac. 965.

Wisconsin.— Eastman *v.* Bennett, 6 Wis. 232.

United States.— Hoge *v.* Magnes, 85 Fed. 355, 29 C. C. A. 564.

60. *Illinois.*— Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Toledo, etc., R. Co. *v.* Thompson, 71 Ill. 434.

Iowa.— Jones *v.* Smith, 6 Iowa 229.

Kentucky.— Cartmell *v.* Walton, 4 Bibb 488.

Massachusetts.— Alvord *v.* Smith, 5 Pick. 232.

Michigan.— Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

New Hampshire.— Smith *v.* Webster, 48 N. H. 142; Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163; Morrill *v.* Richey, 18 N. H. 295.

Tennessee.— Exchange, etc., Bank *v.* Swepson, 1 Lea 355.

Texas.— Rankin *v.* Bell, 85 Tex. 28, 19 S. W. 874.

Vermont.— Ammel *v.* Noonar, 50 Vt. 402.

See 39 Cent. Dig. tit. "Pleading," § 1304.

But *compare* Crawford *v.* Morrell, 8 Johns. (N. Y.) 253.

61. See Damages, 13 Cyc. 183 *et seq.*

62. Jacksonville *v.* Loar, 65 Ill. App. 218; Comfort *v.* Graham, 87 Iowa 295, 54 N. W. 242; Wilcox *v.* Jackson, 57 Iowa 278, 10 N. W. 661.

63. New Orleans, etc., R. Co. *v.* Echols, 54 Miss. 264; Sterrett *v.* Northport Min., etc., Co., 30 Wash. 164, 70 Pac. 266, under statute as to misleading adverse party.

64. *Louisiana.*— Edwards *v.* Smith, 10 La. Ann. 536.

Missouri.— Evans *v.* Evans, (1899) 52 S. W. 12.

New York.— Chester *v.* Jumel, 2 Silv. Sup. 179, 181, 5 N. Y. Suppl. 823; Brusie *v.* Peck, 16 N. Y. Suppl. 648.

South Dakota.—Laird-Norton Co. *v.* Herker, 6 S. D. 509, 62 N. W. 104.

Texas.— Lee *v.* Boutwell, 44 Tex. 151.

See 39 Cent. Dig. tit. "Pleading," § 1337.

65. *Alabama.*— Southern R. Co. *v.* Taylor, 148 Ala. 52, 42 So. 625; Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

California.— Rosenberg *v.* Pimental, 133 Cal. 302, 65 Pac. 620; Stockton Combined Harvester, etc., Works *v.* Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; Bancroft Co. *v.* Haslett, 106 Cal. 151, 39 Pac. 602; Thomas *v.* Jameson, 77 Cal. 91, 19 Pac. 177.

Georgia.— Augusta, etc., R. Co. *v.* McElmurry, 24 Ga. 75.

Illinois.—Peoria Star Co. *v.* Steve W. Floyd Special Agency, 115 Ill. App. 401; Galt *v.* Woliver, 103 Ill. App. 71; Trench *v.* Hardin County Canning Co., 67 Ill. App. 269; St. Louis, etc., R. Co. *v.* Winkelmann, 47 Ill. App. 276.

Indiana.—Phœnix Mut. L. Ins. Co. *v.* Hinesley, 75 Ind. 1.

Iowa.— Carrier *v.* Bernstein, 104 Iowa 572, 73 N. W. 1076. See also Byington *v.* Bradley, 11 Iowa 78.

Kansas.— Russell *v.* Bradley, 47 Kan. 438, 28 Pac. 176; Campbell *v.* Reese, 8 Kan. App. 518, 56 Pac. 543.

Kentucky.— Gentry *v.* Doolin, 1 Bush 1.

Louisiana.— Buquoi *v.* Hampton, 6 Mart. N. S. 8; Pigeau *v.* Commeau, 4 Mart. N. S. 190.

Massachusetts.— Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944; Carter *v.* Franklin Tel. Co., 109 Mass. 161; Perry *v.* Botsford, 5 Pick. 189.

Minnesota.—Erickson *v.* Schuster, 44 Minn. 441, 46 N. W. 914.

Missouri.— Reeves *v.* Larkin, 19 Mo. 192.

New York.— Williams *v.* Freel, 99 N. Y. 666, 2 N. E. 54; Hoes *v.* Third Ave. R. Co., 5 N. Y. App. Div. 151, 39 N. Y. Suppl. 40; Reynolds Card Mfg. Co. *v.* New York Bank Note Co., 91 Hun 463, 36 N. Y. Suppl. 756 [*affirmed* in 157 N. Y. 687, 51 N. E. 1093]; James *v.* Work, 70 Hun 296, 24 N. Y. Suppl. 149; Hall *v.* Roberts, 63 Hun 473, 18 N. Y. Suppl. 480; Zorkowski *v.* Zorkowski, 3 Rob. 613; Lyons *v.* Miller, 10 Misc. 43, 30 N. Y.

sary.[66] And the same rule applies to allegations of place. If the precise location is alleged and the description is immaterial, the ground of charge or of complaint not being local, the description may be rejected as surplusage, and a large departure from the allegations is allowable.[67] But place sometimes becomes material as constituting matter of essential description, in which case a variance in regard thereto is material.[68]

11. PARTIES.[69] The proof must show the same parties to the contract, decree, deed, transaction, or proceeding as are alleged in the pleadings.[70] An allegation that defendant owned certain shares of stock is fatally variant from proof that

Suppl. 832 [*reversed* on other grounds in 10 Misc. 653, 31 N. Y. Suppl. 795]; Schuler *v.* Third Ave. R. Co., 1 Misc. 351, 20 N. Y. Suppl. 683; Duncan *v.* Ray, 19 Wend. 530; Stewart *v.* Eden, 2 Cai. 121, 2 Am. Dec. 222.

Oregon.— Delsman *v.* Friedlander, 40 Oreg. 33, 66 Pac. 297.

Pennsylvania.— Stout *v.* Rassel, 2 Yeates 334.

South Carolina.— Beck *v.* Pearse, 1 Bailey 154; Degraffinreid *v.* Mitchell, Harp. 437.

Texas.— Rockwell First Nat. Bank *v.* Stephenson, 82 Tex. 435, 18 S. W. 583; St. Louis, etc., R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798; East Line, etc., R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; Texas, etc., R. Co. *v.* Virginia Ranch, etc., Co., (1887) 7 S. W. 341; Gulf, etc., R. Co. *v.* Witte, 68 Tex. 295, 4 S. W. 490; Hunstock *v.* Roberts, (Civ. App. 1900) 55 S. W. 514; Kennard *v.* Withrow, (Civ. App. 1894) 28 S. W. 226; St. Louis, etc., R. Co. *v.* Edwards, 3 Tex. App. Civ. Cas. § 342; Walker *v.* Simkins, 2 Tex. App. Civ. Cas. § 69.

Utah.— Brown *v.* Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512.

See 39 Cent. Dig. tit. "Pleading," § 1311.

A great discrepancy in the time alleged and proved may, it seems, constitute a variance. Georgia Cent. R. Co. *v.* Simons, 150 Ala. 400, 43 So. 731.

66. *Indiana.*— Ellis *v.* Ford, 5 Blackf. 554.

Kentucky.— Bannister *v.* Weatherford, 7 B. Mon. 271.

Louisiana.— See Riley *v.* Wilcox, 12 Rob. 648.

New Hampshire.— Drown *v.* Smith, 3 N. H. 299.

Ohio.— Hough *v.* Young, 1 Ohio 504.

Pennsylvania.— Jordan *v.* Cooper, 3 Serg. & R. 564.

Wisconsin.— Paine *v.* Trumbull, 33 Wis. 164.

United States.— Eastman *v.* Bodfish, 8 Fed. Cas. No. 4,255, 2 Robb Pat. Cas. 72, 1 Story 528.

See 39 Cent. Dig. tit. "Pleading," § 1311. And see *supra*, XII, C, 6.

Time of accrual of cause of action.— If plaintiff's testimony shows that the cause of action arose after the date when the action was commenced, the variance is fatal. Carter *v.* Hodge, 7 Rob. (La.) 433; Georgia Pac. R. Co. *v.* Baird, 76 Miss. 521, 24 So. 195.

67. *Delaware.*— Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114.

Louisiana.— Johnson *v.* Canal, etc., R. Co., 27 La. Ann. 53.

Massachusetts.— Peck *v.* Waters, 104 Mass. 345.

Michigan.— Ross *v.* Ionia Tp., 104 Mich. 320, 62 N. W. 401; McCaslin *v.* Lake Shore, etc., R. Co., 93 Mich. 553, 53 N. W. 724.

Missouri.—Prewitt *v.* Missouri, etc., R. Co., 134 Mo. 615, 36 S. W. 667.

New York.— Newstadt *v.* Adams, 5 Duer 43.

Pennsylvania.— Platz *v.* Mckean Tp., 178 Pa. St. 601, 36 Atl. 136.

Tennessee.— Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. 873.

Texas.— Hillsboro *v.* Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012.

Wisconsin.— Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053.

United States.—Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230; Pope *v.* Allis, 115 U. S. 363, 6 S. Ct. 69, 29 L. ed. 393 (construing Wis. Rev. St. 2669); U. S. *v.* Le Baron, 4 Wall. 642, 18 L. ed. 309.

See 39 Cent. Dig. tit. "Pleading," § 1310.

68. *Illinois.*— Wabash Western R. Co. *v.* Friedmann, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200.

Indiana.— Cincinnati, etc., R. Co. *v.* McLain, 148 Ind. 188, 44 N. E. 306.

Missouri.— Fields *v.* Hunter, 8 Mo. 128.

New York.— Alder *v.* Griner, 13 Johns. 449.

North Dakota.— Ausk *v.* Great Northern R. Co., 10 N. D. 215, 86 N. W. 719.

England.— Mostyn *v.* Fabrigas, Cowp. 161.

See 39 Cent. Dig. tit. "Pleading," § 1310. And see *supra*, XII, C, 6.

69. See CONTRACTS, 9 Cyc. 755 *et seq.*

70. *Alabama.*— Smith *v.* Causey, 28 Ala. 655, 65 Am. Dec. 372.

California.— Walsworth *v.* Johnson, 41 Cal. 61.

Georgia.— Commercial Bank *v.* Tucker, 94 Ga. 289, 21 S. E. 507; Rome R. Co. *v.* Sullivan, 25 Ga. 228.

Iowa.— Proctor *v.* Reif, 52 Iowa 592, 3 N. W. 618.

Massachusetts.— Lincoln *v.* Shaw, 17 Mass. 410; Dyer *v.* Stevens, 6 Mass. 389. *Compare* Granville Middle Parish Charitable Assoc. *v.* Baldwin, 1 Metc. 359, 365, holding that where the parties to a contract can be ascertained, and the suit is instituted in the name of the real party, a mistake in the name of the promisee, as described in the promise, will not furnish any ground of defense.

New York.— Rich *v.* Wright, 57 N. Y. App. Div. 236, 68 N. Y. Suppl. 122 (individual lia-

the shares were owned by a corporation of which defendant was an officer.[71] Evidence of two several assaults does not support an allegation of a joint assault,[72] nor can an action against two or more for a joint trespass be sustained by evidence of an assault by one defendant.[73] If a party is described by a certain descriptive title and the proof shows a different title, the variance is material in the absence of evidence showing that the two descriptions apply to the same persons.[74]

12. Names of Persons. There is no variance between an allegation that an instrument was signed by a party's full name and evidence that it was signed by initials or other abbreviation and *vice versa*,[75] nor does a slight difference in the spelling of a name constitute a variance,[76] at least if proof is introduced showing the identity of the parties.[77] The presence or absence of a middle name or initial

bility pleaded, partnership liability proved); Curtiss *v.* Marshall, 8 Bosw. 22; Buellesbach *v.* Sulka, 94 N. Y. Suppl. 1.

South Carolina.— Huggins *v.* Watford, 38 S. C. 504, 17 S. E. 363; Simkins *v.* Montgomery, 1 Nott & M. 589.

South Dakota.— Anderson *v.* Alseth, 6 S. D. 566, 62 N. W. 435.

Texas.— Bowden *v.* Robinson, 4 Tex. Civ. App. 626, 23 S. W. 816.

Vermont.— Murdock *v.* Hicks, 49 Vt. 408.

See 39 Cent. Dig. tit. "Pleading," §§ 1314, 1315.

But *compare* Freeman *v.* Gloyd, 43 Wash. 607, 86 Pac. 1051.

Thus an allegation of a contract made by one corporation is not supported by evidence of a contract made by a different corporation (Wyckoff *v.* Union L. & T. Co., 11 N. Y. Suppl. 423; Supreme Lodge K. P. *v.* Weller, 93 Va. 605, 25 S. E. 891), and an allegation of title derived from one corporation is not proved by evidence that it was derived from another (Burns *v.* Iowa Homestead Co., 48 Iowa 279).

A promise to pay money to a corporation is not proved by showing a promise to pay to a committee of a church. Christian College *v.* Hendley, 49 Cal. 347.

An allegation of a conveyance to one as trustee is not supported by evidence of a conveyance to him individually. Merchants' Bank *v.* McConiga, 8 Nebr. 245.

An account alleged to be due to A is not proved by showing that it is due to A. & Co. Thompson *v.* Stetson, 15 Nebr. 112, 17 N. W. 368. *Compare* Wright *v.* Gussett, 31 Tex. 486.

Statutes changing rule as to persons sued jointly see Hewitt *v.* Maize, 5 Ida. 633, 51 Pac. 607. And see Judgments, 23 Cyc. 807.

How misnomer taken advantage of.— Under the general issue, advantage cannot be taken of the fact that plaintiff sues by a wrong name. Dohorty *v.* Madgett, 58 Vt. 323, 2 Atl. 115. A mistake in setting forth plaintiff's name in the declaration can only be taken advantage of by plea in abatement, unless there is a variance between the declaration and the contract offered in evidence. Chappell *v.* Proctor, Harp. (S. C.) 49. Misnomer of defendant can, in general, be taken advantage of only in abatement; but where, in a suit in assumpsit against two, one is arrested, and the other returned "not found," and it appears on the trial that defendant who is not brought in is misnamed in the declaration, being called "John," instead of "George," plaintiff will fail on the ground of variance. Waterbury *v.* Mather, 16 Wend. (N. Y.) 611. Where a petition and a summons was issued against three obligors, it cannot be shown under a plea of *non est factum*, entered by two of defendants, without affidavit, that the name of the third obligor, who was not served with process, was "Samuel," and not "Stephen," as described in the declaration; but the objection must be made by plea in abatement. Thompson *v.* Elliott, 5 Mo. 118. Where a written contract is sued on, a variance in name can be taken advantage of under the general issue and need not be pleaded in abatement. Gilbert *v.* Hanford, 13 Mich. 40.

71. Hubbard *v.* Long, 105 Mich. 442, 63 N. W. 644.

72. Henry *v.* Carlton, 113 Ala. 636, 21 So. 225.

73. Davis *v.* Caswell, 50 Me. 294.

74. Bangs *v.* Snow, 1 Mass. 181; U. S. *v.* Stafford, 27 Fed. Cas. No. 16,372, 2 Paine 525.

Mere words of description of the person, which do not mislead, cannot form the basis for a material variance. Bay *v.* Cook, 22 N. J. L. 343.

75. *Alabama.*— Blue *v.* American Soda Fountain Co., 150 Ala. 165, 43 So. 709.

Arkansas.— Dudley *v.* Smith, 2 Ark. 365; Webb *v.* Jones, 2 Ark. 330.

Colorado.— Peddie *v.* Donnelly, 1 Colo. 421.

Illinois.— Chumasero *v.* Gilbert, 26 Ill. 39.

Texas.— Whitworth *v.* Alston, 65 Tex. 528.

Wisconsin.— Eastman *v.* Bennett, 6 Wis. 232.

See 39 Cent. Dig. tit. "Pleading," § 1317.

Signature of married woman.—A plea alleging an assignment by "Elizabeth James" may be sustained by proof of a writing signed by "Mrs. A. P. James," where it appears that Elizabeth James is the wife of A. P. James. Cullers *v.* May, 81 Tex. 110, 16 S. W. 813.

76. Bell *v.* Norwood, 7 La. 95; Texas, etc., R. Co. *v.* Haynes, 44 Tex. Civ. App. 272, 97 S. W. 849; Bosley *v.* Pease, (Tex. Civ. App. 1893) 22 S. W. 516 [*affirmed* in 86 Tex. 292, 24 S. W. 279].

77. Hereford *v.* Lake, 15 La. Ann. 693; Cullers *v.* May, 81 Tex. 110, 16 S. W. 813.

will not ordinarily constitute a variance.[78] The addition "jr." is no part of a man's name, and a difference between allegation and proof in this respect does not constitute a material variance.[79] But where the name as proved is substantially different from that alleged, it will be deemed a material variance,[80] unless the evidence shows that the same person was known by both names.[81]

13. Title or Interest. The title or interest proved must in general be the same as that alleged.[82] And so an allegation of a legal title is not supported by proof of an equitable title.[83] But the source of title, if immaterial, need not be proved as alleged. Thus there is no material variance between a title alleged to have been acquired by purchase and proof of a title by subrogation and payment,[84] nor between an allegation of title by inheritance and proof of title by possession,[85] nor between the allegation of title by purchase and proof of title by gift.[86] Ownership of the identical property alleged must be supported by the proof.[87]

78. McDonough *v.* Heyman, 38 Mich. 334; Franklin *v.* Talmadge, 5 Johns. (N. Y.) 84. And see Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372, holding that in a suit against E H, alias E B H, a judgment against E H is not objectionable as evidence, on the ground of variance. *Compare* Com. *v.* Shearman, 11 Cush. (Mass.) 546, holding that George E. Allen would not be presumed to be the same person as George Allen, but evidence of the identity must be shown.

79. Headley *v.* Shaw, 39 Ill. 354; Weber *v.* Fickey, 52 Md. 500. *Contra*, De Kentland *v.* Somers, 2 Root (Conn.) 437.

80. State *v.* Reading, 1 Harr. (Del.) 23.

81. McDonald *v.* People, 12 Colo. App. 98, 54 Pac. 863.

82. *Louisiana.*— Drew *v.* Attakapas Mail Transp. Co., 26 La. Ann. 306; Shaw *v.* Noble, 15 La. Ann. 305.

Minnesota.— Caldwell *v.* Bruggerman, 4 Minn. 270.

Missouri.—Deickman *v.* McCormick, 24 Mo. 596.

North Carolina.— Faulk *v.* Thornton, 108 N. C. 314, 12 S. E. 998 (holding that in the trial of an action to recover damages for an alleged obstruction of an easement over lands to which plaintiff did not, in his complaint, claim title, evidence that plaintiff had title to the servient land was inadmissible); Southerland *v.* Jones, 51 N. C. 321.

Ohio.— Satchell *v.* Doram, 4 Ohio St. 542.

Canada.— Moore *v.* Hannan, 3 Nova Scotia 291.

See 39 Cent. Dig. tit. "Pleading," § 1321.

Thus an allegation of absolute title or entire interest is not supported by proof of a less interest. Winter *v.* Merrick, 69 Ala. 86; Lyon *v.* Kain, 36 Ill. 362; Emerson *v.* Atwater, 7 Mich. 12; Campbell *v.* Wasserman, 9 Pa. Co. Ct. 381; Texas, etc., R. Co. *v.* Oates, 2 Tex. App. Civ. Cas. § 618. *Compare* Russell *v.* Whiteside, 5 Ill. 7; Knott *v.* Tincher, 39 Iowa 628 (holding that under Code (1873), § 2729, where an absolute gift is alleged a lower degree of title may be shown); Watts *v.* Johnson, 4 Tex. 311. An allegation of entire ownership is not sustained by evidence of an undivided joint or common interest (Galveston, etc., R. Co. *v.* Becht, (Tex. Civ. App. 1893) 21 S. W. 971; Missouri Pac. R. Co. *v.* Teague, 2 Tex. App. Civ. Cas. § 780; Gulf, etc., R. Co. *v.* Witt, 2 Tex. App. Civ. Cas. § 774); but an allegation of ownership in plaintiff is sustained by evidence that plaintiff and his wife held the property by entireties (Graney *v.* Berrie, 31 N. Y. App. Div. 285, 52 N. Y. Suppl. 775) and proof of ownership supports an allegation of ownership by assignment (Smith *v.* Merchants' Despatch Transp. Co., 45 Iowa 705).

Ownership and occupation.— In an action for damages growing out of the condition or manner of using certain premises, an allegation of defendant's ownership and occupation of premises is not proved by evidence that they were occupied by his lessees. Gridley *v.* Bloomington, 68 Ill. 47; Coal Run Co. *v.* Giles, 49 Ill. App. 585.

Possession by a landlord is not proved by showing possession by a tenant for years in an action for obstructing a right of way, alleged to be in plaintiff's possession. Higgins *v.* Farnsworth, 48 Vt. 512. But see Sumner *v.* Tileston, 7 Pick. (Mass.) 198, where proof of possession by a tenant at will was held to support an allegation of possession by the landlord in an action for obstructing a mill.

An allegation of injury to plaintiff's property is satisfied by proof of any interest sufficient to support an action. Meaney *v.* Kehoe, 181 Mass. 424, 63 N. E. 925.

Evidence that the possession of property was obtained by virtue of an agreement fraudulently procured does not support an allegation that it was obtained by trick or pretense. Timmons *v.* Wiggins, 78 Ind. 297.

83. Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476; Stuart *v.* Lowry, 49 Minn. 91, 51 N. W. 662; Merrill *v.* Dearing, 47 Minn. 137, 49 N. W. 693; Tarpey *v.* Deseret Salt Co., 5 Utah 205, 14 Pac. 338. But *compare* Oliver *v.* Dougherty, 8 Ariz. 65, 68 Pac. 553; Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278.

84. Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 666.

85. Davis *v.* Leeper, 56 S. W. 712, 22 Ky. L. Rep. 116.

86. McNally *v.* McAndrew, 98 Wis. 62, 73 N. W. 315. See, however, Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444.

87. Ogilvie *v.* Hallam, 58 Iowa 714, 12 N. W. 730.

14. Amount or Value. Allegations as to amount or value need not usually be strictly proved, and a departure in the proof will not cause a material variance,[88] at least where the amount does not constitute matter of essential description.[89]

15. Contracts. The rules as to variance with respect to contracts have been stated elsewhere in this work.[90]

16. Written Instruments[91] — a. In General. In an action on an instrument, a variance is an erroneous description of the instrument, so that it does not appear to be the same when produced in evidence.[92] In case of such a variance, the instrument should not be admitted in evidence under the pleadings,[93] and even if admitted, no recovery can be had upon it.[94] But if it is correctly set out in terms or properly described in the pleading, it is admissible notwithstanding other allegations in the pleading inconsistent with it;[95] and a mere ambiguity, uncertainty, or inconsistency in the instrument shown in evidence will not constitute a variance,[96] nor will the mere misnaming of such instrument.[97] When the instrument in suit is made a part of the pleading by being attached as an exhibit, no objection for variance can be sustained;[98] but the mere conforming to the requirement that copies of instruments sued on shall be filed with the pleadings does not excuse a variance.[99] If the pleading purports to describe an instrument or record *in hæc verba* trifling variances may be fatal;[1] but if it purports merely to plead it substantially or according to its legal effect, a variance will not be deemed

88. Williams *v.* Harper, 1 Ala. 502; Reilly *v.* Ringland, 39 Iowa 106; Lass *v.* Wetmore, 2 Sweeny (N. Y.) 209; Smith *v.* Hicks, 5 Wend. (N. Y.) 48; Eckman *v.* Pfautz, 21 Lanc. L. Rev. (Pa.) 117. *Compare* Diefendorff *v.* Gage, 7 Barb. (N. Y.) 18, holding that an allegation in an answer to a complaint that the subject-matter of the suit "was very poor and of very little value" will not be supported by proof that it is worth nothing.

89. Ammel *v.* Noonar, 50 Vt. 402.

90. See Contracts, 9 Cyc. 748 *et seq.*

91. See Contracts, 9 Cyc. 748 *et seq.*

92. Dixon *v.* U. S., 7 Fed. Cas. No. 3,934, 1 Brock. 177.

Where a plaintiff declares on a note, proof of a bond is a fatal variance. Phillips *v.* Americus Guano Co., 110 Ala. 521, 18 So. 104.

Omission of material part of contract.— Where, in an action on a contract, the material part thereof has been omitted from the declaration, defendant cannot take advantage of the omission as a variance, under the plea of *non est factum*, but must crave oyer and demur. Henry *v.* Cleland, 14 Johns. (N. Y.) 400.

Bonds different in name but alike in form. — Where a declaration on an attachment bond proceeds on the bond as given for an ancillary attachment, and the bond set out on oyer is in form and substance a bond for an original attachment, the variance is not fatal, since the same bond both in form and substance is required to be given whether the attachment be original or ancillary. Dickson *v.* Bachelder, 21 Ala. 699.

93. *Alabama.*— Foster *v.* Ross, Minor 421.

Connecticut.— Stodard *v.* Gates, 2 Root 157.

Illinois.— Higgins *v.* Lee, 16 Ill. 495.

Louisiana.— Prion *v.* Adams, 5 Mart. N. S. 691.

Maryland.— Neale *v.* Fowler, 31 Md. 155.

Texas.— Henry *v.* Fay, 2 Tex. App. Civ. Cas. § 834; Winn *v.* Sloan, 1 Tex. App. Civ. Cas. § 1103.

Canada.— Webster *v.* Nova Scotia Mut. Relief Soc., 9 Can. L. T. 213.

See 39 Cent. Dig. tit. "Pleading," § 1325.

Lease with provision for renewal.— In an action for rent, under an averment describing the lease as for two years, the lease may be admitted in evidence, although extended, by virtue of a covenant therein contained, for an additional period at increased rent. Phelps *v.* Van Dusen, 3 Abb. Dec. (N. Y.) 604, 4 Transcr. App. 399.

94. Adams *v.* Brown, 4 Litt. (Ky.) 7; Hall *v.* Spaulding, 42 N. H. 259.

95. Bishop *v.* Griffith, 4 Colo. 68; Adams *v.* Way, 32 Conn. 160.

If the instrument is called both a note and a due-bill, there is no variance if it appears to be either one. Emerick *v.* Kroh, 14 Pa. St. 315.

96. Lasater *v.* Van Hook, 77 Tex. 650, 14 S. W. 270; May *v.* Pollard, 28 Tex. 677.

97. Bishop *v.* Griffith, 4 Colo. 68; Boone *v.* Stover, 66 Mo. 430. But see Erb *v.* Kindig, 6 Pa. Dist. 418.

98. Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704; Greenwood *v.* Anderson, 8 Tex. 225; Peters *v.* Crittenden, 8 Tex. 131.

99. Morris *v.* Fort, 2 McCord (S. C.) 397.

1. *Alabama.*— Thompson Foundry, etc., Co. *v.* Glass, 136 Ala. 648, 33 So. 811.

Indiana.— Lynch *v.* Wilson, 4 Blackf. 288.

Maryland.— McNamee *v.* Minke, 49 Md. 122.

South Carolina.— Miller *v.* Steen, Harp. 386.

United States.— Ferguson *v.* Harwood, 7 Cranch 408, 3 L. ed. 386; Clark *v.* Phillips, 5 Fed. Cas. No. 2,831*a*, Hempst. 294; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

material which does not alter the substance or legal effect of it,[2] although the variance is fatal if the instrument shown in evidence is of different legal effect from that alleged.[3] But immaterial words, not set forth as descriptive of the instrument, will not cause a material variance,[4] nor will mere errors or discrepancies in spelling,[5] nor obvious clerical errors.[6] It has been held that an allegation that defendant is in possession of the instrument sued on, and that therefore plaintiff is unable to give a more accurate description, will excuse a slight error in description.[7] The consideration for a written contract must be accurately alleged,[8] but if the true consideration is alleged there is no variance if the proof shows an instrument stating a different consideration.[9] And if the consideration named in the instrument is the same as that alleged there is no variance, although it is shown that the actual consideration is different.[10] An instrument may be introduced to sustain an allegation which does not refer to it directly if it substantially supports the allegation.[11] A description of a mortgage as written or printed is supported by evidence that it was partly written and partly printed.[12] When an instrument of writing or a record is not the foundation of the action, a variance is not material, unless the discrepancy is so great as to amount to a strong probability that it cannot be the instrument or record described.[13]

b. Date of Instrument. A difference in the date of an instrument as alleged and the date as proved will ordinarily constitute a material variance;[14] but if an instrument is stated in pleading to have been made on such a day, without alleging when it was dated, an instrument dated on a different day from that stated may be given in evidence.[15]

England.— Purcel *v.* McNamara, 1 Campb. 199, 9 East 361, 9 Rev. Rep. 578; Weall *v.* King, 12 East 452.

A variance in the amount of a note or bond is fatal, as a variance in a matter of essential description. Pillie *v.* Mollere, 2 Mart. (La.) 666; Brown *v.* Martin, 19 Tex. 343.

2. *Alabama.*— Harrison *v.* Weaver, 2 Port. 542.

Arkansas.— State Bank *v.* Peel, 11 Ark. 750.

Connecticut.— Fish *v.* Brown, 17 Conn. 341.

Montana.— Kleinschmidt *v.* Kleinschmidt, 13 Mont. 64, 32 Pac. 1.

New York.— Hartley *v.* Mullane, 20 Misc. 418, 45 N. Y. Suppl. 1023.

Texas.—Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181.

United States.— Ferguson *v.* Harwood, 7 Cranch 408, 3 L. ed. 386; Cannell *v.* Milburn, 5 Fed. Cas. No. 2,384, 2 Cranch C. C. 424.

See 39 Cent. Dig. tit. "Pleading," § 1325.

3. *Illinois.*— Corning Steel Co. *v.* Western Union Tel. Co., 60 Ill. App. 426.

Kentucky.— Adams *v.* Brown, 4 Litt. 7.

South Carolina.— Morris *v.* Fort, 2 McCord 397.

Texas.— Brown *v.* Martin, 19 Tex. 343.

Wisconsin.— Fairbanks *v.* Isham, 16 Wis. 118.

See 39 Cent. Dig. tit. "Pleading," § 1325.

4. Lejeune *v.* Hebert, 2 La. Ann. 145; Bailey *v.* Johnson, 9 Cow. (N. Y.) 115.

Illustration.— In an action by the assignee of time checks and due-bills, the fact that the petition describes the time checks as having no indorsement or assignment on them, while those introduced in evidence have indorsements in writing across their backs is not such a variance as to make them inadmissible in evidence. San Antonio, etc., R. Co. *v.* Cockrill, 72 Tex. 613, 10 S. W. 702.

5. Washington *v.* Denton First Nat. Bank, 64 Tex. 4.

6. Halfin *v.* Winkleman, 83 Tex. 165, 18 S. W. 433; Battles *v.* Barnett, (Tex. Civ. App. 1907) 100 S. W. 817.

7. German Ins. Co. *v.* Gibbs, (Tex. Civ. App. 1896) 35 S. W. 679.

8. Lill *v.* Brant, 1 Ill. App. 266; Cunningham *v.* Shaw, 7 Pa. St. 401.

9. Struthers *v.* Drexel, 122 U. S. 487, 7 S. Ct. 1293, 30 L. ed. 1216. And see Phœnix Mut. L. Ins. Co. *v.* Raddin, 120 U. S. 183, 7 S. Ct. 500, 30 L. ed. 644.

10. Redfield *v.* Haight, 27 Conn. 31.

11. Prather *v.* Vineyard, 9 Ill. 40; Bell *v.* Scott, 3 Mo. 212; Slayden *v.* Stone, 19 Tex. Civ. App. 618, 47 S. W. 747; Hill *v.* Tucker, 1 Tex. App. Civ. Cas. § 1224.

12. Johnson *v.* State, 69 Ala. 593.

13. Leidig *v.* Rawson, 2 Ill. 272, 29 Am. Dec. 354. See also Hull *v.* Blaisdell, 2 Ill. 332.

14. Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 117; Bennett *v.* Giles, 6 Leigh (Va.) 316; Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 240. And see CONTRACTS, 9 Cyc. 755. *Compare* Williams *v.* Manix, (Tex. Civ. App. 1907) 105 S. W. 520.

A year's difference between the date of the instrument declared on and the one offered in evidence is a material variance. Damarin *v.* Young, 27 W. Va. 436.

A slight discrepancy in the date of an instrument as pleaded and proved is not a material variance. Thompson *v.* Lowry, 37 La. Ann. 646.

15. Remington *v.* Henry, 6 Blackf. (Ind.) 63.

c. Place of Execution or Payment. Words showing venue, or words descriptive of the place where an instrument was executed or is payable, are not such as to cause a variance unless used as descriptive of the instrument.[16] A descriptive allegation, as to a note, that it is payable at one place, is not supported by the production of a note payable at another place.[17] But there is no variance between a declaration counting upon a note as if made payable anywhere and a note given in evidence made payable at a designated place.[18]

d. Parties to Instrument. The alleged parties to an instrument described in the pleadings must be identically the same as those shown by the instrument when put in evidence.[19] But discrepancies or variations in the spelling, form, or initials of names may be ignored, if clearly trivial, or explained by other parts of the instrument or by evidence *aliunde*,[20] and allegations as to residence, being immaterial, cannot cause a variance.[21] A mortgage executed to a person as administrator is not admissible in evidence under an allegation in the pleadings that it was executed to him individually.[22] Where a deed purports on its face to have been executed by husband and wife, but the wife has not acknowledged it, according to law, it may be declared on as the deed of the husband only, and will be admitted as evidence under such declaration.[23] Where an assessment is alleged to have been made by three managers, and the proof shows it was signed by only two, this is no variance if the signing is unnecessary and it was in fact made by the three.[24] Where notes in suit are declared upon as the notes of defendant alone, and the notes produced are signed by defendant and other persons severally liable, there is no variance.[25]

e. Property Described in Instrument. A palpable variance in the description of the property mentioned in a written instrument is fatal,[26] but mere clerical errors or minor discrepancies may be explained by reference to other parts of the instrument or by evidence *aliunde*.[27]

17. Judicial Records. A judicial record pleaded must conform exactly with that shown in evidence, in all matters of description,[28] such as amount,[29] costs

16. *Kansas.*— Stout *v.* Crosby, (1900) 63 Pac. 661.
Missouri.— Fields *v.* Hunter, 8 Mo. 128.
New York.— Alder *v.* Griner, 13 Johns. 449.
United States.— Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean 243.
England.— Mostyn *v.* Fabrigas, Cowp. 161. See 39 Cent. Dig. tit. "Pleading," § 1329.

17. New York L. Ins. Co. *v.* McPherson, 137 Ala. 116, 33 So. 825.

18. Kansas City, etc., R. Co. *v.* Cobb, 100 Ala. 228, 13 So. 938 [*overruling* Puckett *v.* King, 2 Ala. 570]. *Contra*, Damarin *v.* Young, 27 W. Va. 436.

19. *Alabama.*— Washington *v.* Timberlake, 74 Ala. 259; Ulrick *v.* Ragan, 11 Ala. 529.
Delaware.— State *v.* Readings Terre-Tenants, 1 Harr. 23.
Georgia.— Davenport *v.* Henderson, 84 Ga. 313, 10 S. E. 920; Whelan *v.* Edwards, 29 Ga. 315.
Illinois.— Chicago Stove Works *v.* Lally, 41 Ill. App. 249.
Iowa.— Roop *v.* Seaton, 4 Greene 252.
Kentucky.— Roberts *v.* Jones, 2 Litt. 88.
Missouri.— Huffman *v.* Ackley, 34 Mo. 277.
Texas.— Dean *v.* Border, 15 Tex. 298.
United States.— Smith *v.* Clarke, 22 Fed. Cas. No. 13,028, 4 Cranch C. C. 293.
See 39 Cent Dig. tit. "Pleading," § 1330.

20. Keith *v.* Sturges, 51 Ill. 142; Vernon Ins. Co. *v.* Glenn, 13 Ind. App. 340, 40 N. E. 759, 41 N. E. 829; Taylor *v.* Merrill, 64 Tex. 494; McKinzie *v.* Stafford, 8 Tex. Civ. App. 121, 27 S. W. 790. And see *supra*, XII, C, 12.
In case of a slight difference in the names of persons, it is for the jury to say whether the person named in the instrument is the same as the person named in the pleading. Lautermilch *v.* Kneagy, 3 Serg. & R. (Pa.) 202.

21. West Side Auction House Co. *v.* Connecticut Mut. L. Ins. Co., 186 Ill. 156, 57 N. E. 839.

22. German Ins. Co. *v.* Fairbanks, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. Rep. 459.

23. Birney *v.* Haim, 2 Litt. (Ky.) 262.

24. North River Meadow Co. *v.* Shrewsbury Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258.

25. Bowden *v.* Winsmith, 11 S. C. 409; Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867.

26. Baxter *v.* Knox, 19 Ill. 267.

27. Hall *v.* Younts, 87 N. C. 285; Cleveland *v.* Sims, 69 Tex. 153, 6 S. W. 634; Huff *v.* Webb, 64 Tex. 284; Echols *v.* Jacobs Mercantile Co., 38 Tex. Civ. App. 65, 84 S. W. 1082.

28. Forrester *v.* Vason, 71 Ga. 49; Giles *v.* Shaw, 1 Ill. 125; Cain *v.* Flynn, 1 Dana (Ky.) 143.

29. Adams *v.* Brown, 4 Litt. (Ky.) 7; Lackland *v.* Pritchett, 12 Mo. 484; Blakey

allowed,[30] date,[31] and form of action.[32] But mere verbal variations not affecting the identity of the judgment will not be deemed material.[33] And where the record is not the foundation of the action or defense, a variance will not be deemed material.[34]

18. Miscellaneous. If the pleading is of allowed claims and the proof shows claims presented but not allowed, there is a material variance.[35] Waiver by stipulation is not proved by evidence of waiver by conduct.[36] An allegation that property was returned for breach of warranty is not sustained by proof of a rescission of the contract and a return of the property thereafter.[37] Evidence that a note was intrusted to defendant does not support an allegation that money was intrusted to him.[38] There is a fatal variance between malfeasance alleged and non-feasance proved.[39] A count for fraud is not supported by evidence of negligence.[40] Proof of a custom among certain banks does not support an allegation of the custom of another bank.[41] There is no variance between a declaration that a boiler exploded and evidence that it was the fire-box which exploded, the fire-box being a part of the boiler.[42] And since the word "boat" in its ordinary acceptation may include "barge," any variance between an allegation that personal injuries were caused by a defect in a "barge" and proof that the defect was in a "boat" is immaterial.[43]

19. Curing Variance. An apparent variance may sometimes be cured by evidence *aliunde* which shows that in fact the proof offered relates to the same parties or subject-matter as the allegation.[44]

20. Effect of Variance. A new trial should be granted on material variance between the proof and the pleading.[45] And where a material variance clearly appears, and the defect is pointed out seasonably, a failure of the trial court to sustain the objection is ground for reversal.[46] But an immaterial variance between the allegations and the proof which is adduced will be disregarded,[47]

v. Saunders, 9 Mo. 742. *Contra*, Overton *v.* Rogers, 99 Ind. 595.

30. Blakey *v.* Saunders, 9 Mo. 742; Ferguson *v.* Frizel, 1 Mo. 441.

31. Gulick *v.* Loder, 14 N. J. L. 572; And see Thomas *v.* Thomas, 3 J. J. Marsh. (Ky.) 589, holding that a plea of another action pending is not supported by a record of another suit upon a note corresponding to the one sued on except in date.

Date not alleged as descriptive.— There is no variance if the date is not alleged as descriptive of the record. Martin *v.* Miller, 3 Mo. 135; Henry *v.* Tilson, 17 Vt. 479.

32. Wilkinson *v.* Garrett, 114 Mass. 446.

33. McQueen *v.* Farrow, 4 Mo. 212; Hutchison *v.* Patrick, 3 Mo. 65 (judge's name omitted); Frevert *v.* Swift, 19 Nev. 400, 13 Pac. 6 (amount alleged *in solido* rather than in separate items).

34. Nowlin *v.* Bloom, 1 Ill. 138.

35. Hofmann *v.* Tucker, 58 Nebr. 457, 78 N. W. 941.

36. Straus *v.* J. M. Russell Co., 85 Fed. 589.

37. Dickinson *v.* Lane, 107 Mass. 548.

38. Bottom *v.* Barton, 12 Colo. App. 53, 54 Pac. 1031.

39. Macumber *v.* White River Log, etc., Co., 52 Mich. 195, 17 N. W. 806.

40. Fox *v.* Hale, etc., Min. Co., 108 Cal. 369, 41 Pac. 308.

41. Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335.

42. Illinois Cent. R. Co. *v.* Behrens, 208 Ill. 20, 69 N. E. 796.

43. Monongahela River Consol. Coal, etc., Co. *v.* Hardsaw, (Ind. App. 1907) 77 N. E. 363, 79 N. E. 1062.

44. *Alabama.*— Chewacla Lime Works *v.* Dismukes, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100.

Connecticut.— Andrews *v.* Williams, 11 Conn. 326.

Illinois.— Berber *v.* Kerzinger, 23 Ill. 346; Citizens' Nat. Bank *v.* Lewis, 78 Ill. App. 217; Atchison, etc., R. Co. *v.* Goetz, etc., Mfg. Co., 51 Ill. App. 151.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Warden *v.* Dundas, Smith 209.

Massachusetts.— Charman *v.* Henshaw, 15 Gray 293.

Michigan.— Hovey *v.* Smith, 22 Mich. 170.

Missouri.— Hibler *v.* Servoss, 6 Mo. 24.

New Jersey.— Youngs *v.* Sunderland, 15 N. J. L. 32.

West Virginia.— Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33.

Original writing as proof of translation.— A German original of a contract may be shown in evidence to support an English translation set forth, if it is further shown that the translation is substantially correct. Christenson *v.* Gorsch, 5 Iowa 374.

45. Lee *v.* Unpefer, 77 S. C. 460, 58 S. E. 343.

46. Chicago Union Traction Co. *v.* Rosenthal, 217 Ill. 458, 75 N. E. 578; Lake St. El. R. Co. *v.* Collins, 118 Ill. App. 270.

47. Warnes *v.* Zuechel, 19 N. Y. App. Div.

and furnishes no ground for a reversal of the judgment by an appellate court.[48]

21. Failure of Proof. Under the statutory provisions in force in some jurisdictions where the allegations of the cause of action or defense to which proof is directed are unproved, not in some particular or particulars only, but in their entire scope and meaning, this constitutes not a variance but a failure of proof which is fatal.[49] Thus, where a cause of action *ex contractu* is alleged and the evidence shows merely a tort, there is a failure of proof;[50] and so where one contract is alleged and a wholly different contract proved.[51] And when there is an entire absence of evidence to support some material allegation, this also constitutes such a failure of proof as to bar a recovery.[52] Where there is such failure of proof no amendment is allowable.[53]

XIV. Defects and Objections, Waiver, and Aider by Verdict or Judgment.[54]

A. Cure by Subsequent Pleading. If a necessary allegation is omitted from a pleading, and the missing allegation is either alleged or admitted by the pleading of the adverse party, the defect is cured.[55] Similarly an allegation

494, 46 N. Y. Suppl. 569; Lyons *v.* Miller, 10 Misc. (N. Y.) 653, 31 N. Y. Suppl. 795; Drexel *v.* Pease, 13 N. Y. Suppl. 774. See also Crocker *v.* Garland, (Cal. App. 1906) 87 Pac. 209 (construing Code Civ. Proc. § 469); Trowbridge *v.* Didier, 4 Duer (N. Y.) 448.

48. Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155; Tomlinson *v.* Miller, 7 Abb. Pr. N. S. (N. Y.) 364 [*affirmed* in Sheld. 197].

49. See the statutes of the different states. And see the following cases:

Colorado.— Union Coal Co. *v.* Edman, 16 Colo. 438, 27 Pac. 1060.

Iowa.— Saatoff *v.* Scott, 103 Iowa 201, 72 N. W. 492.

Missouri.— Beck *v.* Ferrara, 19 Mo. 30; Casey *v.* Donovan, 65 Mo. App. 521; Clark *v.* Clark, 59 Mo. App. 532; Wesby *v.* Bowers, 58 Mo. App. 419; Haughey Livery, etc., Co. *v.* Joyce, 41 Mo. App. 564.

New York.— Rosenfeld *v.* Central Vermont R. Co., 111 N. Y. App. Div. 371, 97 N. Y. Suppl. 905; Rosebrooks *v.* Dinsmore, 4 Rob. 672; Chapman *v.* Carolin, 3 Bosw. 456; Trowbridge *v.* Didier, 4 Duer 448; Plass *v.* Weil, 39 Misc. 777, 81 N. Y. Suppl. 299.

Oregon.— West *v.* Eley, 39 Oreg. 461, 65 Pac. 798.

South Carolina.— Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368.

Washington.— Hartman *v.* Belden, 38 Wash. 655, 80 Pac. 806.

Wyoming.— Kuhn *v.* McKoy, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

See 39 Cent. Dig. tit. "Pleading," § 1340.

50. Butler *v.* Livermore, 52 Barb. (N. Y.) 570.

51. Hartman *v.* Belden, 38 Wash. 655, 80 Pac. 806.

52. Union Coal Co. *v.* Edman, 16 Colo. 438, 27 Pac. 1060; Harford County *v.* Wise, 75 Md. 38, 25 Atl. 65; Groll *v.* Tower, 85 Mo. 249, 55 Am. Rep. 358; Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102.

53. Carpenter *v.* Huffsteller, 87 N. C. 273; Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68.

54. **Appearance** as waiver of irregularities in pleadings see Appearances, 3 Cyc. 522.

Defects in indictment or information see Indictments and Informations, 22 Cyc. 482 *et seq.*

Ground for collaterally attacking judgment see Judgments, 23 Cyc. 1023.

Ground for dismissal of action or nonsuit see Dismissal and Nonsuit, 14 Cyc. 440 *et seq.*

Ground for motion in arrest of judgment see Judgments, 23 Cyc. 824 *et seq.*

Ground for new trial see New Trial, 29 Cyc. 761.

Necessity for assignments of errors to authorize review on appeal of rulings in respect to pleadings see Appeal and Error, 2 Cyc. 982.

Necessity for exception in order to review on appeal rulings in respect to pleadings see Appeal and Error, 2 Cyc. 717.

Necessity that record on appeal contain exceptions to rulings as to pleadings to authorize review see Appeal and Error, 2 Cyc. 1048. Necessity that record contain the pleadings in order to have questions relating to them considered on appeal see Appeal and Error, 2 Cyc. 1043, 3 Cyc. 157.

Plea in abatement as waived unless filed before a plea in bar see *supra*, IV, B, 1.

Right to first urge objections on appeal see Appeal and Error, 2 Cyc. 689 *et seq.*

55. *California.*—Arnold *v.* American Ins. Co., 148 Cal. 660, 84 Pac. 182.

Kentucky.— Howland Coal, etc., Works *v.* Brown, 13 Bush 681; Chicago, etc., R. Co. *v.* Hollis, 91 S. W. 258, 28 Ky. L. Rep. 1102.

Massachusetts.— Dorr *v.* Fenno, 12 Pick. 521; Slack *v.* Lyon, 9 Pick. 62; Dunning *v.* Owen, 14 Mass. 157.

Missouri.— Schubach *v.* McDonald, 179 Mo. 163, 78 S. W. 1020; Stivers *v.* Horne,

which is merely defective may be rendered sufficient by an allegation or admission of the other party which supplies the defect.[56] Thus the defective statement or entire omission of a material fact by plaintiff in setting up his cause of action is cured by an allegation or admission of the fact in the plea or answer,[57] and the

62 Mo. 473; Coulter *v.* Coulter, 124 Mo. App. 149, 100 S. W. 1134.

Nebraska.—Sheibley *v.* Huse, 75 Nebr. 811, 106 N. W. 1028.

Pennsylvania.— Roberts *v.* Dobbins, 12 Phila. 178.

Texas.— Hill *v.* George, 5 Tex. 87; Looney *v.* Simpson, (Civ. App. 1894) 25 S. W. 476.

See 39 Cent. Dig. tit. "Pleading," § 1343 *et seq.*

Rule applicable under codes and practice acts.— This familiar rule of the common law applies equally to practice under the codes of procedure and practice acts. Wall *v.* Toomey, 52 Conn. 35; Riggs *v.* Maltby, 2 Metc. (Ky.) 88.

56. De Flores *v.* Santa Cruz, 86 Cal. 191, 24 Pac. 1026.

57. *Arkansas.*— Hess *v.* Adler, 67 Ark. 444, 55 S. W. 843; Ogden *v.* Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

California.— Abner Doble Co. *v.* Keystone Consol. Min. Co., 145 Cal. 490, 78 Pac. 1050; Herd *v.* Tuohy, 133 Cal. 55, 65 Pac. 139; San Diego Sav. Bank *v.* Barrett, 126 Cal. 413, 58 Pac. 914; Booth *v.* Oakland Sav. Bank, 122 Cal. 19, 54 Pac. 370; Bourn *v.* Dowdell, (1897) 50 Pac. 695; Kreling *v.* Kreling, 118 Cal. 413, 50 Pac. 546; Daggett *v.* Gray, 110 Cal. 169, 42 Pac. 568; Shively *v.* Semi-Tropic Land, etc., Co., 99 Cal. 259, 33 Pac. 848; Schenck *v.* Hartford F. Ins. Co., 71 Cal. 28, 11 Pac. 807; Hegard *v.* California Ins. Co., (1886) 11 Pac. 594; Donegan *v.* Houston, 5 Cal. App. 626, 90 Pac. 1073; Nolan *v.* Fidelity, etc., Co., 2 Cal. App. 1, 82 Pac. 1119. But see Franz *v.* Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466, holding that while an answer may aid a defectively stated allegation, it cannot supply one if wholly omitted from the complaint.

Colorado.— Carroll *v.* Vance, 39 Colo. 216, 88 Pac. 1069; McConathy *v.* Deck, 34 Colo. 232, 82 Pac. 702; Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369; Carhart *v.* Oddenkirk, 20 Colo. App. 402, 79 Pac. 303; Denver First Nat. Bank *v.* Schmidt, 6 Colo. App. 216, 40 Pac. 479.

Idaho.— State *v.* Thum, 6 Ida. 323, 55 Pac. 858.

Illinois.— Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127; Wallace *v.* Curtiss, 36 Ill. 156; Barrett *v.* Lingle, 33 Ill. App. 91.

Indiana.— Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481, 68 N. E. 1014; Wiles *v.* Lambert, 66 Ind. 494; Boyl *v.* Simpson, 23 Ind. 393; Wilson *v.* Merkle, 6 Blackf. 118; Watkins *v.* Gregory, 6 Blackf. 113.

Kansas.— Loyal Mystic Legion of America *v.* Brewer, 75 Kan. 729, 90 Pac. 247; Bierer *v.* Fretz, 32 Kan. 329, 4 Pac. 284; Grandstaff *v.* Brown, 23 Kan. 176; Irwin *v.* Paullett, 1 Kan. 418; St. Louis, etc., R. Co. *v.* Kellar, 10 Kan. App. 480, 62 Pac. 905; Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

Kentucky.— Exchange Bank *v.* Trimble, 108 Ky. 230, 56 S. W. 156, 21 Ky. L. Rep. 1681; Bentley *v.* Bustard, 16 B. Mon. 643, 63 Am. Dec. 561; U. S. Fidelity, etc., Co. *v.* Baptist Church, 102 S. W. 325, 31 Ky. L. Rep. 520; Simpson *v.* Kelley, 90 S. W. 241, 28 Ky. L. Rep. 702; Berea College *v.* Powell, 77 S. W. 381, 25 Ky. L. Rep. 1235; Ware *v.* Long, 69 S. W. 797, 24 Ky. L. Rep. 696; Louisville, etc., R. Co. *v.* Pittman, 64 S. W. 460, 23 Ky. L. Rep. 877; Campbell *v.* Campbell, 64 S. W. 458, 23 Ky. L. Rep. 869; Elliot *v.* Louisville, etc., R. Co., 52 S. W. 833, 21 Ky. L. Rep. 630.

Louisiana.— State *v.* Mechanics', etc., Bank, 35 La. Ann. 562; Burland *v.* Carrollton Bank, 14 La. 189.

Massachusetts.— Vinal *v.* Richardson, 13 Allen 521; Slack *v.* Lyon, 9 Pick. 62.

Minnesota.— Hedderly *v.* Downs, 31 Minn. 183, 17 N. W. 274; Warner *v.* Lockerby, 28 Minn. 28, 8 N. W. 879; Rollins *v.* St. Paul Lumber Co., 21 Minn. 5; Shartle *v.* Minneapolis, 17 Minn. 308; Bennett *v.* Phelps, 12 Minn. 326.

Missouri.— Doerner *v.* Doerner, 161 Mo. 407, 61 S. W. 802; Casler *v.* Chase, 160 Mo. 418, 60 S. W. 1040; Ricketts *v.* Hart, 150 Mo. 64, 51 S. W. 825; Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; Coulter *v.* Coulter, 124 Mo. App. 149, 100 S. W. 1134; Jackson *v.* Powell, 110 Mo. App. 249, 84 S. W. 1132; Currell *v.* Hannibal, etc., R. Co., 97 Mo. App. 93, 71 S. W. 113; Mencfee *v.* Beverforden, 95 Mo. App. 105, 68 S. W. 972; German-American Ins. Co. *v.* Tribble, 86 Mo. App. 546; Krum *v.* Jones, 25 Mo. App. 71. See also Starr, etc., Co. *v.* Missouri, etc., R. Co., 122 Mo. App. 26, 97 S. W. 959.

Montana.— Harmon *v.* Fox, 31 Mont. 324, 78 Pac. 517; Hefferlin *v.* Karlman, 29 Mont. 139, 74 Pac. 201; Crowder *v.* McDonnell, 21 Mont. 367, 54 Pac. 43.

Nebraska.— Chicago, etc., R. Co. *v.* Kerr, 74 Nebr. 1, 104 N. W. 49; Minzer *v.* Willman Mercantile Co., 59 Nebr. 410, 81 N. W. 307; Beebe *v.* Latimer, 59 Nebr. 305, 80 N. W. 904; Railway Officials, etc., Acc. Assoc. *v.* Drummond, 56 Nebr. 235, 76 N. W. 562.

New York.— Cragin *v.* O'Connell, 169 N. Y. 573, 61 N. E. 1128; Cohu *v.* Husson, 113 N. Y. 662, 21 N. E. 703; Gill *v.* Ætna Live Stock Ins. Co., 82 Hun 363, 31 N. Y. Suppl. 485; Miller *v.* White, 4 Hun 62; Belknap *v.* Sealey, 2 Duer 570 [*affirmed* in 14 N. Y. 143, 67 Am. Dec. 120]; Strauss *v.* Trotter, 6 Misc. 77, 26 N. Y. Suppl. 20.

North Carolina.— Tarboro Bank *v.* Maryland Fidelity, etc., Co., 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; Whitley *v.* Southern R. Co., 119 N. C. 724, 25 S. E. 1018; Lockhart *v.* Bear, 117 N. C. 298, 23

same rule applies to the aider of an answer or plea or any other pleading by a subsequent pleading of the adverse party.[58] A defective pleading may also be cured by allegations or admissions appearing in a prior pleading filed by the adverse party.[59] But a party's pleading is not aided by his own allegations or admissions appearing elsewhere in the record,[60] and a party cannot rely upon allegations of his adversary to cure defects in his own pleading when in a subsequent pleading he denies such allegations.[61] So the doctrine of aider can only be invoked in aid of a defective statement of a good cause of action or defense, and not to aid the statement of a bad or defective cause of action or defense.[62] Whether or not a declaration or complaint can be aided by a denial in the plea or answer of a fact omitted by plaintiff or by an averment in the plea or answer of the non-existence or direct opposite of such fact, upon which averment issue is taken, is a controverted question. The general rule is that a denial or negative form of allegation of this kind will aid a defective complaint or declaration,[63] but there is authority

S. E. 484; Johnson *v.* Finch, 93 N. C. 205; Pearce *v.* Mason, 78 N. C. 37.

North Dakota.— Omlie *v.* O'Toole, 16 N. D. 126, 112 N. W. 677.

Ohio.— Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613; Meier *v.* Herancourt, 6 Ohio Dec. (Reprint) 1164, 11 Am. L. Rec. 46.

Pennsylvania.— Zerger *v.* Sailer, 6 Binn. 24.

Texas.— Wright *v.* McCampbell, 75 Tex. 644, 13 S. W. 293; Thomas *v.* Bonnie, 66 Tex. 635, 2 S. W. 724; Grimes *v.* Hagood, 19 Tex. 246; Parlin, etc., Co. *v.* Hanson, 21 Tex. Civ. App. 401, 53 S. W. 62; Missouri, etc., R. Co. *v.* Wickham, (Civ. App. 1898) 44 S. W. 1023; Panhandle Nat. Bank *v.* Security Co., 18 Tex. Civ. App. 96, 44 S. W. 15; Randall *v.* Rosenthal, (Civ. App. 1895) 31 S. W. 822; Willis *v.* Lockett, (Civ. App. 1894) 26 S. W. 419; Phillips *v.* Edelstein, 2 Tex. App. Civ. Cas. § 449.

Utah.— Johnson *v.* Hibbard, 27 Utah 342, 75 Pac. 737.

Virginia.—Turberville *v.* Long, 3 Hen. & M. 309.

Washington.— Rattelmiller *v.* Stone, 28 Wash. 104, 68 Pac. 168.

Wisconsin.— Danley *v.* Williams, 16 Wis. 581.

United States.— U. S. *v.* Morris, 10 Wheat. 246, 6 L. ed. 314.

See 39 Cent. Dig. tit. "Pleading," § 1344.

Profert and oyer.— Failure to make profert is cured by defendant's craving oyer and setting out the instrument in his demurrer. Degraffinreid *v.* Mays, 6 Yerg. (Tenn.) 465. And a misstatement in the declaration of the true meaning of a deed is cured by setting it out on oyer and pleading *non est factum*. Wood *v.* Harris, 12 Mo. 74.

58. *Kentucky.*— Mitchell *v.* Ashby, 78 Ky. 254; Small *v.* Reeves, 76 S. W. 395, 25 Ky. L. Rep. 729.

Massachusetts.— Keay *v.* Goodwin, 16 Mass. 1; Jenkins *v.* Stanley, 10 Mass. 226.

North Carolina.— Gaskins *v.* Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813.

Washington.— Cerf *v.* Wallace, 14 Wash. 249, 44 Pac. 264.

United States.— U. S. *v.* Morris, 10 Wheat. 246, 6 L. ed. 314.

See 39 Cent. Dig. tit. "Pleading," § 1347.

59. Hansen *v.* Wagner, 133 Cal. 69, 65 Pac. 142.

60. *Indiana.*— Phenix Ins. Co. *v.* Rogers, 11 Ind. App. 72, 38 N. E. 865.

Minnesota.— Webb *v.* Bidwell, 15 Minn. 479; Tullis *v.* Orthwein, 5 Minn. 377; Bernheimer *v.* Marshall, 2 Minn. 78, 72 Am. Dec. 89.

Nebraska.— Covey *v.* Henry, 71 Nebr. 118, 98 N. W. 434.

Pennsylvania.— Burt *v.* Kiefer, 3 Del. Co. 544.

Tennessee.— Baker *v.* Louisville, etc., Terminal R. Co., 106 Tenn. 490, 61 S. W. 1029, 53 L. R. A. 474.

But the objection that a portion of plaintiff's cause of action, omitted from the complaint, appears in the reply, is waived unless seasonably raised by defendant. Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269; Denver, etc., R. Co. *v.* Cahill, 8 Colo. App. 158, 45 Pac. 285; Pryor *v.* Warford, 54 S. W. 838, 21 Ky. L. Rep. 1311.

61. Mosness *v.* German-American Ins. Co., 50 Minn. 341, 52 N. W. 932; Cohn-Baer-Myers, etc., Co. *v.* Realty Transfer Co., 117 N. Y. App. Div. 215, 102 N. Y. Suppl. 122 [*affirmed* in 191 N. Y. 533, 84 N. E. 1110]; Sterling *v.* Sterling, 43 Oreg. 200, 72 Pac. 741.

62. Griswold *v.* New York Nat. Ins. Co., 3 Cow. (N. Y.) 96; Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594; Shute *v.* Austin, 120 N. C. 440, 27 S. E. 90.

63. *Alabama.*— Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540.

Arkansas.— Gaines *v.* Summers, 39 Ark. 482.

Colorado.— Cowell *v.* South Denver Real Estate Co., 16 Colo. App. 108, 63 Pac. 991.

Iowa.— Cotes *v.* Davenport, 9 Iowa 227.

Kansas.— D. M. Ferry Co. *v.* Ballinger, 8 Kan. App. 756, 60 Pac. 824.

Kentucky.— Wilson *v.* Alpine Coal Co., 118 Ky. 463, 81 S. W. 278, 26 Ky. L. Rep. 337; Farmers', etc., Bank *v.* Maryland Fidelity, etc., Co., 108 Ky. 384, 56 S. W. 671, 22 Ky. L. Rep. 22; Ford *v.* Harris, 102 Ky. 169, 43 S. W. 199, 19 Ky. L. Rep. 1236; Chesapeake,

to the contrary.[64] The common code provision that allegations in the answer shall be deemed controverted by plaintiff applies only to facts inconsistent with the allegations of the complaint and not to allegations which aid defects in the complaint.[65] An admission once made operates to cure the defect even though the pleading is withdrawn on the trial and a new pleading is filed which does not contain the admission.[66] The doctrine of aider by subsequent pleading is most commonly applied when the objection to the sufficiency of the pleading is made at the trial or after trial, verdict, or judgment; [67] but it has also been held applicable where a demurrer to a pleading is sought to be carried back to a prior pleading bad in substance; in such case the defect may be cured by the subsequent allegation or admission and the prior pleading rendered sufficient as against the demurrer.[68] On demurrer *ore tenus*, on the other hand, it has been held that a pleading must stand or fall by its own averments and cannot be aided by allegations or admissions in the pleadings of the adverse party.[69] Where a demurrer to a complaint is improperly overruled, the error becomes harmless after the filing of an answer supplying the omitted material averment.[70]

B. Waiver of Objections to Pleadings — 1. In General. The general rule is that an objection to a pleading may be waived by failure to urge the objection at the proper time, or by any act which, in legal contemplation, implies an intention to overlook it; [71] or *a fortiori* by express agreement between the parties to the

etc., R. Co. *v.* Thieman, 96 Ky. 507, 29 S. W. 357, 16 Ky. L. Rep. 611; Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496, 11 S. W. 511, 11 Ky. L. Rep. 38; Worthley *v.* Hammond, 13 Bush 510; Continental Casualty Co. *v.* Hunt, 90 S. W. 1056, 28 Ky. L. Rep. 1006; Taylor *v.* Webber, 83 S. W. 567, 26 Ky. L. Rep. 1199; James *v.* Ames, 82 S. W. 229, 26 Ky. L. Rep. 498; Dearing *v.* Moran, 78 S. W. 217, 25 Ky. L. Rep. 1545; Evans *v.* Maysville, etc., R. Co., 77 S. W. 708, 25 Ky. L. Rep. 1258; Wilhoit *v.* Musselman, 72 S. W. 1112, 24 Ky. L. Rep. 2011; Ware *v.* Long, 69 S. W. 797, 24 Ky. L. Rep. 696; Main *v.* Ray, 57 S. W. 7, 22 Ky. L. Rep. 250; Samuels *v.* Simmons, 44 S. W. 395, 19 Ky. L. Rep. 1686; Brice *v.* Louisville, etc., R. Co., 9 S. W. 288, 10 Ky. L. Rep. 526; Dean *v.* Dean, 1 S. W. 811, 8 Ky. L. Rep. 419.

Minnesota.— Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 1020.

Missouri.— Lee *v.* Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Powell *v.* Sherwood, 162 Mo. 605, 63 S. W. 485; Fisher *v.* Central Lead Co., 156 Mo. 479, 56 S. W. 1107; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869; Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; Stephens *v.* Frampton, 29 Mo. 263; Beckmann *v.* Phœnix Ins. Co., 49 Mo. App. 604.

Montana.— Lynch *v.* Bechtel, 19 Mont. 548, 48 Pac. 1112; Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

North Carolina.— Whitley *v.* Southern R. Co., 119 N. C. 724, 25 S. E. 1018; Knowles *v.* Norfolk Southern R. Co., 102 N. C. 59, 9 S. E. 7.

Ohio.— Cleveland, etc., R. Co. *v.* Tehan, 26 Ohio Cir. Ct. 457.

Oregon.— Catlin *v.* Jones, 48 Oreg. 158, 85 Pac. 515.

Tennessee.— Bruce *v.* Beall, 100 Tenn. 573, 47 S. W. 204.

Texas.— International, etc., R. Co. *v.* Sein, 11 Tex. Civ. App. 386, 33 S. W. 558.

See 39 Cent. Dig. tit. "Pleading," § 1346.

64. Vanalstine *v.* Whelan, 135 Cal. 232, 67 Pac. 125; Windsor *v.* Miner, 124 Cal. 492, 57 Pac. 386; Tooker *v.* Arnoux, 76 N. Y. 397; Scofield *v.* Whitelegge, 49 N. Y. 259. But see Abner Doble Co. *v.* McDonald, 145 Cal. 641, 79 Pac. 369; Flinn *v.* Ferry, 127 Cal. 648, 60 Pac. 434; Vance *v.* Anderson, 113 Cal. 532, 45 Pac. 816.

An answer consisting merely of specific denials cannot aid a complaint. Nye *v.* Bill Nye Min. Co., 42 Oreg. 560, 71 Pac. 1043.

65. Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613.

66. Enterprise Coal Co. *v.* Liberty Brewing Co., 20 Mo. App. 16.

67. *California.*— De Flores *v.* Santa Cruz, 86 Cal. 191, 24 Pac. 1026.

Kansas.— Grandstaff *v.* Brown, 23 Kan. 176; Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

Maine.— Elliot *v.* Stuart, 15 Me. 160.

Minnesota.— Gibbens *v.* Thompson, 21 Minn. 398.

Missouri.— Stivers *v.* Horne, 62 Mo. 473; Krum *v.* Jones, 25 Mo. App. 71.

New York.— Bate *v.* Graham, 11 N. Y. 237; Cragin *v.* O'Connell, 50 N. Y. App. Div. 339, 63 N. Y. Suppl. 1071 [*affirmed* in 169 N. Y. 573, 61 N. E. 1128].

Ohio.— Meier *v.* Herancourt, 6 Ohio Dec. (Reprint) 1164, 11 Am. L. Rec. 46.

68. Strauss *v.* Trotter, 6 Misc. (N. Y.) 77, 26 N. Y. Suppl. 20.

69. Wisconsin Lakes Ice, etc., Co. *v.* Pike, etc., Ice Co., 115 Wis. 377, 91 N. W. 988; Doud *v.* Wisconsin, etc., R. Co., 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620.

70. Yocum *v.* Allen, 58 Ohio St. 280, 50 N. E. 909; Northwestern Nat. L. Ins. Co. *v.* Hare, 26 Ohio Cir. Ct. 197.

71. Howe *v.* Frazer, 117 Ill. 191, 7 N. E.

same effect.[72] A defect once waived cannot be subsequently objected to,[73] even though the act constituting the waiver be retracted.[74] But the mere fact that a defect was waived at a prior stage will not be a waiver of the right to object to it when repeated subsequently.[75]

2. By Failure to Make Motion. A failure to make a motion is generally deemed a waiver of defects or objections for which the motion lies.[76]

481. See also Spencer *v.* Field, 97 Va. 38, 33 S. E. 380; Selleck *v.* Griswold, 49 Wis. 39, 5 N. W. 213.

In Georgia defects in a pleading curable by amendment are deemed waived if no objection is taken at the first term. Latimer *v.* Irish-American Bank, 119 Ga. 887, 47 S. E. 322; Bower *v.* Thomas, 69 Ga. 47; Austin *v.* Ferst, 2 Ga. App. 91, 58 S. E. 318.

72. See *infra*, XIV, B, 5.

73. Cupp *v.* Campbell, 103 Ind. 213, 2 N. E. 565; Healy *v.* King County, 37 Wash. 184, 79 Pac. 624. See also Tingley *v.* Times Mirror Co., 151 Cal. 1, 89 Pac. 1097.

74. See cases cited *infra*, this note.

Withdrawal of plea or answer.— If a defect has been once waived by pleading to the merits, the waiver remains even though defendant is permitted to withdraw his plea or answer. Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 388; Bryant *v.* Stephens, 82 S. W. 423, 26 Ky. L. Rep. 718.

75. Spencer *v.* Field, 97 Va. 38, 33 S. E. 380.

76. *Arkansas.*—Adams *v.* Edgerton, 48 Ark. 419, 3 S. W. 628; Crawford *v.* Fuller, 28 Ark. 370.

Colorado.— Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822; Orman *v.* Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602.

Illinois.— Wabash R. Co. *v.* Barrett, 117 Ill. App. 315.

Indiana.— Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Coal Bluff Min. Co. *v.* Watts, 6 Ind. App. 347, 33 N. E. 662.

Iowa.— Mitchell *v.* McLeod, 127 Iowa 733, 104 N. W. 349; Campbell *v.* Spears, 120 Iowa 670, 94 N. W. 1126; McCorkell *v.* Karhoff, 90 Iowa 545, 58 N. W. 913; Horner *v.* Rowley, 51 Iowa 620, 2 N. W. 436.

Kansas.— Chase *v.* Atchison, etc., R. Co., 70 Kan. 546, 79 Pac. 153; Jeffs *v.* Flickenger, 14 Kan. 308; Truitt *v.* Baird, 12 Kan. 420.

Kentucky.— Caldwell *v.* Caldwell, 2 Bush 446; Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406; Thompson *v.* Randall, 90 S. W. 251, 28 Ky. L. Rep. 716; Murray *v.* Booker, 58 S. W. 788, 22 Ky. L. Rep. 781; Stovall *v.* Hibbs, 32 S. W. 1087, 17 Ky. L. Rep. 906; Rountree *v.* Glatt, 13 Ky. L. Rep. 462.

Missouri.— Walters *v.* Hamilton, 75 Mo. App. 237; Herf, etc., Chemical Co. *v.* Lackawanna Line, 70 Mo. App. 274; State *v.* Walbridge, 69 Mo. App. 657; Liddell *v.* Fisher, 48 Mo. App. 449; C. H. Burke Mfg. Co. *v.* The A. Saltzman, 42 Mo. App. 85; Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254.

Nebraska.—Van Etten *v.* Medland, 53 Nebr. 569, 74 N. W. 33 (holding that the filing of a demurrer to a petition is a waiver of the right to insist that the allegations of the pleading shall be made more definite and certain); Powers *v.* Powers, 20 Nebr. 529, 31 N. W. 1; Mulhollan *v.* Scoggin, 8 Nebr. 202.

New York.— Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348; Kromer *v.* Reynolds, 99 N. Y. 245, 1 N. E. 775; White *v.* Rodemann, 44 N. Y. App. Div. 503, 60 N. Y. Suppl. 971; Williams *v.* Folsom, 57 Hun 128, 10 N. Y. Suppl. 895; Scheu *v.* New York, etc., R. Co., 12 N. Y. St. 99.

North Carolina.— Hitch *v.* Edgecombe County Com'rs, 132 N. C. 573, 44 S. E. 30.

Oregon.— Harvey *v.* Southern Pac. R. Co., 46 Oreg. 505, 80 Pac. 1061.

South Carolina.— Martin *v.* Seaboard Air Line R. Co., 70 S. C. 8, 48 S. E. 616; Burns *v.* Southern R. Co., 65 S. C. 229, 43 S. E. 679.

South Dakota.— Smith *v.* Jones, 16 S. D. 337, 92 N. W. 1084.

Tennessee.— Waggoner *v.* White, 11 Heisk. 741.

Washington.— Denver *v.* Spokane Falls, 7 Wash. 226, 34 Pac. 926.

Wyoming.— Turner *v.* Hamilton, 13 Wyo. 408, 80 Pac. 664.

United States.— Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970; Merchants' Ins. Co. *v.* Buckner, 110 Fed. 345, 49 C. C. A. 80; U. S. *v.* Ordway, 30 Fed. 30.

The objection that a pleading was not filed in time is waived by failure to move to strike it from the files. Osgood *v.* Haverty, McCahon (Kan.) 182.

Objections to the verification of a petition, being merely technical, must be made before objections are made to the matter in the petition itself, or the defect will be waived. Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

Unless uncertainty and indefiniteness are availed of by motion to make more specific, they are waived. Roberts *v.* Jones, 82 Ark. 188, 101 S. W. 165; Posey *v.* Green, 78 Ky. 162; Ludeling *v.* Frellsen, 4 La. Ann. 534; Barnsback *v.* Reiner, 8 Minn. 59; Pierce *v.* Pierce, (Miss. 1905) 38 So. 46; C. H. Burke Mfg. Co. *v.* The A. Saltzmann, 42 Mo. App. 85; Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254; Powers *v.* Powers, 20 Nebr. 529, 31 N. W. 1; Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348; Scheu *v.* New York, etc., R. Co., 12 N. Y. St. 99; Hough *v.* Southern R. Co., 144 N. C. 692, 57 S. E. 469; Woodford *v.* Kelley, 18 S. D. 615, 101 N. W. 1069. See also Davie *v.* Lloyd, 38 Colo. 250, 88 Pac. 446. But see Vogeler *v.* Punch, 205 Mo. 558, 103 S. W. 1001. They cannot be reached by an assignment of error based on the insufficiency of the pleading (Falley *v.* Gribling, 128 Ind. 110, 26 N. E. 794), by a motion in arrest of judgment (Bryan *v.* Moore, 81

3. By Pleading Over or Going to Trial Without Objection.[77] The act of pleading to the merits or joining in an issue of fact,[78] or proceeding to a trial on the

Ind. 9), by a request to charge the jury (Long *v.* Hunter, 58 S. C. 152, 36 S. E. 579), nor by excluding evidence at the trial (Burley *v.* German-American Bank, 111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406. *Contra*, Lanphere *v.* Clark, 29 N. Y. Suppl. 107). In some jurisdictions, however, indefiniteness and uncertainty are ground of demurrer, and in such jurisdictions the objection is waived by failure to demur on that ground. Silva *v.* Spangler, (Cal. 1896) 43 Pac. 617; Brown *v.* Martin, 25 Cal. 82; Neves *v.* Costa, 5 Cal. App. 111, 89 Pac. 860; Orman *v.* Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602; Aulbach *v.* Dahler, 4 Ida. 654, 43 Pac. 322; Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652.

If an exhibit to a pleading be objectionable, the proper practice is to bring it to the attention of the court by motion. If this be not done the objection will be waived. Mulhollan *v.* Scoggin, 8 Nebr. 202.

Time of filing.— After demurrer to a plea it is too late to object that it was not filed in time. Manley *v.* Union Bank, 1 Fla. 160. But see Jennison *v.* Hapgood, 2 Aik. (Vt.) 31, holding that an exception as to the time of filing a plea in abatement is not waived by a demurrer.

Where no motion is made to require an election between inconsistent defenses before issue joined, the objection is waived. Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811; Vernon *v.* Union L. Ins. Co., 58 Nebr. 494, 78 N. W. 929.

77. Defects available on demurrer as ground for motion in arrest of judgment see Judgments, 23 Cyc. 830.

78. *Alabama.*— Browder *v.* Irby, 112 Ala. 379, 21 So. 351; Lewis *v.* Simon, 101 Ala. 546, 14 So. 331; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; McKinnon *v.* Lessley, 89 Ala. 625, 8 So. 9; Jones *v.* Collins, 80 Ala. 108; Moore *v.* Leseur, 18 Ala. 606; Minge *v.* Curry, 5 Ala. 168; Ware *v.* Bradford, 2 Ala. 676, 36 Am. Dec. 427; Cowan *v.* Harper, 2 Stew. & P. 236; Richardson *v.* Farnsworth, 1 Stew. 55; Sturdevant *v.* Murrell, 8 Port. 317; Judson *v.* Eslava, Minor 2.

Arizona.— Hobson *v.* New Mexico, etc., R. Co., 2 Ariz. 171, 11 Pac. 545.

Arkansas.— Holland *v.* Quitman College, 63 Ark. 510, 39 S. W. 557.

California.—Allen *v.* Haley, 77 Cal. 575, 20 Pac. 90; Silva *v.* Spangler, (1896) 43 Pac. 617; Brown *v.* Martin, 25 Cal. 82; People *v.* Jones, 20 Cal. 50; San Gabriel Valley Bank *v.* Lake View Town Co., (App. 1906) 86 Pac. 727.

Colorado.—Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57; Colorado City *v.* Liafe, 28 Colo. 468, 65 Pac. 630; Elliott *v.* Field, 21 Colo. 378, 41 Pac. 504; Rosenfeld *v.* Rosenfeld, 21 Colo. 16, 40 Pac. 49; Jenness *v.* Black Hawk, 2 Colo. 578; Hattersley *v.* Burrows, 4 Colo. App. 538, 36 Pac. 889.

Connecticut.— Galvano Type Engraving Co. *v.* Jackson, 77 Conn. 564, 60 Atl. 127; Cole *v.* Jerman, 77 Conn. 374, 59 Atl. 425; McNerney *v.* Barnes, 77 Conn. 155, 58 Atl. 714; Jacobs *v.* Holgenson, 70 Conn. 68, 38 Atl. 914; New England Mfg. Co. *v.* Starin, 60 Conn. 369, 22 Atl. 953.

Idaho.— Chemung Min. Co. *v.* Hanley, 9 Ida. 786, 77 Pac. 226; Aulbach *v.* Dahler, 4 Ida. 654, 43 Pac. 322.

Illinois.— Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538; Gordon *v.* Bankard, 37 Ill. 147; West Chicago Park Com'rs *v.* Schillinger, 117 Ill. App. 525; Feldman *v.* Sellig, 110 Ill. App. 130.

Indiana.— Morrison *v.* Ross, 113 Ind. 186, 14 N. E. 479; Huntington *v.* Mendenhall, 73 Ind. 460; Prenatt *v.* Runyon, 12 Ind. 174.

Iowa.— Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; McCorkell *v.* Karhoff, 90 Iowa 545, 58 N. W. 913; Fairbairn *v.* Haislet, 90 Iowa 143, 57 N. W. 702; Scott *v.* Chicago, etc., R. Co., 68 Iowa 360, 24 N. W. 584, 27 N. W. 276; Ream *v.* Jack, 44 Iowa 325; Rivereau *v.* St. Amant, 3 Greene 118.

Kansas.— Savage *v.* Challiss, 4 Kan. 319.

Kentucky.— Louisville, etc., R. Co. *v.* Kimbrough, 115 Ky. 512, 74 S. W. 229, 24 Ky. L. Rep. 2400; Barlow *v.* Wiley, 3 A. K. Marsh. 457; Kees *v.* Middleton, 1 A. K. Marsh. 5; King *v.* See, 87 S. W. 758, 27 Ky. L. Rep. 1011; Stuart *v.* Harmon, 72 S. W. 365, 24 Ky. L. Rep. 1829; Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836.

Louisiana.— Doullut *v.* McManus, 37 La. Ann. 800; Ludeling *v.* Frellsen, 4 La. Ann. 534; Lotz *v.* Folger, 10 La. Ann. 20; Keene *v.* Relf, 11 La. 304.

Maine.— Winslow *v.* Cumberland Bank, 26 Me. 9.

Maryland.— McKaig *v.* Hebb, 42 Md. 227.

Massachusetts.— Blaisdell *v.* Gladwin, 4 Cush. 373; Baker *v.* Baker, 13 Metc. 125, 46 Am. Dec. 725; Spear *v.* Bicknell, 5 Mass. 125.

Michigan.— McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668; Bauman *v.* Bean, 57 Mich. 1, 23 N. W. 451; Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226; Kean *v.* Mitchell, 13 Mich. 207; Stevens *v.* Osman, 1 Mich. 92, 48 Am. Dec. 696.

Minnesota.—Cathcart *v.* Peck, 11 Minn. 45; Howland *v.* Fuller, 8 Minn. 50.

Missouri.— Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254; Cox *v.* Capron, 10 Me. 691; Kiernan *v.* Robertson, 116 Mo. App. 56, 92 S. W. 138; Dodge *v.* Manufacturers' Coal, etc., Co., 115 Mo. App. 501, 91 S. W. 1007; Strauss *v.* St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156; Weaver *v.* Harlan, 48 Mo. App. 319; Ryors *v.* Prior, 31 Mo. App. 555; Banchor *v.* Gregory, 9 Mo. App. 102.

Montana.— Sanderson *v.* Billings Water Power Co., 19 Mont. 236, 47 Pac. 998.

Nebraska.— Welsh *v.* Burr, 56 Nebr. 361,

merits,[79] is generally a waiver of all uncertainties, irregularities, and formal defects and deficiencies in the pleadings or proceedings of the opposing party. The general rule is that objections which may be taken advantage of by demurrer or answer are

76 N. W. 905; Cook *v.* Pickrel, 20 Nebr. 433, 30 N. W. 421.

New Hampshire.— Hanson *v.* Hoitt, 14 N. H. 56; Roberts *v.* Dame, 11 N. H. 226; Joy *v.* Simpson, 2 N. H. 179.

New Jersey.—Hopper *v.* Hopper, 21 N. J. L. 543; Sayre *v.* Sayre, 3 N. J. L. 1046.

New Mexico.— Bullard *v.* Lopez, 7 N. M. 561, 37 Pac. 1103.

New York.— Sloan *v.* Birdsall, 58 Hun 317, 11 N. Y. Suppl. 814; Williams *v.* Folsom, 57 Hun 128, 10 N. Y. Suppl. 895; Platner *v.* Lehman, 26 Hun 374; Kline *v.* Corey, 18 Hun 524; Germania Bank *v.* Distler, 67 Barb. 333 [*affirmed* in 64 N. Y. 642]; Mann *v.* Fairchild, 5 Barb. 108; Thomas *v.* Loaners' Bank, 38 N. Y. Super. Ct. 466; Currie *v.* Cowles, 6 Bosw. 452; Connoss *v.* Meir, 2 E. D. Smith 314; Huber *v.* Wilson, 11 N. Y. Suppl. 377; Scheu *v.* New York, etc., R. Co., 12 N. Y. St. 99; Murtha *v.* Curley, 3 N. Y. Civ. Proc. 1; White *v.* Delavan, 21 Wend. 26.

North Carolina.— Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927; Puffer *v.* Lucas, 101 N. C. 281, 7 S. E. 734; Warner *v.* Western North Carolina R. Co., 94 N. C. 250; Morgan *v.* Charlotte First Nat. Bank, 93 N. C. 352; Halstead *v.* Mullen, 93 N. C. 252; Johnson *v.* Finch, 93 N. C. 205; Garrett *v.* Trotter, 65 N. C. 430.

Ohio.— Corrigan *v.* Rockefeller, 8 Ohio S. & C. Pl. Dec. 14, 5 Ohio N. P. 338.

Oregon.— Harvey *v.* Southern Pac. Co., 46 Oreg. 505, 80 Pac. 1061; Creecy *v.* Joy, 40 Oreg. 28, 66 Pac. 295; Durkee *v.* Carr, 38 Oreg. 189, 63 Pac. 117; Johnson *v.* Crookshanks, 21 Oreg. 339, 28 Pac. 78.

Pennsylvania.— Ballard *v.* Fitch, 3 Grant 268; Thompson *v.* Musser, 1 Dall. 458, 1 L. ed. 222; Genesee Paper Co. *v.* Bogert, 23 Pa. Super. Ct. 23; Williams *v.* Myers, 18 Pa. Co. Ct. 416.

South Carolina.— Long *v.* Kinard, Harp. 47.

Tennessee.—Anderson *v.* Read, 2 Overt. 205, 5 Am. Dec. 661.

Washington.— Blumenthal *v.* Pacific Meat Co., 12 Wash. 331, 41 Pac. 47.

West Virginia.— Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810.

Wisconsin.— Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227; Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279.

United States.— Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 474.

England.— Jenkins *v.* Rees, 33 Wkly. Rep. 929.

Canada.— Crosskill *v.* "Morning Herald" Printing, etc., Co., 16 Nova Scotia 200; Simpson *v.* Matthison, 3 U. C. Q. B. O. S. 305.

Joining issue on one plea only.— In an action for rent defendant pleaded payment to a third person. Plaintiff replied specially ignoring this plea, and defendant, without demurring, joined issue on the replication. It was held that the plea of payment was no longer an issue under the pleadings, and hence no reversible error was committed in excluding evidence in support thereof. Linam *v.* Jones, 134 Ala. 570, 33 So. 343.

79. *Alabama.*— Moore *v.* Watts, 81 Ala. 261, 2 So. 278.

Arizona.— Smith *v.* King of Arizona Min., etc., Co., 9 Ariz. 228, 80 Pac. 357.

California.— Loftus *v.* Fischer, 106 Cal. 616, 39 Pac. 1064; Klopper *v.* Levy, 98 Cal. 525, 33 Pac. 444; Tynan *v.* Walker, 35 Cal. 634, 95 Am. Dec. 152; King *v.* Davis, 34 Cal. 100.

Colorado.— Creighton *v.* People, 36 Colo. 315, 83 Pac. 1057; Bessemer Irr. Ditch Co. *v.* Woolley, 32 Colo. 437, 76 Pac. 1053, 105 Am. St. Rep. 91; Orman *v.* Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602.

Connecticut.— Dejon *v.* Street, 79 Conn. 333, 65 Atl. 145.

Dakota.— Parliman *v.* Young, 2 Dak. 175, 4 N. W. 139, 711.

Georgia.— Southern R. Co. *v.* Barfield, 115 Ga. 724, 42 S. E. 95; Macon *v.* Melton, 115 Ga. 153, 41 S. E. 499; Johnson *v.* McCullough, 59 Ga. 212.

Illinois.— Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149; Himrod Coal Co. *v.* Clark, 99 Ill. App. 332 [*affirmed* in 197 Ill. 514, 64 N. E. 282]; Dulle *v.* Lally, 64 Ill. App. 292, leave to plead after default and trial on such plea.

Indiana.— Douglass *v.* Reed, 20 Ind. 203.

Iowa.— McDonald *v.* Bice, 113 Iowa 44, 84 N. W. 985; Davis *v.* Walter, 70 Iowa 465, 30 N. W. 804; Ruby *v.* Schee, 51 Iowa 422, 1 N. W. 741; Coates *v.* Galena, etc., R. Co., 18 Iowa 277; Harmon *v.* Chandler, 3 Iowa 150.

Kansas.— Provident Loan Trust Co. *v.* McIntosh, 68 Kan. 452, 75 Pac. 498; Clark *v.* Fensky, 3 Kan. 389; Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476; Ott *v.* Anderson, 9 Kan. App. 320, 61 Pac. 330.

Kentucky.— Illinois Cent. R. Co. *v.* Beauchamp, 77 S. W. 1096, 25 Ky. L. Rep. 1429; Tichenor *v.* Wood, 70 S. W. 837, 24 Ky. L. Rep. 1109.

Massachusetts.— George N. Pierce Co. *v.* Beers, 190 Mass. 199, 76 N. E. 603; Savage *v.* Marlborough St. R. Co., 186 Mass. 203, 71 N. E. 531; Cronan *v.* Woburn, 185 Mass. 91, 70 N. E. 38; Boston, etc., R. Co. *v.* Pearson, 128 Mass. 445; Witt *v.* Potter, 125 Mass. 360; Beatty *v.* Randall, 5 Allen 441; Robinson *v.* Wadsworth, 8 Metc. 67.

Michigan.— Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652; Bauman *v.* Bean, 57 Mich. 1, 23 N. W. 451; Jenks *v.* Brown, 38 Mich. 651; Wales *v.* Lyon, 2 Mich. 276.

Minnesota.— Reed *v.* Pixley, 25 Minn. 482; Dean *v.* Leonard, 9 Minn. 190; Barnsback *v.* Reiner, 8 Minn. 59.

Missouri.— Lee *v.* Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; State *v.* Burr, 143 Mo. 209, 44 S. W. 1045; Spurlock *v.* Missouri Pac. R. Co., 93 Mo. 530, 6 S. W.

waived where not so urged,[80] and that objections apparent on the face of a pleading so that they can be taken advantage of only by demurrer are waived by answering without raising the objection by demurrer.[81] For instance the objection that

349; Smith *v.* Lindsey, 89 Mo. 76, 1 S. W. 88; Edmonson *v.* Phillips, 73 Mo. 57; McKinney *v.* Northcutt, 114 Mo. App. 146, 89 S. W. 351; Durham *v.* Bolivar, 106 Mo. App. 601, 81 S. W. 463; Johnson *v.* Metropolitan St. R. Co., 104 Mo. App. 588, 78 S. W. 275; Antonelli *v.* Basile, 93 Mo. App. 138; Fields *v.* Wabash R. Co., 80 Mo. App. 603.

Nebraska.— Castile *v.* Ford, 53 Nebr. 507, 73 N. W. 945; Darst *v.* Perfect, 42 Nebr. 574, 60 N. W. 928; Rosenbaum *v.* Russell, 35 Nebr. 513, 53 N. W. 384; Marvin *v.* Weider, 31 Nebr. 774, 48 N. W. 825.

Nevada.— Reese *v.* Kinkead, 20 Nev. 65, 14 Pac. 871.

New Jersey.— O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752.

New York.—Rogers *v.* New York, etc., Land Co., 134 N. Y. 197, 32 N. E. 27; Whitman *v.* Foley, 125 N. Y. 651, 26 N. E. 725; Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348; Born *v.* Schrenkeisen, 110 N. Y. 55, 17 N. E. 339; Tyng *v.* Commercial Warehouse Co., 58 N. Y. 308; Stickney *v.* Blair, 50 Barb. 341; Phillips *v.* Burr, 4 Duer 113; Messler *v.* Schwarzkopf, 35 Misc. 72, 71 N. Y. Suppl. 241; Wyckoff *v.* Frommer, 12 Misc. 149, 33 N. Y. Suppl. 11; Bicknell *v.* Spier, 7 Misc. 108, 27 N. Y. Suppl. 386; Scheu *v.* New York, etc., R. Co., 12 N. Y. St. 99; Reimer *v.* Doerge, 61 How. Pr. 142; Baker *v.* Dumbolton, 10 Johns. 240; Meyer *v.* McLean, 1 Johns. 509.

North Carolina.— Walker *v.* Scott, 106 N. C. 56, 11 S. E. 364; Puffer *v.* Lucas, 101 N. C. 281, 7 S. E. 734; Warner *v.* Western North Carolina R. Co., 94 N. C. 250.

North Dakota.— Ward *v.* Gradin, 15 N. D. 649, 109 N. W. 57.

Ohio.— Burckhardt *v.* Burckhardt, 36 Ohio St. 261; Pugh *v.* Calloway, 10 Ohio St. 488; School Section 16 *v.* Odlin, 8 Ohio St. 293; Allison *v.* Luhrig Coal Co., 22 Ohio Cir. Ct. 489, 12 Ohio Cir. Dec. 504.

Oklahoma.— Guthrie *v.* Finch, 13 Okla. 496, 75 Pac. 288.

Oregon.— Louie Chung *v.* Stephenson, (1907) 89 Pac. 386; Seffert *v.* Northern Pac. R. Co., 49 Oreg. 95, 88 Pac. 962.

Pennsylvania.— Young *v.* Geiske, 209 Pa. St. 515, 58 Atl. 887; Little *v.* Fairchild, 195 Pa. St. 614, 46 Atl. 133; Barrington *v.* Washington Bank, 14 Serg. & R. 405; Siegel *v.* Hirsch, 26 Pa. Super. Ct. 398; Applegate *v.* Cohn, 1 Pa. Super. Ct. 174.

Rhode Island.— Vickery *v.* Providence, 17 R. I. 651, 24 Atl. 148.

South Carolina.— Bailey *v.* Godman, 5 Rich. 210.

South Dakota.— Woodford *v.* Kelley, 18 S. D. 615, 101 N. W. 1069.

Tennessee.— Nashville, etc., R. Co. *v.* Conk, 11 Heisk. 575.

Texas.— Herring *v.* Swain, 84 Tex. 523, 19 S. W. 774.

Vermont.— Baker *v.* Sherman, 73 Vt. 26, 50 Atl. 633; Strong *v.* Richardson, 19 Vt. 194; Card *v.* Sargeant, 15 Vt. 393; Barney *v.* Bliss, 2 Aik. 60.

Wisconsin.— Sell *v.* Mississippi River Logging Co., 88 Wis. 581, 60 N. W. 1065; Warren *v.* Landry, 74 Wis. 144, 42 N. W. 247.

United States.— Bell *v.* Mobile, etc., R. Co., 4 Wall. 598, 18 L. ed. 338.

A denial of the "material" allegations of the petition is good on the trial. Smith *v.* Lindsey, 89 Mo. 76, 1 S. W. 88; Rosenbaum *v.* Russell, 35 Nebr. 513, 53 N. W. 384.

Argumentative averments cannot be first reached by objection taken on the trial. Kelly *v.* Rogers, 21 Minn. 146; Downer *v.* Woodbury, 19 Vt. 329.

80. See cases cited in two preceding notes.

81. *Alabama.*— Johnson *v.* Birmingham R., etc., Co., 149 Ala. 529, 43 So. 33; Kendrick *v.* Colyar, 143 Ala. 597, 42 So. 110.

Alaska.— Kimball *v.* Miller, 1 Alaska 347.

California.— Flood *v.* Templeton, 148 Cal. 374, 83 Pac. 148; Bell *v.* Thompson, 147 Cal. 689, 82 Pac. 327; Montgomery *v.* McLaury, 143 Cal. 83, 76 Pac. 964; Cutting Fruit Packing Co. *v.* Canty, 141 Cal. 692, 75 Pac. 564; Buckman *v.* Hatch, 139 Cal. 53, 72 Pac. 445; McFaul *v.* Madera Flume, etc., Co., 134 Cal. 313, 66 Pac. 308; Eachus *v.* Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147; Duke *v.* Huntington, 130 Cal. 272, 62 Pac. 510; Stow *v.* Schiefferly, 120 Cal. 609, 52 Pac. 1000; Silva *v.* Spangler, (1896) 43 Pac. 617; Rose *v.* Rose, 112 Cal. 341, 44 Pac. 658; Weinreich *v.* Johnson, 78 Cal. 254, 20 Pac. 556; Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226; Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16; Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; Harney *v.* McLeran, 66 Cal. 34, 4 Pac. 884; Learned *v.* Tangeman, 65 Cal. 334, 4 Pac. 191; Brown *v.* Martin, 25 Cal. 82; Marius *v.* Bicknell, 10 Cal. 217; Macondray *v.* Simmons, 1 Cal. 393; Dillon *v.* Cross, 5 Cal. App. 766, 91 Pac. 439.

Colorado.— Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 54 Pac. 642; Brahoney *v.* Denver, etc., R. Co., 14 Colo. 27, 23 Pac. 172; Marriott *v.* Clise, 12 Colo. 561, 21 Pac. 909; Mackey *v.* Monahan, 13 Colo. App. 144, 56 Pac. 680; Keys *v.* Morrison, 3 Colo. App. 441, 34 Pac. 259.

Connecticut.— Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682; Bennett *v.* Lathrop, 71 Conn. 613, 42 Atl. 634, 71 Am. St. Rep. 222.

Georgia.— Central R. Co. *v.* Pickett, 87 Ga. 734, 13 S. E. 750; Georgia Southern R. Co. *v.* Neel, 68 Ga. 609.

Idaho.— Aulbach *v.* Dahler, 4 Ida. 654, 43 Pac. 322.

Illinois.— Chicago City R. Co. *v.* O'Donnell, 207 Ill. 478, 69 N. E. 882.

Indiana.— Indianapolis St. R. Co. *v.* Kane, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721; Lassiter *v.* Jackman, 88 Ind. 118; Jones *v.* Hathaway, 77 Ind. 14; Wade *v.* State, 37

another action is pending,[82] want of jurisdiction of the person,[83] defect of parties plaintiff or defendant,[84] misjoinder of parties plaintiff or defendant,[85] want of capacity to sue or the objection that the action is not brought in the name of the real party in interest,[86] misjoinder of causes of action,[87] etc., are waived by failure to demur, where a ground of demurrer and the defect appears on the face of the pleading, or by failure to urge the objection by answer where the defect is not apparent or not ground for demurrer. On the other hand, the general rule is that the objections that the complaint does not state facts sufficient to constitute a cause of action,[88] and that the court has no jurisdiction of the subject-matter,[89]

Ind. 180; Wortman *v.* Ash, 4 Ind. 74; Coulter *v.* Bradley, 30 Ind. App. 421, 66 N. E. 184.

Iowa.— De Sellem *v.* Iowa City Bank, 101 Iowa 566, 70 N. W. 702; Dodge *v.* Davis, 85 Iowa 77, 52 N. W. 2; Linden *v.* Green, 81 Iowa 365, 46 N. W. 1108.

Kansas.— Chase *v.* Atchison, etc., R. Co., 70 Kan. 546, 79 Pac. 153; Lyons *v.* Berlau, 67 Kan. 426, 73 Pac. 52.

Kentucky.— Beale *v.* Barnett, 64 S. W. 838, 23 Ky. L. Rep. 1118; Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238.

Maine.— Wellington *v.* Small, 89 Me. 154, 36 Atl. 107.

Maryland.— Dryden *v.* Barnes, 101 Md. 346, 61 Atl. 342.

Massachusetts.— Lamson Consol. Store-Service Co. *v.* Prudential F. Ins. Co., 171 Mass. 433, 50 N. E. 943; Buck *v.* Hall, 170 Mass. 419, 49 N. E. 658; Witt *v.* Potter, 125 Mass. 360.

Michigan.— Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652.

Minnesota.— Campbell *v.* Railway Transfer Co., 95 Minn. 375, 104 N. W. 547; Schurmeier *v.* English, 46 Minn. 306, 48 N. W. 1112; Densmore *v.* Shepard, 46 Minn. 54, 48 N. W. 528, 681; James *v.* Wilder, 25 Minn. 305.

Missouri.— Mead *v.* Brown, 65 Mo. 552; House *v.* Lowell, 45 Mo. 381; Boyd *v.* St. Louis Transit Co., 108 Mo. App. 303, 83 S. W. 287; Sinclair *v.* Missouri, etc., R. Co., 70 Mo. App. 588; Anderson *v.* McPike, 41 Mo. App. 328.

Montana.— Spencer *v.* Montana Cent. R. Co., 11 Mont. 164, 27 Pac. 681.

Nebraska.— Porter *v.* Sherman County Banking Co., 36 Nebr. 271, 54 N. W. 424; Claire *v.* Claire, 10 Nebr. 54, 4 N. W. 411.

New York.— Jefferson *v.* New York El. R. Co., 132 N. Y. 483, 30 N. E. 981; Blossom *v.* Barrett, 37 N. Y. 434, 97 Am. Dec. 747; De Puy *v.* Strong, 37 N. Y. 372; Ward *v.* Smith, 95 N. Y. App. Div. 432, 88 N. Y. Suppl. 700; Shaw *v.* New York, 83 N. Y. App. Div. 212, 82 N. Y. Suppl. 44; Van Zandt *v.* Grant, 67 N. Y. App. Div. 70, 73 N. Y. Suppl. 600 [*affirmed* in 175 N. Y. 150, 67 N. E. 221]; White *v.* Rodemann, 44 N. Y. App. Div. 503, 60 N. Y. Suppl. 971; Lane *v.* Wheelwright, 69 Hun 180, 23 N. Y. Suppl. 576 [*affirmed* in 143 N. Y. 634, 37 N. E. 826]; Gillett *v.* Borden, 6 Lans. 219; Ayres *v.* O'Farrell, 10 Bosw. 143; Wright *v.* Storrs, 6 Bosw. 600; Van Sielen *v.* New York, 32 Misc. 403, 66 N. Y. Suppl. 555; Berntsen *v.* Huner, 10 Misc. 6, 30 N. Y. Suppl. 540; Barnard *v.* Brown, 17 N. Y. Suppl. 313; Hatton *v.* McFadden, 15 N. Y. St. 124; Garvey *v.* New York L. Ins., etc., Co., 14 N. Y. Civ. Proc. 106; Bebinger *v.* Sweet, 1 Abb. N. Cas. 263.

North Carolina.— Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035; Blalock *v.* Clark, 133 N. C. 306, 45 S. E. 642; Hitch *v.* Edgecombe County Com'rs, 132 N. C. 573, 44 S. E. 30; Queen City Printing, etc., Co. *v.* McAden, 131 N. C. 178, 42 S. E. 575; Cook *v.* American Exch. Bank, 129 N. C. 149, 39 S. E. 746; Weeks *v.* McPhail, 128 N. C. 134, 38 S. E. 292; Mizell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927; Halstead *v.* Mullen, 93 N. C. 252; Johnson *v.* Finch, 93 N. C. 205; Finley *v.* Hayes, 81 N. C. 368.

Ohio.— Cloon *v.* City Ins. Co., 1 Handy 32.

Oklahoma.— Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

Oregon.— Woolley *v.* Plaindealer Pub. Co., 47 Oreg. 619, 84 Pac. 473, 5 L. R. A. N. S. 498; Ausplund *v.* Ætna Indemnity Co., 47 Oreg. 10, 81 Pac. 577, 82 Pac. 12; Moore *v.* Halliday, 43 Oreg. 243, 72 Pac. 801.

South Carolina.— Griffith *v.* Cromley, 58 S. C. 448, 36 S. E. 738.

South Dakota.— Lee *v.* Mellette, 15 S. D. 586, 90 N. W. 855.

Texas.— King *v.* Maxey, (Civ. App. 1894) 28 S. W. 401.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Phillips *v.* Carver, 99 Wis. 561, 75 N. W. 432; John R. Davis Lumber Co. *v.* Home Ins. Co., 95 Wis. 542, 70 N. W. 59; Mead *v.* Bagnall, 15 Wis. 156; Stilwell *v.* Kellogg, 14 Wis. 461; Jessup *v.* Racine City Bank, 14 Wis. 331; Cary *v.* Wheeler, 14 Wis. 281.

See 39 Cent. Dig. tit. "Pleading," § 1348 *et seq.*

Defects not apparent on face of pleading.— A failure to demur cannot amount to a waiver of objection to a defect not apparent on the face of the pleadings. Johns *v.* Bailey, 45 Iowa 241.

82. Garvey *v.* New York L. Ins., etc., Co., 14 N. Y. Civ. Proc. 106.

83. Bunker *v.* Langs, 76 Hun (N. Y.) 543, 28 N. Y. Suppl. 210; Holbrook *v.* Baker, 16 Hun (N. Y.) 176.

84. See *infra*, XIV, E, 4.

85. See *infra*, XIV, E, 5.

86. See *infra*, XIV, E, 3.

87. See *infra*, XIV, B, 9, h.

88. See *infra*, XIV, B, 9, c.

89. See COURTS, 11 Cyc. 699.

Want of jurisdiction which is not waived by an omission to demur or answer on that

are not waived by failure to raise the objection by demurrer or answer but may be urged at any time. These rules as to the effect of failure to raise objections by demurrer or answer are generally the subject of express provisions in the codes and practice acts.[90]

4. By Admitting Evidence Without Objection.[91] If evidence is admitted without objection to prove a fact imperfectly pleaded, the defect will be deemed waived,[92] but no such result follows where the evidence is objected to when offered.[93] In some cases this rule is held to apply only to the introduction of evidence to prove facts defectively alleged, but not wholly wanting,[94] while other cases allow the proof of material facts which are entirely omitted from the pleading, to cure such omission,[95] at least where the facts omitted go to the amount of the recovery

ground is when the cause of action disclosed by the complaint is not properly cognizable by any court of justice to which the provisions of the code are applicable. De Bussierre *v.* Holladay, 55 How. Pr. (N. Y.) 210.

90. See the statutes of the several states. And see cases cited *supra*, this section.

Only defects in a complaint are embraced within the statute in some jurisdictions and it does not extend to a defective or improper counter-claim. Lipman *v.* Jackson Architectural Iron Works, 128 N. Y. 58, 27 N. E. 975. *Contra*, Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

91. See also *infra*, XIV, I.

92. *California.*— Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806; Christensen *v.* Jessen, (1895) 40 Pac. 747.

Colorado.— Nix *v.* Miller, 26 Colo. 203, 57 Pac. 1084; Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

Georgia.— Pittsburgh Spring Co. *v.* Smith, 115 Ga. 764, 42 S. E. 80; Seabrook *v.* Brady, 47 Ga. 650.

Iowa.— Nevada First Nat. Bank *v.* Bryan, 62 Iowa 42, 17 N. W. 165; Montgomery County *v.* American Emigrant Co., 47 Iowa 91.

Kansas.— See Grandstaff *v.* Brown, 23 Kan. 176.

Kentucky.— Illinois Cent. R. Co. *v.* McIntosh, 118 Ky. 145, 80 S. W. 496, 81 S. W. 270, 26 Ky. L. Rep. 14; Louisville, etc., R. Co. *v.* Taylor, 92 Ky. 55, 17 S. W. 198, 13 Ky. L. Rep. 373.

Louisiana.— State *v.* Lundie, 47 La. Ann. 1596, 18 So. 636; Flournoy *v.* Milling, 15 La. Ann. 473.

Minnesota.— Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060.

Missouri.— Hutsell *v.* Crewse, 138 Mo. 1, 39 S. W. 449.

Montana.—Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969.

New Hampshire.— Folsom *v.* Brawn, 25 N. H. 114.

New York.— Strawn *v.* Edward J. Brandt-Dent. Co., 175 N. Y. 463, 67 N. E. 1090.

Pennsylvania.—Coble *v.* Zook, 6 Pa. Super. Ct. 597.

West Virginia.— Trump *v.* Tidewater Coal, etc., Co., 46 W. Va. 238, 32 S. E. 1035.

United States.— Liverpool, etc., Ins. Co. *v.* Gunther, 116 U. S. 113, 6 S. Ct. 306, 29 L. ed. 575.

See 39 Cent. Dig. tit. "Pleading," §§ 1354, 1374, 1386.

An objection at the close of the evidence has been held sufficient. Myers *v.* Paine, 13 N. Y. App. Div. 332, 43 N. Y. Suppl. 133 [*affirmed* in 162 N. Y. 593, 57 N. E. 1118].

Failure to characterize an answer as a counter-claim is not an objection that can be taken after evidence to prove the counter-claim has been introduced without objection. Acer *v.* Hotchkiss, 97 N. Y. 395; Mackinstry *v.* Smith, 16 Misc. (N. Y.) 351, 38 N. Y. Suppl. 93; Selleck *v.* Griswold, 49 Wis. 39, 5 N. W. 213. Nor can the objection be then raised that the facts alleged do not properly constitute a counter-claim. Punteney-Mitchell Mfg. Co. *v.* T. G. Northwall Co., 66 Nebr. 5, 91 N. W. 863.

93. Rogers *v.* St. Paul, 86 Minn. 98, 90 N. W. 155.

94. Kinney *v.* Hosea, 3 Harr. (Del.) 456; Waldsmith *v.* Waldsmith, 2 Ohio 156; Pollard *v.* Thomason, 5 Humphr. (Tenn.) 56; Texas, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1896) 34 S. W. 186.

95. *Kansas.*—Baden *v.* Bertenshaw, 68 Kan. 32, 74 Pac. 639; Long-Bell Lumber Co. *v.* Webb, 7 Kan. App. 406, 52 Pac. 64.

Louisiana.— State Nat. Bank *v.* Clark, 115 La. 691, 39 So. 844; Bell *v.* Globe Lumber Co., 107 La. 725, 31 So. 994; Bryan *v.* Moore, 11 Mart. 26, 13 Am. Dec. 347.

New York.— Lounsbury *v.* Purdy, 18 N. Y. 515, 520 (where a motion to dismiss was made at the trial on the ground that the complaint did not state a cause of action, and the court said: "It may be that for want of these allegations the complaint fails to make out a case of resulting trust or to show a right to any relief. But it does not follow that the judge at the trial was bound to dismiss the suit. We are referred to section 148 of the Code of Procedure, declaring that an omission to demur does not waive the objection that the complaint does not state facts sufficient to constitute a cause of action. But the terms and spirit of that section are satisfied by holding that the right to object at the trial is not absolutely gone by failing to demur. . . . If, however, the proof supplies the facts which the complaint omits to state, it is competent for the court to amend the pleading, and the objection will be overruled"); Johnson *v.* Roach, 83 N. Y. App. Div. 351, 82 N. Y. Suppl. 203; Ginsburg *v.* Von Seggern, 59

merely and not to the right to recover,[96] as where an allegation of earning capacity was omitted in an action for personal injury.

5. By Agreement, Submission, or Reference. Any formal defect in pleadings or proceedings may be waived by an express agreement to that effect,[97] but the waiver will not be extended to defects not embraced by the terms of the agreement.[98] Likewise, defects in the pleadings are waived by a judgment entered by consent,[99] by a stipulation for judgment,[1] by an agreement of record between the parties as to what evidence may be given under the pleadings [2] or what issues shall be tried,[3] or by a stipulation as to the facts.[4] But a stipulation as to the issues cannot waive a fatal defect in the pleadings,[5] and although a general demurrer is overruled by consent, the objection raised by the demurrer that the pleading is fatally defective is not thereby waived.[6] Nor does the submission of a demurrer without argument operate as a waiver of the defects attacked thereby.[7] An amendment of the declaration by consent after plea filed does not authorize defendant to raise any formal objections thereto which equally applied to the original declaration.[8] A submission to arbitration or to a referee,[9] or a submission to the court on an agreed case or statement of facts,[10] or an agreement

N. Y. App. Div. 595, 69 N. Y. Suppl. 758 [*affirmed* in 172 N. Y. 662, 65 N. E. 1116]; Wright *v.* Deering, 2 Misc. 296, 21 N. Y. Suppl. 929; Meyer *v.* Fiegel, 34 How. Pr. 434.

Oklahoma.— Ryndak *v.* Seawell, 13 Okla. 737, 76 Pac. 170.

Pennsylvania.— Wilson's Appeal, 3 Walk. 216.

South Carolina.— Hogg *v.* Pinckney, 16 S. C. 387.

South Dakota.— Martin *v.* Graff, 10 S. D. 592, 74 N. W. 1040; Sherwood *v.* Sioux Falls, 10 S. D. 405, 73 N. W. 913; Wright *v.* Sherman, 3 S. D. 290, 52 N. W. 1093; Johnson *v.* Burnside, 3 S. D. 230, 52 N. W. 1057.

See 39 Cent. Dig. tit. "Pleading," § 1374.

But this rule applies only to complaints capable of being made good by amendment and not to complaints that fail altogether to state a substantial cause of action and are incapable of being made good by amendment. Bauman *v.* Bean, 57 Mich. 1, 23 N. W. 451.

96. Mollie Gibson Consol. Min., etc., Co. *v.* Sharp, 5 Colo. App. 321, 38 Pac. 850.

97. Governor *v.* Bancroft, 16 Ala. 605; Lacy *v.* Rockett, 11 Ala. 1002; Cleveland *v.* Chandler, 3 Stew. (Ala.) 489; Harrison *v.* McCormick, (Cal. 1885) 9 Pac. 114; Nicholson *v.* Drennan, 35 S. C. 333, 14 S. E. 719; Wirth *v.* Bartell, 89 Wis. 594, 62 N. W. 408. See also Fenemore *v.* U. S., 3 Dall. (U. S.) 357, 1 L. ed. 634.

98. Harney *v.* Porter, 62 Cal. 511; Crimmins *v.* United Engineering Co., 49 Misc. (N. Y.) 622, 96 N. Y. Suppl. 1032.

As extending to verification.— An agreement waiving defects in the pleadings waives verification of a plea of usury. Arnold *v.* MacDonald, 22 Tex. Civ. App. 487, 55 S. W. 529.

A stipulation by defendant that the complaint is in proper form waives the objection that the action was not brought by the proper parties, where such objection appears on the face of the complaint. Fletcher *v.* Massachusetts Ben. L. Assoc., 78 Hun (N. Y.) 311, 29 N. Y. Suppl. 173.

99. Collins *v.* Rose, 59 Ind. 33.

1. Pacific Paving Co. *v.* Vizelich, 1 Cal. App. 281, 82 Pac. 82.

2. Talcott *v.* Jackson, 41 Ind. 201; Flanegan *v.* Earnest, 1 Chandl. (Wis.) 149.

3. Bailey *v.* Landingham, 52 Iowa 415, 3 N. W. 460; Jones *v.* Merchants' Nat. Bank, 72 Hun (N. Y.) 344, 25 N. Y. Suppl. 660.

Where plaintiff consented to submit certain matters on affidavits which should have been raised by answer, he waived any error in such procedure. Berman *v.* Cosgrove, 95 Minn. 353, 104 N. W. 534.

4. Sioux Valley State Bank *v.* Drovers' Nat. Bank, 58 Ill. App. 396.

5. Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607.

6. Jones *v.* Los Angeles, etc., R. Co., (Cal. 1894) 37 Pac. 656.

7. Richards *v.* Travelers' Ins. Co., 80 Cal. 505, 22 Pac. 939.

8. Mumford *v.* Stocker, 1 Cow. (N. Y.) 601; Moss *v.* Stipp, 3 Munf. (Va.) 159.

9. *California.*— Kalkman *v.* Baylis, 23 Cal. 303; Ritchie *v.* Davis, 5 Cal. 453.

Massachusetts.— Ames *v.* Stevens, 120 Mass. 218; Page *v.* Monks, 5 Gray 492; Austin *v.* Kimball, 12 Cush. 485, holding that a reference by consent under a rule of court is a waiver of the non-joinder of another party as plaintiff.

Nebraska.— Morris *v.* Haas, 54 Nebr. 579, 74 N. W. 828.

New Jersey.— Taylor *v.* Sayre, 24 N. J. L. 647; Smith *v.* Minor, 1 N. J. L. 16.

New York.— Sterling *v.* Metropolitan L. Ins. Co., 6 N. Y. St. 96.

North Carolina.— Robbins *v.* Killebrew, 95 N. C. 19.

Vermont.— Moulton *v.* Moore, 56 Vt. 700.

See 39 Cent. Dig. tit. "Pleading," §§ 1353, 1359, 1379.

Only amendable defects are waived by a reference. McKay *v.* Darling, 65 Vt. 639, 27 Atl. 324.

10. *Illinois.*— Smith *v.* Chicago, 107 Ill.

that the court may find the facts and render judgment thereon,[11] waives all defects and irregularities in the pleadings not expressly reserved.

6. By Demurrer.[12] A general demurrer, on the ground of failure to state a cause of action or defense, waives formal defects which are ground for special demurrer,[13] and a demurrer specifying certain grounds waives other grounds not specified,[14] except want of jurisdiction over the subject-matter and failure to state a cause of action or defense.[15] So a demurrer is generally a waiver of defects attackable only by motion,[16] and also of the right to treat a pleading as a nullity,[17] or to object that it was not filed in time,[18] or to object to the want of an affidavit.[19]

7. By Failure to Return Copy of Pleading or Exhibit. In some jurisdictions a copy of a pleading served on the opposing party, where defective in mere matters of form, must be promptly returned or the objection is waived.[20] And the same

App. 270 [*affirmed* in 204 Ill. 356, 68 N. E. 395]; Gaines *v.* McAdam, 79 Ill. App. 201.

Kansas.— St. John State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312.

Maine.— Pillsbury *v.* Brown, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94; Machias Hotel Co. *v.* Fisher, 56 Me. 321; Moore *v.* Philbrick, 32 Me. 102, 52 Am. Rep. 642; Gardiner *v.* Nutting, 5 Me. 140, 17 Am. Dec. 211.

Massachusetts.— Morse *v.* Natick, 176 Mass. 510, 57 N. E. 996; West Roxbury *v.* Minot, 114 Mass. 546; Esty *v.* Currier, 98 Mass. 500; Scudder *v.* Worster, 11 Cush. 573; Johnson *v.* Shed, 21 Pick. 225.

Minnesota.— Rogers *v.* St. Paul, 86 Minn. 98, 90 N. W. 155.

New Hampshire.— Child *v.* Eureka Powder Works, 45 N. H. 547.

New York.—Oneida Bank *v.* Ontario Bank, 21 N. Y. 490.

North Carolina.— Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 59 Am. Rep. 242.

Pennsylvania.— Bixler *v.* Kunkle, 17 Serg. & R. 298.

United States.— Saltonstall *v.* Russell, 152 U. S. 628, 14 S. Ct. 733, 38 L. ed. 576; Snow *v.* Miles, 22 Fed. Cas. No. 13,146, 3 Cliff. 608.

See 39 Cent. Dig. tit. "Pleading," § 1353.

11. Earnhart *v.* Robertson, 10 Ind. 8; Early *v.* Early, 134 N. C. 258, 46 S. E. 503.

12. Demurrer as waiving motion to strike see *supra*, XII, G, 3.

13. *Georgia.*—Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155.

Illinois.— Kenyon *v.* Sutherland, 8 Ill. 99.

Indiana.— Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 374, 56 N. E. 98.

Massachusetts.— Proctor *v.* Stone, 1 Allen 193; Robbins *v.* Luce, 4 Mass. 474.

New York.—Loomis *v.* Tifft, 16 Barb. 541; Hobart *v.* Frost, 5 Duer 673.

Ohio.— Beecher *v.* Booth, 9 Ohio Cir. Ct. 469, 6 Ohio Cir. Dec. 131.

Oregon.— Marx *v.* Croisan, 17 Oreg. 393, 21 Pac. 310.

See 39 Cent. Dig. tit. "Pleading," § 1352. See also *supra*, VI, F.

14. *Alabama.*— Turner Coal Co. *v.* Glover, 101 Ala. 289, 13 So. 478.

Arkansas.— Kelly *v.* Ware, 22 Ark. 449.

California.— Powell *v.* Ross, 4 Cal. 197.

Iowa.— Bridgman *v.* Wilcut, 4 Greene 563.

Massachusetts.— Smith *v.* Milton, 133 Mass. 369.

Montana.— Pryor *v.* Walkerville, 31 Mont. 618, 79 Pac. 240.

New York.— Malone *v.* Stilwell, 15 Abb. Pr. 421; Wilson *v.* New York, 1 Abb. Pr. 4.

Texas.— Wilson *v.* Vick, 93 Tex. 88, 53 S. W. 576; Crayton *v.* Munger, 9 Tex. 285.

See 39 Cent. Dig. tit. "Pleading," § 1352. See also *supra*, VI, I.

15. Florida Cent., etc., R. Co. *v.* Ashmore, 43 Fla. 272, 32 So. 832; Monette *v.* Cratt, 7 Minn. 234; People *v.* Banker, 8 How. Pr. (N. Y.) 258.

16. *Indiana.*— Pudney *v.* Burkhart, 62 Ind. 179.

Kentucky.— Posey *v.* Green, 78 Ky. 162; Ingraham *v.* Arnold, 1 J. J. Marsh. 406; Kelly *v.* Talbott, 41 S. W. 439, 19 Ky. L. Rep. 632.

Nebraska.— Van Etten *v.* Medland, 53 Nebr. 569, 74 N. W. 33; Powers *v.* Powers, 20 Nebr. 529, 31 N. W. 1; Fritz *v.* Grosnicklaus, 20 Nebr. 413, 30 N. W. 411.

New York.— Kneeland *v.* Pennell, 49 Misc. 94, 96 N. Y. Suppl. 403; Campbell *v.* Wright, 21 How. Pr. 9.

Ohio.— Martin *v.* Spurrier, 23 Ohio Cir. Ct. 110; Montgomery *v.* Thomas, 10 Ohio S. & C. Pl. Dec. 290, 7 Ohio N. P. 669.

See also *supra*, XIV, B, 2.

17. Mayfield *v.* Barnard, 43 Miss. 270; Anderson *v.* Burke, 6 Sm. & M. (Miss.) 475; Walker *v.* Walker, 6 How. (Miss.) 500.

18. Manley *v.* Union Bank, 1 Fla. 160.

It has been held, however, that an exception as to the time of filing a plea in abatement is not waived by a demurrer. Jennison *v.* Hapgood, 2 Alk. (Vt.) 31.

19. Wilson *v.* Mt. Pleasant Bank, 6 Leigh (Va.) 570; Griswold *v.* Bacheller, 77 Fed. 857.

20. Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429; Smith *v.* Mulliken, 2 Minn. 319; Chatham Bank *v.* Van Veghten, 5 Duer (N. Y.) 628; Sweeney *v.* O'Dwyer, 45 Misc. (N. Y.) 43, 90 N. Y. Suppl. 806; Wilson *v.* Bennett, 2 N. Y. Civ. Proc. 34; Hull *v.* Ball, 14 How. Pr. (N. Y.) 305; Buffalo *v.* Scranton, 20 Wend. (N. Y.) 676. See also Robbins *v.* Benson, 11 Oreg. 514, 6 Pac. 69.

rule applies to a bill of particulars[21] or exhibit.[22] The objection that a pleading was not served in time is waived by neglecting to return it.[23]

8. By Obtaining Extension of Time to Plead. By asking and obtaining an extension of time to plead, it has been held that a party waives all formal objections to the pleadings of his adversary.[24] But obtaining time to answer is not a waiver of a motion to specify in the complaint the name of the county in which plaintiff desires the trial to be had.[25]

9. Application of Rules to Particular Defects and Objections — a. In General. Among the objections which have been held to be waived by pleading over to the merits or going to trial without raising the objection are the following: Argumentative denials;[26] defective caption of a pleading;[27] denial improperly made upon information and belief;[28] departure in a reply;[29] duplicity;[30] failure to designate a part of an answer as a cross complaint;[31] failure to file a pleading;[32] failure to file or serve within the time prescribed by law;[33] failure to serve a copy of a plead-

21. See *infra*, XIV, D.

22. The code provision that on demand by defendant, plaintiff shall furnish him with a copy of the "deed, instrument, or other writing whereon the action is founded" is waived by defendant where he accepted instead of the instrument itself for inspection, and retained it some weeks, although he was unable to get it on some occasions when he asked for it instead of a copy. Marks *v.* Fordyce, 5 Ohio Dec. (Reprint) 81, 2 Am. L. Rec. 392.

23. Rogers *v.* Rockwood, 13 N. Y. Suppl. 939; Clyde *v.* Johnson, 4 N. D. 92, 58 N. W. 512; Moore *v.* Ellis, 89 Wis. 108, 61 N. W. 291; Pritchard *v.* Huntington, 16 Wis. 569.

A notice of withdrawal and change of pleas was combined with notice of special matter, which, so far as the last was concerned, was not served in time. Plaintiff used only the notice relating to the change of pleas on the trial. It was held that he did not thereby estop himself from questioning the sufficiency of the notice of special matter. Covely *v.* Fox, 11 Pa. St. 171.

Ground for refusal.— If a pleading is refused because not served in time, the party refusing it cannot subsequently rely in support of his refusal on the objection that it was entitled in the wrong county. Tolhurst *v.* Howard, 94 N. Y. App. Div. 439, 88 N. Y. Suppl. 235.

24. Sherman *v.* McCarthy, 90 N. Y. App. Div. 542, 85 N. Y. Suppl. 727; Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657; Garrison *v.* Carr, 34 How. Pr. (N. Y.) 187.

Delay in filing.— By so doing he waives the objection that his adversary's pleading was not filed in due time. Beck *v.* Independent Brewing Assoc., 60 Ill. App. 423.

Waiver of motion to strike.— Applying for and obtaining an extension of time to answer waives a prior motion to strike out portions of the complaint. Mary *v.* James, 34 How. Pr. (N. Y.) 238; Restorff *v.* Ehrich, 1 Month. L. Bul. (N. Y.) 33. See also *supra*, XII, G, 2.

25. Merrill *v.* Grinnell, 10 How. Pr. (N. Y.) 31.

26. Fellheimer *v.* Hainline, 65 Ill. App. 384.

27. Salyer *v.* Napier, 51 S. W. 10, 21 Ky. L. Rep. 172, omission of words "Answer and Counter-Claim."

Failure to characterize a counter-claim as such, in the caption, is waived by filing a reply thereto. Nutter *v.* Johnson, 80 Ky. 426; Cason *v.* Cason, 79 Ky. 558; Allensworth *v.* Lowdermilk, 35 S. W. 1030, 18 Ky. L. Rep. 252.

28. Schroeder *v.* Capehart, 49 Minn. 525, 52 N. W. 140.

29. *Colorado.*—Kannaugh *v.* Quartette Min. Co., 16 Colo. 341, 27 Pac. 245; Rocky Ford Canal, etc., Co. *v.* Simpson, 5 Colo. App. 30, 36 Pac. 638.

Indiana.— New *v.* Wambach, 42 Ind. 456; Prenatt *v.* Runyon, 12 Ind. 174.

Kansas.— See Consolidated Kansas City Smelting, etc., Co. *v.* Osborne, 66 Kan. 393, 71 Pac. 838.

Kentucky.— Barbaroux *v.* Barker, 4 Metc. 47; Louisville, etc., R. Co. *v.* Simpson, 64 S. W. 750, 23 Ky. L. Rep. 1075.

Missouri.— Phillips *v.* Barnes, 105 Mo. App. 421, 80 S. W. 43.

Nebraska.— Gregory *v.* Kaar, 36 Nebr. 533, 54 N. W. 859.

See 39 Cent. Dig. tit. "Pleading," § 1388.

But see Osten *v.* Winehill, 10 Wash. 333, 38 Pac. 1123.

30. Prenatt *v.* Runyon, 12 Ind. 174; King *v.* Anthony, 2 Blackf. (Ind.) 131; Robbins *v.* Bosserman, 133 Iowa 318, 110 N. W. 587.

31. Schneider *v.* Reed, 123 Wis. 488, 101 N. W. 682.

32. Johnston *v.* Farmers', etc., Bank, 3 A. K. Marsh. (Ky.) 403.

Where a pleading is treated as filed, the objection that it was not actually filed is waived. Marengo Sav. Bank *v.* Kent, 135 Iowa 386, 112 N. W. 767.

33. *Alabama.*— Rudulph *v.* Wagner, 36 Ala. 698.

Illinois.— Donoghue *v.* Gardner, 24 Ill. 565; Donnelly *v.* Chicago City R. Co., 124 Ill. App. 18.

Iowa.— Paddleford *v.* Cook, 74 Iowa 433, 38 N. W. 137.

Kansas.— Jeffs *v.* Flickenger, 14 Kan. 308; Osgood *v.* Haverty, McCahon 182.

Kentucky.— McKinley *v.* Call, 1 T. B. Mon. 54.

ing;[34] failure to state the facts showing the proper place for trial;[35] improper joinder of defenses, such as inconsistent defenses in bar, joinder of defenses in bar and in abatement, and the like;[36] negative pregnant;[37] pleading a fact merely by inference instead of directly;[38] pleading by way of recital;[39] pleading of legal conclusions;[40] variance between declaration and writ,[41] or between pleading and exhibit attached thereto;[42] or want of a copy of account, instrument sued on, or other exhibit which the opposite party is required by statute to file with his pleading.[43] So want

Maryland.— Stockett *v.* Sasscer, 8 Md. 374; Benson *v.* Davis, 6 Harr. & J. 272.

Massachusetts.— Clark *v.* Montague, 1 Gray 446.

Michigan.— McGowan *v.* Lamb, 66 Mich. 615, 33 N. W. 881.

New Hampshire.— See Child *v.* Eureka Powder Works, 45 N. H. 547.

Ohio.— Hill *v.* Road Dist. No. 6, 10 Ohio St. 621.

Rhode Island.— Piche *v.* Robbins, 24 R. I. 325, 53 Atl. 92.

Texas.— Williams *v.* Verne, 68 Tex. 414, 4 S. W. 548; Leahy *v.* Ortiz, 38 Tex. Civ. App. 314, 85 S. W. 824.

Wisconsin.— Moore *v.* Ellis, 89 Wis. 108, 61 N. W. 291; Kirby *v.* Corning, 54 Wis. 599, 12 N. W. 69.

See 39 Cent. Dig. tit. "Pleading," §§ 1357, 1377, 1394.

Compare Covely *v.* Fox, 11 Pa. St. 171.

Where a demurrer and answer are filed too late, but instead of moving to strike because not filed in time, plaintiff invokes the judgment of the court on the demurrer and amends the petition to conform to its judgment, it is too late at a subsequent term of the court to move to strike the demurrer and answer because not filed in time. Lippman *v.* Ætna Ins. Co., 120 Ga. 247, 47 S. E. 593.

34. Cave *v.* Hall, 5 Mo. 59.

35. Roberts *v.* Corby, 86 Ill. 182; Marx *v.* Croisan, 17 Oreg. 393, 21 Pac. 310; Potten *v.* Bradley, 2 M. & P. 78, 17 E. C. L. 625. But see Merrill *v.* Grinnell, 10 How. Pr. (N. Y.) 31.

36. *Alabama.*— Cleveland *v.* Chandler, 3 Stew. 489.

California.— Klink *v.* Cohen, 13 Cal. 623.

Missouri.— Harper *v.* Fidler, 105 Mo. App. 680, 78 S. W. 1034.

Nebraska.— Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811.

Washington.— Lynch *v.* Richter, 10 Wash. 486, 39 Pac. 125.

37. Hartford F. Ins. Co. *v.* Enoch, 72 Ark. 47, 77 S. W. 899; Bessemer Irr. Ditch Co. *v.* Woolley, 32 Colo. 437, 76 Pac. 1053, 105 Am. St. Rep. 91; Armstrong *v.* Danahy, 75 Hun (N. Y.) 405, 27 N. Y. Suppl. 60.

38. *Indiana.*— Ferguson *v.* State, 90 Ind. 38.

Massachusetts.— Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869.

Minnesota.— Commonwealth Title Ins., etc., Co. *v.* Dokko, 71 Minn. 533, 74 N. W. 891; Cochrane *v.* Quackenbush, 29 Minn. 376, 13 N. W. 154.

Missouri.— Broyhill *v.* Norton, 175 Mo. 190, 74 N. W. 1024.

Utah.— Crescent Min. Co. *v.* Wasatch Min. Co., 5 Utah 624, 19 Pac. 198.

39. Spears *v.* Pechstein, 36 Colo. 328, 84 Pac. 979.

40. West Chicago St. R. Co. *v.* Manning, 170 Ill. 417, 48 N. E. 958; Barrett *v.* Des Moines Mut. Hail, etc., Ins. Co., 120 Iowa 184, 94 N. W. 473; Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 39, 59 N. W. 822.

41. *Arkansas.*— McNeill *v.* Arnold, 17 Ark. 154.

Illinois.— Simons *v.* Waldron, 70 Ill. 281; Carpenter *v.* Hoyt, 17 Ill. 529; Cruikshank *v.* Brown, 10 Ill. 75. See also Wabash R. Co. *v.* Barrett, 117 Ill. App. 315, holding variance waived by filing of demurrer.

Kentucky.— Hopkins *v.* Alvis, 2 A. K. Marsh. 374; Crozier *v.* Gano, 1 Bibb 257; White *v.* Walker, 1 T. B. Mon. 34. See also Pendleton *v.* Commonwealth Bank, 1 T. B. Mon. 171.

Maryland.— Chapman *v.* Davis, 4 Gill 166.

Michigan.— Brewer *v.* Boynton, 71 Mich. 254, 39 N. W. 49.

New York.— Willet *v.* Stewart, 43 Barb. 98; Bandman *v.* Gamble, 4 E. D. Smith 463; Mumford *v.* Stocker, 1 Cow. 601; Garland *v.* Chattle, 12 Johns. 430; Baker *v.* Dumbolton, 10 Johns. 240.

Ohio.— Wilson *v.* Butler Tp. School Sec. 16, 8 Ohio 174.

Pennsylvania.— Kaylor *v.* Shaffner, 24 Pa. St. 489; Hoopes *v.* Pusey, 2 Chest. Co. Rep. 306.

South Carolina.— Robinson *v.* Cornwell, 2 Bailey 137.

Tennessee.— Shelby County *v.* Bickford, 102 Tenn. 395, 52 S. W. 772.

Wisconsin.— Berkley *v.* Johnson, 4 Wis. 215.

United States.— McKenna *v.* Fisk, 1 How. 241, 11 L. ed. 117; Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. ed. 474.

See 39 Cent. Dig. tit. "Pleading," § 1373.

Contra.— Slater *v.* Fehlberg, 24 R. I. 574, 54 Atl. 383.

Variance as waived by appearance see APPEARANCES, 3 Cyc. 524.

42. Weyman *v.* Cater, 13 La. 492.

43. *California.*— Goldsmith *v.* Sawyer, 46 Cal. 209.

Florida.— Waterman *v.* Mattair, 5 Fla. 211.

Indiana.— See Douglass *v.* Keehn, 71 Ind. 97. But *compare* Reveal *v.* Conner, 21 Ind. 289.

Missouri.—Meyer *v.* Chambers, 68 Mo. 626; White *v.* Collier, 5 Mo. 82; Fenwick *v.* Bowling, 50 Mo. App. 516.

Nebraska.— Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479.

of profert,[44] right to oyer,[45] and all objections thereto and defects therein[46] are likewise waived. So where a pleading which is entirely unauthorized is filed but trial is nevertheless had upon the issue raised by it, the objection that it was unauthorized is waived.[47] So the defense that an action is prematurely brought is waived unless urged by demurrer or answer.[48]

b. Availability as Counter-Claim of Facts Set Up as Such. Where the facts pleaded as a counter-claim are not proper to be interposed as such in a particular action, it is generally held that the objection is waived by failure to urge it by demurrer;[49] but in some jurisdictions the rule is to the contrary.[50] Other cases hold that where no demurrer is interposed to a counter-claim and no objection is made to the introduction of evidence thereunder, the objection that it was not a proper counter-claim is waived.[51]

c. Failure of Complaint or Counter-Claim to State Cause of Action.[52] Except where it is otherwise provided by statute,[53] failure of a complaint to state facts

South Carolina.— See Hagood *v.* Mitchell, 1 Bailey 124.

United States.— Semmes *v.* Lee, 21 Fed. Cas. No. 12,652, 3 Cranch C. C. 439.

See 39 Cent. Dig. tit. "Pleading," § 1419.

44. Lowry *v.* Medlin, 6 Humphr. (Tenn.) 450.

Craving and obtaining oyer is a waiver of the omission of profert. Andrews *v.* Moore, Tapp. (Ohio) 183.

45. Eason *v.* Fisher, 1 Ark. 90. See also Dunlap *v.* Brette, 8 La. Ann. 479.

46. Kelly *v.* Matthews, 5 Ark. 223; Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368; Russell *v.* Drummond, 6 Ind. 216; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; Smith *v.* Alworth, 18 Johns. (N. Y.) 445; James *v.* Walruth, 8 Johns. (N. Y.) 410.

The objection of a variance between the instrument given on oyer and that set out in the pleading is waived by pleading instead of demurring after oyer given. Kelly *v.* Matthews, 5 Ark. 223; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; James *v.* Walruth, 8 Johns. (N. Y.) 410; Jarrett *v.* Jarrett, 7 Leigh (Va.) 93; Armstrong *v.* Armstrong, 1 Leigh (Va.) 491.

47. Crapster *v.* Williams, 21 Kan. 109 (rejoinder); Anderson *v.* Anderson, 24 Utah 497, 68 Pac. 319, reply where answer contained no counter-claim.

48. Carter *v.* Turner, 2 Head (Tenn.) 52; Reed *v.* Brewer, Peck (Tenn.) 275.

Raising objection after pleading to the merits.— A plea in abatement of an action on an insurance policy, on the ground that the policy provides that no action shall be commenced until thirty days after proof of loss, will not be heard after the main issues have been made up. American Acc. Co. *v.* Fidler, 35 S. W. 905, 18 Ky. L. Rep. 161.

Cannot be first urged on appeal see APPEAL AND ERROR, 2 Cyc. 667 note 71.

49. Manufacturers' Land, etc., Co. *v.* Covington Saw Mill Co., 60 S. W. 846, 22 Ky. L. Rep. 1559; Lee *v.* Russell, 38 S. W. 874, 18 Ky. L. Rep. 874; Talty *v.* Torling, 79 Minn. 386, 82 N. W. 632; Lace *v.* Fixen, 39 Minn. 46, 38 N. W. 762; Mississippi, etc., Boom Co. *v.* Prince, 34 Minn. 71, 24 N. W. 344; Walker *v.* Johnson, 28 Minn. 147, 9 N. W. 632; Noble Tp. *v.* Aasen, 8 N. D. 77, 76 N. W. 990; Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473; Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

If, however, the facts set up in the counter-claim do not constitute a cause of action of any kind, the objection is not waived by pleading to the merits. Noble Tp. *v.* Aasen, 8 N. D. 77, 76 N. W. 990. And where a counter-claim in a particular action is expressly forbidden by statute, the objection is not waived by pleading to the merits. Vidger *v.* Nolin, 10 N. D. 353, 87 N. W. 593.

50. Dinan *v.* Coneys, 143 N. Y. 544, 38 N. E. 715; Lipman *v.* Jackson Architectural Iron-Works, 128 N. Y. 58, 27 N. E. 975; People *v.* Dennison, 84 N. Y. 272; Smith *v.* Hall, 67 N. Y. 48; Story *v.* Richardson, 91 N. Y. App. Div. 381, 86 N. Y. Suppl. 843 [*affirmed* in 181 N. Y. 584, 74 N. E. 1126]; Sugden *v.* Magnolia Metal Co., 58 N. Y. App. Div. 236, 68 N. Y. Suppl. 809 [*affirmed* in 171 N. Y. 697, 64 N. E. 1126]. *Contra*, Hammond *v.* Terry, 3 Lans. (N. Y.) 186; Ayres *v.* O'Farrell, 10 Bosw. (N. Y.) 143; Myers *v.* Rosenbank, 13 Misc. (N. Y.) 145, 34 N. Y. Suppl. 63.

51. Mitchell *v.* Joyce, 76 Iowa 449, 34 N. W. 455, 41 N. W. 161; Jacobson *v.* Aberdeen Packing Co., 26 Wash. 175, 66 Pac. 419.

52. **As objection which may be first urged on appeal** see APPEAL AND ERROR, 2 Cyc. 691.

53. See the statutes of the several states.

In Iowa the code provides that where any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer, and if no such objection is taken it shall be deemed waived; and that, if the facts stated by the petition do not entitle plaintiff to any relief, advantage may be taken by motion in arrest of judgment. Under this code provision, it is held that the objection that the complaint does not state a cause of action is waived if not taken by demurrer or by motion in arrest of judgment. Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 97; Haden *v.* Sioux City, etc., R. Co., 99 Iowa 735, 48 N. W. 733; Daugherty *v.* Chicago, etc., R. Co., 87 Iowa 276, 54 N. W. 219; McConahey *v.* Griffey, 82 Iowa 564, 48 N. W. 983; Arndt *v.* Hosford, 82 Iowa 499, 48

sufficient to constitute a cause of action is not waived by failure to raise the objection by demurrer or answer or before trial but it may be raised at any time,[54] and this rule is expressly reiterated in most of the codes and practice acts.[55] This rule also applies to counter-claims,[56] although the objection that the counter-claim was not the proper subject of a counter-claim in the particular case is generally held waived by failure to urge such objection by reply or demurrer.[57] However, a failure to state facts sufficient to constitute a cause of action is to be distinguished from a defective statement of a cause of action, the latter being waived by pleading over.[58]

d. Failure of Answer or Reply to State Defense. In some jurisdictions, the failure of an answer to state facts constituting a defense, as distinguished from a defective statement of a defense, is not waived by pleading over or going to trial without objection;[59] while in other jurisdictions the contrary rule seems to prevail.[60] Where a reply is insufficient in substance to constitute a defense, it has

N. W. 981; Linden *v.* Green, 81 Iowa 365, 46 N. W. 1108.

54. *Alabama.*— Cummins *v.* Gray, 4 Stew. & P. 397.

Arizona.— McPherson *v.* Hattick, (1906) 85 Pac. 731.

California.— Flood *v.* Templeton, 148 Cal. 374, 83 Pac. 148; Bell *v.* Thompson, 147 Cal. 689, 82 Pac. 327; Weinreich *v.* Johnston, 78 Cal. 254, 20 Pac. 556.

Colorado.— Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313.

Dakota.— Fraley *v.* Bentley, 1 Dak. 25, 46 N. W. 506.

Georgia.— Brown *v.* Georgia, etc., R. Co., 119 Ga. 88, 46 S. E. 71; Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Francis *v.* Wood, 75 Ga. 648.

Illinois.— Pittsburg, etc., R. Co. *v.* Robson, 204 Ill. 254, 68 N. E. 468; Sherwood *v.* Rieck, 104 Ill. App. 368.

Indiana.— Harris *v.* Harris, 61 Ind. 117; Livesey *v.* Livesey, 30 Ind. 398; Miami County *v.* Hochstetter, 26 Ind. 48.

Indian Territory.— Chicago, etc., R. Co. *v.* Woodworth, 1 Indian Terr. 20, 35 S. W. 238.

Kansas.— Moody *v.* Arthur, 16 Kan. 419; Glasco Bank *v.* Marshall, 5 Kan. App. 252, 47 Pac. 561; Birmingham *v.* Leonhardt, 2 Kan. App. 513, 43 Pac. 996.

Louisiana.— Hepp *v.* Commagere, 10 Rob. 524.

Massachusetts.— Oulighan *v.* Butler, 189 Mass. 287, 75 N. E. 726; Hervey *v.* Moseley, 7 Gray 479, 66 Am. Dec. 515.

Michigan.— Stoflet *v.* Marker, 34 Mich. 313.

Minnesota.—Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118; Stratton *v.* Allen, 7 Minn. 502.

Missouri.— Ivory *v.* Carlin, 30 Mo. 142; Syme *v.* The Indiana, 28 Mo. 335.

Montana.— Thornton *v.* Kaufman, 35 Mont. 181, 88 Pac. 796.

Nebraska.— Renfrew *v.* Willis, 33 Nebr. 98, 49 N. W. 1095; Ball *v.* La Clair, 17 Nebr. 39, 22 N. W. 118; Curtis *v.* Cutler, 7 Nebr. 315.

New York.— Kelly *v.* Security Mut. L. Ins. Co., 186 N. Y. 16, 78 N. E. 584 [*reversing* on other grounds 106 N. Y. App. Div. 352, 94 N. Y. Suppl. 601]; Weeks *v.* O'Brien, 141 N. Y. 199, 36 N. E. 185; Becker *v.* Boon, 61 N. Y. 317; Coffin *v.* Reynolds, 37 N. Y. 640; Jackson *v.* Savage, 109 N. Y. App. Div. 556, 96 N. Y. Suppl. 366; Ulysses *v.* Ingersoll, 81 N. Y. App. Div. 304, 80 N. Y. Suppl. 924 [*reversed* on other grounds in 182 N. Y. 369, 75 N. E. 225]; Gould *v.* Glass, 19 Barb. 179; Ludington *v.* Taft, 10 Barb. 447; Rayner *v.* Clark, 7 Barb. 581; De Bussiere *v.* Holliday, 4 Abb. N. Cas. 111; Burnham *v.* De Bovorse, 8 How. Pr. 159.

Ohio.— Youngstown *v.* Moore, 30 Ohio St. 133; Weidner *v.* Rankin, 26 Ohio St. 522; Masters *v.* Freeman, 17 Ohio St. 323.

Oregon.— King *v.* Boyd, 4 Oreg. 326.

South Carolina.— Garrett *v.* Weinberg, 50 S. C. 310, 27 S. E. 770.

South Dakota.— Strait *v.* Eureka, 17 S. D. 326, 96 N. W. 695.

Texas.— Borden *v.* Houston, 2 Tex. 594.

Vermont.— Wright *v.* Bourdon, 50 Vt. 494.

Washington.— Lyen *v.* Bond, 3 Wash. Terr. 407, 19 Pac. 35.

Wisconsin.— Cox *v.* Groshong, 1 Pinn. 307.

United States.—Kohn *v.* McKinnon, 90 Fed. 623; Rush *v.* Newman, 58 Fed. 158, 7 C. C. A. 136.

See 39 Cent. Dig. tit. "Pleading," § 1366.

55. See the statutes of the several states and cases cited in preceding note.

56. Jones *v.* Hathaway, 77 Ind. 14; Brugman *v.* Burr, 30 Nebr. 406, 46 N. W. 644; Noble Tp. *v.* Aasen, 8 N. D. 77, 76 N. W. 990.

57. See *supra*, XIV, B, 9, b.

58. Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927; Halstead *v.* Mullen, 93 N. C. 252; Johnson *v.* Burnside, 3 S. D. 230, 52 N. W. 1057.

59. Indiana, etc., R. Co. *v.* Larrew, 130 Ind. 368, 30 N. E. 517; Becker *v.* Boon, 61 N. Y. 317; Zinsser *v.* Columbia Cab Co., 66 N. Y. App. Div. 514, 73 N. Y. Suppl. 287.

Evidence in support of immaterial issue.— "If the paragraph of answer was bad, and would have been so held on demurrer, then, no matter how well its allegations may have been proved, the issue joined thereon was an immaterial one, and it was the duty of the trial court, as it is our duty, to disregard such issue and render judgment herein without reference thereto." Allyn *v.* Allyn, 108 Ind. 327, 331, 9 N. E. 279.

60. Nichols *v.* Rasch, 138 Ala. 372, 35 So. 409; Culver *v.* Caldwell, 137 Ala. 125, 34 So.

been held that the defendant does not waive the objection by failure to demur thereto.[61]

e. Failure to Allege Material Fact. Without considering whether the omission of a material averment from the complaint or answer is equivalent to the failure to state facts sufficient to constitute a cause of action or defense, many cases hold that such an omission is waived by pleading to the merits or going to trial without objection,[62] while other cases hold the contrary.[63]

f. Form or Theory of Action. An irregularity or mistake in the form or theory of action,[64] or as to the kind of proceedings which the plaintiff has instituted in

13; Warner-Smiley Co. *v.* Cooper, 131 Ala. 297, 31 So. 28; Memphis, etc., R. Co. *v.* Martin, 131 Ala. 269, 30 So. 827; Capital City Ins. Co. *v.* Cofield, 131 Ala. 198, 31 So. 37; Sharpe *v.* Barney, 114 Ala. 361, 21 So. 490; Western R. Co. *v.* Walker, 113 Ala. 267, 22 So. 182; Liverpool, etc., Ins. Co. *v.* Tillis, 110 Ala. 201, 17 So. 672; White *v.* Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199; Lewis *v.* Simon, 101 Ala. 546, 14 So. 331; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; McKinnon *v.* Lessley, 89 Ala. 625, 8 So. 9; Jones *v.* Collins, 80 Ala. 108; Nunn *v.* Mills, 28 Ala. 600; Moore *v.* Leseur, 18 Ala. 606; Stitzel *v.* Franks, 126 Ill. App. 260; Grand Haven First Nat. Bank *v.* Zeims, 93 Iowa 140, 61 N. W. 483; Arndt *v.* Hosford, 82 Iowa 499, 48 N. W. 981; Mitchell *v.* Williamson, 9 Gill (Md.) 71. See also Puffer *v.* Lucas, 101 N. C. 281, 7 S. E. 734.

61. Brown *v.* Kroh, 31 Ohio St. 492.

62. *Alabama.*— Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283.

Illinois.— Lake Shore, etc., R. Co. *v.* Hessions, 150 Ill. 546, 37 N. E. 905; Herrick *v.* Swartwout, 72 Ill. 340; Brown *v.* Keller, 32 Ill. 151, 83 Am. Dec. 258.

Missouri.— Oil Well Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145; Frederick *v.* Bruckner, 124 Mo. App. 31, 101 S. W. 619; Davis *v.* Watson, 89 Mo. App. 15.

New York.— Minor *v.* Parker, 65 N. Y. App. Div. 120, 72 N. Y. Suppl. 549. See also King *v.* Mackellar, 109 N. Y. 215, 16 N. E. 201. But see Pope *v.* Terre Haute Car, etc., Co., 107 N. Y. 61, 13 N. E. 592. *Contra*, Olmstead *v.* Pound Ridge, 71 Hun 25, 24 N. Y. Suppl. 615.

Oregon.— Drake *v.* Sworts, 24 Oreg. 198, 33 Pac. 563; Olds *v.* Cary, 13 Oreg. 362, 10 Pac. 786.

South Dakota.— Johnson *v.* Burnside, 3 S. D. 230, 52 N. W. 1057.

United States.— Waples *v.* Hayes, 108 U. S. 6, 1 S. Ct. 80, 27 L. ed. 632.

See 39 Cent. Dig. tit. "Pleading," § 1365.

In Iowa the court has gone so far as to hold that by taking issue upon a petition defendant admits that it sets up a cause of action, and cannot insist that plaintiff prove facts outside the record to make out his cause of action. Sutherland *v.* Standard L., etc., Ins. Co., 87 Iowa 505, 54 N. W. 453; Frentress *v.* Mobley, 10 Iowa 450.

63. *Kentucky.*— Bogenschutz *v.* Smith, 84 Ky. 330, 1 S. W. 578. *Contra*, May *v.* May, 96 S. W. 840, 29 Ky. L. Rep. 1033; Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238.

Louisiana.— Hepp *v.* Commagere, 10 Rob. 524. But see Harrison *v.* Faulk, 6 La. 80.

Michigan.— Hartung *v.* Shaw, 130 Mich. 177, 89 N. W. 701.

North Carolina.— Wilson *v.* Lineberger, 94 N. C. 641, 55 Am. Rep. 628.

Texas.— Gulf, etc., R. Co. *v.* Vieno, (Civ. App. 1894) 26 S. W. 230.

Vermont.— Ralston *v.* Strong, 1 D. Chipm. 287.

Wisconsin.— Lawton *v.* Howe, 14 Wis. 241.

Canada.— McPhelim *v.* Weldon, 10 N. Brunsw. 358.

See 39 Cent. Dig. tit. "Pleading," § 1365.

64. *California.*— Dennison *v.* Chapman, 105 Cal. 447, 39 Pac. 61.

Colorado.— Guthiel Park Inv. Co. *v.* Montclair, 32 Colo. 420, 76 Pac. 1050; Relender *v.* Riggs, 20 Colo. App. 423, 79 Pac. 328.

Iowa.— Dodge *v.* Davis, 85 Iowa 77, 52 N. W. 2.

Louisiana.— Lotz *v.* Folger, 10 La. Ann. 20; Featherstone *v.* Robinson, 7 La. 596.

Maine.— Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472.

Michigan.— McCoy *v.* Brennan, 61 Mich. 362, 28 N. W. 129, 1 Am. St. Rep. 589.

Nebraska.— Downie *v.* Ladd, 22 Nebr. 531, 35 N. W. 388.

New York.—Conaughty *v.* Nichols, 42 N. Y. 83; Loomis *v.* Tifft, 16 Barb. 541.

Pennsylvania.— Welker *v.* Metcalf, 209 Pa. St. 373, 58 Atl. 687; Carson *v.* Hood, 4 Dall. 108, 1 L. ed. 762.

South Carolina.— McEwen *v.* Joy, 7 Rich. 33.

Washington.— See Brown *v.* Baldwin, 46 Wash. 106, 89 Pac. 483.

See 39 Cent. Dig. tit. "Pleading," § 1364.

Contra.— Conroy *v.* Equitable Acc. Co., 27 R. I. 467, 63 Atl. 356, holding that an objection that plaintiff has mistaken his action is not waived by submitting the case to the jury but may be taken at any stage of the trial.

Contract or tort.—Uncertainty as to whether an action is founded on contract or tort is waived by joining in all the issues presented. O'Connell *v.* Rosso, 56 Ark. 603, 20 S. W. 531. At the trial plaintiff may treat it as either species of action. Central R. Co. *v.* Pickett, 87 Ga. 734, 13 S. E. 750.

Common-law instead of statutory action.— An objection that a declaration is drawn as if on a common-law right and not on a statute is waived by pleading the general issue. Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721.

order to obtain relief,[65] is waived by pleading to the merits or proceeding to trial without objection.

g. Intermingling Causes of Action or Defenses in One Paragraph. Intermingling in the same paragraph two or more causes of action [66] or defenses [67] is generally waived where no motion to compel a separation or election is made and the party pleads over or goes to trial without urging the objection.

h. Misjoinder of Causes of Action.[68] In most jurisdictions a misjoinder of causes of action is waived by failure to raise the objection by demurrer or answer; [69]

65. McName *v.* Malvin, 56 Iowa 362, 9 N. W. 297; Ashlock *v.* Sherman, 56 Iowa 311, 9 N. W. 242; Lebanon *v.* Forrest, 15 B. Mon. (Ky.) 168.

Nature of relief demanded.— If plaintiff seeks equitable relief but fails to state an equitable cause of action, defendant waives the objection by going to trial on the merits. J. M. Weatherwax Lumber Co. *v.* Ray, 38 Wash. 545, 80 Pac. 775.

66. *Colorado.*— Possell *v.* Smith, 39 Colo. 127, 88 Pac. 1064; Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822; Kannaugh *v.* Quartette Min. Co., 16 Colo. 341, 27 Pac. 245; Baldridge *v.* Leon Lake Ditch Co., 20 Colo. App. 518, 80 Pac. 477; Blyth *v.* People, 16 Colo. App. 526, 66 Pac. 680; Rocky Ford Canal, etc., Co. *v.* Simpson, 5 Colo. App. 30, 36 Pac. 638.

Indiana.— New *v.* Wambach, 42 Ind. 456.

Iowa.— Cruver *v.* Chicago, etc., R. Co., 62 Iowa 460, 17 N. W. 661.

Kentucky.— Noel *v.* Hudson, 13 B. Mon. 204.

Massachusetts.— Com. *v.* Dracut, 8 Gray 455.

Minnesota.— Davis *v.* Hamilton, 85 Minn. 209, 88 N. W. 744.

Missouri.— Jordan *v.* St. Louis Transit Co., 202 Mo. 418, 101 S. W. 11; Scovill *v.* Glasner, 79 Mo. 449; Thompson *v.* School Dist. No. 4, 71 Mo. 495; Dailey *v.* Houston, 58 Mo. 361; House *v.* Lowell, 45 Mo. 381; Murphy *v.* St. Louis Transit Co., 96 Mo. App. 272, 70 S. W. 159; O'Neill *v.* Blase, 94 Mo. App. 648, 68 S. W. 764; Snyder *v.* Parker, 75 Mo. App. 529.

Nevada.— Gardner *v.* Gardner, 23 Nev. 207, 45 Pac. 139.

New York.— Krower *v.* Reynolds, 99 N. Y. 245, 1 N. E. 775; Lane *v.* Wheelwright, 69 Hun 180, 23 N. Y. Suppl. 576 [*affirmed* in 143 N. Y. 634, 37 N. E. 826].

Washington.— Page *v.* Page, 43 Wash. 293, 86 Pac. 582, 117 Am. St. Rep. 1054, 6 L. R. A. N. S. 914.

Wisconsin.— Endress *v.* Shove, 110 Wis. 133, 85 N. W. 653.

United States.— Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970.

See 39 Cent. Dig. tit. "Pleading," § 1371.

Where two causes of action are set out in each count of a complaint but defendant fails to make objection upon that ground, both causes are properly submitted to the jury. Joy *v.* Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184.

67. Bass *v.* Upton, 1 Minn. 408; Fleishman *v.* Meyer, 46 Oreg. 267, 80 Pac. 209.

68. **Misjoinder as ground for motion in arrest of judgment** see JUDGMENTS, 23 Cyc. 829.

69. *California.*— Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16; Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; Learned *v.* Tangeman, 65 Cal. 334, 4 Pac. 191; Marius *v.* Bicknell, 10 Cal. 217; Macondray *v.* Simmons, 1 Cal. 398.

Colorado.— Dubois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067; Brahoney *v.* Denver, etc., R. Co., 14 Colo. 27, 23 Pac. 172; Marriott *v.* Clise, 12 Colo. 561, 21 Pac. 909; Keys *v.* Morrison, 3 Colo. App. 441, 34 Pac. 259.

Dakota.— Fraley *v.* Bentley, 1 Dak. 25, 46 N. W. 506.

Louisiana.— See Kenney *v.* Dow, 10 Mart. 577, 13 Am. Dec. 342.

Minnesota.— Densmore *v.* Shepard, 46 Minn. 54, 48 N. W. 528, 681; James *v.* Wilder, 25 Minn. 305; Gardner *v.* Kellogg, 23 Minn. 463.

Missouri.—Hudson *v.* Wright, 204 Mo. 412, 103 S. W. 8; Mead *v.* Brown, 65 Mo. 552; House *v.* Lowell, 45 Mo. 381; Barnes *v.* Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971; Anderson *v.* McPike, 41 Mo. App. 328.

Nebraska.— Porter *v.* Sherman County Banking Co., 36 Nebr. 271, 54 N. W. 424; Claire *v.* Claire, 10 Nebr. 54, 4 N. W. 411.

New York.— Blossom *v.* Barrett, 37 N. Y. 434, 97 Am. Dec. 747; Jones *v.* Merchants' Nat. Bank, 72 Hun 344, 25 N. Y. Suppl. 660; Gillett *v.* Borden, 6 Lans. 219; Wright *v.* Storrs, 6 Bosw. 600; Berntsen *v.* Huner, 10 Misc. 6, 30 N. Y. Suppl. 540; Barnard *v.* Brown, 17 N. Y. Suppl. 313; Jefferson *v.* New York El. R. Co., 11 N. Y. Suppl. 488 [*reversed* on other grounds in 132 N. Y. 483, 30 N. E. 981]; Hatton *v.* McFadden, 15 N. Y. St. 124; Bebinger *v.* Sweet, 1 Abb. N. Cas. 263.

North Carolina.— Finley *v.* Hayes, 81 N. C. 368.

Ohio.— Cloon *v.* City Ins. Co., 1 Handy 32, 12 Ohio Dec. (Reprint) 12; Beecher *v.* Booth, 9 Ohio Cir. Ct. 469, 6 Ohio Cir. Dec. 131.

Pennsylvania.— Allwein *v.* Brown, 29 Pa. Super. Ct. 331. See also Erie City Iron-Works *v.* Barber, 118 Pa. St. 6, 12 Atl. 411.

Wisconsin.— Endress *v.* Shove, 110 Wis. 133, 85 N. W. 653; Stilwell *v.* Kellogg, 14 Wis. 461; Jesup *v.* Racine City Bank, 14 Wis. 331; Cary *v.* Wheeler, 14 Wis. 281.

Wyoming.— Mau *v.* Stoner, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466.

See 39 Cent. Dig. tit. "Pleading," § 1370.

Compare Phelps *v.* Hurd, 31 Conn. 444; Francis *v.* Wood, 75 Ga. 648.

but in some jurisdictions where a motion is the proper remedy, the objection is waived by failure to move within the time allowed for the motion.[70] So the misjoinder is waived where the demurrer is a general one not specifying the misjoinder as a particular ground of demurrer.[71]

i. Objection That Pleading Is Not Subscribed or Verified. Pleading over or going to trial without objection waives the right to urge that a pleading was not subscribed.[72] So generally the failure to verify a pleading is waived by pleading over or going to trial without raising the objection.[73] So in some jurisdictions a retention of an unverified copy of a pleading served is a waiver of the failure to verify.[74] So where the verification or affidavit is insufficient or incomplete, the objection cannot be urged after pleading over or on the trial,[75] and in some juris-

70. Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96; Adams *v.* Edgerton, 48 Ark. 419, 3 S. W. 628; Crawford *v.* Fuller, 28 Ark. 370; Mitchell *v.* McLeod, 127 Iowa 733, 104 N. W. 349; McDonald *v.* Nashua Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011; Keller *v.* Strong, 104 Iowa 585, 73 N. W. 1071; Flynn *v.* Des Moines, etc., R. Co., 63 Iowa 490, 19 N. W. 312; Hunt *v.* Semonin, 79 Ky. 270; Sale *v.* Crutchfield, 8 Bush (Ky.) 636; Caldwell *v.* Caldwell, 2 Bush (Ky.) 446; Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Stovall *v.* Hibbs, 32 S. W. 1087, 17 Ky. L. Rep. 906; Rountree *v.* Glatt, 13 Ky. L. Rep. 462; Merchants' Ins. Co. *v.* Buckner, 110 Fed. 345, 49 C. C. A. 80, construing Kentucky statute.

71. Beecher *v.* Booth, 9 Ohio Cir. Ct. 469, 6 Ohio Cir. Dec. 131. See also *supra*, VI, F.

72. Fankboner *v.* Fankboner, 20 Ind. 62; Abernathy *v.* Myer-Bridges Coffee, etc., Co., 99 S. W. 942, 30 Ky. L. Rep. 844; Genest *v.* Las Vegas Bldg. Assoc., 11 N. M. 251, 67 Pac. 743; Holmes *v.* Tyler, 8 N. M. 613, 45 Pac. 1129; State *v.* Chadwick, 10 Oreg. 423.

73. *California.*— San Francisco *v.* Itsell, 80 Cal. 57, 22 Pac. 74; McCullough *v.* Clark, 41 Cal. 298; Greenfield *v.* The Gunnell, 6 Cal. 67.

Illinois.— Craig *v.* McKinney, 72 Ill. 305.

Indiana.—Lange *v.* Dammier, 119 Ind. 567, 21 N. E. 749; Toledo Agricultural Works *v.* Work, 70 Ind. 253.

Iowa.— Smith *v.* Powell, 55 Iowa 215, 7 N. W. 602.

Kansas.— Boston L. & T. Co. *v.* Organ, 53 Kan. 386, 36 Pac. 733.

Kentucky.— Butler *v.* Church of Immaculate Conception, 14 Bush 540; Meador *v.* Turpin, 4 Metc. 93; Gordon *v.* Phelps, 6 J. J. Marsh. 218; Ingraham *v.* Arnold, 1 J. J. Marsh. 406.

Massachusetts.— See Butler *v.* Butler, 162 Mass. 524, 39 N. E. 182.

Missouri.— Huntington *v.* House, 22 Mo. 365.

New York.— Schwarz *v.* Oppold, 74 N. Y. 307; Wilson *v.* Bennett, 2 N. Y. Civ. Proc. 34; Buffalo *v.* Scranton, 20 Wend. 676; Richmond *v.* Tallmadge, 16 Johns. 307.

Oregon.— State *v.* Chadwick, 10 Oreg. 423.

Pennsylvania.— Casporus *v.* Jones, 7 Pa. St. 120.

South Carolina.— Stoney *v.* McNeill, Harp. 156.

Tennessee.— Loeb *v.* Nunn, 4 Heisk. 449.

Texas.— Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968; Williams *v.* Bailes, 9 Tex. 61; Ashcroft *v.* Stephens, 16 Tex. Civ. App. 341, 40 S. W. 1036.

Virginia.— Lewis *v.* Hicks, 96 Va. 91, 30 S. E. 466; Harnberger *v.* Cochran, 82 Va. 727, 1 S. E. 120; Wilson *v.* Mt. Pleasant Bank, 6 Leigh 570. See also Spencer *v.* Field, 97 Va. 38, 33 S. E. 380.

Wisconsin.—Kirby *v.* Corning, 54 Wis. 599, 12 N. W. 69.

See 39 Cent. Dig. tit. "Pleading," § 1415.

Mandatory statute.— Colo. Civ. Code, § 61, requiring all pleas, except demurrers, to be verified when a prior one has been, being mandatory, a lack of verification is not waived if objected to before the impaneling of the jury, by motion for judgment. Perras *v.* Denver, etc., R. Co., 5 Colo. App. 21, 36 Pac. 637.

Waiver as extending to new pleas.—If pleas in bar not accompanied by affidavit have been filed without objection on the part of plaintiff, but thereafter such pleas are withdrawn and new pleas are tendered by defendant, plaintiff does not thereby waive the right to insist on the lack of an affidavit as a valid objection to such new pleas. Spencer *v.* Field, 97 Va. 38, 33 S. E. 380.

74. Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228.

75. *Colorado.*—Speer *v.* Craig, 16 Colo. 478, 27 Pac. 891; Nichols *v.* Jones, 14 Colo. 61, 23 Pac. 89.

Illinois.— King *v.* Haines, 23 Ill. 340.

Indiana.—Wickhizer *v.* Bolin, 22 Ind. App. 1, 53 N. E. 238.

Iowa.— Turner *v.* Younker, 76 Iowa 258, 41 N. W. 10; Hughes *v.* Feeter, 18 Iowa 142.

Kansas.— Hoopes *v.* Buford, etc., Implement Co., 45 Kan. 549, 26 Pac. 34.

Maryland.— Hutton *v.* Marx, 69 Md. 252, 14 Atl. 684; Traber *v.* Traber, 50 Md. 1.

Missouri.— Huntington *v.* House, 22 Mo. 365.

Nebraska.— Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

New York.— McMullen *v.* Peart, 1 Silv. Sup. 161, 6 N. Y. Suppl. 354; Gilmore *v.* Hempstead, 4 How. Pr. 153.

Ohio.— Phillips *v.* Le June, 25 Ohio Cir. Ct. 107.

Tennessee.— Seifred *v.* People's Bank, 1 Baxt. 200.

See 39 Cent. Dig. tit. "Pleading," §§ 1416, 1417.

dictions the objection is waived where the copy of the pleading served is not returned within a reasonable time.[76]

C. Waiver of Want of Pleadings, Issue, or Joinder of Issue.[77] Failure to file any pleading which is necessary to form an issue, including a complaint, answer, or reply, or otherwise failing to join issue properly or at all upon any or all of the allegations appearing in the pleadings, is deemed waived by voluntarily proceeding to trial as though issue was properly joined.[78] Likewise where

76. Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429; Smith *v.* Mulliken, 2 Minn. 319; Hull *v.* Ball, 14 How. Pr. (N. Y.) 305.

77. **Absence of pleadings as objection which may first be urged on appeal** see APPEAL AND ERROR, 2 Cyc. 689.

Want of pleadings as cured by appearance see APPEARANCES, 3 Cyc. 525.

78. *Alabama.*— Glass *v.* Meyer, 124 Ala. 332, 26 So. 890; Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93; Andrews *v.* Birmingham Mineral R. Co., 99 Ala. 438, 12 So. 432; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88; Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141, 12 So. 86; Home Protection of North America *v.* Caldwell, 85 Ala. 607, 5 So. 338; Clark *v.* Rose, 75 Ala. 129; Kemper, etc., Nav., etc., Co. *v.* Schieffelin, 5 Ala. 493; Clark *v.* Stoddard, 3 Ala. 366; Baker *v.* Washington, 5 Stew. & P. 142; Bond *v.* Hills, 3 Stew. 283.

Arkansas.— Updegraff *v.* Marked Tree Lumber Co., 83 Ark. 154, 103 S. W. 606.

California.— San Luis Water Co. *v.* Estrada, 117 Cal. 168, 48 Pac. 1075; Crowley *v.* City R. Co., 60 Cal. 628; Gale *v.* Tuolumne Water Co., 14 Cal. 25. See also Harris *v.* Barnhart, 97 Cal. 546, 32 Pac. 589.

Colorado.— Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462; Learned *v.* Tritch, 6 Colo. 579; Taylor *v.* McLaughlin, 2 Colo. 12; Anderson *v.* Sloan, 1 Colo. 484.

Florida.— Frank *v.* Williams, 36 Fla. 136, 18 So. 351; Judge *v.* Moore, 9 Fla. 269.

Georgia.— Beard *v.* White, 120 Ga. 1018, 48 S. E. 400.

Illinois.— Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072; Kaestner *v.* Chicago First Nat. Bank, 170 Ill. 322, 48 N. E. 998; Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626; Strohm *v.* Hayes, 70 Ill. 41; Ohio, etc., R. Co. *v.* Middleton, 20 Ill. 629; Armstrong *v.* Mock, 17 Ill. 166; Ross *v.* Reddick, 2 Ill. 73; Chicago, etc., R. Co. *v.* Jennings, 114 Ill. App. 622 [*affirmed* in 217 Ill. 494, 75 N. E. 560]; Cummings *v.* Smith, 114 Ill. App. 35; O'Leary *v.* Zindt, 109 Ill. App. 309; Moreland *v.* Bebber, 102 Ill. App. 572; Supreme Court of Honor *v.* Barker, 96 Ill. App. 490; Wetz *v.* Greffe, 71 Ill. App. 313; Kellogg *v.* Boehme, 71 Ill. App. 643; West Chicago St. R. Co. *v.* Krueger, 68 Ill. App. 450; Funk *v.* Babbitt, 55 Ill. App. 124; People *v.* Ward, 41 Ill. App. 464; Greser *v.* People, 36 Ill. App. 415; Douglas *v.* Matson, 35 Ill. App. 538; Chicago *v.* Wood, 24 Ill. App. 40. But see Harney *v.* Lamborn, 3 Ill. 480; Ayres *v.* McConnel, 3 Ill. 307.

Indiana.—Citizen's Bank *v.* Bolen, 121 Ind. 301, 23 N. E. 146; McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120; Johnson *v.* Brisco, 92 Ind. 367; Andre *v.* Frybarger, 70 Ind. 280; Davis *v.* Pool, 67 Ind. 425; Houston *v.* Houston, 67 Ind. 276; Kirkpatrick *v.* Alexander, 60 Ind. 95; Holten *v.* Lake County, 55 Ind. 194; Waugh *v.* Waugh, 47 Ind. 580; Stingley *v.* Lafayette Second Nat. Bank, 42 Ind. 580; Pattison *v.* Vaughan, 40 Ind. 253; Train *v.* Gridley, 36 Ind. 241; Irvinson *v.* Van Riper, 34 Ind. 148; Sutherland *v.* Venard, 32 Ind. 483; Ringle *v.* Bicknell, 32 Ind. 369; Knowlton *v.* Murdock, 17 Ind. 487; Denny *v.* Moore, 13 Ind. 418; Norman *v.* Norman, 11 Ind. 288; Brower *v.* Nellis, 16 Ind. App. 183, 44 N. E. 939; Schnull *v.* McPheeters, 12 Ind. App. 509, 40 N. E. 758.

Iowa.— Gregory *v.* Bowlsby, 126 Iowa 588, 102 N. W. 517; Medland *v.* Walker, 96 Iowa 175, 64 N. W. 797; Wright *v.* Waddell, 89 Iowa 350, 56 N. W. 650; Long *v.* Valleau, 87 Iowa 675, 55 N. W. 31, 56 N. W. 748.

Kansas.— Chicago, etc., R. Co. *v.* Frazier, 66 Kan. 422, 71 Pac. 831; Kepley *v.* Carter, 49 Kan. 72, 30 Pac. 182; Cooper *v.* Davis Sewing-Mach. Co., 37 Kan. 231, 15 Pac. 235.

Kentucky.— Cain *v.* Flynn, 1 Dana 143.

Maryland.— Chappell *v.* Real Estate Pooling Co., 89 Md. 258, 42 Atl. 936; Soper *v.* Jones, 56 Md. 503; Ragan *v.* Gaither, 11 Gill & J. 472.

Minnesota.— Lyford *v.* Martin, 79 Minn. 243, 82 N. W. 479; Merchants' Nat. Bank *v.* Barlow, 79 Minn. 234, 82 N. W. 364; Clark *v.* Austin, 38 Minn. 487, 38 N. W. 615; Taylor *v.* Parker, 17 Minn. 469.

Mississippi.— Slaydon *v.* McDonald, 82 Miss. 504, 34 So. 357.

Missouri.— North St. Louis Bldg., etc., Assoc. *v.* Obert, 169 Mo. 507, 69 S. W. 1044; Ferguson *v.* Davidson, 147 Mo. 664, 49 S. W. 859; State *v.* Phillips, 137 Mo. 259, 38 S. W. 931; Turner *v.* Butler, 126 Mo. 131, 28 S. W. 77; Meader *v.* Malcolm, 78 Mo. 550; Bader *v.* Schult, 118 Mo. App. 22, 94 S. W. 834; Zongker *v.* People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486; Holke *v.* Herman, 87 Mo. App. 125; Bircher *v.* St. Louis Sheet Metal Ornament Co., 77 Mo. App. 509; Frank *v.* Frank, 6 Mo. App. 589.

Nebraska.— Gross *v.* Scheel, 67 Nebr. 223, 93 N. W. 418; Albion Milling Co. *v.* Weeping Water First Nat. Bank, 64 Nebr. 116, 89 N. W. 638; Missouri Pac. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169; Schuster *v.* Carson, 28 Nebr. 612, 44 N. W. 734.

New Mexico.— Herlow *v.* Orman, 3 N. M. 291, 6 Pac. 935; Waldez *v.* Archuleta, 3 N. M. 195, 5 Pac. 327.

New York.— Muldoon *v.* Blackwell, 84 N. Y. 646.

the parties have voluntarily tried the case as if certain matters were in issue, neither will be permitted afterward to object that such matters were not properly put in issue by the pleadings.[79] And failure to file a *similiter* is waived under this

North Carolina.— Davis *v.* Golston, 53 N. C. 28.

Oregon.— Minard *v.* McBee, 29 Oreg. 225, 44 Pac. 491.

Pennsylvania.— Morgan *v.* Westmoreland Electric Co., 213 Pa. St. 151, 62 Atl. 638; Lewisburg, etc., R. Co. *v.* Stees, 77 Pa. St. 332; Tams *v.* Bullitt, 35 Pa. St. 308; Good Intent Co. *v.* Hartzell, 22 Pa. St. 277; Ensley *v.* Wright, 9 Pa. St. 501; Long *v.* Long, 4 Pa. St. 29; Glenn *v.* Copeland, 2 Watts & S. 261; Sauerman *v.* Weckerly, 17 Serg. & R. 116; Jenkins *v.* Cutchens, 2 Miles 65; Franklin *v.* Mackey, 9 Lanc. Bar 197; Brown *v.* Headly, 3 Pa. Co. Ct. 76; Burke *v.* Society, 2 Leg. Rec. 15. *Contra*, see Pratt *v.* Phillips, 4 Yeates 467.

Rhode Island.— O'Connell *v.* King, 26 R. I. 544, 59 Atl. 926.

Tennessee.— Winn *v.* Fidelity Mut. Life Assoc., 100 Tenn. 360, 47 S. W. 93; Cherry *v.* Smith, 10 Heisk. 389.

Texas.— Jackson *v.* Marshall, 6 Tex. 324.

Virginia.— Kern *v.* Wyatt, 89 Va. 885, 17 S. E. 549; Bartley *v.* McKinney, 28 Gratt. 750.

West Virginia.— Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611; Baltimore, etc., R. Co. *v.* Bitner, 15 W. Va. 455, 36 Am. Rep. 820.

Wisconsin.— My Laundry Co. *v.* Schmeling, 129 Wis. 597, 109 N. W. 540; Killman *v.* Gregory, 91 Wis. 478, 65 N. W. 53; Stuckey *v.* Fritsche, 77 Wis. 329, 46 N. W. 59.

United States.— Havelock Bank *v.* Western Union Tel. Co., 141 Fed. 522, 72 C. C. A. 580; North Chicago St. R. Co. *v.* Burnham, 102 Fed. 669, 42 C. C. A. 584.

See 39 Cent. Dig. tit. "Pleading," §§ 1356, 1376, 1389.

If a party receives the word "replication" for a replication, it will be held as a replication suitable to the defense made. Boyers *v.* Pratt, 1 Humphr. (Tenn.) 90.

Where no reply is filed to a counter-claim or cross complaint, the rule applies. Conant *v.* Jones, 3 Ida. 606, 32 Pac. 250; Casad *v.* Holdridge, 50 Ind. 529; Arrowsmith *v.* Durell, 14 La. Ann. 849; Clinchy *v.* Apgar, 16 Misc. (N. Y.) 374, 38 N. Y. Suppl. 79; Romano *v.* Irsch, 7 Misc. (N. Y.) 147, 27 N. Y. Suppl. 246; Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

In order to avail of an omission to file a replication the party excepting must stand on the pleadings. Even when he moves for judgment in the lower court unsuccessfully he cannot introduce his proof as though a reply were in, and, after defeat on the merits, profit by an erroneous ruling on the motion. Holke *v.* Herman, 87 Mo. App. 125.

Inadvertent omission.— The joinder by defendants in the issues of law raised by the answers to certain of defendant's pleas without raising the objection that other pleas were not answered is an implied waiver of answer to them until after the final determination of the issues of law. People *v.* Weber, 92 Ill. 288.

Rule to file.— If replications have not been filed when the trial begins, defendant is bound to know it and failure to ask them for a rule against plaintiff to file them is equivalent to consenting that the trial, so far as the pleadings are concerned, may be commenced as if the issues were properly made up. J. S. Keator Lumber Co. *v.* Thompson, 144 U. S. 434, 12 S. Ct. 669, 36 L. ed. 495. See also Strohm *v.* Hayes, 70 Ill. 41.

Motion for judgment on the pleadings.— The absence of a reply to a special plea of contributory negligence is waived by failure to move for judgment on the pleadings, and merely moving for nonsuit or binding instructions. Louisville, etc., R. Co. *v.* Copas, 95 Ky. 460, 26 S. W. 179, 16 Ky. L. Rep. 14. See also Strohm *v.* Hayes, 70 Ill. 41.

Estoppel by evidence.— Where defendant sets forth in his answer a written release, but introduces evidence showing that such release had never been delivered, he is estopped from claiming the benefit of the admission arising out of plaintiff's failure to deny by affidavit the genuineness and due execution of the instrument. Clark *v.* Child, 66 Cal. 87, 4 Pac. 1058.

Want of a declaration or complaint.— Harney *v.* Lamborn, 3 Ill. 480; Ayres *v.* Doe, 3 Ill. 307; Andre *v.* Frybarger, 70 Ind. 280; Davis *v.* Goldston, 53 N. C. 28; Glenn *v.* Copeland, 2 Watts & S. (Pa.) 261; Burke *v.* Society, 2 Leg. Rec. (Pa.) 15.

Where the issues on the pleadings are not made up in accordance with the common law or the statute, they will be treated as regular where the parties have so treated them. Harrison *v.* People, 124 Ill. App. 519.

79. *California.*— People *v.* Swift, 96 Cal. 165, 31 Pac. 16; Hiatt *v.* Meridan School-Dist., 65 Cal. 481, 4 Pac. 464.

Illinois.—Allen *v.* Michel, 38 Ill. App. 313.

Iowa.— Fenner *v.* Crips, 109 Iowa 455, 80 N. W. 526; Great Western Printing Co. *v.* Tucker, 73 Iowa 755, 34 N. W. 205; Wire *v.* Foster, 62 Iowa 114, 17 N. W. 174; Clay *v.* Alcock, 23 Iowa 591.

Maryland.— Farmers', etc., Nat. Bank *v.* Hunter, 97 Md. 148, 54 Atl. 650.

Minnesota.— Erickson *v.* Fisher, 51 Minn. 300, 53 N. W. 638.

Missouri.— Henslee *v.* Cannefax, 49 Mo. 295; Campbell *v.* Seeley, 43 Mo. App. 23.

Montana.— Coulter *v.* Union Laundry Co., 34 Mont. 590, 87 Pac. 973.

Nebraska.— Parkins *v.* Missouri Pac. R. Co., 76 Nebr. 242, 107 N. W. 260.

New York.— Smith *v.* Floyd, 18 Barb. 522; Griffin *v.* Todd, 14 N. Y. Suppl. 351.

United States.— Kansas, etc., R. Co. *v.* Dye, 70 Fed. 24, 16 C. C. A. 604.

rule by going to trial.[80] So the want of a pleading is waived by submitting the case on an agreed statement of facts.[81] When a party goes to trial without asking for a default and without objecting to the want of a plea or answer, the cause will be treated as though the general issue or general denial had been filed.[82]

D. Waiver of Objection to Want, or Insufficiency, of Bill of Particulars.[83] Failure to file a bill of particulars is waived by failure to move, demur, or otherwise object before trial.[84] So all objections to the filing, service, or form of a bill of particulars are waived by pleading over or going to trial without objection.[85]

Where a case is tried as though certain allegations of the complaint were denied, they must be deemed denied. Weidenmueller *v.* Stearns Ranchos Co., 128 Cal. 623, 61 Pac. 374; Tracy *v.* Craig, 55 Cal. 91.

Requesting an instruction to the jury in regard to a particular issue is a waiver of the objection that such issue was not raised by the pleadings. Fenner *v.* Crips, 109 Iowa 455, 80 N. W. 526.

But when no one appears for a party at the trial it is error to proceed as though his pleading were answered when such is not the case. Moreland *v.* Bebber, 102 Ill. App. 572.

80. Barrs *v.* Brace, 38 Fla. 265, 20 So. 991; St. Johns, etc., R. Co. *v.* Ransom, 33 Fla. 406, 14 So. 892; St. Johns, etc., R. Co. *v.* Shalley, 33 Fla. 397, 14 So. 890; Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270; Wilson *v.* Hunter, 25 Fla. 469, 6 So. 432; Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714; Hefling *v.* Van Zandt, 162 Ill. 162, 44 N. E. 424; Hughes *v.* Richter, 161 Ill. 409, 43 N. E. 1066; Hazen *v.* Pierson, 83 Ill. 241; St. Louis, etc., R. Co. *v.* Brown, 34 Ill. App. 552; Williamson *v.* Nigh, 58 W. Va. 629, 53 S. E. 124.

81. Vanderline *v.* Smith, 18 Mo. App. 55; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Saltonstall *v.* Russell, 152 U. S. 628, 14 S. Ct. 733, 38 L. ed. 576.

82. Loomis *v.* Riley, 24 Ill. 307; Hose *v.* Allwein, 91 Ind. 497; Wilcox *v.* Majors, 88 Ind. 203; Felger *v.* Etzell, 75 Ind. 417; Lewis *v.* Bortsfield, 75 Ind. 390; McAlister *v.* Howell, 42 Ind. 15; Helton *v.* Wells, 12 Ind. App. 605, 40 N. E. 930; Young *v.* Gentis, 7 Ind. App. 199, 32 N. E. 796.

83. **Remedy by objecting to evidence** see *infra*, XIV, I, 4.

84. *California.*— Silva *v.* Bair, 141 Cal. 599, 75 Pac. 162; Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263, objections should be made before trial when bill was served several months before.

Florida.— Muller *v.* Ocala Foundry, etc., Works, 49 Fla. 189, 38 So. 64.

Illinois.— Howe *v.* Frazer, 117 Ill. 191, 7 N. E. 481; Eddie *v.* Eddie, 61 Ill. 134.

Indiana.— Chamness *v.* Chamness, 53 Ind. 301.

Kansas.— Mugan *v.* Haley, 16 Kan. 68.

Maine.— Harrington *v.* Tuttle, 64 Me. 474.

Maryland.— Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1077.

Massachusetts.— Preston *v.* Neale, 12 Gray 222.

Michigan.— Peninsular Stove Co. *v.* Osmun, 73 Mich. 570, 41 N. W. 693; McGowan *v.* Lamb, 66 Mich. 615, 33 N. W. 881.

South Carolina.— Long *v.* Kinard, Harp. 47.

See 39 Cent. Dig. tit. "Pleading," § 1421½.

Where proper demand made.— A declaration being insufficient, and defendant having properly demanded a bill of particulars, he waives nothing by pleading to the declaration or noticing cause for trial, and therefore, on plaintiff's refusal to comply with the demand, his evidence is properly excluded. Peterson *v.* Tilden, 44 Mich. 168, 6 N. W. 270.

Where, after the furnishing of an amended bill of particulars by order of the court, defendant makes no objection to its items for over five months and until the very moment of trial, objection thereto is waived and a motion made for a further bill of particulars comes too late and is properly denied. Ames *v.* Bell, 5 Cal. App. 1, 89 Pac. 619.

After plea to the merits.— No objection to the lack or insufficiency of a bill of particulars can be made after a plea upon the merits (Fowler *v.* Meyers, 59 Ill. App. 248; Dunker *v.* Schlotfeldt, 49 Ill. App. 652; Southern Bldg., etc., Assoc. *v.* Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206; Semmes *v.* Lee, 21 Fed. Cas. No. 12,652, 3 Cranch C. C. 439) as after a general denial (Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112).

85. *Alabama.*— Pryor *v.* Johnson, 32 Ala. 27.

California.— McCarthy *v.* Mt. Tecarte Land, etc., Co., 110 Cal. 687, 43 Pac. 391; Dennison *v.* Smith, 1 Cal. 437; Flynn *v.* Seale, 2 Cal. App. 665, 84 Pac. 263.

Connecticut.— Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112; Vila *v.* Weston, 33 Conn. 42.

Delaware.— Mitchell *v.* Yerger, 3 Pennew. 87, 50 Atl. 62.

Massachusetts.— Turner *v.* Twing, 9 Cush. 512.

Michigan.— Buckeye Tp. *v.* Clark, 90 Mich. 432, 51 N. W. 528.

New York.— Hoag *v.* Weston, 10 N. Y. Civ. Proc. 92. But see Matthews *v.* Hubbard, 47 N. Y. 428.

Virginia.— Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

Washington.— Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835.

See 39 Cent. Dig. tit. "Pleading," § 1421.

Compare St. Louis, etc., R. Co. *v.* McReynolds, 24 Kan. 368.

Waiver by failure to promptly return.— The objection that the bill of particulars ac-

E. Objections Relating to Parties — 1. In General.[86] Objections relating to parties must generally be made promptly or they will be deemed waived.[87] For instance, where a person is substituted as a party in place of another, failure to then raise any objection is a waiver of the right to object thereto.[88] So where persons are allowed to intervene as parties without objection, the objection thereto is waived.[89] So the failure of plaintiff to object to the withdrawal of defendant

companying a verified complaint is not itself verified is waived by retaining the bill without objection instead of returning it within a reasonable time. Paine *v.* Smith, 32 Wis. 335. Where defendant accepted a further bill of particulars and retained it for five months without objection, the denial of her motion to preclude plaintiff from giving evidence at the trial in support of his complaint as amended thereby was proper. McCourt *v.* Cowperthwait, 63 N. Y. Suppl. 240.

Waiver of compliance with rule.— A defendant who procures a rule for a bill of particulars is in a position to demand a compliance with the rule or a dismissal of the common counts from the declaration; but if he does neither and goes to trial he will be considered as having waived a compliance with the rule for a bill of particulars. Wilson *v.* St. John's Hospital, 92 Ill. App. 413.

When evidence may be excluded.— Where defendant demanded a bill of particulars and was not satisfied with the statement rendered, he should have demanded a more particular bill, and if it was not then furnished, apply for an order requiring such bill, and until this was done he was in no position to demand that the evidence be excluded for failure to comply with his demand for a more particular bill. Davis *v.* Johnson, 96 Minn. 130, 104 N. W. 766.

In California it has been held that where the account furnished on order is not satisfactory, if the opposite party intends to object to the introduction of evidence on the subject, an order for its exclusion should be obtained previous to the trial. Conner *v.* Hutchinson, 17 Cal. 279.

In Michigan, under a rule of the circuit court providing that where plaintiff's bill of particulars is insufficient the court may, in its discretion, nonsuit him or require a more complete bill to be delivered, a defendant who has made no objection, by motion, to the bill delivered, cannot object to the introduction of any evidence under it, on the trial, on the ground of its insufficiency. Strutz *v.* Brown, 110 Mich. 687, 68 N. W. 981.

86. See, generally, Parties, 30 Cyc. 140 *et seq.*

Death or disability of party as ground for dismissal or nonsuit see Dismissal and Nonsuit, 14 Cyc. 439.

87. See *infra*, XIV, E, 1–5.

88. *Alabama.*— Nelson *v.* Gorce, 34 Ala. 565.

California.— See Ford *v.* Bushard, 116 Cal. 273, 48 Pac. 119, holding that an objection to an *ex parte* order of substitution of parties is waived by answering the supplemental complaint of the substituted plaintiff.

Illinois.—Chicago Legal News Co. *v.* Browne, 103 Ill. 317 [*affirming* 5 Ill. App. 250].

Kentucky.— Water *v.* Harrison, 4 Bibb 87. See also Preston *v.* Breckinridge, 86 Ky. 619, 6 S. W. 641, 10 Ky. L. Rep. 2.

Maryland.— James *v.* Boyd, 1 Harr. & G. 1.

New York.— See Rogers *v.* Ingersoll, 103 N. Y. App. Div. 490, 93 N. Y. Suppl. 140 [*affirmed* in 185 N. Y. 592, 78 N. E. 1111], holding that where an order substituting a plaintiff was not appealed from, and defendant proceeded with the trial of the cause before a referee, he waived any defect in the papers on which the motion for substitution was granted.

Texas.— Armstrong *v.* Bean, 59 Tex. 492.

See 37 Cent. Dig. tit. "Parties," § 175.

Express waiver.— The stipulation of the assignee in bankruptcy, waiving objection to an order substituting one to whom the bankrupt plaintiff had assigned the claim sued on, on notice to defendant's attorneys and the bankrupt's widow and next of kin, is properly received. Schell *v.* Devlin, 82 N. Y. 333.

Subsequent acquiescence.— Where, in an action in the municipal court, an order was entered impleading defendant, by his own consent, as owner of money deposited in court, to which order plaintiff objected, but, after it was granted, had judgment entered against such defendant, any objection as to the propriety of the order was waived, and the question of jurisdiction will not be considered on appeal. Jacobs *v.* Liberman, 51 N. Y. App. Div. 542, 64 N. Y. Suppl. 953 [*affirming* 29 Misc. 354, 60 N. Y. Suppl. 493].

89. *California.*— People *v.* Reis, 76 Cal. 269, 18 Pac. 309; Smith *v.* Penny, 44 Cal. 161; McKenty *v.* Gladwin, 10 Cal. 227.

Indiana.— Barner *v.* Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502.

Iowa.— Sanxey *v.* Iowa City Glass Co., 63 Iowa 707, 17 N. W. 429.

Louisiana.— Lotz *v.* Folger, 10 La. Ann. 20; Herman *v.* Pfister, 2 La. 455.

Minnesota.— Boxell *v.* Robinson, 82 Minn. 26, 84 N. W. 635.

Missouri.— Mulherin *v.* Simpson, 124 Mo. 610, 28 S. W. 86; Weil *v.* Simmons, 66 Mo. 617. See also Kansas City *v.* Schroeder, 196 Mo. 281, 93 S. W. 405, holding that where, after the overruling of certain motions to strike an intervening petition, defendants answered and went to trial on the merits, they thereby waived their objection that the court erred in permitting such petitions to be filed.

See 37 Cent. Dig. tit. "Parties," § 175.

Compare Douthit *v.* Nabors, 133 Ala. 453, 32 So. 625.

Want of formal order.— After the trial of issues raised upon the filing of a petition of intervention, an objection that there was no formal order of the court granting leave to

from the case on filing a disclaimer waives the right to afterward complain thereof.[90] And failure to object at the time to the reinstatement of a party previously stricken out on demurrer for misjoinder is a waiver thereof.[91] An irregularity in that new parties are brought in by amendment in an action of tort may be waived by going to trial without objection.[92]

2. Misnomer or Misdescription.[93] The misnomer of a party is waived where there is an appearance and a plea to the merits without raising the objection,[94] and the objection cannot be first urged on appeal.[95] In those jurisdictions where pleas in abatement are preserved, the objection must be urged by such a plea,[96] and where abolished the objection must be urged by answer.[97] So an objection to a pleading because of the description of parties by their initials is waived by pleading to the merits.[98]

3. Improper Plaintiff.[99] Want of legal capacity to sue and the objection that the action is not brought in the name of the real party in interest is waived where the objection is not urged by demurrer or answer, the objection being required to be urged by demurrer where apparent on the face of the complaint and by answer where not so apparent.[1]

intervene will not be entertained. People's Sav. Inst. *v.* Miles, 76 Fed. 252, 22 C. C. A. 152.

90. Cunningham *v.* Spillman, 72 Ind. 62.

91. Dalton *v.* Moore, 141 Fed. 311, 72 C. C. A. 459.

92. Farraud *v.* Kavanaugh, 132 Mich. 436, 93 N. W. 1083.

93. As ground for motion to dismiss or for nonsuit see Dismissal and Nonsuit, 14 Cyc. 432.

94. *Georgia.*— McIntosh County *v.* Aiken Canning Co., 123 Ga. 647, 51 S. E. 585. See also Gate City Cotton Mills *v.* Cherokee Mills, 128 Ga. 170, 57 S. E. 320.

Illinois.— Moss *v.* Flint, 13 Ill. 570.

Indiana.— Vogel *v.* Brown Tp., 112 Ind. 299, 14 N. E. 77, 2 Am. St. Rep. 187.

Louisiana.— Dougart *v.* Desangle, 10 Rob. 430.

Michigan.— Stofflet *v.* Strome, 101 Mich. 197, 59 N. W. 411; Baldwin *v.* Talbot, 43 Mich. 11, 4 N. W. 547.

Minnesota.— French *v.* Donohue, 29 Minn. 111, 12 N. W. 354.

Oklahoma.— Kingfisher *v.* Pratt, 4 Okla. 284, 43 Pac. 1068.

Pennsylvania.— Freeland *v.* Pennsylvania Cent. Ins. Co., 94 Pa. St. 504.

South Carolina.— Waldrop *v.* Leonard, 22 S. C. 118.

Tennessee.— East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652.

Washington.— Schreiner *v.* Stanton, 26 Wash. 563, 67 Pac. 219.

See 37 Cent. Dig. tit. "Parties," § 177.

95. See Appeal and Error, 2 Cyc. 688.

96. *Alabama.*— Lehman *v.* Warner, 61 Ala. 455.

Illinois.—Riemann *v.* Tyroler, etc., Verein, 104 Ill. App. 413.

Indiana.— Huntington County *v.* Huffman, 134 Ind. 1, 31 N. E. 570.

Texas.— Houston, etc., R. Co. *v.* Weaver, (Civ. App. 1897) 41 S. W. 846.

United States.— Scull *v.* Briddle, 21 Fed. Cas. No. 12,570, 2 Wash. 200.

97. New York *v.* Union R. Co., 31 Misc. (N. Y.) 451, 64 N. Y. Suppl. 483, statute.

98. *Louisiana.*— Parmely *v.* Bradbury, 13 La. 351.

Montana.— Boyd *v.* Platner, 5 Mont. 226, 2 Pac. 346.

Nebraska.— Walgomood *v.* Randolph, 22 Nebr. 493, 35 N. W. 217.

Washington.— Schreiner *v.* Stanton, 26 Wash. 563, 67 Pac. 219.

Wisconsin.— Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279.

See 37 Cent. Dig. tit. "Parties," § 177.

99. As ground for motion to dismiss or for nonsuit see Dismissal and Nonsuit, 14 Cyc. 438.

1. *Alaska.*—Dryden *v.* Sewell, 2 Alaska 182.

Arkansas.— Kraft *v.* Moore, 76 Ark. 391, 89 S. W. 51.

California.— Susanville *v.* Long, 144 Cal. 362, 77 Pac. 987.

Illinois.— See Westphal *v.* Sipe, 62 Ill. App. 111.

Kansas.— Maelzer *v.* Swan, 75 Kan. 496, 89 Pac. 1037; Burton *v.* Cochran, 5 Kan. App. 508, 47 Pac. 569.

Kentucky.—International Development Co. *v.* Howard, 113 Ky. 450, 68 S. W. 459, 24 Ky. L. Rep. 266; Levi *v.* Mendell, 1 Duv. 77; Petty *v.* Malier, 14 B. Mon. 246. See also Wayland *v.* Porterfield, 1 Metc. 638.

Louisiana.— Gualden *v.* Kansas City Southern R. Co., 106 La. 409, 30 So. 889; Lewis *v.* Homer, 23 La. Ann. 254; Wells *v.* Wells, 23 La. Ann. 224; Taylor *v.* Littell, 21 La. Ann. 665; Silvernagle *v.* Fluker, 21 La. Ann. 188; Dyer *v.* Drew, 14 La. Ann. 657; Parker *v.* Moore, 2 La. Ann. 1017; Cheevers *v.* Burke, 19 La. 429. *Compare* Thibodeaux *v.* Comeau, 30 La. Ann. 1119.

Massachusetts.— See Wood *v.* Dean, 165 Mass. 559, 43 N. E. 510.

Michigan.— Johr *v.* St. Clair County, 38 Mich. 532.

Minnesota.— Tapley *v.* Tapley, 10 Minn. 448, 88 Am. Dec. 76.

Mississippi.—Mobile Branch Bank *v.* Rhew, 37 Miss. 110.

Missouri.— Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82; Fowler *v.* Williams, 62 Mo. 403; Bevier *v.* Watson, 113 Mo. App.

4. Defect of Parties.[2] A defect of parties plaintiff or defendant is waived unless the objection is urged by demurrer, if the defect appears on the face of the complaint, or by plea or answer where the defect does not so appear.[3] And

506, 87 S. W. 612; Alexander *v.* Wade, 106 Mo. App. 141, 80 S. W. 19; Barnes *v.* Stanley, 95 Mo. App. 688, 69 S. W. 682; Barber Asphalt Paving Co. *v.* Young, 94 Mo. App. 204, 68 S. W. 107, 1115; Roman *v.* Boston Trading Co., 87 Mo. App. 186; New England L. & T. Co. *v.* Brown, 59 Mo. App. 461; State *v.* Hunt, 46 Mo. App. 616; Galbreath *v.* Newton, 45 Mo. App. 312; Mitchell *v.* Railton, 45 Mo. App. 273.

New Mexico.— Palatine Ins. Co. *v.* Santa Fé Mercantile Co., (1905) 82 Pac. 363.

New York.— Nanz *v.* Oakley, 122 N. Y. 631, 25 N. E. 263; Perkins *v.* Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659; Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. 422, 3 Keyes 497, 3 Transcr. App. 203, 6 Abb. Pr. N. S. 46; Hillyer *v.* Le Roy, 84 N. Y. App. Div. 129, 82 N. Y. Suppl. 80; Jemmerson *v.* Kennedy, 55 Hun 47, 4 Silv. Sup. 114, 7 N. Y. Suppl. 296; Palen *v.* Bushnell, 51 Hun 423, 4 N. Y. Suppl. 63 (holding that a revival by a receiver will not be prevented after issue joined, because plaintiff has not obtained leave of court to sue, as, under Code Civ. Proc. § 499, an objection to plaintiff's capacity to sue is waived, if not made by demurrer or answer); Robbins *v.* Woolcott, 66 Barb. 63; Van Amringe *v.* Barnett, 8 Bosw. 357; Jackson *v.* Whedon, 1 E. D. Smith 141; Pyro-Gravure Co. *v.* Staber, 30 Misc. 658, 64 N. Y. Suppl. 520; American Typefounders Co. *v.* Conner, 6 Misc. 391, 26 N. Y. Suppl. 742; Hathaway *v.* Orient Ins. Co., 11 N. Y. Suppl. 413; Brownson *v.* Gifford, 8 How. Pr. 389 [*affirmed* in 28 N. Y. 242]. See Hanna *v.* People's Nat. Bank, 76 N. Y. App. Div. 224, 78 N. Y. Suppl. 516 [*reversing* on other grounds 35 Misc. 517, 71 N. Y. Suppl. 1076].

North Carolina.— See Mann *v.* Baker, 142 N. C. 235, 55 S. E. 102.

Oregon.— Owings *v.* Turner, 48 Oreg. 462, 87 Pac. 160; Wilson *v.* Wilson, 26 Oreg. 251, 38 Pac. 185.

Pennsylvania.— See Bredin *v.* Dwen, 2 Watts 95.

Wisconsin.— Beloit *v.* Heineman, 128 Wis. 398, 107 N. W. 334; Hughes *v.* Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526; Meyer *v.* Barth, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124; Robbins *v.* Deverill, 20 Wis. 142.

United States.— Perkins *v.* Ingersoll, 19 Fed. Cas. No. 10,988, 1 Dill. 417.

See 37 Cent. Dig. tit. "Parties," § 168.

Where defendants demur on the ground that the complaint does not state a cause of action, they cannot thereafter object to plaintiff's legal capacity to sue. Van Zandt *v.* Van Zandt, 7 N. Y. Suppl. 706, 17 N. Y. Civ. Proc. 448.

But a judgment in favor of a receiver may be attacked for the first time on appeal, on the ground that he sued in his own name, instead of the name of the party for whom he was appointed receiver. Wisener *v.* Myers, 3 Pa. Dist. 687.

Right to first urge objection on appeal see Appeal and Error, 2 Cyc. 684–687.

An objection that a suit is carried on without authority from plaintiff must be made in some jurisdictions at the first term when the appearance of the party making the objection is entered. Mathewson *v.* Eureka Powder Works, 44 N. H. 289.

As distinguished from want of cause of action.—While an objection relating to the legal capacity to sue is waived where not urged by demurrer or by answer, yet where the objection does not relate to the capacity of plaintiff to sue but to the fact that it appears from the petition that the right of action which is sought to be enforced does not exist in plaintiff but in another on whose behalf plaintiff is not authorized to sue, such objection is not waived by failure to raise it by demurrer or answer. Buckingham *v.* Buckingham, 36 Ohio St. 68.

2. As ground for dismissal or nonsuit see Dismissal and Nonsuit, 14 Cyc. 439.

As ground for motion for arrest of judgment see Judgments, 23 Cyc. 827.

3. *Alabama.*— Berlin *v.* Sheffield Coal, etc., Co., 124 Ala. 322, 26 So. 933; Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170. See also Boswell *v.* Morton, 20 Ala. 235.

Arizona.— Stiles *v.* Samainego, 3 Ariz. 48, 20 Pac. 607.

Arkansas.— Less *v.* English, 75 Ark. 288, 87 S. W. 447; Bevens *v.* Barnett, (1893) 22 S. W. 160; Clark *v.* Gramling, 54 Ark. 525, 16 S. W. 475; Molen *v.* Orr, 44 Ark. 486.

California.— Reclamation Dist. No. 551 *v.* Van Loben Sels, 145 Cal. 181, 78 Pac. 638; Florence *v.* Helmes, 136 Cal. 613, 69 Pac. 429 (holding that under Code Civ. Proc. §§ 430, 434, specifying grounds of demurrer to a complaint, including defects of parties, and declaring that, if no objections be taken either by demurrer or answer, they must be deemed waived except as to the questions of jurisdiction and statement of a cause of action, a general demurrer admits sufficiency of parties); Ashton *v.* Zeila Min. Co., 134 Cal. 408, 66 Pac. 494; Lasar *v.* Johnson, 125 Cal. 549, 58 Pac. 161; Woodbury *v.* Nevada Southern R. Co., 120 Cal. 463, 52 Pac. 730; Ah Tong *v.* Earle Fruit Co., 112 Cal. 679, 45 Pac. 7; Williams *v.* Southern Pac. R. Co., 110 Cal. 457, 42 Pac. 974; Foley *v.* Bullard, 99 Cal. 516, 33 Pac. 1081; Smith *v.* Dorn, 96 Cal. 73, 30 Pac. 1024; Potter *v.* Dear, 95 Cal. 578, 30 Pac. 777; Cramer *v.* Tittle, 79 Cal. 332, 21 Pac. 750; Baldwin *v.* Second St. Cable R. Co., 77 Cal. 390, 19 Pac. 644; Trenor *v.* Central Pac. R. Co., 50 Cal. 222; Pavisich *v.* Bean, 48 Cal. 364; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Hastings *v.* Stark, 36 Cal. 122; Wendt *v.*

under the rule that defects or objections which are apparent from the face of the

Ross, 33 Cal. 650; Gillam *v.* Sigman, 29 Cal. 637; Burroughs *v.* Lott, 19 Cal. 125; Sands *v.* Pfeiffer, 10 Cal. 258; Dunn *v.* Tozer, 10 Cal. 167; Whitney *v.* Stark, 8 Cal. 514, 68 Am. Dec. 360; Alvarez *v.* Brannan, 7 Cal. 503, 63 Am. Dec. 274; Andrews *v.* Mokelumne Hill Co., 7 Cal. 330; Beard *v.* Knox, 5 Cal. 252, 63 Am. Dec. 125; Warner *v.* Wilson, 4 Cal. 310; Baker *v.* Lambert, 5 Cal. App. 708, 91 Pac. 340.

Colorado.— Gutheil Park Inv. Co. *v.* Montclair, 32 Colo. 420, 76 Pac. 1050; Medano Ditch Co. *v.* Adams, 29 Colo. 317, 68 Pac. 431; Farmcomb *v.* Stern, 18 Colo. 279, 32 Pac. 612; Abbott *v.* Yuma County, 18 Colo. 6, 30 Pac. 1031; Melsheimer *v.* Hommel, 15 Colo. 475, 24 Pac. 1079; Fitzgerald *v.* Burke, 14 Colo. 559, 23 Pac. 993; Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Cowell *v.* South Denver Real Estate Co., 16 Colo. App. 108, 63 Pac. 991; Wilson *v.* Welch, 8 Colo. App. 210, 46 Pac. 106; Union Pac., etc., R. Co. *v.* Perkins, 7 Colo. App. 184, 42 Pac. 1047; Poundstone *v.* Maben, 5 Colo. App. 70, 37 Pac. 37; Poundstone *v.* Holt, 5 Colo. App. 66, 37 Pac. 35. See also Simonton *v.* Rohm, 14 Colo. 51, 23 Pac. 86, holding that an objection that the individual names of the defendants as copartners are not set out in the complaint, although appearing for the first time at the close of plaintiff's evidence, is not seasonably made. *Compare* Faust *v.* Goodnow, 4 Colo. App. 352, 36 Pac. 71.

Connecticut.— Loomis *v.* Hollister, 75 Conn. 275, 53 Atl. 579.

Georgia.— Mahone *v.* Bryant, 56 Ga. 294; Starnes *v.* Quin, 6 Ga. 84.

Illinois.— Glos *v.* Patterson, 204 Ill. 540, 68 N. E. 443; Bragg *v.* Olson, 128 Ill. 540, 21 N. E. 519; American Bible Soc. *v.* Price, 115 Ill. 623, 5 N. E. 126; Swannell *v.* Byers, 123 Ill. App. 545.

Indiana.— Boseker *v.* Chamberlain, 160 Ind. 114, 66 N. E. 448; State *v.* McClelland, 138 Ind. 395, 37 N. E. 799; Jones *v.* Ahrens, 116 Ind. 490, 19 N. E. 334; Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Talmage *v.* Bierhouse, 103 Ind. 270, 2 N. E. 716; Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217; Foster *v.* Bringham, 99 Ind. 505; Giles *v.* Canary, 99 Ind. 116; Jackson *v.* Weaver, 98 Ind. 307; Citizens' State Bank *v.* Adams, 91 Ind. 280; Lee *v.* Basey, 85 Ind. 543; Newcome *v.* Wiggins, 78 Ind. 306; Cleaveland *v.* Vajen, 76 Ind. 146; Leedy *v.* Nash, 67 Ind. 311; Thomas *v.* Wood, 61 Ind. 132; Bray *v.* Black, 57 Ind. 417; Mobley *v.* Slonaker, 48 Ind. 256; Shore *v.* Taylor, 46 Ind. 345; Baltimore, etc., R. Co. *v.* McWhinney, 36 Ind. 436; Groves *v.* Ruby, 24 Ind. 418; Mewherter *v.* Price, 11 Ind. 199; Womack *v.* McAhren, 9 Ind. 6; Hines *v.* Consolidated Coal, etc., Co., 29 Ind. App. 563, 64 N. E. 886; Ayres *v.* Foster, 25 Ind. App. 99, 57 N. E. 725; Sheridan Gas, etc., Co. *v.* Pearson, 19 Ind. App. 252, 49 N. E. 357, 65 Am. St. Rep. 402; Loufer *v.* Stottlemyer, 16 Ind. App. 221, 44 N. E. 1008; Darnall *v.* Simpkins, 10 Ind. App. 469, 38 N. E. 219; Carico *v.* Moore, 4 Ind. App. 20, 29 N. E. 928.

Iowa.—Anderson *v.* Acheson, 132 Iowa 744, 110 N. W. 335; Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Fulliam *v.* Drake, 105 Iowa 615, 75 N. W. 479; Coe *v.* Anderson, 92 Iowa 515, 61 N. W. 177; McKeever *v.* Jenks, 59 Iowa 300, 13 N. W. 295; Lillie *v.* Case, 54 Iowa 177, 6 N. W. 254; Melick *v.* Tama City First Nat. Bank, 52 Iowa 94, 2 N. W. 1021; Bouton *v.* Orr, 51 Iowa 473, 1 N. W. 704; Ryan *v.* Mullinix, 45 Iowa 631; Bonnon *v.* Urton, 3 Greene 228.

Kansas.— Foster *v.* Lyon County, 63 Kan. 43, 64 Pac. 1037; Chicago, etc., Bridge Co. *v.* Fowler, 55 Kan. 17, 39 Pac. 727; Hurd *v.* Simpson, 47 Kan. 245, 26 Pac. 465; Lyons County *v.* Coman, 43 Kan. 676, 23 Pac. 1038; Union Pac. R. Co. *v.* Kindred, 43 Kan. 134, 23 Pac. 112; Coulson *v.* Wing, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503; Thomas *v.* Reynolds, 29 Kan. 304; Seip *v.* Tilghman, 23 Kan. 289; Humphreys *v.* Keith, 11 Kan. 108; Parker *v.* Wiggins, 10 Kan. 420; Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494; Lyons *v.* Bodenhamer, 7 Kan. 455; Ryan *v.* Phillips, 3 Kan. App. 704, 44 Pac. 909.

Kentucky.— Rittenhouse *v.* Clark, 110 Ky. 147, 61 S. W. 33, 22 Ky. L. Rep. 1610; Mahan *v.* Steele, 109 Ky. 31, 58 S. W. 446, 22 Ky. L. Rep. 546; Fidelity, etc., Co. *v.* Ballard, etc., Co., 105 Ky. 253, 48 S. W. 1074, 20 Ky. L. Rep. 1169; Prichard *v.* Peace, 98 Ky. 99, 32 S. W. 296, 17 Ky. L. Rep. 662; Metcalfe *v.* Brand, 86 Ky. 331, 5 S. W. 773, 9 Am. St. Rep. 282, 9 Ky. L. Rep. 801; McAllister *v.* Louisville Sav. Bank, 80 Ky. 684, 4 Ky. L. Rep. 682; Hardee *v.* Hall, 12 Bush 327; Waits *v.* McClure, 10 Bush 763; Graves *v.* Lebanon Nat. Bank, 10 Bush 23, 19 Am. Rep. 50; Justice *v.* Phillips, 8 Bush 200; Taylor *v.* Stowell, 4 Metc. 175; Gill *v.* Johnson, 1 Metc. 649; Albro *v.* Lawson, 17 B. Mon. 642; Carpenter *v.* Miles, 17 B. Mon. 598; Johnson *v.* Chandler, 15 B. Mon. 584; Haley *v.* Cochran, 102 S. W. 852, 31 Ky. L. Rep. 505; Combs *v.* Krish, 84 S. W. 562, 27 Ky. L. Rep. 154; Becker *v.* Neasom, 51 S. W. 446, 21 Ky. L. Rep. 356; Simrall *v.* Covington, 29 S. W. 880, 16 Ky. L. Rep. 770; Gaither *v.* O'Doherty, 12 S. W. 306, 11 Ky. L. Rep. 594; Smith *v.* Maupin, 4 Ky. L. Rep. 359; Williams *v.* Walters, 3 Ky. L. Rep. 336.

Louisiana.—Sicard *v.* Schwab, 112 La. 475, 36 So. 500; Dyer *v.* Drew, 14 La. Ann. 657; Edwards *v.* Smith, 10 La. Ann. 536; Forgay *v.* Lambeth, 2 La. Ann. 589; Pascal *v.* Ducros, 8 Rob. 112, 31 Am. Dec. 294; Rothschild *v.* Bowers, 2 Rob. 380.

Maine.— McKenney *v.* Bowie, 94 Me. 397, 47 Atl. 918; Richmond *v.* Toothaker, 69 Me. 451; Reed *v.* Wilson, 39 Me. 585.

Massachusetts.— Townsend *v.* Wheatland, 186 Mass. 343, 71 N. E. 782; Nickerson *v.*

pleading must be taken advantage of by demurrer the objection is waived,

Spindell, 164 Mass. 25, 41 N. E. 105; Lyman *v.* Hampshire, 140 Mass. 311, 3 N. E. 211; Derickson *v.* Whitney, 6 Gray 248; Holmes *v.* Marden, 12 Pick. 169.

Michigan.— Nichels *v.* Western Underwriters' Assoc., 129 Mich. 417, 89 N. W. 56; Powers *v.* Hibbard, 114 Mich. 533, 72 N. W. 339; Butterfield *v.* Gilchrist, 53 Mich. 22, 18 N. W. 542.

Minnesota.— Mason *v.* St. Paul F., etc., Ins. Co., 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433; Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086; Moore *v.* Bevier, 60 Minn. 240, 62 N. W. 281; Thurston *v.* Thurston, 58 Minn. 279, 59 N. W. 1017; Christian *v.* Bowman, 49 Minn. 99, 51 N. W. 663; Arthur *v.* Willius, 44 Minn. 409, 46 N. W. 851; Sandwich Mfg. Co. *v.* Herriott, 37 Minn. 214, 33 N. W. 782; Davis *v.* Chouteau, 32 Minn. 548, 21 N. W. 748; Tarbox *v.* Gorman, 31 Minn. 62, 16 N. W. 466; Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261, 276; Blakeley *v.* Le Duc, 22 Minn. 476; Miller *v.* Darling, 22 Minn. 303; McRoberts *v.* Southern Minnesota R. Co., 18 Minn. 108; Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372; Lowry *v.* Harris, 12 Minn. 255; Cover *v.* Baytown, 12 Minn. 124.

Mississippi.—Chamberlin-Hunt Academy *v.* Port Gibson Mfg. Co., 80 Miss. 517, 32 So. 116.

Missouri.— Hutsell *v.* Crewse, 138 Mo. 1, 39 S. W. 449; Boland *v.* Ross, 120 Mo. 208, 25 S. W. 524; Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077; Dodson *v.* Lomax, 113 Mo. 555, 21 S. W. 25; Crook *v.* Tull, 111 Mo. 283, 20 S. W. 8; Franke *v.* St. Louis, 110 Mo. 516, 19 S. W. 938; Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422; Mechanics' Bank *v.* Gilpin, 105 Mo. 17, 16 S. W. 524; Rogers *v.* Tucker, 94 Mo. 346, 7 S. W. 414; Turner *v.* Lord, 92 Mo. 113, 4 S. W. 420; Pike *v.* Martindale, 91 Mo. 268, 1 S. W. 858; Hicks *v.* Jackson, 85 Mo. 283; Baier *v.* Berberich, 85 Mo. 50; Hammons *v.* Renfrow, 84 Mo. 332; Thompson *v.* Chicago, etc., R. Co., 80 Mo. 521; State *v.* Berning, 74 Mo. 87; Sumner *v.* Cottey, 71 Mo. 121; Donnan *v.* Intelligencer Printing, etc., Co., 70 Mo. 168; Van Hoozier *v.* Hannibal, etc., R. Co., 70 Mo. 145; Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268; Rickey *v.* Tenbroeck, 63 Mo. 563; McConnell *v.* Brayner, 63 Mo. 461; Gimbel *v.* Pignero, 62 Mo. 240; Horstkotte *v.* Menier, 50 Mo. 158; Boal *v.* Morgner, 46 Mo. 48; Kerr *v.* Bell, 44 Mo. 120; Mississippi Planing Mill Co. *v.* Presbyterian Church, 54 Mo. 520; Farmers' Bank *v.* Fudge, 109 Mo. App. 186, 82 S. W. 1112; Van Stewart *v.* Miles, 105 Mo. App. 242, 79 S. W. 988; Dunnaway *v.* O'Reilly, 102 Mo. App. 718, 79 S. W. 1004; Meriwether *v.* Joy, 85 Mo. App. 634; Eastin *v.* Joyce, 85 Mo. App. 433; Swinney *v.* Gouty, 83 Mo. App. 549; American Smelter Co. *v.* Manchester F. Assur. Co., 71 Mo. App. 658; Stewart *v.* Gibson, 71 Mo. App. 232; Ellingson *v.* Chicago, etc., R. Co., 60 Mo. App. 679; Toovey *v.* Baxter, 59 Mo. App. 470; New England L. & T. Co. *v.* Brown, 59 Mo. App. 461; Leucke *v.* Tredway, 45 Mo. App. 507; St. Charles First Presb. Church *v.* Kellar, 39 Mo. App. 441; Williams *v.* Jones, 23 Mo. App. 132; Fruin *v.* Mitchell Furniture Co., 20 Mo. App. 313; State *v.* True, 20 Mo. App. 176. But see Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994 (holding that the rule does not apply to proceedings in partition); Seay *v.* Sanders, 88 Mo. App. 478 (holding that where the defect did not appear from the complaint, a nonjoinder of a person as defendant is not waived by failure to demur or answer).

Montana.— Duignan *v.* Montana Club, 16 Mont. 189, 40 Pac. 294; Parchen *v.* Peck, 2 Mont. 567.

Nebraska.— Edney *v.* Baun, 70 Nebr. 159, 97 N. W. 252; Engel *v.* Dado, 66 Nebr. 400, 92 N. W. 629; Union Pac. R. Co. *v.* Vincent, 58 Nebr. 171, 78 N. W. 457; Ayres *v.* Duggan, 57 Nebr. 750, 78 N. W. 296; Castile *v.* Ford, 53 Nebr. 507, 73 N. W. 945; Stephens *v.* Harding, 48 Nebr. 659, 67 N. W. 746; Maurer *v.* Miday, 25 Nebr. 575, 41 N. W. 395; Hall *v.* Strode, 19 Nebr. 658, 28 N. W. 312; Crook *v.* Vandevoort, 13 Nebr. 505, 14 N. W. 470.

New York.— Ostrander *v.* Weber, 114 N. Y. 95, 21 N. E. 112; Reed *v.* Hayt, (1888) 17 N. E. 418; Carr *v.* Security Ins. Co., 109 N. Y. 504, 17 N. E. 369; Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Farwell *v.* Importers', etc., Nat. Bank, 90 N. Y. 483, 27 Alb. L. J. 173; Davis *v.* Bechstein, 69 N. Y. 440, 25 Am. Rep. 218; Roberts *v.* Johnson, 58 N. Y. 613 [*affirming* 37 N. Y. Super. Ct. 157]; Potter *v.* Ellice, 48 N. Y. 321; Finnegan *v.* Carraher, 47 N. Y. 493; Patchin *v.* Peck, 38 N. Y. 39; Donnell *v.* Walsh, 33 N. Y. 43, 88 Am. Dec. 361 [*affirming* 6 Bosw. 621]; Merritt *v.* Walsh, 32 N. Y. 685; Hosley *v.* Black, 28 N. Y. 438 [*affirming* 26 How. Pr. 97]; Byxbie *v.* Wood, 24 N. Y. 607 [*affirming* 2 Bosw. 267]; Scrantom *v.* Farmers', etc., Bank, 24 N. Y. 424 [*affirming* 33 Barb. 527]; Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Wills *v.* Pennell, 116 N. Y. App. Div. 493, 101 N. Y. Suppl. 1017; Fawcett *v.* New York, 112 N. Y. App. Div. 155, 98 N. Y. Suppl. 286; Donovan *v.* Twist, 105 N. Y. App. Div. 171, 93 N. Y. Suppl. 990; Ward *v.* Smith, 95 N. Y. App. Div. 432, 88 N. Y. Suppl. 700; Hyde *v.* Lesser, 93 N. Y. App. Div. 320, 87 N. Y. Suppl. 878; Bauer *v.* Parker, 82 N. Y. App. Div. 289, 81 N. Y. Suppl. 995; Felts *v.* Collins, 67 N. Y. App. Div. 430, 73 N. Y. Suppl. 796; Steinbach *v.* Prudential Ins. Co., 62 N. Y. App. Div. 133, 70 N. Y. Suppl. 809 [*reversed* on other grounds in 172 N. Y. 471, 65 N. E. 281]; Denike *v.* Denike, 44 N. Y. App. Div. 621, 60 N. Y. Suppl. 110 [*affirmed* in 167 N. Y. 585, 60 N. E. 1110]; Van Dam *v.* Tapscott, 40 N. Y. App. Div. 36, 57 N. Y. Suppl. 534; Pickett *v.* Metropolitan L. Ins. Co., 20 N. Y. App. Div. 114, 46 N. Y. Suppl. 693; Thompson *v.* New York El. R. Co., 16 N. Y. App. Div. 449, 45 N. Y. Suppl. 64; Philips *v.* New

although taken by answer if the defect appears on the face of the com-

York El. R. Co., 14 N. Y. App. Div. 595, 44 N. Y. Suppl. 28; Palmer *v.* Marshall, 81 Hun 15, 30 N. Y. Suppl. 567; Maitland *v.* Baldwin, 70 Hun 267, 24 N. Y. Suppl. 29; Briggs *v.* Carroll, 50 Hun 586, 3 N. Y. Suppl. 686 [*affirmed* in 117 N. Y. 288, 22 N. E. 1054]; Fairmount Coal, etc., Co. *v.* Hasbrecht, 48 Hun 206; McCreery *v.* Gordon, 38 Hun 467; Brown *v.* Brown, 29 Hun 498; Maxwell *v.* Pratt, 24 Hun 448; Browning *v.* Marvin, 22 Hun 547; Risley *v.* Wightman, 13 Hun 163; Dickinson *v.* Vanderpoel, 2 Hun 626, 5 Thomps. & C. 168; Chaffee *v.* Morss, 67 Barb. 252; Brown *v.* Cherry, 56 Barb. 635; Wells *v.* Cone, 55 Barb. 585; McVean *v.* Scott, 46 Barb. 379; Tremper *v.* Conklin, 44 Barb. 456 [*affirmed* in 44 N. Y. 58]; Conklin *v.* Barton, 43 Barb. 435; Crouch *v.* Parker, 40 Barb. 94; Hawkins *v.* Avery, 32 Barb. 551; Abbe *v.* Clark, 31 Barb. 238; Van Deusen *v.* Young, 29 Barb. 9 [*reversed* on other grounds in 29 N. Y. 9]; Loomis *v.* Tifft, 16 Barb. 541; Ingraham *v.* Baldwin, 12 Barb. 9 [*affirmed* in 9 N. Y. 45]; Wemple *v.* McManus, 59 N. Y. Super. Ct. 418, 15 N. Y. Suppl. 86; Wotherspoon *v.* Wotherspoon, 49 N. Y. Super. Ct. 152; Rhodes *v.* Dymoek, 33 N. Y. Super. Ct. 141; Purchase *v.* Mattison, 6 Duer 587 [*reversed* on other grounds in 25 N. Y. 211, 15 Abb. Pr. 402, 25 How. Pr. 161]; Benson *v.* Paine, 2 Hilt. 552, 9 Abb. Pr. 28, 17 How. Pr. 407; Belshaw *v.* Colie, 1 E. D. Smith 213; Parker *v.* Paine, 37 Misc. 768, 76 N. Y. Suppl. 942; Amberg *v.* Manhattan L. Ins. Co., 32 Misc. 89, 65 N. Y. Suppl. 424 [*reversed* on other grounds in 56 N. Y. App. Div. 343, 67 N. Y. Suppl. 872]; Kaffeman *v.* Stern, 23 Misc. 599, 53 N. Y. Suppl. 260; McManus *v.* Western Assur. Co., 22 Misc. 269, 48 N. Y. Suppl. 820 [*affirmed* in 43 N. Y. App. Div. 550, 48 N. Y. Suppl. 820, 60 N. Y. Suppl. 1143]; National Bank of Commerce *v.* State Bank, 17 Misc. 691, 41 N. Y. Suppl. 471; Continental Trust Co. *v.* Nobel, 10 Misc. 325, 30 N. Y. Suppl. 994; Knapp *v.* New York El. R. Co., 4 Misc. 408, 24 N. Y. Suppl. 324; Hallen *v.* Jones, 2 Misc. 249, 21 N. Y. Suppl. 943; Rose *v.* Merchants' Trust Co., 96 N. Y. Suppl. 946; Ringle *v.* O'Matthiessen, 39 N. Y. Suppl. 92; Douglass *v.* Leonard, 17 N. Y. Suppl. 591 [*reversing* 14 N. Y. Suppl. 274]; Garrick *v.* Menut, 17 N. Y. Suppl. 455; Selye *v.* Zimmer, 15 N. Y. Suppl. 881; Chase *v.* Jamestown St. R. Co., 15 N. Y. Suppl. 35; Albere *v.* Kingsland, 13 N. Y. Suppl. 794; Clason *v.* Baldwin, 13 N. Y. Suppl. 681, 20 N. Y. Civ. Proc. 291 [*reversed* on other grounds in 129 N. Y. 183, 29 N. E. 226]; Cushman *v.* Family Fund Soc., 13 N. Y. Suppl. 428; Ward *v.* Deane, 10 N. Y. Suppl. 421; Persch *v.* Simmons, 3 N. Y. Suppl. 783; Chamberlain *v.* Insurance Co. of North America, 3 N. Y. Suppl. 701; Warner *v.* Ross, 9 Abb. N. Cas. 385; Astie *v.* Leeming, 3 Abb. N. Cas. 25; Lee *v.* Wilkes, 19 Abb. Pr. 355, 27 How. Pr. 336; Lewis *v.* Graham, 4 Abb. Pr. 106; Rochester Bank *v.* Monteath, 1 Den. 402, 43 Am. Dec. 681; Indiana *v.* Woram, 6 Hill 33, 40 Am. Dec. 378. *Compare* Sperry *v.* Hellman, 2 Misc. 414, 21 N. Y. Suppl. 1014.

North Carolina.— Cherry *v.* Lake Drummond Canal, etc., Co., 140 N. C. 422, 53 S. E. 138; Howe *v.* Harper, 127 N. C. 356, 37 S. E. 505; S. C. Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869; Kornegay *v.* Farmers', etc., Steam-Boat Co., 107 N. C. 115, 12 S. E. 123; Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241; Silver Valley Min. Co. *v.* Baltimore Gold, etc., Min., etc., Co., 99 N. C. 445, 6 S. E. 735, 101 N. C. 679, 8 S. E. 361; Lunn *v.* Shermer, 93 N. C. 164; Usry *v.* Suit, 91 N. C. 406; Davidson *v.* Elms, 67 N. C. 228; Lewis *v.* McNatt, 65 N. C. 63 (holding that objection cannot be taken under a plea of the general issue); Graham *v.* Houston, 15 N. C. 232 (holding that a plea of non-joinder of defendants comes too late after defendant has pleaded in chief). *Compare* Styers *v.* Alspaugh, 118 N. C. 631, 24 S. E. 422.

North Dakota.— Ross *v.* Page, 11 N. D. 458, 92 N. W. 822.

Ohio.— Umsted *v.* Buskirk, 17 Ohio St. 113; Hoop *v.* Plummer, 14 Ohio St. 448; Cuyahoga Falls Real Estate Assoc. *v.* McCaughy, 2 Ohio St. 152; Milius *v.* Marsh, 1 Disn. 512, 12 Ohio Dec. (Reprint) 765; Smith *v.* Smith, 10 Ohio Dec. (Reprint) 494, 21 Cinc. L. Bul. 295; Caldwell *v.* Devinney, 7 Ohio Dec. (Reprint) 599, 4 Cinc. L. Bul. 117; Mains *v.* Henkle, 2 Ohio Dec. (Reprint) 530, 3 West. L. Month. 593; Belmont Branch Bank *v.* Durbin, 2 Ohio Dec. (Reprint) 372, 2 West. L. Month. 543; Stevens *v.* Swallow, 2 Ohio Dec. (Reprint) 305, 2 West. L. Month. 379.

Oregon.— Cooper *v.* Thomason, 30 Oreg. 161, 45 Pac. 296; Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997.

Pennsylvania.— Dixon *v.* Wood, 22 Pa. Co. Ct. 634. See also Conrow *v.* Conrow, (1889) 16 Atl. 522. But see Reinheimer *v.* Hemingway, 35 Pa. St. 432, holding that in an action of replevin by one tenant in common of a chattel, failure to plead the non-joinder in abatement is not a waiver of that objection.

South Carolina.— Lee *v.* Unkefer, 77 S. C. 460, 58 S. E. 343; Battle *v.* Columbia, etc., R. Co., 70 S. C. 329, 49 S. E. 849; Shull *v.* Caughman, 54 S. C. 203, 32 S. E. 301; Allen *v.* Cooley, 53 S. C. 77, 30 S. E. 721; Ross *v.* Linder, 12 S. C. 592; Daniels *v.* Moses, 12 S. C. 130; Evans *v.* McLucas, 12 S. C. 56; Featherston *v.* Norris, 7 S. C. 472; Bryce *v.* Bowers, 11 Rich. Eq. 41.

South Dakota.— Burnett *v.* Costello, 15 S. D. 89, 87 N. W. 575; Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

Texas.— Roane *v.* Ross, 84 Tex. 46, 19 S. W. 339; De Perez *v.* De Everett, 73 Tex. 431, 11 S. W. 388; Jasper, etc., R. Co. *v.* Peck, (Civ. App. 1907) 102 S. W. 776; St. Louis Southwestern R. Co. *v.* Parks, 40 Tex. Civ. App. 480, 90 S. W. 343; Chicago, etc., R. Co. *v.* Seale, (Civ. App. 1905) 89 S. W. 997; Liner *v.* J. B. Watkins Land Mortg. Co., 29 Tex. Civ. App. 187, 68 S. W. 311; Chicago,

plaint.[4] The rule applies equally well to a counter-claim which fails to include necessary parties.[5] The rule, however, is subject to the exception that where the granting of relief against a defendant would prejudice the rights of third persons, and their rights cannot be saved by the judgment, and the controversy cannot be completely determined without their presence, failure to join such persons as parties is not waived by not raising the objection by demurrer or answer.[6] Whether a defect of parties is waived by failure to plead or demur where

etc., R. Co. *v.* Erwin, (Civ. App. 1901) 65 S. W. 496; Mott *v.* Ruenbuhl, 1 Tex. App. Civ. Cas. § 599. See also Hill *v.* Newman, 67 Tex. 265, 3 S. W. 271; Leonard *v.* Worsham, 18 Tex. Civ. App. 410, 45 S. W. 336; Doll *v.* Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87. *Compare* Shelby *v.* Burtis, 18 Tex. 644.

Utah.— Henderson *v.* Turngren, 9 Utah 432, 35 Pac. 495; Spencer *v.* Van Cott, 2 Utah 337.

Vermont.— Armour *v.* Ward, 78 Vt. 60, 61 Atl. 765; Lockwood *v.* White, 65 Vt. 466, 26 Atl. 639; Paine *v.* Tilden, 20 Vt. 554. *Compare* McGregor *v.* Balch, 17 Vt. 562.

Washington.—Grissom *v.* Hofius, 39 Wash. 51, 80 Pac. 1002; Dickerson *v.* Spokane, 26 Wash. 292, 66 Pac. 381; Bignold *v.* Carr, 24 Wash. 413, 64 Pac. 519; Hannegan *v.* Roth, 12 Wash. 695, 44 Pac. 256; Harrington *v.* Miller, 4 Wash. 808, 31 Pac. 325; Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760. See also Baxter *v.* Scoland, 2 Wash. Terr. 86, 3 Pac. 638.

West Virginia.— See Dower *v.* Church, 21 W. Va. 23.

Wisconsin.— Radant *v.* Werheim Mfg. Co., 106 Wis. 600, 82 N. W. 562; Evens, etc., Fire Brick Co. *v.* Hadfield, 93 Wis. 665, 68 N. W. 468; Jones *v.* Foster, 67 Wis. 296, 30 N. W. 697; Hallam *v.* Stiles, 61 Wis. 270, 21 N. W. 42; Weatherby *v.* Meiklejohn, 61 Wis. 67, 20 N. W. 374; Dreutzer *v.* Lawrence, 58 Wis. 594, 17 N. W. 423; Newhall-House Stock Co. *v.* Flint, etc., R. Co., 47 Wis. 516, 2 N. W. 1123; Yates *v.* Shepardson, 39 Wis. 173; Hall *v.* Allen, 31 Wis. 691; Lefebre *v.* Utter, 22 Wis. 189; Akerly *v.* Vilas, 21 Wis. 377; Akerly *v.* Vilas, 21 Wis. 88; Robbins *v.* Deverill, 20 Wis. 142; Harbeck *v.* Southwell, 18 Wis. 418; Kimball *v.* Noyes, 17 Wis. 695; Gundry *v.* Vivian, 17 Wis. 436; Cord *v.* Hirsch, 17 Wis. 403; Carney *v.* La Crosse, etc., R. Co., 15 Wis. 503.

Wyoming.— Gilland *v.* Union Pac. R. Co., 6 Wyo. 185, 43 Pac. 508.

United States.— Minor *v.* Mechanics Bank, 1 Pet. 46, 7 L. ed. 47; Seymour *v.* Du Bois, 145 Fed. 1003; Gentry *v.* Singleton, 128 Fed. 679, 63 C. C. A. 231 [*affirming* 4 Indian Terr. 346, 69 S. W. 898]; Buckingham *v.* Dake, 112 Fed. 258, 50 C. C. A. 492; Tootle *v.* Coleman, 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120; Clarion First Nat. Bank *v.* Hamor, 49 Fed. 45, 1 C. C. A. 153; Chandler *v.* Byrd, 5 Fed. Cas. No. 2,591*b*, Hempst. 222.

See 37 Cent. Dig. tit. "Parties," §§ 169–171.

In Mississippi, the non-joinder of a person as a party is waived, by statute, unless written notice thereof is given with defendant's plea. Darrill *v.* Dodds, 78 Miss. 912, 30 So. 4; Walker *v.* Hall, 66 Miss. 390, 6 So. 318; Stauffer *v.* Garrison, 61 Miss. 67. See also Stiles *v.* Inman, 55 Miss. 469.

In Massachusetts, in an action for injury to personal property, an objection on account of the failure to join as a party plaintiff one who has a joint interest with plaintiff in the property cannot be made if not pleaded in abatement. Meaney *v.* Kehoe, 181 Mass. 424, 63 N. E. 925; Sherman *v.* Fall River Iron Works Co., 5 Allen 213.

Defect of parties as objection which may be first urged on appeal see APPEAL AND ERROR, 2 Cyc. 687.

Previous to the codes, the misjoinder of a party could be taken advantage of only by a plea in abatement. Lee *v.* Wilkes, 27 How. Pr. (N. Y.) 336.

But detinue cannot be maintained by one of several tenants in common, and although the non-joinder be not pleaded in abatement, it may be taken advantage of upon the general issue, by demurrer or by motion in arrest of judgment. Cain *v.* Wright, 50 N. C. 282, 72 Am. Dec. 551.

4. Gassett *v.* Crocker, 10 Abb. Pr. (N. Y.) 133.

5. Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

6. *Arkansas.*— Mayes *v.* Hendry, 33 Ark. 240.

California.— Mitau *v.* Roddan, 149 Cal. 1, 84 Pac. 145, 6 L. R. A. 275; O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236.

Colorado.— Peck *v.* Peck, 33 Colo. 421, 80 Pac. 1063; Colorado State Bank *v.* Davidson, 7 Colo. App. 91, 42 Pac. 687.

Kentucky.— Johnson *v.* Chandler, 15 B. Mon. 584.

Missouri.— See Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994.

Nevada.— Robinson *v.* Kind, 23 Nev. 330, 47 Pac. 1, 977.

New York.— Steinbach *v.* Prudential Ins. Co., 172 N. Y. 471, 65 N. E. 281 [*reversing* 62 N. Y. App. Div. 133, 70 N. Y. Suppl. 809]; Moulton *v.* Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; Osterhoudt *v.* Ulster County, 98 N. Y. 239; Knickerbocker Trust Co. *v.* Oneonta, etc., R. Co., 111 N. Y. App. Div. 812, 97 N. Y. Suppl. 673; Thompson *v.* New York El. R. Co., 16 N. Y. App. Div. 449, 45 N. Y. Suppl. 64; Elias *v.* Schweyer, 13 N. Y. App. Div. 336, 43 N. Y. Suppl. 55. See also Kent *v.* Ætna Ins. Co., 84 N. Y. App. Div. 428, 82 N. Y. Suppl. 817.

Ohio.— Mains *v.* Henkle, 2 Ohio Dec. (Reprint) 530, 3 West. L. Month. 593.

Wisconsin.— McDougald *v.* New Richmond Roller Mills Co., 125 Wis. 121, 103 N. W. 244; Emerson *v.* Schwindt, 108 Wis. 167, 84

defendant has no knowledge thereof until after the introduction of evidence upon the trial is a mooted question.[7] Objections to non-joinder are waived where the party relying thereon successfully opposes the motion by plaintiff for leave to amend in the respect complained of.[8] So where a demurrer for defect of parties is insufficient in form, the objection is waived.[9] A demurrer on the ground of a defect of parties "plaintiff" does not present the question as to a defect of parties "defendant" or whether the alleged necessary party should be brought in before the trial.[10] Where an action is brought by one having no cause of action whatever, the statute requiring a defect of parties to be raised by demurrer or answer is not applicable.[11]

5. MISJOINDER OF PARTIES.[12] At common law the misjoinder of a party could be given in evidence under a general issue or taken advantage of at any stage of the case at which it appeared.[13] At present, however, in most jurisdictions, the objection that there is a misjoinder of parties, either plaintiff or defendant, is waived unless urged by demurrer or answer;[14] although where there is not only a misjoinder

N. W. 186, demurrer insufficient because merely for "defect of parties" without going further into details.

See 37 Cent. Dig. tit. "Parties," §§ 169–171. See also APPEAL AND ERROR, 2 Cyc. 687.

7. See Gilland *v.* Union Pac. R. Co., 6 Wyo. 185, 43 Pac. 508. *Compare* Young *v.* Stickney, 46 Oreg. 101, 79 Pac. 345, holding that where defendant did not take advantage of a defect in parties plaintiff when it was disclosed during the taking of plaintiff's evidence, it was too late to raise the question after verdict by motion for a new trial.

In Kansas, the rule that a defect of parties is waived where not urged by demurrer or answer is subject to the exception that where the defect is not discovered until during the trial, especially where plaintiff has concealed the real facts and thus misled defendant, defendant may then raise the objection without an amendment of the answer. Atchison, etc., R. Co. *v.* Hucklebridge, 62 Kan. 506, 64 Pac. 58. But see Coulson *v.* Wing, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503; Seip *v.* Tilghman, 23 Kan. 289; Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494.

8. Fulton *v.* Cox, 40 Cal. 101.

9. Emerson *v.* Schwindt, 108 Wis. 177, 84 N. W. 186.

10. Kent *v.* Ætna Ins. Co., 84 N. Y. App. Div. 428, 82 N. Y. Suppl. 817.

11. Poor *v.* Watson, 92 Mo. App. 89.

12. **As ground for dismissal or nonsuit** see DISMISSAL AND NONSUIT, 14 Cyc. 439.

As ground for motion for arrest of judgment see JUDGMENTS, 23 Cyc. 827.

13. Bullock *v.* Hayward, 10 Allen (Mass.) 460; Merchants' Ins. Co. *v.* Buckner, 110 Fed. 345, 49 C. C. A. 80.

14. *Alabama.*— Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357, 11 So. 365; Blake *v.* Harlan, 80 Ala. 37. See also Lehman *v.* Greenhut, 88 Ala. 478, 7 So. 299.

California.— Learned *v.* Tangeman, 64 Cal. 334, 4 Pac. 191; Rowe *v.* Bacigalluppi, 21 Cal. 633; Jacks *v.* Cooke, 6 Cal. 164; Warner *v.* Wilson, 4 Cal. 310; Conde *v.* Dreisam Gold Min., etc., Co., 3 Cal. App. 583, 86 Pac. 825.

Colorado.— Brahoney *v.* Denver, etc., R. Co., 14 Colo. 27, 23 Pac. 172; Marriott *v.* Clise, 12 Colo. 561, 21 Pac. 909.

Georgia.— See Maynard *v.* Ponder, 75 Ga. 664.

Illinois.— Helmuth *v.* Bell, 150 Ill. 263, 37 N. E. 230. See Peirce *v.* Walters, 164 Ill. 560, 45 N. E. 1068 [*affirming* 63 Ill. App. 562]; Belton *v.* Fisher, 44 Ill. 32.

Kansas.— Hurd *v.* Simpson, 47 Kan. 372, 27 Pac. 961, 47 Kan. 245, 26 Pac. 465; Lyons *v.* Bodenhamer, 7 Kan. 455; Schwartzel *v.* Karnes, 2 Kan. App. 782, 44 Pac. 41.

Kentucky.—Logan *v.* Cloyd, 1 A. K. Marsh. 201.

Missouri.— Bonsor *v.* Madison County, 204 Mo. 84, 102 S. W. 494; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Ragan *v.* Kansas City, etc., R. Co., 111 Mo. 456, 20 S. W. 234; Lass *v.* Eisleben, 50 Mo. 122; Sœding *v.* Bartlett, 35 Mo. 90; Leucke *v.* Tredway, 45 Mo. App. 507; Anderson *v.* McPike, 41 Mo. App. 328.

Montana.— Conklin *v.* Fox, 3 Mont. 208.

Nebraska.— Goble *v.* Swobe, 64 Nebr. 838, 90 N. W. 919; Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280, holding that the objection that there are too many defendants joined in a petition cannot be raised by an objection, made by defendant at the trial, to the introduction of any testimony, for the reason that the petition fails to state a cause of action.

New Jersey.— See Lyman *v.* Place, 26 N. J. Eq. 30.

New York.— Jacobs *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 134, 94 N. Y. Suppl. 954 [*affirmed* in 186 N. Y. 586, 79 N. E. 1108]; Tucker *v.* Manhattan R. Co., 78 Hun 439, 29 N. Y. Suppl. 202; Ames *v.* Harper, 48 Barb. 56; Dillaye *v.* Wilson, 43 Barb. 261; Leavitt *v.* Fisher, 4 Duer 1; Lowrey *v.* Bates, 26 Misc. 407, 56 N. Y. Suppl. 197; Ensign *v.* Ensign, 14 N. Y. St. 181. *Compare* Covey *v.* Covey, 64 Hun 540, 19 N. Y. Suppl. 487; Case *v.* Price, 9 Abb. Pr. 111, 17 How. Pr. 348, holding that defendant does not, by omitting to object to the misjoinder of improper parties by demurrer or answer, waive his right to raise the objection on the taxation of costs.

of defendants but also a failure to state a cause of action against any one of the defendants, the objection is not waived by a failure to urge it by demurrer or answer.[15] Where misjoinder is a ground for demurrer, the objection is waived unless urged by demurrer where the misjoinder appears on the face of the pleading.[16] In some jurisdictions where the remedy is by motion rather than by demurrer the objection is waived unless taken advantage of by motion.[17]

F. Objections to Demurrers and Rulings Thereon — 1. Waiver of Objection to Sustaining Demurrer.[18] Objection to the sustaining of a demurrer is waived by the party against whom the demurrer is filed moving to dismiss his own action,[19] or filing an amended or substituted pleading in place of the one held

Ohio.— Sprigg *v.* Irwin, 8 Ohio S. & C. Pl. Dec. 668. But see Masters *v.* Freeman, 17 Ohio St. 323.

Pennsylvania.— See Ehret *v.* Schuylkill River, etc., Co., 151 Pa. St. 158, 24 Atl. 1068.

Texas.— Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; Colorado Nat. Bank *v.* Scott, (1891) 16 S. W. 997; Burton *v.* Archinard, (Civ. App. 1899) 49 S. W. 684. See also Howard *v.* Britton, 71 Tex. 286, 9 S. W. 73; Braum *v.* Paulson, (Civ. App. 1906) 95 S. W. 617; Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974.

Utah.— Sidney Stevens Implement Co. *v.* South Ogden Land, etc., Co., 20 Utah 267, 58 Pac. 843.

Vermont.— Passumpsic Sav. Bank *v.* Buck, 71 Vt. 190, 44 Atl. 93. *Compare* Goodale *v.* Frost, 59 Vt. 491, 8 Atl. 280, holding that objection to a misjoinder of a wife with her husband, in an action on book-account to recover for her personal services rendered during coverture, may be taken on the coming in of the auditor's report.

United States.—Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; Mackay *v.* Fox, 121 Fed. 487, 57 C. C. A. 439; U. S. *v.* Agee, 108 Fed. 10, 47 C. C. A. 152. See also Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279; Kittredge *v.* Race, 92 U. S. 116, 23 L. ed. 488.

See 37 Cent. Dig. tit. "Parties," §§ 172–174.

Compare White *v.* Portland, 67 Conn. 272, 34 Atl. 1022; Dodge *v.* Wilkinson, 3 Metc. (Mass.) 292.

A misjoinder of plaintiffs is not waived by a reference of the case under rule of court. Porter *v.* Dickerman, 11 Gray (Mass.) 482.

In Mississippi the misjoinder of a party plaintiff is no ground for reversal, where objection was not made as prescribed by Code, § 1511, and the recovery was in the name of the parties only who had a right of action. Jackson *v.* Dunbar, 68 Miss. 288, 10 So. 38.

Objection as first urgable on appeal see Appeal and Error, 2 Cyc. 688.

15. Higgins *v.* Rockwell, 2 Duer (N. Y.) 650.

16. *Arkansas.*— Gossett *v.* Kent, 19 Ark. 602.

California.— Kippen *v.* Ollasson, 136 Cal. 640, 69 Pac. 293.

Colorado.— People *v.* Washington County Dist. Ct., 18 Colo. 293, 32 Pac. 819; Johnson *v.* Bott, 18 Colo. App. 469, 72 Pac. 612; Colorado Coal, etc., Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251.

Illinois.— Latham *v.* McGinnis, 29 Ill. App. 152.

Missouri.—Hudson *v.* Wright, 204 Mo. 412, 103 S. W. 8; Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422; Kellogg *v.* Malin, 62 Mo. 429; Russell *v.* Defrance, 39 Mo. 506; Daugherty *v.* Burgess, 118 Mo. App. 557, 94 S. W. 594; Burkharth *v.* Stephens, 117 Mo. App. 425, 94 S. W. 720; Doyle *v.* St. Louis Transit Co., 103 Mo. App. 19, 77 S. W. 471; Jones *v.* St. Louis, etc., R. Co., 89 Mo. App. 653; Finney *v.* Randolph, 68 Mo. App. 557.

New York.— Kelly *v.* Jay, 79 Hun 535, 29 N. Y. Suppl. 933; Higgins *v.* Rockwell, 2 Duer 650; Baggott *v.* Boulger, 2 Duer 160.

North Carolina.— Hocutt *v.* Wilmington, etc., R. Co., 124 N. C. 214, 32 S. E. 681.

Rhode Island.— Sayles *v.* Tibbitts, 5 R. I. 79.

Texas.— San Antonio, etc., R. Co. *v.* Jackson, 38 Tex. Civ. App. 201, 85 S. W. 445.

Virginia.— Vaiden *v.* Stubblefield, 28 Gratt. 153.

See 37 Cent. Dig. tit. "Parties," §§ 172–174.

Compare Erwin *v.* Fergson, 5 Ala. 158.

Contra.— See Collins *v.* Mansfield, 13 Ohio Cir. Ct. 258, 7 Ohio Cir. Dec. 445.

17. Mitchell *v.* McLeod, 127 Iowa 733, 104 N. W. 349; Lull *v.* Anamosa Nat. Bank, 110 Iowa 537, 81 N. W. 784; Merchants' Ins. Co. *v.* Buckner, 110 Fed. 345, 49 C. C. A. 80, construing Kentucky statute. *Compare* Faivre *v.* Gillman, 84 Iowa 573, 51 N. W. 46; Cogswell *v.* Murphy, 46 Iowa 44; Rhoads *v.* Booth, 14 Iowa 575.

In Iowa, inasmuch as a demurrer does not lie on the misjoinder of parties, it is held that failure to demur does not waive the objection. Bort *v.* Yaw, 46 Iowa 323.

18. **Pleading in bar after overruling of plea in abatement as waiver of ruling on plea in abatement** see Abatement and Revival, 1 Cyc. 136.

Necessity for exception to rulings on demurrer to authorize review on appeal see Appeal and Error, 2 Cyc. 717.

Waiver on appeal.—Amendment of pleading after demurrer sustained to it as waiver of objection to ruling on demurrer see Appeal and Error, 2 Cyc. 645.

19. Lowman *v.* West, 7 Wash. 407, 35 Pac. 130. See Jones *v.* Pitts, 98 Ga. 521, 25 S. E. 573.

bad on demurrer,[20] or by an agreement of the parties waiving all objections to the

Dismissing one of two improperly united causes, upon leave granted, is a waiver of error in sustaining a demurrer to the complaint on the ground that the two causes were improperly joined. Tripp *v.* Yankton, 11 S. D. 353, 77 N. W. 580.

20. *Alabama.*— Gaines *v.* Virginia, etc., Coal Co., 124 Ala. 394, 27 So. 477; Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723.

California.—Brittan *v.* Oakland Sav. Bank, 112 Cal. 1, 44 Pac. 339; Ganceart *v.* Henry, 98 Cal. 281, 33 Pac. 92; Loveland *v.* Garner, 71 Cal. 541, 12 Pac. 616; Gale *v.* Tuolumne Water Co., 14 Cal. 25.

Colorado.— Enright *v.* Midland Sampling, etc., Co., 33 Colo. 341, 80 Pac. 1041; Zang *v.* Wyant, 25 Colo. 551, 55 Pac. 565, 71 Am. St. Rep. 145; Sylvester *v.* Craig, 18 Colo. 44, 31 Pac. 387; Hurd *v.* Smith, 5 Colo. 233.

Connecticut.— Sidney Novelty Co. *v.* Hanlon, 79 Conn. 79, 63 Atl. 727; Burke *v.* Wright, 75 Conn. 641, 55 Atl. 14; Mitchell *v.* Smith, 74 Conn. 125, 49 Atl. 909.

Florida.— Mayo *v.* Keyser, 17 Fla. 744; Browne *v.* Browne, 17 Fla. 607, 35 Am. Rep. 96; Sanford *v.* Cloud, 17 Fla. 532; Forcheimer *v.* Holly, 14 Fla. 239.

Georgia.— Hamer *v.* White, 110 Ga. 300, 34 S. E. 1001.

Illinois.— MacLachlan *v.* Pease, 171 Ill. 527, 49 N. E. 714; Stirlen *v.* Jewett, 165 Ill. 410, 46 N. E. 259; Dean *v.* Geeman, 44 Ill. 286; Dickhut *v.* Durrell, 11 Ill. 72; Chicago, etc., R. Co. *v.* Bozarth, 91 Ill. App. 68; Wickham *v.* Hyde Park Bldg., etc., Assoc., 80 Ill. App. 523.

Indiana.— Scheiber *v.* United Tel. Co., 153 Ind. 609, 55 N. E. 742; Zimmerman *v.* Gaumer, 152 Ind. 552, 53 N. E. 829; Gowen *v.* Gilson, 142 Ind. 328, 41 N. E. 594; State *v.* Jackson, 142 Ind. 259, 41 N. E. 534; Wood *v.* Hughes, 138 Ind. 179, 37 N. E. 588; Johnson *v.* Conklin, 119 Ind. 109, 21 N. E. 348; Dickson *v.* Rose, 87 Ind. 103; Short *v.* Stotts, 58 Ind. 29; Murphy *v.* Teter, 56 Ind. 545; Wingate *v.* Wilson, 53 Ind. 78; Scotten *v.* Longfellow, 40 Ind. 23; Miles *v.* Buchanan, 36 Ind. 490; Earp *v.* Putnam County, 36 Ind. 470; White *v.* Garretson, 34 Ind. 514; Cross *v.* Truesdale, 28 Ind. 44; Patrick *v.* Jones, 21 Ind. 249; Aiken *v.* Bruen, 21 Ind. 137; Caldwell *v.* Salem Bank, 20 Ind. 294; Ham *v.* Carroll, 17 Ind. 442; Jay *v.* Indianapolis, etc., R. Co., 17 Ind. 262; St. John *v.* Hardwick, 17 Ind. 180; Polleys *v.* Swope, 4 Ind. 217; Worl *v.* Republic Iron, etc., Co., 31 Ind. App. 16, 66 N. E. 1021; Anthony *v.* Masters, 28 Ind. App. 239, 62 N. E. 505; Huntington *v.* Cast, 24 Ind. App. 501, 56 N. E. 949; Taggart *v.* Kem, 22 Ind. App. 271, 53 N. E. 651; Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843.

Iowa.— Long *v.* Furnas, 130 Iowa 504, 107 N. W. 432; Redhead *v.* Iowa Nat. Bank, 123 Iowa 336, 98 N. W. 806; Davis *v.* Boyer, 122 Iowa 132, 97 N. W. 1002; McKee *v.* Illinois Cent. R. Co., 121 Iowa 550, 97 N. W. 69; Nystuen *v.* Hanson, (1902) 91 N. W. 1071; Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 224; Barrett *v.* Northwestern Mut. L. Ins. Co., 99 Iowa 637, 68 N. W. 906; Goodwin *v.* Provident Sav. Life Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473; Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534; Brown *v.* McMahon, 80 Iowa 191, 45 N. W. 761; State *v.* Brewer, 70 Iowa 384, 30 N. W. 646; Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82; Ranney *v.* Templin, 54 Iowa 240, 6 N. W. 296; Lane *v.* Burlington, etc., R. Co., 52 Iowa 18, 2 N. W. 531; Smith *v.* Cedar Falls, etc., R. Co., 30 Iowa 244; Powesheik County *v.* Stanley, 9 Iowa 511; Duncan *v.* Hobart, 8 Iowa 337; Ford *v.* Jefferson County, 4 Greene 273; Gillis *v.* Matthews 4 Greene 254; Taylor *v.* Gallard, 3 Greene 17.

Kansas.—Santa Fé Bank *v.* Haskell County Bank, 54 Kan. 375, 38 Pac. 485; Rosa *v.* Missouri, etc., R. Co., 18 Kan. 124; Brown *v.* J. I. Case Plow Works, 9 Kan. App. 685, 59 Pac. 601.

Louisiana.— Wolf *v.* New Orleans Tailor Made Pants Co., 113 La. 388, 37 So. 2; Stilley *v.* Stilley, 20 La. Ann. 53.

Maryland.— Ellinger *v.* Baltimore, 90 Md. 696, 45 Atl. 884.

Minnesota.—Becker *v.* Sandusky City Bank, 1 Minn. 311.

Missouri.— Heman *v.* Glann, 129 Mo. 325, 31 S. W. 589.

Nebraska.— Hastings First Nat. Bank *v.* Farmers, etc., Bank, 2 Nebr. (Unoff.) 104, 95 N. W. 1062.

New Mexico.— Bremen Min., etc., Co. *v.* Bremen, (1905) 79 Pac. 806.

Ohio.— Linke *v.* Walcutt, 26 Ohio Cir. Ct. 10.

Oklahoma.— Morrill *v.* Casper, 13 Okla. 335, 73 Pac. 1102; Berry *v.* Barton, 12 Okla. 221, 71 Pac. 1074, 66 L. R. A. 513; Kingman *v.* Pixley, 7 Okla. 351, 54 Pac. 494.

Oregon.— Rutenic *v.* Hamakar, 40 Oreg. 444, 67 Pac. 196; Huffman *v.* McDaniel, 1 Oreg. 259.

South Carolina.— Easton *v.* Woodbury, 71 S. C. 250, 50 S. E. 790; Baker *v.* Hornick, 51 S. C. 313, 28 S. E. 941.

Texas.— Anderson *v.* Citizens' Nat. Bank, (1887) 5 S. W. 503; Green *v.* Tate, (Civ. App. 1902) 69 S. W. 486; Barrett *v.* Independent Tel. Co., (Civ. App. 1902) 65 S. W. 1128; Simpson *v.* Texas Tram, etc., Co., (Civ. App. 1899) 51 S. W. 655; Ware *v.* Griner, (Civ. App. 1894) 26 S. W. 898.

Virginia.— Helm *v.* Lynchburg Trust, etc., Bank, 106 Va. 603, 56 S. E. 598; Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792; Harris *v.* Norfolk, etc., R. Co., 88 Va. 560, 14 S. E. 535; Darracutts *v.* Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. 511; Hopkins *v.* Richardson, 9 Gratt. 485, 5 Am. St. Rep. 266.

Washington.— Hays *v.* Peavey, 43 Wash. 163, 86 Pac. 170; Reed *v.* Parker, 33 Wash. 107, 74 Pac. 61; Prescott *v.* Puget Sound Bridge, etc., Co., 31 Wash. 177, 71 Pac. 772.

form of the pleading.[21] But by amending one count or paragraph a party does not waive an objection to the sustaining of a demurrer to another count or paragraph,[22] and when the pleas set up different defenses the going to trial on one does not waive error in sustaining a demurrer to another.[23] The mere asking or obtaining of leave to amend is not a waiver, if such leave is not acted upon.[24]

2. WAIVER OF OBJECTION TO OVERRULING DEMURRER.[25] A demurrant waives his right to object to an adverse ruling on his demurrer by proceeding to trial on the merits,[26] by withdrawing his demurrer,[27] by suffering a default to be taken against

Wisconsin.— Hooker *v.* Brandon, 66 Wis. 498, 29 N. W. 208.

United States.— Marshall *v.* Vicksburg, 15 Wall. 146, 21 L. ed. 121; Ferguson *v.* Meredith, 1 Wall. 25, 17 L. ed. 604; U. S. *v.* Boyd, 5 How. 29, 12 L. ed. 36.

See 39 Cent. Dig. tit. "Pleading," §§ 1401, 1402.

Reservation of objections.— The filing of an amended declaration after a demurrer has been sustained to the original declaration is a waiver of all objections to the ruling on the demurrer, although the motion for leave to file the amended pleading recites that it is made without waiving such objections. Birckhead *v.* Chesapeake, etc., R. Co., 95 Va. 648, 29 S. E. 678.

Trial on other issues.— Where a party, after demurrers to his pleading had been sustained, went to trial on the issues as framed by other pleadings, and did not ask leave to amend his obnoxious pleading or to plead over, he could obtain a review of the ruling on the demurrer, although he did not in writing or orally advise the court that he elected to stand on his pleading. Bennett *v.* Union Cent. L. Ins. Co., 203 Ill. 439, 67 N. E. 971.

Repleading same matter.— Where a demurrer to a pleading is sustained and an exception taken to the ruling, any error therein is not waived by the pleader filing an amended pleading which is but a repetition of the first, whether or not considered a pleading over. Watkins *v.* Iowa Cent. R. Co., 123 Iowa 390, 98 N. W. 910. And where a demurrer to a petition is sustained, and plaintiff files an amendment repeating all the allegations of the original petition and adding others, which are stricken out on motion, and a demurrer is then filed setting up the same grounds as the first, an appeal may be taken from the sustaining of the second demurrer; any right to claim that the amendment was a restatement of the original petition being waived by the second demurrer, in place of a motion to strike out the part to which it was interposed. Koboliska *v.* Swehla, 107 Iowa 124, 77 N. W. 576.

In Iowa the statute providing that answering over after a demurrer is "overruled" does not make the ruling on the demurrer an adjudication of any question raised by the demurrer, does not change the rule as to waiver by amending or answering over after a demurrer is "sustained." Krause *v.* Lloyd, 100 Iowa 666, 69 N. W. 1062.

Statutory provisions to the contrary.— It is sometimes provided by statute that amending after demurrer sustained shall constitute no waiver. Chestnut *v.* Tyson, 105 Ala. 149, 16 So. 729, 53 Am. St. Rep. 101; Williams *v.* Ivey, 37 Ala. 242; Corcoran *v.* Sonora Min., etc., Co., 8 Ida. 651, 71 Pac. 127. And see the statutes of the several states.

When filing cross complaint no waiver.— The right to object to the sustaining of a demurrer to an answer is not waived by the filing of a cross complaint after the overruling, by permission of court given before the overruling. Travelers Ins. Co. *v.* Redfield, 6 Colo. App. 190, 40 Pac. 195.

21. Lincoln *v.* Cook, 3 Ill. 61.

22. Hagely *v.* Hagely, 68 Cal. 348, 9 Pac. 305; Whalen *v.* Muma, 94 Ill. App. 488; Washburn *v.* Roberts, 72 Ind. 213; Folsom *v.* Winch, 63 Iowa 477, 19 N. W. 305.

23. Powell *v.* Palmer, 45 Mo. App. 236; State *v.* Finn, 19 Mo. App. 560; Scott *v.* Hallock, 16 Wash. 439, 47 Pac. 968.

24. Galveston City R. Co. *v.* Hook, 40 Ill. App. 547; East St. Louis *v.* Board of Trustees, 6 Ill. App. 130; West *v.* Wright, 98 Ind. 335; O'Halloran *v.* Marshall, 8 Ind. App. 394, 35 N. E. 926; Farmers', etc., State Bank *v.* Rock Creek School Tp., 118 Iowa 540, 92 N. W. 676. But see Doyle *v.* Sycamore, 193 Ill. 501, 61 N. E. 1117. *Contra*, Garfield County *v.* Beauchamp, 18 Okla. 1, 88 Pac. 1124.

Mere tender as sufficient to constitute waiver.—Where plaintiff, after a demurrer to his first amended complaint was sustained, tendered a second amended complaint, he could not afterward assign error to the action of court in sustaining the demurrer to the first complaint, although the court refused to allow the second amended complaint to be filed. Anthony *v.* Slayden, 27 Colo. 144, 60 Pac. 826.

25. Answering over as waiver of objection on appeal to ruling on demurrer see APPEAL AND ERROR, 2 Cyc. 647.

26. *Connecticut.*— Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487.

Illinois.— Green Co. *v.* Blodgett, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146.

Minnesota.— Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023.

Missouri.— Cofer *v.* Riseling, 153 Mo. 633, 55 S. W. 235.

Utah.— Spanish Fork City *v.* Hopper, 7 Utah 235, 26 Pac. 293.

See 39 Cent. Dig. tit. "Pleading," § 1403.

27. Stout *v.* Duncan, 87 Ind. 383; Farrow *v.* Turner, 2 A. K. Marsh. (Ky.) 495; Beeler *v.* Young, 3 Bibb (Ky.) 520; Stockdon *v.* Bayless, 2 Bibb (Ky.) 60; Crozier *v.* Gano, 1 Bibb (Ky.) 257; Sullenberger *v.* Gest, 14 Ohio 204.

him,[28] by stipulating as to the issues to be tried,[29] by dismissing as to the party against whose pleading his demurrer was directed,[30] by taking issue on a pleading which is substituted for that against which the demurrer was directed,[31] or by subsequently pleading over to the merits.[32] A mere exception to the ruling will

28. New York, etc., R. Co. *v.* Hungerford, 75 Conn. 76, 52 Atl. 487.

29. Brodie *v.* Clator, 8 W. Va. 599.

A stipulation after submission of evidence may waive error involved in overruling a demurrer. Viola Dist. Tp. *v.* Bickelhaupt, 99 Iowa 659, 68 N. W. 914.

30. Strong *v.* Pickering Hardware Co., 9 Ohio Cir. Ct. 249, 6 Ohio Cir. Dec. 212.

31. Rooney *v.* Gray, 145 Cal. 753, 79 Pac. 523; Louisville, etc., R. Co. *v.* House, 104 Tenn. 110, 56 S. W. 836.

32. *Alabama.*— Herbert *v.* Nashville Bank, 1 Stew. & P. 286; Craig *v.* Blow, 3 Stew. 448; Acre *v.* Ross, 3 Stew. 288.

Arkansas.— Thompson *v.* Brazile, 65 Ark. 495, 47 S. W. 299; Jones *v.* Terry, 43 Ark. 230; Hill *v.* Wright, 23 Ark. 530; Hicks *v.* Badham, 17 Ark. 403; Hawkins *v.* Watkins, 6 Ark. 287; Buckner *v.* Greenwood, 6 Ark. 200; Webb *v.* Jones, 2 Ark. 330; Gage *v.* Melton, 1 Ark. 224.

Colorado.— Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642; Gutheil Park Inv. Co. *v.* Montclair, 32 Colo. 420, 76 Pac. 1050; Barth *v.* Deuel, 11 Colo. 494, 19 Pac. 471; Green *v.* Taney, 7 Colo. 278, 3 Pac. 423; Webb *v.* Smith, 6 Colo. 365; Stanbury *v.* Kerr, 6 Colo. 28; Meyer *v.* Binkleman, 5 Colo. 362; Baden Baden Gold Min. Co. *v.* Jose, 20 Colo. App. 260, 78 Pac. 313.

District of Columbia.— Harper *v.* Cunningham, 8 App. Cas. 430; Moses *v.* Taylor, 6 Mackey 255.

Florida.— Dupuis *v.* Thompson, 16 Fla. 69; Bailey *v.* Clark, 6 Fla. 516; Mitchell *v.* Cotton, 2 Fla. 136; Mitchell *v.* Chaires, 2 Fla. 18. The rule is now otherwise by statute. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Illinois.— Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243; Chicago *v.* People, 210 Ill. 84, 71 N. E. 816; Chicago, etc., R. Co. *v.* Bell, 209 Ill. 25, 70 N. E. 754; Dandurand *v.* Kankakee County, 196 Ill. 537, 63 N. E. 1011; Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018; People *v.* Gary, 196 Ill. 310, 63 N. E. 749; People *v.* Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; Betser *v.* Betser, 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303, 52 L. R. A. 630; Jacobs *v.* Marks, 183 Ill. 533, 56 N. E. 154; Lloyt *v.* Chicago, etc., R. Co., 177 Ill. 61, 52 N. E. 1127; Foltz *v.* Hardin, 139 Ill. 405, 28 N. E. 786; Geary *v.* Bangs, 138 Ill. 77, 27 N. E. 462; Independent Order of M. A. *v.* Paine, 122 Ill. 625, 14 N. E. 42; Barnes *v.* Brookman, 107 Ill. 317; Crist *v.* Wray, 76 Ill. 204; Gardner *v.* Haynie, 42 Ill. 291; Vanderbilt *v.* Johnson, 4 Ill. 48; Wann *v.* McGoon, 3 Ill. 74; Beer *v.* Philips, 1 Ill. 44; Commercial News Co. *v.* Beard, 116 Ill. App. 501; Eckman *v.* Webb, 116 Ill. App. 467; Griswold *v.* Griswold, 111 Ill. App. 269, Blasingame *v.* Royal Circle, 111 Ill. App. 202; Leathe *v.* Thomas, 109 Ill. App. 434 [*affirmed* in 218 Ill. 246, 75 N. E. 810]; Modern Woodmen of America *v.* Hicks, 109 Ill. App. 27; Snively *v.* Meixsell, 97 Ill. App. 365; Degenhart *v.* Gent, 97 Ill. App. 145; Dalton *v.* Chicago City R. Co., 93 Ill. App. 7; Chicago, etc., R. Co. *v.* Pearson, 82 Ill. App. 605; Blankenbeker *v.* Ennis, 78 Ill. App. 457; Spraker *v.* Ennis, 78 Ill. App. 446; Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204; Chicago, etc., R. Co. *v.* Pearson, 71 Ill. App. 622; Chicago, etc., R. Co. *v.* Clausen, 70 Ill. App. 550; Baker *v.* Fawcett, 69 Ill. App. 300; Hanchett *v.* Ives, 69 Ill. App. 83; Story, etc., Organ Co. *v.* Rendleman, 63 Ill. App. 123; Mayer *v.* Lawrence, 58 Ill. App. 194; Chicago, etc., R. Co. *v.* Hoyt, 50 Ill. App. 583; Richardson *v.* O'Brien, 44 Ill. App. 243; Chicago, etc., Coal Co. *v.* Glass, 34 Ill. App. 364; Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513; McLaughlin *v.* People, 17 Ill. App. 306.

Indiana.— Robertson *v.* Huffman, 92 Ind. 247; Harbert *v.* Dumont, 3 Ind. 346; Early *v.* Patterson, 4 Blackf. 449.

Indian Territory.— James *v.* Smith, 3 Indian Terr. 447, 58 S. W. 714.

Iowa.— Greiner *v.* Sigourney, (1902) 89 N. W. 1103; Geiser Mfg. Co. *v.* Krogman, 111 Iowa 503, 82 N. W. 938; Adams *v.* Holden, 111 Iowa 54, 82 N. W. 468; Foley *v.* Tipton Hotel Assoc., 102 Iowa 272, 71 N. W. 236; Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 673; Tyler *v.* Coulthard, 95 Iowa 705, 64 N. W. 681, 58 Am. St. Rep. 452; Manwell *v.* Burlington, etc., R. Co., 89 Iowa 708, 57 N. W. 441; Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569; Asbach *v.* Chicago, etc., R. Co., 86 Iowa 101, 53 N. W. 90; Hawkins *v.* Hawkins, 82 Iowa 718, 47 N. W. 994; Wing *v.* Red Oak Dist. Tp., 82 Iowa 632, 48 N. W. 977; Allen *v.* Platt, 79 Iowa 113, 44 N. W. 240; Tootle *v.* Phœnix Ins. Co., 62 Iowa 362, 17 N. W. 583; Gray *v.* Lake, 55 Iowa 156, 7 N. W. 483; Muscatine *v.* Keokuk Northern Line Packet Co., 47 Iowa 350; State *v.* Tieman, 39 Iowa 474; Philips *v.* Hosford, 35 Iowa 593; Fisher *v.* Scholte, 30 Iowa 221; Hull *v.* Alexander, 26 Iowa 569; McLaren *v.* Hall, 26 Iowa 297; Finley *v.* Brown, 22 Iowa 538; Franklin *v.* Twogood, 18 Iowa 515; State *v.* Klingman, 14 Iowa 404; Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229; Smith *v.* Taylor, 11 Iowa 214; Cameron *v.* Armstrong, 8 Iowa 212; Williams *v.* Soutter, 7 Iowa 435; McGinnis *v.* Hart, 6 Iowa 204; Abbott *v.* Striblen, 6 Iowa 191; Paukett *v.* Livermore, 5 Iowa 277; Adams *v.* Peck, 4 Iowa 551; Ford *v.* Jefferson County, 4 Greene 273; The Kentucky *v.* Brooks, 1 Greene 398; Moore *v.* Ross, Morr. 401.

Kentucky.— Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. Rep. 238; Carson *v.*

ordinarily not be sufficient for the purpose of preserving an objection of this

Osborn, 10 B. Mon. 155; Burdit *v.* Burdit, 2 A. K. Marsh. 143; Trigg *v.* Shields, Hard. 168.

Maine.— Wells *v.* Dane, 101 Me. 67, 63 Atl. 324.

Michigan.— Kern *v.* Arbeiter Unterstuetzungs Vercin, 139 Mich. 233, 102 N. W. 746; Sinsabaugh *v.* Brown, 126 Mich. 538, 85 N. W. 1110; Williams *v.* West Bay City, 119 Mich. 395, 78 N. W. 328; Kraatz *v.* Brush Electric Light Co., 82 Mich. 457, 46 N. W. 787; Ashton *v.* Detroit City R. Co., 78 Mich. 587, 44 N. W. 141; Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10; Wales *v.* Lyon, 2 Mich. 276.

Minnesota.—Becker *v.* Sandusky City Bank, 1 Minn. 311; Coit *v.* Waples, 1 Minn. 134.

Missouri.— Rodgers *v.* Western Home Town Mut. F. Ins. Co., 186 Mo. 248, 85 S. W. 333 [*affirming* 93 Mo. App. 24]; Broyhill *v.* Norton, 175 Mo. 190, 74 S. W. 1024; Epperson *v.* Postal Tel. Cable Co., 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; West *v.* McMullen, 112 Mo. 405, 20 S. W. 628; State *v.* Sappington, 68 Mo. 454; Township Bd. of Education *v.* Hackmann, 48 Mo. 243; Pickering *v.* Mississippi Valley Nat. Tel. Co., 47 Mo. 457; Glassey *v.* Sligo Furnace Co., 120 Mo. App. 24, 96 S. W. 310; Strauss *v.* St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156; Burnham *v.* Tillery, 85 Mo. App. 453; Miller *v.* Harper, 63 Mo. App. 293.

Montana.— Lynch *v.* Bechtel, 19 Mont. 548, 48 Pac. 1112; Francisco *v.* Benepe, 6 Mont. 243, 11 Pac. 637.

Nebraska.— Palmer *v.* Caywood, 64 Nebr. 372, 89 N. W. 1034; Citizens' State Bank *v.* Pence, 59 Nebr. 579, 81 N. W. 623; Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933; Reckewey *v.* Waltemath, 28 Nebr. 492, 44 N. W. 659; Buck *v.* Reed, 27 Nebr. 67, 42 N. W. 894; Dorrington *v.* Minnick, 15 Nebr. 397, 19 N. W. 456; Harral *v.* Gray, 10 Nebr. 186, 4 N. W. 1040; Pottinger *v.* Garrison, 3 Nebr. 221; Mills *v.* Miller, 2 Nebr. 299; Emery *v.* Hanna, 4 Nebr. (Unoff.) 491, 94 N. W. 973.

Nevada.— Hardin *v.* Emmons, 24 Nev. 329, 53 Pac. 854; Hammersmith *v.* Avery, 18 Nev. 225, 2 Pac. 55.

New Jersey.— Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299, 23 Am. Rep. 214.

New Mexico.— Butterfield's Overland Dispatch Co. *v.* Wedeles, 1 N. M. 528.

New York.— Brady *v.* Donnelly, 1 N. Y. 126; Kemp *v.* Tonnele Co., 51 Misc. 49, 99 N. Y. Suppl. 885.

Ohio.— Mitchell *v.* McCabe, 10 Ohio 405; Stocking *v.* Burnett, 10 Ohio 137; Pennsylvania, etc., Canal Co. *v.* Webb, 9 Ohio 136; Hamilton *v.* Cochran, 8 Ohio Dec. (Reprint) 198, 6 Cinc. L. Bul. 248; Harvey *v.* Armstrong, 3 Ohio Dec. (Reprint) 338.

Oregon.— Hughes *v.* McCullough, 39 Oreg. 372, 65 Pac. 85; Gschwander *v.* Cort, 19 Oreg. 513, 26 Pac. 621.

Utah.— Young *v.* Martin, 3 Utah 484, 24 Pac. 909. The rule is now otherwise by statute. Henderson *v.* Turngren, 9 Utah 432, 35 Pac. 495.

Vermont.— German *v.* Bennington, etc., R. Co., 71 Vt. 70, 42 Atl. 972; Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130; Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380; Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

Virginia.— Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

United States.—Stanton *v.* Embry, 93 U. S. 548, 23 L. ed. 983; Marshall *v.* Vicksburg, 15 Wall. 146, 21 L. ed. 121; Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

See 39 Cent. Dig. tit. "Pleading," § 1403.

Contra, by statute.— Hurley *v.* Ryan, 119 Cal. 71, 51 Pac. 20; Curtiss *v.* Bachman, 84 Cal. 216, 24 Pac. 379; Hunter's Appeal, 71 Conn. 189, 41 Atl. 557.

Demurrer relating to parties.— Hardy *v.* Swigart, 25 Colo. 136, 53 Pac. 380; Barth *v.* Deuel, 11 Colo. 494, 19 Pac. 471; Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; Richey *v.* Graham, 7 Ind. 579; Westphal *v.* Henney, 49 Iowa 542; Spillane *v.* Missouri Pac. R. Co., 111 Mo. 555, 20 S. W. 293; Continental Zinc Co. *v.* Amsden, 125 Mo. App. 512, 102 S. W. 1087; Haase *v.* Nelson Distillery Co., 64 Mo. App. 131; Haughery Livery, etc., Co. *v.* Joyce, 41 Mo. App. 564; Lederer *v.* Union Sav. Bank, 52 Nebr. 133, 71 N. W. 954; Lonkey *v.* Wells, 16 Nev. 271. But it is otherwise, on overruling a demurrer for defect of parties, when the omitted persons are necessary parties defendant in order to warrant the court in determining the action. Farmers' High Line Canal, etc., Co., Co. *v.* White, 32 Colo. 114, 75 Pac. 415.

Misjoinder of causes.— By the weight of authority the question of misjoinder of causes raised by demurrer is waived by answering over. Green *v.* Taney, 7 Colo. 278, 3 Pac. 423; Union Bank *v.* Dillon, 75 Mo. 380; Rutledge *v.* Tarr, 95 Mo. App. 265, 69 S. W. 22. See Mayer *v.* Lawrence, 58 Ill. App. 194. *Contra,* Thelin *v.* Stewart, 100 Cal. 372, 34 Pac. 861.

Where an issue requires no pleading over, going to trial thereon is not a waiver. Clark *v.* Gramling, 54 Ark. 525, 16 S. W. 475.

Separate pleas.— Trying an issue under one of two inconsistent pleas is no waiver of an exception to the court's ruling against the other. Tucker *v.* Edwards, 7 Colo. 209, 3 Pac. 233.

The mere tender of an answer and request for leave to file same after demurrer overruled is sufficient to constitute a waiver. Bankers' Reserve Life Assoc. *v.* Finn, 64 Nebr. 105, 89 N. W. 672.

As waiver of right to object to introduction of any evidence.— Where a defendant does not elect to stand upon his demurrer when overruled, but pleads issuably, and goes to trial on the merits, he cannot raise the questions presented by the demurrer on the trial by objecting to the introduction of any evi-

nature.[33] These rules are subject to the exception that when the ground of demurrer is the want of jurisdiction of the subject-matter or the failure of the complaint to state a cause of action, the right to object to the ruling is not waived by pleading over.[34] A waiver must result from the voluntary act of the party and pleading over in accordance with the order of the court is not a waiver.[35]

3. Waiver of Failure of Court to Pass Upon Demurrer. Objection to the failure of the court to act upon a demurrer is waived by voluntarily pleading over or going to trial upon the merits.[36]

dence under the declaration. Kraatz *v.* Brush Electric Light Co., 82 Mich. 457, 46 N. W. 787.

In Iowa the statutory provision that "when a demurrer shall be overruled, and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered an adjudication of any question raised by the demurrer; and in such case the sufficiency of the pleading thus attacked shall be determined as if no demurrer had been filed," does not change the rule that by pleading over he waives the right to complain of the rulings on the demurrer, but permits the demurrant to attack the pleading upon the same grounds in other ways at any subsequent stage, as by motion to direct a verdict or in arrest of judgment. Buchanan *v.* Blackhawk Coal Works, 119 Iowa 118, 93 N. W. 51; Frum *v.* Keeney, 109 Iowa 393, 80 N. W. 507.

33. *Illinois.*— Phenix Ins. Co. *v.* Belt R. Co., 182 Ill. 33, 54 N. E. 1046; Grand Lodge B. L. F. *v.* Orrell, 97 Ill. App. 246.

Iowa.— Seippel *v.* Blake, 80 Iowa 142, 41 N. W. 199, 45 N. W. 728; Stanbrough *v.* Daniels, 77 Iowa 561, 42 N. W. 443; Plummer *v.* Roads, 4 Iowa 587.

Minnesota.—Cook *v.* Kittson, 68 Minn. 474, 71 N. W. 670.

Missouri.— Hyatt *v.* Legal Protective Assoc., 106 Mo. App. 610, 81 S. W. 470.

New Mexico.— Beall *v.* Territory, 1 N. M. 507.

Vermont.— German *v.* Bennington, etc., R. Co., 71 Vt. 70, 42 Atl. 972.

See 39 Cent. Dig. tit. "Pleading," § 1403.

34. *Arkansas.*— White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060; De Loach Mill Mfg. Co. *v.* Bonner, 64 Ark. 510, 43 S. W. 504; Murry *v.* Meredith, 25 Ark. 164.

Illinois.— Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 75 N. E. 368; Himrod Coal Co. *v.* Clark, 197 Ill. 514, 64 N. E. 282; McGann *v.* People, 194 Ill. 526, 62 N. E. 941; Chicago, etc., R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680; Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290.

Iowa.— Stiles *v.* Brown, 3 Greene 589.

Louisiana.— Fletcher *v.* Dunbar, 21 La. Ann. 150.

Missouri.— Hudson *v.* Cahoon, 193 Mo. 547, 91 S. W. 72; Hoffman *v.* McCracken, 168 Mo. 337, 67 S. W. 878; Roberts *v.* Central Lead Co., 95 Mo. App. 581, 69 S. W. 630; Wilson *v.* St. Louis, etc., R. Co., 67 Mo. App. 443.

Montana.— Van Horn *v.* Holt, 30 Mont. 69, 75 Pac. 680; Bohm *v.* Dunphy, 1 Mont. 333.

Nebraska.—Hopewell *v.* McGrew, 50 Nebr. 789, 70 N. W. 397; Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933; Singer Mfg. Co. *v.* McAllister, 22 Nebr. 359, 35 N. W. 181; O'Donohue *v.* Hendrix, 13 Nebr. 255, 13 N. W. 215; Farrar *v.* Triplett, 7 Nebr. 237.

Nevada.— Lonkey *v.* Wells, 16 Nev. 275.

New Jersey.— Johnson *v.* Algor, 65 N. J. L. 363, 47 Atl. 571.

North Carolina.— Baker *v.* Garris, 108 N. C. 218, 13 S. E. 2.

Oregon.— Goodnough Mercantile Co. *v.* Galloway, 48 Oreg. 239, 84 Pac. 1049.

Virginia.— Southern R. Co. *v.* Willcox, 98 Va. 222, 35 S. E. 355.

United States.— Teal *v.* Walker, 111 U. S. 242, 4 S. Ct. 420, 28 L. ed. 415; Middleby *v.* Effler, 118 Fed. 261, 55 C. C. A. 355; Pontiac *v.* Talbot Paving Co., 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566; Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507. *Contra*, Plankinton *v.* Gray, 63 Fed. 415, 11 C. C. A. 268.

See 39 Cent. Dig. tit. "Pleading," § 1404.

Objection to the jurisdiction of a federal court is not waived by answering to the merits after a demurrer for the sole purpose of raising such objection has been overruled. *In re* Atlantic City R. Co., 164 U. S. 633, 17 S. Ct. 208, 41 L. ed. 579.

Demurrer overruled by consent.—A party does not waive his objection that the complaint is insufficient by entering a stipulation that his demurrer on that ground shall be overruled and that he shall have time to answer. Morris *v.* Courtney, 120 Cal. 63, 52 Pac. 129.

35. Grove *v.* Harvey, 12 Rob. (La.) 226; Willis *v.* Ives, 1 Sm. & M. (Miss.) 307.

36. *Alabama.*—Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216, 20 So. 472; Elyton Land Co. *v.* Morgan, 88 Ala. 434, 7 So. 249.

California.— Diamond Coal Co. *v.* Cook, (1900) 61 Pac. 578; Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297; Ferrier *v.* Ferrier, 64 Cal. 23, 27 Pac. 960.

Indiana.— Irvinson *v.* Van Riper, 34 Ind. 148.

Kentucky.— Caledonian Ins. Co. *v.* Cooke, 101 Ky. 412, 41 S. W. 279, 19 Ky. L. Rep. 651.

Texas.— Phenix Ins. Co. *v.* Boren, 83 Tex. 97, 18 S. W. 484; Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572; Moore *v.* Woodson, 44 Tex. Civ. App. 503, 99 S. W. 116; Miller *v.* Barler, (Civ. App. 1894) 26 S. W. 1105.

Vermont.— Dyer *v.* Dean, 69 Vt. 370, 37 Atl. 1113.

Washington.— Mosher *v.* Bruhn, 15 Wash. 332, 46 Pac. 397.

4. Waiver of Failure to Join in Demurrer. Arguing a demurrer and submitting it to the court is a waiver of the failure to properly join in the demurrer,[37] and of the objection that the cause was not submitted on the demurrer but upon other issues properly joined.[38]

5. Waiver of Defects in, and Objections to, Demurrer. Joining issue on a demurrer is a waiver of defects of form therein,[39] and of irregularities and delays in presenting such demurrer;[40] but does not waive the objection that the demurrer is frivolous.[41] No objection can be taken to the time of filing a demurrer when it was filed by consent.[42]

G. Objections to Amendments and Supplemental Pleadings and Rulings Thereon — 1. Amendments. Objections to amendments of pleadings, whether as to the time of filing or their form or character, must be made in the trial court; otherwise they are waived.[43] So objections must be made promptly and are waived if unreasonably delayed.[44] Failure to move for or to accept a

But see New England Mortg. Security Co. *v.* Metcalfe, 49 La. Ann. 347, 21 So. 549, holding that where plaintiff, after waiting a reasonable time for decision on his exception to the intervener's petition, files an answer thereto expressly reserving all his rights as set forth in the exception, he does not thereby waive the exception.

A demurrer or exception not called to the attention of the trial court and not acted upon will be deemed abandoned. Woodall *v.* Pacific Mut. L. Ins. Co., (Tex. Civ. App. 1904) 79 S. W. 1090. But where an exception for misjoinder of parties plaintiff is not called to the attention of the court at the term at which it is filed, the court may rule on the point at the next term after the jury has been impaneled. Lottman Bros. Mfg. Co. *v.* Houston Waterworks Co., (Tex. Civ. App. 1896) 38 S. W. 357.

When a demurrer is not shown to have been disposed of by the judgment entry it will be presumed to have been waived. Walker *v.* Cuthbert, 10 Ala. 213; Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054.

37. Harris *v.* McFaddin, 2 Blackf. (Ind.) 71; Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

38. Granger *v.* Warrington, 8 Ill. 299.

39. Shoop *v.* Powles, 13 Md. 304.

40. Witter *v.* McNiel, 4 Ill. 433; Kent *v.* Holliday, 17 Md. 387; Seymour *v.* Pittsburg, etc., R. Co., 44 Ohio St. 12, 4 N. E. 236.

41. Wyckoff *v.* Bishop, 98 Mich. 352, 57 N. W. 170.

42. Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181.

43. *Alabama.*— Tennessee, etc., R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502; Stewart *v.* Goode, 29 Ala. 476.

Arkansas.— Pelham *v.* State Bank, 4 Ark. 202.

California.—Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51.

Colorado.— King *v.* Rea, 13 Colo. 69, 21 Pac. 1084.

Connecticut.— Ritchie *v.* Waller, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, 27 L. R. A. 161.

Illinois.— Hughes *v.* Richter, 161 Ill. 409, 43 N. E. 1066; Tomlinson *v.* Earnshaw, 112 Ill. 311; Teutonia L. Ins. Co. *v.* Mueller, 77 Ill. 22; Utter *v.* Jaffray, 15 Ill. App. 236.

Indiana.— Keister *v.* Myers, 115 Ind. 312, 17 N. E. 161; Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

Iowa.— McCormick Harvesting Mach. Co. *v.* Richardson, 89 Iowa 525, 56 N. W. 682; Benjamin *v.* Vieth, 80 Iowa 149, 45 N. W. 731; Betts *v.* Farrell, 13 Iowa 572.

Kentucky.— Cox *v.* Lacey, 3 Litt. 334.

Massachusetts.— Horne *v.* Meakin, 115 Mass. 326.

Michigan.— Hecht *v.* Ferris, 45 Mich. 376, 8 N. W. 82.

Mississippi.— Pass *v.* McRea, 36 Miss. 143.

Missouri.— Spurlock *v.* Missouri Pac. R. Co., 93 Mo. 530, 6 S. W. 349; Hanly *v.* Holmes, 1 Mo. 84; Jones *v.* Chicago, etc., R. Co., 59 Mo. App. 137; Wetzell *v.* Wagoner, 41 Mo. App. 509; Corrigan *v.* Brady, 38 Mo. App. 649; Robertson *v.* Springfield, etc., R. Co., 21 Mo. App. 633; Hamlin *v.* Carruthers, 19 Mo. App. 567; Lakebrink *v.* Boehmer, 8 Mo. App. 561.

Montana.— Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007.

Nebraska.— Busch *v.* Hagenrick, 10 Nebr. 415, 6 N. W. 474.

New York.— Griggs *v.* Howe, 2 Abb. Dec. 291, 3 Keyes 166, 2 Keyes 574; Hetzel *v.* Easterly, 96 N. Y. App. Div. 517, 89 N. Y. Suppl. 154; Thompson *v.* Hicks, 1 N. Y. App. Div. 275, 37 N. Y. Suppl. 340; Clark *v.* Bradley, 20 N. Y. Suppl. 452; Dickerson *v.* Scheuer, 1 N. Y. Suppl. 419.

South Dakota.— Connor *v.* Dakota Nat. Bank, 7 S. D. 439, 64 N. W. 519.

Texas.— Reagan *v.* Evans, 2 Tex. Civ. App. 35, 21 S. W. 427; Bates *v.* Evans, 2 Tex. App. Civ. Cas. § 211.

United States.— Rush *v.* Kansas City First Nat. Bank, 71 Fed. 102, 17 C. C. A. 627.

See 39 Cent. Dig. tit. "Pleading," § 1409 *et seq.*

A party who amends his pleading to meet objection thereto waives his right to except on the ground that the amendment was not necessary. Glover *v.* Savannah, etc., R. Co., 107 Ga. 34, 32 S. E. 876; Atlantic Coast Line R. Co. *v.* Hart Lumber Co., 2 Ga. App. 88, 58 S. E. 316.

44. Lower Kings River Water Ditch Co. *v.*

continuance is a waiver of an objection to the allowance of an amendment on the ground of surprise,[45] and other objections to an amendment are waived by asking a continuance to plead to it.[46] The acceptance of costs paid as a condition to the amendment of a pleading is a waiver of any objection to the amendment;[47] and going to trial without the payment of costs, when made a condition to the right to amend, is a waiver of the objection that the amendment was made without such payment.[48] An objection to the allowance of an amendment should be made when leave to amend is asked,[49] and in order to avail himself of error in granting the amendment the party objecting should stand on the ruling,[50] since he waives the objection by pleading to the amendment,[51] by going to trial thereon,[52] or by

Kings R., etc., Canal Co., 67 Cal. 577, 8 Pac. 91.

In some jurisdictions it is unreasonable to wait until the next term. Felkel *v.* Hicks, 32 Ala. 25; Life Assoc. of America *v.* Ferrill, 60 Ga. 414; Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438; Irvin *v.* Clark, 98 N. C. 437, 4 S. E. 30.

Keeping an amended pleading sixteen days without giving notice of objection thereto is a waiver. Hollister *v.* Livingston, 9 How. Pr. (N. Y.) 140.

45. *California.*— Walsh *v.* McKeen, 75 Cal. 519, 17 Pac. 673.

Iowa.— Sheldon *v.* Booth, 50 Iowa 209.

Kentucky.— Royer Wheel Co. *v.* Dunbar, 76 S. W. 366, 25 Ky. L. Rep. 746.

Missouri.— Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847.

Nebraska.— Bennett *v.* Taylor, 4 Nebr. (Unoff.) 800, 96 N. W. 669.

Texas.— Western Union Tel. Co. *v.* Bowen, 84 Tex. 476, 19 S. W. 554.

Utah.— Thompson *v.* Whitney, 20 Utah 1, 57 Pac. 429.

Washington.— Helbig *v.* Grays Harbor Electric Co., 37 Wash. 130, 79 Pac. 612.

See 39 Cent. Dig. tit. "Pleading," § 1409.

46. Hollister *v.* Livingston, 9 How. Pr. (N. Y.) 140; Ruege *v.* Gates, 71 Wis. 634, 38 N. W. 181.

47. Crossman *v.* Griggs, 188 Mass. 156, 74 N. W. 358; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Smith *v.* Savin, 69 Hun (N. Y.) 311, 23 N. Y. Suppl. 568 [*affirmed* in 141 N. Y. 315, 36 N. E. 338]; Woodward *v.* Williamson, 39 S. C. 333, 17 S. E. 778; Schoenleber *v.* Burkhardt, 94 Wis. 575, 69 N. W. 343.

48. Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray (Mass.) 376.

49. *Colorado.*—Anthony *v.* Slayden, 27 Colo. 144, 60 Pac. 826.

Georgia.— See Norcross Butter, etc., Mfg. Co. *v.* Summerour, 114 Ga. 156, 39 S. E. 870.

Iowa.— Scott *v.* Chickasaw County, 53 Iowa 47, 3 N. W. 820.

Kentucky.— Hancock *v.* Johnson, 1 Metc. 242.

Montana.— Sanford *v.* Newell, 18 Mont. 126, 44 N. W. 522.

New York.— Mussina *v.* Stillman, 13 Abb. Pr. 93.

See 39 Cent. Dig. tit. "Pleading," § 1409.

50. Grymes *v.* C. F. Liebke Hardwood Mill, etc., Co., 111 Mo. App. 358, 85 S. W. 946.

51. *Alabama.*— Bryan *v.* Wilson, 27 Ala. 208; Caldwell *v.* May, 1 Stew. 425.

California.—Redmond *v.* Peterson, 102 Cal. 595, 36 Pac. 923, 41 Am. St. Rep. 204; Witkowski *v.* Hern, 82 Cal. 604, 23 Pac. 132.

Colorado.— Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041.

District of Columbia.— Hughes *v.* Eachback, 7 D. C. 66.

Illinois.— Harte *v.* Fraser, 104 Ill. App. 201.

Indiana.—Jordan *v.* Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680; Farrington *v.* Hawkins, 24 Ind. 253.

Iowa.— Keokuk County *v.* Howard, 43 Iowa 354.

Kentucky.— Miller *v.* Cavanaugh, 99 Ky. 377, 35 S. W. 920, 18 Ky. L. Rep. 183; Paducah Land, etc., Co. *v.* Cochran, 37 S. W. 67, 18 Ky. L. Rep. 465.

Missouri.— Ingwerson *v.* Chicago, etc., R. Co., 205 Mo. 328, 103 S. W. 1143; Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563; Grymes *v.* C. F. Liebke Hardwood Mill, etc., Co., 111 Mo. App. 358, 85 S. W. 946; Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204; Phillips *v.* Barnes, 105 Mo. App. 421, 80 S. W. 43; Matthews *v.* Perdue, 79 Mo. App. 149; State *v.* Gage, 52 Mo. App. 464; Riley *v.* Stewart, 50 Mo. App. 594.

Nebraska.— Pekin Plow Co. *v.* Wilson, 66 Nebr. 115, 92 N. W. 76. See Herron *v.* Cole, 25 Nebr. 692, 41 N. W. 765.

New York.— Duval *v.* Busch, 21 Abb. N. Cas. 214.

Pennsylvania.— Shriner *v.* Keller, 25 Pa. St. 61.

South Carolina.—Ruberg *v.* Brown, 50 S. C. 397, 27 S. E. 873.

Vermont.— Reynolds *v.* Chynoweth, 68 Vt. 104, 34 Atl. 36; Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462.

See 39 Cent. Dig. tit. "Pleading," § 1411.

Pleading over after motion to strike overruled.— The rule equally applies where the party pleads over after a motion to strike has been previously overruled. Cohn *v.* Souders, 175 Mo. 455, 75 S. W. 413; Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973.

52. *Alabama.*— Willman *v.* Alabama Brokerage Co., 145 Ala. 684, 40 So. 102.

California.— Daly *v.* Ruddell, 137 Cal. 671, 70 Pac. 784; Lower Kings River Water Ditch Co. *v.* Kings River, etc., Canal Co., 67 Cal. 577, 8 Pac. 91.

Colorado.— Mullen *v.* McKim, 22 Colo. 468, 45 Pac. 416.

otherwise recognizing the amended pleading.[53] When a pleading is amended without leave, however, there is no waiver by going to trial upon it without objection, in the absence of notice of the amendment,[54] and retaining an amendment served without authority is not a waiver of the right to object to it in the absence of other facts constituting an estoppel.[55] No objection to an amendment will be sustained unless some reason therefor is given.[56]

2. Supplemental Pleadings. Objections to allowing the filing of a supplemental pleading are waived by proceeding to trial,[57] or by arguing a demurrer thereto.[58] But it may always be objected that the supplemental pleading states no cause of action.[59] Admitting due and timely service of a supplemental complaint is a waiver of the objection that it was served without leave of court.[60]

H. Objections to Rulings on Motions.[61] Error in overruling a motion relating to the pleadings is waived by subsequently demurring,[62] or pleading over,[63]

Georgia.— Hooks *v.* Hays, 86 Ga. 797, 13 S. E. 134.

Indian Territory.— Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

Louisiana.—Turner *v.* Madden, 15 La. Ann. 510.

Missouri.— Liese *v.* Meyer, 143 Mo. 547, 45 S. W. 282; Bender *v.* Zimmerman, 135 Mo. 53, 36 S. W. 210; Gelatt *v.* Ridge, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683; Ward *v.* Pine, 50 Mo. 38; Phillips *v.* Barnes, 105 Mo. App. 421, 80 S. W. 43; Agency School Dist. *v.* Wallace, 75 Mo. App. 317; Hurley *v.* Missouri Pac. R. Co., 57 Mo. App. 675.

New York.— Bovce *v.* International Paper Co., 108 N. Y. App. Div. 94, 95 N. Y. Suppl. 426; Secor *v.* Law, 9 Bosw. 163.

North Carolina.— Wiggins *v.* Kirkpatrick, 114 N. C. 298, 19 S. E. 152.

Rhode Island.— Eaton *v.* Case, 17 R. I. 429, 22 Atl. 943.

Vermont.— Reynolds *v.* Chynoweth, 68 Vt. 104, 34 Atl. 36; Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462; Sherman *v.* Johnson, 58 Vt. 40, 2 Atl. 707.

See 39 Cent. Dig. tit. "Pleading," § 1411.

After defendant has pleaded the general issue and submitted to a trial of an amended petition which contains a different ground of action from the original, he cannot object to a subsequent amended petition containing matter similar to the last, that it presents a different ground of action from the original. Spurlock *v.* Missouri Pac. R. Co., 104 Mo. 658, 16 S. W. 834.

Effect of statute.— Where defendant's motion to strike out plaintiff's fourth amended petition and for final judgment was overruled, his objection to the action of the court in permitting plaintiff to file a fourth or subsequent petition was not waived by filing an answer to a sixth petition and going to trial, as Rev. St. (1879) § 3540, providing that no further petition should be filed after three insufficient ones, was mandatory. Beardslee *v.* Morgner, 73 Mo. 22.

Announcing ready for trial on the amended pleading waives objection thereto. Gildart *v.* Grumbles, 22 Tex. 15.

53. Brinkley *v.* Duncan, 10 Ark. 252.

54. Lee *v.* Hamilton, 12 Tex. 413.

55. Durham *v.* Chapin, 13 N. Y. App. Div. 94, 43 N. Y. Suppl. 342.

56. Reynolds *v.* Dismuke, 48 Ala. 209.

57. King *v.* Hyatt, 51 Kan. 504, 32 Pac. 1105, 37 Am. St. Rep. 304; Battaile *v.* O'Neil, 3 La. Ann. 229; Johnson *v.* White, (Tex. Civ. App. 1894) 27 S. W. 174.

58. Damp *v.* Dane, 33 Wis. 430.

59. Turner *v.* Pierce, 31 Wis. 342.

60. Greenblatt *v.* Mendelsohn, 46 Misc. (N. Y.) 554, 92 N. Y. Suppl. 963.

61. **Necessity for exception** to ruling on motion to authorize review on appeal see Appeal and Error, 2 Cyc. 717.

62. Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 668; Nieukirk *v.* Nieukirk, 84 Iowa 367, 51 N. W. 10. *Contra*, Williams *v.* Miller, 21 Ark. 469.

63. *Arkansas.*— Harrell *v.* Tenant, 30 Ark. 684.

Colorado.— Cerussite Min. Co. *v.* Anderson, 19 Colo. App. 307, 75 Pac. 158.

Georgia.— Bailey *v.* Almand, 98 Ga. 133, 26 S. E. 495, holding that the objection of non-joinder of parties defendant in an action on a joint note is not waived by pleading to the merits after refusal of a motion to dismiss for the non-joinder.

Indiana.— State *v.* Bodly, 7 Blackf. 355.

Iowa.— Carlson *v.* Hall, 124 Iowa 121, 99 N. W. 571; Hunn *v.* Ashton, 121 Iowa 265, 96 N. W. 745; Ida County Sav. Bank *v.* Seidensticker, (1902) 92 N. W. 862; Hurd *v.* Ladner, 110 Iowa 263, 81 N. W. 470; Manatt *v.* Shaver, 98 Iowa 353, 67 N. W. 264; Wattels *v.* Minchen, 93 Iowa 517, 61 N. W. 915; Ida County *v.* Woods, 79 Iowa 148, 44 N. W. 247; Randolf *v.* Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. Rep. 268; Smith *v.* Powell, 55 Iowa 215, 7 N. W. 602; Kline *v.* Kansas City, etc., R. Co., 50 Iowa 656.

Missouri.— White *v.* St. Louis, etc., R. Co., 202 Mo. 539, 101 S. W. 14; Castleman *v.* Castleman, 184 Mo. 432, 83 S. W. 757; Bungenstock *v.* Nishnabotna Drainage Dist., 163 Mo. 198, 64 S. W. 149; State *v.* Merchants' Bank, 160 Mo. 640, 61 S. W. 676; Springfield Engine, etc., Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500; Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928; Holt County *v.* Cannon, 114 Mo. 514, 21 S. W. 851; Santer *v.* Leveridge, 103 Mo. 615, 15 S. W. 981; Gale *v.* Foss, 47 Mo. 276; McMillen *v.* Columbia, 122 Mo. App. 34, 97 S. W. 953; Dwyer *v.* Rohan, 99 Mo. App. 120,

or going to trial.[64] So error in sustaining a motion of this kind is waived by subsequently pleading over or amending,[65] or by acquiescing without objection in the order of the court.[66] However, some cases hold that an exception is sufficient

73 S. W. 384; Bernard *v.* Mott, 89 Mo. App. 403; Shuler *v.* Omaha, etc., R. Co., 87 Mo. App. 618; Howard *v.* Shirley, 75 Mo. App. 150; Lawless *v.* Lawless, 39 Mo. App. 539.

Oregon.— South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5.

Washington.— Kratz *v.* Dawson, 3 Wash. Terr. 100, 13 Pac. 663.

United States.— See Campbell *v.* Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. ed. 280.

See 39 Cent. Dig. tit. "Pleading," § 1426.

If defendant intends to avail himself of an error in striking out his answer, he should let judgment go at the time and stand on his exceptions. By pleading over and going to trial on another issue he voluntarily abandons whatever grounds he might have had for a review of the action of the court. Fuggle *v.* Hobbs, 42 Mo. 537.

Renewal of motion.— Where a motion filed to a petition has been overruled, and exception taken, and afterward an amended petition is filed, to which defendant answers without renewing his motion, he thereby waives the error, if any, committed in the overruling of the motion. Hunter *v.* Lang, 5 Nebr. (Unoff.) 323, 98 N. W. 690. So where a motion to strike a replication from the files is not renewed, notwithstanding the replication is still objectionable, after the allowance of an amendment on a cross motion for leave to amend being entered at the same time as the motion to strike the replication, defendant cannot urge the objection that the court erred in not sustaining his motion to strike off the replication. Protection L. Ins. Co. *v.* Foote, 79 Ill. 361.

Raising same objection by answer.—A motion to strike an answer and counter-claim is not waived by answering the counter-claim where the same point was raised in the answer to the counter-claim as was raised in the motion to strike. Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318.

64. *Iowa.*— Scribner *v.* Taggart, 123 Iowa 321, 98 N. W. 798; Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220.

Kansas.— Beecher *v.* Ireland, 8 Kan. App. 10, 54 Pac. 9.

Missouri.— Dakan *v.* Chase, etc., Mercantile Co., 197 Mo. 238, 94 S. W. 944; Corrigan *v.* Kansas City, 93 Mo. App. 173; Hansard *v.* Menderson Clothing Co., 73 Mo. App. 584; Davis *v.* Boyce, 73 Mo. App. 563.

New York.— Flynn *v.* Smith, 111 N. Y. App. Div. 870, 98 N. Y. Suppl. 56.

Oregon.— Anderson *v.* North Pac. Lumber Co., 21 Oreg. 281, 28 Pac. 5.

Utah.— Young *v.* Martin, 3 Utah 484, 24 Pac. 909.

Washington.— Port Townsend *v.* Lewis, 34 Wash. 413, 75 Pac. 982.

See 39 Cent. Dig. tit. "Pleading," § 1425.

Motion for judgment on pleadings.— It has been held that if either party introduces evidence in support of his own pleading, he waives the right to urge objections to a ruling on a motion for judgment on the pleadings by reason of defects in the pleading of his adversary. Crow *v.* Chicago, etc., R. Co., 57 Mo. App. 135.

Motion to strike irrelevant allegations.— But proceeding to trial after a motion to strike certain parts of the pleading as irrelevant and redundant is overruled does not waive the right to object on the trial to matters complained of as irrelevant and redundant. Ida County *v.* Woods, 79 Iowa 148, 44 N. W. 247.

65. *California.*— Brittan *v.* Oakland Sav. Bank, 112 Cal. 1, 44 Pac. 339; Collins *v.* Scott, 100 Cal. 446, 34 Pac. 1085.

Colorado.— Gale *v.* James, 11 Colo. 540, 19 Pac. 446; Rawlings *v.* Casey, 19 Colo. App. 152, 73 Pac. 1090.

Indiana.— Neal *v.* Scott, 25 Ind. 440.

Iowa.— Walker *v.* Freelove, 79 Iowa 752, 45 N. W. 303; White *v.* Spangler, 68 Iowa 222, 26 N. W. 85. But see Parker *v.* Des Moines Life Assoc., 108 Iowa 117.

Kansas.— Ott *v.* Elmore, 67 Kan. 853, 73 Pac. 898.

Missouri.— Walker *v.* Evans, 98 Mo. App. 301, 71 S. W. 1086.

Oregon.— Hexter *v.* Schneider, 14 Oreg. 184, 12 Pac. 668.

South Dakota.—Boucher *v.* Clark Pub. Co., 14 S. D. 72, 84 N. W. 237.

Washington.— Curtis *v.* Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955. But see Schulte *v.* Littlejohn, 2 Wash. 129, 26 Pac. 79.

See 39 Cent. Dig. tit. "Pleading," § 1427.

Contra.— Corcoran *v.* Sonora Min., etc., Co., 8 Ida. 651, 71 Pac. 127.

66. Burlington Nat. State Bank *v.* Delahaye, 82 Iowa 34, 47 N. W. 999.

An election to amend, as allowed in the court's order, is sufficient to constitute a waiver, although no such amendment is in fact made. Weaver *v.* Stacey, 93 Iowa 683, 62 N. W. 22.

Withdrawing part of pleading not stricken out.— Where the court ruled that part of the answer to an application for a writ of possession be stricken out, defendant who thereupon withdrew the balance debarred himself from objecting to the ruling. Robinson *v.* Veal, 65 Ga. 592.

Where a motion to dismiss an action on the ground of departure is made after a motion to amend the petition is made and sustained, the filing of an answer to the amended petition and proceeding with the trial is a waiver of defendant's right to have the ruling on the motion to dismiss reviewed. Powell *v.* Brookfield Pressed Brick, etc., Mfg. Co., 104 Mo. App. 713, 78 S. W. 646.

Where a plaintiff was entitled to proceed upon two separate causes of action, error in requiring him to elect was not waived by going to trial. Rucker *v.* Omaha, etc., Refining Co., 18 Colo. App. 487, 72 Pac. 682.

to save the objection, although the party amends, pleads over, or goes to trial.[67]

I. Objections to Evidence — 1. As Not Within Issues.[68] Failure to object to evidence at the time it is offered is a waiver of the objection that it is not admissible under the pleadings.[69] If the evidence offered is not objected to,

Acquiescence of one of several parties.— In an action against two railroad companies for personal injuries caused by a defective engine and machinery, an order denying the motion of one of defendants that plaintiff specify the defects will be regarded as acquiesced in by it if it does not except thereto, although there is an exception by its co-defendant. Knott *v.* Dubuque, etc., R. Co., 84 Iowa 462, 51 N. W. 57.

67. Libmann *v.* Manhattan R. Co., 59 Hun (N. Y.) 428, 13 N. Y. Suppl. 378; Peart *v.* Peart, 48 Hun (N. Y.) 79; Federal Iron, etc., Co. *v.* Hock, 42 Wash. 668, 85 Pac. 418; Great Western Coal Co. *v.* Chicago, etc., R. Co., 98 Fed. 274, 39 C. C. A. 79.

Where a motion to strike out a portion of a petition in a federal court was erroneously sustained and the ruling duly excepted to and such motion did not go to any insufficiency or technical defect in the petition but was in effect a demurrer to so much of it as alleged a distinct and substantive part of plaintiff's cause of action, plaintiff did not waive the error by complying with the order permitting him to file an amended petition omitting the averments objected to. Williamson *v.* Liverpool, etc., Ins. Co., 141 Fed. 54, 72 C. C. A. 542. See also Chitwood *v.* Russell, 36 Mo. App. 245, where it was held that where, after denial of a motion by plaintiff to strike out part of the answer, he filed a reply thereto and went to trial thereon, he was not thereby precluded from relying on the ruling as a ground of reversal of a judgment against him; the motion and ruling having been made part of the record by bill of exceptions and a motion for a new trial having again called the attention of the court thereto.

68. **Right to first object on appeal** see Appeal and Error, 2 Cyc. 693 *et seq.*

69. *Alabama.*— Snellgrove *v.* Evans, 145 Ala. 600, 40 So. 567.

California.— McCarthy *v.* Phelan, 132 Cal. 404, 64 Pac. 570; Stockton Combined Harvester, etc., Works *v.* Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565.

District of Columbia.— McAfee *v.* Huidekoper, 9 App. Cas. 36, 34 L. R. A. 720.

Georgia.— Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366.

Illinois.— St. Louis, etc., R. Co. *v.* Warfel, 163 Ill. 641, 45 N. E. 169; Warder *v.* Arnold, 75 Ill. App. 674; Prairie State Paper Co. *v.* Sharp, 67 Ill. App. 477.

Iowa.—Reizenstein *v.* Clark, 104 Iowa 287, 73 N. W. 588.

Kansas.— Feidler *v.* Motz, 42 Kan. 519, 22 Pac. 561; Dresser *v.* Wood, 15 Kan. 344.

Louisiana.— England *v.* Gripon, 15 La. Ann. 304; Powell *v.* Aiken, 18 La. 321; Leggett *v.* Peet, 1 La. 288; McMicken *v.* Brown, 6 Mart. N. S. 85.

Massachusetts.— Farrar *v.* Paine, 173 Mass. 58, 53 N. E. 146; Bullock *v.* Hayward, 10 Allen 460; Holden *v.* Cosgrove, 12 Gray 216.

Michigan.—Kuhn *v.* Freund, 87 Mich. 545, 49 N. W. 867; Frankel *v.* Coots, 41 Mich. 75, 1 N. W. 940.

Mississippi.— Alabama, etc., R. Co. *v.* Searles, 71 Miss. 744, 16 So. 255.

Missouri.— Hamman *v.* Central Coal, etc., Co., 156 Mo. 232, 56 S. W. 1091; Hill *v.* Meyer Bros. Drug Co., 140 Mo. 433, 41 S. W. 909; Dlauhi *v.* St. Louis, etc., R. Co., 139 Mo. 291, 40 S. W. 890; Abbitt *v.* St. Louis Transit Co., 104 Mo. App. 534, 79 S. W. 496.

Montana.— Lawlor *v.* Kemper, 20 Mont. 13, 49 Pac. 398.

Nebraska.— Parker *v.* Parker, 73 Nebr. 4, 102 N. W. 85; Hoefer *v.* Langhorst, 53 Nebr. 364, 73 N. W. 692.

Nevada.— Simpson *v.* Williams, 18 Nev. 432, 4 Pac. 1213.

New Hampshire.— Lyons *v.* Child, 61 N. H. 72.

New Jersey.— Morris *v.* Kettle, 57 N. J. L. 218, 30 Atl. 879.

New York.— Holcomb *v.* Campbell, 118 N. Y. 46, 22 N. E. 1107; Knapp *v.* Simon, 96 N. Y. 284; Hetzel *v.* Easterly, 96 N. Y. App. Div. 517, 89 N. Y. Suppl. 154; Page *v.* Shainwald, 52 N. Y. App. Div. 349, 65 N. Y. Suppl. 174; Cahill Iron Works *v.* Pemberton, 48 N. Y. App. Div. 468, 62 N. Y. Suppl. 944; Robinson *v.* Hawley, 45 N. Y. App. Div. 287, 61 N. Y. Suppl. 138; Domschke *v.* Metropolitan El. R. Co., 74 Hun 442, 26 N. Y. Suppl. 840 [*reversed* on other grounds in 148 N. Y. 337, 42 N. E. 804]; Schlussel *v.* Willett, 34 Barb. 615; Hubbard *v.* Russel, 24 Barb. 404; Flaherty *v.* Miner, 15 Daly 173, 4 N. Y. Suppl. 618 [*affirmed* in 123 N. Y. 382, 25 N. E. 418]; Hoff *v.* Coumeight, 14 Misc. 314, 35 N. Y. Suppl. 1052.

North Dakota.— Kinney *v.* Brotherhood of American Yeomen, 15 N. D. 21, 106 N. W. 44.

Ohio.— Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193.

Rhode Island.— Collier *v.* Jenks, 19 R. I. 493, 34 Atl. 998.

Wisconsin.— See Tomlinson *v.* Wallace, 16 Wis. 224.

United States.— Wasatch Min. Co. *v.* Creseent Min. Co., 148 U. S. 293, 13 S. Ct. 600, 37 L. ed. 454; Yazoo, etc., R. Co. *v.* Wagner, 87 Fed. 855, 31 C. C. A. 261; Earnshaw *v.* McHose, 48 Fed. 589; Draper *v.* Springport, 15 Fed. 328, 21 Blatchf. 240.

See 39 Cent. Dig. tit. "Pleading," § 1428.

It is too late to object at the close of a trial that the answer did not put the fact of indebtedness in issue. Simmons *v.* Sisson, 26 N. Y. 264.

the party presenting it is entitled to the benefit of any cause of action or defense established thereby,[70] although if it is admissible as to one issue raised by the pleadings but inadmissible as to another not made by the pleadings, its reception without objection is not a waiver of objection to the consideration of such latter issue.[71] The scope of the evidence admissible under the pleadings may be enlarged by consent of the parties.[72] Where either party tries a case as if certain issues were presented, he is estopped to afterward object that no such issues were raised by the pleadings,[73] and a request for an instruction to the jury as to an issue is a waiver of the objection that such issue is not presented by the pleadings.[74] A party cannot object to the relevancy of the evidence which he himself causes to be introduced [75] or upon which he himself rests his cause of action or defense.[76]

An objection to an application to amend so as to conform the pleading to the proof is a sufficient objection where it further appears that the issue foreign to the pleadings was not intentionally litigated by the parties. Wixon *v.* Devine, 91 Cal. 477, 27 Pac. 777.

70. *Alabama.*— Hill *v.* Birmingham Union R. Co., 100 Ala. 447, 14 So. 201; Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1, 7 So. 635.

Arkansas.— Shattuck *v.* Byford, 62 Ark. 431, 35 S. W. 1107.

California.— Burnham *v.* Stone, 101 Cal. 164, 35 Pac. 627; Moore *v.* Campbell, 72 Cal. 251, 13 Pac. 689.

Iowa.— National State Bank *v.* Boesch, 90 Iowa 47, 57 N. W. 641.

Kansas.— Feidler *v.* Motz, 42 Kan. 519, 22 Pac. 561.

Kentucky.— Louisville, etc., R. Co. *v.* Walden, 74 S. W. 694, 25 Ky. L. Rep. 1.

Louisiana.— Fontenot *v.* Mannel, 46 La. Ann. 1373, 16 So. 182; Montamat *v.* Debon, 4 Mart. N. S. 147.

Montana.— Capital Lumber Co. *v.* Barth, 33 Mont. 94, 81 Pac. 994.

New York.— Ehrenfried *v.* Lackawanna Iron, etc., Co., 180 N. Y. 515, 72 N. E. 1141 [*affirming* 89 N. Y. App. Div. 130, 85 N. Y. Suppl. 57]; Peck *v.* Goodberlett, 109 N. Y. 180, 16 N. E. 350; Williams *v.* People's F. Ins. Co., 57 N. Y. 274; Ceballos *v.* Munson Steamship Line, 93 N. Y. App. Div. 593, 87 N. Y. Suppl. 811; Prouty *v.* Eaton, 41 Barb. 409; Holt *v.* Wolf, 19 Misc. 635, 44 N. Y. Suppl. 403; Stilwell *v.* Carpenter, 2 Abb. N. Cas. 238; Jackson *v.* Demont, 9 Johns. 55, 6 Am. Dec. 259.

Ohio.— Pennsylvania Co. *v.* Yoder, 25 Ohio Cir. Ct. 32.

Pennsylvania.— Lazarus *v.* George, 3 Luz. Leg. Reg. 143.

Washington.— Bruce *v.* Foley, 18 Wash. 96, 50 Pac. 935; Guley *v.* Northwestern Coal, etc., Co., 7 Wash. 491, 35 Pac. 372.

Wisconsin.— Bowers *v.* Thomas, 62 Wis. 480, 22 N. W. 710.

United States.— Anderson *v.* Angus Independent School Dist., 78 Fed. 750; Central Vermont R. Co. *v.* Soper, 59 Fed. 879, 8 C. C. A. 341.

See 39 Cent. Dig. tit. "Pleading," §§ 1428, 1429.

Contra.— Paul *v.* Perez, 7 Tex. 338.

When consent inferred.— The parties to an action may, by consent, litigate a defense not pleaded, which consent may be inferred from the admission, without objection, of evidence irrelevant, except as to such defense, or from the charge of the court acquiesced in by the parties. Carter *v.* Howard, 17 Misc. (N. Y.) 381, 39 N. Y. Suppl. 1060.

71. *Iowa.*—Eikenberry *v.* Edwards, 67 Iowa 14, 24 N. W. 570.

Michigan.— Freeman *v.* Ellison, 37 Mich. 459.

Minnesota.—Payette *v.* Day, 37 Minn. 366, 34 N. W. 592; O'Neil *v.* Chicago, etc., R. Co., 33 Minn. 489, 24 N. W. 192.

Montana.— Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

New York.— Williams *v.* Mechanics', etc., F. Ins. Co., 54 N. Y. 577.

See 39 Cent. Dig. tit. "Pleading," § 1428.

72. Adams *v.* Farnsworth, 15 Gray (Mass.) 423; Sommers *v.* Myers, 69 N. J. L. 24, 54 Atl. 812.

73. *Illinois.*— Ehrhart *v.* Rork, 114 Ill. App. 509.

Kansas.— Chicago Lumber Co. *v.* Limerick, 53 Kan. 395, 36 Pac. 710.

Mississippi.— Alabama, etc., R. Co. *v.* Searles, 71 Miss. 744, 16 So. 255.

Missouri.—Harwood *v.* Toms, 130 Mo. 225, 32 S. W. 666; Spengler *v.* Kaufman, 43 Mo. App. 5.

Montana.— McMaster *v.* Montana Union R. Co., 12 Mont. 163, 30 Pac. 268.

New York.— Tarbell *v.* Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350.

Ohio.— Tiffin *v.* Shawhan, 43 Ohio St. 178, 1 N. E. 581.

Consent inferred.— A defense which has not been pleaded may be taken as having been within the issues by consent where it was litigated without objection at the trial. Smith *v.* Fox, 18 Misc. (N. Y.) 729, 42 N. Y. Suppl. 20.

74. Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072; Wilmerton *v.* Sample, 42 Ill. App. 254; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624.

75. Romano *v.* Irsch, 4 Misc. (N. Y.) 621, 23 N. Y. Suppl. 967 [*affirmed* in 7 Misc. 147, 27 N. Y. Suppl. 246].

76. Appelman *v.* Broadway Ins. Co., 18 Colo. App. 110, 70 Pac. 451; Hewitt *v.* Morgan, 88 Iowa 468, 55 N. W. 478; Willis *v.* Fernald, 33 N. J. L. 206.

2. On Ground of Variance.[77] Except where there is an entire failure to prove the cause of action or defense alleged,[78] a variance between the pleadings and proofs must be taken advantage of at the trial where it may be cured by amendment or it is waived.[79] In accordance with the application of this rule it has been

77. Variance as ground of motion in arrest of judgment see Judgments, 23 Cyc. 831.

78. White *v.* Gilleland, 93 Mo. App. 310; Springfield Bank *v.* Springfield First Nat. Bank, 30 Mo. App. 271; Peck *v.* Thompson, 15 Vt. 637.

79. *Arizona.*— Walker *v.* Gray, 6 Ariz. 359, 57 Pac. 614.

California.— Colfax Mountain Fruit Co. *v.* Southern Pac. R. Co., 118 Cal. 648, 50 Pac. 775, 40 L. R. A. 78; Delafield *v.* San Francisco, etc., R. Co., (1895) 40 Pac. 958; Bell *v.* Knowles, 45 Cal. 193; Dikeman *v.* Norrie, 36 Cal. 94; Marshall *v.* Ferguson, 23 Cal. 65.

Colorado.— Percy Consol. Min. Co. *v.* Hallam, 22 Colo. 233, 44 Pac. 509; Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42; King *v.* De Coursey, 8 Colo. 463, 9 Pac. 31; McCoy *v.* Wilson, 8 Colo. 335, 7 Pac. 298; Smith *v.* Roe, 7 Colo. 95, 1 Pac. 909; Schmidt *v.* Denver First Nat. Bank, 10 Colo. App. 261, 50 Pac. 733; Denver, etc., R. Co. *v.* Rosuck, 7 Colo. App. 288, 43 Pac. 456; Cunningham *v.* Bostwick, 7 Colo. App. 169, 43 Pac. 151. See also Ramsay *v.* Meade, 37 Colo. 465, 86 Pac. 1018.

Connecticut.—Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161.

Florida.— Florida East Coast R. Co. *v.* Welch, 53 Fla. 145, 44 So. 250.

Georgia.— Watson *v.* Brightwell, 60 Ga. 212.

Illinois.— Chicago City R. Co. *v.* Mager, 185 Ill. 336, 56 N. E. 1058; Alford *v.* Dannenberg, 177 Ill. 331, 52 N. E. 485; Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276; Joliet *v.* Johnson, 177 Ill. 178, 52 N. E. 498; Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936; Union Show Case Co. *v.* Blindauer, 175 Ill. 325, 51 N. E. 709; Chicago, etc., R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; Chicago, etc., R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680; Chicago, etc., R. Co. *v.* Dumser, 161 Ill. 190, 43 N. E. 698; Chicago, etc., R. Co. *v.* Gaelinowski, 155 Ill. 189, 40 N. E. 601; Chicago, etc., R. Co. *v.* Byrum, 153 Ill. 131, 38 N. E. 578; Harris *v.* Shebek, 151 Ill. 287, 37 N. E. 1015; Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; Chicago, etc., R. Co. *v.* Dickson, 143 Ill. 368, 32 N. E. 380; Betting *v.* Hobbett, 142 Ill. 72, 30 N. E. 1048; Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025; Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Foltz *v.* Hardin, 139 Ill. 405, 28 N. E. 786; Chicago *v.* Moore, 139 Ill. 201, 28 N. E. 1071; McCormick Harvesting Mach. Co. *v.* Burandt, 136 Ill. 170, 26 N. E. 588; Consolidated Coal Co. *v.* Wombacher, 134 Ill. 57, 24 N. E. 627; Wight Fire-Proofing Co. *v.* Poczekai, 130 Ill. 139, 22 N. E. 543; Dulin *v.* Prince, 124 Ill. 76, 16 N. E. 242; Mattoon *v.* Fallin, 113 Ill. 249; Wabash, etc., R. Co. *v.* Coble, 113 Ill. 115; Indianapolis, etc., R. Co. *v.* Estes, 96 Ill. 470; Driggers *v.* Bell, 94 Ill. 223; Elgin *v.* Kimball, 90 Ill. 356; Grundeis *v.* Hartwell, 90 Ill. 324; Stookey *v.* Stookey, 89 Ill. 40; Brannan *v.* Strauss, 75 Ill. 234; Doyle *v.* Frank Douglas Mach. Co., 73 Ill. 273; Curry *v.* People, 54 Ill. 263; Pearsons *v.* Lee, 2 Ill. 193; Probst Constr. Co. *v.* Foley, 63 Ill. App. 494; Illinois Cent. R. Co. *v.* Creighton, 63 Ill. App. 165; Chicago *v.* Seben, 62 Ill. App. 248; Huffer *v.* Viskovsky, 62 Ill. App. 94; Morier *v.* Moran, 58 Ill. App. 235; Schwarze *v.* Greenbaum, 58 Ill. App. 221; Cleveland, etc., R. Co. *v.* Strong, 56 Ill. App. 604; Hess *v.* Rosenthal, 55 Ill. App. 324; Williamson *v.* Rexroat, 55 Ill. App. 116; Merrill *v.* Elliott, 55 Ill. App. 34; Nelson *v.* Smith, 54 Ill. App. 345; Springfield *v.* Rosenmeyer, 52 Ill. App. 301; Peake *v.* Walton, 52 Ill. App. 90; Fish *v.* Seeberger, 47 Ill. App. 580; McCormick Harvesting Mach. Co. *v.* Adele, 47 Ill. App. 542; Home Ins. Co. *v.* Bethel, 42 Ill. App. 475; Hammond *v.* Goodale, 38 Ill. App. 365; McMahon *v.* Sankey, 35 Ill. App. 341; Start *v.* Moran, 27 Ill. App. 119; Rozet *v.* Harvey, 26 Ill. App. 558; Lynch *v.* Eimer, 24 Ill. App. 185; St. Louis Coal R. Co. *v.* Moore, 14 Ill. App. 510.

Indiana.— Latshaw *v.* State, 156 Ind. 194, 59 N. E. 471; Allen *v.* Hollingshead, 155 Ind. 178, 57 N. E. 917 (holding that unless the objection is raised at the trial the pleading will be deemed amended); Krewson *v.* Cloud, 45 Ind. 273; Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654; Woodward *v.* Wilcox, 27 Ind. 207; Hull *v.* Green, 26 Ind. 388.

Iowa.— Ressler *v.* Baxley, 81 Iowa 750, 47 N. W. 57; Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510; Iselin *v.* Griffith, 62 Iowa 668, 18 N. W. 302; Singer *v.* Given, 61 Iowa 93, 15 N. W. 858; Lines *v.* Lines, 54 Iowa 600, 7 N. W. 87.

Kentucky.— Davezac *v.* Seiler, 93 Ky. 418, 20 S. W. 375, 14 Ky. L. Rep. 497; Anderson *v.* Rogers, 1 Bush 200; Buffalo Creek Coal Min. Co. *v.* Troendle, 99 S. W. 622, 30 Ky. L. Rep. 740; Tyler *v.* Coleman, 97 S. W. 373, 29 Ky. L. Rep. 1270.

Louisiana.— Wyer *v.* Winchester, 2 Mart. N. S. 69; Larglini *v.* Broussard, 12 Mart. 242.

Maine.— Conway F. Ins. Co. *v.* Sewall, 54 Me. 352; White *v.* Perley, 15 Me. 470.

Maryland.— Straus *v.* Young, 36 Md. 246; Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

Massachusetts.— Lydig *v.* Braman, 177 Mass. 212, 58 N. E. 696; Smith *v.* Colby, 136 Mass. 562; Clarke *v.* Charter, 128 Mass. 483; Russell *v.* Barry, 115 Mass. 300; Hutchinson *v.* Gurley, 8 Allen 23.

Michigan.— Doyle *v.* Detroit Omnibus Line

held for example that a variance may also be waived by agreement of the

Co., 105 Mich. 195, 62 N. W. 1031; Waldron *v.* Palmer, 104 Mich. 556, 62 N. W. 731; Robinson *v.* Lake Shore, etc., R. Co., 103 Mich. 607, 61 N. W. 1014; Slater *v.* Chapman, 67 Mich. 523, 35 N. W. 106, 11 Am. St. Rep. 593; Rorabacher *v.* Lee, 16 Mich. 169; McIlardy *v.* Wadsworth, 8 Mich. 349.

Minnesota.— Adams *v.* Castle, 64 Minn. 505, 67 N. W. 637; O'Connor *v.* Delaney, 53 Minn. 247, 54 N. W. 1108, 39 Am. St. Rep. 601; Johnson *v.* Avery, 41 Minn. 485, 43 N. W. 340; Cummings *v.* Petsch, 41 Minn. 115, 42 N. W. 789; Nelson *v.* Thompson, 23 Minn. 508; Washburn *v.* Winslow, 16 Minn. 33; Short *v.* McRea, 4 Minn. 119.

Mississippi.— Kimbrough *v.* Ragsdale, 69 Miss. 674, 13 So. 830; Ware *v.* McQuillan, 54 Miss. 703; Stier *v.* Surget, 10 Sm. & M. 154; Turnbull *v.* Witherspoon, Walk. 351.

Missouri.— Chouquette *v.* Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897; Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Walden *v.* Bolton, 55 Mo. 405; Clements *v.* Maloney, 55 Mo. 352; Turner *v.* Chillicothe, etc., R. Co., 51 Mo. 501; Wolf *v.* Lauman, 34 Mo. 575; Blair *v.* Corby, 29 Mo. 480; Carroll *v.* Paul, 16 Mo. 226; Stalzer *v.* Jacob Dold Packing Co., 84 Mo. App. 565; Lalor *v.* Byrne, 51 Mo. App. 578; Liddell *v.* Fisher, 48 Mo. App. 449; Estes *v.* Fry, 22 Mo. App. 53; Baker *v.* Raley, 18 Mo. App. 562; Shelton *v.* Durham, 7 Mo. App. 585.

Montana.— Frohner *v.* Rodgers, 2 Mont. 179.

Nebraska.— Smith *v.* Phelan, 40 Nebr. 765, 59 N. W. 562.

Nevada.— Tognini *v.* Kyle, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442.

New Hampshire.— Ireland *v.* Drown, 61 N. H. 638; Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287; McConihe *v.* Sawyer, 12 N. H. 396.

New York.— Cardell *v.* McNiel, 21 N. Y. 336; Barnes *v.* Perine, 12 N. Y. 18; Rosebrooks *v.* Dinsmore, 4 Abb. Dec. 118, 1 Transcr. App. 265, 5 Abb. Pr. N. S. 59, 36 How. Pr. 138; Dey *v.* Prentice, 90 Hun 27, 35 N. Y. Suppl. 563; Hamilton *v.* Gridley, 54 Barb. 542; Allen *v.* Mercantile Mut. Ins. Co., 46 Barb. 642 [*reversed* on other grounds in 44 N. Y. 437, 4 Am. Rep. 700]; Rice *v.* Hollenbeck, 19 Barb. 664; Chapman *v.* Carolin, 3 Bosw. 456; Newstadt *v.* Adams, 5 Duer 43; Luckey *v.* Frantzkee, 1 E. D. Smith 47; Carmichael *v.* John Haneock Mut. L. Ins. Co., 45 Misc. 597, 90 N. Y. Suppl. 1033; McKeever *v.* Dady, 18 N. Y. Suppl. 439; Niebuhr *v.* Schreyer, 13 N. Y. Suppl. 809; Tallman *v.* Earle, 13 N. Y. Suppl. 805; Drexel *v.* Pease, 13 N. Y. Suppl. 774; Mayhew *v.* Howard, 2 N. Y. St. 155; Rockefeller *v.* Hoysradt, 2 Hill 616; Watson *v.* McLaren, 19 Wend. 557 [*affirmed* in 26 Wend. 425, 37 Am. Dec. 260]; Driggs *v.* Dwight, 17 Wend. 71, 31 Am. Dec. 283; Lawrence *v.* Barker, 5 Wend. 301.

North Carolina.— Allen *v.* Sallinger, 108 N. C. 159, 12 S. E. 896.

North Dakota.— Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188; Purcell *v.* St. Paul F. & M. Ins. Co., 5 N. D. 100, 64 N. W. 943.

Ohio.— Spcer *v.* Bishop, 24 Ohio St. 598.

Pennsylvania.— Kroegher *v.* McConway, etc., Co., 149 Pa. St. 444, 23 Atl. 341; Passenger Conductors' L. Ins. Co. *v.* Birnbaum, 116 Pa. St. 565, 11 Atl. 378; Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Pa. St. 180; Wingate *v.* Mechanics' Bank, 10 Pa. St. 104; Miller *v.* Miller, 4 Pa. St. 317; Beale *v.* Com., 16 Serg. & R. 150; Williams *v.* Hood, 1 Phila. 205.

South Carolina.— General Electric Co. *v.* Blacksburg Land, etc., Co., 46 S. C. 75, 24 S. E. 43.

Tennessee.— Hughes *v.* Dice, 1 Swan 329.

Texas.— Greenwood *v.* Anderson, 8 Tex. 225; Western Union Tel. Co. *v.* Trice, (Civ. App. 1898) 48 S. W. 770; Preston *v.* Western Wheel Scraper Co., (Civ. App. 1894) 25 S. W. 1000.

Vermont.— Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367; Hathaway *v.* Sabin, 63 Vt. 527, 22 Atl. 633; U. S. National Bank *v.* Burton, 58 Vt. 426, 3 Atl. 756; Merritt *v.* Closson, 36 Vt. 172; Morrill *v.* Derby, 34 Vt. 440; Gregory *v.* Gleed, 33 Vt. 405; Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665; Waterman *v.* Connecticut, etc., R. Co., 30 Vt. 610, 73 Am. Dec. 326; Phelps *v.* Conant, 30 Vt. 277; Hard *v.* Brown, 18 Vt. 87.

Virginia.— Newport News, etc., R., etc., Co. *v.* McCormick, 106 Va. 517, 56 S. E. 281; Bertha Zine Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; Shenandoah Valley R. Co. *v.* Moose, 83 Va. 827, 3 S. E. 796.

Washington.—Sweeney *v.* Pacific Coast Elevator Co., 14 Wash. 562, 45 Pac. 151.

Wisconsin.— Clark *v.* Slaughter, 129 Wis. 642, 109 N. W. 556; Evens, etc., Fire Brick Co. *v.* Hadfield, 93 Wis. 665, 68 N. W. 468; Russell *v.* Loomis, 43 Wis. 545; Truman *v.* McCollum, 20 Wis. 360; Gardinier *v.* Kellogg, 14 Wis. 605; Gee *v.* Swain, 12 Wis. 450; Drury *v.* Mann, 4 Wis. 202; Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20.

Wyoming.— Rainsford *v.* Massengale, 5 Wyo. 1, 35 Pac. 774.

United States.— Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230; Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293, 13 S. Ct. 600, 37 L. ed. 454; Davis *v.* Patrick, 141 U. S. 479, 12 S. Ct. 58, 35 L. ed. 826; Roberts *v.* Graham, 6 Wall. 578, 18 L. ed. 791; Freund *v.* S. H. Greene, etc., Corp., 139 Fed. 703; Flint, etc., R. Co. *v.* McPherson, 105 Fed. 210, 44 C. C. A. 449; Supreme Council C. K. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96; Sheppard *v.* Newhall, 54 Fed. 306, 4 C. C. A. 352.

See 39 Cent. Dig. tit. "Pleading," § 1438.

A ruling upon the objection must be had in the trial court. Hills *v.* Marlboro, 40 Vt. 648.

parties,[80] or by an admission of the fact proved,[81] or by the successful opposition of the adverse party to the allowance of an amendment to cure it,[82] or by a motion to exclude the evidence on other grounds.[83] But if proper objection is taken, going on with the trial constitutes no waiver of the variance.[84] The general rule is that the objection must be taken to the evidence when it is offered,[85] and is too late after the close of the evidence,[86] or after the case is submitted to the jury,[87]

Where an amendment might have been made to conform the pleading to the proof, on subsequent motion or in the appellate court, the case will be disposed of as though such amendment had been made. Fallon *v.* Lawler, 102 N. Y. 228, 6 N. E. 392; Tisdale *v.* Morgan, 7 Hun (N. Y.) 583; Kennedy *v.* Crandell, 3 Lans. (N. Y.) 1; Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096; Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

After several trials.— Where a variance, between the allegations and proof, if it appeared at all, existed during three trials, it cannot after the third trial be availed of as ground for reversal. Mills *v.* Larrance, 120 Ill. App. 83 [*affirmed* in 217 Ill. 446, 75 N. E. 555].

80. Harbison *v.* Shook, 41 Ill. 141.

Litigating a question not raised on the pleadings will amount to an agreement to waive the variance. Charwat *v.* Vopelak, 19 Misc. (N. Y.) 500, 44 N. Y. Suppl. 26.

81. Buzzell *v.* Snell, 25 N. H. 474, holding that where defendant admits the contract declared on by the payment of money into court, either with or without a plea of tender, he cannot take advantage of any variance between plaintiff's direct proof and the declaration.

82. Stearns *v.* Reidy, 33 Ill. App. 246.

83. Ottawa *v.* Hayne, 114 Ill. App. 21 [*affirmed* in 214 Ill. 45, 73 N. E. 385].

84. Bottom *v.* Barton, 12 Colo. App. 53, 54 Pac. 1031.

85. *Illinois.*— Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072; Jacobs *v.* Marks, 183 Ill. 533, 56 N. E. 154; Insurance Co. of North America *v.* Bird, 175 Ill. 42, 51 N. E. 686; East Dubuque *v.* Burhyte, 173 Ill. 553, 50 N. E. 1077; Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763; Foltz *v.* Hardin, 139 Ill. 405, 28 N. E. 786; Aurora *v.* Plummer, 122 Ill. App. 143; Illinois Cent. R. Co. *v.* Foulks, 92 Ill. App. 391 [*affirmed* in 191 Ill. 57, 60 N. E. 890]; Wabash R. Co. *v.* Randol, 69 Ill. App. 432. But see Republic Iron, etc., Co. *v.* Lee, 227 Ill. 246, 81 N. E. 411 [*reversing* on other grounds 126 Ill. App. 297]. *Contra*, McCormick Harvesting Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402.

Iowa.— Iselin *v.* Griffith, 62 Iowa 668, 18 N. W. 302.

Louisiana.— Thielman *v.* Guéblé, 32 La. Ann. 260, 36 Am. Rep. 267.

Michigan.— See Alderton *v.* Williams, 139 Mich. 296, 102 N. W. 753, where it was held that a variance between the pleadings and proofs will be deemed waived when brought to the attention of the court for the first time by a request to charge after the close of the evidence.

Pennsylvania.— Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Pa. St. 180.

South Carolina.— South Carolina R. Co. *v.* Barrett, 12 S. C. 173.

Vermont.— Phelps *v.* Conant, 30 Vt. 277.

Virginia.— See Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850.

United States.— Preiss *v.* Zitt, 148 Fed. 617, 78 C. C. A. 56. But see Freund *v.* S. H. Greene, etc., Corp., 139 Fed. 703.

See 39 Cent. Dig. tit. "Pleading," § 1438.

But see Straus *v.* Young, 36 Md. 246; Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42. *Compare* Elmore *v.* Elmore, 114 Cal. 516, 46 Pac. 458.

Contra.— Unless plaintiff obtains leave to so amend his complaint as to conform to the proof, an objection on the ground of variance may properly be raised by motion for a nonsuit, although defendant had not objected to the admission of the evidence. Bailey *v.* Brown, 4 Cal. App. 515, 88 Pac. 518.

Although on the first trial evidence as to injuries not pleaded was admitted without objection yet on appeal from the judgment on the second trial the complaint will not be amended or the variance disregarded where on the second trial the defect was specifically pointed out by objection to the evidence and the trial court was not asked to make the amendment. Page *v.* Delaware etc., Canal Co., 76 N. Y. App. Div. 160, 78 N. Y. Suppl. 454, 12 N. Y. Annot. Cas. 18.

86. Hamilton *v.* Gridley, 54 Barb. (N. Y.) 542; Montgomery *v.* Waterbury, 2 Misc. (N. Y.) 145, 21 N. Y. Suppl. 631 [*affirmed* in 142 N. Y. 652, 37 N. E. 569]; Prince, etc., Iron Works *v.* Kenny, 92 N. Y. Suppl. 268.

A motion made after the proofs were in to strike out certain evidence, on the ground of variance, came too late, and was properly overruled. Chicago *v.* Bork, 227 Ill. 60, 81 N. E. 27 [*affirming* 128 Ill. App. 357].

Instructions.— Where evidence is admitted without objection, the question of variance between the pleading and the proof cannot be raised by instructions. International Harvester Co. of America *v.* Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93.

Opportunity to amend as test.— But in McCormick Harvesting Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402, 410, the court said: "It would therefore seem immaterial when the question of variance is called to the attention of the trial court so it is done at the trial at a time when plaintiff may avoid the variance by amendment of his pleadings."

87. Lund *v.* Tynsboro, 11 Cush. (Mass.) 563, 59 Am. Dec. 159; Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638; Thilemann *v.* New York, 66 N. Y. App. Div. 455, 73 N. Y. Suppl. 352.

or after verdict [88] or judgment.[89] The objection must specify exactly wherein the variance consists so that it may be cured by an amendment, a general objection that there is a variance not being sufficient; [90] and in some jurisdictions the adverse party is required to make a showing sufficient to satisfy the court that he has actually been misled to his prejudice.[91]

3. On Ground of Insufficiency of Pleadings. Where a pleading fails to state facts constituting a cause of action or defense, the failure to urge the objection by demurrer or answer is generally not a waiver thereof,[92] and the objection may thereafter be urged on the trial by objecting to the introduction of any evidence thereunder.[93] In some jurisdictions, however, it seems that the objection cannot

88. Matthews *v.* Baraboo, 39 Wis. 674.

89. Merkle *v.* Bennington Tp., 68 Mich. 133, 35 N. W. 846; Brace *v.* Doble, 3 S. D. 416, 53 N. W. 859.

90. Illinois Cent. R. Co. *v.* Behrens, 208 Ill. 20, 69 N. E. 796; Chicago City R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087; Cozzens *v.* Chicago Hydraulic Press Brick Co., 166 Ill. 213, 46 N. E. 788; Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591; Lake Shore, etc., R. Co. *v.* Ward, 135 Ill. 511, 26 N. E. 520; Faulkner *v.* Birch, 120 Ill. App. 281; Ottawa *v.* Hayne, 114 Ill. App. 21 [*affirmed* in 214 Ill. 45, 73 N. E. 385]; Walsh *v.* Colclough, 56 Fed. 778, 6 C. C. A. 114.

Whatever mode is adopted, the variance should be distinctly pointed out, so as to enable the trial court to pass upon it understandingly, and enable plaintiff to obviate the objection by amendment. Fox *v.* Starr, 106 Ill. App. 273.

An objection to evidence as "irrelevant, immaterial and incompetent under the pleadings" does not sufficiently raise the question of a variance between the pleading and proof. Kolodziejski *v.* Seestadt, 143 Mich. 38, 106 N. W. 557.

A specific claim in connection with a general claim of variance will be construed a waiver of all grounds not specified. Jones, etc., Co. *v.* Davenport, 74 Conn. 418, 50 Atl. 1028.

91. *Indiana.*— M. S. Huey Co. *v.* Johnston, 164 Ind. 489, 73 N. E. 996.

Kansas.— Missouri, etc., R. Co. *v.* Green, 75 Kan. 504, 89 Pac. 1042.

Kentucky.— Covington *v.* Miles, 82 S. W. 281, 26 Ky. L. Rep. 609.

Missouri.— Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299; Hayes *v.* Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135.

New York.— Griggs *v.* Howe, 2 Abb. Dec. 291, 3 Keyes 166, 2 Keyes 574, 31 How. Pr. 639 note; Mensch *v.* Mensch, 2 Lans. 235; Timoney *v.* Hoppock, 13 N. Y. St. 568.

North Carolina.— Morgan *v.* Charlotte First Nat. Bank, 93 N. C. 352.

Wisconsin.— Delaplaine *v.* Turnley, 44 Wis. 31.

See 39 Cent. Dig. tit. "Pleading," § 1439.

In Missouri, by statute, an affidavit must be filed. Harrison *v.* Lakenan, 189 Mo. 581, 88 S. W. 53; Litton *v.* Chicago, etc., R. Co., 111 Mo. App. 140, 85 S. W. 978; Kansas City *v.* Ferd Heim Brewing Co., 98 Mo. App. 590, 73 S. W. 302; Cayuga County Nat. Bank *v.* Dunklin, 29 Mo. App. 442; Hoyt *v.* Quinn, 20 Mo. App. 72.

A motion for a peremptory instruction or in arrest of judgment which relies upon a variance need not state specifically the language of the pleading and set out the evidence complained of, and it is sufficient if it so presents the matter to the trial court that it can clearly understand the grounds of the motion and pass intelligently thereon. Republic Iron, etc., Co. *v.* Lee, 227 Ill. 246, 81 N. E. 411.

92. See *supra*, XIV, B, 9, c.

93. *Arizona.*— Consolidated Canal Co. *v.* Peters, 5 Ariz. 80, 46 Pac. 74.

Colorado.— Marriott *v.* Clise, 12 Colo. 561, 21 Pac. 909.

Georgia.— Halliday *v.* Stewart County Bank, 128 Ga. 639, 58 S. E. 169; Walden *v.* Walden, 124 Ga. 145, 52 S. E. 323; Kelly *v.* Stronse, 116 Ga. 872, 43 S. E. 280 [*overruling* Macon *v.* Melton, 115 Ga. 153, 41 S. E. 499; Fleming *v.* Roberts, 114 Ga. 634, 40 S. E. 792]; Crew *v.* Hutcheson, 115 Ga. 511, 42 S. E. 16.

Indiana.— Bane *v.* Ward, 77 Ind. 153; Barnard *v.* Haworth, 9 Ind. 103; Ayres *v.* Blevins, 28 Ind. App. 101, 62 N. E. 305. But see Peden *v.* Mail, 118 Ind. 556, 20 N. E. 493.

Kansas.— Burnette *v.* Elliott, 72 Kan. 624, 84 Pac. 374; Howard *v.* Carter, 71 Kan. 85, 80 Pac. 61; Brower *v.* Timreck, 66 Kan. 770, 71 Pac. 581; Johnson *v.* Big Creek Tp., 10 Kan. App. 398, 61 Pac. 456.

Michigan.— Schindler *v.* Milwaukee, etc., R. Co., 77 Mich. 136, 43 N. W. 911; Rowland *v.* Kalamazoo Superintendents of Poor, 49 Mich. 553, 14 N. W. 494.

Missouri.— Fisher *v.* St. Louis Transit Co., 198 Mo. 562, 95 S. W. 917; Barber Asphalt Paving Co. *v.* Field, 188 Mo. 182, 86 S. W. 860; Hall *v.* Small, 178 Mo. 629, 77 S. W. 733; Broyhill *v.* Norton, 175 Mo. 190, 74 S. W. 1024; Duerst *v.* St. Louis Stamping Co., 163 Mo. 607, 63 S. W. 400; Roberts *v.* Walker, 82 Mo. 200; Weaver *v.* Harlan, 48 Mo. 319; Garner *v.* McCullough, 48 Mo. 318; Ryan *v.* Riddle, 109 Mo. App. 115, 82 S. W. 1117; Harrison *v.* Self, 103 Mo. App. 286, 77 S. W. 91; Goldsmith *v.* St. Louis Candy Co., 85 Mo. App. 595; Laclede Power Co. *v.* Nash-Smith Tea, etc., Co., 85 Mo. App. 321; State *v.* Johnson, 78 Mo. App. 569; Jones *v.* Philadelphia Underwriters, 78 Mo. App. 296; Mumford *v.* Keet, 65 Mo. App. 502.

Nebraska.—Gordon *v.* Omaha, 77 Nebr. 556,

be so urged.[94] To warrant the rejection of evidence in those jurisdictions where the objection may be so urged, the pleading must be so defective that a motion in arrest of judgment would have to be sustained.[95] The objection is equivalent to a demurrer;[96] but a greater latitude of presumption will be indulged in favor

110 N. W. 313; Horton *v.* Rohlff, 69 Nebr. 95, 95 N. W. 36; Ball *v.* La Clair, 17 Nebr. 39, 22 N. W. 118; Curtis *v.* Cutler, 7 Nebr. 315.

New York.— Bossert *v.* Poerschke, 51 N. Y. App. Div. 381, 64 N. Y. Suppl. 733; Lathrop *v.* Godfrey, 6 Thomps. & C. 96.

Ohio.— Lynch *v.* Cleveland, etc., R. Co., 20 Ohio Cir. Ct. 248, 11 Ohio Cir. Dec. 243.

Oklahoma.— Willoughby *v.* Ball, 18 Okla. 535, 90 Pac. 1017; Marshall *v.* Homier, 13 Okla. 264, 74 Pac. 368; Church *v.* Atchison, etc., R. Co., 1 Okla. 44, 29 Pac. 530.

Texas.— Pyron *v.* Butler, 27 Tex. 271; St. Louis Southwestern R. Co. *v.* Rollins, (Civ. App. 1905) 89 S. W. 1099; Avery *v.* Mansur, etc., Implement Co., (Civ. App. 1896) 37 S. W. 466; Simon *v.* Sutton, (Civ. App. 1894) 28 S. W. 223.

Washington.— Prescott *v.* Puget Sound Bridge, etc., Co., 31 Wash. 177, 71 Pac. 772.

Wisconsin.— Benware *v.* Pine Valley, 53 Wis. 527, 10 N. W. 695; Akerly *v.* Vilas, 21 Wis. 377.

United States.— George Adams, etc., Co. *v.* South Omaha Nat. Bank, 123 Fed. 641, 60 C. C. A. 579.

See 39 Cent. Dig. tit. "Pleading," § 1436.

Where an original complaint is wholly defective, but a supplemental complaint sets up matter accruing subsequent to the commencement of the action, so that the two establish a valid cause of action, objection to such supplemental bill cannot be taken for the first time at the trial, by objecting to evidence thereunder. Lowry *v.* Harris, 12 Minn. 255.

No waiver by proceeding to trial.— The objection that the complaint does not state a cause of action made at the opening of the trial is not waived by proceeding with the trial after saving an exception to the overruling of the objection. Steuben County *v.* Wood, 24 N. Y. App. Div. 442, 48 N. Y. Suppl. 471.

The objection to a complaint in equity that plaintiff has an adequate remedy at law cannot, however, be raised by an objection to the introduction of any evidence under the complaint but is waived by failure to urge it by demurrer or answer. Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032; Hoff *v.* Olson, 101 Wis. 118, 76 N. W. 1121, 70 Am. St. Rep. 903. *Contra*, Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891. See also EQUITY, 16 Cyc. 128.

The objection of misjoinder of plaintiffs cannot be raised by an objection to the introduction of any evidence for the reason that the complaint fails to state a cause of action. Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280; Nevil *v.* Clifford, 55 Wis. 161, 12 N. W. 419.

The objection that there is a defect of parties defendant cannot be raised by an objection to the introduction of any evidence under the allegations of the complaint. Greene *v.* Finnell, 22 Wash. 186, 60 Pac. 144.

Procedure where objection sustained.— Where objection to admission of evidence for failure of petition to state a cause of action is sustained, and plaintiff elects to stand on his petition, or does not take leave to amend, judgment should be entered for defendant. Gordon *v.* Omaha, 77 Nebr. 556, 110 N. W. 313.

94. *Alabama.*— Farrow *v.* Andrews, 69 Ala. 96; Coster *v.* Brack, 19 Ala. 210.

Connecticut.— Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211; Adams *v.* Way, 32 Conn. 160.

Illinois.— Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; Greathouse *v.* Robinson, 4 Ill. 7; Illinois Cent. R. Co. *v.* Leiner, 103 Ill. App. 438 [*affirmed* in 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266].

Iowa.— Boyer *v.* Commercial Bldg. Inv. Co., 110 Iowa 491, 81 N. W. 720; Haden *v.* Sioux City, etc., R. Co., 99 Iowa 735, 48 N. W. 733; Van Sickle *v.* Keith, 88 Iowa 9, 55 N. W. 42; McConahey *v.* Griffey, 82 Iowa 564, 48 N. W. 983; Arndt *v.* Hosford, 82 Iowa 499, 48 N. W. 981.

Massachusetts.— See Crocker *v.* Gilbert, 9 Cush. 131.

New Jersey.— Potts *v.* Clarke, 20 N. J. L. 536.

Pennsylvania.— Hobensack *v.* Hallman, 17 Pa. St. 154.

Virginia.— Cunningham *v.* Herndon, 2 Call 530.

A demurrer to the evidence is not a proper way to attack the sufficiency of the pleadings. Stiles *v.* Inman, 55 Miss. 469.

But the objection that a portion of the complaint seeks to recover damages which are purely speculative may be raised by a motion to strike such matter from the complaint or by objections to evidence to support such allegations or by requesting instructions to the jury. Byrne Mill Co. *v.* Robertson, 149 Ala. 273, 42 So. 1008; Kennon *v.* Western Union Tel. Co., 92 Ala. 399, 9 So. 200.

95. Maugh *v.* Hornbeck, 98 Mo. App. 389, 72 S. W. 153; Goldsmith *v.* St. Louis Candy Co., 85 Mo. App. 595; Laclede Power Co. *v.* Nash-Smith Tea, etc., Co., 85 Mo. 321; Marshall *v.* Ferguson, 78 Mo. App. 645.

96. Conrad *v.* Howard, 89 Mo. 217, 1 S. W. 212; Shultz *v.* Jones, 3 Okla. 504, 41 Pac. 400; Rothe *v.* Rothe, 31 Wis. 570; Grannis *v.* Hooker, 29 Wis. 65; Hays *v.* Lewis, 17 Wis. 210.

Not strictly a demurrer ore tenus.— Much confusion results from loosely designating as a demurrer *ore tenus* an objection to all evidence because the complaint is insufficient. Such objection is not a demurrer, in any sense, within the meaning of the code. It is merely an objection to evidence, and the court's decision thereon is merely a ruling on the

of the pleading than upon a formal demurrer,[97] and the practice is not to be encouraged.[98] If there is a single good count, the objection, made to the entire pleading, will be overruled.[99] When such an objection is made to the admission of evidence the precise ground for such objection must be stated, or the objection will not be considered;[1] and it must be shown wherein the pleading fails to state a cause of action.[2] Formal and technical defects, such as uncertainty and indefiniteness, pleading legal conclusions, etc., which are waived by pleading to the merits and going to trial, can never be taken advantage of by objection to the introduction of evidence.[3] Where one party takes issue upon an allegation in the

admission of evidence to be reviewed on exception and corrected like any other ruling. Iron River *v.* Bayfield County, 106 Wis. 587, 82 N. W. 559.

97. *Dakota.*— Stutsman County *v.* Mansfield, 5 Dak. 78, 37 N. W. 304.

Kansas.— Burnette *v.* Elliott, 72 Kan. 624, 84 Pac. 374; Mills *v.* Vickers, 6 Kan. App. 884, 50 Pac. 976.

Michigan.— Barton *v.* Gray, 48 Mich. 164, 12 N. W. 30.

Minnesota.— Cochrane *v.* Quackenbush, 29 Minn. 376, 13 N. W. 154.

Missouri.— State *v.* Delaney, 122 Mo. App. 239, 99 S. W. 1; Heether *v.* Huntsville, 121 Mo. App. 495, 97 S. W. 239.

Nebraska.— Peterson *v.* Hopewell, 55 Nebr. 670, 76 N. W. 451; Harnett *v.* Holdredge, 5 Nebr. (Unoff.) 114, 97 N. W. 443.

North Dakota.— Waldner *v.* Bowdon State Bank, 13 N. D. 604, 102 N. W. 169.

Oklahoma.— Pond Creek First Nat. Bank *v.* Coehran, 17 Okla. 538, 87 Pac. 855; Haffner *v.* Dobrinski, 17 Okla. 438, 88 Pac. 1042.

Oregon.— Keene *v.* Eldriedge, 47 Oreg. 179, 82 Pac. 803; Currey *v.* Butcher, 37 Oreg. 380, 61 Pac. 631.

South Dakota.— Schriner *v.* Dickinson, 20 S. D. 433, 107 N. W. 536; Nerger *v.* Equitable F. Assoc., 20 S. D. 419, 107 N. W. 531; Strait *v.* Eureka, 17 S. D. 326, 96 N. W. 695; Whitbeck *v.* Sees, 10 S. D. 915, 73 N. W. 915.

Wisconsin.— Hoeks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113; Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509.

See 39 Cent. Dig. tit. "Pleading," § 1433 *et seq.*

One who pleads to the merits and goes to trial without demurring greatly impairs his right to question the sufficiency of facts stated in the complaint by objection to the introduction of any evidence, since it is only when a pleading is incapable of being made good by amendment that the court should entertain the objection and the court will indulge every reasonable presumption in favor of the complaint. Strait *v.* Eureka, 17 S. D. 326, 96 N. W. 695.

When rule invoked.— The rule that where a complaint is first attacked by an objection to evidence, it should be most liberally construed, can only be invoked where such an objection has been overruled, the action tried on its merits, and the imperfections of the pleading cured by proper proof. Bon Homme County *v.* McLouth, 19 S. D. 555, 104 N. W. 256.

All material allegations admitted to be true. — On the argument of an objection to the admission of evidence in behalf of plaintiff for the reason that the complaint discloses no cause of action, the court will assume every material allegation of the objectionable pleading as having been admitted to be true in fact. Conrad *v.* Howard, 89 Mo. 217, 1 S. W. 212.

Legal conclusions are not admitted by objection to evidence. Hoyer *v.* Ludington, 100 Wis. 441, 76 N. W. 348.

98. Howard *v.* Carter, 71 Kan. 85, 80 Pac. 61; Rowland *v.* Kalamazoo Superintendents of Poor, 49 Mich. 553, 14 N. W. 494; Jennison *v.* Haire, 29 Mich. 207; Anderson *v.* Carothers, 18 Wash. 520, 52 Pac. 229.

99. Roberts *v.* Walker, 82 Mo. 200.

1. Menke *v.* Gerbracht, 75 Hun (N. Y.) 181, 26 N. Y. Suppl. 1097.

A general objection that the evidence is incompetent, irrelevant, and immaterial is not specific enough where the real objection relates to the sufficiency of the pleadings. Merchants' Nat. Bank *v.* Barlow, 79 Minn. 234, 82 N. W. 364.

2. Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Pine Tree Lumber Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357; James River Nat. Bank *v.* Purchase, 9 N. D. 280, 83 N. W. 7; Hamilton County Com'rs *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507.

Where a complaint alleges two causes of action, one of which is sufficiently alleged, an objection to the reception of any evidence on the ground that the complaint fails to state facts sufficient to constitute a cause of action is not sufficiently specific to reach a defect in pleading the other cause of action. Peterson *v.* Alden, 49 Minn. 428, 52 N. W. 39.

3. *California.*— Eppinger *v.* Kendrick, 114 Cal. 620, 46 Pac. 613; Tompkins *v.* Mahoney, 32 Cal. 231; Walker *v.* Woods, 15 Cal. 66.

Colorado.— Geisseman *v.* Geisseman, 34 Colo. 481, 83 Pac. 635; Michael *v.* Mills, 22 Colo. 439, 45 Pac. 429; Keys *v.* Morrison, 3 Colo. App. 441, 34 Pac. 259.

Idaho.— Naylor *v.* Vermont Loan, etc., Co., 6 Ida. 251, 55 Pac. 297.

Illinois.— Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.

Iowa.— Flanagan *v.* Baltimore, etc., R. Co., 83 Iowa 639, 50 N. W. 60; Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 888; Oliver *v.* Depew, 14 Iowa 490; Kingsbury *v.* Buchanan, 11 Iowa 387.

pleadings of the other, he cannot object to the admission of evidence to prove it even though it be immaterial.[4]

4. As Affected by Bill of Particulars. Variance between the evidence offered and a bill of particulars or copy of account filed must be objected to at the trial or it is waived.[5]

Kansas.— Howard *v.* Carter, 71 Kan. 85, 80 Pac. 61.

Louisiana.—Arrowsmith *v.* Durell, 14 La. Ann. 849; Lowber *v.* McCoy, 12 La. Ann. 795; Tracy *v.* Tuyes, 7 Mart. N. S. 354; Ory *v.* Winter, 4 Mart. N. S. 277.

Maryland.— Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

Massachusetts.— Soper *v.* Manning, 158 Mass. 381, 33 N. E. 516; Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151.

Michigan.— Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64.

Minnesota.— Dodge *v.* McMahan, 61 Minn. 175, 63 N. W. 487.

Missouri.— Drolshagen *v.* Union Depot R. Co., 186 Mo. 258, 85 S. W. 344; Duerst *v.* St. Louis Stamping Co., 163 Mo. 607, 63 S. W. 827; Wilbur *v.* Southwestern Missouri Electric R. Co., 110 Mo. App. 689, 85 S. W. 671; Farmers' Bank *v.* Chicago, etc., R. Co., 109 Mo. App. 165, 83 S. W. 76; Robinson *v.* Metropolitan L. Ins. Co., 105 Mo. App. 567, 80 S. W. 9; Wells *v.* Adams, 88 Mo. App. 215; Jones *v.* Philadelphia Underwriters, 78 Mo. App. 296; Kansas City *v.* American Surety Co., 71 Mo. App. 315; Malone *v.* New York Fidelity, etc., Co., 71 Mo. App. 1; Kansas City Tile, etc., Co. *v.* Neiswanger, 50 Mo. App. 389; Weaver *v.* Harlan, 48 Mo. App. 319; Hatten *v.* Randall, 48 Mo. App. 203.

Nebraska.— Myers *v.* Bealer, 30 Nebr. 280, 46 N. W. 479.

New York.— Kerr *v.* Hays, 35 N. Y. 331; Spies *v.* Roberts, 50 N. Y. Super. Ct. 301.

Oklahoma.— Young *v.* Severy, 5 Okla. 630, 49 Pac. 1024.

Oregon.— Currey *v.* Butcher, 37 Oreg. 380, 61 Pac. 631.

South Carolina.— Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.

South Dakota.— Miller *v.* Durst, 14 S. D. 587, 86 N. W. 631; De Luce *v.* Root, 12 S. D. 141, 80 N. W. 181.

Texas.— Powers *v.* Caldwell, 25 Tex. 352; Black *v.* Drury, 24 Tex. 289; Vance *v.* Claiborne, 2 Tex. Unrep. Cas. 344; Colorado Canal Co. *v.* McFarland, (Civ. App. 1906) 94 S. W. 400; Oneal *v.* Weisman, 39 Tex. Civ. App. 592, 88 S. W. 290; Patterson *v.* Frazer, (Civ. App. 1904) 79 S. W. 1077; McBride *v.* Puckett, (Civ. App. 1901) 66 S. W. 242; Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284; Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210; Davie *v.* Griffith, (Civ. App. 1898) 33 S. W. 390; Illies *v.* Frerichs, 11 Tex. Civ. App. 575, 32 S. W. 915; Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450; Taul *v.* Shanklin, 1 Tex. App. Civ. Cas. § 1135; Fowler *v.* Chapman, 1 Tex. App. Civ. Cas. § 963.

Washington.— Bonne *v.* Security Sav. Soc., 35 Wash. 696, 78 Pac. 38.

Wisconsin.— Schwickerath *v.* Lohen, 48 Wis. 599, 4 N. W. 805; Ready *v.* Sommer, 37 Wis. 265; Learmonth *v.* Veeder, 11 Wis. 138.

United States.— Burley *v.* German-American Bank, 111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406; Ogden City *v.* Weaver, 108 Fed. 564, 47 C. C. A. 485.

See 39 Cent. Dig. tit. "Pleading," § 1435.

Total insufficiency.—An objection to the introduction of any evidence under a petition is good only when there is a total failure to allege in the petition some matter essential to recovery, and is not good when the allegations are simply indefinite or statements of conclusions of law. Pond Creek First Nat. Bank *v.* Cochran, 17 Okla. 538, 87 Pac. 855.

Failure to object to a petition for want of particularity admits evidence as general as the petition is. Carolan *v.* Jefferson, 24 Tex. 229.

Objection that an amended petition states a new cause of action should be made by motion to strike out, not by objection to reception of evidence. Phillips *v.* Barnes, 105 Mo. App. 421, 80 S. W. 43.

As substitute for motion to make more definite.—An objection to the introduction of any evidence cannot serve the purpose of a motion requiring the pleading to be made more definite and certain. Fritz *v.* Watertown, (S. D. 1907) 111 N. W. 630; Leghorn *v.* Nydell, 39 Wash. 17, 80 Pac. 833.

4. Robertshaw *v.* Britton, 74 Miss. 873, 21 So. 523; Mauldin *v.* Seaboard Air Line R. Co., 73 S. C. 9, 52 S. E. 677; Milhous *v.* Southern R. Co., 72 S. C. 442, 52 S. E. 41, 110 Am. St. Rep. 620; Young *v.* Western Union Tel. Co., 65 S. C. 93, 43 S. E. 448; Dent *v.* South-Bound R. Co., 61 S. C. 329, 39 S. E. 527; Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562; Pelzer Mfg. Co. *v.* St. Paul F. & M. Ins. Co., 41 Fed. 271.

A party has no right to a ruling excluding the evidence, although the court has the power to exclude it. Martin *v.* Seaboard Air Line R. Co., 70 S. C. 8, 48 S. E. 616. *Contra*, Powell *v.* Davis, 19 Tex. 380.

5. *Illinois.*— Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 767.

Indiana.— Westfield Bank *v.* Inman, 8 Ind. App. 239, 34 N. E. 21.

Iowa.— Kuhn *v.* Gustafson, 73 Iowa 633, 35 N. W. 660.

Maine.— Parker *v.* Emery, 28 Me. 492.

Michigan.— Cummin *v.* Wilcox, 47 Mich. 501, 11 N. W. 289.

Missouri.— Carroll *v.* Paul, 16 Mo. 226.

New York.— Henry *v.* Dietrich, 7 N. Y. Suppl. 505; Smith *v.* Hicks, 1 Wend. 202.

South Carolina.— Gregg *v.* Vause, 8 Rich. 431.

See 39 Cent. Dig. tit. "Pleading," § 1437.

J. Cure by Verdict or Judgment[6] — **1. General Consideration — a. Statement of Rule.** The phrase "cured by verdict" means that the court will, after verdict, presume that the particular averment omitted from or defectively stated in the pleadings was duly proved at the trial.[7] Such intendment must arise not merely from the verdict but from the united effect of the verdict and the issue upon which the verdict was given.[8] And the particular thing which is presumed to have been proved must always be such as the allegations of the record require to be proved, and such as can therefore be implied from those allegations by fair and reasonable intendment.[9] And on the other hand, a verdict for the party in whose favor such intendment is made is indispensably necessary, for it is in consequence of such verdict, and in order to support it, that the court is induced to put a liberal construction upon the allegations in the record.[10] But nothing is to be intended after verdict but what is expressly stated in the declaration, or necessarily implied from the facts which are stated.[11] Or, in other words,

6. In criminal cases see Indictments and Informations, 22 Cyc. 485 *et seq.*

7. Treanor *v.* Houghton, 103 Cal. 53, 36 Pac. 1081; State *v.* Keena, 63 Conn. 329, 28 Atl. 522; Alford *v.* Baker, 53 Ind. 279; Peck *v.* Martin, 17 Ind. 115; Merrick *v.* Metropolis Bank, 8 Gill 59.

This rule liberally construed.— Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Alcorn *v.* Bass, 17 Ind. App. 500, 46 N. E. 1024; Murray *v.* Booker, 58 S. W. 788, 22 Ky. L. Rep. 781; Warren *v.* Litchfield, 7 Me. 63; Stimpson *v.* Gilchrist, 1 Me. 202; Norton *v.* Wilkes, 93 Minn. 411, 101 N. W. 619; Northern Trust Co. *v.* Markell, 61 Minn. 271, 63 N. W. 735; Holmes *v.* Campbell, 12 Minn. 221; Rogers *v.* Western Home Town Mut. F. Ins. Co., 93 Mo. App. 24; Western Travellers' Acc. Assoc. *v.* Tomson, 72 Nebr. 661, 101 N. W. 341, 103 N. W. 695, 105 N. W. 293; American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Chambers *v.* Barker, 2 Nebr. (Unoff.) 523, 89 N. W. 388; Marsh *v.* State, 2 Nebr. (Unoff.) 372, 96 N. W. 520; Brown *v.* Helsley, 2 Nebr. (Unoff.) 69, 96 N. W. 187; Milner *v.* Harris, 1 Nebr. (Unoff.) 584, 95 N. W. 682; White *v.* Concord R. Co., 30 N. H. 188; Roome *v.* Jennings, 2 Misc. (N. Y.) 257, 21 N. Y. Suppl. 938 [*affirmed* in 3 Misc. 413, 23 N. Y. Suppl. 666 (*affirmed* in 144 N. Y. 659, 39 N. E. 859)]; Utica Bank *v.* Smedes, 3 Cow. (N. Y.) 662; Walker *v.* Harold, 44 Oreg. 205, 74 Pac. 705; Patterson *v.* Patterson, 40 Oreg. 560, 67 Pac. 664; Miller *v.* Hirschberg, 27 Oreg. 522, 40 Pac. 506; Aiken *v.* Coolidge, 12 Oreg. 244, 6 Pac. 712; Scull *v.* Higgins, 21 Fed. Cas. No. 12,570*a*, Hempst. 90; Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21.

It is defects in the pleadings, not in the proofs, which are cured by verdict. Stone *v.* White, 8 Gray (Mass.) 589; Holmes *v.* Preston, 70 Miss. 152, 12 So. 202; Clark *v.* Reed, 12 Sm. & M. (Miss.) 554.

The code has not altered the common-law rules as to the effect of a verdict in curing defects in the pleadings. Brown *v.* Harmon, 21 Barb. (N. Y.) 508.

Effect as to coparties.— Errors which are cured by verdict as to one party are cured as to other coparties. Jenkins *v.* Hurt, 2 Rand. (Va.) 446.

8. State *v.* Keena, 63 Conn. 329, 28 Atl. 522; Dale *v.* Dean, 16 Conn. 579; Chicago, etc., R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680; Peck *v.* Martin, 17 Ind. 115; Ellis *v.* Howard Smith Co., 35 Tex. Civ. App. 566, 80 S. W. 633.

9. *Connecticut.*— State *v.* Keena, 63 Conn. 329, 28 Atl. 522; Murray *v.* Worcester Coal Co., 51 Conn. 103; Dale *v.* Dean, 16 Conn. 579.

Illinois.— Northern Milling Co. *v.* Mackey, 99 Ill. App. 57.

Indiana.— Murphy *v.* Murphy, 95 Ind. 430; Peck *v.* Martin, 17 Ind. 115.

Kentucky.— Rogers *v.* Felton, 98 Ky. 148, 32 S. W. 405, 17 Ky. L. Rep. 724; Murphy *v.* Hubble, 2 Duv. 247; Wilson *v.* Hunt, 6 B. Mon. 379.

Missouri.— State *v.* Williams, 77 Mo. 463; St. Louis International Bank *v.* Franklin County, 65 Mo. 105, 27 Am. Rep. 261; Bowie *v.* Kansas City, 51 Mo. 454; Munchow *v.* Munchow, 96 Mo. App. 553, 70 S. W. 386; New York Store Mercantile Co. *v.* Chapman, 78 Mo. App. 616; Enterprise Coal Co. *v.* Liberty Brewing Co., 20 Mo. App. 16.

New Hampshire.— White *v.* Concord R. Co., 30 N. H. 188.

New York.— Addington *v.* Allen, 11 Wend. 374.

South Carolina.— Simpson *v.* Vaughan, 2 Strobh. 32.

Texas.— Schuster *v.* Freudenthal, 74 Tex. 53, 11 S. W. 1051; Ellis *v.* Howard Smith Co., 35 Tex. Civ. App. 566, 80 S. W. 633.

Vermont.— Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695; Battles *v.* Braintree, 14 Vt. 348; Harding *v.* Cragie, 8 Vt. 501; Vadakin *v.* Soper, 1 Aik. 287.

England.— Jackson *v.* Pesked, 1 M. & S. 234, 14 Rev. Rep. 417; Mackmurdo *v.* Smith, 7 T. R. 518.

Canada.—Connick *v.* Wilson, 4 N. Brunsw. 617.

10. Warren *v.* Harris, 7 Ill. 307; Peck *v.* Martin, 17 Ind. 115.

11. Daniel *v.* Holland, 4 J. J. Marsh. (Ky.) 18; Farrington *v.* Blish, 14 Me. 423; Little *v.* Thompson, 2 Me. 228; Harding *v.* Cragie,

nothing is to be intended, as having been proved, on the trial, but the material facts stated, and such other facts as are necessarily involved in the proof of the facts stated.[12] The rule is frequently stated as follows: Where there is any defect, imperfection, or omission in a pleading, whether of substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict.[13] A find-

8 Vt. 501; Vadakin *v.* Soper, 1 Aik. (Vt.) 287; Spieres *v.* Parker, 1 T. R. 141.

12. Farwell *v.* Smith, 16 N. J. L. 133.

13. Sargeant Williams in 1 Saund. 228 note 1, 85 Eng. Reprint 245.

As quoting or approving this statement of the rule see the following cases:

California.— Treanor *v.* Houghton, 103 Cal. 53, 36 Pac. 1081.

Connecticut.— Dale *v.* Dean, 16 Conn. 579.

Illinois.— Alton R., etc., Co. *v.* Foulds, 190 Ill. 367, 60 N. E. 537; Boyce *v.* Tallerman, 183 Ill. 115, 55 N. E. 703; Consolidated Coal Co. *v.* Scheiber, 167 Ill. 539, 47 N. E. 1052; Gerke *v.* Fancher, 158 Ill. 375, 41 N. E. 982; Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14; Lake Shore, etc., R. Co. *v.* O'Conner, 115 Ill. 254, 3 N. E. 501; Warren *v.* Harris, 7 Ill. 307; Sauter *v.* Anderson, 110 Ill. App. 574; Winheim *v.* Field, 107 Ill. App. 145; Elgin *v.* Thompson, 98 Ill. App. 358; Baltimore, etc., R. Co. *v.* Keck, 84 Ill. App. 159; West Chicago St. R. Co. *v.* Marks, 82 Ill. App. 185; Pullman Palace Car Co. *v.* Connell, 74 Ill. App. 447.

Kentucky.— Covington Sawmill, etc., Co. *v.* Clark, 116 Ky. 461, 76 S. W. 348, 25 Ky. L. Rep. 694; Louisville *v.* Snow, 107 Ky. 536, 54 S. W. 860, 21 Ky. L. Rep. 1268; Western Assur. Co. *v.* Ray, 105 Ky. 523, 49 S. W. 326, 20 Ky. L. Rep. 1360; Malcolm *v.* Malcolm, 100 Ky. 310, 38 S. W. 141, 19 Ky. L. Rep. 563; Ashland, etc., St. R. Co. *v.* Lee, 82 S. W. 368, 26 Ky. L. Rep. 699; Harlow *v.* Supreme Lodge K. H., 62 S. W. 1030, 23 Ky. L. Rep. 456; Youtsey *v.* Kutz, 60 S. W. 857, 22 Ky. L. Rep. 1520; Louisville, etc., R. Co. *v.* Lawes, 56 S. W. 426, 21 Ky. L. Rep. 1793; Cincinnati, etc., R. Co. *v.* Barkley, 13 Ky. L. Rep. 331.

Maine.— Emerson *v.* Lakin, 23 Me. 384.

Michigan.— Smith *v.* Cowles, 123 Mich. 4, 81 N. W. 916; Kean *v.* Mitchell, 13 Mich. 207.

Minnesota.— Hurd *v.* Simonton, 10 Minn. 423.

Missouri.— Garth *v.* Caldwell, 72 Mo. 622; Richardson *v.* Farmer, 36 Mo. 35, 88 Am. Dec. 129.

New York.— Brown *v.* Harmon, 21 Barb. 508.

Ohio.— Cleveland, etc., R. Co. *v.* Tehan, 26 Ohio Cir. Ct. 457.

Oregon.— Houghton *v.* Beck, 9 Oreg. 325.

Pennsylvania.— Quick *v.* Miller, 103 Pa. St. 67.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573.

Texas.— Schuster *v.* Frendenthal, 74 Tex. 53, 11 S. W. 1051; McClellan *v.* State, 22 Tex. 403; De Witt *v.* Miller, 9 Tex. 239; Ellis *v.* Howard Smith Co., 35 Tex. Civ. App. 566, 80 S. W. 633; Western Union Tel. Co. *v.* McHenry, 3 Tex. App. Civ. Cas. § 9.

Utah.— Harkness *v.* McClain, 8 Utah 52, 29 Pac. 964.

Virginia.— Davis *v.* McMullen, 86 Va. 256, 9 S. E. 1095.

Washington.— Moran Bros. Co. *v.* Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 49, 1101.

United States.— Lincoln Tp. *v.* Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518; Wills *v.* Claflin, 92 U. S. 135, 23 L. ed. 490; World's Columbian Exposition Co. *v.* France, 91 Fed. 64, 33 C. C. A. 333.

England.— Delamere *v.* Reg., L. R. 2 H. L. 419, 36 L. J. Q. B. 313, 17 L. T. Rep. N. S. 1.

Canada.— McLean *v.* Phœnix Ins. Co., 13 N. Brunsw. 179.

Another statement of the rule.— "It is said in the court of King's Bench: 'Where matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, then the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial.'" Jackson *v.* Pesked, 1 M. & S. 234, 14 Rev. Rep. 417 [*quoted* in Richardson *v.* Farmer, 36 Mo. 35, 45, 88 Am. Dec. 129; McLean *v.* Phœnix Ins. Co., 13 N. Brunsw. 179].

Where all the evidence given on the trial is preserved in the bill of exceptions, no such presumption will be indulged where it appears that the matter was not in fact proved. Holmes *v.* Preston, 70 Miss. 152, 12 So. 202; International Bank *v.* Franklin County, 65 Mo. 105, 27 Am. Rep. 261; Frost *v.* Pryor, 7 Mo. 314.

The statutes of jeofails often contain the provision that where a verdict has been rendered, the judgment thereon shall not be reversed for the omission of any allegation or averment without proving which the triers of the issue ought not to have given such a verdict. Heman *v.* Allen, 156 Mo. 534, 57 S. W. 559 [*affirmed* in 181 U. S. 402, 21 S. Ct. 645, 45 L. ed. 916, 922]; Sawyer *v.*

ing or judgment by the court where no jury is employed is equivalent, for the purpose of curing defects, to a verdict.[14]

b. Dependent on Failure to Object. The doctrine of cure by verdict applies only when no objection has been made to the defects. Thus there is no cure by verdict where the evidence is introduced over the other party's objection that it is incompetent under the pleadings and exceptions are duly saved.[15] When the defect has first been questioned by demurrer and such demurrer has been erroneously overruled the doctrine of aider by verdict has been held not to apply.[16] Nor is a defect cured by the verdict when the question of the sufficiency of the pleadings is raised by a request for a peremptory instruction.[17]

c. Defects in Collateral Parts of Pleadings. As the verdict is supported on the ground that it is presumed that the facts defectively stated or omitted were proved because they were necessary to be proved in order to warrant such a verdict, no facts will be presumed to have been proved excepting those which were involved in the issue on which such verdict was given; and therefore it has uniformly been held that a defect, omission, or imperfection in some collateral part of the pleading that was not in issue between the parties, so that there was no room to presume that the defect or omission was supplied by proof, is not aided by the verdict.[18] But such a defect is remedied by the statute of jeofails.[19]

d. In Case of Judgment by Default. No such presumptions will be indulged in favor of a pleading after a default judgment as after a trial and verdict.[20] In such cases the introduction of proof is not required, and the judgment would not therefore show that plaintiff had made out a case on which he was entitled to recover.[21] In the case of a default judgment nothing can be presumed but what appears on the face of the pleading,[22] and therefore such a judgment operates only in aid of formal defects,[23] such as, by way of concrete illustrations, want of

Wabash R. Co., 136 Mo. 468, 57 S. W. 108; Seckinger *v.* Philibert, etc., Mfg. Co., 129 Mo. 590, 31 S. W. 957; Helm *v.* Wilson, 4 Mo. 481. Such a provision is limited to averments necessary to make out the cause of action attempted to be set out in the declaration and cannot be extended to embrace a new and distinct cause of action even though the latter be connected in some way with that declared on. Hamer *v.* Rigby, 65 Miss. 41, 3 So. 137.

14. *Georgia.*— Davis *v.* Bray, 119 Ga. 220, 46 S. E. 90.

Indiana.— Sohn *v.* Cambern, 106 Ind. 302, 6 N. E. 813.

Maine.— Emerson *v.* Lakin, 23 Me. 384.

Oregon.— Ferguson *v.* Reiger, 43 Oreg. 505, 73 Pac. 1040.

United States.— Adam *v.* Norris, 103 U. S. 591, 26 L. ed. 583; World's Columbian Exposition Co. *v.* France, 91 Fed. 64, 33 C. C. A. 333.

An award in favor of plaintiff cures the same defects in the declaration that would be cured by a verdict. Dickerson *v.* Hays, 4 Blackf. (Ind.) 44.

15. Bloch Queensware Co. *v.* Metzger, 70 Ark. 232, 65 S. W. 929; State *v.* McElroy, 9 Mo. App. 580; Steuben County *v.* Wood, 24 N. Y. App. Div. 442, 48 N. Y. Suppl. 471.

16. Doty *v.* Patterson, 155 Ind. 60, 56 N. E. 668; Pittsburgh, etc., R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Richmond Gas Co. *v.* Baker, (1895) 39 N. E. 552; Rairden *v.* Winstandley, 99 Ind. 600; McFadin *v.* David, 78 Ind. 445, 41 Am. Rep. 587; Johnson *v.* Breedlove, 72 Ind. 368; Midland Steel Co. *v.* Citizens' Nat. Bank, 26 Ind. App. 71, 59 N. E. 211; Pape *v.* Kaough, 23 Ind. App. 525, 55 N. E. 775; Smith *v.* Miller, 21 Ind. App. 82, 51 N. E. 508. See, however, Fuller *v.* Cox, 135 Ind. 46, 34 N. E. 822, where it is held that if the demurrant submits to a trial on the merits the doctrine of aider does apply. *Contra*, Decatur *v.* Simpson, 115 Iowa 348, 88 N. W. 839; Duncan *v.* Brown, 15 B. Mon. (Ky.) 186; Wilson *v.* Hunt, 6 B. Mon. (Ky.) 379.

17. Hazard Powder Co. *v.* Volger, 3 Wyo. 189, 18 Pac. 636.

18. Dale *v.* Dean, 16 Conn. 579; Gidley *v.* Williams, 1 Ld. Raym. 634, 1 Salk. 37.

Where a declaration alleged a duty on the part of defendant without setting out any fact on which such duty was based, the declaration and issues joined thereon did not require plaintiff to prove the omitted facts, and therefore the defect in the declaration was not cured by the verdict. Schueler *v.* Mueller, 193 Ill. 402, 61 N. E. 1044.

19. Gidley *v.* Williams, 1 Ld. Raym. 634, 1 Salk. 37.

20. Warren *v.* Harris, 7 Ill. 307; Erhardt *v.* Pfeiffer, 29 Ind. App. 570, 64 N. E. 885.

In Tennessee it is said that the same presumption or intendment must be made in favor of final judgment by default as upon a verdict of a jury. Williams *v.* State Bank, 1 Coldw. 43.

21. Emerson *v.* Lakin, 23 Me. 384.

22. Hemmenway *v.* Hickes, 4 Pick. (Mass.) 497.

23. Whipple *v.* Fuller, 11 Conn. 582, 29

profert,[24] variance between the instrument declared on and that produced on oyer,[25] or errors or irregularities in filing papers.[26] It will not supply the omission of allegations or cure defects therein,[27] nor will it cure an entire failure to state a cause of action or defense.[28] In some states, however, the statute of jeofails has placed a judgment by default on the same footing as a verdict.[29]

2. Nature of Defects or Omissions Cured — a. In General. Many defects in a declaration or complaint, which on demurrer would be regarded as fatal to the pleading, will be deemed to be cured by a verdict for plaintiff, if defendant go to trial without demurring.[30] Some cases hold that whenever the defects in the pleading are such as may be obviated by evidence on the trial, even though the pleading might have been held fatally defective on general demurrer, they will be held cured by the verdict and judgment.[31] Where a pleading contains irregularities or defects which would have been amendable had objection been made thereto at the proper time, such irregularities or defects are cured by the verdict or judgment.[32] In other words, every amendment which ought to have been made will be deemed to have been made after verdict.[33]

Am. Dec. 330; Lawver *v.* Langhans, 85 Ill. 138; Bryant *v.* Cheek, 41 S. W. 776, 19 Ky. L. Rep. 749; Belcher *v.* Ross, 33 Tex. 12.

24. Dinsmore *v.* Austill, Minor 89; *Ex p.* Jones, 20 Ark. 35; Shields *v.* Barden, 6 Ark. 459; Tucker *v.* Real Estate Bank, 4 Ark. 429.

25. Cummins *v.* Woodruff, 5 Ark. 116.

26. Fanning *v.* Fly, 2 Coldw. (Tenn.) 486.

27. Warren *v.* Harris, 7 Ill. 307; Erhardt *v.* Pfeiffer, 29 Ind. App. 570, 64 N. E. 885; Emerson *v.* Lakin, 23 Me. 384; Dunn *v.* Sullivan, 23 R. I. 605, 51 Atl. 203.

Alternative allegation.—A civil action charging fraudulent embezzlement "as agent or attorney" is fatally defective in the alternative allegation, although the objection is not taken until after judgment by default. Porter *v.* Hermann, 8 Cal. 619.

28. Hentsch *v.* Porter, 10 Cal. 555; Watson *v.* Zimmerman, 6 Cal. 46.

29. Elliott *v.* Farwell, 44 Mich. 186, 6 N. W. 234; Ragsdale *v.* Caldwell, 2 How. (Miss.) 930.

30. *Alabama.*— Marr *v.* Foster, 1 Stew. 57.

Illinois.— Lake Erie, etc., R. Co. *v.* Wills, 140 Ill. 614, 31 N. E. 122.

Indiana.— Indianapolis, etc., R. Co. *v.* McCaffery, 72 Ind. 294.

Maine.— Bryant *v.* Glidden, 36 Me. 36.

Massachusetts.— Livermore *v.* Boswell, 4 Mass. 437.

Mississippi.— Reaves *v.* Dennis, 6 Sm. & M. 89; Ragsdale *v.* Caldwell, 2 How. 930; Whitaker *v.* Comfort, Walk. 421.

Missouri.— Ayers *v.* St. Louis, etc., R. Co., 124 Mo. App. 422, 101 S. W. 689; Hax *v.* Quincy, etc., R. Co., 123 Mo. App. 172, 100 S. W. 693.

West Virginia.— Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197.

The statutes of jeofails commonly provide that where a verdict has been rendered in any case the judgment thereon shall not be reversed for any defect, imperfection, or omission in the pleadings which could not be regarded on demurrer; or which might have been taken advantage of on demurrer or answer but was not so taken advantage of. Whitaker *v.* Comfort, Walk. (Miss.) 421; Davis *v.* McMullen, 86 Va. 256, 9 S. E. 1095; Vaiden *v.* Bell, 3 Rand. (Va.) 448; Holliday *v.* Myers, 11 W. Va. 276.

31. *Alabama.*— Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1, 7 So. 635.

Indiana.— Burkett *v.* Holman, 104 Ind. 6, 3 N. E. 406; Harter *v.* Parsons, 14 Ind. App. 331, 42 N. E. 1025; Bronnenburg *v.* Rinker, 2 Ind. App. 391, 28 N. E. 568.

Maine.— Emerson *v.* Lakin, 23 Me. 384.

Maryland.— Gent *v.* Cole, 38 Md. 110.

Michigan.— Kean *v.* Mitchell, 13 Mich. 207.

Tennessee.— Cannon *v.* Phillips, 2 Sneed 185.

United States.— Stanley *v.* Whipple, 22 Fed. Cas. No. 13,286, 2 McLean 35, Robb Pat. Cas. 1.

See 39 Cent. Dig. tit. "Pleading," § 1451.

32. *Arkansas.*— St. Louis, etc., R. Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773.

California.— Elizalde *v.* Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861; Larkin *v.* Mullen, 128 Cal. 449, 60 Pac. 1091.

Georgia.— Reid *v.* Beck, 127 Ga. 117, 56 S. E. 130; Reid *v.* Hearn, 127 Ga. 117, 56 S. E. 129; Sanders *v.* Houston Guano, etc., Co., 107 Ga. 49, 32 S. E. 610.

Massachusetts.— Haverhill Loan, etc., Assoc. *v.* Cronin, 4 Allen 141.

New York.— Fullerton *v.* Dalton, 58 Barb. 236 [*affirmed* in 49 N. Y. 659].

Oregon.— Davidson *v.* Oregon, etc., R. Co., 11 Oreg. 136.

Pennsylvania.— McMicken *v.* Com., 58 Pa. St. 213; Pennsylvania Salt Mfg. Co. *v.* Neel, 54 Pa. St. 9.

Wisconsin.— Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

United States.— Walker *v.* Grand Trunk R. Co., 29 Fed. Cas. No. 17,070, 2 Hask. 96.

33. Robison *v.* Wolf, 27 Ind. App. 683, 62 N. E. 74; Leiser *v.* McDowell, 69 N. Y. App. Div. 444, 74 N. Y. Suppl. 1021; Corson *v.* Hunt, 14 Pa. St. 510, 53 Am. Dec. 568; Bell *v.* Irwin, 5 Pa. Super. Ct. 368; Mine, etc., Supply Co. *v.* Parke, etc., Co., 107 Fed. 881, 47 C. C. A. 34.

Where the evidence supports the verdict, the pleadings, if defective, will be treated

b. Formal and Technical Defects — (I) *In General.* All formal and purely technical defects are cured by verdict.[34]

(II) *Instances of Formal Defects.* Under the rule that all formal defects are cured by verdict it has been held that a verdict cures a mistaken [35] or defective [36] description of property, provided that the mistake or defect is not of such nature that the property cannot be identified, a statement of legal conclusions instead of facts,[37] want of a formal introduction or conclusion,[38] or other formal

as amended to conform to the proofs. Haley *v.* Kilpatrick, 104 Fed. 647, 44 C. C. A. 102.

34. *Alabama.*— North Alabama Home Protection *v.* Caldwell, 85 Ala. 607, 5 So. 338; Turner *v.* Brown, 9 Ala. 866; Hill *v.* McNeil, 6 Port. 29; Garrard *v.* Zachariah, 2 Stew. 410; Tankersley *v.* Silburn, Minor 185.

Connecticut.— Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682; Curtice *v.* Beardsley, 1 Root 441.

Georgia.— Sanders *v.* Houston Guano, etc., Co., 107 Ga. 49, 32 S. E. 610.

Illinois.—Lockwood *v.* Doane, 107 Ill. 235; Mechanicsburg *v.* Meredith, 54 Ill. 84; Wallace *v.* Curtiss, 36 Ill. 156; Hamilton *v.* Cook County, 5 Ill. 519.

Indiana.— Wilson *v.* Kelly, 58 Ind. 586; Plano Mfg. Co. *v.* Kesler, 15 Ind. App. 110, 43 N. E. 925; Dotson *v.* Dotson, 13 Ind. App. 436, 41 N. E. 845; Rittenhause *v.* Knoop, 9 Ind. App. 126, 36 N. E. 384.

Iowa.— Wendall *v.* Osborne, 63 Iowa 99, 18 N. W. 709; Shaw *v.* Gordon, 2 Greene 376; Humphreys *v.* Daggs, 1 Greene 435.

Kentucky.— Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053; Drake *v.* Semonin, 82 Ky. 291; Hocker *v.* Davis, 2 T. B. Mon. 118; Hickman *v.* Southerland, 4 Bibb 194; Louisville, etc., R. Co. *v.* Simpson, 64 S. W. 750, 23 Ky. L. Rep. 1075.

Maine.— Piper *v.* Goodwin, 23 Me. 251.

Massachusetts.—Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105.

Mississippi.— Noble *v.* Terrell, 64 Miss. 830, 2 So. 14.

Missouri.— McKee *v.* Calvert, 80 Mo. 348; Haygood *v.* McKoon, 49 Mo. 77; Stone *v.* Halstead, 62 Mo. App. 136.

Montana.— Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007.

Nebraska.— Darst *v.* Perfect, 42 Nebr. 574, 60 N. W. 928; Hoke *v.* Halverstadt, 22 Nebr. 421, 35 N. W. 204.

New Hampshire.— Roberts *v.* Dame, 11 N. H. 226.

New York.— People *v.* Warner, 4 Barb. 314.

Ohio.— Hall *v.* Reed, 17 Ohio 498; Smyth *v.* Sprout, Wright 757.

Pennsylvania.— East Union Tp. *v.* Comrey, 100 Pa. St. 362; Robinson *v.* English, 34 Pa. St. 324; Firemen's Ins. Co. *v.* Seitz, 4 Watts & S. 273; Morrison *v.* Moreland, 15 Serg. & R. 61; Miles *v.* Oldfield, 4 Yeates 423, 2 Am. Dec. 412; Welsch *v.* Vanbebber, 4 Yeates 420; Hockley *v.* Fulmer, 4 Yeates 130; Hamilton *v.* Frederick, 4 Yeates 129; Jenkins *v.* McMichael, 21 Pa. Super. Ct. 161; Shelly *v.* Kuestner, 19 Pa. Super. Ct. 219.

Tennessee.— Read *v.* Memphis Gayoso Gas Co., 9 Heisk. 545; Goodloe *v.* Potts, Cooke 399.

Vermont.— Durrill *v.* Lawrence, 10 Vt. 517; Vadakin *v.* Soper, 1 Aik. 287.

Virginia.— Ellett *v.* Vaughan, 6 Call 77.

Wisconsin.—Brookins *v.* Shumway, 18 Wis. 98; Ward *v.* Price, 1 Pinn. 101.

United States.— Garland *v.* Davis, 4 How. 131, 11 L. ed. 907; Carroll *v.* Peake, 1 Pet. 18, 7 L. ed. 34; Railway Officials', etc., Acc. Assoc. *v.* Wilson, 100 Fed. 368, 40 C. C. A. 411; Keener *v.* Baker, 93 Fed. 377, 35 C. C. A. 350; Hudson *v.* Kansas Pac. R. Co., 9 Fed. 879.

Canada.—Cunnard *v.* Plummer, 4 N. Brunsw. 418.

See 39 Cent. Dig. tit. "Pleading," § 1452.

35. Koiner *v.* Rankins, 11 Gratt. (Va.) 420.

36. *Alabama.*— Snoddy *v.* Watt, 9 Ala. 609.

California.— Whitney *v.* Buckman, 19 Cal. 300.

Indiana.— Major *v.* Miller, 165 Ind. 275, 75 N. E. 159; Malone *v.* Stiekney, 88 Ind. 594; State *v.* Welch, 88 Ind. 308; Anderson *v.* Oseamp, (App. 1893) 35 N. E. 707.

Maryland.— Mundell *v.* Perry, 2 Gill & J. 193.

Michigan.— Stevens *v.* Osman, 1 Mich. 92, 48 Am. Dec. 696.

Missouri.— State *v.* Berning, 74 Mo. 87; Thomasson *v.* Mercantile Town Mut. Ins. Co., 114 Mo. App. 109, 89 S. W. 564, 1135.

New Hampshire.— Colebrook *v.* Merrill, 46 N. H. 160.

North Carolina.— Redmond *v.* Stepp, 100 N. C. 212, 6 S. E. 727.

Pennsylvania.— Fisher *v.* Larick, 7 Serg. & R. 99.

South Carolina.— Lahiffe *v.* Hunter, Harp. 184.

Vermont.— Wetherby *v.* Foster, 5 Vt. 136.

Virginia.— Paul *v.* Smiley, 4 Munf. 468; Lovell *v.* Arnold, 2 Munf. 167.

See 39 Cent. Dig. tit. "Pleading," § 1468.

37. *California.*— Pacific Paving Co. *v.* Diggins, 4 Cal. App. 240, 87 Pac. 415.

Indiana.— Westfall *v.* Stark, 24 Ind. 377.

Kentucky.— Louisville, etc., R. Co. *v.* Lawes, 56 S. W. 426, 21 Ky. L. Rep. 1793; Royal Ins. Co. *v.* Smith, 8 Ky. L. Rep. 521.

Massachusetts.— Worster *v.* Canal Bridge, 16 Pick. 541.

Missouri.— Jackson *v.* St. Louis, etc., R. Co., 80 Mo. 147; Slaughter *v.* Slaughter, 106 Mo. App. 104, 80 S. W. 3.

United States.— Plankinton *v.* Gray, 63 Fed. 415, 11 C. C. A. 268.

38. *Alabama.*— Malone *v.* Donnally, Minor 12.

Ohio.— Nelson *v.* Ford, 5 Ohio 473.

Virginia.—Carthrae *v.* Clarke, 5 Leigh 268; Eppes *v.* Smith, 4 Munf. 466.

part,[39] clerical errors,[40] irregularities in regard to the filing of a pleading,[41] want of or defective venue,[42] argumentative allegations,[43] departure,[44] failure to verify a pleading,[45] to make profert,[46] to file an exhibit,[47] or a proper bill of particulars.[48]

c. Substantial Defects. A verdict or judgment will cure substantial as well as formal defects, for if a material averment is omitted and the issue joined nevertheless required proof of that fact, the defect will be cured where the fact omitted can be fairly implied as within the general scope of the issue made.[49]

West Virginia.— Simmons *v.* Trumbo, 9 W. Va. 358.

United States.— Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335.

39. *Illinois.*— Cook *v.* Scott, 6 Ill. 333.

Indiana.— Louisville, etc., R. Co. *v.* Peck, 99 Ind. 68.

Maine.— Hutchins *v.* Adams, 3 Me. 174.

New York.— Collier *v.* Moulton, 7 Johns. 109.

United States.— Tryon *v.* White, 24 Fed. Cas. No. 14,208, Pet. C. C. 96.

See 39 Cent. Dig. tit. "Pleading," § 1452.

40. *Alabama.*— Jordan *v.* Bell, 8 Port. 53.

California.— Coryell *v.* Cain, 16 Cal. 567.

Mississippi.— Shrock *v.* Bowden, 4 How. 426.

Ohio.— Smyth *v.* Prout, Wright 757.

Oregon.— Wyatt *v.* Wyatt, 31 Oreg. 531, 49 Pac. 855.

Pennsylvania.— Leckey *v.* Bloser, 24 Pa. St. 401; Sauerman *v.* Weckerly, 17 Serg. & R. 116.

South Carolina.— Blythe *v.* Marsh, 1 McCord 360.

Texas.— Jones *v.* Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

England.— Richards *v.* Simonds, 3 Wils. C. P. 40.

41. *Iowa.*— Brantz *v.* Marcus, 73 Iowa 64, 35 N. W. 115.

Kentucky.—Elliott *v.* Treadway, 10 B. Mon. 22; Miller *v.* Foley, 4 Bibb 200.

Missouri.— Magehan *v.* Orme, 7 Mo. 4.

Nebraska.— Heater *v.* Penrod, 2 Nebr. (Unoff.) 711, 89 N. W. 762.

United States.— J. S. Keator Lumber Co. *v.* Thompson, 144 U. S. 434, 12 S. Ct. 669, 36 L. ed. 495.

42. *Alabama.*— Barlow *v.* Garrow, Minor 1.

Florida.— Edwards *v.* Union Bank, 1 Fla. 136.

Illinois.— Chicago, etc., R. Co. *v.* Morris, 26 Ill. 400.

Kentucky.— Tarlton *v.* Briscoe, 4 Bibb 73.

Missouri.—Kronski *v.* Missouri Pac. R. Co., 77 Mo. 362; Duncan *v.* Oliphant, 59 Mo. App. 1.

Pennsylvania.— Nagle *v.* Nagle, 3 Grant 155.

United States.— Crittenden *v.* Davis, 6 Fed. Cas. No. 3,393*b*, Hempst. 96.

England.— Mellor *v.* Barber, 3 T. R. 387.

See 39 Cent. Dig. tit. "Pleading," § 1453.

43. Mills *v.* Larrance, 111 Ill. App. 140; People *v.* Warner, 4 Barb. (N. Y.) 314.

44. Beard *v.* Hand, 88 Ind. 183; Mortland *v.* Holton, 44 Mo. 58; Burdick *v.* Kenyon, 20 R. I. 498, 40 Atl. 99.

45. *Arkansas.*— Randall *v.* Sanders, 71 Ark. 609, 77 S. W. 56.

Indiana.— Decker *v.* Gilbert, 80 Ind. 107.

Indian Territory.— Long-Bell Lumber Co. *v.* Thomas, 1 Indian Terr. 225, 40 S. W. 773.

Kentucky.— Harris *v.* Ray, 15 B. Mon. 628.

Nebraska.— Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863; Trumble *v.* Williams, 18 Nebr. 144, 24 N. W. 716.

Pennsylvania.— Carl *v.* Com., 9 Serg. & R. 63.

Virginia.— Hicks *v.* Goode, 12 Leigh 479, 37 Am. Dec. 677.

See 39 Cent. Dig. tit. "Pleading," § 1450.

46. Worthington *v.* McRoberts, 7 Ala. 814; Switzer *v.* Holloway, 2 Port. (Ala.) 88; Francis *v.* Hazelrigg, 1 A. K. Marsh. (Ky.) 93; Howe *v.* Dawson, Tapp. (Ohio) 201.

47. Owen School Tp. *v.* Hay, 107 Ind. 351, 8 N. E. 220; Galvin *v.* Woollen, 66 Ind. 464; Eigenmann *v.* Backof, 56 Ind. 594; Purdue *v.* Stevenson, 54 Ind. 161; Coppes *v.* Union Nat. Sav., etc., Assoc., 33 Ind. App. 367, 69 N. E. 702; State Bldg., etc., Assoc. *v.* Bracklin, 27 Ind. App. 677, 62 N. E. 91; Fidelity Mut. Life Assoc. *v.* McDaniel, 25 Ind. App. 608, 57 N. E. 645; Duffy *v.* Carman, 3 Ind. App. 207, 29 N. E. 454; Barrett *v.* Johnson, 2 Ind. App. 25, 27 N. E. 983.

48. Davis *v.* Jenkins, 14 Ind. 572; Darnall *v.* Simpkins, 10 Ind. App. 469, 38 N. E. 219.

49. *California.*— Arnold *v.* Am. Ins. Co., 148 Cal. 660; Garner *v.* Marshall, 9 Cal. 268.

Connecticut.— Whitlock *v.* Uhle, 75 Conn. 423, 53 Atl. 891; Dale *v.* Dean, 16 Conn. 579; Griffin *v.* Pratt, 3 Conn. 513; Phelps *v.* Sill, 1 Day 315; Spencer *v.* Overton, 1 Day 183.

Illinois.— Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455; United States Brewing Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081; Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328; Ladd *v.* Piggott, 114 Ill. 647, 2 N. E. 503.

Indiana.— Louisville, etc., R. Co. *v.* Harrington, 92 Ind. 457; Cleaveland *v.* Vajen, 76 Ind. 146; Wortman *v.* Ash, 4 Ind. 74; Nicholson *v.* Carr, 3 Blackf. 104; Knightstown *v.* Homer, 36 Ind. App. 139, 75 N. E. 13; Alcorn *v.* Bass, 17 Ind. App. 500, 46 N. E. 1024.

Kentucky.— Vaughn *v.* Gardner, 7 B. Mon. 326; Lowry *v.* Drake, 1 Dana 46; Fraize *v.* Com., (1895) 29 S. W. 356.

Massachusetts.— Colt *v.* Root, 17 Mass. 229.

Michigan.— Delashman *v.* Berry, 21 Mich. 516.

Minnesota.— Hurd *v.* Simonton, 10 Minn. 423; Daniels *v.* Winslow, 2 Minn. 113.

Missouri.— Grove *v.* Kansas, 75 Mo. 672; Shaler *v.* Van Wormer, 33 Mo. 386; McKinney *v.* Northcut, 114 Mo. App. 146, 89 N. W.

3. Particular Defects or Omissions — a. Defective Allegation of Cause of Action. All uncertainties, irregularities, ambiguities, informalities, imperfections, and other defects in the manner of alleging a cause of action or defense, if a valid cause of action or defense, may nevertheless, with the aid of all lawful and reasonable presumptions, be found, even by implication, in the pleading, will be cured by the verdict or judgment.[50]

351; Robinson *v.* Metropolitan L. Ins. Co., 105 Mo. App. 567, 80 S. W. 9; Haggerty *v.* St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 456; Welch *v.* Mastin, 98 Mo. App. 273, 71 S. W. 1090; Malone *v.* Fidelity, etc., Co., 71 Mo. App. 1; Buck *v.* Peoples St. R., etc., Co., 46 Mo. App. 555; State *v.* Pace, 34 Mo. App. 458.

Nebraska.— Sorenson *v.* Sorenson, 68 Nebr. 483, 94 N. W. 340, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

New York.—Whittlesey *v.* Delaney, 73 N. Y. 571; Clark *v.* Dales, 20 Barb. 42; Addington *v.* Allen, 11 Wend. 374.

Oregon.— Foste *v.* Standard L., etc., Ins. Co., 34 Oreg. 125, 54 Pac. 811; Nicolai *v.* Krimbel, 29 Oreg. 76, 43 Pac. 865.

Tennessee.— Cannon *v.* Phillips, 2 Sneed 185; Rogers *v.* Love, 2 Humphr. 417.

Virginia.— Chichester *v.* Vass, 1 Call 83, 1 Am. Dec. 509.

United States.— Plankinton *v.* Gray, 63 Fed. 415, 11 C. C. A. 268; Dobson *v.* Campbell, 7 Fed. Cas. No. 3,945, 1 Sumn. 319, 1 Robb Pat. Cas. 681; Stanley *v.* Whipple, 22 Fed. Cas. No. 13,286, 2 McLean 35.

The inference which supplies the omitted fact need not be a necessary one; it is sufficient if it is reasonable. Thayer *v.* Marsh, 75 N. Y. 340.

50. *Alabama.*— Bradfield *v.* Patterson, 106 Ala. 397, 17 So. 536; Broughton *v.* Governor, 7 Ala. 561; Strader *v.* Alexander, 9 Port. 441; Irvine *v.* Withers, 1 Stew. 234.

Arkansas.— St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375; Holleville *v.* Patrick, 14 Ark. 208.

California.— Cutting Fruit Packing Co. *v.* Canty, 141 Cal. 692, 75 Pac. 564; Cortelyou *v.* Jones, 132 Cal. 131, 64 Pac. 119; Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687; Hughes *v.* Alsip, 112 Cal. 587, 44 Pac. 1027; Treanor *v.* Houghton, 103 Cal. 53, 36 Pac. 1081; San Diego County *v.* Seifert. 97 Cal. 594, 32 Pac. 644; Schmidt *v.* Market St., etc., R. Co., 90 Cal. 37, 27 Pac. 61; Jones *v.* Block, 30 Cal. 227; People *v.* Rains, 23 Cal. 127; Garcia *v.* Satrustegui, 4 Cal. 244; Happe *v.* Stout, 2 Cal. 460.

Colorado.— Wilcox *v.* Jamieson, 20 Colo. 158, 36 Pac. 902.

Connecticut.— Chestnut Hill Reservoir Co. *v.* Chase, 14 Conn. 123; Bulkley *v.* Storer, 2 Day 531; Dickinson *v.* Harrison, 1 Day 10.

Georgia.— Moss *v.* Fortson, 99 Ga. 496, 27 S. E. 745; Dotterer *v.* Harden, 88 Ga. 145, 13 S. E. 971.

Illinois.— Lake Shore, etc., R. Co. *v.* Enright, 227 Ill. 403, 81 N. E. 374 [*affirming* 129 Ill. App. 223]; Illinois Steel Co. *v.* Hanson, 195 Ill. 106, 62 N. E. 918; Ide *v.* Fratcher, 194 Ill. 552, 62 N. E. 814; Baltimore, etc., Southwestern R. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197; People *v.* Wild Cat Drainage Dist., 181 Ill. 177, 54 N. E. 923; Illinois Cent. R. Co. *v.* Treat, 179 Ill. 576, 54 N. E. 290; East Dubuque *v.* Burhyte, 173 Ill. 553, 50 N. E. 1077; Atchison, etc., R. Co. *v.* Feehan, 149 Ill. 202, 36 N. E. 1036; La Salle *v.* Porterfield, 138 Ill. 114, 27 N. E. 937; Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626; Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 24 N. E. 559; Barnes *v.* Brookman, 107 Ill. 317; Great Western Ins. Co. *v.* Staadem, 26 Ill. 360; Sullivan *v.* Dollins, 13 Ill. 85; Chicago, etc., R. Co. *v.* Laumyer, 123 Ill. App. 49; Anderson Art Co. *v.* Greenburg, 118 Ill. App. 220; Rich *v.* Scalio, 115 Ill. App. 166; Marquette Third Vein Coal Co. *v.* Dielie, 110 Ill. App. 684 [*affirmed* in 208 Ill. 116, 70 N. E. 17]; Sauter *v.* Anderson, 110 Ill. App. 574; Knisely *v.* Brown, 95 Ill. App. 516; Cleveland, etc., R. Co. *v.* Chinsky, 92 Ill. App. 50; West Chicago St. R. Co. *v.* Marks, 82 Ill. App. 185; East Dubuque *v.* Burhyte, 74 Ill. App. 99; Dama *v.* Kaltwasser, 72 Ill. App. 140; Bloomington *v.* Winslow, 71 Ill. App. 340; Barnum, etc., Mfg. Co. *v.* Wagner, 64 Ill. App. 375; Moline Plow Co. *v.* Anderson, 24 Ill. App. 364.

Indiana.— Peoria, etc., R. Co. *v.* Attica, etc., R. Co., 154 Ind. 218, 56 N. E. 210; Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Smith *v.* Heller, 119 Ind. 212, 21 N. E. 657; Pittsburgh, etc., R. Co. *v.* Thornburgh, 98 Ind. 201; Terre Haute, etc., R. Co. *v.* Rodel, 89 Ind. 128, 46 Am. Rep. 164; Lassiter *v.* Jackman, 88 Ind. 118; Yeoman *v.* Davis, 86 Ind. 189; Puett *v.* Beard, 86 Ind. 104; Jenkins *v.* Rice, 84 Ind. 342; Heshion *v.* Julian, 82 Ind. 576; Eshelman *v.* Snyder, 82 Ind. 498; Evansville, etc., R. Co. *v.* Willis, 80 Ind. 225; Felger *v.* Etzell, 75 Ind. 417; Allen *v.* Shannon, 74 Ind. 164; Huntington *v.* Mendenhall, 73 Ind. 460; McMakin *v.* Weston, 64 Ind. 270; Tomlinson *v.* Hamilton, 27 Ind. 139; McPhelomy *v.* Solomon, 15 Ind. 189; Culbertson *v.* Townsend, 6 Ind. 64; Dickerson *v.* Hays, 4 Blackf. 44; Tyrrell *v.* Lockhart, 3 Blackf. 136; Gregg *v.* Gregg, 37 Ind. App. 210, 75 N. E. 674; Knightstown *v.* Homer, 36 Ind. App. 139, 75 N. E. 13; Dickey *v.* Kalfsbeck, 20 Ind. App. 290, 50 N. E. 590; Floyd County *v.* Scott, 19 Ind. App. 227, 49 N. E. 395; Harter *v.* Parsons, (App. 1895) 40 N. E. 157; McCloy *v.* Cox, 12 Ind. App. 27, 39 N. E. 901; McAninch *v.* Hamilton, 1 Ind. App. 429, 27 N. E. 719.

Iowa.— Goucher *v.* Sioux City, 115 Iowa 639, 89 N. W. 24; Connyers *v.* Sioux City, etc., R. Co., 78 Iowa 410, 43 N. W. 267; Shuck *v.* Chicago, etc., R. Co., 73 Iowa 333, 35 N. W. 429; Clark *v.* Taylor, 68 Iowa 519,

b. Failure to State Cause of Action. A pleading which wholly and completely fails to state any cause of action or defense, so that the omitted allegations cannot

27 N. W. 493; Burrows *v.* Frank, 67 Iowa 502, 25 N. W. 750; Peck *v.* Schick, 50 Iowa 281.

Kansas.— Atchison, etc., R. Co. *v.* English, 38 Kan. 110, 16 Pac. 82; Polster *v.* Rucker, 16 Kan. 115.

Kentucky.— Massachusetts Ben. Assoc. *v.* Richart, 99 Ky. 302, 35 S. W. 541, 18 Ky. L. Rep. 95; Rogers *v.* Felton, 98 Ky. 148, 32 S. W. 405, 17 Ky. L. Rep. 724; Boughner *v.* Black, 83 Ky. 521, 4 Am. St. Rep. 174; Garnett *v.* Finnell, 2 Duv. 166; Keys *v.* Powell, 2 A. K. Marsh 253; Kouns *v.* Lowell, 2 Bibb 236; Forbes *v.* Hunter, 102 S. W. 246, 31 Ky. L. Rep. 285; Chesapeake, etc., R. Co. *v.* Satterfield, 100 S. W. 844, 30 Ky. L. Rep. 1168; Carter Dry Goods Co. *v.* Carson, 90 S. W. 578, 28 Ky. L. Rep. 837; Dunekake *v.* Beyer, 79 S. W. 209, 25 Ky. L. Rep. 2001; Bryant *v.* Main, 77 S. W. 680, 25 Ky. L. Rep. 1242; Louisville *v.* Brewer, 72 S. W. 9, 24 Ky. L. Rep. 1671; Turner *v.* Trosper, 69 S. W. 1089, 24 Ky. L. Rep. 813; Bryant *v.* Mack, 41 S. W. 774, 19 Ky. L. Rep. 744; Banks *v.* Collins, 39 S. W. 519, 19 Ky. L. Rep. 46; Wilson *v.* Smith, 38 S. W. 870, 18 Ky. L. Rep. 927; Slusher *v.* Kinnaird, 38 S. W. 134, 18 Ky. L. Rep. 744; Clement *v.* Hughes, (1891) 16 S. W. 358.

Maryland.— Giles *v.* Perryman, 1 Harr. & G. 164; Cappeau *v.* Middleton, 1 Harr. & G. 154; Vandersmith *v.* Washmein, 1 Harr. & G. 4.

Massachusetts.— Crocker *v.* Gilbert, 9 Cush. 131; Soule *v.* Russell, 13 Metc. 436; Worster *v.* Proprietors Canal Bridge, 16 Pick. 541; Read *v.* Chelmsford, 16 Pick. 128.

Michigan.— Shaw *v.* Chicago, etc., R. Co., 123 Mich. 629, 82 N. W. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308; Smith *v.* Pinney, 86 Mich. 484, 49 N. W. 305; Fisher *v.* Busch, 64 Mich. 180, 31 N. W. 39; Delashman *v.* Berry, 21 Mich. 516.

Minnesota.— Macalester College *v.* Nesbitt, 65 Minn. 17, 67 N. W. 652; Rich *v.* Rich, 12 Minn. 468; Cathcart *v.* Peck, 11 Minn. 45; Coit *v.* Waples, 1 Minn. 134.

Mississippi.— Cole *v.* Harman, 8 Sm. & M. 562; Halsey *v.* Pinchard, 6 How. 278; Pickett *v.* Ford, 4 How. 246; Poindexter *v.* Turner, Walk. 349.

Missouri.— Smith *v.* Smith, 201 Mo. 533, 100 S. W. 579; Frye *v.* St. Louis, etc., R. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. N. S. 1069; Jones *v.* St. Joseph F. & M. Ins. Co., 55 Mo. 342; State *v.* Webster, 53 Mo. 135; Hay *v.* Short, 49 Mo. 139; Davis *v.* Cooper, 6 Mo. 148; State *v.* Cowell, 125 Mo. App. 348, 102 S. W. 573; Linville *v.* Green, 125 Mo. App. 289, 102 S. W. 67; Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299; Gerber *v.* Kansas City, 105 Mo. App. 191, 79 S. W. 717; Doherty *v.* Kansas City, 105 Mo. App. 173, 79 S. W. 716; Strauss *v.* St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156; Reed *v.* Crane, 89 Mo. App. 670; Jones *v.* Philadelphia Underwriters, 78 Mo. App. 296; Keaton *v.* Keaton, 74 Mo. App. 174; Clack *v.* Southern Electrical Supply Co., 72 Mo. App. 506; Benham *v.* Taylor, 66 Mo. App. 308; Summers *v.* Home Ins. Co., 56 Mo. App. 653; Clark *v.* Fairley, 24 Mo. App. 429.

Montana.—Raymond *v.* Wimsette, 12 Mont. 551, 31 Pac. 537, 33 Am. St. Rep. 604.

Nebraska.— Grant *v.* Commercial Nat. Bank, 67 Nebr. 219, 93 N. W. 185; Bennett *v.* Bennett, 65 Nebr. 432, 91 N. W. 409, 96 N. W. 994; Powers *v.* Powers, 20 Nebr. 529, 31 N. W. 1; Mapstrick *v.* Ramge, 9 Nebr. 390, 2 N. W. 739, 31 Am. Rep. 415; Western Mattress Co. *v.* Potter, 1 Nebr. (Unoff.) 627, 631, 95 N. W. 841.

Nevada.— McManus *v.* Ophir Silver Min. Co., 4 Nev. 15.

New Hampshire.— Walpole *v.* Marlow, 2 N. H. 385.

New Jersey.—Farwell *v.* Smith, 16 N. J. L. 133.

New Mexico.— Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 21 Pac. 339.

New York.— Ridell *v.* New York Cent., etc., R. Co., 73 N. Y. 618; Frees *v.* Blyth, 99 N. Y. App. Div. 541, 91 N. Y. Suppl. 103; Hall *v.* McKechnie, 22 Barb. 244; House *v.* Howell, 3 Silv. Sup. 455, 6 N. Y. Suppl. 799; Newstadt *v.* Adams, 5 Duer 43; Reynolds *v.* Lounsbury, 6 Hill 534; Bayley *v.* Onondaga County Mut. Ins. Co., 6 Hill 476, 41 Am. Dec. 759; Utica Bank *v.* Smedes, 3 Cow. 662; Hastings *v.* Wood, 13 Johns. 482; Bayard *v.* Malcolm, 2 Johns. 550, 3 Am. Dec. 450.

North Carolina.— Ravenal *v.* Ingram, 131 N. C. 549, 42 S. E. 967; Parish *v.* Wilhelm, 63 N. C. 50.

Ohio.— Youngstown *v.* Moore, 30 Ohio St. 133; Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613; Nott *v.* Johnson, 7 Ohio St. 270; Stull *v.* Wilcox, 2 Ohio St. 569.

Oregon.— Scott *v.* Christenson, 49 Oreg. 223, 89 Pac. 376; Overbeck *v.* Roberts, 49 Oreg. 37, 87 Pac. 158; Ferguson *v.* Reiger, 43 Oreg. 505, 73 Pac. 1040; Roseburg R. Co. *v.* Nosler, 37 Oreg. 299, 60 Pac. 904; Fowler *v.* Phœnix Ins. Co., 35 Oreg. 559, 57 Pac. 421; Sayre *v.* Mohney, 35 Oreg. 141, 56 Pac. 526; Bennett *v.* Minott, 28 Oreg. 339, 39 Pac. 997, 44 Pac. 288; Hemenway *v.* Francis, 20 Oreg. 455, 26 Pac. 301.

Pennsylvania.—Pennsylvania Salt Mfg. Co. *v.* Neel, 54 Pa. St. 9; Cornelius *v.* Molloy, 7 Pa. St. 293; Chestnut Hill, etc., Turnpike Co. *v.* Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675.

South Carolina.— Jordan *v.* Boone, 5 Rich. 528.

Tennessee.— Read *v.* Memphis Gayoso Gas Co., 9 Heisk. 545; Stanley *v.* Brit., Mart. & Y. 222.

Texas.— Brown *v.* Montgomery, 89 Tex. 250, 34 S. W. 443; De Witt *v.* Miller, 9 Tex. 239; Elcan *v.* Childress, 40 Tex. Civ. App. 193, 89 S. W. 84; Lewis *v.* Batten, 35 Tex. Civ. App. 370, 80 S. W. 389.

Utah.— Maynard *v.* Locomotive Engineers'

properly be presumed to have been proved, is not cured by verdict.[51] As the rule

Mut. L., etc., Ins. Assoc., 16 Utah 145, 51 Pac. 259, 67 Am. St. Rep. 602.

Vermont.— Strong *v.* Richardson, 19 Vt. 194; Haselton *v.* Weare, 8 Vt. 480; Richardson *v.* Royalton, etc., Turnpike Co., 6 Vt. 496; Pawlet *v.* Rutland, Brayt. 175.

Virginia.— Snapp *v.* Spengler, 2 Leigh 1; Bailey *v.* Clay, 4 Rand. 346; McMichen *v.* Amos, 4 Rand. 134; Fulgham *v.* Lightfoot, 1 Call 250.

West Virginia.— State *v.* Seabright, 15 W. Va. 590.

Wisconsin.— Blaikie *v.* Griswold, 10 Wis. 293.

United States.— Palmer *v.* Arthur, 131 U. S. 60, 9 S. Ct. 649, 33 L. ed. 87; Lincoln Tp. *v.* Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518; Pearson *v.* Metropolis Bank, 1 Pet. 89, 7 L. ed. 65; World's Columbian Exposition Co. *v.* France, 91 Fed. 64, 33 C. C. A. 333; Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 11 C. C. A. 42; Gray *v.* James, 10 Fed. Cas. No. 5,719, Pet. C. C. 476, 1 Robb Pat. Cas. 140; U. S. *v.* Virgin, 28 Fed. Cas. No. 16,625, Pet. C. C. 7.

England.— Hobson *v.* Middleton, 6 B. & C. 295, 9 D. & R. 249, 5 L. J. K. B. O. S. 160, 13 E. C. L. 142; Huntingtower *v.* Gardiner, 1 B. & C. 297, 2 D. & R. 450, 1 L. J. K. B. O. S. 120, 8 E. C. L. 128; Avery *v.* Hoole, Cowp. 825; McGregor *v.* Graves, 3 Exch. 34, 18 L. J. Exch. 109; Jack *v.* Tease, 12 Ir. Ch. 279.

See 39 Cent. Dig. tit. "Pleading," §§ 1454, 1456, 1467.

Where a complaint alleges facts sufficient to bar another suit for the same cause of action, all other defects to which no objection was interposed are cured by verdict. Xenia Real-Estate Co. *v.* Macy, 147 Ind. 568, 47 N. E. 147; Vermillion County *v.* Chipps, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228; Peters *v.* Banta, 120 Ind. 416, 22 N. E. 95; Donellan *v.* Hardy, 57 Ind. 393; Lewis Tp. Imp. Co. *v.* Royer, 38 Ind. App. 151, 76 N. E. 1068; George *v.* Robinson, 36 Ind. App. 310, 75 N. E. 607; Smith *v.* Smith, 35 Ind. App. 610, 74 N. E. 1008; Markle *v.* Hunt, 12 Ind. App. 353, 40 N. E. 280; Clark *v.* Maxwell, 12 Ind. App. 199, 40 N. E. 274; Warden *v.* Nolan, 10 Ind. App. 334, 37 N. E. 821.

A special verdict will cure a defective averment, but not the entire omission of a necessary averment. Rau *v.* Ball Bros. Glass Mfg. Co., 21 Ind. App. 147, 51 N. E. 945.

The statutes of jeofails usually provide that a verdict or judgment shall not be disturbed for any mispleading or insufficient pleading. See Barrow *v.* Wade, 7 Sm. & M. (Miss.) 49; Brady *v.* Kansas City, etc., R. Co., 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195.

51. *Alabama.*— Douglas *v.* Beasley, 40 Ala. 142.

Arkansas.— Knight *v.* Sharp, 24 Ark. 602; Hughes *v.* Sloan, 8 Ark. 146; Sevier *v.* Holliday, 2 Ark. 512.

California.— Arnold *v.* American Ins. Co., 148 Cal. 660, 84 Pac. 182; Bell *v.* Thompson, 147 Cal. 689, 82 Pac. 327; Buckman *v.* Hatch, 139 Cal. 53, 72 Pac. 445; Hurley *v.* Ryan, 119 Cal. 71, 51 Pac. 20; Richards *v.* Travelers' Ins. Co., 80 Cal. 505, 22 Pac. 939; Barron *v.* Frink, 30 Cal. 486.

Colorado.— Rhodes *v.* Hutchins, 10 Colo. 258, 15 Pac. 329; Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515; Hoyt *v.* Macon, 2 Colo. 113; Park County *v.* Locke, 2 Colo. App. 508, 31 Pac. 351.

Connecticut.— Daly *v.* New Haven, 69 Conn. 644, 38 Atl. 397; Curtis *v.* Mutual Ben. Life Co., 48 Conn. 98; McCune *v.* Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278; Dauchy *v.* Salisbury, 29 Conn. 124; Bailey *v.* Bussing, 29 Conn. 1; Lyon *v.* Alvord, 18 Conn. 1; Phelps *v.* Baldwin, 17 Conn. 209; Russell *v.* Slade, 12 Conn. 455; Hitchcock *v.* Page, 1 Root 293.

Florida.—Florida Cent., etc., R. Co. *v.* Ashmore, 43 Fla. 272, 32 So. 832; Crawford *v.* Feder, 34 Fla. 397, 16 So. 287.

Illinois.— Lake Shore, etc., R. Co. *v.* Enright, 227 Ill. 403, 81 N. E. 374 [*affirming* 129 Ill. App. 223]; McAndrews *v.* Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603 [*affirming* 124 Ill. App. 166]; Illinois Steel Co. *v.* Stonevick, 199 Ill. 122, 64 N. E. 1014; Laflin, etc., Powder Co. *v.* Tearney, (1889) 21 N. E. 516; Bowman *v.* People, 114 Ill. 474, 2 N. E. 484; McLean County Coal Co. *v.* Long, 91 Ill. 617; Chicago, etc., R. Co. *v.* Laumyer, 123 Ill. App. 49; Pullman Co. *v.* Woodfolk, 121 Ill. App. 321; Chicago, etc., R. Co. *v.* Gardanier, 116 Ill. App. 619; Jones *v.* Klawiter, 110 Ill. App. 31 [*affirmed* in 219 Ill. 626, 76 N. E. 673]; Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94; Funk *v.* Piper, 50 Ill. App. 163; Abe Lincoln Mut. Life, etc., Soc. *v.* Miller, 23 Ill. App. 341; Abrahams *v.* Jones, 20 Ill. App. 83; King *v.* Sea, 6 Ill. App. 189.

Indiana.— Goodwine *v.* Cadwallader, 158 Ind. 202, 61 N. E. 939; Cleveland, etc., R. Co. *v.* Parker, 154 Ind. 153, 56 N. E. 86; Sheffer *v.* Hines, 149 Ind. 413, 49 N. E. 348; Jones *v.* Casler, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274; Fuller *v.* Cox, 135 Ind. 46, 34 N. E. 822; Mansur *v.* Streight, 103 Ind. 358, 3 N. E. 112; Home Ins. Co. *v.* Duke, 75 Ind. 535; Newman *v.* Perrill, 73 Ind. 153; Indianapolis, etc., R. Co. *v.* Brucey, 21 Ind. 215; Indianapolis, etc., R. Co. *v.* Davis, 10 Ind. 398; Dickerson *v.* Hays, 4 Blackf. 44; Taylor *v.* Lesson, 35 Ind. App. 620, 74 N. E. 907; Coulter *v.* Bradley, 30 Ind. App. 421, 66 N. E. 184; Miller *v.* Fuller, 21 Ind. App. 254, 52 N. E. 101; Western Assur. Co. *v.* Koontz, 17 Ind. App. 54, 46 N. E. 95; Harter *v.* Parsons, 14 Ind. App. 331, 42 N. E. 1025; South Bend Iron Works *v.* Larger, 11 Ind. App. 367, 39 N. E. 209; Lake Shore, etc., R. Co. *v.* Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303; Cincinnati, etc., R. Co. *v.* Stanley, 4 Ind. App. 364, 30 N. E. 1103.

Iowa.— Bosch *v.* Kassing, 64 Iowa 312, 20 N. W. 454.

Kentucky.— Callahan *v.* Louisville First Nat. Bank, 78 Ky. 604, 39 Am. Rep. 262;

is sometimes stated, a verdict cures a defectively alleged cause of action, but not the allegation of a defective cause of action.[52]

c. Wrong Theory or Form of Action. Mistake as to the form of action is cured by verdict.[53] And the same rule applies under the operation of the statute of

Minor *v.* Kelly, 5 T. B. Mon. 272; Bruner *v.* Stout, Hard. 225; Combs *v.* Pridemore, (1897) 43 S. W. 681, 44 S. W. 107, 19 Ky. L. Rep. 1934.

Maine.— Farrington *v.* Blish, 14 Me. 423; Smith *v.* Moore, 6 Me. 274; Little *v.* Thompson, 2 Me. 228.

Massachusetts.— Hollis *v.* Richardson, 13 Gray 392; Brown *v.* Webber, 6 Cush. 560; Carlisle *v.* Weston, 1 Metc. 26; Reed *v.* Davis, 8 Pick. 514; Williams *v.* Hingham, etc., Turnpike Corp., 4 Pick. 341; Kingsley *v.* Bill, 9 Mass. 198; Stilson *v.* Tobey, 2 Mass. 521.

Minnesota.— Cathcart *v.* Peck, 11 Minn. 45; Lee *v.* Emery, 10 Minn. 187; Loomis *v.* Youle, 1 Minn. 175.

Mississippi.— Poindexter *v.* Turner, Walk. 349.

Missouri.— Seckinger *v.* Philibert, etc., Mfg. Co., 129 Mo. 590, 31 S. W. 957; Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607; Falls *v.* Daily, 74 Mo. 74; Weil *v.* Greene County, 69 Mo. 281; Clinton *v.* Williams, 53 Mo. 141; McNulty *v.* Collins, 7 Mo. 69; Muldrow *v.* Tappan, 6 Mo. 276; Kingston *v.* Newell, 125 Mo. App. 389, 102 S. W. 604; Mueller *v.* La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010; Hyatt *v.* Legal Protective Assoc., 106 Mo. App. 610, 81 S. W. 470; Welch *v.* Mastin, 98 Mo. App. 273, 71 S. W. 1090; Shaver *v.* Mercantile Town Mut. Ins. Co., 79 Mo. App. 420; Clark *v.* Fairley, 24 Mo. App. 429; Clark *v.* Whittaker Iron Co., 9 Mo. App. 446.

Montana.— Thornton *v.* Kaufman, 35 Mont. 181, 88 Pac. 796.

Nebraska.— Barge *v.* Haslam, 63 Nebr. 296, 88 N. W. 516.

New Hampshire.— Low *v.* Tilton, 19 N. H. 271; Bailey *v.* Simonds, 6 N. H. 159, 25 Am. Dec. 454.

New Jersey.—Farwell *v.* Smith, 16 N. J. L. 133.

New York.— Seydel *v.* Corporation Liquidating Co., 46 Misc. 576, 92 N. Y. Suppl. 225; Cheetham *v.* Lewis, 3 Johns. 42.

North Carolina.—Pearce *v.* Mason, 78 N. C. 37.

Ohio.— Cleveland, etc., R. Co. *v.* Stackhouse, 10 Ohio St. 567; Gittings *v.* Baker, 2 Ohio St. 21; Bisack *v.* Pape, 7 Ohio Dec. (Reprint) 115, 1 Cinc. L. Bul. 126.

Oklahoma.— Guthrie *v.* Nix, 3 Okla. 136, 41 Pac. 343.

Oregon.— Nye *v.* Bill Nye Milling Co., 42 Oreg. 560, 71 Pac. 1043; Hannan *v.* Greenfield, 36 Oreg. 97, 58 Pac. 888; Weiner *v.* Lee Shing, 12 Oreg. 276, 7 Pac. 111; Aiken *v.* Coolidge, 12 Oreg. 244, 6 Pac. 712.

Pennsylvania.— Tams *v.* Lewis, 42 Pa. St. 402; Dewart *v.* Masser, 40 Pa. St. 302; Whitall *v.* Morse, 5 Serg. & R. 358.

South Carolina.— Cooper *v.* Halbert, 2 McMull. 419.

Tennessee.— Tumley *v.* Clarksville, etc., R. Co., 2 Coldw. 327; Harlan *v.* Dew, 3 Head 505; Knott *v.* Hicks, 2 Humphr. 162.

Texas.— McClellan *v.* State, 22 Tex. 405; De Witt *v.* Miller, 9 Tex. 239; Ellis *v.* Howard Smith Co., 35 Tex. Civ. App. 566, 80 S. W. 633; Shaw *v.* Lobitz, (Civ. App. 1896) 35 S. W. 877; San Antonio, etc., R. Co. *v.* Flato, 13 Tex. Civ. App. 214, 35 S. W. 859; Mullaly *v.* Ivory, (Civ. App. 1895) 30 S. W. 259; Gulf, etc., R. Co. *v.* Vieno, (Civ. App. 1894) 26 S. W. 230; Texas, etc., R. Co. *v.* McCoy, 3 Tex. Civ. App. 276, 22 S. W. 926.

Vermont.— Baker *v.* Sherman, 73 Vt. 26, 50 Atl. 633; Needham *v.* McAuley, 13 Vt. 68; Bloss *v.* Kittridge, 5 Vt. 28.

Virginia.— Boyles *v.* Overby, 11 Gratt. 202; Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646; Newman *v.* Graham, 3 Munf. 187; Moore *v.* Dawney, 3 Hen. & M. 127; Chichester *v.* Vass, 1 Call 83, 1 Am. Dec. 509; Winston *v.* Francisco, 2 Wash. 187.

Wisconsin.— Harris *v.* Harris, 10 Wis. 467.

United States.— *In re* Belle Fourche First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260; Pontiac *v.* Talbot Paving Co., 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326; World's Columbian Exposition Co. *v.* France, 91 Fed. 64, 33 C. C. A. 333.

See 39 Cent. Dig. tit. "Pleading," § 1459.

Recital.— It has been held that an allegation by way of recital in an action of trespass renders the declaration fatally bad, and the defect will not be cured by verdict. Moore *v.* Dawney, 3 Hen. & M. (Va.) 127. *Contra*, Gordon *v.* Hood, Minor (Ala.) 122.

52. *California.*— San Francisco *v.* Pennie, 93 Cal. 465, 29 Pac. 66.

Illinois.— Chicago *v.* Selz, etc., Co., 202 Ill. 545, 67 N. E. 386; Warren *v.* Harris, 7 Ill. 307; Sherwood *v.* Rieck, 104 Ill. App. 368; Western Wheel Works *v.* Stachnick, 102 Ill. App. 420; Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94; Western Screw Co. *v.* Johnson, 86 Ill. App. 89.

Kentucky.— Daniel *v.* Holland, 4 J. J. Marsh. 18.

Maine.— Farrington *v.* Blish, 14 Me. 423.

Mississippi.— Poindexter *v.* Turner, Walk. 349.

Missouri.— Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504.

Pennsylvania.— Stone *v.* Furry, Add. 114.

South Carolina.— Jordan *v.* Boone, 5 Rich. 528.

England.— Small *v.* Cole, 2 Burr. 1159; Roe *v.* Hersey, 3 Wils. C. P. 274; English *v.* Burnell, 2 Wils. C. P. 258.

53. *Illinois.*— Pearce *v.* Foote, 113 Ill. 223, 55 Am. Rep. 414.

Kentucky.— McClelland *v.* Strong, Hard. 522.

Michigan.— Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405.

jeofails.[54] By "misconception of the form of an action," such statute refers only to cases wherein, on trial, the proof shows a cause of action fit to be asserted in a form different from that adopted.[55]

d. Misjoinder of Causes of Action. At common law a misjoinder of counts upon which the same judgment cannot be rendered is a fatal defect and cannot be cured by a general verdict on the whole declaration,[56] but the rule is otherwise under the statutes of amendments and jeofails.[57] It has, however, been held, at the common law, that in some cases the misjoinder will be aided by intendment, as by taking damages under but one count, or by entering a remittitur of damages so as to recover but for one cause of action, or where the verdict is for plaintiff on the counts well joined and for defendant on the others.[58]

e. Misnomer. A misnomer in plaintiff's name in the complaint and summons is cured by a verdict and judgment rendered in plaintiff's favor by his proper name.[59] So misnaming defendant in the introductory part of the declaration is cured by verdict, especially where defendant has pleaded in bar by his right name.[60] But the verdict or judgment in an action will not cure a defect in the name of a party unless the correct name of the party has once been rightly stated.[61]

f. Want or Informality of Issue — (i) *In General.* Failure to join issue or any irregularity or informality therein is cured by verdict.[62]

Minnesota.— Marsh *v.* Webber, 13 Minn. 109.

Mississippi.— Noble *v.* Terrell, 64 Miss. 830, 2 So. 14; Bone *v.* McGinley, 7 How. 671; Kellogg *v.* Budlong, 7 How. 340; Cartwright *v.* Carpenter, 7 How. 328, 40 Am. Dec. 66.

New Jersey.— Satterthwaite *v.* Morgan, 3 N. J. L. 962.

Pennsylvania.— Carson *v.* Hood, 4 Dall. 108, 1 L. ed. 762.

South Carolina.—White *v.* Marshall, Harp. 122.

See 39 Cent. Dig. tit. "Pleading," § 1457.

54. Breck *v.* Smith, 44 Miss. 690; Cleek *v.* Haines, 2 Rand. (Va.) 440.

Suing in case instead of trespass, or *vice versa*, is cured by the statute of jeofails. Breck *v.* Smith, 44 Miss. 690; Cleek *v.* Haines, 2 Rand. (Va.) 440. *Contra*, Wickliffe *v.* Sanders, 6 T. B. Mon. (Ky.) 296.

55. Boyles *v.* Overby, 11 Gratt. (Va.) 202.

56. Dalson *v.* Bradberry, 50 Ill. 82; Selby *v.* Hutchinson, 9 Ill. 319; Louisville, etc., Canal Co. *v.* Rowan, 4 Dana (Ky.) 606; Nimocks *v.* Inks, 17 Ohio 596. See also Hemingway *v.* Saxton, 3 Mass. 222.

57. *Michigan.*— Schafer *v.* Boyce, 41 Mich. 256, 2 N. W. 1.

Mississippi.— Nobel *v.* Terrell, 64 Miss. 830, 2 So. 14.

Missouri.— Yates *v.* Kimmel, 5 Mo. 87.

New York.— Lovett *v.* Pell, 22 Wend. 369.

Ohio.— Bratton *v.* Smith, 2 Ohio Dec. (Reprint) 360, 2 West. L. Month. 497.

See 39 Cent. Dig. tit. "Pleading," § 1475.

A misjoinder of counts is a "mispleading" as that term is used in the statute of amendments and jeofails. Chicago, etc., R. Co. *v.* Murphy, 198 Ill. 462, 64 N. E. 1011.

58. Dalson *v.* Bradberry, 50 Ill. 82; Louisville, etc., Canal Co. *v.* Rowan, 4 Dana (Ky.) 606; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220; Kightly *v.* Birch, 2 M. & S. 533.

59. Kronski *v.* Missouri Pac. R. Co., 77 Mo. 362.

60. Chicago, etc., R. Co. *v.* Heinrich, 157 Ill. 388, 41 N. E. 860 [*affirming* 57 Ill. App. 399].

61. Gannon *v.* Myars, 11 N. Y. Civ. Proc. 187.

62. *Alabama.*— Hall *v.* Dargan, 4 Ala. 696.

District of Columbia.— Carver *v.* O'Neal, 11 App. Cas. 353.

Illinois.— Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072; Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166; Pinkerton *v.* Sydnor, 87 Ill. App. 76; Spencer *v.* Langdon, 21 Ill. 192; Brazzle *v.* Usher, 1 Ill. 35; Supreme Ct. of Honor *v.* Barker, 96 Ill. App. 490; Brand *v.* Whelan, 18 Ill. App. 186.

Kentucky.— Pringle *v.* Samuel, 1 Bibb 167; Bell *v.* Rowland, Hard. 301, 3 Am. Dec. 729; Com. *v.* Higgin, 82 S. W. 601, 26 Ky. L. Rep. 910.

Massachusetts.— Whiting *v.* Cochran, 9 Mass. 532.

Mississippi.— Tucker *v.* Zollicoffer, 12 Sm. & M. 591; Smith *v.* Warren, 2 How. 895; Chichester *v.* Daggett, 2 How. 863.

Missouri.— St. Joseph F. & M. Ins. Co. *v.* Harlan, 72 Mo. 202; St. Louis Nat. Bank *v.* Ross, 9 Mo. App. 399.

Ohio.— Toledo *v.* Center, 16 Ohio Cir. Ct. 308, 8 Ohio Cir. Dec. 503.

South Carolina.— Taylor *v.* Stockdale, 3 McCord 302.

Tennessee.— Brinson *v.* Smith, Peck 194.

West Virginia.— Douglass *v.* Central Land Co., 12 W. Va. 502; Simmons *v.* Trumbo, 9 W. Va. 358.

See 39 Cent. Dig. tit. "Pleading," §§ 1445, 1480.

The omission of a similiter is cured by verdict. Ripley *v.* Coolidge, Minor (Ala.) 11; Walker *v.* Armour, 22 Ill. 658; Strause *v.* Owen Electric Belt, etc., Co., 64 Ill. App. 435; Templin *v.* Krahn, 3 Ind. 373; Jared *v.* Goodtitle, 1 Blackf. (Ind.) 29; Porter *v.*

(II) *Want of Replication or Reply.* Whether the want of a replication or reply is cured by verdict is a question upon which the courts are about evenly divided, it being held by some that the omission is cured,[63] by others that it is not.[64]

(III) *Want of Pleadings Subsequent to Replication.* By the weight of authority failure to rejoin to plaintiff's replication or reply is cured either by verdict or the statute of jeofails.[65]

g. Wrong Pleas. Several cases exist of bad pleas which are cured by verdict. The test is whether the pleas, although bad on demurrer because wrong in form, still contain enough of substance to put in issue all the material parts of the declaration.[66]

h. Assignment of Breach. Where a contract is sufficiently set forth, any defect or inaccuracy in assigning the breach is aided after verdict, for the court will intend that damages could not have been given if a good breach had not been shown.[67]

i. Averment of Consideration and Promise. Where the statement of a con-

Lane, Morr. (Iowa) 197; Woods *v.* Morgan, Morr. (Iowa) 179; Harmon *v.* James, 7 Sm. & M. (Miss.) 111, 45 Am. Dec. 296; Trabue *v.* Higden, 4 Coldw. (Tenn.) 620; Lowrey *v.* Brown, 3 Sneed (Tenn.) 17; Stone *v.* Van Curler, 2 Vt. 115.

Failure to join in demurrer is cured by verdict. Eason *v.* Fisher, 1 Ark. 90.

63. *Illinois.*— Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072; Tompkins *v.* Gerry, 52 Ill. App. 570.

Indiana.— Jones *v.* Hathaway, 77 Ind. 14.

Iowa.— Coutch *v.* Barton, Morr. 354.

Missouri.— Howell *v.* Reynolds County, 51 Mo. 154; Wells *v.* Missouri-Edison Electric Co., 108 Mo. App. 607, 84 N. W. 204.

Nebraska.— *In re* Cheney, (1907) 110 N. W. 731.

New York.— Coan *v.* Whitmore, 12 Johns. 353.

North Dakota.— Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328.

Pennsylvania.— Thompson *v.* Cross, 16 Serg. & R. 350; Union Ins. Co. *v.* Murphy, 1 Pa. Cas. 570, 4 Atl. 352.

See 39 Cent. Dig. tit. "Pleading," § 1483.

64. *Alabama.*—Kennedy *v.* Pickering, Minor 137; Channing *v.* Caskaden, Minor 73.

Arkansas.— Reagan *v.* Irvin, 25 Ark. 86.

Florida.— Asia *v.* Hiser, 22 Fla. 378; Livingston *v.* L'Engle, 22 Fla. 427; Benbow *v.* Marquis, 17 Fla. 441.

Mississippi.— Hogue *v.* Lewellen, 42 Miss. 302.

Tennessee.— Williams *v.* Ledsinger, 7 Baxt. 429; Trabue *v.* Higden, 4 Coldw. 620.

Virginia.— Norfolk, etc., R. Co. *v.* Coffey, 104 Va. 665, 51 S. E. 729, 52 S. E. 367.

West Virginia.— Baltimore, etc., R. Co. *v.* Faulkner, 4 W. Va. 180.

See 39 Cent. Dig. tit. "Pleading," § 1483.

65. *Illinois.*— Supreme Court of Honor *v.* Barker, 96 Ill. App. 490.

Iowa.— Hendrie *v.* Rippey, 9 Iowa 351.

Maryland.— Tyson *v.* Rickard, 3 Harr. & J. 109, 5 Am. Dec. 424.

Mississippi.— Grubbs *v.* Collins, 54 Miss. 485.

Virginia.— Southside R. Co. *v.* Daniel, 20 Gratt. 344; Moore *v.* Mauro, 4 Rand. 488.

See 39 Cent. Dig. tit. "Pleading," § 1484.

Contra.— Miller *v.* Hoe, 1 Fla. 189; Minor *v.* Kelly, 5 T. B. Mon. (Ky.) 272.

66. Garland *v.* Davis, 4 How. (U. S.) 131, 11 L. ed. 907.

A plea of nil debet in an action of assumpsit is cured by verdict. Smith *v.* Townsend, 21 W. Va. 486.

A plea of not guilty, either to assumpsit (Cavene *v.* McMichael, 8 Serg. & R. (Pa.) 441; King *v.* McDaniel, 4 Call (Va.) 451), or to covenant (Com. *v.* Walker, 1 Hen. & M. (Va.) 144), or to debt for a penalty (Coppin *v.* Carter, 1 T. R. 462 note), is cured by verdict.

A plea of plene administravit to an action of debt on an administrator's bond is cured by verdict. Com. *v.* Richardson, 8 B. Mon. (Ky.) 81.

A plea of non assumpsit to an action of debt is not cured by verdict. Penfold *v.* Hawkins, 2 M. & S. 606; Brennan *v.* Egan, 4 Taunt. 164. *Contra*, Millard *v.* Morse, 32 Pa. St. 506.

A plea of non assumpsit to a declaration sounding in tort is not cured by verdict. Garland *v.* Davis, 4 How. (U. S.) 131, 11 L. ed. 907.

67. *California.*— Regensberger *v.* Quinn, (1895) 39 Pac. 788.

Georgia.— Murphy *v.* Lawrence, 2 Ga. 257.

Indiana.— Howorth *v.* Scarce, 29 Ind. 278.

Mississippi.— Clarke *v.* Gregory, 5 How. 363.

Missouri.— Pinkston *v.* Stone, 3 Mo. 119.

New York.— Wood *v.* Jefferson County Bank, 9 Cow. 194; Thomas *v.* Roosa, 7 Johns. 461.

Pennsylvania.— American Ins. Co. *v.* Francia, 9 Pa. St. 390; Carl *v.* Com., 9 Serg. & R. 63; Weigley *v.* Weir, 7 Serg. & R. 309.

Virginia.— Horrel *v.* McAlexander, 3 Rand. 94; Hammitt *v.* Bullett, 1 Call 567.

United States.— Minor *v.* Mechanics Bank, 1 Pet. 46, 7 L. ed. 47.

See 39 Cent. Dig. tit. "Pleading," § 1474.

sideration is necessary to a cause of action, failure to set it forth will not be cured by verdict.[68] But a defective statement of a valid consideration will be so aided.[69] Where facts are set forth in a declaration which show a legal liability on the part of defendant to plaintiff, a defect in not alleging a promise is cured by verdict.[70]

j. Averment of Value and Damages. Failure to allege the value of property [71] or to lay damages [72] in a declaration will be cured by verdict. The omission is, at most, but an imperfect statement of the facts which constitute the cause of action. Where the action is for injuries sustained by a public nuisance, there must be a specific averment of the special damage, and the defect of such omitted averment is not cured by verdict; for, since the special injury is the gist of the action, unless alleged and proved, no cause of action exists.[73]

68. Lyon *v.* Alvord, 18 Conn. 66; Hitchcock *v.* Page, 1 Root (Conn.) 293; Bruner *v.* Stout, Hard. (Ky.) 225; Whitall *v.* Morse, 5 Serg. & R. (Pa.) 358.

69. Hendrick *v.* Seely, 6 Conn. 176; Kean *v.* Mitchell, 13 Mich. 207; McKee *v.* Bartley, 9 Pa. St. 189; Brown *v.* Parks, 8 Humphr. (Tenn.) 294.

70. Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64; Madden *v.* Welch, 48 Oreg. 199, 86 Pac. 2; Kitchen *v.* Holmes, 42 Oreg. 252, 70 Pac. 830; Miltenberger *v.* Schlegel, 7 Pa. St. 241.

In an action of assumpsit, where the facts necessary to show a good cause of action are alleged, but no promise is alleged, the defect will be cured by verdict. Demesmey *v.* Gravelin, 56 Ill. 93; Kingsley *v.* Bill, 9 Mass. 198; Hoard *v.* Little, 7 Mich. 468; Haynes *v.* Brown, 36 N. H. 545; McCredy *v.* James, 6 Whart. (Pa.) 547. *Contra*, Bruner *v.* Stout, Hard. (Ky.) 225; McNutty *v.* Collins, 7 Mo. 69; Muldrow *v.* Tappan, 6 Mo. 276; Winston *v.* Francisco, 2 Wash. (Va.) 187, all these cases holding that the gist of the action of assumpsit is the promise to pay, and if this be not averred, the omission is not cured by verdict.

The word "promised" is not indispensable in a declaration in assumpsit. Any word of the same import, as "agreed" is sufficient, especially after verdict. Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105.

In an action to recover money paid, a verdict for plaintiff cures a defect in the petition in failing to allege a promise to pay. Stone *v.* Hill, 51 S. W. 184, 21 Ky. L. Rep. 285.

71. *Alabama.*— Irvin *v.* Nichols, 5 Stew. & P. 189.

Arkansas.— Jefferson *v.* Hale, 31 Ark. 286.

Connecticut.— Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682.

Indian Territory.— German-American Ins. Co. *v.* Paul, 2 Indian Terr. 625, 53 S. W. 442.

Maine.— Lane *v.* Maine Mut. F. Ins. Co., 12 Me. 44, 28 Am. Dec. 150; Warren *v.* Litchfield, 7 Me. 63.

Massachusetts.— Baker *v.* Baker, 13 Metc. 125, 46 Am. Dec. 725.

Mississippi.— Jordan *v.* Thomas, 31 Miss. 557.

Missouri.— Jones *v.* St. Joseph F. & M. Ins. Co., 55 Mo. 342; Case *v.* Fogg, 46 Mo. 44; Gustin *v.* Concordia F. Ins. Co., 90 Mo. App. 373; Boulware *v.* Farmers', etc., Co-Operative Ins. Co., 77 Mo. App. 639; See *v.* St. Paul F. & M. Ins. Co., 60 Mo. App. 518.

Oregon.— Nicolai *v.* Krimbel, 29 Oreg. 76, 43 Pac. 865; McKay *v.* Musgrove, 15 Oreg. 162, 13 Pac. 770.

Tennessee.— Williams *v.* State Bank, 1 Coldw. 43.

Texas.— Bradford *v.* Mann, 1 Tex. Unrep. Cas. 225.

Virginia.— Holladay *v.* Littlepage, 2 Munf. 539.

Washington.— Waldron *v.* Home Mut. Ins. Co., 9 Wash. 534, 38 Pac. 136.

United States.— Brown *v.* Barry, 3 Dall. 365, 1 L. ed. 638.

See 39 Cent. Dig. tit. "Pleading," § 1476.

72. *California.*— Merrill *v.* Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915.

Colorado.— Denver, etc., R. Co. *v.* Klaes, 40 Colo. 125, 90 Pac. 60; San Juan County School Dist. No. 1 *v.* Ross, 4 Colo. App. 493, 36 Pac. 560.

District of Columbia.— Chandler, etc., Co. *v.* Norwood, 14 App. Cas. 357.

Indiana.— Brauns *v.* Glesige, 130 Ind. 167, 29 N. E. 1061; Peltier *v.* Britton, 4 Blackf. 502.

Iowa.— Humphreys *v.* Daggs, 1 Greene 435.

Kentucky.— Walker *v.* Kendall, Hard. 404; Robinett *v.* Morris, Hard. 93; Covington, etc., Bridge Co. *v.* Hull, 90 S. W. 1055, 28 Ky. L. Rep. 1038.

Massachusetts.— Richards *v.* Farnham, 13 Pick. 451; Daniels *v.* Daniels, 7 Mass. 135.

Minnesota.— Uldrickson *v.* Samdahl, 92 Minn. 297, 100 N. W. 5.

Mississippi.— Poindexter *v.* Turner, Walk. 349; Delahuff *v.* Reed, Walk. 74.

New York.— Hynes *v.* Patterson, 95 N. Y. 1.

Virginia.— Roane *v.* Drummond, 6 Rand. 182; Chichester *v.* Vass, 1 Call 83, 1 Am. Dec. 509; Stephens *v.* White, 2 Wash. 203; Smith *v.* Walker, 1 Wash. 135.

See 39 Cent. Dig. tit. "Pleading," § 1476.

Claim at conclusion of declaration.— It is too late after verdict to take advantage of an omission to claim a specific sum in damages at the conclusion of the declaration, where the body of the declaration shows that plaintiff claimed damages to an amount exceeding the verdict. Burst *v.* Wayne, 13 Ill. 599; Koehler *v.* King, 119 Ill. App. 6.

73. Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515. But see Hall *v.* Kitson, 3 Pinn. (Wis.) 296, 4 Chandl. 20, holding

k. Averment of Negligence and Contributory Negligence. In actions for damages for negligence, defects, and omissions in the pleadings, in substance or form, are cured by the verdict, where the issues joined are such as necessarily require proof of the facts so defectively presented, and without which proof it is not to be presumed the verdict would have been given.[74] Thus generality of statement as to negligence or contributory negligence will be cured by verdict.[75] So failure of plaintiff to allege that he was in the exercise of due care,[76] and failure to allege that defendant knew or ought to have known of the danger,[77] are such defects of pleading as are cured by verdict. But if the declaration omits to allege any substantial fact which is essential to a right of action and which is not implied in or inferable from the findings of those which are alleged, a verdict for plaintiff does not cure the defect.[78]

l. Averment of Time. If no time is alleged in the declaration,[79] or it is mis-

that the failure of a declaration for damages caused by a public nuisance to set out special injury is cured by verdict, if it allege generally that plaintiff was damnified.

74. *Illinois.*— Chicago Union Traction Co. *v.* Newmiller, 215 Ill. 383, 74 N. E. 410; Illinois Steel Co. *v.* Stonevick, 199 Ill. 122, 64 N. E. 1014; Illinois Steel Co. *v.* Hanson, 195 Ill. 106, 62 N. E. 918; Cribben *v.* Callaghan, 156 Ill. 549, 41 N. E. 178.

Indiana.— Louisville, etc., R. Co. *v.* Goodbar, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162; Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723; Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714.

Maine.— Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Michigan.— Fox *v.* Spring Lake Iron Co., 89 Mich. 387, 50 N. W. 872.

Missouri.— Lynch *v.* St. Joseph, etc., R. Co., 111 Mo. 601, 19 S. W. 1114; Greer *v.* St. Louis, etc., R. Co., 80 Mo. 555; Jackson *v.* St. Louis, etc., R. Co., 80 Mo. 147; Edwards *v.* Kansas City, etc., R. Co., 74 Mo. 117; Leu *v.* St. Louis Transit Co., 110 Mo. App. 458, 85 S. W. 137.

Oregon.— Busch *v.* Robinson, 46 Oreg. 539, 81 Pac. 237, negligence.

See 39 Cent. Dig. tit. "Pleading," § 1473.

75. *Illinois.*—Chicago City R. Co. *v.* Shreve, 226 Ill. 530, 80 N. E. 1049 [*affirming* 128 Ill. App. 462]; Grace, etc., Co. *v.* Sanborn, 225 Ill. 138, 80 N. E. 88 [*affirming* 124 Ill. App. 472]; Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455; Illinois Steel Co. *v.* Ostrowski, 194 Ill. 376, 62 N. E. 822; Alton R., etc., Co. *v.* Foulds, 190 Ill. 367, 60 N. E. 537.

Indiana.— Pennsylvania Co. *v.* Rusie, 95 Ind. 236; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Noblesville Foundry, etc., Co. *v.* Yeaman, 3 Ind. App. 521, 30 N. E. 10.

Iowa.— Seska *v.* Chicago, etc., R. Co., 77 Iowa 137, 41 N. W. 596.

Kentucky.— Covington Sawmill, etc., Co. *v.* Clark, 116 Ky. 461, 76 S. W. 348, 25 Ky. L. Rep. 694.

Missouri.— Van Cleave *v.* St. Louis, 159 Mo. 574, 60 S. W. 1091; Barnes *v.* Columbia Lead Co., 107 Mo. App. 608, 82 S. W. 203; Lien *v.* Chicago, etc., R. Co., 79 Mo. App. 475.

Nebraska.— Chicago, etc., R. Co. *v.* Sims, 17 Nebr. 691, 24 N. E. 388.

Oregon.— Chan Sing *v.* Portland, 37 Oreg. 68, 60 Pac. 718; Wild *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954.

Vermont.— Holden *v.* Rutland, etc., R. Co., 30 Vt. 297; Taylor *v.* Day, 16 Vt. 566.

United States.— Robinson *v.* Louisville R. Co., 112 Fed. 484, 50 C. C. A. 357.

See 39 Cent. Dig. tit. "Pleading," § 1473.

76. Baltimore, etc., Southwestern R. Co. *v.* Tehn, 159 Ill. 535, 42 N. E. 971; Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Illinois Cent. R. Co. *v.* Simmons, 38 Ill. 242; Chicago, etc., R. Co. *v.* Smith, 124 Ill. App. 627 [*affirmed* in 226 Ill. 178, 80 N. E. 716]; Wiggins Ferry Co. *v.* Hill, 112 Ill. App. 475. *Contra*, Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94; Guthrie *v.* Nix, 3 Okla. 136, 41 Pac. 343.

77. Postal Tel.-Cable Co. *v.* Likes, 225 Ill. 249, 80 N. E. 136 [*affirming* 124 Ill. App. 459]; Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455; Boyce *v.* Tallerman, 183 Ill. 115, 55 N. E. 703; Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Mobile, etc., R. Co. *v.* Harmes, 52 Ill. App. 649; Chesapeake, etc., R. Co. *v.* Venable, 111 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427; Ashland, etc., St. R. Co. *v.* Lee, 82 S. W. 368, 26 Ky. L. Rep. 699; Hurst *v.* Ash Grove, 96 Mo. 168, 9 S. W. 631; McLean *v.* Kansas City, 100 Mo. App. 625, 75 S. W. 173; Morriss *v.* Bowers, 105 Tenn. 59, 58 S. W. 328.

78. McAndrews *v.* Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603 [*affirming* 124 Ill. App. 166]; Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94; Indianapolis, etc., R. Co. *v.* Brucey, 21 Ind. 215; South Bend Iron Works *v.* Larger, 11 Ind. App. 367, 39 N. E. 209; Lake Shore, etc., R. Co. *v.* Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303.

79. *Alabama.*— Hubbert *v.* Collier, 6 Ala. 269.

California.— Rutan *v.* Walters, 116 Cal. 403, 48 Pac. 385.

Indiana.— Overton *v.* Rogers, 99 Ind. 595.

Massachusetts.— Burnham *v.* Webster, 5 Mass. 266.

Mississippi.— Delahuff *v.* Reed, Walk. 74.

New Hampshire.— Rowell *v.* Bruce, 5 N. H. 381.

Oregon.— Nicolai *v.* Krimbel, 29 Oreg. 76, 43 Pac. 865.

Pennsylvania.— Graff *v.* Graybill, 1 Watts

stated,[80] or an impossible time is alleged,[81] the defect will be cured by verdict or judgment. The cause of action must, however, be shown to have accrued before the commencement of the suit, and if it appear otherwise from the record, the defect is fatal, and is not cured by verdict.[82]

m. Averment of Title. A verdict will cure a defect in the mode of stating a title, but not one in the title itself.[83]

n. Variance. Immaterial variances between pleadings and proofs, which might have been cured by amendment and which do not prejudice the other party,[84]

428; Sauerman *v.* Weckerly, 17 Serg. & R. 116.

South Carolina.— Blythe *v.* Marsh, 1 McCord 360.

Tennessee.— Nashville L. Ins. Co. *v.* Mathews, 8 Lea 499.

Virginia.— Milstead *v.* Redman, 3 Munf. 219.

United States.— Stockton *v.* Bishop, 4 How. 155, 11 L. ed. 918.

See 39 Cent. Dig. tit. "Pleading," § 1471.

But see Halsey *v.* Salmon, 3 N. J. L. 916, holding that the failure to allege the time of giving notice of dishonor is not cured by verdict.

80. *Alabama.*— Russell *v.* Russell, 62 Ala. 48.

Connecticut.— Hall *v.* Crandall, Kirby 402.

Georgia.— Bond *v.* Central Bank, 2 Ga. 92.

Illinois.— Otto *v.* Jackson, 35 Ill. 349.

Indiana.— John *v.* Clayton, 1 Blackf. 54.

Mississippi.— Wells *v.* Woodley, 5 How. 484.

Missouri.— Block *v.* O'Hara, 1 Mo. 145.

New York.— Allaire *v.* Ouland, 2 Johns. Cas. 52.

Pennsylvania.— Loose *v.* Loose, 36 Pa. St. 538; Crouse *v.* Miller, 10 Serg. & R. 155.

See 39 Cent. Dig. tit. "Pleading," § 1471.

81. Morgan *v.* Morgan, 2 Bibb (Ky.) 388; Bemis *v.* Faxon, 4 Mass. 263; Charles *v.* Delpux, 2 Browne (Pa.) 313; Sorrel *v.* Lewin, 3 Keb. 354, 84 Eng. Reprint 762.

82. Cheetham *v.* Lewis, 3 Johns. (N. Y.) 42; Charles *v.* Delpux, 2 Browne (Pa.) 313; Venables *v.* Daffe, Carth. 113, 90 Eng. Reprint 670. *Contra*, Kraft *v.* Gilchrist, 31 Pa. St. 470.

83. *Alabama.*— Payne *v.* Martin, 1 Stew. 407.

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Indian Territory.— Long-Bell Lumber Co. *v.* Thomas, 1 Indian Terr. 225, 40 S. W. 773.

Kentucky.— U. S. Mail Line Co. *v.* Carrollton Furniture Mfg. Co., 101 Ky. 658, 42 S. W. 342, 19 Ky. L. Rep. 833; Coleman *v.* Croysdale, 3 J. J. Marsh. 541; Hawkins *v.* Walkers, 4 Bibb 292; Bartee *v.* Edmunds, 96 S. W. 535, 29 Ky. L. Rep. 872; Hall *v.* Roberts, 74 S. W. 199, 24 Ky. L. Rep. 2362; Owensboro, etc., Road Co. *v.* Coons, 49 S. W. 966, 20 Ky. L. Rep. 1678.

Mississippi.— Cole *v.* Harman, 8 Sm. & M. 562.

Missouri.— Prendergast *v.* Dwelling House Ins. Co., 67 Mo. App. 426; Ellithorpe *v.* John H. Vogel-Sang Commission Co., 67 Mo. App. 251.

New Jersey.— Halsey *v.* Salmon, 3 N. J. L. 916.

Pennsylvania.— Pennsylvania Salt Mfg. Co. *v.* Neel, 54 Pa. St. 9; Good *v.* Harnish, 13 Serg. & R. 99.

South Carolina.— Craven *v.* Ross, 3 S. C. 72; Jordan *v.* Boone, 5 Rich. 528.

Texas.— Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537; De Witt *v.* Miller, 9 Tex. 239; Mason *v.* Slevin, 1 Tex. App. Civ. Cas. § 11.

Vermont.— Curtis *v.* Burdick, 48 Vt. 166; Haselton *v.* Weare, 8 Vt. 480; Richardson *v.* Royalton, etc., Turnpike Co., 6 Vt. 496.

Virginia.— Dejarnatte *v.* Allen, 5 Gratt. 499; Woodford *v.* Pendleton, 1 Hen. & M. 303.

United States.— De Sobry *v.* Nicholson, 3 Wall. 420, 18 L. ed. 263; Dobson *v.* Campbell, 7 Fed. Cas. No. 3,945, 1 Sumn. 319, 1 Robb Pat. Cas. 681.

See 39 Cent. Dig. tit. "Pleading," § 1469.

84. *Connecticut.*— Jones *v.* Hoyt, 25 Conn. 374.

Illinois.— Archer *v.* Claflin, 31 Ill. 306; Caruthers *v.* Niblack, 73 Ill. App. 197; Mumford *v.* Tolman, 54 Ill. App. 471.

Indiana.— Perry County *v.* Lomax, 5 Ind. App. 567, 32 N. E. 800.

Maryland.— Merrick *v.* Metropolis Bank, 8 Gill 59.

Massachusetts.— Fuller *v.* Ruby, 10 Gray 285.

Michigan.— Marquet *v.* La Duke, 96 Mich. 596, 55 N. W. 1006; Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638.

Missouri.— Bassett *v.* St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Warne *v.* Anderson, 7 Mo. 46; Wall *v.* Continental Casualty Co., 111 Mo. App. 504, 86 S. W. 491.

New Hampshire.— Smith *v.* Eastern R. Co., 35 N. H. 356; Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

Oklahoma.— Mulhall *v.* Mulhall, 3 Okla. 304, 41 Pac. 109.

Pennsylvania.— Kirchner *v.* Smith, 207 Pa. St. 431, 56 Atl. 947; Ashton *v.* Moyer, 14 Phila. 147.

Virginia.— Watson *v.* Alexander, 1 Wash. 340.

West Virginia.— Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197.

Wisconsin.— Lemke *v.* Daegling, 52 Wis. 498, 9 N. W. 399.

United States.— Nashua Sav. Bank *v.* Anglo-American Land, etc., Co., 189 U. S. 221, 23 S. Ct. 517, 47 L. ed. 782; Patrick *v.*

and similar variances between the writ and declaration,[85] cannot be objected to after verdict or judgment.

o. Miscellaneous Defects. Among other defects trial upon an issue not raised by the pleadings,[86] a plea in bar setting up matter arising subsequent to the commencement of the action,[87] a set-off properly pleaded but inappropriate to the action,[88] pleading several pleas or replications when not authorized,[89] or an unauthorized plea [90] have been held to be cured by a verdict or judgment.

PLEADING TO THE MERITS. A phrase of long standing, distinguishing those pleas which answer the cause of action, and on which a trial may be had, from those which are of a different character.[1] (See PLEADING, *ante*, p. 127.)

PLEAS OF THE CROWN. The title of several standard works on criminal law.[2]

PLEASURE. Will or choice.[3]

PLEASURE CARRIAGE. A carriage for the transportation of persons as distinguished from one for the carriage of burdens; [4] one for the more easy, convenient, and comfortable transportation of persons.[5] (See CARRIAGE, 6 Cyc. 351.)

PLEDGERY. A suretyship; an undertaking or answering for.[6] (See, generally, PRINCIPAL AND SURETY.)

Graham, 132 U. S. 627, 10 S. Ct. 194, 33 L. ed. 460; Hudson *v.* Kansas Pac. R. Co., 9 Fed. 879. *Compare* Ingle *v.* Collard, 13 Fed. Cas. No. 7,043, 1 Cranch C. C. 152, holding that a verdict does not cure a variance between the covenant alleged in the declaration and that produced on oyer.

See 39 Cent. Dig. tit. "Pleading," § 1485.

85. *Alabama.*— Summerlin *v.* Dowdle, 24 Ala. 428; Granberry *v.* Wellborn, 4 Ala. 118; Byrne *v.* Hall, 1 Stew. 17; Mayfield *v.* Allen, Minor 274; Robinson *v.* Cox, Minor 84.

Florida.— Robinson *v.* Hartridge, 13 Fla. 501.

Indiana.— Peltier *v.* Britton, 4 Blackf. 502.

Kentucky.— Kennedy *v.* Woods, 3 Bibb 322; Palmer *v.* McGinnis, Hard. 505; Troxwell *v.* Fugate, Hard. 2.

Maryland.— Giles *v.* Perryman, 1 Harr. & G. 164.

Mississippi.— Shrock *v.* Bowden, 4 How. 426.

Pennsylvania.— Shenk *v.* Mingle, 13 Serg. & R. 29; Weidman *v.* Kohr, 13 Serg. & R. 17.

South Carolina.— Karck *v.* Avinger, Riley 201.

See 39 Cent. Dig. tit. "Pleading," § 1477.

Compare Stamps *v.* Graves, 11 N. C. 102, holding that a variance between the writ and the declaration, one being in debt and the other in assumpsit, is fatal, even after verdict.

86. Hackett *v.* Philadelphia Underwriters, 79 Mo. App. 16.

87. Cobbett *v.* Grey, 4 Exch. 729, 19 L. J. Exch. 137.

88. De Loach Mill Mfg. Co. *v.* Standard Sawmill Co., 125 Ga. 377, 54 S. E. 157; Brantley *v.* Dempsey, 24 Ga. 341; Henry *v.* Hoover, 6 Sm. & M. (Miss.) 417.

89. Price *v.* Art Printing Co., 112 Ill. App. 1; Richmond *v.* Patterson, 3 Ohio 368; Vaiden *v.* Bell, 3 Rand. (Va.) 448.

90. Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Pence *v.* Huston, 6 Gratt. (Va.) 304.

1. Rahn *v.* Gunnison, 12 Wis. 528, 531.

2. Such as Hale's Pleas of the Crown, Hawkins Pleas of the Crown, and others. Burrill L. Dict.

In English law it is a phrase now employed to signify criminal causes in which the king is a party. Bouvier L. Dict. [*quoted* in State *v.* Bacon, 27 R. I. 252, 61 Atl. 653, 656].

3. Webster Int. Dict.

"Pleasure of the lodge" see Brendon *v.* Worley, 8 Misc. (N. Y.) 253, 255, 28 N. Y. Suppl. 557.

4. Talcott Mountain Turnpike Co. *v.* Marshall, 11 Conn. 185, 194, where it is said to embrace "four wheeled travelling pleasure carriages," "chaises," "chairs," "sulkeys," and "pleasure sleighs."

A luxury not a necessary see Eskridge *v.* Ditmars, 51 Ala. 245, 254.

"Pleasure carriage" with one horse see Pardee *v.* Blanchard, 19 Johns. (N. Y.) 442, 444.

5. Middlesex Turnpike Co. *v.* Wentworth, 9 Conn. 371, 374. See also Middlesex Turnpike Co. *v.* Freeman, 14 Conn. 85, 91.

As used in the act establishing a turnpike includes a "one horse wagon," made with a spring seat and panneled sides, and which was not used for farming purposes, or for carrying goods. Moss *v.* Moore, 18 Johns. (N. Y.) 128, 129.

6. Cowell L. Dict. [*quoted* in Gloucester Bank *v.* Worcester, 10 Pick. (Mass.) 528, 531].

PLEDGES

By Archibald H. Throckmorton
Dean of College of Law, Central University of Kentucky *

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* Author of "Levees," 25 Cyc. 188; "Names," 29 Cyc. 261.

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CROSS-REFERENCES

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Mortgage:

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Corporate Stock, see CORPORATIONS, 10 Cyc. 637.
Sureties, see PRINCIPAL AND SURETY.

I. TERMINOLOGY.

A. Pledge. A pledge is a transfer of personal property[1] as a security for a debt or other obligation.[2] The word "pledge" is also used to describe the article or

1. Harriman *v.* Woburn Electric Light Co., 163 Mass. 85, 39 N. E. 1004; Mowry *v.* Wood, 12 Wis. 413.

2. *Arkansas.*—Peet *v.* Burr, 31 Ark. 34, 35.
California.— Lilienthal *v.* Ballou, 125 Cal. 183, 187, 57 Pac. 897.
Colorado.— Moffat *v.* Williams, 5 Colo. App. 184, 36 Pac. 914, 915. See also Wilcox *v.* Jackson, 7 Colo. 521, 4 Pac. 966.
Georgia.— Fleming *v.* Georgia R. Bank, 120 Ga. 1023, 1027, 48 S. E. 420. See also Davis *v.* Davis, 88 Ga. 191, 14 S. E. 194.
Illinois.—Corbett *v.* Underwood, 83 Ill. 324, 326, 25 Am. Rep. 392.
Indiana.— Evans *v.* Darlington, 5 Blackf. 320, 322.
Kentucky.— Hamilton *v.* Wagner, 2 A. K. Marsh. 331, 334.
Louisiana.— Carroll *v.* Bancker, 43 La. Ann. 1078, 1089, 1194, 10 So. 187.
Maine.— Eastman *v.* Avery, 23 Me. 248, 250.
Massachusetts.—Walker *v.* Staples, 5 Allen 34, 35.
New Jersey.— Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 686, 64 Am. Dec. 423.
New York.— Milliken *v.* Dehon, 27 N. Y. 364; Cornwell *v.* Baldwin's Bank, 12 N. Y. App. Div. 227, 231, 43 N. Y. Suppl. 771; Haskins *v.* Patterson, 1 Edm. Sel. Cas. 120, 123; Barrow *v.* Paxton, 5 Johns. 258, 261, 4 Am. Dec. 354. See also Rochester Bank *v.* Jones, 4 N. Y. 497, 507, 55 Am. Dec. 290; People *v.* Remington, 59 Hun 282, 292, 12 N. Y. Suppl. 824, 14 N. Y. Suppl. 98 [*affirmed* in 126 N. Y. 654, 27 N. E. 853]; Parshall *v.* Eggart, 52 Barb. 367, 374; Chamberlain *v.* Martin, 43 Barb. 607, 610; Brownell *v.* Hawkins, 4 Barb. 491, 492.
North Carolina.— Doak *v.* State Bank, 28 N. C. 309, 319 [*quoted* in Barrett *v.* Cole, 49 N. C. 40, 41].
Oklahoma.— Jackson *v.* Kincaid, 4 Okla. 554, 561, 46 Pac. 587.
Pennsylvania.— Com. *v.* Cart, 2 Pittsb. 495, 497.
Tennessee.— Pulaski Nat. Bank *v.* Winston, 5 Baxt. 685, 688; Johnson *v.* Smith, 11 Humphr. 396, 398.
Vermont.— Gifford *v.* Ford, 5 Vt. 532, 537.
Virginia.— Gillia *v.* Lynch, 2 Leigh 493, 500.
West Virginia.— Surber *v.* McClintic, 10 W. Va. 236, 242.
United States.— Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439, 445.
See 40 Cent. Dig. tit. "Principal and Surety," § 1.
Other definitions are: "A delivery of goods by a debtor to his creditor, to be kept till the

articles of personal property thus delivered by one person to another as security for the debt or obligation.[3]

B. Pledgor and Pledgee. The person who delivers the property as security is called the pledgor, and the person who receives it to hold in accordance with the contract, the pledgee.[4]

C. Pawn.[5] The word "pawn" has the same legal signification as "pledge,"[6] but in common usage it is applied to a pledge of chattels as distinguished from that of choses in action.[7]

D. Collateral Security. The term "collateral security" means any security in addition to the original obligation or security,[8] but it is most commonly

debt is discharged." Jones Bailm. 117; 2 Kent Comm. 577 [*quoted* in Corbett *v.* Underwood, 83 Ill. 324, 326, 25 Am. Rep. 392; Belden *v.* Perkins, 78 Ill. 449, 452; Markham *v.* Jaudon, 41 N. Y. 235, 241; Hanks *v.* Drake, 49 Barb. (N. Y.) 186, 188; People *v.* German Bank, 110 N. Y. Suppl. 291, 293; Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 164, 24 S. E. 548, 32 L. R. A. 408]. See also Whitney *v.* Peay, 24 Ark. 22, 27; Haskins *v.* Patterson, 1 Edm. Sel. Cas. (N. Y.) 120, 123.

"A bailment of personal property as a seeurity for some debt or engagement." Story Bailm. § 286 [*quoted* in Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Evans *v.* Darlington, 5 Blaekf. (Ind.) 320, 322; Markham *v.* Jaudon, 41 N. Y. 235, 241; Rochester Bank *v.* Jones, 4 N. Y. 497, 507, 55 Am. Dec. 290; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322, 329; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 229, 47 Am. Dec. 248; Johnson *v.* Smith, 11 Humphr. (Tenn.) 396, 398; Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 164, 24 S. E. 548, 32 L. R. A. 408; Mitchell *v.* Roberts, 17 Fed. 776, 778, 5 McCrary 425].

"A deposit of goods redeemable on certain terms." 4 Kent Comm. 138 [*quoted* in Lucketts *v.* Townsend, 3 Tex. 119, 129, 49 Am. Dec. 723].

"A lien created by the owner of personal property by the mere delivery of it to another, upon an express or implied understanding that it shall be retained as security for an existing or future debt." 3 Parsons Contr. 271 [*quoted* in Wilcox *v.* Jackson, 7 Colo. 521, 532, 4 Pac. 966; Corbett *v.* Underwood, 83 Ill. 324, 326, 25 Am. Rep. 392; Farson *v.* Gilbert, 114 Ill. App. 17, 19].

"A deposit of personal property by way of security for the performance of another act." Cal. Civ. Code, § 2986 [*quoted* in Sequeira *v.* Collins, (Cal. 1908) 95 Pac. 876, 877; Rohrbacher *v.* San Francisco Super. Ct., 144 Cal. 631, 633, 78 Pac. 22]; Valentine *v.* Donohoe-Kelley Banking Co., 133 Cal. 191, 195, 65 Pac. 381; St. Helena Sav. Bank *v.* Middlekauff, 113 Cal. 463, 466, 45 Pac. 840].

"A contraet by whieh one debtor gives something to his creditor as a security for his debt." La. Civ. Code, art. 3133.

"A deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, to be a lien upon it." Doak *v.* State Bank, 28 N. C. 309, 319.

Pothier defines a pawn or pledge to be a contract by whieh a debtor gives to his creditor a thing to be detained as security for his debt, which the creditor is bound to return when the debt is paid. Judge Story says the definitions of pawns and pledges, as given by some of the writers, are limited in terms to eases where a pawn is given as a mere security for debt, but a pawn may be given as security for any other engagement. Surber *v.* McClintic, 10 W. Va. 236, 242. See also Haskins *v.* Patterson, 1 Edm. Sel. Cas. (N. Y.) 120, 123.

Lord Holt says: "When goods or ehattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor, this is called in Latin '*vadium*' and in English 'pawn' or 'pledge.'" Haskins *v.* Patterson, 1 Edm. Sel. Cas. (N. Y.) 120, 123.

"In the Roman law," says Story, "it is ealled 'pignus.'" Whitney *v.* Peay, 24 Ark. 22, 27.

Derivation.— The word "pledge" has a legal and well-defined interpretation. It may be derived, says Cowell, from "'the Freneh *pleige, fidejussor; pleiger aucun*, i. e. *fidejuberé pro aliquo*. In the same signification is *plegius* used by Glanv. lib. 10, e. 5, and *plegiatio*, for the act of suretiship. In the Interpreter of the Grand Custumary of Normandy, c. 60, *plegii dicuntur personæ quæ se obligant ad hoc, ad quod qui eos mittit, tenebatur.*' 'Pledgery,' Cowell defines to be 'suretiship, an undertaking, or answering for.'" Gloucester Bank *v.* Worcester, 10 Pick. (Mass.) 528, 531.

The word "pledge," implied in an instrument, does not conclusively determine the character of the transaction. Vanstone *v.* Goodwin, 42 Mo. App. 39, 46.

3. Webster Int. Dict. See also Ga. Civ. Code, (1895) § 2956.

4. Anderson L. Dict. 780. See also Wentworth Co. *v.* French, 176 Mass. 442, 57 N. E. 789.

5. See PAWNBROKERS, 30 Cyc. 1164.

6. Lobban *v.* Garnett, 9 Dana (Ky.) 389; Johnson *v.* Smith, 11 Humphr. (Tenn.) 396.

7. Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200; Ryall *v.* Rolle, 1 Atk. 165, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074.

8. Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496; Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120. See also 7 Cyc. 278.

applied to transactions in which the thing pledged as such additional security is a chose in action.[9]

E. Hypothec; Hypothecation. "Hypothec" is a civil law term meaning the giving of a lien on property to be delivered thereafter.[10] Such property is said to be hypothecated.[11]

II. Requisites and Validity.

A. Nature and Elements of Pledge — 1. In General. The three elements necessary to constitute a contract one of pledge are: (1) The possession of the pledged property must pass from the pledgor to the pledgee or to some one for him;[12] (2) the legal title to the pledged property must remain in the pledgor;[13] (3) the pledgee must have a lien on the property for the payment of a debt or performance of an obligation due him by the pledgor or some other person.[14] And every contract by which the possession of personal property is transferred as security only is to be deemed a pledge.[15] But the agreement that property is to be held as a pledge must be clearly expressed or implied,[16] and a mere loose understanding,[17] or statements by one party, to which the other does not assent,[18] are not sufficient to constitute a contract of pledge.

2. What Law Governs. The validity of a contract of pledge and the rights of the parties under it is determined by the law of the place where the pledged property

9. Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

10. Macomber *v.* Parker, 14 Pick. (Mass.) 497 [*quoting* Ayliff Civ. L. bk. 4, tit. 18, p. 530]. See also 21 Cyc. 1720.

11. See 21 Cyc. 1720.

12. Christian *v.* Atlantic, etc., R. Co., 133 U. S. 233, 10 S. Ct. 260, 33 L. ed. 589. See *infra*, II, B.

13. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 745; Haskins *v.* Patterson, 1 Edm. Sel. Cas. (N. Y.) 120.

14. Haskins *v.* Patterson, 1 Edm. Sel. Cas. (N. Y.) 120; Johnson *v.* Smith, 11 Humphr. (Tenn.) 396.

That pledgee has an insurable interest in the property see Fire Insurance, 19 Cyc. 586.

"There are three kinds of security: the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage,— viz., a pledge." Halliday *v.* Holgate, L. R. 3 Exch. 299, 302, 37 L. J. Exch. 174, 18 L. T. Rep. N. S. 656, 17 Wkly. Rep. 13.

15. *California.*—Irwin *v.* McDowell, (1893) 34 Pac. 708; Waldie *v.* Doll, 29 Cal. 555.

Illinois.— Belden *v.* Perkins, 78 Ill. 449; Kergin *v.* Dawson, 6 Ill. 86.

Kentucky.— Meguiar *v.* Thomas, 42 S. W. 846, 19 Ky. L. Rep. 1003; Bush *v.* Utley, 13 Ky. L. Rep. 541.

Massachusetts.— Beacon Trust Co. *v.* Robbins, 173 Mass. 261, 53 N. E. 868; Hewins *v.* Baker, 161 Mass. 320, 37 N. E. 441; Rowley *v.* Rice, 10 Metc. 7.

New York.— Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127]; Haskins *v.* Kelly, 1 Rob. 160; Lewis *v.* Lozee, 3 Wend. 79.

North Carolina.— Hinsdale *v.* Jerman, 115 N. C. 152, 20 S. E. 294; Penland *v.* Crapo, 114 N. C. 608, 19 S. E. 662.

Rhode Island.— Providence Thread Co. *v.* Aldrich, 12 R. I. 77.

Texas.— Hudson *v.* Wilkinson, 45 Tex. 444.

Vermont.— Taggart *v.* Packard, 39 Vt. 628.

West Virginia.— Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408.

United States.— Herrmann *v.* Central Car Trust Co., 101 Fed. 41, 41 C. C. A. 176.

See 40 Cent. Dig. tit. "Pledges," § 1 *et seq.*

Where commercial correspondent purchases on his own credit and takes bill of lading in his own name, he is not a pledgee, but owner of the property under contract to sell and deliver on payment of the purchase-price. Moors *v.* Kidder, 106 N. Y. 32, 12 N. E. 818; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568.

Factor does not become pledgee of property from the mere fact that the consignor, who is indebted to him, delivers them to a carrier, addressed to the factor and takes a bill of lading expressing that they are to be delivered to the factor. Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290 [*reversing* 4 Den. 489].

Under La. Acts (1874), No. 66, the shipment of an agricultural product to a factor whom the consignor owes, and delivery of the bill of lading to the carrier for transmission is a pledge of the goods to the consignee. Phelps *v.* Howell, 35 La. Ann. 87.

16. Houser *v.* Kemp, 3 Pa. St. 208.

17. Houser *v.* Kemp, 3 Pa. St. 208.

18. Taylor *v.* Jones, 3 N. D. 235, 55 N. W. 593; Tuley *v.* Barton, 79 Va. 387.

Property taken possession of by mortgagee under an invalid mortgage cannot be held by him as a pledge. Janvrin *v.* Fogg, 49 N. H. 340.

Mere statement that articles are "pledged" or "hypothecated" does not necessarily make transaction a pledge. The real essence of

is situated at the time of the contract,[19] or by the law of the state where the contract is made and is to be executed,[20] even though the principal contract to which the pledge is collateral is to be performed in another state and is governed by the laws of that state.[21]

3. Margin Purchases. A contract by which a stockbroker purchases stock or bonds for a customer under an agreement by which the customer is to furnish a certain margin of security, and keep the same good when called on, and in the event of a non-compliance, the broker is to close the account by a public or private sale, creates the relation of pledgor and pledgee between the customer and the broker.[22] But where a contract is made by a commission merchant to purchase for a customer grain to be delivered at a future time, which is in the merchant's name, and agreeing to keep the margin good up to the time of delivery, the relation of pledgor and pledgee is not created.[23]

4. Distinguished From Other Transactions — a. In General. In distinguishing a pledge from other transactions, courts will endeavor to ascertain from the contract the intention of the parties and to give it effect.[24]

b. Antichresis. Antichresis is a term of the civil law meaning a delivery of real property as security for a debt.[25] It differs from a pledge in that the security consists of real property or immovables, and from a mortgage in that the possession of the property is transferred to the creditor.[26]

c. Lien.[27] A pledge is distinguished from a common-law lien in that a contract of pledge implies the pledgee's right to sell on default of the pledgor, while a mere lienor has no authority to sell, but is confined to the right to retain until payment.[28]

the contract will be regarded. Moors *v.* Kidder, 106 N. Y. 32, 12 N. E. 818.

19. Culver *v.* Benedict, 13 Gray (Mass.) 7; Swedish-American Nat. Bank *v.* Gardner First Nat. Bank, 89 Minn. 98, 94 N. W. 218, 99 Am. St. Rep. 549; Morris *v.* East Side R. Co., 104 Fed. 409, 43 C. C. A. 605.

20. Murdock *v.* Columbus Ins., etc., Co., 59 Miss. 152.

21. Swedish-American Nat. Bank *v.* Gardner First Nat. Bank, 89 Minn. 98, 94 N. W. 218, 99 Am. St. Rep. 549.

22. Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80; Stenton *v.* Jerome, 54 N. Y. 480; Markham *v.* Jaudon, 41 N. Y. 235 [*reversing* 49 Barb. 462, 3 Abb. Pr. N. S. 286, and *overruling* Hanks *v.* Drake, 49 Barb. (N. Y.) 186; Sterling *v.* Jaudon, 48 Barb. (N. Y.) 459]; Brass *v.* Worth, 40 Barb. (N. Y.) 648; Wicks *v.* Hatch, 38 N. Y. Super. Ct. 95 [*affirmed* in 62 N. Y. 535]; Read *v.* Lambert, 10 Abb. Pr. N. S. (N. Y.) 428; Morgan *v.* Jaudon, 40 How. Pr. (N. Y.) 366. *Contra*, Covell *v.* Loud, 135 Mass. 41, 46 Am. Rep. 446; Wood *v.* Hayes, 15 Gray (Mass.) 375.

Gold coin.— Schepeler *v.* Eisner, 3 Daly (N. Y.) 11 [*affirmed* in 54 N. Y. 675].

23. Corbett *v.* Underwood, 83 Ill. 324, 25 Am. Rep. 392.

The reason for the distinction between the purchase of stocks and the purchase of grain on margin is that in the former case the stocks are actually purchased by the broker and are delivered into his possession, while in the latter case the grain is not actually purchased and received by the broker, but he has only an executory contract for its sale and delivery. Corbett *v.* Underwood, 83 Ill. 324, 25 Am. Rep. 392.

24. *Illinois.*— Foster *v.* Magill, 119 Ill. 75, 8 N. E. 771. See also Daly *v.* Spiller, 222 Ill. 421, 78 N. E. 782 [*affirming* 119 Ill. App. 272].

Iowa.— Sperry *v.* Clarke, 76 Iowa 503, 41 N. W. 203.

Maryland.— Dungan *v.* New Jersey Mut. Ben. L. Ins. Co., 38 Md. 242.

Mississippi.— Harris *v.* Lombard, 60 Miss. 29.

Pennsylvania.— Bissell *v.* Steel, 67 Pa. St. 443.

See 40 Cent. Dig. tit. "Pledges," § 6.

Under the express terms of Cal. Civ. Code, §§ 2986, 2987, where a corporation, to secure plaintiff from liability on notes he indorsed and procured to be indorsed, transferred to him, and his indorsers, subject to the claims of another, the entire proceeds of certain territory in which it did business, the contract providing that, on failure to meet the notes, the assets would be collected, reduced to cash, and the proceeds applied to the payment of the notes, there was a pledge as collateral security for the notes indorsed and procured to be indorsed by plaintiff. Hutchison *v.* Evans, (Cal. App. 1907) 92 Pac. 1135; Jones *v.* Evans, 6 Cal. App. 88, 91 Pac. 532.

25. See Antichresis, 2 Cyc. 472; Mortgages, 27 Cyc. 964.

26. La. Civ. Code, arts. 3134, 3135; Payne *v.* Habbard, 42 La. Ann. 395, 7 So. 572; Livingston *v.* Story, 11 Pet. (U. S.) 351, 9 L. ed. 746. See also Great Eastern R. Co. *v.* Lambe, 21 Can. Sup. Ct. 431.

27. Lien generally see Liens, 25 Cyc. 655.

28. Doane *v.* Russell, 3 Gray (Mass.) 382; Clidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737.

d. Sale.[29] Pledge differs from sale in that possession [30] but not title [31] passes in case of pledge,[32] while in a sale title passes to the vendee,[33] and transfer of possession may [34] or may not [35] be made. Also where no certain value is placed on the articles delivered,[36] or they are assigned to secure an amount less than their acknowledged value,[37] or there is no agreement to receive the articles in satisfaction of the debt,[38] or where the transfer of the property is collateral to the execution of a note[39] or the payment of a draft [40] the contract is one of pledge and not of sale.[41]

e. Conditional Sale.[42] The most important distinction between a pledge and a conditional sale is that in a contract of pledge the legal title remains in the pledgor,[43] while in a conditional sale title passes to the vendee, with a reservation to the vendor, of a right to repurchase the property at a fixed price and specified time.[44] A contract by which property is transferred by a debtor to his creditor as a security for his debt, with a provision that, if the debt is not paid at maturity, the creditor shall become the owner of the property is, in some states, enforced as a conditional

A pledge is a lien, but also more than a lien. —Jackson *v.* Kincaid, 4 Okla. 554, 46 Pac. 587. See also Jacobs *v.* Knapp, 50 N. H. 71, holding that, by the principles of the common law, a man who has the lawful possession of a thing, and has expended his money or labor upon it at the request of the owner, has a lien upon the property, and a right to retain possession of it until his demand is satisfied. This lien is in the nature of a pledge by the owner of the property to the party with whom he contracts for labor to be bestowed upon it.

Privilege distinguished.— "Privilege" and "pledge" are totally different things; privilege being a right which the nature of a debt gives to a creditor which enables him to be preferred before other creditors, even those who have mortgages. But a pledge is a contract by which a debtor gives something to his creditor as a security for his debts. Carroll *v.* Bancker, 43 La. Ann. 1078, 1194, 10 So. 187.

29. Sale generally see SALES.

30. Smith *v.* Atkinson, 4 Heisk. (Tenn.) 625.

31. Smith *v.* Atkinson, 4 Heisk. (Tenn.) 625; Atlantic, etc., R. Co. *v.* De Galindez, 14 Quebec K. B. 161.

Transfer of notes and mortgage upon an agreement that they are to be collected and proceeds applied to a debt of the transferrer constitutes a pledge and not a sale. Gardinier *v.* Kellogg, 14 Wis. 605.

32. Smith *v.* Atkinson, 4 Heisk. (Tenn.) 625.

33. Smith *v.* Atkinson, 4 Heisk. (Tenn.) 625.

34. James *v.* Hamilton, 2 Hun (N. Y.) 630 [*affirmed* in 63 N. Y. 616].

35. James *v.* Hamilton, 2 Hun (N. Y.) 630 [*affirmed* in 63 N. Y. 616].

36. Beidler *v.* Crane, (Ill. 1889) 19 N. E. 714; Reed *v.* Lansdale, Hard. (Ky.) 6; Harris *v.* Lombard, 60 Miss. 29; Hurst *v.* Jones, 10 Lea (Tenn.) 8.

But where goods are sold for a certain sum, with an agreement that if, on a sale by the vendee, they should bring more than such sum, the excess should be credited to the vendor, such agreement does not affect the character of the sale, or change it into a pledge or mortgage. Reeves *v.* Sebern, 16 Iowa 234, 85 Am. Dec. 513.

37. Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322; Henry *v.* Davis, 7 Johns. Ch. (N. Y.) 40 [*affirmed* in 2 Cow. 324].

Where sale is for full value, it is not transformed into a pledge by an agreement for a resale. Com. *v.* Reading Sav. Bank, 137 Mass. 431.

38. Harris *v.* Lombard, 60 Miss. 29; Stone *v.* Miller, 16 Pa. St. 450; Houser *v.* Kemp, 3 Pa. St. 208.

Where debt is satisfied, transaction is a sale, even though it is agreed the debtor may redeem within a certain time. Lauman's Appeal, 68 Pa. St. 88.

A pledge may be converted into a sale by a subsequent agreement between the parties that the pledgee shall take the pledged property in extinguishment of the debt. Spering's Appeal, 60 Pa. St. 199.

39. Campbell *v.* Parker, 9 Bosw. (N. Y.) 322.

40. Bissell *v.* Steel, 67 Pa. St. 443.

A delivery by the consignor of drafts on the consignee, accompanied by bills of lading unindorsed, to a third person in return for advances is a pledge and not a sale. Bissell *v.* Steel, 67 Pa. St. 443.

41. Foster *v.* Magill, 119 Ill. 75, 8 N. E. 771.

Where the creditor takes a bill of sale of property, under an agreement to sell it and credit the debtor with the proceeds, the legal title passes and the transaction is a sale. Foster *v.* Magill, 119 Ill. 75, 8 N. E. 771.

So where the legal title is transferred to the creditor in trust to sell the goods for the benefit of the debtor, the transaction is a sale and not a pledge. Jensen *v.* Bowles, 8 S. D. 570, 67 N. W. 627.

42. Conditional sale generally see SALES.

43. McLean *v.* Walker, 10 Johns. (N. Y.) 471; Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

44. Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723; Spencer *v.* Jones, (Tex. Civ. App. 1898) 47 S. W. 29.

sale,[45] or a mortgage,[46] while in others it is treated as a pledge, and the provision that upon the debtor's default the title shall become absolute in the pledgee is void.[47]

f. Assignment For Benefit of Creditors.[48] An assignment for the benefit of creditors differs from a pledge,[49] not only in that the legal title passes to the assignee,[50] but also in that it must include all the debtor's property [51] and must be made for the benefit of his creditors generally,[52] while a pledge is made to secure a particular debt, or particular debts,[53] and may consist either of a part,[54] or the whole,[55] of the debtor's personal property.[56]

g. Mortgage — (i) *In General.* A pledge differs from a chattel mortgage[57] (1) in that in the case of a p edge the title remains in the pledgor, both before[58] and

45. Pomez *v.* Camors, 36 La. Ann. 464; Morgenstern *v.* Davis, 14 N. Y. Suppl. 31 [*affirmed* in 158 N. Y. 733, 53 N. E. 1128]; Leavell *v.* Robinson, 2 Leigh (Va.) 161.

46. Bunacleugh *v.* Poolman, 3 Daly (N. Y.) 236.

47. Williamson *v.* Culpepper, 16 Ala. 211, 50 Am. Dec. 175; Smith *v.* 49 & 56 Quartz Min. Co., 14 Cal. 242; Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723. "There is no pretense for saying that this was a conditional sale, for no money was given, or agreed to be given, for the stock — no agreement to take it, either for the eight hundred dollars, or any other sum, at the time of contract." Smith *v.* 49 & 56 Quartz Min. Co., 14 Cal. 242, 247.

Pledge and not conditional sale usually presumed from existence of any of the following facts: (1) Vendor continues bound for the debt; (2) the security is much greater than the debt; (3) the transaction commences by borrowing money, and the conclusion is strengthened where all concur. Williamson *v.* Culpepper, 16 Ala. 211, 50 Am. Dec. 175.

48. **Assignment for creditors** generally see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 113.

49. Maass *v.* Falk, 24 N. Y. Suppl. 448 [*affirmed* in 146 N. Y. 34, 40 N. E. 504].

50. Maass *v.* Falk, 24 N. Y. Suppl. 448 [*affirmed* in 146 N. Y. 34, 40 N. E. 504].

51. Maass *v.* Falk, 24 N. Y. Suppl. 448 [*affirmed* in 146 N. Y. 34, 40 N. E. 504].

52. Maass *v.* Falk, 24 N. Y. Suppl. 448 [*affirmed* in 146 N. Y. 34, 40 N. E. 504].

53. Danforth *v.* Denny, 25 N. H. 155; Low *v.* Wyman, 8 N. H. 536; Maass *v.* Falk, 24 N. Y. Suppl. 448 [*affirmed* in 146 N. Y. 34, 40 N. E. 504]; Hurst *v.* Jones, 10 Lea (Tenn.) 8.

54. Hurst *v.* Jones, 10 Lea (Tenn.) 8.

55. Danforth *v.* Denny, 25 N. H. 155; Low *v.* Wyman, 8 N. H. 536.

56. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 129 note 28.

57. People *v.* Remington, 59 Hun (N. Y.) 282, 12 N. Y. Suppl. 824, 14 N. Y. Suppl. 98 [*affirmed* in 126 N. Y. 654, 27 N. E. 853]; Doak *v.* State Bank, 28 N. C. 309; Surber *v.* McClintic, 10 W. Va. 236; Jones *v.* Smith, 2 Ves. Jr. 372, 30 Eng. Reprint 679. See CHATTEL MORTGAGES, 6 Cyc. 986.

An instrument conveying both real and personal property to a trustee as security for a debt is a mortgage. Harriman *v.* Woburn Electric Light Co., 163 Mass. 85, 39 N. E. 1004.

Transfer of school-land certificates as security is not a pledge but a mortgage, because such certificates are not personal property. Mowry *v.* Wood, 12 Wis. 413.

Where mortgagor pays his debt to the mortgagee and procures an assignment of the mortgage to a third person as security for a smaller sum due him by the mortgagor, such assignment constitutes a pledge and not a mortgage. Haskins *v.* Kelly, 1 Rob. (N. Y.) 160.

The law favors a pledge in a case where there is any doubt as to whether a transaction is a pledge or a mortgage. British Columbia Bank *v.* Marshall, 11 Fed. 19, 8 Sawy. 29.

58. *Alabama.*— Sims *v.* Canfield, 2 Ala. 555.

California.— Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Wright *v.* Ross, 36 Cal. 414; Heyland *v.* Badger, 35 Cal. 404; Dewey *v.* Bowman, 8 Cal. 145.

Kentucky.— Hamilton *v.* Wagner, 2 A. K. Marsh. 331.

Maine.— Cutts *v.* York Mfg. Co., 18 Me. 190.

Maryland.— Dungan *v.* New Jersey Mut. Ben. L. Ins. Co., 38 Md. 242.

New Hampshire.— Ash *v.* Savage, 5 N. H. 545.

New York.— Brownell *v.* Hawkins, 4 Barb. 491; Haskins *v.* Patterson, 1 Edm. Sel. Cas. 120; McLean *v.* Walker, 10 Johns. 471; Brown *v.* Bement, 8 Johns. 96; Barrow *v.* Paxton, 5 Johns. 258, 4 Am. Dec. 354; Cortelyou *v.* Lansing, 2 Cai. Cas. 200.

Ohio.— Fielding *v.* Middlebaugh, 2 Ohio Dec. (Reprint) 55, 1 West. L. Month. 218.

Tennessee.— See McCready *v.* Haslock, 3 Tenn. Ch. 13, holding that where the owners of a stock of goods bought at a chancery sale agree in writing, in order to indemnify their sureties on the purchase note, to turn the stock over to a receiver, who should superintend the business and weekly pay the receipts over to the sureties, etc., the transaction is a pledge and not a mortgage, and requires no registration to be valid as to the creditors of the pledgors.

Texas.— Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

Vermont.— Conner *v.* Carpenter, 28 Vt. 237; Gifford *v.* Ford, 5 Vt. 532; Fletcher *v.* Howard, 2 Aik. 115, 16 Am. Dec. 686.

Virginia.— Gilliat *v.* Lynch, 2 Leigh 493.

West Virginia.— Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E.

after default [59] and until a sale duly made; [60] (2) in that delivery of the pledged articles is necessary,[61] and (3) in that no writing is required; [62] while in a mortgage (1) the legal title passes at once to the mortgagee, subject to be divested upon the payment of the debt or performance of the obligation,[63] and to become absolute upon a default [64] by the mortgagor; (2) delivery of possession is not necessary; [65] and (3) it must be in writing.[66]

(II) *CHOSES IN ACTION.* In a pledge of choses in action, such as stocks, bonds, and notes, it may be necessary to the value of the security that the legal title pass to the pledgee; but it is held by him for the benefit of the pledgor, in whom the general property remains, and the contract is construed in all respects as one of pledge.[67]

548, 32 L. R. A. 408; Surber *v.* McClintic, 10 W. Va. 236.

United States.— Herrmann *v.* Central Car Trust Co., 101 Fed. 41, 41 C. C. A. 176; Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425; British Columbia Bank *v.* Marshall, 11 Fed. 19, 8 Sawy. 29.

See 40 Cent. Dig. tit. "Pledges," § 11.

59. Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

60. See *infra*, VI, C.

61. *Kansas.*— Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219.

Maryland.— Dungan *v.* New Jersey Mut. Ben. L. Ins. Co., 38 Md. 242.

New Hampshire.— Leach *v.* Kimball, 34 N. H. 568; Ash *v.* Savage, 5 N. H. 545.

New York.— People *v.* Remington, 59 Hun 282, 12 N. Y. Suppl. 824, 14 N. Y. Suppl. 98 [*affirmed* in 126 N. Y. 654, 27 N. E. 853]; Barrow *v.* Paxton, 5 Johns. 258, 4 Am. Dec. 354.

North Carolina.— McCoy *v.* Lassiter, 95 N. C. 88; Doak *v.* State Bank, 28 N. C. 309.

North Dakota.— Willard *v.* Monarch Elevator Co., 10 N. D. 400, 87 N. W. 996.

United States.— Thurber *v.* Oliver, 26 Fed. 224.

See 40 Cent. Dig. tit. "Pledges," § 11.

Where possession is taken under an invalid mortgage, the property cannot be held as a pledge. Janvrin *v.* Fogg, 49 N. H. 340.

Where the delivery was accompanied by a writing in which the debtor agreed to give up all claim on the property if the debt was not paid by a certain time, it was construed a mortgage. Bunacleugh *v.* Poolman, 3 Daly (N. Y.) 236.

62. Eastman *v.* Avery, 23 Me. 248. See *infra*, II, A, 10.

63. Murdock *v.* Columbus Ins., etc., Co., 59 Miss. 152; Parshall *v.* Eggert, 54 N. Y. 18 [*reversing* 52 Barb. 367]. See *supra*, note 57.

64. Bunacleugh *v.* Poolman, 3 Daly (N. Y.) 236; Langdon *v.* Buell, 9 Wend. (N. Y.) 80.

65. Langdon *v.* Buell, 9 Wend. (N. Y.) 80; Barrow *v.* Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354.

But may be made see Lobban *v.* Garnett, 9 Dana (Ky.) 389.

The authorities show that the difference between a pledge or pawn of personal chattels and a mortgage of them is, that a mortgage passes the whole legal interest and property from the mortgagor to the mortgagee, and possession by the mortgagee is not essential to create his title, and, generally speaking, is inconsistent with such a title, while a pledge transfers only a special property in the thing pledged, the general property continuing in the pledgor. The pledgee's right is not complete until he has obtained possession, and his right or special property is to hold the pledge as security for the debt or engagement of the pledgor, and on default on the day appointed for payment or performance, to sell the pledge. Securities for money and negotiable instruments may be given in pledge, and the addition, as there is in the agreement here, of an express power to sell on default, will not change what would have been a pledge into a mortgage. Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13, 21 Eng. Rul. Cas. 301; Franklin *v.* Neate, 14 L. J. Exch. 59, 13 M. & W. 481. A pledgee may apply to a court of equity for an order for the sale of the goods pledged, but, as was pointed out in Carter *v.* Wake, 4 Ch. D. 605, 46 L. J. Ch. 841, and in *Ex p.* Hubbard, 17 Q. B. D. 690, 55 L. J. Q. B. 490, 59 L. T. Rep. N. S. 172 note, 3 Morr. Bankr. Cas. 246, 35 Wkly. Rep. 2, the position of a pledgee and pledgor in this court differ entirely from those of a mortgagee and mortgagor. In *Ex p.* Hubbard, *supra*, p. 702, Bowen, L. J., said: "No doubt a pledgee may in some cases enforce his charge in a Court of Equity, but in that case the relief which the Court of Equity would give would not be in respect of 'a right in equity,' but would be equitable relief in respect of a legal right." And in Carter *v.* Wake, *supra*, Jessel, M. R., held that a pledgee has not the right of foreclosure that a mortgagee has, but only the right to have the pledge sold.

66. Hurst *v.* Jones, 10 Lea (Tenn.) 8.

But a parol mortgage of chattels is good between the parties in the absence of statute requiring a writing. McCoy *v.* Lassiter, 95 N. C. 88.

Where instrument states that the debtor "pledged, hypothecated, and mortgaged" his interest in a steamboat, but contains no words of conveyance, it creates a pledge. Thoms *v.* Southard, 2 Dana (Ky.) 475, 26 Am. Dec. 467.

67. Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307; Wright *v.* Holbrook, 2 Rob. (N. Y.) 516, 18 Abb. Pr. 202 [*affirmed* in 32 N. Y. 587]; Campbell *v.* Parker, 9 Bosw. (N. Y.)

(iii) *Delivery of Bill of Sale.* The delivery of a bill of sale or bill of parcels, absolute on its face, with the intention that it shall operate as a security, constitutes not a mortgage, but a pledge.[68] But if it contains a defeasance clause,[69] is accompanied by the delivery of a separate writing containing a defeasance clause,[70] or is accompanied by a parol agreement of the creditor to hold the property as security for a debt contracted at the time of its execution,[71] it is a mortgage.

322; Hasbrouck *v.* Vandervoort, 4 Sandf. (N. Y.) 74; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Irving Park Assoc. *v.* Watson, 41 Oreg. 95, 67 Pac. 945; Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425. "The assignment was absolute in form, but the thing assigned is a chose in action, and the assignment and delivery are necessary to give the pledgee the full authority to readily control it, and afford a prompt means of making the pledge available. For these reasons the fact that the title passes in form by the assignment, in case of a chose in action, does not necessarily make it a mortgage." Gay *v.* Moss, 34 Cal. 125, 132. "With respect to goods and chattels it is in most cases very easy to apply this distinction, but with respect to choses in action which cannot be otherwise delivered, the fact that title passes does not necessarily create a mortgage. To constitute a mortgage the title must be conveyed, but it is not in all cases a mortgage because the title is conveyed. Thus a transfer of stock may be absolute, but still if its object and character are qualified and explained by a contemporaneous paper which forms a part of the contract, and declares it to be a deposit of the stock as collateral security for the payment of a loan, and there is nothing in the contract to work a forfeiture of the right to redeem or otherwise defeat it, except by a lawful sale under the power expressly conferred in the agreement, the transaction will be regarded as a pledge." Dungan *v.* New Jersey Mut. Ben. L. Ins. Co., 38 Md. 242, 252. *Contra*, holding such transfers to be mortgages see Huntington *v.* Mather, 2 Barb. (N. Y.) 538.

Delivery by payee of a note unindorsed as security is a pledge and not a mortgage. Blackf. (Ind.) 320; Garlick *v.* James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294.

Where the instrument is in the usual form of a note followed by the statement that certain bonds, stocks, etc., are deposited with the creditor as collateral security, the deposit constitutes a pledge. Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322; Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87 [*affirming* 3 Hill 593].

Transfer of stock on the books of the corporation from the debtor to the creditor as security is a pledge and not a mortgage. Nabring *v.* Mobile Bank, 58 Ala. 204; Wilson *v.* Little, 2 N. Y. 443, 447, 51 Am. Dec. 307, where it was said that the transfer of stock in the books "is equivalent to actual possession, because it is . . . the means of obtaining possession. . . . The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. . . . It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock and to secure them against a transfer to some other person."

Transfer by member of partially paid building association stock as security is a pledge. Mechanics' Bldg., etc., Assoc. *v.* Conover, 14 N. J. Eq. 219.

Assignment of a lease as security for a note is a pledge. Dewey *v.* Bowman, 8 Cal. 145.

Policy of insurance.— Where insured in a life policy gave one who loaned him money a note for the amount of the loan, and absolute conveyance of the policy, and an assignment with a defeasance, by the terms of which insured was entitled to have the policy reassigned to him on payment of the note when due, the instruments showed that the policy was pledged, and not sold to the lender. Daly *v.* Spiller, 222 Ill. 421, 78 N. E. 782 [*affirming* 119 Ill. App. 272].

68. *Colorado.*—Morgan *v.* Dod, 3 Colo. 551.

Louisiana.— Wolf *v.* Wolf, 12 La. Ann. 529; Williams *v.* The St. Stephens, 2 Mart. N. S. 22; Williams *v.* The St. Stephens, 1 Mart. N. S. 417.

Massachusetts.— Thompson *v.* Dolliver, 132 Mass. 103; Walker *v.* Staples, 5 Allen 34; Whitaker *v.* Sumner, 20 Pick. 399.

Missouri.— Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

United States.— *Ex p.* Fitz, 9 Fed. Cas. No. 4,837, 2 Lowell 519.

See 40 Cent. Dig. tit. "Pledges," § 11.

Contra.— Holding it a mortgage see Heylord *v.* Badger, 35 Cal. 404; Tedesco *v.* Oppenheimer, 15 Misc. (N. Y.) 522, 37 N. Y. Suppl. 1073, 2 N. Y. Annot. Cas. 411.

69. Barrow *v.* Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354; Wood *v.* Dudley, 8 Vt. 430. *Contra*, holding it a pledge, see Kimball *v.* Hildreth, 8 Allen (Mass.) 167. *Compare* Daly *v.* Spiller, 222 Ill. 42, 78 N. E. 782 [*affirming* 119 Ill. App. 272].

Where assignment is in the usual form of a chattel mortgage, containing a conveyance of the legal title and a defeasance clause, it is a mortgage, and not a pledge. Wright *v.* Ross, 36 Cal. 414.

70. Lobban *v.* Garnett, 9 Dana (Ky.) 389; Williams *v.* Rorer, 7 Mo. 556; Wendell *v.* New Hampshire Bank, 9 N. H. 404; Brown *v.* Bement, 8 Johns. (N. Y.) 96. *Compare*, however, Daly *v.* Spiller, 222 Ill. 421, 78 N. E. 782 [*affirming* 119 Ill. App. 272].

71. Smith *v.* Beattie, 31 N. Y. 542; Schoenrock *v.* Farley, 49 N. Y. Super. Ct. 302.

h. Assignment in Trust. An assignment in trust differs from a pledge in that the title passes,[72] from a mortgage in that the assignment is not made to the creditor to be secured,[73] and from an assignment for the benefit of creditors in that it is not a transfer of all the debtor's property to secure his creditors generally.[74]

i. Conditional Payment. The transfer of notes of third parties by a debtor to his creditor on agreement that, if the notes are paid at maturity, the debt is to be satisfied, is a conditional payment [75] and not a pledge.

j. Question For Jury. Where there is a conflict of evidence in regard to the intentions of the parties as to whether a transfer of property should constitute a pledge or another transaction, the question is one for the jury,[76] under instructions from the court.

5. Property That May Be the Subject of Pledge — a. In General. Any valuable thing of a personal nature,[77] whether chattels, such as goods,[78] money,[79] and manuscripts,[80] or choses in action, such as accepted bills of exchange,[81] notes,[82] bonds,[83] mortgages,[84] debts,[85] certificates of stock,[86] leases of real estate,[87] patent rights,[88] insurance policies,[89] and benefit certificates in a benevolent association.[90] Where the property is not in existence, it cannot be the subject of a pledge;[91] but the agreement will be construed as a contract for a pledge,[92] and a lien in favor of the creditor will attach when the property comes into existence.[93]

72. Murdock *v.* Columbus Ins., etc., Co., 59 Miss. 152.

73. Murdock *v.* Columbus Ins., etc., Co., 59 Miss. 152.

74. Murdock *v.* Columbus Ins., etc., Co., 59 Miss. 152.

75. Hanks *v.* Harris, 29 Ark. 323; Lord *v.* Bigelow, 124 Mass. 185; Ormsby *v.* Fortune, 16 Serg. & R. (Pa.) 302; Leas *v.* Janes, 10 Serg. & R. (Pa.) 307.

In such case, as distinguished from a mere pledge, the creditor holds the notes in his own right, and in conditional satisfaction of his debt. See cases cited *supra*, this note.

76. Corn Exch. Bank *v.* Schuttleworth, 99 Iowa 536, 68 N. W. 827; Smith *v.* Nixon, 145 Mich. 593, 108 N. W. 971; Penland *v.* Crapo, 114 N. C. 608, 19 S. E. 662; McCoy *v.* Lassiter, 95 N. C. 88.

77. Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 686, 64 Am. Dec. 423; Markham *v.* Jaudon, 41 N. Y. 235; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322.

But not school-land certificates, as they are not considered personal property. Mowry *v.* Wood, 12 Wis. 413.

An equity in property is incapable of such delivery as to create a legal pledge.— Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755.

78. Woodward *v.* American Exposition R. Co., 39 La. Ann. 566, 2 So. 415.

Things subject to lien for the purchase-money, the pledgees taking subject to the lien. Haynes *v.* Their Creditors, (La. 1888) 5 So. 68.

Property exempt from levy and sale under execution may be the subject of a valid pledge. Frost *v.* Shaw, 3 Ohio St. 270.

What is included in term "goods and chattels" see 20 Cyc. 1268.

79. Cater *v.* Merrell, 14 La. Ann. 375. See also Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063, 53 Am. St. Rep. 228, 32 L. R. A. 479.

80. See Literary Property, 25 Cyc. 1498.

81. Cornwell *v.* Baldwin's Bank, 12 N. Y. App. Div. 227, 43 N. Y. Suppl. 771.

82. Wright *v.* Ross, 36 Cal. 414; Polhemus *v.* Prudential Realty Corp., 74 N. J. L. 570, 67 Atl. 303.

83. Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

84. Valentine *v.* Donohoe-Kelly Banking Co., 133 Cal. 191, 65 Pac. 381.

Whether real or personal property.—Wright *v.* Ross, 36 Cal. 414; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322.

85. Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; Barrow *v.* Milliken, 74 Fed. 612, 20 C. C. A. 559 [*affirming* 65 Fed. 888].

Sugar bounty under U. S. Rev. St. §§ 3477, 3737 [U. S. Comp. St. (1901) pp. 2320, 2507].

But not a mere copy of an account taken from the books of the person to whom it accrued. Cornwell *v.* Baldwin's Bank, 12 N. Y. App. Div. 227, 43 N. Y. Suppl. 771.

86. Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307; Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87. See Corporations, 10 Cyc. 637 *et seq.*

87. Dewey *v.* Bowman, 8 Cal. 145.

88. Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

89. Hewins *v.* Baker, 161 Mass. 320, 37 N. E. 441; Wells *v.* Archer, 10 Serg. & R. (Pa.) 412, 13 Am. Dec. 682. See Fire Insurance, 19 Cyc. 637.

90. Schonfield *v.* Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

But not a pension certificate, as a pledge of this is void by act of congress. Moffatt *v.* Van Doren, 4 Bosw. (N. Y.) 609.

91. Clendenin *v.* Frazer, Smith (Ind.) 348; Smithurst *v.* Edmunds, 14 N. J. Eq. 408.

92. Bogard *v.* Tyler, 55 S. W. 709, 21 Ky. L. Rep. 1452.

93. Bogard *v.* Tyler, 55 S. W. 709, 21 Ky. L. Rep. 1452; Macomber *v.* Parker, 14 Pick.

b. Personal Obligation of Principal Debtor. One personal obligation of a debtor cannot become a pledge or collateral security for another obligation of the same debtor.[94]

6. Title or Interest of Pledgor. A debtor may pledge any interest that he owns in property,[95] and the pledgee will take such property subject to the liens, whether legal [96] or equitable [97] of other parties existing at the time. With the consent of the owner, a debtor may also make a valid pledge of property in which

(Mass.) 497 (where it is said that it is true that, where the property is to be thereafter acquired, it is not strictly and technically a pledge; it is rather an hypothecation; but when the title is acquired *in futuro*, the right of the pledgee attaches immediately upon it); Hetzel *v.* Sawyer, 10 Pa. Dist. 29.

94. *Connecticut.*— *In re* Waddell-Entz Co., 67 Conn. 324, 35 Atl. 257, holding that upon a loan to a corporation, a creditor receives its note and also ten bonds issued by the corporation for one thousand dollars each, which were referred to in the note as "collateral security," such bonds do not constitute collateral security, because only another form of obligation for the principal debt.

Indiana.— Tyner *v.* Stoops, 11 Ind. 22, 71 Am. Dec. 341, holding that where, on a sale of chattels to a firm on six months' credit, the seller subsequently took the note of one of the partners, maturing at the same time as the expiration of the credit, and bearing no interest, such note did not constitute collateral security.

Kentucky.— Steinharter *v.* Covington City Nat. Bank, 10 Ky. L. Rep. 359.

New York.—Atlantic F. & M. Ins. Co. *v.* Boies, 6 Duer 583, holding a promissory note, received by the holder of a bill as collateral security, not made by a third party, but by one already liable on the bill, cannot be treated as a pledge.

Wyoming.— International Trust Co. *v.* Union Cattle Co., 3 Wyo. 803, 31 Pac. 408, 19 L. R. A. 640.

See 40 Cent. Dig. tit. "Pledges," § 15.

The reason is that "a debtor's own personal obligation is no part of his personal property or assets." International Trust Co. *v.* Union Cattle Co., 3 Wyo. 803, 31 Pac. 408, 19 L. R. A. 640.

95. Falke *v.* Fassett, 4 Colo. App. 171, 34 Pac. 1005 (where a railroad company, as authorized by act of congress, appointed an agent to enter upon public domain, and take railroad ties necessary for the railroad, and the agent was to receive for his services a certain price for each accepted tie, the agent had no interest in the ties which could be the subject of a pledge, as the title to the ties passed directly from the United States to the railroad company); Dean *v.* Lawham, 7 Oreg. 422 (holding that where the owner of standing timber sold it, contracting to cut and deliver it at the vendee's mill, and the vendor pledged it to his wood-cutters to secure their wages, the pledgees could hold possession against the vendee); The John W. Cannon, 24 Fed. 392.

A broker who with his own money has purchased stock for another, but holds it in his own name, may pledge it as a security for his own debt without making himself liable to his employer. Wood *v.* Hayes, 15 Gray (Mass.) 375. See Factors and Brokers, 19 Cyc. 210.

A factor, or commission merchant, has no authority at common law to pledge goods intrusted to him for sale. Skinner *v.* Dodge, 4 Hen. & M. (Va.) 432. See Factors and Brokers, 19 Cyc. 122 *et seq.*, 170.

A pledge by one to whom a chattel has been intrusted for manufacture will pass no title to the chattel as against the true owner. Carpenter *v.* Hale, 8 Gray (Mass.) 157.

Pledge by agent employed to invest funds of an estate of stocks owned by the estate as security for a loan taken in his own name does not affect the relative rights of the estate and the pledgee where the estate received the proceeds of the loan. Freeman *v.* Bristol Sav. Bank, 76 Conn. 212, 56 Atl. 527.

Property to be acquired in futuro cannot, at common law, be the subject of a valid pledge. Smithurst *v.* Edmunds, 14 N. J. Eq. 408.

For pledge of future net earnings by a corporation see Corporations, 10 Cyc. 1188.

In Louisiana the husband, as head and master of the community, has the power to pledge the effects of the community without the assent of his wife. Wolf *v.* Wolf, 12 La. Ann. 529.

Power of wife to pledge property constituting part of her separate estate see Husband and Wife, 21 Cyc. 1475, 1643, 1674.

Right of a corporation or its officers to pledge the stock, bonds, and property of the corporation see Corporations, 10 Cyc. 368, 765, 927, 1170.

"The right to sell absolutely certainly carries with it the right to . . . pledge, or assign as a security for a debt, as the greater includes the less." Cornick *v.* Richards, 3 Lea (Tenn.) 1, 5.

96. Vogelsang *v.* Fisher, 128 Mo. 386, 31 S. W. 13.

Pledgee of person in possession under a conditional sale, by which title is reserved to the vendor, takes subject to the vendor's rights. Cragin *v.* Coe, 29 Conn. 51.

97. Drexel *v.* Pease, 133 N. Y. 129, 30 N. E. 732 [*modifying* 56 Hun 649, 11 N. Y. Suppl. 133].

A pledgee by the assignment of claims against a third person takes subject to a prior equitable assignment of the claims. Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475.

he has no interest.[98] But in the absence of the owner's consent,[99] or of his participation in the fraud of the pledgor,[1] a pledge by one who has no interest in the property is void as against the owner.[2]

7. Ratification of Unauthorized Pledge. Where the owner of property which has been pledged by another without his authority,[3] after being informed of the unauthorized pledge,[4] approves it,[5] this constitutes a ratification of the original pledge [6] and makes it valid.[7]

8. Debts and Liabilities That May Be Secured.[8] A pledge may be made not only to secure debts and obligations created at the time of delivery,[9] but also to secure preëxisting debts,[10] future loans and advances,[11] and contingent liabilities.[12]

9. Consideration. The law is very liberal in regard to the consideration required to support a pledge.[13] Accordingly it has been held that such consideration may consist not only of a loan of money,[14] a discount of notes,[15] or of an obligation assumed by the pledgee at the time of the pledge.[16] but also of a surrender or

98. Tomblin *v.* Callen, 69 Iowa 229, 28 N. W. 573.

In Louisiana, under Civ. Code, art. 3145, a person may pledge the property of another with the express or tacit consent of the owner. The John W. Cannon, 24 Fed. 392.

99. Duell *v.* Cudlipp, 1 Hilt. (N. Y.) 166; Kauffman *v.* Klang, 16 Misc. (N. Y.) 379, 38 N. Y. Suppl. 56.

1. Nickerson *v.* Darrow, 5 Allen (Mass.) 419.

2. Cox *v.* McGuire, 26 Ill. App. 315; Rumpf *v.* Barto, 10 Wash. 382, 38 Pac. 1129.

Possession of the property of another, with his consent and with the apparent ownership, gives no authority to pledge it, if such apparent ownership has not been permitted by the real owner with a fraudulent intent. Nickerson *v.* Darrow, 5 Allen (Mass.) 419.

3. Nickerson *v.* Darrow, 5 Allen (Mass.) 419.

4. A subsequent authority to sell goods given by the owner without knowledge of the pledge to an agent who has pledged them without authority will not make the title of the pledgee valid. Nickerson *v.* Darrow, 5 Allen (Mass.) 419.

5. Smith *v.* Mott, 76 Cal. 171, 18 Pac. 260 (such contract is not required to be in writing by the statute of frauds); Coquard *v.* Union Depot Co., 10 Mo. App. 261 (holding that where a wife pledged her trunk to pay the railroad fare of a child traveling with her, and on arriving at a transfer point the husband told the conductor that he was not prepared with the money, but that, if they would send the trunk on to its destination C. O. D., he would "settle," a valid pledge was created); Curtis *v.* Leavitt, 15 N. Y. 9.

Statement by owner whose horse had been pledged by his brother without his authority that he would see the pledgee and "see what the bill was, and would either pay it and take the horse, or let the horse go to pay it" is not sufficient to constitute a ratification. Cox *v.* McGuire, 26 Ill. App. 315.

6. Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770; Louisville Sav. Bank *v.* Kentucky Grand Lodge, 5 Ky. L. Rep. 328.

7. Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770; Louisville Sav. Bank *v.* Kentucky Grand Lodge, 5 Ky. L. Rep. 328.

8. Pledge of wife's property for husband's debt see Husband and Wife, 21 Cyc. 1486.

9. Wolf *v.* Wolf, 12 La. Ann. 529.

10. Wolf *v.* Wolf, 12 La. Ann. 529. See *infra*, II, A, 9.

11. Wolf *v.* Wolf, 12 La. Ann. 529.

Negotiable instruments may be pledged to secure liabilities arising in the future, but, to ascertain what debts are secured, resort must be had to the contract of the parties. Brown *v.* James, (Nebr. 1908) 114 N. W. 591.

As against third parties, such a pledge is valid for all advances made before such third parties acquire a valid lien. U. S. *v.* Lenox, 26 Fed. Cas. No. 15,592, 2 Paine 180.

12. Britton *v.* Harvey, 47 La. Ann. 259, 16 So. 747; Clark *v.* Costello, 79 Hun (N. Y.) 588, 29 N. Y. Suppl. 937.

"Every lawful obligation may be enforced by the auxiliary obligation of pledge."—Britton *v.* Harvey, 47 La. Ann. 259, 16 So. 747.

Such definiteness and certainty as is required in the case of mortgages is not necessary for the validity of a pledge. Marsh *v.* Keating, 78 Conn. 13, 60 Atl. 689.

Pledge voluntarily made to secure an illegal demand may not be reclaimed by the pledgor without payment of the demand. King *v.* Green, 6 Allen (Mass.) 139.

Notes of third persons deposited to secure a note of the pledgor may be resorted to for the payment of a draft given by the pledgor upon a third person in conditional payment of the debt, upon the non-payment of the draft by the drawee. Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251.

13. Robinson *v.* Boyd, 60 Ohio St. 57, 53 N. E. 494.

Illegality of the principal debt will not render the pledge invalid.—King *v.* Green, 6 Allen (Mass.) 139.

Pledgee of bonds held as security for certificates of deposit illegally issued by a bank may nevertheless hold the bonds as security for the money loaned. Curtis *v.* Leavitt, 15 N. Y. 9.

14. Hiller *v.* Pollock, 39 Leg. Int. (Pa.) 237.

15. Hiller *v.* Pollock, 39 Leg. Int. (Pa.) 237.

16. Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St.

exchange [17] of property already held as collateral,[18] or an extension of time for the payment of a debt,[19] and even of a preëxisting debt [20] without any new consideration.[21] In this latter respect, the contract of pledge is an exception to the general rule in regard to the consideration required for the validity of contracts.[22]

10. Pledge in Writing. As a general rule no writing is necessary to the validity of a pledge,[23] and statutes requiring a writing for the validity of sales or mortgages [24] do not apply to pledges.[25] But in some states a pledge of incorporeal property, such as debts, negotiable instruments, and stocks, is required to be in writing.[26]

Rep. 505 [*affirming* 62 Mo. App. 531]; Cherry *v.* Frost, 7 Lea (Tenn.) 1.

17. Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505 [*affirming* 62 Mo. App. 531]; Cherry *v.* Frost, 7 Lea (Tenn.) 1.

18. Just *v.* State Sav. Bank, 132 Mich. 600, 94 N. W. 200.

19. Just *v.* State Sav. Bank, 132 Mich. 600, 94 N. W. 200.

Where the note is payable on demand, an agreement by the creditor to forbear from selling property previously pledged for the immediate enforcement of the demand is sufficient consideration to support a pledge of additional property. Nott *v.* State Nat. Bank, 51 La. Ann. 871, 25 So. 475.

20. Spencer *v.* Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35; Tomblin *v.* Callen, 69 Iowa 229, 28 N. W. 573; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; *In re* Wiley, 29 Fed. Cas. No. 17,655, 4 Biss. 171, where it is said: "A pledge made upon a past consideration, if there still remains a subsisting liability, is made on sufficient consideration."

Statement to the contrary in Haldeman *v.* German Security Bank, 44 S. W. 383, 19 Ky. L. Rep. 1691, is *dictum* since the pledge was void for want of agreement of the parties.

But a mere executory contract for a pledge, as security for an existing debt, where there has been no delivery, is void without a new consideration. Huntington *v.* Sherman, 60 Conn. 463, 22 Atl. 769.

That creditor may have been induced to forego efforts to obtain other security from his debtor is sufficient consideration for the pledge. Robinson *v.* Boyd, 60 Ohio St. 57, 53 N. E. 494.

21. *Connecticut.*— Bridgeport City Bank *v.* Welch, 29 Conn. 475.

Illinois.— Manning *v.* McClure, 36 Ill. 490.

Louisiana.— Citizens' Bank *v.* Payne, 18 La. Ann. 222, 89 Am. Dec. 650.

New Hampshire.— Williams *v.* Little, 11 N. H. 66.

Rhode Island.— Cobb *v.* Doyle, 7 R. I. 550.

United States.— Brooklyn City, etc., R. Co. *v.* National Bank of the Republic, 102 U. S. 14, 26 L. ed. 61; Oates *v.* Montgomery First Nat. Bank, 100 U. S. 239, 25 L. ed. 580; McCarty *v.* Roots, 21 How. 432, 16 L. ed. 162; Goodman *v.* Simonds, 20 How. 343, 15 L. ed. 934; Metropolis Bank *v.* New England Bank, 1 How. 234, 11 L. ed. 115; Swift *v.* Tyson, 16 Pet. 1, 10 L. ed. 865.

See 40 Cent. Dig. tit. "Pledges," § 20.

Contra.— Bay *v.* Coddington, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268 note [*affirmed* in 20 Johns. 637, 11 Am. Dec. 342]. See also Stalker *v.* McDonald, 6 Hill (N. Y.) 93, 96, 40 Am. Dec. 389, where it was said: "Where he has received it for an antecedent debt, either as a nominal payment or as a security for payment, without giving up any security for such debt which he previously had, or paying any money or giving any new consideration, he is not a holder of the note for a valuable consideration, so as to give him any equitable right to detain it from its lawful owner."

22. *In re* Wiley, 29 Fed. Cas. No. 17,655, 4 Biss. 171. See Contracts, 9 Cyc. 358 *et seq.*

23. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Sanders *v.* Davis, 13 B. Mon. (Ky.) 432; Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; Parshall *v.* Eggart, 52 Barb. (N. Y.) 367, 374 [*affirmed* in 54 N. Y. 18] (where the court says: "It is not essential to a valid pledge that the terms of it should be in writing, and a public record made of it, for the reason that in every valid pledge the creditor is found in possession of the goods, and that fact, together with the absence of possession in the debtor, is a sufficient publication of the transaction to other parties, dealing with him"); Hurst *v.* Jones, 10 Lea (Tenn.) 8.

Where the pledge is in writing, the instrument need not be of a formal nature.— The property need not be fully described; it must only be described sufficiently to identify it. Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755.

For form of pledge of stock see Doak *v.* State Bank, 28 N. C. 309, 316.

But a written receipt showing that property has been deposited in pledge with one person cannot be contradicted by oral evidence that it was deposited with another person. Interurban Constr. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927.

24. See Chattel Mortgages, 6 Cyc. 989; Frauds, Statute of, 20 Cyc. 240; Sales.

25. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703.

26. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237 ("such transfer [in writing] of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property"); Wright *v.* Ross, 36 Cal. 414.

11. Equitable Pledge. Where there is a contract for a pledge, which, however, does not constitute a valid pledge because of the lack of some requisite,[27] as the non-existence of the property to be pledged,[28] or a want of delivery [29] the contract is said to create an equitable pledge [30] which a court of equity will enforce between the parties [31] and against the general creditors of the pledgor,[32] but not against subsequent *bona fide* purchasers or pledgees for value.[33]

12. Absolute Transfer as Pledge.[34] A bill of sale [35] or other absolute transfer of property [36] will be construed as a pledge where it appears from the instrument itself [37] or from other evidence, either written [38] or parol,[39] that it was intended as a security only.

13. Evidence as to Nature of Transactions — a. Presumption. In case of doubt whether a transaction by which personal property is given as security is a pledge, or is a sale, mortgage,[40] or absolute assignment,[41] the law favors the conclusion that it is a pledge. But in the case of an assignment absolute on its face, the burden of proof is on the party alleging that it is a pledge.[42]

b. Admissibility. Parol evidence is admissible to show that an assignment of

In Louisiana, as against third persons, writing is required in pledges of movable property, but not in the case of promissory notes, bills of exchange, and stocks. Martin *v.* His Creditors, 15 La. Ann. 165; Cater *v.* Merrell, 14 La. Ann. 375; Matthews *v.* Rutherford, 7 La. Ann. 225; Shaw *v.* Newton, 3 La. 528; Charbonnet *v.* Toledano, 2 La. 386; Devlin *v.* His Creditors, 2 La. 361; La. Civ. Code, art. 3158 [3125].

Admissibility of parol evidence to vary written contract or pledge see Evidence, 17 Cyc. 567 *et seq.*

27. See cases cited *infra*, notes 28–32.

28. Morganstein *v.* Commercial Nat. Bank, 125 Ill. App. 397; Commercial Pub. Co. *v.* Beckwith, 167 N. Y. 329, 60 N. E. 642 [*reversing* 59 N. Y. Suppl. 1101]; Collins' Appeal, 107 Pa. St. 590, 52 Am. Rep. 479.

29. Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755.

30. St. John *v.* Freeman, 1 Ind. 84; Western Fly Guard Co. *v.* Hodges, 72 Nebr. 313, 100 N. W. 407.

A pledge of after-acquired property confers an equitable lien. Morganstein *v.* Chatsworth Commercial Nat. Bank, 125 Ill. App. 397.

That the particular property was designed by the debtor to be subjected to the payment of the debt must appear from the contract. Hook *v.* Ayers, 80 Fed. 978, 26 C. C. A. 287.

31. Flour City Nat. Bank *v.* Garfield, 30 Hun (N. Y.) 579.

32. Cameron *v.* Orleans, etc., R. Co., 108 La. 83, 32 So. 208; Means *v.* Randall Bank, 146 U. S. 620, 13 S. Ct. 186, 36 L. ed. 1107.

Agreement by consignor that a bank shall have a lien on property shipped or the proceeds of its sale, in consideration of the banks furnishing money for the purchase of the property or discounting drafts on the consignee, gives the bank an equitable lien on the property good against the general creditors of the consignor. Means *v.* Randall Bank, 146 U. S. 620, 13 S. Ct. 186, 36 L. ed. 1107.

But where the borrower pays for the property and retains the bill of lading with the consent of the lender until the property is seized at suit of a creditor, the lender requires no lien. Cameron *v.* Orleans, etc., R. Co., 108 La. 83, 32 So. 208.

33. See cases cited *supra*, notes 28–32.

34. See *supra*, II, A, 4, g, (III); also Assignments, 4 Cyc. 65.

35. Newell *v.* Keeler, 13 Mo. App. 189; Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127]; Barry *v.* Coville, 53 Hun (N. Y.) 620, 7 N. Y. Suppl. 36 [*affirmed* in 129 N. Y. 302, 29 N. E. 307]; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322.

36. Newell *v.* Keeler, 13 Mo. App. 189; Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127]; Barry *v.* Coville, 53 Hun (N. Y.) 620, 7 N. Y. Suppl. 36 [*affirmed* in 129 N. Y. 302, 29 N. E. 307]; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322; Fyer *v.* Rishel, 1 Walk. (Pa.) 470.

When absolute transfer as security is a fraud on existing creditors see Fraudulent Conveyances, 20 Cyc. 393.

37. Irwin *v.* McDowell, (Cal. 1893) 34 Pac. 708; Bright *v.* Wagle, 3 Dana (Ky.) 252; Kimball *v.* Hildreth, 8 Allen (Mass.) 167; Barry *v.* Coville, 53 Hun (N. Y.) 620, 7 N. Y. Suppl. 36 [*affirmed* in 129 N. Y. 302, 29 N. E. 307].

38. Rohrle *v.* Stidger, 50 Cal. 207; Marshall *v.* Williams, 3 N. C. 405.

39. May *v.* Eastin, 2 Port. (Ala.) 414; Butler *v.* Rockwell, 14 Colo. 125, 23 Pac. 462; Morgan *v.* Dod, 3 Colo. 551; Newton *v.* Fay, 10 Allen (Mass.) 505; Walker *v.* Staples, 5 Allen (Mass.) 34.

To constitute a transfer of property, absolute on its face, a pledge merely, it is not necessary that an express promise on the part of the transferrer to repay the money should appear. Toledo First Nat. Bank *v.* Central Chandelier Co., 17 Ohio Cir. Ct. 443, 9 Ohio Cir. Dec. 807.

40. British Columbia Bank *v.* Marshall, 11 Fed. 19, 8 Sawy. 29.

41. Caldwell *v.* Fifield, 24 N. J. L. 150.

42. Lance *v.* Bonnell, 38 N. J. Eq. 259, 43 Atl. 288.

property, absolute on its face, is in reality only a pledge [43] given to secure the assignee. So also parol evidence is admissible to explain the terms of a receipt given upon the delivery of property.[44] But where the writing amounts to a contract or agreement between the parties, it is subject to the rule that parol evidence cannot be introduced to vary or contradict the terms of a valid written contract.[45]

c. Weight and Sufficiency. Upon a question whether an ambiguous transaction constitutes a pledge, the writings, if any, accompanying the transaction,[46] the oral statements of the parties made at the time,[47] or afterward,[48] and any collateral circumstances tending to show the intentions of the parties [49] are entitled to con-

43. *Indiana.*— Hazzard *v.* Duke, 64 Ind. 220.

Massachusetts.— Reeve *v.* Dennett, 137 Mass. 315; Newton *v.* Fay, 10 Allen 505; Hazard *v.* Loring, 10 Cush. 267; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

New York.— Chester *v.* Kingston Bank, 16 N. Y. 336; Mulford *v.* Muller, 3 Abb. Dec. 330, 1 Keyes 31.

Pennsylvania.— Leas *v.* James, 10 Serg. & R. 307.

Texas.—Clarke *v.* Adam, 30 Tex. Civ. App. 66, 69 S. W. 1016; Smith *v.* Lang, 2 Tex. Civ. App. 683, 22 S. W. 197.

See 40 Cent. Dig. tit. "Pledges," § 25.

Certificate of stock indorsed in blank.— Riley *v.* Hampshire County Nat. Bank, 164 Mass. 482, 41 N. E. 679; Kutz's Appeal, 100 Pa. St. 75.

Evidence that at the time of a general settlement with the bank and the giving of further collateral security by a customer, he made no claim that he had deposited with the bank certain stock is admissible to prove that stock previously transferred by him to the bank had been sold and not merely pledged. Iowa State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186.

In Louisiana, under Civ. Code, art. 3158, requiring a contract of pledge of movable property, other than notes, bills, and stocks, to be in writing, to affect third parties, parol evidence is inadmissible to prove a written instrument to be a pledge. De Blois *v.* Reiss, 32 La. Ann. 586.

44. Robinson *v.* Frost, 14 Barb. (N. Y.) 536; Skenandoa Cotton Co. *v.* Lefferts, 13 N. Y. Suppl. 33 (holding that where receipt was "in full of account to date," it might be shown by parol evidence that the money was not paid as stated in the receipt, and the assignment was only collateral security); Cassidy *v.* Jenkins, 16 N. Y. Wkly. Dig. 560 [*affirmed* in 101 N. Y. 653]; Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512.

Memorandum of facts, not amounting to an agreement.— Beardsley *v.* Gaylord, 20 N. Y. Suppl. 349 [*affirmed* in 142 N. Y. 662, 37 N. E. 570].

Evidence of a custom is admissible to explain a receipt. Whitney *v.* Tibbits, 17 Wis. 359.

45. Whitney *v.* Lowell, 33 Me. 318; Nelson *v.* Robson, 17 Minn. 284; Marsh *v.* McNair, 99 N. Y. 174, 1 N. E. 660; Thomas *v.* Scutt, 52 Hun (N. Y.) 343, 5 N. Y. Suppl. 365 [*affirmed* in 127 N. Y. 133, 27 N. E. 961]; Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512 note.

But if the instrument is void, it may be contradicted by parol evidence. Roosevelt *v.* Dreyer, 12 Daly (N. Y.) 370.

Parol proof may be made of additional facts, collateral to the writing, upon which the law attaches an obligation. Gilson *v.* Martin, 49 Vt. 474.

Where receipt upon a pledge of stock shows an agreement that the pledgee may sell on one day's notice, parol evidence is inadmissible to show a contemporaneous agreement that the pledgee might use the stock. Fay *v.* Gray, 124 Mass. 500.

Written contract cannot be shown by parol to have been a mere sham designed to deceive the creditors of one of the parties. Conner *v.* Carpenter, 28 Vt. 237.

46. Le Blanc *v.* Bouchereau, 16 La. Ann. 11.

A contemporaneous written promise to deliver the notes as collateral is strong evidence of a debt and delivery by way of pledge. Meyer *v.* Moss, 110 La. 132, 34 So. 332.

47. Schwind *v.* Boyce, 94 Md. 510, 51 Atl. 45.

48. Ayer *v.* Seymour, 15 Daly (N. Y.) 249, 5 N. Y. Suppl. 650.

49. *Alabama.*— Selma Bridge Co. *v.* Harris, 132 Ala. 179, 31 So. 508.

Arkansas.— Caldwell *v.* Meshew, 53 Ark. 263, 13 S. W. 761.

Illinois.— Harding *v.* Commercial Loan Co., 84 Ill. 251.

Iowa.— See Emmetsburg First Nat. Bank *v.* Gunhus, 133 Iowa 409, 110 N. W. 611. 9 L. R. A. N. S. 471.

Louisiana.— Le Blanc *v.* Bouchereau, 16 La. Ann. 11.

Maryland.— Schwind *v.* Boyce, 94 Md. 510, 51 Atl. 45.

Massachusetts.— Beacon Trust Co. *v.* Robbins, 173 Mass. 261, 53 N. E. 868.

Michigan.— See Smith *v.* Nixon, 145 Mich. 593, 108 N. W. 971.

New York.— Ayer *v.* Seymour, 15 Daly 249, 5 N. Y. Suppl. 650.

Wisconsin.— Jenkins *v.* Schaub, 14 Wis. 1.

See 40 Cent. Dig. tit. "Pledges," § 26.

Uncontradicted testimony of one of the parties that the property was transferred as collateral is sufficient to prove a pledge. Proctor *v.* Whitcomb, 134 Mass. 428.

Proof merely that defendant was indebted to plaintiff, and that plaintiff had in his possession notes payable to the order of defendant, and not indorsed, is insufficient to show that such notes were pledged to secure such debt. Sharmer *v.* McIntosh, 43 Nebr. 509, 61 N. W. 727.

sideration. But in the case of a transfer, absolute on its face, it cannot be construed as a pledge unless the evidence is clear and convincing.[50]

14. Recording and Registration. Since a pledge is not required to be in writing,[51] it need not be registered or recorded,[52] and statutes requiring the registration or recordation of contracts of sale,[53] assignments in trust,[54] and mortgages [55] do not apply to contracts of pledge.[56]

B. Delivery and Possession — 1. Necessity. Under both the civil [57] and the common law [58] it is necessary to the validity of a pledge that possession of

50. Travers *v.* Leopold, 124 Ill. 431, 16 N. E. 902 [*affirming* 25 Ill. App. 238]; Millot *v.* Conrad, 114 La. 193, 38 So. 139; Kelly *v.* McDonald, 167 Mass. 581, 46 N. E. 380; McDonald *v.* Birss, 99 Mich. 329, 58 N. W. 359; Durfee *v.* McClurg, 6 Mich. 223, holding that where absolute assignment was made by the wife in favor of a third person, a receipt taken by the husband in his own name, and not as agent for his wife, stating that the transfer was as collateral security, is not sufficient to prove a pledge.

Statement in the petition of the assignee for the appointment of an administrator for the estate of the assignor, that he was a creditor of the estate for the debt secured by the assignment, is sufficient. McDonald *v.* Birss, 99 Mich. 329, 58 N. W. 359.

Where a mortgage is transferred for much less than its real value, slight circumstances will be sufficient to determine the transaction to be a transfer as collateral security, and not a sale. McKinney *v.* Miller, 19 Mich. 142.

51. See *supra*, II, A, 10.

52. Shaw *v.* Wilshire, 65 Me. 485; Parshall *v.* Eggert, 54 N. Y. 18; Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. A. 408; *Ex p.* Fitz, 9 Fed. Cas. No. 4,837, 2 Lowell 519.

In Hawaii, a chattel mortgage is a pledge, within the meaning of the statute requiring the registration of pledges of chattel property. Hardy *v.* Ruggles, 1 Hawaii 457.

In Canada the statute requires the registration of pledges of immovable property. Great Eastern R. Co. *v.* Lambe, 21 Can. Sup. Ct. 431.

53. See Sales.

54. *In re* Handy, 167 Pa. St. 552, 31 Atl. 983, 986.

55. *Alabama.*— American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21.

Kentucky.— Thoms *v.* Southard, 2 Dana 475, 26 Am. Dec. 467; Hamilton *v.* Wagner, 2 A. K. Marsh. 331.

Michigan.— Preston Nat. Bank *v.* George T. Smith Middlings Purifier Co., 84 Mich. 364, 47 N. W. 502.

New York.— *In re* Jenney, 19 Misc. 244, 44 N. Y. Suppl. 84.

North Carolina.— Doak *v.* State Bank, 28 N. C. 309.

Tennessee.— Hurst *v.* Jones, 10 Lea 8; McCready *v.* Haslock, 3 Tenn. Ch. 13.

See 40 Cent. Dig. tit. "Pledges," § 27.

56. *Ex p.* Fitz, 9 Fed. Cas. No. 4,837, 2 Lowell 519.

Assignment of mortgage in pledge need not be recorded. Haskins *v.* Kelly, 1 Rob. (N. Y.) 160.

In Louisiana, by Civ. Code, art. 3158 (3125), pledges of movable property, except promissory notes, bills of exchange, stocks, and other evidences of debt, must be recorded to be valid against third persons. Hubert *v.* His Creditors, 1 La. Ann. 443; Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212; Johnson *v.* Duncan's Syndic, 5 Mart. 168. But an exception is made of acts of pledge executed to a bank and passed by the cashier. Hubert *v.* His Creditors, *supra*. Recordation is not necessary to the validity of a commission merchant's lien for advances on goods consigned to him, where the goods have come into his possession before any lien of a third person attached to them. Helm *v.* Meyer, 30 La. Ann. 943; La. Civ. Code, art. 3247 (3214).

57. Gragard *v.* Metropolitan Bank, 106 La. 298, 30 So. 885; Delogny *v.* Creditors, 48 La. Ann. 488, 19 So. 614; Conger *v.* New Orleans, 32 La. Ann. 1250; Sevin *v.* Caillouet, 30 La. Ann. 528; Foltier *v.* Schroder, 19 La. Ann. 17, 92 Am. Dec. 521; Martin *v.* His Creditors, 15 La. Ann. 165; Deloach *v.* Jones, 18 La. 447; Winchester *v.* Ory's Syndics, 17 La. 428 (holding that a subsequent pledgee, with delivery, there being no evidence that he had any knowledge of the previous pledge, will hold against a prior pledgee, without delivery); Hagan *v.* Sompeyrac, 3 La. 154; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779. But see Hill *v.* McDermot, Dall. (Tex.) 419, holding that, by the Spanish law, possession is not necessary to the validity of a voluntary pledge.

58. *California.*— Lilienthal *v.* Ballou, 125 Cal. 183, 57 Pac. 897; George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Wright *v.* Ross, 36 Cal. 414.

Georgia.— National Exch. Bank *v.* Graniteville Mfg. Co., 79 Ga. 22, 3 S. E. 411; Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400.

Illinois.— Corbett *v.* Underwood, 83 Ill. 324, 25 Am. Rep. 392; Griffen *v.* Henry, 99 Ill. App. 284; Silverman *v.* McGrath, 10 Ill. App. 413.

Indiana.— State *v.* Jeffersonville First Nat. Bank, 89 Ind. 302.

Kansas.— Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219.

Kentucky.— Mechanics' Trust Co. *v.* Dandridge, 37 S. W. 288, 18 Ky. L. Rep. 625.

Maine.— Mosher *v.* Smith, 67 Me. 172;

the pledged property be delivered to the pledgee, or to someone for him.[59] Delivery of the thing is not a consequence, but the very essence of the contract.[60] Such possession must also continue [61] with the pledgee or his agent.[62] Where the property is already in the possession of the pledgee,[63] no further delivery to him is necessary.[64]

2. As Distinguishing Pledge From Mortgage.[65] The requirement that possession must be delivered and retained in order to sustain the validity of a pledge[66]

Beeman *v.* Lawton, 37 Me. 543; Eastman *v.* Avery, 23 Me. 248; Gleason *v.* Drew, 9 Me. 79.

Maryland.— Texter *v.* Orr, 86 Md. 392, 38 Atl. 939.

Massachusetts.— Harding *v.* Eldridge, 186 Mass. 39, 71 N. E. 115; Moors *v.* Reading, 167 Mass 322, 45 N. E. 760, 57 Am. St. Rep. 460; Walker *v.* Staples, 5 Allen 34; Bonsey *v.* Amee, 8 Pick. 236.

Michigan.— Holmes *v.* Hall, 8 Mich. 66, 77 Am. Dec. 444.

Minnesota.— Mahoney *v.* Hale, 66 Minn. 463, 69 N. W. 334; Combs *v.* Tuchelt, 24 Minn. 423.

Mississippi.— Chicago First Nat. Bank *v.* Caperton, 74 Miss. 857, 22 So. 60.

Missouri.— Chitwood *v.* Lanyon Zinc Co., 93 Mo. App. 225; Staples *v.* Simpson, 60 Mo. App. 73.

Nevada.— Reed *v.* Ash, 3 Nev. 116.

New Hampshire.— Walcott *v.* Keith, 22 N. H. 196; Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25.

New York.— Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275; Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307; Ceas *v.* Bramley, 18 Hun 187; Haskins *v.* Patterson, 1 Edm. Sel. Cas. 120; Taylor *v.* Perkins, 26 Wend. 124; Davenport *v.* Buffalo City Bank, 9 Paige 12.

North Carolina.— McCoy *v.* Lassiter, 95 N. C. 88; Thompson *v.* Andrews, 53 N. C. 453; Owens *v.* Kinsey, 52 N. C. 245; Propst *v.* Roseman, 49 N. C. 130.

Ohio.— Fielding *v.* Middlebaugh, 2 Ohio Dec. (Reprint) 55, 1 West. L. Month. 218; *In re* Engle, 1 Ohio S. & C. Pl. 101, 1 Ohio N. P. 110.

Oklahoma.— Jackson *v.* Kincaid, 4 Okla. 554, 46 Pac. 587.

Pennsylvania.— Sholes *v.* Western Asphalt, etc., Co., 183 Pa. St. 528, 38 Atl. 1029; Mercer County *v.* Pittsburgh, etc., R. Co., 27 Pa. St. 389.

Tennessee.— Johnson *v.* Smith, 11 Humphr. 396.

Washington.— Heilbron *v.* Guarantee L. & T. Co., 13 Wash. 645, 43 Pac. 932.

Wisconsin.— Seymour *v.* Colburn, 43 Wis. 67.

United States.— Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. ed. 189; Hook *v.* Ayers, 80 Fed. 978, 26 C. C. A. 287; Thurber *v.* Oliver, 26 Fed. 224; Adams *v.* Merchants' Nat. Bank, 2 Fed. 174, 9 Biss. 396; *In re* Wiley, 29 Fed. Cas. No. 17,655, 4 Biss. 171.

England.— Ryall *v.* Ralle, 1 Atk. 165, 26 Eng. Reprint 107, 1 Ves. 348, 27 Eng. Reprint 1074.

Canada.— Fairbanks *v.* Barlow, 14 Can. Sup. Ct. 217.

See 40 Cent. Dig. tit. "Pledges," §§ 28, 29.

"Two things are essential to constitute a pledge: (1) Possession by the pledgee; (2) that the property pledged be under the power and control of the creditor." Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439, 445.

59. Valley Nat. Bank *v.* Frank, 12 Mo. App. 460; Lewis *v.* Dillard, 76 Fed. 688, 22 C. C. A. 488; Gurney *v.* James, 19 U. C. Q. B. 156.

60. Lee *v.* Bradlee, 8 Mart. (La.) 20. It may be provided by statute that the pledgor may retain possession of the property, where it is so provided in the instrument itself, and the instrument is acknowledged and recorded. But such statutes, being in derogation of the common law, must be strictly construed. Griffen *v.* Henry, 99 Ill. App. 284. "Where the pledgor retained possession, the transaction was fraudulent *per se*, and incapable of explanation." Griffen *v.* Henry, *supra*.

61. *California.*— McFall *v.* Buckeye Grangers' Warehouse Assoc., 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47.

Louisiana.— Lee *v.* Bradlee, 8 Mart. 20.

Maine.— Eastman *v.* Avery, 23 Me. 248.

Massachusetts.— Harding *v.* Eldridge, 186 Mass. 39, 71 N. E. 115; Moors *v.* Reading, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460; Walker *v.* Staples, 5 Allen 34; Macomber *v.* Parker, 14 Pick. 497; Bonsey *v.* Amee, 8 Pick. 236; Ward *v.* Sumner, 5 Pick. 59; Homes *v.* Crane, 2 Pick. 607.

Minnesota.— Mahoney *v.* Hale, 66 Minn. 463, 69 N. W. 334.

New Hampshire.— Walcott *v.* Keith, 22 N. H. 196; Ash *v.* Savage, 5 N. H. 545; Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25.

Vermont.— Atwater *v.* Mower, 10 Vt. 75.

See 40 Cent. Dig. tit. "Pledges," §§ 28, 29.

62. See *infra*, III, A, 7, d, e, f.

63. Parsons *v.* Overmire, 22 Ill. 58; Farson *v.* Gilbert, 114 Ill. App. 17; Brown *v.* Warren, 43 N. H. 430; Markham *v.* Jaudon, 41 N. Y. 235; Providence Thread Co. *v.* Aldrich, 12 R. I. 77.

An order to the pledge holder of notes already indorsed, to hold them for the payment of another debt, constitutes a pledge without further delivery. Ormsby *v.* De Borra, (Cal. 1898) 52 Pac. 499; Ladd *v.* Myers, 4 Cal. App. 352, 87 Pac. 1110.

64. Sufficiency of possession to sustain pledge by factor see Factors and Brokers, 19 Cyc. 124, 170.

65. See Chattel Mortgages, 6 Cyc. 986. See also *supra*, II, A, 4, g.

66. See *supra*, II, B, 1.

distinguishes it from a mortgage,[67] as in the latter case there is no necessity for delivery to the mortgagee.[68]

3. SUFFICIENCY — a. Manner of Delivery— (i) *IN GENERAL.* The delivery of possession of the goods to the pledgee may be actual, constructive,[69] or symbolical;[70] but it must be clear, unequivocal,[71] complete,[72] and effective[73] at all times[74] so as to give notice to third parties of the pledgee's rights. And it is sufficient if possession is delivered to a third person and afterward assented to by the pledgee.[75] Delivery in accordance with the terms of a previous contract[76] supplies the necessary element to render the pledge complete.[77] A mere agreement by the debtor that the creditor shall take and hold certain property as security for his debt is insufficient.[78]

(ii) *CONSTRUCTIVE DELIVERY.* Manual delivery of the property is not

67. *California.*— Gay *v.* Moss, 34 Cal. 125.
Massachusetts.— Ward *v.* Sumner, 5 Pick. 59; Homes *v.* Crane, 2 Pick. 607; Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151.
New York.— Haskins *v.* Patterson, 1 Edm. Sel. Cas. 120; Langdon *v.* Buell, 9 Wend. 80; McLean *v.* Walker, 10 Johns. 471; Cortelyou *v.* Lansing, 2 Cai. Cas. 200.
Ohio.— Bates *v.* Wiles, 1 Handy 532, 12 Ohio Dec. (Reprint) 274.
Vermont.— Conner *v.* Carpenter, 28 Vt. 237; Coty *v.* Barnes, 20 Vt. 78; Atwater *v.* Mower, 10 Vt. 75; Fletcher *v.* Howard, 2 Aik. 115, 16 Am. Dec. 686.
United States.— Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. ed. 189; Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930; Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.
See 40 Cent. Dig. tit. "Pledges," § 30.

68. See CHATTEL MORTGAGES, 6 Cyc. 1053.

69. Dirigo Tool Co. *v.* Woodruff, 41 N. J. Eq. 336, 7 Atl. 125.

70. Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725. See also *infra*, text and notes 79–93.

71. George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; Chicago First Nat. Bank *v.* Caperton, 74 Miss. 857, 22 So. 60, 60 Am. St. Rep. 540.
Possession acquired by a ruse is not sufficient. Union Trust Co. *v.* Trumbull, 137 Ill. 146, 27 N. E. 24.

72. Lanaux's Succession, 46 La. Ann. 1036, 15 So. 708, 25 L. R. A. 577; Mahoney *v.* Hale, 66 Minn. 463, 69 N. W. 334.
The transferee's possession must be exclusive; joint possession together with the pledgor is not sufficient. Jackson *v.* Kincaid, 4 Okla. 554, 46 Pac. 587.

73. See cases cited *infra*, this note.
"The transferor must . . . be deprived of his beneficial use of the property as fully as in the case of a sale." Jackson *v.* Kincaid, 4 Okla. 554, 569, 46 Pac. 587.
Agreement that the pledgee should have immediate control of wheat and delivery the next day of the certificate of measurement and bill of lading was sufficient. Durbrow *v.* McDonald, 5 Bosw. (N. Y.) 130.
Pointing out and counting hogsheads of molasses in the pledgor's warehouse, with contract for a pledge of them, is not sufficient without further delivery. Smyth *v.* Craig, 3 Watts & S. (Pa.) 14.

Pledge of a lessee's rights by delivery and recordation of the agreement between the parties is not sufficient. Caffin *v.* Kirwan, 7 La. Ann. 221.
Nor will a sublessee's delivery of possession of the premises to the pledgee without the consent of his lessor be sufficient. Citizens' Bank *v.* Janin, 46 La. Ann. 995, 15 So. 471.
Written acceptance of delivery not required. — Britton *v.* Harvey, 47 La. Ann. 259, 16 So. 747.
Delivery by a furnace company of iron on a particular piece of ground belonging to the company, but tendered to the pledgee for his use, and painting the pledgee's initials on the iron, was sufficient. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21.

74. See cases cited *infra*, this note.
Possession is sufficient, although terminated by wrongful act of pledgor or third party.— Walcott *v.* Keith, 22 N. H. 196.
Where the same person was president of a debtor corporation and vice-president of a creditor corporation, a delivery to him as vice-president of the creditor corporation by the secretary of the debtor corporation was sufficient. Winslow *v.* Harriman Iron Co., (Tenn. Ch. App. 1897) 42 S. W. 698.

75. Freiburg *v.* Dreyfus, 135 U. S. 478, 10 S. Ct. 716, 34 L. ed. 206 [*affirming* 27 Fed. 78].

76. Virginia-Carolina Chemical Co. *v.* McNair, 139 N. C. 326, 51 S. E. 949.

77. The delivery of bonds by a debtor to his creditor in pursuance of a contract to deliver the same as collateral cures any defect in the contract arising from its failure to name or specify the bonds to be delivered. Virginia-Carolina Chemical Co. *v.* McNair, 139 N. C. 326, 51 S. E. 949.

78. *California.*— Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237.
Connecticut.— Harrison *v.* Clark, 74 Conn. 18, 49 Atl. 186.
Louisiana.— D'Meza's Succ., 26 La. Ann. 35; Caffin *v.* Kirwan, 7 La. Ann. 221.
Massachusetts.— Shaw *v.* Silloway, 145 Mass. 503, 14 N. E. 783.
New Hampshire.— Baker *v.* Tolles, 68 N. H. 73, 36 Atl. 551; Young *v.* Kimball, 59 N. H. 446.
West Virginia.— Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E.

always required,[79] but the mode of delivery may be according to the nature of the property.[80] Thus, especially in the case of bulky articles where manual delivery would be inconvenient,[81] constructive [82] or symbolical [83] delivery, as the contents of a warehouse by the delivery of a key,[84] of a warehouse receipt,[85] or of an order;[86] as by the delivery of a bill of lading; [87] as of a part of the whole; [88] as of a deposit

548, 32 L. R. A. 408; Williams *v.* Gillespie, 30 W. Va. 586, 5 S. E. 210.

See 40 Cent. Dig. tit. "Pledges," §§ 28, 29.

Such a contract is known in the civil law as "hypothecation" see 21 Cyc. 1720. But is not recognized by the common law. Fielding *v.* Middlebaugh, 2 Ohio Dec. (Reprint) 55, 1 West. L. Month. 218.

Agreement by debtor that creditor shall have the benefit of certain fire-insurance policies not in possession of either of them does not constitute a pledge for lack of transfer of possession, but gives the creditor an equitable lien on the policies. *In re* Wittenberg Veneer, etc., Co., 108 Fed. 593.

An agreement in a lease that the personal property on the premises shall be at all times liable for the rent, and that the lessor may hold it therefor on violation of the lease by the lessee, does not constitute a pledge, since possession of the property is not delivered. Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676; Williams *v.* Gillespie, 30 W. Va. 586, 5 S. E. 210.

79. Rice *v.* Austin, 17 Mass. 197; Markham *v.* Jaudon, 41 N. Y. 235.

80. Nevan *v.* Roup, 8 Iowa 207; Chicago First Nat. Bank *v.* Caperton, 74 Miss. 857, 22 So. 60, 60 Am. St. Rep. 540; Mott *v.* Newark German Hospital, 55 N. J. Eq. 722, 37 Atl. 757.

Accounts can be pledged by transfer of the books and it is not necessary that the pledgee should have the sole right of collection. Scott Grocer Co. *v.* Carter, (Tex. Civ. App. 1896) 34 S. W. 375.

A book-account is not pledged by the delivery of a copy of the account as security without an assignment, since such a copy does not represent the debt. Cornwell *v.* Baldwin's Bank, 12 N. Y. App. Div. 227, 43 N. Y. Suppl. 771.

Intermingled with other property of pledgor.— Where a corporation pledged certain personalty on its premises, giving leases to the pledgee, who placed placards stating the fact of such interest on the premises, the fact that the corporation had some of its own unpledged property on the leased premises could not establish ostensible ownership in the corporation of the pledged property. Philadelphia Warehouse Co. *v.* Winchester, 156 Fed. 600.

81. Shaw *v.* Wilshire, 65 Me. 485.

82. Shaw *v.* Wilshire, 65 Me. 485; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779; *Ex p.* Fitz, 9 Fed. Cas. No. 4,837, 2 Lowell 519; *In re* Wiley, 29 Fed. Cas. No. 17,655, 4 Biss. 171.

83. Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725; Mott *v.* Newark German Hospital, 55 N. J. Eq. 722, 37 Atl. 757 (holding that an assignment under seal of a bond and mortgage duly acknowledged and delivered as security for the payment of a debt is an effectual pledge, although there was no manual delivery of the bond and mortgage); Young *v.* Lambert, L. R. 3 P. C. 142, 39 L. J. P. C. 21, 22 L. T. Rep. N. S. 499, 6 Moore P. C. N. S. 406, 18 Wkly. Rep. 497, 16 Eng. Reprint 779 (where the pledgor sent a note to the customs officer in charge of goods, requesting him to hold them "subject to the order" of the pledgees, they paying the duty and storage charges before removal," and the note was accepted by the officer in charge who made a corresponding entry in his book).

84. Nevan *v.* Roup, 8 Iowa 207.

85. Citizens' Banking Co. *v.* Peacock, 103 Ga. 171, 29 S. E. 752; Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 567, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725, where the court says: "If, however, the property is delivered by the owner to a warehouseman and a warehouse receipt is given therefor by the warehouseman, the endorsement of the warehouse receipt, and the delivery thereof to the pledgee is regarded, in law, as the delivery of possession to the pledgee of the property described in the warehouse receipt."

The English doctrine which, in the case of a pledge by a symbolical delivery, requires an attornment by the warehouseman or other custodian of the goods, in order to create such a delivery as will support the pledge, is not in force in the United States. Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

The issuance of a storage warrant or receipt by a person not a warehouseman for his own property in his own possession is not a symbolical delivery. Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725; Thurber *v.* Oliver, 26 Fed. 224. See Geilfuss *v.* Corrigan, 95 Wis. 651, 663, 70 N. W. 306, 60 Am. St. Rep. 143, 37 L. R. A. 302, where the court says: "Storage warrants were not warehouse receipts. . . . In order to be such, they must be issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation."

86. Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408.

87. Rice *v.* Austin, 17 Mass. 197; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290 [*reversing* 4 Den. 489]; Leinkauf Banking Co. *v.* Grell, 62 N. Y. App. Div. 275, 70 N. Y. Suppl. 1083.

88. Nevan *v.* Roup, 8 Iowa 207.

Delivery of samples to the agent of the creditor to facilitate sales of the goods by him on behalf of the debtor is not a deliv-

in a savings bank by delivery of the pass-book;[89] or as by pointing out logs in a boom,[90] is sufficient. Or, if the property being present, is committed by the pledgor to the exclusive control and charge of the pledgee,[91] especially if this is followed by an act of dominion or possession[92] by the pledgee or his agent, this will suffice. But a bare agreement of the parties is never equivalent to a fictitious or symbolical delivery.[93]

b. Time of Delivery. A pledge takes effect upon delivery of the property and its validity is not affected by the fact that the contract for the creation thereof was made prior thereto.[94]

c. Possession by Agent of Pledgee — (i) *In General.* The delivery may be made to an agent[95] or trustee[96] of the pledgee, or to a third person to hold for him;[97] and such third person may even be an agent, clerk, or servant of the

ery of the goods. Thurber *v.* Oliver, 26 Fed. 224.

89. Boynton *v.* Payrow, 67 Me. 587 (where the book had formerly been delivered to the creditor, temporarily returned, and again delivered to a third person to be handed to the creditor); Taft *v.* Bowker, 132 Mass. 277.

90. Jewett *v.* Warren, 12 Mass. 300, 302, 7 Am. Dec. 74, where it was said: "There was all the delivery which could have been usefully made of property of this nature."

Engines in a ship.— *Ex p.* Fitz, 9 Fed. Cas. No. 4,837, 2 Lowell 519.

91. See cases cited *infra*, note 92.

92. Combs *v.* Tuchelt, 24 Minn. 423; Tibbetts *v.* Flanders, 18 N. H. 284.

A pledgee should exercise due care to negative the existence of ostensible ownership in the pledgor, and such means should be resorted to as to fairly put third persons on inquiry, but the giving of notice to the public in such a manner as to insure to all persons dealing with the pledgor knowledge of the existence of the pledge is unnecessary. Philadelphia Warehouse Co. *v.* Winchester, 156 Fed. 600.

Signs and placards placed by a warehouse company, which had made a loan on personal property on certain premises which it thereupon leased, calling attention to the fact that it was interested in such personal property, being of such a character as to attract the attention of persons capable of reading and understanding the English language, and being plainly visible to those visiting the premises and using reasonable care, the pledgee fully discharged the duty of the warehouse company to negative any ostensible ownership in the pledgor. Philadelphia Warehouse Co. *v.* Winchester, 156 Fed. 600.

93. Caffin *v.* Kirwan, 7 La. Ann. 221. But see Keiser *v.* Topping, 72 Ill. 226, holding that, as between the parties, upon an agreement to pledge property, "no actual manual delivery of the property was necessary. Possession, constructively, was where the contract placed it." See also *In re* Clerke, 9 Ohio Dec. (Reprint) 850, 17 Cinc. L. Bul. 369, holding the act of a debtor in designating and setting aside stock, to take effect after his death as collateral security to his creditor, without the creditor's knowledge, and without actual delivery to him, or calling witness to the act, will pass the stock to the creditor after the debtor's death.

94. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21; Voorhis *v.* Olmstead, 66 N. Y. 113 [*affirming* 3 Hun 744, 6 Thomps. & C. 172]; Greeff *v.* Dieckerhoff, 5 N. Y. Suppl. 16 [*affirmed* in 123 N. Y. 658, 25 N. E. 955]; Cartwright *v.* Wilmerding, 24 N. Y. 521, holding that the fact that an interval of some days occurs between the loaning and receipt of the money and the passing of documentary evidence of a pledge of the goods is of no consequence, unless the interval be such as to raise a suspicion that the loan was not in the first place made on the faith of this pledge. And one who has a contract for a pledge ineffectual for want of delivery of the goods may obtain a subsequent delivery, and thus validate the pledge, even as against an intermediate creditor. Parshall *v.* Eggert, 54 N. Y. 18 [*reversing* 52 Barb. 367].

95. Henry *v.* Eddy, 34 Ill. 508.

Such agent may also be the lessee of the pledgor.— Kentucky Furnace Co. *v.* Paducah City Nat. Bank, 75 S. W. 848, 25 Ky. L. Rep. 28.

No receipt by the agent to the pledgor is necessary, when the goods are actually delivered to the agent of the pledgee, although they remain on the pledgor's premises. Dunn *v.* Train, 125 Fed. 221, 60 C. C. A. 113.

Where an agent of the pledgee, without authority, takes a bill of lading in his own name, it does not affect the pledgee's title. Mechanics', etc., Bank *v.* Farmers', etc., Nat. Bank, 60 N. Y. 40.

96. Conger *v.* New Orleans, 32 La. Ann. 1250.

97. Herber *v.* Thompson, 47 La. Ann. 800, 17 So. 318 (holding that a pledgee, who already holds property to secure his debt, may, by consent of the parties, become the pledgee for another creditor after the expiration of the contract made to secure his debt); Woodward *v.* American Exposition R. Co., 39 La. Ann. 566, 2 So. 413; Weems *v.* Delta Moss Co., 33 La. Ann. 973.

Such third person must know of the trust and accept the obligation it imposes. Lanaux's Succ., 46 La. Ann. 1036, 15 So. 708, 25 L. R. A. 577.

Where a single collateral is pledged by two separate and distinct contracts to two credit-

pledgor,[98] provided there is an actual change of possession,[99] and an agreement by all three parties [1] that the property shall be held as security for the pledgee.

ors, whose claims aggregate the value of the collateral, possession by one is a possession for the benefit of the other, and in this respect each is the agent of the other *pro hac vice*. Levy *v.* Winter, 43 La. Ann. 1049, 10 So. 198. If property of A be held by B and C jointly, A may assign the same in pledge to B or C severally, if both B and C have knowledge of the same and assent to hold the property for the pledgee. Brown *v.* Warren, 43 N. H. 430.

98. *Louisiana.*— Jacquet *v.* His Creditors, 38 La. Ann. 863; Weems *v.* Delta Moss Co., 33 La. Ann. 973.

Maine.— Boynton *v.* Payrow, 67 Me. 587.

Massachusetts.— Sumner *v.* Hamlet, 12 Pick. 76.

Minnesota.— Combs *v.* Tuchelt, 24 Minn. 423.

Tennessee.— McCready *v.* Haslock, 3 Tenn. Ch. 13.

United States.— Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779; Dunn *v.* Train, 125 Fed. 221, 60 C. C. A. 113; Stout *v.* Yeager Mill Co., 13 Fed. 802, 4 McCrary 486; *In re* Wiley, 29 Fed. Cas. No. 17,655, 4 Biss. 171.

See 40 Cent. Dig. tit. "Pledges," § 32.

A warehouse company, being engaged in advancing cash on security of a pledge of merchantable commodities, loaned one hundred and fifty thousand dollars on collateral notes of a corporation, taking from it leases of portions of its premises on which the personal property given as security was situated, and under contract with the corporation appointed an employee of the corporation as custodian thereof. The custodian took possession and maintained thereon placards plainly indicating that the warehouse company was specially interested in the personal property. It was held that a valid pledge of such personalty was created, which would be enforced against receivers of the corporation. Philadelphia Warehouse Co. *v.* Winchester, 156 Fed. 600.

99. Hilliker *v.* Kuhn, 71 Cal. 214, 16 Pac. 707 (where the fact that, after delivery to a third person, the pledgor assisted, with or without the knowledge of the pledgee, in taking care of the property, did not affect the validity of the pledge); Matthewson *v.* Caldwell, 59 Kan. 126, 52 Pac. 104 (holding that a delivery of notes as pledges by separating them from other like notes, placing them in a package with a memorandum of the terms of the pledge, pointing them out to the pledgee, and securing her assent to the transaction, delivering them to her husband in her presence as her agent, although he was one of the pledgors, and then placing them in the hands of an employee of the pledgors, with instructions as to their care assented to by the pledgee, one of which instructions was to keep them in a bank vault to which the pledgors had access, is valid); Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408 (holding that where a debtor ordered his agent in writing to hold to the order of the creditor his stock of lubricating oil stored in a certain oil tank in possession of the agent as collateral security for the debt, the indorsement on the order by the agent of an acceptance thereof transferred the possession of the oil to the creditor, so that the oil was thereby pledged for the payment of the debt).

Under an agreement by landlord to pledge cattle, driving them into a corral and counting them by the landlord, his agent in possession of the premises, and the pledgee, and turning them out again to remain on the farm in the agent's possession, is not sufficient delivery. George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53.

An agreement for a pledge, accompanied by an order on a third person for the delivery of the property, is insufficient against a subsequent attaching creditor, where the pledgee failed to take actual possession. Rowell *v.* Clagett, 69 N. H. 201, 41 Atl. 173.

Where the vendee of goods leaves them in the vendor's warehouse, and gives a pledgee an order for them on the vendor, which is accepted, this is a sufficient delivery, and it is not affected by the removal of the goods to another warehouse by the vendor with the vendee's consent. Jones *v.* Baldwin, 12 Pick. (Mass.) 316.

Where a bank, under agreement with a lender of money, deposited securities in the hands of a firm, composed of the president of the bank, and his son, to secure the loan, and the president permitted the securities to remain in the custody of the officers of the bank for convenience of collection, with power to substitute other securities for those pledged, and no indorsement of the securities was made by the bank until after the failure of the bank and the appointment of a recciver, the delivery and possession of the securities was not sufficient to make the pledge valid as against the receiver. Casey *v.* Schuchardt, 96 U. S. 494, 25 L. ed. 790; Casey *v.* New York Nat. Park Bank, 96 U. S. 492, 24 L. ed. 789; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779 [*reversing* 5 Fed. Cas. No. 2,496, 2 Woods 77].

Agreement to pledge tools and machinery used in a factory, and that the superintendent should hold possession for the pledgee, is not sufficient, where the articles were not moved and the pledgors retained exclusive possession and control of the factory and its contents. Dirigo Tool Co. *v.* Woodruff, 41 N. J. Eq. 336, 7 Atl. 125.

Delivery to landlady of bicycle and trunk as security for board is sufficient, even though they were kept in the boarder's room and he kept the key to the trunk and rode the bicycle occasionally. Henry *v.* State, 110 Ga. 750, 36 S. E. 55, 78 Am. St. Rep. 137.

1. Delivery by pledgor to his agent with instructions to deliver to the pledgee is not

(II) *Pledgor as Agent of Pledgee.* At common law a change of possession such as is required for the validity of a pledge is not effected where the pledgor is left in control of the property,[2] even though under an agreement by which he is to hold [3] or manage [4] the property as agent for the pledgee. But under exceptional circumstances where a transfer of possession is impossible because of the nature of the property [5] or where the pledgor is left in possession by the pledgee for a special purpose,[6] the pledge has been upheld.[7]

d. Written Instruments — (I) *In General.* Where property is represented by an instrument in writing, such as a warehouse receipt, elevator receipt, wharfinger's receipt, bill of lading, promissory note, bill of exchange, certificate of stock, or obligation or claim upon other persons, a valid pledge of the property may be effected by a transfer of such instrument.[8]

(II) *Bills of Lading.* The delivery of a bill of lading as security for an advance of money is a sufficient delivery of the goods for which the bill of lading was issued to sustain the pledge.[9]

sufficient (Citizens' Bank *v.* Janin, 46 La. Ann. 995, 15 So. 471), even though such instructions are communicated to the pledgee (Lanaux's Succession, 46 La. Ann. 1036, 15 So. 708, 25 L. R. A. 577).

2. Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400; Harding *v.* Eldridge, 186 Mass. 39, 71 N. E. 115; Chicago First Nat. Bank *v.* Caperton, 74 Miss. 857, 22 So. 60, 60 Am. St. Rep. 540, where a pledgor of cooperage material was allowed such control of the property that he disposed of it and substituted other property at pleasure, and the proceeds of sales of it were paid to a creditor other than the pledgee.

But in Illinois this rule has been changed by statute, so as to permit the pledgor to retain possession of the property pledged, where it is so provided in the instrument creating the pledge, and the instrument itself is properly acknowledged and recorded. Griffin *v.* Henry, 99 Ill. App. 284.

3. Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400; Geddes *v.* Bennett, 6 La. Ann. 516 (holding that where advances are made on property in storage, and the pledgor gives an order for its delivery, but it is sent to his store, the delivery to him, although he executes a receipt acknowledging that he holds it on storage for the pledgee, defeats the pledge); Huntington *v.* Clemence, 103 Mass. 482.

4. Lilienthal *v.* Ballou, 125 Cal. 183, 57 Pac. 897, (1898) 55 Pac. 251; George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; Jackson *v.* Kincaid, 4 Okla. 554, 46 Pac. 587; Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653, where the pledgees of cattle running on a range agreed that the pledgors should look after them under the control and direction of the pledgees.

5. Wallace's Appeal, 104 Pa. St. 559 (holding that a partner may pledge his interest in the partnership to secure a loan of money which is put into the firm as a part of his capital; and if the pledgor, by the agreement, retains possession, the pledgee's right is superior to the claims of general creditors and others claiming under the pledgor, except pledgees for value without notice); Casey *v.* Schuchardt, 96 U. S. 494, 24 L. ed. 790; Casey *v.* New Jersey Nat. Park Bank, 96 U. S. 492, 24 L. ed. 789; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779 [*reversing* 5 Fed. Cas. No. 2,496, 2 Woods 77]; *Ex p.* Fitz, 9 Fed. Cas. No. 4,837, 2 Lowell 519. See also Philadelphia Warehouse Co. *v.* Winchester, 156 Fed. 600.

6. Macomber *v.* Parker, 14 Pick. (Mass.) 497 (where pledgors had pledged their interest in bricks of which they were joint owners with the pledgees, and the bricks were left with the pledgors to sell); Newman *v.* Greenville Bank, 66 Miss. 323, 5 So. 753; Young *v.* Upson, 115 Fed. 192 (holding that where, on the transfer for a loan, the borrower opened a separate account of such bills on his books, and as fast as collected the proceeds were paid to the lender, and all questions of renewal and extension were referred to him, the transfer was complete and effectual).

7. See *infra*, III, A, 7, f.

8. Commercial Bank *v.* Flowers, 116 Ga. 219, 42 S. E. 474; Lollande *v.* Ingram, 19 La. Ann. 364; Hiligsberg's Succession, 1 La. Ann. 340; Winchester *v.* Ory, 17 La. 428; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779. See *infra*, II, B, 3, d, (II)–(VI).

Where the goods are in possession of a third person, a writing executed by the purchaser and delivered to the unpaid seller, stating that he thereby "re-transferred" the goods as collateral security for the purchase-money creates a valid pledge. Roeder *v.* Green Tree Brewery Co., 33 Mo. App. 69.

9. *Massachusetts.*— Alderman *v.* Eastern R. Co., 115 Mass. 233; Newcomb *v.* Boston, etc., R. Corp., 115 Mass. 230; Chicago Fifth Nat. Bank *v.* Bayley, 115 Mass. 228; Green Bay First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Cairo First Nat. Bank *v.* Crocker, 111 Mass. 163.

New York.— Cincinnati First Nat. Bank *v.* Kelly, 57 N. Y. 34; Sather Banking Co. *v.* Hartwig, 23 Misc. 89, 51 N. Y. Suppl. 677.

Ohio.— Irving Nat. Bank *v.* Emery, 1 Cinc. Super. Ct. 76 [*affirmed* in 25 Ohio St. 360, 18 Am. Rep. 299].

Texas.— Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 26 S. W. 421.

(III) *Warehouse Receipts.*[10] Where goods have been deposited in a regular warehouse and a warehouse receipt issued therefor a delivery of the receipt is regarded as a symbolical delivery of the goods themselves [11] and is sufficient to sustain a pledge of the goods. And at common law a warehouseman, having property of his own in store, may make a pledge of it to secure a debt, by executing and delivering an ordinary warehouse receipt, which will be valid against subsequent creditors; [12] but under statutes in some states,[13] a receipt issued by the owner of goods stored in his own warehouse or store is not regarded as a warehouse receipt at all, and its delivery by the owner to a creditor does not effect a valid pledge of the goods.[14]

United States.— Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214.

See 40 Cent. Dig. tit. "Pledges," § 37.

Delivery is sufficient without assignment or indorsement.— Petitt *v.* Memphis First Nat. Bank, 4 Bush (Ky.) 334; Toms *v.* Whitmore, 6 Wyo. 220, 44 Pac. 56, where goods which the consignor had agreed to pledge as a security for a *bona fide* debt were delivered to a carrier for transportation to the pledgee, under a bill of lading expressly naming him as consignee, there was a valid delivery of the pledge.

Where the bill of lading is delivered to a bank as pledgee for advances, the fact that the goods are addressed to the order of the consignee does not give such consignee priority over the bank. Richardson *v.* Nathan, 167 Pa. St. 513, 31 Atl. 740.

But a factor cannot make a valid pledge of goods belonging to his principal by delivery of a bill of lading for advances on his own account. Lallande *v.* His Creditors, 42 La. Ann. 705, 7 So. 895.

10. Warehouse receipts in general see Warehousemen.

11. Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147 (whisky stored in a bonded warehouse); Fourth Nat. Bank *v.* St. Louis Cotton Compress Co., 11 Mo. App. 333.

Mere delivery of the receipts, without written assignment or indorsement, is sufficient. Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349; Citizens' Banking Co. *v.* Peacock, 103 Ga. 171, 27 S. E. 752; Blanc *v.* Germania Nat. Bank, 114 La. 739, 38 So. 537; St. Louis Nat. Bank *v.* Ross, 9 Mo. App. 399.

Notice to the warehouseman is not necessary. Citizens' Banking Co. *v.* Peacock, 103 Ga. 171, 29 S. E. 752; Cartwright *v.* Wilmerding, 24 N. Y. 521 (holding that the custody which the officers of customs have of goods in a bonded warehouse is not a possession, but rather a restraint upon removal vested in the government to secure payment of duties, and such property may be pledged by the owner on delivery of the warehouse receipt issued by the warehouseman); Whitney *v.* Tibbits, 17 Wis. 359.

A written assignment of warehouse receipts as security is valid without actual delivery, where such receipts are held by another creditor as collateral and the first pledgee is notified of the subsequent assignment. Hunt *v.* Bode, 66 Ohio St. 255, 64 N. E. 126; Matter of Stothfang, 20 Ohio Cir. Ct. 275, 11 Ohio Cir. Dec. 103.

But where the property mentioned in the receipt is not in possession of the warehouseman or the party who attempts to pledge it, the delivery of the receipt conveys no interest whatever. Commercial Bank *v.* Flower, 116 Ga. 219, 42 S. E. 474.

That the goods represented by the warehouse receipt are part of a large mass does not render the delivery of the receipt ineffectual. Merchants', etc., Bank *v.* Hibbard, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465.

Where the receipt is issued by one who holds the property in store for the owner, it is not necessary that the person issuing it be strictly a warehouseman under the statutory definition of a warehouseman. Porter *v.* Shotwell, 105 Mo. App. 177, 79 S. W. 728; Union Trust Co. *v.* Wilson, 198 U. S. 530, 25 S. Ct. 766, 49 L. ed. 1154, holding that the indorsement to a third person, as security for loans, of a receipt issued by a warehouse company for goods kept under lock and key in a place leased by it from the owner of the goods, which receipt recites that it received the property on storage, "[to be] delivered only upon surrender of this receipt properly endorsed and payment of all charges thereon," is a sufficient delivery as against attaching creditors of the owner to validate the transaction as a pledge, whether the receipt is to be deemed a public warehouse receipt under Ill. Rev. St. c. 114, § 2, or not.

Under statutes.— The delivery of the warehouse receipts for property pledged is not such delivery of the property as is required by Code, § 2138, to constitute the bailment valid as against a *bona fide* purchaser for value, without notice, and will enable the pledgee to maintain an action of trover against the purchaser from the pledgor, a factor or warehouseman. Augusta Nat. Exch. Bank *v.* Graniteville Mfg. Co., 79 Ga. 22, 3 S. E. 411.

12. Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349; Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418; Cochran *v.* Ripy, 13 Bush (Ky.) 495; Merchants', etc., Bank *v.* Hibbard, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465; Parshall *v.* Eggert, 54 N. Y. 18 [*reversing* 52 Barb. 367], receipt by produce merchant, in form of a warehouse receipt.

13. Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Thorne *v.* Wilmington First Nat. Bank, 37 Ohio St. 254; Adams *v.* Merchants' Nat. Bank, 2 Fed. 174, 9 Biss. 396.

14. A receipt given by a servant to the

(iv) *Bills and Notes.* A valid pledge of bills and notes is effected by simple delivery of them to the creditor,[15] and indorsement or other writing is not necessary.[16] A pledge by a written assignment of a note at the time in the possession of a third person has been upheld,[17] but has also been declared void [18] on the ground that possession is the very essence of a valid pledge.

(v) *Stocks and Bonds.* A valid pledge of bonds and shares of stock is effected by delivery of the bonds [19] and stock certificates [20] without written indorsement or assignment.[21] No transfer of the stock on the books of the corporation is necessary.[22] An agreement,[23] even though in writing,[24] and under seal,[25] that certain stocks and bonds of the debtor shall be collateral security for a debt due the creditor is without effect in the absence of a delivery of the stocks and bonds.[26]

(vi) *Insurance Policies.* Insurance policies also may be pledged by simple delivery, without written assignment.[27]

III. Construction and Operation.

A. In General — 1. Operation and Effect — a. In General. The delivery of a pledge does not affect the rights of the parties under the contract or obligation it is given to secure,[28] except as it provides an additional security, and as the parties may contract by special agreement.[29] Where such special agreements have been made, they will be construed so as to effectuate the intentions of the parties,[30] and will be strictly enforced.[31]

b. Estoppel of Pledgee to Deny Title of Pledgor. The pledgee is estopped to deny the title of his pledgor,[32] either by claiming title to the property in himself,[33]

owner and by him delivered as security for a debt is ineffectual. Yenni *v.* McNamee, 45 N. Y. 614.

15. Matthewson *v.* Caldwell, 59 Kan. 126, 52 Pac. 104; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779.

16. Baggarly *v.* Gaither, 55 N. C. 80; Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779.

In Louisiana, under Civ. Code, art. 3158, first enacted in 1852, a pledge of notes, drafts, and other securities by actual delivery thereof to the pledgee is sufficient (Casey *v.* Schneider, 96 U. S. 496, 24 L. ed. 790), and a written assignment or indorsement is not necessary, as was formerly the case (Maryland Fidelity, etc., Co. *v.* Johnston, 117 La. 880, 42 So. 357; Fluker *v.* Bullard, 2 La. Ann. 338; Robinson *v.* Shelton, 2 Rob. 277; Sewall *v.* McNeill, 17 La. 185).

17. *In re* Wiley, 29 Fed. Cas. No. 17,655, 4 Biss. 171.

18. Storts *v.* Mills, 93 Mo. App. 201.

19. Ribet *v.* Bataille, 35 La. Ann. 1171.

20. Hall *v.* Cayot, 141 Cal. 13, 74 Pac. 299. See Corporations, 10 Cyc. 589.

21. Rice *v.* Gilbert, 72 Ill. App. 649.

22. Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. 897; Rice *v.* Gilbert, 72 Ill. App. 649.

23. Robertson *v.* Robertson, 186 Mass. 308, 71 N. E. 571; Seymour *v.* Hendee, 54 Fed. 563.

24. Atkinson *v.* Foster, 134 Ill. 472, 25 N. E. 528; Lanaux's Succession, 46 La. Ann. 1036, 15 So. 708, 25 L. R. A. 577; Lallande *v.* Ingram, 19 La. Ann. 364.

25. Vanstone *v.* Goodwin, 42 Mo. App. 39, where the instrument was signed, sealed, and witnessed.

26. But where the owner of stock which has been "pooled," pledged it to a firm and afterward to a bank, the possession remaining in the same person, who was chief trustee of the pool, a member of the firm to which the first pledge was made, and cashier of the bank to which the second pledge was made, his possession was held sufficient. Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. 897.

27. D'Meza's Succession, 26 La. Ann. 35; Stout *v.* Yaeger Milling Co., 13 Fed. 802, 4 McCrary 486.

28. Commercial Sav. Bank *v.* Hornberger, 140 Cal. 16, 73 Pac. 625; Duncan *v.* Elam, 1 Rob. (La.) 135; Bright *v.* Carter, 117 Wis. 631, 94 N. W. 645; Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608; Childs *v.* N. B. Carlstein Co., 76 Fed. 86.

29. Grayson *v.* Harrison, (Tenn. Ch. App. 1900) 59 S. W. 438.

30. Rumsey *v.* Lentz, 59 Ohio St. 189, 52 N. E. 189.

31. Klee *v.* Trauerman, 210 Pa. St. 533, 60 Atl. 157.

32. Barnhart *v.* Fulkerth, 73 Cal. 526, 15 Pac. 89; Crossley *v.* Louisiana Sav. Bank, etc., Co., 38 La. Ann. 74.

33. Barnhart *v.* Fulkerth, 73 Cal. 526, 15 Pac. 89; Crossley *v.* Louisiana Sav. Bank, etc., Co., 38 La. Ann. 74.

So long as the pledgee holds property as collateral security for a debt, he cannot claim a holding adversely to the pledgor so as to acquire title under the statute of limitations. Cross *v.* Eureka Lake, etc., Canal Co., 73 Cal. 302, 14 Pac. 885, 2 Am. St. Rep. 808; Gilmer *v.* Billings, 55 Fed. 775; Gilmer *v.* Morris, 35 Fed. 682.

or by setting up the title of a third person to the property pledged to him by the pledgor.[34]

c. Implied Warranty by Pledgor. The pledgor, by the act of pledging, impliedly engages that he is the general owner of the property pledged,[35] unless it particularly appears in the contract that he has a lessor interest in the property.[36] And if he pledges as his own property that does not belong to him, he is estopped from setting up a title to it subsequently acquired by him during the existence of the pledge.[37]

2. Property or Interest Pledged. Upon a pledge of property, the pledgee acquires all the interest which the pledgor owns in the property [38] so far as necessary for his security. While he takes the property subject to any liens on it existing at the time of the pledge,[39] he is also entitled to the benefit of any liens by which it may be secured.[40] Where the pledge is in writing [41] the usual rules of interpretation control descriptions of the property pledged.[42]

3. Title to Property Pledged. Upon a contract of pledge, the general property in the things pledged remains in the pledgor,[43] while a special property passes to

34. Godfrey *v.* Pell, 49 N. Y. Super. Ct. 226 [*affirmed* in 95 N. Y. 649].

35. Mairs *v.* Taylor, 40 Pa. St. 446.

But a tacit assent by an administrator, before his appointment, to an unauthorized pledge of property of the deceased will not prevent his recovery of the property after his appointment. Jones *v.* Logan, 50 Ala. 493. And see Hoffman *v.* Schoyer, 143 Ill. 598, 28 N. E. 823.

36. Northampton First Nat. Bank *v.* Massachusetts L. & T. Co., 123 Mass. 330, holding that where a pledgee rehypothecated by a contract reciting that he assigned all his "right, title and interest in and under the contract together with all the property therein mentioned" he made no implied warranty of title or quality on the second pledge.

37. Goldstein *v.* Hort, 30 Cal. 372.

38. Fisher *v.* Continental Nat. Bank, 64 Fed. 707, 12 C. C. A. 411.

Where stock is only partially paid up at death of the pledgor, and the remainder is paid up out of the estate, the pledgee is entitled to the benefit of only so much as was paid up at the death of the pledgor. Myers *v.* Scully, 85 Pa. St. 360.

Where shares of stock that have been pledged are canceled, they cease to be available as collateral security. Corning *v.* Bridgewater Gas Co., 100 Ill. App. 221.

Where bankers are directed by a customer to purchase certain stock, and they buy it through their brokers, with whom they leave it as collateral security for a general indebtedness, the brokers having no knowledge of the customer's rights, the brokers may hold the stock even against the customer as security for the general indebtedness of the bankers to them. Le Marchant *v.* Moore, 150 N. Y. 209, 44 N. E. 770.

Other property of like kind may be substituted for that originally pledged by agreement of the parties (Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349; Blydenstein *v.* New York Security, etc., Co., 67 Fed. 469, 15 C. C. A. 14), and additional property delivered under an agreement to keep a "margin" good is subject to the same rights of the pledgee as the original property (Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269).

Where a bill of sale is made as security, and other property not mentioned in the instrument is turned over at the same time for the same purpose, the creditor is entitled to possession of the entire property until the debt is paid. Higgins *v.* Graul, 1 N. Y. Suppl. 347.

Power of a trustee to pledge is not included in a power to sell and reinvest trust property. Paterson First Nat. Bank *v.* National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139 [*modifying* 22 N. Y. App. Div. 24, 47 N. Y. Suppl. 880].

A pledge by a trustee of shares of stock in violation of the trust gives no rights to a pledgee who takes them with constructive notice of the trust. Paterson First Nat. Bank *v.* National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139 [*modifying* 22 N. Y. App. Div. 24, 47 N. Y. Suppl. 880].

39. Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; Williams *v.* Gallick, 11 Oreg. 337, 3 Pac. 469.

40. Mechanics' Bldg. Assoc. *v.* Ferguson, 29 La. Ann. 548; Thomson-Houston Electric Co. *v.* Capitol Electric Co., 65 Fed. 341, 12 C. C. A. 643.

41. See *supra*, II, A, 10.

42. See Contracts, 9 Cyc. 577 *et seq.*

"Etc."—A set of scales and a quantity of rock salt is not covered by a pledge of "iron, junk, hides, etc.," the "etc." being held only to refer to property of the same general character as "iron, junk, and hides." Morganstein *v.* Commercial Nat. Bank, 125 Ill. App. 397. See also 16 Cyc. 815.

43. *Alabama.*—Ensley Lumber Co. *v.* Lewis, 121 Ala. 94, 25 So. 729, holding that where notes, which by their terms stipulated that the legal title to the property for which they were given should remain in the payee until they were paid, were indorsed by the payee, and pledged as collateral, the legal title to the property for which they were given did not pass to the pledgee, and, on the payment of the debt for which they were pledged, the

the pledgee.[44] Such special property in the pledgee is sufficient to enable him to hold the things pledged as against the pledgor,[45] his general creditors,[46] and persons claiming under subsequent assignments from the pledgor,[47] and also to maintain trover for the conversion of the property.[48] On the other hand the pledgee

legal title to the property and the notes was in the payee.

Arkansas.— Hughes *v.* Johnson, 38 Ark. 275, holding that a mortgagee does not lose his interest in the mortgage by assigning it to his creditor as collateral security for his own debt, although the assignment stipulates that he is to forfeit all interest if he fails to pay at a fixed time, and he does so fail.

California.—See Heyland *v.* Badger, 35 Cal. 404.

Georgia.— Atlanta Trust, etc., Co. *v.* Nelms, 115 Ga. 53, 41 S. E. 247; Halliday *v.* Stewart County Bank, 112 Ga. 461, 37 S. E. 721.

Maryland.— Butler *v.* Rahm, 46 Md. 541.

Massachusetts.— Homes *v.* Crane, 2 Pick. 607.

New Hampshire.— See Leach *v.* Kimball, 34 N. H. 568.

New York.— Brown *v.* Bronson, 93 N. Y. App. Div. 312, 87 N. Y. Suppl. 872.

Washington.— Furth *v.* West Seattle, 37 Wash. 387, 79 Pac. 936.

United States.— Smith *v.* Lee, 77 Fed. 779; Gilmer *v.* Morris, 35 Fed. 682, holding that where a vendor of stock holds the certificates as a pledge to secure certain debts of the vendee, he holds under the title of the vendee, and cannot claim the property as his own, on the ground that the purchase-money is not all paid.

See 40 Cent. Dig. tit. "Pledges," § 45.

The pledgor may sue in equity to have a note pledged by him collected and credited on his debt. Baker *v.* Burkett, 75 Miss. 89, 21 So. 970.

Loss or destruction of the property without fault on the part of the pledgee must be borne by the pledgor. Thomason *v.* Dill, 30 Ala. 444.

44. *California.*— Gilman *v.* Curtis, 66 Cal. 116, 4 Pac. 1094; Heyland *v.* Badger, 35 Cal. 404; Knoll *v.* Melone, 1 Cal. App. 637, 82 Pac. 982.

Connecticut.— Robertson *v.* Wilcox, 36 Conn. 426.

Illinois.— Seckel *v.* York Nat. Bank, 57 Ill. App. 579.

Maryland.— Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 28, 43 Atl. 33.

Massachusetts.— Alderman *v.* Eastern R. Co., 115 Mass. 233; Newcomb *v.* Boston, etc., R. Corp., 115 Mass. 230; Chicago Fifth Nat. Bank *v.* Bayley, 115 Mass. 228; Cairo First Nat. Bank *v.* Crocker, 111 Mass. 163.

Michigan.—Moreland *v.* Houghton, 94 Mich. 584, 54 N. W. 285.

New Hampshire.— Leach *v.* Kimball, 34 N. H. 568.

New Jersey.— Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478.

New York.— White *v.* Platt, 5 Den. 269.

Pennsylvania.— *In re* Ihmsen, 12 Pittsb. Leg. J. 218.

See 40 Cent. Dig. tit. "Pledges," § 45.

A pledge obtained by fraud of the creditor, although unredeemed by the debtor, vests no interest in the pledgee. Mead *v.* Bunn, 32 N. Y. 275; Wells *v.* Archer, 10 Serg. & R. (Pa.) 412, 13 Am. Dec. 682.

A pledgee to whom a negotiable instrument has been indorsed is, under the law merchant, a holder for value. Curtis *v.* Mohr, 18 Wis. 615; Thomson-Huston Electric Co. *v.* Capitol Electric Co., 65 Fed. 341, 12 C. C. A. 643. See COMMERCIAL PAPER, 7 Cyc. 697, 932. And the pledgee of a negotiable instrument, with knowledge of a defense to it, occupies the position of a *bona fide* purchaser if his pledgor took without notice. Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378. See Greenway *v.* William D. Orthwein Grain Co., 85 Fed. 536, 29 C. C. A. 330, holding that the pledge of promissory notes as collateral for another note neither lengthens the time of payment of those collaterals which fall due earlier, nor shortens the time of payment of those which fall due later, than the principal debt; but when, by their terms, they become due, the makers and indorsers have the right to pay, and the pledgee has the right to collect, them, regardless of the time when the principal debt falls due.

But a mere deposit of a negotiable instrument with a creditor, without indorsement, will not cut off equities existing between the maker and the pledgor. Snow *v.* New York Fourth Nat. Bank, 7 Rob. (N. Y.) 479.

45. Ormsby *v.* De Borra, (Cal. 1898) 52 Pac. 499; Robinson *v.* Ralph, 74 Nebr. 55, 103 N. W. 1044; Stokes *v.* Stokes, 28 Misc. (N. Y.) 58, 59 N. Y. Suppl. 801.

Upon a pledge of a chose in action, the pledgee acquires an interest in it of which the pledgor cannot deprive him by release without first paying the debt secured. Grant *v.* Holden, 1 E. D. Smith (N. Y.) 545; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34.

46. Peet *v.* Burr, 31 Ark. 34; Mitchell *v.* McLeod, 127 Iowa 733, 104 N. W. 349; Green Bay First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Philadelphia Real-Estate Trust Co. *v.* New England L. & T. Co., 93 Fed. 701.

So long as his debt remains unpaid, the creditor has a right to hold all the property pledged to him to secure its payment, and equity will not award to other creditors a part of the property pledged solely on the ground that the remainder would probably be sufficient to pay the debt secured. Ætna Ins. Co. *v.* Wilcox Bank, 48 Nebr. 544, 67 N. W. 449.

47. Phelps *v.* Howell, 35 La. Ann. 87; Deloach *v.* Jones, 18 La. 447.

48. U. S. Express Co. *v.* Meints, 72 Ill. 293; Easton *v.* Hodges, 18 Fed. 677.

Or replevin.— Green Bay First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92.

may forfeit his interest or special property in the pledged property by a wrongful conversion of it.[49]

4. Nature and Extent of Lien. The creditor may hold several pledges from the same or different [50] pledgors, and is not bound to part with any of the property so held until the discharge of all the obligations it has been given to secure.[51] The pledge constitutes a security not only for the principal debt,[52] but also for the interest,[53] for an obligation substituted by agreement by the parties for the original obligation,[54] for any expenses reasonably incurred by the pledgee in the transportation [55] or care of the property pledged.[56] But if the property has been deposited to secure one debt, it cannot, in the absence of a special agreement,[57] be held by the pledgee as security for other obligations.[58] The lien of the pledgee covers not only the property pledged, but also any increase of the property, such as dividends on stock,[59] or interest on bonds.[60] Upon enforcement of the pledge by collection or sale of the collateral the pledgee is entitled to retain only so much of the proceeds as is necessary to discharge his debt, and must turn the balance over to the pledgor.[61]

5. Priorities. Since the pledgee, by act of the pledgor, acquires in addition to his original right against the pledgor, a right or interest in the thing itself which

Joint action may be maintained against the pledgor and a purchaser from him in violation of the pledgee's rights. Ensley Lumber Co. *v.* Lewis, 121 Ala. 94, 25 So. 729.

49. Union Pac. R. Co. *v.* Schiff, 78 Fed. 216, as by a wrongful repledge of the property.

50. Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269.

51. *Kentucky.*— Kinnaird *v.* Dudderrar, 54 S. W. 847, 21 Ky. L. Rep. 1230.

Massachusetts.— Bartlett *v.* Johnson, 9 Allen 530.

Nebraska.— Ætna Ins. Co. *v.* Wilcox Bank, 48 Nebr. 544, 67 N. W. 449.

Pennsylvania.— Caven *v.* Harsh, 186 Pa. St. 132, 40 Atl. 321, holding that where a debtor gives his creditor a judgment note, under agreement that execution is to be confined to certain property, and after judgment and execution on the property mentioned, the debtor assigns collateral to his creditor as security for the debt, the creditor may hold and enforce the collateral for the remainder of the debt, although the judgment is declared satisfied.

United States.— Union Bank *v.* Laird, 2 Wheat. 390, 4 L. ed. 269.

See 40 Cent. Dig. tit. "Pledges," § 46.

But where a note given as collateral is itself accompanied by other notes as collateral security for it, and the pledgee collects enough from these to discharge the first collateral note, it will be considered paid and his lien on it lost. Ober, etc., Co. *v.* Drane, 106 Ga. 406, 32 S. E. 371.

Where a note executed by an officer of a corporation is invalid because of non-conformity with the charter of the corporation, a pledge executed along with it to secure its payment would not lapse for want of a principal obligation, but would remain in full force and effect as security for the return of the money received in the transaction. Blanc *v.* Germania Nat. Bank, 114 La. 739, 38 So. 537.

52. Sather Banking Co. *v.* Hartwig, 23 Misc. (N. Y.) 89, 51 N. Y. Suppl. 677; Swasey *v.* North Carolina R. Co., 23 Fed. Cas. No. 13,679, 1 Hughes 17, 71 N. C. 571.

53. Sather Banking Co. *v.* Hartwig, 23 Misc. (N. Y.) 89, 51 N. Y. Suppl. 677; Swasey *v.* North Carolina R. Co., 23 Fed. Cas. No. 13,679, 1 Hughes 17, 71 N. C. 571.

54. Shinkle *v.* Vickery, 130 Fed. 424, 64 C. C. A. 626 [*affirming* 117 Fed. 916]. *Compare* Hebblethwaite *v.* Flint, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43.

Renewal note.— Mechanicks Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; St. Johnsville First Nat. Bank *v.* Jones, 37 Misc. (N. Y.) 68, 74 N. Y. Suppl. 772; Davis *v.* Bean, 78 Fed. 41.

55. Clark *v.* Dearborn, 103 Mass. 335.

56. Cost of collection.— It has been held that where the pledgee is compelled to bring suit to collect the collateral, he is entitled to pay the attorney's fee out of the proceeds (Hanover Nat. Bank *v.* Brown, (Tenn. Ch. App. 1899) 53 S. W. 206) and also that he has not such right (Commercial Sav. Bank *v.* Hornberger, 140 Cal. 16, 73 Pac. 625), but may be specially stipulated for (Union Nat. Bank *v.* Forsyth, 50 La. Ann. 770, 23 So. 917).

57. See *infra*, III, B, 2, c.

58. Newman *v.* Greenville Bank, 67 Miss. 770, 7 So. 403; Kitchin *v.* Grandy, 101 N. C. 86, 7 S. E. 663. See also *infra*, III, B, 2, a.

59. Gaty *v.* Holliday, 8 Mo. App. 118; Meredith Village Sav. Bank *v.* Marshall, 68 N. H. 417, 44 Atl. 526 (holding that when the dividends are paid to the pledgor because the stock is in his name on the books of the corporation, he receives them as trustee of the pledgee and is answerable to the pledgee for them in a suit for their recovery); Herrman *v.* Maxwell, 47 N. Y. Super. Ct. 347.

60. Androscoggin R. Co. *v.* Auburn Bank, 48 Me. 335.

61. Brotherton *v.* Anderson, 27 Tex. Civ. App. 587, 66 S. W. 682. See *infra*, VI, B, 2.

is the subject of pledge,[62] he is entitled to priority, to the extent of his lien,[63] over subsequent purchasers,[64] pledgees,[65] mortgagees,[66] or other creditors [67] of the pledgor, and also over a subsequent assignee for the benefit of creditors,[68] one claiming under a subsequent levy of an attachment,[69] or execution [70] or over a purchaser at an execution sale.[71]

6. Pledgees as Bona Fide Purchasers — a. In General. Upon a question of priority, the pledgee stands on the same footing as a purchaser; [72] and is deemed a holder for value to the extent of his lien,[73] therefore, where he receives possession of the property from the pledgor in good faith,[74] the pledgee takes priority over a

62. Wiggin *v.* Dorr, 29 Fed. Cas. No. 17,625, 3 Sumn. 410.

63. Crisp *v.* Miller, 5 Heisk. (Tenn.) 697.

64. Crisp *v.* Miller, 5 Heisk. (Tenn.) 697.

65. Schoyer *v.* Leif, 11 Colo. App. 49, 52 Pac. 416; Scribner *v.* Taggart, 123 Iowa 321, 98 N. W. 798; Block *v.* Oliver, 102 Ky. 269, 43 S. W. 238, 19 Ky. L. Rep. 1278; Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun (N. Y.) 213, 33 N. Y. Suppl. 252.

Where one of three single bills, secured by one mortgage, is indorsed, and pledged by the payee to secure his note, and the other two are delivered to the pledgee, but not indorsed, and the proceeds of the mortgage are insufficient to pay all in full, the bill so indorsed is entitled to priority of payment. Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33.

As between two creditors to whom the debtor has contracted to pledge the property, the one in possession will prevail. Nobles *v.* Christian, etc., Grocery Co., 113 Ala. 220, 20 So. 961.

66. Cooper *v.* Ray, 47 Ill. 53; Sanders *v.* Davis, 13 B. Mon. (Ky.) 432.

67. *Alabama.*— Selma Bridge Co. *v.* Harris, 132 Ala. 179, 31 So. 508.

Massachusetts.— Hathaway *v.* Haynes, 124 Mass. 311.

Pennsylvania.— Wells *v.* Archer, 10 Serg. & R. 412, 13 Am. Dec. 682.

South Carolina.— Garvin *v.* State Bank, 7 S. C. 266.

Tennessee.— Hanover Nat. Bank *v.* Brown, (Ch. App. 1899) 53 S. W. 206.

United States.— Wiggin *v.* Dorr, 29 Fed. Cas. No. 17,625, 3 Sumn. 410.

See 40 Cent. Dig. tit. "Pledges," § 47.

68. Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; Walton, etc., Co. *v.* Davis, 114 N. C. 104, 19 S. E. 159; Gammons *v.* Holman, 11 Oreg. 284, 3 Pac. 676, holding that the pledgee of goods *in transitu* is entitled to priority over a general assignee of the owner for the benefit of creditors, where the contract of pledge was made before the assignment for the benefit of creditors, but possession of the goods was not taken until afterward.

69. *Kentucky.*— Anheuser-Busch Brewing Assoc. *v.* Daviess County Distilling Co., 49 S. W. 541, 20 Ky. L. Rep. 1522, holding that a pledgee of a warehouse receipt has a lien prior to that of a creditor of the owner, who attached them in the hands of the distilling company which issued them, to which company they had been delivered by the pledgee for verification.

New Hampshire.— Danforth *v.* Denny, 25 N. H. 155.

New York.— Sather Banking Co. *v.* Hartwig, 23 Misc. 89, 51 N. Y. Suppl. 677.

Tennessee.— McClung *v.* Colwell, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. Rep. 961, where certificates of stock were attached which had been temporarily returned by the pledgee to the pledgor to have them exchanged for stock in a new corporation.

West Virginia.— Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408.

See 40 Cent. Dig. tit. "Pledges," § 47.

70. Smith *v.* Jennings, 74 Ga. 551; Alderton *v.* Conger, 78 Ill. App. 533; Rice *v.* Gilbert, 72 Ill. App. 649; Reeves *v.* Sebern, 16 Iowa 234, 85 Am. Dec. 513.

As to anterior creditors see Great Eastern R. Co. *v.* Lambe, 21 Can. Sup. Ct. 431.

71. McClintock *v.* Kansas City Cent. Bank, 120 Mo. 127, 24 S. W. 1052.

72. Smith *v.* Jennings, 74 Ga. 551; Lewis *v.* Stevenson, 2 Hall (N. Y.) 76.

Consideration of pledge see *supra*, II, A, 1.

73. Saylor *v.* Daniels, 37 Ill. 331, 87 Am. Dec. 250; Clow *v.* Yount, 93 Ill. App. 112; Just *v.* State Sav. Bank, 132 Mich. 600, 94 N. W. 200; Connecticut Trust, etc., Safe-Deposit Co. *v.* Fletcher, 61 Nebr. 166, 85 N. W. 59; Maybin *v.* Kirby, 4 Rich. Eq. (S. C.) 105.

Where a debtor has pledged different securities with a creditor as collateral for different debts, the pledgee is a holder for value only to the extent of particular loans made upon particular securities. Smith *v.* Savin, 9 N. Y. Suppl. 106.

Where the pledge is received for a loan at a usurious rate of interest, the pledgee is a holder for value to the extent of the amount legally due. Memphis Bethel *v.* Continental Nat. Bank, 101 Tenn. 130, 45 S. W. 1072; Fischer *v.* Lee, 98 Va. 159, 35 S. E. 441; Oates *v.* Montgomery First Nat. Bank, 100 U. S. 239, 25 L. ed. 580. See COMMERCIAL PAPER, 7 Cyc. 930 *et seq.*; and CORPORATIONS, 10 Cyc. 1173.

74. Rose *v.* Coble, 61 N. C. 517. *Compare* Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425 [*affirmed* in 190 N. Y. 545, 83 N. E. 1132].

The validity of a pledge is not affected by any fraudulent purpose of the pledgor to which the pledgee is not a party. Rose *v.* Coble, 61 N. C. 517. See FRAUDULENT CONVEYANCES, 20 Cyc. 653. But see Newton *v.* Cardwell Blue Print, etc., Co., 41 Colo. 492, 92 Pac. 914, holding that where a bailee of

prior unrecorded mortgage,[75] or lien,[76] or over the right of an unpaid seller who has parted with possession of the property.[77] Where property has been pledged without authority from the real owner, the pledgee will prevail over the real owner if the latter has put it in the power of the debtor to make a fraudulent pledge of the property;[78] but the mere possession of property, as for safe-keeping, without other evidence of ownership, or authority from the true owner to sell or pledge, will not give the pledgee of such person in possession a lien against the true owner,[79]

goods for safe-keeping pledges them with intent to convert the proceeds to his own use, he is guilty of larceny, and the pledgee acquires no title as against the owner, although he dealt *bona fide* with the pledgor.

75. Lewis *v.* Stevenson, 2 Hall (N. Y.) 76.

But not if the pledgee has reason to believe the mortgagor or his agent has not the right to make the pledge. Lewis *v.* Stevenson, 2 Hall (N. Y.) 76.

76. Ingles Land Co. *v.* Knoxville F. Ins. Co., (Tenn. Ch. App. 1899) 53 S. W. 1111.

77. Bankers' Nat. Bank *v.* Western Union Cold Storage Co., 73 Ill. App. 410; Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270; Hoyt *v.* Baker, 15 Abb. Pr. N. S. (N. Y.) 405; Fischer *v.* Lee, 98 Va. 159, 35 S. E. 441.

Even though the terms of the sale were cash.— Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

Pledgee without notice takes priority over a vendor in a conditional sale, where the conditional sale has not been recorded as required by statute (Pittsburgh Locomotive, etc., Works *v.* State Nat. Bank, 19 Fed. Cas. No. 11,198); or over a vendor who on account of the fraud of the vendee or other reason has a right to rescind the sale (Ohio, etc., R. Co. *v.* Kerr, 49 Ill. 458; Williams *v.* Birch, 6 Bosw. (N. Y.) 299 [*affirmed* in 36 N. Y. 319, 2 Transcr. App. 133]).

The unpaid seller's right of stoppage in transitu upon the insolvency of the buyer is subject to the rights of a bank to whom a bill of lading for the goods has been delivered as security for the discount of a draft on the consignee. Memphis First Nat. Bank *v.* Pettit, 9 Heisk. (Tenn.) 447.

But where the pledgor obtained possession of the goods from the vendor by delivery of a check which he had no reason to believe would be paid, it was held that the vendor should prevail over the pledgee. Goodwin *v.* Massachusetts L. & T. Co., 152 Mass. 189, 25 N. E. 100.

78. *California.*— Brittan *v.* Oakland Sav. Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; Shaffer *v.* Lacy, 121 Cal. 574, 54 Pac. 72; Code Civ. Proc. § 2991.

Iowa.— Plummer *v.* People's Nat. Bank, 65 Iowa 405, 21 N. W. 699.

Massachusetts.— Jarvis *v.* Rogers, 13 Mass. 105.

New York.— Le Marchant *v.* Moore, 150 N. Y. 209, 44 N. E. 770; McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Ontario *v.* Hill, 31 N. Y. App. Div. 324, 52 N. Y. Suppl. 328; St. Johnsville First Nat. Bank *v.* Jones, 37 Misc. 68, 74 N. Y. Suppl. 772.

Pennsylvania.— McManus *v.* Laughlin, 186 Pa. St. 498, 40 Atl. 992; Gallaher *v.* Cohen, 1 Browne 43 (holding that if a mechanic having possession of a chattel for the purpose of repairing it pledge it, the owner cannot maintain trover against the pledgee); Henke's Appeal, 22 Wkly. Notes Cas. 49.

Texas.— Stone *v.* Brown, 54 Tex. 330; May *v.* Martin, 32 Tex. Civ. App. 132, 73 S. W. 840.

West Virginia.—Patton *v.* Joliff, 44 W. Va. 88, 28 S. E. 740.

United States.— Gregory *v.* Boston Safe-Deposit, etc., Co., 36 Fed. 408.

Canada.— Young *v.* Mac Nider, 25 Can. Sup. Ct. 272.

See 40 Cent. Dig. tit. "Pledges," § 48.

Nor is the lien lost by the pledgee's failure to apply to the debt other funds of the pledgor in his hands. Henke's Appeal, 22 Wkly. Notes Cas. (Pa.) 49. But see Hildeburn *v.* Nathans, 1 Phila. (Pa.) 567, holding that evidence is necessary to show approval or notification of the pledge by the owner.

Where property of another is wrongfully pledged, the owner is entitled to have the pledgee first apply to the debt other property of the pledgor held by him. Le Marchant *v.* Moore, 150 N. Y. 209, 44 N. E. 770; Union Pac. R. Co. *v.* Schiff, 78 Fed. 216.

Pledge by broker having apparent ownership of stocks of customers see FACTORS AND BROKERS, 19 Cyc. 298. *Compare* Newton *v.* Cantwell Blue Print, etc., Co., 41 Colo. 492, 92 Pac. 914. A firm of stockbrokers, who held stock belonging to a customer as collateral security for a balance due on the purchase-price, hypothecated it as collateral security for a call loan; the pledgee accepting it in good faith without knowledge of the true owner. Subsequently, the loan being called and the firm being unable to pay it, one of their creditors undertook to borrow the money elsewhere. By hypothecating a part of the securities given as security for the first loan, he obtained part of the required sum and advanced the rest himself, taking as security the stock belonging to the customer, which he knew did not belong to the firm. It was held that his contract was entirely separate from the contract with the former pledgees, and he did not succeed to their rights as assignee. Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425.

79. *Alabama.*— Jones *v.* Logan, 50 Ala. 493.

California.— Shaffer *v.* Lacy, 121 Cal. 574, 54 Pac. 72.

Massachusetts.— Goodwin *v.* Massachusetts L. & T. Co., 152 Mass. 189, 25 N. E. 100.

and in any event the rights of the pledgee are subject to the rights of the owner,[80] and to outstanding equities against the pledgor's interest in the property,[81] of which he had notice at the time of the pledge.[82] Where the pledgor has wrongfully obtained possession of the property and delivered it to a subsequent pledgee, the prior pledgee has the right to require that the second pledgee shall first make application on his debt of other property of the pledgor in his hands.[83]

b. Pledgees of Negotiable Instruments.[84] Where a pledgee of money,[85] or of a negotiable instrument before maturity,[86] payable to the order of the pledgor,[87] or to bearer, receives it in good faith, he is a holder for value within the terms of the law merchant,[88] and is therefore entitled, as against the real owner, to a lien on the instrument to the extent of his debt [89] even though the person who pledged

New York.— McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

West Virginia.—Patton *v.* Joliff, 44 W. Va. 88, 28 S. E. 740.

Authority to an agent to sell or discount a note does not authorize a pledge of it. Haynes *v.* Foster, 2 Cromp. & M. 237, 3 L. J. Exch. 153, 4 Tyrw. 65; Bengal Bank *v.* McLeod, 13 Jur. 945, 5 Moore Indian App. 1, 18 Eng. Reprint 795, 7 Moore P. C. 35, 13 Eng. Reprint 792.

Upon subsequent notice to the pledgee of the rights of the owner, the pledgee must first apply to the satisfaction of his debt any other property of the pledgor held by him as security. Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338.

80. Morningstar *v.* Sterne, 124 Ala. 512, 27 So. 430; Chicago Title, etc., Co. *v.* Brugger, 196 Ill. 96, 63 N. E. 637 [*affirming* 95 Ill. App. 405] (holding that where the owner of a note and trust deed, having indorsement thereon that he is the holder, places them in the hands of an agent to collect the interest, and the agent deposits them as collateral security, the indorsement is notice to the pledgee of such ownership); Perth Amboy Mut. Loan Homestead, etc., Assoc. *v.* Chapman, 178 N. Y. 558, 70 N. E. 1104 [*affirming* 80 N. Y. App. Div. 556, 81 N. Y. Suppl. 38]; Westinghouse *v.* German Nat. Bank, 188 Pa. St. 630, 41 Atl. 734; Allegheny First Nat. Bank's Appeal, 19 Wkly. Notes Cas. (Pa.) 309.

Where pledgee takes from a known trustee, he is put on notice to examine the trust instrument itself. Paterson First Nat. Bank *v.* National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139.

Where an agent for an estate acting in good faith, although without authority, pledged property of the estate for a loan, the pledgee cannot be held liable for conversion of the property received without a return to him of the property bought with the proceeds of the loan. Freeman *v.* Bristol Sav. Bank, 76 Conn. 212, 56 Atl. 527.

81. Atlanta Sav. Bank *v.* Downing, 122 Ga. 692, 51 S. E. 38; Lyman *v.* Randolph State Bank, 179 N. Y. 577, 72 N. E. 1145 [*affirming* 81 N. Y. App. Div. 367, 80 N. Y. Suppl. 901]; Major *v.* Stone's River Nat. Bank, (Tenn. Ch. App. 1899) 64 S. W. 352; Zeis *v.* Potter, 105 Fed. 671, 44 C. C. A. 665.

Where in pursuance of an agreement to advance money as needed upon a pledge of bonds, the pledgee took the last ten of the bonds, with notice that a third party was entitled by contract with the pledgor to the proceeds of five of the bonds, the pledgee takes subject to such contract. Columbia Finance, etc., Co. *v.* Mercer, 57 S. W. 787, 22 Ky. L. Rep. 470.

82. Memphis Bethel *v.* Continental Nat. Bank, 101 Tenn. 130, 45 S. W. 1072; Fischer *v.* Lee, 98 Va. 159, 35 S. E. 441. *Compare* Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425.

The fact that the loan was at a usurious rate of interest is not sufficient in itself to put the pledgee on inquiry of outstanding rights in others. Memphis Bethel *v.* Continental Nat. Bank, 101 Tenn. 130, 45 S. W. 1072; Fischer *v.* Lee, 98 Va. 159, 35 S. E. 441.

What constitutes sufficient notice see Fischer *v.* Lee, 98 Va. 159, 35 S. E. 441.

83. Hazard *v.* Fiske, 83 N. Y. 287 [*affirming* 18 Hun 277].

84. See COMMERCIAL PAPER, 7 Cyc. 930 *et seq.*

85. Spaulding *v.* Kendrick, 172 Mass. 71, 51 N. E. 453.

86. See Greenwell *v.* Hayden, 78 Ky. 332, 39 Am. Rep. 234; Hutchinson *v.* Rice, 105 La. 474, 29 So. 898; Stern *v.* Germania Nat. Bank, 34 La. Ann. 1119.

Pledgee of a negotiable instrument after maturity takes subject to a defect in the title of the pledgor (Greenwell *v.* Haydon, 78 Ky. 332, 39 Am. Rep. 234; Stern *v.* Germania Nat. Bank, 34 La. Ann. 1119); and may claim no greater rights than the pledgor had (Hutchinson *v.* Rice, 105 La. 474, 29 So. 898).

Pledgees as bona fide purchasers of bills of exchange and promissory notes see COMMERCIAL PAPER, 7 Cyc. 930.

87. May *v.* Martin, 32 Tex. Civ. App. 132, 73 S. W. 840.

88. Clow *v.* Yount, 93 Ill. App. 112.

89. Bancroft *v.* McKnight, 11 Rich. (S. C.) 663 (holding that where one having possession of a promissory note payable to bearer surreptitiously transfers it to a *bona fide* holder as collateral security for advances then and thereafter to be made, such holder, having advanced the full amount of the note before notice, may recover it from the drawer, although some of the advances were made after the note fell due); Hansen *v.* Hoffman, 5 Wash. 792, 32 Pac. 747.

it to him had no title or interest in it,[90] as a finder,[91] or a thief.[92] The pledgee's possession of negotiable instruments payable to bearer is *prima facie* evidence of title, and creates a presumption that he acquired them in good faith, for value, without notice, and in the usual course of business;[93] but upon evidence that the pledgor's possession was obtained from the owner through fraud,[94] or that they were fraudulently put in circulation,[95] the burden is upon the pledgee to prove that he took them in good faith, for value, before maturity, without notice, and in the usual course of business. So the pledgee of a stock certificate with a written transfer and power of attorney thereon in blank, signed by the person to whom the certificate was issued [96] or his legal representatives,[97] is recognized as a *bona fide* purchaser for value; but not where the certificates show on their face that the pledgor holds them as trustee.[98] The pledgee of a note or a mortgage takes subject to equities between the maker or mortgagor of which he had notice at the time of the pledge,[99] although not to those of which he had no notice,[1] even though he may receive such notice later.

c. Pledge as Security For Preëxisting Debt.[2] In some jurisdictions, a pledgee who receives property in good faith as security for a preëxisting debt is recognized as a *bona fide* purchaser or holder for value,[3] even though there is no other consideration for the pledge[4] and the pledgor's title to the property is voidable at the option of a third party;[5] but in other jurisdictions to constitute the pledgee a holder for value, it is not sufficient that he receive the property as security for a preëxisting debt;[6] but he must part with something of value, or grant the debtor

90. Baldwin *v.* Ely, 9 How. (U. S.) 580, 13 L. ed. 266.

91. Baldwin *v.* Ely, 9 How. (U. S.) 580, 13 L. ed. 266, pledge of treasury certificates by the finder, where they had been indorsed by the holder before loss.

92. Manhattan Sav. Inst. *v.* New York Nat. Exch. Bank, 53 N. Y. App. Div. 635, 65 N. Y. Suppl. 757 [*affirmed* in 170 N. Y. 58, 62 N. E. 1079, 88 Am. St. Rep. 640].

93. Kittler *v.* Studabaker, 113 Ill. App. 342, 352; Bancroft *v.* McKnight, 11 Rich. (S. C.) 663.

94. Kittler *v.* Studabaker, 113 Ill. App. 342.

95. National Revere Bank *v.* Morse, 163 Mass. 383, 40 N. E. 180.

96. National Safe Deposit, etc., Co. *v.* Gray, 12 App. Cas. (D. C.) 276; Brady *v.* Mt. Morris Bank, 65 N. Y. App. Div. 212, 73 N. Y. Suppl. 532; Smith *v.* Savin, 9 N. Y. Suppl. 106.

Where stock held by a broker as marginal security under a transfer from the owner absolute on its face is pledged by him for his own debt, his pledgee has a lien on the stock for the amount advanced as against the owner. Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338; Whitlock *v.* Seaboard Nat. Bank, 29 Misc. (N. Y.) 84, 60 N. Y. Suppl. 611.

97. Henke's Appeal, 22 Wkly. Notes Cas. (Pa.) 49.

98. Paterson First Nat. Bank *v.* National Broadway Bank, 22 N. Y. App. Div. 24, 47 N. Y. Suppl. 880.

Nor is the pledgee excused from inquiry by the fact that the stock had been before pledged with the knowledge of the *cestui que trust*, and was then in pledge to another. Clemens *v.* Hecksher, 185 Pa. St. 476, 40 Atl. 80.

99. Blakely *v.* Twining, 69 Wis. 238, 34 N. W. 132.

1. Dix *v.* Tully, 14 La. Ann. 456; King *v.* Gayoso, 8 Mart. N. S. (La.) 370; Blakely *v.* Twining, 69 Wis. 238, 34 N. W. 132.

2. See COMMERCIAL PAPER, 7 Cyc. 932 *et seq.*

3. *Colorado.*— Haraszthy *v.* Shandel, 1 Colo. App. 137, 27 Pac. 876.

Illinois.— Saylor *v.* Daniels, 37 Ill. 331, 87 Am. Dec. 250; Manning *v.* McClure, 36 Ill. 490; Mayo *v.* Moore, 28 Ill. 428.

Indiana.— Straughan *v.* Fairchild, 80 Ind. 598.

Maryland.— Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Nevada.— Fair *v.* Howard, 6 Nev. 304.

New Jersey.— Baker *v.* Guarantee Trust, etc., Co., (Ch. 1895) 31 Atl. 174; Armour *v.* Michael, 36 N. J. L. 92; Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

South Carolina.— Charleston Bank *v.* Frost, 11 Rich. 657.

Vermont.— Atkinson *v.* Brooks, 26 Vt. 569, 62 Am. Dec. 592.

United States.— Brooklyn City, etc., R. Co. *v.* New York Nat. Bank of Republic, 102 U. S. 14, 26 L. ed. 61; Oates *v.* Montgomery First Nat. Bank, 100 U. S. 239, 25 L. ed. 580; Swift *v.* Tyson, 16 Pet. 1, 10 L. ed. 865.

See 40 Cent. Dig. tit. "Pledges," § 49.

4. Charleston Bank *v.* Frost, 11 Rich. (S. C.) 657.

5. Haraszthy *v.* Shandel, 1 Colo. App. 137, 27 Pac. 876.

6. *Alabama.*— Fenouille *v.* Hamilton, 35 Ala. 319.

Iowa.— Ruddick *v.* Lloyd, 15 Iowa 441, 83 Am. Dec. 423.

Kentucky.— Alexander *v.* Springfield Bank, 2 Metc. 534; Lee *v.* Snead, 1 Metc. 628, 71

some indulgence, upon the faith of the pledge. In at least one jurisdiction, the pledgee of a negotiable instrument before maturity as security for a preëxisting debt is recognized as a holder for value,[7] but not the pledgee of a chattel.[8] All the cases recognize the lien of the pledgee for a preëxisting debt as against subsequent attaching creditors of the pledgor.[9]

d. Notice to Pledgee. A pledgee who receives property as security takes the pledged property subject to all outstanding rights of other persons against the pledgor of which he has notice.[10] As to what does or does not constitute notice, aside from actual notice,[11] and constructive notice of public records,[12] it is sufficient that the pledgee has knowledge of such facts as would put a reasonably prudent business man on inquiry that would lead to actual notice.[13] Where the property is pledged by one known to the pledgee to hold in a fiduciary capacity,[14]

Am. Dec. 494; Schuster *v.* Jones, 58 S. W. 595, 22 Ky. L. Rep. 568.

Maine.— Homes *v.* Smyth, 4 Me. 177, 33 Am. Dec. 650.

Massachusetts.— Goodwin *v.* Massachusetts L. & T. Co., 152 Mass. 189, 25 N. E. 100.

Missouri.— Goodman *v.* Simonds, 19 Mo. 106.

New York.— Weaver *v.* Barden, 49 N. Y. 286; Stalker *v.* McDonald, 6 Hill 93, 40 Am. Dec. 389; Coddington *v.* Bay, 20 Johns. 637, 11 Am. Dec. 342 [*affirming* 5 Johns. Ch. 54, 9 Am. Dec. 268].

Ohio.— Pitts *v.* Fogelsong, 37 Ohio St. 676, 41 Am. Rep. 540; Copeland *v.* Manton, 22 Ohio St. 398; Lewis *v.* Anderson, 20 Ohio St. 281; Smith *v.* Worman, 19 Ohio St. 145; Cleveland *v.* State Bank, 16 Ohio St. 236, 88 Am. Dec. 445; Reznor *v.* Hatch, 7 Ohio St. 248; Roxborough *v.* Messick, 6 Ohio St. 448, 67 Am. Dec. 346.

Pennsylvania.— Dovey's Appeal, 97 Pa. St. 153; Ashton's Appeal, 73 Pa. St. 153; Garrard *v.* Pittsburgh, etc., R. Co., 29 Pa. St. 154; Lord *v.* Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728; Kirkpatrick *v.* Muirhead, 16 Pa. St. 117; Depeau *v.* Waddington, 6 Whart. 220, 36 Am. Dec. 216; Petrie *v.* Clark, 11 Serg. & R. 377, 14 Am. Dec. 636; Linnard's Appeal, 2 Pa. Cas. 195, 3 Atl. 840.

See 40 Cent. Dig. tit. "Pledges," § 49.

7. National Revere Bank *v.* Morse, 163 Mass. 383, 40 N. E. 180; Goodwin *v.* Massachusetts L. & T. Co., 152 Mass. 189, 25 N. E. 100.

8. Goodwin *v.* Massachusetts L. & T. Co., 152 Mass. 189, 25 N. E. 100.

9. Greenbaum *v.* Burnes, 13 Ky. L. Rep. 267; Davis *v.* Carson, 69 Mo. 609. See also cases cited *supra*, notes 3–9.

10. Kellogg *v.* Tompson, 142 Mass. 76, 6 N. E. 860.

Duty to make inquiry.— One who receives the pledge of collateral security is not bound to inquire as to any restrictions which may have been placed upon its use. Naef *v.* Potter, 127 Ill. App. 106 [*affirmed* in 226 Ill. 628, 80 N. E. 1084].

11. Kellogg *v.* Tompson, 142 Mass. 76, 6 N. E. 860.

12. Strong *v.* Jackson, 123 Mass. 60, 25 Am. Rep. 19.

13. Warren *v.* Barnett, 83 Ala. 208, 3 So. 609 (holding that a merchant who receives from a tenant notes of a subtenant takes subject to the landlord's legal lien); Jones *v.* Farley, 6 Me. 226 (holding that the possession by an agent of a negotiable note payable to his principal is sufficient to put the pledgee on notice as to the agent's power to pledge the note); Taliaferro *v.* Baltimore First Nat. Bank, 71 Md. 200, 17 Atl. 1036 (holding that knowledge of a power to sell does not justify the pledgee in assuming that the holder has power to pledge).

Notice of the rights of one person is notice of the rights of others claiming through him. — Jones *v.* Quinnipiack Bank, 29 Conn. 25.

The fact that the pledgor of a note goes with the pledgee to the bank and requests a loan to the pledgor on the note is not sufficient notice to the bank of the pledgee's interest, and the bank is entitled to hold the note as against him for both that and subsequent loans on it. Voorhees *v.* National Citizens' Bank, 15 Abb. Pr. N. S. (N. Y.) 13.

Where a pledgee received notes as security for a temporary loan, with an option upon its payment, to retain them for other indebtedness, he is charged with notice of all facts known to him at the time he exercised the option to retain the notes for the additional indebtedness. Jones *v.* Quinnipiack Bank, 29 Conn. 25.

14. McConnell *v.* Hodson, 7 Ill. 640; Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Paterson First Nat. Bank *v.* National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139 [*modifying* 22 N. Y. App. Div. 24, 47 N. Y. Suppl. 880]; Appeal of Allegheny First Nat. Bank, 19 Wkly. Notes Cas. (Pa.) 309.

Treasurer of corporation.— Certain corporate bonds, payable to bearer and duly certified by the trustee to have been properly issued, came into the hands of the corporation's treasurer, pursuant to certain reorganization contracts between the person controlling the corporation and himself, after which they were pledged by the treasurer to a bank to secure debts of his firm. It was held that, in making such pledge, the treasurer acted personally, and not as an officer of the corporation, and, having possession of the bonds with all the *indicia* of title, the bank was not charged with notice of any infirmity therein because it had knowledge of the treasurer's official connection with the corporation.

as for instance an executor,[15] guardian,[16] or a trustee,[17] he takes at his peril and with constructive notice of the terms of the trust. But knowledge that the pledgor obtained the subject of the pledge for an inadequate consideration is not alone sufficient to charge the pledgee with notice of defective title.[18]

7. Waiver or Loss of Lien — a. Express Waiver. The lien of the pledgee may be released by the express agreement, for a consideration,[19] of the pledgee to that effect.[20]

b. Implied Waiver. A sale of the pledged property and delivery to the purchaser with the pledgee's consent;[21] a confusion by the pledgee of claims secured by a pledge with others unsecured, so that it is impossible to tell the amount for which he has a lien;[22] any act of the pledgee, short of voluntary release of the pledge, by which he acquiesces in the acquirement by third parties of an interest in the property;[23] or by which he disregards his rights under the pledge and intentionally seeks to obtain a lien on the property by other means for himself,[24] or his assignee,[25] will be construed as an implied waiver of his lien. But the pledgee's

Farmers' L. & T. Co. *v.* Madison Mfg. Co., 153 Fed. 310.

15. Allegheny First Nat. Bank's Appeal, 19 Wkly. Notes Cas. (Pa.) 309.

16. McConnell *v.* Hodson, 7 Ill. 640.

Right of guardian to pledge ward's property see Guardian and Ward, 21 Cyc. 85.

17. Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Paterson First Nat. Bank *v.* National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139 [*modifying* 22 N. Y. App. Div. 24, 47 N. Y. Suppl. 880].

18. Briggs *v.* Rice, 130 Mass. 50, where it appeared that a note and mortgage for fifteen hundred dollars had been absolutely assigned for three hundred dollars, when in fact the transaction was a pledge.

19. Upon a failure of consideration while the contract is executory the pledgee may rescind. Taylor *v.* Judsonia Mercantile Co., 56 Ark. 461, 19 S. W. 1065.

20. Dyott's Estate, 2 Watts & S. (Pa.) 463 (holding that the pledgee may release his pledge without the consent of the other creditors of the pledgor, and not thereby lose his resort against the debtor's property); Arendale *v.* Morgan, 5 Sneed (Tenn.) 703. Where defendant, a loan association, released a deed of trust on real estate, given as security for the payment of a loan, and accepted a bond of indemnity conditioned that the principals would continue to pay the dues and interest on the loan until certain shares of stock, held by them in defendant company and pledged to the payment of the loan, matured, such release neither paid the amount of the loan nor operated as a release of defendant's lien on the stock. Wolff *v.* Famous Mut. Sav. Fund, etc., Assoc., 67 Mo. App. 678.

Where the agreement has been procured by fraud, the pledgee may reassert his claim to the property against any one privy to the fraud. Easton *v.* Hodges, 18 Fed. 677.

21. Thalmann *v.* Capron Knitting Co., 100 N. Y. App. Div. 247, 91 N. Y. Suppl. 520 [*affirmed* in 182 N. Y. 525, 74 N. E. 1126]; Cuero First Nat. Bank *v.* San Antonio, etc., R. Co., 97 Tex. 201, 77 S. W. 410 [*modifying* (Civ. App. 1903) 72 S. W. 1033].

22. Union Trust Co. *v.* Trumbull, 137 Ill. 146, 27 N. E. 24.

23. McDonald *v.* Grant, 34 N. Y. Suppl. 988 (holding that where a pledgee holding bonds as security for three notes, delivered one of the notes together with several of the bonds, as security for his own note, he thereby apportioned his security, and his pledgor might redeem the bonds assigned by the payment of the note they accompanied); Herrmann *v.* Central Car-Trust Co., 95 Fed. 55 (holding that a pledgee of bonds as secondary security, to make good any deficiency there may be after other security has been exhausted, by whose act or with whose consent the primary security has been rendered unavailable for payment of the debt, is estopped from claiming that the contingency will ever arise to entitle him to subject the pledge to its payment).

No waiver where upon a seizure of the property under legal process the pledgee claimed ownership and objected to the seizure, although he did not definitely assert his lien. Gunsell *v.* McDonnell, 67 Iowa 521, 25 N. W. 759.

Bringing suit upon bills of exchange, which the pledgee has been induced through fraud to accept in place of the pledged property, before obtaining information enabling him to trace the goods, does not constitute a waiver of lien on the goods. Easton *v.* Hodges, 18 Fed. 677.

24. Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30; Valley Nat. Bank *v.* Jackaway, 80 Iowa 512, 45 N. W. 881.

But a purchase of the pledged property by the pledgee at a sale which was ordered under a special execution will not constitute a waiver of his special lien by reason of the clerk's mistake in issuing a general execution. Valley Nat. Bank *v.* Jackaway, 80 Iowa 512, 45 N. W. 881.

A pledgee does not forfeit his lien by unsuccessfully contending that the equity of redemption has been extinguished by contract or by a sale under a right as pledgee. Wilkins *v.* Redding, 70 Nebr. 182, 97 N. W. 238.

25. Whitaker *v.* Sumner, 20 Pick. (Mass.) 399.

acceptance of the pledgor's assignment or surrender [26] for the benefit of creditors does not divest him of his lien under the contract of pledge,[27] nor a release of the principal obligation, where his rights to the pledged property are expressly reserved.[28] A tender of the amount due on the obligation the pledge is given to secure, if refused by the pledgee,[29] extinguishes his lien.

c. Resort to Other Remedy.[30] The lien of a pledge is not waived by a suit on the original obligation,[31] nor by attempting to file his claim with the pledgor's assignee in bankruptcy,[32] nor by an invalid private sale of the pledged property,[33] nor by an attachment or execution levied on the property at the instance of the pledgee for the purpose of enforcing his lien.[34]

d. Loss of Possession — (i) *In General.* Since the lien of the pledgee is dependent upon his possession of the pledged property,[35] his abandonment of the property,[36] or his voluntary relinquishment of its possession to the pledgor,[37] the

26. Blouin *v.* Hart, 30 La. Ann. 714.

27. **Effect of pledge by a debtor before insolvency** see INSOLVENCY, 22 Cyc. 1293 note 47.

28. Beacon Trust Co. *v.* Robbins, 173 Mass. 261, 53 N. E. 868.

29. Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30, holding that where a tender is made to a pledgee, who makes no objection to the amount of it, but does not surrender the pledge or accept the tender, the lien is extinguished, and his possession becomes a wrongful conversion, even though the tender is in fact less than the amount due the pledgee.

After a repledge of the property by the pledgee and a sale of the property by his creditors, tender by the original owner comes too late to discharge the lien of the second pledgee. Van Woert *v.* Olmstead, 71 N. Y. Suppl. 431.

But a refusal to receive payment of the debt upon tender does not discharge the lien upon the pledged property unless such tender is in good faith and is declined without just or reasonable cause. Malone *v.* Wright, 90 Tex. 50, 36 S. W. 420.

30. **Seeking other lien** see *supra*, text and notes 24, 25.

31. *Illinois.*— Furness *v.* Union Nat. Bank, 147 Ill. 570, 35 N. E. 624 [*affirming* 46 Ill. App. 522].

Maine.— Smith *v.* Strout, 63 Me. 205.

New York.— Sickles *v.* Richardson, 23 Hun 559; Duden *v.* Waitzfelder, 16 Hun 337.

Pennsylvania.— Klee *v.* Trauerman, 210 Pa. St. 533, 60 Atl. 157.

Wisconsin.—Bright *v.* Carter, 117 Wis. 631, 94 N. W. 645; Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608; Paine *v.* Voorhees, 26 Wis. 522.

See 40 Cent. Dig. tit. "Pledges," § 54.

32. Perry *v.* Parrott, 135 Cal. 238, 67 Pac. 144.

33. Brittan *v.* Oakland Sav. Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58.

34. Guenther *v.* Cary, 34 S. W. 232, 17 Ky. L. Rep. 1262; Lincoln *v.* Linde, 16 N. Y. Suppl. 106, 27 Abb. N. Cas. 278; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703; Marshall *v.* Otto, 59 Fed. 249. *Contra*, H. B. Claflin Co. *v.* Bretzfelder, 69 Ark. 271, 62 S. W. 905; Citizens' Bank *v.* Dows, 68 Iowa 460, 27 N. W. 459.

Nor is the lien waived by imprisonment of the debtor under an execution (Morse *v.* Woods, 5 N. H. 297), although such imprisonment has been held to suspend the pledgee's right to enforce the pledge, since the imprisonment is a satisfaction of the judgment while it lasts (Wakeman *v.* Lyon, 9 Wend. (N. Y.) 241; Sunderland *v.* Loder, 5 Wend. (N. Y.) 58).

Where a creditor of a corporation, by an agreement with its officers, took charge of the affairs of the corporation, and managed them for the purpose of applying the profits to the payment of his debt, he did not waive a lien on property pledged to him by a stock-holder to secure the same debt. Weiscopt *v.* Newman, 65 S. W. 808, 24 Ky. L. Rep. 36.

35. See *supra*, II, B.

36. Walker *v.* Staples, 5 Allen (Mass.) 34; Walcott *v.* Keith, 22 N. H. 196; Black *v.* Bogert, 65 N. Y. 601.

37. *Maine.*— Shaw *v.* Wilshire, 65 Me. 485; Collins *v.* Buck, 63 Me. 459; Beeman *v.* Lawton, 37 Me. 543; Eastman *v.* Avery, 23 Me. 248.

Maryland.— Citizens' Nat. Bank *v.* Hooper, 47 Md. 88.

Massachusetts.— Beacon Trust Co. *v.* Robbins, 173 Mass. 261, 53 N. E. 868 (holding that where a note of which defendant was accommodation maker was pledged to plaintiff, defendant's right as surety is to require plaintiff, before resorting to this note, to credit actual payments on the debt, and also the value of any other collateral it surrendered without the consent of defendant after notice that he was only a surety); Thompson *v.* Dolliver, 132 Mass. 103 (holding that where a pledgee, after receiving possession of chattels, permits the pledgor to resume possession of them, and to hold them until his death, he cannot, by then taking possession of them, defeat the right of the administrator to maintain against him an action for their conversion); Kimball *v.* Hildreth, 8 Allen 167; Homes *v.* Crane, 2 Pick. 607.

Minnesota.— Combs *v.* Tuchelt, 24 Minn. 423.

New Hampshire.— Colby *v.* Cressy, 5 N. H. 237.

North Carolina.— Smith *v.* Sasser, 49 N. C. 43; Barrett *v.* Cole, 49 N. C. 40.

pledgor's agent, to another creditor of the pledgor,[38] or purchaser from him,[39] constitutes a waiver of his lien,[40] even though such relinquishment be under restrictions as to the use of the property by the pledgor,[41] or under an agreement that the articles relinquished are to remain the pledgee's property.[42] But the lien of the pledgee is not lost upon the pledgor's obtaining possession of the property by fraud,[43] or other wrongful act.[44]

(II) *By Levy of Execution Against Pledgor.* The taking of property out of the possession of the pledgee under the levy of an execution,[45] or other legal process,[46] against the pledgor does not divest the pledgee's lien, and even a purchaser at a sheriff's sale takes subject to the pledgee's rights.[47]

e. Delivery to Pledgor For Special Purpose. The delivery, however, of the property by the pledgee to the pledgor for merely a temporary or special purpose,[48] as for example for some temporary use,[49] for the performance of some work on

Tennessee.— Arendale *v.* Morgan, 5 Sneed 703; Mills *v.* Stewart, 5 Humphr. 308.

Vermont.— Samson *v.* Rouse, 72 Vt. 422, 48 Atl. 666; Fletcher *v.* Howard, 2 Aik. 115, 16 Am. Dec. 686.

Washington.— See Heilbron *v.* Guarantee L. & T. Co., 13 Wash. 645, 43 Pac. 932.

United States.— Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779; *In re* Harlow, 11 Fed. Cas. No. 6,070, 10 Nat. Bankr. Reg. 280, holding that where a silver cornet was delivered to the landlord, with an absolute bill of sale, as security for rent and the tenant subsequently borrowed it to use, and failed to return it, the transaction was a pledge, and the lien was gone.

See 40 Cent. Dig. tit. "Pledges," § 55.

38. Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770; Denniston *v.* Hill, 173 Pa. St. 633, 34 Atl. 452.

39. Thalmann *v.* Capron Knitting Co., 100 N. Y. App. Div. 247, 91 N. Y. Suppl. 520 [*affirmed* in 182 N. Y. 525, 74 N. E. 1126].

40. Where goods in storage are pledged without the knowledge of the bailee, who subsequently, on the direction of the pledgor, delivers them to a *bona fide* purchaser, the pledgee cannot maintain replevin against the bailee. Peoples' Bank *v.* Gayley, 92 Pa. St. 518.

41. Walker *v.* Staples, 5 Allen (Mass.) 34.

42. Salinas City Bank *v.* Graves, 79 Cal. 192, 21 Pac. 732, (1889) 21 Pac. 734.

43. Bruley *v.* Rose, 57 Iowa 651, 11 N. W. 629; Walcott *v.* Keith, 22 N. H. 196; Mechanics', etc., Bank *v.* Farmers', etc., Bank, 60 N. Y. 40, holding that where pledgee's agent without authority takes a warehouse receipt in his own name and gives an order to a third person on the warehouseman to deliver the property to a railroad, and such third person takes a bill of lading from the railroad in his own name and pledges it to a bank, the original pledgee prevails.

A voluntary surrender by the pledgee under a mistake as to his rights induced by the misrepresentations of the pledgor is not voidable by him as against third parties. Mills *v.* Stewart, 5 Humphr. (Tenn.) 308.

44. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21, holding that the pledgee's lien on the property is not lost by its wrongful removal from his possession by the pledgor, even though it be sold by him to a *bona fide* vendee.

45. Goodrich *v.* Southmayd, 13 La. 339.

46. Gunsel *v.* McDonnell, 67 Iowa 521, 25 N. W. 759. *Compare* Great Eastern R. Co. *v.* Lambe, 21 Can. Sup. Ct. 431, for execution at instance of anterior creditors.

47. Reichenbach *v.* McKean, 95 Pa. St. 432.

48. *California.*— Hilliker *v.* Kuhn, 71 Cal. 214, 16 Pac. 707.

Illinois.— Hutton *v.* Arnett, 51 Ill. 198; Cooper *v.* Ray, 47 Ill. 53.

Iowa.— Bruley *v.* Rose, 57 Iowa 651, 11 N. W. 629.

Massachusetts.— Harding *v.* Eldridge, 186 Mass. 39, 71 N. E. 115; Moors *v.* Wyman, 146 Mass. 60, 15 N. E. 104; Kellogg *v.* Tompson, 142 Mass. 76, 6 N. E. 860; Wilkie *v.* Day, 141 Mass. 68, 6 N. E. 542; Holmes *v.* Fall River First Nat. Bank, 126 Mass. 353; Thayer *v.* Dwight, 104 Mass. 254 (where the pledgee employed the pledgor as his agent to sell the property, allowed him to contract for it in his own name, and delivered the goods on his order to the purchaser); Macomber *v.* Parker, 14 Pick. 497.

Minnesota.— Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 53 N. W. 141, 39 Am. St. Rep. 609, where the property was nominally consigned by the pledgee to the pledgor, but remained in charge of the pledgee's agent.

New York.— Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; Markham *v.* Jaudon, 41 N. Y. 235; Hays *v.* Riddle, 1 Sandf. 248.

Tennessee.— Winslow *v.* Harriman Iron Co., (Ch. App. 1897) 42 S. W. 698.

England.— Reeves *v.* Capper, Arn. 427, 5 Bing. N. Cas. 136, 2 Jur. 1067, 6 Scott 877, 35 E. C. L. 82; Burra *v.* Ricardo, Cab. & E. 478; Martin *v.* Reid, 11 C. B. N. S. 730, 31 L. J. C. P. 126, 5 L. T. Rep. N. S. 727, 103 E. C. L. 730; Roberts *v.* Wyatt, 2 Taunt. 268, 11 Rev. Rep. 566.

See 40 Cent. Dig. tit. "Pledges," § 57.

49. Henry *v.* State, 110 Ga. 750, 36 S. E. 55; Clare *v.* Agerter, 47 Kan. 604, 28 Pac. 694; Harding *v.* Eldridge, 186 Mass. 39, 71 N. E. 115; Radigan *v.* Johnson, 176 Mass. 433, 57 N. E. 691; Reeves *v.* Capper, Arn.

it,[50] for sale,[51] for lease [52] for the pledgee's account, for pledge to another creditor of the pledgor,[53] for collection,[54] or to be exchanged for other property to be held in pledge,[55] does not divest the pledgee's lien as against the pledgor or attaching creditors,[56] although it would have that effect as against *bona fide* purchasers for value from the pledgor while in such temporary possession, without notice of the pledgee's right.[57]

f. Statute of Limitations.[58] Where the contract of pledge gives the pledgee the right to sell the property for the payment of the debt,[59] such right is not defeated by the bar of the statute of limitations against the principal debt.[60]

B. Persons and Liabilities Secured — 1. Persons Secured. Property delivered to a creditor as security for the debt of one debtor cannot, in the absence of a special agreement, be held by him as security for the debt of another person.[61]

427, 5 Bing. N. Cas. 136, 2 Jur. 1067, 6 Scott 877, 35 E. C. L. 82.

50. Waldie *v.* Doll, 29 Cal. 555; Griffith *v.* Brightwell, 10 Ky. L. Rep. 814; Way *v.* Davidson, 12 Gray (Mass.) 465, 74 Am. Dec. 604.

51. Palmtag *v.* Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Kellogg *v.* Tompson, 142 Mass. 76, 79, 6 N. E. 860 (where the court says: "If property pledged is delivered by the pledgee to the pledgor, to sell or dispose of as his agent, and account to him for the proceeds, as agreed upon between them, this transaction would preserve the pledgee's title to the property. . . . If, however, the pledgee gives the property to the pledgor to dispose of for himself, upon the promise that, if he sells it, he will give him part of the price received for it, under such circumstances the property would pass into the possession of the pledgor as general owner, and the pledgee's lien would be lost"); Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582; Rose *v.* Coble, 61 N. C. 517.

The pledgee's lien is not lost by delivery of the property to an agent agreed on by himself and the pledgor for the purpose of sale, and remittance of the proceeds to the pledgee. Peters *v.* Pacific Guano Co., 42 La. Ann. 690, 7 So. 790.

52. Palmtag *v.* Dautrick, 59 Cal. 154, 43 Am. Rep. 245.

53. Cahn *v.* Ford, 42 La. Ann. 965, 8 So. 477, holding that the pledgee is entitled to the property when it has performed its function as to the second pledge.

54. *Iowa.*— *In re* Reeve, 111 Iowa 260, 82 N. W. 912.

Maryland.— Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33.

Missouri.— Leahy *v.* Simpson, 60 Mo. App. 83.

New York.— White *v.* Platt, 5 Den. 269.

United States.— Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779; Clark *v.* Iselin, 21 Wall. 360, 22 L. ed. 568.

See 40 Cent. Dig. tit. "Pledges," § 57.

But where notes were delivered to be collected and others substituted so as to keep the security good, the lien of the pledgee was waived, since the pledgor was entitled to the money collected. Samson *v.* Rouse, 72 Vt. 422, 48 Atl. 666.

55. Castle *v.* Hickman, (Cal. 1895) 41 Pac. 1036; Way *v.* Davidson, 12 Gray (Mass.) 465, 74 Am. Dec. 604; Hays *v.* Riddle, 1 Sandf. (N. Y.) 248; McClurg *v.* Colwell, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. Rep. 961.

56. Rose *v.* Coble, 61 N. C. 517.

57. Way *v.* Davidson, 12 Gray (Mass.) 465, 74 Am. Dec. 604; Bodenhammer *v.* Newsom, 50 N. C. 107, 69 Am. Dec. 775.

58. Limitations of actions generally see 25 Cyc. 963 *et seq.*

59. Tombler *v.* Palestine Ice Co., 17 Tex. Civ. App. 596, 43 S. W. 896; Gage *v.* Riverside Trust Co., 86 Fed. 984.

60. *In re* Hartranft, 153 Pa. St. 530, 26 Atl. 104, 34 Am. St. Rep. 717; Tombler *v.* Palestine Ice Co., 17 Tex. Civ. App. 596, 43 S. W. 896; Gage *v.* Riverside Trust Co., 86 Fed. 984.

61. Peck *v.* Merrill, 26 Vt. 686. See Litchfield First Nat. Bank *v.* Southworth, 215 Ill. 640, 74 N. E. 771 [*affirming* 117 Ill. App. 143], holding that where plaintiff and her husband delivered a note to a bank reciting that they had deposited with the bank a mortgage as collateral security for the payment thereof, and also as collateral security for all other present and future demands of any kind of the bank against them, such recital confined the pledge to the demands against both plaintiff and her husband and did not include a note signed only by the husband.

Pledge to secure every "indebtedness or liability" of the pledgor does not include a note of another person indorsed by the pledgor and discounted for his benefit by the pledgee. Fullerton *v.* Chatham Nat. Bank, 17 Misc. (N. Y.) 529, 40 N. Y. Suppl. 874.

Where a judgment was assigned under an agreement pledging the proceeds thereof for the protection of a specified principal and sureties on a bond executed for the assignor, and it also provided for the application of the moneys "for the purposes above mentioned," and for the benefit of the sureties as their interest might appear at the time, it was held to contemplate the protection of all the sureties on the bond, and not merely the one described as principal. Hoffman House *v.* Foote, 172 N. Y. 348, 65 N. E. 169 [*reversing* 50 N. Y. App. Div. 163, 63 N. Y. Suppl. 784].

If given to secure a particular debt it will protect not only the immediate pledgee, but

Nor can such property so delivered be held as security for a debt of the original debtor in a different capacity.[62]

2. Debts or Liabilities Secured — a. In General. So property transferred as collateral for one debt cannot, in the absence of special agreement,[63] be held by the pledgee for any other debt or obligation of the pledgor.[64] Thus a pledge

others entitled to the debt. Homer *v.* New Haven Sav. Bank, 7 Conn. 478; German Nat. Bank *v.* Johnson City First Nat. Bank, (Tenn. Ch. App. 1897) 41 S. W. 1070.

62. J. M. Atherton Co. *v.* Ives, 20 Fed. 894, holding that neither the custody of the warehouseman nor the pledge of whisky by delivery of the warehouse receipts gives to the warehouseman or pledgee any general lien for debts not arising from the relation of warehouseman or pledgee.

Property pledged for an individual debt cannot be held for the debt of a partnership of which the pledgor is a member. Fullerton *v.* Chatham Nat. Bank, 17 Misc. (N. Y.) 529, 40 N. Y. Suppl. 874. Nor can property pledged for a debt due to an individual be held for a debt to a firm of which the individual pledgee is a member (Sparhawk *v.* Drexel, 22 Fed. Cas. No. 13,204, 12 Nat. Bankr. Reg. 450, 1 Wkly. Notes Cas. (Pa.) 560); nor property pledged for a debt to one partnership for a debt to another partnership, although the two firms are composed of the same persons (Sparhawk *v.* Drexel, *supra*); nor individual property pledged for one partnership debt for another and different partnership debt (Adams *v.* Sturges, 55 Ill. 468).

Where goods are deposited by a debtor in the hands of his creditor for a particular purpose, or on a particular trust or confidence, the creditor has no such lien upon them, by reason of his possession, as will enable him to retain them as security for his debt. Jarvis *v.* Rogers, 15 Mass. 389; Montreal Bank *v.* White, 154 U. S. 660, 14 S. Ct. 1191, 26 L. ed. 307.

63. See *infra*, III, B, 2. c.

64. *Alabama.*— St. John *v.* O'Connell, 7 Port. 466.

California.— Niles *v.* Edwards, 90 Cal. 10, 27 Pac. 159.

Colorado.— Moffatt *v.* Corning, 14 Colo. 104, 24 Pac. 7.

Illinois.— Baldwin *v.* Bradley, 69 Ill. 32; Adams *v.* Sturges, 55 Ill. 468; Ware *v.* Barnard, etc., Mfg. Co., 94 Ill. App. 498; Midland County *v.* Huchberger, 46 Ill. App. 518.

Kentucky.— Masonic Sav. Bank *v.* Bangs, 84 Ky. 135, 8 Ky. L. Rep. 16, 4 Am. St. Rep. 197; Woolley *v.* Louisville Banking Co., 81 Ky. 527.

Louisiana.— Stewart *v.* Lewis, 42 La. Ann. 37, 6 So. 898; Teutonia Nat. Bank *v.* Loeb, 27 La. Ann. 110; Yard *v.* Mechanics, etc., Bank, 8 La. 480.

Massachusetts.— Moors *v.* Washburn, 147 Mass. 344, 17 N. E. 884; Brown *v.* New Bedford Sav. Inst., 137 Mass. 262; Neponset Bank *v.* Leland, 5 Metc. 259; Jarvis *v.* Rogers, 15 Mass. 389.

Mississippi.— Newman *v.* Greenville Bank, 67 Miss. 770, 7 So. 403.

Missouri.— Southworth County *v.* Lamb, 82 Mo. 242.

Nebraska.— Buffalo County Nat. Bank *v.* Hanson, 34 Nebr. 455, 51 N. W. 1035.

New Jersey.— Keyser *v.* Burd, 43 N. J. Eq. 697, 6 Atl. 18.

New York.— Wyckoff *v.* Anthony, 90 N. Y. 442 [*affirming* 9 Daly 417]; Duncan *v.* Brennan, 83 N. Y. 487; Powers *v.* Savin, 64 Hun 560, 19 N. Y. Suppl. 340, 28 Abb. N. Cas. 463, 22 N. Y. Civ. Proc. 253 [*affirmed* in 139 N. Y. 652, 35 N. E. 207]; Grant *v.* Taylor, 35 N. Y. Super. Ct. 338 [*affirmed* in 52 N. Y. 627]; Geffcken *v.* Slingerland, 1 Bosw. 449; Mechanics', etc., Bank *v.* Livingston, 6 Misc. 81, 26 N. Y. Suppl. 25 [*affirming* 4 Misc. 257, 23 N. Y. Suppl. 813]; Phillips *v.* Thompson, 2 Johns. Ch. 418, 7 Am. Dec. 535.

Ohio.— Stowe *v.* Hamilton First Nat. Bank, 1 Ohio Cir. Ct. 524, 1 Ohio Cir. Dec. 292.

Pennsylvania.— James' Appeal, 89 Pa. St. 54; Selden *v.* Merchants' Nat. Bank, 69 Pa. St. 424; Buckley *v.* Garrett, 60 Pa. St. 333, 100 Am. Dec. 564; Russell *v.* Miller, 54 Pa. St. 154; Shroder *v.* Hatz, 47 Pa. St. 528; Buckley *v.* Garrett, 47 Pa. St. 280; McIntire *v.* Blakeley, 9 Pa. Cas. 227, 12 Atl. 325; Pennsylvania L., etc., Ins. Co. *v.* Clausen, 3 Pa. Cas. 408, 7 Atl. 70; Pennsylvania L., etc., Ins. Co.'s Appeal, 18 Wkly. Notes Cas. 469.

Rhode Island.— Cross *v.* Brown, (1890) 33 Atl. 370.

Tennessee.— Ball *v.* Stanley, 5 Yerg. 199, 26 Am. Dec. 263.

Texas.— Hardie *v.* Wright, 83 Tex. 345, 18 S. W. 615; San Antonio Nat. Bank *v.* Blocker, 77 Tex. 73, 13 S. W. 961; Sweeney *v.* Snow, 1 Tex. App. Civ. Cas. § 728.

Virginia.— Loyd *v.* Lynchburg Nat. Bank, 86 Va. 690, 11 S. E. 104; Gilliat *v.* Lynch, 2 Leigh 493.

United States.—Armstrong *v.* Chemical Nat. Bank, 41 Fed. 234, 6 L. R. A. 226; Boughton *v.* U. S., 12 Ct. Cl. 330.

See 40 Cent. Dig. tit. "Pledges." §§ 58, 58½. And see *supra*, III, A, 4; III, B. 1.

The fact that the party authorized to pledge another's stock certificates for payment of his own specific debt also pledges them for other debts due by him to the creditor does not affect the validity of the pledge for the authorized debt. Springfield Company *v.* Ely, 44 Fla. 319, 32 So. 892.

Indorsers, upon paying the original note, are entitled to keep, as security for money thus expended, collateral deposited to secure such note, but the payee is not entitled to return such collateral, nor may the indorsers use it for any other purpose. Searight *v.* Carlisle Deposit Bank, 162 Pa. St. 504, 29 Atl. 783.

made to secure future advances cannot be held for a previous obligation of the pledgor.[65]

b. General Lien of Bankers and Factors. By long established mercantile usage, certain classes of bailees,[66] such as bankers [67] and factors,[68] have a general lien for the balance of account upon all property of the debtor pledged to them for particular obligations, but general liens are not favored by the courts,[69] and will be held not to exist where there are circumstances in the transaction inconsistent therewith,[70] especially where the rights of third parties are involved.[71]

c. Agreement of Parties Changing Debt Secured. By special agreement, made at the time of the delivery of the collateral,[72] or subsequently,[73] the pledgor may consent that property pledged as security for a particular debt shall be held by the pledgee as security for other obligations already existing,[74] or to be thereafter contracted.[75]

d. Renewal of Note or Other Alteration in Form of Evidence of Debt. Where property is pledged to secure a note, the extension or renewal of the note,[76] even

65. Robinson *v.* Frost, 14 Barb. (N. Y.) 536.

66. Sparhawk *v.* Drexel, 22 Fed. Cas. No. 13,204, 12 Nat. Bankr. Reg. 450, 1 Wkly. Notes Cas. (Pa.) 560.

67. Sparhawk *v.* Drexel, 22 Fed. Cas. No. 13,204, 12 Nat. Bankr. Reg. 450, 1 Wkly. Notes Cas. (Pa.) 560. See BANKS AND BANKING, 5 Cyc. 500 *et seq.*

68. See FACTORS AND BROKERS, 19 Cyc. 157 *et seq.*

But where a collateral note had been given to a factor to secure a specific debt, the latter cannot refuse to surrender the same when the debtor tenders payment of the debt which it secures, by reason of alleged indebtedness of the customer upon unliquidated and disputed claims arising from other separate and distinct contracts. Romero *v.* Newman, 50 La. Ann. 80, 23 So. 493.

69. See First Nat. Bank *v.* Germania Safety Vault, etc., Co., 112 Ky. 734, 66 S. W. 716, 23 Ky. L. Rep. 2123, and Bacon *v.* Bacon, 94 Va. 686, 27 S. E. 576, holding that, in the absence of a special agreement, the bank's lien will be restricted to the debt the collateral was given to secure.

70. Grant *v.* Taylor, 35 N. Y. Super. Ct. 338 [*affirmed* in 52 N. Y. 627], as an inconsistent course of dealing. Where securities pledged by a debtor to a bank are withdrawn by him with the consent of the cashier and pledged to another creditor, the bank does not acquire a lien upon them for a subsequent loan by reason of their return by the debtor to the package in which they were first deposited without the intention to give the bank such lien. Wyeth *v.* National Market Bank, 132 Mass. 597.

71. Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

Where the payee of a note made for his accommodation pledges it to a bank for a particular debt, the bank cannot, as against the accommodation maker, hold it for other debts of the payee. Teutonia Nat. Bank *v.* Loeb, 27 La. Ann. 110.

Where property is pledged to a bank by the ostensible owner without authority from the real owner, the latter, upon notifying the bank, is entitled to have other collateral held by it for the same debt first applied to its payment, and the bank cannot hold such property for a general balance due it by the pledgor. Farwell *v.* Importers' etc., Nat. Bank, 90 N. Y. 483 [*affirming* 47 N. Y. Super. Ct. 409].

72. Hamilton *v.* Wagner, 2 A. K. Marsh. (Ky.) 331.

Where the contract of pledge is in writing, parol evidence is inadmissible to prove the intention of the parties that it was to be security for other obligations than those mentioned in the writing. Hamilton *v.* Wagner, 2 A. K. Marsh. (Ky.) 331.

73. Grangers' Business Assoc. *v.* Clark, 84 Cal. 201, 23 Pac. 1081; Tyler *v.* Busey, 3 MacArthur (D. C.) 344; Bartalott *v.* International Bank, 18 Ill. App. 359; Van Blarcom *v.* Broadway Bank, 9 Bosw. (N. Y.) 532 [*affirmed* in 37 N. Y. 540, 5 Transcr. App. 132]; Lewis *v.* Stevenson, 2 Hall (N. Y.) 76.

74. Thomas *v.* Spencer, (N. J. Ch. 1899) 42 Atl. 275.

75. Brooks-Waterfield Co. *v.* Brookover, 55 Fed. 699.

76. *Colorado.*— Collins *v.* Dawley, 4 Colo. 138, 34 Am. Rep. 72.

Illinois.— Fairbanks *v.* Merchants' Nat. Bank, 30 Ill. App. 28 [*reversed* on the facts in 132 Ill. 120, 22 N. E. 524].

Iowa.— Emmetsburg First Nat. Bank *v.* Gunhus, 133 Iowa 409, 110 N. W. 611, 9 L. R. A. N. S. 471.

Kentucky.— Bank of America *v.* McNeil, 10 Bush 54.

Louisiana.— Union Nat. Bank *v.* Slocomb, 34 La. Ann. 927.

Maryland.— Williams *v.* National Bank, 72 Md. 441, 20 Atl. 191; Flanagin *v.* Hambleton, 54 Md. 222.

Minnesota.— Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

Nebraska.— Omaha First Nat. Bank *v.* Goodman, 58 Nebr. 701, 79 N. W. 1062, 55 Nebr. 418, 77 N. W. 756.

New York.— Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338, 38 Am. Rep. 434; Holland Trust Co. *v.* Waddell, 75 Hun 104, 26 N. Y. Suppl.

though the new note is given only for an unpaid balance on the old one,[77] or includes also another debt,[78] or the change of the indebtedness into the form of a judgment,[79] does not, in the absence of a distinct intention of the parties, affect the pledge, but it continues as a valid and effectual security until the debt is paid.

e. Pledge to Secure General Indebtedness. By agreement of the parties, made before the delivery of the property,[80] at the time of such delivery, or afterward,[81] property pledged for a particular debt may be held by the creditor as security for a general indebtedness of the pledgor,[82] and applied to other debts,[83] whether contracted before or after[84] the agreement. While such an agreement will be construed so as to give effect to every part thereof,[85] yet it will be construed strictly

980 [*affirmed* in 151 N. Y. 666, 46 N. E. 1148].

South Carolina.—Allston *v.* Allston, 2 Hill 362.

United States.— Case *v.* Fant, 53 Fed. 41, 3 C. C. A. 418.

See 40 Cent. Dig. tit. "Pledges," § 60.

The contract of pledge differs from that of a personal surety in this respect, since extension or renewal of a note without the consent of a surety releases him. James *v.* Pike, 23 La. Ann. 477.

A change in the form of the note upon renewal, made inadvertently and by the use of a common form, will not affect the pledge. Cotton *v.* Atlas Nat. Bank, 145 Mass. 43, 12 N. E. 850.

But upon the renewal of a note by different parties, the pledgee has no right to retain as security for the new note property of a third person, deposited as collateral for the old note without first obtaining his consent. Merchants', etc., Nat. Bank *v.* Masonic Hall, 62 Ga. 271; Paducah City Nat. Bank *v.* Smith, 1 Ky. L. Rep. 351.

77. Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 Ohio St. 208; Hardie *v.* Wright, 83 Tex. 345, 18 S. W. 615; Wiley *v.* Ledyard, 10 Ont. Pr. 182.

78. Cotton *v.* Atlas Nat. Bank, 145 Mass. 43, 12 N. E. 850.

79. Jenkins *v.* International Bank, 111 Ill. 462; Everman *v.* Hyman, 3 Ind. App. 459, 29 N. E. 1140; Jones *v.* Scott, 10 Kan. 33; Fisher *v.* Fisher, 98 Mass. 303.

80. Buchanan *v.* International Bank, 78 Ill. 500.

81. Eichelberger *v.* Murdock, 10 Md. 373, 69 Am. Dec. 140.

82. *Georgia.*— Merchants' Nat. Bank *v.* Demere, 92 Ga. 735, 19 S. E. 38, "any general balance due or to become due."

Illinois.— Stanley *v.* Chicago Trust, etc., Bank, 165 Ill. 295, 46 N. E. 273 [*affirming* 61 Ill. App. 257].

Massachusetts.— Moors *v.* Washburn, 147 Mass. 344, 17 N. E. 884; Boardman *v.* Holmes, 124 Mass. 438.

New Jersey.— Clymer *v.* Patterson, 52 N. J. Eq. 188, 27 Atl. 645.

New York.— Mechanics', etc., Bank *v.* Livingston, 6 Misc. 81, 26 N. Y. Suppl. 25.

Pennsylvania.— Hecksher *v.* Shoemaker, 47 Pa. St. 249.

Tennessee.— Hanover Nat. Bank *v.* Brown, (Ch. App. 1899) 53 S. W. 206.

United States.— Sparhawk *v.* Drexel, 22 Fed. Cas. No. 13,204, 12 Nat. Bankr. Reg. 450, 1 Wkly. Notes Cas. (Pa.) 560.

See 40 Cent. Dig. tit. "Pledges," § 61.

A pledge for "all liabilities incurred" constitutes a continuing guaranty. Agawam Bank *v.* Strever, 18 N. Y. 502.

Property is security for all debts of the pledgor to the pledgee upon an agreement that it is to be security for "any other direct or indirect liability of the pledgor to the plaintiff, either due or that might thereafter be contracted." Beacon Trust Co. *v.* Robbins, 173 Mass. 261, 53 N. E. 868.

83. Cross *v.* Brown, (R. I. 1890) 33 Atl. 370, where collateral was deposited to secure the payment of certain notes, "or any other liability," of the maker, the depositary had the right to sell the notes to a third person, and retain the collateral as security for the payment of any other debt.

The creditor may apply the surplus of the collateral pro rata among the general liabilities secured. Eichelberger *v.* Murdock, 10 Md. 373, 69 Am. Dec. 140.

84. Selma Bridge Co. *v.* Harris, 132 Ala. 420, 31 So. 508.

85. Wilson *v.* Carothers, 43 S. W. 684, 19 Ky. L. Rep. 1565 (holding that a pledge of collateral by C. & Bros. to W. & M., "for the payment of our notes this day executed, or any other unsecured liability or liabilities of ours" to W. & M., secures the payment of all liabilities of C. & Bros. to W. & M., whether secured or unsecured); Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315 (holding that where the note provided that any surplus collateral "shall be applicable to any other note or claim against me held by said bank," and it did not appear that the pledgor had had any other transactions individually with the bank, it was authorized to hold any excess of collaterals as security for bills accepted by a firm of which the pledgor was a member); Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338, 38 Am. Rep. 434 [*affirming* 18 Hun 176] (holding that collateral given "as security for the payment of any demands" the bank "may from time to time have or hold against" the debtor, included both past and future advances); Fiske *v.* Williams, 4 N. Y. App. Div. 487, 38 N. Y. Suppl. 899; Omaha First Nat. Bank *v.* Illinois Trust, etc., Bank, 84 Fed. 34.

May include claims of creditor arising from wrongful act of debtor.— Leonard *v.* Kebler, 50 Ohio St. 444, 34 N. E. 659.

so as not to extend the obligation beyond that intended by the pledgor,[86] especially where the rights of sureties or others claiming under the pledgor are involved.[87] Where the agreement is on a printed form furnished by the bank and signed by its customer, it will be construed in favor of the customer.[88]

3. Evidence as to Parties and Debts or Liabilities Secured — a. Admissibility. In addition to the express agreements of the parties, evidence is admissible of correspondence [89] and conversations [90] of the parties in regard to the pledge, of a general course of dealing between them,[91] and of a general banking custom with which both parties were familiar.[92] Upon a question whether securities in the possession of the creditor are held by him as collateral, evidence is admissible [93] that about the time of the transfer of such securities to him he made advances to the debtor; [94] also that the pledgee of shares of stock notified the corporation of the transfer to him and requested an assignment on the books of the company,[95] and that after the pledgee's death securities sought to be held as collateral were found among his papers attached to the principal obligation.[96] On a question as

A prior pledge to secure a general indebtedness is not narrowed by a renewal of one of the secured notes, and a recital that the collateral is security "for the same and any other indebtedness." Selma Bridge Co. *v.* Harris, 132 Ala. 179, 31 So. 508.

86. Harris *v.* Franklin Bank, 77 Md. 423, 26 Atl. 523 (holding that an agreement by the debtor providing that if he should come under any other liability, or enter into any other engagement, the collateral might be applied on the particular loan or any of his other liabilities, contemplated only future liabilities, and such collateral could not be applied to an antecedent debt); Hathaway *v.* Fall River Nat. Bank, 131 Mass. 14; Brown *v.* James, (Nebr. 1908) 114 N. W. 591 (holding that a contract of pledge, providing that certain notes were to be held as security for a certain debt, and any other liability due or to become due or which may hereafter be contracted, did not secure the payment of moneys afterward collected by the pledgor for the pledgee as agent, and unlawfully converted); Gillet *v.* Bank of America, 160 N. Y. 549, 55 N. E. 292 [*reversing* 21 N. Y. App. Div. 392, 47 N. Y. Suppl. 558]; Omaha First Nat. Bank *v.* Illinois Trust, etc., Bank, 84 Fed. 34.

87. Kunkel's Appeal, 192 Pa. St. 14, 43 Atl. 376; San Antonio Nat. Bank *v.* Blocker, 77 Tex. 73, 13 S. W. 961 (holding that a negotiable note deposited with a bank by a partnership to secure a firm debt, under an agreement that "any excess of collaterals upon this note shall be applicable to any other note or claim held by said bank against us, J. R. & S. J. Blocker," and signed "J. R. & S. J. Blocker," such being the firm-name, cannot be held by the bank as security for a note executed by one of the partners as principal, and the other partner and others as sureties); Loyd *v.* Lynchburg Nat. Bank, 86 Va. 690, 11 S. E. 104.

Pledge for debt of a principal and two sureties of a note executed by the principal to the sureties and indorsed by them, with agreement that if the parties should come under any other liability to the bank, the proceeds of the collateral note might be applied by the bank as it deemed best, gives the bank no authority to apply the proceeds of the collateral note on notes of the principal on which the sureties are not liable. Elizabeth City First Nat. Bank *v.* Scott, 123 N. C. 538, 31 S. E. 819. But see Fall River Nat. Bank *v.* Slade, 153 Mass. 415, 26 N. E. 843, 12 L. R. A. 131, holding even against a surety that where stock is pledged to secure a note and any other liabilities of the pledgor to the pledgee, and the same stock is afterward pledged to the same party to secure a second note and any other liabilities of the pledgor to the pledgee, the proceeds of the stock, when sold by the pledgee, may be applied by him in payment of other notes of the pledgor to him in preference to the notes specified, since neither is a special one.

88. Gillet *v.* Bank of America, 160 N. Y. 549, 55 N. E. 292 [*reversing* 21 N. Y. App. Div. 392, 47 N. Y. Suppl. 558), holding that such an agreement that the bank might hold the security for any other liability or liabilities of the undersigned to the said bank, due or to become due, or which may hereafter be contracted or existing" did not cover a note of the pledgor to a third party purchased by the bank.

89. Sherman *v.* Robertson, 88 Hun (N. Y.) 40, 34 N. Y. Suppl. 275.

90. Stoddard *v.* Courtright, 130 Mich. 134, 89 N. W. 710; Sherman *v.* Robertson, 88 Hun (N. Y.) 40, 34 N. Y. Suppl. 275.

91. Jones *v.* Merchants' Nat. Bank, 72 Hun (N. Y.) 344, 25 N. Y. Suppl. 660.

92. Jones *v.* Merchants' Nat. Bank, 72 Hun (N. Y.) 344, 25 N. Y. Suppl. 660.

93. A preponderance of the evidence is sufficient. Omaha First Nat. Bank *v.* Goodman, 55 Nebr. 409, 75 N. W. 846.

94. Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

95. The maker of a note, as security, delivered to the payee certificates of stock. The payee notified the corporations that he held such certificates as collateral security, and requested an assignment on the books of the companies. It was held sufficient to justify a finding that the payee held the certificates as collateral security. Rice *v.* Gilbert, 173 Ill. 348, 50 N. E. 1087.

96. Covert *v.* Townsend, 1 N. Y. Suppl. 816.

to whether a pledgee received certain collaterals in good faith, evidence is admissible that he made advances on the faith of the securities;[97] and, in the case of a loan to an estate, evidence is admissible that the pledgee was informed that the loan was to be put into a corporation in which the estate was largely interested.[98] In attacking the good faith of the pledgee of negotiable securities who obtained them from one not the owner, it is not necessary to show that he had notice of the particular person who was the real owner.[99]

b. Burden of Proof. The burden of proof is upon the creditor claiming a subsequent agreement by which collateral is to be held for additional indebtedness.[1]

IV. Rights and Liabilities of Parties.[2]

A. In General — 1. Possession and Control of Property — a. In General. Since possession is the essence of a valid pledge,[3] the pledgee is entitled to retain possession and control of the property, with the income therefrom,[4] until the complete payment [5] or tender [6] of the debt, or discharge of the obligation,[7] the pledge was given to secure, including interests and costs.[8] And where several things have been pledged, the pledgee is entitled, in the absence of a special agreement, to retain them all until the complete discharge of the debt,[9] and cannot be compelled to surrender a portion of them upon a partial payment of the debt.[10] Where the pledgee is deprived of his possession by the pledgor, in addition to his rights of action in assumpsit, trover, detinue, and replevin,[11] he may go into equity and compel a redelivery of the property to him.[12]

97. Perth Amboy Mut. Loan Homestead, etc., Assoc. *v.* Chapman, 178 N. Y. 558, 70 N. E. 1104 [*affirming* 80 N. Y. App. Div. 536, 81 N. Y. Suppl. 38].

98. Freeman *v.* Bristol Sav. Bank, 76 Conn. 212, 56 Atl. 527.

99. Perth Amboy Mut. Loan Homestead, etc., Assoc. *v.* Chapman, 178 N. Y. 558, 70 N. E. 1104 [*affirming* 80 N. Y. App. Div. 556, 81 N. Y. Suppl. 38].

1. Clement *v.* Houck, 113 Iowa 504, 85 N. W. 765.

Where defendant in an action on promissory notes sets up a counter-claim alleging a tender of payment by himself, and a refusal by plaintiff to deliver up certain bonds deposited as collateral security, the burden of proof is on defendant to show that the collateral was given to secure the notes only, or, if given to secure some other obligation, that such obligation was discharged before the tender. Stokes *v.* Stokes, 155 N. Y. 581, 50 N. E. 342 [*affirming* 11 Misc. 716, 34 N. Y. Suppl. 1149]; Stokes *v.* Stokes, 28 Misc. (N. Y.) 58, 59 N. Y. Suppl. 801.

2. **Respective rights of pledgor and pledgee to vote shares of stock pledged** see Corporations, 10 Cyc. 332.

Usurious pledge see Usury.

3. See *supra*, II, B.

4. O'Brien *v.* Flanders, 41 Ind. 486.

5. *California.*— Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

Connecticut.— Hamlin *v.* Mitchel, 2 Root 297.

Illinois.— Kergin *v.* Dawson, 6 Ill. 86.

Louisiana.— Civ. Code, art. 3164.

Nebraska.— Rathman *v.* Peycke, 37 Nebr. 384, 55 N. W. 1070.

Ohio.— Barnes *v.* Swift, 11 Ohio Dec. (Reprint) 321, 26 Cinc. L. Bul. 110.

Pennsylvania.— Beale *v.* Mechanics' Bank, 5 Watts 529.

South Carolina.— Hendrix *v.* Harman, 19 S. C. 483.

Vermont.—Prescott *v.* Prescott, 41 Vt. 131; Benoir *v.* Paquin, 40 Vt. 199.

See 40 Cent. Dig. tit. "Pledges," § 64.

Pledgor's subsequent adjudication of bankruptcy does not affect such right of the pledgee. Yeatman *v.* New Orleans Sav. Inst., 95 U. S. 764, 24 L. ed. 589.

Where the property is repledged by the pledgee for a debt of his own, the pledgor is not entitled to possession of it merely upon paying the debt for which it has been repledged. Sistare *v.* Olcott, 7 N. Y. St. 470.

The pledgee of stock is not bound to enter into a reorganization scheme at the direction of the pledgor, nor to surrender it to the pledgor for that purpose. Griggs *v.* Day, 21 N. Y. App. Div. 442, 47 N. Y. Suppl. 609 [*reversed* on other grounds in 158 N. Y. 1, 52 N. E. 692].

6. Silverman *v.* McGrath, 10 Ill. App. 413.

7. Kranich *v.* Sherwood, 92 Mich. 397, 52 N. W. 741; Cushing *v.* Breck, 10 N. H. 111, holding that a party who has pledged property to another to indemnify him for becoming bail cannot maintain trover for the property, while the liability exists, by tendering a bond of indemnity and demanding the property.

8. La. Civ. Code, art. 3164.

9. La. Civ. Code, art. 3163.

10. La. Civ. Code, art. 3163.

11. Coleman *v.* Shelton, 2 McCord Eq. (S. C.) 126, 16 Am. Dec. 639. See also *infra*, IV, C, 2, a, (I).

12. Coleman *v.* Shelton, 2 McCord Eq. (S. C.) 126, 16 Am. Dec. 639. See also *infra*, IV, C, 2, a (I).

b. As Against Attachment or Execution Against Pledgor.[13] In the common-law states, except where modified by statute,[14] goods held in pledge may not be taken from the pledgee's possession even by the levy of an attachment or execution in an action against the pledgor,[15] and if the pledgee has been deprived of his possession in this way, he is entitled to recover it.[16] But in Louisiana property held in pledge may be seized by another creditor, taken from the pledgee's possession, and sold subject to the pledgee's claim.[17]

2. Right of Pledgee to Use Pledge. The pledgee is not entitled to use the property pledged,[18] except with the express or implied consent of the pledgor.[19]

3. Liability of Pledgee to Account For Income or Profits.[20] The pledgee must account to the pledgor for all the income, profits, and advantages derived by him from the pledged property.[21] Such profits or income should be applied first to the payment of the interest on the debt, then to the principal,[22] and any surplus

13. **Attachment of pledged property** see Attachment, 4 Cyc. 564.

Notice by pledgee to attaching officer of claim to property see Attachment, 4 Cyc. 730 note 52.

Garnishment of pledged property see Garnishment, 20 Cyc. 991.

14. **In New York,** under 2 Rev. St. 290 (2d ed.) § 20, authorizing a sale of the "pledgor's right and interest in the goods pledged," and section 23, providing that "no personal property shall be exposed for sale, unless the same be present, and within the view of those attending such sale," it was held in Bakewell *v.* Ellsworth, 6 Hill 484, that the property might be taken from the pledgor's possession, under the levy of an execution, for the purpose of sale, but that after the sale possession should be restored to the pledgee until redeemed by the purchaser. This view was sustained in Stief *v.* Hart, 1 N. Y. 20, by an evenly divided court, but was seemingly overruled in Truslow *v.* Putnam, 4 Abb. Dec. 425, 1 Keyes 568, laying down the common-law rule, although without mentioning the statute or either of the previous decisions.

15. Stief *v.* Hart, 1 N. Y. 20 (especially three dissenting opinions); Truslow *v.* Putnam, 4 Abb. Dec. (N. Y.) 425, 1 Keyes 568; Baugh *v.* Kirkpatrick, 54 Pa. St. 84, 93 Am. Dec. 675 (holding that an execution creditor cannot take goods out of a pawnee's possession without tendering him the money for which he holds them in pledge). See also *supra*, III, A, 7, d (II).

16. Currier *v.* Ford, 26 Ill. 488.

Replevin generally see Replevin.

17. Kirkpatrick *v.* Oldham, 38 La. Ann. 553; Horner *v.* Dennis, 34 La. Ann. 389; Pickens *v.* Webster, 31 La. Ann. 870; Auge *v.* Variol, 31 La. Ann. 865; Flournoy *v.* Milling, 15 La. Ann. 473; Williams *v.* The St. Stephen, 1 Mart. N. S. (La.) 417, 2 Mart. N. S. 22.

18. *Illinois.*— McArthur *v.* Howett, 72 Ill. 358.

Minnesota.— Scott *v.* Reed, 83 Minn. 203, 85 N. W. 1012.

New York.— Lawrence *v.* Maxwell, 53 N. Y. 19; Sheridan *v.* Presas, 18 Misc. 180, 41 N. Y. Suppl. 457.

South Dakota.— Hawkins *v.* Hubbard, 2 S. D. 631, 51 N. W. 774, referring to Corp. Laws, § 3671.

United States.— Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930.

Canada.—Atlantic, etc., R. Co. *v.* De Galindez, 14 Quebec 161.

See 40 Cent. Dig. tit. "Pledges," § 66.

But see Thompson *v.* Patrick, 4 Watts (Pa.) 414, holding that the pledgee may use the property, without forfeiting his lien, but is liable in an action for damages for any injury to the property from such use.

Bonds pledged as collateral security.— The pledgee of the bonds of a railway company, deposited with him as security for the payment of advances to the company, cannot use them as if he were a holder for value, and is not a bondholder within the meaning of the Railway Act, 3 Edw. VII, c. 58, §§ 111, 116. He cannot, therefore, cause them to be registered in his name, nor in that of parties to whom he has transferred them; nor deal with them as if they were his property, e. g., by detaching coupons therefrom, so as to change their appearance and reduce the extent of their nominal value. Atlantic, etc., R. Co. *v.* De Galindez, 14 Quebec K. B. 161.

19. Damon *v.* Waldteufel, 99 Cal. 234, 33 Pac. 903; Durant *v.* Einstein, 5 Rob. (N. Y.) 423, 35 How. Pr. 223.

20. **Respective rights of pledgor and pledgee to dividends on stock pledged** see Corporations, 10 Cyc. 558.

21. *Alabama.*—Geron *v.* Geron, 15 Ala. 558, 50 Am. Dec. 543.

California.— Hunsaker *v.* Sturgis, 29 Cal. 142.

Georgia.— Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 577.

Kentucky.— Mims *v.* Mims, 3 J. J. Marsh. 103.

Louisiana.— Leblanc *v.* Bouchereau, 16 La. Ann. 11.

Michigan.— Sokup *v.* Letellier, 123 Mich. 640, 82 N. W. 523.

New Jersey.— McCrea *v.* Yule, 68 N. J. L. 465, 53 Atl. 210.

North Carolina.— Houton *v.* Holliday, 6 N. C. 111, 5 Am. Dec. 522.

Vermont.— Gibson *v.* Martin, 49 Vt. 474, interest received on loan of money pledged.

See 40 Cent. Dig. tit. "Pledges," § 67.

22. Woodson *v.* Woodson, Wythe (Va.) 129.

remaining from such profits, income, or advantages so derived by the pledgee from the pledged property is held for the pledgor.[23]

4. Right of Pledgee to Allowance For Expenses.[24] The pledgee has a lien on the property for any expenses,[25] including the attorney's fees,[26] reasonably incurred by him in keeping and caring for the property pledged,[27] protecting it against liens,[28] taxes, and assessments,[29] or otherwise protecting the pledgor's rights, in making sale for the enforcement of the pledge, in collecting choses in action,[30] and other expenses incurred in rendering the pledged property available for the payment of his debt,[31] although not for any expenses incurred by reason of his own wrongful act.

23. Houton *v.* Holliday, 4 N. C. 11.

24. **Duty of pledgee to pay instalments due on subscription** to pledged stock and to advance money for premiums on pledged insurance policies see *infra*, IV, A, 5.

25. See cases cited *infra*, notes 26–31; and *supra*, III, A, 4.

26. Planters Rice Mill Co. *v.* Merchants' Nat. Bank, 78 Ga. 574, 3 S. E. 327; Ballingall *v.* Hunsberger, 16 Pa. Super. Ct. 117; Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33.

But attorney's fees are not allowed the pledgee unless incurring them was reasonably necessary. Willard *v.* White, 56 Hun (N. Y.) 581, 10 N. Y. Suppl. 170. Nor where payments were made voluntarily by the pledgor. New Orleans Union Nat. Bank *v.* Forsyth, 50 La. Ann. 770, 23 So. 917. Nor where attorney's fee was incurred by the pledgee in asserting his title as against a third party to proceeds of a note voluntarily paid by the pledgor. McCormick *v.* Lundburg, 74 Iowa 558, 38 N. W. 409. Nor attorney's fees incurred by the pledgee in asserting his right against the real owner to property left by him in the possession and apparent ownership of the pledgor, are not properly chargeable against the pledgor, because not incurred in protecting the pledgor's title. Work *v.* Tibbits, 87 Hun (N. Y.) 352, 34 N. Y. Suppl. 308, 2 N. Y. Annot. Cas. 107.

Contingent fee.— The pledgor cannot be charged with more than the usual and reasonable attorney's fees, and where the pledgee, without consulting the pledgor, made a contract for the payment of a fee, contingent upon success, double the regular fee, the excess thereof must be borne by the pledgee. Cressman *v.* Whitall, 16 Nebr. 592, 21 N. W. 458.

27. British Columbia Bank *v.* Frese, 116 Cal. 9, 47 Pac. 183 (reasonable charges for storage, insurance, cartage, brokerage, and discounts saved by payment of cash); Furness *v.* Union Nat. Bank, 147 Ill. 570, 35 N. E. 624 [*affirming* 46 Ill. App. 522]; Hills *v.* Smith, 28 N. H. 369.

28. Wendell *v.* Highstone, 52 Mich. 552, 18 N. W. 354 (money expended by pledgee in redeeming property from a prior mortgage); Fagan *v.* Thompson, 38 Fed. 467.

29. Mabb *v.* Stewart, 147 Cal. 413, 81 Pac. 1073; McCalla *v.* Clark, 55 Ga. 53; Wells *v.* Walker, 9 N. M. 456, 54 Pac. 875.

30. Clamagaran *v.* Sacerdotte, 8 Mart. N. S. (La.) 533; Chew *v.* Chinn, 7 Mart. N. S. (La.) 532; Griggs *v.* Howe, 2 Abb. Dec. (N. Y.) 291, 3 Keyes 166, 2 Keyes 574, 31 How. Pr. 639 note [*affirming* 31 Barb. 100]; Staten Island Bank *v.* Silvie, 89 N. Y. App. Div. 465, 85 N. Y. Suppl. 760; Hickson Lumber Co. *v.* Pollock, 139 N. C. 174, 51 S. E. 855; Blake *v.* Paul, 29 Leg. Int. (Pa.) 366. But an agreement that the expenses of the collection of debts pledged as collateral security shall be borne by the pledgor will not authorize the pledgee to charge a fee for his own trouble. Johnson *v.* Sterling, 3 Mart. N. S. (La.) 483. An agreement conferring power on the pledgee to collect choses in action pledged as collateral and providing for the application of the proceeds does not impose upon the pledgee the duty to prosecute suits at his own charge and risk. Culver *v.* Wilkinson, 145 U. S. 205, 12 S. Ct. 832, 36 L. ed. 676 [*affirming* 33 Fed. 708].

Upon an agreement by a borrowing bank, if the loan was not paid at maturity, to pay commissions on the collection of the collateral, commissions are not allowable on collections of collateral, made after the suspension of the bank, but before the date of maturity of the loan. Union Nat. Bank *v.* Forsyth, 50 La. Ann. 770, 23 So. 917.

Where collaterals are delivered for collection by the creditor to the debtor's agent, with the debtor's consent, and the creditor is compelled to bring suit against such agent for the recovery of the collaterals or their proceeds, the creditor is entitled to allowance for the expenses of such suit, although it is otherwise if the collaterals were delivered to the agent as his agent, or if the suit was unnecessary. Hurst *v.* Coley, 22 Fed. 183.

31. Union Nat. Bank *v.* Forsyth, 50 La. Ann. 770, 23 So. 917; Taylor *v.* Whittemore, 2 Rob. (La.) 99; Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212; Starrett *v.* Barber, 20 Me. 457; Rowan *v.* State Bank, 45 Vt. 160, holding that when property, held as collateral security, is taken into the possession of the creditor in such an unfinished state that a court of chancery would order it finished by a receiver, and the creditor does in that respect what chancery would have ordered, he is entitled to allowance for expenses reasonably incurred in finishing such property and rendering it available for sale.

The proceeds of the sale of part of the property may be applied to the protection and preservation of the remainder, where reasonable and prudent, rather than to part payment of the debt. Denniston *v.* Hill, 173 Pa. St. 633, 34 Atl. 452.

5. Care of Property by Pledgee[32] — **a. In General.** Since the pledge is a bailment for mutual benefit,[33] it is the duty of the pledgee, in the absence of a special contract modifying his common-law liability,[34] to exercise ordinary care[35] in the preservation of the property; and he is liable to the pledgor in case of loss, destruction, or depreciation[36] of the property by reason of his negligence.[37]

b. Sufficiency.[38] Ordinary care has been defined as that degree of care which prudent business men exercise in regard to their own property of a similar kind under similar circumstances,[39] and of course may vary widely under different conditions.[40]

32. Liability of pawnbroker for goods stolen from him see PAWNBROKERS, 30 Cyc. 1168.

33. See *supra*, I, A; II, A.

34. Where the receipt delivered by the pledgee, after describing the property, continued "which we promise to deliver the same to said Drake [the pledgor], or its equivalent in money" on payment of the debt, the pledgee was held absolutely liable for loss of the property in his possession, even though without fault on his part Drake *v.* White, 117 Mass. 10. But a receipt given by a bank stating that the property pledged was "to be returned to him on the payment of his note . . . in four months" was held not to enlarge the common-law duty of the bank to exercise ordinary care. Jenkins *v.* Bowdoinham Nat. Village Bank, 58 Me. 275.

35. *Alabama.*— Petty *v.* Overall, 42 Ala. 145, 94 Am. Dec. 634.

California.— St. Losky *v.* Davidson, 6 Cal. 643.

Illinois.— Union Nat. Bank *v.* Post, 64 Ill. App. 404.

Indian Territory.— Mansur-Tebbetts Implement Co. *v.* Carey, 1 Indian Terr. 572, 45 S. W. 120.

Kentucky.— Cornell Mfg. Co. *v.* Louisville Steam, etc., Power Co., 44 S. W. 637, 20 Ky. L. Rep. 86.

Louisiana.— O'Kelly *v.* Ferguson, 49 La. Ann. 1230, 22 So. 783; Crocker *v.* Monrose, 18 La. 553, 36 Am. Dec. 660.

Maine.— Winthrop Sav. Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56; Jenkins *v.* Bowdoinham Nat. Village Bank, 58 Me. 275.

Maryland.— Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35.

Minnesota.—Minneapolis, etc., Elevator Co. *v.* Betcher, 42 Minn. 210, 44 N. W. 5; Cooper *v.* Simpson, 41 Minn. 46, 42 N. W. 601, 16 Am. St. Rep. 667, 4 L. R. A. 194.

New York.—Ouderkirk *v.* Troy Cent. Nat. Bank, 119 N. Y. 263, 23 N. E. 875; Cutting *v.* Marlor, 78 N. Y. 454; Hazard *v.* Wells, 2 Abb. N. Cas. 444; Fleming *v.* Northampton Nat. Bank, 62 How. Pr. 177.

Pennsylvania.— Erie Bank *v.* Smith, 3 Brewst. 9, 8 Phila. 68.

South Carolina.— Scott *v.* Crews, 2 S. C. 522.

Washington.— Anderson *v.* Carothers, 18 Wash. 520, 52 Pac. 229.

United States.— Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

See 40 Cent. Dig. tit. "Pledges," § 69.

Must use reasonable skill and diligence in employing agents and attorneys. Chaffe *v.* Purdy, 43 La. Ann. 389, 8 So. 923; Commercial Bank *v.* Martin, 1 La. Ann. 344, 45 Am. Dec. 87; Plymouth County Bank *v.* Gilman, 9 S. D. 278, 68 N. W. 735, 62 Am. St. Rep. 868.

36. Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497; Wells *v.* Wells, 53 Vt. 1.

37. Such liability continues after maturity of the debt (Butler *v.* Greene, 49 Nebr. 280, 68 N. W. 496), and even after its discharge, so long as the property remains in possession of the pledgee (Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35; Ouderkirk *v.* Troy Cent. Nat. Bank, 119 N. Y. 263, 23 N. E. 875).

38. See BAILMENTS, 5 Cyc. 181 *et seq.*

Sufficiency of diligence in collection of chose in action pledged see *infra*, IV, B, 2, e, (III).

39. See BAILMENTS, 5 Cyc. 181; NEGLIGENCE, 29 Cyc. 427.

40. Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9, 8 Phila. 68. See Damon *v.* Waldteufel, 99 Cal. 234, 33 Pac. 903 (holding that it is not a breach of the pledgee's duty where a piano is stored with third persons, who with the pledgor's consent are permitted to use it as compensation for the storage); Ouderkirk *v.* Troy Cent. Nat. Bank, 119 N. Y. 263, 23 N. E. 875 (holding that want of reasonable care on the part of the pledgee bank is proved in the case of loss of a special deposit by evidence that the cashier was removed a short time after the deposit, as an alleged defaulter, and that such deposits were usually kept in a vault, but were not entered upon the books of the bank, and no subsequent examination, inspection, or report in relation thereto was ever made or provided for); Van Nostrand *v.* New York Guaranty, etc., Co., 39 N. Y. Super. Ct. 73 (where goods were stored with reputable warehousemen and periodically visited and inspected by the pledgee's agent, and this was held sufficient care); Scott *v.* Crews, 2 S. C. 522 (holding that pledgee bankers are not bound to "avail themselves of all the means for securing their deposits that art and mechanical skill could afford"); Fleming *v.* Northampton Nat. Bank, 9 Fed. Cas. No. 4,862*a*, 62 How. Pr. (N. Y.) 177 (where, in a suit against the pledgee bank, the only evidence tending to establish negligence was that the watchman went away at four A. M., three hours before daylight, and the robbery was committed after he left, a verdict for defendant should be directed).

Where a pledgee of bank stock honestly and in good faith consulted an attorney, in

c. Evidence. Evidence of the nature of the property and of all the circumstances connected with its keeping by the pledgee [41] is admissible. The burden of proof is on the bailee to establish both the loss of the property [42] and his exercise of due diligence and care.[43]

d. Question For Jury. The question whether the pledgee has exercised due diligence and care in keeping the pledged property is for the jury to determine.[44]

6. Care of Property by Pledgor. Where the pledgee permits the pledgor to have free access to the goods, it is equally the duty of the pledgor to care for them, and he cannot hold the pledgee responsible for any loss that could have been prevented by due care on the part of himself.[45]

7. Sale or Other Disposal of Property and Failure to Sell or Convert. A pledgee of chattels [46] in the absence of a special agreement is not required to sell them and apply the proceeds on the debt,[47] even though he is authorized to sell,[48] and has been requested to do so by the pledgor.[49] But in case of sale by the

reference to a defense in a replevin action, and did not defend because he was advised that he could not do so successfully, he did what an ordinarily prudent man would do under the circumstances, and was not liable for the loss thereof, even though the replevin action was barred by limitations. Loomis *v.* Reimers, 119 Iowa 169, 93 N. W. 95.

A pledgee of stock not fully paid up is not bound to pay future instalments as they become due in order to prevent forfeiture of the stock. South Western R. Bank *v.* Douglas, 2 Speers (S. C.) 329.

Lapse or surrender of insurance policy.— The pledgee, in the absence of special contract, is not bound to pay the premiums on a life insurance policy assigned to him, even though he is paid by a third party a sum sufficient for that purpose. Killoran *v.* Sweet, 72 Hun (N. Y.) 194, 25 N. Y. Suppl. 295 [*affirmed* in 144 N. Y. 703, 39 N. E. 857]. And the payment of one premium by him does not create an implied obligation to continue to do so. Van Duersen *v.* Scanlan, 8 Ohio Dec. (Reprint) 362, 7 Cinc. L. Bul. 188. But the pledgee is not justified in surrendering the policy to the holder of a prior assignment, upon request of the latter. Manton *v.* Robinson, (R. I. 1896) 37 Atl. 8. And where at the time of the pledge of an insurance policy, the pledgor was suffering from an incurable disease from which he died within six months thereafter, and the pledgee, with knowledge of the facts, surrendered the policy to the company, he was held liable for the amount the beneficiary would have obtained on the death of the insured. Toplitz *v.* Bauer, 34 N. Y. App. Div. 526, 55 N. Y. Suppl. 29 [*affirmed* in 161 N. Y. 325, 55 N. E. 1059].

41. Scott *v.* Crews, 2 S. C. 522. See Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9, 8 Phila. 68, holding that the fact that one with whom pledges were deposited used the same care in keeping them as he did with his own goods of like character was a circumstance to be considered by the jury, but was not even *prima facie* evidence of ordinary care, where there was evidence of how the pledges were lost.

42. Mansur-Tebbetts Implement Co. *v.* Carey, 1 Indian Terr. 572, 45 S. W. 120.

43. Mansur-Tebbetts Implement Co. *v.* Carey, 1 Indian Terr. 572, 45 S. W. 120; Crocker *v.* Monrose, 18 La. 553, 36 Am. Dec. 660; Ouderkirk *v.* Troy Cent. Nat. Bank, 119 N. Y. 263, 23 N. E. 875.

44. Willets *v.* Hatch, 132 N. Y. 41, 30 N. E. 257, 17 L. R. A. 193 [*affirming* 16 Daly 328, 11 N. Y. Suppl. 73]; Erie Bank *v.* Smith, 3 Brewst. (Pa.) 9, 8 Phila. 68; Scott *v.* Crews, 2 S. C. 522. And see cases cited *supra*, IV, A, 5, a.

45. Willets *v.* Hatch, 132 N. Y. 41, 30 N. E. 251, 17 L. R. A. 193 [*affirming* 16 Daly 328, 11 N. Y. Suppl. 73].

46. Choses in action see *infra*, IV, B.

47. Helena First Nat. Bank *v.* Waddell, 74 Ark. 241, 85 S. W. 417; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Adou *v.* Hutches, 32 Tex. Civ. App. 559, 75 S. W. 41.

Nor can he be compelled to sell.— Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

48. Lake *v.* Little Rock Trust Co., 77 Ark. 53, 90 S. W. 847, 3 L. R. A. N. S. 1199; Howell *v.* Dimock, 15 N. Y. App. Div. 102, 44 N. Y. Suppl. 271; Richardson *v.* Virginia Valley Ins. Co., 27 Gratt. (Va.) 749.

Depreciating in market value.— Where a contract or pledge provided that, in the event of said security or any part thereof depreciating in market value, the pledgor authorized the pledgee to sell and dispose of such security, or any part thereof, either before or after the maturity of the debt, the words "depreciating in market value" can have reference only to a security that becomes less valuable in market after it is pledged than it was at the time it was pledged, and had no proper application to security, the marketable condition of which has remained unchanged, but which was at the time of the pledge, and has remained, worthless. National Bank *v.* Baker, 128 Ill. 533, 538, 21 N. E. 510, 4 L. R. A. 586.

49. Mueller *v.* Nichols, 50 Ill. App. 663; Culver *v.* Wilkinson, 145 U. S. 205, 12 S. Ct. 832, 36 L. ed. 676 [*affirming* 33 Fed. 708].

pledge, he is bound to exercise reasonable care and diligence[50] as to the time,[51] manner,[52] price,[53] and terms of sale.[54] In the event of an unauthorized sale, the pledgor cannot hold the pledgee liable for any loss where such sale has been ratified by the pledgor,[55] or has not been repudiated by him within a reasonable time after acquiring knowledge of it.[56] The rights of the parties are not affected by an invalid sale and the property will remain in the pledgee's possession subject to the same conditions as before.[57]

B. Enforcement of Choses in Action Pledged[58] — **1. Duty of Pledgor to Enforce.** Upon the pledge of a chose in action as collateral, the pledgor is primarily relieved of the responsibility for its enforcement;[59] but he still has an interest in the note, and, at least with the pledgee's consent,[60] may bring suit on it against the maker.[61] And where the pledgor has the knowledge, power, and opportunity to enforce the collateral against the maker, he cannot complain of loss by reason of the pledgee's failure to enforce it.[62]

2. Duty of Pledgee to Enforce[63] — **a. In General.** It is the duty of the pledgee of commercial paper holding the same as collateral security to collect it as it becomes

50. Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214; Grand Forks Second Nat. Bank *v.* Sproat, 55 Minn. 14, 56 N. W. 254; Schaaf *v.* Fries, 90 Mo. App. 111.

Act of agent. — Pledgee is liable for loss occasioned by a breach of duty in his agent in making sale. Bigelow *v.* Walker, 24 Vt. 149, 58 Am. Dec. 156.

51. Porter *v.* Blood, 5 Pick. (Mass.) 54 (holding that a sale of goods nearly six years after delivery to the pledgee for that purpose and when the value of the goods had fallen was negligence as a matter of law, and the pledgee was chargeable with the loss); Anderson *v.* Carothers, 18 Wash. 520, 52 Pac. 229.

52. See cases cited *supra*, note 50. *Compare* Smith *v.* Becker, 129 Wis. 396, 109 N. W. 131, holding that where a bank, which held shares of stock as collateral to a note, owned some of the same stock and sent it all to a broker for sale, and a portion of the shares were sold by the broker, and the proceeds credited on the note, there was as between the pledgor and pledgee an identification of the shares sold as those of the pledgor.

53. Grand Forks Second Nat. Bank *v.* Sproat, 55 Minn. 14, 56 N. W. 254.

But the pledgee of a stock of goods cannot be held liable for the invoice price, but merely for what they brought when sold. Walker *v.* Brungard, 13 Sm. & M. (Miss.) 723.

54. Etheridge *v.* Binney, 9 Pick. (Mass.) 272, holding that, where it was usual to sell on credit, the pledgee is not answerable for loss occasioned by the insolvency of the person, in good credit at the time of the sale, on whom the purchaser gave the pledgee a bill for the price of the goods sold.

55. Violett *v.* Horbach, 119 N. Y. App. Div. 373, 104 N. Y. Suppl. 249; Granger *v.* Fidelity Ins. Trust, etc., Co., 198 Pa. St. 428, 48 Atl. 250.

What constitutes ratification see Violett *v.* Horbach, 119 N. Y. App. Div. 373, 104 N. Y. Suppl. 249.

Assent to commingling of shares of stock. — Three persons gave their joint note to a bank, securing it by a deposit of three certificates of corporate stock, but thereafter the note was taken up and each maker gave his own note, each note being indorsed by the two parties other than the maker. Thereafter, by agreement, the stock was sent by the bank to be exchanged for stock in another corporation. The letter from the pledgors, directing such change, directed an apportionment of the stock among the pledgors and certain others, but the new stock was issued to one of the pledgors on three certificates, no one of which represented merely the shares due any pledgors. It was held that, although the pledgee had originally agreed to keep the stock of each pledgor separate, the facts showed the pledgors to have themselves assented to the mingling of the shares. Smith *v.* Becker, 129 Wis. 396, 109 N. W. 131.

56. Violett *v.* Horbach, 119 N. Y. App. Div. 373, 104 N. Y. Suppl. 249; Swann *v.* Baxter, 36 Misc. (N. Y.) 233, 73 N. Y. Suppl. 336.

57. Duden *v.* Waitzfelder, 16 Hun (N. Y.) 337.

58. **Other rights and liabilities** growing out of the pledge of commercial paper are treated in their appropriate place under Commercial Paper, 7 Cyc. 495 *et seq.*

59. Reynolds *v.* Louisville, etc., R. Co., 143 Ind. 579, 40 N. E. 410 (holding that upon an absolute assignment of a contract as collateral security the assignor cannot sue on it); Lamberton *v.* Windom, 12 Minn. 232, 90 Am. Dec. 301; C. H. Larkin Co. *v.* Dawson, 37 Tex. Civ. App. 345, 83 S. W. 882.

60. O'Kelley *v.* Ferguson, 49 La. Ann. 1230, 22 So. 783.

A pledgor of a note as collateral may obtain judgment thereon, and take proceedings to enforce the same, where the pledgee makes no objection thereto. Gilman *v.* Heitman, 137 Iowa 336, 113 N. W. 932.

61. O'Kelley *v.* Ferguson, 49 La. Ann. 1230, 22 So. 783.

62. City Sav. Bank *v.* Hopson, 53 Conn. 453, 5 Atl. 601.

Pledgee's liability for not enforcing see *infra*, IV, B, 2.

63. **Damages** see *infra*, IV, B, 2, f, (IV).

due and apply the net proceeds to the payment of the debt secured,[64] and he has the right to pursue this course, although he has been expressly given the power to sell the same.[65] The collaterals may, upon their maturity, be collected even before the principal debt is due, in which case the pledgee will hold the proceeds in lieu of the original security.[66] But payment of the secured debt by the pledgor to the pledgee operates as a discharge of the pledged securities,[67] and if they have already been collected by the pledgee, he is liable to the pledgor for the proceeds;[68] but if he has not collected them he is no longer under any obligation to do so,[69] and must hold them for redelivery to the pledgor upon demand.[70] In states where the statute requires suit against the principal debtor on notice by an indorser or surety to the holder, such notice should be given to the pledgee, as he is the person entitled to bring the suit.[71]

b. Under Special Contract. But by the particular terms,[72] or special circumstances,[73] of the contract of pledge, the pledgee may be relieved of the duty of

64. *Illinois.*— Joliet Iron, etc., Co. *v.* Scioto Fire Brick Co., 82 Ill. 548, 25 Am. Rep. 341.

Iowa.— Sheldon *v.* Middleton, 10 Iowa 17.

Kentucky.— Bonta *v.* Curry, 3 Bush 678; Hamilton *v.* Hamilton, 84 S. W. 1156, 27 Ky. L. Rep. 298; Shindler *v.* Hayden, 8 Ky. L. Rep. 859; Hays *v.* Wheatley, 7 Ky. L. Rep. 663.

Massachusetts.—Bowman *v.* Wood, 15 Mass. 534.

Michigan.— Rice *v.* Benedict, 19 Mich. 132.

Missouri.— Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806.

New York.— Wheeler *v.* Newbould, 16 N. Y. 392; Nelson *v.* Edwards, 40 Barb. 279; Farwell *v.* Importers', etc., Nat. Bank, 47 N. Y. Super. Ct. 409 [*affirmed* in 90 N. Y. 483, 16 N. Y. Wkly. Dig. 20]; Nelson *v.* Wellington, 5 Bosw. 178.

South Carolina.—Charleston Bank *v.* Chambers, 11 Rich. 657.

Texas.— C. H. Larkin Co. *v.* Dawson, 37 Tex. Civ. App. 345, 83 S. W. 882.

West Virginia.— Whittaker *v.* Charleston Gas Co., 16 W. Va. 717.

See 40 Cent. Dig. tit. "Pledges," §§ 75, 77.

Suing as owner.— A pledgee of a note may sue on it as owner. Maryland Fidelity, etc., Co. *v.* Johnston, 117 La. 880, 42 So. 357.

His holding a note of the pledgor for the original debt is no bar to his recovery against indorsers on the collateral note (Lazier *v.* Nevin, 3 W. Va. 622); in such suit it is not necessary to join the pledgor as a party, or to set out plaintiff's interest as that of a pledgee (Hilton *v.* Waring, 7 Wis. 492).

65. Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252, 11 N. Y. Annot. Cas. 187 [*affirmed* in 174 N. Y. 514, 66 N. E. 1108].

66. Fergus *v.* Wilmarth, 17 Ill. App. 98 [*affirmed* in 117 Ill. 542, 7 N. E. 508]; Jones *v.* Hawkins, 17 Ind. 550; Seeley *v.* Wickstrom, 49 Nebr. 730, 68 N. W. 1017; Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252, 11 N. Y. Annot. Cas. 187 [*affirmed* in 174 N. Y. 514, 66 N. E. 1108].

Demand not being founded on the principal obligation, but on the pledged collateral, the fact that the principal obligation is immature or contingent is immaterial. Maryland Fidelity, etc., Co. *v.* Johnston, 117 La. 880, 42 So. 357.

But the pledgee is not bound to apply the proceeds of the collateral until the maturity of the principal debt. Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

67. Russell *v.* Epler, 10 Ill. App. 304; Herrmann *v.* Central Car Trust Co., 101 Fed. 41, 41 C. C. A. 176.

68. Overstreet *v.* Nunn, 36 Ala. 666; Brunson *v.* Ballou, 70 Iowa 34, 29 N. W. 794.

69. Overlock *v.* Hills, 8 Me. 383.

70. Overlock *v.* Hills, 8 Me. 383.

71. Pickens *v.* Yarborough, 26 Ala. 417, 62 Am. Dec. 728; McCrary *v.* King, 27 Ga. 26.

72. *Alabama.*— Pickens *v.* Yarborough, 26 Ala. 417, 62 Am. Dec. 728.

Georgia.— Coulter *v.* Wyly, 34 Ga. 239; Lee *v.* Baldwin, 10 Ga. 208.

Louisiana.— Friedlander *v.* Schmalinski, 35 La. Ann. 520, where the debtor promised to pay a certain sum at a certain time less the amount which pledged collaterals might "realize."

New York.— Corning *v.* Pond, 29 Hun 129, where the contract provided that the pledgee might sell the collaterals.

Ohio.— Roberts *v.* Thompson, 14 Ohio St. 1, 82 Am. Dec. 465.

Pennsylvania.— Smouse *v.* Bail, 1 Grant 397.

Wyoming.— See Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561, holding that where the creditor takes an assignment of notes as collateral security so that the title is vested in him and the notes are delivered to his agent, the burden is on him to prove that he was not to assume control of their collection.

See 40 Cent. Dig. tit. "Pledges," §§ 75, 77.

As where the agreement is simply to apply the proceeds of the collateral if paid at maturity. Dowling *v.* Dowling, 2 Colo. App. 28, 30 Pac. 50; Ormsby *v.* Fortune, 16 Serg. & R. (Pa.) 302.

73. Rice *v.* Benedict, 19 Mich. 132 (as where an attempt to enforce might involve the pledgee in loss and expense); Fant *v.* Miller, 17 Gratt. (Va.) 187 (holding that where a merchant made arrangements with a creditor to obtain accommodations from time to time in forms of loans, discounts, and sales, by placing with the creditor bonds,

collecting the collaterals, and in such case he is not liable to the pledgor for a failure to collect.

c. Operation and Effect of Enforcement. The collection of the collateral by the pledgee bars any further action on it by the pledgor,[74] and the amount realized constitutes a payment *pro tanto* of the secured debt.[75] In the enforcement by the pledgee of a mortgage assigned to him, by foreclosure of the mortgage and sale of the property, he acts as trustee for the pledgor;[76] where he buys at the sale himself, he holds the land,[77] and where he sells to another, he holds the proceeds,[78] after the payment of his debt, in trust for the pledgor. But the pledgee is under no obligation to bid at the sale,[79] and where he notifies the pledgor that he will bid only enough to protect himself,[80] or where he makes the pledgor a party to the foreclosure proceedings,[81] he may purchase at the sale, and upon accounting for the purchase-money is under no obligation to surrender the land to the pledgor upon tender of the amount of his debt. Where the pledged collateral is secured by deed of trust, the pledgee may purchase at a sale conducted by the trustee without any obligation to account to the pledgor.[82]

d. Defenses of Maker Against Pledgee. The holder of collaterals securing notes is as a rule entitled to the same immunity against defenses between the original parties, with regard to them, as he is with regard to the notes themselves,[83] although

notes, and accounts as collateral security, but with no agreement as to the mode in which the collaterals were to be dealt with so long as the debtor remained solvent, the creditor was not bound to take steps to enforce the pledges, but after the insolvency of the debtor it was his duty to exercise ordinary diligence in collecting them).

Where an officer of the United States government is the pledgee, he is not bound to collect collateral in excess of the debt due the government. Taggart *v.* U. S., 17 Ct. Cl. 322.

74. Laughlin *v.* District of Columbia, 116 U. S. 485, 6 S. Ct. 472, 29 L. ed. 701.

75. Hennessey *v.* Stempel, 108 La. 159, 32 So. 394; New York Mar. Bank *v.* Vail, 6 Bosw. (N. Y.) 421. See *supra*, IV, B, 2, a.

76. Richardson *v.* Mann, 30 La. Ann. 1060, holding that where the pledgee agreed to foreclose the mortgage or pay the pledgor the difference between the debt due him and the amount secured by the mortgage, and the pledgee upon foreclosure bought the property for less than the amount of the mortgage and then resold it at a profit, he is liable to the pledgor, not for the amount realized on the resale, but for the amount of the mortgage notes.

77. Brown *v.* Tyler, 8 Gray (Mass.) 135, 69 Am. Dec. 239; White Mountains R. Co. *v.* Bay State Iron Co., 50 N. H. 57; *In re* Gilbert, 104 N. Y. 200, 10 N. E. 148; Dalton *v.* Smith, 86 N. Y. 176; Hoyt *v.* Martense, 16 N. Y. 231; Slee *v.* Manhattan Co., 1 Paige (N. Y.) 48.

The pledgor's remedy is by a bill in equity asking a reconveyance, and he cannot maintain trover against the pledgee. Rice *v.* Dillingham, 73 Me. 59.

78. *In re* Gilbert, 104 N. Y. 200, 10 N. E. 148.

79. Plucker *v.* Teller, 174 Pa. St. 529, 34 Atl. 208, 52 Am. St. Rep. 825.

80. Plucker *v.* Teller, 174 Pa. St. 529, 34 Atl. 208, 52 Am. St. Rep. 825.

81. Anderson *v.* Olin, 145 Ill. 168, 34 N. E. 55; Bloomer *v.* Sturges, 58 N. Y. 168.

82. Easton *v.* German-American Bank, 24 Fed. 523, 23 Blatchf. 271.

83. *Alabama.*— Thompson *v.* Maddux, 117 Ala. 468, 23 So. 157; Hart *v.* Adler, 109 Ala. 467, 19 So. 894; Spence *v.* Mobile, etc., R. Co., 79 Ala. 576.

Indiana.— Gabbert *v.* Schwartz, 69 Ind. 450.

Iowa.— Updegraft *v.* Edwards, 45 Iowa 513; Preston *v.* Case, 42 Iowa 549.

Kentucky.— Duncan *v.* Louisville, 13 Bush 378, 26 Am. Rep. 201.

Michigan.— Cox *v.* Cayan, 117 Mich. 599, 76 N. W. 96, 72 Am. St. Rep. 585; Barnum *v.* Phenix, 60 Mich. 388, 27 N. W. 577; Helmer *v.* Krolick, 36 Mich. 371.

Missouri.— Borgess Inv. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Mauch Chunk First Nat. Bank *v.* Rohrer, 138 Mo. 369, 39 S. W. 1047; Mayes *v.* Robinson, 93 Mo. 114, 5 S. W. 611; Hagerman *v.* Sutton, 91 Mo. 519, 4 S. W. 73; Logan *v.* Smith, 62 Mo. 455.

New York.— Gould *v.* Marsh, 1 Hun 566.

South Carolina.— Dearman *v.* Trimmier, 26 S. C. 506, 25 S. E. 501, holding that while the doctrine established in Carpenter *v.* Longan, 16 Wall. (U. S.) 271, 21 L. ed. 313, would doubtless be recognized upon a like presentation of facts in that state, yet that where the holder has lost his right of action on the note and is compelled to rely solely on the mortgage for the enforcement of his claim, that in such case the mortgage must be regarded as non-negotiable paper, and that the holder must rely solely upon the equity rule, and cannot claim the immunity accorded commercial paper.

Virginia.— Dudley *v.* Minor, 100 Va. 728, 42 S. E. 870, holding that in suit on pledged notes secured by a mortgage, the full amount of the notes may be decreed against the makers, without first ordering the land sold.

United States.— Carpenter *v.* Longan, 16

in some jurisdictions the rule is otherwise.[84] If, after the filing of a suit by the pledgee against the maker, he is paid the amount of his debt and costs of the suit, he is not entitled to further maintain the suit.[85] The satisfaction of a judgment on the principal debt cannot be pleaded by the maker of a collateral note as a defense to a suit by the pledgee on such collateral.[86]

e. Diligence by Pledgee — (i) *Necessity.* In the enforcement of collateral by the pledgee it is his duty to use ordinary diligence,[87] not only in making demand for payment or performance on the principal debtor, but also in taking the necessary steps to fix the liability of parties secondarily liable,[88] in making sales when

Wall. 271, 21 L. ed. 313; Swett *v.* Stark, 31 Fed. 858, declining to follow Illinois court.

See 40 Cent. Dig. tit. "Pledges," § 48 *et seq.*

84. Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373; Towner *v.* McClelland, 110 Ill. 542; Bryant *v.* Vix, 83 Ill. 11; Haskell *v.* Brown, 65 Ill. 29; White *v.* Sutherland, 64 Ill. 181; Olds *v.* Cummings, 31 Ill. 188; Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762; Butler *v.* Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265; Bouligny *v.* Fortier, 17 La. Ann. 121; Oster *v.* Mickley, 35 Minn. 245, 28 N. W. 710; Hostetter *v.* Alexander, 22 Minn. 559; Johnson *v.* Carpenter, 7 Minn. 176; Baily *v.* Smith, 14 Ohio St. 396, 84 Am. Dec. 385.

Where the pledgee sues as owner, defendant is not cut off from the equities he could have pleaded had plaintiff sued as pledgee. Maryland Fidelity, etc., Co. *v.* Johnston, 117 La. 880, 42 So. 357.

85. Matthews *v.* Cantey, 48 S. C. 588, 26 S. E. 894.

86. Flynn *v.* Shields, 110 Wis. 172, 85 N. W. 666.

87. *Alabama.*— May *v.* Sharp, 49 Ala. 140; Powell *v.* Henry, 27 Ala. 612; Pickens *v.* Yarborough, 26 Ala. 417, 62 Am. Dec. 728.

California.— Hawley Bros. Hardware Co. *v.* Brownstone, 123 Cal. 643, 56 Pac. 468.

Georgia.—Mauck *v.* Atlanta Trust, etc., Co., 113 Ga. 242, 38 S. E. 845; Colquitt *v.* Stultz, 65 Ga. 305; Lee *v.* Baldwin, 10 Ga. 208.

Illinois.— Mueller *v.* Nichols, 50 Ill. App. 663.

Indiana.— Reynolds *v.* Louisville, etc., R. Co., 143 Ind. 579, 40 N. E. 410; Alexander *v.* Alexander, 64 Ind. 541; Reeves *v.* Plough, 41 Ind. 204.

Indian Territory.—Scott *v.* Tulsa First Nat. Bank, 5 Indian Terr. 292, 82 S. W. 751, 68 L. R. A. 488.

Kentucky.— Bonta *v.* Curry, 3 Bush 678; Noland *v.* Clark, 10 B. Mon. 239; Prentice *v.* Buxton, 3 B. Mon. 35; Estill County Deposit Bank *v.* Richardson, 32 S. W. 292, 17 Ky. L. Rep. 683.

Louisiana.— Commercial Bank *v.* Martin, 1 La. Ann. 344, 45 Am. Dec. 87; Cammack *v.* Priestly, 12 Rob. 423.

Maryland.— Hoffman *v.* Johnson, 1 Bland 103.

Minnesota.— Lamberton *v.* Windom, 12 Minn. 232, 90 Am. Dec. 301.

Mississippi.— Baker *v.* Burkett, 75 Miss. 89, 21 So. 970.

New York.—Buckingham *v.* Payne, 36 Barb. 81; Wakeman *v.* Gowdy, 10 Bosw. 208; Barrow *v.* Rhinelander, 3 Johns. Ch. 614.

Ohio.— Mt. Vernon Bridge Co. *v.* Knox County Sav. Bank, 46 Ohio St. 224, 20 N. E. 339; Roberts *v.* Thompson, 14 Ohio St. 1, 82 Am. Dec. 465.

Rhode Island.— Whitin *v.* Paul, 13 R. I. 40.

Tennessee.— Harper *v.* Second Nat. Bank, 12 Lea 678; Betterton *v.* Roope, 3 Lea 215, 31 Am. Rep. 633; Word *v.* Morgan, 5 Sneed 79; Hanover Nat. Bank *v.* Brown, (Ch. App. 1899) 53 S. W. 206.

Texas.— C. H. Larkin Co. *v.* Dawson, 37 Tex. Civ. App. 345, 83 S. W. 882.

Virginia.— Fant *v.* Miller, 17 Gratt. 187.

West Virginia.— Rumsey *v.* Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935; Whitteker *v.* Charleston Gas Co., 16 W. Va. 717; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

Wisconsin.— Marschuetz *v.* Wright, 50 Wis. 175, 6 N. W. 511.

Wyoming.— Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

United States.— Lawrence *v.* McCalmont, 2 How. 426, 11 L. ed. 326; Northwestern Nat. Bank *v.* J. Thompson, etc., Mfg. Co., 71 Fed. 113, 17 C. C. A. 638; Easton *v.* German-American Bank, 24 Fed. 523, 23 Blatchf. 271.

England.— *Ex p.* Moure, 2 Cox Ch. 63, 30 Eng. Reprint 30.

See 40 Cent. Dig. tit. "Pledges," § 78 *et seq.*

Collection of part.—Where the pledgee of a note is required, under the pledge, to collect only a sufficient sum to pay the debt secured, and then turn it over to the owner thereof, and he collects such sum, he is not liable for failure to take prompt steps to collect the balance of the note at its maturity. Clark *v.* Cullen, (Tenn. Ch. App. 1897) 44 S. W. 204.

88. *Alabama.*— May *v.* Sharp, 49 Ala. 140; Pickens *v.* Yarborough, 26 Ala. 417, 62 Am. Dec. 728; Russell *v.* Hester, 10 Ala. 535.

Iowa.— Kennedy *v.* Rosier, 71 Iowa 671, 33 N. W. 226.

Louisiana.— Cammack *v.* Priestly, 12 Rob. 423.

Michigan.— Whitten *v.* Wright, 34 Mich. 92; Jennison *v.* Parker, 7 Mich. 355.

New York.— Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690.

Pennsylvania.— Miller *v.* Gettysburg Bank, 8 Watts 192, 34 Am. Dec. 449.

Tennessee.— Betterton *v.* Roope, 3 Lea 215, 31 Am. Rep. 633.

authorized,[89] and in prosecuting suit to judgment and execution;[90] and he is liable to the pledgor for any loss occasioned by his negligence in any of these matters.[91]

(II) *DEGREE.* The diligence required of the pledgee in enforcing the collection of collaterals is usually referred to as ordinary diligence,[92] and has been defined as that of an ordinarily prudent man in the conduct of his own business,[93] as that required of a bailee for hire,[94] and as that required of an agent or attorney.[95] The pledgee is not charged with the active duty of watching the movements of the debtor, with a view to forestalling or frustrating any attempt at fraud on his part;[96] and, having exercised ordinary diligence, is not responsible for any loss through failure to enforce the collateral, even though he could have prevented such loss by the exercise of extraordinary care and diligence.[97] The pledgee is not held to so strict a liability as an indorsee of negotiable paper; and in case of failure to present at maturity, to protest and give notice, he is not liable to the pledgor absolutely for the face value of the instrument, but is liable only in the event loss resulted from his negligence and to the extent of such loss.[98]

(III) *SUFFICIENCY.* What is sufficient diligence depends upon the facts and circumstances of each particular case.[99] The pledgee is not bound to demand

United States.— Chemical Nat. Bank *v.* Armstrong, 50 Fed. 798.

England.— Peacock *v.* Pursell, 14 C. B. N. S. 728, 10 Jur. N. S. 178, 32 L. J. C. P. 266, 8 L. T. Rep. N. S. 636, 11 Wkly. Rep. 834, 108 E. C. L. 728.

See 40 Cent. Dig. tit. "Pledges," § 78 *et seq.*

The pledgee is not bound to notify guarantors of the default of the principal debtor, since failure to give such notice does not discharge them. City Sav. Bank *v.* Hopson, 53 Conn. 453, 5 Atl. 601.

89. Whitin *v.* Paul, 13 R. I. 40. See also National Exch. Bank *v.* Kilpatrick, 204 Mo. 119, 102 S. W. 499.

90. Hall *v.* Junction R. Co., 15 Ind. 362; Slevin *v.* Morrow, 4 Ind. 425; Bonta *v.* Curry, 3 Bush (Ky.) 678; Hanna *v.* Holton, 78 Pa. St. 334, 21 Am. Rep. 20.

When there is danger of the insolvency of the maker.— Noland *v.* Clark, 10 B. Mon. (Ky.) 239; Lamberton *v.* Windom, 12 Minn. 232, 90 Am. Dec. 301; Wakeman *v.* Gowdy, 10 Bosw. (N. Y.) 208.

91. *Indiana.*— Slevin *v.* Morrow, 4 Ind. 425.

Kentucky.— Shindler *v.* Hayden, 8 Ky. L. Rep. 859.

Louisiana.— Dwight *v.* Bemiss, 16 La. 145.

Pennsylvania.— Hanna *v.* Holton, 78 Pa. St. 334, 21 Am. Rep. 20; Mullen *v.* Morris, 2 Pa. St. 85.

Rhode Island.— Whitin *v.* Paul, 13 R. I. 40.

Tennessee.— Harper *v.* Second Nat. Bank, 12 Lea 678.

Texas.— Jefferson Nat. Bank *v.* Bruhn, 64 Tex. 571, 53 Am. Rep. 771; Douglass *v.* Mundine, 57 Tex. 344.

West Virginia.— Rumsey *v.* Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935.

See 40 Cent. Dig. tit. "Pledges," § 78 *et seq.*

But see Gilbert *v.* Marsh, 12 Hun (N. Y.) 519, holding that mere neglect on the part of a creditor in collecting securities to a debt will not release the principal debtor; but a request to the creditor to collect by legal proceedings, and a loss to the debtor by failure so to do, must be shown.

92. See *supra*, IV, B, 2, e, (I).

93. Day *v.* Kenton, 62 S. W. 3, 22 Ky. L. Rep. 1917; Montague *v.* Stelts, 37 S. C. 200, 15 S. E. 968, 34 Am. St. Rep. 736; Fant *v.* Miller, 17 Gratt. (Va.) 187.

94. Wakeman *v.* Gowdy, 10 Bosw. (N. Y.) 208; Hazard *v.* Wells, 2 Abb. N. Cas. (N. Y.) 444.

95. Johnson *v.* Sterling, 3 Mart. N. S. (La.) 483; Buckingham *v.* Payne, 36 Barb. (N. Y.) 81; Westphal *v.* Ludlow, 6 Fed. 348, 2 McCrary 505.

96. O'Kelly *v.* Ferguson, 49 La. Ann. 1230, 22 So. 783.

97. *Alabama.*— Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950.

Indiana.— Reeves *v.* Plough, 41 Ind. 204.

Louisiana.— Chaffe *v.* Purdy, 43 La. Ann. 389, 8 So. 923; Commercial Bank *v.* Martin, 1 La. Ann. 344, 45 Am. Dec. 87.

North Carolina.— Silvey *v.* Axley, 118 N. C. 959, 23 S. E. 933.

Texas.— Thomas *v.* Davis, 15 Tex. Civ. App. 359, 39 S. W. 579.

Wisconsin.—Marschuetz *v.* Wright, 50 Wis. 175, 6 N. W. 511.

See 40 Cent. Dig. tit. "Pledges," § 79.

98. Rives *v.* McLosky, 5 Stew. & P. (Ala.) 330; Kennedy *v.* Rosier, 71 Iowa 671, 33 N. W. 226; Lawrence *v.* McCalmont, 2 How. (U. S.) 426, 11 L. ed. 326; Westphal *v.* Ludlow, 6 Fed. 348, 2 McCrary 505.

99. Rumsey *v.* Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935; Wakeman *v.* Gowdy, 10 Bosw. (N. Y.) 208; Northwestern Nat. Bank *v.* J. Thompson, etc., Mfg. Co., 71 Fed. 113, 17 C. C. A. 638.

Failure to record mortgage.— Where the note secured by a chattel mortgage was also secured by a real estate mortgage, and where no evidence is offered showing that the maker of the note was insolvent, or that there was any negligence on the part of the person who

payment of collateral security before its maturity, although he may know at the time that payment would be made if insisted on;[1] nor is he bound to sue an insolvent, where nothing could be gained by so doing,[2] nor is he liable for any loss where his course has been authorized or ratified by the pledgor.[3] But he is liable for loss occasioned by his failure to comply with the request of the pledgor either to take prompt action to collect or secure the collateral, or to surrender possession of it to the pledgor for that purpose.[4] And the pledgee is not justified in failing to sue because of an intimation by the maker that he has a defense against the pledgor.[5] Where the pledgee has notice that the maker of a collateral note is in danger of insolvency, it is his duty to bring suit upon it without delay;[6] but where the maker is reputed in good financial circumstances, and the pledgee has not been requested to sue, an indulgence for a reasonable time will not render the pledgee liable for loss occasioned by the maker's unexpected insolvency.[7] In all such cases of indulgence, the length of time, the amount involved, and the circumstances of the debtor are to be considered.[8] Where a collateral note is payable at a bank as to whose solvency the pledgee has no doubt, it is his duty to send the note to such bank for collection at maturity.[9] Where the collaterals are in turn secured by a lien on personal property, it is sufficient for the pledgee to reduce the collaterals to judgment, leaving the owner of the collaterals to subject the property and apply the proceeds to the payment of his debt.[10] Where the maker offers to settle the note by a delivery of specified property, the pledgee is not bound to communicate such offer to the pledgor;[11] but if the pledgor unites with the maker in requesting such settlement, the pledgee is liable for loss occasioned by his unreasonable refusal to accept it.[12] Even where the paper accepted by the pledgee as collateral is overdue, it is his duty to use due diligence in collecting it,[13] and to sue on it, if

held the said note as collateral which was secured by such mortgage, or that there was any negligence on the part of the person holding the note to make the collection, or that the real estate security was not sufficient to insure the collection, it was held that the person holding the note as collateral cannot be made to respond in damages for a failure to have the chattel mortgage recorded. Buxton *v.* Alton-Dawson Mercantile Co., 18 Okla. 287, 90 Pac. 19.

1. Roberts *v.* Thompson, 14 Ohio St. 1, 82 Am. Dec. 465.

2. *Alabama.*— Powell *v.* Henry, 27 Ala. 612.
Indiana.— Smith *v.* Felton, 85 Ind. 223.
Louisiana.— Chaffe *v.* Purdy, 43 La. Ann. 389, 8 So. 923; Grove *v.* Roberts, 6 La. Ann. 210.
Minnesota.— Lamberton *v.* Windom, 18 Minn. 506.
Missouri.— Wichita Fourth Nat. Bank *v.* Blackwelder, 81 Mo. App. 428.
Virginia.— Peay *v.* Morrison, 10 Gratt. 149.
Wisconsin.— Marschuetz *v.* Wright, 50 Wis. 175, 6 N. W. 511.
United States.—Westphal *v.* Ludlow, 6 Fed. 348, 2 McCrary 505.
See 40 Cent. Dig. tit. "Pledges," § 80.

3. Runals *v.* Harding, 83 Ill. 75; Mitchell *v.* Levi, 28 La. Ann. 946; Medomak Bank *v.* Curtis, 24 Me. 36; Silvey *v.* Axley, 118 N. C. 959, 23 S. E. 933.

4. Roberts *v.* Farmers' Bank, 118 Ky. 80, 80 S. W. 441, 25 Ky. L. Rep. 2296; Bonta *v.* Curry, 3 Bush (Ky.) 678; Lamberton *v.* Windom, 12 Minn. 232, 90 Am. Dec. 301, 18 Minn. 506; Northern Ins. Co. *v.* Wright, 13 Hun (N. Y.) 166 [*affirmed* in 76 N. Y. 445]; Hazard *v.* Wells, 2 Abb. N. Cas. (N. Y.) 444; Childs *v.* Corp, 5 Fed. Cas. No. 2,677, 1 Paine 285.
The pledgee is not bound, upon request of the pledgor, to surrender the collateral to the latter to enable him to sue. Smouse *v.* Bail, 1 Grant (Pa.) 397.

5. Wakeman *v.* Gowdy, 10 Bosw. (N. Y.) 208.

6. Bonta *v.* Curry, 3 Bush (Ky.) 678.

7. Goodall *v.* Richardson, 14 N. H. 567.

8. Goodall *v.* Richardson, 14 N. H. 567; Northwestern Nat. Bank *v.* J. Thompson, etc., Mfg. Co., 71 Fed. 113, 17 C. C. A. 638, holding that a bank having in its custody as collateral security for a debt notes secured by a chattel mortgage on live stock and farming implements on a farm is not necessarily negligent as respects the owners of the notes, because it fails to collect the notes as they mature, although the mortgaged property is at that time adequate for the purpose, since, under certain conditions, such as a failure of crops, a prudent creditor would allow the mortgagor some indulgence.

9. Mt. Vernon Bridge Co. *v.* Knox County Sav. Bank, 46 Ohio St. 224, 20 N. E. 339.

10. Chattanooga First Nat. Bank *v.* Chattanooga Pulley Co., 97 Tenn. 308, 37 S. W. 8.

11. Rives *v.* McLosky, 5 Stew. & P. (Ala.) 330.

12. Barrow *v.* Rhinelander, 3 Johns. Ch. (N. Y.) 614.

13. Easton *v.* German-American Bank, 24 Fed. 523, 23 Blatchf. 271.

necessary.[14] In no event must the pledgee allow the collateral to be barred by the statute of limitations,[15] and he will be liable for all loss occasioned by his failure in this respect; and it is no defense that the maker might not have availed himself of the bar of the statute.[16] In some jurisdictions, if the pledgee has exercised ordinary diligence in selecting an agent or attorney to whom he has intrusted the enforcement of the collateral, he is not responsible for loss occasioned by the negligence of such agent,[17] although in other jurisdictions he is held responsible under the general rule of *respondeat superior*.[18] Where loss results from the negligence of an assignee of the note from the pledgee,[19] or from the negligence of an agent selected by the pledgee without due care,[20] the pledgee is responsible.

f. Right of Action Against Pledgee For Lack of Diligence — (i) *In General.* In an action against the pledgee for failure to enforce collateral, it is not enough to show that it has not been collected;[21] but it must appear that the pledgee has been negligent,[22] and that loss has resulted to the pledgor from such negligence.[23]

(ii) *Evidence.* Upon an action by the pledgor against the pledgee for failure to exercise due diligence in the enforcement of collateral, or where the pledgor sets up such lack of diligence as a defense to a suit on the principal obligation, the creditor must account for the collaterals, as in the case of their loss, but having done so, the mere fact that they have not been collected is not even *prima facie* evidence of negligence,[24] and the burden is on the pledgor to prove negligence and damage[25] although it has been held that the burden is on the creditor to prove diligence,[26] especially where he was warned by the debtor of the embarrassed position of the maker,[27] or the collaterals consisted of numerous notes and accounts.[28] Where the pledgee has permitted securities pledged to him to become barred by limitations,[29] or has wrongfully surrendered collateral pledged to him,[30] the burden is on him to prove that his negligence or wrongful act has not injured the pledgor. The solvency of the maker,[31] or an indorser,[32] for some time after

14. Wakeman *v.* Gowdy, 10 Bosw. (N. Y.) 208; Easton *v.* German-American Bank, 24 Fed. 523, 23 Blatchf. 271. But see Coonley *v.* Coonley, Lalor (N. Y.) 312, holding that the pledgee is not bound to sue on collateral overdue at the time of delivery, unless to prevent the bar of the statute of limitations.

15. *California.*— Hawley Bros. Hardware Co. *v.* Brownstone, 123 Cal. 643, 56 Pac. 468.
Kansas.— Semple, etc., Mfg. Co. *v.* Detwiler, 30 Kan. 386, 2 Pac. 511.
Maryland.— Hoffman *v.* Johnson, 1 Bland 103.
Pennsylvania.— McQueen's Appeal, 104 Pa. St. 595, 49 Am. Rep. 592; Hanna *v.* Holton, 78 Pa. St. 334, 21 Am. Rep. 20; Miller *v.* Gettysburg Bank, 8 Watts 192, 34 Am. Dec. 449.
Wyoming.— Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.
United States.— Northwestern Nat. Bank *v.* J. Thompson, etc., Mfg. Co., 71 Fed. 113, 17 C. C. A. 638.

16. Ft. Dodge First Nat. Bank *v.* O'Connell, 84 Iowa 377, 51 N. W. 162, 35 Am. St. Rep. 313.

17. Chaffe *v.* Purdy, 43 La. Ann. 389, 8 So. 923; Commercial Bank *v.* Martin, 1 La. Ann. 344, 45 Am. Dec. 87.

18. Plymouth County Bank *v.* Gilman, 6 Dak. 304, 50 N. W. 194.

19. Betterton *v.* Roope, 3 Lea (Tenn.) 215, 31 Am. Rep. 633.

20. Prentice *v.* Buxton, 3 B. Mon. (Ky.) 35.

21. Kiser *v.* Ruddick, 8 Blackf. (Ind.) 382.

22. Smith *v.* Felton, 85 Ind. 223; Grove *v.* Roberts, 6 La. Ann. 210; Lamberton *v.* Windom, 18 Minn. 506, 12 Minn. 232, 90 Am. Dec. 301.

23. Dowling *v.* Dowling, 2 Colo. App. 28, 30 Pac. 50; Aldrich *v.* Goodell, 75 Ill. 452; Steger *v.* Bush, Sm. & M. Ch. (Miss.) 172.

24. Reeves *v.* Plough, 41 Ind. 204; Rumsey *v.* Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935.

25. *Colorado.*— Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903.
Idaho.— Murphy *v.* Bartsch, 2 Ida. (Hasb.) 636, 23 Pac. 82.
Minnesota.— Mahoney *v.* Barber, 67 Minn. 308, 69 N. W. 886.
Missouri.— Wichita Fourth Nat. Bank *v.* Blackwelder, 81 Mo. App. 428.
Wisconsin.— Charter Oak L. Ins. Co. *v.* Smith, 43 Wis. 329.
See 40 Cent. Dig. tit. "Pledges," § 83.

26. Montague *v.* Stetts, 37 S. C. 200, 15 S. E. 968, 34 Am. St. Rep. 736.

27. Slevin *v.* Morrow, 4 Ind. 425, burden on creditor to show reason for not collecting.

28. Prentice *v.* Buxton, 3 B. Mon. (Ky.) 35.

29. Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

30. Toplitz *v.* Bauer, 38 N. Y. App. Div. 623, 57 N. Y. Suppl. 1149 [*affirmed* in 161 N. Y. 325, 55 N. E. 1059].

31. Commercial Bank *v.* Martin, 1 La. Ann. 344, 45 Am. Dec. 87.

32. Rumsey *v.* Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935.

maturity, together with the failure of the pledgee to collect is strong evidence of negligence, especially if other creditors have during that time enforced claims by suit;[33] while the insolvency of the maker at material times is evidence to rebut negligence.[34] Evidence that the pledgee in suing or giving time on collateral notes and accounts acted under the advice of counsel is admissible to prove good faith and due diligence.[35]

(III) *Questions For Court and Jury.* Where the facts are undisputed, it has been said that diligence is a question, not of fact, but of law, to be determined by the court upon settled principles, governing such cases;[36] but where the evidence is conflicting, or the inferences to be drawn from facts proved are doubtful, the question is for the jury.[37]

(IV) *Extent of Liability.* Upon establishing loss through the negligence of the pledgee, the pledgor is entitled to recover not the value of the collaterals pledged, but the amount of loss sustained by him.[38] Where, however, it is admitted that the securities were worth their face value at the time of their delivery to the creditor, such value will in the absence of a contrary showing be presumed to continue until their maturity.[39] Where the pledgee by his negligence permits the collaterals to be barred by statutes of limitations, he will be charged with their value as of the date of their bar,[40] and not as of the date of maturity, since, if they had been collected after maturity, they would have been credited from the date of collection. In an action by the pledgor to recover profits realized by the pledgee from a purchase and sale of the collateral, the pledgee is entitled to allowance for commissions on the resale where it appears such sale was made by a firm of brokers of which he was a member.[41]

C. Conversion of Pledged Property[42] **— 1. In General — a. By Pledgee** — (I) *In General.* The wrongful or unauthorized disposition of the pledged property by the pledgee so as to put it out of his power to redeliver it on payment of the debt it secures constitutes a conversion.[43] But a conversion

33. Hamilton *v.* Hamilton, 84 S. W. 1156, 27 Ky. L. Rep. 298.

34. Slevin *v.* Morrow, 4 Ind. 425; Spencer *v.* Plano Mfg. Co., 79 Minn. 35, 81 N. W. 538.

35. Fant *v.* Miller, 17 Gratt. (Va.) 187.

36. Wakeman *v.* Gowdy, 10 Bosw. (N. Y.) 208.

37. Rumsey *v.* Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935; Northwestern Nat. Bank *v.* J. Thompson, etc., Mfg. Co., 71 Fed. 113, 17 C. C. A. 638.

38. *Illinois.*— Aldrich *v.* Goodell, 75 Ill. 452.

Louisiana.— Chaffe *v.* Purdy, 43 La. Ann. 389, 8 So. 923; Grove *v.* Roberts, 6 La. Ann. 210.

Massachusetts.— Coleman *v.* Lewis, 183 Mass. 485, 67 N. E. 603, 97 Am. St. Rep. 450, 68 L. R. A. 482; Thayer *v.* Putnam, 12 Metc. 297.

Mississippi.— Fennell *v.* McGowan, 58 Miss. 261.

Missouri.— National Exch. Bank *v.* Kilpatric, 204 Mo. 119, 102 S. W. 499.

Pennsylvania.— McQueen's Appeal, 104 Pa. St. 595, 49 Am. Rep. 592.

United States.— Henry *v.* Travelers' Ins. Co., 42 Fed. 363.

See 40 Cent. Dig. tit. "Pledges," § 85.

Where corporate stock was pledged as collateral to a note, and the payee failed to sell the stock for its par value, although requested so to do by the maker, and the stock became worthless, the amount of the loss should be credited on the note. National Exch. Bank *v.* Kilpatric, 204 Mo. 119, 102 S. W. 499.

39. Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

40. Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

41. Plucker *v.* Teller, 174 Pa. St. 529, 34 Atl. 208, 52 Am. St. Rep. 825.

42. Conversion by invalid sale see *infra*, VI, B, 3, b.

Negligence in collection of chose in action pledged see *supra*, III, B, 2, f, (I) *et seq.*

Sale of stock by broker on margin contract on failure of customer to keep margin good see Factors and Brokers, 19 Cyc. 211.

43. *Connecticut.*— Stevens *v.* Burlbut Bank, 31 Conn. 146.

Indiana.— Rosenzweig *v.* Frazer, 82 Ind. 342.

Louisiana.— Romero *v.* Newman, 50 La. Ann. 80, 23 So. 493.

Maryland.— German Sav. Bank *v.* Renshaw, 78 Md. 475, 28 Atl. 281.

Massachusetts.— Radigan *v.* Johnson, 174 Mass. 68, 54 N. E. 358; Potter *v.* Tyler, 2 Metc. 58, holding that a pledgee who passively permitted a sale of the pledge under an attachment against him was guilty of a conversion of the pledge.

Michigan.— Allen *v.* Dubois, 117 Mich. 115, 75 N. W. 443, 72 Am. St. Rep. 557, holding that a sale of the identical shares of stock pledged is a conversion even though the

is not effected by a mere assertion by the pledgee of ownership of the pledged property;[44] nor by his bringing suit on it in his own name;[45] nor by his collection of the income therefrom;[46] nor by his assignment of the collateral together with the principal obligation;[47] nor by a transfer of pledged certificates of stock under an arrangement by which he retains control over them;[48] nor by the registration of pledged stock or bonds in his own name;[49] nor by a taking from the possession of the pledgee under an attachment against the pledgor;[50] nor by his assent to the foreclosure of a mortgage by which the collateral is secured and to the payment of a share of the expenses incident to such foreclosure, from the proceeds.[51] One to whom stock has been pledged for a loan has full power to hypothecate it so long as the original pledgor may obtain possession of it upon payment of his debt;[52] but if it has been mingled with the other securities of the pledgee,[53] or has been rehy-

pledgee has on hand at all times and tenders back an equal number of shares in the same company.

Minnesota.— Upham *v.* Barbour, 65 Minn. 364, 68 N. W. 42.

Missouri.— Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806; Schaaf *v.* Fries, 90 Mo. App. 111.

Nebraska.— Woodworth *v.* Hascall, 59 Nebr. 124, 80 N. W. 483; Butler *v.* Greene, 49 Nebr. 280, 68 N. W. 496, unauthorized use and exposure by reason of which the property was stolen.

New Jersey.— Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643.

New York.— Toplitz *v.* Bauer, 161 N. Y. 325, 55 N. E. 1059 [*affirming* 38 N. Y. App. Div. 623, 57 N. Y. Suppl. 1149]; Lawrence *v.* Maxwell, 53 N. Y. 19; Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425 [*affirmed* in 190 N. Y. 545, 83 N. E. 1132]; Bailey *v.* American Deposit, etc., Co., 52 N. Y. App. Div. 402, 65 N. Y. Suppl. 330; Usher *v.* Van Vranken, 48 N. Y. App. Div. 413, 63 N. Y. Suppl. 104; Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 320 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127]; Douglas *v.* Carpenter, 17 N. Y. App. Div. 329, 45 N. Y. Suppl. 219; Ogden *v.* Lathrop, 1 Sweeny 643 (holding that a sale before maturity by a pledgee of a stock note which he had general authority to "use, transfer, or hypothecate" is a conversion); Luckey *v.* Gannon, 1 Sweeny 12, 6 Abb. Pr. N. S. 209, 37 How. Pr. 134; Hardy *v.* Jaudon, 1 Rob. 261 [*affirmed* in 41 N. Y. 619] (holding that upon a pledge of stock a contract giving the pledgees the right "to sell the same at the broker's board, or at public or private sale, or otherwise at their option, on the non-performance of this promise and without notice" the pledgees "not being obliged to return the identical certificate" did not authorize the pledgees to part with the stock until default by the pledgor, and a sale before default was a conversion); Sheridan *v.* Presas, 18 Misc. 180, 41 N. Y. Suppl. 451; Lamb *v.* O'Reilly, 13 Misc. 212, 34 N. Y. Suppl. 235; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60.

Ohio.— Glidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737.

Tennessee.— Clark *v.* Cullen, (Ch. App.) 44 S. W. 204.

Texas.— Hart *v.* Tyrrell, 36 Tex. Civ. App. 626, 82 S. W. 1074, 86 S. W. 350.

Wisconsin.— Ainsworth *v.* Bowen, 9 Wis. 348.

United States.— Brown *v.* Newton First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293; Brown *v.* Newton First Nat. Bank, 112 Fed. 901, 50 C. C. A. 602, 56 L. R. A. 876.

See 40 Cent. Dig. tit. "Pledges," § 86 *et seq.*

Custom and usage.— But where upon a pledge of securities to secure a debt for stock purchased on margin, the pledgor agreed that all transactions in stocks should be in every way subject to the usages of defendant's office, the agreement is binding and the pledgee may introduce evidence that the sale of the stock by him was in accordance with the usage of his office. Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 89.

Intent.— It is immaterial whether such unauthorized disposition is made with or without a wrongful intent. Boldewahn *v.* Schmidt, 89 Wis. 444, 62 N. W. 177; Heath *v.* Griswold, 5 Fed. 573, 18 Blatchf. 555.

44. Brown *v.* Leary, 100 N. Y. App. Div. 421, 91 N. Y. Suppl. 463.

45. Luter *v.* Roberts, (Tex. Civ. App. 1897) 39 S. W. 1002.

46. Androscoggin R. Co. *v.* Auburn Bank, 48 Me. 335.

47. Waddle *v.* Owen, 45 Nebr. 489, 61 N. W. 731.

48. Day *v.* Holmes, 103 Mass. 306 (transfer to a trustee, with retention of control); Heath *v.* Griswold, 5 Fed. 573, 18 Blatchf. 555 (a transfer of stock to avoid liability as a stock-holder, but control over the stock retained by means of a power of attorney to transfer such stock at will).

49. Day *v.* Holmes, 103 Mass. 306; Ritchie *v.* Burke, 109 Fed. 16.

50. Barnhart *v.* Edwards, (Cal. 1896) 47 Pac. 251.

51. Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252, 11 N. Y. Annot. Cas. 187 [*affirmed* in 174 N. Y. 514, 66 N. E. 1108].

52. Packard *v.* Denver Sav. Bank, 8 Colo. App. 204, 45 Pac. 511; Shelton *v.* French, 33 Conn. 489. See also Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425 [*affirmed* in 190 N. Y. 545, 83 N. E. 1132].

53. Douglas *v.* Carpenter, 17 N. Y. App. Div. 329, 45 N. Y. Suppl. 219. *Compare*

pothecated by him to secure a different or larger debt than that for which it was pledged to him,[54] or if the collaterals have been transferred, but the obligation they were given to secure retained,[55] or if it has been in any way placed beyond the control of the pledgee,[56] this is a conversion. In the event of a special contract by the parties governing their rights, evidence of a custom or usage in conflict therewith is inadmissible,[57] since the effect of such evidence would be to vary the express terms of the agreement.

(II) *Compromise, Renewal, and Exchange of Security.* One who receives from his debtor as collateral security the obligation of a third person has ordinarily only the power to hold such obligation and to receive payment or collect it at maturity,[58] applying the proceeds to the payment of the debt; and if, without his debtor's consent,[59] he renews,[60] extends,[61] or releases [62] such obligation of such third person, surrenders possession of it,[63] either to the maker thereof or to a third person,[64] or compromises with the persons liable on it,[65] or exchanges it for other

Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425 [*affirmed* in 190 N. Y. 545, 83 N. E. 1132].

54. Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338; Lawrence *v.* Maxwell, 53 N. Y. 19; Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425 [*affirmed* in 190 N. Y. 545, 83 N. E. 1132]; Douglas *v.* Carpenter, 17 N. Y. App. Div. 329, 45 N. Y. Suppl. 219; Oregon, etc., Co. *v.* Hilmers, 20 Fed. 717, holding that evidence that a broker with whom securities are pledged for a loan is authorized by custom to repledge them in such manner that they cannot be restored to the owner on payment of the loan is admissible, since it would destroy the contract of pledge.

55. Ware *v.* Russell, 57 Ala. 43, 29 Am. Rep. 710. *Compare* Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425 [*affirmed* in 190 N. Y. 545, 83 N. E. 1132].

56. Sheridan *v.* Presas, 18 Misc. (N. Y.) 180, 41 N. Y. Suppl. 451 (absolute gift of the property by the pledgee); Ryman *v.* Gerlach, 153 Pa. St. 197, 25 Atl. 1031, 26 Atl. 302 (holding that where stock is deposited by the owner with a local broker, by whom it is transferred to another broker as collateral for other stock to be purchased for the owner, and is sold by the pledgee with knowledge as to its ownership, as the property of the local broker, he is guilty of conversion). *Compare* Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425 [*affirmed* in 190 N. Y. 545, 83 N. E. 1132].

57. Rich *v.* Boyce, 39 Md. 314; Lawrence *v.* Maxwell, 53 N. Y. 19.

58. Gage *v.* Punchard, 6 Daly (N. Y.) 229; Garlick *v.* James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294.

59. The collateral may be exchanged by pledgee for other security with the consent of the pledgor. Griggs *v.* Day, 21 N. Y. App. Div. 442, 47 N. Y. Suppl. 609 [*reversed* on other grounds in 158 N. Y. 1, 52 N. E. 692]; Randolph *v.* Merchants' Nat. Bank, 9 Lea (Tenn.) 63.

60. Stevens *v.* Wiley, 165 Mass. 402, 43 N. E. 177; Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85.

61. *Arkansas.*— Key *v.* Fielding, 32 Ark. 56.

Iowa.— Greenwald *v.* Metcalf, 28 Iowa 363.

Massachusetts.— Stevens *v.* Wiley, 165 Mass. 402, 43 N. E. 177.

Michigan.— Paw Paw First Nat. Bank *v.* Walker, 115 Mich. 434, 73 N. W. 378.

Nebraska.— Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85.

New York.— Gage *v.* Punchard, 6 Daly 229; Nexsen *v.* Lyell, 5 Hill 466.

Wyoming.— Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

See 40 Cent. Dig. tit. "Pledges," § 87.

Instalments.— But where a contract where money was payable in instalments was assigned as collateral, and the pledgee extended the time of payment of some of the instalments, the pledgee was not liable to the pledgor, if the extension was not made while the obligor under the contract could have met the payments. Riley *v.* Allendale Bank, 57 S. C. 98, 35 S. E. 535.

62. Brown *v.* Newton First Nat. Bank, 112 Fed. 901, 50 C. C. A. 602, 56 L. R. A. 876, release of judgment by the pledgee.

63. Powell *v.* Ong, 92 Ill. App. 95; Greenwald *v.* Metcalf, 28 Iowa 363; Stevens *v.* Wiley, 165 Mass. 402, 43 N. E. 177; Wood *v.* Matthews, 73 Mo. 477, holding that the pledgee is liable for the surrender of a note, although it is uncollectable.

64. Fletcher *v.* Dickinson, 7 Allen (Mass.) 23; Griggs *v.* Day, 21 N. Y. App. Div. 442, 47 N. Y. Suppl. 609 [*reversed* on other grounds in 158 N. Y. 1, 52 N. E. 692]; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322 (where the pledgee collusively transferred a bond and mortgage held as collateral to a third person for a grossly inadequate sum and the securities were canceled by the transferee); Manton *v.* Robinson, 19 R. I. 405, 34 Atl. 148.

65. Union Trust Co. *v.* Rigdon, 93 Ill. 458; Powell *v.* Ong, 92 Ill. App. 95; Union Nat. Bank *v.* Post, 64 Ill. App. 404; Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; Garlick *v.* James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294.

Thus where a pledgee of a note and mortgage releases the mortgage debt on receipt of a deed of the mortgaged premises, without the consent of the pledgor, he must account

securities,[66] he is liable to the debtor for conversion.[67] An exception to the general rule exists, however, in the case of a compromise by the pledgee of the pledged security on terms advantageous to the pledgor as well as to himself,[68] especially where the maker is insolvent and the debt is insufficiently secured;[69] and in such case he must account to the pledgor only for the amount actually received under the compromise.

(iii) *Sale of Commercial Paper Pledged.*[70] In the absence of special authority or agreement permitting him to do so, a pledgee has no right to sell commercial paper held as pledge, either at public or private sale,[71] and an unauthorized sale by him constitutes a conversion of the instrument. The power to sell may, however, be given the pledgee by express agreement,[72] although even in such case notice of the time and place of sale must be given the pledgor.[73]

b. By Pledgor or Other Person. If the pledgor wrongfully takes possession

to the pledgor for the face value of the mortgage debt. Chester *v.* Hill, 66 Cal. 480, 6 Pac. 132; Dickson *v.* Cole, 34 Wis. 621. But, where one of two obligors, who are jointly indebted as principals, pledges certain choses in action as collateral security for the joint debt, the pledgee may, with the consent of the pledgor, accept less than the face value of such collaterals in settlement of the same, without making himself liable to account to the other obligor for more than the sum actually received by him. Foltz *v.* Hardin, 139 Ill. 405, 28 N. E. 786 [*affirming* 38 Ill. App. 542].

66. *Iowa.*— Greenwald *v.* Metcalf, 28 Iowa 363.

Massachusetts.— Stevens *v.* Wiley, 165 Mass. 402, 43 N. E. 177.

Nebraska.— Hass *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85.

New York.— Chester *v.* Kingston Bank, 17 Barb. 271 [*affirmed* in 16 N. Y. 336]; Gage *v.* Punchard, 6 Daly 229; Nexsen *v.* Lyell, 5 Hill 466.

Utah.— Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147.

Wyoming.— Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

See 40 Cent. Dig. tit. "Pledges," § 87.

But a new unexecuted agreement to exchange the collateral does not amount to a conversion. Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252, 11 N. Y. Annot. Cas. 187 [*affirmed* in 174 N. Y. 514, 66 N. E. 1108].

67. Even under an express power to sell the note, the pledgee cannot compromise and surrender it to the maker for a sum less than is due thereon, but enough to pay the principal debt, and such action will *prima facie* render him liable for the face of the note in excess of his debt. Newall *v.* Sexton, 61 Cal. 645; Depuy *v.* Clark, 12 Ind. 427; Wood *v.* Matthews, 73 Mo. 477; Garlick *v.* James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294.

68. Exeter Bank *v.* Gordon, 8 N. H. 66. And see Girard F. & M. Ins. Co. *v.* Marr, 46 Pa. St. 504, holding that, upon an exchange by the pledgee of collaterals for other securities, he is not liable to the pledgor for conversion in the absence of some evidence of loss to the pledgor by reason of the exchange.

69. Hanover Nat. Bank *v.* Brown, (Tenn. Ch. App. 1899) 53 S. W. 206; Fant *v.* Miller, 17 Gratt. (Va.) 187, 217 (where the court said: "If more could be made by compounding or compromising a debt than in any other way, or if such a compromise was deemed advisable in the exercise of a sound discretion, looking to the interest of the creditor, they had a right to make such compromise. New securities taken by them in the discharge of their duties might properly be taken in their own names"); De Clark *v.* Waters, 10 Wyo. 31, 65 Pac. 855.

70. Right to enforce chose in action pledged see *supra*, IV, B.

71. *Illinois.*— Zimpleman *v.* Veeder, 98 Ill. 613; Union Trust Co. *v.* Rigdon, 93 Ill. 458; Joliet Iron, etc., Co. *v.* Scioto Brick Co., 82 Ill. 548, 25 Am. Rep. 341.

Massachusetts.— See Fletcher *v.* Dickinson, 7 Allen 23.

Missouri.— Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806.

New York.— Wheeler *v.* Newbould, 16 N. Y. 392; Brown *v.* Ward, 3 Duer 660.

West Virginia.— Whitteker *v.* Charleston Gas Co., 16 W. Va. 717.

See 40 Cent. Dig. tit. "Pledges," §§ 75, 87.

Compare Potter *v.* Thompson, 10 R. I. 1, where the court held that such securities could be sold after their maturity.

Corporation bonds, being in their nature marketable securities at established values, have been distinguished in this respect from commercial paper, and may in general be sold by the pledgee, on notice, before their maturity. National Exch. Bank *v.* Kilpatric, 204 Mo. 119, 102 S. W. 499; Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Brown *v.* Ward, 3 Duer (N. Y.) 660; Alexandria, etc., R. Co. *v.* Burke, 22 Gratt. (Va.) 254, where coupon county bonds were held to be subject of sale. But see *contra*, as to railroad bonds (Joliet Iron, etc., Co. *v.* Scioto Fire Brick Co., 82 Ill. 548, 25 Am. Rep. 341); and, as to municipal corporation orders (Whitteker *v.* Charleston Gas Co., 16 W. Va. 717).

72. Davis *v.* Funk, 39 Pa. St. 243, 80 Am. Dec. 519.

73. Goldsmidt *v.* Worthington M. E. Church, 25 Minn. 202; Davis *v.* Funk, 39 Pa. St. 243, 80 Am. Dec. 519, where the

of the pledged property without the consent of the pledgee,[74] this constitutes a conversion, for which the pledgee may maintain an action. So, where the possession of the property is wrongfully secured, or retained by a third person, he may be sued in conversion by either the pledgor,[75] or the pledgee.[76] In an action by the pledgee against the pledgor for conversion of the property, plaintiff is entitled to recover only the property itself, or the debt it was given to secure, with interest, since this is the measure of the pledgor's liability to him.[77]

2. Actions For Possession or Proceeds of Property — a. Between Pledgor and Pledgee — (i) *In General.* In the event of conversion by the pledgee of the pledged property, the pledgor may maintain an action for the property itself,[78] or, as in the case of its sale or exchange, for the proceeds,[79] or he may bring an action for the amount of damages suffered by him,[80] or, in a suit by the pledgee on the principal obligation,[81] he may set up the conversion of the pledge as a defense *pro tanto* or in full, according to the circumstances of the case.[82] But the pledgor is not entitled to recover the property unless he establishes either that it was obtained from him by fraud, or that the pledgee has violated the conditions on which it was delivered.[83] Upon judgment in trover against the pledgee, he will be given an option to return the property itself or its value.[84] In an action by the pledgee against the pledgor for conversion of the property, plaintiff is entitled to recover only the property itself, or the debt it was given to secure, with interest, as this is the measure of the pledgor's liability to him.[85]

(ii) *Tender of Payment of Debt Secured.* In a suit to recover the

question of whether or not the pledgee had a right to sell such security was not passed upon.

74. Jones *v.* Hicks, 52 Miss. 682; Walcott *v.* Keith, 22 N. H. 196.

75. Felt *v.* Heye, 23 How. Pr. (N. Y.) 359.

76. Porter *v.* Foster, 20 Me. 391, 37 Am. Dec. 59.

77. Walcott *v.* Keith, 22 N. H. 196.

78. Johnson *v.* Robbins, 20 La. Ann. 569.

79. *District of Columbia.*— Stiles *v.* Selinger, 2 Mackey 429.

Illinois.— Union Nat. Bank *v.* Post, 192 Ill. 385, 61 N. E. 507 [*affirming* 93 Ill. App. 339].

Massachusetts.— Mayo *v.* Peterson, 126 Mass. 516, as by an action for money had and received for the use of the pledgor.

Missouri.— Schaaf *v.* Fries, 90 Mo. App. 111.

New Jersey.— Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643.

Wisconsin.— Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21.

United States.— Brown *v.* Newton First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293.

See 40 Cent. Dig. tit. "Pledges," § 89.

The full sale price may be recovered by the pledgor, although the pledgee took a note for the price which he afterward surrendered to the purchaser for less than its face value. Demars *v.* Hudon, 33 Mont. 170, 82 Pac. 952.

Where the property is sold by the pledgee on credit, without interest, and the sale is ratified by the pledgor by his suing for the proceeds, the pledgor is chargeable with interest on his debt not only to the time of the sale, but until the payment of sufficient purchase-money to discharge his debt. Demars *v.* Hudon, 33 Mont. 170, 82 Pac. 952.

Where a pledgee, having an option to purchase the property pledged at a specified price, converts the property, the pledgor may elect to consider the conversion as an exercise of the option, and sue for the price. Upham *v.* Barbour, 65 Minn. 364, 68 N. W. 42.

If a pledged note is construed as paid to the pledgee, no matter by what means, he is liable for the face value, whether it was legally collectable or not. Union Nat. Bank *v.* Post, 192 Ill. 385, 61 N. E. 507 [*affirming* 93 Ill. App. 339].

If several items of property are pledged at one time, for one sum, and no reason exists for a separate demand of each article, the contract of pledge is entire, and the pledgor cannot bring separate actions of trover for separate articles. Bullard *v.* Thorpe, 66 Vt. 599, 30 Atl. 36, 44 Am. St. Rep. 867, 25 L. R. A. 605.

Judgment in trover; effect on title.— The right of the owner to the securities is not lost or merged in a judgment in trover, which he has recovered against his pledgee who has fraudulently hypothecated them. If the judgment is held to represent the securities, the rights of the parties will be protected by requiring the owner to make suitable credit on the judgment.

Right to sue in assumpsit see Assumpsit, 4 Cyc. 332 note 65.

80. See *infra*, IV, C, 3.

81. See *infra*, VII, B.

82. Bulkeley *v.* Welch, 31 Conn. 339; Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643; Brown *v.* Newton First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293.

83. Winston *v.* Rawson, 38 Ill. App. 193.

84. Johnson *v.* Robbins, 20 La. Ann. 569.

85. Jones *v.* Hicks, 52 Miss. 682.

property itself or its proceeds, the pledgor must tender payment of the debt the pledge was given to secure,[86] unless the lien created by the pledge has been otherwise discharged.[87]

(III) *STATUTE OF LIMITATIONS.*[88] The statute of limitations does not run against the debt due the pledgee so long as he remains in possession of the property, at least to the extent of the value of such property.[89] But the statute of limitations begins to run against the pledgor's right to recover the property immediately such right accrues,[90] and where a demand is necessary to the accrual of such right, from the time such demand is made.[91]

(IV) *PLEADING AND PRACTICE.* Matters relating to pleading,[92] evidence,[93] judgments,[94] etc.,[95] in actions between pledgor and pledgee for possession or pro-

86. Johnson *v.* Robbins, 20 La. Ann. 569; Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342, 7 N. E. 869, 56 Am. Rep. 679; Mayo *v.* Peterson, 126 Mass. 516; Schaaf *v.* Fries, 90 Mo. App. 111; Hopper *v.* Smith, 63 How. Pr. (N. Y.) 34. See also Whitlock *v.* Seaboard Nat. Bank, 29 Misc. (N. Y.) 84, 60 N. Y. Suppl. 611.

87. *Arkansas.*— Meyer Bros. Drug Co. *v.* Matthews, 69 Ark. 483, 64 S. W. 264.

Colorado.— E. F. Hallack Lumber Mfg. Co. *v.* Gray, 19 Colo. 149, 34 Pac. 1000.

Massachusetts.— Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342, 7 N. E. 869, 56 Am. Rep. 679.

Michigan.— Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390.

New York.— Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127]; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60.

Texas.— Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

Other methods of discharge see *infra*, VI, A. 2.

88. **Statute of limitations** generally see LIMITATIONS OF ACTIONS, 25 Cyc. 963 *et seq.*

89. Villere *v.* Shaw, 108 La. 71, 32 So. 196.

90. Kase *v.* Burnham, 206 Pa. St. 330, 55 Atl. 1028.

Equity follows the law in the application of the statute. Wheeler *v.* Breslin, 47 Misc. (N. Y.) 507, 95 N. Y. Suppl. 966. And will not permit a recovery by the pledgor after the lapse of the statutory period, although the delay was owing to plaintiff's difficulty in establishing his title to the collaterals as against a third party. Kase *v.* Burnham, 206 Pa. St. 330, 55 Atl. 1028.

91. The right to demand return of the collateral accrues upon payment of the debt it secures (Brown *v.* Bronson, 93 N. Y. App. Div. 312, 87 N. Y. Suppl. 872), or upon a tender of the amount of the debt at its maturity (Wheeler *v.* Breslin, 47 Misc. (N. Y.) 507, 95 N. Y. Suppl. 966).

92. **Pleading** generally see PLEADING, *ante*, p. 1 *et seq.*

A statement of claim in replevin shows a *prima facie* case which sets forth that defendant was indebted to plaintiff and as collateral for the debt assigned to plaintiff certain chattels, the possession of which he was allowed to retain until the debt was paid, that the debt had never been paid, and the chattels never delivered to plaintiff. Such a statement of claim is not overcome by an affidavit of defense averring that there had never been a delivery to plaintiff, either actually or constructively, of the property pledged and replevied. In such a case where defendant retains possession under a claim property bond, he will not be heard to say that the chattels replevied were not the chattels pledged. Rickard *v.* Major, 34 Pa. Super. Ct. 107.

A plea of title which proves invalid does not deprive pledgee of the right to insist upon his lien as pledgee. Hubbard *v.* Tod, 171 U. S. 474, 19 S. Ct. 14, 43 L. ed. 246.

Affidavit of defense.— In an action of replevin to recover pledged property, defendant cannot in his affidavit of defense contradict the sheriff's return. If there was a wrongful return, the remedy is by an action against the sheriff. Rickard *v.* Major, 34 Pa. Super. Ct. 107.

Variance.— In an action by the pledgor to recover the proceeds of a pledge, an allegation that it was assigned to E. & Co., and proof that it was assigned to E. is an immaterial variance. Clarke *v.* Adam, 30 Tex. Civ. App. 66, 69 S. W. 1016.

93. **Evidence** generally see EVIDENCE, 16 Cyc. 821 *et seq.*

Burden of proof.— So long as the principal obligation and the collateral pledged for its security remain with the creditor, or upon his death, with his personal representatives, the burden is upon the debtor, in an action to recover the collateral, to show that the note has been paid, and to explain its continued possession by the creditor or his representatives. Brown *v.* Bronson, 93 N. Y. App. Div. 312, 87 N. Y. Suppl. 872.

Presumptions.— Where the pledgee shows that the property has been stolen from him, it will be presumed, in the absence of evidence to the contrary, that he has not subsequently recovered it. Ware *v.* Squyer, 81 Minn. 388, 84 N. W. 126, 83 Am. St. Rep. 390.

Admissibility.— In support of the pledgee's claim that he had become absolute owner of property originally transferred to him as a pledge, he may show that, although he had numerous subsequent transactions with the pledgor, the latter did not mention the property nor claim any interest in it. Smith *v.* Sherry, 55 Wis. 480, 13 N. W. 482.

94. **Judgment** generally see JUDGMENTS, 23 Cyc. 623. See also Johnson *v.* Robbins, 20 La. Ann. 569; Jones *v.* Hicks, 52 Miss. 682.

95. **Parties.**— Where, in an action to re-

ceeds of pledged property, are controlled by the rules governing the particular form of action.[96]

b. Against Third Person — (i) *By Pledgee*— (a) *In General.* The pledgee has a special property in the thing pledged sufficient to enable him to maintain an action in trover,[97] detinue,[98] replevin,[99] or, under certain circumstances, a suit in equity,[1] or other action for the recovery of the specific property,[2] or its proceeds, from a third person who has wrongfully obtained possession of or has converted it to his own use.[3]

(b) *Pleading and Practice.*[4] It is not necessary for the pledgor to join as a plaintiff in the action or suit.[5] No demand is necessary before suing in trover for the property.[6] And in such action he is entitled to an alternative judgment for the full value of the collaterals; [7] but upon an action against a purchaser from the pledgor, the pledgee can recover only the amount of his debt.[8] The effect of the satisfaction by the wrong-doer of the judgment in trover is to vest in him title to the property or its proceeds.[9]

(ii) *By Pledgor.* Where the pledge has been wrongfully transferred by the pledgee to a third party, not a holder in due course of a negotiable instrument,[10] the pledgor may, upon the payment or tender of his debt,[11] maintain an action

cover possession of shares of corporate stock held by defendant as security for the payment of certain notes given by plaintiff to a third person for the purchase-price of the stock, there was no claim that the notes had not been paid, and defendant's refusal to surrender the stock was not based on that ground, but on the ground that he had an interest in the stock, the seller of the stock was not a necessary party. Leigh *v.* Laughlin, 222 Ill. 265, 78 N. E. 563 [*affirming* 123 Ill. App. 564].

96. See Assumpsit, Action of, 4 Cyc. 317; Detinue, 14 Cyc. 239; Equity, 16 Cyc. 1; Replevin; Trover and Conversion.

97. See *supra*, IV, A, 1, a.

98. Jones *v.* Pullen, 66 Ala. 306; Gafford *v.* Stearns, 51 Ala. 434; Noles *v.* Marable, 50 Ala. 366; Bryan *v.* Smith, 22 Ala. 534. See Detinue, 14 Cyc. 269 note 24; and *supra*, IV, A, 1, a.

99. The pledgee and not the pledgor is the proper person to bring such suit so long as such relation exists between them. Selleck *v.* Macon Compress, etc., Co., 72 Miss. 1019, 17 So. 603; Peebles *v.* Murphy, (Miss. 1895) 17 So. 278. See Replevin; and *supra*, IV, A, 1, a.

1. Michigan State Bank *v.* Gardner, 3 Gray (Mass.) 305; Page *v.* Boggess, 41 Misc. (N. Y.) 46, 83 N. Y. Suppl. 569. See *supra*, IV, A, 1, a.

2. Lyons *v.* Rogers, 1 Brev. (S. C.) 5.

Where the property is in the possession of a depositary of the pledgee, the pledgee, having no notice of any other rights on the part of the depositary, does not lose any of his rights against such person by modifications in the contract with the pledgor. Mercantile Trust Co. *v.* Atlantic Trust Co., 69 Hun (N. Y.) 264, 23 N. Y. Suppl. 496.

Right to sue in assumpsit for the proceeds see Assumpsit, 4 Cyc. 332 note 65.

3. Citizens' Bank *v.* Tiger Tail Mill, etc., Co., 152 Mo. 145, 53 S. W. 902; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290 [*reversing* 4 Den. 489].

Such recovery will be subject to liens existing on the property at the time of the pledge to plaintiff. Page *v.* Boggess, 41 Misc. (N. Y.) 46, 83 N. Y. Suppl. 569.

4. See also Assumpsit, Action of, 4 Cyc. 317; Detinue, 14 Cyc. 239; Replevin; Trover and Conversion.

5. Michigan State Bank *v.* Gardner, 3 Gray (Mass.) 305. If, in an action by the pledgee, to which the pledgor is a party, to collect a note held by him as collateral, the pledgee takes other security from the maker, releases his interest in the note, and withdraws from the action, the pledgor being substituted as plaintiff, the pledgor is not entitled to a judgment against the pledgee for the value of the note. Thomas *v.* Davis, 15 Tex. Civ. App. 359, 39 S. W. 579.

A pledgor may file a cross complaint, however, in a suit by the pledgee against a third person to recover the pledged property or its proceeds, where his claims conflict with those of the pledgee. Tom Boy Gold Mines Co. *v.* Green, 11 Colo. App. 447, 53 Pac. 845.

6. Porter *v.* Foster, 20 Me. 391, 37 Am. Dec. 59.

7. And this is so, irrespective of the amount for which they were pledged, as this is the measure of his responsibility to the pledgor. Soule *v.* White, 14 Me. 436; Jones *v.* Hicks, 52 Miss. 682; Hanover Nat. Bank *v.* American Dock, etc., Co., 14 N. Y. App. Div. 255, 43 N. Y. Suppl. 544.

8. Grand Forks Second Nat. Bank *v.* St. Thomas First Nat. Bank, 8 N. D. 50, 76 N. W. 504, as this would be the extent of his recovery against the pledgor himself.

9. Thompson *v.* Toland, 48 Cal. 99.

10. See *infra*, V, B, 1.

11. German Sav. Bank *v.* Renshaw, 78 Md. 475, 28 Atl. 281 (holding that where the debt has already been paid to the original pledgee, the pledgor need make no further tender to the person in possession); McCutcheon *v.* Dittman, 164 N. Y. 355, 58 N. E. 97 [*modifying* 23 N. Y. App. Div. 285, 48 N. Y. Suppl. 360].

against such third person for the recovery of the property.[12] Where the pledgee has surrendered a note to the maker for less than its full value, in addition to the pledgor's remedy against the pledgee for conversion,[13] he may also recover from the maker the residue on the note.[14] If the pledgee, upon the maturity of a note deposited with him as collateral, refuses to sue on it, a bill will lie by the pledgor to have the note collected and the amount credited on his debt.[15] Where the pledgor has conferred upon the pledgee the *indicia* of ownership of the property, he can recover from a third person who has received it from the pledgee in good faith as collateral for a loan only the value of the property in excess of the loan by defendant to the pledgee.[16]

c. By Third Person — (i) *In General.* The validity of a pledge to secure notes cannot be attacked by a suit to which neither the pledgor nor the holders of the notes are parties.[17]

(ii) *Owner of Property Pledged Without Consent.* Where property has been pledged without the consent of the owner, and by one upon whom he has not conferred the *indicia* of ownership,[18] he may recover the property itself or the proceeds from the pledgee;[19] but if the owner has conferred such *indicia* upon the pledgor,[20] he can recover against the pledgee only the proceeds in excess of the amount for which it was pledged.[21] These rules would apply with equal force in favor of *bona fide* purchasers from the true owner.[22]

Until the payment or tender of his debt he cannot recover such possession. Selleck *v.* Macon Compress, etc., Co., 72 Miss. 1019, 17 So. 603; Peebles *v.* Murphy, (Miss. 1895) 17 So. 278; Talty *v.* Freedman's Sav., etc., Co., 93 U. S. 321, 23 L. ed. 886; Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13, 21 Eng. Rul. Cas. 301. But see Felt *v.* Heye, 23 How. Pr. (N. Y.) 359, allowing a recovery without either payment or tender of the debt.

12. Where the pledgor consents to a sale by one claiming by a transfer from his pledgee, he cannot hold such person responsible for more than the actual amount received, although the property is sold for less than it is worth. Merchants' Bank *v.* Livingston, 17 Hun (N. Y.) 321 [*affirmed* in 79 N. Y. 618].

13. See *supra*, IV, C, 2, a.

14. Zimpleman *v.* Veeder, 98 Ill. 613; Union Trust Co. *v.* Rigdon, 93 Ill. 458; Craig *v.* McHenry, 35 Pa. St. 120; De Clark *v.* Waters, 10 Wyo. 31, 65 Pac. 855.

15. Baker *v.* Burkett, 75 Miss. 89, 21 So. 970.

16. Van Woert *v.* Olmstead, 71 N. Y. Suppl. 431; Klein's Appeal, 10 Pa. Cas. 477, 14 Atl. 369. In Van Woert *v.* Olmstead, *supra*, it was held, however, that where stock belonging to customers is pledged by a firm of brokers for their own debt, and subsequently upon a general assignment of the firm, the stock is sold by the pledgees for more than the amount of their debts, the pledgees must pay the costs of sale, and one of the customers who has brought suit against the pledgees for an accounting is entitled to have his costs paid out of the fund recovered for the benefit of himself and other customers.

Mutual rights of pledgors.—Where the property of a number of pledgors has been mingled together and converted by the pledgee, the surplus proceeds of such property remaining upon the pledgee's insolvency is impressed with a trust for the benefit of the pledgors in proportion to their loss. Whitlock *v.* Seaboard Nat. Bank, 29 Misc. (N. Y.) 84, 60 N. Y. Suppl. 611. See also Van Woert *v.* Olmstead, 71 N. Y. Suppl. 431.

17. Hubbard *v.* Tod, 171 U. S. 474, 19 S. Ct. 14, 43 L. ed. 246.

18. See cases cited *infra*, note 19.

19. O'Herron *v.* Gray, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498; Henry *v.* Marvin, 3 E. D. Smith (N. Y.) 71; Skinner *v.* Dodge, 4 Hen. & M. (Va.) 432, holding that if plaintiff has filed his bill in equity in order to obtain discovery, he would not, upon a disclosure of the facts, be sent to a court of law, but a decree would be entered at once against the pledgee.

20. See cases cited *infra*, note 21.

21. Brittan *v.* Oakland Sav. Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58, 112 Cal. 1, 44 Pac. 339; Powers *v.* Savin, 2 N. Y. Suppl. 835, holding that it is error in such case to award the surplus proceeds to the assignee for the benefit of the pledgor's creditors.

So if the loan was made in good faith for the benefit of an estate, although it proved invalid, the pledgee cannot be held liable for conversion of the collateral without repayment of his loan. Freeman *v.* Bristol Sav. Bank, 76 Conn. 212, 56 Atl. 527.

But the pledgee is not entitled to set off sums advanced to the pledgor on the property with notice of plaintiff's ownership. Kaminski *v.* Schefer, 46 N. Y. App. Div. 170, 61 N. Y. Suppl. 771; Ryman *v.* Gerlach, 153 Pa. St. 197, 25 Atl. 1031, 26 Atl. 302. Nor upon a negotiable note not belonging to the pledgor and received by him otherwise than in the usual course of business. Keutgen *v.* Parks, 2 Sandf. (N. Y.) 60.

22. See Hoyt *v.* Selby Smelting, etc., Co.,

(iii) *Prior Lienor.* Any liens existing on the property at the time of its pledge may be enforced against the pledgee.[23]

(iv) *Subsequent Purchaser*[24] *or Claimant* — (a) *Of or Through Pledgor.* A subsequent purchaser of the property from the pledgor[25] is entitled to bring suit for the enforcement of the contract of pledge,[26] or for the conversion of the property;[27] but is entitled to recover possession of the property from the pledgee only upon payment or tender to the pledgee of the amount of the debt for which it is security.[28]

(b) *Of or Through Pledgee.* So one to whom the goods have been delivered by the pledgee, with the consent of the pledgor, may maintain an action for their conversion.[29] In a suit to foreclose a mortgage by one to whom it has been wrongfully repledged by the original pledgee, plaintiff is entitled to receive only the amount for which it was originally pledged.[30]

(v) *Maker of Pledged Note.* Where the pledgee has wrongfully transferred a note pledged to him, he will be liable to the maker, upon the payment or tender of his debt, for the amount the maker was obliged to pay to the holder of the note.[31]

3. Actions For Damages — a. Between Pledgor and Pledgee — (i) *By Pledgee* — (a) *In General.* Where the pledgee has delivered the property to the pledgor for a special purpose, an action in trover,[32] or the statutory substitute therefor,[33] lies against the pledgor for conversion of the property, and it is no defense to the action that the pledgee wrongfully sold other securities which he held for the same debt.[34]

(b) *Measure of Damages.* The measure of damages is the value of the property, with interest, from the time of the conversion,[35] unless such amount exceeds the sum due the pledgee, in which case that sum is the proper measure of damages.[36]

(ii) *By Pledgor* — (a) *In General.* Upon a conversion of the property by the pledgee, the pledgor, instead of suing for the property itself or its proceeds,[37] may maintain an action for damages for breach of the contract to keep the property safely and restore it to the pledgor upon payment of the debt,[38] without first

90 Cal. 339, 27 Pac. 288; Ambrose *v.* Evans, 66 Cal. 74, 4 Pac. 960.

If the suit is for the recovery of the property itself, and it is sold pending the action, judgment cannot be given for the surplus in excess of the debt to the pledgee, since this did not constitute any part of plaintiff's action. Ambrose *v.* Evans, 66 Cal. 74, 4 Pac. 960, where plaintiff claiming as assignee of the owner sued the pledgee of one with whom the owner had deposited the stock for safekeeping.

Where the evidence conflicts as to the authority of the superintendent of a mining corporation to pledge its bullion to a creditor of the corporation, a finding in favor of such authority will sustain a judgment in favor of the pledgee in an action of claim and delivery brought against him by a subsequent purchaser of the bullion from the corporation. Hoyt *v.* Selby Smelting, etc., Co., 90 Cal. 339, 27 Pac. 288.

Subsequent purchaser from: Pledgee see *infra*, IV, C, 2, c, (iv), (b). Pledgor see *infra*, IV, C, 2, c, (iv), (a).

23. Blalock *v.* Keys, 13 Ky. L. Rep. 205.

24. **Subsequent purchaser from owner** see *supra*, text and note 22; *infra*, V, C.

25. Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun (N. Y.) 213, 33 N. Y. Suppl. 252.

Fraud of pledgee's clerk acting for pledgor. — Such purchaser cannot maintain an action against the pledgee for false representations made by his clerk in negotiating the sale, where it appears that the clerk was acting in the transaction for the pledgor. Polhemus *v.* Holland Trust Co., 59 N. J. Eq. 93, 45 Atl. 534.

26. Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun (N. Y.) 213, 33 N. Y. Suppl. 252.

27. Genet *v.* Howland, 45 Barb. (N. Y.) 560.

28. Jones *v.* Rahilly, 16 Minn. 320.

29. Clark *v.* Dearborn, 103 Mass. 335.

30. Merchants' Bank *v.* Livingston, 17 Hun (N. Y.) 321 [*affirmed* in 79 N. Y. 618].

31. Romero *v.* Newman, 50 La. Ann. 80, 23 So. 493.

32. Hays *v.* Riddle, 1 Sandf. (N. Y.) 248.

33. Hurst *v.* Coley, 15 Fed. 645.

34. Hays *v.* Riddle, 1 Sandf. (N. Y.) 248.

35. Hays *v.* Riddle, 1 Sandf. (N. Y.) 248. See also Damages, 13 Cyc. 170 *et seq.*

36. Hays *v.* Riddle, 1 Sandf. (N. Y.) 248.

37. See *supra*, IV, C, 2, a.

38. Nabring *v.* Mobile Bank, 58 Ala. 204 (holding that, although a stock-holder, after pledging his stock, has not such legal title as will enable him to maintain trover against the pledgee for an unauthorized sale, he may

demanding a return of the pledged property,[39] or tendering the amount of his debt;[40] or he may plead such conversion as a set-off to a suit on the original debt by the pledgee or his representative.[41] Nor is the pledgor estopped from recovering damages against his pledgee for a wrongful sale of the property by the fact that he has purchased the property from the pledgee's vendee.[42]

(B) *Measure of Damages* — (1) In General. The measure of damages which the pledgor is entitled to recover against the pledgee for conversion of the property, or for other violation of the pledgee's contract, is the actual amount of loss suffered by the pledgor by reason of the pledgee's wrongful act.[43] Upon the conversion of chattels, the measure of the pledgor's damages is the market value of the chattels at the time of conversion.[44] In the cases where it is held that the pledgor must tender payment of his debt before he is entitled to demand a return of the property or maintain a suit for its conversion,[45] it is held that the measure of his damages is the value of the property at the time of such tender and demand,[46] and not its value at the time of conversion. Ordinarily [47] the burden is on the pledgor to allege and prove not only the conversion, but the fact and extent of his loss.[48] Upon his failure to prove the actual value of the securities converted it will be presumed that they were of no value or only of a nominal value, and the pledgor will not be entitled to a judgment,[49] or he will be entitled to a judgment only for a nominal amount.[50]

(2) Mortgage. The measure of damages for the conversion of a mortgage by

maintain a special action on the case); Schaaf *v.* Fries, 90 Mo. App. 111; Brown *v.* Newton First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293.

39. Cox *v.* Albert, 78 Ind. 241; Crawford *v.* Verry, 12 Ind. 427; Usher *v.* Van Vranken, 48 N. Y. App. Div. 413, 63 N. Y. Suppl. 104.

Where, however, a pledgee of certain bonds agreed to cancel the debt and return the bonds in consideration of services rendered and to be rendered by the pledgor, a demand for the return of the bonds was essential, to make the pledgee's retention thereof a conversion. Scrivner *v.* Woodward, 139 Cal. 314, 73 Pac. 863.

40. Cox *v.* Albert, 78 Ind. 241; Fletcher *v.* Dickinson, 7 Allen (Mass.) 23; Schaaf *v.* Fries, 90 Mo. App. 111; Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307; Usher *v.* Van Vranken, 48 N. Y. App. Div. 413, 63 N. Y. Suppl. 104; Hopper *v.* Smith, 63 How. Pr. (N. Y.) 34; Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

41. See *infra*, IV, C, 3, a, (II), (C); VII, B, 3, b. See also Bulkeley *v.* Welch, 31 Conn. 339.

Loss of property through pledgee's negligence as matter of set-off or counter-claim see *infra*, VII, B, 3, b. See also Hook *v.* White, 36 Cal. 299; Cooper *v.* Simpson, 41 Minn. 46, 42 N. W. 601, 16 Am. St. Rep. 667, 4 L. R. A. 194; Taggard *v.* Curtenius, 15 Wend. (N. Y.) 155.

42. Hilgert *v.* Levin, 72 Mo. App. 48.

43. *Georgia.*— Harrell *v.* Citizens' Banking Co., 111 Ga. 846, 36 S. E. 460; Fisher *v.* George S. Jones Co., 108 Ga. 490, 34 S. E. 172.

Illinois.— Zimpleman *v.* Veeder, 98 Ill. 613; Union Trust Co. *v.* Rigdon, 93 Ill. 458; Union Nat. Bank *v.* Post, 93 Ill. App. 339 [*affirmed* in 192 Ill. 385, 61 N. E. 507].

Maryland.— Baltimore Third Nat. Bank *v.* Boyd, 44 Md. 47, 22 Am. Rep. 35.

Minnesota.— Lamberton *v.* Windom, 12 Minn. 232, 90 Am. Dec. 301.

New Hampshire.— Exeter Bank *v.* Gordon, 8 N. H. 66.

New York.— Cortelyou *v.* Lansing, 2 Cai. Cas. 200, 7 Am. Dec. 296.

Ohio.— Roberts *v.* Thompson, 14 Ohio St. 1, 82 Am. Dec. 465.

See 40 Cent. Dig. tit. "Pledges," § 94.

If the pledgor is not the absolute owner of the property, he should introduce evidence to show the extent and value of his interest. Interurban Constr. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927.

44. Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60; Davis *v.* Wrigley, 1 Tex. App. Civ. Cas. § 733. See also Damages, 13 Cyc. 170 *et seq.* But see Gregg *v.* Columbia Bank, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633, holding that in South Carolina the court may instruct the jury that they may fix the damages as the value at the time of conversion, or as the highest value up to the time of trial.

45. See *supra*, IV, C, 2 a, (II).

46. Hopper *v.* Smith, 63 How. Pr. (N. Y.) 34.

47. For rules as to particular kinds of property converted see *infra*, IV, C, 3, a, (II), (B), (2)–(5).

48. Fisher *v.* George S. Jones Co., 108 Ga. 490, 34 S. E. 172; Griggs *v.* Day, 136 N. Y. 152, 32 N. E. 612, 32 Am. St. Rep. 704, 18 L. R. A. 120.

49. Fisher *v.* George S. Jones Co., 108 Ga. 490, 34 S. E. 172.

50. Griggs *v.* Day, 158 N. Y. 1, 52 N. E. 692 [*reversing* 21 N. Y. App. Div. 442, 47 N. Y. Suppl. 609].

the pledgee is *prima facie* the amount for which the mortgage is security,[51] and not the value of the mortgaged property.[52]

(3) Note, Bond, or the Like. Upon the conversion of a note or bond pledged as collateral, the pledgee is liable to the owner for its actual value at the time of such conversion,[53] and its actual value is *prima facie* its face value and interest,[54] although the pledgee will be allowed to introduce evidence to prove that its actual value was less than its face value.[55]

(4) Policy of Insurance. Upon the wrongful surrender of a policy of insurance by the pledgee before the death of the insured, the measure of damages is the face value of the policy,[56] less any premiums accrued upon the death of the insured.[57]

(5) Stock. In the case of an unauthorized sale of stocks the pledgor is entitled to recover the highest value reached by the stocks between the time of sale and a reasonable time after he has received notice of it so as to enable him to replace

51. Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127].

52. Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127], holding that where it is not shown that the mortgagor is insolvent, the pledgee is not entitled to an instruction that the value of the security is to be determined by the value of the property mortgaged.

53. *California.*— Scrivner *v.* Woodward, 139 Cal. 314, 73 Pac. 863.

Illinois.— Union Nat. Bank *v.* Post, 64 Ill. App. 404.

Indiana.— Hazzard *v.* Duke, 64 Ind. 220; Depuy *v.* Clark, 12 Ind. 427.

Kentucky.— Stark *v.* Price, 5 Dana 140.

Louisiana.— Eseurieux *v.* Chapdu, 12 Rob. 520.

Maine.— Freeman *v.* Harwood, 49 Me. 195, allowing such recovery even in the case of a void sale to the pledgee as purchaser.

Missouri.—Interurban Constr. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927.

Nebraska.— Cropsey *v.* Averill, 8 Nebr. 151.

New York.— Thayer *v.* Manley, 73 N. Y. 305; Booth *v.* Powers, 56 N. Y. 22; Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127].

South Carolina.— Sullivan *v.* Sullivan, 20 S. C. 509; Reynolds *v.* Witte, 13 S. C. 5, 36 Am. Rep. 678.

See 40 Cent. Dig. tit. "Pledges," § 94.

Even against a surety or indorser, the pledgee is liable only for the actual value of the note. Vose *v.* Florida R. Co., 50 N. Y. 369.

Interest should be allowed the pledgor on the surplus due him from the time of the conversion by the pledgee. Hazzard *v.* Duke, 64 Ind. 220.

In an action by an assignee of the pledgor for the conversion of a bond by the pledgee, he may recover the actual value of the bond at the time of its conversion, and not merely what he paid for it. August *v.* O'Brien, 30 Misc. (N. Y.) 54, 61 N. Y. Suppl. 720 [*affirmed* in 50 N. Y. App. Div. 626, 63 N. Y. Suppl. 989].

In the case of an unauthorized exchange of collateral by the pledgee, he is liable for the difference between the value of the original and that of the substituted collateral. Nelson *v.* First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425.

54. *Alabama.*— Coeke *v.* Chaney, 14 Ala. 65; St. John *v.* O'Connel, 7 Port. 466.

California.— Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035.

Illinois.— Powell *v.* Ong, 92 Ill. App. 95; Union Nat. Bank *v.* Post, 64 Ill. App. 404.

Indiana.— Hazzard *v.* Duke, 64 Ind. 220.

Louisiana.— Laloire *v.* Wiltz, 29 La. Ann. 329.

Massachusetts.— Thomas *v.* Waterman, 7 Mete. 227.

Nebraska.— Haas *v.* Bank of Commeree, 41 Nebr. 754, 60 N. W. 85.

New York.— Hawks *v.* Hineheliff, 17 Barb. 492; Gage *v.* Punehard, 6 Daly 229; Nexsen *v.* Lyell, 5 Hill 466.

Ohio.— Boake *v.* Bonte, 8 Ohio Dec. (Reprint) 141, 5 Cine. L. Bul. 934.

Tennessee.— Clark *v.* Cullen, (Ch. App. 1897) 44 S. W. 204.

Utah.— Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147.

See 40 Cent. Dig. tit. "Pledges," § 94.

55. *Illinois.*— Powell *v.* Ong, 92 Ill. App. 95; Union Nat. Bank *v.* Post, 64 Ill. App. 404.

Louisiana.— Laloire *v.* Wiltz, 29 La. Ann. 329.

New Hampshire.— Exeter Bank *v.* Gordon, 8 N. H. 66.

South Carolina.— Nesbitt *v.* Moore, 39 S. C. 351, 17 S. E. 798.

Utah.— Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147, holding that where the notes have a market value, it is competent to show what the cash market value was at the time of conversion.

See 40 Cent. Dig. tit. "Pledges," § 94.

56. Bailey *v.* American Deposit, etc., Co., 52 N. Y. App. Div. 402, 65 N. Y. Suppl. 330 [*affirmed* in 165 N. Y. 672, 59 N. E. 1118].

57. Toplitz *v.* Bauer, 161 N. Y. 325, 55 N. E. 1059.

the stocks.[58] In such case, when the facts are undisputed, and different inferences cannot reasonably be drawn from them, what is a reasonable time is a question of law.[59]

(c) *Set-Offs.* In all cases the pledgee is entitled to have the debt due him set off against the amount of damages recovered;[60] and the pledgor will then usually be entitled to interest on the surplus from the date of the conversion.[61] In an action by the pledgor against the pledgee for conversion of the property, the latter is entitled to set off damages sustained by him by reason of the pledgor's breach of the contract the pledge was given to secure;[62] but he cannot show, in an action against him for surrendering notes to the maker for less than their face value, that the pledgor was indebted to the maker of the notes in an amount greater than the pledgor's loss.[63]

b. Against Third Person — (i) *By Pledgee* — (a) *In General.* The pledgee being entitled to the possession of the property, may bring an action for damages against any one who wrongfully injures the same,[64] or converts it to his own use,[65] even though it be taken under an attachment regular on its face;[66] or against one who returns it, without authority, to the pledgor.[67]

(b) *Measure of Damages.* In an action for damages instituted by the pledgee against a third party for injury to or conversion of the property which has been pledged to him, he is not limited to recovery for his interest only, but may recover the total amount of the loss, which in a case of the conversion of the property is the actual value of the property at the time of the conversion.[68] But as against the

58. Griggs *v.* Day, 158 N. Y. 1, 52 N. E. 692 [*reversing* 21 N. Y. App. Div. 442, 47 N. Y. Suppl. 609]. For full discussion of the rule see DAMAGES, 13 Cyc. 170 *et seq.*

In Maryland the measure of damages is the value of the stock at the time of its conversion; and this is the rule whether the action is an action in tort or one in assumpsit. Franklin Bank *v.* Harris, 77 Md. 423, 26 Atl. 523; Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

Where the parties had been engaged in a negotiation for a settlement, the measure of damages was the highest value from the time of the conversion until the negotiations were broken off. Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307.

59. Griggs *v.* Day, 158 N. Y. 1, 52 N. E. 692 [*reversing* 21 N. Y. App. Div. 442, 47 N. Y. Suppl. 609] (holding that four years, or even one year, is more than a reasonable time); Wright *v.* Metropolis Bank, 110 N. Y. 237, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289; Colt *v.* Owens, 90 N. Y. 368 (holding that thirty days after notice to the pledgor is a reasonable time).

60. *Illinois.*— Union Nat. Bank *v.* Post, 93 Ill. App. 339 [*affirmed* in 192 Ill. 385, 61 N. E. 507].

Maryland.— Dowler *v.* Cushwa, 27 Md. 354; Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

Massachusetts.— Farrar *v.* Paine, 173 Mass. 58, 53 N. E. 146.

Michigan.— Feige *v.* Burk, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390.

Nebraska.— Cropsey *v.* Averill, 8 Nebr. 151.

New York.— Bailey *v.* American Deposit, etc., Co., 52 N. Y. App. Div. 402, 65 N. Y. Suppl. 330 [*affirmed* in 165 N. Y. 672, 59 N. E. 1118]; Dykers *v.* Allen, 7 Hill 497, 42 Am. Dec. 87 [*affirming* Allen *v.* Dykers, 3 Hill 593]; Nexsen *v.* Lyell, 5 Hill 466.

Pennsylvania.— See Garrison *v.* Bryant, 10 Phila. 474.

Tennessee.— Clark *v.* Cullen, (Ch. App. 1897) 44 S. W. 204. *Contra*, Ball *v.* Stanley, 5 Yerg. 199, 26 Am. Dec. 263, holding that where the pledgor tenders the amount of the debt, and the pledgee refuses it, the pledgor may maintain trover and recover the full value of the property without any abatement for the amount for which the property was pledged, the pledgee being left to his action to recover the money.

See 40 Cent. Dig. tit. "Pledges," § 94.

61. *Alabama.*— St. John *v.* O'Connel, 7 Port. 466.

Illinois.— Sutphen *v.* Cushman, 35 Ill. 186, holding, however, that the pledgee is liable only for legal interest, and not for usurious interest, actually collected by him from the maker.

Nebraska.— Cropsey *v.* Averill, 8 Nebr. 151.

New York.— Usher *v.* Van Vranken, 48 N. Y. App. Div. 413, 63 N. Y. Suppl. 104.

South Carolina.— Gregg *v.* Columbia Bank, 72 S. C. 458, 52 S. E. 195.

62. Reardon *v.* Patterson, 19 Mont. 231, 47 Pac. 956.

63. Union Trust Co. *v.* Rigdon, 93 Ill. 458.

64. Barnes *v.* Swift, 11 Ohio Dec. (Reprint) 321, 26 Cinc. L. Bul. 110.

65. Barnes *v.* Swift, 11 Ohio Dec. (Reprint) 321, 26 Cinc. L. Bul. 110.

66. Roeder *v.* Green Tree Brewery Co., 33 Mo. App. 69.

67. Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

68. Thompson *v.* Toland, 48 Cal. 99; Barnes *v.* Swift, 11 Ohio Dec. (Reprint) 321, 26 Cinc. L. Bul. 110; Lyle *v.* Barker, 5 Binn. (Pa.) 457. See also DAMAGES, 13 Cyc. 170 *et seq.*

pledgor,[69] or any one claiming through him,[70] the pledgee is entitled to recover only the amount of his debt, or if his debt is greater than the value of the property, such value, with interest to date of judgment.[71] Where the conversion is by an officer acting under a writ of attachment or execution against the pledgor legal and regular in all respects, such officer occupies the same position as the pledgor, and is liable to the pledgee only to the same extent;[72] but if the attachment or execution is improperly issued, or is otherwise illegal, the officer is liable for the full value of the goods,[73] which will be their market value at the time of the conversion,[74] and not the price for which they were sold by the officer.[75]

(II) *By Pledgor* — (A) *In General.* The pledgor, as general owner of the property, may maintain an action for damages against a third person for its injury or conversion,[76] and no tender of his debt is necessary before bringing such action;[77] but the pledgor, not being entitled to the possession of the property, cannot maintain trespass for taking it from the possession of the pledgee.[78] So the pledgor may recover damages against a third person by reason of whose breach of contract to pay the pledgor's debt to the pledgee the collateral has been forfeited.[79]

(B) *Measure of Damages.* In an action by the pledgor against a third person for conversion, he may recover the full value of the collateral[80] less any of his indebtedness paid by defendant to the pledgee.[81]

V. TRANSFER OF DEBT OR PLEDGE.

A. Assignment[82] of Pledge or Debt — 1. Assignability of Pledgee's Interest. A pledgee or his personal representative[83] may assign his interest under the contract,[84] whether the principal debt is negotiable or not,[85] without first demanding payment of the pledgor,[86] or notifying him that the assignment is to be made;[87] and the assignee will acquire in all respects the same rights to which

Where the suit is against one to whom he has repledged the property, and who has restored it to the owner upon receipt of his debt, by a pledgee who has been paid his debt by the owner, he can recover only the value of the property in excess of the debt for which he pledged it. Sistare *v.* Olcott, 7 N. Y. St. 470.

69. Barnes *v.* Swift, 11 Ohio Dec. (Reprint) 321, 26 Cinc. L. Bul. 110.

70. Brownell *v.* Hawkins, 4 Barb. (N. Y.) 491.

71. Hudson *v.* Wilkinson, 61 Tex. 606.

72. Baldwin *v.* Bradley, 69 Ill. 32.

73. Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770; Pomeroy *v.* Smith, 17 Pick. (Mass.) 85.

74. Grabfelder *v.* Lockett, (Tex. Civ. App. 1894) 26 S. W. 168.

75. Grabfelder *v.* Lockett, (Tex. Civ. App. 1894) 26 S. W. 168.

76. See cases cited *infra*, notes 77.

Case for slave.— Where a slave was left in pledge, redeemable upon certain conditions, and the pledgor sold the slave absolutely to a third person who obtained possession and refused to deliver the slave to the pledgee, the latter could not maintain trover against such third person, but his remedy was by special action on the case. Lyons *v.* Rogers, 1 Brev. (S. C.) 5.

77. Usher *v.* Van Vranken, 48 N. Y. App. Div. 413, 63 N. Y. Suppl. 104; Gregg *v.* Columbia Bank, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633.

78. Gay *v.* Smith, 38 N. H. 171.

79. Rea *v.* Forrest, 88 Ill. 275.

80. Craig *v.* McHenry, 35 Pa. St. 120.

81. Craig *v.* McHenry, 35 Pa. St. 120.

82. **Assignment** generally see Assignments, 4 Cyc. 1 *et seq.*

83. Drake *v.* Cloonan, 99 Mich. 121, 57 N. W. 1098, 41 Am. St. Rep. 586.

84. *California.*— Colton *v.* Oakland Sav. Bank, 137 Cal. 376, 70 Pac. 225, holding that the construction given such an assignment by the parties should prevail as against a stranger.

Georgia.— Civ. Code, § 2961; Cumming *v.* McDade, 118 Ga. 612, 45 S. E. 479; Forsyth Bank *v.* Davis, 113 Ga. 341, 38 S. E. 836, 84 Am. St. Rep. 248.

Illinois.— Belden *v.* Perkins, 78 Ill. 449.

Massachusetts.— Proctor *v.* Whitcomb, 137 Mass. 303 (holding that an agreement between the pledgor and an indorser of a collateral note that the note should be "used" only at a certain bank does not deprive the bank of the right to transfer its claim against the pledgor, together with the collateral note); Jarvis *v.* Rogers, 15 Mass. 389.

New Hampshire.— Goss *v.* Emerson, 23 N. H. 38.

Vermont.— Russell *v.* Fillmore, 15 Vt. 130; Bullard *v.* Billings, 2 Vt. 309.

See 40 Cent. Dig. tit. "Pledges," § 97.

85. Goss *v.* Emerson, 23 N. H. 38.

86. Drake *v.* Cloonan, 99 Mich. 121, 57 N. W. 1098, 41 Am. St. Rep. 568.

87. Drake *v.* Cloonan, 99 Mich. 121, 57 N. W. 1098, 41 Am. St. Rep. 586.

the pledgee was entitled.[88] Such assignment is effected by delivery of the collateral to the assignee,[89] and no formal assignment is necessary.[90] If the assignee converts the collateral to his own use, the original pledgee will not be liable to the pledgor for such conversion.[91] So the pledgee of a note may make a valid assignment of it to another simply for collection.[92]

2. Transfer of Debt Secured.[93] The pledge being regarded as collateral to the principal obligation,[94] upon an assignment of the latter without the pledge,[95] the assignor will hold the collateral as trustee for his assignee,[96] even though the assignee takes a renewal of the principal obligation in his own name,[97] and payments received by him on the collateral will be held for the use of the assignee.[98] So where the pledgee assigns the debt to one person and the collateral to another, the latter will hold the collateral in trust for the assignee of the debt.[99] But where it is the evident intention of the parties in the delivery of collateral that it shall be held for the personal security of the pledgee,[1] upon an assignment by the pledgee of his debt, without the collateral, the latter becomes the property of the pledgor freed from the lien.[2] If after the assignment of the principal debt without recourse the pledgee makes an exchange of collateral with the pledgor, the assignee may enforce the principal obligation against the pledgor,[3] without returning or accounting for the collateral,[4] since in such case the pledgee is acting as trustee for the pledgor rather than for assignee in holding the collateral.[5]

3. Transfer of Pledge Without Transfer of Debt.[6] The pledgee having merely a special property in the pledge as security for his debt cannot make a valid assignment of the collateral separate from the debt so as to confer any rights on such assignee as against the pledgor.[7]

B. Rights Secured by Purchaser From Pledgee — 1. In General. Upon an assignment by the pledgee of his interest in the pledge,[8] or upon an absolute sale [9] or pledge [10] by him of a chattel [11] or non-negotiable security,[12] whether to

88. Ga. Civ. Code, § 2961; Forsyth Bank *v.* Davis, 113 Ga. 341, 38 S. E. 836, 84 Am. St. Rep. 248; Belden *v.* Perkins, 78 Ill. 449; Jarvis *v.* Rogers, 15 Mass. 389; Goss *v.* Emerson, 23 N. H. 38.

As holder in due course of a negotiable instrument, he may even acquire greater rights. Cumming *v.* McDade, 118 Ga. 612, 45 S. E. 479.

89. Forsyth Bank *v.* Davis, 113 Ga. 341, 38 S. E. 836, 84 Am. St. Rep. 248; Pulaski Nat. Bank *v.* Winston, 5 Baxt. (Tenn.) 685; Johnson *v.* Smith, 11 Humphr. (Tenn.) 396.

90. Carpenter *v.* Longan, 16 Wall. (U. S.) 271, 21 L. ed. 313.

91. Forsyth Bank *v.* Davis, 113 Ga. 341, 38 S. E. 836, 84 Am. St. Rep. 248; Goss *v.* Emerson, 23 N. H. 38.

92. Hunt *v.* Bessey, 96 Me. 429, 52 Ala. 905.

93. See Assignments, 4 Cyc. 73.

94. See *supra*, I, A,; II, A, 1.

95. Painter *v.* Harding, 3 Phila. (Pa.) 59.

96. Painter *v.* Harding, 3 Phila. (Pa.) 59.

97. Hawkins *v.* New York Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957.

98. Painter *v.* Harding, 3 Phila. (Pa.) 59.

99. Perry *v.* Parrott, 135 Cal. 238, 67 Pac. 144; Adler *v.* Sargent, 109 Cal. 42, 41 Pac. 799. See also Kernohan *v.* Manss, 53 Ohio St. 118, 41 N. E. 258, 29 L. R. A. 317. But see Whitney *v.* Peay, 24 Ark. 22, holding that where a pledgee of stock repledges it to a third person, the original debt goes with it, and a subsequent purchaser from the first pledgee of a claim against the original pledgor gets nothing.

1. Morgan *v.* Dugan, (Md. 1894) 30 Atl. 558.

2. Morgan *v.* Dugan, (Md. 1894) 30 Atl. 558.

3. Haskell *v.* Africa, 68 N. H. 421, 41 Atl. 73.

4. Haskell *v.* Africa, 68 N. H. 421, 41 Atl. 73.

5. Haskell *v.* Africa, 68 N. H. 421, 41 Atl. 73.

6. See Assignments, 4 Cyc. 72.

7. Van Eman *v.* Stanchfield, 13 Minn. 75; Easton *v.* Hodges, 18 Fed. 677, holding, however, that an assignment may be made simply for the purpose of enabling the assignee to bring suit on the collateral for the benefit of the assignor.

Where, however, a single note covers the specific debt of the payee and that of a third party, is secured by mortgage bonds, and each party has a right of possession of his share of such bonds, there is no assignment of the pledge without an assignment of the debt it secures. Dexter *v.* McClellan, 116 Ala. 37, 22 So. 461.

Power to sell see *supra*, IV, B, 2; *infra*, VII, C.

8. Bradley *v.* Parks, 83 Ill. 169.

9. Williams *v.* Ashe, 111 Cal. 180, 43 Pac. 595.

10. Agnew *v.* Johnson, 22 Pa. St. 471, 62 Am. Dec. 303.

11. Bradley *v.* Parks, 83 Ill. 169.

12. McNeil *v.* New York Tenth Nat. Bank,

one who takes with notice of the pledgor's rights,[13] or to a *bona fide* purchaser for value without such notice,[14] such assignee or purchaser steps into the shoes of the original pledgee;[15] and cannot be required to surrender the property to the pledgor except upon payment or tender of the debt for which it was originally pledged.[16] But if the purchaser has notice that the sale is fraudulent on the part of the pledgee,[17] he acquires no right whatever as against the pledgor.[18] If the collateral security is itself a negotiable instrument,[19] or is delivered as security for a negotiable instrument,[20] the transfer of the collateral to a *bona fide* purchaser for value,[21] or, in the latter case, the transfer of the principal obligation and the collateral to such purchaser,[22] vests in him a valid legal title, without any liability to the pledgor. In an action by the pledgee against a purchaser from him for the price of the pledged property, the purchaser is not entitled to inquire into the amount due the pledgee on the original obligation.[23]

2. Pledgee of Pledgee.[24] A pledgee has the right to repledge property delivered to him as security[25] without obtaining the consent of the pledgor,[26] and does not lose his right to its possession as against the pledgor by so doing.[27] The subpledgee, unless he occupies the favored position of a *bona fide* purchaser for value of a negotiable instrument,[28] takes only the title of his transferrer;[29] but he is entitled to hold the property until the debt of the original owner has been discharged.[30] Unless authorized by a special agreement,[31] the pledgee has no right

55 Barb. (N. Y.) 59, holding that a stock certificate even with a blank power of attorney attached is regarded as non-negotiable.

13. Boswell *v.* Thigpen, 75 Miss. 308, 22 So. 823; Treadwell *v.* Clark, 73 N. Y. App. Div. 473, 77 N. Y. Suppl. 350; Garrison *v.* Bryant, 10 Phila. (Pa.) 474; Taggart *v.* Packard, 39 Vt. 628.

14. Williams *v.* Ashe, 111 Cal. 180, 43 Pac. 595; Talty *v.* Freedman's Sav., etc., Co., 93 U. S. 321, 23 L. ed. 886.

15. See cases cited *supra*, notes 13, 14; *infra*, note 16.

Illustration.—A transaction whereby a bank holding a demand note payable to it at its place of business, and secured by pledge, indorses the note "without recourse" and delivers it, with the pledged securities, to a third person, for a consideration more than sufficient to pay the note, is, on its face, a sale of the note and a substitution of the purchaser in the place of the bank as the pledgee of the securities. Smith *v.* Shippers' Oil Co., 120 La. 640, 45 So. 533.

16. Lewis *v.* Nott, 36 N. Y. 395; Talty *v.* Freedman's Sav., etc., Co., 93 U. S. 321, 23 L. ed. 886; Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13, 21 Eng. Rul. Cas. 301.

17. Dana *v.* Buckeye Coal, etc., Co., 38 Ill. App. 371.

18. Dana *v.* Buckeye Coal, etc., Co., 38 Ill. App. 371.

19. See Commercial Paper, 7 Cyc. 495 *et seq.*

20. Nelson *v.* Owen, 113 Ala. 372, 21 So. 75.

21. Nelson *v.* Owen, 113 Ala. 372, 21 So. 75. See Commercial Paper, 7 Cyc. 924 *et seq.*

22. White *v.* Dodge, 187 Mass. 449, 73 N. E. 549.

23. Rice, etc., Malting Co. *v.* International Bank, 185 Ill. 422, 56 N. E. 1062 [*affirming* 86 Ill. App. 136].

24. Pledgee as bona fide purchaser see *supra*, III, A, 6.

25. Meyer *v.* Moss, 110 La. 132, 34 So. 332; Coleman *v.* Anderson, (Tex. Civ. App. 1904) 82 S. W. 1057 [*affirmed* in 98 Tex. 570, 86 S. W. 730].

Stock-brokers may repledge stock held by them as collateral security. Whitlock *v.* Seaboard Nat. Bank, 29 Misc. (N. Y.) 84, 60 N. Y. Suppl. 611. See also Factors and Brokers, 19 Cyc. 211, 298.

26. Coleman *v.* Anderson, (Tex. Civ. App. 1904) 82 S. W. 1057 [*affirmed* in 98 Tex. 570, 86 S. W. 730].

27. Meyer *v.* Moss, 110 La. 132, 34 So. 332.

28. Interurban Constr. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927.

29. McDonald *v.* Grant, 34 N. Y. Suppl. 988 (holding that upon a transfer of a note and bonds held as collateral for the note, the bonds could be held only for the amount of the note and not for a general balance due from the original pledgee); McRady *v.* Thomas, 16 Lea (Tenn.) 173.

30. Jarvis *v.* Rogers, 15 Mass. 389; New York, etc., R. Co. *v.* Davies, 38 Hun (N. Y.) 477; Pulaski Nat. Bank *v.* Windston, 5 Baxt. (Tenn.) 685.

31. Matteson *v.* Dent, 112 Iowa 551, 84 N. W. 710 (holding that where the pledgee repledges the property under a special authority from the pledgor, the subpledgee is chargeable with notice of the extent of such authority); Greeff *v.* Dieckerhoff, 5 N. Y. Suppl. 16 [*affirmed* in 123 N. Y. 658, 25 N. E. 955]; Matthews *v.* Warner, 145 U. S. 475, 12 S. Ct. 945, 36 L. ed. 782 [*affirming* 33 Fed. 369] (holding that a letter from the pledgor to the pledgee reading, "You are hereby authorized to assign to Thomas Upham, Esquire the mortgage . . . which

as against the pledgor to repledge the property for a greater amount than that for which it is held as security;[32] and where the pledgee thus exceeds his power, his assignee must deliver up the property to the pledgor upon the payment of the original debt it was delivered to secure.[33] Where the pledgor is estopped to deny the pledgee's authority to repledge the property,[34] as where he has conferred the *indicia* of ownership upon the pledgee,[35] he may still require that the subpledgee shall first apply to the satisfaction of his debt other collateral transferred to him by the pledgee;[36] but where he has received payment in full from the pledgee for the property converted by him, he has no further right against the assignee.[37]

C. Transfer of Interest of Pledgor. Subject to the rights of the pledgee,[38] the pledgor may sell or assign his interest in the pledged property,[39] and his assignee,[40] at least where the pledgee has notice of the assignment,[41] succeeds to all his rights in the property. But the relationship between the pledgor and the pledgee being regarded as a fiduciary one,[42] the purchase of the property by the pledgee at a public sale is voidable at the option of the pledgor,[43] and, in the case of a private sale by the pledgor, of his remaining interest in the property to the pledgee, the sale is presumed to be fraudulent and void,[44] unless the pledgee can show that it was fair, open, *bona fide*, and for an adequate consideration.[45] But this rule does not apply to the sale of the property under an execution against the pledgor,[46] and the pledgee is free to buy at such sale.[47] A purchase of the property by the pledgee does not extinguish his rights under the pledge as against an intervening garnishment by a creditor;[48] but he will hold the legal title, subject (1) to the payment of the debt for which the property was pledged to him, and (2) to the payment of the debt of the garnishing creditor.[49]

VI. PAYMENT AND REDEMPTION.[50]

A. Payment or Other Discharge of Obligation — 1. In General. As the contract of pledge is merely collateral to the principal obligation it is given to secure, it is discharged by the payment of the principal obligation.[51] So too the

I have given you as collateral security for loans made to me," authorized the delivery of the mortgage as security for loans by U to the pledgee in excess of the amount for which it was held by the pledgee).

32. Skiff *v.* Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102.

33. Covell *v.* Tradesmen's Bank, 1 Paige (N. Y.) 131; Mould *v.* Importers', etc., Nat. Bank, 72 N. Y. App. Div. 30, 76 N. Y. Suppl. 148, holding that, although a pledged certificate of stock has been exchanged for one with a different number, the pledgor may still assert his right to it so long as he can trace it; and that the filing by the pledgor of his claim against the trustee in bankruptcy of his pledgee will not preclude him from suing to recover the stock or its proceeds from the subpledgee.

34. Gould *v.* Farmers' L. & T. Co., 23 Hun (N. Y.) 322; Myers *v.* Merchants' Nat. Bank, 16 N. Y. Suppl. 58, 27 Abb. N. Cas. 266.

35. Skiff *v.* Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102.

36. Gould *v.* Farmers' L. & T. Co., 23 Hun (N. Y.) 322.

37. Colton *v.* Oakland Sav. Bank, 137 Cal. 376, 70 Pac. 225.

38. Kamena *v.* Huelbig, 23 N. J. Eq. 78.

39. Fisher *v.* Bradford, 7 Me. 28, holding that the payee of a note which he has pledged may still negotiate it to a third person, who upon the payment of the debt for which it has been pledged may sue thereon in his own name.

40. Brown *v.* Omaha Hotel Assoc., 63 Nebr. 181, 88 N. W. 175.

41. Brown *v.* Omaha Hotel Assoc., 63 Nebr. 181, 88 N. W. 175.

42. See *supra*, II, A, 1.

43. Pledgee's right to purchase at sale of pledge see *infra*, VII, C.

44. See cases cited *infra*, note 45.

45. Wetherell *v.* Johnson, 208 Ill. 247, 70 N. E. 229; Rankin *v.* Wilsey, 17 Iowa 463 (holding that a pledge of the income from property is merged by the conveyance of the property to the pledgee); Jennings *v.* Hinton, 128 N. C. 214, 38 S. E. 863.

46. Clark *v.* Holland, 72 Iowa 34, 33 N. W. 350, 2 Am. St. Rep. 230.

47. Clark *v.* Holland, 72 Iowa 34, 33 N. W. 350, 2 Am. St. Rep. 230.

48. Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609.

49. Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609.

50. Payment generally see PAYMENT, 30 Cyc. 1173.
Subrogation generally see SUBROGATION.
Tender generally see TENDER.

51. Russell *v.* Epler, 10 Ill. App. 304; Herrmann *v.* Central Car Trust Co., 101 Fed. 41, 41 C. C. A. 176; Birdwood *v.* Raphael, 5

discharge of the principal obligation of the debtor in any other way will operate to discharge the contract of pledge.[52]

2. Methods of Discharge — a. In General. Besides actual payment of the principal obligation,[53] there are other ways of effecting a valid discharge of a collateral contract or pledge,[54] as by a surrender of the principal obligation,[55] by a settlement of the pledgee with the pledgor by which the pledgor is released from further liability on the principal obligation,[56] by an avoidance of the principal contract by the pledgee,[57] or by substantial fulfilment of the condition accepted by the pledgee.[58] But a mere change in the form of the principal obligation, as the giving of a new note, will not discharge the pledgee's lien on the collateral.[59]

b. Tender of Payment — (i) *Effect.* Upon a tender of the amount due on the principal obligation,[60] the lien of the pledgee is discharged,[61] and the pledgor is entitled to the possession of the property,[62] even though such tender is refused by the pledgee.[63] Where the amount of the debt is not in dispute, a tender is not vitiated by the demand of the pledgor at the time that the property be returned to him.[64]

(ii) *Time of Making.* The tender may be made at or after the maturity of the debt,[65] but must be before the sale of the collateral for default.[66]

Price 593, holding that where goods are pledged to secure certain acceptances, they are discharged from the lien and cannot be held for acceptances made after the pledge, when the original acceptances have been paid.

Payment by check.— While a creditor who has surrendered collateral upon the payment of the secured debt by check is entitled, if the check is dishonored, to reclaim the collateral, yet when the check is paid the payment relates back to the delivery of the check, and the collateral is to be regarded as surrendered as of that date. Block *v.* Oliver, 102 Ky. 269, 43 S. W. 238, 19 Ky. L. Rep. 1278.

Receipt by the pledgee of sufficient rents or profits from the pledge to pay the debt constitutes payment. Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517.

What constitutes payment in general see Payment, 30 Cyc. 1173 *et seq.*

52. Leighton *v.* Bowen, 75 Me. 504; Ward *v.* Ward, 37 Mich. 253.

53. See *supra*, text and note 51.

54. See cases cited *infra*, notes 55–58.

55. Union, etc., Bank *v.* Smith, 107 Tenn. 476, 64 S. W. 756.

56. Herrmann *v.* Central Car Trust Co., 101 Fed. 41, 41 C. C. A. 176.

57. Green *v.* Sinker, 135 Ind. 434, 35 N. E. 262.

Sale of the property by which the pledgee has incapacitated himself to perform his part of the contract by the return of the property is sufficient as a discharge. Meyer Bros. Drug Co. *v.* Matthews, 69 Ark. 483, 64 S. W. 264; E. F. Hallack Lumber Mfg. Co. *v.* Gray, 19 Colo. 149, 34 Pac. 1000; Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390; Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127]; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60; Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

58. Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; Boehm *v.* U. S., 20 Ct. Cl. 241.

59. Meeker *v.* Waldron, 62 Nebr. 689, 87 N. W. 539; Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 Ohio St. 208; Delaware County Trust, etc., Co. *v.* Haser, 199 Pa. St. 17, 48 Atl. 694, 85 Am. St. Rep. 763.

60. The tender by the pledgor by way of compromise of a larger amount than he claims is due is not an admission that the amount tendered is due. Talmage *v.* New York Third Nat. Bank, 91 N. Y. 531.

61. *California.*—Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

Colorado.— Tom Boy Gold Mines Co. *v.* Green, 11 Colo. App. 447, 53 Pac. 845.

Minnesota.— Norton *v.* Baxter, 41 Minn. 146, 42 N. W. 865, 16 Am. St. Rep. 679, 4 L. R. A. 305.

New York.— Haskins *v.* Kelly, 1 Rob. 160, 1 Abb. Pr. N. S. 63; Lehmeyer *v.* Provident Loan Soc., 31 Misc. 719, 65 N. Y. Suppl. 313.

Utah.— Hyams *v.* Bamberger, 10 Utah 3, 36 Pac. 202.

Vermont.— Taggart *v.* Packard, 39 Vt. 628.

United States.— Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

See 40 Cent. Dig. tit. "Pledges," § 106.

62. McCalla *v.* Clark, 55 Ga. 53.

63. Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

64. Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

But where the amount is in dispute, a tender of a sum less than that claimed by the pledgee, although equal to the amount actually due, is not good, if coupled with such a condition. Wilkins *v.* Redding, 70 Nebr. 182, 97 N. W. 238.

65. Norton *v.* Baxter, 41 Minn. 146, 42 N. W. 865, 16 Am. St. Rep. 679, 4 L. R. A. 305; Hyams *v.* Bamberger, 10 Utah 3, 36 Pac. 202; Taggart *v.* Packard, 39 Vt. 628. See also McCalla *v.* Clark, 55 Ga. 53.

66. See cases cited *supra*, note 65.

(iii) *Keeping Tender Good.* It is not necessary that the tender be kept good to enable the pledgor to avail himself of it as a defense to an action by the pledgee to enforce the collateral;[67] but if the pledgor seeks affirmative relief, he must keep his tender good, or at least offer to pay the amount into court.[68]

c. Offer of Payment Without Actual Tender. A mere offer to pay the amount of the debt for which property has been pledged, not accompanied by an actual tender of money, is insufficient to discharge the pledgee's lien, or entitle the pledgor to a return of the property.[69]

d. Loss by Negligence of Pledgee as Payment. Loss or depreciation in value of the thing pledged, through negligence of the pledgee, does not of itself operate to extinguish, *pro tanto*, the debt secured,[70] although it will of course entitle the pledgor to damages.[71]

3. Effect of Payment or Discharge — a. In General. Upon the payment or other discharge of the principal obligation, the pledgor becomes the absolute owner of the collateral,[72] and entitled to the possession thereof,[73] freed from the lien of the pledgee,[74] from any right of the pledgee to hold it for any other debt than that for which it was pledged,[75] and from any right of set-off which a third party might have against the pledgee.[76] Where the pledgee has the legal title to the property, he will hold it as a mere naked trustee for the pledgor,[77] and any payments made to him on the collaterals will be held for the use of the pledgor.[78] Where the pledgee realizes enough from a portion of the collaterals to pay the principal debt, his interest in the remaining collaterals is extinguished.[79]

b. On Pledgee's Duty to Collect Collaterals. After the discharge of the principal debt, the pledgee is under no further obligation to collect collateral securities,[80] and in fact has no interest in them which will enable him to bring suit on them.[81]

c. Partial Payment or Discharge. Partial payments on the principal debt operate *pro tanto* to reduce the lien of the pledgee on the collaterals;[82] and by special agreement of the parties provision may be made for a release of a portion

67. Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; Norton *v.* Baxter, 41 Minn. 146, 42 N. W. 865, 16 Am. St. Rep. 679, 4 L. R. A. 305.

68. Larsen *v.* Breene, 12 Colo. 480, 21 Pac. 498; Norton *v.* Baxter, 41 Minn. 146, 42 N. W. 865, 16 Am. St. Rep. 679, 4 L. R. A. 305.

69. Lewis *v.* Mott, 36 N. Y. 395; Potter *v.* Thompson, 10 R. I. 1.

70. Cooper *v.* Simpson, 41 Minn. 46, 42 N. W. 601, 16 Am. St. Rep. 667, 4 L. R. A. 194; Taggard *v.* Curtenius, 15 Wend. (N. Y.) 155.

71. See *supra*, IV, A, 5 *et seq.*; IV, B, 2, f *et seq.*; and IV, C, 3.

72. Elliott *v.* Armstrong, 2 Blackf. (Ind.) 198; Ward *v.* Ward, 37 Mich. 253.

73. Geron *v.* Geron, 15 Ala. 558, 50 Am. Dec. 143 (holding that the pledgor may recover the property by an action at law, or defend his right to the possession, if sued by the pledgee); Bryson *v.* Rayner, 25 Md. 424, 90 Am. Dec. 69.

74. Russell *v.* Epler, 10 Ill. App. 304; Callanan *v.* Smart, 60 Iowa 305, 14 N. W. 328 (holding that upon a pledge of property to secure two different persons, one of them cannot, after he has made a settlement with the pledgor, maintain an action against the other pledgee for a part of the proceeds of the pledge); Gilpen *v.* Leksell, 54 Kan. 674, 39 Pac. 176.

75. Watson *v.* Cabot Bank, 5 Sandf. (N. Y.) 423 (holding that upon the discharge of a note which had been wrongfully pledged to one who originally took *bona fide*, the pledgee could not hold it for loans thereafter made to the pledgor with notice that it belonged to a third person who had not authorized such use of it); Martin's Appeal, 13 Wkly. Notes Cas. (Pa.) 167 (holding that upon an assignment by an executor of collateral belonging to the estate as security for a debt of the testator, the pledgee must surrender it upon the payment of the debt, and cannot hold it for a personal debt of the executor, even though the latter is a legatee under the will and has been given power to sell the property involved).

76. Thompson *v.* Harrison, 1 Daly (N. Y.) 302.

77. Thomas *v.* Van Meter, 62 Ill. App. 309.

78. Merrifield *v.* Baker, 9 Allen (Mass.) 29. *Compare* Madill First Nat. Bank *v.* Pickens, (Indian Terr. 1907) 104 S. W. 947.

79. New England Trust Co. *v.* New York Belting, etc., Co., 166 Mass. 42, 43 N. E. 928; Farwell *v.* Importers', etc., Nat. Bank, 47 N. Y. Super. Ct. 409 [*affirmed* in 90 N. Y. 483].

80. Overlock *v.* Hills, 8 Me. 383.

Duty to collect see *supra*, IV, B, 2.

81. Bean *v.* Dolliff, 67 Me. 228.

82. Rutledge *v.* Townsend, 38 Ala. 706.

of the collaterals upon the payment of a part of the principal debt,[83] or the performance of other conditions not amounting to a complete discharge of the principal obligation;[84] but in the absence of such special agreement, the pledgee is entitled to hold all of the collateral until the entire debt has been discharged.[85] But where upon the receipt by the pledgee or his agent of funds sufficient to discharge the debt, he is induced through the fraud of the pledgor to permit their application in part upon other debts,[86] the pledge remains in full force as to the balance due.

B. Return of Property on Payment or Other Discharge — 1. Persons Entitled to Return. Upon the discharge of the obligation the pledge was given to secure,[87] the pledgor[88] or his assignee[89] is entitled to the collateral[90] or its proceeds,[91]

83. Indianapolis First Nat. Bank *v.* Root, 107 Ind. 224, 8 N. E. 105.

84. Malone *v.* Wright, 90 Tex. 50, 36 S. W. 420.

But where policies of life insurance were pledged on an agreement that they might be redeemed upon paying their surrender value, and subsequently, in consideration for an extension of the debt, other collaterals were pledged, the pledgee's lien upon the insurance policies was not released by a sale of the second collateral for more than the surrender value of the policies, but not enough to discharge the debt. Winston *v.* Hart, 65 Minn. 439, 68 N. W. 72.

85. Goepper *v.* Phœnix Brewing Co., 115 Ky. 708, 74 S. W. 726, 25 Ky. L. Rep. 84.

Even when owner of collateral is surety. — Ellis *v.* Conrad Seipp Brewing Co., 107 Ill. App. 139 [*affirmed* in 207 Ill. 291, 69 N. E. 808].

86. Peters *v.* Pacific Guano Co., 42 La. Ann. 690, 7 So. 790.

87. **To secure debt of third person.** — The pledgee is not entitled to hold the property as security for the debt of a third person unless the pledgor has agreed that it may be so held. Loekey *v.* Gannon, 1 Sweeny (N. Y.) 12, 6 Abb. Pr. N. S. 209, 37 How. Pr. 134.

88. Mayo *v.* Avery, 18 Cal. 309; Stone *v.* Mulvaine, 119 Ill. App. 443 [*affirmed* in 217 Ill. 40, 75 N. E. 421]; Higgins *v.* Wright, 43 Barb. (N. Y.) 461 (holding that where collateral is pledged by the first indorser on a note to secure the second indorser, upon the discharge of the latter, the pledgor, and not the maker of the note, is entitled to the collateral); Dean *v.* Lawham, 7 Oreg. 422.

A delivery of a collateral note to a third person for collection, in pursuance of an agreement with the pledgor, is equivalent to a delivery to the pledgor. Ludden *v.* Marsters, 16 Nebr. 654, 21 N. W. 442.

89. *Indiana.* — Indianapolis First Nat. Bank *v.* Root, 107 Ind. 224, 8 N. E. 105.

Nebraska. — Cressman *v.* Whitall, 16 Nebr. 592, 21 N. W. 458.

New York. — August *v.* O'Brien, 30 Misc. 54, 61 N. Y. Suppl. 720 [*affirmed* in 50 N. Y. App. Div. 626, 63 N. Y. Suppl. 989].

Tennessee. — Hughes *v.* Settle, (Ch. App. 1895) 36 S. W. 577, holding that if the pledgee, after notice of the pledgor's assignment of his interest in the collateral as security for another debt, surrenders the collateral to the pledgor, he is liable to the assignee for any loss thereby occasioned to him.

Texas. — Houston, etc., R. Co. *v.* Conner, 29 Tex. Civ. App. 259, 67 S. W. 773, holding that a pledgee of stock cannot withhold possession of it from the pledgor after tender of his debt, under a notice from alleged purchasers of the stock to hold the same, where the agreement under which such purchasers claimed was not affirmatively shown to be valid and binding.

See 40 Cent. Dig. tit. "Pledges," §§ 108, 109.

90. Barry *v.* Coville, 53 Hun (N. Y.) 620, 7 N. Y. Suppl. 36 [*affirmed* in 129 N. Y. 302, 29 N. E. 307] (holding that on payment or tender of the amount due the pledgee, the pledgor is entitled to a reassignment of his interest in patents pledged as security for his debt); Langton *v.* Waite, L. R. 6 Eq. 165, 37 L. J. Ch. 345, 18 L. T. Rep. N. S. 80, 16 Wkly. Rep. 508 [*affirmed* in L. R. 4 Ch. 402, 20 L. T. Rep. N. S. 337, 17 Wkly. Rep. 475].

A refusal to return the collateral is justification for non-payment of the note. Schlesinger *v.* Wise, 106 N. Y. App. Div. 587, 94 N. Y. Suppl. 718, 720, 721; Schlesinger *v.* McDonald, 106 N. Y. App. Div. 570, 94 N. Y. Suppl. 721.

Delivery of collateral note to the maker and offer by him to deliver it to the pledgor is sufficient. Norman *v.* Rogers, 29 Ark. 365.

But if the pledgee has acquired an absolute interest in the collateral in his own right, the pledgor is not entitled to their return, since the pledgee, as part-owner, has an equal right to the possession. Angus *v.* Robinson, 62 Vt. 60, 19 Atl. 993.

A deposit by a tenant to secure performance of all the covenants of the lease cannot be recovered back until the end of the term. Mirsky *v.* Horowitz, 46 Misc. (N. Y.) 257, 92 N. Y. Suppl. 48.

91. St. John *v.* O'Connel, 7 Port. (Ala.) 466; Cressman *v.* Whitall, 16 Nebr. 592, 21 N. W. 458; Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203. *Compare* Union Bank *v.* Elliott, 14 Manitoba 187, holding that a creditor whose debt has been satisfied must return collaterals pledged as security for the debt, or account for them at their face value, in the absence of proof that they are not collectable.

if any remain.[92] So where an indorser of a note secured by collateral takes it up, he is entitled to the collateral.[93] But these rights are extinguished where the entire collateral has been required to satisfy the principal obligation,[94] or the pledgor's remaining interest has been exhausted under legal process for the payment of other claims against him.[95]

2. Duty of Pledgee to Return. Accordingly, whenever the obligation which the pledge was given to secure is discharged,[96] it becomes the duty of the pledgee to return the property or its proceeds, if any, to the pledgee.[97]

3. Conversion[98] by Failure to Return — a. In General. The failure of the pledgee to return the collateral upon payment of the principal debt is itself a conversion,[99] for which an action may be maintained[1] by the pledgor[2] or his assignee.[3]

b. Failure to Return Identical Stock. While as a general rule the pledgor, upon discharge of his obligation, is entitled to the return of the specific property pledged,[4] corporate stock, being merely evidence of an interest in the business of the corporation, stands on a different footing;[5] and in the absence of a special agreement,[6] the pledgee is not liable for their conversion by reason of his sale or other disposition of the identical certificates delivered to him, so long as he

Deposit in bank after collateral paid.— Where a note held by a bank as collateral was paid to the bank after the loan secured thereby had been repaid, the money so received became a deposit for the use and benefit of the owner, if he should elect to so treat it. Madill First Nat. Bank *v.* Pickens, (Indian Terr. 1907) 104 S. W. 947.

92. Cressman *v.* Whitall, 16 Nebr. 592, 21 N. W. 458; Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203.

93. Surghnor *v.* Beauchamp, 24 La. Ann. 471; O'Hara *v.* Haas, 46 Miss. 374; Lansingburgh Nat. Exch. Bank *v.* Silliman, 65 N. Y. 475.

94. See Cressman *v.* Whitall, 16 Nebr. 592, 21 N. W. 458; Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203; and cases cited *supra*, notes 87–93.

95. McNeal *v.* Florence Loan Assoc., 40 N. J. Eq. 351, 3 Atl. 125.

96. See *supra*, VI, B, 1.

Manner of discharge see *supra*, VI, A, 2.

97. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203; Dean *v.* Lawham, 7 Oreg. 422.

98. **Other conversion** by pledgee see *supra*, IV, C, 1, a.

99. See cases cited *infra*, note 1.

Tender of the amount of the debt and demand for the return of the property is *prima facie* evidence of a conversion. De Clark *v.* Bell, 10 Wyo. 1, 65 Pac. 852. But where on the same day that tender has been made and refused, and before suit is brought or the situation of the parties has materially changed, the pledgee retracts his refusal and offers to surrender the property upon the payment of the debt and charges legally due, there is no conversion. McCalla *v.* Clark, 55 Ga. 53.

1. Whiting *v.* McDonald, 1 Root (Conn.) 444 (holding that a declaration in an action on the case, alleging that plaintiff on a certain date was indebted to defendant by a note to secure the payment of which he delivered continental loan office certificates for a certain sum in lawful money, for defendant to hold and to redeliver to plaintiff on his paying said note; that on a certain date he tendered in full the sum due on the note, with interest, and demanded the certificates, which defendant refused; and that this money has ever since been ready for defendant, who had thereby become liable to pay for said certificates, stated a cause of action); Roberts *v.* Berdell, 61 Barb. (N. Y.) 37 [*affirmed* in 52 N. Y. 644, 15 Abb. Pr. N. S. 177]; Hardy *v.* Jaudon, 1 Rob. (N. Y.) 261; Abrahams *v.* Southwestern R. Bank, 1 S. C. 441, 7 Am. Rep. 33.

2. See cases cited *supra*, note 1.

3. Genet *v.* Howland, 45 Barb. (N. Y.) 560, holding that the pledgee's failure to return the property to the pledgor's assignee on demand constituted a new conversion.

4. See *supra*, VI, B, 1.

5. See cases cited *infra*, note 6 *et seq.*

6. Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87, holding that where the pledgee is expressly given the power to sell stock pledged upon default, this is an implied denial of his right to do so before default, even though he retain an equal number of other shares.

Evidence of a usage among brokers giving the pledgee the right to sell is not admissible where it would change the terms of an express contract. Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507, 35 How. Pr. 289; Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

Parol evidence is inadmissible where it would modify or contradict the terms of a written contract. Fay *v.* Gray, 124 Mass. 500. Under a pledge to the payee of a note "with authority to use, transfer or hypothecate the same at payee's option, payee being required, on payment or tender . . . to return an equal quantity of said security, and not the specific stock deposited," the pledgee may sell the stock before default, if he retains an equal amount for the pledgor. Ogden *v.* Lathrop, 65 N. Y. 158 [*reversing* 35 N. Y. Super. Ct. 731].

retains at all times an equal number of shares of the same class and value,[7] to be delivered to the pledgor, upon discharge of his obligation. Where the pledgee has wrongfully converted the shares pledged to him,[8] he may be compelled to transfer to the pledgor an equal number of similar shares held by him,[9] where necessary to give the pledgor an adequate remedy for the conversion.[10]

4. Necessity of Tender and Demand. Upon discharge of his obligation the pledgor may usually maintain an action for the recovery of the pledge or its proceeds without a distinct demand for the return of the property;[11] but where the pledge-holder is not the person to whom payment is made,[12] or where the pledgor has merely an option to withdraw the collateral *pro rata* upon partial payment of the debt,[13] the pledgor cannot maintain an action without first demanding a return of the collateral. The pledgor is not entitled to recover the property itself by an action in replevin,[14] or other possessory action,[15] without making and keeping good a tender of his debt, although tender is not necessary to the maintenance of an action to recover the proceeds,[16] or for a conversion.[17]

5. Right of Action and Defenses — a. Forms of Action. The remedy of the pledgor[18] or his assignee[19] for the conversion of the pledged property or for a failure to return the same may be in replevin or other possessory action for the property itself,[20] by an action in assumpsit for money had and received to recover its proceeds,[21] by an action in trover for the property or its value, with damages for its detention,[22]

7. *California.*— Hayward *v.* Rogers, 62 Cal. 348; Thompson *v.* Toland, 48 Cal. 99; Atkins *v.* Gamble, 42 Cal. 86, 10 Am. Rep. 282.

New York.— Horton *v.* Morgan, 19 N. Y. 170, 75 Am. Dec. 311 [*affirming* 6 Duer 56]; Dykers *v.* Allen, 7 Hill 497, 42 Am. Dec. 87; Nourse *v.* Prime, 4 Johns. Ch. 490, 8 Am. Dec. 606, 7 Johns. Ch. 69, 11 Am. Dec. 403. See also Hibblethwaite *v.* Flint, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43.

Pennsylvania.— Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720.

United States.— Hubbell *v.* Drexel, 11 Fed. 115.

England.— Le Croy *v.* Eastman, 10 Mod. 499, 88 Eng. Reprint 825. But see Langton *v.* Waite, L. R. 6 Eq. 165, 37 L. J. Ch. 345, 18 L. T. Rep. N. S. 80, 16 Wkly. Rep. 508.

See 40 Cent. Dig. tit. "Pledges," § 114. See also Corporations, 10 Cyc. 646.

Surrender of the certificate and procuring the issue of a new one under a power of attorney indorsed thereon does not constitute a conversion. Rich *v.* Boyce, 39 Md. 314; Ketchum *v.* Stevens, 19 N. Y. 499. Even though the pledgee insists on his right to vote the stock and to receive a dividend declared on it. Union, etc., Bank *v.* Farrington, 13 Lea (Tenn.) 333.

The right of the pledgee to recall stock pledged by him is not such possession as the law requires. Saltus *v.* Genin, 3 Bosw. (N. Y.) 257, 7 Abb. Pr. 193.

8. Draper *v.* Stone, 71 Me. 175.

Conversion by pledgee generally see *supra*, IV, C, 1, a; VI, B, 3.

9. Draper *v.* Stone, 71 Me. 175.

10. As where the stock has no market value and cannot be purchased from others. Krouse *v.* Woodward, 110 Cal. 638, 42 Pac. 1084.

11. Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720.

12. Dewart *v.* Masser, 40 Pa. St. 302.

13. Williamson *v.* McClure, 37 Pa. St. 402.

14. Wilkins *v.* Redding, 70 Nebr. 182, 97 N. W. 238; Talty *v.* Freedman's Sav., etc., Co., 93 U. S. 321, 23 L. ed. 886.

15. Lewis *v.* Mott, 36 N. Y. 395; De Clark *v.* Bell, 10 Wyo. 1, 65 Pac. 852; Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13, 21 Eng. Rul. Cas. 301.

The answer of defendant pledgee is sufficiently definite and certain where it alleges that the amount of the principal debt has not been paid, but that a large sum still remains unpaid. Walker *v.* Granite Bank, 1 Abb. Pr. N. S. (N. Y.) 406.

16. Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200.

17. Meyer Bros. Drug Co. *v.* Matthews, 69 Ark. 483, 64 S. W. 264; Wilkins *v.* Redding, 70 Nebr. 182, 97 N. W. 238; De Clark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

The reason is that the property being no longer in the pledgee's possession, tender would be useless, and the amount of the debt will be set off against the amount recovered. Meyer Bros. Drug Co. *v.* Matthews, 69 Ark. 483, 64 S. W. 264.

18. See cases cited *infra*, notes 19–23.

19. Newell *v.* Sexton, 61 Cal. 645; Southworth Co. *v.* Lamb, 82 Mo. 242; Rateliff *v.* Vance, 2 Mill (S. C.) 239.

20. Wilkins *v.* Redding, 70 Nebr. 182, 97 N. W. 238; Talty *v.* Freedman's Sav., etc., Co., 93 U. S. 321, 23 L. ed. 886.

21. Hancock *v.* Franklin Ins. Co., 114 Mass. 155 (holding that by bringing an action for money had and received, the pledgor waives the tort of conversion and ratifies the pledgee's disposition of the collateral); Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200.

22. *Alabama.*— Overstreet *v.* Nunn, 36 Ala. 649.

or under some circumstances, where necessary to obtain adequate redress, by a proceeding or suit in equity.[23]

b. Defenses. The pledgee may allege and prove in defense that no valid satisfaction of the principal obligation has been made or tendered,[24] or that there has been a material alteration in the collateral since its execution;[25] but he cannot plead as a defense or set-off to such a suit that the collateral was worthless, or of any less value than the amount paid to him upon it;[26] that plaintiff was not the owner of the claim sued on;[27] or that at the time of the tender and demand, a suit by a third party claiming title to the property was pending.[28]

c. Limitations. Although the statute of limitations begins to run against the principal debt secured from the time of its maturity,[29] the statute does not begin to run against the right of the pledgor to sue for failure to return the collateral until its conversion by the pledgee.[30]

d. Amount of Recovery. In actions against the pledgee for failure to return the collateral upon payment or tender, the amount of recovery is the actual loss suffered by reason of defendant's wrongful act, and this is determined by the same rules as in other cases of conversion by the pledgee.[31] Where the pledgee wrongfully refuses a tender of the amount due on the principal debt, he is responsible for any depreciation in the value of the pledge after such tender and refusal.[32] In a suit on the principal debt, the pledgor is entitled to set off any sums realized

California.—Newell *v.* Sexton, 61 Cal. 645.
Connecticut.—Ayres *v.* French, 41 Conn. 142.
Missouri.—Southworth Co. *v.* Lamb, 82 Mo. 242.
New York.—Luckey *v.* Gannon, 1 Sweeny 12, 6 Abb. Pr. N. S. 209. 37 How. Pr. 134; McLean *v.* Walker, 10 Johns. 471.
South Carolina.—Abrahams *v.* Southwestern R. Bank, 1 S. C. 441, 7 Am. Rep. 33; Ratcliff *v.* Vance, 2 Mill 239.
See 40 Cent. Dig. tit. "Pledges," § 115.

Trover is a proper remedy to recover the value of things represented by valuable papers, such as certificates of stock and promissory notes. Ayres *v.* French, 41 Conn. 142.

Upon a pledge of collateral to the president of a bank to secure a debt to the bank, the cashier can be held liable for failure to return it to the pledgor only by establishing that he, the president, and the bank, by their joint control, were depriving the pledgor of his property. McIntire *v.* Blakeley, 9 Pa. Cas. 227, 12 Atl. 325.

In Louisiana in a suit against the heirs of the pledgee to recover the amount of a note deposited as collateral, exceeding five hundred dollars, it was held the pledge must be proved by the testimony of at least one witness and supported by corroborating circumstances. Escurieux *v.* Chapdu, 12 Rob. 520.

23. Brown *v.* Runals, 14 Wis. 693, as where it is sought to enjoin a sale of the collateral.

Where the pledgor may obtain adequate redress at law, equity is without jurisdiction. Flowers *v.* Sproule, 2 A. K. Marsh. (Ky.) 54; Mather *v.* Bennett, 9 Cush. (Mass.) 175.

24. McCalla *v.* Clark, 55 Ga. 53; McIntire *v.* Blakeley, 9 Pa. Cas. 227, 12 Atl. 325.

The pledgee may show what became of the note secured, and to that end may introduce the receipt of a third person. Simmons *v.* Henry, 12 N. Y. Civ. Proc. 204.

25. Flint *v.* Craig, 56 N. Y. 22 [*reversing* 59 Barb. 319].

26. Union Nat. Bank *v.* Post, 93 Ill. App. 339 [*affirmed* in 192 Ill. 385, 61 N. E. 507].

27. Smith *v.* Hall, 67 N. Y. 48.

28. Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; Cass *v.* Higenbotam. 100 N. Y. 248, 3 N. E. 189 [*reversing* 27 Hun 406].

29. Slaymaker *v.* Wilson, 1 Penr. & W. (Pa.) 216.

30. Roberts *v.* Berdell, 61 Barb. (N. Y.) 37 [*affirmed* in 52 N. Y. 644, 15 Abb. Pr. N. S. 177] (holding that the statute ran from the demand of the pledgor for the return of the collateral and the pledgee's refusal); Bailey *v.* Drew, 2 N. Y. Suppl. 212 (holding that the same rule applies in favor of the pledgor's assignee in bankruptcy and is not affected by U. S. Rev. St. (1878) § 5057, providing that all suits by or against an assignee in bankruptcy shall be commenced within two years after the cause of action occurred); Slaymaker *v.* Wilson, 1 Penr. & W. (Pa.) 216.

31. See *supra*, IV, C, 3.

Where property received in exchange for pledged property.—Even though plaintiff was entitled to a money judgment on failure of defendant to deliver the property, it would be for the actual value of the property received in exchange, and not for its par value. Hebblethwaite *v.* Flint, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43.

32. Loughborough *v.* McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; Griswold *v.* Jackson, 2 Edw. (N. Y.) 461; Sullivan *v.* Sullivan, 20 S. C. 509.

But the pledgee is not liable for depreciation in value of collateral until demand made for its return, under an agreement by which the pledgor had a right to return of collateral in proportion to the amount of the

by the creditor from collaterals,[33] and may in an independent action recover any surplus in the pledgee's possession after satisfaction of the debt.[34]

C. Redemption — 1. Right to Redeem — a. In General. Upon default of the pledgor in discharging the principal obligation at maturity, the pledgee does not acquire title to the collateral, but holds it subject to the right of redemption in the pledgor,[35] or his representative,[36] until this right has been extinguished by a lawful sale of the property.[37]

b. Upon Wrongful Sale or Conversion. Where the pledgee has been guilty of a wrongful sale or conversion of the collateral, the pledgor is entitled to redeem it within a reasonable time after learning of such sale or conversion;[38] but his right of redemption is extinguished where he has authorized,[39] or ratified[40] the sale, or where he has failed to assert his right within a reasonable time after receiving notice of a wrongful sale,[41] especially where the collaterals have increased in value since the sale.[42]

c. Waiver of Right. So the pledgor may waive his right to redeem by a contract, for a separate consideration,[43] made after the original contract of pledge, and either before, or after[44] default in the principal obligation, but equity will

debt paid. Williamson *v.* McClure, 37 Pa. St. 402.

33. Dorrill *v.* Eaton, 35 Mich. 302. See also *infra*, VII, B, 3, b.

34. Miles *v.* Walther, 3 Mo. App. 96; King *v.* Hutchins, 28 N. H. 561, holding that in such suit to recover the surplus of a note pledged to secure a judgment, interest should be allowed on the note up to the time of its payment and on the judgment until the same time, and then plaintiff was entitled to interest on the surplus remaining after the satisfaction of his debt up to the time of his judgment. See also *supra*, VI, B, 2, 3.

35. *Kentucky.*— Hart *v.* Burton, 7 J. J. Marsh. 322.

Louisiana.— Meyer *v.* Moss, 110 La. 132, 34 So. 332, holding that by subpledging and redeeming the subpledge, the pledgee does not acquire a new title to the pledged property, but merely continues the same tenure.

Massachusetts.—Jennings *v.* Wyzanski, 188 Mass. 285, 74 N. E. 347, holding that where four mortgages of real estate were pledged as collateral security for the payment of a note other than the mortgage debt, and the fourth in point of priority was foreclosed, and the land sold to the pledgees, who retained the title to the other mortgages, the right of the pledgor to redeem from the pledge the three remaining mortgages was unaffected by the foreclosure.

Michigan.— Graydon *v.* Church, 7 Mich. 36.

Vermont.— White River Sav. Bank *v.* Capital Sav. Bank, etc., Co., 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754.

See 40 Cent. Dig. tit. "Pledges," § 118.

36. Chambers *v.* Kunzman, 59 N. J. Eq. 433, 45 Atl. 599; Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200.

37. Jennings *v.* Wyzanski, 188 Mass. 285, 74 N. E. 347 (holding that the pledgor's right to redeem is unaffected by a transfer of the collateral by the pledgee not amounting to a sale in accordance with the terms of the pledge); Swann *v.* Baxter, 36 Misc. (N. Y.) 233, 73 N. Y. Suppl. 336. See *infra*, VI, C, 2; VII, C, 8.

38. Treadwell *v.* Clark, 73 N. Y. App. Div. 473, 77 N. Y. Suppl. 350, holding that where, shortly after a wrongful sale of collateral by the pledgee and immediately upon the pledgor's receiving notice of it, he notified the purchaser of his claim and again the next month gave him similar notice, his suit brought six years thereafter to redeem was not barred by laches.

39. Swann *v.* Baxter, 36 Misc. (N. Y.) 233, 73 N. Y. Suppl. 336.

40. Earle *v.* Grant, 14 R. I. 228; Lacombe *v.* Forstall, 123 U. S. 562, 8 S. Ct. 247, 31 L. ed. 255.

41. Swann *v.* Baxter, 36 Misc. (N. Y.) 233, 73 N. Y. Suppl. 336; Hayward *v.* Eliot Nat. Bank, 96 U. S. 611, 24 L. ed. 855, holding the right to redeem was lost where the shares had been sold after due demand and notice, the loan discharged, and the debtor received notice thereof without making any objection until four years afterward.

Presumption of abandonment.— Where in an action to redeem brought thirty years after default, the pledgor relied upon the lapse of time as a presumption of payment of the principal debt, it was held rebutted by the countervailing presumption of the debtor's abandonment of the collateral after so long a time. Daly *v.* Spiller, 222 Ill. 421, 78 N. E. 782 [*affirming* 119 Ill. App. 272]; Louchbaum's Estate, 7 Pa. Dist. 100.

42. Lacombe *v.* Forstall, 123 U. S. 562, 8 S. Ct. 247, 31 L. ed. 255, holding the right to redeem lost where the pledgor had approved the sale and did not seek to redeem until two years afterward when the collateral had become three times as valuable as at the time of sale.

43. Rutherford *v.* Massachusetts Mut. L. Ins. Co., 45 Fed. 712.

44. Cunningham *v.* Jones, 108 Ky. 728, 57 S. W. 488, 22 Ky. L. Rep. 450 (holding the right of redemption waived by the delivery of an absolute bill of sale of the collateral to the pledgee, and the surrender by him of the notes received marked "paid"); Small *v.* Saloy, 42 La. Ann. 183, 7 So. 450;

scrutinize such a contract with great care, and set it aside if harsh or unconscionable.[45]

2. TIME TO REDEEM. Upon payment of the proper amount,[46] the pledgor may redeem at any time before a valid sale or foreclosure of the pledge.[47] Such right is not extinguished by a wrongful sale or surrender of the property,[48] as the purchaser will acquire no greater interest in the property than the pledgee had; nor is such right of redemption barred by a provision in the contract of pledge that unless it is redeemed by a certain time, the collateral is to become the property of the pledgee,[49] and the pledgor may still redeem after the time fixed. If no time has been fixed for the performance of the principal obligation, or for the redemption of the pledge, the pledgor is entitled to a reasonable time after demand,[50] before sale or foreclosure.[51]

3. PERSONS ENTITLED TO REDEEM. Upon the death or bankruptcy of the pledgor, his right of redemption passes to his personal representative[52] or assignee.[53] So redemption may be made by the owner of property that has been pledged without his consent,[54] or by a prior pledgee who has assented to the subsequent pledge.[55]

4. AMOUNT NECESSARY TO REDEEM. As a prerequisite to his right to redeem, the pledgor must tender the amount of the principal debt, with interest to date,[56] and any expenses of the pledgee properly chargeable upon the pledge,[57] subject to a reduction, however, to the extent of any benefit or profits derived by the pledgee from the possession or use of the property.[58] Where the pledgee had repledged the property, the original pledgor is entitled to redeem upon payment

Rutherford *v.* Massachusetts Mut. L. Ins. Co., 45 Fed. 712.

45. Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50. *Compare* Daly *v.* Spiller, 222 Ill. 421, 78 N. E. 782 [*affirming* 119 Ill. App. 272].

Laches see *infra*, VI, C, 5, d.

46. See *infra*, VI, C, 4.

47. *California.*— Wright *v.* Ross, 36 Cal. 414.

Illinois.— Wadsworth *v.* Thompson, 8 Ill. 423, holding that the time for redemption may be extended by a subsequent parol contract and no new consideration for such extension is necessary.

Maine.— Keen *v.* Jordan, 53 Me. 144.

Missouri.— Perry *v.* Craig, 3 Mo. 516.

New York.—Bailey *v.* Drew, 2 N. Y. Suppl. 212.

See 40 Cent. Dig. tit. "Pledges," § 119.

48. Dungan *v.* Newark Mut. Ben. L. Ins. Co., 46 Md. 469; Taggart *v.* Packard, 39 Vt. 628.

49. Keen *v.* Jordan, 53 Me. 144; Vickers *v.* Battershall, 84 Hun (N. Y.) 496, 32 N. Y. Suppl. 314; Clark *v.* Henry, 2 Cow. (N. Y.) 324.

50. Keen *v.* Jordan, 53 Me. 144; Perry *v.* Craig, 3 Mo. 516; Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200.

51. See *infra*, VII, C, 3, a.

52. Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200.

53. Bailey *v.* Drew, 2 N. Y. Suppl. 212.

54. National Safe Deposit, etc., Co. *v.* Gray, 12 App. Cas. (D. C.) 276.

55. Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 65 Fed. 559.

56. Bigelow *v.* Young, 30 Ga. 121 (holding that where a slave was pledged "to be redeemed at any time by the pledgor paying the amount which may be due," the slave could only be redeemed by payment of what was due at the time of redemption); Craig *v.* McMullin, 9 Dana (Ky.) 311; Field *v.* Beeler, 3 Bibb (Ky.) 18; Clark *v.* Seagraves, 186 Mass. 430, 71 N. E. 813 (holding that, although the debts, as security for which the pledge was given, were barred by limitations, the pledgor, having waived the statute, must, in order to redeem, pay interest from the time the security was given, not merely from the date of bringing the bill); Winkler *v.* Madgeburg, 100 Wis. 421, 76 N. W. 332.

57. McKie *v.* Gregory, 175 Mass. 505, 56 N. E. 720 (decided under St. (1892) c. 428, § 1, governing the assignment of legacies as collateral); Newton *v.* Van Dusen, 47 Minn. 437, 50 N. W. 820; Kelly *v.* Falconer, 45 N. Y. 42 (holding that where a debtor pledged his interest under a contract to purchase land, and the pledgee paid the remainder due under the contract, received a deed, sold part of the land and advanced money to the purchaser to cut logs on the lot sold, the pledgee was entitled, upon redemption, to his original debt, and the balance expended in the purchase of the land, less the amount received from the purchaser, but without any allowance for the money loaned to the purchaser under the lumbering contract).

Currency payable.— Where a pledge is made to a creditor in a foreign country, it is payable in the currency of the creditor's domicile, and if paid in a different country from that of the creditor's domicile, he is also entitled to exchange. Stoker *v.* Cogswell, 25 How. Pr. (N. Y.) 267.

58. Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517; Craig *v.* McMullin, 9 Dana (Ky.) 311;

of the amount due from him.[59] The pledgee cannot prevent redemption by refusing to disclose the exact amount due on the debt, and denying that the tender made was the proper sum;[60] and where the pledgee, without objection, accepts the amount tendered, he cannot afterward refuse to return the collateral on the ground that the amount tendered was insufficient.[61]

5. Right of Action and Defenses — a. In General. The pledgor may maintain an action against the pledgee not only to redeem,[62] but also where there is doubt or dispute as to the amount due on the debt, for an accounting.[63]

b. Form of Remedy. The remedy of the pledgor to redeem is, in general, at law,[64] and a bill in equity will not lie for that purpose,[65] except upon the allegation of some additional ground of equitable jurisdiction,[66] as a sale or assignment of the pledge by the pledgee, and a demand for its retransfer to the pledgor,[67] or a request for an accounting,[68] or discovery.[69]

c. Tender of Amount of Debt. While in the absence of express provision to the contrary, a pledgor cannot recover possession of the pledged property without paying his debt, even though it is barred by the statute of limitations,[70] tender of the amount of the debt is not required where the goods are pledged to secure a running account,[71] nor where the pledgor sues to redeem from a wrongful sale by the pledgee.[72]

Field *v.* Beeler, 3 Bibb (Ky.) 18; Rayner *v.* Bryson, 29 Md. 473 (holding that the pledgee is chargeable with dividends received on pledged stock and with interest on such dividends computed from the time the bill was filed up to the stating of the account, and on subsequent dividends, from their receipt until the accounting); Newton *v.* Van Dusen, 47 Minn. 437, 50 N. W. 820.

Where, however, one to secure his debt to an estate assigns personal property, which is his interest in the estate, to the administratrix, he is not entitled, on redeeming, to a credit by way of income on such property. Clark *v.* Seagraves, 186 Mass. 430, 71 N. E. 813. And the pledgor is not entitled to a reduction on the debt by reason of funds in the hands of the pledgee belonging to him, where such funds have been garnished by another creditor of the pledgor. Kountze *v.* Bonner, 12 Tex. Civ. App. 131, 34 S. W. 163.

59. Torrey *v.* Harris, 12 Daly (N. Y.) 385.

60. Chambers *v.* Kunzman, 59 N. J. Eq. 433, 45 Atl. 599.

61. August *v.* O'Brien, 30 Misc. (N. Y.) 54, 61 N. Y. Suppl. 720 [*affirmed* in 50 N. Y. App. Div. 626, 63 N. Y. Suppl. 989].

62. See cases cited *infra*, note 63.

63. *Nevada.*— Beatty *v.* Sylvester, 3 Nev. 228.

New York.— Barry *v.* Coville, 53 Hun 620, 7 N. Y. Suppl. 36 [*affirmed* in 129 N. Y. 302, 29 N. E. 307]. See also Hebblethwaite *v.* Flint, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43.

North Carolina.— Chalk *v.* Traders' Nat. Bank, 87 N. C. 200.

Ohio.— Kingsbury *v.* Phelps, Wright 370, holding that such right to an accounting is not defeated by an agreement that if the pledgor does not make payment by a certain time, the collateral shall become the property of the pledgee on his failure to pay at the time stated.

South Carolina.— Maxwell *v.* Foster, 64 S. C. 1, 41 S. E. 776, holding that the pledgor was entitled to an accounting by the assignee of the pledgee, and the creditor to whom such assignee had pledged the property.

See 40 Cent. Dig. tit. "Pledges," § 122. See also *infra*, text and note 68.

64. De Bevoise *v.* H. & W. Co., 67 N. J. Eq. 472, 58 Atl. 91; Durant *v.* Einstein, 5 Rob. (N. Y.) 423, 35 How. Pr. 223; Doak *v.* State Bank, 28 N. C. 309; Surber *v.* McClintic, 10 W. Va. 236.

Trover is the usual action to effect a redemption. Loughborough *v.* McNevin, 74 Cal. 250, 15 Pac. 773, 5 Am. St. Rep. 435.

65. See cases cited *infra*, notes 66–69.

66. Hasbrouck *v.* Vandervoort, 4 Sandf. (N. Y.) 74.

67. *Alabama.*— Nelson *v.* Owen, 113 Ala. 372, 21 So. 75.

Missouri.— Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

New Hampshire.— Merrill *v.* Houghton, 51 N. H. 61, holding that where it is out of the pledgee's power to return the property, the court may, in a proper case, decree compensation.

New York.— Treadwell *v.* Clark, 73 N. Y. App. Div. 473, 77 N. Y. Suppl. 350.

Texas.— Smith *v.* Anderson, 8 Tex. Civ. App. 188, 27 S. W. 775, where the pledgee had exchanged the certificate of stock pledged for another certificate in his own name.

See 40 Cent. Dig. tit. "Pledges," § 123.

68. Stokes *v.* Frazier, 72 Ill. 428; Hasbrouck *v.* Vandervoort, 4 Sandf. (N. Y.) 74; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Conyngham's Appeal, 57 Pa. St. 474; Kemp *v.* Westbrook, 1 Ves. 278, 27 Eng. Reprint 1030. See also *supra*, text and note 63.

69. Hasbrouck *v.* Vandervoort, 4 Sandf. (N. Y.) 74.

70. Puckhaber *v.* Henry, 152 Cal. 419, 93 Pac. 114.

71. Beatty *v.* Sylvester, 3 Nev. 228.

72. Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

d. Laches and Limitations. Mere lapse of time after the maturity of the principal obligation does not bar the pledgor's right to redeem,[73] unless it is accompanied by elements of estoppel;[74] and the statute of limitations begins to run against such right,[75] not from the maturity of the debt,[76] but only from the time demand is made on the pledgor to redeem,[77] or his interest in the property is repudiated by the pledgee,[78] as by a claim of absolute title in himself.[79]

e. Parties. In a suit for redemption, all persons having an interest in the pledge should be made parties.[80]

f. Pleading. The bill or petition to redeem should state the terms of the contract of pledge,[81] should show plaintiff's interest in the collateral,[82] and allege or tender a fulfilment of the conditions entitling him to redeem;[83] but in a suit against a transferee from the pledgee, it is not necessary to allege that defendant took with notice of plaintiff's rights.[84] In an action by the pledgee to enforce the contract of a pledge, the pledgor may file a cross bill to redeem, upon tender of a sufficient amount to discharge the debt.[85]

g. Evidence. Mere delay on the part of the pledgor in redeeming will not raise a presumption of abandonment;[86] and an action by the pledgee on the principal debt is an admission that the pledgor's right to redeem is still open.[87] The pledgor may introduce evidence to show that a transfer of the collateral by the pledgee

73. Keen *v.* Jordan, 53 Me. 144; Chouteau *v.* Allen, 70 Mo. 290; Kingsbury *v.* Phelps, Wright (Ohio) 370; Reynolds *v.* Cridge, 131 Pa. St. 189, 18 Atl. 1010.

74. Lance *v.* Bonnell, 58 N. J. Eq. 259, 43 Atl. 288; Waterman *v.* Brown, 31 Pa. St. 161.

Laches will not defeat the pledgor's right to redeem unless the pledgee has been injured by such laches. Whittemore *v.* Hamilton, 51 Conn. 153; Groeltz *v.* Cole, 128 Iowa 340, 103 N. W. 977. In Daly *v.* Spiller, 119 Ill. App. 272 [*affirmed* in 222 Ill. 421, 78 N. E. 782], it was held that where insured in a life policy pledged the same to secure a loan, and at the time of insured's death the lender had a bill pending alleging that insured assigned and pledged the policy, and praying for an accounting, and that the policy be sold to satisfy the lender's claim, and pending the suit the lender stated to one to whom insured had applied for money to pay the loan that the suit had been brought because insured did not pay, and the lender retained the note given by insured, the facts showed that the pledgee and pledgor had recognized the existence of a right to redeem, so that the right to do so could not be denied on the ground of laches, waiver, or abandonment. See also *supra*, text and note 73.

75. Equity follows the law in the application of the statute of limitations to the pledgor's right to redeem. Perry *v.* Craig, 3 Mo. 516; Lance *v.* Bonnell, 58 N. J. Eq. 259, 43 Atl. 288.

76. Miner *v.* Beekman, 50 N. Y. 337 [*overruling* Roberts *v.* Sykes, 30 Barb. 173]; Bailey *v.* Drew, 2 N. Y. Suppl. 212.

77. Jones *v.* Thurmond, 5 Tex. 318.

78. State University *v.* State Nat. Bank, 96 N. C. 280, 3 S. E. 359; Jones *v.* Thurmond, 5 Tex. 318; Gilmer *v.* Morris, 43 Fed. 456.

79. Waterman *v.* Brown, 31 Pa. St. 161; Hogan *v.* Hall, 1 Strobh. Eq. (S. C.) 323, where the pledgee retains the property after a settlement with the pledgor.

80. Lewis *v.* Varnum, 12 Abb. Pr. (N. Y.) 305, holding that in an action against an assignee from the pledgee, in which an accounting is asked, the pledgee is a necessary party.

But in the absence of such interest the mere fact that they have been parties to transactions connected with the pledge is not sufficient to render them necessary parties to an action to redeem. Burlingame *v.* Hobbs, 12 Gray (Mass.) 367 (holding that in a bill for an accounting as to advances made by defendant to a third person, for which plaintiff had given security, the person to whom the advances were made is not a necessary party); Hobart *v.* Andrews, 21 Pick. (Mass.) 526 (holding that where the pledgor had assigned his interest in the pledge to one who had assigned it to plaintiff, the original assignee was not a necessary party to a suit by the second assignee for the redemption of the pledged property).

81. Houston, etc., R. Co. *v.* Conner, 29 Tex. Civ. App. 259, 67 S. W. 773.

82. Mann *v.* Bamberger, 4 Heisk. (Tenn.) 486; Houston, etc., R. Co. *v.* Conner, 29 Tex. Civ. App. 259, 67 S. W. 773.

83. Rennie *v.* Deshon, 31 N. J. Eq. 378 (holding that an offer to pay the specific amount due on the contract of pledge is not necessary, but a general offer to pay any amount found due is sufficient); Houston, etc., R. Co. *v.* Conner, 29 Tex. Civ. App. 259, 67 S. W. 773.

84. Nelson *v.* Owen, 113 Ala. 372, 21 So. 75; Maxwell *v.* Foster, 64 S. C. 1, 41 S. E. 776, the defense of *bona fide* purchaser being one to be set up affirmatively by plea or answer.

85. Kountze *v.* Bonner, 12 Tex. Civ. App. 131, 34 S. W. 163.

86. Whelan *v.* Kinsley, 26 Ohio St. 131.

87. Cutts *v.* York Mfg. Co., 18 Me. 190.

was not a sale under the contract, but was merely colorable.[88] Exhibits filed by plaintiff may constitute evidence to sustain and supplement defendant's pleadings.[89]

h. Value of Converted Stock Chargeable to Pledgee. In a suit to redeem stock wrongfully sold by the pledgee, the pledgor is entitled, as far as possible, to be placed in the same position as if the sale had not been made, and where the stock itself cannot be restored to him, he may recover the market value of the stock at the time of filing his bill to redeem.[90]

i. Judgment. The judgment in a suit for redemption should order a payment of the amount for which the pledge is security as a condition to the return of the pledge.[91] So too when a suit is brought against a *bona fide* holder to redeem property wrongfully sold or repledged to him, the court may decree the payment of defendant's claim as a condition to redemption, and declare plaintiff's rights extinguished if the condition is not performed.[92] Where, pending a suit for redemption and accounting, or before suit brought, but unknown to the pledgor, the pledgee has sold the property, the judgment may be that the pledgee account for the value of the pledge at the time of its conversion.[93]

j. Costs. Where the pledgor's debt has not been paid at the time of the filing of his bill to redeem, he must pay the costs of the proceeding;[94] but where the debt has been paid before the bill is filed,[95] or where the pledgee, having sold the pledge, has refused to give any information respecting the sale,[96] the costs are chargeable to the pledgee.

VII. ENFORCEMENT.[97]

A. In General — 1. Remedies of Pledgee — a. In General. The pledgee, upon default of the pledgor in the discharge of the principal obligation, may proceed personally against the pledgor for his debt,[98] or file a bill in chancery to obtain a judicial sale under a regular decree of foreclosure,[99] or he may sell the pledge without judicial process, upon reasonable notice to the debtor to redeem.[1]

88. Jennings *v.* Wyzanski, 188 Mass. 285, 74 N. E. 347.

89. Kiser *v.* Ruddick, 8 Blackf. (Ind.) 382.

90. Fowle *v.* Ward, 113 Mass. 548, 18 Am. Rep. 534. *Compare* with the amount of recovery in action for conversion *supra*, V, B, 5, d; III, C, 3, a, (II).

Where the stock has no market value he may elect to recover the amount for which it was sold, and the pledgee cannot object that the price was speculative or more than the stock was worth. Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

91. Smith *v.* Anderson, 8 Tex. Civ. App. 188, 27 S. W. 775.

92. Hubbard *v.* Tod, 171 U. S. 474, 19 S. Ct. 14, 43 L. ed. 246 [*affirming* 76 Fed. 905, 22 C. C. A. 606].

93. Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171 (holding also that the bill will be considered amended for that purpose); Blood *v.* Erie Dime Sav., etc., Co., 164 Pa. St. 95, 30 Atl. 362. *Compare* Beatty *v.* Sylvester, 3 Nev. 228.

94. Rayner *v.* Bryson, 29 Md. 473.

95. Rayner *v.* Bryson, 29 Md. 473; Archdeacon *v.* Bowes, McClell. 149, 13 Price 353, 28 Rev. Rep. 685; Livingston *v.* Wood, 27 Grant Ch. (U. C.) 515.

96. Cake *v.* Shull, (N. J. Ch. 1888) 13 Atl. 666.

97. Amount for which creditor holding collateral can prove claim against debtor's assignee for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 261 *et seq.*

98. *California.*— Sonoma Valley Bank *v.* Hill, 59 Cal. 107.

Indiana.— Dugan *v.* Sprague, 2 Ind. 600.

Iowa.— Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497.

Kansas.— Jones *v.* Scott, 10 Kan. 33.

Massachusetts.— Whitaker *v.* Sumner, 20 Pick. 399; Whitwell *v.* Brigham, 19 Pick. 117; Townsend *v.* Newell, 14 Pick. 332; Beckwith *v.* Sibley, 11 Pick. 482; Cleverly *v.* Brackett, 8 Mass. 150.

New York.— Butterworth *v.* Kennedy, 5 Bosw. 143; Elder *v.* Rouse, 15 Wend. 218; Case *v.* Boughton, 11 Wend. 106; Langdon *v.* Buell, 9 Wend. 80.

Vermont.— Rutland Bank *v.* Woodruff, 34 Vt. 89.

See 40 Cent. Dig. tit. "Pledges," § 1291. See also *infra*, VII, B.

Execution may be levied on the pledge and sale made by the sheriff under such personal judgment. Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497; Buck *v.* Ingersoll, 11 Metc. (Mass.) 226; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703. See also VII, B.

Right to sue out attachment for a debt which is secured by a pledge see Attachment, 4 Cyc. 453 note 88.

99. Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497; Deloach *v.* Jones, 18 La. 447. See also *infra*, VII, D.

1. *Iowa.*— Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497.

b. By Special Agreement. The method of enforcement of the pledge may be regulated by the agreement of the parties, and such agreement, when not fraudulent or against public policy, will be enforced by the courts.[2] A provision, however, authorizing one method of enforcement, does not preclude resort to other methods, in the absence of an express prohibition.[3]

c. Pledge of Commercial Paper. On a pledge of commercial paper, the pledgee may either collect the collateral,[4] or proceed on the original obligation without restoring the collateral.[5]

d. Pledge of Two or More Collaterals. Where the pledgee is in possession of two securities for his debt, he may proceed against either or both of them at his election,[6] and cannot be compelled to subject one before resorting to the other.[7]

e. Appropriation of Pledge to Debt. The pledgee is not entitled upon the pledgor's default to take the property as his own in satisfaction of the debt.[8] A provision in the contract by which the absolute property in the pledge is to vest in the pledgee, upon the default of the pledgor, is void,[9] and the pledgor is still entitled to redeem.[10] Nor can the pledgee cut off the pledgor's interest in the collateral by a mere notice that, if the debt is not paid by a certain time, he will take the collateral as his own.[11] So where a surety who holds collateral to indemnify him against liability on the debt transfers such collateral to the payee for the purpose of discharging the debt, the transfer does not divest the pledgor of his interest in the collateral and he may still redeem it, even after maturity of his debt.[12]

Louisiana.— Deloach *v.* Jones, 18 La. 447.

New York.— Ogden *v.* Lathrop, 1 Sweeny 643; Stearns *v.* Marsh, 4 Den. 227, 47 Am. Dec. 248; Cortelyou *v.* Lansing, 2 Cai. Cas. 200; Hart *v.* Ten Eyck, 2 Johns. Ch. 62.

Pennsylvania.— Smith *v.* Coale, 12 Phila. 177.

Texas.— Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

See 40 Cent. Dig. tit. "Pledges," § 129.

Right to sell see *infra*, VII, C.

A mere bailee of his debtor's property, in the absence of a contract of pledge, is not entitled to sell such property for his debt, except by judicial sale under judgment and execution on his debt. Xenia First Nat. Bank *v.* Stewart, 114 U. S. 224, 5 S. Ct. 845, 29 L. ed. 101.

2. Hunter *v.* Hamilton, 52 Kan. 195, 34 Pac. 782.

3. Farmers', etc., Bank *v.* Copsey, 134 Cal. 287, 66 Pac. 324 (holding that where a mortgage is pledged with power of sale on default, the pledgee, at his option, both under the contract and by force, 2 Cal. Civ. Code, §§ 3006, 3011, instead of selling, may foreclose the mortgage); Coffin *v.* Chicago, etc., Constr. Co., 67 Barb. (N. Y.) 337.

4. Rockford Nat. Bank *v.* Young Men's Christian Assoc. Gymnasium Co., 78 Ill. App. 180; Comstock *v.* Smith, 23 Me. 202; Polhemus *v.* Prudential Realty Corp., 74 N. J. L. 570, 67 Atl. 303; Huyler *v.* Dahoney, 48 Tex. 234. See also Naef *v.* Potter, 127 Ill. App. 106 [*affirmed* in 226 Ill. 628, 80 N. E. 1084].

5. Comstock *v.* Smith, 23 Me. 202; Polhemus *v.* Prudential Realty Corp., 74 N. J. L. 570, 67 Atl. 303.

6. Weiscopt *v.* Newman, 65 S. W. 808, 24 Ky. L. Rep. 36.

7. Weiscopt *v.* Newman, 65 S. W. 808, 24 Ky. L. Rep. 36.

8. *Connecticut.*— Seymour *v.* Ives, 46 Conn. 109.

Missouri.—Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

Nevada.— Beatty *v.* Sylvester, 3 Nev. 228, holding such appropriation by the pledgee void unless it was authorized by the pledgor, and unless the pledgee made the fact of appropriation clear, either by notifying the pledgor, or crediting him on his books.

New York.— Cortelyou *v.* Lansing, 2 Cai. Cas. 200.

Pennsylvania.— Conyngham's Appeal, 57 Pa. St. 474; Diller *v.* Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Davis *v.* Funk, 39 Pa. St. 243, 80 Am. Dec. 519. But see Waterman *v.* Brown, 31 Pa. St. 161, holding that the pledgor could not complain where the pledge was worth less than the amount of the debt at the time of its appropriation, and eleven years, including the period of limitations, had expired before suit was brought.

See 40 Cent. Dig. tit. "Pledges," § 130.

Compare Du Brutz *v.* Visalia Bank, 4 Cal. App. 201, 87 Pac. 467.

9. Lucketts *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723; Livingston *v.* Story, 11 Pet. (U. S.) 351, 9 L. ed. 746.

Intimations to the contrary in Diller *v.* Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177, and Conyngham's Appeal, 57 Pa. St. 474, are merely *dicta*.

10. Lucketts *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

But where stock has been pledged, its transfer on the books to the pledgee or a third person does not invalidate the contract of pledge. Brother *v.* Saul, 11 La. Ann. 223.

11. Groeltz *v.* Cole, 128 Iowa 340, 103 N. W. 977.

12. Morgan *v.* Dod, 3 Colo. 551. *Contra*, Vest *v.* Green, 3 Mo. 219.

f. Concurrent Remedies and Election. The pledgee may bring concurrent suits on the principal obligation and on collateral securities held by him,[13] and cannot be compelled to make an election as to which he will enforce.[14] In a suit on the collateral, he is not restricted to the recovery of his debt, but may collect the entire amount of the collateral,[15] although any surplus after the satisfaction of his debt will be held by him for the pledgor.[16] But where the pledgee, after the maturity of the principal debt, wrongfully transfers the collateral to third persons, he will be held to have elected to take them in satisfaction of his debt, and he will not thereafter be allowed to sue on the principal obligation for any alleged deficiency.[17]

2. Default by Pledgor[18] — a. Time of Maturity Not Fixed. Where no definite time is expressed for the maturity of the principal obligation, the pledgor will be considered in default upon his failure to perform within a reasonable time after notice,[19] or after a reasonable time and his having made performance impossible.[20]

b. Time of Maturity Fixed — (i) *In General.* If a definite time is fixed, he will be in default upon failure to perform by the time stated,[21] unless such time has been extended by the pledgee, in which case the pledge cannot be sold until the expiration of the extension.[22]

(ii) *On Demand.* If the principal obligation is payable on demand, the pledgor will be in default upon his failure to pay on demand.[23]

3. Proceeds and Surplus — a. Application of Proceeds to Debt.[24] Upon a sale or collection of the collateral security, the proceeds must be applied to the debt or debts it was given to secure, and to no others.[25] Thus the pledgee, in the appli-

13. Barnes *v.* Bradley, 56 Ark. 105, 19 S. W. 319; Ducasse *v.* Keyser, 28 La. Ann. 419; Plant's Mfg. Co. *v.* Falvey, 20 Wis. 200.

14. Cleveland Second Nat. Bank *v.* Morrison, 3 Ohio Dec. (Reprint) 534.

15. Ducasse *v.* Keyser, 28 La. Ann. 419.

16. Ducasse *v.* Keyser, 28 La. Ann. 419.

17. Hawks *v.* Hinchcliff, 17 Barb. (N. Y.) 492.

18. Time to redeem see *supra*, VI, C, 2.

19. Perry *v.* Craig, 3 Mo. 516.

20. *Ex p.* Fisher, 20 S. C. 179.

21. McAulay *v.* Moody, 128 Cal. 202, 60 Pac. 778 (holding that where the pledgor has directed payment to the pledgee of a dividend which has been declared on the pledged stock and which is sufficient to complete payment of the principal debt, but the dividend is not paid at the maturity of the debt by reason of a dispute between the pledgor and the corporation, the pledgor is in default); Manning *v.* Shriver, 79 Md. 41, 28 Atl. 899 (holding that upon a pledge to secure a note by which the maker agreed to maintain on demand ten per cent margin collateral security, and "on the non-performance of this promise or any part of it, I authorize C. C. Shriver, agent, to sell the collateral," the authority to sell related to the failure to pay the note as well as to the failure to maintain such margin); Rankin *v.* McCullough, 12 Barb. (N. Y.) 103 (holding that where a note is given for three months and collateral delivered which the pledgee agrees to hold for three months, the pledgor is in default as to the collateral and sale may be made at the end of three months, without grace, although as to the note he may be entitled to three days' grace).

22. Wadsworth *v.* Thompson, 8 Ill. 423.

Upon an indefinite extension, the pledgee cannot sell until a reasonable time after demand and notice, but where the extension is conditioned on the payment of interest, the pledgee may sell upon default in the payment of interest and notice to the pledgor of that fact. Louisville Banking Co. *v.* W. H. Thomas, etc., Co., 69 S. W. 1078, 24 Ky. L. Rep. 811, 68 S. W. 2, 24 Ky. L. Rep. 115.

23. Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315, holding that part payment only constitutes default, and that the pledgee's agreement not to press the demand without notice did not constitute a waiver of his rights to sell the collateral after notice.

24. Debts or liabilities secured see *supra*, III, B.

Right of surety or indorser to control application see Payment, 30 Cyc. 1251.

25. *California.*— Marziou *v.* Pioche, 8 Cal. 522. *Compare* Du Brutz *v.* Visalia Bank, 4 Cal. App. 201, 87 Pac. 407.

Connecticut.— Pitkin *v.* Spencer, 16 Conn. 121.

Indiana.— Keller *v.* Orr, 106 Ind. 406, 7 N. E. 195.

Iowa.— Iowa Nat. Bank *v.* Cooper, (1904) 101 N. W. 459.

New York.— Armstrong *v.* McLean, 153 N. Y. 490, 47 N. E. 912 [*reversing* 92 Hun 397, 36 N. Y. Suppl. 764]; Jones *v.* Benedict, 83 N. Y. 79.

Pennsylvania.— Price *v.* Franklin F. Ins. Co., 13 Wkly. Notes Cas. 312.

Rhode Island.— Browne *v.* Rhode Island Mortg., etc., Co., 21 R. I. 169, 43 Atl. 537, holding that upon default on notes for which collateral is pledged with a trust company, the holders of the notes are entitled to receive from the company the collateral de-

cation of the proceeds to his secured debt, takes precedence over the general creditors of the pledgor;[26] and where the pledgor, after delivery of the collateral, has made a general assignment for the benefit of creditors, the pledgee is still entitled to apply the proceeds of the collateral to the debts it was given to secure, to the exclusion of other claims.[27] The rights of the parties as to the application will be determined by the terms of the pledge as they existed at the time of the sale or collection,[28] and the application will be made as of that date.[29]

b. Distribution Among Claims Secured.[30] The debtor upon giving collateral security has the right to direct the application of the proceeds,[31] or to authorize their application as the creditor may elect.[32] But if at the time of the delivery of the collateral the debtor fails to exercise his right to direct the application of its proceeds, he cannot do so afterward,[33] and the creditor may at his election apply the proceeds to the payment of any of the secured debts that are due at the time the money is received.[34] In some jurisdictions this right of the creditor to determine the application is recognized whether the proceeds of the collateral are

livered for the security of their respective notes, and the company had no right to mingle it in a common fund.

Texas.— Whitesboro First Nat. Bank *v.* Andrews, (Civ. App. 1903) 77 S. W. 956, holding that where cotton was pledged to a bank as security for advances and was subsequently sold with the bank's consent, the purchaser was not entitled to retain a part of the purchase-money in satisfaction of a debt due him by the pledgor, and the bank was not estopped to recover a sum retained by the purchaser by reason of its having credited such sum to him, in ignorance of the real price for which the cotton was sold, nor by reason of its inability to place the parties *in statu quo*.

See 40 Cent. Dig. tit. "Pledges," § 134.

Collateral for joint obligation.— Proceeds of collateral pledged as security for a joint note cannot be applied to payment of an individual debt of one of the makers. Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608. But see Morris *v.* East Side R. Co., 104 Fed. 409, 43 C. C. A. 605, holding that where the pledgee holds separate securities for different notes, an application of the proceeds in each case to the wrong note is immaterial if neither security brings enough to satisfy the smaller note.

26. Clay *v.* His Creditors, 9 Mart. (La.) 519.

27. Cohen *v.* State Bank, 29 Fla. 655, 11 So. 44.

28. McCathern *v.* Bell, 93 Ga. 290, 20 S. E. 315 (holding that, even though the contract is in writing, if it does not show the purpose of delivery of the pledge, parol evidence may be introduced to show that it was to secure a particular debt, and that a subsequent written agreement between the parties touching other indebtedness, providing that the creditor may apply payments to any demands he may have against the debtors at time of payment, does not affect the application of the collaterals or other proceeds, no express mention of them being made in the subsequent agreement); Fall River Nat. Bank *v.* Slade, 153 Mass. 415, 26 N. E. 843, 12 L. R. A. 131.

An assignment of a life policy by the in-

sured and beneficiary as collateral to the insured's debt gave the assignee a right, on insured's failure to pay the premiums, to receive a paid-up policy in lieu of the one assigned. Defendant failed to pay either the premiums or the debt, which amounted to more than the face of the paid-up policy, which the assignee demanded and received. It was held that, although without the assignment the paid-up policy would have belonged to the beneficiary, yet under it the assignee could treat such paid-up policy as so much money and apply it on the debt without attempting to make any sale of it as pledged property. Du Brutz *v.* Visalia Bank, 4 Cal. App. 201, 87 Pac. 467.

29. Stokes *v.* Frazier, 72 Ill. 428; *In re* Wilhelm, 182 Pa. St. 281, 37 Atl. 819.

30. Application of payments generally see PAYMENT, 30 Cyc. 1227.

31. Beach *v.* State Bank, 2 Ind. 488, holding that where the collateral is expressed to be delivered as security for the aggregate of a number of drafts described, the proceeds must be applied to the payment of such drafts *pro rata*.

32. Tracy *v.* Syracuse First Nat. Bank, 48 N. Y. App. Div. 285, 62 N. Y. Suppl. 657.

Application by the creditor in good faith cannot be interfered with by other creditors where the creditor has been expressly given the right to apply the proceeds as he might elect. Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

33. Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51.

34. Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51; Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608.

Where pledgees mix the proceeds of wool belonging to one company with the proceeds of that of another company on which a bank had a claim, so that it was impossible to identify any specific part of the money in their hands as having been derived from the sale of either portion of the wool and the funds resulting from these mingled assets is insufficient to pay both claims in full, they were properly required to abate in proportion to the amount of their respective claims. Smith *v.* Moors, 215 Pa. St. 421, 64 Atl. 593.

voluntarily paid to him or are collected by suit;[35] but in others it is confined to voluntary payments, and where collection is made through resort to legal proceedings, the court will apply the proceeds to the different debts secured in accordance with equitable principles,[36] and will usually direct application *pro rata* upon the secured debts.[37]

c. Disbursements and Charges.[38] The pledgee is entitled to allowance for all proper charges and expenses of converting the security into money,[39] including commissions where the pledgee is also a broker or factor,[40] or where they are stipulated for in the contract of pledge,[41] and reasonable attorney's fees actually incurred.[42] But the pledgee is not entitled to allowance for unreasonable expenditures in preserving the pledge,[43] or its value,[44] nor is he entitled to the interest on the security as a bonus in addition to the payment of his debt.[45]

d. Right to Surplus. The surplus proceeds of collaterals sold or collected after the satisfaction of debts for which they are security are held by the pledgee in trust for the pledgor,[46] to whom, or to whose order,[47] such surplus must be paid on

35. Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608.

36. Armstrong *v.* McLean, 153 N. Y. 490, 47 N. E. 912; Orleans County Nat. Bank *v.* Moore, 112 N. Y. 543, 20 N. E. 357, 8 Am. St. Rep. 775, 3 L. R. A. 302 [*distinguishing* Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51]; Jones *v.* Benedict, 83 N. Y. 79.

37. Armstrong *v.* McLean, 153 N. Y. 490, 47 N. E. 912. Plaintiff assigned to defendant as collateral security notes and the mortgage securing them, with the understanding that defendant should complete the foreclosure of the mortgage commenced by plaintiff. The mortgage not being a first lien, defendant, with plaintiff's consent, proceeded to secure prior liens by purchase, and after some disbursements for this purpose, plaintiff and defendant made an agreement, reciting the advancement of money by defendant in purchasing liens on the mortgaged property and perfecting its title, and the necessity for further expenditures therefor, and providing that plaintiff should have the right to purchase the property of defendant within eighteen months by paying plaintiff's original indebtedness to defendant and the amounts advanced by defendant in purchasing liens on the property and perfecting its title. Immediately thereafter defendant foreclosed said mortgage and other liens, plaintiff not being made a party, and defendant bought the property at the sheriff's sale. It was held that defendant acquired the title to the property at the foreclosure for its own benefit, and therefore, although plaintiff did not exercise the option to purchase, defendant was obliged to account to plaintiff for the property on the basis of the amount of its bid at the foreclosure sale, it to have credit for plaintiff's indebtedness and for expenses in acquiring and perfecting title. Munson *v.* American Sav. Bank, etc., Co., 43 Wash. 549, 86 Pac. 1047.

38. Right of pledgee to allowance for expenses in care of property and collection of chose in action pledged see *supra*, IV, A, 4.

39. Moors *v.* Wyman, 146 Mass. 60, 15 N. W. 104, selling goods.

40. Sheldon *v.* Raveret, 49 Barb. (N. Y.) 203.

41. Goodwin *v.* Massachusetts L. & T. Co., 152 Mass. 189, 25 N. E. 100.

42. Mansur-Tebbets Implement Co. *v.* Carey, 1 Indian Terr. 572, 45 S. W. 120; Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

Unless actually incurred, no allowance will be made. See cases cited *supra*, this note.

43. Iowa Nat. Bank *v.* Cooper, (Iowa 1904) 101 N. W. 459, holding a payment of an assessment of thirty dollars a share on stock worth only five dollars a share unreasonable.

44. Goodwin *v.* Massachusetts L. & T. Co., 152 Mass 189, 25 N. E. 100, holding that the pledgee is entitled to allowance for losses incurred in the sale and purchase with the consent of the pledgor of "futures" to "protect" cotton pledged to him, although it would be otherwise if such transactions had not been authorized by the pledgor.

45. Ruberg *v.* Brown, 71 S. C. 287, 51 S. E. 96.

46. *California.*— Ponce *v.* McElvy, 47 Cal. 154.

Illinois.— Post *v.* Union Nat. Bank, 159 Ill. 421, 42 N. E. 976.

Louisiana.— Ducasse *v.* Keyser, 28 La. Ann. 419.

Maine.— Fletcher *v.* Harmon, 78 Me. 465, 7 Atl. 271.

Massachusetts.— Stevens *v.* Bell, 6 Mass. 339.

Michigan.— Graydon *v.* Church, 7 Mich. 36.

New York.— Dalton *v.* Smith, 86 N. Y. 176 (holding that where a mortgage is pledged and the pledgee purchases the land at a foreclosure sale, the pledgor's equitable interest in the mortgage attaches to the land, and upon the sale of the land by the pledgee the pledgor is entitled to the surplus received above the amount of the debt); Earle *v.* New York L. Ins. Co., 7 Daly 303 [*affirmed* in 74 N. Y. 618].

Pennsylvania.— Foster *v.* Berg, 104 Pa. St. 324.

Wisconsin.— Plant's Mfg. Co. *v.* Falvey, 20 Wis. 200; Hilton *v.* Waring, 7 Wis. 492.

See 40 Cent. Dig. tit. "Pledges," § 137.

47. Knight *v.* Yarborough, 7 Sm. & M.

demand.[48] When, however, the pledgor is not the owner of the collateral but has pledged it for his own debt, with[49] or without[50] the consent of the owner, the surplus proceeds are held by the pledgee for the owner,[51] who is entitled to such surplus as against the pledgor,[52] his assignee for the benefit of creditors,[53] or other person claiming under the pledgor.[54]

e. Proceedings — (i) *By Pledgor or Owner.* The pledgor may recover the surplus proceeds of the collateral in an action in assumpsit,[55] but not in an action in trover;[56] and upon a sale of the pledge with his consent he may sue the purchaser or his assignee to recover the balance due.[57] The owner of property wrongfully pledged by one having it in possession, upon the assignment of such pledgor for the benefit of creditors, may elect to ratify the pledge and look only to the pledgor's estate for satisfaction,[58] or he may file a claim for damages for the wrongful conversion against the assignee of the pledgor and also sue the pledgee for any surplus realized from the collateral after the payment of the debt it was pledged to secure.[59]

(ii) *By Assignee of Pledgor or Owner.* The assignee of the pledgor's interest in the property acquires the right to recover the surplus proceeds from the pledgee freed from any set-off the pledgee may thereafter acquire against the original pledgor.[60] And the assignee of the executor of an insured person may sue an insurance company for the surplus due on a life insurance policy after the payment to the pledgee of the secured debt, and the company is not entitled to set

(Miss.) 179, holding that, where the collateral was paid in bank-notes then current at par and the pledgee failed to apply the surplus as directed by the pledgor, he was liable for any depreciation in the value of the notes in his hands.

48. See cases cited *supra*, note 46.

49. Gauntlett *v.* Patton, 96 N. Y. App. Div. 627, 89 N. Y. Suppl. 385 (holding that the evidence was insufficient to establish ownership in the claimant); *Ex p.* Fisher, 20 S. C. 179.

50. Hatch *v.* New York Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403 [*affirming* 82 Hun 515, 31 N. Y. Suppl. 530]; Farwell *v.* Importers, etc., Nat. Bank, 90 N. Y. 483, 16 N. Y. Wkly. Dig. 20 [*affirming* 47 N. Y. Super. Ct. 409]; Rhinelander *v.* National City Bank, 36 N. Y. App. Div. 11, 56 N. Y. Suppl. 229 (holding that where brokers wrongfully pledged to a bank stock of one customer left with them for safe-keeping and that of another held by them as collateral, neither of these customers was entitled to priority over the other as to the surplus after payment of the debt to the bank); Smith *v.* Savin, 9 N. Y. Suppl. 106 (holding that where a surplus is realized by the pledgee from the sale of collaterals, part of which belonged to the pledgor and part to a third person, the latter may claim the entire surplus and not merely the proportion realized from his property).

51. See cases cited *infra*, notes 52, 53.

52. Persch *v.* Consolidation Nat. Bank, 13 Phila. (Pa.) 157, holding that such wrongful pledgor cannot recover the surplus from the pledgee.

53. Matter of Bonner, 8 Daly (N. Y.) 75.

54. See cases cited *supra*, notes 52, 53.

55. Gould *v.* Farmers' L. & T. Co., 23 Hun (N. Y.) 322, holding that one who has pledged property held by him in pledge may, after having redeemed it, maintain an action for the surplus proceeds, since, while not the owner, he is in a position to redeliver on demand. See Powers *v.* Savin, 64 Hun (N. Y.) 560, 19 N. Y. Suppl. 340, 22 N. Y. Civ. Proc. 253, 28 Abb. N. Cas. 463 [*affirmed* in 139 N. Y. 652, 35 N. E. 207], holding that in an action against the pledgee by the owner to recover the surplus proceeds of collateral pledged by a firm for its own debt, the assignee of the firm as a party defendant was not entitled to recover the surplus proceeds of other collateral delivered by the firm to the same pledgee as security for a different debt, under Code Civ. Proc. § 1294, providing that judgment may be given against one or more defendants, that the "ultimate rights of the parties on the same side" may be determined, and that "a defendant" may be given "any affirmative relief to which he is entitled," since that section does not authorize a defendant to raise an issue solely between himself and a co-defendant, which is not raised by the complaint.

Pledgor's action for the surplus is not premature where the collateral is delivered as security for a contingent liability, and the pledgee has collected more than enough to satisfy all possible liability under the pledge, although such liability has not been terminated. Mercantile Nat. Bank *v.* Peabody, 18 Colo. App. 455, 72 Pac. 611.

56. Loomis *v.* Stave, 72 Ill. 623.

57. Kimball *v.* Jackman, 42 N. H. 242.

58. Le Marchant *v.* Moore, 150 N. Y. 209, 44 N. E. 770.

59. Rhinelander *v.* National City Bank, 36 N. Y. App. Div. 11, 55 N. Y. Suppl. 229.

60. Van Blarcom *v.* Broadway Bank, 37 N. Y. 540, 5 Transcr. App. 132 [*reversing* 9 Bosw. 532].

off expenses incurred by it in resisting unfounded claims of other persons to such surplus.[61]

4. Operation and Effect. Where a sale of the collateral is made by the pledgee in good faith, the pledgor is bound by the sale, although the property might have brought a higher price under other circumstances.[62] Upon the sale of a contract of indemnity held by the pledgee, the purchaser does not acquire an absolute title, but only the interest of the pledgee.[63] Where a lien is created on stock by its delivery as a pledge, and also by a contemporaneous deed of trust, the lien of the pledgee as such may be enforced even though the enforcement of the deed of trust is barred by the statute of limitations as to chattel mortgages.[64] If judgment for the amount of his debt is obtained by the pledgee on a bond and mortgage for a greater amount held by him as security, the bond and mortgage is not thereby extinguished as to the balance.[65] On the foreclosure by the pledgee of a mortgage delivered to him as collateral, and a purchase of the land by him, he will hold the land in trust for the pledgor upon the payment of the secured debt.[66]

B. Action on Debt or Liability Secured[67]**— 1. Enforcement or Surrender of Security as Condition Precedent.**[68] In the absence of a special agreement,[69] the pledgee is under no obligation to surrender [70] or enforce [71] collaterals held by him before suing on the principal obligation.

61. Earle *v.* New York L. Ins. Co., 7 Daly (N. Y.) 303 [*affirmed* in 74 N. Y. 618].

62. White *v.* Rahway Bd. of Assessors, 16 Fed. 833.

63. Jenckes *v.* Rice, 119 Iowa 451, 93 N. W. 384.

64. Richardson *v.* Longmont Supply Ditch Co., 19 Colo. App. 483, 76 Pac. 546.

65. Brumagim *v.* Chew, 19 N. J. Eq. 130 [*affirmed* in 21 N. J. Eq. 520].

66. Hoult *v.* Ramsbottom, 127 Cal. 171, 59 Pac. 587; Jennings *v.* Wyzanski, 188 Mass. 285, 74 N. E. 347.

But he will hold the title free from the pledgor's right to redeem, upon the latter's failure to pay the debt after reasonable notice. Blood *v.* Shepard, 69 Kan. 752, 77 Pac. 565.

67. Attachment for a debt which is secured by a pledge see Attachment, 4 Cyc. 453 note 88.

68. Failure to enforce or surrender as defense see *infra*, VII, B, 3, e.

69. Merger of original contract.— Where a creditor takes an absolute bond, with warrant of attorney to confess judgment thereon, as collateral security for advances made and liabilities incurred on behalf of the obligor, he cannot afterward, on discharging those liabilities, resort to a parol or implied promise of indemnity, but must rest upon the securities. Roosevelt *v.* Mark, 6 Johns. Ch. (N. Y.) 266.

70. *California.*— Sonoma Valley Bank *v.* Hill, 59 Cal. 107.

District of Columbia.— Ambler *v.* Ames, 1 App. Cas. 191.

Maryland.— Rich *v.* Boyce, 39 Md. 314.

Massachusetts.— Taylor *v.* Cheever, 6 Gray 146.

Pennsylvania.— Gerlach *v.* Cammerer, 2 Wkly. Notes Cas. 67.

Vermont.— Rutland Bank *v.* Woodruff, 34 Vt. 89; Chapman *v.* Clough, 6 Vt. 123.

See 40 Cent. Dig. tit. "Pledges," § 140.

71. *California.*— Commercial Sav. Bank *v.* Hornberger, 140 Cal. 16, 73 Pac. 625.

District of Columbia.— Ambler *v.* Ames, 1 App. Cas. 191.

Georgia.— Napier *v.* Central Georgia Bank, 68 Ga. 637; Colquitt *v.* Stultz, 65 Ga. 305.

Illinois.— Darst *v.* Bates, 95 Ill. 493; Wilhelm *v.* Schmidt, 84 Ill. 183; Archibald *v.* Argall, 53 Ill. 307.

Indiana.— Olvey *v.* Jackson, 106 Ind. 286, 4 N. E. 149.

Louisiana.—Germania Sav. Bank *v.* Peuser, 40 La. Ann. 796, 5 So. 75.

Maine.— Snow *v.* Thomaston Bank, 19 Me. 269; York Bank *v.* Appleton, 17 Me. 55.

Massachusetts.— Whitwell *v.* Brigham, 19 Pick. 117; Beckwith *v.* Sibley, 11 Pick. 482. See Cornwall *v.* Gould, 4 Pick. 444, holding that an action may be maintained on an implied contract for money paid out and expended to another's use without first resorting to collateral held as security for such liability.

Michigan.— Wallace *v.* Finnegan, 14 Mich. 170, 90 Am. Dec. 243.

Nebraska.— Grand Island Sav., etc., Assoc. *v.* Moore, 40 Nebr. 686, 59 N. W. 115.

New Jersey.— Freehold Nat. Banking Co. *v.* Brick, 37 N. J. L. 307.

New York.— De Cordova *v.* Barnum, 130 N. Y. 615, 29 N. E. 1099, 27 Am. St. Rep. 538 [*affirming* 9 N. Y. Suppl. 237] (holding that a broker need not sell stock held by him as collateral before suing on the principal debt); Pate *v.* Hoffman, 61 Hun 386, 16 N. Y. Suppl. 74; Lee Bank *v.* Kitching, 7 Bosw. 664, 11 Abb. Pr. 435; Queens County Bank *v.* Leavitt, 10 N. Y. Suppl. 194; Broadwell *v.* Holcombe, 4 N. Y. Civ. Proc. 159.

Pennsylvania.— Leas *v.* James, 10 Serg. & R. 307; McCausland *v.* Hickman, 3 Wkly. Notes Cas. 94.

Texas.— Stamper *v.* Johnson, 3 Tex. 1.

See 40 Cent. Dig. tit. "Pledges," § 140.

2. Necessity of Accounting For Pledge. While as a general rule the pledgee, in a suit on the principal obligation, is not bound to account for collateral pledged to him as security,[72] yet if it is alleged by defendant that he has realized on such collateral,[73] or has lost or misappropriated it,[74] the pledgee must account for the same, and a failure or refusal to do so will operate as a bar to the recovery of the debt itself.

3. Defenses — a. In General. The mere fact that the creditor has taken or holds collateral security is no defense to an action on the principal debt, without first realizing on the security,[75] in the absence of an express agreement to that effect, nor does the taking of security of a higher nature operate as a merger of the original debt so as to bar a suit on the latter;[76] but it is a good defense to such a suit that the creditor agreed to realize first on the collateral,[77] or that, aside from the collateral, the pledgor's personal estate is not sufficient to pay the debt, without resort to the realty.[78]

b. Set-Off of Value of Collaterals. As a general rule the pledgor is entitled to set off against the amount of the debt any profits or proceeds realized by the pledgee from the collateral,[79] and any loss resulting from the negligence,[80] wrongful sale of,[81]

Collaterals subject to prior claims.— Before suing the maker, an indorser of notes was not bound to apply collateral securities delivered to him subject to the claims of a creditor by the payee as security for the indorsement of notes including those sued on; a bill in equity having been filed against plaintiff by the creditor claiming the assets, and it appearing that no part of the money on hand could be applied to any particular note or claim until after the settlement of the litigation, and then only in the event of plaintiff's success. Hutchison *v.* Evans, (Cal. App. 1907) 92 Pac. 1135; Jones *v.* Evans, 6 Cal. App. 88, 91 Pac. 532.

A statute requiring an enforcement of collateral before suing on the principal debt is constitutional and valid. Swift *v.* Fletcher, 6 Minn. 550; Schalck *v.* Harmon, 6 Minn. 265.

But a statute requiring chattel mortgages to be enforced before resort to suit on the principal debt does not apply to pledges. Ehrlich *v.* Ewald, 66 Cal. 97, 4 Pac. 1062; Mauge *v.* Heringhi, 26 Cal. 577.

Before calling on surety proceeds of the pledge must be applied on debt. Goodwin *v.* Massachusetts L. & T. Co., 152 Mass. 189, 25 N. E. 100.

72. Ambler *v.* Ames, 1 App. Cas. (D. C.) 191; U. S. Bank *v.* Peabody, 20 Pa. St. 454; Marberry *v.* Farmers', etc., Nat. Bank, 6 Tex. Civ. App. 607, 26 S. W. 215.

73. Simes *v.* Zane, 1 Phila. (Pa.) 501.

74. Stuart *v.* Bigler, 98 Pa. St. 80 (holding that the pledgee cannot escape the duty of accounting for the collateral by showing that it has become worthless); Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28; Davis *v.* Smith, 1 Phila. (Pa.) 46; Marberry *v.* Farmers', etc., Nat. Bank, 6 Tex. Civ. App. 607, 26 S. W. 215.

75. *Indiana.*— Dugan *v.* Sprague, 2 Ind. 600.

Kentucky.— Willoughby *v.* Spear, 4 Bibb 397.

Louisiana.— Canonge *v.* Fuselier, 10 La. Ann. 697.

Massachusetts.— Whitwell *v.* Brigham, 19 Pick. 117.

New York.— Thompson *v.* Sullivan, 60 How. Pr. 71.

Virginia.— Raynolds *v.* Carter, 12 Leigh 166, 37 Am. Dec. 642.

See 40 Cent. Dig. tit. "Pledges," § 142.

76. Davis *v.* Anable, 2 Hill (N. Y.) 339; Stamper *v.* Johnson, 3 Tex. 1.

77. Mills *v.* Gould, 14 Ind. 278.

78. Alexander *v.* Alexander, 64 Ind. 541.

79. Ambler *v.* Ames, 1 App. Cas. (D. C.) 191; Early's Appeal, 89 Pa. St. 411.

80. Cutting *v.* Marlor, 78 N. Y. 454 [*affirming* 17 Hun 573 (*affirming* 6 Abb. N. Cas. 388, 57 How. Pr. 56)] (holding an action by a bank on a note subject to a set-off for the value of collateral which the directors of the bank negligently and carelessly allowed the president to convert to his own use); Lyon *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 61.

The loss of the property through the negligence of the pledgee does not operate *ipso facto* as a satisfaction of the debt to the extent of the loss, but may be pleaded by the pledgor as a set-off or counter-claim in a suit on the debt secured. Hook *v.* White, 36 Cal. 299; Cooper *v.* Simpson, 41 Minn. 46, 42 N. W. 601, 16 Am. St. Rep. 667, 4 L. R. A. 194; Taggard *v.* Curtenius, 15 Wend. (N. Y.) 155.

81. *Connecticut.*— Bulkeley *v.* Welch, 31 Conn. 339.

Georgia.— Waring *v.* Gaskill, 95 Ga. 731, 22 S. E. 659.

New York.— Weston *v.* Turver, 1 N. Y. Suppl. 807; Stearns *v.* Marsh, 4 Den. 227, 47 Am. Dec. 248, holding that there is no valid objection to such a set-off on the ground that the damages are unliquidated or uncertain.

Pennsylvania.— Sitgreaves *v.* Farmers', etc., Bank, 49 Pa. St. 359 (holding that in an action against an indorser he is entitled to a set-off for a wrongful sale which would be available to the principal debtor); McManus *v.* Sweatman, 42 Leg. Int. 387.

or other wrongful act [82] of the pledgee in regard to the collateral.[83] But in some jurisdictions the pledgor is not allowed to set off unliquidated damages;[84] and the giving of a new note by the pledgor without claiming credit for the conversion of collateral will constitute a waiver of such claim by him.[85]

c. Non-Performance of Condition Precedent.[86] Tender or payment of the amount due on the principal debt is not a condition precedent to the pledgor's right to set off the value of collateral converted by the pledgee.[87] But it has been held that in a suit on certain notes defendant cannot avail himself of the defense that a part of the notes sued on were delivered as security for the others without first paying the amount of his real indebtedness.[88]

4. Parties. In an action by the pledgee on the original obligation, it is not necessary to join parties interested in the collateral, and the maker of a note held as security,[89] or the assignor of a mortgage received as security from the assignee,[90] is not a proper party.

5. Pleading. Under a general plea of *non assumpsit*,[91] or of payment,[92] the pledgor will usually be allowed to prove a conversion of the collateral by the pledgee, or his negligence in realizing on it and applying the proceeds to the payment of the debt.

6. Evidence — a. Burden of Proof. Upon an issue raised by defendant as to the conversion of collaterals by the pledgee, the burden is on the pledgee to account for them ;[93] but having done so, the burden is on defendant to prove a conversion.[94]

b. Admissibility — (i) *In General.* Evidence of the willingness of the maker to secure a note pledged as collateral is not admissible in the absence of a showing of negligence or wrongful conduct on the part of the pledgee.[95] Any evidence of a settlement or other conduct of defendant inconsistent with his assertion of a set-off or counter-claim is admissible.[96]

(ii) *Parol Evidence.* On an issue of payment of the principal debt by the sale of collateral, parol evidence is admissible to show that the collateral was also held as security for another debt,[97] but parol evidence is not admissible as to debts due plaintiff for which the collateral was not held as security.[98]

Wisconsin.— Ainsworth *v.* Bowen, 9 Wis. 348.

See 40 Cent. Dig. tit. "Pledges," § 143.

82. *Connecticut.*— Bulkeley *v.* Welch, 31 Conn. 339.

Georgia.— Napier *v.* Central Georgia Bank, 68 Ga. 637.

Massachusetts.— Potter *v.* Tyler, 2 Metc. 58.

New Jersey.— Donnell *v.* Wyckoff, 49 N. J. L. 48, 7 Atl. 672.

Pennsylvania.— Dwight *v.* Singer, 27 Pa. Super. Ct. 119.

See 40 Cent. Dig. tit. "Pledges," § 143.

Compare Levy *v.* Loeb, 85 N. Y. 365 [*reversing* 47 N. Y. Super. Ct. 61], a wrongful brokerage transaction.

83. But depreciation in the value of collateral will not be allowed as a set-off unless accompanied by negligence or wrongful act of the pledgee. Colquitt *v.* Stultz, 65 Ga. 305; Granite Bank *v.* Richardson, 7 Metc. (Mass.) 407; Taggard *v.* Curtenius, 15 Wend. (N. Y.) 155. Nor is the pledgor entitled to credit for notes pledged unless he shows that the duty devolved on the pledgee of collecting and applying them before suing on the principal debt (Lormer *v.* Bain, 14 Nebr. 178, 15 N. W. 323), or that the notes have been or should have been collected (Dugan *v.* Sprague, 2 Ind. 600).

84. Barton *v.* Radclyffe, 149 Mass. 275, 21 N. E. 374; Longley *v.* Hall, 11 Pick (Mass.) 125.

85. Girard Bank *v.* Richards, 4 Phila. (Pa.) 250.

86. Enforcement or surrender of security as condition precedent to action by pledgee see *supra*, VII, B, 1.

87. Waring *v.* Gaskill, 95 Ga. 731, 22 S. E. 659; Rush *v.* Kansas City First Nat. Bank, 71 Fed. 102, 17 C. C. A. 627.

88. Liverpool Royal Bank *v.* Grand Junction R., etc., Co., 100 Mass. 444, 97 Am. Dec. 115.

89. Forstall *v.* Farmers' Union Commercial Assoc., 47 La. Ann. 105, 16 So. 651.

90. Styers *v.* Alspaugh, 118 N. C. 631, 24 S. E. 422.

91. Stearnes *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248.

92. Simes *v.* Zane, 1 Phila. (Pa.) 501; Montague *v.* Stelts, 37 S. C. 200, 15 S. E. 968, 34 Am. St. Rep. 736.

93. Upton *v.* Paxton, (Iowa 1886) 29 N. W. 809.

94. Norcross *v.* Pease, 5 Allen (Mass.) 331.

95. Silvey *v.* Axley, 118 N. C. 959, 23 S. E. 933.

96. Merriam *v.* Childs, 93 Mo. 131, 5 S. W. 615.

97. Globe Nat. Bank *v.* Ingalls, 126 Mass. 209.

98. Weston *v.* Turver, 1 N. Y. Suppl. 807.

7. Questions For Jury. Upon a conflict of evidence as to whether certain property is held by the pledgee as collateral security,[99] or as to whether the pledgee has committed a specific wrongful act in regard to the property,[1] the question is for the jury.

8. Amount For Which Pledgee Is Accountable. Where the pledgee, acting strictly within his rights under the pledge, realizes upon the collateral on default of the pledgor, he must account only for the amount actually received by him;[2] but where he is guilty of conversion of the pledge,[3] he must account not merely for the amount received for it, but for its full value.[4]

9. Equitable Relief Against Judgment. The pledgor, upon paying the amount of a judgment on the principal debt into court, will be entitled to an order that no execution issue until the return of the collateral;[5] but he will not be entitled to enjoin execution on the judgment upon the mere allegation of irregularities in the enforcement of the collateral,[6] he must then account for it before he will be entitled to judgment on the principal debt.[7]

C. Sale[8] — 1. Right to Sell — a. In General. Upon default by the pledgor in the performance of the principal obligations,[9] it becomes the right and the privilege of the pledgee to sell the pledged property[10] at public auction, without judicial

99. Staten Island Bank *v.* Silvie, 89 N. Y. App. Div. 465, 85 N. Y. Suppl. 760.

1. Cammann *v.* Huntington, 89 N. Y. App. Div. 99, 85 N. Y. Suppl. 434.

2. Faulkner *v.* Hill, 104 Mass. 188 (holding that upon a surrender to an assignee from the pledgor of a part of the collateral on receiving part payment on the debt, the pledgee need account for only the actual amount received); Berlin *v.* Eddy, 33 Mo. 426 (holding that upon a sale of stocks on default of the pledgor and after notice to him, the pledgee need account only for the amount received, even though the stocks pledged had been mingled with others and a sale was made from the mass); Youngs *v.* Stahelin, 34 N. Y. 258.

3. Fowle *v.* Ward, 113 Mass. 548, 18 Am. Rep. 534; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Simes *v.* Zane, 1 Phila. (Pa.) 501.

4. Fowle *v.* Ward, 113 Mass. 548, 18 Am. Rep. 534; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Simes *v.* Zane, 1 Phila. (Pa.) 501.

Measure of damages for conversion of pledge see *supra*, III, C, 3, a, (D).

5. Semple, etc., Mfg. Co. *v.* Detwiler, 30 Kan. 386, 2 Pac. 511.

6. Carpenter *v.* Sanborn, (Tex. Civ. App. 1894) 25 S. W. 36.

7. But the pledgee cannot be required to account for collateral that was never in his possession or under his control. U. S. Bank *v.* Peabody, 20 Pa. St. 454; Bray *v.* Morse, 41 Wis. 343.

8. Auction sale generally see Auctions and Auctioneers, 4 Cyc. 1037.

Judicial sale generally see Judicial Sales, 24 Cyc. 1.

Private sale generally see Sales.

9. What constitutes default see *supra*, VII, A, 2.

10. *California.*— Wilson *v.* Brannan, 27 Cal. 258.

Louisiana.— James *v.* Pike, 23 La. Ann. 277, upholding the pledgee's right to sell whether the property belongs to the debtor or to a third person who pledged it as security for the debtor.

Massachusetts.— Radigan *v.* Johnson, 174 Mass. 68, 54 N. E. 358 (holding that where property is delivered as security for a debt payable in instalments, with provision that on failure to pay any instalments as agreed, the whole debt shall become due, the pledgee, on default in the payment of an instalment, may sell the property for the entire debt); Guenzburg *v.* H. W. Downs Co., 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525; Merchants' Nat. Bank *v.* Thompson, 133 Mass. 482; Parker *v.* Brancker, 22 Pick. 40.

South Carolina.— Hand *v.* Savannah, etc., R. Co., 21 S. C. 162.

United States.— Guaranty Trust Co. *v.* Galveston City R. Co., 87 Fed. 813, 31 C. C. A. 235, holding that the pledgee's right to sell second mortgage bonds of a railroad company held as collateral is not affected by his having become the owner of the majority of the first mortgage bonds, and having begun a suit for the foreclosure of the first mortgage, in which a receiver had been appointed.

See 40 Cent. Dig. tit. "Pledges," § 152.

Pledgee's right to sell is not merged in a judgment obtained on the principal debt. Elbert *v.* Moffly, 2 Pa. Co. Ct. 71.

Pledgee's right to sell is not waived by his indulgence of the pledgor for an indefinite time after maturity of the debt. Louisville Banking Co. *v.* W. H. Thomas, etc., Co., 68 S. W. 2, 24 Ky. L. Rep. 115, 69 S. W. 1078, 24 Ky. L. Rep. 811; Williams *v.* U. S. Trust Co., 133 N. Y. 660, 31 N. E. 29 [*affirming* 14 N. Y. Suppl. 502]; Tucker *v.* Wilson, 1 P. Wms. 261, 24 Eng. Reprint 379.

Where other property is substituted for the original pledge, the right to sell is attached to the substituted property. Jeanes' Appeal, 116 Pa. St. 573, 11 Atl. 862, 2 Am. St. Rep. 624.

Cal. Code Civ. Proc. § 1524, giving the pledgor's personal representative the right to sell property pledged subject to the pledgee's lien, does not affect the pledgee's right to sell

process,[11] upon giving the pledgor reasonable notice of the time and place of sale.[12] This right of the pledgee to sell is not a peculiar trust reposed in the creditor, but exists as an incident to the contract of pledge and as a part of the security,[13] unless an express agreement to the contrary be affirmatively shown.[14] The right of the pledgee to sell may be exercised not only against the pledgor,[15] but also against the receiver,[16] or assignee of the pledgor for the benefit of creditors,[17] and all other persons claiming through the pledgor.[18] Nor can the pledgee be required to postpone the sale on the ground that it would result in a sacrifice,[19] the only remedy against a sale being to redeem the pledge.[20] Ordinarily the pledgee has no right to sell the property before the debt is due,[21] and if he is expressly given this power, his authority will be strictly construed.[22]

b. As Dependent on Nature of Pledge.[23] As an exception to the pledgee's right to sell for default, he cannot sell choses in action, such as notes, drafts, and other evidences of indebtedness,[24] unless expressly authorized to do so;[25] but must hold

on notice. Bell *v.* Mills, 123 Fed. 24, 59 C. C. A. 104.

11. Carr *v.* Louisiana Nat. Bank, 29 La. Ann. 258, holding that where a pledge was made prior to the amendment of Civ. Code, art. 3165, authorizing the sale or disposition of the property pledged in the manner agreed on by the parties, without the intervention of the courts, a renewal of the pledge subsequent to such amendment validated an agreement permitting sale, although it may have been invalid in the original agreement.

12. See *infra*, VII, C, 4.

13. Alexandria, etc., R. Co. *v.* Burke, 22 Gratt. (Va.) 254.

For what debt sold.— Pledged property cannot be sold, save in satisfaction of a debt which it is intended to secure. Smith *v.* Shippers' Oil Co., 120 La. 640, 45 So. 533.

14. King *v.* Texas Banking, etc., Co., 58 Tex. 669.

An express contract defining the rights of the parties as to the conditions upon which sale may be made will be strictly enforced (Bourn *v.* Dowdell, (Cal. 1897) 50 Pac. 695); and even an agreement by which the pledgee binds himself not to dispose of the collateral will usually be construed so as not to deprive him of the right to sell after default (Kelley *v.* Root, 74 N. Y. App. Div. 499, 77 N. Y. Suppl. 431 [*affirming* 37 Misc. 207, 75 N. Y. Suppl. 163].

15. Union Cattle Co. *v.* International Trust Co., 149 Mass. 492, 21 N. E. 962.

16. Harrison *v.* Friend, 1 Ohio S. & C. Pl. Dec. 258, 1 Ohio N. P. 39, holding that the pledgee can sell even though the amount due him is in dispute.

17. Rasch *v.* His Creditors, 1 La. Ann. 31; Chapman *v.* Gale, 32 N. H. 141.

18. See cases cited *supra*, notes 16, 17.

19. Union Nat. Bank *v.* Forsyth, 50 La. Ann. 770, 23 So. 917; Rasch *v.* His Creditors, 1 La. Ann. 31; King *v.* Texas Banking, etc., Co., 58 Tex. 669.

20. See cases cited *supra*, note 19.

21. See *supra*, IV, C, 1, a, (I); and *infra*, text and note 22.

22. Illinois Nat. Bank *v.* Baker, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586, holding that where the pledgee is given the power to sell stock upon its depreciating in value, he does not acquire the power to sell upon discovering that part of the stock is worthless, because not genuine.

23. **Duty of pledgee to enforce chose in action** pledged see *supra*, III, B, 2.

24. *Illinois.*— Joliet Iron, etc., Co. *v.* Scioto Fire Brick Co., 82 Ill. 548, 25 Am. Rep. 341

Kentucky.— Shindler *v.* Hayden, 8 Ky. L. Rep. 859.

Minnesota.— White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

New York.— Wheeler *v.* Newbould, 16 N. Y. 392 [*affirming* 5 Duer 29]; Nelson *v.* Wellington, 5 Bosw. 178; Brown *v.* Ward, 3 Duer 660.

Tennessee.— Moses *v.* Grainger, 106 Tenn. 7, 58 S. W. 1067, 53 L. R. A. 857.

See 40 Cent. Dig. tit. "Pledges," § 153.

But see Richards *v.* Davis, 5 Pa. L. J. Rep. 471; Potter *v.* Thompson, 10 R. I. 1 (holding that such commercial paper, if not paid at maturity, may be sold by the pledgee); Brightman *v.* Reeves, 21 Tex. 70 (holding that the pledgee has the right to sell commercial paper held as security even before its maturity).

Municipal warrants or orders must be collected and not sold. Whiteker *v.* Charleston Gas Co., 16 W. Va. 717.

Insurance policies may not be sold, but must be collected when due (Miller *v.* Magee, 2 N. Y. Suppl. 156), unless there is an express agreement to the contrary (Palmer *v.* Mutual L. Ins. Co., 38 Misc. (N. Y.) 318, 77 N. Y. Suppl. 869.

Nor may contracts be sold.— Moffat *v.* Williams, 5 Colo. App. 184, 36 Pac. 914, holding that where a construction contract is pledged for advances and the property is afterward sold under a mechanic's lien at the instance of both pledgor and pledgee and is purchased jointly by them, the pledgee cannot sell the certificate of purchase, as it represents the original pledge which he was not entitled to enforce by sale.

25. Cole *v.* Dalziel, 13 Ill. App. 23; Watson *v.* Smith, 60 Minn. 296, 62 N. W. 265 (holding that where a note and mortgage were pledged as security, with power in case of default to sell "the mortgage," the sale of both note and mortgage was proper); Moses *v.* Grainger, 106 Tenn. 7, 58 S. W. 1067, 53 L. R. A. 857.

and collect them as they become due.[26] Where, however, bonds having a long time to run are pledged as security for a short-time loan, it would be unreasonable to require the pledgee to wait until their maturity to realize on his security, and he may accordingly sell them at public auction upon default and notice.[27]

c. Revocation of Power of Sale. The right of the pledgee to sell is not a mere naked power,[28] but is a power coupled with an interest,[29] and as such is not revocable at the will of the pledgor,[30] nor is it revoked by the pledgor's bankruptcy,[31] or death;[32] and upon the death of the pledgee it survives to his representatives.[33]

2. Duty to Sell.[34] Although the pledgee, for the pledgor's default, is entitled to sell the collateral, he is not obliged to do so,[35] and is not liable for a depreciation in value of the property after the failure to sell.[36] By special agreement it may be made the duty of the pledgee to sell within a specified time after default,[37] but this duty is not devolved upon him by the mere direction or request of the pledgor to sell.[38] The pledgee may exercise his own judgment,[39] and is liable only for damages resulting from bad faith[40] or negligence.[41]

3. Demand of Payment[42]**— a. In General.** The pledgee is not entitled to sell the collateral upon default in the payment of the principal debt by the pledgor until he has demanded payment,[43] and given the pledgor a reasonable time in which to

26. Springer *v.* Purcell, 5 Ohio Dec. (Reprint) 139, 5 Cinc. L. Bul. 889; Boake *v.* Bonte, 5 Cinc. L. Bul. 934, 6 Ohio Dec. (Reprint) 1013, 9 Am. L. Rec. 487.

27. *Iowa.*— Old Dominion Bank *v.* Dubuque, etc., R. Co., 8 Iowa 277, 74 Am. Dec. 302.

Kansas.— Water Power Co. *v.* Brown, 23 Kan. 676.

Massachusetts.— Union Cattle Co. *v.* International Trust Co., 149 Mass. 492, 21 N. E. 962.

New Jersey.— Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

South Carolina.— Hand *v.* Savannah, etc., R. Co., 21 S. C. 162.

See 40 Cent. Dig. tit. "Pledges," § 153.

28. De Wolf *v.* Pratt, 42 Ill. 198.

29. De Wolf *v.* Pratt, 42 Ill. 198.

30. De Wolf *v.* Pratt, 42 Ill. 198.

31. Renshaw *v.* Creditors, 40 La. Ann. 37, 3 So. 403; Jacquet *v.* His Creditors, 38 La. Ann. 863.

32. Droste's Estate, 9 Wkly. Notes Cas. (Pa.) 224; Bell *v.* Mills, 123 Fed. 24, 59 C. C. A. 104, construing Cal. Code Civ. Proc. § 2888.

33. Chapman *v.* Gale, 32 N. H. 141.

34. Sale prior to default see *supra*, IV, A, 7; IV, C, 1 a, (I); VII, C, 1, a; and *supra*, text and note 22.

35. Colquitt *v.* Stultz, 65 Ga. 305; Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497; Newsome *v.* Davis, 133 Mass. 343.

36. Colquitt *v.* Stultz, 65 Ga. 305; Rozet *v.* McClellan, 48 Ill. 345, 95 Am. Dec. 551; O'Neill *v.* Whigham, 87 Pa. St. 394.

37. Cooper *v.* Simpson, 41 Minn. 46, 42 N. W. 601, 16 Am. St. Rep. 667, 4 L. R. A. 194.

38. Minneapolis, etc., Elevator Co. *v.* Betcher, 42 Minn. 210, 44 N. W. 5; Franklin Sav. Inst. *v.* Preetorius, 6 Mo. App. 470; Field *v.* Leavitt, 37 N. Y. Super. Ct. 215. But see Moore *v.* Brooks, 2 Pa. Co. Ct. 619, holding that it is the pledgee's duty to sell pledged stock upon request of the pledgor, where the stock has been transferred to the name of the pledgee.

39. Franklin Sav. Ins. *v.* Preetorius, 6 Mo. App. 470; Field *v.* Leavitt, 37 N. Y. Super. Ct. 215.

40. Field *v.* Leavitt, 37 N. Y. Super. Ct. 215.

41. Franklin Sav. Inst. *v.* Preetorius, 6 Mo. App. 470.

42. **Necessity of demand for further margin** as condition precedent to right to sell see Factors and Brokers, 19 Cyc. 211.

43. *Alabama.*— Nabring *v.* Mobile Bank, 58 Ala. 204, holding the pledgor of stock entitled to such demand, although he has caused the stock to be transferred to the pledgee on the books of the corporation.

California.—Dewey *v.* Bowman, 8 Cal. 145; Hyatt *v.* Argenti, 3 Cal. 151.

Colorado.— Moffat *v.* Williams, 5 Colo. App. 184, 36 Pac. 914.

Illinois.— Wing *v.* Beach, 31 Ill. App. 78, holding that a demand for a debt was not insufficient because the collaterals deposited as security therefor were not then produced or shown to be in possession of the bank holding the debt, the note being payable at such bank.

Louisiana.—Smith *v.* Shippers' Oil Co., 120 La. 640, 45 So. 533.

New York.— Bryan *v.* Baldwin, 52 N. Y. 232; Markham *v.* Jaudon, 41 N. Y. 235 [*reversing* 49 Barb. 462, 3 Abb. Pr. N. S. 286]; Milliken *v.* Dehon, 27 N. Y. 364 (holding a demand made of the pledgor's clerk, who had acted for the pledgor all through the transaction, sufficient); Toplitz *v.* Bauer, 34 N. Y. App. Div. 526, 55 N. Y. Suppl. 29 [*affirmed* in 161 N. Y. 325, 55 N. E. 1059]; Genet *v.* Howland, 45 Barb. 560, 30 How. Pr. 360 (holding that an unsigned notice left at the pledgor's office stating that if a certain part of the loan was not paid the pledge would not be "used" did not constitute a sufficient demand of payment); Campbell *v.* Parker,

redeem,[44] unless the pledgor has expressly agreed that the pledgee may sell without demand,[45] or has waived demand;[46] and an agreement that the pledgee may sell at public or private sale without notice to the pledgor does not dispense with the necessity of a demand of payment.[47]

b. Maturity of Debt at Fixed Date. Where the debt is payable at a fixed date, it has been held that demand of payment before sale is not necessary,[48] although in other cases it has been held necessary.[49]

4. Notice of Sale[50] **— a. Necessity.** The pledgee cannot make a valid sale of the collateral without first giving to the pledgor reasonable notice of the time and place of sale,[51] unless it has been expressly agreed between the parties that a sale

9 Bosw. 322; Wheeler *v.* Newbould, 5 Duer 29 [*affirmed* in 16 N. Y. 392]; Jaroslauski *v.* Saunderson, 1 Daly 232.

Ohio.— Bates *v.* Wiles, 1 Handy 532, 12 Ohio Dec. (Reprint) 274.

Pennsylvania.— Davis *v.* Funk, 39 Pa. St. 243, 80 Am. Dec. 519.

Rhode Island.— Earle *v.* Grant, 14 R. I. 228.

See 40 Cent. Dig. tit. "Pledges," § 155.

Use of the word "demand" was not necessary when it appeared the pledgee had been in correspondence with the pledgor urging payment of the debt (Carson *v.* Iowa City Gas Light Co., 80 Iowa 638, 45 N. W. 1068); or where the pledgee signified to the pledgor his desire for payment in such manner as to be equivalent to a request (McDougall *v.* Hazelton Tripod-Boiler Co., 88 Fed. 217, 31 C. C. A. 487).

Demand of additional margins is necessary before a valid sale can be made of property pledged under an agreement to maintain a certain margin, and giving the pledgee power to sell on default. Milliken *v.* Dehon, 27 N. Y. 364.

In case of the pledgor's death, demand should be made upon his personal representative. Bell *v.* Mills, 123 Fed. 24, 59 C. C. A. 104.

44. *California.*— Gay *v.* Moss, 34 Cal. 125.

Connecticut.— Stevens *v.* Hurlbut Bank, 31 Conn. 146.

Illinois.— State Nat. Bank *v.* Baker, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586.

Indiana.— Evans *v.* Darlington, 5 Blackf. 320.

Maryland.— Dungan *v.* Newark Mut. Ben. L. Ins. Co., 46 Md. 469.

Minnesota.— Goldsmidt *v.* Worthington First M. E. Church, 25 Minn. 202.

New York.— Genet *v.* Howland, 45 Barb. 560. 30 How. Pr. 360; Haskins *v.* Patterson, 1 Edm. Sel. Cas. 120; Stearns *v.* Marsh, 4 Den. 227, 47 Am. Dec. 248; Garlick *v.* James, 12 Johns. 146, 7 Am. Dec. 294; Cortelyou *v.* Lansing, 2 Cai. Cas. 200; Hart *v.* Ten Eyck, 2 Johns. Ch. 62 [*reversed* on other grounds in 1 Cow. 744 note]. But see Atlantic Nat. Bank *v.* Franklin, 64 Barb. 449 [*reversed* on other grounds in 55 N. Y. 235], holding that a call loan is payable immediately on demand, and that the pledgee of collateral for such a loan may sell at once upon demand and failure to pay.

Pennsylvania.— Conyngham's Appeal, 57 Pa. St. 474; Diller *v.* Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; De Lisle *v.* Priestman, 1 Browne 176; Robertson *v.* Lippincott, 1 Phila. 308.

See 40 Cent. Dig. tit. "Pledges," § 155.

45. Harris *v.* Thomas, 37 Ill. App. 517; Union Nat. Bank *v.* Forsyth, 50 La. Ann. 770, 23 So. 917; Chouteau *v.* Allen, 70 Mo. 290; Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307 [*affirming* 1 Sandf. 351].

46. Toplitz *v.* Bauer, 34 N. Y. App. Div. 526, 55 N. Y. Suppl. 29 [*affirmed* in 161 N. Y. 325, 55 N. E. 1059].

Pledgee's right to sell without demand is waived where he induces the pledgor not to dispose of other property to pay the debt by a promise not to sell or surrender the collateral. Toplitz *v.* Bauer, 34 N. Y. App. Div. 526, 55 N. Y. Suppl. 29 [*affirmed* in 161 N. Y. 325, 55 N. E. 1059].

"Without further notice."— Under a note payable at the bank of payee, providing that it is secured by pledge of the securities mentioned on the reverse thereof, with the right to call for additional security, should the same decline, and, on failure to respond, the note to become due and payable on demand, with full power and authority to sell the pledged securities at the option of the bank, without further notice, pledgor does not waive his right to actual notice by demand for payment or otherwise of the intention of the pledgee to sell; the words "further notice" implying actual previous notice of demand for payment. Smith *v.* Shippers' Oil Co., 120 La. 640, 45 So. 533.

47. Mowry *v.* Wood, 12 Wis. 413.

Demand of payment and notice of sale are distinct.— Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307 [*affirming* 1 Sandf. 351]; Genet *v.* Howland, 45 Barb. (N. Y.) 560, 30 How. Pr. 360.

48. Chouteau *v.* Allen, 70 Mo. 290; Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294, 37 N. Y. Suppl. 271 [*affirmed* in 157 N. Y. 699, 51 N. E. 1090]; Charrier *v.* Boutin, 13 Quebec Super. Ct. 384.

49. Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Bates *v.* Wiles, 1 Handy (Ohio) 532, 12 Ohio Dec. (Reprint) 274.

50. **Judicial foreclosure** where notice to debtor cannot be given see *infra*, VII, D.

51. *California.*— Colton *v.* Oakland Sav. Bank, 137 Cal. 376, 70 Pac. 225; Gay *v.* Moss, 34 Cal. 125; Hyatt *v.* Argenti, 3 Cal. 151.

Colorado.— Morgan *v.* Dod, 3 Colo. 551.

may be made without such notice,[52] or unless the pledgor has waived his right to

Connecticut.— Stevens *v.* Hurlbut Bank, 31 Conn. 146.

Illinois.— State Nat. Bank *v.* Baker, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586; Sell *v.* Ward, 81 Ill. App. 675. But see McDowell *v.* Chicago Steel Works, 124 Ill. 491, 16 N. E. 854, 7 Am. St. Rep. 381, holding that under a contract giving the pledgee the right to sell at public or private sale at his discretion thirty days after default in making payment on demand, demand of payment is sufficient, and notice of sale is not required.

Indiana.— Evans *v.* Darlington, 5 Blackf. 320.

Louisiana.—Smith *v.* Shippers' Oil Co., 120 La. 640, 45 So. 533.

Massachusetts.— Guinzburg *v.* H. W. Downs Co., 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525; Washburn *v.* Pond, 2 Allen 474; Parker *v.* Brancker, 22 Pick. 40.

Minnesota.— Goldsmidt *v.* Worthington First M. E. Church, 25 Minn. 202.

Missouri.— Greer *v.* Lafayette County Bank, 128 Mo. 559, 30 S. W. 319.

New York.—Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338; Stenton *v.* Jerome, 54 N. Y. 480 (holding that where a stock-broker purchased stock for plaintiff under an agreement by which plaintiff was to furnish a specified margin of security, and keep the same good when called on, and in the event of non-compliance the brokers were authorized to close the account by public or private sale, a sale without notice was invalid); Bryan *v.* Baldwin, 52 N. Y. 232; Markham *v.* Jaudon, 41 N. Y. 235 (holding that evidence of a custom that under certain circumstances the pledged property might be sold without notice is inadmissible as in direct variance with a settled rule of law); Wheeler *v.* Newbould, 16 N. Y. 392 [*affirming* 5 Duer 29]; Atlantic Nat. Bank *v.* Franklin, 64 Barb. 449 [*reversed* on other grounds in 55 N. Y. 235]; McNeil *v.* New York Tenth Nat. Bank, 55 Barb. 59 (stock pledged as "margin"); Genet *v.* Howland, 45 Barb. 560, 30 How. Pr. 360; Gruman *v.* Smith, 44 N. Y. Super. Ct. 389 [*reversed* on other grounds in 81 N. Y. 25] (holding that a demand by a broker to whom stock is pledged for more "margin" is not equivalent to notice of sale, and a sale three days later without further notice is wrongful); Jaroslauski *v.* Saunderson, 1 Daly 232; Lewis *v.* Graham, 4 Abb. Pr. 106; Castello *v.* Albany City Bank, 1 N. Y. Leg. Obs. 25; Stearns *v.* Marsh. 4 Den. 227, 47 Am. Dec. 248 (holding the pledgor entitled to notice whether the debt is payable on demand or at a fixed date); Patchin *v.* Pierce, 12 Wend. 61; Garlick *v.* James, 12 Johns. 146, 7 Am. Dec. 294; McLean *v.* Walker, 10 Johns. 471; Cortelyou *v.* Lansing, 2 Cai. Cas. 200; Hart *v.* Ten Eyck, 2 Johns. Ch. 100. But see Haskins *v.* Patterson, 1 Edm. Sel. Cas. 120, holding that where the pledgee was authorized to sell at public or private sale, and the pledgee upon default gave notice that unless the debt was paid he would sell the property, notice of the time and place of sale was not necessary.

Pennsylvania.— Robertson *v.* Lippincott, 1 Phila. 308.

See 40 Cent. Dig. tit. "Pledges," § 157.

Illustration.— Where, by a course of dealing, followed by a specific assurance to that effect, the maker of a demand note, payable at the payee bank, and for the payment of which securities are pledged, is led to believe that the securities will not be sold without actual notice to him, a sale, without such notice, will not be sustained, either as to the pledgee or as to the buyer, when it appears that the latter was fully informed of the situation. Smith *v.* Shippers' Oil Co., 120 La. 640, 45 So. 533.

52. *Arkansas.*— Fitzgerald *v.* Blocher, 32 Ark. 742, 29 Am. Rep. 3.

California.— Hyatt *v.* Argenti, 3 Cal. 151, holding that where plaintiff had placed certain securities, accompanied by an absolute assignment in writing, in the hands of defendant in return for money advanced, and was in the habit of directing defendant to pay his drafts "when in funds, from the proceeds of the securities placed in your hands," defendant had full authority to sell such securities without demand or notice.

Illinois.— Loomis *v.* Stave, 72 Ill. 623; Harris *v.* Thomas, 37 Ill. App. 517.

Iowa.— Carson *v.* Iowa City Gas-Light Co., 80 Iowa 638, 45 N. W. 1068.

Maryland.—Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269; Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779.

New York.— Williams *v.* U. S. Trust Co., 133 N. Y. 660, 31 N. E. 29 [*affirming* 14 N. Y. Suppl. 502]; Wicks *v.* Hatch, 62 N. Y. 535 [*affirming* 38 N. Y. Super. Ct. 95] (holding that where one issued a power of attorney to another, authorizing him to "buy, sell, assign and transfer, in his discretion, gold, stocks and bonds, and to draw, execute, sign and deliver, for me and in my name, all orders, checks, or other instruments in writing, whatsoever, which shall or may, in his discretion, be necessary in the conducting, carrying on and transacting the business of buying and selling gold, stocks," and the attorney purchased on his own credit for the account of plaintiff, stocks on a margin which he held as pledgee, the instrument operated as a waiver by the pledgor of the right of notice of sale); Milliken *v.* Dehon, 27 N. Y. 364; Genet *v.* Howland, 45 Barb. 560, 30 How. Pr. 360.

Pennsylvania.— Jeanes' Appeal, 116 Pa. St. 573, 11 Atl. 862, 2 Am. St. Rep. 624; Conyngham's Appeal, 57 Pa. St. 474 (holding that where the president of a bank becomes a borrower from the bank, and pledges collateral security, it cannot be inferred, merely from that relationship, that he gave the bank power to sell the pledge without notice); Elbert *v.* Patten, 2 Pa. Co. Ct. 70 (holding that where a pledgee of stock, who

notice.[53] But a pledgee holding under such an agreement may waive his right to sell without notice, either expressly,[54] or by granting indefinite indulgence to the pledgor.[55]

b. Requisites and Sufficiency. The notice must inform the pledgor [56] that a sale is to be made of the pledged property [57] and of the time and place of sale,[58] and must be given a reasonable time before sale so that the pledgor may have an opportunity to protect his interests.[59] In the absence of some statutory provision

had authority to sell without notice to the pledgor, bought in the stock at his own sale, a subsequent sale by him without notice to the pledgor was a good exercise of the power).

United States.—Huiskamp *v.* West, 47 Fed. 236.

See 40 Cent. Dig. tit. "Pledges," § 157.

An agreement that the pledgee may sell at public or private sale does not authorize a sale without notice. Bates *v.* Wiles, 1 Handy (Ohio) 532, 12 Ohio Dec. (Reprint) 274; Lester *v.* Hieman, 4 Ohio Dec. (Reprint) 132, 1 Clev. L. Rep. 52.

An agreement that a sale may be made on a certain contingency without notice does not authorize a sale on a different ground without notice. Huiskamp *v.* West, 47 Fed. 236.

Subsequent sale.— In Elbert *v.* Patten, 2 Pa. Co. Ct. 70, where a pledgee of stock, who had authority to sell without notice to the pledgor, bought in the stock at his own sale, a subsequent sale by him without notice to the pledgor was a good exercise of the power.

53. Mowry *v.* Wood, 12 Wis. 413 (holding that where the waiver of notice is in writing, its sufficiency is for the court, not for the jury); Tucker *v.* Wilson, 1 P. Wms. 261, 24 Eng. Reprint 379.

54. See cases cited *infra*, note 55.

55. Bailey *v.* American Deposit, etc., Co., 165 N. Y. 672, 59 N. E. 1118 [*affirming* 52 N. Y. App. Div. 402, 65 N. Y. Suppl. 330]; Moses *v.* Grainger, 106 Tenn. 7, 58 S. W. 1067, 53 L. R. A. 857, acceptance of partial payments and indulgence for four years. But see Thornton *v.* Martin, 116 Ga. 115, 42 S. E. 348, holding that evidence that two or three days before the sale of corporation stock pledged as security for a note, the pledgee notified the maker that he wanted to collect the note within a short time, and the maker replied that he was ready to pay whenever the pledgee wished, is insufficient to show an agreement to postpone the sale until further notice, and is irrelevant.

56. Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338 [*affirming* 69 Hun 311, 23 N. Y. Suppl. 568] (holding, however, that where property is pledged by one not the owner to a *bona fide* pledgee, only the pledgor and not the owner is entitled to notice of sale); Jenkins *v.* Smith, 21 Misc. (N. Y.) 750, 48 N. Y. Suppl. 126 (holding that where a note is secured both by a mortgage and a pledge, the holder of a mechanic's lien on the mortgaged property, which is junior to the mortgage lien, is not entitled to notice of sale of the pledge by the mortgagee).

Notice to agent of the pledgor is sufficient. Washburn *v.* Pond, 2 Allen (Mass.) 474; Potter *v.* Thompson, 10 R. I. 1.

Notice to the executor of the pledgor is sufficient. Buffalo German Ins. Co. *v.* Buffalo Third Nat. Bank, 19 Misc. (N. Y.) 564, 43 N. Y. Suppl. 550 [*affirmed* in 29 N. Y. App. Div. 137, 51 N. Y. Suppl. 667 (*reversed* on other grounds in 162 N. Y. 163, 56 N. E. 521, 48 L. R. A. 107)]; Bell *v.* Mills, 123 Fed. 24, 59 C. C. A. 104.

57. McCuteheon *v.* Dittman, 23 N. Y. App. Div. 285, 48 N. Y. Suppl. 360.

Names of the pledgor and pledgee may be omitted if the pledgor understands that the property to be sold is his. Earle *v.* Grant, 14 R. I. 228. But sending the pledgor a newspaper containing a marked advertisement of a list of shares and bonds to be sold, without showing that any of them are the pledgor's, is not sufficient notice.

Notice need not state grounds on which power of sale is exercised.— McDougall *v.* Hazelton Tripod-Boiler Co., 88 Fed. 217, 31 C. C. A. 487.

A mere call for more margins does not constitute notice of sale. Gruman *v.* Smith, 44 N. Y. Super. Ct. 389 [*reversed* on other grounds in 81 N. Y. 25].

58. Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 243, 89 Am. Dec. 779 (holding that where, to secure a loan payable on one day's notice, stock was pledged on the agreement that it might be sold without further notice on failure to pay the loan. A notice to pay the loan given on the thirteenth of a certain month authorized a sale of the stock on the twentieth); Washburn *v.* Pond, 2 Allen (Mass.) 474; Markham *v.* Jaudon, 41 N. Y. 235 [*reversing* 49 Barb. 462, 3 Abb. Pr. N. S. 286]; Wheeler *v.* Newbould, 16 N. Y. 392; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Conyngham's Appeal, 57 Pa. St. 474. But see Worthington *v.* Tormey, 34 Md. 182 (holding that notice of the place of sale of stock is not necessary); Milliken *v.* Dehon, 27 N. Y. 364 [*reversing* 10 Bosw. 325] (holding that where a private sale is authorized by the terms of the contract, the time and place of sale need not be stated in the notice to pledgor of the pledgee's intention to sell). For additional cases see *supra*, note 57.

59. Jacoby *v.* Jacoby, 103 Fed. 473, holding a notice posted by the pledgee about the close of business hours the day before the sale and received two hours before the sale was insufficient.

Two days have been held sufficient under certain circumstances. Stewart *v.* Drake, 46 N. Y. 449; Willoughby *v.* Comstock, 3 Hill (N. Y.) 389.

requiring it,[60] no formal notice is required;[61] but it is sufficient that notice is sent by mail to the pledgor's post-office,[62] or that knowledge that the sale is to be made is brought home to the pledgor.[63]

c. Excuse For Failure to Give Notice. Notice is excused where the contract of pledge provides that sale may be made without notice,[64] or where the giving of notice has been rendered impossible by act of the pledgor.[65]

5. Time and Place of Sale. The sale of the pledged property need not be made promptly upon the pledgor's default,[66] and waiver by the pledgor of notice of the sale is not affected by the pledgee's delay in exercising the power of sale.[67] The sale must be at a reasonable time and place;[68] where, however, the pledgor, upon receiving due notice, makes no objection to the time or place of sale, he cannot claim after the sale that the time or place was improper.[69]

6. Manner and Conduct of Sale[70] — a. Good Faith and Diligence. The pledgee,[71] in making sale of the property pledged to him as collateral security, must act in good faith,[72] and with a reasonable degree of skill and diligence[73] in securing a fair

By Cal. Civ. Code, § 3002, notice is required "at such a reasonable time before the sale as will enable the pledgor to attend."

By Ga. Civ. Code, § 2958, thirty days' notice is required. Halliday *v.* Stewart County Bank, 112 Ga. 461, 37 S. E. 721.

60. Where notice is required by statute, it must be served in the name prescribed to be sufficient. Andrews *v.* New Orleans City Bank, 5 La. Ann. 737.

61. Alexandria, etc., R. Co. *v.* Burke, 22 Gratt. (Va.) 254; Earle *v.* Grant, 14 R. I. 228.

62. Worthington *v.* Tormey, 34 Md. 182, holding such notice sufficient even though it did not reach the pledgor.

63. Formal notice of the time and place of sale is not necessary, if the pledgor has actual knowledge. Earle *v.* Grant, 14 R. I. 228; Alexandria, etc., R. Co. *v.* Burke, 22 Gratt. (Va.) 254.

64. Dullnig *v.* Weekes, 16 Tex. Civ. App. 1, 40 S. W. 178.

65. Potter *v.* Thompson, 10 R. I. 1 (by pledgor's absence in Europe); Racine City Bank *v.* Babcock, 5 Fed. Cas. No. 2,741, Holmes 180 (by failure of pledgor bank and winding up of business).

But the pledgor's failure to put up further margins, after notice to do so, does not excuse notice of time and place of sale. Rothschild *v.* Allen, 90 N. Y. App. Div. 233, 86 N. Y. Suppl. 42 [*affirmed* in 180 N. Y. 561, 73 N. E. 1132].

66. Thornton *v.* Martin, 116 Ga. 115, 42 S. E. 348; Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497.

67. Thornton *v.* Martin, 116 Ga. 115, 42 S. E. 348; Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497.

68. Thornton *v.* Martin, 116 Ga. 115, 42 S. E. 348 (holding that where, as collateral security for a note, the maker pledges railroad stock, and gives the pledgee full powers of sale, the sale need not be made in the county in which the railroad is situated, especially where the note is dated and made payable in another county, in which also the maker resides); Guinzburg *v.* H. W. Downs Co., 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525 (holding that a sale of stock in a small Massachusetts corporation pledged in Massachusetts to a New York corporation, where such stock was not listed in New York and had never been sold there, should be in Massachusetts); Laclede Nat. Bank *v.* Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528 (holding that, where the weather was inclement, the bidders few, and the bids very low, it was the duty of the pledgee to postpone the sale); Chouteau *v.* Allen, 70 Mo. 290 (holding that where bonds were pledged as security for the payment of a note which was in turn pledged as security to pay certain acceptances, the time when the pledgee might sell the bonds was determined by the maturity of the note, and not of the acceptances); Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294, 37 N. Y. Suppl. 271 [*affirmed* in 157 N. Y. 699, 51 N. E. 1090] (holding that where the time and place of sale is reasonable, the pledgee is not liable because the market was in poor condition).

69. Guinzburg *v.* H. W. Downs Co., 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525, where notice was received four days before sale.

70. Manner and conduct of judicial sale see *infra*, VII, D.

71. Sale by agent.— The pledgor cannot object that a sale of the pledge by an agent of the pledgee was without authority from the pledgee, where the agent assumed to have authority and the pledgee made no objection to the sale. McDougall *v.* Hazleton Tripod-Boiler Co., 88 Fed. 217, 31 C. C. A. 487.

72. Perkins *v.* Applegate, 85 S. W. 723, 27 Ky. L. Rep. 522; Schaaf *v.* Fries, 77 Mo. App. 346; Foote *v.* Utah Commercial, etc., Bank, 17 Utah 283, 54 Pac. 104.

Where the pledgee desisted from bidding at the request of an intending purchaser, but the sale was public and in the presence of parties interested, it was not invalid. Corning *v.* Pond, 29 Hun (N. Y.) 129.

73. Kinnaird *v.* Dudderrar, 54 S. W. 847, 21 Ky. L. Rep. 1230; Whipple *v.* Dutton, 175 Mass. 365, 56 N. E. 581, holding that where a pledgee used good judgment and diligence in the sale of property pledged, and the proceeds were less than enough to pay his claim,

price,[74] and conserving the pledgor's interests,[75] so far as consistent with his own protection;[76] but he is not required to exercise the same care, prudence, and diligence that a prudent man would in the sale of his own property.[77]

b. Public or Private Sale. In the absence of a special agreement,[78] the sale must be at public auction,[79] after due advertisement,[80] so that the pledgor may see that the sale is fair and arrange to get the best price; and a private sale is not binding on the pledgor.[81] But a private sale is valid where the pledgor has authorized it,[82] or acquiesced in it.[83] A sale of stock at the broker's board is regarded as a private sale,[84] since the public are not permitted to attend, and it is not conducted

the pledgor could not recover for the pledgee's foreclosure in a manner not authorized by law, no damages having been shown.

The owner of stock wrongfully pledged to a bona fide pledgee cannot complain that other stock of the pledgor was sold wrongfully, where in fact it was sold for its full value. Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338.

74. Perkins *v.* Applegate, 85 S. W. 723, 27 Ky. L. Rep. 522; Barber *v.* Hathaway, 47 N. Y. App. Div. 165, 62 N. Y. Suppl. 329 [*affirmed* in 169 N. Y. 575, 61 N. E. 1127], holding that, where pledged property was sold at a public sale for a certain amount, it cannot be assumed that its value was less than that amount, even on testimony of a witness to that effect.

Poor market.— Sale not invalid merely because made when the market was in poor condition. Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294, 37 N. Y. Suppl. 271 [*affirmed* in 157 N. Y. 699, 51 N. E. 1090].

75. Sparhawk *v.* Drexel, 22 Fed. Cas. No. 13,204, 12 Nat. Bankr. Reg. 450, 1 Wkly. Notes Cas. (Pa.) 560.

76. Sparhawk *v.* Drexel, 22 Fed. Cas. No. 13,204, 12 Nat. Bankr. Reg. 74, 1 Wkly. Notes Cas. (Pa.) 510.

77. Newsome *v.* Davis, 133 Mass. 343.

Only one bidder.—A sale is not invalid merely because there was only one bidder. Guinzburg *v.* W. H. Downs Co., 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525.

The pledgee is not bound to divide up a certificate of stock and sell in small lots. Newsome *v.* Davis, 133 Mass. 343.

78. **Any special agreement** as to the mode of sale must be complied with. Mowry *v.* Wood, 12 Wis. 413.

79. *Colorado.*—Morgan *v.* Dod, 3 Colo. 551.

Maryland.— Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

Massachusetts.— Fletcher *v.* Dickinson, 7 Allen 23; Washburn *v.* Pond, 2 Allen 474.

New York.— Genet *v.* Howland, 45 Barb. 560, 30 How. Pr. 360; Wheeler *v.* Newbould, 5 Duer 29 [*affirmed* in 16 N. Y. 392]; Brown *v.* Ward, 3 Duer 660.

Pennsylvania.— Conyngham's Appeal, 57 Pa. St. 474.

Utah.— Foote *v.* Utah Commercial, etc., Bank, 17 Utah 283, 54 Pac. 104, holding that when a pledgee who has been given authority to sell at public or private sale chooses to sell at public sale, he must conform to the rules governing public sales, so far as publicity is concerned.

See 40 Cent. Dig. tit. "Pledges," § 161.

80. Laclede Nat. Bank *v.* Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528 (holding that waiver by the pledgor of notice of sale to him does not excuse public advertisement of property where such is necessary to secure a fair price for it, and that under certain circumstances it is the duty of the pledgee to adjourn the sale in order to prevent a sacrifice of the property); Jacoby *v.* Jacoby, 103 Fed. 473 (holding that in a sale at noon, advertisement in the paper the evening before and on the morning of the sale was insufficient).

Under Cal. Civ. Code, § 3005, requiring that a sale of pledged property shall be made "in the manner and upon notice to the public usual at the place of sale," it is not necessary that the published notice of such sale shall state that the property is pledged, or that it is the property of the pledgor, where that is not shown to be usual at the place of sale. Bell *v.* Mills, 123 Fed. 24, 59 C. C. A. 104.

81. Moffat *v.* Williams, 5 Colo. App. 184, 36 Pac. 914; Strong *v.* National Mechanics' Banking Assoc., 45 N. Y. 718.

Local custom to sell at private sale is not admissible in evidence, since such custom is illegal and void. Wheeler *v.* Newbould, 16 N. Y. 392.

82. *Louisiana.*— Union Nat. Bank *v.* Forsyth, 50 La. Ann. 770, 23 So. 917; Florance *v.* Greene, 8 Rob. 10, holding that by agreement with the pledgor the pledgee may take the property at an appraised value.

Maryland.— Manning *v.* Shriver, 79 Md. 41, 28 Atl. 899; Bryson *v.* Rayner, 25 Md. 424, 90 Am. Dec. 69, holding that an agreement authorizing a pledgee of shares in a corporation "to give the stock to any broker to sell" permits a private sale by a broker for the market price.

Montana.— Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582.

Pennsylvania.— Jeanes' Appeal, 116 Pa. St. 573, 11 Atl. 862, 2 Am. St. Rep. 624; Colket *v.* Ellis, 10 Phila. 375.

Texas.— Dullnig *v.* Weekes, 16 Tex. Civ. App. 1, 40 S. W. 178.

United States.— Smith *v.* Lee, 84 Fed. 557, holding that, where the pledgor agrees that stock may be sold at a certain price to one person, he cannot complain of a sale at that price to another person.

See 40 Cent. Dig. tit. "Pledges," § 161.

83. Willoughby *v.* Comstock, 3 Hill (N. Y.) 389; *Ex p.* Fisher, 20 S. C. 179. See also Rose *v.* Doe, 4 Cal. App. 680, 89 Pac. 135.

84. Hagan *v.* Continental Nat. Bank, 182

by auction stating the number of shares and for whose account they are sold;[85] and such sale is accordingly not binding on the pledgor.[86]

7. Persons Who May Buy at Sale[87] — a. In General. Where by the terms of the contract the pledgee is authorized to buy at his own sale,[88] a purchase by him in good faith and for a fair consideration is valid and binding on the pledgor, but the burden of proof is on him to show good faith and that the property brought a fair value,[89] and, in the absence of such special authority, a purchase of the property by the pledgee is voidable at the option of the pledgor.[90]

b. Effect of Purchase By or For Pledgee.[91] Where the pledgee, without authority, purchases the property at his own sale, the pledgor[92] may, at his election, to be exercised within a reasonable time,[93] avoid the sale, in which case the pledgee will hold the property subject to the same conditions as before;[94] or

Mo. 319, 81 S. W. 171; Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

85. Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171; Dykers *v.* Allen, 7 Hill (N. Y. 497, 42 Am. Dec. 87.

86. Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171; Brass *v.* Worth, 40 Barb. (N. Y.) 648; Rankin *v.* McCullough, 12 Barb. (N. Y.) 103; Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87; Castello *v.* Albany City Bank, 1 N. Y. Leg. Obs. 25. But see Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779, and Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269, holding a pledgee's sale of stock at the broker's board binding on the pledgor without any special authority to sell in that way. And in Brown *v.* Ward, 3 Duer (N. Y.) 660, it was said, contrary to the other New York cases, that a sale of stock at the merchant's exchange, in accordance with a custom, would be good.

87. Right of pledgee to buy at sale on foreclosure of pledge see *infra*, VII, D.

88. *Louisiana.*— Barry *v.* American White Lead, etc., Works, 107 La. 236, 31 So. 733.

Maryland.— Manning *v.* Shriver, 79 Md. 41, 28 Atl. 899.

Massachusetts.— Jennings *v.* Wyzanski, 188 Mass. 285, 74 N. E. 347.

Missouri.— Chouteau *v.* Allen, 70 Mo. 290.

Pennsylvania.— *In re* Phillips, 205 Pa. St. 531, 55 Atl. 218.

See 40 Cent. Dig. tit. "Pledges," § 162.

89. Ohio Nat. Bank *v.* Central Constr. Co., 17 App. Cas. (D. C.) 524; Perkins *v.* Applegate, 85 S. W. 723, 27 Ky. L. Rep. 522.

90. *California.*— Wright *v.* Ross, 36 Cal. 414.

Illinois.— Stokes *v.* Frazier, 72 Ill. 428.

Maryland.— Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

Massachusetts.— Middlesex Bank *v.* Minot, 4 Metc. 325.

New York.— Bryan *v.* Baldwin, 52 N. Y. 232.

Pennsylvania.— Register *v.* Sellers, 4 Pa. Co. Ct. 490, 19 Phila. 446 (holding that, if the pledgee wishes to buy at his own sale, he should reserve the right in the contract of pledge, or he must sell by foreclosure or under execution levied on the property); Ihmsen's Estate, 12 Pittsb. Leg. J. N. S. 218.

United States.— Marsh *v.* Whitmore, 21 Wall. 178, 22 L. ed. 482 [*affirming* 16 Fed. Cas. No. 9,122, 1 Hask. 391]; Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 54 Fed. 759, 4 C. C. A. 561.

See 40 Cent. Dig. tit. "Pledges," § 162.

A special partner, prohibited by statute from transacting any business on account of the partnership, may purchase at a sale of property pledged to the firm. Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106.

Where a pledge is made to the cashier of a bank personally as trustee for a debt due the bank, the bank may purchase at a sale of the cashier. Crescent City Bank *v.* Carpenter, 26 Ind. 108.

91. Right of pledgee to buy at sale on foreclosure of pledge see *infra*, VII, D.

92. The pledgee cannot avoid the sale. Faulkner *v.* Hill, 104 Mass. 188.

The owner of property pledged without authority may avoid a sale by the pledgee to himself not made in good faith. Foote *v.* Utah Commercial, etc., Bank, 17 Utah 283, 54 Pac. 104.

93. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644, 7 So. 106; Morrell *v.* Trotter, 15 Phila. (Pa.) 201, holding that a purchase of the pledgee after notice to the pledgor will not be set aside after the lapse of eight years.

94. *Alabama.*— Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644, 7 So. 106.

Colorado.— Winchester *v.* Joslyn, 31 Colo. 220, 72 Pac. 1079, 102 Am. St. Rep. 30.

Illinois.— Stokes *v.* Frazier, 72 Ill. 428; Chicago Artesian Well Co. *v.* Corey, 60 Ill. 73.

Iowa.— Old Dominion Bank *v.* Dubuque, etc., R. Co., 8 Iowa 277, 74 Am. Dec. 302.

Kentucky.— Perkins *v.* Applegate, 85 S. W. 723, 27 Ky. L. Rep. 522, holding that a purchase by the pledgee not in good faith is absolutely void and the pledgor is not estopped by three years' delay from setting it aside.

Maine.—Appleton *v.* Turnbull, 84 Me. 72, 24 Atl. 592; Parker *v.* Vose, 45 Me. 54.

Maryland.— Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779.

Massachusetts.— Lord *v.* Hartford, 175 Mass. 320, 56 N. E. 609; Middlesex Bank *v.* Minot, 4 Metc. 325.

New York.— Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190; Bryan *v.* Baldwin, 52 N. Y. 232 [*affirming* 7 Lans. 174].

Ohio.— Glidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737; Leighton *v.* Burkham, 7 Ohio Cir. Ct. 487, 4 Ohio Cir. Dec. 692.

he may affirm the sale, and hold the pledgee responsible for the application of the proceeds.[95] And where the purchase is made nominally by a third person, but is merely colorable, and in reality is by or for the pledgee,[96] it is not binding on the pledgor.[97] But the agent or attorney of the pledgee may purchase, if *bona fide* for himself,[98] and the sale is not rendered voidable by his subsequent sale of the property to the pledgee.[99] The purchase by the pledgee, however, so long as he retains possession and control, does not amount to a conversion of the property, and cannot be so treated by the pledgor.[1]

8. Operation and Effect. If the pledgee sells the stock fairly and rightfully in all respects, he is not responsible for its bringing less than its estimated value,[2] and he must account only for the amount received.

9. Conversion by Invalid Sale — a. In General. A wrongful sale of the pledged property, before default,[3] or without demand or notice,[4] or otherwise in violation

Pennsylvania.—Sitgreaves *v.* Farmers', etc., Bank, 49 Pa. St. 359; Register *v.* Sellers, 4 Pa. Co. Ct. 490, 19 Phila. 446; Hestonville, etc., Pass. R. Co. *v.* Shields, 3 Brewst. 257.

Utah.— Hyams *v.* Bamberger, 10 Utah 3, 36 Pac. 202.

Washington.— Muhlenberg *v.* Tacoma, 25 Wash. 36, 64 Pac. 925.

United States.— Kansas City First Nat. Bank *v.* Rush, 85 Fed. 539, 29 C. C. A. 333; Leahy *v.* Lobdell, 80 Fed. 665, 26 C. C. A. 75. But see Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439, holding that where by the terms of the contract the pledgee is given power on default to sell the property at public or private sale, without advertisement, demand of payment, or notice, a purchase by him in good faith at public sale is valid and gives him a good title. *Compare* Atlantic Trust Co. *v.* Woodbridge Canal, etc., Co., 86 Fed. 975, in which the validity of the pledgee's purchase was sustained without discussion.

See 40 Cent. Dig. tit. "Pledges," § 164.

Purchase and exchange for other property. — Where pledged property was sold on foreclosure and at the sale bought by the pledgee under circumstances rendering the sale voidable, and afterward without the pledgor's knowledge transferred for other property at a fair price, there was no conversion of either the pledged stock or the other property, but the pledgor's rights remained in the new property as in the property pledged. Hebblethwaite *v.* Flint, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43.

95. Killian *v.* Hoffman, 6 Ill. App. 200; Faulkner *v.* Hill, 104 Mass. 188.

Where the pledgee of a mortgage forecloses it against the mortgagor without making his pledgor a party and purchases the land, he will hold the land subject to the pledge in the place of the mortgage. Jeffersonville First Nat. Bank *v.* Ohio Falls Car, etc., Works, 20 Fed. 65. Or the pledgor may affirm the foreclosure, and require the pledgee to account for the amount for which the land sold. Ross *v.* Barker, 58 Nebr. 402, 78 N. W. 730.

96. Parker *v.* Vose, 45 Me. 54; Norton *v.* Baxter, 41 Minn. 146, 42 N. W. 865, 16 Am. St. Rep. 679, 4 L. R. A. 305; Minneapolis Agricultural, etc., Assoc. *v.* Canfield, 121 U. S. 295, 7 S. Ct. 887, 30 L. ed. 962 [*affirming* 14 Fed. 801, 4 McCrary 646].

97. Parker *v.* Vose, 45 Me. 54; Norton *v.* Baxter, 41 Minn. 146, 42 N. W. 865, 16 Am. St. Rep. 679, 4 L. R. A. 305; Minneapolis Agricultural, etc., Assoc. *v.* Canfield, 121 U. S. 295, 7 S. Ct. 887, 30 L. ed. 962 [*affirming* 14 Fed. 801, 4 McCrary 646]. *Compare* Leahy *v.* Lobdell, 80 Fed. 665, 26 C. C. A. 75.

But a mere subsequent sale by a purchaser in good faith to the pledgee does not render the original sale voidable (Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Earle *v.* Grant, 14 R. I. 228); nor the pledgee liable for any profits made by him out of the property (Raben *v.* Aurora First Nat. Bank, 37 Nebr. 364, 55 N. W. 1055).

98. Steelman *v.* Weiskittel, 88 Md. 519, 42 Atl. 216.

99. Steelman *v.* Weiskittel, 88 Md. 519, 42 Atl. 216.

1. *Alabama.*— Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87.

Colorado.— Winchester *v.* Joslyn, 31 Colo. 220, 72 Pac. 1079, 102 Am. St. Rep. 30.

New York.— Bryan *v.* Baldwin, 52 N. Y. 232 [*affirming* 7 Lans. 174].

Ohio.— Leighton *v.* Burkham, 7 Ohio Cir. Ct. 487, 4 Ohio Cir. Dec. 692.

United States.— Kansas City First Nat. Bank *v.* Rush, 85 Fed. 539, 29 C. C. A. 333.

See 40 Cent. Dig. tit. "Pledges," § 164.

2. Union Nat. Bank *v.* Forsyth, 50 La. Ann. 770, 23 So. 917; Hewitt *v.* Steele, 136 Mo. 327, 38 S. W. 82; Ainsworth *v.* Bowen, 9 Wis. 348.

3. Greer *v.* Lafayette County Bank, 128 Mo. 559, 30 S. W. 319.

4. Waring *v.* Gaskill, 95 Ga. 731, 22 S. E. 659; Greer *v.* Lafayette County Bank, 128 Mo. 559, 30 S. W. 319; Toplitz *v.* Bauer, 34 N. Y. App. Div. 526, 55 N. Y. Suppl. 29 [*affirmed* in 161 N. Y. 325, 55 N. E. 1059]; Leahy *v.* Lobdell, 80 Fed. 665, 26 C. C. A. 75. But *compare* Ogden *v.* Lathrop, 65 N. Y. 158 [*reversing* 35 N. Y. Super. Ct. 73].

For example a sale of pledged stock by a broker without demand and notice. Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390; Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80; Markham *v.* Jaudon, 41 N. Y. 235 [*reversing* 49 Barb. 462, 2 Abb. Pr. N. S. 286]; Morgan *v.* Jaudon, 40 How. Pr. (N. Y.) 366.

of the rights of the pledgor,[5] so that the property is placed beyond the control of the pledgee,[6] constitutes a conversion of the property, for which the pledgee is liable to the pledgor.[7]

b. Actions For. Upon a wrongful sale of the collateral by the pledgee, the pledgor may sue either in trover for the conversion,[8] or in case for damages,[9] or, if he elects to ratify the sale, in assumpsit for the proceeds, as money received to his use.[10] And tender of his debt is not necessary before bringing suit,[11] as it would be useless, the pledgee having put it out of his power to perform his part of the contract,[12] and being allowed to set off the amount of his debt against the amount of the pledgor's recovery.[13] But where the pledgee has bought the property at his own sale, the pledgor cannot sue him in conversion unless he has first tendered the amount of his debt and demanded a return of the property, and the tender and demand have been refused by the pledgee.[14]

c. Measure of Damages. Whether the pledgor sues in trover [15] or in case,[16] or whether he pleads the wrongful sale by the pledgee in defense to a suit on the principal debt,[17] he is entitled to recover of the pledgee the actual amount of the loss suffered by him by reason of the wrongful sale.[18] Upon a wrongful sale of

5. *Alabama.*— Nebring *v.* Mobile Bank, 58 Ala. 204.

Arkansas.— Fitzgerald *v.* Blocher, 32 Ark. 742, 29 Am. Rep. 3.

Colorado.— E. F. Hallack Lumber, etc., Co. *v.* Gray, 19 Colo. 149, 34 Pac. 1000.

New York.— Hope *v.* Lawrence, 1 Hun 317.

Pennsylvania.— Blood *v.* Erie Dime Sav., etc., Co., 164 Pa. St. 95, 30 Atl. 362.

Wisconsin.—Ainsworth *v.* Bowen, 9 Wis. 348.

See 40 Cent. Dig. tit. "Pledges," § 165.

6. Purchase by pledgee at his own sale as conversion see *supra*, VII, C, 7, b.

7. But a sale without the consent of the pledgor, in the absence of fraud, cannot constitute a conversion. McClintock *v.* Kansas City Cent. Bank, 120 Mo. 127, 24 S. W. 1052.

8. Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269; Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Glidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737 (holding that while a purchase by the pledgee does not amount to a conversion, yet if he afterward sells even a part of the property so as not to be able to return it to the pledgor upon performance by him, he is liable for conversion of the whole); Ainsworth *v.* Bowen, 9 Wis. 348 (holding that where a pledgee improperly made a sale, whereby the pledge brought less than it should have brought, it was no defense to an action against him for conversion that the pledgor shortly thereafter bought the pledge from the purchaser at said sale at about the price for which the pledgee sold it).

9. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644, 7 So. 106 (holding count good in case, although informal); Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269; Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779; Lord *v.* Hartford, 175 Mass. 320, 56 N. E. 609 (holding that the pledgor may still maintain an action for damages for a wrongful sale, although he is precluded by the lapse of time from avoiding the sale).

Where a part-owner of stock pledges it for his individual benefit, with the authority and consent of his coöwner, the pledgee is estopped to set up the coöwner's title as a defense to an action by the pledgor for its conversion. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644, 7 So. 106.

10. Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248.

11. Rosenzweig *v.* Frazer, 82 Ind. 342; Toplitz *v.* Bauer, 34 N. Y. App. Div. 526, 55 N. Y. Suppl. 29 [*affirmed* in 161 N. Y. 325, 55 N. E. 1059]; Smith *v.* Savin, 69 Hun (N. Y.) 311, 23 N. Y. Suppl. 568, 30 Abb. N. Cas. 192 [*affirmed* in 141 N. Y. 315, 36 N. E. 338]; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Neiler *v.* Kelley, 69 Pa. St. 403.

12. Ogden *v.* Lathrop, 1 Sweeny (N. Y.) 643.

13. Smith *v.* Savin, 69 Hun (N. Y.) 311, 23 N. Y. Suppl. 568, 30 Abb. N. Cas. 192 [*affirmed* in 141 N. Y. 315, 36 N. E. 338]; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248.

14. Glidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737.

Laches or ratification as defense see *infra*, VII, C, 10.

15. Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

16. Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

17. Parker *v.* Vose, 45 Me. 54; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248, holding the pledgor entitled to set off the full value of goods sold and not merely the amount of the proceeds.

18. E. F. Hallack Lumber Mfg. Co. *v.* Gray, 19 Colo. 149, 34 Pac. 1000; *In re* Litchfield Bank, 28 Conn. 575; Wheeler *v.* Newbould, 5 Duer (N. Y.) 29 [*affirmed* in 16 N. Y. 392]; Mowry *v.* Baraboo First Nat. Bank, 54 Wis. 38, 11 N. W. 247.

Nominal damages only can be recovered for the sale of commercial paper for more than

stocks or bonds, the pledgee will be charged with the highest market price attained by them within a reasonable time after notice of their sale to the pledgor;[19] upon a sale of commercial paper, he will be charged with its actual value at the time of sale, which is *prima facie* its face value;[20] and upon a sale of other property, he will be charged with its actual value at the time of conversion.[21]

10. Waiver of Defects and Ratification of Invalid Sale. The pledgor may waive compliance by the pledgee with any of the requisites of a valid sale,[22] or, after acquiring full knowledge of an invalid sale,[23] may ratify it, so as to make it binding upon him.[24] Such ratification need not be express, but may be implied,[25] as by accepting the proceeds of the sale,[26] by a recognition of the sale in a subsequent settlement,[27] by negotiations for a repurchase of the property,[28] or even by mere acquiescence,[29] especially where such acquiescence is long continued.[30]

its face value. Cole *v.* Dalziel, 13 Ill. App. 23.

19. Dimock *v.* U. S. National Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643; Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338; Wright *v.* Metropolis Bank, 110 N. Y. 237, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289 [*overruling* Markham *v.* Jaudon, 41 N. Y. 235, holding that the pledgee should be charged with the highest market price between the time of conversion and the trial, and Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307 [*affirming* 1 Sandf. 351], holding the pledgee chargeable with the highest market price between the sale and the time negotiations for a compromise and settlement were broken off].

In Maryland the pledgor has been entitled to recover only the actual value of the stocks at the time of their conversion. Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

In Pennsylvania it has been held that, where the pledgor has tendered payment and demanded a return of his stocks, he can recover their highest market price between the time of conversion and the trial, but in the absence of such tender he can recover only their value at the time of sale. Neiler *v.* Kelley, 69 Pa. St. 403.

20. E. F. Hallack Lumber Mfg. Co. *v.* Gray, 19 Colo. 149, 34 Pac. 1000; Springer *v.* Purcell, 8 Ohio Dec. (Reprint) 139, 5 Cinc. L. Bul. 889; Conyngham's Appeal, 57 Pa. St. 474; Davis *v.* Funk, 39 Pa. St. 243, 80 Am. Dec. 519.

21. Belden *v.* Perkins, 78 Ill. 449 (allowing a recovery against a purchaser from the pledgee, in an action for money had and received, of the market value of the property, less the secured debt); Parker *v.* Vose, 45 Me. 54; McManus *v.* Sweatman, 42 Leg. Int. (Pa.) 387; Ainsworth *v.* Bowen, 9 Wis. 348.

22. Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Willoughby *v.* Comstock, 3 Hill (N. Y.) 389, holding that, upon notice to the pledgor of the place of sale, his failure to object to it constituted a waiver of any objections.

For waiver of notice of sale see *supra*, VII, C, 4, a.

No waiver.— Where counsel for the owner of collaterals was present at a sale thereof by the holder, and announced before the sale that he would present his objection to such sale to the court, the owner will not be held to have acquiesced in the sale by failure to make further objection. Laclede Nat. Bank *v.* Richardson, 156 Mo. 270, 56 S. W. 1117. *Compare* Rose *v.* Doe, 4 Cal. App. 680, 89 Pac. 135.

23. Hamilton *v.* State Bank, 22 Iowa 306; Brass *v.* Worth, 40 Barb. (N. Y.) 648.

Without knowledge that sale was wrongful there is no ratification. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644, 7 So. 106; Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338 [*affirming* 69 Hun 311, 23 N. Y. Suppl. 568, 30 Abb. N. Cas. 192].

24. Hill *v.* Finigan, 77 Cal. 267, 19 Pac. 494, 11 Am. St. Rep. 279; Hill *v.* Finigan, 62 Cal. 426; Child *v.* Hugg, 41 Cal. 519; Rose *v.* Doe, 4 Cal. App. 680, 89 Pac. 135.

25. Downer *v.* Whittier, 144 Mass. 448, 11 N. E. 585, where the pledgor of the stock sold, as treasurer of the corporation, transferred the stock to the name of the purchaser.

26. Hamilton *v.* State Bank, 22 Iowa 306.

27. Lafitte *v.* Godchaux, 35 La. Ann. 1161.

28. Hill *v.* Finigan, 77 Cal. 267, 19 Pac. 494, 11 Am. St. Rep. 279.

29. Carroll *v.* Mullanphy Sav. Bank, 3 Mo. App. 249; Earle *v.* Grant, 14 R. I. 228.

30. *Illinois.*— McDowell *v.* Chicago Steel Works, 124 Ill. 491, 16 N. E. 854, 7 Am. St. Rep. 381 [*affirming* 22 Ill. App. 405], six years.

Louisiana.— Lafitte *v.* Godchaux, 35 La. Ann. 1161, eight years.

Massachusetts.— Downer *v.* Whittier, 144 Mass. 448, 11 N. E. 585, seven years.

Pennsylvania.— Slingluff *v.* Montgomery Ins., etc., Co., 14 Montg. Co. Rep. 165.

United States.— Marsh *v.* Whitmore, 21 Wall. 178, 22 L. ed. 482 [*affirming* 16 Fed. Cas. No. 9,122, 1 Hask. 391], eleven years.

See 40 Cent. Dig. tit. "Pledges," § 168.

Delay of one year.— Plaintiff's assignor pledged certain bonds to secure a debt, and was present, but did not object to a private sale thereof, on April 3, 1899. No objection was subsequently made to such sale until after a subsequent sale of the bonds with other similar bonds in April, 1900, to a purchaser procured by plaintiff's assignor for which he was paid a commission. It was held that both plaintiff and his assignor were estopped to object to the validity of the

11. Title and Rights of Purchaser.[31] Upon a sale by the pledgee of property other than negotiable instruments,[32] or upon a sale of negotiable instruments to one with notice of the pledge,[33] the purchaser takes a good title where the sale was rightful and regular in all respects,[34] and in the case of a chose in action may enforce it for its face value against the maker;[35] but where the sale was in violation of the pledgor's rights, the purchaser acquires only such title and rights as the pledgee possessed.[36] Upon a sale, however, to a *bona fide* purchaser, of a negotiable instrument, or of other property to which the pledgor has given the pledgee the *indicia* of ownership,[37] the purchaser takes absolute title, even against the pledgor.[38]

D. Actions to Foreclose[39]**— 1. Right of Action and Defenses.** If the pledgee has been wrongfully deprived by the pledgor of the possession of the property,[40] or if he is unable to find the pledgor,[41] or if for any other reason he cannot demand payment and give the pledgor notice of sale,[42] he must resort to a judicial foreclosure of the lien. And even where, by reason of the nature of the pledge relation,[43] or by the

original sale of the pledged bonds. Rose *v.* Doe, 4 Cal. App. 680, 89 Pac. 135.

Delay of three years before bringing suit does not constitute a ratification where the sale was absolutely void because of the pledgee's fraudulent sale to himself. Perkins *v.* Applegate, 85 S. W. 723, 27 Ky. L. Rep. 522.

31. Operation and effect of sale in general see *supra*, VII, C, 7, b.

Effect of purchase by or for pledgee see *supra*, VII, C, 8.

32. Williams *v.* Ashe, 111 Cal. 180, 43 Pac. 595.

33. See cases cited *infra*, note 34.

34. *Iowa.*— Carson *v.* Iowa City Gas-Light Co., 80 Iowa 638, 45 N. W. 1068, upholding the validity of a sale of stock, although at only fourteen per cent of its par value and to one interested in a rival company.

Massachusetts.— Guinzburg *v.* H. W. Downs Co., 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525, holding sale valid, although only one bidder.

Rhode Island.— Potter *v.* Thompson, 10 R. I. 1.

Texas.— Brightman *v.* Reeves, 21 Tex. 70, holding an authorized sale valid, whether the purchaser knew the property was pledged or not.

United States.— Morris *v.* East Side R. Co., 104 Fed. 409, 43 C. C. A. 605 (holding a sale of bonds valid, although the pledgee furnished the purchaser over ninety per cent of the purchase-money, where there was no fund, and allowing the purchaser to enforce the bonds to their full amount); Wheelwright *v.* St. Louis, etc., Transp. Co., 56 Fed. 164 (holding sale valid, although for a small amount in the absence of fraud).

See 40 Cent. Dig. tit. "Pledges," § 169.

35. *In re* Woods, 52 Md. 520 (holding that upon a valid sale of the pledgor's own notes deposited as a collateral, the purchaser could prove against the pledgor's trustee for the benefit of creditors for the face value of the notes, and the pledgee for the remainder of his debt after crediting their proceeds); Morris *v.* East Side R. Co., 104 Fed. 409, 43 C. C. A. 605; McDougall *v.* Hazelton Tripod-Boiler Co., 88 Fed. 217, 21 C. C. A. 487.

36. Harding *v.* Eldridge, 186 Mass. 39, 71 N. E. 115; Handy *v.* Sibley, 46 Ohio St. 9, 17 N. E. 329; Morris *v.* East Side R. Co., 95 Fed. 13.

37. Green *v.* Lepley, 88 Ill. App. 543; McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Lewis *v.* Mott, 36 N. Y. 395; Morris *v.* Grant, 34 Hun (N. Y.) 377 (holding the purchaser's title good to the entire property where he had received notice of the pledgor's rights after he had paid for only a portion of it); Dudley *v.* Gould, 6 Hun (N. Y.) 97; Seaman *v.* Reeve, 15 Barb. (N. Y.) 454.

Fraud of pledgee to which the purchaser is not a party does not vitiate sale. Cole *v.* Cosgrove, 16 Ill. App. 167.

38. Brittan *v.* Oakland Sav. Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58, 112 Cal. 1, 44 Pac. 339 (holding, however, that so long as the purchaser retains possession of the property, he holds it subject to the pledgor's redemption upon tender of the amount secured or the purchase-price, whichever is the larger); Laclede Nat. Bank *v.* Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528.

39. N. D. Rev. Codes (1905), § 6269, which provides generally that liens on personalty may be foreclosed on notice in the manner provided for foreclosure of mortgages on personalty, did not repeal the special provision relating to the foreclosure of pledged property as contained in Civ. Code, § 76 (Rev. Codes (1905), §§ 6193, 6218), requiring a sale at auction or a judicial sale. Reeves *v.* Bruening, 16 N. D. 398, 114 N. W. 313.

40. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21.

41. Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248.

42. Indiana, etc., R. Co. *v.* McKernan, 24 Ind. 62; Markham *v.* Jaudon, 41 N. Y. 235; Ogden *v.* Lathrop, 1 Sweeny (N. Y.) 643; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Garlick *v.* James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294.

43. White River Sav. Bank *v.* Capital Sav. Bank, etc., Co., 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754.

express terms of the contract,[44] he possesses the power to sell on notice, without judicial process, he may elect to file a bill in equity in the nature of foreclosure for the sale of the pledge.[45] Pledges of commercial paper, which ordinarily must be enforced by collection and not by sale,[46] and pledges of bonds and mortgages,[47] may also, under proper circumstances, be foreclosed by a bill in equity. A third person claiming adverse title to the pledgee will be allowed to set up such title upon foreclosure;[48] but the pledgor will not be allowed to plead as a defense that he gave the pledge to defraud his creditors.[49]

2. Proceedings and Relief — a. Parties. In an action to foreclose, there should be joined as parties defendant the pledgor,[50] or his representative,[51] and all other persons having an interest in the pledged property;[52] but a mere general creditor will not be permitted to become a party.[53]

b. Pleading and Process. Where by statute,[54] or by the terms of the contract,[55] certain requisites are prescribed before suit for foreclosure can be brought, the bill or petition must allege compliance, or excuse a failure to comply, with the conditions.[56] A petition should not be dismissed on demurrer where it states the substance of the contract of pledge, although in informal terms,[57] nor because it may appear on final hearing that it will not be necessary to sell all the property pledged.[58] And no consideration is required to be stated or proved, unless the want of consideration is set up by the answer.[59] No levy is required on the property in the pledgee's possession.[60]

44. McArthur *v.* Magee, 114 Cal. 126, 45 Pac. 1068; Farmers', etc., Nat. Bank *v.* Rogers, 1 N. Y. Suppl. 757, 15 N. Y. Civ. Proc. 250; Land Title, etc., Co. *v.* Asphalt Co. of America, 121 Fed. 192.

45. Morrissey *v.* Broomal, 37 Nebr. 766, 56 N. W. 383; Smith *v.* Coale, 12 Phila. (Pa.) 177.

A pledge to secure an unliquidated demand may be enforced by foreclosure without first proceeding at law to ascertain the damages. Vaupell *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143.

Pledgee's recovery of a judgment against the pledgor and the appointment of a receiver for the pledgor's property do not affect his right to enforce the pledge by judicial foreclosure. Pate *v.* Hoffman, 61 Hun (N. Y.) 386, 16 N. Y. Suppl. 74.

Where property is levied on in the pledgee's possession for another debt of the pledgor; the pledgee is entitled to have his lien enforced by joining in the proceedings, without resort to a separate suit for foreclosure. Buena Vista Loan, etc., Bank *v.* Grier, 114 Ga. 398, 40 S. E. 284.

46. Donohoe *v.* Gamble, 38 Cal. 340, 99 Am. Dec. 399 (where the maker of the note was a non-resident and had no property within the state); Cleghorn *v.* Minnesota Title Ins., etc., Co., 57 Minn. 341, 59 N. W. 320, 47 Am. St. Rep. 615; Philadelphia Bank *v.* Aldridge, 5 Phila. (Pa.) 446.

47. Blood *v.* Shepard, 69 Kan. 752, 77 Pac. 565; Porter *v.* Frazer, 6 Misc. (N. Y.) 553, 27 N. Y. Suppl. 517.

48. Washington Nat. Bldg., etc., Assoc. *v.* Saunders, 24 Wash. 321, 64 Pac. 546.

49. Chafee *v.* A. & W. Sprague Mfg. Co., 14 R. I. 168.

50. Newcombe *v.* Chicago, etc., R. Co., 55 Hun (N. Y.) 607, 6 N. Y. Suppl. 366.

Where the pledgor is beyond the jurisdiction of the court and no relief is prayed against him, he is not a necessary, although he is a proper, party. Springfield Co. *v.* Ely, 44 Fla. 319, 32 So. 892.

51. Richardson *v.* Turner, 52 La. Ann. 1613, 28 So. 158; Denny *v.* Cole, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940, holding a receiver of the pledgor firm a necessary party.

Sale of property after death of the pledgor and before the appointment of a personal representative for the management of his estate is void. Andrews *v.* New Orleans City Bank, 5 La. Ann. 737.

52. Brown *v.* Omaha Hotel Assoc., 63 Nebr. 181, 88 N. W. 175.

Assignee of pledgee's interest with notice of the pledgee. Brown *v.* Omaha Hotel Assoc., 63 Nebr. 181, 88 N. W. 175.

But the owner of the legal title to land is not a necessary party to a suit for the sale of a contract for the sale and purchase of the land by the pledgee of the contract. Vaughn *v.* Cushing, 23 Ind. 184.

53. See Parties, 30 Cyc. 1 *et seq.*

54. Gentis *v.* Blasco, 15 La. Ann. 104.

55. Ormsby *v.* De Borra, (Cal. 1898) 52 Pac. 499; Crossman *v.* Griggs, 186 Mass. 275, 71 N. E. 560.

56. Falmouth Nat. Bank *v.* Cape Cod Ship Canal Co., 166 Mass. 550, 44 N. E. 617.

57. Sharmer *v.* McIntosh, 43 Nebr. 509, 61 N. W. 727. And see Zivley *v.* Lampasas First Nat. Bank, (Tex. Civ. App. 1897) 39 S. W. 219, holding that a pledge lien may be foreclosed on proper pleadings in a suit against the estate of the pledgor and others for conversion of the pledged property.

58. Land Title, etc., Co. *v.* Asphalt Co. of America, 121 Fed. 192.

59. Robinson *v.* Boyd, 60 Ohio St. 57, 53 N. E. 494.

60. Croft *v.* Colfax Electric Light, etc., Co., 113 Iowa 455, 85 N. W. 761.

c. Evidence. In the suit to foreclose, notes or mortgages held as collateral may be admitted as evidence,[61] and also an order from the pledgor directing the property to be held in pledge.[62]

d. Relief. Upon establishing his case, the pledgee is entitled to an order for the sale of the property [63] and to a personal judgment for any deficiency.[64] If property is sold under a void decree, the chancellor may order its restitution so as to place the parties in the same position as before.[65] The advantages of foreclosure in equity are that it concludes the rights of all parties in interest and prevents any recourse against the pledgee for violation of his duties to the pledgor or to third parties,[66] and that it enables the pledgee to buy at the sale,[67] which he is not allowed to do at a sale upon notice, without judicial process.

e. Rights of Purchaser. The purchaser is entitled to the income from the property from the date of sale; [68] and where another person remains in possession from the date of the sale until its confirmation, he must account to the purchaser for the net income therefrom during such period.[69]

E. Actions to Enforce Right of Action Pledged — 1. In General. The pledgee of a chose in action may enforce it by suit,[70] in his own name,[71] or in that

61. Ormsby *v.* De Borra, (Cal. 1898) 52 Pac. 499; Fresno First Nat. Bank *v.* Dusy, 110 Cal. 69, 42 Pac. 476.

62. Ormsby *v.* De Borra, (Cal. 1898) 52 Pac. 499.

Proof of agency.— In an action on defendant's note, and to foreclose a lien on P's stock pledged for its payment, evidence that defendant executed the note as the agent of P is admissible to show that defendant had authority as P's agent to pledge the stock, although it tends to show that the note was made for the benefit of P, whose name does not appear in the note. Meyerholtz *v.* Paxton, (Cal. App. 1907) 94 Pac. 78.

63. **Oil leases may be sold.**— Murphy *v.* Hardee, 22 Ohio Cir. Ct. 511, 12 Ohio Cir. Dec. 837.

But where separate property has been pledged for separate debts, each parcel must be sold to pay the debt it was given to secure and a sale and application in gross is error. Mahoney *v.* Caperton, 15 Cal. 313.

64. Commercial Nat. Bank *v.* Grant, 73 Nebr. 435, 103 N. W. 68.

Attorney's fees will be allowed where stipulated for, notwithstanding a statute providing that upon the foreclosure of a mortgage such fees must be fixed by the court. Hildreth *v.* Williams, (Cal. 1893) 33 Pac. 1113.

65. Brown *v.* Vanleave, 21 S. W. 756, 14 Ky. L. Rep. 821.

66. Boynton *v.* Payrow, 67 Me. 587.

67. Adams *v.* Coons, 37 La. Ann. 305; Register *v.* Sellers, 4 Pa. Co. Ct. 490, 19 Phila. 446.

68. Murphy *v.* Hardee, 22 Ohio Cir. Ct. 511, 12 Ohio Cir. Dec. 837.

69. Murphy *v.* Hardee, 22 Ohio Cir. Ct. 511, 12 Ohio Cir. Dec. 837.

70. **But where a broker has wrongfully pledged to a bank notes of third parties left with him for discount,** and the bank has collected sufficient from the notes to pay the broker's indebtedness to it, it cannot sue on one of the unpaid notes for the benefit of the makers of notes that had been paid, the proper remedy being a bill for contribution in equity. New England Trust Co. *v.* New York Belting, etc., Co., 166 Mass. 42, 43 N. E. 928.

Where notes held as collateral are impounded in an equity suit, the pledgee is still entitled to control the same so far as necessary to bring an action at law upon the notes, and to have the proceeds thereof paid into court. Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33.

The right of the indorser of a note outstanding and past due to enforce the collateral held by him to secure him against liability on his indorsement, consisting of a note secured by a trust deed, is a matter solely between himself and the pledgors, with which the purchasers of the property covered by the trust deed, under a sale made in attachment proceedings, are not concerned, where they have failed to establish their claim that the collateral had been extinguished by payment. Southern Pine Lumber Co. *v.* Ward, 208 U. S. 126, 28 S. Ct. 239, 52 L. ed. 420 [*affirming* 16 Okla. 131, 85 Pac. 459].

71. *Florida.*— Withers *v.* Sandlin, 36 Fla. 619, 18 So. 856, pledge of an account.

Louisiana.— Mechanics', etc., Ins. Co. *v.* Lozano, 39 La. Ann. 321, 1 So. 608; Chaffe *v.* Du Bose, 36 La. Ann. 257; Louisiana State Bank *v.* Gaiennie, 21 La. Ann. 555; Dix *v.* Tully, 14 La. Ann. 456; King *v.* Osborne, 2 Mart. N. S. 247.

Missouri.— Dickey *v.* Porter, 203 Mo. 1, 101 S. W. 586.

New York.— Ridgway *v.* Bacon, 72 Hun 211, 25 N. Y. Suppl. 651; Nelson *v.* Edwards, 40 Barb. 279.

South Dakota.— Citizens' Nat. Bank *v.* Great Western Elevator Co., 13 S. D. 1, 82 N. W. 186.

Wisconsin.— Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

See 40 Cent. Dig. tit. "Pledges," § 186. See also *infra*, VII, E, 4.

of the pledgor,[72] according to the practice in the respective jurisdictions, unless he has expressly agreed not to do so;[73] and he possesses the right without first seeking to enforce the principal obligation,[74] and although the principal debt is not yet due,[75] or the contingent liability which the pledge was given to secure has not attached,[76] and even though he is authorized to enforce the pledge by sale of the collateral.[77] Upon a pledge of bonds secured by mortgage, the pledgee also has the right to foreclose the mortgage.[78] Where suit has been begun by the pledgor for the enforcement of the right of action before his pledge of it to the pledgee, upon his obtaining judgment, the pledgee or his assignee will be entitled to intervene and claim the proceeds, without allowance to the pledgor out of the funds for the expenses of his suit.[79]

2. Defenses.[80] The obligor on the chose in action pledged may defeat an action by the pledgee for its collection by showing that it has been duly paid [81] or otherwise discharged,[82] by showing that the secured debt has been paid,[83] or by proof of an agreement to sue first on the principal debt and a failure to do so.[84] But, without proof of a special agreement, it is not a good defense that the pledgee has not attempted to collect the principal debt; [85] that the maker, with knowledge of the pledge, and without the pledgee's consent, has paid the pledgor;[86] that the pledgee has obtained an unsatisfied judgment against the pledgor; [87] that he has obtained judgment on another note held as collateral for the same debt; [88] that a suit by the pledgee against one of the parties to the instrument has failed; [89] that the pledgee took the note with the intention of making illegal use of it; [90] that the action is brought by the pledgor instead of by the pledgee; [91] that in a suit on a note

72. Crews *v.* Yowell, 76 S. W. 127, 25 Ky. L. Rep. 598.

73. Coulter *v.* Wyly, 34 Ga. 239.

74. Murphy *v.* Murphy, 74 Conn. 198, 50 Atl. 394; Delaware County Trust, etc., Co. *v.* Haser, 199 Pa. St. 17, 48 Atl. 694, 85 Am. St. Rep. 763; Lishy *v.* O'Brien, 4 Watts (Pa.) 141; Lazier *v.* Nevin, 3 W. Va. 622.

75. Seeley *v.* Wickstrom, 49 Nebr. 730, 68 N. W. 1017; Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252, 11 N. Y. Annot. Cas. 187 [*affirmed* in 174 N. Y. 514, 66 N. E. 1108]; Bay *v.* Gunn, 1 Den. (N. Y.) 108; Westervelt *v.* Huff, 2 Sandf. Ch. (N. Y.) 98.

76. Hapgood *v.* Wellington, 136 Mass. 217.

77. Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252, 11 N. Y. Annot. Cas. 187 [*affirmed* in 174 N. Y. 514, 66 N. E. 1108]; Holland Trust Co. *v.* Waddell, 75 Hun (N. Y.) 104, 26 N. Y. Suppl. 980 [*affirmed* in 151 N. Y. 666, 46 N. E. 1148].

78. *California.*— Fernandez *v.* Tormey, 121 Cal. 515, 53 Pac. 1119, holding such action not a conversion or divesting of the pledgor's title to the mortgage securities.

Mississippi.— Natchez *v.* Minor, 9 Sm. & M. 544, 48 Am. Dec. 727.

New York.— Field *v.* Sibley, 74 N. Y. App. Div. 81, 77 N. Y. Suppl. 252, 11 N. Y. Annot. Cas. 187 [*affirmed* in 174 N. Y. 514, 66 N. E. 1108]; Westervelt *v.* Haff, 2 Sandf. Ch. 98.

South Carolina.— Ruberg *v.* Brown, 71 S. C. 287, 51 S. E. 96.

Wisconsin.— Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872, holding that the pledgee of a mortgage may exercise an option given by the mortgage to the mortgagee or his assigns to declare the whole debt due after any default.

United States.— Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed. 814, holding that upon such foreclosure and purchase of the property by the pledgee, the bonds and mortgage and notes become the foundation of the foreclosure judgment, and must be surrendered for cancellation, although judgment be rendered only for the amount due upon the notes.

See 40 Cent. Dig. tit. "Pledges," § 186.

79. McDougall *v.* Hazelton Tripod-Boiler Co., 88 Fed. 217, 31 C. C. A. 487.

80. That plaintiff is merely a pledgee is no defense see Commercial Paper, 8 Cyc. 59, 60.

81. Scheppers' Appeal, 125 Pa. St. 598, 17 Atl. 479.

82. Manner of discharge see *supra*, VI, A. 2.

83. Mutual Bank *v.* Burrell, 29 Misc. (N. Y.) 322, 60 N. Y. Suppl. 522.

84. Barr *v.* Kane, 32 Ind. 416.

85. St. Louis Third Nat. Bank *v.* Harrison, 10 Fed. 243, 3 McCrary 316.

86. Withers *v.* Sandlin, 36 Fla. 619, 18 So. 856; Ridley *v.* Ford, 24 Ga. 183; Hoffacker *v.* Manufacturers' Nat. Bank, (Md. 1892) 23 Atl. 579; Williams *v.* Baltimore Nat. Bank, 72 Md. 441, 20 Atl. 191.

Effect of payment to pledgor on account of recovery by pledgee see *infra*, VII, E, 7.

87. Burnham *v.* Windram, 164 Mass. 313, 41 N. E. 305.

88. Smith *v.* Hunter, 33 Ind. 106.

89. Williams *v.* Jones, 79 Ala. 119.

90. Proctor *v.* Whitcomb, 137 Mass. 303.

91. Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269 (holding that if the notes are produced at the trial, payment to the holder will extinguish them); Liner *v.* J. B. Watkins Land Mortg. Co., 29 Tex. Civ. App. 187, 68 S. W. 311.

by a purchaser from the pledgee it was not proved that the pledgee made demand and served notice on the pledgor before the sale; [92] that an assignee of the pledgee who is a party to the action claims a lien on the pledge as security for a debt of the pledgee; [93] that other parties are claiming title to the note or its proceeds; [94] that upon the pledge of a negotiable instrument before maturity, the consideration between the maker and the pledgor has failed; [95] that equities have arisen between the maker and the pledgor since the assignment and notice to the maker; [96] or that the pledgee has exchanged other collateral held by him for the principal debt, unless such exchange has caused a loss to the pledgor.[97] Nor is the maker entitled to set off money received by the pledgee from a person who was only secondarily liable on the pledgor's debt.[98]

3. Right to Compel Pledgee to Exhaust Other Collateral. The maker of a collateral note cannot compel the pledgee, before enforcing it, to exhaust other security held by him for the principal debt,[99] even though the maker has a set-off available against the pledgor.[1] Nor can a surety compel the pledgee to apply the proceeds of pledged property upon a note to which he is a party rather than to other notes for which the property was also held as security.[2] Nor will an injunction be issued to restrain a pledgee from enforcing his collaterals while his debtors and the sureties on the collaterals are litigating their equities therein.[3]

4. Parties. Ordinarily the pledgee of a chose in action may sue thereon in his own name,[4] and in the absence of special circumstances,[5] the pledgor is not a necessary party to the suit; [6] but all persons claiming an interest in the pledge adverse to that of the pledgee should be joined in the action.[7] But that does not mean that the pledgor, where he is the real party in interest, may not also bring the suit either alone, or by joining with the pledgee as plaintiff.[8] Under a statute requiring every action to be prosecuted "in the name of the real party in interest," [9] it has been held that either the pledgor [10] or the pledgee of a note which has not been

92. Hatch *v.* Brewster, 53 Barb. (N. Y.) 276.

93. Ridgway *v.* Bacon, 72 Hun (N. Y.) 211, 25 N. Y. Suppl. 651.

94. Moody *v.* Andrews, 39 N. Y. Super. Ct. 302 [*affirmed* in 64 N. Y. 641].

95. Hardie *v.* Wright, 83 Tex. 345, 18 S. W. 615.

96. Moody *v.* Andrews, 39 N. Y. Super. Ct. 302 [*affirmed* in 64 N. Y. 641]; Eastern Tube Co. *v.* Harrison, 140 Fed. 519.

97. Girard F. & M. Ins. Co. *v.* Marr, 46 Pa. St. 504.

98. Brown *v.* Pegram, 125 Fed. 577, 60 C. C. A. 383 [*affirming* 122 Fed. 1000].

99. Dallemand *v.* Nova Scotia Bank, 54 Ill. App. 600; Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85.

1. Dallemand *v.* Nova Scotia Bank, 54 Ill. App. 600; Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85.

2. Denniston *v.* Hill, 173 Pa. St. 633, 34 Atl. 452.

Surety's right to control application of payments see Payment, 30 Cyc. 1251.

3. Goodwyn *v.* State Bank, 4 Desauss. Eq. (S. C.) 389.

4. Turner *v.* Stroud, 37 Ark. 556; Maryland Fidelity, etc., Co. *v.* Johnston, 117 La. 880, 42 So. 357; Lafayette Bank *v.* Bruff, 33 La. Ann. 624. See also *supra*, VII, D, 1.

Pledgee of a lien may bring suit in his own name to enforce the lien, but the extent of his recovery for himself will be the amount of the debt the pledgor owes him, and he will be a trustee for the pledgor for the overplus. Dickey *v.* Porter, 203 Mo. 1, 2, 101 S. W. 586.

Upon the transfer of a note and mortgage to a third party as security for a debt under an agreement that he is to collect the collateral and apply it on the debt, the suit for the foreclosure of the mortgage should be in the name of the pledgor, as the real owner of the note and mortgage. Gardinier *v.* Kellogg, 14 Wis. 605.

5. But where plaintiff's pleadings show the note was delivered to a bank merely as collateral security and that plaintiff voluntarily satisfied the debt to the bank and took the note as security for the payment so made, the personal representative of the original pledgor is a necessary party. Taylor *v.* Hord, 30 S. W. 693, 17 Ky. L. Rep. 95.

6. Curtis *v.* Mohr, 18 Wis. 615.

Maker of note.— Where a suit is brought against the pledgor on the ground that he has notified the maker of a note transferred by him to the pledgee as collateral not to pay it to the pledgee, the maker is a necessary party. Woodard *v.* Sauls, 134 N. C. 274, 46 S. E. 507.

7. Ridgway *v.* Bacon, 72 Hun (N. Y.) 211, 25 N. Y. Suppl. 651.

8. Dickey *v.* Porter, 203 Mo. 1, 101 S. W. 586.

9. See Parties, 30 Cyc. 44 *et seq.*

10. Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373.

Pledgee as necessary party.— Under Code

indorsed by the payee[11] may sue thereon in his own name, but that the pledgor of a bond is a necessary party to a suit by the pledgee against the obligor on the bond;[12] and that the pledgor of a special tax bill may sue in his own name to enforce the same.[13]

5. Pleading. The pledgee's petition must show his title to the chose in action,[14] and his right to enforce it against the maker or obligor.[15]

6. Evidence. Since the pledgee may be a *bona fide* holder of the instrument only to the extent of the amount for which he holds it as security, in a suit by him against the maker, the latter may show that he is not liable on the instrument to the pledgor;[16] but the presumption is that the pledgee is entitled to enforce the collateral for its face value, and the burden is on the maker to prove the amount of the pledgor's debt to the pledgee less than the face of the collateral.[17]

7. Amount and Extent of Recovery.[18] As a general rule the *bona fide* pledgee of a chose in action may enforce it for the entire amount thereof against the maker as obligor, and will retain any surplus after the payment of his debt, as trustee for the pledgor;[19] but where the maker proves a defense not available as a bar to

Civ. Proc. § 367, requiring actions to be prosecuted in the name of the real party in interest, the pledgor of a note is entitled to maintain a suit thereon against the maker, although Civ. Code, § 3006, authorizes a pledgee of an evidence of debt to collect it at maturity, but the pledgee would be a necessary party to the action. Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373. But although under Code Civ. Proc. § 389, authorizing the court to bring in necessary parties, the pledgee of a note should be brought in as a party to an action by the pledgor thereon, where the pledgee still retained an interest at the time of the trial, this was not necessary where the note had been transferred back to the pledgor before the time of trial. Graham *v.* Light, *supra*.

11. Van Riper *v.* Baldwin, 19 Hun (N. Y.) 344 [*affirmed* in 85 N. Y. 618]. See also Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373.

Pledgor as necessary party.— Under Cal. Code Civ. Proc. § 3006, the pledgor would not be a necessary party in such an action. Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373.

12. Chew *v.* Brumagin, 21 N. J. Eq. 620, construing N. Y. Code, § 111.

13. Dickey *v.* Porter, 203 Mo. 1, 101 S. W. 586, holding that the fact that plaintiff had pledged the special tax bill sued upon as collateral security for a note for a less sum, there being no default in the payment of the note, did not prevent him from suing to enforce the tax bill, and under Rev. St. (1899) § 540 [Annot. St. (1906) p. 575], requiring actions to be prosecuted in the name of the real party in interest, the action was properly brought by him at law.

14. Ridgway *v.* Bacon, 72 Hun (N. Y.) 211, 25 N. Y. Suppl. 651.

15. Louisiana Sav. Bank, etc., Co. *v.* Bussey, 27 La. Ann. 472.

16. Gammon *v.* Huse, 9 Ill. App. 557; Steere *v.* Benson, 2 Ill. App. 560. For further cases see *infra*, VII, E, 7.

17. Hancock *v.* Hodgson, 4 Ill. 329; Gammon *v.* Huse, 9 Ill. App. 557.

18. **Amount of recovery on bills and notes pledged** as affected by defenses in favor of and against prior parties see Commercial Paper, 8 Cyc. 300.

19. *Illinois.*— Tooke *v.* Newman, 75 Ill. 215.

Louisiana.— Smith *v.* Isaacs, 23 La. Ann. 454.

Maine.— Gowen *v.* Wentworth, 17 Me. 66.

Massachusetts.— Pomeroy *v.* Smith, 17 Pick. 85.

Nebraska.— Seeley *v.* Wickstrom, 49 Nebr. 730, 68 N. W. 1017; Barmby *v.* Walfe, 44 Nebr. 77, 62 N. W. 318; Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85.

Rhode Island.— Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219.

South Carolina.—Charleston Bank *v.* Chambers, 11 Rich. 657.

Texas.— Bond *v.* National Exch. Bank, (Civ. App. 1899) 53 S. W. 71; Jackson *v.* Chemical Nat. Bank, (Civ. App. 1898) 46 S. W. 295.

Vermont.— Tarbell *v.* Sturtevant, 26 Vt. 513; Sawyer *v.* Cutting, 23 Vt. 486.

Wisconsin.— Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872; Union Nat. Bank *v.* Roberts, 45 Wis. 373; Northwestern Mut. L. Ins. Co. *v.* Germania F. Ins. Co., 40 Wis. 446; Croft *v.* Bunster, 9 Wis. 503 (note secured by mortgage); Hilton *v.* Waring, 7 Wis. 492.

See 40 Cent. Dig. tit. "Pledges," § 194.

Contra.— Letellier *v.* Boivin, 16 Quebec Super. Ct. 428, holding that one to whom a note is transferred as collateral security has no recourse against the maker in excess of the amount due on the principal debt.

Pledge less than principal debt.— Where it appears that the amount of the notes pledged is less than the principal debt, it is not error to give judgment for the amount of the notes without directing an account of the sum due the pledgee. Dudley *v.* Minor, 100 Va. 728, 42 S. E. 870.

Costs of the action, including attorney's fee, may be recovered from the maker. Hanover Nat. Bank *v.* Brown, (Tenn. Ch. App. 1899) 53 S. W. 206.

recovery by the pledgee, but good as against the pledgor, the pledgee will be allowed to recover only to the extent of the debt for which he holds the collateral as security.[20] So where the suit is by the pledgee against one who became a party to the instrument for the accommodation of the pledgor,[21] or where the pledgor is also the

20. *Arkansas.*— Brown *v.* Callaway, 41 Ark. 418.

California.— Bell *v.* Bean, 75 Cal. 86, 16 Pac. 521.

Georgia.— Hatcher *v.* Independence Nat. Bank, 79 Ga. 547, 5 S. E. 111; Ridley *v.* Ford, 24 Ga. 183.

Illinois.— Lull *v.* Stone, 37 Ill. 224; Germania L. Ins. Co. *v.* Koehler, 59 Ill. App. 592; Vanliew *v.* Galesburg Second Nat. Bank, 21 Ill. App. 126; Gammon *v.* Huse, 9 Ill. App. 557; Steere *v.* Benson, 2 Ill. App. 560.

Indiana.— Valette *v.* Mason, 1 Ind. 288.

Kansas.— Farmers' State Bank *v.* Blevins, 46 Kan. 536, 26 Pac. 1044; McCrum *v.* Corby, 11 Kan. 464.

Louisiana.— Mechanics' Bldg. Assoc. *v.* Ferguson, 29 La. Ann. 548; Citizens' Bank *v.* Payne, 18 La. Ann. 222, 89 Am. Dec. 650; Lacroix *v.* Derbigny, 18 La. Ann. 27.

Massachusetts.— Fisher *v.* Fisher, 98 Mass. 303; Bond *v.* Fitzpatrick, 8 Gray 536; Williams *v.* Cheney, 3 Gray 215; Chicopee Bank *v.* Chapin, 8 Metc. 40.

Minnesota.— St. Paul Nat. Bank *v.* Connor, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

Missouri.— Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Grant *v.* Kidwell, 30 Mo. 455; Doud *v.* Reid, 53 Mo. App. 553.

Nebraska.— Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85; Helmer *v.* B. M. Webster Commercial Bank, 28 Nebr. 474, 44 N. W. 482; Connecticut Trust, etc., Co. *v.* Trumbo, 2 Nebr. (Unoff.) 850, 90 N. W. 216.

Nevada.— Haydon *v.* Nicoletti, 18 Nev. 290, 3 Pac. 473.

New Jersey.— Duncan *v.* Gilbert, 29 N. J. L. 521; Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.— Huff *v.* Wagner, 63 Barb. 215; Fourth Nat. Bank *v.* Snow, 3 Daly 167; Pearce, etc., Engineering Co. *v.* Brouer, 10 Misc. 502, 31 N. Y. Suppl. 195; Williams *v.* Smith, 2 Hill 301.

Ohio.— Handy *v.* Sibley, 46 Ohio St. 9, 17 N. E. 329; Warren First Nat. Bank *v.* Fowler, 36 Ohio St. 524, 38 Am. Rep. 610; Cincinnati Second Nat. Bank *v.* Hemingway, 34 Ohio St. 381.

Pennsylvania.— Logan *v.* Cassell, 88 Pa. St. 288, 32 Am. Rep. 453.

Rhode Island.— Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219.

Tennessee.— Memphis Bethel *v.* Continental Nat. Bank, 101 Tenn. 130, 45 S. W. 1072; Longmire *v.* Fain, 89 Tenn. 393, 18 S. W. 70; Stephenson *v.* Landis, 14 Lea 433; Ramsey *v.* Clark, 4 Humphr. 244, 40 Am. Dec. 645.

Texas.— Wright *v.* Hardie, 88 Tex. 653, 32 S. W. 885.

Wisconsin.— Union Nat. Bank *v.* Roberts, 45 Wis. 373; Curtis *v.* Mohr, 18 Wis. 615.

England.— Wiffen *v.* Roberts, 1 Esp. 261.

See 40 Cent. Dig. tit. "Pledges," §§ 75, 77, 194.

Bankrupt maker.— Although a pledgee may prove the pledged notes for their full amount against the assets in bankruptcy of the maker, yet if there are equities which would prevent the pledgor from proving, the pledgee can receive in dividends only the amount for which he holds the notes in pledge. *Ex p.* Kelty, 15 Fed. Cas. No. 7,681, 1 Lowell 394.

Pledgor's equity purchased by maker.— Where a party holds a note as indemnity against an acceptance given by him, he can recover against the maker who has purchased the pledgor's equity in it, only the amount actually paid by him on the acceptance and such commissions as were agreed on, with interest and costs. Warren *v.* Emerson, 29 Fed. Cas. No. 17,195, 1 Curt. 239.

Where equities between the maker and other parties remain to be determined, the surplus, after payment of the pledgee's debt, may be directed to be paid into court for distribution under its direction. Nantucket Pac. Bank *v.* Stebbins, 6 Duer (N. Y.) 341.

Upon the payment of the pledgor's debt to the pledgee, the pledgee's right to enforce the collateral note against the maker is at an end. Roche *v.* Ladd, 1 Allen (Mass.) 436.

Where a pledged note was without consideration, and is saved from nullity in the hands of the pledgee only because taken by him in good faith before maturity, the judgment against the maker will not be absolute, but will be framed so as to be executed only in so far as may be necessary to carry out the purpose of the pledge. Maryland Fidelity, etc., Co. *v.* Johnston, 117 La. 880, 42 So. 357.

21. *California.*— Bell *v.* Bean, 75 Cal. 86, 16 Pac. 521.

Maryland.—Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts.— Skillings *v.* Marcus, 159 Mass. 51, 34 N. E. 80; Fisher *v.* Fisher, 98 Mass. 303; Hilton *v.* Smith, 5 Gray 400; Stoddard *v.* Kimball, 6 Cush. 469; Chicopee Bank *v.* Chapin, 8 Metc. 40.

New Jersey.— Duncan *v.* Gilbert, 29 N. J. L. 521.

New York.— Continental Nat. Bank *v.* Bell, 125 N. Y. 38, 25 N. E. 1070; Blydenburgh *v.* Thayer, 1 Abb. Dec. 156, 3 Keyes 293, 1 Transcr. App. 221, 34 How. Pr. 88; East River Bank *v.* Butterworth, 45 Barb. 476.

Ohio.— Handy *v.* Sibley, 46 Ohio St. 9, 17 N. E. 329; Brown *v.* Merchants' Nat. Bank, 41 Ohio St. 445.

Rhode Island.— Atlas Bank *v.* Doyle, 9 R. I. 76, 96 Am. Dec. 368, 11 Am. Rep. 219.

Virginia.— Berkeley *v.* Tinsley, 88 Va. 1001, 14 S. E. 842.

See 40 Cent. Dig. tit. "Pledges," § 194.

Compare Malone *v.* Wright, 90 Tex. 50, 36 S. W. 420 [*modifying* (Civ. App. 1896) 34 S. W. 455].

maker of the collateral note sued on,[22] the amount of the pledgee's recovery will be restricted to the principal debt.

PLEGIIS ACQUIETANDIS. A writ that anciently lay for a surety against him for whom he was surety, if he paid not the money at the day.[1]

PLENA ET CELERIS JUSTITIA FIAT PARTIBUS. A maxim meaning "Let full and speedy justice be done to the parties."[2]

PLENARY. Full; entire; complete; unabridged.[3]

PLENE ADMINISTRAVIT. Literally "He has fully administered." In practice, a plea by an executor or administrator that he has fully administered all the assets that have come to his hands.[4] (See, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 998.)

PLENE COMPUTAVIT. Literally "He has fully accounted." A plea in an action of account-render, alleging that the defendant has fully accounted.[5] (See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 412.)

PLENIPOTENTIARY. A term applied, in international law, to ministers and envoys of the second rank of public ministers.[6] (See, generally, AMBASSADORS AND CONSULS, 2 Cyc. 260.)

PLIGHT. CONDITION, *q. v.*; POSITION, *q. v.*; state; situation; predicament.[7]

PLOT. As a noun, a stratagem or secret plan; a secret project; an intrigue; a conspiracy.[8] As a verb, to plan; form plans for; devise; contrive; conspire to effect or bring about.[9] (Plot: In General, see CONSPIRACY, 8 Cyc. 615. Entrapment, see CRIMINAL LAW, 12 Cyc. 160.)

PLOTTAGE. The added value which a plot of land has against the aggregate value of the several lots which compose it.[10]

PLOWBOTE. A sufficient supply of wood for making and repairing instruments of husbandry.[11] (See COMMON LANDS, 8 Cyc. 349.)

PLUMB. True; vertical; accurate.[12]

PLUMBER. One who fits dwellings and public buildings with tanks, pipes, traps, fittings, and fixtures for the conveyance of gas, water, and sewage.[13] (See,

22. Vogan *v.* Caminetti, 65 Cal. 438, 4 Pac. 435; Bowles *v.* Doble, 11 Oreg. 474, 5 Pac. 918.

1. Black L. Dict. [*citing* Fitzherbert Nat. Brev. 137].

2. Black L. Dict. [*citing* 4 Inst. 67].

3. Black L. Dict.

"Plenary causes" are those in which the order and solemnity of the law are strictly observed in the regular contestation of the suit. Greenleaf Ev. [*quoted* in Arellano *v.* Chacon, 1 N. M. 269, 276, where the term "summary proceedings" is also defined].

"Under the Mexican system possessory suits are either plenary, being such as are prosecuted and defended in the manner and with the formalities of ordinary judicial proceedings; or summary, also termed interdicts, which are conducted without the solemnities of ordinary suits, are terminated within a short period, and either admit of no appeal, or only of an appeal without suspension of the execution of the judgment. (4 Feb. Mej. 271, Sec. 1, Ed. 1834; Escriche Dic. de Leg. Art. '*Juicio Posesorio.*')" Sunol *v.* Hepburn, 1 Cal. 254, 259.

4. Burrill L. Dict. [*citing* Tidd Pr. 644]. See also Peck *v.* Marling, 22 W. Va. 708, 733, 734; Smith *v.* Chapman, 93 U. S. 41, 42, 23 L. ed. 795; Jessup *v.* Simpson, 14 U. C. Q. B. 213, 217; Nugent *v.* Campbell, 3 U. C. Q. B. 301, 303.

5. Black L. Dict.

6. Burrill L. Dict. [*citing* Wheaton Int. L. p. 3, § 6].

7. Century Dict. See also Texas, etc., R. Co. *v.* Echols, 17 Tex. Civ. App. 677, 684, 41 S. W. 488, where it is said that the word "plight" does not universally mean a dangerous condition.

8. Century Dict.

9. Century Dict.

Distinguished from "to advise" and "to consult" in State *v.* McDonald, 4 Port. (Ala.) 449, 460.

10. Matter of Armory Bd., 35 Misc. (N. Y.) 548, 550, 72 N. Y. Suppl. 37, especially in certain parts of the city of New York.

The term is also used to designate the additional value given to city lots by the fact that they are contiguous, which enables them to be utilized as large blocks of land. Matter of Armory Bd., 35 Misc. (N. Y.) 548, 550, 73 N. Y. App. Div. 152, 154, 76 N. Y. Suppl. 766.

11. Anderson *v.* Cowan, 125 Iowa 259, 260, 101 N. W. 92.

12. Century Dict. [*quoted* in Kirby Lumber Co. *v.* Poindexter, (Tex. Civ. App. 1907) 103 S. W. 439, 440, where it is held that proof that a wheel was not round and "wobbly" supports an allegation that the wheel was "out of plumb"].

13. State *v.* Gardner, 58 Ohio St. 599, 606, 51 N. E. 136, 65 Am. St. Rep. 785, 41 L. R. A. 689, where it is said: "The busi-

generally, CONSTITUTIONAL LAW; LICENSES, 25 Cyc. 620, text and note 92.[14] See also PLUMBING.)

PLUMBING. A part of the work of erection and construction of buildings.[15] (See PLUMBER.)

PLUNDER. As a noun, that which is taken from the enemy by force; "spoil," "rapine," "booty," "pillage," etc.[16] As a verb in its most common meaning, to take property from persons or places by open force;[17] but in a fuller sense, to take by fraud.[18] (Plunder: In General, see BURGLARY; EMBEZZLEMENT; LARCENY; PIRACY; RECEIVING STOLEN GOODS; ROBBERY. Of Wreck, see SHIPPING. See also PLUNDERAGE.)

PLUNDERAGE. A maritime term for the embezzlement of goods on board a ship.[19] (See PLUNDER.)

PLURAL. Containing more than one; consisting of two or more; designating two or more.[20] (Plural: Wife, see BIGAMY, 5 Cyc. 687.)

PLURALIS NUMERUS EST DUOBUS CONTENTUS. A maxim meaning "The plural number is contained in two."[21]

ness of the plumber is not ranked with the learned professions, and that much of his work is mechanical merely, calling for the exercise of deftness of the hands rather than the possession of scientific knowledge."

14. See 8 Cyc. 1068 note 13.

15. Owen *v.* Johnson, 174 Pa. St. 99, 101, 34 Atl. 549, so recognized in relation to mechanics' liens.

It is not a luxury or convenience only but an essential part of modern city dwellings. Owen *v.* Johnson, 174 Pa. St. 99, 101, 34 Atl. 549.

16. Webster Dict.; Worcester Dict. [both *quoted* in U. S. *v.* Stone, 8 Fed. 232, 246].

Synonymous with "spoil" see U. S. *v.* Pitman, 27 Fed. Cas. No. 16,051, 1 Sprague 196, 198.

17. Carter *v.* Andrews, 16 Pick. (Mass.) 1, 9, where it is said: "This may be in a course of lawful war, or by unlawful hostility, as in the case of pirates or banditti."

18. U. S. *v.* Pitman, 27 Fed. Cas. No. 16,051, 1 Sprague 196, where it is said: "It is contended by counsel, that 'to plunder,' means to take by force. But although this is undoubtedly one sense of the word, it by no means expresses its full meaning. The various lexicographers, who have been quoted at the bar, inform us that it means as well, a taking by fraud."

No special legal signification.—"Mr. Stephen says of this word 'plunder' that he does not know that it has any special legal signification. Steph. Dig. Crim. Law, (St. Louis, Ed. 1878) 261, 266, and notes. In Roget's Thesaurus it will be found grouped with 'mutilation,' 'spoliation,' 'destruction,' and 'sack,' at section 619; with 'harm,' 'wrong,' 'molest,' spoil,' 'despoil,' 'lay waste,' 'dismantle,' 'demolish,' 'consume,' 'overrun,' and 'destroy,' at section 649; with 'booty,' 'spoil,' and 'prey,' at section 793; and with 'taking,' 'catching,' 'seizing,' 'carrying away,' 'stealing,' 'thieving,' 'depredation,' 'pilfering,' 'larceny,' 'robbery,' 'marauding,' 'embezzlement,' 'filch,' 'pilfer,' and 'purloin,' at sections 791, 792, (Sears' Ed. 1866). In Abbott's Law Dictionary 'plunder' is said to be often used to express the idea of taking property without right to do so; but not as expressing the nature of the wrong involved, or necessarily imputing a felonious intent. 2 Abb. Dict. 284, word, 'Plunder.' In Bouvier's Law Dictionary it is limited to the idea of capturing property from a public enemy on land; but 'plunderage' is defined as a maritime term for the 'embezzlement' of goods on board a ship. The word is used in Rev. St. § 5361, in describing an intent as a synonym of 'despoil,' this being also a section of the act of 1825, from which the one we are considering was taken. The first English statute of 7 and 8 Geo. IV. c. 29, § 18, used the words 'plunder or steal,' but contained a proviso that where things of small value were cast on shore and were stolen, without circumstances of violence, the offender might be prosecuted for simple larceny; which shows that the statute was not regarded as declaring the crime of larceny simply, but something more. Indeed, anciently, the common law would take no jurisdiction of theft upon the high seas, but committed the offender to answer in the admiralty. The second English statute of 1 Vict. c. 87, § 8, uses the words 'plunder or steal,' as does the latest, 24 & 25 Vict. c. 96, § 64, without the proviso, and, with the exception of the word 'destroy,' the act is the same as our act of 1825, which was enacted before any of the English statutes. 2 Russ. Crimes, 150; 3 Fish. Dig. (Jacob's Ed.) 3322." U. S. *v.* Stone, 8 Fed. 232, 246.

19. Bouvier L. Dict. [*quoted* in U. S. *v.* Stone, 8 Fed. 232, 246].

"It will be found, by reference to the shipping articles used in England and this country, that the word 'plunderage,' is used in them, in a manner to imply, not a forcible taking, but a fraudulent taking, in fact, an embezzlement." U. S. *v.* Pitman, 27 Fed. Cas. No. 16,051, 1 Sprague 196, 198. See also Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 303, 319.

20. Webster Dict. [*quoted* in Friel *v.* Wood, 1 Utah 160, 165].

It may sometimes mean only one.—Bouvier L. Dict. [*quoted* in Pierson *v.* Armstrong, 1 Iowa 282, 295, 63 Am. Dec. 440].

21. Burrill L. Dict. [*citing* Colt *v.* Glover, 1 Rolle 451, 476].

PLURALITER. In the plural.[22] (See PLURAL.)

PLURALITY. In elections, the number of votes received by one candidate, in excess of those received by either one of two or more other candidates.[23] (Plurality: Of Subjects, see STATUTES. Of Votes, Generally, see ELECTIONS, 15 Cyc. 388; In County-Seat Election, see COUNTIES, 11 Cyc. 376; In Governing Body of City, see MUNICIPAL CORPORATIONS, 28 Cyc. 335.)

PLURES COHÆREDES SUNT QUASI UNUM CORPUS PROPTER UNITATEM JURIS QUOD HABENT. A maxim meaning "Several co-heirs are, as it were, one body, by reason of the unity of right which they possess."[24]

PLURES PARTICIPES SUNT QUASI UNUM CORPUS, IN EO QUOD UNUM JUS HABENT. A maxim meaning "Several parceners are as one body, in that they have one right."[25]

PLURIES. A term applied to the third or subsequent writ issued when an original and alias writ have proved ineffectual.[26] (Pluries: Execution, see EXECUTIONS, 17 Cyc. 1034; JUSTICES OF THE PEACE, 24 Cyc. 623. Process, see PROCESS. Writ to Revive Judgment, see JUDGMENTS, 23 Cyc. 1453. Writ to Suspend Statute of Limitations, see LIMITATION OF ACTIONS, 25 Cyc. 1297.)

PLUS EXEMPLA QUAM PECCATA NOCENT. A maxim meaning "Examples hurt more than crimes."[27]

PLUS PECCAT AUTHOR QUAM ACTOR. A maxim meaning "The originator or instigator of a crime is a worse offender than the actual perpetrator of it."[28]

PLUS VALET CONSUETUDO QUAM CONCESSIO. A maxim meaning "Custom is more powerful than grant."[29]

PLUS VALET UNUS OCULATUS TESTIS QUAM AURTITI DECEM. A maxim meaning "One eye-witness is of more weight than ten ear-witnesses, (or those who speak from hearsay)."[30]

PLUS VIDENT OCULI QUAM OCULUS. A maxim meaning "Several eyes see more than one."[31]

PLY. As a noun, a fold; a thickness.[32] As a verb, a word importing the performance of repeated acts of the same kind;[33] to make regular trips.[34]

P. M. An abbreviation for "postmaster";[35] also for "post-meridian," afternoon.[36]

PNEUMATIC TUBES. Tubes for the transmission of parcels operated by atmospheric pressure applied within the tubes.[37]

22. Burrill L. Dict. [*citing* Roe *v.* Prideaux, 10 East 158].

23. Green *v.* State Bd. of Canvassers, 5 Ida. 130, 140, 47 Pac. 259, 95 Am. St. Rep. 169.

There can be no plurality where there are but two candidates, or two ways of voting on a proposition. Green *v.* State Bd. of Canvassers, 5 Ida. 130, 140, 47 Pac. 259, 95 Am. St. Rep. 169.

Distinguished from "majority" see Black L. Dict.

24. Black L. Dict. [*citing* Coke Litt. 163].

25. Black L. Dict. [*citing* Coke Litt. 164].

26. Black L. Dict.

27. Black L. Dict.

28. Burrill L. Dict. [*citing* Flower's Case, 5 Coke 99*a*, 77 Eng. Reprint 208].

29. Black L. Dict.

30. Burrill L. Dict. [*citing* 4 Inst. 279].

31. Black L. Dict. [*citing* 4 Inst. 160].

32. Century Dict. See Jaqua *v.* Witham, etc., Co., 106 Ind. 545, 546, 7 N. E. 314.

33. New York, etc., R. Co. *v.* Scovill, 71 Conn. 136, 147, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157.

34. Webster Dict. [*quoted* in San Francisco *v.* Talbot, 63 Cal. 485, 487, where it is said: "'Plying' implies regularity, and is not the term used to express the character of the irregular and transient visitations of a ship to a port in the course of her voyage to various ports. In that case a vessel is said to 'touch' at each of the ports which she visits"].

"Plying coastwise" is used to indicate vessels engaged in the domestic trade, or plying between port and port in the United States, as contradistinguished from those vessels engaged in the foreign trade, or plying between a port of the United States and a port of a foreign country. San Francisco *v.* California Steam Nav. Co., 10 Cal. 504, 508.

"Plying for hire" see *Ex p.* Kippins, [1897] 1 Q. B. 1, 3, 18 Cox C. C. 459, 60 J. P. 791, 66 L. J. Q. B. 95, 75 L. T. Rep. N. S. 421, 45 Wkly. Rep. 188.

35. Black L. Dict.

36. Black L. Dict. See also Heddenick *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

37. Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 105, 20 N. E. 594, 2 L. R. A. 789.

PNEUMONIA. See HOMICIDE, 21 Cyc. 700.

P. N. R. Letters when used as an abbreviation which have neither customary signification nor usual interpretation, nor any accepted meaning of which judicial notice can be taken.[38]

POACH. To steal game on a man's land.[39] (See FISH AND GAME, 19 Cyc. 1000; POACHING.)

POCKET. A small bag inserted in a garment for carrying small articles.[40]

POD NET. A species of fishing net also called DUTCH NET,[41] *q. v.*

PŒNA AD PAUCOS, METUS AD OMNES. A maxim meaning "Punishment to few, dread or fear to all."[42]

PŒNA AD PAUCOS, METUS AD OMNES PERVENIAT. A maxim meaning "If punishment be inflicted on a few, a dread comes to all."[43]

PŒNÆ POTIUS MOLLIENDÆ QUAM EXASPERANDÆ SUNT. A maxim meaning "Punishments should rather be softened than aggravated."[44]

PŒNÆ SUNT RESTRINGENDÆ. A maxim meaning "Punishments should be restrained."[45]

PŒNA EX DELICTO DEFUNCTI HÆRES TENERI NON DEBET. A maxim meaning "The heir ought not to be bound by a penalty arising out of the wrongful act of the deceased."[46]

PŒNA GRAVIOR ULTRA LEGEM POSITA ÆSTIMATIONEM CONSERVAT. A maxim meaning "A heavier punishment put beyond the law preserves esteem."[47]

PŒNA NON DEBET ANTEIRE CRIMEN.[48] A maxim meaning "Punishment ought not to precede accusation."[49]

PŒNA NON POTEST, CULPA PERENNIS ERIT. A maxim meaning "Punishment cannot be, crime will be, perpetual."[50]

PŒNA SUOS TENERE DEBET ACTORES [AUCTORES] ET NON ALIOS. A maxim meaning "Punishment ought to bind its own authors [those who have caused it,] and not others."[51]

PŒNA TOLLI POTEST, CULPA PERENNIS ERIT. A maxim meaning "The punishment can be removed, but the crime remains."[52]

38. So held, where the form "P. N. R." was used in a prescription for an intoxicant sold, instead of the statement required by statute that such intoxicant was "prescribed as a necessary remedy." State *v.* Manning, 107 Mo. App. 51, 56, 81 S. W. 223, 225.

39. Black L. Dict.

Night poaching see FISH AND GAME, 19 Cyc. 1017 note 56.

Trespass on private lands and fisheries see FISH AND GAME, 19 Cyc. 1016.

40. Webster Int. Dict.

"Flue pocket" see 19 Cyc. 1081.

"The pocket of" a person named indicates naturally and sufficiently for the purposes of an indictment, a pocket in the clothing worn by him. See Com. *v.* Sherman, 105 Mass. 169, 171.

Pocketing a venire see Keppele *v.* Williams, 1 Dall. (Pa.) 29, 1 L. ed. 23.

"Pocket-judgment" was a statute-merchant which was enforceable at any time after nonpayment on the day assigned, without further proceedings. Wharton L. Lex.

"Pocket pistol" is such a pistol as a man ordinarily carries, or may conveniently carry, or actually carries on his person in his pocket. Porter *v.* State, 7 Baxt. (Tenn.) 106, 108. See also PISTOL, 30 Cyc. 1632.

41. See Rea *v.* Hampton, 101 N. C. 51, 52, 7 S. E. 649, 9 Am. St. Rep. 21, where it appears that the use of such nets is forbidden by statute in certain waters in North Carolina.

42. Bouvier L. Dict.

43. Black L. Dict.

44. Morgan Leg. Max.

45. Peloubet Leg. Max.

46. Burrill L. Dict.

47. Morgan Leg. Max.

48. Lofft Max. No. 120, without translation.

49. It is to be noted that compilers, in translating this maxim, have rendered "crimen" by "crime." See Morgan Leg. Max.; Peloubet Leg. Max. The word, however, has another sense, namely "accusation or charge." See Black L. Dict. and Burrill L. Dict., in which, as the context shows, it must be here used.

50. Peloubet Leg. Max.

51. Burrill L. Dict. *Compare* Black L. Dict., which, omitting the alternative "*auctores*" translates "*suos actores*" as "the guilty."

52. Bouvier L. Dict., where, however, the Latin maxim is quoted from Houghtaling *v.* Kelderhouse, 1 Park. Cr. (N. Y.) 241, 242, in which it is misquoted from Browne *v.* Crashaw, 2 Bulstr. 154, where, instead of "*tolli*" appears the word "*mori*."

PŒNA VEL REMEDIUM EX INCREMENTIO QUOD PRIUS ERAT NON TOLLIT. A maxim meaning "Neither punishment nor remedy takes away from the increase which was before." [53]

POINT. As a noun, in practice, a distinct proposition or question of law arising or propounded in a case; [54] although in a less usual connection, the term may relate to "fact" and has been construed as synonymous with that word.[55] As a noun, the term is also often used in the sense of PLACE,[56] *q. v.*, in describing boundaries, and in other connections.[57] As a verb, to indicate, show, make manifest; often with "out." [58]

POINTER DOG. A bird dog, used in hunting birds.[59] (See POINTING.)

POINTER OF WALLS. One engaged in the occupation of pointing.[60] (See POINTING.)

POINTING. As used of dogs, standing and intently looking in one direction; the attitude taken in setting birds.[61] In brick-masonry, finishing up the lines of

53. Morgan Leg. Max.

54. Black L. Dict. [*cited* in Kent *v.* State, 64 Ark. 247, 251, 41 S. W. 849].

"Point of evidence" as a subject of decision is a question as to the competency of a witness, or the competency or relevancy of evidence. See Lower Augusta *v.* Selinsgrove, 64 Pa. St. 166, 168 [*quoted* in Edinburg Poor Dist. *v.* Strattanville Poor Dist., (Pa. 1898) 41 Atl. 589; Spring Tp. Overseers of Poor *v.* Walker Tp. Overseers of Poor, 1 Pa. Super. Ct. 383, 385]. Where in construing a provision for exceptions to any decision "upon any point of evidence" it is said: "A point of evidence cannot by any latitude of construction be considered to mean whether the entire testimony makes out the case or proves the facts. It means evidently whether a witness offered is competent or whether evidence offered is competent or relevant as tending to prove any fact material to the issue.

"Point of law" as a subject of decision, is a question of law applicable to the facts as they may be found by the court which the party may propose in the shape of a written point and require an answer. Lower Augusta *v.* Selinsgrove, 64 Pa. St. 166, 168 [*quoted* in Edenburg Poor Dist. *v.* Strattanville Poor Dist., (Pa. 1898) 41 Atl. 589; Spring Tp. Overseers of Poor *v.* Walker Tp. Overseers of Poor, 1 Pa. Super. Ct. 383, 385]. See APPEAL AND ERROR, 2 Cyc. 660, 756.

A "point or question" submitted to a judge, upon which, by statute (Minn. Sess. Laws (1861), c. 25, p. 136), he is required to give his opinion in writing, while not in all cases easy to define, in case of a demurrer can apparently "mean no more than one of the grounds of demurrer specified in the statutes." Commonwealth Ins. Co. *v.* Pierro, 6 Minn. 569.

A point upon which circuit judges disagree, within the meaning of a provision for its certification to the U. S. supreme court, must be a question of law, not of fact, must arise in the progress of the cause and not incidentally or in relation to collateral matter after a judgment or decree, nor can it be a matter within the discretion of the court, although it may include a question in connection with the discretion of the court below, involving the right of the matter in controversy. Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 254–256, 18 L. ed. 224.

"Points" have been defined as meaning "requests for charge . . . statements of the rules or particular portions of the law, which counsel deem applicable to the special facts of the case" (Myers *v.* Kingston Coal Co., 126 Pa. St. 582, 598, 17 Atl. 891); "generally isolated and often abstract propositions framed, not so much upon the real aspects of the evidence, as they are to express the extremes of the case, and to lead to the expression of opinions upon the theoretical rather than the practical questions of the cause" (Roberts *v.* Roberts, 54 Pa. St. 265, 269).

55. See Kent *v.* State, 64 Ark. 247, 251, 41 S. W. 849, construing the phrase "corroborated 'on any point'" as applied to testimony.

56. For example see BOUNDARIES, 5 Cyc. 871 text and note 13.

"Point of junction" see U. S. *v.* Oregon, etc., R. Co., 164 U. S. 526, 540, 17 S. Ct. 165, 41 L. ed. 541.

"Point of navigability."— See Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 301, 17 N. W. 626, 47 Am. Rep. 789.

57. Thus, within the terms of a contract, a certain military post has been held a "point" at which articles should be received for transportation. Blaek *v.* U. S., 91 U. S. 267, 269, 23 L. ed. 324. In Wood *v.* Stafford Springs, 74 Conn. 437, 439, 51 Atl. 129, occur the phrases "at a point 163 feet easterly from Main street;" "about twelve feet easterly of the point where the accident occurred;" "fixed mathematical point." See also The Margaret, 9 P. D. 47, 48, 53 L. J. P. D. & Adm. 17, 50 L. T. Rep. N. S. 447, 32 Wkly. Rep. 564.

58. Century Dict.

"Point out" the particulars of the defect; as office of a demurrer see Dennehey *v.* Woodsum, 100 Mass. 195, 198.

59. Gunn *v.* State, 89 Ga. 341, 15 S. E. 458.

60. See Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 479, 55 N. W. 626, where it appears that trade or occupation of a "pointer" of walls is incidental to that of a brickman.

61. Citizens' Rapid-Transit Co. *v.* Dew, 109

mortar, and replacing defective or broken brick in the walls.[62] (See POINTER DOG; POINTER OF WALLS.)

POINT RESERVED. In practice, a term described as follows: When, in the progress of the trial of a cause, an important or difficult point of law is presented to the court, and the court is not certain of the decision that should be given, it may reserve the point, that is, decide it provisionally as it is asked by the party, but reserve its more mature consideration for the hearing on a motion for a new trial, when, if it shall appear that the first ruling was wrong, the verdict will be set aside.[63] (See, generally, APPEAL AND ERROR, 2 Cyc. 660.)

POINTS AND AUTHORITIES. A synonym for BRIEF,[64] *q. v.* (See BRIEF, 5 Cyc. 1117, and Cross-References Thereunder.)

Tenn. 317, 319, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

62. Wilson *v.* Northwestern Mut. Acc. Assoc., 53 Minn. 470, 475, 55 N. W. 626.

63. Black L. Dict.

64. Duncan *v.* Kohler, 37 Minn. 379, 381, 34 N. W. 594, as the term brief is employed and used in this country.

POISONS

By Ernest G. Chilton*

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CROSS-REFERENCES

For Matters Relating to:

Adulteration of Food, see Adulteration, 1 Cyc. 914; Food, 19 Cyc. 1084.
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Abortion by, see Abortion, 1 Cyc. 171.
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In Relation to Insurance, see Accident Insurance, 1 Cyc. 264; Life Insurance, 25 Cyc. 876.
Killing or Injuring Animals by, see Animals, 2 Cyc. 414.
Sale by Druggist, see Druggists, 14 Cyc. 1084.
Taking Fish or Game by, see Fish and Game, 19 Cyc. 1012.

I. DEFINITION.

The term "poison" may be defined to be any substance which, when applied to the body externally, or in any way introduced into the system, is capable, without acting mechanically, but by its own inherent qualities, of destroying life.[1]

1. People *v.* Van Deleer, 53 Cal. 147, 148. Other definitions are: "A substance [which] when taken into the body, is capable of destroying some part or parts of the body, so

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II. Injuries Resulting From Sale or Use of Poisons.

A. Sale Under False Label — 1. Liability Therefor.[2] One who puts on the market a deadly poison negligently labeled as a harmless medicine is liable to all persons who, without fault on their part, are injured by using it as such medicine relying on the false label,[3] whether labeled by himself or an agent,[4] or whether sold to the injured person directly or to a middleman and by him resold to the injured person.[5]

2. Actions For Damages. It is negligence *per se* to fail to comply with the statute making it a misdemeanor to deliver or sell to another any poisonous substance or liquor without having it labeled poison, and the vendor is liable for personal injuries to any person of which injuries his negligence is the proximate cause.[6]

as to leave them permanently incapable of performing their functions." U. S. Mutual Acc. Assoc. *v.* Newman, 84 Va. 52, 61, 3 S. E. 805.

"Any substance which, when introduced into the animal organism, is capable of producing a morbid, noxious, or deadly effect." Preferred Mut. Acc. Assoc. *v.* Beidelman, 1 Mona. (Pa.) 481, 482.

"A substance which, when administered in small quantity, is capable of acting deleteriously on the body." Dougherty *v.* People, 1 Colo. 514, 519.

"A substance taken internally, seriously injurious to health and often fatal to life." Bacon *v.* U. S. Mutual Acc. Assoc., 44 Hun (N. Y.) 599, 602.

"A substance having an inherent deleterious property which renders it, when taken into the system, capable of destroying life." 2 Wharton & S. Med. Jur. § 1.

In popular language the term "poison" is confined to substances which in small doses destroy life. Dougherty *v.* People, 1 Colo. 514.

Using the word in a loose sense, a great many things are called poisonous in the sense of poisoning — that is to say, they produce death — while strictly speaking they are not poisons. Using the word in a loose sense, one would say a person drowned was poisoned. U. S. Mutual Acc. Assoc. *v.* Newman, 84 Va. 52, 3 S. E. 805.

The quantity of a given substance required to destroy life cannot enable one to distinguish a poisonous from a non-poisonous substance. Boswell *v.* State, 114 Ga. 40, 44, 39 S. E. 897.

Imports fatal properties.— Poison is a word which *ex vi termini* imports fatal properties when introduced into the human system, and therefore it is not necessary in an indictment for murder to aver that the accused knew the noxious properties of the poison administered. State *v.* Slagle, 83 N. C. 630.

Statutory definition.—A poison is defined in the act prohibiting the sale of any poison without a label attached to be "any drug, chemical or preparation, which according to standard works on medicine or *materia medica*, is liable to be destructive to adult human life in quantities of sixty grains or less." Kentucky Bd. of Pharmacy *v.* Cassidy, 115 Ky. 690, 74 S. W. 730, 25 Ky. L. Rep. 102.

Poisonous substances, as used in an indictment charging the offense of exposing a poisonous substance with intent that a certain animal belonging to another person should take and eat the same, should be construed to include paris green. State *v.* Labounty, 63 Vt. 374, 21 Atl. 730.

Ammonia.— Within the meaning of a life insurance policy excepting liability on account of a death resulting from poison, death results from poison when it is caused by the insured swallowing aqua ammonia given him through mistake for medicine. Early *v.* Standard L., etc., Ins. Co., 113 Mich. 58, 71 N. W. 500, 67 Am. St. Rep. 445.

Coal gas.— Poison as used in a life insurance policy excepting a company from liability for death caused by taking poison or coming into contact with poisonous substances cannot be considered to include coal gas. U. S. Mutual Acc. Assoc. *v.* Newman, 84 Va. 52, 3 S. E. 805.

Sting of insect.— The question whether the term "poison" in a policy exempting the insurer from liability for injuries resulting therefrom includes the sting of venomous insects is for the jury. Preferred Mut. Acc. Assoc. *v.* Beidelman, 1 Mona. (Pa.) 481.

2. **Liability of druggist** see 14 Cyc. 1085 note 65, 1086 note 72.

3. Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

Label on patent medicine directing size of dose.— The proprietor of a patent medicine is liable to any one who in taking his medicine in such quantities as the label directs is injured by poison contained in the medicine. Blood Balm Co. *v.* Cooper, 83 Ga. 457, 10 S. E. 118, 20 Am. St. Rep. 324, 5 L. R. A. 612.

4. Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

5. Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

6. Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377.

Burden of proof.— In an action for the death of one from drinking poisonous liquor sold and delivered by defendant without labeling the same as required by statute, the bur-

B. Use — 1. Liability Therefor. One who uses a poisonous substance in manufacture is not liable to another injured by handling the manufactured article, where it appears that the substance in question, the common one used for the purpose, was not at the time of the injury known to be poisonous to handle.[7]

2. Actions For Damages. In an action to recover damages for injuries resulting from the use of a poisonous substance in manufacture, an instruction to the jury is not erroneous on the ground that it removes the question of proximate cause from the case, if such question has been fully covered by other instructions.[8]

III. Offenses Relating to Poisions.[9]

A. Administering[10] — 1. Elements — a. In General. To manually deliver poison to another[11] or to force it down his throat[12] is not an element of the offense of administering poison to another; it is enough to compel him by threats of violence to swallow it,[13] to furnish it to him for the purpose of suicide if he takes it for that purpose,[14] or to intentionally leave it in any place where he is likely to take it by mistake, if he does so take it and any part of it goes into his stomach.[15]

b. Poison Must Enter Stomach. It is not an administering within the statute unless some portion of the poison actually enters the stomach of the person for whom it was intended.[16]

c. Intent to Injure — (I) *Must Clearly Appear.* Where the statute makes an intent to injure an element of the offense, such intent should clearly appear.[17]

(II) *Double Intent.* To constitute administering with intent to injure it is not necessary that the poison be administered with the specific intent to do bodily harm, but it is sufficient if it be administered as a means for the accomplishment of another unlawful purpose.[18]

2. Extent of Injury. When poison is administered and operates to derange the healthy organization of the system, temporarily or permanently, it is an injury within a statute making it an offense to administer poison to another with intent to injure.[19]

B. Mixing With Food or Drink. Administering forms no part of the offense of mingling poison with the food, drink, or medicine of another with intent to injure him.[20]

C. Sale Without Label. A statute making it an offense to sell poison not labeled as such does not apply to cases where a druggist is induced to deliver the

den rests upon plaintiff to show that the violation of the statute was the proximate cause of the death. Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377.

7. Gould *v.* Slater Woolen Co., 147 Mass. 315, 17 N. E. 531.

8. Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793, 106 Am. St. Rep. 377.

9. Criminal law generally see Criminal Law, 12 Cyc. 70 *et seq.*

10. To commit: Abortion see Abortion, 1 Cyc. 171. Murder see Homicide, 21 Cyc. 719.

To injure or kill animal see Animals, 2 Cyc. 415 note 50, 416 note 63, 432, 435 note 77.

11. Rex *v.* Harley, 4 C. & P. 369, 19 E. C. L. 558.

12. Blackburn *v.* State, 23 Ohio St. 146, holding further that neither fraud nor deception is a necessary ingredient of the offense of administering poison.

13. Blackburn *v.* State, 23 Ohio St. 146.

14. Blackburn *v.* State, 23 Ohio St. 146.

15. Rex *v.* Harley, 4 C. & P. 369, 19 E. C. L. 558.

16. Sumpter *v.* State, 11 Fla. 247. See also Blackburn *v.* State, 23 Ohio St. 146; Rex *v.* Cadman, 1 Moody Cr. Cas. 114, where the reporter states that the judges "seemed to think swallowing not essential," which statement was declared by Park, J., in Rex *v.* Harley, 4 C. & P. 369, 19 E. C. L. 558, to be erroneous, his own note of the case showing that the judges were unanimously of opinion that the poison had not been administered because it had not been taken into the stomach, but only into the mouth.

17. People *v.* Adwards, 5 Mich. 22.

18. People *v.* Adwards, 5 Mich. 22; People *v.* Carmichael, 5 Mich. 10, 71 Am. Dec. 769.

19. People *v.* Carmichael, 5 Mich. 10, 71 Am. Dec. 769.

Instance.— Thus where morphine was administered in a dose sufficient to cause deep sleep, but not death, it was held to be an injury within the meaning of the statute. People *v.* Adwards, 5 Mich. 22.

20. Madden *v.* State, 1 Kan. 340.

poisonous substance to a person without knowing its character, by the representation of such person that it was his.[21]

D. Sale Without Prescription. A statute making it an offense to sell or give away certain poisonous substances without a prescription for the same from a physician or regularly qualified pharmacist applies to a physician as well as any other illegal seller.[22]

E. Prosecutions For Unlawful Sale or Use — 1. Indictment. In prosecutions of this character indictment is governed by the same rules applicable to indictments in criminal cases in general.[23]

2. Defenses. One who engages in the prosecution of an unlawful design against another and uses poison to accomplish such design, which, by its natural action produces a greater injury than was anticipated, is not relieved from criminal responsibility for his act by ignorance of the probable extent of the injury.[24] In a prosecution against a physician for selling opium without a prescription, defendant must show, in order to make his defense complete, that he comes within the provisions of the act "to prevent the practice of medicine and surgery by unqualified persons," and as a legally practising physician sold the opium as a prescription.[25]

3. Evidence. Evidence in prosecutions of this character, including the admissibility[26] as well as the weight and sufficiency[27] of evidence, is subject to the same rules which control in criminal cases in general.

4. Instructions to Jury. Instructions to the jury in prosecutions of this character are governed by the same rules which control in giving or refusing to give instructions to the jury in criminal cases in general.[28]

POKER. A game of chance,[1] played with cards, and, usually with chips, for diversion or gain.[2] (See, generally, Gaming, 20 Cyc. 873.)

21. Hackett *v.* Pratt, 52 Ill. App. 346.

22. State *v.* Jones, 18 Oreg. 256, 22 Pac. 840.

Statute constitutional.— Under the police power the legislature has authority to make it an offense to sell, give away, or otherwise dispose of, a given poisonous drug except on the prescription of a duly licensed practising physician. State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488.

23. See, generally, Indictments and Informations, 22 Cyc. 157.

Sufficient indictment.— An indictment for the offense of mingling poison with any food, drink, or medicine with the intent to injure another need not charge that the offense was committed wilfully, but only that the act was done and the intent with which it was done. Davis *v.* State, 4 Tex. App. 456. An indictment for mingling poison with the food, drink, or medicine of another is sufficient where it alleges that the drink was mixed with the intent that the victim should drink it and to do her injury. It is not necessary to charge that it was feloniously done. Madden *v.* State, 1 Kan. 340.

24. People *v.* Carmichael, 5 Mich. 10, 71 Am. Dec. 769.

25. State *v.* Ching Gang, 16 Nev. 62.

26. See Criminal Law, 12 Cyc. 390 *et seq.*

Improperly excluded.— In a prosecution for a sale of poison without having properly labeled it, it is error to exclude evidence tending to show that the mixture in question was a non-poisonous one and a useful and valuable medical remedy. State *v.* Marvin, 5 Ohio S. & C. Pl. Dec. 593.

27. See Criminal Law, 12 Cyc. 485 *et seq.*

Not sufficient.— Extrajudicial confessions alone are not sufficient to prove the body of the crime of administering poison to another. Blackburn *v.* State, 23 Ohio St. 146, holding further that the confession may, however, be admitted and used to prove the body of the crime in connection with other evidence in the case.

28. See Criminal Law, 12 Cyc. 587 *et seq.*

Request properly refused.—In a prosecution for mingling poison with food with intent to injure there was evidence that defendant administered the poison to prosecutrix for purposes of seduction. It was held that a request to charge that the jury could not convict defendant unless they were satisfied that he administered the poison with the specific intent of doing her bodily harm, and not for purposes of seduction, was properly refused. People *v.* Carmichael, 5 Mich. 10, 71 Am. Dec. 769.

1. Kennon *v.* King, 2 Mont. 437, 439.

2. Sims *v.* State, 1 Ga. App. 776, 777, 57 S. E. 1029, where it is said: "Poker is a well-known American game, and, we understand, is always played with cards, and is generally considered as a gentleman's game, played for diversion or gain. But even when played for diversion, chips, representative of value, are generally used.

Each party plays for himself.— Laytham *v.* Agnew, 70 Mo. 48, 49.

POLICE. A word which, in law, is not a term of indefinite meaning, although it has several significations.[3] As a function, that species of superintendence by magistrates which has principally for its object the maintenance of public tranquillity among its citizens;[4] the government of a city or town; the administration of the laws and regulations of a city or incorporated town or borough.[5] In general, as a system, one of precaution, either for the prevention of crime or of calamities,[6] divided into administrative police, which has for its object to maintain constantly public order in every part of the general administration; and judiciary police which is intended principally to prevent crimes by punishing criminals.[7] Applied to persons, the officers who are appointed for the purpose of the maintenance of public tranquillity among the citizens.[8] (Police: Commissioner, see MUNICIPAL CORPORATIONS, 28 Cyc. 486. Court, see POLICE COURT. Department, see MUNICIPAL CORPORATIONS, 28 Cyc. 486. Force, see POLICE FORCE. Jurisdiction, see POLICE JURISDICTION. Jury, see POLICE JURY. Justice, see POLICE JUSTICE. Magistrate, see POLICE MAGISTRATE. Officer, see POLICE OFFICER. Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 347. Power, see POLICE POWER. Purposes, see POLICE PURPOSES. Regulation, see POLICE REGULATION. See also POLICEMAN.)

POLICE BOARD. See MUNICIPAL CORPORATIONS, 28 Cyc. 486.

POLICE COMMISSIONER. See MUNICIPAL CORPORATIONS, 28 Cyc. 486.

POLICE COURT.[9] An inferior court exercising a limited jurisdiction over offenses of a criminal nature; and perhaps also a limited civil jurisdiction;[10] a court for the trial of offenders brought up on charges preferred by the police.[11] (Police

"**Senate poker**" is described as a game played with cards. The dealer sits on one side of a table, and the players around in front of him. The players put up their money in the dealer's hands, for which he issues to the players some ivory or bone chips. The dealer then deals to each man five cards. Then the players either bet their chips or not, according as they are willing to venture on their hands. They may discard and draw more, if they see fit. For each dollar that is bet on the game, the dealer takes off five per cent or ten per cent, or something like that amount, for the proprietor of the house. At the end of each game the chips are handed in to the dealer, who cashes them. No particular table is required for the game. It may be played as well upon the floor, a bed, a rock, or any smooth surface. A dealer in such game, who takes no part in the game, but merely receives the percentage, is not guilty of exhibiting a gaming bank and table for the purpose of gaming. Hairston *v.* State, 34 Tex. Cr. 346, 30 S. W. 811.

Poker-table as gaming device see GAMING, 20 Cyc. 883 text and note 28.

Games with cards as gaming see GAMING, 20 Cyc. 884.

Playing for chips as gaming see GAMING, 20 Cyc. 889.

In Manitoba poker has been held not to be in itself an unlawful game. Reg. *v.* Shaw, 4 Manitoba 404, 405.

3. Monet *v.* Jones, 10 Sm. & M. (Miss.) 237, 243.

As a power see POLICE POWER, *post*, p. 902.

4. Bouvier L. Dict. [*quoted* in State *v.* Hine, 59 Conn. 50, 60, 21 Atl. 1024, 10 L. R. A. 83].

5. Webster Dict. [*quoted* in Dibble *v.* Merriman, 52 Conn. 214, 215].

6. Louisville *v.* Wehmhoff, 116 Ky. 812, 830, 76 S. W. 876, 79 S. W. 201; Logan *v.* State, 5 Tex. App. 306, 314; Bentham [*quoted* in State *v.* Greer, 78 Mo. 188, 194].

7. Bouvier L. Dict. [*quoted* in State *v.* Hine, 59 Conn. 50, 61, 21 Atl. 1024, 10 L. R. A. 83]. See also Monet *v.* Jones, 10 Sm. & M. (Miss.) 237, 243.

The police of a state, in a comprehensive sense, embraces its system of internal regulation by which it is sought not only to preserve the public order, and to prevent offenses against the state, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others. Cooley Const. Lim. 572 [*quoted* in People *v.* Squire, 107 N. Y. 593, 605, 14 N. E. 820, 1 Am. St. Rep. 893 note; Com. *v.* Seward, 2 Kulp (Pa.) 294, 295; Logan *v.* State, 5 Tex. App. 306, 314].

8. See Bouvier L. Dict. [*quoted* in State *v.* Hine, 59 Conn. 50, 61, 21 Atl. 1024, 10 L. R. A. 83], where, after the definition in the abstract, as hereinabove given (see *supra*, text and note 4), is added: "The officers who are appointed for this purpose are also called police."

9. **Courts of police justices in New Jersey** see 11 Cyc. 785.

10. Anderson L. Dict. [*quoted* (incorrectly) in the recorder's opinion reported and affirmed in *Ex p.* Baxter, 3 Cal. App. 716, 721, 86 Pac. 998.].

Of District of Columbia see 11 Cyc. 966.

11. Century Dict. [*cited* in *Ex p.* Baxter, 3 Cal. App. 716, 721, 86 Pac. 998].

Court: In General, see COURTS,[12] 11 Cyc. 655 note 4; JUSTICES OF THE PEACE, 24 Cyc. 403 note 2; MUNICIPAL CORPORATIONS, 28 Cyc. 786. Jurisdiction and Powers of,[13] see CRIMINAL LAW;[14] JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS.[15] See also MUNICIPAL COURT, 28 Cyc. 1777; POLICE MAGISTRATE.)

POLICE DEPARTMENT. See MUNICIPAL CORPORATIONS, 28 Cyc. 486.

POLICE FORCE. A term commonly understood to refer to the body of men appointed to preserve the peace and good order of a city or town.[16] (See MUNICIPAL CORPORATIONS, 28 Cyc. 497; POLICE; POLICEMAN; POLICE OFFICER.)

POLICE JURISDICTION. The right to regulate and govern a city or state.[17] (See MUNICIPAL JURISDICTION, 28 Cyc. 1777; POLICE; POLICE POWER; and, generally, CONSTITUTIONAL LAW, 8 Cyc. 864; COURTS, 11 Cyc. 771; MUNICIPAL CORPORATIONS, 28 Cyc. 785.)

POLICE JURY. In Louisiana, the designation of the board of officers in a parish corresponding to the commissioners or supervisors of a county in other states.[18] (See, generally, COUNTIES, 11 Cyc. 380.)

POLICE JUSTICE. See POLICE MAGISTRATE.

POLICE MAGISTRATE or **JUSTICE.** A term which, without other legal definition, supposes some officer of the state, or some municipal division thereof, invested with authority — executive or judicial, relating to the administration of police or municipal laws.[19] More specifically, an inferior judicial magistrate, whose jurisdiction, in the absence of constitutional or statutory extensions, is confined to criminal cases arising under the ordinances and regulations of a municipality.[20] (See POLICE COURT; and, generally, COURTS, 11 Cyc. 718; JUDGES, 23 Cyc. 504; JUSTICES OF THE PEACE, 24 Cyc. 403 note 2; MUNICIPAL CORPORATIONS, 28 Cyc. 535.)

POLICEMAN.[21] As a generic term, a word which may equally apply to any member of the police force, be his rank and station what it may.[22] (Policeman:

12. Extent of legislative authority over see COURTS, 11 Cyc. 713.

13. Power to punish for contempt see CONTEMPT, 9 Cyc. 28.

14. See 12 Cyc. 201 note 54.

15. See MUNICIPAL CORPORATIONS, 28 Cyc. 786.

16. Florence *v.* Brown, 49 S. C. 332, 336, 337, 26 S. E. 880, 49 S. C. 342, 27 S. E. 273.

The term has also been said to mean "nothing more nor less, so far as it is lawfully constituted, than an additional force of constables and watchmen appointed by the State for certain limited purposes." Allor *v.* Wayne County, 43 Mich. 76, 98, 4 N. W. 492 [*quoted* in White *v.* Manistee County, 105 Mich. 608, 614, 63 N. W. 653].

Distinguished from individual constables. — "A police force is an organization; it has a controlling mind, by which its members may be made to act in concert; while the constable acts upon his own responsibility and his own conception of his legal duties." White *v.* Manistee County, 105 Mich. 608, 614, 63 N. W. 653.

A chief of police is a member of the force and amenable to the rules adopted to secure its good conduct and efficiency. Brownell *v.* Russell, 76 Vt. 326, 330, 57 Atl. 103.

The term is never used in the sense of "police power," or "police regulations," therefore, when it appears in a statute, it cannot be construed "police," from which it has a totally different and distinct meaning. Florence *v.* Brown, 49 S. C. 332, 336, 337, 26 S. E. 880, 49 S. C. 342, 27 S. E. 273.

17. Earl, C. J., in dissenting opinion in People *v.* New Jersey Cent. R. Co., 42 N. Y. 283, 314.

18. Black L. Dict.

19. People *v.* Curley, 5 Colo. 412, 416.

20. McDermont *v.* Dinnie, 6 N. D. 278, 281, 69 N. W. 294.

In Canada the term includes stipendiary and district magistrates. Note in O'Neil *v.* Atty.-Gen., 1 Can. Cr. Cas. 303, 316.

21. As employee see EMPLOYEE, 15 Cyc. 1033 text and note 58.

Tenure as determined by board see DETERMINE, 14 Cyc. 236 note 11.

22. State *v.* Vallins, 140 Mo. 523, 532, 41 S. W. 887. See also State *v.* Kennedy, 69 Conn. 220, 225, 37 Atl. 503.

But this can only be true when it is used alone as a generic term and as descriptive of the whole police force, officers as well as men, and not when officers and men are carefully segregated from each other in meaning, in apt terms of distinctive designation. State *v.* Vallins, 140 Mo. 523, 532, 41 S. W. 887, holding that a provision concerning "policeman," when that word is clearly differentiated in the context from "police officer," does not apply to a chief of police.

Equivalent of "watchman" at common law see State *v.* Evans, 161 Mo. 95, 110, 61 S. W. 590, 84 Am. St. Rep. 669 [*cited* in Porter *v.* State, 124 Ga. 297, 301, 52 S. E. 283, 2 L. R. A. N. S. 730].

"Only a citizen dressed in blue clothes and brass buttons."— People *v.* Glennon, 37 Misc. (N. Y.) 1, 5, 74 N. Y. Suppl. 794.

In General, see MUNICIPAL CORPORATIONS.[23] As Public Officer,[24] see MUNICIPAL CORPORATIONS, 28 Cyc. 497; and, generally, OFFICERS, 29 Cyc. 1366 note 39; POLICE OFFICER.)

POLICE OFFICER. One of the staff of men employed in cities and towns to enforce the municipal police, *i. e.*, the laws and ordinances for preserving the peace and good of the community.[25] (Police Officer: As Employee, see EMPLOYEES, 15 Cyc. 1033 text and note 58. As Public Officer, see OFFICERS,[26] 29 Cyc. 1366 note 39. Authority of to Arrest Without Warrant, see ARREST,[27] 3 Cyc. 877. False Personation of, see FALSE PERSONATION,[28] 19 Cyc. 380. Liability — For False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 332; Of Master For Acts of Special Police Officer, see MASTER AND SERVANT;[29] Of Municipality For Acts of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1299. Subject to — Mandamus, see MANDAMUS;[30] Protection and Relief by Injunction, see INJUNCTIONS.[31] See also POLICE; POLICE FORCE; POLICEMAN; and, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 497.)

POLICE ORDINANCES. A term described as designating "at once family rules on a large scale, and State laws on a small scale."[32] (See Cross-References under ORDINANCE, 29 Cyc. 1522.)

POLICE POWER. Strictly speaking, a term which has relation to a power of organization of a system of regulations tending to the health, order, convenience, and comfort of the inhabitants, and to the prevention and punishment of injuries and offenses to the public.[33] (Police Power: In General, see CONSTITUTIONAL LAW;[34] MUNICIPAL CORPORATIONS.[35] Delegation of, see CONSTITUTIONAL LAW;[36] MUNICIPAL CORPORATIONS.[37] Distinguished From — Eminent Domain, see ACTIONS;[38] EMINENT DOMAIN;[39] LEVEES;[40] Regulation of Commerce, see COMMERCE;[41] Taxation, see TAXATION. Exercise of — As Impairing Obligation of Contract, see CONSTITUTIONAL LAW;[42] By District of Columbia, see DISTRICT OF COLUMBIA;[43] By Municipality, see MUNICIPAL CORPORATIONS;[44] Not Repugnant to Religious Freedom, see CONSTITUTIONAL LAW;[45] To Control Private Corporation, see CONSTITUTIONAL LAW;[46] CORPORATIONS;[47] To Prevent Spread of Fire, see ACTIONS.[48] Particular Subjects of Regulation by, see ADULTERATION, 1 Cyc. 940; ANIMALS, 2 Cyc. 438; ASYLUMS, 4 Cyc. 363; AUCTIONS AND AUCTIONEERS, 4 Cyc. 1039; BANKS AND BANKING, 5 Cyc. 433; CARRIERS, 6 Cyc. 492;

23. See 28 Cyc. 497–534.

24. **Held an "officer"** within the meaning, in common language, of that term. Sanner *v.* State, 2 Tex. App. 458.

An executive but not purely ministerial officer see Haynes *v.* Com., 104 Va. 854, 856, 52 S. E. 358.

25. Black L. Dict.

"A police officer is intimately connected with the enforcement of all laws and ordinances concerning crimes, and is an important factor in preserving the peace and good order of the community." Cleu *v.* San Francisco Police Com'rs, 3 Cal. App. 174, 177, 84 Pac. 672.

Includes chief of police see Brownell *v.* Russell, 76 Vt. 326, 330, 57 Atl. 103.

The term does not apply to a constable, for the purposes of a statute wherein it is used to describe a class of officers who are not constables (Com. *v.* Smith, 111 Mass. 407); nor is the mayor of a city one of its "police officials" when nowhere expressly designated as such, though he is, *ex officio*, the head of its police department (People *v.* Gregg, 59 Hun (N. Y.) 107, 110, 113, 13 N. Y. Suppl. 114).

Police surgeon not a clerk see 7 Cyc. 191 note 56.

26. **Department and officers** in general see MUNICIPAL CORPORATIONS, 28 Cyc. 486–536.

27. See 3 Cyc. 877 note 50; 19 Cyc. 350.

28. See 19 Cyc. 380, 381 note 16.

29. See 26 Cyc. 1521.

30. See 26 Cyc. 280.

31. See 22 Cyc. 889.

32. Porter *v.* State, 124 Ga. 297, 307, 52 S. E. 283, 2 L. R. A. N. S. 730.

33. Monet *v.* Jones, 10 Sm. & M. (Miss.) 237, 244.

Defined also in MUNICIPAL CORPORATIONS, 28 Cyc. 692.

34. See 8 Cyc. 863 *et seq.*

35. See 28 Cyc. 692 *et seq.*

36. See 8 Cyc. 866.

37. See 28 Cyc. 693 *et seq.*

38. See 1 Cyc. 655 note 37.

39. See 15 Cyc. 557, 562.

40. See 25 Cyc. 591.

41. See 7 Cyc. 419 note 62, 422 note 83.

42. See 8 Cyc. 997 note 23.

43. See 14 Cyc. 530.

44. See 28 Cyc. 692 *et seq.*

45. See 8 Cyc. 884.

46. See 8 Cyc. 974.

47. See 10 Cyc. 175 note 17, 1087 text and note 81.

48. See 1 Cyc. 656 note 38.

Cemeteries, 6 Cyc. 708; Collision, 7 Cyc. 320; Drains, 14 Cyc. 1025 note 8; Druggists, 14 Cyc. 1079; Explosives, 19 Cyc. 3; Fences, 19 Cyc. 488; Ferries, 19 Cyc. 506; Fish and Game, 19 Cyc. 1006; Food, 19 Cyc. 1087; Gaming, 20 Cyc. 879; Hawkers and Peddlers, 21 Cyc. 365; Health, 21 Cyc. 384; Hospitals, 21 Cyc. 1110; Inspection, 22 Cyc. 1364; Insurance, 22 Cyc. 1386, and the Insurance Titles; Intoxicating Liquors, 23 Cyc. 64; Licenses, 25 Cyc. 600; Motor Vehicles, 28 Cyc. 32; Municipal Corporations, 28 Cyc. 705; Pawnbrokers, 30 Cyc. 1165; Physicians and Surgeons, 30 Cyc. 1547; Pilots, 30 Cyc. 1609; Poisons; Reformatories; Searches and Seizures; Streets and Highways; Theaters and Shows.)

POLICE PURPOSES.[49] Ordinarily such as arise in the administration of the affairs of cities and towns, in the exercise of their power and duty to promote the public health, convenience, and welfare.[50]

POLICE REGULATION or **REGULATIONS.** The term which is used to define a power which resides in the state.[51] In the plural, such provisions of law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens and to secure them in the enjoyment of their property.[52] (See Municipal Regulation; and, generally, Constitutional Law; Municipal Corporations.[53])

POLICY. Prudence or wisdom in practical affairs; art, stratagem;[54] the general principles by which a government is guided in its management of public affairs, or the legislature in its measures;[55] a term which, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed to the welfare or prosperity of the state or community.[56] Also a method of gambling by betting as to what numbers will be drawn in a lottery;[57] a form of gambling in which bets are made on numbers to be drawn by lottery.[58] (Policy:

49. "Government purposes" see 20 Cyc. 1285.

"Municipal purpose" see 28 Cyc. 1778.

50. Sessions *v.* Crunkilton, 20 Ohio St. 349, 358 [*cited* in Champaign County *v.* Church, 62 Ohio St. 318, 346, 57 N. E. 50, 78 Am. St. Rep. 718, 48 L. R. A. 738].

51. *In re* O'Neill, 41 Wash. 174, 83 Pac. 104, 106, 3 L. R. A. N. S. 558.

For matters concerning the power of police regulation see Constitutional Law, 8 Cyc. 863–876; Municipal Corporations, 28 Cyc. 296, 692–831.

It is difficult to define the scope of the term. It has been the subject of much discussion by the courts and its application has sometimes been sarcastically criticized as the use of an indefinable something to sustain legislation unsupportable on any other ground. *In re* O'Neill, 41 Wash. 174, 83 Pac. 104, 106, 3 L. R. A. N. S. 558.

52. State *v.* Greer, 78 Mo. 188, 194. See also Sonora *v.* Curtin, 137 Cal. 583, 585, 70 Pac. 674; *Ex p.* Bourgeois, 60 Miss. 663, 671, 45 Am. Rep. 420; Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 827, 14 S. E. 665; Cooley Const. Lim. [*quoted* in State *v.* Greer, 78 Mo. 188, 195; Sloan *v.* Pacific R. Co., 61 Mo. 24, 31, 21 Am. Rep. 397].

53. See also Carriers, 6 Cyc. 462 note 85; Constitutional Law, 8 Cyc. 863–876, 971 note 68; Customs Duties, 12 Cyc. 110 note 18; District of Columbia, 14 Cyc. 530; Municipal Corporations, 28 Cyc. 704, 775–831.

54. See Scott *v.* Blood, 16 Me. 192, 195, where it is said: "But policy is a word susceptible of a good sense and a bad one. If it be understood as art, stratagem, it should never be a ground of judicial decision. If taken in the sense of the art of governing, or the management of affairs, it is rather inappropriate for courts of law to be dealing with it, otherwise than in the synonyme of prudence or wisdom in practical affairs, appertaining to the administration of justice; to suppress a mischief, rightly to expound the law, to guard against fraud, and advance the remedy for a mischief or inconvenience."

55. Black L. Dict.

56. Black L. Dict.

57. Webster Imp. Dict. [*quoted* in State *v.* Carpenter, 60 Conn. 97, 102, 22 Atl. 497, which case in turn is cited as having settled that "'playing policy' is a method of gambling" in State *v.* Flint, 63 Conn. 248, 250, 28 Atl. 28].

Judicial notice of meaning denied see State *v.* Russell, 17 Mo. App. 16, 18. See also State *v.* Sellner, 17 Mo. App. 39, 40. *Compare*, however, State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497, where the court took notice of the fact that the term "policy playing" was in current use when an ordinance prohibiting it was enacted, and quoted the definition of "policy" from Webster Imp. Dict.

58. Century Dict. [*quoted* in State *v.* Wilkerson, 170 Mo. 184, 192, 70 S. W. 478]. See also Gaming, 20 Cyc. 887.

Held to be a lottery see Lotteries, 25 Cyc. 1639.

Methods of playing.—A business consisting in the sale of tickets which entitle the purchaser not only to a lead pencil but also to select certain numbers, the numbers selected being placed in a wheel, the wheel revolved, a fixed quantity of numbers drawn therefrom at fixed intervals by a blindfolded boy, and

As Unlawful Game, see GAMING, 20 Cyc. 866; LOTTERIES, 25 Cyc. 1636. Of Insurance, see POLICY OF INSURANCE. Of Law Affecting — Constitutionality of Statute, see CONSTITUTIONAL LAW;[59] Power of Judiciary to Pass on Policy of Statute, see CONSTITUTIONAL LAW, 8 Cyc. 733. Public, see CONTRACTS;[60] PUBLIC POLICY.)

POLICY HOLDER. One to whom an insurance policy has been granted.[61] (See POLICY OF INSURANCE; and, generally, the Insurance Titles.)

POLICY OF INSURANCE.[62] **A. Referring to the Document.** The name by which the formal written instrument in which the contract of insurance is usually embodied is known;[63] the written instrument in which a contract of insurance is set forth;[64] a mercantile instrument in writing, by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation whenever the event shall happen by which the loss is to accrue;[65] the written evidence of an agreement by the terms of which the insurer, in consideration of a stipulated premium, undertakes to indemnify the insured against such damage as he may sustain by reason of injury

money prizes awarded to the persons who selected numbers all of which have been drawn at the single drawing next after the purchase, was "called and generally known as 'playing policy.'" State *v.* Kansas Mercantile Assoc., 45 Kan. 351, 352, 353, 25 Pac. 984, 23 Am. St. Rep. 727, 11 L. R. A. 430. "Persons who wish to play 'policy,' as he calls it, pay the respondent a sum of money, usually from five to fifty cents, and at the same time select two, three, or four numbers, from one to seventy-eight. If the player selects two numbers it is called a 'saddle.' If he selects three it is called a 'gig.' If he selects four it is called a 'horse.' If all the numbers selected by the player came out in the drawing, he won a certain amount from the policy dealer. In the case of a 'gig,' or three numbers, if the player won, he received ten dollars for five cents; in the case of a 'saddle,' the odds were proportionately less; in the case of a 'horse,' proportionately greater." People *v.* Elliott, 74 Mich. 264, 266, 41 N. W. 916, 16 Am. St. Rep. 640, 3 L. R. A. 403. For a description substantially the same as the last, except as to amounts, which are not stated see Wilkinson *v.* Gill, 74 N. Y. 63, 64, 30 Am. Rep. 264.

"Writing policy" or "selling policy" see State *v.* Wilkerson, 170 Mo. 184, 188, 70 S. W. 478, where those terms are used synonymously with reference to the sale of policy tickets, and where it appears that in evidence it "was further shown that a person who sells tickets or writes policy is a necessary part of the game; that his duties are entirely different from the service of one selling lottery tickets. A lottery ticket is made printed and complete, and a sale of it consists of a delivery simply of the ticket. While one selling policy necessarily writes the tickets himself, keeps duplicate copies thereof in what is called 'a book,' which is two sheets of manifold paper — one he must deliver at the place of the drawing before it takes place, the other he keeps to pay winning tickets (if any) by. He secures the winning numbers or reports and is then prepared to and does pay the winning tickets, having first sold them and collected the money for them."

"Policy tickets."— Lottery tickets are not legalized by being so called. Boyland *v.* State, 69 Md. 511, 512, 16 Atl. 132.

59. Inquiry into policy of legislation see CONSTITUTIONAL LAW, 8 Cyc. 851 text and note 38.

Policy and expediency in construction of constitutional provisions see CONSTITUTIONAL LAW, 8 Cyc. 733, 8 Cyc. 738 note 85.

60. See 9 Cyc. 481.

Policy of law: Not to be interfered with, in sustaining mortgage of other jurisdiction see CHATTEL MORTGAGES, 6 Cyc. 1061 note 94. To uphold rather than restrain an agreement of compromise with creditors see COMPOSITIONS WITH CREDITORS, 8 Cyc. 421 note 41.

61. Webster Int. Dict.

"Persistent policy holder" see 30 Cyc. 1526 note 9.

Relief, to restore rights in foreign life insurance company after forfeiture for nonpayment, refused, see FOREIGN CORPORATIONS, 19 Cyc. 1238 text and note 69.

62. "Policy, or, more fully, policy of assurance or insurance."— So denominated in London Assur. Corp. *v.* Paterson, 106 Ga. 538, 553, 32 S. E. 650.

63. London Assur. Corp. *v.* Paterson, 106 Ga. 538, 553, 32 S. E. 650.

"The very term 'policy' imports that the party insured holds a written instrument to which that name has been given." First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305, 308.

64. Cal. Civ. Code, § 2586 [*quoted* in Black L. Dict.]

Distinguished from "risk" see London, etc., F. Ins. Co. *v.* Lycoming F. Ins. Co., 105 Pa. St. 424, 430, 431.

Alteration: Generally ALTERATIONS OF INSTRUMENTS, 2 Cyc. 137 *et seq.* Of risk see 2 Cyc. 194. Of separate indorsed contract with different party see 2 Cyc. 190 note 48.

65. Black L. Dict.

Exception as to life policy see *infra*, B, 2, text and note 73.

to or destruction of the subject matter by means of the risk insured against;[66] the evidence delivered to the insured of the contract of the insurer.[67]

B. Referring to the Contract — 1. In General. A contract[68] in writing,[69] by which the insurer, for a reasonable compensation, engages that certain property of the insured, specified in the policy, shall sustain no loss or damage from any of the perils enumerated in the contract between the parties;[70] distinctly a personal contract, by which the insurer undertakes to indemnify the party named in the writing against loss, in a manner and subject to conditions therein described.[71]

2. Life Insurance.[72] Not, like a fire or marine policy a mere contract of indemnity, but a contract to pay a certain sum of money in the event of death.[73]

C. Miscellaneous Terminology.[74] Various kinds of policy are distinguished

66. Cleveland Oil, etc., Mfg. Co. *v.* Norwich Union F. Ins. Co., 34 Oreg. 228, 237, 55 Pac. 435.

Exception as to life policy see *infra*, B, 2, text and note 73.

67. American Credit Indemnity Co. *v.* Wood, 73 Fed. 81, 84, 19 C. C. A. 264.

"A policy is but the evidence of a contract of insurance" (Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169, 192); and "ordinarily, of itself, constitutes complete evidence of the contract" (American Credit Indemnity Co. *v.* Wood, 73 Fed. 81, 84, 19 C. C. A. 264).

Distinguished from "application" see American Credit Indemnity Co. *v.* Wood, 73 Fed. 81, 84, 19 C. C. A. 264.

A standard fire insurance policy being prescribed by the legislature "it is usual for the company to issue a policy of insurance evidencing the contract between the parties; but the policy accomplishes nothing more than that, for when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy and the contract is a completed one." Ilicks *v.* British America Assur. Co., 162 N. Y. 284, 288, 56 N. E. 743, 48 L. R. A. 424 [*reversing* 13 N. Y. App. Div. 444, 43 N. Y. Suppl. 623].

68. "In the parlance of the business of insurance, ordinarily the contract is called a policy." State *v.* Pittsburg, etc., R. Co., 68 Ohio St. 9, 30, 67 N. E. 93, 96 Am. St. Rep. 635, 64 L. R. A. 405.

"Policy" and "contract" used in same provision synonymously see Wilkins *v.* State Ins. Co., 43 Minn. 177, 179, 45 N. W. 1.

A contract to whose existence agreement of parties is essential see Baldwin *v.* Pennsylvania F. Ins. Co., 20 Pa. Super. Ct. 238, 243.

It is "a commercial contract, based on the usages and customs of trade, expressed in a brief and inartificial form, and in some of its parts in peculiar and technical language, containing numerous stipulations, some of which are comprehended in a few short phrases, and others which arise solely by implication, and are not obvious on the face of the instrument." Greene *v.* Pacific Mut. Ins. Co., 9 Allen (Mass.) 217, 219.

It is "a mercantile contract, having its origin in, and deriving its incidents from the usages and laws of commercial nations." First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305, 307.

An "executory contract" see National L. Ins. Co. *v.* Minch, 53 N. Y. 144, 151.

A "voluntary contract" see Brown *v.* U. S. Casualty Co., 95 Fed. 935, 937.

69. A verbal policy is unknown to the law of insurance. Cockerill *v.* Cincinnati Mut. Ins. Co., 16 Ohio 148, 164, the word "verbal" being there used in contradistinction to the phrase "in writing."

70. Insurance Co. of North America *v.* Jones, 2 Binn. (Pa.) 547, 561.

Exception as to life policy see *infra*, B, 2, text and note 73.

71. Lett *v.* Guardian F. Ins. Co., 125 N. Y. 82, 86, 25 N. E. 1088.

It is a contract of indemnity, personal to the party to whom it is issued, or for whose interest the insurer undertakes to be responsible in case of loss. Kase *v.* Hartford F. Ins. Co., 58 N. J. L. 34, 36, 32 Atl. 1057.

Exception as to life policy see *infra* B, 2, text and note 73.

A chose in action see Fire Insurance, 19 Cyc. 631; Life Insurance, 25 Cyc. 764.

Assignability see Fire Insurance, 19 Cyc. 621; Life Insurance, 25 Cyc. 764; Marine Insurance, 26 Cyc. 612.

Policy guaranteeing payment to bearer passes by mere delivery see Commercial Paper, 7 Cyc. 812 note 55.

Not subject to garnishment see Grace *v.* Koch, 1 Tex. App. Civ. Cas. § 1062.

Neither commerce nor interstate commerce see Commerce, 7 Cyc. 418.

72. See, generally, Life Insurance, 25 Cyc. 687 *et seq.*

73. Corson's Appeal, 113 Pa. St. 438, 443, 6 Atl. 213, 57 Am. Rep. 479.

Not usually contract of indemnity see Life Insurance, 25 Cyc. 702 text and note 22.

When so construed as to afford indemnity see Life Insurance, 25 Cyc. 740 text and note 46.

A certificate of membership in a mutual benefit society is in the nature of a mutual life insurance policy, although not within the term "policy of life insurance," used in a restricted sense in the statute of Illinois relating to life insurance companies. Martin *v.* Stubbings, 126 Ill. 387, 403, 18 N. E. 657, 9 Am. St. Rep. 620.

74. Enumeration of the particular kinds of insurance contracts or policies see Insurance, 22 Cyc. 1383, 1384, 1385.

by the following terms: "Advance;"[75] "assessment;"[76] "blanket;"[77] "cash;"[78] "endowment;"[79] "floating;"[80] "incontestable;"[81] "interest;"[82] "mixed;"[83] "mutual;"[84] "open;"[85] "paid-up;"[86] "participating;"[87] "permanent;"[88] "running;"[89] "specific;"[90] "stock;"[91] "substituted;"[92] "term;"[93] "time;"[94] "tontine;"[95] "valued;"[96] "voyage;"[97] "wager."[98]

75. See LIFE INSURANCE, 25 Cyc. 699.

76. See LIFE INSURANCE, 25 Cyc. 700.

77. "Blanket policies" has been applied to policies "covering the machinery in the several buildings, and underwriting it for a round sum." American Cent. Ins. Co. *v.* Landau, 62 N. J. Eq. 73, 104, 49 Atl. 738. The term is distinguished from "specific policies," in American Cent. Ins. Co. *v.* Landau, 62 N. J. Eq. 73, 104, 49 Atl. 738. Effect of this policy see FIRE INSURANCE, 19 Cyc. 674–676.

78. A "cash policy" is "essentially different" from a "stock policy." The "payment of a cash premium does not decide the character of a policy as to whether it is mutual or stock." Schimpf *v.* Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373, 375 [*quoted* in Given *v.* Rettew, 162 Pa. St. 638, 640, 29 Atl. 703, in the "Conclusions of Law" of the court below].

79. "Endowment policy" see 15 Cyc. 1046. See also LIFE INSURANCE, 25 Cyc. 698.

"Endowment insurance contract" see LIFE INSURANCE, 25 Cyc. 698.

80. "Floating policy."—"When a fire insurance . . . is made to insure not any specific goods, but the goods which may at the time of the fire be in a certain building" it is so called. Black L. Dict. Effect of this kind of policy see FIRE INSURANCE, 19 Cyc. 668. Marine see MARINE INSURANCE, 26 Cyc. 573.

81. "Incontestable policy."—In construing a provision, in a policy, that it should be incontestable after three years except in certain contingencies, it was said: "The term 'incontestable' is of great breadth. It is the 'policy' which is to be incontestable. We think the language broad enough to cover all grounds for contest not specially excepted in that clause. The word 'policy' may well be taken to mean a formal document delivered by the company, and containing evidence of an obligation to pay." Mutual Reserve Fund Life Assoc. *v.* Austin, 142 Fed. 398, 401, 73 C. C. A. 498, 6 L. R. A. N. S. 1064.

Incontestability see LIFE INSURANCE, 25 Cyc. 873.

82. "Interest policy" see 22 Cyc. 1586. See also MARINE INSURANCE, 26 Cyc. 571.

83. "Mixed policy" see 27 Cyc. 811. See also MARINE INSURANCE, 26 Cyc. 576.

84. "A mutual policy" is one by virtue of which "the insured becomes a member of the corporation . . . is entitled to a share of the profits and is responsible for the losses to the extent of his premium paid or agreed to be paid." Schimpf *v.* Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373, 376 [*quoted* in Given *v.* Rettew, 162 Pa. St. 638, 640, 29 Atl. 703, in the "Conclusions of Law" of the court below], distinguishing "stock policy."

85. "Open policy" see FIRE INSURANCE, 19 Cyc. 671, 672; MARINE INSURANCE, 29 Cyc. 573.

86. "Paid-up policy" see LIFE INSURANCE, 25 Cyc. 790.

87. "Participating policy."—Expert testimony that "the words 'participating policy' mean the same as 'participating in premiums,'" the word "participate" in either connection importing "a sharing of any and all profits accruing to the company or class to which the individual or policy belongs" held competent in Fry *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116, 126.

88. "Permanent policy" is defined as "an insurance from year to year, and until terminated by an express notice by one of the parties to the contract to the other." Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 23 How. Pr. (N. Y.) 448, 449.

89. "Running policy" see MARINE INSURANCE, 26 Cyc. 573.

90. "Specific policies" has been applied to such as "limit their loss to a fixed sum on each separate parcel" of property insured. American Cent. Ins. Co. *v.* Landau, 62 N. J. Eq. 73, 104, 49 Atl. 738, distinguishing "blanket policies."

91. "A stock policy is issued solely upon the credit of the capital stock of the company to one who may be an entire stranger to the corporation, who acquires no right of membership by reason of his policy, no right to participate in its profits, and who subjects himself to no liability by reason of its losses." Schimpf *v.* Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373, 376 [*quoted* in Given *v.* Rettew, 162 Pa. St. 638, 640, 29 Atl. 703, in the "Conclusions of Law" of the court below], distinguishing "mutual policy."

92. "Substituted policy" see ACCIDENT INSURANCE, 1 Cyc. 245; LIFE INSURANCE, 25 Cyc. 792.

93. "Term insurance contract" see LIFE INSURANCE, 25 Cyc. 699 note 6.

94. "Time policy."—"When a fire insurance is made for a limited period (e. g., a year), it is called a 'time policy.'" Black L. Dict. Usual in fire and marine insurance see FIRE INSURANCE, 19 Cyc. 673; MARINE INSURANCE, 26 Cyc. 576.

95. See LIFE INSURANCE, 25 Cyc. 700.

96. "Valued policy" see FIRE INSURANCE, 19 Cyc. 671, 672, 673; MARINE INSURANCE, 26 Cyc. 572.

97. "Voyage policy" see MARINE INSURANCE, 26 Cyc. 576.

98. "Wager policy" is "a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against." Black L. Dict. In varieties of in-

POLITE ART. See Art.[99]

POLITIÆ LEGIBUS, NON LEGES POLITIIS, ADAPTANDÆ. A maxim meaning "Politics are to be adapted to the laws, not laws to politics."[1]

POLITICAL. Pertaining to policy or the administration of government.[2] (See Political Action; Political Character; Political Corporation; Political Discretion; Political Division of the State; Political Occurrences; Political Offense; Political Offices; Political Party; Political Power; Political Questions; Political Rights; Political Status; Political Subdivision of the State; Politics.)

POLITICAL ACTION. In the popular sense that which a man does in the line of his political affiliations or ambitions.[3] Used of an action at law in the sense of one which determines a political question.[4] (See Political.)

POLITICAL CHARACTER. A term which may be used to designate affiliation to one political party as distinguished from another.[5] (See Party, 30 Cyc. 768; Political; and, generally, Elections, 15 Cyc. 279.)

POLITICAL CORPORATION. One which has principally for its object the administration of the government, or to which the powers of government, or a part of such powers, have been delegated.[6] (See, generally, Corporations;[7] Counties;[8] Municipal Corporations;[9] Schools and School-Districts; Towns.)

POLITICAL DISCRETION. A discretion which embraces, combines, and considers all circumstances, events, and projects, foreign or domestic, that can affect the national interest.[10] (See Discretion, 14 Cyc. 382; Discretionary Power, 14 Cyc. 383; Judicial Discretion, 23 Cyc. 1617; Legal Discretion, 25 Cyc. 174; Political.)

POLITICAL DIVISION OF THE STATE. A division formed for the more effectual or convenient exercise of political power within the political localities.[11] (See Political Subdivision of the State.)

surance see Fire Insurance, 19 Cyc. 583–584 text and note 6; Life Insurance, 25 Cyc. 701, 702, 706; Marine Insurance, 26 Cyc. 571.

99. See 3 Cyc. 1011 note 1.

1. Morgan Leg. Max.

2. Bouvier L. Dict. [*quoted* in People *v.* Morgan, 90 Ill. 558, 563].

"In its higher and true sense . . . that which pertains to the government of a nation. In this sense it includes the entire system of its laws, constitutional and statutory." *In re* Kemp, 16 Wis. 359, 396.

Applied to corporations as synonymous with "municipal" or "public" (see Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544); these words being used interchangeably (see Curry *v.* Sioux City Dist. Tp., 62 Iowa 102, 104, 17 N. W. 191; Cook *v.* Portland, 20 Oreg. 580, 585, 27 Pac. 263, 13 L. R. A. 533).

3. Com. *v.* Rentschler, 11 Pa. Dist. 203, 204, holding that the phrase is so used in a statute declaring it criminal to distribute circulars reflecting upon the political actions of a candidate.

4. See State *v.* Cunningham, 83 Wis. 90, 134, 53 N. W. 35, 35 Am. St. Rep. 27 note, 17 L. R. A. 135, where it is held that an action at law which may have a political effect is not necessarily a political action.

5. See Shields *v.* McGregor, 91 Mo. 534, 544, 4 S. W. 266; Turner *v.* Drake, 71 Mo. 285, 287.

The words apply to independent candidates as well as to those who are nominees of regular party organizations. Shields *v.* McGregor, 91 Mo. 534, 544, 4 S. W. 266.

6. Black L. Dict.; Bouvier L. Dict. [*quoted* in Auryansen *v.* Hackensack Imp. Commission, 45 N. J. L. 113, 115].

Statutory definition.—"Political corporations are those which have principally for their object the administration of a portion of the state, and to whom a part of the powers of government is delegated to that effect." La. Civ. Code, art. 429 [*quoted* in State *v.* Louisiana Bar Assoc., (La. 1904) 36 So. 241; State *v.* Kohnke, 109 La. 838, 843, 33 So. 793].

Does not include a bar association consisting in a mere voluntary association of lawyers. State *v.* Louisiana Bar Assoc., (La. 1904) 36 So. 241.

"A community clothed with extensive civil authority . . . is sometimes called a 'political,' sometimes a 'municipal,' and sometimes a 'public' corporation." See Angell & A. Corp. [*cited* in Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544].

Subject to jurisdiction coextensive with its limits see Courts, 11 Cyc. 668.

7. Distinguished from private corporations with reference to governmental control see Corporations, 10 Cyc. 157 *et seq.*

8. See 11 Cyc. 341–343.

9. See 28 Cyc. 132–179.

10. Wynehamer *v.* People, 2 Park. Ch. (N. Y.) 377, 398, distinguishing "legal discretion."

11. State *v.* Englewood Drainage, etc., Com'rs, 41 N. J. L. 154, 156.

POLITICAL OCCURRENCES. A term which, when used in a charter party to designate a certain ground of demurrage, has been held to include only such political occurrences as directly cause the delay and not such as are indirect causes of it.[12] (See, generally, SHIPPING.)

POLITICAL OFFENSE. See EXTRADITION (INTERNATIONAL).[13]

POLITICAL OFFICES. Such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior[14] officer.[15]

POLITICAL PARTY. See ELECTIONS,[16] 15 Cyc. 326.

POLITICAL POWER. The policy of government or its administration.[17] (See, generally, CONSTITUTIONAL LAW, 8 Cyc. 714.)

POLITICAL QUESTIONS. See CONSTITUTIONAL LAW.[18]

POLITICAL RIGHTS. Those which may be exercised in the formation or administration of the government;[19] which consist in the power to participate,

The distinctive marks are that such divisions embrace each a certain territory and its inhabitants, organized for the public advantage and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions, and that to the electors residing within each is to some extent committed the power of local government, to be wielded either mediately or immediately, within their territory, for the benefit of the people there residing. State *v.* Englewood Drainage, etc., Com'rs, 41 N. J. L. 154, 157 [*quoted* in Allison *v.* Corker, 67 N. J. L. 596, 606, 52 Atl. 362]. See also Smith *v.* Howell, 60 N. J. L. 384, 386, 38 Atl. 180, where the syllabus of State *v.* Englewood, *supra* (there cited as Lydecker *v.* Englewood) is quoted as a concise statement of the existing authority in the supreme court on the subject as follows: "A political division to whose boundaries a general tax may be confined is a division of the state with its inhabitants, organized for the public advantage and not in the interest of particular individuals or classes, the chief design of which is the exercise of governmental functions, and to the electors residing within which is, to some extent, committed the power of local government."

"Essential element, in a sustainable political division, of the popular voice of the inhabitants of the territory" see Allison *v.* Corker, 67 N. J. L. 596, 607, 52 Atl. 362.

Includes a street lighting district, the legal voters of which once a year elect commissioners to determine how much money shall be expended by them in lighting the streets of the district. Smith *v.* Howell, 60 N. J. L. 384, 385, 38 Atl. 180.

Does not include a sewerage, drainage, and water district under a board to be elected every five years by male and female resident landowners in fee, such board being invested with some control over a defined territory, but having no concern with the inhabitants, such district being formed, not for public advantage, but in the interest of a particular class — the landowners, and the chief end of which is not the government of the persons and things within its territory, but mere land improvement at the expense of the land either by general tax or special assessment, and the electors of which district have no voice whatever in its corporate affairs, the choice of commissioners and approval of plans falling on the landowners alone. State *v.* Englewood Tp. Drainage, etc., Com'rs, 41 N. J. L. 154, 155, 157.

12. See Sixteen Hundred Tons Nitrate of Soda *v.* McLeod, 61 Fed. 849, 851, 10 C. C. A. 115, where political occurrences, by cause of which dealers refuse to sell, but which leave them free to sell if they will, were held not included by the term.

13. **Usually not subject to extradition** see EXTRADITION (INTERNATIONAL), 19 Cyc. 56.

14. Waldo *v.* Wallace, 12 Ind. 569, 572; Twenty Per Cent Cases, 13 Wall. (U. S.) 568, 575, 20 L. ed. 707 [*affirming* 7 Ct. Cl. 290, 293, and *quoted* in Black L. Dict.]; Bouvier L. Dict. (Rawle's Rev.) 540.

15 Waldo *v.* Wallace, 12 Ind. 569, 572; Bouvier L. Dict. (Rawle's Rev.) 540.

Distinguished from "judicial offices" and "ministerial offices" see Waldo *v.* Wallace, 12 Ind. 569, 572; Twenty Per Cent Cases, 13 Wall. (U. S.) 568, 575, 20 L. ed. 707 [*affirming* 7 Ct. Cl. 290, 293, and *quoted* in Black L. Dict.]. *Compare* 23 Cyc. 1619; 27 Cyc. 794.

16. See also 30 Cyc. 768 text and notes 15–18.

17. People *v.* Morgan, 90 Ill. 558, 562.

It consists of the three great attributes of sovereignty, namely, legislative, executive, and judicial authority. Stewart *v.* Polk County, 30 Iowa 9, 18, 1 Am. Rep. 238. *Compare* Kennett *v.* Chambers, 14 How. (U. S.) 38, 50, 14 L. ed. 316 (where the "political department" is mentioned as distinct from the "judicial branch" of the government); Luther *v.* Borden, 7 How. (U. S.) 1, 39, 12 L. ed. 581 (where "political power" is mentioned as distinct from "judicial power"). *Compare* 19 Cyc. 1620; 25 Cyc. 182.

"It embraces all governmental powers and functions, whether exercised by one department or another, or the officers of one or the other . . . and may be exercised either in the formation or administration of government or both." People *v.* Morgan, 90 Ill. 558, 562.

18. See 8 Cyc. 845.

19. See Bouvier L. Dict. [*quoted* in People *v.* Morgan, 90 Ill. 558, 563].

directly or indirectly, in the establishment or management of the government;[20] those rights which belong to a nation, or to a citizen, or to an individual member of a nation, so distinguished from civil rights, namely, local rights, of a citizen.[21] (Political Rights: In General, see CONSTITUTIONAL LAW.[22] Of Alien, see ALIENS.[23] Of Suffrage, see ELECTIONS.[24])

POLITICAL STATUS. A condition by which a person becomes the subject of a particular country.[25] (Political Status: Of Alien, see ALIENS, 2 Cyc. 88. Of Citizen, see CITIZENS, 7 Cyc. 136. Of State, see CONSTITUTIONAL LAW.[26])

POLITICAL SUBDIVISION OF THE STATE. A term which, as used in the Missouri constitution,[27] relating to jurisdiction, does not include a city within a county,[28] nor a division of more limited powers,[29] such as a school-district.[30] (See POLITICAL DIVISION OF THE STATE.)

POLITICS. In its true original meaning, a term which comprehends everything that concerns the government of the country.[31] (See POLITICAL.)

POLL. As a noun, a number or aggregate of heads; a list or register of heads or individuals; the register of the names of electors who may vote at an election;[32]

"'Rights,' as used in this definition . . . synonymous with power." People *v.* Morgan, 90 Ill. 558, 563.

Political right, a right exercisable in the administration of government. Anderson L Dict. [*quoted* in People *v.* Tool, 35 Colo. 225, 239, 86 Pac. 224, 229, 231, 117 Am. St. Rep. 198, 6 L. R. A. N. S. 822; People *v.* Barrett, 203 Ill. 99, 104, 67 N. E. 742, 96 Am. St. Rep. 296; Fletcher *v.* Tuttle, 151 Ill. 41, 53, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143; Winnett *v.* Adams, 71 Nebr. 817, 824, 97 N. W. 681].

20. Bouvier L. Dict. [*quoted* in People *v.* Washington, 36 Cal. 658, 662; People *v.* Barrett, 203 Ill. 99, 104, 67 N. E. 742, 96 Am. St. Rep. 296; Fletcher *v.* Tuttle, 151 Ill. 41, 53, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143; Winnett *v.* Adams, 71 Nebr. 817, 824, 99 N. W. 681].

21. Encyclopedic Dict. [*quoted* in *In re* Provincial Elections Act, 8 Brit. Col. 76, 79].

"A very wide expression" see *In re* Provincial Elections Act, 8 Brit. Col. 76, 79.

Distinguished from "civil rights" see People *v.* Washington, 36 Cal. 658, 662; People *v.* Barrett, 203 Ill. 99, 104, 67 N. E. 742, 96 Am. St. Rep. 296; Fletcher *v.* Tuttle, 151 Ill. 41, 53, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143; Winnett *v.* Adams, 71 Nebr. 817, 824, 99 N. W. 681. See also CIVIL RIGHTS, 7 Cyc. 160 note 3.

Not affected ex post facto by certain constitutional restrictions see CONSTITUTIONAL LAW, 8 Cyc. 746.

Not subject to injunction see INJUNCTIONS, 22 Cyc. 899.

22. See 8 Cyc. 877–894.

23. See 2 Cyc. 89 note 24. *Compare* 2 Cyc. 89 note 27.

24. See 15 Cyc. 280.

25. See U. S. *v.* Wong Kim Ark, 169 U. S. 649, 656, 18 S. Ct. 456, 42 L. ed. 890, where it is said: "In Udny *v.* Udny, L. R. 1 H. L. Sc. 441 . . . Lord Westbury . . . began by saying: 'The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions: one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status.'"

May depend on different laws in different countries see U. S. *v.* Wong Kim Ark, 169 U. S. 649, 657, 18 S. Ct. 456, 42 L. ed. 890.

26. See 8 Cyc. 845 note 29.

27. Mo. Const. art. 6, § 12.

28. Parker *v.* Zeisler, 139 Mo. 298, 300, 302, 40 S. W. 881 [*followed* in Webb City, etc., Waterworks Co. *v.* Webb City, 143 Mo. 493, 495, 45 S. W. 279]; St. Charles *v.* Hackman, 133 Mo. 634, 641, 34 S. W. 878; Kansas City *v.* Neal, 122 Mo. 232, 234, 25 S. W. 695. See also Northcutt *v.* Eager, 132 Mo. 265, 273, 33 S. W. 1125.

St. Louis, however, is a political subdivision by virtue of Mo. Const. art. 9, §§ 20, 22, 23, and a statute in pursuance thereof defining the city limits and conferring upon the city all the rights and privileges of a county. See Northcutt *v.* Eager, 132 Mo. 265, 273, 33 S. W. 1125; Kansas City *v.* Neal, 122 Mo. 232, 234, 26 S. W. 695.

29. Harrison County School Dist. No. 6 *v.* Burris, 84 Mo. App. 654, 662.

But under Mo. Const. art. 10, § 12, limiting the indebtedness of a county, city, town, township, school-district, or other political division, has been held to include a levee district. Morrison *v.* Morey, 146 Mo. 543, 560, 48 S. W. 629 [*distinguished* in Harrison County School Dist. No. 6 *v.* Burris, 84 Mo. App. 654, 662].

30. School Dist. No. 1 *v.* Boyle, 182 Mo. 347, 348, 81 S. W. 409 [*following* Harrison County School Dist. No. 6 *v.* Burris, 84 Mo. App. 654, 662].

31. Chesterfield *v.* Janssen, 2 Ves. 125, 156, 28 Eng. Reprint 82.

32. Webster Dict. [*quoted* in De Soto Parish *v.* Williams, 49 La. Ann. 422, 426, 21 So. 647, 37 L. R. A. 761].

"Vote" used synonymously see De Soto

a mode of ascertaining the sense of a meeting and whether the persons tendering their votes are qualified to vote therein.[33] As an adjective, cut or shaved smooth or even; cut in a straight line without indentation.[34] As a verb, to single out, one by one, of a number of persons.[35] (See DEEDS, 13 Cyc. 522; ELECTIONS;[36] GRAND JURIES;[37] JURIES;[38] PARLIAMENTARY LAW, 29 Cyc. 1688.)

POLLICITATION. In the civil law, a sort of contract, which arises from a promise made by one party only, without any consent or acceptance by the other.[39] (See, generally, CONTRACTS, 9 Cyc. 247.)

POLL PARISH. See CONGREGATION.[40]

POLL TAX. See TAXATION.[41]

POLLUTION. The act of polluting, or the state of being polluted (in any sense of the verb); defilement; uncleanness; impurity.[42] (Pollution: Of Water, see WATERS.[43] Of Well, see GAS;[44] WATERS.)

POLYGAMIA EST PLURIUM SIMUL VIRORUM UXORUMVE CONNUBIUM. A phrase meaning "Polygamy is the marriage with many husbands or wives at one time."[45] (See BIGAMY, 5 Cyc. 688; POLYGAMY. See also POLYGAMIST.)

POLYGAMIST.[46] One who practices polygamy, or maintains its lawfulness;[47] any person having several wives.[48] (See POLYGAMY; and, generally, BIGAMY, 5 Cyc. 688.)

Parish *v.* Williams, 49 La. Ann. 422, 426, 21 So. 647, 37 L. R. A. 761.

33. See Reg. *v.* Wimbledon Local Bd., 8 Q. B. D. 459, 465, 46 J. P. 292, 51 L. J. Q. B. 219, 46 L. T. Rep. N. S. 47, 30 Wkly. Rep. 400, where it is said: "A poll is not a new meeting, but it is a mode of ascertaining the sense of the meeting which is continued for that purpose, and, further, where a qualification exists, it is a mode of ascertaining whether the persons tendering their votes do in fact possess that qualification."

"Where a poll is demanded, the election commences with it. . . . It is an abandonment of what was done before." Anthony *v.* Seger, 1 Hagg. Cons. 9, 13.

Common-law right to demand a poll see Reg. *v.* Wimbledon Local Bd., 8 Q. B. D. 459, 463, 46 J. P. 292, 51 L. J. Q. B. 219, 46 L. T. Rep. N. S. 47, 30 Wkly. Rep. 400; Reg. *v.* Hedger, 12 A. & E. 150, 158, 4 P. & D. 61, 40 E. C. L. 83; Reg. *v.* St. Mary, 8 A. & E. 356, 360, 2 Jur. 566, 3 N. & P. 416, W. W. & H. 398, 35 E. C. L. 629; Campbell *v.* Maund, 5 A. & E. 865, 880, 2 Harr. & W. 457, 6 L. J. M. C. 145, 1 N. & P. 558, 31 E. C. L. 859; White *v.* Steele, 12 C. B. N. S. 383, 408, 7 Jur. N. S. 805, 8 Jur. N. S. 1177, 31 L. J. C. P. 265, 5 L. T. Rep. N. S. 449, 6 L. T. Rep. N. S. 686, 104 E. C. L. 383; Reg. *v.* How, 33 L. J. M. C. 53, 54, 9 L. T. Rep. N. S. 385; Reg. *v.* St. Matthew Parish, 32 L. T. Rep. N. S. 558, 559.

34. Black L. Dict.

Deed-poll: In general see 2 Blackstone Comm. 296. Defined, see 13 Cyc. 522. Estoppel by see ESTOPPEL, 16 Cyc. 689.

35. Black L. Dict. [*citing* 1 Burrill Pr. 238].

To poll a jury is to require that each juror shall himself declare what is his verdict. Black L. Dict. Polling jurors see CRIMINAL LAW, 12 Cyc. 687, 688; TRIAL.

36. Opening and closing of polls see ELECTIONS, 15 Cyc. 364.

Polling places see ELECTIONS, 15 Cyc. 343, 344. For INDIANS see 22 Cyc. 141 note 86.

37. See 20 Cyc. 1327 *et seq.*

38. See 24 Cyc. 310 note 6, 311 text and notes 11, 12, 324, 330 text and note 10.

39. McCulloch *v.* Eagle Ins. Co., 1 Pick. (Mass.) 278, 283, adding: "But this is a peculiar kind of obligation which exists only from an individual toward a body politic or government."

40. See 8 Cyc. 577 note 7.

41. See also MUNICIPAL CORPORATIONS, 28 Cyc. 1658, 1700; STREETS AND HIGHWAYS.

42. Webster Int. Dict.

A finding that defendants had "polluted" a stream has been held to be but another form of saying that they had "deposited culm, muck and dirt in it." Fricke *v.* Quinn, 188 Pa. St. 474, 482, 41 Atl. 737.

Powers and duties of sanitary authorities in dealing with nuisances and offensive conditions see HEALTH, 21 Cyc. 396.

43. See also EASEMENTS, 14 Cyc. 1217 note 1; JUDGES, 23 Cyc. 579 text and note 37; NUISANCES, 29 Cyc. 1178.

44. See 20 Cyc. 1180 note 21.

45. Black L. Dict.

46. Disqualified as: Elector see cases cited *infra*, note 48. Juror see JURIES, 24 Cyc. 199.

47. Webster Int. Dict. *Compare*, however, Murphy *v.* Ramsey, 114 U. S. 15, 40, 41, 5 S. Ct. 747, 29 L. ed. 47, holding that the word, in the statute there construed, is used neither "in the sense of describing those who entertain the opinion that bigamy and polygamy ought to be tolerated as a practice," nor "only such persons as have violated the first section of the act," where the person guilty of polygamy or bigamy within the meaning of that statute is described.

48. As used in U. S. Rev. St. (1878) § 5352, the term has been defined as in the text (Cannon *v.* U. S., 116 U. S. 55, 74, 6 S. Ct. 278, 20 L. ed. 561); also, more precisely within the meaning of the statute, as

POLYGAMY.[49] The proper name of the offense of having a plurality of husbands or wives.[50] (See, generally, BIGAMY, 5 Cyc. 688. See also POLYGAMIST.)

POLYMANIA. General mental alienation.[51] (See, generally, INSANE PERSONS, 22 Cyc. 1109.)

POND. A body of water naturally or artificially confined, and usually of less extent than a lake.[52] (Pond: In General, see NAVIGABLE WATERS, 29 Cyc. 289; WATERS. As Boundary, see BOUNDARIES.[53] As Possible Nuisance, see NUISANCES.[54])

PONDERANTUR TESTES, NON NUMERANTUR. A maxim meaning "Witnesses are weighed, not counted." [55]

PONDERE, NUMERO, ET MENSURA. A maxim supplemented in translation for application to evidence, by the words: "Let evidence be estimated first by weight, and then by number, then by measure." [56]

PONE. A common-law writ also called attachment.[57]

PONTAGE. A duty levied for repairing bridges.[58]

PONY. A small horse.[59] (See COLT, 7 Cyc. 403; HORSE, 21 Cyc. 1102; and, generally, ANIMALS, 2 Cyc. 304.)

PONY HOMESTEAD. A term sometimes applied to a homestead exempt by law from sale under process; statutory homestead.[60] (See, generally, HOMESTEADS, 21 Cyc. 458.)

POOL. Applied to business arrangements or combinations,[61] a combination of persons contributing money to be used for the purpose of increasing or depressing the market price of stocks, grain, or other commodities; also the aggregate of the sums so contributed; [62] a combination having the intention and power, or tendency,

"any man . . . who, having previously married one wife, still living, and having another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives" (Murphy *v.* Ramsey, 114 U. S. 15, 41, 5 S. Ct. 747, 29 L. ed. 47 [*quoted* in Cannon *v.* U. S., 116 U. S. 55, 73, 6 S. Ct. 278, 29 L. ed. 561]).

49. **Libelous per se as an accusation** see LIBEL AND SLANDER, 25 Cyc. 278.

50. Com. *v.* McNerny, 10 Phila. (Pa.) 206. **Statutory definitions** see Ga. Code (1882), § 4530 [*quoted* in Black L. Dict.]. Minn. Pub. St. [*quoted* in State *v.* Armington, 25 Minn. 29, 38; State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241].

A more just designation of the crime of Bigamy see 5 Cyc. 688 note 2.

Distinguished from bigamy see Com. *v.* McNerny, 10 Phila. (Pa.) 206, 207.

51. Matter of Russell, 1 Barb. Ch. (N. Y.) 38, 41, distinguishing monomania. *Compare* 26 Cyc. 515; 27 Cyc. 886.

52. Webster Dict. [*quoted* in Peters *v.* State, 96 Tenn. 682, 684, 36 S. W. 399, 33 L. R. A. 114]. *Compare* Ne-pee-nauk Club *v.* Wilson, 96 Wis. 290, 295, 71 N. W. 661.

53. See 5 Cyc. 869, 893.

54. See 29 Cyc. 1179.

55. Black L. Dict.

Applied in: Bakeman *v.* Rose, 14 Wend. (N. Y.) 105, 109; Starratt *v.* Miller, Hodg. El. Rep. (U. C.) 458, 479.

Cited in Starkie Ev. (10th Am. ed.) 832.

56. **So rendered in** Morgan Leg. Max.

57. See ATTACHMENT, 4 Cyc. 396 text and note 2.

58. Truro *v.* Reynalds, 8 Bing. 275, 282, 21 E. C. L. 538.

59. Webster Dict. [*quoted* in Golden *v.* Cockrill, 1 Kan. 259, 266, 81 Am. Dec. 510], where it is said: "The terms horse and pony are not, in common usage and acceptation, synonymous or convertible terms; but, on the contrary, the term pony is used to distinguish from horses in general a peculiar breed, having well known and strongly marked characteristics."

60. See Bennett *v.* State Trust Co., 106 Ga. 578, 580, 32 S. E. 625.

61. **Agreement as to sharing profits** see JOINT ADVENTURES, 23 Cyc. 460 text and note 25.

Agreements in restraint of trade see CONTRACTS, 9 Cyc. 525, 577; and, generally, MONOPOLIES, 27 Cyc. 898 *et seq.*

Paper given in aid of or pursuant to illegal combination see COMMERCIAL PAPER, 7 Cyc. 744 note 25.

Pooling arrangement involving insured interests see FIRE INSURANCE, 19 Cyc. 745 note 68.

Real estate pool see Kilbourn *v.* Thompson, 103 U. S. 168, 195, 26 L. ed. 377, where it is said: "The word 'pool,' in the sense here used, is of modern date, and may not be well understood, but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic."

Whether or not a joint adventure see 23 Cyc. 453.

62. Webster Dict. [*quoted* in Black L. Dict.; Mollyneaux *v.* Wittenberg, 39 Nebr. 547, 557, 58 N. W. 205].

Applied to an agency consisting of divers companies and established for the purpose of preventing competition by means of a fixed rate see Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 356, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754.

to monopolize business or control production, or to interfere with trade, or to fix and regulate prices and the like;[63] a joint adventure by several owners of a specified stock or other security, temporarily subjecting all their holdings to the same control for the purpose of a speculative operation, in which any of the shares contributed by one, and any profit on the shares contributed by another, shall be shared by all alike.[64] In the parlance of horse-racing, ball-games, etc., the combination of a number of persons, each staking a sum of money on the success of a horse in a race, a contestant in a game, etc., the money to be divided among the successful betters according to the amount put in by each;[65] also, the result in favor of the winner, or possibly, stakes,[66] a combination of stakes, the money derived from which is to go to the winner.[67] Applied to games,[68] one of the various games played on a six pocket billiard table;[69] a game played on a billiard table with six pockets[70] by two or more persons;[71] a kind of billiards.[72] Geographically, a standing water without any current or issue;[73] a fishing place.[74] (Pool: As a Combination in Busi-

63. Chicago, etc., Coal Co. *v.* People, 114 Ill. App. 75, 112.

"Pool or trust" see Chicago, etc., Coal Co. *v.* People, 114 Ill. App. 75, 112.

As a verb in this sense.— To "combine and pool the large competing bakeries throughout the country into practically what is known and called a 'trust;'" also "pooled the business, of 35 of the leading bakeries;" also, "all profits pooled" see American Biscuit, etc., Co. *v.* Klotz, 44 Fed. 721, 724.

Pooling contracts.— "Contracts between competing corporations, commonly termed 'pooling contracts,' to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy." U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 65, 7 C. C. A. 15, 24 L. R. A. 73.

64. Green *v.* Higham, 161 Mo. 333, 336, 61 S. W. 798.

"Pooling" is an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. American Biscuit, etc., Co. *v.* Klotz, 44 Fed. 721, 725.

"Combination in the form of trust" as that expression is used in U. S. St. July 2, 1890, prohibiting monopolies, and in La. St. July 5, 1890, of like purpose, "would seem to point to just what, in popular language, is meant by pooling." American Biscuit, etc., Co. *v.* Klotz, 44 Fed. 721, 725.

Pooling arrangement as to shares see CORPORATIONS, 10 Cyc. 617 note 44.

65. Century Dict. [*quoted* in Lacey *v.* Palmer, 93 Va. 159, 164, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822].

Kinds of pool defined and described see GAMING, 20 Cyc. 886 note 54.

Buying pools.— In discussing testimony in connection with horse-racing the parties bought pools and got gain thereby, it was said: "There is no proof of what the buying of pools is; probably it is a device by which, ordinarily, money may be got from others by taking the risk of losing one's own." Harris *v.* White, 81 N. Y. 532, 541.

66. See Brunswick, etc., Co. *v.* Valleau, 50 Iowa 120, 123, 32 Am. Rep. 119.

67. See Com. *v.* Ferry, 146 Mass. 203, 208, 15 N. E. 484 [*cited* in Reilly *v.* Gray, 77 Hun (N. Y.) 402, 408, 28 N. Y. Suppl. 811].

"A pool, generally speaking, is a combination of stakes; and within the meaning of the law, a pool is money that has been paid in by those who have bought a right in it, and which is to be paid over to the winner, if he gets the right number in a game of chance." Com. *v.* Ferry, 146 Mass. 203, 207, 15 N. E. 484 [*cited* in *Ex p.* Powell, 43 Tex. Cr. 391, 399, 66 S. W. 298], charge of trial judge.

68. The game is a mode of gaming see 20 Cyc. 887 text and notes 79, 80.

69. Standard Dict. [*quoted* in State *v.* Johnson, 108 Iowa 245, 247, 79 N. W. 62].

70. Century Dict. [*quoted* in State *v.* Johnson, 108 Iowa 245, 247, 79 N. W. 62; Clearwater *v.* Bowman, 72 Kan. 92, 94, 82 Pac. 526].

71. Century Dict. [*quoted* in Clearwater *v.* Bowman, 72 Kan. 92, 94, 82 Pac. 526].

72. See Encyclopœdia Brit.; Webster Int. Dict. [both *cited* in State *v.* Johnson, 108 Iowa 245, 247, 79 N. W. 62].

73. Black L. Dict.; Burrill L. Dict. [*citing* Collics Sewers (82) 102].

Passes land as well as water when used as a word of description see in Coke Litt. 5*a*, 5*b* [*quoted* in Johnson *v.* Rayner, 6 Gray (Mass.) 107, 110, and *cited* in Goodrich *v.* Eastern R. Co., 37 N. H. 149, 164], the following passage: "*Stagnum*, in English a pool, doth consist of water and land; and therefore by the name of *stagnum* or a pool the water and land shall pass also."

74. See Bennett *v.* Boggs, 3 Fed. Cas. No. 1,319, Baldw. 60, 63, 70, where it appears by the statement of facts, that a certain statute in force both in New Jersey and Pennsylvania defined a pool or fishing place to be "from the place or places where seines or nets are usually thrown in, to the place or places where they have been usually taken out; or from the place or places where they may hereafter be thrown into the water, to the place or places where they may be taken out," and of this it is held in the opinion as follows: "The words, fishery, pool, or fishing place, as defined in the act of 1808, can apply only to a place on the shore to which a fishery is annexed, and there can be no pool or fishery in reference to fishing by claim of common right on the river."

ness, see POOLING. As a Contract, see CONTRACTS, 9 Cyc. 523; POOL-SELLING. As a Monopoly, see CORNER, 9 Cyc. 978; MONOPOLIES, 27 Cyc. 898 *et seq.* As Gaming, see GAMING, 20 Cyc. 885. Of Railroads, see RAILROADS. Of Water, see WATERS. See also POOL-ROOM; POOL-SELLER; POOL-SELLING; POOL-TICKET.)

POOL MEASURE. An allowance claimed by ancient custom in the port of London of one chaldron to every score, the basis of which measure is the chaldron, a well known quantity, being a multiple of so many bushels; a measure by the ordinary chaldron with a certain allowance of one chaldron over in twenty.[75] (See, generally, WEIGHTS and MEASURES.)

POOL-ROOM.[76] A room in which pools on races, etc., are sold;[77] a room in which betting on races is carried on;[78] in its common and popular meaning, a place where people resort to wager on horse-racing which is run away from the room or out of the state.[79] In another sense, a room where the game of pool is played.[80] (See GAMING, 20 Cyc. 894; POOL.)

POOL-SELLER. One who sells pools on any event — as horse racing, boat racing, elections, etc.[81] (See GAMING, 20 Cyc. 894; POOL; POOL-SELLING.)

POOL-SELLING.[82] A method of betting[83] or wagering money upon horse races or other contests;[84] betting upon the results of horse-races and other trials of skill, speed, and durations, at a place with apparatus and devices convenient for this purpose.[85] (See POOL; POOL-SELLER; and, generally, GAMING, 20 Cyc. 885.)

75. Parish *v.* Thompson, 3 East 525, 530, 532.

76. Included in "gaming-room" see 20 Cyc. 967 note 1.

As disorderly house see DISORDERLY HOUSES, 14 Cyc. 486.

77. Century Dict. [*cited* in *Ex p.* Powell, 43 Tex. Cr. 391, 399, 66 S. W. 298].

Keeping as an offense see GAMING, 20 Cyc. 894.

As criminal nuisance see Respass *v.* Com., 102 S. W. 800, 31 Ky. L. Rep. 443; Enright *v.* Com., 102 S. W. 799, 31 Ky. L. Rep. 442, 444; Gormley *v.* Com., 102 S. W. 332, 31 Ky. L. Rep. 372; Respass *v.* Com. 102 S. W. 331, 332, 31 Ky. L. Rep. 371 [*followed* in Respass *v.* Com., 102 S. W. 332, 31 Ky. L. Rep. 373]; Huber *v.* Com., 102 S. W. 291, 292, 31 Ky. L. Rep. 320; Ehrlick *v.* Com., 102 S. W. 289, 31 Ky. L. Rep. 401, 10 L. R. A. N. S. 995.

78. State *v.* Maloney, 115 La. 498, 513, 39 So. 539.

79. State *v.* Maloney, 115 La. 498, 513, 39 So. 539, where it is said: "Conceding that the term 'pool' or 'pool room' has, according to lexicographers, several meanings, we are of opinion that the legislation on the subject, the direct result of the decisions of this court, show that the term 'pool room' was used to designate a room in which betting on races is carried on."

80. See Goytino *v.* McAleer, 4 Cal. App. 655, 88 Pac. 991, where the word is so used.

Police power to regulate see Goytino *v.* McAleer, 4 Cal. App. 655, 88 Pac. 991.

81. *Ex p.* Powell, 43 Tex. Cr. 391, 399, 66 S. W. 298.

82. As conducting a lottery see 25 Cyc. 1639.

As nuisance see NUISANCES, 29 Cyc. 1179.

Municipal police power to regulate see MUNICIPAL CORPORATIONS, 28 Cyc. 714 text and note 52.

On horse-races to take place without the state subject to state prohibition see COMMERCE, 7 Cyc. 437 note 16.

Prohibited see GAMING, 20 Cyc. 885.

83. Barker *v.* Mosher, 60 N. H. 73, 74 [*cited* in *In re* Opinion of Justices, 73 N. H. 625, 627, 63 Atl. 505].

84. See *In re* Opinion of Justices, 73 N. H. 625, 627, 63 Atl. 505.

"A scheme for facilitating 'betting on horse races.'" So characterized as described in a certain complaint. Reilly *v.* Gray, 77 Hun (N. Y.) 402, 408, 28 N. Y. Suppl. 811 [*quoted* in People *v.* McCue, 87 N. Y. App. Div. 72, 73, 83 N. Y. Suppl. 1088].

Not confined to pools on horse-races see *Ex p.* Powell, 43 Tex. Cr. 391, 398, 399, 66 S. W. 298. But *compare* State *v.* Delmar Jockey Club, 200 Mo. 34, 56, 92 S. W. 185, 98 S. W. 539, where it is said: "Whatever may be the correct definitions of the terms 'book-making' and 'pool-selling,' wherever either is used it is always understood to have reference to horse racing of some character, and the one is, therefore, germane to the other."

"Book-making and pool-selling are each betting upon the horse race or particular event upon which they are made or sold. . . . In the first, the betting is with the book-makers; in the second, the betting is among the purchasers of the pool" (Swigart *v.* People, 154 Ill. 284, 288, 40 N. E. 432 [*cited* in Ullman *v.* St. Louis Fair Assoc., 167 Mo. 273, 283, 66 S. W. 949, 56 L. R. A. 606]); they are kindred terms (see State *v.* Delmar Jockey Club, 200 Mo. 34, 56, 92 S. W. 185, 98 S. W. 539).

The phrase "pool selling and selling pools" held unequivocal in an indictment. See People *v.* Corbalis, 17 N. Y. Cr. 469, 472.

85. State *v.* Scott, 80 Conn. 317, 68 Atl. 258, 259.

The term imports a transaction, where the

POOL-STOCK. A term which appears to have been used by a certain corporation to describe certain of its stock which was not to be used until after a given period of years, and for which special receipts were issued to holders as evidence of their ownership.[86] (See, generally, CORPORATIONS, 10 Cyc. 1 *et seq.*)

POOL TICKET. A ticket entitling the holder to a share in the proceeds of a pool.[87] (See GAMING, 20 Cyc. 877; POOL.)

POOR. Destitute of property; wanting in material riches or goods, needy, indigent.[88] The word is used in two senses:[89] In one sense simply as opposed to rich,[90] applied to persons who are not entirely destitute of property but who are not rich; as a poor man or woman, poor people;[91] in the other sense to describe that class who are entirely destitute and helpless;[92] indigent, necessitous, denoting extreme want;[93] in law, so completely destitute of property as to be entitled to maintenance from the public.[94] It may also be used in a third sense as a term of endearment and compassion.[95] (Poor: As Applied to Beneficiaries, see CHARITIES, 6 Cyc. 939. As Entitled to Public Support, see PAUPERS, 30 Cyc. 1064. Debtor, see POOR DEBTOR, and Cross-References Thereunder. See also POOR CHILD; POOR DEBTOR; POOR-HOUSE; POOR RATE; POOR RELATIONS.)

POOR CHILD. A term which, as used in the statute relating to binding by indentures, has been held not to include a person over the age of twenty-one years, although he might, if already bound, have been compelled to serve until the age of twenty-four.[96]

POOR DEBTOR. An insolvent debtor.[97] (See DEBTOR, 13 Cyc. 425, and Cross-References Thereunder.)

POOR FARM. See PAUPERS, 30 Cyc. 1075.

POOR-HOUSE. A term which has been held applicable to a house provided for the reception and relief of poor persons.[98] (See PAUPERS, 30 Cyc. 1075; POOR.

POOR LAW. See PAUPERS, 30 Cyc. 1064.

POOR RATE. In English law, a tax levied by parochial authorities for the relief of the poor.[99]

POOR RELATIONS. A phrase held to include only distributees under the

money of some person other than the seller of the pool is to be received by him. People *v.* Bennett, 113 Fed. 515, 516.

86. See Williams *v.* Ashurst Oil, etc., Co., 144 Cal. 619, 624, 78 Pac. 28.

87. *Ex p.* Powell, 43 Tex. Cr. 391, 399, 66 S. W. 298.

88. Webster Dict. [*quoted* in State *v.* Osawkee Tp., 14 Kan. 418, 423, 19 Am. Rep. 99; Hoffen's Estate, 70 Wis. 522, 527, 36 N. W. 407].

Applied to preachers, in a charitable provision, held to "point at those for whom no public provision was made by the state, but who subsisted on the voluntary contributions of their respective flocks." Atty.-Gen. *v.* Shore, 11 Sim. 592, 635, 34 Eng. Ch. 592, 59 Eng. Reprint 1002, construing the term "poor and godly preachers."

"Poor of the county" see PAUPERS, 30 Cyc. 1064 note 2.

89. State *v.* Osawkee Tp., 14 Kan. 418, 421, 19 Am. Rep. 99.

90. State *v.* Osawkee Tp., 14 Kan. 418, 421, 19 Am. Rep. 99.

91. Webster Dict. [*quoted* in State *v.* Osawkee Tp., 14 Kan. 418, 422, 19 Am. Rep. 99].

92. State *v.* Osawkee Tp., 14 Kan. 418, 422, 19 Am. Rep. 99.

93. Webster Dict. [*quoted* in State *v.* Osawkee Tp., 14 Kan. 418, 422, 19 Am. Rep. 99; Hoffen's Estate, 70 Wis. 522, 527, 36 N. W. 407].

94. Webster Dict. [*quoted* in State *v.* Osawkee Tp., 14 Kan. 418, 423, 19 Am. Rep. 99]. See also PAUPERS, 30 Cyc. 1064.

95. Anonymous, 1 P. Wms. 327, 24 Eng. Reprint 410, so construing the word used in a will, as in the phrases "my poor father," or "my poor child."

96. Rex *v.* St. John Bedwardine, 5 B. & Ad. 169, 173, 27 E. C. L. 79, construing 56 Geo. III, c. 139, § 11.

97. Standard Dict.

Bonds for relief under arrest see ARREST, 3 Cyc. 978.

Discharge see ARREST, 3 Cyc. 964 *et seq.*; EXECUTIONS, 17 Cyc. 1541–1568.

Exemptions see CONSTITUTIONAL LAW, 8 Cyc. 758.

Motions for relief under arrest see ARREST, 3 Cyc. 964 *et seq.*

Review of proceedings by certiorari see CERTIORARI, 6 Cyc. 741.

98. See Southwell *v.* Royal Holloway College, [1895] 2 Q. B. 487, 495, 59 J. P. 503, 64 L. J. Q. B. 791, 73 L. T. Rep. N. S. 183, 15 Reports 533, 44 Wkly. Rep. 315.

Under Missouri Laws (1879), p. 78, not a county building, see Melvin *v.* Summerville, 210 Pa. St. 41, 44, 59 Atl. 483.

99. Black L. Dict.

Gifts in aid of see CHARITIES, 6 Cyc. 923.

statute of distributions;[1] heirs at law.[2] (See, generally, CHARITIES, 6 Cyc. 908; WILLS.)

POPULAR ACTION. Such an action as may be brought by any person, as in the case of a penal statute which forbids some act or omission, on pain of forfeiting a penalty to any such person as will sue for it.[3] (See ACTIONS, 1 Cyc. 732, 733 text and notes 71–76; PENALTIES, 30 Cyc. 1331 *et seq.*)

POPULAR ELECTION. Election by the people; that which is participated in by the people at large.[4] (See, generally, ELECTIONS, 15 Cyc. 268 *et seq.*)

POPULAR GOVERNMENT. One wherein the body of the nation keeps in its hands the empire or the right of command.[5] (See GOVERNMENT, 20 Cyc. 1284.)

POPULAR SENSE. In reference to the construction of a statute, that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it.[6]

POPULAR USE. The occasional and precarious enjoyment of property by members of society in their individual capacities — without the power to enforce such enjoyment according to law.[7]

POPULATION. The whole number of people or inhabitants [8] in a country or a portion of the country.[9] Also a part of the inhabitants in any way distinguished from the rest, as the German population of New York.[10] (Population: Enumeration of, see CENSUS, 6 Cyc. 725. Of Counties, see COUNTIES.[11] Of Municipal Corporations, see MUNICIPAL CORPORATIONS.[12] Subject of Judicial Notice, see

1. See McNeilledge *v.* Galbraith, 8 Serg. & R. (Pa.) 43, 45, 11 Am. Dec. 572, where it is said: "This bequest is to be construed as if the word 'poor' were not in it. There is no distinguishing between the degrees of poverty; for if degrees of poverty were to be taken into consideration, and govern the construction, it would open a field of inquiry into the relative poverty of relations, rendering it very difficult and embarrassing, if not impracticable, ever to arrive at a just conclusion who were poor. The devise to relations, is, of itself, not free from ambiguity, and courts have been obliged to lay hold of the Statutes of Distributions as the standard, to prevent an inquiry which would be infinite, and would extend to relations *ad infinitum*." See also Widmore *v.* Woodroffe, Ambl. 636, 27 Eng. Reprint 413, holding the same as to a bequest to the "most necessitous" of testator's relations. But *compare* Brunsden *v.* Woolredge, Ambl. 507, 27 Eng. Reprint 327, holding that the phrase applies to those who are poor and objects of charity.

As beneficiaries see CHARITIES, 6 Cyc. 908, 909.

2. Ross *v.* Ross, 25 Can. Sup. Ct. 307, 330.

3. Sweet L. Dict. [*quoted* in Shrigley *v.* Taylor, 4 Ont. 396, 397]. See also Grover *v.* Morris, 73 N. Y. 473, 474.

4. Reid *v.* Gorsuch, 67 N. J. L. 396, 402, 51 Atl. 457.

Popular assent to organization of city see MUNICIPAL CORPORATIONS, 28 Cyc. 120.

Popular vote: As to boundaries of counties see COUNTIES, 11 Cyc. 351. As to location of county-seat see COUNTIES, 11 Cyc. 367, 374.

Submission of enacted law to popular will see CONSTITUTIONAL LAW, 8 Cyc. 840.

5. Vattel L. Nat. §§ 1, 2 [*quoted* in Stark *v.* McGowen, 1 Nott & M. (S. C.) 387, 392, 9 Am. Dec. 712].

6. Black L. Dict. See also Grenfell *v.* Inland Revenue Com'r, 1 Ex. D. 242, 248, 45 L. J. Exch. 465, 34 L. T. Rep. N. S. 426, 24 Wkly. Rep. 582].

7. Gilmer *v.* Lime Point, 18 Cal. 229, 238, comparing the terms "common benefit," "public interest," "public use," and "public utility."

8. Century Dict.; Webster Dict. [both *quoted* in Matter of Silkman, 88 N. Y. App. Div. 102, 119, 84 N. Y. Suppl. 1025].

9. Webster Dict. [*quoted* in Matter of Silkman, 88 N. Y. App. Div. 102, 110, 84 N. Y. Suppl. 1025].

10. Century Dict. [*quoted* in Matter of Silkman, 88 N. Y. App. Div. 102, 119, 84 N. Y. Suppl. 1025].

11. Of counties.—As regulated by constitution see COUNTIES, 11 Cyc. 344. As used in N. Y. Const. art. 6, § 20, prohibiting practice as an attorney by judges, of specified courts, elected in a county having a "population" exceeding one hundred and twenty thousand, *quære*, whether the word is to be confined to the citizen inhabitants, excluding aliens, or extends to all inhabitants. The court declined to decide the question, but Woodward, J., in a concurring opinion, took the view that the word was not of so precise a definition that it could not be made to conform to the spirit of the instrument, and that it was therefore limited to the resident citizen population of the county. Matter of Silkman, 88 N. Y. App. Div. 102, 103, 108, 84 N. Y. Suppl. 1025.

12. Of municipal corporations: As basis of classification see MUNICIPAL CORPORATIONS, 28 Cyc. 143–145. As part of corporation see MUNICIPAL CORPORATIONS, 28 Cyc. 120 text and note 28, 28 Cyc. 122 text and note 43. In N. J. Rev. Sup. p. 506, providing for classification of cities, the term means enumeration of inhabitants, and refers to such enumeration as the law provides

Evidence.[13] Synonym, in One Construction, of "People," see People, 30 Cyc. 1388 text and note 8.)

Populist. A member of the People's Party.[14]

Populus Anglicanus nemini servire nisi Deo et legibus. A maxim meaning "The people of England are subject to none but to God and the laws."[15]

Populus Anglicanus non nisi suis legibus quas ipse elegerit tenetur obtemperare. A maxim meaning "The people of England are bound to obey only their own laws, which they themselves have chosen."[16]

Populus vult decipi — et decipiatur. A Latin phrase meaning "The people wishes to be deceived — and let it be deceived."[17]

Porcelain. A ceramic ware having a translucent body, and when glazed a translucent glaze also.[18]

Porch. In common speech, a word applied to a shelter in front of a door, and capable of being used as a generic term including a shelter with closed sides as well as one with pillars.[19] (See Portico.)

Pork. The flesh of swine, fresh or salted, used for food.[20]

Port. A term used in two senses — first, according to the popular understanding, as denoting a particular place; and, second, in a larger acceptation, as comprising under one name a district of many places classed together for the purpose of revenue;[21] a term which even when applied to a single specific port, may be used in different senses, one as the head port of a district wherein are subordinate and independent ports, and the other the limited (also the popular) sense, of a port situate locally on a certain river or part of a river with a town near thereto;[22] a term which, in sea phrase, may be said to be any safe station for

to be made. *In re* Passaic, 54 N. J. L. 156, 158, 23 Atl. 517.

13. See 16 Cyc. 870.

14. Standard Dict. [*quoted* in Porter *v.* Flick, 60 Nebr. 773, 778, 84 N. W. 262].

15. Morgan Leg. Max.

16. Morgan Leg. Max.

17. Cited (without translation), as illustrating an improper point of view, in Bonisteel *v.* Saylor, 17 Ont. App. 505, 517.

18. Century Dict.

"Painting on procelain" and "decorated, porcelain ware," as subject of customs duties distinguished see Arthur *v.* Jacoby, 103 U. S. 677, 678, 26 L. ed. 454; *In re* Davis Collamore, 53 Fed. 1006.

19. See Atty.-Gen. *v.* Ayer, 148 Mass. 584, 587, 20 N. E. 451, comparing the word with "portico." See also Garrett *v.* Janes, 65 Md. 260, 270, 3 Atl. 597.

As subject to building restrictions see Deeds, 13 Cyc. 716 text and note 87, 13 Cyc. 717 note 88.

Does not include a flight of steps from the street to the second-story of a building; nor does such a structure bear sufficient relation to a porch to come within the meaning of a provision permitting the use of space "for erecting porches . . . or for other purposes of utility," although such provision is construed to relate to porches and other erections of similar nature. People *v.* Carpenter, 1 Mich. 273, 282, 284.

20. Webster Dict. [*quoted* in Whitson *v.* Culbertson, 7 Ind. 195, 196].

"Mess pork" see 27 Cyc. 484.

"Pork on foot" is a term which embraces hogs that may, in due season, and at convenience, be prepared for and converted into pork, as well as those that may be ready for the knife. Byous *v.* Mount, 89 Tenn. 361, 364, 365, 17 S. W. 1037, where the term is so construed as used in the statute exempting from execution "pork slaughtered or on foot."

"Pork hogs" is a term which may indicate slaughtered or live hogs, according to circumstances. See Alexander *v.* Dunn, 5 Ind. 122, 124, where the term, in consideration of the fact that the hogs so described were to be delivered at a pork-house, and of the use of the word "net" in connection with the weight, was construed as "slaughtered hogs"; while it was said that had the slaughter-house been indicated, live hogs would plainly have been intended.

"Pork-house" is a term which has been used to describe a place for weighing and cutting up pork, as distinguished from a slaughter-house. See Alexander *v.* Dunn, 5 Ind. 122, 124.

21. Kingston-upon-Hull Dock Co. *v.* Browne, 2 B. & Ad. 43, 54, 22 E. C. L. 28.

The name of a single port may cover various places. Martin *v.* Hilton, 9 Metc. (Mass.) 371, 377; Smith *v.* Swift, 8 Metc. (Mass.) 329, 332; Kingston-upon-Hull Dock Co. *v.* Browne, 2 B. & Ad. 43, 54, 22 E. C. L. 28. But the name of a port does not necessarily include all its members within its legal limits. See Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 510, 515, where it is said that goods consigned under a bill of lading to a merchant in New York city, at the "port of entry" could not properly be delivered at distant places within the limits of the port.

"Port" and "district" often of the same import see District, 14 Cyc. 524 note 33.

22. Kingston-upon-Hull Dock Co. *v.*

ships; but, in law, described as a place for arriving and lading and unlading of ships in a manner prescribed by law; and near to which is a city or town for the accommodation of mariners and securing and vending of merchandise; [23] a place either on the sea coast or on a river, where ships stop for the purpose of loading and unloading, from whence they part and where they finish their voyages; [24] in the

Browne, 2 B. & Ad. 43, 59, 22 E. C. L. 28, where it is shown that the word in these two uses was applied in 14 Geo. III, c. 56, to the port of Hull or Kingston-upon-Hull.

23. The Wharf Case, 3 Bland (Md.) 361, 369, adding that in this (the legal) sense "a public port is a complex subject, consisting of somewhat that is natural, as a convenient access from the sea, a safe situation against winds, and a shore upon which vessels may well unlade; something that is artificial, as keys, wharves and warehouses; and something that is civil, as privileges and regulations given to it by the government. A public port often includes more than the bare place where ships lade or unlade; it is sometimes extended many miles, including several places as members of the port; designating one as a port of entry, and another as a port of delivery."

As used in U. S. Rev. St. (1878) § 2767, providing that no merchandise shall be transported under penalty of forfeiture thereof from one port of the United States to another port of the United States, in a foreign vessel, the word means "any place from which merchandise may be shipped." Petrel Guano Co. *v.* Jarnette, 25 Fed. 675, 677.

Home port.— Within the meaning of U. S. Rev. St. (1878) tit. 48, c. 1, as to registry and recording of vessels, as in admiralty law, the home port of a vessel is the place where she belongs and where her owners reside. The Dingley Bill. 23 U. S. St. at L. 58 [U. S. Comp. St. (1901) p. 2831] provides that the word, as used in the U. S. Rev. St. (1878) §§ 4178, 4334 [U. S. Comp. St. (1901) p. 2963], in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or the place in the same district where the vessel was built or where one or more of the owners reside. The words themselves "home port" indicate that that is where the vessel belongs or is owned. It may be a port of entry or a port or place other than a port of entry. The Lotus No. 2, 26 Fed. 637, 639, 640.

"'Port,' as used in the revenue act, rests somewhat in theory, and involves intention . . . and perhaps subsequent acts, to make its operation effectual. The language of the statute is that it may include places where cargoes are received and discharged, thus indicating a distinction between a commercial and a fiscal port. It cannot be the intention of the law that a vessel must report at the barge office before it can be considered in port, since there are several piers or docks between that office and the mouth of the river." Hartwell Lumber Co. *v.* U. S. 128 Fed. 306, 308, referring to the port of Chicago, in view of the purposes of the Dingley Act, in force July 24, 1897.

Distinction as used in relation to collection of customs and in relation to regulation of commerce.— Within the meaning of U. S. Rev. St. (1878) § 2767, as used in title 34, chapter 4, in relation to collection of duties on imports, the term may include any place from which merchandise can be shipped for importation or at which merchandise can be imported, but in title 48 in reference to the regulations of commerce and navigation, and chapter 1, under that title in reference to recording and registry of vessels, it is not confined to that meaning. In the former case it means a port of entry, in the latter it is used in the general sense. The Lotus No. 2, 26 Fed. 637, 640.

Within the meaning of the terms "home" and "foreign ports" as used in regard to maritime liens attaching in the latter on the Missouri river, the word applies to places where steamboats may land with safety and lie moored to the shore, and not merely those places designated by acts of congress as ports of entry and for other purposes. Rees *v.* Steam-boat General Terry, 3 Dak. 155, 159, 13 N. W. 533.

24. See Curia Phillipicia, p. 456, No. 35 [*cited* in Packwood *v.* Walden, 7 Mart. N. S. (La.) 81, 88].

"Port of delivery" is a phrase used to distinguish the port of unlivery, or destination, from any port at which the vessel touches in the course of the voyage for other purposes as for advice, refreshment, inquiry after markets, or in consequence of stress of weather, or other necessity. The Two Catherines, 24 Fed. Cas. No. 14,288, 2 Mason 319, 331. See, generally, SHIPPING.

"Port of departure" is a term which as used in a regulation requiring the master of the vessel about to depart from any foreign port for a port in the United States to procure "at such port of departure" a bill of health, means the port from which the vessel cleared, and not another port at which she last stopped while bound to the United States. The Dago, 61 Fed. 986, 989, 10 C. C. A. 224. See, generally, SHIPPING.

"Port of destination" is the port at which a ship is to end her voyage. Bouvier L. Dict. [*quoted* in Sheridan *v.* Ireland, 66 Me. 65, 69]. It is the same as a port of actual delivery, in relation to the rule that seamen's wages are due from the voyage thereto in cases of capture or wreck. Giles *v.* The Cynthia, 1 Pet. Adm. 203, 204, 207 [*cited* in Blanchard *v.* Bucknam, 3 Me. 1, 5]. It is distinguished from port of discharge in U. S. *v.* Barker, 24 Fed. Cas. No. 14,516, 5 Mason (U. S.) 404, 406 [*quoted* in Schermacher *v.* Yates, 57 Fed. 668, 669].

"Continuance of insurance to port of destination" see MARINE INSURANCE, 26 Cyc. 596. **"Port of destination to be determined"** see MARINE INSURANCE, 26 Cyc. 592. Port

commercial sense and by the most ancient definitions, an enclosed place where vessels lade and unload goods for export or import;[25] the waters within the gate, or door, or outlet toward the sea;[26] a HAVEN,[27] *q. v.*, and something more; a HARBOUR,[28] *q. v.*, where customs officers are established and where goods are either imported or exported to foreign countries.[29] The word has also been applied to a place on land without relation to water.[30] (Port: In General, see HARBOR, 21 Cyc. 360; NAVIGABLE WATERS, 29 Cyc. 333. As Used in Marine Insurance, see MARINE INSURANCE.[31] Charges,[32] see COMMERCE, 7 Cyc. 462; SHIPPING. Collision, see COLLISION, 7 Cyc. 328. Foreign, see FOREIGN PORT.[33] Of Entry,[34] see CUSTOMS

of destination on island see MARINE INSURANCE, 26 Cyc. 593. "Several ports of destination" see MARINE INSURANCE, 26 Cyc. 593. See, generally, SHIPPING.

"Port of shipment" is a term whose statutory meaning has been held to include a shop or storehouse whence goods are sold or delivered, although one-half mile from the railway station. Union Slate Co. *v.* Tilton, 73 Me. 207, 210, 211, construing the term as used in Rev. St. c. 91.

"Port of unlivery" is a phrase used interchangeably with "port of unlading." The Two Catherines, 24 Fed. Cas. No. 14,288, 2 Mason 319, 330, 331. See, generally, SHIPPING.

Applicable to Delaware breakwater see The Wm. Law, 14 Fed. 792, 794.

Port of Boston see Martin *v.* Hilton, 9 Metc. (Mass.) 371, 377.

Port of Chicago see Hartwell Lumber Co. *v.* U. S., 128 Fed. 306, 308.

"Port of Falmouth" see Smith *v.* Swift, 8 Metc. (Mass.) 329, 333.

Port of Hull or Kingston-upon-Hull see Kingston-upon-Hull Dock Co. *v.* Browne, 2 B. & Ad. 43, 54, 22 E. C. L. 28.

Port of New York see Trundy *v.* The Tawtemio, 53 Fed. 835 (holding that North Brother Island is included); Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 510, 515 (where Spuyten Duyvel, Throg's Neck, and Sandy Hook are said to be within the legal limits of the port).

"Port worthy" see Gartside *v.* Orphans' Ben. Ins. Co., 62 Mo. 322, 325, contrasting the term "seaworthy."

25. Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 510, 515.

Never consists, even partly, in land.— "Land, according to any definition, can never be considered as making a part of a port. A bank, quay, or wharf, is a necessary appendage to it; and, according to the jurisprudence of this state, is always public and destined to the use of all, as well as the port itself. But this public use cannot legally be extended farther than the bank or wharf, which is always distinct from alluvion fully formed, and subjected by law to the ownership of private individuals or public bodies." Packwood *v.* Walden, 7 Mart. N. S. (La.) 81, 88, holding that a place formerly part of a port ceased to be so upon being occupied by alluvion.

A place of actual use.— "Not any place within the geographical limits of the same name where ships might load and unload, but where they in fact do so, *i. e.*, where they are accustomed to do so." Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 510, 516.

By the Roman law: "*Locus conclusus, quo importantur merces, et unde exportantur.*" Justinian Dig. 50, 16, 59 [*quoted* in Packwood *v.* Walden, 7 Mart. N. S. (La.) 81, 88; Bouvier L. Dict.]; Pardessus Lois Mar. tit. 1, p. 179 [*quoted* in Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 510, 515], adding, "*idem et statio dicitur conclusus ac firmata*" the latter meaning "A station (anchorage) is also so called when inclosed and made safe."

26. U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401, 493.

27. See 21 Cyc. 363.

"A haven, and somewhat more."— Hale De Jure Maris [*quoted* in U. S. *v.* Morel, 26 Fed. Cas. No. 15,807, Brunn. Col. Cas. 373, 375, where it is added: "That is, for arriving and unlading ships, etc."].

"Common ponds or watering places" said to lie within the equity of the words "ports and havens" as used in Statute of Charitable Uses, 43 Eliz. c. 4, see Paine *v.* Woods, 108 Mass. 160, 169.

The term "ports and havens," within the rule that all ports and havens are within the body of the counties of the realm (a discredited common-law theory asserted in opposition to the doctrine of admiralty jurisdiction in ports or havens), means not merely port and haven towns, but all the tide-waters included within the harbors and franchises. De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398, 429.

28. See 21 Cyc. 361 text and note 17. See also NAVIGABLE WATERS, 29 Cyc. 302, 304.

29. Coulson & F. L. Wat. [*quoted* in Nash *v.* Newton, 30 N. Brunsw. 610, 623].

30. Union Slate Co. *v.* Tilton, 73 Me. 207, 210, 211.

31. See MARINE INSURANCE, 26 Cyc. 596 *et seq.*

32. **"Port charges"** is a term which has been held to include tonnage dues at the port where they are exacted, no matter what the ground which may actuate the government in imposing them. Smith *v.* Drew, 22 Fed. Cas. No. 13,038, 10 Ben. 614, 617, 618.

33. See 19 Cyc. 1352.

34. **"Port of entry"** is no more than a designated locality within and at which congress has extended the liberty of commerce with the United States. Cross *v.* Harrison, 16 How. (U. S.) 164, 196, 14 L. ed. 889 [*quoted* in De Lima *v.* Bidwell, 182 U. S. 1, 186, 21 S. Ct. 743, 45 L. ed. 1041].

DUTIES, 12 Cyc. 1138. Regulation, see COMMERCE, 7 Cyc. 462. Risk, see MARINE INSURANCE.[35] See, generally, ADMIRALTY, 1 Cyc. 806; PILOTS, 30 Cyc. 1608; SHIPPING.)

PORTABLE. A term which may be synonymous with movable.[36]

PORTER. A malt liquor of a dark brown color, moderately bitter, and possessing tonic and intoxicating qualities;[37] a certain liquor, made from malt, containing a certain percentage of alcohol.[38]

PORTICO. A word usually applied to a shelter in front of a door, although formerly in its classic sense, and possibly still in close discrimination suggesting length and a roof supported by pillars.[39] (See PORCH.)

PORTION. Part,[40] a division, as distinct from its minor parts;[41] a term which may imply either a provision from a parent's property or a marriage portion;[42] that part of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child;[43] the part of an inheritance given to a child;[44] a provision

35. See MARINE INSURANCE, 26 Cyc. 594 text and note 4.

36. Goff *v.* Pope, 83 N. C. 123, 124, 126.

Distinguished from "stationary" see Goff *v.* Pope, 83 N. C. 123, 125.

"Portable engines are distinguished from stationary ones by this, that the former are constructed with a special view to being readily removed from place to place." Greenwood *v.* Maddox, 27 Ark. 648, 652. See also Goff *v.* Pope, 83 N. C. 123, 125.

37. Webster Dict. [*quoted* in State *v.* Oliver, 26 W. Va. 422, 426, 53 Am. Rep. 79].

As intoxicating liquor see INTOXICATING LIQUORS, 23 Cyc. 62 text and note 34.

As subject to internal revenue tax see INTERNAL REVENUE, 22 Cyc. 1648 text and note 75.

38. Murphy *v.* Montclair Tp., 39 N. J. L. 673, 676.

39. See Atty.-Gen. *v.* Ayer, 148 Mass. 584, 587, 20 N. E. 451, comparing the word with the term "porch."

40. Holly *v.* State, 54 Ala. 238, 240.

41. See National Bank of Republic *v.* Banholzer, 69 Minn. 24, 28, 71 N. W. 919.

42. Wood *v.* Briant, 2 Atk. 521, 522, 26 Eng. Reprint 713.

When applied to property acquired from one's ancestor, the word is the most comprehensive that can be used, broad enough to include and intended to cover all the property or estate thus received. Lewis' Appeal, 108 Pa. St. 133, 137.

When used, with reference to the gift inter vivos which shall operate as an ademption of a legacy it is clearly of technical import and is generally used for the purpose of indicating or signifying that part of a person's estate which a child would be entitled to upon the death of such person, but which has been given to the child by such person, while living, as an advancement or provision. State *v.* Crossley, 69 Ind. 203, 209, adding that where there is great disparity between the gift made *inter vivos* and the legacy bequeathed in the will, the amount of the legacy being largely in excess of the gift, the gift cannot be regarded as either a portion or advancement, within the legal meaning of the terms, which will operate as an ademption or a satisfaction *pro tanto* of the legacy, unless the testator in making the gift declared his intention, or unless the circumstances clearly indicate such intention, that the gift shall so operate.

43. Bouvier L. Dict. [*quoted* in Lewis' Appeal, 108 Pa. St. 133, 137]. See also Phelps *v.* Phelps, 55 Conn. 359, 361, 11 Atl. 596.

Meaning governed by context see Jones *v.* Maggs, 9 Hare 605, 607, 22 L. J. Ch. 90, 41 Eng. Ch. 605, 68 Eng. Reprint 654.

Implying a vested or not vested estate see Smith *v.* Edwards, 88 N. Y. 92, 108 [*cited* in Dougherty *v.* Thompson, 167 N. Y. 472, 485, 60 N. E. 760]; *In re* Miller, 2 Lea (Tenn.) 54, 57.

Indicating intention to divide when used in a deed see Thrasher *v.* Ballard, 35 W. Va. 524, 527, 14 S. E. 232.

"Portion of my property remaining" is a phrase said to be sufficient, in a will, to pass real estate unless restrained by the context, or unless the provisions of the will show that the words were meant to apply only to personal property. Wheeler *v.* Dunlap, 13 B. Mon. (Ky.) 291, 293.

Synonymous with "share" and "part" see Lewis' Appeal, 108 Pa. St. 133, 136. See also Bourne *v.* Buckton, 21 L. J. Ch. 193, 194, 197, 2 Sim. N. S. 91, 42 Eng. Ch. 91, 61 Eng. Reprint 275.

"Amount given" synonymous with "shares" and "portion" see Henley *v.* Robb, 86 Tenn. 474, 481, 7 S. W. 190.

Accrued shares will not pass under the word in a will see Jarman Wills (R. & T. 5th Am. ed.) 562 [*cited* in Glover *v.* Condell, 163 Ill. 566, 598, 45 N. E. 173, 35 L. R. A. 360].

In Provincial Act, 4 Wm. & M. c. 2, relating to distribution of intestate estates see Sheffield *v.* Lovering, 12 Mass. 490, 491.

Within the second section of the Thellusson Act (30 & 40 Geo. III, c. 94) see Jones *v.* Maggs, 9 Hare 605, 606, 607, 22 L. J. Ch. 90, 41 Eng. Ch. 604, 68 Eng. Reprint 654; Eyre *v.* Marsden, 2 Jur. 583, 588, 2 Keen 564, 7 L. J. Ch. 220, 15 Eng. Ch. 564, 48 Eng. Reprint 744; Bourne *v.* Buckton, 21 L. J. Ch. 193, 198, 2 Sim. N. S. 91, 42 Eng. Ch. 91, 61 Eng. Reprint 275.

44. Hope *v.* Rusha, 88 Pa. St. 127, 131.

for marriage.[45] The term has also been applied to a widow's award,[46] or distributive share.[47] (See, generally, Descent and Distribution, 14 Cyc. 1 *et seq.*; Wills.)

PORTO RICO. An island which had been for some months under military occupation by the United States as a conquered country, when by the second article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island, which, upon such ratification, ceased to be foreign, to the United States.[48] (See, generally, Territories.)

PORTRAIT.[49] A picture drawn after the life.[50] (Portrait: Contract to Paint, see Contracts, 9 Cyc. 619 text and note 8. Subject of Copyright, see Copyright, 9 Cyc. 905, 906, 923 note 64, 953. Unauthorized Use of, see Injunctions, 22 Cyc. 899 text and note 19. See also Negative, 29 Cyc. 398; Painting, 29 Cyc. 1554; Photograph, 30 Cyc. 1537; Picture, 30 Cyc. 1606.)

PORT RISK. See Marine Insurance, 26 Cyc. 594.[51]

PORTUS EST LOCUS IN QUO EXPORTANTUR ET IMPORTANTUR MERES. A definition meaning "A port is a harbor where goods are exported or imported."[52]

PORT WORTHY. See *ante*, p. 918 note 24.

POSITION. The state of being placed; posture.[53] Of a civil status, an indefi-

45. Trafford *v.* Ashton, 1 P. Wms. 415, 418, 24 Eng. Reprint 451, where this definition was given as a reason why certain "portions" directed to be raised by will for testator's daughters, should be raised by sale or mortgage and not deferred until they could be paid from rents. See also Butler *v.* Dunscombe, 1 P. Wms. 448, 457, 24 Eng. Reprint 466, 2 Vern. Ch. 760, 23 Eng. Reprint 1096.

Not necessarily a sum to be paid in gross, since it may be both vested and directed to be paid out of the profits, see Evelyn *v.* Evelyn, 2 P. Wms. 659, 672, 24 Eng. Reprint 904.

"**Two ways of raising portions;** the 1st, by sale or mortgage; the 2d by perception of profits" see Evelyn *v.* Evelyn, 2 P. Wms. 659, 669, 24 Eng. Reprint 904.

46. Weaver *v.* Weaver, 109 Ill. 225, 231 [*distinguished* in Pavlicek *v.* Roessler, 121 Ill. App. 219, 222, 223 (*reversed*, without, however, affecting this question, in 222 Ill. 83, 78 N. E. 11)].

47. Pavlicek *v.* Roessler, 121 Ill. App. 219, 222, 223 [*reversed*, without, however, affecting this question, in 222 Ill. 83, 78 N. E. 11].

48. De Lima *v.* Bidwell, 182 U. S. 1, 180, 199, 21 S. Ct. 743, 45 L. ed. 1041.

Customs duties with respect to see Downes *v.* Bidwell, 182 U. S. 244, 287, 341, 344, 21 S. Ct. 770, 45 L. ed. 1088 [*cited* in People *v.* Bingham, 189 N. Y. 124, 129, 81 N. E. 773], Dooley *v.* U. S., 182 U. S. 222, 234, 21 S. Ct. 762, 45 L. ed. 1074 [*followed* in Armstrong *v.* U. S., 182 U. S. 243, 21 S. Ct. 827, 45 L. ed. 1086]; Customs Duties, 12 Cyc. 1109 note 8, 1116 note 40.

Mining in Porto Rico see 27 Cyc. 623.

Power of governor to demand extradition under 31 U. S. St. at L. 77, 80, 81, see People *v.* Bingham, 189 N. Y. 124, 130, 81 N. E. 773 [*affirming* 117 N. Y. App. Div. 411, 102 N. Y. Suppl. 878].

49. **Derivation, signifying thoroughness.**—"The word is evidently taken from the Latin word, '*petrahere*,' or '*pertractare*,' both of which words derive their force from being compounded, in part, of the preposition *per*, which, when used in composition, signifies doing an act completely, thoroughly, or with labor; as in our word 'perfect,' and the Latin word '*perfectum*.'" Leeds *v.* Amherst, 14 L. J. Ch. 73, 74, 13 Sim. 459, 36 Eng. Ch. 459, 60 Eng. Reprint 178.

50. Johnson Dict. [*quoted* and *explained* as follows: "That is, corresponding to the life," in Leeds *v.* Amherst, 14 L. J. Ch. 73, 74, 13 Sim. 459, 36 Eng. Ch. 459, 60 Eng. Reprint 178].

With painters, portraits are pictures of men and women, either heads or greater lengths drawn from the life. The word is to distinguish a face painting from historical painting. Bailey Dict. [*quoted* in Leeds *v.* Amherst, 14 L. J. Ch. 73, 74, 13 Sim. 459, 36 Eng. Ch. 459, 60 Eng. Reprint 178].

"**Resemblance d'une personne**" see Fleming & T. French Dict. [*quoted* in Leeds *v.* Amherst, 14 L. J. Ch. 73, 74, 13 Sim. 459, 36 Eng. Ch. 459, 60 Eng. Reprint 178].

"**In an edition of Richelet's Dictionary,** which was printed in the year 1732, Richelet speaks of the word 'portrait' as a French word, and he explains the meaning in Latin, and then gives an interpretation of it in French. He says 'Portrait, Imago picta, effigies. Le mot se dit des hommes seulement, et en parlant de peinture. C'est tout ce qué représente une personne d'après nature avec des couleurs.'" Leeds *v.* Amherst, 14 L. J. Ch. 73, 74, 13 Sim. 459, 36 Eng. Ch. 459, 60 Eng. Reprint 178.

Not confined to objects exclusively human see Leeds *v.* Amherst, 14 L. J. Ch. 73, 74, 13 Sim. 459, 36 Eng. Ch. 459, 60 Eng. Reprint 178.

51. See also *ante*, p. 919 note 35.

52. Given as a maxim in Morgan Leg. Max.

53. Worcester Dict. [*quoted* in Jones *v.* Tuck, 48 N. C. 202, 205, where in this sense the term is said to be synonymous with situation].

nite term which may include that of an officer or may be limited to that of an employee.[54] (See, generally, Employee, 15 Cyc. 1031; Officers, 29 Cyc. 1356.)

Positive. Laid down, enacted, or prescribed. Express, *q. v.*; Affirmative, *q. v.*; Direct, *q. v.*; Absolute, *q. v.*; explicit;[55] Direct, *q. v.*; Express, *q. v.*; opposed to circumstantial.[56] In common parlance Absolute, *q. v.*; Certain, *q. v.*[57] (Positive: Evidence, see Evidence, 16 Cyc. 848, 849 note 13; 17 Cyc. 800. Fraud, see Fraud, 20 Cyc. 8. See also Positive Law.)

Positive evidence or testimony. See Evidence, 16 Cyc. 848, 849 note 13; 17 Cyc. 800.

Positive fraud. See Fraud, 20 Cyc. 8.

Positive law. Law actually and specifically enacted or adopted by proper authority for the government of an organized jural society.[58] When applied to divine law, revealed, as distinguished from natural law.[59] (See Law, 25 Cyc. 163; Law of Nature, 25 Cyc. 168; Statutes.)

Positively. Is defined by the Latin words, *certe, profecto,*— which are translated into English, by the words, certainly, assuredly, truly, indeed, doubtless, really.[60] (See Positive.)

Posito uno oppositorum negatur alterum. A maxim meaning "One of two opposite positions being affirmed, the other is denied." [61]

54. See People *v.* England, 16 N. Y. App. Div. 97, 99, 45 N. Y. Suppl. 12.

Thus, as used in statutes restricting discharge of veterans from public service, in New Jersey, the word is defined: "A place, the duties of which are continuous and permanent, analogous to those of an office, and which pertain to the position as such" (Stewart *v.* Hudson County, 61 N. J. L. 117, 118, 38 Atl. 842), as distinguished on one side from public office and on the other from mere employment (Daily *v.* Essex County, 58 N. J. L. 319, 33 Atl. 739. For substantially the same definition see also Cavenaugh *v.* Essex County, 58 N. J. L. 531, 533, 33 Atl. 943; MacDonald *v.* Newark, 55 N. J. L. 267, 269, 26 Atl. 82; Lewis *v.* Jersey City, 51 N. J. L. 240, 242, 17 Atl. 112. As used in the Veteran Act of New York (N. Y. St. (1896) c. 821), the term is intended to embrace all subordinate places in public service. People *v.* Van Wyck, 157 N. Y. 495, 504, 52 N. E. 559.

"Office" used as synonymous in Ga. St. (1882–1883) Pamphl. Laws, p. 136, see Colquitt *v.* Simpson, 72 Ga. 501, 510.

Implying legal status see Moran *v.* Baker, 49 Misc. (N. Y.) 327, 99 N. Y. Suppl. 197.

Held to include the place of a deputy warden of Hudson county almshouse (Stewart *v.* Hudson County, 61 N. J. L. 117, 118, 38 Ala. 842); guard or keeper of county jail when employed for no special length of time (Cavenaugh *v.* Essex County, 58 N. J. L. 531, 533, 33 Atl. 943); janitor of county court-house (Daily *v.* Essex County, 58 N. J. L. 319, 33 Atl. 739); clerk in city treasurer's office (MacDonald *v.* Newark, 55 N. J. L. 267, 26 Atl. 82); bridge tender appointed by the board of public works (Lewis *v.* Jersey City, 51 N. J. L. 240, 243, 17 Atl. 112).

Does not include the place of a carpenter employed by the day only, upon such services in the line of his trade as might be directed from time to time by his superior. Kreigh *v.* Hudson County, 62 N. J. L. 178, 179, 40 Atl. 625.

In New York, while it may include some offices, is limited to subordinate positions, and it is impossible to draw any line and say what offices lie within it or without it. See People *v.* England, 16 N. Y. App. Div. 97, 102, 45 N. Y. Suppl. 12. It does not include a member of a board of assessors who act upon their own responsibility (People *v.* Van Wyck, 157 N. Y. 495, 505, 52 N. E. 559), or the clerk of a police court, he being a chief clerk (People *v.* England, 16 N. Y. App. Div. 97, 45 N. Y. Suppl. 12).

55. Black L. Dict.

Positive agreement see Coleman *v.* Roberts, 1 Mo. 97, 100.

"Positive duty" is a duty which is not discretionary. Blyhl *v.* Waterville, 57 Minn. 115, 118, 58 N. W. 817, 48 Am. St. Rep. 596. "Duty" defined see 14 Cyc. 1125.

"Positive prescription" denotes the acquisition of property by the continued possession of the acquirer for such a time as is described by the law to be sufficient for that purpose. Erskine Inst. 3, 7, 2 [*quoted* in Mann *v.* Brodie, 10 App. Cas. 378, 391], stating that the term was so generally defined by English lawyers, as was "usucapion" by the Romans. See also Prescription.

"Positive servitude" is a term used to designate a servitude by which the proprietor of the servient estate is required to suffer something to be done his property by another. Rowe *v.* Nally, 81 Md. 367, 369, 32 Atl. 198, distinguishing "negative servitude." See Easements, 14 Cyc. 1142.

"Sale positive" equivalent to "sale without reserve" see Walsh *v.* Barton, 24 Ohio St. 28, 46.

56. Webster Dict. [*quoted* in Schrack *v.* McKnight, 84 Pa. St. 26, 30].

57. Coleman *v.* Roberts, 1 Mo. 97, 100.

58. Black L. Dict.

59. See Borden *v.* State, 11 Ark. 519, 527, 54 Am. Dec. 217.

60. Kottman *v.* Ayer, 1 Strobh. (S. C.) 552, 572.

61. Peloubet Leg. Max.

POSITUS IN CONDITIONE NON CENSETUR POSITUS IN INSTITUTIONE. A maxim meaning "One placed (or named) in a condition is not regarded as placed (or named) in the destination." [62]

POSSE COMITATUS. The whole power of the county; the name given to an assemblage convened in obedience to a summons of the sheriff issued to all male persons over fifteen years of age in the county to assist him in preserving the peace.[63] (Posse Comitatus: Appointment or Designation, see SHERIFFS AND CONSTABLES. Assisting in — Making Arrest, see ARREST, 3 Cyc. 960; Suppressing Riot, see RIOT. Power to Summon,[64] see SHERIFFS AND CONSTABLES.)

POSSESS. To own; have, as a belonging, property; [65] to have legal title to; [66] according to etymology, to sit upon; hence, to occupy in person, to have and to hold; [67] to occupy in person.[68] (See POSSESSED; POSSESSIO; POSSESSION, and Cross-References Thereunder.)

POSSESSED. A variable term in the law, which has different meanings, as it is used in different circumstances; [69] which implies sometimes temporary interest in lands,[70] and is frequently used to distinguish an estate or interest in possession from an estate or interest in reversion or remainder; [71] sometimes, the corporeal having,[72] or the actual reduction into manual possession, manucaption, actual receipt into the hands, or purse, or coffers of an individual; [73] and sometimes under a not unusual interpretation, no more than ownership,[74] having a right to the immediate possession, having an interest in possession; [75] held by lawful

Applied in Le Serjeant's Case, 2 Rolle 422, 81 Eng. Reprint 892.

62. Trayner Leg. Max.

63. See Com. *v.* Martin, 7 Pa. Dist. 219, 224, 9 Kulp 69.

Disobedience of the summons is a misdemeanor. Com. *v.* Martin, 7 Pa. Dist. 219, 9 Kulp 69.

64. Power to summon is not invariably confined to the sheriff. See ARREST, 3 Cyc. 960, 961 note 25.

Right of officer to summon assistance in arrest under civil process see ARREST, 3 Cyc. 960, 961.

Right of peace officer to summon bystanders see ARREST, 3 Cyc. 893.

65. Century Dict. [*quoted* in Fuller *v.* Fuller, 84 Me. 475, 479, 24 Atl. 946].

"All the property I possess" in a deed, being general words, do not pass or purport to pass anything not held by the grantor as his own property. Jones *v.* Sasser, 18 N. C. 452, 463. *Compare* Hemingway *v.* Hemingway, 22 Conn. 462, 466, 472; Whitehead *v.* Gibbons, 10 N. J. Eq. 230, 239.

66. Webster Dict. [*quoted* in Fuller *v.* Fuller, 84 Me. 475, 479, 24 Atl. 946].

67. Fuller *v.* Fuller, 84 Me. 475, 479, 24 Atl. 946.

"Own" equivalent in common speech and according to all the lexicographers see Thomas *v.* Blair, 111 La. 678, 684, 35 So. 811.

"'My property,' and 'the property I possess,' mean one and the same thing." Thomas *v.* Blair, 111 La. 678, 684, 35 So. 811, construing the latter phrase as used in a will.

68. Webster Dict. [*quoted* in Evans *v.* Foster, 79 Tex. 48, 51, 15 S. W. 170].

"Occupied" used as synonymous when applied to land in charge to jury see Evans *v.* Foster, 79 Tex. 48, 51, 14 S. W. 170.

"Frequently used in the sense of 'own,' 'entitled to'" see Brantly *v.* Kee, 58 N. C. 332, 337, where the phrase "all the estate or property which she 'now possesses'" was held, in the absence of any motive to the contrary, and despite the possible doubt implied by the word "now" whether property only in remainder was not excluded, to include "all that she owned."

69. Thompson *v.* Moran, 44 Mich. 602, 603, 7 N. W. 180.

70. As in contradistinction to "seized." Thompson *v.* Moran, 44 Mich. 602, 603, 7 N. W. 180. *Compare,* however, *infra,* note 76.

71. See Wilton *v.* Colvin, 3 Drew. 617, 622, 2 Jur. N. S. 867, 25 L. J. Ch. 850, 4 Wkly. Rep. 759, 61 Eng. Reprint 1039.

72. As "seized and possessed."—Thompson *v.* Moran, 44 Mich. 602, 603, 7 N. W. 180.

73. Wilton *v.* Colvin, 3 Drew. 617, 622, 2 Jur. N. S. 867, 25 L. J. Ch. 850, 4 Wkly. Rep. 759, 61 Eng. Reprint 1039.

Corporal possession.— Under the phrase, in a tax statute "real estate 'possessed' by each inhabitant of such town, &c., on the first day of May," land in the actual possession of a tenant is not possessed by the owner. Martin *v.* Mansfield, 3 Mass. 419, 428.

74. See Thompson *v.* Moran, 44 Mich. 602, 603, 7 N. W. 180, where it is said: "But it sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his. In this sense it may be used even though an intruder may have excluded the owner for the time being."

75. Wilton *v.* Colvin, 3 Drew. 617, 622, 2 Jur. N. S. 867, 25 L. J. Ch. 850, 4 Wkly. Rep. 759, 61 Eng. Reprint 1039, so construing the word as used in a marriage settlement, in the phrase, "All and every the estate and effects of . . . which [she] . . . shall become seised of, possessed of, or entitled unto."

title.[76] The word is often coupled with the word "seised," merely to apply to personalty, as "seised" is used to apply to realty.[77] (See Possess; Possessio; Possession, and Cross-References Thereunder.)

POSSESSIO. In the civil law that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all others.[78] (See Possess; Possessed; Possession.)

POSSESSIO CONTRA OMNES VALET PRÆTER EUM CUI JUS SIT POSSESSIONIS. A maxim meaning "Possession is valid against all save him who has the right of possession." [79]

POSSESSIO EST QUASI PEDIS POSITIO. A maxim meaning "Possession is, as it were, the position of the foot." [80]

POSSESSIO FRATRIS DE FEODO SIMPLICI FACIT SOROREM ESSE HÆREDEM. A maxim meaning "The brother's possession of an estate in fee-simple makes the sister to be heir." [81]

POSSESSION. A. Ambiguity of Meaning. "Possession" is a word of ambiguous meaning, whether considered in its relation to real property[82] or

76. Webster Dict. [*quoted* in Wooten *v.* White, 125 N. C. 403, 405, 406, 34 S. E. 508, where it is said: "When one is said to be 'possessed' of land, his possession is deemed to be lawful," and held that where a complaint for wrongful tax sale alleged that plaintiff was "seized and possessed," an admission in the answer that he was "possessed" was a sufficient admission of title, since it was immaterial to the case whether plaintiff held in fee, for life, or for years].

Importing a lawful holding see Sheldon *v.* Hoy, 11 How. Pr. (N. Y.) 11, 15.

Used to denote ownership see Hemingway *v.* Hemingway, 22 Conn. 463, 466, 472 (construing the phrase, in a will, "all my estate, both real and personal to me belonging, and which I shall die possessed of"); *In re* Realty Voters, 19 R. I. 387, 389, 35 Atl. 213 (construing the phrase, "Really and truly possessed . . . of real estate," in R. I. Const. art. 2, § 1, descriptive of a qualification for voting).

"All . . . that I may die possessed of" construed as including all of which testator had a right to dispose see Whitehead *v.* Gibbons, 10 N. J. Eq. 230, 239. *Compare* Hemingway *v.* Hemingway, 22 Conn. 462, 466, 472; Jones *v.* Sasser, 18 N. C. 452, 462.

Not denoting merely personal or corporal occupation see Hemingway *v.* Hemingway, 22 Conn. 462, 472.

In the sense of "seized."—"Possessed of an irrevocable possession in fee simple," as used in N. M. Comp. Laws (1884), § 2750, means "seized of an indefeasible estate in fee simple." Douglass *v.* Lewis, 131 U. S. 75, 81, 9 S. Ct. 634, 33 L. ed. 53.

More comprehensive than "seized" and including an equitable remainder as used in Conn. Gen. St. § 168 see Greene *v.* Huntington, 73 Conn. 106, 113, 46 Atl. 883.

"Was possessed in fee" as a sufficient allegation, in ejectment, of a claim in fee see Jarrett *v.* Stevens, 36 W. Va. 445, 447, 15 S. E. 177.

77. Wilton *v.* Colvin, 3 Drew. 617, 622, 2 Jur. N. S. 867, 25 L. J. Ch. 850, 4 Wkly. Rep. 759, 61 Eng. Reprint 1039, construing a marriage settlement.

78. Black L. Dict. [*citing* Mackeldey Rom. L. § 238].

"The term 'possessio' occurs in the Roman jurists in various senses. There is *possessio* generally, and *possessio civilis*, and *possessio naturalis*. *Possessio* denoted, originally, bare detention; but this detention, under certain conditions, becomes a legal state, inasmuch as it leads to ownership through *usucapio*. Accordingly the word *possessio*, which required no qualification so long as there was no other notion attached to *possessio*, requires such qualification when detention becomes a legal state. This detention, then, when it has the conditions necessary to *usucapio*, is called *possessio civilis*, and all other *possessio* as opposed to *civilis* is *naturalis*." Sandars Just. Inst. 274 [*quoted* in Wharton L. Lex.].

Possessio per longum, continuum et pacificum usum, *sine consensu expresso, per patientiam veri domini, qui scivit et non prohibuit, sed permisit de consensu tacito* is a description of adverse possession as a means of acquiring easements, which means: "Possession through a long time, continuous and peaceable use without express consent, by sufferance of the true owner who has known and has not prevented, but permitted by tacit consent." Bracton, lib. 2, c. 23, § 1 [*quoted* in Sargent *v.* Ballard, 9 Pick. (Mass.) 251, 254].

79. Morgan Leg. Max.

80. Bouvier L. Dict.

Application see Ratcliff's Case, 3 Coke 37*a*, 42*a*, 76 Eng. Reprint 713.

81. Black L. Dict.

Applied in Ratcliff's Case, 3 Coke 37*a*, 41*b*, 76 Eng. Reprint 713.

Discussed in Coke Litt. 15*b* [*cited* in Murray *v.* Thorniley, 2 C. B. 217, 224, 10 Jur. 270, 15 L. J. C. P. 155, 52 E. C. L. 216, and *quoted* in Doe *v.* Hutton, 3 B. & P. 643, 648].

82. See Leslie *v.* Rothes, [1894] 2 Ch. 499, 506, 63 L. J. Ch. 617, 71 L. T. Rep. N. S. 134, 7 Reports 600, where it is said: "The ambiguous character of the term 'possession' is well known, and has been recognised by high authority. It has several meanings,

personal property,[83] and this is especially true when it occurs in statutory provisions.[84]

B. Definitions[85] — **1. In General.** The term has been defined as follows: Simply the owning or having a thing in one's power;[86] the present right and power to control a thing;[87] the detention and control of the manual or ideal custody of anything which may be the subject of property, for one's use or enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name;[88] the detention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his name;[89] the act of possessing, a having and holding or retaining of property in one's power or control;[90] the having or holding or detention of property in one's power or command;[91] the sole control of the property or of some physical attachment to it;[92] that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all other persons.[93]

and it may well have several different meanings in the same instrument, some of them overlapping one another, and some being combinations of more than one."

83. Bourne *v.* Fosbrooke, 18 C. B. N. S. 515, 526, 11 Jur. N. S. 202, 34 L. J. C. P. 164, 13 Wkly. Rep. 497, 114 E. C. L. 514.

84. Pegram *v.* Carson, 10 Bosw. (N. Y.) 505, 514, where it is said: "The word 'possession,' so susceptible of various constructions, is particularly so in statutes, where its meaning must be ascertained from the purpose of the whole statute and the context where it is used."

85. **Distinguished from:** "Access" see Gilkerson-Sloss Commission Co. *v.* London, 53 Ark. 88, 91, 13 S. W. 513, 7 L. R. A. 403; Rice *v.* Frayser, 24 Fed. 460, 462. Custody see Embezzlement, 15 Cyc. 493–494, 518–519; Larceny, 25 Cyc. 25–31. See also Reg. *v.* Sleep, 8 Cox C. C. 472, 480.

86. Brown *v.* Volkening, 64 N. Y. 76, 80 [*quoted* in Baragiano *v.* Villani, 117 Ill. App. 372, 375 (where "Volkening" is miscited "Volkenberg"); Foust *v.* Territory, 8 Okla. 541, 543, 544, 58 Pac. 728].

87. Shipp *v.* Patten, 123 Ky. 65, 93 S. W. 1033, 29 Ky. L. Rep. 480.

Implies right.—"The legal idea of 'possession' though varying according to circumstances, still embraces the conception of right as well as that of physical control." Fuller *v.* Fuller, 84 Me. 475, 480, 24 Atl. 946. "It implies a present right to deal with the property at pleasure and to exclude other persons from meddling with it." Sullivan *v.* Sullivan, 66 N. Y. 37, 41 [*quoted* in Baragiano *v.* Villani, 117 Ill. App. 372, 375; Garvey *v.* Union Trust Co., 29 N. Y. App. Div. 513, 518, 52 N. Y. Suppl. 260; Bailey *v.* Bond, 77 Fed. 406, 409, 23 C. C. A. 206].

Through licensee.—"Property upon a man's land, and especially property annexed to the land, a structure, which cannot be removed without the consent of the land owner, cannot be held to be beyond his possession," though used by a mere licensee. Webster Lumber Co. *v.* Keystone Lumber, etc., Co., 51 W. Va. 545, 555, 42 S. E. 632, 66 L. R. A. 33.

88. Black L. Dict. [*quoted* in Foust *v.* Territory, 8 Okla. 541, 543, 58 Pac. 728, where, however, "normal" is substituted for "manual"]. See also Bourne *v.* Fosbrooke, 18 C. B. N. S. 515, 526, 11 Jur. N. S. 202, 34 L. J. C. P. 164, 13 Wkly. Rep. 497, 114 E. C. L. 515; Reg. *v.* Sleep, 8 Cox C. C. 472, 480, 7 Jur. N. S. 979, L. & C. 44, 30 L. J. M. C. 170, 4 L. T. Rep. N. S. 525, 9 Wkly. Rep. 709.

Manual custody unnecessary.—Bourne *v.* Fosbrooke, 18 C. B. N. S. 515, 526, 11 Jur. N. S. 202, 34 L. J. C. P. 164, 13 Wkly. Rep. 497, 114 E. C. L. 515, where it is said: "In most instances, it is considered to import the manual custody of the chattel; though a man may also be said to be in possession of an article which he has not at the moment about his person." See also Reg. *v.* Sleep, 8 Cox C. C. 472, 480, 7 Jur. N. S. 979, L. & C. 44, 30 L. J. M. C. 170, 4 L. T. Rep. N. S. 525, 9 Wkly. Rep. 709.

89. Redfield *v.* Utica, etc., R. Co., 25 Barb. (N. Y.) 54, 58 [*quoted* in Tidwell *v.* Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192, 195]; Bouvier L. Dict. [*quoted* in Baragiano *v.* Villani, 117 Ill. App. 372, 375, and, to and excluding the words "by himself" *et seq.*, in Evans *v.* Foster, 79 Tex. 48, 51, 15 S. W. 170].

90. Century Dict. [*quoted* in Nathan *v.* Dierssen, 146 Cal. 63, 66, 79 Pac. 739].

91. Harrison *v.* People, 50 N. Y. 518, 523, 10 Am. Rep. 517 [*quoted* in People *v.* Mills, 178 N. Y. 274, 286, 70 N. E. 786, 67 L. R. A. 131], defining that possession the taking from which is larceny.

92. Harrison *v.* People, 50 N. Y. 518, 523, 10 Am. Rep. 517. "As in the Case of Wilkinson (1 Leach 321, note *a*), where one had his keys tied to the strings of his purse in his pocket, which the prisoner attempted to take, and had the purse in his hand, but the strings of the purse still held to the pocket by means of the keys." Harrison *v.* People, 50 N. Y. 518, 523, 10 Am. Rep. 517.

93. Gilkerson-Sloss Commission Co. *v.* London, 53 Ark. 88, 91, 13 S. W. 513, 7 L. R. A. 403 (omitting the words "of fact"); Black L. Dict. [*quoted* in Foust *v.* Territory, 8 Okla. 541, 543, 58 Pac. 728]; Burrill L. Dict. (omitting "at his pleasure," and concluding

2. Possession of Land — a. In General. Possession of land has been defined as the holding of it and exclusive exercise of dominion over it.[94]

b. Compared With "Occupancy." As applied to land, the term may be employed in the sense of Occupancy, *q. v.*, with which it is nearly if not quite synonymous,[95] and which has been said to be its ordinary meaning.[96]

c. Compared With "Seizin." The term in this connection has also been used as implying actual seizin;[97] but while it has been said to be, now, legally, synony-

"others" instead of "other persons") [*quoted* in Rice *v.* Frayser, 24 Fed. 460, 463].

Including power to exclude.— "By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded." Bouvier L. Dict. [*quoted* in Webster Lumber Co. *v.* Keystone Lumber, etc., Co., 51 W. Va. 545, 554, 42 S. E. 632, 66 L. R. A. 33]. See also Sullivan *v.* Sullivan, 66 N. Y. 37, 42.

94. Booth *v.* Small, 25 Iowa 177 [*quoted* in Tidwell *v.* Chiricahua Cattle Co., (Ariz. 1898) 53 Pac. 192, 195; Bailey *v.* Bond, 77 Fed. 406, 409, 23 C. C. A. 206].

Double meaning.— "In an instrument dealing with real estate 'possession' means broadly one of two things. It may mean what has been styled . . . 'physical possession,' as when a tenant in fee occupies and farms his own land, or if not farming his own land, still occupies in the sense of receiving his rents from his tenants. In that connection, the alternative to 'possession,' natural, proper, technical, strictly legal, is receipt of the rents and profits. Again, 'possession' in a legal instrument is frequently used with reference to the title, and to designate that title which is enjoyed *in presenti* as distinguished from that which is to be enjoyed *in futuro* — the distinction being between an estate in possession and an estate in remainder, reversion, or expectancy. In most legal instruments . . . it is generally possible to give to the word 'possession' either one or the other of these two meanings, although, no doubt, they occasionally overlap one another." Leslie *v.* Rothers, [1894] 2 Ch. 499, 506, 63 L. J. Ch. 617, 71 L. T. Rep. N. S. 134, 7 Reports 600.

By owner, implies right.— "There can be no possession, actual or constructive, by an owner of an estate in lands without at least the right to actual possession as against every other person." Sullivan *v.* Sullivan, 66 N. Y. 37, 42 [*quoted* in Garvey *v.* Union Trust Co., 29 N. Y. App. Div. 513, 518, 52 N. Y. Suppl. 260, and with the substitution of "any" for "every" in Foust *v.* Territory, 8 Okla. 541, 544, 58 Pac. 728]. Implies the right to occupy or enjoy. Bailey *v.* Bond, 77 Fed. 406, 409, 23 C. C. A. 206.

Cannot be more than exercise of exclusive dominion see Wood Limitations [*quoted* in McCaughn *v.* Young, 85 Miss. 277, 292, 37 So. 839].

Something more than a mere right or title, whether to a present or future estate. See Sullivan *v.* Sullivan, 66 N. Y. 37, 41 [*quoted* in Garvey *v.* Union Trust Co., 29 N. Y. App. Div. 513, 518, 52 N. Y. Suppl. 260; Foust *v.* Territory, 8 Okla. 541, 543, 58 Pac. 728; Bailey *v.* Bond, 77 Fed. 406, 409, 23 C. C. A. 206].

Not necessarily lost by removal see McCaughn *v.* Young, 85 Miss. 277, 292, 37 So. 839; Harper *v.* Tapley, 35 Miss. 506, 512; Ford *v.* Wilson, 35 Miss. 490, 505, 72 Am. Dec. 137; Crispen *v.* Hannavan, 50 Mo. 536, 550; Aldrich *v.* Griffith, 66 Vt. 390, 402, 29 Atl. 376.

Actual residence not required see Muller *v.* Balke, 167 Ill. 150, 153, 47 N. E. 355; U. S. *v.* Rogers, 23 Fed. 658, 666.

Not mere presence upon premises see Baragiano *v.* Villani, 117 Ill. App. 372, 375 (instancing as insufficient the condition of a lodger or one temporarily there); Kerslake *v.* Cummings, 180 Mass. 65, 67, 61 N. E. 760.

Construed as "estate" see Douglass *v.* Lewis, 131 U. S. 75, 81, 9 S. Ct. 634, 33 L. ed. 53.

95. See Evans *v.* Foster, 79 Tex. 43, 51, 15 S. W. 170 (where it is said: "Webster defines occupancy as 'possession;' . . . possession, 'actual seizin or occupancy;' . . . Bouvier defines occupaney as 'the taking possession of those things corporeal,' etc. . . . and says that 'an order to complete a possession two things are required — 1, that there be an occupancy, and 2, that the taking be with an intent to possess.' The very liberally cultured professional mind may be able to discover a technical difference in the meaning of the two words, but we are inclined to the opinion that a court would find great difficulty in defining that difference to the understanding of an average jury"); Bouvier L. Dict. tit. "Occupaney," "Possession" [*cited* in Walters *v.* People, 18 Ill. 194, 199, 65 Am. Dec. 730, where it is said that the words are there "used and understood in the same great variety of senses"].

Nearly synonymous with occupaney and may, in contemplation of law, exist in the same manner by or through a tenancy. See Walters *v.* People, 21 Ill. 178.

A synonym for occupaney see Webb *v.* Rhodes, 28 Ind. App. 393, 61 N. E. 735, 736. See also Taylor *v.* Wright, 121 Ill. 455, 466, 13 N. E. 529 [*cited* in Walker *v.* Converse, 148 Ill. 622, 630, 36 N. E. 202].

Distinguished from occupancy see Mygatt *v.* Coe, 142 N. Y. 78, 85, 36 N. E. 870, 24 L. R. A. 850. There may be a legal or constructive possession, where there is no actual occupation. Ward *v.* Dewey, 16 N. Y. 519, 531.

96. See Nathan *v.* Dierssen, 146 Cal. 63, 66, 79 Pac. 739.

97. Webster Dict. [*quoted* in Evans *v.* Foster, 79 Tex. 48, 51, 15 S. W. 170].

mous with "seizin," [98] and is sometimes used in that sense,[99] it does not fully express the technical meaning of that term, as seizin includes possession yet it implies something more,[1] and does not mean the same.[2]

3. In the Sense of "Ownership." The word has been used in certain cases in the same sense as "ownership," when referring to realty,[3] as well, also as when referring to personalty.[4] And the term "ownership" has sometimes been satisfied by the fact of possession.[5]

4. With Reference to Thing Possessed. As applied to the thing possessed, the word is used in some of the books in the sense of property,[6] and may, no doubt, include real estate if so intended, although such would not be its technical signification.[7] A possession is a hereditament or chattel.[8]

C. Kinds of Possession [9] **— 1. Actual.**[10] That possession which exists where the thing is in the immediate occupancy of the party.[11] Applied to land, the actual exercise by the owner of the present power to deal with the estate and

98. See Slater *v.* Rawson, 6 Metc. (Mass.) 439, 444, where it is said: "According to the modern authorities, there seems to be no legal difference between the words 'seizin' and 'possession,' although there is a difference between the words 'disseizin' and 'dispossession.'"

99. See Fort Dearborn Lodge *v.* Klein, 115 Ill. 177, 180, 3 N. E. 272, 56 Am. Rep. 133.

1. See Fort Dearborn Lodge *v.* Klein, 115 Ill. 177, 183, 3 N. E. 272, 56 Am. Rep. 133.

Necessarily included in seizin see Seymour *v.* Carli, 31 Minn. 81, 83, 16 N. W. 495.

2. Ferguson *v.* Witsell, 5 Rich. (S. C.) 280, 284, 57 Am. Dec. 744. See also Coke Litt. 153*a* [*cited* in Slater *v.* Rawson, 6 Metc. (Mass.) 439, 444].

3. State *v.* South Penn Oil Co., 42 W. Va. 80, 100, 24 S. E. 688.

Held to include a conveyable future interest in Hill *v.* Broughton, 3 Bro. Ch. 180, 185, 29 Eng. Reprint 477, holding that a remainder-man in tail who during the life-estate suffers a recovery, although he conveyed to a trustee to allow him to do so, has come into possession, within the meaning of a deed providing for a charge to be raised when stated persons should come into possession.

Distinguished from ownership. — Okla. St. (1893) § 2299, "undertakes to define two distinct classes of offenses — one, the forcible entering upon or detaining the lands of another; the other, the forcible entering upon or detaining the possessions of another. The words 'lands of another' imply title or ownership, as distinguished from 'possession' which word, as here used, implies nothing more than a possessory right or possession." The statute "makes it a misdemeanor for the owner of lands or any other person to forcibly and violently enter upon or detain that which is in the possession of another." Foust *v.* Territory, 8 Okla. 541, 544, 545, 58 Pac. 728.

4. Woodford *v.* Woodford, 44 N. J. Eq. 79, 81, 14 Atl. 273, where in a will giving testator's wife "possession" of one third of his personal estate, the word was construed as used in the sense of "ownership" because "a possession without limitation as to time" was intended.

5. See Mechanics' Liens, 27 Cyc. 55 text and note 28.

Proof of possession as sufficient to support allegation of ownership in indictment see False Pretenses, 19 Cyc. 435 text and note 58.

6. Black L. Dict.

"Possession means, not merely manual possession, but a property in the thing, though in the custody of another person." Reg. *v.* Sleep, 8 Cox C. C. 472, 480, 7 Jur. N. S. 979, L. & C. 44, 30 L. J. M. C. 170, 4 L. T. Rep. N. S. 525, 9 Wkly. Rep. 709.

7. Bouvier L. Dict. [*cited* in Blaisdell *v.* Hight, 69 Me. 306, 308, 31 Am. Rep. 278].

"In popular usage the word . . . includes . . . property to which one has title; as 'his landed possessions,' 'the French possessions.'" Fuller *v.* Fuller, 84 Me. 475, 479, 24 Atl. 946.

"So in Scripture, 'The house of Jacob shall possess their possessions'" see Fuller *v.* Fuller, 84 Me. 475, 480, 24 Atl. 946.

"Personal estate and possessions" in a will does not include realty. Blaisdell *v.* Hight, 69 Me. 306, 308, 31 Am. Rep. 278.

8. Finch Law, bk. 2, c. 3 [*quoted* in Black L. Dict.].

9. Under the laws of Louisiana, France, Spain, and Mexico see *infra*, D.

10. Actual possession see Adverse Possession, 1 Cyc. 982–996, 1148.

Same as "pedis possessio" or **"pedis positio"** see Churchill *v.* Onderdonk, 59 N. Y. 134, 136. See also 30 Cyc. 1329.

Synonymous with "occupation," "*possessio pedis*," and "subjection to the will and control." See Lawrence *v.* Fulton, 19 Cal. 683, 690. See also 30 Cyc. 1329.

Distinguished from: "Constructive possession" or "possession in law" see Churchill *v.* Onderdonk, 59 N. Y. 134, 136. "Control" see Attachments, 4 Cyc. 577 text and note 69.

11. Brown *v.* Volkening, 64 N. Y. 76, 80 [*quoted* in Foust *v.* Territory, 8 Okla. 541, 543, 544, 58 Pac. 728].

Of diseased cattle as a basis of liability for infection, under Tex. Sess. Laws (1867), p. 169, "that usual and well known possession that men generally have of personal property" not a mere lien without the actual control. Smith *v.* Race, 76 Ill. 490, 491.

exclude other persons from meddling with it;[12] an actual and continuous occupancy or exercise of full dominion, and this may be either, first, an occupancy in fact of the whole that is in possession, or, second, an occupancy of part thereof in the name of the whole;[13] a subjection to the will and dominion of the claimant, usually evidenced by occupation, by a substantial inclosure, cultivation or by appropriate use;[14] and as much consists of a present power and right of dominion as an actual corporal presence.[15]

2. CONSTRUCTIVE.[16] That possession which exists in contemplation of law without actual personal occupation;[17] that which the law annexes to the title,[18] and which may exist without an actual *pedis possessio* where there is a present right, and the possession is either vacant or is consistent with the right of the owner to an immediate and actual possession by himself;[19] possession of one claiming to hold by virtue of some title, without having the actual occupancy.[20] Constructive

Distinguished from: "Constructive possession" see LARCENY, 25 Cyc. 89 text and notes 95, 97.

12. See Fleming *v.* Maddox, 30 Iowa 239, 241 [*quoted* in Tidwell *v.* Chiricahua Cattle Co., (Ariz. 1898) 53 Pac. 192, 195; Black L. Dict.] (through self, tenant, or agent); Sullivan *v.* Sullivan, 66 N. Y. 37, 42 [*quoted* in Garvey *v.* Union Trust Co., 29 N. Y. App. Div. 513, 518, 52 N. Y. Suppl. 260].

13. McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 471, 51 Am. Dec. 637.

14. Coryell *v.* Cain, 16 Cal. 567, 573 [*quoted* in Tidwell *v.* Chiricahua Cattle Co., (Ariz. 1898) 53 Pac. 192, 195].

15. Minturn *v.* Burr, 16 Cal. 107, 109 [*quoted* in Tidwell *v.* Chiricahua Cattle Co., (Ariz. 1898) 53 Pac. 192, 195].

16. Constructive possession see ADVERSE POSSESSION, 1 Cyc. 982, 983 text and note.

17. Brown *v.* Volkening, 64 N. Y. 76, 80 [*quoted* in Foust *v.* Territory, 8 Okla. 541, 543, 544, 58 Pac. 728].

18. McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 471, 51 Am. Dec. 637.

19. Sullivan *v.* Sullivan, 66 N. Y. 37, 42 [*quoted* in Garvey *v.* Union Trust Co., 29 N. Y. App. Div. 513, 518, 52 N. Y. Suppl. 260].

20. Bouvier L. Dict. [*quoted* in Fleming *v.* Maddox, 30 Iowa 239, 241 (*quoted* in Black L. Dict.)].

For example, the possession of undivided property within N. Y. Code Civ. Proc. § 1532, has been described as not an actual, physical possession only, but also that possession which follows the title (Bender *v.* Terwilliger, 48 N. Y. App. Div. 371, 372, 63 N. Y. Suppl. 269 [*affirmed* in 166 N. Y. 590, 59 N. E. 1118]); not a strict *pedis possessio*, but a present right to possession (Weston *v.* Stoddard, 137 N. Y. 119, 128, 33 N. E. 62, 33 Am. St. Rep. 697, 20 L. R. A. 624); a constructive possession, such as the law draws to the title (Wainman *v.* Hampton, 110 N. Y. 429, 433, 18 N. E. 234). Each of the three passages above cited is quoted in Heinze *v.* Butte, etc., Consol. Min. Co., 126 Fed. 1, 3, 61 C. C. A. 63, holding that the possession which the law imputes to the holder of the legal title is sufficient to maintain an action for partition under Mont. Code Civ. Proc. § 1340, giving that remedy to cotenants "who hold and are in possession of real property as joint tenants."

May be of whole by occupancy of part.— As where the owner of a tract of land regularly laid out is in possession of a part, but is constructively in possession of the whole. Bouvier L. Dict. [*quoted* in Fleming *v.* Maddox, 30 Iowa 239, 241 (*quoted* in Black L. Dict.)]. This is often called "constructive possession" see McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 471, 51 Am. Dec. 637. Although, where there is no controversy, the rule that possession of a part is possession of the whole is to be taken in reference to the entire tract, yet where there is a conflict of titles it is to be taken in reference to such conflict. Taylor *v.* Burnsides, 1 Gratt. (Va.) 165, 196. Occupancy of part under conveyance may constitute possession of the whole (Coleman *v.* Billings, 89 Ill. 183, 188; Barger *v.* Hobbs, 67 Ill. 592, 597; Davis *v.* Easley, 13 Ill. 192, 199); and in such case the deed will be regarded as enlarging the possession of a portion so as to include all land called for by the deed (Austin *v.* Rust, 73 Ill. 491, 493).

By one, that of another.— By agent or servant see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1133. By officer when regarded as that of prisoner see GARNISHMENT, 20 Cyc. 1025 text and note 3. By one joint debtor of property levied upon as necessitating notice to others under Kentucky statute see EXECUTIONS, 17 Cyc. 1097–1098 text and note 99. By one joint tenant that of all see JOINT TENANCY, 23 Cyc. 490 text and note 35. By one tenant in common the possession of all see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1141 text and note 54; MINES AND MINERALS, 27 Cyc. 599 text and note 42. By servant see LARCENY, 25 Cyc. 93 text and note 50. By slave that of master see Hite *v.* State, 9 Yerg. (Tenn.) 198, 206. By tenant that of landlord see ADVERSE POSSESSION, 1 Cyc. 1058–1060. Of insured property by one partner that of all insured as such see FIRE INSURANCE, 19 Cyc. 755 text and notes 43, 44. Of personalty by wife that of husband at common law see HUSBAND AND WIFE, 21 Cyc. 1208 text and note 40. Constructively, the owner of land is as much in possession where it is occupied by his tenant as when occupied by himself. Christy *v.* Springs, 11 Okla. 710, 714, 69 Pac. 864.

possession is also called "possession in law," [21] and another of its synonyms is "legal possession." [22]

3. OTHER DESCRIPTIONS. Possession may be adverse,[23] apparent,[24] contested,[25] continuous,[26] derivative,[27] disputed,[28] exclusive,[29] hostile,[30] innocent,[31] lawful,[32] legal,[33] mixed,[34] naked,[35] notorious; open and notorious,[36] peaceable,[37] scrambling,[38] substantial,[39] virtual,[40] in fact,[41] in law,[42] under color of title,[43] by relation of law.[44]

21. Churchill *v.* Onderdonk, 59 N. Y. 134, 136.

22. McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 471, 51 Am. Dec. 637.

23. See ADVERSE POSSESSION, and Cross-References Thereunder, 1 Cyc. 968–1155. Of mere successive holders as making up period of adverse possession see FRAUDS, STATUTE OF, 20 Cyc. 221 text and note 42.

24. A species of presumptive title where land descended to the heir of an abator, intruder, or disseizor who died seized. Wharton L. Lex.

25. **Contested or disputed distinguished from peaceable** see Powell *v.* Mayo, 24 N. J. Eq. 178, 181 [*quoted* in Adler *v.* Sullivan, 115 Ala. 582, 587, 22 So. 87 (*quoted* in Southern R. Co. *v.* Hall, 145 Ala. 224, 226, 41 So. 135)].

26. See ADVERSE POSSESSION, 1 Cyc. 1000–1024, 1148.

27. "In jurisprudence, the possession of a lessee, bailee, licensee, etc." Black L. Dict. [*citing* Holland Jur.].

28. **Disputed or contested possession** see *supra*, text and note 25.

29. See ADVERSE POSSESSION, 1 Cyc. 1024–1026, 1148.

Degrees in exclusiveness.—"Possession of land is the holding of an exclusive exercise of dominion over it. It is evident that this is not and cannot be uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner cannot occupy, literally, the whole tract,—he cannot have an actual *pedis possessio* of all, nor hold it in the grasp of his hand. His possession must be indicated by other acts. The usual one is that of inclosure. But this cannot always be done, yet he may hold possession, in fact, of uninclosed land by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable and acquire the profits it yields in its present condition. Such acts being continued and uninterrupted will amount to actual possession." Illinois Steel Co. *v.* Jeka, 123 Wis. 419, 429, 101 N. W. 399.

30. See ADVERSE POSSESSION, 1 Cyc. 1026–1082, 1148.

31. **Distinguished from "lawful" possession** see Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 62, 68 N. Y. Suppl. 744.

32. **Distinguished from "innocent" possession** see Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 63, 68 N. Y. Suppl. 744.

By defendant in conversion or replevin, said to continue until made unlawful by demand and refusal see Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 57, 68 N. Y. Suppl. 744.

33. **"Legal possession" as synonym for "constructive possession"** see McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 471, 51 Am. Dec. 637.

34. See ADVERSE POSSESSION, 1 Cyc. 1130–1333.

35. See Wharton L. Lex. [*quoted* in Black L. Dict.]. See also 29 Cyc. 259.

36. See ADVERSE POSSESSION, 1 Cyc. 996–1000, 1148.

37. **Peaceable distinguished from disputed or contested possession** see Powell *v.* Mayo, 24 N. J. Eq. 178, 181 [*quoted* in Adler *v.* Sullivan, 115 Ala. 582, 587, 22 So. 87 (*quoted* in Southern R. Co. *v.* Hall, 145 Ala. 224, 226, 41 So. 135)].

38. **"Scrambling possession"** is one "without any savor of the legitimate enjoyment of property rights, and neither sought nor secured on any such account; but which is only scrambled for, by one party or by both, because of some supposed advantage it may command in a pending struggle. The uniform course of adjudication . . . has always been to refuse recognition of such a miscalled possession as investing its claimant with any title to the protection offered in behalf of a peaceable occupancy, however acquired, which the holder intends and uses simply as an exercise of that dominion which insures an enjoyment of the ordinary and accustomed rights of property." Dyer *v.* Reitz, 14 Mo. App. 45, 46.

Distinguished from "peaceable possession" see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1115 text and note 38.

No basis for action of forcible entry and detainer see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1132–1333.

As estoppel when coupled with representation that property held belongs to estate of another see DETINUE, 14 Cyc. 247 note 32.

39. **"Substantial possession"** is an occupancy in fact of the whole that is in possession — *pedis possessio*. McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 471, 51 Am. Dec. 637.

40. **"Virtual possession"** is a term employed on one occasion to distinguish the possession of the whole by occupancy of a part see McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 471, 51 Am. Dec. 637.

41. **As where the party is in actual use and enjoyment** of the land or other real estate. Bacon *v.* Sheppard, 11 N. J. L. 197, 198, 20 Am. Dec. 583.

42. Churchill *v.* Onderdonk, 59 N. Y. 134, 136.

43. See Whitney *v.* Backus, 149 Pa. St. 29, 33, 24 Atl. 51. See also ADVERSE POSSESSION, 1 Cyc. 1082.

44. **"Possession by relation of law"** is where the party in actual possession becomes dispossessed, and is afterward restored, by reëntry or in some other lawful manner;

D. In Civil Law Jurisdictions — 1. In Louisiana. Under Louisiana law, the detention or enjoyment of a thing, which we hold or exercise by ourself or by another who keeps it or exercises it in our name,[45] and divided into two species natural and civil.[46]

2. In French Law. In a proper sense, the detention of a thing, which he, who is master of it, or who has reason to believe that he is so, has in his own keeping, or in that of another person by whom he possesses; it implies a right and a fact, the right to enjoy annexed to the right of property, and the fact of the real detention of the thing that it be in the hands of the master, or of another party.[47]

3. In Spanish and Mexican Law. The occupation of a corporeal thing.[48]

E. As a Degree of Title.[49] A good title where no better title appears; [50] one

he is then, during the period which has intervened between the dispossession and the restoration, deemed in possession by relation of law. Bacon *v.* Sheppard, 11 N. J. L. 197, 198, 20 Am. Dec. 583.

Less efficacious than possession in fact see Bacon *v.* Sheppard, 11 N. J. L. 197, 198, 20 Am. Dec. 583.

45. La. Code, art. 3389 [*quoted* in Suñol *v.* Hepburn, 1 Cal. 254, 266].

Implies a right and a fact.— The right to enjoy annexed to the right of property, and the fact of the real detention of the thing, that is in the hands of the master or another party. La. Code, art. 3397 [*cited* in Suñol *v.* Hepburn, 1 Cal. 254, 266].

"**To be able to acquire possession** of a property, two distinct things are requisite: 1. The intention of possessing as owner; 2. The corporeal possession of the thing." La. Code, art. 3399 [*cited* in Suñol *v.* Hepburn, 1 Cal. 254, 266].

Occupation of part with entry and intention to possess all within the boundaries is possession of the whole. See La. Code, art. 3400 [*cited* in Suñol *v.* Hepburn, 1 Cal. 254, 266].

Intent to possess sufficient to preserve possession once acquired by corporeal detention see La. Code, art. 3405 [*cited* in Suñol *v.* Hepburn, 1 Cal. 254, 267].

Possession animo domini is: That kind of possession which is the basis of usucaption, or the prescription of acquisition, and which "must be, at least in its commencement, a corporeal possession, and must be continuous, uninterrupted, peaceable, public, and unequivocal." Wilson *v.* Marshall, 10 La. Ann. 327, 330 [*quoted* (as Wilson *v.* Martin) in Vicksburg, etc., R. Co. *v.* Le Rosen, 52 La. Ann. 192, 197, 26 So. 854].

46. La. Code, art. 3390 [*cited* in Suñol *v.* Hepburn, 1 Cal. 254, 266].

"**Civil possession.**"— Possession is civil, when a person ceases to reside in the house or on the land which he occupied, or to detain the moveable which he possesses, but without intending to abandon the possession." La. Code, art. 3392 [*quoted* in Suñol *v.* Hepburn, 1 Cal. 254, 266]. It is "the detention of a thing by virtue of a 'just title, and under the conviction of possessing as owner.'" La. Code, art. 3394 [*quoted* in Suñol *v.* Hepburn, 1 Cal. 254, 266]. "In law, civil possession is as extensive as ownership, and there may be cases where actual possession is broader than the title." Thomas *v.* Blair, 111 La. 678, 684, 35 So. 811.

"**Natural possession**" is "that by which a man detains a thing corporeal, as by occupying a house, cultivating grounds, or retaining a moveable in possession." La. Code, art. 3391 [*quoted* in Suñol *v.* Hepburn, 1 Cal. 254, 266]. It is "also defined to be the corporeal detention of a thing, which we possess as belonging to us, without any title to that possession, or with a title which is void." La. Code, art. 3393 [*quoted* in Suñol *v.* Hepburn, 1 Cal. 254, 266].

47. Suñol *v.* Hepburn, 1 Cal. 254, 263, 264.

48. It is divided into possession in fact (*de hecho*), and possession in fact and by the will (*de hecho y de voluntad*), the former, nothing more than a simple holding or detention of a thing, which is under our control, without the intention of acquiring the thing for ourselves; such as the possession of a bailee, a tenant, and others, who possess a thing in the name of another, and not in their own; the latter, the holding of a thing with the intention of excluding all others from its use, or, that holding or detention, which a man has of things corporeal, by the aid both of the body and the mind; the latter species, divided into natural and civil, natural being that which consists in the detention of the thing itself corporeally, as one's house or estate; civil being that which consists in the detention of the thing mentally, as when one departs from his house or estate without the intent to abandon it; true possession comprising both natural and civil and resulting from some regular title, that is, a title sufficient to transfer the property; for the acquisition of which is necessary the will or intention to acquire it, and an occupation or actual detention of the thing, either corporeally or symbolically. See Suñol *v.* Hepburn, 1 Cal. 254, 262.

Transfer of possession accompanying oral grant of realty under Spanish and New Mexican law see Frauds, Statute of, 20 Cyc. 209 text and note 52, 210 text and note 53.

49. **Distinguished from "title"** see Attachment, 4 Cyc. 572 text and notes 28, 29.

One of the elements of title see Shafer *v.* Constans, 3 Mont. 369, 371.

50. Black L. Dict. [*citing* 20 Viner Abr. 278]. *Compare*, however, Cole *v.* Berry, 42 N. J. L. 308, 315, 36 Am. Rep. 511 [*quoted* in Kestner *v.* Keiser Cigar Co., 4 Pa. Dist. 479, 480] (evidence of title, but not title); Miller

degree of title, although the lowest, such an interest in land that one who has only the bare possession may maintain ejectment against a mere wrong-doer who has entered into the possession.[51]

F. In Connection With Various Subjects. Among the many subjects in relation to which possession is important on the civil side of the law are abandonment,[52] admiralty,[53] alterations of instruments,[54] assignments,[55] assignments for benefit of creditors.[56] It is an object of the writ of assistance,[57] also of the proceeding, assize,[58] and is of importance in relation to attachment as affecting amenability of property thereto,[59] and otherwise bearing upon the proceeding, as

Piano Co. *v.* Parker, 155 Pa. St. 208, 210, 26 Atl. 303, 35 Am. St. Rep. 873 (where it is said that possession is not conclusive of title).

51. Swift *v.* Agnes, 33 Wis. 228, 240 [*quoted* in Baragiano *v.* Villani, 117 Ill. App. 372, 375]; Foust *v.* Territory, 8 Okla. 541, 543, 58 Pac. 728.

"**Legal possession of land,** though the lowest interest or title that a person can have, is an estate therein, capable of being conveyed, and when conveyed creates a sufficient privity of estate between a grantor and grantee to carry the covenants of warranty and quiet enjoyment through successive conveyances to a remote grantee. . . . Legal possession of land which is sufficient to carry the covenants upon a conveyance must be a right or interest in the nature of property, valid, at all events, against all extraneous intrusion and capable of the same kind of transfer and devolution as other property." Mygatt *v.* Coe, 147 N. Y. 456, 462, 463, 47 N. E. 17.

The lowest degree of title see 29 Cyc. 259 text and note 24.

First degree of title see ENTRY, WRIT OF, 15 Cyc. 1071 note 69.

Prevails where equity is equal see EQUITY, 16 Cyc. 139 note 52.

Mere possession sufficient against all persons unable to show better right see ENTRY, WRIT OF, 15 Cyc. 1071.

Naked possession as an estate see ESTATES, 16 Cyc. 599 note 1, 600 text and note 8.

Of property inherited by wife, from ancestor, as ground of recovery by husband, without reduction to possession, from one who has no better title see DESCENT AND DISTRIBUTION, 14 Cyc. 72 note 64.

Resulting in possessory title when conveyed by quitclaim by grantor without title see DEEDS, 13 Cyc. 654 note 6.

As limit of legal title granted under certain deeds see DEEDS, 13 Cyc. 656 text and note 64.

"**Possession is nine-tenths of the law.**—This adage is not to be taken as true to the full extent, so as to mean that the person in possession can only be ousted by one whose title is nine times better than his, but it places in a strong light the legal truth that every claimant must succeed by the strength of his own title, and not by the weakness of his antagonist's." Wharton L. Lex. [*quoted* in Black L. Dict.].

52. See ABANDONMENT, 1 Cyc. 6 text and note 97 text and notes 16, 20; HOMESTEADS, 21 Cyc. 537 note 41, 558 text and note 16, 609 text and note 35, 621 text and note 5.

53. See ADMIRALTY, 1 Cyc. 814, 837, 839–840, 852, 870, 895.

54. See ALTERATIONS OF INSTRUMENTS, 2 Cyc. 187, 239 note 16.

55. See ASSIGNMENTS, 4 Cyc. 7 text and note 7, 30 text and notes 59–61.

56. **By assignee:** As right see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 234, 235. Dating in California, from time of filing schedule and petition see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 221 note 53. Failure to deliver to assignee as not invalidating assignment see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 145 note 95. Good against subsequent attachments see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 195 note 85, 221 note 54. In assignment of personalty only as affecting need of acknowledgment or affidavit of good faith see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 154, 155 text and note 29. May be taken before giving bond see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 230 note 78. Necessary to pass title to personalty see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 195 text and note 86. Of leased building continued by assignee for lessee's creditors as source of personal liability see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 237 note 99. Of leased premises, while disposing of merchandise, as evidence see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 236 note 98. Of property, delivered under agreement that title shall remain in vendor until payment, not to be claimed by assignee see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 215, 216 note 39. Postponed to bond in Arkansas and Indian Territory see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 146 note 95, 148 note 7. Recoverable see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 234 text and note 94, 243 note 31. Taken as constituting acceptance see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 136 note 57.

By assignor: In general see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 183, 184. As evidence of fraud see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 202–203 text and notes 18–20, 207 note 40.

57. See ASSISTANCE, WRIT OF, 4 Cyc. 289–298.

58. See 4 Cyc. 298 text and note 3.

59. **As affecting attachability:** By agent of undisclosed principal see ATTACHMENT, 4 Cyc. 634 note 80. By creditor under bill of sale see ATTACHMENT, 4 Cyc. 453 note 88. By debtor, of visible property subject to execution, as ground for foreign attachment see ATTACHMENT, 4 Cyc. 444 note 59. By

material to levy,[60] the protection of rights or claims in property attached,[61] or to contention as to title or ownership in the goods attached,[62] including remedies for interference with possession,[63] as contributing to the fact of notice of title,[64] as entitling the possessor to notice of levy [65] and to restoration after dissolution of attachment,[66] and, when fraudulent, as a ground for the remedy.[67] Possession

defendant as alternative to ownership, failure to show as rendering return insufficient to authorize writ to another county for service see ATTACHMENT, 4 Cyc. 612 note 68. By mortgagor see ATTACHMENT, 4 Cyc. 558 text and notes 45, 46. By prior lienor see ATTACHMENT, 4 Cyc. 634 note 80. By receiptor holding for mortgages under prior attachment see ATTACHMENT, 4 Cyc. 638 note 91. By third person see ATTACHMENT, 4 Cyc. 580, 638 note 91. In the interest of mortgagee under prior mortgage see ATTACHMENT, 4 Cyc. 592 note 50.

Joint possession by joint owners of farm not justifying attachment of share of crops set apart in custody of one for debt of other see ATTACHMENT, 4 Cyc. 566 note 2.

Right of possession in mortgagee as affecting attachability of mortgagor's interest see ATTACHMENT, 4 Cyc. 558 note 46.

60. **As entitling possessor to notice** see ATTACHMENT, 4 Cyc. 583 text and note 14, 593 note 53.

Possession of personalty by officer: Actual or constructive as obviating need of overt act in levy under subsequent writ see ATTACHMENT, 4 Cyc. 604 text and note 20. As duty — In general (see ATTACHMENT, 4 Cyc. 584–591); entitling officer to reimbursement (see ATTACHMENT, 4 Cyc. 721–724); excused by direction to take receipt (see ATTACHMENT, 4 Cyc. 665 note 82). By officer as agent of plaintiff under void process see ATTACHMENT, 4 Cyc. 831 note 3. Essential to levy see ATTACHMENT, 4 Cyc. 603 text and note 12. Failure to take see ATTACHMENT, 4 Cyc. 606 text and note 31, 652 note 26. Joint by officers making different attachments impossible see ATTACHMENT, 4 Cyc. 603 note 12. Manual as obviating need of service of notice see ATTACHMENT, 4 Cyc. 606 note 37. Of mortgaged chattels see ATTACHMENT, 4 Cyc. 592–593 note 50, 593 note 52. Of prior attaching officer, as affecting return on subsequent levy see ATTACHMENT, 4 Cyc. 614 text and note 79. Of property jointly owned see ATTACHMENT, 4 Cyc. 566 text and notes 2, 5, 598 note 74. Power of taking not to be abandoned by officer taking receipt see ATTACHMENT, 4 Cyc. 662 note 63, 663 note 66. Prevented by fraud or force to be mentioned in return see ATTACHMENT, 4 Cyc. 609 note 57. Right of actual resulting in incidental right to open receptacle see ATTACHMENT, 4 Cyc. 581 text and note 4. Right of levying officer to retain see ATTACHMENT, 4 Cyc. 652 note 26. Sufficient to sustain action for violation see ATTACHMENT, 4 Cyc. 659–660. Test of sufficiency see ATTACHMENT, 4 Cyc. 583–584 text and note 17. Under prior levy not to be disturbed on subsequent levy see ATTACHMENT, 4 Cyc. 604–605 text and notes 21, 22. Wrongfully taken as ground of liability (see ATTACHMENT, 4 Cyc. 722 note 10, 831 note 3); constructive deprivation (see ATTACHMENT, 834 note 22).

Possession of realty: Need not be changed on attachment see ATTACHMENT, 4 Cyc. 622 note 38. Not required by officer see ATTACHMENT, 4 Cyc. 594 notes 55, 56, 605 text and note 23. Of non-resident or his tenant not necessarily to be disturbed see ATTACHMENT, 4 Cyc. 594 note 55.

Possession of writ, actual as distinguished from control, by officer at time of levy not essential see ATTACHMENT, 4 Cyc. 577 text and note 69.

61. **As object of claimant's bond** see ATTACHMENT, 4 Cyc. 759 note 11.

As secured to defendant see ATTACHMENT, 4 Cyc. 677–710.

By mortgagee see ATTACHMENT, 4 Cyc. 559 text and notes 50, 51, 53, 726 note 30. As right of trustee under deed of trust see ATTACHMENT, 4 Cyc. 593 note 52.

For safe-keeping by receiptor or bailee see ATTACHMENT, 4 Cyc. 660–675.

62. See ATTACHMENT, 4 Cyc. 726 note 25, text and note 26, 740 text and note 61.

As matter of evidence of ownership on interpleader see ATTACHMENT, 4 Cyc. 743–744 note 86, 744 note 87, text and note 88, 745 text and notes 98, 99, 746 note 5, text and note 6, 747 note 17, 748 text and notes 32, 33, 749 text and note 36, 750 note 44.

By debtor of stranger's goods intermingled with his own as affecting right of stranger to intervene see ATTACHMENT, 4 Cyc. 730 note 52, 742 text and note 52.

63. See ATTACHMENT, 4 Cyc. 762–769, 572–574, 838 note 43.

Replevied by assignee for creditors from attaching officer as defense to action by defendant against officer for non-delivery see ATTACHMENT, 4 Cyc. 808 note 80.

Taken by attachment purchaser, as trespass, when selling officer had no title see ATTACHMENT, 4 Cyc. 716 note 69.

64. See ATTACHMENT, 4 Cyc. 638 note 91, 640 note 94, 730 note 52.

65. See ATTACHMENT, 4 Cyc. 583 text and note 14, 593 note 53.

Possessor to be served when defendant cannot be found, by statute, see ATTACHMENT, 4 Cyc. 613 text and note 75.

66. See ATTACHMENT, 4 Cyc. 808–809.

67. **As ground for attachment:** Of mortgaged property retained by mortgagor see ATTACHMENT, 4 Cyc. 422 text and note 45. Of property assigned for creditors retained by assignor see ATTACHMENT, 4 Cyc. 422 text and note 39.

By wife of her earnings when permitted by husband not fraudulent conveyance see ATTACHMENT, 4 Cyc. 426 note 56.

Actual, essential to justification of attachment on ground of fraudulent transfer see ATTACHMENT, 4 Cyc. 563 note 76.

is material: as substantiating, when long continued, proof of boundaries;[68] in relation to champerty and maintenance,[69] to chattel mortgages,[70] whether the possession of the mortgaged property be that of the mortgagor,[71] the mortgagee,[72] or some other person.[73] Possession of commercial paper affects the right of action thereon,[74] the question of payment,[75] and right to demand[76] or receive pay-

68. See Boundaries, 5 Cyc. 963.

69. See Champerty and Maintenance, 6 Cyc. 880 text and note 48.

Adverse possession as tending to render champertous the transfer of property held therein see Champerty and Maintenance, 6 Cyc. 857, 858 (personalty); 867–879, 883–887, 884–890 (realty).

70. **Possession of mortgaged chattels:** By common agent of mortgagee and mortgagor see Chattel Mortgages, 6 Cyc. 1055 note 69. By party as affecting attachment and levy see Chattel Mortgages, 7 Cyc. 52–54. Change of — dispensed with by recording see Chattel Mortgages, 6 Cyc. 1063–1064; essential to oral mortgage see Chattel Mortgages, 6 Cyc. 990 note 20. In relation to fraud see Chattel Mortgages, 6 Cyc. 1096–1122. Right to, and actions thereon see Chattel Mortgages, 7 Cyc. 6–35.

71. **By mortgagor:** Actual, as affecting filing under statute see Chattel Mortgages, 6 Cyc. 1083 note 72. After default mere bailment see Chattel Mortgages, 7 Cyc. 77 note 25. As right until default see Exemptions, 18 Cyc. 1452 note 41. As subject of statement in mortgage see Chattel Mortgages, 6 Cyc. 1024 note 29, 1025 text and note 32. Changed to custody of law at decease when necessary to validity of mortgage see Executors and Administrators, 18 Cyc. 561 note 47. For benefit of mortgagee see Chattel Mortgages, 6 Cyc. 1119 note 90. Not necessary to mortgagor's interest see Chattel Mortgages, 6 Cyc. 1039 note 3. Of animals, statement as sufficient description of location see Chattel Mortgages, 6 Cyc. 1029 text and note 46. Of future chattels as affecting ratification see Chattel Mortgages, 6 Cyc. 1051 text and notes 51–53. Permitted by mortgagee no evidence of consent to creation of lien see Chattel Mortgages, 7 Cyc. 38 note 12. Retention as statutory evidence of fraud see Chattel Mortgages, 6 Cyc. 1114 text and note 53. Stipulation to retain see Chattel Mortgages, 6 Cyc. 1099–1100. With power of sale see Chattel Mortgages, 6 Cyc. 1104–1121.

72. **By mortgagee:** In general see Chattel Mortgages, 6 Cyc. 1053–1060. Adverse to all but mortgagor see Chattel Mortgages, 6 Cyc. 1053 note 59. After default see Chattel Mortgages, 7 Cyc. 77 note 25, 78–81. After maturity of debt not legal title subject to attachment see Chattel Mortgages, 7 Cyc. 77–78 note 26. As necessary to validity of mortgage against other creditors see Executors and Administrators, 18 Cyc. 561 note 47. As subjecting mortgagee to responsibility see Chattel Mortgages, 7 Cyc. 90–92. Dispenses with need of refiling see Chattel Mortgages, 6 Cyc. 1095. Not to be taken after death of mortgagor, custody of law prevailing see Executors and Administrators, 18 Cyc. 59 note 24. Of animal before period of nurture has passed see Chattel Mortgages, 6 Cyc. 1050 note 43. Of future property needless in equity under American rule see Chattel Mortgages, 6 Cyc. 1052 text and notes 55, 56. Retained under authority of mortgage until payment see Chattel Mortgages, 7 Cyc. 85 note 68. Right to waived by mortgagee of attached goods see Attachment, 4 Cyc. 593 note 52. Subsequent to assignment for creditors see Chattel Mortgages, 6 Cyc. 1052 text and note 54. Transfer to mortgagee, as affecting subsequent rights of creditors under stipulation in mortgage see Chattel Mortgages, 6 Cyc. 1121. Under Iowa Code, § 1927, affecting garnishment see Garnishment, 20 Cyc. 1061 note 42. When mortgagee is trustee in trustee action see Garnishment, 20 Cyc. 1150 note 35. Where fraudulently obtained, with refusal to deliver, as duress see Chattel Mortgages, 6 Cyc. 1100 note 70.

73. **By purchaser** as against mortgagee see Chattel Mortgages, 6 Cyc. 1079 text and notes 50, 51.

Right of assignee to possession and limitations thereon see Chattel Mortgages, 7 Cyc. 58 text and note 11.

74. **As subject of allegations** in declaration or complaint see Commercial Paper, 8 Cyc. 123 note 87, 123–124.

By pledgee see Commercial Paper, 8 Cyc. 67 note 2.

By pledgor see Commercial Paper, 8 Cyc. 67 note 3.

Essential to action see Commercial Paper, 8 Cyc. 66–67 text and notes 2, 3.

Mala fide possession see Commercial Paper, 8 Cyc. 59–60 note 23, 85 note 37.

Mere possession as entitling holder to sue, effect upon pleading see Commercial Paper, 8 Cyc. 173 text and note 97.

Of paper payable to particular person or bearer see Commercial Paper, 8 Cyc. 86 text and notes 49–51.

75. **As affecting competency of indorsements** see Commercial Paper, 8 Cyc. 270 text and note 29.

As evidence of payment: By maker, as evidence of payment, rebutted, see Commercial Paper, 8 Cyc. 249 text and note 15. By maker or accepter, when evidence and when not see Commercial Paper, 8 Cyc. 246–248. By one who has paid, although lost, after payment, provable see Commercial Paper, 8 Cyc. 202 note 72. By party under obligation to pay see Commercial Paper, 7 Cyc. 1017 text and note 70. Mere possession by accepter whether evidence of payment see Commercial Paper, 8 Cyc. 292 note 55.

As evidence of non-payment: By payee see Commercial Paper, 8 Cyc. 248, 250 text and note 19. By personal representative of payee see Commercial Paper, 8 Cyc. 248.

76. **As evidence of authority to demand** payment see Commercial Paper, 7 Cyc. 1004

ment,[77] as well as the question of delivery;[78] possession is also evidence of ownership[79] or title,[80] and of authority to give notice of dishonor;[81] may affect evidence in other ways,[82] and involves, when lawful, authority to transfer a negotiable instrument.[83] Possession of property is a consideration for commercial paper.[84] Under constitutional law possession may be the subject of protection[85] or affect a protected right,[86] and is subject to proper restriction and regulation[87] in relation to copy-

text and note 79; 8 Cyc. 283–284 text and note 93.

As requisite to demand of payment with exception see COMMERCIAL PAPER, 7 Cyc. 997–998 text and notes 18–21.

By holder at time of demand to be shown by certificate of protest see COMMERCIAL PAPER, 7 Cyc. 1058 text and notes 43, 44.

In Georgia as subjecting possessor to notice to collect see COMMERCIAL PAPER, 7 Cyc. 913 text and note 44.

77. **Actual possession by person in charge of place at time of payment** as essential to agency to receive see COMMERCIAL PAPER, 7 Cyc. 1035 text and note 80.

As evidence of right to receive payment see COMMERCIAL PAPER, 7 Cyc. 1035 text and note 82; 8 Cyc. 250–251 text and notes 24–26.

By guardian after payment of note payable to him as such, not preventing extinguishment, see COMMERCIAL PAPER, 7 Cyc. 1035 text and note 76.

By person receiving payment.— Necessary to relieve payer of risk (see COMMERCIAL PAPER, 7 Cyc. 1028–1029 text and note 44); as fact indicating proper person to be paid (see COMMERCIAL PAPER, 7 Cyc. 1031 note 59, 1035 text and note 83).

By pledgee precluding discharge by unauthorized payment to pledgor see COMMERCIAL PAPER, 7 Cyc. 1033 text and note 73.

Mere possession of unindorsed note payable to another not authorizing payment to holder see COMMERCIAL PAPER, 7 Cyc. 1036 note 86.

Of bank-book not evidence of right to draw money see COMMERCIAL PAPER, 7 Cyc. 541 note 66.

Of certificate indorsed in blank under treaty with Mexico see COMMERCIAL PAPER, 7 Cyc. 542 note 69.

Of note acknowledged to belong to ward by third person see COMMERCIAL PAPER, 7 Cyc. 1034 note 76.

78. See COMMERCIAL PAPER, 7 Cyc. 683 note 61, 684 note 63. 815 text and notes 83, 86; 8 Cyc. 219–220 text and notes 71, 72.

79. See COMMERCIAL PAPER, 7 Cyc. 1004 note 79; 8 Cyc. 87–88 text and notes 54–58, 121 text and note 77, 227–231 text and notes 1–15.

80. **Of bill or note payable to bearer:** As evidence of title in holder see COMMERCIAL PAPER, 8 Cyc. 85–86 text and notes 37–44, 227–229 text and notes 2, 3. Mode of acquisition, needless to allege see COMMERCIAL PAPER, 8 Cyc. 121 text and note 77. No presumption of title where bearer is joint owner who cannot sue singly see COMMERCIAL PAPER, 8 Cyc. 89 note 71.

Of paper indorsed in blank as showing transfer of title see COMMERCIAL PAPER, 8 Cyc. 116 text and note 50.

Not in "ordinary course of business" in certain cases see COMMERCIAL PAPER, 7 Cyc. 927 text and notes 94–96.

81. See COMMERCIAL PAPER, 7 Cyc. 1078 text and note 91, 1080 text and note 96; 8 Cyc. 244 text and note 77.

82. **By stranger** as bearing on question of indebtedness see COMMERCIAL PAPER, 7 Cyc. 1017 text and note 71.

Retained by owner as rendering his declarations against his sole interest admissible see COMMERCIAL PAPER, 8 Cyc. 255–256 text and notes 64, 65

83. See COMMERCIAL PAPER, 7 Cyc. 783 text and note 71.

84. See COMMERCIAL PAPER, 7 Cyc. 695 notes 19, 20, 706 note 81, 707 notes 81, 83, 709–710 note 8.

85. **As vested right** see CONSTITUTIONAL LAW, 8 Cyc. 894 note 37. Held not a vested right, possession as conferred on administrator (see CONSTITUTIONAL LAW, 8 Cyc. 914 note 97); future possession by remainderman (see CONSTITUTIONAL LAW, 8 Cyc. 912 note 88); possession of public office (see CONSTITUTIONAL LAW, 8 Cyc. 906–907 text and notes 38–40. *Compare* 8 Cyc. 955 note 8).

86. **Examples:** Adverse possession as resulting in vested right protected from *ex post facto* legislation see CONSTITUTIONAL LAW, 8 Cyc. 898 text and notes 75, 76. By husband, of wife's property, as requisite to his vested right therein see CONSTITUTIONAL LAW, 8 Cyc. 909 text and note 58. Of land after tax-sale, as affecting power of legislature to provide as to rights of parties at future time see CONSTITUTIONAL LAW, 8 Cyc. 1136 note 91. Reduction of charter right of corporation to possession as a condition precedent to constitutional protection against repeal see CONSTITUTIONAL LAW, 8 Cyc. 960 note 25.

87. **An act withholding possession from one recovering land** sold by any of certain officers until he pays the demand, for payment of which it was sold, not an encroachment on the judicial function see CONSTITUTIONAL LAW, 8 Cyc. 816 note 72.

As subject to exercise of police power: Of certain articles connected with lottery see CONSTITUTIONAL LAW, 8 Cyc. 1088 note 89. Of fish or game see CONSTITUTIONAL LAW, 8 Cyc. 1122 text and note 39. Of game birds killed on possessor's own land see CONSTITUTIONAL LAW, 8 Cyc. 1046 note 84. Of lottery tickets see CONSTITUTIONAL LAW, 8 Cyc. 870 text and note 1. Restriction upon action for, possession of liquors, how limited see CONSTITUTIONAL LAW, 8 Cyc. 1000 note 41. But mere possession of liquor, not to be prohibited by legislation see 8 Cyc. 1045 text and note 71.

Of a specific sum of money, subject to order of court to transfer, not an infringement of

right,[88] to rights in franchises [89] and shares of corporations,[90] and has to do with the operation and breach of various covenants,[91] as that against encumbrances; [92] for quiet enjoyment; [93] of right to convey,[94] of seizin,[95] of title,[96] of warranty,[97] and covenants running with the land.[98] The possession of dead bodies is subject to regulation.[99] In relation to the disposal of a decedent's property and the course of descent and distribution,[1] the importance of possession begins with that of the decedent before the death [2] after which the possession falls to the various persons appointed by will,[3] or by law [4]— and these may be the personal representatives,[5] whose possession,[6] whether by executor by will or by administrator by law,

inhibition against imprisonment for debt see CONSTITUTIONAL LAW, 8 Cyc. 883 text and note 76.

Provision for action of forcible entry and detainer a proper regulation of possession of property see CONSTITUTIONAL LAW, 8 Cyc. 1124 note 52.

88. **Possession of unauthorized copies** see COPYRIGHT, 9 Cyc. 971 note 50.

89. **Possession of franchise:** As defense in action see CORPORATIONS, 10 Cyc. 1086 text and note 72. Long and undisputed as evidence of right see CORPORATIONS, 10 Cyc. 1087 note 72.

Possession of inalienable franchises see CORPORATIONS, 10 Cyc. 1095.

90. **Immediate right to possession** essential to action in nature of trover for share certificate see CORPORATIONS, 10 Cyc. 612.

Shares retained by mortgagor see CORPORATIONS, 10 Cyc. 638.

91. **As subject of representations merged** in covenant see COVENANTS, 11 Cyc. 1068 text and notes 34–36.

By covenantee as affecting right to interest on purchase-money upon breach see COVENANTS, 11 Cyc. 1173, 1174 text and notes 94–96.

Possession delayed by outstanding lease measure of damages see COVENANTS, 11 Cyc. 1172 text and note 86.

92. See COVENANTS, 11 Cyc. 1071 text and note 53, 1112 note 24, 1164 note 40.

93. See COVENANTS, 11 Cyc. 1072 note 54, 1077 text and note 64, 1118, 1119 text and note 59, 1120 text and note 70, 1121 text and notes 71, 72, 1136 text and note 60, 1168 text and note 70.

94. **Not implied by covenant of right to convey** except where the theory of actual seizin prevails see COVENANTS, 11 Cyc. 1070 text and notes 44, 45.

95. See 11 Cyc. 1108 text and note 1, 1108, 1109 text and notes 2, 3, 1110 note 15, 1161 text and note 28, 1162, 1163 text and notes 30–33.

96. **Possession held or disturbed by some intruder** not breach see COVENANTS, 11 Cyc. 1119 text and note 62.

97. See COVENANTS, 11 Cyc. 1122 notes 76, 77, 1123 note 79, 1126 text and note 1, 1127 text and note 4, 1128–1129, 1130 text and notes 16, 17, 1151 note 56.

98. **Possession by husband, as well as wife, of wife's property, and delivery to grantee,** essential to covenant running with land in husband's deed so as to join the wife see COVENANTS, 11 Cyc. 1083 note 84.

99. See DEAD BODIES, 13 Cyc. 269–275, 276 note 40, 279, 281 note 72, 281–282.

1. See DESCENT AND DISTRIBUTION, 14 Cyc. 1–226; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1–1367.

2. **Before decease:** Actual possession in decedent not essential to inclusion of property in the inventory see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 200 text and note 7. By donor, in a revocable gift of land, who dies without revoking it see DESCENT AND DISTRIBUTION, 14 Cyc. 179 note 9. By testator, of commercial paper made by representative, how effective see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 230 note 20. Mere possession of personalty, not wholly wrongful, under claim of title, by decedent at time of death, as passing to representative see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 354 text and note 70. Of mortgaged chattel retained by decedent as preventing mortgagee from obtaining preference see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 561 note 47. Of personalty retained by decedent until death, as causing subsequent sale by representative to supersede decedent's bill of sale see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 366 note 72. Of property at time of death, as raising presumption of ownership see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 193 text and note 69. Transferred by decedent as affecting representative's right see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 196–197 text and note 85.

3. See, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1 *et seq.*; WILLS.

4. See DESCENT AND DISTRIBUTION, 14 Cyc. 110–113.

Presumed to have continued in party receiving it at death see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1020 text and note 51.

5. See, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1 *et seq.*

6. **Presumed to be legal** see 18 Cyc. 1019–1020 text and note 50, 1305 text and note 16.

By representative in other capacity: In general see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1258–1260. As trustee, as demanding inventory, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 198 note 88. Justified by guardian, as such, when sued as former special administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1329 text and note 4.

Accompanied by personal interest: By one as representative, how changed to that of same person as legatee or distributee see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 145 text and note 54. When creditor of estate see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 566 text and notes 5–7, 569–570 text and notes 19–28. When universal legatee see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 146 note 56.

Estoppel to deny: Appointment under

is not only a right,[7] but a duty [8] and source of responsibility; [9] or they may be legatees,[10] heirs,[11] or the surviving spouse,[12] or it may be considered the custody of the law.[13] In the hands of persons other than representatives, heirs, distributees, or legatees [14] possession is recoverable [15] and renders the possessor accountable,[16] unless it is his by right.[17] The possession of personalty at the death of the owner is the right of the personal representative,[18] although

which it was obtained, in action on bond, see 18 Cyc. 1292 text and note 41. Decedent's title or set up title adverse to beneficiaries see 18 Cyc. 212 text and note 86.

As shown by joint inventory see 18 Cyc. 1340 text and notes 12–15.

7. See Executors and Administrators, 18 Cyc. 148 text and note 65, 234, 353 note 63.

As between co-representatives see Executors and Administrators, 18 Cyc. 1331 text and note 27.

Right in administrator pendente lite see Executors and Administrators, 18 Cyc. 1326 text and note 77.

Right of succeeding executor see Executors and Administrators, 18 Cyc. 82 note 55.

8. See Executors and Administrators, 18 Cyc. 219–220 text and notes 45–47, 1020 text and note 35.

Of unadministered property as duty of administrator *de bonis non* see Executors and Administrators, 18 Cyc. 1317 text and notes 14, 15.

Taken before appointment see Executors and Administrators, 18 Cyc. 213 text and note 91.

9. Involving duty to account see Executors and Administrators, 18 Cyc. 219.

Involving liability: In general see Executors and Administrators, 18 Cyc. 1336 text and note 86. For *devastavit* see Executors and Administrators, 18 Cyc. 1337 text and notes 87, 88. In case of joint possession of assets see Executors and Administrators, 18 Cyc. 1345 text and note 68. In case of possession of assets by co-representative permitted by the other (see Executors and Administrators, 18 Cyc. 1338), or by independent executor as permitting action on claim and execution against him, without prior presentment to estate (see Executors and Administrators, 18 Cyc. 1353–1354 text and notes 23, 24). Where money retained by special administrator see 18 Cyc. 1329.

10. See Wills.

By universal legatee see Descent and Distribution, 14 Cyc. 120 text and note 87; Executors and Administrators, 18 Cyc. 146 note 56.

Right as between heirs and legatees see Descent and Distribution, 14 Cyc. 120 text and notes 86, 87.

11. See Descent and Distribution, 14 Cyc. 110–111 text and notes 91, 92, 112 text and notes 96–98, 112–113 text and note 2.

As charging possessors with liability see Descent and Distribution, 14 Cyc. 119–120.

Right as between heirs and legatees see 14 Cyc. 120 text and notes 86, 87.

Taken without prejudice to creditors' rights see Descent and Distribution, 14 Cyc. 108 text and note 79; Executors and Administrators, 18 Cyc. 61 note 32.

12. By widow: As source of liability see Descent and Distribution, 14 Cyc. 125. Not affecting creditors' right to security or administration see Executors and Administrators, 18 Cyc. 61 note 32.

Possession of deceased wife's property by husband or his representatives as trustees see Descent and Distribution, 14 Cyc. 149 text and note 5.

13. As against mortgagee of chattels see Executors and Administrators, 18 Cyc. 59 note 24.

Subject to receivership see Executors and Administrators, 18 Cyc. 1329–1330 text and note 11.

14. By creditor of estate of goods enough to pay his claim, as defense to his suit on representative's bond, see Executors and Administrators, 18 Cyc. 1291 text and note 24.

Possession by third person, no hindrance to vesting in representative see Executors and Administrators, 18 Cyc. 192 text and note 64.

15. Possession wrongfully obtained, indefensible by claim of legacy against executor's action to recover see Executors and Administrators, 18 Cyc. 899 note 50.

16. By executor de son tort see Executors and Administrators, 18 Cyc. 1355 note 35, 1357 text and notes 39, 40–45, 1357–1358 text and notes 47, 48.

By husband in right of wife as source of liability see Descent and Distribution, 14 Cyc. 120 text and note 79.

By two defendants, not in common and differently acquired as demanding separate suits by executor for accounting see Equity, 16 Cyc. 253 note 40.

Subject of discovery see Executors and Administrators, 18 Cyc. 217 text and note 31, 217–218 text and note 34.

17. Of money by creditor of distributee immediately applicable by court see Executors and Administrators, 18 Cyc. 60 note 28.

Of personalty by mortgagee: On default under provision in mortgage as right against personal representative see Executors and Administrators, 18 Cyc. 355–356 note 76. Not to be taken by mortgagee under power in chattel mortgage after death of mortgagor as being in custody of the court see Executors and Administrators, 18 Cyc. 59 note 24.

Of pledged property as right of pledgee as against personal representative see Executors and Administrators, 18 Cyc. 355 note 75.

Transferred by representative see Executors and Administrators, 18 Cyc. 364 text and note 37.

18. See Executors and Administrators, 18 Cyc. 354–355.

the possession of personalty by heirs or distributees [19] is permissible where there are no debts and no administration,[20] or if creditors do not object,[21] and is not in general to be disturbed needlessly by the representative;[22] but after administration possession may become the right of the heirs.[23] While in general the right to possession of real property belonging to a decedent's estate is in the heirs,[24] or devisees,[25] or, to some extent, in the surviving spouse,[26] the immediate right may be in the personal representatives [27] in many jurisdictions for certain pur-

As right of administrator and not next of kin see DESCENT AND DISTRIBUTION, 14 Cyc. 112 text and note 99.

By administrator de bonis non see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1311 text and notes 89–91, 1317 text and notes 14, 15.

Continued possession by agent and successor of executrix presumed see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 843 text and note 14.

Custody of: Assets see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 234. Books and papers see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 234–235, 1332.

Possession of note see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 230 note 20, 355 note 73. When important to settle estate, although not for recovery of amount see EQUITY, 16 Cyc. 42 note 65.

Possession of public land, mere right to enjoy, treated as personalty see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 187 text and note 28.

Presumed to be protected by former administration see DESCENT AND DISTRIBUTION, 14 Cyc. 106 note 70.

19. See DESCENT AND DISTRIBUTION, 14 Cyc. 107–108 text and notes 77–79, 109 text and note 83.

Of chattel received from decedent by his child, not made adverse by demand of administrator *pendente lite* and refusal see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 917 note 28.

Of personalty recoverable by heirs: Jurisdiction see DESCENT AND DISTRIBUTION, 14 Cyc. 105 text and note 66, 148 text and notes 99, 1. Limitation of action by heirs or distributees to recover see DESCENT AND DISTRIBUTION, 14 Cyc. 149–150 text and notes 9–11.

20. See DESCENT AND DISTRIBUTION, 14 Cyc. 107 text and note 77, 109 text and note 83, 113 text and note 3.

21. See DESCENT AND DISTRIBUTION, 14 Cyc. 108 text and note 78.

22. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 222 text and note 63.

23. See DESCENT AND DISTRIBUTION, 14 Cyc. 112–113 text and note 2.

24. Immediate right in heirs see DESCENT AND DISTRIBUTION, 14 Cyc. 110, 111 text and notes 91–92, 112 text and notes 96–98.

Possession of realty by heirs: As source of liability between heirs see DESCENT AND DISTRIBUTION, 14 Cyc. 116–117 text and notes 39–41, 119–120. Taken without prejudice to creditor's rights see DESCENT AND DISTRIBUTION, 14 Cyc. 108 text and note 79. That of ancestor see DESCENT AND DISTRIBUTION, 14 Cyc. 102 text and note 54.

Of land of heirs by surviving spouse as involving liability to account see DESCENT AND DISTRIBUTION, 14 Cyc. 116 notes 32, 33, 117 note 42.

Of land sold under void decree to be restored to heirs see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 785 text and note 48.

Right as entitling heir to bring actions relating to realty see DESCENT AND DISTRIBUTION, 14 Cyc. 140 text and note 64. Realty recoverable by heirs see DESCENT AND DISTRIBUTION, 14 Cyc. 105 text and note 66, 148 text and note 98. Limitations of actions by heirs and distributees to recover see DESCENT AND DISTRIBUTION, 14 Cyc. 149 text and notes 7, 8.

25. See WILLS.

Of deeds by devisee having rights with others not to be disturbed by executor having no power of sale or conversion of realty see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 298 note 41.

26. By widow: As sole heir of deceased husband's estate against one claiming as coheir permitted to continue on giving bond see DESCENT AND DISTRIBUTION, 14 Cyc. 125. Not to be recovered from widow entitled to part by heir before proceedings for partition or appraisement see DESCENT AND DISTRIBUTION, 14 Cyc. 124 text and note 30.

Of decedent's house as quarantine see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 375–378.

27. See DESCENT AND DISTRIBUTION, 14 Cyc. 140–143 text and notes 65–69; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 300–303, 303–304 text and note 66, 305 text and notes 72, 78.

As essential to remedies see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 299–300 text and notes 49, 50, 51, 52, 878 text and notes 50–57. Of specific property to be secured before trial under California code by auxiliary remedy see 14 Cyc. 240 note 1.

As source of liability see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 296 note 33, 305–307 text and notes 79–85, 308 text and notes 89–96, 312–313 text and notes 27–31.

As subject of action by administrator with will annexed see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1322 note 48.

By statute see DESCENT AND DISTRIBUTION, 14 Cyc. 104 text and note 58, 111–112 text and notes 93–95, 140–143 text and notes 65–69; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 305 text and notes 71, 72; 18 Cyc. 353 note 63, 796 note 67. Under California statute without title see 18 Cyc. 353 note 53.

By way of foreclosure see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 223 text and note 67.

In special administrator by order of court

poses.[28] Possession of realty by a purchaser from the estate is subject to various perils.[29] Possession of property, or of an instrument, may affect a deed, or the act of conveyance.[30] Possession is the subject of the action of detinue,[31] wherein defendant's liability depends upon the fact[32] and plaintiff's cause of action is on the right thereto.[33] As material to dower possession may be by the husband,[34] widow,[35] or another.[36]

see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1329 text and note 99.

Not taken by appraisal see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 205 text and note 45.

Not to be taken from administrator under mortgage of interest of devisee, before settlement of estate see MORTGAGES, 27 Cyc. 1039 text and note 20.

Of railroad, held adversely to estate, to be recovered by administrator before court can order sale see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 694 text and note 67.

28. **By statute** see *supra*, note 27.

29. **As estoppel to resist payment of purchase-money** for defect in sale see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 799 text and note 92.

In absence of confirmation of title see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 788 notes 77, 79.

Received from representative in part payment, as barring statutory resale by representative at purchaser's risk see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 785 text and note 44.

Subject to decree in equity avoiding sale see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 817 text and note 26.

Under invalid sale see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 317 note 55, 785 note 48.

30. **Possession of deed:** As affecting result of omission or insertion of grantee's name see DEEDS, 13 Cyc. 540–541 text and notes 11, 12. Transferred from grantor, essential to valid delivery of deed see DEEDS, 13 Cyc. 562 text and note 94.

Possession of realty in general: As material to release see DEEDS, 13 Cyc. 525 text and notes 61–67, 537 text and note 75; DOWER, 14 Cyc. 966 text and note 13. By grantee, as affecting fact of conveyance see DEEDS, 13 Cyc. 563–564. By grantor as material to fact of conveyance see DEEDS, 13 Cyc. 528 text and notes 92–99. By grantor or grantee immaterial to form of conveyance see DEEDS, 13 Cyc. 537 text and note 71 Of estate of inheritance by ancestor necessary to validity of collateral warranty as against heir under 4 & 5 Anne 16, § 21 see DEEDS, 13 Cyc. 651 note 42. Retained by grantor affecting fact of conveyance see DEEDS, 13 Cyc. 562, 563.

Possession of homestead: Abandonment of as curing insufficient conveyance see HOMESTEADS, 21 Cyc. 547 text and notes 60, 61. As admitting evidence of deed, defective in acknowledgment, under which it was taken see HOMESTEADS, 21 Cyc. 559–560 text and note 40. Change of, following oral transfer see HOMESTEADS, 21 Cyc. 542 note 10. Surrender of by wife see HOMESTEADS, 21 Cyc. 548 text and notes 68, 80.

31. See DETINUE, 14 Cyc. 239 *et seq.*

By defeated party under bond as resulting in liability for non-delivery see DETINUE, 14 Cyc. 280–281 text and notes 63, 64.

32. See DETINUE, 14 Cyc. 258–262.

Possession by defendant: Adverse see DETINUE, 14 Cyc. 248, 254–255. Denied or justified in answer see DETINUE, 14 Cyc. 269–270 text and notes 22–30. Distinguished from interest as characterizing proper defendant see DETINUE, 14 Cyc. 265 text and note 7. How acquired immaterial see DETINUE, 14 Cyc. 241 text and note 6. How taken by process see DETINUE, 14 Cyc. 262, 265 text and notes 99–4. Right to by virtue of special interest as preventing defendant's liability see DETINUE, 14 Cyc. 255–257 text and notes 64–67. To be averred see DETINUE, 14 Cyc. 265–266 text and note 11. Tortiously acquired not resulting in estoppel see DETINUE, 14 Cyc. 249 note 38. Unlawful commencement as fixing initial date for computing the damages see DETINUE, 14 Cyc. 262–263 text and note 96.

33. See DETINUE, 14 Cyc. 243 text and note 10, 244 text and note 12.

By plaintiff: Actual of personalty once held by executor or administrator as empowering him to maintain detinue in his individual capacity see DETINUE, 14 Cyc. 247 text and notes 27, 29. Prior effect see DETINUE, 14 Cyc. 248 text and notes 36, 38, 250–252. Taken by plaintiff as affecting judgment for defendant see DETINUE, 14 Cyc. 274–276 text and notes 46, 47. Value of, to plaintiff, as fixing measure of damages see DETINUE, 14 Cyc. 263 note 98.

Plaintiff's right to, when sufficient see DETINUE, 14 Cyc. 244 text and note 13, 244–245 text and notes 14–15.

34. **By husband:** Actual need not be proved where no adverse possession is shown in widow's action see DOWER, 14 Cyc. 991 text and note 81. As evidence see DOWER, 14 Cyc. 991 text and note 82, 993 text and note 14, 994 text and notes 20–22, 994–995 text and note 25. As tenant for years, under statute see DOWER, 14 Cyc. 972 text and note 92. Without seizin no basis for dower see DOWER, 14 Cyc. 914 text and note 34. Wrongful as tenant of freehold, effect see DOWER, 14 Cyc. 974 text and notes 94, 95.

35. **By widow:** As resulting in liability see DOWER, 14 Cyc. 1016 text and notes 65–70. Continued after right is barred as raising presumption of election see DESCENT AND DISTRIBUTION, 14 Cyc. 88 text and notes 76, 77. Continuous as preventing limitation against widow see DOWER, 14 Cyc. 989 text and notes 56, 57. Taken by reversioner under lease from widow as waiver of claim of forfeiture for waste see DOWER, 14 Cyc. 1015 text and note 49.

36. **By other than husband or widow:** Adverse see DOWER, 14 Cyc. 930, 983 text and notes 80, 81, 989 text and note 57. As

Possession is the ground and object of ejectment,[37] and of the writ of entry.[38] As a subject of jurisdiction in equity[39] possession may be the object of recovery,[40] protection,[41] and is often important in relation to equitable relief affecting title.[42] Possession of property may affect or be affected by various estates,[43] as may that of a deed,[44] or may be an estate in itself.[45] Possession may act as estoppel to deny title under which it has been taken, on which therefore the possessor's claim depends;[46]

material to release see DOWER, 14 Cyc. 966 text and note 13. By tenants under title by conveyance from husband as estoppel to deny husband's title see DOWER, 14 Cyc. 981 text and notes 61, 62. Demand for upon tenant as statutory prerequisite to suit for recovery see DOWER, 14 Cyc. 983 text and note 78. Under certain statutes as charging possessor with costs in dower see DOWER, 14 Cyc. 1011 text and note 11.

37. See EJECTMENT, 15 Cyc. 1–246.

Priority as question in issue see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 597 note 25.

38. See ENTRY, WRIT OF, 15 Cyc. 1057–1083.

39. See INJUNCTIONS, 22 Cyc. 816–828, 831–841.

As rendering possessor liable to preventive action to protect future rights see EQUITY, 16 Cyc. 102 text and note 26.

Prevails where equities are equal see EQUITY, 16 Cyc. 139 note 52.

40. **Decree for delivery** generally, but not always, refused see EQUITY, 16 Cyc. 109 text and notes 75, 76, 77.

Rendering possessor a necessary party to bill see EQUITY, 16 Cyc. 187 text and note 11.

Of personalty: In general see EQUITY, 16 Cyc. 49–52. Bill to restrain disposal retained to compel delivery see EQUITY, 16 Cyc. 117 note 10. Of books and papers by third person necessary procedure see EQUITY, 16 Cyc. 195 text and note 81. Of negotiable instruments see EQUITY, 16 Cyc. 58 note 41. Of stereotyped plates of work subject of equitable recovery by author see EQUITY, 16 Cyc. 58 note 41.

Of realty: In general see EQUITY, 16 Cyc. 52–55. Bill not founded on mortgage, when not within chancery jurisdiction see MORTGAGES, 27 Cyc. 1517 note 60. By purchaser not usually ordered in decree for sale see EQUITY, 16 Cyc. 479 note 84. Of homestead recoverable in equity by one who has begun proceedings under homestead law against one with no title see EQUITY, 16 Cyc. 90 note 69. Taken by writ on decree of sale of, or awarding, land see EQUITY, 16 Cyc. 499 text and note 29. Where defendants are entitled to jury trial not recoverable in equity see EQUITY, 16 Cyc. 61–62 note 59. Withheld by two defendants and claimed adversely by other persons not sufficient to make out a case of multiplicity of suits see EQUITY, 16 Cyc. 61 note 62.

41. **By defendant with legal title not readily taken** by means of receiver, where claim is founded on disputed equity see EQUITY, 16 Cyc. 138 note 47.

By injunction see *infra*, p. 944 note 99.

Of land: Adverse, of land condemned as street without compensation see EQUITY, 16 Cyc. 233 note 77. Established see EQUITY, 16 Cyc. 239 text and note 34. Forcible, by plaintiff, resulting in refusal to restrain ejectment see EQUITY, 16 Cyc. 144 note 87. Not to be restrained when issue is legal title see EQUITY, 16 Cyc. 64 note 72. Undisturbed as exonerating plaintiff from laches in late application see EQUITY, 16 Cyc. 174–175.

42. **Adverse.**— See ADVERSE POSSESSION, 1 Cyc. 968. See also EQUITY, 16 Cyc. 154 text and note 44. Necessary to bar, bill to redeem, by lapse of time see EQUITY, 16 Cyc. 155 text and note 47.

As affecting suit to quiet title see QUIETING TITLE. See also EQUITY, 16 Cyc. 108 note 73, 115 note 96.

Not a condition requisite to jurisdiction to enforce an equitable against a legal title see EQUITY, 16 Cyc. 90 note 67.

Right carried with decree establishing title see EQUITY, 16 Cyc. 498 text and note 19.

Under contract as rendering possessor proper party to suit to establish a lien see EQUITY, 16 Cyc. 186 note 99.

43. **Adverse possession** see ADVERSE POSSESSION, 1 Cyc. 968–1155.

As barring estate tail see ESTATES, 16 Cyc. 613–614.

As right: Ascertained, essential to vested estate see ESTATES, 16 Cyc. 667 text and note 70. In grantor after breach of condition see DEEDS, 13 Cyc. 705 text and note 83, 713 note 62. In life-tenant see ESTATES, 16 Cyc. 618–619, 647 text and note 29. In remainder-man see ESTATES, 16 Cyc. 622 note 78, 643 text and note 94, 645 note 11, 652 text and notes 91–93, 658 text and notes 74–78, 660 text and note 14.

By life-tenant of personalty see ESTATES, 16 Cyc. 641 notes 71, 72, 641–642 text and notes 73–86.

By reversioner see DEEDS, 13 Cyc. 650 text and note 34; ESTATES, 16 Cyc. 662 text and notes 32, 33, 663 text and notes 42, 43, 45, 46.

Estates in possession defined see ESTATES, 16 Cyc. 605.

Of future estate to commence at future period see ESTATES, 16 Cyc. 604 note 44, 605 text and note 64.

Under contract with reversioner see ESTATES, 16 Cyc. 664 note 62.

44. See DEEDS, 13 Cyc. 569 text and note 44.

45. **Naked possession as an estate** see ESTATES, 16 Cyc. 599 note 1, 600 text and note 8.

46. **Estopping possessor:** By trustee of note secured by deed of trust permitted by legal holder see MORTGAGES, 27 Cyc. 1223 note 37. Obligation of grantee to restore to grantor, as resulting in estoppel by deed see ESTOPPEL, 16 Cyc. 717 note 58. Obtained from fraudulent grantee see FRAUDULENT CONVEYANCES, 20 Cyc. 625 note 60. Under another's title see ESTOPPEL, 16 Cyc. 719 text and note 72, 804. Under claim of title see

is often highly relevant in evidence;[47] and is *prima facie* evidence of title[48] or ownership;[49] of seizin;[50] or the right to possess[51] or convey;[52] may be evidence of fraud;[53] possession of property under an instrument may assist the evidential quality of the instrument;[54] possession of a deed may be evidence in regard to its execution,[55] or in relation to delivery;[56] and when held in a particular manner, without controversy and with acquiescence, may aid in the construction of the instrument;[57] possession of a document may affect its use in evidence.[58] Possession has to do with executions in connection with which it affects the liability of property to execution and levy;[59] entering also into the consideration of questions

ESTOPPEL, 16 Cyc. 688 note 14, 697 text and note 60, 771 note 12, 803–804.

Mere possession by another not estoppel against true owner see ESTOPPEL, 16 Cyc. 776 text and note 26.

Of defendant not admitted by bringing ejectment so as to preclude subsequent action of trespass see ESTOPPEL, 16 Cyc. 800 text and note 7.

When not estopped to assert after-acquired title see ESTOPPEL, 16 Cyc. 771 note 11.

47. **As subject of testimony in nature of conclusion of law** see EVIDENCE, 17 Cyc. 220 text and note 95. 224 text and note 28.

Incriminating see *infra*, 948–950 text and notes 44–58.

Of land favorable to possessor see DEEDS, 13 Cyc. 746.

Of qualities or appliances necessary to a particular act see EVIDENCE, 17 Cyc. 275 text and note 46.

Of realty as subject of evidence see EVIDENCE, 17 Cyc. 485.

Presumed to have continued from date proved see EVIDENCE, 16 Cyc. 1054 text and note 34.

Right to possession as subject of evidence see ENTRY, WRIT OF, 15 Cyc. 134–143.

48. See EJECTMENT, 15 Cyc. 128–129; JUDGMENTS, 23 Cyc. 1369 note 6.

Presumption: Where several are in apparent possession see EVIDENCE, 16 Cyc. 1075 text and note 8. Long continued, as ground of conclusive presumption of non-eviction by title paramount see COVENANTS, 11 Cyc. 1152 text and note 63.

49. See EVIDENCE, 16 Cyc. 1074, 1075; NUISANCES, 29 Cyc. 1234 note 20.

50. See ENTRY, WRIT OF, 15 Cyc. 1082 text and note 61.

51. **Actual, peaceable possession of land** as raising the presumption of right see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1163 text and note 51.

52. **Peaceable possession of land** as *prima facie* evidence of right to convey see DEEDS, 13 Cyc. 738 text and note 65.

53. See ATTACHMENT, 4 Cyc. 422 text and notes 39, 45, 426 note 56, 563 note 76; CHATTEL MORTGAGES, 6 Cyc. 1096–1122; EVIDENCE, 16 Cyc. 1000–1001 text and notes 89–93.

54. See EVIDENCE, 17 Cyc. 432–455.

As affecting admissibility: Without proof of execution see EVIDENCE, 17 Cyc. 452, 453 text and notes 33–39. Without proof of record see EVIDENCE, 17 Cyc. 430 note 92.

As strengthening presumption of acceptance of deed see DEEDS, 13 Cyc. 732 note 34, 733 text and note 35.

To be shown, with production of recorded deed, to establish *prima facie* title see DEEDS, 13 Cyc. 745 text and note 37.

Under ancient deed see DEEDS, 13 Cyc. 743 note 26; EVIDENCE, 17 Cyc. 183 text and note 38.

55. See DEEDS, 13 Cyc. 727 text and note 83.

Of one part of indenture by party thereto as presumptive evidence that other part was executed by him see DEEDS, 13 Cyc. 554 note 36.

56. **Possession by grantee** see DEEDS, 13 Cyc. 563–564, 733–734, 748–749.

Possession by grantor see DEEDS, 13 Cyc. 569 text and note 43, 733, 748, 749.

57. See DEEDS, 13 Cyc. 609 note 5.

58. **Bearing on use of document in evidence:** By other than party offering proof as affecting the production of primary evidence see EVIDENCE, 17 Cyc. 332 text and note 34, 333 text and note 38, 334–335 text and note 39, 527 text and notes 15, 18, 528, 529, 529–531 text and notes 24–27, 532–534 text and notes 34, 35, 534 text and notes 37, 40, 556–564, 567 text and notes 54–57. Of ancient deed see DEEDS, 13 Cyc. 743 note 26; EVIDENCE, 17 Cyc. 450–451 text and note 25. Of books or writings by adverse party as foundation of notice to produce (see EVIDENCE, 17 Cyc. 457 text and notes 66, 67, 461–462 text and note 90); as basis for discovery (see DISCOVERY, 14 Cyc. 374). Of letter by party adverse to writer see EVIDENCE, 17 Cyc. 412 text and note 92. Of letter or telegram with recognition by party against whom it is offered see EVIDENCE, 17 Cyc. 412 text and note 91.

59. See EXECUTIONS, 17 Cyc. 973–980.

By attorney, of debtor's money collected on judgment, good against execution see EXECUTIONS, 17 Cyc. 982 note 72.

By defendant as rendering money subject to be taken see EXECUTIONS, 17 Cyc. 940 text and note 83.

By grantor of property sold to secure indebtedness see EXECUTIONS, 17 Cyc. 966 note 6.

By mortgagor: At common law not effectual to retain legal title necessary to execution see EXECUTIONS, 17 Cyc. 961 text and note 88. Of chattels as affecting levy against mortgagee see EXECUTIONS, 17 Cyc. 965 text and notes 1–3.

By pawnee, rightful, accompanying beneficial interest see EXECUTIONS, 17 Cyc. 968 text and note 14.

By vendee: At prior *bona fide* sale good against execution creditor see EXECUTIONS, 17 Cyc. 1070 note 73. Before execution of

in relation to levy,[60] to proceedings to determine conflicting claims,[61] to sale[62] and the disposition of property after sale,[63] to supplementary proceed-

conveyance as not preventing levy upon execution against grantor see EXECUTIONS, 17 Cyc. 968 text and note 16.

Custodia legis as against execution see EXECUTIONS, 17 Cyc. 980–983.

Lack of possession as not affecting equitable title of vendee of realty holding bond for title see EXECUTIONS, 17 Cyc. 970 text and note 26.

Of land together with equitable title, whether sufficient interest for execution see EXECUTIONS, 17 Cyc. 957 text and note 69.

Of school lands under certificate for future title on condition not sufficient interest see EXECUTIONS, 17 Cyc. 956 note 64.

Right of, for purposes of sale after default in chattel mortgage by trustee under deed of trust as conflicting with levy upon mortgagor's interest see EXECUTIONS, 17 Cyc. 962–964 text and notes 92–96.

Right of, in mortgagor of chattels as rendering them subject to execution against him see EXECUTIONS, 17 Cyc. 962 text and note 91.

60. Adverse under claim of paramount title by other than defendant not ground for stay see EXECUTIONS, 17 Cyc. 1136–1138 note 43.

As between two tribunals issuing execution see EXECUTIONS, 17 Cyc. 1063 text and note 46.

As right of bona fide purchaser for statutory period pending an act of levy see EXECUTIONS, 17 Cyc. 1070–1071 text and note 77.

By claimant at time of levy as *prima facie* evidence of ownership see EXECUTIONS, 17 Cyc. 1576 text and note 43.

By coöwner of chattel, exclusive and long, as justifying act of taking see EXECUTIONS, 17 Cyc. 1090 note 69.

By defendant as affecting levy see EXECUTIONS, 17 Cyc. 1119–1120.

By judgment debtor, of property levied upon when raising presumption of fraud see EXECUTIONS, 17 Cyc. 1061–1063 text and notes 38–41.

By officer: Of bills and notes essential to valid levy see EXECUTIONS, 17 Cyc. 1089 text and note 60. Of personal property in general see EXECUTIONS, 17 Cyc. 1085–1087. Of personalty and fixtures see EXECUTIONS, 17 Cyc. 1087 text and note 56. Under valid levy see EXECUTIONS, 17 Cyc. 1095–1096 text and notes 89–91.

By one joint debtor of property levied upon as necessitating notice to others under Kentucky statute see EXECUTIONS, 17 Cyc. 1097–1098 text and note 99.

By representatives of defendant see EXECUTIONS, 17 Cyc. 1074 text and note 99.

Custody of property under levy in general see EXECUTIONS, 17 Cyc. 1121–1135.

Of land: As right of execution creditor of life-tenant for rents and profits see EXECUTIONS, 17 Cyc. 1094 note 35. Under levy not in officer see EXECUTIONS, 17 Cyc. 1092 text and note 77.

Of property previously levied upon wrongfully obtained by party subject to lien of prior execution see EXECUTIONS, 17 Cyc. 1070 note 73.

Restorable after levy when indemnity refused see EXECUTIONS, 17 Cyc. 1071 note 81.

Transfer or levy without visible change of possession see EXECUTIONS, 17 Cyc. 1069–1070.

Under chattel mortgage or attachment after delivery of execution to officer, although before levy, as subject to lien of execution existing at the time of delivery see EXECUTIONS, 17 Cyc. 1066 text and notes 55, 56.

61. As affecting admissibility in evidence of acts, declarations, and admissions of possessor see EXECUTIONS, 17 Cyc. 1215 note 8, text and note 11.

As right of intervening claimant see EXECUTIONS, 17 Cyc. 1206 text and notes 36, 37.

By defendant see EXECUTIONS, 17 Cyc. 1214 note 5, 1217 note 26, 1218 text and note 29, 1219–1220 text and notes 43, 44, 46, 1221 text and note 62.

By claimant: As dispensing with notice of claim to property levied upon see EXECUTIONS, 17 Cyc. 1202 text and note 10. At time of levy as placing burden on plaintiff to show validity of execution see EXECUTIONS, 17 Cyc. 1213–1214 text and note 3. Obtained by statutory bond as preventing default against claimant until after issue directed by court see EXECUTIONS, 17 Cyc. 1222 note 73.

By mortgagee essential to replevin by him from sheriff see EXECUTIONS, 17 Cyc. 1207 note 47.

By officer: Actual essential to discharge of liability on surrender of property under bond see EXECUTIONS, 17 Cyc. 1229 text and note 30. Under attachment at time of levy as not dispensing with statutory notice of third person's claim see EXECUTIONS, 17 Cyc. 1202 note 9.

Recovered by replevin after execution see EXECUTIONS, 17 Cyc. 1207 text and note 47, 1232 note 64.

Withheld from officer as ground of liability under bond of indemnity see EXECUTIONS, 17 Cyc. 1232 text and note 60.

62. Adverse, of personalty, as conflicting with delivery by bill of sale see EXECUTIONS, 17 Cyc. 1347 note 46.

As constructive notice of adverse claim to execution purchaser see EXECUTIONS, 17 Cyc. 1303.

By mortgagee see EXECUTIONS, 17 Cyc. 1270 note 42.

By officer: Essential to right to injunction against sale see EXECUTIONS, 17 Cyc. 1187 note 65. For statutory period before sale on execution, not essential to title of *bona fide* purchaser at sale see EXECUTIONS, 17 Cyc. 1308–1309 text and note 15. Of bill or note on which debt is due as essential to sale of right of creditor arising from such debt to dividend in insolvent estate see EXECUTIONS, 17 Cyc. 1237 note 98.

By purchaser subject to disturbance or reasonable apprehension thereof as ground for retaining price in Louisiana see EXECUTIONS, 17 Cyc. 1262 note 2.

63. See EXECUTIONS, 17 Cyc. 1310–1317.

During redemption period after sale as involving liability to purchaser see EXECU-

ings,[64] and as affecting the question of satisfaction.[65] Possession of the property of decedents is a function of executors and administrators.[66] Possession affects and is affected by exemptions,[67] and the functions of factors;[68] is the subject of forcible entry and detainer,[69] whether the proceeding be criminal[70] or civil (wherein it is the basis of the action),[71] and proof is requisite of that both of plaintiff[72]

TIONS, 17 Cyc. 1318–1319 text and notes 67, 68, 1319 text and notes 71, 72.

By execution purchaser: As condition precedent to right to redeem see EXECUTIONS, 17 Cyc. 1336 text and note 76. Failure to recover as resulting in revival of judgment see EXECUTIONS, 17 Cyc. 1321 text and note 85. As matter of statutory right until redemption see EXECUTIONS, 17 Cyc. 1337 text and note 79. Not essential to his right to bill to quiet title see EXECUTIONS, 17 Cyc. 1287 text and note 23. Under invalid sale as involving liability see EXECUTIONS, 17 Cyc. 1332 text and notes 88, 95.

By officer: Kept pending determination of claim as subject to costs see EXECUTIONS, 17 Cyc. 1226 note 96. Upon sale of mortgaged chattels to be retained until purchaser has complied with conditions of mortgage see ESTOPPEL, 16 Cyc. 771 note 9.

How recovered by owner deprived by invalid sale see EXECUTIONS, 17 Cyc. 1323 text and notes 97, 98.

64. See EXECUTIONS, 17 Cyc. 1412 text and note 79, 1413 text and note 86.

By corporation see EXECUTIONS, 17 Cyc. 1413 text and note 84.

By court see EXECUTIONS, 17 Cyc. 1413 text and note 83.

By debtor: Acquired after examination showing no property see EXECUTIONS, 17 Cyc. 1430 text and note 23. Allowed by receiver in supplementary proceedings see EXECUTIONS, 17 Cyc. 1492 note 86. As agent merely see EXECUTIONS, 17 Cyc. 1467 note 27. Constructive see EXECUTIONS, 17 Cyc. 1446 note 1. Of other's property see EXECUTIONS, 17 Cyc. 1414 text and note 6. Of property subject to execution (see EXECUTIONS, 17 Cyc. 1407 note 47), under execution permitted (see EXECUTIONS, 17 Cyc. 1486 text and note 67). Only to be acquired from debtor by valid order see EXECUTIONS, 17 Cyc. 1449 text and note 22. On sufferance not required to be surrendered to receiver see EXECUTIONS, 17 Cyc. 1464 note 90.

By receiver: Difficulty in obtaining see EXECUTIONS, 17 Cyc. 1458 text and note 44. Forcible, not to be taken from third person see EXECUTIONS, 17 Cyc. 1447 note 5. Mere right, during statutory period for which debtor may retain see EXECUTIONS, 17 Cyc. 1464 note 1. Taken at unauthorized sale see EXECUTIONS, 17 Cyc. 1459 note 58.

By third person see EXECUTIONS, 17 Cyc. 1412 text and note 79, 1447 note 5, 1482 text and notes 98–10, 1483 text and notes 11–17. As affecting liability to execution see EXECUTIONS, 17 Cyc. 1411 note 74.

65. See EXECUTIONS, 17 Cyc. 1396 text and note 51, 1396–1397 text and note 56, 1398 text and note 68.

66. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1–1367, cited in particular *supra*, 934–936 text and notes 5–9, 18, 27, 28.

67. **Possession of exempt property:** As affecting estoppel to claim exemption in Missouri see EXEMPTIONS, 18 Cyc. 1458 note 86. By purchaser see EXEMPTIONS, 18 Cyc. 1391 note 17. Not a false basis for credit see EXEMPTIONS, 18 Cyc. 1459 text and note 89. Of wages earned see EXEMPTIONS, 18 Cyc. 1433–1434 text and notes 35–37. Tortiously obtained see EXEMPTIONS, 18 Cyc. 1490 note 63. With title, sufficient to support action against officer for sale see EXEMPTIONS, 18 Cyc. 1452 note 41.

68. See FACTORS AND BROKERS, 19 Cyc. 109.

By factor: Of documents of title see FACTORS AND BROKERS, 19 Cyc. 179–181. Of goods mentioned in the Factors Act see 19 Cyc. 176–179.

69. See FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1112 note 1, text and note 4.

Right to: As distinct from actual, not generally in issue see FACTORS AND BROKERS, 19 Cyc. 1125–1126 text and notes 71–77. As subject of evidence see EVIDENCE, 16 Cyc. 1166.

70. **By defendant:** As constituting offense when violently taken or kept see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1112 text and note 1. Held by force see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1113 note 14, 1114 text and note 17.

Of prosecutor: How alleged in indictment see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1119. Invaded as gist of offense see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1115 text and notes 35–41. Restored under statute see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1114 text and notes 24, 25, 1122–1123.

71. See FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1124 text and note 71, 1127 text and note 76, 1128–1133, 1138–1141 text and notes 27–36.

As fixing person to be served with demand see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1145 text and note 4.

By plaintiff as subject of allegations see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1151–1152 text and notes 81–93, 1152–1153 text and notes 94–98, 1153 text and note 7.

Of ancestor that of heirs see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1139 text and notes 31, 32.

Of decedent, sufficient to pass cause of action to successor see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1139 text and notes 31–35.

Of easement not sufficient to support action unless sole and exclusive see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1139, 1140 text and notes 37, 38.

Peaceably acquired under title not ground for action see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1135 text and note 3.

72. See FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1163–1164 notes 44–56, 1164–1166, 1168 note 13.

and defendant,[73] and it is affected by the proceeding,[74] and may be a basis of limitation.[75] Possession is material to some questions under the statute of frauds,[76] as affecting sales of personalty,[77] or agreements relating to realty within the statute.[78] The fact of possession by one person or another is important in its relation to fraudulent conveyances,[79] as affected thereby,[80] as affecting the conveyance itself,[81] or the creditor's remedy,[82] or otherwise touching the rights of persons in connection with the conveyance.[83] Possession of a defendant's property by another is the basis of garnishment.[84] Possession is material to gifts, *inter vivos*[85] as well as to such as are given on condition of the death of the donor

73. See FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1163 note 47.

74. **As subject of:** Judgment see FORCIBLE ENTRY AND DETAINER. 19 Cyc. 1174 note 79, text and note 80–86. Writ of restitution see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1175 text and notes 97, 98.

Peaceable possession, before and at commencement of suit not affected see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1138 text and note 25.

Wrongfully taken by proceedings see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1138 text and notes 20–24.

75. See FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1123, 1146 text and note 23, 1149 text and notes 46, 47, 1151 text and note 76, 1156 text and note 42.

76. See FRAUDS, STATUTE OF, 20 Cyc. 147.

77. **By buyer** see FRAUDS, STATUTE OF, 20 Cyc. 248.

By seller see FRAUDS, STATUTE OF, 20 Cyc. 250.

By seller's bailee see FRAUDS, STATUTE OF, 20 Cyc. 250.

In relation to acceptance see FRAUDS, STATUTE OF, 20 Cyc. 248 note 6, text and notes 8, 9, 249 text and note 13.

In relation to receipt see FRAUDS, STATUTE OF, 20 Cyc. 250.

78. **Possession of realty:** In general see FRAUDS, STATUTE OF, 20 Cyc. 296–299. Accepted by landlord as element of termination of lease see FRAUDS, STATUTE OF, 20 Cyc. 223 text and note 52. An interest therein see FRAUDS, STATUTE OF, 20 Cyc. 230 note 94. By plaintiff, in action for damage thereto see FRAUDS, STATUTE OF, 20 Cyc. 306 text and note 2. Change of, not effectual to pass title in oral exchange of land see FRAUDS, STATUTE OF, 20 Cyc. 225 text and note 66. How proved see FRAUDS, STATUTE OF, 20 Cyc. 211–212, 317 text and note 73–74. Not to be reserved by parol see FRAUDS, STATUTE OF, 20 Cyc. 213 text and note 91. When changed sufficient without writing to carry mere possessory rights see FRAUDS, STATUTE OF, 20 Cyc. 221 text and notes 41, 42. With oral contract of sale in Louisiana and Pennsylvania see FRAUDS, STATUTE OF, 20 Cyc. 226 note 68. With oral partition effective see FRAUDS, STATUTE OF, 20 Cyc. 224–225 text and note 62.

79. **Presumed prima facie to continue in grantee once possessed** see FRAUDULENT CONVEYANCES, 20 Cyc. 635 note 34.

80. **Possession:** By husband, of wife's property, under antenuptial settlement fraudulent as to creditors, to be transferred to wife see FRAUDULENT CONVEYANCES, 20 Cyc. 637 note 42. Right of, not to be acquired by simple contract creditor by attempted purchase after fraudulent conveyance see FRAUDULENT CONVEYANCES, 20 Cyc. 669 note 63. Transfer of, for existing debt, not vitiated by former fraudulent conveyance in connection with mortgage of same property for same debt see FRAUDULENT CONVEYANCES, 20 Cyc. 571–572 text and note 57.

81. **Retained after transfer** see FRAUDULENT CONVEYANCES, 20 Cyc. 403 note 71, 412, note 11, 413 note 18, 476 note 39, 519 note 23, 536–555, 555–556 note 87, 564 note 26, 610 text and note 64, 614 text and note 81, 615–616 text and notes 95–99, 630 note 46, 653 note 61, 673 note 85, 762–763, 769 note 78, 773 text and note 12, 782 note 94, 783 text and notes 96–1, 783–784 note 2, 815 text and note 45.

Delivered with retention of title or benefit see FRAUDULENT CONVEYANCES, 20 Cyc. 394 text and note 36, 557 note 88, 746 note 19.

Possession of wife's personalty by husband see FRAUDULENT CONVEYANCES, 20 Cyc. 373 note 25, text and note 26, 375 text and note 42, 376 notes 42, 44, 395 text and note 42.

82. See FRAUDULENT CONVEYANCES, 20 Cyc. 657 note 93, 658 text and note 94, 677 note 78, 703 note 51.

83. **Adverse possession:** As between fraudulent grantor and grantee see FRAUDULENT CONVEYANCES, 20 Cyc. 617. By grantee against creditors see FRAUDULENT CONVEYANCES, 20 Cyc. 629.

By bona fide purchaser see FRAUDULENT CONVEYANCES, 20 Cyc. 651 note 51, 652 text and note 56.

When necessary to charge fraudulent grantee with liability see FRAUDULENT CONVEYANCES, 20 Cyc. 633, 635–636.

84. See GARNISHMENT, 20 Cyc. 1010–1022.

As ground for garnishee proceedings see GARNISHMENT, 20 Cyc. 1081 text and note 28.

Property held under fraudulent conveyance see FRAUDULENT CONVEYANCES, 20 Cyc. 663 note 26, 664 note 26, 665 text and notes 35–37, 665, 666 text and note 38.

85. **Possession of subject of alleged gift:** Adverse by third person as preventing gift see GIFTS, 20 Cyc. 1211 note 81. After donor's death and accompanied with declaration of gift not sufficient to prove delivery see GIFTS, 20 Cyc. 1225 note 75. As evidence of gift see GIFTS, 20 Cyc. 1222. Delivered with right to reclaim see GIFTS, 20 Cyc. 1211 text and note 79. Essential see GIFTS, 20 Cyc. 1195–1209, 1209 text and notes 71, 73. Repossession by donor, after perfected gift, see GIFTS, 20 Cyc. 1213. Subsequent to declara-

or *causa mortis*.[86] Guardians may be entitled to possession of property [87] and persons of their wards.[88] Possession is material to homesteads,[89] as affecting the claim,[90] or the question of abandonment or surrender thereof [91] or as affected by the homestead right.[92] The relation of matrimony frequently gives rise between husband and wife to the question of possession of property [93] or

tion see GIFTS, 20 Cyc. 1209, 1210 text and notes 74–76, 1212 note 86.

86. **Possession of subject of donatio causa mortis:** After-acquired insufficient see GIFTS, 20 Cyc. 1234 text and note 22. Delivery essential see GIFTS, 20 Cyc. 1230 text and note 9, 1231 text and note 10, 1234 text and note 21. Delivery to third person to be retained for donee sufficient see GIFTS, 20 Cyc. 1236 note 28, 1240 note 48. Previous to gift and continued by donee not sufficient see GIFTS, 20 Cyc. 1234 text and notes 23, 24. To be continued until donor's death see GIFTS, 20 Cyc. 1232 text and note 14.

87. See GUARDIAN AND WARD, 21 Cyc. 136 text and notes 7, 76, 77, 79 text and note 60.

By guardian: As estoppel to deny jurisdiction of court conferring it see GUARDIAN AND WARD, 21 Cyc. 246 text and note 13. As source of liability see GUARDIAN AND WARD, 21 Cyc. 93 text and note 64, 99 text and note 16. Illegal subject of conflict as to question of liability see GUARDIAN AND WARD, 21 Cyc. 226 text and notes 52, 53. Proceedings to obtain by foreign guardian see GUARDIAN AND WARD, 21 Cyc. 267. To be obtained with due diligence see GUARDIAN AND WARD, 21 Cyc. 274 text and note 40. When his right to be sued for in name of guardian see GUARDIAN AND WARD, 21 Cyc. 202–203 text and notes 66–68.

Of infant's property without right of guardianship: By executor or administrator not guardianship see GUARDIAN AND WARD, 21 Cyc. 20 text and note 69. Held over by tenant for life of another see GUARDIAN AND WARD, 21 Cyc. 191 note 82. Taken without right as trespass or volunteer guardianship see GUARDIAN AND WARD, 21 Cyc. 20 text and notes 65, 66.

Of property by ward, application for see GUARDIAN AND WARD, 21 Cyc. 119 note 76.

88. See GUARDIAN AND WARD, 21 Cyc. 62–65.

89. **Of homestead, that of husband** as person to receive notice of foreclosure see MORTGAGES, 27 Cyc. 1690 note 76.

90. **As element of basis of claim:** In general see HOMESTEADS, 21 Cyc. 508 text and note 98. Adverse: As prevailing over homestead right see HOMESTEADS, 21 Cyc. 555, 581 note 6. By *cestui que trust* inconsistent with homestead in trustee see HOMESTEADS, 21 Cyc. 508 text and note 95. For statutory period see HOMESTEADS, 21 Cyc. 489–490 text and note 17, 508. Immediate, right to, by remainder-man see HOMESTEADS, 21 Cyc. 503, 504 text and note 59. Mere possession insufficient see HOMESTEADS, 21 Cyc. 502. Under contract of purchase after full payment see HOMESTEADS, 21 Cyc. 503 note 49. With equitable title and occupancy as home see HOMESTEADS, 21 Cyc. 508 text and note 98.

Of other property not necessarily defeating claim see HOMESTEADS, 21 Cyc. 464 text and note 45 (by debtor); 21 Cyc. 566 (by widow).

Within reasonable time after levy as evidence of prior intent to occupy as home see HOMESTEADS, 21 Cyc. 643 text and note 12.

91. **Delivery to grantee by ancestor** as affecting subsequent claim by heirs see HOMESTEADS, 21 Cyc. 558 text and note 16.

Evidence tending to prove loss as affecting homestead rights see HOMESTEADS, 21 Cyc. 640 text and note 70.

Retained by widow who conveys undivided interest see HOMESTEADS, 21 Cyc. 569 text and note 47.

Surrendered: As admitting in evidence deed defective in acknowledgment under which it was taken see HOMESTEADS, 21 Cyc. 559, 560 text and note 40. By mortgagor to mortgagee under lease annually renewable as resulting in loss see HOMESTEADS, 21 Cyc. 611 text and note 56. By wife as estoppel to assert invalidity of conveyance (see HOMESTEADS, 21 Cyc. 548 text and note 68), but for exception (see HOMESTEADS, 21 Cyc. 548 text and note 80). To grantee as element of abandonment see HOMESTEADS, 21 Cyc. 609 text and note 35.

92. **As right of surviving children** see HOMESTEADS, 21 Cyc. 573 text and notes 95–97.

As widow's right: As against minor children of deceased not exclusive see HOMESTEADS, 21 Cyc. 563 text and note 69. As against remainder-men exclusive see HOMESTEADS, 21 Cyc. 579 text and note 69. Distinct from her right as heir see HOMESTEADS, 21 Cyc. 579 text and note 70.

By grantor at time of judgment against him as affecting purchaser's complaint in action to enjoin sale on execution see HOMESTEADS, 21 Cyc. 557 text and note 93.

By purchaser at foreclosure see HOMESTEADS, 21 Cyc. 631 text and note 47, 631–632 text and note 48.

By widow and minors joint or in common according to statute see HOMESTEADS, 21 Cyc. 563 text and notes 69–71.

Let or transferred by husband: Consent of wife requisite see HOMESTEADS, 21 Cyc. 535 text and notes 32, 33. In Illinois abandonment or transfer of possession essential to deed by husband to wife see HOMESTEADS, 21 Cyc. 537 note 41. Right of wife after wrongful attempt by husband to assign away her rights see HOMESTEADS, 21 Cyc. 558 text and note 25.

Under defective conveyance see HOMESTEADS, 21 Cyc. 554–555 text and notes 57, 59, 560 text and notes 43, 44.

93. See HUSBAND AND WIFE, 21 Cyc. 1207–1209.

Adverse possession: As between husband and wife see HUSBAND AND WIFE, 21 Cyc. 1208–1209. By third person, when husband has life-estate in wife's lands, remainder in her see HUSBAND AND WIFE, 21 Cyc. 1209 text and note 47.

the right thereto.[94] Possession is material to the right to compensation for improvements made within its duration.[95] The persons of infants are subject to possession, in the sense of custody, by parents [96] or persons *in loco parentis*;[97] the right of possession of property to which infants are legally entitled is generally in themselves.[98] In many cases the right to relief by injunctions is affected by possession.[99] Insane persons also are subject to possession in the sense of custody.[1] Possession is important in relation to insurance, as in fire insurance,[2]

Possession by husband: As affecting — Consideration, consisting in wife's property, for transaction between husband and wife see FRAUDULENT CONVEYANCES, 20 Cyc. 524 note 49; Conveyances see FRAUDULENT CONVEYANCES, 20 Cyc. 373 note 25, text and note 26, 375 text and note 42, 376 notes 42, 44, 395 text and note 42. As trustee for wife not adverse (see HUSBAND AND WIFE, 21 Cyc. 1158 text and note 15, 1414 text and note 14), but for exception (see 21 Cyc. 1414 text and note 15). Not conclusive *per se* of his ownership as against wife see HUSBAND AND WIFE, 21 Cyc. 1155 note 92. Of wife's land — Under common-law marital right not adverse as against her see HUSBAND AND WIFE, 21 Cyc. 1208 text and note 46, 1209 text and note 48; with receipt and appropriation of rents as ownership within mechanic's lien law see MECHANICS' LIENS, 27 Cyc. 62 note 48. Of wife's property not a badge of fraud see FRAUDULENT CONVEYANCES, 20 Cyc. 441 note 77, 606 text and note 49.

Possession of homestead that of husband see MORTGAGES, 27 Cyc. 1690 note 76.

Possession of personalty by wife that of husband at common law see HUSBAND AND WIFE, 21 Cyc. 1208 text and note 40.

Under deed from husband conveying interest in wife's land not adverse to wife see HUSBAND AND WIFE, 21 Cyc. 1168 note 8.

94. As between husband and wife: In general see HUSBAND AND WIFE, 21 Cyc. 1157–1195. As right of husband in wife's property under statute see HUSBAND AND WIFE, 21 Cyc. 1414. By deceased wife's representative of wife's choses in action when recoverable in equity from husband see EQUITY, 16 Cyc. 49 note 3. Recoverable by husband without reduction to possession from one who has no better right see DESCENT AND DISTRIBUTION, 14 Cyc. 72 note 64.

95. See EXECUTIONS, 17 Cyc. 1331 note 39, 1332 note 40; IMPROVEMENTS, 22 Cyc. 11 text and note 44, 15, 16 text and note 72, 21, 22, 23 text and notes 14, 16, 27 note 31, 30 text and notes 57, 58, 62, 33 text and note 98; MORTGAGES, 27 Cyc. 1266, 1269, 1510 text and note 7.

As affecting the question of liability by third person in good faith see IMPROVEMENTS, 22 Cyc. 30 text and note 62.

Need not be retained by grantee for purpose of litigating question of increased value see COVENANTS, 11 Cyc. 1176 note 11.

Right of, as resulting in liability to make compensation for improvements see IMPROVEMENTS, 22 Cyc. 27, 28 text and notes 44, 45.

96. See HUSBAND AND WIFE, 21 Cyc. 1148; INFANTS, 22 Cyc. 524 text and note 15; PARENT AND CHILD, 1586, 1680 text and note 40.

Of illegitimate see BASTARDS, 5 Cyc. 637–638.

Wrongfully taken from parent see PARENT AND CHILD, 29 Cyc. 1679–1682.

97. Custody by person in loco parentis: In general see PARENT AND CHILD, 29 Cyc. 1671. By guardian see GUARDIAN AND WARD, 21 Cyc. 62–65. By master see APPRENTICES, 3 Cyc. 552. By stepfather only when *in loco parentis* see PARENT AND CHILD, 29 Cyc. 1668. Of adopted child see ADOPTION, 1 Cyc. 930.

Custody of infants by court see INFANTS, 22 Cyc. 519.

98. See INFANTS, 22 Cyc. 527; PARENT AND CHILD, 29 Cyc. 1654 note 14.

By child of gift from parent see PARENT AND CHILD, 29 Cyc. 1656–1657 text and note 24, 1659 notes 53, 54, 1660 text and notes 56–58, 1660–1661 notes 63–65, 1661 text and note 68, 1671 text and note 40.

99. See INJUNCTIONS, 22 Cyc. 750 note 63, 751 note 68, 753 note 73, 802–803 text and notes 49–51, 803 note 56, 817 note 53, 823 text and notes 82, 96, 97, 826–827 text and notes 13–18, 828–829, 829–830 text and note 25, 839–840 text and note 73.

1. See INSANE PERSONS, 22 Cyc. 1158–1169.

2. Possession of insured property: As affecting question of — "Ownership in fee" see FIRE INSURANCE, 19 Cyc. 696 text and note 59; "Sole and unconditional ownership" see FIRE INSURANCE, 19 Cyc. 693 text and note 22, 694 text and notes 30, 32, 35, 695 text and note 41, 696 text and note 58. As contributing to "ownership" within the meaning of the policy see FIRE INSURANCE, 19 Cyc. 692 text and notes 15, 17, 748 text and notes 95–99. As resulting in insurable interest see FIRE INSURANCE, 19 Cyc. 584–585 text and note 12, 590 text and note 52. By insured — During period in which insurer is authorized to repair premises partially destroyed, not essential to continued occupancy see FIRE INSURANCE, 19 Cyc. 733 text and note 91; of property involved in litigation as affecting policy see FIRE INSURANCE, 19 Cyc. 749 text and notes 3, 4. By mortgagee under common-law theory of mortgage see FIRE INSURANCE, 19 Cyc. 750 note 7. By tenant in tail see FIRE INSURANCE, 19 Cyc. 884 note 43. Change of possession see FIRE INSURANCE, 19 Cyc. 744, 746 text and note 84, 747 text and note 85, 752 text and note 23, 755–756 text and notes 49–51. Retained by insured as not preventing avoidance of policy upon change of title see FIRE INSURANCE, 19 Cyc. 743 note 56. Taken by attachment as avoiding policy under its terms see FIRE INSURANCE, 19 Cyc. 751 text and note 18.

life insurance,[3] marine insurance.[4] Possession may be material to interpleader.[5] Possession of intoxicating liquors is a subject of legislation.[6] The joinder and splitting of actions where possession is one subject has received judicial consideration.[7] Unity of possession is essential to joint tenancy.[8] Possession may affect the operation of judgments,[9] has to do with judicial sales,[10] is important in connection with the relation of landlord and tenant,[11] and in connection with liens[12] including loggers' liens,[13] maritime liens,[14] along with all mechanics' liens,[15]

Of policy as right of insured see FIRE INSURANCE, 19 Cyc. 601 text and note 26.

3. Possession of policy: As evidence see LIFE INSURANCE, 25 Cyc. 719 text and note 20, 768 text and note 20, 927 text and notes 68–70, 928 text and note 82, 945 text and note 8. As right of person who contracts insurance and pays premiums see LIFE INSURANCE, 25 Cyc. 731. By insurance agent who is also the insured see LIFE INSURANCE, 25 Cyc. 729 note 77. In Missouri of policy for benefit of third person see LIFE INSURANCE, 25 Cyc. 779 note 97. Not a condition precedent to action thereon where policy has been assigned as security for a loan to the insured see LIFE INSURANCE, 25 Cyc. 906 text and note 70.

4. Possession of maritime property: As basis of common-law lien see MARINE INSURANCE, 26 Cyc. 561 text and note 8. In relation to — "Arrival" (see MARINE INSURANCE, 26 Cyc. 588 note 28); Insurable interest (see MARINE INSURANCE, 26 Cyc. 556 text and note 44, 557 text and notes 60–65, 558 text and notes 70, 78, 559 text and notes 86, 88); "Seizure" (see MARINE INSURANCE, 26 Cyc. 657 text and note 3); "Total loss" (see MARINE INSURANCE, 26 Cyc. 686 text and notes 20–23, 693 text and note 71).

5. See INTERPLEADER, 23 Cyc. 9.

As affecting sheriff's interpleader see EXECUTIONS, 7 Cyc. 1208 note 49.

6. How recovered see INTOXICATING LIQUORS, 23 Cyc. 333–334.

Mere possession, not to be prohibited by statute see CONSTITUTIONAL LAW, 8 Cyc. 1045 text and note 71.

Purchased by town-agent as such, not ownership see INTOXICATING LIQUORS, 23 Cyc. 167 text and note 79.

Restriction upon action for see CONSTITUTIONAL LAW, 8 Cyc. 1000 note 41; INTOXICATING LIQUORS, 23 Cyc. 89 text and note 26.

Taken away without authority as cause of action by mortgagee see INTOXICATING LIQUORS, 23 Cyc. 340 text and note 17.

7. See JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 410 text and note 17, 436 note 16.

8. See JOINT TENANCY, 23 Cyc. 448 text and note 42.

As between joint tenants see JOINT TENANCY, 23 Cyc. 492–493 text and note 78, 493 text and note 82.

By joint tenants see JOINT TENANCY, 23 Cyc. 490.

9. By grantee or mortgagee under prior unrecorded instrument as notice to judgment creditor see JUDGMENTS, 23 Cyc. 1387.

By judgment debtor as essential to judgment lien see JUDGMENTS, 23 Cyc. 1369 note 6.

10. See JUDICIAL SALES, 24 Cyc. 55–56.

11. See LANDLORD AND TENANT, 24 Cyc. 845 *et seq.*; SUMMARY PROCEEDINGS.

Defendant's bond in action for possession of leased premises not an unreasonable restriction see JURIES, 24 Cyc. 177 note 51.

12. Accompanying lien, effect.— Lien in nature of pledge see LIENS, 25 Cyc. 682 note 76. Lien under contract, as rendering contract an equitable mortgage and not a common-law lien see MORTGAGES, 27 Cyc. 977 note 93. Superiority of one lien over another see LIENS, 25 Cyc. 679 note 48.

By sheriff through seizure prior to recording lien as affecting priority see LIENS, 25 Cyc. 669 note 56.

Delivered, essential to transfer of lien see LIENS, 25 Cyc. 678 text and note 33.

Essential: To common-law lien see LIENS, 25 Cyc. 660 text and note 1, 670–672; MARITIME LIENS, 26 Cyc. 749 note 8, 796 note 78. Under some statutes see LIENS, 25 Cyc. 671 text and note 80.

Not essential: At civil law see LIENS, 25 Cyc. 671 text and note 77. To equitable lien see LIENS, 25 Cyc. 662 text and note 9, 671 text and note 78. To lien in more extensive and common use of the latter word see LIENS, 25 Cyc. 660–661 text and note 3. Under some statutes see LIENS, 25 Cyc. 671–672 text and note 81.

Relinquishment a waiver where essential to lien see LIENS, 25 Cyc. 675 text and notes 14–18.

Wrongful: Purpose to obtain, vitiating advance as foundation for lien see LIENS, 25 Cyc. 668 text and note 46. Taken from common-law lienor, remedy see LIENS, 25 Cyc. 681 notes 68, 69.

13. See LOGGING, 25 Cyc. 1580 text and notes 54, 55, 1581 notes 56, 60, 1592 text and notes 76, 77, 79, 1596 text and notes 33, 39, 1598 text and note 74.

14. See ADMIRALTY, 1 Cyc. 863, 864 note 73, 875 note 62. MARITIME LIENS, 26 Cyc. 749 text and notes 5–7, 769 notes 77, 78, 798 note 91, 814 text and note 18.

Of funds to supply needs of vessel, by owner, presumed see MARITIME LIENS, 26 Cyc. 778 text and note 45.

15. Possession of subject of lien: As right of purchaser under lien sale until foreclosure of prior mortgage, when lien is prior as to building and not as to land see MECHANICS' LIENS, 27 Cyc. 446 note 22. By person contracting, as element of lien on land see MECHANICS' LIENS, 27 Cyc. 53 text and notes 93, 94. By vendee under contract of sale as affecting form of notice see MECHANICS' LIENS, 27 Cyc. 169 note 57. Right not vested, by decree of sale, in plaintiff see MECHANICS' LIENS, 27 Cyc. 441 text and note 73. Taken by owner as tending to show completion sufficient to support date of filing lien see MECHANICS' LIENS, 27 Cyc. 151 note 46.

and may be an interest subject to the latter.[16] Possession affects some of the limitations of actions,[17] and may afford "probable cause" as a defense to malicious prosecution.[18] Possession is important in its relation to rights in ownership or enjoyment of mines and minerals,[19] as affecting mining partnership,[20] as a source of lien,[21] as material to bills to quiet title [22] or for injunctions [23] and to other actions concerning mining property;[24] also in relation to leases thereof,[25] and the right to ore.[26] In connection with mortgages the possession of mortgaged realty is material as a test of the character of the transaction [27] as affecting par-

16. **As interest subject to lien:** As "ownership" see MECHANICS' LIENS, 27 Cyc. 55 text and note 28, 59 text and notes 42, 43, 62 note 48. By mortgagee see MECHANICS' LIENS, 27 Cyc. 55 text and note 26. By mortgagor see MECHANICS' LIENS, 27 Cyc. 55 text and note 23. By tenant in common enabling him to bind his own interest see MECHANICS' LIENS, 27 Cyc. 54 text and note 7.

Allegation of possession insufficient to establish right see MECHANICS' LIENS, 27 Cyc. 173 note 92.

17. **Adverse possession** see LIMITATIONS OF ACTIONS, 25 Cyc. 998–999 text and notes 74–76, 1257, 1280 note 3.

Beginning after commencement of action in ejectment see LIMITATIONS OF ACTIONS, 25 Cyc. 1303 note 52.

By cestui que trust see LIMITATIONS OF ACTIONS, 25 Cyc. 1167 text and notes 45–49.

Essential to acquisition of title under statute see LIMITATIONS OF ACTIONS, 25 Cyc. 1012 text and note 40.

18. See MALICIOUS PROSECUTION, 26 Cyc. 37.

19. **Affecting claim:** Actual and *bona fide* of oil or placer claim, dependent on discovery see MINES AND MINERALS, 27 Cyc. 559 note 82. Adverse see MINES AND MINERALS, 27 Cyc. 593 text and notes 82, 83, 635 note 60, 646 note 44. As affecting right to veins beneath see MINES AND MINERALS, 27 Cyc. 658 text and note 93. As between mere actual and prior possessor or worker, and locator under mining laws see MINES AND MINERALS, 27 Cyc. 555 text and note 42. As between original and new locators see MINES AND MINERALS, 27 Cyc. 595 note 10, 639 note 85. As evidence of ownership see MINES AND MINERALS, 27 Cyc. 577 note 40, 636, 637 text and note 72. By official administrator not that of the crown see MINES AND MINERALS, 27 Cyc. 589 note 51. Exclusive see MINES AND MINERALS, 27 Cyc. 535 note 49, 643 text and note 12. In relation to abandonment see MINES AND MINERALS, 27 Cyc. 597 text and note 19, 598 text and note 29. Material to location see MINES AND MINERALS, 27 Cyc. 559–560. Of guano deposit on unclaimed island by discoverer see MINES AND MINERALS, 27 Cyc. 625 text and note 81.

Not a right of one merely contracting to work until mines are exhausted as against owner see MINES AND MINERALS, 27 Cyc. 747 note 11.

Of cross veins, under the Mineral Act see MINES AND MINERALS, 27 Cyc. 586 text and notes 21, 22.

20. See MINES AND MINERALS, 27 Cyc. 756 note 32.

21. See MINES AND MINERALS, 27 Cyc. 769 note 22.

22. See MINES AND MINERALS, 27 Cyc. 652 text and note 21, 653 text and notes 24–27, 28, 654 text and notes 35, 36, 655 text and note 50, 657 text and note 78.

23. See MINES AND MINERALS, 27 Cyc. 658 text and note 93, 662 text and notes 28, 35.

24. **Affecting actions:** Actual or constructive essential to action of trespass see MINES AND MINERALS, 27 Cyc. 632, 633. In evidence — Generally (see MINES AND MINERALS, 27 Cyc. 610 text and notes 53–55, 611 text and note 62, 612 text and notes 66, 67, 614 note 80, 638 note 79); of original certificate of location, not essential when record or certified copy is produced (see MINES AND MINERALS, 27 Cyc. 577 text and note 38). In pleading see MINES AND MINERALS, 27 Cyc. 615 text and note 94, 645 text and note 42. Material to ejectment see MINES AND MINERALS, 27 Cyc. 641–647 text and notes 1–12, 18, 19, 23, 31, 44, 47, 53, 55, 64. Of claim by one or other party as affecting character of suit to enforce adverse claim see MINES AND MINERALS, 27 Cyc. 608 text and notes 28, 30. Of location or mine excluded, prevented, or withheld, as subject of action see MINES AND MINERALS, 27 Cyc. 630 text and note 22. Of lode, action to try right within jurisdiction of equity see MINES AND MINERALS, 27 Cyc. 652 text and note 18. Right of, in or through alien as subject of action see MINES AND MINERALS, 27 Cyc. 551 text and note 20.

25. **Possession by lessee** see MINES AND MINERALS, 27 Cyc. 691 note 8, 697 note 56, 714 text and note 71, 719 note 11, 731 text and note 95, 741–742 text and note 85, 742 text and notes 88, 89.

Possession by lessor see MINES AND MINERALS, 27 Cyc. 718 text and note 4, 722 text and note 43, 727 text and notes 45, 65.

Mere possession transferred, not a "transfer" within the meaning of a provision for termination on transfer see MINES AND MINERALS, 27 Cyc. 694 text and note 30.

Taken by mistake not tenancy, although possessor agrees to pay for coal taken therefrom for a certain time, see MINES AND MINERALS, 27 Cyc. 691 note 8.

26. See MINES AND MINERALS, 27 Cyc. 649 text and note 85, 650 text and notes 90, 99.

Of gold found and taken on public land recoverable by finder from dispossessor see MINES AND MINERALS, 27 Cyc. 649 text and note 88.

27. See MORTGAGES, 27 Cyc. 971–972, 1014–1015.

As point of difference between lien at common law and equitable mortgage see MORTGAGES, 27 Cyc. 997 note 93.

Awarded by decree to person entitled, charged with payment of sum of money, not

ticular rights;[28] as notice;[29] in relation to foreclosure[30] or redemption,[31] as adverse to various interests;[32] and in other respects,[33] whether held by the mortgagor,[34]

a mortgage see MORTGAGES, 27 Cyc. 967 text and note 44.

28. **In mortgagee:** By trustees under deed of trust, as affecting right to maintain action for natural product previously taken see MORTGAGES, 27 Cyc. 1248 text and note 75. To building on premises see MORTGAGES, 27 Cyc. 1248 note 79, 1249 text and note 83. To collect rents and profits see MORTGAGES, 27 Cyc. 1250 text and note 86, 1251 text and note 90, 1252 text and notes 96–98, 1730 note 1. To crops see MORTGAGES, 27 Cyc. 1248 note 72. To cut and sell timber see MORTGAGES, 27 Cyc. 1247 text and notes 66, 67. To exercise acts of dominion and control see MORTGAGES, 27 Cyc. 1245 text and notes 52, 53. To lease see MORTGAGES, 27 Cyc. 1246 text and notes 58, 59. To work a mine or quarry see MORTGAGES, 27 Cyc. 1248 text and note 78.

In mortgagor: After foreclosure sale — affecting rights in growing crop (see MORTGAGES, 27 Cyc. 1729–1730 text and notes 96–98); not giving right, on vacating, to take and sell manure (see MORTGAGES, 27 Cyc. 1248 text and note 76); to rents and profits (see MORTGAGES, 27 Cyc. 1731, 1732 text and notes 12–14); affecting right to cut and dispose of timber (see MORTGAGES, 27 Cyc. 1246–1247 text and notes 61–65, 1247 text and note 68); lease (see MORTGAGES, 27 Cyc. 1244–1245 text and notes 47–51); rents and profits (see MORTGAGES, 27 Cyc. 1249–1250 text and notes 84, 85); work a mine or quarry (see MORTGAGES, 27 Cyc. 1248 text and note 77).

In mortgagor's lessee; to crops see MORTGAGES, 27 Cyc. 1248 text and note 73, 1729 text and notes 92, 93.

In purchase at sale as affecting right to rents and profits see MORTGAGES, 27 Cyc. 1730–1731 text and notes 4–7.

29. **By person other than mortgagor** see MORTGAGES, 27 Cyc. 1169 note 28, 1187–1189 text and notes 37–44, 1202 text and notes 18–20, 1323 text and note 75, 1371 note 52, 1373 note 61, 1548 text and note 75.

30. **By mortgagee:** Actual, not a condition precedent to foreclosure sale see MORTGAGES, 27 Cyc. 1464 text and note 88. By entry and holding for statutory period see MORTGAGES, 27 Cyc. 1513 note 31. By entry and writ of entry see MORTGAGES, 27 Cyc. 1439–1448. In England pending redemption by crown see MORTGAGES, 27 Cyc. 1548 text and note 71. Of cotenant's interest see MORTGAGES, 27 Cyc. 1517 note 60. On abortive attempt to foreclose see MORTGAGES, 27 Cyc. 1064 text and note 86. On strict foreclosure see MORTGAGES, 27 Cyc. 1647 text and note 85, 1649 text and note 3.

By other than mortgagee: Adverse as bad see MORTGAGES, 27 Cyc. 1559 text and notes 58, 59, 1560 text and note 62, 1561 text and notes 65, 66. As requiring notice to possessor see MORTGAGES, 27 Cyc. 1690 note 76. By claimant see MORTGAGES, 27 Cyc. 1576 note 50. By lessee see MORTGAGES, 27 Cyc. 1580. By mortgagor — As subject of allegation (see MORTGAGES, 27 Cyc. 1598 text and note 33); as entitling him to service of notice (see MORTGAGES, 27 Cyc. 1690 note 76). By receiver see MORTGAGES, 27 Cyc. 1630 text and notes 45, 53. By third person see MORTGAGES, 27 Cyc. 1671 note 4. In Louisiana, by third possessor or purchaser of equity of redemption see MORTGAGES, 27 Cyc. 1549 text and note 76. Under license to occupy permanently see MORTGAGES, 27 Cyc. 1548 text and note 75.

Under purchase-money mortgage see MORTGAGES, 27 Cyc. 1554 text and notes 26, 27.

31. **Adverse possession as a bar** see MORTGAGES, 27 Cyc. 1821–1822. By mortgagee as affecting statute of limitations against redemption see MORTGAGES, 27 Cyc. 1851 text and note 9.

During period of redemption see MORTGAGES, 27 Cyc. 1731 text and notes 12, 13.

Right as between plaintiff and defendant in suit for redemption see MORTGAGES, 27 Cyc. 1862 note 18.

32. See MORTGAGES, 27 Cyc. 1149–1151 text and notes 64–80.

Barring foreclosure see *supra*, note 30.

Barring redemption see *supra*, note 31.

By purchaser at sale under deed of trust with notice of claims see MORTGAGES, 27 Cyc. 1796 note 3.

Destructive to lien see MORTGAGES, 27 Cyc. 1163 text and note 77.

33. **Possession of mortgaged property:** In general see MORTGAGES, 27 Cyc. 1234–1244. In Louisiana see MORTGAGES, 27 Cyc. 964 text and notes 17, 18.

Right of possession as between mortgagor and mortgagee see MORTGAGES, 27 Cyc. 959–960 note 5, 961–963 text and notes 6–13.

34. **As evidence:** In favor of plaintiff in fieri facias see EXECUTIONS, 17 Cyc. 1218 text and note 30. Of payment see MORTGAGES, 27 Cyc. 1398–1399 text and note 75, 1400 text and notes 86–87.

As preventing total failure of consideration see MORTGAGES, 27 Cyc. 1061 text and note 60.

As source of: Liability see MORTGAGES, 27 Cyc. 1253–1254 text and notes 13–14, 1255 notes 21–24, 1270–1273. Reliance to mortgagee see MORTGAGES, 27 Cyc. 1195 text and note 72.

As ownership subject to mortgagee's remedies see MORTGAGES, 27 Cyc. 958 note 2.

At date of mortgage, as material to *prima facie* case of execution creditor on foreclosure see MORTGAGES, 27 Cyc. 1673 text and note 16.

Not adverse to mortgagee see MORTGAGES, 27 Cyc. 1244 note 40, 1361 text and note 65.

Subject to trust deed in nature of mortgage see MORTGAGES, 27 Cyc. 966 text and note 30.

In New Hampshire under agreement of parties at foreclosure see MORTGAGES, 27 Cyc. 1445 note 89.

Of part of premises at foreclosure see MORTGAGES, 27 Cyc. 1588 note 47.

the mortgagee,[35] or by some other person or persons;[36] and possession of papers relating to mortgage by one person or another may have its effect.[37] Possession may be highly material to the question of liability for negligence,[38] is frequently held to constitute constructive notice of ownership,[39] and has to do with liability for nuisance.[40] Office is a subject of possession by officers.[41] Possession is the object of the writ of possession[42] and is important in relation to sales.[43] Under criminal law possession may be merely material to or evidence of an offense, as is true in connection with such particular crimes and misdemeanors as abortion,[44]

35. Actual or constructive as preventing presumption of payment see MORTGAGES, 27 Cyc. 1401 text and note 90.

As resulting in liability see MORTGAGES, 27 Cyc. 965 text and note 27, 1153 text and notes 92, 93, 1245 text and notes 54, 55, 1252 text and notes 99, 1, 1252–1253 text and notes 4–8, 1254 text and note 16, 1258 note 35, 1259 notes 40, 43, 1271 text and notes 14–16, 1838 text and note 16, 1841, 1844 text and notes 45, 46.

As right at common law see MORTGAGES, 27 Cyc. 1234 text and note 46.

As right of creditor under *vente à réméré* see MORTGAGES, 27 Cyc. 964 text and note 17.

Benefit of mortgagee's possession as passing by assignment see MORTGAGES, 27 Cyc. 1298–1299 text and note 10.

By creditor under antichresis at civil law see MORTGAGES, 27 Cyc. 964 text and note 16.

Described see MORTGAGES, 27 Cyc. 1839–1840.

Of part of premises retained after payment by mortgagee not as such, but under independent agreement, see MORTGAGES, 27 Cyc. 1230 note 9.

Under voidable title in Louisiana see MORTGAGES, 27 Cyc. 1214 note 99.

Under Welsh mortgage see MORTGAGES, 27 Cyc. 975 text and notes 24, 27.

36. By assignee of mortgage see MORTGAGES, 27 Cyc. 1308 text and notes 70–73.

By mortgagor's lessee as involving liability see MORTGAGES, 27 Cyc. 1255 text and note 23, 1731 text and note 13.

By purchaser: At foreclosure sale see MORTGAGES, 27 Cyc. 1647 text and notes 86–88, 1727 note 74, 1737–1743. Prior to foreclosure sale see MORTGAGES, 27 Cyc. 1037 text and note 3, 1337–1338 text and note 60, 1339 text and notes 66–69. Under invalid foreclosure sale see MORTGAGES, 27 Cyc. 1490–1491 text and note 26, 1494 text and note 55, 1728 text and note 82, 1733 text and note 20, 1793 note 82.

By tenant as entitling him to notice of mortgagee's right to rents see MORTGAGES, 27 Cyc. 1251 text and note 94.

37. Of abstract of title as part security of loan see MORTGAGES, 27 Cyc. 1231 note 15.

Of evidence of debt: By mortgagor as not necessarily proving payment or extinguishing mortgage see MORTGAGES, 27 Cyc. 1405 text and note 27. Secured by deed of trust as identification of legal holder see MORTGAGES, 27 Cyc. 1048 text and note 76.

Of mortgage and note as affecting question of delivery see MORTGAGES, 27 Cyc. 1114 note 4.

Of mortgage deed see MORTGAGES, 27 Cyc. 1231 text and notes 14, 15.

Of mortgage securities: As indicating right to collect see MORTGAGES, 27 Cyc. 1387 note 72, 1388 text and note 83. By mortgagor as raising presumption of payment see MORTGAGES, 27 Cyc. 1399, 1400 text and notes 83–85.

Of note or bond of mortgagor as relieving complainant in foreclosure from need of production see MORTGAGES, 27 Cyc. 1619 text and note 53.

Of title deeds: By creditor as security as creating an equitable mortgage see MORTGAGES, 27 Cyc. 987 text and note 45. When a right of mortgagee see MORTGAGES, 27 Cyc. 1231 text and note 15.

Of trust and mortgage securities not essential to action to foreclose see MORTGAGES, 27 Cyc. 1541 note 26.

Of trust deed not essential to acceptance of trust see MORTGAGES, 27 Cyc. 968 text and note 38.

38. See NEGLIGENCE, 29 Cyc. 477 text and notes 74, 75, 484 text and note 12, 546, 547 text and note 36, 549, text and note 52, 566, 585 text and note 34.

39. See NOTICE, 29 Cyc. 1115–1116.

40. See NUISANCES, 29 Cyc. 1204–1205 text and notes 21–28.

Of that which is injured see NUISANCES, 29 Cyc. 1234–1235, 1242–1243, 1258 text and note 45, 1262 text and note 93, 1263 note 3. Not essential to owner's right to action where there is injury to the fee see NUISANCES, 29 Cyc. 1234 text and note 21.

41. See OFFICERS, 29 Cyc. 1415–1422.

By justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 415.

Not a vested right see CONSTITUTIONAL LAW, 8 Cyc. 906–907 text and notes 38–40. *Compare* CONSTITUTIONAL LAW, 8 Cyc. 935 note 8.

Withheld from claimant by former incumbent, remedy by mandamus see EQUITY, 16 Cyc. 56 note 34.

42. See EQUITY, 16 Cyc. 500 note 29; MORTGAGES, 27 Cyc. 1444–1445 text and note 82.

For improvement of land in default of payment by occupying claimant see IMPROVEMENTS, 22 Cyc. 29 note 54.

43. See JUDICIAL SALES, 24 Cyc. 55–56; SALES; VENDOR AND PURCHASER.

As affecting statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 248, 250.

Replevin not a change of possession to effectuate unrecorded bill of sale as required by Utah statute see ATTACHMENTS, 4 Cyc. 751 note 53.

44. Possession of: Advertising cards see ABORTION, 1 Cyc. 184 note 14; 194 text and note 91. Instruments see ABORTION, 1 Cyc. 187 text and note 48, 192 note 80.

burglary,[45] counterfeiting,[46] embezzlement,[47] false pretenses,[48] forgery,[49] homicide,[50] larceny,[51] — wherein possession by the person deprived is essential to the crime,[52] as is that acquired by the offender[53] — receiving stolen

45. **Possession of:** Burglarious implements see BURGLARY, 6 Cyc. 239–240. Property taken see BURGLARY, 6 Cyc. 236–239, 246–250, 254–255; CRIMINAL LAW, 12 Cyc. 458 text and note 42.

46. **Possession of:** Counterfeiting tools see COUNTERFEITING, 11 Cyc. 317–318 text and notes 94, 95. Counterfeit money see COUNTERFEITING, 11 Cyc. 317–318 text and notes 94, 95, 318–320, 320 text and note 19, 321 text and note 39, note 41.

47. **Possession of property embezzled.**— As evidence see EMBEZZLEMENT, 15 Cyc. 530. As subject of instruction to jury see EMBEZZLEMENT, 15 Cyc. 535. By bailee or other under agreement as material to offense see EMBEZZLEMENT, 15 Cyc. 500. Lawfully acquired, essential to offense see EMBEZZLEMENT, 15 Cyc. 488 text and note 1. Must be proved as alleged see EMBEZZLEMENT, 16 Cyc. 536 text and note 42. Prior to intent see EMBEZZLEMENT, 15 Cyc. 491–492 text and note 6. Source of, to be alleged in indictment see EMBEZZLEMENT, 15 Cyc. 519–521 text and notes 19–24.

48. **Acquired by defendant:** As essential to crime see FALSE PRETENSES, 19 Cyc. 408–409 notes 20, 21. Voluntarily given see LARCENY, 25 Cyc. 10–11 note 1.

By person to be defrauded: As material to crime see FALSE PRETENSES, 19 Cyc. 415 text and note 60. As sufficient to support allegation of ownership in indictment see FALSE PRETENSES, 19 Cyc. 435 text and note 58.

49. **Possession of articles like those obtained,** months after forgery, insufficient to sustain conviction see FORGERY, 19 Cyc. 1423 text and note 46.

Possession of money or goods of imported drawer of forged order by drawee immaterial see FORGERY, 19 Cyc. 1383 text and note 86.

Possession of forged papers: As evidence of guilt see FORGERY, 19 Cyc. 1412 text and note 69, 1412–1413 text and notes 84, 85, 1413 text and note 89, 1419 text and note 91, 1422 text and note 40, 1425 text and note 83. In certain county as evidence that the forgery took place in that county see FORGERY, 19 Cyc. 1425 text and note 97. Of paper other than that in question admissible to show guilt of the intent see FORGERY, 19 Cyc. 1417 text and note 42, 1419 text and note 92, 1419–1420 text and notes 98, 99, 1–4. Retained by agent for uttering, not uttering see FORGERY, 19 Cyc. 1389 text and note 24. With intent to defraud as forgery see FORGERY, 19 Cyc. 1390.

Possession of instrument with intent to forge as forgery in Missouri see FORGERY, 19 Cyc. 1388 note 11.

Possession of material for making forged instruments: By wife of defendant, of instrument apparently cut for purpose of making alterations similar to those made in note found on him not competent without evidence of concert between them see FORGERY, 19 Cyc. 1420 text and note 9. Of chemical substance of use in effecting erasure see FORGERY, 19 Cyc. 1419 text and note 80. Timely, as corroborating evidence of falsity of certain instrument see FORGERY, 19 Cyc. 1421 text and note 24.

50. **Possession of:** Money or other property of deceased see HOMICIDE, 21 Cyc. 940. Weapons and other objects see HOMICIDE, 21 Cyc. 939–940.

51. **Larceny from building.**— Possession of building as affecting allegation of ownership thereof in indictment for larceny therefrom see LARCENY, 25 Cyc. 99 text and note 43.

52. See LARCENY, 25 Cyc. 35, 36.

As alleged in indictment see LARCENY, 25 Cyc. 88 text and notes 80, 86, 89–90 text and notes 95–22, 91–92 text and notes 29–36, 92 text and notes 39–40.

As distinguished from ownership; effect on form of indictment see LARCENY, 25 Cyc. 74 text and notes 57, 58.

As subject of charge to jury see LARCENY, 25 Cyc. 147.

By one as not conflicting with allegation of ownership in other see LARCENY, 25 Cyc. 195 text and note 30.

Of animals see LARCENY, 25 Cyc. 17 text and notes 72, 75, 81, 17–18 text and notes 75–85.

Of child's property: As between parent and child see LARCENY, 25 Cyc. 95 text and notes 64–66. Of married woman's property as between husband and wife see LARCENY, 25 Cyc. 94 text and notes 51–63.

53. **As affected by consent obtained.**— By conditional consent (see LARCENY, 25 Cyc. 44, 45); *bona fide* (see LARCENY, 25 Cyc. 29–31 text and notes 57, 58); by mistake (see LARCENY, 25 Cyc. 43); through entrapment by owner (see LARCENY, 25 Cyc. 43, 44); through submission of owner (see LARCENY, 25 Cyc. 43); with consent by fraud (see LARCENY, 25 Cyc. 40–43); with forced consent (see LARCENY, 25 Cyc. 40). Of bailee or custodian authorized thereto see LARCENY, 25 Cyc. 39 text and notes 64, 65. Of custodian not authorized to transfer see LARCENY, 25 Cyc. 39 text and notes 66–68. Voluntarily given not "larceny by trick" see LARCENY, 25 Cyc. 10, 11 note 1. With non-consent to taking, to be proved under Texas statute see LARCENY, 25 Cyc. 126 text and note 44.

As essential to offense see LARCENY, 25 Cyc. 12 text and note 9, 18 text and note 96, 19 text and note 3, 19–22. With coexistent intent to steal see LARCENY, 25 Cyc. 45 text and note 5.

Of stolen goods, as evidence: Generally, see CRIMINAL LAW, 12 Cyc. 458 text and note 41; LARCENY, 25 Cyc. 111, 112 text and notes 86, 88, 125 text and note 19, 129 text and note 72, 131–142, 151–153; LOGGING, 25 Cyc. 1601 note 19. As affecting declarations see LARCENY, 25 Cyc. 111 text and notes 82–84. Other than in question see LARCENY, 25 Cyc. 107 text and note 27, 150–151 text and note 64.

goods,[54] robbery,[55] violations of customs laws,[56] or statutes concerning fish and game [57] or concerning intoxicating liquors.[58] And too certain offenses consist in possession with unlawful intent;[59] such as the possession of counterfeit;[60] or tools for counterfeiting;[61] of a dead body;[62] of fish or game in close season;[63] of an instrument forged [64] or to be forged;[65] of intoxicating liquors,[66] or a house or place where liquor is unlawfully sold or kept.[67] (Possession: Adverse, see Adverse Possession, 1 Cyc. 968. As Question of Fact or Law, see Evidence, 17 Cyc. 220 text and note 95, 224 text and note 28; Forcible Entry and Detainer, 19 Cyc. 1170; Fraudulent Conveyances, 20 Cyc. 543 text and notes 22–24; Improvements, 22 Cyc. 34 text and note 4. As Security, see Garnishment, 20 Cyc. 1012 note 58; Pledges. As Subject of Remedies — Compensatory Merely, see Torts; Trespass; Trover and Conversion; To Obtain, see Assistance, Writ of, 4 Cyc. 289; Assize, 4 Cyc. 298; Attachment, 4 Cyc. 368, cited in particular, *supra*, 930, 931 text and notes 59–67; Detinue, 14 Cyc. 239, cited in particular, *supra*, 937 text and notes 31–33; Ejectment, 15 Cyc. 1; Entry, Writ of, 15 Cyc. 1057; Equity, 16 Cyc. 1, cited in particular, *supra*, 938 note 40; Executions, 17 Cyc. 878, cited in particular, *supra*, 939–941 text and notes 59–65; Forcible Entry and Detainer, 19 Cyc. 1109, cited in particular, *supra*, 941, 942 text and notes 69–75; Replevin; Summary Proceedings; To Protect, see Equity, 16 Cyc. 1, cited in particular, *supra*, 938 text and note 41; Injunctions, 22 Cyc. 816–828, 831–841; Nuisances, 29 Cyc. 1234 note 20. As Subject to Eminent Domain, see, generally, Eminent Domain, 15 Cyc. 543. As Subject to Protective and Restrictive Legislation, see *supra*, 933 text and note 85, text and note 87. By Administrator, see *supra* 934, 935 text and notes 5–9, 935 text and note 18, 936, 937 text and notes 27, 28. By Agent — In General, see, generally, Principal and Agent; Of Undisclosed Principal as Affecting Attachability of Property, see Attachment, 4 Cyc. 634 note 80. By Assignee, see, *supra*, 930 notes 55, 56; Insolvency, 22 Cyc. 1277 text and note 43, 1301 text and note 3. By Bailee — In General, see, generally, Bailments, 5 Cyc. 157; Carriers, 6 Cyc. 352; Depositaries, 13 Cyc. 792; Warehousemen; In Relation to Attachment, see Attachment, 4 Cyc. 660–675; Liable to Execution, see Executions, 17 Cyc.

54. **Possession of stolen goods** as corroborating testimony as to felonious intent and guilty knowledge in receiving see Criminal Law, 12 Cyc. 458 text and note 43.

55. **Possession of stolen goods** as evidence see Criminal Law, 12 Cyc. 458 note 41.

56. Of goods under illegal circumstances as evidence see Customs Duties, 12 Cyc. 1167 note 40.

57. **Possession of fish or game** out of season as *prima facie* evidence of violation of statute see Fish and Game, 19 Cyc. 1024 text and note 16.

58. See Intoxicating Liquors, 23 Cyc. 87 note 9, 66 note 57.

Possession of United States license see Intoxicating Liquors, 23 Cyc. 255 text and note 76.

59. **Prohibited possession** to be punishable must be with knowledge. See Reg. *v.* Sleep, 8 Cox C. C. 472, 478; Reg. *v.* Cohen, 8 Cox C. C. 41, 42; Reg. *v.* Wilmett, 3 Cox C. C. 281, 283.

60. See Counterfeiting, 11 Cyc. 302 text and note 7, 305 text and note 42, 307, 309 note 98, 310 text and notes 13, 14, 311 text and note 28, 312 text and note 41, 314 text and note 62, 315 text and note 74, 316, 317 text and notes 86–88, 321 note 41, text and note 46.

61. See Counterfeiting, 11 Cyc. 303 text and note 8, 305 text and note 43, 307–308, 313 note 44, 321 note 45.

62. See Dead Bodies, 13 Cyc. 276 note 40, 279 text and note 61.

63. See Fish and Game, 19 Cyc. 1009–1012, 1024 text and note 14, 1025 text and note 24, 1030 text and note 60.

Proper subject of legislative prohibition see Constitutional Law, 8 Cyc. 1222 text and note 39. Although birds killed by possessor on his own land see Constitutional Law, 8 Cyc. 1045 text and note 84.

64. See Forgery, 19 Cyc. 1390, 1410, 1425, 1427 text and notes 24–26, 1428, 1429 text and note 68.

65. **In Missouri** as forgery of fourth degree see Forgery, 19 Cyc. 1388 note 11.

66. See Intoxicating Liquors, 23 Cyc. 86 note 8, 174, 175 text and notes 60–68, 250 text and note 22, 251 text and note 26.

By bailee or agent as subject to forfeiture see Intoxicating Liquors, 23 Cyc. 293 text and note 18.

How justified see Intoxicating Liquors, 23 Cyc. 300 note 7.

Power of city to declare possession of intoxicating liquors a nuisance not power to make it an offense see Intoxicating Liquors, 23 Cyc. 67 note 76.

67. See Intoxicating Liquors, 23 Cyc. 258, 259.

976–977 text and note 50. By Carrier, see, generally, CARRIERS, 6 Cyc. 352. By Creditor, see *supra*, 932 text and note 72, 947 text and notes 28, 30, 31, 948 text and notes 35, 37; ATTACHMENT 4 Cyc. 453 note 88; PLEDGES. By Debtor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 183; ATTACHMENT, 4 Cyc. 422 text and notes 39, 45, 444 note 59, 612 note 68, 622 note 38, 730 note 52, 742 note 52, 808–809 text and notes 80–88; BANKRUPTCY, 5 Cyc. 345, text and notes 51, 52; CHATTEL MORTGAGES, 6 Cyc. 980; 7 Cyc. 122, cited in particular, *supra*, 932 text and note 71; EXECUTIONS, 17 Cyc. 940 text and note 83, 957 text and note 69, 961 text and note 88, 965 text and notes 1–3, 973 note 38, 1061–1062 text and notes 38–41, 1090 note 69, 1097–1098 text and note 99, 1119–1120, 1214 note 5, 1215 note 8, 1217 note 26, 1218 text and note 29, 1219–1220 text and notes 43, 44, 46, 1221 text and note 62, 1396 text and note 51, 1396–1397 text and note 56, 1398 text and note 68, 1407 note 47, 1412 text and note 79, 1413 text and note 86, 1414 text and note 6, 1430 text and note 23, 1446 note 1, 1449 text and note 22, 1464 note 90, 1467 note 27, 1486 text and note 67, 1492 note 86; EXEMPTIONS, 18 Cyc. 1369, cited in particular, *supra*, 941 note 67; INSOLVENCY, 22 Cyc. 1289 note 27, 1335 note 26; MORTGAGES, 27 Cyc. 916, cited in particular, *supra*, 947 notes 28, 30, 947 note 34, 948 note 37. By Depositary, see, generally, DEPOSITARIES, 13 Cyc. 792. By Heir, see *supra*, 935 text and note 11, 936 text and notes 19, 20, 24. By Legatee, see *supra*, 935 text and note 10, 936 text and note 25. By Lessee or Lessor — In General, see, generally, LANDLORD AND TENANT, 24 Cyc. 845; SUMMARY PROCEEDINGS; Of Mining Property, see *supra*, 946 note 25. By Officer — Of Property Attached, see *supra*, 931 notes 60, 63; Of Office, see *supra*, 948 text and note 41; Of Property Taken Under Execution, see *supra*, 940 notes 60–62, 941 note 63; Of Replevied Property, see REPLEVIN. By Partner, see PARTNERSHIP, 30 Cyc. 445. By Pawnee or Pledgee — In General, see, generally, PAWNBROKERS, 30 Cyc. 1153; PLEDGES; In Relation to Execution, see *supra*, 939 note 59. By Purchaser — In General, see SALES; VENDOR AND PURCHASER; Affecting Transactions within the Statute of Frauds, see *supra*, 942 text and notes 77, 78; Of Mortgaged Property, see *supra* 932 note 73, 942 notes 28, 32, 36; Of Property under Execution, see *supra*, 940 notes 60, 62, 63. By Receiver, see, generally, RECEIVERS. By Tenants in Common, see TENANTS IN COMMON. By Trustee — In General, see TRUSTS; In Trustee Process, see GARNISHMENT, 20 Cyc. 978, 1010; Of Instrument of Trust, see MORTGAGES, 27 Cyc. 968 text and note 38; Under Deed of Trust to Secure Bonds or Stock, see MORTGAGES, 27 Cyc. 1248 text and note 75. By Vendee or Vendor — In General, see SALES; VENDOR AND PURCHASER; Affecting Transactions within the Statute of Frauds, see *supra*, 942 text and notes 77, 78. By Warehouseman, see WAREHOUSEMEN. Common, see TENANCY IN COMMON. In Relation to — Acceptance of Goods, see FRAUDS, STATUTE OF, 20 Cyc. 248 note 6, text and notes 8; 9, 249 text and note 13; SALES; Decedents' Estates, see *supra*, 934–937 text and notes 1–29; Forfeiture, see, generally, FORFEITURES, 19 Cyc. 1355; Perpetuities, see PERPETUITIES, 30 Cyc. 1493–1494 text and notes 40–43, 1502 text and note 92; Powers — In General, see POWERS; In Perpetuity, see PERPETUITIES, 30 Cyc. 1493–1494 text and notes 40–43; Real Actions, see REAL ACTIONS; Salvage, see SALVAGE; Sequestration, see SEQUESTRATION; Statute of Frauds, see *supra*, 942 text and notes 76–78; Statute of Limitations, see *supra*, 946 text and note 17. Supplementary Proceedings, see *supra*, 940–941 text and note 64; Taxation — In General, see TAXATION; Of Mortgaged Property, see MORTGAGES, 27 Cyc. 1253–1254 text and notes 13–16, 1255 text and notes 21, 23, 24, 1257 text and note 34, 1258 note 35; Torts — In General, see TORTS; In Particular, see *supra*, 948 text and notes 38, 40; TRESPASS; Trial of Right of Property, see QUIETING TITLE; TRESPASS TO TRY TITLE; Trover, see TROVER AND CONVERSION; War, see WAR; Waste — In General, see WASTE; In Particular, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 299–300 text and notes 49, 50; TRUSTS. Joint, see JOINT TENANCY, 23 Cyc. 448 text and note 42; By Partners, see PARTNERSHIP, 30 Cyc. 445. Material to — Acquisition by Limitation or Prescription, see ADVERSE POSSESSION, 1 Cyc. 968;

Limitations of Actions, 25 Cyc. 998–999 text and notes 74–76; Delivery of Goods, see Frauds, Statute of, 20 Cyc. 250; Sales; Donatio Causa Mortis, see *supra*, 943 text and note 86; Dower, 14 Cyc. 966 text and note 13; Homesteads, 21 Cyc. 503 note 49, 537 note 41, 548 text and notes 68, 80, 554–555 text and notes 57, 59, 559–560 text and note 40, 569 text and note 47; Mortgages, 27 Cyc. 1464 text and note 88; Exchange of Property, see, generally, Exchange of Property, 17 Cyc. 829; Property, see Property; Quieting Title, see *supra*, 938 note 42, and generally, Quieting Title; Release, see Release; Tender, see Tender; Transfer of Real Property, see *supra*, 937 text and note 30, 942 text and note 81. Naked, see Naked Possession, 29 Cyc. 259. Of Adjoining Lands, see Adjoining Landowners, 1 Cyc. 772 note 17, text and note 20, 774 text and note 31, 792 note 75. Of Document, see *supra*, 937 text and note 30, 938 text and note 40, 939 text and notes 52–55, 941 text and note 68, 948 text and note 37; Wills; and, generally, Discovery, 14 Cyc. 300. Of Fixtures, see, generally, Fixtures, 14 Cyc. 1032. Of Franchise, see *supra*, 934 text and note 89. Of Intermingled Property see, generally, Confusion of Goods, 8 Cyc. 570. Of Lost Goods, see, generally, Finding Lost Goods, 19 Cyc. 535. Of Maritime Property, see *supra*, 930 note 53, 945 text and note 14; Salvage; Shipping. Of Persons — In General, see, generally, Abduction, 1 Cyc. 140; Arrest, 3 Cyc. 867; False Imprisonment, 19 Cyc. 316; Habeas Corpus, 21 Cyc. 279; Kidnapping, 29 Cyc. 796; Of Infants, see *supra*, text and notes 96, 97; Of Insane Persons, see *supra*, 944 text and note 1. Of Pledged Property, see, generally, Pawnbrokers, 30 Cyc. 1163; Pledges. Of Public Lands, see Public Lands. Of Railroad Property, see Railroads; Street Railroads. Of Record, see Records. Of Riparian Land, see Waters. Of Stock in Company, see *supra*, 934 text and note 90. Of Trust Property — In General, see Trusts; Subject to Deed of Trust in Nature of Mortgage, see Mortgages, 27 Cyc. 966 text and note 30, 1248. Of Ward's Property, see *supra*, 943 text and note 87. Of Water Rights, see Waters. Of Weapons — In General, see Weapons; As Evidence of Crime, see Homicide, 21 Cyc. 939–940. Of Wharf, see Wharves. Of Wife's Property — In General, see Husband and Wife, 21 Cyc. 1157–1195; As Affecting Conveyance, see Fraudulent Conveyances, 20 Cyc. 373 note 25, text and note 26, 375 text and note 42, 376 notes 42, 44, 395 text and note 42, 637 note 42. Use and Occupation, see Use and Occupation. See also Possess; Possessed; Possession Fence; Possession Money; Possessio Pedis; Possessor; Possessory; Possessory Action; Possessory Claim; Possessory Judgment; Possessory Lien; Possessory Title; Possessory Warrant.)

POSSESSION FENCE. A term said to mean an enclosure made by the lapping of fallen trees.[68] (See, generally, Fences, 19 Cyc. 466; Possession.)

POSSESSIO PACIFICA FACIT JUS. A maxim meaning "Peaceable possession for the legal time gives a right." [69]

POSSESSIO PACIFICA POUR ANNS 60 FACIT JUS. A maxim meaning "Peaceable possession for sixty years gives a right." [70]

POSSESSIO PEDIS. An occupancy in fact of the whole that is in possession, substantial possession;[71] a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real demonstrative act done.[72] A term synonymous with "Occupation," *q. v.*, "subjection to the will and control," and "actual possession." [73] (See Pedis Possessio, 30 Cyc. 1329; and, generally, Adverse Possession, 1 Cyc. 968.)

68. See Freedman *v.* Bonner, (Tex. Civ. App. 1897) 40 S. W. 47, 48, and from the meaning and connection in which it is used such inclosure would seem to be merely for the purpose of marking a claim.

69. Morgan Leg. Max., "for the legal time" being evidently an interpolation by the translator to suit the law of adverse possession.

70. Black L. Dict.

71. McColman *v.* Wilkes, 3 Strobh. (S. C.) 465, 471, 51 Am. Dec. 637.

Does not require actual occupancy see Porter *v.* Kennedy, 1 McMull. (S. C.) 354, 357.

72. Churchill *v.* Onderdonk, 59 N. Y. 134, 136, where the term is given as "*pedis possessio* or *pedis positio*," and "actual possession" is said to be the same thing.

73. See Lawrence *v.* Fulton, 19 Cal. 683, 690.

POSSESSIO TERMINUM TENENTIS POSSESSIO REVERSIONARII EST HABENDA. A maxim meaning "The possession of the tenant of the estate is to be reckoned the possession of the reversion." [74]

POSSESSOR. One who possesses; one who has possession.[75] (See, generally, POSSESS; POSSESSION.)

POSSESSORY ACTION. An action which has for its immediate object to obtain or recover the actual "possession" of the subject-matter; [76] an action founded on possession.[77]

POSSESSORY CLAIM. A term used to describe a claim, founded in Possession.[78] (See CLAIM, 7 Cyc. 180; POSSESSION.)

POSSESSORY LIEN. See ATTORNEY AND CLIENT, 4 Cyc. 1005.

POSSESSORY TITLE. A term which has been applied to a title gained by possession.[79] (Possessory Title: In General, see ADVERSE POSSESSION, 1 Cyc. 968. To Mining Claims, see MINES AND MINERALS, 27 Cyc. 641. To Public Land, see PUBLIC LANDS. To Support Action, see EJECTMENT, 15 Cyc. 17; ENTRY, WRIT OF, 15 Cyc. 1071; QUIETING TITLE; TRESPASS; TRESPASS TO TRY TITLE.)

74. Morgan Leg. Max.

75. Black L. Dict.

Distinguished from "owner" see Ainsa *v.* U. S., 184 U. S. 639, 646, 22 S. Ct. 507, 46 L. ed. 727.

Used in the sense of owner, in the opinion in Higgins *v.* Kusterer, 41 Mich. 318, 324, 2 N. W. 13, 32 Am. Rep. 160, as that opinion is construed in Bigelow *v.* Shaw, 65 Mich. 341, 346, 32 N. W. 800, 8 Am. St. Rep. 902.

Pocedores de buena feé, "'possessors in good faith' rather than owners" see Ainsa *v.* U. S., 184 U. S. 639, 646, 22 S. Ct. 507, 46 L. ed. 727.

Possessor in bad faith.— See La. Civ. Code, art. 3452 [*quoted* in Black L. Dict.]. One who is not ignorant of the fact that there exists a defect in his title or his mode of acquiring possession (Philippine Civ. Code, art. 433 [*quoted* in Lerma *v.* De la Cruz, 7 Philippine 581, 584]).

76. Black L. Dict., adding: "As distinguished from an action which merely seeks to vindicate the plaintiff's 'title,' or which involves the bare right only; the latter being called a 'petitory' action."

"**In admiralty practice** a possessory suit is one which is brought to recover the possession of a vessel, had under a claim of title" (Black L. Dict.); one which seeks to restore to the owner the possession of which he has been unjustly deprived, when that possession has followed a legal title, or as it is sometimes phrased, when there has been a possession under a claim of title with a constat of property (The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465, 468).

Distinguished from petitory action: In general see Black L. Dict. In admiralty see The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465, 468 [*cited* in Black L. Dict.]; 1 Kent Comm. 371 [*cited* in Black L. Dict.]. See PETITORY SUIT, 30 Cyc. 1535.

Replevin and ejectment included see Atwater *v.* Spalding, 86 Minn. 101, 102, 90 N. W. 370, 91 Am. St. Rep. 331.

To protect possession see Jennings-Heywood Oil Syndicate *v.* Houssiere-Latreille Oil Co., 117 La. 960, 962, 963, 42 So. 467.

Title not put in issue see Jennings-Heywood Oil Syndicate *v.* Houssiere-Latreille Oil Co., 117 La. 960, 967, 42 So. 467.

Not to be joined with petitory action see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 435 text and note 14.

77. Black L. Dict., adding: "Trespass for injuries to personal property is called a 'possessory' action, because it lies only for a plaintiff who, at the moment of the injury complained of, was in actual or constructive, immediate, and exclusive possession."

In Louisiana see Code Proc. § 6 [*quoted* in Black L. Dict.].

78. **For examples** see Larsen *v.* Oregon R., etc., Co., 19 Oreg. 240, 244, 246, 247, 23 Pac. 974 [*cited* in Enoch *v.* Spokane Falls, etc., R. Co., 6 Wash. 393, 398, 33 Pac. 966] (where the term is used in connection with the application of the provision of U. S. St. March 3, 1875 (18 U. S. St. at L. 482), § 3, concerning the condemnation of "possessory claims," to the right of a settler, upon a homestead claim, whose compliance with the land law is incipient and not yet complete, to whom therefore no patent has been granted; which right, though inchoate, is protected); Fields *v.* Livingston, 17 U. C. C. P. 15, 25 (where it is said: "There are two kinds of possessory claims under the law of limitation; one, by which the party either has in himself alone, or in himself and by those through whom he claims, such a length of possession that a legal and marketable title has thereby been acquired by the occupant, and the right of the owner has become extinguished; the other, by which an extinguishment alone has been effected without any more than the mere possessory title vesting in any one").

"**Possessory claimant**" is a term sometimes applied to the owner of a possessory claim. Enoch *v.* Spokane Falls, etc., R. Co., 6 Wash. 393, 397, 33 Pac. 966.

79. See Black *v.* Ryan, 4 App. Cas. (D. C.) 283, 287, where the phrase "good as a possessory title" was said to apply to "a title good by prescription or adverse possession under such circumstances and for such length of time as to have ripened into a perfect title, indefeasible at law or in equity."

POSSESSORY WARRANT

By Ernest G. Chilton*

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* Author of "Livery-Stable Keepers," 25 Cyc. 1504; "Marshaling Assets and Securities," 26 Cyc. 1511; "Motions," 28 Cyc. 1; "Notice," 28 Cyc. 1110; "Orders," 29 Cyc. 1511; Parliamentary Law," 29 Cyc. 1686; "Pawnbrokers," 30 Cyc. 1163; "Pensions," 30 Cyc. 1366; "Pent Roads," 30 Cyc. 1377; "Poisons," 31 Cyc. 896. Joint author of "Licenses," 25 Cyc. 593.

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CROSS-REFERENCES

For Matters Relating to:
Detinue, see DETINUE, 14 Cyc. 238.
Replevin, see REPLEVIN.
Trover, see TROVER AND CONVERSION.

I. NATURE AND PURPOSE.

A. Nature. The proceeding by possessory warrant is, in its nature, a mere summary mode of transferring possession of personalty to await the main trial of a civil suit.[1]

B. Purpose. The object or purpose of the proceeding is to protect and quiet possession of personalty [2] by restoring it summarily to the party having the recent lawfully acquired, quiet and peaceable possession thereof.[3]

II. IN WHOSE FAVOR AVAILABLE.

A. Consignees of Goods. A consignee of goods cannot obtain possession of them from a carrier who received them from another carrier by means of a possessory warrant, without producing the bill of lading or accounting therefor.[4]

B. Landlords. In addition to the ordinary cases in which a possessory warrant will issue,[5] a new and distinct right in a landlord to repossess crops by possessory warrant is created [6] in all cases where the cropper unlawfully sells or otherwise disposes of any part of a crop, or excludes the landlord from possession thereof, while the title thereto remains in the landlord.[7]

1. Jordan *v.* Owens, 67 Ga. 616.
2. Welborn *v.* Shirly, 65 Ga. 695; Jackson *v.* Sparks, 36 Ga. 445; Coursey *v.* Curtis, 18 Ga. 237.
3. Welborn *v.* Shirly, 65 Ga. 695; Amos *v.* Dougherty, 65 Ga. 612.
4. Bass *v.* Glover, 63 Ga. 745, where it is said that if, as between the consignee and the carrier, the consignee only was in possession within the meaning of the possessory warrant law, it was only a constructive possession, and while it remains uncertain as to who is the holder of the bill of lading, there is reasonable doubt in whom the best claims to a constructive possession reside.
5. Ga. Code Pr. (1895) § 4799.
6. Ga. Civ. Code (1895), § 3130.
7. Visage *v.* Bowers, 122 Ga. 760, 50 S. E. 952; Landrum *v.* Smith, 1 Ga. App. 215, 57 S. E. 913.

Where it does not appear, however, that defendant is seeking to remove the property, or to do any of the acts mentioned in Ga. Civ. Code (1895), § 3130, a proceeding by possessory warrant will not lie thereunder. Visage *v.* Bowers, 122 Ga. 760, 50 S. E. 952.

C. Persons Jointly Interested. Where two persons are jointly interested in personal property, either legally or equitably, and one of them delivers the possession of the same to a third person, the other cannot recover possession of the same by possessory warrant sued out by himself alone.[8] If, however, by the terms of partnership, one partner must have and has had the exclusive possession of certain personalty, in order to carry out the objects of the partnership, the warrant will, at his instance, lie against his copartner who has deprived him of possession by fraud.[9]

D. Principals. The possession of property by an agent is in law the possession of his principal, and suffices to support a proceeding by possessory warrant whenever the former, after demand, has refused to deliver the property to the latter,[10] or whenever there has been a wrongful taking from the agent's possession by a third party.[11]

E. Tenants. A warrant will lie at the instance of a tenant who has been deprived of his lawfully acquired, quiet, and peaceable possession of property by the landlord, although title is in the latter.[12]

F. Wife, For Self and Children. After property has, under the provisions of the statute, been set apart to the head of a family as an exemption, his possession is for the use and benefit of the wife and children, and if the property is tortiously taken from his possession, the wife, on behalf of herself and minor children, may proceed by possessory warrant to recover it.[13]

G. President of a Corporation. The president of a corporation cannot maintain a possessory warrant in his own name to recover possession of the corporate property of which he has had no prior possession either as an officer or an individual.[14]

III. Against Whom Available.

A. Agents. The warrant will lie against an agent at the instance of his principal where the former, after demand, has refused to deliver the property to the latter.[15]

B. Carriers. The remedy does not lie against a common carrier at the instance of a consignee of goods who is not in possession of the bill of lading.[16]

C. Landlords. Although title is in a landlord, his tenant, whom he has deprived of his lawfully acquired and peaceable possession of property, may invoke against him the remedy by possessory warrant.[17]

D. Public Officers. Public officers who, in the discharge of their official duties, take possession of property, are not amenable to a proceeding by possessory warrant.[18] It is otherwise, however, where the officer's act is under an invalid statute.[19]

8. Askew *v.* Nicholson, 84 Ga. 478, 10 S. E. 1089.

9. Ivey *v.* Hammock, 68 Ga. 428.

10. Sheriff *v.* Thompson, 116 Ga. 436, 42 S. E. 738; Meredith *v.* Knott, 34 Ga. 222.

11. Hillyer *v.* Brogden, 67 Ga. 24. See also Wynn *v.* Harrison, 111 Ga. 816, 35 S. E. 643, where a father permitted a minor son to use a chattel for a particular purpose, and the same principle was applied.

12. Ivey *v.* Hammock, 68 Ga. 428.

13. Tucker *v.* Edwards, 71 Ga. 602.

14. McElvoy *v.* Hussey, 64 Ga. 314.

15. See *supra*, II, D.

16. See *supra*, II, A.

17. See *supra*, II, B.

18. King *v.* Ford, 70 Ga. 628; Raiford *v.* Hyde, 36 Ga. 93.

Levying on property.—A possessory warrant will not lie to recover possession of property levied on by a sheriff in the discharge of his official duty, but the party injured by the levy made by the officer under such circumstances is left to his remedy by a claim or action of trespass against the officer. Raiford *v.* Hyde, 36 Ga. 93.

Impounding stock.—A city marshal impounding stock is not amenable to a possessory warrant (King *v.* Ford, 70 Ga. 628), unless the stock was impounded under a void law (Reeves *v.* Gay, 92 Ga. 309, 18 S. E. 61).

19. Reeves *v.* Gay, 92 Ga. 309, 18 S. E. 61; Cunningham *v.* Campbell, 33 Ga. 625.

Impressing property.— Where the statute under which a public officer impresses property is void, the proceeding by possessory warrant is an appropriate remedy to recover possession from him. Cunningham *v.* Campbell, 33 Ga. 625.

E. Purchasers at Judicial Sales. The warrant will not lie against the purchaser at a judicial sale made under the forms prescribed by law, on the ground that the trespass was committed by a levying officer in taking possession of the property, the purchaser not being particeps in the tort.[20]

IV. GROUNDS.

A. In General. A possessory warrant lies only where it is shown that defendant acquired possession of the property in dispute in one of the modes prescribed by the statute;[21] and it is not the proper remedy to recover possession of property where the title[22] or right to possession[23] is in dispute.

B. Possession Taken — 1. By Fraud. If one obtains the possession alone by fraud a possessory warrant will lie against him at the instance of the party injured;[24] but it will not lie where the title is obtained by fraud, and the possession accompanies it by the consent of the owner.[25]

2. By Force or Duress. The warrant lies whenever personal property has been taken from the possession of the complaining party by force or violence.[26] So too the warrant lies when a husband under duress of threats to prosecute him criminally delivers to a third person property belonging to his wife without her consent.[27]

3. By Enticement. Where a personal chattel is taken by enticement from the possession of another, a possessory warrant lies at the instance of the injured party to recover possession thereof.[28]

4. By Consent. Where possession of the property was obtained by none of the means inhibited by the statute, but by consent, a possessory warrant will not lie.[29]

C. Possession Received Without Legal Authority. The warrant lies whenever property in the recent peaceable and lawfully acquired possession of one person has disappeared without his knowledge and consent, and has been received into the possession of another without lawful authority.[30]

V. PROPERTY SUBJECT TO WARRANT.

The remedy is invocable to quiet the possession of all kinds of personal property of which the holder had the immediate possession and use.[31]

20. Finney *v.* Fechtner, 54 Ga. 501.

21. Brown *v.* Todd, 124 Ga. 939, 3 S. E. 678; Susong *v.* McKenna, 121 Ga. 97, 48 S. E. 695; Allen *v.* Printup, 118 Ga. 630, 45 S. E. 911; Owens *v.* Outlaw, 105 Ga. 477, 30 S. E. 427; Trotti *v.* Wyly, 77 Ga. 684.

22. Trotti *v.* Wyly, 77 Ga. 684.

23. Brown *v.* Todd, 124 Ga. 939, 53 S. E. 678; Owens *v.* Outlaw, 105 Ga. 477, 30 S. E. 427; Trotti *v.* Wyly, 77 Ga. 684.

24. Tucker *v.* Edwards, 71 Ga. 602; Ivey *v.* Hammock, 68 Ga. 428; Hoffman *v.* Barthelmess, 63 Ga. 759, 36 Am. Rep. 129; Peak *v.* Cogborn, 50 Ga. 562. See also Amos *v.* Dougherty, 65 Ga. 612.

25. Mossman *v.* McKinley, 67 Ga. 391; Welborn *v.* Shirly, 65 Ga. 695; Amos *v.* Dougherty, 65 Ga. 612 (holding further that a tender back of whatsoever may have been given in exchange by the complaining party will not make the possession which merely followed the title, such possession as is declared by the statute necessary to authorize the exercise of the warrant); Jackson *v.* Sparks, 36 Ga. 445.

26. Cunningham *v.* Campbell, 33 Ga. 625.

27. Harris *v.* Webb, 101 Ga. 84, 28 S. E. 620, holding further that the fact that the wife subsequently, under duress of threats to prosecute her husband, assented to the retention of possession, does not affect her right to invoke the remedy.

28. Roseberry *v.* Roseberry, 31 Ga. 122; Mann *v.* Waters, 30 Ga. 207.

29. Dennard *v.* Butler, 2 Ga. App. 198, 58 S. E. 297.

30. Manning *v.* Mitcherson, 69 Ga. 447, 47 Am. Rep. 764; Mann *v.* Waters, 30 Ga. 207.

31. Manning *v.* Mitcherson, 69 Ga. 447, 47 Am. Rep. 764 (holding that a possessory warrant will lie to recover possession of a canary bird which has been tamed and confined by plaintiff, but which has accidentally escaped from its cage to a neighboring house); Coursey *v.* Curtis, 18 Ga. 237 (where the court holds further that a promissory note must be held to be embraced within the terms of the possessory warrant act, for as an evidence of debt saving the holder, while in his possession, the trouble and expense of otherwise proving his debt, the note is properly of use and value to him). See also Wilcox *v.* Turner, 46 Ga. 218, promissory notes and liens.

VI. PROCEEDINGS TO PROCURE.

A. Prior Possession as Condition Precedent — 1. In General. Prior possession in plaintiff is a condition precedent to the right to maintain the proceeding.[32]

2. Character of Possession. Whether naked constructive possession will suffice to support the proceeding has not been squarely decided, although the decisions strongly intimate that something more is required.[33]

B. Jurisdiction. The proceeding being summary and special, the jurisdiction must clearly appear on the face of the papers.[34]

C. Venue. Possessory warrant may be had in the county where the property in dispute is found.[35]

D. Affidavit For Warrant — 1. Necessity For. The affidavit is the foundation of the proceeding.[36]

2. Who May Make. The affidavit required by the statute must be made by the injured party.[37]

3. Sufficiency of Allegations. In deciding what averments will suffice, regard must be had to the general scope and scheme of the statute, and to what, in the nature of things, is practicable or impracticable, in applying it to the actual cases which it is intended to reach.[38]

E. Hearing and Determination — 1. Hearing — a. Mode. The magistrate, on the return of the warrant, is required by the statute to hear the evidence in a summary way.[39]

b. Continuance to Procure Testimony. A time should be fixed for trial and the parties allowed a reasonable opportunity to procure testimony;[40] but a continuance, in order to obtain testimony, is properly refused where such evidence is irrelevant.[41]

32. Hillyer *v.* Brogden, 67 Ga. 24; McEvoy *v.* Hussey, 64 Ga. 314.

33. See cases cited *infra*, this note.

Possession of agent.— It has been held that the possession of the agent is more than a bare constructive possession of the principal and will therefore support the proceeding. Sheriff *v.* Thompson, 116 Ga. 436, 42 S. E. 738; Hillyer *v.* Brogden, 67 Ga. 24; Bass *v.* Glover, 63 Ga. 745. See also Cobb *v.* Megrath, 36 Ga. 625, where the court, in discussing the holding of Meredith *v.* Knott, 34 Ga. 222, says that the court in that case went to the utmost limit of the law touching possessory warrants, and that if it meant to decide that a constructive possession in plaintiff is sufficient to enable him to maintain the proceeding, it may be very seriously doubted whether it did not go beyond the bounds prescribed by the statute.

Possession of a minor son is that of his father and will support this proceeding. Wynn *v.* Harrison, 111 Ga. 816, 35 S. E. 643.

34. Claton *v.* Ganey, 63 Ga. 331.

Superior court has no jurisdiction to enforce the execution of an order emanating from the magistrate before whom a possessory warrant is sued out, the magistrate having competent power to enforce the execution of his orders. Sherill *v.* Parrott, 26 Ga. 388.

35. Jordan *v.* Owens, 67 Ga. 616, holding further that a proceeding by possessory warrant is not a suit and therefore necessary to be brought in the county of defendant's residence.

36. Mills *v.* Glover, 22 Ga. 319.

37. Mills *v.* Glover, 22 Ga. 319.

Consignee of property.— The oath which is to be taken to procure a possessory warrant is not suitable to be taken by the consignee of property who is not in possession of the bill of lading. Bass *v.* Glover, 63 Ga. 745.

Member of firm.— Merely describing affiant as a member of a designated firm does not make the affidavit one in favor of the firm; affiant will be considered as prosecuting for himself if the possession violated is his own. McClain *v.* Cherokee Iron Co., 58 Ga. 233.

38. Claton *v.* Ganey, 63 Ga. 331.

Location of property.—An affidavit is sufficiently specific which alleges that defendant is of the county in which the warrant is applied for. Claton *v.* Ganey, 63 Ga. 331, where the court says that while it does not follow with absolute certainty that the property is in a given county because the person who has taken or received it is of that county, yet there is a fair presumption, unless the contrary appears, that such is the fact.

Under Ga. Civ. Code, § 3130, an affidavit alleging that the cropper is attempting to exclude him from possession of the crop and fails to pay for supplies and advances made to him, need not further allege the existence of any of the grounds for obtaining the possessory warrant, under section 4799. Visage *v.* Bowers, 122 Ga. 760, 50 S. E. 952.

39. Welman *v.* Harris, Ga. Dec., Pt. II, 63

40. Marchman *v.* Todd, 15 Ga. 25.

41. Mann *v.* Waters, 30 Ga. 207, holding

c. Issues. On the trial of the proceeding neither the right to possession [42] nor the title [43] to the property is involved; the sole issue to be determined is in whose lawfully acquired, quiet, and peaceable possession the property last was,[44] and whether possession thereof has been obtained from such party in any of the several modes prohibited by the statute.[45]

d. Evidence — (i) *BURDEN OF PROOF.* Upon the hearing the burden rests on plaintiff to support the facts contained in his affidavit by competent and sufficient evidence.[46] However, the burden of proof may shift to defendant, as where plaintiff has made out a *prima facie* case,[47] or where defendant sets up as a defense his own quiet and peaceable possession.[48]

(ii) *ADMISSIBILITY.* The evidence must be confined to the question of possession solely, and any other evidence not pertinent to that issue, exclusively, the magistrate has no right to receive.[49]

(iii) *WEIGHT AND SUFFICIENCY.* Where the evidence shows that personal property was obtained by consent and by none of the means inhibited by the statute, a judgment in favor of defendant is justified by the evidence.[50]

e. Questions of Fact. Whether plaintiff has or has not consented is a question of fact which must vary in each particular case, and may, or may not, be inferred, according to the circumstances which may have been proven.[51]

2. DETERMINATION — a. Property Must Be in Court's Custody. Generally, no final order disposing of the property should be made by the primary court until after it is produced and placed within the power of the court or its officers.[52]

b. In Favor of Plaintiff. If the magistrate finds from the evidence that possession of the property has been obtained from plaintiff in any of the modes prohibited by the statute, it is its duty to restore possession to plaintiff,[53] on his giving the bond required by statute,[54] which is conditioned to have the property forthcoming to answer in any suit brought by defendant in relation to any lien or claim upon it within four years thereafter; [55] or on plaintiff's failure to give such bond to turn over the property to defendant on his giving a like bond.[56]

that a continuance, in order to obtain evidence that a judgment on a former warrant between the same parties and covering the same property, while adjudging the possession to plaintiff, limited the time during which the possession was to continue, was properly refused, since any such limit contained in the judgment was not relevant to the issue of the case.

42. Ivey *v.* Hammock, 68 Ga. 428; Mann *v.* Waters, 30 Ga. 207; Mills *v.* Glover, 22 Ga. 319.

43. Wynn *v.* Wynn, 68 Ga. 820; Ivey *v.* Hammock, 68 Ga. 428; Cassidy *v.* Clark, 62 Ga. 412; Mann *v.* Waters, 30 Ga. 207; Mills *v.* Glover, 22 Ga. 319.

44. Ivey *v.* Hammock, 68 Ga. 428.

45. Mann *v.* Waters, 30 Ga. 207.

46. Welman *v.* Harris, Ga. Dec., Pt. II, 63.

47. Marchman *v.* Todd, 15 Ga. 25.

Change of possession.— Where plaintiff shows that he was heretofore in peaceable possession of the property which is now found in the possession of defendant, he has made out a *prima facie* case, and the burden shifts to defendant to show that the change of possession has been by the consent of plaintiff or by operation of law. Marchman *v.* Todd, 15 Ga. 25.

48. New *v.* Le Hardy, 46 Ga. 616, where it is held that the burden rests with defendant to establish the defense interposed, that he has been in quiet and peaceable possession of the property for four years next immediately preceding the issuance of the warrant.

49. Welman *v.* Harris, Ga. Dec., Pt. II, 63.

The judgment on a former warrant between the same parties and covering the same property is relevant to show that plaintiff's former possession, of which he has been deprived, was a legally acquired one, when taken in connection with proof that the property was delivered to him in pursuance of the judgment. Mann *v.* Waters, 30 Ga. 207.

50. Dennard *v.* Butler, 2 Ga. App. 198, 58 S. E. 297.

51. Marchman *v.* Todd, 15 Ga. 25.

52. McClain *v.* Cherokee Iron Co., 58 Ga. 233, in which it is said that the scheme of the statute is that the property shall be under the control of the primary court at the time the final order is made. See also Roseberry *v.* Roseberry, 31 Ga. 122.

53. Sheriff *v.* Thompson, 116 Ga. 436, 42 S. E. 738; Roseberry *v.* Roseberry, 31 Ga. 122; Mann *v.* Waters, 30 Ga. 207.

54. Ivey *v.* Hammock, 68 Ga. 428; Roseberry *v.* Roseberry, 31 Ga. 122.

This bond is a condition precedent to the delivery of the property to plaintiff which cannot be dispensed with by the primary court. Hillyer *v.* Brogden, 67 Ga. 24; McClain *v.* Cherokee Iron Co., 58 Ga. 233.

55. Hillyer *v.* Brogden, 67 Ga. 24.

56. Roseberry *v.* Roseberry, 31 Ga. 122.

c. In Favor of Defendant — (I) *In General.* If plaintiff fails on the hearing to support the facts contained in his affidavit by competent and sufficient evidence, it is the duty of the magistrate to dismiss the proceeding for want of jurisdiction, and leave plaintiff for redress to the ordinary proceedings at law.[57] If defendant satisfactorily shows quiet and peaceable possession of the property in himself,[58] or in himself and those under whom he claims,[59] for four years next immediately preceding the issuance of the warrant, it is the duty of the magistrate to dismiss the proceeding,[60] without any bond to plaintiff for its forthcoming.[61]

(II) *Effect of.* An order dismissing the warrant without any reason stated therein or appearing on the record, will not be regarded as an adjudication of the right of possession in favor of defendant.[62]

d. Mode of Restoring Property. The final order, when proper to be made by the primary court, should be for delivery of the property to the officer and then by the officer to the party.[63]

e. Review by Certiorari [64] — (I) *Proceedings* — (A) *Time For Instituting.* Certiorari from a decision of a county judge in a proceeding by possessory warrant must be sued out within ten days from the decision.[65]

(B) *Notice of Application and of Hearing.* The written notice of the sanction of petition for service, and of the time and place of hearing, which is required by the statute to be given to defendant, may be dispensed with by a waiver in writing.[66]

(C) *Hearing.* The superior court, in hearing a certiorari, is restricted to the errors alleged to have been committed by the primary court on the trial.[67]

(II) *Determination* — (A) *Final.* The superior court, on certiorari, may, in its discretion, make a final disposition of a proceeding by possessory warrant without sending it back for a new trial,[68] even though the evidence before the magistrate was conflicting on controlling issues;[69] but the court has no power to order the delivery of the property in dispute to plaintiff without the bond required by the statute;[70] nor can it make final order requiring one party to a proceeding to deliver the property directly to the other.[71]

(B) *Ordering New Trial.* All issues under the possessory warrant act are mixed questions of law and fact, and whenever the finding of the primary court is against the principles of equity and justice, a new trial should be ordered.[72] But the superior court, on certiorari, cannot order a rehearing on the ground of newly discovered evidence since the trial of the proceeding.[73]

(III) *Enforcement of Judgment of Reversal.* When the property is, in pursuance of the judgment, turned over to plaintiff, on his giving the bond

See also Bush *v.* Rawlins, 80 Ga. 583, 5 S. E. 761.

57. Welman *v.* Harris, Ga. Dec., Pt. II, 63. See also Bush *v.* Rawlins, 80 Ga. 583, 5 S. E. 761; McEvoy *v.* Hussey, 64 Ga. 314.

58. New *v.* Le Hardy, 46 Ga. 616; Mills *v.* Glover, 22 Ga. 319.

59. Gaillard *v.* Hudson, 81 Ga. 738, 8 S. E. 534.

60. Bush *v.* Rawlins, 80 Ga. 583, 5 S. E. 761.

61. Bush *v.* Rawlins, 80 Ga. 583, 5 S. E. 761, where the court says that it is aware that in the head-note to the case of Roseberry *v.* Roseberry, 31 Ga. 122, a different view is announced, but the facts of that case show the question was not raised therein, and that its disposition was not necessary to a decision of the case.

62. Roseberry *v.* Roseberry, 31 Ga. 122.

63. McClain *v.* Cherokee Iron Co., 58 Ga. 233.

64. Certiorari generally see Certiorari, 6 Cyc. 730.

65. Robin *v.* Noble, 36 Ga. 271.

66. New *v.* Le Hardy, 46 Ga. 616.

67. Marchman *v.* Todd, 15 Ga. 25.

68. Sheriff *v.* Thompson, 116 Ga. 436, 42 S. E. 738.

69. Susong *v.* McKenna, 121 Ga. 97, 48 S. E. 695; Bush *v.* Rawlins, 80 Ga. 583, 5 S. E. 761 [*overruling* Claton *v.* Ganey, 63 Ga. 331, holding that in a possessory warrant case where the evidence was conflicting the superior court should remand the case for rehearing, and in effect *overruling* Desvergers *v.* Kruger, 60 Ga. 100, on which case the decision in Claton *v.* Ganey, *supra*, was founded].

70. Hillyer *v.* Brogden, 67 Ga. 24; McClain *v.* Cherokee Iron Co., 58 Ga. 233.

71. McClain *v.* Cherokee Iron Co., 58 Ga. 233, where it is also said that the order when properly made should be for delivery to the officer and then by the officer to the party entitled.

72. Marchman *v.* Todd, 15 Ga. 25.

73. Marchman *v.* Todd, 15 Ga. 25.

required by the statute, the judgment is performed, and if certiorari is afterward sued out and judgment reversed, defendant is left to the ordinary remedies, and the court cannot attach plaintiff for contempt in failing to obey its order to redeliver the property which he has sold before reversal and cannot produce.[74]

VII. CONSTRUCTION OF STATUTES.

The proceeding is summary, harsh, and in derogation of the common law,[75] and the statute authorizing it should be strictly construed;[76] and especially so as the proceeding under the statute, to a certain extent, partakes of a criminal nature.[77]

POSSIBILITAS POST DISSOLUTIONEM EXECUTIONIS NUNQUAM REVIVISCATUR. A maxim meaning "Possibility is never revived after the dissolution or the execution."[1]

POSSIBILITY. That which is possible,[2] a definition of CHANCE, *q. v.* In law, a CONTINGENCY,[3] *q. v.*; an event which may or may not happen;[4] a thing or event which may or may not happen;[5] an uncertain thing which may happen;[6] an estate founded on such contingency;[7] a contingent interest in real or personal estate;[8] it being either near[9] (or ordinary[10] or common[11]) or remote[12] (or extraor-

74. Johnson *v.* Yoemans, 41 Ga. 368.

75. Trotti *v.* Wyly, 77 Ga. 684; King *v.* Ford, 70 Ga. 628; Welborn *v.* Shirly, 65 Ga. 695; Mills *v.* Glover, 22 Ga. 319; Marchman *v.* Todd, 15 Ga. 25; Welman *v.* Harris, Ga. Dec., Pt. II, 63.

76. Trotti *v.* Wyly, 77 Ga. 684; King *v.* Ford, 70 Ga. 628; Welborn *v.* Shirly, 65 Ga. 695.

77. Welman *v.* Harris, Ga. Dec., Pt. II, 63.

1. Peloubet Leg. Max.

2. Webster Dict. [*quoted* in Carney *v.* Kain, 40 W. Va. 758, 781, 23 S. E. 650].

3. Webster Dict. [*quoted* in Carney *v.* Kain, 40 W. Va. 758, 781, 23 S. E. 650].

4. Anderson L. Dict. [*quoted* in Carney *v.* Kain, 40 W. Va. 758, 781, 23 S. E. 650].

5. Webster Dict. [*quoted* in Carney *v.* Kain 40 W. Va. 758, 781, 23 S. E. 650].

6. Bouvier L. Dict. [*quoted* in Bodenhamer *v.* Welch, 89 N. C. 78, 81].

7. Burrill L. Dict. [*cited* in Kinzie *v.* Winston, 14 Fed. Cas. No. 7,835, 4 Nat. Bankr. Reg. 84].

8. Bouvier L. Dict. [*quoted* in Bodenhamer *v.* Welch, 89 N. C. 78, 81]; Webster Dict. [*quoted* in Carney *v.* Kain, 40 W. Va. 758, 781, 23 S. E. 650].

Distinguished from right in Carney *v.* Kain, 40 W. Va. 758, 781, 23 S. E. 650, where it is said: "The fact that a thing is possible to one and not to others does not change the nature of a possibility and transmute it into a right."

May include right of entry for breach of condition see Smith Real & Pers. Prop. (6th ed.) § 890 [*quoted* in *Re* Melville, *infra*]; *Re* Melville, 11 Ont. 626, 630, so holding in construing the word as used in Ont. Rev. St. c. 106, § 2.

"Possibility of benefit" is a term which was applied to an interest, such as an insurance policy in holding the latter a part of a bankrupt's effects to which the assignees in bankruptcy are entitled, in Schondler *v.* Wace, 1 Campb. 487, 488.

"Reasonable possibility" see Sims *v.* State, 100 Ala. 23, 14 So. 560; Nichols *v.* State, 100 Ala. 23, 25, 14 So. 539.

Kind held not transferable at common law. — "The proposition is undoubtedly correct that the common law treated all transfers and conveyances of mere possibilities, as well as of all choses in action, as absolute nullities. . . . But what does the term 'possibility,' as used by common law writers, import? It has never applied to interests which were vested either in interest or possession, but always to remote and improbable contingencies." Vint *v.* King, 28 Fed. Cas. No. 16,950.

Contract to transfer expectancy after death of living ancestor in title. — Held void see Reed *v.* Crocker, 12 La. Ann. 436, 437; Boynton *v.* Hubbard, 7 Mass. 112, 122. Supported under peculiar circumstances see Fitch *v.* Fitch, 8 Pick. (Mass.) 480, 483. *Compare* Lewis *v.* Madison, 1 Munf. (Va.) 303, 314–315, 322–325.

9. Black L. Dict.; Burrill L. Dict.; Jacob L. Dict.

Examples. — Death, or death without issue or coverture (Cholmley's Case, 2 Coke 50*a*, 51*b*, 76 Eng. Reprint 527; 4 Kent Comm. 206 [*cited* in Burrill L. Dict]); where an estate is limited to one after the death of another (Black L. Dict.; Jacob L. Dict.).

10. Black L. Dict.

11. Burrill L. Dict.

12. Black L. Dict.; Burrill L. Dict.; Jacob L. Dict.

Examples. — A remainder to the heirs of a person not in being. Burrill L. Dict. That a man shall be married to a woman and that she shall then die and he marry another. Black L. Dict.; Jacob L. Dict. That one might take holy orders. Cholmley's Case, 2 Coke 50*a*, 51*b*, 76 Eng. Reprint 527. "The law will never adjudge a grant good by reason of a possibility, or expectation of a thing, which is against law, for that is *potentia remotissima & vana*." Cholmley's Case, 2 Coke 50*a*, 51*b*, 76 Eng. Reprint 527.

Possibility upon a possibility no foundation for remainder see Lampet's Case, 10

dinary [13]). And the word has a general sense, in which it includes even executory interests, which are the objects of limitation; but in its more specific sense, it is that kind of contingent benefit which is neither the object of a limitation, like an executory interest, nor is founded in any lost, but recoverable seizin, like a right of entry; [14] thus, a possibility may be coupled with an interest,[15] or may be a mere or bare possibility otherwise known as an EXPECTANCY,[16] *q. v.*, or naked possibility; [17] while a third classification has been made of mere contingent interests.[18]

Coke 46*b*, 77 Eng. Reprint 994 [*cited* in Dennett *v.* Dennett, 40 N. H. 498, 503]; Coke Litt. 25*b*, 184*a* [*cited* in Dennett *v.* Dennett, *supra*; 2 Fearne Remainders 378].

13. Black L. Dict.

14. Smith Real & Pers. Prop. 192 [*quoted* in Needles *v.* Needles, 7 Ohio St. 432, 443, 70 Am. Dec. 85]. For the same passage (except that for the final words "like a right of entry") is substituted the following: "Of this nature is a possibility of reverter on the grant of a qualified or determinable fee. . . . Of the same nature is a contingent right of entry in case there should be a breach of a condition subsequent" see Smith Real & Pers. Prop. (6th ed.) § 890 [*quoted* in *Re* Melville, 11 Ont. 626, 630].

"There are two kinds of possibilities; the one 'a bare possibility, that which the heir has from the curtesy of the ancestor,' which is nothing more than hope of succession. Such a possibility undoubtedly is not the object of disposition, for if the heir were to dispose of it during the life of the ancestor," though it afterward devolved on him from his ancestor, "such disposition would be void" (Jones *v.* Roe, 3 T. R. 88, 93 [*quoted* in Stover *v.* Eycleshimer, 46 Barb. (N. Y.) 84, 87]), "the other, a possibility, or contingency, like the present," namely, the contingent right devised to the first son, if any, of T who should live to be twenty-one years of age, "and which is widely different from the former;" held devisable, and said to be also transmissible and descendible, as a valuable interest by way of executory devise (see Jones *v.* Roe, 3 T. R. 88, 93–98 [*affirming* 1 H. Bl. 230, and *discussed* in Jackson *v.* Waldron, 13 Wend. (N. Y.) 178, 222, wherein Chancellor Walworth, in the minority opinion (at p. 193) cited the case as authority that a possibility coupled with an interest was assignable, but Senator Tracy in the majority opinion (at p. 222) declared that Jones *v.* Roe, *supra*, did not "trench at all on the old doctrine in Lampet's Case," 10 Coke 46*b*, 47*a*–50*b*, 77 Eng. Reprint 994, "that a contingent interest is not assignable;" where, also, there was a difference of opinion as to the kind of possibility, the chancellor and minority regarding a devise over on death of the immediate devisee without issue as an interest (see pp. 191–196), and Senator Tracy, with the majority, insisting that it was no interest, but a naked possibility (see pp. 218–221)]).

15. "A possibility 'coupled with an interest,' is where the person, who is to take an estate upon the happening of a contingency, is ascertained and fixed." Burrill L. Dict. "A possibility coupled with an interest: this may of course be sold, assigned, transmitted or devised: such a possibility occurs in executory devises and in contingent, springing or executory uses." Bouvier L. Dict. [*quoted* in Bodenhamer *v.* Welch, 89 N. C. 78, 81].

As distinguished from bare possibility devisable see 1 Fearne Remainders 545–546 [*cited* in Vint *v.* King, 28 Fed. Cas. No. 16,950].

Does not include right of entry for forfeiture as used either in St. 8 & 9 Vict. c. 106 (Hunt *v.* Remnant, 9 Exch. 635, 640, 18 Jur. 335, 23 L. J. Exch. 135, 2 Wkly. Rep. 276, per Maule, J.; Hunt *v.* Bishop, 8 Exch. 675, 680, 22 L. J. Exch. 337); or, it would seem to follow, from the two cases last cited, in Ont. Rev. St. c. 98, § 5 (*Re* Melville, 11 Ont. 626, 630).

Not coupled with interest unless person to take is ascertained see 4 Kent Comm. 262 [*cited* in Burrill L. Dict.].

16. "A 'bare' or 'mere' possibility, signifies nothing more than an expectancy, which is specifically applied to a mere hope of succession unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir, apparent or presumptive, has of succeeding to the ancestor's estate." Smith Real & Pers. Prop. [*quoted* in Needles *v.* Needles, 7 Ohio St. 432, 443, 70 Am. Dec. 85]. "A 'bare' possibility is one that is not coupled with an interest; as that a son may inherit to his father who is living. This is not considered as an estate in law." Burrill L. Dict. A bare possibility, or hope of succession. This is the case of an heir apparent during the life of his ancestor. It is evident that he has no right which he can assign, devise, or even release. Bouvier L. Dict. [*quoted* in Bodenhamer *v.* Welch, 89 N. C. 78, 81, where, however, the word "of" is substituted for "or," before "hope of succession"]. A possibility founded on a trust differs from a mere possibility. The first may be devised but the other cannot. Jacob L. Dict.

"Contingent interest of a person unascertained, or a 'mere' possibility as distinguished from a contingent interest in a person who is ascertained" see Needles *v.* Needles, 7 Ohio St. 432, 443, 70 Am. Dec. 85.

Possibility not vested in right see Kinzie *v.* Winston, 14 Fed. Cas. No. 7,835, 4 Nat. Bankr. Reg. 84.

17. See 29 Cyc. 259.

As distinguished from contingent interests see 2 Fearne Remainders (4th London ed.) 439, 440 [*cited* in Vint *v.* King, 28 Fed. Cas. No. 16,950].

Executory devises not naked possibilities see Jones *v.* Roe, 3 T. R. 88, 94 [*affirming* 1 H. Bl. 230].

18. See Bouvier L. Dict., giving as an example "a devise to Paul if he survive Peter."

(Possibility: As Subject of — Assignment, see ASSIGNMENTS, 4 Cyc. 13–16; Bequest or Devise, see WILLS; Conveyance, see DEEDS, 13 Cyc. 658; Creditors' Bill, see CREDITORS' SUITS, 12 Cyc. 31; Opinion of Witness, see EVIDENCE, 17 Cyc. 217; Trust, see TRUSTS. Curtesy in, see CURTESY, 12 Cyc. 1011. In Remainder or Reversion, see ESTATES, 16 Cyc. 648–661. In Reversion, see ESTATES, 16 Cyc. 661–664. Naked, see NAKED POSSIBILITY OR EXPECTANCY, 29 Cyc. 259. Of Inheritance, see DESCENT AND DISTRIBUTION, 14 Cyc. 33. Of Innocence, in Relation to Reasonable Doubt, see CRIMINAL LAW, 12 Cyc. 624. Of Issue, see TRUSTS; WILLS. Of Issue Extinct, see ESTATES, 16 Cyc. 614. Of Life, see DAMAGES, 13 Cyc. 141–142; DEATH, 13 Cyc. 366; EVIDENCE, 16 Cyc. 871. Of Performance of Contract, see CONTRACTS, 9 Cyc. 326, 408, 625–633. Of Reverter, see EJECTMENT, 15 Cyc. 28.[19] Of Right in Relation to Creditors' Suit, see CREDITORS' SUITS, 12 Cyc. 31. Of Value of Life, see DEATH, 13 Cyc. 365–372. See also CONTINGENCY, 9 Cyc. 72; EXPECTANCY, 18 Cyc. 1501; POSSIBLE.)

POSSIBLE. Capable of being done;[20] liable to happen, or to come to pass, capable of existing or of being conceived or thought of, capable of being done, not contrary to the nature of things;[21] a definition of "contingent."[22] In a descriptive phrase denoting a relative degree, such as "all possible skill,"[23] "as nearly as possible,"[24] "as rapidly as possible,"[25] or "as soon as possible,"[26]

19. See also Carney *v.* Kain, 40 W. Va. 758, 781–782, 23 S. E. 650.

20. Webster Dict. [*quoted* in International, etc., R. Co. *v.* Welch, 86 Tex. 203, 205, 24 S. W. 390, 40 Am. St. Rep. 829].

"Practicable" is one construction of "possible" (Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602, 609, 64 N. E. 995; Hartlev *v.* Chicago Sanitary Dist., 107 Ill. App. 546, 566); but not necessarily synonymous (Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602, 609, 64 N. E. 995; Wooters *v.* International, etc., R. Co., 54 Tex. 294, 300).

Distinguished from "probable or natural" see South-Side Pass. R. Co. *v.* Trich, 117 Pa. St. 390, 399, 11 Atl. 627, 2 Am. St. Rep. 672 [*quoted* in Douglass *v.* New York, etc., R. Co., 209 Pa. St. 128, 131, 58 Atl. 160; Scott *v.* Allegheny Valley R. Co., 172 Pa. St. 646, 652, 33 Atl. 712], where it is said: "But things or results which are only possible cannot be spoken of as either probable or natural. . . . Things which are possible may never happen, but those which are natural or probable are those which do happen and happen with such frequency or regularity as to become a matter of definite inference."

"'Possible' . . . to see," where one can see by a slight movement, or the like, although, from choice, he omit to do so see Aiken *v.* Weckerly, 19 Mich. 482, 506.

21. Webster Dict. [*quoted* in Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 383, 16 Pac. 667, 5 Am. St. Rep. 754].

22. See 9 Cyc. 72.

23. "All possible skill, foresight and care;" "greatest possible care and diligence" see Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 381, 385, 16 Pac. 667, 5 Am. St. Rep. 754.

24. "As nearly as possible" construed "as nearly as practicable" see Finch *v.* Riverside, etc., R. Co., 87 Cal. 597, 599, 25 Pac. 765; Green *v.* McCrane, 55 N. J. Eq. 436, 442, 37 Atl. 318.

25. "As rapidly as possible," in a shipping contract, construed "as soon as navigation permits" see Cleveland Rolling-Mill Co. *v.* Rhodes, 121 U. S. 255, 263, 7 S. Ct. 882, 30 L. ed. 920 [*reversing* 17 Fed. 426].

26. As soon as possible.— Not always to be taken literally see Edwards *v.* Baltimore F. Ins. Co., 3 Gill (Md.) 176, 188 [*quoted* in Provident L. Ins., etc., Co. *v.* Baum, 29 Ind. 236, 240 (*quoted* in Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721); Provident L. Ins., etc., Co. *v.* Martin, 32 Md. 310, 315]. "In the administration of justice, cannot have an arbitrary, stereotyped definition. They must possess so much flexibility as to be read and applied in the light of the surrounding circumstances" see Robinson *v.* Brooks, 40 Fed. 525, 526. Not "as soon as I possibly can" see Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, 673, 27 Wkly. Rep. 221. Cannot mean "forthwith" when used in context with and in evident distinction from the latter word see Palmer *v.* St. Paul F. & M. Ins. Co., 44 Wis. 201, 208. Not same as "directly" (see Sentenne *v.* Kelly, 59 Hun (N. Y.) 512, 515, 13 N. Y. Suppl. 529; Palmer *v.* St. Paul F. & M. Ins. Co., 44 Wis. 201, 208); or "instantly" (see Palmer *v.* St. Paul F. & M. Ins. Co., *supra*). As strong as "immediate" see Fidelity, etc., Co. *v.* Courtney, 103 Fed. 599, 607, 43 C. C. A. 331. Frequently construed "within a reasonable time" see Florence Gas, etc., Co. *v.* Hanby, (Ala. 1893) 13 So. 343, 348 [*quoted* in Harlev *v.* Chicago Sanitary Dist., 107 Ill. App. 546, 547] (adding "or within such time as was reasonably necessary, under the circumstances"); Scammon *v.* Germania Ins. Co., 101 Ill. 621, 626; McPike *v.* Western Assur. Co., 61 Miss. 37, 43; State Ins. Co. *v.* Maackens, 38 N. J. L. 564, 569; Hinds *v.* Kellogg, 13 N. Y. Suppl. 922; Ben Franklin F. Ins. Co. *v.* Flynn, 98 Pa. St. 627, 634; Home Ins. Co. *v.* Davis, 98 Pa. St. 280, 283; Columbia Ins. Co. *v.* Lawrence, 10 Pet. (U. S.) 507, 513, 9 L. ed. 512. *Compare*, however, Sentenne *v.* Kelly, 59 Hun (N. Y.) 512, 515, 13 N. Y. Suppl. 529 (where the phrase was said not to be synonymous with "a reasonable time"); Snodgrass *v.* Wolf, 11 W. Va.

the meaning of the word is often modified to suit the particular case. Similarly

158, 165, 166 (where, in view of the fact that the court had found no judicial construction of the phrase, it was taken in its "natural, plain, obvious and ordinary significations" as requiring that the conveyance to be made by a party, be made "as soon as it was within his power" to do so; "as soon as he had the ability"); Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, 673, 675, 676, 27 Wkly. Rep. 221 [*quoted* in Sentenne *v.* Kelly, 59 Hun (N. Y.) 512, 513, 515, 13 N. Y. Suppl. 529, which, however, omits the remarks of Brett, L. J., and the vitally important phrase "with an undertaking to do it in the shortest practicable time" in the opinion of Bramwell, L. J.] where, with reference to a defense based on a cause of delay consisting in defendant's lack of a foreman capable of certain essentials, it is said, by Bramwell, L. J.: "to do a thing 'as soon as possible' means to do it within a reasonable time," with an undertaking to do it in the shortest practicable time. "In Atwood *v.* Emery the expressions of eminent judges seem to favor a different view as to the construction of the words 'as soon as possible.' I quite agree that a manufacturer or tradesman is not bound to discard all other work for the occasion, in order to take in hand a thing which he promises to do 'as soon as possible;' for instance, a tailor who accepts an order to make a coat 'as soon as possible' need not put down a half-made vest in order to begin the coat; every customer knows at the time of giving the order that the manufacturer or tradesman may have other orders on hand; and I do not think that Atwood *v.* Emery goes further than this. . . . If, however, it is an authority in favor of the defendants, I cannot agree with it. In construing the contract in the present case, I think it would be utterly unreasonable to hold that the defendants were not bound to deliver the 'gun' until the state of affairs in their work-shop should allow them to do so; the defendants ought not to have undertaken to make it, unless they were certain that they could carry out their contract;" by Brett, L. J.: "I do not think that Atwood *v.* Emery (1) decided anything which can be fully adopted. It was there held that the delay on the part of the plaintiffs was to be excused by reason of the size of their business, and by the circumstance that they had several orders on hand. . . . But in the present case I think . . . that the accidents of the defendants' business were not to be taken into amount in their favor;" and by Cotton, L. J.: "By the words 'as soon as possible' the defendants must be taken to have meant, that they would make the 'gun' as quickly as it could be made in the largest establishment with the best appliances. I do not think that these words can be taken to mean that the defendants merely promised to make the 'gun' as quickly as the means at their disposal might allow"); Atwood *v.* Emery, 1 C. B. N. S. 110, 115, 26 L. J. C. P. 73, 5 Wkly. Rep. 19, 87 E. C. L. 110 [*cited* in Benjamin Sales (7th Am. ed.) Pt. II, 705 (*quoted* in Robinson *v.* Brooks, 40 Fed. 525), and *explained* and *distinguished* in Hydraulic Engineering Co. *v.* McHaffie, *supra*] (where the phrase is construed, by Cresswell, J.: "No more than a reasonable time, regard being had to the plaintiffs' facilities and extent of business, and to the contracts they already had in hand;" by Williams, J.: "Within a reasonable time, regard being had to other orders which they might previously have received;" by Crowder, J.: "As soon as 'you' possibly can," adding: "nor can I understand how it can reasonably be suggested that either party contemplated that the plaintiffs were to put aside any other engagement, in order that this particular one should be performed"). Also construed "without unreasonable delay" (Scammon *v.* Germania Ins. Co., 101 Ill. 621, 626; Atwood *v.* Emery, *supra*, per Cresswell, J.); "with due diligence under the circumstances of the case" and without unnecessary and unreasonable delay (Niagara Ins. Co. *v.* Scammon, 100 Ill. 644, 651 [*cited* in Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602, 609, 64 N. E. 995]; May Ins. § 462 [*quoted* in Konrad *v.* Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721]); "with due diligence, [or without unnecessary procrastination or delay,] under all the circumstances of the case" (Edwards *v.* Baltimore F. Ins. Co., 3 Gill (Md.) 176, 188 [*quoted* in Provident L. Ins., etc., Co. *v.* Baum, 29 Ind. 236, 241 (*quoted* in Konrad *v.* Union Casualty Co., 49 La. Ann. 636, 639, 21 So. 721); Provident L., etc., Ins. Co. *v.* Martin, 32 Md. 310, 315] and see to like effect Cornell *v.* Le Roy, 9 Wend. (N. Y.) 126 [*quoted* in Edwards *v.* Baltimore F. Ins. Co., 3 Gill (Md.) 176, 186]); "as soon as it could be, under the circumstances, or within a reasonable time, or as soon as practicable" (Palmer *v.* St. Paul F., etc., Ins. Co., 44 Wis. 201, 208, 209 [*quoted* in Harlev *v.* Chicago Sanitary Dist., 107 Ill. App. 546, 567, and *cited*, to support the two latter constructions, in Black L. Dict. "Possible" (*quoted* in Robinson *v.* Brooks, 40 Fed. 525, 527)]; as meaning that the thing to be done by one contracting to convey land, should be made "as soon as it was within his power," or "as soon as he had the ability" (Snodgrass *v.* Wolf, 11 W. Va. 158, 166). It has been held equivalent, when applied to delivery in a bill of lading, to a requirement for quick despatch in unloading, requiring the consignee to make use of all means of discharge readily available, not admitting of a detention of the vessels for such a disposition of the cargo as merely suited the convenience or the business purposes of the consignor and the consignee (Egan *v.* Barclay Filtre Co., 61 Fed. 527); too indefinite and uncertain in connection with a promise to pay, to render the promise conditional or prevent it from removing the bar of the statute of limitations (Norton *v.* Shepard, 48 Conn. 141, 143, 40 Am. Rep. 157); and in the following phrase: "eight hundred to be delivered 'as soon as possible,' balance within eighteen months," to require "greater celerity than 'a reasonable time'" (Sentenne *v.* Kelly, 59 Hun (N. Y.) 512, 513,

with respect to the phrase "as speedily as possible."[27] (See CONTINGENT, 9 Cyc. 72; POSSIBILITY.)

POST. As a noun, a piece of timber, metal (solid or built up), or other solid substance, of considerable size, set upright, and intended as a support to a weight or structure resting upon it, or as a firm point of attachment for something;[28] a military establishment where a body of troops is permantly fixed;[29] a conveyance for letters or despatches;[30] a mode of conveying written or unwritten intelligence to and from appointed stations at regular intervals or whenever the performance of such service may properly be required;[31] and in old practice, the name given to a species of writ of entry.[32] As a verb, to attach to a post, a wall, or other usual place of affixing public notices;[33] to attach to a sign post or other usual place of affixing public notices; to advertise;[34] to bring to the notice or attention of the public by affixing to a post.[35] As a prefix, after, afterwards.[36] As a Latin preposition, after.[37]

POSTAGE. The fee charged by law for carrying letters, packets, and documents by the public mails.[38] (See POST-OFFICE, *post*, p. 986.)

POSTAGE STAMP. A ticket issued by government, to be attached to mail-matter, and representing the postage or fee paid for the transmission of such

515, 13 N. Y. Suppl. 529). When regarded as synonymous with "as soon as practicable" neither phrase can be construed to require more than the exercise of reasonable diligence in view of all the circumstances which might attend upon the execution of the work. See Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602, 609, 64 N. E. 995. An agreement to ship "as soon as possible" construed as an agreement "to use all reasonable diligence to ship as soon as possible." See Pope *v.* Filley, 9 Fed. 65, 68, 3 McCrary 190 [*overruled* on another point in Filley *v.* Pope, 115 U. S. 213, 9 S. Ct. 19, 29 L. ed. 372, and *quoted* in Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602, 609, 64 N. E. 995].

27. **"As speedily as possible,"** construed "within a reasonable time," in a liquidation agreement (see Bacon *v.* Albany Perforated Wrapping Paper Co., 22 Misc. (N. Y.) 592, 593, 49 N. Y. Suppl. 620; Smith *v.* Underhill, 19 N. Y. Suppl. 249, 252); or "without unreasonable delay" (Bacon *v.* Albany Perforated Wrapping Paper Co., *supra*).

28. Century Dict. [*quoted* in Kirker-Bender Fire-Escape Co. *v.* Chicago Beach Hotel Co., 116 Fed. 359, 362, 53 C. C. A. 579].

Describing a boundary mark, the term is not satisfied by a stump, although, it seems, a proper stump might be hewed, marked, and adopted as a mining location post, but then should be described both as post and stump in a descriptive survey (see Pollard *v.* Shively, 5 Colo. 309, 316); nor is a line of marked trees the equivalent of a line of posts (Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19, 24, 25, 28).

29. U. S. *v.* Caldwell, 19 Wall. (U. S.) 264, 268, 22 L. ed. 114.

30. Black L. Dict. See POST-OFFICE.

"Derived from 'positi,' the horses carrying the letters or despatches being kept or placed at fixed stations." Wharton L. Lex. [*quoted* in Black L. Dict.]

As medium of offer or acceptance with respect the making of a valid contract see CONTRACTS, 9 Cyc. 293–297.

31. U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541, adding that "regular posts no longer transmit unwritten intelligence."

32. Black L. Dict.

"Post disseisin" in English law is the name of a writ which lies for him who, having recovered lands and tenements by force of a novel disseisin, is again disseised by a former disseisor. Jacob L. Dict. [*quoted* in Black L. Dict.].

33. Webster Int. Dict. [*quoted* in Allen *v.* Allen, 114 Wis. 615, 623, 91 N. W. 218].

34. Webster Dict. [*quoted* in State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 417, 9 So. 89; Vose *v.* Terrell, 12 Tex. Civ. App. 439, 441, 34 S. W. 170].

"Posted" as used in a railroad rule requiring that the rules and regulations should be posted in stations, etc., means that such rules and regulations shall be advertised in the form of a poster, printed in bill or placard form, in such stations. They should be so attached to something in a conspicuous place in the station that they can, without being removed, be read conveniently by the public. The use of a pamphlet does not meet the requirement. State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 417, 9 So. 89.

"Posting as required by law" held to mean actual posting the requisite number of days. See Nelson *v.* State, (Tex. Cr. App. 1902) 75 S. W. 502, 504.

Posting notices: In general see NOTICE, 29 Cyc. 927. Of particular matters see CHATTEL MORTGAGES; EXECUTIONS; and other special titles.

35. Standard Dict. [*quoted* in Allen *v.* Allen, 114 Wis. 615, 623, 91 N. W. 218].

36. Burrill L. Dict.

37. Black L. Dict.

38. Black L. Dict.

As incidental expense of county officer, allowable, see COUNTIES, 11 Cyc. 434 note 69.

For county use, not within scope of rule relating to furnishing supplies, see COUNTIES, 11 Cyc. 479 note 51.

Prepaid on notice of protest see COMMERCIAL PAPER, 8 Cyc. 244 note 74.

matter through the public mails.[39] (See POST-OFFICE, *post*, p. 986. See also POSTAGE; POSTAL.)

POSTAL. Relating to the mails; pertaining to the post-office.[40] (See POST-OFFICE, *post*, p. 970.)

POST-DATED. See BANKS AND BANKING, 5 Cyc. 528–529; COMMERCIAL PAPER, 7 Cyc. 531, 752, 954. See also POST NOTE, *post*, p. 968.

POST DIEM. After the day.[41]

POSTEA. Literally, "afterwards." In practice, whatever is done, subsequent to the joining of issue and awarding the trial, as entered on the record;[42] the name given to the entry, on record, of the proceedings on the trial of a cause, including the verdict of the jury;[43] a formal statement indorsed on the *nisi prius* record which gives an account of the proceedings at the trial of the action.[44]

POSTED WATERS. A phrase used to describe all waters marked by notices posted on the banks under the provisions of the chapter in which the phrase occurs.[45] (See, generally, POST; WATERS.)

POSTER. A large bill posted for advertising.[46]

POSTERI DIES TESTES SUNT SAPIENTISSIMI. A maxim meaning "We can not judge accurately of deeds, save by their results."[47]

POSTERIORA DEROGANT PRIORIBUS. A maxim meaning "Things subsequent supersede things prior."[48]

POSTERIORES LEGES AD PRIORES PERTINENT, NISI CONTRARIO SINT. A maxim meaning "Later laws pertain to former, if they be not to the contrary."[49]

POSTERIORE TESTAMENTO PRIUS IPSO JURE RUMPITUR. A maxim of the civil law, meaning "By a later will the former is broken by the law itself."[50]

POSTERITY. All the descendants of a person in a direct line to the remotest generation.[51] (See CHILDREN, 7 Cyc. 123; DESCENDANT, 13 Cyc. 1047; HEIR, 21 Cyc. 408; ISSUE, 23 Cyc. 358; OFFSPRING, 29 Cyc. 1473.)

POST EXECUTIONEM STATUS LEX NON PATITUR POSSIBILITATEM. A maxim meaning "After the execution of an estate, the law suffers not a possibility."[52]

POST FACTUM NULLUM CONSILIUM. A maxim meaning "After the deed counsel is in vain."[53]

POSTHUMOUS CHILD. One born after the death of its father; or, when the Cæsarean operation is performed, after that of the mother.[54] (Posthumous Child:

39. Black L. Dict.
Unissued as subject of larceny see LARCENY, 25 Cyc. 15.

40. Abbott L. Dict.; Black L. Dict.
"Postal route" as a term including all public roads and highways within the United States, while kept up and maintained as such see U. S. Rev. St. (1878) § 3964 [U. S. Comp. St. (1901) p. 2707] [*cited* in Cosgriff *v.* Tri-State Tel., etc., Co., 15 N. D. 210, 107 N. W. 525, 527, where it is apparently regarded as synonymous with "post route" and "post road"].

41. Black L. Dict.
Payment or tender after day of maturity of debt see PAYMENT, 30 Cyc. 1184; TENDER.

42. See 3 Blackstone Comm. 386 [*cited* in Burrill L. Dict.].

43. Burrill L. Dict.
Entry on record: Of judgment see JUDGMENTS, 23 Cyc. 835–856. Of verdict, findings, and decisions see TRIAL.

44. Black L. Dict.

45. See State *v.* Theriault, 70 Vt. 617, 619, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290.

46. Webster Dict. [*quoted* in State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 417, 9 So. 891].

47. Morgan Leg. Max.
Literally, it means either "Later days are the witnesses of the wisest man" or "Later days are the wisest witnesses."

48. Wharton L. Lex.
Application of this principle to repealing acts see STATUTES.

49. See U. S. *v.* Navarro, 3 Philippine 143, 171.

50. Applied in Cutto *v.* Gilbert, 1 Spinks 276, 280.

51. Black L. Dict.
No broader or more comprehensive term, perhaps, in our language, than this which embraces not only children, but descendants to the remotest generations. Breckenridge *v.* Denny, 8 Bush (Ky.) 523, 527.

52. Peloubet Leg. Max.

53. Peloubet Leg. Max.

54. Black L. Dict.
Different and peculiar construction.— One born before the father's death was held "a posthumous child within the meaning of the will" whereby the father, having been taken sick, made a legacy to one daughter and, if his wife, then enceinte should have a posthumous daughter, a part of the same property to the latter.

As Beneficiary in Action For Death of Parent, see DEATH, 13 Cyc. 336. As Heir or Distributee, see DESCENT AND DISTRIBUTION, 14 Cyc. 39; JUDGMENTS, 23 Cyc. 1278 note 5. As Legatee or Devisee, see WILLS. Settlement of, see PAUPERS, 30 Cyc. 1102 note 67.)

POSTHUMUS PRO NATO HABETUR. A maxim meaning "A posthumous child is considered as though born (at the parent's death)." [55]

POST LETTER. See POST-OFFICE, *post*, p. 970.

POSTLIMINIUM. Literally "postliminy." [56] In international law, the law under which property, if taken by an enemy in time of war, is restored to its former state, upon coming again under the power of the nation to which it formerly belonged; [57] that right in virtue of which persons and things taken by the enemy are restored to their former state on coming again into the power of the nation to which they belonged.[58] (See WAR.)

POSTLIMINIUM FINGIT EUM QUI CAPTUS EST IN CIVITATE SEMPER FUISSE. A maxim meaning "Postliminy feigns that he who has been captured has never left the state." [59]

POSTLIMINY. See POSTLIMINIUM.

POST LITEM MOTAM. After controversy raised; [60] a term applied to unsworn statements made after the controversy, upon which they are offered in evidence, had arisen; [61] also to writing made for the purpose of comparison under like circumstances.[62] *Lis mota* [63]—the "controversy raised" within the meaning of the rule rejecting proof of unsworn statements made thereafter [64] is not necessarily the litigation in which they are offered [65] but may precede it; [66] nor does it consist in the mere facts that afterward come in question; [67] and it must be upon the very

Jaggard *v.* Jaggard, Prec. Ch. 175, 177, 24 Eng. Reprint 85.

Presumption against birth after death of mother suggested see Reeves *v.* Hager, 101 Tenn. 712, 717, 50 S. W. 760.

55. Bouvier L. Dict.

Applied in: Hall *v.* Hancock, 15 Pick. (Mass.) 255, 258, 26 Am. Dec. 598; Gibson *v.* Gibson, 2 Freem. 223, 224, 22 Eng. Reprint 1173; Trower *v.* Butts, 1 Sim. & St. 181, 183, 24 Rev. Rep. 164, 1 Eng. Ch. 181, 57 Eng. Reprint 72.

56. See Black L. Dict.

57. Herbert *v.* Moore, Dall. (Tex.) 592, 593.

58. Vattel L. Nat. b. 3, c. 14, § 204 [*quoted* (with the substitution of "the *postliminii*" for "*postliminium*") in Leitensdorfer *v.* Webb, 1 N. M. 34, 44].

In the civil law, it is a doctrine or fiction of the law by which the restoration of a person to any status or right formerly possessed by him was considered as relating back to the time of his original loss or deprivation. Black L. Dict.

59. Peloubet Leg. Max.

60. See Berkeley Peerage, 4 Campb. 401, 404, where it is said of a deposition: "It was made *post litem motam*, after a controversy raised upon this very point."

61. See Kirby *v.* Boaz, 41 Tex. Civ. App. 282, 91 S. W. 642.

62. King *v.* Donahue, 110 Mass. 155, 156, 14 Am. Rep. 589; Hickory *v.* U. S., 151 U. S. 303, 306, 14 S. Ct. 334, 38 L. ed. 170.

63. See 25 Cyc. 1445–1446.

64. See EVIDENCE, 16 Cyc. 1202 text and note 90.

For the converse of the rule (namely, that declaration should be made *ante litem motam* to be free from the taint of bias) see EVIDENCE, 16 Cyc. 1240 text and note 49. See 2 Cyc. 472 note 13.

65. See 25 Cyc. 1446 text and note 81, and *infra*, note 66.

66. Lovat Peerage, 10 App. Cas. 763, 780 (holding that statements made to one in the course of a visit made with the purpose of claiming an estate, and which were afterward related by him to members of his family, were excluded by the rule); Dysart Peerage, 6 App. Cas. 489, 503 (where a Scotch marriage preceded by an excessively violent courtship was appropriately held a beginning of controversy sufficient to exclude from use in after litigation, statements made after the marriage, but before the litigation, by a party to the former, but not to the latter); Frederick *v.* Atty.-Gen., 44 L. J. P. & M. 1, 4, 5, 6, 32 L. T. Rep. N. S. 39 (where a dispute between members of a family was held sufficient to exclude statements made therein from use in later litigation upon the point then in question).

A statement given to the parties employed in getting up the *lis;* namely, a statement of what the declarant would be prepared to say as a witness, is not admissible, a rule applied to written statements in Dysart Peerage, 6 App. Cas. 489, 507 [*followed* in Lovat Peerage, 10 App. Cas. 763, 780, where it is applied to oral statements].

Declarations apparently not remembered or acted upon until after the contest has arisen, although made before, are affected so far as to be of little weight. Crouch *v.* Hooper, 16 Beav. 182, 183, 1 Wkly. Rep. 10, 51 Eng Reprint 747.

67. Shedden *v.* Atty.-Gen., 30 L. J. P. & M. 217, 233, 2 Swab. & Tr. 170 (where Cresswell criticized the ruling of Alderson, B., in Walker *v.* Beauchamp, 6 C. & P. 552, 561, 25 E. C. L. 571, "that the commencement of

point in regard to which evidence is offered.[68] (Post Litem Motam: Applied to Unsworn Statements, see Evidence, 16 Cyc. 1240. See also Lis Mota, 29 Cyc. 1445.)

POSTMAN. A letter carrier.[69] (See Post-Office, *post*, p. 984.)

POSTMASTER. See Post-Office, *post*, p. 976.[70]

POSTMASTER-GENERAL. See Post-Office, *post*, p. 976.[71]

POST-MORTEM. Literally, "after death."[72] (Post-Mortem: Examination — As Evidence, see Homicide, 21 Cyc. 947; As Source of Liability, see Dead Bodies, 13 Cyc. 281 notes 70–72; By Coroner, see Coroners, 9 Cyc. 985. House For as Injurious to Business, see Covenants, 11 Cyc. 1078 note 73. See also Autopsy, 4 Cyc. 1075.)

POST NOTE. In mercantile law, a note payable at a future day, as distinguished from a note payable on demand; a species of bank notes payable at a distant period and not on demand,[73] which differ from other promissory notes only as to the time of payment.[74] (See, generally, Commercial Paper, 7 Cyc. 495.)

POST-NUPTIAL. After marriage.[75] (Post-Nuptial: Agreement or Settlement; In General, see Husband and Wife, 21 Cyc. 1254; Barring Dower, see Dower, 14 Cyc. 941–943; Validity as Against Creditors, see Fraudulent Conveyances, 20 Cyc. 392, 454 note 51.)

POST OBIT AGREEMENT or BOND. An agreement, on the receipt of a sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest,

the controversy must be taken to be the arising of that state of facts on which the claim is founded, without any more" which he quotes in substance, adding "now, if that be so, it is perfectly plain that all declarations whatever must be excluded, because, for instance, the moment a marriage takes place, that state of circumstances exists, out of which the subsequent contest (perhaps twenty years afterward) arises"); Lauderdale Peerage, 10 App. Cas. 692, 712, holding that the mere possibility or likelihood that proof of a marriage may be needed, and the making of certificate thereof and an affidavit authenticating such certificate, is not *lis mota* so as to exclude those documents from admission when the marriage subsequently comes in question, although they may have been made for some particular purpose, there being nothing to show that such purpose, if any, was not in good faith and proper.

68. Gee *v.* Ward, 7 E. & B. 509, 514–516, 3 Jur. N. S. 692, 5 Wkly. Rep. 579, 90 E. C. L. 509; Shedden *v.* Atty.-Gen., 30 L. J. P. & M. 217, 235, 2 Swab. & Tr. 170; Freeman *v.* Phillipps, 4 M. & S. 486, 492, 16 Rev. Rep. 524. See also Newcastle *v.* Broxstowe, 4 B. & Ad. 273, 279, 2 L. J. M. C. 47, 1 N. & M. 598, 24 E. C. L. 126.

69. Black L. Dict.

70. Sub-postmaster included see Lancaster *v.* Shaw, 10 Ont. L. Rep. 604, 605, 6 Ont. Wkly. Rep. 316.

"In cities and towns" in Ontario Election Act, § 4, includes "every postmaster in every city and town, whether paid by permanent salary or not, and whether the postmaster of the city or a postmaster of any part of a city or town." Lancaster *v.* Shaw, 10 Ont. L. Rep. 604, 607, 6 Ont. Wkly. Rep. 316.

Contract including resignation and influence toward appointment of a successor void see Contracts, 9 Cyc. 495 note 91.

71. Subject to mandamus in respect to ministerial act see Constitutional Law, 8 Cyc. 856 note 48; Mandamus, 26 Cyc. 246.

72. Black L. Dict.; Burrill L. Dict.

"'Post-mortem' examination means an examination of a body after death, and does not necessarily imply an autopsy" (Wehle *v.* U. S. Mutual Acc. Assoc., 11 Misc. (N. Y.) 36, 38, 31 N. Y. Suppl. 865); and, as generally understood, the dissection of the body made within a few hours, or, at furthest, days after the death (Stephens *v.* People, 4 Park. Cr. (N. Y.) 396, 475).

73. Burrill L. Dict.

74. *In re* Dyott, 2 Watts & S. (Pa.) 463, 489.

It is a species of obligation resorted to by banks when the exchanges of the country, and especially of the banks, have become embarrassed by excessive speculation. Hogg's Appeal, 22 Pa. St. 479, 488, where it is said: "[They are] intended to enter into the circulation of the country as part of its medium of exchanges; the smaller ones for ordinary business, and the larger ones for heavier operations. They are intended to supply the place of demand notes, which the banks cannot afford to issue or re-issue, to relieve the necessities of commerce or of the banks, or to avoid a compulsory suspension. They are under seal, or without seal, and at long or short dates, at more or less interest or without interest, as the necessities of the bank may require. Like the Housatonic Railroad Company's notes, or those of the Manual Labor Bank, they may even be marked on the face 'secured by pledge of stock and property, or 'secured in trust on real estate,' or, like those of the New York banks, the notes may be in fact so secured; still, as they are intended and issued not merely as evidence of a loan, and to be thrown into the stock market, but as a part of the circulating medium, they are called post-notes."

75. Black L. Dict.

on the death of the person from whom he has some expectation, if the obligor be then living;[76] an undertaking by a borrower of money to pay a large sum exceeding the legal rate of interest after the death of a person from whom he has expectations, in case of surviving him.[77]

76. Boynton *v.* Hubbard, 7 Mass. 112, 119.

Not void per se (see Crawford *v.* Russell, 62 Barb. (N. Y.) 92, 95; Curling *v.* Townshend, 19 Ves. Jr. 628, 632, 633, 34 Eng. Reprint 649; Wharton *v.* May, 5 Ves. Jr. 27, 57, 31 Eng. Reprint 454); but declared void if clearly fraudulent or unconscionable (Crawford *v.* Russell, *supra*).

Contingent interest as subject of assignment see ASSIGNMENTS, 4 Cyc. 15–16.

Contract to transfer expectancy on death of ancestor see POSSIBILITY, *ante*, p. 961, note 8.

77. See Crawford *v.* Russell, 62 Barb. (N. Y.) 92, 95, where it was said: "This character of agreements are not always void."

POST-OFFICE

By Edward C. Ellsbree*

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* Author of "Inspection," 22 Cyc. 1363; "Novation," 29 Cyc. 1129; "Obscenity," 29 Cyc. 1314; "Piracy," 30 Cyc. 1626.

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CROSS-REFERENCES

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Addition of Post-Office Address to Signature of Pleadings, see PLEADING, *ante*, p. 526.

Communicating Offer or Acceptance by Mail, see CONTRACTS, 9 Cyc. 293.

Evidence of Mailing, Delivery, or Receipt of Letters, see EVIDENCE, 16 Cyc. 1065.

Injunction Restraining Partner From Receiving or Opening Mail, see PARTNERSHIP, 30 Cyc. 725.

Jurisdiction and Venue, see CRIMINAL LAW, 12 Cyc. 206.

Mailing and Transmitting Depositions, see DEPOSITIONS, 13 Cyc. 862.

Notice:

By Mail, see NOTICE, 29 Cyc. 1116, 1123.

To Pay Insurance Premiums, Dues, or Assessments, see FIRE INSURANCE, 19 Cyc. 775; LIFE INSURANCE, 25 Cyc. 833.

Payment by Mail, see PAYMENT, 30 Cyc. 1186.

Remittance by Mail of Insurance Premiums or Assessment, see LIFE INSURANCE, 25 Cyc. 842.

Sending Return of Execution by Mail, see EXECUTIONS, 17 Cyc. 1370.

I. POST-OFFICE DEPARTMENT, POST-OFFICES, AND POSTAL REVENUES.

A. Control and Regulation of Postal Service — 1. IN GENERAL. By the constitution of the United States power is vested in congress to establish post-offices and post-roads.[1] This power has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to insure its safe and speedy transit, and the prompt delivery of its contents. In other words the power possessed by congress embraces the regulation of the entire postal system of the country.[2]

2. POST-ROADS AND ROUTES. The power given by the constitution to establish post-roads means such roads as are regularly laid out by the authority of the

1. U. S. Const. art. 1, § 8.
2. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113; *Re* Jackson, 96 U. S. 727, 24 L. ed. 877.

states or by counties under the laws of the states.[3] This power was given to enable the general government to make, repair, keep open, and improve post-roads, whenever the exercise of such an independent national power should be deemed proper to effectuate the satisfactory transportation of the mail; but it was not given to authorize congress to adopt and use state roads as post-roads without compensation, if any should be just, and should be demanded.[4]

B. Post-Offices — 1. Establishment and Discontinuance. By the legislation of congress the postmaster-general has the power to "establish post-offices," [5] as well where the commissions of the office amount to or exceed one thousand dollars as where they do not.[6] The power to establish implies the power to discontinue,[7] unless congress expressly prohibits such discontinuance in a particular case; [8] and deputy postmasters occupy their offices subject to the contingency that such offices may be so discontinued.[9]

2. Lease of Buildings For Post-Offices. While the postmaster-general, under the power to establish post-offices, may designate the places, that is, the locali-

3. Cleveland, etc., R. Co. *v.* Franklin Canal Co., 5 Fed. Cas. No. 2,890.

"Post-road" has been defined as being a public highway whose use by the post is prescribed or authorized by law (U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541); one of the highways or public passages on which mail is transported on a post route (U. S. *v.* Kochersperger, *supra*).

"Post route" is a term usually synonymous with post-road. See U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541; Black L. Dict. It has also been defined as being the appointed course or prescribed line of transportation of mail. U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541, distinguishing "post-road."

"Post-road" and "post route" distinguished.— The term "post-road" ordinarily signifies a highway by land or water made by statute an avenue over which mails may be lawfully transmitted; while the term "post route" signifies a post-road, or definite portion thereof, over which mails are usually transported by contract. Philadelphia, etc., R. Co. *v.* U. S., 13 Ct. Cl. 199. See also Cosgriff *v.* Tri-State Tel., etc., Co., 15 N. D. 210, 107 N. W. 525, 5 L. R. A. N. S. 1142; Blackham *v.* Gresham, 16 Fed. 609 [*cited* in U. S. *v.* Easson, 18 Fed. 590]; U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541.

After discontinuance as state road.— So far as the designation and use of any state road as a post route may be concerned, the power of congress to establish post-roads cannot import more than the precedent power to establish post-offices and transport the mails, excepting only that the one implies only a right of use on just and common terms as long as a state shall choose to continue a road as a state road, and the other may imply a right in congress, not only to enjoy the like use, but to continue, as a post route, a road once adopted or designated or established as a post-road, even after it shall have been discontinued as a state road. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113.

The act of congress making all roads post-roads means only such as have charters from the several states, and not such as are built in derogation of law. Cleveland, etc., R. Co. *v.* Franklin Canal Co., 5 Fed. Cas. No. 2,890. Such act does not give to the United States, to a mail contractor, or to the owner of a road, the right to an injunction to restrain a threatened injury. Cleveland, etc., R. Co. *v.* Franklin Canal Co., *supra*.

4. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113.

Unless congress elects to exercise its right of eminent domain, and buy a state road, or make one, or help to make or repair it, the constitution gives no authority to use it as a post-road, without the consent of the state or owner, or without making just compensation for its use. Dickey *v.* Maysville, etc., Turnpike Road Co., 7 Dana (Ky.) 113.

5. Ware *v.* U. S., 4 Wall. (U. S.) 617, 18 L. ed. 389.

6. Ware *v.* U. S., 4 Wall. (U. S.) 617, 18 L. ed. 389.

7. Ware *v.* U. S., 4 Wall. (U. S.) 617, 18 L. ed. 389, holding that unless there is some provision in the acts of congress restraining its exercise, the power to establish post-offices, as interpreted by usage coeval with the creation of the post-office department and recognized in congressional legislation, infers a power to discontinue them.

Notice sent to discontinued post-office see Commercial Paper, 7 Cyc. 1097 note 90.

8. See 29 U. S. St. at L. 313 [U. S. Comp. St. (1901) p. 2633]. The intention of congress, expressed in this provision, was to take from the postmaster-general the power to discontinue a post-office at a county-seat for the purpose of consolidation with another regardless of any view that he might entertain in respect of the public interests affected. U. S. *v.* Cortelyou, 26 App. Cas. (D. C.) 298.

9. Ware *v.* U. S., 4 Wall. (U. S.) 617, 18 L. ed. 389, holding that the postmaster-general may exercise the power, notwithstanding the deputy postmasters have been appointed by the president, by and with the advice and consent of the senate, and under a statute which enacts that the appointee shall hold his office for the term of four years unless sooner removed by the president.

ties, at which the mails are to be received,[10] he cannot bind the United States by any lease or purchase of a building to be used for the purpose of a post-office unless the power to do so is derived from a statute which either expressly or by necessary implication authorizes him to make such lease or purchase.[11]

C. Post-Office Department — 1. Postmaster-General — a. Powers and Duties. The law-making power has given to the postmaster-general great power of discretion in the management of the mails and post-roads, and committed much to his opinion and good judgment.[12] Under statutory authority the postmaster-general has power to establish post-offices at such places on post-roads established by law as he may deem expedient;[13] he prescribes the penalties on postmasters' bonds,[14] may appoint postmasters of a certain class,[15] may temporarily fix the salary of new offices[16] and must readjust the salaries of postmasters,[17] may designate distributing or separating offices,[18] may discontinue a post-office,[19] fixes the salary of letter carriers[20] and prescribes their uniform,[21] may establish branch offices,[22] may, upon evidence "satisfactory to himself," return certain registered letters as "fraudulent,"[23] and may discontinue a post-road when "in his opinion it cannot be safely continued."[24]

b. Liability. The law is well established that the postmaster-general is not responsible for the negligence of postmasters or their deputies or assistants.[25]

2. Chief Clerk. The official duties of the chief clerk of the post-office department embrace all matters relating to finance in that department.[26]

3. Postmasters[27] — a. Qualification; Bond. The postmaster-general had, from the institution of his office, implied, if not express, authority to take bonds of his

10. Chase *v.* U. S., 155 U. S. 489, 15 S. Ct. 174, 39 L. ed. 284.

11. Chase *v.* U. S., 155 U. S. 489, 15 S. Ct. 174, 39 L. ed. 284, holding that general authority "to establish post-offices" does not itself, without more, necessarily imply authority to bind the United States by a contract to lease or purchase a post-office building.

An appropriation of money to pay for the rent of a post-office building at a named place might give authority to the postmaster-general to lease such building in that locality as he deemed proper for the service, always keeping within the amount so appropriated. Chase *v.* U. S., 155 U. S. 489, 15 S. Ct. 174, 39 L. ed. 284. So also the power to lease a building to be used as a post-office may be implied from a general appropriation of money to pay for rent of post-offices in any particular fiscal year or years. Chase *v.* U. S., 155 U. S. 489, 15 S. Ct. 174, 39 L. ed. 284.

Limitation of postmaster-general's power. — In any case the power of the postmaster-general to lease buildings for post-office use is limited to leases for a period not exceeding that covered by the appropriations of the current year. Chase *v.* U. S., 155 U. S. 489, 15 S. Ct. 174, 39 L. ed. 284; Abbott *v.* U. S., 66 Fed. 447; Connecticut Mut. L. Ins. Co. *v.* U. S., 21 Ct. Cl. 195.

Contracts need not be in writing.—The contracts of the post-office department for the renting of post-office accommodations need not necessarily be in writing. Little *v.* U. S., 19 Ct. Cl. 272.

12. Griffith *v.* U. S., 22 Ct. Cl. 165, where it is said that such a policy is necessary, for no such service can be strictly mapped out and defined by statute, and its changing needs require the attention of an executive officer vested with power of management.

13. U. S. Rev. St. (1878) § 3829 [U. S. Comp. St. (1901) p. 2608].

14. U. S. Rev. St. (1878) § 3834 [U. S. Comp. St. (1901) p. 2610].

15. U. S. Rev. St. (1878) § 3836 [U. S. Comp. St. (1901) p. 2611].

16. U. S. Rev. St. (1878) § 3853.

17. U. S. Rev. St. (1878) § 3854.

18. U. S. Rev. St. (1878) § 3859.

19. U. S. Rev. St. (1878) § 3864 [U. S. Comp. St. (1901) p. 2632].

20. U. S. Rev. St. (1878) § 3866.

21. U. S. Rev. St. (1878) § 3867 [U. S. Comp. St. (1901) p. 2637].

22. U. S. Rev. St. (1878) § 3871 [U. S. Comp. St. (1901) p. 2639].

23. U. S. Rev. St. (1878) § 3929.

Such statute is not unconstitutional as depriving persons of property without due process of law; the act itself in effect declaring that the mere depositing of letters in the mail shall not operate to transfer property to the person addressed. Dauphin *v.* Key, 4 MacArthur (D. C.) 203.

24. U. S. Rev. St. (1878) § 3974 [U. S. Comp. St. (1901) p. 2710].

25. Whitfield *v.* Le Despencer, Cowp. 754; Lane *v.* Cotton, 1 Ld. Raym. 646, 91 Eng. Reprint 1332.

26. Brown *v.* U. S., 9 How. (U. S.) 487, 13 L. ed. 228, holding that the chief clerk of the department is not entitled to charge a commission for negotiating loans for the use of the department.

27. **Postmaster exempt from jury service** see Juries, 24 Cyc. 205.

Enjoining postmaster from carrying out in-

deputies, conditioned for the faithful performance of their duties, and to pay all moneys that should come to their hands for postages, etc.[28] At present such a bond is required by statute.[29] A bond given by a postmaster, with sureties, for the performance of his official duties, does not constitute a binding contract, until approved and accepted by the postmaster-general.[30]

b. Suspension and Vacation of Office. Under the tenure of office act,[31] the president had authority to suspend a postmaster, his commission being in terms "subject to the conditions prescribed by law."[32] A postmaster may vacate his office by removing his residence from the place where the office is kept,[33] but the mere fact that he remains out of the neighborhood of the office will not have this effect.[34]

c. Compensation — (i) *In General.* Salaries of postmasters are left, in a greater or lesser degree, to the discretion of the postmaster-general.[35] When the law constitutes him the sole judge to determine the compensation to be allowed, the postmaster is without judicial redress; but when the law prescribes rules to govern the action of the postmaster-general, or sets specific bounds to his discretion, a postmaster may sue and recover whatever the law declares he shall be paid.[36] By the act of 1883[37] the salary of a postmaster is made dependent upon and regulated by the amount of business done at his office.[38]

(ii) *During Suspension.* A person appointed by the president to perform the duties of a postmaster, suspended under the "tenure of office act," is entitled to the salary and emoluments of the office while he performs the duties of the suspended officer, who is not entitled to the salary till he actually resumes the office.[39]

(iii) *Fees.* The statute[40] provides that postmasters "may be allowed, as compensation for issuing and paying money-orders," a certain proportion of the fees, "provided such compensation, together with the postmaster's salary, shall not exceed" a certain sum. This is intended as compensation for increased responsibility and personal service; but the clerks in the money-order department must be paid by the postmaster, and if the postmaster-general fail or refuse to fix the allowance the postmaster is without judicial remedy.[41]

valid order of the postmaster-general see Injunctions, 22 Cyc. 879 note 48.

28. Postmaster-Gen. *v.* Early, 12 Wheat. (U. S.) 136, 6 L. ed. 577; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678; Postmaster-Gen. *v.* Rice, 19 Fed. Cas. No. 11,312.

29. U. S. Rev. St. (1878) § 3834 [U. S. Comp. St. (1901) p. 2610].

30. Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106.

Proof of acceptance.— Such acceptance need not be proved by direct or express evidence. The reception and detention of a postmaster's bond, by the postmaster-general, for a considerable time, without objection, is sufficient evidence of its acceptance. Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106. The return of an official bond to the principal obligor by the postmaster-general, for the purpose of obtaining an additional surety, affords no proof that it had not been accepted, nor does it amount either to a surrender or canceling of it. Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106.

31. 16 U. S. St. at L. 6.

32. Embry *v.* U. S., 100 U. S. 680, 25 L. ed. 772 [*affirming* 12 Ct. Cl. 455].

33. U. S. *v.* Pearce, 27 Fed. Cas. No. 16,020, 2 McLean 14. The post-office act provides that no person shall hold the office of postmaster who does not reside at the place where the office is kept.

34. U. S. *v.* Pearce, 27 Fed. Cas. No. 16,020, 2 McLean 14.

35. Fairchild *v.* U. S., 12 Ct. Cl. 226. See *supra*, I, C, 1, a.

36. Fairchild *v.* U. S., 12 Ct. Cl. 226.

37. 22 U. S. St. at L. 600, 602, c. 142 [U. S. Comp. St. (1901) p. 2619].

38. U. S. *v.* Wilson, 144 U. S. 24, 12 S. Ct. 539, 36 L. ed. 332.

39. Embry *v.* U. S., 100 U. S. 680, 25 L. ed. 772 [*affirming* 12 Ct. Cl. 455].

In case of suspension, the president could designate some suitable person to perform temporarily the duties of the office until the matter should be acted on by the senate when in session. If the senate concurred in the suspension, and advised and consented to the removal, the president might remove and by and with the advice and consent of the senate appoint another person to the office. If, however, the senate refused to concur, the officer suspended might resume the functions of his office, but his salary and emoluments during the suspension went to the person who performed his duties, and not to him. Embry *v.* U. S., 100 U. S. 680, 25 L. ed. 772.

40. U. S. Rev. St. (1878) § 4047.

41. Shipman *v.* U. S., 27 Ct. Cl. 129.

(IV) *EXTRA ALLOWANCES.* The statute[42] provides that "the Postmaster-General may allow . . . to the postmasters at offices of the first and second classes . . . a reasonable sum for the necessary cost of rent," etc.[43] The provision that no such allowance shall be made except on the order of the postmaster-general prohibits such allowance from being made by other administrative officers, but does not exclude a postmaster from judicial redress.[44] Under the act of June 22, 1854,[45] authorizing the postmaster-general in his discretion to make an extra allowance to postmasters for extra labor and expense in certain cases, no postmaster has a right to such allowance until it is made him by the postmaster-general, and the action of the latter in the premises is final, and not subject to judicial review.[46]

(V) *INCREASE AND READJUSTMENT* — (A) *In General.* After a postmaster's salary has been fixed, a readjustment by the postmaster-general must be made before it can be increased.[47] Such readjustment is an executive act,[48] taking effect in general prospectively;[49] and, if it be not performed, the law imposes no obligation on the government to pay an increased salary.[50]

(B) *Classes of Readjustment* — (1) BIENNIAL. The revised Post-Office Act, 1872,[51] contemplates and provides for two classes of readjustments of salaries. The first of these, the biennial readjustment, is general and mandatory. The

Where a postmaster employs the regular clerks in the money-order department, the government may recover the value of their services. Shipman *v.* U. S., 27 Ct. Cl. 129.

42. U. S. Rev. St. (1878) § 3860 [U. S. Comp. St. (1901) p. 2624].

43. Moffett *v.* U. S., 37 Ct. Cl. 499.

By the term "may," the statute allows the postmaster-general to do justice to his subordinates in the manner prescribed; but does not invest him with discretion to allow reimbursement to one postmaster and refuse it to another. Moffett *v.* U. S., 37 Ct. Cl. 499. *Compare* U. S. *v.* Davis, 25 Fed. Cas. No. 14,927, Deady 294, holding that the provision of the act of July 1, 1864 (13 U. S. St. at L. 336, c. 197, § 5), which enacts that "the Postmaster-General shall allow to the postmaster a just and reasonable sum for the necessary cost, in whole or in part, of rent, fuel," etc., is, in effect, permissive and not mandatory, and no postmaster has any legal right to such allowance until it is awarded him by the postmaster-general.

44. Moffett *v.* U. S., 37 Ct. Cl. 499.

45. 10 U. S. St. at L. 298, 299.

46. U. S. *v.* Davis, 25 Fed. Cas. No. 14,927, Deady 294.

47. U. S. *v.* McLean, 95 U. S. 750, 24 L. ed. 579; Trask *v.* U. S., 27 Ct. Cl. 330.

A statement of readjustment by a clerk in the post-office department, but not acted on by the postmaster-general, is not evidence of a readjustment. Trask *v.* U. S., 27 Ct. Cl. 330.

A report by the postmaster-general to congress stating in general terms that claims filed before a certain day "have been reviewed" and that the review "has been completed" is insufficient to establish the readjustment of any single postmaster's salary. Peysert *v.* U. S., 41 Ct. Cl. 311.

Parol evidence to show the adoption or ratification of the alleged readjustment of salary by the postmaster-general in the absence of record evidence is inadmissible. Trask *v.* U. S., 27 Ct. Cl. 330.

48. U. S. *v.* McLean, 95 U. S. 750, 24 L. ed. 579; Trask *v.* U. S., 27 Ct. Cl. 330.

Mandamus to compel readjustment.— When the salary of a postmaster has been adjusted and fixed at the proper time, on a sworn statement of the revenues of the office furnished by such postmaster, a mandamus will not issue to compel a subsequent postmaster-general to readjust the salary so fixed by his predecessor. The adjustment of such salary is not merely a ministerial function, but requires skill and discretion. U. S. *v.* Key, 3 MacArthur (D. C.) 328.

A court cannot perform the executive act of making the readjustment if the postmaster-general neglects the perfromance of his duty. Trask *v.* U. S., 27 Ct. Cl. 330.

49. U. S. *v.* Ewing, 184 U. S. 140, 22 S. Ct. 480, 46 L. ed. 471 [*reversing* 35 Ct. Cl. 474]; U. S. *v.* Wilson, 144 U. S. 24, 12 S. Ct. 539, 36 L. ed. 332 [*affirming* 26 Ct. Cl. 186] (holding that on the raising of a post-office to the third class the postmaster is entitled to the increased salary from the first day of the quarter next following the order of the postmaster-general assigning the office to such class, and fixing his salary, and his rights cannot be affected by a subsequent order of the sixth auditor, or by the time of the issue of his commission from the president); U. S. *v.* McLean, 95 U. S. 750, 24 L. ed. 579.

Readjustment for expired terms.—Act of March 3, 1883 (22 U. S. St. at L. 600 [U. S. Comp. St. (1901) p. 2619]), providing for the readjustment of postmasters' salaries for expired terms, provides only for the adjustment of such salaries under the act of 1866, which was not retroactive; and therefore salaries for terms which expired prior to 1866 cannot be readjusted under the act of 1883. Trask *v.* Wanamaker, 21 D. C. 119.

50. U. S. *v.* McLean, 95 U. S. 750, 24 L. ed. 579; Peysert *v.* U. S., 41 Ct. Cl. 311.

51. 17 U. S. St. at L. 283, 295, c. 335, § 82.

statute is imperative " that the salaries of postmasters shall be readjusted by the postmaster-general once in two years," and the basis and method of readjustment are so clearly defined by statute that the duty of readjustment involves no discretion and is merely ministerial.[52]

(2) SPECIAL AND DISCRETIONARY. The second class of readjustments is special and discretionary. The power to readjust salaries " in special cases " is not confined to biennial periods, but is to be exercised by the postmaster-general " as much oftener as he may deem expedient." [53]

(VI) *WITHHOLDING COMMISSIONS.* The act of June 17, 1878,[54] authorizing the postmaster-general in his discretion, when satisfied that the postmaster has made a false return of business, to withhold commissions on such returns, " and to allow any compensation that under the circumstances he may deem reasonable," applies only to postmasters whose accounts are pending and unsettled, and gives the postmaster-general no authority to make an order reducing the compensation of a postmaster after his accounts have been settled and allowed.[55]

d. Liability — (I) *FOR DETENTION OF MAIL OR REFUSAL TO DELIVER.* Trover will lie in a state court against a postmaster for detaining or refusing without right to deliver a letter or newspaper from a party to whom it was sent.[56]

(II) *FOR LOST OR STOLEN MAIL.* A postmaster is not responsible for the default and misfeasance of his clerks or assistants, although appointed by him, and under his control, unless it be shown that the postmaster was negligent in not exercising proper care and prudence in the selection of suitable and competent persons to perform the duties of clerks or deputy assistants, or unless it be shown

52. U. S. *v.* Vilas, 124 U. S. 86, 8 S. Ct. 422, 31 L. ed. 29 (holding that this enactment did not impose on the postmaster-general a legal duty to readjust the salaries of postmasters oftener than once in two years); Fairchild *v.* U. S., 12 Ct. Cl. 226.

Based on quarterly returns.— A readjustment can be made only when there are quarterly returns for two years preceding on which it can be based. U. S. *v.* Vilas, 124 U. S. 86, 8 S. Ct. 422, 31 L. ed. 29.

Readjustment establishes salary for two years only.— U. S. *v.* Vilas, 124 U. S. 86, 8 S. Ct. 422, 31 L. ed. 29.

53. U. S. *v.* Vilas, 124 U. S. 86, 8 S. Ct. 422, 31 L. ed. 29; Fairchild *v.* U. S., 12 Ct. Cl. 226.

Discretion here is necessary to determine what is an extraordinary increase or decrease, and that discretion is confined to the postmaster-general. Fairchild *v.* U. S., 12 Ct. Cl. 226.

Decision not reviewable.— Under Act Cong. March 3, 1863 (12 U. S. St. at L. 702, c. 70, § 5), providing that whenever the presence of a large military force near a post-office makes an unusual increase in the business of the office, the postmaster-general shall make a special order allowing a proportionately increased compensation to the postmaster, the postmaster-general is the sole judge of the exigencies of each case, and his decision is not reëxaminable by any department of the government. U. S. *v.* Wright, 11 Wall. (U. S.) 648, 20 L. ed. 188.

Extraordinary increase or decrease in business.—A subsequent section of the statute (§ 84) contains a proviso " that in cases of an extraordinary increase or decrease in the business of any post-office, the Postmaster General may adjust the salary " so as to take effect from the beginning of a preceding instead of from the succeeding quarter. This proviso is manifestly a mere exception to the general requirement of the same section, that all changes of salary shall take effect subsequently to the readjustment. Fairchild *v.* U. S., 12 Ct. Cl. 226.

54. 20 U. S. St. at L. 141, c. 259, § 1.

55. Jaedicke *v.* U. S., 85 Fed. 372, 29 C. C. A. 199; U. S. *v.* Hutcheson, 39 Fed. 540, 2 L. R. A. 805.

56. Teal *v.* Felton, 12 How. (U. S.) 284, 13 L. ed. 990 [*affirming* 1 N. Y. 537, 49 Am. Dec. 352].

State courts have jurisdiction over all cases of trover, and the constitution of the United States does not abrogate their jurisdiction in this class of cases. Teal *v.* Felton, 12 How. (U. S.) 284, 13 L. ed. 990 [*affirming* 1 N. Y. 537, 49 Am. Dec. 352].

A postmaster, who assumes to charge letter postage on a newspaper, in consequence of an initial being on the wrapper thereof, does not act in a judicial capacity in such a sense as to protect him from an action for improperly detaining such newspaper, although no fraud or malice on his part be alleged or proved. Teall *v.* Felton, 1 N. Y. 537, 49 Am. Dec. 352.

Where a declaration charged a postmaster with unlawful refusal to deliver a letter, a new count, charging the same act to have been done by one duly sworn, whom defendant wrongfully permitted to have the care of the mail in his office, does not introduce a new cause of action. Bishop *v.* Williamson, 11 Me. 495.

that the postmaster himself was negligent in the duty resting upon him to properly superintend such clerks or assistants in the performance of the particular acts or duty, the doing of which or the omission to do which caused the loss and injury.[57] This exemption from liability is available to the postmaster only in cases where such clerks or subassistants are appointed in pursuance of some law expressly authorizing it, so that by virtue of the law and the appointment the appointees become in some sort public officers themselves, and if a postmaster employs a clerk or assistant independent of express authority, who is paid by him out of his own salary or means, he is liable for his default or misfeasance as any private person would be for the acts of his agent or employee. The doctrine *respondeat superior* applies in such cases.[58] So also if the loss be occasioned by the negligence of clerks who were not regularly appointed and sworn as his assistants, the postmaster will be responsible.[59] The burden of proof is upon him who alleges negligence to establish that fact.[60] He must also show that the loss was the direct consequence of the particular negligence proved.[61]

57. *Alabama.*— Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

Massachusetts.—Keenan *v.* Southworth, 110 Mass. 474, 14 Am. Rep. 613.

New York.— Wiggins *v.* Hathaway, 6 Barb. 632.

Pennsylvania.— Schroyer *v.* Lynch, 8 Watts 453.

South Carolina.— Bolan *v.* Williamson, 2 Bay 551. *Contra,* Coleman *v.* Frazier, 4 Rich. 146, 53 Am. Dec. 727; Bolan *v.* Williamson, 1 Brev. 181.

See 40 Cent. Dig. tit. "Post-Office," § 12.

Not liable as common carrier.— A postmaster's liability for moneys or letters received by him in his official capacity is not that of a common carrier, and proof that the letters containing money were delivered to him or his agent, in his presence, and by his direction, for registration, and of their loss, without evidence of negligence resulting in their loss, is insufficient to authorize a recovery against him. Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213; Schroyer *v.* Lynch, 8 Watts (Pa.) 453.

Form of action.— Where a postmaster loses a letter which he receives, containing money, through his want of ordinary care, he is not liable to an action for money had and received, unless he puts the money to his own use. Danforth *v.* Grant, 14 Vt. 283, 39 Am. Dec. 224.

Pleadings must be made up according to the case.— Where it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case, and his liability then will only result from his own neglect in not properly superintending the discharge of their duties in his office. Dunlop *v.* Munroe, 7 Cranch (U. S.) 242, 3 L. ed. 329.

Where issue is taken on the negligence of the postmaster himself, it is not competent to give in evidence the negligence of his assistants. Dunlop *v.* Munroe, 7 Cranch (U. S.) 242, 3 L. ed. 329.

No action against personal representatives. — Whether or not an action will lie against a postmaster in his lifetime for money feloniously taken out of a letter by one of his clerks, no action will lie therefor against his personal representatives after his death. Franklin *v.* Low, 1 Johns. (N. Y.) 396.

58. Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

Evidence of competency of clerk.— Where a postmaster has employed a clerk without express authority, in an action against him for the value of lost letters, evidence of the competency of his clerk is inadmissible, since the exemption from liability of the postmaster for the defaults of his clerks is available to the postmaster only in cases where such clerks are appointed under a law expressly authorizing it. Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

Presumption on appeal.— In an action against a postmaster for the value of the contents of registered letters alleged to have been lost, in the absence of any contrary showing on the record, the appellate court will, to sustain the rulings of the court below, presume that his clerk or assistant is employed without express authority. Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

59. Bishop *v.* Williamson, 11 Me. 495; Christy *v.* Smith, 23 Vt. 663.

60. Wiggins *v.* Hathaway, 6 Barb. (N. Y.) 632.

61. Wiggins *v.* Hathaway, 6 Barb. (N. Y.) 632; Dunlop *v.* Munroe, 7 Cranch (U. S.) 242, 3 L. ed. 329. *Contra,* Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213; Christy *v.* Smith, 23 Vt. 663, holding that under a declaration against a postmaster, which alleges that he carelessly and negligently lost a letter, which was received at his office and was directed to plaintiff, any general proof of negligence, tending to show that the loss was occasioned thereby, and which satisfies the jury that it was so occasioned, is sufficient to sustain the issue for plaintiff.

Evidence of other acts of negligence.— In an action on the case against a postmaster for negligence, by which a letter of plaintiff was lost, evidence of specific acts of negligence in relation to other letters is not admissible, unless such acts were in their nature continuing. Wentworth *v.* Smith, 44 N. H. 419, 82 Am. Dec. 228.

(III) *On Official Bonds* — (A) *Extent of Liability* — (1) In General. The legal effect of a postmaster's bond is that he and his sureties will pay the actual loss which the government may sustain by any failure to discharge his duties faithfully.[62] The statute [63] requires that the bond of a postmaster at a money-order post-office "shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business." [64] Such additional condition is merely cumulative, however, and its omission does not render the obligation of no effect as to the money-order business.[65]

(2) Term Covered. The sureties on a postmaster's bond are liable for his non-compliance with subsequent as well as past laws or orders till his official term expires, if the orders be such as are justified by law,[66] but they are not liable for a default occurring before the bond was given.[67]

(B) *Discharge From Liability* — (1) By Indulgence or Forbearance. Mere indulgence or forbearance on the part of the government toward a postmaster who is in default, in the absence of fraud, will not discharge his sureties

Evidence of exposed manner in which office kept.— In an action against a postmaster for negligence, by means of which a money letter, addressed to plaintiff, and proved to have reached his office, was there lost, evidence of the exposed manner in which the office was kept is admissible to go to the jury. Ford *v.* Parker, 4 Ohio St. 576.

Evidence that the clerk or assistant registered the letters is competent. Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

62. Jaedicke *v.* U. S., 85 Fed. 372, 29 C. C. A. 199.

Loss of registered package.— A postmaster is liable on his bonds for the loss of a registered package, stolen after its delivery to him, irrespective of his negligence. U. S. *v.* Griswold, 9 Ariz. 304, 80 Pac. 317. The United States may recover the full value of such a registered package, notwithstanding U. S. Rev. St. (1878) § 3926, provides that the sender is entitled to be indemnified to the extent of ten dollars, such recovery being only for the benefit of the sender. U. S. *v.* Griswold, 8 Ariz. 453, 76 Pac. 596.

Postage stamps, etc., not paid for.— Act March 3, 1851 (9 U. S. St. at L. 587, 589, c. 20, § 3), which provides "that it shall be the duty of the Postmaster-General to provide and furnish to all deputy postmasters, and to all other persons applying and paying therefor, suitable postage stamps," etc., authorizes the postmaster-general to deliver postage stamps to a deputy postmaster without prepayment; and the sureties on the official bond of a deputy postmaster are liable for postage stamps so received by their principal. U. S. *v.* Mason, 26 Fed. Cas. No. 15,737, 2 Bond 183.

Rebate on rent and rent of sublet portions of office.— Where a postmaster rented a post-office for the government at one thousand dollars per year, and received a secret rebate of one hundred and fifty dollars from his landlord, and also sublet portions of the space so rented for a news-stand and a confectionary stand, and received rent therefor, he and the sureties on his bond are liable to the government for such rebate and rent. U. S. *v.* Saylor, 31 Fed. 543.

Robbery of mail carrier.— To assist the government in safely conveying, through the mails, the public money which from time to time comes into the postmaster's hands, constitutes an essential element of the duties and trusts confided to him, and if he intercepts and robs a mail carrier, his sureties are liable on his bond. U. S. *v.* Jones, 36 Fed. 759.

Neglect to safely keep moneys collected.— A postmaster is the agent of the postmaster-general, and, although the latter is not by law liable for the misconduct of the former, he can employ him as agent to keep safely the money collected by himself or other postmasters near; and the sureties of the postmaster are liable on his official bond to the extent of its penalty for any neglect as such agent. Boody *v.* U. S., 3 Fed. Cas. No. 1,636, 1 Woodb. & M. 150.

63. U. S. Rev. St. (1878) § 3834 [U. S. Comp. St. (1901) p. 2610].

64. Bryan *v.* U. S., 90 Fed. 473, 33 C. C. A. 617, 53 L. R. A. 218, holding that a postmaster's bond, conditioned for the payment of all moneys that shall "come into his hands from . . . money orders issued by him," covers moneys received and embezzled by a money-order clerk, since the words "come into his hands" are equivalent to "come into his official custody."

Where a postmaster negligently delivers blank orders to a stranger, and they are filled up, the name of the postmaster forged thereon, and they are paid by the offices on which they are drawn, and in due course charged to the account of such postmaster in the books of the department, it becomes his duty to account for such orders, and on his refusal to do so the amount paid thereon may be recovered in an action on his bond. U. S. *v.* Barker, 100 Fed. 34, 40 C. C. A. 264.

65. Weeks *v.* U. S., 2 Indian Terr. 162, 48 S. W. 1036; Grady *v.* U. S., 98 Fed. 238, 39 C. C. A. 42.

66. Boody *v.* U. S., 3 Fed. Cas. No. 1,636, 1 Woodb. & M. 150.

67. U. S. *v.* Le Baron, 19 How. (U. S.) 73, 15 L. ed. 525; U. S. *v.* Van Steinberg, 77 Fed. 860.

from their obligations on his bond.[68] Nor will the fact that the government continued a postmaster in office after discovery of a defalcation, and delayed to disclose the same, relieve his sureties from liability for subsequent defalcations.[69]

(2) By Delay in Bringing Suit. Before the act of March 3, 1825,[70] expressly providing therefor, neither a postmaster nor his sureties were discharged from liability on his bond by the postmaster-general's neglect to sue, within the time prescribed by law, for balances due from the postmaster.[71] Under this act the sureties on a postmaster's bond are discharged from all liability by two years' delay to bring suit after a default in not paying, when required by law, a quarterly balance found due by the auditor.[72]

(3) By Increase of Responsibility. An act of congress increasing rates of postage, and consequently the responsibility of the postmaster's sureties, will not discharge them.[73]

(4) By Order to Retain Balances. The order of the postmaster-general to the postmaster not to remit the money he may receive, but to retain it to answer his drafts, does not discharge the sureties.[74]

(5) By Giving New Bond. The giving a new official bond by a postmaster does not discharge his sureties under the old bond for the past or subsequent defaults of his principal.[75]

(6) By Accident or Misadventure. A postmaster is not a mere bailee for hire of the funds committed to his charge as an officer, and he is not released from liability merely because he uses the degree of care exacted from a bailee of that

68. U. S. *v.* Wright, 28 Fed. Cas. No. 16,776, 1 N. J. L. J. 4.

Possession of office by special agent.— The possession of the office of a postmaster by a special agent of the department for one day, while adjusting his accounts, does not release his sureties from all subsequent liability under U. S. Rev. St. (1878) § 3836 [U. S. Comp. St. (1901) p. 2611], which provides therefor when a special agent takes charge till a vacancy can be regularly filled, that section applying only to cases where the office is vacant. U. S. *v.* Wright, 28 Fed. Cas. No. 16,776.

Apparent acquiescence of government.— It is no defense to claim against a postmaster and his sureties, for rent received from the subtenants of a part of the post-office, that the special agents of the department had frequently visited the office, seen the subtenants in possession, and made no claim for rent, it appearing that the department had no knowledge of these facts. U. S. *v.* Saylor, 31 Fed. 543.

69. Jones *v.* U. S., 18 Wall. (U. S.) 662, 21 L. ed. 867; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678; U. S. *v.* Wright, 28 Fed. Cas. No. 16,776.

70. U. S. St. at L. 102, 103, c. 64, § 3.

71. Dox *v.* U. S. Postmaster-Gen., 1 Pet. (U. S.) 318, 7 L. ed. 160; Locke *v.* Postmaster-Gen., 15 Fed. Cas. No. 8,441, 3 Mason 446; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 347.

72. Postmaster-Gen. *v.* Fennell, 19 Fed. Cas. No. 11,307, 1 McLean 217; Roddy *v.* U. S., 20 Fed. Cas. No. 11,990, 2 Pittsb. (Pa.) 374, 3 Wall. Jr. 358; U. S. *v.* Scars, 27 Fed. Cas. No. 16,246, 1 Code Rep. (N. Y.) 128.

Exception to rule.— The act of congress of March 3, 1825 (4 U. S. St. at L. 102, c. 64, § 3), which exonerates the sureties of a postmaster if balances are not sued for within two years after they occur, does not apply to a case where, by the mode of keeping the account, on legal principles, the balance due from the postmaster is thrown on the last quarter. Jones *v.* U. S., 7 How. (U. S.) 681, 12 L. ed. 870; Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106; U. S. *v.* Kershner, 26 Fed. Cas. No. 15,527, 1 Bond 432.

Computation of time.—In determining when the sureties are discharged under the statute by failure to bring suit for two years after a default, the defalcation of the postmaster is to be counted from the time the law required the moneys to be paid over, to wit, at the end of every three months, and not from the time he failed to pay the draft of the department. Postmaster-Gen. *v.* Fennell, 19 Fed. Cas. No. 11,307, 1 McLean 217; U. S. *v.* Scars, 27 Fed. Cas. No. 16,246, 1 Code Rep. (N. Y.) 128.

73. Postmaster-Gen. *v.* Munger, 19 Fed. Cas. No. 11,309, 2 Paine 189.

It would be otherwise if the act of congress enlarged the powers of the postmaster, or superadded new duties, whereby he was made the receiver of other moneys than for postages. Postmaster-Gen. *v.* Munger, 19 Fed. Cas. No. 11,309, 2 Paine 189.

74. Locke *v.* Postmaster-Gen., 15 Fed. Cas. No. 8,441, 3 Mason 446; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678.

75. Postmaster-Gen. *v.* Munger, 19 Fed. Cas. No. 11,309, 2 Paine 189; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678.

character, because he has not been negligent, nor because he has been robbed or the property otherwise stolen from him.[76]

(IV) *ACTIONS TO ENFORCE LIABILITY* — (A) *Who May Sue.* In the absence of statute, a private person cannot sue on a postmaster's official bond for moneys coming to him as such, and lost through his negligence or default.[77]

(B) *Pleading.* In an action on a postmaster's bond to recover the value of registered mail matter negligently lost by him, it is not necessary that the pleadings state that the suit is for the use of the sender of the package.[78] A plea of counter-claim for certain extra services and expenses incurred by a postmaster under the acts of June 22, 1854, and July 1, 1864,[79] should show that the office kept by defendant was within the act authorizing an allowance on such accounts.[80]

(C) *Defenses and Counter-Claims.* In an action on a postmaster's bond, defendant may, among the ordinary defenses to such actions,[81] plead a counter-claim, if it appear from such plea that the items thereof have been duly presented to the proper department for allowance, and rejected.[82] Voluntary payment to a creditor of the government cannot be set up as a defense.[83]

(D) *Evidence.* The usual rules of evidence,[84] including its admissibility,[85] as well as its weight and sufficiency,[86] obtain in actions upon a postmaster's bond.

76. U. S. *v.* Fordyce, 122 Fed. 962, holding that a postmaster is not relieved from liability by the fact that the United States furnished the building and the safe therein, both of which he was required to use, and from which the property was taken by the burglars. U. S. *v.* Morrison, 26 Fed. Cas. No. 15,817, Chase 521.

The only exceptions are those provided for by the acts of congress, being losses occasioned by the Confederate forces or guerillas, or other armed forces. U. S. *v.* Morrison, 26 Fed. Cas. No. 15,817, Chase 521, holding that no surrender of the property of the post-office department to the government of the Confederate states, under any other than the coercion of armed force, will excuse a postmaster from liability on his bond.

77. U. S. *v.* Griswold, 8 Ariz. 453, 76 Pac. 596; Idaho Gold Reduction Co. *v.* Croghan, 6 Ida. 471, 56 Pac. 164.

78. U. S. *v.* Griswold, 8 Ariz. 453, 76 Pac. 596, it being sufficient if it appears that the United States is suing to recover the loss suffered by the sender.

79. 10 U. S. St. at L. 298, 299; 13 U. S. St. at L. 335.

80. U. S. *v.* Davis, 25 Fed. Cas. No. 14,927, Deady 294.

81. See BONDS, 5 Cyc. 816.

Discharge see *supra*, I, C, 3, d, (III), (B).

82. U. S. *v.* Davis, 25 Fed. Cas. No. 14,927, Deady 294. See also U. S. *v.* Roberts, 9 How. (U. S.) 501, 13 L. ed. 234.

83. U. S. *v.* Keehler, 9 Wall. (U. S.) 83, 19 L. ed. 574.

84. See BONDS, 5 Cyc. 842 *et seq.*; EVIDENCE, 16 Cyc. 847 *et seq.*

Actual receipt of money.—It is not essential to support an action on the bond of a postmaster for failure to account for money orders which were made upon blank forms intrusted to him for his use, and which have been paid by the offices on which they were drawn, and in due course charged to his account on the books of the department, that it should be proved that he actually received the money therefor. U. S. *v.* Barker, 100 Fed. 34, 40 C. C. A. 264.

85. See BONDS, 5 Cyc. 845 *et seq.*; EVIDENCE, 16 Cyc. 847 *et seq.*

Admissibility.— In an action against a postmaster and his bondsmen to recover for shortage in his accounts, on a certificate of the postmaster-general, withholding certain commissions because of alleged false returns discovered on a readjustment of defendant's accounts, it is error to exclude testimony that defendant had a full settlement with the government when he retired from office. U. S. *v.* Miller, 8 Utah 29, 28 Pac. 957. Evidence of what took place in the office after it was turned over to his successor is inadmissible against him. Nagle *v.* U. S., 145 Fed. 302, 76 C. C. A. 181.

86. See BONDS, 5 Cyc. 847; EVIDENCE, 16 Cyc. 753 *et seq.*

Weight and sufficiency.— An order of the postmaster-general, reciting that he is satisfied that a certain postmaster has made false returns, and fixing a compensation which he deems reasonable, is not conclusive on the postmaster and his sureties in an action on his official bond to recover moneys alleged to have been illegally withheld according to such false returns, but such order is only *prima facie* evidence, which defendants may contradict by other evidence. U. S. *v.* Dumas, 149 U. S. 278, 13 S. Ct. 872, 37 L. ed. 734; Jaedicke *v.* U. S., 85 Fed. 372, 29 C. C. A. 199; U. S. *v.* Jaedicke, 73 Fed. 100. After an account of a postmaster, regular on its face, has been adjusted and allowed by the proper accounting officers, and fully paid, such officers cannot, after the term of office has expired, evolve *ex parte* a balance in favor of the government, founded solely on a general and vague allegation of fraud, so as to make such balance *prima facie* evidence against the postmaster and his sureties. Such allegations must be specific, and

4. Deputies and Assistant Postmasters. It has been held that an assistant postmaster is not an officer of the government, but a mere servant or agent of the postmaster,[87] and therefore he is not liable for his negligence.[88] The better rule seems to be, however, that an assistant postmaster is liable for losses and injuries occasioned by his own default or negligence.[89]

5. Clerks in Post-Offices. Clerks are only bound to use such care and diligence in the discharge of their duties as a prudent man exercises in his own affairs.[90] The official position of a clerk in a post-office must be determined by the roster of the office, approved by the postmaster-general.[91] The legal right of a clerk in a post-office to the salary of such office depends upon his being *de jure* an officer holding or entitled to hold the office.[92]

6. Letter Carriers — a. Appointment and Removal. Power is conferred by law upon the postmaster-general to employ carriers so far as the public convenience may require.[93] Incident to the power of appointment is the power to remove outright,[94] or to reduce carriers to the list of substitutes.[95] Notwithstanding a rule exists in the post-office department that no carrier shall be removed except for cause and on written charges, there is no provision of law which gives a carrier a permanent position, and the removal of a carrier is beyond review by the courts.[96] Nor can they interfere with an order of the post-office department reducing a letter carrier to the substitute roll.[97]

b. Duties. The duty of collecting letters and packages to be registered, imposed on letter carriers by the order of the postmaster-general of December 5, 1899, is

sustained by competent evidence. U. S. *v.* Miller, 8 Utah 29, 28 Pac. 957; U. S. *v.* Case, 49 Fed. 270; U. S. *v.* Hutcheson, 39 Fed. 540, 2 L. R. A. 805; U. S. *v.* Hilliard, 26 Fed. Cas. No. 15,368, 3 McLean 324.

87. Coleman *v.* Frazier, 4 Rich. (S. C.) 146, 53 Am. Dec. 727.

88. Bolan *v.* Williamson, 1 Brev. (S. C.) 181.

89. Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213; Whitfeld *v.* Le Despencer, Cowp. 754; Lane *v.* Cotton, 1 Ld. Raym. 646, 91 Eng. Reprint 1332.

Assistant liable for own negligence.— Action will lie against a deputy postmaster in favor of one sustaining a loss by his negligence in office. Maxwell *v.* McIlroy, 2 Bibb (Ky.) 211.

Diligence required.— A deputy postmaster is only bound to use such care and diligence in the discharge of his duties as a prudent man exercises in his own affairs. Dunlop *v.* Munroe, 8 Fed. Cas. No. 4,167, 1 Cranch C. C. 536 [*affirmed* in 7 Cranch 242, 3 L. ed. 329].

The instructions of the postmaster-general to the deputy postmasters may be given in evidence in an action on the case against a deputy postmaster for negligence. Dunlop *v.* Munroe, 8 Fed. Cas. No. 4,167, 1 Cranch C. C. 536 [*affirmed* in 7 Cranch 242, 3 L. ed. 329].

90. Dunlop *v.* Munroe, 8 Fed. Cas. No. 4,167, 1 Cranch C. C. 536 [*affirmed* in 7 Cranch 242, 3 L. ed. 329].

Sending registered letter by unregistered mail.— Where a post-office clerk received a letter containing money to be sent as a registered letter, and discovering that the letter could not be so sent, by direction of his superior, the chief clerk sent the letter by mail unregistered, and it was lost, both clerks were liable for the value of the letter. Fitzgerald *v.* Burrill, 106 Mass. 446.

91. Barrett *v.* U. S., 37 Ct. Cl. 44 (holding that where a clerk was designated on the roster as "money order and stamp clerk, salary allowed $600," the postmaster of the office cannot make him chief clerk; and his performance of the duties of chief clerk will not entitle him to the salary of that office); Belcher *v.* U. S., 34 Ct. Cl. 400.

92. Belcher *v.* U. S., 34 Ct. Ct. 400.

Discretion in fixing compensation.— Under the act of March 2, 1889 (25 U. S. St. at L. 841 [U. S. Comp. St. (1901) p. 2626]), enacting that superintendents of delivery are to receive from one thousand three hundred dollars to not exceeding two thousand seven hundred dollars, and "not exceeding forty-five per centum of the salary of the postmaster," it was within the discretion of the postmaster-general to fix the compensation of all superintendents of delivery at less than forty-five per cent of the postmaster's salaries, but at not less than one thousand three hundred dollars. Belcher *v.* U. S., 34 Ct. Cl. 400.

93. Corcoran *v.* U. S., 38 Ct. Cl. 341; Dearie *v.* U. S., 36 Ct. Cl. 5.

94. Corcoran *v.* U. S., 38 Ct. Cl. 341; Dearie *v.* U. S., 36 Ct. Cl. 5.

95. Dearie *v.* U. S., 36 Ct. Cl. 5, holding that where the postmaster-general has power to remove, the reduction of a carrier to the substitute roll is a modification of the power for the benefit of the carrier, and he cannot complain.

96. Dearie *v.* U. S., 36 Ct. Cl. 5.

97. Dearie *v.* U. S., 36 Ct. Cl. 5, holding that in the absence of proof to the contrary, courts must assume that the discretion of

within the scope of the office of the letter carrier, and germane to the previous duties pertaining to it.[98]

c. Compensation — (i) *In General.* The right of a letter carrier to salary depends upon appointment, which is wholly a matter of statute.[99]

(ii) *As a Substitute.* Where a letter carrier accepts the terms of an order which takes his name from the roll of regular letter carriers and places it on the roll of substitutes, without objection or protest, he thereby assents to the arrangement, and cannot recover the compensation of a regular carrier while paid for his services as a substitute.[1] A substitute cannot recover for the time when he is required to report and hold himself in readiness for assignment to service.[2]

(iii) *During Suspension.* When a letter carrier is suspended, nothing being said as to deprivation of pay, and afterward restored to duty, he is entitled to his pay during the period of suspension.[3]

(iv) *For Extra Service* — (a) *In General.* Under the letter carriers' eight-hour law,[4] a letter carrier is entitled to extra pay for work in excess of eight hours.[5] Carriers are not entitled to extra pay unless they are "employed," that is, engaged in active postal duties,[6] and this cannot be except with the knowledge and consent of the postmaster.[7]

the postmaster-general in reducing the number of carriers is legally exercised.

98. National Surety Co. *v.* U. S., 129 Fed. 70, 63 C. C. A. 512.

99. Rush *v.* U. S., 33 Ct. Cl. 417.

Two things are essential to deprive an officer of his statutory compensation: (1) That the power so to do must be lodged, directly or by necessary implication, in some official hands; (2) that it must be exercised actually and expressly, and not indirectly or by implication. Steele *v.* U. S., 40 Ct. Cl. 403; Corcoran *v.* U. S., 38 Ct. Cl. 341.

1. Dearie *v.* U. S., 36 Ct. Cl. 5.

2. Dearie *v.* U. S., 36 Ct. Cl. 5.

3. Steele *v.* U. S., 40 Ct. Cl. 403; Corcoran *v.* U. S., 38 Ct. Cl. 341.

4. 25 U. S. St. at L. 157 [U. S. Comp. St. (1901) p. 2637].

5. Rush *v.* U. S., 33 Ct. Cl. 417 (holding that a postmaster has no authority to increase or diminish the number of hours constituting a day's work, nor to employ a carrier to work more than eight hours a day, except as the same may be required by the public service); Laurey *v.* U. S., 32 Ct. Cl. 259 (holding that where letter carriers are required by the postmaster to perform clerical services in the post-office, they may recover for overtime under the act May 24, 1888, notwithstanding a regulation of the post-office department providing that carriers shall not be employed as clerks).

Nature of employment.— It is wholly immaterial whether such excess is employed in duties strictly pertaining to carrying letters, or in other work in the post-office, which is authorized by the regulations of the department, and required by the postmaster. U. S. *v.* Post, 148 U. S. 124, 13 S. Ct. 567, 37 L. ed. 392 [*affirming* 27 Ct. Cl. 244].

6. U. S. *v.* Post, 148 U. S. 124, 13 S. Ct. 567, 37 L. ed. 392 [*affirming* 27 Ct. Cl. 244]; Seville *v.* U. S., 33 Ct. Cl. 495; Rush *v.* U. S., 33 Ct. Cl. 417.

Intervals between trips.— Under the act of May 24, 1888, which provides that letter carriers employed more than eight hours per day shall be paid extra therefor, a carrier is not entitled to extra pay for the short intervals, or "swings," between his trips, when not actually employed in work, and not required to remain in or about the post-office. U. S. *v.* McCrory, 119 Fed. 861, 56 C. C. A. 373; U. S. *v.* Langston, 85 Fed. 613, 29 C. C. A. 379; Franklin *v.* U. S., 34 Ct. Cl. 526.

Set-off against claim for overtime.— The government cannot set off against a claim for extra hours' work on certain days a deficit of hours occurring because the carrier worked less than eight hours on Sundays and legal holidays. U. S. *v.* Gates, 148 U. S. 134, 13 S. Ct. 570, 37 L. ed. 396.

A delivery carrier's service may be made to begin when he arrives at the post-office, and to end when he completes his delivery. Seville *v.* U. S., 33 Ct. Cl. 495.

A collecting carrier's service may be made to begin when he reaches the first mail box on each tour, and to end when he delivers such mail matter at the post-office. Seville *v.* U. S., 33 Ct. Cl. 495.

7. Seville *v.* U. S., 33 Ct. Cl. 495 (holding that knowledge and consent of the postmaster to the working of overtime by a carrier cannot be presumed or implied, in the face of instructions from the post-office department, or the postmaster, of which the carrier has notice); Rush *v.* U. S., 33 Ct. Cl. 417.

Contract of employment presumed from performance of duties.— If a carrier in good faith performs postal duties more than eight hours a day with the knowledge and consent of the postmaster, a contract of employment will be presumed. Rush *v.* U. S., 33 Ct. Cl. 417.

Subordinates have no authority to require overtime from letter carriers without the consent of the postmaster (Seville *v.* U. S., 33 Ct. Cl. 495), but where overtime is made by letter carriers under the supervision of subordinates, who report the facts to the postmaster, and he does nothing, his consent

(B) *Waiver.* The compensation of a letter carrier for services in excess of eight hours a day is fixed by statute, and not by contract, and a postmaster has no authority to increase or diminish it, or to take it away, even though the carriers consent to serve without compensation.[8]

d. Bonds. The statute[9] provides that every letter carrier shall be required to give a bond conditioned for the faithful discharge of the duties and trusts imposed upon him.[10]

7. Railway Postal Clerks.[11] The statutes authorizing and fixing the compensation of postal railway clerks constitute an express contract; and the postmaster-general cannot, by the terms of an appointment, either detract from or enlarge the compensation.[12] The expenses of a railway postal clerk necessarily incurred upon the line of his route away from home must be borne by himself.[13]

D. Postage. The rates of postage are fixed by statute.[14] "Sea postage" is the difference reached by subtracting "inland" postage from the total postage.[15]

E. Postage Stamps, Stamped Envelopes, and Postal Cards. The postmaster-general is required by law[16] to provide suitable letter and newspaper envelopes, to be known as stamped envelopes, and to sell the same to the public, as nearly as may be, at the cost of procuring them, with the addition of the value of the postage stamps impressed thereon.[17]

must be presumed (Chicago Letter Carriers *v.* U. S., 34 Ct. Cl. 531).

8. Rush *v.* U. S., 35 Ct. Cl. 223.

Extra pay is a measure of compensation for services rendered, and is designed to secure efficiency in the public service; to diminish or take it away is contrary to public policy. Rush *v.* U. S., 35 Ct. Cl. 223.

Service without compensation.— The postmaster cannot require extra service without compensation. Laurey *v.* U. S., 32 Ct. Cl. 259.

9. U. S. Rev. St. (1878) § 3870 [U. S. Comp. St. (1901) p. 2638].

10. National Surety Co. *v.* U. S., 129 Fed. 70, 63 C. C. A. 512.

Duties contemplated.—All duties prescribed by subsequent legislation or regulation which are of the same kind as those previously pertaining to the office, which are within its scope and naturally belong to its business, are within the contemplation and intention of the parties to such a bond. National Surety Co. *v.* U. S., 129 Fed. 70, 63 C. C. A. 512, holding that the duty of collecting letters and packages to be registered which were imposed on letter carriers by the order of the post-office department during the term of the bond is within the scope of the office of a letter carrier and germane to the previous duties pertaining to it.

Amount recoverable.— The United States may maintain an action against the surety on the bond of a letter carrier who has stolen letters to be registered for the value of the contents of the letters, where the contents of no single letter exceed ten dollars in value, although the owners of the letters have made no claim against the government for indemnity and nothing has been paid to them. National Surety Co. *v.* U. S., 129 Fed. 70, 63 C. C. A. 512.

11. Relation as passenger of postal clerks traveling on trains see Carriers, 6 Cyc. 542 note 46.

12. Hartman *v.* U. S., 40 Ct. Cl. 133. But see Gleeson *v.* U. S., 23 Ct. Cl. 207; Gleeson *v.* U. S., 22 Ct. Cl. 82 [*reversed* on other grounds in 124 U. S. 255, 8 S. Ct. 502, 31 L. ed. 421].

13. Parshall *v.* U. S., 147 Fed. 433, 77 C. C. A. 457; Hartman *v.* U. S., 40 Ct. Cl. 133, holding that the appropriation acts appropriating for actual and necessary expenses of general superintendents and "railway postal clerks, while actually traveling on business of the department and away from their several designated headquarters" by their own language exclude railway postal clerks traveling in the discharge of their ordinary duty.

Not employee traveling under direction of postmaster-general.—A railway postal clerk is not "an officer, clerk, or employee" traveling "under the order or direction of the postmaster-general," within the intent of the Post-Office Regulation, § 11. That regulation refers only to officers detailed for special duty. Hartman *v.* U. S., 40 Ct. Cl. 133.

14. See U. S. Rev. St. (1878) § 3896 *et seq.* [U. S. Comp. St. (1901) p. 2662 *et seq.*].

Constitutionality of law increasing rate of postage see Statutes.

Writing or memorandum on newspaper.— A single letter or initial on the wrapper of a newspaper is not a writing or memorandum, within Act Cong. March 3, 1825 (4 U. S. St. at L. 102, 105, 111, c. 64, §§ 13, 30), that will subject the newspaper to letter postage; and the postmaster-general has no discretionary authority to order letter postage to be charged on newspapers bearing such a mark or sign. Teal *v.* Felton, 12 How. (U. S.) 284, 13 L. ed. 990.

15. Pacific Mail Steamship Co. *v.* U. S., 28 Ct. Cl. 1.

16. U. S. Rev. St. (1878) § 3915 [U. S. Comp. St. (1901) p. 2677].

17. These stamped envelopes are furnished by private parties under contract with the

F. Money Orders. A money order is an order for a specified sum of money, not less than one cent or greater than fifty dollars, made out at a money-order office, on a blank form prescribed by law and the post-office regulations, and payable at some other money-order office.[18] More than one indorsement of a money order renders the same invalid and not payable.[19]

G. Disposition of Postal Revenues and Funds.[20] The act of 1836[21] requires the revenues of the post-office department to be paid into the treasury of the United States, and the money disbursed to be drawn therefrom. Each payment need not be carried in by a separate warrant, but they may be carried in quarterly by large "covering warrants."[22]

II. Mailable Matter,[23] Transmission, and Delivery of Mail.

A. In General — 1. Exclusion of Matter From Mails — a. In General. The constitutional power of congress to establish post-offices and post-roads embraces

post-office department. See Plimpton Mfg. Co. *v.* U. S., 15 Ct. Cl. 14.

Failure to supply government on time.— While a company was getting ready to furnish envelopes, the post-office department was obliged to purchase them of a third party at a higher rate than that at which the company's contract bound it to supply them; these, however, being sold to the public, under U. S. Rev. St. (1878) § 3915 [U. S. Comp. St. (1901) p. 2677], at cost, the damage was sustained by the public, and not by the department, and the department could not set up the excess of cost as a counterclaim. Plimpton Mfg. Co. *v.* U. S., 15 Ct. Cl. 14.

18. U. S. *v.* Long, 30 Fed. 678, 679.

19. Moore *v.* Skyles, 33 Mont. 135, 82 Pac. 799, 114 Am. St. Rep. 801, 3 L. R. A. N. S. 136; U. S. Rev. St. (1878) § 4037 [U. S. Comp. St. (1901) p. 2747].

20. **Property stolen from mails.**— The postmaster-general has the exclusive right to the custody of money or other property stolen from the mails and which comes into the possession of any officer of the United States or other person, and the exclusive jurisdiction to determine who are the rightful owners and to distribute it among them. 9 U. S. St. at L. 147, c. 33, § 2; Laws *v.* Burt, 129 Mass. 202, holding that this statute applies to the proceeds of such moneys.

21. 5 U. S. St. at L. 80, c. 270, § 1.

22. Boody *v.* U. S., 3 Fed. Cas. No. 1,636, 1 Woodb. & M. 150.

These quarterly returns consist, on the debit side, of the gross amount received for postages during the quarter; and on the credit side are entered the commissions of the postmaster, the incidental expenses, etc., which being deducted from the amount on the debit side, shows the amount due by the postmaster at the close of the quarter. And this balance is stated by the postmaster in his return. Lawrence *v.* U. S., 15 Fed. Cas. No. 8,145, 2 McLean 581.

Deposit of receipts during quarter.—A postmaster is not bound to keep the money received for postage distinct from his own, nor to deposit it specifically in the name of the United States. Trafton *v.* U. S., 24 Fed. Cas. No. 14,135, 3 Story 646.

Deposit in the joint names of the postmaster and his assistant does not make them jointly responsible for the same to the government. Trafton *v.* U. S., 24 Fed. Cas. No. 14,135, 3 Story 646.

23. **"Mail."**— The carriage of letters, whether applied to the bag into which they are put, the coach or vehicle by means of which they are transported, or any other means for their carriage and delivery by public authority (Wynen *v.* Schappert, 6 Daly (N. Y.) 558, 560, 55 How. Pr. 156); a portable receptacle in which letters or packets of written or printed sheets are conveyed by post to an appointed station (U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541); a bag, valise, or portmanteau used in the conveyance of letters, papers, packets, etc., by any person acting under the authority of the postmaster-general from one post-office to another (U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78, 105); the whole body of matter transported by the postal agents, or any letter or package forming a component part of it (U. S. *v.* Inabnet, 41 Fed. 130, 131; U. S. *v.* Marselis, 26 Fed. Cas. No. 15,724, 2 Blatchf. 108, 110).

"Mailed."— A word usually employed to designate the placing of letters or parcels in a post-office, to be delivered under the public authority (National Butchers', etc., Bank *v.* De Groot, 43 N. Y. Super. Ct. 341, 344); or the depositing of the same in a street letter box (Casco Nat. Bank *v.* Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319). Properly preparing a letter for transmission by the servants of the postal department, and putting it in the custody of the officer charged with the duty of forwarding the mail. Pier *v.* Heinrichshoffen, 67 Mo. 163, 169, 29 Am. Rep. 501; Goucher *v.* Carthage Novelty Co., 116 Mo. App. 99, 102, 91 S. W. 447; Reynolds *v.* Maryland Casualty Co., 30 Pa. Super. Ct. 456, 459. A letter is properly mailed when addressed, stamped, and deposited in a proper place for the receipt of mail. Ward *v.* D. A. Morr Transfer, etc., Co., 119 Mo. App. 83, 88, 95 S. W. 964.

"Mail matter."— This term includes letters, packets, etc., received for transmission, and to be transmitted by post to the person to whom such matter is directed. U. S. *v.*

the regulation of the entire postal system, and includes as a necessary incident the right to determine what may be carried in the mails, and what shall not be, and to impose penalties for the violation of its regulations to be enforced through the courts.[24] The use of the postal service of the United States is not a matter of right, but of privilege, limited by the statutes declaring certain classes of matter to be non-mailable,[25] and congress has power to confer authority on the postmaster-general to forbid delivery of registered letters or payment of money orders to a citizen or corporation found by him to be using the mails for fraudulent purposes, but not to deprive them of the ordinary use of the mails.[26] Such a finding cannot be reviewed by the courts in so far as it involves questions of fact, nor unless a plain error of law is shown.[27]

b. How Enforced. Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter,[28] they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties

Huggett, 40 Fed. 636, 641; U. S. *v.* Rapp, 30 Fed. 818, 820.

"Mismails" see 27 Cyc. 807.

24. *Ex p.* Rapier, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93; *In re* Jackson, 96 U. S. 727, 24 L. ed. 877; Missouri Drug Co. *v.* Wyman, 129 Fed. 623; U. S. *v.* Loring, 91 Fed. 881.

Object of exclusion.— In excluding various articles from the mail, the object of congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. *Ex p.* Jackson, 96 U. S. 727, 24 L. ed. 877.

No distinction between mala in se and mala prohibita.— With respect to this power no distinction can be made between *mala in se* and *mala prohibita*, and the question as to what should be excluded must be left to congress, in the exercise of a sound discretion. *Ex p.* Rapier, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93.

25. Dauphin *v.* Key, MacArthur & M. (D. C.) 203; People's U. S. Bank *v.* Gilson, 140 Fed. 1; Missouri Drug Co. *v.* Wyman, 129 Fed. 623.

For lawful purposes, however, a citizen of the United States has a property right in the use of the mails of which he cannot be deprived without due process of law; hence congress has no power to confer authority on the head of the postal department, upon a determination on evidence satisfactory to him that a citizen is using mails for the purpose of conducting a lottery or other fraudulent scheme, to issue an order instructing a postmaster to return or send to the dead-letter office all mail matter coming to his office directed to such person, without regard to whether such matter is or is not non-mailable. Hoover *v.* McChesney, 81 Fed. 472.

26. Dauphin *v.* Key, MacArthur & M. (D. C.) 203; Fairfield Floral Co. *v.* Bradbury, 89 Fed. 393; Hoover *v.* McChesney, 81 Fed. 472; Enterprise Sav. Assoc. *v.* Zumstein, 67 Fed. 1000, 15 C. C. A. 153; New Orleans Nat. Bank *v.* Merchant, 18 Fed. 841.

Statutes cover only cases of actual fraud.— These statutes were not intended to cover any case which the postmaster-general might regard as based on false opinions, but only cases of actual fraud, in fact, in regard to which opinions formed no basis. American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. ed. 90; Missouri Drug Co. *v.* Wyman, 129 Fed. 623.

Such statutes not unconstitutional.— Dauphin *v.* Key, MacArthur & M. (D. C.) 203; Public Clearing House *v.* Coyne, 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092 [*affirming* 121 Fed. 927]; Horner *v.* U. S., 143 U. S. 207, 12 S. Ct. 407, 36 L. ed. 126; *Ex p.* Rapier, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93; Missouri Drug Co. *v.* Wyman, 129 Fed. 623; U. S. *v.* Harmon, 45 Fed. 414; New Orleans Nat Bank *v.* Merchant, 18 Fed. 841; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

Lotteries.— Act Cong. Sept. 19, 1890 (26 U. S. St. at L. 465 [U. S. Comp. St. (1901) p. 2659]), excluding lottery matter from the mails, is within the constitutional power conferred by the grant of authority to establish post-offices and post-roads, and in no way abridges the freedom of the press or the right of free communication. Horner *v.* U. S., 143 U. S. 207, 12 S. Ct. 407, 36 L. ed. 126; *Ex p.* Rapier, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93. Schemes held to be lotteries see Public Clearing House *v.* Coyne, 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092 [*affirming* 121 Fed. 927]; Preferred Mercantile Co. *v.* Hibbard, 142 Fed. 877. See also LOTTERIES, 25 Cyc. 1641.

27. People's U. S. Bank *v.* Gilson, 140 Fed. 1; Missouri Drug Co. *v.* Wyman, 129 Fed. 623; Davis *v.* Brown, 103 Fed. 909; Enterprise Sav. Assoc. *v.* Zumstein, 67 Fed. 1000, 15 C. C. A. 153; Enterprise Sav. Assoc. *v.* Zumstein, 64 Fed. 837.

28. *Re* Jackson, 96 U. S. 727, 24 L. ed. 877.

Limitation on power of congress.— No law of congress can place in the hands of officials

receiving the letters or packages, or from the agents depositing them in the post-office, or others cognizant of the facts.[29] And as to objectionable printed matter which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts, and, in some cases, by the direct action of the officers of the postal service.[30]

c. Second-Class Matter — (I) *Classification by Congress.* By the act of congress of March 3, 1879,[31] congress did not commit to the postmaster-general, or to any one else, the matter of determining what should be carried in the mails as second-class matter, and what as matter of the third class, but has reserved to itself that power exclusively, itself making the classification.[32] Under this act mailable matter of the second class embraces all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within certain conditions subsequently stated.[33]

(II) *Identification by Postmaster-General* — (A) *In General.* Of course the postmaster-general and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute.[34]

(B) *Conclusiveness of Decision.* A certificate issued by the post-office department to a publisher, entitling certain of his publications to admission to the mails as second-class mail matter, and which by its own terms continues in effect until revoked, is a mere license,[35] and the postmaster-general is not bound by the con-

connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the constitution. *Re* Jackson, 96 U. S. 727, 24 L. ed. 877. Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. If therefore printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by congress. *Re* Jackson, *supra.*

29. *Re* Jackson, 96 U. S. 727, 24 L. ed. 877.

30. *Re* Jackson, 96 U. S. 727, 24 L. ed. 877.

31. 20 U. S. St. at L. 359, c. 180, § 10 [U. S. Comp. St. (1901) p. 2646].

32. Payne *v.* U. S., 20 App. Cas. (D. C.) 581.

33. 20 U. S. St. at L. 359, c. 180 [U. S. Comp. St. (1901) p. 2646].

"Periodicals" and "periodical publications."— Within the meaning of the statute classifying mail matter, the terms "periodicals" and "periodical publications" are synonymous. Smith *v.* Payne, 22 App. Cas. (D. C.) 463 [*affirmed* in 194 U. S. 104, 24 S. Ct. 595, 48 L. ed. 893]; Payne *v.* Houghton, 22 App. Cas. (D. C.) 234 [*affirmed* in 194 U. S. 88, 24 S. Ct. 590, 48 L. ed. 888].

The feature of periodicity must not only exist, but the publication must also be a periodical in the ordinary sense of the term. U. S. *v.* Cortelyou, 28 App. Cas. (D. C.) 570, 12 L. R. A. N. S. 166.

Books complete in themselves are not, because published at stated intervals and in consecutive numbers, entitled to second-class postage rates. Smith *v.* Payne, 194 U. S. 104, 24 S. Ct. 595, 48 L. ed. 893 [*affirming* 22 App. Cas. (D. C.) 463]; Houghton *v.* Payne, 194 U. S. 88, 24 S. Ct. 590, 48 L. ed. 888 [*affirming* 22 App. Cas. (D. C.) 234].

"Institutions of learning," within Act Cong. July 16, 1894 (28 U. S. St. at L. 104, c. 137, § 1), providing that periodical publications issued by incorporated institutions of learning shall be admitted to the mails as second-class matter, are those organizations of a permanent nature wherein instruction is given in the higher branches of education only, and which owe their origin to private or public munificence, and are established solely for the public good, and not for private gain. U. S. *v.* Payne, 20 App. Cas. (D. C.) 606. An incorporated educational institution conducting a correspondence college for the gain and profit of its stock-holders is not a regularly incorporated institution of learning. Columbian Correspondence College *v.* Wynne, 25 App. Cas. (D. C.) 149; U. S. *v.* Payne, 20 App. Cas. (D. C.) 606.

34. Payne *v.* U. S., 20 App. Cas. (D. C.) 581, holding that section 276 of the postal laws and regulations promulgated by the postmaster-general, defining second-class matter, is invalid so far as it superadds to the requirements of Act Cong. March 3, 1879 (20 U. S. St. at L. 355, c. 180), classifying mail matter.

35. Smith *v.* Payne, 22 App. Cas. (D. C.) 463 [*affirmed* in 194 U. S. 104, 24 S. Ct. 595, 48 L. ed. 893]; Houghton *v.* Payne, 194

struction placed by a predecessor in office upon the statute relating to second-class mail matter, so as to preclude him from revoking such a certificate which had been issued by such predecessor, where no vested right has been created by such certificate.[36] But when a publication has been accorded second-class mail privileges, the same cannot be suspended or revoked until a hearing shall have been granted to the parties interested.[37]

(c) *Review of Decision by Courts.* The question of the admissibility of publications to the mails as second-class matter, calling for the exercise of discretion on the part of the postmaster-general, the courts will not ordinarily review his decision thereon, although they have the power, and will occasionally exercise the right of so doing,[38] particularly where it is asserted that he acted without authority of law or in excess of the power granted to him,[39] or where his determination is clearly wrong.[40]

2. Deposit and Collection of Mail. The statute[41] directing any carrier of the mail to receive any mail matter presented to him, etc., includes a city letter carrier,[42] and a delivery of a letter to such a carrier is a deposit of the letter in the post-office.[43]

B. Contracts For Carrying Mails — 1. Power to Contract. The postmaster-general is authorized by the Revised Statutes[44] to enter into contracts for carrying the mails,[45] and the only limitation of time placed upon him is that of

U. S. 88, 24 S. Ct. 590, 48 L. ed. 888 [*affirming* 22 App. Cas. (D. C.) 234].

36. Houghton *v.* Payne, 194 U. S. 88, 24 S. Ct. 590, 48 L. ed. 888 [*affirming* 22 App. Cas. (D. C.) 234] (holding further that the fact that a publisher may have made large contracts for the future delivery of his publications at prices founded on confidence in the continuation of the admission to the mails of such publications at second-class rates under a certificate issued by a former postmaster-general will not entitle him to an injunction against the present postmaster-general restraining the cancellation of such certificate); Columbian Correspondence College *v.* Wynne, 25 App. Cas. (D. C.) 149.

37. Lewis Pub. Co. *v.* Wyman, 152 Fed. 787.

38. Bates, etc., Co. *v.* Payne, 194 U. S. 106, 24 S. Ct. 595, 48 L. ed. 894 [*affirming* 22 App. Cas. (D. C.) 250].

Right to review as affected by form of relief sought.— The general question of the extent and limitations of the judicial power to supervise the determination of the postmaster-general respecting the admission of publications to carriage in the mails at second-class rates is not affected by differences in the form of relief sought, whether mandamus in one case or injunction in another, except that greater circumspection should be exercised where the remedy sought is injunction, which may have a continued mandatory operation. Columbian Correspondence College *v.* Wynne, 25 App. Cas. (D. C.) 149; Smith *v.* Payne, 22 App. Cas. (D. C.) 463 [*affirmed* in 194 U. S. 104, 24 S. Ct. 595, 48 L. ed. 893]; Payne *v.* Houghton, 22 App. Cas. (D. C.) 234 [*affirmed* in 194 U. S. 88, 24 S. Ct. 590, 48 L. ed. 888].

39. Lewis Pub. Co. *v.* Wyman, 152 Fed. 787.

40. U. S. *v.* Cortelyou, 28 App. Cas. (D. C.) 570, 12 L. R. A. N. S. 166.

41. U. S. Rev. St. (1878) § 3980 [U. S. Comp. St. (1901) p. 2712].

42. Wynen *v.* Schappert, 6 Daly (N. Y.) 558, 55 How. Pr. 156.

43. Wynen *v.* Schappert, 6 Daly (N. Y.) 558, 55 How. Pr. 156.

44. U. S. Rev. St. (1878) § 3941 *et seq.* [U. S. Comp. St. (1901) p. 2691 *et seq.*].

45. New York Cent. R. Co. *v.* U. S., 21 Ct. Cl. 468.

A postmaster has no authority to make contracts in regard to the mail-messenger service, or to direct it. Travis *v.* U. S., 196 U. S. 239, 25 S. Ct. 233, 49 L. ed. 461 [*affirming* 38 Ct. Cl. 590]; Slavens *v.* U. S., 196 U. S. 229, 25 S. Ct. 229, 49 L. ed. 457 [*affirming* 38 Ct. Cl. 574]; Whitsell *v.* U. S., 34 Ct. Cl. 5.

Congress principal, postmaster-general agent.— In the case of mail transportation contracts, congress must be deemed the principal, the postmaster-general its agent, and a statute reducing compensation a notice to the contractors, limiting the authority of the agent. Chicago, etc., R. Co. *v.* U. S., 15 Ct. Cl. 232.

Power to contract for pneumatic tube service.— Under Act April 21, 1902 (32 U. S. St. at L. 114, c. 563, § 1 [U. S. Comp. St. Supp. (1905) p. 526]), the postmaster-general was authorized to contract for the transmission of mail by means of pneumatic tubes, but only after public advertisement therefor, and not until after a careful investigation as to the means and practicability of such service, nor until a favorable report in writing shall have been submitted to the postmaster-general by a commission of not less than three expert public officials. Beach *v.* U. S., 41 Ct. Cl. 110. But under such act the postmaster-general has no authority to enter into a contract binding the United States for the use of a patented device. Beach *v.* U. S., 41 Ct. Cl. 110.

section 3956, which restricts such contracts made by him to periods not exceeding four years.[46]

2. Prerequisites. The act of congress of June 8, 1872,[47] requires that before making any contract for carrying the mail the postmaster-general shall give public notice, which notice shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered, and the frequency of the service.[48]

3. Validity. A contract for postal car facilities, which makes the liability of the United States conditional on future appropriations, is valid, and becomes operative if appropriations are subsequently made;[49] and if a contract, dependent upon an appropriation for its validity, does not exceed the appropriation it will be deemed valid, although the appropriation is exhausted.[50]

4. Annulment or Vacation. Under the statute[51] the power of the postmaster-general to terminate the contract is not predicated on an abandonment of the entire service, but the postmaster-general may put an end to the service of the contractor and relet a part of it to another.[52] It is sometimes further stipulated in the contract that the postmaster-general may annul the contract or impose forfeitures in his discretion, for failure to perform the service according to the contract.[53]

5. Assignment, Subletting, and Substitution — a. In General. A contractor for the conveyance of the mails cannot transfer, assign, or sublet his contract without the consent of the postmaster-general;[54] but he may lawfully contract with

46. New York Cent., etc., R. Co. *v.* U. S., 21 Ct. Cl. 468; Chicago, etc., R. Co. *v.* U. S., 14 Ct. Cl. 125, holding that the limitation in U. S. Rev. St. (1878) § 3956 [U. S. Comp. St. (1901) p. 2701], of mail contracts to four years, is not controlled by sections 3679, 3932, the former section being a part of a later act revising preëxisting laws.

Implied contract.— The regulation of the post-office department that contracts in a section of the country are to be let for four years cannot be held to impose any obligation on the postmaster-general so that a contract, to be implied from services rendered after the expiration of a written contract, should be construed to last four years, but is merely designated to further the administration of business. Jacksonville, etc., R. Co. *v.* U. S., 118 U. S. 626, 7 S. Ct. 48, 30 L. ed. 273.

47. 17 U. S. St. at L. 313, c. 335, § 243.

48. Garfielde *v.* U. S., 93 U. S. 242, 23 L. ed. 779; Cosgrove *v.* U. S., 31 Ct. Cl. 332.

Formal contract unnecessary.— The acceptance by the post-office department of the proposal of a bidder after public notice to carry the mails in accordance therewith created a contract of the same force and effect as if a formal contract had been written out and signed by the parties. Garfielde *v.* U. S., 93 U. S. 242, 23 L. ed. 779.

Part of an established post route may be changed without thereby creating a new route requiring a new advertisement and bid. U. S. *v.* Barlow, 132 U. S. 271, 10 S. Ct. 77, 33 L. ed. 346.

A proposal for expedited and increased service, with the order made thereon, does not constitute a new contract requiring a new advertisement, but makes simply an alteration of the existing contract in a manner authorized by statute. Griffith *v.* U. S., 22 Ct. Cl. 165.

Representations of a matter peculiarly within the knowledge of the department must be regarded as in the nature of a warranty. Utah, etc., Stage Co. *v.* U. S., 39 Ct. Cl. 420 [*affirmed* in 199 U. S. 414, 26 S. Ct. 69, 50 L. ed. 251].

49. New York Cent., etc., R. Co. *v.* U. S., 21 Ct. Cl. 468.

50. New York Cent., etc., R. Co. *v.* U. S., 21 Ct. Cl. 468.

51. The Postal Laws and Regulations provide that the postmaster-general may terminate a contract for carrying the mail whenever, in his judgment, the public interest shall demand such a change, on allowing a month's pay as indemnity. Postal Laws & Regulations (1887), § 817.

52. Travis *v.* U. S., 196 U. S. 239, 25 S. Ct. 233, 49 L. ed. 461 [*affirming* 38 Ct. Cl. 590]; Slavens *v.* U. S., 196 U. S. 229, 25 S. Ct. 229, 49 L. ed. 457 [*affirming* 38 Ct. Cl. 574].

53. Gaines *v.* Trengrove, 77 Minn. 349, 79 N. W. 1045, holding that his decision can only be impeached on the ground of fraud or such gross mistakes of the facts as imply bad faith or a failure to exercise honest judgment.

54. U. S. Rev. St. (1878) § 3963 [U. S. Comp. St. (1901), p. 2704]; 20 U. S. St. at L. 61 [U. S. Comp. St. (1901) p. 2704]. See also Nix *v.* Bell, 66 Ga. 664 (holding that a partial assignment of a United States mail contract, being illegal under the laws of the United States and the post-office regulations, is not a valid consideration to support a promise to pay for a half interest in the contract); McConaghy *v.* Clark, 35 Wash. 689, 77 Pac. 1084.

Transfer under decree for foreclosure of mortgage.— On the foreclosure of a mortgage on all its assets and the sale thereof to a new company, a contract made by a railroad company to carry the mails is an-

or employ another to perform for him the services required by the contract.[55] So also a person who has obtained a contract for carrying the mails may agree to do so as the agent of another.[56]

b. Breach of Contract of Subletting or Substitution. After a contract of subletting or substitution has been made and approved by the postmaster-general, a breach thereof by either party will render him liable in damages to the other.[57]

c. Abandonment by Subcontractor. If a subcontractor for the conveyance of the mails abandons his contract, the post-office department may employ temporary service on the route,[58] and may reinstate the original contractor without permitting the subcontractor to resume service under the subcontract.[59] Without the consent of that department the subcontractor cannot be reinstated by the contractor.[60]

6. Bonds — a. Of Contractors. Contractors for carrying the mail are required to give bonds with sureties, and liability thereon is determined by the rules applicable to the enforcement of bonds generally.[61] Furthermore it is required

nulled and the new company can claim no benefit under the contract. St. Paul, etc., R. Co. *v.* U. S., 18 Ct. Cl. 405.

Subletting by subcontractor.— Under Act May 17, 1878 (20 U. S. St. at L. 61 [U. S. Comp. St. (1901) p. 2704]), the post-office department may annul a mail contract where a subcontractor has sublet his contract, although it be done without the knowledge or consent of the original contractor. McGinnis *v.* U. S., 27 Ct. Cl. 146.

The leading purpose of these acts was to prevent speculating contractors from reaping a profit out of the government by subletting for a less sum than contracted for. Myers *v.* Pickett, 81 Tex. 53, 16 S. W. 643.

A subletting is not void, but voidable, and is good, as between the parties, where the government has not interposed to avoid it. Myers *v.* Pickett, 81 Tex. 53, 16 S. W. 643. But see Peet *v.* Knight, 2 Pa. Co. Ct. 445.

Allegation of consent.— Where the petition on a subcontract to carry mail alleges that it was "duly filed" in the post-office department, and "duly accepted by said department as required by law," it sufficiently alleges that the subletting was "with the consent in writing of the Postmaster-General." Salisbury *v.* U. S., 28 Ct. Cl. 52.

55. *Georgia.*— Moon *v.* Potter, 115 Ga. 673, 42 S. E. 43.

Iowa.— Gordon *v.* Dalby, 30 Iowa 223.

Kentucky.— Wilson *v.* Beach, 11 Ky. L. Rep. 1001.

Maine.— Frye *v.* Burdick, 67 Me. 408.

New Hampshire.— Whitehouse *v.* Langdon, 10 N. H. 331.

See 40 Cent. Dig. tit. "Post-Office," § 29.

56. Oregon Steamship Co. *v.* Otis, 27 Hun (N. Y.) 452.

One may bid for himself and others.— It is not illegal for one man to bid for a mail contract on account of himself and others, unless the arrangement was made with a design to defraud the government by preventing competition. Huntington *v.* Bardwell, 46 N. H. 492; Bellows *v.* Russell, 20 N. H. 427, 51 Am. Dec. 238.

57. See cases cited *infra*, this note.

Contract of subletting.— Where a contract of subletting stipulates for a discharge thereof on the removal of the contractor before the expiration of his term, the contractor may refuse a contract for increased service without becoming liable in damages to the subcontractor. Wingate *v.* McNamar, 28 Ind. 481. Where a subcontractor of a mail contract agrees to carry the mail in accordance with the terms of the contractor's agreement with the government, there is a breach of agreement if the subcontractor does not carry the mail during the entire period for which the principal contractor is bound to carry for the government. Welder *v.* Dunn, 2 Tex. App. Civ. Cas. § 96.

Contract of substitution.— Where, in an action for breach of contract by which defendant agreed to substitute himself for plaintiff as subcontractor in a mail contract, it does not appear that the contractor was willing to make the substitution or that the United States had consented thereto, plaintiff is not entitled to recover. McConaghy *v.* Clark, 35 Wash. 689, 77 Pac. 1084.

58. Logan *v.* Woodlief, 47 La. Ann. 1142, 17 So. 698.

59. Logan *v.* Woodlief, 47 La. Ann. 1142, 17 So. 698.

60. Logan *v.* Woodlief, 47 La. Ann. 1142, 17 So. 698.

61. U. S. Comp. St. (1901) p. 2695 *et seq.*

Liability in particular cases see Gillespie *v.* Lake, 85 Cal. 402, 24 Pac. 891; U. S. *v.* Oliver, 36 Fed. 758.

Actions on bonds.— In an action by the United States on the bond of a mail-route contractor, to recover damages resulting from the alleged abandonment of the contract by defendant, where the answer contains a general denial, it is incumbent on the plaintiff to prove the alleged abandonment (U. S. *v.* McCoy, 193 U. S. 593, 24 S. Ct. 528, 48 L. ed. 805 [*reversing* 113 Fed. 1021, 51 C. C. A. 688]); and evidence of the official finding of the postmaster-general that he was a failing contractor, together with the official reports of the local postmaster upon which the finding was based, is sufficient for this purpose (U. S. *v.* McCoy, *supra*).

that every proposal for carrying the mail must be accompanied by the bond of the bidder.[62]

b. Of Subcontractors. A bond given by a subcontractor or assignee of a mail contract, sublet in violation of the statute which renders the subletting null and void, is also null and void, and its invalidity may be asserted in an action thereon, notwithstanding defendant was a party to the illegal act.[63] If, however, the contract between the parties does not amount to an assignment or transfer of the mail contract, the bond may be enforced.[64]

C. Compensation For Carrying Mails — 1. Right to Compensation — a. In General. The compensation of a mail contractor is entirely within the discretion of the postmaster-general, subject to limitation as to the maximum imposed by congress.[65] By the uniform practice of the department the delivery of mails between intermediate stations and the post-offices thereat is not to be paid for in addition to the amount computed upon the mileage of the railroad proper.[66]

b. Voluntary Service. The government is not liable for voluntary service by a mail contractor,[67] unless rendered with the knowledge and consent of the post-office department.[68] When the contractor has performed the services ordered, the fact that the postmaster-general made the order irregularly will not deprive him of his right to compensation.[69]

c. Effect of Suspension or Discontinuance of Service. Contracts for transportation of the mail customarily provide that the postmaster-general may discontinue the service, whenever the public interest in his judgment shall require such discontinuance, on condition that the contractor be allowed one month's extra pay as indemnity.[70] Under such a contract a discontinuance during the

62. 18 U. S. St. at L. 235, c. 456, § 12 [U. S. Comp. St. (1901) p. 2695].

Liability on proposal bond.—A proposal bond, given by a bidder for a contract for carrying the mail, is an absolute undertaking to pay the amount named therein as liquidated damages in case of condition broken, and not one of indemnity or security to the government against loss or damages for breach of contract, and in an action thereon the actual damages cannot be inquired into. U. S. *v.* Alcorn, 145 Fed. 995. See also U. S. *v.* U. S. Fidelity, etc., Co., 151 Fed. 534 [*affirmed* in 158 Fed. 1022, 86 C. C. A. 673 (*affirmed* in 209 U. S. 306, 28 S. Ct. 537, 52 L. ed. 804)].

63. Peet *v.* Knight, 2 Pa. Co. Ct. 445.

64. Moon *v.* Potter, 115 Ga. 673, 42 S. E. 43.

65. Chicago, etc., R. Co. *v.* U. S., 104 U. S. 680, 26 L. ed. 891; Texas, etc., R. Co. *v.* U. S., 28 Ct. Cl. 379.

A railroad is not necessarily entitled to the maximum rate allowed by law. The postmaster-general has discretion to make contracts at lower rates. Minneapolis, etc., R. Co. *v.* U. S., 24 Ct. Cl. 350; Eastern R. Co. *v.* U. S., 20 Ct. Cl. 23 [*affirmed* in 129 U. S. 391, 9 S. Ct. 320, 32 L. ed. 730].

Transoceanic mails.— The compensation for carrying mails to a foreign port is within the postmaster-general's discretion subject to the limitation as to the maximum that it shall not exceed the "sea and United States inland postage," under U. S. Rev. St. (1878) § 4009 [U. S. Comp. St. (1901) p. 2726]. Pacific Mail Steamship Co. *v.* U. S., 28 Ct. Cl. 1.

66. Minneapolis, etc., R. Co. *v.* U. S., 24 Ct. Cl. 350; Jacksonville, etc., R. Co. *v.* U. S., 21 Ct. Cl. 155 [*affirmed* in 118 U. S. 626, 7 S. Ct. 48, 30 L. ed. 273].

67. Wightman *v.* U. S., 23 Ct. Cl. 144; Utica, etc., R. Co. *v.* U. S., 22 Ct. Cl. 265.

68. 22 U. S. St. at L. 216, c. 379, § 1 [U. S. Comp. St. (1901) p. 2703].

The carriage of mails beyond the contract route without a separate agreement is an extension of the existing contract at the same rate. St. Louis Southwestern R. Co. *v.* U. S., 32 Ct. Cl. 565.

If voluntary service on a restored route is accepted by the department, and congress pass an act referring the claim therefor, and directing how damages thereon, if any, shall be computed, the service is thereby validated, and the contractor entitled to compensation. Wightman *v.* U. S., 23 Ct. Cl. 144.

69. Salisbury *v.* U. S., 28 Ct. Cl. 404.

70. See cases cited *infra*, this note.

When right accrues.—A claim against the post-office for one month's extra compensation for discontinued service does not accrue till the payment is due, namely, one month after the end of the current quarter. Salisbury *v.* U. S., 28 Ct. Cl. 404.

A subcontractor who has taken over a mail contract for "the full amount of mail pay" that shall become due to the contractor, and assumed all the obligations of the contract, is entitled to the one month's pay provided in the original contract in case of discontinuance of the service (Salisbury *v.* U. S., 28 Ct. Cl. 404. See also Garman *v.* U. S., 34 Ct. Cl. 237), and may sue to recover the same (Salisbury *v.* U. S., 28 Ct. Cl. 52).

Effect on claim for services performed.— The annulment of a mail contract does not

Civil war,[71] or for failure to accept less compensation than provided in the contract,[72] entitles the contractor to the extra pay.[73] Where the service is discontinued at the request of the contractor, he having failed to perform, and being in default, he cannot recover the one month's extra pay;[74] but if the discontinuance is only in part, the contractor's right is not forfeited by subsequent misconduct on the other part, although the one may be set off against the other.[75]

d. Land-Grant Railroads. The land-grant railroad statutes are in the nature of grants and the roads which so received public lands are to be regarded as the beneficiaries of a grant.[76] By the terms of the grant the mail is to be transported over those roads "at such price as Congress may, by law, direct" and "until such price is fixed by law, the Postmaster General shall have the power to determine the same."[77] The power to establish the price includes the power also to declare the period of its duration,[78] and where the rate of compensation for a specific period is agreed upon, the acts of congress reducing the compensation of land-grant companies for carrying the mails do not apply.[79] If, however, a land-grant road carries the mails without an express contract with the postmaster-general, it is subject to the reductions of those acts.[80]

affect the claim of the contractor for services performed. Pacific Mail Steamship Co. *v.* U. S., 103 U. S. 721, 26 L. ed. 419.

Decision not binding on successors in office. — A decision that a contractor is not entitled to the one month's extra pay does not bind the successors in office of the postmaster-general. Day *v.* U. S., 21 Ct. Cl. 262.

71. Campbell *v.* U. S., 19 Ct. Cl. 320.

A suspension of a mail route during the Civil war by an order of the postmaster-general, made with notice to the contractor that he would be held responsible for a renewal when the postmaster-general should deem it safe to renew the service, amounts to a discontinuance of the service, for which the contractor, pursuant to his contract, is entitled to call for a month's pay. Reeside *v.* U. S., 8 Wall. (U. S.) 38, 19 L. ed. 318.

72. Wreford *v.* U. S., 32 Ct. Cl. 415.

Discontinuance of performance by contractor only.— Where the postmaster-general discontinues the contractor's performance, although the service itself was not discontinued, and was continuously performed by another contractor, the discontinuance being ordered because the contractor would not consent to a reduction of the service, the measure of damages was the one month's pay, and not the profit which the contractor might have made. Travis *v.* U. S., 38 Ct. Cl. 590; Slavens *v.* U. S., 38 Ct. Cl. 574.

73. See cases cited *infra*, this note.

The "one month's extra pay" allowed by mail-transportation contracts where the service is discontinued by the postmaster-general before the expiration of the contract is of the nature of liquidated damages (Salisbury *v.* U. S., 28 Ct. Cl. 52; Mordecai *v.* U. S., 19 Ct. Cl. 11), and no action therefor can be maintained under the act of March 3, 1877; that act appropriates money only for "mail service performed" (Mordecai *v.* U. S., *supra*).

74. Walsh *v.* U. S., 21 Ct. Cl. 268.

75. Walsh *v.* U. S., 21 Ct. Cl. 268.

76. See cases cited *infra*, this and notes 77 *et seq.*

A railroad which did not participate in public lands granted by congress to a state for railroad purposes is not a "land-grant road." Chicago, etc., R. Co. *v.* U. S., 14 Ct. Cl. 125.

The obligation of a railroad arising from the acceptance of a land grant constitutes a privity of contract. Duval *v.* U. S., 25 Ct. Cl. 46.

77. 11 U. S. St. at L. 18, c. 41, § 5; 11 U. S. St. at L. 19, c. 42, § 5.

78. Jacksonville, etc., R. Co. *v.* U. S., 118 U. S. 626, 7 S. Ct. 48, 30 L. ed. 273; Chicago, etc., R. Co. *v.* U. S., 104 U. S. 680, 26 L. ed. 891 [*reversing* 15 Ct. Cl. 232].

79. Chicago, etc., R. Co. *v.* U. S., 104 U. S. 680, 26 L. ed. 891 [*reversing* 15 Ct. Cl. 232]; St. Paul, etc., R. Co. *v.* U. S., 18 Ct. Cl. 405. But see Union Pac. R. Co. *v.* U. S., 16 Ct. Cl. 569; Chicago, etc., R. Co. *v.* U. S., 14 Ct. Cl. 125.

80. Jacksonville, etc., R. Co. *v.* U. S., 118 U. S. 626, 7 S. Ct. 48, 30 L. ed. 273 [*affirming* 21 Ct. Cl. 155].

Perpetual contract.—A land-grant railroad is under a perpetual contract with the United States made by the Land Grant Act of 1856, to transport the mails at such rates as congress may by law direct, or, in the absence of that direction, the postmaster-general determine. Jacksonville, etc., R. Co. *v.* U. S., 118 U. S. 626, 7 S. Ct. 48, 30 L. ed. 273 [*affirming* 21 Ct. Cl. 155].

A railroad built partly by a land grant is entitled, for transportation of the mail, to full rates for such portion of the road as was not aided by such land grant. U. S. *v.* Alabama, etc., R. Co., 142 U. S. 615, 12 S. Ct. 306, 35 L. ed. 1134 [*affirming* 25 Ct. Cl. 30]. Such a construction being adopted by five successive postmaster-generals, and being in accordance with the equities of the case, if not with the literal wording of the statute, will be regarded as conclusive on subsequent officials and the courts. U. S. *v.* Alabama, etc., R. Co., *supra*.

2. Readjustment and Reduction. By the acts of congress of July 12, 1876, and of June 17, 1878, the postmaster-general was authorized to readjust the compensation to be paid for the transportation of mails on railroad routes, by reducing the compensation ten and five per cent respectively.[81] These acts apply only to contracts thereafter made,[82] or to such as did not require the performance of the service for a specified period.[83] Therefore when a company binds itself to carry the mails during a certain period, its acceptance during that period of less than it was entitled to demand does not prejudice its right to claim what is legally due under its contract.[84] If, however, the company, having no definite time contract, may decline to accede to the reduction when made, its failure to do so and the acceptance of the reduced compensation constitutes an assent to the rates fixed by the reduction.[85]

3. New, Additional, and Expedited Service — a. New or Additional Service. Contracts for transportation of the mails generally reserve the right to the postmaster-general to require new or additional service without extra compensation.[86] Such a contract gives to the postmaster-general very considerable discretion in calling for additional service without compensation,[87] limited, however, by the general rule that where new or additional service is not different in kind and character from that specified in the contract, the contractor cannot recover therefor;[88] but when the new or additional service is different in

81. 19 U. S. St. at L. 79 [U. S. Comp. St. (1901) p. 2721]; 20 U. S. St. at L. 142 [U. S. Comp. St. (1901) p. 2722].

In case of extension of established mail route.— The adjustment of compensation to a railway company for carrying the mails may be confined, where an extension is made beyond the terminal of an established mail route, to the extension alone, without readjusting the compensation for the whole route as extended. Chicago, etc., R. Co. *v.* U. S., 198 U. S. 385, 25 S. Ct. 665, 49 L. ed. 1094.

82. Chicago, etc., R. Co. *v.* U. S., 104 U. S. 680, 26 L. ed. 891; Chicago, etc., R. Co. *v.* U. S., 14 Ct. Cl. 125.

83. Chicago, etc., R. Co. *v.* U. S., 104 U. S. 687, 26 L. ed. 893; Chicago, etc., R. Co. *v.* U. S., 104 U. S. 680, 26 L. ed. 891.

84. Chicago, etc., R. Co. *v.* U. S., 104 U. S. 687, 26 L. ed. 893; Chicago, etc., R. Co. *v.* U. S., 104 U. S. 680, 26 L. ed. 891.

85. Eastern R. Co. *v.* U. S., 129 U. S. 391, 9 S. Ct. 320, 32 L. ed. 730 [*affirming* 20 Ct. Cl. 23]; Texas, etc., R. Co. *v.* U. S., 28 Ct. Cl. 379.

86. See cases cited *infra*, this and note 87 *et seq.*

The purpose of this stipulation is to require the performance, without additional compensation, of new or additional service which may arise from improved methods in the transaction of the business of the post-office department, and in the increased demand for service resulting from the growth and development of towns and cities. U. S. *v.* Utah, etc., Stage Co., 199 U. S. 414, 26 S. Ct. 69, 50 L. ed. 251.

87. U. S. *v.* Utah, etc., Stage Co., 199 U. S. 414, 26 S. Ct. 69, 50 L. ed. 251.

The phrase "new or additional service" is not one of exact meaning, defining the precise extent of the obligation incurred, and permits the court to give it a reasonable construction with a view to doing justice between the parties. In giving a proper construction the court is required to examine the entire contract, to consider the relation of the parties and the circumstances under which it was signed. U. S. *v.* Utah, etc., Stage Co., 199 U. S. 414, 26 S. Ct. 69, 50 L. ed. 251.

88. U. S. *v.* Utah, etc., Stage Co., 199 U. S. 414, 26 S. Ct. 69, 50 L. ed. 251 [*affirming* 39 Ct. Cl. 420].

New and additional service.— "New" service is service similar in its nature to that embraced in the general intent of the contract. "Additional" service is an increase of the service which the contract as a whole contemplated. Union Transfer Co. *v.* U. S., 36 Ct. Cl. 216; Woolverton *v.* U. S., 27 Ct. Cl. 292; Otis *v.* U. S., 20 Ct. Cl. 315.

Change of schedule.— Where, by order of the post-office department, the direction of a mail route is reversed, but the change requires no greater speed or increase of distance, the carrier is not entitled to increase of pay, although the change occasions him serious loss; section 812 of the regulations authorizing the postmaster-general to "change schedules of departures and arrivals in all cases, without increase of pay, provided the running time be not abridged. *In re* Smith, 26 Ct. Cl. 178.

Service not contemplated by contract.—An increase in the service required on a mail route, as the result of the establishment of a new distributing station in the city of New York, amounting to more than three hundred thousand miles of additional transfer service, and involving an additional expenditure of nearly ten thousand dollars for ferry tolls, cannot be required by the postmaster-general without extra compensation, under the authority reserved to him in the contract to call for new additional mail messenger, or transfer service without addi-

kind or character from that specified in the contract the contractor may recover.[89]

b. Expedited Service. The statute,[90] limiting the amount of compensation to be allowed for expedited mail service, is equally obligatory on both parties, limiting the authority of the postmaster-general, and notifying the contractor of such limitation;[91] and, if the compensation allowed is in excess of the statute,

tional compensation. U. S. *v.* Utah, etc., Stage Co., 199 U. S. 414, 26 S. Ct. 69, 50 L. ed. 251 [*affirming* 39 Ct. Cl. 420].

Carrying mails to and from street cars.— A change of service under a mail contract, by directing the carrying of the mails to and from street cars at certain street crossings, is fairly within the power reserved by the contract in the postmaster-general. Travis *v.* U. S., 196 U. S. 239, 25 S. Ct. 233, 49 L. ed. 461 [*affirming* 38 Ct. Cl. 590]; Slavens *v.* U. S., 196 U. S. 229, 25 S. Ct. 229, 49 L. ed. 457 [*affirming* 38 Ct. Cl. 574].

"Foot service."— The carriage of the mails up and down the steps at elevated railroad stations is called for by a contract for performing the covered regulation wagon, mail messenger, transfer, and mail station service on a mail route, in which the contractor agreed to take the mails from and deliver them to the post-offices, mail stations, and cars. U. S. *v.* Utah, etc., Stage Co., 199 U. S. 414, 26 S. Ct. 69, 50 L. ed. 251 [*affirming* 39 Ct. Cl. 420].

Increase of branch post-offices.— Under a contract for covered regulation wagon, mail messenger, transfer, and mail station service, and for all new additional service of said kinds, although the number of branch post-offices is greatly increased, the service for them must be regarded as additional, and not as extra (Union Transfer Co. *v.* U. S., 36 Ct. Cl. 216); but a new system of receiving stations is not new or additional transfer and mail station service, within such contract, but is extra service, for which the contractor should recover (Union Transfer Co. *v.* U. S., *supra*. See also Woolverton *v.* U. S., 34 Ct. Cl. 247).

89. U. S. *v.* Utah, etc., Stage Co., 199 U. S. 414, 26 S. Ct. 69, 50 L. ed. 251 [*affirming* 39 Ct. Cl. 420]; Woolverton *v.* U. S., 34 Ct. Cl. 247 (holding that where a contract calls for the delivery of mail at a railroad station in Jersey City, and the postmaster compels the contractor to likewise carry local Jersey City mail, it will be deemed extra service, for which the contractor is entitled to extra compensation); Woolverton *v.* U. S., 27 Ct. Cl. 292.

The carrying of empty mail bags beyond those made necessary by the preponderance of mail in one direction is extra service, entitling the contractor to extra compensation. Woolverton *v.* U. S., 34 Ct. Cl. 247. See also Knox *v.* U. S., 30 Ct. Cl. 59.

The transport of gold is not included under "mail-messenger service," and the contractor is entitled to extra compensation therefor. Woolverton *v.* U. S., 34 Ct. Cl. 247.

Services required by unauthorized agent.— A contractor for carrying the mails is not entitled to extra compensation for services outside the terms of his contract, which were performed in compliance with the unauthorized demand of the local postmaster, where, upon protest to the postmaster-general, the contractor was promptly relieved from such services, and another contract was made for their performance. Travis *v.* U. S., 196 U. S. 239, 25 S. Ct. 233, 49 L. ed. 461 [*affirming* 38 Ct. Cl. 590]; Slavens *v.* U. S., 196 U. S. 229, 25 S. Ct. 229, 49 L. ed. 457 [*affirming* 38 Ct. Cl. 574].

Waiver of right to extra compensation.— Where a contractor renders extra service to the government during a period of more than six years without notice that he regards it as extra, and without demanding extra compensation, he will be held to have waived his right to extra pay. Whitsell *v.* U. S., 34 Ct. Cl. 5.

Estoppel to claim extra compensation.— Estoppel against a claim for extra mail service arises where the postmaster-general replied to a claim that if pressed he would discontinue a mail service then being performed by the contractor, and which had several months to run, and which he had the right to discontinue at any time, and the contractor neglected to inform the postmaster-general that his claim would be pressed, and continued to receive the benefits of the existing service, although he in the meanwhile, without the postmaster-general's knowledge, presented documents to the second assistant postmaster-general (with whom the business had previously been transacted) to prove the justice of his claim. Alvord *v.* U. S., 9 Ct. Cl. 500, 8 Ct. Cl. 364.

Voluntary performance of extra service.— Where the additional service of a mail contractor is voluntary, no liability is imposed on the government. Wightman *v.* U. S., 23 Ct. Cl. 144.

Economical performance of extra service. —A contractor who is compelled to perform extra service must perform it in the most expeditious and economical manner. A mail messenger contractor must include new stations in existing routes or circuits if he can. Union Transfer Co. *v.* U. S., 36 Ct. Cl. 216.

Condition precedent to payment of extra compensation.— Compensation allowed by the postmaster-general to a contractor for additional services cannot be paid until it is shown that the same is "expressed in the order and entered upon the books of the department," and that service additional to that required by the contract has been performed. Cosgrove *v.* U. S., 31 Ct. Cl. 332.

90. U. S. Rev. St. (1878) § 3961 [U. S. Comp. St. (1901) p. 2702].

91. Parker *v.* U. S., 26 Ct. Cl. 344.

the action of the postmaster-general is *ultra vires*;[92] and, if shown by the evidence to be materially in excess, the contract will be deemed to have been made in mutual mistake of fact.[93]

4. Fines, Forfeitures, and Deductions — a. In General. The Revised Statutes[94] authorize the postmaster-general to impose "fines" on delinquent mail contractors.[95] The power to impose a fine can be exercised as long as there is money remaining due upon the contract.[96] Conversely, the authority to impose fines is limited to the subject-matter of the contract and to payments which would otherwise be due to the contractor.[97] The fines imposed by the postmaster-general are in the nature of liquidated damages for the public inconvenience caused by a contractor's negligence,[98] and his decisions are final.[99]

b. Evidence of. A document authenticated by the postmaster-general, under the seal of the department, reciting the imposition of a fine upon a mail-route contractor is admissible as evidence of such fact, and is sufficient *prima facie* to support a charge against the contractor, in his account with the department, of the amount of the fine;[1] but it is not sufficient evidence that the fine has been paid,

92. Parker *v.* U. S., 26 Ct. Cl. 344.

93. Parker *v.* U. S., 26 Ct. Cl. 344.

Method of compensation.—Under Act Cong. April 7, 1880 (21 U. S. St. at L. 72 [U. S. Comp. St. (1901) p. 2703]), providing that the service under a contract shall not be expedited "to a rate of pay exceeding fifty per centum upon the contract as originally let," the fifty per cent is computed on the compensation for all the service, both as originally stipulated and as increased by additional service, which is to be determined by the rates fixed in the original contract. Allman *v.* U. S., 131 U. S. 31, 9 S. Ct. 632, 33 L. ed. 51.

94. U. S. Rev. St. (1878) § 3962 [U. S. Comp. St. (1901) p. 2704].

95. Parker *v.* U. S., 26 Ct. Cl. 344; Minneapolis, etc., R. Co. *v.* U. S., 24 Ct. Cl. 350; Otis *v.* U. S., 24 Ct. Cl. 61.

The legal effect of this statute is to require the department to exact this agreement from all mail carriers, and to take such contracts out of the ordinary rules of law regulating penalties and liquidated damages. Parker *v.* U. S., 26 Ct. Cl. 344.

U. S. Rev. St. (1878) § 3962 was not repealed by Act March 3, 1879 (20 U. S. St. at L. 358, c. 180, § 5 [U. S. Comp. St. (1901) p. 2646]), providing that the postmaster-general shall, for every failure of a railroad company to deliver mail on schedule time, deduct not less than one half the price of the trip, and, where the trip is not performed, not less than the price of one trip, and not exceeding, in either case, the price of three trips. The latter section merely makes an exception to the provisions of section 3962 as to railroad companies, and on repeal of that section of the act of 1879 the provisions of section 3962 are again in force. Chicago, etc., R. Co. *v.* U. S., 127 U. S. 406, 8 S. Ct. 1194, 32 L. ed. 180; Minneapolis, etc., R. Co. *v.* U. S., 24 Ct. Cl. 350; Jacksonville, etc., R. Co. *v.* U. S., 21 Ct. Cl. 155.

Under Act June 27, 1848 (9 U. S. St. at L. 241), the power of the postmaster-general to impose a fine on a contractor for transmission of mails to and from foreign countries, for any unreasonable or unnecessary delay in the departure of the mails, or in the performance of the trips, is limited to the cases and for the causes specified in the act. U. S. *v.* Collins, 25 Fed. Cas. No. 14,834, 4 Blatchf. 142.

A mere recommendation by the postmaster-general to the head of another department to make a deduction from the pay of a contractor is not sufficient to impose a fine. U. S. *v.* Collins, 25 Fed. Cas. No. 14,834, 4 Blatchf. 142.

Restoration of suspended contract.—Where a mail transportation service, suspended because of alleged imperfect performance, is restored on condition that the contractor shall pay the cost of the service during suspension, he is bound thereby, and cannot thereafter recover from the government the amount paid by it for such service, and deducted from the moneys due him. Woodlief *v.* U. S., 26 Ct. Cl. 457.

96. Parker *v.* U. S., 26 Ct. Cl. 344, holding that the fact that the account of the contractor for a certain quarter has been transmitted to the accounting officers of the treasury, and adjusted, and a balance certified and paid, does not preclude the postmaster-general from imposing a fine for a previously committed, but subsequently discovered, delinquency.

97. Parker *v.* U. S., 26 Ct. Cl. 344.

Fine exceeding contract price.— The postmaster-general may impose a fine exceeding the contract price, but cannot deduct it from moneys due the contractor on other contracts. Parker *v.* U. S., 26 Ct. Cl. 344.

98. Parker *v.* U. S., 26 Ct. Cl. 344.

99. Allman *v.* U. S., 131 U. S. 31, 9 S. Ct. 632, 33 L. ed. 51; Parker *v.* U. S., 26 Ct. Cl. 344; Otis *v.* U. S., 24 Ct. Cl. 61.

The excuse that delinquencies were unavoidable is proper matter for consideration by the postmaster-general, but cannot be considered by the court in the absence of fraud or other irregularity. Minneapolis, etc., R. Co. *v.* U. S., 24 Ct. Cl. 350.

1. U. S. *v.* McCoy, 104 Fed. 669, 44 C. C. A. 125.

so as to authorize a judgment for its amount against a subcontractor, through whose fault it was incurred.[2]

5. Payment, Overpayments, and Recovery Thereof — a. In General. In all cases where money has been paid out of the funds of the post-office department in consequence of fraudulent representations,[3] or under a mistake of fact,[4] it may be recovered back in an action by the government,[5] or the money so paid out may be deducted from other money due the payee.[6]

b. Estoppel. Although as a general rule estoppel does not run against the government,[7] there are exceptions, and after a settlement has been made between the postmaster-general and a railroad company, an overpayment cannot be set up as a counter-claim against a subsequent purchaser of the road.[8]

6. Presentation of Claims — a. In General. Presentation of a claim to the second assistant postmaster-general, his being the proper office in the department for considering it, is equivalent to, and a compliance with, any rule requiring presentation to the postmaster-general.[9]

b. Waiver and Estoppel. The fact that a railroad company has claimed and been awarded compensation for certain services in connection with the mails, and at the same time has failed to make any charge or claim for certain other services, is evidence of a waiver of any claim for the latter services.[10] Where, however, a mail carrier has no means of knowing the amount of compensation to which he is

2. Riley *v.* Hart, 3 La. Ann. 184.

3. U. S. *v.* Piatt, 157 U. S. 113, 15 S. Ct. 498, 39 L. ed. 639. See also U. S. *v.* Voorhees, 135 U. S. 550, 10 S. Ct. 841, 34 L. ed. 258.

Participation in fraud by government officers.— Where such mistake was caused by fraudulent representations of the contractors, it is immaterial whether or not such fraud was participated in by the subordinate officers of the department. U. S. *v.* Barlow, 132 U. S. 271, 10 S. Ct. 77, 33 L. ed. 346 [*reversing* 26 Fed. 903].

Misrepresentations of facts known to post-office department.— Inaccuracies in an affidavit by a mail contractor as to information for the cost of an expedited mail service, relating to the schedules of arrivals and departures, and other matters as well known to the post-office department as to the contractor, cannot be set up as a fraudulent representation of the contractor, in a suit by him against the government, based on such service. Peterson *v.* U. S., 26 Ct. Cl. 332.

Self-evident absurdity no basis for action of fraud.— Griffith *v.* U. S., 22 Ct. Cl. 165.

4. U. S. *v.* Piatt, 157 U. S. 113, 15 S. Ct. 498, 39 L. ed. 639; U. S. *v.* Barlow, 132 U. S. 271, 10 S. Ct. 77, 33 L. ed. 346; U. S. *v.* Cosgrove, 26 Fed. 908; Cosgrove *v.* U. S., 31 Ct. Cl. 332. See also U. S. *v.* Voorhees, 135 U. S. 550, 10 S. Ct. 841, 34 L. ed. 258.

The word "mistake" includes the erroneous construction or application of a statute. Wisconsin Cent. R. Co. *v.* U. S., 164 U. S. 190, 17 S. Ct. 45, 41 L. ed. 399.

Overpayment to land-grant road.—An overpayment to a railroad for carrying the mails at full rates, upon the supposition that it was not a land-grant road when in fact it was, is a payment in mistake of fact, which may be recovered. Duval *v.* U. S., 25 Ct. Cl. 46.

5. See Payment, 30 Cyc. 1298 *et seq.*

Recovery from subcontractor.— Excessive extra allowances paid to a subcontractor for carrying the mails, upon the faith of false representations as to the number of "horses and men" required for expediting the service, which false representations were made by the original contractor in the interest and at the instigation of the subcontractor, may be recovered from the latter by an action brought under U. S. Rev. St. (1878) § 4057 [U. S. Comp. St. (1901) p. 2756]. U. S. *v.* Salisbury, 157 U. S. 121, 15 S. Ct. 501, 30 L. ed. 639; U. S. *v.* Piatt, 157 U. S. 113, 15 S. Ct. 498, 39 L. ed. 639.

6. Wisconsin Cent. R. Co. *v.* U. S., 164 U. S. 190, 17 S. Ct. 45, 41 L. ed. 399; U. S. *v.* Carr, 132 U. S. 644, 10 S. Ct. 182, 33 L. ed. 483; Duval *v.* U. S., 25 Ct. Cl. 46.

When a mail contractor sues to recover one month's extra pay conceded to be due him, the United States can maintain a counter-claim to recover back overpayments made to him upon the same contract. Cosgrove *v.* U. S., 31 Ct. Cl. 332.

7. See Estoppel, 16 Cyc. 714.

8. Duval *v.* U. S., 25 Ct. Cl. 46.

9. Alvord *v.* U. S., 95 U. S. 356, 24 L. ed. 414.

10. Central Pac. R. Co. *v.* U. S., 164 U. S. 93, 17 S. Ct. 35, 41 L. ed. 362 [*affirming* 28 Ct. Cl. 427].

Transportation of post-office inspectors.— Where a railroad company has for years accorded free transportation to post-office inspectors pursuant to a claim of the department therefor, contained in their commissions, and has made no demand for payment at the time or long after, such acquiescence amounts to a waiver of any claim for compensation. Central Pac. R. Co. *v.* U. S., 164 U. S. 93, 17 S. Ct. 35, 41 L. ed. 362 [*distinguishing* Union Pac. R. Co. *v.* U. S., 104 U. S. 662, 26 L. ed. 884].

entitled, and accepts what is paid to him on the assurance that it is the full amount of the agreed compensation, he is not concluded by his acquiescence.[11]

D. Carriage[12] and Delivery of Mails — 1. Regulation of Departure and Arrival and Frequency of Service. It rests altogether in the discretion of the postmaster-general to determine at what hours the mail shall leave particular places and arrive at others, and to determine whether it shall leave the same place only once a day or more frequently.[13]

2. Delivery of Mail — a. Duty to Deliver. It is the duty of postmasters to deliver letters deposited in the office for persons residing in the same place, as well as those transmitted by mail.[14]

b. Effect of Delivery.[15] Where a letter has been delivered to the person to whom it is directed, or his authorized agent, the government is discharged of further responsibility, and its functions cease to operate upon the letter.[16]

3. Rights, Duties, and Liabilities of Carriers and Contractors[17] — a. Exemption From Arrest. While a mail carrier is exempt, as a matter of public policy, from arrest on civil process while engaged in such service,[18] the rule is different where the process is issued on a charge of felony,[19] or other criminal offense affecting the public welfare.[20]

b. Liability For Lost or Stolen Mail — (i) *In General.* A mail contractor is liable to third persons for a loss occasioned by his own personal negligence or default in the discharge of his duties,[21] but not for a loss caused by the negligence or default of a carrier when he has employed a person of suitable skill and ability.[22]

(ii) *Railroads.* A railroad company carrying the United States mails, whether under contract or by virtue of the requirements of the constitution and laws, is not in respect to such service a common carrier, but is a public agent of the United States, employed in performing a governmental function;[23] and as

Where a mail contractor renders service within the route of another contractor, and allows the latter to receive pay therefor from the government, without objection, he is estopped to call on the government for payment. Utica, etc., R. Co. *v.* U. S., 22 Ct. Cl. 265.

11. Pacific Mail Steamship Co. *v.* U. S., 28 Ct. Cl. 1.

12. Carriage of mails over toll-roads see Turnpikes and Toll-Roads.

13. Neil *v.* Ohio, 3 How. (U. S.) 720, 11 L. ed. 800.

14. Nevius *v.* Lansingburgh Bank, 10 Mich. 547.

In England a postmaster is bound to deliver all letters to the several inhabitants within a post town or place at their respective places of abode, at the rate of postage only as established by act of parliament. Smith *v.* Powdich, Cowp. 182. But the post town is the limit to which he is so bound to deliver. Smith *v.* Powdich, *supra*.

15. What constitutes delivery under statute relating to embezzlement see *infra*, III, A, 11.

Regulations as to reclaiming letters as affecting contracts by mail see Contracts, 9 Cyc. 297.

16. U. S. *v.* Dauphin, 20 Fed. 625; U. S. *v.* Parsons, 27 Fed. Cas. No. 16,000, 2 Blatchf. 104; U. S. *v.* Sander, 27 Fed. Cas. No. 16,219, 6 McLean 598.

The delivery of a letter to an errand boy, addressed to his employer, is a delivery to the employer when it is received by the former in pursuance of his duty as errand boy. U. S. *v.* Driscoll, 25 Fed. Cas. No. 14,994, 1 Lowell 303.

17. Collection of toll from carriers of mail see Turnpikes and Toll-Roads.

Vessel transporting mail as exempt from attachment see Attachment, 4 Cyc. 569.

18. U. S. *v.* Bean, 24 Fed. Cas. No. 14,550 (holding further that this exemption extends to such driver or carrier while he is waiting for the mail); U. S. *v.* Barney, 24 Fed. Cas. No. 14,525, 3 Hughes 545, 2 Wheel. Cr. Cas. (N. Y.) 513; U. S. *v.* Harvey, 26 Fed. Cas. No. 15,320.

19. U. S. *v.* Kirby, 7 Wall. (U. S.) 482, 19 L. ed. 278.

20. Penny *v.* Walker, 64 Me. 430, 18 Am. Rep. 269 (arrest for a violation of the liquor law); U. S. *v.* Hart, 26 Fed. Cas. No. 15,316, Pet. C. C. 390, 3 Wheel. Cr. Cas. (N. Y.) 304 (arrest for rapid driving).

21. Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504; Conwell *v.* Voorhees, 13 Ohio 523, 42 Am. Dec. 206 [*affirming* 1 Ohio Dec. (Reprint) 24, 1 West. L. J. 187]; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

22. Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504; Hutchins *v.* Brackett, 22 N. H. 252, 53 Am. Dec. 248; Conwell *v.* Voorhees, 13 Ohio 523, 42 Am. Dec. 206 [*affirming* 1 Ohio Dec. (Reprint) 24, 1 West. L. J. 187]. See also Holman *v.* Weller, 8 U. C. Q. B. 202. *Contra*, Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

23. Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334 (holding that the fact that the railroad company is also a

such it is liable for its own negligence,[24] but not for the negligence or tortious acts of its subordinates or employees in the selection of whom it has exercised ordinary care.[25]

III. Offenses Against Postal Laws.[26]

A. Offenses and Responsibility Therefor — 1. Unlawfully Franking Letters. Although it is unlawful for a member of congress to frank envelopes to be used in transmitting printed circulars through the mail, it is not penal.[27]

2. Writing on Newspapers Without Paying Letter Postage. The mere writing of a name on a newspaper is not within the prohibition of the Post-Office Act.[28]

3. Obstructing Passage of Mail[29] — a. In General. Any person who know-

common carrier as well as a contractor with the government for carrying the mails does not transform it into a common carrier as to the mails, and so render it liable as such to the sender for the loss of a letter sent by mail); Boston Ins. Co. *v.* Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796; Bankers' Mutual Casualty Co. *v.* Minneapolis, etc., R. Co., 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397.

24. Bankers' Mutual Casualty Co. *v.* Minneapolis, etc., R. Co., 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397.

Ordinary care only required.— Conceding that a railroad may be held liable by the addressee of a package for the loss of the same in the mail through the railroad's negligence, the degree of care required is only the reasonable care exacted of an ordinary bailee for him. German State Bank *v.* Minneapolis, etc., R. Co., 113 Fed. 414.

Negligence of employees not negligence of company.— The negligence of the servants of a railroad company in the operation of a train and the care of a switch is not the negligence of the company itself, so far as concerns the performance of its duty in regard to carrying the mails; and the company is not liable to the addressee of the mail matter carried over its line, caused by the negligence of such servants. Boston Ins. Co. *v.* Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796.

25. Bankers' Mutual Casualty Co. *v.* Minneapolis, etc., R. Co., 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397.

Rule of respondeat superior inapplicable.— The responsibility of a railroad company to an individual for a failure in the performance of its duty in carrying the mail, if it exist at all, can only be based upon a neglect of the corporation itself, since the rule of *respondeat superior* does not apply to a failure in the performance of an official duty by a duly authorized agent. Boston Ins. Co. *v.* Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796.

Relation of master and servant does not exist.— Since neither the sender nor addressee of mail carried over a railroad has any control over the railroad company in the handling of mail matter, the relation of master and servant does not exist, so as to render the company liable to the addressee for a loss caused by the negligence of the servants of the company. Boston Ins. Co. *v.* Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796.

No privity of contract.— The interest which the addressee of mail matter has in the performance by a railroad company of its agreement with the government for the carrying of mails is too indirect to make him a privy to the contract, so as to have a right of action thereon. Boston Ins. Co. *v.* Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796.

Even if the duty of a railroad company in the carrying of the mail be considered as ministerial, the company is not liable to the addressee of mail destroyed in an accident, since no liability exists to an individual for a breach of official duty owing solely to the public, although the individual have a mediate interest therein. Boston Ins. Co. *v.* Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796.

The duty of a railroad in carrying the mails is to the government, whether it be considered as created by a statute, or arising under contract (Boston Ins. Co. *v.* Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796), and not to the addressee of a letter or package (German State Bank *v.* Minneapolis, etc., R. Co., 113 Fed. 414).

Railroad not bailee of mail.— A railroad company, since it has no control over the mail matter transported by it, but merely has charge of the car in which the mails are carried, is not a bailee of such matter, so as to render it liable to the addressee thereof for a loss caused by the negligence of its servants. Boston Ins. Co. *v.* Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796. But see Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334.

26. **Criminal law** generally see Criminal Law, 12 Cyc. 70 *et seq.*

Offenses against post-office as infamous crimes see Indictments and Informations, 22 Cyc. 184 note 76.

Libel or slander in accusing of crimes relating to United States mail see Libel and Slander, 25 Cyc. 315.

27. They do not come within the meaning of the word "letters" in the act of March 3, 1825. Dewees' Case, 7 Fed. Cas. No. 3,848, Chase 531.

28. U. S. *v.* Grafton, 26 Fed. Cas. No. 15,245.

29. **Civil liability** for obstructing mail see *infra*, IV.

ingly and wilfully obstructs or retards the passage of the mail,[30] or any carriage, horse, driver, or carrier carrying the same is punishable by a fine of one hundred dollars.[31]

b. Persons and Acts Punishable. The statute of congress by its terms applies only to persons who "knowingly and wilfully" obstruct or retard the passage of the mail, or of its carrier; that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation.[32] When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object.[33] The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows.[34]

30. By the term "passage of the mails" is meant the transmission of mail matter from the time the same is deposited in a place designated by law or by the rules of the post-office department up to the time the same is delivered to the person to whom it is addressed. U. S. *v.* Lingle, 9 Haz. Reg. (Pa.) 78; U. S. *v.* Claypool, 14 Fed. 127 (holding that mail matter in the post-office, ready for delivery, and there for that purpose, is on its passage, within the meaning of the law, and to interfere with it so as to obstruct and retard its delivery is an offense); U. S. *v.* McCracken, 26 Fed. Cas. No. 15,664, 3 Hughes 344.

31. U. S. Rev. St. (1878) § 3995 [U. S. Comp. St. (1901) p. 2716].

Interference by state statute.—A state statute which unnecessarily interferes with the speedy and uninterrupted carriage of the United States mails cannot be considered a reasonable police regulation. Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 16 S. Ct. 1096, 41 L. ed. 107

City ordinance limiting speed of mail trains.—A reasonable exercise by a city of the police power vested in it by the legislature in regard to the speed of trains within its limits is not invalid as an interference with the United States mail, although it may incidentally limit the speed of mail trains. Chicago, etc., R. Co. *v.* Carlinville, 200 Ill. 314, 65 N. E. 730.

Statute applicable to railroads.—Although U. S. Rev. St. (1878) § 3995 [U. S. Comp. St. (1901) p. 2716], making it an offense to obstruct the mails, was originally enacted prior to the use of railroads for mail purposes, it is applicable to the carriage of mail by trains. U. S. *v.* Cassidy, 67 Fed. 698.

32. U. S. *v.* Kirby, 7 Wall. (U. S.) 482, 19 L. ed. 278; U. S. *v.* Woodward, 44 Fed. 592; U. S. *v.* Claypool, 14 Fed. 127.

33. U. S. *v.* Kirby, 7 Wall. (U. S.) 482, 19 L. ed. 278; U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Sears, 55 Fed. 268; U. S. *v.* Kane, 19 Fed. 42, 9 Sawy. 614; U. S. *v.* Claypool, 14 Fed. 127; U. S. *v.* Lawhead, 26 Fed. Cas. No. 15,570; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,392, 2 Hask. 164.

Placing obstructions on the track of an electric railway engaged in carrying the mails constitutes the crime of obstructing the mails. U. S. *v.* Thomas, 55 Fed. 380.

To prevent the running of a mail train as made up is a violation of the statute, although the mail car would be permitted to go without certain other cars, since it is not practicable to transport a mail car by itself, and thus, by preventing the transit of other cars, the transportation of the mails is interfered with. *In re* Grand Jury, 62 Fed. 840; U. S. *v.* Clark, 25 Fed. Cas. No. 14,805, 16 Alb. L. J. 224, 13 Phila. (Pa.) 476.

34. U. S. *v.* Kirby, 7 Wall. (U. S.) 482, 19 L. ed. 278; Harper *v.* Endert, 103 Fed. 911; U. S. *v.* Sears, 55 Fed. 268; U. S. *v.* Kane, 19 Fed. 42, 9 Sawy. 614.

Failure to run other than regular passenger trains.—Where the regular passenger trains of a railroad have been designated for the carrying of mail, failure of the railroad to run other trains for that purpose, on the refusal of its employees to move the regular trains so long as certain cars are attached, is not in violation of the statute against obstruction of the mail. *In re* Grand Jury, 62 Fed. 834.

Arrest of mail carrier or driver.—The act of congress of March 3, 1825 (4 U. S. St. at L. 104, c. 64, § 9), which punishes the obstruction or retarding of the passage of the mail or its carrier, does not apply to the temporary detention of the mail by the arrest of a carrier on a warrant duly issued against him by a state court on a charge of murder (U. S. *v.* Kirby, 7 Wall. (U. S.) 482, 19 L. ed. 278), or other criminal offense affecting the public welfare (U. S. *v.* Hart, 26 Fed. Cas. No. 15,316, Pet. C. C. 390, 3 Wheel. Cr. (N. Y.) 304). A warrant in a civil action against a mail carrier is, however, no justification for the officer executing it. U. S. *v.* Harvey, 26 Fed. Cas. No. 15,320, Brunn. Col. Cas. 540.

The attachment, knowingly, of a mail coach and horses, while carrying the mail, is void, being an obstruction of the mail within Act Cong. March 3, 1825 (4 U. S. St. at L. 104, c. 64, § 9). Harmon *v.* Moore, 59 Me. 428; U. S. *v.* Barney, 24 Fed. Cas. No. 14,525, 3 Hughes 545, 2 Wheel. Cr. (N. Y.) 513. But see Lathrop *v.* Middleton, 23 Cal. 257, 83 Am. Dec. 112.

Detaining mail carrier for refusal to pay toll.—On indictment for obstructing the mail, defendant, a toll-gate keeper on a gravel road, cannot justify his act on the ground that the

c. Conspiracy to Obstruct Mail. A conspiracy to obstruct the mail, in violation of section 3995 of the Revised Statutes, is a violation of section 5440, as a conspiracy to commit an offense against the United States,[35] and this, although the obstruction is effected by merely quitting employment.[36] An essential ingredient of the offense is knowledge by defendants that the mails were being carried upon the train which they conspired to obstruct.[37]

4. Conveyance of Mail Matter Out of Mail. It is provided by statute[38] that no person shall establish any private express for the conveyance of letters or packets,[39] or in any manner cause or provide for the conveyance of the same, by regular trips or at stated periods,[40] over any post route, which is or may be established by law,[41] or from any city, town, or place to any other city, town, or place between which the mail is regularly carried. So too it is made unlawful for letters to be carried by any vehicle or vessel making regular trips on places declared to be post-roads, or on places parallel to such roads.[42] It is also made unlawful

driver of the mail wagon refused to pay toll in advance, and that, by statute, toll-gate keepers on gravel roads are authorized to stop persons who refuse to pay in advance. U. S. *v.* Sears, 55 Fed. 268. See also U. S. *v.* De Mott, 3 Fed. 478. But see Harper *v.* Endert, 103 Fed. 911.

35. U. S. *v.* Debs, 63 Fed. 436; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,392, 2 Hask. 164.

36. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803.

37. Salla *v.* U. S., 104 Fed. 544, 44 C. C. A. 26.

38. U. S. Rev. St. (1878) § 3982 [U. S. Comp. St. (1901) p. 2712].

Act constitutional.— The act of congress prohibiting the establishment of private expresses is constitutional. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,489.

39. See cases cited *infra*, this note.

Letters only subject of prohibition.— Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Chouteau *v.* The St. Anthony, 11 Mo. 226.

A letter is a message in writing. Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Chouteau *v.* The St. Anthony, 11 Mo. 226.

A seal is not necessary to constitute it a letter. U. S. *v.* Bromley, 12 How. (U. S.) 88, 13 L. ed. 905.

A packet is two or more letters under one cover. Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Chouteau *v.* The St. Anthony, 11 Mo. 226; U. S. *v.* Chaloner, 25 Fed. Cas. No. 14,777, 1 Ware 214.

Carrying letters need not be sole business of express.— The establishment of an express, one of the purposes of which is the carrying of letters over a mail route, is a violation of the law. Nor does it make any difference that they are carried without distinct compensation. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,489.

An expressman conveying letters in an express car is punishable under this act. U. S. *v.* Gray, 26 Fed. Cas. No. 15,253.

Exception—letter relating to article shipped. — It is not a violation of the post-office laws for an express company to carry with a money letter or package a non-stamped letter of advice concerning such money. Act March 3, 1845, permits an unstamped letter of advice relating merely to the article shipped to be transmitted with such article. Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Chouteau *v.* The St. Anthony, 11 Mo. 226; U. S. *v.* U. S. Express Co., 28 Fed. Cas. No. 16,602, 5 Biss. 91.

40. See U. S. *v.* Easson, 18 Fed. 590.

Provision for a delivery daily, once, twice, or thrice, as the case may be, over the streets of a city, wherever wanted, is a provision for a delivery by regular trips or at stated periods. U. S. *v.* Easson, 18 Fed. 590.

41. See cases cited *infra*, this note.

Letter carriers' routes are to be considered post routes within the meaning of the act. U. S. *v.* Easson, 18 Fed. 590; Blackham *v.* Gresham, 16 Fed. 609, 21 Blatchf. 354.

Private letter carriers within the limits of a post town are not prohibited. U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541.

Contract unnecessary to constitute post route.— If the mail is actually carried over a railroad, under the authority of the post-office department, with the assent of, and by an arrangement with, the railroad corporation, although without a formal written contract, that is sufficient to make it a mail route within the meaning of the law forbidding the use thereof for the private transportation of mail. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,489.

42. 4 U. S. St. at L. 107, c. 64, § 19.

An order for goods, folded and directed as a letter, is "mailable matter," within the meaning of Act Cong. March 3, 1825 (4 U. S. St. at L. 107, c. 64, § 10) prohibiting any stage coach, railroad car, steamboat, or other vehicle or vessel, or any of the owners, managers, servants, or crews of either, which regularly performs trips on a post route on which the mail is carried, from transporting letters, packages, or other "mailable matter," except such as may have relation to some part of the cargo or to some article at the same time conveyed in a stage or other vehicle. U. S. *v.* Bromley, 12 How. (U. S.) 88, 95, 13 L. ed. 905.

Knowledge by carrier necessary.— The carrier of letters by private express, in a package, is not liable to the penalty unless he

for any person to set up any foot or horse post for the conveyance of letters on any post-road.[43]

5. Mailing Obscene Matter or Information Concerning Same — a. Mailing Obscene Matter — (I) *In General* — (A) *Gist of Offense.* The substance of the offense of mailing any obscene, lewd, or lascivious publication is the employment of, or attempt to employ, the mails for the transmission of obscene matter.[44]

(B) *Test of Obscenity.* Matter is "obscene" within the statute making it a criminal offense to mail any obscene, lewd, or lascivious publication,[45] when it is offensive to the common sense of decency and modesty of the community, and is such as to deprave and corrupt those whose minds are open to such immoral influences.[46] Language which is merely coarse, vulgar, and indecent is not within the purview of the statute.[47] It is not necessary that the entire contents of the publication be objectionable; it is sufficient if a single article or passage be

knew that the package contained letters. U. S. *v.* Adams, 24 Fed. Cas. No. 14,421. Thus, if a passenger in a railroad car or steamboat passing over a post-road carry letters without the knowledge or consent of the proprietor of such car or boat or any of his servants, the owner does not incur the penalty. U. S. *v.* Kimball, 26 Fed. Cas. No. 15,531. Nor is the person who sends the letter liable where the carrier is not. U. S. *v.* Hall, 26 Fed. Cas. No. 15,281; U. S. *v.* Kimball, 26 Fed. Cas. No. 15,531; U. S. *v.* Pomeroy, 27 Fed. Cas. No. 16,065, 3 N. Y. Leg. Obs. 143. *Contra*, U. S. *v.* Fisher, 25 Fed. Cas. No. 15,100. But if a person be openly engaged in the business of private letter carrying over the post-roads of the United States, and a railroad company be notified by public advertisement, and by the agent of the post-office department, that the party and his agents are engaged in such business, they will be liable by reason of their conveying such agents carrying letters. U. S. *v.* Hall, *supra*. And the company being liable, the person sending the letter is liable. U. S. *v.* Hall, *supra*.

43. 4 U. S. St. at L. 238.

"Post routes" not synonymous with "post-roads."— U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541. See also *supra*, I, A, 2.

The setting up of a post by railroad car or steamboat is not within the meaning of Act March 2, 1827 (4 U. S. St. at L. 238, c. 61, § 3), which enacts that no person shall set up any foot or horse post for the conveyance of letters or packets on any post-road. U. S. *v.* Kimball, 26 Fed. Cas. No. 15,531.

44. U. S. *v.* Harris, 122 Fed. 551; U. S. *v.* Brazeau, 78 Fed. 464.

45. U. S. Rev. St. (1878) § 3893 [U. S. Comp. St. (1901) p. 2658].

46. Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799; Swearingen *v.* U. S., 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765; U. S. *v.* Wroblenski, 118 Fed. 495; U. S. *v.* Moore, 104 Fed. 78; U. S. *v.* Janes, 74 Fed. 545; U. S. *v.* Males, 51 Fed. 41; U. S. *v.* Harmon, 45 Fed. 414; U. S. *v.* Clarke, 38 Fed. 732; U. S. *v.* Slenker, 32 Fed. 691; U. S. *v.* Wightman, 29 Fed. 636; U. S. *v.* Britton, 17 Fed. 731; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338, 8 Reporter 38. *Compare* Obscenity, 29 Cyc. 1314.

The words "obscene," "lewd," and "lascivious" have reference to that form of immorality which relates to sexual impurity (Swearingen *v.* U. S., 161 U. S. 446, 16 S. Ct. 562, 40 L. ed. 765; U. S. *v.* Wyatt, 122 Fed. 316), and have the same meaning as given them at common law in prosecutions for obscene libel (Swearingen *v.* U. S., *supra*; U. S. *v.* Clarke, 38 Fed. 500). "Obscene" is that which is offensive to chastity and modesty (U. S. *v.* Martin, 50 Fed. 918 [*following* U. S. *v.* Harmon, 45 Fed. 414]. "Lascivious" is synonymous with "lewd." U. S. *v.* Clarke, 38 Fed. 732.

Offense to religious sentiments.—An article is not non-mailable because it offends the religious sentiments of a majority of the people by attacking the doctrine of the immaculate conception of Christ in coarse or even obscene language, where it has no tendency to induce sexual immorality, that being the class of publications against which it is the purpose of the statute to protect the public. U. S. *v.* Moore, 104 Fed. 78.

Alleged medical works.— Where the acts described and the ideas conveyed in a book are calculated to deprave the morals of the reader by exciting sensual desires and libidinous thoughts, the book is obscene under U. S. Rev. St. (1878) § 3893, and it is immaterial that the information conveyed is accurate and scientific and tends to prevent disease and other ills resulting from existing ignorance upon the topics discussed; that, as a whole, the book is calculated to be of value to the medical practitioner and to men and women in the marriage relation, that its publication was approved by several physicians; and that some portions of it are extracts from standard works. Burton *v.* U. S., 142 Fed. 57, 73 C. C. A. 243; U. S. *v.* Smith, 45 Fed. 476; U. S. *v.* Chesman, 19 Fed. 497. Such publications will not, because of their character, be considered privileged communications by a physician to a patient, in the absence of a showing that defendant is a physician, and that the persons to whom they were addressed were his patients. U. S. *v.* Smith, *supra*.

47. U. S. *v.* Males, 51 Fed. 41; U. S. *v.* Wightman, 29 Fed. 636.

obscene.[48] Nor need the words used be of themselves obscene, if such is their necessary import.[49]

(c) *Motive.* Where the writings, papers, and publications sent through the mail by the accused are depraving and corrupting, and tend to excite lustful thoughts, the fact that they were so sent in the real or supposed interest of science, philosophy, or morality is immaterial.[50] Nor is it material that defendant did not regard the matter as obscene.[51]

(d) *Persons Liable.* It is not essential to the commission of the offense prescribed by statute [52] that the objectionable matter be deposited in the mail by the offender himself,[53] or by another acting under his express direction;[54] he being equally responsible if it is deposited therein as a natural consequence of an act intentionally done by him with knowledge of its probable effect.[55]

(ii) *Sealed Letters or Packages.* The original section [56] did not in terms include a letter and the decisions were conflicting as to whether a sealed letter was within its import;[57] but by the amendment of 1888,[58] the omission was supplied by the insertion of the word "letter" after the word "paper" and before the word "writing." [59]

b. Advertising Articles For Immoral Use — (i) *In General.* The statute also forbids the use of the mails for carrying any advertisement giving information where articles designed for producing abortion and preventing conception can be obtained or made.[60] In such a case it is not necessary that the advertisement

48. Demolli *v.* U. S., 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. N. S. 424; Burton *v.* U. S., 142 Fed. 57, 73 C. C. A. 243; U. S. *v.* Harman, 38 Fed. 827; U. S. *v.* Clarke, 38 Fed. 732.

49. U. S. *v.* Moore, 129 Fed. 159; U. S. *v.* Martin, 50 Fed. 918. But see U. S. *v.* Lamkin, 73 Fed. 459.

The words "obscene," "lewd," "lascivious," or of an "indecent character," in the federal statute prohibiting the sending of such matter through the mail, does not neeessarily mean that the separate words are of such a character, but the character of the letter is to be determined by treating it as a whole. U. S. *v.* Hanover, 17 Fed. 444.

50. U. S. *v.* Harmon, 45 Fed. 414; U. S. *v.* Slenker, 32 Fed. 691; U. S. *v.* Bebout, 28 Fed. 522.

51. Rosen *v.* U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606; Burton *v.* U. S., 142 Fed. 57, 73 C. C. A. 243.

52. U. S. Rev. St. (1878) § 3893.

53. Demolli *v.* U. S., 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. N. S. 424; Bates *v.* U. S., 10 Fed. 92, 10 Biss. 70.

54. Demolli *v.* U. S., 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. N. S. 424; Bates *v.* U. S., 10 Fed. 92, 10 Biss. 70.

55. Demolli *v.* U. S., 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. N. S. 424, holding that one who causes the objectionable matter written by him to be printed in a newspaper, intending to bring it to the attention of the readers of the paper, and knowing that the regular and established method of transmitting the paper to its readers is by mail, knowingly causes the objectionable matter to be deposited in the mail within U. S. Rev. St. (1878) § 3893, when in such regular course the paper with the objectionable matter printed therein is deposited in the post-office for mailing and delivery.

56. U. S. Rev. St. (1878) § 3893.

57. U. S. *v.* Chase, 135 U. S. 255, 10 S. Ct. 756, 34 L. ed. 117; U. S. *v.* Huggett, 40 Fed. 636; U. S. *v.* Mathias, 36 Fed. 892; U. S. *v.* Comerford, 25 Fed. 902; U. S. *v.* Loftis, 12 Fed. 671, 8 Sawy. 194; U. S. *v.* Williams, 3 Fed. 484; U. S. *v.* Foote, 25 Fed. Cas. No. 15,128, 13 Blatchf. 418. *Contra*, see Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; U. S. *v.* Gaylord, 50 Fed. 410; U. S. *v.* Thomas, 27 Fed. 682; U. S. *v.* Morris, 18 Fed. 900, 9 Sawy. 439; U. S. *v.* Britton, 17 Fed. 731; U. S. *v.* Hanover, 17 Fed. 444; U. S. *v.* Gaylord, 17 Fed. 438.

58. 25 U. S. St. at L. 496 [U. S. Comp. St. (1901) p. 2658].

59. Andrews *v.* U. S., 162 U. S. 420, 16 S. Ct. 798, 40 L. ed. 1023; Grimm *v.* U. S., 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550; U. S. *v.* Ling, 61 Fed. 1001; U. S. *v.* Nathan, 61 Fed. 936; U. S. *v.* Andrews, 58 Fed. 861; U. S. *v.* Martin, 50 Fed. 918; *In re* Wahll, 42 Fed. 822.

Contra.— It was held in several of the lower courts, however, that the word "letter" thus introduced, must, in the light of the other words used, be deemed to be some sort of a publication, and not merely private sealed letters. U. S. *v.* Jarvis, 59 Fed. 357; U. S. *v.* Warner, 59 Fed. 355; U. S. *v.* Wilson, 58 Fed. 768.

60. U. S. Rev. St. (1878) § 3893 [U. S. Comp. St. (1901) p. 2658].

A notice consisting of a written slip of paper, without address or signature, sent in reply to a letter asking for information, is within the prohibition of U. S. Rev. St. (1878) § 3893 [U. S. Comp. St. (1901) p. 2658], forbidding the sending through the mails of advertisements of preventives of conception, if the prohibited information is thereby conveyed. U. S. *v.* Foote, 25 Fed. Cas. No. 15,128, 13 Blatchf. 418.

should indicate any particular article or thing or its properties,[61] or that the article should be at the place designated.[62] Nor is it necessary that the article sent in reply to a request for such information should be capable of producing the desired effect.[63]

(II) *Answers to Decoy Letters.* The offense of sending letters by mail giving information where obscene pictures can be obtained does not lose its criminal character, although the letters were sent in response to an inquiry made under an assumed name by a government official, with a view of detecting the accused in the commission of an offense,[64] unless the accused was solicited to use the mails and thus to commit an offense.[65]

6. Mailing Offensive, Defamatory, or Threatening Matter.[66] The statute[67] declares unmailable matter upon the envelope or outside cover of which,[68] or any postal card upon which, are any delineation,[69] epithets,[70] terms or language of an indecent,[71] lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display,[72] and obviously intended, to reflect injuriously upon the character or conduct of another.[73]

61. De Gignac *v.* U. S., 113 Fed. 197, 52 C. C. A. 71; U. S. *v.* Kelly, 26 Fed. Cas. No. 15,514, 3 Sawy. 566.

However innocent on its face it may appear, if the letter conveyed, and was intended to convey, information in respect to the place or person where, or of whom, such objectionable matters could be obtained, it is within the statute. Grimm *v.* U. S., 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550; De-Gignac *v.* U. S., 113 Fed. 197, 52 C. C. A. 71.

62. U. S. *v.* Bott, 24 Fed. Cas. No. 14,626, 11 Blatchf. 346.

63. Bates *v.* U. S., 10 Fed. 92, 10 Biss. 70; U. S. *v.* Bott, 24 Fed. Cas. No. 14,626, 11 Blatchf. 346.

64. Andrews *v.* U. S., 162 U. S. 420, 16 S. Ct. 798, 40 L. ed. 1023; Grimm *v.* U. S., 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550 [*affirming* 50 Fed. 528]; Bates *v.* U. S., 10 Fed. 92, 10 Biss. 70.

65. U. S. *v.* Adams, 59 Fed. 674 [*following* U. S. *v.* Whittier, 28 Fed. Cas. No. 16,688, 5 Dill. 35, 6 Reporter 260].

66. Publication of libel by sealed or unsealed letters to person libeled see Libel and Slander, 25 Cyc. 367, 368.

67. U. S. Rev. St. (1878) § 3893, amended by 25 U. S. St. at L. 496 [U. S. Comp. St. (1901) p. 2658].

68. Outside pages of publication considered cover.— When the outside pages of a publication, although of the same color as the rest of the publication, overspread or overlay the publication, such pages may be considered the "outside cover," of the publication, within Act Sept. 26, 1888. U. S. *v.* Burnell, 75 Fed. 824.

Absence of wrapper or cover.— The statute cannot be extended by construction to cases where there is no wrapper or cover at all, even though such cases may be within the reason and policy of the enactment. U. S. *v.* Gee, 45 Fed. 194.

A sealed letter containing defamatory language is not within the prohibition of this statute. U. S. *v.* Durant, 46 Fed. 753.

69. "Delineation" signifies representations expressed otherwise than by language. Therefore the sending through the mail by a collection agency of dunning letters, inclosed in black envelopes, addressed in white letters, the purpose of which was universally known to the post-office employees, is a "delineation," within the act. U. S. *v.* Dodge, 70 Fed. 235.

70. U. S. *v.* Pratt, 27 Fed. Cas. No. 16,082, holding that the mailing of a postal card containing words imputing illicit intercourse to third persons, but no epithet in the form of a substantive or adjective, is an offense under U. S. Rev. St. (1878) § 3893 [U. S. Comp. St. (1901) p. 2658], punishing the mailing of postal cards containing "indecent or scurrilous epithets."

71. The term "indecent" in U. S. Rev. St. (1878) § 3893 [U. S. Comp. St. (1901) p. 2658], in connection with the offense defined in said section of mailing any book, letter, envelope, postal card, etc., containing any indecent, etc., delineations, epithets, etc., either written or printed, taken with the history of the legislation on the subject, means immodest, impure; and language which is coarse or unbecoming, or even profane, is not within the inhibition of the act. U. S. *v.* Smith, 11 Fed. 663.

72. Display type.— Mailing a letter inclosed in an envelope, on which the words "Excelsior Collection Agency" are printed in very large full-faced capital letters, which occupy more than half the envelope, and are so placed as to be entirely separate from the direction to return to the sender, is a violation of the statute. U. S. *v.* Brown, 43 Fed. 135. It is otherwise when the type used is neither large nor unusual, but of a size and character quite common upon business envelopes. *In re* Barber, 75 Fed. 980.

73. U. S. *v.* Burnell, 75 Fed. 824; U. S. *v.* Davis, 38 Fed. 326.

Language held threatening.—A postal card reading: "It is with regret that I once more ask you to take your choice. I will vindicate myself if I live. The truth, and the whole truth must come out," contains language of a "threatening" character, within the meaning of the United States

7. Use of Mails to Defraud — a. In General. The statute[74] which makes it a criminal offense for any person to use the mails in the execution of a scheme or artifice to defraud contemplates three classes of transactions, namely, lotteries and other like games of chance, "confidence games," and schemes which from their very nature, in the light of business experience, are sure to end in financial disaster to their contributors.[75]

b. Mailing Matter Concerning Lotteries[76] or Gift Enterprises — (i) *In General.* By statute,[77] it is made unlawful to send[78] through the mails, letters or circulars[79] concerning lotteries, etc. The word "lottery" embraces the elements of procuring through lot or chance, by the investment of money or something of value, some greater amount of money or thing of value.[80]

(ii) *Persons Liable.* While the effect of the statute,[81] prohibiting the mailing

postal laws. Griffin *v.* Pembroke, 64 Mo. App. 263.

The word "notorious," when written on the outside of a letter, after the name of the person addressed, as follows, "Room 32, Pease House, Front St., City, The Notorious," is not obviously intended to reflect injuriously on the character or conduct of another, and the mailing of such letter is therefore not within the prohibition of the statute. U. S. *v.* Jarvis, 59 Fed. 357.

Dunning postal cards.—A postal card demanding payment of a debt, and stating that "if it is not paid at once we shall place the same with our lawyer for collection," is non-mailable matter. U. S. *v.* Smith, 69 Fed. 971; U. S. *v.* Bayle, 40 Fed. 664, 6 L. R. A. 742. See also U. S. *v.* Simmons, 61 Fed. 640. But see U. S. *v.* Elliott, 51 Fed. 807. A postal card containing the words, "Please call and settle account, which is long past due, and for which our collector has called several times, and oblige," is not within the prohibition, as the language cannot be said to be threatening or offensive to the person addressed, or such as to attract public notice. U. S. *v.* Bayle, *supra.*

This provision relates to the external appearance, and is a protection against delineations or words which will convey or imply insult, threat, or harm to the person addressed, operating either directly in injuring his feelings, or indirectly by attracting the notice of other persons, and raising injurious inferences. *In re* Barber, 75 Fed. 980.

No extension of statute by construction.— *In re* Barber, 75 Fed. 980; U. S. *v.* Dodge, 70 Fed. 235.

74. U. S. Rev. St. (1878) § 5480 [U. S. Comp. St. (1901) p. 3696].

75. Rosenberger *v.* Harris, 136 Fed. 1001 [*reversed* on other grounds in 145 Fed. 449].

U. S. Rev. St. (1878) § 5480 [U. S. Comp. St. (1901) p. 3696], and its amendments, are general in character, and make the use of the mails for promoting schemes to defraud a criminal offense. U. S. Rev. St. (1878) § 3894 [U. S. Comp. St. (1901) p. 2659], as amended, is specific and applies only to the promotion of lottery schemes by the use of the mails. U. S. *v.* Sauer, 88 Fed. 249.

76. See also Lotteries, 25 Cyc. 1631.

77. U. S. Rev. St. (1878) § 3894 [U. S. Comp. St. (1901) p. 2659].

78. "Sending" of letters and circulars concerning lotteries, denounced in U. S. Rev. St. (1878) § 3894 [U. S. Comp. St. (1901) p. 2659], means the knowingly forwarding or causing to be forwarded through the mail, as matter to be conveyed by mail, that is, as mail matter, after the prohibited article has been deposited in the mail, and does not include the naked sending toward or to the post-office. U. S. *v.* Dauphin, 20 Fed. 625.

79. **Statute applicable to sealed letters.**— *Re* Jackson, 13 Fed. Cas. No. 7,124, 14 Blatchf. 245.

A lottery ticket is not a "letter," within the meaning of the statute which forbids the mailing of "any letter or circular concerning lotteries," etc., but a schedule setting out the prizes offered in a lottery, printed on the back of all lottery tickets sent out for a particular drawing, is a "circular," within the meaning of that statute. U. S. *v.* Clark, 22 Fed. 708.

80. U. S. *v.* Wallis, 58 Fed. 942. See also Lotteries, 25 Cyc. 1633 *et seq.*

Bond investment schemes.— When a city or a government, as an inducement to the purchase of its bonds, holds out large prizes to be determined in the manner in which prizes are usually determined in lotteries, the mailing of circulars concerning such drawings, past and future, is a mailing of lottery circulars within U. S. Rev. St. (1898) § 3894 [U. S. Comp. St. (1901) p. 2659]. Horner *v.* U. S., 147 U. S. 449, 13 S. Ct. 409, 37 L. ed. 237 [*distinguishing* Kohn *v.* Koehler, 96 N. Y. 362, 48 Am. Rep. 628]; MacDonald *v.* U. S., 63 Fed. 426, 12 C. C. A. 339; U. S. *v.* McDonald, 59 Fed. 563; U. S. *v.* Politzer, 59 Fed. 273; U. S. *v.* Zeisler, 30 Fed. 499.

All so-called gift enterprises in which each purchaser of a ticket is given something of value equal to its cost, when connected with a drawing by lot for prizes to be received by some and not others, are lotteries. U. S. *v.* Fulkerson, 74 Fed. 619; U. S. *v.* Wallis, 58 Fed. 942.

A guessing contest dependent on judgment is not a lottery. U. S. *v.* Rosenblum, 121 Fed. 180.

81. U. S. Rev. St. (1878) § 3894 [U. S. Comp. St. (1901) p. 2659].

of lottery circulars, etc., is to make any matter concerning lotteries unmailable, and to subject the sender of any such matter by mail to the penalty therein provided,[82] the statute was aimed at lottery dealers only and not individual buyers of lottery tickets.[83] The offense is complete, although the letters or circulars in question are sent in reply to letters written by a detective, under a fictitious name, for no other purpose than to obtain evidence of the commission of the offense.[84]

c. Other Schemes or Artifices to Defraud — (i) *Elements of Offense* — (A) *In General.* The elements in the offense of using the mail for the purpose of defrauding[85] are: (1) The devising, or intending to devise, a scheme or artifice to defraud; (2) the opening or intending to open correspondence or communication with some other person, or inciting such person to open correspondence, by means of the post-office department, with the one devising the scheme; (3) in pursuance of the scheme, putting a letter or packet in the mail, or taking one out.[86]

(B) *Intent to Defraud.* To bring a case within the operation of the statute, an intent to defraud must exist.[87] It is not necessary to prove a specific intent,[88] but such intent may be determined by inference from all the facts and circumstances of the case.[89]

(C) *Intent to Effect Scheme Through Use of Mails.* This statute does not embrace every case where a letter promotive of, or connected with, a fraudulent design may be sent through the post-office by the person engaged in or contem-

82. U. S. *v.* Zeisler, 30 Fed. 499.

To constitute the offense of knowingly depositing or causing to be deposited in the mail a circular concerning a lottery, it is necessary that the offending party should be conscious of the physical act of depositing or causing to be deposited the circular in the mail, and that he should be aware that such circular related to an enterprise where the premiums or prizes or other important pecuniary detail is determined or fixed by lot or chance. U. S. *v.* Politzer, 59 Fed. 273.

83. U. S. *v.* Mason, 22 Fed. 707. "It is very plain that the broad, literal terms of this statute are to be restricted in some manner. It declares that the mailing of any letter concerning a lottery shall be punishable; so that a father writing his son, warning him against spending money upon tickets in any specified lotteries, would be indictable for a criminal offense. That cannot be the meaning of the statute. It must be construed, not according to its literal terms, but with reference to the evil to which congress was addressing itself, and the remedy it intended to provide for the suppression of that evil." U. S. *v.* Mason, 22 Fed. 707.

84. U. S. *v.* Moore, 19 Fed. 39; U. S. *v.* Duff, 6 Fed. 45, 19 Blatchf. 9.

Carrying on lottery business under assumed name.—Act March 2, 1889 (25 U. S. St. at L. 873, c. 393, § 2 [U. S. Comp. St. (1901) p. 2660]), making it a criminal offense to use the United States mails in carrying on or promoting any unlawful business under a false, fictitious, or assumed name, and U. S. Rev. St. (1878) § 3894 [U. S. Comp. St. (1901) p. 2659], as amended by Act Sept. 19, 1890, forbidding the use of the mails in carrying on or promoting the lottery business, construed *in pari materia*, plainly show the intent of congress to make the use of the mails to carry on or promote the lottery business under an assumed name a criminal offense. MacDaniel *v.* U. S., 87 Fed. 321, 30 C. C. A. 670.

85. U. S. Rev. St. (1878) § 5480 [U. S. Comp. St. (1901) p. 3696].

86. Durland *v.* U. S., 161 U. S. 306, 16 S. Ct. 508, 40 L. ed. 709; Stokes *v.* U. S., 157 U. S. 187, 15 S. Ct. 617, 39 L. ed. 667; U. S. *v.* Dexter, 154 Fed. 890; Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581; Brown *v.* U. S., 143 Fed. 60, 74 C. C. A. 214; Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399; U. S. *v.* Long, 68 Fed. 348; U. S. *v.* Smith, 45 Fed. 561; U. S. *v.* Hoeflinger, 33 Fed. 469; U. S. *v.* Wootten, 29 Fed. 702; U. S. *v.* Flemming, 18 Fed. 907; U. S. *v.* Stickle, 15 Fed. 798.

Amendment of March 2, 1889.—Amendment of U. S. Rev. St. (1878) § 5480, relating to the fraudulent use of the mails, by Act March 2, 1889 (25 U. S. St. at L. 873, c. 393, § 1 [U. S. Comp. St. (1901) p. 3698], did not limit the scope of such sections to schemes, artifices, or devices described in the amendment, but added to the offenses denounced by the original act those specified in the act of 1889. Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399. See also Milby *v.* U. S., 120 Fed. 1, 57 C. C. A. 21.

87. U. S. *v.* White, 150 Fed. 379; Post *v.* U. S., 135 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 989 [*reversing* 128 Fed. 950]; Milby *v.* U. S., 109 Fed. 638, 48 C. C. A. 574.

88. Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329.

89. Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329; U. S. *v.* Staples, 45 Fed. 195; U. S. *v.* Finney, 45 Fed. 41; U. S. *v.* Stickle, 15 Fed. 798, holding that, in determining the intention of the accused, in a prosecution for using the mails to defraud, it is proper for the jury to consider all the facts and circumstances in evidence, the nature and quality of his advertisements and circulars, and the statements and representations therein contained, their truth or falsity in different

plating the fraud. The scheme to defraud must be one which is to be effected by the deviser of it opening a correspondence by mail, or by inciting someone else to open such correspondence with him,[90] whether that be the sole or only part of the means to be employed in effecting it.[91]

(D) *Actual Use of Mails.* The gist of the offense under the statute is the use of the mails as a material part of carrying out the scheme to defraud,[92] and the mailing of the letter in execution of the unlawful scheme constitutes the *corpus delicti*.[93]

(II) *Particular Schemes or Artifices Included.* The phrase "scheme or artifice to defraud" is not limited to such as are to be accomplished by means of deception or trickery,[94] but includes any scheme designed and intended to injure another by depriving him of his property wrongfully.[95] A scheme need not be unlawful in itself, or constitute a fraud, either at common law or by statute.[96] It is enough if its purpose is to defraud other persons of their money, although no particular person had been selected as the subject of its operation.[97] The crimi-

particulars, whether he filled orders for goods or not, and the quality of such orders, and his conduct in the premises generally.

90. Dalton *v.* U. S., 154 Fed. 461, 83 C. C. A. 317; Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581; U. S. *v.* Mitchell, 36 Fed. 492, 1 L. R. A. 796; U. S. *v.* Owens, 17 Fed. 72, 5 McCrary 307; Brand *v.* U. S., 4 Fed. 394, 18 Blatchf. 384.

91. Brown *v.* U. S., 143 Fed. 60, 74 C. C. A. 214; Weeber *v.* U. S., 62 Fed. 740; U. S. *v.* Flemming, 18 Fed. 907.

92. Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581; U. S. *v.* Ryan, 123 Fed. 634; Milby *v.* U. S., 120 Fed. 1, 57 C. C. A. 21; Horman *v.* U. S., 116 Fed. 350, 53 C. C. A. 570; Milby *v.* U. S., 109 Fed. 638, 48 C. C. A. 574; U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235.

93. U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235.

94. Horman *v.* U. S., 116 Fed. 350, 53 C. C. A. 570.

Schemes or artifices held within statute: Ordering goods through the mails with the intention of not paying for them. U. S. *v.* Staples, 45 Fed. 195; U. S. *v.* Wootten, 29 Fed. 702. See also U. S. *v.* Watson, 35 Fed. 358. A scheme to put counterfeit money in circulation. U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235. Advertising for agents with the intention of inducing them to make deposits, and converting the same. U. S. *v.* Finney, 45 Fed. 41; U. S. *v.* Stickle, 15 Fed. 798. Misrepresentations by the promoters of a fraudulent investment scheme as to the future profits which would accrue to investors. Durland *v.* U. S., 161 U. S. 306, 16 S. Ct. 508, 40 L. ed. 709. A scheme to induce persons by means of letters sent through the mails to send one dollar each in payment for a special life reading, giving the horoscope of the sender and the events of his life from the cradle to the grave. U. S. *v.* White, 150 Fed. 379. Scheme to defraud members of a mutual insurance company. Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399. See also Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329. The intentional use of a legal contract to defraud another may constitute a scheme to defraud, although the use of the same contract with an honest intent for a proper purpose would be lawful. Miller *v.* U. S., *supra*.

Schemes or artifices held not within statute: Practice of exaggerating the value of goods offered for sale. U. S. *v.* Staples, 45 Fed. 195. Carrying on business under assumed name. U. S. *v.* Finney, 45 Fed. 41. Sending through the mails, by persons who have entered into a conspiracy to defraud, of letters to each other, not intended to be shown to the intended victims, or otherwise used in carrying out the fraudulent scheme, but merely for the purpose of giving or asking information as to the acts of the different parties to the conspiracy, and to keep each other informed as to its progress. U. S. *v.* Ryan, 123 Fed. 634.

Adaptability to deceive test of scheme to defraud.— Whether the pretensions made by the accused, which are averred to constitute the scheme of fraud, constitute an agreement, valid or otherwise, or consist of representations of fact, present or future, an expression of opinion or assurance of past, present, or future conditions, it may constitute a scheme to defraud, provided only it be designed and reasonably adapted to deceive. Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581.

95. U. S. *v.* Dexter, 154 Fed. 890; Van Deusen *v.* U. S., 151 Fed. 989, 81 C. C. A. 175; Horman *v.* U. S., 116 Fed. 350, 53 C. C. A. 570; Weeber *v.* U. S., 62 Fed. 740.

A plan to extort money from another by threatening to publish charges against him accusing him of having committed crimes, unless a sum demanded is paid, is a "scheme to defraud" within the meaning of the statute. U. S. *v.* Horman, 118 Fed. 780; Horman *v.* U. S., 116 Fed. 350, 53 C. C. A. 570.

96. U. S. *v.* Loring, 91 Fed. 881.

Illegality of scheme immaterial.— In a prosecution for using the mails in furtherance of a scheme to defraud by the payment of large returns for money to be used in betting on horse-races, the fact that such scheme involved a gambling transaction forbidden by the laws of the state where it was devised and where defendants resided was immaterial. O'Hara *v.* U. S., 129 Fed. 551, 64 C. C. A. 81.

97. U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235.

nality of defendant does not rest upon the probabilities of the success of the scheme,[98] or upon the fact of success.[99] Nor is it necessary that the guilty person should be the originator of the fraudulent scheme in which he participates,[1] or that he should intend to obtain a benefit by the alleged fraud, or to convert the money obtained thereby to his own use.[2]

8. Illegal Sale or Other Disposition of Stamps and Inducing Sale on Credit — a. In General. By statute,[3] postmasters are peremptorily forbidden, not only to dispose of postage stamps in the payment of debts or in the purchase of commodities,[4] or to pledge them, but to sell or dispose of them except for cash.[5] An attempt to induce a postmaster to sell stamps on credit is also made penal.[6]

b. Newspaper and Periodical Stamps. Prior to 1881 there was no act of congress or regulation of the post-office department prohibiting the sale to the public of newspaper and periodical stamps, issued under the act of June 23, 1874, either by the department itself or by postmasters.[7] Therefore the possession thereof by persons outside of, and unconnected with, the post-office department was not presumptively unlawful.[8]

9. Detention, Opening, or Destruction of Mail Matter by Postmaster or Employee.[9] The statute[10] making it a criminal offense for any employee of the post-office department to unlawfully detain, delay, or open any letter, etc., applies to any letter or packet[11] which is intended to be conveyed by post,[12] and which has not reached its destination.[13]

10. Taking or Opening Mail Matter to Obstruct Correspondence[14] — a. At Common Law. Breaking open a private letter, and publishing its contents,

98. Durland *v.* U. S., 161 U. S. 306, 16 S. Ct. 508, 40 L. ed. 709; Weeber *v.* U. S., 62 Fed. 740. *Compare* U. S. *v.* Fay, 83 Fed. 839, holding that a "scheme to defraud," within the scope of U. S. Rev. St. (1878) § 5480 [U. S. Comp. St. (1901) p. 3696], involves the element of some plausible device, reasonably calculated to deceive persons of ordinary comprehension and prudence; and a manifest hoax or humbug, which belies the known laws of nature, is not an indictable offense thereunder.

Impossibility of execution immaterial.— The fact that the scheme was impossible of execution on its face is immaterial. O'Hara *v.* U. S., 129 Fed. 551, 64 C. C. A. 81.

99. Weeber *v.* U. S., 62 Fed. 740.

1. U. S. *v.* Flemming, 18 Fed. 907.

2. Kellogg *v.* U. S., 126 Fed. 323, 61 C. C. A. 229. *Contra*, U. S. *v.* Beach, 71 Fed. 160.

3. 20 U. S. St. at L. 140, c. 259, § 1.

4. U. S. *v.* Douglass, 33 Fed. 381.

5. The word "cash" means ready money, or money on hand, and a sale on credit is not a sale for cash within the meaning of the statute. Palliser *v.* U. S., 136 U. S. 257, 10 S. Ct. 1034, 34 L. ed. 514.

6. U. S. Rev. St. (1878) § 5441 [U. S. Comp. St. (1901) p. 3680]; Palliser *v.* U. S., 136 U. S. 257, 10 S. Ct. 1034, 34 L. ed. 514.

7. See cases cited *infra*, this note.

Sales of newspaper and periodical stamps as specimens, pursuant to a circular signed by the third postmaster-general, even if irregular, were not unlawful, and were ratified by the government's acceptance of the purchase-price. U. S. *v.* Walter Scott Stamp Co., 87 Fed. 721.

Requiring stamps to be affixed to receipt. — The direction given by the postmaster-general that newspaper and periodical stamps issued under the act of June 23, 1874, should be affixed to the stub of a receipt rather than to the mail matter itself, was not even inferentially a prohibition of the sale of such stamps by postmasters. U. S. *v.* Walter Scott Stamp Co., 87 Fed. 721.

Exchange with postal union.— The exchange by the government of newspaper and periodical stamps with members of the so-called "Postal Union," whereby over seven hundred complete sets of such stamps were issued, was without any reservation, and did not render unlawful the sale or gift of such stamps to private dealers or collectors. U. S. *v.* Walter Scott Stamp Co., 87 Fed. 721.

8. U. S. *v.* Walter Scott Stamp Co., 87 Fed. 721.

9. Postmaster's civil liability for detention of mail and refusal to deliver same see *supra*, I, C, 3, d, (I).

10. U. S. Rev. St. (1878) § 3891 [U. S. Comp. St. (1901) p. 2657].

11. See cases cited *infra*, this note.

Anonymous letters.— Whether anonymous letters are within the statute *quære*. U. S. *v.* Oliver, 27 Fed. Cas. No. 15,917.

The term "packet" means any packet that is mailable, whether of letters or merchandise. U. S. *v.* Blackman, 17 Fed. 837, 5 McCrary 438.

12. U. S. *v.* Oliver, 27 Fed. Cas. No. 15,917.

Box letters to be delivered in the place where posted are not letters which are intended to be "conveyed by post" within the meaning of the act. U. S. *v.* Oliver, 27 Fed. Cas. No. 15,917.

13. U. S. *v.* Pearce, 27 Fed. Cas. No. 16,020, 2 McLean 14.

14. Searches and seizures see *infra*, III, B.

is a misdemeanor at common law.[15] It is not a public offense, however, to publish the contents of a letter which came innocently into the possession of the publisher after being opened.[16]

b. Under Statutes — (i) *In General.* The statute[17] providing that any person who shall take any letter, etc., out of a post-office or from a mail carrier, before it has been delivered to the person to whom it is addressed, with a design to obstruct correspondence, or shall secrete, embezzle, or destroy the same, shall be punished, is designed to protect letters sent by mail from embezzlement, and from interference with the improper designs therein enumerated, until they reach their destination by delivery to the person addressed, or his authorized agent.[18] The taking must be unlawful,[19] and with the intent of not delivering the letter to the addressee.[20]

(ii) *Defenses.* It is no defense to a prosecution under this statute[21] for taking a letter from the post-office with intent to obstruct correspondence that defendant, by virtue of an order from the writer of the letter, took it from the office where it was to be delivered;[22] that the letter related in part to the business of defendant or business in which he was interested;[23] that the letter was not sealed, and was written by defendant himself;[24] that the addressee's name was not correctly given;[25] that the letter was of no value to the person to whom it was addressed, or that accused believed in good faith, at the time that he took it out of the post-office, that it was of no value;[26] or that the letter was voluntarily delivered to defendant by the postmaster.[27] One cannot be convicted, however, if he knew the contents of the letter before he received it.[28]

11. Embezzlement, Stealing, or Fraudulently Obtaining Mail Matter[29] — **a. By Postal Employees**[30] — (i) *In General.* The statute[31] creates two distinct classes

15. Gill's Case, 3 City Hall Rec. (N. Y.) 61; Noah's Case, 3 City Hall Rec. (N. Y.) 13.

16. Noah's Case, 3 City Hall Rec. (N. Y.) 13.

17. U. S. Rev. St. (1878) § 3892 [U. S. Comp. St. (1901) p. 2657].

18. See cases cited *infra*, this note. See also *infra*, III, A, 11.

Letter addressed to one in care of another. —After a letter has been delivered by the postal authorities to the person in whose care it is addressed, it is no longer in the custody of the United States, nor subject to its jurisdiction; and the opening and destruction of such letter, or the abstraction of its contents after it has been so delivered, is no offense under U. S. Rev. St. (1878) § 3892 [U. S. Comp. St. (1901) p. 2657]. U. S. *v.* Huilsman, 94 Fed. 486; U. S. *v.* Lee, 90 Fed. 256; U. S. *v.* Mulvaney, 27 Fed. Cas. No. 15,833; U. S. *v.* Parsons, 27 Fed. Cas. No. 16,000, 2 Blatchf. 104; U. S. *v.* Thoma, 28 Fed. Cas. No. 16,471. *Contra*, U. S. *v.* Hilbury, 29 Fed. 705.

Letter left at office of addressee.— U. S. Rev. St. (1878) § 3892 [U. S. Comp. St. (1901) p. 2657] does not extend to the case of a letter stolen from the desk of the addressee, on which it was placed by a mail carrier, in the absence of any one to receive it, this amounting to a delivery to the person addressed. U. S. *v.* Safford, 66 Fed. 942. *Contra*, U. S. *v.* McCready, 11 Fed. 225.

Delivery to authorized agent delivery to addressee.— U. S. *v.* Driscoll, 25 Fed. Cas. No. 14,994, 1 Lowell 303; U. S. *v.* Sander, 27 Fed. Cas. No. 16,219, 6 McLean 598.

19. U. S. *v.* Safford, 66 Fed. 942; U. S. *v.* Parsons, 27 Fed. Cas. No. 16,000, 2 Blatchf. 104. But see U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904.

20. U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904, holding that where it appears that defendant, at the time he received the letter, intended to deliver it, and subsequently decided not to do so, the offense prescribed by the statute has not been committed.

Presumption of intent.— If a person takes a letter out of the post-office, addressed to another, without the authority or direction of the addressee, but with the declared purpose of delivering it, and does not deliver it, the first opportunity he has, the law raises the inference by that fact that, when he got it, he did not intend to deliver it. U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904.

21. U. S. Rev. St. (1878) § 3892 [U. S. Comp. St. (1901) p. 2657].

22. U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904. *Contra*, U. S. *v.* Eddy, 25 Fed. Cas. No. 15,024, 1 Biss. 227; U. S. *v.* Tanner, 28 Fed. Cas. No. 16,430, 6 McLean 128.

23. U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904.

24. U. S. *v.* Pond, 27 Fed. Cas. No. 16,067, 2 Curt. 265.

25. U. S. *v.* Pond, 27 Fed. Cas. No. 16,067, 2 Curt. 265.

26. U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904.

27. U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904.

28. U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904.

29. Stealing or embezzling mail as offense which must be prosecuted by indictment see Indictments and Informations, 22 Cyc. 184 note 76.

30. Embezzlement by postmaster's assistant see Embezzlement, 15 Cyc. 504 note 47.

31. U. S. Rev. St. (1878) § 5467 [U. S. Comp. St. (1901) p. 3691].

of offenses: The one relating to the embezzlement of letters, etc.; the other relating to stealing their contents.[32] Under this section [33] no one can be convicted who is not employed in the post-office department,[34] but whether he is employed directly by the United States or indirectly by a contractor is immaterial.[35] He must be, however, a regular assistant whose duty it is to perform the various functions which appertain to the office.[36] Only such letters as are, at the time, a proper subject of deposit in the mail,[37] and the contents of which are valuable,[38] can be the subject of the offense. The taking need not be with intent to steal.[39]

(II) *Decoy Letters or Packages.* It is no defense to an indictment of a post-office employee for embezzlement that the letter embezzled was a "decoy," [40]

32. U. S. *v.* Lacher, 134 U. S. 624, 10 S. Ct. 625, 33 L. ed. 1080; U. S. *v.* Delany, 55 Fed. 475; U. S. *v.* Dorsey, 40 Fed. 752; U. S. *v.* Wight, 38 Fed. 106; U. S. *v.* Atkinson, 34 Fed. 316; U. S. *v.* Jenther, 26 Fed. Cas. No. 15,476, 13 Blatchf. 335; U. S. *v.* Pelletreau, 27 Fed. Cas. No. 16,023, 14 Blatchf. 126; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,438, 1 Hughes 514. See also U. S. *v.* Gruver, 35 Fed. 59. *Contra*, U. S. *v.* Hartley, 42 Fed. 835; U. S. *v.* Long, 10 Fed. 879, 4 Woods 454.

U. S. Rev. St. (1878) § 3891 [U. S. Comp. St. (1901) p. 2657], U. S. Rev. St. (1878) § 5467 [U. S. Comp. St. (1901) p. 3691] are to be construed together — the offense of secreting, embezzling, or destroying mail matter which contains articles of value being punishable under the one, and the like offense as to mail matter which does not contain such articles being punishable under the other. U. S. *v.* Lacher, 134 U. S. 624, 10 S. Ct. 625, 33 L. ed. 1080.

33. U. S. Rev. St. (1878) § 5467 [U. S. Comp. St. (1901) p. 3691].

34. See cases cited *infra*, this note.

Deputy postmaster.— One sworn in as a deputy postmaster and who handled the mail whenever he was about the post-office and felt inclined to do so is an employee within the meaning of the law punishing embezzlement by an employee in the postal service. U. S. *v.* Brent, 24 Fed. Cas. No. 14,640.

A mail carrier is a person employed in a department of the general post-office, within the meaning of the statute (U. S. *v.* Belew, 24 Fed. Cas. No. 14,563, 2 Brock. 280; Reg. *v.* Bickerstaff, 2 C. & K. 761, 61 E. C. L. 761), although he has not been sworn (U. S. *v.* Foye, 25 Fed. Cas. No. 15,157, 1 Curt. 364).

In England a person gratuitously assisting the postmaster is liable to the penalty imposed on employees. Rex *v.* Reason, 2 C. L. R. 120, 6 Cox C. C. 227, Dears. C. C. 226, 17 Jur. 1014, 23 L. J. M. C. 11, 2 Wkly. Rep. 54. And so is a person employed by the postmaster. Rex *v.* Salisbury, 5 C. & P. 155, 24 E. C. L. 502. But not a person who is employed at a receiving office to black boots and tie up bags. Rex *v.* Pearson, 4 C. & P. 572, 19 E. C. L. 655.

35. U. S. *v.* Hanna, 4 N. M. 216, 17 Pac. 79.

A stage driver employed by a stage company, which had a contract for carrying the mails, and who was sworn as a mail carrier, was an employee of the postal service, within the meaning of this section, although he was hired and paid by the stage company. U. S. *v.* Hanna, 4 N. M. 216, 17 Pac. 79.

36. U. S. *v.* Nott, 27 Fed. Cas. No. 15,900, 1 McLean 499.

A person who has discontinued his employment as an assistant in a post-office, and who, although receiving no compensation, gives some instructions to a person in the office when the postmaster is absent, is not an employee of the post-office department within the meaning of the act of 1825, section 21, which prescribes the punishment for embezzlement by a person employed in the post-office department. U. S. *v.* Nott, 27 Fed. Cas. No. 15,900, 1 McLean 499.

37. U. S. *v.* Taylor, 37 Fed. 200.

Letter intended to be conveyed by mail.— It is a necessary element of the first clause of this section that the letter embezzled shall be intended to be conveyed by mail or delivered by a letter carrier; under the second clause this is unnecessary. Hall *v.* U. S., 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607.

38. Bromberger *v.* U. S., 128 Fed. 346, 63 C. C. A. 76.

A silver certificate issued by the United States is a "pecuniary obligation or security of the government," and "an article of value," within the meaning of U. S. Rev. St. (1878) § 5467 [U. S. Comp. St. (1901) p. 3691]. Bromberger *v.* U. S., 128 Fed. 346, 63 C. C. A. 76.

39. U. S. *v.* Thompson, 29 Fed. 706.

40. Byram *v.* U. S., 25 App. Cas. (D. C.) 546; Scott *v.* U. S., 172 U. S. 343, 19 S. Ct. 209, 43 L. ed. 471; Hall *v.* U. S., 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607; Montgomery *v.* U. S., 162 U. S. 410, 16 S. Ct. 797, 40 L. ed. 1020; Goode *v.* U. S., 159 U. S. 663, 16 S. Ct. 136, 40 L. ed. 297; Ennis *v.* U. S., 154 Fed. 842, 83 C. C. A. 478; Bromberger *v.* U. S., 128 Fed. 346, 63 C. C. A. 76; U. S. *v.* Jones, 80 Fed. 513; U. S. *v.* Bethea, 44 Fed. 802; Walster *v.* U. S., 42 Fed. 891; U. S. *v.* Dorsey, 40 Fed. 752; U. S. *v.* Wight, 38 Fed. 106; U. S. *v.* Cottingham, 25 Fed. Cas. No. 14,872, 2 Blatchf. 470; U. S. *v.* Foye, 25 Fed. Cas. No. 15,157, 1 Curt. 364.

"Decoy letters" defined see 13 Cyc. 432.

Genuineness of letter immaterial.— It makes no difference with respect to the duty of the carrier, whether the letter be genuine or a decoy, with a fictitious address. Coming into possession as such carrier, it is his duty

addressed to a fictitious person or place,[41] and was never intended to be delivered,[42] provided it was intended to be conveyed by mail;[43] nor that it was made up so as to attract attention, and indicate that it contained money.[44]

b. By Other Persons. The statute[45] applies to the stealing of the mail by every person, irrespective of his employment in the post-office,[46] and the offenses provided against are: (1) The stealing of the mail or the taking from out of the mail or post-office or other authorized depository, a letter or packet, or the taking of such mail or letter or packet therefrom, or from any post-office, etc., or other authorized depository, with or without the consent of the person having the custody thereof;[47] (2) the opening, embezzling, or destroying of any such mail,

to treat it for what it appears to be on its face — a genuine communication; to make an effort to deliver it, or, if the address be not upon his route, to hand it to the proper carrier, or put it into the list box. Certainly he has no more right to appropriate it to himself than he would have if it were a genuine letter. For the purpose of these sections a letter is a writing or document, which bears the outward semblance of a genuine communication, and comes into the possession of the employee in the regular course of his official business. His duties in respect to it are not relaxed by the fact or by his knowledge that it is not what it purports to be — in other words, it is not for him to judge of its genuineness. Goode *v.* U. S., 159 U. S. 663, 16 S. Ct. 136, 40 L. ed. 297.

In Canada the same rule prevails (Rex *v.* Ryan, 9 Ont. L. Rep. 137, 5 Ont. Wkly. Rep. 125; Mayer *v.* Vaughan, 20 Quebec Super. Ct. 549), but in England it is usually held otherwise (Reg. *v.* Gardner, 1 C. & K. 628, 47 E. C. L. 628; Reg. *v.* Rathbone, C. & M. 220, 2 Moody C. C. 242, 41 E. C. L. 124; Reg. *v.* Shepherd, Dears. C. C. 606, 2 Jur. N. S. 96, 25 L. J. M. C. 52, 4 Wkly. Rep. 237. But see Reg. *v.* Young, 2 C. & K. 446, 2 Cox C. C. 142, 1 Den. C. C. 194, 61 E. C. L. 466).

41. Byram *v.* U. S., 25 App. Cas. (D. C.) 546; Scott *v.* U. S., 172 U. S. 343, 19 S. Ct. 209, 43 L. ed. 471; Hall *v.* U. S., 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607; U. S. *v.* Bethea, 44 Fed. 802; U. S. *v.* Wight, 38 Fed. 106; Reg. *v.* Young, 2 C. & K. 466, 2 Cox C. C. 142, 1 Den. C. C. 194, 61 E. C. L. 466; Mayer *v.* Vaughan, 20 Quebec Super. Ct. 549. *Contra*, U. S. *v.* Denicke, 35 Fed. 407.

42. Scott *v.* U. S., 172 U. S. 343, 19 S. Ct. 209, 43 L. ed. 471; U. S. *v.* Wight, 38 Fed. 106; U. S. *v.* Foye, 25 Fed. Cas. No. 15,157, 1 Curt. 364. But see U. S. *v.* Matthews, 35 Fed. 890, 1 L. R. A. 104; U. S. *v.* Denicke, 35 Fed. 407.

43. Walster *v.* U. S., 42 Fed. 891; U. S. *v.* Wight, 38 Fed. 106; U. S. *v.* Matthews, 35 Fed. 890, 1 L. R. A. 104; U. S. *v.* Rapp, 30 Fed. 818; Reg. *v.* Rathbone, C. & M. 220, 2 Moody C. C. 242, 41 E. C. L. 124; Reg. *v.* Shepherd, Dears. C. C. 606, 2 Jur. N. S. 96, 25 L. J. M. C. 52, 4 Wkly. Rep. 237.

The words "intended to be conveyed by mail" are regarded as simply descriptive of the character of the letter as mailable matter, and are satisfied by evidence that the letter was so conveyed before or after it reached the hands of defendant. U. S. *v.* Hall, 76 Fed. 566 [*affirmed* in 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607]; U. S. *v.* Wight, 38 Fed. 106.

U. S. Rev. St. (1878) § 5468 [U. S. Comp. St. (1901) p. 3692], declares that the fact that a letter has been deposited in any authorized depository for mail matter, or in charge of any postmaster, or of any clerk, carrier, agent, or messenger of the postal service, shall be evidence that it was intended to be conveyed by mail. See Walster *v.* U. S., 42 Fed. 891.

44. U. S. *v.* Wight, 38 Fed. 106.

45. U. S. Rev. St. (1878) § 5469 [U. S. Comp. St. (1901) p. 3692].

46. See cases cited *infra*, this note.

A post-office clerk who steals a letter or package from the post-office is punishable under section 5469, notwithstanding he may be subject to indictment under section 5467. U. S. *v.* Marselis, 26 Fed. Cas. No. 15,724, 2 Blatchf. 108; U. S. *v.* Marselis, 26 Fed. Cas. No. 15,725, 2 Blatchf. 111 note.

Slave. — The word "person" includes slaves as well as freemen. U. S. *v.* Amy, 24 Fed. Cas. No. 14,445.

47. U. S. *v.* Pearee, 27 Fed. Cas. No. 16,020, 2 McLean 14.

To constitute a post-office there need not be a building or room set apart. The post-office may be a desk, trunk, or box carried from one house or building to another. U. S. *v.* Marselis, 26 Fed. Cas. No. 15,724, 2 Blatchf. 108. See also U. S. *v.* Nott, 27 Fed. Cas. No. 15,900, 1 McLean 499.

The term "branch post-office" as used in U. S. Rev. St. (1878) § 5469 [U. S. Comp. St. (1901) p. 3692], includes every place within such office where letters are kept in the regular course of business for reception, stamping, sorting, or delivering. Goode *v.* U. S., 159 U. S. 663, 16 S. Ct. 136, 40 L. ed. 297.

A letter carrier appointed by the postmaster-general, pursuant to the act of July 2, 1836, section 41, to deliver letters received at a city post-office, is a mail carrier within the meaning of this section. U. S. *v.* Parsons, 27 Fed. Cas. No. 16,000, 2 Blatchf. 104.

The term "mail," as used in U. S. Rev. St. (1878) § 5469 [U. S. Comp. St. (1901) p. 3692], relative to larceny from the mails, may mean either the whole body of matter transported by the postal agents, or any letter or package forming a component part of it. U. S. *v.* Inabnet, 41 Fed. 130.

letter, or packet containing any article of value; [48] (3) the obtaining, by fraud or deception, from any person having custody thereof, any such mail, letter, or packet, containing such article of value.[49] To constitute the offense where no fraud is practised, the taking must be with a criminal intent; [50] not a taking by the authority of the addressee, although there is a subsequent embezzlement, nor a taking by mistake or with an innocent intent.[51]

12. Receiving Property Stolen From Mails. To constitute an offense under the statute [52] making it a criminal offense to receive, conceal, or aid in concealing any article of value, knowing it to have been stolen or embezzled from the mail, the property in question must have been stolen or embezzled from the mail; [53] and defendant, knowing it to have been stolen or embezzled, must have received it from the thief,[54] or concealed,[55] or aided the thief or someone else in concealing it.[56] Where an indictment alleges that two persons received property stolen from the mail, without alleging whether it was done jointly or severally, one of defendants may be found guilty when the other defendant has been discharged on a plea of *autrefois convict*.[57]

13. Robbery of Mail — a. In General. The statutory offense [58] of robbing the mail consists in robbing the carrier, agent, or other person intrusted with the mail, of the mail or any part thereof.[59] Two species of robbery are provided against: (1) A robbery of the mail under such circumstances as amount to the

48. See cases cited *infra*, this note.

Contents of letter need not be "mailable matter."— The fact that an article contained in a letter in course of transmission by mail is not lawfully "mailable matter" is no defense to an indictment for stealing it. Beery *v.* U. S., 2 Colo. 186; U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524.

49. See Goode *v.* U. S., 159 U. S. 663, 16 S. Ct. 136, 40 L. ed. 297.

50. U. S. *v.* Smith, 11 Utah 433, 40 Pac. 708; U. S. *v.* Meyers, 142 Fed. 907; U. S. *v.* Inabnet, 41 Fed. 130; *In re* Burkhardt, 33 Fed. 25; U. S. *v.* Parsons, 27 Fed. Cas. No. 16,000, 2 Blatchf. 104.

51. U. S. *v.* Meyers, 142 Fed. 907; *In re* Burkhardt, 33 Fed. 25; U. S. *v.* Driscoll, 25 Fed. Cas. No. 14,994, 1 Lowell 303; U. S. *v.* Parsons, 27 Fed. Cas. No. 16,000, 2 Blatchf. 104; U. S. *v.* Pearce, 27 Fed. Cas. No. 16,020, 2 McLean 14; U. S. *v.* Sander, 27 Fed. Cas. No. 16,219, 6 McLean 598.

52. U. S. Rev. St. (1878) § 5470 [U. S. Comp. St. (1901) p. 3693].

53. U. S. *v.* Keene, 26 Fed. Cas. No. 15,512, 5 McLean 509.

The record of the conviction of the individual who stole it is sufficient proof of the fact that the article was stolen, if such article be identified. U. S. *v.* Keene, 26 Fed. Cas. No. 15,512, 5 McLean 509; U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

54. See cases cited *infra*, this note.

To constitute a guilty receiving of stolen property by defendant, he must have voluntarily taken it into his control and possession, or voluntarily had it in his control and possession, with intent to prevent the larceny or the thief from being discovered, or the property from being reclaimed by the true owner or for his benefit; but he need not have received it with intent to make any gain or profit thereby for himself. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

The possession of gold coin received at the mint in exchange for gold dust stolen from the mails is not a possession of such dust. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

Receiving in district where indictment found.— The receiving of the stolen property must have been in the district where the indictment is found. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

55. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

A guilty concealing also implies that defendant voluntarily secreted the property, or put it out of the way, or in some manner disposed of it with a like intent as in the case of receiving. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

56. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

To aid in concealing stolen property defendant must do some act with intent to assist the thief or other person, then in the guilty possession of the property, in concealing it, or furtively disposing of it, with a like intent as in the case of receiving. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

57. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

58. U. S. Rev. St. (1878) § 5472 [U. S. Comp. St. (1901) p. 3694].

59. See cases cited *infra*, this note.

The word "rob" in relation to the offense of robbing the mail is used in its common-law sense. U. S. *v.* Reeves, 38 Fed. 404; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

Carrier need not have taken oath.— U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

Robbing postmaster.— Where the evidence

offense by the principles of the common law; (2) a robbery effected by putting in jeopardy the life of the person having the custody of the mail, by the use of dangerous weapons.[60] If the accused was present on the occasion of the robbery of the mails charged, aiding, advising, and procuring its commission, it becomes immaterial whether he actually entered the car containing the mail or not, as he is to be regarded as a principal, and convicted as such.[61]

b. Attempts. To constitute an attempt to rob the mail within the statute there must concur: (1) An attempt;[62] (2) the attempt must be to rob the mail;[63] (3) the attempt must be accompanied by an assault upon the person having custody of the mail, or shooting at him or his horse, or threatening him with dangerous weapons.[64]

14. Breaking and Entering Post-Office — a. In General. The statute[65] providing for the punishment of any person who shall break into any building used in part as a post-office with intent to commit therein larceny creates a purely statutory offense which is unknown to the common law, and which must be classed as a misdemeanor, and not a felony.[66] The offense is committed by breaking into any part of the building with intent to commit larceny in the part used as a post-office.[67]

b. Retention of Money Found on Person of Burglar. The United States cannot retain money found on the person of one who pleads guilty to burglary of a post-office without identifying it as that stolen; and money so retained may be recovered.[68]

B. Right of Search and Seizure[69] of Mailable Matter. The statutes[70] authorize the postmaster-general to empower any special agent or other officer of his department to make searches for mailable matter transported in violation of law, not being in a dwelling-house, and authorizes any special agent, collector,

proves that the accused took by force, from the postmaster, a package directed to another person, which was a part of the United States mail, although such package was not in the post-office, and had been removed to some other place, and although the postmaster may have intended to appropriate the same for a private debt due to himself, the accused is guilty of robbing the mail within the statute. U. S. *v.* Bowman, 3 N. M. 201, 5 Pac. 333.

60. U. S. *v.* Reeves, 38 Fed. 404; U. S. *v.* Bernard, 24 Fed. Cas. No. 14,584; U. S. *v.* Hare, 26 Fed. Cas. No. 15,304, Brunn. Col. Cas. 449, 2 Wheel. Cr. Cas. (N. Y.) 283; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

"Jeopardy" means a well-grounded apprehension of danger to life in case of refusal or resistance. U. S. *v.* Reeves, 38 Fed. 404; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

A dangerous weapon is one likely to produce death or great bodily harm. U. S. *v.* Reeves, 38 Fed. 404. Pistols are dangerous weapons. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78. A pistol used by the accused need not have been pointed at the carrier, if intended to be used in case of resistance, or if seen by the carrier, who had reasonable cause to believe it was to be so used. U. S. *v.* Wilson, *supra*.

61. U. S. *v.* Reeves, 38 Fed. 404.

62. U. S. *v.* Reeves, 38 Fed. 404.

An attempt to commit a crime has been held to mean an endeavor to accomplish it carried beyond mere preparation, but falling short of the ultimate design. U. S. *v.* Reeves, 38 Fed. 404.

63. U. S. *v.* Reeves, 38 Fed. 404, holding that the attempt must be to rob the mail, and not merely an attempt to rob the express car, or the passengers on the train.

64. U. S. *v.* Reeves, 38 Fed. 404.

To constitute the assault it is not necessary that serious bodily injury should be inflicted. Drawing a gun, with a threat to use it, or forcibly ejecting the person in possession of the mails from the mail car, is sufficient. U. S. *v.* Reeves, 38 Fed. 404.

65. U. S. Rev. St. (1878) § 5478 [U. S. Comp. St. (1901) p. 3696].

66. Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272.

67. U. S. *v.* Shelton, 100 Fed. 831; U. S. *v.* Williams, 57 Fed. 201; U. S. *v.* Campbell, 16 Fed. 233, 9 Sawy. 20.

"Therein" refers to that part of the building used as a post-office. U. S. *v.* Shelton, 100 Fed. 831; U. S. *v.* Saunders, 77 Fed. 170; U. S. *v.* Williams, 57 Fed. 201.

An entry into the postmaster's room of a post-office building, and a theft of postage stamps, by opening the locked vault in which they were kept, constitute a forcible breaking and entry into the post-office building, punishable under U. S. Rev. St. (1878) § 5478 [U. S. Comp. St. (1901) p. 3696]. U. S. *v.* Yennie, 74 Fed. 221.

68. Ferguson *v.* U. S., 64 Fed. 88.

69. Searches and seizures generally see Searches and Seizures.

70. U. S. Rev. St. (1878) §§ 3990, 4026 [U. S. Comp. St. (1901) pp. 2715, 2739].

or other customs officer, or United States marshal, or his deputy, to seize all letters and bags, packets, or parcels containing letters which are being carried contrary to law and detain the same until two months after the final determination of all suits and proceedings which may at any time, within six months after such seizure, be brought against any person for sending or carrying such letters.[71]

C. Indictment and Information[72] — **1. Conspiracy to Defraud Government in Weight of Mail.** An indictment charging railway officials with conspiring to deceive the postal officers and defraud the government by fraudulently increasing the mails at a time when they were being weighed to determine the compensation of the road for carrying the same states an offense against the United States and is sufficient.[73] It is not necessary to aver that the contemplated fraud was successful,[74] or the fraudulent mail matter of sufficient weight to entitle the company to increased compensation,[75] or that the forwarding of the matter would not be continued beyond the period fixed for weighing the mails;[76] nor need the indictment aver what particular officer was intended to be deceived.[77]

2. Unlawfully Franking Letters. An indictment against a member of congress for unlawfully franking need not charge that he franked any letter as a member of congress, or that he was a member of congress, when the offense was committed.[78] It should, however, negative the fact that the letters were written by order of defendant on the business of his office.[79]

3. Obstructing Passage of Mail. An indictment for obstructing the mails need not allege that the act was feloniously done,[80] or that defendants knew that the trains they retarded carried the mails,[81] nor that the acts of overturning cars on a railroad track were not done in the exercise of a lawful right;[82] but it must allege that such acts were knowingly, wilfully, or unlawfully done.[83] Where the indictment charges a conspiracy to obstruct the mails, it is not restricted to the allegation of a single overt act in pursuance thereof, since the gist of the offense is the conspiracy, which is a single offense.[84] In such an indictment it is necessary to charge that the defendants knew that the mails were carried upon the train they conspired to obstruct.[85]

4. Conveyance of Mail Matter Out of Mail. An information under the Post-Office Act of 1845, for carrying a letter on a mail route, and not in the mail, need not negative the fact that it was stamped.[86]

5. Mailing Obscene Matter or Information Concerning Same — a. Mailing Obscene Matter — (i) *Description of Offense* — (a) *In General.* An indictment for violation of the statute[87] prohibiting the mailing of publications of a certain described character must charge specifically that the publication mailed by defendant was of the character declared non-mailable by the statute,[88] and it is not sufficient to merely set out a copy of such publication, leaving its non-mailable character to be inferred therefrom;[89] nor is the defect cured by the con-

71. Blackham *v.* Gresham, 16 Fed. 609, 21 Blatchf. 354.

72. Indictment or information generally see Indictments and Informations, 22 Cyc. 157 *et seq.*

73. U. S. *v.* Newton, 48 Fed. 218.

74. U. S. *v.* Newton, 48 Fed. 218.

75. U. S. *v.* Newton, 48 Fed. 218.

76. U. S. *v.* Newton, 48 Fed. 218.

77. U. S. *v.* Newton, 48 Fed. 218.

78. Dewees' Case, 7 Fed. Cas. No. 3,848, Chase 531.

79. Dewees' Case, 7 Fed. Cas. No. 3,848, Chase 531, holding that an allegation that a member of congress franked envelopes which he consented should be used by one Cunningham for the purpose of transmitting through the mail certain matter properly chargeable with postage, sufficiently excludes the possibility that the letters were written by the order of defendant on the business of his office.

80. U. S. *v.* Debs, 65 Fed. 210.

81. U. S. *v.* Debs, 65 Fed. 210.

82. U. S. *v.* Debs, 65 Fed. 210.

83. U. S. *v.* Debs, 65 Fed. 210.

84. U. S. *v.* Debs, 65 Fed. 210.

85. Salla *v.* U. S., 104 Fed. 544, 44 C. C. A. 26.

86. U. S. *v.* Tilden, 28 Fed. Cas. No. 16,523.

87. U. S. Rev. St. (1878) § 3893 [U. S. Comp. St. (1901) p. 2658].

88. U. S. *v.* Clifford, 104 Fed. 296; Bates *v.* U. S., 10 Fed. 92, 10 Biss. 70.

89. U. S. *v.* Clifford, 104 Fed. 296.

clusion of a subsequent count, "contrary to the form of the statute." [90] It is sufficient to allege that the publication mailed was "obscene, lewd, and lascivious" without adding "and of an indecent character." [91]

(B) *Setting Out Obscene Matter.* The constitutional right of a defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense; [92] and this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court,[93] provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; [94] and in such case the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.[95]

(C) *Address.* In an indictment for depositing in the mails newspapers containing an obscene article, an allegation that the newspapers were addressed, or that direction was given for mailing or delivery is requisite; [96] but this is not necessary in the case of a letter, where the same is set out in the indictment, and shown to commence with an address.[97]

(D) *Knowledge of Obscene Character of Matter Mailed.* Since it is the depositing and mailing of a publication, with knowledge of its contents, such as is described in the statute, which constitutes a violation of the law,[98] the indictment should allege that when defendant deposited the publication he knew of its contents, and that it contained matter, the mailing of which was inhibited by the statute.[99] As to whether knowledge of the offensive character of the matter is sufficiently charged by the allegation that defendant "knowingly deposited in the mails" certain obscene matter, there is an apparent conflict in the decisions. These decisions may be nearly all harmonized, however, by this distinction, that such an allegation is insufficient when objection is taken on motion to quash before trial,[1] but that the

90. U. S. *v.* Clifford, 104 Fed. 296.

91. Rinker *v.* U. S., 151 Fed. 755, 81 C. C. A. 379; Timmons *v.* U. S., 85 Fed. 204, 30 C. C. A. 74.

92. Rosen *v.* U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606.

93. Rosen *v.* U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606; Rinker *v.* U. S., 151 Fed. 755, 81 C. C. A. 379; Tubbs *v.* U. S., 105 Fed. 59, 44 C. C. A. 357; *In re* Wahll, 42 Fed. 822; U. S. *v.* Clarke, 40 Fed. 325; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338, 8 Reporter 38; U. S. *v.* Foote, 25 Fed. Cas. No. 15,128, 13 Blatchf. 418.

As the alleged obscene publication cannot be regarded as part of the record, a demurrer to the indictment on the grounds that the publication was not obscene, and that, if unfit for general circulation, it might lawfully be sent to certain persons, to whom the indictment did not show that the publication was not mailed, cannot be sustained. U. S. *v.* Clarke, 38 Fed. 500.

94. Rosen *v.* U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606; U. S. *v.* Reid, 73 Fed. 289; U. S. *v.* Fuller, 72 Fed. 771; Bates *v.* U. S., 10 Fed. 92, 10 Biss. 70; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338, 8 Reporter 38.

Where the objectionable matter was contained in a newspaper, it is not enough to aver that defendant was publisher of a newspaper named, and did deposit "certain newspapers, to wit, two thousand printed newspapers," without further identifying them by name, date, or otherwise. U. S. *v.* Reid, 73 Fed. 289; U. S. *v.* Harmon, 34 Fed. 872.

95. Rosen *v.* U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606; Rinker *v.* U. S., 151 Fed. 755, 81 C. C. A. 379; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338, 8 Reporter 38; U. S. *v.* Foote, 25 Fed. Cas. No. 15,128, 13 Blatchf. 418.

96. U. S. *v.* Brazeau, 78 Fed. 464, holding that a general averment that the newspapers were "deposited for mailing and delivery" is insufficient.

97. U. S. *v.* Harris, 122 Fed. 551. See also Rinker *v.* U. S., 151 Fed. 755, 81 C. C. A. 379.

98. See *supra*, III, A, 5, a.

99. U. S. *v.* Clifford, 104 Fed. 296; U. S. *v.* Slenker, 32 Fed. 691.

1. U. S. *v.* Reid, 73 Fed. 289.

defect in failing to so sufficiently charge knowledge in the indictment will be regarded as waived after verdict.[2]

(II) *Matter of Defense.* As the statute contains no exceptions to the rule making obscene publications non-mailable, the fact that a publication which would ordinarily be classed as within its meaning might lawfully be sent to certain persons does not render it necessary to aver in the indictment that it was not sent to such persons, it being matter of defense to show that it was sent to such persons.[3]

b. Mailing Information Concerning Obscene Pictures or Articles For Immoral Use. An indictment charging defendant with having deposited in a post-office for mailing a letter or circular giving information where and of whom might be obtained obscene, lewd, and lascivious pictures is sufficient if it specifies the place where and of whom the letter or circular gave information, and alleges the character of the information, leaving further disclosures to the evidence.[4] It is not necessary to aver ownership or possession of the objectionable matter,[5] nor that the information was given to one who inquired for or desired it,[6] nor to describe the pictures about which information was given, further than to state their character.[7] An indictment charging the mailing of a letter giving information where and from whom an article or thing designed and intended for the prevention of conception might be obtained or made must state what the particular "article or thing" consisted of, describing it with at least such particularity that the accused may not only know the particular charge against him, but may be able to plead the judgment of conviction or acquittal in bar of a second prosecution.[8] A charge in the conjunctive "obtained and made" is good, and proof of either will be sufficient to support the charge made in the indictment.[9]

6. Use of Mails to Defraud — a. Mailing Matter Concerning Lotteries or Gift Enterprises. An indictment for mailing a letter or circular [10] concerning a lottery in violation of the statute should set forth such letter or circular *in hæc verba*,[11] and aver that defendant knew the matter so deposited concerned a lottery.[12] Such

2. Price *v.* U. S., 165 U. S. 311, 17 S. Ct. 366, 41 L. ed. 727; Rosen *v.* U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606; Burton *v.* U. S., 142 Fed. 57, 73 C. C. A. 243; U. S. *v.* Reid, 73 Fed. 289; U. S. *v.* Clark, 37 Fed. 106; U. S. *v.* Chase, 27 Fed. 807; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338, 8 Reporter 38. *Contra*, U. S. *v.* Slenker, 32 Fed. 691.

3. U. S. *v.* Clarke, 38 Fed. 500.

4. Grimm *v.* U. S., 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550; De Gignac *v.* U. S., 113 Fed. 197, 52 C. C. A. 71. But see U. S. *v.* Kaltmeyer, 16 Fed. 760, 5 McCrary 260, holding that a bill of indictment for depositing for mailing a notice of where an article for the prevention of conception may be obtained should set out the notice, unless it cannot be copied without great inconvenience, or is so obscene as to be unfit to go upon public records.

If, however, the indictment does set out the letter, which does not on its face purport to convey information, without also setting out the other extrinsic facts on which the government relies, the allegations are repugnant, and an objection on the ground of uncertainty will be sustained. U. S. *v.* Grimm, 45 Fed. 558.

5. De Gignac *v.* U. S., 113 Fed. 197, 52 C. C. A. 71.

While the possession of obscene, lewd, or lascivious books, pictures, etc., constitutes no offense under the act of Sept. 26, 1888, chapter 1039, it is proper in an indictment for committing the offense prohibited by that act to allege the possession as a statement of a fact tending to interpret the letter. Grimm *v.* U. S., 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550.

6. De Gignac *v.* U. S., 113 Fed. 197, 52 C. C. A. 71; U. S. *v.* Grimm, 45 Fed. 558.

7. Grimm *v.* U. S., 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550 [*affirming* 50 Fed. 528]; De Gignac *v.* U. S., 113 Fed. 197, 52 C. C. A. 71.

8. U. S. *v.* Pupke, 133 Fed. 243.

9. U. S. *v.* Kelly, 26 Fed. Cas. No. 15,514, 3 Sawy. 566.

10. Writing described as "letter and circular."— A writing is not improperly described as a "letter and circular." U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

11. U. S. *v.* Conrad, 59 Fed. 458; U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

Omission not cured by verdict.— U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

12. U. S. *v.* Fulkerson, 74 Fed. 619, holding that an allegation that defendant "did knowingly deposit" in the post-office a certain pamphlet concerning a lottery sufficiently alleges that defendant knew that the matter deposited concerned a lottery, since the word "knowingly" qualifies, not only the

an indictment need not allege specifically facts showing the enterprise to be a lottery. A general averment to that effect is sufficient.[13] Nor need it show how the letter or circular concerns the lottery;[14] but, where the circulars do not show on their face that they relate to a lottery, the indictment should aver the existence of a lottery, or an intention to hold a lottery, to which the circulars refer.[15]

b. Other Schemes to Defraud — (i) *In General.* An indictment charging a scheme to defraud by the use of the mails must allege three matters of fact: (1) That the person charged devised a scheme to defraud;[16] (2) that he intended to effect this scheme by opening or intending to open correspondence with some other person through the post-office establishment, or by inciting such other person to open communication with him;[17] (3) and that in carrying out such

verb "deposited," but the whole matter described.

13. U. S. *v.* Fulkerson, 74 Fed. 631; U. S. *v.* Conrad, 59 Fed. 458; U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554, holding that it is not necessary to allege facts showing that the writing set forth concerned a lottery, "in the sense contemplated by the statute," when it clearly appears on the face of such writing that it was such a letter as was within the prohibition of the statute. See also MacDaniel *v.* U. S., 87 Fed. 321, 30 C. C. A. 670. But see U. S. *v.* MacDonald, 65 Fed. 486.

Informal averment cured by verdict.— The informal averment of facts necessary to show the illegal quality of the writing is cured by verdict and will not sustain a motion in arrest of judgment. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

Averment that letter "concerning lottery offering prizes."— It is not necessary to allege that the writing was one "concerning a lottery offering prizes." U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

Averment that letter "in aid of lottery."— It is not necessary that the indictment should allege that the letter deposited in the post-office was in aid of a lottery, since the statute does not require this as an element of the crime, but only that the letter should have been concerning a lottery. U. S. *v.* Fulkerson, 74 Fed. 631.

Where the indictment does not purport to give the details of the lottery, the objection that such scheme is not a lottery, because the only element of chance therein relates to time of payment, cannot arise. U. S. *v.* Fulkerson, 74 Fed. 631.

Existence of lottery.— In an indictment for depositing in a post-office a document concerning a lottery, an allegation that an envelope deposited by defendant "contained a certain pamphlet concerning a certain lottery, which said lottery was then and there being conducted by a certain corporation, called," etc., sufficiently affirms the existence of a lottery. U. S. *v.* Fulkerson, 74 Fed. 631; U. S. *v.* Fulkerson, 74 Fed. 619.

14. U. S. *v.* Fulkerson, 74 Fed. 631; U. S. *v.* Bailey, 47 Fed. 117.

15. U. S. *v.* Bailey, 47 Fed. 117.

16. Stokes *v.* U. S., 157 U. S. 187, 15 S. Ct. 617, 39 L. ed. 667; Brown *v.* U. S., 143 Fed. 60, 74 C. C. A. 214; Ewing *v.* U. S., 136 Fed. 53, 69 C. C. A. 61; O'Hara *v.* U. S., 129 Fed. 551, 64 C. C. A. 81; Dalton *v.* U. S., 127 Fed. 544, 62 C. C. A. 238; Stewart *v.* U. S., 119 Fed. 89, 55 C. C. A. 641; U. S. *v.* Post, 113 Fed. 852; Weeber *v.* U. S., 62 Fed. 740; U. S. *v.* Hoeflinger, 33 Fed. 469.

The intention of defendant to defraud, being the very gist and substance of the offense, must be clearly alleged (U. S. *v.* Post, 113 Fed. 852), but it is not necessary to further charge an intention to convert the money obtained to defendant's own use (Ewing *v.* U. S., 136 Fed. 53, 69 C. C. A. 61; Kellogg *v.* U. S., 126 Fed. 323, 61 C. C. A. 229; U. S. *v.* Bernard, 84 Fed. 634). If, however, an intention to convert is charged, it is unnecessary to specify the manner in which the conversion was accomplished. U. S. *v.* Loring, 91 Fed. 881.

Variance.— A defendant charged in the indictment with having devised a scheme to defraud, to be effected by means of the post-office establishment, must be shown to have devised the particular scheme specified in the indictment, and cannot be convicted on evidence that is as consistent with a different scheme, which, although equally within the statute, is not charged. Beck *v.* U. S., 145 Fed. 625, 76 C. C. A. 417.

17. Stokes *v.* U. S., 157 U. S. 187, 15 S. Ct. 617, 39 L. ed. 667; Brown *v.* U. S., 143 Fed. 60, 74 C. C. A. 214; Ewing *v.* U. S., 136 Fed. 53, 69 C. C. A. 61; O'Hara *v.* U. S., 129 Fed. 551, 64 C. C. A. 81; Dalton *v.* U. S., 127 Fed. 544, 62 C. C. A. 238; Kellogg *v.* U. S., 126 Fed. 323, 61 C. C. A. 229; U. S. *v.* Clark, 125 Fed. 92; Stewart *v.* U. S., 119 Fed. 89, 55 C. C. A. 641; U. S. *v.* Post, 113 Fed. 852; U. S. *v.* Loring, 91 Fed. 881; Weeber *v.* U. S., 62 Fed. 740; U. S. *v.* Smith, 45 Fed. 561; U. S. *v.* Hoeflinger, 33 Fed. 469.

Direct allegation necessary.— U. S. *v.* Long, 68 Fed. 348; U. S. *v.* Harris, 68 Fed. 347.

Use of mails as essential part of scheme.— An indictment for using the mails to defraud must show that the fraudulent scheme was "to be effected" through that medium as an essential part, and not as a mere adjunct or incident, and that the original design contemplated and embraced this. U. S. *v.* Clark, 121 Fed. 190.

Duplicity.— An indictment is not bad for duplicity for alleging that the scheme to defraud was to be effected "by opening correspondence . . . and by inciting [the person addressed] . . . to open correspondence," although the statute reads "or" inciting,

scheme such person must have either deposited a letter or packet in the post-office, or taken or received one therefrom.[18] Another requisite of such an indictment is that the fraudulent scheme must be described with sufficient certainty to inform defendant with reasonable certainty of the nature of the evidence to establish the scheme which will be adduced at the trial,[19] and this must be done by direct and positive averment, and not inferentially.[20] If the indictment does not charge a scheme to defraud the public generally, or a class not capable of being resolved into individuals, but clearly imports an intention to defraud definite individuals, it must describe them by name,[21] or give a good and true reason for the omission.[22] The letters or circulars themselves need not be set out;[23] nor is it necessary to negative the truth of the representations contained therein.[24]

(II) *Joinder of Offenses or Counts.* Each letter put into the post-office in pursuance of a scheme to defraud constitutes a separate and distinct offense;[25] and, according to the express provision of the statute, but three offenses committed within the same six calendar months can be joined in the same indictment,[26] to say nothing of the same count;[27] but an indictment containing more

etc. Kellogg *v.* U. S., 126 Fed. 323, 61 C. C. A. 229; U. S. *v.* Bernard, 84 Fed. 634.

18. Stokes *v.* U. S., 157 U. S. 187, 15 S. Ct. 617, 39 L. ed. 667; Brown *v.* U. S., 143 Fed. 60, 74 C. C. A. 214; Ewing *v.* U. S., 136 Fed. 53, 69 C. C. A. 61; O'Hara *v.* U. S., 129 Fed. 551, 64 C. C. A. 81; Stewart *v.* U. S., 119 Fed. 89, 55 C. C. A. 641; U. S. *v.* Post, 113 Fed. 852; Weeber *v.* U. S., 62 Fed. 740; U. S. *v.* Hoeflinger, 33 Fed. 469.

Date of mailing.— In a prosecution for devising a scheme or artifice to defraud, to be effected through the post-office establishment, the date of the alleged mailing of the different letters, papers, or writings described in the indictment was not an essential element of the offense; it being sufficient that the letters, writings, circulars alleged, or some of them, were deposited or caused to be deposited in the mails by defendant at any time within three years next prior to the finding of the indictment. U. S. *v.* Dexter, 154 Fed. 890.

19. U. S. *v.* Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. ed. 516; Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581; U. S. *v.* Etheredge, 140 Fed. 376; Post *v.* U. S., 135 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 989; Milby *v.* U. S., 120 Fed. 1, 57 C. C. A. 21; Stewart *v.* U. S., 119 Fed. 89, 55 C. C. A. 641; U. S. *v.* Post, 113 Fed. 852; U. S. *v.* Loring, 91 Fed. 881; U. S. *v.* Beatty, 60 Fed. 740; U. S. *v.* Hoeflinger, 33 Fed. 469.

Particularity required.—An indictment for mailing a letter in execution or attempted execution of a scheme to defraud in violation of Rev. St. § 5480, while required to allege the particulars of the scheme with sufficient certainty to show its existence, and character, need not do so with the same particularity as to time, place, and circumstance as is required with reference to the mailing of the letter. Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581.

20. Dalton *v.* U. S., 127 Fed. 544, 62 C. C. A. 238.

21. Larkin *v.* U. S., 107 Fed. 697, 46 C. C. A. 588, holding that such an indictment, stating the names of persons to whom letters or postal cards were addressed, does not satisfy the requirement that the names of parties intended to be defrauded must be alleged if it is not alleged that the scheme to defraud included them.

22. Larkin *v.* U. S., 107 Fed. 697, 46 C. C. A. 588.

Names unknown.— The omission to state in the indictment the names of the parties intended to be defrauded, and the names and addresses on the letters placed in the post-office in carrying out the fraudulent scheme, is excused by the allegation, if true, that such names and addresses are to the grand jury unknown. Durland *v.* U. S., 161 U. S. 306, 16 S. Ct. 508, 40 L. ed. 709; U. S. *v.* Loring, 91 Fed. 881.

23. Hume *v.* U. S., 118 Fed. 689, 55 C. C. A. 407; U. S. *v.* Loring, 91 Fed. 881.

24. Ewing *v.* U. S., 136 Fed. 53, 69 C. C. A. 61; U. S. *v.* Bernard, 84 Fed. 634; U. S. *v.* Hoeflinger, 33 Fed. 469.

25. *Ex p.* Henry, 123 U. S. 372, 8 S. Ct. 142, 31 L. ed. 174; Francis *v.* U. S., 152 Fed. 155, 81 C. C. A. 407 [*modifying* 144 Fed. 520]; U. S. *v.* Clark, 125 Fed. 92.

26. *Ex p.* Henry, 123 U. S. 372, 8 S. Ct. 142, 31 L. ed. 174; U. S. *v.* Clark, 125 Fed. 92; U. S. *v.* Nye, 4 Fed. 888, holding that the latter clause of U. S. Rev. St. (1878) § 5840 [U. S. Comp. St. (1901) p. 3696], providing that the indictment for misusing the post-office may severally charge offenses to the number of three when committed within the same six calendar months, is not a part of the description of the offense, which is completely defined in the former part of the section, but relates only to the procedure.

27. U. S. *v.* Clark, 125 Fed. 92. *Contra,* U. S. *v.* Loring, 91 Fed. 881, holding that the last clause of U. S. Rev. St. (1878) § 5480 [U. S. Comp. St. (1901) p. 3696], authorizing the joining of offenses to the number of three in the same indictment, means offenses relating to separate frauds, and is not a limitation of the right to include in one indictment any number of counts charging different acts in pursuance of the same fraudulent scheme.

than three counts is not for that reason fatally defective, where no demurrer or other objection was taken in the trial court, and only a single sentence was given thereon.[28] Nor does such provision prevent other indictments for other and distinct offenses committed within the same six months.[29] Counts for using the mails to defraud, in violation of section 5480,[30] and for conspiracy to commit such offense under section 5440,[31] where based upon the same transaction, may be joined in one indictment.[32]

7. Detention of Mail-Matter by Postmaster. An indictment against a postmaster for detaining mail is sufficient if it allege in the words of the statute that the letter in question was unlawfully detained, with intent to prevent its arrival. It need not aver that the letter was knowingly and wilfully detained.[33]

8. Taking or Opening Mail-Matter to Obstruct Correspondence of Another. In an indictment for opening a letter addressed to another person with intent to obstruct his correspondence, it is not necessary to lay any venue to the allegation of intent,[34] or to allege that the opening was unlawful,[35] or that the person to whom the letter was addressed was a real person,[36] if it be alleged that the letter was opened with intent to obstruct such person's correspondence, or to pry into his business or secrets.[37] An indictment for opening and reading or making public a letter addressed to another person must allege that it was a sealed letter,[38] or that it was published with knowledge that it had been opened and read without authority.[39]

9. Embezzlement or Theft of Mail — a. In General. Although under the statute relating to embezzlement and theft of the mail, "embezzling a letter" and "stealing its contents" are separate offenses, and may be charged as such,[40] the offenses are of the same grade and subject to the same penalty; and hence they may both be charged in a single count of the indictment, stating the whole transaction as a single offense, when both acts are committed by the same person at the same time, and constitute a single continuous act.[41] A count in such an indictment alleging that defendant did secrete and embezzle a certain letter is not defective for duplicity;[42] nor are averments that the letter was secreted,

28. Hall *v.* U. S., 152 Fed. 420, 81 C. C. A. 562; Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329.

Demurrer.— Where it appears from an inspection of the whole indictment that the three offenses charged were not committed within the same six calendar months, a demurrer thereto should be sustained. Bass *v.* U. S., 20 App. Cas. (D. C.) 232.

Entry of nolle as to part of counts.— Where an indictment charges, in different counts, the commission of five separate and distinct offenses, permit a *nolle* as to two of the counts. U. S. *v.* Nye, 4 Fed. 888.

29. *Ex p.* Henry, 123 U. S. 372, 8 S. Ct. 142, 31 L. ed. 174; Hall *v.* U. S., 152 Fed. 420, 81 C. C. A. 562; U. S. *v.* Clark, 125 Fed. 92; U. S. *v.* Martin, 28 Fed. 812.

The mere fact of the finding of two indictments charging more than three offenses within the same six months will not make both indictments void. *In re* Haynes, 30 Fed. 767.

Consolidation of indictments.— U. S. Rev. St. (1878) § 1024 [U. S. Comp. St. (1901) p. 720] authorizes the consolidation of such indictments, notwithstanding the aggregate offenses are more in number than can be joined in one indictment under section 5480 (Booth *v.* U. S., 154 Fed. 836, 83 C. C. A. 552), and, this being so, it is immaterial that all the offenses charged may not have been committed within the same six months (Booth *v.* U. S., *supra*. *Contra*, Bass *v.* U. S., 20 App. Cas. (D. C.) 232).

30. U. S. Rev. St. (1878) § 5480 [U. S. Comp. St. (1901) p. 3696].

31. U. S. Rev. St. (1878) § 5440 [U. S. Comp. St. (1901) p. 3676].

32. U. S. *v.* Clark, 125 Fed. 92.

33. U. S. *v.* Holmes, 40 Fed. 750.

34. U. S. *v.* Pond, 27 Fed. Cas. No. 16,067, 2 Curt. 265.

35. U. S. *v.* Pond, 27 Fed. Cas. No. 16,067, 2 Curt. 265.

36. U. S. *v.* Pond, 27 Fed. Cas. No. 16,067, 2 Curt. 265.

37. U. S. *v.* Pond, 27 Fed. Cas. No. 16,067, 2 Curt. 265.

38. State *v.* Bagwell, 107 N. C. 859, 12 S. E. 254, 9 L. R. A. 840.

39. State *v.* Bagwell, 107 N. C. 859, 12 S. E. 254, 9 L. R. A. 840.

40. U. S. *v.* Byrne, 44 Fed. 188; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,438, 1 Hughes 514.

41. U. S. *v.* Byrne, 44 Fed. 188; U. S. *v.* Golding, 25 Fed. Cas. No. 15,224, 2 Cranch C. C. 212.

42. U. S. *v.* Sander, 27 Fed. Cas. No. 16,219, 6 McLean 598.

embezzled, and destroyed, and that its contents were stolen, repugnant.[43] A fraudulent intent on the part of defendant need not be alleged. The offense is a mere misdemeanor and it is sufficient to set it forth in the language of the statute.[44] If the indictment is under section 5467,[45] it is sufficient to charge "that defendant was a person employed in one of the departments of the Post Office Establishment of the United States," [46] and the particular office held by the accused need not be stated.[47]

b. Description of Matter Stolen or Embezzled — (i) *In General.* An indictment charging the embezzlement of a letter and the stealing of its contents is good if it contains a substantial description of the subject-matter sufficient to inform the accused of what he is charged with taking, and to protect him from being again put in jeopardy for the same taking.[48]

(ii) *Value of Property.* In an indictment for stealing under sections 5467 and 5469,[49] if the thing within the statute be described, no value need be alleged.[50] Under the earlier statutes, providing a different punishment according as the letter embezzled did or did not contain articles of value, an indictment is sufficient without an averment that it contained no article of value, as it is an offense to steal a letter containing no such article;[51] but, if the letter contain an article of value, it must be so averred, to subject the defendant to the higher penalty.[52]

(iii) *Ownership of Property.* It has been broadly held that an indictment for embezzling a letter and stealing its contents need not charge the ownership of such property.[53] In a few cases, however, the following distinction is made: If the prosecution is for the embezzlement of a letter containing articles of value, an averment as to the ownership of such articles is not necessary;[54] but

43. Bromberger *v.* U. S., 128 Fed. 346, 63 C. C. A. 76; U. S. *v.* Byrne, 44 Fed. 188.

44. U. S. *v.* Trosper, 127 Fed. 476 (holding that where an indictment for abstracting mail matter from the mails, charged that defendant did "steal" and take from out of a mail the package described, it sufficiently charged a felonious intent); U. S. *v.* Hartley, 42 Fed. 835 (holding this to be the rule under the first clause of section 5467, but that under the second clause the felonious intent should be alleged); U. S. *v.* Atkinson, 34 Fed. 316; U. S. *v.* Falkenhainer, 21 Fed. 624. But see U. S. *v.* Smith, 11 Utah 433, 40 Pac. 708; U. S. *v.* Meyers, 142 Fed. 907; Jones *v.* U. S., 27 Fed. 447, holding that the offense intended to be punished by the statute is the common-law offense of larceny, when committed by an employee of the postal service, and the words of the statute do not specifically set forth all the elements necessary to constitute the offense intended to be punished, and therefore an indictment which merely follows the words of the statute is insufficient.

45. U. S. Rev. St. (1878) § 5467 [U. S. Comp. St. (1901) p. 3691].

46. U. S. *v.* Patterson, 27 Fed. Cas. No. 16,011, 6 McLean 466.

47. U. S. *v.* Clark, 25 Fed. Cas. No. 14,801, Crabbe 584.

48. U. S. *v.* Fuller, 4 N. M. 358, 20 Pac. 175 (holding that an indictment which charged the embezzlement of a package containing "eight hundred dollars" was sufficient, without setting out the kind of dollars, or that such dollars possessed value); Rosecrans *v.* U. S., 165 U. S. 257, 17 S. Ct. 302, 41 L. ed. 708; Bromberger *v.* U. S., 128 Fed. 346, 63 C. C. A. 76 (holding that an indictment charging embezzlement of a letter containing an article of value and the stealing of such article is sufficiently specific where it describes the letter and describes the article contained therein as a silver certificate of the United States, giving its denomination, without setting out specifically the marks and numbers thereon); Jones *v.* U. S., 27 Fed. 447; U. S. *v.* Golding, 25 Fed. Cas. No. 15,224, 2 Cranch C. C. 212; U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,556, 2 McLean 431; U. S. *v.* Patterson, 27 Fed. Cas. No. 16,011, 6 McLean 466.

By or to whom written.—An indictment against a mail carrier for embezzling letters intrusted to him to be carried need not allege to whom the letters were addressed or by whom they were written. Farnum *v.* U. S., 1 Colo. 309.

49. U. S. Rev. St. (1878) §§ 5467, 5469 [U. S. Comp. St. (1901) pp. 3691, 3692].

50. Bowers *v.* U. S., 148 Fed. 379, 78 C. C. A. 193; Jones *v.* U. S., 27 Fed. 447; U. S. *v.* Clark, 25 Fed. Cas. No. 14,801, Crabbe 584.

51. U. S. *v.* Fisher, 25 Fed. Cas. No. 15,102, 5 McLean 23.

52. Farnum *v.* U. S., 1 Colo. 309; U. S. *v.* Cummings, 25 Fed. Cas. No. 14,901*a*; U. S. *v.* Fisher, 25 Fed. Cas. No. 15,102, 5 McLean 23.

53. Bowers *v.* U. S., 148 Fed. 379, 78 C. C. A. 193; U. S. *v.* Trosper, 127 Fed. 476; U. S. *v.* Falkenhainer, 21 Fed. 624.

54. U. S. *v.* Baugh, 1 Fed. 784, 4 Hughes 501; U. S. *v.* Laws, 26 Fed. Cas. No. 15,579,

if the indictment is for larceny from a letter it is necessary to lay the property stolen on some other person than the prisoner.[55]

c. Mailing, Carriage, and Delivery — (i) *Under Section 5467, Clause 1.* An indictment under the first clause of section 5467[56] for embezzling a letter need not negative, in terms, that the letter had been delivered to the true owner. If it was fully delivered, so as to be beyond the purview of the postal laws before the acts charged against defendant were committed, this is matter of affirmative defense to be shown by him.[57] Neither need it be alleged that defendant obtained the letter by virtue of his employment. It is enough that, being an employee, he has obtained possession of the letter.[58] Nor is it necessary to aver that the letter embezzled was intended to be conveyed by post to any particular place, but only that it was intended to be conveyed by post.[59]

(ii) *Under Section 5467, Clause 2.* Under the second clause of section 5467[60] the indictment must show that the letter, the contents of which were stolen, was one which had come in some way or manner under the jurisdiction and into the possession of the post-office department.[61] It is not necessary to aver that the letter was intended to be conveyed by mail,[62] or delivered by a letter carrier, etc.[63]

d. Variance — (i) *As to Description of Letters or Contents.* While it is unnecessary to particularly describe a letter or the contents thereof alleged to have been embezzled,[64] if either be described, they must be proved as laid.[65]

2 Lowell 115; U. S. *v.* Okie, 27 Fed. Cas. No. 15,916, 5 Blatchf. 516.

55. U. S. *v.* Cummings, 25 Fed. Cas. No. 14,901; U. S. *v.* Foye, 25 Fed. Cas. No. 15,157, 1 Curt. 364.

Ownership of check.— Where it appears that a check was sent through the mails by a debtor to a creditor, with instructions to credit the amount on his debt, the ownership of the check may properly be laid in the latter. U. S. *v.* Jones, 31 Fed. 718. An indictment for the larceny of a check while in custody of the post officers may properly allege the ownership to be in the addressee, as the regulations of the post-office department constitute the postal authorities trustees for the person to whom a letter is addressed. U. S. *v.* Jones, 31 Fed. 725.

56. U. S. Rev. St. (1878) § 5467 [U. S. Comp. St. (1901) p. 3691].

57. U. S. *v.* Fuller, 4 N. M. 358, 20 Pac. 175; Wight *v.* Nicholson, 134 U. S. 136, 10 S. Ct. 487, 33 L. ed. 865; U. S. *v.* Wight, 38 Fed. 106; U. S. *v.* Jenther, 26 Fed. Cas. No. 15,476, 13 Blatchf. 335.

58. U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,556, McLean 431; U. S. *v.* Laws, 26 Fed. Cas. No. 15,579, 2 Lowell 115; U. S. *v.* Martin, 26 Fed. Cas. No. 15,731, 2 McLean 256, holding that an indictment is good, if it alleges that the letter, containing bank-notes, was put into the post-office to be conveyed by post, and came into the possession of defendant, as a driver of the mail stage, although it does not allege that the letter was regularly mailed.

An indictment under U. S. Rev. St. (1878) § 4046 [U. S. Comp. St. (1901) p. 2752], which provides generally that "every postmaster, assistant, clerk or other person employed in or connected with the business or operations of any money order office who converts to his own use . . . any portion of the money order funds shall be deemed guilty of embezzlement," is not sufficient where it merely avers that defendant was a clerk employed in a money order office, and charges the offense in the language of the statute, but it must, in addition, charge that the funds converted came into his possession by virtue of his employment, which is essential to the crime of embezzlement and to differentiate it from larceny. U. S. *v.* Allen, 150 Fed. 152.

59. U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,556, 2 McLean 431; U. S. *v.* Laws, 26 Fed. Cas. No. 15,579, 2 Lowell 115; U. S. *v.* Okie, 27 Fed. Cas. No. 15,916, 5 Blatchf. 516.

60. U. S. Rev. St. (1878) § 5467 [U. S. Comp. St. (1901) p. 3691].

61. Hall *v.* U. S., 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607.

62. Hall *v.* U. S., 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607; U. S. *v.* Wight, 38 Fed. 106. *Contra*, U. S. *v.* Winter, 28 Fed. Cas. No. 16,744, 13 Blatchf. 333.

63. Hall *v.* U. S., 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607; U. S. *v.* Wight, 38 Fed. 106.

64. See *supra*, III, C, 9, b, (i).

65. U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,556, 2 McLean 431.

Description as of time stolen.— If a check is correctly described as it was at the time it was stolen, subsequent indorsements or other alterations thereon will not make a variance. U. S. *v.* Jones, 31 Fed. 718.

Description of silver certificate.— An indictment for the statutory offense of embezzlement describing a silver certificate as being for one dollar, deposited "with the treasurer of the United States," is sufficient, although the words "deposited in the treasury" are used in the certificate. U. S. *v.* Eliason, 7 Mackey (D. C.) 104.

Name of drawer of draft.— Where an in-

The same rule applies to the description of the termini between which the letter was intended to be sent by post.[66]

(II) *As to Ownership.* Where an indictment for embezzling letters containing money charged that the letters in question came into defendant's possession as a railway postal clerk, to be delivered to the persons addressed, evidence that the letters were decoys and were to be intercepted before reaching the person to whom they were addressed does not constitute a variance.[67] So when the indictment alleges ownership in the person to whom a letter was directed and it appears in proof that it was in the custody of the post-office department for the benefit of the person to whom it was addressed, there is no variance.[68]

10. Robbery of Mail — a. In General. An indictment for advising, etc., a mail carrier to rob the mail should set forth that the carrier did in fact commit the offense — not necessarily, however, by a distinct, substantive averment of that fact.[69]

b. Issues, Proof, and Variance. In order to sustain an indictment for robbing "the mail" in the custody of a carrier, it is not necessary to prove a robbery of all the mail in the possession of the carrier.[70]

11. Breaking and Entering Post-Office. The acts and intent which constitute the crime of breaking and entering a post-office must be set forth with reasonable particularity of time, place, and circumstances.[71] An indictment for breaking and entering a building used in part as a post-office, "with intent to commit therein larceny," is sufficient without charging that the intent was to commit larceny in that part of the building used as a post-office, and that the breaking and entering was into that part.[72] Where, however, it charges the breaking into a building used in part as a post-office with intent to commit larceny "in said building," but fails to charge an intent to commit larceny in that part of the building used as a post-office, it is defective.[73] Breaking into a post-office building, with intent to commit larceny, and the actual stealing of stamps, constitute separate offenses, but, when both are parts of the same transaction, a single count stating these facts is not fatally bad.[74]

D. Evidence — 1. Presumptions. The rules governing presumptions in

dictment charges defendant with stealing from the mail a certain letter containing a draft signed "Joseph Johnson, President," a draft signed "Jos. Johnson" is not admissible. U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429.

Direction of letter.— Where an indictment charges that a letter alleged to be embezzled was directed to a certain person, and the proof shows that it was directed to another person, the variance is fatal. U. S. *v.* Denicke, 35 Fed. 407. But see U. S. *v.* Fuller, 4 N. M. 358, 20 Pac. 175, holding that in a prosecution for the embezzlement of a registered package where there is proof that such a package was actually put in the mail, and afterward taken by the accused, a variance as to the name of the sender, or of the person to whom the package was directed, is immaterial. A slight and unsubstantial variance between the indictment and the proof, in regard to the direction of a letter which is not produced, and which the witness states, after the lapse of two years, with doubt, will not exclude the evidence. U. S. *v.* Burroughs, 25 Fed. Cas. No. 14,695, 3 McLean 405. Where an indictment describes the letter embezzled as "a letter enclosed in an envelope, addressed and directed as follows, that is to say, to M. D., No. 122 W. 26 St.," it was held to be competent to give evidence relating to a letter contained in an envelope directed "M. D., No. 122 W. 26 Street," the word "to" and the abbreviation "St." not being on the envelope, the variances not being material. U. S. *v.* Jenther, 26 Fed. Cas. 15,476, 13 Blatchf. 335.

On an indictment in several counts, if the proof conforms to the averments in one of the counts, a motion to acquit on all the counts is properly overruled, although the proof varies from the allegations in the other counts as to those particulars. Walster *v.* U. S., 42 Fed. 891.

66. U. S. *v.* Foye, 25 Fed. Cas. No. 15,157, 1 Curt. 364.

67. Montgomery *v.* U. S., 162 U. S. 410, 16 S. Ct. 797, 40 L. ed. 1020.

68. U. S. *v.* Jones, 31 Fed. 718.

69. U. S. *v.* Mills, 7 Pet. (U. S.) 138, 8 L. ed. 636.

70. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

71. Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272.

72. U. S. *v.* Williams, 57 Fed. 201.

73. U. S. *v.* Martin, 140 Fed. 256; U. S. *v.* Campbell, 16 Fed. 233, 9 Sawy. 20.

74. U. S. *v.* Yennie, 74 Fed. 221.

criminal cases generally are applicable in prosecutions for offenses against the postal laws.[75]

2. Burden of Proof. In prosecutions for offenses against the postal laws, as in other criminal cases, the burden of proof is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime.[76]

3. Admissibility[77] — a. Embezzling Letters and Stealing Contents. In a prosecution against a postal clerk for embezzling a letter and stealing its contents, any evidence tending to show the intent of defendant is admissible.[78]

b. Mailing Obscene Matter. Under an indictment for depositing obscene matter in the mails, evidence tending to prove the identity of such matter is admissible.[79] Where the particular portions of the writing claimed to be obscene are marked, other portions thereof cannot be read in evidence;[80] nor can clauses of alleged similar character be read from other books by way of illustration.[81] Proof of the subsequent commission of another crime by the defendant is irrelevant and inadmissible.[82]

c. Mailing Matter Giving Information Concerning Obscene Pictures or Articles. In prosecutions for mailing letters giving information where obscene pictures can be obtained, where the letters complained of, to a casual reader, appear to be harmless, the government is entitled to allege and prove by extrinsic evidence that they in fact give information concerning obscene pictures or literature, and were so intended.[83]

d. Mailing Threatening or Abusive Matter. Extraneous evidence is not admissible to show that the language of a postal card, on its face threatening or abusive, was not so intended by the sender, or so understood by the sendee.[84]

e. Use of Mails to Defraud — (i) *In General.* Since, in a prosecution for use of the mails with intent to defraud, the gist of the offense is the fraudulent intent,[85] any competent evidence reflecting on such intent is admissible.[86] The

75. See Criminal Law, 12 Cyc. 384 *et seq.*

Public officers presumed to do duty.— All employees of the post-office department are presumed to have done their duty until the contrary appears from proof. U. S. *v.* Jones, 31 Fed. 718.

Presumption that pistol loaded.— In a prosecution for robbery of the mail, which is made by statute a capital offense when the carrier's life is put in jeopardy by the use of a dangerous weapon, a pistol in the possession of the accused at the time of the alleged robbery need not be proved to have been loaded, the presumption being that it was. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78; U. S. *v.* Wood, 28 Fed. Cas. No. 16,756, 3 Wash. 440.

Presumption of intent not to deliver letter. — On the trial of an indictment for taking a letter from a post-office with intent to obstruct correspondence, if it appears that defendant took a letter out of the post-office addressed to another person, without the authority or direction of the person to whom it was addressed, with the declared purpose of delivering it, and that he did not deliver it the first opportunity he had, the law raises the presumption that when he got the letter he did not intend to deliver it. U. S. *v.* Nutt, 27 Fed. Cas. No. 15,904. This presumption is subject to rebuttal. U. S. *v.* Nutt, *supra.*

76. Post *v.* U. S., 135 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 989 [*reversing* 128 Fed. 950]; Melton *v.* U. S., 120 Fed. 504, 57 C. C. A. 134, holding that an instruction placing on defendant the burden of rebutting the inferences arising from the evidence of guilt is erroneous. See also Criminal Law, 12 Cyc. 379 *et seq.*

In prosecutions of postmasters for using postage stamps in the purchase of merchandise, the government must prove that the stamps so used had been received by the postmaster from the post-office department. U. S. *v.* Williamson, 26 Fed. 690.

77. See Criminal Law, 12 Cyc. 390 *et seq.*

78. U. S. *v.* Falkenhainer, 21 Fed. 624, holding that where there was testimony tending to show that the letters stolen were taken from a straight package, which defendant had no right to disturb, evidence was admissible to show what the contents were when it was received, and the letters it contained, which were not stolen, were admissible in evidence for that purpose.

79. Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

80. U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 17 Blatchf. 357.

81. U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 17 Blatchf. 357.

82. Safter *v.* U. S., 87 Fed. 329, 31 C. C. A. 1.

83. U. S. *v.* Grimm, 50 Fed. 528.

84. Griffin *v.* Pembroke, 64 Mo. App. 263.

85. See *supra*, III, A, 7.

86. Bass *v.* U. S., 20 App. Cas. (D. C.)

government may prove that fraudulent representations were made either by the oral statement of defendant, or by letters written by him, or by circulars, pamphlets, or publications sent by him through the mails.[87] Whether defendant did in fact defraud any one is immaterial.[88] Evidence tending to establish a different sort of fraud from that charged in the indictment is inadmissible,[89] but evidence of prior similar transactions is properly admitted as showing the nature of the scheme which defendant was engaged in executing when he mailed the letter to the person specified in the indictment.[90]

(II) *Mailing Matter Concerning Lotteries.* Where an indictment charges defendants with sending through the mails circulars concerning a lottery, the prosecution may show, by evidence outside the circulars, that the business advertised therein was in effect a lottery.[91] Circumstantial evidence is competent which tends to show that defendant had both motive and opportunity to mail the writing in violation of the statute.[92]

4. Weight and Sufficiency — a. Mailing Obscene Matter. To authorize a conviction under an indictment for sending obscene or indecent matter through the mails, it must be proven beyond a reasonable doubt that defendants or their agents deposited, or caused to be deposited, the paper containing the objectionable matter in the post-office for mailing;[93] that defendants knew that the paper contained the objectionable matter;[94] and that the publication was obscene, lewd, lascivious, or indecent.[95]

b. Use of Mails to Defraud — (I) *In General.* As the offense of using the mails to defraud consists in the concocting of a scheme or artifice to defraud individuals of their property and money, and in the employment of the post-office department in carrying into execution such scheme or artifice, to warrant a conviction the jury must be satisfied, beyond a reasonable doubt, of the intention of the accused to defraud;[96] and they must also be satisfied beyond a

232; U. S. *v.* Ried, 42 Fed. 134; U. S. *v.* Stickle, 15 Fed. 798, holding that in determining the intention of the accused, it is proper for the jury to consider all the facts and circumstances in evidence, the nature and quality of his advertisements and circulars, and the statements and representations therein contained, their truth or falsity in different particulars, whether he filled orders for goods or not, and the quality of such orders, and his conduct in the premises generally.

Evidence as to defendant's knowledge and experience of financial schemes, and as to previous attacks made on the honesty of the scheme, is material as bearing on the question whether or not defendant was himself deceived respecting it. U. S. *v.* Durland, 65 Fed. 408.

87. Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581; Rumble *v.* U. S., 143 Fed. 772, 75 C. C. A. 30; Balliet *v.* U. S., 129 Fed. 689, 64 C. C. A. 201.

Letter written to defendant admissible.— A letter written to defendant before the close of the transactions charged in the indictment, although not answered by him, is admissible in evidence, where it is shown that it was part of a larger correspondence between the parties, and taken in connection with such correspondence and the other evidence, tended to show the representations charged in the indictment to have been made by defendant were false, and known by him to be so. Rumble *v.* U. S., 143 Fed. 772.

88. Bass *v.* U. S., 20 App. Cas. (D. C.) 232; Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329.

89. Booth *v.* U. S., 139 Fed. 252, 71 C. C. A. 378.

90. Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581; O'Hara *v.* U. S., 129 Fed. 551, 64 C. C. A. 81.

91. MacDonald *v.* U. S., 63 Fed. 426, 12 C. C. A. 339.

The surrounding circumstances and the occupation of defendant are admissible in evidence in order to prove that the letter and circular related to a lottery. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

Papers inclosed in the same envelope with the writing set forth in an indictment for mailing a letter and circular concerning a lottery are admissible in evidence as part of the *res gestæ*. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

92. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

93. U. S. *v.* Bebout, 28 Fed. 522.

94. U. S. *v.* Bebout, 28 Fed. 522.

95. U. S. *v.* Bebout, 28 Fed. 522.

96. U. S. *v.* Post, 128 Fed. 950 [*reversed* on other grounds in 135 Fed. 1, 67 C. C. A. 569, 90 L. R. A. 989]; U. S. *v.* Staples, 45 Fed. 195; U. S. *v.* Stickle, 15 Fed. 798.

Scheme to sell counterfeit money.— Under an indictment for devising a scheme to sell

reasonable doubt of the use by the person so accused of the post-office for that purpose.[97]

(II) *Mailing Matter Concerning Lottery.* On a prosecution for depositing in the mail a letter or circular concerning a lottery the jury must be satisfied beyond a reasonable doubt that the letter was mailed;[98] that it was concerning a lottery;[99] and that defendant deposited it, or caused it to be deposited.[1]

c. Larceny From the Mails. To justify a conviction for larceny from the mails the jury must be satisfied beyond a reasonable doubt not only that the mail had been violated,[2] but that the letter or package, with the stealing of which defendant is charged, had been in, and was taken from, the mail.[3] The most satisfactory evidence that it had been in the mail is that of the person who deposited it in the post-office, and, of its loss, that of the person to whom it was addressed, to the effect that it was never received by him.[4] If, however, such evidence is not forthcoming, a conviction may be had on circumstantial evidence.[5] Mere suspicion against defendant is overcome by the proof of his good character by reliable witnesses.[6]

E. Trial[7]**— 1. Reception of Evidence.** Where a postmaster is charged with stealing a letter from the mail, the other employees through whose hands the letter would pass should be examined,[8] especially if the accused proves an exemplary character.[9]

counterfeit money through the mails, based on the act providing for the punishment of one using the mails in the execution of "a scheme to defraud, or to sell" counterfeit money, it is not necessary to prove a scheme to defraud. Streep *v.* U. S., 160 U. S. 128, 16 S. Ct. 244, 40 L. ed. 365.

97. U. S. *v.* Post, 128 Fed. 950 [*reversed* on other grounds in 135 Fed. 1, 67 C. C. A. 569, 90 L. R. A. 989]; Hanley *v.* U. S., 127 Fed. 929, 62 C. C. A. 561; Kellogg *v.* U. S., 126 Fed. 323, 61 C. C. A. 229 (holding that where the evidence showed such a wholesale use of the mails that an intelligent mind could reach no other conclusion than that such use was contemplated by the persons originating the scheme from the beginning, the evidence was sufficient to establish that the use of the mails was a parcel of the alleged scheme, although no witness testified to such fact directly, and it appeared that some of the communications between the swindlers and their victims were exchanged without the use of the mails); U. S. *v.* Stickle, 15 Fed. 798.

Evidence held sufficient to show use of mails see Klein *v.* U. S., 151 Fed. 420, 80 C. C. A. 650; U. S. *v.* White, 150 Fed. 379.

Evidence held sufficient to show mailing.— On a prosecution for using the mails to defraud, the fact that defendant wrote the letter in question is evidence from which, if unexplained, the jury may infer that he also mailed such letter. Brand *v.* U. S., 4 Fed. 394, 18 Blatchf. 384. See also Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581.

98. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554, holding that the post-office stamp upon the envelope is *prima facie* proof that the letter was mailed.

99. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

Evidence of the Louisiana statute of incorporation, and of the sale of the lottery tickets contained in the mailed envelope, are sufficient, in a prosecution for mailing a letter and circular concerning the Louisiana state lottery, to establish the existence of such lottery, in the absence of any evidence to the contrary. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

1. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

Evidence held sufficient to show mailing by defendant.— Where it was undisputed that defendant was engaged in the lottery business, evidence that defendant received an order for two lottery tickets such as were subsequently mailed with the letter; that the name used in the address of the letter was the same as that signed to the order; that the tickets bore his stamp; and that the letter inclosed his business card, would justify the conclusion that defendant deposited the letter in the post-office for mailing. U. S. *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554. See also U. S. *v.* Duff, 6 Fed. 45, 19 Blatchf. 9.

2. U. S. *v.* McKenzie, 35 Fed. 826, 13 Sawy. 337; U. S. *v.* Crow, 25 Fed. Cas. No. 14,895, 1 Bond 51.

3. U. S. *v.* Crow, 25 Fed. Cas. No. 14,895, 1 Bond 51.

4. U. S. *v.* Crow, 25 Fed. Cas. No. 14,895, 1 Bond 51.

5. U. S. *v.* McKenzie, 35 Fed. 826, 13 Sawy. 337; U. S. *v.* Crow, 25 Fed. Cas. No. 14,895, 1 Bond 51; U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524.

6. U. S. *v.* Poage, 27 Fed. Cas. No. 16,059, 6 McLean 89.

7. See Criminal Law, 12 Cyc. 504 *et seq.*

8. U. S. *v.* Emerson, 25 Fed. Cas. No. 15,051, 6 McLean 406; U. S. *v.* Whitaker, 28 Fed. Cas. No. 16,672, 6 McLean 342. But see U. S. *v.* Brent, 24 Fed. Cas. No. 14,640.

9. U. S. *v.* Whitaker, 28 Fed. Cas. No. 16,672, 6 McLean 342.

2. Questions For Jury. Ordinarily the question whether or not a particular publication is obscene, lewd, or lascivious is for the jury, under instructions from the court as to the meaning of the words.[10] But it is within the province of the court to construe the objectionable document so far as necessary to decide whether a verdict establishing its obscenity would be set aside as against evidence and reason.[11] The question of the intent with which letters are abstracted from the mail is for the jury.[12]

F. Sentence and Punishment. The punishment of offenders against the postal laws is a matter of statutory provision.[13]

IV. Civil Liability For Obstructing Mail.

A person receiving a letter addressed to another owes him the duty not to obstruct his mail, and a breach of this duty renders him liable for the damages proximately resulting therefrom.[14]

POSTPONE. To Adjourn,[1] *q. v.*; to put off;[2] to Delay,[3] *q. v.* (See Postponement.)

POSTPONEMENT. A term which may be used synonymously with "continuance."[4] (Postponement: Of Civil Action, see Continuances in Civil Cases,

10. Rosen *v.* U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606; U. S. *v.* Harmon, 45 Fed. 414; U. S. *v.* Clarke, 38 Fed. 500; U. S. *v.* Davis, 38 Fed. 326.

11. U. S. *v.* Smith, 45 Fed. 476.

12. U. S. *v.* Wilson, 44 Fed. 593.

13. See cases cited *infra*, this note.

Mailing non-mailable matter.— Act Cong. Sept. 26, 1888, amending section 2 of the act of June 18, 1888 (25 U. S. St. at L. 187 [U. S. Comp. St. (1901) p. 2661]), relating to non-mailable matter, changes all former penalties provided for that offense; and as the law of Sept. 26, 1888, has no saving clause relating to offenses arising under the said second section, offenses committed prior to Sept. 26, 1888, cannot be punished under the present law. U. S. *v.* Barber, 37 Fed. 55.

Mailing letters concerning lotteries.— Although a fine is the only punishment prescribed by U. S. Rev. St. (1878) § 3894 [U. S. Comp. St. (1901) p. 2659], which prohibits the carrying in the mail of letters or circulars concerning lotteries, and punishes as a crime the offense of knowingly depositing or sending anything to be conveyed by mail in violation of such section, a person who violates the statute may be arrested for trial, and imprisoned or bailed. *In re* Jackson, 13 Fed. Cas. No. 7,124, 14 Blatchf. 245.

Use of mails to defraud.— Where three indictments, each charging a single offense under the statute relating to the use of the mails to defraud, are consolidated as permitted by that statute, and defendant is convicted of the three offenses committed within the same six calendar months, the court is entitled to sentence defendant, in its discretion, to the full extent of the penalty provided for each offense. *In re* De Bara, 179 U. S. 316, 21 S. Ct. 110, 45 L. ed. 207. *Ex p.* Henry, 123 U. S. 372, 8 S. Ct. 142, 31 L. ed. 174; Hanley *v.* U. S., 127 Fed. 929, 62 C. C. A. 561 [*reversing* 123 Fed. 849, 59 C. C. A. 153]; Howard *v.* U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509.

Robbery of mails.— Robbing the mail is a capital crime if the robbery be effected by the use of dangerous weapons, thus putting in jeopardy the life of the person having the custody of such mails, and the punishment is death. U. S. *v.* Hare, 26 Fed. Cas. No. 15,304, Brunn. Col. Cas. 449, 2 Wheel. Cr. (N. Y.) 283; U. S. *v.* Wood, 28 Fed. Cas. No. 16,757, Brunn. Col. Cas. 456, 2 Wheel. Cr. (N. Y.) 325. See also U. S. *v.* Reeves, 38 Fed. 404; U. S. *v.* Aminhisor, 24 Fed. Cas. No. 14,442; U. S. *v.* Bernard, 24 Fed. Cas. No. 14,584; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78; U. S. *v.* Wood, 28 Fed. Cas. No. 16,756, 3 Wash. 440.

14. Cohen *v.* Cohen, 26 Tex. Civ. App. 315, 63 S. W. 544, holding that where a letter addressed to plaintiff was delivered by mistake to defendant, who negligently retained possession thereof for several days, defendant was liable for the damages sustained by reason of plaintiff's failure to sell certain property which would have been sold but for the negligent retention of the letter.

1. See 1 Cyc. 793.

2. Bisham *v.* Tucker, 2 N. J. L. 253, 254.

3. Bisham *v.* Tucker, 2 N. J. L. 253, 254. See also Shufelt *v.* Power, 13 How. Pr. (N. Y.) 89, 90.

4. See 1 Abbott L. Dict. 277 [*cited* in State *v.* Underwood, 76 Mo. 630, 639] (where the word is given as a definition of "continuance"); Burrill L. Dict. [*cited* in State *v.* Underwood, *supra*] (where "continuance" in modern practice, is defined as "postponement of the proceedings in a cause").

Held not to result from a stay prior to the term see Shufelt *v.* Power, 13 How. Pr. (N. Y.) 89, 90.

It is sometimes more strictly applied to a continuance to another day during the same term. State *v.* Nathaniel, 52 La. Ann. 558, 562, 26 So. 1008, where it is said: "We have

9 Cyc. 75–162; Justices of the Peace, 24 Cyc. 576–581. Of Corporate Meeting, see Corporations, 10 Cyc. 322–323. Of Count of Votes, see Elections, 15 Cyc. 374. Of Criminal Case, see Continuances in Criminal Cases, 9 Cyc. 163–209; Criminal Law, 12 Cyc. 881–882. Of Debt to Prior Debt Secured by Same Mortgage, see Mortgages, 27 Cyc. 1166–1167. Of Election, see Elections, 15 Cyc. 342. Of Election Returns, see Elections, 15 Cyc. 375, 376 text and notes 41, 42. Of Execution, see Executions, 17 Cyc. 1135–1151; Mortgages, 27 Cyc. 1658. Of Execution Sale, see Executions, 17 Cyc. 1061 note 35, 1248, 1249. Of Foreclosure Sale, see Mortgages, 27 Cyc. 1694–1695. Of Hearing—Before Arbitrators, see Arbitration and Award, 3 Cyc. 648–649; By Referee, see References; In Equity, see Equity, 16 Cyc. 409, 410. Of Lien to Prior Lien, see Judgments, 23 Cyc. 1339–1390; Liens, 25 Cyc. 678–680; Maritime Liens, 26 Cyc. 802–809; Mechanics' Liens, 27 Cyc. 230–255; Mortgages, 27 Cyc. 1167–1182. Of Meeting, see Corporations, 10 Cyc. 786; Counties, 11 Cyc. 394; Municipal Corporations, 28 Cyc. 328, 330 text and note 63; Parliamentary Law, 29 Cyc. 1686; Towns. Of Motion, see Motions, 28 Cyc. 17. Of Performance of Contract, see Contracts, 9 Cyc. 603–615; Frauds, Statute of, 20 Cyc. 198–209, 226–238. Of Proceedings—On Appeal, see Appeal and Error, 29 Cyc. 885–916; On Application For New Trial, see New Trial, 29 Cyc. 935–936; Pending Other Attachment in Attachment Suits in Justice's Court, see Justices of the Peace, 24 Cyc. 543 note 2; To Take Deposition, see Depositions, 13 Cyc. 893–894. Of Right to Sue For Life Insurance by Agreement, see Life Insurance, 25 Cyc. 909. Of Sale—In General, see Sales; By Personal Representative, see Executors and Administrators, 18 Cyc. 766; Under Judicial Process, Order, or Decree in General, see Judicial Sales, 24 Cyc. 20 note 29, 23, 32 note 40. Of Session of Court, see Courts, 11 Cyc. 729. Of Term of Court, see Courts, 11 Cyc. 733–735. Of Trial in Federal Court Pending Decision in State Court, see Courts, 11 Cyc. 903. See also Adjournment, 1 Cyc. 793; Delay, 13 Cyc. 767; Postpone.)

POST-ROAD. See Post-Office, *ante*, p. 974.

POST ROUTE. See Post-Office, *ante*, p. 974.

POTENTIA DEBET SEQUI JUSTITIAM, NON ANTECEDERE. A maxim meaning "Power ought to follow, not precede, justice." [5]

POTENTIA EST DUPLEX, REMOTA ET PROPINQUA; ET POTENTIA REMOTISSIMA ET VANA EST QUÆ NUNQUAM VENIT IN ACTUM. A maxim meaning "Possibility is of two kinds, remote and near; that which never comes into action is a power the most remote and vain." [6]

POTENTIA INUTILIS FRUSTRA EST. A maxim meaning "Useless power is vain." [7]

POTENTIAL. Existing in possibility; that which may be possible; [8] having latent power; endowed with energy adequate to a result; efficacious; existing in possibility, not in act.[9] In electrical science, the intensity of pressure by which the electricity is caused to pass along a conductor; also known as electro-motive force; tension; or pressure.[10] (Potential: Interest, see Chattel Mortgages, 6 Cyc. 1045. See also Potentially.)

been unable to distinguish, for the purposes of this case, between the application as made for a 'postponement' and an application for a 'continuance.' It is true that the word 'postponement' is usually preferred, when the purpose is to obtain a continuance to another day during the term at which the case is fixed, rather than to a future term; but the terms of the District Courts are now continuous, and, in this particular case, the postponement was asked until witnesses, not alleged to reside in the parish, or State, or elsewhere, and not alleged to be obtainable at any time, should be summoned, and their attendance obtained."

5. Peloubet Leg. Max.

6. Black L. Dict.

7. Bouvier L. Dict.

8. See Webster Dict. [*quoted* in Campbell *v.* J. E. Grant Co., 36 Tex. Civ. App. 641, 644, 82 S. W. 794].

9. Dickey *v.* Waldo, 97 Mich. 255, 261, 56 N. W. 608, 23 L. R. A. 499.

"Potential existence" has been defined as that existence of a thing which may be at some time. Dickey *v.* Waldo, 97 Mich. 255, 261, 56 N. W. 608, 23 L. R. A. 449 (distinguishing "actual existence"); Campbell *v.* J. E. Grant Co., 36 Tex. Civ. App. 641, 644, 82 S. W. 794.

10. Anglo-American Brush Electric Light Corp. *v.* King, [1892] A. C. 367, 371.

POTENTIALLY. In possibility, not in act, not positively; in efficacy, not in actuality.[11] (See POTENTIAL.)

POTENTIA NON EST NISI AD BONUM. A maxim meaning "Power is not conferred except for the public good." [12]

POTERIT ENIM QUIS REM DARE ET PARTEM REI RETINERE, VEL PARTEM DE PERTINENTIIS, ET ILLA PARS QUAM RETINENT SEMPER CUM EO EST ET SEMPER FUIT. A maxim meaning, literally, "For one shall be able to grant a thing, and withhold part of the thing, or part from out the appurtenances, and that part which he withholds is always with him and always was;" [13] expressing the idea that the operation of an exception is to retain in the grantor some portion of his former estate, and whatever is thus excepted or taken out of the grant remains in him as of his former title.[14]

POTESTAS DELEGATA NON POTEST DELEGARI. See DELEGATA POTESTAS NON POTEST DELEGARI.

POTESTAS REGIA EST FACERE JUSTITIAM. A maxim meaning "The power of the crown consists in the power to do justice." [15]

POTESTAS STRICTE INTERPRETATUR. A maxim meaning "A power is strictly interpreted." [16]

POTESTAS SUPREMA SEIPSUM DISSOLVERE POTEST, LIGARE NON POTEST. A maxim meaning "Supreme power can dissolve, but cannot bind itself." [17]

POTEST QUIS RENUNCIARE PRO SE ET SUIS JURI QUOD PRO SE INTRODUCTUM EST. A maxim meaning "One may relinquish for himself and his heirs a right which was introduced for his own benefit." [18]

POTION. Draught, used as a liquid, medicine or dose.[19]

POTIOR EST CONDITIO DEFENDENTIS. A maxim meaning "The condition of a defendant is the better one." [20]

POTIOR EST CONDITIO POSSIDENTIS. A maxim meaning "Better is the condition of the possessor." [21]

11. So defined by Craig see Cole *v.* Kerr, 19 Nebr. 553 556, 26 N. W. 598 [*quoted* in Long *v.* Hines, 40 Kan. 220, 222, 19 Pac. 796, 10 Am. St. Rep. 192; New Lincoln Hotel Co. *v.* Shears, 57 Nebr. 478, 486, 78 N. W. 25, 73 Am. St. Rep. 524, 43 L. R. A. 588].

12. Peloubet Leg. Max.

13. Applied in Coke Litt. 47*a* [*quoted* in Engel *v.* Ayer, 85 Me. 448, 454, 27 Atl. 352 (reading "*pertinentis*" for "*pertinentiis*"); Hammond *v.* Woodman, 41 Me. 177, 193, 66 Am. Dec. 219 (omitting "*de*" before "*pertinentiis*"), and *cited* in Greenleaf *v.* Birth, 6 Pet. (U. S.) 302, 310, 9 L. ed. 132 (where, however, the maxim is rendered: "*Si quis rem dat et partem retinet, illa pars, quam retinet, semper cum eo est, et semper fuit*")].

14. See Engel *v.* Ayer, 85 Me. 448, 453, 27 Atl. 352, where the maxim is applied in distinguishing between the nature of an exception and that of a reservation.

15. Morgan Leg. Max.

16. Black L. Dict. [*citing* Jenkins Cent. 17 case 29 in margin].

17. Peloubet Leg. Max.

18. Black L. Dict.

19. Webster Dict. [*quoted* in Runnels *v.* State, 45 Tex. Cr. 446, 448, 77 S. W. 458].

20. Burrill L. Dict.

Cited and applied in: Foye *v.* Southard, 64 Me. 389, 399; Kendrick *v.* Crowell, 38 Me. 42, 44; Marks *v.* Hapgood, 24 Me. 407, 410; Agricultural Bank *v.* Burr, 24 Me. 256, 270; Hannan *v.* Hannan, 123 Mass. 441, 443, 25 Am. Rep. 121; Cranson *v.* Goss, 107 Mass. 439, 440, 9 Am. Rep. 45; Williams *v.* Ingell, 21 Pick. (Mass.) 288, 289; Harwood *v.* Knapper, 50 Mo. 456, 458; Hintze *v.* Taylor, 57 N. J. L. 239, 241, 30 Atl. 551; Stewart *v.* Smithson, 1 Hilt. (N. Y.) 119, 121; Lennig's Estate, 6 Pa. Dist. 249, 252; Frick *v.* Hammond, 3 Pa. L. J. 413, 414; Lewis *v.* Baker, 31 Wkly. Notes Cas. (Pa.) 223, 224; Coon *v.* Reed, 2 Wkly. Notes Cas. (Pa.) 159; Harrington *v.* Grant, 54 Vt. 236, 239; Smith *v.* Bromley, Dougl. (3d ed.) 696, 697 note [*quoted* in White *v.* Franklin Bank, 22 Pick. (Mass.) 181, 187; Trebilcock *v.* Walsh, 21 Ont. App. 55, 65]; Jones *v.* Barkley, Dougl. (3d ed.) 684 [*cited* in White *v.* Franklin Bank, *supra*]; Gray *v.* Whitman, 3 Nova Scotia 157, 158.

Held inapplicable in case of money wrongfully paid by mistake (Frontier Bank *v.* Morse, 22 Me. 88, 89, 38 Am. Dec. 284); also where parties are not *in pari delicto* (White *v.* Franklin Bank, 22 Pick. (Mass.) 181, 186. See also Holman *v.* Johnson, Cowp. 341, 343 [*cited* in Hope *v.* Linden Park Blood Horse Assoc., 58 N. J. L. 627, 631, 34 Atl. 1070, 55 Am. St. Rep. 614]).

21. Bouvier L. Dict.

Cited and applied in: Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111, 113, 24 Atl. 794; Magoun *v.* Lapham, 21 Pick. (Mass.) 135, 140; Greenwood *v.* Curtis, 6 Mass. 358, 381, 4 Am. Dec. 145; Gates *v.* Winslow, 1 Mass. 65, 66 [*cited* in Pearson *v.* Lord, 6 Mass. 81, 84]; Clare *v.* Lamb, L. R. 10 C. P. 334, 341. 44 L. J. C. P. 177, 32 L. T. Rep. N. S. 196, 23 Wkly. Rep. 389; East India Co. *v.* Tritton, 3 B. & C. 280, 289, 5 D. & R. 214,

POTIUS EST PETERE FONTES. A maxim meaning "It is better to seek the sources." [22]

POTTERY. A term applied to wares, of various designs and uses, composed of a base of plastic clay given form by the manipulation of the potter and fixed in that form and glazed by firing in a furnace.[23]

POTT'S FRACTURE. As usually defined, breaking of one bone between the knee and ankle joints and the dislocation of the other.[24]

POULTRY. A word which has been said to include pigeons.[25]

POUND. As a place of detention,[26] an INCLOSURE, *q. v.*, an enclosed place in which cattle or goods distrained are shut up; [27] a place for impounding stray animals; an inclosed piece of land, secured by a firm structure of stone or of posts or timber placed in the ground.[28] As value, a definite quantity of gold with a mark upon it to determine its weight and fineness.[29] (Pound: As Standard of Weight, see WEIGHTS AND MEASURES. See also POUNDAGE.)

POUNDAGE. In practice, the amount allowed to the sheriff or other officer for commissions on the money made by virtue of an execution.[30] (Poundage: As Officers' Fees, see SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS.)

POUND BREACH.[31] See ANIMALS, 2 Cyc. 455.

3 L. J. K. B. O. S. 24, 27 Rev. Rep. 353, 10 E. C. L. 134; Norwich *v.* Norfolk R. Co., 4 E. & B. 397, 443, 1 Jur. N. S. 344, 24 L. J. Q. B. 105, 30 Eng. L. & Eq. 120, 82 E. C. L. 397; Munt *v.* Stokes, 4 T. R. 561, 564 [*cited* in Pearson *v.* Lord, 6 Mass. 81, 84]; Mott *v.* Feenor, 10 Nova Scotia 387, 388; Day *v.* Day, 17 Ont. App. 157, 161.

Applied where both parties are negligent see Snow *v.* Peacock, 3 Bing. 406, 411, 11 E. C. L. 201.

Potior est conditio possidentis, et defendentis see Union Bridge Co. *v.* Troy, etc., R. Co., 7 Lans. (N. Y.) 240, 247; Campbell *v.* Campbell, 7 Cl. & F. 166, 181, 7 Eng. Reprint 1030, Macl. & R. 387, 9 Eng. Reprint 142.

22. See Bourke *v.* Granberry, Gilm. (Va.) 16, 25, 9 Am. Dec. 589.

23. See Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680, 709, 39 Atl. 923.

"Known as the Pottery building," a phrase in a fire policy, does not in itself, without further evidence, indicate an intention to include a building partly used as a pottery along with one adjoining and wholly so used. Forbes *v.* American Ins. Co., 164 Mass. 402, 405, 41 N. E. 656.

Pottery business see Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680, 711, 39 Atl. 923.

24. Peterson *v.* Modern Brotherhood of America, 125 Iowa 562, 101 N. W. 289, 67 L. R. A. 631, where, however, the term was applied in the particular case by testifying physicians, to "the breaking of the fibula 1½ to 2 inches above the joint, and of what is known as the 'malleolus process.'"

25. See Com. *v.* Lewis, 25 Wkly. Notes Cas. (Pa.) 432, 433, where it is said: "Although pigeons belong to the class of animals *feræ naturæ*, they are so nearly allied to the domestic birds as to be included under the subject 'poultry' in the Encyclopædia Britannica."

As domitæ naturæ see ANIMALS, 2 Cyc. 305 note 3.

26. See ANIMALS, 2 Cyc. 452.

27. Burrill L. Dict.

As inclosure see ANIMALS, 2 Cyc. 452–456.

Pound-covert—Pound-overt.—A pound (*parcus*, which signifies any inclosure) is either pound-overt, that is, open overhead; or pound-covert, that is, close. 3 Blackstone Comm. 13. And see Coke Litt. 47*b*.

28. Wooley *v.* Groton, 2 Cush. (Mass.) 305, 308.

Impounding of animals damage feasant see ANIMALS, 2 Cyc. 400–414.

29. See Borie *v.* Trott. 5 Phila. (Pa.) 366, 403, 404, where the above definition is quoted as that of Sir Robert Peel, and the following comment added: "Many pages have been written to controvert this definition and to prove that a pound is a mere abstraction — something like a mathematical point, without length, breadth or thickness. But common sense, I think, vindicates Sir Robert Peel. A standard measure must be some actual length or capacity — a standard weight some actual weight. How else can other weights and measures be compared with it? This is the object of a standard. So a standard of value must be some actual value."

The British sovereign, a coin representing a pound sterling, is equivalent to about four dollars and eighty-seven cents according to the standard fixed by 4 U. S. St. at L. 700. Schermerhorn *v.* Talman, 14 N. Y. 93, 135.

"A note payable in pounds sterling or British sovereigns is payable in 'money' just as much and as certainly as if it was payable in dollars. The case is different from a note made payable in 'currency,' which may be 'money' only conventionally, but not legally. But where a note is made payable in a particular denomination of foreign money, as pounds sterling, it is payable in money the same as if it was payable in a denomination of domestic money." King *v.* Hamilton, 12 Fed. 478, 479, 8 Sawy. 167.

30. Bouvier L. Dict. [*quoted* in Bowe *v.* Campbell, 2 N. Y. Civ. Proc. 232, 234].

Sheriff's commissions as costs see COSTS, 11 Cyc. 103 text and notes 52–54, 131 text and note 33.

Not chargeable to attorney unless paid him by defendant see ATTORNEY AND CLIENT, 4 Cyc. 923 note 33.

31. **As action** may be joined with trespass

POUND-KEEPER. An officer charged with the care of a pound, and of animals confined there.[32] (See POUND.)

POUR AUTRE VIE or **PUR AUTRE VIE.** See ESTATES, 16 Cyc. 614.

POURPRESTURE or **PURPRESTURE.**[33] The wrongful inclosure of another's property, or the encroaching or taking to oneself that which ought to be in common.[34]

POURPRISE. A close or inclosure.[35] (See POURPRESTURE.)

POVERTY. The quality or state of being poor or indigent, want or scarcity of means or sustenance; indigence; need.[36] (Poverty: In General, see PAUPERS, 30 Cyc. 1058. As Affecting Competency to Serve in Fiduciary Capacity, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 78–79 text and notes 35–37; 99 text and note 13; GUARDIAN AND WARD, 21 Cyc. 32 note 81; TRUSTS. As Element of Duress, see CONTRACTS, 9 Cyc. 461. As Ground For Security For Costs, see COSTS, 11 Cyc. 174.[37] As Object of Charitable Relief, see CHARITIES, 6 Cyc. 906–910.[38] Distinguished From Insolvency, see INSOLVENCY, 22 Cyc. 1257 note 4. Of Party to Divorce, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 87 note 59; DIVORCE, 14 Cyc. 755.)

POWDER. A word applicable to a mass of fine particles of any substance whatever, but sufficient, in a proper context, to designate gunpowder.[39] (See, generally, EXPLOSIVES, 19 Cyc. 1.)

POWER. An ability to do;[40] the right, ability, or faculty of doing something;[41] the ability to act, regarded as latent or inherent; the faculty of doing or performing something; capacity for action or performance;[42] the capacity to be acted upon in some particular manner.[43] (Power: Applied Mechanically, see

see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 398.

32. Black L. Dict.

Appointment and nature of office see ANIMALS, 2 Cyc. 453–454.

As recipient of notice or certificate of impounding see ANIMALS, 2 Cyc. 405.

33. Derived from Pourprise, see Coke Litt. 277*b* [*quoted* in State *v.* Kean, 69 N. H. 122, 125, 45 Atl. 256, 48 L. R. A. 102].

34. 4 Blackstone Comm. 167 [*cited* in Burrill L. Dict.].

Example.— Where there is a house erected or an inclosure made upon any part of the king's demesnes or of a highway or common street or public water or such like public things it is properly called a *purpresture.* 4 Blackstone Comm. 467 [*quoted* in State *v.* Kean, 69 N. H. 122, 125, 45 Atl. 256, 48 L. R. A. 102].

Applied to rivers as state highways see Atty.-Gen. *v.* Eau Claire, 37 Wis. 400, 447 [*quoted* in *In re* Pierce, 44 Wis. 411, 434, where it is said: "An unauthorized encroachment upon any of them is a violation of the duty assumed by the state, in its aggregate and sovereign character, to keep them forever open. Every such encroachment is a *pourpresture,* which concerns the sovereign prerogative of the state, and the prerogative jurisdiction of this court"].

35. See Coke Litt. 277*b* [*quoted* in State *v.* Kean, 69 N. H. 122, 125, 45 Atl. 256, 48 L. R. A. 102].

36. Webster Int. Dict.

"Adjudication of poverty" see PAUPERS, 30 Cyc. 1131.

"Poverty-affidavit" is a term which has been applied to an affidavit made by way of excuse from giving security for costs. Cole *v.* Hoeburg, 36 Kan. 263, 264, 13 Pac. 275.

37. Suits in forma pauperis see COSTS, 11 Cyc. 200–204.

38. Degrees of poverty not to be considered in construing request for "poor" relation see McNeilledge *v.* Galbraith, 8 Serg. & R. (Pa.) 43, 45, 11 Am. Dec. 572.

39. See Blankenship *v.* Com., 66 S. W. 994, 995, 23 Ky. L. Rep. 1995, where an allegation of shooting with "powder and leaden balls" was held sufficient for the purposes of indictment for murder committed by means of shooting without stating kind of weapon used.

40. Remington *v.* Peckham, 10 R. I. 550, 553.

41. Bouvier L. Dict. [*quoted* in Bradley *v.* State, 111 Ga. 168, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691].

Sometimes used in the same sense as "right" see Rapalje & L. L. Dict. [*quoted* in Freligh *v.* Saugerties, 24 N. Y. Suppl. 182]; Matter of Lima, etc., R. Co., 68 Hun (N. Y.) 252, 22 N. Y. Suppl. 967.

42. Webster Dict. [*quoted* in Bradley *v.* State, 111 Ga. 168, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691].

"Authority" as applied to executive officers seems to be a convertible term with "power." Newburn *v.* Durham, 10 Tex. Civ. App. 655, 662, 32 S. W. 112.

The words "power" and "authority" sometimes construed "duty" and "obligation."— Baltimore *v.* Marriott, 9 Md. 160, 174, 66 Am. Dec. 326 [*cited* in Cochrane *v.* Frostburg, 81 Md. 54, 64, 31 Atl. 703, 48 Am. St. Rep. 479, 27 L. R. A. 728, and *quoted* in Anne Arundel County Com'rs. *v.* Duckett, 20 Md. 468, 477, 83 Am. Dec. 557 (*quoted* in Com. *v.* Marshall, 3 Wkly. Notes Cas. (Pa.) 182, 185)].

43. Worcester Dict. [*quoted* in Freligh *v.* Saugerties, 24 N. Y. Suppl. 182].

Electricity, 15 Cyc. 466; Steam; Waters. Excepted or Reserved Out of Estate by Deed or Will, see Powers. Executive, see Constitutional Law, 8 Cyc. 857; Executive, 17 Cyc. 1579. Judicial, see Judicial Power, 23 Cyc. 1620, and Cross-References Thereunder. Legislative, see Legislative Power, 25 Cyc. 182, and Cross-References Thereunder. Of Agent, see Principal and Agent, and Cross-References Thereunder. Of Army Officers, see Army and Navy, 3 Cyc. 832. Of Assignees and Receivers, see Assignments For Benefit of Creditors, 4 Cyc. 185; Bankruptcy, 5 Cyc. 273; Insolvency, 22 Cyc. 1280; Receivers, and Cross-References Thereunder. Of Association, see Associations, 4 Cyc. 304, and Cross-References Thereunder. Of Attorney, see Principal and Agent. Of Corporation, see Corporations, 10 Cyc. 1096, and Cross-References Thereunder. Of Court—In General, see Courts, 11 Cyc. 659; To Punish For Contempt, see Contempt, 9 Cyc. 26. Of Court Commissioners, see Court Commissioners, 11 Cyc. 623. Of Government, see Constitutional Law, 8 Cyc. 806. Of Guardian, see Guardian and Ward, 21 Cyc. 62, and Cross-References Thereunder. Of Husband, see Husband and Wife, 21 Cyc. 1147, 1411. Of Infant, see Infants, 22 Cyc. 513, 527, 580. Of Judge — In General, see Judges, 23 Cyc. 534; To Punish For Contempt, see Contempt, 9 Cyc. 31. Of Justice of the Peace — In General, see Justices of the Peace, 24 Cyc. 417, 440; To Punish For Contempt, see Contempt, 9 Cyc. 29. Of Married Woman, see Husband and Wife, 21 Cyc. 1310. Of Militia Officer, see Militia, 27 Cyc. 502 notes 86, 87. Of Municipal and Quasi-Municipal Corporations, see Municipal Corporations, 28 Cyc. 257, and Cross-References Thereunder. Of Naval Officers, see Army and Navy, 3 Cyc. 834. Of Parent, see Parent and Child, 29 Cyc. 1584. Of Partnership, see Partnership, 30 Cyc. 424, and Cross-References Thereunder. Of Personal Representative, see Executors and Administrators, 18 Cyc. 206. Of Pilot, see Pilots, 30 Cyc. 621. Of Private Officer, see Associations, 4 Cyc. 308; Corporations, 10 Cyc. 903, 924, 933, and Cross-References Thereunder. Of Public Officer, see Officers, 29 Cyc. 1431, and Cross-References Thereunder. Of Referee, see References, and Cross-References Thereunder. Of Sale—Excepted or Reserved Out of Estate by Deed or Will, see Powers, and Cross-References Thereunder; In Chattel Mortgage, see Chattel Mortgages, 6 Cyc. 1104; In Mortgage of Realty, see Mortgages, 27 Cyc. 1449; In Trust, see Trusts, and Cross-References Thereunder. Of State, see Constitutional Law, 8 Cyc. 714; States. Of Trustee, see Trusts. Of United States, see Constitutional Law, 8 Cyc. 770; United States. Of United States Commissioner, see United States Commissioners. Police, see Police Power, and Cross-References Thereunder. Reservation of Power of Revocation as Invalidating Conveyance, see Fraudulent Conveyances, 20 Cyc. 560. To Punish For Contempt, see Contempt, 9 Cyc. 26. To Regulate Commerce, see Commerce, 7 Cyc. 419. To Revoke Marriage Settlement, see Husband and Wife, 21 Cyc. 1265. See also Authority, 14 Cyc. 1074; Powers.)

POWER OF APPOINTMENT. See Powers.

POWER OF ATTORNEY. See Principal and Agent.

POWERS

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CROSS-REFERENCES

For Matters Relating to:

Adverse Possession by Donee Against Donor, see ADVERSE POSSESSION, 1 Cyc. 1043.

Authority or Power in General, see AUTHORITY, 4 Cyc. 1074; POWER, *ante*, p. 1031, and Cross-References Thereunder.

Power of Attorney, see PRINCIPAL AND AGENT, *post*, p. 1175.

Power of Disposition as Affecting or Affected by Rule Against Perpetuities, see PERPETUITIES, 30 Cyc. 1491.

Power of Sale in Mortgages and Trust Deeds, see CHATTEL MORTGAGES, 7 Cyc. 105; MORTGAGES, 27 Cyc. 1102, 1449.

Powers in Trusts, see TRUSTS.

Power to Prefer Creditors as Vitiating Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 584.

Validity and Construction of Particular Instruments Reserving or Granting Powers, see DEEDS, 13 Cyc. 675; TRUSTS; WILLS.

I. Definition and General Nature.

A. Definition. A power is defined to be a liberty or authority reserved by, or limited to, a party to dispose of real or personal property for his own benefit, or for the benefit of others, and operating upon an estate or interest, vested either in himself or some other person; the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either wholly or partially.[1] A power does not imply ownership; it is not an estate or interest.[2]

1. Buller note 1 to Coke Litt. 342*b* [*quoted* in Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 433, 22 Am. Rep. 52].

Other definitions.— "An authority enabling one person to dispose of the interest which is vested in another." Goodhill *v.* Brigham, 1 B. & P. 192, 197, per Buller, J. [*disapproved* in 1 Sugden Powers 106].

"A power is a method of causing a use, with its accompanying estate, to spring up at the will of a given person. . . . It is an authority conferred upon one person to dispose of property vested in himself or in another person. It is a mode of disposing of property which operates under the statute of uses or wills, and it vests in the donee of the power a present indefeasible executory interest in such property." Bouton *v.* Doty, 69 Conn. 531, 542, 37 Atl. 1064.

A power of appointment is a mode which the owner of the estate reserves to himself, or gives to another, through the medium of the statute of uses, of raising and passing an estate. Maundrell *v.* Maundrell, 10 Ves. Jr. 247, 7 Rev. Rep. 393, 32 Eng. Reprint 839. *Compare* Freme *v.* Clement, 18 Ch. D. 499, 503, 504, 50 L. J. Ch. 801, 44 L. T. Rep. N. S. 399, 30 Wkly. Rep. 1 [*approved* in Heinemann *v.* De Wolf, 25 R. I. 243, 55 Atl. 707], where such a power was defined as "a power of disposition given to a person over property not his own by some one who directs the mode in which that power shall be exercised by a particular instrument." See also Heinemann *v.* De Wolf, 25 R. I. 243, 55 Atl. 707.

Under the New York statutes a power is defined to be "an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving the power, might himself lawfully perform." N. Y. Laws (1896), c. 547, § 111. Prior to this act the definition was "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power, might himself lawfully perform." 1 N. Y. Rev. St. p. 732, § 74. See Murray *v.* Miller, 178 N. Y. 316, 323, 70 N. E. 870; Tilden *v.* Green, 130 N. Y. 29, 63, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33; Sweeney *v.* Warren, 127 N. Y. 426, 433, 28 N. E. 413, 24 Am. St. Rep. 468; Dana *v.* Murray, 122 N. Y. 604, 612, 26 N. E. 21; Delaney *v.* McCormack, 88 N. Y. 174, 180; Cutting *v.* Cutting, 86 N. Y. 522, 530; Jennings *v.* Conboy, 73 N. Y. 230, 233; Leonard *v.* American Baptist Home Mission Soc., 35 Hun (N. Y.) 290, 293; Eells *v.* Lynch, 8 Bosw. (N. Y.) 465, 481; Dempsey *v.* Tylee, 3 Duer (N. Y.) 73, 97; Lathrop *v.* Lathrop, 18 N. Y. Suppl. 651, 653; Root *v.* Stuyvesant, 18 Wend. (N. Y.) 257, 283; Coster *v.* Lorillard, 14 Wend. (N. Y.) 265, 324.

The Minnesota statute defines a power as "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." Gen. St. (1878) c. 44, § 2; Rev. Laws (1905), § 3267. See Carson *v.* Cochran, 52 Minn. 67, 72, 53 N. W. 1130.

A power of sale is a trust. Coleman *v.* Cabaniss, 121 Ga. 281, 48 S. E. 927. See also Pollock *v.* Hooley, 67 Hun (N. Y.) 370, 22 N. Y. Suppl. 215, where it was held that a general power of sale conferred by will on named executors is a personal trust given them in a capacity distinctly different from their duty as executors. See, generally, Executors and Administrators, 18 Cyc. 1.

Power of sale conferred on executors a common-law authority see Rodgers *v.* Wallace, 50 N. C. 181. See, generally, Executors and Administrators, 18 Cyc. 1.

2. Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23; Eaton *v.* Straw, 18 N. H. 320.

Not an estate or interest in lands.— Eells *v.* Lynch, 8 Bosw. (N. Y.) 465, 482 (where it is said: "A power is not an estate or interest in lands; unexercised, it is an encumbrance; and when exercised, the act performed by virtue of it is considered and construed as done by the donor of the power"); Root *v.* Stuyvesant, 18 Wend. (N. Y.) 257, 283 (where it is said: "It is not an estate or interest in the land, but an authority to create an estate or interest. A power may be given to a person who has an estate in the land, or to a mere stranger. The name of the power is different in the two cases, but its nature is not changed. In either case it is the execution of the power, and not the power itself, which creates property"); Doe *v.* McEachern, 26 N. Brunsw. 391. "That a person having a power over property has not, in strictness, any interest in, or right or title to, the property to which the power relates, appears in early authorities; . . . though where the power is for his own benefit, he has the means of acquiring such interest, right or title; and in all cases, by the execution of the power, the possession, right, title or interest is altered or divested." Maryland Mut. Benev. Soc. *v.* Clendenen, 44

B. Property Subject to Powers. Personal property, as well as realty, may be the subject of a power;[3] and it has been held that the New York statute in relation to powers, although it in terms refers to real property only, is nevertheless also applicable to personal property.[4]

C. Purposes For Which a Power May Be Created. Subject to statutory restrictions, a power may be created to appoint property by will,[5] to convey, transfer, sell, exchange, or charge property,[6] or to do any other act which the donor of the power might himself lawfully perform.[7] The power may be given to one of several grantees in a deed to annul the use therein named and create others, and the other grantees take subject to the exercise of this power.[8] Under the New York statutes relating to trusts, which abolish all express trusts other than those enumerated, but declare that, if the trust authorizes the performance of any act lawful under a power, it shall be valid as a power in trust, the purposes for which a power may be created are not limited.[9]

D. Who May Create Powers. A power can only be created by a person competent to do the act which he attempts to authorize.[10]

E. To Whom Powers May Be Granted. Any person, although himself incapable of contracting or conveying, may, as a general rule, be the donee or grantee of a power and execute the same.[11] Thus a power may be granted to and executed by a *feme covert*,[12] or by an infant.[13] A power to convey land may be granted to and executed by a partnership[14] or corporation.[15] A power of sale

Md. 429, 433, 22 Am. Rep. 52 [*quoting* 1 Chance Powers, § 2]. See Lampet's Case, 10 Coke 46*b*, 77 Eng. Reprint 994; Albany's Case, 1 Coke 110*b*, 76 Eng. Reprint 250; Coke Litt. 265*b*. And see *infra*, V, C, 1.

Not property.—"No two ideas can well be more distinct the one from the other than those of 'property' and 'power.' This is a 'power,' and nothing but a 'power.' A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognizes are they 'property.' In one sense no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law." *Ex p.* Gilchrist, 17 Q. B. D. 521, 531, 55 L. J. Q. B. 578, 55 L. T. Rep. N. S. 538, 3 Morr. Bankr. Cas. 193, 34 Wkly. Rep. 709 [*reversing* 17 Q. B. D. 167].

3. See Sugden Powers 2. See also McGriff *v.* Porter, 5 Fla. 373; Trimble *v.* Lebus, 94 Ky. 304, 22 S. W. 329, 15 Ky. L. Rep. 85; Ford *v.* Ford, 2 Duv. (Ky.) 418; Shaw *v.* Silloway, 145 Mass. 503, 14 N. E. 783; Woodson *v.* Perkins, 5 Gratt. (Va.) 345; D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930; and *supra*, I, A.

4. Cutting *v.* Cutting, 86 N. Y. 522 [*reversing* 20 Hun 360], construing Rev. St. pt. 2, c. 1, tit. 2, art. 3.

5. See *infra*, V, B.

6. See *infra*, V, B.

7. See Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290, holding that manufacturing establishments can be carried on by means of a devise of a power to trustees, as well as by vesting the legal estate in them.

8. Dumesnil *v.* Dumesnil, 92 Ky. 526, 18 S. W. 229, 13 Ky. L. Rep. 770.

9. Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290.

10. Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239; Kennedy *v.* Ten Broeck, 11 Bush (Ky.) 241; Tilden *v.* Green, 130 N. Y. 29, 63, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33; Delaney *v.* McCormack, 88 N. Y. 174; Dempsey *v.* Tylee, 3 Duer (N. Y.) 73.

Infants see, generally, INFANTS, 22 Cyc. 503.

Married women see, generally, HUSBAND AND WIFE, 21 Cyc. 1119.

11. Ford *v.* Ford, 2 Duv. (Ky.) 418; Armstrong *v.* Kerns, 61 Md. 364; Osgood *v.* Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488; McMurtry *v.* Brown, 6 Nebr. 368; and other cases cited in the notes following.

12. Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44; Armstrong *v.* Kerns, 61 Md. 364; Osgood *v.* Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488; Hoover *v.* Samaritan Soc., 4 Whart. (Pa.) 445. And see *infra*, VI, B, 2, c.

13. Sheldon *v.* Newton, 3 Ohio St. 494; *In re* D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930. And see *infra*, VI, B, 2, a.

14. McCulloch County Land, etc., Co. *v.* Whiteford, 21 Tex. Civ. App. 314, 50 S. W. 1042.

15. Killingsworth *v.* Portland Trust Co., 18 Oreg. 351, 23 Pac. 66, 17 Am. St. Rep. 737, 7 L. R. A. 638. See, generally, CORPORATIONS, 10 Cyc. 1.

may be lawfully granted to one who has no legal or equitable interest in the property which is to be the subject of the sale;[16] but a use cannot be raised by a general power of appointment given to a stranger, unless the conveyance operates by transmutation of possession.[17] The owner of property may create a valid power in himself, as in the case where the creator of a trust reserves the power to sell and convey the land to others.[18]

F. Effect of Statutes. In most jurisdictions the creation, execution, and effect of powers are to some extent regulated by statute;[19] and in some jurisdictions a complete and exhaustive code has been enacted on the subject, abolishing powers as they existed at common law, and leaving the creation, construction, and execution of powers to be governed by the statute.[20] A statute in relation to powers does not apply to powers executed before it took effect.[21] It has been held that a statute authorizing in a particular case the surrender of a power of sale which is simply collateral,[22] or confirming such surrender when made, is constitutional and valid, since it diverts or takes away no vested or settled rights.[23]

II. CLASSIFICATION.

A. General and Special Powers. By a general power is understood a right to appoint to whomsoever the donee pleases. By a special or particular power is meant that the donee is restricted to objects or beneficiaries designated in the instrument creating the power.[24] Under some statutes the definitions are different.[25]

16. Coleman *v.* Cabaniss, 121 Ga. 281, 48 S. E. 927.

17. Taylor *v.* Eatman, 92 N. C. 601; Smith *v.* Smith, 46 N. C. 135, 59 Am. Dec. 581.

18. Griffith *v.* Maxfield, 66 Ark. 513, 51 S. W. 832.

19. See the statutes of the different states.

20. N. Y. Laws (1896), c. 547; 1 N. Y. Rev. St. p. 732, § 73. See Sweeney *v.* Warren, 127 N. Y. 426, 28 N. E. 413, 14 L. R. A. 215; Delaney *v.* McCormack, 88 N. Y. 174; Cutting *v.* Cutting, 86 N. Y. 522 [*reversing* 20 Hun 360]; Jennings *v.* Conboy, 73 N. Y. 230; Coster *v.* Lorillard, 14 Wend. (N. Y.) 265.

21. Harlan *v.* Brown, 2 Gill (Md.) 475, 41 Am. Dec. 434.

22. Powers simply collateral see *infra*, II, D, 4.

23. Morris *v.* Thomson, 19 N. J. Eq. 307 [*affirmed* in 20 N. J. Eq. 489].

24. Thompson *v.* Garwood, 3 Whart. (Pa.) 287, 306, 31 Am. Dec. 502; Higginson *v.* Ker, 30 Ont. 62, 67. See *infra*, V, B, 1, e.

A general power is, in regard to the estates which may be created by the force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee but because it enables him to give the fee to whom he pleases. Therefore whatever estate may be created by a man seized in fee may equally be created under a general power of appointment. Thompson *v.* Garwood, 3 Whart. (Pa.) 287, 31 Am. Dec. 502 [*citing* 1 Sugden Powers 495].

A power general in terms will not be cut down to a particular power, unless there is an apparent intention. Thompson *v.* Garwood, 3 Whart. (Pa.) 287, 31 Am. Dec. 502 [*citing* Bristow *v.* Warde, 2 Ves. Jr. 336, 2 Rev. Rep. 235, 30 Eng. Reprint 660].

25. **In New York,** under the Revised Statutes, a power was declared to be general where it authorized the alienation in fee by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever; and it was declared to be special where (1) the persons or class of persons to whom the disposition of the lands under the power was to be made were designated, or (2) where the power authorized the alienation, by means of a conveyance, will or charge, of a particular estate or interest less than a fee. 1 Rev. St. p. 732, §§ 77, 78. These sections, however, have been repealed, and it is now declared that a power is general, "where it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever;" and a power is special where either: (1) "The persons or class of persons to whom the disposition of the property under the power is to be made are designated;" or (2) "the power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee." Laws (1896), c. 547, §§ 114, 115. See Dana *v.* Murray, 122 N. Y. 604, 26 N. E. 21; Delaney *v.* McCormack, 88 N. Y. 174; Cutting *v.* Cutting, 86 N. Y. 522; Jennings *v.* Conboy, 73 N. Y. 230; Leonard *v.* American Baptist Home Mission Soc., 35 Hun (N. Y.) 290; Fellows *v.* Heermans, 4 Lans. (N. Y.) 230, 255; Coster *v.* Lorillard, 14 Wend. (N. Y.) 265, 324. A power is special where a class of persons to whom the disposition of lands under the power is to be made is designated contingently, upon the happening of a certain event, as well as if a class or person is designated absolutely. Wright *v.* Tallmadge, 15 N. Y. 307.

B. Beneficial Powers. Under the New York statute a general or special power is beneficial where no person other than the grantee has, by the terms of its creation, any interest in its execution; and a beneficial power, general or special, other than one of those specified and defined in the statute, is void.[26] There is a like statute in Minnesota.[27]

C. Powers in Trust. Under the New York statute a general power is in trust where any person or class of persons other than the grantee of the power is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution; and a special power is in trust where either: (1) The disposition or charge which it authorizes is limited to be made to a person or class of persons other than the grantee of the power; or (2) where a person or class of persons other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power.[28] There is a statute to the same effect in Minnesota.[29]

D. Powers Appendant or Appurtenant, in Gross, or Collateral — 1. Powers Appendant or Appurtenant. Powers appendant or appurtenant are so called because they strictly depend upon the estate limited to the person to whom they are given.[30] Illustrations of such a power are where an estate for life is

In **Minnesota** a power is general "when it authorizes the alienation in fee, by means of a conveyance, will, or charge, of the lands embraced in the power, to any alienee whatever;" and a power is special (1) "when the person or class of persons to whom the disposition of the lands under the power is to be made is designated," or (2) "when the power authorizes the alienation, by means of a conveyance, will, or charge, of a particular estate or interest, less than a fee." Minn. Rev. Laws (1905), §§ 3270, 3271. See Hershey *v.* Meeker County Bank, 71 Minn. 255, 265, 73 N. W. 967.

26. N. Y. Laws (1896), c. 547, § 116; 1 N. Y. Rev. St. p. 732, § 79, p. 733, § 92. See Sweeney *v.* Warren, 127 N. Y. 426, 433, 28 N. E. 413, 24 Am. St. Rep. 468 [*reversing* 52 Hun 246, 6 N. Y. Suppl. 575]; Dana *v.* Murray, 122 N. Y. 604, 612, 26 N. E. 21; Cutting *v.* Cutting, 86 N. Y. 522, 531; Jennings *v.* Conboy, 73 N. Y. 230, 234 [*reversing* 10 Hun 77]; Leonard *v.* American Baptist Home Mission Soc., 35 Hun (N. Y.) 290.

A power is not beneficial when any person other than the grantee has, by the terms of its creation, an interest on its execution upon a certain contingency. Wright *v.* Tallmadge, 15 N. Y. 307.

27. Minn. Rev. Laws (1905), §§ 3272, 3285. And see Hershey *v.* Meeker County Bank, 71 Minn. 255, 265, 73 N. W. 967; Ness *v.* Davidson, 45 Minn. 424, 426, 48 N. W. 10.

28. N. Y. Laws (1896), c. 547, §§ 117, 118; 1 N. Y. Rev. St. p. 734, §§ 94, 95. And see Murray *v.* Miller, 178 N. Y. 316, 323, 70 N. E. 870 [*affirming* 85 N. Y. App. Div. 414, 83 N. Y. Suppl. 591]; Sweeney *v.* Warren, 127 N. Y. 426, 433, 28 N. E. 413, 24 Am. St. Rep. 468 [*reversing* 52 Hun 246, 6 N. Y. Suppl. 575]; Dana *v.* Murray, 122 N. Y. 604, 612, 26 N. E. 21; Delaney *v.* McCormack, 88 N. Y. 174, 180; Cutting *v.* Cutting, 86 N. Y. 522, 532 [*reversing* 20 Hun 360]; Fellows *v.* Heermans, 4 Lans. (N. Y.) 230, 256; Lathrop *v.* Lathrop, 18 N. Y. Suppl. 651, 653; Coster *v.* Lorillard, 14 Wend. (N. Y.) 265, 324.

Violation of statute of perpetuities see Murray *v.* Miller, 178 N. Y. 316, 70 N. E. 870 [*affirming* 85 N. Y. App. Div. 414, 83 N. Y. Suppl. 591]; and, generally, Perpetuities, 30 Cyc. 1464.

Powers in trust generally see Trusts.

In order to create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be accomplished by its execution shall be specified in or clearly ascertainable from the instrument by which the power is attempted to be created. Sweeney *v.* Warren, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468 [*reversing* 52 Hun 246, 6 N. Y. Suppl. 575].

When a power is conferred upon executors by virtue of the office, and not upon them as individuals, in the absence of evidence that it was intended to be beneficial to them, the presumption is that it was given for the purpose of being executed in the interest of the estate and not for their own benefit. Sweeney *v.* Warren, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468 [*reversing* 52 Hun 246, 6 N. Y. Suppl. 575].

29. Minn. Rev. Laws (1905), §§ 3287, 3288. And see Hershey *v.* Meeker County Bank, 71 Minn. 255, 265, 73 N. W. 967; Carson *v.* Cochran, 52 Minn. 67, 53 N. W. 1130; Ness *v.* Davidson, 45 Minn. 424, 426, 48 N. W. 10.

30. 1 Sugden Powers 43. And see Brown *v.* Renshaw, 57 Md. 67, 79; Reid *v.* Gordon, 35 Md. 174, 184 (where it is said that powers are "appendant, when the exercise of them is in the first instance to interfere with, and to a certain extent, to supersede the estate of the donee of such power"); Clark *v.* Wilson, 53 Miss. 119, 128 ("a power is annexed to the estate when the donee has an estate in the land, and the estate to be created by the power is to, or may, take effect in possession, during the continuance of the estate to which it is an-

limited to a person, with a power to grant leases in possession,[31] or to convey or encumber his life-estate;[32] where an estate is limited to such uses as a person shall appoint, and in default of and until appointment, to him in fee;[33] and where property is mortgaged and a power of sale is given to the mortgagee.[34]

2. **Powers Collateral or in Gross.** Powers collateral or in gross are powers given to a person who had an interest in the estate at the execution of the deed creating the power, or to whom an estate is given by the deed, but which enable him to create such estates only as will not attach on the interest limited to him.[35] Illustrations of such a power are where a man seized in fee settles his estate on others, reserving to himself only a particular power;[36] and where land is granted or devised to a person for life with power to appoint the estate after his death among his children or to others,[37] or to sell and convey the fee.[38]

3. **Powers Both Appendant and in Gross.** A power may with reference to the different estates in the land over which it rides have different aspects; it may, in regard to one, be a power appendant; in respect to the other, a power in gross.[39]

4. **Powers Simply Collateral.** A power simply collateral, sometimes also called a "naked" power, is a power given to a person not having any interest in the land, and to whom no estate is given, to dispose of or charge the estate in favor of some other person.[40]

nexed"); Garland *v.* Smith, 164 Mo. 1, 14, 64 S. W. 188 ("powers appendant are such as the donee is authorized to execute out of the estate limited to him, and depend for their validity upon the estate which is in him"); Root *v.* Stuyvesant, 18 Wend. (N. Y.) 257, 283; Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 236, 14 Am. Dec. 458; *In re* D'Angibau, 15 Ch. D. 228, 232, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930; Grange *v.* Tiving, O. Bridgm. 115.

31. 1 Sugden Powers 43, where it is said: "A lease granted under the power may operate wholly out of the life estate of the party executing it, and must, in every case, have its operation out of his estate during his life; that is, the lease takes effect in possession and is served out of the whole fee, and, therefore, wholly or *pro tanto* displaces the life estate." See also Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188; Root *v.* Stuyvesant, 18 Wend. (N. Y.) 257, 283; Grange *v.* Tiving, O. Bridgm. 115.

32. Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188.

33. 1 Sugden Powers 78. And see Brown *v.* Renshaw, 57 Md. 67.

34. Clark *v.* Wilson, 53 Miss. 119; Bell *v.* Twilight, 22 N. H. 500; Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 236, 14 Am. Dec. 458; Bergen *v.* Bennett, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281.

35. 1 Sugden Powers 44. And see Thorington *v.* Thorington, 82 Ala. 489, 1 So. 7, 16; Reid *v.* Gordon, 35 Md. 174, 184 (where it is said that powers are "in gross, when they do not commence until the determination of the estate of the donee"); Clark *v.* Wilson, 53 Miss. 119, 128; Garland *v.* Smith, 164 Mo. 1, 14, 64 S. W. 188 ("powers in gross are such as one who has an estate in land has to create such estate only as will not attach on the interest limited to him, or to take effect out of his own interest"); Norris *v.* Thomson, 19 N. J. Eq. 307, 314 [*affirmed* in 20 N. J. Eq. 489]; Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 236, 14 Am. Dec. 458; *In re* D'Angibau, 15 Ch. D. 228, 232, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930; Cowan *v.* Besserer, 5 Ont. 624.

36. 1 Sugden Powers 44.

37. 1 Sugden Powers 44. See also Thorington *v.* Thorington, 82 Ala. 489, 1 So. 7, 16; Cowan *v.* Besserer, 5 Ont. 624.

38. Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44; Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188; Wynkoop *v.* Wynkoop, 10 Wkly Notes Cas. (Pa.) 65.

39. "Where an estate is settled to A, for life, remainder to B, in tail, remainder to A, in fee, and A has a power to jointure his wife after his death, this power is collateral, or in gross, as to the estate for life, but appendant or appurtenant as to the remainder in fee. It may affect the latter, but can never attach on the former." 1 Sugden Powers 44. And see Reid *v.* Gordon, 35 Md. 174 (where a power of sale given to a wife under a will was partly appendant and partly in gross); Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188 (where a deed conveyed land to a trustee in trust for the sole and separate use and benefit of the grantor's wife for and during her natural life, with power in said wife to sell, mortgage, incumber, lease, or otherwise dispose of the land; and it was held that the power was appendant so far as her right to lease, convey, or incumber her life estate was concerned, and in gross so far as it authorized her to appoint the fee). *Compare*, however, Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44.

40. 1 Sugden Powers 45. And see McGriff *v.* Porter, 5 Fla. 373; Hammond *v.* Croxton, 162 Ind. 353, 69 N. E. 250, 70 N. E. 368; Bradt *v.* Hodgdon, 94 Me. 559, 48 Atl. 179; Reid *v.* Gordon, 35 Md. 174, 184 (where it is said that powers are altogether "collateral, when the donee has no estate at all in the

E. Powers Coupled With an Interest. A power coupled with an interest means an interest in the subject-matter over or concerning which the power is to be executed, and it is not sufficient that the interest is in that which is to be produced by the exercise of the power.[41]

III. CREATION AND VALIDITY.

A. Instruments Creating Powers. A power to dispose of property must be created by an instrument which would itself be sufficient to dispose of such property.[42] Powers are usually created by deed [43] or will;[44] but they may be created by an instrument not under seal if such an instrument would be sufficient to do the act authorized.[45] Furthermore it has been held that a power of

property which is the subject of the power"); Shelton *v.* Homer, 5 Mete. (Mass.) 462, 466; Steele *v.* Farber, 37 Mo. 71, 78; Norris *v.* Thomson, 19 N. J. Eq. 307, 314 [*affirmed* in 20 N. J. Eq. 489]; Learned *v.* Tallmadge, 26 Barb. (N. Y.) 443, 449; Jackson *v.* Davenport, 18 Johns. (N. Y.) 295, 300 [*affirmed* in 20 Johns. 537]; Root *v.* Stuyvesant, 18 Wend. (N. Y.) 257, 284; Bergen *v.* Bennett, 1 Cai. Cas. (N. Y.) 1, 15, 2 Am. Dec. 281; *In re* D'Angibau, 15 Ch. Div. 228, 232.

41. *Arizona.*— Taylor *v.* Burns, 8 Ariz. 463, 76 Pac. 623.

Arkansas.— Denson *v.* Thurmond, 11 Ark. 586; Yeates *v.* Pryor, 11 Ark. 58, 78.

California.— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Colorado.— Darrow *v.* St. George, 8 Colo. 592, 9 Pac. 791.

Connecticut.— Mansfield *v.* Mansfield, 6 Conn. 559, 16 Am. Dec. 76.

Florida.— McGriff *v.* Porter, 5 Fla. 373.

Georgia.— Baggett *v.* Edwards, 126 Ga. 463, 55 S. E. 250; Coney *v.* Sanders, 28 Ga. 511.

Illinois.— Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838; White *v.* Glover, 59 Ill. 459.

Indiana.— Hawley *v.* Smith, 45 Ind. 183; Jeffersonville Assoc. *v.* Fisher, 7 Ind. 699.

Kentucky.— Baird *v.* Rowan, 1 A. K. Marsh. 214.

Minnesota.— Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030.

Missouri.— Schanewerk *v.* Hoberecht, 117 Mo. 22, 22 S. W. 949, 38 Am. St. Rep. 631.

New Hampshire.— Hilliard *v.* Beattie, 67 N. H. 571, 39 Atl. 897; Bell *v.* Twilight, 22 N. H. 500.

New Jersey.— Probasco *v.* Creveling, 25 N. J. L. 449.

New York.— Russell *v.* Russell, 36 N. Y. 581, 93 Am. Dec. 540; Stephens *v.* Sessa, 50 N. Y. App. Div. 547, 549, 64 N. Y. Suppl. 28; Wilson *v.* Troup, 2 Cow. 195, 236, 14 Am. Dec. 458; Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281.

North Carolina.— Wilmington *v.* Bryan, 141 N. C. 666, 54 S. E. 543.

North Dakota.— Brown *v.* Skotland, 12 N. D. 445, 97 N. W. 543.

Ohio.— Williams *v.* Veach, 17 Ohio 171, 49 Am. Dec. 453; Martin *v.* Spurrier, 23 Ohio Cir. Ct. 110.

Pennsylvania.— White's Appeal, 36 Pa. St. 134.

Tennessee.— Horn *v.* Brayles, (Ch. App. 1900) 62 S. W. 297, 307.

Texas.— Armstrong *v.* Moore, 59 Tex. 646; Daugherty *v.* Moon, 59 Tex. 397; Western Union Tel. Co. *v.* Hearne, (Civ. App. 1897) 40 S. W. 50.

United States.— Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130; Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522; Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Kahn *v.* Weill, 42 Fed. 704.

England.— *In re* Bacon, [1907] 1 Ch. 475, 76 L. J. Ch. 213, 96 L. T. Rep. N. S. 690.

See 40 Cent. Dig. tit. "Powers," § 78. See also *infra*, IV, A.

"'Power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, can not, in accurate law language, be said to be 'coupled' with it." Willingham *v.* Rushing, 105 Ga. 72, 76, 31 S. E. 130 [*quoting* from the opinion of Marshall, C. J., in the leading case of Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589].

42. Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Johnson *v.* Yates, 9 Dana (Ky.) 491; Clark *v.* Graham, 6 Wheat. (U. S.) 577, 5 L. ed. 334.

43. Johnson *v.* Yates, 9 Dana (Ky.) 491; Brown *v.* Renshaw, 57 Md. 67; 1 Sugden Powers 152, 157; and other cases cited in the notes following.

Powers of attorney see PRINCIPAL AND AGENT.

Powers in trust see TRUSTS.

Power of sale in mortgage see CHATTEL MORTGAGES, 7 Cyc. 105; MORTGAGES, 27 Cyc. 1449.

44. Young *v.* Young, 68 N. C. 309; 1 Sugden Powers 115 *et seq.*; and cases cited in notes following. See also WILLS.

45. Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765, holding that a power to sell land, not under seal, is sufficient to authorize a contract of sale, a seal not being necessary for such a contract.

disposition of a fund may be given to a member by the charter of a benevolent or charitable society or association.[46]

B. Provisions Granting or Reserving Powers — 1. In General. Powers may be granted, whether by deed, will, or otherwise, either expressly[47] or impliedly.[48] Whether a particular power is expressly created in any case is a question of intention and construction;[49] and in like manner it is a question of

46. Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

47. See the cases cited *infra*, note 49.

48. *Alabama.*— Winston *v.* Jones, 6 Ala. 550.

Illinois.— Stoff *v.* McGinn, 178 Ill. 46, 52 N. E. 1048; Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205.

Maine.— Putnam Free School *v.* Fisher, 30 Me. 523.

Maryland.— Conkling *v.* Washington University, 2 Md. Ch. 497.

Massachusetts.— Hale *v.* Hale, 137 Mass. 168; Bowen *v.* Dean, 110 Mass. 438; Purdie *v.* Whitney, 20 Pick. 25; Going *v.* Emery, 16 Pick. 107, 26 Am. Dec. 645.

Missouri.— Porter *v.* Schofield, 55 Mo. 56; Drumheler *v.* Hobb, 23 Mo. App. 161.

New Jersey.—Lindley *v.* O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79; Naar *v.* Naar, 41 N. J. Eq. 88, 3 Atl. 94; Whitehead *v.* Wilson, 29 N. J. Eq. 396.

New York.— Cahill *v.* Russell, 140 N. Y. 402, 35 N. E. 664 [*reversing* 68 Hun 540, 23 N. Y. Suppl. 78]; Byrnes *v.* Baer, 86 N. Y. 210; Stewart *v.* Hamilton, 37 Hun 19; Coogan *v.* Ockershausen, 55 N. Y. Super. Ct. 286, 18 N. Y. St. 366; Gersen *v.* Rinteln, 2 Dem. Surr. 243.

Ohio.— Bishop *v.* Remple, 11 Ohio St. 277; Dean *v.* Loewenstein, 6 Ohio Cir. Ct. 587, 3 Ohio Cir. Dec. 597.

Pennsylvania.— Gray *v.* Henderson, 71 Pa. St. 368; *Ex p.* Elliott, 5 Whart. 524, 34 Am. Dec. 572.

Rhode Island.—Ames *v.* Ames, 15 R. I. 12, 22 Atl. 1117.

South Carolina.— Mimms *v.* Delk, 42 S. C. 195, 20 S. E. 91.

Virginia.— Carrington *v.* Goddin, 13 Gratt. 587; Harrison *v.* Harrison, 2 Gratt. 1, 44 Am. Dec. 365.

United States.— Roberdeau *v.* Roberdeau, 20 Fed. Cas. No. 11,888, 1 Cranch C. C. 305.

England.— Tait *v.* Lathbury, L. R. 1 Eq. 174, 35 Beav. 112, 11 Jur. N. S. 991, 14 Wkly. Rep. 216, 55 Eng. Reprint 837; Flux *v.* Best, 31 L. T. Rep. N. S. 645, 23 Wkly. Rep. 228.

See 40 Cent. Dig. tit. "Powers," § 15 *et seq.* And see other cases cited *infra*, note 50.

49. See the cases cited *infra*, this note.

Express power of appointment granted.— Young *v.* Young, 68 N. C. 309 (by will); Drusadow *v.* Wilde, 63 Pa. St. 170 (by deed); Tobin *v.* Gregg, 34 Pa. St. 446 (by will); Hess *v.* Hess, 5 Watts (Pa.) 187 (by will); Pulliam *v.* Byrd, 2 Strobh. Eq. (S. C.) 134 (by will); Law Guarantee, etc., Co. *v.* Jones, 103 Tenn. 245, 58 S. W. 219 (power of appointment in father of devisees); Maloney *v.* Hawkins, 9 Lea (Tenn.) 663 (by will); Wimberly *v.* Bailey, 58 Tex. 222 (by will); Hanbury *v.* Tyrell, 21 Beav. 322, 52 Eng. Reprint 883 (by deed); Berchtoldt *v.* Hertford, 7 Beav. 172, 8 Jur. 50, 29 Eng. Ch. 172, 49 Eng. Reprint 1029 (by will); Higginson *v.* Kerr, 30 Ont. 62 (will creating, not a trust, but a general power of appointment in executor). See 40 Cent. Dig. tit. "Powers," § 10. And see, generally, WILLS.

Express power of appointment not granted. — Howard *v.* Law, 15 Phila. (Pa.) 341, by will.

Express power to charge estate.— Wigsell *v.* Smith, 1 L. J. Ch. O. S. 121, 1 Sim. & St. 321, 24 Rev. Rep. 182, 1 Eng. Ch. 321, 57 Eng. Reprint 129, power to charge estate by way of jointure.

Express power of sale and conveyance given person having estate or interest.— Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44 (power of sale in widow having life-estate under will for division among children under the will); Norris *v.* Harris, 15 Cal. 226 (life-estate in wife under will with absolute power of disposition); Crozier *v.* Hoyt, 97 Ill. 23 (life-estate in wife under will with power of disposition); Mix *v.* White, 36 Ill. 484 (agreement giving one of two joint purchasers of land power to sell the interest of the other); Trimble *v.* Lebus, 94 Ky. 304, 22 S. W. 329, 15 Ky. L. Rep. 85 (power under will in wife to sell bank stock given to her for life); Fritsch *v.* Klausing, 13 S. W. 241, 11 Ky. L. Rep. 788 (power to sell in life-tenant under deed); Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407 (power in husband under wife's will to sell for his comfort land in which he is given a life-estate); Hardy *v.* Sanborn, 172 Mass. 405, 52 N. E. 517 (power of sale in widow having life-estate under will); Shaw *v.* Silloway, 145 Mass. 503, 14 N. E. 783 (power to sell personal property under agreement); Baird *v.* Boucher, 60 Miss. 326 (power of sale in widow having life-estate under will); Yates *v.* Clark, 56 Miss. 212 (unlimited power of disposal in widow under will); Andrews *v.* Brumfield, 32 Miss. 107 (unrestricted power of disposition in life-tenant under will); Gaven *v.* Allen, 100 Mo. 293, 13 S. W. 501 (holding that where a testator devised his property to his wife, providing that in case of her remarrying it should be divided among his children, and she was empowered to act as to the sale of his property "as she thinks best for the benefit of herself and my children," the will gave her power to convey a perfect title in fee); Leonard *v.* American

intention and construction whether a power is to be implied from the provisions

Baptist Home Mission Soc., 35 Hun (N. Y.) 290 (power in widow having life-estate under will to sell real estate for her support); Parks *v.* Robinson, 138 N. C. 269, 50 S. E. 649 (power of disposition in widow having life-estate under will); Bodmann German Protestant Widows' Home *v.* Lippardt, 70 Ohio St. 261, 71 N. E. 770 (power to sell and convey in widow under will); Bishop *v.* Remple, 11 Ohio St. 277 (power to sell and convey in widow under a will giving her a life-estate); Danish *v.* Disbrow, 51 Tex. 235 (legal title and power of sale in widow under a will providing that she should have all the testator's property "for the maintenance of herself and the children," and that she should "manage the same in such a manner as she thinks best and as her necessities may require"); Rutter *v.* Anderson, 48 W. Va. 215, 36 S. E. 357 (power of widow having life-estate under will to sell for her support and maintenance); *In re* Richards, [1902] 1 Ch. 76, 71 L. J. Ch. 66, 85 L. T. Rep. N. S. 452, 50 Wkly. Rep. 90 (holding that where a testator gave the income of his estate to his wife for her life with remainder to residuary legatees, but directed that "in case such income shall not be sufficient she is to use such portion of my said real and personal estate as she may deem expedient," she had a general power of appointment during her life over the capital); *Re* Silverthorn, 15 Ont. L. Rep. 112, 10 Ont. Wkly. Rep. 798 (power of sale in widow having life-estate under will). See 40 Cent. Dig. tit. "Powers," § 11.

Express power of sale and conveyance not given person having estate or interest.— Clark *v.* Clark, 172 Ill. 355, 358, 50 N. E. 101 (holding that the appointment of testator's wife as testatrix, with power to sell and dispose of his property, "using her own discretion therein," following a devise of such property to the wife for life, did not couple a power of absolute disposition with the life-estate, but merely empowered the wife to sell as executrix, in due course of administration; and that a wife who has a life-estate in testator's property has no authority, under a clause of the will nominating her as executrix, with power to sell the property at discretion, to sell the same for her support and maintenance); Maxwell *v.* Barringer, 110 N. C. 76, 14 S. E. 516, 28 Am. St. Rep. 668 (power of sale not created by a deed).

Express power of sale given executors or trustees.— Hamilton *v.* Hamilton, 98 Ill. 254 (power to sell real estate for division among children under will); Hughes *v.* Washington, 72 Ill. 84 (discretionary power to sell and reinvest proceeds); Boland *v.* Tiernay, 118 Iowa 59, 91 N. W. 836 (power of sale for investment and distribution); Marrett *v.* Babb, 91 Ky. 88, 15 S. W. 4, 12 Ky. L. Rep. 652 (power to sell land to pay debts); Bradt *v.* Hodgdon, 94 Me. 559, 48 Atl. 179 (naked power to sell real estate and invest proceeds); Carter *v.* Van Bokkelen, 73 Md. 175, 20 Atl. 781 (power to sell and convey land for reinvestment, and confirmation of sale by orphans' court as required by Code, art. 93, § 282); Alley *v.* Lawrence, 12 Gray (Mass.) 373; Battelle *v.* Parks, 2 Mich. 531 (power to sell real estate and invest proceeds); Naar *v.* Naar, 41 N. J. Eq. 88, 3 Atl. 94 (power under deed of trust to sell partner's interest in real estate); Brown *v.* Doherty, 185 N. Y. 383, 78 N. E. 147, 113 Am. St. Rep. 915 [*affirming* 93 N. Y. App. Div. 190, 87 N. Y. Suppl. 563] (imperative power in executors to dispose of residuary real estate); Cahill *v.* Russell, 140 N. Y. 402, 35 N. E. 664 [*reversing* 68 Hun 540, 23 N. Y. Suppl. 78] (power under will to sell real estate for payment of debts and legacies, the words "as hereinafter provided" being rejected as redundant); Ferris *v.* Ferris, 10 Misc. (N. Y.) 317, 30 N. Y. Suppl. 951 (power of sale conferred on executor by the words "If I do not sell, I authorize my executors to sell at once if they deem best," occurring in the will after the clause disposing of certain land or its proceeds); Matter of Spencer, 8 Misc. (N. Y.) 193, 29 N. Y. Suppl. 1083 (power to sell real estate to pay legatees); Bloodgood *v.* Bruen, 2 Bradf. Surr. (N. Y.) 8 (power to sell real estate to pay debts); *In re* Watts, 202 Pa. St. 85, 51 Atl. 588 (unlimited power of disposition given executor by a will providing: "I also desire the remainder of my estate to be disposed of in accordance with the judgment and advice of my executor"); *In re* Roger, 185 Pa. St. 428, 39 Atl. 1109; Livingood *v.* Heffner, 9 Pa. Cas. 526, 13 Atl. 187 (power of executor under will to sell and convey real estate, subject to a limitation regarding the wife's right to occupation and possession during widowhood); Coal Creek Consol. Coal Co. *v.* East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 S. W. 634; *In re* Koch, 25 Ont. 262; Johnson *v.* Kramer, 8 Ont. 193 (naked power in executor to sell with the consent of widow given life-estate); *Re* Ford, 7 Ont. Pr. 451; *Re* Roberts, 10 Ont. L. Rep. 395, 6 Ont. Wkly. Rep. 49; Moore *v.* Power, 8 U. C. C. P. 109 (naked power of sale to pay debts and not a devise of the fee); Little *v.* Aikman, 28 U. C. Q. B. 337 (power of sale to pay debts); Hopkins *v.* Brown, 10 U. C. Q. B. 125 (naked power of sale in executors for distribution under will); Gregory *v.* Connolly, 7 U. C. Q. B. 500 (naked power of sale for payment of debts and distribution); Nicoll *v.* Cotter, 5 U. C. Q. B. 564 (naked power of sale and not a devise of the fee). See 40 Cent. Dig. tit. "Powers," § 12.

Express power of sale not given executors or trustees.—Kent *v.* Shepard, 115 N. Y. App. Div. 64, 100 N. Y. Suppl. 597 [*affirmed* in 188 N. Y. 566, 80 N. E. 1112]; Herb *v.* Walther, 6 Pa. Dist. 687, holding that where testatrix in her will desired her executor to sell her house and lot in one year after her death, without describing or locating the property, the power to sell was too indefinite to justify the sale without an order of court.

Reservation of power to sell and convey in declaration of trust.— Griffith *v.* Maxfield, 66

of a will, deed, or other instrument.[50] No particular form of words is necessary

Ark. 513, 51 S. W. 832. See, generally, TRUSTS.

50. See the cases cited *infra*, this note.

Powers implied in persons having estate or interest.— Henderson *v.* Blackburn, 104 Ill. 227, 44 Am. Rep. 780 (power of sale in life-tenant under will); Clark *v.* Middlesworth, 82 Ind. 240 (power of disposition in widow having life-estate under will); Wenger *v.* Thompson, 128 Iowa 750, 105 N. W. 333 (power to sell and convey real estate in widow under will giving her all of testator's property for her own use and for the maintenance and education of his children during her life, and providing that after her death all of said property then remaining in her possession, or the proceeds of said property, should be divided among the children); Morse *v.* Cross, 17 B. Mon. (Ky.) 735 (power to sell real estate in widow under will giving her estate during life and widowhood); Bowen *v.* Dean, 110 Mass. 438 (absolute power of disposition implied from devise of an estate to a woman "to hold to her and her assigns forever," with remainder over should she "die intestate and seised of any portion of said estate at the time of her decease"); Paine *v.* Barnes, 100 Mass. 470 (power of widow having life-estate under will to sell or mortgage for her support); Bishop *v.* Remple, 11 Ohio St. 277 (power of sale in widow having life-estate under will); Coonrod *v.* Coonrod, 6 Ohio 114 (power of devisee to sell land); Roberts *v.* Lewis, 153 U. S. 367, 14 S. Ct. 945, 38 L. ed. 747 (power to sell and convey in widow having estate during widowhood under will); Smith *v.* McIntyre, 95 Fed. 585, 37 C. C. A. 177 (power to sell and convey in widow having life-estate under will); *In re* Richards, [1902] 1 Ch. 76, 71 L. J. Ch. 66, 85 L. T. Rep. N. S. 452, 50 Wkly. Rep. 90 (power of sale in widow having life-estate under will); Kennerley *v.* Kennerley, 10 Hare 160, 16 Jur. 649, 44 Eng. Ch. 155, 68 Eng. Reprint 880 (power of appointment in widow having life-estate under will). See 40 Cent. Dig. tit. "Powers," § 15. And see, generally, ESTATES, 16 Cyc. 595; WILLS.

Power not implied in persons having estates or interest.— Birmingham *v.* Lesan, 76 Me. 482 (no power of disposition in widow under will); McCauley's Appeal, 93 Pa. St. 102 (no power of appointment in widow as to insurance policy); Clark *v.* Campbell, 2 Rawle (Pa.) 215 (no power of sale under will in widow after remarriage); Box *v.* Word, 65 Tex. 159 (no power of sale in widow under will); Van Grutten *v.* Foxwell, 84 L. T. Rep. N. S. 545 (general power of appointment not given wife by marriage settlement).

Power not implied in executors or trustees to sell real estate.— Williams *v.* Williams, 49 Ala. 439 (power to sell land devised for payment of debts not implied from a clause in the will authorizing the executor to "pay off such lawful claim or claims as may be justly presented, returning unto each heir their portion thereof according to law"); Walker *v.* Murphy, 34 Ala. 591 (no implied power to sell real estate at private sale for payment of legacies); Hill *v.* Den, 54 Cal. 6 (no implied power to sell real estate from mere direction in will to pay debts); Neal *v.* Patten, 40 Ga. 363 (the same); Poulter *v.* Poulter, 193 Ill. 641, 61 N. E. 1056; Gammon *v.* Gammon, 153 Ill. 41, 38 N. E. 890 (no implied power to sell residuary real estate for division); Griffin *v.* Griffin, 141 Ill. 373, 31 N. E. 131 (no power of sale conferred by a will appointing testator's wife sole executrix and declaring that "she is not to give any bonds or have the property appraised, but has a good right to do in all things as I would have just right to do if living"); Hale *v.* Hale, 125 Ill. 399, 17 N. E. 470 (no implied power to sell real estate for investment or payment of legacies); Albert *v.* Albert, 68 Md. 352, 12 Atl. 11 (no power to dispose of property implied from appointment of executors to divide the same); Snedeker *v.* Allen, 2 N. J. L. 35 (no implied power to sell land from mere charge of debts or legacies thereon); Walker *v.* Walker, 36 N. J. Eq. 376 (no implied power of sale in wife under will, although sale was necessary to provide for maintenance of son); Seeger *v.* Seeger, 21 N. J. Eq. 90 (power to sell real estate not implied merely because necessary or convenient to carry out directions of will); Booraem *v.* Wells, 19 N. J. Eq. 87 (power to sell not implied from directions to rent certain land for the use of a legatee during life and to make such other arrangements as the executors might think best for his support); Geroe *v.* Winter, 5 N. J. Eq. 655 (no implied power of sale in executors under a will by which the testator gave the remainder of his real estate to his three children in fee simple, to be divided or sold as two out of the three heirs could agree, and appointed one of such children and the husband of the other as executors); *In re* Fox, 52 N. Y. 530, 11 Am. Rep. 751 [*affirming* 63 Barb. 157] (no power of sale implied from mere charge of debts on land); Downing *v.* Marshall, 1 Abb. Dec. (N. Y.) 525; Mapes *v.* Tyler, 43 Barb. (N. Y.) 421 (no power of sale under will to sell real estate for division among heirs); Alvord *v.* Sherwood, 21 Misc. (N. Y.) 354, 47 N. Y. Suppl. 749; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106); Skinner *v.* Wood, 76 N. C. 109 ("power to settle my estate as he shall judge best" does not confer a power to sell land on the executors); Wetherell *v.* Gorman, 73 N. C. 380 (no power to sell real estate in wife, who is executrix and guardian, implied from bequest to her of all the testator's property, after payment of his debts, "for the benefit of her and my children, and that she shall hold the same as my executrix and guardian for their mutual benefit: Provided, That the principal shall not be used, unless the interest fails to meet their

to create a power under a will or deed; any words, however informal, which clearly

reasonable parts"); Dunn *v.* Keeling, 13 N. C. 283 (power to sell land not implied from the words "after all my debts are paid," annexed to a devise); Worley *v.* Taylor, 21 Oreg. 589, 28 Pac. 903, 28 Am. St. Rep. 771 (power of sale not implied from a devise "after the payment of all my just debts"); Clark *v.* Riddle, 11 Serg. & R. (Pa.) 311 (no implied power to sell real estate to pay debts and legacies); *In re* Mathewson, 12 R. I. 145 (power of sale not implied from the fact that legacies constitute an implied lien on residuary realty); Alexander *v.* Wallace, 8 Lea (Tenn.) 569 (no power to sell land implied from appointment of executor to take charge of testator's entire estate, without bond or liability for errors or defects either to his heirs or to any court); *In re* Besley, 18 Wis. 451 (appointment of testator's son "as sole executor" gives him no powers that do not belong to the office); Dunlap *v.* Pyle, 8 Fed. Cas. No. 4,163, 5 McLean 322 (no implied power under will to sell real estate for division or distribution); Doe *v.* Hughes, 6 Exch. 223, 20 L. J. Exch. 148 (no power of sale from mere charge of debts on land); *In re* Rebbeck, 63 L. J. Ch. 596, 71 L. T. Rep. N. S. 74, 8 Reports 376, 42 Wkly. Rep. 473 (no power of sale from mere charge of legacies on land). See 40 Cent. Dig. tit. "Powers," § 16 *et seq.*; and EXECUTORS AND ADMINISTRATORS, 18 Cyc. 320; TRUSTS; WILLS.

Power implied in executors or trustees to sell real estate.— Winston *v.* Jones, 6 Ala. 550 (power to sell real estate for distribution among legatees); Rakestraw *v.* Rakestraw, 70 Ga. 806; Stoff *v.* McGinn, 178 Ill. 46, 52 N. E. 1048 (holding that a power of sale by an executor arises by implication, where his duties under the will cannot be performed without making a sale); Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205 (power to sell land for division among legatees); Putnam Free School *v.* Fisher, 30 Me. 523 (power to sell real estate for investment and distribution); Ogle *v.* Reynolds, 75 Md. 145, 23 Atl. 137 (where a will directed real estate to be sold without saying by whom); Conkling *v.* Washington University, 2 Md. Ch. 497 (power to sell land for payment of debts and distribution); Hale *v.* Hale, 137 Mass. 168 (power to sell for investment and distribution); Brown *v.* Kelsey, 2 Cush. (Mass.) 243; Purdie *v.* Whitney, 20 Pick. (Mass.) 25 (power to sell real estate for investment and payment of annuities and bequests of remainder); Going *v.* Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645 (power to sell real estate to pay charitable bequest); Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61 (where a will directed a sale without saying by whom); Clark *v.* Hornthal, 47 Miss. 434 (the same); Porter *v.* Schofield, 55 Mo. 56 (power of sale implied from a deed of trust binding the trust estate for the payment of the debts of the *cestui que trust*); Drumheler *v.* Haff, 23 Mo. App. 161 (power to sell real estate to pay legacies); Lindley *v.* O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79 (holding that where a testator imposes on his executor trusts or duties which require for their execution or performance an estate in his lands or a power of sale, the executor will take by implication such estate or power); Cook *v.* Cook, (N. J. Ch. 1900) 47 Atl. 732 (power to sell real estate implied from direction to "invest, pay and divide" all the property); Tompkins *v.* Miller, (N. J. Ch. 1893) 27 Atl. 484 (power under will to sell real estate for investment); Terry *v.* Smith, 42 N. J. Eq. 504, 8 Atl. 886 (power to sell land implied where a testatrix bequeathed a one-sixth interest of her real and personal property to A for life, and directed that after A's death the principal and interest thereof should be "paid" to B); Hollman *v.* Tigges, 42 N. J. Eq. 127, 7 Atl. 347 (power to sell for division under will); Naar *v.* Naar, 41 N. J. Eq. 88, 3 Atl. 94 (power to sell and convey implied where a trust directed real estate devised to be converted into money); Ballantine *v.* Frelinghuysen, 38 N. J. Eq. 266 (power to continue business of partnerships or to form corporation and to convey testator's interest in firms or in real estate); Belcher *v.* Belcher, 38 N. J. Eq. 126 (power to sell real estate implied from a devise to executors in trust to divide the property among testator's children, paying the sons their shares and paying the income of the daughter's shares to them in half yearly payments for life); Haggerty *v.* Lanterman, 30 N. J. Eq. 37 (power to sell realty from duty imposed on executor to pay debts and to divide the estate and to invest the shares of daughters, the personalty being insufficient to pay the debts); Whitehead *v.* Wilson, 29 N. J. Eq. 396 (power to sell real estate to pay debts); Vanness *v.* Jacobus, 17 N. J. Eq. 153 (power to sell real estate for division among legatees); Corse *v.* Chapman, 153 N. Y. 466, 47 N. E. 812 [*affirming* 36 N. Y. Suppl. 1124] (power to sell real estate for division under will); Phillips *v.* Davies, 92 N. Y. 199; Byrnes *v.* Baer, 86 N. Y. 210 (power to sell real estate for investment in bonds and mortgages); Van Winkle *v.* Fowler, 52 Hun (N. Y.) 355, 5 N. Y. Suppl. 317 (power to sell real estate implied from devise of the same to the executor and a direction that he use the same for the purpose of clothing, educating, and maintaining testatrix's children); Stewart *v.* Hamilton, 37 Hun (N. Y.) 19 (holding that where a will gives the executors everything in trust, and they are enjoined not to sell the realty "under three years, unless sold to advantage," they are impliedly given power of sale); Leonard *v.* American Baptist Home Mission Soc., 35 Hun (N. Y.) 290 (power of widow under will to sell real estate for support); Bingham *v.* Jones, 25 Hun (N. Y.) 6 (power of sale for division under will); Morton *v.* Morton, 8 Barb. (N. Y.) 18 (implied power to sell moiety

indicate an intention to give or reserve a power are sufficient for that purpose.[51] The whole intention must be looked at and a power may be given in

of remainder for investment and division among remainder-men); Coogan *v.* Oekershausen, 55 N. Y. Super. Ct. 286 (power to sell land to pay debts implied where a will directed debts and funeral expenses to be first paid and devised all the residue of the estate to the executor in trust); Conover *v.* Hoffman, 1 Bosw. (N. Y.) 214 [*affirmed* in 1 Abb. Dec. 429, 15 Abb. Pr. 100] (power to sell real estate for division under will); Dominiek *v.* Miehael, 4 Sandf. (N. Y.) 374 (power to sell land for division under will where, without a sale, a just and equal division of the estate would be difficult or impraeticable); Matter of Hesdra, 20 N. Y. Suppl. 79, 2 Connoly Surr. 514 (power to sell for payment of debts); Livingston *v.* Murray, 39 How. Pr. (N. Y.) 102 (power to sell real estate for investment and to pay annuity to widow and remainder to heirs at her death); Gersen *v.* Rinteln, 2 Dem. Surr. (N. Y.) 243; Vaughan *v.* Farmer, 90 N. C. 607 (implied power to sell real estate for division under will); Steele *v.* Worthington, 2 Ohio 182 (where testator invested his executor with full and eomplete power to dispose of all his estate in his diseretion, and with full power to settle and adjust all his worldly affairs as he might please, "meaning expressly to invest him with as full power to that effect as I might possess, not ineompatible with the tenor and substance of this last will and testament"); Dean *v.* Loewenstein, 6 Ohio Cir. Ct. 587, 3 Ohio Cir. Dec. 597 (holding that authority given by a will to an exeeutor to eonvert realty into money is equivalent to authority to sell); Sargent *v.* Sibley, 8 Ohio Dec. (Reprint) 434, 8 Cinc. L. Bul. 6 (power of exeeutor to sell unprodueti've property under power given him to invest, manage, and eontrol the estate as in his judgment would be best ealculated to eombine safety with produetiveness); Gray *v.* Henderson, 71 Pa. St. 368; *Ex p.* Elliott, 5 Whart. (Pa.) 524, 34 Am. Dec. 572 (power to sell real estate to pay annuity); Sehropp *v.* Shaeffer, 2 Pa. Dist. 362 (power to sell real estate implied where testatrix gave to her ehildren all of her "estate," and direeted her exeeutor to eonvert her "effects" into money); Arrott's Estate, 9 Pa. Co. Ct. 535 (power to sell real estate implied from a devise of "all the rest, residue and remainder of my estate, real, personal or mixed, of whatsoever nature and wherever situated," to exeeutors in trust to "receive, eollect, secure and obtain and reduee into possession all the capital, prineipal moneys or interest by me invested or held"); Morgan's Estate, 9 Pa. Co. Ct. 119; Palmer's Appeal, 1 Am. L. Reg. 439; Mimms *v.* Delk, 42 S. C. 195, 20 S. E. 91 (implied power to sell for distribution land not divisible in kind); Geiger *v.* Kaigler, 15 S. C. 262 (implied power to sell under a will giving the exeeutor "disposal of my property," and power to retain the remainder in his possession, and to "make an equal division of the said estate"); Lockart *v.* Northington, 1 Sneed (Tenn.) 318 (where will directs sale without saying by whom); Carlton *v.* Goebler, 94 Tex. 93, 58 S. W. 829 (power to sell real estate to pay debts); Carrington *v.* Goddin, 13 Gratt. (Va.) 587 (power to sell real estate to pay annuity); Steele *v.* Levisay, 11 Gratt. (Va.) 454 (power of sale for distribution under will); Harrison *v.* Harrison, 2 Gratt. (Va.) 1, 44 Am. Dec. 365 (power of widow to sell real estate under will for payment of debts, or for the convenient enjoyment, advancement, or division of the property); Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986 (implied power of city to sell real estate held in trust); Roberdeau *v.* Roberdeau, 20 Fed. Cas. No. 11,888, 1 Cranch C. C. 305 (implied power under will to sell reversion of land to pay annuities); Tait *v.* Lathbury, L. R. 1 Eq. 174, 35 Beav. 112, 11 Jur. N. S. 991, 14 Wkly. Rep. 216, 35 Eng. Reprint 837 (holding that a deelaration in a settlement, whieh eontains a power to vary seeurities, that real estate purchased with trust funds shall be considered personal estate for the purposes of the settlement, is suffieient to give the trustees a power of sale of sueh real estate); Bateman *v.* Bateman, 1 Atk. 421, 26 Eng. Reprint 268 (power to sell real estate to pay debts); Greetham *v.* Colton, 34 Beav. 615, 11 Jur. N. S. 848, 13 L. T. Rep. N. S. 34, 6 New Rep. 311, 13 Wkly. Rep. 1009, 55 Eng. Reprint 773 (the same); Robinson *v.* Lowater, 17 Beav. 592, 51 Eng. Reprint 1165 [*affirmed* in 5 De G. M. & G. 272, 18 Jur. 363, 23 L. J. Ch. 641, 2 Wkly. Rep. 394, 54 Eng. Ch. 215, 45 Eng. Reprint 875] (the same); Flux *v.* Best, 31 L. T. Rep. N. S. 645, 23 Wkly. Rep. 228 (implied power to sell real estate to pay debts and legaeies and for division among residuary legatees); Glover *v.* Wilson, 17 Grant Ch. (U. C.) 111. See 40 Cent. Dig. tit. "Powers," § 16 *et seq.*; and EXECUTORS AND ADMINISTRATORS, 18 Cyc. 320; TRUSTS; WILLS.

Power implied in executors to convey.— Jones *v.* Jones, 13 N. J. Eq. 236, power of exeeutors to eonvey to one to whom the will "sells" property for a certain sum.

51. *Alabama.*— Blount *v.* Moore, 54 Ala. 360; Winston *v.* Jones, 6 Ala. 550.

Michigan.— Thateher *v.* St. Andrew's Chureh, 37 Mieh. 264.

Missouri.— Turner *v.* Timberlake, 53 Mo. 371.

New York.— Lesser *v.* Lesser, 11 Misc. 223, 32 N. Y. Suppl. 167.

South Carolina.— Withers *v.* Yeadon, 1 Rich. Eq. 324.

South Dakota.— Reilly *v.* Phillips, 4 S. D. 604, 57 N. W. 780.

Tennessee.— Wilburn *v.* Spofford, 4 Sneed 698.

Texas.— Daugherty *v.* Moon, 59 Tex. 397.

England.— Hopkinson *v.* Phipps, 2 Jur.

any part of the instrument, whether before or after conveyance of the estate.[52]

2. Effect of Failure to Designate Person to Execute. A clause in a will providing that the real estate may be sold, if advisable, is ineffective where no one is directed or empowered to convey the title.[53] As we shall see, however, when a power is given in a will to sell property without expressly naming a donee of the power, and the proceeds are to go to pay debts or legacies, or for distribution, the power vests in the executors by implication.[54]

3. Effect of Other Dispositions or Provisions Inconsistent With Power. The mere fact that the donor of a power makes other disposition of, or provisions as to, the subject-matter does not necessarily affect the power; but the instrument will be so construed, if possible, as to reconcile the inconsistency and give effect to all of its provisions.[55] Power given by will to an executor to sell all or any portion of the residuary real estate is not affected by the devise of such residuary share, for the devise is to be construed as subject to the power of sale.[56] Nor is a power of sale in executors necessarily inconsistent with a specific devise in fee.[57]

C. Validity — 1. In General. To be valid, a power must be definite and certain as to its objects,[58] and must be created for a lawful pur-

639, 7 L. J. Ch. 255; Oxon *v.* Leighton, 2 Vern. Ch. 376, 23 Eng. Reprint 837; 1 Sugden Powers 116.

See 40 Cent. Dig. tit. "Powers," § 9.

Liberal construction.— If it appears that a testator intended to give a power of sale, the language used by him, although inapt, will be construed liberally in furtherance of the purpose. Lesser *v.* Lesser, 11 Misc. (N. Y.) 223, 32 N. Y. Suppl. 167. See *infra*, V, A, 3.

An expression in a will of a wish or expectation that a devisee will appoint the property among a certain class of persons amounts to a direction to appoint. Withers *v.* Yeadon, 1 Rich. Eq. (S. C.) 324.

52. *In re* Patterson, 5 Manitoba 274. And see 1 Sugden Powers 117.

53. Whittemore *v.* Russell, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200. See also Baumeister *v.* Silver, 98 Md. 418, 56 Atl. 825.

54. See *infra*, VI, B, 3.

55. *Maine.*— Nash *v.* Simpson, 78 Me. 142, 3 Atl. 53, holding that where power of sale for the purposes of necessary support is given to a widow, to whom a life-estate in lands is devised, this power will not be controlled by a wish expressed in the devise that the land "shall remain as it is" for twenty years.

New Jersey.— Hemhauser *v.* Decker, 38 N. J. Eq. 426; Brown *v.* Brown, 31 N. J. Eq. 422 (express power given executors to sell land to pay debts not qualified by a power given them in another section of the will to sell after the death or remarriage of the testator's widow); Rudderow *v.* Nield, 27 N. J. Eq. 89.

New York.— Crooke *v.* Prince, 97 N. Y. 421 (holding that where land was devised to a trustee for a married woman during her life subject to the power of disposition by her, the power, in order to reconcile the apparent inconsistency, should be deemed to relate to the remainder); Skinner *v.* Quin, 43 N. Y. 99 [*reversing* 49 Barb. 128, 33 How. Pr. 229]; Crittenden *v.* Fairchild, 41 N. Y. 289; Belmont *v.* O'Brien, 12 N. Y. 394 (power of sale not repugnant to trusts created by deed); Arnold *v.* Gilbert, 5 Barb. 190 (power given executors by a will to lease lots for terms of years, to insure, rebuild, and repair houses, and to sell, purchase and exchange gores of land, not inconsistent with previously granted power to sell the whole of the real estate for the general purposes of the will).

North Carolina.— Levy *v.* Griffis, 65 N. C. 236, no inconsistency in a devise to a trustee in trust for the sole and separate use of a married woman, with a power given her to appoint the estate in fee by deed or will, vesting the trust in her in fee under Rev. Code, c. 119, § 26.

Virginia.— Shearman *v.* Hicks, 14 Gratt. 96, valid power of appointment notwithstanding estate in fee.

See 40 Cent. Dig. tit. "Powers," § 14.

56. Courter *v.* Stagg, 27 N. J. Eq. 305; Provost *v.* Provost, 27 N. J. Eq. 296; Rudderow *v.* Nield, 27 N. J. Eq. 89; Skinner *v.* Quin, 43 N. Y. 99 [*reversing* 49 Barb. 128, 33 How. Pr. 229]; Conover *v.* Hoffman, 1 Bosw. (N. Y.) 214 [*affirmed* in 1 Abb. Dec. 429, 15 Abb. Pr. 100].

57. Crittenden *v.* Fairchild, 41 N. Y. 289; Hunnier *v.* Rogers, 55 Barb. (N. Y.) 85.

58. Norris *v.* Thomson, 19 N. J. Eq. 307 [*affirmed* in 20 N. J. Eq. 489] (holding that a power given to one by a will to appoint among such "benevolent, religious, or charitable institutions as she may think proper," was void as being too vague and indefinite to be enforced); Henly *v.* Fitzgerald, 65 Barb. (N. Y.) 508 (holding that a direction in a will that the executor should purchase a farm in a certain locality and of a certain value, in case the testator should not do so in his lifetime, was inoperative and void and did not create a valid power or power in trust, because it was too vague and indefinite to be carried into effect). *Compare*

pose.[59] Where the same person is made the devisee of the fee in lands and the donee of a power of sale thereof, the power is merged in the fee, and becomes inoperative.[60]

2. Effect of Invalidity or Failure of Other Dispositions or Provisions. Where a power is inseparably connected with other dispositions of, or provisions as to, the subject-matter, which are invalid or impossible of accomplishment, the power itself fails;[61] but it is otherwise where the power is not so connected with the invalid or impossible provisions, and is otherwise valid.[62]

3. Partial Invalidity. A power for several purposes does not fail because among them is one which is void or has lapsed.[63]

4. Relief Against Invalidity. Equity will not interfere in favor of the grantee of a power or of a purchaser under him to supply a defect in the creation of the power.[64]

Brown *v.* Kelsey, 2 Cush. (Mass.) 243, holding that where testatrix bequeathed what should remain of her estate after payment of certain legacies "for the promotion of such religious and charitable enterprises, as shall be designated by a majority of the pastors composing the Middlesex Union Association," there was a sufficiently certain designation of the charities, and an appointment made accordingly by the members of such association would entitle the appointees to hold as if the property had been given to them directly. See also Charities, 6 Cyc. 939.

59. Bates *v.* Bates, 134 Mass. 110, 45 Am. Rep. 305; Goodill *v.* Brigham, 1 B. & P. 192.

Power to create perpetuity void.— Bates *v.* Bates, 134 Mass. 110, 45 Am. Rep. 305; Marlborough *v.* Godolphin, 1 Eden 404, 28 Eng. Reprint 741 [*affirmed* in 3 Bro. P. C. 232, 1 Eng. Reprint 1289]. And see Perpetuities, 30 Cyc. 1464.

Particular powers held valid.— Dudley *v.* Weinhart, 93 Ky. 401, 20 S. W. 308, 14 Ky. L. Rep. 434 (power of appointment whereby donee might defeat devises and bequests, and make new disposition of property held not void as an attempt to give power to revoke the will, in contravention of Ky. Gen. St. c. 113, § 10); Dumesnil *v.* Dumesnil, 92 Ky. 526, 18 S. W. 229, 13 Ky. L. Rep. 770 (power not invalid because donee might select appointees unknown to donor); Blanchard *v.* Blanchard, 4 Hun (N. Y.) 287 [*affirmed* in 70 N. Y. 615] (exclusive power of management and control of farm given wife of testator).

60. Jennings *v.* Conboy, 73 N. Y. 230 [*reversing* 10 Hun 77].

61. *Maryland.*— Barnum *v.* Barnum, 26 Md. 119, 90 Am. Dec. 88, power to lease connected with trusts which are void under rule against perpetuities.

Massachusetts.— Bates *v.* Bates, 134 Mass. 110, 45 Am. Rep. 305, perpetuities.

New Jersey.— See Denton *v.* Clark, 36 N. J. Eq. 534.

New York.— Benedict *v.* Webb, 98 N. Y. 460; Martin *v.* Pine, 79 Hun 426, 29 N. Y. Suppl. 995; Abbott *v.* James, 14 N. Y. St. 597.

North Dakota.— Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413, holding that a power of sale dependent on a void trust falls with the trust.

Ohio.— Patton *v.* Patton, 39 Ohio St. 590, holding that where a testator directed his executor to sell real estate for the purpose of paying a void bequest and no disposition over was made of the property, it descended to the heir as land and was not subject to the power of sale.

Pennsylvania.— Downer *v.* Downer, 9 Watts 60.

South Carolina.— Fryerson *v.* Fryerson, 3 Strobh. 459.

See 40 Cent. Dig. tit. "Powers," § 23.

62. Denton *v.* Clark, 36 N. J. Eq. 534 (power of sale given by will construed as given for general purposes, and not invalid because certain legacies were left blank with respect to the amount); Dana *v.* Murray, 122 N. Y. 604, 26 N. E. 21 (holding that where an estate attempted to be created by a will was invalid by reason of unlawful suspension of the power of alienation, a power of sale authorized to take effect on the termination of the estate was also void); McCready *v.* Metropolitan L. Ins. Co., 83 Hun (N. Y.) 526, 32 N. Y. Suppl. 489 [*affirmed* in 148 N. Y. 761, 43 N. E. 988] (to substantially the same effect); Lindo *v.* Murray, 91 Hun (N. Y.) 335, 36 N. Y. Suppl. 231 [*affirmed* in 157 N. Y. 697, 51 N. E. 1091] (holding that an absolute and independent power given by will to executors to sell all or any portion of the real estate of testator, at such times and in such manner and upon such terms as they should consider most for the interests of the estate, and to execute deeds therefor, was valid, although trusts created by the will, with which the power of sale was in no way connected, were declared void); Thompson *v.* Carmichael, 1 Sandf. Ch. (N. Y.) 387 (holding that where a devise of real estate in trust empowered the trustees to mortgage for such purposes as might be necessary under the will, the power was valid for the benefit of legatees, although the devise was declared void as unlawfully restraining the power of alienation); Zerbe *v.* Zerbe, 2 Leg. Chron. (Pa.) 311 (holding that where a will appointed executors and authorized them to sell testator's property, their power to sell was not taken away by the fact that the only devise in the will was invalid because of its uncertainty).

63. Wilson *v.* Lynt, 16 How. Pr. (N. Y.) 348. See also Downing *v.* Marshall, 1 Abb. Dec. (N. Y.) 525. And see the cases referred to in the preceding note.

64. Sanderlin *v.* Thompson, 17 N. C. 539.

IV. Modification or Revocation, Duration, and Termination.

A. Revocability. A mere naked power is revocable at the will of the donor or grantor;[65] but where a power is coupled with an interest,[66] or is given for a valuable consideration,[67] it is irrevocable.

B. Manner of Revocation or Modification. A duly created power cannot be revoked or modified except in express terms or by necessary implication.[68] Where a general power of appointment by deed or will has been exercised by an appointment by deed reserving a power of revocation and appointment to new uses to be exercised by deed only, the creation of this last power to appoint by deed only cannot, without clear evidence of intention, be taken as operating to destroy the original power to appoint by deed or will.[69]

C. Duration and Termination — 1. In General. The duration of a power is dependent upon the intention of the grantor or donor, as shown by the terms of the instrument creating it, the purposes had in view, and the circumstances surrounding the transaction.[70] The general rule is that powers cannot continue

65. *Alabama.*— Elmes *v.* Sutherland, 7 Ala. 262.

Arizona.— Taylor *v.* Burns, 8 Ariz. 463, 76 Pac. 623.

Indiana.— Jeffersonville Assoc. *v.* Fisher, 7 Ind. 699.

North Carolina.— Wilmington *v.* Bryan, 141 N. C. 666, 54 S. E. 543.

Pennsylvania.— Frederick's Appeal, 52 Pa. St. 338, 91 Am. Dec. 159.

See 40 Cent. Dig. tit. "Powers," § 24. And see the cases cited *supra*, II, D, 4.

66. *Georgia.*— Baggett *v.* Edwards, 126 Ga. 463, 55 S. E. 250.

Illinois.— Bonney *v.* Smith, 17 Ill. 531.

New Hampshire.— Hilliard *v.* Beattie, 67 N. H. 571, 39 Atl. 897.

New York.— Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281.

Pennsylvania.— Lightner's Appeal, 82 Pa. St. 301.

Texas.— Wells *v.* Littlefield, 59 Tex. 556.

See 40 Cent. Dig. tit. "Powers," § 24. And see *supra*, II, E.

67. Bonney *v.* Smith, 17 Ill. 531; Smyth *v.* Craig, 3 Watts & S. (Pa.) 14; Pacific Coast Co. *v.* Anderson, 107 Fed. 973, 47 C. C. A. 106 [*affirming* 99 Fed. 109]; *In re* Hannan's Empress Gold Min., etc. Co., [1896] 2 Ch. 643, 65 L. J. Ch. 902, 75 L. T. Rep. N. S. 45.

68. New *v.* Potts, 55 Ga. 420; Bennett *v.* Rosenthal, 11 Daly (N. Y.) 91; Anderson *v.* Butler, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166 (holding that where in the body of a will authority was given the executor to sell certain lands, and in codicils the lands were given to different legatees from those first named, without revoking in express terms the power to sell, such power remained, unless suspended or vacated for cause by the court); Douglass *v.* Dickson, 11 Rich. (S. C.) 417 (holding that a contract by a testator to sell a particular tract of land did not revoke, so far as it related to that contract, a power in his will giving his executors authority to sell his lands for division); Starr *v.* Stark, 22 Fed. Cas. No. 13,317, 2 Sawy. 603, 642 [*affirmed* in 94 U. S. 477, 24 L. ed. 276] (holding that a revocation of a power is not necessarily implied from a subsequent power to another to do the same thing, where the second is not absolutely inconsistent with the first).

69. Saunders *v.* Evans, 8 H. L. Cas. 721, 7 Jur. N. S. 1293, 31 L. J. Ch. 233, 5 L. T. Rep. N. S. 129, 9 Wkly. Rep. 501, 11 Eng. Reprint 611.

70. *Maryland.*— Johns Hopkins University *v.* Middleton, 76 Md. 186, 24 Atl. 454; Hoffman *v.* Hoffman, 66 Md. 568, 8 Atl. 466.

New Jersey.— Cruikshank *v.* Parker, 52 N. J. Eq. 310, 29 Atl. 682.

New York.— Taber *v.* Willets, 1 N. Y. App. Div. 285, 37 N. Y. Suppl. 233 [*affirmed* in 153 N. Y. 663, 48 N. E. 1107]; Smith *v.* A. D. Farmer Type Founding Co., 18 Misc. 434, 41 N. Y. Suppl. 788 [*affirming* 17 Misc. 311, 40 N. Y. Suppl. 356].

Pennsylvania.— Steger's Estate, 33 Leg. Int. 416; Kaufman *v.* Hollinger, 4 Wkly. Notes Cas. 27.

Texas.— Hallum *v.* Silliman, 78 Tex. 347, 14 S. W. 797.

England.— Sharp *v.* St. Saubeur, L. R. 7 Ch. 343, 41 L. J. Ch. 576, 26 L. T. Rep. N. S. 142, 20 Wkly. Rep. 269; *In re* Jump, [1903] 1 Ch. 129, 72 L. J. Ch. 16, 87 L. T. Rep. N. S. 502, 51 Wkly. Rep. 266 (holding that the question of the duration of a power in a settlement is, if the rule against perpetuities is not infringed, one of intention; and that a power of sale given by a will to trustees to enable them to perform a trust for the maintenance, out of capital as well as income, of a lunatic during his life, was not determined by the lunatic becoming absolutely entitled to the property, so long as he was unable to call for a conveyance); *In re* Cotton, 19 Ch. D. 624, 51 L. J. Ch. 514, 46 L. T. Rep. N. S. 813, 30 Wkly. Rep. 610; Wood *v.* White, 3 Jur. 117, 8 L. J. Ch. 209, 4 Myl. & C. 460, 18 Eng. Ch. 460, 41 Eng. Reprint 178.

See 40 Cent. Dig. tit. "Powers," § 26.

beyond the period required for the purposes for which they were created;[71] but the whole intent of the instrument of creation is to be looked to, and the power will be held valid and subsisting until its purpose is spent.[72]

2. Death of Donor or Grantor. A mere naked or collateral power is revoked by the death of the donor or grantor,[73] unless it is necessarily such as can be exercised only after his death;[74] but it is otherwise in the case of a power coupled with an interest.[75]

3. Death of Beneficiary. Whether or not the death of a beneficiary under a power determines the power depends upon whether the object had in view in the creation of the power is frustrated thereby. If such purpose is defeated by the death of the beneficiary the power terminates;[76] but if the purpose can still be effectuated, notwithstanding his death, the power is unaffected.[77] Where

71. Fox *v.* Storrs, 75 Ala. 265.

72. Lantsbery *v.* Collier, 2 Kay & J. 709, 25 L. J. Ch. 672, 4 Wkly. Rep. 826, 69 Eng. Reprint 967 [*discussing* Ware *v.* Polhill, 11 Ves. Jr. 257, 8 Rev. Rep. 144, 32 Eng. Reprint 1087].

A power of sale given by will to carry out a trust in favor of devisees continues operative as long as the trust continues. Bolton *v.* Jaeks, 6 Bosw. (N. Y.) 166.

A discretionary power of sale is not put an end to during the life of the tenant for life by the fact that all the remainder-men have acquired vested interests in their share. Biggs *v.* Peacock, 22 Ch. D. 284, 52 L. J. Ch. 1, 47 L. T. Rep. N. S. 341, 31 Wkly. Rep. 148.

73. *Arkansas.*— Gartland *v.* Nunn, 11 Ark. 720 (holding that where, in a bond for title given by a vendor to a vendee, a third person was named as trustee, and empowered to sell the land for the payment of the purchase-money on failure of the vendee to pay, such third person possessed a naked power, without an interest in the land, which was revoked by the death of the vendee, so that a sale thereafter made by him was void); Yeates *v.* Pryor, 11 Ark. 58 (holding that the death of the donor of a power revokes it, even though it is declared irrevocable, unless the power is coupled with an interest, not in the thing to be obtained by such power, but in the estate itself).

California.— *In re* Cunningham, Myr. Prob. 76.

Indiana.— Hawley *v.* Smith, 45 Ind. 183.

South Carolina.— Fisher *v.* Fair, 34 S. C. 203, 13 S. E. 470, 14 L. R. A. 333.

Texas.— Nehring *v.* McMurrain, (Civ. App. 1898) 45 S. W. 1032.

United States.— Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Lockett *v.* Hill, 15 Fed. Cas. No. 8,443, 9 Nat. Bankr. Reg. 167, 1 Woods 552.

See 40 Cent. Dig. tit. "Powers," § 27.

74. Hunt *v.* Ennis, 12 Fed. Cas. No. 6,889, 2 Mason 244.

75. *Arkansas.*— Yeates *v.* Pryor, 11 Ark. 58.

California.— Norton *v.* Whitehead, 84 Cal. 263, 24 Pac. 154, 18 Am. St. Rep. 172.

Georgia.— Baggett *v.* Edwards, 126 Ga. 463, 55 S. E. 250 (holding that where title to land is conveyed to secure a debt, and the instrument is not merely a mortgage, a power of sale for failure to make payment is a power coupled with an interest, and is not revoked by the death of the debtor); Roland *v.* Coleman, 76 Ga. 652.

Illinois.— Bennesen *v.* Savage, 130 Ill. 352, 22 N. E. 838.

Indiana.— Hawley *v.* Smith, 45 Ind. 183; Wood *v.* Wallace, 24 Ind. 226; Jeffersonville Assoc. *v.* Fisher, 7 Ind. 699.

Mississippi.—Frank *v.* Colonial, etc., Mortg. Co., 86 Miss. 103, 38 So. 340, 70 L. R. A. 135.

New York.— Stephens *v.* Sessa, 50 N. Y. App. Div. 547, 64 N. Y. Suppl. 28.

Pennsylvania.— Droste's Estate, 9 Wkly. Notes Cas. 224; Riddle *v.* Kent, 10 Montg. Co. Rep. 119. But see Frederick's Appeal, 52 Pa. St. 338, 91 Am. Dec. 159.

West Virginia.— McNeill *v.* McNeill, 43 W. Va. 765, 28 S. E. 717.

United States.— Hunt *v.* Ennis, 12 Fed. Cas. No. 6,889, 2 Mason 244; Lockett *v.* Hill, 15 Fed. Cas. No. 8,443, 9 Nat. Bankr. Rep. 167, 1 Woods 552.

See 40 Cent. Dig. tit. "Powers," § 27.

Contra.— Watson *v.* King, 4 Campb. 272, 16 Rev. Rep. 790, 2 E. C. L. 54.

76. Seymour *v.* Bull, 3 Day (Conn.) 388 (holding that a power to executors to sell lands devised to the children of the testator, in such way and manner as they should judge most beneficial to the devisees, ceased on the death of one of the devisees); Sharpsteen *v.* Tillou, 3 Cow. (N. Y.) 651 (to the effect that where testator provided for the sale of his real estate on the death of his widow, and the division of the proceeds between his sons, and the sons, except one, died without issue before the widow, the power ceased); Jackson *v.* Jansen, 6 Johns. (N. Y.) 73; Fidler *v.* Lash, 23 Wkly. Notes Cas. (Pa.) 449 (holding that where there was a devise to wife for life, remainder over, with power to the executors to sell, if they should see fit, and to invest the proceeds, and pay the interest to the wife, the power ceased on the death of the wife); Schively's Appeal, 9 Wkly. Notes Cas. (Pa.) 566 [*reversing In re* Linnard's Estate, 8 Wkly. Notes Cas. (Pa.) 536] (death of appointee by will during lifetime of testator); Harmon *v.* Smith, 38 Fed. 482 (death of sole beneficiary).

77. Ely *v.* Dix, 118 Ill. 477, 9 N. E. 62;

a power is coupled with an interest, the death of the beneficiary does not determine the power.[78]

4. Death of Donee or Grantee. A power necessarily ceases on the death of the donee or grantee, where there is no one else authorized to execute it.[79] A power created by will has no existence until the death of the testator, and therefore, where a person by will creates a power of appointment in favor of another, and the latter purports to exercise it by will and predeceases the donor of the power, the appointment is invalid.[80]

5. Accomplishment of Purpose, Exhaustion, or Impossibility of Execution — a. In General. A power ceases upon the accomplishment of the purpose of its creation,[81] upon its exhaustion,[82] or where its execution becomes impossible.[83]

Cotton *v.* Burkelman, 142 N. Y. 160, 36 N. E. 890, 40 Am. St. Rep. 584 [*affirming* 2 Misc. 165, 21 N. Y. Suppl. 623]; Millspaugh *v.* Van Zandt, 55 Hun (N. Y.) 463, 8 N. Y. Suppl. 637; Harvey *v.* Brisbin, 50 Hun (N. Y.) 376, 3 N. Y. Suppl. 676 [*affirmed* in 143 N. Y. 151, 38 N. E. 108]; McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484.

78. Cotton *v.* Burkelman, 142 N. Y. 160, 36 N. E. 890, 40 Am. St. Rep. 584 [*affirming* 2 Misc. 165, 21 N. Y. Suppl. 623]; Horn *v.* Broyles, (Tenn. Ch. App. 1900) 62 S. W. 297.

79. Chambers *v.* Tulane, 9 N. J. Eq. 146; Wainwright *v.* Low, 57 Hun (N. Y.) 386, 10 N. Y. Suppl. 888 [*affirmed* in 132 N. Y. 313, 30 N. E. 747]; Hotchkiss *v.* Elting, 36 Barb. (N. Y.) 38; Dominick *v.* Michael, 4 Sandf. (N. Y.) 374. See also *infra*, VI, B, 9–12.

80. Sharpe *v.* McCall, [1903] 1 Ir. 179; Jones *v.* Southall, 32 Beav. 31, 9 Jur. N. S. 93, 32 L. J. Ch. 130, 8 L. T. Rep. N. S. 103, 1 New Rep. 152, 11 Wkly. Rep. 247, 55 Eng. Reprint 12.

81. *Illinois.*— Smyth *v.* Taylor, 21 Ill. 296.

New York.— Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; Hovey *v.* Chisolm, 56 Hun 328, 9 N. Y. Suppl. 671; Chamberlain *v.* Taylor, 36 Hun 24; Farrer *v.* McCue, 26 Hun 477 [*reversed* on other grounds in 89 N. Y. 139].

Ohio.— Ward *v.* Barrows, 2 Ohio St. 241.

Pennsylvania.— Swift's Appeal, 87 Pa. St. 502; Adams' Estate, 9 Pa. Co. Ct. 664 [*reversed* on other grounds in 148 Pa. St. 394, 23 Atl. 1072, 24 Atl. 189]; McCurdy's Appeal, 23 Wkly. Notes Cas. 226 [*affirming* 21 Wkly. Notes Cas. 187]. And see Beeson *v.* Breading, 77 Pa. St. 156. *Compare* Swan *v.* Covert, 138 Pa. St. 306, 22 Atl. 28.

Tennessee.— Murdock *v.* Johnson, 7 Coldw. 605.

West Virginia.— Snider *v.* Snider, 3 W. Va. 200.

See 40 Cent. Dig. tit. "Powers," §§ 29, 31.

Some trusts unsatisfied.— Where an estate was devised in trust for persons in shares, some of which were given absolutely, and others for life with remainder, and unlimited power of sale was given to the trustees, it was held that this power could be exercised over the whole so long as any of the trusts of any of the shares remained to be performed. Taite *v.* Swinstead, 26 Beav. 525, 5 Jur. N. S. 1019, 7 Wkly. Rep. 373, 53 Eng. Reprint 1001. See also Trower *v.* Knightley, 6 Madd. 134, 56 Eng. Reprint 1043.

82. *Georgia.*— Hill *v.* Hill, 81 Ga. 516, 8 S. E. 879.

Kentucky.— Johnson *v.* Yates, 9 Dana 491; Fritsch *v.* Klausing, 13 S. W. 241, 11 Ky. L. Rep. 788.

North Carolina.— Brown *v.* Beard, 6 N. C. 125, where a will directed the executors to sell a certain one of two tracts of land to pay testator's debts, and reserved the other for his widow and children, and the executors sold the reserved tract, and it was held that they had no power afterward to sell the other tract.

Pennsylvania.— Swift's Appeal, 87 Pa. St. 502; *Ex p.* Elliott, 5 Whart. 524, 34 Am. Dec. 572; Hidell *v.* Girard L. Ins., etc., Co., 14 Phila. 401.

South Carolina.—McNair *v.* Craig, 36 S. C. 100, 15 S. E. 135.

England.— Wood *v.* White, 3 Jur. 117, 8 L. J. Ch. 209, 4 Myl. & C. 460, 18 Eng. Ch. 460, 41 Eng. Reprint 178.

See 40 Cent. Dig. tit. "Powers," §§ 29, 31.

Compare Wood *v.* Nesbitt, 62 Hun (N. Y.) 445, 16 N. Y. Suppl. 918 [*reversed* on other grounds in 19 N. Y. Suppl. 423], holding that sales of realty made by executors under a power contained in a will to sell "all and every part of the estate," by which money was realized more than sufficient to provide for certain annuities, for which purpose, besides others, the sales were authorized, did not exhaust the power nor preclude its execution by an administratrix with the will annexed, where the moneys so realized were not applied to provide for the annuities, but were misappropriated by the executors.

Partial execution.—A trust to raise by sale a sum not exceeding a certain amount is not exhausted by raising a less amount. Harrold *v.* Harrold, 3 Giffard 192, 7 Jur. N. S. 1274, 4 L. T. Rep. N. S. 699, 66 Eng. Reprint 378.

A power to lend a certain amount of trust funds is not exhausted by one loan, but, after repayment, it may be again exercised. Versturme *v.* Gardiner, 17 Beav. 338, 51 Eng. Reprint 1064.

83. Hetzel *v.* Barber, 69 N. Y. 1; Sharpsteen *v.* Tillou, 3 Cow. (N. Y.) 651.

Death of beneficiary see *supra*, IV, C, 3.

Death of donee or grantee see *supra*, IV, C, 4.

b. Reservation of Power of Revocation. A general power of appointment over the fee will not be exhausted by an appointment to uses exhausting the fee, but reserving a power of revocation.[84]

6. Suspension. Where the exercise of a power is made dependent upon the happening of a future event, the power is suspended until that event happens;[85] and where a power is given by will to sell estates, which are the subject of a settlement which also contains a power of sale, the power is in abeyance so long as the trusts of that settlement remain unperformed.[86] So too a general power of appointment in a *feme sole* will be suspended upon her marriage, where there is a trust declared in that event which is inconsistent with the continuance of the general power;[87] and it has been said that where a power is given to a woman to dispose of an estate by will, and she marries, it is a suspension of the power where she is not enabled by statute to make a will.[88]

7. Merger. A general power of appointment does not prevent the fee from vesting, subject to be divested by the execution of the power;[89] and where one who is given power to charge an estate becomes entitled to the reversion in fee, the power does not merge, unless an intention to such effect appears.[90]

8. Release or Other Extinguishment.[91] Powers appendant, appurtenant, or in gross may be released or extinguished by the donee or grantee;[92] but in the

Where the principal design of a power can be effected, although some comparatively unimportant object not expressly qualifying the delegated power may fail, the power is valid. Wilson *v.* Lynt, 30 Barb. (N. Y.) 124.

84. Saunders *v.* Evans, 8 H. L. Cas. 721, 7 Jur. N. S. 1293, 31 L. J. Ch. 233, 5 L. T. Rep. N. S. 129, 9 Wkly. Rep. 501, 11 Eng. Reprint 611.

85. Raper *v.* Sanders, 21 Gratt. (Va.) 60.

86. Wolley *v.* Jenkins, 23 Beav. 53, 3 Jur. N. S. 321, 26 L. J. Ch. 379, 5 Wkly. Rep. 281, 53 Eng. Reprint 21.

87. Gould *v.* Gould, 2 Jur. N. S. 484, 25 L. J. Ch. 642, 4 Wkly. Rep. 516.

88. Rich *v.* Beaumont, 6 Bro. P. C. 152, 2 Eng. Reprint 994. But see *supra*, I, E; *infra*, VI, B, 2, c.

89. Maundrell *v.* Maundrell, 10 Ves. Jr. 265, 7 Rev. Rep. 393, 32 Eng. Reprint 839, overthrowing the principle of Cross *v.* Hudson, 3 Bro. Ch. 30, 29 Eng. Reprint 390. See also Richardson *v.* Harrison, 16 Q. B. D. 85, 55 L. J. Q. B. 58, 54 L. T. Rep. N. S. 456; Tickner *v.* Tickner [*cited* in Parsons *v.* Freeman, 3 Atk. 741, 742, 26 Eng. Reprint 1225]. But see Wolley *v.* Jenkins, 23 Beav. 53, 3 Jur. N. S. 321, 26 L. J. Ch. 379, 5 Wkly. Rep. 281, 53 Eng. Reprint 21.

90. Sing *v.* Leslie, 2 Hem. & M. 68, 10 Jur. N. S. 794, 33 L. J. Ch. 549, 10 L. T. Rep. N. S. 332, 4 New Rep. 17, 71 Eng. Reprint 385.

91. As to what powers of appointment may be extinguished or released see Cunynghame *v.* Thurlow, 1 Russ. & M. 436 note, 5 Eng. Ch. 436, 39 Eng. Reprint 169; West *v.* Berney, 1 Russ. & M. 431, 5 Eng. Ch. 431, 39 Eng. Reprint 167.

92. *Alabama.*— Thorington *v.* Thorington, 82 Ala. 489, 1 So. 716.

Georgia.— Hill *v.* Hill, 81 Ga. 516, 8 S. E. 879.

Maryland.— Brown *v.* Renshaw, 57 Md. 67; Reid *v.* Gordon, 35 Md. 174.

New Jersey.— Norris *v.* Thomson, 19 N. J. Eq. 307 [*affirmed* in 20 N. J. Eq. 489].

New York.— Dooper *v.* Noelke, 5 Daly 413.

Pennsylvania.— See Neilson's Appeal, 10 Pa. Cas. 558, 13 Atl. 943, in which the facts expressly negatived a waiver of the donee's power of sale.

Rhode Island.— Grosvenor *v.* Bowen, 15 R. I. 549, 10 Atl. 589, holding that where a testatrix devised all her realty inherited from her mother to her husband for life, and on his death to such persons as he might by last will appoint, and, in default of appointment, to her own heirs at law, her heirs at law took vested estates in remainder, subject to be divested by the execution of the power of appointment given to the husband, and further, that the husband could release his power of appointment to the tenants in remainder, and that he and they could, by their joint deed, convey in fee simple the devised realty.

South Carolina.— Atkinson *v.* Dowling, 33 S. C. 414, 12 S. E. 93, holding that where lands were devised to one for life, with power of appointment, the remainder to such of the testator's children and grandchildren as the life-tenant might see fit, with a limitation over to the testator's three sons, in case the power of appointment should not be exercised, the power was not coupled with a trust, and might be released by the tenant for life during her life.

Virginia.— Hume *v.* Hord, 5 Gratt. 374.

England.— Foakes *v.* Jackson, [1900] 1 Ch. 807, 69 L. J. Ch. 352, 74 L. T. Rep. N. S. 26, 48 Wkly. Rep. 616; *In re* Hancock, [1896] 2 Ch. 173, 65 L. J. Ch. 690; *In re* Radcliffe, [1892] 1 Ch. 227, 61 L. J. Ch. 186, 66 L. T. Rep. N. S. 363, 40 Wkly. Rep. 323; Smith *v.* Honblon, 26 Beav. 482, 53 Eng. Reprint 984; Digges' Case, 1 Coke 173*a*, 76 Eng. Reprint 373; Albany's Case, 1 Coke 110*b*, 76 Eng. Reprint 250; Page *v.* Soper, 1 Eq. Rep. 540, 11 Hare 321, 17 Jur. 851, 22 L. J. Ch. 1044, 1 Wkly. Rep. 518, 45 Eng. Ch. 317, 68 Eng. Reprint 1298; Miles *v.* Knight, 12 Jur. 666, 17 L. J. Ch. 458; Walmsley *v.* Jewett, 23 L. J. Ch. 425,

absence of a statute, where the power is given to one who has no estate or interest in the property, that is, where the power is simply collateral, the person intrusted with the power cannot release or extinguish it, and may exercise it notwithstanding any agreement to the contrary.[93] The same is true of a power coupled with a trust,[94] which, however, may be extinguished by the consent of all the parties, and a reconveyance by the beneficiaries and trustees to the donor.[95] It has been laid down that any dealing with the estate by the donee of a power appendant or in gross which is inconsistent with the exercise of the power puts an end to it.[96] On the other hand, the donee of such a power may absolutely alienate his estate in the subject-matter without extinguishing the power, so long as nothing is done in derogation of the alienee's estate.[97] A power of sale of realty to be

2 Wkly. Rep. 179; Smith *v.* Plumer, 17 L. J. Ch. 145; Smith *v.* Death, 5 Madd. 371, 21 Rev. Rep. 314, 56 Eng. Reprint 937; Webb *v.* Shaftesbury, 3 Myl. & K. 599, 10 Eng. Ch. 599, 40 Eng. Reprint 228; Savile *v.* Blacket, 1 P. Wms. 777, 24 Eng. Reprint 610; Bickley *v.* Guest, 1 Russ. & M. 440, 5 Eng. Ch. 440, 39 Eng. Reprint 170; West *v.* Berney, 1 Russ. & M. 431, 5 Eng. Ch. 431, 39 Eng. Reprint 167; Horner *v.* Swann, Turn. & R. 430, 24 Rev. Rep. 92, 12 Eng. Ch. 430, 37 Eng. Reprint 1166; 1 Sugden Powers 82 *et seq.*, 87 *et seq.*

See 40 Cent. Dig. tit. "Powers," §§ 31, 69, 70.

By covenant not to exercise power.— Isaac *v.* Hughes, L. R. 9 Eq. 191, 39 L. J. Ch. 379, 22 L. T. Rep. N. S. 11 (voluntary covenant); Hurst *v.* Hurst, 16 Beav. 372, 22 L. J. Ch. 538, 1 Wkly. Rep. 105, 51 Eng. Reprint 822; Piers *v.* Tuite, 1 Dr. & Wal. 279 (agreement with creditors); Davies *v.* Huguenin, 1 Hem. & M. 730, 32 L. J. Ch. 417, 8 L. T. Rep. N. S. 443, 2 New Rep. 101, 11 Wkly. Rep. 1040, 71 Eng. Reprint 320 (covenant for valuable consideration); *In re* Chambers, 11 Ir. Eq. 518; Walford *v.* Gray, 11 Jur. N. S. 473, 11 L. T. Rep. N. S. 432, 5 New Rep. 235, 13 Wkly. Rep. 761. But see Uxbridge *v.* Bayly, 4 Bro. Ch. 13, 29 Eng. Reprint 753, 1 Ves. Jr. 499, 30 Eng. Reprint 457.

Alienation of particular estate.— Where a tenant for life with a power of appointing part for advancing his children assigned his whole interest, he was held to have precluded himself from exercising the power. Noel *v.* Henley, McClell. & Y. 303, 29 Rev. Rep. 805. *Compare* Whitmarsh *v.* Robertson, 6 Jur. 921, 11 L. J. Ch. 404, 1 Y. & Coll. 715, 20 Eng. Ch. 715, 62 Eng. Reprint 1085; Cowan *v.* Besserer, 5 Ont. 624.

Release for consideration to donee.— It has been held that where a power to appoint a fund among strangers is vested in a donee who has a life-estate therein, he cannot release it for a consideration of benefit to himself, unless all the beneficiaries consent. Thomson *v.* Norris, 20 N. J. Eq. 489 [*affirming* 19 N. J. Eq. 307]. But see *In re* Somes, [1896] 1 Ch. 250, 65 L. J. Ch. 262, 74 L. T. Rep. N. S. 49, 44 Wkly. Rep. 236, where it was held that a release of a limited power of appointment is not void, although made by the donee for his own benefit.

Change of trustee.— Where a husband conveyed personalty to a trustee for the use of his wife for life with a power of appointment to her, and, in default of an appointment by her, to her heirs, a conveyance by the husband and wife and trustee of the property, on precisely the same trusts and to the same uses as those specified in the original conveyance, had only the effect of changing the trustee, and the power remained as before. Johnson *v.* Yates, 9 Dana (Ky.) 491.

An executor does not forfeit a power of sale by asking intervention of the court for the benefit of minor beneficiaries. Rose *v.* Thornley, 33 S. C. 313, 12 S. E. 11.

93. Norris *v.* Thomson, 19 N. J. Eq. 307 [*affirmed* in 20 N. J. Eq. 489]. See also Wilks *v.* Burns, 60 Md. 64; Learned *v.* Tallmadge, 26 Barb. (N. Y.) 443; Willis *v.* Shorral, 1 Atk. 474, 26 Eng. Reprint 302; Digges' Case, 1 Coke 173*a*, 76 Eng. Reprint 373; Albany's Case, 1 Coke 110*b*, 76 Eng. Reprint 250; Edwards *v.* Sleater, Hardres 415; Trippet *v.* Eyre, 2 Vent. 110, 86 Eng. Reprint 338; Anonymous Y. B. 15 Hen. VII, 11*b*; 1 Sugden Powers 48.

In England, however, by the act of 1881 (44 & 45 Vict. c. 41, § 52), "a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power." See *In re* Chisholm, [1901] 2 Ch. 82, 70 L. J. Ch. 533.

94. Atkinson *v.* Dowling, 33 S. C. 414, 12 S. E. 93; Weller *v.* Ker, L. R. 1 H. L. Sc. 11 (holding that when a power coupled with a duty is conferred upon trustees, to be executed by them at a fixed period, and after they have come to judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power, or execute it until the time appointed, or enter into any anterior compact respecting it); *Re* Eyre, 49 L. T. Rep. N. S. 259.

95. Lewis *v.* Howe, 174 N. Y. 340, 66 N. E. 975, 1101 [*affirming* 64 N. Y. App. Div. 572; 72 N. Y. Suppl. 851].

96. Foakes *v.* Jackson, [1900] 1 Ch. 807, 69 L. J. Ch. 352, 74 L. T. Rep. N. S. 26, 48 Wkly. Rep. 616; *In re* Hancock, [1896] 2 Ch. 173, 65 L. J. Ch. 690, 74 L. T. Rep. N. S. 658, 44 Wkly. Rep. 545.

97. Leggett *v.* Doremus, 25 N. J. Eq. 122; Cowan *v.* Besserer, 5 Ont. 624.

Express reservation of right to exercise power.— Proctor *v.* Scharpff, 80 Ala. 227, holding that where a testatrix devised her

executed by the trustee for the purposes of distribution becomes extinguished upon the reconversion of the property into realty by the election of the persons beneficially interested therein to take it as realty,[98] and where the whole beneficial interest is acquired by one of the beneficiaries, the exercise of such power becomes unnecessary.[99] On the other hand, a sale of land under the directions of a will passes a good title, although the persons entitled to the proceeds of the sale have previously conveyed their interests in the land, as such interests are personal and have no connection with the title.[1] If a power is extinguished by a conveyance of the estate to which it is appendant, it may be revived by a reconveyance for the same uses and purposes as under the original conveyance to the trustees.[2]

9. Bankruptcy of Donee. A mere power unexecuted in a tenant for life who becomes bankrupt does not vest in his assignees,[3] and a power given by will to a bankrupt to appoint among his children may be exercised after the bankruptcy.[4] But where a life-tenant with a general power of appointment, with remainder, in default of appointment, to himself in fee executed the power after his bankruptcy in favor of an appointee, the appointment was held void.[5]

V. Construction.

A. General Rules — 1. What Law Governs. In construing instruments creating powers the law of the grantor's or donor's domicile governs, and not the law of the *situs* of the property.[6]

2. Intention of Donor. Powers are to be construed in accordance with the intention of the donor or grantor; and in general that intention is to be gathered from the instrument itself, although a reference may sometimes be had to the circumstances under which it was given.[7] A power general in terms will not be cut

property to her husband for life, with remainder to their children, giving her husband discretionary power to sell and reinvest, and the husband conveyed his life-estate in the property to the remainder-men, expressly reserving to himself the right to sell and reinvest as authorized by the will, the power of sale was unaffected by the conveyance.

98. Prentice *v.* Janssen, 79 N. Y. 478; Reeser Estate, 4 Pa. Co. Ct. 417. See also Chasy *v.* Gowdy, 43 N. J. Eq. 95, 9 Atl. 580. See Conversion, 9 Cyc. 853. *Compare* Hoyt *v.* Day, 32 Ohio St. 101, where it was held that the fact that by proceedings in partition testator's widow had her devise of half of his property assigned to her in land, did not affect a power given the executor by the will to sell real estate for the purpose of distribution among the devisees, so far as the remaining half of the land was concerned.

99. Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400.

1. Orrender *v.* Call, 101 N. C. 399, 7 S. E. 878.

Mortgage by person having equitable interest.— Where a devise expressly vests the legal title to land in executors, a mortgage executed by one having an equitable interest does not prevent the executors from selling under the power conferred on them precisely as though the mortgage had not been given. Vandeveer *v.* Conover, 40 N. J. Eq. 161.

2. Salisbury *v.* Bigelow, 20 Pick. (Mass.) 174.

3. Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1.

Execution not compelled in favor of creditors.— Thorpe *v.* Goodall, 1 Rose 270, 17 Ves. Jr. 460, 34 Eng. Reprint 178.

4. *In re* Aylwin, L. R. 16 Eq. 585, 42 L. J. Ch. 745, 28 L. T. Rep. N. S. 865, 21 Wkly. Rep. 864. See also Haswell *v.* Haswell, 2 De G. F. & J. 456, 63 Eng. Ch. 356, 45 Eng. Reprint 698; Wickham *v.* Wing, 2 Hem. & M. 436, 11 Jur. N. S. 424, 34 L. J. Ch. 425, 13 L. T. Rep. N. S. 37, 6 New Rep. 21, 13 Wkly. Rep. 650, 71 Eng. Reprint 533.

5. Doe *v.* Britain, 2 B. & Ald. 93; Hole *v.* Escott, 2 Jur. 1059, 8 L. J. Ch. 83, 4 Myl. & C. 187, 18 Eng. Ch. 187, 41 Eng. Reprint 74. See also Badham *v.* Mee, 7 Bing. 695, 20 E. C. L. 309, 9 L. J. C. P. O. S. 213, 1 Moore & S. 14, 28 E. C. L. 479, 2 L. J. Ch. 4, 1 Myl. & K. 32, 7 Eng. Ch. 32, 39 Eng. Reprint 593.

6. Crusoe *v.* Butler, 36 Miss. 150.

7. *Alabama.*— Marks *v.* Tarver, 59 Ala. 335; Capal *v.* McMillan, 8 Port. 197.

California.— Beatty *v.* Clark, 20 Cal. 11.

Kentucky.— Morgan *v.* Halsey, 97 Ky. 789, 31 S. W. 866, 17 Ky. L. Rep. 529, 36 L. R. A. 716.

Maryland.— Collins *v.* Foley, 63 Md. 158, 52 Am. Rep. 505; Nevin *v.* Gillespie, 56 Md. 320; Pearce *v.* Van Lear, 5 Md. 85.

Mississippi.— Guion *v.* Pickett, 42 Miss. 77; Bartlett *v.* Sutherland, 24 Miss. 395.

New Jersey.— Anderson *v.* Anderson, 31 N. J. Eq. 560.

down to a particular power, unless an intent to do so is apparent from the instrument conferring the power.[8] A particular intent will be made to yield to the general intent, where they are inconsistent with each other.[9]

3. Liberal or Strict Construction. While it has been held that mere naked powers are to be construed strictly, and powers coupled with an interest liberally,[10] the better view seems to be that all powers are to be construed liberally in equity, in furtherance of the purpose for which they were created.[11] A distinction is drawn, however, between conveyances wherein it is the object of the grantor to convey his property and to retain a future power in himself of disposing of it, but to restrict himself in the exercise of that power to a particular mode, and conveyances wherein it is his object to place the property entirely beyond his own control, but to confer on a third person the power of changing the disposition of it, it being held that in the former case the restraining words or phases ought to receive such a construction as is most favorable to the owner; but in the latter case they should be taken in their most efficacious sense so as to operate in favor of the donee.[12]

4. Limitations and Restrictions.[13] When no condition is actually annexed to

New York.— Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458; Jackson *v.* Veeder, 11 Johns. 169.

Pennsylvania.— Kerr *v.* Verner, 66 Pa. St. 326; Thompson *v.* Garwood, 3 Whart. 287, 31 Am. Dec. 502.

Tennessee.— Pate *v.* Pierce, 4 Coldw. 104.

Texas.— Adams *v.* Mauermann, 90 Tex. 438, 39 S. W. 280.

Virginia.— Ropp *v.* Minor, 33 Gratt. 97.

United States.— Le Roy *v.* Beard, 8 How. 451, 12 L. ed. 1151.

England.— Farington *v.* Parker, L. R. 4 Eq. 116, 16 L. T. Rep. N. S. 258, 15 Wkly. Rep. 685; Smith *v.* Doe, 2 B. & B. 473, 6 E. C. L. 235, Bligh 290, 4 Eng. Reprint 610, 3 Moore C. P. 339, 7 Price 281, 22 Rev. Rep. 19; Bute *v.* Stuart, 1 Bro. P. C. 476, 1 Eng. Reprint 700; Taylor *v.* Horde, 1 Burr. 60; Gower *v.* Eyre, Coop. 156, 10 Eng. Ch. 156, 35 Eng. Reprint 514; Ren *v.* Bulkeley, Dougl. (3d ed.) 292; Hawkins *v.* Kemp, 3 East 411; Van Grutten *v.* Foxwell, 84 L. T. Rep. N. S. 545; Griffith *v.* Harrison, 4 T. R. 737; Pomery *v.* Partington, 3 T. R. 665; Lewthwaite *v.* Clarkson, 2 Y. & C. Exch. 372.

See 40 Cent. Dig. tit. "Powers," § 33.

Words are to be taken in their ordinary and common acceptation, and not according to any legal or technical exposition of them. Griffith *v.* Harrison, 4 T. R. 737, 749.

A power resting on personal confidence in the donee cannot be extended beyond its express terms and the clear intention of the testator. Marks *v.* Tarver, 59 Ala. 335.

8. Thompson *v.* Garwood, 3 Whart. (Pa.) 287, 31 Am. Dec. 502.

9. Capal *v.* McMillan, 8 Port. (Ala.) 197.

10. Antrim *v.* Buckingham, 1 Ch. Cas. 17, 22 Eng. Reprint 672, 2 Freem. 168, 22 Eng. Reprint 1135, 3 Salk. 276, 91 Eng. Reprint 822; Marlborough *v.* Godolphin, 2 Ves. 61, 28 Eng. Reprint 41. *Compare* Zouch *v.* Woolston, 2 Burr. 1136, where it was held that powers coupled with property, if merely legal, are to be construed with equal strictness in equity as at law.

In construing a marriage settlement, courts will not hold a naked power of appointment, of a special and limited character, reserved to the settlor, to be a power coupled with an interest, or a power of revocation, so as to enable him to defeat the provision for the children, if any other construction can be adopted consistently with the terms of the instrument. Gorin *v.* Gordon, 38 Miss. 205.

Deed divesting estates.— A deed in the exercise of a power of appointment divesting vested estates must be construed strictly. *In re* Kingston, L. R. 5 Ir. 169.

11. Pearce *v.* Van Lear, 5 Md. 85; Norcum *v.* D'Œnch, 17 Mo. 98; Lesser *v.* Lesser, 11 Misc. (N. Y.) 223, 32 N. Y. Suppl. 167; Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 14 Am. Rep. 458, 7 Johns. Ch. 25; Jackson *v.* Veeder, 11 Johns. (N. Y.) 169; Roberts *v.* Dixall, 2 Eq. Cas. Abr. 668, 22 Eng. Reprint 561; Long *v.* Long, 5 Ves. Jr. 445, 5 Rev. Rep. 101, 31 Eng. Reprint 674. *Compare* Pool *v.* Potter, 63 Ill. 533.

12. Imlay *v.* Huntington, 20 Conn. 146.

"A power of appointment in favor of the owner is to be construed liberally as part of his ancient estate." *Re* Patterson, 5 Manitoba 274, 278 [*citing* Fitzgerald *v.* Fauconberge, Fitzg. 207; Kibbet *v.* Lee, Hob. 312, 80 Eng. Reprint 455].

Under Cal. Civ. Code, § 922, providing that every power of disposition is deemed absolute by means of which the holder is enabled to dispose of the fee in possession for his own benefit, and section 1069 providing that a reservation in a grant shall be interpreted in favor of the grantor, where a deed reserved to the grantor the power to "grant, bargain and sell to any person, for such price and on such terms" as to him seemed advisable, it was held that the reserved power, liberally construed, gave to the grantor the right to convey the premises, if he deemed a conveyance beneficial to him or his estate. Lewis *v.* Lewis, 3 Cal. App. 727, 86 Pac. 994.

13. **Conditions or contingencies on which power is dependent** see *infra*, V, B, 1, i, 2, f.

a power, one need not be sought out,[14] and where property is left by will with full power of disposal, no verbal statements or requests by the testator will in any manner control its disposition.[15] So too if an inconsistency exists in an instrument creating a power between the terms of an instrument to be executed under it and the consideration which it recites as moving to the grantor of the power, the recital will not operate as a limitation upon the power.[16] A general power may, however, be restrained and qualified by a particular proviso.[17]

B. Nature and Extent of Power Granted — 1. Powers of Appointment or Revocation — a. In General. The language of the donor's grant is to be looked to for the extent of the power conferred, and the limitations, if any, which are imposed on its exercise.[18] But where an absolute power to dispose of property is conferred, it embraces all powers necessary to effect the disposition.[19]

b. Discretion of Donee. Where, by the terms of the instrument creating a power of appointment or revocation, its exercise is left to the discretion of the donee, the exercise of such discretion will not be interfered with, in the absence of bad faith.[20]

c. To Whom Appointment May Be Made — (I) *Under General Powers.* Where a power of appointment is general, that is, wholly unlimited as to the beneficiaries,[21] the donee of such general power of appointment may exercise the same by appointing to or for the benefit of any one whom he may choose to appoint,[22]

Conditions attached to execution see *infra*, VI, G.

Limitations on power of sale in general see *infra*, V, B, 2.

Restrictions or limitations as to instrument of execution see *infra*, VI, E, 2.

14. Noreum *v.* D'Œnch, 17 Mo. 98, where it was held that in a will inartificially drawn by the testator himself, because he has required that certain acts shall be done only with the consent of his executors, it is not necessarily to be inferred that other acts, although as important in their nature, are to be done in the same manner.

General power followed by limited power.— There is no rule of construction of marriage settlements, that a power professing to give either parent the right to deal with the property settled, to the disinheriting of the children of the marriage, shall be construed as a power of appointment for the benefit of the children. Peover *v.* Hassel, 1 Johns. & H. 341, 7 Jur. N. S. 406, 30 L. J. Ch. 314, 4 L. T. Rep. N. S. 113, 9 Wkly. Rep. 399, 70 Eng. Reprint 778.

15. McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506.

16. Beatty *v.* Clark, 20 Cal. 11.

17. Fane *v.* Devonshire, 6 Bro. P. C. 137, 2 Eng. Reprint 984.

A general power of revocation in the preamble of a deed may be abridged by a special power in the operating part of it. Norton *v.* Frecker, 1 Atk. 524, 26 Eng. Reprint 330.

18. Inglis *v.* McCook, 68 N. J. Eq. 27, 59 Atl. 630. See also Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188; Minton *v.* Kirwood, L. R. 3 Ch. 614, 37 L. J. Ch. 606, 18 L. T. Rep. N. S. 781, 16 Wkly. Rep. 991; Wood *v.* Wood, L. R. 10 Eq. 220, 39 L. J. Ch. 790, 23 L. T. Rep. N. S. 295, 18 Wkly. Rep. 819; Brown *v.* Bamford, 10 Jur. 447, 15 L. J. Ch. 361, 1 Phil. 620, 19 Eng. Ch. 620, 41 Eng. Reprint 769; Machinley *v.* Sison, 1 Jur. 558, 8 Sim. 561, 8 Eng. Ch. 561, 59 Eng. Reprint 222; Barrymore *v.* Ellis, 8 Sim. 1, 8 Eng. Ch. 1, 59 Eng. Reprint 1.

Intention of donor see *supra*, V, A, 2.

19. Kinnan *v.* Guernsey, 64 How. Pr. (N. Y.) 253 [*affirmed* in 19 N. Y. Wkly. Dig. 410]. See also Andrew *v.* Auditor, 5 Ohio S. & C. Pl. 242, 5 Ohio N. P. 123.

20. Matthews *v.* Capshaw, 109 Tenn. 480, 72 S. W. 964, 97 Am. St. Rep. 854; Steele *v.* Levisay, 11 Gratt. (Va.) 454; Cowles *v.* Brown, 4 Call (Va.) 477; Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650; Eaton *v.* Smith, 2 Beav. 236, 17 Eng. Ch. 236, 48 Eng. Reprint 1171. A devise in a will directing the distribution of the residue of the testator's estate among his brothers and sisters or nephews and nieces who should be most in need of it, at the discretion of trustees therein named, is valid and confers absolute power upon the trustees of selecting beneficiaries from the classes of persons mentioned. Brosseau *v.* Doré, 35 Can. Sup. Ct. 205.

Revocation and new appointment.— Where a settlement contained a power authorizing the tenant for life (a volunteer) to revoke the trusts, and resettle the same upon such trusts as to her should seem meet, it was held that this general power could not be controlled, and that an appointment to herself absolutely was a good execution. Meade King *v.* Warren, 32 Beav. 111, 55 Eng. Reprint 44.

Shares to be appointed, and selection, equality, and exclusion of appointees see *infra*, V, B, 1, e.

21. See *supra*, II, A.

22. *Georgia.*— New *v.* Potts, 55 Ga. 420, exercise by widow in favor of second husband.

North Carolina.— Taylor *v.* Eatman, 92 N. C. 601, exercise by married woman in favor of husband.

even himself.[23] The donee of such a power may exercise it in favor of his creditors or his estate,[24] or he may exercise it by a mortgage providing that the surplus shall be paid over to himself or his heirs.[25]

(II) *Under Limited Powers* — (A) *In General.* Where a power of appointment is not general, but limited to certain beneficiaries, or to a certain class of beneficiaries, it can only be exercised in favor of such beneficiaries or class, and any attempt to exercise it in favor of others is void,[26] at least in so far

Pennsylvania. — Ingersoll's Estate, 3 Pa. Dist. 399; Horner's Estate, 4 Pa. Co. Ct. 189.

Texas. — Hanna *v.* Lodewig, 73 Tex. 37, 11 S. W. 133.

England. — Taylor *v.* Allhusen, [1905] 1 Ch. 529, 74 L. J. Ch. 350, 92 L. T. Rep. N. S. 382, 53 Wkly. Rep. 523; Wood *v.* Wood, L. R. 10 Eq. 220, 39 L. J. Ch. 790, 23 L. T. Rep. N. S. 295, 18 Wkly. Rep. 819 (exercise in favor of donee and her husband); Langley *v.* Fisher, 9 Beav. 90, 15 L. J. Ch. 73, 50 Eng. Reprint 277; Sutton *v.* Southern, 5 L. J. Ch. 185 (exercise by donee in favor of her husband).

Canada. — *Re* Patterson, 5 Manitoba 274, 8 Can. L. T. 153 (exercise by husband and wife by deed in favor of husband); Higginson *v.* Kerr, 30 Ont. 62; Fenton *v.* Cross, 7 Grant Ch. (U. C.) 20.

See 40 Cent. Dig. tit. "Powers," § 38.

23. *New Jersey.* — Mutual L. Ins. Co. *v.* Everett, 40 N. J. Eq. 345, 3 Atl. 126.

North Carolina. — Hicks *v.* Ward, 107 N. C. 392, 12 S. E. 318, 10 L. R. A. 821.

South Carolina. — Manning *v.* Screven, 56 S. C. 78, 34 S. E. 22.

Texas. — Hanna *v.* Ladewig, 73 Tex. 37, 11 S. W. 133, exercise by conveyance good, whatever the motive or consideration, and a subsequent reconveyance to the donee of the power immaterial.

England. — Taylor *v.* Allhusen, [1905] 1 Ch. 529, 74 L. J. Ch. 350, 92 L. T. Rep. N. S. 382, 53 Wkly. Rep. 523; Wood *v.* Wood, L. R. 10 Eq. 220, 39 L. J. Ch. 790, 23 L. T. Rep. N. S. 295, 18 Wkly. Rep. 819; Meade King *v.* Warren, 32 Beav. 111, 55 Eng. Reprint 44, appointment under power in a marriage settlement to the donee herself absolutely, to the exclusion of the other persons entitled under the settlement. And see Cambridge *v.* Rous, 25 Beav. 574, 53 Eng. Reprint 756.

Canada. — *Re* Patterson, 5 Manitoba 274, 8 Can. L. T. 153; Higginson *v.* Ker, 30 Ont. 62 (holding that executors were given an absolute power of appointment, which they might exercise in favor of themselves or any other person or persons); Fenton *v.* Cross, 7 Grant Ch. (U. C.) 20.

See 40 Cent. Dig. tit. "Powers," § 39.

24. Ingersoll's Estate, 3 Pa. Dist. 399.

25. Hicks *v.* Ward, 107 N. C. 392, 12 S. E. 318, 10 L. R. A. 821. See also Manning *v.* Screven, 56 S. C. 78, 34 S. E. 22.

Power to mortgage under power of appointment see *infra*, V, B, 1, g, (II).

26. *Alabama.* — Thorington *v.* Hall, 111 Ala. 323, 21 So. 335, 56 Am. St. Rep. 54.

Kentucky. — Lasley *v.* Blakeman, 4 B. Mon. 539.

Maryland. — Smith *v.* Hardesty, 88 Md. 387, 41 Atl. 788; Myers *v.* Baltimore Safe-Deposit, etc., Co., 73 Md. 413, 21 Atl. 58.

Massachusetts. — Loring *v.* Wilson, 174 Mass. 132, 54 N. E. 502; Loring *v.* Blake, 98 Mass. 253.

New Hampshire. — Varrell *v.* Wendell, 20 N. H. 431.

New Jersey. — Cochran *v.* Elwell, 46 N. J. Eq. 333, 19 Atl. 672; Lippincott *v.* Ridgway, 11 N. J. Eq. 526.

New York. — Drake *v.* Drake, 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664 [*affirming* 56 Hun 590, 10 N. Y. Suppl. 183]; Austin *v.* Oakes, 117 N. Y. 577, 23 N. E. 193 [*modifying* 48 Hun 492, 1 N. Y. Suppl. 307]; Stewart *v.* Keating, 15 Misc. 44, 36 N. Y. Suppl. 913.

North Carolina. — Carson *v.* Carson, 62 N. C. 57; Rankin *v.* Hoyle, 41 N. C. 161.

Ohio. — Huber *v.* Free, 12 Ohio Cir. Ct. 333, 5 Ohio Cir. Dec. 537.

Pennsylvania. — Wickersham *v.* Savage, 58 Pa. St. 365; Horwitz *v.* Norris, 49 Pa. St. 213; Salter *v.* Howell, 15 Serg. & R. 188; Foterall's Estate, 2 Pa. Dist. 146, 12 Pa. Co. Ct. 548.

South Carolina. — Snoddy *v.* Snoddy, 1 Strobh. Eq. 84.

Tennessee. — Herrick *v.* Fowler, 108 Tenn. 410, 67 S. W. 861; Cruse *v.* McKee, 2 Head 1, 73 Am. Dec. 186.

Vermont. — Parks *v.* American Home Missionary Soc., 62 Vt. 19, 20 Atl. 107, where a will gave the use of testator's estate to his wife for life "and so much of the principal as she may see fit to use for her necessary and comfortable support, and for charitable and benevolent purposes, and contributions for worthy objects, in her own discretion, without limitation or restriction on my part, believing she will exercise prudence and good discretion"; and it was held that she could not give away the principal to her friends or relatives, and therefore that the assignment of certain shares of stock to a member of her family in consideration of past kindness was void.

Virginia. — Hood *v.* Haden, 82 Va. 588; Harrison *v.* Harrison, 2 Gratt. 1, 44 Am. Dec. 365; Knight *v.* Yarbrough, Gilm. 27; Morris *v.* Owen, 2 Call 520.

England. — *In re* Hancock, [1896] 2 Ch. 173, 65 L. J. Ch. 690, 74 L. T. Rep. N. S. 658, 44 Wkly. Rep. 545; Palmer *v.* Wheeler, 2 Ball & B. 18, 12 Rev. Rep. 60; Denning *v.* Ellerton, 26 Beav. 231, 53 Eng. Reprint 886; Lloyd *v.* Lloyd, 26 Beav. 96, 53 Eng. Reprint 833; Brown *v.* Nisbett, 1 Cox Ch. 13, 29 Eng. Reprint 1040 (under power to appoint to daughters does not authorize appointment to their executors); *In re* Chambers, 11 Ir. Eq.

as the power is exceeded;[27] and this is true whether the appointment be made directly or indirectly in favor of a stranger.[28] The rule applies of course to an attempt to exercise the power wholly or partially in favor of the donee of the power himself or of his estate,[29] unless he is one of the class of beneficiaries specified in the power;[30] and to an attempt to exercise it in favor of the parent[31] or the children or other descendants[32] of a beneficiary. A power of appointment cannot be exercised in favor of the husband or wife of a beneficiary,[33] except, in

518; Ratcliffe *v.* Hampson, 1 Jur. N. S. 1104, 4 Wkly. Rep. 67; Fox *v.* Charlton, 6 L. T. Rep. N. S. 743, 10 Wkly. Rep. 506; Chester *v.* Chadwick, 13 Sim. 102, 36 Eng. Ch. 102, 60 Eng. Reprint 40.

Canada.— Bell *v.* Lee, 8 Ont. App. 185, 3 Can. L. T. Occ. Notes 197; Rogerson *v.* Campbell, 10 Ont. L. Rep. 748, 6 Ont. Wkly. Rep. 617.

See 40 Cent. Dig. tit. "Powers," §§ 39, 41.

27. **Partial invalidity of execution of power** see *infra*, VI, I, 3.

28. Bell *v.* Lee, 8 Ont. App. 185, 3 Can. L. T. Occ. Notes 197. In this case a testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or to his brother or sister, and by his will he gave about one fourth of the estate to two of his children, and as to the residue appointed the same to his brother, desiring him to first pay his (testator's) indebtedness to his father's estate, and to release his policy of insurance from such indebtedness, and then gave the policy and all moneys arising therefrom to a stranger. It was held that the appointment to the children was valid, but the appointment to the brother was invalid, as being a fraudulent exercise of the power, inasmuch as the stranger indirectly got the benefit of the appointment to the brother. Herrick *v.* Fowler, 108 Tenn. 410, 67 S. W. 861 (cannot encumber by a charge); Rogerson *v.* Campbell, 10 Ont. L. T. Rep. 748 (holding that a limitation upon the power to appoint land cannot be evaded by giving legacies to persons not the objects of the power and making them a charge on the land, or by directing that a person not an object of the power (the husband of the donee) may occupy the land for one year). And see *infra*, VI, I, 2.

29. Cochran *v.* Elwell, 46 N. J. Eq. 333, 19 Atl. 672 (holding that the donee of power to appoint a fund among certain beneficiaries could not charge the fund with payment of the expense of settling her estate); Shank *v.* Dewitt, 44 Ohio St. 237, 6 N. E. 255 [*reversing* 8 Ohio Dec. (Reprint) 574, 9 Cinc. L. Bul. 23]; *In re* Sinclair, Ir. R. 2 Eq. 45, 16 Wkly. Rep. 420 (holding that where a man left his property to his wife in trust for herself and the children of the marriage as she should by deed or will appoint, this was a power to appoint to the children and not to herself, and that an appointment to herself, reserving only one-millionth part to the children, was bad); Bell *v.* Lee, 8 Ont. App. 185, 3 Can. L. T. Occ. Notes 197 (referred to *supra*, note 28).

Benefit to donee of power see *infra*, VI, I, 2, c.

30. Taylor *v.* Allhusen, [1905] 1 Ch. 529, 74 L. J. Ch. 350, 92 L. T. Rep. N. S. 382, 53 Wkly. Rep. 523, where, under the terms of a settlement, trust funds were to be held in trust for such persons and purposes and in such manner as the settlor should appoint, "so only that every such appointment be made to or in favour of a grandchild or grandchildren" of the settlor's grandfather; and it was held that as the settlor was herself a member of the class, there was no reason why she could not appoint the trust funds to herself.

31. Lloyd *v.* Lloyd, 26 Beav. 96, 53 Eng. Reprint 833 (holding that where there was a power to appoint to children "with such directions or regulations for maintenance, education and advancement as their mother should appoint," and she appointed the income to the children's father until the younger should attain the age of twenty-one, "in or toward the maintenance and education" of the children, the appointment was invalid); Chester *v.* Chadwick, 13 Sim. 102, 36 Eng. Ch. 102, 60 Eng. Reprint 40 (power to appoint to children does not authorize appointment of the income to their mother for life to be applied in her discretion for their interest, with remainder to the children). See also White *v.* Grane, 18 Beav. 571, 23 L. J. Ch. 863, 2 Wkly. Rep. 320, 52 Eng. Reprint 224. But where property was settled on a woman for life for her separate use, without power of anticipation, with remainder to the husband for life, with remainder to their children, and a power was given to the wife during her life to dispose of the principal for the purpose of educating or advancing the children or to answer any other occasion, it was held that the wife was authorized to execute the power in favor of the husband. Sutton *v.* Southern, 5 L. J. Ch. 185.

32. *Alabama.*— Thorington *v.* Hall, 111 Ala. 323, 21 So. 335, 56 Am. St. Rep. 54, holding that a power of appointment in favor of certain named children cannot be exercised in favor of grandchildren.

Kentucky.— Lasley *v.* Blakeman, 4 B. Mon. 539.

New Jersey.— Lippincott *v.* Ridgway, 11 N. J. Eq. 526.

Pennsylvania.— Fotterall's Estate, 2 Pa. Dist. 146, 12 Pa. Co. Ct. 548.

South Carolina.— Snoddy *v.* Snoddy, 1 Strobh. Eq. 84.

Virginia.— Morris *v.* Owen, 2 Call 520.

See 40 Cent. Dig. tit. "Powers," § 39. And see *infra*, V, B, 1, c, (II), (B).

33. Hambury *v.* Tyrell, 21 Beav. 322, 52 Eng. Reprint 883; Ratcliffe *v.* Hampson, 1 Jur. N. S. 1104, 4 Wkly. Rep. 67.

the case of the husband of a beneficiary, by giving him what he would be entitled to by law if the appointment were directly to the wife.[34]

(B) *Children.* In the absence of a statute, a power of appointment among the children generally, or among particular children, of a donor, donee, or other person does not authorize either a general or partial appointment to his grandchildren or remoter descendants,[35] even though there be no children living at the time the power is executed,[36] unless an intention to include grandchildren is manifest from the instrument creating the power.[37] The rule does not apply of course where the power is to appoint to children or their descendant or descendants.[38]

34. Wombwell *v.* Hanrott, 14 Beav. 143, 20 L. J. Ch. 581, 51 Eng. Reprint 241 (holding that where a mother had a power of appointment to her daughters, and on the marriage of one of them appointed that a moiety of the fund should be vested in her or her intended husband in her right, and to be paid to the husband, the appointment was valid, although the husband was not an object of the power); Bristow *v.* Warde, 2 Ves. Jr. 336, 2 Rev. Rep. 235, 30 Eng. Reprint 660 (sustaining, under a power to appoint among children, an appointment to the husband of a daughter for life, and if she survived him, then to her for life).

35. *Alabama.*— Thorington *v.* Hall, 111 Ala. 323, 21 So. 335, 56 Am. St. Rep. 54.

Kentucky.— Lasley *v.* Blakeman, 4 B. Mon. 539, cannot give child a life-estate and grandchild the remainder.

Maryland.— Smith *v.* Hardesty, 88 Md. 387, 41 Atl. 788.

North Carolina.—Carson *v.* Carson, 62 N. C. 57; Little *v.* Bennett, 58 N. C. 156; Rankin *v.* Hoyle, 41 N. C. 161.

Pennsylvania.— Horwitz *v.* Norris, 49 Pa. St. 213. And see Pepper's Will, 120 Pa. St. 235, 13 Atl. 929; Wickersham *v.* Savage, 58 Pa. St. 365; Salter *v.* Howell, 15 Serg. & R. 188.

South Carolina.— Snoddy *v.* Snoddy, 1 Strobh. Eq. 84.

Tennessee.— Herriek *v.* Fowler, 108 Tenn. 410, 67 S. W. 861; Cruse *v.* McKee, 2 Head 1, 73 Am. Dec. 186; Jarnagin *v.* Conway, 2 Humphr. 50.

Virginia.— Hood *v.* Haden, 82 Va. 588; Morris *v.* Owen, 2 Call 520.

England.— Robinson *v.* Hardeastle, 2 Bro. Ch. 344, 29 Eng. Reprint 193; Pitt *v.* Jackson, 2 Bro. Ch. 51, 29 Eng. Reprint 27; Kennerley *v.* Kennerley, 10 Hare 160, 16 Jur. 649, 44 Eng. Ch. 155, 68 Eng. Reprint 880; Hewett *v.* Daere, 2 Jur. 836, 2 Keen 622, 7 L. J. Ch. 295, 15 Eng. Ch. 622, 48 Eng. Reprint 768; Neatherway *v.* Fry, Kay 172, 23 L. J. Ch. 222, 69 Eng. Reprint 73 [*distinguishing* Fox *v.* Gregg, 2 Sugd. Pow. App. No. 23]; Jones *v.* Torin, 6 Sim. 255, 9 Eng. Ch. 255, 58 Eng. Reprint 589 (descendants); Alexander *v.* Alexander, 2 Ves. 640, 28 Eng. Reprint 408; Smith *v.* Camelford, 2 Ves. Jr. 698, 3 Rev. Rep. 36, 30 Eng. Reprint 848; Butcher *v.* Butcher, 1 Ves. & B. 79, 12 Rev. Rep. 193, 35 Eng. Reprint 31 [*affirming* 9 Ves. Jr. 382, 32 Eng. Reprint 650]; Whistler *v.* Webster, 2 Ves. Jr. 366, 2 Rev. Rep. 260, 30 Eng. Reprint 676; Bristow *v.* Warde, 2 Ves. Jr. 336, 2 Rev. Rep. 235, 30 Eng. Reprint 660.

See 40 Cent. Dig. tit. "Powers," § 39.

Construction of statute.— This rule has in some jurisdictions been changed by statute; but a statute providing that "when a disposition under an appointment or power is directed to be made to the children of any person, without restricting it to any particular children, it may be exercised in favor of the grandchildren or other descendants of such person" (Ala. Code, § 1862), does not authorize one, given a power of appointment to three named children of the testator, to make an appointment to two of them and the children of the third, who is deceased, at least where it does not appear that testator had no children other than those named. Thorington *v.* Hale, 111 Ala. 323, 21 So. 335, 56 Am. St. Rep. 54.

Children of second marriage.— Power given to a wife by her husband's will to appoint among his children gives her no power to include in the appointment her children by a second marriage. Huber *v.* Free, 12 Ohio Cir. Ct. 333, 5 Ohio Cir. Dec. 537.

36. Smith *v.* Hardesty, 88 Md. 387, 41 Atl. 788; Snoddy *v.* Snoddy, 1 Strobh. Eq. (S. C.) 84.

37. Ingraham *v.* Meade, 13 Fed. Cas. No. 7,045, 3 Wall. Jr. 32 (where the issue of children were provided for in default of appointment in the same clause in which children alone were mentioned as entitled to receive under appointment); Langston *v.* Blackmore, Ambl. 289, 27 Eng. Reprint 194; Fowler *v.* Cohn, 21 Beav. 360, 2 Jur. N. S. 315, 4 Wkly. Rep. 412, 52 Eng. Reprint 898 (holding that an appointment to a grandchild was authorized by a devise to the use of the children of A "and their heirs" for such estates and in such manner and form as A should by deed appoint; and in default of such appointment, to the use of all the children of said A and the several and respective heirs of the bodies of all and every such children); Harley *v.* Mitford, 21 Beav. 280, 52 Eng. Reprint 867 ("children" and "issue" used interchangeably in will); *Ex p.* Williams, 1 Jac. & W. 89, 20 Rev. Rep. 231, 37 Eng. Reprint 309; Tucker *v.* Sanger, McClell. 449, 13 Price 609; Dalzell *v.* Welch, 2 Sim. 319, 29 Rev. Rep. 110, 2 Eng. Ch. 319, 57 Eng. Reprint 808 ("child or children" construed to mean "issue").

38. Hillen *v.* Iselin, 144 N. Y. 365, 39 N. E. 368 [*affirming* 67 Hun 444, 22 N. Y. Suppl. 282], where a testator devised land

Illegitimate children cannot take under a power of appointment limited to children,[39] and even where natural children are named as the beneficiaries, such as are born after the creation of the power cannot take, although *en ventre sa mere* at that time.[40] Power to appoint to children does not include a son-in-law;[41] and under a power of appointment to the children of a person living at the death of such person appointment to a child dying in his lifetime is void.[42]

(c) *Issue.* The word "issue" in a will or other instrument creating a power of appointment means all descendants, to any remote degree,[43] unless the context or other provisions of the instrument in which it is used, and such circumstances as may legitimately bear in that direction, show it to have been used in the more restricted sense of "children."[44] Where a power of appointment is created in favor of a particular person "or" his issue, it has been held that the word "or" is to be taken in a discretionary, rather than a substitutional, sense, and that the power may be exercised in favor of the issue to the exclusion of such person.[45] A power of appointment between children of a donee and the issue of such children as may die before the donee is improperly exercised by an appointment to the issue of living children.[46]

(d) *Family and Next of Kin.* A power of appointment among the "family"

to his wife for life, and empowered her to divide and parcel out the same among his sons upon such terms and conditions as she should deem just and right, and provided that in case of no division before her death the lands should go to the sons and their heirs, it was held that, upon the death of a son, the widow could allot his portion to his heirs. Schwartz's Estate, 168 Pa. St. 204, 31 Atl. 1085.

"Child" or "children" may mean "issue," and thus include grandchildren or other descendants. Dalzell *v.* Welch, 2 Sim. 319, 29 Rev. Rep. 110, 2 Eng. Ch. 319, 57 Eng. Reprint 808. And see Harley *v.* Mitford, 21 Beav. 280, 52 Eng. Reprint 867.

Issue see *infra*, V, B, 1, c, (II), (C).

39. Dorin *v.* Dorin, L. R. 7 H. L. 568, 46 L. J. Ch. 652, 33 L. T. Rep. N.S. 281, 23 Wkly. Rep. 570; *In re* Kerr, 4 Ch. D. 600, 46 L. J. Ch. 287, 36 L. T. Rep. N. S. 356, 25 Wkly. Rep. 390; Dover *v.* Alexander, 2 Hare 275, 7 Jur. 124, 12 L. J. Ch. 175, 24 Eng. Ch. 275, 67 Eng. Reprint 114; Vanderzee *v.* Aclom, 4 Ves. Jr. 771, 31 Eng. Reprint 399.

"Family" see *infra*, V, B, 1, c, (II), (D).

40. Metham *v.* Devnon, 1 P. Wms. 529, 24 Eng. Reprint 502.

41. Knight *v.* Yarbrough, Gilmer (Va.) 27; Ratcliffe *v.* Hampson, 1 Jur. N. S. 1104, 4 Wkly. Rep. 67.

42. Denning *v.* Ellerton, 26 Beav. 231, 53 Eng. Reprint 886.

43. Drake *v.* Drake, 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664 [*affirming* 56 Hun 590, 10 N. Y. Suppl. 183]; Glenn *v.* Glenn, 2 S. C. 308; *In re* Warren, 26 Ch. D. 208, 53 L. J. Ch. 787, 50 L. T. Rep. N. S. 454, 32 Wkly. Rep. 641; Harley *v.* Mitford, 21 Beav. 280, 52 Eng. Reprint 867; Hockley *v.* Mawbey, 3 Bro. Ch. 82, 29 Eng. Reprint 420, 1 Ves. Jr. 150, 1 Rev. Rep. 93, 30 Eng. Reprint 271; Dalzell *v.* Welch, 2 Sim. 319, 29 Rev. Rep. 110, 2 Eng. Ch. 319, 57 Eng. Reprint 808; Leigh *v.* Norbury, 13 Ves. Jr. 340, 33 Eng. Reprint 321; Routledge *v.* Dorril, 2 Ves. Jr. 357, 2 Rev. Rep. 250, 30 Eng. Reprint 671; Harrison *v.* Symons, 14 Wkly. Rep. 959.

A power of distribution among the issue of the donee can only be exercised in favor of issue living during his lifetime. Hockley *v.* Mawbey, 3 Bro. Ch. 82, 29 Eng. Reprint 420, 1 Ves. Jr. 143, 1 Rev. Rep. 93, 30 Eng. Reprint 271.

Intention necessary to restrain "issue" to "children" see Leigh *v.* Norbury, 13 Ves. Jr. 340, 33 Eng. Reprint 321.

"Issue" may have different meanings in different parts of the same will or deed, and it is not an inflexible rule that, because the word evidently means "children," in the proper sense of the term, in one part it must necessarily be so construed in another part. *In re* Warren, 26 Ch. D. 208, 53 L. J. Ch. 787, 50 L. T. Rep. N. S. 454, 32 Wkly. Rep. 641. And see Drake *v.* Drake, 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664 [*affirming* 56 Hun 540, 10 N. Y. Suppl. 183].

"Children" held not to cut down technical meaning of "issue" see Harrison *v.* Symons, 14 Wkly. Rep. 959.

Issue construed to take per stirpes see Robinson *v.* Sykes, 23 Beav. 40, 2 Jur. N. S. 895, 26 L. J. Ch. 782, 53 Eng. Reprint 16.

44. Drake *v.* Drake, 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664 [*affirming* 56 Hun 590, 10 N. Y. Suppl. 183]; Lees *v.* Lees, Ir. R. 5 Eq. 549 (where marriage articles contained no limitation over in default of appointment among "issue," and the word "issue" was confined to children of the marriage); Swift *v.* Swift, 5 L. J. Ch. 376, 8 Sim. 168, 8 Eng. Ch. 168, 59 Eng. Reprint 67 ("issue" construed "child").

45. Drake *v.* Drake, 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664 [*affirming* 56 Hun 590, 10 N. Y. Suppl. 183]. See also Hillen *v.* Iselin, 144 N. Y. 365, 39 N. E. 368 [*affirming* 67 Hun 444, 22 N. Y. Suppl. 282], where the power was to appoint to a child, or its descendants.

46. Fotterall's Estate, 2 Pa. Dist. 146.

or "next of kin" of the donee or other person will receive a liberal construction. Thus it has been held that an illegitimate child [47] or grandchild [48] is a proper object of a power of appointment to or among one's "family"; and where a power is given a person to appoint a fund among his own family or next of kin, he is not confined to his statutory next of kin, but may appoint to any relative.[49] On the other hand a power to appoint for the benefit of a married woman and her family will not as a rule include the husband; [50] and it has been held that a testamentary gift by a man to his "family" should be read as a gift to his "children" to the exclusion of his wife.[51] In construing the word "family" a distinction has been made between powers of selection and powers of distribution, and it is held that a less restricted construction will be applied in the former than in the latter case.[52]

(E) *Husband and Wife.* Where a power of appointment is exercisable in favor of the wife of a person, the question as to what wife is meant, whether of a first or subsequent marriage, is wholly dependent upon the intention of the donor as shown by the instrument creating the power.[53] Where a wife had power to appoint the income to her husband as long as he should continue a widower, to apply it to the maintenance of her children, it was held that the husband was entitled to the income until he should marry again, although there were no children.[54]

(F) *Nephews and Nieces.* A power to appoint among nephews and nieces does not extend to great-nephews and great-nieces; [55] nor does a power to appoint to great-nephews and nieces extend to their children.[56]

(G) *Relations.* Where the donee has a power of selecting among relations, the power extends to relations at large, and is not confined to the next of kin.[57]

47. Humble *v.* Bowman, 47 L. J. Ch. 62, holding that an illegitimate child whom the testator had treated and recognized as his child was included as an object of a power to appoint testator's family, the term "family" including such an illegitimate child.

48. Lambe *v.* Eames, L. R. 6 Ch. 597, 40 L. J. Ch. 447, 25 L. T. Rep. N. S. 175, 19 Wkly. Rep. 659, illegitimate grandchild.

49. Snow *v.* Teed, L. R. 9 Eq. 622, 39 L. J. Ch. 420, 23 L. T. Rep. N. S. 303, 18 Wkly. Rep. 623.

In New York, however, under a power to give to any of the male descendants of the "family" of a testator bearing his surname, it was held that the word "family" meant "children" of the testator. Dominick *v.* Sayre, 3 Sandf. (N. Y.) 555.

If the donee does not exercise the power, the word "family" will be construed to mean legal "next of kin." Grant *v.* Lynam, 6 L. J. Ch. O. S. 129, 4 Russ. 292, 28 Rev. Rep. 97, 4 Eng. Ch. 292, 38 Eng. Reprint 815. See also Cruwys *v.* Colman, 9 Ves. Jr. 319, 7 Rev. Rep. 210, 32 Eng. Reprint 626.

50. See MacLeroth *v.* Bacon, 5 Ves. Jr. 159, 5 Rev. Rep. 11, 31 Eng. Reprint 523, where, however, an appointment in favor of the husband was upheld under the terms of the will.

51. *In re* Hutchinson, 8 Ch. D. 540, 39 L. T. Rep. N. S. 86, 26 Wkly. Rep. 904.

52. Sinnott *v.* Walsh, L. R. 3 Ir. 12, L. R. 5 Ir. 27.

53. See the cases cited *infra*, this note.

Restriction to present wife by terms of marriage settlement.— *In re* Hancock, [1896] 2 Ch. 173, 65 L. J. Ch. 690, 74 L. T. Rep. N. S. 658, 44 Wkly. Rep. 545. See also *In re* Sheridan, L. R. 1 Ir. 54.

Power exercisable in favor of any wife.— Mason *v.* Mason, 19 Wkly. Rep. 741.

Power confined to future wife.— Dillon *v.* Dillon, 11 Ir. Eq. 423. See also Mills *v.* Mills, 8 Ir. Eq. 192.

Power exercisable in favor of both first and second wife.— Maultby *v.* Maultby, 2 Ir. Ch. 32.

Effect of divorce.— Where a marriage was dissolved, but before the decree became absolute, the husband married A abroad, and by a prior settlement a power was reserved to him to appoint a life-interest to any surviving wife, it was held that A was an object of the power, irrespective of the validity of her marriage. Dolby *v.* Powell, 30 Beav. 534, 54 Eng. Reprint 996.

54. *Re* Main, 15 Wkly. Rep. 216.

55. Salter *v.* Howell, 15 Serg. & R. (Pa.) 188; Falkner *v.* Butler, Ambl. 514, 27 Eng. Reprint 332.

56. Waring *v.* Lee, 8 Beav. 247, 9 Jur. 170, 50 Eng. Reprint 97.

57. Williams *v.* Burrows, 1 Ohio Dec. (Reprint) 218, 4 West. L. J. 527; Huling *v.* Fenner, 9 R. I. 410; Sinnott *v.* Walsh, L. R. 3 Ir. 12; Supple *v.* Lowson, Ambl. 729, 27 Eng. Reprint 471; Harding *v.* Glyn, 1 Atk. 469, 26 Eng. Reprint 299; Grant *v.* Lynam, 6 L. J. Ch. O. S. 129, 4 Russ. 292, 28 Rev. Rep. 97, 4 Eng. Ch. 292, 38 Eng. Reprint 815; Lee *v.* Okey, 5 L. J. Exch. 44, 1 Y. & C. Exch. 550; Forbes *v.* Ball, 3 Meriv. 437, 36 Eng. Reprint 168; Mahon *v.* Savage, 1 Sch. & Lef. 111; Spring *v.* Biles, 1 T. R. 435 note; Cruwys *v.* Colman, 9 Ves. Jr. 319, 7 Rev.

But where the donee has merely a power to appoint among relatives, and not among such of them as he thinks proper, he is confined in his appointment to the next of kin within the statute;[58] and the next of kin are such as are living at the time of the execution of the power, and not such as were living at the time of its creation.[59] In default of appointment, the fund will, without reference to whether the power was exclusive or merely distributive, be divided amongst the statutory next of kin, unless a contrary intent appear in the instrument.[60]

(H) *Death of Objects.* The exercise of a power of appointment in favor of a deceased person or his personal representative is void.[61] Where there is a power to divide a fund amongst the members of a particular class, the death of some of the members of that class before the exercise of the power will not prevent its exercise in favor of the survivors.[62]

d. Property, Estates, or Interests Included. What property, estates, or interests are included in a power of appointment is a matter of construction, and necessarily depends upon the terms of the instrument creating the power.[63]

e. Shares to Be Appointed, and Selection, Equality, and Exclusion of Appointees — (I) *In General.* The shares to be appointed and the selection,

Rep. 210, 32 Eng. Reprint 626. But see Brudsden *v.* Woolredge, Ambl. 507, 27 Eng. Reprint 327.

58. Varrell *v.* Wendell, 20 N. H. 431; *In re* Deakin, [1894] 3 Ch. 565, 63 L. J. Ch. 779, 71 L. T. Rep. N. S. 838, 8 Reports 702, 43 Wkly. Rep. 70 (notwithstanding the Powers Law Amendment Act of 1874); Pope *v.* Whiteombe, 3 Meriv. 689, 17 Rev. Rep. 171, 686, 36 Eng. Reprint 264; Cruwys *v.* Colman, 9 Ves. Jr. 319, 7 Rev. Rep. 210, 32 Eng. Reprint 626.

Where the donee was illegitimate, to the knowledge of the donor, it was held that the persons among whom the property was divisible were the persons, being legitimate, who would have been the statutory next of kin of the donee at her death, if she had been legitimate. *In re* Deakin, [1894] 3 Ch. 565, 63 L. J. Ch. 779, 71 L. T. Rep. N. S. 838, 8 Reports 702, 43 Wkly. Rep. 70. But *compare In re* Standley, L. R. 5 Eq. 303.

59. Fineh *v.* Hollingsworth, 21 Beav. 112, 3 Eq. Rep. 993, 1 Jur. N. S. 718, 25 L. J. Ch. 55, 3 Wkly. Rep. 589, 52 Eng. Reprint 801 [*explaining* Pope *v.* Whiteombe, 3 Meriv. 689, 17 Rev. Rep. 171, 686, 36 Eng. Reprint 264, which is said in 2 Sugden Powers 250, to be ineorreetly reported, a eorreet report being given in his appendix, No. 29].

60. Grant *v.* Lynam, 6 L. J. Ch. O. S. 129, 4 Russ. 292, 28 Rev. Rep. 97, 4 Eng. Ch. 292, 38 Eng. Reprint 815; Bireh *v.* Wade, 3 Ves. & B. 198, 13 Rev. Rep. 181, 35 Eng. Reprint 454; Cruwys *v.* Colman, 9 Ves. Jr. 319, 7 Rev. Rep. 210, 32 Eng. Reprint 626. See also *Re* Caplin, 2 Dr. & Sm. 527, 11 Jur. N. S. 383, 34 L. J. Ch. 578, 12 L. T. Rep. N. S. 526, 6 New Rep. 17, 13 Wkly. Rep. 646, 62 Eng. Reprint 720.

Relations decreed to take share and share alike.— Harding *v.* Glyn, 1 Atk. 469, 26 Eng. Reprint 299; Casterton *v.* Sutherland, 9 Ves. Jr. 445, 32 Eng. Reprint 674; Reade *v.* Reade, 5 Ves. Jr. 744, 31 Eng. Reprint 836; Fortescue *v.* Gregor, 5 Ves. Jr. 553, 31 Eng. Reprint 734; Doyley *v.* Atty.-Gen., 4 Vin. Abr. 485 Pl. 16. But see Pope *v.* Whiteombe, 3 Meriv. 689, 17 Rev. Rep. 171, 686, 36 Eng. Reprint 264, which, however, is said to be incorrectly reported; a corrected report being given in 2 Sugden Powers, App. No. 29.

61. Buteher *v.* Buteher, 1 Ves. & B. 79, 12 Rev. 193, 35 Eng. Reprint 31 [*affirming* 9 Ves. Jr. 382, 32 Eng. Reprint 650].

62. Paske *v.* Haselfoot, 33 Beav. 125, 9 Jur. N. S. 1047, 9 L. T. Rep. N. S. 75, 2 New Rep. 568, 11 Wkly. Rep. 1089, 55 Eng. Reprint 314. See also *In re* Ware, 45 Ch. D. 269, 59 L. J. Ch. 717, 63 L. T. Rep. N. S. 52, 38 Wkly. Rep. 767; *In re* Capon, 10 Ch. D. 484, 48 L. J. Ch. 355, 27 Wkly. Rep. 376; Woodeoek *v.* Renneck, 4 Beav. 190, 49 Eng. Reprint 311 [*affirmed* in 6 Jur. 138, 11 L. J. Ch. 110, 1 Phil. 72, 19 Eng. Ch. 72, 41 Eng. Reprint 558]; Boyle *v.* Peterborough, 3 Bro. Ch. 243, 29 Eng. Reprint 514, 1 Ves. Jr. 299, 30 Eng. Reprint 353, 2 Rev. Rep. 108; Colston *v.* Pemberton, 5 L. J. Ch. 181; Houstoun *v.* Houstoun, 1 L. J. Ch. 50, 4 Sim. 611, 6 Eng. Ch. 611, 58 Eng. Reprint 299; Buteher *v.* Butcher, 1 Ves. & B. 91, 12 Rev. Rep. 193, 35 Eng. Reprint 31 [*affirming* 9 Ves. Jr. 382, 32 Eng. Reprint 650]; Rieketts *v.* Loftus, 4 Y. & C. Exeh. 519. But see Reade *v.* Reade, 5 Ves. Jr. 744, 31 Eng. Reprint 836.

63. *Illinois.*— Pulliam *v.* Christy, 19 Ill. 331, holding that a wife eould not dispose of her life-estate.

Maryland.— Franke *v.* Auerbaeh, 72 Md. 580, 20 Atl. 129 (power to make advaneements including real as well as personal property); Cooke *v.* Husbands, 11 Md. 492 (power of disposition limited to rents and profits, and no power to convey fee).

New York.— Mott *v.* Aekerman, 92 N. Y. 539 (power of appointment relating to remainder in fee); Fothergill *v.* Fothergill, 80 Hun 316, 30 N. Y. Suppl. 292 (power of wife to dispose of one third of whole estate, and not of her dower interest merely); Cruger *v.* Cruger, 5 Barb. 225 (power of wife to dispose of the principal, or the ineome only, or any part of either).

Pennsylvania.— *In re* Wood, 1 Pa. St. 368, where it was held that there was no power

equality, and exclusion of appointees depend of course upon the construction of the instrument creating the power.[64] A power to dispose by will of a certain sum of money out of a larger fund, to one class, and the balance of the fund to another class, with an alternative disposition by the donor of the power upon failure to make such distribution, is not validly executed by appointing a larger sum to the one class, and the balance of the fund to members of the second class not mentioned in the alternative disposition made by the donor.[65]

(II) *Under Exclusive Power.* A power to appoint to certain objects or any of them in the discretion of the donee is an exclusive power, and may be exercised by the donee by appointing to such of the objects, excluding others, and in such shares as he may see fit.[66] The donee is, however, confined in his

to devise land under power to direct division of proceeds of sale thereof.

South Carolina.— Fronty *v.* Fronty, Bailey Eq. 517, power to dispose of remainder.

Tennessee.— Pate *v.* Pierce, 4 Coldw. 104, either real or personal property by way of advancements.

Virginia.— Mitchells *v.* Johnson, 6 Leigh 461, where the power did not extend to the remainder.

England.— Beddington *v.* Baumann, [1903] A. C. 13, 72 L. J. Ch. 155, 87 L. T. Rep. N. S. 658, 19 T. L. R. 58, 51 Wkly. Rep. 383 [*approving In re* Dowsett, [1901] 1 Ch. 398, 70 L. J. Ch. 149, 49 Wkly. Rep. 268]; *In re* Curteis, L. R. 14 Eq. 217, 41 L. J. Ch. 631, 26 L. T. Rep. N. S. 863; Cross *v.* Wilks, 35 Beav. 562, 55 Eng. Reprint 1014; Phillips *v.* Brydon, 26 Beav. 77, 53 Eng. Reprint 826; Lefevre *v.* Freeland, 24 Beav. 403, 53 Eng. Reprint 413; Samuda *v.* Lousada, 7 Beav. 243, 29 Eng. Ch. 243, 49 Eng. Reprint 1058; *In re* Hutchinson, 5 De G. & Sm. 681, 17 Jur. 59, 64 Eng. Reprint 1297; *Re* Rickman, 80 L. T. Rep. N. S. 518.

See 40 Cent. Dig. tit. "Powers," § 40.

Power to appoint interest authorizes appointment of capital, notwithstanding a subsequent limitation of the said "trust moneys, and the interest." Phillips *v.* Brydon, 26 Beav. 77, 53 Eng. Reprint 826.

Power to appoint in default of appointment.— Where a settlement gives the wife surviving the husband a power to appoint, in default of appointment by him, such provision gives the wife a power of appointment in respect of any portion unappointed or not validly appointed by him. *Ex p.* Bernard, 6 Ir. Ch. 133.

64. See the cases cited in the notes following.

65. Rogers' Estate, 31 Pa. Super. Ct. 620 [*affirmed* in 218 Pa. St. 431, 67 Atl. 762].

66. *Maryland.*—Franke *v.* Auerbach, 72 Md. 580, 20 Atl. 129; Addison *v.* Bowie, 2 Bland 606, where the will authorized the donee to designate "any one or more" of the testator's children to take the lands devised.

New Jersey.— Cochran *v.* Elwell, 46 N. J. Eq. 333, 19 Atl. 672, power to donee to dispose of the property by will "to any of her children or grandchildren" that she might think proper.

New York.— Monzo *v.* Woodhouse, 185 N. Y. 295, 78 N. E. 71, 6 L. R. A. N. S. 746 [*affirming* 111 N. Y. App. Div. 80, 97 N. Y. Suppl. 653 (*affirming* 46 Misc. 352, 94 N. Y. Suppl. 835)].

Pennsylvania.— *In re* McNeile, 217 Pa. St. 179, 66 Atl. 328; Young's Appeal, 83 Pa. St. 59, where testator devised the residue of his estate to his wife for life, with power of appointment at her death between her and his relations equally, or such of them as she should think most worthy, and it was held that an appointment of one half of the estate to six of her relations and the other half to nineteen of his, in certain proportions, was good, and that it was not necessary to distribute the funds among the appointees *per capita.*

South Carolina.— Fronty *v.* Fronty, Bailey Eq. 517, where testator empowered his wife, "by her last will," etc., "to make some provision or portion" to their adopted child, whom he "recommended to her good and generous heart," and it was held that an appointment of two thirds of the estate to the child was valid.

Virginia.— Rhett *v.* Mason, 18 Gratt. 541, power "to dispose of all or any part of my estate, to our children or to any of them, at such times and in such proportions as she [the donee] may think just and prudent."

United States.— Ingraham *v.* Meade, 13 Fed. Cas. No. 7,045, 3 Wall. Jr. 32, power to appoint "among such of the children of R. & M. and in such proportions as M. may appoint."

England.— McGibbon *v.* Abbott, 10 App. Cas. 653, 54 L. J. P. C. 39, 54 L. T. Rep. N. S. 138 (power to appoint "to such son's children in such proportion as my said son shall decide by his last will and testament); *In re* Veale, 5 Ch. D. 622, 46 L. J. Ch. 799, 36 L. T. Rep. N. S. 634 ("to and amongst my other children or their issue in such parts, shares and proportions, manner and form, as my said daughter . . . shall . . . appoint"); Macey *v.* Shurmer, 1 Atk. 389, 26 Eng. Reprint 249 ("amongst all or such" children); Alloway *v.* Alloway, 2 C. & L. 509, 4 Dr. & War. 380 ("to and among" younger children, in such shares and proportions as donee should appoint); Dighton *v.* Tomlinson, Comyns 194, 10 Mod. 31, 88 Eng. Reprint 612, 1 P. Wms. 149, 24 Eng. Reprint 335, 1 Salk. 239, 91 Eng. Reprint 212 ("to any of" the objects); Bland *v.* Plummer, 9 L. T. Rep. N. S. 825 (power to appoint to "all and every or any child or children"); Tucker *v.* Sanger, McClell.

selection to the objects or class named, and an appointment by him to a stranger to the power is void.[67]

(III) *Under Non-Exclusive Power.* Under a power of appointment to or among certain persons or a class of persons, without words of exclusion, the property must be so distributed that all shall have some portion of it.[68] Unless

449, 13 Price 607 ("to the use of such of her child or children, and for such [of her] estate or estates, and in such shares and proportions, manner and form," as the donee should limit and appoint); Spring *v.* Biles, 1 T. R. 435 note ("to and amongst such" of my relations); Swift *v.* Gregson, 1 T. R. 432 ("to such child and children" as donee might appoint); Thomas *v.* Thomas, 2 Vern. Ch. 513, 23 Eng. Reprint 928 (power to appoint "to one or more" of objects as donee should think fit); Wollen *v.* Tanner, 5 Ves. Jr. 218, 31 Eng. Reprint 355 (power to appoint "to and among all such child or children").

Canada.— Brosseau *v.* Doré, 35 Can. Sup. Ct. 205, power to appoint estate among brothers and sisters or nephews and nieces who should be most in need of it.

See 40 Cent. Dig. tit. "Powers," § 41.

"Such."— Under a power to appoint to the use of such child or children, etc., an appointment to one is good. Kemp *v.* Kemp, 5 Ves. Jr. 849, 5 Rev. Rep. 182, 31 Eng. Reprint 891. See also Paske *v.* Haselfoot, 33 Beav. 125, 9 Jur. N. S. 75, 2 New Rep. 563, 11 Wkly. Rep. 1089, 55 Eng. Reprint 314; Turner *v.* Bryans, 31 Beav. 303, 54 Eng. Reprint 1155; Kenworthy *v.* Bate, 6 Ves. Jr. 793, 6 Rev. Rep. 46, 31 Eng. Reprint 1312.

Powers held exclusive, although no words of exclusion used see Burrell *v.* Burrell, Ambl. 660, 27 Eng. Reprint 428.

Power confined to one of class see Brown *v.* Higgs, 4 Ves. Jr. 708, 4 Rev. Rep. 323, 31 Eng. Reprint 366, where the point was raised, but not decided, whether a limitation to one of the sons of S, in default of heirs male of the body of J, as J should direct, should be construed a gift to all the sons, or merely to such son as J should appoint.

67. Shannon *v.* Pickell, 2 N. Y. St. 160.

68. *Alabama.*— Hatchett *v.* Hatchett, 103 Ala. 556, 16 So. 550.

Indiana.— Farmer *v.* Farmer, 93 Ind. 435.

Kentucky.— Clay *v.* Smallwood, 100 Ky. 212, 38 S. W. 7, 19 Ky. L. Rep. 50; Degman *v.* Degman, 98 Ky. 717, 34 S. W. 523, 17 Ky. L. Rep. 1310.

Minnesota.— Faloon *v.* Flannery, 74 Minn. 38, 76 N. W. 954.

New Jersey.—Micheau *v.* Crawford, 8 N. J. L. 90; Wright *v.* Wright, 41 N. J. Eq. 382, 4 Atl. 855; Lippincott *v.* Ridgway, 10 N. J. Eq. 164, 11 N. J. Eq. 526. A will authorizing testator's daughter by her will "to dispose of" a fund "to and among" his grandchildren "in such shares and in such manner as she shall think right and proper," gives her a non-exclusive power of appointment, and hence a provision of her will excluding two grandchildren in a *per capita* distribution of the fund is invalid. Cameron *v.* Crowley, (Ch. 1907) 65 Atl. 875.

Ohio.— Stableton *v.* Ellison, 21 Ohio St. 527.

Pennsylvania.— Russell *v.* Kennedy, 66 Pa. St. 248; Neilson's Estate, 17 Wkly. Notes Cas. 158, 326.

South Carolina.— Seibels *v.* Whatley, 2 Hill Eq. 605.

Utah.— Allen *v.* Barnes, 5 Utah 100, 12 Pac. 912.

Virginia.— McCamant *v.* Nuckolls, 85 Va. 331, 12 S. E. 160; Knight *v.* Yarbrough, Gilm. 27; Carrington *v.* Belt, 6 Munf. 374; Hudson *v.* Hudson, 6 Munf. 352; Cowles *v.* Brown, 4 Call 477.

West Virginia.— Thrasher *v.* Ballard, 35 W. Va. 524, 14 S. E. 232.

England.— Bulteel *v.* Plummer, L. R. 6 Ch. 160, 23 L. T. Rep. N. S. 753; Moynan *v.* Moynan, L. R. 1 Ir. 382; Robinson *v.* Sykes, 23 Beav. 40, 2 Jur. N. S. 895, 26 L. J. Ch. 782, 53 Eng. Reprint 16; Strutt *v.* Braithwaite, 5 De G. & Sm. 369, 16 Jur. 882, 21 L. J. Ch. 609, 64 Eng. Reprint 1157; White *v.* Wilson, 1 Drew. 298, 17 Jur. 15, 22 L. J. Ch. 62, 1 Wkly Rep. 47, 61 Eng. Reprint 466; Piers *v.* Tuite, 1 Dr. & Wal. 279; Menzey *v.* Walker, Forr. 72; Beere *v.* Prendergast, Hayes & J. 384; Donoghue *v.* Brooke, Ir. R. 9 Eq. 489; *In re* Davids, Johns. 495, 6 Jur. N. S. 94, 29 L. J. Ch. 116, 1 L. T. Rep. N. S. 130, 8 Wkly. Rep. 39, 70 Eng. Reprint 517; Barron *v.* Barron, 2 Jones Exch. 226; Young *v.* Waterpark, 6 Jur. 656, 11 L. J. Ch. 367, 13 Sim. 199, 36 Eng. Ch. 199, 60 Eng. Reprint 77; Stolworthy *v.* Sancroft, 10 Jur. N. S. 762, 33 L. J. Ch. 708, 10 L. T. Rep. N. S. 223, 12 Wkly. Rep. 635; Burleigh *v.* Pearson, 1 Ves. 281, 27 Eng. Reprint 1032; Wilson *v.* Piggott, 2 Ves. Jr. 351, 2 Rev. Rep. 346, 30 Eng. Reprint 668; *In re* Aplin, 13 Wkly. Rep. 1062; Fowler *v.* Hunter, 3 Y. & J. 506.

See 40 Cent. Dig. tit. "Powers." § 41.

"Such" equivalent to "the said."— Under a direction to trustees to apply rents and profits "[towards the] maintenance of all and every the child or children, until such child or children" should attain twenty-one, "and when and as such child or children respectively should attain twenty-one," upon trust to convey "unto such child or children" as the parents should appoint, it was held that the word "such" must be taken in the sense of "the said," and that the power did not warrant an exclusive appointment. Strutt *v.* Braithwaite, 5 De G. & Sm. 369, 16 Jur. 882, 21 L. J. Ch. 609, 64 Eng. Reprint 1157.

"All younger children" held to include unborn children see Piers *v.* Tuite, 1 Dr. & Wal. 279.

Appointment to objects and stranger.— Where a father, having a power of appoint-

an intention is shown in the instrument creating a non-exclusive power of appointment that the appointees shall take equally,[69] the donee may appoint such shares as he thinks fit,[70] provided, in some jurisdictions, none of them are illusory.[71]

f. Estates or Interests to Be Appointed — (i) *In General.* The donee of a power of appointment can appoint such an estate or interest only as is authorized by the instrument creating the power; he cannot appoint a greater or a less estate or interest.[72] On the other hand, if there is no restriction as to the estate or interest to be raised by the execution of the power, or if this is expressly left to the discretion of the donee, he may appoint any estate or interest he may see fit.[73]

ment among all his children, by will excluded one child and appointed a portion to grandchildren who were not objects of the power, it was held that the appointment was valid so far as it related to the portion appointed to the children. *In re* Bernard, 6 Ir. Ch. 133.

Successive appointments.— Under a power to appoint among all children, if part is well appointed to some, having a share not illusory, which is afterward appointed so as to entirely exclude one, the last appointment is void. Wilson *v.* Piggott, 2 Ves. Jr. 351, 2 Rev. Rep. 346, 30 Eng. Reprint 668. See also Young *v.* Waterpark, 6 Jur. 656, 11 L. J. Ch. 367, 13 Sim. 199, 36 Eng. Ch. 199, 60 Eng. Reprint 77.

69. *Indiana.*— Farmer *v.* Farmer, 93 Ind. 435.

Ohio.— Stableton *v.* Ellison, 21 Ohio St. 527.

South Carolina.— Seibels *v.* Whatley, 2 Hill Eq. 605.

Virginia.— Carrington *v.* Belt, 6 Munf. 374.

England.—Ward *v.* Tyrell, 25 Beav. 563, 4 Jur. N. S. 779, 27 L. J. Ch. 749, 53 Eng. Reprint 752; Astry *v.* Astry, Prec. Ch. 256, 24 Eng. Reprint 124.

70. *Illinois.*— Hawthorn *v.* Ulrich, 207 Ill. 430, 69 N. E. 885.

Kentucky.— Clay *v.* Smallwood, 100 Ky. 212, 38 S. W. 7, 19 Ky. L. Rep. 50; Degman *v.* Degman, 98 Ky. 717, 34 S. W. 523, 17 Ky. L. Rep. 1310.

Maryland.— Allder *v.* Jones, 98 Md. 101, 56 Atl. 487.

New Jersey.— Wright *v.* Wright, 41 N. J. Eq. 382, 4 Atl. 855.

Pennsylvania.— Pepper's Will, 120 Pa. St. 235, 13 Atl. 929.

Utah.— Allen *v.* Barnes, 5 Utah 100, 12 Pac. 912.

Virginia.— McCamant *v.* Nuckolls, 85 Va. 331, 12 S. E. 160; Cowles *v.* Brown, 4 Call 477.

England.— Gainsford *v.* Dunn, L. R. 17 Eq. 405, 43 L. J. Ch. 403, 30 L. T. Rep. N. S. 283, 22 Wkly. Rep. 499; Cotgreave *v.* Cotgreave, 1 De G. & Sm. 38, 11 Jur. 51, 16 L. J. Ch. 145, 63 Eng. Reprint 961; White *v.* Wilson, 1 Drew. 298, 17 Jur. 15, 22 L. J. Ch. 62, 1 Wkly. Rep. 47, 61 Eng. Reprint 466; Barry *v.* Barry, Ir. R. 10 Eq. 397; Wall *v.* Thurborne, 1 Vern. Ch. 355, 23 Eng. Reprint 519; Maddison *v.* Andrew, 1 Ves. 57, 27 Eng. Reprint 889; Buteher *v.* Butcher, 1 Ves. & B. 79, 12 Rev. Rep. 193, 35 Eng. Reprint 31 [*affirming* 9 Ves. Jr. 382, 32 Eng. Reprint 650]; Dyke *v.* Sylvester, 12 Ves. Jr. 126, 33 Eng. Reprint 48; Moeatta *v.* Lousada, 12 Ves. Jr. 123, 33 Eng. Reprint 47; Wilson *v.* Piggott, 2 Ves. Jr. 351, 2 Rev. Rep. 346, 30 Eng. Reprint 668; Bax *v.* Whitbread, 10 Ves. Jr. 31, 32 Eng. Reprint 755.

See 40 Cent. Dig. tit. "Powers," § 41.

71. **Illusory appointments** see *infra*, VI, I, 2, b.

72. *Alabama.*— Hill *v.* Jones, 65 Ala. 214.

Delaware.— Davis *v.* Vincent, 1 Houst. 416; Harker *v.* Reilly, 4 Del. Ch. 72.

Illinois.— Butler *v.* Huestis, 68 Ill. 594, 18 Am. Rep. 589.

Maryland.— Myers *v.* Safe Deposit, etc., Co., 73 Md. 413, 21 Atl. 58; Cooke *v.* Husbands, 11 Md. 492.

Ohio.— Shank *v.* Dewitt, 44 Ohio St. 237, 6 N. E. 255 [*reversing* 8 Ohio Dec. (Reprint) 574, 9 Cinc. L. Bul. 23]; Jennert *v.* Houser, 4 Ohio Cir. Ct. 353, 2 Ohio Cir. Dec. 591.

Pennsylvania.— Pepper's Appeal, 120 Pa. St. 235, 13 Atl. 929, 6 Am. St. Rep. 702; Stephenson *v.* Richardson, 88 Pa. St. 40; Wickersham *v.* Savage, 58 Pa. St. 365; Wetherill *v.* Wetherill, 1 Phila. 64.

Virginia.— Hood *v.* Haden, 82 Va. 588; Mitchells *v.* Johnsons, 6 Leigh 461.

England.— *In re* De Houghton, [1896] 2 Ch. 385, 65 L. J. Ch. 667, 74 L. T. Rep. N. S. 613, 44 Wkly. Rep. 635; *In re* Porter, 45 Ch. D. 179, 59 L. J. Ch. 595, 63 L. T. Rep. N. S. 431; Bute *v.* Stuart, 1 Bro. P. C. 476, 1 Eng. Reprint 700 [*affirming* 2 Eden 88, 28 Eng. Reprint 829]; *Re* Adams, 94 L. T. Rep. N. S. 720 [*reversing* 93 L. T. Rep. N. S. 742, 54 Wkly. Rep. 42], under a power to appoint real estate to the donee's son for life, with remainder to his issue in tail, an appointment to the son "and his issue" gives an estate tail to the son and is void as in excess of the power.

Canada.— Areher *v.* Urquhart, 23 Ont. 214; Seane *v.* Hartwiek, 11 U. C. Q. B. 550.

See 40 Cent. Dig. tit. "Powers," § 42.

73. *Alabama.*— Hill *v.* Jones, 65 Ala. 214; Friend *v.* Oliver, 27 Ala. 532.

Delaware.— Harper *v.* Reilly, 4 Del. Ch. 72.

Illinois.— Butler *v.* Huestis, 68 Ill. 594, 18 Am. Rep. 589.

Maryland.— Torrance *v.* Torranee, 4 Md. 11.

New York.— Hillen *v.* Iselin, 144 N. Y. 365, 39 N. E. 368 [*affirming* 67 Hun 444, 22 N. Y. Suppl. 282]; Beardsley *v.* Hotchkiss, 96 N. Y. 201 [*affirming* on this point 30 Hun

(II) *Estates in Fee.* A general power to appoint or dispose of an estate in favor of a particular object authorizes the appointment of a fee, although no words of inheritance are contained in the power;[74] but a fee cannot be appointed where the power authorizes the appointment of a less estate only.[75]

(III) *Limited Estates.* Whether or not the donee of a power of appointment may appoint a limited estate is dependent upon the true construction of the instrument creating the power.[76] The general rule is that where a power to appoint the fee is given without positive restriction, or if the power is general, or is limited as to the objects only, a limited or qualified estate may be appointed;[77]

605]; Maitland *v.* Baldwin, 70 Hun 267, 24 N. Y. Suppl. 29; Frear *v.* Pugsley, 9 Misc. 316, 30 N. Y. Suppl. 149.

Pennsylvania.— Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85.

England.— Wainwright *v.* Miller, [1897] 2 Ch. 255, 66 L. J. Ch. 616, 76 L. T. Rep. N. S. 718, 45 Wkly. Rep. 652; Hodgson *v.* Halford, 11 Ch. D. 959, 48 L. J. Ch. 548, 27 Wkly. Rep. 545; Wilson *v.* Wilson, 21 Beav. 25, 52 Eng. Reprint 767; Trollope *v.* Linton, 2 L. J. Ch. O. S. 3, 1 Sim. & St. 477, 24 Rev. Rep. 211, 1 Eng. Ch. 477, 57 Eng. Reprint 189.

See 40 Cent. Dig. tit. "Powers," § 42.

74. 1 Sugden Powers 501, 503. And see the following cases:

Georgia.— Weed *v.* Knorr, 77 Ga. 636, 1 S. E. 167.

Maryland.— Myers *v.* Safe-Deposit, etc., Co., 73 Md. 413, 21 Atl. 58.

New York.— Mott *v.* Ackerman, 92 N. Y. 539.

United States.— Ladd *v.* Ladd, 8 How. 10, 12 L. ed. 967, power of appointment construed as authorizing the donee to convey the fee and not merely the annual interest, rents, and profits.

England.— Dighton *v.* Tomlinson, Comyns 194, 10 Mod. 31, 88 Eng. Reprint 612, 1 P. Wms. 149, 24 Eng. Reprint 335, 1 Salk. 239, 91 Eng. Reprint 212; Rex *v.* Stafford, 7 East 521; Liefe *v.* Saltingstone, 1 Mod. 189, 86 Eng. Reprint 819; Doe *v.* Jackson, 1 M. & Rob. 553.

75. Cooke *v.* Husbands, 11 Md. 492 (power of disposal in life-tenants construed as limited to the rents and profits and as not authorizing a conveyance of the fee); Scane *v.* Hartwick, 11 U. C. Q. B. 550, 551 (where a testator devised to his wife all his property, real and personal, "as long as she, my said wife Mary, shall exist; and at her decease the said property to be at her sole disposal, unto any one or other of my descendants, so as the said property and land shall be entailed in the family, from one generation to another," and it was held that a devise by the widow in fee was an excessive execution of the power, and therefore void).

76. See the cases cited in the notes following.

77. *Alabama.*— Friend *v.* Oliver, 27 Ala. 532, life-tenant with power of appointment to children may appoint to the separate use of a married daughter.

Illinois.— Butler *v.* Huestis, 68 Ill. 594, 597, 18 Am. Rep. 589, where it is said: "The law seems to be well settled by authority, where a party has the power to appoint a fee, if there are no words of positive restriction — a less estate may be appointed. The appointment of a less estate than the donee might have created under the power, is not thereby rendered void. But where an appointment is to be made of a particular estate, or in a certain manner, and in no other way, the negative words must control, and the donee is not permitted to appoint a different estate, or in any other manner."

New York.— Hillen *v.* Iselin, 144 N. Y. 365, 39 N. E. 368 [*affirming* 67 Hun 444] 22 N. Y. Suppl. 282 (donee of power to appoint in fee, or for less estate, with "such limitations and conditions" as she saw fit, not limited to creation of vested estate); Beardsley *v.* Hotchkiss, 96 N. Y. 201 [*affirming* on this point 30 Hun 605].

Pennsylvania.— Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85, holding that where an unrestricted power of appointment by will is given, donee has power to appoint the fee to trustees for the benefit of certain persons for life, with remainder over in fee.

England.—Wainwright *v.* Miller, [1897] 2 Ch. 255, 66 L. J. Ch. 616, 76 L. T. Rep. N. S. 718, 45 Wkly. Rep. 652 [*following* Hodgson *v.* Halford, 11 Ch. Div. 959, 48 L. J. Ch. 548, 27 Wkly. Rep. 545]; Wilson *v.* Wilson, 21 Beav. 25, 52 Eng. Reprint 767 (appointment of fund to children, but postponing payment of the capital until after the death or marriage of the last surviving unmarried daughter); Jebb *v.* Tugwell, 7 De G. M. & G. 663, 2 Jur. N. S. 54, 25 L. J. Ch. 109, 4 Wkly. Rep. 157, 56 Eng. Ch. 513, 44 Eng. Reprint 258; Dickinson *v.* Mort, 8 Hare 178, 32 Eng. Ch. 178, 68 Eng. Reprint 322 (holding that under a power to charge an estate with a certain sum for the portion of a younger child, the donee could appoint such sum to a married daughter for her separate use, with a restraint upon anticipation); Trollope *v.* Linton, 2 L. J. Ch. O. S. 3, 1 Sim. & S. 477, 24 Rev. Rep. 211, 1 Eng. Ch. 477, 57 Eng. Reprint 189 (power to appoint estates to children as he should by will appoint validly exercised by appointment to trustees for term, upon trust to raise sums by way of portions for children).

See 40 Cent. Dig. tit. "Powers," § 42.

A general power to appoint a fund among children in such proportions as shall be thought fit authorizes the gift of particular interests and the apportionment of such in-

but if the power expressly or by clear implication requires that an estate in fee, and no other, shall be appointed, a less estate than a fee cannot be limited.[78] Where a mere power of distribution or appointment is conferred, the donee cannot limit the estate of the appointees;[79] and where there is but one of a class to which the estate is limited in default of appointment, the donee cannot appoint a limited estate to that one, even though the instrument creating the power authorizes him to direct in what shares and proportions, and for what estates, the objects shall take.[80]

(iv) *APPOINTMENTS IN TRUST.*[81] Under a power of appointment, either general or special, without restriction as to the nature of the estate to be raised, the donee is not limited to an appointment of the legal estate, but may execute the power by an appointment in trust for the objects of the power.[82] It is other-

terests at discretion. For instance, an interest for life may be given to one child in a particular share, and the capital of the same share to another child, or a share may even be limited to a child upon a contingency. Beardsley *v.* Hotchkiss, 96 N. Y. 201 [*affirming* on this point 30 Hun 605].

An appointment for life, with power to appoint the remainder, is a good execution of a general power to appoint to children. Slark *v.* Dakyns, L. R. 10 Ch. 35, 44 L. J. Ch. 205, 31 L. T. Rep. N. S. 712, 23 Wkly. Rep. 118; Morse *v.* Martin, 34 Beav. 500, 55 Eng. Reprint 728; Bray *v.* Bree, 8 Bligh N. S. 568, 5 Eng. Reprint 1053, 2 Cl. & F. 453, 6 Eng. Reprint 1225; Phipson *v.* Turner, 2 Jur. 414, 9 Sim. 227, 16 Eng. Ch. 227, 59 Eng. Reprint 345. And see Wollaston *v.* King, L. R. 8 Eq. 165, 38 L. J. Ch. 392, 20 L. T. Rep. N. S. 1003, 17 Wkly. Rep. 641; Carver *v.* Bowles, 9 L. J. Ch. O. S. 91, 2 Russ. & M. 301, 11 Eng. Ch. 301, 39 Eng. Reprint 409. But see Com. *v.* Sharpless, 2 Chest. Co. Rep. (Pa.) 246, where it was held that a power to one "to declare trusts and uses for his two children, for the benefit of them and their respective issue," is not properly executed by directing that the estate shall be placed in trust for them for life, and at their death to go to such persons as they may direct by will. And see Smith's Estate, 4 Wkly. Notes Cas. (Pa.) 265.

78. 1 Sugden Powers 518. And see Jennert *v.* Houser, 4 Ohio Cir. Ct. 353, 2 Ohio Cir. Dec. 591.

A power to appoint real estate among children in tail does not authorize an appointment of a less estate, such as an estate for life. *In re* Porter, 45 Ch. D. 179, 59 L. J. Ch. 595, 63 L. T. Rep. N. S. 431.

79. Stuyvesant *v.* Neil, 67 How. Pr. (N. Y.) 16. And see Myers *v.* Safe-Deposit, etc., Co., 73 Md. 413, 21 Atl. 58.

80. Pepper's Appeal, 120 Pa. St. 235, 252, 13 Atl. 929, 6 Am. St. Rep. 702. In this case testator devised the share of his son C in trust for his use for life, "and from and after his death, then to the use of such of his children and issue, and in such shares and for such estates as he shall by last will appoint, and in default of such appointment, then to the use of all his children that may be living at his death, and the issue of any deceased child or children, their heirs," etc. C died, leaving as his only issue a son R, born after testator's death; and it was held that, under the terms of the will, R took the remainder in fee, and that the power given to C did not authorize an appointment by his will giving R an estate in the nature of a conditional fee. See also Wickersham *v.* Savage, 58 Pa. St. 365; Horwitz *v.* Norris, 49 Pa. St. 213; Smith's Appeal, 4 Wkly. Notes Cas. (Pa.) 265; Doe *v.* Denny, Say. 295; Campbell *v.* Sandys, 1 Sch. & Lef. 281, 9 Rev. Rep. 33; Roe *v.* Dunt, 2 Wils. C. P. 336. *Compare* Bray *v.* Hammersley, 3 Sim. 513, 6 Eng. Ch. 513, 57 Eng. Reprint 1090.

81. **Delegation of power** see *infra*, VI, B, 6.

82. *Delaware.*— Harker *v.* Reilly, 4 Del. Ch. 72, holding that a power reserved in a trust deed to order the trustee "to grant and convey the said premises . . . for such estate and estates and interest" as the grantor might by will direct, included the right to create a trust and to direct a sale of the premises.

Maryland.— Torrance *v.* Torrance, 4 Md. 11, under a devise of an estate to testator's wife, with power "by deed, will, or otherwise, to give, grant, convey, devise or dispose of my said estate unto and among all or such of my children, or their issue, in such manner and proportion, and for such term and estate as she shall think fit," the shares of the daughters to be secured to them for life, free from any control of their husbands or liability for their debts.

Massachusetts.— Loring *v.* Wilson, 174 Mass. 132, 54 N. E. 502; Perry *v.* Cross, 132 Mass. 454, sustaining, under a general power of "disposition" by will, a conveyance of property by a wife in trust, reserving to herself an equitable life-estate therein, containing no power of revocation, and accompanied by livery of seizin.

New York.— Maitland *v.* Baldwin, 70 Hun 267, 24 N. Y. Suppl. 29 (holding that a provision in a will giving, at the death of testator's wife, a certain sum "in such manner and form, and to such person or persons as she by her last will and testament may direct, limit or appoint," does not require the wife to make a direct, absolute gift, but allows her to dispose of the money in trust or otherwise); Frear *v.* Pugsley, 9 Misc. 316, 30 N. Y. Suppl. 149 (holding that a bequest of property to trustees, with power to a *cestui que trust* of disposition by will, is a

wise, however, where it appears, either expressly or impliedly, from the instrument creating the power that the donor intended the appointees to take, not in trust, but absolutely.[83] On the other hand, where the instrument creating a power of appointment expressly, or by clear implication, provides that the appointment shall be made in trust for the objects of the power, the donee cannot appoint an absolute estate.[84] If the power is to appoint in a certain manner or to certain persons, or to declare certain trusts or uses, the donee can create such trusts only as are within the power.[85]

(v) *Appointing Land Under Power to Charge.* In equity unlimited power to charge an estate will authorize a disposition of the estate itself, in trust to sell and divide the proceeds among the objects.[86]

valid execution of a absolute power of disposition given by will).

Pennsylvania.— Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85 (holding that a power to direct trustees to "grant and convey the said real estate in fee . . . in such parts or shares" as the donee of the power may by will direct, is an unlimited power, and the donee may direct that the fee shall be conveyed upon a trust, with remainder over); Fotterall's Estate, 2 Pa. Dist. 146, 12 Pa. Co. Ct. 548 (holding that where the manner of executing a limited power of appointment is left to the discretion of the donee, a trust may be created if the execution otherwise carries out the purpose of the donor); Boyle's Estate, 5 Wkly. Notes Cas. 363 (under a testamentary power to appoint "to such of my children, or their issue, in such way or manner, and in such proportions and for such estate and estates as she, my said wife, by her last will and testament . . . shall direct, limit, and appoint").

England.— Webb *v.* Sadler, L. R. 8 Ch. 419, 42 L. J. Ch. 498, 28 L. T. Rep. N. S. 288, 21 Wkly. Rep. 394; *In re* Redgate, [1903] 1 Ch. 356, 72 L. J. Ch. 204, 51 Wkly. Rep. 276; *In re* Paget, [1898] 1 Ch. 290, 67 L. J. Ch. 151, 78 L. T. Rep. N. S. 72, 46 Wkly. Rep. 328; Scotney *v.* Lomer, 29 Ch. D. 535, 54 L. J. Ch. 558, 52 L. T. Rep. N. S. 747, 33 Wkly. Rep. 633; Willis *v.* Kymer, 7 Ch. D. 181, 47 L. J. Ch. 90, 38 L. T. Rep. N. S. 207 (holding that where a precatory trust has been created by will in favor of children, *simpliciter*, the trustee may, in exercising the trust, limit the shares of the daughters to their separate use); Fowler *v.* Cohn, 21 Beav. 360, 2 Jur. N. S. 315, 4 Wkly. Rep. 412, 52 Eng. Reprint 898; Trollope *v.* Linton, 2 L. J. Ch. O. S. 3, 1 Sim. & St. 477, 1 Eng. Ch. 477, 57 Eng. Reprint 189 (holding that power to appoint estates to children, as the donee shall by will appoint, is exercised by appointment to trustees for a term upon trust to raise sums by way of portions for children); Kenworthy *v.* Bate, 6 Ves. Jr. 793, 6 Rev. Rep. 46, 31 Eng. Reprint 1312; Crompe *v.* Barrow, 4 Ves. Jr. 681, 4 Rev. Rep. 318, 31 Eng. Reprint 351.

See 40 Cent. Dig. tit. "Powers," § 42.

Appointment to trustees for sale see *infra*, V, B, 1, f, (VII).

83. Myers *v.* Safe-Deposit, etc., Co., 73 Md. 413, 21 Atl. 58 [*distinguishing* Torrance *v.* Torrance, 4 Md. 11] (holding that a devise of an estate to testator's widow for life, with remainder to such of his children and grandchildren as she should by will appoint, and, in default of such appointment, the estate to pass as if testator had died intestate, created only a special power in the widow to apportion an absolute estate in the remainder among such of testator's children and grandchildren as she should see fit; and that her execution of the power by creating trusts for life, as to over half of the estate, in some of testator's children and grandchildren, with limitations over, was void); Stewart *v.* Keating, 15 Misc. (N. Y.) 44, 36 N. Y. Suppl. 913; Jennert *v.* Houser, 4 Ohio Cir. Ct. 353, 2 Ohio Cir. Dec. 591. See also Pocklington *v.* Bayne, 1 Bro. Ch. 450, 28 Eng. Reprint 1234.

84. Morriss *v.* Morriss, 33 Gratt. (Va.) 51, where a testator by his will gave his wife a life-interest in lands, with power of appointment among his descendants, and by a codicil qualified the power by providing that "whatever she shall, by will, deed or otherwise, give beneficially to any of my deseendants, the same shall not be given absolutely to such descendant or descendants, so as to be under his or her control, but given in trust for him or her, and in case of a female to her sole and separate use"; and it was held that the will and codicil required that any provision made by the wife under the power for the grandchildren should be in trust for them, and for the separate use of females, and that she could not give them an absolute estate; and therefore, where by her will she gave the property to certain of their descendants, directing that it should not be sold for six years, her executor to hold it in the meantime, and that, when sold, the proceeds should be divided, and each one's portion invested, and paid over at the age of twenty-one years, this was not a valid execution of the power.

85. Loring *v.* Wilson, 174 Mass. 132, 54 N. E. 502; *In re* Ingersoll, 167 Pa. St. 536, 31 Atl. 858, 859, 860; Wickersham *v.* Savage, 58 Pa. St. 365; Com. *v.* Sharpless, 2 Chest. Co. Rep. (Pa.) 246 (referred to *supra*, V, B, 1, f, (III), note 77); Smith's Estate, 4 Wkly. Notes Cas. (Pa.) 265; Alexander *v.* Alexander, 2 Ves. 640, 28 Eng. Reprint 408; Crompe *v.* Barrow, 4 Ves. Jr. 681, 4 Rev. Rep. 318, 31 Eng. Reprint 351.

86. Long *v.* Long, 5 Ves. Jr. 445, 5 Rev. Rep. 101, 31 Eng. Reprint 674. In this case

(vi) *Charging Land Under Power to Appoint.* A power to appoint land authorizes, in equity, a charge thereon for the benefit of an object of the power.[87] A power given by will to divide or appoint the estate to or among the testator's children as the donee may see proper, etc., is properly executed by devising land in fee to one or more of the children and charging it with pecuniary legacies in favor of the others.[88]

(vii) *Sale Under Power to Appoint.* In England it is a well-settled doctrine that a power to appoint an estate authorizes an appointment to trustees to sell and divide the proceeds among the objects of the power,[89] unless it appears from the instrument creating the power to appoint the estate that it was intended that the objects of the power should take the real estate and not the proceeds thereof.[90]

(viii) *Appointment of Principal Under Power to Appoint Interest.* A power to appoint the interest authorizes the appointment of the principal[91]

the estate was limited to the father for life, remainder to the wife and issue in strict settlement; and power was given to the father, in case there were any younger children, to charge the estate with the payment "of such sum or sums of money," for the benefit of the children, as he should think fit. By his will he directed the estate to be sold, and gave the money amongst his children, giving the eldest son a very small portion. This appointment was held to be, in substance, exactly what he had a right to do. See also Baily *v.* Lloyd, 7 L. J. Ch. O. S. 98, 5 Russ. 330, 29 Rev. Rep. 30, 5 Eng. Ch. 330, 38 Eng. Reprint 1051; Bullock *v.* Fladgate, 1 Ves. & B. 471, 12 Rev. Rep. 270, 35 Eng. Reprint 183; Kenworthy *v.* Bate, 6 Ves. Jr. 793, 6 Rev. Rep. 46, 31 Eng. Reprint 1312; 1 Sugden Powers 508.

87. Roberts *v.* Dixall, 2 Eq. Cas. Abr. 668 pl. 19, 22 Eng. Reprint 561; 2 Sugden Powers, App. No. 17, where a father had a power to appoint and divide the estate among his younger children in such proportions as he should think proper, and intending to exercise this power, he gave a gross sum to the younger child, and charged it on the estate. Lord Hardwicke decreed that the power was, in substance, well executed. See also Hill *v.* Jones, 65 Ala. 214; Allder *v.* Jones, 98 Md. 101, 56 Atl. 487; Monjo *v.* Woodhouse, 185 N. Y. 295, 78 N. E. 71, 6 L. R. A. N. S. 746 [*affirming* 111 N. Y. App. Div. 80, 97 N. Y. Suppl. 653 (*affirming* 46 Misc. 352, 94 N. Y. Suppl. 835)] (holding that where a testator gave his widow power to devise a house and lot to any or all of their grandchildren, the imposition in her will of a charge on a share devised to a grandchild for debts of the grandchild's father and brother to the estate of the testatrix, to be paid into the residuary portion, which was also bequeathed to her children and grandchildren, was valid); Darling *v.* Edson, 4 Pa. Super. Ct. 498; Middleton *v.* Pryor, Ambl. 391, 27 Eng. Reprint 260; Palmer *v.* Wheeler, 2 Ball & B. 18, 12 Rev. Rep. 60; Trollope *v.* Linton, 2 L. J. Ch. O. S. 3, 1 Sim. & St. 477, 24 Rev. Rep. 211, 1 Eng. Ch. 477, 57 Eng. Reprint 189; Thwaytes *v.* Dye, 2 Vern. Ch. 80, 23 Eng. Reprint 661; Kenworthy *v.* Bate, 6 Ves. Jr. 793, 6 Rev. Rep. 46, 31 Eng. Reprint 1312; Ricketts *v.* Lottus, 4 Y. & C. Exch. 519; 1 Sugden Powers 509. But see Browne *v.* Taylor, Cro. Car. 38, 79 Eng. Reprint 638; Arundel *v.* Pembroke, Dyer 263*b*, 73 Eng. Reprint 584, which, however, were cases at law.

88. Allder *v.* Jones, 98 Md. 101, 56 Atl. 487; Darling *v.* Edson, 4 Pa. Super. Ct. 498.

89. Harker *v.* Reilly, 4 Del. Ch. 72; *In re* McNeile, 217 Pa. St. 179, 66 Atl. 328 [*distinguishing* Stephenson *v.* Richardson, 88 Pa. St. 40]; Webb *v.* Sadler, L. R. 8 Ch. 419, 42 L. J. Ch. 498, 28 L. T. Rep. N. S. 388, 21 Wkly. Rep. 394; *In re* Redgate, [1903] 1 Ch. 356, 72 L. J. Ch. 204, 51 Wkly. Rep. 276; *In re* Paget, [1898] 1 Ch. 290, 67 L. J. Ch. 151, 78 L. T. Rep. N. S. 72, 46 Wkly. Rep. 328; Fowler *v.* Cohn, 21 Beav. 360, 2 Jur. N. S. 315, 4 Wkly. Rep. 412, 52 Eng. Reprint 898; Cowx *v.* Foster, 1 Johns. & H. 30, 6 Jur. N. S. 1051, 29 L. J. Ch. 886, 2 L. T. Rep. N. S. 797, 70 Eng. Reprint 649; Kenworthy *v.* Bate, 6 Ves. Jr. 793, 6 Rev. Rep. 46, 31 Eng. Reprint 1312; 1 Sugden Powers 510.

The fact that the limitations are equitable, and not legal, does not prevent the operation of the rule that a power to appoint land is well executed by an appointment to trustees to sell. *In re* Redgate, [1903] 1 Ch. 356, 72 L. J. Ch. 204, 51 Wkly. Rep. 276.

90. Doe *v.* Vincent, 1 Houst. (Del.) 416; Alley *v.* Lawrence, 12 Gray (Mass.) 373; Stephenson *v.* Richardson, 88 Pa. St. 40, where a testator devised real estate to the sole and separate use of his daughter, not to be subject to sale or mortgage, and after her death to "descend, in fee-simple, to such of her children as she may direct," etc.

91. Phillips *v.* Brydon, 26 Beav. 77, 53 Eng. Reprint 826 (holding that a power to appoint the interest of a fund authorized the appointment of the capital, notwithstanding subsequent powers over and limitation of the said "trust moneys, and the interest"); Samuda *v.* Lousada, 7 Beav. 243, 29 Eng. Ch. 243, 49 Eng. Reprint 1058 (holding that a power to appoint an annuity authorized appointment of the principal sum invested in the funds for securing it). And see *In re* L'Herminier, [1894] 1 Ch. 675, 676, where North, J., said: "The power of appointing

of a fund, at least unless the period within which the income is to be appointed is limited.[92]

(IX) *ADVANCEMENTS.* A power of appointment may include a power to make advancements to or among children;[93] but a will devising property to testator's wife for life and directing that at her death it shall be equally divided between his children, and also authorizing her to divide the same or any portion thereof among said children during her life, does not authorize her to advance a sum to one of the children without any division among the others.[94]

g. Authority, Under Power of Appointment, to Convey or Mortgage — (I) *TO CONVEY.* Where the intention of the donor, as shown by the instrument creating a power of appointment, can be as effectually carried out by a conveyance as by an appointment, a conveyance by the donee is a valid execution of the power;[95] but a power of disposition by will cannot be executed by a conveyance of the estate by deed;[96] and where a testator devised his estate to his wife for life, and directed that immediately after her death it should be sold and the proceeds divided as his wife should direct in her will, and the wife made a will devising such real estate, it was held that it was not a valid execution of the power, since the power gave her no authority to dispose of the land itself, but only to direct what disposition should be made of the proceeds of the sale thereof.[97]

(II) *TO MORTGAGE.* Where there is a general power of appointment, the donor may validly exercise it by mortgage;[98] and where such a mortgage provides that, in case of a sale thereunder, any overplus remaining after paying the debt secured thereby shall be paid to the mortgagor, his heirs, representatives, or assigns, or otherwise disposes of the surplus or equity of redemption, it is a total appointment under the power.[99] But a power of appointment by will given to a grantee

the income or fruit of a fund is, in my opinion, equivalent to a power over the tree which produces the fruit."

92. See *In re* L'Herminier, [1894] 1 Ch. 675.

93. Franke *v.* Auerbach, 72 Md. 580, 20 Atl. 129 (holding that under a devise of all testator's property to his wife for life, with power to will it to their children and also to make advances to them during her life, discriminating between them in her discretion, the remainder undisposed of at her death to be equally divided among the children, the wife could convey in fee-simple part of the realty to one of the children by way of advancement); Pate *v.* Pierce, 4 Coldw. (Tenn.) 104.

94. Farmer *v.* Farmer, 93 Ind. 435.

95. *Kentucky.*— Johnson *v.* Yates, 9 Dana 491, conveyance by husband and wife.

Maryland.— Franke *v.* Auerbach, 72 Md. 580, 20 Atl. 129; Benesch *v.* Clark, 49 Md. 497.

Massachusetts.— How *v.* Waldron, 98 Mass. 281, where a will directed that the trustees should hold the property until a certain time, and then convey it to the devisees, "it being my will that said estate shall then be equally divided amongst my children," and it was held that the trustees were not bound to make partition, but might convey to the children as tenants in common.

New Jersey.— Elle *v.* Young, 24 N. J. L. 775.

Pennsylvania.— O'Rourke *v.* Sherwin, 156 Pa. St. 285, 27 Atl. 43; McFadden *v.* Drake, 79 Pa. St. 473.

South Carolina.— Boyd *v.* Satterwhite, 10 S. C. 45, where it was held that a power to dispose of the proceeds of a sale of land may be executed by disposing of the land itself.

Tennessee.— Pate *v.* Pierce, 4 Coldw. 104.

See 40 Cent. Dig. tit. "Powers," § 44. And see *infra*, VI, E.

Compare Haymond *v.* Jones, 33 Gratt. (Va.) 317.

96. Bentham *v.* Smith, Cheves Eq. (S. C.) 33, 34 Am. Dec. 599. See *infra*, VI, E, 2.

97. *In re* Wood, 1 Pa. St. 368.

98. *New Hampshire.*— Pittsfield Sav. Bank *v.* Berry, 63 N. H. 109.

New York.— Campbell *v.* Low, 9 Barb. 585.

North Carolina.— Hicks *v.* Ward, 107 N. C. 392, 12 S. E. 318, 10 L. R. A. 821.

Pennsylvania.— Lancaster *v.* Dolan, 1 Rawle 231, 18 Am. Dec. 625, holding that a power to appoint by any writing in the nature of a will or other instrument, under hand and seal, executed in the presence of two credible witnesses, is well executed by a mortgage.

South Carolina.— Manning *v.* Screven, 56 S. C. 78, 34 S. E. 22; Peace *v.* Spierin, 2 Desauss. Eq. 460.

England.— Heather *v.* O'Neil, 2 De G. & J. 399, 4 Jur. N. S. 957, 27 L. J. Ch. 513, 6 Wkly. Rep. 484, 59 Eng. Ch. 317, 44 Eng. Reprint 1044; Anson *v.* Lee, 4 Sim. 364, 6 Eng. Ch. 364, 58 Eng. Reprint 136.

See 40 Cent. Dig. tit. "Powers," § 45.

99. Hicks *v.* Ward, 107 N. C. 392, 12 S. E. 318, 10 L. R. A. 821; Jackson *v.* Innes, 1 Bligh 104, 20 Rev. Rep. 45, 4 Eng. Reprint 38; Heather *v.* O'Neil, 2 De G. & J. 399, 4 Jur. N. S. 957, 27 L. J. Ch. 513, 6 Wkly.

in a conveyance for life is not deemed to be executed by a mortgage,[1] and where the only power of alienation in the instrument of creation is a power to sell for reinvestment, it does not confer the right to encumber or mortgage the *corpus* of the estate.[2]

h. Purposes of Appointment. A power of appointment cannot be validly exercised otherwise than for the purposes intended by the grantor, as shown by the instrument creating the power.[3]

i. Conditions or Contingencies on Which Power Is Dependent — (I) *In General.* Where a power of appointment or revocation is given conditionally upon the happening or not happening of a certain event, it can only be exercised by the donee upon the fulfilment of the condition.[4]

(II) *Consent, Request, or Approval of Third Person.* Thus where the consent, request, or approval of a third person is required to the execution of a power of appointment, it constitutes a limitation on the power, which, like every other condition, must be strictly complied with.[5]

Rep. 484, 59 Eng. Ch. 317, 44 Eng. Reprint 1044; Barnett *v.* Wilson, 7 Jur. 593, 12 L. J. Ch. 428, 2 Y. & Coll. 407, 21 Eng. Ch. 407, 63 Eng. Reprint 182; Anson *v.* Lee, 4 Sim. 364, 6 Eng. Ch. 364, 58 Eng. Reprint 136; 1 Sugden Powers 360 [*citing* Fitzgerald *v.* Fauconberge, Fitzg. 207].

Equity of redemption or surplus undisposed of.— But where there is nothing more than a mortgage, and disposition is made with respect to the equity of redemption, or the surplus after a sale, there is an appointment *pro tanto* only, and such equity of redemption or surplus goes as on default of appointment. Hicks *v.* Ward, 107 N. C. 392, 12 S. E. 318, 10 L. R. A. 821; Jackson *v.* Innes, 1 Bligh 104, 20 Rev. Rep. 45, 4 Eng. Reprint 38; Whitbread *v.* Smith, 3 De G. M. & G. 727, 2 Eq. Rep. 377, 18 Jur. 475, 23 L. J. Ch. 611, 2 Wkly. Rep. 177, 52 Eng. Ch. 567, 43 Eng. Reprint 286; Eyton *v.* Knight, 2 Jur. 8; Thorne *v.* Thorne, 1 Vern. Ch. 141, 23 Eng. Reprint 373; Perkins *v.* Walker, 1 Vern. Ch. 97, 27 Eng. Reprint 339; 1 Sugden Powers 359.

1. Bentham *v.* Smith, Cheves Eq. (S. C.) 33, 34 Am. Dec. 599.

2. Norris *v.* Woods, 89 Va. 873, 17 S. E. 552 [*citing* Green *v.* Claiborne, 83 Va. 386, 5 S. E. 376; Bailey *v.* Hill, 77 Va. 492; Greensboro Bank *v.* Chambers, 30 Gratt. (Va.) 202, 32 Am. Rep. 661].

3. Hopkins *v.* Quinn, 93 Ind. 223 (holding that where a will gave testator's widow his entire property for life, with power to specifically dispose of the "remaining part" by will, and also gave her his "stock, personal property and money during her natural life," she could not create any charge on the property for her last sickness and funeral expenses, to operate after her death); Morgan *v.* Halsey, 97 Ky. 789, 31 S. W. 866, 17 Ky. L. Rep. 529, 36 L. R. A. 716 (no power to devise estate for a charitable purpose, in the absence of a change in the circumstances surrounding the donee or the devisees in remainder); Parks *v.* American Home Missionary Soc., 62 Vt. 19, 20 Atl. 107 (holding that where a will gave the testator's estate to his wife "for and during her natural life, and so much of the principal as she may see fit to use for her necessary and comfortable support . . . and contributions for worthy objects, in her own discretion, without limitation or restriction," she had no authority to make a gift of a part of the principal to a private individual "in recognition of kindness and in testimony of affection and regard," as this was not a charitable gift).

4. Austin *v.* Oakes, 117 N. Y. 577, 23 N. E. 193 [*modifying* 48 Hun 492, 1 N. Y. Suppl. 307] (power contingent upon death of devisees or legatees); McLintock *v.* Cowen, 49 Pa. St. 256 (where land purchased with the separate property of a married woman, whose husband was insolvent, was conveyed to a trustee by deed providing that it should be held in trust for her sole use during her life, and after her death for the use of such person as the husband, "by any deed . . . made before or after the death of the said Eliza [wife], but to take effect therefrom," should appoint, and also providing that, in case the wife should survive the husband, the land should be held in trust for her and her heirs forever, and it was held that the appointment could only be exercised by the husband in the event of his surviving the wife).

Conditions attached to execution see *infra*, VI, G.

Power of sale dependent on condition or contingency see *infra*, V, B, 2, f.

Time of execution of power dependent upon contingency see *infra*, VI, C, 3.

5. *Alabama.*— Gindrat *v.* Montgomery Gas-Light Co., 82 Ala. 596, 2 So. 327, 60 Am. Rep. 769, construing power as only requiring consent of first *cestui que trust.*

Connecticut.— Imlay *v.* Huntington, 20 Conn. 146, consent of trustee in antenuptial settlement to exercise of power of appointment by wife not necessary unless required by the terms of the deed of settlement.

Georgia.— Weeks *v.* Sego, 9 Ga. 199, holding that where, under a marriage settlement, a married woman had the power of disposing of her property by will, with the consent and approbation of the trustee, she could not

2. Sale or Exchange — a. In General. The scope and extent of a power of sale or exchange, and whether such power is limited or within the discretion of the donee, is of course dependent upon the construction of the instrument creating the power.[6]

make a valid disposition of it by will without such consent and approbation.

New York.— Barber *v.* Cary, 11 N. Y. 397.

Pennsylvania.— Slifer *v.* Beates, 9 Serg. & R. 166.

England.— Byam *v.* Byam, 19 Beav. 58, 1 Jur. N. S. 79, 24 L. J. Ch. 209, 3 Wkly. Rep. 95, 52 Eng. Reprint 270 (holding that new trustees appointed by the court might consent); Offen *v.* Harman, 1 De G. F. & J. 253, 6 Jur. N. S. 487, 29 L. J. Ch. 307, 1 L. T. Rep. N. S. 315, 8 Wkly. Rep. 129, 62 Eng. Ch. 194, 45 Eng. Reprint 355 (parol consent and subsequent joinder in deed held sufficient); Simpson *v.* Hornby, Gibb. 115, 120, 25 Eng. Reprint 80, 84, Prec. Ch. 439, 452, 24 Eng. Reprint 196, 202, 2 Vern. Ch. 722, 23 Eng. Reprint 1074; Bateman *v.* Davis, 3 Madd. 98, 18 Rev. Rep. 200, 56 Eng. Reprint 446 (subsequent acquiescence not sufficient).

See 40 Cent. Dig. tit. "Powers," §§ 64, 129 *et seq.*

Consent, request, or approval necessary to exercise of power of sale see *infra*, V, B, 2, f, (II).

Sufficiency of consent as affecting execution see *infra*, VI, G, 2.

6. *Alabama.*— Tarver *v.* Haines, 55 Ala. 503, holding that a discretionary power to sell, conferred on executors, is unaffected by Rev. Code, § 1609, abolishing the distinction between a naked power to sell and a devise with directions to sell.

Georgia.— Ellis *v.* Gray, 110 Ga. 611, 36 S. E. 97, holding that where a deed, after conveying property in fee-simple to two grantees, further stipulated that the grantor retained and reserved to herself the right to reinvest or dispose of the property as she might think necessary, "for the advantage and use" of the grantees, such reservation, at most, conferred upon the grantor a mere power to sell and reinvest for the benefit of the grantees, and further, that a subsequent deed from the same grantor, dealing with the same property and undertaking to convey a life-estate to one of the grantees, with remainder over to her children and a second remainder over to the other grantee named in the original deed, was not a good execution of the power.

Kentucky.— Trimble *v.* Lebus, 94 Ky. 304, 22 S. W. 329, 15 Ky. L. Rep. 85 (discretionary power given to executor by will to sell stock, bonds, or other property not affected by a statute prohibiting sales of such property by an executor or administrator without order of court); Powell *v.* Powell, 5 Bush 619, 96 Am. Dec. 372 (holding that power vested in a husband to superintend, and with the concurrence of the wife to sell and convey real estate, the title to which had vested in the wife and her child, did not authorize the husband to convey the interest of the child to its mother); Fritsch *v.* Klausing, 13 S. W. 241, 11 Ky. L. Rep. 788 (where a grantor conveyed land to his daughter for life with remainder to her children, or, in case she should die without leaving children or descendants, to the grantor's heirs on the death of the daughter and her husband, provided that if she and her husband should ever sell the land, the purchase-money should be invested in other land, the title to which should be secured to the daughter in the same manner as was the title to the land originally conveyed; and it was held that the deed conferred on the daughter a power of sale which enabled her to convey a fee-simple title).

Maryland.— Magruder *v.* Peter, 11 Gill & J. 217, holding a power to executors to sell unaffected by Acts (1785), c. 72, § 4, providing for a resort to equity for such purpose.

Massachusetts.— Dodge *v.* Moore, 100 Mass. 335, holding that under a will giving to testator's widow the income of all his estate, with full power and authority to sell any part of the estate which she might think expedient, either for her support or for investment, and giving to his daughter all the remainder, the widow's discretion to sell was unlimited.

Mississippi.— Yates *v.* Clark, 56 Miss. 212, where a will declared: "I hereby appoint my wife Bettie L. Clark, my sole exeeutrix, without bond or accountability to any one, to have, use, and employ all my property, real and personal, for her own, and the use of our children, and [to] dispose of the same in such manner as she may think is for their mutual advantage"; and it was held that this made the widow the donee of a power to dispose of all the property, real and personal, of the testator, in her discretion, for the mutual advantage of herself and her children by the testator; that she was made the sole judge of "their mutual advantage," and her power of disposing of the property was unlimited; and that the power was vested in her as an individual, and not as executrix.

New Jersey.— Stephens *v.* Milnor, 24 N. J. Eq. 358, discretion of executors to sell.

New York.— Hancox *v.* Wall, 28 Hun 214 (no discretion in trustees); Dominick *v.* Michael, 4 Sandf. 374 (construction of executors' power to sell); Slocum *v.* Slocum, 4 Edw. 613 (discretionary power in executors).

North Carolina.— Devereux *v.* Dunn, 37 N. C. 206, no power in widow under will to sell real estate.

Ohio.— Jones *v.* Lewis, 8 Ohio Dec. (Reprint) 368, 7 Cinc. L. Bul. 211, holding that the authority of an executor having power under the will to sell realty is not limited because the power is not coupled with an interest.

Pennsylvania.— Hanbest *v.* Grayson, 206

b. Property, Estates, or Interests Included — (i) *In General.* In determining what property, estate, or interests are included in a power of sale or exchange the ordinary rules of construction are to be applied, and effect is to be given to the intention of the donor, as shown by the terms of the instrument conferring the power, viewed, if necessary, in the light of the circumstances surrounding its creation.[7]

Pa. St. 59, 55 Atl. 786 (construction of executor's power of sale); Marshall's Estate, 138 Pa. St. 260, 22 Atl. 90 (discretion of testamentary trustees to sell held absolute and not affected by lapse of time, or the fact that they had already sold part of the property and distributed the proceeds); Wells *v.* Sloyer, 3 Pa. L. J. 203 (no discretion in executor as to execution of a power to sell within a limited time).

Tennessee.— Horn *v.* Broyles, (Ch. App. 1900) 62 S. W. 297, reservation by grantor of a power of sale for reinvestment in a deed giving himself and his wife a life-estate, with a vested remainder to others.

Texas.— Adams *v.* Mauermann, 90 Tex. 438, 39 S. W. 280, scope of wife's power to sell real estate under deed to her and her daughters.

Wisconsin.— McLenegan *v.* Yeiser, 115 Wis. 304, 91 N. W. 682, construction and validity of power of sale vested by will in testamentary trustees.

England.— Minors *v.* Battison, 1 App. Cas. 428, 46 L. J. Ch. 2, 35 L. T. Rep. N. S. 1, 25 Wkly. Rep. 27; *In re* Evans, 2 C. M. & R. 206, 4 L. J. Exch. 201, 5 Tyrw. 660; Nickisson *v.* Cockill, 3 De G. J. & S. 622, 9 Jur. N. S. 975, 32 L. J. Ch. 753, 8 L. T. Rep. N. S. 778, 2 New Rep. 557, 11 Wkly. Rep. 1082, 68 Eng. Ch. 472, 46 Eng Reprint 778; Bird *v.* Tox, 11 Hare 40, 45 Eng. Ch. 40, 68 Eng. Reprint 1178; Shipperdson *v.* Tower, 6 Jur. 658, 1 Y. & Coll. 441, 20 Eng. Ch. 441, 62 Eng. Reprint 961; Thomas *v.* Dering, 1 Jur. 427, 1 Keen. 729, 6 L. J. Ch. 267, 15 Eng. Ch. 729, 48 Eng. Reprint 488; Cust *v.* Middleton, 9 Jur. N. S. 709, 8 L. T. Rep. N. S. 160, 1 New Rep. 508, 11 Wkly. Rep. 456; Glover *v.* Heelis, 32 L. T. Rep. N. S. 534, 23 Wkly. Rep. 677; Noel *v.* Henley, 7 Price 241, 26 Rev. Rep. 660.

See 40 Cent Dig. tit. "Powers," §§ 48, 49. And see *supra*, III, B, 1.

Under a power to sell within a limited period, an executor has no discretion as to the execution of the power. Wells *v.* Sloyer, 3 Pa. L. J. 203.

Effect of reversioners' interests vesting.— A discretionary power of sale is not put an end to during the life of the tenant for life by all the reversioners having acquired vested interests in their shares. Biggs *v.* Peacock, 22 Ch. D. 284, 52 L. J. Ch. 1, 47 L. T. Rep. N. S. 341, 3 Wkly. Rep. 148.

Exchange by executor under testamentary power see Executors and Administrators, 18 Cyc. 322.

Sale by executor under testamentary power see Executors and Administrators, 18 Cyc. 318 *et seq.*

7. *Alabama.*— Johnson *v.* Johnson, 33 Ala. 284.

California.— Sharp *v.* Loupe, 120 Cal. 89, 52 Pac. 134, 586; *In re* Pearson, 98 Cal. 603, 33 Pac. 451; Watson *v.* Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Smith *v.* Olmstead, (1890) 22 Pac. 1143 (construing Code Civ. Proc. §§ 1307, 1561); De Etcheborne *v.* Auzerais, 45 Cal. 121.

Illinois.— Henderson *v.* Blackburn, 104 Ill. 227, 44 Am. Rep. 780; Kinney *v.* Knoebel, 51 Ill. 112.

Kentucky.— Isaacs *v.* Swan, 1 Duv. 277; Hite *v.* Taylor, 3 A. K. Marsh. 353; White *v.* Guthrie, 8 S. W. 274, 10 Ky. L. Rep. 94.

Maryland.— Young *v.* Twigg, 27 Md. 620, land specially devised not included.

Massachusetts.— Hale *v.* Hale, 137 Mass. 168; Roberts *v.* Whiting, 16 Mass. 186.

Michigan.— Haddon *v.* Hemingway, 39 Mich. 615.

Minnesota.— Ness *v.* Davidson, 45 Minn. 424, 48 N. W. 10; Officer *v.* Simpson, 27 Minn. 147, 6 N. W. 488.

Mississippi.— See McComb *v.* Gilkey, 29 Miss. 146, where the power of sale was conferred by special act on the guardians of certain lots.

Missouri.— Donnan *v.* Intelligencer Printing, etc., Co., 70 Mo. 168; Noreum *v.* D'Uench, 17 Mo. 98.

New Jersey.— Hatt *v.* Rich, 59 N. J. Eq. 492, 45 Atl. 969; Cruikshank *v.* Parker, 51 N. J. Eq. 21, 26 Atl. 925; Anderson *v.* Anderson, 31 N. J. Eq. 560; Provost *v.* Provost, 27 N. J. Eq. 296; Youmans *v.* Youmans, 26 N. J. Eq. 149; Graydon *v.* Graydon, 23 N. J. Eq. 229; Bacot *v.* Wetmore, 17 N. J. Eq. 250.

New York.— Cussack *v.* Tweedy, 126 N. Y. 81, 26 N. E. 1033 [*affirming* 56 Hun 617, 11 N. Y. Suppl. 16]; Kip *v.* Hirsh, 103 N. Y. 565, 9 N. E. 317 [*reversing* 53 N. Y. Super. Ct. 1]; Prentice *v.* Janssen, 79 N. Y. 478 [*affirming* 14 Hun 548]; Hetzel *v.* Barber, 69 N. Y. 1; Bruner *v.* Meigs, 64 N. Y. 506 [*affirming* 6 Hun 203]; Roome *v.* Philips, 27 N. Y. 357; Lewis *v.* Smith, 9 N. Y. 502, 61 Am. Dec. 706; Pollock *v.* Hooley, 67 Hun 370, 22 N. Y. Suppl. 215; Strube *v.* Leutzbach, 12 Misc. 216, 33 N. Y. Suppl. 264.

North Carolina.— Epley *v.* Epley, 111 N. C. 505, 16 S. E. 321; Saunders *v.* Saunders, 108 N. C. 327, 12 S. E. 909; Towles *v.* Fisher, 77 N. C. 437.

Pennsylvania.— Pennsylvania L. Ins. Co. *v.* Leggate, 166 Pa. St. 147, 30 Atl. 946; Cresson *v.* Ferree, 70 Pa. St. 466; Brewer *v.* Taylor, 6 Pa. Cas. 369, 9 Atl. 515.

Rhode Island.— Derby *v.* Derby, 4 R. I. 414, holding that a cemetery lot is not embraced in a power of sale to an executor, in which the property to be sold is described in general terms.

(II) *After-Acquired Property or Interests.*[8] A power of sale does not extend to after-acquired property or interests,[9] unless there is a statute to such effect,[10] or unless a manifest intent is apparent on the face of the instrument creating the power that such property or interests shall be included;[11] and the same is true where land is sold under a power and the proceeds reinvested in land.[12]

c. Estates or Interests to Be Conveyed. Whether the fee or a lesser estate or interest may be conveyed under a power of sale is dependent upon the terms of the instrument creating the power.[13] It appears, however, to be well settled that where a power of disposal accompanies a bequest or devise of an estate for life or during widowhood or for a term of years, the power of disposal is only coextensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life or widowhood or for a term of years could make, unless there are other words clearly indicating that a larger power was intended.[14] If such inten-

South Carolina.— McCants *v.* Bee, 1 McCord Eq. 383, 16 Am. Dec. 610.

Texas.— King *v.* Bock, 80 Tex. 156, 15 S. W. 804.

United States.— Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130.

England.— Tait *v.* Lathbury, L. R. 1 Eq. 174, 35 Beav. 112, 11 Jur. N. S. 991, 14 Wkly. Rep. 216, 55 Eng. Reprint 837; Buckley *v.* Howell, 29 Beav. 546, 7 Jur. N. S. 536, 30 L. J. Ch. 524, 4 L. T. Rep. N. S. 172, 9 Wkly. Rep. 544, 54 Eng. Reprint 739; Blackwood *v.* Burrowes, 2 C. & L. 459, 4 Dr. & War. 441; Gurly *v.* Gurly, 8 Cl. & F. 743, 8 Eng. Reprint 291; Clements *v.* Henry, 10 Ir. Ch. 79; Bowden *r.* Bowden, 17 Sim. 65, 42 Eng. Ch. 65, 60 Eng. Reprint 1052; Giles *v.* Homes, 15 Sim. 359, 38 Eng. Ch. 359, 60 Eng. Reprint 657; Clark *v.* Seymour, 7 Sim. 67, 8 Eng. Ch. 67, 58 Eng. Reprint 762.

See 40 Cent. Dig. tit. "Powers," §§ 50–52.

Where the terms of a power are clear, the safest course is to abide by the words, unless upon the whole will there is something amounting almost to demonstration that the plain meaning of the words is not the meaning of the testator. Bacot *v.* Wetmore, 17 N. J. Eq. 250.

The granting clause prevails over any part of the deed conflicting therewith; and hence the trustee in a deed of an undivided two-thirds interest, containing a clause assuming to empower him, on condition broken, to sell the whole of the property, can make a valid conveyance of only the undivided two-thirds. Donnan *v.* Intelligencer Printing, etc., Co., 70 Mo. 168.

Where testator has made an executory contract to sell, a power of sale conferred on the executor becomes inapplicable. Roome *v.* Philips, 27 N. Y. 357.

Sale by executor under testamentary power see also Executors and Administrators, 18 Cyc. 323, 324.

8. Effect of testamentary provisions to pass after-acquired property see Wills.

9. *Alabama.*— Jones *v.* Morris, 61 Ala. 518; Meador *v.* Sorsby, 2 Ala. 712, 36 Am. Dec. 432.

Georgia.— Leonard *v.* Owen, 93 Ga. 678, 20 S. E. 65.

New Jersey.— Chambers *v.* Tulane, 9 N. J. Eq. 146.

New York.— Green *v.* Dikeman, 18 Barb. 535.

Pennsylvania.— Miller *v.* Kissler, 5 Lack. Jur. 309.

Tennessee.— Peck *v.* Peck, 9 Yerg. 301.

England.— Langford *v.* Pitt, 2 P. Wms. 629, 24 Eng. Reprint 890; Wagstaff *v.* Wagstaff, 2 P. Wms. 258, 24 Eng. Reprint 721; Longford *v.* Eyre, 1 P. Wms. 740, 24 Eng. Reprint 593; Jones *v.* Clough, 2 Ves. 365, 28 Eng. Reprint 234.

See 40 Cent. Dig. tit. "Powers," § 53.

10. Roney *v.* Stiltz, 5 Whart. (Pa.) 381; Martin *v.* Baily, 13 Leg. Int. (Pa.) 189, both construing and applying the act of April 8, 1883, § 10 (Pamphl. Laws 249), providing that real estate acquired by a testator after making his will shall pass by a general devise, unless a contrary intent be manifest from the face of the testamentary instrument itself.

11. *Kentucky.*— Preuser *v.* Terry, 16 S. W. 133, 13 Ky. L. Rep. 25; Cummins *v.* Carrick, 2 S. W. 490, 8 Ky. L. Rep. 600.

Maryland.— Reisman *v.* Collins, (1885) 1 Atl. 883.

New Jersey.— Fluke *v.* Fluke, 16 N. J. Eq. 478.

South Carolina.— Porcher *v.* Daniel, 12 Rich. Eq. 349.

West Virginia.— Dearing *v.* Selvey, 50 W. Va. 4, 40 S. E. 478.

England.— Elton *v.* Elton, 27 Beav. 634, 54 Eng. Reprint 252.

See 40 Cent. Dig. tit. "Powers," § 53.

12. Fritsch *v.* Klausing, 13 S. W. 241, 11 Ky. L. Rep. 788; Sheldon *v.* Tucker, 3 R. I. 98.

13. See Pendleton *v.* Bell, 32 Mo. 100 (fee); Hume *v.* Randall, 141 N. Y. 499, 36 N. E. 402 [*reversing* 65 Hun 437, 20 N. Y. Suppl. 352] (fee); Dyett *v.* Central Trust Co., 140 N. Y. 54, 35 N. E. 341 [*affirming* 19 N. Y. Suppl. 19] (remainder in fee); Holly *v.* Hirsch, 135 N. Y. 590, 32 N. E. 709 [*reversing* 63 Hun 241, 17 N. Y. Suppl. 821] (legal title); Kortright *v.* Storminger, 49 Hun (N. Y.) 249, 1 N. Y. Suppl. 880 (fee); Devereux *v.* Dunn, 37 N. C. 206 (only during **minority of child).**

14. *Illinois.*— Kaufman *v.* Breckinridge, 117 Ill. 305, 7 N. E. 666; Henderson *v.* Blackburn, 104 Ill. 227, 44 Am. Rep. 780;

tion does appear there is power to convey the fee or absolute title;[15] and it has been held that, in interpreting such power given by will to a life-tenant, the court will look at the circumstances under which the devisor made the will, such as the state of his property, of his family, and the like, and that the admission of such evidence is not a violation of the rule forbidding variation of a will by parol evidence.[16]

d. Authority Incidental to Sale or Conveyance — (i) *In General.* The donee of a power of sale has incidental authority to do such acts as will effectuate the intention of the donor, as shown by the instrument creating the power,[17] as to sell by executory contract as well as by deed of bargain and sale,[18] to grant an easement,[19] to sell free of debts,[20] etc. But he is not authorized to deal with the property otherwise than in accordance with such intention.[21] A trustee's power to

Mulberry *v.* Mulberry, 50 Ill. 67; Boyd *v.* Strahan, 36 Ill. 355.

Missouri.— Gaven *v.* Allen, 100 Mo. 293, 13 S. W. 501.

Virginia.— Miller *v.* Potterfield, 86 Va. 876, 11 S. E. 456, 19 Am. St. Rep. 919.

United States.— Giles *v.* Little, 104 U. S. 291, 26 L. ed. 745; Brant *v.* Virginia Coal, etc., Co., 93 U. S. 326, 23 L. ed. 927; Smith *v.* Bell, 6 Pet. 68, 8 L. ed. 232.

England.— Bradly *v.* Westcott, 13 Ves. Jr. 445, 9 Rev. Rep. 207, 33 Eng. Reprint 361.

15. *Connecticut.*—Bouton *v.* Doty, 69 Conn. 531, 37 Atl. 1064; Security Co. *v.* Pratt, 65 Com. 161, 32 Atl. 396; Lewis *v.* Palmer, 46 Conn. 454.

Georgia.— Weed *v.* Knorr, 77 Ga. 636, 1 S. E. 167.

Illinois.— Kaufman *v.* Breckinridge, 117 Ill. 305, 7 N. E. 666 (holding that where a life-tenant was given power of disposal for a certain purpose, which it would be impossible to accomplish by a sale of the life-estate, and which could be accomplished by disposal of the fee, the power must be held to be that which was necessary for the accomplishment of the purpose; and where the life-estate was in unimproved and unproductive realty, and the purpose was the support of the family, the power must be held to allow an absolute disposition); Henderson *v.* Blackburn, 104 Ill. 227, 44 Am. Rep. 780; Crozier *v.* Hoyt, 97 Ill. 23.

Indiana.— McMillan *v.* William Deering, etc., Co., 139 Ind. 70, 38 N. E. 398; Downie *v.* Buennagel, 94 Ind. 228; South *v.* South, 91 Ind. 221, 46 Am. Rep. 591; Clark *v.* Middlesworth, 82 Ind. 240.

Kentucky.— Fink *v.* Leisman, 38 S. W. 6, 18 Ky. L. Rep. 710.

Massachusetts.— Hoxie *v.* Finney, 147 Mass. 616, 18 N. E. 593 (reservation of life-estate and sale of remainder); Hale *v.* Marsh, 100 Mass. 468. And see Andrews *v.* Cape Ann Bank, 3 Allen 313; Blanchard *v.* Blanchard, 1 Allen 223.

Missouri.— Gaven *v.* Allen, 100 Mo. 293, 13 S. W. 501; Boyer *v.* Allen, 76 Mo. 498.

New York.— Terry *v.* Wiggins, 47 N. Y. 512; Kortright *v.* Storminger, 49 Hun 249, 1 N. Y. Suppl. 880; Hickey *v.* Peterson, 5 Silv. Sup. 490, 9 N. Y. Suppl. 917. And see Philips *v.* New York El. R. Co., 14 N. Y. App. Div. 595, 44 N. Y. Snppl. 28.

Ohio.— Bishop *v.* Remple, 11 Ohio St. 277.

Pennsylvania.— Forsythe *v.* Forsythe, 108 Pa. St. 129; Hinkle *v.* Rehm, 16 Pa. Super. Ct. 470.

Rhode Island.—Ames *v.* Ames, 15 R. I. 12, 22 Atl. 1117.

Tennessee.— Moyston *v.* Bacon, 7 Lea 236. And see Shields *v.* Netherland, 5 Lea 193.

West Virginia.— John *v.* Barnes, 21 W. Va. 498.

England.— Barford *v.* Street, 16 Ves. Jr. 135, 139, 33 Eng. Reprint 935, where it is said that "an estate for life with an unqualified power of appointing the inheritance comprehends everything."

See 40 Cent. Dig. tit. "Powers," § 54.

16. Kaufman *v.* Breckinridge, 117 Ill. 305, 7 N. E. 666; John *v.* Barnes, 21 W. Va. 498; Smith *v.* Bell, 6 Pet. (U. S.) 68, 8 L. ed. 322.

17. Valentine *v.* Schreiber, 3 N. Y. App. Div. 235, 38 N. Y. Suppl. 417; Demarest *v.* Ray, 29 Barb. (N. Y.) 563; and other cases cited in the notes following.

A power to sell in fee, on ground-rent or otherwise, is well executed by a sale on ground-rent, with a clause in the deed allowing a redemption of the rent by the purchaser in payment of a sum of money. *Ex p.* Huff, 2 Pa. St. 227.

18. Demarest *v.* Ray, 29 Barb. (N. Y.) 563.

19. Valentine *v.* Schreiber, 3 N. Y. App. Div. 235, 38 N. Y. Suppl. 417, holding that executors and trustees under a will with power to sell may, in carrying out the provisions of the trust, convey an easement in favor of lands already sold, when such conveyance appears distinctly advantageous to the estate. And see Weiss *v.* Goodhue, (Tex. Civ. App. 1907) 102 S. W. 793. But *compare* Atwater *v.* Perkins, 51 Conn. 188.

20. Grant *v.* Hook, 13 Serg. & R. (Pa.) 259, holding that where testator authorized his executors to sell as much realty as was necessary to pay debts and educate his minor children, and further recited that his son had purchased an estate, on which testator had advanced part of the money, the son having given his bond and mortgage, and ordered his executors to pay off such mortgage, they had power to sell the real estate free of debt.

21. *Connecticut.*— Atwater *v.* Perkins, 51 Conn. 188, holding that a donee of a naked power of sale, on selling one tract, cannot

sell and reinvest does not include authority to settle actions of ejectment pending against him by agreeing to allow verdicts to be taken for plaintiffs in some cases, and for defendant in others.[22]

(II) *To Transfer Without Sale.* Where the purposes for which a power of sale was created can be fully accomplished by a transfer without sale, such a transfer will be upheld as a substantial execution of the power;[23] but it is otherwise

grant a right to carry a drain through another tract.

Maryland.— Dean *v.* Adler, 30 Md. 147, no power to enter into a covenant so as to bind remainder-men.

New York.—Adair *v.* Brimmer, 74 N. Y. 539 (executors not authorized to dispose of land for the purpose of forming a mining corporation and to receive stock in payment); Ramsey *v.* Wandell, 32 Hun 482 (executors not authorized to give covenants of warranty and against encumbrances).

Ohio.— Pollock *v.* Pine, 2 Ohio Cir. Ct. 359, 1 Ohio Cir. Dec. 529, executor not authorized to enter into an agreement to sell for one third less than had been previously agreed on by the testator and purchaser in an executory contract of sale.

Pennsylvania.— Hickok *v.* Still, 168 Pa. St. 155, 31 Atl. 1100, 47 Am. St. Rep. 880 (holding that under a power to sell during the life of testator's husband, and a peremptory direction to sell immediately after his death, the executor could not sell the privilege of buying at any time within three and one-half years); Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204 (holding that a power contained in a deed of trust, to sell the trust property "either for a price or consideration to be paid out and out in money, or upon the reservation of a ground-rent," extinguishable or otherwise, was not well executed by a sale on credit, the purchase-money to be secured by mortgage on the premises); *In re* Hilliard, 8 Luz. Leg. Reg. 237 (holding that where a testator gave his executors full power to sell real estate, and to make title to the same, for payment of debts or for the purpose of distribution among his children, the executors had no authority to rent, repair, insure, or otherwise control it, except to sell it for the purposes set forth in the will).

Virginia.— Grantland *v.* Wight, 5 Munf. 295, executor not bound to convey with general warranty, without special agreement to that effect, made before sale.

See 40 Cent. Dig. tit. "Powers," § 55.

22. Lemon *v.* Jennings, 52 Ga. 452.

23. *Illinois.*— Hughes *v.* Washington, 72 Ill. 84 (authority of executor under will to employ an attorney to protect the interest of the estate and to attend to an appeal, giving him in consideration therefor an interest in certain land); White *v.* Glover, 59 Ill. 459 (holding that where a testator devised all his property to a trustee to pay debts, and set off to his wife her share of the estate and to hold the remainder to his children, with power to sell and convey the same, and invest the proceeds for the support of his children, and convey the same or the proceeds thereof to them when they should become twenty-one years of age, a conveyance of a portion of the estate to the widow in lieu of her dower and all claim on the estate, was within the power conferred).

Indiana.— Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788 (holding that under a will empowering the executors to settle, adjudicate, and compromise all debts of the testator, to make settlements with his former partners without authority from any court, and to sell and convey at public or private sale any of testator's land in order to pay his debts, the executors had power to convey testator's interest in the firm, whose assets were chiefly land, in consideration of an agreement by the purchaser to pay the firm debts, and also certain individual debts of the testator); Tower *v.* Hartford, 115 Ind. 186, 17 N. E. 281 (holding that where a testator bequeathed to his wife all the residue of his personalty, and provided that whatever should be undisposed of after his death should descend to his heirs, the widow had at least an absolute power of disposition, and the assignment without consideration of a note for money received by her under the will and loaned was an effectual exercise of her power).

New York.— Mutual L. Ins. Co. *v.* Woods, 121 N. Y. 302, 24 N. E. 602 [*affirming* 4 N. Y. Suppl. 133] (where testator gave the residue of his estate to his executors in trust "with power to sell, dispose of or convey the same," and invest and apply the proceeds as therein directed, and the foreclosure of a mortgage on the realty executed by the testator resulted in a large deficiency, and in consideration of a small sum of money the executrix under the will made a bargain and sale deed of the property to the purchaser at the foreclosure sale; and it was held that this was a valid exercise of the power of sale conferred by the will, it appearing that the estate received adequate consideration for the property; and it was further held that it was immaterial that the deed was executed to cure possible defects in the title); Brown *v.* Farmers' L. & T. Co., 117 N. Y. 266, 22 N. E. 952 (where a debtor, who held bonds as a legatee under a will, with power to sell them, turned them over to his creditor in satisfaction and discharge of his debt, and it was held that, as the transaction in effect amounted to a sale, it would be upheld without construing the will as to the legatee's power to pledge the bonds); Brant *v.* Gelston, 2 Johns. Cas. 384.

North Carolina.— Jones *v.* Loftin, 38 N. C. 136, holding that where a will authorized the executor to sell a chattel purchased by the testator, the price of which remained unpaid, the rescission of the purchase was a due execution of the power.

where the instrument requires a sale and can only be executed, according to the intent, by a sale.[24] A life-tenant or executor having power to sell cannot convey as a gift or otherwise without consideration, and such a conveyance is void.[25] A life-tenant of real or personal property having the power to sell the same and to receive the proceeds and appropriate them to his own use may convey the property in payment of a debt.[26]

(III) *To Exchange.* A power given by will to sell does not include the power to exchange.[27] But where a power to sell land and invest the proceeds in other land is conferred, a direct exchange is a valid execution of the power.[28]

(IV) *To Make Partition.*[29] A power to "sell and exchange" includes a power to make partition.[30] Some of the cases hold that a power to sell, and nothing more, will authorize a partition.[31] Other cases, however, are to the contrary.[32]

Ohio.— Stableton *v.* Ellison, 21 Ohio St. 527, holding that where testator at his death held the legal title to land, the equitable estate of which belonged to another, and his will gave his widow power to dispose of all his property as she might deem best, she had the power to convey the legal title to the person having the equity.

Wisconsin.— Sydnor *v.* Palmer, 29 Wis. 226, holding that an executor who is required by the will to retain land for the benefit of infant devisees, or to sell it for their benefit when its use becomes unprofitable, may convey it directly to them.

See 40 Cent. Dig. tit. "Powers," § 56.

Election of legatees to take land.— When testator directs certain land to be sold and the proceeds divided among the persons named in the will, the legatees, if of full age, may elect to take either the land or the money, provided the rights of others are not thereby affected. Prentice *v.* Janssen, 79 N. Y. 478 [*affirming* 14 Hun 548]. See also Sydnor *v.* Palmer, 29 Wis. 226; and Conversion, 9 Cyc. 853.

24. Powell *v.* Powell, 5 Bush (Ky.) 619, 96 Am. Dec. 372 (holding that a power in a husband to superintend, and with the concurrence of the wife to sell and convey real estate, the title to which had vested in the wife and her child, did not authorize the husband to convey the interest of the child to its mother); Harris *v.* Strodl, 132 N. Y. 392, 30 N. E. 962 [*affirming* 57 Hun 592, 10 N. Y. Suppl. 859]; Russell *v.* Russell, 36 N. Y. 581, 93 Am. Dec. 540 (holding that where an executrix was empowered by the will to sell real estate as she should deem most expedient for the best interest of all the legatees, this was a general power in trust, in which she had no interest and which must be executed by a "sale" in the discretion of the executrix, and not by a conveyance, and therefore it was not well executed by a conveyance of real estate to one of the legatees in satisfaction of a debt due from the testator); Hellferish *v.* Helfferish, 11 Ohio Dec. (Reprint) 303, 26 Cinc. L. Bul. 83, 11 Ohio Dec. (Reprint) 234, 25 Cinc. L. Bul. 313.

25. Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407; Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188; Sires *v.* Sires, 43 S. E. 266, 21 S. E. 115.

26. Brown *v.* Farmers' L. & T. Co., 117 N. Y. 266, 22 N. E. 952 [*affirming* 51 Hun 386, 4 N. Y. Suppl. 422], transfer of bonds in payment of debt. See also Shields *v.* Netherland, 5 Lea (Tenn.) 193, conveyance of land as security for debt.

27. *Iowa.*— Edwards *v.* Cottrell, 43 Iowa 194, power of sale in chattel mortgage.

Kentucky.— Ross *v.* Barr, 53 S. W. 658, 21 Ky. L. Rep. 974.

Mississippi.— Columbus Banking, etc., Co. *v.* Humphries, 64 Miss. 258, 1 So. 232.

Ohio.— Cleveland *v.* State Bank, 16 Ohio St. 236, 88 Am. Dec. 445; Taylor *v.* Galloway, 1 Ohio 232, 13 Am. Dec. 605; Fleischman *v.* Shoemaker, 2 Ohio Cir. Ct. 152, 1 Ohio Cir. Dec. 415.

Wisconsin.— King *v.* Whiton, 15 Wis. 684.

United States.— Woodward *v.* Jewell, 140 U. S. 247, 11 S. Ct. 784, 35 L. ed. 478.

See also as to powers of attorney to sell Hampton *v.* Moorhead, 62 Iowa 91, 17 N. W. 202; Long *v.* Fuller, 21 Wis. 121; McMichael *v.* Wilkie, 18 Ont. App. 464 [*reversing* 19 Ont. 739]. But see Smith *v.* Spears, 22 Ont. 286, power of sale in mortgage. See Exchange of Property, 17 Cyc. 830.

28. Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78.

29. See also Partition, 30 Cyc. 159.

30. Phelps *v.* Harris, 51 Miss. 789 [*affirmed* in 101 U. S. 370, 25 L. ed. 855]; *In re* Trith, 3 Ch. D. 618, 45 L. J. Ch. 780, 35 L. T. Rep. N. S. 146, 24 Wkly. Rep. 1061; Abell *v.* Heathcote, 4 Bro. Ch. 278, 29 Eng. Reprint 891, 2 Ves. Jr. 98, 30 Eng. Reprint 542, 2 Rev. Rep. 171. *Compare*, however, Bradshaw *v.* Fane, 3 Drew. 534, 2 Jur. N. S. 247, 25 L. J. Ch. 413, 2 Wkly. Rep. 422, 61 Eng. Reprint 1006; Atty.-Gen. *v.* Hamilton, 1 Madd. 214, 16 Rev. Rep. 208, 56 Eng. Reprint 80; McQueen *v.* Farquhar, 11 Ves. Jr. 467, 8 Rev. Rep. 212, 32 Eng. Reprint 1168.

31. King *v.* Merritt, 67 Mich. 194, 34 N. W. 689; Elle *v.* Young, 24 N. J. L. 775 [*reversing* 23 N. J. L. 478]; Anderson *v.* Butler, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166.

32. Braunsdorf *v.* Braunsdorf, 23 N. Y. Suppl. 722 [*affirmed* in 76 Hun 609, 29 N. Y. Suppl. 1141]; *In re* Carr, 16 R. I. 645, 19 Atl. 145, 27 Am. St. Rep. 773; Brassey *v.* Chalmers, 16 Beav. 223, 51 Eng. Reprint 763 [*affirmed* in 4 De G. M. & G. 528, 53 Eng. Ch. 412, 43 Eng. Reprint 613]; Brad-

(v) *To Mortgage.* Generally speaking a power of sale out and out, or for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage;[33] but when it is for raising a particular charge, and the estate is settled or devised subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the courts will support it as a

shaw *v.* Fane, 3 Drew. 534, 2 Jur. N. S. 247, 25 L. J. Ch. 413, 4 Wkly. Rep. 422, 61 Eng. Reprint 1006; McQueen *v.* Tarquhar, 11 Ves. Jr. 467, 8 Rev. Rep. 212, 32 Eng. Reprint 1168.

33. *Alabama.*— Butler *v.* Gazzam, 81 Ala. 491, 1 So. 16, holding that a power given a trustee to sell lands for reinvestment does not authorize a mortgage for a debt created by borrowing money.

California.— Webb *v.* Winter, (1901) 65 Pac. 1028.

Connecticut.— O'Brien *v.* Flint, 74 Conn. 502, 51 Atl. 547.

Florida.— Fridenburg *v.* Wilson, 20 Fla. 359.

Georgia.— McMillan *v.* Cox, 109 Ga. 42, 34 S. E. 341. But see Miller *v.* Redwine, 75 Ga. 130.

Iowa.—Hubbard *v.* German Catholic Cong., 34 Iowa 31.

Kentucky.— Hirschman *v.* Brashears, 79 Ky. 258, power given to a husband and wife to sell the separate estate of the wife does not authorize a mortgage to secure a debt of the husband.

Maryland.—Wilson *v.* Maryland L. Ins. Co., 60 Md. 150; Tyson *v.* Latrobe, 42 Md. 325.

Massachusetts.— Hoyt *v.* Jaques, 129 Mass. 286; Wood *v.* Goodridge, 6 Cush. 117, 52 Am. Dec. 771.

Michigan.— Parkhurst *v.* Trumbull, 130 Mich. 408, 90 N. W. 25.

Minnesota.— Morris *v.* Watson, 15 Minn. 212.

Mississippi.— Stokes *v.* Payne, 58 Miss. 614, 38 Am. Rep. 340.

Missouri.— Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099 (holding that a power given by will to a devisee for life or during widowhood, to sell any of the property devised for the support of the devisee and children, is not a power to convey by mortgage or deed of trust); Price *v.* Courtney, 87 Mo. 387, 56 Am. Rep. 453; Kinney *v.* Mathews, 69 Mo. 520. *Compare* Wood *v.* Kice, 103 Mo. 329, 15 S. W. 623, in which the deed conveying the land in trust for A and the heirs of her body was upon a valuable consideration and was not a gift, and it was held that a clause authorizing the trustee, at the request of A and her heirs, to sell the estate, and hold the proceeds in trust in like manner, did not exclude the power to mortgage for the benefit of the *cestuis que trustent.*

Nebraska.— Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

New Jersey.— Dubois *v.* Van Valen, 61 N. J. Eq. 331, 48 Atl. 241; Rutherford Land, etc., Co. *v.* Sanutrock, 60 N. J. Eq. 471, 46 Atl. 648; Ferry *v.* Laible, 31 N. J. Eq. 566. *Compare* Schulting *v.* Schulting, 41 N. J. Eq. 130, 3 Atl. 526, where it is held that equity will, in a proper case, sanction the exercise of a power to mortgage under a power to sell, and a power of sale in such case will be construed as authorizing a mortgage where it is necessary for the preservation of the estate, but not where the object is improvement merely.

New York.—Albany F. Ins. Co. *v.* Bay, 4 N. Y. 9; Allen *v.* De Witt, 3 N. Y. 276; Coutant *v.* Servoss, 3 Barb. 128; Bloomer *v.* Waldron, 3 Hill 361 [*overruling* Williams *v.* Woodard, 2 Wend. 487]; Cumming *v.* Williamson, 1 Sandf. Ch. 17. And see Freifeld *v.* Mankowski, 37 Misc. 303, 75 N. Y. Suppl. 454.

South Carolina.—Allen *v.* Ruddell, 51 S. C. 366, 29 S. E. 198; Creighton *v.* Clifford, 6 S. C. 188.

Texas.— Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247. But *compare* Sampson *v.* Williamson, 6 Tex. 102, 55 Am. Dec. 762; Stevenson *v.* Roberts, 25 Tex. Civ. App. 577, 64 S. W. 230.

Virginia.— Green *v.* Clairborne, 83 Va. 386, 5 S. E. 376.

England.— Devaynes *v.* Robinson, 24 Beav. 86, 3 Jur. N. S. 707, 27 L. J. Ch. 157, 2 Wkly. Rep. 509, 53 Eng. Reprint 289; Page *v.* Cooper, 16 Beav. 396, 1 Wkly. Rep. 136, 51 Eng. Reprint 331; Haldenby *v.* Spofforth, 1 Beav. 390, 3 Jur. 241, 8 L. J. Ch. 238, 17 Eng. Ch. 390, 48 Eng. Reprint 991; Shaftesbury *v.* Marlborough, 2 L. J. Ch. 30, 2 Myl. & K. 111, 7 Eng. Ch. 111, 39 Eng. Reprint 886; Walker *v.* Southall, 56 L. T. Rep. N. S. 882; Lord St. Leonards in Stroughill *v.* Anstey, 1 De G. M. & G. 635, 16 Jur. 671, 22 L. J. Ch. 130, 50 Eng. Ch. 490, 42 Eng. Reprint 700.

See 40 Cent. Dig. tit. "Powers," § 59.

Contra.— Columbia Ave. Sav. Fund, etc., Co. *v.* Lewis, 190 Pa. St. 558, 42 Atl. 1094; McCreary *v.* Bomberger, 151 Pa. St. 323, 24 Atl. 1066, 31 Am. St. Rep. 760; Zane *v.* Kennedy, 73 Pa. St. 182; Pennsylvania L. Ins., etc., Co. *v.* Austin, 42 Pa. St. 257; Duval's Appeal, 38 Pa. St. 112; Lancaster *v.* Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; Jackson *v.* Everett, (Tenn. 1894) 58 S. W. 340; Steifel *v.* Clark, 9 Baxt. (Tenn.) 466; Williams *v.* Whitmore, 1 Tenn. Cas. 239; Mills *v.* Banks, 3 P. Wms. 1, 24 Eng. Reprint 943 (*dictum* of Lord Macclesfield); Ball *v.* Harris, 1 Jur. 706, 8 Sim. 485, 8 Eng. Ch. 485, 59 Eng. Reprint 193 [*affirmed* in 3 Jur. 140, 8 L. J. Ch. 114, 4 Myl. & C. 264, 18 Eng. Ch. 264, 41 Eng. Reprint 103, and *approving* Shaw *v.* Borrer, 1 Keen 557, 5 L. J. Ch. 364, 15 Eng. Ch. 559, 48 Eng. Reprint 422].

Power "to sell, exchange, or otherwise dispose of" property has been held to authorize a mortgage. Hamilton *v.* Mound City Mut. L. Ins. Co., 3 Tenn. Ch. 124. See also Faulk

conditional sale — as something within the power.[34] And where an absolute and unrestricted power to sell for the benefit and in the discretion of the donee of the power is conferred such power has been held to include a power to mortgage.[35]

(VI) *To Pledge or Hypothecate.* While it has been directly held that a power to a trustee to sell securities includes a power to make a conditional sale of them by hypothecation,[36] it would seem that whether or not a power to pledge or hypothecate is included in a power to sell must depend upon the construction of the instrument creating the power.[37]

(VII) *To Lease.* A power to sell does not as a rule authorize a lease;[38] but circumstances may justify a departure from the words of the power.[39]

e. Purpose of Sale. It is well settled that a power of sale can only be exercised for the purpose or purposes pointed out in the instrument of creation,[40] in determining which the intent of the donor, as shown by the terms of the instrument, governs.[41] Where the power of sale is unrestricted, or is given for any purpose

r. Dashiell, 62 Tex. 642, 50 Am. Rep. 542, where the power was "to sell, exchange, and dispose of."

Executor's power to mortgage see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 345.

34. Lord St. Leonard in Stroughill *v.* Anstey, 1 De G. M. & G. 635, 16 Jur. 671, 22 L. J. Ch. 130, 50 Eng. Ch. 490, 42 Eng. Reprint 700. See also Orford *v.* Albemarle, 12 Jur. 811, 17 L. J. Ch. 396.

Power to sell for payment of debts.— Under a power to executors to sell lands to pay debts, authority may be granted them to mortgage, if it is greatly to the advantage of the estate to mortgage rather than sell. Loebenthal *v.* Raleigh, 36 N. J. Eq. 169. See also Hoyt *v.* Jaques, 129 Mass. 286.

35. Kent *v.* Morrison, 153 Mass. 137, 26 N. E. 427, 25 Am. St. Rep. 616, 10 L. R. A. 756; Christian *v.* Keen, 80 Va. 369 (where it is said that the question is wholly one of construction): Lee *v.* U. S. Bank, 9 Leigh (Va.) 200; O'Connor *v.* Anderson, 2 Can. L. T. Occ. Notes 593. "The true principle is, that a power to sell and convey may include the power to mortgage, but it does not necessarily do so; and whether such power is or is not included depends upon the character of the estate, the words granting the power, and the purposes for which the debt was created." McMillan *v.* Cox, 109 Ga. 42, 49, 34 S. E. 341.

36. Kaiser's Estate, 2 Lanc. L. Rev. (Pa.) 362.

37. Bailie *v.* Kinchley, 52 Ga. 487 (where the will of a cotton factor authorized the executors "to sell, exchange, or otherwise dispose of, any portion or all of my estate," and this was held broad enough to empower them to raise money by pledging notes of the estate to a reasonable amount as collateral security); Harbison *v.* James, 90 Mo. 411, 2 S. W. 292 (bequest of property to wife "with power to sell and reinvest, as she may desire, any part of the same for her separate use and benefit," and any portion undisposed of at her death to go to the children); Brown *v.* Farmers' L. & T. Co., 51 Hun (N. Y.) 386, 4 N. Y. Suppl. 422 [*affirmed* on another point in 117 N. Y. 266, 22 N. E. 952].

38. *Connecticut.*— Seymour *v.* Bull, 3 Day 388.

New York.— Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 4 N. Y. St. 380.

Ohio.— Breuer *v.* Hayes, 10 Ohio Dec. (Reprint) 583, 22 Cinc. L. Bul. 144 [*affirming* 10 Ohio Dec. (Reprint) 391, 21 Cinc. L. Bul. 29]; Bowler *v.* Brush Electric Light Co., 10 Ohio Dec. (Reprint) 582, 22 Cinc. L. Bul. 136.

United States.— Waldron *v.* Chasteney, 28 Fed. Cas. No. 17,058, 2 Blatchf. 62.

England.— Evans *v.* Jackson, 8 L. J. Ch. 8, 8 Sim. 217, 8 Eng. Ch. 217, 59 Eng. Reprint 87.

See 40 Cent. Dig. tit. "Powers," § 61. See also EXECUTORS AND ADMINISTRATORS, 18 Cyc. 343.

39. Hedges *v.* Riker, 5 Johns. Ch. (N. Y.) 163.

40. *Illinois.*— Swift *v.* Castle, 23 Ill. 209.

Kentucky.— Floyd *v.* Johnson, 2 Litt. 109, 13 Am. Dec. 255.

Maryland.— Brome *v.* Pembroke, 66 Md. 193, 7 Atl. 47.

Massachusetts.— Allen *v.* Dean, 148 Mass. 594, 20 N. E. 314.

New Jersey.— Hammond *v.* Cronkright, 47 N. J. Eq. 447, 20 Atl. 847; Brearley *v.* Brearley, 9 N. J. Eq. 21.

New York.— Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643 [*affirming* 41 Hun 206]; *In re* Karge, 18 N. Y. Suppl. 724.

Ohio.— Hoyt *v.* Day, 32 Ohio St. 101.

Pennsylvania.—Wetherill *v.* Mecke, Brightly 135.

Rhode Island.— Goddard *v.* Brown, 12 R. I. 31.

South Carolina.— Sires *v.* Sires, 43 S. C. 266, 21 S. E. 115; Evans *v.* Evans, 1 Desauss. Eq. 515.

Tennessee.— Maloney *v.* Hawkins, 9 Lea 663.

Texas.— Wells *v.* Petree, 39 Tex. 419.

See 40 Cent. Dig. tit. "Powers," § 62.

Sale by executor under testamentary power see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 321.

41. *Maryland.*— Seeger *v.* Leakin, 76 Md. 500, 25 Atl. 862.

Massachusetts.—Hoxie *v.* Finney, 147 Mass. 616, 18 N. E. 593.

Mississippi.— Stokes *v.* Stokes, 66 Miss. 456, 6 So. 155.

the donee may deem advisable, it may be exercised in the discretion of the donee.[42]

f. Power Dependent on Condition or Contingency [43] — (i) *In General.* A power of sale dependent upon a condition or contingency becomes operative upon the fulfilment of the condition or happening of the contingency,[44] and not before such event.[45] Where a will gives a life-estate with power in the devisee or in an

New York.— Dyett *v.* Central Trust Co., 140 N. Y. 54, 35 N. E. 341 [*affirming* 19 N. Y. Suppl. 19]; Knapp *v.* Knapp, 46 Hun 190; Manier *v.* Phelps, 15 Abb. N. Cas. 123.

Pennsylvania.— Adams' Estate, 148 Pa. St. 394, 23 Atl. 1072, 24 Atl. 189; Wetherill *v.* Com., 1 Pa. Cas. 22, 1 Atl. 185.

Virginia.— Harrison *v.* Harrison, 2 Gratt. 1, 44 Am. Dec. 365.

England.— Barker *v.* Devonshire, 3 Meriv. 310, 36 Eng. Reprint 119.

See 40 Cent. Dig. tit. "Powers," § 62.

42. Wardwell *v.* McDowell, 31 Ill. 364; Busch *v.* Rapp, 63 S. W. 479, 23 Ky. L. Rep. 605; Hatt *v.* Rich, 59 N. J. Eq. 492, 45 Atl. 969; Matter of Ryder, 41 N. Y. App. Div. 247, 58 N. Y. Suppl. 635; Matter of Canterd, 63 Hun (N. Y.) 280, 17 N. Y. Suppl. 910 [*affirmed* in 136 N. Y. 106, 32 N. E. 551]; O'Flyn *v.* Powers, 21 N. Y. Suppl. 905 [*affirmed* in 136 N. Y. 412, 32 N. E. 1085]; *In re* Powers, 11 N. Y. Suppl. 396 [*affirmed* in 124 N. Y. 361, 26 N. E. 940].

43. Sales by executors see also Executors and Administrators, 18 Cyc. 321.

44. *Connecticut.*— Hamilton *v.* Crosby, 32 Conn. 342, for support of son.

Georgia.— Harp *v.* Wallin, 93 Ga. 811, 20 S. E. 966, holding that where a will authorized a devisee to sell the land if he should see cause to send testator's wife to an asylum, and the devisee elected to send her to an asylum, having procured an adjudication that she was insane, the power to sell was operative, although the wife was not in fact sent to an asylum.

Iowa.— Urban *v.* Hopkins, 17 Iowa 105, sale authorized on marriage of testator's wife.

Kentucky.— Paxton *v.* Bond, 15 S. W. 875, 12 Ky. L. Rep. 949.

Maryland.— Moale *v.* Cutting, 59 Md. 510, power of sale if necessary to pay annuity.

Massachusetts.— Mayo *v.* Merritt, 107 Mass. 505, power given executor to sell real estate as soon as deemed best for the interest of those concerned.

New Jersey.— Howell *v.* Sebring, 14 N. J. Eq. 84; Huyler *v.* Kingsland, 11 N. J. Eq. 406.

New York.— Bunner *v.* Storm, 1 Sandf. Ch. 357, judgment of executors conclusive as to necessity for sale.

Ohio.— Dean *v.* Loewenstein, 6 Ohio Cir. Ct. 587, 3 Ohio Cir. Dec. 597, where a will gave testator's son a life-estate, with remainder to his children, and provided that the son might sell the land and invest in other land for the use of the children if he should think proper to remove from that part of the country.

Pennsylvania.— Hanbest *v.* Grayson, 206 Pa. St. 59, 55 Atl. 786.

South Carolina.— Jennings *v.* Teague, 14 S. C. 229, judgment of executor as to happening of contingency.

England.— Kinsington *v.* West London Cemetery Co., 2 Jur. 959, 8 L. J. Ch. 81.

See 40 Cent. Dig. tit. "Powers," § 63.

45. *Connecticut.*— Hull *v.* Culver, 34 Conn. 403.

Illinois.— Griffin *v.* Griffin, 141 Ill. 373, 31 N. E. 131.

Maryland.— Moale *v.* Cutting, 59 Md. 510, power given executor to sell real estate when "absolutely necessary."

Massachusetts.— Rathbun *v.* Colton, 15 Pick. 471; Minot *v.* Prescott, 14 Mass. 496.

New Jersey.—Moores *v.* Moores, 41 N. J. L. 440 (power of sale given executor to sell real estate if necessary to pay debts); Snedeker *v.* Allen, 2 N. J. L. 35 (holding that where a testator died leaving a wife and three children, a provision in the will, "If my said wife Catharine doth marry, that then my whole estate shall be sold, and an equal division made in four parts," did not authorize a sale by the executors on the death of the wife); Hampton *v.* Nicholson, 23 N. J. Eq. 423 (power given executor to sell real estate at expiration of term under which it was held or at death of the tenant before that time).

New York.— *In re* Christie, 133 N. Y. 473, 31 N. E. 515 (power given wife to sell on majority of youngest child); Kilpatrick *v.* Barron, 125 N. Y. 751, 26 N. E. 925 [*affirming* 54 Hun 322, 75 N. Y. Suppl. 542] (power of sale on death or marriage of children); Allen *v.* DeWitt, 3 N. Y. 276 (power given executor to sell after payment of debts for division among children); *In re* Vandervoort, 1 Redf. Surr. 270 (holding that where a will created a trust of the rents of real estate for the benefit of a family "while they continue such," and there was no similar trust of the proceeds of the sale of such lands under a power contained in the will, such power, although not limited in terms, could not be exercised until the family should be broken up).

Pennsylvania.— Hay *v.* Mayer, 8 Watts 203, 34 Am. Dec. 453, where executor could not sell during husband's life, as he was entitled to an estate by the curtesy.

South Carolina.— South Carolina R. Co. *v.* Toomer, 9 Rich. Eq. 270, power of sale in executors conditional upon the necessity for its exercise.

Tennessee.—Gee *v.* Graves, 2 Head 239, executor's power of sale conditional on remarriage of widow.

Canada.— Johnson *v.* Kræmer, 8 Ont. 193.

See 40 Cent. Dig. tit. "Powers," § 63.

executor or trustee to sell when necessary for the support and maintenance of the devisee or of others, the power is contingent upon such necessity.[46]

(II) *Consent, Request, or Approval of Third Person.* Where the consent, request, or approval of any person is required to the execution of a power of sale or exchange, it constitutes a limitation upon the power, which, like every other condition, must be strictly complied with.[47] In construing such limitations effect is to be given to the intention of the donor as shown by the whole instrument.[48]

46. *Connecticut.*— Hull *v.* Culver, 34 Conn. 403.

Illinois.— Fleming *v.* Mills, 182 Ill. 464, 55 N. E. 373; Griffin *v.* Griffin, 141 Ill. 373, 31 N. E. 131.

Maine.— Warren *v.* Webb, 68 Me. 133. And see Scott *v.* Perkins, 28 Me. 22, 48 Am. Dec. 470.

Massachusetts.— Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407; Paine *v.* Barnes, 100 Mass. 470; Larned *v.* Bridge, 17 Pick. 330; Rathbun *v.* Colton, 15 Pick. 471; Stevens *v.* Winship, 1 Pick. 318, 11 Am. Dec. 178; Minot *v.* Prescott, 14 Mass. 496, power of sale dependent upon insufficiency of income for comfortable support. And see Price *v.* Bassett, 168 Mass. 598, 47 N. E. 243.

Missouri.— Scheidt *v.* Cecrelius, 94 Mo. 322, 7 S. W. 412, 4 Am. St. Rep. 384.

New York.— Rose *v.* Hatch, 55 Hun 457, 8 N. Y. Suppl. 720 [*affirmed* in 125 N. Y. 427, 26 N. E. 467].

Conveyance to pay debt of child.— A widow given by will a life-estate in real property, and empowered to sell it for the support and maintenance of herself or family, is without authority to convey the property to pay a debt of one of her children. Fleming *v.* Mills, 182 Ill. 464, 55 N. E. 373.

Wife having life-estate sole judge of necessity for sale.— Paxton *v.* Bond, 15 S. W. 875, 12 Ky. L. Rep. 949.

Purchaser not bound to ascertain necessity. — Doran *v.* Piper, 164 Pa. St. 430, 30 Atl. 306. But see Hull *v.* Culver, 34 Conn. 403; Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178. *Contra*, Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Scheidt *v.* Crecelius, 94 Mo. 322, 7 S. W. 412, 4 Am. St. Rep. 384.

47. *Alabama.*—Gindrat *v.* Montgomery Gas-Light Co., 82 Ala. 596, 2 So. 327, 60 Am. Rep. 769.

Georgia.— Augusta *v.* Radcliffe, 66 Ga. 469.

Indiana.— Mack *v.* Mulcahy, 47 Ind. 68, at direction and consent of widow.

Maryland.— Powles *v.* Jordan, 62 Md. 499; Tyson *v.* Mickle, 2 Gill 376.

Massachusetts.— Richardson *v.* Crooker, 7 Gray 190.

Michigan.— Bates *v.* Leonard, 99 Mich. 295, 58 N. W. 311, construing Howell Annot. St. (1882) §§ 5635, 5637, and holding that a requirement of approval of the judge of probate to a sale by a widow and life-tenant was a condition which could not be disregarded.

New Jersey.— Crane *v.* Bolles, 49 N. J. Eq. 373, 24 Atl. 237, power of sale by executors dependent upon consent or request of majority of children.

New York.— Gulick *v.* Griswold, 160 N. Y. 399, 54 N. E. 780 [*affirming* 14 N. Y. App. Div. 85, 43 N. Y. Suppl. 443]; Barber *v.* Cary, 11 N. Y. 397.

North Carolina.— Towles *v.* Fisher, 77 N. C. 437.

Virginia.— Patteson *v.* Horsley, 29 Gratt. 263.

Wisconsin.— Goebel *v.* Thieme, 85 Wis. 286, 55 N. W. 706.

United States.— Waldron *v.* Chasteney, 28 Fed. Cas. No. 17,058, 2 Blatchf. 62.

England.— *In re* Bedingfeld, (1893) 2 Ch. 332, 62 L. J. Ch. 430, 68 L. T. Rep. N. S. 634, 3 Reports 483, 41 Wkly. Rep. 413; Malmesbury *v.* Malmesbury, 31 Beav. 407, 54 Eng. Reprint 1196; Wolley *v.* Jenkins, 23 Beav. 53, 3 Jur. N. S. 321, 26 L. J. Ch. 379, 5 Wkly. Rep. 281, 53 Eng. Reprint 21; Truell *v.* Tysson, 21 Beav. 437, 2 Jur. N. S. 630, 25 L. J. Ch. 801, 4 Wkly. Rep. 409, 52 Eng. Reprint 928; Chapman *v.* Harris, 8 L. T. Rep. N. S. 306, 2 New Rep. 56; Arkell *v.* Henley, 3 Wkly. Rep. 259.

Canada.— Johnson *v.* Kræmer, 8 Ont. 193.

See 40 Cent. Dig. tit. "Powers," §§ 64, 129.

Relief in equity.— Where a will makes the consent of the executor necessary to the validity of a sale by the widow of the testator, having the power of disposal for the benefit of herself and children, and a merely selfish reason induces the executor to refuse his consent, a court of equity will, on application, authorize a sale. Norcum *v.* D'Œnch, 17 Mo. 98.

Sufficiency of consent as affecting execution see *infra*, VI, G, 2.

Consent, request, or approval necessary to exercise of power of appointment see *supra*, V, B, 1, i, (II).

48. *Alabama.*—Gindrat *v.* Montgomery Gas-Light Co., 82 Ala. 596, 2 So. 327, 60 Am. Rep. 769.

Connecticut.— Imlay *v.* Huntington, 20 Conn. 146.

Kentucky.— Williams *v.* Williams, 1 Duv. 221, where a testator gave his "executors" power to sell land, to be exercised only with the consent of his surviving wife, and by a subsequent clause appointed his wife sole executrix, and it was held that she could sell without the advice or coöperation of any other person.

New Jersey.— Duryee *v.* Martin, 36 N. J. Eq. 444.

New York.— Hamilton *v.* New York Stock Exch. Bldg. Co., 20 Hun 88.

3. Mortgage, Lease, Management, Improvement, or Investment — a. Mortgage — (i) *In General.* Whether or not a power to mortgage is conferred and, if so, the scope and extent of the power, are questions which wholly depend upon the construction of the instrument under which the power is claimed.[49] A mortgage given for an unauthorized purpose is void.[50] A power to trustees to sell, and, if unable to sell to advantage, to mortgage to pay borrowed money, or to keep in repair, gives no power to pay mortgage debts contracted by the testator.[51] But a power to encumber by mortgage has been held to include power to extend an outstanding mortgage on the property,[52] and to authorize renewals.[53]

(ii) *Dependent on Condition or Contingency.* As in the case of a power of appointment [54] or sale,[55] contingencies or conditions upon which a power to mortgage is made dependent must happen or be fulfilled.[56]

b. Lease [57] — (i) *In General.* In construing powers to lease the general rule of interpretation prevails, that they are to be construed liberally according to

Pennsylvania.— Hackett *v.* Milnor, 156 Pa. St. 1, 26 Atl. 738.

South Carolina.— Pyron *v.* Mood, 2 McMull 281.

Texas.— Harris *v.* Petty, 66 Tex. 514, 1 S. W. 525.

See 40 Cent. Dig. tit. "Powers," § 64.

A direction to the donee to consult the heirs as to the advisability of a sale does not render their consent necessary to a sale under the power. Haggerty *v.* Lanterman, 30 N. J. Eq. 37.

49. *Connecticut.*—Bouton *v.* Doty, 69 Conn. 531, 37 Atl. 1064, power reserved by grantor to mortgage the premises for his own personal benefit.

Georgia.— Fletcher *v.* American Trust, etc., Co., 111 Ga. 300, 36 S. E. 767.

Iowa.—L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550, power construed as limited to discharging indebtedness on real estate of testator.

Kentucky.— Brown *v.* Crittenden, (1886) 1 S. W. 421, holding that under a will charging testator's estate with the support of an imbecile daughter, power to the executor to mortgage any of the property devised, if necessary for her support, was unlimited, when exercised for that purpose.

Minnesota.— Wilson *v.* Bell, 17 Minn. 61, conveyance of lands to copartner with power to mortgage.

New Hampshire.— Brown *v.* Brown, 70 N. H. 623, 47 Atl. 591, power to mortgage not conferred by will.

New Jersey.— Mulford *v.* Mulford, 42 N. J. Eq. 68, 6 Atl. 609.

New York.— Mutual L. Ins. Co. *v.* Shipman, 108 N. Y. 19, 15 N. E. 58 (mortgage by widow and executrix after remarriage sustained); Syracuse Sav. Bank *v.* Holden, 105 N. Y. 415, 11 N. E. 950; Leavitt *v.* Pell, 25 N. Y. 474 [*affirming* 27 Barb. 322] (power to mortgage, reserved to a married woman in respect to land held in trust for her separate use, held to support a mortgage to secure her husband's debt).

Pennsylvania.— Magraw *v.* Pennock, 2 Grant 89 (authority to borrow money, and grant a mortgage to secure it, in order to pay debts for which trust estate is liable, authorizes a mortgage to the creditors themselves); Fisher *v.* Leedom, 2 Del. Co. 317; Miller *v.* Schlegel, 10 Wkly. Notes Cas. 521.

Texas.— Merriman *v.* Russell, 39 Tex. 278, trustee unauthorized to mortgage to secure his own individual debt.

United States.— Warner *v.* Connecticut Mut. L. Ins. Co., 109 U. S. 357, 3 S. Ct. 221, 27 L. ed. 962; Ames *v.* Holderbaum, 44 Fed. 224.

England.— Bennett *v.* Wyndham, 23 Beav. 521, 3 Jur. N. S. 1143, 5 Wkly. Rep. 410, 53 Eng. Reprint 205 (power to raise money (except by sale) to discharge encumbrances precludes raising it by mortgage, the word "sale" verbally including mortgage); Doe *v.* Carr, C. & M. 123, 41 E. C. L. 73; Atty.-Gen. *v.* Hardy, 15 Jur. 441, 20 L. J. Ch. 450, 1 Sim. N. S. 338, 40 Eng. Ch. 338, 61 Eng. Reprint 131 (mortgages by trustees to themselves upheld); Wilson *v.* Halliley, 8 L. J. Ch. O. S. 171, 1 Russ. & M. 590, 5 Eng. Ch. 590, 39 Eng. Reprint 226.

See 40 Cent. Dig. tit. "Powers," § 65.

Power granted by court, although not given by instrument see Frith *v.* Cameron, L. R. 12 Eq. 169, 40 L. J. Ch. 778, 24 L. T. Rep. N. S. 791, 19 Wkly. Rep. 886.

Power to sell or exchange as including power to mortgage see *supra*, V, B, 2, d, (v).

Executor's power to mortgage see Executors and Administrators, 18 Cyc. 345.

50. Syracuse Sav. Bank *v.* Holden, 105 N. Y. 415, 11 N. E. 950.

51. Mulford *v.* Mulford, 42 N. J. Eq. 68, 6 Atl. 609.

52. Warner *v.* Connecticut Mut. L. Ins. Co., 109 U. S. 357, 3 S. Ct. 221, 27 L. ed. 962.

53. Ames *v.* Holderbaum, 44 Fed. 224. And see Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550.

54. See *supra*, V, B, 1, i.

55. See *supra*, V, B, 2, f.

56. Bouton *v.* Doty, 69 Conn. 531, 37 Atl. 1064; Paine *v.* Barnes, 100 Mass. 470, only when necessary for support and maintenance. See *supra*, V, B, 2, f, (i).

57. Power of sale as including power to lease see *supra*, V, B, 2, d, (vii).

Executor's power to lease under will see Executors and Administrators, 18 Cyc. 343.

the intention of the parties.[58] Unless conferred expressly,[59] or by necessary implication, the owner of a life or other limited estate has no power to grant leases binding upon the remainder-man or reversioner; [60] nor does a power to lease include a power to sell.[61]

(II) *What Property May Be Leased.* The determination of what may be demised under a power to lease depends upon the construction of the instrument creating the power.[62]

(III) *To Whom Made.* Where no restriction is placed upon the donee, he may lease to whomsoever he may see fit.[63]

58. Collins *v.* Foley, 63 Md. 158, 52 Am. Rep. 505; Taussig *v.* Reel, 134 Mo. 530, 34 S. W. 1104; Goddard *v.* Brown, 12 R. I. 31; Right *v.* Thomas, 3 Burr. 1441, W. Bl. 446. "An opinion has, however, prevailed that a power of leasing is to receive a more strict construction than any other power (see Fitz. 219; 3 Vin. Abr. 431), and that equity cannot relieve against a defect in the execution of it; but we have already seen that this relief is administered in proper cases (2 Sugd. Powers 131), and the books abound with authorities in favour of the liberal construction of this power. Lord Mansfield, whose authority is generally quoted in favour of the rigid construction (1 Burr. 121), seems merely to have meant that the power must not be abused (Dougl. 573; 1 Blackst. 449). Lord Chancellor Cowper thought the power was to be taken strictly (see 3 Cha. Rep. 73); but Lord Chief Justice Holt, in the same case, was of a contrary opinion (3 Cha. Rep. 69, 70): and that was the opinion of Bridgman, C. J. (Bridg. by Ban. 90, 91). Lord Kenyon has decided that the intention of the parties must govern in the construction of this power (3 Term Rep. 675), and Lord Redesdale has shown, upon very solid grounds, that the power must receive as liberal an interpretation as a power of jointuring or any other power (1 Sch. & Lef. 61)." 2 Sugden Powers 306.

Power to let is the same as a power to lease. Parker *v.* Sowerby, 1 Drew. 488, 1 Eq. Rep. 217, 17 Jur. 752, 22 L. J. Ch. 942, 1 Wkly. Rep. 404, 61 Eng. Reprint 539.

59. Vivian *v.* Jegon, L. R. 3 H. L. 285, 37 L. J. C. P. 313, 19 L. T. Rep. N. S. 218.

60. Roe *v.* Grantham, 3 Burr. 1259; Shrewsbury *v.* Keightley, 19 C. B. N. S. 606, 34 L. J. Ch. 322 [*affirmed* in L. R. 2 C. P. 130, 12 Jur. N. S. 999, 36 L. J. C. P. 17, 16 L. T. Rep. N. S. 265, 15 Wkly. Rep. 284].

61. Roe *v.* Vingut, 1 N. Y. Suppl. 914 [*affirmed* in 117 N. Y. 204, 22 N. E. 933]; Gurney *v.* Gurney, 3 Drew. 208, 3 Eq. Rep. 569, 1 Jur. N. S. 298, 24 L. J. Ch. 656, 3 Wkly. Rep. 353, 61 Eng. Reprint 882. But *compare* Sturgeon *v.* Ely, 6 Pa. St. 406, in which the court upheld a sale, not authorized under the power, in order to prevent circuity of action.

62. See Doe *v.* Stephens, 6 Q. B. 208, 8 Jur. 951, 13 L. J. Q. B. 350, 51 E. C. L. 208; Dayrell *v.* Hoare, 12 A. & E. 356, 9 L. J. Q. B. 299, 4 P. & D. 114. 40 E. C. L. 182; Doe *v.* Lock, 2 A. & E. 705, 4 L. J. K. B. 113, 4 N. & M. 807, 29 E. C. L. 325; Doe *v.* Colman, 1 Bing. 28, 7 Moore C. P. 271, 8 E. C. L. 386; Goodtitle *v.* Funucan, Dougl. (3d ed.) 565; Doe *v.* Rendle, 3 M. & S. 99; Fuller *v.* Abbott, 4 Taunt. 105; Pomery *v.* Partington, 3 T. R. 665.

Lands "usually so leased."— In a lease, under a power of demising for lives, or for years determinable on lives, any part of the lands "usually so leased," the joining of lands in the same lease which were usually let separately is not at variance with the power, for the words "usually so leased" apply to the duration of the lease. Doe *v.* Stephens, 6 Q. B. 208, 8 Jur. 951, 13 L. J. Q. B. 350, 51 E. C. L. 208. See also Doe *v.* Williams, 11 Q. B. 688, 12 Jur. 455, 17 L. J. Q. B. 154, 63 E. C. L. 688.

"Where a power extends to lands usually letten lands which have been twice or thrice letten are within the power (2 Ro. Abr. 261, pl. 11, 12; Vaugh. 33); but the land which has only been once letten is not, we are told, within the proviso, for *usus fit ex iteratis actibus* (2 Ro. Abr. 263, pl. 263, pl. 13). And it is said, that if land has been let by contract from year to year, for three years, it is not within the power, for it is but one lease (2 Ro. Abr. 262, pl. 14; *contra*, pl. 2, Ja. B.)" 2 Sugden Powers 317.

Lands not before let.— In Baggott *v.* Oughton, 8 Mod. 249, 88 Eng. Reprint 178, the power was to lease "all or any of the premises, at such yearly rents, or more, as the same are now let at," and a lease was made of lands never before leased. It was held that the lease was void. See also *In re* Baltingladd, 1 Freem. 23, Vaugh. 28, 89 Eng. Reprint 21; Foot *v.* Marriot, 3 Vin. Abr. 429 pl. 9; Williams *v.* Matthews, 2 N. & M. 264.

Effect of leasing lands not within power see Doe *v.* Stephens, 6 Q. B. 208, 8 Jur. 951, 13 L. J. Q. B. 350, 51 E. C. L. 208.

Lease of coal.— Under a power granted to the executors to sell or lease testator's "real estate," it was held that they could lease the coal in a mine on his estate. Wentz's Appeal, 106 Pa. St. 301.

Unopened mines.— As a lease of land with the mines, where there are open mines, does not justify the lessee in working unopened mines, so a power to lease such land with the mines does not authorize the lease of unopened mines. Clegg *v.* Rowland, L. R. 2 Eq. 160, 35 L. J. Ch. 396, 14 L. T. Rep. N. S. 217, 14 Wkly. Rep. 530. See also Campbell *v.* Leach, Ambl. 740, 27 Eng. Reprint 478; Daly *v.* Beckett, 24 Beav. 114, 3 Jur. N. S. 754, 3 Wkly. Rep. 514, 53 Eng. Reprint 301.

63. *In re* Jeffcock, 51 L. J. Ch. 507 (holding that power to lease to any "person or

(IV) *Term and Duration* — (A) *Commencement.* The time at which a lease may be made to commence under a power of leasing is to be determined by the terms of the instrument creating the power. Where the power is to lease in possession, it will not support a lease in reversion or to begin *in futuro.*[64]

(B) *Duration.* Where no limit is put upon the period for which a lease may be made, the donee may lease for such term as he may see fit, provided that the rights of remainder-men and reversioners are not prejudiced thereby.[65] But where the term of the lease is fixed by the instrument creating the power, the donee can demise for no greater term than is authorized,[66] although he may for a less.[67]

persons" the donees should think fit authorizes a lease to a limited company); Bevan *v.* Habgood, 1 Johns. & H. 22, 7 Jur. N. S. 41, 30 L. J. Ch. 107, 8 Wkly. Rep. 703, 70 Eng. Reprint 728 (holding that where a mortgage contained a power enabling the mortgagor, until foreclosure, to grant leases, he could grant a lease to a trustee for himself). *Compare*, however, Boyce *v.* Edbrooke, [1903] 1 Ch. 836, 72 L. J. Ch. 547, 88 L. T. Rep. N. S. 344, 51 Wkly. Rep. 424, holding that a lease granted, in the exercise of statutory powers to lease, by a tenant for life to himself and others as lessees, containing covenants by the lessee with the lessor, was bad, whether the covenants were joint only or joint and several, because the reversioners did not in either case obtain binding legal covenants by all the lessees on which an action could be brought. In Boyce *v.* Edbrooke, *supra*, the case of Bevan *v.* Habgood, *supra*, was discussed and questioned.

Lease to second husband.— Where a marriage settlement reserved to the wife, tenant for life, after the death of her husband, a power of leasing by indenture under her hand and seal to any person for twenty-one years, so as upon every such lease there be reserved the best rent, it was held that a lease granted in pursuance of this power to a second husband was void as against the remainder-man. Doe *v.* Gilbert, 5 Q. B. 423, Dav. & M. 429, 8 Jur. 37, 13 L. J. Q. B. 21, 48 E. C. L. 423.

64. Taussig *v.* Reel, 134 Mo. 530, 34 S. W. 1104; Griffen *v.* Ford, 1 Bosw. (N. Y.) 123; Pollard *v.* Greenville, 1 Ch. Cas. 10, 22 Eng. Reprint 668, 1 Ch. Rep. 184, 21 Eng. Reprint 544; Doe *v.* Watton, Cowp. 189; Sussex *v.* Wroth, Cro. Eliz. 5, 78 Eng. Reprint 272; Doe *v.* Calvert, 2 East 376; Bowes *v.* East London Water Work Co., 3 Madd. 375, 23 Rev. Rep. 84, 56 Eng. Reprint 543 [*affirmed* in Jac. 324, 4 Eng. Ch. 324, 37 Eng. Reprint 873]; Shaw *v.* Summers, 3 Moore C. P. 196; Doe *v.* Cavan, 5 T. R. 567; Opey *v.* Thomassins, T. Raym. 132, 83 Eng. Reprint 71; Slocomb *v.* Hawkins, Yelv. 222, 80 Eng. Reprint 145.

A power to lease generally only empowers the donee to lease in possession. Winter *v.* Loveden, 1 Ld. Raym. 267, 91 Eng. Reprint 1075, per Holt, L. C. J. But see Sinclair *v.* Jackson, 8 Cow. (N. Y.) 543; Coventry *v.* Coventry, Comyns 312.

Agreement for renewal.—Although a lessor has power to lease in possession only, an agreement between lessor and lessee a short period before the expiration of the lease, for a renewal upon the same terms as before, may be enforced in equity. Dowell *v.* Dew, 7 Jur. 117, 12 L. J. Ch. 158, 1 Y. & Coll. 345, 20 Eng. Ch. 345, 62 Eng. Reprint 918.

Per verba de præsenti.—Where there is a power to grant leases in possession, but not by way of reversion or interest, a lease *per verba de præsenti* is not contrary to the power, although the estate, at the time of granting the lease, was held by tenants at will, or from year to year, if at the time they received directions from the grantor of the lease to pay the rent to the lessee. Goodtitle *v.* Funucan, Dougl. (3d ed.) 565.

65. Collins *v.* MacTavish, 63 Md. 166 (for ninety-nine years); Prather *v.* Foote, 1 Disn. (Ohio) 434, 12 Ohio Dec. (Reprint) 717 (perpetual leasehold with the privilege of purchasing); Goddard *v.* Brown, 12 R. I. 31; Boyland *v.* Warner, Hay. & J. 79 (for lives renewable forever); Hackett *v.* Hobart, 1 Jones Exch. 288 (for lives); Atty.-Gen. *v.* Moses, 2 Madd. 294, 56 Eng. Reprint 343 (for nine hundred and ninety-nine and one thousand years).

66. Vivian *v.* Jegon, L. R. 3 H. L. 285; 37 L. J. C. P. 313, 19 L. T. Rep. N. S. 218; Commons *v.* Marshall, 6 Bro. P. C. 168, 2 Eng. Reprint 1005; Byrne *v.* Acton, 1 Bro. P. C. 186, 1 Eng. Reprint 503; Clark *v.* Smith, 9 Cl. & F. 126, 6 Jur. 697, 8 Eng. Reprint 363; Montgomery *v.* Charteris, 5 Dow. 293, 3 Eng. Reprint 1334; Doe *v.* White, 2 D. & R. 716, 1 L. J. K. B. O. S. 170, 16 E. C. L. 119; Edwards *v.* Millbank, 4 Drew. 606, 29 L. J. Ch. 45, 62 Eng. Reprint 232; Jenner *v.* Morris, 1 Dr. & Sm. 334, 7 Jur. N. S. 385, 3 L. T. Rep. N. S. 497, 9 Wkly. Rep. 29, 62 Eng. Reprint 407; Doe *v.* Prideaux, 10 East 158, 10 Rev. Rep. 258; Doe *v.* Hiern, 5 M. & S. 40; Doe *v.* Halcombe, 7 T. R. 713.

Lease pro tanto valid.— Where one has power to lease for ten years, and leases for twenty, the lease is good for ten years. Pawcy *v.* Bowen, 1 Ch. Cas. 23, 22 Eng. Reprint 674, 3 Ch. Rep. 11, 21 Eng. Reprint 713. See also Byrne *v.* Acton, 1 Bro. P. C. 186, 1 Eng. Reprint 503, in which A, with power to lease for twenty-one years, or three lives, agreed to lease for thirty-one years, and it was held that he was only bound to grant such a lease as was warranted by the power.

67. Isherwood *v.* Oldknow, 3 M. & S. 382, 16 Rev. Rep. 305. See also Harris *v.* Bessie, 1 Keb. 347, 83 Eng. Reprint 986.

Option to lessee to determine.— Trustees of a settlement having a power of leasing "for any term or number of years not exceeding twenty-one years," agreed to grant

(v) *Terms and Conditions.* The terms, covenants, and conditions of a lease under a power of leasing are to be determined by the terms of the instrument by which the power is created, and unauthorized terms, covenants, or conditions cannot be supported.[68] A court of equity will not, against the remainder-man or reversioner, reform a lease executed under a power, where it contains covenants not warranted.[69]

c. Management and Control, Improvement, and Investment. Where an estate is left by will to the management and control of the executor, or of a testamentary trustee, the extent of his powers is necessarily dependent upon the terms of the will or testamentary instrument and the object had in view by the testator;[70] and

a lease for twenty-one years, determinable, at the option of the lessee, at the end of the first seven or fourteen years, and it was held that such a lease was within the power. Edwards *v.* Milbank, 4 Drew. 606, 29 L. J. Ch. 45, 62 Eng. Reprint 232.

Clause of surrender.— Where the transaction is *bona fide*, and the terms of the power do not require the number of years to be absolute, a clause of surrender will not vitiate the lease. Muskerry *v.* Chinnery, Ll. & G. t. Pl. 201.

68. Cavan *v.* Poulteney, 6 Bro. P. C. 175, 5 T. R. 567, 2 Eng. Reprint 1010; Medwin *v.* Sandham, 3 Swanst. 685, 36 Eng. Reprint 1022; Doe *v.* Sandham, 1 T. R. 705; and other cases cited *infra*, this note.

"Upon such terms and conditions as they shall think best" gives trustees the power to make long leases, with provisions for the purchase of improvements made by the lessee, as agreed, or upon appraisal, and also with provisions for altering the rent from time to time by arbitration or appraisal. Goddard *v.* Brown, 12 R. I. 31.

"Usual and reasonable" terms and conditions construed.— Doe *v.* Williams, 11 Q. B. 688, 12 Jur. 455, 17 L. J. Q. B. 154, 63 E. C. L. 688 (to do service); Doe *v.* Stephens, 6 Q. B. 208, 8 Jur. 951, 13 L. J. Q. B. 350, 51 E. C. L. 208; Doe *v.* Sandham, 1 T. R. 705 (covenant by lessor to rebuild held void).

Evidence of "usual" clauses see Doe *v.* Stephens, 6 Q. B. 208, 8 Jur. 951, 13 L. J. Q. B. 350, 51 E. C. L. 208; Doe *v.* Lock, 2 A. & E. 705, 4 L. J. K. B. 113, 4 N. & M. 807, 29 E. C. L. 325; Donegal *v.* Greg, 13 Ir. Eq. 12.

A building lease is authorized by an unrestricted power of leasing. *In re* James, 64 L. J. Ch. 686, 73 L. T. Rep. N. S. 1. An instrument is invalid as a building lease, under a power to grant such leases, where it does not contain any covenant to build, but only a covenant to repair and insure. *In re* Hallett, 52 L. J. Ch. 804, 48 L. T. Rep. N. S. 894.

Under a power to lease at the "best rent," the highest rent that can be obtained is not required; and the true criterion is, whether the rent has been fairly obtained without any private advantage to the donee. Dyas *v.* Cruise, 8 Ir. Eq. 407, 2 J. & L. 460. See also construing "best rent" Doe *v.* Rogers, 5 B. & Ad. 755, 3 L. J. K. B. 23, 2 N. & M. 550, 27 E. C. L. 318; Doe *v.* Harvey, 1 B. & C. 426, 2 D. & R. 589, 8 E. C. L. 182; Doe *v.* Radcliffe, 10 East 278; Doe *v.* York, 6 East 86; Doe *v.* Lloyd, 3 Esp. 78, 6 Rev. Rep. 813; Priee *v* Asheton, 4 L. J. Exch. 3, 1 Y. & C. Exch. 82; Doe *v.* Creed, 4 M. & S. 371.

"Best yearly rent" construed see Rutland *v.* Wythe, 10 Cl. & F. 419, 12 M. & W. 355, 8 Eng. Reprint 801.

"Usual rent."—A power to lease, so as the usual rent is reserved or made payable yearly, is well exeeuted by a lease reserving the usual yearly rent, but making it payable half yearly. Fryer *v.* Coombs, 11 A. & E. 403, 4 P. & D. 120 note, 39 E. C. L. 227.

"Ancient rent" construed see Doe *v.* Hole, 15 Q. B. 848, 15 Jur. 13, 20 L. J. Q. B. 57, 69 E. C. L. 848; Doe *v.* Grazebrook, 4 Q. B. 406, 3 G. & D. 334, 7 Jur. 530, 12 L. J. Q. B. 221, 45 E. C. L. 406; Roe *v.* Rawlings, 7 East 279, 3 Smith K. B. 254, 8 Rev. Rep. 632; Orby *v.* Mohun, Gibb. 45, 25 Eng. Reprint 32, Prec. Ch. 257, 24 Eng. Reprint 124, 2 Vern. Ch. 531, 23 Eng. Reprint 944 [*affirmed* in 6 Bro. P. C. 145, 2 Eng. Reprint 989].

Nominal rent.— Under a power to lease at any rent nominal rent may be reserved. Muskerry *v.* Chinney, Ll. & G. t. S. 185, 11 Eng. Ch. 185.

Rent incident to reversion.— Where the power requires the rent to be reserved incident to the immediate reversion, a lease reserving the rent to the donee, his heirs and assigns, is void. Yellowly *v.* Gower, 11 Exch. 274, 24 L. J. Exch. 289.

Provisions as to reëntry see Doe *v.* Loek, 2 A. & E. 705, 4 L. J. K. B. 113, 4 N. & M. 807, 29 E. C. L. 325; Tankerville *v.* Wingfield, 2 B. & B. 498 note, 63 E. C. L. 246, 3 Bligh 331 note, 4 Eng. Reprint 624, 5 Moore 346 note, 7 Priee 343 note, 22 Rev. Rep. 39 note; Smith *v.* Doe, 2 B. & B. 473, 6 E. C. L. 235, 3 Bligh 290, 4 Eng. Reprint 610, 3 Moore C. P. 339, 7 Priee 281, 22 Rev. Rep. 19; Coxe *v.* Day, 13 East 118.

69. Medwin *v.* Sandham, 3 Swanst. 685, 36 Eng. Reprint 1022.

70. *Alabama.*— Dickinson *v.* Conniff, 65 Ala. 581.

Georgia.— Palmer *v.* Moore, 82 Ga. 177, 8 S. E. 180, 14 Am. St. Rep. 147.

Indiana.— Maek *v.* Muleahy, 47 Ind. 68.

North Carolina.— Hinton *v.* Hinton, 68 N. C. 99.

Pennsylvania.—Matter of Cusack, 3 Brewst. 325.

Texas.— Cooper *v.* Horner, 62 Tex. 356; Blanton *v.* Mayes, 58 Tex. 422.

See 40 Cent. Dig. tit. "Powers," § 66. See

the same is true where power is conferred to make improvements,[71] or to invest and reinvest.[72]

4. Charging and Jointure. As in the case of other powers, the scope and extent of a power to charge is dependent upon the intention of the donor, as shown by the will or other instrument creating the power.[73] A power to charge includes power to sell,[74] and a power to charge lands with a sum of money imports interest thereof also.[75] Under a trust of a term to raise portions out of the rents and profits, it was held that by virtue of the word "profits" the trustees might sell or mortgage.[76]

C. Interest of Donee or Grantee — 1. In General. A power may be coupled with an interest,[77] or the donee or grantee of a power may also have an interest or estate in the property which is the subject of the power;[78] but it is an elementary principle that the mere existence of a power confers no right of property or interest on the donee or grantee,[79] even where such power is for his own

also Executors and Administrators, 18 Cyc. 233; Trusts.

71. Starr *v.* Moulton, 97 Ill. 525; Barclay *v.* Dupuy, 6 B. Mon. (Ky.) 92; Brown *v.* Chesterman, 9 N. Y. Suppl. 187; Wetmore *v.* Holsman, 23 How. Pr. (N. Y.) 202; Matter of Wagenen, 16 How. Pr. (N. Y.) 6. See Executors and Administrators, 18 Cyc. 271; Trusts.

72. *Massachusetts.*— Amory *v.* Green, 13 Allen 413.

New Jersey.— Stephens *v.* Milnor, 24 N. J. Eq. 358.

New York.— Leggett *v.* Hunter, 19 N. Y. 445.

North Carolina.— Crawford *v.* Wearn, 115 N. C. 540, 20 S. E. 724.

Ohio.— Sargent *v.* Sibley, 8 Ohio Dec. (Reprint) 434, 8 Cinc. L. Bul. 6.

Pennsylvania.— Gernert *v.* Albert, 160 Pa. St. 95, 28 Atl. 576.

Rhode Island.— Goddard *v.* Brown, 12 R. I. 31.

South Carolina.— Pearce *v.* Venning, 14 Rich. Eq. 84.

Tennessee.— Laird *v.* Scott, 5 Heisk. 314.

England.— Atwell *v.* Atwell, L. R. 13 Eq. 23, 41 L. J. Ch. 23, 25 L. T. Rep. N. S. 526, 20 Wkly. Rep. 108.

See 40 Cent. Dig. tit. "Powers," § 68. And see Executors and Administrators, 18 Cyc. 253; Trusts.

73. *In re* De Hoghton, [1896] 2 Ch. 385, 65 L. J. Ch. 667, 74 L. T. Rep. N. S. 613, 44 Wkly. Rep. 635; Armstrong *v.* Armstrong, L. R. 18 Eq. 541, 43 L. J. Ch. 719; Cooper *v.* Macdonald, L. R. 16 Eq. 258, 42 L. J. Ch. 533, 28 L. T. Rep. N. S. 693, 21 Wkly. Rep. 833; Knapp *v.* Knapp, L. R. 12 Eq. 238, 24 L. T. Rep. N. S. 540; Blandy *v.* Kimber, 24 Beav. 148, 53 Eng. Reprint 313; Maultby *v.* Maultby, 2 Ir. Ch. 32; Wilson *v.* Halliley, 8 L. J. Ch. O. S. 171, 1 Russ. & M. 590, 5 Eng. Ch. 590, 39 Eng. Reprint 226; Muskerry *v.* Chinnery, Ll. & G. t. S. 185, 11 Eng. Ch. 185; *In re* Beckett, 93 L. T. Rep. N. S. 746, 22 T. L. R. 84; *Re* Lindo, 59 L. T. Rep. N. S. 462; Stackhouse *v.* Barnston, 10 Ves. Jr. 453, 32 Eng. Reprint 921; Mason *v.* Mason, 19 Wkly. Rep. 741.

An absolute power to charge an estate with a definite sum is "an encumbrance" upon the estate. Evans *v.* Evans, 22 L. J. Ch. 785, 1 Wkly. Rep. 215.

74. Okeden *v.* Okeden, 1 Atk. 550, 26 Eng. Reprint 345 and notes; Green *v.* Belchier, 1 Atk. 506, 26 Eng. Reprint 319; Tasker *v.* Small, 5 L. J. Ch. 321, 6 Sim. 625, 9 Eng. Ch. 626, 58 Eng. Reprint 728; Kenworthy *v.* Bate, 6 Ves. Jr. 793, 6 Rev. Rep. 46, 31 Eng. Reprint 1312; Long *v.* Long, 5 Ves. Jr. 445, 5 Rev. Rep. 101, 31 Eng. Reprint 674.

75. Hall *v.* Carter, 2 Atk. 358, 26 Eng. Reprint 615, 9 Mod. 347, 88 Eng. Reprint 498; Boycot *v.* Cotton, 1 Atk. 552, 26 Eng. Reprint 347; Simpson *v.* O'Sullivan, 3 Dr. & War. 446; Roe *v.* Pogson, 2 Madd. 457, 56 Eng. Reprint 403; Kilmurry *v.* Geery, 2 Salk. 538, 91 Eng. Reprint 456.

76. Trafford *v.* Ashton, 1 P. Wms. 415, 24 Eng. Reprint 451. See also Bootle *v.* Blundell, Coop. 136, 10 Eng. Ch. 136, 35 Eng. Reprint 506, 1 Meriv. 193, 35 Eng. Reprint 646, 19 Ves. Jr. 494, 34 Eng. Reprint 600, 15 Rev. Rep. 93; Allan *v.* Backhouse, 2 Ves. & B. 65, 13 Rev. Rep. 23, 35 Eng. Reprint 243.

77. See *supra*, II, E; IV, A.

78. See *supra*, II, D, 1; III, B, 1.

79. *Georgia.*— Patterson *v.* Lawrence, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143.

Illinois.— Gilman *v.* Bell, 99 Ill. 144.

Maryland.— Maryland Mut. Benev. Soc. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

Michigan.— Holmes *v.* Hall, 8 Mich. 66, 77 Am. Dec. 444.

Mississippi.— Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46.

New Hampshire.— Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23; Eaton *v.* Straw, 18 N. H. 320.

North Carolina.— Harrison *v.* Battle, 21 N. C. 213.

South Carolina.— Clarke *v.* Deveaux, 1 S. C. 172.

United States.— Carver *v.* Astor, 4 Pet. 1, 93, 7 L. ed. 761.

England.— Holmes *v.* Coghill, 7 Ves. Jr. 499, 6 Rev. Rep. 166, 32 Eng. Reprint 201 [*affirmed* in 12 Ves. Jr. 206, 8 Rev. Rep. 323, 33 Eng. Reprint 79]. And see Lampet's Case, 10 Coke 46*b*, 77 Eng. Reprint 994; Albany's Case, 1 Coke 110*b*, 76 Eng. Reprint 250; *In re* Powell, 39 L. J. Ch. 188, 18 Wkly. Rep. 228.

benefit.[80] In the latter case, however, the donee has the means of acquiring such interest, right, or title; and in all cases, by the execution of the power, the possession, right, title, or interest is altered or divested.[81]

2. Under Power of Appointment or Disposition — a. In General. A general power of appointment or disposition, existing as a mere technical power, does not imply ownership, but excludes the idea of any absolute fee simple in the person possessing such power.[82] But where there is a gift to a person indefinitely, with a superadded power of disposal, the donee takes an absolute estate.[83]

b. Limited Estate With Power Superadded. It is very generally held that, where a life or other limited estate is granted and there follows an additional power of disposal or appointment to the tenant for life, they will not have the effect of conferring an additional right of property upon the tenant by being construed to enlarge to a fee or absolute estate the estate which had been previously expressly

See 40 Cent. Dig. tit. "Powers," §§ 1, 71 *et seq.* And see *supra*, I, A, text and note 2.

80. Gilman *v.* Bell, 99 Ill. 144.

81. Maryland Mut. Benev. Soc. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

82. Eaton *v.* Straw, 18 N. H. 320. "A power of appointment is not an absolute right of property. Holmes *v.* Coghill, 7 Ves. Jr. 499, 6 Rev. Rep. 166, 32 Eng. Reprint 201 [*affirmed* in 12 Ves. Jr. 206, 8 Rev. Rep. 323, 33 Eng. Reprint 79]. It is not an estate and has none of the elements of an estate. Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23; Eaton *v.* Straw, 18 N. H. 320; Livingston *v.* Murray, 68 N. Y. 485; William *v.* Holmes, 4 Rich. Eq. (S. C.) 475; Pulliam *v.* Byrd, 2 Strobh. Eq. (S. C.) 134; Goodhill *v.* Brigham, 1 B. & P. 192; 4 Kent's Com. 319. An unexecuted power of appointment vests no interest in the donee, whether annexed to a particular estate or not, and therefore is not assets for the payment of the debts of the deceased donee. Harrison *v.* Battle, 21 N. C. 213." Patterson *v.* Lawrence, 83 Ga. 703, 707, 10 S. E. 355, 7 L. R. A. 143. And see the other cases cited *supra*, p. 1088 note 79.

83. *Connecticut.*— McKenzie's Appeal, 41 Conn. 607, 19 Am. Rep. 525. And see Mansfield *v.* Shelton, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285.

Illinois.— Dalrymple *v.* Leach, 192 Ill. 51, 61 N. E. 443; Wilson *v.* Turner, 164 Ill. 398, 45 N. E. 820; Fairman *v.* Beal, 14 Ill. 244. And see Funk *v.* Eggleston, 92 Ill. 515, 34 Am. Rep. 136.

Indiana.— Mulvane *v.* Rude, 146 Ind. 476, 45 N. E. 659.

Iowa.— Law *v.* Douglass, 107 Iowa 606, 78 N. W. 212.

Maine.— Taylor *v.* Brown, 88 Me. 56, 33 Atl. 664; Stuart *v.* Walker, 72 Me. 145, 39 Am. Rep. 311.

Maryland.— Combs *v.* Combs, 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359; Benesch *v.* Clark, 49 Md. 497.

Massachusetts.— Knight *v.* Knight, 162 Mass. 460, 38 N. E. 1131; Foster *v.* Smith, 156 Mass. 379, 31 N. E. 291.

Missouri.— Tisdale *v.* Prather, 210 Mo. 402, 109 S. W. 41; Evans *v.* Folks, 135 Mo. 397, 37 S. W. 126 [*citing* Green *v.* Sutton, 50 Mo. 186].

New Jersey.— Benz *v.* Fabian, 54 N. J. Eq. 615, 35 Atl. 760.

New York.— Jackson *v.* Robins, 16 Johns. 537. And see Trask *v.* Sturges, 170 N. Y. 482, 63 N. E. 534 [*reversing* 56 N. Y. App. Div. 625, 68 N. Y. Suppl. 1149]; Van Horne *v.* Campbell, 100 N. Y. 287, 3 N. E. 316, 53 Am. Rep. 166.

Ohio.— Widows' Home *v.* Lippardt, 70 Ohio St. 261, 71 N. E. 770.

Pennsylvania.— Morris *v.* Phaler, 1 Watts 389. And see Evans *v.* Smith, 166 Pa. St. 625, 31 Atl. 346.

Tennessee.— Bradley *v.* Carnes, 94 Tenn. 27, 27 S. W. 1007, 45 Am. St. Rep. 696.

Vermont.— Stowell *v.* Hastings, 59 Vt. 494, 8 Atl. 738, 59 Am. Rep. 748.

Virginia.— May *v.* Joynes, 20 Gratt. 692.

England.— Lambe *v.* Eames, L. R. 6 Ch. 597, 40 L. J. Ch. 447, 25 L. T. Rep. N. S. 175, 19 Wkly. Rep. 659; *In re* Hutchinson, 8 Ch. D. 540, 39 L. T. Rep. N. S. 86, 26 Wkly. Rep. 904; Mackett *v.* Mackett, L. R. 14 Eq. 49, 41 L. J. Ch. 704, 20 Wkly. Rep. 860; Maskelyne *v.* Maskelyne, Ambl. 750, 27 Eng. Reprint 484; Hinton *v.* Foye, 1 Atk. 465, 26 Eng. Reprint 296; Howorth *v.* Dewell, 29 Beav. 18, 6 Jur. N. S. 1360, 9 Wkly. Rep. 27, 54 Eng. Reprint 531; Elton *v.* Sheppard, 1 Bro. Ch. 532, 28 Eng. Reprint 1282; Watts *v.* Campbell, 2 Giffard 112, 66 Eng. Reprint 48; Robinson *v.* Dusgate, 2 Vern. Ch. 181, 23 Eng. Reprint 719; Hixon *v.* Oliver, 13 Ves. Jr. 108, 9 Rev. Rep. 148, 33 Eng. Reprint 235. But see Blakeney *v.* Blakeney, 6 Sim. 52, 9 Eng. Ch. 52, 58 Eng. Reprint 515.

See, generally, Wills.

Failure of particular object.— If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. Kellett *v.* Kellett, L. R. 3 H. L. 160.

Direction as to disposal by testator.— In Lightburne *v.* Gill, 3 Bro. P. C. 250, 1 Eng. Reprint 1300, A gave the residue of his estate to B to dispose of as she should think fit, but if she should die unmarried or intestate, to go to his brother's children. B possessed this residue, and disposed of it in her own name and upon her death in-

declared to be for life or other limited term only, but will be carried into effect only as powers over the property given to the life-tenant; [84] and the same is true

testate and unmarried it was held that no part of her personal estate went to the brother's children.

84. *Alabama.*— Denson *v.* Mitchell, 26 Ala. 360, express bequest for life with superadded power of disposition.

Connecticut.— Mansfield *v.* Shelton, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285.

Illinois.— Funk *v.* Eggleston, 92 Ill. 515, 34 Am. Rep. 136 (gift to wife by will for life with power of disposition by will or deed); Boyd *v.* Strahan, 36 Ill. 355 (bequest to wife "to be at her own disposal, and for her own proper use and benefit, during her natural life"); Fairman *v.* Beal, 14 Ill. 244 (devise for life with power of disposition).

Indiana.— Dunning *v.* Vandusen, 47 Ind. 423, 17 Am. Rep. 709, bequest and devise to wife "to have and to hold her life, and to dispose of at her death at her pleasure."

Iowa.— Dickey *v.* Barnstable, 122 Iowa 572, 98 N. W. 368.

Maine.— Copeland *v.* Barron, 72 Me. 206; Stuart *v.* Walker, 72 Me. 145, 39 Am. Rep. 311; Warren *v.* Webb, 68 Me. 133, devise and bequest to wife "for and during her natural life . . . to have and to hold the same to her and her assigns, for and during the term aforesaid, for her proper use, benefit and support and maintenance; and after her decease" to testator's children.

Maryland.— Mines *v.* Gambrill, 71 Md. 30, 18 Atl. 43 (equitable life-estate under will with power of appointment by will); Foos *v.* Scarf, 55 Md. 301 (equitable life-estate created by deed with power of disposition superadded); Benesch *v.* Clark, 49 Md. 497.

Massachusetts.— Collins *v.* Wickwire, 162 Mass. 143, 38 N. E. 365; Chase *v.* Ladd, 153 Mass. 126, 26 N. E. 429, 25 Am. St. Rep. 614; Stevens *v.* Winship, 1 Pick. 318, 11 Am. Dec. 178, devise to wife with power of sale for support.

Mississippi.— Gorin *v.* Gordon, 38 Miss. 205 (marriage settlement); Dean *v.* Nunnally, 36 Miss. 358 (devise and bequest to wife during life or widowhood, with power of disposition).

Missouri.— Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188 (equitable life-estate created by deed, with power of appointment and disposition); Evans *v.* Folks, 135 Mo. 397, 37 S. W. 126 [*citing* Lewis *v.* Pitman, 101 Mo. 281, 14 S. W. 52; Harbison *v.* James, 90 Mo. 411, 2 S. W. 292; Russell *v.* Eubanks, 84 Mo. 82; Reinders *v.* Koppelmann, 68 Mo. 482, 30 Am. Rep. 802; Rubey *v.* Barnett, 12 Mo. 3, 49 Am. Dec. 112] (express devise for life with power of disposition does not enlarge the estate to a fee simple).

New Hampshire.— Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23, devise for life with power of disposition. And see Eaton *v.* Straw, 18 N. H. 320.

New Jersey.— Robeson *v.* Shotwell, 55 N. J. Eq. 318, 321, 36 Atl. 780 [*affirmed* without opinion in 55 N. J. Eq. 824, 41 Atl. 1115], where it is said: "The distinction, made from the time of the earliest cases, is between an estate given indefinitely in the first instance and one given expressly for life, and although, as was said by Sir William Grant, in Bradly *v.* Westcott, 13 Ves. Jr. 452, 9 Rev. Rep. 207, 33 Eng. Reprint 361, the distinction is perhaps slight, it is perfectly established, and, under the language of the decisions of our courts, I think it may be said to be a rule of construction which is a rule of property so far as a general rule of construction can be applicable to wills." See also Downey *v.* Borden, 36 N. J. L. 460 [*affirming* 35 N. J. L. 74]; Wooster *v.* Cooper, 53 N. J. Eq. 682, 33 Atl. 1050; Pratt *v.* Douglas, 38 N. J. Eq. 516.

New York.— Jackson *v.* Robins, 16 Johns. 537, 588, where Chancellor Kent said: "Where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion."

North Carolina.— Harrison *v.* Battle, 21 N. C. 213.

Ohio.— Widows' Home *v.* Lippardt, 70 Ohio St. 261, 71 N. E. 770.

Pennsylvania.—Girard L. Ins., etc., Co. *v.* Chambers, 46 Pa. St. 485, 86 Am. Dec. 513 [*overruling* so far as conflicting Harrison *v.* Brolaskey, 20 Pa. St. 299] (equitable life-estate created by will, with power of appointment by will); Ralston *v.* Waln, 44 Pa. St. 279 (equitable life-estate created by deed, with power of appointment); Morris *v.* Phaler, 1 Watts 389; Flintham's Appeal, 11 Serg. & R. 16.

Tennessee.— Henderson *v.* Vaulx, 10 Yerg. 30, devise for life with power of disposal at death. And see Young *v.* Mutual L. Ins. Co., 101 Tenn. 311, 47 S. W. 428.

Texas.— Weir *v.* Smith, 62 Tex. 1, bequest to wife for life with power of disposition.

United States.— Brant *v.* Virginia Coal, etc., Co., 93 U. S. 326, 23 L. ed. 927; Ward *v.* Amory, 29 Fed. Cas. No. 17,146, 1 Curt. 419.

England.— *In re* Thomson, 14 Ch. D. 263, 49 L. J. Ch. 622, 43 L. T. Rep. N. S. 35, 28 Wkly. Rep. 802; *In re* Jackson, 13 Ch. D. 189, 49 L. J. Ch. 82, 41 L. T. Rep. N. S. 499, 28 Wkly. Rep. 209; Pennock *v.* Pennock, L. R. 13 Eq. 144, 41 L. J. Ch. 141, 25 L. T. Rep. N. S. 691, 20 Wkly. Rep. 141; Freeland *v.* Pearson, L. R. 3 Eq. 658, 36 L. J. Ch. 374, 15 Wkly. Rep. 419; Scott *v.* Josselyn, 26 Beav. 174, 5 Jur. N. S. 560, 28 L. J. Ch. 297, 53 Eng. Reprint 863; Crozier *v.* Crozier, 2 C. & L. 309, 3 Dr. & War. 353, 5 Ir. Eq. 415; Dighton *v.* Tomlin-

where no life-estate is expressly given, but the power of disposition is limited to particular objects,[85] or where there are limitations over in default of execution.[86] This rule is not, however, absolute, and where the fee is clearly intended to pass, the donee will not be restricted to a life-estate.[87]

3. Under Power of Sale — a. In General. A naked power of sale vests no interest in the subject-matter in the donee.[88] But where the instrument creating the power manifests an intention that the donee shall have all the beneficial interests in the property, it vests the title in him.[89]

b. Under Power of Sale in Executors. Whether an executor takes an interest in lands intrusted to him under a will to sell, or is clothed merely with a power of disposition, was early held to depend upon the terms of the devise. A devise to the executor to sell passes the title to him;[90] but a direction or devise that executors shall sell the land, or that lands shall be sold by the executors, gives them no estate therein, but a mere naked power, and the land vests in the devisees, or, if the will makes no other disposition thereof, it descends to the heirs, subject to the execution of the power;[91] and the same is true of a devise of land to be sold by exec-

son, Comyns 194, 10 Mod. 31, 88 Eng. Reprint 612, 1 P. Wms. 149, 24 Eng. Reprint 335, 1 Salk. 239, 91 Eng. Reprint 212; Reid *v.* Thompson, 2 Ir. Ch. 26; Espinasse *v.* Luffingham, 8 Ir. Eq. 129, 3 J. & L. 186; Archibald *v.* Wright, 2 Jur. 759, 7 L. J. Ch. 120, 9 Sim. 161, 16 Eng. Ch. 162, 59 Eng. Reprint 320; Simpson *v.* Forrester, 1 Knapp 231, 12 Eng. Reprint 306; Anonymous, 3 Leon. 71, 74 Eng. Reprint 548; Reith *v.* Seymour, 6 L. J. Ch. O. S. 97, 4 Russ. 263, 28 Rev. Rep. 77, 4 Eng. Ch. 263, 38 Eng. Reprint 804; Liefe *v.* Saltingtone, 1 Mod. 189, 86 Eng. Reprint 819; Barford *v.* Street, 16 Ves. Jr. 135, 33 Eng. Reprint 935; Anderson *v.* Dawson, 15 Ves. Jr. 532, 33 Eng. Reprint 856; Bradley *v.* Westcott, 13 Ves. Jr. 445, 9 Rev. Rep. 207, 33 Eng. Reprint 361; Reid *v.* Shergold, 10 Ves. Jr. 370, 32 Eng. Reprint 888; Nannock *v.* Horton, 7 Ves. Jr. 391, 32 Eng. Reprint 158. But see Goodtitle *v.* Otway, 2 Wils. C. P. 6; Jennor *v.* Hardie, 1 Leon. 283, 74 Eng. Reprint 258.

See 40 Cent. Dig. tit. "Powers," § 71; and, generally, Wills.

Contra.— Brown *v.* Strother, 102 Va. 145, 47 S. E. 236; May *v.* Joynes, 20 Gratt. (Va.) 692. *Compare* Honaker *v.* Duff, 101 Va. 675, 44 S. E. 900; Johns *v.* Johns, 86 Va. 333, 10 S. E. 2.

85. Haralson *v.* Redd, 15 Ga. 148; Dickey *v.* Barnstable, 122 Iowa 572, 98 N. W. 368; Le Marchant *v.* Le Marchant, L. R. 18 Eq. 414, 22 Wkly. Rep. 839; Curnick *v.* Tucker, L. R. 17 Eq. 320; Harding *v.* Glyn, 1 Atk. 469, 26 Eng. Reprint 299; Shovelton *v.* Shovelton, 32 Beav. 143, 1 New Rep. 226, 55 Eng. Reprint 56; Gully *v.* Cregoe, 24 Beav. 185, 53 Eng. Reprint 327; Acheson *v.* Fair, 2 C. & L. 208, 3 Dr. & War. 512; Dighton *v.* Tomlinson, Comyns 194, 10 Mod. 31, 88 Eng. Reprint 612, 1 P. Wms. 149, 24 Eng. Reprint 335, 1 Salk. 239, 91 Eng. Reprint 212; Ware *v.* Mallard, 16 Jur. 492, 21 L. J. Ch. 355; Forbes *v.* Ball, 3 Meriv. 437, 36 Eng. Reprint 168; Daniel *v.* Ubley, W. Jones 137, 82 Eng. Reprint 73. And see Mansfield *v.* Shelton, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285.

86. Evans *v.* Folks, 135 Mo. 397, 37 S. W. 126; Lyndall's Estate, 13 Pa. Co. Ct. 449. *Contra*, May *v.* Joynes, 20 Gratt. (Va.) 692. *Compare* Brown *v.* Strother, 102 Va. 145, 47 S. E. 236; Honaker *v.* Duff, 101 Va. 675, 44 S. E. 900; Johns *v.* Johns, 86 Va. 333, 10 S. E. 2.

87. London Chartered Bank *v.* Lempriere, L. R. 4 P. C. 572, 42 L. J. P. C. 49, 29 L. T. Rep. N. S. 186, 9 Moore P. C. N. S. 426, 21 Wkly. Rep. 513, 17 Eng. Reprint 574; Reid *v.* Atkinson, Ir. R. 5 Eq. 373; Doe *v.* Thomas, 3 A. & E. 123, 30 E. C. L. 77; Holloway *v.* Clarkson, 2 Hare 521, 6 Jur. 923, 24 Eng. Ch. 521, 67 Eng. Reprint 215; *In re* David, Johns. 495, 6 Jur. N. S. 94, 29 L. J. Ch. 116, 1 L. T. Rep. N. S. 130, 8 Wkly. Rep. 39, 70 Eng. Reprint 517; Hoy *v.* Master, 3 L. J. Ch. 134, 6 Sim. 568, 9 Eng. Ch. 569, 58 Eng. Reprint 706; Irwin *v.* Farrer, 19 Ves. Jr. 86, 34 Eng. Reprint 450.

88. Holmes *v.* Hall, 8 Mich. 66, 77 Am. Dec. 444; Clark *v.* Deveaux, 1 S. C. 172.

89. See Travis County *v.* Christian, (Tex. Civ. App. 1892) 21 S. W. 119.

90. Y. B. 9 Hen. VI, 13, b, 24, b. See also Litt. § 169; Coke Litt. 113*a*; 181*b*; 1 Sugden Powers 131. And see the cases cited in the notes following.

91. *Alabama.*— Robinson *v.* Allison, 74 Ala. 254; Mitchell *v.* Spence, 62 Ala. 450; Patton *v.* Crow, 26 Ala. 426.

California.— Estep *v.* Armstrong, 91 Cal. 659, 27 Pac. 1091.

Connecticut.— Bull *v.* Bull, 3 Day 384. And see Seymour *v.* Bull, 3 Day 388.

Delaware.— Lockwood *v.* Stradley, 1 Del. Ch. 298, 12 Am. Dec. 97.

Florida.— Simmons *v.* Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343.

Illinois.— Lambert *v.* Harvey, 100 Ill. 338.

Iowa.— Boland *v.* Tiernay, 118 Iowa 59, 91 N. W. 836.

Kentucky.— Jameson *v.* Smith, 4 Bibb 307.

Maryland.— Guyer *v.* Maynard, 6 Gill & J. 420.

Massachusetts.— Greenough *v.* Welles, 10 Cush. 571; Shelton *v.* Homer, 5 Metc. 462.

utors.[92] But the question is always one of intention on the whole will, and the mere form of the devise may be controlled by the context;[93] and by statute in Pennsylvania a mere direction in a will to executors to sell and convey land breaks the descent and vests the legal estate in them.[94]

4. Under Power in Executors to Lease, Receive Rents and Profits, or Manage and Control. Where, under a power to lease, receive rents and profits, or manage and control, all the duties enjoined on the executor by the will in regard to the land of the testator can be discharged under a power, the executor does not take an estate therein by implication;[95] but the rule is otherwise where an

Mississippi.— Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46.

Missouri.— Compton *v.* McMahan, 19 Mo. App. 494.

New Hampshire.— Gregg *v.* Currier, 36 N. H. 200; Dexter *v.* Sullivan, 34 N. H. 478.

New Jersey.— Moores *v.* Moores, 41 N. J. L. 440; Snowhill *v.* Snowhill, 23 N. J. L. 447; Todd *v.* Wortman, 45 N. J. Eq. 723, 18 Atl. 843; Romaine *v.* Hendrickson, 24 N. J. Eq. 231; Fluke *v.* Fluke, 16 N. J. Eq. 478; Gest *v.* Flock, 2 N. J. Eq. 108.

New York.— Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; Onondaga Trust, etc., Co. *v.* Price, 87 N. Y. 542; Whitlock *v.* Washburn, 62 Hun 369, 17 N. Y. Suppl. 60; Farrar *v.* McCue, 26 Hun 477 [*reversed* on other grounds in 89 N. Y. 139]; Hetzell *v.* Barber, 6 Hun 534; Cashman *v.* Wood, 6 Hun 520; Catton *v.* Taylor, 42 Barb. 578; Reed *v.* Underhill, 12 Barb. 113; Post *v.* Benchley, 15 N. Y. St. 618; Murray *v.* Murray, 7 N. Y. St. 391; Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 4 N. Y. St. 380; Robinson *v.* Robinson, 2 N. Y. St. 666; Jackson *v.* Schauber, 7 Cow. 187 [*reversed* on other grounds in 2 Wend. 13]; Bergen *v.* Bennett, 1 Cai. Cas. 1, 2 Am. Dec. 281; Marsh *v.* Wheeler, 2 Edw. 156; Janssen *v.* Wemple, 3 Redf. Surr. 229; Scott *v.* Monell, 1 Redf. Surr. 431.

North Carolina.— Perkins *v.* Presnell, 100 N. C. 220, 6 S. E. 801; Beam *v.* Jennings, 89 N. C. 451; Jenkins *v.* Maxwell, 52 N. C. 612; Bradshaw *v.* Ellis, 22 N. C. 20, 32 Am. Dec. 686.

Ohio.— Elstner *v.* Fife, 32 Ohio St. 358. And see Nimmons *v.* Westfall, 33 Ohio St. 213.

Pennsylvania.— Cobel *v.* Cobel, 8 Pa. St. 342.

South Carolina.—Baldwin *v.* Cooley, 1 S. C. 256; Thomson *v.* Gaillard, 3 Rich. 418, 45 Am. Dec. 778; Ware *v.* Murph, Rice 54, 33 Am. Dec. 97; Ferguson *v.* King, 2 Nott & M. 588; Haskell *v.* House, 3 Brev. 242.

Tennessee.— Rogers *v.* Marker, 12 Heisk. 645; Hope *v.* Johnson, 2 Yerg. 123.

West Virginia.— Dunn *v.* Renick, 33 W. Va. 476, 10 S. E. 810.

United States.— Chew *v.* Hyman, 7 Fed. 7, 10 Biss. 240.

England.— Lancaster *v.* Thornton, 2 Burr. 1027; Houell *v.* Barnes, Cro. Car. 382, 79 Eng. Reprint 933; Yates *v.* Compton, 2 P. Wms. 308, 24 Eng. Reprint 743. But see *dictum* of Hale, C. B., in Barrington *v.* Atty.-Gen., Hardres 419.

See 40 Cent. Dig. tit. "Powers," § 73.

See also Descent and Distribution, 14 Cyc. 102 *et seq.*; Executors and Administrators, 18 Cyc. 297 *et seq.*; and, generally, Wills.

92. Ferebee *v.* Procter, 19 N. C. 439. And see 1 Sugden Powers 132 *et seq.*, in which the contrary opinion, maintained by Lord Hale and Mr. Hargrave, is shown to be unfounded.

93. Mosby *v.* Mosby, 9 Gratt. (Va.) 584. And see the following cases in which the executors were held to take an interest, although there was no devise to them:

Illinois.— Wicker *v.* Ray, 118 Ill. 472, 8 N. E. 835, in which a devise of the beneficial interest to parties named, with a power to the executors to sell and convert at their discretion, for the interest of the beneficiaries, was held to invest the executors with the fee.

Maine.— Richardson *v.* Woodbury, 43 Me. 206, in which the title was held to be vested in the executor by implication.

Maryland.— Keplinger *v.* Maccubbin, 58 Md. 203.

New Jersey.— Meeker *v.* Boylan, 28 N. J. L. 274, holding that executors who are authorized to pay the rents of certain property to the widow during life, and then to sell and pay over the proceeds to the legatees, have a power coupled with an interest, and may hold as against the heir during the life of the widow.

New York.—Greenland *v.* Waddell, 5 N. Y. St. 835, holding that where a will provides that realty shall be sold for the purpose of division among the legatees, the title remains in the executors until sold.

Ohio.— Dabney *v.* Manning, 3 Ohio 321, 17 Am. Dec. 597, holding that a power to an executor to sell land, when in his opinion sale can be made to good advantage, the proceeds to be distributed to children as they come of age, is a power connected with a trust, and the executor is entitled to possession of the land, as against the heir on whom the title descended, subject to be divested by the execution of the power. See also Nimmons *v.* Westfall, 33 Ohio St. 213.

West Virginia.— Bell *v.* Humphrey, 8 W. Va. 1.

See 40 Cent. Dig. tit. "Powers," § 73.

94. Wells *v.* Sloyer, 1 Pa. L. J. Rep. 516. construing Pa. Act, March 31, 1792. See also Dundas' Appeal, 64 Pa. St. 325; Shippen *v.* Clapp, 36 Pa. St. 89; Shippen *v.* Clapp, 29 Pa. St. 265; Smith's Estate, 4 Phila. (Pa.) 181. *Compare*, however, Cobel *v.* Cobel, 8 Pa. St. 342.

95. Onondaga Trust, etc., Co. *v.* Price, 87

estate in the executor is necessary to the due execution of the trust imposed upon him..[96]

5. Effect of Existence of Power on Other Rights and Interests in Property. Other rights and interests in the subject-matter of a power are unaffected by its mere existence, although liable to destruction or divestment upon its execution.[97] But where a testator directs his executor to sell land, and devises whatever remains after payment of debts and certain legacies to a person named, the latter acquires no seizin in the land, and only takes such part of the proceeds of the sale as may remain after the payment of the debts and legacies.[98] A conveyance upon the trust that the grantor shall have the use of the property during his life, with a qualified power of appointment in him, and that at his death it shall be conveyed to his heirs, gives the grantor's children an equitable interest during his lifetime, and that interest is assignable by the children during the lifetime of their father, subject, however, to be defeated by their father exercising the power of appointment reserved to him in the deed.[99]

6. Rights and Remedies of Creditors of Donee — a. Upon Non-Execution of General Power of Appointment. Upon the non-execution of a general power of appointment by the donee, equity will not subject the subject-matter of the power as assets for the benefit of the creditors of the donee, as against the donor or persons to whom it is limited in default of appointment;[1] and in this respect it seems that a defective execution in favor of a volunteer is to be regarded as in effect non-execution.[2] This rule, however, is in some jurisdictions changed by statute. Thus in several states there are statutes providing, in substance, that when an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee absolute, as to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power shall not be executed, or the lands sold for the satisfaction of debts, during the continuance of such particular estate.[3] So it is

N. Y. 542; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Tucker *v.* Tucker, 5 N. Y. 408 [*reversing* 5 Barb. 99]; Martin *v.* Martin, 43 Barb. (N. Y.) 172; Blount *v.* Johnston, 5 N. C. 36.

96. Tobias *v.* Ketchum, 32 N. Y. 319; Brewston *v.* Striker, 2 N. Y. 19 [*affirming* 1 E. D. Smith 321]; Craig *v.* Craig, 3 Barb. Ch. (N. Y.) 76; Boyd *v.* Talbert, 12 Ohio 212; Doe *v.* Burrows, 1 Ohio Dec. (Reprint) 218, 4 West. L. J. 527.

97. Thomas *v.* Moody, 1 Ky. L. Rep. 123 (where the grantees of the fee were held to take the title subject to the reserved power to the grantor to sell); Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Buckley *v.* Buckley, 11 Barb. (N. Y.) 43 (mere power to sell does not alter rights of parties to the realty until enforced); Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908 (reservation of power of revocation or new appointment does not impair validity or efficiency of conveyance until exercised). *Compare* Dana *v.* Murray, 122 N. Y. 604, 26 N. E. 21 (construing 1 Rev. St. pt. 2, c. 1, tit. 2, art. 3, §§ 74, 76–79, 96); Herbemont *v.* Bostick, 2 Brev. (S. C.) 435 (holding that where the executor is authorized to sell, the heir has no estate which he can dispose of. The heir's conveyance was, however, made after the execution of the power).

98. Fickett *v.* Dyer, 19 Me. 58.

99. Whipple *v.* Fairchild, 139 Mass. 262, 30 N. E. 89.

1. *Georgia.*—Patterson *v.* Lawrence, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143.

Illinois.— Gilman *v.* Bell, 99 Ill. 144, where it was held that equity will not compel the donee of a power to execute it in his own favor, at the instance of creditors.

Kentucky.— Boyce *v.* Waller, 9 Dana 478.

Massachusetts.— Crawford *v.* Langmaid, 171 Mass. 309, 50 N. E. 606.

New Hampshire.— Johnson *v.* Cushing, 15 N. H. 298, 41 Am. Dec. 694.

Rhode Island.— Ryan *v.* Mahan, 20 R. I. 417, 39 Atl. 893.

United States.— Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908, in which a power of revocation and appointment was reserved to the grantor.

England.— Harrington *v.* Harte, 1 Cox Ch. 131, 29 Eng. Reprint 1094; Tollet *v.* Tollet, 2 P. Wms. 489, 24 Eng. Reprint 828; Hixon *v.* Oliver, 13 Ves. Jr. 108, 9 Rev. Rep. 148, 33 Eng. Reprint 235; Holmes *v.* Coghill, 7 Ves. Jr. 499, 6 Rev. Rep. 166, 32 Eng. Reprint 201 [*affirmed* in 12 Ves. Jr. 206, 8 Rev. Rep. 323, 33 Eng. Reprint 79]; 2 Sugden Powers 173.

2. 1 Sugden Powers 109 [*discussing* Holmes *v.* Coghill, 12 Ves. Jr. 206, 8 Rev. Rep. 323, 33 Eng. Reprint 79].

3. Ala. Civ. Code (1907), § 3423; N. Y. Laws (1896), c. 547. § 129 (formerly 1 Rev. St. p. 732, § 81); Wis. St. (1898) § 2108.

Statutes construed.—Alford *v.* Alford, 56 Ala. 350; *In re* Moehring, 154 N. Y. 423, 48

provided that where the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor must be taken as the absolute owner of the estate conveyed, as to the rights of creditors and purchasers.[4]

b. Upon Execution of General Power. Where a donee has a general power of appointment, either by deed or will, and exercises it in favor of a volunteer,[5] equity will, in exclusion of the appointee, seize upon the subject-matter as assets for the payment of the debts of the donee.[6] This rule is declared or recognized by statute in some states.[7] The rule does not apply where the power is limited and not general.[8]

7. Assignment of Power. Where a power is given by words that clearly indicate that the donor places special confidence in the donee, so that the element of personal choice is found, it must be exercised by the person thus selected, and ordinarily is not transmissible or assignable.[9]

VI. Execution.

A. Duty to Execute — 1. Mandatory or Discretionary Powers. Where a power is mandatory, that is, where no discretion is vested in the donee as to whether

N. E. 818; Deegan *v.* Wade, 144 N. Y. 573, 39 N. E. 692; Hume *v.* Randall, 141 N. Y. 499, 36 N. E. 402; Rose *v.* Hatch, 125 N. Y. 427, 26 N. E. 467; Crooke *v.* Kings County, 97 N. Y. 421; Cutting *v.* Cutting, 86 N. Y. 522; Auer *v.* Brown, 121 Wis. 115, 98 N. W. 966; Larsen *v.* Johnson, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404.

4. Ala. Civ. Code (1907), § 3422, construed and applied in Alford *v.* Alford, 96 Ala. 385, 11 So. 316.

5. The rule does not apply as against a *bona fide* purchaser for value, but only as against a volunteer, and a *bona fide* purchaser under a voluntary appointee will be protected. Patterson *v.* Lawrence, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143; Hart *v.* Middlehurst, 3 Atk. 371, 26 Eng. Reprint 1014; George *v.* Milbanke, 9 Ves. Jr. 190, 7 Rev. Rep. 157, 32 Eng. Reprint 575; 2 Sugden Powers 30.

6. *District of Columbia.*— Duncanson *v.* Manson, 3 App. Cas. 260; Knowles *v.* Dodge, 1 Mackey 66.

Georgia.— See Patterson *v.* Lawrence, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143.

Kentucky.— Boyce *v.* Waller, 9 Dana 478.

Maryland.— See Price *v.* Cherbonnier, 103 Md. 107, 63 Atl. 209.

Massachusetts.— O'Donnell *v.* Barbey, 129 Mass. 453; Clapp *v.* Ingraham, 126 Mass. 200.

New Hampshire.— Johnson *v.* Cushing, 15 N. H. 298, 41 Am. Dec. 694.

New York.— Tallmadge *v.* Sill, 21 Barb. 34. But see Cutting *v.* Cutting, 86 N. Y. 522 [*reversing* on another point 20 Hun 360], holding that the common-law rule was abrogated by Rev. St. 732, § 73.

North Carolina.— Rogers *v.* Hinton, 62 N. C. 101, 63 N. C. 78.

Vermont.— See Wales *v.* Bowdish, 61 Vt. 23, 17 Atl. 1000, 4 L. R. A. 819, where it was held that the rule did not apply in favor of creditors who were such before the creation of the power.

Virginia.— Freeman *v.* Butters, 94 Va. 406, 26 S. E. 845.

United States.— Brandies *v.* Cochrane, 112 U. S. 344, 5 S. Ct. 194, 28 L. ed. 760; Jones *v.* Clifton, 101 U. S. 225, 25 L. ed. 908.

England.—Beyfus *v.* Lawley, [1903] A. C. 411, 72 L. J. Ch. 781, 89 L. T. Rep. N. S. 309; Troughton *v.* Troughton, 3 Atk. 656, 26 Eng. Reprint 1177, 1 Ves. 86, 27 Eng. Reprint 908; Pack *v.* Bathurst, 3 Atk. 269, 26 Eng. Reprint 957; Bainton *v.* Ward, 2 Atk. 172, 26 Eng. Reprint 507; Hinton *v.* Toye, 1 Atk. 465, 26 Eng. Reprint 296; Harrington *v.* Harte, 1 Cox Ch. 131, 29 Eng. Reprint 1094; Jenney *v.* Andrews, 6 Madd. 264, 56 Eng. Reprint 1091; Lassels *v.* Cornwallis, Prec. Ch. 232, 24 Eng. Reprint 113, 2 Vern. Ch. 465, 23 Eng. Reprint 898; Thompson *v.* Towne, Prec. Ch. 52, 24 Eng. Reprint 26, 2 Vern. Ch. 319, 23 Eng. Reprint 806; Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1; George *v.* Milbanke, 9 Ves. Jr. 190, 7 Rev. Rep. 157, 32 Eng. Reprint 575; 2 Sugden Powers 29.

See 40 Cent. Dig. tit. "Powers," § 77.

Contra.—Stokes' Estates, 3 Pa. Co. Ct. 193; King's Estate, 14 Wkly. Notes Cas. (Pa.) 77.

7. Boyce *v.* Waller, 9 Dana (Ky.) 478, 482.

8. Johnson *v.* Cushing, 15 N. H. 298, 41 Am. Dec. 694. And see Price *v.* Cherbonnier, 103 Md. 107, 63 Atl. 209.

A power of appointment is or is not general within the rule according to the persons or uses to which the property may be appointed under it, and not according to the time when its exercise takes effect in possession, or the instrument by which its exercise is to be manifested. Johnson *v.* Cushing, 15 N. H. 298, 41 Am. Dec. 694.

9. Sells *v.* Delgado, 186 Mass. 25, 70 N. E. 1036. See also Saunders *v.* Webber, 39 Cal. 287; Shelton *v.* Homer, 5 Metc. (Mass.) 462; Fuller *v.* Davis, 63 Miss. 78; Phillips *v.* Wood, 16 R. I. 274, 15 Atl. 88.

Delegation of power see *infra*, VI, B, 6.

or not he shall execute it, it is his duty to exercise it,[10] even though he is given a discretion as to the manner of executing it,[11] or as to the shares to be appointed.[12] If, however, the donee is given a discretion as to its execution or non-execution, he may exercise the power or not as he sees fit.[13]

2. Compelling Execution. Where a power is imperative or is coupled with a trust, a court of equity will compel its execution in favor of the objects,[14] but as

10. *District of Columbia.*— Fitzgerald *v.* Wynne, 1 App. Cas. 107.

Indiana.— Kintner *v.* Jones, 122 Ind. 148, 23 N. E. 701.

Kentucky.— Green *v.* Johnson, 4 Bush 164; Muldrow *v.* Fox, 2 Dana 74 (in which there was a peremptory direction to executors to sell, and it was held that a direction to "lay out the proceeds to the best advantage of the children" did not make the sale discretionary); Coleman *v.* McKinney, 3 J. J. Marsh. 246.

Maryland.— Venable *v.* Baltimore Mercantile Trust, etc., Co., 74 Md. 187, 21 Atl. 704.

Massachusetts.— Greenough *v.* Welles, 10 Cush. 571.

Minnesota.— Faloon *v.* Flannery, 74 Minn. 38, 76 N. W. 954 [*distinguishing* Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497].

New Jersey.— Berrien *v.* Berrien, 4 N. J. Eq. 37.

New York.— Smith *v.* Floyd, 140 N. Y. 337, 35 N. E. 606 [*affirming* 71 Hun 56, 24 N. Y. Suppl. 610] (where it was held that the beneficiaries were entitled to the property on non-execution); Dominick *v.* Sayre, 3 Sandf. 555; *In re* Quin, 5 N. Y. Suppl. 261, 1 Connoly Surr. 381.

England.— Weller *v.* Ker, L. R. 1 H. L. Sc. 11; Harding *v.* Glyn, 1 Atk. 469, 26 Eng. Reprint 299; Pierson *v.* Garnet, 2 Bro. Ch. 38, 29 Eng. Reprint 20, Prec. Ch. 202 note, 24 Eng. Reprint 97; Meller *v.* Stanley, 2 De G. J. & S. 183, 10 L. T. Rep. N. S. 512, 4 New Rep. 124, 12 Wkly. Rep. 780, 67 Eng. Ch. 143, 46 Eng. Reprint 345.

See 40 Cent. Dig. tit. "Powers," § 80.

A power is always imperative when its subject, that is, the property given, and its object, that is, the persons to whom it is given, are certain. Dominick *v.* Sayre, 3 Sandf. (N. Y.) 555.

11. Graham *v.* Livingston, 7 Hun (N. Y.) 11. See *infra*, VI, D.

12. White *v.* Wilson, 1 Drew. 298, 17 Jur. 15, 22 L. J. Ch. 62, 1 Wkly. Rep. 47, 61 Eng. Reprint 466. See *supra*, V, B, 1, e.

13. *Alabama.*—Proctor *v.* Scharpff, 80 Ala. 227; Mitchell *v.* Spence, 62 Ala. 450; Tarver *v.* Haines, 55 Ala. 503.

Connecticut.— Beers *v.* Narramore, 61 Conn. 13, 22 Atl. 1061.

Kentucky.— Hawkins *v.* Hawkins, 13 B. Mon. 245.

New Jersey.— Hurlbut *v.* Hutton, 42 N. J. Eq. 15, 6 Atl. 286.

New York.— Towler *v.* Towler, 142 N. Y. 371, 36 N. E. 869 [*affirming* 65 Hun 457, 20 N. Y. Suppl. 342].

Pennsylvania.— Peterson's Estate, 7 Wkly. Notes Cas. 507.

South Carolina.—Atkinson *v.* Dowling, 33 S. C. 414, 12 S. E. 93, discretionary power of appointment, to be exercised or not at the absolute option of the donee.

Virginia.— McCamant *v.* Nuckolls, 85 Va. 331, 12 S. E. 160.

England.— Richardson *v.* Harrison, 16 Q. B. D. 85, 55 L. J. Q. B. 58, 54 L. T. Rep. N. S. 456; Lancashire *v.* Lancashire, 1 De G. & Sm. 288, 11 Jur. 1024, 63 Eng. Reprint 1071 [*affirmed* in 12 Jur. 363, 17 L. J. Ch. 270, 22 Eng. Ch. 657, 41 Eng. Reprint 1097]; Robinson *v.* Smith, 6 Madd. 194, 56 Eng. Reprint 1065.

See 40 Cent. Dig. tit. "Powers," § 80.

A testamentary power of sale should not be exercised where it is prejudicial to a devisee for life, unless necessary to protect the estate. Espenship's Estate, 13 Pa. Co. Ct. 294.

14. *District of Columbia.*— Fitzgerald *v.* Wynne, 1 App. Cas. 107, holding that where it is the duty of a trustee to execute a power, it is not discretionary with him whether he will execute it or not; that the principle applicable to trusts will be adopted, and his refusal, negligence, accident, or other circumstances will not be permitted to disappoint the interests of those for whose benefit he was clothed with the power.

Georgia.— Mastin *v.* Barnard, 33 Ga. 520; Heard *v.* Sill, 26 Ga. 302 [*citing* Brown *v.* Higgs, 8 Ves. Jr. 574, 32 Eng. Reprint 473].

Indiana.— Kintner *v.* Jones, 122 Ind. 148, 23 N. E. 701.

Massachusetts.— Greenough *v.* Welles, 10 Cush. 571.

New Jersey.— See Berrien *v.* Berrien, 4 N. J. Eq. 37, 40.

New York.— Smith *v.* Floyd, 140 N. Y. 337, 35 N. E. 606; *In re* Gantert, 136 N. Y. 106, 32 N. E. 551 [*affirming* 63 Hun 280, 17 N. Y. Suppl. 910]; Hancox *v.* Wall. 28 Hun 214; Van Boskerck *v.* Herrick, 65 Barb. 250; Arnold *v.* Gilbert, 5 Barb. 190; Selden *v.* Vermilyea, 1 Barb. 58; Wilcox *v.* Quinby, 20 N. Y. Suppl. 5.

Ohio.— Neff *v.* Neff, 3 Ohio Dec. (Reprint) 75, 3 Wkly. L. Gaz. 67.

Pennsylvania.— Fahnestock *v.* Fahnestock, 152 Pa. St. 56, 25 Atl. 313, 34 Am. St. Rep. 623; Philadelphia's Appeal, 112 Pa. St. 470, 4 Atl. 4; Erie Dime Sav., etc., Co. *v.* Vincent, 105 Pa. St. 315; Houck *v.* Houck, 5 Pa. St. 273; Lafferty's Estate, 2 Pa. Dist. 215; Wells *v.* Sloyer, 1 Pa. L. J. Rep. 516.

Virginia.— McCamant *v.* Nuckolls, 85 Va. 331, 12 S. E. 160.

England.— Harding *v.* Glyn, 1 Atk. 469, 26 Eng. Reprint 299; Robson *v.* Flight, 4 De G. J. & S. 608, 11 Jur. N. S. 147, 34 L. J. Ch. 226, 11 L. T. Rep. N. S. 725, 5 New Rep. 344, 13 Wkly. Rep. 393, 69 Eng. Ch. 466, 46 Eng. Reprint 1054; Joel *v.* Mills,

a rule it will not interfere either to compel or control the execution of a general or discretionary power.[15] Even in such case, however, there may be circumstances under which a court of equity will enforce the execution of the power.[16]

3. **Restraining Execution.** Unless a clear case of abuse of discretion, bad faith, or fraud is shown, equity will not as a rule interpose to restrain the execution of a power.[17] But the exercise of a power of sale by executors will be restrained, where they do not comply with the testator's directions as to the manner of sale,[18] and where land has been advertised for sale under a power contained in an instrument purporting to be a will, which has been admitted to probate without notice to the heirs and upon insufficient proof, and the validity of which is in controversy, an injunction will be granted on motion of the heirs.[19]

B. Persons Authorized to Execute Powers — 1. In General. The instrument creating the power determines by whom it is to be executed,[20] and

3 Kay & J. 458, 69 Eng. Reprint 1189; Ray *v.* Adams, 3 Myl. & K. 237, 10 Eng. Ch. 237, 40 Eng. Reprint 90; Crumwys *v.* Colman, 9 Ves. Jr. 319, 7 Rev. Rep. 210, 32 Eng. Reprint 626; Brown *v.* Higgs, 8 Ves. Jr. 561, 32 Eng. Reprint 473 [*affirming* 4 Ves. Jr. 708, 4 Rev. Rep. 323, 31 Eng. Reprint 366]; Mott *v.* Buxton, 7 Ves. Jr. 201, 32 Eng. Reprint 81.

See 40 Cent. Dig. tit. "Powers," § 80½. And see, generally, Trusts.

By statute in Wisconsin, "if the trustee of a power with the right of selection shall die, leaving the power unexecuted, its execution shall be adjudged in the circuit court for the benefit equally of all the persons designated as objects of the trust." Wis. St. (1898) § 2127. See Derse *v.* Derse, 103 Wis. 113, 79 N. W. 44; Jones *v.* Roberts, 84 Wis. 465, 54 N. W. 917.

Where the purpose has been accomplished, the execution of a power will not be enforced or sanctioned. Wilks *v.* Burns, 60 Md. 64. See also Prentice *v.* Janssen, 79 N. Y. 478, construing 1 Rev. St. p. 734, § 96.

15. *Florida.*— Lines *v.* Darden, 5 Fla. 51.

Illinois.— Crozier *v.* Hoyt, 97 Ill. 23.

Kentucky.— Flint *v.* Spurr, 17 B. Mon. 499; McGaughey *v.* Henry, 15 B. Mon. 383.

Massachusetts.— Eldredge *v.* Heard, 106 Mass. 579. And see Proctor *v.* Heyer, 122 Mass. 525.

New York.— Towler *v.* Towler, 142 N. Y. 371, 36 N. E. 869 [*affirming* 65 Hun 457, 20 N. Y. Suppl. 342]; Mason *v.* Jones, 3 Edw. 497; Bunner *v.* Storm, 1 Sandf. Ch. 357.

North Carolina.—Young *v.* Young, 97 N. C. 132, 2 S. E. 78.

Pennsylvania.— Ingle's Estate, 76 Pa. St. 430; Andrews' Estate, 6 Pa. Dist. 24; Peterson's Estate, 13 Phila. 265.

Rhode Island.— Brown *v.* Phillips, 16 R. I. 612, 18 Atl. 249.

South Carolina.— Fronty *v.* Fronty, Bailey Eq. 517.

Tennessee.— Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017.

Virginia.— McCamant *v.* Nuckolls, 85 Va. 331, 12 S. E. 160; Dixon *v.* McCue, 14 Gratt. 540.

England.— Brophy *v.* Bellamy, L. R. 8 Ch. 798, 43 L. J. Ch. 183, 29 L. T. Rep. N. S. 380; Richardson *v.* Harrison, 16 Q. B. D. 85, 55 L. J. Q. B. 58, 54 L. T. Rep. N. S. 456 (holding that a power given by will to a tenant for life to appoint to his children, with an express limitation over in default of such appointment, cannot be construed as conferring upon the children any estate or interest in default of the exercise of the power of appointment, at least in the absence of provisions extending the operation of the power); Lancashire *v.* Lancashire, 1 De G. & Sm. 288, 11 Jur. 1024 [*affirmed* in 12 Jur. 363, 17 L. J. Ch. 270, 2 Phil. 657, 22 Eng. Ch. 657, 41 Eng. Reprint 1097]; Tollet *v.* Tollet, 2 P. Wms. 489, 24 Eng. Reprint 828; Brook *v.* Brook, 3 Smale & G. 280, 65 Eng. Reprint 659; Elliot *v.* Hele, 1 Vern. Ch. 406, 23 Eng. Reprint 547; Hixon *v.* Oliver, 13 Ves. Jr. 108, 9 Rev. Rep. 148, 33 Eng. Reprint 235; Coxe *v.* Basset, 3 Ves. Jr. 155, 30 Eng. Reprint 945 (holding that the court will not execute a power given by the testator to trustees to continue his charities or to give any others they should think fit). And see Bull *v.* Vardy, 1 Ves. Jr. 270, 30 Eng. Reprint 338.

16. Taussig *v.* Reel, 134 Mo. 530, 34 S. W. 1104, holding that where one is in possession under a contract for a lease with the donee of a power to lease, a court of equity may compel execution of the power.

17. McDonald *v.* O'Hara, 9 Misc. (N. Y.) 686, 30 N. Y. Suppl. 545 [*affirmed* in 144 N. Y. 566, 39 N. E. 642]; Blodgett *v.* Schofield, 15 N. Y. St. 488; Andrews' Estate, 6 Pa. Dist. 24; Bruner *v.* Naglee, 7 Phila. (Pa.) 384 (holding that an executrix having power to sell real estate at her discretion and to enjoy the income from the proceeds will not be restrained by injunction because she has sufficient income besides; but a reckless or unwise exercise of such power may be restrained); Marker *v.* Kekewich, 8 Hare 291, 14 Jur. 544, 19 L. J. Ch. 492, 32 Eng. Ch. 291, 68 Eng. Reprint 372; Roberts *v.* Bozon, 3 L. J. Ch. O. S. 113.

Improper conduct of trustee not ground for injunction see Pechel *v.* Fowler, Anstr. 549, 3 Rev. Rep. 627.

18. Napier *v.* Napier, 89 Ga. 48, 14 E. E. 870.

19. Galbreath *v.* Everett, 84 N. C. 546.

20. Koch *v.* Robinson, 83 S. W. 111, 26 Ky. L. Rep. 969; McIlvain *v.* Porter, 7 S. W. 309, 8 S. W. 705, 9 Ky. L. Rep. 899 (executor); Pratt *v.* Rice, 7 Cush. (Mass.) 209 (executors appointed by will and codicil);

where a power implies a personal confidence in the donee, it can only be exercised by the person named, and if he declines or refuses to exercise the trust, the power will be considered as revoked and absolutely null.[21] It has been held, however, that a sale made by the life-tenant, and adopted by the trustee under a power to sell, will be supported in equity as against remainder-men.[22]

2. Capacity to Execute[23] — a. Infants. Powers simply collateral or in gross, whether as to real or personal estate, may be exercised by an infant;[24] but he cannot execute a power appendant or appurtenant,[25] unless the intention that he shall execute during infancy may be plainly inferred from the instrument creating the power.[26]

b. Lunatics. Lunatics cannot execute powers;[27] but where a donee, while sane, covenants to execute a power when he becomes entitled to the estate in possession, the effect of the covenant does not depend upon the continuance of his mental capacity, and a deed exercising the power upon his accession to the estate is binding, although he has become insane.[28]

c. Married Women. Both at common law and under the modern statutes a married woman can, without the consent or concurrence of her husband, execute a power, whether appendant, in gross, or simply collateral, by will, deed, or otherwise, even in favor of her husband, and even though she may be under disability

Taylor *v.* Miles, 28 Beav. 411, 6 Jur. N. S. 1063, 3 L. T. Rep. N. S. 115, 54 Eng. Reprint 424.

Right to receive purchase-money.— The right to execute a power of sale of real estate is implied to be in him through whose hands the fund is to pass. Bentham *v.* Willshire, 4 Madd. 44, 20 Rev. Rep. 271, 56 Eng. Reprint 625.

Power of sale in executors see Executors and Administrators, 18 Cyc. 322.

21. Hinson *v.* Williamson, 74 Ala. 180. See *infra*, VI, B, 6.

22. Hope *v.* Liddell, 21 Beav. 183, 2 Jur. N. S. 105, 25 L. J. Ch. 90, 4 Wkly. Rep. 145, 52 Eng. Reprint 829.

23. **Corporation** see *supra*, I, E.

Partnership see *supra*, I, E.

24. Sheldon *v.* Newton, 3 Ohio St. 494, 507 (where it was said, speaking of a power not coupled with an interest, that "the law is perfectly settled, that an infant may, absolutely and irrevocably, execute a power either by absolute deed, or otherwise, as fully and effectually as an adult person;" that he is a "mere conduit-pipe" through which the title passes, and "having no interest," he has no right to disaffirm his act); Hill *v.* Clark, 4 Lea (Tenn.) 405; *In re* D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930 (power in gross); Hearle *v.* Greenbank, 3 Atk. 695, 26 Eng. Reprint 1200, 1 Ves. 298, 27 Eng. Reprint 1043; King *v.* Bellard, 1 Hem. & M. 343, 32 L. J. Ch. 646, 8 L. T. Rep. N. S. 633, 2 New Rep. 442, 11 Wkly. Rep. 900, 71 Eng. Reprint 149; Grange *v.* Tiving, O. Bridgm. 107; 1 Sugden Powers 213.

25. Thompson *v.* Lyon, 20 Mo. 155, 61 Am. Dec. 599; Hill *v.* Clark, 4 Lea (Tenn.) 405, 409 (where it is said that "if a power is given to an infant, relating to his own estate, it must be inserted in the deed that he may execute it during his infancy, or his execution of it will have no effect); Hearle *v.* Greenbank, 3 Atk. 695, 26 Eng. Reprint 1200, 1 Ves. 298, 27 Eng. Reprint 1043; King *v.* Bellord, 1 Hem. & M. 343, 32 L. J. Ch. 646, 8 L. T. Rep. N. S. 633, 2 New Rep. 442, 11 Wkly. Rep. 900, 71 Eng. Reprint 149; *In re* Armit, Ir. R. 5 Eq. 352 (power over personal property).

26. *In re* Cardross, 7 Ch. D. 728, 47 L. J. Ch. 327, 38 L. T. Rep. N. S. 778, 26 Wkly. Rep. 389, holding that an infant can execute a power not simply collateral, where it may be plainly inferred from the instrument creating the power that such an exercise was in contemplation of the persons executing the instrument. And see Hill *v.* Clark, 4 Lea (Tenn.) 405 (referred to in the preceding note); *In re* D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930. *Contra*, Thompson *v.* Lyon, 20 Mo. 155, 61 Am. Dec. 599; *In re* Armit, Ir. R. 5 Eq. 352.

27. See Morgan *v.* Annis, 3 De G. & Sm. 461, 64 Eng. Reprint 562; Price *v.* Berrington, 7 Hare 394, 27 Eng. Ch. 394, 68 Eng. Reprint 163. And see, generally, Insane Persons.

Exercise of power by committee.— In England, under the Lunacy Act (1890), §§ 116, 120, 128, the court is empowered to authorize the committee of a lunatic to exercise powers vested in the latter. St. 53 & 54 Vict. c. 5. See as to the construction and application of this statute *In re* S. S. B., [1906] 1 Ch. 712, 75 L. J. Ch. 522, 94 L. T. Rep. N. S. 599, 22 T. L. R. 461, 54 Wkly. Rep. 429; *In re* A., [1904] 2 Ch. 328, 73 L. J. Ch. 648, 91 L. T. Rep. N. S. 238, 53 Wkly. Rep. 2; *In re* Salt, [1896] 1 Ch. 117, 65 L. J. Ch. 152, 73 L. T. Rep. N. S. 598, 44 Wkly. Rep. 146; *In re* Baggs, [1894] 2 Ch. 416 note, 63 L. J. Ch. 612, 77 L. T. Rep. N. S. 138; *In re* X., [1894] 2 Ch. 415, 63 L. J. Ch. 613, 71 L. T. Rep. N. S. 139, 7 Reports 365, 42 Wkly. Rep. 657.

28. Affleck *v.* Affleck, 3 Jur. N. S. 326, 26 L. J. Ch. 358, 3 Smale & G. 394, 5 Wkly. Rep. 425, 65 Eng. Reprint 709.

to dispose of her own estate; and it is of no consequence whether the power was granted to her before or after she became a married woman.[29] But where the

29. *Alabama.*— Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44 (using substantially the language of the text); Harden *v.* Darwin, 77 Ala. 472.

Georgia.— Wayne *v.* Myddleton, 2 Ga. 383. See Banks *v.* Sloat, 69 Ga. 330; New *v.* Potts, 55 Ga. 420.

Illinois.— See Breit *v.* Yeaton, 101 Ill. 242.

Kentucky.— Ford *v.* Ford, 2 Duv. 418, both at common law and by statute. See also Kennedy *v.* Ten Broeck, 11 Bush 241; Harris *v.* Harbeson, 9 Bush 397, in which case, however, it was held that a "special power" to dispose of property by will, within the meaning of the Kentucky statute, had not been conferred upon a married woman by a deed from her husband and herself to a trustee.

Maryland.— Armstrong *v.* Kerns, 61 Md. 364; Nevin *v.* Gillespie, 56 Md. 320; Schley *v.* McAney, 36 Md. 266. See also Bouldin *v.* Reynolds, 58 Md. 491; Tyson *v.* Tyson, 31 Md. 134.

Massachusetts.— Osgood *v.* Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488; Hall *v.* Bliss, 118 Mass. 554, 19 Am. Rep. 476; Cranston *v.* Crane, 97 Mass. 459, 93 Am. Dec. 106 (power of sale in mortgage); Heath *v.* Withington, 6 Cush. 497.

Missouri.— Claflin *v.* Van Wagoner, 32 Mo. 252 (indorsement of note held an appointment in writing); Thompson *v.* Lyon, 20 Mo. 155, 61 Am. Dec. 599.

New Jersey.—Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 33 Atl. 305.

New York.— By statute. Laws (1896), c. 547, §§ 122, 123, formerly 1 Rev. St. p. 732, § 80, p. 733, § 87, p. 735, § 110, p. 736, § 117. See Crooke *v.* Kings County, 97 N. Y. 421; Leavitt *v.* Pell, 25 N. Y. 474 (mortgage to secure husband's debts valid under a power to mortgage reserved to a married woman in respect to land held in trust for her separate use); Wright *v.* Tallmadge, 15 N. Y. 307; Albrecht *v.* Pell, 11 Hun 127; Campbell *v.* Low, 9 Barb. 585; Bunce *v.* Vander Grift, 8 Paige 37; Bradish *v.* Gibbs, 3 Johns. Ch. 523 (execution of power by will in favor of husband).

North Carolina.— Taylor *v.* Eatman, 92 N. C. 601.

Pennsylvania.— Coryell *v.* Dunton, 7 Pa. St. 530, 49 Am. Dec. 489; Hoover *v.* Samaritan Soc., 4 Whart. 445 (execution of power in favor of husband); Deffenbaugh *v.* Harris, 3 Pa. Cas. 193, 6 Atl. 139. And see Rush *v.* Lewis, 21 Pa. St. 72.

South Carolina.— Thompson *v.* Perry, 2 Hill Eq. 204, 29 Am. Dec. 68. See also Oliver *v.* Grimball, 14 S. C. 556; Myers *v.* McBride, 13 Rich. 178 (where, however, it was held that the power was not executed); Converse *v.* Converse, 9 Rich. Eq. 535.

Virginia.— Woodson *v.* Perkins, 5 Gratt. 345.

United States.— Ladd *v.* Ladd, 8 How. 10, 12 L. ed. 967.

England.— Wood *v.* Wood, L. R. 10 Eq. 220, 39 L. J. Ch. 790, 23 L. T. Rep. N. S. 295, 18 Wkly. Rep. 819; Ross *v.* Ewer, 3 Atk. 160, 26 Eng. Reprint 892 (by will); Wright *v.* Cadogan, 1 Bro. P. C. 486, 1 Eng. Reprint 707 (reservation of power of appointment and appointment in favor of husband and children); Thomlinson *v.* Dighton, Comyns 194, 10 Mod. 31, 88 Eng. Reprint 612, 1 P. Wms. 149, 24 Eng. Reprint 335, 1 Salk. 239, 91 Eng. Reprint 212; Taylor *v.* Meads, 4 De G. J. & S. 597, 11 Jur. N. S. 166, 34 L. J. Ch. 203, 12 L. T. Rep. N. S. 6, 5 New Rep. 348, 13 Wkly. Rep. 394, 69 Eng. Ch. 457, 46 Eng. Reprint 1050 (power of disposition over equitable fee of real estate devised to trustees for her separate use); Nedby *v.* Nedby, 5 De G. & Sm. 377, 21 L. J. Ch. 446, 64 Eng. Reprint 1161 (by deed to husband; undue influence); Gibbons *v.* Moulton, 1 Rep. t. Finch 346, 23 Eng. Reprint 189; Harris *v.* Graham, 1 Rolle Abr. 329 pl. 12; Downes *v.* Timperon, 4 Russ. 334, 4 Eng. Ch. 334, 38 Eng. Reprint 831 (by deed); Driver *v.* Thompson, 4 Taunt. 294, 13 Rev. Rep. 592; Sawyer *v.* Bletsoe, 2 Vern. Ch. 329, 23 Eng. Reprint 812 (holding that if a wife has a power to dispose of money in the lifetime of her husband, she may dispose of it by a writing in the nature of a will, although it is not so provided); Peacock *v.* Monk, 2 Ves. 190, 28 Eng. Reprint 123 (by act in her life or by will); Burnet *v.* Mann, 1 Ves. 156, 27 Eng. Reprint 953 (appointment by will during coverture); 1 Sugden Powers 184 *et seq.* See also Noble *v.* Willcock, L. R. 8 Ch. 778, 42 L. J. Ch. 681, 29 L. T. Rep. N. S. 194, 21 Wkly. Rep. 711 (by will); Bishop *v.* Wall, 3 Ch. D. 194, 45 L. J. Ch. 773, 25 Wkly. Rep. 93 (by will); Wright *v.* Englefield, Ambl. 468, 27 Eng. Reprint 308, 2 Eden 239, 28 Eng. Reprint 890 (by will); Guise *v.* Small, Anstr. 277 (by deed conveying contingent interest); Henley *v.* Philips, 2 Atk. 48, 26 Eng. Reprint 426 (by will); Boddington *v.* Abernathy, 5 B. & C. 776, 8 D. & R. 626, 4 L. J. K. B. O. S. 181, 11 E. C. L. 677; Inman *v.* Whitley, 7 Beav. 337, 29 Eng. Ch. 337, 49 Eng. Reprint 1095 (appointment valid); Neale *v.* Hodgson, 5 Beav. 159, 49 Eng. Reprint 538 (appointment to husband; effect of bankruptcy); Frederick *v.* Hartwell, 1 Cox Ch. 193, 29 Eng. Reprint 1124 (appointment to husband); Thomas *v.* Jones, 1 De G. J. & S. 63, 9 Jur. N. S. 161, 32 L. J. Ch. 139, 1 L. T. Rep. N. S. 610, 1 New Rep. 138, 11 Wkly. Rep. 242, 66 Eng. Ch. 49, 46 Eng. Reprint 25 (by will); *Ex p.* Stutely, 1 De G. & Sm. 703, 63 Eng. Reprint 1259 (appointment by way of mortgage); Sutherland *v.* Northmore, Dick. 56, 21 Eng. Reprint 188 (*feme covert* not relieved, after husband's death, from improvident execution of power); Brewer *v.* Swirles, 2 Eq. Rep. 493, 18 Jur. 1069, 23 L. J. Ch. 542, 2 Smale & G. 219, 2 Wkly. Rep. 339, 65 Eng. Reprint 373 (appointment after fund wasted by donee); Dowell *v.* Dew, 7 Jur. 117, 12 L. J. Ch. 158, 1 Y. & Coll. 345, 20 Eng. Ch. 345, 62 Eng. Reprint 918 (power of leasing); Green *v.* Campbell, 8 L. J. Ch.

terms of the instrument are inconsistent with the exercise of the power during coverture, it cannot then be exercised;[30] and where a power is restricted to first coverture, it cannot be exercised during widowhood, or second coverture.[31] In the absence of restrictions the rule is otherwise.[32] A power to appoint by will may be executed by a married woman, although she cannot make a will.[33]

3. Failure to Designate Person to Execute. The instrument creating a power must in some way designate the person by whom it is to be executed, but it may do so impliedly.[34] Whenever a power is given in a will to sell property without expressly naming a donee of the power, and the proceeds of the sale are to go to pay debts or legacies, or to be distributed, then the power by implication vests in the executors, unless a contrary intent appears.[35] In some cases it is held

172 (restraint on anticipation); Horner *v.* Bendloes, 9 Mod. 335, 88 Eng. Reprint 490 (power survives to wife); Lynn *v.* Ashton, 1 Russ. & M. 188, 5 Eng. Ch. 188, 39 Eng. Reprint 73, Taml. 328, 12 Eng. Ch. 328, 48 Eng. Reprint 130 (to purchase annuity); Southby *v.* Stonehouse, 2 Ves. 610, 28 Eng. Reprint 389 (by writing in nature of will).

Canada.— Fenton *v.* Cross, 7 Grant Ch. (U. C.) 20.

See 40 Cent. Dig. tit. "Powers, § 7. And see, generally, Husband and Wife.

There was formerly some doubt on this point in the case of a power not simply collateral. See 1 Sugden Powers 184. And see Antrim *v.* Buckingham, 1 Ch. Cas. 17, 22 Eng. Reprint 672, 2 Freem. 168, 22 Eng. Reprint 1135, 3 Salk. 276, 91 Eng. Reprint 822; Grange *v.* Tiving, O. Bridgm. 107.

Infant feme covert.— *In re* D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930; *In re* Cardross, 7 Ch. D. 728, 47 L. J. Ch. 327, 38 L. T. Rep. N. S. 778, 26 Wkly. Rep. 389. And see *supra*, VI, B, 2, a.

Effect of confirmation when discovert.— Du Hourmelin *v.* Sheldon, 19 Beav. 389, 52 Eng. Reprint 401.

30. Gould *v.* Gould, 2 Jur. N. S. 484, 25 L. J. Ch. 642, 2 Wkly. Rep. 516.

Power to woman "being sole" cannot be executed during coverture. Antrim *v.* Buckingham, 1 Ch. Cas. 17, 22 Eng. Reprint 672, 2 Freem. 168, 22 Eng. Reprint 1135, 3 Salk. 276, 91 Eng. Reprint 822.

31. Holliday *v.* Overton, 14 Beav. 467, 51 Eng. Reprint 366, 15 Beav. 480, 51 Eng. Reprint 623, 16 Jur. 346, 21 L. J. Ch. 769 [*affirmed* in 16 Jur. 751]; Burnham *v.* Bennett, 2 Coll. 254, 9 Jur. 888, 33 Eng. Ch. 254, 63 Eng. Reprint 723; Morris *v.* Howes, 4 Hare 599, 9 Jur. 966, 30 Eng. Ch. 599, 67 Eng. Reprint 787 [*affirmed* in 10 Jur. 955, 16 L. J. Ch. 121]; Horseman *v.* Abbey, 1 Jac. & W. 381, 21 Rev. Rep. 188, 37 Eng. Reprint 420.

32. New *v.* Potts, 55 Ga. 420.

In favor of second husband.—A power of disposition in the testator's widow, wholly unlimited as to beneficiaries, may be exercised in favor of her second husband. New *v.* Potts, 55 Ga. 420.

33. Osgood *v.* Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488.

34. Whittemore *v.* Russell, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200. Where a testator directs that his real estate shall be sold and the proceeds disposed of in a certain manner, but does not provide how the sale shall be made and appoints no executor, a sale can be made only under a decree of a court of equity, and the legal title to the property is meanwhile in the heirs at law of the testator liable to be divested by a sale. Baumeister *v.* Silver, 98 Md. 418, 56 Atl. 825. And see *supra*, III, B, 2.

35. *Alabama.*— Blount *v.* Moore, 54 Ala. 360; McCollum *v.* McCollum, 33 Ala. 711.

Florida.— Lott *v.* Meacham, 4 Fla. 144.

Illinois.— Bates *v.* Woodruff, 123 Ill. 205, 13 N. E. 845; Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205.

Indiana.— Davis *v.* Hoover, 112 Ind. 423, 14 N. E. 468.

Kentucky.— Marrett *v.* Babb, 91 Ky. 88, 15 S. W. 4, 12 Ky. L. Rep. 652; Isaacs *v.* Swan, 1 Duv. 277; Waller *v.* Logan, 5 B. Mon. 515; Anderson *v.* Turner, 3 A. K. Marsh. 131; McCulloch *v.* Sander, 5 Ky. L. Rep. 517.

Maine.— Whittemore *v.* Russell, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200.

Maryland.— Ogle *v.* Reynolds, 75 Md. 145, 23 Atl. 137; Magruder *v.* Peter, 11 Gill & J. 217. *Compare* Magruder *v.* Peter, 4 Gill & J. 323, application to chancellor, under Acts (1785), c. 72, to appoint a trustee to sell and convey.

Massachusetts.— Putnam *v.* Story, 132 Mass. 205. And see Hale *v.* Hale, 137 Mass. 168.

Michigan.— Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61.

Mississippi.— Clark *v.* Hornthal, 47 Miss. 434.

Nebraska.— Schroeder *v.* Wilcox, 39 Nebr. 136, 57 N. W. 1031.

New Jersey.— Potter *v.* Adriance, 44 N. J. Eq. 14, 14 Atl. 16; Loudersbough *v.* Weart, 25 N. J. Eq. 399; Lippincott *v.* Lippincott, 19 N. J. Eq. 121; Jones *v.* Jones, 13 N. J. Eq. 236; Chambers *v.* Tulane, 9 N. J. Eq. 146; Geroe *v.* Winter, 5 N. J. Eq. 655 [*reversing* 5 N. J. Eq. 319].

New York.— Meehan *v.* Brennan, 16 N. Y. App. Div. 395, 45 N. Y. Suppl. 57; Officer *v.* Board of Home Missions, 47 Hun 352; Mapes *v.* Tyler, 43 Barb. 421; Dorland *v.* Dorland, 2 Barb. 63; Meakings *v.* Cromwell, 2 Sandf. 512 [*affirmed* in 5 N. Y. 136]; Lesser *v.* Lesser, 11 Misc. 223, 32 N. Y. Suppl. 167; Loring *v.* Binney, 3 How. Pr. N. S. 143.

that where no executor is named in the will, the administrator with the will annexed cannot execute the power,[36] while others hold that he may;[37] and where a will authorizes a sale by any person legally qualified to administer the estate, it has been held that an administrator *de bonis non cum testamento annexo* may sell without a license from the court of probate.[38]

4. Personal, Official, or Fiduciary Character of Donee. To constitute a power created by will a personal one, the persons on whom it is conferred must be specially named, and not merely referred to as a class, or *virtute officii*, as "my executors";[39] in such a case the power is never personal, and may be exercised by any person holding the office.[40] Where a power to sell lands is given to executors *ratione officii*, and only by their official name, it has been doubted whether its exercise must not be limited to those who prove the will, but where it is given to executors by their individual names, or to executors "hereinafter named," it vests in all those thus named, whether they prove the will or not, by force of the will itself. A devise of the power is then construed to take effect in precisely the same manner as a devise of the legal estate.[41]

5. Courts, and Trustees Appointed Thereby.[42] Where a power is conferred on a person, not as an individual, but *ratione officii*, it may be exercised by the court or by a substituted trustee, on the principle that the court will not allow a trust

Compare Bogert *v.* Hertell, 4 Hill 492; Crocheron *v.* Jaques, 3 Edw. 207.

North Carolina.— Saunders *v.* Saunders, 108 N. C. 327, 12 S. E. 909; Council *v.* Averett, 95 N. C. 131; Vaughan *v.* Farmer, 90 N. C. 607; Baines *v.* Drake, 50 N. C. 153; Smith *v.* McCrary, 38 N. C. 204; Hester *v.* Hester, 37 N. C. 330; Foster *v.* Craige, 22 N. C. 209.

Pennsylvania.— Bell's Appeal, 71 Pa. St. 465; Gray *v.* Henderson, 71 Pa. St. 368; McFarland's Appeal, 37 Pa. St. 300; Houck *v.* Houck, 5 Pa. St. 273; Jenkins *v.* Stouffer, 3 Yeates 163; White *v.* Taylor, 1 Yeates 422; Lloyd *v.* Taylor, 2 Dall. 223, 1 L. ed. 357.

Rhode Island.— Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

South Carolina.— By statute. Drayton *v.* Grimke, Bailey Eq. 392.

Tennessee.— Lockart *v.* Northington, 1 Sneed 318.

United States.— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— Forbes *v.* Peacock, 6 Jur. 476, 9 L. J. Ch. 367, 11 Sim. 152, 34 Eng. Ch. 152, 59 Eng. Reprint 832; Forbes *v.* Peacock, 12 L. J. Exch. 460, 11 M. & W. 630. And see Blatch *v.* Wilder, 1 Atk. 420, 26 Eng. Reprint 267.

Canada.— Glover *v.* Wilson, 17 Grant Ch. (U. C.) 111.

See 40 Cent. Dig. tit. "Powers," § 83. See also Executors and Administrators, 18 Cyc. 323.

Power in sole acting executor see Davoue *v.* Fanning, 2 Johns. Ch. (N. Y.) 252.

36. Hall *v.* Irwin, 7 Ill. 176; Van Giessen *v.* Bridgford, 83 N. Y. 348.

37. Davis *v.* Hoover, 112 Ind. 423, 14 N. E. 468 (construing 2 Rev. St. (1876) p. 529, § 92); Hester *v.* Hester, 37 N. C. 330 (construing Rev. St. § 34).

38. Rollins *v.* Rice, 59 N. H. 493.

39. Powers held to create personal trust.— *Alabama.*—Proctor *v.* Scharpff, 80 Ala. 227. *Georgia.*— Wasten *v.* Barnard, 33 Ga. 520. *Indiana.*—Munson *v.* Cole, 98 Ind. 502. *Massachusetts.*— Hunt *v.* Holden, 2 Mass. 168. *Missouri.*— Owen *v.* Switzer, 51 Mo. 322; State *v.* Boon, 44 Mo. 254; Compton *v.* McMahan, 19 Mo. App. 494. *New Jersey.*— Sites *v.* Eldredge, 45 N. J. Eq. 632, 18 Atl. 214, 14 Am. St. Rep. 769. See also Drummond *v.* Jones, 44 N. J. Eq. 53, 13 Atl. 611. *New York.*— Catton *v.* Taylor, 42 Barb. 578; Bolton *v.* Jacks, 6 Rob. 166; Dominick *v.* Michael, 4 Sandf. 374. *England.*— Robson *v.* Flight, 4 De G. J. & S. 608, 11 Jur. N. S. 147, 34 L. J. Ch. 226, 11 L. T. Rep. N. S. 725, 5 New Rep. 344, 13 Wkly. Rep. 393, 69 Eng. Ch. 466, 46 Eng. Reprint 1054; Cole *v.* Wade, 16 Ves. Jr. 27, 10 Rev. Rep. 129, 33 Eng. Reprint 894.

See 40 Cent. Dig. tit. "Powers," § 84.

40. *Georgia.*— Mastin *v.* Barnard, 33 Ga. 520.

Maryland.— Druid Park Heights Co. *v.* Oettinger, 53 Md. 46.

New Jersey.— Drummond *v.* Jones, 44 N. J. Eq. 53, 13 Atl. 611.

Pennsylvania.— Evans *v.* Chew, 71 Pa. St. 47.

England.— Brassey *v.* Chalmers, 16 Beav. 223, 51 Eng. Reprint 763 [*affirmed* in 4 De G. M. & G. 528, 53 Eng. Ch. 412, 43 Eng. Reprint 613].

The omission of the word "assigns" from the language used in a will to designate the successors of a trustee appointed by the will in the event of the trustee's death does not exclude the idea that testator intended that the discretion conferred upon the trustee relative to the manner of selling the trust property was intended to be attached to the office. Druid Park Heights Co. *v.* Oettinger, 53 Md. 46.

41. Dominick *v.* Michael, 4 Sandf. (N. Y.) 374.

42. See, generally, Trusts.

to fail for want of a trustee;[43] but, in the absence of a statute,[44] where the power is conferred upon the donee as a matter of personal trust or discretion, it cannot be exercised by the court or by a new trustee.[45] A testator may direct that the

43. *District of Columbia.*— Marshall *v.* Wheeler, 7 Mackey 414, construing Md. Act (1785), § 4.

Georgia.— Freeman *v.* Prendergast, 94 Ga. 369, 21 S. E. 837.

Kentucky.— Price *v.* Swager, 4 S. W. 34, 9 Ky. L. Rep. 89.

Maryland.— Safe Deposit, etc., Co. *v.* Sutro, 75 Md. 361, 23 Atl. 732; Druid Park Heights Co. *v.* Oettinger, 53 Md. 46.

Massachusetts.— Bradford *v.* Monks, 132 Mass. 405; Gibbs *v.* Marsh, 2 Metc. 243. And see Sells *v.* Delgado, 186 Mass. 25, 70 N. E. 1036.

New Jersey.— Pedrick *v.* Pedrick, 50 N. J. Eq. 479, 26 Atl. 267 [*affirming* 48 N. J. Eq. 313, 21 Atl. 946].

New York.— Lahey *v.* Kortright, 132 N. Y. 450, 30 N. E. 989 [*affirming* 58 N. Y. Super. Ct. 576, 11 N. Y. Suppl. 47]; Royce *v.* Adams, 123 N. Y. 402, 25 N. E. 386 [*affirming* 57 Hun 415, 10 N. Y. Suppl. 821]; Farrar *v.* McCue, 89 N. Y. 139 [*affirming* 26 Hun 477]; Roome *v.* Philips, 27 N. Y. 357; *In re* Paton 41 Hun 497; Ross *v.* Robert, 2 Hun 90 [*affirmed* in 63 N. Y. 652]. See also Williams *v.* Conrad, 30 Barb. 524.

Rhode Island.— Boutelle *v.* City Sav. Bank, 17 R. I. 781, 24 Atl. 838.

South Carolina.— See American Bible Soc. *v.* Noble, 11 Rich. Eq. 156.

Virginia.— Carrington *v.* Bell, 6 Munf. 514.

England.— Byam *v.* Byam, 19 Beav. 58, 1 Jur. N. S. 79, 24 L. J. Ch. 209, 3 Wkly. Rep. 95, 52 Eng. Reprint 270.

See 40 Cent. Dig. tit. "Powers," § 85.

44. Nugent *v.* Cloon, 117 Mass. 219, construing Gen. St. c. 100, § 9.

45. *Alabama.*— Doe *v.* Ladd, 77 Ala. 223; Hinson *v.* Williamson, 74 Ala. 180; Mitchell *v.* Spence, 62 Ala. 450.

Connecticut.— Security Co. *v.* Snow, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107, where a testator gave a share of his estate to his wife in trust to be conveyed and paid over to a daughter "as my said wife may deem for the interest and welfare of my said daughter," and directed that any portion of the trust property, principal or income, which should not be paid over or conveyed to the daughter during her life, should at her death go to her "lawful heirs," and it was held that the discretionary powers given to the wife in the discharge of the trust were purely personal and terminated at her death, and that thereupon the trust ceased to be susceptible, either of complete execution, or partial execution in such a way as to satisfy the testator's design.

District of Columbia.— Edwards *v.* Maupin, 7 Mackey 39.

Georgia.— Simmons *v.* McKinlock, 98 Ga. 738, 26 S. E. 88, holding that where a deed conveyed land to a certain person in trust for a married woman for life, and at her death to her children then living, "with power in the said trustee, by and with the written consent of the [life tenant], to sell said property and reinvest the same in other property, subject to the same limitations and restrictions," the power thus created conferred upon the trustee a special personal trust, which did not pass to a successor.

Kentucky.—Flint *v.* Spurr, 17 B. Mon. 499, where a testator directed that on a certain contingency a tract of land should be sold by his executors, and the money arising therefrom should be applied by them to the advancement and support or education of such of his nephews, nieces, or other descendants, whose merit or indigence might, in the opinion of said executors, entitle them to assistance, the matter of determining who were entitled to such assistance being left to the discretion of the executors, with the restriction that the concurrence of at least two of them should be necessary to any part of the application of the money, and it was held that after the death of all the executors before the period of distribution, a chancellor could not exercise the discretionary power conferred on them.

Maryland.— Keplinger *v.* Maccubbin, 58 Md. 203.

New York.— *In re* Bierbaum, 40 Hun 504, holding that where a will names one as executor, and confers on him a discretionary power of sale, the court on his death cannot appoint a trustee to execute the power.

North Carolina.— Young *v.* Young, 97 N. C. 132, 2 S. E. 78, where land was settled on a trustee in trust for A for life, remainder in trust for her children then living and the issue of such children as should die leaving issue, with a power in the trustee to sell the land whenever, in his opinion, it should be best for the interest of the *cestuis que trust-ent*, with directions to reinvest the proceeds as he should think best, and it was held that a court of equity could not decree a sale at the instance of a life-tenant and her children, and the trustee having died without executing the power of sale, a trustee appointed by the court could not execute it.

Pennsylvania.— Woodward's Estate, 8 Phila. 211, holding that where a testator devised upon trust, vesting his trustee also with a power by the exercise of which, at the discretion of the trustee, the trust would determine, and the trustee died without exercising this power, the power and the trust generally were separable; that the power, being discretionary, was personal to the trustee and was extinguished by his death, while the trust passed to the new trustee and continued to subsist unaffected by the power.

Rhode Island.— Bailey *v.* Burges, 10 R. I. 422, holding that a power of sale and reinvestment in a deed to a trustee "his heirs and assigns . . . from time to time as and when the said trustee shall deem it expe-

same discretionary power which he has given to trustees designated by himself shall belong to the trustees appointed by the court, in case of a vacancy; but if he omits to do so, a discretionary power will be construed to be personal.[46] In case of an equitable conversion a power conferred upon executors must be exercised by the administrator with the will annexed, and not by a substituted trustee;[47] and the same is true where an executor takes no estate in the land but a mere power in trust to sell.[48]

6. Delegation of Powers. The donee of a power in whose discretion special confidence is reposed cannot delegate its exercise to another,[49] save in some par-

dient, to sell or mortgage," etc., "at his discretion," is a special discretionary power and does not devolve on a new trustee appointed by the court.

Tennessee.— Balote *v.* White, 2 Head 703.

United States.— Partee *v.* Thomas, 11 Fed. 769.

England.— Hibbard *v.* Lamb, Ambl. 309, 27 Eng. Reprint 209 (where a testator gave annuities and directed the residue of her estate to be disposed of in charity to such persons and in such manner as her executors or the survivor might think fit, and on their death new trustees were appointed to sustain the annuities, but it was held that they could not dispose of the residue, as such power was a personal trust confined to the executors); Fordyce *v.* Bridges, 2 Coop. t. Cott. 326, 47 Eng. Reprint 1179, 17 L. J. Ch. 185, 2 Phil. 497, 22 Eng. Ch. 497, 41 Eng. Reprint 1035 [*varying* 10 Beav. 90, 10 Jur. 1020, 16 L. J. Ch. 81, 50 Eng. Reprint 516]; Newman *v.* Warner, 20 L. J. Ch. 654, 1 Sim. N. S. 457, 40 Eng. Ch. 457, 61 Eng. Reprint 177. But see Browne *v.* Paull, 16 Jur. 707, holding that where trustees having a power of sale disclaimed, the court could exercise the discretion of the trustee and sell, if necessary.

See 40 Cent. Dig. tit. "Powers," § 85.

46. Edwards *v.* Maupin, 7 Mackey (D. C.) 39.

47. Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400, construing 1 Rev. St. p. 730, §§ 69, 70.

48. Matter of Christie, 59 Hun (N. Y.) 153, 13 N. Y. Suppl. 202 [*affirmed* in 133 N. Y. 473, 31 N. E. 515], construing 1 Rev. St. p. 729, § 56.

49. *Arkansas.*— Hill *v.* Peoples, 80 Ark. 15, 95 S. W. 990.

California.— Saunders *v.* Webber, 39 Cal. 287.

Delaware.— Doe *v.* Vincent, 1 Houst. 416.

Iowa.— Singleton *v.* Scott, 11 Iowa 589. But *compare* Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238, where it was held that a discretionary power of sale of real estate conferred on executors by the will would not invest them with a personal trust with respect to such estate, and render invalid a sale by a third person under a power delegated by them, although the executors were directed to invest the proceeds of sale and pay over the profits to a beneficiary.

Massachusetts.— Shelton *v.* Horner, 5 Metc. 462.

New Jersey.— Tarlton *v.* Gilsey, (Ch. 1897) 37 Atl. 467, holding that where a will authorizes such of the executors "as shall qualify and survive" to sell testator's lands, all who qualify and survive must join in a contract of sale, and one of them cannot delegate to another the power to act for him, at least unless all have jointly agreed on the terms of sale, so that no discretion remains to be exercised, and even then the contract must purport to be that of all.

New York.— Coleman *v.* Beach, 97 N. Y. 545 (holding that where a power of sale was given to a life-tenant, but it was provided that the proceeds of the sale should be immediately invested, and that the principal should be conveyed unimpaired to the issue of the marriage of the donee and the donor's son, the donee could not delegate to her executor the exercise of the power of disposition); Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89 (holding that an executor or other trustee empowered to sell lands in his discretion cannot authorize an agent to contract for their sale, the power being a personal trust, which cannot be delegated); Whitlock *v.* Washburn, 62 Hun 369, 17 N. Y. Suppl. 60; Hawley *v.* James, 5 Paige 318 [*reversed* on other grounds in 16 Wend. 61], Berger *v.* Duff, 4 Johns. Ch. 368. *Compare* Crooke *v.* Kings County, 97 N. Y. 421; Betts *v.* Betts, 4 Abb. N. Cas. 317 (in both of which it is held that there was no delegation of power); Suarez *v.* Pumpelly, 2 Sandf. Ch. 336.

North Carolina.— Haslen *v.* Kean, 4 N. C. 700, 7 Am. Dec. 718.

Ohio.— Lake Shore, etc., R. Co. *v.* Hutchins, 37 Ohio St. 282; Jennert *v.* Houser, 4 Ohio Cir. Ct. 353, 2 Ohio Cir. Dec. 591 (holding that the provisions of a will devising realty to a devisee, he to divide the fee simple among the heirs of his body, by deed or will, as to him shall seem best, do not empower such devisee to will the property to one of his heirs to hold for three years and then distribute among certain parties, named in proportions as stated in the will); Allen *v.* Globe Ins. Co., 10 Ohio Dec. (Reprint) 204, 19 Cinc. L. Bul. 198. And see Wills *v.* Cowper, 2 Ohio 124.

Pennsylvania.— Bohlen's Estate, 75 Pa. St. 304, delegation of powers by trustee under will.

Rhode Island.— See Phillips *v.* Wood, 16 R. I. 274, 15 Atl. 88.

South Carolina.— Black *v.* Erwin, Harp. 412. See also Reeves *v.* Brayton, 36 S. C. 384, 15 S. E. 658, conveyance by executor.

Texas.— Terrell *v.* McCown, 91 Tex. 231,

ticular act not requiring the exercise of judgment,[50] unless authorized so to do

43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54]; Smith *v.* Swan, 2 Tex. Civ. App. 563, 22 S. W. 247.

Virginia.— Hood *v.* Haden, 82 Va. 588.

United States.— Coquard *v.* Chariton Co., 14 Fed. 203, 4 McCrary 539; Dunlap *v.* Pyle, 8 Fed. Cas. No. 4,163, 5 McLean 322; Pearson *v.* Jamison, 19 Fed. Cas. No. 10,879, 1 McLean 197.

England.— Williamson *v.* Farwell, 35 Ch. D. 128, 56 L. J. Ch. 645, 56 L. T. Rep. N. S. 824, 36 Wkly. Rep. 37; Carr *v.* Atkinson, L. R. 14 Eq. 397, 41 L. J. Ch. 785, 26 L. T. Rep. N. S. 680, 20 Wkly. Rep. 620 (holding that where the donee of a power appointed a life-interest to M, an object of the power, and then delegated to M a power to appoint a life-interest to a stranger to the power, and subject thereto appointed the property to objects of the power, the delegated power was void, but the subsequent appointment was good); Hutchinson *v.* Tottenham, [1898] 1 Ir. 403; Ingram *v.* Ingram, 2 Atk. 88, 26 Eng. Reprint 455 (holding that a power under a settlement for a husband to dispose of an estate, in such proportions as he should think fit, among the issue of the marriage, could not be delegated by him to his wife, as it was not transmissible); Combes' Case, 9 Coke 75*a*, 77 Eng. Reprint 843; Topham *v.* Portland, 1 De G. J. & S. 517, 32 L. J. Ch. 257, 8 L. T. Rep. N. S. 180, 1 New Rep. 496, 11 Wkly. Rep. 507, 66 Eng. Ch. 401, 46 Eng. Reprint 205 (holding that a donee of a power could not delegate it, even though it had been acquired under a voluntary settlement made by himself); Lancashire *v.* Lancashire, 1 De G. & Sm. 288, 11 Jur. 1024, 63 Eng. Reprint 1071 [*affirmed* in 12 Jur. 363, 17 L. J. Ch. 270, 2 Phil. 657, 22 Eng. Ch. 657, 41 Eng. Reprint 1097]; Hawkins *v.* Kemp, 3 East 411; Alexander *v.* Alexander, 2 Ves. 640, 28 Eng. Reprint 408; Stockbridge *v.* Story, 19 Wkly. Rep. 1049. And see Hitch *v.* Leworthy, 2 Hare 200, 15 L. J. Ch. 235, 24 Eng. Ch. 200, 67 Eng. Reprint 83; Bulteel *v.* Abinger, 6 Jur. 410; Hamilton *v.* Royse, 2 Sch. & Lef. 330; Cole *v.* Wade, 16 Ves. Jr. 27, 10 Rev. Rep. 129, 33 Eng. Reprint 894.

Canada.— Smith *v.* Chishome, 15 Ont. App. 738 [*reversing* 11 Ont. 191], power of appointment. See also *Re* Patterson, 5 Manitoba 274.

See 40 Cent. Dig. tit. "Powers," §§ 79, 86, 147.

But *compare* Murdock *v.* Leath, 10 Heisk. (Tenn.) 166, where it was held that trustees in a will, with power to sell "at such times, in such manner, and upon such terms as to them shall seem best," may execute their trust through an attorney in fact.

Statement of the rule.— "Whenever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare*." 1 Sugden Powers 221, 222.

Where an interest or legal estate vests in executors, they can act by attorney in carrying out a power of sale. May *v.* Frazee, 4 Litt. (Ky.) 391, 14 Am. Dec. 159. See also Colsten *v.* Chaudet, 4 Bush (Ky.) 666. But see Saunders *v.* Webber, 39 Cal. 287; Pearson *v.* Jamison, 19 Fed. Cas. No. 10,879, 1 McLean 197.

50. *Georgia.*— Ray *v.* Home, etc., Inv., etc., Co., 98 Ga. 122, 26 S. E. 56 (holding that in exercising a power of sale given by a deed of trust, it is not indispensably essential that the donee of the power be actually present and personally conduct the sale); Palmer *v.* Young, 96 Ga. 246, 22 S. E. 928, 51 Am. St. Rep. 136 (to the same effect).

Iowa.— Singleton *v.* Scott, 11 Iowa 589.

Kentucky.— Colsten *v.* Chaudet, 4 Bush 666.

Maryland.— Albert *v.* Albert, 68 Md. 352, 12 Atl. 11, where the donee of a power of appointment made the appointment himself and appointed executors merely to divide the property accordingly.

Mississippi.— Dunton *v.* Sharpe, 70 Miss. 850, 12 So. 800, holding that the trustee need not be personally present at a sale under a trust deed, and that he may act through others in advertising and making the sale.

New Jersey.— Keim *v.* Lindley, (Ch. 1895) 30 Atl. 1063, holding that, while trustees with a discretionary power to sell cannot delegate such discretion to another, yet, having exercised the discretion and determined to sell and fixed a price, they may authorize an agent to contract in their names upon those terms.

New York.— Gates *v.* Dudgeon, 173 N. Y. 426, 66 N. E. 116, 93 Am. St. Rep. 608 [*reversing* 72 N. Y. App. Div. 562, 76 N. Y. Suppl. 561], holding that where an executor and trustee has been given power under a will to sell real estate, and with full knowledge of the facts has determined to sell it for a fixed price, he may authorize his attorney to close the sale, and the contract entered into by such attorneys at the price fixed is binding on such executor and trustee.

Pennsylvania.— Bohlen's Estate, 75 Pa. St. 304.

South Carolina.— Black *v.* Erwin, Harp. 411.

Texas.— Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54] (holding that while an executor cannot delegate discretionary powers, such as the right to decide to sell property of the estate and the terms of sale, he may delegate the mere execution of deeds on terms found satisfactory by himself); Smith *v.* Swan, 2 Tex. Civ. App. 563, 22 S. W. 247 (holding that where a discretionary power of sale is given an executor, he may delegate the execution and delivery of the deed to another,

either expressly [51] or by necessary implication.[52] The rule does not apply, however, where the power is originally authorized to be executed by the donee and his assigns; but in such case the power, being annexed to an interest in the donee, will pass with it to any person who comes to the power under him, and this is true whether the claimant is an assignee in fact, or an assignee in law as an heir or executor.[53] And where the power is tantamount to an ownership, and does not involve any confidence or personal judgment, and no act personal to the donee is required to be performed, it may be executed by attorney in the same manner as a fee simple may be conveyed by attorney.[54] The donee of a discretionary power of sale may ratify a sale made by his attorney in fact.[55] So too where a power of

the negotiation of the sale and the arrangement of, and agreement to, all its details being done by himself).

United States.— Coquard *v.* Chariton Co., 14 Fed. 203, 4 McCrary 539; Pearson *v.* Jamison, 19 Fed. Cas. No. 10,879, 1 McLean 197.

England.— Atty.-Gen. *v.* Scott, 1 Ves. 413, 27 Eng. Reprint 1113; 1 Sugden Powers 223, where it is said: The cases "merely establish that the donee cannot delegate the *confidence and discretion* reposed in him to another. Where the deed of appointment is actually prepared, or the donee points out the precise appointment which he is desirous should be made, there no confidence, no discretion, is delegated. The appointment is in every respect an exercise of his own judgment; and there cannot be any reason why he should not be permitted to execute the *deed* of appointment by attorney." *Compare* Stuart *v.* Norton, 3 L. T. Rep. N. S. 602, 14 Moore P. C. 17, 9 Wkly. Rep. 320, 15 Eng. Reprint 212.

See 40 Cent. Dig. tit. "Powers," § 86.

51. Cheveral *v.* McCormick, 58 Tex. 440 (holding, however, that where a trustee is authorized to execute a power through a substitute, the action of a substitute will not be upheld in the absence of proof of his appointment and authority); 1 Sugden Powers 223 [*citing* Palliser *v.* Ord, Bunb. 166].

52. Vane *v.* Rigden, L. R. 5 Ch. 663, 39 L. J. Ch. 797, 18 Wkly. Rep. 1092 (holding that a mortgage of book debts by an executor may contain a power of attorney to collect them); Russell *v.* Plaice, 18 Beav. 21, 2 Eq. Rep. 1149, 18 Jur. 254, 23 L. J. Ch. 441, 2 Wkly. Rep. 243, 52 Eng. Reprint 9 (holding that the right of an administratrix to mortgage assets included the right to insert in the mortgage a power of sale).

Lands abroad.— In Stuart *v.* Norton, 3 L. T. Rep. N. S. 602, 14 Moore P. C. 17, 9 Wkly. Rep. 320, 15 Eng. Reprint 212, it was held that a trustee, resident in England, appointed by the will of a testator resident in England, of lands situated in British Guinea, might appoint an attorney to act there in the matter of the trust, if the will did not provide to the contrary.

53. 1 Sugden Powers 223 [*citing* Howe *v.* Whitfield, Freem. K. B. 476, 89 Eng. Reprint 357, 2 Show. 57, 89 Eng. Reprint 791, T. Jones 110, 84 Eng. Reprint 1171, 1 Vent. 338, 339, 86 Eng. Reprint 218, 219].

54. 1 Sugden Powers 224 [*citing* Anonymous, Dyer 283*a*, pl. 30, 73 Eng. Reprint 635; Warren *v.* Arthur, 2 Mod. 317, 86 Eng. Reprint 1097; Combes' Case, 9 Coke 75*a*, 77 Eng. Reprint 843]. And see Coats *v.* Louisville, etc., R. Co., 92 Ky. 263, 17 S. W. 564, 13 Ky. L. Rep. 557 (holding that where the power of disposition given to a widow was for her own benefit, and not for the benefit of the remainder, she had the right to delegate that power, and therefore a sale by her, through an agent, of shares of stock which belonged to the estate passed the title); Crooke *v.* Kings County, 97 N. Y. 421 (where a married woman empowered to dispose of the remainder of an estate in which she had a life-interest, devised it to her husband for life in trust to apply the income, in his discretion, to the support of their children, with remainder to them in fee, the husband being empowered to sell and convey either in fee or lesser estate, and to invest the proceeds on the same trusts, and it was held not a delegation of the power, but a complete exercise of it).

Appointment in such shares as another shall nominate see White *v.* Wilson, 1 Drew. 298, 17 Jur. 15, 22 L. J. Ch. 62, 1 Wkly. Rep. 47, 61 Eng. Reprint 466.

If a married woman has power to dispose of her property in fee or for a less estate, she has absolute ownership thereof, and may delegate to trustees the power to appoint one of two classes who shall hold the fee. Dillard *v.* Dillard, (Va. 1895) 21 S. E. 669.

55. *Arkansas.*— Hill *v.* Peoples, 80 Ark. 15, 95 S. W. 990, holding that while trustees under a will empowering them to sell and convey lands could not legally delegate to an agent authority to fix prices on the lands and make sales thereof, a ratification of a sale made by an agent was equivalent to making a sale themselves; and that where testator devised lands to three trustees, with full power to sell and convey the same, and it appeared that one of the trustees had agreed to a sale of the land by an agent, testimony of another of the trustees that he offered to sell the land to such agent authorized a finding that such trustees adopted and ratified the acts of each other and contracted for sales of the land.

Ohio.— Lake Shore, etc., R. Co. *v.* Hutchins, 37 Ohio St. 282, sustaining a sale by an attorney in fact of an executor, ratified by the latter by receipt of the purchase-money.

Pennsylvania.— Silverthorn *v.* McKinster, 12 Pa. St. 67, sale by two executors, subse-

appointment is unlimited and the donee is at liberty to appoint his executor to execute it, he may, by will, empower his executor to collect and distribute the fund.[56] Where a power which cannot be transferred is delegated, and estates are limited over in default of any appointment by the person to whom the power is wrongfully delegated, the delegation is simply void, and the estates limited over take effect immediately.[57]

7. Joint or Several Authority — a. General Rule. As a general rule, where power to act is conferred on two or more, and it is dependent on their judgment whether such act shall be done, the power is a special confidence in their combined judgments, and the concurrence of all is necessary to a valid exercise of the power,[58]

quently ratified by the third, held valid. And see Bohlen's Estate, 75 Pa. St. 304.

Texas.— See Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54].

West Virginia.—Dunn *v.* Renick, 40 W. Va. 349, 22 S. E. 66, sale by one executor, ratified by the other, held valid.

56. Long *v.* Long, 69 S. W. 804, 24 Ky. L. Rep. 677.

57. Ingram *v.* Ingram, 2 Atk. 88, 26 Eng. Reprint 455; 1 Sugden Powers 225. See also Williamson *v.* Farwell, 35 Ch. D. 128, 56 L. J. Ch. 645, 56 L. T. Rep. N. S. 824, 36 Wkly. Rep. 37 (holding that where a donee of a limited power of appointment among his own children appointed by his will to his son for life, and after his decease to the children of the son, as he should appoint, and in default of the appointment to the son absolutely, and the son died without having attempted to exercise the delegated power, the ultimate limitation in favor of the son was valid); Carr *v.* Atkinson, L. R. 14 Eq. 397, 41 L. J. Ch. 785, 26 L. T. Rep. N. S. 680, 20 Wkly. Rep. 620; Hiteh *v.* Leworthy, 2 Hare 200, 15 L. J. Ch. 235, 24 Eng. Ch. 200, 67 Eng. Reprint 83 (holding that an attempt to delegate powers which the appointer could not transfer did not invalidate the direction in the same deed which he had power to give).

58. *Alabama.*—Robinson *v.* Allison, 74 Ala. 254; Marks *v.* Tarver, 59 Ala. 335; Tarver *v.* Haines, 55 Ala. 503.

California.— See Panaud *v.* Jones, 1 Cal. 488.

Connecticut.—Allen's Appeal, 69 Conn. 702, 38 Atl. 701.

Illinois.— Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166; Wardwell *v.* McDowell, 31 Ill. 364.

Iowa.— Taylor *v.* Dickinson, 15 Iowa 483.

Kentucky.— Muldrow *v.* Fox, 2 Dana 74; Halbert *v.* Grant, 4 T. B. Mon. 580; Floyd *v.* Johnson, 2 Litt. 109, 13 Am. Dec. 255; Brown *v.* Hobson, 3 A. K. Marsh. 380, 13 Am. Dec. 187; Wooldridge *v.* Watkins, 3 Bibb 349. And see Morrison *v.* Barnett, 2 Bibb 270.

Maryland.— Poole *v.* Anderson, 80 Md. 454, 31 Atl. 207.

Massachusetts.— Morville *v.* Fowle, 144 Mass. 109, 10 N. E. 766; Shelton *v.* Homer, 5 Metc. 462.

Michigan.— Dodge *v.* Tullock, 110 Mich. 480, 68 N. W. 239; Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859.

Minnesota.— Smith *v.* Glover, 50 Minn. 58, 52 N. W. 210, 912.

Mississippi.— Noel *v.* Harvey, 29 Miss. 72; Bartlett *v.* Sutherland, 24 Miss. 395.

New Jersey.— Tarlton *v.* Gilsey, (Ch. 1897) 37 Atl. 467; Keim *v.* O'Reilly, 54 N. J. Eq. 418, 34 Atl. 1073; Crane *v.* Hearn, 26 N. J. Eq. 378; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394; Holcomb *v.* Coryell, 11 N. J. Eq. 476.

New York.— Brown *v.* Doherty, 185 N. Y. 383, 78 N. E. 147, 113 Am. St. Rep. 915 [*affirming* 93 N. Y. App. Div. 190, 87 N. Y. Suppl. 563]; Wilder *v.* Ranney, 95 N. Y. 7 (executors); Brennen *v.* Willson, 71 N. Y. 502 (assignees for benefit of creditors); Whitlock *v.* Washburn, 62 Hun 369, 17 N. Y. Suppl. 60; Steves *v.* Weaver, 49 Hun 267, 2 N. Y. Suppl. 321; Correll *v.* Lauterbach, 14 Misc. 469, 36 N. Y. Suppl. 615; Lawrence *v.* Whitney, 9 N. Y. St. 389; Sinclair *v.* Jackson, 8 Cow. 543; Berger *v.* Duff, 4 Johns. Ch. 368; Hertell *v.* Van Buren, 3 Edw. 20 [*reversed* on other grounds in 4 Hill 492]. See also Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 4 N. Y. St. 380.

North Carolina.— Wasson *v.* King, 19 N. C. 262 (executors); Debow *v.* Hodge, 4 N. C. 36.

Ohio.— Fleischman *v.* Shoemaker, 2 Ohio Cir. Ct. 152, 1 Ohio Cir. Dec. 415.

Pennsylvania.— Neel *v.* Beach, 92 Pa. St. 221 (executors); Daily's Appeal, 87 Pa. St. 487 (executors).

Texas.— Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330 (executors); Giddings *v.* Butler, 47 Tex. 535; Hart *v.* Rust, 46 Tex. 556.

Vermont.— Williams *v.* Mattocks, 3 Vt. 189, executors and trustees.

Virginia.— Deneale *v.* Morgan, 5 Call 407, executors.

West Virginia.—Dunn *v.* Renick, 40 W. Va. 349, 22 S. E. 66, executors.

Wisconsin.— Crowley *v.* Hicks, 72 Wis. 539, 40 N. W. 151, executors.

United States.— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— Naylor *v.* Goodall, 47 L. J. Ch. 53, 37 L. T. Rep. N. S. 422, 26 Wkly. Rep. 162 (trustees selling trust property); Townshend *v.* Wilson, 3 Madd. 261, 18 Rev. Rep. 234, 56 Eng. Reprint 505. And see Brassey *v.* Chalmers, 16 Beav. 223, 51 Eng. Reprint 763 [*affirmed* in 4 De G. M. & G. 528, 53 Eng. Ch. 412, 43 Eng. Reprint 613]; Crewe *v.* Dickens, 4 Ves. Jr. 97, 31 Eng. Reprint 50.

See 40 Cent. Dig. tit. "Powers," § 87 *et seq.*

at least so far as acts involving discretion are concerned.[59] A power may, however, be executed by one donee with the assent of the other or others,[60] and where a power to sell is given to two executors, a sale by one, subsequently ratified by the other, is valid.[61] And of course the general rule does not apply where the power is in terms given to the donees jointly or severally,[62] or where a majority of the donees are expressly authorized to act.[63]

b. Survivorship — (i) *In General.* It is a general principle of the common law that a naked power, not coupled with an interest, given to several persons, must be executed by all, and does not survive to the other or others on the death of one, but when it is coupled with an interest, it may be exercised by a survivor,[64]

Concurrence of all acting executors necessary to sale.— Bull *v.* Bull, 3 Day (Conn.) 384; Pennsylvania L. Ins., etc., Co. *v.* Banerle, 143 Ill. 459, 33 N. E. 166; Wells *v.* Lewis, 4 Metc. (Ky.) 269; Debow *v.* Hodge, 4 N. C. 36; Wright *v.* Dunn, 73 Tex. 293, 11 S. W. 330; Giddings *v.* Butler, 47 Tex. 535; Hart *v.* Rust, 46 Tex. 556; Williams *v.* Mattocks, 3 Vt. 189; Johnston *v.* Thompson, 5 Call (Va.) 248. But see Wood *v.* Sparks, 18 N. C. 389.

Concurrence of two of three trustees in sale under power in will see Hill *v.* Peoples, 80 Ark. 15, 95 S. W. 990.

Compelling joinder.— Where lands are ordered by will to be sold by the executors, and one of the executors refuses to join in the sale, the court will order him to join in the deed within a reasonable time after the purchase-money is paid. Love *v.* Love, 3 Hayw. (Tenn.) 13.

59. Tarlton *v.* Gilsey, (N. J. Ch. 1897) 37 Atl. 467.

60. Panaud *v.* Jones, 1 Cal. 488; Giddings *v.* Butler, 47 Tex. 535.

61. Baines *v.* Drake, 50 N. C. 153; Silverthorn *v.* McKinster, 12 Pa. St. 67; Dunn *v.* Reniek, 40 W. Va. 349, 22 S. E. 66.

Evidence held insufficient to show ratification.— Whitlock *v.* Washburn, 62 Hun (N. Y.) 369, 17 N. Y. Suppl. 60.

62. Taylor *v.* Dickinson, 15 Iowa 483 (holding that when a deed of trust to two or more trustees authorizes them "or either of them" to execute the trust, one may act without the concurrence of the other, especially where one has removed permanently beyond the jurisdiction of the state); Hite *v.* Shrader, 3 Litt. (Ky.) 444 (executors authorized "jointly or separately, to make conveyances," etc.).

63. Crane *v.* Decker, 22 Hun (N. Y.) 452.

Where only two executors are living, one has no power to act alone under a will providing that a power of sale given to the executors therein should be exercised by a majority of them. Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 4 N. Y. St. 380.

64. *Alabama.*— Tarver *v.* Haines, 55 Ala. 503; Parsons *v.* Boyd, 20 Ala. 112.

Arkansas.—See Watkins *v.* Turner, 34 Ark. 663, power given by contract to husband and wife to appoint to children.

California.— Saunders *v.* Sehmaelzle, 49 Cal. 59.

Connecticut.— Glover *v.* Stillson, 56 Conn. 316, 15 Atl. 752.

Georgia.— O'Brien *v.* Battle, 98 Ga. 766, 25 S. E. 780; Parrott *v.* Edmondson, 64 Ga. 332.

Illinois.— Wardwell *v.* McDowell, 31 Ill. 364.

Kentucky.— Muldrow *v.* Fox, 2 Dana 74.

Maryland.— Gutman *v.* Buekler, 69 Md. 7, 13 Atl. 635; Gray *v.* Lyneh, 8 Gill 403.

Massachusetts.—Parker *v.* Sears, 117 Mass. 513; National Webster Bank *v.* Eldridge, 115 Mass. 424.

New York.— Belmont *v.* O'Brien, 12 N. Y. 394; Jackson *v.* Given, 16 Johns. 167; Franklin *v.* Osgood, 14 Johns. 527 [*affirming* 2 Johns. Ch. 1]; Jackson *v.* Burtis, 14 Johns. 391.

Tennessee.— Williams *v.* Otey, 8 Humphr. 563, 47 Am. Dec. 632; Robertson *v.* Gaines, 2 Humphr. 367.

Virginia.— Roberts *v.* Stanton, 2 Munf. 129, 5 Am. Dec. 463.

United States.— Loring *v.* Marsh, 6 Wall. 337, 18 L. ed. 802 [*affirming* 15 Fed. Cas. No. 8,515, 2 Cliff. 469]; Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130; Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— *In re* Bacon, [1907] 1 Ch. 475, 76 L. J. Ch. 213, 96 L. T. Rep. N. S. 690; Atty-Gen. *v.* Gleg, 1 Atk. 356, 26 Eng. Reprint 227; Welstead *v.* Colvile, 28 Beav. 537, 54 Eng. Reprint 472; Brassey *v.* Chalmers, 16 Beav. 223, 51 Eng. Reprint 763 [*affirmed* in 4 De G. M. & G. 528, 53 Eng. Ch. 412, 43 Eng. Reprint 613]; Eaton *v.* Smith, 2 Beav. 236, 48 Eng. Reprint 1171; Cookson *v.* Bingham, 3 De G. M. & G. 668, 17 Jur. 1039, 23 L. J. Ch. 127, 2 Wkly. Rep. 45, 52 Eng. Ch. 521, 43 Eng. Reprint 263 [*affirming* 17 Beav. 262, 1 Wkly. Rep. 459, 51 Eng. Reprint 1034]; Hind *v.* Poole, 3 Eq. Rep. 449, 1 Jur. N. S. 371, 1 Kay & J. 383, 3 Wkly. Rep. 331, 69 Eng. Reprint 507; Lane *v.* Debenham, 11 Hare 188, 17 Jur. 1005, 1 Wkly. Rep. 465, 45 Eng. Ch. 188, 68 Eng. Reprint 1241; Montefiore *v.* Browne, 7 H. L. Cas. 241, 4 Jur. N. S. 1201, 11 Eng. Reprint 96; Warburton *v.* Sandys, 9 Jur. 503, 14 L. J. Ch. 431, 14 Sim. 622, 37 Eng. Ch. 622, 60 Eng. Reprint 499; Jones *v.* Price, 5 Jur. 719, 10 L. J. Ch. 195, 11 Sim. 557, 34 Eng. Ch. 557, 59 Eng. Reprint 988; Reid *v.* Reid, 8 Jur. N. S. 499, 10 Wkly. Rep. 225; Townshend *v.* Wilson, 3 Madd. 261, 18 Rev. Rep. 234, 56 Eng. Reprint 505; Horner *v.* Bendloes, 9 Mod. 335, 88 Eng. Reprint 490; Cole *v.* Wade, 16 Ves. Jr. 27, 10 Rev. Rep. 129, 33 Eng. Reprint 894.

even though the power is discretionary,[65] unless a contrary intention appears from the instrument creating the power.[66] In some jurisdictions, however, the common-law rule that a power conferred upon two or more persons does not survive the death of one of the donees has been changed by statute.[67] If a power be annexed to an office, any person filling the office may execute it.[68]

(II) *EXECUTORS* — (A) *At Common Law.* A naked power of sale given to executors by name, and not *ratione officii*, does not survive at common law;[69] but where the power is coupled with an interest, either legal or equitable, and whether beneficial or not,[70] or if it is given to the executors *ratione officii*,[71] it may

Canada.— *In re* Koch, 25 Ont. 262.

See 40 Cent. Dig. tit. "Powers," § 88.

65. Lane *v.* Debenham, 11 Hare 188, 17 Jur. 1005, 1 Wkly. Rep. 465, 45 Eng. Ch. 188, 68 Eng. Reprint 1241.

66. O'Brien *v.* Battle, 98 Ga. 766, 25 S. E. 780.

67. Matter of Wilkin, 90 N. Y. App. Div. 324, 86 N. Y. Suppl. 360; Hunter *v.* Anderson, 152 Pa. St. 386, 25 Atl. 538; Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204. And see *infra*, VI, B, 7, b, (II), (B).

68. Brassey *v.* Chalmers, 16 Beav. 223, 51 Eng. Reprint 763 [*affirmed* in 4 De G. M. & G. 528, 53 Eng. Ch. 412, 43 Eng. Reprint 613]. And see Townshend *v.* Wilson, 3 Madd. 261, 18 Rev. Rep. 234, 56 Eng. Reprint 505. See also *infra*, VI, B, 7, b, (II), (A).

69. *Alabama.*— Robinson *v.* Allison, 74 Ala. 254. And see Tarer *v.* Haines, 55 Ala. 503.

Georgia.— O'Brien *v.* Battle, 98 Ga. 766, 25 S. E. 780.

Illinois.— Wardwell *v.* McDowell, 31 Ill. 364.

Kentucky.— Muldrow *v.* Fox, 2 Dana 74.

Missouri.— Gaines *v.* Fender, 82 Mo. 497.

New Jersey.— Cain *v.* McCan, 3 N. J. L. 438, 4 Am. Dec. 384.

New York.— Catton *v.* Taylor, 42 Barb. 578; Osgood *v.* Franklin, 2 Johns. Ch. 1, 19, 7 Am. Dec. 513 [*affirmed* in 14 Johns. 527].

South Carolina.— Dick *v.* Harby, 48 S. C. 516, 26 S. E. 900.

Tennessee.— Robertson *v.* Gaines, 2 Humphr. 367.

Vermont.— Ferre *v.* American Bd. of Com'rs for Foreign Missions, 53 Vt. 162.

United States.— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— *In re* Bacon, [1907] 1 Ch. 475, 76 L. J. Ch. 213, 96 L. T. Rep. N. S. 690; Brassey *v.* Chalmers, 16 Beav. 223, 51 Eng. Reprint 763 [*affirmed* in 4 De G. M. & G. 528, 53 Eng. Ch. 412, 43 Eng. Reprint 613]. And see Atty.-Gen. *v.* Gleg, 1 Atk. 356, 26 Eng. Reprint 227; Danne *v.* Annas, Dyer 219*a*, 73 Eng. Reprint 484.

See 40 Cent. Dig. tit. "Powers," § 88. And see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1334.

But *compare* Davis *v.* Christian, 15 Gratt. (Va.) 11, where it was held *obiter*, that a power given to executors by name may be executed by the survivor, if the will does not point to a joint execution.

70. *Alabama.*— Robinson *v.* Allison, 74 Ala. 254; Tarver *v.* Haines, 55 Ala. 503; Parsons *v.* Boyd, 20 Ala. 112.

Kentucky.— Clay *v.* Hart, 7 Dana 1; Muldrow *v.* Fox, 2 Dana 74.

Massachusetts.—Gould *v.* Mather, 104 Mass. 283.

Missouri.— Gaines *v.* Fender, 82 Mo. 497.

New York.— Osgood *v.* Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513 [*affirmed* in 14 Johns. 527].

Tennessee.— Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017; Fitzgerald *v.* Standish, 102 Tenn. 383, 52 S. W. 294.

Vermont.— See Ferre *v.* American Bd. of Com'rs for Foreign Missions, 53 Vt. 162.

United States.— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— *In re* Bacon, [1907] 1 Ch. 475, 76 L. J. Ch. 213, 96 L. T. Rep. N. S. 690. See also *In re* Cookes, 4 Ch. D. 454.

Canada.— *In re* Koch, 25 Ont. 262; *Re* Ford, 7 Ont. Pr. 451.

71. *Alabama.*— Robinson *v.* Allison, 74 Ala. 254.

Kentucky.— Clay *v.* Hart, 7 Dana 1. And see Muldrow *v.* Fox, 2 Dana 74.

Maryland.—Magruder *v.* Peter, 11 Gill & J. 217.

Massachusetts.—Gould *v.* Mather, 104 Mass. 283; Chandler *v.* Rider, 102 Mass. 268.

Missouri.— Gaines *v.* Fender, 82 Mo. 497.

New York.— Conover *v.* Hoffman, 1 Bosw. 214 [*affirmed* in 15 Abb. Pr. 100]; Osgood *v.* Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513 [*affirmed* in 14 Johns. 527].

North Carolina.— Simpson *v.* Simpson, 93 N. C. 373. And see Smith *v.* McCrary, 38 N. C. 204.

Pennsylvania.— O'Rourke *v.* Sherwin, 156 Pa. St. 285, 27 Atl. 43; Lloyd *v.* Taylor, 1 Yeates 422, where testator directed a sale, but appointed no one to make it. And see Zebach *v.* Smith, 3 Binn. 69, 5 Am. Dec. 352.

South Carolina.— Dick *v.* Harby, 48 S. C. 516, 26 S. E. 900; Jennings *v.* Teague, 14 S. C. 229.

Texas.— Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54]; McDonald *v.* Hamblen, 78 Tex. 628, 14 S. W. 1042.

Virginia.— Davis *v.* Christian, 15 Gratt. 11, 38.

United States.— U. S. Bank *v.* Beverly, 1 How. 134, 11 L. ed. 75; Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— Flanders *v.* Clarke, 3 Atk. 509, 26 Eng. Reprint 1093, 1 Ves. 9, 27 Eng. Reprint 857; Brassey *v.* Chalmers, 16 Beav. 223, 51 Eng. Reprint 763 [*affirmed* in 4 De G.

be exercised by the survivor. So too where the power is coupled with a trust, as where something is directed to be done in which third persons are interested, who have the right to call on the executors to exercise the power, such power survives.[72] If the will expressly requires the power to be exercised jointly, it does not survive.[73]

(B) *By Statute.* In some of the states the common-law rule that a naked power of sale given to executors by name, and not *ratione officii*, does not survive has been changed by statutes providing in substance that where a power of sale is given by will to two or more executors, and one or more shall die, the power may be executed by the survivor or survivors;[74] and in some jurisdictions,[75] although not in others,[76] it is held that the statute applies where the power is merely discretionary as well as where it is mandatory. It has also been held that the statute is retrospective, and applies to wills already made and admitted to probate.[77] Such a statute does not prevent a testator from placing such limitations on the exercise of powers as he may see fit; and a power of sale to two or more executors will not survive if a joint execution is expressly required by the will.[78]

c. Neglect or Refusal to Qualify or Act. As has been said, at common law a mere naked power to act, as distinguished from a power coupled with an interest, could not be exercised by less than the entire number of donees;[79] and the rule applied where one of two or more executors refused or neglected to qualify.[80] But this rule was modified in England by statute in cases where a part of the

M. & G. 528, 53 Eng. Ch. 412, 43 Eng. Reprint 613]; Forbes *v.* Peacock, 12 L. J. Exch. 460, 11 M. & W. 630.

Canada.— See *In re* Koch, 25 Ont. 262; *Re* Ford, 7 Ont. Pr. 451.

See 40 Cent. Dig. tit. "Powers," § 88.

Surviving executors have power to sell lands, under a will directing such lands to be sold, but not appointing sellers. Smith *v.* McCrary, 38 N. C. 204; Jenkins *v.* Stouffer, 3 Yeates (Pa.) 163; White *v.* Taylor, 1 Yeates (Pa.) 422; Lloyd *v.* Taylor, 2 Dall. (Pa.) 223, 1 L. ed. 357.

Survival of discretionary power.— Davis *v.* Christian, 15 Gratt. (Va.) 11.

72. *District of Columbia.*— Coombs *v.* O'Neal, 1 MacArthur 405.

Kentucky.— Muldrow *v.* Fox, 2 Dana 74.

Maryland.— Gray *v.* Lynch, 8 Gill 403.

Missouri.— Gaines *v.* Fender, 82 Mo. 497.

New York.— Osgood *v.* Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513 [*affirmed* in 14 Johns. 527].

South Carolina.— Dick *v.* Harby, 48 S. C. 516, 26 S. E. 900; Bredenburg *v.* Bardin, 36 S. C. 197, 15 S. E. 372.

Tennessee.— Robertson *v.* Gaines, 2 Humphr. 367.

United States.— U. S. Bank *v.* Beverly, 1 How. 134, 11 L. ed. 75; Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— See Lane *v.* Debenham, 11 Hare 188, 17 Jur. 1005, 1 Wkly. Rep. 465, 45 Eng. Ch. 188, 68 Eng. Reprint 1241.

See 40 Cent. Dig. tit. "Powers," § 88.

73. Burnett *v.* Piercy, 149 Cal. 178, 86 Pac. 603; Herriot *v.* Prime, 87 Hun (N. Y.) 95, 33 N. Y. Suppl. 970 [*affirmed* on other grounds in 155 N. Y. 5, 49 N. E. 142].

74. *Alabama.*— Robinson *v.* Allison, 74 Ala. 254; Tarver *v.* Haines, 55 Ala. 503.

Illinois.— Ely *v.* Dix, 118 Ill. 477, 9 N. E. 62.

New York.— Carroll *v.* Conley, 42 Hun 431; House *v.* Raymond, 3 Hun 44; Carroll *v.* Conley, 9 N. Y. Suppl. 865.

North Carolina.— Cowles *v.* Reavis, 109 N. C. 417, 13 S. E. 930.

Pennsylvania.— Philadelphia Trust, etc., Co. *v.* Lippincott, 106 Pa. St. 295; Cobb *v.* Biddle, 14 Pa. St. 444; Miller *v.* Meetch, 8 Pa. St. 417.

South Carolina.—Bredenburg *v.* Bardin, 36 S. C. 197, 15 S. E. 372.

Texas.— Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54]; McDonald *v.* Hamblen, 78 Tex. 628, 14 S. W. 1042; McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484.

See 40 Cent. Dig. tit. "Powers," § 88. And see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1334.

75. Ely *v.* Dix, 118 Ill. 477, 9 N. E. 62; House *v.* Raymond, 3 Hun (N. Y.) 44; Cobb *v.* Biddle, 14 Pa. St. 444; Miller *v.* Meetch, 8 Pa. St. 417.

76. Robinson *v.* Allison, 74 Ala. 254; Mitchell *v.* Spence, 62 Ala. 450; Tarver *v.* Haines, 55 Ala. 503 (holding that the statute does not apply to or affect a discretionary power of sale conferred upon executors as a matter of personal trust and confidence); Smith *v.* Moore, 6 Dana (Ky.) 417; Muldrow *v.* Fox, 2 Dana (Ky.) 74; Bartlett *v.* Sutherland, 24 Miss. 395, construing provision of Hutchinson's Code, 671.

77. Bredenburg *v.* Bardin, 36 S. C. 197, 15 S. E. 372.

78. Herriott *v.* Prime, 87 Hun (N. Y.) 95, 33 N. Y. Suppl. 970 [*affirmed* on other grounds in 155 N. Y. 5, 49 N. E. 142].

79. See *supra*, VI, B, 7, b, (I).

80. Wooldridge *v.* Watkins, 3 Bibb (Ky.) 349. See *supra*, VI, B, 7, b, (I); and EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1334.

executors refused to qualify or act,[81] and, as so modified, was adopted as a part of the common law,[82] or reënacted, in most of the United States, so that it may now be said to be the general rule that a power of sale, unless expressly restricted,[83] may be exercised by the executors who qualify.[84] This is also the rule in Canada.[85] In some jurisdictions the renunciation of executors who refuse to act must be formal and of record to enable the other executor to convey,[86] but in other jurisdictions it may be proved and established like any other fact.[87] All the executors

81. St. 21 Hen. VIII, c. 4.

82. Clinefelter *v.* Ayres, 16 Ill. 329. And see Ely *v.* Dix, 118 Ill. 477, 9 N. E. 62; Wardwell *v.* McDowell, 31 Ill. 364.

83. Hyatt *v.* Aguero, 56 N. Y. Super. Ct. 63, 1 N. Y. Suppl. 339, 14 N. Y. Civ. Proc. 286. And see Herriot *v.* Prime, 87 Hun (N. Y.) 95, 33 N. Y. Suppl. 970 [*affirmed* on other grounds in 155 N. Y. 5, 49 N. E. 142].

84. *Alabama.*— Marks *v.* Tarver, 59 Ala. 335; Tarver *v.* Haines, 55 Ala. 503 (both holding, however, that the statute does not apply to discretionary power); Leavens *v.* Butler, 8 Port. 380.

Connecticut.— Solomon *v.* Wixon, 27 Conn. 520.

Florida.— Stewart *v.* Mathews, 19 Fla. 752.

Georgia.— Wolfe *v.* Hines, 93 Ga. 329, 20 S. E. 322.

Illinois.— Ely *v.* Dix, 118 Ill. 477, 9 N. E. 62; Wardwell *v.* McDowell, 31 Ill. 364 (discretionary power included); Clinefelter *v.* Ayres, 16 Ill. 329.

Kentucky.— Ross *v.* Clore, 3 Dana 189; Muldrow *v.* Fox, 2 Dana 74; Coleman *v.* McKinney, 3 J. J. Marsh. 246 (discretionary powers not included); Anderson *v.* Turner, 3 A. K. Marsh. 131; Wooldridge *v.* Watkins, 3 Bibb 349; Fontaine *v.* Dunlop, 6 Ky. L. Rep. 201. The statute only applies, it has been held, in cases where sales are directed positively and unconditionally by the testator. Wooldridge *v.* Watkins, *supra.*

Massachusetts.— Warden *v.* Richards, 11 Gray 277.

Michigan.— Herrick *v.* Carpenter, 92 Mich. 440, 52 N. W. 747; Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859 (discretionary powers not included); Vernor *v.* Coville, 54 Mich. 281, 20 N. W. 75.

Mississippi.— Bartlett *v.* Sutherland, 24 Miss. 395 (discretionary power not included); Bodley *v.* McKinney, 9 Sm. & M. 339. And see Columbus Banking, etc., Co. *v.* Humphries, 64 Miss. 258, 1 So. 232. *Compare* Clark *v.* Hornthal, 47 Miss. 434.

Missouri.— Phillips *v.* Stewart, 59 Mo. 491.

New Jersey.— Weimar *v.* Fath, 43 N. J. L. 1 (statute includes discretionary power); Corlis *v.* Little, 14 N. J. L. 373; Rutherford Land, etc., Co. *v.* Sanntrock, (Ch. 1899) 44 Atl. 938; Denton *v.* Clark, 36 N. J. Eq. 534 [*affirming* 36 N. J. Eq. 419]; Coykendall *v.* Rutherford, 2 N. J. Eq. 360.

New York.—Leggett *v.* Hunter, 19 N. Y. 445 [*affirming* 25 Barb. 81]; Meakings *v.* Cromwell, 5 N. Y. 136 [*affirming* 2 Sandf. 512]; Taylor *v.* Morris, 1 N. Y. 341 (discretionary powers included); Correll *v.* Lauterbach, 12 N. Y. App. Div. 531, 42 N. Y. Suppl. 143 [*affirmed* in 159 N. Y. 553, 54 N. E. 1089]; Dominick *v.* Michael, 4 Sandf. 374; Shiffer *v.* Dietz, 52 How Pr. 372; Niles *v.* Stevens, 4 Den. 399; Roseboom *v.* Mosher, 2 Den. 61; Sharp *v.* Pratt, 15 Wend. 610; Jackson *v.* Ferris, 15 Johns. 346; Ogden *v.* Smith, 2 Paige 195; Bunner *v.* Storm, 1 Sandf. Ch. 357. *Compare In re* Bull, 45 Barb. 334; Schalle *v.* Schalle, 55 N. Y. Super. Ct. 474 [*affirmed* in 113 N. Y. 261, 21 N. E. 84].

North Carolina.— Smith *v.* McCrary, 38 N. C. 204; Wood *v.* Sparks, 18 N. C. 389; Marr *v.* Peay, 6 N. C. 84, 5 Am. Dec. 521; Miller *v.* White, 1 N. C. 135, 1 Am. Dec. 591.

Ohio.— Collier *v.* Grimesey, 36 Ohio St. 17; Taylor *v.* Galloway, 1 Ohio 232, 13 Am. Dec. 605.

Pennsylvania.— McDowell *v.* Gray, 29 Pa. St. 211 (discretionary powers included); Heron *v.* Hoffner, 3 Rawle 293; Zebach *v.* Smith, 3 Binn. 69, 5 Am. Dec. 352. See also Taylor *v.* Adams, 2 Serg. & R. 534, 7 Am. Dec. 665.

Rhode Island.— Bailey's Petitioner, 15 R. I. 60, 1 Atl. 131; Pell *v.* Mercer, 14 R. I. 412.

South Carolina.— Smith *v.* Winn, 27 S. C. 591, 4 S. E. 240; Jennings *v.* Teague, 14 S. C. 229; De Saussure *v.* Lyons, 9 S. C. 492; Chanet *v.* Villeponteaux, 3 McCord 29; Britton *v.* Lewis, 8 Rich. Eq. 271. And see Uldrick *v.* Simpson, 1 S. C. 283. *Compare* Mallet *v.* Smith, 6 Rich. Eq. 12, 60 Am. Dec. 107.

Tennessee.— Robertson *v.* Gaines, 2 Humphr. 367.

Texas.— Johnson *v.* Bowden, 37 Tex. 621, 43 Tex. 670, discretionary powers included. *Compare* Blanton *v.* Mayes, 58 Tex. 422.

Virginia.— Nelson *v.* Carrington, 4 Munf. 332, 6 Am. Dec. 519; Geddy *v.* Butler, 3 Munf. 345.

United States.— Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130.

See 40 Cent. Dig. tit. "Powers," § 89; and EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1334.

85. Wessels *v.* Carscallen, 10 U. C. C. P. 215.

86. Clinefelter *v.* Ayres, 16 Ill. 329; Neel *v.* Beach, 92 Pa. St. 221 (and formal renunciation after execution of power by qualified executor does not validate the execution); Heron *v.* Hoffner, 3 Rawle (Pa.) 393 (to the same effect).

87. Roseboom *v.* Mosher, 2 Den. (N. Y.) 61; Marr *v.* Peay, 6 N. C. 84, 5 Am. Dec. 521; Geddy *v.* Knox, 3 Munf. (Va.) 345.

Failure to qualify prima facie evidence of refusal.— Robertson *v.* Gaines, 2 Humphr. (Tenn.) 367. And see Uldrick *v.* Simpson, 1 S. C. 283, 286.

who qualify must join in the execution of the power, unless it is otherwise provided by statute.[88]

d. Resignation, Disqualification, or Removal. Where an executor resigns or relinquishes his office after qualification his co-executor cannot execute a power of sale,[89] unless the power is coupled with an interest, or is given *ratione officii*,[90] or unless the common-law rule is changed by statute.[91] In New Jersey and New York, when an executor is disqualified,[92] or is removed from office,[93] the power becomes lodged in the remaining executor or executors.

8. Renunciation, Resignation, or Discharge as Affecting Right to Execute. Where an executor renounces or resigns the office, or is discharged therefrom, he is not deprived of the right to execute a power of sale given him by the will,[94] unless the power was given simply *ratione officii*.[95] Where a person is appointed executor and trustee by a will, and he resigns as testamentary trustee, a sale of the property, which, as executor and trustee, he had power to sell, is void.[96]

9. Representatives or Assignees of Donee. A power cannot be exercised by the executor or administrator of the donee,[97] unless it is coupled with an interest or trust,[98] or is expressly conferred upon the donee and his executors or administrators, and the object of the power continues.[99] Nor can a power be executed by the assigns of the donee,[1] unless it is conferred upon him and his assigns.[2] But the donee of a power of appointment, who exercises the power by making an

Presumption of renunciation.— Eskridge *v.* Patterson, 78 Tex. 417, 14 S. W. 1000; Nelson *v.* Carrington, 4 Munf. (Va.) 332, 6 Am. Dec. 519.

88. See Executors and Administrators, 18 Cyc. 1335.

89. Tarver *v.* Haines, 55 Ala. 503; Shelton *v.* Homer, 5 Metc. (Mass.) 462.

90. Tarver *v.* Haines, 55 Ala. 503; Wells *v.* Lewis, 4 Metc. (Ky.) 269; Digges *v.* Jarman, 4 Harr. & M. (Md.) 485; Gould *v.* Mather, 104 Mass. 283.

91. Tarver *v.* Haines, 55 Ala. 503, statute not applicable to discretionary power involving personal trust and confidence.

92. Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 33 Atl. 305, holding that where a husband and wife are appointed joint executors with power of sale of realty, and the husband is disqualified from acting by being a subscribing witness to the will appointing them, the wife may execute the power of sale alone by deed in which her husband joins.

93. Weimar *v.* Fath, 43 N. J. L. 1; Clark *v.* Denton, 36 N. J. Eq. 419 [*affirmed* in 36 N. J. Eq. 534]; *In re* Bull, 45 Barb. (N. Y.) 334.

94. *California.*— Elmer *v.* Gray, 73 Cal. 283, 14 Pac. 862.

Georgia.— Scholl *v.* Olmstead, 84 Ga. 693, 11 S. E. 541.

Massachusetts.— Clark *v.* Tainter, 7 Cush. 567.

Missouri.— Hazel *v.* Hagan, 47 Mo. 277.

New York.— Hetzell *v.* Easterly, 66 Barb. 443; Dominick *v.* Michael, 4 Sandf. 374.

North Carolina.— Wood *v.* Sparks, 18 N. C. 389.

Ohio.— Veazie *v.* McGugin, 40 Ohio St. 365.

Pennsylvania.— Moody *v.* Fulmer, 3 Grant 17.

South Carolina.— Mordecai *v.* Schirmer, 38 S. C. 294, 16 S. E. 889.

England.—Keates *v.* Burton, 14 Ves. Jr. 434, 9 Rev. Rep. 315, 33 Eng. Reprint 587.

See 40 Cent. Dig. tit. "Powers," § 91.

95. *Illinois.*— Chappell *v.* McKnight, 108 Ill. 570.

Iowa.— Boland *v.* Tiernay, 118 Iowa 59, 91 N. W. 836.

Missouri.— Littleton *v.* Addington, 59 Mo. 275.

Ohio.— Elstner *v.* Fife, 32 Ohio St. 358.

Tennessee.— Jones *v.* Fulghum, 3 Tenn. Ch. 193.

England.— *In re* Gordon, 6 Ch. D. 531, 46 L. J. Ch. 794.

Canada.— Travers *v.* Gustin, 20 Grant Ch. (U. C.) 106.

See 40 Cent. Dig. tit. "Powers," § 91.

96. Andrews *v.* Andrews, 7 Heisk. (Tenn.) 234.

97. *Delaware.*—Doe *v.* Vincent, 1 Houst. 416.

New Jersey.— Chambers *v.* Tulane, 9 N. J. Eq. 146, executor of an executor having power of sale.

New York.— Dominick *v.* Michael, 4 Sandf. 374, executor or administrator *cum testamento annexo* of executor having power of sale.

South Carolina.— Reeves *v.* Tappan, 21 S. C. 1.

England.— Cole *v.* Wade, 16 Ves. Jr. 27, 10 Rev. Rep. 129, 33 Eng. Reprint 894.

See 40 Cent. Dig. tit. "Powers," § 92.

98. Reeves *v.* Tappan, 21 S. C. 1.

99. Doolittle *v.* Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389 note (power of sale in mortgage given to the mortgagee "his executors, administrators and assigns"); Smith *v.* Folwell, 1 Binn. (Pa.) 546; Cole *v.* Wade, 16 Ves. Jr. 27, 10 Rev. Rep. 129, 33 Eng. Reprint 894.

1. See *supra*, VI, B, 6.

2. Howe *v.* Whitfield, Freem. K. B. 476, 89 Eng. Reprint 357, 2 Show. 57, 89 Eng. Reprint 791, T. Jones 110, 84 Eng. Reprint

appointment, may leave to his executors such acts as a division of the property according to the appointment.[3]

10. Executor in Right of Wife. Where a married woman in the capacity of an executrix is directed to sell property for the payment of the testator's debts, her husband, as executor in right of his wife, may sell the chattels of the estate which pass by delivery, but cannot convey lands which the will directed her to convey, the legal title thereto being vested in her.[4]

11. Administrator With Will Annexed. Where a will confers a power of sale or other power on the executor merely *ratione officii*, and to be exercised in any event, the power may be executed by an administrator with the will annexed, but, at least in the absence of a statute, he cannot exercise discretionary powers involving personal trust and confidence, and which are not generally within the scope of administrative functions. In some jurisdictions this subject is regulated by statute.[5]

12. Heirs of Donor or Donee. Where lands are devised to trustees in fee, upon trusts, or with powers which, in their execution, require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heirs at law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate, subject to the trusts of the will; but a trust which gives the trustee no other duty to discharge than simply to clothe the equitable ownership with the legal estate may be performed by the heir.[6] Where a power is personal to the donee it cannot be exercised by his heirs.[7]

C. Time of Execution[8] — 1. In General. The whole period of the life of the donee is allowed for the execution of a power, where it is general in its terms.[9]

1171, 1 Vent. 338, 339, 86 Eng. Reprint 218, 219, power to make leases. See also Doolittle *v.* Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389 note.

The assignee of a note is not the "legal representative" of the payees, so as to be entitled to substitute a trustee under a provision in a deed of trust authorizing the payees "or their legal representatives" to appoint another trustee. An assignee claims in his own right, and not in a representative character. Fuller *v.* Davis, 63 Miss. 78.

3. Albert *v.* Albert, 68 Md. 352, 12 Atl. 11, holding that this is not a delegation of the power. See *supra*, VI, B, 6.

4. May *v.* Frazee, 4 Litt. (Ky.) 391, 14 Am. Dec. 159.

5. **Powers of administrator with the will annexed** see Executors and Administrators, 18 Cyc. 1323, 1324.

6. Robson *v.* Flight, 4 De G. J. & S. 608, 11 Jur. N. S. 147, 34 L. J. Ch. 226, 11 L. T. Rep. N. S. 725, 5 New Rep. 344, 13 Wkly. Rep. 393, 69 Eng. Ch. 466, 46 Eng. Reprint 1054.

7. Stamper *v.* Venable, 117 Tenn. 557, 97 S. W. 812. In this case a conveyance was made partly in consideration of the grantee's agreement to deed back to the grantor, when called upon to do so, contemporaneously with which instrument the grantee executed to the grantor a power of attorney authorizing the grantor to collect and appropriate the rents during her life, the transaction amounting to a grant in fee, with power of revocation reserved to the grantor. It was held that the heirs of the grantor had no authority to exercise the right of revocation, for the reason that the power reserved was one which was personal to the grantor.

8. **Sales by executors** see Executors and Administrators, 18 Cyc. 324.

Duration of power generally see *supra*, IV, C.

9. Coleman *v.* Seymour, 1 Ves. 209, 27 Eng. Reprint 987; 1 Sugden Powers 346. See also Muldrow *v.* Fox, 2 Dana (Ky.) 74; Jones *v.* Breed, 13 S. W. 366, 11 Ky. L. Rep. 896; Biggs *v.* Peacock, 22 Ch. D. 284, 52 L. J. Ch. 1, 47 L. T. Rep. N. S. 341, 31 Wkly. Rep. 148 [*affirming* 20 Ch. D. 200, 51 L. J. Ch. 555, 46 L. T. Rep. N. S. 582, 30 Wkly. Rep. 605] (holding that a discretionary power of sale was not put an end to during the life of the tenant for life by the fact that all the reversioners had acquired a vested interest in their shares); *In re* Cotton, 19 Ch. D. 624, 51 L. J. Ch. 514, 46 L. T. Rep. N. S. 813, 30 Wkly. Rep. 610 (holding that a power given to trustees to sell land could be exercised by them after the property had, under the trusts, become absolutely vested in persons who were *sui juris*, where on the construction of the instrument it appeared to be the intention that it should be then exercised, provided that the *cestui que trust* had not put an end to the trust by electing to take the property as it stood); *In re* Brown, L. R. 10 Eq. 349, 39 L. J. Ch. 845, 18 Wkly. Rep. 945; Wilkinson *v.* Duncan, 23 Beav. 469, 3 Jur. N. S. 530, 26 L. J. Ch. 495, 5 Wkly. Rep. 398, 3 Eng. Reprint 184; Sillibourne *v.* Newport, 1 Jur. N. S. 608, 1 Kay & J. 602, 3 Wkly. Rep. 653; Lantsbery *v.* Collier, 2 Kay & J. 709, 25 L. J. Ch. 672, 4 Wkly. Rep. 826, 69 Eng. Reprint 967;

It should, however, be executed within a reasonable time,[10] which cannot be measured by any arbitrary standard, but depends upon the circumstances of the particular case.[11] Where the donee is directed to execute the power within a certain time or at a future time, the general rule of construction is that the limitation is directory merely,[12] unless it appears that the donor intended that it should be of the essence of the power;[13] nor will a provision in a will making legacies payable

Trower *v.* Knightley, 6 Madd. 134, 56 Eng. Reprint 1043; Cowan *v.* Besserer, 5 Ont. 624. *Compare* Bleakly *v.* Bleakly, (Md. 1887) 8 Atl. 658, where the will was held to contemplate an immediate sale by the executors. And see Van Boskerck *v.* Herrick, 65 Barb. (N. Y.) 250.

The statute of limitations may be invoked by an heir or devisee, or by a purchaser from either, to prevent the sale of land to pay debts and legacies, or to prevent a sale by the executor for these purposes, when his right to sell is derived from the will alone. Butler *v.* Johnson, 41 Hun (N. Y.) 206 [*affirmed* in 111 N. Y. 204, 18 N. E. 643].

Sale under power after death of donor.— Where title to land is conveyed to secure a debt under power of sale given for failure to make payment, the execution of the power of sale is not a suit against the administrator of the deceased debtor, so as to require a delay of twelve months after the administrator has qualified before action can be taken. Baggett *v.* Edwards, 126 Ga. 463, 55 S. E. 250.

10. Davis *v.* Hoover, 112 Ind. 423, 14 N. E. 468; *In re* Weston, 91 N. Y. 502; Huston's Appeal, 9 Watts (Pa.) 472; Vickers *v.* Scott, 3 L. J. Ch. 223, 3 Myl. & K. 500, 10 Eng. Ch. 500, 40 Eng. Reprint 190. And see Walker *v.* Shore, 19 Ves. Jr. 387, 34 Eng. Reprint 561.

11. *In re* Weston, 91 N. Y. 502, where it was held that, in the absence of special modifying facts, the eighteen months within which an executor must account might be considered a "reasonable time" in which to sell land.

One year a reasonable time see McCoury *v.* Leek, 14 N. J. Eq. 70.

Lapse of seventeen years not a bar to execution see Muldrow *v.* Fox, 2 Dana (Ky.) 74, in which, however, the sale was made at the instance of the devisees.

Lapse of twenty-nine years held not to invalidate exercise of power.— Clifford *v.* Morrell, 22 N. Y. App. Div. 470, 48 N. Y. Suppl. 83.

Cloud on title.—An executor empowered to sell land by will should not exercise the power while there is a cloud on the title affecting its value. Peck *v.* Peck, 9 Yerg. (Tenn.) 301.

A sale for purpose of educating children should be made during their minority. Muldrow *v.* Fox, 2 Dana (Ky.) 74.

12. *California.*— Kidwell *v.* Brummagim, 32 Cal. 436.

Maryland.— See Harlan *v.* Brown, 2 Gill 475, 41 Am. Dec. 436, in which the sale was made within the specified time, but the conveyance was not executed until afterward.

Massachusetts.— Hale *v.* Hale, 137 Mass. 168.

New Jersey.— Marsh *v.* Love, 42 N. J. Eq. 112, 6 Atl. 889; Chasmar *v.* Bucken, 37 N. J. Eq. 415.

New York.— Mott *v.* Ackerman, 92 N. Y. 539; Waldron *v.* Schlang, 47 Hun 252.

Pennsylvania.— Fahnestock *v.* Fahnestock, 152 Pa. St. 56, 25 Atl. 313, 34 Am. St. Rep. 623; Shalter's Appeal, 43 Pa. St. 83, 82 Am. Dec. 552; Miller *v.* Meetch, 8 Pa. St. 417; Wells *v.* Sloyer, 1 Pa. L. J. Rep. 516.

Rhode Island.—See National Bank of Commerce *v.* Smith, 17 R. I. 244, 21 Atl. 959.

England.— Pearce *v.* Gardner, 10 Hare 287, 1 Wkly. Rep. 98, 44 Eng. Ch. 279, 68 Eng. Reprint 935.

See 40 Cent. Dig. tit. "Powers," § 99.

The word "immediately" in a will may be construed to mean "within a reasonable time," or "as soon as may be." Rhode Island Hospital Trust Co. *v.* Harris, 20 R. I. 160, 37 Atl. 701.

13. *Kentucky.*— Muldrow *v.* Fox, 2 Dana 74.

Maryland.— Harlan *v.* Brown, 2 Gill 475, 41 Am. Dec. 436, holding, however, that where a will authorized an executor to sell the residue of the testator's real and personal estate within two years from his decease, a sale made within the two years was valid, although the conveyance to the purchaser was not executed until after that period; and parol evidence of the time of the sale was admissible.

New Jersey.— Hampton *v.* Nicholson, 23 N. J. Eq. 423; Booraem *v.* Wells, 19 N. J. Eq. 87.

New York.— Prentice *v.* Janssen, 14 Hun 548 [*affirmed* in 79 N. Y. 478]; Dunshee *v.* Goldbacher, 56 Barb. 579; Richardson *v.* Sharpe, 29 Barb. 222.

Pennsylvania.— Fidler *v.* Lash, 125 Pa. St. 87, 17 Atl. 240; Wilkinson *v.* Buist, 124 Pa. St. 253, 16 Atl. 856, 10 Am. St. Rep. 580; Ervine's Appeal, 16 Pa. St. 256, 55 Am. Dec. 499; Loomis *v.* McClintock, 10 Watts 274.

United States.— Daly *v.* James, 8 Wheat. 495, 5 L. ed. 670 (sale by executor after time limited); Simmons *v.* Baynard, 30 Fed. 532 (holding that a sale by a trustee on the day specified in the power exhausted the power, and where he failed to compel the purchaser to take the title on his failure to comply with his bid, and on a later day advertised and sold again, the second sale was void).

England.— Cooper *v.* Martin, L. R. 3 Ch. 47, 17 L. T. Rep. N. S. 587, 16 Wkly. Rep. 234 (holding that where a wife was given power to appoint before the youngest child should attain the age of twenty-five years,

within a specified time after the testator's death preclude the executor from selling the real estate after the lapse of such time, in order to pay unpaid legatees.[14] A power of sale vested by a will or other instrument in trustees will continue, in the absence of express limitation to the contrary, during the life of the trust, unless the purpose of the power fails, but will cease on termination of the trust or failure of the purpose.[15] Where, however, neither the execution nor non-execution, partial or complete, of a trust power, is made expressly to depend on the will of the grantees, its immediate execution can be enforced by any of the beneficiaries.[16] In case of a trust reserving to the grantor the right of appointment by will, an appointment will be effective, although made in a will executed prior to the creation of the trust,[17] and where property is devised to a person, to be his absolutely in case he survives the testator, and with power to dispose of the same by a will executed in testator's lifetime, a will made during such time is a good execution of the power, although the donee survives the testator, and dies without reëxecuting or revoking the will.[18]

with a gift over in default, and a trust of residuary personal estate to be distributed on the youngest child attaining twenty-five, and an appointment was made by deed before the youngest child attained twenty-five, and there was a subsequent appointment by will, but the widow did not die until after the youngest child had attained twenty-five years, the appointment by will was invalid, as time was of the essence of the power, but the appointment by deed was valid); Pollard *v.* Pollard, [1894] P. 172, 63 L. J. P. D. & Adm. 104, 70 L. T. Rep. N. S. 815, 6 Reports 594 (holding that where a marriage settlement gave the wife, upon the death of the husband, a power of appointment in favor of a second husband and the children of a second marriage, the court would not, upon the dissolution of the marriage through the misconduct of the husband, vary the settlement so as to enable the wife to exercise such power of appointment before his death); *In re* Borrowes, Ir. R. 2 Eq. 468 (appointment upon or previous to marriage); *Re* Twiss, 16 L. T. Rep. N. S. 139, 15 Wkly. Rep. 540 (power during joint lives); Brown *v.* Sansome, McClell. & Y. 427, 29 Rev. Rep. 813 (power to lend; interest vesting at twenty-one).

See 40 Cent. Dig. tit. "Powers," § 101.

At death of particular person see Carlyon *v.* Truscott, L. R. 20 Eq. 348, 44 L. J. Ch. 186, 32 L. T. Rep. N. S. 50; Blacklow *v.* Laws, 2 Hare 40, 6 Jur. 112, 24 Eng. Ch. 40, 67 Eng. Reprint 17.

14. Bailey *v.* Brown, 9 R. I. 79. See also Wild *v.* Bergen, 16 Hun (N. Y.) 127.

15. *Alabama.*— Fox *v.* Storrs, 75 Ala 265.

Georgia.— Scholl *v.* Olmstead, 84 Ga. 693, 11 S. E. 541.

Maryland.— Johns Hopkins University *v.* Middleton, 76 Md. 186, 24 Atl. 454; Hoffman *v.* Hoffman, 66 Md. 568, 8 Atl. 466, holding that where executors were authorized under a will to sell the whole or any part of the real estate of the testator, in their discretion, the power to sell did not cease with the settlement of the personal estate, but existed over any part of the real estate that was still undivided, and ceased upon its allotment, either by the act of the parties or by legal proceedings of the devisees.

New Jersey.— Cruikshank *v.* Parker, 52 N. J. Eq. 310, 29 Atl. 682.

New York.— Cussack *v.* Tweedy, 126 N. Y. 81, 26 N. E. 1033 [*affirming* 56 Hun 617, 11 N. Y. Suppl. 16]; Taber *v.* Willets, 1 N. Y. App. Div. 285, 37 N. Y. Suppl. 233 [*affirmed* in 153 N. Y. 663, 48 N. E. 1107]; Bolton *v.* Jacks, 6 Rob. 166.

Pennsylvania.— Kaufman *v.* Hollinger, 4 Wkly. Notes Cas. 27.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Harris, 20 R. I. 160, 37 Atl. 701; Bailey *v.* Brown, 9 R. I. 79.

Texas.— Hallum *v.* Silliman, 78 Tex. 347, 14 S. W. 797.

England.— *In re* Sudeley, [1894] 1 Ch. 334, 63 L. J. Ch. 194, 70 L. T. Rep. N. S. 549, 8 Reports 79, 42 Wkly. Rep. 231; Peters *v.* Lewes, etc., R. Co., 18 Ch. D. 429, 50 L. J. Ch. 839, 45 L. T. Rep. N. S. 234, 29 Wkly. Rep. 875; Trower *v.* Knightley, 6 Madd. 134, 56 Eng. Reprint 1043.

See 40 Cent. Dig. tit. "Powers," §§ 26, 99.

Partial failure.— The power of trustees to sell will not cease on partial cessation of the trust. Johns Hopkins University *v.* Middleton, 76 Md. 186, 24 Atl. 454; Cussack *v.* Tweedy, 126 N. Y. 81, 26 N. E. 1033 [*affirming* 56 Hun 617, 11 N. Y. Suppl. 16]; Taber *v.* Willets, 1 N. Y. App. Div. 285, 37 N. Y. Suppl. 233 [*affirmed* in 153 N. Y. 663, 48 N. E. 1107]; Trower *v.* Knightley, 6 Madd. 134, 56 Eng. Reprint 1043, holding that where an estate was devised in trust for two daughters for life, with remainder in moiety for their children at twenty-one, and a power of sale was given to trustees during the continuance of the trust, the power subsisted, although one moiety had vested absolutely.

Duration and termination of powers see *supra*, IV, C.

16. Van Boskerck *v.* Herrick, 65 Barb. (N. Y.) 250.

17. U. S. Trust Co. *v.* Chauncey, 32 Misc. (N. Y.) 358, 66 N. Y. Suppl. 563.

18. Thorndike *v.* Reynolds, 22 Gratt. (Va.) 21, holding that the power conferred by the will was intended to take effect from its

2. DISCRETION OF DONEE. Where the execution of a power is left to the discretion of the donee, it may be executed by him at such time as he shall see fit.[19]

3. EXECUTION DEPENDENT ON CONTINGENCY.[20] Where a power is authorized to be executed on a contingent event, it may, unless contrary to the intention of the donor, be executed before the event, although it cannot take effect until the contingency happens.[21] If the contingency upon which a power is dependent never happens and is no longer liable to happen, the power ceases to have existence, and cannot be executed.[22]

4. POWERS SUBJECT TO LIFE-ESTATE. Where a power is given subject to a life-

date, and that the execution was intended to take effect from the date of donee's will, although not in such manner as to divest and pass the title in the life of the testator and the donee.

19. *Connecticut.*— Beers *v.* Narramore, 61 Conn. 13, 22 Atl. 1061, where the provision was "that my trustee . . . shall have power, from time to time, when it shall be deemed for the best interest of my estate, to sell any part or parts thereof for the improvement and benefit of the remainder."

New Jersey.— McCoury *v.* Leek, 14 N. J. Eq. 70, holding that executors are entitled to a reasonable time, in the exercise of their discretion, for making a sale of land.

New York.— Dorland *v.* Dorland, 2 Barb. 63; Weston *v.* Ward, 4 Redf. Surr. 415. *Compare* Hancox *v.* Meeker, 62 How. Pr. 336, where it was held that the selection of a proper time for the execution of the trust created by will was not within the discretion of the executors.

South Carolina.— Jennings *v.* Teague, 14 S. C. 229 (in the absence of bad faith); Greer *v.* McBeth, 12 Rich. Eq. 254.

Vermont.— Judevine *v.* Judevine, 61 Vt. 587, 18 Atl. 778, 7 L. R. A. 517, where a suggestion made by the testator was held advisory only.

Virginia.— Wimbish *v.* Rawlins, 76 Va. 48 (delay of two years in good faith and for the best interests of the estate not improper under a discretionary power to convert land into money); Staples *v.* Staples, 24 Gratt. 225 (sale sustained in absence of bad faith).

See 40 Cent. Dig. tit. "Powers," § 100.

20. Conditions attached to execution see *infra*, VI, G.

Construction; conditions or contingencies on which power is dependent see *supra*, V, B, 1, i, 2, f.

21. Machier *v.* Funk, 90 Va. 284, 18 S. E. 197; Sutherland *v.* Northmore, 1 Dick. 56, 21 Eng. Reprint 188; Wandesforde *v.* Carrick, Ir. R. 5 Eq. 486 (holding that this is *a fortiori* true where the happening of the contingency cannot be ascertained till the moment of the donee's death); Bradley *v.* Bury, 10 Jur. N. S. 937, 10 L. T. Rep. N. S. 868; Ashford *v.* Cafe, 5 L. J. Ch. 109, 7 Sim. 641, 8 Eng. Ch. 641, 58 Eng. Reprint 984; Harris *v.* Graham, 2 Rolle Abr. 247, pl. 6; Martin *v.* Kelso, 5 Wkly. Rep. 440; 1 Sugden Powers 347. But see Hamlin *v.* Thomas, 24 Wkly. Notes Cas. (Pa.) 4, holding that a power to be exercised on a given event cannot properly be executed before the happening of that event; but that, where a power is complete, its exercise being postponed for the benefit of a particular person, the consent of the person will be equivalent to the happening of the stipulated contingency.

Appointment among a class.—A power of appointment among a class cannot be well exercised at a time when, although all the persons who may be included in the class are known, it is uncertain whether they will, in fact, be included in it. Blight *v.* Hartnoll, 19 Ch. D. 294, 51 L. J. Ch. 162, 45 L. T. Rep. N. S. 524, 30 Wkly. Rep. 513.

Discretionary power.— Where a testator empowered his widow, if his children should conduct themselves to her satisfaction up to the age of twenty-five, and marry with her approbation, but not otherwise, to give them £1,000 each, it was held that she had a discretionary power which she might exercise after a child attained such age, although unmarried. Davidson *v.* Rook, 22 Beav. 206, 52 Eng. Reprint 1087.

"If a power be given to a person to make a lease, &c., six months, or any other given time before his death, the power may be executed at any time, although it be not six months before his death." 1 Sugden Powers 347 [*citing* Harris *v.* Grimm, 2 Rolle Abr. 247, pl. 6].

If a power is to arise upon two contingencies, one of which may not be capable of being ascertained until the death of the donee of the power, it is competent to the donee to exercise it at any time during his life, although neither of the contingencies has happened. 1 Sugden Powers 349 [*citing* Sutherland *v.* Northmore, Dick. 56, 21 Eng. Reprint 188.

22. Moores *v.* Moores, 41 N. J. L. 440; Noble *v.* Willock, L. R. 8 Ch. 778, 42 L. J. Ch. 681, 29 L. T. Rep. N. S. 194, 21 Wkly. Rep. 711; Jones *v.* Southall, 32 Beav. 31, 9 Jur. N. S. 93, 32 L. J. Ch. 130, 8 L. T. Rep. N. S. 103, 1 New Rep. 152, 11 Wkly. Rep. 247, 55 Eng. Reprint 12; Trimmell *v.* Fell, 16 Beav. 537, 22 L. J. Ch. 954, 51 Eng. Reprint 887; Cooke *v.* Briscoe, Dr. & Wal. 596; Earle *v.* Barker, 11 H. L. Cas. 280, 13 L. T. Rep. N. S. 29, 11 Eng. Reprint 1340; Baker *v.* Young, 10 Jur. N. S. 163, 9 L. T. Rep. N. S. 704; Price *v.* Parker, 17 L. J. Ch. 398, 16 Sim. 198, 39 Eng. Ch. 198, 60 Eng. Reprint 849; Goldsmid *v.* Goldsmid, 1 Turn. & R. 445, 24 Rev. Rep. 98, 12 Eng. Ch. 445, 37 Eng. Reprint 1172; Sculthorp *v.* Burgess, 1 Ves. Jr. 91, 30 Eng. Reprint 245.

estate, it cannot, except by consent of the life-tenant,[23] be executed during the continuance of such estate.[24]

5. Appointment by Survivor. In England a general power of appointment given to the survivor of two can be well exercised by the will, made during the lives of both, of the person who turns out to be the survivor.[25] Where, however, the power is special and given to the survivor of two persons,[26] or where it is limited to be executed after the death of one,[27] it cannot be well exercised by a will made during the lives of both by that individual who afterward proves to be the survivor, unless he republishes the will after the other's death.[28]

D. Mode of Execution[29] — 1. In General. As a general rule a power must be executed in strict accordance with its terms;[30] but where no mode is prescribed, or where the manner of execution is left to the discretion of the donee, he may execute it in any manner which will legally effectuate the intention of the donor.[31] In the case of a power coupled with an interest, the law is satisfied with a substantial compliance with its terms,[32] nor is the same strictness applied to the execution of a power coupled with a trust as if it were a naked one.[33]

2. In What Name and Capacity Executed. A power may generally be executed in the name of the donee,[34] but where it merely authorizes the donee to execute it

23. Snell *v.* Snell, 38 N. J. Eq. 119; Knapp *v.* Knapp, 46 Hun (N. Y.) 190; Hamlin *v.* Thomas, 126 Pa. St. 20, 17 Atl. 506 (oral consent sufficient); Styer *v.* Freas, 15 Pa. St. 339; Gast *v.* Porter, 13 Pa. St. 533.

24. Booraem *v.* Wells, 19 N. J. Eq. 87. See also Dohoney *v.* Taylor, 79 Ky. 124, holding that where a will directed that lands given a widow for life should be sold on her death by the executor, and he declined to qualify, and the widow qualified as administratrix, she could not, as such, sell the land devised to her for life.

Widow declining to take under will.— Where a devise was made to testator's wife for life, and, after her death or marriage, the lands to be sold for division among his children, and his wife renounced the will, and dower was assigned her, it was held that the executor had no power to sell any part of the subject of the devise during the widowhood of the wife. Jackson *v.* Ligon, 3 Leigh (Va.) 161. But see Gallagher's Estate, 2 Leg. Chron. (Pa.) 155.

A power of appointment by will may be executed during the life of the first life-tenant by the second tenant for life. Lindsley *v.* Camptown First Christian Soc., 37 N. J. Eq. 277.

25. Thomas *v.* Jones, 1 De G. J. & S. 63, 9 Jur. N. S. 161, 32 L. J. Ch. 139, 7 L. T. Rep. N. S. 610, 1 New Rep. 138, 11 Wkly. Rep. 242, 66 Eng. Ch. 49, 46 Eng. Reprint 25.

Deed of both not good execution see McAdam *v.* Logan, 3 Bro. Ch. 310, 29 Eng. Reprint 553.

26. *Re* Moir, 46 L. T. Rep. N. S. 723.

27. Cave *v.* Cave, 8 De G. M. & J. 131, 2 Jur. N. S. 295, 57 Eng. Ch. 102, 44 Eng. Reprint 339.

28. *In re* Blackburn, 43 Ch. D. 75, 59 L. J. Ch. 208, 38 Wkly. Rep. 140. In this case a testator having a power of appointment jointly with his wife during her life, and in case of her predeceasing him, a power of appointment as survivor by deed or will, by his will, made in the lifetime of his wife, provided that any estate or property of which he might be possessed at the time of his decease, or over which he might have a power of bequest or disposal, should be held in trust for the benefit of the children of the marriage as therein mentioned; and by a codicil made after the death of his wife, after giving the residue of real and personal estate to his second son and daughters, confirmed his will in all respects in so far as it was capable of taking effect. It was held that the power of appointment was well exercised by the effect of the codicil in republishing the will.

29. **Manner and conduct of sale by executor** see Executors and Administrators, 18 Cyc. 325.

30. O'Brien *v.* Flint, 74 Conn. 502, 51 Atl. 547; Breit *v.* Yeaton, 101 Ill. 242; Fairman *v.* Beal, 14 Ill. 244; Haslen *v.* Kean, 4 N. C. 700, 7 Am. Dec. 718; Barretto *v.* Young, [1900] 2 Ch. 339, 69 L. J. Ch. 605, 83 L. T. Rep. N. S. 154; Doe *v.* Loch, 2 A. & E. 705, 4 L. J. K. B. 113, 4 N. & M. 807, 29 E. C. L. 325; Ross *v.* Ewer, 3 Atk. 156, 26 Eng. Reprint 892; Cavan *v.* Pulteney, 6 Bro. P. C. 175, 5 T. R. 567, 2 Eng. Reprint 1010; Burnet *v.* Mann, 1 Ves. 156, 27 Eng. Reprint 953. See also Rutledge *v.* Crampton, 150 Ala. 275, 43 So. 822; Crosby *v.* Huston, 1 Tex. 203.

31. Fotterall's Estate, 2 Pa. Dist. 146, 12 Pa. Co. Ct. 548; Harrison *v.* Harrison, 2 Gratt. (Va.) 1, 44 Am. Dec. 393; Knight *v.* Yarborough, 4 Rand. (Va.) 566; Cowles *v.* Brown, 4 Call (Va.) 477.

32. Rowe *v.* Lewis, 30 Ind. 163; Rowe *v.* Beckel, 30 Ind. 154, 95 Am. Dec. 676.

33. Taylor *v.* Benham, 5 How. (U. S.) 233, 12 L. ed. 130. See also DuBois *v.* Barker, 4 Hun (N. Y.) 80.

34. Cranston *v.* Crane, 97 Mass. 459, 93 Am. Dec. 106; Alley *v.* Lawrence, 12 Gray

in the name of the donor, or as his attorney, it must be so executed;[35] and a naked power, which expires with the death of the party creating it, must be executed in the name, and as the act, of the grantor.[36] Regularly the donee should execute a power in the capacity in which it is conferred upon him;[37] but the mere fact that a conveyance is made by an executor or trustee personally, instead of in his fiduciary capacity, will not defeat its operation;[38] and where a guardian is authorized by will to sell land, a deed following the authority to sell and describing the guardian as executor alone will be a valid execution of the power since the reference to the will gives notice of the guardian's authority.[39] Where a power, as to make partition, has no connection with the office or duties of an executor, but is conferred upon the donees as executors, yet in its execution, they act, not at all as executors, but wholly as devisees in trust.[40] A power to convey land granted to a firm may be properly executed under the firm-name and the act of acknowledgment made by one partner as its agent.[41]

3. Powers of Sale — a. Public or Private Sale. Although public sales have been required in a few states,[42] the general rule is that an executor or trustee with power to sell may make a sale either at auction or privately,[43] unless the mode of sale shall be prescribed in the instrument creating the power, in which case the prescribed mode must be followed.[44] Where a sale before a master is directed by decree, a contract by the trustee for a private sale will not be enforced.[45]

b. Sale in Whole or in Parcels. Where a deed conveys several tracts of land,

(Mass.) 373; Coles *v.* Kearney, 8 Ohio Dec. (Reprint) 733, 9 Cinc. L. Bul. 245; Miller *v.* Meetch, 8 Pa. St. 417. See also Faulk *v.* Dashiell, 62 Tex. 642, 50 Am. Rep. 542.

35. Cranston *v.* Crane, 97 Mass. 459, 93 Am. Dec. 106.

36. Hunt *v.* Ennis, 12 Fed. Cas. No. 6,889, 2 Mason 244.

37. Schley *v.* Brown, 70 Ga. 64, holding that where land is devised to one "as trustee," he being also appointed executor, a conveyance by him as executor passes no title. See also Brooks *v.* Terry, 14 N. Y. Suppl. 238.

38. *Georgia.*— Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

Mississippi.— See Cohea *v.* Johnson, 69 Miss. 46, 13 So. 40, holding that a deed shown to have been made by an administrator *de bonis non* with the will annexed is valid, although after the signature of the grantor only the word "administrator" appears, there being no other designation of his official character.

New York.— Wright *v.* Syracuse, etc., R. Co., 92 Hun 32, 36 N. Y. Suppl. 901 (in which the instrument itself showed the source of the donee's authority); Bolton *v.* Jacks, 6 Rob. 166.

Ohio.— Coles *v.* Kearney, 8 Ohio Dec. (Reprint) 733, 9 Cinc. L. Bul. 245, in which the executor possessed no property but that devised.

Pennsylvania.— Miller *v.* Meetch, 8 Pa. St. 417, in which the conveyance itself purported to be in pursuance of the power, and to pass the testator's estate.

See 40 Cent. Dig. tit. "Powers," § 105.

39. Fontaine *v.* Dunlap, 82 Ky. 321. See also Norris *v.* Harris, 15 Cal. 226.

40. Dominick *v.* Michael, 4 Sandf. (N. Y.) 374.

41. McCulloch Land, etc., Co. *v.* Whitefort, 21 Tex. Civ. App. 314, 50 S. W. 1042.

42. Ashurst *v.* Ashurst, 13 Ala. 781; Gaines *v.* New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950. See also Fraley's Estate, 9 Wkly. Notes Cas. (Pa.) 127.

43. *California.*— Panaud *v.* Jones, 1 Cal. 488.

Georgia.— Anderson *v.* Holland, 83 Ga. 330, 9 S. E. 670; Smith *v.* Halsey, 62 Ga. 341; Mattox *v.* Eberhart, 38 Ga. 581; Wright *v.* Zeigler, 1 Ga. 324, 44 Am. Dec. 656.

Illinois.— White *v.* Glover, 59 Ill. 459.

Indiana.— Munson *v.* Cole, 98 Ind. 502.

Mississippi.— Buckingham *v.* Wesson, 54 Miss. 526; Jelks *v.* Barrett, 52 Miss. 315.

New Jersey.— See Wright *v.* Wright, 4 N. J. Eq. 28.

Rhode Island.— Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

South Carolina.— Huger *v.* Huger, 9 Rich. Eq. 217.

See 40 Cent. Dig. tit. "Powers," § 106.

44. Tyree *v.* Williams, 3 Bibb (Ky.) 365, 6 Am. Dec. 663; Pendleton *v.* Fay, 2 Paige (N. Y.) 202; McCreery *v.* Hamlin, 7 Pa. St. 87.

In New Hampshire an executor may sell real estate at private sale, when so directed in the will. Gafney *v.* Kenison, 64 N. H. 354, 10 Atl. 706.

The New York statute, requiring sales in pursuance of an authority given by will to be made by auction after six weeks' notice, does not apply to a case where a different mode of sale is pointed out in the will, or where it is expressly left to the discretion of the executor or trustee. McDermut *v.* Lorillard, 1 Edw. 273.

45. Raymond *v.* Webb, Lofft. 66.

and empowers the trustee to sell them together or in lots, and a sale of the whole is made at once, without objection from the grantor, the sale is valid.[46]

c. Parol Sale. A power to sell, without particular directions for its execution, may be executed by a parol sale,[47] unless it is in contravention of the statute of frauds.[48]

d. Terms of Sale.[49] Where the instrument conferring a power of sale does not prescribe the terms upon which sale is to be made, the donee may sell upon such terms as will carry out the intention of the donor.[50] A power to sell land, however, does not authorize an exchange or barter of lands, but a sale for money only.[51]

E. Instrument of Execution[52] — **1. In General.** Where a power is given generally, without defining the mode by which it must be exercised, it may be exercised by deed, will, or simple note in writing;[53] and a power to appoint per-

46. Doe *v.* Turner, 7 Ohio, Pt. II, 216. See also MORTGAGES, 27 Cyc. 1480.

47. Silverthorn *v.* McKinster, 12 Pa. St. 67.

48. Perkins *v.* Presnell, 100 N. C. 220, 6 S. E. 801.

49. See also EXECUTORS AND ADMINISTRATORS, 18 Cyc. 325; MORTGAGES, 27 Cyc. 1481.

50. Shelton *v.* Carpenter, 60 Ala. 201; Rogers *v.* Jones, 13 Tex. Civ. App. 453, 35 S. W. 812. See also Allen *v.* De Witt, 3 N. Y. 276.

When a power of investment of proceeds exists, the acceptance of a mortgage on the property sold is a proper exercise of the trustee's discretion. McLenegan *v.* Yeiser, 115 Wis. 304, 91 N. W. 682 [*citing* Leggett *v.* Hunter, 19 N. Y. 445].

A sale partly for cash and partly for an equitable claim is a good execution of a naked power to sell, and invest the money arising from the sale, where the equitable claim is admitted or established. McComb *v.* Waldron, 7 Hill (N. Y.) 335 [*reversing* 1 Hill 111]. But see Bloomer *v.* Waldron, 3 Hill (N. Y.) 361.

51. Taylor *v.* Galloway, 1 Ohio 232, 13 Am. Dec. 605. See *supra*, V, B, 2, d, (III).

52. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 330.

53. *Georgia.*— New *v.* Potts, 55 Ga. 420, by will.

Illinois.— Christy *v.* Pulliam, 17 Ill. 59 (by deed); Fairman *v.* Beal, 14 Ill. 244 (holding that a power to be exercised by the life-tenant "at his death" may be exercised by deed).

Indiana.— Tower *v.* Hartford, 115 Ind. 186, 17 N. E. 281, assignment of note without consideration.

Maryland.— Benesch *v.* Clark, 49 Md. 497, holding that the fact that the disposition of the property is not to take effect until the death of the donee is no reason why it cannot be made by deed, in the absence of a clear intent to the contrary.

Massachusetts.— Stone *v.* Forbes, 189 Mass. 163, 75 N. E. 141 (power of appointment executed by general residuary clause of will); Burbank *v.* Sweeney, 161 Mass. 490, 37 N. E. 669 (by will).

Missouri.— Wead *v.* Gray, 78 Mo. 59 (by will or deed); Claflin *v.* Van Wagoner, 32 Mo. 252 (indorsement of note by married woman an appointment in writing).

New Jersey.— Cueman *v.* Broadnax, 37 N. J. L. 508, simple note in writing.

North Carolina.— *Ex p.* Britton, 39 N. C. 35, holding that under a provision that the donee should "make any appointment in writing, witnessed by two witnesses," he might make appointment by deed so witnessed, and was not restricted to a writing in the nature of a will.

Pennsylvania.— Yard *v.* Pittsburgh, etc., R. Co., 131 Pa. St. 205, 18 Atl. 874 (power to revoke trust and reconvey upon new uses well executed by simple deed annulling trust without declaring new uses); Forsythe *v.* Forsythe, 108 Pa. St. 129 (by will).

Tennessee.— Cathey *v.* Cathey, 9 Humphr. 470, 49 Am. Dec. 714, by will.

England.— Charlton *v.* Charlton, [1906] 2 Ch. 523, 75 L. J. Ch. 715, 95 L. T. Rep. N. S. 714 (approval of draft deed); Proby *v.* Landor, 28 Beav. 504, 6 Jur. N. S. 1278, 30 L. J. Ch. 593, 9 Wkly. Rep. 47, 54 Eng. Reprint 460 (memorandum contemporaneous with will); Eaton *v.* Smith, 2 Beav. 236, 17 Eng. Ch. 236, 48 Eng. Reprint 1171 (statement of facts as an appointment by trustees); Roscommon *v.* Fowke, 6 Bro. P. C. 158, 2 Eng. Reprint 998 (power of revocation and new appointment well executed by will); Dighton *v.* Tomlinson, Comyns 194, 10 Mod. 31, 88 Eng. Reprint 612, 1 P. Wms. 149, 24 Eng. Reprint 335, 1 Salk. 239, 91 Eng. Reprint 212 (by fine); Taylor *v.* Meads, 4 De G. J. & S. 597, 11 Jur. N. S. 166, 34 L. J. Ch. 203, 12 L. T. Rep. N. S. 6, 5 New Rep. 348, 13 Wkly. Rep. 394, 69 Eng. Ch. 457, 46 Eng. Reprint 1050 (by will); Irwin *v.* Irwin, 10 Ir. Ch. 29 (by settlement); *In re* Jennings, 8 Ir. Ch. 421 (letter promising to appoint); Brodrick *v.* Brown, 1 Kay & J. 328, 69 Eng. Reprint 484; Martin *v.* Kelso, 5 Wkly. Rep. 440 (by deed).

See 40 Cent. Dig. tit. "Powers," § 121.

Gift inter vivos.— Ewing *v.* Handley, 4 Litt. (Ky.) 346, 14 Am. Dec. 140 (unrecorded loan and continued possession of slaves for more than five years equivalent to gift); Farrington *v.* Parker, L. R. 4 Eq. 116, 16 L. T. Rep. N. S. 258, 15 Wkly. Rep. 685 (parol gift); Brodrick *v.* Brown, 1 Kay & J. 328, 69 Eng. Reprint 484.

The execution of a bond by the donee of

sonalty amongst a class may, it seems, if no formality be required, be executed by merely naming the parties to be benefited.[54] Where *cestuis que trustent* are given the power to substitute another trustee, they may do so by separate instruments.[55]

2. Restrictions as to Nature of Instrument — a. In General. Where the execution of a power is restricted by the instrument creating it to a particular instrument, as to a deed or will, or to either of two particular instruments, the restriction must be observed, and the power cannot be validly executed in any other way.[56]

a power in favor of the object thereof operates as an exercise of the power. Burke *v.* Lambert, 15 Wkly. Rep. 913.

Execution by check or order in writing see Brodrick *v.* Brown, 1 Kay & J. 328, 69 Eng. Reprint 484.

Instructions to solicitor to prepare deed not sufficient see Hawke *v.* Hawke, 26 Wkly. Rep. 93

A bill by husband and wife, who have a power of appointment for her separate use, submitting that the subject of it should be applied in payment of his debts, for which a decree passes is tantamount to an actual appointment. Allen *v.* Papworth, 1 Ves. 163, 27 Eng. Reprint 958. See also Erwin *v.* Farrer, 19 Ves. Jr. 86, 34 Eng. Reprint 450. *Compare* as to answer Carter *v.* Carter, Mosely 365, 25 Eng. Reprint 442.

Petition see Holloway *v.* Clarkson, 2 Hare 521, 6 Jur. 923, 24 Eng. Ch. 521, 67 Eng. Reprint 215; Fortescue *v.* Gregor, 5 Ves. Jr. 553, 31 Eng. Reprint 734.

Renewal of a lease by a life-tenant, with a power of appointment in his own name and at his expense, has not the effect of an appointment in his own favor. Brookman *v.* Hales, 2 Ves. & B. 45, 13 Rev. Rep. 9, 35 Eng. Reprint 235.

Power of attorney held not to execute see Hughes *v.* Wells, 9 Hare 749, 16 Jur. 927, 41 Eng. Ch. 749, 68 Eng. Reprint 717.

Conveyance or mortgage under power of appointment see *supra*, V, B, 1, g.

Mortgage, pledge, or lease under power of sale see *supra*, V, B, 2, d, (v)–(vii).

54. Bailey *v.* Hughes, 19 Beav. 169, 52 Eng. Reprint 313.

55. Crosby *v.* Huston, 1 Tex. 203.

56. *Alabama.*— Rutledge *v.* Crampton, 150 Ala. 275, 43 So. 822.

Delaware.— Harker *v.* Elliott, 3 Harr. 51, holding that the power given by an act of assembly to a married woman "to hold, bargain, sell and convey her lands, and to receive rents and profits and purchase-money thereof; and that her deed conveying said land shall be good; and that she shall have power to make contracts and transact business, binding herself in the same manner as if she was unmarried"; referred to acts and contracts *inter vivos* and did not enable her to dispose of her land by last will and testament made in her husband's lifetime.

Georgia.— Porter *v.* Thomas, 23 Ga. 467; Weeks *v.* Sego, 9 Ga. 199.

Illinois.— Henderson *v.* Blackburn, 104 Ill. 227, 44 Am. Rep. 780; Breit *v.* Yeaton, 101 Ill. 242; Fairman *v.* Beal, 14 Ill. 244.

Indiana.— John *v.* Bradbury, 97 Ind. 263.

Maryland.— Wilks *v.* Burns, 60 Md. 64.

Mississippi.— Doty *v.* Mitchell, 9 Sm. & M. 435.

New Jersey.— See Robbins *v.* Abrahams, 5 N. J. Eq. 465, in which a power restricted to execution by writing under seal or by will was held well executed by mortgage.

North Carolina.— Reid *v.* Boushall, 107 N. C. 345, 12 S. E. 324.

Ohio.— Taliaferro *v.* Young Men's Christion Assoc., 10 Ohio Dec. (Reprint) 1, 18 Cinc. L. Bul. 2.

Rhode Island.— Moore *v.* Dimond, 5 R. I. 121.

South Carolina.— Bentham *v.* Smith, Cheves Eq. 33, 34 Am. Dec. 599.

Tennessee.— Starnes *v.* Allison, 2 Head 221; Marshall *v.* Stephens, 8 Humphr. 159, 47 Am. Dec. 601; Morgan *v.* Elam, 4 Yerg. 375.

Texas.— Weir *v.* Smith, 62 Tex. 1.

Virginia.— Gaskins *v.* Finks, 90 Va. 384, 19 S. E. 166.

England.— Woodward *v.* Hasley, Rolls Feb. 1727, MS. [*cited* in 1 Sugden Powers 269]; Barretto *v.* Young, [1900] 2 Ch. 339, 69 L. J. Ch. 605, 83 L. T. Rep. N. S. 154; Darlington *v.* Pulteney, Cowp. 260; Patch *v.* Shore, 2 Dr. & Sm. 589, 9 Jur. N. S. 63, 32 L. J. Ch. 185, 7 L. T. Rep. N. S. 554, 1 New Rep. 157, 11 Wkly. Rep. 142, 62 Eng. Reprint 743; Majoribanks *v.* Hovenden, Drury 11, 16 Ir. Eq. 238; Doe *v.* Thorley, 10 East 438; Hougham *v.* Sandys, 6 L. J. Ch. O. S. 67, 2 Sim. 95, 2 Eng. Ch. 95, 57 Eng. Reprint 725; Paul *v.* Hewetson, 2 Myl. & K. 434, 7 Eng. Ch. 434, 39 Eng. Reprint 1009; Tollet *v.* Tollet, 2 P. Wms. 489, 24 Eng. Reprint 828; Bushell *v.* Bushell, 1 Sch. & Lef. 96, 9 Rev. Rep. 21; Doe *v.* Cavan, 5 T. R. 567; Anderson *v.* Dawson, 15 Ves. Jr. 532, 33 Eng. Reprint 856; Reid *v.* Shergold, 10 Ves. Jr. 370, 32 Eng. Reprint 888; 1 Sugden Powers 263, 268, 270. But see Smith *v.* Ashton, 1 Ch. Cas. 264, 22 Eng. Reprint 792, Freem. K. B. 308, 22 Eng. Reprint 1229, 89 Eng. Reprint 226, 3 Keb. 551, 84 Eng. Reprint 874, Rep. t. Finch 273, 23 Eng. Reprint 150, 3 Salk. 277, 91 Eng. Reprint 822 [*citing* Sneed *v.* Sneed, Ambl. 64, 27 Eng. Reprint 37], holding a power to make provision for children by deed well executed by will.

Canada.— Shore *v.* Shore, 21 Ont. 54, 11 Can. L. T. Occ. Notes 108 (will under seal not a good execution of a power required to be executed by deed); *Re* Collard, 16 Ont. 735 (power to be executed by will cannot be executed by deed or by covenant not to revoke will).

See 40 Cent. Dig. tit. "Powers," § 121½ *et seq.*

The instrument creating a power of appointment or disposition may by implication require its execution by will.[57]

b. Instrument in Writing. A power required to be executed by a writing or instrument in writing is well executed by a will,[58] provided it is executed with the formalities, if any, prescribed by law and by the instrument creating the power;[59]

Deed or will.—"If a deed is expressly required, the power cannot be executed by will." 1 Sugden Powers 268 [*citing* Woodward *v.* Hasley, Rolls Feb. 1727, MS.; Darlington *v.* Pulteney, Cowp. 260]. "It is well settled law that a power to appoint by will cannot be executed in any other manner. The intention of the creator of such a power is taken to be that the donee of it shall not deprive himself until the time of his death of his right to select such of the objects of the power as he may deem proper." *Re* Collard, 16 Ont. 735, 736.

A power to appoint by deed or will is a single power, with a restriction requiring it to be exercised by one or the other of those instruments, but leaving to the donee the option to choose which instrument he will use. Saunders *v.* Evans, 8 H. L. Cas. 721, 7 Jur. N. S. 1293, 31 L. J. Ch. 233, 5 L. T. Rep. N. S. 129, 9 Wkly. Rep. 501, 11 Eng. Reprint 611.

A deed in form testamentary is not a good execution of a power exercisable by will only. Patch *v.* Shore, 2 Dr. & Sm. 589, 9 Jur. N. S. 63, 32 L. J. Ch. 185, 7 L. T. Rep. N. S. 554, 1 New Rep. 157, 11 Wkly. Rep. 142, 62 Eng. Reprint 743.

57. Porter *v.* Thomas, 23 Ga. 467; Weir *v.* Smith, 62 Tex. 1; Doe *v.* Thorley, 10 East 438; Brown *v.* Chambers, Hayes 597 (where a testator empowered his wife to appoint an estate among her sons, and provided that in case of her intestacy it should be divided equally among all then alive); Paul *v.* Hewetson, 2 Myl. & K. 434, 7 Eng. Ch. 434, 39 Eng. Reprint 1009 (power "to will" property).

Power to "leave" property has been construed as requiring execution by will. Moore *v.* Ffolliot, L. R. 19 Ir. 499; Doe *v.* Thorley, 10 East 438; Walsh *v.* Wallinger, 11 Eng. Ch. 78, 39 Eng. Reprint 324, 9 L. J. O. S. Ch. 7, 2 Russ. & M. 78, Taml. 425, 12 Eng. Ch. 425, 48 Eng. Reprint 169.

Power of appointment or disposition "at death" of donee.—It has been held that, where a will giving a life estate to the wife contains the words, "I further will and request, that, at her death, she makes such a disposition of it as she thinks best," such power cannot be executed by a conveyance by deed, but only by appointment by will. Porter *v.* Thomas, 23 Ga. 467. And in Weir *v.* Smith, 62 Tex. 1, it was held that where property is given to the testator's widow, with power at the time of her death to make a final disposition of such parts as she shall not have disposed of in maintaining herself and children, such power can be exercised only by will. See also Wilks *v.* Burns, 60 Md. 64; *In re* Flower, 55 L. J. Ch. 200, 53 L. T. Rep. N. S. 717, 34 Wkly. Rep. 149. *Compare*, however, Christy *v.* Pulliam, 17 Ill. 59 (holding that, where a testator devised land to "[his] dearly beloved wife . . . to dispose of at her death to any person she may think best to live with her and take care of her," the power was well executed by deed during the wife's lifetime); Fairman *v.* Beal, 14 Ill. 244 (holding that where land was devised to a person for life, and it was provided that "at her death" she might dispose of it as she should please, the words "at her death" did not by implication restrain the exercise of the power to a will, but she might properly exercise the same by deed); Benesch *v.* Clark, 49 Md. 497 (holding that, unless the language of the instrument creating the power indicates that the power must be executed by last will and testament, the fact that the disposition is not to take effect until the death of the donee of the power, is no reason why the disposition cannot be made by deed). "The mere circumstance of the estate being limited to A for life, and 'after his death,' or 'then' to be at his disposal, will not, by implication, restrain the execution of the power to a will." 1 Sugden Powers 270 [*citing* Dighton *v.* Tomlinson, Comyns 194, 10 Mod. 31, 88 Eng. Reprint 612, 1 P. Wms. 149, 24 Eng. Reprint 335, 1 Salk. 239, 91 Eng. Reprint 212; *Ex p.* Williams, 1 Jac. & W. 89, 20 Rev. Rep. 231, 37 Eng. Reprint 309; Anonymous 3 Leon. 71, 74 Eng. Reprint 548]. See also Humble *v.* Bowman, 47 L. J. Ch. 62, holding that, in the case of a devise to a widow for life "and to be distributed to the testator's family at her decease as she might think proper," the power of distribution was exercisable by deed.

58. Heath *v.* Withington, 6 Cush. (Mass.) 497; Jackson *v.* Veeder, 11 Johns. (N. Y.) 169; Smith *v.* Adkins, L. R. 14 Eq. 402, 41 L. J. Ch. 628, 27 L. T. Rep. N. S. 90, 20 Wkly. Rep. 717; Collard *v.* Sampson, 16 Beav. 543, 51 Eng. Reprint 889 [*affirmed* in 4 De G. M. & G. 224, 1 Eq. Rep. 262, 17 Jur. 641, 22 L. J. Ch. 729, 53 Eng. Ch. 174, 43 Eng. Reprint 493]; Roscommon *v.* Fowke, 6 Bro. P. C. 158, 2 Eng. Reprint 998; Taylor *v.* Meads, 4 De G. J. & S. 597, 11 Jur. N. S. 166, 34 L. J. Ch. 203, 12 L. T. Rep. N. S. 6, 5 New Rep. 348, 13 Wkly. Rep. 394, 69 Eng. Ch. 457, 46 Eng. Reprint 1050; Orange *v.* Pickford, 4 Drew. 363, 4 Jur. N. S. 649, 27 L. J. Ch. 808, 6 Wkly. Rep. 738, 62 Eng. Reprint 140; Buckell *v.* Blenkhorn, 5 Hare 131, 26 Eng. Ch. 131, 67 Eng. Reprint 857.

59. Smith *v.* Adkins, L. R. 14 Eq. 402, 41 L. J. Ch. 628, 27 L. T. Rep. N. S. 90, 20 Wkly. Rep. 717; Orange *v.* Pickford, 4 Drew. 363, 4 Jur. N. S. 649, 27 L. J. Ch. 808, 6 Wkly. Rep. 738, 62 Eng. Reprint 140. See *infra*, VI, E, 3.

and a power to be exercised by an instrument in the nature of or purporting to be a will is well exercised by an instrument of a testamentary character, although it is void as a will.[60]

3. Formal Requisites — a. In General. A deed, will, or other instrument in execution of a power must be executed with the formalities required by law in the execution of such instruments generally,[61] and a will of lands in execution of a power must follow all the formalities required for a valid devise.[62] In the exercise of a power all formalities prescribed by the instrument creating the power for its execution must be observed;[63] but as a rule where a power may be executed by either of two instruments, formalities prescribed for one are not required for the other.[64]

b. Signature, Seal, and Attestation. A requirement that the instrument of execution shall be signed by, or under the hand of, the donee,[65] or that it shall be under seal,[66] must be complied with. So, where the instrument creating a power

60. Olivet *v.* Whitworth, 82 Md. 258, 33 Atl. 723; Welch *v.* Henshaw, 170 Mass. 409, 49 N. E. 659, 64 Am. St. Rep. 309; Heath *v.* Withington, 6 Cush. (Mass.) 497; Barnes *v.* Irwin, 2 Dall. (Pa.) 199, 1 L. ed. 348, 1 Am. Dec. 278; *In re* Broad, [1901] 2 Ch. 86, 70 L. J. Ch. 601, 84 L. T. Rep. N. S. 577.

61. *Illinois.*— Breit *v.* Yeaton, 101 Ill. 242.

Massachusetts.—Osgood *v.* Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488.

North Carolina.— Leigh *v.* Smith, 38 N. C. 442, 42 Am. Dec. 182.

South Carolina.— Blount *v.* Walker, 28 S. C. 545, 6 S. E. 558.

England.— *In re* Scholefield, [1905] 2 Ch. 408, 74 L. J. Ch. 610, 93 L. T. Rep. N. S. 122, 21 T. L. R. 675, 54 Wkly. Rep. 56 (unattested codicil); Hummel *v.* Hummel, [1898] 1 Ch. 642, 67 L. J. Ch. 363, 78 L. T. Rep. N. S. 518, 46 Wkly. Rep. 507; Sanders *v.* Franks, 2 Madd. 147, 56 Eng. Reprint 289 (power to dispose of an estate by will duly executed and attested not well executed by a will not signed, sealed, or attested); Wilkes *v.* Holmes, 9 Mod. 485, 88 Eng. Reprint 591; *In re* Edmonstone, 49 Wkly. Rep. 555 (holding that a power of appointment conferred by a will, exercisable by deed or writing duly executed or by will, is not validly exercised by testamentary documents executed by the donee, but attested by one witness only, and containing no reference to the power or to the property subject to it).

See 40 Cent. Dig. tit. "Powers," § 125 *et seq.*

Deed by surviving executor.—Where a deed is executed by one of two executors under a provision of the will authorizing such executor to convey the land after the death of his coexecutor, who was life-tenant of the land, the deed need not recite the death of the co-executor, as that will be presumed. Cowles *v.* Reavis, 109 N. C. 417, 13 S. E. 930.

Privy examination of married women see Johnson *v.* Yates, 9 Dana (Ky.) 491.

62. Wagstaff *v.* Wagstaff, 2 P. Wms. 258, 24 Eng. Reprint 721; Longford *v.* Eyre, 1 P. Wms. 740, 24 Eng. Reprint 593. See also Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44, construing Code (1896), § 1052.

Power in gross.— Where a father, tenant for life, articles to charge for younger children after his death, as he, by will duly executed, should direct, and he directs by will with two witnesses only, it is a good execution of the power, since nothing passes from the father. Jones *v.* Clough, 2 Ves. 365, 28 Eng. Reprint 234.

A will may be good as to personalty, although insufficient as to realty because not duly attested. Duff *v.* Dalzell, 1 Bro. Ch. 147, 28 Eng. Reprint 1044.

Married women.— Where a married woman has power to appoint by will executed according to law, she need not follow the formalities governing the wills of married women, but may execute it with such formalities as are required in the execution of wills generally. Schley *v.* McCeney, 36 Md. 266. See also Wilson *v.* Gaines, 9 Rich. Eq. (S. C.) 420.

63. Breit *v.* Yeaton, 101 Ill. 242; Haslen *v.* Kean, 4 N. S. 700, 7 Am. Dec. 718; Barretto *v.* Young, [1900] 2 Ch. 339, 69 L. J. Ch. 605, 83 L. T. Rep. N. S. 154; Thackwell *v.* Gardiner, 5 De G. & Sm. 58, 16 Jur. 588, 21 L. J. Ch. 777, 64 Eng. Reprint 1017; O'Cauaghan *v.* Comyn, Ll. & G. t. Pl. 484.

64. Olivet *v.* Whitworth, 82 Md. 258, 33 Atl. 723; Schley *v.* McCeney, 36 Md. 266; Shearman *v.* Hicks, 14 Gratt. (Va.) 96.

65. Ross *v.* Ewer, 3 Atk. 156, 26 Eng. Reprint 892, unsigned paper in the handwriting of the donee insufficient.

66. Osgood *v.* Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488; Pepper's Will, 1 Pars. Eq. Cas. (Pa.) 436 (will); Waln's Estate, 5 Pa. Co. Ct. 52; Ross *v.* Ewer, 3 Atk. 156, 26 Eng. Reprint 892; MacAdam *v.* Logan, 3 Bro. Ch. 310, 29 Eng. Reprint 553; Martin *v.* Mitchell, 2 Jac. & W. 413, 22 Rev. Rep. 184, 37 Eng. Reprint 685; Taylor *v.* Johnson, 2 P. Wms. 504, 24 Eng. Reprint 836.

Stamp equivalent to seal.— Sprange *v.* Barnard, 2 Bro. Ch. 585, 29 Eng. Reprint 320.

A slight dash, acknowledged in the instrument, has been held sufficient. Hacker's Ap-

prescribes that it shall be executed by an instrument witnessed or attested by a certain number of witnesses, or in a certain manner, such requirement must be complied with.[67] At the present day no memorandum of attestation to an instrument, made in execution of a power, stating the observance of all the particulars required by the instrument creating the power, is needed to establish that the power has been duly executed.[68]

F. Intent to Execute — 1. In General. The intention to execute a power must always appear in its execution, either by express terms or recitals, or by necessary implication.[69]

peal, 121 Pa. St. 192, 15 Atl. 500, 1 L. R. A. 861.

A scroll affixed to a will, although unrecognized therein, has been held sufficient. Pollock *v.* Glassell, 2 Gratt. (Va.) 439.

Unsealed will rectified by sealed codicil.— Porter *v.* Turner, 3 Serg. & R. (Pa.) 108.

Under the English Wills Act (1 Viet. c. 26, § 10), a seal is not required, although called for in the instrument creating the power, where the power is expressly to be exeeuted by will; but a will made in exeeution of a power to appoint by writing under seal must be sealed. West *v.* Ray, 2 Eq. Rep. 431, Kay 385, 23 L. J. Ch. 447, 2 Wkly. Rep. 319, 69 Eng. Reprint 163 [*disapproving* Buekell *v.* Blenkhorn, 5 Hare 131, 26 Eng. Ch. 131, 67 Eng. Reprint 857].

67. Breit *v.* Yeaton, 101 Ill. 242; Yeaton *v.* Yeaton, 4 Ill. App. 579; Wainwright *v.* Low, 132 N. Y. 313, 30 N. E. 747 [*affirming* 57 Hun 386, 10 N. Y. Suppl. 888]; Ocheltree *v.* McClung, 7 W. Va. 232; Barretto *v.* Young, [1900] 2 Ch. 339, 69 L. J. Ch. 605, 83 L. T. Rep. N. S. 154; Sergeson *v.* Sealey, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; *In re* Daly, 25 Beav. 456, 4 Jur. N. S. 525, 27 L. J. Ch. 751, 6 Wkly. Rep. 533, 53 Eng. Reprint 711; Thaekwell *v.* Gardiner, 5 De G. & Sm. 58, 16 Jur. 588, 21 L. J. Ch. 777, 64 Eng. Reprint 1017; Burnham *v.* Bennett, 1 De G. & Sm. 513, 63 Eng. Reprint 1172; Hughes *v.* Wells, 9 Hare 749, 16 Jur. 927, 41 Eng. Ch. 749, 68 Eng. Reprint 717; Bainbridge *v.* Smith, 5 L. J. Ch. 300, 8 Sim. 86, 8 Eng. Ch. 86, 59 Eng. Reprint 35; Stanhope *v.* Keir, 2 L. J. Ch. O. S. 166, 2 Sim. & St. 37, 1 Eng. Ch. 37, 57 Eng. Reprint 259; O'Callaghan *v.* Comyn, Ll. & G. t. Pl. 484; Sanders *v.* Franks, 2 Madd. 147, 17 Rev. Rep. 202, 56 Eng. Reprint 289; Moodie *v.* Reid, 1 Madd. 516, 56 Eng. Reprint 189, 2 Madd. 156, 56 Eng. Reprint 292, 16 Rev. Rep. 257; Hopkins *v.* Myall, 2 Russ. & M. 86, 11 Eng. Ch. 86, 39 Eng. Reprint 327. *Compare* Olivet *v.* Whitworth, 82 Md. 258, 33 Atl. 723; Snearman *v.* Hieks, 14 Gratt. (Va.) 96; Wade *v.* Paget, 1 Bro. Ch. 363, 1 Cox Ch. 74, 29 Eng. Reprint 1069; Cotter *v.* Layer, 2 P. Wms. 623, 24 Eng. Reprint 887; Rieketts *v.* Loftus, 4 Y. & C. Exeh. 519.

68. Newton *v.* Rieketts, 9 H. L. Cas. 262, 7 Jur. N. S. 952, 31 L. J. Ch. 247, 5 L. T. Rep. N. S. 62, 10 Wkly. Rep. 1, 11 Eng. Rep. 731; Burdett *v.* Spilsbury, 10 Cl. & F. 340, 8 Eng. Reprint 772; Vincent *v.* Sodor, 4 De G. & Sm. 294, 15 Jur. 365, 20 L. J. Ch. 433, 64 Eng. Reprint 839. See also Ladd *v.* Ladd, 8 How. (U. S.) 10, 12 L. ed. 967, where a marriage settlement gave the woman the power of appointment to the use of such persons as she might from time to time appoint during the coverture, by any writing or writings under her hand and seal attested by three credible witnesses, and she executed a deed which recited that the parties had thereunto set their hands and seals, and which the witnesses attested as having been "sealed and delivered." This was held a sufficient exeeution of the power, although the witnesses did not attest the faet of her "signing" it.

It was otherwise in England under the earlier cases. See Waterman *v.* Smith, 4 Jur. 672, 9 Sim. 629, 16 Eng. Ch. 629, 59 Eng. Reprint 501; Wright *v.* Wakeford, 17 Ves. Jr. 454, 34 Eng. Reprint 176.

69. *Alabama.*— Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44; Doe *v.* Ladd, 77 Ala. 223.

Delaware.— Doe *v.* Vineent, 1 Houst. 416.

Illinois.— Goff *v.* Pensenhafer, 190 Ill. 200, 60 N. E. 110; Harvard College *v.* Balch, 171 Ill. 275, 49 N. E. 543; Coffing *v.* Taylor, 16 Ill. 457.

Indiana.— Bullerdick *v.* Wright, 148 Ind. 477, 47 N. E. 931; Axtel *v.* Chase, 77 Ind. 74; Dunning *v.* Vandusen, 47 Ind. 423, 17 Am. Rep. 709.

Kentueky.— Payne *v.* Johnson, 95 Ky. 175, 24 S. W. 238, 609, 15 Ky. L. Rep. 522.

Maryland.— Patterson *v.* Wilson, 64 Md. 193, 1 Atl. 68; Foos *v.* Searf, 55 Md. 301; Maryland Mut. Benev. Soe. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

Mississippi.— Andrews *v.* Brumfield, 32 Miss. 107.

New Hampshire.— Burleigh *v.* Clough, 52 N. H. 267, 280, 13 Am. Rep. 23.

New Jersey.— Cueman *v.* Broadnax, 37 N. J. L. 508; Mieheau *v.* Crawford, 8 N. J. L. 90; Robeson *v.* Shotwell, 55 N. J. Eq. 318, 36 Atl. 780 [*affirmed* in 55 N. J. Eq. 824, 41 Atl. 1115].

New York.—Weinstein *v.* Weber, 178 N. Y. 94, 70 N. E. 115 [*affirming* 81 N. Y. Suppl. 62]; Stewart *v.* Keating, 15 Mise. 44, 36 N. Y. Suppl. 913.

North Carolina.— Pippen *v.* Wesson, 74 N. C. 437.

Pennsylvania.— Wetherill *v.* Wetherill, 18 Pa. St. 265; Long *v.* Landis, 9 Lanc. Bar 153.

Rhode Island.— Cotting *v.* De Sartiges, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367; Brown *v.* Phillips, 16 R. I. 612, 18 Atl. 249; Phillips *v.* Brown, 16 R. I. 279, 15 Atl. 90.

Tennessee.— Pate *v.* Puice, 4 Coldw. 104.

2. Reference to Power — a. Necessity. In the execution of a power, a direct reference to the power is not necessary, nor is it necessary that the intention to execute it should expressly appear upon the face of the instrument; but it must be apparent that the transaction is not fairly or reasonably susceptible of any other interpretation than as indicating an intention to execute the power; and this intention is to be collected from all the circumstances.[70]

Texas.— Hill *v.* Conrad, 91 Tex. 341, 43 S. W. 789.

United States.— Blagge *v.* Miles, 3 Fed. Cas. No. 1,479, 1 Story 426.

England.— *In re* Weston, [1906] 2 Ch. 620, 76 L. J. Ch. 51, 95 L. T. Rep. N. S. 581; Garth *v.* Townsend, L. R. 7 Eq. 220; Sykes *v.* Carroll, [1903] 1 Ir. 17; Pennefather *v.* Pennefather, Ir. R. 7 Eq. 300; Reith *v.* Seymour, 6 L. J. Ch. O. S. 97, 4 Russ. 263, 28 Rev. Rep. 77, 4 Eng. Ch. 263, 38 Eng. Reprint 804; Maundrell *v.* Maundrell, 10 Ves. Jr. 247, 7 Rev. Rep. 393, 32 Eng. Reprint 839.

Canada.— Dudes *v.* Graham, 16 Grant Ch. (U. C.) 167.

See 40 Cent. Dig. tit. "Powers," § 110.

Where it is uncertain whether or not an act done is in execution of the power conferred on the donee to do it, the act will not be construed to be an execution of the power. Hill *v.* Conrad, 91 Tex. 341, 43 S. W. 789. See also Walke *v.* Moore, 95 Va. 729, 30 S. E. 374.

Intention not to appoint shown.—Langslow *v.* Langslow, 21 Beav. 552, 2 Jur. 1057, 25 L. J. Ch. 610, 52 Eng. Reprint 973.

70. *Alabama.*— Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44; Gulf Red Cedar Lumber Co. *v.* O'Neal, 131 Ala. 117, 30 So. 466, 90 Am. St. Rep. 22; Gindrat *v.* Montgomery Gas-Light Co., 82 Ala. 596, 2 So. 327, 6 Am. Rep. 769; Doe *v.* Ladd, 77 Ala. 223; Matthews *v.* McDade, 72 Ala. 377; McRae *v.* McDonald, 57 Ala. 423.

California.— Morffew *v.* San Francisco, etc., R. Co., 107 Cal. 587, 40 Pac. 810.

Connecticut.— O'Brien *v.* Flint, 74 Conn. 502, 51 Atl. 547; Hollister *v.* Shaw, 46 Conn. 248; Hamilton *v.* Crosby, 32 Conn. 342; Johnson *v.* Stanton, 30 Conn. 297; Solomon *v.* Wixon, 27 Conn. 520.

Delaware.— Doe *v.* Vincent, 1 Houst. 416.

District of Columbia.— Coombs *v.* O'Neal, 1 MacArthur 405.

Georgia.— Middlebrooks *v.* Ferguson, 126 Ga. 232, 55 S. E. 34; New England Mortg. Security Co. *v.* Buice, 98 Ga. 795, 26 S. E. 84; Holder *v.* American Inv., etc., Co., 94 Ga. 640, 21 S. E. 897; Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

Illinois.— Goff *v.* Pensenhafer, 190 Ill. 200, 60 N. E. 110; Funk *v.* Eggleston, 92 Ill. 515, 34 Am. Rep. 136.

Indiana.— Rinkenberger *v.* Meyer, 155 Ind. 152, 56 N. E. 913; Bullerdick *v.* Wright, 148 Ind. 477, 47 N. E. 931; Silvers *v.* Canary, 109 Ind. 267, 9 N. E. 904; South *v.* South, 91 Ind. 221, 46 Am. Rep. 591.

Kentucky.— Thomas *v.* Wright, 66 S. W. 993, 23 Ky. L. Rep. 2183 [*distinguishing* Payne *v.* Johnson, 95 Ky. 175, 24 S. W. 238, 609, 15 Ky. L. Rep. 522]. See also Parmers *v.* Respass, 5 T. B. Mon. 562.

Maine.— Hall *v.* Preble, 68 Me. 100.

Maryland.— Ridgely *v.* Cross, 83 Md. 161, 34 Atl. 469; Cooper *v.* Haines, 70 Md. 282, 17 Atl. 79; Patterson *v.* Wilson, 64 Md. 193, 1 Atl. 68; Foos *v.* Scarf, 55 Md. 301; Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52; Mory *v.* Michael, 18 Md. 227.

Massachusetts.— Ladd *v.* Chase, 155 Mass. 417, 29 N. E. 637; Gould *v.* Mather, 104 Mass. 283, 290. See also Bangs *v.* Smith, 98 Mass. 270 [*citing* Willard *v.* Ware, 10 Allen 263; Amory *v.* Meredith, 7 Allen 397].

Mississippi.— Yates *v.* Clark, 56 Miss. 212; Andrews *v.* Brumfield, 32 Miss. 107.

Missouri.— Papin *v.* Piednoir, 205 Mo. 521, 104 S. W. 63; Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451; Campbell *v.* Johnson, 65 Mo. 439; Owen *v.* Switzer, 51 Mo. 322; Pease *v.* Pilot Knob Iron Co., 49 Mo. 124; Bredell *v.* Collier, 40 Mo. 287.

Nebraska.— See Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

New Hampshire.— Burleigh *v.* Clough, 52 N. H. 267, 280, 13 Am. Rep. 23.

New Jersey.— Cueman *v.* Broadnax, 37 N. J. L. 508; Micheau *v.* Crawford, 8 N. J. L. 90; Munson *v.* Berdan, 32 N. J. Eq. 376.

New York.— Hutton *v.* Benkard, 92 N. Y. 295; Brown *v.* Farmers' L. & T. Co., 51 Hun 386, 4 N. Y. Suppl. 422 [*affirmed* in 117 N. Y. 266, 22 N. E. 952]; Hogle *v.* Hogle, 49 Huu 313, 2 N. Y. Suppl. 172; Bolton *v.* Jacks, 6 Rob. 166; Bigelow *v.* Tilden, 18 Misc. 689, 43 N. Y. Suppl. 858; Heyer *v.* Burger, Hoffm. 1. *Compare* Whitlock *v.* Washburn, 62 Hun 369, 17 N. Y. Suppl. 60.

North Carolina.— Taylor *v.* Eatman, 92 N. C. 601; Holt *v.* Hogan, 58 N. C. 82. But see Johnson *v.* Johnson, 108 N. C. 619, 13 S. E. 183, holding that, on a sale of property under a power in a will, the executor should execute a deed with reference to the will, and his power thereunder, even though one of the devisees was purchaser.

Ohio.— Bishop *v.* Remple, 11 Ohio St. 277; Coles *v.* Kearney, 8 Ohio Dec. (Reprint) 733, 9 Cinc. L. Bul. 245.

Pennsylvania.— Drusadow *v.* Wilde, 63 Pa. St. 170; Coryell *v.* Dunton, 7 Pa. St. 530, 49 Am. Dec. 489; Lancaster *v.* Dolan, 1 Rawle 231, 18 Am. Dec. 625; Ingersoll's Estate, 3 Pa. Dist. 399; McCauley *v.* Heise, 20 Lanc. L. Rev. 313; Taylor *v.* Smiley, 14 Phila. 76; Wynkoop *v.* Wynkoop, 10 Wkly. Notes Cas. 65.

Rhode Island.— Cotting *v.* De Sartiges, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367.

South Carolina.— Poreher *v.* Daniel, 12

b. Reference to Subject-Matter or to Instrument Creating Power. An intention to execute a power may be sufficiently shown by a reference to the subject-matter of, or to the instrument creating the power, without any direct reference to the power itself.[71] Where the donee of a power of appointment or sale also has a

Rich. Eq. 349. *Compare* Myers *v.* McBride, 13 Rich. 178.

Tennessee.— Matthews *v.* Capshaw, 109 Tenn. 480, 72 S. W. 964, 97 Am. St. Rep. 854 [*following* Young *v.* Mutual L. Ins. Co., 101 Tenn. 311, 47 S. W. 428; Pate *v.* Pierce, 4 Coldw. 113]; Herrick *v.* Fowler, 108 Tenn. 410, 67 S. W. 861; Law Guarantee, etc., Co. *v.* Jones, 103 Tenn. 245, 58 S. W. 219.

Texas.— Hill *v.* Conrad, 91 Tex. 541, 43 S. W. 789; Weir *v.* Smith, 62 Tex. 1.

Virginia.— Walke *v.* Moore, 95 Va. 729, 30 S. E. 374; Hood *v.* Haden, 82 Va. 588.

Wisconsin.— Lardner *v.* Williams, 98 Wis. 514, 74 N. W. 346.

United States.— Lee *v.* Simpson, 134 U. S. 572, 10 S. Ct. 631, 33 L. ed. 1038 [*affirming* 39 Fed. 235]; Warner *v.* Connecticut Mut. L. Ins. Co., 109 U. S. 357, 3 S. Ct. 221, 27 L. ed. 962; Blake *v.* Hawkins, 98 U. S. 315, 25 L. ed. 139; Daniel *v.* Felt, 100 Fed. 727; Henderson *v.* Smith, 62 Fed. 708, 10 C. C. A. 602; Blagge *v.* Miles, 3 Fed. Cas. No. 1,479, 1 Story 426.

England.— *In re* Mayhew, [1901] 1 Ch. 677, 70 L. J. Ch. 428, 84 L. T. Rep. N. S. 761, 49 Wkly. Rep. 330; *In re* Sharland, [1899] 2 Ch. 536, 68 L. J. Ch. 747, 81 L. T. Rep. N. S. 384; *In re* Milner, [1899] 1 Ch. 563, 68 L. J. Ch. 255, 80 L. T. Rep. N. S. 151, 47 Wkly. Rep. 369; Smith *v.* Adkins, L. R. 14 Eq. 402, 41 L. J. Ch. 628, 27 L. T. Rep. N. S. 90, 20 Wkly. Rep. 717; Atty.-Gen. *v.* Wilkinson, L. R. 2 Eq. 817, 12 Jur. N. S. 593, 14 L. T. Rep. N. S. 725, 14 Wkly. Rep. 910; Probert *v.* Morgan, Ambl. 441, 26 Eng. Reprint 281, 1 Atk. 441, 26 Eng. Reprint 281; *Ex p.* Caswall, 1 Atk. 559, 26 Eng. Reprint 351; Molton *v.* Hutchinson, 1 Atk. 558, 26 Eng. Reprint 351; Blake *v.* Marnell, 2 Ball & B. 44, 12 Rev. Rep. 68 [*affirmed* in 4 Dow. 248, 3 Eng. Reprint 1153]; Dillon *v.* Dillon, 1 Ball & B. 92; Roscommon *v.* Fowke, 6 Bro. P. C. 158, 2 Eng. Reprint 998; Carver *v.* Richards, 1 De G. F. & J. 548, 6 Jur. N. S. 410, 29 L. J. Ch. 357, 2 L. T. Rep. N. S. 161, 8 Wkly. Rep. 349, 62 Eng. Ch. 425, 45 Eng. Reprint 474; Webb *v.* Honnor, 1 Jac. & W. 352, 21 Rev. Rep. 180, 37 Eng. Reprint 410; Elliott *v.* Elliott, 10 Jur. 730, 15 L. J. Ch. 393, 15 Sim. 321, 38 Eng. Ch. 321, 60 Eng. Reprint 642; *Re* Comber, 11 Jur. N. S. 968, 13 L. T. Rep. N. S. 459, 14 Wkly. Rep. 172; Bailey *v.* Lloyd, 7 L. J. Ch. O. S. 98, 5 Russ. 330, 29 Rev. Rep. 30, 5 Eng. Ch. 330, 38 Eng. Reprint 1051; Walker *v.* Mackie, 4 Russ. 76, 4 Eng. Ch. 76, 38 Eng. Reprint 733; Hunloke *v.* Gell, 1 Russ. & M. 515, 5 Eng. Ch. 515, 39 Eng. Reprint 198; Maddison *v.* Andrew, 1 Ves. 57, 37 Eng. Reprint 889; Bradly *v.* Westcott, 15 Ves. Jr. 445, 9 Rev. Rep. 207, 33 Eng. Reprint 361; Maundrell *v.* Maundrell, 10 Ves. Jr. 247, 7 Rev. Rep. 393, 32 Eng. Reprint 839; Bennett *v.* Aburrow, 8 Ves. Jr. 609, 7 Rev. Rep. 131, 32 Eng. Reprint 492. *Compare* Saunders *v.* Carden, L. R. 27 Ir. 43; Cooper *v.* Martin, 12 Jur. N. S. 887, 15 L. T. Rep. N. S. 268, 15 Wkly. Rep. 5.

Canada.—Hutchinson *v.* Baird, 1 N. Brunsw. Eq. 624; Deedes *v.* Graham, 16 Grant Ch. (U. C.) 167.

See 40 Cent. Dig. tit. "Powers," § 110 *et seq.*

No reference to limited power.— Where a testatrix having a power of appointing a life-estate and other powers, by her will, after giving her husband all her property, appointed all real and personal estate over which she might have a power of appointment to her husband, it was held that it was not necessary that there should be a reference to the power or to the property, if the intention to exercise the power was otherwise clear, and that the testatrix had clearly expressed her intention of exercising every power that she had in favor of her husband. *In re* Sharland, [1899] 2 Ch. 536, 68 L. J. Ch. 747, 81 L. T. Rep. N. S. 384.

71. *Alabama.*— Doe *v.* Ladd, 77 Ala. 223.

Georgia.— Middlebrooks *v.* Ferguson, 126 Ga. 232, 55 S. E. 34.

Illinois.— Goff *v.* Pensenhafer, 190 Ill. 200, 60 N. E. 110; Funk *v.* Eggleston, 92 Ill. 515, 34 Am. Rep. 136.

Indiana.— Rinkenberger *v.* Meyer, 155 Ind. 152, 56 N. E. 913; Bullerdick *v.* Wright, 148 Ind. 477, 47 N. E. 931.

Maine.— Hall *v.* Preble, 68 Me. 100.

Maryland.— Farlow *v.* Farlow, 83 Md. 118, 34 Atl. 837; Cooper *v.* Haines, 70 Md. 282, 17 Atl. 79; Balls *v.* Dampman, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545; Carroll *v.* Llewellin, 1 Harr. & M. 162.

Massachusetts.— Loring *v.* Wilson, 174 Mass. 132, 54 N. E. 502 (mistake as to nature of title immaterial); Newburyport Bank *v.* Stone, 13 Pick. 420. See also Cumston *v.* Bartlett, 149 Mass. 243, 21 N. E. 373.

Missouri.— Papin *v.* Piednoir, 205 Mo. 521, 104 S. W. 63; Owen *v.* Ellis, 64 Mo. 77; Turner *v.* Timberlake, 53 Mo. 371. *Compare* Hardy *v.* Clarkson, 87 Mo. 171, where the instrument of creation, the subject-matter, and the power itself were all referred to in the instrument.

New Jersey.— Munson *v.* Berdan, 35 N. J. Eq. 376.

New York.— Hutton *v.* Benkard, 92 N. Y. 295; White *v.* Hicks, 33 N. Y. 383 [*affirming* 43 Barb. 64]; Hogle *v.* Hogle, 49 Hun 313, 2 N. Y. Suppl. 172. See also Wright *v.* Syracuse, etc., R. Co., 92 Hun 32, 36 N. Y. Suppl. 901.

Ohio.— Bishop *v.* Remple, 11 Ohio St. 277.

Pennsylvania.— Robeno *v.* Marlatt, 6 Pa. Co. Ct. 251; Taylor's Appeal, 10 Wkly. Notes Cas. 48 [*affirming* 9 Wkly. Notes Cas. 30].

Tennessee.— Matthews *v.* Capshaw, 109

life-estate or other interest in the subject-matter of the power, the general rule is that a deed or other instrument which makes no reference to the power will pass only the individual interest of the donee, unless there is something to show an intention to execute the power; [72] but it is otherwise where an intention to execute

Tenn. 480, 72 S. W. 964, 97 Am. St. Rep. 854; Young *v.* Mutual L. Ins. Co., 101 Tenn. 311, 47 S. W. 428.

Virginia.— Hood *v.* Haden, 82 Va. 588.

United States.— Lee *v.* Simpson, 134 U. S. 572, 10 S. Ct. 631, 33 L. ed. 1038 [*affirming* 39 Fed. 235]; Blagge *v.* Miles, 3 Fed. Cas. No. 1,479 1 Story 426.

England.— Coxen *v.* Rowland, [1894] 1 Ch. 406, 63 L. J. Ch. 179, 70 L. T. Rep. N. S. 89, 8 Reports 525, 42 Wkly Rep. 568; Smith *v.* Adkins, L. R. 14 Eq. 402, 41 L. J. Ch. 628, 27 L. T. Rep. N. S. 90, 20 Wkly. Rep. 717; Saunders *v.* Carden, L. R. 27 Ir. 43 (inaccurate reference to power as to one fund); Probert *v.* Morgan, Ambl. 6. 27 Eng. Reprint 3, 1 Atk. 441, 26 Eng. Reprint 281; *Ex p.* Caswall, 1 Atk. 559, 26 Eng. Reprint 351; Molton *v.* Hutchinson, 1 Atk. 558, 26 Eng. Reprint 351; Dillon *v.* Dillon, 1 Ball & B. 92; *In re* Wilmot, 29 Beav. 644, 54 Eng. Reprint 777 (misrecital as to source of power); Pidgely *v.* Pidgely, 1 Call. 255, 8 Jur. 529, 28 Eng. Ch. 255, 63 Eng. Reprint 408; Carver *v.* Richards, 1 De G. F. & J. 548, 6 Jur. N. S. 410, 29 L. J. Ch. 357, 2 L. T. Rep. N. S. 161, 8 Wkly. Rep. 349, 62 Eng. Ch. 425, 45 Eng. Reprint 474; Hutchins *v.* Osborne, 3 De G. & J. 142, 60 Eng. Ch. 111, 44 Eng. Reprint 1223 [*affirmed* in 4 Jur. N. S. 30, 4 K. & J. 252, 27 L. J. Ch. 421, 6 Wkly. Rep. 426, 70 Eng. Reprint 105]; Harrey *v.* Stracey, 1 Drew. 73, 16 Jur. 771, 22 L. J. Ch. 23, 61 Eng. Reprint 379; Rooke *v.* Rooke, 2 Dr. & Sm. 38, 31 L. J. Ch. 636, 6 L. T. Rep. N. S. 527, 10 Wkly. Rep. 435, 62 Eng. Reprint 535; Innes *v.* Sayer, 16 Jur. 21, 21 L. J. Ch. 190, 3 Macn. & G. 606, 49 Eng. Ch. 468, 42 Eng. Reprint 393; Frankcombe *v.* Hayward, 9 Jur. 344; *Re* Comber, 11 Jur. N. S. 968, 13 L. T. Rep. N. S. 459, 14 Wkly. Rep. 172; Harrington *v.* Harrington, 12 L. J. Ch. 354, 13 Sim. 318, 36 Eng. Ch. 318, 60 Eng. Reprint 124; Hughes *v.* Turner, 4 L. J. Ch. 141, 3 Myl. & K. 666, 10 Eng. Ch. 666, 40 Eng. Reprint 254; Walker *v.* Mackie, 4 Russ. 76, 4 Eng. Ch. 76, 38 Eng. Reprint 733; Hunloke *v.* Gell, 1 Russ. & M. 515, 5 Eng. Ch. 515, 39 Eng. Reprint 198; Maples *v.* Brown, 2 Sim. 327, 2 Eng. Ch. 327, 57 Eng. Reprint 811; Bradly *v.* Westcott, 13 Ves. Jr. 445, 9 Rev. Rep. 207, 33 Eng. Reprint 361; Bennett *v.* Aburrow, 8 Ves. Jr. 609, 7 Rev. Rep. 131, 32 Eng. Reprint 492.

Canada.— Hutchinson *v.* Baird, 1 N. Brunsw. Eq. 624; Deedes *v.* Graham, 16 Grant Ch. (U. C.) 167.

See 40 Cent. Dig. tit. "Powers," § 112 *et seq.*

72. *Georgia.*— New England Mortg. Security Co. *v.* Buice, 98 Ga. 795, 26 S. E. 84 (conveyance by widow having both individual interest and power of sale); Holder *v.* American Inv., etc., Co., 94 Ga. 640, 21 S. E. 897 (executrix having power of sale and also individual interest). See also Terry *v.* Rodahan, 79 Ga. 278, 285, 5 S. E. 38, 11 Am. St. Rep. 420.

Illinois.— Coffing *v.* Taylor, 16 Ill. 457.

Indiana.— Axtel *v.* Chase, 77 Ind. 74. But *compare* the cases in this state cited in the note following.

Kentucky.— German Bank *v.* Best, 14 S. W. 954, 12 Ky. L. Rep. 623, deed by widow having life-estate and power of sale.

Mississippi.— Yates *v.* Clark, 56 Miss. 212.

New Hampshire.— See Burleigh *v.* Clough, 52 N. H. 267, 280, 13 Am. Rep. 23.

New York.— Weinstein *v.* Weber, 178 N. Y. 94, 70 N. E. 115 [*affirming* 78 N. Y. App. Div. 645, 81 N. Y. Suppl. 62]; Mutual L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177 [*reversing* 50 Hun 578, 3 N. Y. Suppl. 684].

North Carolina.— Exum *v.* Baker, 118 N. C. 545, 24 S. E. 351; Towles, *v.* Fisher, 77 N. C. 437.

Pennsylvania.— Wetherill *v.* Wetherill, 18 Pa. St. 265 (holding that where a person has a power over an estate, but not an interest in it to the extent of the power, no terms in an instrument, however comprehensive, without referring to the power or to the property which was to be the subject of its exercise, will amount to an execution of the power, unless they demonstrate that the power was in contemplation, and that there was an intention to execute it, the instrument having an operation otherwise than as an execution of the power); Jones *v.* Wood, 16 Pa. St. 25; Hay *v.* Mayer, 8 Watts 203, 34 Am. Dec. 453.

Rhode Island.— Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186 (holding that a wife's quitclaim deed of all her right, title, etc., in certain land, part of her deceased husband's estate, passed only her life-estate under his will, and was not an execution by her of a power given her by the will to sell for her support); Phillips *v.* Brown, 16 R. I. 279, 15 Atl. 90 (to substantially the same effect).

Wisconsin.— Lardner *v.* Williams, 98 Wis. 514, 74 N. W. 346 (mortgage by widow having life-estate as well as power to mortgage); Towle *v.* Ewing, 23 Wis. 336, 99 Am. Dec. 179 (quitclaim deed).

United States.— Shirras *v.* Caig, 7 Cranch 34, 3 L. ed. 260 (mortgage by one having a legal and equitable title to a moiety of the property and also a power from the person holding the residue of the legal, but not of the equitable estate, to sell and convey his right also); Daniel *v.* Felt, 100 Fed. 727 (conveyance by she having life-estate and power to sell the fee).

England.— Wildbore *v.* Gregory, L. R. 12 Eq. 482, 41 L. J. Ch. 129, 19 Wkly. Rep. 967 (holding that where, under a settlement,

the power appears,[73] and it has repeatedly been held that where a person having power to convey the fee simple estate, and also having a life-estate or other interest, executes a conveyance of the fee, the conveyance will be referred to the execution of the power,[74] because otherwise it cannot take full effect according to its

a husband had power to appoint part of a freehold estate among children, the residue of the estate belonging to him absolutely, and by his will gave "'the whole of my property real and personal, consisting of a farm' (describing the freehold estate above mentioned), 'and whatever may devolve to me by virtue of the marriage settlement,'" to a trustee upon trust for his children, the will did not operate as an exercise of the power of appointment); Roake *v.* Denn, 4 Bligh N. S. 3, 5 Eng. Reprint 1, 1 Dow. & Cl. 437, 6 Eng. Reprint 589 (holding that where a tenant in fee of one undivided moiety, who was also a tenant for life of the other undivided moiety, with power of appointment in fee, devised all his freehold estates to a certain person on condition that, out of the rents, he should keep the estates in repair, there was not a valid execution of the power); Noel *v.* Noel, 4 Drew. 624, 7 Wkly. Rep. 572, 62 Eng. Reprint 239 (holding that where a person, being entitled to personal property derived through the will of his father, settled part of it with a power of appointment among his children, leaving a fractional part in himself, and made a will giving all the personal estate that he derived from the will of his father to his daughters, exclusive of his other children, the fractional part reserved to himself satisfied the language of the gift, and that it was not an execution of his power).

See 40 Cent. Dig. tit. "Powers," § 112 *et seq.*

"The general rule of construction, both as to deeds and wills, is that if there be an interest and power existing together in the same person over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest and not to the power. If there be any legal interest on which the deed can attach, it will not execute a power. If an act will work two ways, the one by an interest, and the other by a power, and the act be indifferent, the law will attribute it to the interest and not to the authority." New England Mortg. Security Co. *v.* Buice, 98 Ga. 795, 800, 26 S. E. 84 [*citing* 4 Kent Comm. 234, 235].

A statute (Wis. Rev. St. § 2149), providing that instruments, executed by the grantee of a power, conveying an estate or creating a charge, which is only authorized by the power, shall be deemed a valid execution of the power, although it is not referred to in the instrument, does not apply where such grantee possesses an interest as well as a power. Lardner *v.* Williams, 98 Wis. 514, 74 N. W. 346. See also Mutual L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177 [*reversing* 50 Hun 578, 3 N. Y. Suppl. 684].

73. Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44; Gulf Red Cedar Lumber Co. *v.* O'Neal, 131 Ala. 117, 30 So. 466, 90 Am. St. Rep. 22; Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303; McCreary *v.* Bomberger, 151 Pa. St. 323, 24 Atl. 1066, 31 Am. St. Rep. 760.

74. *Alabama.*— Young *v.* Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. Rep. 44. And see Gulf Red Cedar Lumber Co. *v.* O'Neal, 131 Ala. 117, 133, 30 So 466, 90 Am. St. Rep. 22; Gindrat *v.* Montgomery Gas-Light Co., 82 Ala. 596, 604, 2 So. 327, 60 Am. Rep. 769.

Arkansas.— Lanigan *v.* Sweany, 53 Ark. 185, 13 S. W. 740.

Illinois.—See Goff *v.* Pensenhafer, 190 Ill. 200, 60 N. E. 110; Funk *v.* Eggleston, 92 Ill. 515, 34 Am. Rep. 136.

Indiana.— Rinkenberger *v.* Meyer, 155 Ind. 152, 56 N. E. 913; McMillan *v.* Deering, 139 Ind. 70, 38 N. E. 398; Silvers *v.* Canary, 109 Ind. 267, 9 N. E. 904; South *v.* South, 91 Ind. 221, 46 Am. Rep. 591; Clark *v.* Middlesworth, 82 Ind. 240.

Kentucky.— Thomas *v.* Wright, 66 S. W. 993, 23 Ky. L. Rep. 2183.

Massachusetts.— See Ladd *v.* Chase, 155 Mass. 417, 29 N. E. 637.

Mississippi.— Baird *v.* Boucher, 60 Miss. 326, deed of fee by life-tenant under will having thereunder power to convey the fee. *Compare* Yates *v.* Clark, 56 Miss. 212.

Missouri.— Worden *v.* Perry, 197 Mo. 569, 95 S. W. 880; Grace *v.* Perry, 197 Mo. 550, 95 S. W. 875; Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451; Campbell *v.* Johnson, 65 Mo. 439 [*overruling* expressly Owen *v.* Switzer, 51 Mo. 322, and impliedly Pease *v.* Pilot Knob Iron Co., 49 Mo. 124]. See also Owen *v.* Ellis, 64 Mo. 77.

Nebraska.— Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 363.

Ohio.— Bishop *v.* Remple, 11 Ohio St. 277.

Pennsylvania.— McCreary *v.* Bomberger, 151 Pa. St. 323, 24 Atl. 1066, 31 Am. St. Rep. 760; Robeno *v.* Marlatt, 6 Pa. Co. Ct. 251 [*reversed* on other grounds in 136 Pa. St. 35, 20 Atl. 512].

South Carolina.— Moody *v.* Tedder, 16 S. C. 557, conveyance of all her "interest and life-estate" by widow having life-estate and also absolute power of disposition.

Tennessee.— Matthews *v.* Capshaw, 109 Tenn. 480, 72 S. W. 964, 97 Am. St. Rep. 854; Guarantee, etc., Co. *v.* Jones, 103 Tenn. 245, 58 S. W. 219; Young *v.* Mutual L. Ins. Co., 101 Tenn. 311, 47 S. W. 428.

Texas.— Hanna *v.* Ladewig, 73 Tex. 37, 11 S. W. 133.

Virginia.— Walke *v.* Moore, 95 Va. 729, 30 S. E. 374.

Wisconsin.—Auer *v.* Brown, 121 Wis. 115, 98 N. W. 966.

United States.— Smith *v.* McIntyre, 95

terms.[75] Where the instrument purports to pass the interest, it will of course be so construed, and not as an exercise of the power.[76]

3. Wills — a. At Common Law. In order that a power of appointment may be well executed by a will, it must appear in some way, in the absence of a statute, that there was an intention to execute it.[77] It was well settled at common law, and is held in most of the United States in the absence of a statute,[78] that a power of appointment or disposition is not executed by a general devise or bequest of all the testator's estate, real or personal, or by a general residuary devise or bequest, containing no reference to the power or to the subject-matter thereof,[79] in the

Fed. 585, 37 C. C. A. 177; Henderson *v.* Smith, 62 Fed. 708, 10 C. C. A. 602; Blagge *v.* Miles, 3 Fed. Cas. No. 1479, 1 Story 426.

See 40 Cent. Dig. tit. "Powers," § 110 *et seq.*

Consideration equal to value of fee.—When the donee of a power to sell land possesses also an interest in the subject of the power, a general warranty deed executed by him for a consideration equal to the value of the fee, and professing and evidencing an intention to convey the fee, is a valid execution of the power without actual reference to its source. It is sufficient if the power exists. Rinkenberger *v.* Meyer, 155 Ind. 152, 56 N. E. 913; McMillan *v.* Deering, 139 Ind. 70, 38 N. E. 398; Tower *v.* Hartford, 115 Ind. 186, 17 N. E. 281; Silvers *v.* Canary, 109 Ind. 267, 9 N. E. 904; Downie *v.* Buennagel, 94 Ind. 228; South *v.* South, 91 Ind. 221, 46 Am. Rep. 591; Clark *v.* Middlesworth, 82 Ind. 240. See also Campbell *v.* Johnson, 65 Mo. 439.

75. Baird *v.* Boucher, 60 Miss. 326; and other cases cited in the preceding note.

Instrument inoperative except as executing power see *infra*, VI, F, 4.

76. Payne *v.* Johnson, 95 Ky. 175, 24 S. W. 238, 609, 15 Ky. L. Rep. 522; Ridgely *v.* Cross, 83 Md. 161, 34 Atl. 469; Davis *v.* Kirksey, 14 Tex. Civ. App. 380, 37 S. W. 994; Maundrell *v.* Maundrell, 10 Ves. Jr. 247, 7 Rev. Rep. 393, 32 Eng. Reprint 839. See also Stewart *v.* Keating, 15 Misc. (N. Y.) 44, 36 N. Y. Suppl. 913.

77. *Connecticut.*— Johnson *v.* Stanton, 30 Conn. 297.

Delaware.— Doe *v.* Vincent, 1 Houst. 416.

Maryland.— Patterson *v.* Wilson, 64 Md. 193, 1 Atl. 68; Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52.

Mississippi.— Andrews *v.* Brumfield, 32 Miss. 107.

New York.—Stewart *v.* Keating, 15 Misc. 44, 36 N. Y. Suppl. 913.

North Carolina.— Holt *v.* Hogan, 58 N. C. 82.

Pennsylvania.— *In re* Philadelphia Trust Co., 13 Phila. 44.

Rhode Island.— Mason *v.* Wheeler, 19 R. I. 21, 31 Atl. 426, 61 Am. St. Rep. 734.

South Carolina.— Bilderback *v.* Boyce, 14 S. C. 528.

United States.— Blagge *v.* Miles, 3 Fed. Cas. No. 1,479, 1 Story 426.

England.— *In re* Cotton, 40 Ch. D. 41, 58 L. J. Ch. 174, 37 Wkly. Rep. 232; *In re* Thurston, 32 Ch. D. 508, 55 L. J. Ch. 564, 54 L. T. Rep. N. S. 833, 34 Wkly. Rep. 528; *In re* Ruding, L. R. 14 Eq. 266, 41 L. J. Ch. 665, 20 Wkly. Rep. 936; Hope *v.* Hope, 5 Giffard 13, 66 Eng. Reprint 902; Lendrick *v.* Russell, 10 Ir. Eq. 269; Nannock *v.* Horton, 7 Ves. Jr. 391, 32 Eng. Reprint 158.

See 40 Cent. Dig. tit. "Powers," § 110 *et seq.* And see *supra*, VI, F, 1.

78. By statute see *infra*, VI, F, 3, b.

79. *Connecticut.*— Hollister *v.* Shaw, 46 Conn. 248 [*citing* Johnson *v.* Stanton, 30 Conn. 297].

Delaware.— Lane *v.* Lane, 4 Pennew. 368, 55 Atl. 184, 103 Am. St. Rep. 122, 64 L. R. A. 849.

Illinois.— Harvard College *v.* Balch, 171 Ill. 275, 49 N. E. 543.

Maryland.— Thom *v.* Thom, 101 Md. 444, 61 Atl. 193; Mines *v.* Gambrill, 71 Md. 30, 18 Atl. 43; Patterson *v.* Wilson, 64 Md. 193, 1 Atl. 68; Maryland Mut. Benev. Soc. I. O. R. M. *v.* Clendinen, 44 Md. 429, 22 Am. Rep. 52 [*following* Mory *v.* Michael, 18 Md. 227]. And see Balls *v.* Dampman, 69 Md. 393, 16 Atl. 16, 1 L. R. A. 545.

New Jersey.— Meeker *v.* Breintnall, 38 N. J. Eq. 345. And see Wooster *v.* Cooper, 59 N. J. Eq. 204, 45 Atl. 381.

Pennsylvania.— *In re* Philadelphia Trust Co., 13 Phila. 44.

Rhode Island.— Mason *v.* Wheeler, 19 R. I. 21, 31 Atl. 426, 61 Am. St. Rep. 734; Cotting *v.* De Sartiges, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367.

South Carolina.— Bilderbach *v.* Boyce, 14 S. C. 528.

England.— *In re* Huddleston, [1894] 3 Ch. 595, 64 L. J. Ch. 157, 8 Reports 462, 43 Wkly. Rep. 139; *In re* Byron, [1891] 3 Ch. 474, 60 L. J. Ch. 807, 65 L. T. Rep. N. S. 218, 40 Wkly. Rep. 11; *In re* Herdman, L. R. 31 Ir. 87 (will of married woman); Molton *v.* Hutchinson, 1 Atk. 558, 26 Eng. Reprint 351; Evans *v.* Evans, 23 Beav. 1 3 Jur. N. S. 7, 26 L. J. Ch. 193, 5 Wkly. Rep. 169, 53 Eng. Reprint 1 (will of married woman); Andrews *v.* Emmot, 2 Bro. Ch. 297, 29 Eng. Reprint 162; Davies *v.* Thorns, 3 De G. & Sm. 347, 13 Jur. 383, 18 L. J. Ch. 212, 64 Eng. Reprint 510; Webb *v.* Honnor, 1 Jac. & W. 352, 21 Rev. Rep. 180, 37 Eng. Reprint 410; Mattingley's Trusts, 2 Johns. & H. 426, 70 Eng. Reprint 1125; *Re* Comber, 11 Jur. N. S. 968, 13 L. T. Rep. N. S. 459, 14 Wkly. Rep. 172; *In re* Bidwell, 9 Jur. N. S. 37, 32 L. J. Ch. 71, 8 L. T. Rep. N. S. 107, 1 New

absence of a plainly manifested intention to the contrary.[80] In some states, however, this rule has been repudiated and a general or residuary devise or bequest will execute a power of appointment, unless a contrary intent appears.[81] So too it has been held in England that the amount or circumstances of the testator's property cannot, except where the gift is specific, be inquired into to show an intention to execute a power of appointment;[82] but this rule has been repudiated in some of the United States;[83] and it has been held that a will bequeathing

Rep. 176, 11 Wkly. Rep. 161; Hughes *v.* Turner, 4 L. J. Ch. 141, 3 Myl. & K. 666, 10 Eng. Ch. 666, 40 Eng. Reprint 254; Lovell *v.* Knight, 1 L. J. Ch. 47, 3 Sim. 275, 6 Eng. Ch. 275, 57 Eng. Reprint 1002 (will of married woman); Napier *v.* Napier, 5 L. J. Ch. O. S. 65, 1 Sim. 28, 27 Rev. Rep. 144, 2 Eng. Ch. 28, 57 Eng. Reprint 489; Harvey *v.* Harvey, 32 L. T. Rep. N. S. 141, 23 Wkly. Rep. 478; Hoste *v.* Blackman, 6 Madd. 190, 56 Eng. Reprint 1064 (devise for sale); Lempriere *v.* Valpy, 5 Sim. 108, 9 Eng. Ch. 108, 58 Eng. Reprint 278 (will of married woman); Jones *v.* Curry, 1 Swanst. 66, 36 Eng. Reprint 300, 1 Wils. Ch. 24, 37 Eng. Reprint 11; Lewis *v.* Lewellyn, Turn. & R. 104, 23 Rev. Rep. 201, 12 Eng. Ch. 104, 37 Eng. Reprint 1034; Bradly *v.* Westcott, 13 Ves. Jr. 445, 9 Rev. Rep. 207, 33 Eng. Reprint 361; Bennett *v.* Aburrow, 8 Ves. Jr. 609, 7 Rev. Rep. 131, 32 Eng. Reprint 492; Roach *v.* Haynes, 8 Ves. Jr. 584, 32 Eng. Reprint 482; Nannock *v.* Horton, 7 Ves. Jr. 391, 32 Eng. Reprint 158; MacLeroth *v.* Bacon, 5 Ves. Jr. 159, 5 Rev. Rep. 11, 31 Eng. Reprint 523; Croft *v.* Slee, 4 Ves. Jr. 60, 31 Eng. Reprint 32; Langham *v.* Nenny, 3 Ves. Jr. 467, 30 Eng. Reprint 1109. And see Lowes *v.* Hackward, 18 Ves. Jr. 168, 34 Eng. Reprint 281.

See 40 Cent. Dig. tit. "Powers," §§ 116, 117, 120.

80. *Illinois.*— Funk *v.* Eggleston, 92 Ill. 515, 34 Am. Rep. 136.

Maryland.— Balls *v.* Dampman, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545.

New Jersey.— Munson *v.* Berdan, 35 N. J. Eq. 376.

New York.— Hutton *v.* Benkard, 92 N. Y. 295; White *v.* Hicks, 33 N. Y. 383 [*affirming* 43 Barb. 64].

Pennsylvania.— Keefer *v.* Schwartz, 47 Pa. St. 503; Clermontel's Estate, 12 Phila. 139; Moss *v.* Pennsylvania L. Ins., etc., Co., 4 Wkly. Notes Cas. 358.

Texas.— Weir *v.* Smith, 62 Tex. 1.

United States.— Blagge *v.* Miles, 3 Fed. Cas. No. 1,479, 1 Story 426.

England.— *In re* Mayhew, [1901] 1 Ch. 677, 70 L. J. Ch. 428, 84 L. T. Rep. N. S. 761, 49 Wkly. Rep. 330; *In re* Milner, [1899] 1 Ch. 563, 68 L. J. Ch. 255, 80 L. T. Rep. N. S. 151, 47 Wkly. Rep. 369; Atty.-Gen. *v.* Wilkinson, L. R. 2 Eq. 816, 12 Jur. N. S. 593, 14 L. T. Rep. N. S. 725, 14 Wkly. Rep. 910; *Re* Comber, 11 Jur. N. S. 968, 13 L. T. Rep. N. S. 459, 14 Wkly. Rep. 172; Walker *v.* Mackie, 4 Russ. 76, 4 Eng. Ch. 76, 38 Eng. Reprint 733. See also Scrope's Case, 10 Coke 143*b*, 77 Eng. Reprint 1143.

See 40 Cent. Dig. tit. "Powers," § 110 *et seq.* And see *supra*, VI, F, 1, 2, a, b.

Use of the word "appoint" in addition to the words "devise and bequeath" may be sufficient to show an intention to execute a power. *In re* Mayhew, [1901] 1 Ch. 677, 70 L. J. Ch. 428, 84 L. T. Rep. N. S. 761, 49 Wkly. Rep. 330; *In re* Milner, [1899] 1 Ch. 563, 68 L. J. Ch. 255, 80 L. T. Rep. N. S. 151, 47 Wkly. Rep. 369. *Compare*, however, *In re* Weston, [1906] 2 Ch. 620, 76 L. J. Ch. 51, 95 L. T. Rep. N. S. 581.

Exercise of part of power by reference.— Where a testator, by reference to a power, executes it in part by general legacies, it may be executed as to the residue by a general residuary bequest not specifically referring to the power. Elliott *v.* Elliott, 10 Jur. 730, 15 L. J. Ch. 393, 15 Sim. 321, 38 Eng. Ch. 321, 60 Eng. Reprint 642; *Re* Comber, 11 Jur. N. S. 968, 13 L. T. Rep. N. S. 459, 14 Wkly. Rep. 172. See also Harvey *v.* Stracey, 1 Drew. 73, 16 Jur. 771, 22 L. J. Ch. 23, 61 Eng. Reprint 379. But *compare* Hughes *v.* Turner, 4 L. J. Ch. 141, 3 Myl. & K. 666, 10 Eng. Ch. 666, 40 Eng. Reprint 254.

81. Tudor *v.* Vail, 195 Mass. 18, 80 N. E. 590; Stone *v.* Forbes, 189 Mass. 163, 75 N. E. 141; Hassam *v.* Hazen, 156 Mass. 93, 30 N. E. 469; Cumston *v.* Bartlett, 149 Mass. 243, 21 N. E. 373; Bangs *v.* Smith, 98 Mass. 270; Willard *v.* Ware, 10 Allen (Mass.) 263; Armory *v.* Meredith, 7 Allen (Mass.) 397; Emery *v.* Haven, 67 N. H. 503, 35 Atl. 940 [*following* Kimball *v.* New Hampshire Bible Soc., 65 N. H. 139, 23 Atl. 83–85, and *disapproving* Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23; Bell *v.* Twilight, 22 N. H. 500]; Johnston *v.* Knight, 117 N. C. 122, 23 S. E. 92.

82. *In re* Huddleston, [1894] 3 Ch. 595, 64 L. J. Ch. 157, 8 Reports 462, 43 Wkly. Rep. 139; Andrews *v.* Emmot, 2 Bro. Ch. 297, 29 Eng. Reprint 162; Davies *v.* Thorns, 2 De G. & Sm. 347, 13 Jur. 383, 18 L. J. Ch. 212, 64 Eng. Reprint 510; Webb *v.* Honnor, 1 Jac. & W. 352, 21 Rev. Rep. 180, 37 Eng. Reprint 410; Jones *v.* Tucker, 2 Meriv. 533, 35 Eng. Reprint 1044; Nannock *v.* Horton, 7 Ves. Jr. 391, 32 Eng. Reprint 158. See Standen *v.* Standen, 2 Ves. Jr. 589, 30 Eng. Reprint 791.

Specific gift.— Where a gift is *prima facie* specific, evidence of the state of the property at the date of the will is admissible. Sayer *v.* Sayer, 7 Hare 377, 13 Jur. 402, 18 L. J. Ch. 274, 27 Eng. Ch. 377, 68 Eng. Reprint 156 [*affirmed* in 16 Jur. 21, 21 L. J. Ch. 190, 3 Macn. & G. 606, 49 Eng. Ch. 468, 42 Eng. Reprint 393]. See also *In re* Huddleston, [1894] 3 Ch. 595, 64 L. J. Ch. 157, 8 Reports 462, 43 Wkly. Rep. 139.

83. Funk *v.* Eggleston, 92 Ill. 515, 34 Am.

exactly the sum the testator had a right to dispose of under a power is a good execution of the power, although the will contains no direct reference to or express recital of the power.[84] Of course a devise or bequest, whether general or specific, or even a general residuary devise or bequest, is sufficient to execute a power of appointment, where there is a clear reference in the will either to the power itself or to the subject-matter thereof.[85]

b. Under Statutes. Both in England and in some of the United States statutes have been enacted which provide in substance that a general devise or bequest shall be construed to include any estate over which the testator had power to appoint as he might think proper, and shall operate as an execution of such power.[86]

Rep. 136; Andrews *v.* Brumfield, 32 Miss. 107; Hutton *v.* Benkard, 92 N. Y. 295; White *v.* Hicks, 33 N. Y. 383 [*affirming* 43 Barb. 64]; Hogle *v.* Hogle, 49 Hun (N. Y.) 313, 2 N. Y. Suppl. 172; *In re* Watson, 12 N. Y. Suppl. 115.

84. Munson *v.* Berdan, 35 N. J. Eq. 376. In England there was a decision to the same effect in Lownds *v.* Lownds, 1 Y. & J. 445. To the contrary, however, see Davies *v.* Thorns, 3 De G. & Sm. 347, 13 Jur. 383, 18 L. J. Ch. 212, 64 Eng. Reprint 510; Jones *v.* Tucker, 2 Meriv. 533, 35 Eng. Reprint 1044.

85. *Illinois.*— Funk *v.* Eggleston, 92 Ill. 515, 34 Am. Rep. 136.

Maryland.— Cooper *v.* Haines, 70 Md. 282, 17 Atl. 79.

Massachusetts.— Newburyport Bank *v.* Stone, 13 Pick. 420.

Missouri.— Papin *v.* Piednoir, 205 Mo. 521, 104 S. W. 63; Bredell *v.* Collier, 40 Mo. 287.

Virginia.— Hood *v.* Haden, 82 Va. 588.

United States.— Lee *v.* Simpson, 134 U. S. 572, 10 S. Ct. 631, 33 L. ed. 1038 [*affirming* 39 Fed. 235]; Blake *v.* Hawkins, 98 U. S. 315, 25 L. ed. 139.

England.— Coxen *v.* Rowland, [1894] 1 Ch. 406, 63 L. J. Ch. 179, 70 L. T. Rep. N. S. 89, 8 Reports 525, 42 Wkly. Rep. 568; *In re* Hunt's Trusts, 31 Ch. D. 308, 55 L. J. Ch. 280, 54 L. T. Rep. N. S. 69, 34 Wkly. Rep. 247; *In re* Swinburne, 27 Ch. D. 696, 54 L. J. Ch. 229, 33 Wkly. Rep. 394; Atty.-Gen. *v.* Wilkinson, L. R. 2 Eq. 816, 12 Jur. N. S. 593, 14 L. T. Rep. N. S. 725, 14 Wkly. Rep. 910; Peirce *v.* McNeale, [1894] 1 Ir. 118; Probert *v.* Morgan, Ambl. 6, 27 Eng. Reprint 3, 1 Atk. 441, 26 Eng. Reprint 281; *Ex p.* Caswall, 1 Atk. 559, 26 Eng. Reprint 351; Molton *v.* Hutchinson, 1 Atk. 558, 26 Eng. Reprint 351; Dillon *v.* Dillon, 1 Ball & B. 92; Pidgely *v.* Pidgely, 1 Coll. 255, 8 Jur. 529, 28 Eng. Ch. 255, 63 Eng. Reprint 408; Harvey *v.* Stracey, 1 Drew. 73, 16 Jur. 771, 22 L. J. Ch. 23, 61 Eng. Reprint 379; Clifford *v.* Clifford, 9 Hare 675, 41 Eng. Ch. 675, 68 Eng. Reprint 684; Frankcombe *v.* Hayward, 9 Jur. 344; Lowe *v.* Pennington, 10 L. J. Ch. 83; Walker *v.* Mackie, 4 Russ. 76, 4 Eng. Ch. 76, 38 Eng. Reprint 733; Hunloke *v.* Gell, 1 Russ. & M. 515, 5 Eng. Ch. 515, 39 Eng. Reprint 198; Maples *v.* Brown, 2 Sim. 327, 2 Eng. Ch. 327, 57 Eng. Reprint 811; Lewis *v.* Lewellyn, Turn. & R. 104, 23 Rev. Rep. 201, 12 Eng. Ch. 104, 37 Eng. Reprint 1034; Bennett *v.* Aburrow, 8 Ves. Jr. 609, 7 Rev. Rep. 131, 32 Eng. Reprint 492. *Compare* Jones *v.* Jones, 10 Jur. 960.

Canada.—Hutchinson *v.* Baird, 1 N. Brunsw. Eq. 624; Deedes *v.* Graham, 16 Grant Ch. (U. C.) 167.

"All my money."— Where a testator possessing a power, by a will stated by him to be made in pursuance of the power, bequeathed in these terms: "I give all of my money," it was held that this amounted to a sufficient execution of the power. Harvey *v.* Stracey, 1 Drew. 73, 16 Jur. 771, 22 L. J. Ch. 23, 61 Eng. Reprint 379.

Recital that donee thought he had appointed.— Burke *v.* Lambert, 15 Wkly. Rep. 913.

Power and interest.— Where it is manifest on the construction of a will that the testator intended to dispose thereby of property of his own, and also of property over which he had a special power of appointment, and under the disposition made by the will the property subject to the power is given to a member of the class amongst whom it can be appointed, the property passes under the power, it being immaterial whether the testator supposed that the property passed by the power or by virtue of his own interest therein. Byrne *v.* Cullinan, [1904] 1 Ir. 42.

Inaccurate reference to power as to one fund only.— Saunders *v.* Carden, L. R. 27 Ir. 43.

86. *Kentucky.*— St. (1903) § 4845. See Payne *v.* Johnson, 95 Ky. 175, 24 S. W. 238, 609, 15 Ky. L. Rep. 522 (devise by a testator of "what little property I have after the payment of my debts" passes property which has been devised to him for life and after his death to such uses as he might appoint by will); Herbert *v.* Herbert, 85 Ky. 134, 2 S. W. 682, 8 Ky. L. Rep. 752.

Maryland.— Laws (1888), c. 249; 2 Pub. Gen. Laws, art. 93, § 323. The statute does not apply of course where the will was executed and the testator died before it took effect. Mines *v.* Gambrill, 71 Md. 30, 18 Atl. 43; Cooper *v.* Haines, 70 Md. 282, 17 Atl. 79.

New York.— Laws (1896), c. 547, § 156 (formerly 1 Rev. St. p. 737, § 126). This provision, although in terms applicable only to devises of real estate, has been construed as also applying to general bequests of personal property. See Lockwood *v.* Mildsberger, 159 N. Y. 181, 53 N. E. 803 [*reversing* 5 N. Y. App. Div. 459, 38 N. Y. Suppl. 1107]; New York L. Ins., etc., Co. *v.* Livingston, 133 N. Y. 125, 30 N. E. 724 [*affirming* 14 N. Y. Suppl. 902]; Mott *v.* Ackerman, 92 N. Y. 539; Hutton *v.* Benkard, 92 N. Y. 295; Kibler *v.*

The provisions of such statutes both in the states in which they were enacted

Miller, 57 Hun 14, 10 N. Y. Suppl. 375 [*affirmed* in 141 N. Y. 571, 36 N. E. 345]; Thomas *v.* Snyder, 43 Hun 14; *In re* Piffard, 42 Hun 34 [*affirmed* in 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193]; Bolton *v.* De Peyster, 25 Barb. 539; U. S. Trust Co. *v.* Chauncey, 32 Misc. 358, 66 N. Y. Suppl. 563; Bigelow *v.* Tilden, 18 Misc. 689, 43 N. Y. Suppl. 858; Van Wert *v.* Benedict, 1 Bradf. Surr. 114. The statute does not change the general rule that where the testator had both a power and an interest, a general devise is presumed to refer to the interest. Mutual L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177 [*reversing* 50 Hun 578, 3 N. Y. Suppl. 684]; Weinstein *v.* Weber, 58 N. Y. App. Div. 112, 68 N. Y. Suppl. 570.

Pennsylvania.—Act June 4, 1879 (Pamphl. L. 88, § 3). See *In re* Howell, 185 Pa. St. 350, 39 Atl. 966 (holding that under this statute, where the donee of a power of appointment by will died leaving a widow but no issue, having devised and bequeathed all his estate, "both real and personal, according to the intestate laws," the estate covered by the power of appointment, as well as his individual estate, passed to the widow and collateral kindred); Dillon *v.* Faloon, 158 Pa. St. 468, 27 Atl. 1082; Aubert's Appeal, 109 Pa. St. 447, 1 Atl. 336; Stokes' Estate, 15 Pa. Dist. 104; Dunn's Estate, 19 Lanc. L. Rev. 225. The statute is not confined to wills executed after the act took effect, but applies where the testator died after, although the will was executed before, it took effect. Aubert's Appeal, *supra*.

Virginia.—Code (1904), § 2526. See Machir *v.* Funk, 90 Va. 284, 18 S. E. 197.

Wisconsin.—1 St. (1898) § 2151.

England.—1 Vict. c. 26, § 27. See *In re* Wilkinson, L. R. 4 Ch. 587, 17 Wkly. Rep. 839; *In re* Jacob, [1907] 1 Ch. 445, 76 L. J. Ch. 217, 96 L. T. Rep. N. S. 362; *In re* Byron, [1891] 3 Ch. 474, 60 L. J. Ch. 807, 65 L. T. Rep. N. S. 218, 40 Wkly. Rep. 11; *In re* Brace, [1891] 2 Ch. 671, 60 L. J. Ch. 505, 64 L. T. Rep. N. S. 525, 39 Wkly. Rep. 508; Charles *v.* Burke, 43 Ch. D. 223 note, 60 L. T. Rep. N. S. 380; *In re* Jones, 34 Ch. D. 65, 56 L. J. Ch. 58, 55 L. T. Rep. N. S. 597, 35 Wkly. Rep. 74; Chandler *v.* Pocock, 15 Ch. D. 491, 49 L. J. Ch. 442, 45 L. T. Rep. N. S. 112, 28 Wkly. Rep. 806; *In re* Clarke, 14 Ch. D. 422, 49 L. J. Ch. 586, 43 L. T. Rep. N. S. 40, 28 Wkly. Rep. 753; Wilday *v.* Barnett, L. R. 6 Eq. 193, 16 Wkly. Rep. 961; Laing *v.* Cowan, 24 Beav. 112, 53 Eng. Reprint 300; Gale *v.* Gale, 21 Beav. 349, 4 Wkly. Rep. 277, 52 Eng. Reprint 894; Clifford *v.* Clifford, 9 Hare 675, 41 Eng. Ch. 675, 68 Eng. Reprint 684; *In re* Keown, Ir. R. 1 Eq. 372; Scriven *v.* Sandom, 2 Johns. & H. 743, 70 Eng. Reprint 1258; Bristow *v.* Skirrow, 5 Jur. N. S. 1379, 1 L. T. Rep. N. S. 180; Hutchins *v.* Osborne, 4 Jur. N. S. 830, 4 Kay & J. 252, 27 L. J. Ch. 421, 6 Wkly. Rep. 426, 70 Eng. Reprint 105 [*affirmed* in 3 De G. & J. 142, 60 Eng. Ch. 111, 44 Eng. Reprint 1223]; Hawthorn *v.* Shedden, 2 Jur. N. S. 749, 25 L. J. Ch. 833, 3 Smale & G. 293, 65 Eng. Reprint 665; Walker *v.* Banks, 1 Jur. N. S. 606; Turner *v.* Turner, 21 L. J. Ch. 843.

The 27th section of the English Wills Act presupposes the existence of some real estate, or some personal estate, as the case may be, which is subject to a general power of appointment, and which, although not the testator's property, is at his uncontrolled disposition. The section does not extend to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to this conversion *pro tanto* of the real estate of another into a money charge, which if and when charged will be personal estate which the testator will have power to appoint as he may think fit, but which has no existence unless and until the testator creates it. *In re* Wallinger, [1898] 1 Ir. 139. See also *In re* Salvin, [1906] 2 Ch. 459, 75 L. J. Ch. 825, 95 L. T. Rep. N. S. 289, where the above case was followed and it was held that where a testator had under a settlement power by deed or will to charge real estate, of which he was only tenant for life, with payment to himself or any other person or persons of any sum or sums not exceeding in the whole £6,000, with interest, and to appoint the premises charged to any person for any term of years upon trusts for raising the sums charged; and by his will he gave all his real property to one person and all his personal property (except some pecuniary legacies) to other persons, the gift of personalty did not operate as a charge in favor of the donees, on the real estate which he had power to charge.

Inapplicable to limited or special powers.—*In re* Hayes, [1901] 2 Ch. 529, 70 L. J. Ch. 770, 85 L. T. Rep. N. S. 85, 17 T. L. R. 740, 49 Wkly. Rep. 659 [*affirming* [1900] 2 Ch. 332, 69 L. J. Ch. 691, 83 L. T. Rep. N. S. 152, 16 T. L. R. 448, 49 Wkly. Rep. 21]; *In re* Byron, [1891] 3 Ch. 474, 60 L. J. Ch. 807, 65 L. T. Rep. N. S. 218, 40 Wkly. Rep. 11; Cloves *v.* Awdry, 12 Beav. 604, 50 Eng. Reprint 1191; *Re* Caplin, 2 Dr. & Sm. 527, 11 Jur. N. S. 383, 34 L. J. Ch. 578, 12 L. T. Rep. N. S. 526, 6 New Rep. 17, 13 Wkly. Rep. 646, 62 Eng. Reprint 720; Russell *v.* Russell, 12 Ir. Ch. 377; Moss *v.* Harter, 18 Jur. 973, 2 Smale & G. 458, 2 Wkly. Rep. 540, 65 Eng. Reprint 480.

Inchoate powers.—The English Wills Act (1 Vict. c. 26, § 27) applies only to powers actually created at the death of the testator, and does not enable a testator to execute an inchoate power of which he was the intended donee under the will of a person who survives him. Jones *v.* Southall, 32 Beav. 31, 9 Jur. N. S. 93, 32 L. J. Ch. 130, 18 L. T. Rep. N. S. 103, 1 New Rep. 152, 11 Wkly. Rep. 247, 55 Eng. Reprint 12.

Residuary legatee — Lapsed share.—A general residuary clause will operate as an execution of a power where a prior express ap-

and in England have been frequently construed and given effect, except of course where a contrary intention clearly appeared in the will.[87]

c. Will Executed Prior to Creation of Power. While there is some conflict of authority, the better view seems to be that a will executed prior to the creation of a power cannot be held an execution thereof,[88] in the absence of statutory

pointment has lapsed. *In re* Spooner, 21 L. J. Ch. 151, 2 Sim. N. S. 129, 42 Eng. Ch. 129, 61 Eng. Reprint 289. See also *In re* Hunt, 31 Ch. D. 308, 55 L. J. Ch. 280, 54 L. T. Rep. N. S. 69, 34 Wkly. Rep. 247; Freme *v.* Clement, 18 Ch. D. 499, 50 L. J. Ch. 801, 44 L. T. Rep. N. S. 399, 30 Wkly. Rep. 1.

Power expressly requiring reference.—A power to appoint by will expressly referring to the power itself is not exercised by a general bequest or devise contained in the will of the donee. Phillips *v.* Cayley, 43 Ch. D. 222, 59 L. J. Ch. 177, 62 L. T. Rep. N. S. 86, 38 Wkly. Rep. 241 [*disapproving In re* Marsh, 38 Ch. D. 630, 57 L. J. Ch. 639, 59 L. T. Rep. N. S. 595, 37 Wkly. Rep. 10]; *In re* Phillips, 41 Ch. D. 417, 58 L. J. Ch. 448, 60 L. T. Rep. N. S. 808, 37 Wkly. Rep. 504.

Requirement that will purport to exercise power.—A residuary bequest of personal estate over which the testator has "any disposing power" is a sufficient exercise of a general testamentary power of appointment to which a condition is attached that no will shall be deemed an exercise of the power "unless it expressly purports to exercise such power." *In re* Waterhouse, 77 L. J. Ch. 30, 98 L. T. Rep. N. S. 30 [*affirming* 96 L. T. Rep. N. S. 688].

Power of revocation and new appointment. — A general devise and bequest does not operate under section 27 of the Wills Act, 1887, as an exercise of a power of revocation and new appointment, and this applies to the case where the power of revocation and new appointment is that contained in the instrument originally creating it, as well as to the case where the power is that reserved by an appointment made in exercise of the original power. *In re* Goulding, 48 Wkly. Rep. 183.

87. See the statutes above cited and the cases *infra*, this note.

On face of will.— The intention to exclude the power should appear on the face of the will. Machir *v.* Funk, 90 Va. 284, 18 S. E. 197.

"**The only safe rule** for discriminating between mere conjecture and the contrary intent required by the statute is to inquire whether there is anything in the will inconsistent with the notion that the residuary bequest is meant to operate as an execution of the power." Scriven *v.* Sandom, 2 Johns. & H. 743, 745, 70 Eng. Reprint 1258. See also Lake *v.* Currie, 2 De G. M. & G. 536, 16 Jur. 1027, 51 Eng. Ch. 419, 42 Eng. Reprint 981; Moss *v.* Harter, 18 Jur. 973, 2 Sm. & G. 458, 2 Wkly. Rep. 540, 65 Eng. Reprint 480.

Intention to be collected from whole instrument see Baily *v.* Lloyd, 7 L. J. Ch. O. S. 98, 5 Russ. 330, 29 Rev. Rep. 30, 5 Eng. Ch. 330, 38 Eng. Reprint 1051.

Contrary intention not shown.—*In re* Jacob, [1907] 1 Ch. 445, 76 L. J. Ch. 217, 96 L. T. Rep. N. S. 362; *In re* Clark, 14 Ch. D. 422, 49 L. J. Ch. 586, 43 L. T. Rep. N. S. 40, 28 Wkly. Rep. 753.

Whether a settlement creating a power was made by testator or a stranger is immaterial in ascertaining whether the testator has shown an intention not to execute. *In re* Clark, 14 Ch. D. 422, 49 L. J. Ch. 586, 43 L. T. Rep. N. S. 40, 28 Wkly. Rep. 753.

Testator's ignorance of the existence of the power does not show contrary intent. Walker *v.* Banks, 1 Jur. N. S. 606.

Testator's forgetfulness of power held not to show intention not to execute.— *Re* Boyd, 63 L. T. Rep. N. S. 92.

"**Necessary implication,**" under a statute requiring that the intention not to execute the power must appear "either expressly or by necessary implication," results only where the will permits of no other interpretation; and therefore the intent not to execute the power must not be implied unless it so clearly appears that it is not to be avoided. Lockwood *v.* Mildeberger, 159 N. Y. 181, 53 N. E. 803 [*reversing* 5 N. Y. App. Div. 459, 38 N. Y. Suppl. 1107], holding also that when a will disposes of all the testator's own property, an intention not to execute a power of appointment conferred by will is not to be inferred from the fact that it makes no reference to the primary will or to the power of appointment therein conferred.

88. *District of Columbia.*— Howard *v.* Carusi, MacArthur & M. 260.

Maryland.— Farlow *v.* Farlow, 83 Md. 118, 34 Atl. 837.

Pennsylvania.— Dunn's Appeal, 85 Pa. St. 94; Fry's Estate, 11 Phila. 305; Vaux's Estate, 11 Phila. 57; Murray's Estate, 5 Wkly. Notes Cas. 296.

Rhode Island.— Matteson *v.* Goddard, 17 R. I. 299, 21 Atl. 914.

England.— *In re* Hayes, [1900] 2 Ch. 332, 69 L. J. Ch. 691, 83 L. T. Rep. N. S. 152, 16 T. L. R. 448, 49 Wkly. Rep. 21 [*affirmed* in [1901] 2 Ch. 529, 70 L. J. Ch. 770, 85 L. T. Rep. N. S. 85, 17 T. L. R. 740, 49 Wkly. Rep. 659]; *In re* Wells, 42 Ch. D. 646, 58 L. J. Ch. 835, 61 L. T. Rep. N. S. 588, 38 Wkly. Rep. 229; Doe *v.* Dilnot, 2 B. & P. N. R. 401; Thompson *v.* Simpson, 50 L. J. Ch. 461, 44 L. T. Rep. N. S. 710; Leigh *v.* Norbury, 13 Ves. Jr. 340, 33 Eng. Reprint 321.

See 40 Cent. Dig. tit. "Powers," § 118.

Contra.— Webb *v.* Jones, 36 N. J. Eq. 163; Burkett *v.* Whittemore, 36 S. C. 428, 15 S. E. 616. *Compare* Lepley *v.* Smith, 13 Ohio Cir. Ct. 189, 7 Ohio Cir. Dec. 264.

Practically contemporaneous execution.— Where a trust was created by deed for the

provisions to the effect that a will so executed should be operative in such a manner.[89]

4. Instrument Inoperative Except as Execution of Power. Where a deed or will cannot operate except as an execution of a power, it will be presumed to be so intended, although the power is not referred to.[90]

benefit of the grantor for life, with power of appointment by will, and a will was executed by him so nearly contemporaneous therewith as to make it a part of the same transaction, it was held that the appointment was good, although the will was in fact executed before the deed. U. S. Trust Co. *v.* Chauncey, 32 Misc. (N. Y.) 358, 66 N. Y. Suppl. 563, where the will was executed thirteen days prior to the deed.

A codicil executed after the creation of a power, ratifying and republishing a will executed before its creation, may execute a power created after the execution of the will. Willard *v.* Ware, 10 Allen (Mass.) 263. In this case a testator, after disposing of all his estate by will, conveyed land in trust for his six children and their issue, and in case of their death without issue then for his heirs, reserving to himself full power to alter the trusts by deed or will. He married a second wife, lost one child, and subsequently made a codicil to his will, giving to his wife "in fee simple one-sixth part of the whole estate and property, real, personal and mixed, whereof I die possessed, it being my intention to give to her what would be her legal share if she were one of my children," and ratified and confirmed his will in all respects in which it was not qualified by the codicil; and in the will and deed of trust he preserved equality among his children. It was held that the codicil operated as an execution of the power of disposal, which the testator reserved to himself, of the estate conveyed by the deed of trust, and his widow was entitled to one sixth of his whole estate, and the other five sixths would be disposed of according to the directions of the will, irrespective of the deed of trust. See also Stone *v.* Forbes, 189 Mass. 163, 75 N. E. 141; *In re* Blackburn, 43 Ch. D. 75, 59 L. J. Ch. 208, 38 Wkly. Rep. 140; Meredyth *v.* Meredyth, Ir. R. 5 Eq. 565. *Compare* Hope *v.* Hope, 5 Giffard 13, 66 Eng. Reprint 902.

89. See the cases cited *infra*, this note.

In England under the statute of 1 Vict. c. 26, § 24, providing that every will shall be construed to speak and take effect as if executed immediately before testator's death, unless a contrary intention appears by the will, and section 27, by which, unless a contrary intention appears, a general devise or bequest is to be construed as executing a general power of appointment, such a power of appointment may be executed, unless a contrary intention appears, by a will executed before the creation of the power. Airey *v.* Bower, 12 App. Cas. 263, 56 L. J. Ch. 742, 56 L. T. Rep. N. S. 409, 35 Wkly. Rep. 657; *In re* Hayes, [1900] 2 Ch. 332, 69 L. J. Ch. 691, 83 L. T. Rep. N. S. 152, 16 T. L. R. 448, 49 Wkly. Rep. 21 [*affirmed* in [1901] 2 Ch. 529, 70 L. J. Ch. 770, 85 L. T. Rep. N. S. 85, 17 T. L. R. 740, 49 Wkly. Rep. 659]; Boyes *v.* Cook, 14 Ch. D. 53, 49 L. J. Ch. 350, 42 L. T. Rep. N. S. 556, 28 Wkly. Rep. 754; *In re* Ruding, L. R. 14 Eq. 266, 41 L. J. Ch. 665, 20 Wkly. Rep. 936; Pettinger *v.* Ambler, L. R. 1 Eq. 510, 35 Beav. 321, 35 L. J. Ch. 389, 14 L. T. Rep. N. S. 118; Peiree *v.* McNeale, [1894] 1 Ir. 118; Patch *v.* Shore, 2 Dr. & Sm. 589, 9 Jur. N. S. 63, 32 L. J. Ch. 185, 7 L. T. Rep. N. S. 554, 1 New Rep. 157, 11 Wkly. Rep. 142, 62 Eng. Reprint 743; Stillman *v.* Weedon, 12 Jur. 992, 18 L. J. Ch. 46, 16 Sim. 26, 39 Eng. Ch. 26, 60 Eng. Reprint 782; Cofield *v.* Pollard, 3 Jur. N. S. 1203, 5 Wkly. Rep. 774; Thompson *v.* Simpson, 50 L. J. Ch. 461, 44 L. T. Rep. N. S. 710; *Re* Old, 54 L. T. Rep. N. S. 677; Hodsdon *v.* Dancer, 16 Wkly. Rep. 1101.

Statute inapplicable to special power.—*In re* Hayes, [1900] 2 Ch. 332, 69 L. J. Ch. 691, 83 L. T. Rep. N. S. 152, 16 T. L. R. 448, 49 Wkly. Rep. 21 [*affirmed* in [1901] 2 Ch. 529, 70 L. J. Ch. 770, 85 L. T. Rep. N. S. 85, 17 T. L. R. 740, 49 Wkly. Rep. 659].

90. *Alabama.*— Doe *v.* Ladd, 77 Ala. 223.

Georgia.— Terry *v.* Rodahan, 79 Ga. 278, 5 So. 38, 11 Am. St. Rep. 420. And see Middlebrooks *v.* Ferguson, 126 Ga. 232, 55 S. E. 34.

Illinois.— Goff *v.* Pensenhafer, 190 Ill. 200, 60 N. E. 110; Funk *v.* Eggleston, 92 Ill. 515, 34 Am. Rep. 136.

Indiana.— Bullerdick *v.* Wright, 148 Ind. 477, 47 N. E. 931.

Maryland.— Balls *v.* Dampman, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545.

Mississippi.— Baird *v.* Boucher, 60 Miss. 326; Yates *v.* Clark, 56 Miss. 212; Andrews *v.* Brumfield, 32 Miss. 107.

Missouri.—Papin *v.* Piednoir, 205 Mo. 521, 104 S. W. 63; Worden *v.* Perry, 197 Mo. 569, 95 S. W. 880; Grace *v.* Perry, 197 Mo. 550, 95 S. W. 875; Owen *v.* Ellis, 64 Mo. 77; Reilly *v.* Chouquette, 18 Mo. 220.

New York.— Bradish *v.* Gibbs, 3 Johns. Ch. 523. It is now provided by statute (Laws (1896), c. 547, § 155; 1 Rev. St. p. 737, § 124) that an instrument executed by the grantee of a power, conveying an estate or creating a charge, which he would have no right to convey or create except by virtue of the power, shall be deemed a valid execution of the power, although the power be not recited or referred to therein. See Vines *v.* Clarke, 111 N. Y. App. Div. 12, 97 N. Y. Suppl. 532; Cole *v.* Gourlay, 9 Hun 493. The statute does not apply where the grantee, in addition to the power, has an interest in the subject-matter. Mutual L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177 [*reversing* 50 Hun

G. Conditions Attached to Execution — 1. In General. Conditions annexed to the exercise of a power must be strictly complied with.[91]

2. Consent or Approval of Third Persons — a. In General. Where the execution of a power is conditioned upon the consent or approval of a third person, the power cannot be validly exercised without such consent or approval,[92] which

578, 3 N. Y. Suppl. 684]; Weinstein *v.* Weber, 58 N. Y. App. Div. 112, 68 N. Y. Suppl. 580. Nor does it apply to a case where the grantor in a deed expressly states that he proposes to execute a certain power, which he believes he possesses, and has no intention of executing another power, which he does not believe he possesses. Pollock *v.* Hooley, 67 Hun 370, 22 N. Y. Suppl. 215.

North Carolina.— Kirkman *v.* Wadsworth, 137 N. C. 453, 49 S. E. 962; Exum *v.* Baker, 118 N. C. 545, 24 S. E. 351; Hendricks *v.* Mendenhall, 4 N. C. 371.

Ohio.— Bishop *v.* Remple, 11 Ohio St. 277.

Pennsylvania.— Keefer *v.* Schwartz, 47 Pa. St. 503; Lancaster *v.* Dolan, 1 Rawle 231, 18 Am. Dec. 625; McCauley *v.* Heise, 20 Lanc. L. Rev. 313; Taylor *v.* Smiley, 9 Wkly. Notes Cas. 30.

South Carolina.— Porcher *v.* Daniel, 12 Rich. Eq. 349.

Tennessee.— Matthews *v.* Capshaw, 109 Tenn. 480, 72 S. W. 964, 97 Am. St. Rep. 854.

Virginia.—Walke *v.* Moore, 95 Va. 729, 30 S. E. 374; Hood *v.* Haden, 82 Va. 588.

Wisconsin.— See Lardner *v.* Williams, 98 Wis. 514, 74 N. W. 346, construing Rev. St. § 2149, and holding that it does not apply where the donee of the power also possesses an interest in the subject-matter.

United States.— Lee *v.* Simpson, 134 U. S. 572, 10 S. Ct. 631, 33 L. ed. 1038; Warner *v.* Connecticut Mut. L. Ins. Co., 109 U. S. 357, 3 S. Ct. 221, 27 L. ed. 962; Smith *v.* McIntyre, 95 Fed. 585, 37 C. C. A. 177; Blagge *v.* Miles, 3 Fed. Cas. No. 1,479, 1 Story 426.

England.— *In re* Mills, 34 Ch. D. 186, 56 L. J. Ch. 118, 55 L. T. Rep. N. S. 665, 35 Wkly. Rep. 133; Atty.-Gen. *v.* Wilkinson, L. R. 2 Eq. 816, 12 Jur. N. S. 593, 14 L. T. Rep. N. S. 725, 14 Wkly. Rep. 910; *In re* Gratwick, L. R. 1 Eq. 177, 35 Beav. 215, 11 Jur. N. S. 919, 55 Eng. Reprint 877; Shelford *v.* Acland, 23 Beav. 10, 3 Jur. N. S. 8, 26 L. J. Ch. 144, 5 Wkly. Rep. 170, 53 Eng. Reprint 4 (married woman); Clere's Case, 6 Coke 17*b*, 77 Eng Reprint 279; Rooke *v.* Rooke, 2 Dr. & Sm. 38, 21 L. J. Ch. 636, 6 L. T. Rep. N. S. 527, 10 Wkly. Rep. 435, 62 Eng. Reprint 535; Curteis *v.* Kenrick, 4 Jur. 934, 9 Sim. 443, 16 Eng. Ch. 443, 59 Eng. Reprint 429 (married woman); Broderick *v.* Brown, 1 Kay & J. 328, 69 Eng. Reprint 484; Napier *v.* Napier, 5 L. J. Ch. O. S. 65, 1 Sim. 28, 27 Rev. Rep. 144, 2 Eng. Ch. 28, 57 Eng. Reprint 489; *Re* Ludlam, 63 L. T. Rep. N. S. 330; Churchill *v.* Dibben, 9 Sim. 447 note, 16 Eng. Ch. 447 note, 59 Eng. Reprint 430 note (married woman); Lewis *v.* Lewellyn, Turn. & R. 104, 25 Rev. Rep. 201, 12 Eng. Ch. 104, 27 Eng. Reprint 1034; Bennett *v.* Aburrow, 8 Ves. 609, 7 Rev. Rep. 131, 32 Eng. Reprint 492; Standen *v.* Standen, 2 Ves. Jr. 589, 30 Eng. Reprint 791.

Canada.— Deedes *v.* Graham, 16 Grant Ch. (U. C.) 167, holding that where the donee of a power of appointment made a will, not referring to the power, disposing of "the moneys now or at my death invested in mortgages or otherwise," and the settled estate was invested in mortgages, and the donee had no other mortgages, the intention of the testatrix to appoint the settled estate sufficiently appeared. See also Hutchinson *v.* Baird, 1 N. Brunsw. Eq. 624.

See 40 Cent. Dig. tit. "Powers," § 119.

91. *Alabama.*— Jones *v.* Morris, 61 Ala. 518; Dawson *v.* Ramser, 58 Ala. 573.

Kentucky.— Bakewell *v.* Ogden, 2 Bush 265.

Massachusetts.— Cranston *v.* Crane, 97 Mass. 459, 93 Am. Dec. 106, power of sale in mortgage. See also Krause *v.* Klucken, 135 Mass. 482.

New York.— Cleveland *v.* Boerum, 27 Barb. 252 [*affirmed* in 24 N. Y. 613]; Correll *v.* Lauterbach, 14 Misc. 469, 36 N. Y. Suppl. 615.

Pennsylvania.—Waln's Estate, 5 Pa. Co. Ct. 52.

United States.— Batchelor *v.* Brereton, 112 U. S. 396, 5 S. Ct. 180, 28 L. ed. 748; Fontain *v.* Ravenel, 17 How. 369, 15 L. ed. 80.

See 40 Cent. Dig. tit. "Powers," § 128 *et seq.* See also *supra*, V, B, 1, i, 2, f; VI, C, 3.

92. *Alabama.*— Gindrat *v.* Montgomery Gas-Light Co., 82 Ala. 596, 2 So. 327, 60 Am. Rep. 769; March *v.* England, 65 Ala. 275.

Connecticut.—Imlay *v.* Huntington, 20 Conn. 146.

Georgia.—Augusta *v.* Radcliffe, 66 Ga. 469; Weeks *v.* Sego, 9 Ga. 199.

Maryland.— Powles *v.* Jordan, 62 Md. 499; Tyson *v.* Mickle, 2 Gill 376.

Massachusetts.— Richardson *v.* Crooker, 7 Gray 190.

Michigan.— Bates *v.* Leonard, 99 Mich. 296, 58 N. W. 311.

Missouri.— Bozarth *v.* Bozarth, 24 Mo. 320.

New Jersey.— Peirsol *v.* Roop, 56 N. J. Eq. 739, 40 Atl. 124; Crane *v.* Bolles, 49 N. J. Eq. 373, 24 Atl. 237.

New York.— Gulick *v.* Griswold, 160 N. Y. 399, 54 N. E. 780 [*affirming* 14 N. Y. App. Div. 85, 43 N. Y. Suppl. 443]; Kissam *v.* Dierkes, 49 N. Y. 602; Barber *v.* Cary, 11 N. Y. 397; Correll *v.* Lauterbach, 14 Misc. 469, 36 N. Y. Suppl. 615.

North Carolina.—Towles *v.* Fisher, 77 N. C. 437.

Pennsylvania.—Slifer *v.* Beates, 9 Serg. & R. 166. See Hackett *v.* Milnor, 156 Pa. St. 1, 26 Atl. 738.

South Carolina.— Bredenburg *v.* Bardin, 36 S. C. 197, 15 S. E. 372.

must be given in the mode, if any, set out in the instrument creating the power,[93] or provided by statute.[94]

b. Death of Person Whose Consent Is Required. Independently of statute,[95] or of an intent to the contrary appearing in the instrument creating the power,[96] the death of the person, or of one of several persons, whose consent is required to the execution of a power, before giving his consent, will prevent its execution.[97]

H. Supervision of Courts — 1. In General. The donee of a power may execute it as conferred and in the manner designated in the instrument creating the power without the interposition of a court of equity;[98] and, in the absence of evidence of fraud, collusion, or abuse of discretion, a court of equity will not interfere with the execution of a discretionary power by the donee.[99] In some jurisdic-

Virginia.— Patteson *v.* Horsley, 29 Gratt. 263.

Wisconsin.— Goebel *v.* Thieme, 85 Wis. 286, 55 N. W. 706.

United States.— Batchelor *v.* Brereton, 112 U. S. 396, 5 S. Ct. 180, 28 L. ed. 748; Waldron *v.* Chasteney, 28 Fed. Cas. No. 17,058, 2 Blatchf. 62.

England.— *In re* Bedingfeld, [1893] 2 Ch. 332, 62 L. J. Ch. 430, 68 L. T. Rep. N. S. 634, 3 Reports 483, 41 Wkly. Rep. 413; Malmesbury *v.* Malmesbury, 31 Beav. 407, 54 Eng. Reprint 1196; Wolley *v.* Jenkins, 23 Beav. 53, 53 Eng. Reprint 21 [*affirmed* in 3 Jur. N. S. 321, 26 L. J. Ch. 379, 5 Wkly. Rep. 281]; Truell *v.* Tysson, 21 Beav. 437, 2 Jur. N. S. 630, 25 L. J. Ch. 801, 4 Wkly. Rep. 409, 52 Eng. Reprint 928; Simpson *v.* Hornby, Gilb. 115, 120, 25 Eng. Reprint 80, 84, Prec. Ch. 439, 452, 24 Eng. Reprint 196, 202, 2 Vern. Ch. 722, 23 Eng. Reprint 1074; Hope *v.* Hope, 1 Jur. N. S. 770, 3 Wkly. Rep. 617; Bateman *v.* Davis, 3 Madd. 98, 18 Rev. Rep. 200, 56 Eng. Reprint 446; Sympson *v.* Hornsby, Prec. Ch. 452, 24 Eng. Reprint 202.

See 40 Cent. Dig. tit. "Powers," §§ 64, 129 *et seq.* And see *supra*, V, B, 1, i, (II), 2, f, (II).

Subsequent acquiescence insufficient.— Bateman *v.* Davis, 3 Madd. 98, 18 Rev. Rep. 200, 56 Eng. Reprint 446. *Compare* Offen *v.* Harman, 1 De G. F. & G. 253, 6 Jur. N. S. 487, 29 L. J. Ch. 307, 1 L. T. Rep. N. S. 315, 8 Wkly. Rep. 129, 62 Eng. Ch. 194, 45 Eng. Reprint 355.

Consent presumed from lapse of time.— Bredenburg *v.* Bardin, 36 S. C. 197, 15 S. E. 372.

93. Slifer *v.* Beates, 9 Serg. & R. (Pa.) 166; Waldron *v.* Chasteney, 28 Fed. Cas. No. 17,058, 2 Blatchf. 62; Offen *v.* Harman, 1 De G. F. & J. 253, 6 Jur. N. S. 487, 29 L. J. Ch. 307, 1 L. T. Rep. N. S. 315, 8 Wkly. Rep. 129, 62 Eng. Ch. 194, 45 Eng. Reprint 355.

94. Grindat *v.* Montgomery Gas-Light Co., 82 Ala. 596, 2 So. 327, 60 Am. Rep. 769; March *v.* England, 65 Ala. 275, construing Code (1876), § 2215.

95. N. Y. Laws (1896), c. 547, § 154.

Statute dispensing with consent not retroactive.— Gulick *v.* Griswold, 160 N. Y. 399, 54 N. E. 780 [*affirming* 14 N. Y. App. Div. 85, 43 N. Y. Suppl. 443].

96. Leeds *v.* Wakefield, 10 Gray (Mass.) 514; Phillips *v.* Davies, 92 N. Y. 199; Odell *v.* Youngs, 64 How. Pr. (N. Y.) 56; Hackett *v.* Milnor, 156 Pa. St. 1, 26 Atl. 738.

97. *Georgia.*— Mackay *v.* Moore, Dudley 94.

Maryland.— Powles *v.* Jordan, 62 Md. 499.

New Jersey.— Peirsol *v.* Roop, 56 N. J. Eq. 739, 40 Atl. 124.

New York.— Gulick *v.* Griswold, 160 N. Y. 399, 54 N. E. 780 [*affirming* 14 N. Y. App. Div. 85, 43 N. Y. Suppl. 443]; Kissam *v.* Dierkes, 49 N. Y. 602; Barber *v.* Cary, 11 N. Y. 397.

England.— Danne *v.* Annas, Dyer 219*a*, 73 Eng. Reprint 484.

See 40 Cent. Dig. tit. "Powers," § 130.

98. O'Bannon *v.* Musselman, 2 Duv. (Ky.) 523.

Executors may go into chancery to have their discretion directed and controlled in disposing of real estate for the payment of debts, as required by the will. Hinton *v.* Cole, 3 Humphr. (Tenn.) 656.

99. *Illinois.*— Crozier *v.* Hoyt, 97 Ill. 23.

Iowa.— Dickey *v.* Barnstable, 122 Iowa 572, 98 N. W. 368.

Massachusetts.— Proctor *v.* Heyer, 122 Mass. 525.

New York.— See Martin *v.* Martin, 43 Barb. 172, holding that a court of equity has power to control the exercise of a power of sale under a will by the executors, when the sale is manifestly opposed to the interest of an infant devisee.

Pennsylvania.— See Anderson's Estate, 6 Pa. Dist. 24, as to the authority of the orphans' court.

Tennessee.— Hamilton *v.* Mound City Mut. L. Ins. Co., 6 Lea 402.

Virginia.— Dixon *v.* McCue, 14 Gratt. 540.

United States.— Giles *v.* Little, 104 U. S. 291, 26 L. ed. 745. See also Waldron *v.* Chasteney, 28 Fed. Cas. No. 17,058, 2 Blatchf. 62, holding that questions as to the discreet exercise of a power of sale under a will belong to a court of equity, not to a court of law.

England.— Thomas *v.* Williams, 24 Ch. D. 558, 52 L. J. Ch. 603, 49 L. T. Rep. N. S. 111, 31 Wkly. Rep. 943; Tempest *v.* Camoys, 21 Ch. D. 571, 51 L. J. Ch. 785, 48 L. T. Rep. N. S. 13, 31 Wkly. Rep. 326; Camden *v.* Murray, 16 Ch. D. 161, 50 L. J. Ch. 282, 43 L. T. Rep. N. S. 661, 29 Wkly. Rep. 190.

See 40 Cent. Dig. tit. "Powers," § 133.

tions, however, a supervisory control of testamentary powers of sale has been conferred by statute upon the probate or orphans court.[1]

2. Leave of Court. Where a direct power of sale is conferred upon an executor by will, he may sell under the power without procuring an order of sale from the probate court.[2] But where a power of sale is conferred for a specific purpose, as to pay legacies, an executor cannot sell for another purpose, as to pay debts, without the leave of the probate court.[3] Where one has a life-estate in land, with a limited power of sale in case the "use and improvement" becomes insufficient for his support, he is authorized to exercise such power on the actual existence of necessity at the time of each sale, without an order of any court.[4]

3. Notice of Sale. In Utah, where a will gives the executor a mere naked power of sale, without direction as to notice, a sale without the statutory notice is invalid.[5]

4. Confirmation. In some jurisdictions confirmation or ratification by the court is required in case of a sale by an executor under a testamentary power.[6]

Where the question is simply one of detail, rather than one of judgment and opinion, courts of equity will exercise a greater control. Dickey *v.* Barnstable, 122 Iowa 572, 98 N. W. 368.

Charitable gifts.— Where discretionary powers are given an executor to determine the object of charitable testamentary gifts, the powers should be exercised under the direction of the court after reference to the master, especially where the fund, after the powers have been exercised, is to pass out of the jurisdiction of the court. Pell *v.* Mercer, 14 R. I. 412.

Where trustees for sale disclaim, the court can exercise their discretion, and sale if necessary. Browne *v.* Paull, 16 Jur. 707.

1. See Ogle *v.* Reynolds, 75 Md. 145, 23 Atl. 137; Erie Dime Sav., etc., Co. *v.* Vincent, 105 Pa. St. 315; Kirk *v.* Carr, 54 Pa. St. 285; Brittain's Estate, 28 Pa. Sup. Ct. 144; Andrews' Estate, 6 Pa. Dist. 24; Curren's Estate, 11 Phila. (Pa.) 59.

Concurrent jurisdiction of equity.—An administrator *de bonis non* appointed by the orphans' court may file a bill in equity asking to be allowed to administer the estate and execute a power of sale under the discretion of the court, as the jurisdiction of the orphans' court is not exclusive under the statute, but a superintending power is reserved for the courts of equity. Keplinger *v.* Maccubbin, 58 Md. 203. But see Erie Dime Sav., etc., Co. *v.* Vincent, 105 Pa. St. 315.

Mo. Rev. St. (1889) § 136, does not make an executor or administrator succeeding as donee of a power under a will amenable to the probate court in the execution of such power. *In re* Rickenbaugh, 42 Mo. App. 328.

2. *Alabama.*— McRae *v.* McDonald, 57 Ala. 423, holding that proceedings had in the probate court on the application of the executors for an order of sale for the purpose of discharging the duties required by the will here were nullities, but that the sale would stand as an execution of the power. But see Jay *v.* Stein, 49 Ala. 514. *Compare* Jones *v.* Morris, 61 Ala. 518.

California.— Delaney's Estate, 49 Cal. 76; Larco *v.* Casaneuava, 30 Cal. 560; White *v.* Moses, 21 Cal. 43; Payne *v.* Payne, 18 Cal. 291.

Illinois.— White *v.* Clover, 59 Ill. 459. *Compare* Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166.

Indiana.— Iles *v.* Martin, 69 Ind. 114.

Maryland.— See Brooks *v.* Bergner, 83 Md. 352, 35 Atl. 98, construing Code, art. 93, §§ 276, 279.

Michigan.— Tracy *v.* Murray, 49 Mich. 35, 12 N. W. 900; Battelle *v.* Parks, 2 Mich. 531.

New Hampshire.— Gafney *v.* Kenison, 64 N. H. 354, 10 Atl. 706.

New York.— Pollock *v.* Holley, 67 Hun 370, 22 N. Y. Suppl. 215. holding that one who has attempted to convey land under an order of court, which is a mere nullity, may afterward convey it to the grantee by virtue of a power of sale, which, through ignorance of law, he did not know he possessed when he executed the first instrument.

Ohio.— Wanzer *v.* Widow, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 323.

Pennsylvania.— Hamlin *v.* Thomas, 126 Pa. St. 20, 17 Atl. 306. *Compare* Bell's Appeal, 66 Pa. St. 498; Mussleman's Appeal, 65 Pa. St. 480, decided under the express provisions of Act Feb. 24, 1834, § 12.

Texas.— De Zbranikov *v.* Burnett, 10 Tex. Civ. App. 442, 31 S. W. 71.

United States.— Ames *v.* Holderbaum, 44 Fed. 224; Woolworth *v.* Root, 40 Fed. 723.

See 40 Cent. Dig. tit. "Powers," § 134.

Administrator de bonis non cannot sell without leave.— Tippett *v.* Mize, 30 Tex. 361, 94 Am. Dec. 299, construing Paschal Dig. Tex. art. 1324.

3. Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

4. Bartlett *v.* Buckland, 78 Conn. 517, 63 Atl. 350.

5. Matter of Walker, 6 Utah 369, 23 Pac. 930, construing Comp. Laws (1888), §§ 4145, 4181.

6. Perkins *v.* Gridley, 50 Cal. 97; *In re* Durham, 49 Cal. 490; Ogle *v.* Reynolds, 75 Md. 145, 23 Atl. 137; Montgomery *v.* Williamson, 37 Md. 421; Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449. See also Provident L. & T. Co. *v.* Mills, 91 Fed. 435.

5. SETTING ASIDE SALE UNDER POWER. In the absence of proof of error or mistake, or wilful disregard of an executor's duty, in the sale of a decedent's real estate, under a power contained in the will, the court will not interfere with the executor's exercise of his discretion,[7] nor will it interfere to set aside a sale by an administrator with the will annexed which is absolutely void.[8] Where, in ejectment, defendants claim under deed from a devisee under a will giving him a life-estate, with power to sell in case of necessity, the deed may be attacked on the ground that it was not necessary to sell the land, without first having it set aside by a court of equity.[9]

I. Validity and Sufficiency of Execution — 1. WHAT LAW GOVERNS. Questions as to the validity and sufficiency of the execution of a power are, as a general rule, to be determined, in the case of personalty, by the law of the domicile of the donor of the power, and in the case of real estate by the law of the place where it is situated, and not by that of the donee of the power.[10]

General power to confirm sale see Robinson *v.* Ostendorff, 38 S. C. 66, 16 S. E. 371.

A sale made by the executor as trustee, and not as executor, need not be confirmed. Morffew *v.* San Francisco, etc., R. Co., 107 Cal. 587, 40 Pac. 810. See also Williams' Estate, 92 Cal. 183, 28 Pac. 227, 679; *In re* Delaney, 49 Cal. 76; Schwartz's Estate, 168 Pa. St. 204, 31 Atl. 1085.

In Texas confirmation is necessary only when the sale needed to be authorized by the court. Smith *v.* Swan, 2 Tex. Civ. App. 563, 22 S. W. 247.

In Pennsylvania the orphans' court will ratify a sale of land by executors with power to sell, and allow security to be entered, in order that a lien for debts not of record may be discharged. Wainwright's Estate, 11 Phila. 147. See also Mussleman's Appeal, 65 Pa. St. 480.

As to notice of hearing see Perkins *v.* Gridley, 50 Cal. 97; *In re* Durham, 49 Cal. 490.

Setting aside confirmation see *In re* Durham, 49 Cal. 490; Montgomery *v.* Williamson, 37 Md. 421.

Where an executor asks instructions of the court as to the validity and extent of his powers, making infant remainder-men parties, the latter thereupon become wards of the court, and the executor should be required to report to the court for confirmation any sale made by him. Proctor *v.* Scharpff, 80 Ala. 227.

7. Castor's Estate, 16 Phila. (Pa.) 360. See also *In re* Bagger, 78 Iowa 171, 42 N. W. 639.

Sale on shorter credit than directed by the will is not such a departure from the terms of the power as requires the sale to be set aside. Richardson *v.* Hayden, 18 B. Mon. (Ky.) 242.

Where an executor indirectly purchases at his own sale, it will be set aside in equity. Howell *v.* Sebring, 14 N. J. Eq. 84.

8. Posey *v.* Conaway, 10 Ala. 811. But see Littell *v.* Gouge, 32 S. W. 411, 17 Ky. L. Rep. 747, holding that a sale of land under a power in a will, by an administrator *cum testamento annexo*, should be set aside, where it appears that it was unnecessary for payment of debts or costs of administration, and that it was made at a sacrifice and without notice to devisees under the will.

9. Scheidt *v.* Creecelius, 94 Mo. 322, 7 S. W. 412, 4 Am. St. Rep. 384.

10. *Delaware.*— Lane *v.* Lane, 4 Pennew. 368, 55 Atl. 184, 103 Am. St. Rep. 122, 64 L. R. A. 849, holding that the law of the domicile of the testator governs, as against the law of the domicile of the person to whom he gives by will a power of appointment, in determining whether the donee's will is an execution of the power.

Massachusetts.— Sewall *v.* Wilmer, 132 Mass. 131.

New York.— Ward *v.* Stanard, 82 N. Y. App. Div. 386, 81 N. Y. Suppl. 906, disposition of personalty.

Pennsylvania.— Bingham's Appeal, 64 Pa. St. 345. When the donee of a power to appoint, by will, real estate situated in Pennsylvania, died domiciled in another state, leaving a will containing an appointment of such realty, and which was probated in the forum of the domicile, the validity of the appointment so made, as an execution of the power, was determined by the law of Pennsylvania. Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85.

Rhode Island.— Cotting *v.* De Sartiges, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367.

South Carolina.— Blount *v.* Walker, 28 S. C. 545, 6 S. E. 558.

England.— *In re* Scholefield, [1905] 2 Ch. 408, 74 L. J. Ch. 610, 93 L. T. Rep. N. S. 122, 21 T. L. R. 675, 54 Wkly. Rep. 56; *In re* D'Este, [1903] 1 Ch. 898, 72 L. J. Ch. 305, 88 L. T. Rep. N. S. 384, 51 Wkly. Rep. 552 (holding that where an English settlement containing a power of appointment was made on the marriage of an Englishwoman and Frenchman, whose domicile she then took and retained till her death, and she might by will have exercised the power of appointment; but her will, although valid according to French law, was unattested, and it made no specific reference to the settlement, or any power of appointment, the will did not operate as an appointment under the settlement); *In re* Megret, [1901] 1 Ch. 547, 70 L. J. Ch. 451, 84 L. T. Rep. N. S. 192; Barretto *v.* Young, [1900] 2 Ch. 339, 69 L. J. Ch. 605, 83 L. T. Rep. N. S. 154; Pouey *v.* Hordern, [1900] 1 Ch. 492, 69 L. J. Ch. 231, 82 L. T. Rep. N. S. 51, 16 T. L. R. 191; Hummel *v.* Hummel, [1898] 1 Ch. 642,

2. Fraud — a. In General. The donee of a power may not do indirectly that which it is unlawful for him to do directly, and to render the execution of the power valid he must act in entire good faith and with a view to the accomplishment of the real intent had in view in its creation.[11] But where the donee has exercised the power, without any agreement that the party in whose favor it in terms beneficially operates that such party shall apply its benefits in a manner unlawful for

67 L. J. Ch. 363, 78 L. T. Rep. N. S. 518, 46 Wkly. Rep. 507; *In re* Hernando, 27 Ch. D. 284, 53 L. J. Ch. 865, 51 L. T. Rep. N. S. 117, 33 Wkly. Rep. 252; Topham *v.* Portland, 1 De G. J. & S. 517, 32 L. J. Ch. 257, 8 L. T. Rep. N. S. 180, 1 New Rep. 496, 11 Wkly. Rep. 507, 66 Eng. Ch. 401, 46 Eng. Reprint 205; Tatnall *v.* Hankey, 2 Moore P. C. 342, 12 Eng. Reprint 1036. *Compare* D'Huart *v.* Harkness, 34 Beav. 324, 11 Jur. N. S. 633, 34 L. J. Ch. 311, 5 New Rep. 440, 13 Wkly. Rep. 513, 55 Eng. Reprint 660; *In re* Price, [1900] 1 Ch. 442, 69 L. J. Ch. 225, 82 L. T. Rep. N. S. 79, 16 T. L. R. 189, 48 Wkly. Rep. 373.

See 40 Cent. Dig. tit. "Powers," § 138.

11. *Connecticut.*— Budington *v.* Munson, 33 Conn. 481, where, however, the facts were held not to furnish satisfactory evidence of a corrupt appointment.

Massachusetts.— Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407.

New York.— Benedict *v.* Arnoux, 7 N. Y. App. Div. 1, 39 N. Y. Suppl. 793 [*reversed* on other grounds in 154 N. Y. 715, 49 N. E. 326]; Arnoux *v.* Phyfe, 6 N. Y. App. Div. 605, 39 N. Y. Suppl. 973 [*affirmed* in 159 N. Y. 552, 54 N. E. 1089]; Harty *v.* Doyle, 49 Hun 410, 3 N. Y. Suppl. 574. *Compare* McComb *v.* Waldron, 7 Hill 335.

Rhode Island.— Hutchinson *v.* Cole, 6 R. I. 314.

South Carolina.— Glenn *v.* Glenn, 21 S. C. 308.

West Virginia.— Bradford *v.* McConihay, 15 W. Va. 732.

United States.— Ingraham *v.* Meade, 13 Fed. Cas. No. 7,045, 3 Wall. Jr. 32.

England.— *In re* Kirwan, 25 Ch. D. 373, 52 L. J. Ch. 952, 49 L. T. Rep. N. S. 292, 32 Wkly. Rep. 581; *In re* Huish, L. R. 10 Eq. 5, 39 L. J. Ch. 499, 22 L. T. Rep. N. S. 565, 18 Wkly. Rep. 817; Birley *v.* Birley, 25 Beav. 299, 4 Jur. N. S. 315, 27 L. J. Ch. 569, 6 Wkly. Rep. 400, 53 Eng. Reprint 651; Pryor *v.* Pryor, 2 De G. J. & S. 205, 10 Jur. N. S. 603, 33 L. J. Ch. 441, 10 L. T. Rep. N. S. 360, 4 New Rep. 440, 12 Wkly. Rep. 781, 67 Eng. Ch. 160, 46 Eng. Reprint 353; *In re* Marsden, 4 Drew. 594, 5 Jur. N. S. 590, 28 L. J. Ch. 906, 7 Wkly. Rep. 520, 62 Eng. Reprint 228; Brewer *v.* Swirles, 2 Eq. Rep. 493, 18 Jur. 1069, 23 L. J. Ch. 542, 2 Smale & G. 219, 2 Wkly. Rep. 339, 65 Eng. Reprint 373; Harrison *v.* Randall, 9 Hare 397, 16 Jur. 72, 21 L. J. Ch. 294, 41 Eng. Ch. 397, 68 Eng. Reprint 562; Marshall *v.* Sladden, 7 Hare 428, 14 Jur. 106, 19 L. J. Ch. 57, 27 Eng. Ch. 428, 68 Eng. Reprint 177 [*affirmed* in 4 De G. & Sm. 468, 64 Eng. Reprint 916]; Portland *v.* Topham, 11 H. L. Cas. 32, 10 Jur. N. S. 501, 34 L. J. Ch. 113, 10 L. T. Rep. N. S. 355, 12 Wkly. Rep. 697, 11 Eng. Reprint 1242; Weir *v.* Chamley, 1 Ir. Ch. 295; D'Abbadie *v.* Bizoin, Jr. R. 5 Eq. 205; Daubeny *v.* Cockburn, 1 Meriv. 626, 14 Rev. Rep. 174, 35 Eng. Reprint 801; Woods *v.* Woods, 1 Myl. & C. 401, 13 Eng. Ch. 401, 40 Eng. Reprint 429.

Canada.— Bell *v.* Lee, 8 Ont. App. 185, 3 Can. L. T. Occ. Notes 197; Rogerson *v.* Campbell, 10 Ont. L. Rep. 748, 6 Ont. Wkly. Rep. 617, both of which are referred to *supra*, p. 1060 note 28.

See 40 Cent. Dig. tit. "Powers," § 139.

Indirect appointment to stranger.— If a power is exercised in favor of an object, upon the understanding that deeds shall be executed by the appointee, settling the property upon persons not objects of the power, in furtherance of the desire of the donee to appoint to those persons, the appointment is void in equity as a fraud upon the power. Pryor *v.* Pryor, 2 De G. J. & S. 205, 10 Jur. N. S. 603, 33 L. J. Ch. 441, 10 L. T. Rep. N. S. 360, 4 New Rep. 440, 12 Wkly. Rep. 781, 67 Eng. Ch. 160, 46 Eng. Reprint 353. See also Whelan *v.* Palmer, 39 Ch. D. 648, 57 L. J. Ch. 784, 58 L. T. Rep. N. S. 937, 36 Wkly. Rep. 587; *In re* Kirwan, 25 Ch. D. 373, 52 L. J. Ch. 952, 49 L. T. Rep. N. S. 292, 32 Wkly. Rep. 581; Birley *v.* Birley, 25 Beav. 299, 4 Jur. N. S. 315, 27 L. J. Ch. 569, 6 Wkly. Rep. 400, 53 Eng. Reprint 651; Lee *v.* Fernie, 1 Beav. 483, 17 Eng. Ch. 483, 48 Eng. Reprint 1027; Carver *v.* Richards, 1 De G. F. & J. 548, 6 Jur. N. S. 410, 29 L. J. Ch. 357, 2 L. T. Rep. N. S. 161, 8 Wkly. Rep. 349, 62 Eng. Ch. 425, 45 Eng. Reprint 474; Salmon *v.* Gibbs, 3 De G. & Sm. 343, 13 Jur. 355, 18 L. J. Ch. 177, 64 Eng. Reprint 508; *In re* Marsden, 4 Drew. 594, 5 Jur. N. S. 590, 28 L. J. Ch. 906, 7 Wkly. Rep. 520, 62 Eng. Reprint 228; Ranking *v.* Barnes, 10 Jur. N. S. 463, 33 L. J. Ch. 539, 3 New Rep. 660, 12 Wkly. Rep. 656; Dauberry *v.* Cockburn, 1 Meriv. 626, 15 Rev. Rep. 174, 35 Eng. Reprint 801.

A covenant by the donee to exercise the power in favor of one of the objects is, it seems, illegal and void. Thacker *v.* Kay, L. R. 8 Eq. 408.

Appointee's ignorance of improper purpose immaterial see *In re* Marsden, 4 Drew. 594, 5 Jur. N. S. 590, 28 L. J. Ch. 906, 7 Wkly. Rep. 520, 62 Eng. Reprint 228. But *compare* Dauberry *v.* Cockburn, 1 Meriv. 626, 15 Rev. Rep. 174, 35 Eng. Reprint 801.

Agreement between appointees.— Where there is an appointment to A and B by one instrument (and *a fortiori* by different instruments), the appointment to A may be good, and the appointment to B bad, and they may agree between themselves that the bad appointment shall not be disturbed. Harrison *v.* Randall, 9 Hare 397, 16 Jur. 72, 21

the donee to direct, the simple fact that such party has voluntarily, and without any knowledge of what the donee intended to do, applied or agreed with a third party so to apply them, is not enough to make the appointment fraudulent and void.[12] And where a testator empowers his son to sell land "to any of my issue," a conveyance by the son to his son is not rendered invalid because the latter shortly afterward conveys to an outsider.[13] The inadequacy of the price brought at a sale under a power conferred by will, without evidence of fraud or collusion, is not sufficient to impeach the sale.[14]

b. Illusory Appointments. In England and some of the United States it has been held that, where there is a power of appointment among several distributees, it cannot be legally exercised except by giving to each appointee a beneficial interest in the fund fairly proportioned to the amount for distribution, and that the appointment of a nominal share to a beneficiary is illusory and void in equity, although not at law,[15] unless he has been otherwise provided for by the donee.[16] This doctrine has never been recognized in other states,[17] and is now abolished by statute in England.[18]

c. Benefit of Donee. The donee of a power cannot lawfully exercise it in such a manner as to secure an advantage to himself, contrary to the intention of the donor as shown in the instrument creating the power;[19] and a release or agreement

L. J. Ch. 294, 41 Eng. Ch. 397, 68 Eng. Reprint 562.

12. Ingraham *v.* Meade, 13 Fed. Cas. No. 7,045, 3 Wall. Jr. 32.

13. Glenn *v.* Glenn, 21 S. C. 308.

14. Bradford *v.* McConihay, 15 W. Va. 732. See also McComb *v.* Waldron, 7 Hill (N. Y.) 335.

15. *Alabama.*— Hatchett *v.* Hatchett, 103 Ala. 556, 16 So. 550.

Kentucky.— Clay *v.* Smallwood, 100 Ky. 212, 38 S. W. 7, 19 Ky. L. Rep. 50; Degman *v.* Degman, 98 Ky. 717, 34 S. W. 523, 17 Ky. L. Rep. 1310.

Tennessee.— See Herrick *v.* Fowler, 108 Tenn. 410, 67 S. W. 861.

Virginia.— McCamant *v.* Nuckolls, 85 Va. 331, 12 S. E. 160; Rhett *v.* Mason, 18 Gratt. 541.

West Virginia.— Thrasher *v.* Ballard, 35 W. Va. 524, 14 S. E. 232.

England.— Hart *v.* Tribe, 32 Beav. 279, 55 Eng. Reprint 110; Ward *v.* Tyrrell, 25 Beav. 563, 4 Jur. N. S. 779, 27 L. J. Ch. 749, 53 Eng. Reprint 752; Hockley *v.* Mawbey, 3 Bro. Ch. 82, 29 Eng. Reprint 420, 1 Ves. Jr. 143, 1 Rev. Rep. 93, 30 Eng. Reprint 271; Pocklington *v.* Bayne, 1 Bro. Ch. 450, 28 Eng. Reprint 1234; Lloyd *v.* Lance, 14 L. J. Ch. 456; Lysaght *v.* Royse, 2 Sch. & Lef. 151; Gibson *v.* Kinven, 1 Vern. Ch. 66, 23 Eng. Reprint 315; Alexander *v.* Alexander, 2 Ves. 640, 28 Eng. Reprint 408; Kemp *v.* Kemp, 5 Ves. Jr. 849, 5 Rev. Rep. 182, 31 Eng. Reprint 891; Spencer *v.* Spencer, 5 Ves. Jr. 362, 31 Eng. Reprint 630; Maddison *v.* Andrew, 1 Ves. 57, 27 Eng. Reprint 889.

See 40 Cent. Dig. tit. "Powers," § 140.

The question whether an appointment is or is not illusory must be determined upon the circumstances of each case, according to sound discretion. Butcher *v.* Butcher, 1 Ves. & B. 79, 12 Rev. Rep. 193, 35 Eng. Reprint 31.

16. Hatchett *v.* Hatchett, 103 Ala. 556, 16 So. 550; Herrick *v.* Fowler, 108 Tenn. 410, 67 S. W. 861; Burrell *v.* Burrell, Ambl. 660, 27 Eng. Reprint 428; Bax *v.* Whitbread, 10 Ves. Jr. 31, 32 Eng. Reprint 755 [*affirmed* in 16 Ves. Jr. 15, 33 Eng. Reprint 889]; Long *v.* Long, 5 Ves. Jr. 445, 5 Rev. Rep. 101, 31 Eng. Reprint 674; Bristow *v.* Warde, 2 Ves. Jr. 336, 2 Rev. Rep. 235, 30 Eng. Reprint 660.

Provision must be made by donee see Vanderzee *v.* Aclom, 4 Ves. Jr. 771, 31 Eng. Reprint 399.

17. Lines *v.* Darden, 5 Fla. 51; Hawthorn *v.* Ulrich, 207 Ill. 430, 69 N. E. 885; Graeff *v.* De Turk, 44 Pa. St. 527; Van Syckel's Estate, 9 Pa. Dist. 367; Fronty *v.* Fronty, Bailey Eq. (S. C.) 517.

18. 11 Geo. IV, and 1 Wm. IV, c. 46. See also *In re* Capon, 10 Ch. D. 484, 48 L. J. Ch. 355, 27 Wkly. Rep. 376; Gainsford *v.* Dunn, L. R. 17 Eq. 405, 43 L. J. Ch. 403, 30 L. T. Rep. N. S. 283, 22 Wkly. Rep. 499; *In re* Stone, Ir. R. 3 Eq. 621, 18 Wkly. Rep. 222.

19. *Kentucky.*— Degman *v.* Degman, 98 Ky. 717, 34 S. W. 523, 17 Ky. L. Rep. 1310, holding that, as a power of appointment must be exercised for the benefit of the parties entitled thereto, and not with a view of benefiting the donee of the power, a widow to whom was devised a life-estate, with power to divide the remainder among the testator's children as she should think best, could not convey to one of the children a greater portion than was granted to the others, on condition that such child should assume the payment of her debts and provide for her and her second husband during their lives.

New Jersey.— Thomson *v.* Norris, 20 N. J. Eq. 489.

North Carolina.— Holt *v.* Hogan, 58 N. C. 82.

Ohio.— Shank *v.* Dewitt, 44 Ohio St. 237, 6 N. E. 255.

Pennsylvania.— Taylor *v.* Haskell, 178 Pa. St. 106, 35 Atl. 732; Bruch *v.* Lantz, 2

not to execute by the donee, in consideration of a benefit to himself, is as much a fraud on the power as an execution for his own benefit.[20] But the mere fact that the donee or a third person is indirectly benefited by the exercise of a power does not render its execution fraudulent, where such benefit is not the moving cause of such execution;[21] and where the execution of a power, as by will, is valid in its inception, it will not be afterward avoided by being made the basis of transactions amounting to a fraud on the power.[22]

3. Partial Invalidity. In equity the fact that the execution of a power is partly invalid, because of excess of the power, fraud, or for any other reason, does not, as a rule, invalidate it *in toto*, if the valid and invalid parts are severable;[23] but

Rawle 392, 21 Am. Dec. 458. See also Cadbury *v.* Duval, 10 Pa. St. 265.

South Carolina.— Drayton *v.* Drayton, 2 Desauss. Eq. 250 note.

Tennessee.— Bostick *v.* Winton, 1 Sneed 524.

England.— Cunninghame *v.* Anstruther, L. R. 2 H. L. Sc. 223; *In re* Perkins, [1893] 1 Ch. 283, 62 L. J. Ch. 531, 67 L. T. Rep. N. S. 743, 3 Reports 40, 41 Wkly. Rep. 170; Langston *v.* Blackmore, Ambl. 289, 27 Eng. Reprint 194; Wicherly's Case, Ambl. 234 note, 27 Eng. Reprint 155; Lane *v.* Page, Ambl. 233, 27 Eng. Reprint 155; Palmer *v.* Wheeler, 2 Ball & B. 18, 12 Rev. Rep. 60; Eland *v.* Baker, 29 Beav. 137, 7 Jur. N. S. 956, 9 Wkly. Rep. 444, 54 Eng. Reprint 579; Reid *v.* Reid, 25 Beav. 469, 53 Eng. Reprint 716; Askham *v.* Barker, 17 Beav. 37, 22 L. J. Ch. 769, 1 Wkly. Rep. 279, 51 Eng. Reprint 945; Jackson *v.* Jackson, 7 Cl. & F. 977, 7 Eng. Reprint 1338, West 575, 9 Eng. Reprint 605; Aleyn *v.* Belchier, 1 Eden 132, 28 Eng. Reprint 634; Rowley *v.* Rowley, 2 Eq. Rep. 241, 18 Jur. 306, Kay 242, 23 L. J. Ch. 275, 23 L. T. Rep. N. S. 55, 69 Eng. Reprint 103; Beaden *v.* King, 9 Hare 499, 22 L. J. Ch. 111, 41 Eng. Ch. 499, 68 Eng. Reprint 608; Harrison *v.* Randall, 9 Hare 397, 16 Jur. 72, 21 L. J. Ch. 294, 41 Eng. Ch. 397, 68 Eng. Reprint 562; Skelton *v.* Flanagan, 14 Ir. Ch. 484; Hewett *v.* Dacre, 2 Jur. 836, 2 Keen 622, 7 L. J. Ch. 295, 15 Eng. Ch. 622, 48 Eng. Reprint 768; Humphry *v.* Olver, 5 Jur. N. S. 946, 28 L. J. Ch. 406, 7 Wkly. Rep. 334; Warde *v.* Dickson, 5 Jur. N. S. 698, 28 L. J. Ch. 315, 7 Wkly. Rep. 148; Mackechnie *v.* Majoribanks, 39 L. J. Ch. 604, 22 L. T. Rep. N. S. 841, 18 Wkly. Rep. 993; Arnold *v.* Hardwicke, 4 L. J. Ch. 152, 7 Sm. 343, 8 Eng. Ch. 343, 58 Eng. Reprint 869; Tucker *v.* Sanger, McClell. 449, 13 Price 607; Farmer *v.* Martin, 2 Sim. 502, 29 Rev. Rep. 151, 2 Eng. Ch. 502, 57 Eng. Reprint 876; Clinton *v.* Seymour, 4 Ves. Jr. 440, 31 Eng. Reprint 226; Smith *v.* Camelford, 2 Ves. Jr. 698, 3 Rev. Rep. 36, 30 Eng. Reprint 848.

See 40 Cent. Dig. tit. "Powers," § 141.

Strong suspicion that an appointment by a father to his son was for the benefit of the father, and a fraud upon the power, is not sufficient to avoid the transaction. Hamilton *v.* Kirwan, 8 Ir. Eq. 278, 2 J. & L. 393.

An appointment to an infant of immature years is not rendered invalid by the fact that the donee might benefit by reason of its death. *In re* De Hoghton, [1896] 2 Ch. 385, 65 L. J. Ch. 667, 74 L. T. Rep. N. S. 613, 44 Wkly. Rep. 635; Henty *v.* Wrey, 21 Ch. D. 332, 53 L. J. Ch. 674, 47 L. T. Rep. N. S. 231, 30 Wkly. Rep. 850; Beere *v.* Hoffmister, 23 Beav. 101, 3 Jur. N. S. 78, 26 L. J. Ch. 177, 53 Eng. Reprint 40; Fearon *v.* Desbrisay, 14 Beav. 635, 21 L. J. Ch. 505, 51 Eng. Reprint 428 (one appointee *en ventre sa mere*); Butcher *v.* Jackson, 14 Sim. 444, 37 Eng. Ch. 444, 60 Eng. Reprint 430; Domville *v.* Lamb, 1 Wkly. Rep. 246. See also Gee *v.* Gurney, 2 Coll. 486, 10 Jur. 367, 33 Eng. Ch. 486, 63 Eng. Reprint 826. *Compare* Hinchinbroke *v.* Seymour, 1 Bro. Ch. 395, 28 Eng. Reprint 1200.

Appointment by parent to dying child held invalid see Carroll *v.* Graham, 11 Jur. N. S. 1012, 13 L. T. Rep. N. S. 391; Wellesley *v.* Mornington, 1 Jur. N. S. 1202, 2 Kay & J. 143, 69 Eng. Reprint 728.

20. Thomson *v.* Norris, 20 N. J. Eq. 489. But see *In re* Somes, [1896] 1 Ch. 250, 65 L. J. Ch. 262, 74 L. T. Rep. N. S. 49, 44 Wkly. Rep. 236 [*following In re* Radcliffe, [1892] 1 Ch. 227, 61 L. J. Ch. 186, 66 L. T. Rep. N. S. 363, 40 Wkly. Rep. 323], decided under Conveyancing Act (1881), § 52.

21. Cooper *v.* Cooper, L. R. 5 Ch. 203, 39 L. J. Ch. 240, 22 L. T. Rep. N. S. 1, 18 Wkly. Rep. 299; Roach *v.* Trood, 3 Ch. D. 429, 34 L. T. Rep. N. S. 105, 24 Wkly. Rep. 803; *In re* Huish, L. R. 10 Eq. 5, 39 L. J. Ch. 499, 22 L. T. Rep. N. S. 565, 18 Wkly. Rep. 817; Conolly *v.* McDermott, Beatty 601; Cockroft *v.* Sutcliffe, 2 Jur. N. S. 323, 25 L. J. Ch. 313, 4 Wkly. Rep. 339; Shirley *v.* Fisher, 47 L. T. Rep. N. S. 109.

22. Pares *v.* Pares, 10 Jur. N. S. 90, 33 L. J. Ch. 215, 12 Wkly. Rep. 231.

23. *Georgia.*— New *v.* Potts, 55 Ga. 420, holding that the fact that the exercise of a limited power given by will in respect to one half of the property is illusory or collusive will not render void the exercise of an unlimited power as to the other half, it not appearing that the latter power would have been differently exercised if the former had not been perverted.

Illinois.— Butler *v.* Huestis, 68 Ill. 594, 18 Am. Rep. 589.

Kentucky.— Johnson *v.* Yates, 9 Dana 491.

Maryland.— Graham *v.* Whitridge, 99 Md. 248, 57 Atl. 609, 58 Atl. 36, 66 L. R. A. 408; Barnum *v.* Barnum, 26 Md. 119, 90 Am. Dec. 88, holding that where a power is itself valid in not transgressing the rule against perpetuities, and the donee in exercising it goes beyond the proper boundary, equity, being

if the invalidity is inseparably connected with the whole transaction, the execution is wholly invalid;[24] and if a power of appointment has, through mistake, been exercised by the deceased donee in favor of some who are, and of some who are not, the legitimate objects, it is not to be held good *pro tanto*, in a case where, in the absence of an appointment, the fund would be distributed among the proper objects, but is wholly void.[25] The court will not entertain a suit to set aside an appointment of a part as a fraud upon the power, when it appears that another appointment, not impeached, was made, in which regard was had to the appointment complained of, and the object of which was to equalize the interests of the several appointees.[26]

4. Confirmation — a. By Objects of Power. Where the legitimate objects of a power expressly confirm an invalid execution, they are afterward estopped to contest its validity.[27]

guided by the power, will treat the excess as surplusage and void, where the portion that exceeds the boundary of perpetuity can be ascertained.

Massachusetts.— Loring *v.* Blake, 98 Mass. 253.

Michigan.— Ready *v.* Kearsley, 14 Mich. 215, holding that the general rule is that if the donee of a power, undertaking to execute it by a conveyance, annexes unauthorized conditions, the conveyance is valid and the conditions void.

New York.— Hillen *v.* Iselin, 144 N. Y. 365, 39 N. E. 368 [*affirming* 67 Hun 444, 22 N. Y. Suppl. 282] (holding that the fact that the donee of a power in a will named trustees other than those named in the will, to hold the estate during the life of her son, was immaterial under the rule that the execution of a power will not be defeated because of some provision in excess of the power, but will be executed so far as warranted, the excess only being disregarded); Austin *v.* Oakes, 117 N. Y. 577, 23 N. E. 193; Griffen *v.* Ford, 1 Bosw. 123.

Ohio.— Knox County Com'rs *v.* Nichols, 14 Ohio St. 260; State *v.* Perrysburg Bd. of Education, 5 Cinc. L. Bul. 147.

Pennsylvania.— Rogers' Estate, 31 Pa. Super. Ct. 620 [*affirmed* in 218 Pa. St. 431, 67 Atl. 762].

Tennessee.— Cruse *v.* McKee, 2 Head 1, 73 Am. Dec. 186.

Virginia.— Hood *v.* Haden, 82 Va. 588; Morris *v.* Owen, 2 Call 520.

United States.— Warner *v.* Howell, 29 Fed. Cas. No. 17,184, 3 Wash. 12.

England.— *In re* Finch, [1903] 2 Ch. 486, 72 L. J. Ch. 690, 89 L. T. Rep. N. S. 162; Palmer *v.* Wheeler, 2 Ball & B. 18, 12 Rev. Rep. 60; Brown *v.* Nisbett, 1 Cox Ch. 13, 29 Eng. Reprint 1040 (appointment to daughters valid, although appointment to executors of such of them as should die void, as not within the power); Topham *v.* Portland, 1 De G. J. & S. 517, 32 L. J. Ch. 257, 8 L. T. Rep. N. S. 180, 1 New Rep. 496, 11 Wkly. Rep. 507, 66 Eng. Ch. 401, 46 Eng. Reprint 205; Aleyn *v.* Belchier, 1 Eden 132, 28 Eng. Reprint 634; Rowley *v.* Rowley, 2 Eq. Rep. 241, 18 Jur. 306, Kay 242, 23 L. J. Ch. 275, 23 L. T. Rep. N. S. 55, 69 Eng. Reprint 103; Harrison *v.* Randall, 9 Hare 397, 16 Jur. 72, 21 L. J. Ch. 294, 41 Eng. Ch. 397, 68 Eng. Reprint 562; *In re* Bernard, 6 Ir. Ch. 133; *In re* Chambers, 11 Ir. Eq. 518 (appointment to persons not objects of the power void, but appointment of residue, being within the power, valid); Ranking *v.* Barnes, 10 Jur. N. S. 463, 33 L. J. Ch. 539, 3 New Rep. 660, 12 Wkly. Rep. 565; Ratcliffe *v.* Hampson, 1 Jur. N. S. 1104, 4 Wkly. Rep. 67; Viant *v.* Cooper, 76 L. T. Rep. N. S. 768; Fox *v.* Charlton, 6 L. T. Rep. N. S. 743, 10 Wkly. Rep. 506; Crompe *v.* Barrow, 4 Ves. Jr. 681, 4 Rev. Rep. 318, 31 Eng. Reprint 351; Smith *v.* Camelford, 2 Ves. Jr. 698, 3 Rev. Rep. 36, 30 Eng. Reprint 848; Bristow *v.* Warde, 2 Ves. Jr. 336, 2 Rev. Rep. 235, 30 Eng. Reprint 660 (appointment void for excess only, and what is ill-appointed goes as in default of appointment).

Canada.— Bell *v.* Lee, 8 Ont. App. 185, 3 Can. L. T. Occ. Notes 197 referred to *supra*, p. 1060 note 28.

See 40 Cent. Dig. tit. "Powers," §§ 142, 151.

24. Myers *v.* Baltimore Safe-Deposit, etc., Co., 73 Md. 413, 21 Atl. 58; Rogers' Estate, 31 Pa. Super. Ct. 620 [*affirmed* in 218 Pa. St. 431, 67 Atl. 762]; Hutchins *v.* Hutchins, Ir. R. 10 Eq. 453; Farmer *v.* Martin, 2 Sim. 502, 29 Rev. Rep. 151, 2 Eng. Ch. 502, 57 Eng. Reprint 876; Agassiz *v.* Squire, 18 Beav. 431, 1 Jur. N. S. 50, 23 L. J. Ch. 985, 52 Eng. Reprint 170; Dauberry *v.* Cockburn, 1 Meriv. 626, 15 Rev. Rep. 174, 35 Eng. Reprint 801.

25. Varrell *v.* Wendell, 20 N. H. 431.

26. Harrison *v.* Randall, 9 Hare 397, 16 Jur. 72, 21 L. J. Ch. 294, 41 Eng. Ch. 397, 68 Eng. Reprint 562.

27. Wright *v.* Goff, 22 Beav. 207, 2 Jur. N. S. 481, 25 L. J. Ch. 803, 4 Wkly. Rep. 522, 52 Eng. Reprint 1087 (confirmation by only object of power of execution in favor of strangers); Skelton *v.* Flanagan, Ir. R. 1 Eq. 362 (mortgage); Preston *v.* Preston, 21 L. T. Rep. N. S. 346 (deed of confirmation). *Compare*, however, Wade *v.* Cox, 4 L. J. Ch. 105, holding that where a tenant for life with remainder to his children as he might appoint was indebted to a trustee of the fund, and soon after his son became of age executed the power in his favor, and the whole fund was retained by the trustee in

b. By Legislative Act. An invalid execution of a power may be confirmed by a general or special legislative act.[28]

5. Reëxecution After Invalid Appointment. The fact that an execution of a power of appointment is invalid because fraudulent or excessive does not prevent a subsequent valid reëxecution of the power.[29] And fraud in the appointment of part of a fund will not necessarily render invalid a subsequent appointment of the residue.[30] But if the taint of the first appointment enters into and is not cured by the subsequent appointment the latter is also invalid.[31]

6. Partial and Successive Executions — a. In General. A power may be exercised from time to time by partial and successive executions, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest;[32] and where successive irrevocable appointments are made in favor of the same person, the later appointment will be held to be in substitution for the former, if such appears to be the intention of the donee of the power, and the appointee will be compelled to elect between them.[33]

b. Abatement and Priority of Appointments. The first of several successive appointments by deed has priority, where all cannot be satisfied out of the fund, and the appointees do not take ratable portions of the fund;[34] but where suc-

satisfaction of his debt, and the son, at the age of twenty-three executed a release to the trustee of all his claims, and eighteen years afterward filed a bill the whole transaction was fraudulent and void, and that the trustee should be ordered to replace the fund, the father also being declared responsible.

28. Price *v.* Huey, 22 Ind. 18 (general act validating sales); Thomson *v.* Norris, 20 N. J. Eq. 489 (special act).

29. Carver *v.* Richards, 27 Beav. 488, 5 Jur. N. S. 1412, 29 L. J. Ch. 169, 1 L. T. Rep. N. S. 257, 8 Wkly. Rep. 157, 54 Eng. Reprint 193 [*affirmed* in 1 De G. F. & J. 548, 6 Jur. N. S. 410, 29 L. J. Ch. 357, 2 L. T. Rep. N. S. 161, 8 Wkly. Rep. 349, 62 Eng. Ch. 425, 45 Eng. Reprint 474]. See also Morgan *v.* Gronow, L. R. 16 Eq. 1, 42 L. J. Ch. 410, 28 L. T. Rep. N. S. 434.

30. Rowley *v.* Rowley, 2 Eq. Rep. 241, 18 Jur. 306, Kay 242, 23 L. J. Ch. 275, 23 L. T. Rep. N. S. 55, 69 Eng. Reprint 103.

31. Askham *v.* Barker, 12 Beav. 499, 50 Eng. Reprint 1152; Farmer *v.* Martin, 2 Sim. 502, 29 Rev. Rep. 151, 2 Eng. Ch. 502, 57 Eng. Reprint 876. *Compare* Armytage *v.* Armytage, 6 Jur. 790, 1 Y. & Coll. 461, 20 Eng. Ch. 461, 62 Eng. Reprint 971.

When an appointment has been set aside on the ground that it was made in reliance on a sense of moral obligation known to be operating on the mind of the appointee, which would lead her to carry out the appointor's wishes, nothing short of a distinct declaration by the appointor that he considers the appointee relieved from such obligation can make a fresh appointment to the same person valid. Topham *v.* Portland, L. R. 5 Ch. 40, 39 L. J. Ch. 259, 22 L. T. Rep. N. S. 847, 18 Wkly. Rep. 235. And see Jackson *v.* Jackson, Drury 99.

32. Johnson *v.* Yates, 9 Dana (Ky.) 491; Tyson *v.* Tyson, 31 Md. 134; Asay *v.* Hoover, 5 Pa. St. 21, 45 Am. Dec. 713; Cunninghame *v.* Anstruther, L. R. 2 H. L. Sc. 223; Hervey *v.* Hervey, 1 Atk. 561, 26 Eng. Reprint 352; Versturme *v.* Gardiner, 17 Beav. 338, 51 Eng. Reprint 1064; Bovy *v.* Smith, 2 Ch. Cas. 124, 22 Eng. Reprint 877, 1 Vern. Ch. 85, 23 Eng. Reprint 328; Webster *v.* Boddington, 16 Sim. 177, 39 Eng. Ch. 177, 60 Eng. Reprint 840; Job *v.* Job, 2 Wkly. Rep. 25.

A power of appointing a fee may be exe cuted at several times, viz., at one time to pass an estate for life, and the fee at another. Bovy *v.* Smith, 2 Ch. Cas. 124, 22 Eng. Reprint 877, 1 Vern. Ch. 85, 23 Eng. Reprint 328.

Primary and secondary powers.— Where property was settled in trust for the children, as the husband and wife should jointly appoint, but if either should die before any appointment made, then as the survivor should solely appoint, it was held that, notwithstanding a joint appointment of part of the property, a sole appointment might be made of the remainder by the survivor. Matter of Simpson, 4 De G. & Sm. 521, 20 L. J. Ch. 415, 64 Eng. Reprint 940. See also Brown *v.* Nisbett, 1 Cox Ch. 13, 29 Eng. Reprint 1040; Mapleton *v.* Mapleton, 4 Drew. 515, 28 L. J. Ch. 785, 7 Wkly. Rep. 468, 62 Eng. Reprint 198. But see Simpson *v.* Paul, 2 Eden 34, 28 Eng. Reprint 808.

Appointment pendente lite.— In a suit to have an appointment under a discretionary power declared invalid, a subsequent appointment *pendente lite* was upheld. Ward *v.* Tyrrell, 25 Beav. 563, 4 Jur. N. S. 779, 27 L. J. Ch. 740, 53 Eng. Reprint 752.

Misapplication of fund appointed.—An estate having once borne a charge in favor of legatees or creditors is discharged, although the fund has been misapplied by the trustees. Omerod *v.* Hardman, 5 Ves. Jr. 722, 31 Eng. Reprint 825.

33. *In re* Tancred, [1903] 1 Ch. 715, 72 L. J. Ch. 324, 88 L. T. Rep. N. S. 164, 51 Wkly. Rep. 510; England *v.* Lavers, L. R. 3 Eq. 63, 15 Wkly. Rep. 51. See also Hindle *v.* Taylor, 5 De G. M. & G. 577, 1 Jur. N. S. 1029, 25 L. J. Ch. 78, 4 Wkly. Rep. 62, 54 Eng. Ch. 456, 43 Eng. Reprint 994.

34. *In re* Creagh, L. R. 25 Ir. 128; Trollope

cessive appointments are made by separate wills, the later will takes priority.[35] Where specific sums are appointed by will to some appointees, and there is an appointment of the residue to another, the specific appointments have priority, and the pecuniary and residuary legacies do not abate proportionably.[36] Where the fund is insufficient to satisfy contemporaneous legacies, they are abated proportionably.[37] Where a person has a power of appointment over two funds under separate powers, and appoints a sum by will, referring generally to both powers, the sum must be considered as appointed ratably out of both funds.[38] Where a donee of a power of appointment appoints a specific sum out of the fund over which he has power to appoint, and the fund is subsequently reduced, the specific sum appointed is to be paid in full, and not ratably out of the deficient gross sum.[39]

7. Lapsed Appointments — a. In General. Where an appointee dies before the appointment to him, whether by will or deed, takes effect, his appointment lapses,[40] except in so far as the rule is changed by statute.[41] The same principle which makes a gift to an appointee, under a special power of appointment by will, fail or lapse by reason of the death of the appointee before the death of the testator, also applies to the failure of the subject-matter of the appointment.[42] Where under a general testamentary power money is appointed not out of mere bounty, but in satisfaction of a debt, the gift will inure to the estate of the appointee, if he dies before the testator.[43]

b. Distribution of Subject-Matter on Death of Appointee[44] — (i) *In General.* Upon the death of a sole appointee or of all of several appointees under a

v. Routledge, 1 De G. & Sm. 662, 11 Jur. 1002, 63 Eng. Reprint 1240; Gilbert *v.* Whitfield, 52 L. J. Ch. 210, 48 L. T. Rep. N. S. 383; Stokes *v.* Bridgman, 47 L. J. Ch. 759.

Specific appointment of part and general appointment of residue.— Where an appointment is made to take effect out of a trust fund generally, and afterward an appointment is made of a specific portion of the trust fund, the portion not specifically appointed must be first applied in satisfaction of the first appointment; and the specifically appointed portion is only to be resorted to in the event of a deficiency. Morgan *v.* Gronow, L. R. 16 Eq. 1, 42 L. J. Ch. 410, 28 L. T. Rep. N. S. 434.

35. Pettinger *v.* Ambler, L. R. 1 Eq. 510, 35 Beav. 321, 35 L. J. Ch. 389, 14 L. T. Rep. N. S. 118.

36. De Lisle *v.* Hodges, L. R. 17 Eq. 440, 43 L. J. Ch. 385, 30 L. T. Rep. N. S. 158, 22 Wkly. Rep. 363; Petre *v.* Petre, 14 Beav. 197, 15 Jur. 693, 51 Eng. Reprint 262; Harley *v.* Moon, 1 Dr. & Sm. 623, 7 Jur. N. S. 1227, 31 L. J. Ch. 140, 6 L. T. Rep. N. S. 411, 10 Wkly. Rep. 146, 62 Eng. Reprint 516; Cust *v.* Middleton, 18 L. T. Rep. N. S. 36, 16 Wkly. Rep. 391.

37. De Lisle *v.* Hodges, L. R. 17 Eq. 440, 43 L. J. Ch. 385, 30 L. T. Rep. N. S. 158, 22 Wkly. Rep. 363; Miller *v.* Huddestone, L. R. 6 Eq. 65, 37 L. J. Ch. 421, 18 L. T. Rep. N. S. 203; Laurie *v.* Clutton, 15 Beav. 65, 51 Eng. Reprint 460.

Deficiency made out of lapsed share.— Where A had power to appoint £10,000 among his children, and having appointed £3,000 to one child, appointed by will £10,000 among all his children *nominatim*, and one of the children died in testator's lifetime, it was held that the deficiency of the other shares should be made up out of the lapsed share. Eales *v.* Drake, 1 Ch. D. 217, 45 L. J. Ch. 51, 24 Wkly. Rep. 184.

38. Swete *v.* Tindal, 31 L. T. Rep. N. S. 223.

39. Booth *v.* Alington, 6 De G. M. & G. 613, 3 Jur. N. S. 49, 26 L. J. Ch. 138, 5 Wkly. Rep. 107, 55 Eng. Ch. 477, 43 Eng. Reprint 1372.

40. Harker *v.* Reilly, 4 Del. Ch. 72; Lyndall's Estate, 2 Pa. Dist. 476; Holyland *v.* Lewin, 26 Ch. D. 266, 53 L. J. Ch. 530, 51 L. T. Rep. N. S. 14, 32 Wkly. Rep. 443; Lakin *v.* Lakin, 34 Beav. 443, 11 Jur. N. S. 522, 12 L. T. Rep. N. S. 517, 13 Wkly. Rep. 704, 55 Eng. Reprint 707; Wright *v.* Cadogan, 1 Bro. P. C. 486, 1 Eng. Reprint 707; *In re* Harries, Johns. 199, 70 Eng. Reprint 395; Colthurst *v.* Colthurst, 2 Jones Exch. 262; Carter *v.* Taggart, 16 Sim. 423, 39 Eng. Ch. 423, 60 Eng. Reprint 938; Bielefield *v.* Record, 2 Sim. 354, 2 Eng. Ch. 354, 57 Eng. Reprint 821; Marborough *v.* Godolphin, 2 Ves. 61, 28 Eng. Reprint 41; Oke *v.* Heath, 1 Ves. 135, 27 Eng. Reprint 940; Brookman *v.* Hales, 2 Ves. & B. 45, 13 Rev. Rep. 9, 35 Eng. Reprint 235; Burges *v.* Mawbey, 10 Ves. Jr. 319, 32 Eng. Reprint 867; Vanderzee *v.* Aclom, 4 Ves. Jr. 771, 31 Eng. Reprint 399.

41. Lyndall's Estate, 2 Pa. Dist. 476.

42. Beddington *v.* Baumann, [1903] A. C. 13, 72 L. J. Ch. 155, 87 L. T. Rep. N. S. 658, 19 T. L. R. 58, 51 Wkly. Rep. 383.

43. Stevens *v.* King, [1904] 2 Ch. 30, 73 L. J. Ch. 535, 90 L. T. Rep. N. S. 665, 52 Wkly. Rep. 443.

44. Limitation over or other disposition of property on failure of execution see Wills.

special power before the appointment takes effect, the subject-matter goes as in default of appointment.[45] But under a general power the effect of testamentary appointment in trust for one who dies in the lifetime of the appointor is that the appointed property does not revert to the donor, or to those who would have taken under a gift over in default, but remains part of the general estate of the appointor.[46] If, however, the appointment under a general power is made directly to the appointee, it is a question of intention whether, on the death of the appointee, the subject-matter remains in the appointor, or reverts to the donor or those who would have taken by gift over in default.[47]

(II) *Upon Death of Joint Appointee.* Where one of several joint appointees dies before the appointment takes effect, the entire subject-matter passes to the survivors.[48]

c. Effect of Appointment of Residue — (I) *In General.* Where a definite fund is subject to a special power of appointment, and one sum, part of the fund, is appointed to one person, and another sum, other part of it, to another, and "all the rest," or "all the remainder" of the fund to a third, the third appointee cannot claim a share which may lapse in consequence of the death of either of the former appointees;[49] but if there is upon the will a plain indication of an intention to appoint the whole that may remain strictly in shape of residue, or to appoint the entire fund charged only with the sums specified in the preceding appointments, then the residuary clause will be read as an appointment of the entire fund, subject to the preceding appointments, the court acting upon the manifest intention of the testator to dispose of the entire fund.[50]

(II) *Under English Wills Act.* Under the English Wills Act a general residuary devise or bequest will include property appointed under the will, where the appointment has lapsed by reason of the appointee's death.[51]

8. Evidence of Due Execution. The burden of proof is on one who attacks the execution of a power on the ground of fraud,[52] and if the proof leaves it doubtful

45. Harker *v.* Reilly, 4 Del. Ch. 72; Lyndall's Estate, 2 Pa. Dist. 476; Colthurst *v.* Colthurst, 2 Jones Exch. 262.

46. *In re* Van Hagan, 16 Ch. D. 18, 50 L. J. Ch. 1, 44 L. T. Rep. N. S. 161, 29 Wkly. Rep. 84. See also Chamberlain *v.* Hutchinson, 22 Beav. 444, 52 Eng. Reprint 1179, opinion by Sir John Romilly, M. R.

Fund not exhausted.— Where the donee of a general power appoints the entire funds upon trusts which do not exhaust it, and there is no appointment of the residue, the surplus falls into the donee's estate. Leferve *v.* Freeland, 24 Beav. 403, 53 Eng. Reprint 413.

47. *In re* Boyd, [1897] 2 Ch. 232, 66 L. J. Ch. 614, 77 L. T. Rep. N. S. 76, 45 Wkly. Rep. 648; Coxen *v.* Rowland, [1894] 1 Ch. 406, 63 L. J. Ch. 179, 70 L. T. Rep. N. S. 89, 8 Reports 525, 42 Wkly. Rep. 568; *In re* Pinede, 12 Ch. D. 667, 48 L. J. Ch. 741, 41 L. T. Rep. N. S. 579, 28 Wkly. Rep. 178; *In re* Davies, L. R. 13 Eq. 163, 25 L. T. Rep. N. S. 785, 20 Wkly. Rep. 165; Wilkinson *v.* Schneider, L. R. 9 Eq. 423, 39 L. J. Ch. 410; Bickenden *v.* Williams, L. R. 7 Eq. 310, 38 L. J. Ch. 222, 17 Wkly. Rep. 441; *In re* De Luse, L. R. 3 Ir. 232; Chamberlain *v.* Hutchinson, 22 Beav. 444, 52 Eng. Reprint 1179; Hoare *v.* Osborne, 10 Jur. N. S. 694, 33 L. J. Ch. 586, 10 L. T. Rep. N. S. 258, 12 Wkly. Rep. 661.

48. Wright *v.* Cadogan, 1 Bro. P. C. 486, 1 Eng. Reprint 707.

49. *In re* Harries, Johns. 199, 70 Eng. Reprint 395.

50. *In re* Harries, Johns. 199, 70 Eng. Reprint 395. See also Carter *v.* Taggart, 16 Sim. 423, 39 Eng. Ch. 423, 60 Eng. Reprint 938 (entire sum charged with legacy); Oke *v.* Heath, 1 Ves. 135, 27 Eng. Reprint 940 (residue as residue).

51. Freme *v.* Clement, 18 Ch. D. 499, 50 L. J. Ch. 801, 44 L. T. Rep. N. S. 399, 30 Wkly. Rep. 1; Bush *v.* Cowan, 9 Jur. N. S. 429, 9 L. T. Rep. N. S. 161, 11 Wkly. Rep. 395; *In re* Spooner, 21 L. J. Ch. 151, 2 Sim. N. S. 129, 42 Eng. Ch. 129, 61 Eng. Reprint 289.

52. Budington *v.* Munson, 33 Conn. 481; Askham *v.* Barker, 17 Beav. 37, 22 L. J. Ch. 769, 1 Wkly. Rep. 279, 51 Eng. Reprint 945.

Fraudulent intention abandoned.— Where the evidence establishes that it was at one time intended by the appointor that an appointment should be exercised for his own benefit, the burden of proof that such intention was subsequently abandoned lies on the appointee. Humphry *v.* Olver, 5 Jur. N. S. 946, 28 L. J. Ch. 406, 7 Wkly. Rep. 334. And when an appointment has been set aside by reason of what has taken place between the donee and the appointee, a second appointment by the same donee to the same appointee can only be sustained by clear proof on the part of the appointee that the second appointment is perfectly free from the taint which attached to the first. Topham *v.*

whether a power of appointment has been legally or illegally exercised, the presumption in favor of meritorious claimants is that it has been legally exercised.[53] Not only the instrument of execution, but all the accompanying facts must be examined, to ascertain the real nature of the transaction.[54] The intentions of the donor are to be collected from the instruments, and not from parol evidence, but parol evidence is admissible to show the purposes for which the power was exercised, although they may not appear on the deeds.[55] Where a will gives executors plenary power to sell, their deed is conclusive evidence of sale under the power, and vests the title to the land in the purchaser;[56] and where a purchaser has had uninterrupted possession for thirty years under what purported to be the execution of a power of sale conferred upon a trustee, it will be presumed that the conveyance to him was sufficient to pass the estate of the grantor, and was made in pursuance of a valid execution of the power.[57] But the execution of a power will not be presumed from the fact that the bequests in a will exceed the testator's estate.[58]

9. Revocation of Execution.[59] A power which, in any mode, and to any extent whatever, has been exercised revocably, and the revocable appointment made under which has been revoked, without being operated upon, is generally of the same force, and exercisable in the same manner, as if the revoked appointment had not existed; and a power cannot be necessarily exhausted by a revocable act, although exercising otherwise the power to the utmost, more than by a conditional act, or by an act of merely partial execution.[60] Conversely, where an act of revocation is itself rescinded, the original execution of the power remains in full force and effect.[61] If an irrevocable appointment is made of a life-interest in favor of a first wife, and, subject thereto, the fund is appointed absolutely to children, the appointor cannot, after the death of his first wife, make a valid appointment to a second wife, to take effect in priority to the interests of the children, such appointment being inconsistent with the previous exercise of the power.[62]

J. Defective, Excessive, and Irregular Execution, and Non-Execution — 1. Aiding Defective Execution — a. In General. Equity may correct the execution of a power, defective in form, but it has no jurisdiction to relieve from the effects of a failure to execute,[63] unless it is imperative or coupled with a

Portland, L. R. 5 Ch. 40, 39 L. J. Ch. 259, 22 L. T. Rep. N. S. 847, 18 Wkly. Rep. 235. And see Hutchins *v.* Hutchins, Ir. R. 10 Eq. 453.

53. Marshall *v.* Stephens, 8 Humphr. (Tenn.) 159, 47 Am. Dec. 601.

Mere suspicion.— The court will not go against a title on mere suspicion of appointment by the donee for his own benefit, as, for example, in the case of a purchaser under the execution of a power of appointment by a father, subject to estates for life, in him and his wife, in favor of their son, all three joining and receiving the money, the fair value. McQueen *v.* Farquhar, 11 Ves. Jr. 467, 8 Rev. Rep. 212, 32 Eng. Reprint 1168.

Strong suspicion.— It has even been held that a strong suspicion that an appointment by a father to his son was for the benefit of the father and a fraud upon the power is not sufficient to avoid the transaction. Hamilton *v.* Kirwan, 8 Ir. Eq. 278, 2 J. & L. 393.

54. Askham *v.* Barker, 17 Beav. 37, 22 L. J. Ch. 769, 1 Wkly. Rep. 279, 51 Eng. Reprint 945.

55. Portland *v.* Topham, 11 H. L. Cas. 32, 10 Jur. N. S. 501, 34 L. J. Ch. 113, 10 L. T. Rep. N. S. 355, 12 Wkly. Rep. 697, 11 Eng. Reprint 1242.

56. White *v.* Williamson, 2 Grant (Pa.) 249.

57. Doe *v.* Ladd, 77 Ala. 223.

Consent of third person presumed.— Bredenburg *v.* Bardin, 36 S. C. 197, 15 S. E. 372.

58. Bingham's Appeal, 64 Pa. St. 345.

59. Revocation of testamentary appointment see Wills.

60. Saunders *v.* Evans, 8 H. L. Cas. 721, 7 Jur. N. S. 1293, 31 L. J. Ch. 233, 5 L. T. Rep. N. S. 129, 9 Wkly. Rep. 501, 11 Eng. Reprint 611.

61. See Burkett *v.* Whittemore, 36 S. C. 428, 15 S. E. 616, in which a deed by the donee in execution of the power was held to be in effect rescinded by a reconveyance to her, so that the power was not completely executed thereby, and consequently a prior execution by will was not revoked, and remained in full force and effect.

62. *In re* Hancock, [1896] 2 Ch. 173, 65 L. J. Ch. 690, 74 L. T. Rep. N. S. 658, 44 Wkly. Rep. 545.

63. *Alabama.*— McBryde *v.* Wilkinson, 29 Ala. 662; Mitchell *v.* Denson, 29 Ala. 327, 65 Am. Dec. 403.

trust.[64] Where, however, application is made to a court of equity to aid the execution of a power which has not been technically and legally executed, the right to relief depends upon establishing satisfactorily the intention on the part of the donee to execute the power.[65] And even where the intention to execute is shown, equity cannot relieve against the defective execution of a power created by law, nor dispense with any of the formalities required thereby for its due execution.[66] Furthermore, the defects which will be corrected in the execution of a power are matters of form, such as the want of a seal or witnesses, or of signatures, and not matters of substance or essence.[67] It has been held that where a power to be

California.— Beatty *v.* Clark, 20 Cal. 11.

Connecticut.— Lockwood *v.* Sturdevant, 6 Conn. 373.

Florida.— Lines *v.* Darden, 5 Fla. 51.

Illinois.— Bond *v.* Ramsey, 72 Ill. 550.

Iowa.— Long *v.* Hewitt, 44 Iowa 363; Wilkinson *v.* Getty, 13 Iowa 157, 81 Am. Dec. 428.

Kentucky.— Muldrow *v.* Fox, 2 Dana 74.

Maryland.— Howard *v.* Carpenter, 11 Md. 259.

Mississippi.— McCaleb *v.* Pradat, 25 Miss. 257.

New Jersey.— Robeson *v.* Shotwell, 55 N. J. Eq. 318, 36 Atl. 780 [*affirmed* in 55 N. J. Eq. 824, 41 Atl. 1115]; Mutual L. Ins. Co. *v.* Everett, 40 N. J. Eq. 345, 3 Atl. 126; Hampton *v.* Nicholson, 23 N. J. Eq. 423; Lippincott *v.* Stokes, 6 N. J. Eq. 122.

New York.— Ward *v.* Stanard, 82 N. Y. App. Div. 386, 81 N. Y. Suppl. 906; Griffen *v.* Ford, 1 Bosw. 123; Dominick *v.* Sayre, 3 Sandf. 555; Kemp *v.* Kemp, 36 Misc. 79, 72 N. Y. Suppl. 617; Correll *v.* Lauterbach, 14 Misc. 469, 36 N. Y. Suppl. 615; Schenck *v.* Ellingwood, 3 Edw. 175.

North Carolina.— Harrison *v.* Battle, 21 N. C. 213; Sanderlin *v.* Thompson, 17 N. C. 539.

Ohio.— Stableton *v.* Ellison, 21 Ohio St. 527; Barr *v.* Hatch, 3 Ohio 527.

Rhode Island.— Brown *v.* Phillips, 16 R. I. 612, 18 Atl. 249.

Texas.— Cheveral *v.* McCormick, 58 Tex. 440; Giddings *v.* Butler, 47 Tex. 535.

Virginia.— Knight *v.* Yarbrough, Gilm. 27.

United States.— American Freehold Land-Mortg. Co. *v.* Walker, 31 Fed. 103; Piatt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69.

England.— Kennard *v.* Kennard, L. R. 8 Ch. 227, 42 L. J. Ch. 280, 28 L. T. Rep. N. S. 83, 21 Wkly. Rep. 206; Carver *v.* Richards, 27 Beav. 488, 5 Jur. N. S. 1412, 29 L. J. Ch. 169, 1 L. T. Rep. N. S. 257, 8 Wkly. Rep. 157, 54 Eng. Reprint 193 [*affirmed* in 1 De G. F. & J. 548, 6 Jur. N. S. 410, 29 L. J. Ch. 357, 2 L. T. Rep. N. S. 161, 8 Wkly. Rep. 349, 62 Eng. Ch. 425, 45 Eng. Reprint 474]; Lowson *v.* Lowson, 3 Bro. Ch. 272, 29 Eng. Reprint 532; Smith *v.* Ashton, 1 Ch. Cas. 263, 22 Eng. Reprint 792, Freem. K. B. 308, 22 Eng. Reprint 1229, 89 Eng. Reprint 226, 3 Keb. 551, 84 Eng. Reprint 874, Rep. t. Finch 273, 23 Eng. Reprint 150, 3 Salk. 277, 91 Eng. Reprint 822; Morgan *v.* Milman, 3 De G. M. & G. 24, 17 Jur. 193, 22 L. J. Ch. 897, 1 Wkly. Rep. 134, 52 Eng. Ch. 20, 43 Eng. Reprint 10; Gooding *v.* Gooding, 1 Eq. Cas. Abr. 342, 21 Eng. Reprint 1089; Buckell *v.* Blenkhorn, 5 Hare 131, 26 Eng. Ch. 131, 67 Eng. Reprint 857; Wilkes *v.* Holmes, 9 Mod. 485, 88 Eng. Reprint 591; Cotter *v.* Layer, 2 P. Wms. 623, 24 Eng. Reprint 887; Cockerell *v.* Cholmeley, 1 Russ. & M. 418, 5 Eng. Ch. 418, 29 Eng. Reprint 161.

See 40 Cent. Dig. tit. "Powers," § 150.

And see *supra*, VI, A, 2.

64. See *supra*, VI, A, 2. And see *infra*, VI, J, 3.

65. Robeson *v.* Shotwell, 55 N. J. Eq. 318, 36 Atl. 780 [*affirmed* in 55 N. J. Eq. 824, 41 Atl. 1115]; Lippincott *v.* Stokes, 6 N. J. Eq. 122; Garth *v.* Townsend, L. R. 7 Eq. 220.

66. *Alabama.*— Ellett *v.* Wade, 47 Ala. 456; McBryde *v.* Wilkinson, 29 Ala. 662.

Maryland.— Smith *v.* Bowes, 38 Md. 463.

Mississippi.— Miller *v.* Palmer, 55 Miss. 323, administrator's sale.

Missouri.— Grayson *v.* Weddle, 63 Mo. 523 (administrator's sale); Houx *v.* Bates County, 61 Mo. 391; Wannall *v.* Klein, 51 Mo. 150 (notary's certificate); Speck *v.* Wohlien, 22 Mo. 310 (administrator's sale); Moreau *v.* Detchemendy, 18 Mo. 522 (sheriff's deed).

United States.— Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478.

See 40 Cent. Dig. tit. "Powers," § 150.

Married women.— The power to sell and convey the real estate of a married woman held to her separate use is a special statutory power, unless the will, deed, or other instrument by which the separate estate is created otherwise provides, and must be strictly complied with as to all matters of the essence or substance of the power; the general rule being that equity will not interpose to correct, aid, or carry into effect the defective execution of such powers. Ellett *v.* Wade, 47 Ala. 456.

67. American Freehold Land-Mortg. Co. *v.* Walker, 31 Fed. 103. See also Breit *v.* Yeaton, 101 Ill. 242; Schenck *v.* Ellingwood, 3 Edw. (N. Y.) 175; Justis *v.* English, 30 Gratt. (Va.) 565, 574; Kennard *v.* Kennard, L. R. 8 Ch. 227, 42 L. J. Ch. 280, 28 L. T. Rep. N. S. 83, 21 Wkly. Rep. 206; Cooper *v.* Martin, L. R. 3 Ch. 47, 17 L. T. Rep. N. S. 587, 16 Wkly. Rep. 234; Sergeson *v.* Sealey, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; Morse *v.* Martin, 34 Beav. 500, 55 Eng. Reprint 728; Lucena *v.* Lucena, 5 Beav. 249, 49 Eng. Re-

executed by deed is executed by will, this is such a defect as will be aided in equity in a proper case;[68] but equity cannot make valid the attempted execution of a power which is void for want of authority in the person who attempts its execution,[69] or because it is executed after expiration of the period prescribed by the instrument creating the power.[70]

b. In Whose Favor Equity Interferes. Before a court of equity will aid a defective execution of a power the party who seeks relief must show in himself some superior equity to that of him against whom relief is asked.[71] Equity will aid a defective execution of a power in favor of a charity,[72] of creditors,[73] of purchasers for value,[74] or of a wife or legitimate child;[75] but it will not interpose in favor of volunteers,[76] legatees,[77] grandchildren, at least as against children,[78]

print 573; Wilkie *v.* Holme, Dick. 165, 21 Eng. Reprint 232; Cotter *v.* Layer, 2 P. Wms. 623, 24 Eng. Reprint 887; Cockerell *v.* Cholmeley, 1 Russ. & M. 418, 5 Eng. Ch. 418, 39 Eng. Reprint 161; and other cases cited *supra*, note 63.

Covenant to appoint enforced see Thacker *v.* Key, L. R. 8 Eq. 408. *Compare* Morgan *v.* Milman, 3 De G. M. & G. 24, 17 Jur. 193, 22 L. J. Ch. 897, 1 Wkly. Rep. 134, 52 Eng. Ch. 20, 43 Eng. Reprint 10, in which there was no binding contract.

68. Bruce *v.* Bruce, L. R. 11 Eq. 371, 40 L. J. Ch. 141, 24 L. T. Rep. N. S. 212; Sneed *v.* Sneed, Ambl. 64, 27 Eng. Reprint 37; Sergeson *v.* Sealey, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; MacAdam *v.* Logan, 3 Bro. Ch. 310, 29 Eng. Reprint 553; Wade *v.* Paget, 1 Bro. Ch. 363, 28 Eng. Reprint 1180, 1 Cox Ch. 74, 29 Eng. Reprint 1069; Darlington *v.* Pulteney, Cowp. 260; Tollet *v.* Tollet, 2 P. Wms. 489, 24 Eng. Reprint 828.

69. Cheveral *v.* McCormick, 58 Tex. 440.

70. Cooper *v.* Martin, L. R. 3 Ch. 47, 17 L. T. Rep. N. S. 587, 16 Wkly. Rep. 234, holding that, where there was a power to appoint by deed or will before the youngest child should attain twenty-five, and there was an appointment by a will which was executed before the youngest child attained twenty-five, but which came into operation by the donee's death after the prescribed period, the will, having come into operation after the prescribed period, could not take effect as an appointment; and further that this was not such a defective execution as would be relieved against in equity.

71. Lines *v.* Darden, 5 Fla. 51.

Meritorious consideration necessary.— Darlington *v.* Pulteney, Cowp. 260, 267. And see Sergeson *v.* Sealey, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; Cotter *v.* Layen, 2 P. Wms. 623, 24 Eng. Reprint 887.

72. Innes *v.* Sayer, 16 Jur. 21, 21 L. J. Ch. 190, 3 Macn. & G. 606, 49 Eng. Ch. 468, 42 Eng. Reprint 393; Atty.-Gen. *v.* Burdet, 2 Vern. Ch. 755, 23 Eng. Reprint 1093. See also Coxe *v.* Basset, 3 Ves. Jr. 155, 30 Eng. Reprint 945.

73. Hervey *v.* Hervey, 1 Atk. 561, 26 Eng. Reprint 352; Evans *v.* Saunders, 1 Drew. 415, 17 Jur. 338, 22 L. J. Ch. 471, 1 Wkly. Rep. 529, 61 Eng. Reprint 511. See also Holmes *v.* Coghill, 12 Ves. Jr. 206, 8 Rev. Rep. 323, 33 Eng. Reprint 79. *Compare* Thackwell *v.* Gardiner, 5 De G. & Sm. 58, 16 Jur. 588, 21 L. J. Ch. 777, 64 Eng. Reprint 1017.

74. *In re* Dyke, L. R. 7 Eq. 337, 20 L. T. Rep. N. S. 292, 17 Wkly. Rep. 658; Thackwell *v.* Gardiner, 5 De G. & Sm. 58, 16 Jur. 588, 21 L. J. Ch. 777, 64 Eng. Reprint 1017; Wilkie *v.* Holme, Dick. 165, 21 Eng. Reprint 232; Fothergill *v.* Fothergill, 2 Freem. 256, 22 Eng. Reprint 1194; Hughes *v.* Wells, 9 Hare 749, 16 Jur. 927, 41 Eng. Ch. 749, 68 Eng. Reprint 717; Dauberry *v.* Cockburn, 1 Meriv. 628, 15 Rev. Rep. 174, 35 Eng. Reprint 801; Cotter *v.* Layer, 2 P. Wms. 623, 24 Eng. Reprint 887; Cockerell *v.* Cholmeley, 1 Russ. & M. 418, 424, 5 Eng. Ch. 418, 39 Eng. Reprint 161.

75. Bruce *v.* Bruce, L. R. 11 Eq. 371, 40 L. J. Ch. 141, 24 L. T. Rep. N. S. 212; Sneed *v.* Sneed, Ambl. 64, 27 Eng. Reprint 37; Sergeson *v.* Sealey, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; Hervey *v.* Hervey, 1 Atk. 561, 26 Eng. Reprint 352; Morse *v.* Martin, 34 Beav. 500, 55 Eng. Reprint 728; Lucena *v.* Lucena, 5 Beav. 249, 49 Eng. Reprint 573; MacAdam *v.* Logan, 3 Bro. Ch. 310, 29 Eng. Reprint 553; Wade *v.* Paget, 1 Bro. Ch. 363, 28 Eng. Reprint 1180, 1 Cox Ch. 74, 29 Eng. Reprint 1069; Darlington *v.* Pulteney, Cowp. 260; Alford *v.* Alford, Gilb. 167, 25 Eng. Reprint 117; Sing *v.* Leslie, 2 Hem. & M. 68, 10 Jur. N. S. 794, 33 L. J. Ch. 549, 10 L. T. Rep. N. S. 332, 4 New Rep. 17, 71 Eng. Reprint 385; Hume *v.* Rundell, 6 Madd. 331, 23 Rev. Rep. 232, 56 Eng. Reprint 1117; Cotter *v.* Layer, 2 P. Wms. 623, 24 Eng. Reprint 887; Tollet *v.* Tollet, 2 P. Wms. 489, 24 Eng. Reprint 828.

76. Wooster *v.* Cooper, 59 N. J. Eq. 204, 45 Atl. 381; Sergeson *v.* Sealey, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; Evans *v.* Evans, 1 Drew. 654, 61 Eng. Reprint 601; Evans *v.* Saunders, 1 Drew. 415, 17 Jur. 338, 22 L. J. Ch. 471, 1 Wkly. Rep. 529, 61 Eng. Reprint 511.

77. Evans *v.* Saunders, 1 Drew. 415, 17 Jur. 338, 22 L. J. Ch. 471, 1 Wkly. Rep. 529, 61 Eng. Reprint 511.

78. Lynn *v.* Lynn, 33 Ill. App. 299; Morriss *v.* Morriss, 33 Gratt. (Va.) 51; Kettle *v.* Townsend, 1 Salk. 187, 91 Eng. Reprint 170; Tudor *v.* Anson, 2 Ves. 582, 28 Eng. Reprint 371; Perry *v.* Whitehead, 6 Ves. Jr. 544, 31 Eng. Reprint 1187. But see Freestone

illegitimate children,[79] brothers and sisters,[80] nephews and nieces,[81] cousins,[82] or husband;[83] nor will equity aid the defective execution of a power reserved by a settlor in his own favor.[84]

2. Execution in Excess of Power. Where there has been an excess in the execution of a power, it is void so far as the excess is concerned, but good within the limits of the power,[85] unless the valid and invalid parts are inseparably con-

v. Rant [*cited* in Watts *v.* Bullas, 1 P. Wms. 60, 61 note, 24 Eng. Reprint 293].

79. Bramhall *v.* Hall, Ambl. 467, 27 Eng. Reprint 307, 2 Eden 225, 28 Eng. Reprint 882; Blake *v.* Blake, Beatty 575; Tudor *v.* Anson, 2 Ves. 582, 28 Eng. Reprint 371.

80. Goodwyn *v.* Goodwyn, 1 Ves. 226, 27 Eng. Reprint 998. *Compare* Goring *v.* Nash, 3 Atk. 186, 26 Eng. Reprint 909.

81. Marston *v.* Cowan, 3 Bro. Ch. 170, 29 Eng. Reprint 471. And see Strode *v.* Falkland, 3 Ch. Rep. 169, 21 Eng. Reprint 758, 2 Vern. Ch. 621, 625, 23 Eng. Reprint 1008.

82. Tudor *v.* Anson, 2 Ves. 582, 28 Eng. Reprint 371.

83. Breit *v.* Yeaton, 101 Ill. 242; Hughes *v.* Wells, 9 Hare 749, 16 Jur. 927, 41 Eng. Ch. 749, 68 Eng. Reprint 717; Moodie *v.* Reid, 1 Madd. 516, 56 Eng. Reprint 189, 2 Madd. 156, 56 Eng. Reprint 292, 16 Rev. Rep. 257. And see Hopkins *v.* Myall, 2 Russ. & M. 86, 11 Eng. Ch. 86, 39 Eng. Reprint 327; Watt *v.* Watt, 3 Ves. Jr. 244, 30 Eng. Reprint 992.

84. Ellison *v.* Ellison, 6 Ves. Jr. 656, 6 Rev. Rep. 19, 31 Eng. Reprint 1243.

85. *Kentucky.*— Johnson *v.* Yates, 9 Dana 491.

Maryland.— Bauernschmidt *v.* Bauernschmidt, 97 Md. 35, 54 Atl. 637; Barnum *v.* Barnum, 26 Md. 119, 90 Am. Dec. 88.

Massachusetts.— Loring *v.* Blake, 98 Mass. 253.

Michigan.— Ready *v.* Kearsley, 14 Mich. 215.

New York.— Hillen *v.* Iselin, 144 N. Y. 365, 39 N. E. 368 [*affirming* 67 Hun 444, 22 N. Y. Suppl. 282]; Griffen *v.* Ford, 1 Bosw. 123.

Ohio.— Knox County Com'rs *v.* Nichols, 14 Ohio St. 260; State *v.* Perrysburg Bd. of Education, 5 Cinc. L. Bul. 147.

Tennessee.— Cruse *v.* McKee, 2 Head 1, 73 Am. Dec. 186.

Virginia.— Hood *v.* Haden, 82 Va. 588.

United States.— Warner *v.* Howell, 29 Fed. Cas. No. 17,184, 3 Wash. 12.

England.— *In re* Porter, 45 Ch. D. 179, 59 L. J. Ch. 595, 63 L. T. Rep. N. S. 431; *In re* Swinburne, 27 Ch. D. 696, 54 L. J. Ch. 229, 33 Wkly. Rep. 394; *In re* Farncombe, 9 Ch. D. 652, 47 L. J. Ch. 328; Churchill *v.* Churchill, L. R. 5 Eq. 44, 16 Wkly. Rep. 182; *In re* Jeaffreson, L. R. 2 Eq. 276, 12 Jur. N. S. 660, 35 L. J. Ch. 622, 14 Wkly. Rep. 759; Miller *v.* Gulson, L. R. 13 Ir. 408; Hervey *v.* Hervey, 1 Atk. 561, 26 Eng. Reprint 352; Palmer *v.* Wheeler, 2 Ball & B. 18, 12 Rev. Rep. 60; Gerrard *v.* Butler, 20 Beav. 541, 52 Eng. Reprint 712; Stephens *v.* Gadsden, 20 Beav. 463, 52 Eng. Reprint 682; Crozier *v.* Crozier, 2 C. & L. 309, 3 Dr. & War. 353, 5 Ir. Eq. 415; Hay *v.* Watkins, 2 C. & L. 157, 3 Dr. & War. 339, 5 Ir. Eq. 273; Palsgrave *v.* Atkinson, 1 Coll. 190, 28 Eng. Ch. 190, 63 Eng. Reprint 378; Harvey *v.* Stracey, 1 Drew. 73, 16 Jur. 771, 22 L. J. Ch. 23, 61 Eng. Reprint 379; Richardson *v.* Simpson, 9 Ir. Eq. 367, 3 J. & L. 540; Caulfield *v.* Maguire, 8 Ir. Eq. 164, 2 J. & L. 141; Kampf *v.* Jones, 1 Jur. 814, 2 Keen 756, 7 L. J. Ch. 63, 15 Eng. Ch. 756, 48 Eng. Reprint 821; De la Hooke *v.* Hill, 4 Jur. 765; Watt *v.* Creyke, 3 Jur. N. S. 56, 26 L. J. Ch. 211, 3 Smale & G. 362, 65 Eng. Reprint 695; Carver *v.* Bowles, 9 L. J. Ch. O. S. 91, 2 Russ. & M. 301, 11 Eng. Ch. 301, 39 Eng. Reprint 409; Parry *v.* Bowen, Nels. 87, 21 Eng. Reprint 796; Sadler *v.* Pratt, 5 Sim. 632, 9 Eng. Ch. 632, 58 Eng. Reprint 476; *Re* Sondes, 2 Smale & G. 416, 65 Eng. Reprint 461; Alexander *v.* Alexander, 2 Ves. 640, 28 Eng. Reprint 408; Crompe *v.* Barrow, 4 Ves. Jr. 681, 4 Rev. Rep. 318, 31 Eng. Reprint 351.

See 40 Cent. Dig. tit. "Powers," § 151.

See *supra*, VI, I, 3.

Appointment to objects and strangers.— *In re* Swinburne, 27 Ch. D. 696, 54 L. J. Ch. 229, 33 Wkly. Rep. 394; *In re* Farncombe, 9 Ch. D. 652, 47 L. J. Ch. 328; *In re* Kerr, 4 Ch. D. 600, 46 L. J. Ch. 287, 36 L. T. Rep. N. S. 356, 25 Wkly. Rep. 390; Adams *v.* Adams, Cowp. 651; Rncker *v.* Scholefield, 1 Hem. & M. 36, 9 Jur. N. S. 17, 32 L. J. Ch. 46, 1 New Rep. 48, 11 Wkly. Rep. 137, 71 Eng. Reprint 16; Line *v.* Hall, 43 L. J. Ch. 107, 29 L. T. Rep. N. S. 568, 22 Wkly. Rep. 124; Sadler *v.* Pratt, 5 Sim. 632, 9 Eng. Ch. 632, 58 Eng. Reprint 476; Crompe *v.* Barrow, 4 Ves. Jr. 681, 4 Rev. Rep. 318, 31 Eng. Reprint 351; Bristow *v.* Warde, 2 Ves. Jr. 336, 2 Rev. Rep. 235, 30 Eng. Reprint 660.

Unauthorized conditions and limitations.— Ready *v.* Kearsley, 14 Mich. 215; McDonald *v.* McDonald, L. R. 2 H. L. Sc. 482; Churchill *v.* Churchill, L. R. 5 Eq. 44, 16 Wkly. Rep. 182; *In re* Jeaffreson, L. R. 2 Eq. 276, 12 Jur. N. S. 660, 35 L. J. Ch. 622, 14 Wkly. Rep. 759; Blacket *v.* Lamb, 14 Beav. 482, 16 Jur. 142, 21 L. J. Ch. 46, 51 Eng. Reprint 371; Palsgrave *v.* Atkinson, 1 Coll. 190, 28 Eng. Ch. 190, 63 Eng. Reprint 378; Harvey *v.* Stracey, 1 Drew. 73, 16 Jur. 771, 22 L. J. Ch. 23, 61 Eng. Reprint 379; Rooke *v.* Rooke, 2 Dr. & Sm. 38, 31 L. J. Ch. 636, 6 L. T. Rep. N. S. 527, 10 Wkly. Rep. 435, 62 Eng. Reprint 535; Stroud *v.* Norman, 2 Eq. Rep. 308, 18 Jur. 264, Kay 313, 23 L. J. Ch. 443, 69 Eng. Reprint 132; Richardson *v.* Simpson, 9 Ir. Eq. 367, 3 J. & L. 540; Caulfield *v.* Maguire, 8 Ir. Eq. 164, 2 J. & L. 141; Watt *v.* Creyke, 3 Jur. N. S.

nected.[86] But, in order to reject the excess and let the appointment stand, the court must see distinctly what the donee had in view, and be satisfied that if he had rightly understood the extent of his power he would have so executed it.[87]

3. Non-Execution. As has already been stated, equity will not, as a rule, relieve against the non-execution of a power,[88] and where there are no limitations over in default of execution,[89] the interest undisposed of by him remains in the donor, and he, or his heirs or next of kin, will be entitled thereto on non-execution.[90] This rule does not apply, however, where there is not a mere power, but a trust in favor of the objects of the power.[91] And where a will, marriage settlement, or other instrument gives a power of appointment among certain persons or a class, without any limitation over upon non-execution of the power, and a general intention that such persons or class shall take appears, subject only to their selection or a division by the donee, their right to take will not be defeated by the failure of the donee to execute the power, but they will be entitled in equity to an equal distribution.[92] Where a testator directs his executors to sell, within a

56, 26 L. J. Ch. 211, 3 Smale & G. 362, 65 Eng. Reprint 695; Carver *v.* Bowles, 9 L. J. Ch. O. S. 91, 2 Russ. & M. 301, 11 Eng. Ch. 301, 39 Eng. Reprint 409; Sadler *v.* Pratt, 5 Sim. 632, 9 Eng. Ch. 632, 58 Eng. Reprint 476; Stockbridge *v.* Story, 19 Wkly. Rep. 1049; Graham *v.* Angell, 17 Wkly. Rep. 702; Wilson *v.* Wilson, 17 Wkly. Rep. 220.

86. Johnson *v.* Yates, 9 Dana (Ky.) 491; Barnum *v.* Barnum, 26 Md. 119, 90 Am. Dec. 88; Webb *v.* Sadler, L. R. 8 Ch. 419, 42 L. J. Ch. 498, 28 L. T. Rep. N. S. 388, 21 Wkly. Rep. 394; Agassiz *v.* Squire, 18 Beav. 431, 1 Jur. N. S. 50, 23 L. J. Ch. 985, 52 Eng. Reprint 170; D'Abbadie *v.* Bizoin, Ir. R. 5 Eq. 205; Scane *v.* Hartwick, 11 U. C. Q. B. 550. See *supra*, VI, I, 3.

87. Hamilton *v.* Royse, 2 Sch. & Lef. 315.

88. Pigott *v.* Peanriee, Comyns 250, Gilb. 137, 25 Eng. Reprint 96; Buckell *v.* Blenkhorn, 5 Hare 131, 26 Eng. Ch. 131, 67 Eng. Reprint 857; Tollet *v.* Tollet, 2 P. Wms. 489, 24 Eng. Reprint 828; Elliot *v.* Hele, 1 Vern. Ch. 406, 23 Eng. Reprint 547; Hixon *v.* Oliver, 13 Ves. Jr. 108, 9 Rev. Rep. 148, 33 Eng. Reprint 235; Holmes *v.* Coghill, 12 Ves. Jr. 206, 8 Rev. Rep. 323, 33 Eng. Reprint 79; Brown *v.* Higgs, 8 Ves. Jr. 561, 32 Eng. Reprint 473; Bull *v.* Vardy, 1 Ves. Jr. 270, 30 Eng. Reprint 338.

Non-execution of a power is where nothing is done; defective execution is where there has been an intention to execute, and that intention sufficiently declared, but the act declaring the intention is not an execution in the form prescribed. Shannon *v.* Bradstreet, 1 Sch. & Lef. 63, 9 Rev. Rep. 11.

No action in case of death of donee see Piggott *v.* Penrice, Comyns 250, Gilb. Eq. 137, 25 Eng. Reprint 96.

Trust to sell executed in equity see Faulkner *v.* Davis, 18 Gratt. (Va.) 651, 98 Am. Dec. 698.

Compelling execution see *supra*, VI, A, 2.

89. **Limitation over or other disposition of property on failure of execution** see Wills.

90. *Kentucky.*— Thompson *v.* Vance, 1 Metc. 669. And see McGaughey *v.* Henry, 15 B. Mon. 383.

New York.— Jackson *v.* Potter, 4 Wend. 672.

North Carolina.— Bond *v.* Moore, 90 N. C. 239; Harrison *v.* Battle, 21 N. C. 213.

Pennsylvania.— Dunn's Estate, 13 Phila. 395.

Virginia.— Frazier *v.* Frazier, 2 Leigh 642.

United States.— See Hawkins *v.* Blake, 108 U. S. 422, 2 S. Ct. 804, 27 L. ed. 775.

England.— *In re* Jefferys, L. R. 14 Eq. 136, 42 L. J. Ch. 17, 26 L. T. Rep. N. S. 821, 20 Wkly. Rep. 667; Anonymous, Comyns 345; Lancashire *v.* Lancashire, 1 De G. & Sm. 288, 11 Jur. 1024, 63 Eng. Reprint 1071 [*affirmed* in 17 Jur. 363, 17 L. J. Ch. 270, 2 Phil. 657, 22 Eng. Ch. 657, 41 Eng. Reprint 1097]; Halfhead *v.* Sheppard, 1 E. & E. 918, 102 E. C. L. 918; Emblyn *v.* Freeman, Proc. Ch. 541, 24 Eng. Reprint 243; Malim *v.* Barker, 3 Ves. Jr. 150, 30 Eng. Reprint 942; Thrupp *v.* Goodrich, 18 Wkly. Rep. 125.

See 40 Cent. Dig. tit. "Powers," §§ 153, 154.

No appointed charge on land.— Where the grantor of certain real estate has charged it with a fund to be held by the grantee in trust for such uses as she may appoint, and she fails to appoint a portion of the fund, the land does not, upon her death, become freed from the charge of the unappointed remnant, but it falls into her estate and passes under her will as a part of the personalty. Hawkins *v.* Blake, 108 U. S. 422, 2 S. Ct. 804, 27 L. ed. 775.

91. Gorin *v.* Gordon, 38 Miss. 205; Smith *v.* Floyd, 140 N. Y. 337, 35 N. E. 606; Lacey *v.* Philcox, 5 Jur. 453, 5 Myl. & C. 72, 46 Eng. Ch. 66, 41 Eng. Reprint 299; Salusbury *v.* Denton, 3 Jur. N. S. 740, 3 Kay & J. 529, 26 L. J. Ch. 856, 5 Wkly. Rep. 865, 69 Eng. Reprint 1219; Hutchinson *v.* Hutchinson, 13 Ir. Eq. 332; *In re* Hargroves, Ir. R. 8 Eq. 256; Brown *v.* Higgs, 4 Ves. Jr. 708, 4 Rev. Rep. 323, 31 Eng. Reprint 366 [*affirmed* in 8 Ves. Jr. 561, 32 Eng. Reprint 473]. See *supra*, VI, A, 2.

No trust created see Carberry *v.* McCarthy, L. R. 7 Ir. 328; Brook *v.* Brook, 3 Smale & G. 280, 65 Eng. Reprint 659.

92. *Kentucky.*— McGaughey *v.* Henry, 15 B. Mon. 383.

Mississippi.— Gorin *v.* Gordon, 38 Miss. 205.

specified time after his death, sufficient lands to pay his debts, a creditor cannot be deprived of his beneficiary interest under the power by the executors' failure to execute it within the time limited.[93]

K. Rights and Liabilities of Parties Upon Execution — 1. Of Appointees or Beneficiaries. Where a power is executed, the person taking under it takes under him who created the power and not under him who executed it, and the estates created take effect as if created by the instrument conferring the power,[94] except that

New Jersey.— Micheau *v.* Crawford, 8 N. J. L. 90.

New York.— Smith *v.* Floyd, 140 N. Y. 337, 35 N. E. 606.

Ohio.— Millikin *v.* Welliver, 37 Ohio St. 460.

Tennessee.— Cathey *v.* Cathey, 9 Humphr. 470, 49 Am. Dec. 714.

Wisconsin.— Derse *v.* Derse, 103 Wis. 113, 79 N. W. 44 (statute); Jones *v.* Roberts, 84 Wis. 465, 54 N. W. 917.

England.— Wilson *v.* Duguid, 24 Ch. D. 244, 53 L. J. Ch. 52, 49 L. T. Rep. N. S. 124, 31 Wkly. Rep. 945; *In re* Jackson, 13 Ch. D. 189, 49 L. J. Ch. 82, 41 L. T. Rep. N. S. 499, 28 Wkly. Rep. 209; Tweedale *v.* Tweedale, 7 Ch. D. 633, 47 L. J. Ch. 530, 38 L. T. Rep. N. S. 137, 26 Wkly. Rep. 457; *In re* Jefferys, L. R. 14 Eq. 136, 42 L. J. Ch. 17, 26 L. T. Rep. N. S. 821, 20 Wkly. Rep. 667; *In re* Phene, L. R. 5 Eq. 346; Musprat *v.* Gordon, Anstr. 34, 3 Rev. Rep. 541; Bellasis *v.* Uthwatt, 1 Atk. 427, 26 Eng. Reprint 271; Reid *v.* Reid, 25 Beav. 469, 53 Eng. Reprint 716; Woodcock *v.* Renneck, 4 Beav. 190, 49 Eng. Reprint 311 [*affirmed* in 6 Jur. 138, 11 L. J. Ch. 110, 1 Phil. 72, 19 Eng. Ch. 72, 41 Eng. Reprint 558]; Witts *v.* Boddington, 3 Bro. Ch. 95, 29 Eng. Reprint 428; Hockley *v.* Mawbey, 3 Bro. Ch. 82, 29 Eng. Reprint 420, 1 Ves. Jr. 150, 1 Rev. Rep. 93, 30 Eng. Reprint 271; *Re* Eddowes, 1 Dr. & Sm. 395, 7 Jur. N. S. 354, 5 L. T. Rep. N. S. 389, 62 Eng. Reprint 430; Kennedy *v.* Kingston, 2 Jac. & W. 431, 22 Rev. Rep. 197, 37 Eng. Reprint 692; *Re* White, Johns. 656, 70 Eng. Reprint 582; Falkner *v.* Wynford, 9 Jur. 1006, 15 L. J. Ch. 8; Stolworthy *v.* Sancroft, 10 Jur. N. S. 762, 33 L. J. Ch. 708, 10 L. T. Rep. N. S. 223, 12 Wkly. Rep. 635; Izod *v.* Izod, 9 Jur. N. S. 1216, 1 New Rep. 462, 11 Wkly. Rep. 452; *In re* Susanni, 47 L. J. Ch. 65, 26 Wkly. Rep. 93; Penny *v.* Turner, 17 L. J. Ch. 133, 2 Phil. 493, 22 Eng. Ch. 493, 41 Eng. Reprint 1034 [*affirming* 10 Jur. 768, 15 Sim. 368, 38 Eng. Ch. 368, 60 Eng. Reprint 661]; Walsh *v.* Wallinger, 9 L. J. Ch. O. S. 7, 2 Russ. & M. 78, 11 Eng. Ch. 78, 39 Eng. Reprint 324, Taml. 425, 12 Eng. Ch. 425, 48 Eng. Reprint 169; Brown *v.* Pocock, 6 Sim. 257, 9 Eng. Ch. 257, 58 Eng. Reprint 590; Jones *v.* Torin, 6 Sim. 255, 9 Eng. Ch. 255, 58 Eng. Reprint 589; Morgan *v.* Surman, 1 Taunt. 289; Longmore *v.* Broom, 7 Ves. Jr. 124, 32 Eng. Reprint 51; Reade *v.* Reade, 5 Ves. Jr. 744, 31 Eng. Reprint 836; Fowler *v.* Hunter, 3 Y. & J. 506. *Compare* Richardson *v.* Harrison, 16 Q. B. D. 85, 55 L. J. Q. B. 58, 54 L. T. Rep. N. S. 456; *In re* Weekes, [1897] 1 Ch. 289, 66 L. J. Ch. 179, 76 L. T. Rep. N. S. 112, 45 Wkly. Rep. 265 (holding that where the donee of a power to appoint among certain objects does not appoint, and there is no gift over in default of appointment, a gift will not be implied in favor of the objects unless the instrument creating the power discloses an intention that they should take; that is, unless, in fact, the power is in the nature of a trust with a power of selection only in the donee); Moore *v.* Ffolliot, L. R. 19 Ir. 499; Campbell *v.* Bouskell, 27 Beav. 325, 54 Eng. Reprint 127; Crossling *v.* Crossling, 2 Cox Ch. 396, 2 Rev. Rep. 88, 30 Eng. Reprint 183; Halfhead *v.* Sheppard, 1 E. & E. 918, 102 E. C. L. 918; Mill *v.* Mill, Ir. R. 11 Eq. 158.

Implied gift negatived by recital see Carberry *v.* McCarthy, L. R. 7 Ir. 328.

See 40 Cent. Dig. tit. "Powers," §§ 152, 153.

Effect of partial execution.— Where one having the power of appointment among certain persons dies without having fully executed it, those appointed, who have received anything, can claim a share of the residue only by bringing what they have received into the *collation bonorum*. Knight *v.* Yarbrough, Gilm. (Va.) 27. See also Deveaux *v.* Barnwell, 1 Desauss. Eq. (S. C.) 497.

93. Wild *v.* Bergen, 16 Hun (N. Y.) 127.

94. *Illinois.*— Christy *v.* Pulliam, 17 Ill. 59.

Maryland.— Conner *v.* Waring, 52 Md. 724.

New Jersey.—Ashton *v.* Wilkinson, 53 N. J. Eq. 6, 30 Atl. 895; Leggett *v.* Doremus, 25 N. J. Eq. 122.

New York.— Bradish *v.* Gibbs, 3 Johns. Ch. 523.

North Carolina.— Norfleet *v.* Hawkins, 93 N. C. 392; Smith *v.* Garey, 22 N. C. 42.

Pennsylvania.— Wells *v.* Sloyer, 1 Pa. L. J. Rep. 516; Ashmead's Estate, 12 Wkly. Notes Cas. 371.

England.— Middleton *v.* Crofts, 2 Atk. 650, 26 Eng. Reprint 788, 2 Barn. 351, Cas. t. Hardw. 57, Str. 1056, W. Kel. 148, 25 Eng. Reprint 539; Cook *v.* Duchenfield, 2 Atk. 562, 26 Eng. Reprint 737; *Re* Barker, 5 L. T. Rep. N. S. 206; Tatnall *v.* Hankey, 2 Moore P. C. 342, 12 Eng. Reprint 1036; Marlborough *v.* Godolphin, 2 Ves. 61, 28 Eng. Reprint 41; Wright *v.* Wakeford, 17 Ves. Jr. 454, 34 Eng. Reprint 176; Maundrell *v.* Maundrell, 10 Ves. Jr. 247, 7 Rev. Rep. 393, 32 Eng. Reprint 839; Mosley *v.* Mosley, 5 Ves. Jr. 248, 31 Eng. Reprint 570.

See 40 Cent. Dig. tit. "Powers," § 156.

The only exceptions to the rule are when the person executing the power has granted

they vest only from the time of execution.[95] Where the donee of a general testamentary power of appointment over a fund, in consideration of money lent to him, covenants by deed to exercise the power by a will giving the lender a first charge on the fund, and does so, the fund is assets for the payment of the appointor's debts generally, and the lender has no priority over the other creditors.[96] Where a tenant for life under a marriage settlement, in exercise of a power of appointment in favor of the children of the marriage, by deed appointed "that so much of the stock, funds, shares, and securities" then subject to the trusts of the settlement "as shall be sufficient to raise" a certain "net sum," should, subject to the life-interest therein of the appointor, "henceforth belong and be vested in" a certain person, one of the objects of the power, and be held in trust for him, his executors, administrators, and assigns, the appointee took the money clear of all charges, including succession duty.[97] Where, under a marriage settlement, the husband and wife took successive life-interests in a trust fund, the wife's interest being cut down to one moiety on remarriage, and subject thereto the fund was settled on trust for the issue of the marriage as the husband should appoint, and in default of appointment for the sons at twenty-one or daughters at twenty-one or marriage, with the usual hotchpot clause; and by his will, which recited that he had power to appoint the fund after the death of his wife, the husband appointed that "after the death of my said wife" three fifths of the fund should be held in trust for his elder son and two fifths for his younger son, these sons being the only issue of the marriage, the wife having remarried after her husband's death, it was held that the moiety of the income thereby set free during her life passed under the appointment.[98] Where all the beneficiaries who are distributees of the proceeds of the sale of land directed to be sold under a power join in asking a conveyance of the lands to themselves, according to their distributive shares, and such a course does not substantially conflict with the purpose of the gift, a conveyance will be decreed.[99] The disposition of the subject-matter of a power by the donee in express execution of the power will be restricted, in the absence of anything in the context showing

a lease or any other interest which he may grant by virtue of his estate, for then he is not allowed to defeat his own act; but suffering a judgment is not within the exception as an act done by the party, since it is *in invitum*. Leggett *v.* Doremus, 25 N. J. Eq. 122.

No equity in appointee against heir at law see Sanderlin *v.* Thompson, 17 N. C. 539.

95. *New Jersey.*— Ashton *v.* Wilkinson, 53 N. J. Eq. 6, 30 Atl. 895.

New York.— *In re* Johnson, 19 N. Y. Suppl. 963.

Pennsylvania.— Boyles' Estate, 5 Wkly. Notes Cas. 363.

Tennessee.— Herrick *v.* Fowler, 108 Tenn. 416, 67 S. W. 861.

England.— *In re* Vizard, L. R. 1 Ch. 588, 12 Jur. N. S. 680, 35 L. J. Ch. 804, 14 Wkly. Rep. 1000; Sweetapple *v.* Horlock, 11 Ch. D. 745, 48 L. J. Ch. 660, 41 L. T. Rep. N. S. 272, 27 Wkly. Rep. 865; De Serre *v.* Clarke, L. R. 18 Eq. 587, 43 L. J. Ch. 821, 31 L. T. Rep. N. S. 161, 23 Wkly. Rep. 3; Childers *v.* Eardley, 28 Beav. 648, 54 Eng. Reprint 515; Lee *v.* Olding, 2 Jur. N. S. 850, 25 L. J. Ch. 580, 4 Wkly. Rep. 398; Southby *v.* Stonehouse, 2 Ves. 610, 28 Eng. Reprint 389; Marborough *v.* Godolphin, 2 Ves. 61, 28 Eng. Reprint 41.

See 40 Cent. Dig. tit. "Powers," § 156.

96. *In re* Lawley, [1902] 2 Ch. 799, 71 L. J. Ch. 895, 87 L. T. Rep. N. S. 536, 51 Wkly. Rep. 150 [*affirmed* in [1903] A. C. 411, 72 L. J. Ch. 781, 89 L. T. Rep. N. S. 309, and *distinguishing In re* Newnham, [1881] W. N. 69], holding that all that the lender gets by the deed is the personal covenant of the borrower and the right to damages for the breach of it; and that as regards the fund he is in the position of a legatee, and is a volunteer.

97. *In re* Saunders, [1898] 1 Ch. 17, 67 L. J. Ch. 55, 77 L. T. Rep. N. S. 450, 46 Wkly. Rep. 180 [*reversing* [1897] 1 Ch. 888, 66 L. J. Ch. 503, 76 L. T. Rep. 345, 45 Wkly. Rep. 456, and *questioning* Banks *v.* Braithwaite, 32 L. J. Ch. 35, 7 L. T. Rep. N. S. 149, 10 Wkly. Rep. 612].

98. *In re* Schuckburgh, [1901] 2 Ch. 794, 71 L. J. Ch. 32, 85 L. T. Rep. N. S. 406, 50 Wkly. Rep. 132 [*following* Maddison *v.* Chapman, 4 Kay & J. 709, 719, 70 Eng. Reprint 294 (*affirmed* in 3 De G. & J. 536, 5 Jur. N. S. 277, 28 L. J. Ch. 450, 7 Wkly. Rep. 214, 60 Eng. Ch. 416, 44 Eng. Reprint 1375)], the court finding on the face of the will an intention to appoint the whole fund subject to the wife's interest, and being therefore at liberty to read the words "after the death of my said wife" as "subject to my said wife's interest."

99. Wooster *v.* Cooper, 59 N. J. Eq. 204, 45 Atl. 381.

a contrary intention, to an execution of the power so as not to affect the donee's individual estate.[1]

2. Of Purchasers on Sale Under Power[2] — a. In General. An executor's sale under a power, even though required to be confirmed by the court, is not a judicial sale, and a purchaser can repudiate his contract only on grounds which would be sufficient for the rescission of any other contract of sale.[3] On the other hand where an administrator with the will annexed, in the execution of a power given to executors who have resigned, sells land and gives the purchaser a title bond and possession of the premises, the purchaser acquires thereby an equitable right on payment of the purchase-price, to a conveyance of the land.[4] Statutes have been enacted in some jurisdictions providing that when an absolute power of disposition, not accompanied by any trusts, shall be given to the owner of any particular estate for life or years, such estate shall be changed into a fee absolutely, in respect to the rights of creditors and purchasers, but subject to any future estate limited thereon, in case the power shall not be executed.[5]

b. Rights and Liabilities as to Purchase-Money. On the sale of real estate by an executor under a testamentary power, he, not the heirs, is entitled to the purchase-money, and can alone maintain an action for it,[6] although it has been held that where testator directed his land to be sold by his executors, and the proceeds to be paid at a specified time to certain legatees, and the land was sold, and possession, with the title bond, was given to the purchaser, but the purchase-money had not been paid, nor the conveyance made when the time arrived for the payment to the legatees, the legacies were an equitable charge on the land, and the legatees had the right in equity to subject the land to the payment of the purchase-money.[7] A payment by a purchaser in depreciated currency constitutes a *devastavit* to which he is a party, and he will be decreed to take the lands at their value at the time of the decree, or otherwise they will be again sold.[8] In Pennsylvania, where a testator orders his land to be sold, but names no one to execute the power, and the executor sells without authority from the orphans court, that court has authority to compel specific performance by the purchaser.[9]

c. Estate or Interest Acquired by Purchaser. A purchaser under a testamentary power can take no greater estate or interest than the testator had,[10] and where a sale by an executor is made avowedly under the provisions of the will the purchaser can demand only such title as was in contemplation of the parties when the sale was made.[11] Where a life-tenant, with full power of disposition under the will, conveys in fee for a valuable consideration, the purchaser acquires the fee, although the conveyance contains no reference to the will or the power.[12]

1. Heinemann *v.* De Wolf, 25 R. I. 243, 55 Atl. 707.

2. Title and rights of purchaser under sale by executor see Executors and Administrators, 18 Cyc. 336.

3. *In re* Pearson, 98 Cal. 603, 33 Pac. 451.

Where the purchase has not been ratified by the court the purchaser can be brought in by citation to protect his interest, on an application for such ratification. Mussleman's Appeal, 65 Pa. St. 480.

4. Elstner *v.* Fife, 32 Ohio St. 358.

5. Alford *v.* Alford, 56 Ala. 350; Deegan *v.* Wade, 144 N. Y. 573, 39 N. E. 692; Hume *v.* Randall, 141 N. Y. 499, 36 N. E. 402; Crooke *v.* Kings County, 97 N. Y. 421; Cutting *v.* Cutting, 86 N. Y. 522; Auer *v.* Brown, 121 Wis. 115, 98 N. W. 966 [*distinguishing* Mutual L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177; Lardner *v.* Williams, 98 Wis. 514, 74 N. W. 346; Towle *v.* Ewing, 23 Wis. 336, 99 Am. Dec. 179]; Larsen *v.* Johnson, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404.

Limited estates with superadded power generally see *supra*, V, C, 2, b.

6. Shippen *v.* Clapp, 29 Pa. St. 265.

7. Elstner *v.* Fife, 32 Ohio St. 358.

8. Tosh *v.* Robertson, 27 Gratt. (Va.) 270.

9. Bell's Appeal, 71 Pa. St. 465, construing Pa. Act, Feb. 24, 1834, § 12.

10. Reversion or remainder subject to life-estate see Hairston *v.* Dobbs, 80 Ala. 589, 2 So. 147.

11. Goddin *v.* Vaughn, 14 Gratt. (Va.) 102.

12. Boyer *v.* Allen, 76 Mo. 498; Dillon *v.* Faloon, 158 Pa. St. 468, 27 Atl. 1082; Forsythe *v.* Forsythe, 108 Pa. St. 129, the last two cases holding that where there is a devise to a widow for life with an absolute power of testamentary disposition, and this power is exercised, the title made by the widow is in fee.

d. Rights as Against Creditors of Heirs or Devisees. A purchaser at a *bona fide* sale under a testamentary power of sale takes a good title as against creditors or lienors of the heirs or devisees of the testator.[13]

e. Rights as Against Subsequent Purchasers. Where subsequent purchasers know that the power to sell under the provisions of the will has been conditionally exhausted by the making of an executory contract of sale, they take the property subject to the chance of their conveyances becoming inoperative by the final fulfilment of the executory contract.[14]

f. Rights as Dependent Upon Existence or Due Execution of Power. A purchaser at a sale under a power is bound to ascertain whether the power of sale exists at the time of his purchase;[15] but in order for him to be affected by a fraudulent or illegal exercise of the power on the part of the donee, either participation in the fraud or notice of it must be brought home to him.[16]

g. Rights as Dependent on Application of Purchase-Money. Where an executor or trustee is authorized to sell land, a purchaser under the power is not, in the absence of bad faith, bound to see that the purchase-money is properly applied.[17]

Warranty deed by life-tenant as conveyance of fee see Downie *v.* Buennagel, 94 Ind. 228.

Quitclaim deed by life-tenant as conveyance in fee see Hall *v.* Preble, 68 Me. 100.

13. Morse *v.* Hackensack Sav. Bank, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62 [*reversing* 46 N. J. Eq. 161, 18 Atl. 367]; Bolton *v.* Stretch, 30 N. J. Eq. 536; Ackerman *v.* Gorton, 67 N. Y. 63 [*reversing* 6 Hun 301]; Smyth *v.* Anderson, 31 Ohio St. 144. But *compare* Ingram *v.* Sloan, 27 N. C. 565, in which the sale was made under a power in the will to sell for the benefit of volunteers.

14. Demarest *v.* Ray, 29 Barb. (N. Y.) 563.

15. Harmon *v.* Smith, 38 Fed. 482. See also Davis *v.* Howcott, 21 N. C. 460.

Where the power is contingent upon the happening of a certain event which is a condition precedent, the purchaser must ascertain whether such event has happened; and this is so even though the deed recites the performance of the condition. Griswold *v.* Perry, 7 Lans. (N. Y.) 98.

Every reasonable presumption indulged in favor of bona fide purchaser see Smith *v.* McIntire, 83 Fed. 456.

16. *Georgia.*— Wolfe *v.* Hines, 93 Ga. 329, 20 S. E. 322.

Illinois.— Griffin *v.* Griffin, 141 Ill. 373, 31 N. E. 131.

Indiana.— Price *v.* Huey, 22 Ind. 18.

Kentucky.— Larue *v.* Larue, 3 J. J. Marsh. 156.

Massachusetts.— Penniman *v.* Sanderson, 13 Allen 193.

Missouri.— Thompson *v.* Lyon, 20 Mo. 155, 61 Am. Dec. 599.

New York.— Du Bois *v.* Barker, 4 Hun 80; Carroll *v.* Conley, 9 N. Y. Suppl. 865 [*affirmed* in 124 N. Y. 643, 27 N. E. 412]; Wait *v.* Cerqua, 7 N. Y. Suppl. 110 [*affirmed* in 117 N. Y. 654, 22 N. E. 1133]; Roseboom *v.* Mosher, 2 Den. 61. *Compare* Hovey *v.* Chisolm, 56 Hun 328, 9 N. Y. Suppl. 671, in which the purchaser was charged with notice.

Ohio.— Dean *v.* Loewenstein, 6 Ohio Cir. Ct. 587, 3 Ohio Cir. Dec. 597.

Pennsylvania.— Doran *v.* Piper, 164 Pa. St. 430, 30 Atl. 306; Eisenbrown *v.* Burns, 30 Pa. Super. Ct. 46, holding that where testator directed his executors to permit his niece to occupy a residence free of charge so long as it might remain in its then present condition and the property of his estate, giving to his executors full power to sell all his estate, the purchaser in ejectment against the niece to recover possession was not required to show that the sale of the premises was necessary to carry out the provisions of the will.

Tennessee.— Fitzgerald *v.* Standish, 102 Tenn. 383, 52 S. W. 294; Marshall *v.* Stephens, 8 Humphr. 159, 47 Am. Dec. 601.

Texas.— Cooper *v.* Horner, 62 Tex. 356; Wright *v.* Heffner, 57 Tex. 518. But see McCown *v.* Terrell, (Civ. App. 1897) 40 S. W. 54. *Compare* Baldridge *v.* Scott, 48 Tex. 178.

Virginia.— Davis *v.* Christian, 15 Gratt. 11.

Wisconsin.— Sydnor *v.* Palmer, 29 Wis. 226.

See 40 Cent. Dig. tit. "Powers," §§ 162, 163.

Ratification.— Where one of three trustees, under a will empowering them to sell and convey land, sold the same, evidence that all the trustees permitted the purchaser to occupy the land from year to year, make valuable improvements, and also to make certain payments to them from year to year, tended to show ratification by the other two trustees of the sale of the land by the first trustee, even though they accepted such payments as rent, and had no actual knowledge that the vendee claimed as purchaser of the land, as under the circumstances they were bound to take notice of his rights. Hill *v.* Peoples, 80 Ark. 15, 95 S. W. 990.

The purchaser under a special power is presumed to be cognizant of its extent, if contained in the instrument creating the power; and if he purchases in cases in which the special authority is not pursued, he purchases at his peril. Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

17. *Arkansas.*— Ludlow *v.* Flournoy, 34 Ark. 451.

PRACTICABLE. Admitting of use; passable,[1] possible of reasonable performance;[2] that which can be put into practice; possible of execution or performance;[3] that which may be done, practised, or accomplished, that which is performable, feasible, possible.[4] (See FEASIBLE, 19 Cyc. 461; PASSABLE, 30 Cyc. 800; POSSIBLE, *ante*, p. 963; PRACTICAL, *post*, this page.)

PRACTICAL. PRACTICABLE (*q. v.*); reasonable; feasible.[5]

Georgia,— Wright *v.* Zeigler, 1 Ga. 324, 44 Am. Dec. 656.

Illinois.— Bates *v.* Woodruff, 123 Ill. 205, 13 N. E. 845; Crozier *v.* Hoyt, 97 Ill. 23; Whitman *v.* Fisher, 74 Ill. 147; Wardwell *v.* McDowell, 31 Ill. 364.

Indiana.— Munson *v.* Cole, 98 Ind. 502.

Maryland.— Seldner *v.* McCreery, 75 Md. 287, 23 Atl. 641; Keister *v.* Scott, 61 Md. 507; Alther *v.* Barroll, 22 Md. 500.

Massachusetts.— Carroll *v.* Shea, 149 Mass. 317, 21 N. E. 373.

New Jersey.— Barnes *v.* Trenton Gas-Light Co., 27 N. J. Eq. 33; Dewey *v.* Ruggles, 25 N. J. Eq. 35.

New York.— Coogan *v.* Ockershausen, 55 N. Y. Super. Ct. 286; Dyett *v.* Central Trust Co., 19 N. Y. Suppl. 19 [*affirmed* in 140 N. Y. 54, 35 N. E. 341]; Behrman *v.* Von Heyn, 15 N. Y. Suppl. 604.

North Carolina.— Hauser *v.* Shore, 40 N. C. 357. *Compare* Rutledge *v.* Smith, 45 N. C. 283.

Ohio.— Sater *v.* Kocher, 8 Ohio Cir. Ct. 390, 6 Ohio Cir. Dec. 276; Dean *v.* Loewenstein, 6 Ohio Cir. Ct. 587, 3 Ohio Cir. Dec. 597; Dean *v.* Nicholas, 11 Ohio Dec. (Reprint) 215, 25 Cinc. L. Bul. 278.

Pennsylvania.— *In re* Cochrane, 202 Pa. St. 415, 51 Atl. 989; Grant *v.* Hood, 13 Serg. & R. 259; McCartney's Estate, 2 Pa. Co. Ct. 202; Dinsmore *v.* Kelso, 4 Brewst. 34.

South Carolina.—Webb *v.* Chisolm, 24 S. C. 487; Hyatt *v.* McBurney, 18 S. C. 199; Laurens *v.* Lucas, 6 Rich. Eq. 217; Dining *v.* Peyton, 2 Desauss. Eq. 375.

Tennessee.— Law Guarantee, etc., Co. *v.* Jones, 103 Tenn. 245, 58 S. W. 219; Young *v.* Mutual L. Ins. Co., 101 Tenn. 311, 47 S. W. 428.

Texas.— Cooper *v.* Horner, 62 Tex. 356; Rogers *v.* Jones, 13 Tex. Civ. App. 453, 35 S. W. 812.

Virginia.— Hughes *v.* Tabb, 78 Va. 313; Davis *v.* Christian, 15 Gratt. 11; Carrington *v.* Goddin, 13 Gratt. 587; Steele *v.* Levisay, 11 Gratt. 454; Meeks *v.* Thompson, 8 Gratt. 134, 56 Am. Dec. 134.

West Virginia.—John *v.* Barnes, 21 W. Va. 498.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185; Greenway *v.* Roberts, 10 Fed. Cas. No. 5,790, 2 Cranch C. C. 246.

England.— Corser *v.* Cartwright, L. R. 7 H. L. 731, 45 L. J. Ch. 605; Robinson *v.* Lowater, 17 Beav. 592, 51 Eng. Reprint 1165 [*affirmed* in 5 De G. M. & G. 272, 18 Jur. 363, 23 L. J. Ch. 641, 2 Wkly. Rep. 394, 54 Eng. Ch. 215, 43 Eng. Reprint 875]; Smith *v.* Gwyon, 1 Bro. Ch. 186, 28 Eng. Reprint 1072; Colyer *v.* Finch, 5 H. L. Cas. 905, 3 Jur. N. S. 25, 26 L. J. Ch. 65, 10 Eng. Reprint 1159; Eland *v.* Eland, 3 Jur. 474, 8 L. J. Ch. 289, 4 Myl. & C. 420, 18 Eng. Ch. 420, 41 Eng. Reprint 162; Ball *v.* Harris, 3 Jur. 140, 8 L. J. Ch. 114, 4 Myl. & C. 264, 18 Eng. Ch. 264, 41 Eng. Reprint 103 [*affirming* 1 Jur. 706, 8 Sim. 485, 8 Eng. Ch. 485, 59 Eng. Reprint 193]; Jones *v.* Noyes, 4 Jur. N. S. 1033, 28 L. J. Ch. 47, 7 Wkly. Rep. 21; Shaw *v.* Borrie, 1 Keen 559, 5 L. J. Ch. 364, 15 Eng. Ch. 559, 48 Eng. Reprint 422; Forbes *v.* Peacock, 15 L. J. Ch. 371, 1 Phil. 717, 19 Eng. Ch. 717, 41 Eng. Reprint 805 [*reversing* 7 Jur. 688, 13 L. J. Ch. 46, 12 Sim. 528, 35 Eng. Ch. 447, 59 Eng. Reprint 1235].

See 40 Cent. Dig. tit. "Powers," § 164.

Limitations upon rule in England see Abbot *v.* Gibbs, 1 Eq. Cas. Abr. 358, 21 Eng. Reprint 1101: Haynes *v.* Forshaw, 11 Hare 93, 17 Jur. 930, 22 L. J. Ch. 1060, 1 Wkly. Rep. 346, 45 Eng. Ch. 95, 68 Eng. Reprint 1201; Horne *v.* Horne, 4 L. J. Ch. O. S. 52, 2 Sim. & St. 448, 1 Eng. Ch. 448, 57 Eng. Reprint 417; Johnson *v.* Kennett, 3 Myl. & K. 624, 10 Eng. Ch. 624, 40 Eng. Reprint 238 [*reversing* 6 Sim. 384, 9 Eng. Ch. 384, 58 Eng. Reprint 638]; Watkins *v.* Cheek, 2 Sim. & St. 199, 25 Rev. Rep. 181, 1 Eng. Ch. 199, 57 Eng. Reprint 321; Spalding *v.* Shalmer, 1 Vern. Ch. 301, 23 Eng. Reprint 483.

1. Webster Dict. [*quoted* in Mayo *v.* Thigpen, 107 N. C. 63, 65, 11 S. E. 1052].

2. English L. Dict. [*quoted* in Pittsburgh, etc., R. Co. *v.* Indianapolis, etc., Traction Co., 169 Ind. 634, 637, 81 N. E. 487].

Does not mean the use of every human means to accomplish the work under a contract. Reedy *v.* Smith, 42 Cal. 245, 251.

As used in statute regulating the carrying of certain dangerous substances on board vessels carrying passengers it means "commercially practicable," as distinguished from "physically or mechanically practicable." The Benton, 51 Fed. 302, 303; U. S. *v.* Wise, 7 Fed. 190, 192.

3. Standard Dict. [*quoted* in People *v.* Errant, 229 Ill. 56, 66, 82 N. E. 271].

4. Rizer *v.* People, 18 Colo. App. 40, 69 Pac. 315, 316; Streeter *v.* Streeter, 43 Ill. 155, 165.

Distinguished from "possible" see Pittsburgh, etc., R. Co. *v.* Indianapolis, etc., Traction Co., 169 Ind. 634, 637, 81 N. E. 487; Mims *v.* State, 26 Minn. 494, 497, 5 N. W. 369; Wooters *v.* International, etc., R. Co., 54 Tex. 294, 300.

5. Moore *v.* Wilder, 66 Vt. 33, 36, 28 Atl. 320.

"Practical architect and sanitary engineer" see State *v.* Starkey, 49 Minn. 503, 507, 52 N. W. 24.

"Practical construction" see CONSTITUTIONAL LAW, 8 Cyc. 726.

"Practical dip" see 14 Cyc. 290 note 2.

"Practical location" see BOUNDARIES, 5 Cyc. 938.

PRACTICE. In its general sense, to exercise or follow a profession or calling as one's usual business to gain a livelihood;[6] to exercise a calling or profession; the application of science or knowledge to the wants of men in the recurring incidents of life, as, in the practice of law or medicine.[7] In law, the mode of proceeding by which a legal right is enforced;[8] that which regulates the formal steps in an action or other judicial proceeding;[9] the course of procedure in courts;[10] the form, manner, and order in which proceedings have been and are accustomed to be had;[11] the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law, and the rules laid down by the respective courts.[12] (Practice or Procedure: In Civil Actions or Proceedings in General, see ABATEMENT AND REVIVAL, 1 Cyc. 10; ACCOUNTS AND ACCOUNTING, 1 Cyc. 351; ADMIRALTY, 1 Cyc. 797; AMICUS CURIÆ, 2 Cyc. 281; APPEARANCES, 3 Cyc. 500; ARREST, 3 Cyc. 867; ASSISTANCE, WRIT OF, 4 Cyc. 289; ASSUMPSIT, ACTION OF, 4 Cyc. 317; ATTACHMENT, 4 Cyc. 368; BAIL, 5 Cyc. 1; BANKRUPTCY, 5 Cyc. 227; CLERKS OF COURTS, 7 Cyc. 193; CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 589; CONTEMPT, 9 Cyc. 1; CONTINUANCES IN CIVIL CASES, 9 Cyc. 75; COSTS, 11 Cyc. 1; COURT COMMISSIONERS, 11 Cyc. 622; COURTS, 11 Cyc. 633; COVENANT, ACTION OF, 11 Cyc. 1022; CREDITORS' SUITS, 12 Cyc. 1; DEBT, ACTION OF, 13 Cyc. 402; DEPOSITIONS, 13 Cyc. 792; DEPOSITS IN COURT, 13 Cyc. 1030; DETINUE, 14 Cyc. 238; DISCOVERY, 14 Cyc. 301; DISMISSAL AND NONSUIT, 14 Cyc. 466; EJECTMENT, 15 Cyc. 1; ELECTION OF REMEDIES, 15 Cyc. 251; ENTRY, WRIT OF, 15 Cyc. 1057; EQUITY, 16 Cyc. 1; EVIDENCE, 16 Cyc. 821, 17 Cyc. 1; EXECUTIONS, 17 Cyc. 878; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1; EXEMPTIONS, 18 Cyc. 1369; FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1108; GARNISHMENT, 20 Cyc. 969; GUARDIAN AND WARD, 21

"Practical mechanic" see 26 Cyc. 1609 note 35.

Practicable plumber see *ante*, p. 890.

6. Jackson *v.* Hough, 38 W. Va. 236, 241, 18 S. E. 575.

7. Webster Dict. [*quoted* in People *v.* Blue Mountain Joe, 129 Ill. 370, 377, 21 N. E. 923].

Practice: As apothecary see DRUGGISTS, 14 Cyc. 1078. Of law see ATTORNEY AND CLIENT, 4 Cyc. 889. Of medicine see PHYSICIANS AND SURGEONS, 30 Cyc. 1539. Of pharmacy see DRUGGISTS, 14 Cyc. 1078. Of surgery see PHYSICIANS AND SURGEONS, 30 Cyc. 1539.

"Practice of the church" see McRae *v.* McLeod, 26 Grant Ch. (U. C.) 255, 259.

8. Opp *v.* Ten Eyck, 99 Ind. 345, 351; Poyser *v.* Minors, 7 Q. B. D. 329, 333, 46 J. P. 84, 50 L. J. Q. B. 555, 45 L. T. Rep. N. S. 33, 29 Wkly. Rep. 773; Sewell *v.* British Columbia Towing Co., 1 Brit. Col. 153, 173.

Distinguished from the law which gives or declares the right see Anderson L. Dict. [*quoted* in Bowar *v.* Chicago West. Div. R. Co., 136 Ill. 101, 106, 26 N. E. 702, 12 L. R. A. 81].

9. Rapalje & L. L. Dict. [*quoted* in People *v.* Central Pac. R. Co., 83 Cal. 393, 404, 23 Pac. 303].

It deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions. Rapalje & L. L. Dict. [*quoted* in People *v.* Central Pac. R. Co., 83 Cal. 393, 404, 23 Pac. 303].

10. In a general sense it includes pleading. —Burrill L. Dict. [*quoted* in People *v.* Central Pac. R. Co., 83 Cal. 393, 404, 23 Pac. 303].

Distinguished from pleading.—Allen *v.* Smillie, 1 Abb. Pr. (N. Y.) 354, 356; Atty.-Gen. *v.* Sillem, 10 H. L. Cas. 704, 768, 11 Eng. Reprint 1200, 10 Jur. N. S. 446, 10 L. T. Rep. N. S. 434, 4 New Rep. 29, 12 Wkly. Rep. 641.

It is said to refer to those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in. Kring *v.* Missouri, 107 U. S. 221, 232, 2 S. Ct. 443, 27 L. ed. 506 [*citing* Bishop Cr. Proc. § 2]; Burrill L. Dict. [*quoted* in People *v.* Central Pac. R. Co., 83 Cal. 393, 404, 23 Pac. 303].

Synonymous with procedure see Morris *v.* Newark, 73 N. J. L. 268, 270, 62 Atl. 1005.

11. Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 1, 8 [*citing* 3 Dan. Ch. 1950 and note].

12. Bouvier L. Dict. [*quoted* in People *v.* Raymond, 186 Ill. 407, 415, 57 N. E. 1066; Fleischman *v.* Walker, 91 Ill. 318, 321; Bowlus *v.* Brier, 87 Ind. 391, 395; Van Aken *v.* Coldren, 80 Iowa 254, 258, 45 N. W. 873; State *v.* Frazier, 36 Oreg. 178, 185, 59 Pac. 5, 7; Com. *v.* Mayloy, 57 Pa. St. 291, 296; Butler *v.* Young, 4 Fed. Cas. No. 2,245, 1 Flipp. 276, 279].

Similar but more comprehensive definition is "the form and manner of conducting and carrying on suits, actions, or prosecutions at law or in equity, civil or criminal, through their various stages, from the commencement to final judgment and execution, according to the principles and rules laid down by the several Courts." Wharton L. Lex. [*quoted* in *Re* Osler, 7 Ont. Pr. 80, 81].

Cyc. 1; Habeas Corpus, 21 Cyc. 279; Informations in Civil Cases, 22 Cyc. 716; Injunctions, 22 Cyc. 724; Insolvency, 22 Cyc. 1249; Interpleader, 23 Cyc. 43; Joinder and Splitting of Actions, 23 Cyc. 376; Judges, 23 Cyc. 499; Judgments, 23 Cyc. 623; Judicial Sales, 24 Cyc. 1; Juries, 24 Cyc. 82; Justices of the Peace, 24 Cyc. 383; Limitations of Actions, 25 Cyc. 963; Lis Pendens, 25 Cyc. 1447; Mandamus, 26 Cyc. 125; Motions, 28 Cyc. 1; Ne Exeat, 29 Cyc. 382; Orders, 29 Cyc. 1511; Parties, 30 Cyc. 1; Partition, 30 Cyc. 145; Pleading; Possessory Warrant; Process; Prohibition; Quieting Title; Quo Warranto; Real Actions; Receivers; Recoupment, Set-Off, and Counter-Claim; References; Removal of Causes; Replevin; Scire Facias; Sequestration; Stipulations; Submission of Controversy; Summary Proceedings; Supersedeas; Tender; Trespass to Try Title; Trial; Trover and Conversion; United States Commissioners; Venue; Wills; Witnesses. In Criminal Prosecutions in General, see Arrest, 3 Cyc. 867; Bail, 5 Cyc. 1; Contempt, 9 Cyc. 1; Continuances in Criminal Cases, 9 Cyc. 163; Courts, 11 Cyc. 633; Criminal Law, 12 Cyc. 70; Grand Juries, 20 Cyc. 1291; Indictments and Informations, 22 Cyc. 157; Judges, 23 Cyc. 499. In Particular Civil Actions and Proceedings, see Particular Titles in this work, such as Accident Insurance, Arbitration and Award, Builders and Architects, Cancellation of Instruments, Commercial Paper, Contracts, Damages, Descent and Distribution, Divorce, Fraudulent Conveyances, Mechanics' Liens, Mortgages, Parent and Child, and the like. In Particular Courts and Tribunals, see Arbitration and Award, 3 Cyc. 568; Army and Navy, 3 Cyc. 812; Courts, 11 Cyc. 633; Justices of the Peace, 24 Cyc. 383; Militia, 27 Cyc. 489; References. In Prosecutions For Particular Offenses, see Particular Titles in this work, such as Homicide, Larceny, Rape, and the like. Judicial Notice, see Evidence, 16 Cyc. 849. On Review, see Admiralty, 1 Cyc. 797; Appeal and Error, 2 Cyc. 474, 3 Cyc. 1; Arbitration and Award, 3 Cyc. 568; Audita Querela, 4 Cyc. 1058; Bankruptcy, 5 Cyc. 227; Certiorari, 6 Cyc. 730; Criminal Law, 12 Cyc. 70; Equity, 16 Cyc. 1; Insolvency, 22 Cyc. 1249; Justices of the Peace, 24 Cyc. 383; New Trial, 29 Cyc. 707; Review. Operation and Effect of Decision Relating to, see Courts, 11 Cyc. 744. Rules of Court, see Courts, 11 Cyc. 739. Statutory Provisions Relating to, see Constitutional Law, 8 Cyc. 843, 879, 884, 916, 998, 1049, 1056, 1079, 1080, 1137; Statutes.)

PRACTICES. A succession of acts of a similar kind or in a like employment.[13]

PRACTISING ATTORNEY. A party who follows the business of the profession of the law as his avocation or calling.[14] (See, generally, Attorney and Client, 4 Cyc. 889.)

PRADOS. Fields.[15] (See Field, 19 Cyc. 526.)

PRÆCIPE. See Process.

PRÆDIUM DOMINANS. In the civil law, the estate unto which the service is due; the ruling estate.[16] (See, generally, Easements, 14 Cyc. 1134.)

PRÆDIUM SERVIENS. An estate subject to a privilege or service.[17] (See, generally, Easements, 14 Cyc. 1134.)

PRÆFERRE PATRIAM LIBERIS REGEM DECET. A maxim meaning "A king should prefer his country even before his children."[18]

13. Black L. Dict.

Under an act prohibiting certain "practices" contrary to public order and decency a single offense was held to be prohibited by the act as well as repeated offenses of the same kind. *Ex p.* Delaney, 43 Cal. 478, 480.

14. Wheatley *v.* State, 11 Lea (Tenn.) 262, 263.

Does not include a real estate broker though he is licensed to practise law. Wheatley *v.* State, 11 Lea (Tenn.) 262, 263.

A retired lawyer who tries a single case for a neighbor gratuitously has been held not to be a practising attorney so as to be liable to a penalty under the Mississippi statute for practising without having paid the license-tax. McCargo *v.* State, (Miss. 1887) 1 So. 161, 162.

15. Vernon Irr. Co. *v.* Los Angeles, 106 Cal. 237, 247, 39 Pac. 762.

16. Morgan *v.* Mason, 20 Ohio 401, 409, 55 Am. Dec. 464.

17. Morgan *v.* Mason, 20 Ohio 401, 409, 55 Am. Dec. 464.

18. Morgan Leg. Max. [*citing* Riley 340].

PRÆMUNIRE. In English law, the name of an offense against the king and his government, though not subject to capital punishment.[19]

PRÆPROPERA CONSILIA RARO SUNT PROSPERA. A maxim meaning "Hasty counsels are rarely prosperous." [20]

PRÆSCRIPTIO EST TITULUS EX USU ET TEMPORE SUBSTANTIAM CAPIENS AB AUCTORITATE LEGIS. A maxim meaning "Prescription is a title by authority of law, deriving its force from use and time." [21]

PRÆSCRIPTIO ET EXECUTIO NON PERTINENT AD VALOREM CONTRACTUS, SED AD TEMPUS ET MODUM ACTIONIS INSTITUENDÆ. A maxim meaning "Prescription and execution do not affect the validity of the contract, but the time and manner of bringing an action." [22]

PRÆSCRIPTIO IN FEODO NON ACQUIRIT JUS. A maxim meaning "Prescription in fee acquires not a right." [23]

PRÆSENTARE NIHIL ALIUD EST QUAM PRÆSTO DARE SEU OFFERE. A maxim meaning "To present is no more than to give or offer on the spot." [24]

PRÆSENTIA CORPORIS TOLLIT ERROREM NOMINIS, ET VERITAS NOMINIS TOLLIT ERROREM DEMONSTRATIONIS. A maxim meaning "The presence of the subject takes away the effect of error in the name,[25] and the truth of the name takes away the effect of error in the description." [26]

PRÆSTAT CAUTELA QUAM MEDELA. A maxim meaning "Prevention is better than cure." [27]

PRÆSUMATUR PRO JUSTITIA SENTENTIÆ. A maxim meaning "The presumption should be in favor of the justice of a sentence." [28]

PRÆSUMITUR PRO LEGITIMATIONE. A maxim meaning "Legitimacy is to be presumed." [29]

PRÆSUMITUR REX HABERE OMNIA JURA IN SCRINIO PECTORIS SUI. A maxim meaning "The king is presumed to have all law in the recess of his heart." [30]

PRÆSUMPTIO, EX EO QUOD PLERUMQUE FIT. A maxim meaning "Presumptions arise from what generally happens." [31]

PRÆSUMPTIO JURIS EST DE JURE. A maxim meaning "A legal presumption is a legal rule." [32]

PRÆSUMPTIONES SUNT CONJECTURÆ EX SIGNO VERISSIMILI AD PROBANDUM ASSUMPTÆ. A maxim meaning "Presumptions are conjectures from probable proof, assumed for purposes of evidence." [33]

PRÆSUMPTIO VIOLENTA PLENA PROBATIO. A maxim meaning "Strong presumption is full proof." [34]

19. Black L. Dict.

20. Burrill L. Dict. [*citing* 4 Inst. 57].

21. Bouvier L. Dict. [*citing* Coke Litt. 113].

22. Bouvier L. Dict.

Applied in: Pearsall *v.* Dwight, 2 Mass. 84, 90, 3 Am. Dec. 35; Decouche *v.* Savetier, 3 Johns. Ch. (N. Y.) 190, 218, 8 Am. Dec. 478.

23. Peloubet Leg. Max. [*citing* Wharton 817].

24. Bouvier L. Dict. [*citing* Coke Litt. 120].

25. Peloubet Leg. Max. [*citing* Bacon Leg. Max. 24].

26. Morgan Leg. Max. [*citing* Bacon Leg. Max.].

Applied in: Montgomery *v.* Johnson, 31 Ark. 74, 81; Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 599, 26 S. W. 20; State *v.* Brooks, 92 Mo. 542, 573, 5 S. W. 257, 330; State *v.* Union Trust Co., 92 Mo. 157, 158, 6 S. W. 867; Hopkins *v.* Hitchcock, 14 C. B. N. S. 65, 73, 9 Jur. N. S. 896, 32 L. J. C. P. 154, 8 L. T. Rep. N. S. 204, 11 Wkly. Rep. 597, 108 E. C. L. 65; Rand *v.* Green, 9 C. B. N. S. 470, 477, 7 Jur. N. S. 126, 30 L. J. C. P. 80, 3 L. T. Rep. N. S. 298, 9 Wkly. Rep. 54, 99 E. C. L. 470.

27. Bouvier L. Dict. [*citing* Coke Litt. 304].

28. Burrill L. Dict. [*citing* Mascard. de Prob. Concl. 1237 note 2; Best Ev. Introd. 42].

29. Peloubet Leg. Max [*citing* Bury's Case, 5 Coke 98*b*, 77 Eng. Reprint 207].

30. Morgan Leg. Max. [*citing* Halkerstone 129].

31. Bouvier L. Dict.

Applied in Post *v.* Pearsall, 22 Wend. (N. Y.) 425, 475.

32. Peloubet Leg. Max. [*citing* Traynor Leg. Max.].

33. Peloubet Leg. Max. [*citing* Bouvier L. Dict.].

34. Burrill L. Dict. [*citing* Coke Litt. 6*b*].

PRÆSUMPTIO VIOLENTA VALET IN LEGE. A maxim meaning "Strong presumption avails in law." [35]

PRÆTEXTU LEGIS INJUSTA AGENS DUPLO PUNIENDUS. A maxim meaning "He who under the cloak of the law acts unjustly should bear a double punishment." [36]

PRÆTEXTU LICITI NON DEBET ADMITTI ILLICITUM. A maxim meaning "An unlawful thing ought not to be admitted under a lawful pretext." [37]

PRAIRIE. A meadow; level grassy land; [38] a level or rolling tract of treeless land covered with coarse grass, and generally of rich soil especially as in parts of the western United States; also any natural grass land, as the so-called natural meadows; [39] an extensive tract of land destitute of trees, covered with coarse grass and usually characterized by a deep fertile soil; a meadow or tract of grass land, especially a so-called natural meadow. [40] (Prairie: Fire — Liability For, see FIRES, 19 Cyc. 977; NEGLIGENCE, 29 Cyc. 460; RAILROADS.)

PRAXIS JUDICUM EST INTERPRES LEGUM. A maxim meaning "The practice of the judges is the interpreter of the laws." [41]

PRAYER. The request contained in a bill in equity that the court will grant the process, aid, or relief which the complainant desires. Also, by extension, the term is applied to that part of the bill which contains this request. [42] (Prayer: For Appeal, see APPEAL AND ERROR, 2 Cyc. 809. For Instructions, see APPEAL AND ERROR, 2 Cyc. 700; CRIMINAL LAW, 658; TRIAL. For Oyer, see PLEADING, *ante*, p. 550. For Relief — In General, see EQUITY, 19 Cyc. 224; PLEADING, *ante*, p. 110; Conformity to, see EQUITY, 19 Cyc. 486; JUDGMENTS, 23 Cyc. 816; In Admiralty, see ADMIRALTY, 1 Cyc. 853; In Attachment, see ATTACHMENT, 4 Cyc. 515; In Mandamus, see MANDAMUS, 26 Cyc. 446; In Suit For Accounting, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 439; In Suit For Infringement, see COPYRIGHT, 9 Cyc. 965; PATENTS, 30 Cyc. 1031; In Suit For Injunction, see INJUNCTIONS, 22 Cyc. 930; In Suit to Avoid Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 740; In Suit to Foreclose, see MORTGAGES, 27 Cyc. 1599. Striking Out, see PLEADING, *ante*, p. 641.)

PREACHER. In England, a term formerly affected by the dissenters from the Established Church who considered themselves rather as persons whose mission was to preach the gospel, than to minister the ordinances and to lead the devotion of the people. [43] (See, generally, RELIGIOUS SOCIETIES.)

PREAMBLE. A clause introductory to, and explanatory of, the reasons for passing, the act. [44] (See STATUTES.)

PRECARIOUS. Uncertain; insecure. [45]

35. Bouvier L. Dict. [*citing* Jenkins Cent. 58].

36. Morgan Leg. Max. [*citing* Grigg Max.].

37. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

38. Century Dict. [*quoted* in Gardner *v.* Mann, 36 Ind. App. 694, 76 N. E. 417, 418].

39. Standard Dict. [*quoted* in Gardner *v.* Mann, 36 Ind. App. 694, 76 N. E. 417, 418].

40. Webster Dict. [*quoted* in Gardner *v.* Mann, 36 Ind. App. 694, 76 N. E. 417, 418; Interstate Galloway Cattle Co. *v.* Kline, 51 Kan. 23, 28, 32 Pac. 628].

Distinguished from "cultivated field" see Brunell *v.* Hopkins, 42 Iowa 429, 431.

"Prairie land" not synonymous with "timbered land" see Buxton *v.* St. Louis, etc., R. Co., 58 Mo. 55, 56; Tiarks *v.* St. Louis, etc., R. Co., 58 Mo. 45, 49.

41. Bouvier L. Dict.

42. Black L. Dict.

43. Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 572, 8 Eng. Reprint 450, 7 Jur. 781, 5 Scott N. R. 958, 11 Sim. 592, 34 Eng. Ch. 592, 59 Eng. Reprint 1002.

44. Townsend *v.* State, 147 Ind. 624, 635, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294.

It is said to be the key of the statute, to open the minds of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished, by the provisions of the statute. Bouvier L. Dict. [*quoted* in Fenner *v.* Luzerne County, 167 Pa. St. 632, 635, 31 Atl. 862].

Not a part of a statute.— It may be looked to in aid of the interpretation of an ambiguity in a statute, but if the terms are clear the preamble may not be resorted to to create a doubt and uncertainty, which otherwise does not exist. Coverdale *v.* Edwards, 155 Ind. 374, 382, 58 N. E. 495; James *v.* Dubois, 16 N. J. L. 285; Den *v.* Urison, 2 N. J. L. 212, 224.

45. Century Dict.

The circumstances of an executor are "precarious" only when his conduct and char-

PRECATORY TRUST. See TRUSTS; WILLS.

PRECEDENT. An adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterward arising or a similar question of law;[46] a draught of a conveyance, settlement, will, pleading, bill, or other legal instrument, which is considered worthy to serve as a pattern for future instruments of the same nature.[47] (See COURTS, 11 Cyc. 744. See also DICTUM, 14 Cyc. 286.)

PRECEDENT CONDITION. See CONDITION PRECEDENT, 8 Cyc. 558.

PRECEDING. Next before.[48]

PRECEPT. In law, a command or mandate in writing.[49]

PRECINCT. In general, any district marked out and defined;[50] a district within certain boundaries.[51] As applied to counties, an established political subdivision of the county;[52] a political subdivision of a county possessing no corporate

acter present such evidence of improvidence or recklessness in the management of the trust estate, or of his own, as, in the opinion of prudent and discreet men, endangers its security. Shields *v.* Shields, 60 Barb. (N. Y.) 56, 61.

"**Precarious loan**" is a bailment by way of loan which is not to continue for any fixed time, but may be recalled at the mere will and pleasure of the lender. Black L. Dict.

"**Precarious possession**" is that possession which one enjoys by the leave of another, and during his pleasure; title which exeludes ownership. La. Civ. Code (1900), art. 3556, subd. 25.

"**Precarious right**" is the right which the owner of a thing transfers to another, to enjoy the same until it shall please the owner to revoke it. Black L. Dict.

"**Precarious trade**" in international law is such trade as may be carried on by a neutral between two belligerent powers by the mere sufferance of the latter. Black L. Dict.

46. Blaek L. Dict.

Precedents sub silentio is a term applied to silent uniform course of practice, uninterrupted though not supported by legal decisions. Black L. Dict. "It is not only from decided eases, where the point has been raised upon argument, but also from the long continued practice of the courts, without objection made, that we eollect rules of law." Calton *v.* Bragg, 15 East 223, 226, 13 Rev. Rep. 451, per Lord Ellenborough, C. J. Though the practice of the courts, or forms of pleadings, which pass *sub silentio*, do not make the law; yet a constant practice of permitting acts of assembly, or laws to be read out of printed books, without opposition, is a great evidence of the law. Thompson *v.* Musser, 1 Dall. (Pa.) 458, 464, 1 L. ed. 222.

Where a certain point of law is not brought to the view of the court in determining a course, the decision is not a precedent, calling for the same decision in a similar ease in which the point is brought before the court. The Edward, 1 Wheat. (U. S.) 261, 274, 4 L. ed. 86.

47. Blaek L. Dict.

48. Simpson *v.* Robert, 35 Ga. 180.

Yet a different signification will be given to them if required by the context and facts of the case. Simpson *v.* Robert, 35 Ga. 180.

"**Preceding paragraph**" see *In re* Salomon, 55 Fed. 285, 286.

By statute in many states it is provided that the word "preceding" when used by way of reference to any section of a statute or title of a code shall mean the section next preceding that in which the reference is made, unless some other section is expressly designated, or unless the context requires a different construction. Wilkinson *v.* State, 10 Ind. 372, 373; and the statutes of the several states. Under a statute providing that a public stock yard shall be a stock yard which, for the preceding twelve months, shall have had an average daily receipt of a certain number of live stock, the word "preceding" does not mean anterior to the passage of the act, but that a stock yard, to come under the law, must have maintained for a period of twelve months a stated volume of business. Cotting *v.* Kansas City Stock-Yards Co., 79 Fed. 679, 681. Under a Texas statute providing that it shall be a good cause for challenge of a juror that he has served for one week in the district court within six months preceding, it is held that the word "preceding" means service rendered at a term prior to and other than the one then being held. Myers *v.* State, 7 Tex. App. 640, 652; Tuttle *v.* State, 6 Tex. App. 556, 559; Garcia *v.* State, 5 Tex. App. 337, 340; Walsh *v.* State, 3 Tex. App. 413. Under the Texas constitution, meaning of "last preceding census of the United States" see Nelson *v.* Edwards, 55 Tex. 389, 393.

49. Webster L. Dict. [*quoted* in Adams *v.* Voce, 1 Gray (Mass.) 51, 58].

Includes warrants and processes in eriminal cases, the word "precepts" being synonymous with the word "processes." Adams *v.* Vose, 1 Gray (Mass.) 51 58.

50. Union Pac. R. Co. *v.* Ryan, 113 U. S. 516, 524, 5 S. Ct. 601, 28 L. ed. 1098.

51. Webster Dict. [*quoted* in Union Pac. R. Co. *v.* Ryan, 2 Wyo. 408, 418].

As used in an officer's return, it means the territory within which the officer may legally discharge the duties of his office. Brooks *v.* Norris, 124 Mass. 172, 173.

Precinct of the prison embraces not only the prison buildings but the grounds connected therewith. Hix *v.* Sumner, 50 Me. 290, 291.

52. Caudle *v.* Talladega County Com'rs' Ct., 144 Ala. 502, 504, 39 So. 307.

powers.[53] In elections, the place of voting.[54] In reference to religious societies, a corporation established solely for the purpose of maintaining public worship.[55] (Precinct: Division of City, see Municipal Corporations, 28 Cyc. 230. Election, see Elections, 15 Cyc. 309.)

Precious Metals. In popular language, Gold (*q. v.*) and silver.[56] (See Metals, 27 Cyc. 485.)

Precious Stone. A stone distinguished for its beauty and rarity and prized for use in ornamentation, especially in Jewelry, *q. v.*; a Gem, *q. v.*, a Jewel,[57] *q. v.*

Precise. Clear (*q. v.*) and Distinct,[58] *q. v.*; Exact,[59] *q. v.*

Preclude. Sometimes embraced in the meaning of the term Exclude,[60] *q. v.*

Preconceive. To think of beforehand — that is, before the execution of the act thought of.[61] (See Deliberate, 13 Cyc. 770.)

Precontract. A contract or engagement made by a person, which is of such a nature as to preclude him from lawfully entering into another contract of the same nature.[62]

Predecessor. In common acceptation, one who goes before or precedes another in a given state, position, or office.[63] As defined by English statute, settlor, disponer, testator, obligor, ancestor, or any other person from whom the interest of the successor shall be derived.[64] (Predecessor: In Office, see Officers, 29 Cyc. 1356.)

Predial Servitude. A charge laid on an estate for the use and utility of another estate belonging to another owner.[65] (See Easements, 14 Cyc. 1134.)

Predicate. In grammatical analysis, the word or words which assert some-

53. State *v.* Chichester, 31 Nebr. 325, 327, 47 N. W. 934, 11 L. R. A. 104.

Distinguished from "county" see Caudle *v.* Talladega County Com'rs' Ct., 144 Ala. 502, 504, 39 So. 307.

As a school district see Regard *v.* Avoyelles Police Jury, 117 La. 952, 954, 42 So. 438. A common school district is not a "precinct" within the meaning of the act relative to the taxing of railroads. Louisville, etc., R. Co. *v.* Johnson, 11 S. W. 666, 667, 11 Ky. L. Rep. 118.

As a village see State *v.* Chichester, 31 Nebr. 325, 327, 47 N. W. 934, 11 L. R. A. 104.

54. State *v.* Anslinger, 171 Mo. 600, 610, 71 S. W. 1041.

Used interchangeably with "election districts" see Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 196, 6 N. W. 607, 36 Am. Rep. 840.

55. Milford *v.* Godfrey, 1 Pick. (Mass.) 91, 97, where the term is used as a synonym of "parish."

56. Casher *v.* Holmes, 2 B. & Ad. 592, 596, 9 L. J. K. B. O. S. 280, 22 E. C. L. 249.

A schedule imposing a duty on copper, brass, pewter, and tin; and on "all other metals" not enumerated, held not to include gold and silver. Casher *v.* Holmes, 2 B. & Ad. 592, 596, 9 L. J. K. B. O. S. 280, 22 E. C. L. 249.

57. Century Dict. See also 20 Cyc. 1181; 23 Cyc. 374.

As used in the Tariff Act includes diamonds cut but not set. U. S. *v.* Frankel, 68 Fed. 186, 188.

Articles such as paper cutters, paper weights, knife handles, and pen or pencil holders, made wholly or chiefly of agate or onyx, are dutiable by similitude, to precious stones under Act, Oct. 1, 1890, § 5. Hahn *v.* U. S., 121 Fed. 152.

Articles such as bowls, vases, trays, wine pitchers, tea-cups, altar sets, flower stands, and other completed articles, manufactured from jade by cutting, carving or other means, are not "precious stones" within section 435 Schedule N, § 1, c. 11, Tariff Act, July 24, 1897, 30 U. S. St. at L. 192. Tiffany *v.* U. S., 126 Fed. 255.

58. Ferguson *v.* Rafferty, 128 Pa. St. 337, 346, 18 Atl. 484, 6 L. R. A. 33.

59. Barnard *v.* Graham, 120 Ind. 135, 137, 22 N. E. 112.

As used in describing the kind of evidence necessary to establish a parol exchange of land means precision in the terms of the agreement set up, and that the evidence to support it must be of a high order, carrying conviction, to a moral certainty, of its truth. Jermyn *v.* McClure, 195 Pa. St. 245, 247, 45 Atl. 938.

60. Lindsay *v.* People, 1 Ida. 438, 456.

61. State *v.* Spotted Hawk, 22 Mont. 33, 67, 55 Pac. 1026.

62. Black L. Dict. [*citing* 1 Bishop Mar. & Div. §§ 112, 272].

63. Lorillard Co. *v.* Pepper, 65 Fed. 597, 598.

64. Zetland *v.* Lord Advocate, 3 App. Cas. 505, 520, 38 L. T. Rep. N. S. 297, 26 Wkly. Rep. 725; *Re* Jenkinson, 24 Beav. 64, 71, 3 Jur. N. S. 279, 26 L. J. Ch. 241, 5 Wkly. Rep. 301, 53 Eng. Reprint 281.

65. Black L. Dict. [*quoting* La. Civ. Code, art. 647].

thing concerning the subject.[66] (Predicate: For Impeachment of Witnesses, see WITNESSES.)

PREDOMINANT. In its natural and ordinary signification, something greater or superior in power and influence to others, with which it is connected or compared.[67]

PREËMPTION. At common law, a term used to express the right of the king through his purveyors to buy provisions and other necessaries for the use of his household at an appraised value in preference to all others, and even without the consent of the owner.[68] In international law, the term is used as expressive of the right of a nation or country to detain the goods of strangers passing through its territories and seas in order to afford to its own subjects or citizens a preference of purchase.[69] (Preëmption: In General, see PUBLIC LANDS. As Basis For Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1097.)

PREËMPTOR. See PUBLIC LANDS.

PREËXISTING DEBT. Words which, in their natural meaning, include all debts previously contracted, whether they have become payable or not.[70] (Preëxisting Debt: Affecting Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 420, 497. As Consideration, see CONTRACTS, 9 Cyc. 353, 362; MORTGAGES, 27 Cyc. 1051. Of Bankrupt, see BANKRUPTCY, 5 Cyc. 227. Of Insolvent, see INSOLVENCY, 22 Cyc. 1249. See also DEBT, 13 Cyc. 393.)

PREFECT. A name applied to functionaries well known in the Roman law and under the empire who were clothed with extensive powers both judicial and administrative.[71]

PREFERENCE.[72] In a general sense, the act of preferring one thing above another; estimation of one thing more than another; choice of one thing rather than another.[73] As used in reference to debtor and creditor, an advantage in the payment of a debt due him, acquired by one creditor over other creditors;[74] an advantage given to or obtained by one creditor over others;[75] any advantage given by previous payment to one creditor, to which advantage all the other

66. Bourland *v.* Hildreth, 26 Cal. 161, 232.

67. Matthews *v.* Bliss, 22 Pick. (Mass.) 48, 53.

68. Garcia *v.* Callender, 125 N. Y. 307, 311, 26 N. E. 283 [*citing* 1 Sharswood's Blackstone Comm. 287; 1 Stephen Comm. (8th ed.) 539; Webster Dict.], where it is added: "And also, of forcibly impressing the carriages and horses of the subject to do the king's business on the public roads in the conveyance of timber, baggage, and the like, however inconvenient to the owner, upon paying him a settled price."

69. Garcia *v.* Callender, 125 N. Y. 307, 311, 26 N. E. 283 [*citing* Chitty Com. L. 103; Manning L. Nat. 393, 395].

70. *In re* Fletcher, 136 Mass. 340, 342.

As a consideration see Evans *v.* Greenhow, 15 Gratt. (Va.) 153, 156; Gilbert *v.* Lawrence, 56 W. Va. 281, 290, 49 S. E. 155.

71. Crespin *v.* U. S., 168 U. S. 208, 213, 18 S. Ct. 53, 42 L. ed. 438 [*citing* Reynolds Land Laws 205].

As defined by statute, the term means Judge of Probate. Comp. Laws (N. M. 1897), § 3803.

"Prefect's court," as defined by statute, means probate court. Comp. Laws (N. M. 1897), § 3803.

72. "Preference share" see *post*, note 82.

73. Webster Dict. [*quoted* in Keller *v.* State, 102 Ga. 506, 514, 31 S. E. 92].

By a common carrier as between two persons occupying the same situation or relation to the carrier. Harp *v.* Choctaw, etc., R. Co., 125 Fed. 445, 452, 61 C. C. A. 405.

Free pass.— The federal statute forbidding certain preferences means preferences in transportation of persons or property. A free ticket or a free pass not used is not transportation; it is not a preference or advantage to the holder or any prejudice or disadvantage to others. *In re* Huntington, 68 Fed. 881, 882.

In a contract.—A provision in a contract of a dealer in natural gas at wholesale to supply a retail dealer for a fixed term and that upon the expiration of that term the latter shall have a "preference" in the former's supply means that favorable consideration which a bidder on equal terms with others is entitled to over his competitors. The methods of ascertaining it would seem clearly to be that, when the former company received an offer for a portion of its surplus gas, it would communicate this fact to the latter. Conemaugh Gas Co. *v.* Jackson Farm Gas Co., 186 Pa. St. 443, 449, 40 Atl. 1000, 65 Am. St. Rep. 865.

In a will.— Whilst a preference is in all cases founded on an apprehension of a deficiency of assets, it is not established thereby, it must be expressed in the will. *In re* Waln, 109 Pa. St. 479, 488.

74. Chism *v.* Citizens' Bank, 77 Miss. 599, 602, 27 So. 637 [*citing* Black Bankr. (1898) p. 188].

75. Stephens *v.* McArthur, 19 Can. Sup. Ct. 446, 470.

creditors were not a party;[76] some advantage over another;[77] the paying or securing to one or more creditors, in whole or in part, to the exclusion of the rest;[78] the paying or securing to one or more of his creditors by an insolvent debtor, the whole or a part of their claims, to the exclusion of the rest;[79] the expression of a motive or desire to favor some creditors over others.[80] (Preference: Affecting Validity of Compromise, see COMPOSITIONS WITH CREDITORS, 8 Cyc. 468. As Violation of Injunction, see INJUNCTIONS, 22 Cyc. 1017 note 32. By Assignor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 163. By Bankrupt, see BANKRUPTCY, 5 Cyc. 369. By Carrier, see CARRIERS, 6 Cyc. 498. By Child With Respect to Its Custody, see PARENT AND CHILD, 29 Cyc. 1596. By Corporation, see CORPORATIONS, 10 Cyc. 1246. By Insolvent, see INSOLVENCY, 22 Cyc. 1285. By Partnership, see PARTNERSHIP, 30 Cyc. 520 note 66. Ground For Attachment, see ATTACHMENT, 4 Cyc. 416. Of Cause on Calendar, see APPEAL AND ERROR, 3 Cyc. 204. Of Claim Against Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 544. Of Claim For Wages, see MASTER AND SERVANT, 26 Cyc. 1066. Of Discharged Soldier or Sailor in Appointment To or Removal From Office, see MUNICIPAL CORPORATIONS, 28 Cyc. 404, 444; OFFICERS, 29 Cyc. 1374. Of Landowner to Acquire Franchise, see FERRIES, 19 Cyc. 498. On Withdrawal of Member From Association, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 131. Rendering Conveyance Fraudulent, see FRAUDULENT CONVEYANCES, 20 Cyc. 572. See also DISCRIMINATION, 14 Cyc. 385; PRIORITY, and Cross-References Thereunder.)

PREFERENTIAL. Giving, indicating, or having a preference or precedence.[81]

PREFERRED. A relative word, referring to something else, and meaning that the thing to which it is attached, whatever that may be, has some advantage over another thing of the same character, which but for this advantage would be like the other.[82] (Preferred: Cause, see APPEAL AND ERROR, 3 Cyc. 204. Creditor, see PREFERENCE, and Cross-References Thereunder. Dividend, see CORPORATIONS, 10 Cyc. 571. Stock, see CORPORATIONS, 10 Cyc. 569.)

PREFIX. See NAMES, 29 Cyc. 267.

PREGNANT. As an adjective, being with young, as a female, great with child.[83] As a noun, one who is with child.[84] (See ABORTION, 1 Cyc. 171, 179,

76. Sharp *v.* Jackson, [1899] A. C. 419, 423, 68 L. J. Q. B. 866, 6 Manson 264, 80 L. T. Rep. N. S. 841, 15 T. L. R. 418.

77. Edison Gen. Electric Co. *v.* Van Couver, etc., Tramway Co., 4 Brit. Col. 460, 482.

78. Bouvier L. Dict. [*quoted* in Jewell *v.* Truhn, 38 Minn. 432, 433, 38 N. W. 106].

79. Chadbourne *v.* Harding, 80 Me. 580, 584, 16 Atl. 248.

80. Savage *v.* Miller, 56 N. J. Eq. 432, 439, 36 Atl. 578, 39 Atl. 665.

81. Webster Int. Dict.

"Preferential dividend" see Henry *v.* Great Northern R. Co., 3 Jur. N. S. 1133, 1136, 27 L. J. Ch. 1, 6 Wkly. Rep. 87.

"Preferential lien" see Lazier *v.* Henderson, 29 Ont. 673, 678 [*quoting In re* McCraken, 4 Ont. App. 486].

82. State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 530.

"Preferred dividend" is: That which is paid to one class of shareholders in priority to that to be paid to another class. Taft *v.* Hartford, etc., R. Co., 8 R. I. 310, 333, 5 Am. Rep. 575. The fund paid to one class of shareholders in priority to that to be paid to another class. Chaffee *v.* Rutland R. Co., 55 Vt. 110, 129. A certificate for shares of stock in a railroad corporation declaring that such stock is entitled to preferred dividends out of the net earnings means that such dividends shall be paid on such stock before the payment of dividends on the common stock, but does not entitle the holder of such preferred stock to dividends thereon before payment of interest on a subsequent mortgage debt of the company. St. John *v.* Erie R. Co., 21 Fed. Cas. No. 12,226, 10 Blatchf. 271.

"The expression 'preference share,' or 'preferential dividend,' is equivocal. It by no means clearly indicates what are the rights of those to whom it applies. I do not think it can fairly be said to be an inaccurate expression, whichever of the two constructions be put upon it. All that the language fairly imports is, that some preference is given to the persons to whom the language applies." Hackett *v.* Northern Pac. R. Co., 140 Fed. 717; Henry *v.* Great Northern R. Co., 3 Jur. N. S. 1133, 1136, 27 L. J. Ch. 1, 6 Wkly. Rep. 87.

Under a statute giving the court before whom an indictment shall be preferred power to certify that the offense was frivolous, and to award costs, means "carried on." Reg. *v.* Pembridge, 3 Q. B. 901, 906, 3 G. & D. 603, 6 Jur. 1037, 12 L. J. Q. B. 47, 43 E. C. L. 1028.

83. Webster Dict. [*quoted* in Eckhardt *v.* People, 22 Hun (N. Y.) 525, 527].

84. Webster Dict. [*quoted* in Eckhardt *v.* People, 22 Hun (N. Y.) 525, 527].

185; Divorce, 14 Cyc. 596, 697; Marriage, 26 Cyc. 903. See also In Ventre Sa Mere, 23 Cyc. 348.)

Pregnant Negative. See Pleading, *ante*, p. 203.

Prejudice.[85] As a noun, a leaning toward one side of a question from other considerations than those belonging to it; in law a bias on the part of judge, jury, or witness which interferes with fairness of judgment;[86] a prejudgment;[87] judgment beforehand;[88] prepossession; judgment formed beforehand without examination;[89] an opinion or decision of mind formed without due examination; prejudgment; a bias or leaning toward one side or the other of a question from other considerations than those belonging to it; an unreasonable predilection or prepossession for or against anything; especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge.[90] As a verb, to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question; to bias the mind by hasty and incorrect notions, and give it an unreasonable bent to one side or other of a cause.[91] (Prejudice: Affecting Review in Civil Actions, see Appeal and Error, 3 Cyc. 383. Affecting Review in Criminal Prosecutions, see Criminal Law, 12 Cyc. 910. As Element of Estoppel, see Estoppel, 16 Cyc. 744. As Element of Laches, see Equity, 16 Cyc. 162. Dismissal Without, see Dismissal and Nonsuit, 14 Cyc. 406; Equity, 16 Cyc. 460. Disqualifying Judge, see Judges, 23 Cyc. 582. Disqualifying Juror, see Juries, 24 Cyc. 280. Error Without in Civil Actions, see Appeal and Error, 3 Cyc. 383. Error Without in Criminal Prosecution, see Criminal Law, 12 Cyc. 910. From Default Judgment Affecting Right to Relief, see Judgments, 23 Cyc. 894. From Instrument as Element of Forgery, see Forgery, 19 Cyc. 1375. Ground For — Asserting Invalidity of Conveyance, see Fraudulent Conveyances, 20 Cyc. 419; Change of Venue in Civil Actions, see Venue; Change of Venue in Criminal Prosecution, see Criminal Law, 12 Cyc. 244; Continuance in Civil Actions, see Continuances in Civil Cases, 9 Cyc. 87; Continuance in Criminal Prosecution, see Continuances in Criminal Cases, 9 Cyc. 189; New Trial in Civil Actions, see New Trial, 29 Cyc. 767; New Trial in Criminal Prosecution, see Criminal Law, 12 Cyc. 712; Removal of Cause, see Removal of Causes; Reversal in Admiralty, see Admiralty, 1 Cyc. 904; Reversal in Civil Actions, see Appeal and Error, 3 Cyc. 441; Reversal in Criminal Prosecution, see Criminal Law, 12 Cyc. 940. Judgment or Decree Without as Bar, see Judgments, 23 Cyc. 1144. Of Arbitrator, see Arbitration and Award, 3 Cyc. 617. Of Judge — In General, see Judges, 23 Cyc. 582; As Ground For New Trial, see New Trial, 29 Cyc. 711. To Adverse Party as Ground For Objection to Fraudulent Dismissal, see Dismissal and Nonsuit, 14 Cyc. 406.)

Preliminary. Introductory; initiatory; preceding; temporary and provisional.[92] (Preliminary: Examination, see Criminal Law, 12 Cyc. 290. Injunction, see Injunctions, 22 Cyc. 957. Proof, see Accident Insurance, 1 Cyc. 274; Fire Insurance, 19 Cyc. 843; Life Insurance, 25 Cyc. 883; Marine Insurance, 26 Cyc. 708.)

Premature. Happening, arriving, existing, or performed before the proper

A synonym of "with child." Eckhardt *v.* People, 22 Hun (N. Y.) 525, 527.

85. Not synonymous with "bias" see 5 Cyc. 685.

86. Keen *v.* Brown, 46 Fla. 487, 490, 35 So. 401.

87. Willis *v.* State, 12 Ga. 444, 448; State *v.* Anderson, 14 Mont. 541, 545, 37 Pac. 1.

Means same thing as "prejudgment," that is, when one has prejudged a person's guilt of the accusation charged against him, that he has a prejudice against such person. Faulkner *v.* State, 43 Tex. Cr. 311, 322, 65 S. W. 1093; Randle *v.* State, 34 Tex. Cr. 43, 55, 28 S. W. 953.

88. State *v.* Anderson, 14 Mont. 541, 545, 37 Pac. 1.

89. Hudgins *v.* State, 2 Ga. 173, 176.

The popular meaning of the word involves some grudge or ill will, as well as a preconceived opinion. Willis *v.* State, 12 Ga. 444, 448.

90. Webster Dict. [*quoted* in *In re* Breckinridge, 31 Nebr. 489, 493, 48 N. W. 142; Mitchell *v.* State, 36 Tex. Cr. 278, 319, 33 S. W. 367, 36 S. W. 456. See also Randle *v.* State, 34 Tex. Cr. 43, 55, 28 S. W. 953].

91. Webster Dict. [*quoted* in State *v.* Barton, 71 Mo. 288, 296].

92. Black L. Dict.

or usual time.[93] (Premature: Action — In General, see Actions, 1 Cyc. 745; As Ground For Abatement, see Abatement and Revival, 1 Cyc. 23 note 13; As Ground For Arrest of Judgment, see Judgments, 23 Cyc. 924; In Admiralty, see Admiralty, 1 Cyc. 877; On Policy, see Accident Insurance, 1 Cyc. 281; Fire Insurance, 19 Cyc. 903; Life Insurance, 25 Cyc. 909; Marine Insurance, 26 Cyc. 716; Raising Objection Below, see Appeal and Error, 2 Cyc. 667 note 71. Appeal, see Appeal and Error, 2 Cyc. 805. Judgment, see Judgments, 23 Cyc. 924. Proceeding For Mandamus, see Mandamus, 26 Cyc. 392.)

Premeditate. To Deliberate,[94] *q. v.*; to Intend, *q. v.*; to Design,[95] *q. v.*; to meditate beforehand;[96] to think about beforehand, to meditate upon previously, to deliberate upon, or contrive in advance;[97] to think beforehand;[98] to think, consider, or revolve in mind beforehand; to Deliberate,[99] *q. v.*; to think of a matter beforehand; to conceive of a thing before it is executed;[1] to think of a matter before it is executed;[2] to think of in advance; to determine upon beforehand;[3] to think on or revolve in the mind beforehand;[4] to weigh in the mind; to consider and examine the reasons for and against; to consider maturely; to reflect upon.[5] (See Premeditated; Premeditation.)

Premeditated.[6] Contrived beforehand, or designed previously;[7] contrived or designed previously;[8] Deliberate,[9] *q. v.*; meditated or thought upon beforehand;[10] previously considered or meditated;[11] to have formed in the mind by previous thought or meditation; previously contrived, designed, or intended.[12] (See Premeditate; Premeditation.)

Premeditation.[13] The act of meditating beforehand; previous deliberation; previous contrivance or design formed;[14] the act of premeditating; previous deliberation; forethought;[15] a design formed to commit a crime, or to do some other thing before it is done; a deliberation and continued persistence which

93. Webster Int. Dict.

"Premature labor" is the delivery of a woman soon after the sixth month after conception. Smith *v.* State, 33 Me. 48, 59, 54 Am. Dec. 607.

94. Cleveland *v.* State, 86 Ala. 1, 9, 5 So. 426; Com. *v.* Perrier, 3 Phila. (Pa.) 229, 232.

95. Anderson L. Dict. [*quoted* in Perugl *v.* State, 104 Wis. 230, 242, 80 N. W. 593, 76 Am. St. Rep. 865].

96. Com. *v.* Tucker, 189 Mass. 457, 487, 76 N. E. 127, 7 L. R. A. N. S. 1056.

97. Walcher *v.* Territory, 18 Okla. 528, 533, 90 Pac. 887.

98. State *v.* Exum, 138 N. C. 599, 617, 50 S. E. 283; State *v.* Dowden, 118 N. C. 1145, 1151, 24 S. E. 722.

99. Webster Dict. [*quoted* in Cook *v.* State, 46 Fla. 20, 40, 35 So. 665]; Fahnestock *v.* State, 23 Ind. 231, 263; Brannigan *v.* People, 3 Utah 488, 493, 24 Pac. 767.

1. Com. *v.* Smith, 2 Wheel. Cr. (N. Y.) 79, 86.

2. State *v.* Dodds, 54 W. Va. 289, 297, 46 S. E. 228.

3. Carleton *v.* State, 43 Nebr. 373, 412, 61 N. W. 699; Anderson L. Dict. [*quoted* in Perugi *v.* State, 104 Wis. 230, 242, 80 N. W. 593, 76 Am. St. Rep. 865].

4. Daughdrill *v.* State, 113 Ala. 7, 31, 21 So. 378.

5. Webster Dict. [*quoted* in Milton *v.* State, 6 Nebr. 136, 143].

6. **Synonymous with "aforethought."**—Edwards *v.* State, 25 Ark. 444, 446; People *v.* Ah Choy, 1 Ida. 317, 319.

Synonymous with "aforethought" and "prepense." People *v.* Clark, 7 N. Y. 385, 393; Brannigan *v.* People, 3 Utah 488, 493, 24 Pac. 767.

7. Martin *v.* State, 119 Ala. 1, 5, 25 So. 255.

8. Hawes *v.* State, 88 Ala. 37, 44, 7 So. 302; Mitchell *v.* State, 60 Ala. 26, 28.

9. Webster Dict. [*quoted* in Cook *v.* State, 46 Fla. 20, 40, 35 So. 665].

As used in statutory definition of murder is synonymous with "deliberate." People *v.* Ah Choy, 1 Ida. 317, 319; State *v.* Lopez, 15 Nev. 407, 414. But see People *v.* Mongano, 1 N. Y. Cr. 411, 413, where it is said that there is a substantial difference between "deliberate" and "premeditate."

Would seem to imply something more than "deliberate," and may mean that the party not only "deliberated," but had formed in his mind the "plan of destruction." State *v.* Dodds, 54 W. Va. 289, 297, 46 S. E. 228.

10. Keigans *v.* State, 52 Fla. 57, 65, 41 So. 886.

11. Atkinson *v.* State, 20 Tex. 522, 531.

12. Webster Dict. [*quoted* in Cook *v.* State, 46 Fla. 20, 40, 35 So. 665].

13. **A synonym of.** "Deliberation" see Cook *v.* State, 46 Fla. 20, 40, 35 So. 665. Of "express malice" and "malice aforethought" see Clifford *v.* State, 58 Wis. 477, 486, 17 N. W. 304.

Compared with "deliberation" see 13 Cyc. 771 note 71.

14. Simmerman *v.* State, 14 Nebr. 568, 569, 17 N. W. 115.

15. Keigans *v.* State, 52 Fla. 57, 65, 41 So. 886; Century Dict. [*quoted* in Cook *v.* State, 46 Fla. 20, 40, 35 So. 665].

indicates more perversity than will;[16] intent before the act;[17] a prior determination to do the act in question;[18] thinking out beforehand;[19] the mental operation of thinking over an act or line of action already decided in the mind, before carrying the act or line of action into execution;[20] the mental operation of thinking upon an act before doing it; or upon an inclination before carrying it out.[21] (Premeditation: As Element of — Crime in General, see CRIMINAL LAW, 12 Cyc. 147; Mayhem, see MAYHEM, 26 Cyc. 1597; Murder, see HOMICIDE, 21 Cyc. 726.)

PREMISES. In an instrument of writing, previous matter contained therein and concerning which something is proposed;[22] that which has been before mentioned;[23] that which is before; introduction; statements previously made.[24] In reference to real estate, lands and tenements;[25] land and the building thereon;[26] land and its appurtenances;[27] a piece of real estate; a building with its adjuncts.[28] Used in the *habendum* clause of a deed, the thing granted or conveyed by the deed.[29] In reference to pleading,[30] in equity, the stating part of the bill.[31] (Prem-

16. Bouvier L. Dict. [*quoted* in Brannigan *v.* People, 3 Utah 488, 494, 24 Pac. 767].

17. Stokes *v.* State, 54 Fla. 109, 113, 44 So. 759; Killins *v.* State, 28 Fla. 313, 334, 9 So. 711; Perugi *v.* State, 104 Wis. 230, 243, 80 N. W. 593, 76 Am. St. Rep. 865.

18. State *v.* Banks, 143 N. C. 652, 657, 57 S. E. 174.

19. State *v.* Spivey, 132 N. C. 989, 43 S. E. 475.

20. State *v.* Lindgrind, 33 Wash. 440, 443, 74 Pac. 565.

21. State *v.* Boody, 18 Wash. 165, 173, 51 Pac. 356; State *v.* Straub, 16 Wash. 111, 120, 47 Pac. 227.

22. Teutonia F. Ins. Co. *v.* Mund, 102 Pa. St. 89, 93.

23. Rapalje & L. L. Dict. [*quoted* in Alaska Imp. Co. *v.* Hirsch, 119 Cal. 249, 255, 47 Pac. 124, 51 Pac. 340].

24. Bouvier L. Dict. [*quoted* in Alaska Imp. Co. *v.* Hirsch, 119 Cal. 249, 255, 47 Pac. 124, 51 Pac. 340].

The term is wide enough to cover all that goes before in the deed. Saylor *v.* Cooper, 2 Ont. 398, 403.

25. State *v.* French, 120 Ind. 229, 230, 22 N. E. 108, 135; Carr *v.* Philadelphia Fire Assoc., 60 N. H. 513, 520; Hilton's Appeal, 116 Pa. St. 351, 358, 9 Atl. 342; Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142, 148.

26. Robinson *v.* Mercer County Mut. F. Ins. Co., 27 N. J. L. 134, 141; Rouse *v.* Catskill, etc., Steam-Boat Co., 59 Hun (N. Y.) 80, 82, 13 N. Y. Suppl. 126; Doe *v.* Willetts, 7 C. B. 709, 715, 62 E. C. L. 709.

27. New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322, 331; Steinhardt *v.* Burt, 27 Misc. (N. Y.) 782, 783, 57 N. Y. Suppl. 751; Thompson *v.* Browne, 10 S. D. 344, 347, 73 N. W. 194; Sands *v.* Kaukauna Water Power Co., 115 Wis. 229, 232, 91 N. W. 679.

Includes land and appurtenances thereto (Winlock *v.* State, 121 Ind. 531, 533, 23 N. E. 514); house, outhouse, or other building (Covy *v.* State, 4 Port. (Ala.) 186, 190). In a contract to sell certain premises on P street, the term would include the land on which the buildings were located. P. H. Snook, etc., Furniture Co. *v.* Steiner, 117 Ga. 363, 370, 43 S. E. 775.

Does not include personal property. Carr *v.* Roger Williams Ins. Co., 60 N. H. 513, 520; Robinson *v.* Mercer County Mut. F. Ins. Co., 27 N. J. L. 134, 141; Howard F. & M. Ins. Co. *v.* Cornick, 24 Ill. 455.

28. Webster Dict. [*quoted* in State *v.* Moore, (Miss. 1898) 24 So. 308].

Execution against land.— In a statute providing that all the debtor's interest in the premises will pass by a levy of an execution against land, unless it is larger than the estate mentioned in the appraiser's return, the word "premises" must be construed to apply to the estate taken. Swanton *v.* Crooker, 49 Me. 455, 459.

29. Holbrook *v.* Debo, 99 Ill. 372, 381; New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322, 331; Steinhardt *v.* Burt, 27 Misc. (N. Y.) 782, 783, 57 N. Y. Suppl. 751.

The technical meaning of the term in a deed is all that precedes the *habendum*. Berry *v.* Billings, 44 Me. 416, 423, 69 Am. Dec. 107; Farquharson *v.* Eichelberger, 15 Md. 63, 72; Budd *v.* Brooke, 3 Gill (Md.) 198, 235, 43 Am. Dec. 321; Sumner *v.* Williams, 8 Mass. 162, 174, 5 Am. Dec. 83; Brown *v.* Manter, 21 N. H. 528, 533, 53 Am. Dec. 223; Rouse *v.* Catskill, etc., Steam-Boat Co., 59 Hun (N. Y.) 80, 83, 13 N. Y. Suppl. 126; Sands *v.* Kaukauna Water Power Co., 115 Wis. 229, 232, 91 N. W. 679.

May refer to the title and interest intended to be conveyed as well as to the land itself. Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 38, 71 N. E. 22; Cummings *v.* Dearborn, 56 Vt. 441, 443; Smith *v.* Pollard, 19 Vt. 272, 277.

Easement.— The word "premises" as used in the *habendum* of a deed may apply to the easement as well as to the land. Deavitt *v.* Washington County, 75 Vt. 156, 161, 53 Atl. 563.

30. As used in plea of arbitration.— Where a plea alleged the submission of all matters in variance between parties to arbitrators and that the arbitrators did make their award in writing under their hands, of and concerning the "premises," it was held that the word "premises" should be construed to mean all matters in variance between the parties. Young *v.* Shook, 4 Rawle (Pa.) 299, 304.

31. Bouvier L. Dict. [*quoted* in Sandy *v.* State, 60 Ala. 18, 19].

ises: In Deed, see DEEDS, 13 Cyc. 537. Sale of Liquor to Be Drunk on, see INTOXICATING LIQUORS, 23 Cyc. 201. Subject-Matter of — Conveyance, see DEEDS, 13 Cyc. 626; Insurance Contract, see FIRE INSURANCE, 19 Cyc. 591; Lease, see LANDLORD AND TENANT, 24 Cyc. 1043; Mortgage, see MORTGAGES, 27 Cyc. 1137. Trespass Upon, see TRESPASS.)

PREMIUM. An award or recompense for some act to be done;[32] a reward or recompense for some act done;[33] some valuable thing, offered by a person for the doing by others, into the strife for which he does not enter.[34] In the law and business of insurance, the consideration for a contract of insurance.[35] (Premium: For Admission to Firm, see PARTNERSHIP, 30 Cyc. 358. For Exhibit at Fair, see AGRICULTURE, 2 Cyc. 74. For Insurance, see ACCIDENT INSURANCE, 1 Cyc. 240; FIRE INSURANCE, 19 Cyc. 604; LIFE INSURANCE, 25 Cyc. 749; LIVE-STOCK INSURANCE, 25 Cyc. 1517; MARINE INSURANCE, 26 Cyc. 603; MUTUAL BENEFIT INSURANCE, 29 Cyc. 98; and other Insurance Titles. Note, see ACCIDENT INSURANCE, 1 Cyc. 241; FIRE INSURANCE, 19 Cyc. 611; LIFE INSURANCE, 25 Cyc. 752; LIVE-STOCK INSURANCE, 25 Cyc. 1517. On Loan, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 147.)

PREPARED.[36] As used on labels in the drug trade, a word understood to mean that an article was manufactured by a certain person, or that it passed through some process under his hands, which would give him personal knowledge of its true name and quality.[37] (See also LABEL, 24 Cyc. 808.)

PREPAY STATION. In the law of carriers, a station at which the carrier delivers freight to the consignee directly and without the intervention of a local agent, and to which consignments are accepted alone upon the condition that all charges for transportation be prepaid by the shippers.[38]

PREPENSE. PREMEDITATED (*q. v.*) or thought of beforehand.[39] (See PREMEDITATION, *ante*, p. 1162, and Cross-References Thereunder.)

PREPONDERANCE. Superiority in weight, influence, or force;[40] superiority of weight; outweighing.[41] (Preponderance: Of Evidence in — Civil Action, see EVIDENCE, 17 Cyc. 754; Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 490. Of Negligence, see NEGLIGENCE, 29 Cyc. 422, 559.)

PRÉPOSÉ. A person who stands in the same relation to the *committant* as "*domestique*" does to *maitre*, that is, a person whom the *committant* has intrusted to perform certain things on his behalf.[42] (See, generally, MASTER AND SERVANT, 26 Cyc. 941; PRINCIPAL AND AGENT.)

PREROGATIVE. That power, preëminence, or privilege which the king hath and claimeth over and beyond other persons, and above the ordinary course of

32. Delier *v.* Plymouth Agricultural Soc., 57 Iowa 481, 485, 10 N. W. 872.

33. Alvord *v.* Smith, 63 Ind. 58, 63; Treacy *v.* Chinn, 79 Mo. App. 648, 651: People *v.* Fallon, 4 N. Y. App. Div. 82, 88, 39 N. Y. Suppl. 865, 11 N. Y. Cr. 279.

34. Harris *v.* White, 81 N. Y. 532, 539; Porter *v.* Day, 71 Wis. 296, 301, 37 N. W. 259.

Distinguished from "wager" see Alvord *v.* Smith, 63 Ind. 58, 63; Delier *v.* Plymouth Agricultural Soc., 57 Iowa 481, 485, 10 N. W. 872; Treacy *v.* Chinn, 79 Mo. App. 648, 651; Harris *v.* White, 81 N. Y. 532, 539; People *v.* Fallon, 4 N. Y. App. Div. 82, 88, 39 N. Y. Suppl. 865; Porter *v.* Day, 71 Wis. 296, 301, 37 N. W. 259.

35. Bouvier L. Dict.; Webster Dict. [*quoted* in Northwestern L. Assoc. *v.* Stout, 32 Ill. App. 31, 38].

36. "Excavated and prepared" see Miller *v.* McKeesport, etc., R. Co., 179 Pa. St. 350, 354, 36 Atl. 287.

"Prepared coal" see Wright *v.* Warrior Run Coal Co., 182 Pa. St. 514, 521, 38 Atl. 491.

37. Thomas *v.* Winchester, 6 N. Y. 397, 411, 57 Am. Dec. 455.

38. Bird *v.* Southern R. Co., 99 Tenn. 719, 727, 42 S. W. 451, 63 Am. St. Rep. 856.

39. State *v.* Curtis, 70 Mo. 594, 598.

A synonym of "premeditated" and "aforethought" see Territory *v.* Bannigan, 1 Dak. 451, 461, 46 N. W. 597; People *v.* Clark, 7 N. Y. 385, 392.

40. Ball *v.* Marquis, (Iowa 1902) 92 N. W. 691, 692; Webster Dict. [*quoted* in Martin *v.* St. Louis, etc., R. Co., (Tex. Civ. App. 1900) 56 S. W. 1011, 1012].

41. Shinn *v.* Tucker, 37 Ark. 580, 588; Anderson L. Dict. [*quoted* in Hill *v.* Scott, 38 Mo. App. 370, 376].

42. Serandat *v.* Saisse, L. R. 1 P. C. 152, 161, 12 Jur. N. S. 301, 35 L. J. C. P. 17, 3 Moore P. C. N. S. 534, 14 Wkly. Rep. 487, 16 Eng. Reprint 202.

the common law, in right of his crown.[43] (See PREROGATIVE COURT; PREROGATIVE WRITS.)

PREROGATIVE COURT. An appellation applied in England to the archbishop's court;[44] a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills.[45] (See, generally, COURTS, 11 Cyc. 633.)

PREROGATIVE WRITS. Remedies of an extraordinary kind granted by the courts in certiorari cases, but never as a matter of right; they being a direct intervention of the government with the liberty or property of the subject.[46] (See CERTIORARI, 6 Cyc. 730; HABEAS CORPUS, 21 Cyc. 279; INJUNCTIONS, 22 Cyc. 724; MANDAMUS, 26 Cyc. 125; NE EXEAT, 29 Cyc. 382; PROHIBITION; QUO WARRANTO.)

PRES. An abbreviation for PRESIDENT,[47] *q. v.*

PRESBYTERIAN.[48] See CONGREGATIONALIST, 8 Cyc. 579.

PRESCRIBE. To ESTABLISH,[49] *q. v.*; to give law; to direct; to dictate; to give as a guide, direction, or rule of action;[50] to lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate; to point; to direct;[51] to lay down authoritatively for direction; to give as a guide, direction, or rule of action; to impose as a peremptory order; to direct.[52] As applied to medicine or drugs, to write or to give medical directions; to indicate remedies;[53] to direct as a remedy;[54] to advise, appoint, or designate as a remedy for disease.[55] (See PRESCRIPTION, and Cross-References Thereunder.)

PRESCRIPTION.[56] At common law, the mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment;[57] a mode of acquiring

43. Jacob L. Dict. [*quoted* in Atty.-Gen. *v.* Eau Claire, 37 Wis. 400, 443].

Implies sovereign right. Atty.-Gen. *v.* Eau Claire, 37 Wis. 400, 443.

44. *In re* Coursen, 4 N. J. Eq. 408, 413.

45. Robinson *v.* Fair, 128 U. S. 53, 86, 9 S. Ct. 30, 32 L. ed. 415.

Not a court of last resort.— Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 655, 44 Atl. 762.

46. Rapalje & L. L. Dict. [*quoted* in Territory *v.* Ashenfelter, 4 N. M. 85, 91, 12 Pac. 879].

"The principal writs of this nature are (1) the writ of procedendo; (2) the writ of mandamus; (3) the writ of prohibition; (4) the writ of quo warranto; (5) the writ of habeas corpus; (6) the writ of certiorari. The prerogative writ of quo warranto has, however, fallen into disuse." 2 Rapalje & L. L. Dict. 697, 1057 [*quoted* in Territory *v.* Ashenfelter, 4 N. M. 85, 91, 12 Pac. 879].

Nature of.— This class of writs, it would seem, appertain to and are peculiarly the instruments of the sovereign power, acting through its appropriate department; prerogatives of sovereignty, represented in England by the king, and in this country by the people in their corporate character, or in other words, the state, and from their very nature, from their peculiar character, functions and objects, to appertain to and appropriately belong to the supreme judicial tribunal of the state. Atty.-Gen. *v.* Blossom, 1 Wis. 317, 320.

When proper remedy.— The writ will issue only in cases *publici juris* and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people. Duluth Elevator Co. *v.* White, 11 N. D. 534, 538, 90 N. W. 12; State *v.* Archibald, 5 N. D. 359, 66 N. W. 234; State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283; Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

47. Griffin *v.* Erskine, 131 Iowa 444, 448, 109 N. W. 13, being in such common use that the courts will take judicial notice of its meaning.

48. Presbyterians and congregationalists distinguished.— Muzzy *v.* Wilkins, Smith (N. H.) 1, 22.

49. Webster Dict. [*quoted* in *Ex p.* Lothrop, 118 U. S. 113, 119, 6 S. Ct. 984, 30 L. ed. 108].

50. Webster Dict. [*quoted* in Hunt *v.* Chicago, etc., R. Co., 20 Ill. App. 282, 289].

"Prescribed by law" see Exline *v.* Smith, 5 Cal. 112, 113; Hunt *v.* Chicago, etc., R. Co., 20 Ill. App. 282, 288; Walter *v.* Greenwood, 29 Minn. 87, 89, 12 N. W. 145; State *v.* Tolle, 71 Mo. 645, 650; Sloan *v.* Gibson, 4 Mo. 32, 33; Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 190, 1 N. E. 663; Winters *v.* Hughes, 3 Utah 443, 450, 24 Pac. 759.

51. Webster Dict. [*quoted* in Mansfield *v.* People, 164 Ill. 611, 613, 45 N. E. 976].

52. Webster Dict. [*quoted* in New York *v.* Hexamer, 59 N. Y. App. Div. 4, 12, 69 N. Y. Suppl. 198].

53. State *v.* Lawson, (Del. 1907) 65 Atl. 593.

54. Worcester Dict. [*quoted* in Brinson *v.* State, 89 Ala. 105, 110, 8 So. 527].

55. Century Dict. [*quoted In re* Bruendl, 102 Wis. 45, 48, 78 N. W. 169].

Applied to physicians, the term has a broader meaning than merely prescribing medicines. *In re* Bruendl, 102 Wis. 45, 48, 78 N. W. 169.

56. "Prescription of a statute" see Peterman *v.* Huling, 31 Pa. St. 432, 436.

57. Clarke *v.* Clarke, 133 Cal. 667, 669, 66 Pac. 10.

real property, when a man could show no other title to what he claimed than that he and those under whom he claimed had immemorially used to enjoy it;[58] the manner of acquiring property by a long, honest, and uninterrupted possession or use during the time required by law;[59] a title acquired by possession had during the time and in the manner fixed by law;[60] a title acquired by use and time, and allowed by law;[61] a title, the validity of which depends upon continual and peaceable usage from time whereof memory of man is not to the contrary;[62] the user for a time whereof the memory of man runneth not to the contrary;[63] a prescribing for title; the claim of title to a thing by virtue of immemorial use and enjoyment; the right or title acquired by possession had during the time and in the manner fixed by law.[64] In civil law, a right by which a mere possessor acquires the property of a thing which he possesses by the continuance of his possession during the time fixed by law;[65] the bar from the lapse of time which the law has fixed as the limit of an action founded on debt;[66] the term used in the Louisiana reports for limitation.[67] In medicine, a written medical recipe;[68] a statement usually written of the medicine or remedy to be used by patients, and the manner of using them;[69] a direction of a remedy or of remedies for disease, and the manner of using them; a medical recipe; also a prescribed remedy.[70] (Prescription: In General, see Adverse Possession, 1 Cyc. 968; Limitations of Actions, 25 Cyc. 963. By Physician — In General, see Physicians and Surgeons, 30 Cyc. 1578; Of Liquor, see Intoxicating Liquors, 23 Cyc. 188, 271; Of Poison, see Poisons. Creating — Customary Right, see Customs and Usages, 12 Cyc. 1033; Easement, see Adjoining Landowners, 1 Cyc. 775, 786; Easements, 14 Cyc. 1145; Ferry Franchise, see Ferries, 19 Cyc. 497; Highway or Street, see Municipal Corporations, 28 Cyc. 835; Streets and Highways; Partition Fence, see Fences, 19 Cyc. 470; Right of Navigation, see Navigable Waters, 29 Cyc. 305, 310; Right of Way, see Easements, 14 Cyc. 1154; Right to Maintain Nuisance, see Nuisances, 29 Cyc. 1206; Right to Maintain Obstruction or Encroachment, see Municipal Corporations, 28 Cyc. 895; Streets and Highways; Water Rights, see Navigable Waters, 29 Cyc. 305, 310. Title by — In General, see Adverse Possession, 1 Cyc. 968; Between Cotenants, see Tenancy in Common.)

Properly applies only to incorporeal rights. Johnson *v.* Lewis, 47 Ark. 66, 70, 14 S. W. 466; Donnell *v.* Clark, 19 Me. 174, 182; Hindley *v.* Metropolitan El. R. Co., 42 Misc. (N. Y.) 56, 62, 85 N. Y. Suppl. 561; Oregon Constr. Co. *v.* Allen Ditch Co., 41 Oreg. 209, 216, 69 Pac. 455, 93 Am. St. Rep. 701; Woolbridge *v.* Couglin, 46 W. Va. 345, 348, 33 S. E. 233; Murray *v.* Scribner, 74 Wis. 602, 604, 43 N. W. 549.

It is a personal usage.— State *v.* Kansas, etc., R. Co., 45 Iowa 139, 142; Albright *v.* Cortright, 64 N. J. L. 330, 333, 45 Atl. 634; Corkum *v.* Feener, 29 Nova Scotia 115, 117.

58. Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 436, 15 S. E. 182.

59. Bouvier L. Dict. [*quoted* in Louisville, etc., R. Co. *v.* Hays, 11 Lea (Tenn.) 382, 388, 47 Am. Rep. 291].

60. Pittsburgh, etc., R. Co. *v.* Crown Point, 150 Ind. 536, 548, 50 N. E. 741; Stevens *v.* Dennett, 51 N. H. 324, 329; Applegate *v.* Morse, 7 Lans. (N. Y.) 59, 61.

61. Lawton *v.* Rivers, 2 McCord (S. C.) 445, 449, 13 Am. Dec. 741.

62. Simpson *v.* Coe, 4 N. H. 301, 302.

63. Boyden *v.* Achenbach, 79 N. C. 539, 541.

64. Webster Dict. [*quoted* in Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 436, 15 S. E. 182].

65. Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 600, 14 Pac. 379; Billings *v.* Hall, 7 Cal. 1, 4, where distinction between the statutes of limitation, as they are known at common law, and prescription is indicated.

66. Huber *v.* Steiner, 2 Bing. N. Cas. 202, 214, 2 Dowl. P. C. 781, 1 Hodges 206, 4 L. J. C. P. 233, 2 Scott 304, 29 E. C. L. 501.

67. Chenot *v.* Lefevre, 8 Ill. 637, 642.

68. Mayer *v.* State, 63 N. J. L. 35, 37, 42 Atl. 772.

69. Century Dict. [*quoted* in Caldwell *v.* State, 18 Ind. App. 48, 46 N. E. 697, 698].

70. Webster Dict. [*quoted* in State *v.* Bluefield Drug Co., 43 W. Va. 144, 148, 27 S. E. 350].

Medical provision for animals as well as human beings is embraced in the term. Ray *v.* Burbank, 61 Ga. 505, 512, 34 Am. Rep. 103.

As used in the statute prohibiting the sale of vinous or alcoholic liquors, except for medical, chemical, or sacramental purposes, upon a prescription or recommendation of a graduated physician, or a regular practitioner of medicine, who has taken the oath prescribed, is substantially the same as "recommendation." Thompson *v.* State, 37 Ark. 408, 410.

PRESCRIPTIO NON DATUR IN BONA FELORUM, NISI PER RECORDUM. A maxim meaning "Prescription is not granted against the goods of felons, except by record." [71]

PRESENCE. A term which implies that some person or thing is within view,[72] in company with, within the view of, in the same room with,[73] before, in the sight of, in front of, in the view of.[74]

PRESENT. As an adjective,[75] being or abiding, as a person, in this or any specified place; being in view or immediately at hand; opposed to absent; now existing; being at this time; in past or future.[76] As a noun, literally a gift.[77] As a verb, to lay before a public body for consideration, as before a legislature, a court of judicature, a corporation, etc.; to indict; to give notice officially of a crime or offense.[78] (See PRESENTATION; PRESENTMENT.)

71. Morgan Leg. Max. [*citing* Halkerstone 129].

72. Graham *v.* Graham, 32 N. C. 219, 220.

"In the presence of" see 23 Cyc. 41.

73. Baldwin *v.* Baldwin, 81 Va. 405, 410, 59 Am. Rep. 669; Neil *v.* Neil, 1 Leigh (Va.) 6, 11.

74. Richardson Dict. [*quoted* in Ray *v.* Hill, 3 Strobh. (S. C.) 297, 303, 49 Am. Dec. 647].

As used in a statute prescribing the mode for the execution of wills "its meaning depends upon the circumstances of each particular case; and the duty of ascertaining it devolves on the court or jury which has to decide the case; their guides being reason and common sense, controlled only by authoritative adjudications. It is a word of which every man has something like a just idea, but which no man can accurately define. In fact, it implies an area which has no metes and bounds; but is contracted or enlarged according as the attestation occurs, as it certainly may, 'in a small chamber, or a spacious hall, a public street or an open field.'" Nock *v.* Nock, 10 Gratt. (Va.) 106, 117.

75. **Used in connection with other words.**—"Present ability" see Warwick *v.* State, 17 Ind. App. 334, 46 N. E. 650, 651; State *v.* Sheerin, 12 Mont. 539, 544, 31 Pac. 543, 33 Am. St. Rep. 600. "Present at the election" see Brown *v.* Com., 3 Grant (Pa.) 209. "Present attendant physician" see Everett *v.* Carr, 59 Me. 325, 332. "Present business" see Thorn *v.* De Breteuil, 179 N. Y. 64, 71, 71 N. E. 470. "Present capital" see Dean *v.* Dean, 54 Wis. 23, 34, 11 N. W. 239, 241. "Present cash value of an annuity" see Jamieson's Estate, 31 Pa. Co. Ct. 207, 208. "Present heirs" see Tinder *v.* Tinder, 131 Ind. 381, 386, 30 N. E. 1077; Fountain County Coal, etc., Co. *v.* Beckleheimer, 102 Ind. 76, 77, 1 N. E. 202, 52 Am. Rep. 645. "Present inclination" see Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 367, 67 Am. Dec. 471. "Present liabilities" see St. John *v.* Dann, 66 Conn. 401, 406, 34 Atl. 110; Hart *v.* Wynne, (Tex. Civ. App. 1897) 40 S. W. 848, 849. "Present market value" see Santa Ana *v.* Harlin, 99 Cal. 538, 542, 34 Pac. 224. "Present prices" see Brunswick, etc., Water Dist. *v.* Maine Water Co., 99 Me. 371, 383, 59 Atl. 537. "Present proprietors" see Central Bridge Corp. *v.* Abbott, 4 Cush. (Mass.) 473, 474. "Present provision" see Robb *v.* Washington, etc., College, 103 N. Y. App. Div. 327, 350, 93 N. Y. Suppl. 92. "Present support" see Woodbury *v.* Woodbury, 58 N. H. 44; Woodbury's Appeal, 57 N. H. 483, 484; Foster *v.* Foster, 36 N. H. 437, 438; Piper *v.* Piper, 34 N. H. 563, 566; Kingman *v.* Kingman, 31 N. H. 182, 190, 191; Mathes *v.* Bennett, 21 N. H. 188, 192; Duncan *v.* Eaton, 17 N. H. 441, 442; Hubbard *v.* Wood, 15 N. H. 74, 78. "Present time" see State *v.* Rose, 30 Kan. 501, 506, 1 Pac. 817; State *v.* Casinova, 1 Tex. 401, 403. "Present value" see National Water Works Co. *v.* Kansas City, 62 Fed. 853, 865, 10 C. C. A. 653, 27 L. R. A. 827. "Present wife" see Mull *v.* Mull, 50 Misc. (N. Y.) 362, 365, 100 N. Y. Suppl. 523. "The justice or justices, or 'the greater part' of them 'present'" see Agnew *v.* Campbell, 17 N. J. L. 291, 294.

"Presently acquired property" defined see Hughes-Hallett *v.* Hughes-Hallett, 152 Pa. St. 590, 593, 26 Atl. 101.

76. Century Dict.

Decision on appeal.—A provision of a state constitution "that the concurrence of four justices 'present at the argument' is necessary for a judgment by the court in Bank; and that if four justices 'so present' do not concur in a judgment, all the justices qualified to 'sit' in the cause 'shall hear the argument.' These clauses are not to be construed as requiring that a judgment cannot be pronounced by the court in Bank unless concurred in by four of the justices who were physically present at an oral argument, or that all of the justices qualified to 'sit' shall literally 'hear' an argument. . . . The meaning of these clauses and the construction to be given them is, that the argument shall be 'considered' by the court, or by those of the justices who are qualified to 'act' in the cause, and that the judgment to be rendered shall be concurred in by four of the justices of the court." Niles *v.* Edwards, 95 Cal. 41, 43, 30 Pac. 134.

77 Thomas *v.* People, 59 Ill. 160, 163, where, however, it is said: "Yet, in the relation, and in the sense in which it was used, [it] evidently meant a prize." See GIFTS, 20 Cyc. 1192.

78. State *v.* Hinckley, 4 Minn. 345.

As used in an indictment, the word means nothing more than that the jury represent or show to the court that a certain person has

PRESENTATION. A showing or delivering over.[79] (Presentation: Of Claim Against — Bank, see Banks and Banking, 5 Cyc. 569; County, see Counties, 11 Cyc. 585; Estate, see Assignments For Benefit of Creditors, 4 Cyc. 264; Bankruptcy, 5 Cyc. 323; Executors and Administrators, 18 Cyc. 448; Guardian and Ward, 21 Cyc. 117; Insolvency, 22 Cyc. 1316; Municipality, see Municipal Corporations, 28 Cyc. 1748; Receiver, see Receivers. Of Claim of — Exemption, see Exemptions, 18 Cyc. 1467; Homestead, see Homesteads, 21 Cyc. 624.)

PRESENTI PERICULO SUCCURRENDUM, NEQUA ORIRI POSSIT INJURIA. A maxim meaning "We must bring relief to present danger, lest any injury arise."[80]

PRESENTMENT. See Commercial Paper, 7 Cyc. 503; Grand Juries, 20 Cyc. 1335; Indictments and Informations, 22 Cyc. 175.

PRESERVATIVE. Anything which tends to keep safe and sound or free from injury, corruption, or decay; a preventive of damage, decomposition, or waste;[81] a preservative agent;[82] that which preserves;[83] or has the power of preserving;[84] that which serves or tends to preserve; that which has power to keep safe or sound; a safeguard;[85] that which tends to secure from injury, destruction, decay or corruption; a preventive of injury or decay.[86] (See Preserve.)

PRESERVE. To keep; to secure; to uphold.[87] (See Preservative.)

PRESIDE. To direct, control, and govern, as a chief officer.[88]

PRESIDENT.[89] A term very generally applied to the chief executive officer of a

committed a certain offense. Com. *v.* Keefe, 9 Gray (Mass.) 290, 292.

Under a statute requiring persons having claims against a decedent's estate, on due notice to "present" them, accompanied by a proper voucher and affidavit of their correctness, the term simply means a display or a profert of the claim, accompanied with a proper voucher, and a reasonable opportunity to the administrator to examine into and determine for himself upon the justness and validity of the demand. Willis *v.* Marks, 29 Oreg. 493, 504, 45 Pac. 293.

Used in a state constitution requiring that every bill, before it becomes a law, shall be "presented to the Governor" for approval, the term means not merely exhibited, but that opportunity must be afforded him to deliberately consider its provisions and prepare his objections, if any he has, to its passage. Harpending *v.* Haight, 39 Cal. 189, 199, 2 Am. Rep. 432.

79. Bartlett *v.* Holmes, 13 C. B. 630, 637, 1 C. L. R. 159, 17 Jur. 858, 22 L. J. C. P. 182, 1 Wkly. Rep. 334, 76 E. C. L. 630, 20 Eng. L. & Eq. 277, where it is said: "The word 'presentation' may, no doubt, have many meanings, according to the context, or as circumstances require."

80. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

81. Century Dict. [*quoted* in People *v.* Biesecker, 58 N. Y. App. Div. 391, 394, 68 N. Y. Suppl. 1067].

82. Webster Int. Dict. [*quoted* in People *v.* Biesecker, 58 N. Y. App. Div. 391, 394, 68 N. Y. Suppl. 1067].

83. Century Dict. [*quoted* in People *v.* Biesecker, 58 N. Y. App. Div. 391, 394, 68 N. Y. Suppl. 1067]; Webster Int. Dict. [*quoted* in People *v.* Biesecker, *supra*]; Webster Unabr. Dict. [*quoted* in People *v.* Biesecker, *supra*].

84. Webster Int. Dict. [*quoted* in People *v.* Biesecker, 58 N. Y. App. Div. 391, 394, 68 N. Y. Suppl. 1067]; Webster Unabr. Dict. [*quoted* in People *v.* Biesecker, *supra*].

85. Standard Dict. [*quoted* in People *v.* Biesecker, 58 N. Y. App. Div. 391, 394, 68 N. Y. Suppl. 1067].

86. Webster Unabr. Dict. [*quoted* in People *v.* Biesecker, 58 N. Y. App. Div. 391, 394, 68 N. Y. Suppl. 1067].

87. Neuendorff *v.* Duryea, 6 Daly (N. Y.) 276, 281, 52 How. Pr. (N. Y.) 267.

To preserve order means to keep or secure the proper state, or condition, or established mode of proceeding. Neuendorff *v.* Duryea, 6 Daly (N. Y.) 276, 281, 52 How. Pr. 267.

A provision of the federal constitution that the right of trial by jury shall be "preserved" means that it shall remain as it existed at common law at the time of the adoption of the constitution. Gribble *v.* Wilson, 101 Tenn. 612, 614, 49 S. W. 736.

A power of attorney giving authority to preserve and manage propery cannot be held to include an authority to mortgage it, and is inconsistent with the idea of imposing a personal charge upon principals except for such expenses as may be incurred in its preservation and management. Golinsky *v.* Allison, 114 Cal. 458, 459, 46 Pac. 295.

88. Smith *v.* People, 47 N. Y. 330, 334.

89. President of a court.— In construing the federal statute providing that the records and judicial proceedings of the courts of any state "shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form" the court said: "We are of opinion that the phrase president of a court does import a judicial officer; that it has as definite a meaning in common parlance and is as well understood, at least, as the phrase 'presiding magistrate,' which is one of the titles used

business corporation.[90] (President: Of Bank, see Banks and Banking, 5 Cyc. 454, 468, 484, 579. Of Corporation, see Corporations, 10 Cyc. 903. Of Municipality, see Municipal Corporations, 28 Cyc. 400. Of United States — In General, see United States; As Commander in Chief, see Army and Navy, 3 Cyc. 848; Power as Executive, see Constitutional Law, 8 Cyc. 857; Power as to Extradition, see Extradition (International), 19 Cyc. 50; Power to Pardon, see Pardons, 29 Cyc. 1563; Power to Suspend Habeas Corpus, see Habeas Corpus, 21 Cyc. 352.)

PRESIDING JUDGE. See Judges, 23 Cyc 537.[91]

PRESIDING JUSTICE. Sometimes used as equivalent to "chief judge," or "presiding magistrate."[92]

PRESIDING OFFICER. A term which has been defined by statute.[93]

PRESS. See Constitutional Law, 8 Cyc. 892; Newspapers, 29 Cyc. 692.

PRESSURE. A term used in telephonic art in reference to the effects of the movements of the diaphragm caused by sound waves at the contact between the electrodes.[94]

PRESUME.[95] To believe without examination; to affirm a thing to be true, without proof;[96] to take for granted, or to assume a fact beforehand, and without evidence;[97] to take or assume a matter beforehand, without proof — to take for granted.[98] (See Presumption.)

PRESUMPTION. A term defined elsewhere in this work.[99] (Presumption: In Civil Action, see Evidence, 16 Cyc. 1059. In Criminal Prosecution, see Criminal Law, 12 Cyc. 384. Of Jurisdiction, see Courts, 11 Cyc. 691; Judgments, 23 Cyc. 1078, 1577. Of Life, Death, or Survivorship, see Death, 13 Cyc. 295. Of Payment, see Payment, 30 Cyc. 1267. On Appeal or Error, see Appeal and Error, 3 Cyc. 266; Criminal Law, 12 Cyc. 887.)

PRESUMPTIVE EVIDENCE. See Evidence, 16 Cyc. 1050.

PRESUMPTIVELY. By previous supposition.[1] (See Presume.)

PRESUMPTIVE TRUST. Sometimes used as synonymous with "resulting trust."[2] (See Trusts.)

PRETEND. To hold as true that which is false; to feign; to simulate.[3] (See Pretended.)

PRETENDED. Feigned; not real;[4] something falsely assumed; something claimed contrary to the truth of the matter.[5] (See Pretend.)

in the act. Undoubtedly the title 'president of a court,' may by possibility, in some state or kingdom, be used to designate some other than a judicial officer, and so, for aught we know to the contrary, may the title of judge or chief justice. But until the contrary appears, the title will be presumed to be used in its ordinary and appropriate sense." Gavit *v.* Snowhill, 26 N. J. L. 76, 78.

90. Roe *v.* Versailles Bank, 167 Mo. 406, 409, 67 S. W. 303; Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 540, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714.

An indictment charging the misapplication of funds by a person as "president and agent" of bank is not uncertain or contradictory since he may be both president and agent. There is no repugnance in the two characters. U. S. *v.* Northway, 120 U. S. 327, 330, 7 S. Ct. 580, 30 L. ed. 664.

91. See also State *v.* Judge Eleventh Judicial Dist., 47 La. Ann. 154, 155, 16 So. 744.

92. Bean *v.* Loryea, 81 Cal. 151, 153, 22 Pac. 513.

93. Mass. Rev. Laws (1902), p. 104, c. 11, § 1, relating to elections.

"Presiding officer" of a common council as not referring simply to the alderman called to the chair in the absence of the mayor see *In re* Dudley, 24 Misc. (N. Y.) 278, 283, 53 N. Y. Suppl. 703.

94. American Bell Tel. Co. *v.* National Tel. Mfg. Co., 119 Fed. 893, 915, 56 C. C. A. 423, comparing term with "variable pressure."

95. **Derived** from the Latin *præsumere*, consisting of "*præ*," before, and "*sumere*," to take. Morford *v.* Peck, 46 Conn. 380, 385.

96. Hammock *v.* McBride, 6 Ga. 178, 184.

97. Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033, 1039.

"Presumed" means taken for granted without proof. Green *v.* Maloney, 7 Houst. (Del.) 22, 28, 30 Atl. 672.

"Presumed" distinguished from "inferred" see Bannon *v.* Insurance Co. of North America, 115 Wis. 250, 259, 91 N. W. 666.

98. Morford *v.* Peck, 46 Conn. 380, 385.

99. See Evidence, 16 Cyc. 1050.

1. Worcester Dict. [*quoted* in Isaacs *v.* Isaacs, 61 How. Pr. (N. Y.) 369, 371].

2. Dunn *v.* Zwilling, 94 Iowa 233, 237, 62 N. W. 746.

3. Brown *v.* Perez, (Tex. Civ. App. 1894) 25 S. W. 980, 983.

4. Astugueville *v.* Loustaunau, 61 Tex. 233, 239.

5. Powell *v.* Yeazel, 46 Nebr. 225, 229, 64 N. W. 695.

PRETENSE or **PRETENCE.** A holding out, or offering to others something false and feigned ;[6] a show, or holding forth in form something which does not, in fact, exist.[7] (See, generally, False Pretenses, 19 Cyc. 384; Fraud, 20 Cyc. 1.)

PRETERMIT. To pass by, to omit, to disregard.[8] (To Pretermit: Child, see Descent and Distribution, 14 Cyc. 55.)

PRETERMITTED CHILD. See Descent and Distribution, 14 Cyc. 55.

PRETEXT. Ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance; pretense.[9]

PRETIUM AFFECTIONIS. An imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it.[10]

PRETIUM SUCCEDIT IN LOCUM REI. A maxim meaning "The price succeeds in place of the thing." [11]

PRETTY. In some degree; moderately; considerably; rather.[12]

PREVAILING. Prevalent; current; general; common.[13]

PREVENT.[14] To hinder; to obstruct; to intercept;[15] to intercept and stop; to hinder; to obstruct; to impede; to thwart;[16] to intercept; to hinder; to frustrate; to stop; to thwart;[17] to hinder from happening by previous measures; to keep from occurring or being brought about as an event or result; to ward off; to preclude; to hinder; to stop in advance, from some act or operation; intercept or bar the action of; check; restrain.[18]

PREVENTIVE. Serving to prevent or hinder; guarding against or warding off something, as disease, injustice, loss, etc.[19] (Preventive: Justice, see Breach of the Peace, 5 Cyc. 1028.[20] Relief, see Injuctions, 22 Cyc. 724.)

6. State *v.* Grant, 86 Iowa 216, 222, 53 N. W. 120; State *v.* Joaquin, 43 Iowa 131, 132.

7. Sprague *v.* Fletcher, 67 Vt. 46, 49, 30 Atl. 693.

As implying sham, falsity, and groundlessness see Hash *v.* Com., 88 Va. 172, 190, 13 S. E. 398.

"Pretenses," in a bill in chancery, are allegations sometimes made for the purpose of negativing an anticipated defense. Black L. Dict. [*citing* Hunt Eq. pt. 1, c. 1].

8. Allison *v.* Allison, 101 Va. 537, 568, 44 S. W. 904, 63 L. R. A. 920.

"Pretermitted defense" see Swennes *v.* Sprain, 120 Wis. 68, 71, 97 N. W. 511.

9. Webster Dict. [*quoted* in State *v.* Ball, 27 Nebr. 601, 604, 43 N. W. 398].

Under the "pretext of practising medicine" see Macon *v.* State, 4 Humphr. (Tenn.) 421, 422.

10. Bouvier L. Dict. [*quoted* in The H. F. Denieck, 77 Fed. 226, 233, 23 C. C. A. 123].

11. Peloubet Leg. Max. [*citing* Isaack *v.* Clark, 2 Bulstr. 306, 312].

12. Webster Dict. [*quoted* in Nelms *v.* State, 123 Ga. 575, 577, 51 S. E. 588].

Less emphatic than "very" see Webster Dict. [*quoted* in Nelms *v.* State, 123 Ga. 575, 577, 51 S. E. 588].

13. People *v.* Coler, 166 N. Y. 1, 42, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814.

"Prevailing party" is the party who prosecutes a meritorious action, or defends successfully. Belding *v.* Conklin, 2 Code Rep. (N. Y.) 112. See Costs, 11 Cyc. 27.

The prevailing rate of wages is the current, general, or common rate. In other words it is the market rate or that which the services are fairly and reasonably worth. People *v.* Coler, 166 N. Y. 1, 42, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814.

14. Derived from the Latin word "*prævenire*" — to come before; to precede. Luton *v.* Badham, 127 N. C. 96, 105, 27 S. E. 143, 80 Am. St. Rep. 783, 53 L. R. A. 337.

15. Webster Dict. [*quoted* in Burr *v.* Williams, 20 Ark. 171, 175].

16. Webster Dict. [*quoted* in Brady *v.* Bartlett, 56 Cal. 350, 365].

17. Webster Dict. [*quoted* in Green *v.* State, 109 Ga. 536, 539, 35 S. E. 97; Luton *v.* Badham, 127 N. C. 96, 105, 37 S. E. 143, 80 Am. St. Rep. 783, 53 L. R. A. 337].

The difference between "prevent and prohibit" is not material. If any difference, "prevent" is a stronger word, conveying the idea of prohibition, and the use of the means necessary to give it effect. *In re* Jones, 78 Ala. 419, 425.

Physical force not necessarily implied see Cort *v.* Ambergate, etc., R. Co., 17 Q. B. 127, 145, 15 Jur. 877, 20 L. J. Q. B. 460, 79 E. C. L. 127.

18. Standard Dict. [*quoted* in Green *v.* State, 109 Ga. 536, 539, 35 S. E. 97].

In an obsolete sense, it means to go before; to precede; to be beforehand with; to get the start of; to anticipate; to forestall (Webster Dict. [*quoted* in Brady *v.* Bartlett, 56 Cal. 350, 364]); to come before the usual time (Smith *v.* Whitbeck, 13 Ohio St. 471, 478).

"In our translation of the Bible, in the liturgy, and in old theological standards, it is employed to express the idea of 'assisting' and 'going before.'" Peverelly *v.* People, 3 Park. Cr. (N. Y.) 59, 69.

19. Century Dict.

20. "Preventive justice consists in obliging those persons, whom there is a probable

PREVIOUS. Before and up to.[21] (See PREVIOUSLY.)

PREVIOUSLY. An adverb of time, used in comparing an act or state named, to another act or state, subsequent in order of time, for the purpose of asserting the priority of the first.[22] (See PREVIOUS.)

PRICE. The amount at which a commodity is valued or sold in the market; the market price;[23] the sum for which anything may be bought, or at which its value is rated; an equivalent in money asked for anything; cost,[24] the sum in money or other equivalent set upon an article by the seller, which he demands for it;[25] the sum of money for which a thing is bought or sold, or offered for sale;[26] the sum of money which an article is sold for;[27] the sum or amount of money, or its equivalent, which a seller asks or obtains for his goods in market; an exchangeable value of a commodity;[28] the sum stipulated as the equivalent of the thing sold, and also every incident taken into consideration for the fixing of the price put to the debit of the vendee, and agreed to by him;[29] the value which the seller places on his goods for sale.[30] (Price: Cost, see COST PRICE, 10 Cyc. 1370. Current, see

ground to suspect of future misbehavior, to stipulate with, and to give full assurance to, the public, that such offense shall not happen, by finding pledges or securities for keeping the peace, or for their good behavior." 4 Browne's Blackstone Comm. c. 28, p. 668 [*quoted* in State *v.* Sargent, 74 Minn. 242, 244, 76 N. W. 1129]. Under a statute declaring that "Death by suicide, or by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract," the killing of his wife's paramour by the husband on discovering them in the act of adultery is not an act of preventive justice. "The word 'preventive' must be construed to refer to a killing by an authorized officer of the law or a private person standing for the time being in the attitude of a public officer; as, a member of the sheriff's posse, or the like, under those circumstances where the law authorizes the taking of human life in the advancement of public justice. It can not be properly interpreted to ever include a killing by a private person, to avenge or prevent a private wrong, even though the circumstances be such that the homicide is justifiable." Supreme Lodge K. P. *v.* Crenshaw, 129 Ga. 195, 198, 58 S. E. 628, 121 Am. St. Rep. 216.

21. State *v.* Gunagy, 84 Iowa 177, 181, 50 N. W. 882.

Used in connection with other words.— "Previous building" see Slocum *v.* Caldwell, 13 S. W. 1069, 1070, 12 Ky. L. Rep. 514. "Previous chaste character" see State *v.* Gunagy, 84 Iowa 177, 181, 50 N. W. 882; State *v.* Gates, 27 Minn. 52, 53, 6 N. W. 404; State *v.* Timmens, 4 Minn. 325. "'Previous' demand" see Tyler *v.* Bland, 9 M. & W. 338, 340. "Previous intention" see Com. *v.* Ober, 12 Cush. (Mass.) 493, 496. "Previous notice" see Hooser *v.* Hunt, 65 Wis. 71, 78, 26 N. W. 442. "Previous support" see Bangor *v.* Madawaska, 72 Me. 203, 205. "Previous year" see Clark *v.* Lancaster County, 69 Nebr. 717, 732, 96 N. W. 593.

22. Lebrecht *v.* Wilcoxon, 40 Iowa 93, 94. See Bloomer *v.* Reid, 22 Pa. St. 51, 53.

"Previously patented" see Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 3, 15 S. Ct. 508, 39 L. ed. 601.

23. Standard Dict. [*quoted* in Wing *v.* Wadhams Oil, etc., Co., 99 Wis. 248, 250, 74 N. W. 819].

24. Worcester Dict. [*quoted* in Atty.-Gen. *v.* Toronto, 20 Ont. 19, 25].

"Value and price are, therefore, not synonymous, or the necessary equivalents of each other, though commonly market value and market price are legal equivalents." Theiss *v.* Wiess, 166 Pa. St. 9, 17, 31 Atl. 63, 45 Am. St. Rep. 638; Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 386, 13 Am. Rep. 716. But see State *v.* Sparks, 30 W. Va. 101, 103, 3 S. E. 40, where an indictment charged the larceny of "one gelding of the 'price' of $100.00" and on demurrer in the indictment the court held that "value" and "price" are convertible and synonymous. See also 26 Cyc. 819 note 29.

25. Webster Dict.; Worcester Dict. [both *quoted* in Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 386, 13 Am. Rep. 687].

As money.— The word "price" does not invariably refer to money, but may mean reward or compensation generally. Borland *v.* Nevada Bank, 99 Cal. 89, 93, 33 Pac. 737, 37 Am. St. Rep. 32; Schrandt *v.* Young, 62 Nebr. 254, 266, 86 N. W. 1085; Hudson Iron Co. *v.* Alger, 54 N. Y. 173, 177; London, etc., Bank *v.* Belton, 15 Q. B. D. 457, 50 J. P. 86, 54 L. J. Q. B. 568, 34 Wkly. Rep. 31. But see *Ex p.* Saxe, 2 Deac. & C. 172, 179, Mont. & B. 134, where it is held: "That the word 'price' can apply only to pecuniary considerations, and certainly only to such considerations as are easily capable of being reduced, by valuation, to a definite money 'price.'"

26. Guy *v.* McDaniel, 51 S. C. 436, 440, 29 S. E. 196.

Synonymous with "sum" see Paul *v.* Grimm, 165 Pa. St. 139, 143, 30 Atl. 721, 44 Am. St. Rep. 648.

27. Hudson Iron Co. *v.* Alger, 54 N. Y. 173, 177.

28. Century Dict. [*quoted* in Wing *v.* Wadhams Oil, etc., Co., 99 Wis. 248, 250, 74 N. W. 819].

29. De L'Isle *v.* Moss, 34 La. Ann. 164, 167.

30. Scott *v.* People, 62 Barb. (N. Y.) 62, 72, where in the opinion of Johnson, J., it is said: "It is not a fixed and unchangeable thing. It may be one thing today and another tomorrow, and one valuation to one customer, and a different one to another on the same day or hour. Whatever a seller

CURRENT PRICE, 12 Cyc. 999. Evidence of, see EVIDENCE, 16 Cyc. 1136, 1141. Market, see MARKET PRICE, 26 Cyc. 819. Of Goods Sold, see SALES. Of Land Sold, see VENDOR AND PURCHASER. Regulation of, see MUNICIPAL CORPORATIONS, 28 Cyc. 724.)

PRIMA FACIE. At first view.[31] (See PRIMA FACIE CASE.)

PRIMA FACIE CASE. A case made out by proper and sufficient testimony;[32] one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side;[33] a state of facts which entitles the state to have the case go to the jury;[34] that amount of evidence which would be sufficient to counterbalance the general presumption of innocence, and warrant a conviction, if not encountered and controlled by evidence tending to contradict it, and render it improbable, or to prove facts inconsistent with it.[35] (See PRESUMPTION, ante, p. 1169, and Cross-References Thereunder. See also TRIAL.)

PRIMAGE. Compensation to the master for his particular care of the goods;[36] small payment to the master for his care and trouble, which he is to receive for his own use, unless he has otherwise agreed with his owners.[37] (See SHIPPING.)

PRIMA PARS ÆQUITATIS ÆQUALITAS. A maxim meaning "The radical element of equity is equality."[38]

PRIMARILY. In the first or most important place; originally; in the first intention.[39] (See PRIMARY.)

PRIMARY. First in order of time or development; original; first in order; preparatory to something higher;[40] first in time; original; primitive; first;[41] preparatory or preliminary to something higher.[42] (Primary: Election, see ELECTIONS, 15 Cyc. 332. Evidence, see EVIDENCE, 17 Cyc. 465.)

asks any one to give is the price, until he changes it for another."

"Price of real property" see Kneen *v.* Halin, 6 Ida. 621, 624, 59 Pac. 14.

Prices f. o. b.—Where goods are to be shipped from one point to another, and the seller gives the price f. o. b. at the point of destination, this means what the goods will cost the buyer at the point of destination, in other words, that the freight will be paid by the seller, and does not mean that title to the goods is to remain in the seller until delivery at the point of destination. Niemeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 326, 74 N. W. 670, 40 L. R. A. 534. But see Globe Oil Co. *v.* Powell, 56 Nebr. 463, 466, 76 N. W. 1081, where it is said that this is not "an inflexible rule, in all similar cases." The words are not synonymous with "delivery f. o. b." nor with "f. o. b." standing by itself. Detroit Southern R. Co. *v.* Malcomson, 144 Mich. 172, 174, 107 N. W. 915, 115 Am. St. Rep. 390. See 19 Cyc. 1082.

31. S. *v.* Richards, 126 Iowa 497, 502, 102 N. W. 439.

32. State *v.* Lawlor, 28 Minn. 216, 224, 9 N. W. 698.

33. Abbott L. Dict. [*quoted* in Gilpin *v.* Missouri, etc., R. Co., 197 Mo. 319, 325, 94 S. W. 869].

34. State *v.* Hardelein, 169 Mo. 579, 586, 7 S. W. 130.

In criminal cases, the term means proof beyond all reasonable doubt in the absence of other proof raising the reasonable doubt. Copp *v.* Henniker, 55 N. H. 179, 205, 20 Am. Rep. 194.

35. Com. *v.* Kimball, 24 Pick. (Mass.) 359, 373, 35 Am. Dec. 326.

36. Blake *v.* Morgan, 3 Mart. (La.) 375, 381.

37. Peters *v.* Speights, 4 Md. Ch. 375, 381.

It is no longer a gratuity to the master unless so expressly stipulated, but belongs to the owners or freighters, and is but an increase of the freight rate. Carr *v.* Austin, etc., R. Co., 14 Fed. 419, 421, 4 Woods 327.

38. Bouvier L. Dict.

39. Century Dict. See also Ewing's Appeal, (Pa. 1886) 4 Atl. 832, 836.

"'Primarily' liable on an instrument" see Mass. Rev. Laws (1902), p. 653, c. 73, par. 208; Bates Annot. St. Ohio (1904), par. 3178*a*; Ballinger & C. Comp. Oreg. par. 4592; Va. Code Supp. (1898) par. 2841*a*.

40. Webster Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170].

41. Worcester Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170].

42. Com. *v.* Young, 16 Pa. Super. Ct. 317, 322.

"Primary battery" is a chemical generator of electricity, which is active only by virtue of the materials of which it is composed (Brush Electric Co. *v.* Milford, etc., St. R. Co., 58 Fed. 387, 388); one which is active in virtue of the material of which it is made (Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 132, 2 C. C. A. 682). Distinguished from secondary battery. Brush Electric Co. *v.* Milford, etc., St. R. Co., 58 Fed. 387, 388.

"Primary disposal" is a term used in reference to the lands of the United States and means their disposal by the officers or agents of the government to some person who, having the qualifications to acquire such

PRIMARY AND SECONDARY EVIDENCE. See EVIDENCE, 17 Cyc. 465.

PRIMARY ELECTION. See ELECTIONS, 15 Cyc. 332.

PRIMARY MEETING. An organized assemblage of electors or delegates representing a political party or principle.[43] (See ELECTIONS, 15 Cyc. 332.)

PRIME. First in order of time; primitive; original; of the first excellence, value or importance; first rate; capital.[44] (See PRIMARY.)

PRIMO EXCUTIENDA EST VERBI VIS, NE SERMONIS VITIO OBSTRUATUR ORATIO, SIVE LEX SINE ARGUMENTIS. A maxim meaning "The full meaning of a word should be ascertained at the outset, in order that the sense may not be lost by defect of expression, and that the law be not without reasons." [45]

PRIMOGENITURE. The state of being the first-born among several children of the same parents; seniority by birth in the same family; the superior or exclusive right possessed by the eldest son, and particularly, his right to succeed to the estate of his ancestor, in right of his seniority by birth, to the exclusion of younger sons.[46]

PRIMUS ACTUS JUDICII EST JUDICIS APPROBATORIUS. A maxim meaning "The first step of procedure is held to be approbatory of the judge." [47]

PRINCEPS ET RESPUBLICA EX JUSTA CAUSA POSSUNT REM MEAM AUFERRE. A maxim meaning "The king, and the republic may, in a just cause, take away my property." [48]

PRINCEPS LEGIBUS SOLUTUS EST. A maxim meaning "The emperor is free from laws." [49]

PRINCIPAL. As an adjective, highest in rank, authority, character, importance, or degree; most considerable or important; CHIEF, *q. v.*; MAIN,[50] *q. v.* As a

lands, and who has complied with the terms of the law therefor, is entitled to conveyance thereof by patent or deed, without any reserved authority in the government or its officers to withhold the same. Topeka Commercial Security Co. *v.* McPherson, 7 Okla. 332, 340, 54 Pac. 489.

"Primary invention" is one which performs a function never performed by any earlier invention. Western Electric Co. *v.* Robertson, 142 Fed. 471, 476, 73 C. C. A. 587. See PATENTS, 30 Cyc. 803.

43. State *v.* Tooker, 18 Mont. 540, 543, 46 Pac. 530, 34 L. R. A. 315; Price *v.* Lush, 10 Mont. 61, 66, 24 Pac. 749, 9 L. R. A. 467.

As defined by statute, it is an organized assemblage of electors or delegates representing a political party. Wyo. Rev. St. (1899) p. 219.

44. Century Dict.

"Prime barley" see Whitmore *v.* Coates, 14 Mo. 9, 15.

"Prime cost" see U. S. *v.* Sixteen Packages, 27 Fed. Cas. No. 16,303, 2 Mason 48, 53.

"Prime cost and charges" see Goodwin *v.* U. S., 10 Fed. Cas. No. 5,554, 2 Wash. 493, 499.

"Prime negro slaves" see Limehouse *v.* Gray, 3 Brev. (S. C.) 231, 233.

"Prime quality winter oil" is good and superior to other oil in the market. Hastings *v.* Lovering, 2 Pick. (Mass.) 214, 222, 13 Am. Dec. 420.

45. Black L. Dict. [*citing* Coke Litt. 68].

46. Black L. Dict.

47. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

48. Peloubet Leg. Max. [*citing* King's Prerogative Case, 12 Coke 12, 13, 77 Eng. Reprint 1294].

49. Bouvier L. Dict. [*citing* Dig. 1, 3, 31; Halifax Anal. prev. VI, VII, note].

50. Webster Dict. [*quoted* in Standard Oil Co. *v.* Com., 110 Ky. 821, 823, 62 S. W. 897, 23 Ky. L. Rep. 302; *In re* Sullivan, 25 Wash. 430, 437, 65 Pac. 793].

Used in connection with other words.—"Principal course of drainage" see Bayha *v.* Taylor, 36 Mo. App. 427, 442. "Principal creditor" see *In re* Sullivan, 25 Wash. 430, 437, 65 Pac. 793. "Principal debtor" see *In re* Loder, 15 Fed. Cas. No. 8,457, 4 Ben. 305, 309, 4 Nat. Bankr. Reg. 190, 15 Fed. Cas. No. 8,458, 4 Ben. 328. "Principal department" see People *v.* Kipley, 171 Ill. 44, 76, 49 N. E. 229, 41 L. R. A. 775. "Principal duty" see Canney *v.* Walkeine, 113 Fed. 66, 51 C. C. A. 53, 58 L. R. A. 33. "Principal legatees" see Quintard *v.* Morgan, 4 Dem. Surr. (N. Y.) 168, 170. "Principal obligation" see London, etc., Bank *v.* Bandmann, 120 Cal. 220, 222, 52 Pac. 583, 584, 65 Am. St. Rep. 179. "Principal office" see Jossey *v.* Georgia, etc., R. Co., 102 Ga. 706, 709, 28 S. E. 273; Milwaukee Steamship Co. *v.* Milwaukee, 83 Wis. 590, 598, 53 N. W. 839, 18 L. R. A. 353. "Principal place of business" see Middletown Ferry Co. *v.* Middletown, 40 Conn. 65, 70; Standard Oil Co. *v.* Com., 110 Ky. 821, 822, 62 S. W. 897, 23 Ky. L. Rep. 302; Blumenthal *v.* Hudson River Boot, etc., Mfg. Co., 15 N. Y. Suppl. 826, 827; Milwaukee Steamship Co. *v.* Milwaukee, 83 Wis. 590, 598, 53 N. W. 839, 18 L. R. A. 353.

"Principal contract" as defined by statute, is one entered into by both parties, on their own accounts, or in the several qualities they assume. La. Civ. Code (1900), art. 1771.

"Principal officer," as used in reference to corporations is one whose oversight or agency extends either over the whole or some particular department of the general business of the corporation. Farmers' L. & T. Co. *v.* Warring, 20 Wis. 290, 292. As a president

noun,[51] a sum of money placed at interest, or employed as a fund, as distinguished from its income or profits.[52] (See PRINCIPAL AND AGENT; PRINCIPAL AND SURETY.)

PRINCIPAL AND ACCESSARY. See CRIMINAL LAW, 12 Cyc. 183; INDICTMENTS AND INFORMATIONS, 22 Cyc. 359–362.

who has ordinarily a general oversight over its entire business, a secretary over its records, or a treasurer over its moneys — or at least receiving and paying them out. Farmers' L. & T. Co. *v.* Warring, 20 Wis. 290, 292.

The words "president or other principal officer" mean the chief executive officer of the corporation, whether called "chairman," "president," or by any other title, and were not intended to include "general manager." Dale *v.* Blue Mountain Mfg. Co., 167 Pa. St. 402, 405, 31 Atl. 633.

51. See also MASTER AND SERVANT, 26 Cyc. 941; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY.

Principal and accessary see CRIMINAL LAW, 12 Cyc. 183.

52. Sheets' Appeal, 52 Pa. St. 257, 267.

No strict legal meaning.— The loose general idea involved in it is a source of income. Sheets' Appeal, 52 Pa. St. 257, 267.

Distinguished from "interest" see Epping *v.* Columbus, 117 Ga. 263, 269, 43 S. E. 803. Where the jurisdiction of superior courts is limited to cases in which the demand, exclusive of interest, amounts to three hundred dollars, the jurisdiction is ascertained by regarding the debt sued upon as divided into two parts, one of which, in reference to the other, is principal; one represents the original debt, the other the interest upon such debt. "The terms 'principal' and 'interest' are correlative. Each implies and excludes the other. That which is principal cannot be interest. Yet we contract for compound interest, and necessarily this is an agreement that the installment of interest which is compounded shall be made a principal and bear interest. But the term 'principal' applies to the new sum only in relation to the interest upon it. It is still true that this new principal itself accrued upon that contract sued upon as interest. If we were to speak of it with reference to the original principal, or in regard to the mode in which it accrued on the obligation — became a part of the debt — we should call it interest." Christian *v.* San Diego Super. Ct., 122 Cal. 117, 119, 54 Pac. 518.

As used in a will providing that the principal of the subdivided moiety [real estate] is to be invested, and the income only used for the benefit and use of the devisee, it means the original gift, as distinguished from its income. Gammon *v.* Gammon, 153 Ill. 41, 46, 38 N. E. 890. As used in a will providing that the testatrix's two sons should share alike, and if neither have children the principal will come back to the children of a certain daughter, the daughter to get her full share, "principal" is synonymous with "share." The testatrix did not use it in the sense of a sum of money placed at interest. *In re* Kennedy, 190 Pa. St. 79, 83, 42 Atl. 459.

Not including real property see Chisolm *v.* Hamersley, 114 N. Y. App. Div. 565, 569, 100 N. Y. Suppl. 38.

"Principal money" see Prichard *v.* Prichard, L. R. 11 Eq. 232, 234, 40 L. J. Ch. 92, 24 L. T. Rep. N. S. 259, 19 Wkly. Rep. 226.

A verdict for principal and interest was held to mean the principal and interest claimed in the declaration. Phillips *v.* Behn, 19 Ga. 298, 301.

PRINCIPAL AND AGENT

By Edwin C. Goddard
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I. THE RELATION.

A. Definition and Nature — 1. IN GENERAL. Agency in its broadest sense includes every relation in which one person acts for or represents another by his authority.[1] In the more restricted sense in which the term is used in the law of principal and agent, agency may be defined as the relation which results where one party, called the principal, authorizes another, called the agent, to act for him in business dealings with third persons.[2] Agency is a representative relation. Its

1. State *v.* Hubbard, 58 Kan. 797, 801, 51 Pac. 290, 39 L. R. A. 860.

Definitions of agent are: "A person employed by another to act for him." Anderson L. Dict. [*quoted* in Crowley *v.* Sumner, 97 Ill. App. 301, 304].

"One who undertakes to manage some affair to be transacted for another by his authority on account of the latter who is called the principal, and to render an account of it." Bouvier L. Dict. [*followed* in Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460, 462].

"A person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified." Evans Agency (Ewell ed.), § 1 [*quoted* in Metzger *v.* Huntington, 139 Ind. 501, 520, 37 N. E. 1084, 39 N. E. 235; Flesh *v.* Lindsay, 115 Mo. 1, 18, 21 S. W. 907, 37 Am. St. Rep. 374].

"A representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations." Huffcut Agency (2d ed.), § 6 [*quoted* in Clark & S. Agency 3].

"One who acts for or in the place of another, by authority from him." Webster Int. Dict. [*quoted* in Wynegar *v.* State, 157 Ind. 577, 579, 62 N. E. 38; State *v.* Hubbard, 58 Kan. 797, 801, 51 Pac. 290, 39 L. R. A. 860].

"One who acts for, or in place of, another, denominated the principal, in virtue of power or authority conferred by the latter, to whom an account must be rendered." Rowe *v.* Rand, 111 Ind. 206, 210, 12 N. E. 377.

"One who is employed by another to do some act or transact some business on his account." Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688, 692 [*citing* Parsons Contr. p. 39; Story Agency, § 3].

"One who derives authority from another to do a certain act." Walton *v.* Dore, 113 Iowa 1, 84 N. W. 928 [*citing* Evans Princ. & A. 1].

"A substitute, or a person employed to manage the affairs of another." Adams *v.* Whittlesey, 3 Conn. 560, 567.

"The term agent is one of wide signification." It may "be said to apply to any one who by authority performs an act for another." Wynegar *v.* State, 157 Ind. 577, 579, 62 N. E. 38. But the mere fact that one transacts business for another does not constitute him the latter's agent. Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460.

Definitions of principal are: "One primarily and originally concerned, and who is not an accessory, or auxiliary." Adams *v.* Whittlesey, 3 Conn. 560, 567.

"One who, being competent *sui juris* to do any act for his own benefit or on his own account, confides it to another person to do for him." Cyclopedic L. Dict. [*citing* 1 Domat, bk. 1, tit. 15; Story Agency, § 3].

Personal mandate is a mandate whereby one person appoints another his special agent, or whereby one person gives "power to another to transact for him and in his name one or several affairs." State *v.* Michel, 113 La. 4, 8, 36 So. 869.

2. See authorities cited *infra*, this note.

Definitions of agency are: "A contract

fundamental maxim is, *Qui facit per alium facit per se.* The agent represents, acts for, and derives his authority from, another, his principal; he is an attorney, standing in the place of his employer.[3] The most characteristic feature of the agent's employment is that he is employed primarily to bring about business relations between his principal and third persons, and this power is perhaps the most distinctive mark of the agent as contrasted with others, not agents, who act in representative capacities.[4] The relation of agent is normally contractual, since it generally arises from a contract, either express or implied in fact, previously entered into between the principal and the agent.[5] In exceptional cases, however, the elements of a contract are wanting. Thus the agent may undertake to act for the principal without compensation, and enter upon the undertaking; and in this event, although even as between the parties the relation of agency exists, the contractual element of consideration is wanting.[6] So the relation may arise in certain cases by operation of law, as where an abandoned wife is invested by law with a limited power to bind her husband in contract to third persons; and in these cases none of the elements of a contract appear.[7] And finally, even as between the parties, the legal effects and consequences of agency may attach where one person acts for another without authority or in excess of his authority, and the latter subsequently ratifies the act.[8]

2. Other Relations Distinguished — a. In General. Not infrequently contracts are so ambiguously drawn or the facts are such as to throw doubt on the nature of the relation existing between parties alleged to be principal and agent.[9]

either express or implied by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, by which that other assumes to do the business, and to render an account of it." 2 Kent Comm. 612 [*approved* in Ish *v.* Crane, 13 Ohio St. 574, 584].

"A legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party,— the agent — is employed and authorized to represent and act for the other,— the principal — in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority." Mechem Agency, § 1 [*cited* in Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 21, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318]. And see Steele *v.* Lawyer, 47 Wash. 266, 91 Pac. 958.

Code definitions see Cal. Civ. Code (1903), § 2295; Mont. Civ. Code (1895), § 3070; N. D. Rev. Codes (1899), § 4303; S. D. Civ. Code (1903), § 1656.

3. Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318.

4. Central Georgia Land, etc., Co. *v.* Exchange Bank, 101 Ga. 345, 28 S. E. 863; Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413, both holding that the relation of principal and agent cannot exist where neither party has authority to bind or represent the other in any transaction with third persons. And see *infra*, I, A, 2.

5. See authorities cited *supra*, note 2. And see *infra*, I, D, 1, a.

Consent of the parties is ordinarily essential to the creation of an agency. See *infra*, I, D, 1, a.

6. See *infra*, I, D, 1, b.

Duties of gratuitous agent to principal see *infra*, III, A.

7. See *infra*, I, D, 2.

These cases may be regarded as quasi-agencies. They bear the same relation to true agency as quasi-contracts bear to true contract.

8. See *infra*, I, F.

9. See cases cited *infra*, this note.

Agent or borrower.— It not infrequently happens that one person furnishes money for the use of another under circumstances that make it difficult to tell whether the latter is appointed agent of the former or is a mere borrower on his own account. See Krohn *v.* Lambeth, 114 Cal. 302, 46 Pac. 164 (where defendant agreed to furnish to a broker a certain amount of money to be used in a purchase of a mine, which was to be conveyed to a corporation to be formed, in which defendant was to have a certain share of the stock, the money advanced to be repaid him from the profits; and the broker purchased the mine in accordance with the agreement, making a cash payment thereon, which was furnished by defendant, and executing his own note for a deferred payment, defendant not being known in the transaction with the seller; and the court held that this was a loan by defendant to the broker to enable him to buy the mine, and it was to be repaid; it did not make the broker defendant's agent, on whose note defendant could be held liable as an undisclosed principal); Central Georgia Land, etc., Co. *v.* Exchange Bank, 101 Ga. 345, 28 S. E. 863 (where a bank advanced money to a cotton buyer with which to pay for cotton as he bought it, but neither party contemplated that he should assume to act as agent of the bank, or that the bank should have any interest in his business or share any losses, and it was held to be a loan and not an

In determining whether a contract or the conduct of the parties constitutes an agency or some other relation, the court will as a rule give effect to the intention of the parties; and the question is not governed by the name the parties themselves give to the relation.[10] But if the facts establish the relation of principal and agent as a matter of law, the intention of the parties is immaterial, and the character of the relation is not affected by any agreement of the parties that an agency between them does not exist or that some other relation does exist.[11]

b. Master and Servant. The relation of principal and agent and master and servant are frequently confused. In general the principles governing the rights, duties, and liabilities growing out of the two relations are the same, and to determine whether a given relation is one of agency or of service is of no consequence. This results from the fact that the law of principal and agent is an outgrowth and expansion of the law of master and servant.[12] Occasionally, however, and espe-

agency); Spencer *v.* Mali, 87 Ill. App. 680 [*affirmed* in 186 Ill. 363, 57 N. E. 1033] (holding that where a single woman who has no knowledge of business affairs appoints her brother-in-law as her agent, who is skilled, capable, and experienced, to conduct her business, and leaves to him its sole management and control, and large profits are made, such profits cannot be subjected to the payment of his debts on the theory that as the property was placed in the agent's hands with absolute control of it the original capital should be considered as a loan to him, and the increase caused by his skill should be subjected to the payment of his debts); Van Sandt *v.* Dows, 63 Iowa 594, 19 N. W. 669, 50 Am. Rep. 759 [*following* Dows *v.* Morse, 62 Iowa 231, 17 N. W. 495] (where a contract was made whereby one party was to furnish money to be used by the other in the purchase of corn, which was to be the property of the former, marked with his name, and sold by him, he to receive out of the sales his original investment with eight per cent interest and one cent a bushel on the corn besides, the second party to receive the balance and to guarantee the first against loss in the transaction; and the court held that the second party did not receive this money as a borrower, but as an agent, and he did not cease to be an agent and become a borrower on investing it); Hartshorne *v.* Thomas, 43 N. J. Eq. 419, 10 Atl. 843 (where a person was held to be an agent rather than a borrower).

Agent or joint owner.—An agreement by which one party agrees to ship to another, for sale, his entire output during a season, establishes between them the relation of principal and agent, and not joint ownership. Elwell *v.* Coon, (N. J. Ch. 1900) 46 Atl. 580. And see FACTORS AND BROKERS.

Agent or licensee.— In some cases permission is granted by one person to another which under different conditions may amount to a mere license to do some act or acts on his own responsibility (Murphy *v.* Emigration Com'rs, 28 N. Y. 134, holding that the licensing of the owners or captains of steamboats, etc., to receive the land passengers and their baggage, and of persons to solicit emigrant passengers and baggage for boarding-houses and transportation lines, by the commissioners of emigration, does not make the licensed persons the agents of the commissioners, for whose acts the commissioners can be held liable), or to a commission to the second party to act as agent of the first on the responsibility of his principal (Bingaman *v.* Hickman, 115 Pa. St. 420, 8 Atl. 644, (1889) 17 Atl. 20, where lien creditors by written agreement selected three men as a committee to represent them, authorized them to take possession of kaolin mines on land bound by the liens, employ men, purchase horses, etc., prepare for market and sell the kaolin, and appropriate the proceeds in accordance with a scheme of distribution adopted by the creditors and made part of the agreement, which also fixed the committee's compensation and reserved a right to revoke their powers, and the court held that this was not a mere license to work the mines, but was a contract of agency). License generally see LICENSES, 25 Cyc. 593.

Agent or obligor.—An agreement, whereby a physician was induced to locate at defendant's sawmill as a physician, that defendant would collect for him specified sums from its employees monthly, was an original obligation to pay such sums, and not merely an agreement to collect and pay over as an agent. Texarkana Lumber Co. *v.* Lennard, (Tex. Civ. App. 1907) 104 S. W. 506.

Agent or particeps criminis.— One who managed what he termed a "board of trade," where he received money from plaintiff on representations that defendant, a firm of brokers, whose correspondent he was, would purchase options on the Chicago board of trade, a commission being taken and shared by him and defendant, and he not pretending to bargain either with plaintiff or defendant, was not merely an agent of either party, but a *particeps criminis* in the gambling enterprise. Munns *v.* Donovan Commission Co., 117 Iowa 516, 91 N. W. 789. And see CONTRACTS, 9 Cyc. 465 *et seq.*; GAMING.

Municipal agents distinguished from municipal officers see MUNICIPAL CORPORATIONS, 28 Cyc. 585.

10. See *infra*, I, A, 2, d–g; I, D, 1, a.

11. See *infra*, I, A, 2, d–g; I, D, 1, a.

12. Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413.

The word "servant" in its broadest meaning includes an agent. Agents are often denominated servants, and servants are often

cially in the application of statutes using the word agent or servant, the distinction may be controlling.[13] The distinction between principal and agent and master and servant is very difficult to define; the two relations are essentially similar, and the real difference between them may be said to be one of degree only.[14] Several tests of agency have been suggested. Thus the agent has been said to be employed in a capacity superior to that of the servant.[15] Again he is said to be clothed with greater discretion than the servant. The agent is to accomplish a certain end, in general using his own discretion as to the means adopted, while the servant is bound to perform his service in the manner commanded by the master.[16] But such distinctions are of doubtful utility, and must at most be applied with reference to the facts of each case, for manifestly some servants have large discretion, some agents little or none. Again the two relations are so closely associated that the same person may act at one time or in one part of his employment as an agent, and at another time or in another part of his employment as a servant. The only essential distinction is that the agent is employed to establish contractual relations between his principal and third persons, the servant is not. Rather the servant deals with things, or if he deals with persons it is not to bring about contractual relations. If a servant contracts for his employer with third persons he is in so far an agent; otherwise not.[17]

called agents. Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413, 416. Servant defined see MASTER AND SERVANT, 26 Cyc. 965. The words "agents" and "servants" in a general sense both apply to persons in the service of another. Turner *v.* Cross, 83 Tex. 218, 228, 18 S. W. 578, 15 L. R. A. 262. And see People *v.* Treadwell, 69 Cal. 226, 235, 10 Pac. 502. *Compare* Rich *v.* Austin, 40 Vt. 416. Indeed it has been said that in legal essence there is no difference between the relation of master and servant and that of principal and agent, the terms "servant" and "agent" being fundamentally interchangeable, and the distinction between them evidential only. Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 451, 34 Atl. 335 [*citing* 28 Am. L. Rev. 9 (article by C. C. Allen); 4 Harvard L. Rev. 345, and 5 Harvard L. Rev. 1 (articles by O. W. Holmes, Jr.)].

13. See cases cited *infra*, this note, and *passim*, this section.

Penal statutes referring to servants will not be so construed as to apply to agents. Reg. *v.* Walker, 8 Cox C. C. 1, Dears. & B. 600, 4 Jur. N. S. 465, 27 L. J. M. C. 207, 6 Wkly. Rep. 505; Reg. *v.* Goodbody, 8 C. & P. 665, 34 E. C. L. 951; Rex *v.* Carr, R. & R. 148. However, a statute defining embezzlement by an agent has been held to apply to any kind of officer, agent, attorney, clerk, servant, or employee, if the employment be of a character necessarily to involve confidence and to afford the opportunity to commit the offense complained of. Wynegar *v.* State, 157 Ind. 577, 62 N. E. 38. See EMBEZZLEMENT, 15 Cyc. 496 *et seq.* *Compare* People *v.* Treadwell, 69 Cal. 226, 235, 10 Pac. 502, 508; Territory *v.* Maxwell, 2 N. M. 250, 262 [*citing* 1 Wharton Cr. L. § 1022].

Statutes making stock-holders of corporations personally liable for wages due a laborer or servant will not be construed so as to include an agent. See CORPORATIONS, 10 Cyc. 690.

14. Merritt *v.* Huber, 137 Iowa 135, 114 N. W. 627, where it is said that the true distinction is to be found in the nature of the service to be performed and the manner of its performance.

15. Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413; Flesch *v.* Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; Wakefield *v.* Fargo, 90 N. Y. 213; 1 Blackstone Comm. 427. And see People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502.

16. *Alabama.*— Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304.

Georgia.— McCroskey *v.* Hamilton, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79.

New Mexico.— See Territory *v.* Maxwell, 2 N. M. 250 [*citing* 1 Whart. Cr. L. § 1022].

South Dakota.— See Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9; 49 Am. St. Rep. 859, 23 L. R. A. 490.

United States.— Singer Mfg. Co. *v.* Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440.

England.— Reg. *v.* Walker, 8 Cox C. C. 1, Dears. & B. 600, 4 Jur. N. S. 465, 27 L. J. M. C. 207, 6 Wkly. Rep. 505.

See 40 Cent. Dig. tit. "Principal and Agent," § 4.

17. *California.*— People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502.

Indiana.— Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413.

Louisiana.— Lochte *v.* Gélé, McGloin 52.

Maine.— Gardner *v.* Boston, etc., R. Co., 70 Me. 181.

North Carolina.— Moore *v.* Tickle, 14 N. C. 244, holding that the relation of agency cannot be inferred from the relation of master and servant; and that a groom is a mere servant, not the general agent, of the owner of a horse.

Pennsylvania.— Morrow *v.* Tunkhannock Ice Co., 211 Pa. St. 445, 60 Atl. 1004 (where plaintiff was employed to sell ice for defendant for five years at a commission of one dollar per car, and had performed some service, but had effected no sales, and it was held that

c. Employer and Independent Contractor. The liability of an employer for the acts and contracts of one employed to work for his interests often turns on the distinction between agent or servant on the one hand, and independent contractor on the other. For the acts of the agent [18] or servant [19] within the scope of his employment the employer is in general liable; for the acts of the independent contractor in general he is not.[20] In so far as the employer retains the right of general control and management of the work, he makes the employee his agent or servant; [21] but in so far as the employer leaves the choice of means and methods to the employee, he makes him an independent contractor.[22] The independent contractor, like the agent, undertakes to accomplish a certain end. In the work to be done and the means to be adopted to attain the end he is, even more than the agent, free from the control and direction of the employer. As a rule his acts are his own, his contracts are his own, and for them he, and not the employer, is responsible.[23] So far as the employer is concerned, the independent contractor,

the employment was one of agency, not of service; that as he had contracted no business relations with third persons he had entirely failed to perform as agent, and hence was entitled to no compensation); The Portland *v.* Lewis, 2 Serg. & R. 197.

Texas.— Turner *v.* Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262.

Canada.— Violett *v.* Sexton, 14 Quebec K. B. 360.

See 40 Cent. Dig. tit. "Principal and Agent," § 4. And see *supra*, I, A, 1.

18. See *infra*, III, E.

19. See MASTER AND SERVANT, 26 Cyc. 1518 *et seq.*

20. See MASTER AND SERVANT, 26 Cyc. 970, 1552 *et seq.*

21. See MASTER AND SERVANT, 26 Cyc. 1547.

Right of supervision.— The fact that the employer retains the right to make daily supervision and approval of the work does not necessarily render the employee an agent or servant. Casement *v.* Brown, 148 U. S. 615, 13 S. Ct. 672, 37 L. ed. 582. And see MASTER AND SERVANT, 26 Cyc. 1549.

22. Lawrence *v.* Shipman, 39 Conn. 586 (holding that where, by the terms of the contract, the employee was to accomplish a certain specified result, the choice of means and methods and details being left to him, he was an independent contractor, and not an agent or servant); Kirby *v.* Lackawanna Steel Co., 109 N. Y. App. Div. 334, 95 N. Y. Suppl. 833 (where the owner of a manufacturing plant agreed to keep up and operate the plant, and to run it entirely to manufacture defendant's work as directed by defendant, and defendant was to direct as to the number of men employed, the work they should do, and the wages they should receive, and was to pay all wages and expenses of running the plant, but not to hire or discharge employees, and it was held that the relation was not one of principal and agent, but the owner of the works was an independent contractor).

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work. Powell *v.* Virginia Constr. Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925. To the same effect see Jensen *v.* Barbour, 15 Mont. 582, 39 Pac. 906. And see MASTER AND SERVANT, 26 Cyc. 970, 1546. Whether one is an independent contractor or not depends upon whether or not he is in an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished. Barg *v.* Bousfield, 65 Minn. 355, 68 N. W. 45. To the same effect see Burns *v.* McDonald, 57 Mo. App. 599.

23. *California.*— Kuhlman *v.* Burns, 117 Cal. 469, 49 Pac. 585.

Colorado.— Atlas Lumber Co. *v.* Schenck, 2 Colo. App. 246, 29 Pac. 1137.

Connecticut.— Lawrence *v.* Shipman, 39 Conn. 586.

Georgia.— Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231.

Louisiana.— Camp *v.* St. Louis Church, 7 La. Ann. 321.

Massachusetts.— Pearl *v.* West End St. R. Co., 176 Mass. 177, 57 N. E. 339, 49 L. R. A. 826.

Missouri.— Crosno *v.* Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275; Dellecella *v.* Harmonie Club, 34 Mo. App. 179.

New York.— Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Storrs *v.* Utica, 17 N. Y. 104, 72 Am. Dec. 437; Kelly *v.* Mayor, 11 N. Y. 432; Pack *v.* Mayor, 8 N. Y. 222; Kirby *v.* Lackawanna Steel Co., 109 N. Y. App. Div. 334, 95 N. Y. Suppl. 833.

Oregon.— Simmonds *v.* Wrightman, 36 Oreg. 120, 58 Pac. 1100.

Pennsylvania.— Painter *v.* Pittsburgh, 46 Pa. St. 213; Wayne *v.* Johnson, 1 Phila. 503, holding that the employment of a contractor to do a piece of work does not render him an agent, nor authorize him to pledge the credit of the employer, even for purchases necessary to complete the job.

Tennessee.— Powell *v.* Virginia Constr. Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

Vermont.— Ladd *v.* Grand Isle, 67 Vt. 172, 31 Atl. 34.

United States.— Casement *v.* Brown, 148 U. S. 615, 13 S. Ct. 672, 37 L. ed. 582; New Orleans, etc., R. Co. *v.* Hanning, 15 Wall. 649, 21 L. ed. 220; Robbins *v.* Chicago, 4 Wall.

like the servant, deals with things, but, unlike the servant, he uses his own discretion, and on his own account deals with persons and makes contracts.[24] One may be an agent, and not an independent contractor, though he is paid according to the amount of work accomplished.[25]

d. Trusteeship.[26] While agency is a trust relation demanding of the agent undivided loyalty and fidelity to the interests of the principal confided to his charge,[27] it differs in many respects from any recognized class of trusts.[28] In the ordinary agency the title to any property involved, and usually to all the proceeds of the agency, remains in the principal, and the agent acts in the name of the principal;[29] in a trust the legal title is in the trustee, and he acts in his own name.[30] Agency may in general be revoked at any time;[31] a trust can ordinarily be terminated only by the fulfilment of the purposes of the trust.[32] It is the business of the agent to make contracts binding his principal to third persons;[33] a mere trustee cannot render either the creator of the trust or the beneficiary liable to third persons.[34] In this, as in the case of other relations that are sometimes difficult to distinguish from agency, the courts will construe the contract so as to give effect to the true intent of the parties, notwithstanding the name they may have given to their relation in the contract.[35]

657, 18 L. ed. 427; Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539.

England.— Steel *v.* South-Eastern R. Co., 16 C. B. 550, 81 E. C. L. 550; Knight *v.* Fox, 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. 9, 1 Eng. L. & E. 477.

See 40 Cent. Dig. tit. "Principal and Agent, § 5.

24. Atlas Lumber Co. *v.* Schenck, 2 Colo. App. 246, 29 Pac. 1137 (where it was said that while the independent contractor, like the agent, enters into contractual relations with third persons, it is entirely on his own account; he is not, like the agent, authorized to make any contracts for the employer, or in his name; if he does this, and in so far as he does, he becomes an agent); Johnston *v.* Dahlgren, 48 N. Y. App. Div. 537, 62 N. Y. Suppl. 1115.

25. Crosno *v.* Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275.

26. See, generally, TRUSTS.

27. See *infra*, III, A, 1.

28. Weer *v.* Gand, 88 Ill. 490 (where it was held that from the fact that one person reposes confidence in another, and that that other acts as a confidential adviser and agent, and finally becomes a debtor, it by no means follows that the relation of trustee and *cestui que trust* exists. Thus where one person employs another as agent, loans money or sells property on credit, a trust is imposed, but such transactions have never been considered by the courts as falling within any recognized class of trusts. If one puts property into the hands of another to manage for him, the relation is that of principal and agent, although had one person conveyed property to another for the benefit of a third a trust would have been created); Hartley *v.* Phillips, 198 Pa. St. 9, 47 Atl. 929.

29. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377 (holding that one who is employed by the purchasers at a sheriff's sale to dispose of the goods for them, and who deposits the proceeds of sales made from time to time in bank to his account as "trustee," using the word "trustee" because he has another account with the bank as "agent," is nevertheless only an agent, and not a trustee, as to the fund so deposited); Taylor *v.* Davis, 110 U. S. 330, 2 S. Ct. 147, 28 L. ed. 163. And see *infra*, II, C; III, A, 4.

30. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Taylor *v.* Davis, 110 U. S. 330, 4 S. Ct. 147, 28 L. ed. 163.

31. Flaherty *v.* O'Connor, 24 R. I. 587, 54 Atl. 376, where this power of revocation was made a test to determine whether the relation was one of agency or trust. And see *infra*, I, G, 1, b, (I), (A).

32. Lyle *v.* Burke, 40 Mich. 499, where it was held, per Cooley, J., that an instrument placing in the hands of defendant a fund to be used and expended for the support of the maker of the instrument and his sister during their lives, and to be thereafter divided by defendant among the maker's heirs then in being, created a trust and not a mere agency revocable by the maker's death. See also Kraft *v.* Neuffer, 202 Pa. St. 558, 52 Atl. 100.

However, the creator of the trust may reserve the right of revocation. Van Cott *v.* Prentice, 104 N. Y. 45, 10 N. E. 257.

33. Taylor *v.* Davis, 110 U. S. 330, 28 L. ed. 163. And see *supra*, I, A, 1.

34. Shepard *v.* Abbott, 179 Mass. 300, 60 N. E. 782 (holding that where a mortgagee placed the money for which the mortgage was given in the hands of the broker through whom the loan was negotiated, to be paid out for building material on the order of the mortgagor, the broker was not an agent of the mortgagee so as to bind him by accepting a bill of exchange drawn by the mortgagor on the broker as trustee of the fund); Taylor *v.* Davis, 110 U. S. 330, 28 L. ed. 163.

35. Viser *v.* Bertrand, 16 Ark. 296 (holding that an instrument appointing, for a valuable consideration, one B "a trustee, to perform all the duties I ought to perform in the premises, and to hire out and appropriate the proceeds of said negroes, when

e. Partnership.[36] Partnership is a branch of the law of principal and agent, each partner having authority in partnership affairs to act as principal for himself, and as agent for the other partners, and this is the most certain test of partnership.[37] An agent, on the other hand, does not act for himself, but for his principal alone.[38] In general, an agreement to share profits raises a presumption of partnership, while vesting title to the property which forms the subject-matter of the agreement in one of the parties, or sharing profits but not losses, is significant of an intent to create an agency.[39] But these presumptions are by no means conclusive. The early English rule that sharing profits and losses was the test of partnership[40] was generally followed by early American cases, and is still adhered to in some of the states.[41] But this rule has been overruled in England,[42] and apart from this it has always been recognized that an agreement to share profits as profits is to be distinguished from an agreement to share in profits as compensation for services. The former creates a partnership, the latter an agency, unless there is added the grant of the rights, powers, and duties incident to a partnership.[43] As between the parties themselves it is purely a question of inten-

hired, to the benefit of said Mary E. B. Viser, and her daughter . . . as it appropriately belongs, and hereby investing him [B] with all the power I possess, by virtue of my marriage," is merely a power founded on a valuable consideration, and not a deed of trust); Coggeshall *v.* Coggeshall, 2 Strobh. (S. C.) 51 (holding that where a son, by an unsealed instrument, promised for a valuable consideration to pay his mother a certain sum of money in annual instalments, with a proviso in case of her death, etc., and constituted a third person holder of the agreement during her life to perform the trusts therein contained, such third person is an agent, and not a trustee) See also Cleghorn *v.* Castle, 13 Hawaii 186; Weer *v.* Gand, 88 Ill. 490; Kraft *v.* Neuffer, 202 Pa. St. 558, 52 Atl. 100; Hartley *v.* Phillips, 198 Pa. St. 9, 47 Atl. 929; Flaherty *v.* O'Connor, 24 R. I. 587, 54 Atl. 376; Rich *v.* Austin, 40 Vt. 416.

36. See, generally, PARTNERSHIP, 30 Cyc. 334.

37. Person *v.* Carter, 7 N. C. 321. See also Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957; Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Eastman *v.* Clark, 53 N. H. 276, 16 Am. Rep. 192; Holme *v.* Hammond, L. R. 7 Exch. 218, 41 L. J. Exch. 157, 20 Wkly. Rep. 747; Cox *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754.

38. Person *v.* Carter, 7 N. C. 321. And see *infra*, III, A, 1.

39. *Connecticut.*— Parker *v.* Canfield, 37 Conn. 250, 9 Am. Rep. 317.

Illinois.— Fongner *v.* Chicago First Nat. Bank, 141 Ill. 124, 30 N. E. 442.

Indiana.— Ellsworth *v.* Pomeroy, 26 Ind. 158.

Iowa.— Price *v.* Alexander, 2 Greene 427, 52 Am. Dec. 526.

England.— Cox *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754. See 40 Cent. Dig. tit. "Principal and Agent, § 8.

40. Waugh *v.* Carver, 2 H. Bl. 235.

41. Perry *v.* Butt, 14 Ga. 699.

When one puts in money and another services in a joint undertaking, no doubt the result is a partnership. Brinkley *v.* Harkins, 48 Tex. 225. But see Hartshorne *v.* Thomas, 43 N. J. Eq. 419, 10 Atl. 843, which holds to the contrary even though the parties were to share profits and losses.

42. Cox *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754, which case has been generally followed in the United States.

43. Reed *v.* Murphy, 2 Greene (Iowa) 574; Price *v.* Alexander, 2 Greene (Iowa) 427, 52 Am. Dec. 526; Buzard *v.* Greenville Bank, 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7.

That sharing in profits as compensation for services constitutes an agency and not a partnership is held in Stafford *v.* Sibley, 106 Ala. 189, 17 So. 324; Pulliam *v.* Schimpf, 100 Ala. 362, 14 So. 488; Couch *v.* Woodruff, 63 Ala. 466; Moore *v.* Smith, 19 Ala. 774; Coward *v.* Clanton, 122 Cal. 451, 55 Pac. 147; Wheeler *v.* Farmer, 38 Cal. 203; Darrow *v.* St. George, 8 Colo. 592, 9 Pac. 791; Parker *v.* Canfield, 37 Conn. 250, 9 Am. Rep. 317; Loomis *v.* Marshall, 12 Conn. 69, 30 Am. Dec. 596; Padgett *v.* Ford, 117 Ga. 508, 43 S. E. 1002; Thornton *v.* McDonald, 108 Ga. 3, 33 S. E. 680; Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418; Grinton *v.* Strong, 148 Ill. 587, 36 N. E. 559 [*affirming* 45 Ill. App. 82]; Fongner *v.* Chicago First Nat. Bank, 141 Ill. 124, 30 N. E. 442; Burton *v.* Goodspeed, 69 Ill. 237; Hefner *v.* Palmer, 67 Ill. 161; Niehoff *v.* Dudley, 40 Ill. 406; Pierpont *v.* Lanphere, 104 Ill. App. 232; Allen *v.* Hudson, 78 Ill. App. 376; Eibenschutz *v.* Wetten, 64 Ill. App. 617; Stumph *v.* Bauer, 76 Ind. 157; Keiser *v.* State, 58 Ind. 379; Emmons *v.* Newman, 38 Ind. 372; Ellsworth *v.* Pomeroy, 26 Ind. 158; Macy *v.* Combs, 15 Ind. 469, 77 Am. Dec. 103; Johnson *v.* Carter, 120 Iowa 355, 94 N. W. 850; McBride *v.* Ricketts, 98 Iowa

tion to be deduced from the contract itself.[44] The intent, however, is to be gathered, not from the name given by the parties to the relation, but from the legal effect of the contract, or, if there is no contract, from the acts of the parties and the character of the transaction.[45]

539, 67 N. W. 410; Porter *v.* Curtis, 96 Iowa 539, 65 N. W. 824; Winter *v.* Pipher, 96 Iowa 17, 64 N. W. 663; Richards *v.* Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Dows *v.* Morse, 62 Iowa 231, 17 N. W. 495; Holbrook *v.* Oberne, 56 Iowa 324, 9 N. W. 291; Ruddick *v.* Otis, 33 Iowa 402; Krause *v.* Meyer, 32 Iowa 566; Partridge *v.* Kingman, 130 Mass. 476; Com. *v.* Bennett, 118 Mass. 443; Pratt *v.* Langdon, 12 Allen (Mass.) 544, 97 Mass. 97, 93 Am. Dec. 61; Julio *v.* Ingalls, 1 Allen (Mass.) 41; Chandler *v.* Howland, 7 Gray (Mass.) 348, 66 Am. Dec. 487; Holmes *v.* Old Colony R. Corp., 5 Gray (Mass.) 58; Bradley *v.* White, 10 Metc. (Mass.) 303, 43 Am. Dec. 435; Denny *v.* Cabot, 6 Metc. (Mass.) 82; Blanchard *v.* Coolidge, 22 Pick. (Mass.) 151; Turner *v.* Bissell, 14 Pick. (Mass.) 192; Cutler *v.* Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385; Grozier *v.* Atwood, 4 Pick. (Mass.) 234; Baxter *v.* Rodman, 3 Pick. (Mass.) 435; Rice *v.* Austin, 17 Mass. 197; Stockman *v.* Mitchell, 109 Mich. 348, 67 N. W. 336; Canton Bridge Co. *v.* Eaton Rapids, 107 Mich. 613, 65 N. W. 761; Child *v.* Emerson, 102 Mich. 38, 60 N. W. 292; Colwell *v.* Britton, 59 Mich. 350, 26 N. W. 538; Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Wilcox *v.* Matthews, 44 Mich. 192, 6 N. W. 215; Morrison *v.* Cole, 30 Mich. 102; Hinnan *v.* Littell, 23 Mich. 484; Rice *v.* Longfellow Bros. Co., 78 Minn. 394, 81 N. W. 207; Davis *v.* Peterson, 59 Minn. 165, 60 N. W. 1007; Wass *v.* Atwater, 33 Minn. 83, 22 N. W. 8; Gill *v.* Ferris, 82 Mo. 156; Campbell *v.* Dent, 54 Mo. 325; Wiggins *v.* Graham, 51 Mo. 17; Bruen *v.* Kansas City Agricultural, etc., Fair Assoc., 40 Mo. App. 425; Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Eastman *v.* Clark, 53 N. H. 276, 16 Am. Rep. 192; Brundred *v.* Muzzy, 25 N. J. L. 268; Perrine *v.* Hankinson, 11 N. J. L. 181; Elwell *v.* Com., (N. J. Ch. 1900) 46 Atl. 580; Richardson *v.* Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Smith *v.* Bodine, 74 N. Y. 30; Osbrey *v.* Reimer, 51 N. Y. 630; Lewis *v.* Greider, 51 N. Y. 231; Merchants' Nat. Bank *v.* Barnes, 32 N. Y. App. Div. 92, 52 N. Y. Suppl. 786; Heye *v.* Tilford, 2 N. Y. App. Div. 346, 37 N. Y. Suppl. 751 [*affirmed* in 152 N. Y. 642, 46 N. E. 1148]; Conklin *v.* Barton, 43 Barb. (N. Y.) 435; Hunt *v.* McCabe, 40 Misc. (N. Y.) 461, 82 N. Y. Suppl. 661; Martin *v.* Richl, 27 Misc. (N. Y.) 112, 58 N. Y. Suppl. 141; Lansburgh *v.* Walsh, 12 Misc. (N. Y.) 124, 33 N. Y. Suppl. 45; De Cordova *v.* Powter, 1 N. Y. Suppl. 147 [*affirmed* in 123 N. Y. 645, 25 N. E. 954]; Burckle *v.* Eckart, 1 Den. (N. Y.) 337; Vanderburgh *v.* Hull, 20 Wend. (N. Y.) 70; Champion *v.* Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488; Southern Fertilizer Co. *v.* Reams, 105 N. C. 283, 11 S. E. 467; Mauney *v.* Coit, 86 N. C. 463; Harvey *v.* Childs, 28 Ohio St. 319, 22 Am. Rep. 387; McArthur *v.* Ladd, 5 Ohio 514; Page *v.* Simpson, 188 Pa. St. 393, 41 Atl. 638; Ryder *v.* Jacobs, 182 Pa. St. 624, 38 Atl. 471; Haines' Estate, 176 Pa. St. 354, 35 Atl. 237; Edwards *v.* Tracy, 62 Pa. St. 374; Dunham *v.* Rogers, 1 Pa. St. 255; Miller *v.* Bartlet, 15 Serg. & R. (Pa.) 137; Blight *v.* Ewing, 1 Pittsb. (Pa.) 275; Lowry *v.* Brooks, 2 McCord (S. C.) 421; Brown *v.* Watson, 72 Tex. 216, 10 S. W. 395; Goode *v.* McCartney, 10 Tex. 193; Texas, etc., R. Co. *v.* Smissen, 31 Tex. Civ. App. 549, 73 S. W. 42; Heidenheimer *v.* Walthew, 2 Tex. Civ. App. 501, 21 S. W. 981; Smith *v.* Burton, 59 Vt. 408, 10 Atl. 536; Clark *v.* Smith, 52 Vt. 529; Mason *v.* Potter, 26 Vt. 722; Kellogg *v.* Griswold, 12 Vt. 291; Bowman *v.* Bailey, 10 Vt. 170; Ambler *v.* Bradley, 6 Vt. 119; Nicholaus *v.* Thielges, 50 Wis. 491, 7 N. W. 341; Ford *v.* Smith, 27 Wis. 261; Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835; Thompson *v.* Toledo First Nat. Bank, 111 U. S. 529, 4 S. Ct. 689, 28 L. ed. 507; Berthold *v.* Goldsmith, 24 How. (U. S.) 536, 16 L. ed. 762; Benedict *v.* Davis, 3 Fed. Cas. No. 1,293, 2 McLean 347; Hazard *v.* Hazard, 11 Fed. Cas. No. 6,279, 1 Story 371; Mollwo *v.* Ward Ct., L. R. 4 P. C. 419; Walker *v.* Hirsch, 27 Ch. D. 460, 54 L. J. Ch. 315, 51 L. T. Rep. N. S. 581, 32 Wkly. Rep. 992; Ross *v.* Parkyns, L. R. 20 Eq. 331, 44 L. J. Ch. 610, 30 L. T. Rep. N. S. 331, 24 Wkly. Rep. 5; Holme *v.* Hammond, L. R. 7 Exch. 218, 41 L. J. Exch. 157, 20 Wkly. Rep. 747; Cox *v.* Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754 [*overruling* Waugh *v.* Carver, 2 H. Bl. 235]; Benjamin *v.* Porteus, 2 H. Bl. 590; *Re* English, etc., Church, etc., Assur. Soc., 1 Hem. & M. 85, 8 L. T. Rep. N. S. 724, 2 New Rep. 107, 11 Wkly. Rep. 681, 71 Eng. Reprint 38; Shaw *v.* Galt, 16 Ir. C. L. 357; Mair *v.* Glennie, 4 Maule & S. 240, 16 Rev. Rep. 445; Meyer *v.* Sharpe, 2 Rose 124, 5 Taunt. 74, 1 E. C. L. 49. *Compare* Perry *v.* Butt, 14 Ga. 699.

44. Ellsworth *v.* Pomeroy, 26 Ind. 158; Price *v.* Alexander, 2 Greene (Iowa) 427, 52 Am. Dec. 526.

45. Parchen *v.* Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Eastman *v.* Clark, 53 N. H. 276, 16 Am. Rep. 192 [*quoted* with approval in Parchen *v.* Anderson, *supra*].

The law declares what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. Post *v.* Kimberly, 9 Johns. (N. Y.) 470 [*approved* in Beecher *v.* Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465].

f. Landlord and Tenant.[46] While the ordinary lease bears no resemblance to a contract of agency, yet in some cases contracts have been so drawn as to raise a doubt whether they created the relation of landlord and tenant or that of principal and agent. If the intention of the parties, collected from the whole contract and the surrounding circumstances, was to create a lease, it will be so regarded,[47] and the landlord will not be liable for the acts of the tenant,[48] nor can the tenant escape liability by claiming that he is a mere agent;[49] and where the contract on its face appears to be one of lease, and it has been so treated by the parties, third persons cannot insist on a different construction to establish their rights.[50] But if it appears that it was the purpose to conduct an enterprise through an agent, although under an agreement called a "lease," then the relation will be treated as one of agency with its resulting liabilities;[51] and especially will this be so where

46. **Tenancy distinguished from agency** see also LANDLORD AND TENANT, 24 Cyc. 880.

47. State *v.* Page, 1 Speers (S. C.) 408, 40 Am. Dec. 608; Colcord *v.* Hall, 3 Head (Tenn.) 625.

Illustrations.— Where a father gives his son the use of certain real estate, the son to pay for improvements and retain the profits, the relation created is that of landlord and tenant and not principal and agent, and in the absence of an agreement to that effect, the father is not liable for the value of materials purchased by the son to be used in improving the land. Hawley *v.* Curry, 74 Ill. App. 309. Defendants, owners of a manufactory and of a pond above it, having purchased of plaintiff the right of drawing off the water from the pond through his land, had made a written contract with B by which he was to run defendant's mill for one year, and to manufacture for them, at a specified price, cotton furnished by them, and to keep the mill in good running order at his own expense, except the main gearing, which was to be repaired by defendants if necessary, and no rent was to be charged by defendants, and they were not to be called on for any expense unless the main gearing should fail or some injury should arise to the dam, and six or seven acres where the factory stood, with the factory houses, blacksmith's shop, etc., were to be used by B. In an action against defendants for an injury sustained by plaintiff in consequence of B's letting off the water from the pond so rapidly as to overflow plaintiff's land, it was held that B was the lessee and not the agent of defendants, and consequently that they were not liable for the injury. Fiske *v.* Framingham Mfg. Co., 14 Pick. (Mass.) 491. So, on an issue whether S was the agent of W, who had leased a certain compress for a term of years, or the holder of the lease, it appeared that, although S took possession of the compress under a power of attorney authorizing him to represent W, S never kept any accounts or dealt with W as principal; that S used printed letter heads in connection with the compress business in which his name appeared as lessee; that a written contract with a third person was made by S, in which S and W were referred to as the lessees; and that in the directory of the city where the compress was located S was advertised as proprietor and lessee of the compress. It was held that S was the real lessee, or the assignee of the lease, and was liable for the rent. Ragsdale *v.* Meridian Land, etc., Co, 71 Miss. 284, 14 So. 193.

48. Freiberg *v.* Beach Hotel, etc., Imp. Co., 63 Tex. 449. And see cases cited *supra*, note 47.

49. Ragsdale *v.* Meridian Land, etc., Co., 71 Miss. 284, 14 So. 193. And see cases cited *supra*, note 47.

50. Freiberg *v.* Beach Hotel, etc., Imp. Co., 63 Tex. 449.

51. Hine *v.* Cushing, 53 Hun (N. Y.) 519, 6 N. Y. Suppl. 850; Williams *v.* McKinley, 65 Fed. 4.

Illustrations.— A lumber company and B entered into an agreement called a "lease," reciting that the company was the owner of a mill and timber rights and options, and that B was desirous of manufacturing the timber and operating the mill, and also that B had contracted with one person to operate the mill and manufacture the timber, and contracted with another person to sell the manufactured lumber. The company leased the premises to B for about three years at a yearly rental of one dollar and the net proceeds of the operations, which B agreed to account for; and the company agreed to pay B for his services one thousand five hundred dollars a year, payable monthly, and a percentage of the net proceeds of the business at the close of each year. The company assigned the agreement to a creditor. The creditor and B entered into a contract reciting the making of the foregoing agreement, and providing that the creditor would perform the conditions set forth in the company's lease to B, and that B would perform the conditions therein required of him, and also providing that in case of B's death the agreement should not lapse, but should inure to the benefit of the person B designated; and B designated the creditor. It was held that B was a mere agent, rendering the creditor liable for the expenses of the operation of the mill incurred pursuant to a contract made by B. Petteway *v.* McIntyre, 131 N. C. 432, 42 S. E. 851. An agreement was made between A and a hotel company "for the keeping of the hotel for the term of seven continuous years." A, as the landlord, was

it appears that the so-called lease is a mere sham to conceal the real relationship of the parties or to secure for them exemptions from liability.[52]

g. Buyer and Seller,[53] Vendor and Purchaser,[54] Option Holder and Owner,[55] Grantor and Grantee.[56] The distinction between the relation of principal and agent and that of buyer and seller is ordinarily plain and simple. In a sale title passes to the buyer; in agency title remains in the principal, although possession be transferred to the agent.[57] So where goods are delivered by one person to another to sell on behalf of the person delivering them, the transaction is an agency to sell on consignment, the property in the goods remaining in the principal or consignor, and the agent or consignee being liable, not to pay a price, but to account for the proceeds of the goods when sold;[58] but if from the whole agreement it

to provide for the hotel; to contract no debts on account of the concern without the consent of the directors; to reside with his family in the hotel but free of all charge for board or rent; to keep constantly in his employment a bookkeeper, who should keep the accounts and be liable to discharge by A if the directors disapproved of him; and the books were to be opened for the examination of any of the directors. Then followed provisions for the compensation of A, varying according to the profits, but at last securing him in any event a certain compensation of four thousand dollars per annum. Another provision in the agreement was that A's interest was personal merely, not transferable to any one, nor liable for his debts; and, if A should die, that compensation should be made to his representatives. It was held that this agreement was not a lease, and that A, being in possession as agent of the owners to manage for them, had no legal interest in the possession which could be set up against an execution for the debt of the company. State *v.* Page, 1 Speers (S. C.) 408, 40 Am. Dec. 608.

52. Oriental Inv. Co. *v.* Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80.

53. See, generally, SALES.

54. See, generally, VENDOR AND PURCHASER.

55. See, generally, SALES; VENDOR AND PURCHASER.

56. See, generally, DEEDS, 13 Cyc. 505.

57. Texas Brewing Co. *v.* Templeman, 90 Tex. 277, 38 S. W. 27; Milburn Mfg. Co. *v.* Peak, 89 Tex. 209, 34 S. W. 102; Texas Brewing Co. *v.* Anderson, (Tex. Civ. App. 1897) 40 S. W. 737; *Ex p.* Flannagans, 9 Fed. Cas. No. 4,855, 2 Hughes 264, 12 Nat. Bankr. Reg. 230. And see cases cited *infra*, note 58 *et seq.* See also *infra*, III, A, 4.

58. *Georgia.*— Holleman *v.* Bradley Fertilizer Co., 106 Ga. 156, 32 S. E. 83.

Illinois.— Fleet *v.* Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192 [*reversing* 98 Ill. App. 564]; Lenz *v.* Harrison, 148 Ill. 598, 36 N. E. 567 [*affirming* 47 Ill. App. 170]; Burton *v.* Goodspeed, 69 Ill. 237; W. O. Dean Co. *v.* Lombard, 61 Ill. App. 94; Brown *v.* John Church Co., 55 Ill. App. 615.

Indian Territory.— Martin *v.* Stratton-White Co., 1 Indian Terr. 394, 37 S. W. 833.

Iowa.— Norton *v.* Melick, 97 Iowa 564, 66 N. W. 780; Williams *v.* Davis, 47 Iowa 363; Bayliss *v.* Davis, 47 Iowa 340; Conable *v.* Lynch, 45 Iowa 84.

Kansas.— McKinney *v.* Grant, 76 Kan. 779, 93 Pac. 180.

Kentucky.— Com. *v.* Parlin, 118 Ky. 168, 80 S. W. 791, 26 Ky. L. Rep. 58.

Louisiana.— Dunn *v.* Calderwood, 23 La. Ann. 642; Woodworth *v.* Wilson, 11 La. Ann. 402.

Maine.— Gray *v.* Millay, 61 Me. 327; Blood *v.* Palmer, 11 Me. 414, 26 Am. Dec. 547.

Maryland.— Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351 (holding that where machinery shipped to defendant was to be sold by him for not less than the list or invoice price, so that defendant could not sell at any price he chose, and where payment could not be received at any time defendant chose, and until sold to others the ownership was in the shipper, and the machinery was subject to return on demand, the transaction was a bailment for sale, and not a sale); Planters' Mut. Ins. Co. *v.* Engle, 52 Md. 468.

Massachusetts.— Walker *v.* Butterick, 105 Mass. 237; Eldridge *v.* Benson, 7 Cush. 483.

Michigan.— Snook *v.* Davis, 6 Mich. 156.

Minnesota.— St. Paul Harvester Works *v.* Nicolin, 36 Minn. 232, 30 N. W. 763.

Mississippi.— Denney *v.* Wheelwright, 60 Miss. 733.

Missouri.— Weir Plow Co. *v.* Porter, 82 Mo. 23; Banister *v.* Weber Gas, etc., Co., 82 Mo. App. 528.

New York.— Gause *v.* Commonwealth Trust Co., 100 N. Y. App. Div. 427, 91 N. Y. Suppl. 847 [*reversing* 44 Misc. 46, 89 N. Y. Suppl. 723]; Childs *v.* Waterloo Wagon Co., 37 N. Y. App. Div. 242, 57 N. Y. Suppl. 520; Weyman *v.* People, 4 Hun 511; Wight *v.* Wood, 57 Barb. 471; Barret *v.* Gracie, 34 Barb. 20; Morss *v.* Stone, 5 Barb. 516; Pam *v.* Vilmar, 54 How. Pr. 235; Covill *v.* Hill, 4 Den. 323. And see Cæsar Misch Incorporation *v.* Mosheim, 123 N. Y. App. Div. 322, 107 N. Y. Suppl. 1092; Collyer *v.* Krakauer, 122 N. Y. App. Div. 797, 107 N. Y. Suppl. 739, holding that a delivery of goods to another, who was to sell them on a commission, the proceeds to be credited on notes of the owner held by the one to whom the goods were delivered, was not a sale and delivery of the goods to him, resulting in an obligation to pay therefor.

Ohio.— Cincinnati, etc., R. Co. *v.* Citizens'

appears, by whatever name the transaction is designated, that it is the intention of the parties that the property in the goods is to pass to the person receiving them for a price to be paid by him, the transaction is a sale.[59] There is, however,

Nat. Bank, 11 Ohio Dec. (Reprint) 50, 24 Cinc. L. Bul. 198 [*reversed* on other grounds in 11 Ohio Dec. (Reprint) 703, 29 Cinc. L. Bul. 15].

Pennsylvania.— Keystone Watch-Case Co. *v.* Fourth St. Nat. Bank, 194 Pa. St. 535, 45 Atl. 328; Monjo *v.* French, 163 Pa. St. 107, 29 Atl. 907; Brown *v.* Billington, 163 Pa. St. 76, 29 Atl. 904, 43 Am. St. Rep. 780; Middleton *v.* Stone, 111 Pa. St. 589, 4 Atl. 523; Deburghraeve *v.* Autenrieth, 24 Pa. Super. Ct. 267; Susquehanna Boom Co. *v.* Rogers, 3 Wkly. Notes Cas. 478.

South Carolina.— McPherson *v.* Neuffer, 11 Rich. 267.

Tennessee.— W. W. Kimball Co. *v.* First Nat. Bank, 1 Tenn. Ch. App. 505.

Texas.— Milburn Mfg. Co. *v.* Peak, 89 Tex. 209, 34 S. W. 102; Hamilton *v.* Willing, 73 Tex. 603, 11 S. W. 843; Furlow *v.* Gillian, 19 Tex. 250; Barnes *v.* Darby, 18 Tex. Civ. App. 468, 44 S. W. 1029.

United States.— Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167; Atlas Glass Co. *v.* Ball Bros. Glass Mfg. Co., 87 Fed. 418; Metropolitan Nat. Bank *v.* Benedict Co., 74 Fed. 182, 20 C. C. A. 277.

See 40 Cent. Dig. tit. "Principal and Agent," § 10; 43 Cent. Dig. tit. "Sales," §§ 17–19.

Contract to manufacture and sell.— Where the owner of a cheese factory agreed with dairymen to manufacture their milk into butter and cheese at a certain rate per pound, he to sell the product and pay them the proceeds, less his compensation, in proportion to the amount of milk furnished by each, the transaction did not amount to a sale of the milk to the manufacturer, but he was simply the agent of the dairymen. Elgin First Nat. Bank *v.* Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174. And see Sattler *v.* Hallock, 160 N. Y. 291, 54 N. E. 667, 73 Am. St. Rep. 686, 46 L. R. A. 679 [*affirming* 15 N. Y. App. Div. 500, 44 N. Y. Suppl. 543]; Stewart *v.* Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215.

59. *Colorado.*— Lemp *v.* Ryus, 7 Colo. App. 37, 42 Pac. 169.

Connecticut.— See Harris *v.* Coe, 71 Conn. 157, 41 Atl. 552; Johnson *v.* Allen, 70 Conn. 738, 40 Atl. 1056, holding that delivery on such terms is a bailment, and that the bailee is not liable for the goods until he sells.

Illinois.— Peoria Mfg. Co. *v.* Lyons, 153 Ill. 427, 38 N. E. 661; House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; Fleet *v.* Hertz, 98 Ill. App. 564; Boehm *v.* Griebenow, 78 Ill. App. 675; People *v.* Midkiff, 71 Ill. App. 141; David Bradley Mfg. Co. *v.* Raynor, 70 Ill. App. 639; Peoria Mfg. Co. *v.* Lyons, 55 Ill. App. 41; Barnes *v.* Morse, 38 Ill. App. 274; Hadfield *v.* Berry, 28 Ill. App. 376.

Indiana.— Whitman Agricultural Co. *v.* Hornbrook, 24 Ind. App. 255, 55 N. E. 502.

Iowa.— Henney Buggy Co. *v.* Cathels, 110 Iowa 24, 81 N. W. 164; Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369; Butterick Pub. Co. *v.* Bailey, 105 Iowa 326, 75 N. W. 189; Norwegian Plow Co. *v.* Clark, 102 Iowa 31, 70 N. W. 808; Balch *v.* Ashton, 54 Iowa 123, 6 N. W. 146.

Maryland.— Gibney *v.* Curtis, 61 Md. 192; Albert *v.* Lindau, 46 Md. 334.

Michigan.— De Kruif *v.* Flieman, 130 Mich. 12, 89 N. W. 558; Henry Bill Pub. Co. *v.* Durgin, 101 Mich. 458, 59 N. W. 812; Aspinwall Mfg. Co. *v.* Johnson, 97 Mich. 531, 56 N. W. 932; Granite Roofing Co. *v.* Casler, 82 Mich. 466, 46 N. W. 728; Adriance *v.* Rutherford, 57 Mich. 170, 23 N. W. 718.

Minnesota.— Sutton *v.* Baker, 91 Minn. 12, 97 N. W. 420.

Missouri.— Chapman *v.* Kerr, 80 Mo. 158; Blow *v.* Spear, 43 Mo. 496, 97 Am. Dec. 412; Bicking *v.* Stevens, 69 Mo. App. 168.

Nebraska.— Richardson Drug Co. *v.* Oberfelder, 58 Nebr. 822, 80 N. W. 50; Yoder *v.* Haworth, 57 Nebr. 150, 77 N. W. 377, 73 Am. St. Rep. 496; Mack *v.* Drummond Tobacco Co., 48 Nebr. 397, 67 N. W. 174, 58 Am. St. Rep. 691; Houck *v.* Linn, 48 Nebr. 227, 66 N. W. 1103.

New York.— Weston *v.* Brown, 158 N. Y. 360, 53 N. E. 36 [*affirming* 36 N. Y. Suppl. 675]; Fish *v.* Benedict, 74 N. Y. 613; Roosevelt *v.* Nusbaum, 75 N. Y. App. Div. 117, 77 N. Y. Suppl. 457; Vosbury *v.* Mallory, 70 N. Y. App. Div. 247, 75 N. Y. Suppl. 480; Baker *v.* Turner, 19 N. Y. App. Div. 223, 46 N. Y. Suppl. 25; Depew *v.* Keyser, 3 Duer 335; Marsh *v.* Wickham, 14 Johns. 167.

North Carolina.— Kellam *v.* Brown, 112 N. C. 451, 17 S. E. 416.

Pennsylvania.— Braunn *v.* Keally, 146 Pa. St. 519, 23 Atl. 389, 28 Am. St. Rep. 811; Ruthrauff *v.* Hagenbuch, 58 Pa. St. 103; Seyfert *v.* Herron, 11 Wkly. Notes Cas. 72.

Rhode Island.— Brayman *v.* Leslie, 16 R. I. 521, 17 Atl. 922.

Tennessee.— Atlanta Guano Co. *v.* Phipps, (Ch. App. 1897) 41 S. W. 1087.

Texas.— Texas Brewing Co. *v.* Templeman, 90 Tex. 277, 38 S. W. 27; Williams *v.* Drummond Tobacco Co., 17 Tex. Civ. App. 635, 44 S. W. 185.

Utah.— Haarstick *v.* Fox, 9 Utah 110, 33 Pac. 251.

Virginia.— Howell *v.* Boudar, 95 Va. 815, 30 S. E. 1007; Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496.

United States.— *In re* Linforth, 1 Fed. Cas. No. 8,369, 16 Nat. Bankr. Reg. 435, 4 Sawy. 370; *Ex p.* Flannagans, 9 Fed. Cas. No. 4,855, 2 Hughes 264, 12 Nat. Bankr. Reg. 230; Nutter *v.* Wheeler, 18 Fed. Cas. No. 10,384, 2 Lowell 346.

England.— *Ex p.* White, L. R. 6 Ch. App.

a large class of cases arising from the consignment of goods under special contracts in which distinctions are difficult because the same contract contains some provisions characteristic of shipment to a consignee as agent for the purpose of sale to third persons, and of shipment to a purchaser as principal debtor, with power to dispose of the goods as his own.[60] In general provisions that the consignee shall, on receipt of the goods or at some stated time or times thereafter, pay for all goods received, whether sold or not, and that he may sell to whom he will, at what price and on what terms he will, are characteristic of a contract of sale,[61]

397, 40 L. J. Bankr. 73, 24 L. T. Rep. N. S. 45, 19 Wkly. Rep. 488.

See 40 Cent. Dig. tit. "Principal and Agent," § 10; 43 Cent. Dig. tit. "Sales," §§ 17–19.

Illustrations.— A contract providing that defendants were to manufacture and sell a certain number of machines to plaintiff, and that plaintiff was to purchase the machines from defendants at a specified price and on certain terms, is a contract of sale, and not one constituting plaintiff defendants' agent. Whitman Agricultural Co. *v.* Hornbrook, 24 Ind. App. 255, 55 N. E. 502. Plaintiff, a musical instrument manufacturer, agreed to appoint defendant his exclusive agent in New York, and to advance necessary funds to pay rents for the first six months, to be repaid within three months from the date of the advance, and to consign on sale to defendant the stock necessary to equip the agency. Defendant agreed to rent, at his own expense, a suitable apartment, employ necessary assistance, devote his time to the sale of plaintiff's wares, and to pay plaintiff certain percentages of the advertised price of the merchandise. Defendant also agreed to make monthly settlements and remit for all balances due plaintiff, to keep up the stock of instruments, etc., by reordering as fast as sold, and to pay monthly for such instruments and music so reordered, and for all other instruments and music at the rate specified. It was held that the contract was for the sale of goods on credit, and did not create a fiduciary relation between the parties; and that such construction was not changed by a subsequent writing by which defendant acknowledged his indebtedness to plaintiff in payment for musical instruments, etc., which he promised to pay in specified monthly instalments, and authorizing plaintiff, in case of failure, to institute such legal proceedings against him as the circumstances might warrant. Conn *v.* Chambers, 123 N. Y. App. Div. 298, 107 N. Y. Suppl. 976. Where a foreign firm agreed to sell all the goods it manufactured for the United States through defendants, and to pay them for their services a commission on all sales not made from stock, whether such sales were made by defendants or by such firm; and on all sales made by defendants in their own name from stock kept by such firm in the United States for their account, defendants were, in addition to the commission, to deduct five per cent on the invoice price of the goods, the sales on which such five per cent was allowed vested the title to such goods in defendants as buyers, and were not ordinary sales on commission. Vereinigte Pinsel-Fabriken *v.* Rogers, 52 N. Y. App. Div. 529, 65 N. Y. Suppl. 478, 31 N. Y. Civ. Proc. 37. A contract by which a manufacturer appointed a firm "special selling factors" to handle his goods, under which all goods consigned were to remain the property of the consignor until sold at prices fixed by him, the consignees to protect the consignor from decline in price and to have the benefit of any advance, and which required the consignees to remit for all goods consigned at the end of sixty days, whether sold or not, and whether collected for or not, and which did not require any report of sales, in so far as it affects the rights of third persons, is a contract of sale, and not of agency. Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285. To the same effect see Snelling *v.* Arbuckle, 104 Ga. 362, 30 S. E. 863; Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496.

60. Woodworth *v.* Wilson, 11 La. Ann. 402; Seyfert *v.* Herron, 11 Wkly. Notes Cas. (Pa.) 72; Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285; Williams Mower, etc., Co. *v.* Raynor, 38 Wis. 119.

61. Augusta Nat. Bank *v.* Goodyear, 90 Ga. 711, 16 S. E. 962; *Ex p.* Flannagans, 9 Fed. Cas. No. 4,855, 2 Hughes 264, 12 Nat. Bankr. Reg. 230; *In re* Linforth, 15 Fed. Cas. No. 8,369, 16 Nat. Bankr. Reg. 435, 4 Sawy. 370, where goods were to be furnished at a fixed price, and the consignee was to pay all freight and other charges, was to have the right to sell as he chose for what prices he pleased, and was to pay at a fixed time for all goods sold without rendering an account of sales. And see Columbia Carriage Co. *v.* Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288.

The mere word "consignee" does not mean a sale by one or a purchase by the other. The invoice is not a bill of sale, nor evidence of a sale. Sturn *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093.

However, a clause providing that the final payment for any consignment shall be made within twelve months of shipment was held, in Lenz *v.* Harrison, 148 Ill. 598, 36 N. E. 567, not to create a sale, but to be incorporated in the contract to compel the agent promptly to sell and report sales.

Option to buy or sell.— A contract that requires the consignee to pay for unsold goods at a stated time is a contract of sale and not of agency, even though the consignor reserves the right to exercise an option not to sell at that time, but to require the consignee to store the goods as the property of the consignor. But where the contract provides that goods unsold in the hands of the consignee at

whatever terms may be used in describing it.[62] If it appears that possession of property has been transferred but a naked title reserved merely to secure payment of the price, the contract is a sale, although it may in the agreement be called an agency.[63] On the other hand, provisions that title is to remain in the consignor,[64] that unsold property is to be returned,[65] and that the consignee shall pay the proceeds of sales to the consignor [66] are characteristic of agency, even though, as in a *del credere* agency, the agent guarantees payment.[67] The contract may be one of agency, although the agent is to find his compensation in the discount allowed him by the principal from the usual price,[68] in the advance he may be able to secure from third persons above the principal's price to him,[69] or, it would seem,

a certain date are to be settled for or stored, free of charge, as the property of the consignor until another season, settlement to be at the option of the consignor, the title does not pass until sales are made or the option is exercised, and the relation is one of agency. Moline Plow Co. *v.* Rodgers, 53 Kan. 743, 37 Pac. 111, 42 Am. St. Rep. 317. The contract may be one of agency and not of sale, although the consignor retains the option to require the consignee at the close of a year to purchase unsold machines or to retain them as agent or bailee to sell. Williams Mower, etc., Co. *v.* Raynor, 38 Wis. 119.

62. Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285; Williams *v.* Drummond Tobacco Co., 17 Tex. Civ. App. 635, 44 S. W. 185; Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496.

63. National Cordage Co. *v.* Sims, 44 Nebr. 148, 62 N. W. 514; Forrest *v.* Nelson, 108 Pa. St. 481; Thompson *v.* Paret, 94 Pa. St. 275; *In re* Carpenter, 125 Fed. 831, holding that a contract which provided that "all goods received under this contract . . . shall be . . . held by us, as the agents of" the seller, creates not an agency but a sale, it appearing that the consignee agreed to give his note for all goods shipped, on receipt of the invoice.

64. *Illinois.*— Lenz *v.* Harrison, 148 Ill. 598, 36 N. E. 567.

Kansas.— McKinney *v.* Grant, 76 Kan. 779, 93 Pac. 180.

Maryland.— Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351.

Texas.— Columbia Carriage Co. *v.* Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288.

Wisconsin.— Williams Mower, etc., Co. *v.* Raynor, 38 Wis. 119.

United States.— Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

See 40 Cent. Dig. tit. "Principal and Agent," § 10; 43 Cent. Dig. tit. "Sales," §§ 17–19.

65. McKinney *v.* Grant, 76 Kan. 779, 93 Pac. 180; Eldridge *v.* Benson, 7 Cush. (Mass.) 483 (where A agreed with B to furnish certain books at a certain price to such good and responsible persons as B should designate to act as agents for the sale of the books, supplying their orders, and receiving their remittances, and placing all money so received, above the amount of the price agreed on, to the credit of B; and at the close of the labors of such agents to receive all the books returned by them uninjured and credit the same at the cost price to B; and B on his part guaranteed to A the security and full payment of the stipulated price for all books so furnished; and it was held that the contract between A and B was that of principal and agent, and not that of buyer and seller, and that books furnished under the contract to the agents designated by B did not become B's property); Columbia Carriage Co. *v.* Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288. And see Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351.

66. *Georgia.*— Augusta Nat. Bank *v.* Goodyear, 90 Ga. 711, 16 S. E. 962.

Kansas.— McKinney *v.* Grant, 76 Kan. 779, 93 Pac. 180.

Louisiana.— See Woodworth *v.* Wilson, 11 La. Ann. 402.

New York.— Cæsar Misch Incorporation *v.* Mosheim, 123 N. Y. App. Div. 322, 107 N. Y. Suppl. 1092.

Wisconsin.— Williams Mower, etc., Co. *v.* Raynor, 38 Wis. 119.

United States.— See Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

See 40 Cent. Dig. tit. "Principal and Agent," § 10; 43 Cent. Dig. tit. "Sales," §§ 17–19.

67. Lambeth Rope Co. *v.* Brigham, 170 Mass. 518, 49 N. E. 1022; Willcox, etc., Sewing Mach. Co. *v.* Ewing, 141 U. S. 627, 12 S. Ct. 94, 35 L. ed. 882. And see Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

Del credere agency see FACTORS AND BROKERS, 19 Cyc. 109.

68. Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238; Willcox, etc., Sewing Mach. Co. *v.* Ewing, 141 U. S. 627, 12 S. Ct. 94, 35 L. ed. 882. See, however, Vereinigte Pinsel-Fabriken *v.* Rogers, 52 N. Y. App. Div. 529, 65 N. Y. Suppl. 478. 31 N. Y. Civ. Proc. 37. *Compare* Nagle *v.* McNorton, 65 Miss. 197, 3 So. 650; Scyfert *v.* Herron, 11 Wkly. Notes Cas. (Pa.) 72, in both of which cases similar facts were held to constitute an agreement, not of agency, but of sale at a discount.

69. Augusta Nat. Bank *v.* Goodyear, 90 Ga. 711, 16 S. E. 962; Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351 (holding that the fact that goods are consigned for sale with the provision that the factor may retain on a sale of the property all the money in excess of the invoice price does not destroy the relation of factor and principal, and render the

even though the contract provides no compensation at all for the agent.[70] Not all the cases can be reconciled. Some contracts seem to have been intentionally so drawn as to enable the consignor of goods to treat the contract as either sale or agency, or both, as might suit his purpose.[71] However such a contract may be regarded as between the parties, the courts will endeavor so to construe it as to protect the rights of others, and save them from prejudice because of the uncertain or contradictory terms of the contract.[72] To make a sale and at the same time constitute the buyer simply an agent of the seller to hold the property until it is paid for is an attempt to accomplish what cannot be done. The two things are incompatible and cannot coexist.[73] It is possible, however, to create by one contract a relation of agency which is to be changed by the fulfilment of given conditions or by the exercise of an option by one of the parties into a conditional or absolute sale.[74] In such cases on fulfilment of the condition [75] or the exercise of the option [76] title at once passes to the agent; and this is so even though he may not have paid for the goods as the contract provides, where payment of the price is not made a condition precedent to the passing of title.[77] The distinction between contracts of agency and of sale is often of importance. In some states the statutes require contracts of sale to be registered, and the validity of a given contract may depend on showing that it is a contract of agency and not of sale.[78] So the validity of a contract may depend on whether it is a contract of sale within the statute of frauds or an agency.[79] Again the distinction may be vital in determining questions arising between the principal or seller and the agent or buyer, especially as to the liability of the latter to the former. More often it becomes an issue in

transaction a conditional sale); Lambeth Rope Co. *v.* Brigham, 170 Mass. 518, 49 N. E. 1022; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

70. Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722, where it appeared not only that the contract made no provision for compensation to the agent, but that the agent paid five thousand dollars for the option to buy, this to be applied on the purchase-price, and sale was to be at not less than five hundred thousand dollars, and the court held that if more were secured it would belong not to the agent as compensation, but to the principal.

71. Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285. And see Snelling *v.* Arbuckle, 104 Ga. 362, 30 S. E. 863.

72. Lenz *v.* Harrison, 148 Ill. 598, 36 N. E. 567; Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; Bayliss *v.* Davis, 47 Iowa 340; Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285.

However, the law will not override the will of the parties in the construction of their own contracts for the benefit of a third person whose interests are not affected thereby, or who acquired his interest with full knowledge of what the parties conceded and agreed was their contract. Metropolitan Nat. Bank *v.* Benedict Co., 74 Fed. 182, 20 C. C. A. 377.

73. Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496. And see Snelling *v.* Arbuckle, 104 Ga. 362, 30 S. E. 863.

74. Ætna Powder Co. *v.* Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194; Forrest *v.* Nelson, 108 Pa. St. 481, where it is held that a present sale and delivery of property coupled with an agreement that the title shall not vest until the price is paid is quite different from a present delivery coupled with an option to purchase, title meantime remaining in the first party; the former is a sale, the latter becomes such only when the option is exercised. See also Nutter *v.* Wheeler, 18 Fed. Cas. No. 10,384, 2 Lowell 346.

75. Ætna Powder Co. *v.* Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194.

76. Moline Plow Co. *v* Rodgers, 53 Kan. 743, 37 Pac. 111, 42 Am. St. Rep. 317.

77. Ætna Powder Co. *v.* Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194; Norwegian Plow Co. *v.* Clark, 102 Iowa 31, 70 N. W. 808, where the court said that the fact that the consignor had failed to exact compliance with the contract by the consignee would not change the nature of the transaction.

Election of remedies.— In Moline Plow Co. *v.* Rodgers, 53 Kan. 743, 37 Pac. 111, 42 Am. St. Rep. 317, it appeared that the consignors, when their agent absconded, had a right under the contract to demand a return of the unsold goods or to treat the season as closed and sue for the price of the goods whether sold by the agent or remaining in his possession unsold. With knowledge of the material facts, the consignors elected to sue for the price, and it was held that they could not thereafter abandon their first election and choose the opposite remedy. See, generally, ELECTION OF REMEDIES, 15 Cyc. 251; SALES.

78. See Columbia Carriage Co. *v.* Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288; Monitor Mfg. Co. *v.* Jones, 96 Wis. 619, 72 N. W. 44.

Necessity of registration see SALES.

79. Requirements of statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 238 *et seq.*

questions arising with third persons, as in cases where the agent or buyer is insolvent and creditors seek to attach his property, including that in his possession by shipment from the principal or seller.[80] A common mode of sale, especially of real estate, is by an option bond by the terms of which the prospective purchaser secures an option for the purchase of the property on given terms within a stated time. Such a contract does not *per se* constitute the option holder the owner's agent, and if the transaction is really what it purports to be it creates the relation of possible vendor and purchaser.[81] But where the option bond is a mere form of agency given to secure to the agent control of the negotiations, or to lend to him the appearance and character of a purchaser for its effect on third persons with whom the agent may negotiate, and it was not contemplated that the agent should really acquire any title or become the purchaser, then the con-

80. Contracts held to be sales, although having some of the marks of agency, see Elgin First Nat. Bank *v.* Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174; Ætna Powder Co. *v.* Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194; Norwegian Plow Co. *v.* Clark, 102 Iowa 31, 70 N. W. 808 [*distinguishing* Bayliss *v.* Davis, 47 Iowa 340]; Keene *v.* Demelman, 172 Mass. 17, 51 N. E. 188; Aspinwall Mfg. Co. *v.* Johnson, 97 Mich. 531, 56 N. W. 932; Roosevelt *v.* Nusbaum, 75 N. Y. App. Div. 117, 77 N. Y. Suppl. 457; Russell *v.* McSwegan, 84 N. Y. Suppl. 614; Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285; Columbia Carriage Co. *v.* Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288; Williams *v.* Drummond Tobacco Co., 17 Tex. Civ. App. 635, 44 S. W. 185; Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496; *In re* Carpenter, 125 Fed. 831; Saxlehner *v.* Eisner, etc., Co., 88 Fed. 61; *Ex p.* Flannagans, 9 Fed. Cas. No. 4,855, 2 Hughes 264, 12 Nat. Bankr. Reg. 230; *In re* Linforth, 15 Fed. Cas. No. 8,369, 4 Sawy. 370, 16 Nat. Bankr. Reg. 435; Nutter *v.* Wheeler, 18 Fed. Cas. No. 10,384, 2 Lowell 346; *Ex p.* White, L. R. 6 Ch. 397, 40 L. J. Bankr. 73, 24 L. T. Rep. N. S. 45, 19 Wkly. Rep. 488, a leading case on this subject.

Contracts held to constitute agencies, although having some of the marks of sales, see Taylor *v.* Burns, 8 Ariz. 463, 76 Pac. 623; Robinson *v.* Easton, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167; Holleman *v.* Bradley Fertilizer Co., 106 Ga. 156, 32 S. E. 83; Augusta Nat. Bank *v.* Goodyear, 90 Ga. 711, 16 S. E. 962; Lenz *v.* Harrison, 148 Ill. 598, 36 N. E. 567; Burton *v.* Goodspeed, 69 Ill. 237; Norton *v.* Melick, 97 Iowa 564, 66 N. W. 780; Thompson *v.* Barnum, 49 Iowa 392; Bayliss *v.* Davis, 47 Iowa 340; Conable *v.* Lynch, 45 Iowa 84; Crooker *v.* Brown, 40 Iowa 144; Moline Plow Co. *v.* Rodgers, 53 Kan. 743, 37 Pac. 111, 42 Am. St. Rep. 317; Com. *v.* Parlin, etc., Co., 118 Ky. 168, 80 S. W. 791, 26 Ky. L. Rep. 58; Lambeth Rope Co. *v.* Brigham, 170 Mass. 518, 49 N. E. 1022; Dittmar *v.* Norman, 118 Mass. 319; Walker *v.* Butterick, 105 Mass. 237; Eldridge *v.* Benson, 7 Cush. (Mass.) 483; Dewes Brewery Co. *v.* Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270; Osborne *v.* Josselyn, 92 Minn. 266, 99 N. W. 890; Denney *v.* Wheelwright, 60 Miss. 733; National Cordage Co. *v.* Sims, 44 Nebr. 148, 62 N. W. 514; Childs *v.* Waterloo Wagon Co., 37 N. Y. App. Div. 242, 57 N. Y. Suppl. 520; Matter of Chambers, 17 N. Y. App. Div. 340, 45 N. Y. Suppl. 264; Wight *v.* Wood, 57 Barb. (N. Y.) 471; Daly *v.* Stetson, 54 N. Y. Super. Ct. 202; Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488; Keystone Watch Case Co. *v.* Fourth St. Nat. Bank, 194 Pa. St. 535, 45 Atl. 328; Brown *v.* Billington, 163 Pa. St. 76, 29 Atl. 904, 43 Am. St. Rep. 780; Balderston *v.* National Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772; Wright *v.* Calhoun, 19 Tex. 412; Barnes *v.* Darby, 18 Tex. Civ. App. 468, 44 S. W. 1029; Monitor Mfg. Co. *v.* Jones, 96 Wis. 619, 72 N. W. 44; Williams Mower, etc., Co. *v.* Raynor, 38 Wis. 119; Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093; Willcox, etc., Sewing-Mach. Co. *v.* Ewing, 141 U. S. 627, 12 S. Ct. 94, 35 L. ed. 882; Metropolitan Nat. Bank *v.* Benedict Co., 74 Fed. 182, 20 C. C. A. 377.

81. *California.*— Robinson *v.* Easton, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167, where plaintiffs authorized defendant to sell land for them, no terms being stated in the agreement, at a certain price, within five days, agreeing to pay as commission whatever the land brought over the price fixed, and it was held that defendant was more than a mere agent of plaintiffs, the agreement being in the nature of an option for five days.

Massachusetts.— Keene *v.* Demelman, 172 Mass. 17, 51 N. E. 188, where a real estate broker obtained an option on lots containing an agreement that they were to be transferred to the grantee or his assigns on payment of the consideration, and it was held that on the face of the contract the relation of the parties was that of possible vendor and purchaser and not that of principal and agent.

New York.— Russell *v.* McSwegan, 84 N. Y. Suppl. 614.

Wisconsin.— Harney *v.* Burhans, 91 Wis. 348, 64 N. W. 1031.

United States.— Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371; Mason *v.* Crosby, 16 Fed. Cas. No. 9,235, 2 Ware 306.

England.— Livingston *v.* Ross, [1901] A. C. 327, 70 L. J. P. C. 58, 85 L. T. Rep. N. S. 382.

See 40 Cent. Dig. tit. "Principal and Agent," § 9; 43 Cent. Dig. tit. "Sales," §§ 17–19; 48 Cent. Dig. tit. "Vendor and Purchaser," § 3.

But see Chezum *v.* Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109.

tract is one of agency, and not of sale.[82] And it has been said that the courts incline to construing such a contract as an agency rather than as a prospective sale. Even where the language purports to provide for a sale, yet if the circumstances show an intent to create an agency, it will be construed as creating the relation of principal and agent.[83] Instead of an option to purchase, the agency sometimes takes the form of a power of attorney to the agent to receive or sell the land. Such an instrument creates an agency, and is not a conveyance to the agent, even though it is for his beneficial use.[84] Where a person is employed to purchase goods on behalf of another the transaction is an agency to buy;[85] but if it is the intention of the parties that the one is to purchase on his own behalf and sell the goods to the other, the transaction is a contract to sell.[86] So where one person, on the order of another, secures and ships goods to him on a commission, the undertaking is presumptively an agency and not a sale,[87] although in doubtful cases the

82. Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722; Barber *v.* Martin, 67 Nebr. 445, 93 N. W. 722; Chezum *v.* Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109; Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371; Daniel *v.* Mitchell, 6 Fed. Cas. No. 3,562, 1 Story 172; Doggett *v.* Emerson, 7 Fed. Cas. No. 3,960, 3 Story 700; Hough *v.* Richardson, 12 Fed. Cas. No. 6,722, 3 Story 659; Mason *v.* Crosby, 16 Fed. Cas. No. 9,235, 2 Ware 306. But see Robinson *v.* Easton, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167; Haarstick *v.* Fox, 9 Utah 110, 33 Pac. 251.

83. Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722; Chezum *v.* Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109. But see Robinson *v.* Easton, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167.

84. Freeman *v.* Rahm, 58 Cal. 111 (holding that a power of attorney to receive the principal's share of an estate, executed in consummation of a sale of the principal's interest therein to the attorney, and duly acknowledged and recorded, will not operate to transfer the title as against an attachment levied by a creditor on the interest of the principal); Tharp *v.* Brenneman, 41 Iowa 251 (where it was held that the execution of a simple power of attorney, without words of conveyance but authorizing a conveyance to be made to certain persons on certain conditions and for certain purposes, vests no interest in such beneficiaries); Douglas *v.* De Laittre, 55 Fed. 873 (holding that an irrevocable power of attorney to sell and convey land, coupled with a release to the attorney of the grantor's claim to the proceeds of any sales made by the attorney, does not vest in the attorney the title to the land). And see Kimmell *v.* Powers, (Okla. 1907) 91 Pac. 687.

In Texas similar powers to an agent have been construed as a sale, but the court seems to emphasize the consideration that it was a well known fact that this course was frequently adopted "at that day" to effect a conveyance. Brown *v.* Simpson, 67 Tex. 225, 2 S. W. 644; Cook *v.* Lindsay, 57 Tex. 67; Cox *v.* Bray, 28 Tex. 247; Davidson *v.* Senior, 3 Tex. Civ. App. 547, 23 S. W. 24.

85. *Illinois.*— National School Furnishing Co. *v.* Cole, 30 Ill. App. 156.

Massachusetts.— Whitney *v.* Beckford, 105 Mass. 267.

Michigan.— Hatch *v.* McBrien, 83 Mich. 159, 47 N. W. 214.

New York.— Keswick *v.* Rafter, 35 N. Y. App. Div. 508, 54 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 653, 59 N. E. 1124]; Field *v.* Banker, 9 Bosw. 467.

England.— Seymour *v.* Pychlau, 1 B. & Ald. 14.

See 40 Cent. Dig. tit. "Principal and Agent," § 9; 43 Cent. Dig. tit. "Sales," §§ 17–19.

86. Black *v.* Webb, 20 Ohio 304, 55 Am. Dec. 456; Robertson *v.* Shannon, 1 McMull. (S. C.) 164; Kelly *v.* Sibley, 137 Fed. 586, 69 C. C. A. 674, holding that where defendant proposed to sell plaintiffs an unlimited quantity of machine bolts which he was to get under a contract which he had with non-resident manufacturers, and plaintiffs replied, accepting the offer and requesting that defendant place the order with the factory and advise plaintiffs how soon they could look for shipment, defendant was a seller of the bolts and not plaintiff's agent to buy or purchase the same.

Agent advancing money for purchase.— Where a commercial correspondent, set in motion by a principal for whom he acts, advances his own money or credit for the purchase of property, and takes the bill of lading in his own name, looking to the property as the means of reimbursement until the original principal shall pay the price, he becomes the owner, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the price is paid. New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300; Moors *v.* Kidder, 106 N. Y. 32, 12 N. E. 818; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568.

87. Hunter *v.* Gordon, 33 Ill. App. 464; Whitney *v.* Beckford, 105 Mass. 267 (holding that a person was an agent, and not a seller, where he bought goods on the order of another, charging a commission, although he consigned the goods to himself, attaching a draft on the principal to the bill of lading, which he indorsed in blank, and sending the draft and bill of lading through a bank for presentment to and acceptance by the prin-

question must be determined upon a review of all that passed between the parties, before and contemporaneously with the dealings under consideration,[88] whether the relation created is that of principal and agent [89] or seller and buyer; [90] and some contracts have been held to create one an agent in procuring specified goods, and a seller in subsequently transferring and delivering them to the principal.[91] In all these transactions the controlling question in every case is what was the intent of the parties,[92] as it may be gathered, not from chance words or names used in describing the relation cut off,[93] but as it is evidenced by a consideration of the entire instrument,[94] and from the circumstances surrounding it.[95]

3. Classes or Kinds of Agents. Agents may be classified in various ways: (1) With reference to the manner of their appointment, agents are either express or implied. If they are appointed in terms, whether verbally or by writing, the agency is express; if they are not appointed in terms, but the appointment is implied as a matter of fact from the conduct of the parties and the circumstances of the case, the agency is implied.[96] (2) With reference to their authority in fact, agents are said to be either (a) actual or (b) apparent or ostensible. An actual agent is one who has, either expressly or by implication in fact, been authorized by the principal to act in his behalf. An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him.[97] (3) With reference to the scope of their authority

cipal); Hatch *v.* McBrien, 83 Mich. 159, 47 N. W. 214.

88. Hunter *v.* Gordon, 33 Ill. App. 464.

89. See cases cited *supra*, note 87.

90. Central Georgia Land, etc., Co. *v.* Exchange Bank, 101 Ga. 345, 20 S. E. 863 (where it was held that one whose business it was to receive orders for cotton, and fill them when he thought he could purchase at a price that would yield him a profit, was an independent dealer, and not the agent of his customers); Simonds *v.* Wrightman, 36 Oreg. 120, 58 Pac. 1100 (holding that one is an independent dealer, and not an agent, who purchases hops of the growers and ships them to another, drawing sight drafts therefor on the latter, and stating that his "offers and your orders are good for 24 hours, unless otherwise stipulated").

91. Columbus Constr. Co. *v.* Crane Co., 52 Fed. 635, 3 C. C. A. 216. And see Ireland *v.* Livingston, L. R. 5 H. L. 395, 41 L. J. Q. B. 201, 27 L. T. Rep. N. S. 79.

92. Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496; Monitor Mfg. Co. *v.* Jones, 96 Wis. 619, 72 N. W. 44; Williams Mower, etc., Co. *v.* Raynor, 38 Wis. 119. And see cases cited *passim*, this section.

93. Peek *v.* Heim, 127 Pa. St. 500, 17 Atl. 984, 14 Am. St. Rep. 865; Texas Brewing Co. *v.* Anderson, (Tex. Civ. App. 1897) 40 S. W. 737; Towle *v.* White, 29 L. T. Rep. N. S. 78, 21 Wkly. Rep. 465; *Ex p.* White, L. R. 6 Ch. App. 397. And see cases cited *passim*, this section.

94. Taylor *v.* Burns, 8 Ariz. 463, 468, 76 Pac. 623 [*affirmed* in 203 U. S. 220, 76 Pac. 623], where the court said: "It is a settled rule of construction of instruments of this character that the intention of the parties must govern, as this intention is evidenced by a consideration of the entire instrument . . . [and] not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligation between the parties, and the intention which they have manifested in forming them." See also Osborne *v.* Josselyn, 92 Minn. 266, 99 N. W. 890; *Ex p.* Flannagans, 9 Fed. Cas. No. 4,855, 2 Hughes 264, 12 Nat. Bankr. Reg. 230. And see cases cited *passim*, this section.

95. Burton *v.* Goodspeed, 69 Ill. 237; Woodworth *v.* Wilson, 11 La. Ann. 402; Barnes Safe, etc., Co. *v.* Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 45 Am. St. Rep. 846, 22 L. R. A. 850. See also Walker *v.* Butterick, 105 Mass. 237; Audenried *v.* Betteley, 8 Allen (Mass.) 302; Weir Plow Co. *v.* Porter, 82 Mo. 23; Peek *v.* Heim, 127 Pa. St. 500, 17 Atl. 984, 14 Am. St. Rep. 865; Thompson *v.* Paret, 94 Pa. St. 275; Livingstone *v.* Ross, [1901] A. C. 327, 70 L. J. P. C. 58, 85 L. T. Rep. N. S. 382. And see cases cited *passim*, this section. See, however, Norton *v.* Melick, 97 Iowa 564, 567, 66 N. W. 780, where the court declined to consider the claim that there was a sale when the contract expressly stated that the transaction was not a sale, but "that the title, ownership, and right of possession of said property shall be in Willis Norton & Co., until the same shall be paid for in full." "The real inquiry is," said the court, "what was the intention of the parties to the contract? And that intention must prevail, and when it is plainly and unequivocally expressed in the writing that it is an agency, and not a sale, and the title does not pass, there is no room for construction." This language cannot be accepted as an accurate statement of the law unless it is read with the limitations already noticed.

96. See *infra*, I, D, 1, c.

97. See *infra*, I, E, 2, a, (II).

agents are frequently classified as general and special or particular; and in this connection there has also been mentioned a class termed universal agents. A general agent is said to be one who has authority to transact generally the business of the principal in regard to which he is employed. A special or particular agent has been defined as an agent empowered to do a specific act or one or more specific acts, or employed for a particular purpose, or as an agent acting under limited powers, and subject to restrictions imposed by the principal. The terms "general" and "special" or "particular" in this connection are used relatively. A universal agent has been said to be one who is appointed to do all the acts that the principal may personally do, and which he may lawfully delegate to another the power of doing.[98] (4) With reference to the geographical extent of their authority some agents are said to be either general or local.[99] (5) A principal may appoint a number of agents to act for him in regard to the same matter, and in this event it becomes a question whether any one of the number may execute the authority separately or whether all must join in the act. With reference to this question agents are said to be either joint or several, according to whether all must join in executing the authority or whether one may act alone.[1] (6) With reference to the person from whom he immediately derives his authority to act in behalf of a principal, a person is said to be either an agent or a subagent. The agent derives his authority directly from the principal, or from one whom the principal has authorized, not to do the act in question, but merely to appoint an agent to do it. The subagent derives his authority to do the act in question immediately from the agent who has been appointed to do the act.[2]

B. Parties to Relation — 1. Capacity to Be Principal[3] — a. In General. Inasmuch as one who acts through an agent in law does the act himself — *qui facit per alium facit per se*, it follows that capacity to act by agent depends in general on capacity in the principal to do the act himself if he were present.[4] It is a general rule therefore that one who has capacity to act for himself may be a principal and do the act by an agent;[5] and that incapacity to appoint an agent is a necessary consequence of personal disability to do the act for which the agent is employed.[6] Presumptively, then, every person *sui juris* is capable of being a principal, while persons *non sui juris* are wholly or partially incapable of acting as principals.[7]

b. Persons Non Compos Mentis. One who is *non compos mentis* is naturally incapable of appointing an agent; being unable to comprehend business, he is equally wanting in discretion to select an agent to do such business.[8] Accordingly a lunatic is no more capable of constituting an agent than of binding himself by contract.[9] It has often been said that the power of attorney of a lunatic is not

98. See *infra*, II, A, 4, a.

99. See *infra*, II, A, 4, a.

1. See *infra*, II, C, 3.

2. See *infra*, II, D.

3. Capacity of married woman as principal see Husband and Wife, 21 Cyc. 1238, 1304.

Capacity of municipal corporation as principal see Municipal Corporations, 28 Cyc. 588; and see other public or quasi-public corporation titles.

Capacity of partnership as principal see Partnership, 30 Cyc. 491.

Capacity of private corporation as principal see Corporations, 10 Cyc. 1140.

Capacity of state as principal see States.

Purpose of relation as affecting capacity to act by agent see *infra*, I, C, 1.

4. Davis *v.* Lane, 10 N. H. 156.

5. Caley *v.* Morgan, 114 Ind. 350, 356, 16 N. E. 790; MacFarland *v.* Heim, 127 Mo. 327, 334, 29 S. W. 1030, 48 Am. St. Rep. 629 [*citing* Story Agency, § 6]; Greenwood *v.* Spring, 54 Barb. (N. Y.) 375, 377.

6. Davis *v.* Lane, 10 N. H. 156. And see Ferguson *v.* Morris, 67 Ala. 389.

A citizen of one belligerent state cannot appoint a citizen of the other belligerent state as his agent. Small *v.* Lumpkins, 28 Gratt. (Va.) 832; U. S. *v.* Grossmayer, 9 Wall. (U. S.) 72, 19 L. ed. 627.

7. MacFarland *v.* Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629 [*citing* Story Agency, § 6]; Snyder *v.* Sponable, 1 Hill (N. Y.) 567.

8. Perrine's Case, 41 N. J. Eq. 409, 5 Atl. 579, holding that one who was born deaf and dumb, and who has no comprehension of business matters, cannot select an agent to manage his business. And see Davis *v.* Lane, 10 N. H. 156.

Retrospective operation of adjudication of lunacy see *Ex p.* Bradbury, 4 Deac. 202, 3 Jur. 1108, 9 L. J. Bankr. 7, Mont. & C. 625; and Insane Persons, 22 Cyc. 1133 *et seq.*

9. Pearl *v.* McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Marvin *v.* Inglis, 39

merely voidable at his election or at the election of his representative, but is wholly void.[10] But this broad statement of the rule has often been questioned and greatly limited, and by weight of authority the contracts made by such an agent are not always void.[11] Thus it has been held that the contract of one not judicially declared a lunatic is voidable only, and as the legal effect of the contract is the same when made through an agent, the agent's appointment is of course in such a case not wholly void, but voidable at the election of the lunatic or his representatives.[12] And when, in good faith and without knowledge of the principal's insanity, consideration has been given and used for the lunatic's benefit, and the third person cannot be restored to his former position, the best considered cases uphold the agent's power so far as may be necessary equitably to protect the rights of such third person.[13] The court may, however, set aside the power of attorney and the agent's contracts on a showing that no injustice is thereby done to the third person;[14] and of course the lunatic, on restoration to sanity, may disaffirm the agency, and have all transactions by the agent in his behalf set aside except such as have been fair, in good faith, and without knowledge of the insanity, and which have led the third person so to change his position that he cannot be placed *in statu quo*.[15] On the other hand, in jurisdictions holding the lunatic's power of attorney

How. Pr. (N. Y.) 329; Snyder *v.* Sponable, 1 Hill (N. Y.) 567. And see cases cited *infra*, note 10 *et seq.*

Capacity to confer power.— For a valid execution of a power of attorney to convey land, it is essential that the party executing the power should at the time possess sufficient mind and memory to understand the nature of the business he is engaged in, and to know the character and location of the property and the object and effect of the act he is doing. In other words it is essential that he should recollect that he is the owner of the property mentioned, the place where such property is situated, and that the instrument conferred authority for the sale of the same. Hall *v.* Unger, 11 Fed. Cas. No. 5,949, 2 Abb. 507, 4 Sawy. 672 [*affirmed* in 15 Wall. 9, 21 L. ed. 73].

10. *Illinois.*— McClun *v.* McClun, 176 Ill. 376, 52 N. E. 928.

Kentucky.—Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71.

New York.— Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 285. See, however, New York cases cited *infra*, note 11 *et seq.*

United States.— Dexter *v.* Hall, 15 Wall. 9, 21 L. ed. 73 [*affirming* 11 Fed. Cas. No. 5,949, 2 Abb. 507, 4 Sawy. 672]; Plaster *v.* Rigney, 97 Fed. 12, 38 C. C. A. 25.

England.— Daily Tel. Newspaper Co. *v.* McLaughlin, [1904] A. C. 776, 73 L. J. P. C. 95, 91 L. T. Rep. N. S. 233, 20 T. L. Rep. 674; Cumming *v.* Ince, 11 Q. B. 112, 12 Jur. 331, 17 L. J. Q. B. 105, 63 E. C. L. 112; Stead *v.* Thornton, 3 B. & Ad. 357 note *b*, 23 E. C. L. 161; Tarbuck *v.* Bispham, 6. L. J. Exch. 49, 2 M. & W. 2. But see Drew *v.* Nunn, 4 Q. B. D. 661, 48 L. J. Q. B. 591, 40 L. T. Rep. N. S. 671, 27 Wkly. Rep. 810; Elliot *v.* Ince, 7 De G. M. & G. 475, 3 Jur. N. S. 597, 26 L. J. Ch. 821, 5 Wkly. Rep. 465, 56 Eng. Ch. 369, 44 Eng. Reprint 186.

See 27 Cent. Dig. tit. "Insane Persons," §§ 12, 13; 40 Cent. Dig. tit. "Principal and Agent," § 13.

11. Blinn *v.* Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806 [*affirming* 63 N. Y. App. Div. 25, 71 N. Y. Suppl. 343]. And see cases cited *infra*, note 12 *et seq.*

12. Allen *v.* Berryhill, 27 Iowa 534, 1 Am. Rep. 309; Blinn *v.* Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806 [*affirming* 63 N. Y. App. Div. 25, 71 N. Y. Suppl. 343]; Person *v.* Warren, 14 Barb. (N. Y.) 488; Wamsley *v.* Darragh, 12 Misc. (N. Y.) 199, 33 N. Y. Suppl. 274; Williams *v.* Sapieha, 94 Tex. 430, 61 S. W. 115 [*citing* Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Ferguson *v.* Houston, etc., R. Co., 73 Tex. 344, 11 S. W. 347; Cummings *v.* Powell, 8 Tex. 80].

13. Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536 [*approved* in Hill *v.* Day, 34 N. J. Eq. 150]; Blinn *v.* Schwarz, 63 N. Y. App. Div. 25, 71 N. Y. Suppl. 343 [*affirmed* in 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806, and *citing* Canfield *v.* Fairbanks, 63 Barb. (N. Y.) 461]; Merritt *v.* Merritt, 27 N. Y. App. Div. 208, 50 N. Y. Suppl. 604, 43 N. Y. App. Div. 68, 59 N. Y. Suppl. 357 [*citing* Davis *v.* Lane, 10 N. H. 156; Carter *v.* Beckwith, 128 N. Y. 312, 28 N. E. 582; Riggs *v.* American Tract Soc., 84 N. Y. 330; Mutual L. Ins. Co. *v.* Hunt, 79 N. Y. 541 [*affirming* 14 Hun 169]; Drew *v.* Nunn, 4 Q. B. D. 661, 48 L. J. Q. B. 591, 40 L. T. Rep. N. S. 671, 27 Wkly. Rep. 810]; Elias *v.* Enterprise Bldg., etc., Assoc., 46 S. C. 188, 24 S. E. 102. See also Person *v.* Warren, 14 Barb. (N. Y.) 488; Elliot *v.* Ince, 7 De G. M. & G. 475, 3 Jur. N. S. 597, 26 L. J. Ch. 821, 5 Wkly. Rep. 465, 56 Eng. Ch. 369, 44 Eng. Reprint 186.

14. Person *v.* Warren, 14 Barb. (N. Y.) 488.

15. Davis *v.* Lane, 10 N. H. 156; Person *v.* Warren, 14 Barb. (N. Y.) 488; Wamsley *v.* Darragh, 12 Misc. (N. Y.) 199, 33 N. Y. Suppl. 274; Williams *v.* Sapieha, 94 Tex. 430, 61 S. W. 115.

In those jurisdictions where it is held that the lunatic's power of attorney is void, the

voidable rather than void, he may, on being restored to sanity, ratify the act of his agent.[16]

c. Infants. It is well settled that an infant cannot bind himself absolutely by the appointment of an agent.[17] The cases are not in accord, however, as to whether the appointment of an agent by an infant is absolutely void or merely voidable at his election when he attains his majority. In very few cases holding the appointment to be void is the reason for such a rule examined, and those few rely almost entirely on a note of the editor to a case not involving agency at all.[18] Yet it cannot be denied that the majority of the cases referring to the matter take the view that the infant's letter of attorney is absolutely void.[19] There are a few cases to this effect in which the question was actually involved, the infant having ratified the act of the assumed agent but the courts holding the ratification ineffectual because the act was void,[20] or the action being one in which a third person and not the infant sought the benefit of the rule on the ground that the act, being void, could have no validity as to any one.[21] But most of these statements are mere

lunatic on being restored can of course disaffirm. Indeed, as the power is considered void there would be no possibility of affirming it. Daily Tel. Newspaper Co. *v.* McLaughlin, [1904] A. C. 776, 73 L. J. P. C. 95, 91 L. T. Rep. N. S. 233, 20 T. L. R. 674. See cases cited *supra*, note 10.

16. Blinn *v.* Schwarz, 63 N. Y. App. Div. 25, 71 N. Y. Suppl. 343 [*affirmed* in 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806].

17. See INFANTS, 22 Cyc. 514.

18. Tucker *v.* Moreland, 1 Am. Lead. Cas. 247 note. As this is almost the only reasoning in support of the rule to be found in the books it will be quoted in full. "An act which an infant is under a legal incapacity to perform, is the appointment of an attorney, or, in fact, an agent of any kind, and this rule depends upon reasoning which, if somewhat refined, is yet perhaps well founded. The constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess, that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, the power of attorney is not operative according to its terms; if they are binding upon the infant, then he has done through the agency of another what he could not have done directly, binding acts. The fundamental principle of law in regard to infants requires that the infant shall have the power of affirming such acts done by the attorney as he chooses, and avoiding others, at his option; but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts, he must ratify the power of attorney, and if he ratifies the power, all that was done under it is confirmed. If he affirms part of a transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction. Such personally and discretionary legal capacity as an infant is vested with is, therefore, in its nature incapable of delegation; and the rule that an infant cannot make an attorney is, perhaps, not an arbitrary or accidental exception to a principle, but a direct, logical necessity of that principle. But if the consideration suggested as the foundation of this rule be not satisfactory, the rule itself is established by a conclusive weight of authority." This reasoning has seemed to many courts highly artificial, and the conclusiveness of the authority in its favor has been denied, such courts preferring the view of Chancellor Kent (2 Kent Comm. 235) that "the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants shall be deemed voidable only, and subject to their election when they become of age, either to affirm or disavow them."

19. See INFANTS, 22 Cyc. 514.

20. *Delaware.*— Waples *v.* Hastings, 3 Harr. 403.

Indiana.— Trueblood *v.* Trueblood, 8 Ind. 195, 65 Am. Dec. 756, in which the court doubted that the rule was founded in solid reason, but laid it down as undoubted law.

Missouri.— Poston *v.* Williams, 99 Mo. App. 513, 73 S. W. 1099; Turner *v.* Bondalier, 31 Mo. App. 582.

New York.— Fonda *v.* Van Horne, 15 Wend. 631, 30 Am. Dec. 77.

North Carolina.— Sawyer *v.* Northan, 112 N. C. 261, 16 S. E. 1023, where the court held without argument or citation of authorities that a contract of purchase by an infant acting through an agent is a mere nullity, as an infant is incapable of appointing an agent.

Rhode Island.— Rocks *v.* Cornell, 21 R. I. 532, 45 Atl. 552, where it was held that an infant is incapable of appointing an attorney, and such appointment cannot affect the rights of the infant although he has ratified his act.

See 27 Cent. Dig. tit. "Infants," §§ 5, 7; 40 Cent. Dig. tit. "Principal and Agent," § 13.

21. Lawrence *v.* McArter, 10 Ohio 37, where one holding by deed from the infant himself brought ejectment against one holding by conveyance by the infant's attorney.

Third persons cannot avoid an infant's acts if they are not void but only voidable. See INFANTS, 22 Cyc. 547.

dicta, the cases either involving no question of agency at all,[22] or containing other facts or circumstances that must have led the court to the same decision whether the power of attorney was void or voidable.[23] Thus many of the cases were actions in which the infant was seeking to disaffirm the act of the agent, as of course he had a perfect right to do,[24] or in which there had been no ratification of the act by the infant on reaching majority.[25] In many states the cases seem inconsistent, and it is not clear what the rule is.[26] The majority of the best reasoned cases, however,

22. *Alabama.*— American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; Flexner *v.* Dickerson, 72 Ala. 318.

Illinois.— Cole *v.* Pennoyer, 14 Ill. 158.

Indiana.— Fetrow *v.* Wiseman, 40 Ind. 148.

New York.— Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 285; Roof *v.* Stafford, 7 Cow. 179, 9 Cow. 626.

Ohio.— Harner *v.* Dipple, 31 Ohio St. 72, 27 Am. Rep. 496.

Tennessee.— Barker *v.* Wilson, 4 Heisk. 268; Scott *v.* Buchanan, 11 Humphr. 468.

Virginia.— Mustard *v.* Wohlford, 15 Gratt. 329, 76 Am. Dec. 209.

United States.— In Dexter *v.* Hall, 15 Wall. 9, 21 L. ed. 73, Story, J., says he knows of no case of authority in which the letter of attorney of an infant has been held merely voidable, and he cites among other cases Whitney *v.* Dutch, 14 Mass. 462, which certainly squarely denied his position. Dexter *v.* Hall, *supra*, moreover, was a case of lunacy and not of infancy. So in Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345, an infant's letters of attorney are referred to as void, but the case did not involve the point.

England.— Zouch *v.* Parsons, 3 Burr. 1794, W. Bl. 575; Thompson *v.* Leach, 3 Mod. 302, 87 Eng. Reprint 199.

See 27 Cent. Dig. tit. "Infants," §§ 5, 7; 40 Cent. Dig. tit. "Principal and Agent," § 13.

23. *Dakota.*— Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239, was an action by an infant to disaffirm a conveyance by attorney. Plaintiff, while an infant, had married, which the court held would of itself have been a revocation of authority. Furthermore, the statutes of Dakota disabled an infant absolutely to give a delegation of power. Here were three reasons for annulling the deed, and it was scarcely necessary to invoke the common law, as the court did, to make the authority of no effect, the statute being held to be merely declaratory of the common law.

Indiana.— Pickler *v.* State, 18 Ind. 266; Tapley *v.* McGee, 6 Ind. 56; Hiestand *v.* Kuns, 8 Blackf. 345, 46 Am. Dec. 481.

Kentucky.— Semple *v.* Morrison, 7 T. B. Mon. 298; Pyle *v.* Cravens, 4 Litt. 17.

Michigan.— In Armitage *v.* Widoe, 36 Mich. 124, a much cited case, Cooley, J., laid down the doctrine that no rule is clearer than that an infant cannot empower an agent or attorney to act for him. Strangely enough the first authority cited in support is Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229, which holds the very reverse. Furthermore the contract was held to be one with which the infant had no relation, and which he had never seen until after the suit was brought.

New York.— Robbins *v.* Mount, 4 Rob. 553, 33 How. Pr. 24.

Wisconsin.— Holden *v.* Curry, 85 Wis. 504, 55 N. W. 965, which was a suit by an infant to avoid the effect of an act of one who at the time he acted was without any authority or power, but who was later appointed guardian of the infant.

See 27 Cent. Dig. tit. "Infants," §§ 5, 7; 40 Cent. Dig. tit. "Principal and Agent," § 13.

24. *Alabama.*— Glass *v.* Glass, 76 Ala. 368; Philpot *v.* Bingham, 55 Ala. 435; Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

Delaware.— Karcher *v.* Green, 8 Houst. 163, 32 Atl. 225; Carnahan *v.* Allderdice, 4 Harr. 99.

Illinois.— Fuqua *v.* Sholem, 60 Ill. App. 140.

New York.— Roof *v.* Stafford, 7 Cow. 179, 9 Cow. 626; Bennett *v.* Davis, 6 Cow. 393.

Pennsylvania.— Knox *v.* Flack, 22 Pa. St. 337; Lutes *v.* Thompson, 5 Pa. Co. Ct. 451; Cole *v.* Cole, 9 Lanc. Bar 105; Small *v.* Murphy, 1 Luz. Leg. Reg. 332.

Vermont.— Fuller *v.* Smith, 49 Vt. 253; Somers *v.* Rogers, 26 Vt. 585; Starbird *v.* Moore, 21 Vt. 529.

Virginia.— Dellinger *v.* Foltz, 93 Va. 729, 25 S. E. 998; Mustard *v.* Wohlford, 15 Gratt. 329, 76 Am. Dec. 209.

England.—Ashlin *v.* Langton, 3 L. J. C. P. 264, 4 Moore & S. 719, 30 E. C. L. 362 (where a warrant of attorney was vacated as against an infant, as of course it must be when that point is raised as an objection); Saunderson *v.* Marr, 1 H. Bl. 75; Doe *v.* Roberts, 16 M. & W. 778 (a leading case in which Parke, B., said there was no doubt about the law, an infant cannot appoint an agent; but this was *dictum*, for the action was a disaffirmance by the infant). See also Wood *v.* Heath, 1 Chit. 708 note, 18 E. C. L. 385.

See 27 Cent. Dig. tit. "Infants," §§ 5, 7; 40 Cent. Dig. tit. "Principal and Agent," § 13.

25. Burns *v.* Smith, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268; Wade *v.* Pulsifer, 54 Vt. 45; Mustard *v.* Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

26. In Alabama an exception is made in at least one case, for a partner may as agent for the partnership dispose of the funds, although one of the firm is an infant. Sadler *v.* Robinson, 2 Stew. 520.

In Connecticut it has been held that an infant may employ an attorney to prosecute her seducer, on the ground that her condition is such as to make such employment a

hold that the infant's appointment of an agent, like his other contracts not for

contract for neccssarics. Munson *v.* Washband, 31 Conn. 303, 83 Am. Dec. 151.

In Kentucky the early cases of Pyle *v.* Cravens, 4 Litt. 17, and Semple *v.* Morrison, 7 T. B. Mon. 298, speak of a warrant of attorney by an infant as absolutely void. But in the first case the court said no such warrant was proved, and in the second as the notc was signed for an infant in her presence and at her request, it may be doubted whether the court should not have ruled that the signature was really her own, as in Gardner *v.* Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740. In Duwall *v.* Graves, 7 Bush 461, 467, the court seems to regard this doctrine as antiquated. It says: "But if it be admitted that the rule, as anciently adjudged — that naked powers of attorney by infants are void — be still the arbitrary law," etc., the rule does not apply to a power coupled with an interest.

In Maine the court in two cases, like the courts of several other states, seems to have accepted without examination the doctrine that an infant cannot appoint an agent, but in neither of these cases was there any agency. Robinson *v.* Weeks, 56 Me. 102; Dana *v.* Combs, 6 Me. 89, 19 Am. Dec. 194, where the rule was limited to the delegation of a naked power with no interest. But when the question was really involved the court reached a different conclusion. Hardy *v.* Waters, 38 Me. 450, holding an indorsement of a note by the agent of an infant voidable only, and avoidable only by the infant or his heir or representative. This case is the stronger because the infant had a guardian who had not approved the transfer until after the suit was commenced. It was later vigorously attacked, but upon mature deliberation was approved in Towle *v.* Dresser, 73 Me. 252.

In Maryland the position of the court is uncertain. In Wainwright *v.* Wilkinson, 62 Md. 146, the appointment of an attorney by an infant is said to be nugatory. In this case the infant sought through her *prochein ami* to disaffirm her act, and of course should be allowed to do so. In Deford *v.* State, 30 Md. 179, it was said that infants are not capable of appointing an attorney, but there was no pretense that the infants in question had even attempted to do so; they were suing by their *prochein ami*. In the earlier case of Hall *v.* Jones, 21 Md. 439, a father, on behalf of himself and his minor children, made a contract of sale of land. It was held that the children could, on coming of age, ratify, and the ratification would date back to the date of the sale. If so the conclusion is irresistible that the agency of the father was not void but voidable.

In Massachusetts the question has been more fully considered than elsewhere, and the law seems to be firmly settled there that the infant's appointment of an agent is voidable and not void, except perhaps where it could be held as matter of law to be prejudicial to the infant. See Simpson *v.* Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 100 Am. St. Rep. 560, 63 L. R. A. 741. In Fairbanks *v.* Snow, 145 Mass. 153, 156, 13 N. E. 596, 1 Am. St. Rep. 446, the court said that "the distinction as to powers of attorney has been limited, if not wholly done away with, in Massachusetts, in regard to infants" [*citing* Moley *v.* Brine, 120 Mass. 324; Welch *v.* Welch, 103 Mass. 562; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229], although the court admits that in some of the states and in England a power of attorney given by an infant is void. There are in Massachusetts, as elsewhere, chance remarks that seem to deny the power of an infant to appoint an agent. Cassier's Case, 139 Mass. 458, 1 N. E. 920; Guild *v.* Cranston, 8 Cush. 506. In both these cases the remarks referred to the appointment of an attorney to appear in court for the infant; such appearance, of course, should be by guardian *ad litem* or by *prochein ami*. But the principal case, and the leading case for the doctrine that an infant's appointment of an attorney is voidable merely, is the early case of Whitney *v.* Dutch, *supra*, a case which strangely enough has been equally cited for and against the doctrine there laid down. In that case Parker, C. J., after careful consideration of the question, although he found no cases in point, reached the conclusion that despite many references in the books to an infant's power of attorney as an example of a void contract, the infant's appointment of an agent, except perhaps an appointment that must be under seal, is not absolutely void but voidable only, and he perceives no satisfactory reason for excepting even powers under seal.

In Missouri the courts have examined the question with some care and reached the conclusion that an infant cannot appoint an agent. The case of Poston *v.* Williams, 99 Mo. App. 513, 73 S. W. 1099, was an action by an infant against his agent, and the operation of the rule denied the infant relief for what appears to have been the fraud of the agent. The court relied on Turner *v.* Bonalier, 31 Mo. App. 582, a rather unusual case, almost the only one in which the question is considered on reason and the old rule upheld, although the court found that the decision must have been the same for another cause. The result was to throw the infant out of court because the affidavit to his statement in replevin was made by attorney. A *prochein ami* had been appointed and of course should have acted, but the court went further and declared that any appointment of an agent by an infant by a power of attorney is void. The authorities were reviewed, and the erroneous statement of Strong, J., in Dexter *v.* Hall, 15 Wall. (U. S.) 9, 26, 21 L. ed. 73, that Massachusetts so holds was quoted with approval. The conclusion was reached that the rule is, perhaps, not arbitrary or accidental, but necessary for the protection of the infant. The application of the rule in Missouri seems not to have

necessaries, is a voidable contract,[27] subject to affirmance or disaffirmance after the infant comes of age. He may then ratify or deny both the appointment of the

been a benefit, but in each case a clear detriment to the infant, enabling the other party, and not the infant, to take advantage of the infancy. In Thompson *v.* Lyon, 20 Mo. 155, 61 Am. Dec. 599, an infant's power of attorney coupled with an interest is said to be bad. *Compare* Duvall *v.* Graves, 7 Bush (Ky.) 461; Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176, in both which eases the court says such a power is good, although a naked power is void. Irreconcilable with these Missouri eases seems the early case of Ward *v.* The Little Red, 8 Mo. 358, in which it was said that an infant may become a party to a contract made without his authority by a subsequent ratification. See also MacFarland *v.* Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629, in which the court quotes with approval the statement in Story Agency, § 6, that infants "are incapable of appointing agents, except under special circumstances."

In Nebraska there is no case directly discussing the general question. The right of an attorney to recover for services rendered to a minor was in Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176, made to depend on whether they could under the circumstances be called necessaries. The implication seems to be that there may be a valid employment of attorney by an infant. See also the general discussion of voidability of infant's contracts in Englebert *v.* Troxell, 40 Nebr. 195, 58 N. W. 852, 42 Am. St. Rep. 665, 26 L. R. A. 177.

In New Hampshire, although the broad question was not passed upon, it was held that an infant may under certain circumstances employ an attorney to appear for him in a suit, and that he will be bound by the acts of such attorney (Belivean *v.* Amoskeag Mfg. Co., 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L. R. A. 167), and may be liable to the attorney for his services (Barker *v.* Hibbard, 54 N. H. 539, 20 Am. Rep. 160).

In South Carolina it seems always to have been taken for granted that an infant may ratify the acts of his agent. The case of Shumate *v.* Harbin, 35 S. C. 521, 15 S. E. 270, might have rested on the theory that the contract of a mother as agent for the improvement of the property of her infant child was a contract for necessaries, but the original contract by which the child became owner of the property through the act of the mother as agent could not be so explained. The case of Rhode *v.* Tuten, 34 S. C. 496, 13 S. E. 676, was similar, the contract of a mother in leasing the land of her infant children being upheld as a valid agreement, although no guardianship was shown. In Salinas *v.* Bennett, 33 S. C. 285, 11 S. E. 968, the contract of a partner was held to bind an infant partner, the fact that the latter remained in the partnership and drew profits therefrom after coming of age being regarded as a ratification. The case of Scott *v.* Scott, 29 S. C. 414, 7 S. E. 811, is a clear statement of the rule that the contract of an agent for an infant principal is "not absolutely void, but voidable." This point was not necessarily involved, for the infant chose to disaffirm and no ratification was shown. In Miller *v.* Sims, 2 Hill 479, a partnership liability was involved, but the earlier case of Alexander *v.* Heriot, Bailey Eq. 223, was decided on the broad ground that if an agent makes a contract for an infant, although not for necessaries, and the infant after coming of age affirms it, he is bound thereby. The still earlier case of Belton *v.* Briggs, 4 Desauss. Eq. 465, is undoubted authority for the same doctrine.

See 27 Cent. Dig. tit. "Infants," §§ 5, 7; 40 Cent Dig. tit. "Principal and Agent," § 13.

27. *California.*— In Hastings *v.* Dollarhide, 24 Cal. 195, 208, the rule is stated thus: "It is established by the tenor of the modern decisions that an infant may execute a promissory note by agent." The infant's appointment of an agent is voidable and not void, and no one can take advantage of the fact of infancy but the infant himself or his heirs or personal representatives. In Childs *v.* Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121, an infant was held to be bound by a judgment, where he appeared by attorney and no guardian *ad litem* had been appointed. The question is now governed by statute in California. See Cal. Civ. Code. § 33.

Maine.— Towle *v.* Dresser, 73 Me. 252; Hardy *v.* Waters, 38 Me. 450.

Massachusetts.— Simpson *v.* Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 100 Am. St. Rep. 560, 63 L. R. A. 741; Fairbanks *v.* Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; Stiff *v.* Keith, 143 Mass. 224, 9 N. E. 577; Moley *v.* Brine, 120 Mass. 324; Welch *v.* Welch, 103 Mass. 562; McCarty *v.* Murray, 3 Gray 578; Miles *v.* Boyden, 3 Pick. 213; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229, a leading case.

Minnesota.— The case of Coursolle *v.* Weyerhauser, 69 Minn. 328, 72 N. W. 697, might have been decided on other grounds, but the case is interesting because of the able review of the question by Mitchell, J. The interest is greater because it involved the validity of a sealed instrument executed by the agent of an infant. The court found that on principle an infant's contract appointing an agent should stand on the same footing as any other contract, and be voidable the same as his personal contracts, citing especially Craig *v.* Van Bebber, 18 Am. St. Rep. 629 note.

New Jersey.— In Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 175, it was held that an infant's appointment of an agent was voidable only, and may be avoided by the infant alone.

Texas.—Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Ferguson *v.*

agent and the act the agent has assumed to do for him.[28] This rule furnishes the infant full protection, and yet enables him to take advantage of such contracts of an agent on his behalf as he desires to assume on reaching years of discretion;[29] and, as has been said, it is supported by the weight of reason, and by many highly respected authorities, if not by the actual weight of authority.[30]

2. Capacity to Be Agent[31]— a. In General. Any one who has capacity to act for himself is ordinarily capable of acting as agent for another.[32] But so much as this is not required, and it is generally held that one may be capable of acting as agent for another, although he is not capable of acting for himself.[33]

b. Persons Defective in Mental Capacity.[34] Although less capacity is required to act as agent than to act in one's own right,[35] still in the very nature of things some mental capacity is necessary in an agent, and it has been said that infants of tender years, lunatics, and imbeciles are therefore generally incompetent to act as such.[36] However, a person lacking in ordinary intelligence may so act in some cases at least;[37] and an intoxicated person, it seems, is not necessarily incapable of acting as agent.[38] Generally speaking the principal will not be heard to complain of the lack of mental capacity of one whom he has chosen to represent him.[39] However, an agent lacking contractual capacity, although he may bind his principal, will not of course himself be bound by an agency contract more than by any other, and hence incurs none of the agent's contractual liabilities.[40]

c. Infants.[41] All the cases are agreed that an infant may in general act as agent,[42] his capacity being limited only by the readiness of the principal to intrust to him a commission, and his own physical and mental capacity to carry out the instructions under which he acts.[43] Thus it has been held that an infant may

Houston, etc., R. Co., 73 Tex. 344, 11 S. W. 347; Vogelsang *v.* Null, 67 Tex. 465, 3 S. W. 451; Cummings *v.* Powell, 8 Tex. 80.

See 27 Cent. Dig. tit. "Infants," §§ 5, 7; 40 Cent. Dig. tit. "Principal and Agent," § 13.

28. Coursolle *v.* Weyerhauser, 69 Minn. 328, 72 N. W. 697; Ferguson *v.* Houston, etc., R. Co., 73 Tex. 344, 11 S. W. 347; Vogelsang *v.* Null, 67 Tex. 465, 3 S. W. 451.

29. See Ferguson *v.* Houston, etc., R. Co., 73 Tex. 344, 11 S. W. 347; Vogelsang *v.* Null, 67 Tex. 465, 3 S. W. 451; Cummings *v.* Powell, 8 Tex. 80.

30. See cases cited *supra*, notes 27, 28.

31. Capacity of corporation to act as agent see Corporations, 10 Cyc. 1140, and other corporation titles.

Capacity of married woman to act as agent see Husband and Wife, 21 Cyc. 1215 *et seq.*, 1234 *et seq.*, 1305.

Capacity of partnership to act as agent see Partnership, 30 Cyc. 424.

Citizen of belligerent state as agent see *supra*, page 1206, note 6.

Purpose of relation as affecting capacity to act as agent see *infra*, I, C, 1.

32. Lea *v.* Bringier, 19 La. Ann. 197.

33. Lyon *v.* Kent, 45 Ala. 656 [*citing* Stanley *v.* Nelson, 28 Ala. 514; Powell *v.* State, 27 Ala. 51]; Governor *v.* Daily, 14 Ala. 469; Cobb *v.* Judge Grand Rapids Super. Ct., 43 Mich. 289, 5 N. W. 309; Chastain *v.* Bowman, 1 Hill (S. C.) 270; King *v.* Bellord, 1 Hem. & M. 343, 32 L. J. Ch. 646, 8 L. T. Rep. N. S. 633, 2 New Rep. 442, 11 Wkly. Rep. 900, 71 Eng. Reprint 149.

34. See, generally, Insane Persons.

35. See *supra*, I, B, 2, a.

36. Lyon *v.* Kent, 45 Ala. 656.

37. Cobb *v.* Judge Grand Rapids Super. Ct., 43 Mich. 289, 5 N. W. 309.

38. Cameron *v.* Ward, 22 Ga. 168, holding that in any event third persons cannot object to his incapacity.

39. King *v.* Bellord, 1 Hem. & M. 343, 32 L. J. Ch. 646, 8 L. T. Rep. N. S. 633, 2 New Rep. 442, 11 Wkly. Rep. 900, 71 Eng. Reprint 149; Foreman *v.* Great Western R. Co., 38 L. T. Rep. N. S. 851.

40. See *infra*, III, A, 4, a, note 90. Also *compare infra*, I, B, 2, c.

41. See Infants, 22 Cyc. 515.

42. *Alabama.*— Lyon *v.* Kent, 45 Ala. 656.

Kentucky.— Talbot *v.* Bowen, 1 A. K. Marsh. 463, 10 Am. Dec. 747, holding that contracts made by him as agent bind his principal under the same conditions and circumstances that the contracts of an adult agent bind the principal.

Massachusetts.— Brown *v.* Hartford F. Ins. Co., 117 Mass. 479.

Michigan.— Cobb *v.* Judge Grand Rapids Super. Ct., 43 Mich. 289, 5 N. W. 309.

Ohio.— Sheldon *v.* Newton, 3 Ohio St. 494.

England.— *In re* D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756, 43 L. T. Rep. N. S. 135, 28 Wkly. Rep. 930; Hearle *v.* Greenbank, 3 Atk. 695, 26 Eng. Reprint 1200; King *v.* Bellord, 1 Hem. & M. 343, 32 L. J. Ch. 646, 8 L. T. Rep. N. S. 633, 2 New Rep. 442, 11 Wkly. Rep. 900, 71 Eng. Reprint 149. And see Grange *v.* Tirving, O. Bridgm. 107.

See 27 Cent. Dig. tit. "Infants," §§ 6, 7; 40 Cent. Dig. tit. "Principal and Agent," § 14.

43. Lyon *v.* Kent, 45 Ala. 656.

execute a power by instrument under seal,[44] and even, when it is clear that such was the intention, a power coupled with an interest.[45] But while an infant agent may effectually bind the principal and third person, the infant himself of course will incur none of the contractual liability attaching to an adult agent, either to his principal or to the third person.[46]

d. Persons Having or Representing Interests Adverse to Those of Principal. If, at the time of his appointment as agent, a person has or represents interests adverse to those of the principal, and the principal has no notice of that fact, he is disqualified in law to undertake the agency.[47]

C. Purpose of Relation — 1. In General. From the fundamental maxim of agency, *qui facit per alium, facit per se*, it follows that, as a general rule of law, whatever a man may do himself he may do through an agent.[48] There are, however, many acts in reference to which the common law requires personal performance on the part of the actor, and these he cannot perform by agent or attorney, an instance being that an agent cannot perform by a subagent the acts which he has been appointed to perform in person.[49] So there are many acts regulated by statute which, because of their nature or the requirements of the statute, must be done personally.[50] If a person cannot lawfully do an act himself, he cannot of

Rights of third persons.— It has been suggested that the rights of third persons may set a limit on the infant's capacity to act as agent, unless the duty undertaken is in keeping with his age, capacity, and experience. Mechem Agency, § 59. It may be doubted whether a third person can be compelled to deal with an infant agent at all, because the infant cannot, like an adult agent, be held personally liable to the third party; but if third persons consent to contract through an infant agent, it is difficult to see why they, equally with the principal who chose the agent, do not waive any right to complain of the infancy. The cases say that the infant can execute a power as fully and effectually as an adult. See cases cited *supra*, note 42.

44. U. S. Investment Corp. *v.* Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326; Sheldon *v.* Newton, 3 Ohio St. 494.

45. In the case of *In re* Cardross, 7 Ch. D. 728, 47 L. J. Ch. 327, 38 L. T. Rep. N. S. 778, 26 Wkly. Rep. 389, Jessel, M. R., after reviewing the authorities concludes that it is good law that an infant can exercise a power even though it be coupled with an interest, where an intention appears that it should be exercisable during minority. This is the doctrine of Sugden Powers (8th ed.), 911, and King *v.* Bellord, 1 Hem. & M. 343, 32 L. J. Ch. 646, 8 L. T. Rep. N. S. 633, 2 New Rep. 442, 11 Wkly. Rep. 900, 71 Eng. Reprint 149, but seems contrary to the opinion of some earlier cases. *Compare* Lord Hardwicke in Hearle *v.* Greenbank, 3 Atk. 695, 26 Eng. Reprint 1200.

46. See Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747. And see *infra*, III, A, 4, a. *Compare supra*, I, B, 2, b.

47. **Adverse interest:** As affecting liability of agent to principal see *infra*, III, A, 1, b. As affecting liability of principal to agent see *infra*, III, B, 2, d, (III), (IV); III, B, 3, c, (IV), (A). As affecting liability of principal to third person see *infra*, III, E, 1, a, (V). As affecting liability of third person to principal see *infra*, III, F, 1, c. As authorizing revocation of agency see *infra*, I, G, 1, b, (II). As terminating agency see *infra*, I, G, 2, c. (II).

Adverse interest of: Auctioneer see Auctions and Auctioneers, 4 Cyc. 1047. Broker see Factors and Brokers, 19 Cyc. 206, 207, 226–228, 234. Insurance agent see Insurance, 22 Cyc. 1435, 1442, 1445; and other insurance titles.

Creation and existence of double agency see *infra*, I, D, 1, d, (III).

48. *Alabama.*— Lyon *v.* Kent, 45 Ala. 656.

Indiana.— Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790.

Maryland.— Silverwood *v.* Latrobe, 68 Md. 620, 13 Atl. 161.

Ohio.— Brisbane *v.* Stoughton, 17 Ohio 482.

Tennessee.— Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19.

Texas.— McKee *v.* Coffin, 66 Tex. 304, 1 S. W. 276; Coffee *v.* Silvan, 15 Tex. 354, 65 Am. Dec. 169.

Vermont.— Sumner *v.* Conant, 10 Vt. 9.

Wisconsin.— Gibbs *v.* Holcomb, 1 Wis. 23.

England.— Furnivall *v.* Hudson, [1893] 1 Ch. 335, 62 L. J. Ch. 178, 68 L. T. Rep. N. S. 378, 3 Reports 230, 41 Wkly. Rep. 358; Combes' Case, 9 Coke 75*a*, 77 Eng. Reprint 843.

See 40 Cent. Dig. tit. "Principal and Agent," § 46.

49. See *infra*, II, D.

Assignment of contracts involving personal services or relation of personal confidence see Assignments, 4 Cyc. 22, 23.

Delegation by executor of testamentary power to sell land see Executors and Administrators, 18 Cyc. 323.

50. Dickson *v.* Morgan, 7 La. Ann. 490 (holding that the power of answering interrogatories on oath cannot be conferred by one person on another); Lytle *v.* Smith, 3 Humphr. (Tenn.) 327 (holding that a constable cannot constitute an agent to receive the moneys due on an execution); U. S. *v.*

course confer authority upon another as his agent to do such act in his behalf.[51]

2. Illegality. An act which, if done by the principal, would be illegal as in violation of common law or of some statutory provision cannot be done through the agency of another; and any agreement that authorizes or requires an agent to do an illegal act or tends to induce the commission thereof is consequently void.[52]

Bartlett, 24 Fed. Cas. No. 14,532, 2 Ware 17 (holding that the enrolment of a vessel under oath of the owner by agent is ineffectual). See also Finnegan *v.* Lucy, 157 Mass. 439, 32 N. E. 656.

Personal performance held not to be required by statute see Webber *v.* Brown, 38 Ill. 87 (claim to property seized on execution); Basham *v.* Com., 13 Bush (Ky.) 36 (signature of surety on sheriff's bond); Finnegan *v.* Lucy, 157 Mass. 439, 32 N. E. 656 (notice by wife not to sell liquor to husband); Lytle *v.* Smith, 3 Humphr. (Tenn.) 327 (holding that a constable may constitute an agent to take out execution); White *v.* Holliday, 11 Tex. 606 (procuring grant of public lands); *In re* Whitley, 32 Ch. D. 337, 55 L. J. Ch. 540, 54 L. T. Rep. N. S. 912, 34 Wkly. Rep. 505 (signature to memorandum of association by company); Reg. *v.* Middlesex, 1 L. M. & P. 621 (notice of appeal from order for removal of pauper); *In re* Boldero, 1 Rose 231 (signature to petition in bankruptcy).

Agency for purpose of: Acceptance of assignment in behalf of assignee see Assignments, 4 Cyc. 29 note 56. Acceptance, in behalf of creditor, of assignment for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 140. Acknowledging debt barred by limitations see Limitations of Actions, 25 Cyc. 1353. Acknowledging submission to arbitration see Arbitration and Award, 3 Cyc. 603 note 94. Answering or making disclosure in garnishment proceeding see Garnishment, 20 Cyc. 1081. Asserting claim in admiralty proceedings see Admiralty, 1 Cyc. 863 note 71. Committing act of bankruptcy see Bankruptcy, 5 Cyc. 286 note 92. Effecting accord and satisfaction see Accord and Satisfaction, 1 Cyc. 319. Entering appearance see Appearances, 3 Cyc. 512. Entering on land to interrupt adverse possession see Adverse Possession, 1 Cyc. 1011. Executing assignment for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 150. Executing bonds in general see Bonds, 5 Cyc. 735. Executing administrator's bond see Executors and Administrators, 18 Cyc. 134 note 95. Executing appeal-bond see Appeal and Error, 2 Cyc. 840. Executing attachment bond see Attachment, 4 Cyc. 534. Executing redelivery bond in attachment see Attachment, 4 Cyc. 681. Locating mining claim see Mines and Minerals, 27 Cyc. 552. Making affidavits in general see Affidavits, 2 Cyc. 5. Making affidavit in attachment see Attachment, 4 Cyc. 471. Making affidavit on appeal see Appeal and Error, 2 Cyc. 809. Taking acknowledgment see Acknowledgments, 1 Cyc. 555. Voting at meeting of creditors of bankrupt see Bankruptcy, 5 Cyc. 321.

51. Ferguson *v.* Morris, 67 Ala. 389, where it was held that a foreign administrator who has no power to collect money himself cannot appoint an agent with authority to collect the money for him.

52. *Alabama.*— Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55.

California.— Moore *v.* Moore, 130 Cal. 110, 62 Pac. 294, 80 Am. St. Rep. 78.

Colorado.— Hoyt *v.* Macon, 2 Colo. 502.

Illinois.— Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414 [*cited* in Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302].

Kansas.— Bowman *v.* Phillips, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L. R. A. 631.

Louisiana.— Irwin *v.* Levy, 24 La. Ann. 302; Haney *v.* Manning, 21 La. Ann. 166.

Michigan.— McCurdy *v.* Dillon, 135 Mich. 678, 98 N. W. 746; McDonnell *v.* Rigney, 108 Mich. 276, 66 N. W. 52.

Mississippi.— Wooten *v.* Miller, 7 Sm. & M. 380.

New York.— Sedgwick *v.* Stanton, 14 N. Y. 289; Lowey *v.* Granite State Provident Assoc., 8 Misc. 319, 28 N. Y. Suppl. 560; Parks *v.* Jacob Dold Packing Co., 6 Misc. 570, 27 N. Y. Suppl. 289; Rolfe *v.* Delmar, 7 Rob. 80.

Ohio.— Pape *v.* Standard Oil Co., 27 Ohio Cir. Ct. 111.

Pennsylvania.— Johnson *v.* Hulings, 103 Pa. St. 498, 49 Am. Rep. 131; Holt *v.* Green, 73 Pa. St. 198, 13 Am. Rep. 737.

Tennessee.—Rhodes *v.* Summerhill, 4 Heisk. 204.

Utah.— Mexican International Banking Co. *v.* Lichtenstein, 10 Utah 338, 37 Pac. 574, sale of lottery tickets.

United States.— Lanahan *v.* Pattison, 14 Fed. Cas. No. 8,036, 1 Flipp. 410.

England.— Debenham *v.* Ox, 1 Ves. 276, 27 Eng. Reprint 1029.

See 40 Cent. Dig. tit. "Principal and Agent," § 46; and cases cited *infra*, this note *et seq.*

Agency involving crime.— There can be no such thing as agency in the perpetration of a crime, but all persons actively participating are principals. Pearce *v.* Foote, 113 Ill. 228, 55 Am. Rep. 414 [*cited* in Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302]; Leonard *v.* Poole, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728; State *v.* Matthis, 1 Hill (S. C.) 37; Mexican International Banking Co. *v.* Lichtenstein, 10 Utah 338, 37 Pac. 574. And see Criminal Law, 12 Cyc. 70, and Cross-References Thereunder.

Adverse interest of agent as affecting validity of contract see *supra*, I, B, 2, d, text and note 47.

This principle is fully discussed and its various applications in other places in this work.[53]

D. Creation and Existence — 1. By Act of Parties — a. Necessity of Mutual Assent; Intention. It is a fundamental principle that agency can exist only by the will of the principal, and with the consent of the agent.[54] It is therefore essential to the formation of the relation that the principal shall in some manner, either expressly or by implication from conduct for which he is responsible, appoint the agent,[55] and that the agent shall in some way accept the appointment.[56]

53. See Contracts, 9 Cyc. 465–577.

Agency agreements involving: Gambling transactions see Gaming, 20 Cyc. 921 *et seq.* Monopolies see Monopolies, 27 Cyc. 900.

Stipulation for contingent compensation as affecting legality of contract in general see Champerty and Maintenance, 6 Cyc. 858 *et seq.* See also Attorney and Client, 4 Cyc. 989 *et seq.*

54. *Iowa.*— Storm Lake Bank *v.* Missouri Valley L. Ins. Co., 66 Iowa 617, 24 S. W. 239. And see Walton *v.* Dore, 113 Iowa 1, 84 N. W. 928.

Kansas.— State *v.* Hubbard, 58 Kan. 797, 51 Pac. 290, 39 L. R. A. 860.

New York.— Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318; Raney *v.* Weed, 3 Sandf. 577.

Ohio.— Ish *v.* Crane, 13 Ohio St. 574.

United States.— *In re* Carpenter, 125 Fed. 831; New York Cent. Trust Co. *v.* Bridges, 57 Fed. 753, 764, 6 C. C. A. 539, where it is said: "An agency is created — authority is actually conferred — very much as a contract is made, i. e. by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them."

England.— Markwick *v.* Hardingham, 15 Ch. D. 339, 43 L. T. Rep. N. S. 647, 29 Wkly. Rep. 361; Love *v.* Mack, 93 L. T. Rep. N. S. 352.

See 40 Cent. Dig. tit. "Principal and Agent," § 1.

55. *Alabama.*— Hill *v.* Helton, 80 Ala. 528, 1 So. 340; Holman *v.* Norfolk Bank, 12 Ala. 369.

Arkansas.— St. Louis, etc., R. Co. *v.* Bennett, 53 Ark. 208, 13 S. W. 742, 22 Am. St. Rep. 187.

Colorado.— Thatcher *v.* Kaucher, 2 Colo. 698.

Delaware.— State *v.* Foster, 1 Pennew. 289, 40 Atl. 939.

Illinois.— Halladay *v.* Underwood, 90 Ill. App. 130; Peoria Grape Sugar Co. *v.* Turney, 70 Ill. App. 589 [*affirmed* in 175 Ill. 631, 51 N. E. 587]; Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460.

Indiana.— Lucas *v.* Rader, 29 Ind. App. 281, 64 N. E. 488.

Kansas.— State *v.* Hubbard, 58 Kan. 797, 51 Pac. 290, 39 L. R. A. 860; Hall *v.* Smith, 3 Kan. App. 685, 44 Pac. 908, 909, where the court said: "In no case can agency be established without showing some connection between the principal and the claimed agent, from which may be reasonably inferred authority from the principal to do the act for which it is sought to hold him responsible."

Massachusetts.— Hyde *v.* Boston, etc., Co., 21 Pick. 90 (holding that an agreement by a purchaser that a third person shall have a lien by mortgage or otherwise, after a certain time, for a debt due him from the vendor, does not constitute the vendor the agent of the purchaser to execute such mortgage); Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160.

Michigan.— Grover, etc., Sewing Mach. Co. *v.* Polhemus, 34 Mich. 247, holding that a principal is not holden for an indebtedness incurred in his name without authority by an agent, where he has never held the agent out as having such authority or done anything to ratify the unauthorized act; much less where the credit was originally given in the agent and not to the principal; and that an agent can never invest himself with authority, so as to bind his principal, by mere false statements to others with whom he deals as to the extent of his authority.

Minnesota.— Graves *v.* Horton, 38 Minn. 66, 35 N. W. 568; Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130.

Missouri.— Alt *v.* Grosclose, 61 Mo. App. 409.

Nebraska.— Starring *v.* Mason, 4 Nebr. 367.

Nevada.— Jos. Schlitz Brewing Co. *v.* Grimmon, 28 Nev. 235, 81 Pac. 43.

New York.— Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318; McGoldrick *v.* Willits, 52 N. Y. 612; Smith *v.* Duchardt, 45 N. Y. 597; Howard *v.* Norton, 65 Barb. 161; Raney *v.* Weed, 3 Sandf. 577; Roberge *v.* Monheimer, 21 Misc. 491, 47 N. Y. Suppl. 655 (holding that the agency is not to be implied from the assumed agent's own statement of his authority); Tallmadge *v.* Lounsbury, 21 N. Y. Suppl. 908; Dobson *v.* Kuhnla, 20 N. Y. Suppl. 771.

Ohio.— Ish *v.* Crane, 13 Ohio St. 574.

Pennsylvania.— Frailey *v.* Waters, 7 Pa. St. 221; Creighton *v.* Keith, 16 Phila. 130.

Vermont.— Follett *v.* Stanton, 16 Vt. 35.

Washington.— Opie *v.* Pacific Inv. Co., 26 Wash. 505, 67 Pac. 231, 56 L. R. A. 778.

United States.— *In re* Carpenter, 125 Fed. 831.

England.— Markwick *v.* Hardingham, 15 Ch. D. 339, 43 L. T. Rep. N. S. 647, 29 Wkly. Rep. 361; Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

Canada.— Macklem *v.* Thorne, 30 U. C. Q. B. 464.

56. *Arkansas.*— Beebe *v.* De Baun, 8 Ark. 510.

While a mutual intention to create the relation of principal and agent is generally an essential element of agency, still it is to be observed that where the facts are such as to create an agency as a matter of law, the actual intention of the parties and the name they give to their relation are immaterial; they cannot agree that facts which in law establish the relation of agency shall not establish that relation or shall establish a different relation.[57]

b. Necessity of Consideration. An executory agreement to act as agent for another is ordinarily not binding on either party unless it is based on a consideration.[58] If, however, one who gratuitously promises to act for another enters upon performance of the undertaking, he is bound to complete performance according to his promise, notwithstanding the lack of consideration;[59] and if the promise has been executed in pursuance of the authority conferred, it is immaterial whether or not there was any consideration for the agent's undertaking,[60] since the rule making consideration an essential element of simple contract does not apply to executed agreements.[61]

c. Mode of Creation — (i) *In General.* There is, in general, no particular way in which an agent must be appointed,[62] although, as will later appear, in a few

Delaware.— State *v.* Foster, 1 Pennew. 289, 40 Atl. 939.

Kentucky.— Vickery *v.* Lanier, 1 Metc. 133.

Louisiana.— McCoy *v.* Weber, 38 La. Ann. 418.

Michigan.— McDonald *v.* Bœing, 43 Mich. 394, 5 N. W. 439, 38 Am. Rep. 199.

United States.— See Barr *v.* Lapsley, 1 Wheat. 151, 4 L. ed. 58.

Mode of acceptance see *infra*, I, D, 1, c, (I).

57. *Iowa.*—Trotter *v.* Grand Lodge I. L. H., 132 Iowa 513, 109 N. W. 1099, 7 L. R. A. N. S. 569.

Louisiana.— Tete *v.* Lanaux, 45 La. Ann. 1343, 14 So. 241.

New York.— Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318.

Tennessee.— Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285.

Texas.— Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405.

United States.— *Ex p.* Flannagans, 9 Fed. Cas. No. 4,855, 2 Hughes 264, 12 Nat. Bankr. Reg. 230.

England.— *Ex p.* White, L. R. 6 Ch. 397, 40 L. J. Bankr. 73, 24 L. T. Rep. N. S. 45, 19 Wkly. Rep. 488.

And see *supra*, I, A, 2, a.

58. *Iowa.*— Cravens *v.* Cravens, Morr. 285. And see Walton *v.* Dore, 113 Iowa 1, 84 N. W. 928.

Michigan.— Spencer *v.* Towles, 18 Mich. 9.

New Hampshire.— Low *v.* Connecticut, etc., Rivers R. Co., 46 N. H. 284.

New York.— Thorne *v.* Deas, 4 Johns. 84.

England.— Balfe *v.* West, 13 C. B. 466, 22 L. J. C. P. 175, 1 Wkly. Rep. 335, 76 E. C. L. 466; Coggs *v.* Bernard, 2 Ld. Raym. 909; Elsee *v.* Gatward, 5 T. R. 143.

Consideration held to be sufficient see Tuers *v.* Tuers, 100 N. Y. 196, 2 N. E. 922.

Agent's right to compensation see *infra*, III, B, 2.

Liability for failure to perform gratuitous promise to act for another and for misfeasance see *infra*, III, A, 3, a, (III).

59. *Colorado.*— Fisher *v.* Seymour, 23 Colo. 542, 49 Pac. 30.

Kansas.— See Dull *v.* Dumbauld, 7 Kan. App. 376, 51 Pac. 936.

Kentucky.— Vickery *v.* Lanier, 1 Metc. 133.

Louisiana.— Passano *v.* Acosta, 4 La. 26, 23 Am. Dec. 470.

Maryland.— Williams *v.* Higgins, 30 Md. 404.

Michigan.— Spencer *v.* Towles, 18 Mich. 9.

New York.— Thorne *v.* Deas, 4 Johns. 84.

South Carolina.—Nixon *v.* Bogin, 26 S. C. 611, 2 S. E. 302.

United States.— Short *v.* Skipwith, 22 Fed. Cas. No. 12,809, 1 Brock. 103; Walker *v.* Smith, 29 Fed. Cas. No. 17,086, 1 Wash. 152, 4 Dall. 389, 1 L. ed. 878.

England.— Balfe *v.* West, 13 C. B. 466, 22 L. J. C. P. 175, 1 Wkly. Rep. 335, 76 E. C. L. 466; Wilkinson *v.* Coverdale, 1 Esp. 74; Elsee *v.* Gatward, 5 T. R. 143.

If one intrusts property to another, who agrees to perform services in reference thereto, the latter, although he is to receive no compensation, is bound to use reasonable care in respect to the safe custody of the property, and also bound to perform the services as agreed, since the bailment affords a sufficient consideration for his promise. Robinson *v.* Threadgill, 35 N. C. 39; Coggs *v.* Bernard, 2 Ld. Raym. 909.

60. See Haluptzok *v.* Great Northern R. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739.

61. Maxwell *v.* Graves, 59 Iowa 613, 13 N. W. 758; Matthews *v.* Smith, 67 N. C. 374.

62. *Delaware.*— Geylin *v.* De Villeroi, 2 Houst. 311.

Iowa.— Schneider *v.* Schneider, 125 Iowa 1, 98 N. W. 159, holding that where an administrator, in correspondence with a sister of decedent, dissuaded her from employing counsel, and told her he would look after her interests, and she permitted him to do so, he was her agent, and as such should be held to

special instances the law requires a particular form of appointment.[63] The relation may be formed either by express contract between the parties,[64] or by a contract implied in fact.[65] The appointment may be made by instrument under seal,[66] and generally by simple writing [67] or by mere word of mouth.[68] The appointment must be communicated to the agent,[69] and in some instances it may be necessary that the agent's acceptance of the undertaking should be communicated to the principal; [70] but as a rule if the agent proceeds to act under the appointment it is unnecessary to give the principal express notice of acceptance.[71]

(II) *Implied Appointment* — (A) *In General.* The relation of principal and agent does not depend upon an express appointment and acceptance thereof, but it may be implied from the words and conduct of the parties and the circumstances of the case.[72] It is often difficult to determine upon general principles

the strictest accountability, in the purchase of her share of the estate, for the truth of his representations concerning it.

Minnesota.— Haluptzok *v.* Great Northern R. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739.

New Jersey.—Thomas *v.* Spencer, (Ch. 1899) 42 Atl. 275, holding that where a person nodded his head in response to an inquiry whether the inquirer should sign a contract for him, and the inquirer then signed in his presence, he was bound.

New York.— Tues *v.* Tues, 100 N. Y. 196, 2 N. E. 922.

See 40 Cent. Dig. tit. "Principal and Agent," § 16. And see cases cited *infra*, note 64 *et seq.*

63. See *infra*, I, D, 1, e.

64. *Delaware.*— State *v.* Foster, 1 Pennew. 289, 40 Atl. 939; Geylin *v.* De Villeroi, 2 Houst. 311.

Iowa.— Storm Lake Bank *v.* Missouri Valley L. Ins. Co., 66 Iowa 617, 24 N. W. 239.

Massachusetts.— Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160.

Minnesota.— Rice *v.* Longfellow Bros. Co., 78 Minn. 394, 81 N. W. 207.

New York.— Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318.

Canada.— Sayward *v.* Dunsmuir, 11 Brit. Col. 375; Ingersoll, etc., Gravel Road Co. *v.* McCarthy, 16 U. C. Q. B. 162.

See 40 Cent. Dig. tit. "Principal and Agent," § 16.

65. See *infra*, I, D, 1, c, (II).

66. See *infra*, I, D, 1, e, (III).

67. See *infra*, I, D, 1, e, (II).

68. See *infra*, I, D, 1 e, (I).

69. Barr *v.* Lapsley, 1 Wheat. (U. S.) 151, 4 L. ed. 58. And see Contracts, 9 Cyc. 270.

70. See for example McDonald *v.* Bœing, 43 Mich. 394, 5 N. W. 439, 38 Am. Rep. 199; *In re* Consort Deep Level Gold Mines, [1897] 1 Ch. 575, 66 L. J. Ch. 297, 76 L. T. Rep. N. S. 300, 45 Wkly. Rep. 420.

71. George *v.* Sandel, 18 La. Ann. 535 (in which it was held that when a person appointed as agent of another acts under the appointment there is a tacit acceptance, although he writes to his principal declining the agency); Parkhill *v.* Imlay, 15 Wend. (N. Y.) 431; Roberts *v.* Ogilby, 9 Price 269, 23 Rev. Rep. 671. And see Garvey *v.* Scott, 9 Ill. App. 19 (where plaintiff, having left a horse in defendant's charge, asked a third person if he would take the horse from defendant and sell it for him if he wrote to him to do so, and was told by such third person that he would, and he afterward wrote such third person to sell the horse, and without making any response to such letter the horse was sold, and it was held that the contract of agency was complete); Wright *v.* Rankin, 18 Grant Ch. (U. C.) 625. See also Contracts, 9 Cyc. 270. To the contrary see McDonald *v.* Bœing, 43 Mich. 394, 5 N. W. 439, 38 Am. Rep. 199.

Time for acceptance.— The agent must proceed to act under the appointment within a reasonable time. Parkhill *v.* Imlay, 15 Wend. (N. Y.) 431.

72. *Alabama.*— Hill *v.* Helton, 80 Ala. 528, 1 So. 340.

California.—Anglo-Californian Bank *v.* Cerf, 147 Cal. 393, 81 Pac. 1081.

Delaware.— State *v.* Foster, 1 Pennew. 289, 40 Atl. 939; Geylin *v.* De Villeroi, 2 Houst. 311.

Iowa.— Storm Lake Bank *v.* Missouri Valley L. Ins. Co., 66 Iowa 617, 24 N. W. 239.

Kansas.— Bull *v.* Duncan, (App. 1899) 59 Pac. 42; Dull *v.* Dumbauld, 7 Kan. App. 376, 51 Pac. 936; Hall *v.* Smith, 3 Kan. App. 685, 44 Pac. 908.

Kentucky.— Hall *v.* Ayer, etc., Tie Co., 102 S. W. 867, 31 Ky. L. Rep. 508.

Maine.— Trundy *v.* Farrar, 32 Me. 225.

Massachusetts.— Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160.

Minnesota.— Lindquist *v.* Dickson, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. N. S. 729; Haluptzok *v.* Great Northern R. Co., 55 Minn 446, 57 N. W. 144, 26 L. R. A. 739.

Missouri.— Johnson *v.* Hurley, 115 Mo. 513, 22 S. W. 492; Phillips *v.* Geiser Mfg. Co., 129 Mo. App. 396, 107 S. W. 471.

New Mexico.— Ilfeld *v.* Stover, 4 N. M. 54, 12 Pac. 714.

Pennsylvania.— Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390.

West Virginia.—Ruffner *v.* Hewitt, 7 W. Va. 585.

Canada.— Sayward *v.* Dunsmuir, 11 Brit. Col. 375; Wright *v.* Rankin, 18 Grant Ch. (U. C.) 625; Ingersoll, etc., Gravel Road Co. *v.* McCarthy, 16 U. C. Q. B. 162.

whether any agency exists; rather it must be determined from the facts and circumstances of the particular case.[73] It will not be inferred from the fact that third persons thought the agency existed,[74] nor because the alleged agent assumed to act as such,[75] nor because the conditions and circumstances were such as to make such an agency seem natural and probable, and to the advantage of the supposed principal.[76] Finally, an implied agency must be based upon facts, and facts for which the principal is responsible,[77] and upon a natural and reasonable, and not a strained, construction of those facts.[78] And if, in view of the facts, an implied agency is apparent, its extent is limited to acts of a like kind with those from which it is implied, and is to be restricted to the purpose for which the facts show that it was granted.[79]

73. **Agency held to exist by implication** from the facts and circumstances of the case see Wilson *v.* Henderson, 123 Cal. 258, 55 Pac. 986; Malburn *v.* Schreiner, 49 Ill. 69; State *v.* Fellows, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825; Sandifer *v.* Lynn, 52 Mo. App. 553; New York Cent., etc., R. Co. *v.* Davis, 86 Hun (N. Y.) 86, 34 N. Y. Suppl. 206 [*affirmed* in 158 N. Y. 674, 52 N. E. 1125]; McReynolds' Appeal, 66 Pa. St. 102 (where an assignment of a part interest of a railroad contract, the assignor reserving "the same control over the execution of the work . . . as he would have had had these presents never been executed," was held to constitute the assignor the attorney in fact of the assignee so far as his interest was concerned); Hussey *v.* Crass, (Tenn. Ch. App. 1899) 53 S. W. 986; Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878; Hough *v.* Richardson, 12 Fed. Cas. No. 6,722, 3 Story 659; Wright *v.* Rankin, 18 Grant Ch. (U. C.) 625.

Agency held not to exist by implication from the facts and circumstances of the case see Mills *v.* Abbeville Southern R. Co., 137 Ala. 505, 34 So. 815; Haynes *v.* Crutchfield, 7 Ala. 189; Thorne *v.* Bowers, 1 Ariz. 239, 25 Pac. 476; Daniel *v.* Maddox-Rucker Banking Co., 124 Ga. 1063, 53 S. E. 573; Stinson *v.* Thornton, 56 Ga. 377; Lewis *v.* Amourous, 3 Ga. App. 50, 59 S. E. 338; Gadmer *v.* Lent, 102 Iowa 741, 70 N. W. 732; Steele *v.* Watson, 86 Iowa 629, 53 N. W. 420; Storm Lake Bank *v.* Missouri Valley L. Ins. Co., 66 Iowa 617, 24 N. W. 239; Cravens *v.* Cravens, Morr. (Iowa) 285; Fidelity Trust, etc., Co. *v.* Carr, 66 S. W. 990, 67 S. W. 258, 24 Ky. L. Rep. 156, 23 Ky. L. Rep. 2409; Smith *v.* Edwards, 2 Harr. & G. (Md.) 411; Pepard *v.* Lewis, 37 Minn. 280, 33 N. W. 790; Padley *v.* Catterlin, 64 Mo. App. 629; State *v.* State Journal Co., 77 Nebr. 752, 110 N. W. 763, 9 L. R. A. N. S. 174; Woodward *v.* Bixby, 68 N. H. 219, 44 Atl. 298; Holman *v.* Goslin, 103 N. Y. App. Div. 606, 93 N. Y. Suppl. 126; Elkinton *v.* White, 5 Pa. Dist. 199; Snyder *v.* Baker, (Tex. Civ. App. 1896) 34 S. W. 981; O'Connell *v.* Marvin, 47 Wash. 8, 91 Pac. 254; Sutherland *v.* Gilmour, 5 N. Brunsw. 165.

Agency of debtor for creditor in procuring security for debt.— The debtor is not as a rule regarded as the creditor's agent in procuring security for the debt. Campbell *v.* Murray, 62 Ga. 86; Helms *v.* Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147 [*approved* in Hunter *v.* Fitzmaurice, 102 Ind. 449, 2 N. E. 127; Wheeler *v.* Barr, 7 Ind. App. 381, 34 N. E. 591]; Harris *v.* Bradley, 7 Yerg. (Tenn.) 310; Hyatt *v.* Zion, 102 Va. 909, 48 S. E. 1. And see Woodward *v.* Bixby, 68 N. H. 219, 44 Atl. 298. To the contrary see Haskit *v.* Elliott, 58 Ind. 493.

Agency implied from relationship of parties. — Agency cannot be inferred from mere blood relationship or family ties, unattended by conditions, acts, or conduct clearly implying the relation of principal and agent. Bassett *v.* Dodgin, 10 Bing. 40, 2 L. J. C. P. 259, 3 Moore & S. 417, 25 E. C. L. 28, holding that there is no presumption, in the absence of evidence, that a man's father-in-law is his agent. See, however, Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878. Agency involved in family relation see HUSBAND AND WIFE; PARENT AND CHILD. Cotenant as agent see TENANCY IN COMMON. Joint tenant as agent see JOINT TENANCY. Partner as agent see PARTNERSHIP.

74. Artley *v.* Morrison, 73 Iowa 132, 34 N. W. 779; Winkelman *v.* Brickert, 102 Wis. 50, 78 N. W. 164.

75. Deverell *v.* Bolton, 18 Ves. Jr. 505, 34 Eng. Reprint 409. See also *supra*, I, D, 1, a.

76. Bickford *v.* Menier, 107 N. Y. 490, 14 N. E. 438; Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

77. See *supra*, I, D, 1, a.

78. Kansas, etc., Coal Co. *v.* Millett, 50 Mo. App. 382 (holding that the fact that a junior mortgagee assented to the appointment of an agent by the mortgagor to collect the rents and apply them in payment of running expenses and the interest on the first mortgage does not make such agent the agent of the junior mortgagee, so as to bind the latter by his contracts for heating and lighting the mortgaged property); Associate Alumni Gen. Theological Seminary *v.* General Theological Seminary, 26 N. Y. App. Div. 144, 49 N. Y. Suppl. 745 (holding that the fact that the alumni association of a college, which had passed resolutions to raise a fund to establish a professorship, applied to such college for its sanction, which was granted by resolution of the board of trustees that "this board . . . hereby recognizes them as agents accordingly, and earnestly commends their agency to the confidence and liberality of the church," does not entitle the college to the fund as principal); Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

79. Humphrey *v.* Havens, 12 Minn. 298

(B) *Agency by Estoppel Distinguished.* Implied agency does not include, and is properly speaking distinguishable from, agency by estoppel,[80] although the two are usually confused. In a strict use agency by estoppel should be restricted to cases in which the authority is not real but apparent.[81] To the third person the principal is equally liable in the case of implied agency and agency by estoppel, although this distinction is to be noted, that agency by estoppel can be invoked only when the third person knew and relied on the conduct of the principal,[82] while in implied agency he need have had no knowledge of the principal's acts, nor have relied on the same. The agent by implied authority being an actual agent, the principal is liable for his acts the same as though the authority had been express.[83] As between the principal and agent, moreover, the distinction is vital. An agent by implied appointment is a real agent with all his rights and liabilities; an apparent agent, an agent by estoppel, is no agent at all, and as against the principal has none of the rights of an agent.[84]

(C) *Agency Implied From Active Holding Out, Course of Dealing, Acquiescence, Etc.* Agency in fact, as distinguished from agency by estoppel, may be implied where one person by his conduct holds out another as his agent, or thereby invests him with apparent or ostensible authority as agent.[85] So an actual agency may be implied from the habit and course of dealing between the parties,[86] as where the

(holding that authority to do a certain act cannot be implied from authority to do an entirely different act); Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33; Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

80. **Agency by estoppel** see *infra*, I, E, 2.

81. Columbia Mill Co. *v.* National Bank of Commerce, 52 Minn. 224, 229, 53 N. W. 1061 (where it was said: "For the sake of convenience, we make a distinction between implied authority — that is, such as the principal in fact intends the agent to have, though the intention is implied from the acts and conduct of the principal — and apparent authority,— that is, such as, though not actually intended by the principal, he permits the agent to appear to have. The rule as to apparent authority rests essentially on the doctrine of estoppel. The rule is that, where one has reasonably and in good faith been led to believe from the appearance of authority which a principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency, to the prejudice of the one so dealing"); Morris *v.* Joyce, 63 N. J. Eq. 549, 53 Atl. 139; Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

82. Hackett *v.* Van Frank, 105 Mo. App. 384, 399, 79 S. W. 1013 (where it is said: "While the circumstances relied on to create an agency by estoppel must be proven to have been known to and relied on by the party asserting the estoppel, this is not the rule when they are counted on to establish actual authority or ratification; for then the essence of the matter is the intention of the party to be charged, to authorize or abide by what was done; not that the third party believed, on sufficient grounds, that it had been authorized"); Bickford *v.* Menier, 107 N. Y. 490, 14 N. E. 438 (holding that the rule that a principal is liable for the acts of his agent within the apparent scope of his authority applies only where a third person has acted, believing and having a right to believe that the agent was acting within his authority, and where such person would sustain loss if the act of the agent was not considered that of the principal). See also *infra*, I, E, 2, a, (II), (B).

83. Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434, holding that in an action by the assignee of a corporation for conversion of its property, where defendant alleges that he purchased it from the corporation, evidence that the person from whom defendant purchased was the general manager of the corporation is admissible, although defendant had no knowledge thereof at the time of the sale. See also Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Hefferman *v.* Boteler, 87 Mo. App. 316.

84. Cadwell *v.* Dullaghan, 74 Iowa 239, 37 N. W. 178. And see *infra*, III, B, 2, a, (I); III, B, 3, c, (I).

85. Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., Co., 127 Ala. 137, 28 So. 679; Matter of Zinke, 90 Hun (N. Y.) 127, 35 N. Y. Suppl. 645.

Estoppel to deny agency of one who is held out as agent see *infra*, I, E, 2, a, (II), (A).

86. *Alabama.*— Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304, where the relation was implied from the facts that previous dealings were had by defendant with plaintiff through the alleged agent, that the alleged agent was connected with the building of a house, where defendant was frequently present during transactions between plaintiff and the alleged agent, and that payments were made by defendant on plaintiff's account for the materials furnished, with full knowledge that the account was made out against her and without any objection.

Connecticut.— Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37.

Iowa.— Whiting *v.* Western Stage Co., 20 Iowa 554.

Maine.— Trundy *v.* Farrar, 32 Me. 225.

alleged principal has previously employed the alleged agent as such in transactions similar to the one in suit.[87] So too authority may be implied from the acquiescence of the alleged principal in acts done in his behalf by the alleged agent, especially

Michigan.— See Blair *v.* Carpenter, 75 Mich. 167, 42 N. W. 790.

Minnesota.— Haluptzok *v.* Great Northern R. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739 (holding that agency may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the principal for so long a time that knowledge and consent on the part of the principal may be inferred); Columbia Mill Co. *v.* National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061; Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130.

Missouri.— Summerville *v.* Hannibal, etc., R. Co., 62 Mo. 391; Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672.

New Hampshire.— Kent *v.* Tyson, 20 N. H. 121.

See 40 Cent. Dig. tit. "Principal and Agent," § 27 *et seq.*

See, however, Kelly *v.* Tracy, etc., Co., 71 Ohio St. 220, 73 N. E. 455 (holding that agency is not to be inferred from a course of dealing with another principal); Starr *v.* Royal Electric Co., 33 Nova Scotia 156 [*affirmed* in 30 Can. Sup. Ct. 384] (where no course of dealing showing agency was proved to exist).

87. *Alabama.*— Hill *v.* Helton, 80 Ala. 528, 1 So. 340.

Maine.— Hazeltine *v.* Miller, 44 Me. 177.

New York.— Dickinson *v.* Salmon, 36 Misc. 169, 73 N. Y. Suppl. 196. See, however, Bickford *v.* Menier, 107 N. Y. 490, 14 N. E. 438.

Texas.— Pullman Palace Car Co. *v.* Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624.

United States.— Stockton *v.* Watson, 101 Fed. 490, 42 C. C. A. 211.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 27, 27½.

See, however, Walton Guano Co. *v.* McCall, 111 Ga. 114, 36 S. E. 469 (which holds that an agent's general authority to collect is not shown by proving occasional instances of his receiving partial payments on a note); Fadner *v.* Hibler, 26 Ill. App. 639 (holding that no inference of an agent's authority to sign a contract for his principal can be drawn from evidence that the agent had twice in the presence of the principal drawn up and signed contracts embodying terms made by the principal); Rice *v.* James, 193 Mass. 458, 79 N. E. 807 (holding that on an issue as to whether one who purchased lumber from plaintiff had acted in so doing as defendant's agent, it was proper to refuse a requested instruction that if the alleged agent claimed to plaintiff to be the agent of defendant, and bought goods in his behalf prior to the date of the sale in question for which defendant had paid, it made no difference what limits defendant might have placed on such agent's authority to buy, unless he notified plaintiff of such limitations prior to the sale in question, as the instruction failed to recognize any difference as to the effect of purchases made at different times under a special authority for each time and purchases made as a general agent, in reference to inferring authority to make like purchases afterward); Smith *v.* Roe, 1 Can. L. J. N. S. 154 (holding that the fact that a man employs another to do a specified act for him at a particular time raises no presumption whatever that the person so employed has authority to do a similar act at a different time).

Dissimilar transactions.—Authority to do an act as an agent will not be implied from the doing by the actor of a totally distinct and different act on behalf of the alleged principal. Collins *v.* Crews, 3 Ga. App. 233, 59 S. E. 727. Thus, where it was not shown that shingle-mill owners had authorized or known of the construction of a logging road to their timber, or had constructed logging roads at any other time, the authority of their agent, who had limited powers, to contract for the construction of such a road will not be implied from the fact that contracts negotiated by him for acts of an entirely different kind were entered into by them. Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33. So a general authority to an agent to collect debts, and to pay and receive money, does not authorize him to bind his principal by negotiable instruments; nor can an agent having authority to collect money for his principal, arising from the use or proceeds of the sale of his property, bind him by entering into contracts for which money is to be paid out. Hazeltine *v.* Miller, 44 Me. 177. And the business of selling logs after their arrival at the market is distinct from that of operating in the woods, or the driving of logs; an agency for the two kinds of business is so different that proof of an agency for the one will have no tendency to prove its existence for the other. To establish an agency by inference, it must be shown that the acts sought to be proved are of the same general character and effect as those under a recognized agency. Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111.

Subsequent transactions.— The fact that in a particular instance a person was authorized by the owner of property to negotiate a sale of it to one person on certain terms, the actual transfer to be made by the owner personally, is not sufficient to prove authority in such person to sell and transfer the same property at a prior time and on different terms to another and different person. Graves *v.* Horton, 38 Minn. 66, 35 N. W. 568.

The fact that the agent performed similar acts for other persons in the neighborhood in and about the same business does not authorize the inference that he was authorized to perform such acts as agent for plaintiff. Hill *v.* Helton, 80 Ala. 528, 1 So. 340.

if the agent has repeatedly been permitted to perform acts like the one in question.[88] Finally, the subsequent adoption and ratification by the principal of similar acts done by the agent may justify the inference that the agent has authority to do acts of that kind.[89]

d. Identity of Principal — (i) *In General.* When agency is shown, it is often difficult to determine, as between two or more parties involved, whose agent the representative has been in the given transaction. The question in such cases is, as between two parties who sustain relations to the agent, which of them under all the circumstances and conditions of the case it is fair to conclude appointed him and controlled his acts and the tenure of his employment.[90]

88. *Alabama.*— Fisher *v.* Campbell, 9 Port. 210, holding that authority to purchase of supplies may be implied from previous employment in similar acts, and from subsequent acquiescence.

Kentucky.— Columbia Land, etc., Co. *v.* Tinsley, 60 S. W. 10, 22 Ky. L. Rep. 1082 (holding that previous authority may be inferred from acquiescence and receipt of benefits); McConnell *v.* Bowdry, 4 T. B. Mon. 392 (holding that long acquiescence in the alleged agent's act is evidence of prior authority).

Massachusetts.— See Pratt *v.* Putnam, 13 Mass. 361.

Missouri.— Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672.

Nebraska.— Cheshire Provident Inst. *v.* Vandegrift, 1 Nebr. (Unoff.) 339, 95 N. W. 615, holding that where an undisclosed principal is informed that an agent has collected a note, and acquiesces in such act for three years, it tends to show that the act was fully authorized.

New York.— Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Dickinson *v.* Salmon, 36 Miss. 169, 73 N. Y. Suppl. 196 [*affirming* 35 Misc. 838, 72 N. Y. Suppl. 1099].

North Carolina.— Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688.

England.— See Marlborough *v.* Strong, 1 Bro. P. C. 175, 1 Eng. Reprint 496.

See 40 Cent. Dig. tit. "Principal and Agent," § 27 *et seq.*

89. *Iowa.*— Whiting *v.* Western Stage Co., 20 Iowa 554.

Kansas.—Steelsmith *v.* Union Pac. Ry. Co., 1 Kan. App. 10, 40 Pac. 992.

Maine.— Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111; Lee *v.* Oppenheimer, 34 Me. 181; Trundy *v.* Farrar, 32 Me. 225.

Maryland.— Philadelphia, etc., R. Co. *v.* Weaver, 34 Md. 431.

Missouri.— Stothard *v.* Aull, 7 Mo. 318; Sharp *v.* Knox, 48 Mo. App. 169; White *v.* Missouri Pac. R. Co., 19 Mo. App. 400.

Nebraska.—Wilber First Nat. Bank *v.* Ridpath, 47 Nebr. 96, 66 N. W. 37.

New Mexico.— Ilfeld *v.* Stover, 4 N. M. 54, 12 Pac. 714.

New York.— Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Wood *v.* Auburn, etc., R. Co., 8 N. Y. 160; Engh *v.* Greenbaum, 4 Thomps. & C. 426; Jackson Architectural Iron Works *v.* Rouss, 59 N. Y. Super. Ct. 512, 15 N. Y. Suppl. 137; Kirkpatrick *v.* Livingston, 7 Misc. 571, 28 N. Y. Suppl. 93; Hartley *v.* Cataract Steam Engine Co., 19 N. Y. Suppl. 121; Weed *v.* Carpenter, 4 Wend. 219.

Texas.— Friedlander *v.* Cornell, 45 Tex. 585; Osborne *v.* Gatewood, (Civ. App. 1903) 74 S. W. 72; Pullman Palace Car Co. *v.* Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624; History Co. *v.* Flint, (Tex. App. 1891) 15 S. W. 912.

Virginia.— Downer *v.* Morrison, 2 Gratt. 237.

Wisconsin.— Phillips *v.* McGrath, 62 Wis. 124, 22 N. W. 169.

United States.— Townsend *v.* Chappell, 12 Wall. 681, 20 L. ed. 436; Bicknell *v.* Austin Min. Co., 62 Fed. 432.

See 40 Cent. Dig. tit. "Principal and Agent," § 27 *et seq.*

Limitations and qualifications of rule.—The mere fact that the principal has acquiesced in the doing of similar acts by the agent is not conclusive of his general authority to do such acts. Toledo, etc., R. Co. *v.* McCormick, 40 Ill. App. 51. Nor is authority to be inferred from the fact that the principal has previously ratified an act of the agent of a different character (Smith *v.* Georgia, etc., R. Co., 113 Ga. 625, 38 S. E. 956; Humphrey *v.* Havens, 12 Minn. 298; White Sewing-Mach. Co. *v.* Hill, 136 N. C. 128, 48 S. E. 575), or an act done under substantially different conditions (Smith *v.* Georgia, etc., R. Co., *supra*). Nor is authority to be inferred from the fact that on one or two previous occasions the principal has approved similar acts (Temple *v.* Pomroy, 4 Gray (Mass.) 128; Paige *v.* Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; Danaher *v.* Garlock, 33 Mich. 295; Woods *v.* Francklyn, 19 N. Y. Suppl. 377; Wills *v.* International, etc., R. Co., 41 Tex. Civ. App. 58, 92 S. W. 273), although it has been held that the implication of authority rests not so much on the number as on the character of the acts approved, and that the adoption of a single act by the principal may be so unequivocal and comprehensive as to establish an agency to do similar acts (Anderson *v.* Johnson, 74 Minn. 171, 77 N. W. 26; Wilcox *v.* Chicago, etc., R. Co., 24 Minn. 269; Briggs *v.* Kennett, 8 Misc. (N. Y.) 264, 28 N. Y. Suppl. 540).

Essentials of ratification see *infra*, I, F, 2.

90. *Alabama.*— Ford *v.* Postal Tel. Cable Co., 124 Ala. 400, 27 So. 409, where plaintiff agreed with the chairman of the street com-

(II) *Agency to Negotiate Loans.* In the negotiation of loans it is often

mittee of a city council that he would do certain work for the city for a certain price, and the latter agreed to submit the matter to the committee, and, if they agreed to employ plaintiff, to send him a telegram, and it was held that the chairman, in sending the telegram, was not acting as plaintiff's agent, but as agent of the city.

California.— Murdock *v.* Clarke, (1890) 24 Pac. 272, where it appeared that by an agreement between a mortgagor and mortgagees the latter were to have the sole right to the possession of the land, accounting for the rents and profits, and were to select a person to manage the property; that at an accounting against the mortgagees they testified that they were to send a man to take possession in order to take care of the personal property security, and that everything was to be run in their name; and they also spoke of the man selected, both in their testimony and in the pleadings, as their agent; and it was held that for the purposes of possession and accounting such person must be considered as the agent of the mortgagees only, although his selection was approved by the mortgagor, and his salary was paid as a part of the running expenses.

Illinois.— Evans *v.* Pierce, 70 Ill. App. 457 (holding that where the treasurer of a university delivered the checks for the salaries of the employees thereof, as shown by the pay-roll, to the registrar, to deliver to the employees as they signed the pay-roll, and pending delivery to the employees the bank on which the checks were drawn and in which were funds to pay them failed, the registrar was the agent of the treasurer, not of the employees); Brainard *v.* Turner, 4 Ill. App. 61.

Kansas.— Detwilder *v.* Heckenlaible, 63 Kan. 627, 66 Pac. 653, holding that where a borrower by express stipulation makes the agent through whom a loan is obtained his agent to pay the principal of such loan and interest thereon, evidence which is as reconcilable with the theory that the agent is acting as the agent of the borrower in receiving and forwarding such principal and interest as with the theory that such agent is acting as the agent of the lender must be held to show agency under such stipulation and not to show agency for the lender.

Kentucky.— Martin *v.* Kennedy, 90 S. W. 975, 28 Ky. L. Rep. 966.

Massachusetts.— Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561, where the agent of a surety company, on receiving an application for the company to act as surety for a building contractor, told the contractor to have the owner's attorney "draw the bond, and bring it back to the company, and that it would execute the same as surety," and such instructions were carried out, and the contractor paid the attorney for his services, and the company executed the bond, supposing that certain recitals in the bond were true, and it was held that the contractor did not act as the company's agent in employing the attorney at the request of the company.

Michigan.— Fair *v.* Bowen, 127 Mich. 411, 86 N. W. 991, where it appeared that B executed a mortgage on certain land to plaintiff and then conveyed it to defendant; that subsequently H wrote plaintiff's agent that defendant wished to sell eighty acres, and would pay four hundred dollars and interest for a release of that eighty; that plaintiff's agent forwarded the release to H, to whom defendant delivered certificates of deposit for four hundred dollars and interest; that H embezzled the certificates, and defendant, on discovering H's failure to remit, refrained at H's request from notifying plaintiff of the embezzlement; and the court held that H was the agent of defendant, the evidence showing that H acted at defendant's request and in his behalf.

Minnesota.— McMullen *v.* People's Sav., etc., Assoc., 57 Minn. 33, 58 N. W. 820.

Missouri.— Sanborn *v.* Buchanan County First Nat. Bank, 115 Mo. App. 50, 90 S. W. 1033, where according to a course of business, a bank on making loans occasionally took notes running to defendant bank, and then two of the officers of the former bank indorsed the notes and sent them to defendant bank, which gave the other bank credit as a deposit, defendant bank obtaining a certain percentage of interest, and the officers as consideration for their indorsement retaining the difference between that interest and that called for by the notes, and it was held that in such transactions the bank officers in question did not act as agents for defendant bank, nor did they act as agents of defendant bank in foreclosing a mortgage given to secure the notes, it appearing that defendant bank had sent the notes to the officers for collection, with directions to protest and return if they were not paid, but instead the officers, to save themselves on their indorsement, foreclosed the mortgage.

New Jersey.— Polhemus *v.* Holland Trust Co., 59 N. J. Eq. 93, 45 Atl. 534, holding that where defendant held bonds of a gas corporation as security for a loan, under an agreement that they should be surrendered as the corporation might sell them, and that the proceeds of the sale should be applied in liquidation of the debt, and plaintiff was induced to purchase some of the bonds by defendant's clerk, by false representations that they were first mortgage bonds, defendant was not liable for the loss sustained, since the clerk in such transaction acted in the interest of the gas corporation, and not as defendant's agent.

New York.— Cooper *v.* Hong Kong, etc., Banking Corp., 107 N. Y. 282, 14 N. E. 277 [*reversing* 13 Daly 183]; Horstmann *v.* Baltzer, 38 Hun 367; Graves *v.* Mumford, 26 Barb. 94 (where it appeared that the owner of a farm procured a loan for three thousand dollars from an agent of V, who had sent money for investment; that at the time there was a mortgage on the farm given by

difficult to determine whether an intermediary is the agent of the borrower or of

a former owner to a third person for two thousand dollars; that the owner gave his mortgage to V to secure the three thousand dollars which he received from the agent, less the amount of the former owner's mortgage, which sum the agent retained to pay the latter mortgage; that the money secured by the mortgage to such third person was not due, and he refused to receive it, and the agent paid him interest on the mortgage until 1849, when he paid him the balance of the principal and interest with money belonging to M, in his hands to be invested for her; that such third person at the request of the agent executed an assignment of the mortgage in blank, the agent stating that he wanted the mortgage to raise the money again temporarily, and afterward filled up the blank with the name of M as assignee; that the agent died without having applied the money of V, retained by him for that purpose out of the loan made to the owner, to the payment of the former owner's mortgage; that V had no actual notice of the existence of the other mortgage; and it was held that the legal effect of the transactions between the agent and such third person was not a payment and satisfaction of the former mortgage, as the agent was then acting as the agent of M and paid the money out of her funds); Ulster County Sav. Inst. *v.* New York Fourth Nat. Bank, 5 Silv. Sup. 144, 8 N. Y. Suppl. 162 (holding that where the treasurer of a savings bank sent certificates of stock to a correspondent of the bank with instructions to have the stock sold, inclosing a power of attorney of the owner to transfer it, and the letter was of the usual form used by the bank in its business transactions with the correspondent, and was signed by the treasurer as such, and the correspondent had previously sold stock for the bank, the correspondent, having acted upon the letter, could look to the bank as the principal; that the treasurer did not act as agent of the stock owner); Dodge *v.* Wilbur, 5 Sandf. 397 [*affirmed* in 10 N. Y. 579] (where commission merchants in London authorized D, one of plaintiffs, to procure for them certain consignments of cotton and to draw on them or on defendants in New York for the necessary advances, and requested defendants to pay such bills as might be drawn, and promised to honor such bills as defendants for their reimbursement should draw on them, and it was held that defendants in accepting and paying the bills acted solely as disbursing agents of such commission merchants, and not as agents of D or of the shippers of the cotton).

Washington.—Sibson *v.* Hamilton, etc., Co., 22 Wash. 449, 61 Pac. 162, holding that where the absolute control of the business and property of a debtor corporation passes by agreement into the hands of a mortgagee, and an officer and stock-holder in the corporation is made manager under the direction of the mortgagee for the purpose of continuing the business and paying off the indebtedness, such stock-holder becomes the agent of the mortgagee, and for any mismanagement of the business on his part, resulting in loss, the mortgagee, and not the corporation, is liable.

United States.— Davis *v.* Patrick, 122 U. S. 138, 7 S. Ct. 1102, 30 L. ed. 1090 (where it apeared that a mining company, being indebted to D and desiring to obtain further advances from him to work its mines, executed a writing by which it was agreed that D should advance a certain amount of money, and P was appointed manager of its property and business until out of the profits he had repaid D, D to have the power to remove P if not satisfied with his management; that the company also executed a power of attorney to P, authorizing him to work and manage the mine; that P employed his brother to haul ore, and he sued D for his services, claiming that P was D's agent; and it was held that P was not the agent of D but of the company, and that the agreement was intended only as security for the repayment of the advances made by D to the company); American Bonding, etc., Co. *v.* Takahashi, 111 Fed. 125, 49 C. C. A. 267 (where it appeared that plaintiffs applied to the general agent, who was also local manager and secretary, of defendant, to furnish a bond to a railway company to whom plaintiffs had contracted to supply laborers to be paid by them, the company requiring the bond to protect it from claims which the laborers might make against it for wages; that the agent, as a condition to the furnishing of the bond and for the protection of defendant, required the money to become due from the railroad company under the contract to be paid to him as trustee, to be disbursed by him to the laborers, and the contract and bond accordingly provided that such money should be paid to the agent, designating him merely as trustee, and that he should pay the laborers therefrom, and pay over the remainder to plaintiffs, and that they also reserved the right to defendant to designate a new trustee at any time on notice to the other parties; that these requirements were within the general authority of the agent and were also expressly approved by defendant, which subsequently exercised the power given it to change the trustee; and the court held that the agent in his capacity as trustee represented defendant, which was responsible for the faithful execution of his trust, and liable to plaintiffs for the sum due them from the trustee on an accounting); Jones *v.* U. S., 1 Ct. Cl. 383 (holding that an astronomer who assists contracting engineers in a government survey and is paid with their money, but who is not appointed by them and cannot be discharged by them, and who is not responsible to them, is not their agent, but the agent of the government).

England.— Gosling *v.* Gaskell, [1897] A. C. 575, 66 L. J. Q. B. 848, 77 L. T. Rep. N. S. 314; Gibbons *v.* Proctor, 55 J. P. 616, 64 L. T. Rep. N. S. 594. And see Roberts *v.*

the lender. Each case must be decided upon its own particular circumstances.[91] If a person desiring a loan makes known that desire to one who applies to a money lender and consummates the loan, the intermediary is the agent of the borrower, not of the lender.[92] So if the borrower in a written application or otherwise expressly makes the intermediary his agent,[93] if he pays the agent's commission

Ogilby, 9 Price 269, 23 Rev. Rep. 671; Waterlow *v.* Cotton, 2 Wkly. Rep. 562.

Canada.—Armstrong *v.* Johnston, 32 Ont. 15 (holding that one to whom the accommodation indorser of a note transferred other notes indorsed to him by the makers of the former note for the purpose of procuring its payment acts for such indorser instead of the makers); Berube *v.* Great North Western Tel. Co., 14 Quebec Super. Ct. 178 (holding that the operator of a telegraph company who receives and transmits the message is not the agent of the sender, but of the telegraph company).

Agent of vendor or purchaser.— Where, at the time for delivery of deed by L and payment of purchase-money by N, there being an unsatisfied mortgage which it was the duty of L to satisfy, it was agreed that a part of the purchase-money equal to the mortgage should be left with S, to be paid by him to L on the mortgage being paid, and an agreement showing this was signed by L and N, reciting "Cash retained by G. R. Schaefer for use of L. W. Lipman until the mortgage . . . is satisfied," and S gave L a receipt reciting receipt from L of said sum to be paid him on satisfaction of the mortgage, L consented to S acting as his agent for custody of the money, so that he must bear the loss of S's embezzlement thereof. Lipman *v.* Noblit, 194 Pa. St. 416, 45 Atl. 377. This seems doubtful, for the only purpose of such retention of the money seems to be the protection of the purchaser, and not of the vendor. If the agent did not hold for the purchaser why did he retain the money at all? *Compare* Travelers' Ins. Co. *v.* Jones, 16 Colo. 515, 27 Pac. 807; Stone *v.* Davenport, 7 Ohio Dec. (Reprint) 83, 1 Cinc. L. Bul. 102 [*affirmed* in 29 Ohio St. 309]; Vandaleur *v.* Blagrave, 11 Jur. 935, 17 L. J. Ch. 45 [*affirming* 6 Beav. 565, 7 Jur. 1002, 49 Eng. Reprint 944. A land agent procured an option to purchase plaintiff's land for twenty thousand dollars. He then organized a syndicate, composed of himself and nine others, to purchase the land from plaintiff for twenty-two thousand dollars; but there was a secret understanding between him and plaintiff that they should share between them the advance of two thousand dollars. When the contract between plaintiff and the members of the syndicate came to be executed one of them refused to sign it, and the agent procured another person to sign it, the other members of the syndicate not consenting to such change in its membership, and being ignorant of the arrangement between plaintiff and the agent for sharing the profits of the transaction. It was held that the land agent, in procuring the additional signature, was the agent of plaintiff, and not of his associates in the syndicate, and that the latter were not bound by his act, while plaintiff was; and that the act was a fraud on the other members of the syndicate, and avoided the contract. Crittenden *v.* Armour, 80 Iowa 221, 45 N. W. 888. See Curtis *v.* Innerarity, 6 How. (U. S.) 146, 12 L. ed. 380. See also VENDOR AND PURCHASER. Identity of principal of real estate broker see FACTORS AND BROKERS, 19 Cyc. 191.

Agency of insurer or insured see INSURANCE, 22 Cyc. 1444 *et seq.*

91. See Merriam *v.* Haas, 154 U. S. 542, 14 S. Ct. 1159, 18 L. ed. 29, where the court said that to determine in a given case whether a person is the agent of the lender or of the borrower is a question of the weight of testimony rather than of the application of legal principles. See also *infra*, II, A, 6, h, (IV); and FACTORS AND BROKERS, 19 Cyc. 191 note 91.

92. Johnson *v.* Shattuck, 67 Ark. 159, 53 S. W. 888; Goodale *v.* Middaugh, 8 Colo. App. 223, 46 Pac. 11 (holding that the fact that one who by false representations induces another to make a loan to a third person is at the time the custodian of the money to be loaned, and that the note and security therefor are to be taken by him and delivered to the lender, does not constitute him the agent of the lender, it appearing that he acted for the borrower in requesting the loan); Englemann *v.* Reuse, 61 Mich. 395, 28 N. W. 149.

93. Land Mortg. Inv. Agency Co. *v.* Preston, 119 Ala. 290, 24 So. 707; Land Mortg., etc., Co. *v.* Vinson, 105 Ala. 389, 17 So. 23; American Mortg. Co. *v.* King, 105 Ala. 358, 16 So. 889; Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 414, 14 So. 656 (all holding that where, in an application for a loan of money, the borrower agrees to pay a third person as his attorney "a reasonable fee for taking the application, conducting the correspondence, making ample abstract of title to his lands, and securing and paying over the money" borrowed, he thereby constitutes such person his agent with authority to receive the money from the lender, and the embezzlement of the money by such agent after it comes into his hands from the lender for the purpose of being paid over to the borrower is the loss of the latter); Knox County *v.* Goggin, 105 Mo. 182, 16 S. W. 684 (where defendant sought a loan from a local loan agent by an application in which he appointed the local agent his agent for the purpose of negotiating the loan and discharging prior encumbrances, and the local agent received no compensation from the loan company, and the court held that the local agent was the agent of the borrower and not of the lender); Cooper *v.* Headley, 12 N. J. Eq. 48. See, however, cases cited *infra*, page 1226 note 8.

for negotiating the loan,[94] or if he employs the intermediary to examine the title to the property offered as security [95] or to discharge prior encumbrances thereon,[96] these facts, taken collectively or in various lesser combinations, justify an inference that the intermediary is the agent of the borrower. On the other hand if a money lender employs the intermediary to negotiate loans,[97] to examine the title to property offered as security,[98] to see that the property is discharged from prior encumbrances,[99] to prepare the papers and see to the execution thereof,[1] to pay over the money to the borrower,[2] or to perform other services in regard to the

94. *Alabama.*— Land Mortg. Inv. Agency Co. *v.* Preston, 119 Ala. 290, 24 So. 707; Land Mortg., etc., Co. *v.* Vinson, 105 Ala. 389, 17 So. 23; American Mortg. Co. *v.* King, 105 Ala. 358, 16 So. 889; Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656.

Arkansas.— Johnson *v.* Shattuck, 67 Ark. 159, 53 S. W. 888.

Iowa.— Thomas *v.* Desney, 57 Iowa 58, 10 N. W. 315.

Missouri.— Knox County *v.* Goggin, 105 Mo. 182, 16 S. W. 684.

New Jersey.— Cooper *v.* Headley, 12 N. J. Eq. 48.

New York.— Lantry *v.* Sutton, 5 N. Y. Suppl. 14.

See 40 Cent. Dig. tit. "Principal and Agent," § 28.

See, however, *infra*, page 1226 note 5.

95. Farmer *v.* American Mortg. Co., 116 Ala. 410, 22 So. 426 (where it was held that an agent employed, by appointment in writing by one representing himself to be the owner of certain land, to negotiate for him a loan on mortgage, who in the line of such employment examined the title to the land for the purpose of inducing the making of such loan by means of his representations that the mortgagor had a perfect title, was in no sense the agent of the mortgagee); Boyd *v.* Boyd, 128 Iowa 699, 104 N. W. 798, 111 Am. St. Rep. 215 (holding that an agent for a borrower in procuring a loan is not the agent of the lender because the latter consents to rely on the agent's representation as to the condition of the borrower's title, and the lender is not chargeable with the knowledge possessed by the agent). *Compare* Love *v.* Mack, 93 L. T. Rep. N. S. 352. See also *infra*, II, A, 6, h, (IV).

96. See *infra*, note 99.

97. *Iowa.*— McLean *v.* Ficke, 94 Iowa 283, 62 N. W. 753.

Michigan.— Matteson *v.* Blackmer, 46 Mich. 393, 9 N. W. 445, where the opinion of the court was delivered by Cooley, J.

Minnesota.— Gerdes *v.* Burnham, 78 Minn. 511, 81 N. W. 516.

Nebraska.— Jensen *v.* Lewis Inv. Co., 39 Nebr. 371, 58 N. W. 100; New England Mortg. Security Co. *v.* Addison, 15 Nebr. 335, 18 N. W. 76.

New York.— Yeoman *v.* McClenahan, 190 N. Y. 121, 82 N. E. 1086.

South Carolina.— Bates *v.* American Mortg. Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340. See Land Mortg. Inv., etc., Co. *v.* Gillam, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203.

United States.— Stockton *v.* Watson, 101 Fed. 490, 42 C. C. A. 211.

See 40 Cent. Dig. tit. "Principal and Agent," § 28.

98. Matteson *v.* Blackmer, 46 Mich. 393, 9 N. W. 445; Jensen *v.* Lewis Inv. Co., 39 Nebr. 371, 58 N. W. 100; Blackwell *v.* British-American Mortg. Co., 65 S. C. 105, 43 S. E. 395; Bates *v.* American Mortg. Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340; Stockton *v.* Watson, 101 Fed. 490, 42 C. C. A. 211. *Compare* Love *v.* Mack, 93 L. T. Rep. N. S. 352.

99. See cases cited *infra*, this note.

Whether a loan agent who retains part of the money loaned until prior encumbrances are discharged acts in so doing as agent of the lender or of the borrower is in dispute. Certainly he may be so employed by the borrower. But when the agent is directed to retain a portion of the loan until the prior encumbrance is discharged, it would seem that he does so for the lender, who alone is interested in having the discharge before he parts with his money. Otherwise the retention of the money seems without meaning, for if the agent acts for the borrower then his possession is the possession of his principal, and the latter may demand that the money be paid him without discharging prior claims against the property, and such is the holding of many cases. Travelers' Ins. Co. *v.* Jones, 16 Colo. 515, 27 Pac. 807; Day *v.* Dages, 17 Ind. App. 228, 46 N. E. 589; McLean *v.* Ficke, 94 Iowa 283, 62 N. W. 753; Larson *v.* Lombard Inv. Co., 51 Minn. 141, 53 N. W. 179; Jensen *v.* Lewis Inv. Co., 39 Nebr. 371, 58 N. W. 100; Gibson *v.* Davenport, 29 Ohio St. 309 [*affirming* 7 Ohio Dec. (Reprint) 83, 1 Cinc. L. Bul. 102]; Stockton *v.* Watson, 101 Fed. 490, 42 C. C. A. 211. But there are other cases that hold that the discharging of the prior encumbrance is the duty of the owner of the property, and hence in attending to such discharge the agent acts for him. Englemann *v.* Reuse, 61 Mich. 395, 28 N. W. 149; Knox County *v.* Goggin, 105 Mo. 182, 16 S. W. 684; Lipman *v.* Noblit, 194 Pa. St. 416, 45 Atl. 377; Pepper *v.* Cairns, 133 Pa. St. 114, 19 Atl. 336, 19 Am. St. Rep. 625, 7 L. R. A. 750.

1. Matteson *v.* Blackmer, 46 Mich. 393, 9 N. W. 445; Bates *v.* American Mortg. Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340. See Land Mortg. Inv., etc., Co. *v.* Gillam, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203.

2. *Alabama.*— Land Mortg. Inv. Agency Co. *v.* Preston, 119 Ala. 290, 24 So. 707, in which it was held that an agent to procure a loan, who obtained it from a company

loan,[3] these facts, taken collectively or in various lesser combinations, justify an inference that the intermediary is the agent of the lender. If the lender pays the intermediary's commission, it tends to establish an agency in the lender's behalf;[4] and if the service is performed at the request and by the direction of the lender, presumptively the agent is his agent, even though the borrower is required to pay for the service.[5] However, none of the foregoing facts is conclusive on the question of agency, and will not preclude the alleged principal from showing that the intermediary was actually acting as the agent of the other party,[6] or as agent of each, but for different purposes.[7] And the fact that the application for the loan recites that the intermediary is the agent of the borrower is not controlling, if the facts and circumstances are such as to create an agency in behalf of the lender as a matter of law.[8]

(III) *AGENCY FOR ADVERSE PARTY.* Often the agent of one party to a transaction is appointed by the adverse party his agent for certain purposes, and each party will then stand in the relation of principal to the agent as to the matters by him intrusted to the agent, and as to those alone.[9] But such appointment of the

which sent the money to him to be sent to the borrower, is the agent of the lender in paying over the money to the borrower.

Iowa.— McLean *v.* Ficke, 94 Iowa 283, 62 N. W. 753.

Michigan.—Matteson *v.* Blackmer, 46 Mich. 393, 9 N. W. 445.

Nebraska.— Jensen *v.* Lewis Inv. Co., 39 Nebr. 371, 58 N. W. 100.

United States.— Stockton *v.* Watson, 101 Fed. 490, 42 C. C. A. 211.

See 40 Cent. Dig. tit. "Principal and Agent," § 28.

3. Stockton *v.* Watson, 101 Fed. 490, 42 C. C. A. 211. See Land Mortg. Inv., etc., Co. of America *v.* Gillam, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203.

4. Jensen *v.* Lewis Inv. Co., 39 Nebr. 371, 58 N. W. 100.

5. See cases cited *infra*, this note. See, however, cases cited *supra*, page 1225, note 94.

An attorney employed by a person to examine the title to real estate upon which he contemplates loaning money is his agent, although he is paid by the person seeking the loan. Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; Gibson *v.* Davenport, 29 Ohio St. 309 [*affirming* 7 Ohio Dec. (Reprint) 83, 1 Cinc. L. Bul. 102]; Antioch College *v.* Carroll, 11 Ohio Dec. (Reprint) 220, 25 Cinc. L. Bul. 289; West *v.* Gibson, 6 Ohio Dec. (Reprint) 1034, 9 Am. L. Rec. 689.

6. See cases cited *passim*, this section.

7. *Alabama.*— Land Mortg. Inv. Agency Co. *v.* Preston, 119 Ala. 290, 24 So. 707.

Indiana.— International Bldg., etc., Assoc. *v.* Watson, 158 Ind. 508, 64 N. E. 23.

Missouri.— May *v.* Mutual Ben. L. Ins. Co., 72 Mo. App. 286.

New York.— Lantry *v.* Sutton, 5 N. Y. Suppl. 14.

Pennsylvania.— Pepper *v.* Cairns, 133 Pa. St. 114, 19 Atl. 336, 19 Am. St. Rep. 625, 7 L. R. A. 750.

South Carolina.— Blackwell *v.* British-American Mortg. Co., 65 S. C. 105, 43 S. E. 395.

See 40 Cent. Dig. tit. "Principal and and Agent," § 28. And see, generally, *infra*, I, D, 1, d, (III).

8. McLean *v.* Ficke, 94 Iowa 283, 62 N. W. 753; Larson *v.* Lombard Inv. Co., 51 Minn. 141, 53 N. W. 179; Jensen *v.* Lewis Inv. Co., 39 Nebr. 371, 58 N. W. 100; New England Mortg. Security Co. *v.* Addison, 15 Nebr. 335, 18 N. W. 76; Bates *v.* American Mortg. Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340. See, however, cases cited *supra*, page 1224, note 93.

9. *Alabama.*— Ball *v.* State Bank, 8 Ala. 590, 42 Am. Dec. 649.

California.— Murdock *v.* Clarke, 90 Cal. 427, 27 Pac. 275.

Louisiana.— O'Conner *v.* Bernard, 6 Mart. N. S. 303, holding that where one receives notes from a debtor against whom he has claims for collection, as collateral security, with a promise to sue on them, he acts as agent of the debtor in the collection. And see O'Keefe's Succession, 12 La. Ann. 246.

Massachusetts.— Cropper *v.* Adams, 8 Pick. 40, where one as agent for A sold, but did not transfer, stock to C, and promised C to be accountable for such dividends as he or his agent should receive before transfer, and it was held that he thereby became C's agent to receive such dividends.

Michigan.— Colwell *v.* Keystone Iron Co., 36 Mich. 51, holding that an employee of a seller may, by consent of all the parties, accept as the vendee's agent a delivery of property sold, in which case he holds it throughout singly as the vendee's agent.

North Carolina.—Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289, where, in an action for damages against a railroad company, the proof showed that plaintiff had employed C, a depot agent of defendant, to purchase cotton for him and hold it for forwarding over defendant's road according to plaintiff's directions, and it was held that C in so dealing acted solely as plaintiff's agent, and there was no liability on defendant from any loss resulting from the failure of C to perform his duty as such agent.

agent of the adverse party must, from the acts of the parties or the circumstances of the case, be clear; it is not to be inferred from words or conduct not inconsistent with an intention to deal with the agent as representing the adverse party only.[10]

e. Form of Authority —(I) *ORAL AUTHORITY.* In general no written instrument or particular form of words is necessary to constitute the relation of principal and agent.[11] For most purposes the agent's authority need not even be express,[12] but if it is express, oral authority is sufficient.[13] Although it is a general

Pennsylvania.— Western R. Co. *v.* Roberts, 4 Phila. 110, holding that if a purchaser who has bought from an agent for cash pays the agent in notes to be by him turned into cash for the account of the principal, the purchaser thereby makes such agent his in the process of conversion, and assumes responsibility for any loss that may happen for want of fidelity.

Tennessee.— Williams *v.* Williams, 11 Heisk. 95.

Texas.— Trammell *v.* Turner, (Civ. App. 1904) 82 S. W. 325.

United States.— Curtis *v.* Innerarity, 6 How. 146, 12 L. ed. 380, holding that where an agent of a vendor gave a receipt in full for certain balances by way of adjustment and compromise, and the vendor disapproved thereof, the purchasers, by making such payment, which was not within the power of the agent to receive, constituted him their agent, and having for two years afterward insisted on the binding force of the payments to the extent to which the agent had given releases, could not claim the payment to be only on account after the agent became insolvent.

England.— Hewitt *v.* Loosemore, 9 Hare 449, 15 Jur. 1097, 21 L. J. Ch. 69, 41 Eng. Ch. 449, 68 Eng. Reprint 586, holding that a mortgagor who is himself a solicitor and prepares the mortgage papers, in so doing may be considered the agent of the mortgagee.

See 40 Cent. Dig. tit. "Principal and Agent," § 33.

Double agency in negotiation of loan see *supra*, I, D, 1, d, (II).

10. *Alabama.*— Kidd *v.* Cromwell, 17 Ala. 648, 13 Ala. 576, where A & Co., being indebted by note to B & Co. of New York, wrote to them to "return the note to C & Co., our agents in Mobile, who will pay it on presentation," and the note was accordingly remitted to C & Co., who in return sent their receipt to B & Co. in which they promised "to account" to them for the note, and the court held that C & Co. did not thereby become the agents of B & Co., and could not discharge A & Co. from the debt without a payment to B & Co.

Colorado.— Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440, holding that where an agent is authorized only to offer security to the payee of a note for the release of a surety, the payee, by rejecting the offer and proposing to the agent to submit to his principal a proposition to accept the security as collateral security for the note without releasing the surety, does not make the agent his own.

Illinois.— Tufts *v.* Johnson, 46 Ill. App. 191, holding that the mere fact that a purchaser of a stock of goods asks the manager of the seller his opinion of its value does not make the manager the purchaser's agent so as to charge her with his knowledge of a vendor's lien retained on a portion of the goods.

Indiana.— See Worley *v.* Moore, 77 Ind. 567.

Iowa.— Fisher *v.* Schiller Lodge, 50 Iowa 459, holding that if a debtor employs an agent to carry money to his creditor, the creditor by accepting the money does not make the messenger his agent, so that if at another time the messenger should appropriate the money the loss would be that of the creditor, and not that of the debtor.

Mississippi.— Lowenstein *v.* Goodbar, 69 Miss. 808, 13 So. 860, where it appeared that certain creditors effected a purchase of their debtor's stock of goods, assuming to pay certain debts, as to which the debtor was discharged; that a creditor whose debt was assumed was the regular retained attorney of the debtor in his business, and after the terms of the sale were agreed on he, being requested by telegram, prepared the bill of sale, and took temporary possession of the goods, until the purchaser's agent could arrive; and it was held that this did not constitute him the agent of the purchasers in making their purchase.

New York.— Kelly *v.* Lehigh Valley Coal Co., 8 Daly 291.

Tennessee.— Tennessee Bank *v.* Moore, 3 Sneed 544, holding that where a defendant in a suit on a bill of exchange had consigned cotton to a firm of merchants with instructions to sell and apply the proceeds to the payment of the bill, the active member of which firm was the agent of plaintiff and as such the holder of the bill for collection, and the proceeds of said cotton came into the hands of said agent, the law presumes that it was so received as the agent of defendant, and not of plaintiff.

Utah.— Thompson *v.* Avery, 11 Utah 214, 39 Pac. 829.

Vermont.— Strong *v.* Dodds, 47 Vt. 348.

United States.— Holt *v.* Dorsey, 12 Fed. Cas. No. 6,647, 1 Wash. 396.

See 40 Cent. Dig. tit. "Principal and Agent," § 33.

11. Geylin *v.* De Villeroi, 2 Houst. (Del.) 311; Hirsch *v.* Beverly, 125 Ga. 657, 54 S. E. 678; Trundy *v.* Farrar, 32 Me. 225. And see *supra*, I, D, 1, c, (I).

12. Miller *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 236; Jones *v.* Lewis, 8 Ohio Dec. (Reprint) 368, 7 Cinc. L. Bul. 211. And see *supra*, I, D, 1, c, (II); *infra*, II, A, 3.

13. *Alabama.*— Cocke *v.* Campbell, 13 Ala. 286, authority to sell a chattel.

rule that the authority of the agent must be of equal dignity to the power to be executed by him,[14] this does not require an agent to have written authority in order to make a written contract for his principal,[15] nor, at common law, in order to make contracts with respect to land, unless such contracts must be under seal.[16] In particular, it is the rule that authority to execute, indorse, or transfer negotiable

California.— Dingley *v.* McDonald, 124 Cal. 90, 56 Pac. 790, authority to assign a cause of action.

Delaware.— State *v.* Foster, 1 Pennew. 289, 40 Atl. 939.

Georgia.— Kirklin *v.* Atlas Sav., etc., Assoc., 107 Ga. 313, 33 S. E. 83, authority to bid off money offered by a building assoeiation in principal's name and to sign principal's name to the list of members of the assoeiation.

Illinois.— Paris *v.* Lewis, 85 Ill. 597; Sehneider *v.* Seely, 40 Ill. 257; Cook *v.* Harrison, 19 Ill. App. 402, authority to execute a ehattel mortgage.

Indiana.— Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790.

Kentucky.— Kirkpatriek *v.* Cisna, 3 Bibb 244, authority to sell personal property.

Maine.— Trundy *v.* Farrar, 32 Me. 225.

Massachusetts.— Phelps *v.* Sullivan, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 488; Com. *v.* Griffith, 2 Piek. 11; Shed *v.* Brett, 1 Piek. 401, 11 Am. Dec. 209 (authority to present and demand payment of a note); Emerson *v.* Providenee Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Staekpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Michigan.— Hannan *v.* Prentis, 124 Mieh. 417, 83 N. W. 102 (authority to sell real estate); Moreland *v.* Houghton, 94 Mieh. 548, 54 N. W. 285 (authority to assign mortgage).

New York.— Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330.

North Carolina.— Smith *v.* Browne, 132 N. C. 365, 43 S. E. 915; Blaeknall *v.* Parris, 59 N. C. 70, 78 Am. Dec. 239 (authority to sell real estate); Piekard *v.* Brewer, 22 N. C. 428 (authority to eontraet to eonvey slaves).

Ohio.— Jones *v.* Lewis, 8 Ohio Dec. (Reprint) 368, 7 Cine. L. Bul. 211, authority to sign a written agreement to sell lands.

Oregon.— Hughes *v.* Lansing, 34 Oreg. 118, 55 Pae. 95, 75 Am. St. Rep. 574.

Pennsylvania.— London Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390.

South Carolina.— MeGowan *v.* Reid, 27 S. C. 262, 3 S. E. 337, authority to seize ehattels under a mortgage.

Texas.— Bannister *v.* Wallaee, 14 Tex. Civ. App. 452, 37 S. W. 250 (authority to sign a bond); Cohen *v.* Oliver, 9 Tex. Civ. App. 35, 29 S. W. 81 (authority to mortgage chattels).

United States.— Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539.

England.— Heard *v.* Pilley, L. R. 4 Ch. 548, 38 L. J. Ch. 718, 21 L. T. Rep. N. S. 68, 17 Wkly. Rep. 750 (authority to make contraet for purchase of land); Coles *v.* Treeothiek, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. 167, 32 Eng. Reprint 592.

Canada.— Ingersoll, etc., Gravel Road Co. *v.* MeCarthy, 16 U. C. Q. B. 162 (where the court said: "We do not find a distinction drawn in any ease between an authority in writing not under seal where that will sufliee, and a verbal authority merely"); Reg. *v.* Sneider, (Trin. T. 3 & 4 Viet.) R. & J. Dig. 2991 (authority to receive moneys under bond).

See 40 Cent. Dig. tit. "Prineipal and Agent," § 378 *et seq.*

Requirements of statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 147.

14. Johnson *v.* Dodge, 17 Ill. 433; New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. (Mass.) 56; Worrall *v.* Munn, 5 N. Y. 229. 55 Am. Dec. 330; Lawrence *v.* Taylor, 5 Hill (N. Y.) 107; Cribben *v.* Deal, 21 Oreg. 211, 27 Pae. 1046, 28 Am. St. Rep. 746 [*quoting* Shepherd Touehst. 54]. And see *infra*, I, D, 1, e, (III).

15. *Maryland.*— Small *v.* Owings, 1 Md. Ch. 363.

Missouri.— Webb *v.* Browning, 14 Mo. 354.

West Virginia.— Pierey *v.* Hedriek, 2 W. Va. 458, 98 Am. Dec. 774.

United States.— Weleh *v.* Hoover, 29 Fed. Cas. No. 17,368, 5 Craneh C. C. 444.

England.— James *v.* Smith, [1891] 1 Ch. 384, 63 L. T. Rep. N. S. 524, 39 Wkly. Rep. 396 [*affirmed* in 65 L. T. Rep. N. S. 544]; Deverell *v.* Bolton, 18 Ves. Jr. 505, 34 Eng. Reprint 409.

See 40 Cent. Dig. tit. "Prineipal and Agent," § 378 *et seq.* And see eases eited *supra*, note 13.

16. *Arkansas.*— Graeie *v.* White, 18 Ark. 17, authority to pay or tender money for prineipal to redeem land sold for taxes.

Georgia.— Goode *v.* Rawlins, 44 Ga. 593, authority to eonsent in behalf of a mortgagor to a sale on execution of the entire fee in the land.

Massachusetts.—Pratt *v.* Putnam, 13 Mass. 361, an authority to receive seizin.

Michigan.—Antrim Iron Co. *v.* Anderson, 140 Mieh. 702, 104 N. W. 319, 112 Am. St. Rep. 434; Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490.

New York.— Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330.

Pennsylvania.— Miles *v.* Cook, 1 Grant 58, authority to make an entry on land. And see Frailey *v.* Waters, 7 Pa. St. 221.

United States.— Sheets *v.* Selden, 2 Wall. 177, 17 L. ed. 822, authority to act as agent for a lessor in eollection of rent or in demanding its payment.

England.— James *v.* Smith, [1891] 1 Ch. 384, 63 L. T. Rep. N. S. 524, 39 Wkly. Rep. 396 [*affirmed* in 65 L. T. Rep. N. S. 544], authority to purchase real estate.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 380, 382, 383, 388. And for a

instruments need not be written,[17] although the authority is not to be lightly inferred but must be clearly shown.[18]

(II) *Written Authority; Power of Attorney* — (A) *In General.* An agent for any purpose may be, and often is, appointed by writing, called the power of attorney;[19] and if written authority is required by law the same provision that requires the writing forbids that a power previously given shall subsequently be extended or altered by parol.[20] Although it has been held that the term "power of attorney" imports a sealed instrument unless the contrary is shown,[21] yet that is not at all necessary, and is now much less common than formerly. Indeed to constitute a valid power no special form is requisite. It is enough if the principal in the writing makes a clear expression of his desires.[22] Nor need the writing be so detailed as to specify each act the agent is empowered to do, or particularly to describe the property with which he is to deal, provided it is specific enough to enable him reasonably to understand his principal's will.[23] On the other hand a pretended power of attorney is worthless unless it contains a sufficient description of the agent, and of the property or subject with which he is to deal, and of the acts he is to do.[24] Once executed, it becomes the property of the agent to whom it is

fuller discussion of authority to contract with reference to land see *infra*, I, D, 1, e, (III). (B).

And see Andrews *v.* Jones, 10 Ala. 400.

17. *Illinois.*— Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17; Handyside *v.* Cameron, 21 Ill. 588, 74 Am. Dec. 119.

Louisiana.— Nalle *v.* Higginbotham, 21 La. Ann. 477.

Maine.— Trundy *v.* Farrar, 32 Me. 225.

Massachusetts.—Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160.

Missouri.— People's Bank *v.* Scalzo, 127 Mo. 164, 29 S. W. 1032.

New York.— Bank of North America *v.* Embury, 21 How. Pr. 14.

West Virginia.— Piercy *v.* Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

England.—Anonymous, 12 Mod. 564, 88 Eng. Reprint 1522.

See 40 Cent. Dig. tit. "Principal and Agent," § 386. And see Commercial Paper, 7 Cyc. 784.

18. See *infra*, II, A, 6, e.

19. **A power of attorney is:** An instrument by which the authority of one person to act in the place and stead of another as attorney in fact is set out. White *v.* Furgeson, 29 Ind. App. 144, 64 N. E. 49.

An instrument by which the authority of an attorney in fact or private attorney is set forth. Treat *v.* Tolman, 113 Fed. 892, 51 C. C. A. 522 [*affirming* 106 Fed. 679].

An instrument authorizing a person to act as the agent or attorney of the person granting it. Black L. Dict.

Attorney in fact defined see 4 Cyc. 1036.

20. Spofford *v.* Hobbs, 29 Me. 148, 48 Am. Dec. 521; Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927.

21. Cutler *v.* Haven, 8 Pick. (Mass.) 490; Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

22. *Alabama.*—Phillips *v.* Hornsby, 70 Ala. 414.

Louisiana.— Steer *v.* Ward, 10 Mart. 679.

New Jersey.— Tyrrell *v.* O'Connor, 56 N. J. Eq. 448, 41 Atl. 674.

Virginia.— Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766.

United States.— Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 19, 378 *et seq.*

23. *California.*— Roper *v.* McFadden, 48 Cal. 346, upholding a power authorizing the agent to sell and convey all the real estate of the principal in San Francisco, but not describing the land more particularly.

Louisiana.— Rownd *v.* Davidson, 113 La. 1047, 37 So. 965 (holding that a power of attorney to sell and convey all the real estate of the principal in a certain parish sufficiently describes the property); State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522; Valentine *v.* Hawley, 37 La. Ann. 303; New Orleans Commercial Bank *v.* Routh, 7 La. Ann. 128; Reynolds *v.* Rowley, 2 La. Ann. 890.

Minnesota.— Finnegan *v.* Brown, 90 Minn. 396, 97 N. W. 144; Bradley *v.* Whitesides, 55 Minn. 455, 57 N. W. 148; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539.

Nebraska.— Connell *v.* Galligher, 36 Nebr. 749, 55 N. W. 229, holding it to be a sufficient description if therefrom the property is capable of identification.

North Carolina.— Janney *v.* Robbins, 141 N. C. 400, 53 S. E. 863 [*citing* Perry *v.* Scott, 109 N. C. 374, 14 S. E. 294; Farmer *v.* Batts, 83 N. C. 387; Carson *v.* Ray, 52 N. C. 609, 78 Am. Dec. 267], in which the court held a power of attorney authorizing the appointee to sell and convey "all our land in the state of North Carolina" to be sufficiently definite in its description of the land to be admissible, together with a deed executed pursuant to the power, as evidence of title.

Texas.— Pool *v.* Foster, (Civ. App. 1899) 49 S. W. 923; Crimp *v.* Yokeley, 20 Tex. Civ. App. 231, 48 S. W. 1116.

See 40 Cent. Dig. tit. "Principal and Agent," § 19.

24. Stafford *v.* Lick, 13 Cal. 240 (holding that a power of attorney to sell land must contain some description of the prop-

issued, and he has a right to keep it as evidence of the authority under which he acts, until it is recalled by the principal.[25]

(B) *Execution* — (1) In General. It has been held that a power of attorney must be executed with the same solemnities required for the execution of the instrument made by agent acting under it.[26] However, a power, when attached to judicial proceedings, thereby becomes duly authenticated, and cannot thereafter be questioned by parties to the proceedings.[27]

(2) Execution in Blank. A power of attorney executed in blank, although under seal, may be filled up in accordance with the agreement of the parties, in which event it takes effect as from its date.[28] But a power does not become effective when filled in without the knowledge or authority of the principal and where the elements of estoppel are not present.[29]

(C) *Acknowledgment and Recordation.* In the absence of any statute requiring it, a power of attorney need not be acknowledged [30] or recorded,[31] although as matter of proof of authority the power may be and usually is recorded with any recorded instrument which has been executed under it.[32] When, however, an instrument required by law to be publicly recorded is to be executed by an agent, the same reason that calls for recording the original instrument demands that the power of the agent be likewise recorded in order to prove the validity of the instrument he has assumed to have authority to execute. Hence it is common to find the statutes requiring in such cases that the power of attorney of the agent shall be acknowledged and recorded with the instrument executed by such agent.[33]

erty to be sold, unless it is shown that the land in controversy is the only land owned at the time by the principal); Ashley *v.* Bird, 1 Mo. 640, 14 Am. Dec. 313.

25. Pridmore *v.* Harrison, 1 C. & K. 613, 47 E. C. L. 613; Hibberd *v.* Knight, 2 Exch. 11, 12 Jur. 162, 17 L. J. Exch. 119. See *infra*, I, G, 1, b, (II).

26. Gage *v.* Gage, 30 N. H. 420; Clark *v.* Graham, 6 Wheat. (U. S.) 577, 5 L. ed. 334. And see *infra*, I, D, 1, e, (III).

Attestation.—A power of attorney executed by "Julia A. Bird" and "William J. Bird" was attested as follows: "Signed . . . in presence of James Bayne, as to J. A. B., M. Michaelson, as to W. J. B." It was held that the attestation was sufficient as against an objection to the use of initials to designate the signatures attested. Boswell *v.* Laramie First Nat. Bank, (Wyo. 1907) 92 Pac. 624, 93 Pac. 661.

27. Lehmann's Succession, 41 La. Ann. 987, 7 So. 33.

28. Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 231 (where a power of attorney to transfer corporate stock was executed in blank as to the names of the attorney and the transferee); Eagleton *v.* Gutteridge, 2 Dowl. P. C. N. S. 1053, 12 L. J. Exch. 359, 11 M. & W. 465 (where a power of attorney executed abroad, appointing B the attorney, was delivered to Henry B, who was the party meant to be authorized by it, and he filled up the blank with his christian name, and the court held that the power was not invalidated thereby).

Acknowledgment of power after filling in blanks see *infra*, note 33.

29. Cox *v.* Manvel, 50 Minn. 87, 52 N. W. 273.

30. *California.*— Roper *v.* McFadden, 48 Cal. 346.

Indiana.— Moore *v.* Pendleton, 16 Ind. 481.

Massachusetts.— Valentine *v.* Piper, 22 Pick. 85, 33 Am. Dec. 715.

New Jersey.— Tyrrell *v.* O'Connor, 56 N. J. Eq. 448, 41 Atl. 674.

New York.— King *v.* Post, 12 N. Y. St. 575.

United States.— *In re* Powell, 19 Fed. Cas. No. 11,354, 2 Nat. Bankr. Reg. 45.

See 40 Cent. Dig. tit. "Principal and Agent," § 22.

Compare Ryder *v.* Johnston, (Ala. 1907) 45 So. 181.

31. *California.*— Roper *v.* McFadden, 48 Cal. 346.

Georgia.—Anderson *v.* Dugas, 29 Ga. 440.

Indiana.— Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790; Moore *v.* Pendleton, 16 Ind. 481.

Kentucky.— Spurr *v.* Trimble, 1 A. K. Marsh. 278. *Contra*, Taylor *v.* McDonald, 2 Bibb 420 [*cited* in Moore *v.* Farrow, 3 A. K. Marsh. 41].

Louisiana.— Rownd *v.* Davidson, 113 La. 1047, 37 So. 965.

Massachusetts.— Valentine *v.* Piper, 22 Pick. 85, 33 Am. Dec. 715.

New Jersey.— Tyrrell *v.* O'Connor, 56 N. J. Eq. 448, 41 Atl. 674.

New York.— Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458, *semble*. See, however, Jackson *v.* Bowen, 6 Cow. 141.

See 40 Cent. Dig. tit. "Principal and Agent," § 22.

32. Anderson *v.* Dugas, 29 Ga. 440; Rownd *v.* Davidson, 113 La. 1047, 37 So. 965.

33. See the statutes of the different states. And see Graves *v.* Ward, 2 Duv. (Ky.) 301; Harris *v.* Price, 14 B. Mon. (Ky.) 414; Hardin *v.* Taylor, 4 T. B. Mon. (Ky.) 516; Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360; Oatman *v.* Fowler, 43 Vt. 462; Bush *v.* Van Ness, 12 Vt. 83; Gib-

Other statutes permit, but do not require, that powers of attorney shall be recorded, and make such record competent evidence of the agent's authority.[34] As the purpose of requiring acknowledgment and record is thereby to give notice to third persons, failure to record the power of attorney even when recording is required by law will not invalidate the agent's acts thereunder except as to creditors and subsequent purchasers without notice,[35] unless the statute makes recording a prerequisite to authority to act, or provides that unrecorded instruments shall be absolutely void.[36]

(III) *SEALED AUTHORITY*[37] — (A) *In General.* It has been said to be a maxim of the common law that authority to execute a sealed instrument must be conferred by an instrument of equal solemnity, that is by one under seal.[38] The rule

bons *v.* Sloane, 10 Fed. Cas. No. 5,382, 6 McLean 273. *Compare* Johnson *v.* Bush, 3 Barb. Ch. (N. Y.) 207.

Acknowledgment of power executed in blank see Gibbons *v.* Sloane, 10 Fed. Cas. No. 5,382, 6 McLean 273, in which a power was held invalid because when it was filled up acknowledgment was not made as required by statute.

Time of acknowledgment.— It is not necessary that a power of attorney should be acknowledged on the day it is executed. It may be acknowledged at a later date, even at a date subsequent to the contract made by the agent, for the acknowledgment is of importance only as showing that the power was executed by the principal whose name is signed to it. Springer *v.* Orr, 82 Ill. App. 558.

Sufficiency of recordation see Mix *v.* Hotchkiss, 14 Conn. 32 (holding that the power was recorded "with" the deed, although they were written in the book eighty pages apart, both being properly indexed); Taylor *v.* McDonald, 2 Bibb (Ky.) 420 (holding a deed unavailing because the deed and the power were not recorded in the office required by law); Rosenthal *v.* Ruffin, 60 Md. 324 (in which it was held that the power need not be recorded at the same time with the deed; that it is enough if it is recorded prior to the deed; that the terms "with the deed," employed in the statute, means upon the proper records of the city or county where the deed is recorded); Drake *v.* Brander, 8 Tex. 351 (in which objection to a power because it was not filed was held to be sufficiently answered by filing it); Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894 (holding that a power of attorney with reference to the sale of land is not entitled to record in a county in which none of the land is situated); Oatman *v.* Fowler, 43 Vt. 462 (in which the court held that the power must accompany the grant upon the records, and that record of a copy of the power is unavailing).

Form of acknowledgment see Boswell *v.* Laramie First Nat. Bank, (Wyo. 1907) 92 Pac. 624, 93 Pac. 661.

The certificate of acknowledgment must describe the donor and the subject-matter on which the power is to operate. See Crutchfield *v.* Stewart, 10 Yerg. (Tenn.) 237.

Effect of record as notice.— The record of a power of attorney imparts notice to third persons dealing with the subject-matter thereof. Landers *v.* Bolton, 26 Cal. 393, 419.

34. See the statutes of the different states. And see Lobdell *v.* Mason, 71 Miss. 937, 15 So. 44; Costen's Appeal, 13 Pa. St. 292.

35. *Connecticut.*— Mix *v.* Hotchkiss, 14 Conn. 32.

Kentucky.— Voorhies *v.* Gore, 3 B. Mon. 529; Godsey *v.* Standifer, 101 S. W. 921, 31 Ky. L. Rep. 44.

Montana.— McAdow *v.* Black, 4 Mont. 475, 1 Pac. 751.

New Hampshire.— Montgomery *v.* Dorion, 6 N. H. 250.

New York.— Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458.

Ohio.— Diehl *v.* Stine, 1 Ohio Cir. Ct. 515, 1 Ohio Cir. Dec. 287.

See 40 Cent. Dig. tit. "Principal and Agent," § 22.

36. See Joseph *v.* Fisher, 122 Ind. 399, 23 N. E. 856; Johnson *v.* Sukeley, 13 Fed. Cas. No. 7,414, 2 McLean 562.

37. Authority to fill in blanks in sealed instrument executed by principal see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 165 *et seq.*

38. *Alabama.*— Cocke *v.* Campbell, 13 Ala. 286. And see Elliott *v.* Stocks, 67 Ala. 336.

California.— Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

Delaware.— Hartnett *v.* Baker, 4 Pennew. 431, 56 Atl. 672.

Georgia.— Overman *v.* Atkinson, 102 Ga. 750, 29 S. E. 758; McCalla *v.* American Freehold Land Mortg. Co., 90 Ga. 113, 15 S. E. 687; Pollard *v.* Gibbs, 55 Ga. 45; Rowe *v.* Ware, 30 Ga. 278; Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549; Hayes *v.* Atlanta, 1 Ga. App. 25, 57 S. E. 1087.

Illinois.— Johnson *v.* Dodge, 17 Ill. 433; Bragg *v.* Fessenden, 11 Ill. 544; Maus *v.* Worthing, 4 Ill. 26.

Indiana.— Rhode *v.* Louthain, 8 Blackf. 413.

Kentucky.— Cummins *v.* Cassily, 5 B. Mon. 74; Mitchell *v.* Sproul, 5 J. J. Marsh. 264; McMurtry *v.* Frank, 4 T. B. Mon. 39.

Maine.— Heath *v.* Nutter, 50 Me. 378; Baker *v.* Freeman, 35 Me. 485; Wheeler *v.* Nevins, 34 Me. 54; Spofford *v.* Hobbs, 29 Me. 148, 48 Am. Dec. 521.

Massachusetts.—Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17.

Minnesota.— Dayton *v.* Nell, 43 Minn. 246, 45 N. W. 231.

is a technical one and has been changed in some of the states by statutes abolishing all distinctions between sealed and unsealed instruments,[39] while many of the American courts, without awaiting a legislative action, have shown a disposition to relax its strictness.[40] Thus it has often been held that if an agent in executing a contract unnecessarily attaches a seal thereto, the seal may be treated as surplusage, and it is sufficient that the authority of the agent who executed it was conferred by parol;[41] and so is parol authority sufficient for the execution of a

Missouri.— Shuetze *v.* Bailey, 40 Mo. 69; St. Louis Dairy Co. *v.* Sauer, 16 Mo. App. 1.

New Hampshire.— Haydock *v.* Duncan, 40 N. H. 45; Gage *v.* Gage, 30 N. H. 420.

New Jersey.— Wagoner *v.* Watts, 44 N. J. L. 126; Long *v.* Hartwell, 34 N. J. L. 116; Perry *v.* Smith, 29 N. J. L. 74; Tappan *v.* Redfield, 5 N. J. Eq. 339.

New York.—Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330.

North Carolina.— Humphreys *v.* Finch, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293; Harshaw *v.* McKesson, 65 N. C. 688; Delius *v.* Cawthorn, 13 N. C. 90.

Pennsylvania.— Gordon *v.* Bulkeley, 14 Serg. & R. 331.

Tennessee.— Cain *v.* Heard, 1 Coldw. 163; McNutt *v.* McMahan, 1 Head 98; Mosby *v.* Arkansas, 4 Sneed 324; Smith *v.* Dickinson, 6 Humphr. 261, 44 Am. Dec. 306; Boyd *v.* Dodson, 5 Humphr. 37; Turbeville *v.* Ryan, 1 Humphr. 113, 34 Am. Dec. 622.

United States.— See Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

England.— Berkeley *v.* Hardy, 5 B. & C. 355, 8 D. & R. 102, 4 L. J. K. B. O. S. 184, 11 E. C. L. 495; Steiglitz *v.* Egginton, Holt N. P. 141, 17 Rev. Rep. 622, 3 E. C. L. 63.

Canada.— Doe *v.* Armstrong, Taylor (U. C.) 352; Ingersoll, etc., Gravel Road Co. *v.* McCarthy, 16 U. C. Q. B. 162.

See 40 Cent. Dig. tit. "Principal and Agent," § 378 *et seq.*

In the civil law no such rule obtains. Posten *v.* Rassette, 5 Cal. 467; Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

Nor can a parol authority enlarge a power of attorney previously given under seal. Paine *v.* Tucker, 21 Me. 138, 38 Am. Dec. 255; Stetson *v.* Patten, 2 Me. 358, 11 Am. Dec. 111.

39. See the statutes of the different states. See also Dolbeer *v.* Livingston, 100 Cal. 617, 35 Pac. 328; Swartz *v.* Ballou, 47 Iowa 188, 29 Am. Rep. 470; Bates *v.* Best, 13 B. Mon. (Ky.) 215; J. B. Streeter Co. *v.* Janu, 90 Minn. 393, 96 N. W. 1128.

40. See cases cited *infra*, note 41 *et seq.*

Deed as equitable contract for sale.— Still other cases hold that even where the instrument is required by law to be under seal, an instrument ineffective because executed by an agent wanting authority under seal will still be treated in equity as a simple contract which may be specifically enforced against the principal. The effect of this view is a practical abrogation of all requirements for sealed authority. See cases cited *infra*, I, D, 1, e, (III), (B), (2).

41. *California.*— Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602.

Connecticut.— White *v.* Fox, 29 Conn. 570.

Delaware.— Hartnett *v.* Baker, 4 Pennew. 431, 56 Atl. 672.

Illinois.— Ingraham *v.* Edwards, 64 Ill. 526 (*semble*); Truett *v.* Wainwright, 9 Ill. 411; Cook *v.* Harrison, 19 Ill. App. 402; Beidler *v.* Fish, 14 Ill. App. 29. A contrary view was expressed in the early case of Maus *v.* Worthing, 4 Ill. 26, although the point was not involved.

Minnesota.— Thomas *v.* Joslin, 30 Minn. 388, 15 N. W. 675; Dickerman *v.* Ashton, 21 Minn. 538; Minor *v.* Willoughby, 3 Minn. 225.

Missouri.— Klostermann *v.* Loos, 58 Mo. 290; Shuetze *v.* Bailey, 40 Mo. 69; Lehman *v.* Nolting, 56 Mo. App. 549.

New Jersey.—Wagoner *v.* Watts, 44 N. J. L. 126; Long *v.* Hartwell, 34 N. J. L. 116.

New York.— Henry *v.* Root, 33 N. Y. 526; Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83; Wood *v.* Auburn, etc., R. Co., 8 N. Y. 160; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lawrence *v.* Taylor, 5 Hill 107. Earlier New York cases (Hanford *v.* McNair, 9 Wend. 54, and Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121) stand for the opposite doctrine, although in the former case the fact that the form of the action was covenant was fatal to a claim that the instrument might be treated as a simple contract.

Pennsylvania.— Barnes *v.* Du Bois, 43 Pa. St. 260; Cooper *v.* Rankin, 5 Binn. 613, per Brackenridge, J.

Tennessee.— Farris *v.* Martin, 10 Humphr. 495.

Texas.— Crozier *v.* Carr, 11 Tex. 376.

Wisconsin.— Stowell *v.* Eldred, 39 Wis. 614.

Wyoming.— Marshall *v.* Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679.

United States.— Nichols *v.* Haines, 98 Fed. 692, 39 C. C. A. 235.

England.— Hunter *v.* Parker, 10 L. J. Exch. 281, 7 M. & W. 322. *Compare* Berkeley *v.* Hardy, 5 B. & C. 355, 8 D. & R. 102, 4 L. J. K. B. O. S. 184, 11 E. C. L. 495.

See 40 Cent. Dig. tit. "Principal and Agent," § 378 *et seq.*

Contra.— Rowe *v.* Ware, 30 Ga. 278 [*approved* in Overman *v.* Atkinson, 102 Ga. 750, 29 S. E. 758; Pollard *v.* Gibbs, 55 Ga. 45]; Rhode *v.* Louthain, 8 Blackf. (Ind.) 413 (in which, however, the court held that the previous lack of authority to make the bond in question was cured by a later oral ratification); Cummins *v.* Cassily, 5 B. Mon. (Ky.) 74 (where the court recognized that possibly there was little reason for the rule); Mitchell *v.* Sproul, 5 J. J. Marsh. (Ky) 264; McMurtry *v.* Frank, 4 T. B. Mon. (Ky.) 39

deed in the presence and by the direction of the principal, for such execution is treated in law as the act, not of the agent, but of the principal himself, the agent being regarded as a mere instrument.[42]

(B) *Deeds of Conveyance and Contracts Therefor* — (1) In General. Conveyances of land, except when the necessity of a seal has been abrogated by statute, must be made by instrument under seal,[43] and accordingly in most jurisdictions an agent must have sealed authority to execute a conveyance of land,[44] although not to make a contract to convey, since such a contract does not require a seal.[45]

(2) Ineffectual Deed as Equitable Contract to Convey. In many jurisdictions the common-law rule requiring sealed authority is practically nullified by the fact that a deed which is ineffectual as such because executed by an agent without sealed authority is treated in equity as a contract for a deed, which the courts will specifically enforce by requiring the principal to execute a deed.[46]

(both of which cases, however, might have been decided on the ground that the agent had no authority sealed or otherwise to make the bond sued on); Baker *v.* Freeman, 35 Me. 485; Wheeler *v.* Nevins, 34 Me. 54; Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17; Cadell *v.* Allen, 99 N. C. 542, 6 S. E. 399; Humphreys *v.* Finch, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293; Harshaw *v.* McKesson, 65 N. C. 688; Bland *v.* O'Hagan, 64 N. C. 471; Blacknall *v.* Parish, 59 N. C. 70, 78 Am. Dec. 239; Graham *v.* Holt, 25 N. C. 300, 40 Am. Dec. 408; Davenport *v.* Sleight, 19 N. C. 381, 31 Am. Dec. 420; Delius *v.* Cawthorn, 13 N. C. 90.

Unnecessary use of seal by partner see Partnership, 30 Cyc. 487.

42. See St. Louis Dairy Co. *v.* Sauer, 16 Mo. App. 1; Gordon *v.* Bulkeley, 14 Serg. & R. (Pa.) 331.

Signature by agent in presence and by direction of principal as dispensing with written authority required by statute of frauds see Frauds, Statute of, 20 Cyc. 275.

Signature of contract by third person in promisor's presence and by his direction see Contracts, 9 Cyc. 301.

Signature of deed by third person in grantor's presence and by his direction see Deeds, 13 Cyc. 554.

Signature by hand of another in general see Signatures.

43. See Deeds, 13 Cyc. 555.

44. *Colorado.*— Tilton *v.* Cofield, 2 Colo. 392.

Illinois.— Watson *v.* Sherman, 84 Ill. 263; Peabody *v.* Hoard, 46 Ill. 242.

Kentucky.— Spurr *v.* Trimble, 1 A. K. Marsh. 278; Plummer *v.* Russell, 2 Bibb 174.

New York.— Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330.

North Carolina.— Cadell *v.* Allen, 99 N. C. 542, 6 S. E. 399.

Tennessee.— Smith *v.* Dickinson, 6 Humphr. 261, 44 Am. Dec. 306.

United States.— Piatt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69.

See 40 Cent. Dig. tit. "Principal and Agent," § 382.

Seal not the only requisite.— It has sometimes been said that a power to convey lands must possess the same requisites, witnesses as well as seal, and observe the same solemnities, as are necessary in a deed directly conveying the lands. Clark *v.* Graham, 6 Wheat. (U. S.) 577, 5 L. ed. 334. To the same effect are Butterfield *v.* Beall, 3 Ind. 203; Heath *v.* Nutter, 50 Me. 378; Gage *v.* Gage, 30 N. H. 420; Murphy *v.* McVicker, 17 Fed. Cas. No. 9,951, 4 McLean 252.

Under a modern statute it has been said that since a lease for more than one year must be by deed the agent's appointment to make it must also be by deed. Lobdell *v.* Mason, 71 Miss. 937, 15 So. 44. Since the use of private seals is by statute dispensed with, it would seem that the deed referred to must be a writing signed and acknowledged, but not of necessity sealed.

45. *Alabama.*— Ledbetter *v.* Walker, 31 Ala. 175.

Illinois.— Watson *v.* Sherman, 84 Ill. 263 [*citing* Peabody *v.* Hoard, 46 Ill. 242; Johnson *v.* Dodge, 17 Ill. 433].

Minnesota.— Dickerman *v.* Ashton, 21 Minn. 538; Groff *v.* Ramsey, 19 Minn. 44; Minor *v.* Willoughby, 3 Minn. 225.

New Jersey.— Force *v.* Dutcher, 18 N. J. Eq. 401; Doughaday *v.* Crowell, 11 N. J. Eq. 201.

New York.— Lawrence *v.* Taylor, 5 Hill 107.

Pennsylvania.— Baum *v.* Dubois, 43 Pa. St. 260.

Wisconsin.— Dodge *v.* Hopkins, 14 Wis. 630.

See 40 Cent. Dig. tit. "Principal and Agent," § 380.

46. *Alabama.*— Ledbetter *v.* Walker, 31 Ala. 175; Morrow *v.* Higgins, 29 Ala. 448.

California.— Heinlein *v.* Martin, 53 Cal. 321; Jones *v.* Marks, 47 Cal. 242; Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Rep. 602; Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765, holding that a power to sell and convey land not under seal, and therefore insufficient to authorize the execution of a conveyance of the fee, is nevertheless sufficient authority for the execution of a contract of sale; and a deed made by the donee, reciting the sale, and purporting, in pursuance of the power, to convey the fee, is good as an agreement to convey.

Colorado.— Tilton *v.* Cofield, 2 Colo. 392.

(c) *Bonds.* The term "bond" imports a sealed instrument, and there cannot be a perfect bond without a seal.[47] Hence an agent's authority to execute a bond must be under seal.[48]

2. By Operation of Law. Agency is in a few instances implied by law without the consent of the principal, and even against his express dissent.[49]

E. Estoppel to Assert or to Deny Agency — 1. Estoppel to Assert. If a person has acted in his own name, holding himself out as principal, he cannot afterward, as against persons interested in the transaction, set up that he was acting as agent only.[50] So if a principal in a transaction represents to the other party that his agent is jointly interested as principal, he is estopped, as against the other party, to assert the agency.[51] And if the owner of property represents

Illinois.— Peabody *v.* Hoard, 46 Ill. 242 [*citing* Johnson *v.* Dodge, 17 Ill. 433; Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756]. So where a trust deed authorizes the trustee, his legal representatives or attorney, to sell the land conveyed on default of payment, and a sale is fairly made under a power of attorney not under seal, and the purchase-money paid and a conveyance executed by the attorney, the sale will be good in equity, and the purchaser will acquire the equitable title to the premises, and may set up such title in bar of a suit in equity to have the sale set aside. Watson *v.* Sherman, 84 Ill. 263.

Indiana.— Joseph *v.* Fisher, 122 Ind. 399, 23 N. E. 856.

Minnesota.— Dickerman *v.* Ashton, 21 Minn. 538; Minor *v.* Willoughby, 3 Minn. 225. So a conveyance for a valuable consideration, made by one authorized only by a letter of attorney not under seal, is good as a contract to convey, and the equitable right of the purchaser thereunder is superior to the title of a subsequent grantee with notice. Groff *v.* Ramsey, 19 Minn. 44.

Mississippi.— Lobdell *v.* Mason, 71 Miss. 937, 15 So. 44.

New Hampshire.— Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Sherman *v.* New York Cent. R. Co., 22 Barb. 239.

North Carolina.— Osborne *v.* Horner, 33 N. C. 359; Pickard *v.* Brewer, 22 N. C. 428. In Cadell *v.* Allen, 99 N. C. 542, 6 S. E. 399, the court denied equitable relief on the ground that the action was simply one at law, viz. ejectment.

United States.— Lyon *v.* Pollock, 99 U. S. 668, 25 L. ed. 265; Pratt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69.

47. See Bonds, 5 Cyc. 736.

48. *Georgia.*— Overman *v.* Atkinson, 102 Ga. 750, 29 S. E. 758; Whelan *v.* Sherron, Ga. Dec., pt. II, 43.

Illinois.— Maus *v.* Worthing, 4 Ill. 26.

Massachusetts.— Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17.

New York.— Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Hanford *v.* McNair, 9 Wend. 54.

North Carolina.— Kime *v.* Brooks, 31 N. C. 218; Delius *v.* Cawthorn, 13 N. C. 90.

Pennsylvania.— Gordon *v.* Bulkeley, 14 Serg. & R. 331; Cooper *v.* Rankin, 5 Binn. 613.

South Carolina.—Boyd *v.* Boyd, 2 Nott & M. 125.

See 40 Cent. Dig. tit. "Principal and Agent," § 384.

Contra.— U. S. *v.* Turner, 28 Fed. Cas. No. 16,547, 2 Bond 379, in which the court held that where a bond is executed in the name of the firm by a manager of the business, who was so in the habit of using the firm-name, authority to sign by a written instrument, sealed or otherwise, need not be shown.

Assignment of bond.— But where a sealed bond is transferable by an assignment not under seal, a power of attorney to assign it need not be under seal. Prioleau *v.* South Western R. Bank, 16 Ga. 582.

49. **Agency arising from necessity** see Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878; and cross-references *infra*, this note.

Implied agency of: Master of vessel for owner see Shipping. Partner for copartner see Partnership, 30 Cyc. 477 *et seq.* Servant to pledge master's credit for medical or surgical aid see Corporations, 10 Cyc. 926; Master and Servant, 26 Cyc. 1050; and *infra*, II, A, 6, h, (v), (c). Seller to sell goods for account of buyer see Sales. Consignee to sell goods for account of consignor see Sales. Wife for husband see Husband and Wife, 21 Cyc. 1215 *et seq.*, 1234 *et seq.*; Parent and Child, 29 Cyc. 1607. Husband for wife see Husband and Wife, 21 Cyc. 1238 *et seq.* Child for parent see Parent and Child, 29 Cyc. 1608 *et seq.*, 1664. Parent for child see Parent and Child, 29 Cyc. 1619.

Agency by estoppel see *infra*, I, E.

Agency by ratification see *infra*, I, F.

50. Baltes *v.* Ripp, 1 Abb. Dec. (N. Y.) 78, 3 Keyes 210, holding that one who purchases as for himself at a wrongful sale on execution cannot, when sued for conversion, assert that he purchased for another. And see, generally, *infra*, III, C.

51. East Haddam Bank *v.* Shailor, 20 Conn. 18, in which case D sued A, B, and C as indorsers on notes given as security for moneys loaned by D to them with the understanding that all were interested in the transaction for which the money was needed, while in fact C was only the agent of A and B in the business, and the court held that B, having united in the representations on the faith of which D advanced the money, was estopped from denying C's interest in the transaction.

that his agent is the owner thereof,[52] or actively or by acquiescence or by want of due care holds out his agent as owner,[53] he is estopped to assert the agency as against third persons who deal with the agent in reliance on his ownership. However, a principal who merely intrusts an agent with possession and control of property necessary to the transaction of the business of the agency is not thereby estopped from asserting his title to the same.[54]

2. Estoppel to Deny — a. Estoppel of Principal — (i) *As Against Agent.* The agent may sometimes invoke estoppel against his principal when the latter seeks to hold him responsible for unauthorized acts. If the principal upon being informed of them did not promptly repudiate them he will be estopped to deny the agent's authority.[55]

(ii) *As Against Third Person*[56]— (a) *Preliminary Distinctions.* Under the doctrine of equitable estoppel[57] two persons may find themselves charged with all the consequences of agency as to third persons, when as between themselves there exists as a matter of fact no agency at all, or no agency for the particular purpose in question.[58] Strictly speaking agency by estoppel should be limited to cases in which there is no real, but only an apparent, agency, for when an actual agency is shown, whether by express or implied appointment, it is quite unnecessary to invoke the aid of estoppel.[59] Practically, however, this distinction is not

52. Simar *v.* Shea, 89 N. Y. App. Div. 84, 85 N. Y. Suppl. 457 [*affirmed* in 180 N. Y. 558, 73 N. E. 1132], holding that if a consignor of goods represents that he has sold them to the consignee, he is estopped, as against one who has bought the goods from the consignee in reliance on the representation, to assert that the consignee was merely his selling agent.

53. *Indiana.*— Rathbone *v.* Sanders, 9 Ind. 217.

Iowa.— White *v.* Morgan, 42 Iowa 113, holding that where the owner of property has permitted his agent in possession to represent himself as the owner, whereby he has obtained credit and incurred a debt for an improvement on the property, the owner is estopped to deny his liability therefor.

Maine.— See Munroe *v.* Whitehouse, 90 Me. 139, 37 Atl. 866, holding that where a person intrusted with goods as agent sells them to one who has no knowledge that he is agent, but is led to believe from the manner in which he has been allowed to deal with the goods that they are his, the other party may offset against the principal a debt of the agent.

Missouri.— De Baun *v.* Atchison, 14 Mo. 543.

New Hampshire.— See Clement *v.* Leverett, 12 N. H. 317, where a principal accepted bills of exchange drawn on him by his agent, payable to the order of the agent, who agreed to get them discounted for the benefit of the principal, and the agent, assuming to be the owner of the bills, pledged them to a *bona fide* holder to secure money borrowed for his own use, and it was held that the principal, having enabled the agent to hold himself out as owner of the bills of exchange, was bound by the pledge.

New Jersey.— Reed *v.* Vancleve, 27 N. J. L. 352, 72 Am. Dec. 369.

Ohio.— Gordon *v.* Kearney, 17 Ohio 572, applying the principle that as between two innocent persons he shall suffer who incautiously gave a third person the means of obtaining false credit.

Canada.— Young *v.* MacNider, 25 Can. Sup. Ct. 272.

And see *infra*, II, A, 6, b, (II); III, F, 1, e, (III). See also Fraudulent Conveyances, 20 Cyc. 323.

However, the fact that an agent in possession and use of the property of his principal held himself out to the public as the owner of the same in such manner as to induce credit to be given him cannot prevail against the principal, where he did nothing to superinduce the agent's conduct and did not acquiesce therein. Curl *v.* Bond, 52 La. Ann. 1052, 27 So. 577. And the principal is not estopped unless he knew that the agent was acting as owner and failed to repudiate his acts. White *v.* Morgan, 42 Iowa 113.

54. Greene *v.* Dockendorf, 13 Minn. 70; McGoldrick *v.* Willits, 52 N. Y. 612; McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Gussner *v.* Hawks, 13 N. D. 453, 101 N. W. 898. And see Rogers *v.* Holden, 142 Mass. 196, 7 N. E. 768; Cupples *v.* Whelan, 61 Mo. 583; Weaver *v.* Barden, 49 N. Y. 286.

55. St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737. See, generally, *infra*, III, A.

56. Estoppel by acceptance of benefits of act of person assuming authority see *infra*, I, F, 3, c, (II).

Estoppel by conduct of alleged principal subsequent to transaction between third person and alleged agent see *infra*, I, F; I, G.

Estoppel by ratification see *infra*, I, F.

Estoppel to deny continuance of agency see *infra*, I, G, 1, b, (III), (B), (II).

Estoppel to deny validity of deed executed in blank where blanks are filled in by agent see Alterations of Instruments, 2 Cyc. 171.

57. See Estoppel, 16 Cyc. 722 *et seq.*

58. See *infra*, I, E, 2, a, (II), (B).

59. See *supra*, I, D, 1, c, (II), (B).

clearly made, and it is often impossible from the facts brought out by the evidence to determine whether the agency is actual or ostensible.[60] In most cases the distinction would not affect the rights of the parties, but, as elsewhere pointed out, occasionally a case may turn on whether the agency is implied or is one by estoppel.[61] The doctrine of estoppel involves apparent or ostensible agency, which exists where the principal intentionally, or by want of ordinary care, induces third persons to believe another to be his agent, although he did not in fact employ him.[62] As to third persons the distinction between actual and apparent or ostensible agency is unimportant, as the liability of principal and agent is the same in either case, but as between the parties themselves of course the ostensible agent is no agent at all.[63] Apparent or ostensible agency is really agency by estoppel, and it is more strictly accurate to say that liability arises for the acts of such

60. This will be clear from an examination of the cases cited *supra*, I, D, 1, c, (II); *infra*, I, E, 2, a, (II), (B).

61. See *supra*, I, D, 1, c, (II), (B). See also Cadwell *v.* Dullaghan, 74 Iowa 239, 37 N. W. 178; Morris *v.* Joyce, 63 N. J. Eq. 549, 53 Atl. 139; and *infra*, I, E, 2, a, (II), (B).

62. Apparent authority "is such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess." St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 295, 90 S. W. 737. The apparent authority of an agent which will be sufficient to bind his principal for acts done thereunder is such authority as he appears to have by reason of the actual authority which he has. Northwest Thresher Co. *v.* Eddyville State Bank, (Nebr. 1907) 114 N. W. 291.

Ostensible agency exists in law where one either intentionally, or from want of ordinary care, induces another to believe that a third person is his agent, although he never in fact employed him. In other words, one may actually create another his agent; and one may, on the other hand, induce a third person to believe another his agent, and to act with him as such, in which event the principal would be liable for the acts of the agent. Bibb *v.* Bancroft, (Cal. 1889) 22 Pac. 484. An agency is ostensible when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 11 N. D. 280, 91 N. W. 436; Reid *v.* Kellogg, 8 S. D. 596, 67 N. W. 687.

Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Quay *v.* Presidio, etc., R. Co., 82 Cal. 1, 22 Pac. 925; S. D. Civ. Code (1903), § 1675. "There are two essential features of an authority of this character; viz., the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. A belief founded on the agent's statements is not sufficient; for a party has no right to take the agent's word for the existence of his authority." Where it does not appear that the acts of a principal which are supposed to have been sufficient to justify a belief in an agent's authority were known to the person dealing with him, they could not have generated in his mind any belief on the subjects of the agency, and hence there was no ostensible authority. Harris *v.* San Diego Flume Co, 87 Cal. 526, 527, 25 Pac. 758. This is the embodiment of a well-established principle of the common law which has been called the "foundation of the law of agency." Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138. "Ostensible authority," as used in Cal. Civ. Code, § 2369, providing that a factor has ostensible authority to deal with the property of his principal as his own in transactions with persons not having notice of the actual ownership, has a broader meaning than "ostensible authority" as used in Civ. Code, § 2317, defining ostensible authority to be such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess, for it has reference to the ostensible authority of agents in general. "The authority is as real where it is declared to be ostensible, as where it is declared to be actual." Wisp *v.* Hazard, 66 Cal. 459, 462, 6 Pac. 91. Ostensible authority is defined in S. D. Comp. Laws, §§ 3965, 3979, as such authority as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Reid *v.* Kellogg, 8 S. D. 596, 603, 67 N. W. 687. Ostensible authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on apparent agency. Northwest Thresher Co. *v.* Eddyville State Bank, (Nebr. 1907) 114 N. W. 291; Holt *v.* Schneider, 57 Nebr. 523, 77 N. W. 1086 [*distinguishing* Frey *v.* Curtis, 52 Nebr. 406, 72 N. W. 478; Porter *v.* Ourada, 51 Nebr. 510, 71 N. W. 52]; Phœnix Ins. Co. *v.* Walter, 51 Nebr. 182, 70 N. W. 938; Thomson *v.* Shelton, 49 Nebr. 644, 68 N. W. 1055; Blanke Tea, etc., Co. *v.* Trade Exhibit Co., 5 Nebr. (Unoff.) 358, 98 N. W. 714.

63. Bibb *v.* Bancroft, (Cal. 1889) 22 Pac. 484; Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 11 N. D. 280, 91 N. W. 436. And see *infra*, II, A, 2, e.

a so-called agent, not because there is any agency, but because the principal will not be permitted to deny it.[64]

(B) *General Rule and Its Limitations.* The same acts and conduct on the part of a principal that, when so intended, work an implied appointment often estop the principal to deny an appointment when no actual agency was intended. Accordingly, it is a general rule that when a principal by any such acts or conduct has knowingly caused or permitted another to appear to be his agent either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.[65] This rule

64. St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737; Griggs *v.* Selden, 58 Vt. 561, 5 Atl. 504; Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645. See also *supra*, I, D, 1, c, (II), (B).

65. *Alabama.*— Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304. And see Nicholson *v.* Moog, 65 Ala. 471, holding that where a merchant abandons his business, and allows it to be carried on in his name by a relative, under authority of the same revenue licenses, the same rule of liability applies for debts afterward contracted in his name as in the case of a retiring partner.

Arkansas.— Jenkins *v.* Shinn, 55 Ark. 347, 18 S. W. 240; Hynson *v.* Noland, 14 Ark. 710.

California.— Gosliner *v.* Grangers' Bank, 124 Cal. 225, 56 Pac. 1029; Buckley *v.* Silverberg, 113 Cal. 673, 45 Pac. 804; Allin *v.* Williams, 97 Cal. 403, 32 Pac. 441; Karns *v.* Olney, 80 Cal. 90, 22 Pac. 57, 13 Am. St. Rep. 101; Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138.

District of Columbia.—Dye *v.* Virginia Midland R. Co., 20 D. C. 63.

Georgia.— Fitzgerald Cotton Oil Co. *v.* Farmers' Supply Co., 3 Ga. App. 212, 59 S. E. 713.

Idaho.— Morgan *v.* Neal, 7 Ida. 629, 65 Pac. 66, 97 Am. St. Rep. 264.

Illinois.— Union Stockyard, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; Swannell *v.* Byers, 123 Ill. App. 545; Williams *v.* Pelley, 96 Ill. App. 346; St. Louis Southwestern R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619.

Indiana.— Kiefer *v.* Klinsick, 144 Ind. 46, 42 N. E. 447; Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Growcock *v.* Hall, 82 Ind. 202; Pursley *v.* Morrison, 7 Ind. 356, 63 Am. Dec. 424; German-American Bldg. Assoc. *v.* Droge, (App. 1895) 41 N. E. 397; Burnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927.

Iowa.— Beebe *v.* Equitable Mut. L., etc., Assoc., 76 Iowa 129, 40 N. W. 122; Whiting *v.* Western Stage Co., 20 Iowa 554; Tappan *v.* Morseman, 18 Iowa 499.

Kentucky.— Jones *v.* Commercial Bank, 78 Ky. 413.

Louisiana.— Airey *v.* Okolona Sav. Inst., 33 La. Ann. 1346; Rankin *v.* Stewart, 5 La. Ann. 357; Lochte *v.* Gélé, McGloin 52.

Maine.— Breckenridge *v.* Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353; Trundy *v.* Farrar, 32 Me. 225.

Massachusetts.— Holden *v.* Phelps, 141 Mass. 456, 5 N. E. 815.

Michigan.— Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570.

Minnesota.— Columbia Mill Co. *v.* National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061; Tice *v.* Russell, 43 Minn. 66, 44 N. W. 886.

Missouri.— Carthage First Nat. Bank *v.* Newark Mut. Ben. L. Ins. Co., 145 Mo. 127, 46 S. W. 615; Summerville *v.* Hannibal, etc., R. Co., 62 Mo. 391; De Baun *v.* Atchison, 14 Mo. 543; St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737; Hefferman *v.* Boteler, 87 Mo. App. 316; Suddarth *v.* Empire Lime Co., 79 Mo. App. 585; Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672; Morse *v.* Diebold, 2 Mo. App. 163.

Nebraska.— Faulkner *v.* Simms, (1902) 89 N. W. 171; Holt *v.* Schneider, 57 Nebr. 523, 77 N. W. 1086; Johnston *v.* Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 N. W. 1100; Lebanon Sav. Bank *v.* Blanke, 2 Nebr. (Unoff.) 403, 89 N. W. 169; Harrison Nat. Bank *v.* Williams, 2 Nebr. (Unoff.) 400, 89 N. W. 245.

New Hampshire.— Knapp *v.* U. S., etc., Express Co., 55 N. H. 348.

New Jersey.— Putnam *v.* Clark, 29 N. J. Eq. 412 [*affirmed* in 33 N. J. Eq. 238].

New Mexico.— Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721.

New York.— Page *v.* Methfessel, 71 Hun 442, 25 N. Y. Suppl. 11 [*affirmed* in 145 N. Y. 602, 40 N. E. 164]; Johnson *v.* Jones, 4 Barb. 369 (in which the court says that where a person is sought to be charged for the act of another, and there is evidence of an apparent authority, the question to be determined is, not what power was intended to be given to the agent, but what power a third person dealing with him had a right to infer, from his own acts and those of his principal, that he possessed); Trankla *v.* McLean, 18 Misc. 221, 4 N. Y. Suppl. 385; Maher *v.* Willson, 3 N. Y. Suppl. 80 [*affirmed* in 123 N. Y. 655, 25 N. E. 954].

North Carolina.— James *v.* Russell, 92 N. C. 194.

Ohio.— Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 392.

Oregon.— Neppach *v.* Oregon, etc., R. Co., 46 Oreg. 374, 80 Pac. 482.

Pennsylvania.— De Witt *v.* De Witt, 202 Pa. St. 255, 51 Atl. 987; Hubbard *v.* Ten Brook, 124 Pa. St. 291, 16 Atl. 817, 10 Am.

is particularly true where the principal has knowingly by such acts and conduct recognized the agency through a long course of dealing or in many transactions;[66] and the

St. Rep. 585, 2 L. R. A. 823; Mecough *v.* Loughery, 12 Phila. 416 [*affirmed* in 37 Leg. Int. 341].

South Carolina.— Jenkins *v.* Hogg, 2 Treadw. 821.

Texas.— Brennan *v.* Dansby, 43 Tex. Civ. App. 7, 95 S. W. 700; Baker, etc., Co. *v.* Kellett-Chatham Mach. Co., (Civ. App. 1905) 84 S. W. 661; Bay City Irr. Co. *v.* Sweeney, (Civ. App. 1904) 81 S. W. 545; Eastern Mfg. Co. *v.* Brenk, 32 Tex. Civ. App. 97, 73 S. W. 538; Barnes *v.* Downes, 2 Tex. App. Civ. Cas. § 524.

Vermont.— Landon *v.* Proctor, 39 Vt. 78; Tier *v.* Lampson, 35 Vt. 179, 82 Am. Dec. 834; Hawkins *v.* Barney, 27 Vt. 392.

Virginia.— Hooe *v.* Oxley, 1 Wash. 19, 1 Am. Dec. 425.

Washington.— Haner *v.* Furuya, 39 Wash. 122, 81 Pac. 98.

West Virginia.— Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

United States.— Townsend *v.* Chappell, 12 Wall. 681, 20 L. ed. 436; U. S. *v.* Coxe, 18 How. 100, 15 L. ed. 299; Burritt *v.* Reueh, 4 Fed. Cas. No. 2,201, 4 McLean 325.

England.— Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

Canada.— Commercial Bank *v.* Merritt, 21 U. C. Q. B. 358; Bisaillon *v.* Elliott, 13 Quebec Super. Ct. 289.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

The various methods by which a person may so hold out another as his agent as to be estopped to deny the existence of the agency were enumerated by the court in Hackett *v.* Van Frank, 105 Mo. App. 384, 394, 79 S. W. 1013, where it is said: "By the law of estoppel, a man may be bound by an unauthorized and unratified act. This consequence ensues when the conduct of the represented party induced some one to trust the pretending agent's assumed authority in matters which would entail a loss on the trusting party, if the one represented were permitted to deny responsibility. An estoppel may be raised because the supposed principal intentionally held the actor out to the public as an agent possessed of the authority he assumed; or permitted the actor to hold himself out in that way; or by negligent conduct, created a false impression respecting the actor's authority; or negligently failed to correct such an impression created by the actor himself, when the principal ought, in reason, to have known it was likely to entrap some one . . . and though fraud may be an ingredient of the case, it is not essential. The estoppel may be allowed on the score of negligent fault, on the principle that where one of two innocent persons must suffer loss, the loss will be visited on him whose conduct brought about the situation. Of course, if a man presents some one to the public as his agent, whom he in fact has not appointed, and on that score afterward denies responsibility for the pretended agent's acts, the defense is highly fraudulent; as it is, too, if a man denies responsibility after advisedly permitting another to represent him, when no appointment had been made, or beyond the scope of the appointment. That a man knew what was done in his name by another may be established by direct evidence, or by proof that it was done in a manner to warrant the inference that the party represented knew of it. . . . We believe these are all the predicaments in which a person is liable, by the law of agency, for the acts of another."

Consideration as element of estoppel.— The fact that no consideration moved to the alleged principal does not defeat the estoppel. Booth *v.* Wiley, 102 Ill. 84, 106.

Fraud as element of estoppel.— Actual fraud on the part of the alleged principal is not essential in order to estop him. Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013.

One who succeeds to the alleged principal's rights in the subject-matter of the apparent agency is similarly estopped, where he had notice of the facts (Booth *v.* Wiley, 102 Ill. 84, 106), or where he acquired his rights without consideration (Philadelphia Trust, etc., Co. *v.* Philadelphia Seventh Nat. Bank, 6 Fed. 114).

One who deals with the person with whom the alleged agent dealt is entitled to assert the estoppel, where he relied on the apparent agency to his injury. McCalla *v.* American Freehold Land Mortg. Co., 90 Ga. 113, 15 S. E. 687; Gore *v.* Royse, 56 Kan. 771, 44 Pac. 1053.

Although authority to do an act with reference to another's land must be in writing, and there is none such, yet the principal may be estopped, as against a *bona fide* purchaser from one who dealt with the agent, to question the validity of the agent's act. McCalla *v.* American Freehold Land Mortg. Co., 90 Ga. 113, 15 S. E. 687; Gore *v.* Royse, 56 Kan. 771, 44 Pac. 1053.

Estoppel as to acts done in excess or in abuse of actual authority.— The doctrine stated in the text applies equally to cases in which there is an entire want of authority to act as agent and those in which an agent with certain authority is permitted to appear to have larger authority. See *infra*, II, A, 2, e.

Estoppel to assert revocation of agency.— Where a person, after long being the agent of defendants in selling stoves, continued, after the termination of the agency, with their knowledge and acquiescence, to hold himself out to the world as their agent, and plaintiff in buying a stove of him was thereby led to regard him as their agent, defendants were estopped from denying its continuation. Bradish *v.* Belknap, 41 Vt. 172. And see *infra*, I, C, 1, b (III), (B), (1).

66. *Alabama.*— Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304.

California.— Ukiah Bank *v.* Mohr, 130 Cal. 268, 62 Pac. 511, where plaintiffs sued on

rule has accordingly been very frequently applied in a great number and variety of

drafts drawn on defendants by an alleged agent of the latter and cashed by plaintiffs for him, many precisely similar drafts having been cashed by them and paid by defendants.

Iowa.—Wilson *v.* Fones, 99 Iowa 132, 68 N. W. 588 (holding that a purchaser of land subject to a lease who permitted the former owner to collect the rents, which he paid over to her from time to time, thereby recognized him as her agent, and was bound by an authority given by him to the tenant to sell grain); Whiting *v.* Western Stage Co., 20 Iowa 554.

Maine.— Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111.

Michigan.— Hirschmann *v.* Iron Range, etc., R. Co., 97 Mich. 384, 56 N. W. 842.

Nebraska.— Cheshire Provident Inst. *v.* Pensner, 63 Nebr. 682, 88 N. W. 849, holding that where an agent had been in the habit of investing money for his principal, paying the taxes where foreclosures were necessary, and making all collections of interest and frequently of the principal, the principal is estopped to deny the authority of the agent to collect a note in his hands.

New Hampshire.— Knapp *v.* U. S., etc., Express Co., 55 N. H. 348, holding that an express company whose agents have been accustomed to receive and to send notes for collection to points beyond its own line, delivering them to a connecting express company, is estopped to deny that such agents were authorized to make contracts on its behalf to transact such business beyond the terminus of its own line.

New York.— Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429 [*affirming* 65 N. Y. Suppl. 1135] (holding that where defendant corporation, conducting a department store, advertised itself as carrying on the practice of dentistry in one of its departments, and plaintiff employed defendant to treat her teeth, and the work was unskilfully done, for which she claimed damages, defendant was estopped from denying the agency of the persons doing the work, although in fact they were carrying on the practice on their own account); Ferris *v.* Kilmer, 48 N. Y. 300 [*reversing* 47 Barb. 411] (holding that where one authorizes another to use his name in conducting and carrying on a business, he is liable for the debts incurred in such business, although he has no beneficial interest therein); Durst *v.* Burton, 47 N. Y. 167, 7 Am. Rep. 428 [*affirming* 2 Lans. 137] (where defendants owned a cheese factory which they leased to C to run, they having no supervision or control, and they furnished the materials, took the products, and sold them in the market as manufactured by themselves. and the court held that while as between themselves C was an independent contractor, as to the public defendants assumed the character of principals); Sloss Iron, etc., Co. *v.* Jackson Architectural Iron Works, 103 N. Y. App. Div. 316, 92 N. Y. Suppl. 1056 (holding that where plaintiff through its agent had been accustomed for a long time, in selling iron to defendant, to make deliveries on the order of a particular representative of defendant, and when any iron was wanted such representative gave direction to have deliveries made, and they could not be made except on his order, plaintiff was justified in dealing with him as defendant's authorized agent); Marine Bank *v.* Butler Colliery Co., 1 Silv. Sup. 155, 5 N. Y. Suppl. 291 [*affirmed* in 125 N. Y. 695, 26 N. E. 751]; Tucker *v.* Woolsey, 6 Lans. 482, 64 Barb. 142.

Oregon.— Neppach *v.* Oregon, etc., R. Co., 46 Oreg. 374, 80 Pac. 482, holding that one who is held out by a railroad company as its authorized land agent, and who transacts its entire business in relation to the acquisition and disposal of lands, may bind the company by a contract extending the time for payment by a purchaser of lands from it, or waiving a strict compliance by him with the provisions of his contract in that regard.

Pennsylvania.— Ruane *v.* Murray, 26 Pa. Super. Ct. 187, holding that where defendant permitted a saloon to be conducted in her name, and actively aided a third person in holding himself out to the public as the responsible proprietor by annually applying for a license in his name, she clothed him with apparent authority to bind her by contracts within the scope of that particular business, and if he, when he employed plaintiff, represented himself to be acting as the agent of defendant, she was bound by the contract.

Texas.— Elsner *v.* State, 30 Tex. 524, where it was held that a young man standing behind a counter of his father and dealing with his customers may be considered as agent, and the father be held responsible for his acts in the line of duty.

Vermont.— Landon *v.* Procter, 39 Vt. 78.

Virginia.— Hooe *v.* Oxley, 1 Wash. 19, 1 Am. Dec. 425, holding that if, in consequence of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmance of his power to draw that the principal will be bound to pay other bills, although the agent should misapply the money raised thereby.

West Virginia.— Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670, in which the court held that if an agent notifies his principal of continuous unauthorized acts committed by himself, the principal, to escape responsibility therefor, must promptly repudiate the same before the rights of third persons are affected; otherwise he will be estopped to deny that such acts were authorized.

England.— Summers *v.* Solomon, 7 E. & B. 879, 3 Jur. N. S. 962, 26 L. J. Q. B. 301, 5 Wkly. Rep. 660, 90 E. C. L. 879, where it appeared that defendant owned a jeweler's shop at Lewes, living himself at London and visiting the shop monthly; that the shop was managed by a shopman, from whom plaintiff had for some years received orders at Lewes

transactions,[67] many of which fall within the rule, as commonly stated, that where one of two innocent persons must suffer by the act of a third, he who has enabled the third person to occasion the loss must sustain it.[68] The general rule, it will

in defendant's name for goods which were sent to the shop and afterward paid for by defendant; that the shopman absconded and came to London and ordered jewelry there of plaintiff in defendant's name, which he carried away with him; and the court held that the previous course of dealing justified plaintiff in assuming that the shopman had general authority to order goods for the shop on defendant's credit, and that defendant was therefore liable for the goods obtained by the shopman in London.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 27½, 42. And see *infra*, I, F, 2, a, (IV).

67. *District of Columbia.*— Dye *v.* Virginia Midland R. Co., 20 D. C. 63, where it was held that the question of agency of one railroad company for another depends, as to the public not on the actual contract between the two, but on what the first, by its holding out, invited the public to believe.

Georgia.— People's Sav. Bank *v.* Smith, 114 Ga. 185, 39 S. E. 920 (holding that where the holder of a note surrenders to the maker collaterals given to secure its payment in order that the latter may sell them and apply the proceeds to the payment of his indebtedness, the relation of principal and agent exists between them in so far as third persons are concerned); Florida, etc., R. Co. *v.* Varnedoe, 81 Ga. 175, 7 S. E. 129 (holding that a railroad company which, with knowledge and without objection, allows a person to rent an office on its right of way and put up a sign styling it the office of the company is liable for ties purchased by such person in its name).

Illinois.— Booth *v.* Wiley, 102 Ill. 84, holding that it the holder of a judgment which is a lien on land allows it to be believed that one assuming to act as his agent in postponing the judgment lien to a trust deed about to be made to secure a loan had authority to do so, and the lender of the money secured by the deed, and a surety on the note given, act in that belief in taking the deed and signing the note, he is bound by the act of the apparent agent.

Indiana.— Foss-Schneider Brewing Co. *v.* McLaughlin, 5 Ind. App. 415, 31 N. E. 838, where defendant company gave to another the "sole right" to control the sale of its goods in a certain city, furnished him with a delivery wagon, and built him an ice-house, and on the ice-house and wagon defendant either had painted its corporate name and that of the other as agent, or, after the same had been painted, permitted it to remain, and it was held that there was a holding out of such person as agent of defendant, and one acting in good faith had a right to deal with him as such.

Massachusetts.— Holden *v.* Phelps, 141 Mass. 456, 5 N. E. 815, holding that where the records of a bank purported to give an authority to its treasurer to assign mortgages, the bank was bound by the authority appearing on its records, although the authority was never given to the treasurer by the trustees, the word "assign" being an unauthorized interpolation in the record.

Missouri.— Johnson *v.* Hurley, 115 Mo. 513, 22 S. W. 492, holding that where the conduct of a landowner was such as to have reasonably induced defendant to believe that one with whom he dealt as agent had authority to make sale of the land, and defendant, acting on such belief, paid the price and expended large sums in improvements, the owner will be estopped to dispute the agent's authority.

New Jersey.— Morris *v.* Joyce, 63 N. J. Eq. 549, 53 Atl. 139, holding that by leaving all her papers in possession of her agent, plaintiff was estopped to deny the agent's authority to deliver a mortgage and assignment to the indorser, either absolutely or as collateral.

Virginia.— Marrow *v.* Brinkley, 85 Va. 55, 6 S. E. 605, holding that where the agent of plaintiffs' intestate was authorized by the latter to represent him in suits to sell his land for debt, which fact was known to plaintiffs, who are claimants of the land, and they did not after intestate's death revoke or question the agent's authority during the pendency of the suits, they are estopped after a sale to set up the agent's want of authority.

Washington.— Haner *v.* Furuya, 39 Wash. 122, 81 Pac. 98, where plaintiff was referred to room 7, upstairs, and was there told by the person in charge of the office that his account was all right and would be paid by defendant, and the court held that if room 7 was in fact one of the departments of defendant's business, defendant was estopped to deny the authority of the alleged agent.

United States.— Burton *v.* Burley, 13 Fed. 811, 9 Biss. 253, holding that where the president of a national bank instructed its correspondent bank to charge up against the bank of which he was president the amount of a note given by him, in payment of such note, and an account was rendered showing the transaction, the bank was estopped from denying the correctness of the charge in an action by a receiver, subsequently appointed, seeking to set aside the transaction.

See 40 Cent. Dig. tit. "Principal and Agent," § 42. And see *supra*, note 67.

68. *Idaho.*— Morgan *v.* Neal, 7 Ida. 629, 65 Pac. 66, 97 Am. St. Rep. 264.

Missouri.— Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Hutting Sash, etc., Co. *v.* Gitchell, 69 Mo. App. 115.

Ohio.— Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 392.

West Virginia.— Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

be observed, embraces three primary elements.[69] First, the person sought to be bound must, by his words or conduct, have represented that the person assuming to act for him had authority so to do.[70] Accordingly an estoppel does not arise

United States.— Stowe *v.* U. S., 19 Wall. 13, 22 L. ed. 144; Whiting *v.* Wellington, 10 Fed. 810.

Narrower statement of rule.— There is no general rule of law that where one of two innocent persons must suffer for the acts of a third, that innocent person who has enabled such third person to occasion the loss must himself sustain the loss; but there is a general rule of law that in such a case an innocent person who has enabled the third person to occasion the loss by his neglect of some duty owing from him to the other innocent person must himself sustain the loss. Rimmer *v.* Webster, [1902] 2 Ch. 163, 71 L. J. Ch. 561, 86 L. T. Rep. N. S. 491, 18 T. L. R. 548, 50 Wkly. Rep. 517, holding, accordingly, that where an owner of property invests another person with his *indicia* of title, neither intending, nor giving grounds for a legitimate presumption that he intends, that such person should deal with the property with some third person, the owner is not primarily liable, as between himself and an innocent third person, for any loss occasioned by a dealing with the property, unauthorized by him, between the innocent third person and the person so invested with the *indicia* of title, for no duty on the part of the owner can be inferred toward the third person, and there cannot accordingly be any neglect of such duty; but that where an owner of property invests another person with his *indicia* of title, intending, or giving grounds for a legitimate presumption that he intends, that such person should deal with the property with some third person in a limited manner, the owner in such a case is primarily liable, as between himself and an innocent third person whom he has neglected to inform of the existence and extent of the limitation, for any loss occasioned by a dealing with the property between the innocent third person and the person so invested with the *indicia* of title in excess of the limit imposed, for a duty is inferred on the part of the owner to inform the third person, whom he invites to deal with the property, of the existence and extent of the limitation, and for any loss arising from the neglect of such duty the owner is primarily liable as between himself and the third person.

69. See *infra*, this section, text and notes.

All the elements of estoppel must be present.— Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570. Elements of estoppel see ESTOPPEL, 16 Cyc. 726 *et seq.*

70. *Arkansas.*— Jenkins *v.* Shinn, 55 Ark. 347, 18 S. W. 240.

Connecticut.— Fellows *v.* Hartford, etc., Steamboat Co., 38 Conn. 197.

Illinois.— Schmidt *v.* Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250; Hawley *v.* Curry, 74 Ill. App. 309.

Indiana.— Robinson *v.* Nipp, 20 Ind. App. 156, 50 N. E. 408.

Iowa.— Gilman Linseed Oil Co. *v.* Norton, 89 Iowa 434, 56 N. W. 663, 48 Am. St. Rep. 400, holding that an owner of flaxseed whose buyer has sold some of it without his knowledge is not estopped to reclaim his seed from the purchaser because it was in possession and control of the buyer while he was doing a business in other grains on his own account.

Maine.— Munroe *v.* Whitehouse, 90 Me. 139, 37 Atl. 866.

Massachusetts.— Nourse *v.* Jennings, 180 Mass. 592, 62 N. E. 974; Kingman *v.* Pierce, 17 Mass. 247.

Michigan.— Wilson *v.* Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544, holding that the fact that a mortgagee was a stockholder in a company to which the mortgage debt was paid does not estop him to deny the company's authority to accept payment.

Missouri.— Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013.

New Mexico.— Ilfeld *v.* Stover, 4 N. M. 54, 12 Pac. 714, where it appeared that a creditor took a conveyance of a store from his debtor in satisfaction of the debt; that the debtor had a stock of liquor in the store, and requested permission to take out a license in the creditor's name to retail the same, which permission the creditor gratuitously gave him, and the license was conspicuously posted on the premises; and it was held that in the absence of evidence of the creditor's assent to or knowledge of the debtor's acts as his agent, the creditor was not chargeable with payment of goods delivered the debtor on his representation that he was the creditor's agent.

New York.— Rowan *v.* Kemp, 103 N. Y. Suppl. 775, holding that the fact that defendant's brother was a guest in defendant's family apartment, having no home of his own in the city, and transacted the business in question largely from such residence, did not constitute a holding out of the brother by defendant as his agent.

Oregon.— Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390.

Pennsylvania.— Harvey *v.* Schuylkill Trust Co., 199 Pa. St. 421, 49 Atl. 277 (holding that defendant is not estopped to deny that its solicitor, who had an office with it, where he also, to plaintiff's knowledge, attended to law business other than defendant's, had authority to make contracts or receive money for it, although in communicating with plaintiff he used its letter heads, and sent his receipts and forged instruments drawn on forms in use by it, and in one case sent her a mortgage, money for the purchase of which from defendant she had sent him); Mecouch *v.* Loughery, 12 Phila. 416 [*affirmed* in 37 Leg. Int. 341].

Texas.— Freiberg *v.* Beach Hotel, etc., Imp. Co., 63 Tex. 449; Fred W. Wolf Co. *v.* Galbraith, 39 Tex. Civ. App. 351, 87 S. W. 390;

from the mere fact that the agent has acted for the principal on one or more previous occasions, but not under appearance of a general authority so to act;[71] nor does the rule in question apply to acts of the agent outside the scope of the authority which the principal has caused him to seem to possess.[72] Furthermore no estoppel arises unless the representations, by word or by conduct, were made either with the intention that they should be acted upon, or under such circumstances as to induce a reasonable and prudent man to believe that they were intended to be acted upon.[73] And if the claim of estoppel is based on the alleged

Lenoir *v.* Rosenthall, 1 Tex. App. Civ. Cas. § 209.

United States.— See Thurber *v.* Cecil Nat. Bank, 52 Fed. 513.

England.— See Rimmer *v.* Webster, [1902] 2 Ch. 163, 71 L. J. Ch. 561, 86 L. T. Rep. N. S. 491, 18 T. L. R. 548, 50 Wkly. Rep. 517.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

71. *California.*— Ruddock Co. *v.* Johnson, (1902) 67 Pac. 680.

Iowa.— See Burlington, etc., R. Co. *v.* Sherwood, 62 Iowa 309, 17 N. W. 564, holding that the fact that the principal had been in the habit of ratifying unauthorized sales made by the agent did not bind him to ratify the unauthorized sale in suit.

Massachusetts.— Nourse *v.* Jennings, 180 Mass. 592, 62 N. E. 974, where it appeared that plaintiff's son-in-law, being indebted to defendant for two thousand dollars on a note to which he had forged plaintiff's name, applied to defendant for a further loan of two thousand five hundred dollars, offering as security a mortgage on plaintiff's property, and agreeing that the mortgage should also secure the prior indebtedness; that plaintiff, in ignorance of the debt of two thousand dollars, executed to defendant a mortgage for the two thousand five hundred dollars, "together with any sums that I now owe" defendant; and it was held that the fact that plaintiff had mortgaged her property on two previous occasions to raise money to assist her son-in-law, and that the former negotiations were conducted by him did not show that he had apparent authority to make the agreement that the mortgage should cover the prior indebtedness.

Missouri.— Commerce Bank *v.* Bernero, 17 Mo. App. 313, holding that the mere fact that notes previously executed by an agent without authority had been purchased by a third person and paid at maturity by someone does not of itself estop the person in whose name they were executed from denying the agent's authority to execute a particular note, unless there has been a course of dealing between the parties which would justify belief in authority in the particular instance.

Texas.—Owens *v.* Hughes, (Civ. App. 1903) 71 S. W. 783 (where it was held that the mere fact that lumber was purchased on a certain occasion by one who represented himself as agent of another, and was so recognized by his principal, who paid the bill thus contracted, will not estop the principal from denying the agent's authority to obtain lumber a short time afterward from the same seller by representing himself to be acting in the same capacity); Lenoir *v.* Rosenthall, 1 Tex. App. Civ. Cas. § 209.

England.— Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645. And see Margetts *v.* Perks, 34 L. J. Ch. 109, 10 L. T. Rep. N. S. 85, 12 Wkly. Rep. 517.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

72. *Illinois.*— Elgin First Nat. Bank *v.* Kilbourne, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174.

Indiana.— Robinson *v.* Nipp, 20 Ind. App. 156, 50 N. E. 408.

Maine.— Spofford *v.* Hobbs, 29 Me. 148, 48 Am. Dec. 521.

Massachusetts.— Mt. Morris Bank *v.* Gorham, 169 Mass. 519, 48 N. E. 341.

Missouri.— Walker *v.* Hannibal, etc., R. Co., 121 Mo. 575, 26 S. W. 360, 42 Am. St. Rep. 547, 24 L. R. A. 363 (holding that where a station agent caused drills of a lime company to be put on a baggage car, and they were carried gratuitously, and thrown off by the baggage man near the lime company's quarry, the railroad company is not estopped to deny that the station agent acted without authority, it not being shown that he sent the drills as freight or that he had authority to send them on a passenger train); Fougue *v.* Burgess, 71 Mo. 389; Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013 (holding that apparent authority to deal in beer as the agent of another gives no apparent authority to deal in whisky).

Nebraska.— Nichols *v.* Hail, 4 Nebr. 210.

Ohio.— Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 392.

Vermont.— Adams *v.* Flanagan, 36 Vt. 400.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

73. Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570. And see ESTOPPEL, 16 Cyc. 726 *et seq.*

Communication of representation.— Statements by plaintiff to a third person, not made to be communicated to defendant, to the effect that a certain person was authorized to act as his agent, do not, in a controversy with defendant, estop plaintiff from denying the authority of such alleged agent, even though the person to whom the state-

principal's acquiescence in or recognition of another's assumption of authority, it must appear that he had knowledge thereof else no estoppel arises.[74] Second, it is essential, in order to estop a man to deny the authority of another to act for him, that his representation of authority, whether by word or by conduct, should have been believed and relied upon in good faith by the person asserting the estoppel; that such person should have been misled by the representation; and that his change of position should have been induced thereby.[75] No estoppel arises therefore, if, at the time he changed his position, the person asserting the estoppel knew that no authority in fact existed,[76] or should, as a reasonably pru-

ments were made afterward came into defendant's employ. Maguire *v.* Selden, 103 N. Y. 642, 8 N. E. 517. And see Mecouch *v.* Loughery, 12 Phila. (Pa.) 416 [*affirmed* in 37 Leg. Int. 341], holding that a declaration to be effective as an estoppel must be made to him who acts upon it.

74. *California.*— Rodgers *v.* Peckham, 120 Cal. 238, 52 Pac. 483.

Iowa.— Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351; Beebe *v.* Equitable Mut. Life, etc., Assoc., 76 Iowa 129, 40 N. W. 122, holding that the fact that an insurance agent advertised his agency as a branch office does not estop the company from denying its liability on his purchase of furniture for his office, where it does not appear that it knew before the contract was made that the agent was holding himself out as having authority to make it.

Massachusetts.— Manning *v.* Leland, 153 Mass. 510, 27 N. E. 519, holding that defendant is not estopped from denying that plaintiff was his agent in procuring money for him, where he did not authorize the employment of plaintiff, and did not know when he received the money that plaintiff had claimed to act as his agent in procuring it.

Missouri.— Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013.

Texas.— Lenoir *v.* Rosenthall, 1 Tex. App. Civ. Cas. § 209.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

75. *Alabama.*— Patterson *v.* Neal, 135 Ala. 477, 33 So. 39; Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808 (holding that the neglect of the principal to inform himself as to the manner in which the agent conducts his business, and to see that his instructions are obeyed, does not constitute ground of liability, unless it induces those dealing with the agent to believe he had authority); St. John *v.* Redmond, 9 Port. 428 (in which the court held that where it is sought to bind a principal for acts performed by an agent acting without authority on the ground of a previous recognition of similar acts, it is necessary to show that the instrument in question was taken on the faith of such previous recognition).

California.— Gosliner *v.* Grangers' Bank, 124 Cal. 225, 56 Pac. 1029; Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758.

Illinois.—Maxey *v.* Heckethorn, 44 Ill. 437; Rawson *v.* Curtiss, 19 Ill. 456; Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184.

Indiana.— Kiefer *v.* Klinsick, 144 Ind. 46, 42 N. E. 447.

Maryland.— Hartlove *v.* William Fait Co., 89 Md. 254, 43 Atl. 62.

Massachusetts.— See Nourse *v.* Jennings, 180 Mass. 592, 62 N. E. 974.

Michigan.— Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570.

Missouri.— St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737 (holding that where an agent, in excess of his authority, contracted in the name of his principal for bill-board advertising at a certain monthly rental, and after some rental had accrued the lessor wrote the principal in regard to payment, the principal's subsequent silence did not estop him from denying liability for the accrued instalments); Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013.

Nebraska.— Hastings First Nat. Bank *v.* Farmers', etc., Bank, 56 Nebr. 149, 76 N. W. 430.

Oregon.— Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390.

Pennsylvania.— Mecouch *v.* Loughery, 12 Phila. 416 [*affirmed* in 35 Leg. Int. 341].

Texas.— Fred W. Wolf Co. *v.* Galbraith, 39 Tex. Civ. App. 351, 87 S. W. 390; Lewis *v.* Brown, 39 Tex. Civ. App. 139, 87 S. W. 704.

United States.— Schimmelpennich *v.* Bayard, 1 Pet. 264, 7 L. ed. 138, holding that if they are not misled by the principal, but depend on their own knowledge of the supposed agent, third persons cannot invoke estoppel against the principal.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

Ignorance of representations at time of change of position.— If, at the time he dealt with the alleged agent, the third person had no knowledge of the alleged principal's representations of authority, no estoppel arises. Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758; Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Hefferman *v.* Boteler, 87 Mo. App. 316; Hastings First Nat. Bank *v.* Farmers', etc., Bank, 56 Nebr. 149, 76 N. W. 430; Buskirk *v.* Talcott, 96 N. Y. Suppl. 714.

Representations made after change of position.— No estoppel arises where the representations of authority were not made until after the third person had dealt with the alleged agent. Watertown Steam-Engine Co. *v.* Palmer, 84 Ga. 368, 10 S. E. 969, 20 Am. St. Rep. 368; Taliaferro *v.* Baltimore First Nat. Bank, 71 Md. 200, 17 Atl. 1036.

76. Kiefer *v.* Klinsick, 144 Ind. 46, 42 N. E. 447.

dent man, have known that fact, as where he was acquainted with facts that should have suggested an inquiry, which, if pursued, would have led to a discovery of the alleged agent's want of authority.[77] So an estoppel cannot be invoked in favor of one who has relied upon the alleged agent's declaration of his authority, and made no further inquiry.[78] Third, in reliance upon the representation of authority made by the person sought to be bound, the person asserting the estoppel must have changed his position as otherwise he would not have done, so that if the authority is not admitted to exist he will suffer injury which otherwise he would not suffer.[79]

b. Estoppel of Agent. One who professes to act as agent for another in a particular transaction may be estopped as against both the supposed principal [80] and third persons interested in the transaction,[81] to deny the agency.

c. Estoppel of Third Person. One who deals with a person professing to act as agent for another is generally estopped, as against the supposed principal, to deny the agency.[82] Similarly one who enters into a particular transaction with

77. *Illinois.*— Hawley *v.* Curry, 74 Ill. App. 309, where it was said that third persons who are misled as to the agency through their own fault or carelessness cannot invoke the aid of estoppel.

Indiana.— See Robinson *v.* Nipp, 20 Ind. 42 N. E. 447, where it was said that one who relies upon the doctrine of estoppel must not have been guilty of contributory negligence, but must have used reasonable care to inform himself as to whether the agent had authority.

Iowa.— Tappan *v.* Morseman, 18 Iowa 499, holding that the fact that the alleged principal had previously expressed a future intention to invest the alleged agent with the authority in question did not justify the third person in afterward dealing with the alleged agent as being one who was invested with such authority.

Missouri.— St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

Oregon.— Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390.

Pennsylvania.— Mecouch *v.* Loughery, 12 Phila. 416 [*affirmed* in 37 Leg. Int. 341].

Wisconsin.— McDermott *v.* Jackson, 102 Wis. 419, 78 N. W. 598.

England.— Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645, where it was pointed out that any one dealing with a person assuming to act as agent for another can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist and to what extent, while the alleged principal has no similar mode of protecting his interests.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

78. *Arkansas.*— Jenkins *v.* Shinn, 55 Ark. 347, 18 S. W. 240.

California.— Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758.

Indiana.— See Robinson *v.* Nipp, 20 Ind. App. 156, 50 N. E. 408.

New Jersey.— Morris *v.* Joyce, 63 N. J. Eq. 549, 53 Atl. 139.

New York.— Buskirk *v.* Talcott, 96 N. Y. Suppl. 714.

Pennsylvania.— Mecouch *v.* Loughery, 12 Phila. 416 [*affirmed* in 37 Leg. Int. 341].

Canada.— Hart *v.* Pryor, 10 Nova Scotia 53.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

79. *Illinois.*—Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460.

Michigan.— Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570.

Oregon.— Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390.

Pennsylvania.— Mecouch *v.* Loughery, 12 Phila. 416 [*affirmed* in 37 Leg. Int. 341].

Texas.— Fred W. Wolf Co. *v.* Galbraith, 39 Tex. Civ. App. 351, 87 S. W. 390; Lewis *v.* Brown, 39 Tex. Civ. App. 139, 87 S. W. 704.

See 40 Cent. Dig. tit. "Principal and Agent," § 42.

80. Reigard *v.* McNeil, 38 Ill. 400; Dennis *v.* McCagg, 32 Ill. 429 (both holding that where a person obtains a conveyance of land in his own name, paying his own money for it but professing to act as agent for another, he will be estopped from denying the agency); Satterthwaite *v.* Loomis, 81 Tex. 64, 16 S. W. 616. See also Smith *v.* Kemper, 4 Mart. (La.) 409, 6 Am. Dec. 708; Gilbert *v.* Nantucket Bank, 5 Mass. 97; Hereford *v.* Southern Pac. R. Co., (Tex. 1888) 7 S. W. 218; and, generally, *infra*, III, A.

81. Yetter *v.* Van Patten, 103 Ill. App. 59; Walters *v.* Bray, (Tex. Civ. App. 1902) 70 S. W. 443, where one executed a deed as attorney in fact, and he was held to be estopped to deny the agency as against those whom the grantee represented. See also Gilbert *v.* Nantucket Bank, 5 Mass. 97; Hereford *v.* Southern Pac. R. Co., (Tex. 1888) 7 S. W. 218; and, generally, *infra*, III, C.

82. *Indiana.*— Palmer *v.* Egbert, 4 Ind. 65.

Iowa.— Baker *v.* The Milwaukee, 14 Iowa 214, holding that a carrier who has contracted with a person as agent of a consignor cannot deny the agency.

Louisiana.—Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583, holding that one who buys land from a person professing to act as agent, and executes notes payable to the

the agent of another may be estopped, both as against the principal [83] and third persons in interest,[84] to say that the agent had no authority to enter into the transaction.

F. Ratification [85] — **1. Definition and Nature — a. Definition.** Ratification as used in the law of principal and agent may be defined as the adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent in doing the act or making the contract without authority to do so.[86]

supposed principal, cannot deny the agency when sued on the notes by the latter.

Mississippi.— Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

Ohio.— Davis *v.* Harness, 38 Ohio St. 397.

South Carolina.— McGowan *v.* Reid, 27 S. C. 262, 3 S. E. 337, holding that one who sues the principal for the acts of the agent cannot deny the agency.

See 40 Cent. Dig. tit. "Principal and Agent," § 44. And see *infra*, I, F, 4, e, (I).

Compare Warrick *v.* Smith, 137 Ill. 504, 27 N. E. 709.

83. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248, holding that one who borrows money from a person assuming to act as agent of another is estopped to deny the agency. And see American Bonding Co. *v.* Loeb, 47 Wash. 447, 92 Pac. 282, holding that where one accepts the benefit of a bond issued through the agent of a bonding company he is estopped from questioning its authorization. And see *infra*, I, F, 4, e, (I).

Estoppel by recitals.— A bond reciting a contract between the principal and a municipality through a municipal board will estop the obligors to deny the authority of the board to make and perform the contract. Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397.

84. Waco Bridge Co. *v.* Waco, 85 Tex. 320, 20 S. W. 137, holding that, as against a third person in whose favor the reservation was made, one holding under a deed made by an attorney in fact cannot object to a reservation therein on the ground that the attorney had no power to make it.

85. **Ratification of appointment of agent having adverse interest** see cross-references *supra*, page 1213 note 47.

86. See Lexington *v.* Lafayette County Bank, 165 Mo. 671, 65 S. W. 943; Reid *v.* Field, 83 Va. 26, 1 S. E. 395.

Other definitions are: "An agreement to adopt an act performed by another for the one who agrees to adopt it." Haggerty *v.* Juday, 58 Ind. 154, 158 [*citing* Bouvier L. Dict.]; Hatton *v.* Stewart, 2 Lea (Tenn.) 233, 235.

"The adoption of a previously formed contract, notwithstanding a vice which rendered it relatively void; and, by the very nature of the act of ratification, confirmation, or affirmance, the party confirming becomes a party to the contract." Kraft *v.* Wilson, (Cal. 1894) 37 Pac. 790, 792.

"The acceptance by a principal of the acts of one who, without original authority, acted with third parties, in the name of such principal." Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 323, 44 Am. Rep. 646.

"The adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him except for his subsequent assent; as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority." Ansonia *v.* Cooper, 64 Conn. 536, 544, 30 Atl. 760, 66 Conn. 184, 33 Atl. 195 [*approved* in Curnane *v.* Scheidel, 70 Conn. 13, 38 Atl. 875].

"**To ratify** is to give sanction and validity to something done without authority by one individual on behalf of another." Heyn *v.* O'Hagen, 60 Mich. 150, 156, 26 N. W. 861 [*quoting* Evans Agency 48].

"**Ratification takes place** when one person adopts a contract made for him, or in his name, which is not binding on him because the one who made it was not duly authorized to do so. Ratification is a question of fact; and, in the great majority of instances, turns on the conduct of the principal in relation to the alleged contract or the subject of it, from which his purpose and intention thereabout may be reasonably inferred. And, generally, deliberate and repeated acts of the principal with a knowledge of the facts, that are consistent with an intention to adopt the contract, or inconsistent with a contrary intention, are sufficient evidence of ratification." Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. 505, 507.

"**Ratification cannot be accurately defined as a legal term.** Generically, the word always expresses the same idea, and in legal effect is always the adoption of the act of one who has assumed to be an agent without the grant of an antecedent authority. In its application to different conditions, legal accuracy requires the observance of very wide differences in the significance of the term." Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670, 675 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634].

"**Confirmation**" and "**ratification.**"— In its primary use the word "confirmation" applies to that by which what was before voidable is made valid, as where one makes valid a voidable contract of his own which he might have repudiated, while ratification applies to the act of another in the nature of an act of agency; but these words are often used interchangeably as synonyms. Sciffert, etc., Lumber Co. *v.* Hartwell, 94 Iowa 576, 63 N. W. 333, 58 Am. St. Rep. 413. "Confirmation is . . . a ratification of a previous trans-

b. Nature and Necessity in General. A ratification is necessary only where an agent acts as such without authority [87] under particular conditions.[88] Ordinarily the principal has an election either to repudiate or to ratify the unauthorized transaction; [89] and although it has been held that, until ratification, an unauthorized contract made by one person for another is utterly void,[90] it is more accurate to say that such contract is voidable and without effect on the person in whose behalf it was made, and that in order to make it binding on him he must subsequently ratify it.[91] A principal may either ratify unauthorized acts or contracts made on his behalf by a mere stranger or volunteer who has never been his agent but who has assumed to act as such in the particular transaction,[92] or he may ratify the act of one who is his agent for certain purposes, but who in the particular transaction acted outside the scope of his authority or after the termination of his agency,[93] whereupon the relation of principal and agent is created in respect to matters concerning which none before existed, and the act or contract thereby becomes as effectual as to the principal as though it had been previously authorized, not only from the moment of his ratification but by relation back from the moment of the unauthorized transaction.[94]

c. Adoption Distinguished. Although the term "adopt" or "adoption" is often used in its broader sense in defining ratification, in its legal sense there is a distinction between "adoption" and "ratification." Accurately speaking a ratification is an adoption and more. It is the acceptance of a previously unauthorized contract and takes effect from the making of such contract, whereas an adop-

action known to be voidable." Hereu *v.* Hereu, 6 Ariz. 270, 283, 56 Pac. 871.

Adoption distinguished see *infra*, I, F, 1, c.

Estoppel distinguished see *infra*, I, F, 1, d

87. Henderhen *v.* Cook, 66 Barb. (N. Y.) 21; Sparkman *v.* Supreme Council A. L. H., 57 S. C. 16, 35 S. E. 391. And see *supra*, I, F, 1, a.

If the agent acts within his authority, real or apparent, no ratification need be shown. Allard *v.* Allard, 6 Rob. (La.) 320; Story *v.* Maclay, 6 Mont. 492, 13 Pac. 198; Henderhen *v.* Cook, 66 Barb. (N. Y.) 21; Graham *v.* Edwards, (Tex. Civ. App. 1907) 99 S. W. 436.

88. See *infra*, I, F, 2, e.

89. Stanley *v.* Chamberlain, 39 N. J. L. 565 (holding that where an agent rents premises knowing that the tenant intends to use them for gaming purposes, the principal, having no knowledge of such intended use, may repudiate the agent's contract and recover on a *quantum valebat* for the use of the premises); Andrews *v.* Ætna L. Ins. Co., 92 N. Y. 596; Riley *v.* Wheeler, 44 Vt. 189.

Repudiation as precluding ratification.—The fact that the principal at first disapproves of the unauthorized transaction does not prevent a subsequent ratification (Andrews *v.* Ætna L. Ins. Co., 92 N. Y. 596; Woodward *v.* Harlow, 28 Vt. 338; Pickles *v.* Western Assur. Co., 40 Nova Scotia 327), although it has been said that he cannot after an effective repudiation change his election and ratify so as to save himself from the wrongdoing of his agent (Holden *v.* Metropolitan Nat. Bank, 138 Mass. 48, 151 Mass. 112, 23 N. E. 733, holding that where the treasurer of a bank, without authority, pledges certain stock of the bank as security for advances, converts the advances, and the pledgee sells the stock, the bank, after repudiating the acts of the treasurer, cannot recover the proceeds of the sale from the pledgee as money had and received).

Bringing suit against the agent is not such a repudiation as to prevent a subsequent ratification, where it appears that the suit did not proceed to judgment, but was settled out of court by an agreement to take the agent's acts. Sheldon *v.* Sheldon, 3 Wis. 699.

90. Henderhen *v.* Cook, 66 Barb. (N. Y.) 21.

91. Bannon *v.* Warfield, 42 Md. 22; Pearsoll *v.* Chapin, 44 Pa. St. 9; Galveston, etc., R. Co. *v.* Allen, 42 Tex. Civ. App. 576, 94 S. W. 417; Hartshorn *v.* Wright, 11 Fed. Cas. No. 6,169, Pet. C. C. 64.

92. Hefner *v.* Vandolah, 62 Ill. 483, 14 Am. Rep. 106 (holding that an unauthorized act may be ratified, although there was no previous agency for any purpose); Pells *v.* Snell, 31 Ill. App. 158 [*reversed* on other grounds in 130 Ill. 379, 23 N. E. 117]; Heyn *v.* O'Hagen, 60 Mich. 150, 21 N. W. 861; Ruggles *v.* Washington County, 3 Mo. 496; Williams *v.* Moore, 24 Tex. Civ. App. 402, 58 S. W. 953.

93. *Florida.*— Florida Cent., etc., R. Co. *v.* Ashmore, 43 Fla. 272, 32 So. 832, after revocation.

New Jersey.— Keim *v.* Lindley, (Ch. 1895) 30 Atl. 1063.

South Carolina.— State *v.* Waldrop, 73 S. C. 60, 52 S. E. 793, holding that it is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act.

Tennessee.— Bement *v.* Armstrong, (Ch. App. 1896) 39 S. W. 899.

Vermont.— Middlebury College *v.* Williamson, 1 Vt. 212.

94. See *infra*, I, F, 4, a.

tion is in legal effect the making of a contract as of the date of the adoption.[95] A ratification implies an existing person on whose behalf the contract might have been made at the time.[96] An adoption, however, may be made by a person who has no legal existence at the time the contract was made on his behalf,[97] and is peculiarly applicable to the law of corporations, where a corporation, after its organization, adopts contracts made by its promoters or agents before the corporation is organized.[98] One may, if he will, adopt for his own use the terms of any contract that suits his purpose; he may ratify a contract only when it was originally made for him without authority.[99]

d. Estoppel Distinguished. In the literature of the law there has often been little inclination displayed to distinguish between ratification and estoppel *in pais*;[1] but the distinction between the two is nevertheless well defined, and where as in some states the mode of ratification is governed by statute, it becomes important and necessary to distinguish them.[2] The substance of ratification is confirmation of the unauthorized act or contract after it has been done or made, whereas the substance of estoppel is the principal's inducement to another to act to his prejudice.[3] Acts and conduct amounting to an estoppel *in pais* may in some instances amount to a ratification; but on the other hand ratification may be complete without any of the elements of an estoppel,[4] and if the act or contract in question has in fact been ratified and the ratification is sufficient, there is no need of invoking the doctrine of estoppel.[5]

2. Essentials of Ratification — a. The Act Ratified — (i) *In General.* Subject to the conditions hereafter considered,[6] any act which is done by one per-

95. McArthur *v.* Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653; Garrett *v.* Gonter, 42 Pa. St. 143, holding that adoption does not relate back and validate prior acts.

Statement of distinction.— The adoption of a former contract is the making of a contract as of the date of the adoption. To adopt is to take and receive as one's own that with reference to which there existed no prior relation, either colorable or otherwise. To ratify is to confirm, approve, or sanction a previous act or an act done in behalf of the party ratifying without sufficient authority. But as to contracts adoption and ratification are often treated as synonymous, and in many cases the result is the same whether the contract be adopted or ratified. Schreyer *v.* Turner Flouring Mills Co., 29 Oreg. 1, 43 Pac. 719.

96. See *infra*, I, F, 2, d.

97. McArthur *v.* Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653.

98. McArthur *v.* Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653. And see Corporations, 10 Cyc. 262.

99. See *infra*, I, F, 2, c.

1. See Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

The facts are usually set forth at length and the conclusion reached and expressed that such conduct amounts to a ratification; and indeed where the form which the ratification must take is not governed by a statutory rule it may and usually does matter little whether the acts of a principal are said to be such as to constitute a ratification or to be such as to constitute an estoppel. By either name he is held equally bound. Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

2. Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

Within the meaning of Cal. Civ. Code, § 2310, ratification is a technical legal term having a well defined and specific meaning, and to use "ratification" interchangeably with estoppel or with the words "adopt" or "confirm" must result and has resulted in unfortunate confusion. Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

3. Steffens *v.* Nelson, 94 Minn. 365, 102 N. W. 871. And see *supra*, I, E, 2, a, (II).

Statement of distinction.— The distinction between a contract intentionally assented to or ratified in fact and an estoppel to deny the validity of the contract is very wide. In the former case the party is bound because he intended to be; in the latter he is bound notwithstanding there was no such intention. because the other party will be prejudiced and defrauded by his conduct unless the law treat him as legally bound. In the one case the party is bound because the contract contains the necessary ingredients to bind him. including a consideration. In the other he is not bound for these reasons, but because he has permitted the other party to act to his prejudice under such circumstances that he must have known, or be presumed to have known, that such party was acting on the faith of his conduct and acts being what they purported to be, without apprising him to the contrary. Forsyth *v.* Day, 46 Me. 176.

4. Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

5. Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

6. See *infra*, I, F, 2, a, (II)–(IV); I, F, 2, c, d.

son on behalf of another without prior authority and which would in law be his act if done in pursuance of authority is as a general rule capable of ratification by the person on whose behalf it was done; [7] and this is true where the person who did the act was a subagent appointed by the agent without the authority of the principal.[8]

(II) *VOID AND VOIDABLE ACTS.* If an act done or a contract entered into by one person in behalf of another without authority is by positive law or public policy illegal and void, it cannot be ratified; [9] but unauthorized acts which are merely voidable may be ratified by the person in whose behalf they were done.[10]

7. *Alabama.*— Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

Illinois.— Hickox *v.* Fels, 86 Ill. App. 216.

Missouri.— Daugherty *v.* Burgess, 118 Mo. App. 557, 94 S. W. 594; Alexander *v.* Wade, 106 Mo. App. 141, 80 S. W. 19.

Pennsylvania.— McCully *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 25.

England.—Athy Guardians *v.* Murphy, [1896] 1 Ir. 65, holding that, although subsequent ratification may supply the want of authority in an agent at the time of his acceptance of an offer, it must be shown in such a case that there was a contract purporting to be made by and with the agent, which, if the agent had authority, would be a valid, binding contract.

See also *infra*, I, F, 2, b, (I).

8. Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190 (in which it was held that an agent, held out as such, binds his principal by his own acts and those of his subagent, or at least the principal has a right to ratify and adopt them as against a person who has dealt with the subagent as duly authorized and with relation to the principal's affairs); Blantin *v.* Whitaker, 11 Humphr. (Tenn.) 313.

A principal who gives an agent verbal authority to sell land may ratify a sale, although made by a subagent who was appointed without the knowledge of the principal. Tynan *v.* Dullnig, (Tex. Civ. App. 1894) 25 S. W. 465.

9. *Arizona.*— Hereu *v.* Hereu, 6 Ariz. 279, 56 Pac. 871.

Colorado.— Weston *v.* Estey, 22 Colo. 334, 45 Pac. 367, holding that a bank cannot ratify an act of its cashier which involves an agreement that the bank shall work mines, since it is unlawful for a bank to engage in mining.

Georgia.— Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435.

Indiana.— Shepardson *v.* Gillette, 133 Ind. 125, 31 N. E. 788.

Iowa.— Lewis *v.* Kerr, 17 Iowa 73.

Louisiana.— Decuir *v.* Lejeune, 15 La. Ann. 569.

Minnesota.— Sanford *v.* Johnson, 24 Minn. 172, attempted lease which was absolutely void.

Mississippi.— Jefferson County *v.* Arrighi, 54 Miss. 668; Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

Missouri.— Macfarland *v.* Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629.

New Hampshire.— Bontelle *v.* Melendy, 19 N. H. 196, 49 Am. Dec. 152.

North Carolina.— Rawlings *v.* Neal, 126 N. C. 271, 35 S. E. 597; Woodcock *v.* Merrimon, 122 N. C. 731, 30 S. E. 321; Spence *v.* Wilmington Cotton Mills, 115 N. C. 210, 20 S. E. 372.

Pennsylvania.— Daughters of American Revolution *v.* Schenley, 204 Pa. St. 572, 54 Atl. 366.

Tennessee.— Carnes *v.* Polk, 4 Coldw. 87.

United States.— U. S. *v.* Grossmayer, 9 Wall. 72, 19 L. ed. 627.

See 40 Cent. Dig. tit. "Principal and Agent," § 624. And see *infra*, I, F, 2, a, (III), (IV); I, F, 4, a, (II).

A writing by an agent insufficient to pass an interest in land or as a memorandum of a contract of sale thereof cannot be ratified as a conveyance or memorandum by the party sought to be charged thereby. Woodcock *v.* Merrimon, 122 N. C. 731, 30 S. E. 321.

Where an act performed by an agent of the state is forbidden by statute, the statute as a whole must be examined to determine whether it was the intention of the legislature to make the forbidden act totally void. If the intention was to make the act unlawful in any case, whether performed by the state itself or by its agents, such an act performed by an agent cannot be ratified. If on the other hand the act is merely forbidden to the agents of the state, the state can lawfully ratify the act when performed in its name by those who assumed to act as its agents. State *v.* Buttles, 3 Ohio St. 309, holding that where a statute made it illegal for a public agent to loan state funds, the state might nevertheless ratify an unauthorized loan of such funds, since it might have authorized the loan in the first instance.

Where the contract is without an object there can be no valid ratification, as where the person assuming to act as agent bought a cargo of salt which did not belong to the seller. Mummy *v.* Haggerty, 15 La. Ann. 268.

10. *Arizona.*— Hereu *v.* Hereu, 6 Ariz. 270, 56 Pac. 871.

Georgia.— Whitley *v.* James, 121 Ga. 521, 49 S. E. 600.

Illinois.— Paul *v.* Berry, 78 Ill. 158.

Louisiana.— Harper *v.* Devene, 10 La. Ann. 724.

Mississippi.— Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

New Jersey.— Keim *v.* O'Reilly, 54 N. J. Eq. 418, 34 Atl. 1073.

New York.— Commercial Bank *v.* Warren, 15 N. Y. 577.

Pennsylvania.— Henry Christian Bldg.,

(III) *TORTS IN GENERAL.* A principal may ratify a tort committed by another on his behalf, so as to make himself liable therefor,[11] such as a wilful trespass [12] or conversion.[13] But it has been held that if an unauthorized act involved a crime or was opposed to public policy, it cannot be ratified.[14]

(IV) *FORGERY.* Whether a principal can by ratification make himself liable on a contract which is a forgery is in dispute. In some jurisdictions it is held that he cannot, because of public policy, which forbids that by consenting to be bound by the forged contract the principal should induce or encourage the exemption from prosecution of the forger;[15] and also on the technical grounds that the forged contract does not purport to be executed by an agent but by the principal himself, and hence there is no assumption of agency and nothing to ratify,[16] and that in the absence of any new consideration or element of estoppel a subsequent promise or ratification of the forged instrument is a mere *nudum pactum.*[17] In these jurisdictions the ratification which the law interdicts relates only to such acts as clearly appear to have been done in violation of a criminal statute, and it has been said that it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution.[18] But where the signature or act of forgery is of an ambiguous character and may as well be attributed to a mistaken assumption of authority as to a criminal purpose, public policy does not forbid its ratification.[19] In other jurisdictions, however, the courts take the ground that so far as considerations of public policy are concerned, the ratification of forgery should stand on the same footing as other contracts, and that as to the want of authority, it can make no difference whether the unauthorized act was or was not a forgery, since this want of authority is the very thing which the ratification cures; and hence it is held in such jurisdictions that the principal whose name has been forged may ratify the signature so as to make himself civilly liable on the contract,[20] but not so as to excuse the forger from prosecu-

etc., Assoc. *v.* Walton, 181 Pa. St. 201, 37 Atl. 261, 59 Am. St. Rep. 636.

Tennessee.— Carnes *v.* Polk, 4 Coldw. 87.

United States.— Findlay *v.* Pertz, 66 Fed. 427, 13 C. C. A. 559 [*affirmed* in 74 Fed. 681, 20 C. C. A. 662].

See 40 Cent. Dig. tit. "Principal and Agent," § 624.

11. Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211; Eastern Counties R. Co. *v.* Broom, 6 Exch. 314, 15 Jur. 297, 20 L. J. Exch. 196 (assault); Bird *v.* Brown, 4 Exch. 786, 14 Jur. 132, 19 L. J. Exch. 154; Scott *v.* New Brunswick Bank, 23 Can. Sup. Ct. 277 (false representations).

12. Avakian *v.* Noble, 121 Cal. 216, 53 Pac. 559; Byne *v.* Hatcher, 75 Ga. 289; Crockett *v.* Sibley, 3 Ga. App. 554, 60 S. E. 326; Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070.

13. Creson *v.* Ward, 66 Ark. 209, 49 S. W. 827; Hilbery *v.* Hatton, 2 H. & C. 822, 33 L. J. Exch. 190, 10 L. T. Rep. N. S. 39.

14. Daughters of American Revolution *v.* Schenley, 204 Pa. St. 572, 54 Atl. 366. And see *supra*, I, F, 2, a, (II).

15. Henry Christian Bldg., etc., Assoc. *v.* Walton, 181 Pa. St. 201, 37 Atl. 261, 59 Am. St. Rep. 636; Shisler *v.* Vandike, 92 Pa. St. 447, 37 Am. Rep. 702; McHugh *v.* Schuylkill County, 67 Pa. St. 391, 5 Am. Rep. 445 [*distinguishing* Garrett *v.* Gonter, 42 Pa. St. 143]. See, generally, *supra*, I, F, 2, a, (II).

16. *Indiana.*— Henry *v.* Heeb, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613.

Kentucky.— Owsley *v.* Philips, 78 Ky. 517, 39 Am. Rep. 258.

Missouri.— Kelchner *v.* Morris, 75 Mo. App. 588. *Compare* Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430; Cravens *v.* Gillilan, 63 Mo. 28, in both of which cases the court indicates, although the question was not involved, that a forgery can be ratified. See also Dow *v.* Spenny, 29 Mo. 386.

Ohio.— Workman *v.* Wright, 33 Ohio St. 405, 31 Am. Rep. 546. *Compare* Dodge *v.* National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648.

Pennsylvania.— Henry Christian Bldg., etc., Assoc. *v.* Walton, 181 Pa. St. 201, 37 Atl. 261, 59 Am. St. Rep. 36.

17. Henry *v.* Heeb, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613; Workman *v.* Wright, 33 Ohio St. 405, 31 Am. Rep. 546.

18. Henry *v.* Heeb, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613.

19. Henry *v.* Heeb, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613. See Reg. *v.* Beardsall, 1 F. & F. 529, in which the failure to answer a letter was held to justify the prisoner in the belief that he had implied authority to sign the name.

20. *Illinois.*— Hefner *v.* Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Livings *v.* Wiler, 32 Ill. 387.

Maine.— Casco Bank *v.* Keene, 53 Me. 103; Forsyth *v.* Day, 46 Me. 176.

Massachusetts.— Wellington *v.* Jackson, 121 Mass. 157; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Greenfield Bank *v.* Crafts, 4 Allen 447, holding that by ratifying

tion.[21] Probably all authorities, however, agree that the principal will be liable if his promise to assume the contract induces the other party to change his position to his prejudice; but in such a case the liability rests on the doctrine of estoppel and not on ratification.[22] On the same ground ratification of one act of forgery may estop the principal to deny the genuineness of his signature in subsequent similar forgeries.[23] In any event a forgery cannot be ratified so as to enable the forger to take advantage of the contract.[24]

b. Who May Ratify[25] — (i) *In General.* As a general rule any person may ratify an unauthorized act of another on his behalf if he could have given previous authority to do the act, and if he still has power to do it at the time of the ratification; otherwise not.[26] A principal therefore is incapable of ratifying an act if his own status has so changed that he is no longer capable of doing the act,[27] as where

a forged signature on commercial paper the person whose signature has been forged becomes liable thereon, although no words of agency appear on the paper and no facts are shown sufficient to constitute an estoppel *in pais*.

New Hampshire.— See Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

New York.— Howard *v.* Duncan, 3 Lans. 174.

Rhode Island.— Crout *v.* De Wolf, 1 R. I. 393.

Tennessee.— Jones *v.* Hamlet, 2 Sneed 256; Fitzpatrick *v.* Caperton Cove School Com'rs, 7 Humphr. 224, 46 Am. Dec. 76.

England.— Brook *v.* Hook, L. R. 6 Exch. 89, 40 L. J. Exch. 50, 24 L. T. Rep. N. S. 84, 19 Wkly. Rep. 506.

Canada.— Scott *v.* New Brunswick Bank, 23 Can. Sup. Ct. 277.

21. Greenfield Bank *v.* Crafts, 4 Allen (Mass.) 447; Williams *v.* Bayley, L. R. 1 H. L. 200, 12 Jur. N. S. 875, 33 L. J. Ch. 717, 14 L. T. Rep. N. S. 802; Brook *v.* Hook, L. R. 6 Exch. 89, 40 L. J. Exch. 50, 24 L. T. Rep. N. S. 34, 19 Wkly. Rep. 506; Scott *v.* New Brunswick Bank, 23 Can. Sup. Ct. 277. But see Reg. *v.* Smith, 3 F. & F. 504.

22. *California.*— Campbell *v.* Campbell, 133 Cal. 33, 65 Pac. 134.

Connecticut.— See Union Bank *v.* Middlebrook, 33 Conn. 95.

Illinois.— Hefner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123.

Iowa.— Smith *v.* Tramel, 68 Iowa 488, 27 N. W. 471.

Kentucky.— Rudd *v.* Matthews, 79 Ky. 479, 42 Am. Rep. 231.

Maine.— Casco Bank *v.* Keene, 53 Me. 103.

Maryland.— Woodruff *v.* Munroe, 33 Md. 146.

New York.— Thorn *v.* Bell, Lalor 430; Weed *v.* Carpenter, 4 Wend. 219.

Ohio.— Workman *v.* Wright, 33 Ohio St. 405, 31 Am. Rep. 546.

Pennsylvania.— See Lancaster *v.* Smith, 67 Pa. St. 427.

Rhode Island.— Crout *v.* De Wolf, 1 R. I. 393.

England.— McKenzie *v.* British Linen Co., 6 App. Cas. 82, 44 L. T. Rep. N. S. 431, 29 Wkly. Rep. 477.

See, generally, *supra*, I, E, 2, a, (II), (B).

23. De Feriet *v.* Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597. See Crout *v.* De Wolf, 1 R. I. 393. See, generally, *supra*, I, E, 2, a, (II), (B).

24. Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.

25. Ratification by infant see *supra*, I, B, 2, c. And see, generally, Infants, 22 Cyc. 539 *et seq.*, 600 *et seq.*

Ratification by lunatic on restoration to reason see *supra*, I, B, 1, b.

Ratification by corporation generally see Corporations, 10 Cyc. 1069 *et seq.*

Ratification by municipal corporation see Municipal Corporations, 28 Cyc. 592, 675 *et seq.*

Ratification by partnership see Partnership, 30 Cyc. 528 *et seq.*

Ratification by state see States.

26. *California.*— Krumdick *v.* White, 107 Cal. 37, 39 Pac. 1066 (holding that the acceptance by an executrix, testator's widow, of the proceeds of a sale of property belonging to the estate by one claiming to act as testator's agent is not a ratification of such sale, for she could not have authorized such a sale); McCracken *v.* San Francisco, 16 Cal. 591 (holding that the ratification is the first proceeding by which the supposed principal becomes a party to the transaction, and he cannot acquire or incur the rights resulting from that transaction unless he is in a position to enter directly into a similar transaction himself).

Indiana.— Shepardson *v.* Gillette, 133 Ind. 125, 31 N. E. 788.

Missouri.— Lingenfelder *v.* Leschen, 134 Mo. 55, 34 S. W. 1089; Ellerbe *v.* National Exch. Bank, 109 Mo. 445, 19 S. W. 241; Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430.

Pennsylvania.— Bell *v.* Waynesboro Borough, 195 Pa. St. 299, 45 Atl. 930.

United States.— Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 14 S. Ct. 572, 38 L. ed. 470; Norton *v.* Shelby County, 118 U. S. 485, 6 S. Ct. 1121, 30 L. ed. 178; Marsh *v.* Fulton County, 10 Wall. 676, 19 L. ed. 1040.

England.— Dibbins *v.* Dibbins, [1896] 2 Ch. 348, 65 L. J. Ch. 724, 75 L. T. Rep. N. S. 137, 44 Wkly. Rep. 595; Purcell *v.* Henderson, L. R. 16 Ir. 213 [*affirmed* in L. R. 16 Ir. 466].

27. Upton *v.* Dennis, 133 Mich. 238, 94 N. W. 728, holding that an administratrix

before the attempted ratification he has disposed of the property or interest which was the subject-matter of the agent's unauthorized contract.[28]

(II) *Ratification by Agent.* An agent cannot as a general rule ratify an unauthorized act performed by himself so as to make his principal liable thereon.[29] Nor can an agent ratify an unauthorized act performed by a third person on behalf of his principal,[30] unless he has authority to ratify it,[31] or had authority to perform the act in person or to authorize the act to be performed by another.[32]

c. Actor Must Have Acted in Behalf of Ratifier. In order that an unauthorized act may be capable of ratification it is necessary that it should have been performed by one acting as agent on behalf of another as principal.[33] Hence if an alleged agent does not pretend or assume to be acting for another, but acts solely on his own account, then as to such other the transaction is *inter alios acta*, and he cannot make himself a party to it by his ratification of the act;[34] and even where

cannot by a letter written after her discharge ratify a settlement.

28. McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421.

29. *Illinois.*— Fay *v.* Slaughter, 194 Ill. 157, 62 N. E. 592, 56 L. R. A. 564 [*reversing* 94 Ill. App. 111], holding that an agent having authority to do lawful things cannot by virtue of such authority ratify his own unauthorized or illegal acts so as to bind his principal.

Iowa.— Britt *v.* Gordon, 132 Iowa 431, 108 N. W. 319. But see Palmer *v.* Cheney, 35 Iowa 281.

Michigan.— Deffenbaugh *v.* Jackson Paper-Mfg. Co., 120 Mich. 242, 79 N. W. 197; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795.

Nebraska.— Driscoll *v.* Modern Brotherhood of America, 77 Nebr. 282, 109 N. W. 158; Bullard *v.* De Groff, 59 Nebr. 783, 82 N. W. 4, 80 Am. St. Rep. 677.

Pennsylvania.— Henry *v.* Milne, 43 Pa. St. 418, holding that if one assuming to act as agent for another purchase goods, but has in fact no authority, and the goods are attached as his property, the employment by the pretended agent of counsel to bring suit claiming the goods for the principal does not effect a ratification by the latter, but such counsel becomes the counsel of the pretended agent.

See 40 Cent. Dig. tit. "Principal and Agent," § 621.

Joint agents.— The principle that one is presumed to have ratified a contract made for him unless he repudiates it applies only to principals — the parties to be bound; it has no application to joint agents as to the ratification of the separate act of one by the other. Penn *v.* Evans, 28 La. Ann. 576.

30. *Alabama.*— Patterson *v.* Neal, 135 Ala. 477, 33 So. 39; Singer Mfg. Co. *v.* McLean, 105 Ala. 316, 16 So. 912, holding that where an agent is authorized solely to take an inventory and report the business of a salesman, he cannot ratify a disposition of his principal's property; nor by accepting property of his principal relieve the salesman from liability for it.

Michigan.— Ironwood Store Co. *v.* Harrison, 75 Misc. 197, 42 N. W. 808; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795.

Nebraska.— Bullard *v.* De Groff, 59 Nebr. 783, 82 N. W. 4, 80 Am. Rep. 677.

New Hampshire.— Bohanan *v.* Boston, etc., R. Co., 70 N. H. 526, 49 Atl. 103.

Canada.— See Fowler *v.* Hooker, 4 U. C. Q. B. 18.

See 40 Cent. Dig. tit. "Principal and Agent," § 621.

31. Whitehead *v.* Wells, 29 Ark. 99.

32. Mound City Mut. L. Ins. Co. *v.* Huth, 49 Ala. 529; U. S. Express Co. *v.* Rawson, 106 Ind. 215, 6 N. E. 337; Ironwood Store Co. *v.* Harrison, 75 Mich. 197, 42 N. W. 808; Bohanan *v.* Boston, etc., R. Co., 70 N. H. 526, 49 Atl. 103, *semble*.

33. *California.*— McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Goetz *v.* Goldbaum, (1894) 37 Pac. 646; Ellison *v.* Jackson Water Co., 12 Cal. 542.

Connecticut.— Shoninger *v.* Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88.

District of Columbia.— Balloch *v.* Hooper, 6 Mackey 421.

Iowa.— Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070.

Maine.— Mattocks *v.* Young, 66 Me. 459, holding that ratification arises only when one assuming an agency performs some act which purports to impose an obligation or liability upon another.

Minnesota.— Mitchell *v.* Minnesota Fire Assoc., 48 Minn. 278, 51 N. W. 608.

Missouri.— Herd *v.* Buffalo Bank, 66 Mo. App. 643; Bank of Commerce *v.* Bernero, 17 Mo. App. 313, holding it to be essential that the party whose act is to be ratified should have assumed to act as agent for the party ratifying at the date of the act sought to be ratified.

New York.— Thompson *v.* Craig, 16 Abb. Pr. N. S. 29.

North Carolina.— Moore *v.* Rogers, 51 N. C. 297.

Oregon.— Backhaus *v.* Buells, 43 Oreg. 558, 72 Pac. 976, 73 Pac. 342.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Gazzam, 32 Pa. St. 340.

England.— Marsh *v.* Joseph, [1897] 1 Ch. 213, 66 L. J. Ch. 128, 75 L. T. Rep. N. S. 558, 45 Wkly. Rep. 209; Vere *v.* Ashby, 10 B. & C. 288, 8 L. J. K. B. O. S. 57, 21 E. C. L. 127; Ancona *v.* Marks, 7 H. & N. 686, 8 Jur. N. S. 516, 31 L. J. Exch. 163, 5 L. T. Rep. N. S. 753, 10 Wkly. Rep. 251.

34. *California.*— Goetz *v.* Goldbaum, (1894) 37 Pac. 646.

one falsely professes to act as agent but is actually contracting for himself and in his own name, the alleged principal cannot make himself a party to the contract by ratification.[35] Nor can one person ratify an act done by one assuming to act as agent for another person.[36] In some cases it is said that in order that there may be a ratification, the unauthorized act must have been done avowedly for the person sought to be charged as principal, and that if the agent did not profess to be acting for the person sought to be held as having ratified the act, the subsequent assent of such person is of no effect.[37] In other cases, however, it is said that while it is necessary that the act should have been done by one who was in fact assuming to act as an agent, it is not necessary that he should have been understood to be such by the person with whom he was dealing, and that the principal may ratify if the agent reasonably intended, although without open avowal, to act as agent.[38]

d. Existence of Principal. It is necessary for a valid ratification that the person in whose behalf the unauthorized act was done should have been in existence and identified or capable of being identified at the time of the performance of the act.[39] This rule is especially applicable to the acts of promoters of a cor-

Colorado.— Ilfeld *v.* Ziegler, 40 Colo. 401, 91 Pac. 825, holding that where one in selling goods did not purport to act as agent of a third person but in his own right as owner, the third person could not be bound thereby on the theory of ratification.

District of Columbia.— Balloch *v.* Hooper, 6 Mackey 421.

Iowa.— Wyckoff *v.* Davis, 127 Iowa 399, 103 N. W. 349.

Massachusetts.— New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381, 21 N. E. 947. But see Greenfield Bank *v.* Crafts, 4 Allen 447.

Michigan.— Ferris *v.* Snow, 130 Mich. 254, 90 N. W. 850; Crane *v.* Partland, 9 Mich. 493.

Missouri.— Hammerslough *v.* Cheatham, 84 Mo. 13; Herd *v.* Buffalo Bank, 66 Mo. App. 643.

Nebraska.— Tecumseh Nat. Bank *v.* Chamberlain Banking House, 63 Nebr. 163, 88 N. W. 186.

New York.—Hamlin *v.* Sears, 82 N. Y. 327; Condit *v.* Baldwin, 21 N. Y. 219, 78 Am. Dec. 137 [*affirming* 21 Barb. 181]; Garrett *v.* McComb, 58 N. Y. App. Div. 419, 68 N. Y. Suppl. 996; Squier *v.* Norris, 1 Lans. 282; Fellows *v.* Oneida County Com'rs, 36 Barb. 655; Collins *v.* Suau, 7 Rob. 623.

North Carolina.— Rawlings *v.* Neal, 126 N. C. 271, 35 S. E. 597.

Oregon.—Backhaus *v.* Buells, 43 Oreg. 558, 72 Pac. 976, 73 Pac. 342.

England.— Wilson *v.* Tummon, 1 D. & L. 513, 17 L. J. C. P. 306, 6 M. & G. 236, 6 Scott N. R. 894, 46 E. C. L. 236. See Watson *v.* Swann, 11 C. B. N. S. 756, 31 L. J. C. P. 210, 103 E. C. L. 755; Woollen *v.* Wright, 1 H. & C. 554, 31 L. J. Exch. 513, 7 L. T. Rep. N. S. 73, 10 Wkly. Rep. 715.

Canada.— Craig *v.* Matheson, 32 Nova Scotia 452.

Acts of third person.— Where a principal is represented by a duly authorized agent, and some third person who may also be benefited by the transaction assumes, without the knowledge or consent of the principal or his agent, to make representations and statements to promote the transaction, the principal will not be bound thereby, although he accepts the benefits of the transaction negotiated by his agent. Tecumseh Nat. Bank *v.* Chamberlain Banking House, 63 Nebr. 163, 88 N. W. 186, 57 L. R. A 811.

35. Virginia Pocahontas Coal Co. *v.* Lambert, 107 Va. 368, 58 S. E. 561.

36. Lewis *v.* Kerr, 17 Iowa 73; American Nat. Bank *v.* Cruger, 91 Tex. 446, 44 S. W. 278; Commercial, etc., Bank *v.* Jones, 18 Tex. 811; Wilson *v.* Tummon, 1 D. & L. 513, 12 L. J. C. P. 306, 6 Man. & G. 236, 6 Scott N. R. 894, 46 E. C. L. 236; Craig *v.* Matheson, 32 Nova Scotia 452. *Compare* Goldsmidt *v.* Wagner, (Tex. Civ. App. 1907) 99 S. W. 737, in which it appeared that a contract for the sale of a machine recited that the agent procuring the sale was representing a person named, while in fact he was representing a third person who accepted and retained the price, and it was held that as the buyer knew whom the agent was representing, the third person taking the benefit of the contract was bound by its terms.

37. Crowder *v.* Reed, 80 Ind. 1; Commerical, etc., Bank *v.* Jones, 18 Tex. 811.

A contract made by a man professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third person, cannot be ratified by that third person so as to render him able to sue or liable to be sued on the contract. Keighley *v.* Durant, [1901] A. C. 240, 70 L. J. K. B. 662, 84 L. T. Rep. N. S. 777, 17 T. L. R. 527 [*reversing* [1900] 1 Q. B. 629, 69 L. J. Q. B. 382, 82 L. T. Rep. N. S. 217, 16 T. L. R. 244, 48 Wkly. Rep. 476].

38. Brooks *v.* Cook, 141 Ala. 499, 38 So. 641; Hayword *v.* Langmaid, 181 Mass. 426, 63 N. E. 912; Foster *v.* Bates, 1 D. & L. 400, 7 Jur. 1093, 13 L. J. Exch. 88, 12 M. & W. 226.

39. *In re* Empress Engineering Co., 16 Ch. D. 125, 43 L. T. Rep. N. S. 742, 29 Wkly. Rep. 342; Melhado *v.* Porto Alegre, etc., R. Co., L. R. 9 C. P. 503, 31 L. T. Rep. N. S. 57, 23 Wkly. Rep. 57; Kelner *v.* Baxter, L. R. 2 C. P. 174, 12 Jur. N. S. 1016, 36 L. J. C. P. 94, 15 L. T. Rep. N. S. 313, 15 Wkly. Rep.

poration before its organization. In such case there can be no ratification by the corporation after its organization. Although it may become liable on the promoter's contracts by adopting them, this liability does not relate to the time the contract was made but only to the time of adoption.[40] An apparent exception to the above rule exists in the case of executors and administrators. In such case the executor's or administrator's power when he is appointed relates back to the death of decedent, and since before he is appointed he is capable of being identified by the appointment, he may ratify an act done since the death of decedent and before his appointment.[41]

e. Knowledge of Facts — (i) *In General.* As a general rule, in order that a ratification of an unauthorized act or transaction of an agent may be valid and binding, it is essential that the principal have full knowledge, at the time of the ratification, of all material facts relative to the unauthorized transaction.[42]

278; Gunn *v.* London, etc., F. Ins. Co., 12 C. B. N. S. 694, 104 E. C. L. 694; Watson *v.* Swann, 11 C. B. N. S. 756, 31 L. J. C. P. 210, 103 E. C. L. 756, holding that the person for whom the agent professes to act must be capable of being ascertained at the time; that while he need not be named, there must be such a description of him that he can be ascertained.

A contract entered into in anticipation of the formation of an association by one who subsequently becomes its agent cannot be ratified by the association after its formation, since the existence of a principal when the act is done is one of the essential elements of a ratification. Stainsby *v.* Frazer's Metallic Life Boat Co., 3 Daly (N. Y.) 98.

40. See Corporations, 10 Cyc. 1071 *et seq.*

41. Foster *v.* Bates, 1 D. & L. 400, 7 Jur. 1093, 13 L. J. Exch. 88, 12 M. & W. 226. And see Executors and Administrators, 18 Cyc. 213, 214.

42. *Alabama.*— Brown *v.* Bamberger, 110 Ala. 342, 20 So. 114; Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364, 94 Ala. 514, 10 So. 391; Herring *v.* Skaggs, 73 Ala. 446; Howe Mach. Co. *v.* Ashley, 60 Ala. 496; Blevins *v.* Pope, 7 Ala. 371.

Arkansas.— Martin *v.* Hickman, 64 Ark. 217, 41 S. W. 852.

California.— Lambert *v.* Gerner, 142 Cal. 399, 76 Pac. 53; Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433; Golinsky *v.* Allison, 114 Cal. 458, 46 Pac. 295; Brown *v.* Rouse, 104 Cal. 672, 38 Pac. 507; Kraft *v.* Wilson, (1894) 37 Pac. 790; Dean *v.* Bassett, 57 Cal. 640; McCracken *v.* San Francisco, 16 Cal. 591; Dupont *v.* Wertheman, 10 Cal. 354; Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235; Lindow *v.* Cohn, 5 Cal. App. 388, 90 Pac. 485; Pease *v.* Fink, 3 Cal. App. 371, 85 Pac. 657; Munroe *v.* Fette, 1 Cal. App. 333, 82 Pac. 206.

Colorado.— Schollay *v.* Moffitt-West Drug Co., 17 Colo. App. 126, 67 Pac. 182; Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634].

Connecticut.— Goodwin *v.* East Hartford, 70 Conn. 18, 38 Atl. 876.

Dakota.— Nichols *v.* Bruns, 5 Dak. 28, 37 N. W. 752, holding that where a special agent used fraudulent misrepresentations in making an unauthorized purchase, the principal, not knowing of such misrepresentations, will not be liable in an action for deceit, even though he accepts the benefits of the purchase.

Florida.— Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480; Madison *v.* Newsome, 39 Fla. 149, 22 So. 270; Croom *v.* Swann, 1 Fla. 211.

Georgia.— Ludden, etc., Music House *v.* McDonald, 117 Ga. 60, 43 S. E. 425; Holland *v.* Van Beil, 89 Ga. 223, 15 S. E. 302; New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892; Mapp *v.* Phillips, 32 Ga. 72; Owsley *v.* Woolhopter, 14 Ga. 124.

Illinois.— Sill *v.* Pate, 230 Ill. 39, 82 N. E. 356; Mathews *v.* Hamilton, 23 Ill. 470; Cadwell *v.* Meek, 17 Ill. 220.

Indiana.— Metzger *v.* Huntington, 139 Ind. 501, 37 N. E. 1084, 39 N. E. 235; Davis *v.* Talbot, 137 Ind. 235, 36 N. E. 1098; Manning *v.* Gasharie, 27 Ind. 399; Richmond Trading, etc., Co. *v.* Farquar, 8 Blackf. 89; Gage *v.* Pike, Smith 145.

Iowa.— Britt *v.* Gordon, 132 Iowa 431, 108 N. W. 319; Eggleston *v.* Mason, 84 Iowa 630, 51 N. W. 1; Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575; Tidrick *v.* Rice, 13 Iowa 214. See, however, Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070, holding that where a tortious act is simply in excess of authority, mere approval of the wrong without full knowledge is generally sufficient to render the principal liable.

Kansas.— St. John, etc., Co. *v.* Cornwell, 52 Kan. 712, 35 Pac. 785; Stout *v.* McLachlin, 38 Kan. 120, 15 Pac. 902; Bohart *v.* Oberne, 36 Kan. 284, 13 Pac. 388; Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

Kentucky.— Fletcher *v.* Dysart, 9 B. Mon. 413; Gaskill *v.* Huffaker, 49 S. W. 770, 20 Ky. L. Rep. 1555.

Maine.— Tucker *v.* Jerris, 75 Me. 184; Forsyth *v.* Day, 41 Me. 382; Barnard *v.* Wheeler, 24 Me. 412; Thorndike *v.* Godfrey, 3 Me. 429.

Maryland.— Groscup *v.* Downey, 105 Md. 273, 65 Atl. 930; Bannon *v.* Warfield, 42 Md. 22; Howard *v.* Carpenter, 11 Md. 259.

Massachusetts.— Foote *v.* Cotting, 195 Mass. 55, 80 N. E. 600; Beacon Trust Co. *v.* Souther, 183 Mass. 413, 67 N. E. 345; Shepard, etc., Lumber Co. *v.* Eldridge, 171 Mass. 516, 51 N. E. 9, 68 Am. St. Rep. 446, 41 L. R. A. 617; Combs *v.* Scott, 12 Allen

And in order to make this rule operative the principal must know the actual facts

493; Lincoln *v.* Whittenton Mills, 12 Metc. 131; Peters *v.* Ballistier, 3 Pick. 495.

Michigan.— Pittsburgh, etc., Min. Co. *v.* Scully, 145 Mich. 229, 108 N. W. 503; Cowan *v.* Sargent Mfg. Co., 141 Mich. 87, 104 N. W. 377; Upton *v.* Dennis, 133 Mich. 238, 94 N. W. 728; Deffenbaugh *v.* Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197; Blakley *v.* Cochran, 117 Mich. 394, 75 N. W. 940.

Minnesota.— Johnson *v.* Ogren, 102 Minn. 8, 112 N. W. 894; Hunt *v.* Petts Agricultural Works, 69 Minn. 539, 72 N. W. 813; Jackson *v.* Badger, 35 Minn. 52, 26 N. W. 908; Humphrey *v.* Havens, 12 Minn. 298; Woodbury *v.* Larned, 5 Minn. 339.

Missouri.— Case *v.* Hammond Packing Co., 105 Mo. App. 168, 79 S. W. 732; Johnson *v.* Fecht, 94 Mo. App. 605, 68 S. W. 615 [*affirmed* in 185 Mo. 335, 83 S. W. 1077]; Gaskill *v.* Dodson Lead, etc., Co., 84 Mo. App. 521; Steunkle *v.* Chicago, etc., R. Co., 42 Mo. App. 73.

Montana.— Nord *v.* Boston, etc., Consol. Copper, etc., Min. Co., 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647.

Nebraska.—Fitzgerald *v.* Kimball Bros. Co., 76 Nebr. 236, 107 N. W. 227; Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616; Nebraska Wesleyan University *v.* Parker, 52 Nebr. 453, 72 N. W. 470; Cram *v.* Sickel, 51 Nebr. 828, 71 N. W. 724, 66 Am. St. Rep. 478; O'Shea *v.* Rice, 49 Nebr. 893, 69 N. W. 308; Columbia Nat. Bank *v.* Rice, 48 Nebr. 428, 67 N. W. 165; Holm *v.* Bennett, 43 Nebr. 808, 62 N. W. 194.

Nevada.— Clarke *v.* Lyon County, 7 Nev. 75.

New Hampshire.— Bohanan *v.* Boston, etc., R. Co., 70 N. H. 526, 49 Atl. 103; Hovey *v* Brown, 59 N. H. 114; Hazelton *v.* Batchelder, 44 N. H. 40; Tebbetts *v.* Moore, 19 N. H. 369.

New Jersey.— Belcher *v.* Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 Atl. 399; Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941; Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Clement *v.* Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 Atl. 82 [*reversing* 69 N. J. Eq. 347, 60 Atl. 419]; Dugan *v.* Lyman, (Ch. 1892) 23 Atl. 657.

New York.— Weber *v.* Bridgman, 113 N. Y. 600, 21 N. E. 985 [*reversing* 12 N. Y. St. 622]; Whitney *v.* Martine, 88 N. Y. 535 [*reversing* 47 N. Y. Super. Ct. 396]; Ritch *v.* Smith, 82 N. Y. 627, 60 How. Pr. 157; Risley *v.* Indianapolis, etc., R. Co., 62 N. Y. 240; Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155; Henry *v.* Wilkes, 37 N. Y. 562; Smith *v.* Tracy, 36 N. Y. 79; Seymour *v.* Wyckoff, 10 N. Y. 213; Nixon *v.* Palmer, 8 N. Y. 398; Prichard *v.* Sigafus, 103 N. Y. App. Div. 535, 93 N. Y. Suppl. 152; Hogue *v.* Simonson, 94 N. Y. App. Div. 139, 87 N. Y. Suppl. 1065; Barnett *v.* Daw, 55 N. Y. App. Div. 202, 66 N. Y. Suppl. 880; Price *v.* Keyes, 1 Hun 177, 3 T. & C. 720 [*reversed* on other grounds in 62 N. Y. 378]; Howell *v.* Christy, 3 Lans. 238; Henderhen *v.* Cook, 66 Barb. 21; Brass *v.* Worth, 40 Barb. 648; Roach *v.* Coe, 1 E. D. Smith 175; Long *v.* Poth, 16 Misc. 85, 37 N. Y. Suppl. 670; Cornelius *v.* Reiser, 11 N. Y. Suppl. 904; Schwartz *v.* Weber, 6 N. Y. St. 688.

North Carolina.— Brittain *v.* Westall, 137 N. C. 30, 49 S. E. 54.

Oklahoma.— Stock Exch. Bank *v.* Williamson, 6 Okla. 348, 50 Pac. 93.

Pennsylvania.— Daley *v.* Isclin, 218 Pa. St. 515, 67 Atl. 837; Zoebisch *v.* Rauch, 133 Pa. St. 532, 19 Atl. 415; Merrick Thread Co. *v.* Philadelphia Shoe Mfg. Co., 115 Pa. St. 314, 8 Atl. 794; Pittsburgh, etc., R. Co. *v.* Gazzam, 32 Pa. St. 340; Johann *v.* Inman, 17 Leg. Int. 190.

South Carolina.— Reeves *v.* Brayton, 36 S. C. 384, 15 S. E. 658; Fraser *v.* McPherson, 3 Desauss. Eq. 393.

South Dakota.— Quale *v.* Hazel, 19 S. D. 483, 104 N. W. 215; Shull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654; Fargo *v.* Cravens, 9 S. D. 646, 70 N. W. 1053; Jewell Nursery Co. *v.* State, 5 S. D. 623, 59 N. W. 1025.

Tennessee.— Williams *v.* Storm, 6 Coldw. 203; Carnes *v.* Polk, 4 Coldw. 87; Bement *v.* Armstrong, (Ch. App. 1896) 39 S. W. 899.

Texas.— Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734; Moss *v.* Berry, 53 Tex. 632; Laredo *v.* Macdonnell, 52 Tex. 511; Vincent *v.* Rather, 31 Tex. 77, 98 Am. Dec. 516; Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Commercial, etc., Bank *v.* Jones, 18 Tex. 811; Sterling *v.* De Laune, (Civ. App. 1907) 105 S. W. 1169; Swayne *v.* Union Mut. L. Ins. Co., (Civ. App. 1899) 49 S. W. 518; Iron City Nat. Bank *v.* San Antonio Fifth Nat. Bank, (Civ. App. 1898) 47 S. W. 533; Gimbel *v.* Gomprecht, (Civ. App. 1896) 36 S. W. 781; Chaison *v.* Beauchamp, 12 Tex. Civ. App. 109, 34 S. W. 303; Collins *v.* Durward, 4 Tex. Civ. App. 339, 23 S. W. 561; Rhine *v.* Blake, 1 Tex. App. Civ. Cas. § 1066.

Utah.— Moyle *v.* Congregational Soc., 16 Utah 69, 50 Pac. 806; Nephi First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Vermont.— Spooner *v.* Thompson, 48 Vt. 259.

Virginia.— Rowland Lumber Co. *v.* Ross, 100 Va. 275, 40 S. E. 922; Day *v.* National Mut. Bldg., etc., Assoc., 96 Va. 484, 31 S. E. 902; Anderson *v.* Creston Land Co., 96 Va. 257, 31 S. E. 82.

Washington.— Heinzerling *v.* Agen, 46 Wash. 390, 90 Pac. 262; Armstrong *v.* Oakley, 23 Wash. 122, 62 Pac. 499; Haynes *v.* Tacoma, etc., R. Co., 7 Wash. 211, 34 Pac. 922.

West Virginia.— Thompson *v.* Laboring man's Mercantile, etc., Co., 60 W. Va. 42, 53 S. E. 908.

Wisconsin.— Knapp *v.* Smith, 97 Wis. 111, 72 N. W. 349; Hall *v.* Chicago, etc., R. Co.,

and not merely what the agent supposed were the facts.[43] If the material facts have been suppressed or are unknown, there is no ratification, and the principal is at liberty to repudiate his assent and assert his rights in other ways;[44] and it

48 Wis. 317, 4 N. W. 325; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445; Dodge *v.* McDonnell, 14 Wis. 553.

United States.—Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705 [*affirming* 32 Fed. 55]; Bell *v.* Cunningham, 3 Pet. 69, 7 L. ed. 606; Henry *v.* Lane, 128 Fed. 243, 62 C. C. A. 625; Chauche *v.* Pare, 75 Fed. 283, 21 C. C. A. 329; Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347; Bosseau *v.* O'Brien, 3 Fed. Cas. No. 1,667, 4 Biss. 395.

England.— Banque Jacques-Cartier *v.* Banque d'Épargne de Montreal, 13 App. Cas. 111, 57 L. J. P. C. 42; Marsh *v.* Joseph, [1897] 1 Ch. 213, 66 L. J. Ch. 128, 75 L. T. Rep. N. S. 558, 45 Wkly. Rep. 209; Falcke *v.* Scottish Imperial Ins. Co., 34 Ch. D. 234, 56 L. J. Ch. 707, 56 L. T. Rep. N. S. 220, 35 Wkly. Rep. 143; Bush *v.* Buckinam, 2 Vent. 83, 86 Eng. Reprint 322.

Canada.— See Cameron *v.* Paxton, 15 Can. Sup. Ct. 622.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 627–633.

Effect of records.—A general ratification of all acts does not extend to those the principal was ignorant of, although they be deeds on record. Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235. Assent by the principal to an unauthorized act of the agent may be presumed from acquiescence after notice, but the record of a deed from the agent is not constructive notice to the principal of its contents; much less will it give him notice that his agent has exceeded the limit of his authority when an inspection of the deed will not inform him of this fact. Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611.

Usurious transactions.—If an agent in loaning money exacts without authority a bonus or sum in excess of the legal rate of interest, the acceptance by the principal of the security taken or the sum paid without knowledge of the nature of the transaction is not a ratification of the act and will not prevent a recovery of the amount lent with legal interest. Nye *v.* Swan, 49 Minn. 431, 52 N. W. 39; Philips *v.* Mackellar, 92 N. Y. 34; Estevez *v.* Purdy, 66 N. Y. 446 [*reversing* 6 Hun 46]; Condit *v.* Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Elmer *v.* Oakley, 3 Lans. (N. Y.) 34.

43. Owensboro Bank *v.* Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211; Mummy *v.* Haggerty, 15 La. Ann. 268, holding that acts of the principal will not amount to a ratification of a contract where they are entirely based on the representations of the agent, who was himself deceived as to the real existence of the thing which was the object of the contract.

44. *Alabama.*— Brown *v.* Bamberger, 110 Ala. 342, 20 So. 114; Burns *v.* Campbell, 71 Ala. 271; Blevins *v.* Pope, 7 Ala. 371.

Arizona.— McGlassen *v.* Tyrrell, 5 Ariz. 51, 44 Pac. 1088.

Arkansas.— Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381; Lyon *v.* Tams, 11 Ark. 189.

California.— Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433; Dean *v.* Bassett, 57 Cal. 640.

Colorado.— Dean *v.* Hipp, 16 Colo. App. 537, 66 Pac. 804; Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634]; Gauthier Decorating Co. *v.* Ham, 3 Colo. App. 559, 34 Pac. 484.

Connecticut.— Shoninger *v.* Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88, 59 Conn. 588, 22 Atl. 437; Lester *v.* Kinne, 37 Conn. 9.

Georgia.— Hardeman *v.* Ford, 12 Ga. 205.

Illinois.— Bank of Commerce *v.* Miller, 105 Ill. App. 224.

Indiana.— Carter *v.* Pomeroy, 30 Ind. 438; Willison *v.* McKain, 12 Ind. App. 78, 39 N. E. 886.

Iowa.— Eggleston *v.* Mason, 84 Iowa 630, 51 N. W. 1; Beebe *v.* Equitable Mut. Life, etc., Assoc., 76 Iowa 129, 40 N. W. 122; Roberts *v.* Rumley, 58 Iowa 301, 12 N. W. 323.

Kansas.— Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

Kentucky.— McDoel *v.* Ohio Valley Imp., etc., Co., 36 S. W. 175, 18 Ky. L. Rep. 294.

Maine.— Morrell *v.* Dixfield, 30 Me. 157.

Maryland.— Taliaferro *v.* Baltimore First Nat. Bank, 71 Md. 200, 17 Atl. 1036; Bannon *v.* Warfield, 42 Md. 22.

Massachusetts.— Foote *v.* Cotting, 195 Mass. 55, 80 N. E. 600; Pierce Co. *v.* Beers, 190 Mass. 199, 76 N. E. 603; Shepard, etc., Lumber Co. *v.* Eldridge, 171 Mass. 516, 51 N. E. 9, 68 Am. St. Rep. 446, 41 L. R. A. 617; Manning *v.* Leland, 153 Mass. 510, 27 N. E. 519; Thacher *v.* Pray, 113 Mass. 291, 18 Am. Rep. 480; Combs *v.* Scott, 12 Allen 493; Adams *v.* Bourne, 9 Gray 100.

Michigan.— Wood *v.* Palmer, 151 Mich. 30, 115 N. W. 242.

Minnesota.— Jackson *v.* Badger, 35 Minn. 52, 26 N. W. 908.

Mississippi.— Grouch *v.* Hazlehurst Lumber Co., (1894) 16 So. 496.

Missouri.— Cedar Falls Citizens' Sav. Bank *v.* Marr, 129 Mo. App. 26, 107 S. W. 1009.

New Jersey.— Ryle *v.* Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 Atl. 87; Lindley *v.* Keim, 54 N. J. Eq. 418, 34 Atl. 1073 [*reversing* (Ch. 1895) 30 Atl. 1063].

New Mexico.— Kirchner *v.* Laughlin, 6 N. M. 300, 28 Pac. 505.

New York.— King *v.* Mackellar, 109 N. Y. 215, 16 N. E. 201; Phillips *v.* Mackellar, 92 N. Y. 34; Smith *v.* Tracy, 36 N. Y. 79; Condit *v.* Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Seymour *v.* Wyckoff, 10 N. Y. 213; Larkin *v.* Radosta, 119 N. Y. App. Div. 515, 104 N. Y. Suppl. 165; Hogue *v.* Simonson, 94 N. Y. App. Div. 139, 87 N. Y. Suppl. 1065; Henderhen *v.* Cook, 66 Barb. 21; Taylor *v.* Hoey, 36 N. Y. Super. Ct. 402 [*af-*

matters not whether the principal's want of knowledge was due to designed or undesigned concealment or wilful representation on the part of the agent or his mere inadvertence, or whether the question arises between the principal and the agent or as to third persons.[45] Where, however, the principal was sufficiently informed of the facts, he cannot repudiate a ratification because he did not know the legal effect of the facts.[46] If the principal's misapprehension of the facts is partial, and the contract can be so severed as to enable him to avoid it to the extent of the mistake, it has been held that the balance of the contract ratified can be enforced against him.[47]

(II) *FAILURE TO INQUIRE.* In the absence of circumstances sufficient to put a man of reasonable prudence on inquiry, no duty rests upon a principal to make any effort to discover whether another is doing unauthorized acts in his name, and he may assume, until otherwise advised, that his agent will act within the scope of his authority; and hence a principal's failure to use diligence to make such discovery is not such negligence as will charge him with constructive knowledge of what he might have discovered by such inquiry, and therefore will not render him liable under a ratification made without such knowledge.[48] Knowledge is not to be imputed to a principal by reason of the mere fact that he had reasonable opportunity to acquire such knowledge.[49]

firmed in 58 N. Y. 677]; Stidham *v.* Sanford, 36 N. Y. Super. Ct. 341; Meserole *v.* Archer, 3 Bosw. 376; Tallmadge *v.* Lounsbury, 21 N. Y. Suppl. 908; Sage *v.* Sherman, Lalor 147.

North Carolina.— Swindell *v.* Latham, 145 N. C. 144, 58 S. E. 1010; Johnson *v.* Royster, 88 N. C. 194.

Pennsylvania.— Dalcy *v.* Iselin, 218 Pa. St. 515, 67 Atl. 837; Keefe *v.* Sholl, 181 Pa. St. 90, 37 Atl. 116; Copeland *v.* Stoneham Tannery Co., 142 Pa. St. 446, 21 Atl. 825.

South Carolina.— Butler *v.* Haskell, 4 Desauss. Eq. 651.

South Dakota.— Shull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654.

Tennessee.— Cason *v.* Cason, 116 Tenn. 173, 93 S. W. 89; Walker *v.* Walker, 5 Heisk. 425.

Texas.— Commercial, etc., Bank *v.* Jones, 18 Tex. 811; Suderman-Dolson Co. *v.* Rogers, (Civ. App. 1907) 104 S. W. 193; Boyd *v.* Jacobs, 6 Tex. Civ. App. 442, 25 S. W. 681.

Vermont.— Saville, etc., Co. *v.* Welch, 58 Vt. 683, 5 Atl. 491; Town *v.* Hendee, 27 Vt. 258; Brown *v.* Billings, 22 Vt. 9.

United States.— Owings *v.* Hull, 9 Pet. 607, 9 L. ed. 246; Oshkosh Nat. Bank *v.* Munger, 95 Fed. 87, 36 C. C. A. 659; Union Switch, etc., Co. *v.* Johnson Railroad Signal Co., 61 Fed. 940, 10 C. C. A. 176; Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347; Rust *v.* Eaton, 24 Fed. 830; McClelland *v.* Whiteley, 15 Fed. 322, 11 Biss. 444.

England.— De Bussche *v.* Alt, 8 Ch. D. 286, 3 Aspin. 384, 47 L. J. Ch. 381, 38 L. T. Rep. N. S. 370; Lewis *v.* Reed, 14 L. J. Exch. 295, 13 M. & W. 834.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 627–633.

45. Lyon *v.* Tams, 11 Ark. 189; Vincent *v.* Rather, 31 Tex. 77, 98 Am. Dec. 516; Butterworth *v.* Shannon, 5 Can. L. T. Occ. Notes 282.

46. Kelley *v.* Newburyport, etc., R. Co., 141 Mass. 496, 6 N. E. 745; Hyatt *v.* Clark, 118 N. Y. 563, 23 N. E. 891. *Compare* Brown *v.* Rouse, 104 Cal. 672, 38 Pac. 507 (holding that the fact that a wife, under the mistaken belief that a note and mortgage executed by her husband as her agent for money borrowed by him was binding on her, acquiesced in the payment of instalments of interest on the note, does not constitute a ratification of his act); Dugan *v.* Lyman, (N. J. Ch. 1892) 23 Atl. 657.

47. Miller *v.* Sacramento Bd. of Education, 44 Cal. 166 (holding that if a ratification by a party of an act done in his behalf by another without authority be made under a misapprehension of the full scope of the act, it is voidable to the extent of the mistake, and the party can be relieved *pro tanto*); Brong *v.* Spence, 56 Nebr. 638, 77 N. W. 54.

48. *Alabama.*— Brown *v.* Bamberger, 110 Ala. 342, 20 So. 114.

Arizona.— Phœnix Valley Bank *v.* Brown 9 Ariz. 311, 83 Pac. 362.

California.— Ballard *v.* Nye, (1902) 69 Pac. 481.

Colorado.— Smyth *v.* Lyneh, 7 Colo. App. 383, 43 Pac. 670 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634].

Florida.— Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480.

Massachusetts.— Combs *v.* Scott, 12 Allen 493.

Minnesota.— Johnson *v.* Ogren, 102 Minn. 8, 112 N. W. 894.

Vermont.— White *v.* Langdon, 30 Vt. 599.

Duty to inquire see *infra*, I, F, 2, e, (III).

49. Phœnix Valley Bank *v.* Brown, 9 Ariz. 311, 83 Pac. 362; Sehrt-Patterson Milling Co. *v.* Hughes, 8 Kan. App. 514, 56 Pac. 143.

Where an agent having unwritten authority to make leases of real property executes a lease for more than three years, the knowledge of his principal of the facts that the tenant is in possession and paying rent and making trade improvements, unless they were such as indicated possession under a lease be-

(III) *Deliberate Ratification.* The lack of full knowledge, however, does not protect a principal who deliberately chooses to act without such knowledge, as where, knowing that he is ignorant of some of the facts, he has such confidence in his agent that he is willing to assume the risk and to ratify the act without making inquiry for further information than he at the time possesses,[50] or where he deliberately ratifies without full knowledge under circumstances which are sufficient to put a reasonable man upon inquiry.[51]

f. Ratification in Part. Although a principal has an election either to repudiate or to ratify an unauthorized act of an agent on his behalf, he cannot ratify in part

yond the agent's authority, is not sufficient knowledge to work either ratification or estoppel. Clement *v.* Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 Atl. 82.

50. *California.*— Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156; Pope *v.* J. K. Armsby Co., 111 Cal. 159, 43 Pac. 589.

Colorado.— Lynch *v.* Smith, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670]; Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232.

Florida.— Oxford Lake Line Co. *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480.

Illinois.— Campbell *v.* Millar, 84 Ill. App. 208.

Indiana.— Metzger *v.* Huntington, 139 Ind. 501, 37 N. E. 1084, 39 N. E. 235.

Iowa.— Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070.

Massachusetts.— Metcalf *v.* Williams, 144 Mass. 452, 11 N. E. 700.

Michigan.— Liska *v.* Lodge, 112 Mich. 635, 71 N. W. 171.

Minnesota.— Ehrmanntraut *v.* Robinson, 52 Minn. 333, 54 N. W. 188.

Nebraska.— Rank *v.* Garvey, 66 Nebr. 767, 92 N. W. 1025, 99 N. W. 666.

New York.— Glor *v.* Kelly, 166 N. Y. 589, 59 N. E. 1123 [*affirming* 49 N. Y. App. Div. 617, 63 N. Y. Suppl. 339]; Hyatt *v.* Clark, 118 N. Y. 563, 23 N. E. 891; Stokes *v.* Mackey, 19 N. Y. Suppl. 918, in which it was said that a principal may, if he chooses, adopt or ratify his agent's acts without full information, if his intent to do so be clearly manifest; that if he has such confidence in his agent's judgment and fidelity that he is willing to abide by any reasonable liability which the agent has honestly and in good faith assumed to impose on him, he may take the risk of the agent's act without inquiry and adopt the whole act.

South Dakota.— Shull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654; Jewell Nursery Co. *v.* State, 5 S. D. 623, 59 N. W. 1025.

Virginia.— Anderson *v.* Creston Land Co., 96 Va. 257, 31 S. E. 82; Forbes *v.* Hagman, 75 Va. 168.

Washington.— Heinzerling *v.* Agen, 46 Wash. 390, 90 Pac. 262.

England.— Marsh *v.* Joseph, [1897] 1 Ch. 213, 66 L. J. Ch. 128, 75 L. T. Rep. N. S. 558, 45 Wkly. Rep. 209; Fitzmaurice *v.* Bayley, 6 E. & B. 868, 3 Jur. N. S. 264, 26 L. J. Q. B. 114, 88 E. C. L. 868 [*reversed* on other grounds in 8 E. & B. 664, 4 Jur. N. S. 506, 27 L. J. Q. B. 143, 92 E. C. L. 664 (*affirmed* in 9 H. L. Cas. 78, 6 Jur. N. S. 1215, 3 L. T. Rep. N. S. 69, 8 Wkly. Rep. 750, 11 Eng. Reprint 657)]; Lewis *v.* Read, 14 L. J. Exch. 295, 13 M. & W. 834.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 627–633.

51. *Arkansas.*— Lee *v.* Kirby, 80 Ark. 366, 97 S. W. 298.

California.— Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156; Wilder *v.* Beede, 119 Cal. 646, 51 Pac. 1083; Pope *v.* J. K. Armsby Co., 111 Cal. 159, 43 Pac. 589.

Florida.— Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480.

Georgia.— New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892.

Illinois.— Swisher *v.* Palmer, 106 Ill. App. 432.

Iowa.— Tabor State Bank *v.* Kelly, 109 Iowa 544, 80 N. W. 520.

Massachusetts.— Kelley *v.* Newburyport, etc., Horse R. Co., 141 Mass. 496, 6 N. E. 745; Combs *v.* Scott, 12 Allen 493.

New York.— Lowenstein *v.* McIntosh, 37 Barb. 251.

Where the situation naturally and reasonably suggests that some inquiry or investigation should be made, and none is made, the person failing to make it will be deemed in law possessed of such facts as the inquiry would have disclosed. Where, therefore, the agent's whole conduct toward his principal is suggestive of unfair dealing, he is held by his ratification, although he was ignorant of important facts. Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156.

Illustrations.—A principal who is informed of a written contract of purchase made in his name by one assuming to act as his agent, and who is requested by the vendor to state whether the agent had authority to make it and whether the contract is correct, is put upon inquiry as to the terms of the contract; and it is negligence for him not to take the precaution to obtain a copy of it from the vendor before giving him assurance that it could be carried out, and in such case he cannot plead want of knowledge of the details of the contract to prevent the effect of a ratification implied from such assurance. Pope *v.* J. K. Armsby Co., 111 Cal. 159, 43 Pac. 589. So where a principal receives from his agent the proceeds of an unauthorized act with his report or account of the transaction, he cannot ignorantly or purposely shut his eyes to means of information within his possession and control, and thereby avail himself of the benefits of the transaction, and then repudiate it. Johnson *v.* Ogren, 102 Minn. 8, 112 N. W. 894.

or repudiate in part, but must either repudiate or ratify the whole transaction.[52] He cannot ratify that part which is beneficial to himself and reject the remainder; with the benefits, he must take the burdens.[53] Thus a principal cannot ratify a

52. *Alabama.* — Crawford *v.* Barkley, 18 Ala. 270.

Arkansas.—Niemeyer Lumber Co. *v.* Moore, 55 Ark. 240, 17 S. W. 1028; Kelly *v.* Carter, 55 Ark. 112, 17 S. W. 706; Daniels *v.* Brodie, 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81.

Georgia.— Dolvin *v.* Ameriean Harrow Co., 125 Ga. 699, 54 S. E. 706; Byne *v.* Hatcher, 75 Ga. 289; Mercier *v.* Copelan, 73 Ga. 636; Southern Express Co. *v.* Palmer, 48 Ga. 85; Hodnett *v.* Tatum, 9 Ga. 70.

Idaho.— Burke Land, etc., Co. *v.* Wells, 7 Ida. 42, 60 Pac. 87.

Illinois.— Fay *v.* Slaughter, 194 Ill. 157, 62 N. E. 592, 88 Am. St. Rep. 148, 56 L. R. A. 564 [*reversing* 94 Ill. App. 111]; Swisher *v.* Palmer, 106 Ill. App. 432; Nicholson *v.* Doney, 37 Ill. App. 531.

Indiana.— Adams Express Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

Iowa.— Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68; National Imp., etc., Co. *v.* Maiken, 103 Iowa 118, 72 N. W. 431; Eadie *v.* Ashbaugh, 44 Iowa 519; Krider *v.* Western College, 31 Iowa 547.

Kentucky.— Atkinson *v.* Howlett, 11 Ky. L. Rep. 364.

Louisiana.— Boudreaux *v.* Feibleman, 105 La. 401, 29 So. 881; E. O. Standard Milling Co. *v.* Flower, 46 La. Ann. 315, 15 So. 16; Elam *v.* Carruth, 2 La. Ann. 275.

Minnesota.— Nye *v.* Swan, 49 Minn. 431, 52 N. W. 39.

Missouri.— Watson *v.* Bigelow, 47 Mo. 413 (holding that where an agent borrows money on the credit of the principal without the latter's knowledge or authority, and invests it in property which the principal afterward appropriates, the measure of the principal's liability is the amount borrowed, and not merely the proceeds of the sale of the property purchased with the loan); Shinn *v.* Guyton, etc., Mule Co., 109 Mo. App. 557, 83 S. W. 1015; Clydesdale Horse Co. *v.* Bennett, 52 Mo. App. 333; Nichols *v.* Kern, 32 Mo. App. 1.

Nebraska.— Citizens' State Bank *v.* Pence, 59 Nebr. 579, 81 N. W. 623; German Nat. Bank *v.* Hastings First Nat. Bank, 59 Nebr. 7, 80 N. W. 48; Martin *v.* Humphrey, 58 Nebr. 414, 78 N. W. 715.

New York.— Elwell *v.* Chamberlin, 31 N. Y. 611; Slocum *v.* Gilman, 84 Hun 405, 32 N. Y. Suppl. 297; Tallman *v.* Kimball, 74 Hun 279, 26 N. Y. Suppl. 811; Henderhen *v.* Cook, 66 Barb. 21.

North Carolina.— Patton *v.* Brittain, 32 N. C. 8.

North Dakota.— Dowagiac Mfg. Co. *v.* Hellekson, 13 N. D. 257, 100 N. W. 717.

Oregon.— McLeod *v.* Despain, 49 Oreg. 536, 90 Pac. 492, 92 Pac. 1088; Coleman *v.* Stark, 1 Oreg. 115.

Pennsylvania.— Mundorff *v.* Wickersham, 63 Pa. St. 87, 3 Am. Rep. 531; Melcher *v.* United Tel., etc., Co., 20 Lanc. L. Rev. 401.

Tennessee.— Fort *v.* Coker, 11 Heisk. 579.

Texas.— Conley *v.* Columbus Tap R. Co., 44 Tex. 579; Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; History Co. *v.* Flint, (Civ. App. 1891) 15 S. W. 912.

Vermont.— McClure *v.* Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; Woodward *v.* Harlow, 28 Vt. 338.

Virginia.— Anderson *v.* Creston Land Co., 96 Va. 257, 31 S. E. 82.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585.

United States.— Mason *v.* Crosby, 16 Fed. Cas. No. 9,234, 1 Woodb. & M. 342; Wilcocks *v.* Phillips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. 47.

England.— Smith *v.* Hodson, 4 T. R. 211.

Canada.—Dalton *v.* Hamilton, 12 N. Brunsw. 423.

See 40 Cent. Dig. tit. "Principal and Agent," § 656.

53. *Colorado.*— Moffitt-West Drug Co. *v.* Lyneman, 10 Colo. App. 249, 50 Pac. 736.

Illinois.— Henderson *v.* Cummings, 44 Ill. 325; Swisher *v.* Palmer, 106 Ill. App. 432.

Indiana.— Johnson *v.* Hoover, 72 Ind. 395; Judah *v.* Vincennes University, 16 Ind. 56.

Iowa.— Deering *v.* Grundy County Nat. Bank, 81 Iowa 222, 46 N. W. 1117.

Kansas.— McKinstry *v.* Citizens' Bank, 57 Kan. 279, 46 Pac. 302; Wells *v.* Hickox, 1 Kan. App. 485, 40 Pac. 821.

Kentucky.— Elizabethtown Milling, etc., Co. *v.* Elizabethtown Milling Co., 13 Ky. L. Rep. 96.

Louisiana.— Dupre *v.* Splane, 16 La. 51.

Michigan.— Dodge *v.* Tullock, 110 Mich. 480, 68 N. W. 239; Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276; Eberts *v.* Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278.

Missouri.— U. S. Mortgage, etc., Co. *v.* Crutcher, 169 Mo. 444, 69 S. W. 380.

Nebraska.— Warder, etc., Co. *v.* Myers, 70 Nebr. 15, 96 N. W. 992; Hinman *v.* F. C. Austin Mfg. Co., 65 Nebr. 187, 90 N. W. 934; Hall *v.* Hopper, 64 Nebr. 633, 90 N. W. 549; Citizens' State Bank *v.* Pence, 59 Nebr. 579, 81 N. W. 623; Martin *v.* Humphrey, 58 Nebr. 414, 78 N. W. 715; U. S. School-Furniture Co. *v.* Lancaster County School Dist. No. 87, 56 Nebr. 645, 77 N. W. 62; Rogers *v.* Empkie Hardware Co., 24 Nebr. 653, 39 N. W. 844.

New Hampshire.— Warren *v.* Hayes, 74 N. H. 355, 68 Atl. 193; Tasker *v.* Kenton Ins. Co., 59 N. H. 438.

New York.— Sultan *v.* Bailey, 85 N. Y. Suppl. 332.

North Carolina.—Rudasill *v.* Falls, 92 N. C. 222.

Oregon.— McLeod *v.* Despain, 49 Oreg. 536, 90 Pac. 492, 92 Pac. 1088; La Grande Nat. Bank *v.* Blum, 27 Oreg. 215, 41 Pac. 659.

contract made for him by an agent without also ratifying and becoming bound by the terms and conditions, although unauthorized, upon which it was made;[54] or without ratifying the representations and warranties,[55] and all other instrumentalities employed by the agent as an inducement to bring about the contract.[56] Accordingly a ratification with full knowledge of part of a transaction in general

Pennsylvania.— Wheeler, etc., Mfg. Co. *v.* Aughey, 144 Pa. St. 398, 22 Atl. 667, 27 Am. St. Rep. 638; Mundorff *v.* Wiekersham, 63 Pa. St. 87, 3 Am. Rep. 531.

Tennessee.— Gaudelupo, etc., Min. Co. *v.* Beatty, (1886) 1 S. W. 348; Seago *v.* Martin, 6 Heisk. 308.

Texas.— Anderson *v.* Walker, (Civ. App. 1899) 49 S. W. 937.

Utah.— Shafer *v.* Russell, 28 Utah 444, 79 Pac. 559.

West Virginia.— Cumberland Third Nat. Bank *v.* Laboringman's Mercantile, etc., Co., 56 W. Va. 446, 49 S. E. 544.

United States.— Stark *v.* Starr, 94 U. S. 477, 24 L. ed. 276 [*affirming* 22 Fed. Cas. No. 13,317, 2 Sawy. 603]; Foster *v.* Swasey, 9 Fed. Cas. No. 4,984, 2 Woodb. & M. 217.

Canada.— Dalton *v.* Hamilton, 12 N. Brunsw. 423.

See 40 Cent. Dig. tit. "Principal and Agent," § 656. And see *infra*, I, F, 3, c, (II), (IV).

54. *Iowa.*— Casady *v.* Manehester F. Ins. Co., 109 Iowa 539, 80 N. W. 521.

Kansas.— Babcock *v.* Deford, 14 Kan. 408; Wells *v.* Hickox, 1 Kan. App. 485, 40 Pac. 821.

Maine.— Wood *v.* Finson, 89 Me. 459, 36 Atl. 911; Billings *v.* Mason, 80 Me. 496, 15 Atl. 59.

Michigan.— Eberts *v.* Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278.

Missouri.— Nichols *v.* Kern, 32 Mo. App. 1.

New York.— Crigler *v.* Bedell, 4 N. Y. Suppl. 653; Gates *v.* Green, 4 Paige 355, 27 Am. Dec. 68.

Pennsylvania.— Mundorff *v.* Wickersham, 63 Pa. St. 87, 3 Am. Rep. 531.

Texas.— Meyer *v.* Smith, 3 Tex. Civ. App. 37, 21 S. W. 995.

Vermont.— Newell *v.* Hurlburt, 2 Vt. 351.

Wisconsin.— Kiekland *v.* Menasha Wooden-Ware Co., 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831; Paine *v.* Wilcox, 16 Wis. 202.

Canada.—Creighton *v.* Janes, 40 U. C. Q. B. 372.

See 40 Cent. Dig. tit. "Principal and Agent," § 657.

55. *Alabama.*— Holman *v.* Calhoun, (1906) 40 So. 356; Philips, etc., Mfg. Co. *v.* Wild, 144 Ala. 545, 39 So. 359; Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336.

Florida.— Croom *v.* Swann, 1 Fla. 246.

Georgia.— Dolvin *v.* American Harrow Co., 125 Ga. 699, 54 S. E. 706.

Illinois.— Cochran *v.* Chitwood, 59 Ill. 53.

Iowa.— Blaess *v.* Nichols, etc., Co., 115 Iowa 373, 88 N. W. 829; Higbee *v.* Trumbauer, 112 Iowa 74, 83 N. W. 812; Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68.

Kansas.— Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437, 57 Pac. 43.

Maryland.— Swatara R. Co. *v.* Brune, 6 Gill 41.

Michigan.— Busch *v.* Wilcox, 82 Mich. 315, 46 N. W. 940, 47 N. W. 328, 21 Am. St. Rep. 563.

Nebraska.— Leavitt *v.* Sizer, 35 Nebr. 80, 52 N. W. 832; Esterly Harvesting Mach. Co. *v.* Frolkey, 34 Nebr. 110, 51 N. W. 594; McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614.

New York.— Crans *v.* Hunter, 28 N. Y. 389; Murray *v.* Sweasy, 69 N. Y. App. Div. 45, 74 N. Y. Suppl. 543.

Ohio.— State *v.* Perry, Wright 663, holding that where one acting without authority obtains a contract for another by fraud, if the other takes the contract he adopts the agency, and is chargeable with the fraud as to the contract.

Pennsylvania.— American Buttonhole Overseaming, etc., Mach. Co. *v.* Maurer, (1887) 10 Atl. 762; Jones *v.* National Bldg. Assoc., 94 Pa. St. 215; Rheinstrom *v.* Elk Brewing Co., 28 Pa. Super. Ct. 519; Chicago Cottage Organ Co. *v.* McManigal, 8 Pa. Super. Ct. 632.

South Dakota.— Union Trust Co. *v.* Phillips, 7 S. D. 225, 63 N. W. 903.

Texas.— American Nat. Bank *v.* Cruger, 91 Tex. 446, 44 S. W. 278; Pioneer Sav., etc., Assoc. *v.* Baumann, (Civ. App. 1900) 58 S. W. 49.

West Virginia.— Honaker *v.* Pocatalico Dist. Bd. of Education, 42 W. Va. 170, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413; Lane *v.* Black, 21 W. Va. 617.

Wisconsin.— Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980; Gunther *v.* Ullrich, 82 Wis. 220, 52 N. W. 88, 33 Am. St. Rep. 32; Morse *v.* Ryan, 26 Wis. 356.

United States.— Doggett *v.* Emerson, 7 Fed. Cas. No. 3,960, 3 Story 700.

See 40 Cent. Dig. tit. "Principal and Agent," § 658. And see *infra*, I, F, 4, d; III, F, 1, a, (II).

But see Black River Sav. Bank *v.* Edwards, 10 Gray (Mass.) 387, in which it was held that the adoption of a note obtained by an agent within his authority does not include the adoption of a fraudulent agreement or understanding between the agent and the other party, beyond the line of the agent's authority.

56. D. M. Osborn Co. *v.* Jordan, 52 Nebr. 465, 72 N. W. 479; Rogers *v.* Empkie Hardware Co., 24 Nebr. 653, 39 N. W. 844; McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614; New England Mortg. Security Co. *v.* Henderson, 13 Nebr. 574, 14 N. W. 519; Smith *v.* Barnard, 148 N. Y. 420, 42 N. E. 1054; Elwell *v.* Chamberlin, 31 N. Y. 611.

operates as a ratification of the whole.[57] But this latter rule does not apply to different and independent transactions; and in the absence of other evidence of ratification, the mere ratification by a principal of previous acts of an agent is not conclusive of the ratification of later similar acts, and will not prevent the principal from rejecting them if he so elects.[58]

g. Necessity of New Consideration. Since ratification is equivalent to prior authority,[59] the original contract after ratification and by force of the ratification alone becomes the contract of the parties as though it had in the first instance been made by the agent with authority; and hence no consideration other than that inuring to the principal from the original contract is necessary to support a ratification.[60]

h. Necessity of Intention to Ratify. A ratification of the unauthorized act of an agent or of a stranger who assumes to act as such must be found in the intention of the principal, either express or implied, to ratify.[61] If that intention cannot be shown no ratification can be held to have been established.[62] But in most cases it is this intention as manifested by the principal's acts and statements, rather than by his professions as to ratification, that must determine whether the principal had a legal intent to ratify;[63] and the circumstances may be such that the law will recognize a constructive intention to ratify where none was actually intended.[64]

3. Manner of Ratification — a. In General. Ratification proceeds upon the

57. *Arkansas.*— Daniels *v.* Brodie, 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81.

Georgia.— Ingraham *v.* Barber, 72 Ga. 158.

Iowa.— Des Moines Nat. Bank *v.* Meredith, 114 Iowa 9, 86 N. W. 46; Krider *v.* Western College, 31 Iowa 547.

Minnesota.— King *v.* Franklin Lumber Co., 80 Minn. 274, 83 N. W. 170.

Nebraska.— German Nat. Bank *v.* Hastings First Nat. Bank, 59 Nebr. 7, 80 N. W. 48.

Pennsylvania.—Anderson *v.* National Surety Co., 196 Pa. St. 288, 46 Atl. 306.

Vermont.— McClure *v.* Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557.

United States.— Gaines *v.* Miller, 111 U. S. 395, 4 S. Ct. 426, 28 L. ed. 466.

England.— Rodmell *v.* Eden, 1 F. & F. 542.

See 40 Cent. Dig. tit. "Principal and Agent," § 656; and *infra*, I, F, 3, c, (I).

58. Burlington, etc., R. Co. *v.* Sherwood, 62 Iowa 309, 17 N. W. 564 (holding that where the owner of lands reserves the right to pass upon sales thereof made by his agent, his adoption of a number of sales will not prevent him from rejecting others); Forsyth *v.* Day, 41 Me. 382; Todd *v.* Bishop, 136 Mass. 386 (holding that one for whom an agent buys or sells stock does not necessarily, by receiving the profits of one transaction, ratify another which resulted in loss).

59. See *infra*, I, F, 4.

60. *Alabama.*—Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

Colorado.— Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634].

Missouri.— Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430.

New Hampshire.— Grant *v.* Beard, 50 N. H. 129, holding that a suit to enforce the obligation of a party ratifying an act of one assuming to be an agent is, to all intents and purposes, a suit founded upon the original contract, and not upon the act of ratification, and no new consideration in support thereof is necessary.

New York.— Commercial Bank *v.* Warren, 15 N. Y. 577.

Pennsylvania.— Garrett *v.* Gonter, 42 Pa. St. 143.

Tennessee.— Fitzpatrick *v.* Caperton Cove School Tract Com'rs, 7 Humphr. 224, 46 Am. Dec. 76.

61. Goodwin *v.* East Hartford, 70 Conn. 18, 38 Atl. 876; Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073; St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737; Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559]. And see *infra*, I, F, 3, b; I, F, 3, c, (I).

62. Monchcux *v.* Mistrot, 22 La. Ann. 421; Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559].

63. Forsyth *v.* Day, 46 Me. 176; St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737; Oregon R. Co. *v.* Oregon, R., etc., Co., 28 Fed. 505.

64. Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800 (in which it was said that ratification, like authorization, is generally the creature of intent; but that that intent may often be presumed by the law from the conduct of the party, and that presumption may be conclusive, even against the actual intention of the party, where his conduct has been such that it would be inequitable to others to permit him to assert that he had not ratified the unauthorized act of his agent); St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737; Hazard *v.* Spears, 2 Abb. Dec. (N. Y.) 353, 4 Keyes 469 (holding that to constitute the conversation and acts of the principal with a knowledge of the facts a ratification, it is not material whether a ratification was contem-

theory that there was no previous authority,[65] and acts as a substitute for such authority.[66] Accordingly the general rule is that whatever form of appointment would have been sufficient to clothe the agent with original authority to do the act will be sufficient to clothe him with authority by ratification,[67] and conversely that wherever the law requires a particular mode of authorization there can be no valid ratification except in the same manner.[68] So except where a particular form of authorization would have been necessary, no particular formality is essential to constitute a ratification,[69] which may be either express or implied,[70] or in writing or by parol.[71] If, however, the original authority must have been given in writing the ratification to be valid must also be in writing,[72] and the same principle applies to acts which could be authorized by a municipality only by ordinance,[73] or by a corporation only by resolution or vote.[74] The general rule also is that if the authority must have been under seal the ratification also must be under seal;[75] but an exception to this rule has been made in the case of a ratification by one partner of a deed executed by another partner for the partnership,[76] and in one jurisdiction it has been held that a ratification under seal is not necessary irrespective of the question of partnership.[77] In any case it is the nature of the

plated or not); Bement *v.* Armstrong, (Tenn. Ch. App. 1896) 39 S. W. 899.

65. Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156. And see *supra*, I, F, 1, a, b.

66. Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156; Kraft *v.* Wilson, (Cal. 1894) 37 Pac. 790; Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243; Grant *v.* Beard, 50 N. H. 129; Daughters of American Revolution *v.* Schenley, 204 Pa. St. 584, 54 Atl. 370. And see *supra*, I, F, 1, a, b; *infra*, I, F, 4.

67. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670]; Goode *v.* Rawlins, 44 Ga. 593.

68. Borel *v.* Rollins, 30 Cal. 408; McCracken *v.* San Francisco, 16 Cal. 591; Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Long *v.* Poth, 16 Misc. (N. Y.) 85, 37 N. Y. Suppl. 670; Morris *v.* Ewing, 8 N. D. 99, 76 N. W. 1047.

69. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670]; Garrett *v.* Gonter, 42 Pa. St. 143.

70. Taylor *v.* Agricultural, etc., Assoc., 68 Ala. 229; Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156; Byrne *v.* Doughty, 13 Ga. 46; Evans *v.* Buckner, 1 Heisk. (Tenn.) 291; Bement *v.* Armstrong, (Tenn. Ch. App. 1896) 39 S. W. 899. And see *infra*, I, F, 3, b, c.

A parol contract may be ratified by an express parol recognition of the act, by conduct implying acquiescence, or by silence when the party in good faith ought to speak. Grant *v.* Beard, 50 N. H. 129.

71. Goode *v.* Rawlins, 44 Ga. 593; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Murphy *v.* Renkert, 12 Heisk. (Tenn.) 397.

72. *California.*— Borderre *v.* Den, 106 Cal. 594, 39 Pac. 946.

Kentucky.— Riggan *v.* Crain, 86 Ky. 249, 5 S. W. 561, 9 Ky. L. Rep. 528; Ragan *v.* Chenault, 78 Ky. 545.

Minnesota.— Judd *v.* Arnold, 31 Minn. 430, 18 N. W. 151.

Missouri.— Hawkins *v.* McGroarty, 110 Mo. 546, 19 S. W. 830.

New York.— Long *v.* Poth, 16 Misc. 85, 37 N. Y. Suppl. 670.

North Dakota.— Morris *v.* Ewing, 8 N. D. 99, 76 N. W. 1047.

Texas.— Zimpelman *v.* Keating, 72 Tex. 318, 12 S. W. 177.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 624, 625.

73. McCracken *v.* San Francisco, 16 Cal. 591. And see MUNICIPAL CORPORATIONS, 28 Cyc. 676.

74. Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. And see CORPORATIONS, 10 Cyc. 1069 *et seq.*

75. *California.*— Borel *v.* Rollins, 30 Cal. 408.

Georgia.— McCalla *v.* American Freehold Land Mortg. Co., 90 Ga. 113, 15 S. E. 687; Pollard *v.* Gibbs, 55 Ga. 45.

Illinois.— Ingraham *v.* Edwards, 64 Ill. 526; Bragg *v.* Fessenden, 11 Ill. 544.

Maine.— Heath *v.* Nutter, 50 Me. 378; Spofford *v.* Hobbs, 29 Me. 148, 48 Am. Dec. 521; Stetson *v.* Patten, 2 Me. 358, 11 Am. Dec. 111.

New Hampshire.—Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

North Carolina.— Davenport *v.* Sleight, 19 N. C. 381, 31 Am. Dec. 420.

Pennsylvania.—Bellas *v.* Hays, 5 Serg. & R. 427, 9 Am. Dec. 385.

Tennessee.— Cain *v.* Heard, 1 Coldw. 163; Smith *v.* Dickinson, 6 Humphr. 261, 44 Am. Dec. 306.

Texas.— Skirvin *v.* O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696.

See 40 Cent. Dig. tit. "Principal and Agent," § 625.

76. Haynes *v.* Seachrest, 13 Iowa 455; Swan *v.* Stedman, 4 Metc. (Mass.) 548; Cady *v.* Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379. And see PARTNERSHIP, 30 Cyc. 486.

77. Holbrook *v.* Chamberlain, 116 Mass. 155, 17 Am. Rep. 146; McIntyre *v.* Park, 11 Gray (Mass.) 102, 106, 71 Am. Dec. 690,

authorization necessary, and not that of the act done by the agent, which determines the necessary form of ratification; [78] and if written authority was not necessary a contract in writing may be ratified by parol,[79] or impliedly by subsequent recognition or acquiescence,[80] although it was one which necessarily must have been in writing; [81] and if a seal was not essential to the validity of an instrument, the fact that one was attached by the agent does not make a ratification under seal necessary.[82] A ratification not under seal of an instrument to which a seal has been unnecessarily attached does not, however, render it effective as a sealed instrument,[83] but does make it effective as a simple contract not under seal.[84] The principal may be estopped by his acts and conduct to deny the authority of an agent, although there is no valid ratification by reason of the fact that in the particular case a particular form of ratification was necessary; [85] but unless the facts are sufficient to constitute an estoppel the general rule applies that the ratification must be in such a form as would be good as a prior authorization.[86]

b. Express. A ratification in express terms and with knowledge of the facts

where the court said: "However this may be elsewhere, by the law of Massachusetts such instrument may be ratified by parol. . . . The cases in which this doctrine has been adjudged were those in which one partner, without the previous authority of his copartners, executed a deed in the name of the firm. But we do not perceive any reason for confining the doctrine to that class of cases."

78. Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

79. Goetz *v.* Goldbaum, (Cal. 1894) 37 Pac. 646; Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Jenkins *v.* Mayer, 13 Fed. Cas. No. 7,272, 2 Biss. 303, 3 Nat. Bankr. Reg. 776.

80. Emerson *v.* Coggswell, 16 Me. 77; Goss *v.* Stevens, 32 Minn. 472, 21 N. W. 549.

81. Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

82. *Colorado.*— Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670].

Michigan.— Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490.

Mississippi.— Adams *v.* Power, 52 Miss. 828.

Missouri.— Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Shuetze *v.* Bailey, 40 Mo. 69.

New Hampshire.—Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

South Carolina.— State *v.* Spartanburg, etc., R. Co., 8 S. C. 129.

Texas.— Rutherford *v.* Montgomery, 14 Tex. Civ. App. 319, 37 S. W. 625.

United States.— Jenkins *v.* Mayer, 13 Fed. Cas. No. 7,272, 2 Biss. 303, 3 Nat. Bankr. Reg. 776.

See 40 Cent. Dig. tit. "Principal and Agent," § 625.

Contra.—Pollard *v.* Gibbs, 55 Ga. 45; Hayes *v.* Atlanta, 1 Ga. App. 25, 57 S. E. 1087.

In Texas it is held that a seal is not essential to the validity of a deed, and therefore that the unauthorized execution of a deed need not be ratified under seal (Rutherford *v.* Montgomery, 14 Tex. Civ. App. 319, 37 S. W. 625), but that the ratification must be in writing (Zimpelman *v.* Keating, 72 Tex. 318, 12 S. W. 177).

83. Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203, holding that a parol ratification of a mortgage executed by an agent under seal, covering both real and personal property, is ineffective as to the realty, but makes the mortgage effective as to the personalty, since a seal is not essential to the validity of a mortgage of personal property. See also Ingraham *v.* Edwards, 64 Ill. 526, holding that if the instrument is accepted as a sealed instrument, and action is brought upon it as such instead of in assumpsit where it might have been offered and regarded as a simple contract, parol ratification is not sufficient, although the seal was unnecessary.

84. Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Shuetze *v.* Bailey, 40 Mo. 69; Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

85. Borel *v.* Rollins, 30 Cal. 408. See also Judd *v.* Arnold, 31 Minn. 430, 18 N. W. 151; Hawkins *v.* McGroarty, 110 Mo. 546, 19 S. W. 830.

Where a person enters into possession of land under a sealed lease executed by an agent without authority under seal, and pays an instalment of rent in pursuance of the contract, he cannot subsequently deny the agent's authority. Vanderbilt *v.* Persse, 3 E. D. Smith (N. Y.) 428.

86. *Georgia.*— McCalla *v.* American Freehold Land Mortg. Co., 90 Ga. 113, 15 S. E. 687.

Michigan.— Palmer *v.* Williams, 24 Mich. 328.

Minnesota.— Judd *v.* Arnold, 31 Minn. 430, 18 N. W. 151.

Missouri.— Hawkins *v.* McGroarty, 110 Mo. 546, 19 S. W. 830.

North Dakota.— Morris *v.* Ewing, 8 N. D. 99, 76 N. W. 1047.

Texas.— Zimpelman *v.* Keating, 72 Tex. 318, 12 S. W. 177.

See 40 Cent. Dig. tit. "Principal and Agent," § 625.

of what an agent has done is of course equivalent to a prior authority.[87] Whether such express ratification must be in writing or under seal depends upon the principles above stated,[88] and unless a different mode of authorization would have been necessary an express ratification may be oral.[89] So also it is not necessary that the principal should state in express terms that he ratifies the act, but it is sufficient if what he has stated or written shows that such was his intention,[90] as when with a knowledge of the facts he states on being informed of what has been done that it is "all right," [91] or where goods have been purchased by an agent in his name he states on being presented with the bill or informed of the transaction that he will pay for them.[92] There may also be a ratification by means of an express authority given subsequent to the act but dated so as to appear to be prior thereto,[93] or by the admissions in an answer in a suit involving the transaction in question [94] or the property affected thereby.[95] An express ratification of what an agent may have done under a power of attorney is held to be no broader than the power; [96] and a writing alleged to be a ratification will be strictly limited to the purposes therein expressed, both in determining whether it amounts to a ratification [97] and in deciding whether it is broad enough to cover the acts claimed to be therein ratified; [98] but a qualification or condition in an express ratification should not be so construed as to defeat the necessary legal effect of what has been expressly ratified.[99]

c. Implied — (i) *In General.* Ratification of the acts of an agent need not in most cases be express, but may be implied from the acts and conduct of the principal,[1] and generally speaking a ratification may be implied from any acts or

87. Riggan *v.* Crain, 86 Ky. 249, 5 S. W. 561, 9 Ky. L. Rep. 528; Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155. And see *infra*, I, F, 4, a.

88. See *supra*, I, F, 3, a.

89. Goode *v.* Rawlins, 44 Ga. 593; Grant *v.* Beard, 50 N. H. 129; Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155.

90. *Iowa.*— Chamberlain *v.* Robertson, 31 Iowa 408.

New York.— Tummonds *v.* Moody, 3 N. Y. Suppl. 714.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

Texas.— Garrett *v.* Josey, 44 Tex. Civ. App. 1, 97 S. W. 139.

Vermont.— Burgess *v.* Harris, 47 Vt. 322.

See 40 Cent. Dig. tit. "Principal and Agent," § 624.

91. Tummonds *v.* Moody, 3 N. Y. Suppl. 714; Brown *v.* Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779.

92. Watson *v.* Gray, 4 Abb. Dec. (N. Y.) 540, 4 Keyes 385; Burgess *v.* Harris, 47 Vt. 322.

93. Milliken *v.* Coombs, 1 Me. 343, 10 Am. Dec. 70. And see *infra*, I, F, 3, c, (v).

94. Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429.

95. Donason *v.* Barbero, 230 Ill. 138, 82 N. E. 620, holding that where, after the execution of a deed with a blank for the name of the grantee, the grantor's agent inserted the name of a grantee without authority, such act was ratified by the grantor's appearance in a subsequent suit for partition of the land and disclaiming any interest therein, the complaint having alleged a conveyance of the land to the grantee by such deed.

96. Hunter *v.* Sacramento Valley Beet Sugar Co., 11 Fed. 15, 7 Sawy. 498.

97. Landt *v.* Schneider, 31 Mont. 15, 77 Pac. 307; Riley *v.* Grant, 16 S. D. 553, 94 N. W. 427.

98. Hunter *v.* Sacramento Valley Beet Sugar Co., 11 Fed. 15, 7 Sawy. 498.

99. Scranton *v.* Demere, 6 Ga. 92, holding that where a warrant of attorney was executed under a rule of court to confirm an appeal entered by an agent of the party to the suit, reciting that it was "hereby ratifying and confirming all that my said attorney has done, or may hereafter do, in my name, in the premises, without incurring costs to me," the condition as to costs should be construed as relating only to another or greater amount of costs than was legally incident to entering the appeal, and that such entry being expressly ratified, the principal would be bound for all costs necessarily incident thereto, notwithstanding the qualification in the warrant of attorney.

1. *Alabama.*— Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

Arkansas.— Whitehead *v.* Wells, 29 Ark. 99.

California.— Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156, (1902) 69 Pac. 481; Pope *v.* J. K. Armsby Co., 111 Cal. 159, 43 Pac. 589; Kraft *v.* Wilson, (1894) 37 Pac. 790; Fraser *v.* San Francisco Bridge Co., 103 Cal. 79, 36 Pac. 1037.

Colorado.— Jenet *v.* Albers, 7 Colo. App. 271, 43 Pac. 452.

Connecticut.— Duncan *v.* Kearney, 72 Conn. 585, 45 Atl. 358; Church *v.* Sterling, 16 Conn. 388.

Georgia.— Cook *v.* Buchanan, 86 Ga. 760, 13 S. E. 83; Byrne *v.* Doughty, 13 Ga. 46; Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459.

Illinois.— Connett *v.* Chicago, 114 Ill. 233,

conduct on the part of the principal reasonably tending to show such an intention on the part of the principal to ratify the acts or transactions of the alleged agent,[2] particularly where his conduct is inconsistent with any other intention,[3] or where it appears that he has repeatedly recognized and approved similar acts done by the agent.[4] So a ratification may be implied where the principal has carried out or offered to perform a part of an unauthorized agreement with knowledge of the whole,[5]

29 N. E. 280; Searing *v.* Butler, 69 Ill. 575; Joseph Wolf Co. *v.* Bank of Commerce, 107 Ill. App. 58; Campbell *v.* Millar, 84 Ill. App. 208.

Iowa.— Burlington, etc., R. Co. *v.* Columbus Junction, 104 Iowa 110, 73 N. W. 501.

Kentucky.— Luttrell *v.* East Tennessee Tel. Co., 86 S. W. 1124, 27 Ky. L. Rep. 872.

Louisiana.— Bogel *v.* Teutonia Nat. Bank, 28 La. Ann. 953; Szymanski *v.* Plassan, 20 La. Ann. 90, 96 Am. Dec. 382; Merritt *v.* Wright, 19 La. Ann. 91; Warneken *v.* Marchand, 18 La. Ann. 147; Flower *v.* Jones, 7 Mart. N. S. 140.

Maryland.— Maddux *v.* Bevan, 39 Md. 485.

Massachusetts.— Barnes *v.* Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; Boynton *v.* Turner, 13 Mass. 391; Clement *v.* Jones, 12 Mass. 60.

Missouri.— Clydesdale Horse Co. *v.* Bennett, 52 Mo. App. 333.

New Hampshire.— Hoit *v.* Cooper, 41 N. H. 111; Hatch *v.* Taylor, 10 N. H. 538.

New York.— Harnett *v.* Garvey, 36 N. Y. Super. Ct. 326; Wilmot *v.* Richardson, 6 Duer 328; Appelbaum *v.* Galewski, 34 Misc. 281, 69 N. Y. Suppl. 636; Codwise *v.* Hacker, 1 Cai. 526; Day *v.* Perkins, 2 Sandf. Ch. 359.

Oklahoma.— Fant *v.* Campbell, 8 Okla. 586, 58 Pac. 741.

Pennsylvania.— Cake's Appeal, 110 Pa. St. 65, 20 Atl. 415.

Tennessee.— Evans *v.* Buckner, 1 Heisk. 291.

Texas.— Ransom *v.* Alexander, 31 Tex. 443.

West Virginia.— Curry *v.* Hale, 15 W. Va. 867.

Wisconsin.— Plumer *v.* Wausau Boom Co., 49 Wis. 449, 5 N. W. 232.

United States.— Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274; Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 67 Fed. 49; U. S. *v.* Turner, 28 Fed. Cas. No. 16,547, 2 Bond 379.

Canada.— Pettigrew *v.* Doyle, 17 U. C. C. P. 34.

See 40 Cent. Dig. tit. "Principal and Agent," § 636.

Ratification by corporation.—A ratification of acts of an agent of a corporation may be implied from an adoption or recognition of such acts by the corporation. Detroit *v.* Jackson, 1 Dougl. (Mich.) 106; Holmes *v.* Kansas City Bd. of Trade, 81 Mo. 137. And see CORPORATIONS, 10 Cyc. 1076 *et seq.*

2. *California.*— Kraft *v.* Wilson, (1894) 37 Pac. 790.

Georgia.— Byrne *v.* Doughty, 13 Ga. 46.

Massachusetts.— Beacon Trust Co. *v.* Souther, 183 Mass. 413, 67 N. E. 345.

Minnesota.— Dana *v.* Turlay, 38 Minn. 106, 35 N. W. 860; Goss *v.* Stevens, 32 Minn. 472, 21 N. W. 549; Minor *v.* Willoughby, 3 Minn. 225.

Nebraska.— Prine *v.* Syverson, 37 Nebr. 860, 56 N. W. 714.

New York.— Keeler *v.* Salisbury, 33 N. Y. 648; Codwise *v.* Hacker, 1 Cai. 526.

Tennessee.— Evans *v.* Buckner, 1 Heisk. 291.

See 40 Cent. Dig. tit. "Principal and Agent," § 636.

3. Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229; Kraft *v.* Wilson, (Cal. 1894) 37 Pac. 790; Mathews *v.* Gilliss, 1 Iowa 242; Star *v.* Stark, 22 Fed. Cas. No. 13,317, 2 Sawy. 603 [*affirmed* in 94 U. S. 477, 24 L. ed. 276].

4. *Alabama.*— Tabler *v.* Sheffield Land, etc., Co., 87 Ala. 305, 6 So. 196.

California.— Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138.

Colorado.— Robert E. Lee Silver Min. Co. *v.* Englebach, 18 Colo. 106, 31 Pac. 771; Witcher *v.* Gibson, 15 Colo. App. 163, 61 Pac. 192.

Iowa.— Whiting *v.* Western Stage Co., 20 Iowa 554.

Massachusetts.— Ely *v.* James, 123 Mass. 36.

Missouri.— White *v.* Missouri Pac. R. Co., 19 Mo. App. 400.

Pennsylvania.—Himes *v.* Herr, 3 Pa. Super. Ct. 124, 39 Wkly. Notes Cas. 568.

Wisconsin.—Gallinger *v.* Lake Shore Traffic Co., 67 Wis. 529, 30 N. W. 790.

See 40 Cent. Dig. tit. "Principal and Agent," § 636.

Authority implied from previous recognition or ratification of similar acts see *supra*, I, D, 1, c, (II), (C).

5. *California.*— Mowry *v.* Mowry, 103 Cal. 314, 37 Pac. 398.

Illinois.— Kennedy *v.* Supreme Lodge K. P., 124 Ill. App. 55.

Indiana.— American Quarries Co. *v.* Lay, 37 Ind. App. 386, 73 N. E. 608; Nichols, etc., Co. *v.* Berning, 37 Ind. App. 109, 76 N. E. 776.

Iowa.— Iowa State Nat. Bank *v.* Taylor, 93 Iowa 631, 67 N. W. 677.

Kansas.— Culver *v.* Warren, 36 Kan. 391, 13 Pac. 577.

Maryland.— Curtis *v.* Gibney, 59 Md. 131.

Missouri.— Welsh *v.* Ferd Heim Brewing Co., 47 Mo. App. 608, holding that, although the secretary of a corporation had no authority to execute a lease on its behalf, where he did so and the corporation for ten months paid the rent by its check and entered the payments on its books, the execution of the lease is ratified and binding on the corporation.

Nevada.— Clarke *v.* Lyon County, 8 Nev. 181.

has accepted without objection a performance[6] or a part payment or performance[7] on the part of the other party to the agreement, or has entered into a settlement with the agent of the account between them upon the basis that the transaction was valid,[8] or has voluntarily treated the agent as his debtor in the transaction,[9] or agreed to look to the agent for money which the agent has collected without authority;[10] and where an agency has been shown to exist the facts will be liberally construed in favor of the approval by the principal of the acts of the agent,[11] and very slight circumstances and small matters will sometimes suffice to raise the presumption of ratification.[12] Ratification is, however, a matter of intention, express or implied, on the part of the principal,[13] and in order to establish

New Jersey.— Lyons *v.* Wait, 51 N. J. Eq. 60, 26 Atl. 334.

New York.— Tallman *v.* Kimball, 74 Hun 279, 26 N. Y. Suppl. 811; Murray *v.* New York, etc., R. Co., 50 Misc. 573, 99 N. Y. Suppl. 477; Hill *v.* Coates, 34 Misc. 535, 69 N. Y. Suppl. 964; Mahony *v.* Ungrich, 59 N. Y. Super. Ct. 377, 14 N. Y. Suppl. 375 [*affirmed* in 129 N. Y. 632, 29 N. E. 1030]; Boyden *v.* Baldwin, 12 Misc. 549, 34 N. Y. Suppl. 19 [*affirmed* in 15 Misc. 103, 36 N. Y. Suppl. 478]; Skinner *v.* Dayton, 19 Johns. 513, 10 Am. Dec. 286 [*reversing* 5 Johns. Ch. 351].

North Carolina.— Williams *v.* Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800, in which it was held that where an agent without authority purchases goods for his principal, the fact that the principal accepts and pays for part of the goods according to the contract constitutes a ratification thereof.

Pennsylvania.— Anderson *v.* National Surety Co., 196 Pa. St. 288, 46 Atl. 306; Haworth *v.* Truby, 138 Pa. St. 222, 20 Atl. 942.

South Dakota.— Townsend *v.* Kennedy, 6 S. D. 47, 60 N. W. 164.

United States.— The Henrietta, 91 Fed. 675.

Canada.— Ryan *v.* Terminal City Co., 25 Nova Scotia 131.

See 40 Cent. Dig. tit. "Principal and Agent," § 636; and *supra*, I, F, 2, f.

Although the principal objects to a contract made by an agent without authority, if the objection is merely as to its terms and not to the agent's lack of authority, and the principal offers to pay a certain amount different from that stipulated in discharge of the contract, it will be deemed a ratification of the agent's act. Hill *v.* Coates, 34 Misc. (N. Y.) 535, 69 N. Y. Suppl. 964.

When part performance is not ratification. — Ratification is a matter of intention, express or implied, and if the principal expressly repudiates the unauthorized contract of one assuming to act as his agent and refuses to be bound thereby, the fact that he makes a payment for some goods which have been delivered under the unauthorized contract, which payment is made with the distinct understanding that it shall not affect the relations of the parties, will not amount to a ratification. Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559].

6. Lengsfield *v.* Richardson, 52 Miss. 443, holding that where a purchaser of land employs an agent to procure a deed of general warranty, and the agent takes a deed of limited warranty, the acceptance by the principal of such deed without objection and with knowledge of its character is a ratification of the agent's act.

7. Very *v.* Levy, 13 How. (U. S.) 345, 14 L. ed. 173.

8. Sanders *v.* Peck, 87 Fed. 61, 30 C. C. A. 530.

9. Ogden *v.* Marchand, 29 La. Ann. 61; Cushman *v.* Loker, 2 Mass. 106.

But an ineffectual attempt to obtain redress from the agent before resorting to the other party, which has not prejudiced the other party by the delay, will not amount to a ratification. Gilmore Linseed Oil Co. *v.* Norton, 89 Iowa 434, 56 N. W. 663, 48 Am. St. Rep. 400.

10. Glor *v.* Kelly, 49 N. Y. App. Div. 617, 63 N. Y. Suppl. 339 [*affirmed* in 166 N. Y. 589, 59 N. E. 1123], holding that where goods were sold by an agent who also without authority collected the payment therefor, and the purchaser on being asked for payment by the principal informed the latter that he had settled with the agent, and the principal agreed with the agent to look to him for the money, and made no other effort to collect from the purchaser or denial of the agent's authority to collect the money, this was a ratification, although the agreement between the principal and agent was not communicated to the purchaser.

11. *Georgia.*—Byrne *v.* Doughty, 13 Ga. 46.

Illinois.— Cairo, etc., R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299.

Iowa.— Hopwood *v.* Corbin, 63 Iowa 218, 18 N. W. 911.

Louisiana.— Szymanski *v.* Plassan, 20 La. Ann. 90, 96 Am. Dec. 382; Flower *v.* Jones, 7 Mart. N. S. 140.

Maryland.— Hartlove *v.* William Fait Co., 89 Md. 254, 43 Atl. 62.

New York.— Codwise *v.* Hacker, 1 Cai. 526.

Tennessee.— Bement *v.* Armstrong, (Ch. App. 1896) 39 S. W. 899.

See 40 Cent. Dig. tit. "Principal and Agent," § 636.

12. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Byrne *v.* Doughty, 13 Ga. 46.

However, ratification of a forged instrument is not to be implied from a doubtful state of facts. Fay *v.* Slaughter, 194 Ill. 157, 62 N. E. 592, 88 Am. St. Rep. 148, 56 L. R. A. 564 [*reversing* 94 Ill. App. 111]; Chicago Edison Co. *v.* Fay, 164 Ill. 323, 45 N. E. 534 [*affirming* 62 Ill. App. 55].

13. Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073; Merritt *v.* Bissell, 155 N. Y. 396,

an implied ratification there must be some acts or conduct upon his part which reasonably tend to show such intention;[14] and a mere effort on the part of the principal, after knowledge of the unauthorized act, to avoid loss thereby, will not amount to a ratification so as to relieve the agent from liability.[15] The principal in doing the acts relied on as a ratification must also have acted with knowledge of the material facts,[16] and if, as soon as informed of the facts, he expressly repudiates the transaction, a ratification cannot be implied.[17] In reference to what acts or conduct will constitute an implied ratification a distinction should be made between cases where the person assuming to act as agent did so without authority and cases where there was an actual agency but the agent exceeded the authority conferred;[18] conduct which in the former case might be sufficient will not always amount to a ratification in the latter.[19] It is also the rule that as between the principal and third persons dealing with an agent less is required to constitute a ratification than is required between the principal and the agent.[20] It is not necessary, in order to prevent a principal from being bound by the unauthorized act of an agent, that he should expressly repudiate it,[21] since a repudiation or intention not to ratify as well as a ratification may be implied from the acts and conduct of the principal;[22] and this is so not only where the principal by his conduct utterly repudiates the agent's acts,[23] but also when to avoid loss he seeks a friendly settlement of the differences caused by such unauthorized acts by yielding something of his own right to totally avoid the agent's agreements,[24] or requests the other party to the agreement not to insist upon its being carried out;[25] and

50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559]. And see *supra*, I, F, 2, h.

Mistake as to grounds of repudiation.— If a principal on learning of an unauthorized contract of an agent repudiates it, giving a reason for so doing which proves to be without foundation, this does not change his repudiation into an adoption of it. Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073.

14. *Arkansas.*— Bromley *v.* Aday, 70 Ark. 351, 68 S. W. 32; Johnson *v.* Craig, 21 Ark. 533.

Georgia.— Walker *v.* Vale Royal Mfg. Co., 75 Ga. 29.

Illinois.— Torrence *v.* Shedd, 112 Ill. 466; Brillhart *v.* McConnell, 25 Ill. 476.

Kansas.— Swofford Bros. Dry Goods Co. *v.* Berkowitz, 7 Kan. App. 24, 51 Pac. 796.

Massachusetts.— Rice *v.* New York Cent., etc., R. Co., 195 Mass. 507, 81 N. E. 285; Kupfer *v.* South Parish, 12 Mass. 185.

Minnesota.— Rice *v.* Tavernier, 8 Minn. 214, 83 Am. Dec. 778.

Missouri.— Oglesby *v.* Smith, 38 Mo. App. 67.

New York.— Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559]; Offerman *v.* Reich, 88 N. Y. Suppl. 936; Le Count *v.* Greenley, 6 N. Y. St. 91.

Vermont.— Rutland, etc., R. Co. *v.* Lincoln, 29 Vt. 206.

See 40 Cent. Dig. tit. "Principal and Agent," § 637.

Time of acts relied on.— Where an agent makes an unauthorized contract which is to be performed on a certain date, and the principal is not informed of it until after the date of the performance is past, his subsequent conduct cannot be relied on as a ratification of the agent's agreement. Slocum *v.* Gilman, 84 Hun (N. Y.) 405, 32 N. Y. Suppl. 297.

15. Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113.

16. See *supra*, I, F, 2, e.

17. Brooklyn Daily Eagle *v.* Dellmar, 30 Misc. (N. Y.) 747, 62 N. Y. Suppl. 1041; Roberts *v.* Francis, 123 Wis. 78, 100 N. W. 1076.

The principal need not reiterate his repudiation, and if the other party continues to act under the unauthorized agreement made by the agent after an express repudiation by the principal, he will do so at his peril. Brooklyn Daily Eagle *v.* Dellman, 30 Misc. (N. Y.) 747, 62 N. Y. Suppl. 1041.

18. Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243; Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559].

19. Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559]; Hatton *v.* Stewart, 2 Lea (Tenn.) 233.

20. Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113; Bennett *v.* Armstrong, (Tenn. Ch. App. 1896) 39 S. W. 899.

21. Powell *v.* Henry, 27 Ala. 612.

22. Blevins *v.* Pope, 7 Ala. 371; Slocum *v.* Gilman, 84 Hun (N. Y.) 405, 32 N. Y. Suppl. 297; O'Connor *v.* O'Connor, 45 W. Va. 354, 32 S. E. 276.

23. Ticonic Water Power, etc., Co. *v.* Lang, 63 Me. 480; Crooker *v.* Appleton, 25 Me. 131; Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073; O'Connor *v.* O'Connor, 45 W. Va. 354, 32 S. E. 276.

24. Gilmore Linseed Oil Co. *v.* Norton, 89 Iowa 434, 56 N. W. 663, 48 Am. St. Rep. 400; Brown *v.* Foster, 137 Mich. 35, 100 N. W. 167; Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113.

25. Johnson *v.* Craig, 21 Ark. 533, holding that where an agent made an unauthorized contract of sale, and the principal informed

where the act was unauthorized and the principal's acts and conduct are equally consistent with an intention not to ratify, a ratification will not ordinarily be implied.[26] If the contract of an agent is not to become binding until it is submitted to and approved by the principal, a ratification of the agent's acts is not to be implied where the contract has not been so submitted and the principal refuses to ratify it after learning of its terms;[27] but if the contract was submitted to the principal a ratification may be implied from his subsequent conduct in relation thereto.[28]

(II) *ACCEPTING BENEFITS* — (A) *In General.* It is a well settled principle of ratification that the principal must ratify the whole of the agent's unauthorized act or not at all, and cannot accept its beneficial results and at the same time avoid its burdens.[29] It follows that, as a general rule, if a principal with full knowledge of all the material facts takes and retains the benefits of the unauthorized act of an agent, he thereby ratifies such act,[30] and with the benefits accepts

the agent that he would not ratify, and in order to avoid any misunderstanding or difficulty with the other party wrote him in the form of a request not to insist upon the transaction being carried out as he did not desire to sell, there was no ratification.

26. *Alabama.*— Blevins *v.* Pope, 7 Ala. 371.

Maine.— Hastings *v.* Bangor House, 18 Me. 436, holding that where goods are purchased by one unauthorizedly acting as agent of another, if the latter deny the authority on having knowledge of the acts, and afterward in pursuance of a prior agreement with the pretended agent to receive goods of that description in payment of a debt due from him, receives the goods so purchased, such receipt does not amount to a ratification of the agency, making him liable to the seller, but being a purchase from the person assuming to act as agent is rather a denial that the original purchase was made by him as agent.

Massachusetts.— Kupfer *v.* South Parish, 12 Mass. 185.

New York.— Wade *v.* Wolfson, 90 N. Y. Suppl. 1078 (holding that where defendant's acts in relation to goods alleged to have been purchased by him through the agency of his wife, who had no apparent authority to bind him, were in no way inconsistent with the actual oral contract made by defendant with the salesman whereby he was to sell the goods on commission, defendant could not be held as a purchaser on the theory of a ratification of his wife's unauthorized act); McGowan *v.* Treacy, 84 N. Y. Suppl. 497.

Virginia.— Hortons *v.* Townes, 6 Leigh 47.

See 40 Cent. Dig. tit. "Principal and Agent," § 637.

Bringing suit against the agent is rather a repudiation than a ratification of his act. Holland Coffee Co. *v.* Johnson, 38 Misc. (N. Y.) 187, 77 N. Y. Suppl. 247.

27. Bissell *v.* Terry, 69 Ill. 184; Merrick Thread Co. *v.* Philadelphia Shoe Mfg. Co., 115 Pa. St. 314, 8 Atl. 794; Sumner *v.* Stewart, 69 Pa. St. 321; Abbe *v.* Rood, 1 Fed. Cas. No. 6, 6 McLean 106; Colt *v.* Rood, 6 Fed. Cas. No. 3,031, 6 McLean 106.

The neglect of the agent to notify the other party of his principal's disapproval of the contract, where the principal was without knowledge of the facts, does not amount to a ratification by the principal. Merrick Thread Co. *v.* Philadelphia Shoe Mfg. Co., 115 Pa. St. 314, 8 Atl. 794.

28. *In re* Wheeler, 29 Fed. Cas. No. 17,488, 2 Lowell 252, holding that a contract by an agent made subject to the principal's ratification will be held ratified by the principal's entering it on his books and corresponding with the other party in regard thereto as a subsisting contract.

29. See *supra*, I, F, 2, f.

30. *Arkansas.*— Creson *v.* Ward, 66 Ark. 209, 49 S. W. 827.

California.— Spencer *v.* McCament, (App. 1907) 93 Pac. 682.

Colorado.— Witcher *v.* Gibson, 15 Colo. App. 163, 61 Pac. 192.

Connecticut.— Ansonia *v.* Cooper, 66 Conn. 184, 33 Atl. 905; Disbrow *v.* Secor, 58 Conn. 35, 18 Atl. 981; Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211.

Georgia.— Haney School Furniture Co. *v.* Hightower Baptist Inst., 113 Ga. 289, 38 S. E. 761; Hodnett *v.* Tatum, 9 Ga. 70.

Illinois.— Henderson *v.* Cummings, 44 Ill. 325.

Indiana.— Allen *v.* Studebaker Bros. Mfg. Co., 152 Ind. 406, 53 N. E. 422; Aultman *v.* Richardson, 21 Ind. App. 211, 52 N. E. 86; Hunt *v.* Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964.

Iowa.— Lull *v.* Anamosa Nat. Bank, 110 Iowa 537, 81 N. W. 784; Tabor State Bank *v.* Kelly, 109 Iowa 544, 80 N. W. 520; Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575.

Kansas.— Lakin Bank *v.* National Bank of Commerce, 57 Kan. 183, 45 Pac. 587; Waterson *v.* Rogers, 21 Kan. 529.

Kentucky.— Forman *v.* Crutcher, 2 A. K. Marsh. 69; Singer Mfg. Co. *v.* Stephens, 53 S. W. 525, 21 Ky. L. Rep. 946; Southern Lumber Co. *v.* Wireman, 41 S. W. 297, 19 Ky. L. Rep. 585.

Louisiana.— Hornbeck *v.* Gilmer, 110 La. 500, 34 So. 651; Woods *v.* Rocchi, 32 La. Ann. 210; Elam *v.* Carruth, 2 La. Ann. 275.

Maine.— Leavitt *v.* Fairbanks, 92 Me. 521, 43 Atl. 115.

Maryland.— Swindell *v.* Gilbert, 100 Md. 399, 60 Atl. 102.

the burdens resulting therefrom.[31] This rule of course has no application where the principal receives no benefit from the agent's act;[32] nor does it apply if he is legally entitled to what he has received without assenting to the act of the agent

Michigan.— Payn *v.* Gidley, 122 Mich. 605, 81 N. W. 558; Bissell *v.* Dowling, 117 Mich. 646, 76 N. W. 100; Hitchcock *v.* Griffin, etc., Co., 99 Mich. 447, 58 N. W. 373, 41 Am. St. Rep 624.

Minnesota.— Johnson *v.* Ogren, 102 Minn. 8, 112 N. W. 894; Payne *v.* Haekney, 84 Minn. 195, 87 N. W. 608; Coggins *v.* Higbie, 83 Minn. 83, 85 N. W. 930; Landin *v.* Moorhead Nat. Bank, 74 Minn. 222, 77 N. W. 35; Wright *v.* Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015.

Mississippi.— Thurmond *v.* Carter, 59 Miss. 127; Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617.

Missouri.— Kirkpatriek *v.* Pease, 202 Mo. 471, 101 S. W. 651; Ruggles *v.* Washington County, 3 Mo. 496; Short *v.* Stephens, 92 Mo. App. 151; J. T. Donovan Real Estate Co. *v.* Clark, 84 Mo. App. 163; Bohlmann *v.* Rossi, 73 Mo. App. 312; Huttig Sash, etc., Co. *v.* Gitchell, 69 Mo. App. 115; Davis *v.* Krum, 12 Mo. App. 279.

Montana.— Case *v.* Kramer, 34 Mont. 142, 85 Pac. 878.

Nebraska.— Plano Mfg. Co. *v.* Nordstrom, 63 Nebr. 123, 88 N. W. 164; U. S. School-Furniture Co. *v.* Lancaster County School Dist. No. 87, 56 Nebr. 645, 77 N. W. 62; Brong *v.* Spence, 56 Nebr. 638, 77 N. W. 54.

New Hampshire.— Warren *v.* Hayes, 74 N. H. 355, 68 Atl. 193; Low *v.* Connecticut, etc., Rivers R. Co., 46 N. H. 284.

New Jersey.— Clement *v.* Young-MeShea Amusement Co., 69 N. J. Eq. 347, 60 Atl. 419.

New Mexico.— Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721.

New York.— Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874; Finch *v.* Gillespie, 122 N. Y. App. Div. 858, 107 N. Y. Suppl. 418; Rollins *v.* Sidney B. Bowman Cycle Co., 84 N. Y. App. Div. 287, 82 N. Y. Suppl. 781; West *v.* Banigan, 51 N. Y. App. Div. 328, 64 N. Y. Suppl. 884 [*affirmed* in 172 N. Y. 622, 65 N. E. 1123]; Myers *v.* Mutual L. Ins. Co., 32 Hun 321 [*affirmed* in 99 N. Y. 1, 1 N. E. 33]; Budd *v.* Howard Thomas Co., 40 Misc. 52, 81 N. Y. Suppl. 152; Jaeger *v.* Koenig, 30 Misc. 580, 62 N. Y. Suppl. 803; Hobkirk *v.* Green, 26 Misc. 18, 55 N. Y. Suppl. 605; Number 121 Madison Ave. *v.* Osgood, 18 N. Y. Suppl. 126, 19 N. Y. Suppl. 911; James *v.* Schmidt, 2 N. Y. Suppl. 649.

North Carolina.—Johnson *v.* East Carolina Land, etc., Co., 116 N. C. 926, 21 S. E. 28; Miller *v.* State Land, etc., Co., 66 N. C. 503.

North Dakota.— Morris *v.* Ewing, 8 N. D. 99, 76 N. W. 1047.

Oklahoma.—Fant *v.* Campbell, 8 Okla. 586, 58 Pac. 741.

Pennsylvania.— Ange *v.* Darlington, 185 Pa. St. 111, 39 Atl. 845; Wheeler, etc., Mfg. Co. *v.* Aughey, 144 Pa. St. 398, 22 Atl. 667, 27 Am. St. Rep. 638; Central School Supply House *v.* South Middleton Tp. School Bd., 9 Pa. Super. Ct. 110; Massey *v.* Insurance Co., 3 Phila. 200.

Rhode Island.—Robinson *v.* Bailey, 19 R. I. 464, 36 Atl. 1126.

South Carolina.— Welch *v.* Clifton Mfg. Co., 55 S. C. 568, 33 S. E. 739.

Tennessee.— Hart *v.* Dixon, 5 Lea 336; Walker *v.* Walker, 7 Baxt. 260; Evans *v.* Buckner, 1 Heisk. 291.

Texas.— Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; Evans-Snider-Buel Co. *v.* Hilje, (Civ. App. 1904) 83 S. W. 208; Angel *v.* Miller, 16 Tex. Civ. App. 679, 39 S. W. 1092; Houston, etc., R. Co. *v.* Wright, 15 Tex. Civ. App. 151, 38 S. W. 836; Rutherford *v.* Montgomery, 14 Tex. Civ. App. 319, 37 S. W. 625.

Utah.— Shafer *v.* Russell, 28 Utah 444, 79 Pac. 559; Marks *v.* Taylor, 23 Utah 152, 470, 63 Pac. 897, 65 Pac. 203.

Vermont.— French *v.* Barre, 58 Vt. 567, 5 Atl. 568; Fitzsimmons *v.* Joslin, 21 Vt. 129, 52 Am. Dec. 46.

West Virginia.— Black Lick Lumber Co. *v.* Camp Constr. Co., (1908) 60 S. E. 409; Cumberland Third Nat. Bank *v.* Laboringman's Mercantile, etc., Co., 56 W. Va. 446, 49 S. E. 544; Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

Wisconsin.— Kriz *v.* Peege, 119 Wis. 105, 95 N. W. 108; McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375; Kiekland *v.* Menasha Wooden-Ware Co., 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831; Miles *v.* Ogden, 54 Wis. 573, 12 N. W. 81.

United States.— Sutherland *v.* Illinois Cent. R. Co., 152 Fed. 694, 81 C. C. A. 620; Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371; Bacon *v.* The Poconoket, 67 Fed. 262 [*affirmed* in 70 Fed. 640, 17 C. C. A. 309]; Cotting *v.* Grant St. Electric R. Co., 65 Fed. 545.

See 40 Cent. Dig. tit. "Principal and Agent," § 644.

31. *Colorado.*—Witcher *v.* Gibson, 15 Colo. App. 163, 61 Pac. 192.

Kansas.—Waterson *v.* Rogers, 21 Kan. 529.

Nebraska.— U. S. School-Furniture Co. *v.* Lancaster County School Dist. No. 87, 56 Nebr. 645, 77 N. W. 62; D. M. Osborn Co. *v.* Jordan, 52 Nebr. 465, 72 N. W. 479.

New York.— Rollins *v.* Sidney B. Bowman Cycle Co., 84 N. Y. App. Div. 287, 82 N. Y. Suppl. 781.

Texas.— Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

See 40 Cent. Dig. tit. "Principal and Agent," § 644; and cases cited *supra*, note 31.

32. Quay *v.* Presidio, etc., R. Co., 82 Cal. 1, 22 Pac. 925; Fay *v.* Slaughter, 194 Ill. 157, 62 N. E. 592, 88 Am. St. Rep. 148, 56 L. R. A. 564 [*reversing* 94 Ill. App. 111].

and he does not otherwise give his approval to such act,[33] or where the benefit received by the principal is merely incidental and arises out of a credit extended by a third person to the agent in his individual capacity.[34] The mere fact that the principal has received or enjoyed the benefits of the unauthorized act will not amount to a ratification if he did so in ignorance of the facts;[35] nor will his retention of such benefits after knowledge of the facts amount to a ratification if at the time he acquires such knowledge and without his fault conditions are such that he cannot be placed *in statu quo* or repudiate the entire transaction without loss,[36] or if the other party to the transaction did not deal with the agent as such but in his individual capacity;[37] nor will the retention of the benefits of one transaction constitute a ratification of another separate and distinct transaction between the agent and the same third party of which the principal had no knowledge.[38] A principal also has a right to receive money from an agent in payment of a debt due from the latter without inquiry as to the source from which it came;[39] and if it is

33. *Colorado.* — Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531.

Georgia.— Baldwin Fertilizer Co. *v.* Thompson. 106 Ga. 480, 32 S. E. 591.

Iowa.— Forcheimer *v.* Stewart, 73 Iowa 216, 32 N. W. 665, 35 N. W. 148.

Louisiana.— Kilgour *v.* Ratcliff, 2 Mart. N. S. 292.

Maine.— White *v.* Sanders, 32 Me. 188; Crooker *v.* Appleton, 25 Me. 131.

Michigan.— Somerville *v.* Wabash R. Co., 109 Mich. 294, 67 N. W. 320.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 644, 645.

Application of rule.— If the principal merely receives back his own property, which was in the custody of another and to which he was unconditionally entitled, he does not thereby ratify an unauthorized agreement made by his agent under which the possession was restored, in the absence of any other evidence of a ratification of such act. Baldwin Fertilizer Co. *v.* Thompson, 106 Ga. 480, 32 S. E. 591. So the fact that a mining company retains ore taken from a mine by means of funds loaned to it without its knowledge by a third person through an agent who had no authority to borrow is not a ratification of the unauthorized act, since the ore belonged to the company both before and after it was taken from the mine. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531. And where an agent makes an unauthorized contract for a sale of land to a tenant of his principal, the fact that the principal after knowledge of the contract collects a small sum of money from the tenant, who at the time of the contract was in arrears for rent under his lease, is not a ratification of the contract of sale. Torrence *v.* Shedd, 112 Ill. 466.

34. Grover, etc., Mach. Co. *v.* Polhemus, 34 Mich. 247, holding that where a principal furnishes his agent with a horse, which the agent is to feed and take care of, the fact that the employment of the horse by the agent in the prosecution of the principal's business afforded a profit to the principal does not make the latter liable for board and keeping of the horse procured by the agent on credit without authority and charged directly to the agent.

35. See *supra*, I, F, 2, e.

36. *Arkansas.* — Martin *v.* Hickman, 64 Ark. 217, 41 S. W. 852.

Iowa.— Claflin *v.* Wilson, 51 Iowa 15, 50 N. W. 578.

Kentucky.— Gaskill *v.* Huffaker, 49 S. W. 770, 20 Ky. L. Rep. 1555, holding that where a note was sent to a bank indorsed "for collection," and the bank without authority sold the note, and the principal without knowledge of the transaction received the proceeds, a subsequent retention of the money after knowledge thereof is not a ratification, if the maker of the note has become insolvent so that the principal cannot be restored to his former condition.

Maine.— Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96.

Minnesota.— Humphrey *v.* Havens, 12 Minn. 298.

Missouri.— Clark *v.* Clark, 59 Mo. App. 532, holding that the unauthorized act of an agent is not ratified by the acceptance by the principal of the fruits or proceeds if he did not know that the agent had exceeded his authority in time to repudiate the entire transaction without essential injury to himself.

Pennsylvania.— Thrall *v.* Wilson, 17 Pa. Super. Ct. 376.

United States.— Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705 [*affirming* 32 Fed. 55].

See 40 Cent. Dig. tit. "Principal and Agent," § 644 *et seq.*

There is no ratification if, at the time the principal acquires knowledge of the facts, that which he has received has been sold or disposed of (Martin *v.* Hickman, 64 Ark. 217, 41 S. W. 852; Humphrey *v.* Havens, 12 Minn. 298; Thrall *v.* Wilson, 17 Pa. Super. Ct. 376), or so commingled with his other property that it cannot be identified and restored to the person entitled thereto (Thrall *v.* Wilson, *supra*),

37. Wyckoff *v.* Davis, 127 Iowa 399, 103 N. W. 349; Thompson *v.* Craig, 16 Abb. Pr. N. S. (N. Y.) 29.

38. Schollay *v.* Moffitt-West Drug Co., 17 Colo. App. 126, 67 Pac. 182.

39. Case *v.* Hammond Packing Co., 105 Mo. App. 168, 79 S. W. 732.

in good faith so received and applied by the principal, its subsequent retention after he learns that it was procured through an unauthorized transaction entered into by the agent in his name will not amount to a ratification of such transaction.[40] The rule of ratification by the acceptance of benefits also implies the power of election to aeeept or reject what has been received,[41] and does not apply where the benefit has been received without knowledge and its return is impossible, as in the case of labor performed or services rendered,[42] or its continued enjoyment by the principal is unavoidable,[43] as where in taking, using, or disposing of a building or other thing he unavoidably enjoys the benefit of work or materials furnished or repairs or improvements made thereon.[44] Where, however, the principal has suffered no prejudice and can make restitution, he should, when he is apprised of the facts, make his election, and if he decides not to ratify he should return the fruits of the unauthorized act,[45] and if he does not do so but retains, uses, or disposes of what he has received, he will be held to have ratified the act of the agent,[46] and

40. *California.*— Dupont *v.* Wertheman, 10 Cal. 354.

Illinois.— Pope *v.* Lowitz, 14 Ill. App. 96.

Kansas.— Bohart *v.* Oberne, 36 Kan. 284, 13 Pac. 388.

Massachusetts.— Thatcher *v.* Pray, 113 Mass. 291, 18 Am. Rep. 480. See also Collateral Loan Co. *v.* Sallinger, 195 Mass. 135, 80 N. E. 811.

Missouri.— Sanborn *v.* Buchanan First Nat. Bank, 115 Mo. App. 50, 90 S. W. 1033 [*overruling* Trenton First Nat. Bank *v.* Badger Lumber Co., 54 Mo. App. 327, 60 Mo. App. 255]; Case *v.* Hammond Packing Co., 105 Mo. App. 168, 79 S. W. 732.

See 40 Cent. Dig. tit. "Principal and Agent," § 644 *et seq.*

41. Swayne *v.* Union Mut. L. Ins. Co., (Tex. Civ. App. 1899) 49 S. W. 518.

42. Swayne *v.* Union Mut. L. Ins. Co., (Tex. Civ. App. 1899) 49 S. W. 518; Moyle *v.* Salt Lake City Cong. Soc., 16 Utah 69, 50 Pac. 806.

43. Mills *v.* Berla, (Tex. Civ. App. 1893) 23 S. W. 910.

44. Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39, 14 N. E. 832; Mills *v.* Berla, (Tex. Civ. App. 1893) 23 S. W. 910; Moyle *v.* Salt Lake City Cong. Soc., 16 Utah 69, 50 Pac. 806; Forman *v.* The Liddesdale, [1900] App. Cas. 190, 9 Aspin. 45, 69 L. J. P. C. 44, 82 L. T. Rep. N. S. 331.

45. *Connecticut.* — Disbrow *v.* Secor, 58 Conn. 35, 18 Atl. 981.

Iowa.— Russ *v.* Hansen, 119 Iowa 375, 93 N. W. 502; National Imp., etc., Co. *v.* Maiken, 103 Iowa 118, 72 N. W. 431; Deering *v.* Grundy County Nat. Bank, 81 Iowa 222, 46 N. W. 1117.

Maryland.— Dentzel *v.* City, etc., R. Co., 90 Md. 434, 45 Atl. 201.

Minnesota.— Anderson *v.* Johnson, 74 Minn. 171, 77 N. W. 26.

Nebraska.— U. S. School-Furniture Co. *v.* Lancaster County School Dist. No. 87, 56 Nebr. 645, 77 N. W. 62.

New York.— Coykendall *v.* Constable, 99 N. Y. 309, 1 N. E. 884; Elwell *v.* Chamberlin, 31 N. Y. 611.

Pennsylvania.— Carlisle, etc., Co. *v.* Iron City Sand Co., 20 Pa. Super. Ct. 378.

See 40 Cent. Dig. tit. "Principal and Agent," § 644 *et seq.*

Tender of certified check.—Where a principal on hearing of an unauthorized compromise made by his agent repudiates it, the fact that the money which he tendered back was in the form of a certified bank check instead of legal tender money does not affect the repudiation. Harper *v.* National L. Ins. Co., 56 Fed. 281, 5 C. C. A. 505.

46. *Connecticut.* — Disbrow *v.* Secor, 58 Conn. 35, 18 Atl. 981.

Georgia.— Haney School Furniture Co. *v.* Hightower Baptist Inst., 113 Ga. 289, 38 S. E. 761; Smith *v.* Holbrook, 99 Ga. 256, 25 S. E. 627.

Illinois.— Campbell *v.* Millar, 84 Ill. App. 208.

Iowa.— Fleishman *v.* Ver Does, 111 Iowa 322, 82 N. W. 757; Casaday *v.* Manchester F. Ins. Co., 109 Iowa 539, 80 N. W. 521; National Imp., etc., Co. *v.* Maiken, 103 Iowa 118, 72 N. W. 431.

Kentucky.— Kenny Co. *v.* Anderson, 81 S. W. 663, 26 Ky. L. Rep. 367 [*affirmed* in 83 S. W. 581, 26 Ky. L. Rep. 1217]; Henry Vogt Mach. Co. *v.* Lingenfelser, 62 S. W. 499, 23 Ky. L. Rep. 38; Givens *v.* Cord, (1898) 44 S. W. 665; Howe *v.* Combs, 38 S. W. 1052, 18 Ky. L. Rep. 1002.

Louisiana.— Chambers *v* Haney, 45 La. Ann. 447, 12 So. 621.

Minnesota.— Payne *v.* Hackney, 84 Minn. 195, 87 N. W. 608; Anderson *v.* Johnson, 74 Minn. 171, 77 N. W. 26; Wright *v.* Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015.

Nebraska.— Farmers', etc., Bank *v.* Farmers', etc., Nat. Bank, 49 Nebr. 379, 68 N. W. 488; Johnston *v.* Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 N. W. 383.

New York.— Coykendall *v.* Constable, 99 N. Y. 309, 1 N. E. 884.

Vermont.— Beecher *v.* Grand Trunk R. Co., 43 Vt. 133.

Washington.— Peterson *v.* Hicks, 43 Wash. 412, 86 Pac. 634.

West Virginia.— Truslow *v.* Parkersburg Bridge, etc., R. Co., 61 W. Va. 628, 57 S. E. 51.

Wisconsin.— Andrews *v.* Robertson, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep.

this notwithstanding a previous denial, upon learning the facts, of the agent's authority or expressions of disapproval or repudiation of his act.[47]

(B) *Particular Benefits and Transactions.* Subject to the general rules and qualifications above stated,[48] the benefit received may be anything of value to the principal, which is accepted by him after being fully advised of the facts, such as money from the proceeds of sales by the agent,[49] money, property, or other fruits accepted by the agent in compromise or settlement of a claim in favor of the principal,[50] or the benefits enjoyed by a principal as the result of the compromise or settlement by the agent of claims against the principal,[51] goods or property acquired or contracted for by the agent,[52] services rendered the principal by a third

870, 54 L. R. A. 673; McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375.

See 40 Cent. Dig. tit. "Principal and Agent," § 644 *et seq.*

But the principal is entitled to a reasonable time after notice of facts sufficient to put him upon inquiry in which to ascertain the true state of facts and return what he has received. McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375.

47. *Georgia.*—Haney School Furniture Co. *v.* Hightower-Baptist Inst., 113 Ga. 289, 38 S. E. 761.

Illinois.— Campbell *v.* Millar, 84 Ill. App. 208.

Iowa.— National Imp., etc., Co. *v.* Maiken, 103 Iowa 118, 72 N. W. 431.

Minnesota.— Wright *v.* Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015.

Pennsylvania.— Sloan *v.* Johnson, 20 Pa. Super. Ct. 643.

Texas.— Stetson-Preston Co. *v.* Dodson, (Civ. App. 1907) 103 S. W. 685.

Washington.— Peterson *v.* Hicks, 43 Wash. 412, 86 Pac. 634.

See 40 Cent. Dig. tit. "Principal and Agent," § 644 *et seq.*

Although the principal expressly repudiates the act of an agent in the purchase of property, he will be held to have ratified the purchase if he does not return out retains and uses the property purchased. Wright *v.* Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015.

48. See *supra*, I, F, 3, c, (II), (A).

49. *Arkansas.*— Kelly *v.* Carter, 55 Ark. 112, 17 S. W. 706.

Colorado.— Farrer *v.* Caster, 17 Colo. App. 41, 67 Pac. 171.

Connecticut.— Dunn *v.* Hartford, etc., R. Co., 43 Conn. 434.

Illinois.— Prettyman *v.* Wilkey, 19 Ill. 235; Nicholson *v.* Doney, 37 Ill. App. 531; Baer *v.* Lichten, 24 Ill. App. 311.

Kentucky.— Powell *v.* Gossom, 18 B. Mon. 179.

Louisiana.— Chambers *v.* Haney, 45 La. Ann. 447, 12 So. 621; Thomas *v.* Scott, 3 Rob. 256; McDonald *v.* Catlett, 11 La. 503.

Massachusetts.— Murray *v.* Mayo, 157 Mass. 248, 31 N. E. 1063.

Michigan.— Vaughn *v.* Sheridan, 50 Mich. 155, 15 N. W. 62.

Mississippi.— Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617; Bias *v.* Cockrum, 37 Miss. 509, 75 Am. Dec. 76.

Missouri.— Clark *v.* Clark, 59 Mo. App. 532.

Nebraska.— Rogers *v.* Empkie Hardware Co., 24 Nebr. 653, 39 N. W. 814; Sandwich Mfg. Co. *v.* Shiley, 15 Nebr. 109, 17 N. W. 267.

New York.— Coykendall *v.* Constable, 99 N. Y. 309, 1 N. E. 884; James *v.* Schmidt, 2 N. Y. Suppl. 649.

Pennsylvania.— Warden *v.* Eichbaum, 3 Grant 42; Siemens Regenerative Gas Lamp Co. *v.* Horstmann, 24 Wkly. Notes Cas. 396; Horter *v.* Silliman, 3 Wkly. Notes Cas. 405.

Tennessee.— Seago *v.* Martin, 6 Heisk. 308.

Texas.— Goldschmidt *v.* Wagner, (Civ. App. 1907) 99 S. W. 737.

Wisconsin.— Parish *v.* Reeve, 63 Wis. 315, 23 N. W. 568; Pierce *v.* O'Keefe, 11 Wis. 180.

United States.— Lindroth *v.* Litchfield, 27 Fed. 894; Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43.

See 40 Cent. Dig. tit. "Principal and Agent," § 651.

50. *Illinois.*— Marshall *v.* Moore, 36 Ill. 321.

Indiana.— Wallace *v.* Lawyer, 90 Ind. 499.

Kansas.— Leavenworth County *v.* Hamlin, 31 Kan. 105, 1 Pac. 237.

Maryland.— Maddux *v.* Bevan, 39 Md. 485.

New York.— Farmers', etc., Bank *v.* Sherman, 6 Bosw. 181 [*affirmed* in 33 N. Y. 69].

See 40 Cent. Dig. tit. "Principal and Agent," § 650.

51. *Indiana.*— Hauss *v.* Niblack, 80 Ind. 407, holding that where some of a number of bondsmen employed an attorney at a certain fee to settle suits pending against all, and the others, with knowledge of the contract, enjoyed the fruits of the compromise, they thereby ratified the contract.

New York.— Continental Nat. Bank *v.* Koehler, 117 N. Y. 657, 22 N. E. 1133; Bridenbecker *v.* Lowell, 32 Barb. 9; Houghton *v.* Dodge, 5 Bosw. 326; Palmerton *v.* Huxford, 4 Den. 166.

Texas.— Campbell *v.* Jenkins, (Civ. App. 1896) 34 S. W. 673.

Vermont.— Vermont State Baptist Convention *v.* Ladd, 58 Vt. 95, 4 Atl. 634.

Wisconsin.— Miles *v.* Ogden, 54 Wis. 573, 12 N. W. 81; Reid *v.* Hibbard, 6 Wis. 175.

See 40 Cent. Dig. tit. "Principal and Agent," § 650.

52. *Arkansas.*— Niemeyer Lumber Co. *v.* Moore, 55 Ark. 240, 17 S. W. 1028; Pike *v.* Douglass, 28 Ark. 59, holding that if one

person under a contract of hiring by the agent,[53] or materials furnished, or work completed and accepted by, the principal.[54] The benefits accepted and received by the principal within the rule stated may also be those resulting from a lease,[55]

purchases goods for another without authority, and the person for whom they are purchased receives them and uses or sells them on his own account after being informed that they were purchased for him, this is an implied ratification of the act of the person making the purchase in his name; and if he merely informs the seller that the purchase was unauthorized this is not sufficient, but he should restore the goods to the seller or pay for them if he converts them to his own purposes.

California.— Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252, holding that where land was purchased for a corporation by its officers without authority, and a mortgage executed for the purchase-price, and the corporation after learning of the transaction took possession of the land, surveyed and platted it, took its rents and profits, sold some of it, and exercised ownership over it subject to the mortgage, the corporation was bound by the purchase and mortgage.

Colorado.— Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232.

Georgia.— McDowell *v.* McKenzie, 65 Ga. 630; Ketchum *v.* Verdell, 42 Ga. 534.

Illinois.— Sterling Bridge Co. *v.* Baker, 75 Ill. 139; Evans *v.* Chicago, etc., R. Co., 26 Ill. 189.

Iowa.— Palmer *v.* Cheney, 35 Iowa 281.

Kentucky.— Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481 (holding that resistance by a corporation to an attempt to recover property which it had acquired by its agent is a sufficient recognition of the agency); Weisiger *v.* Graham, 3 Bibb 313; Weisiger *v.* Samuel, Litt. Sel. Cas. 185; Logan County Nat. Bank *v.* Townsend, 3 S. W. 122, 8 Ky. L. Rep. 694; Georgetown Water Co. *v.* Central Thompson-Huston Co., 16 Ky. L. Rep. 125.

Louisiana.— Slocumb *v.* Cage, 22 La. Ann. 165; Cook *v.* State Bank, 2 La. Ann. 324.

Maine.— Hastings *v.* Bangor House Proprietors, 18 Me. 436; Newhall *v.* Dunlap, 14 Me. 180, 31 Am. Dec. 45, holding that where a principal claims goods purchased for him by his agent, he cannot deny the authority of the agent to purchase them.

Massachusetts.— Sartwell *v.* Frost, 122 Mass. 184; Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394; Bearce *v.* Bowker, 115 Mass. 129; French *v.* Price, 24 Pick. 13.

Missouri.— Carson *v.* Cummings, 69 Mo. 325; Fahy *v.* Springfield Grocer Co., 57 Mo. App. 73; Ten Broek *v.* Winn Boiler Compound Co., 20 Mo. App. 19.

New York.— Smith *v.* Tracy, 36 N. Y. 79; Wheeler, etc., Mfg. Co. *v.* Elberson, 84 Hun 501, 32 N. Y. Suppl. 303; Hess *v.* Baar, 14 Misc. 286, 35 N. Y. Suppl. 687 [*affirming* 11 Misc. 619, 32 N. Y. Suppl. 918]; Moss *v.* Rossie Lead Min. Co., 5 Hill 137.

North Carolina.— Williams *v.* Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800; Patton *v.* Brittain, 32 N. C. 8.

Oregon.— Duzan *v.* Meserve, 24 Oreg. 523, 34 Pac. 548.

Pennsylvania.— Hall *v.* White, 123 Pa. St. 95, 16 Atl. 521; Relf *v.* Mobile Bank, 20 Pa. St. 435.

Texas.— Conley *v.* Columbus Tap R. Co., 44 Tex. 579.

Vermont.— Brooks *v.* Fletcher, 56 Vt. 624.

Virginia.— Downer *v.* Morrison, 2 Gratt. 237.

Wisconsin.— Fintel *v.* Cook, 88 Wis. 485, 60 N. W. 788; Spaulding Lumber Co. *v.* Stout, 86 Wis. 89, 56 N. W. 189.

United States.— Bell *v.* Cunningham, 3 Pet. 69, 7 L. ed. 606; Pope *v.* Meadow Spring Distilling Co., 20 Fed. 35.

See 40 Cent. Dig. tit. "Principal and Agent," § 649.

53. Ehrsam *v.* Mahan, 52 Kan. 245, 34 Pac. 800 (holding that the acceptance of the services of attorneys and the receipt of the avails thereof operate as a ratification); Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39, 14 N. E. 832; Gaudelupo Y. Calvo Min. Co. *v.* Beatty, (Tenn. 1886) 1 S. W. 348; American China Development Co. *v.* Boyd, 148 Fed. 258.

54. W. H. Stubbings Co. *v.* World's Columbian Exposition Co., 110 Ill. App. 210; Carlin *v.* Brown, 80 Ill. App. 541; Luttrell *v.* East Tennessee Tel. Co., 86 S. W. 1124, 27 Ky. L. Rep. 872; Brown *v.* Wright, 25 Mo. App. 54; Fischer *v.* Jordan, 54 N. Y. App. Div. 621, 66 N. Y. Suppl. 286 [*affirmed* in 169 N. Y. 615, 62 N. E. 1095].

55. *Alabama.*— Franklin *v.* Pollard Mill Co., 88 Ala. 318, 6 So. 685.

Colorado.— Burkhard *v.* Mitchell, 16 Colo. 376, 26 Pac. 657, holding that where the owner claims that the agent had no authority to execute a lease for more than a year, but notwithstanding accepts rent from the tenants for four months after the end of the first year, he thereby ratifies the lease for the entire term, and cannot demand a higher rent for the balance of the term and oust the tenant for refusal to pay it.

Iowa.— Chamberlain *v.* Collinson, 45 Iowa 429.

Minnesota.— Ehrmantraut *v.* Robinson, 52 Minn. 333, 54 N. W. 188, holding that where a principal, knowing that an unauthorized contract has been made by an agent in his behalf for the use and occupation of certain premises, enters into possession and enjoys their use without knowing or ascertaining what the terms of the lease are, he will be held to have intended to ratify the contract, whatever it may be.

New Jersey.— Clemeat *v.* Young-McShea Amusement Co., 69 N. J. Eq. 347, 60 Atl. 419.

New York.— Hyatt *v.* Clark, 118 N. Y. 563,

mortgage,[56] or contract to convey land,[57] contracts and transactions with reference to negotiable instruments,[58] contracts of loan,[59] agreements by the agent to submit to arbitration matters in dispute,[60] contracts made on behalf of corporations

23 N. E. 891 [*affirming* 55 N. Y. Super. Ct. 98, 8 N. Y. St. 134].

United States.— Bicknell *v.* Austin Min. Co., 62 Fed. 432; Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. 505.

See 40 Cent. Dig. tit. "Principal and Agent," § 647.

56. *Georgia.*—Lampkin *v.* Cartersville First Nat. Bank, 96 Ga. 48, 23 S. E. 390.

Illinois.— Union Mut. L. Ins. Co., *v.* Kirchoff, 133 Ill. 368, 27 N. E. 91.

Indiana.— Fouch *v.* Wilson, 59 Ind. 93.

Iowa.— Iowa State Sav. Bank *v.* Taylor, 98 Iowa 631, 67 N. W. 677; Brown *v.* Kiene, 72 Iowa 342, 33 N. W. 651.

Michigan.— Connecticut Mut. L. Ins. Co., *v.* Bulte, 45 Mich. 113, 7 N. W. 707.

See 40 Cent. Dig. tit. "Principal and Agent," § 647.

57. Powell *v.* Gossom, 18 B. Mon. (Ky.) 179; Murray *v.* Mayo, 157 Mass. 248, 31 N. E. 1063; Kirkpatrick *v.* Pease, 202 Mo. 471, 101 S. W. 651.

58. *California.*— Mitchell *v.* Finnell, 101 Cal. 614, 36 Pac. 123, holding that an indorsement with full knowledge of the circumstances under which a note was procured ratifies whatever an agent did in procuring it.

Georgia.— Turner *v.* Wilcox, 54 Ga. 593; Murray *v.* Walker, 44 Ga. 58, holding that where an agent for the collection of a note received Confederate money in payment without authority, but the principal accepted the same from him and used it, he thereby ratified the act of the agent.

Illinois.— Nicholson *v.* Doney, 37 Ill. App. 531; Baer *v.* Lichten, 24 Ill. App. 311.

Indiana.— Moore *v.* Pendleton, 16 Ind. 481; Hunt *v.* Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964.

Kentucky.— German Nat. Bank *v.* Louisville Butchers' Hide, etc., Co., 97 Ky. 34, 29 S. W. 882, 16 Ky. L. Rep. 881.

Massachusetts.— Ely *v.* James, 123 Mass. 36; Hayden *v.* The Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143.

Minnesota.— Woodbury *v.* Larned, 5 Minn. 339.

Missouri.— Mayer *v.* Old, 57 Mo. App. 639.

New York.— Continental Nat. Bank *v.* Koehler, 117 N. Y. 657, 22 N. E. 1133.

Pennsylvania.— Wheeler, etc., Mfg. Co. *v.* Aughey, 144 Pa. St. 398, 22 Atl. 667, 27 Am. St. Rep. 638; Horter *v.* Silliman, 3 Wkly. Notes Cas. 405.

Texas.— Campbell *v.* Jenkins, (Civ. App. 1896) 34 S. W. 673.

See 40 Cent. Dig. tit. "Principal and Agent," § 644 *et seq.*

59. *Alabama.*— Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

Illinois.— Ottawa Northern Plank Road Co. *v.* Murray, 15 Ill. 336.

Maine.— Perkins *v.* Boothby, 71 Me. 91, holding that where an agent borrows money and applies it to the payment and discharge of the legal liabilities of his principal, and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal for money had and received.

Minnesota.— Willis *v.* St. Paul Sanitation Co., 53 Minn. 370, 55 N. W. 550.

Missouri.— Watson *v.* Bigelow, 47 Mo. 413; Trenton First Nat. Bank *v.* Badger Lumber Co., 54 Mo. App. 327, 60 Mo. App. 255, holding that one who, after his agent has borrowed money on his note, collects the lenders' draft and refuses to return it or the proceeds upon being informed of the manner in which it was procured by the agent, is liable on such note to the lender, who believed the agent had authority to execute it.

Montana.— McAdow *v.* Black, 4 Mont. 475, 1 Pac. 751.

New Hampshire.— Connecticut River Sav. Bank *v.* Fiske, 60 N. H. 363; Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205.

New York.— Whitney *v.* Union Trust Co., 65 N. Y. 576; Shires *v.* Morris, 8 Cow. 60.

Pennsylvania.— Mundorff *v.* Wickersham, 63 Pa. St. 87, 3 Am. Rep. 531.

Vermont.— Spooner *v.* Thompson, 48 Vt. 259; Lyman *v.* Norwich University, 28 Vt. 560.

Washington.—Allen *v.* Olympia Light, etc., Co., 13 Wash. 307, 43 Pac. 55.

Wisconsin.— Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

United States.— Prentiss Tool, etc., Co. *v.* Godchaux, 66 Fed. 234, 13 C. C. A. 420.

See 40 Cent. Dig. tit. "Principal and Agent," § 646.

Loan not ratified.—A mining corporation whose agent without authority borrowed money on its behalf and used it in operating the mine does not ratify the agent's act by retaining the ore taken from the mine with the use of the money borrowed by the agent, as it has a right to its own ore without ratifying or repudiating such loan. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531.

Usurious loans.—Where an agent intrusted with money to loan at legal interest exacts as a condition of making the loan a bonus for himself, without the knowledge or authority of the principal, such act on his part does not constitute usury in the principal or affect the security in his name. Phillips *v.* Mackellar, 92 N. Y. 34; Estevez *v.* Purdy, 66 N. Y. 446 [*reversing* 6 Hun 46].

60. *Connecticut.*—White *v.* Fox, 29 Conn. 570.

Georgia.— Johnson *v.* Cochran, 81 Ga. 39, 6 S. E. 809, 12 Am. St. Rep. 294; Perry *v.* Mulligan, 58 Ga. 479, holding that after a person has taken and enjoyed large benefits from an award it is too late for him to object thereto on the ground that his agent had no written or other legal authority to bind him by the submission.

Michigan.— Detroit *v.* Jackson, 1 Dougl. 106.

by agents or officers acting in excess of their authority,[61] including municipal as well as private corporations,[62] and contracts and transactions generally for a principal by an agent acting beyond the authority conferred,[63] including any warranties or representations, fraudulent or otherwise, made by the agent as an inducement to the third person setting up the ratification.[64]

Mississippi.— Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

New York.— Lowenstein *v.* McIntosh, 37 Barb. 251.

United States.— Orvis *v.* Wells, 73 Fed. 110, 19 C. C. A. 382.

See 40 Cent. Dig. tit. "Principal and Agent," § 653.

61. *Alabama.* — Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229, holding that a corporation has as full capacity as a natural person to ratify the unauthorized or defectively executed acts of its agents.

Connecticut.— Perry *v.* Simpson Waterproof Mfg. Co., 37 Conn. 520.

Georgia.— Whitley *v.* James, 121 Ga. 521, 49 S. E. 600.

Iowa.— Humphrey *v.* Patrons Mercantile Assoc., 50 Iowa 607.

Kentucky.— German Nat. Bank *v.* Louisville Butcher's Hide, etc., Co., 97 Ky. 34, 29 S. W. 882, 16 Ky. L. Rep. 881.

Maine.— Fitch *v.* Lewiston Steam-Mill Co., 80 Me. 34, 12 Atl. 732.

Massachusetts.— Episcopal Charitable Soc. *v.* Episcopal Church, 1 Pick. 372.

Michigan.— Clement, etc., Co. *v.* Michigan Clothing Co., 110 Mich. 458, 68 N. W. 224; Detroit *v.* Jackson, 1 Dougl. 106.

Missouri.—Akers *v.* Ray County Sav. Bank, 63 Mo. App. 316; Brown *v.* Wright, 25 Mo. App. 54; Ten Broek *v.* Winn Boiler Compound Co., 20 Mo. App. 19.

New Hampshire.— Connecticut River Sav. Bank *v.* Fiske, 60 N. H. 363; Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Jourdan *v.* Long Island R. Co., 115 N. Y. 380, 22 N. E. 153; Whitney *v.* Union Trust Co., 65 N. Y. 576; Alexander *v.* Brown, 9 Hun 641; Houghton *v.* Dodge, 5 Bosw. 326; Schurr *v.* New York, etc., Suburban Inv. Co., 16 N. Y. Suppl. 210 [*affirmed* in 18 N. Y. Suppl. 454].

Vermont.— Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159; Whitwell *v.* Warner, 20 Vt. 425.

Washington.—Allen *v.* Olympia Light, etc., Co., 13 Wash. 307, 43 Pac. 55.

Wisconsin.— Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

United States.— Prentiss Tool, etc., Co. *v.* Godchaux, 66 Fed. 234, 13 C. C. A. 420; Bicknall *v.* Austin Min. Co., 62 Fed. 432.

See 40 Cent. Dig. tit. "Principal and Agent," § 644 *et seq.* And see CORPORATIONS, 10 Cyc. 1078.

62. *California.*— San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453.

Indiana.— Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Maine.—Abbott *v.* Hermon Third School Dist., 7 Me. 118.

Missouri.— Ruggles *v.* Washington County, 3 Mo. 496.

Pennsylvania.—Allegheny City *v.* McClurkan, 14 Pa. St. 81; North Whitehall Tp. *v.* South Whitehall Tp., 3 Serg. & R. 117.

United States.— Clark *v.* Washington, 12 Wheat. 40, 6 L. ed. 544; Bank of Columbia *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

See 40 Cent. Dig. tit. "Principal and Agent," § 644 *et seq.* And see MUNICIPAL CORPORATIONS, 28 Cyc. 677.

63. *California.*— Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225; Wyman *v.* Moore, 103 Cal. 213, 37 Pac. 230.

Indiana.— Terry *v.* New York Provident Fund Soc., 13 Ind. App. 1, 41 N. E. 18, 55 Am. St. Rep. 217.

Iowa.— Milligan *v.* Davis, 49 Iowa 126.

Michigan.— Clement, etc., Co. *v.* Michigan Clothing Co., 110 Mich. 458, 68 N. W. 224.

Nebraska.— Hughes *v.* Insurance Co. of North America, 40 Nebr. 626, 59 N. W. 112.

New York.— Smith *v.* Barnard, 148 N. Y. 420, 42 N. E. 1054; Sturgis *v.* New Jersey Steamboat Co., 62 N. Y. 625 [*affirming* 35 N. Y. Super. Ct. 251].

Pennsylvania.— Massey *v.* Insurance Co., 3 Phila. 200.

Utah.— Brown *v.* Parsons, 10 Utah 223, 37 Pac. 346.

Virginia.— Higginbotham *v.* May, 90 Va. 233, 17 S. E. 941.

United States.— Connecticut Ins. Co. *v.* Pennsylvania Ins. Co., 51 Fed. 884, 2 C. C. A. 535; Belleville Sav. Bank *v.* Winslow, 35 Fed. 471.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 644, 645.

64. *Dakota.*— Nichols *v.* Bruns, 5 Dak. 28, 37 N. W. 752.

Florida.— Croom *v.* Swann, 1 Fla. 211.

Illinois.— Hopkins *v.* Snedaker, 71 Ill. 449; Woodford *v.* McClenahan, 9 Ill. 85.

Indiana.— Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459.

Iowa.— Eadie *v.* Ashbaugh, 44 Iowa 519.

Kentucky.— Western Mfg. Co. *v.* Cotton, 104 S. W. 758, 31 Ky. L. Rep. 1130, 12 L. R. A. N. S. 427.

Maryland.— Swindell *v.* Gilbert, 100 Md. 399, 60 Atl. 102.

Michigan.— Krolik *v.* Curry, 148 Mich. 214, 111 N. W. 761; Ripley *v.* Case, 86 Mich. 261, 49 N. W. 46; Busch *v.* Wilcox, 82 Mich. 317, 336, 46 N. W. 940, 47 N. W. 328, 21 Am. St. Rep. 554.

Minnesota.—Albitz *v.* Minneapolis, etc., R. Co., 40 Minn. 476, 42 N. W. 394.

Nebraska.— Leavitt *v.* Sizer, 35 Nebr. 80, 52 N. W. 832; Sycamore Marsh Harvester Co. *v.* Sturm, 13 Nebr. 210, 13 N. W. 202.

New Hampshire.— Presby *v.* Parker, 56 N. H. 409.

(III) *Acquiescence or Silence* — (A) *In General.* As a general rule the principal, upon learning of the unauthorized act of his agent, if he does not intend to be bound thereby, must within a reasonable time repudiate it.[65] It has been variously stated that the principal should repudiate the act promptly,[66] immediately,[67] at once,[68] or as soon as informed or notified of the act;[69] but the rule usually applied is that of a reasonable time,[70] what is a reasonable time being

New York.— Krumm *v.* Beach, 96 N. Y. 398 [*affirming* 25 Hun 293]; Akberg *v.* John Kress Brewing Co., 65 Hun 182, 19 N. Y. Suppl. 956 [*affirmed* in 138 N. Y. 648, 34 N. E. 513].

North Carolina.— Lane *v.* Dudley, 6 N. C. 119, 5 Am. Dec. 523.

Pennsylvania.— Meyerhoff *v.* Daniels, 173 Pa. St. 555, 34 Atl. 298, 51 Am. St. Rep. 782.

Texas.— Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675; Texas Elevator, etc., Co. *v.* Mitchell, 7 Tex. Civ. App. 222, 28 S. W. 45; Gulf, etc., R. Co. *v.* Pittman, 4 Tex. Civ. App. 167, 23 S. W. 318.

Wisconsin.— Burke *v.* Milwaukee, etc., R. Co., 83 Wis. 410, 53 N. W. 692; Morse *v.* Ryan, 26 Wis. 356.

United States.— Clark *v.* Reeder, 158 U. S. 505, 15 S. Ct. 849, 39 L. ed. 1070 [*affirming* 40 Fed. 513]; Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371; Continental Ins. Co. *v.* Pennsylvania Ins. Co., 51 Fed. 884, 2 C. C. A. 535; Foster *v.* Swasey, 9 Fed. Cas. No. 4,984, 2 Woodb. & M. 217.

See 40 Cent. Dig. tit. "Principal and Agent." § 648.

If the principal has no knowledge of an unauthorized warranty made by an agent in the sale of property not usually sold with warranty, his receipt of the proceeds of the sale does not constitute a ratification of the unauthorized warranty. Smith *v.* Tracy, 36 N. Y. 79. And see *supra*, I, F, 2, e.

65. *Alabama.*— Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

Arkansas.— Lyon *v.* Tams, 11 Ark. 189.

Colorado.— Lynch *v.* Smyth, 25 Colo. 102, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670]; Breed *v.* Central City First Nat. Bank, 6 Colo. 235.

Georgia.— Whitley *v.* James, 121 Ga. 521, 49 S. E. 600.

Louisiana.— Starr *v.* Zacharie, 18 La. 517; Dupre *v.* Splane, 16 La. 51.

Massachusetts.— Brigham *v.* Peters, 1 Gray 139.

Minnesota.— Anderson *v.* Johnson, 74 Minn. 171, 77 N. W. 26; Stearns *v.* Johnson, 19 Minn. 540.

Mississippi.— Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617.

New Hampshire.— Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319.

New York.— Bridenbecker *v.* Lowell, 32 Barb. 9; Ketchem *v.* Marsland, 18 Misc. 450, 42 N. Y. Suppl. 7.

Pennsylvania.— Hotchkiss *v.* Rochm, 181 Pa. St. 65, 37 Atl. 119 (holding that where an agent without authority sold his principal's notes for part cash and the residue in notes of other persons, an effort of the principal to rescind, made after he received the notes and over a month after one of them had matured, came too late); Massey *v.* Insurance Co., 3 Phila. 200.

Tennessee.— Walker *v.* Walker, 7 Baxt. 260; Bement *v.* Armstrong, (Ch. App. 1896) 39 S. W. 899.

Texas.— Yellow Pine Lumber Co. *v.* Carroll, 76 Tex. 135, 13 S. W. 261.

Wisconsin.— McWhinne *v.* Martin, 77 Wis. 182, 46 N. W. 118; Saveland *v.* Green, 40 Wis. 431.

United States.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Central Trust Co. *v.* Ashville Land Co., 72 Fed. 361, 18 C. C. A. 590.

See 40 Cent. Dig. tit. "Principal and Agent," § 641.

The repudiation must be communicated to the other party to the transaction and not merely to the agent. Bement *v.* Armstrong, (Tenn. Ch. App. 1896) 39 S. W. 899.

66. *Georgia.*— Bray *v.* Gunn, 53 Ga. 144.

Illinois.— Booth *v.* Wiley, 102 Ill. 84.

Kentucky.— Clay *v.* Spratt, 7 Bush 334.

New York.— Hazard *v.* Spears, 2 Abb. Dec. 353, 4 Keyes 469.

Pennsylvania.—Bredin *v.* Dubarry, 14 Serg. & R. 27.

Canada.— Conant *v.* Miall, 17 Grant Ch. (U. C.) 574.

See 40 Cent. Dig. tit. "Principal and Agent," § 641.

The term "promptly" has been explained as implying merely that the principal "should not have been dilatory; should have been guilty of no unnecessary delay" (Clay *v.* Spratt, 7 Bush (Ky.) 334); but in other cases where the term "promptly" was used it was used in connection with the expressions "on the spot, or certainly within a few days" (Hazard *v.* Spears, 2 Abb. Dec. (N. Y.) 353, 4 Keyes 469), and "the first moment the facts comes to his knowledge" (Bredin *v.* Dubarry, 14 Serg. & R. (Pa.) 27).

67. Bonneau *v.* Poydras, 2 Rob. (La.) 1; Pitts *v.* Shubert, 11 La. 286, 30 Am. Dec. 718.

68. Johnson *v.* Jones, 4 Barb. (N. Y.) 369.

69. Barrière *v.* Peychaud, 14 La. Ann. 370; Crane *v.* Bedwell, 25 Miss. 507; Bredin *v.* Dubarry, 14 Serg. & R. (Pa.) 27.

70. Lyon *v.* Tams, 11 Ark. 189; Whitley *v.* James, 121 Ga. 521, 49 S. E. 600; Mapp *v.* Phillips, 32 Ga. 72; Peck *v.* Ritchey, 66 Mo. 114; St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737. See also cases cited *supra*, note 65.

It is error to instruct that the principal must repudiate the act "within a few days." Each case is governed by its peculiar circumstances, and the words "within a reasonable

dependent upon the circumstances of the particular case,[71] which may be such on the one hand as to require prompt or immediate action, or on the other hand as to make some delay excusable or immaterial.[72] If the principal on being informed of the unauthorized act of the agent does not then repudiate it or do so within a reasonable time thereafter, but without any objection acquiesces in what the agent has done, he will ordinarily be held to have ratified the act,[73] and this is particularly true where the delay has been for a long

time" or their equivalent should be used. Peck *v.* Ritchey, 66 Mo. 114.

It is stating the rule too broadly to say that the principal will be bound unless he repudiates the act instantly or as soon as it comes to his knowledge, particularly in the case of a mere intruder. Miller *v.* Excelsior Stone Co., 1 Ill. App. 273.

71. *Arkansas.*— Lyon *v.* Tams, 11 Ark. 189.

Georgia.— Whitley *v.* James, 121 Ga. 521, 49 S. E. 600; Mapp *v.* Phillips, 32 Ga. 72.

Kansas.— Halloway *v.* Arkansas City Milling Co., 77 Kan. 76, 93 Pac. 577.

Mississippi.— Burns *v.* Kelley, 41 Miss. 339.

Missouri.— Peck *v.* Ritchey, 66 Mo. 114.

See 40 Cent. Dig. tit. "Principal and Agent," § 641.

72. Lyon *v.* Tams, 11 Ark. 189; Peck *v.* Ritchey, 66 Mo. 114.

73. *Alabama.*— Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

Arkansas.— Ladenberg *v.* Beal-Doyle Dry Goods Co., 83 Ark. 440, 104 S. W. 145; Lyon *v.* Tams, 11 Ark. 189.

Colorado.— Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670]; King *v.* Rea, 13 Colo. 69, 21 Pac. 1084; Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Breed *v.* Central City First Nat. Bank, 6 Colo. 235; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565; Tennis *v.* Barnes, 11 Colo. App. 196, 52 Pac. 1038.

Georgia.— Whitley *v.* James, 121 Ga. 521, 49 S. E. 600; Crockett *v.* Chattahoochee Brick Co., 95 Ga. 540, 21 S. E. 42; Bray *v.* Gunn, 53 Ga. 144; Byrne *v.* Doughty, 13 Ga. 46.

Illinois.— Ernst *v.* McChesney, 186 Ill. 617, 58 N. E. 399 [*affirming* 89 Ill. App. 164]; Booth *v.* Wiley, 102 Ill. 84; Francis *v.* Kerker, 85 Ill. 190; Darst *v.* Gale, 83 Ill. 136; Indianapolis, etc., R. Co. *v.* Morris, 67 Ill. 295; Ward *v.* Williams, 26 Ill. 447, 79 Am. Dec. 385; Hall *v.* Harper, 17 Ill. 82; Joseph Wolf Co. *v.* Bank of Commerce, 107 Ill. App. 58; Lepman *v.* Woods, 79 Ill. App. 269.

Indiana.— Terre Haute, etc., R. Co. *v.* Stockwell, 118 Ind. 98, 20 N. E. 650.

Iowa.— Henderson *v.* Beatty, 124 Iowa 163, 99 N. W. 716; Wright *v.* Farmers' Mut. Live-Stock Ins. Assoc., 96 Iowa 360, 65 N. W. 308; Bray *v.* Smith, 87 Iowa 339, 54 N. W. 222; Farwell *v.* Howard, 26 Iowa 381.

Kansas.— Halloway *v.* Arkansas City Milling Co., 77 Kan. 76, 93 Pac. 577; Kaffer *v.* Walters, 9 Kan. App. 291, 61 Pac. 323.

Kentucky.— Wheeler *v.* Citizens' Nat. Bank, 107 S. W. 316, 32 Ky. L. Rep. 939; Pennsylvania Iron Works Co. *v.* Henry Voght Mach. Co., 96 S. W. 551, 29 Ky. L. Rep. 861, 8 L. R. A. N. S. 1023.

Louisiana.— Johnson *v.* Carrere, 45 La. Ann. 847, 13 So. 195; Kehlor *v.* Kemble, 26 La. Ann. 713; Dunklin *v.* Horrell, 23 La. Ann. 394; Mangum *v.* Bell, 20 La. Ann. 215; Delaney *v.* Levi, 19 La. Ann. 251; Starr *v.* Zacharie, 18 La. 517; Dupre *v.* Splane, 16 La. 51; Segond *v.* Thomas, 10 La. 295.

Massachusetts.— Foster *v.* Rockwell, 104 Mass. 167; Brigham *v.* Peters, 1 Gray 139; Shaw *v.* Nudd, 8 Pick. 9; Pratt *v.* Putnam, 13 Mass. 361.

Michigan.— Cooper *v.* Mulder, 74 Mich. 374, 41 N. W. 1084.

Minnesota.— Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800; Stearns *v.* Johnson, 19 Minn. 540.

Mississippi.— Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617, holding that the principal when informed of the unauthorized acts of his agent with respect to property must, within a reasonable time, elect to approve or disaffirm them. If he does not disaffirm them, and so inform the agent, the latter may presume that his conduct has been affirmed. Silence will be equivalent to approval.

Missouri.— Schmidt *v.* Rankin, 193 Mo. 254, 91 S. W. 78; Mayer *v.* Old, 57 Mo. App. 639.

Nebraska.— German Nat. Bank *v.* Hastings First Nat. Bank, 59 Nebr. 7, 80 N. W. 48; Oberne *v.* Burke, 50 Nebr. 764, 70 N. W. 387; Day *v.* Miller, 1 Nebr. (Unoff.) 107, 95 N. W. 359.

Nevada.— Martin *v.* Victor Mill, etc., Co., 19 Nev. 180, 8 Pac. 161.

New Hampshire.— Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319.

New York.— Hyatt *v.* Clark, 118 N. Y. 563, 23 N. E. 891; Andrews *v.* Ætna L. Ins. Co., 92 N. Y. 596; Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Hazard *v.* Spears, 2 Abb. Dec. 353, 4 Keyes 469; Vosburg *v.* Mallory, 70 N. Y. App. Div. 247, 75 N. Y. Suppl. 480; Myers *v.* Mutual L. Ins. Co., 32 Hun 321 [*affirmed* in 99 N. Y. 1, 1 N. E. 33]; Wardrop *v.* Dunlop, 1 Hun 325 [*affirmed* in 59 N. Y. 634]; Bridenbecker *v.* Lowell, 32 Barb. 9; Johnson *v.* Jones, 4 Barb. 369; Benedict *v.* Rockwell, 25 Misc. 325, 54 N. Y. Suppl. 581; Ketchem *v.* Marsland, 18 Misc. 450, 42 N. Y. Suppl. 7; Bryce *v.* Clark, 16 N. Y. Suppl. 854.

North Carolina.— Brown *v.* Smith, 67 N. C. 245.

Pennsylvania.— Knauer *v.* McKoon, 19 Pa. Super. Ct. 539; Massey *v.* Insurance Co., 3 Phila. 200; Brown *v.* Weinmann, 34 Pittsb. Leg. J. N. S. 400.

Tennessee.— Hart *v.* Dixon, 5 Lea 336;

period,[74] or the circumstances were such as to impose upon the principal a duty to act promptly,[75] as where loss or injury to the other party was likely to result from a failure to do so.[76] Delay in repudiating an unauthorized act of an agent cannot constitute a ratification if the principal, during such time, was ignorant of the facts,[77] and if he repudiates it with reasonable promptness after learning the facts there is no ratification;[78] nor if the principal has promptly expressed his disapproval of the act will a delay in asserting his rights be deemed a ratification,[79] if his subsequent conduct is not inconsistent with his original repudiation.[80] Mere silence or delay in repudiating the act of an agent does not necessarily amount to a ratification.[81] While it may be considered as evidence of a ratification it is not

Walker *v.* Walker, 7 Baxt. 260; Fort *v.* Coker, 11 Heisk. 579; Bement *v.* Armstrong, (Ch. App. 1896) 39 S. W. 899.

Texas.— Yellow Pine Lumber Co. *v.* Carroll, 76 Tex. 135, 13 S. W. 261; Brennon *v.* Dansby, 43 Tex. Civ. App. 7, 95 S. W. 700; Angel *v.* Miller, 16 Tex. Civ. App. 679, 39 S. W. 1092; Pillman *v.* Freidberg, 2 Tex. App. Civ. Cas. § 582.

Virginia.— Forbes *v.* Hagman, 75 Va. 168.

West Virginia.— Curry *v.* Hale, 15 W. Va. 867.

Wisconsin.— Platt *v.* Schmitt, 117 Wis. 489, 94 N. W. 345; Roundy *v.* Erspamer, 112 Wis. 181, 87 N. W. 1087; McWhinne *v.* Martin, 77 Wis. 182, 46 N. W. 118; Saveland *v.* Green, 40 Wis. 431.

United States.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; American China Development Co. *v.* Boyd, 148 Fed. 258; Central Trust Co. *v.* Ashville Land Co., 72 Fed. 361, 18 C. C. A. 590; Rice *v.* Ege, 42 Fed. 661 Lorie *v.* North Chicago City R. Co., 32 Fed. 270; Colt *v.* Rood, 6 Fed. Cas. No. 3,031, 6 McLean 106; Wilcox *v.* Phillips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. 47.

England.— Loring *v.* Davis, 32 Ch. D. 625, 55 L. J. Ch. 725, 54 L. T. Rep. N. S. 899, 34 Wkly. Rep. 701; Sentance *v.* Hawley, 13 C. B. N. S. 458, 7 L. T. Rep. N. S. 745, 11 Wkly. Rep. 311, 106 E. C. L. 458.

Canada.— McDonald *v.* Morrison, 27 Nova Scotia 347; Conant *v.* Miall, 17 Grant Ch. (U. C.) 574; McLean *v.* Hime, 27 U. C. C. P. 195.

See 40 Cent. Dig. tit. "Principal and Agent," § 638 *et seq.*

74. *Colorado.*— Hoosac Min., etc., Co. *v.* Donat, 10 Colo. 529, 16 Pac. 157, over one hundred days.

Connecticut.— J. B. Owens Pottery Co. *v.* Turnbull Co., 75 Conn. 628, 54 Atl. 1122.

Georgia.— Whitley *v.* James, 121 Ga. 521, 49 S. E. 600. fourteen years.

Illinois.— Swartwout *v.* Evans, 37 Ill. 442 (two years).; Williams *v.* Merritt, 23 Ill. 623 (eighteen years).

Indiana.— Wakeman *v.* Jones, Smith 308, several years.

Mississippi.— Bias *v.* Cockrum, 37 Miss. 509, 75 Am. Dec. 76, twenty years.

Missouri.— Chouteau *v.* Allen, 70 Mo. 290.

New Jersey.— Baldwin *v.* Howell, (Ch. 1894) 30 Atl. 423.

Texas.— Shinn *v.* Hicks, 68 Tex. 277, 4 S. W. 486.

See 40 Cent. Dig. tit. "Principal and Agent," § 638 *et seq.*

75. Harrod *v.* McDaniels, 126 Mass. 413.

76. Lepman *v.* Woods, 79 Ill. App. 269; Metcalf *v.* Williams, 144 Mass. 452, 11 N. E. 700.

77. See *supra*, I, F, 2, e.

78. *Iowa.*— Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575.

Mississippi.—Burns *v.* Kelley, 41 Miss 339.

New York.— McIntosh *v.* Battel, 68 Hun 216, 22 N. Y. Suppl. 805.

Oregon.— Reid *v.* Alaska Packing Co., 47 Oreg. 215, 83 Pac. 139.

Pennsylvania.— Deacon *v.* Greenfield, 141 Pa. St. 467, 21 Atl. 650.

See 40 Cent. Dig. tit. "Principal and Agent," § 638 *et seq.*

The principal may wait, after learning that a contract has been made different in its terms from that authorized, until he can ascertain its nature and how it will affect his interests before deciding whether he will repudiate it. Barnard *v.* Wheeler, 24 Me. 412.

Where the principal at once repudiates the agent's act, the mere fact that he accepts a transfer of the agent's property voluntarily offered by him to cover any loss that the principal may sustain cannot be considered as a ratification of or acquiescence in the unauthorized act (Lazard *v.* Merchants', etc., Transp. Co., 78 Md. 1, 26 Atl. 897); nor where the act is promptly repudiated will the fact that the principal retained the agent in his employ amount to a ratification (Deacon *v.* Greenfield, 141 Pa. St. 467, 21 Atl. 650).

79. Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073; Brooklyn Daily Eagle *v.* Dellmar, 30 Misc. (N. Y.) 747, 62 N. Y. Suppl. 1041; McClure *v.* Evartson, 14 Lea (Tenn.) 495; O'Connor *v.* O'Connor, 45 W. Va. 354, 32 S. E. 276.

80. Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073.

81. *Alabama.*— Mobile, etc., R. Co. *v.* Jay, 65 Ala. 113.

California.— Deane *v.* Gray Bros. Artificial Stone Paving Co., 109 Cal. 433, 42 Pac. 443; California Bank *v.* Sayre, 85 Cal. 102, 24 Pac. 713.

Iowa.— Burlington Gaslight Co. *v.* Green, 22 Iowa 508.

Louisiana.— Guimbillot *v.* Abat, 6 Rob. 284.

New Jersey.— Dugan *v.* Lyman, (Ch. 1892) 23 Atl. 657.

Tennessee.— Hatton *v.* Stewart, 2 Lea 233.

conclusive,[82] and it is held that it cannot be conclusive unless the rights of innocent third persons have been prejudiced thereby,[83] or in other words unless the case contains this element of equitable estoppel.[84] Silence is, however, always an element to be considered in connection with other evidence tending to show a ratification,[85] and may alone be sufficient to justify a finding of ratification,[86] particularly where the circumstances impose a special duty upon the principal to speak,[87] as where the other party was liable to be misled or injured by his failure to do so.[88] If the acquiescence, silence, or delay on the part of the principal has caused third persons in reliance thereon to forego some right or act to their prejudice, he should be held to have ratified the act of the agent.[89] Cases of this

Texas.— Meyer *v.* Smith, 3 Tex. Civ. App. 37, 21 S. W. 995.

Vermont.— White *v.* Langdon, 30 Vt. 599.

Virginia.— Hortons *v.* Townes, 6 Leigh 47.

See 40 Cent. Dig. tit. "Principal and Agent," § 642.

If the liabilities have become fixed before the principal acquires knowledge of the act, so that an election to approve or disapprove could be attended with no advantage to him, his silence should not be construed as a ratification. Amory *v.* Hamilton, 17 Mass. 103.

82. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800; Dugan *v.* Lyman, (N. J. Ch. 1892) 23 Atl. 657; Meyer *v.* Smith, 3 Tex. Civ. App. 37, 21 S. W. 995.

83. *Colorado.*— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Louisiana.— Guimbillot *v.* Abat, 6 Rob. 284.

Minnesota.— Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800.

Missouri.— St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

New Jersey.— Doughaday *v.* Crowell, 11 N. J. Eq. 201.

New York.— Norden *v.* Duke, 120 N. Y. App. Div. 1, 104 N. Y. Suppl. 854.

Texas.— Williams *v.* Moore, 24 Tex. Civ. App. 402, 58 S. W. 953.

See 40 Cent. Dig. tit. "Principal and Agent," § 642.

Application of rule.— If the transaction between the agent and a third person is complete before the principal is notified, so that no injury can result to such person from a failure to repudiate the transaction within a reasonable time, the principal's failure to do so is merely evidence of a ratification; it is not conclusive, nor does it amount to an estoppel. But if the transaction is still in progress, and the silence of the principal after notice induces the person dealing with the agent to pursue a course which would be detrimental to him if the principal were not bound, a ratification will be conclusively presumed or the principal will be held estopped by his silence and delay. Ilfeld *v.* Zeigler, 40 Colo. 401, 91 Pac. 825; Breed *v.* Central City First Nat. Bank, 4 Colo. 481; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

84. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; Norden *v.* Duke, 120 N. Y. App. Div. 1, 104 N. Y. Suppl. 854; Williams *v.* Moore, 24 Tex. App. 402, 58 S. W. 953.

85. Kraft *v.* Wilson, (Cal. 1894) 37 Pac. 790.

86. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670]; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565; Toledo, etc., R. Co. *v.* Prince, 50 Ill. 26.

87. Lepman *v.* Woods, 79 Ill. App. 269; Metcalf *v.* Williams, 144 Mass. 452, 11 N. E. 700.

88. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Lepman *v.* Woods, 79 Ill. App. 269; Metcalf *v.* Williams, 144 Mass. 452, 11 N. E. 700.

89. *California.*— Dover *v.* Pittsburg Oil Co., 143 Cal. 501, 77 Pac. 405.

Colorado.— Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670].

Georgia.— Weaver *v.* Ogletree, 39 Ga. 586.

Illinois.— Sammis *v.* Poole, 188 Ill. 396, 58 N. E. 934 [*affirming* 89 Ill. App. 118]; Booth *v.* Wiley, 102 Ill. 84; Johnston *v.* Berry, 3 Ill. App. 256.

Iowa.— Alexander *v.* Jones, 64 Iowa 207, 19 N. W. 913.

Kansas.— Latham *v.* Hutchinson First Nat. Bank, 40 Kan. 9, 18 Pac. 824.

Massachusetts.— Merrifield *v.* Parritt, 11 Cush. 590.

Nebraska.— Garland *v.* Wells, 15 Nebr. 298, 18 N. W. 132; Day *v.* Miller, 1 Nebr. (Unoff.) 107, 95 N. W. 359.

New Jersey.— Lyle *v.* Addicks, 62 N. J. Eq. 123, 49 Atl. 1121.

Washington.— Lynch *v.* Richter, 10 Wash. 486, 39 Pac. 125.

West Virginia.— Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670; Curry *v.* Hale, 15 W. Va. 867.

See 40 Cent. Dig. tit. "Principal and Agent," § 638 *et seq.*

Opportunity to improve position.— Where after knowledge of the unauthorized act the third person affected thereby has an opportunity to improve his position, the failure of the principal to repudiate the act within a reasonable time after notice will amount to a ratification. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670].

character evidently contain the element of estoppel,[90] and some of the decisions are expressly based wholly or in part upon this ground.[91] It has been stated that since implied ratification by mere silence or failure to disaffirm is founded upon the doctrine of equitable estoppel,[92] it cannot be set up by the principal as a ratification in his own favor;[93] but as elsewhere shown there is a clear distinction between ratification and estoppel,[94] and silence may be evidence from which a ratification may be inferred, although no element of estoppel is involved.[95] It is also held that ratification by acquiescence is a doctrine that applies to principals, and that one of two joint agents who can only act jointly does not by failure to repudiate the separate act of his co-agent thereby ratify the act so as to make it valid and binding as against the principal;[96] but it may be invoked by the agent against the principal to protect him from the consequences of his failure to act according to his original agreement with the principal.[97]

(B) *Distinction Between Unauthorized Acts of Agents and of Strangers.* In applying the doctrine of ratification by silence or acquiescence the decisions make a distinction between cases where a stranger or volunteer assumes to act for another without any authority and cases where a recognized agent merely exceeds his authority,[98] and a further distinction has been made between acts of a mere obtrusive volunteer and one who, although without authority, assumes in good faith to act as an agent,[99] or who may reasonably be presumed to have the authority to act as such from the fact of having had such authority at a previous time [1] or on

90. St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

91. *California.*— Dover *v.* Pittsburg Oil Co., 143 Cal. 501, 77 Pac. 405; Pope *v.* J. K. Armsby Co., 111 Cal. 159, 43 Pac. 589, opinion of the court delivered by Van Fleet, J.

Illinois.— Reese *v.* Wallace, 113 Ill. 589; Prettyman *v.* Wilkey, 19 Ill. 235.

Maine.— Leavitt *v.* Fairbanks, 92 Me. 521, 43 Atl. 115.

Mississippi.— Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

Missouri.— St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

Nebraska.— Garland *v.* Wells, 15 Nebr. 298, 18 N. W. 132; Day *v.* Miller, 1 Nebr. (Unoff.) 107, 95 N. W. 359.

New Jersey.— Lyle *v.* Addicks, 62 N. J. Eq. 123, 49 Atl. 1121; Baldwin *v.* Howell, (Ch. 1894) 30 Atl. 423.

New York.— Sheldon Hat Blocking Co. *v.* Eickemeyer Hat Blocking Mach. Co., 90 N. Y. 607, 64 How. Pr. 467.

Washington.— Lynch *v.* Richter, 10 Wash. 486, 39 Pac. 125.

United States.— Bailey *v.* U. S., 15 Ct. Cl. 490, holding that, although fraud is ordinarily an element of estoppel, nevertheless where a payment is made to an agent without due authority of the principal, his gross carelessness in not disavowing the payment, and long continued neglect to put the payors on their guard, and silence which operated to mislead or prevent them from pursuing their remedy against the agent, will constitute an estoppel.

See 40 Cent. Dig. tit. "Principal and Agent," § 638 *et seq.*

The rule has been stated that if the principal remains silent when it is his duty to speak, he will not be permitted to speak when in justice he should remain silent. Williams *v.* Merritt, 23 Ill. 623.

The doctrine applies to corporations as well as to individuals. Sheldon Hat Blocking Co. *v.* Eickemeyer Hat Blocking Mach. Co., 90 N. Y. 607, 64 How. Pr. 467. See CORPORATIONS, 10 Cyc. 1076 *et seq.*

92. Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800. And see cases cited *supra*, note 91.

93. Turner *v.* Kennedy, 57 Minn. 104, 58 N. W. 823.

94. See *supra*, I, F, 1, d.

95. Thompson *v.* Laboringman's Mercantile etc., Co., 60 W. Va. 42, 53 S. E. 908.

96. Penn *v.* Evans, 28 La. Ann. 576.

97. Massey *v.* Greenabaum, (Del. 1904) 58 Atl. 804; Searing *v.* Butler, 69 Ill. 575; Frothingham *v.* Haley, 3 Mass. 68. See also Owsley *v.* Woolhopter, 14 Ga. 124.

98. *Illinois.*—Ward *v.* Williams, 26 Ill. 447, 79 Am. Dec. 358.

Massachusetts.— Foster *v.* Rockwell, 104 Mass. 167.

Michigan.— Heyn *v.* O'Hagen, 60 Mich. 150, 26 N. W. 861.

New York.— Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559]; Ketchem *v.* Marsland, 18 Misc. 450, 42 N. Y. Suppl. 7; Woodman *v.* Wicker, 88 N. Y. Suppl. 411.

Washington.— Lynch *v.* Richter, 10 Wash. 486, 39 Pac. 125.

Wisconsin.— Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

Canada.— Conant *v.* Miall, 17 Grant Ch. (U. C.) 574.

See 40 Cent. Dig. tit. "Principal and Agent," § 638 *et seq.*

99. Robbins *v.* Blanding, 87 Minn. 246, 91 N. W. 844.

1. Lynch *v.* Richter, 10 Wash. 486, 39 Pac. 125.

account of his family relations with the alleged principal.[2] While the authorities are not uniform as to the extent of the effect of these distinctions,[3] they are agreed that the question as to the relations between the principal and agent or person acting as such is important in determining whether there has been a ratification.[4] It has been said that in the case of an unauthorized act by a mere stranger the principal need take no notice of it, and can be bound only by an affirmative ratification;[5] but on the contrary it has been held that while mere silence in such cases is not conclusive,[6] it is evidence of ratification,[7] although of less weight than in the case of an agent exceeding his authority;[8] and that whether an inference of ratification should be drawn therefrom depends upon the circumstances of the case;[9] and if the circumstances are such that silence on the part of the principal would be calculated to mislead the other party, a failure to repudiate the act may justify a finding of ratification.[10]

(IV) *Bringing Suit or Attempting to Enforce Contract.* If the principal with knowledge of the facts brings suit against a third person, basing his right of action upon a contract made by an agent without authority, he thereby ratifies such contract;[11] and the same rule applies if he attempts in any other way

2. Lynch *v.* Richter, 10 Wash. 486, 39 Pac. 125. See also Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

3. See Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

4. Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243; Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634 [*reversing* 7 Colo. App. 383, 43 Pac. 670]; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

The duty to repudiate promptly is more imperative where an agency actually exists than in the case of one acting without any authority. Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243; Foster *v.* Rockwell, 104 Mass. 167.

5. Ward *v.* Williams, 26 Ill. 447, 79 Am. Dec. 385. See also Deane *v.* Gray Bros. Artificial Stone Paving Co., 109 Cal. 433, 42 Pac. 443.

As between the principal and an agent whose authority has been expressly revoked, the principal is under no duty to repudiate an act done by the agent subsequent to such revocation. Kelly *v.* Phelps, 57 Wis. 425, 15 N. W. 385.

6. *California.*— Deane *v.* Gray Bros. Artificial Stone Paving Co., 109 Cal. 433, 42 Pac. 443.

Illinois.— Miller *v.* Excelsior Stone Co., 1 Ill. App. 273.

Iowa.— Britt *v.* Gordon, 132 Iowa 431, 108 N. W. 319.

New York.— Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280 [*reversing* 84 Hun 194, 32 N. Y. Suppl. 559].

Tennessee.— Hatton *v.* Stewart, 2 Lea 233.

See 40 Cent. Dig. tit. "Principal and Agent," § 638 *et seq.*

7. Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128.

8. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

9. Heyn *v.* O'Hagen, 60 Mich. 150, 26 N. W. 861.

10. Heyn *v.* O'Hagen, 60 Mich. 150, 26 N. W. 861; Robbins *v.* Blanding, 87 Minn. 246, 91 N. W. 844; Lynch *v.* Richter, 10 Wash. 486, 39 Pac. 125; Saveland *v.* Green, 40 Wis. 431.

11. *Alabama.*— Gaines *v.* Acre, Minor 141.

California.— Argenti *v.* Brannan, 5 Cal. 351.

Colorado.— Lyon *v.* Washburn, 3 Colo. 201.

Connecticut.— Curnane *v.* Scheidel, 70 Conn. 13, 38 Atl. 875; Shoninger *v.* Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; New Milford First Nat. Bank *v.* New Milford, 36 Conn. 93.

Georgia.— J. F. Bailey Co. *v.* West Lumber Co., 1 Ga. App. 398, 58 S. E. 120.

Illinois.— Bailey *v.* Pardridge, 134 Ill. 188, 27 N. E. 89; Connett *v.* Chicago, 114 Ill. 233, 29 N. E. 280.

Indiana.— Moore *v.* Butler University, 83 Ind. 376; Johnson *v.* Hoover, 72 Ind. 395; Kyser *v.* Wells, 60 Ind. 261.

Iowa.— Warder, etc., Co. *v.* Cuthbert, 99 Iowa 681, 68 N. W. 917; Farrar *v.* Peterson, 52 Iowa 420, 3 N. W. 457.

Louisiana.— Zino *v.* Verdelle, 9 La. 51; Surgat *v.* Potter, 12 Mart. 365, holding that where an agent to sell for cash sells on credit, his act is ratified by the principal if the latter sues the vendee for the price.

Maine.— Medomak Bank *v.* Curtis, 24 Me. 36.

Massachusetts.— Fiedler *v.* Smith, 6 Cush. 336; Folger *v.* Mitchell, 3 Pick. 396; Sutton First Parish *v.* Cole, 3 Pick. 232; Odiorne *v.* Maxcy, 13 Mass. 178.

Michigan.— Merrill *v.* Wilson, 66 Mich. 232, 33 N. W. 716.

Mississippi.— Walker *v.* Mobile, etc., R. Co., 34 Miss. 245; Augusta Bank *v.* Conrey, 28 Miss. 667; Dove *v.* Martin, 23 Miss. 588; Planters' Bank *v.* Sharp, 4 Sm. & M. 75, 43 Am. Dec. 470.

Missouri.— Daugherty *v.* Burgess, 118 Mo. App. 557, 94 S. W. 594; Shinn *v.* Guyton, etc., Mule Co., 109 Mo. App. 557, 83 S. W. 1015; Alexander *v.* Wade, 106 Mo. App. 141, 80 S. W. 19.

to enforce or take advantage of such contract,[12] or if he sets it up by way of defense to a suit brought against him.[13] In such case the principal must abide by the entire contract as it was made by the agent,[14] and cannot avail himself of its benefits without also accepting its burdens,[15] or reject that part of the contract which was unauthorized and enforce the rest,[16] for the contract as made is the only one assented to by the third person against whom he seeks to enforce it.[17] If, however, when the principal first acquires knowledge of the facts conditions are such that he cannot in justice to himself repudiate the whole of the agent's acts he may stand upon what he has authorized, and the third person must bear the loss resulting from his dealing with an agent without learning the bounds of his authority.[18] It has

Nebraska.— Esterly Harvesting Mach. Co. *v.* Frolkey, 34 Nebr. 110, 51 N. W. 594.

New Hampshire.— Ham *v.* Boody, 20 N. H. 411, 51 Am. Dec. 235.

New York.— Henderhen *v.* Cook, 66 Barb. 21; Elwell *v.* Chamberlain, 4 Bosw. 320 [*affirmed* in 31 N. Y. 611]; Dodge *v.* Lambert, 2 Bosw. 570; Crigler *v.* Bedell, 4 N. Y. Suppl. 653.

Oregon.— La Grande Nat. Bank *v.* Blum, 27 Oreg. 215, 41 Pac. 659.

Pennsylvania.— Pearsoll *v.* Chapin, 44 Pa. St. 9.

South Dakota.— Plano Mfg. Co. *v.* Millage, 14 S. D. 331, 85 N. W. 594; Union Trust Co. *v.* Phillips, 7 S. D. 225, 63 N. W. 903.

Tennessee.— Gracy *v.* Potts, 4 Baxt. 395; Franklin *v.* Ezell, 1 Sneed 497.

Texas.— Bouvet *v.* Woodward, 2 Tex. Unrep. Cas. 449.

Washington.— Hart *v.* Maney, 12 Wash. 266, 40 Pac. 987.

Wisconsin.— Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549.

United States.— Wilson *v.* Pauly, 72 Fed. 129, 18 C. C. A. 475; Benedict *v.* Maynard, 3 Fed. Cas. No. 1,294, 4 McLean 569.

England.— Smith *v.* Hodson, 4 T. R. 211.

See 40 Cent. Dig. tit. "Principal and Agent," § 655.

A sale by an agent to himself under a general authority to sell is voidable only, and may be ratified by the principal's suing him for and recovering the price. Gaines *v.* Acre, Minor (Ala.) 141.

12. *Alabama.*— Atkinson *v.* Jones, 72 Ala. 248 (holding that where an agent exchanged a mule for a horse without authority, an assertion by his principal, with knowledge of the facts, of title to the horse was a ratification of the exchange); Jones *v.* Atkinson, 68 Ala. 167.

District of Columbia.— Averell *v.* Second Nat. Bank, 6 Mackey 358, holding that a bank, by protesting a check, ratifies its receipt for collection by the paying teller.

Illinois.— Fraternal Army of America *v.* Evans, 215 Ill. 629, 74 N. E. 689 [*affirming* 114 Ill. App. 578].

Iowa.— Hartley State Bank *v.* McCorkell, 91 Iowa 660, 60 N. W. 197; Mathews *v.* Gilliss, 1 Iowa 242.

Louisiana.— Stanfield *v.* Tucker, 4 La. Ann. 413.

Maine.— Partridge *v.* White, 59 Me. 564.

Michigan.— Nichols *v.* Shaffer, 63 Mich. 599, 30 N. W. 383, holding that a principal who chooses to keep and enforce a mortgage obtained by his agent in return for his release of another mortgage thereby ratifies the act of the agent, and is responsible for the manner in which the second mortgage was obtained, although the agent acted without authority.

Missouri.— Ellerbe *v.* National Exch. Bank, 109 Mo. 445, 19 S. W. 241.

Texas.— Jones *v.* Gilchrist, (Civ. App. 1894) 27 S. W. 890; Pillman *v.* Freiberg, 2 Tex. App. Civ. Cas. § 582.

United States.— Mason *v.* Crosby, 16 Fed. Cas. No. 9,234, 1 Woodb. & M. 342.

See 40 Cent. Dig. tit. "Principal and Agent," § 655.

13. Fraternal Army of America *v.* Evans, 215 Ill. 629, 74 N. E. 689 [*affirming* 114 Ill. App. 578]; Gibson *v.* Norway Sav. Bank, 69 Me. 579.

14. *Arkansas.*— Drennen *v.* Walker, 21 Ark. 539.

Connecticut.— Shoninger *v.* Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88.

Idaho.— Burke Land, etc., Co. *v.* Wells, 7 Ida. 42, 60 Pac. 87.

Iowa.— Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68; Beidman *v.* Goodell, 56 Iowa 592, 9 N. W. 900.

Kansas.— Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437, 57 Pac. 43.

Louisiana.— Pellerin *v.* Dungan, 2 La. Ann. 383.

Massachusetts.— Edgar *v.* Joseph Breck, etc., Corp., 172 Mass. 581, 52 N. E. 1083.

Michigan.— Eberts *v.* Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278.

Minnesota.— Nye *v.* Swan, 49 Minn. 431, 52 N. W. 39.

New York.— Henderhen *v.* Cook, 66 Barb. 21.

England.— Smith *v.* Hodson, 4 T. R. 211.

See 40 Cent. Dig. tit. "Principal and Agent," § 655; and *supra*, I, F, 2, f.

15. Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437, 57 Pac. 43; Edgar *v.* Joseph Breck, etc., Corp., 172 Mass. 581, 52 N. E. 1083.

16. Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68.

17. Shoninger *v.* Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; Eberts *v.* Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278.

18. Cooley *v.* Perrine, 41 N. J. L. 322, 32 Am. Rep. 210. See also Bryant *v.* Moore, 26

been held that an action of assumpsit against a purchaser for goods sold and delivered without authority by an agent is not a ratification of the sale if the action was not relied on but discontinued before trial,[19] or if the complaint was amended so as to contain a count in trover;[20] but on the contrary it has been held that if such a suit is instituted with full knowledge of the facts it operates as a conclusive ratification,[21] and that plaintiff cannot thereafter discontinue the action and repudiate the transaction and sue in trover for the value of the property sold.[22] A suit brought by the agent without the knowledge of the principal upon an unauthorized transaction entered into by the former is not a ratification by the principal;[23] nor is the institution of a suit by the principal based upon the contract a ratification if instituted without knowledge of the material facts;[24] but upon discovery of the facts plaintiff should abandon his suit on the contract and repudiate the act of his agent, and assert such rights as he may have arising from the unauthorized act. So long as he insists and relies upon the contract, he cannot escape the consequences of a ratification by showing that he was not fully informed of its terms and conditions.[25] If the action is not based upon the contract made by the agent, the principal may, without ratifying it, maintain an action to protect his rights,[26] as in the case of goods wrongfully sold and delivered, by tendering back what may have been received and bringing an action of replevin[27] or an action of trover to recover their value.[28] Where an agent makes an unauthorized sale of property an action by the principal against the agent to recover the proceeds of the sale is *prima facie* a ratification of the sale;[29] but a suit against the agent for moneys wrongfully received is not necessarily a ratification, as to third persons, of the agent's unauthorized contract;[30] and where money has been wrongfully lent by the agent without taking sufficient security, an action in assumpsit by the principal against the borrower to recover the money lent is not an approval of the security taken and will not relieve the agent from liability.[31] Where an agent makes an unauthorized sale and delivery of property amounting to a conversion, the owner may, without ratifying the sale as made, waive the tort and sue the agent on the common counts in assumpsit to recover the value of the property;[32] and where an agent has made an unauthorized lease of property, an action by an heir of the owner to require the agent to account for rents received since the owner's death but not to hold him accountable as his own agent is not a ratification of the lease.[33]

(v) *Subsequent Grant of Authority.* The doing of an unauthorized act by an agent may be ratified by the principal's subsequently giving him authority to do the particular act and antedating it prior to the doing of such act;[34] and the

Me. 84, 45 Am. Dec. 107; Tulane University *v.* O'Connor, 192 Mass. 428, 78 N. E. 494.

19. Peters *v.* Ballistier, 3 Pick. (Mass.) 495.

20. Gould *v.* Blodgett, 61 N. H. 115, holding that the bringing of assumpsit by a principal to recover from a third person for property delivered to him by an agent without authority and in payment of his own debt is neither a ratification of the unauthorized delivery nor a conclusive election of remedies, and that an amendment by filing a count in trover was properly allowed.

21. Butler *v.* Hildreth, 5 Metc. (Mass.) 49.

22. Butler *v.* Hildreth, 5 Metc. (Mass.) 49.

23. Ver Veer *v.* Malone, 134 Iowa 653, 112 N. W. 82; St. Mary's Bank *v.* Calder, 3 Strobh. (S. C.) 403.

24. Shoninger *v.* Peabody, 59 Conn. 588, 22 Atl. 437. And see *supra*, I, F, 2, c.

25. Henderhen *v.* Cook, 66 Barb. (N. Y.) 21.

26. Brown *v.* Foster, 137 Mich. 35, 100 N. W. 167; Brown *v.* Johnson, 12 Sm. & M. (Miss.) 398, 51 Am. Dec. 118; Holland Coffee Co. *v.* Johnson, 38 Misc. (N. Y.) 187, 77 N. Y. Suppl. 247.

27. See Shoninger *v.* Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88.

28. See Smith *v.* Hodson, 4 T. R. 211.

29. Frank *v.* Jenkins, 22 Ohio St. 597.

30. Barnsdall *v.* O'Day, 134 Fed. 828, 67 C. C. A. 278, holding that the bringing of an action by a principal against his agent in the purchase of lands for the amount of a commission secretly paid him by the vendor does not operate to ratify the contract so as to discharge the vendor from liability for the fraud and deceit by which, with the assistance of the agent, the sale was induced.

31. St. Mary's Bank *v.* Calder, 3 Strobh. (S. C.) 403.

32. Brown *v.* Foster, 137 Mich. 35, 100 N. W. 167.

33. Moffatt *v.* Nicholl, 9 Grant Ch. (U. C.) 446.

34. Milliken *v.* Coombs, 1 Me. 343, 10 Am.

receipt of authority by the agent to do the particular act after the act is done will amount to a ratification of the act;[35] but authority to do future acts does not amount to a ratification of similar acts already done.[36]

4. Operation and Effect — a. Retroactiveness — (i) *General Rule.* In accordance with the maxim, *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* — every ratification relates back and is equivalent to prior authority — it is a well settled rule, subject to certain exceptions,[37] that a ratification relates back to the time when the unauthorized act was done and makes it as effective from that moment as though it had been originally authorized, and that therefore upon ratification the parties to all intents and purposes stand in the same position as though the person assuming to act as agent had acted under authority previously conferred.[38]

Dec. 70. See also Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

35. New Orleans Exch., etc., Co. *v.* Boyce, 3 Rob. (La.) 307; Rice *v.* McLarren, 42 Me. 157, holding that a letter from a principal to his agent authorizing certain acts, received subsequent to their performance, is a ratification thereof.

36. Britt *v.* Gordon, 132 Iowa 431, 108 N. W. 319; Moore *v.* Lockett, 2 Bibb (Ky.) 67, 4 Am. Dec. 683, holding that a letter, subsequent to an unauthorized sale, giving an agent power to sell did not legalize the previous sale not ratified under the power. See also Stillman *v.* Fitzgerald, 37 Minn. 186, 33 N. W. 564.

Collections made by an agent on a note after the death of his principal and before directions of the executors to proceed to collect the note are not ratified by the executors by such directions. Hill *v.* Best, (Tex. Civ. App. 1897) 40 S. W. 202.

37. See *infra*, I, F, 4, a, (II).

38. *Alabama.*— Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238; Reynolds *v.* Dothard, 11 Ala. 531; Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612.

Arkansas.— Drennen *v.* Walker, 21 Ark. 539; Irons *v.* Reyburn, 11 Ark. 378.

California.— Kraft *v.* Wilson, (1894) 37 Pac. 790; People *v.* Eel River, etc., R. Co., 98 Cal. 665, 33 Pac. 728; Cowan *v.* Abbott, 92 Cal. 100, 28 Pac. 213; McCracken *v.* San Francisco, 16 Cal. 591.

Connecticut.— Ansonia *v.* Cooper, 64 Conn. 536, 30 Atl. 760; Johnson *v.* Smith, 21 Conn. 627.

Delaware.— Bancroft *v.* Wilmington Conference Academy, 5 Houst. 577.

Georgia.— Haney School Furniture Co. *v.* Hightower Baptist Institute, 113 Ga. 289, 38 S. E. 761 (so provided by Civ. Code, § 3019); Weaver *v.* Ogletree, 39 Ga. 586; Perry *v.* Hudson, 10 Ga. 362.

Illinois.— Connett *v.* Chicago, 114 Ill. 233, 29 N. E. 280; Hefner *v.* Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 454.

Indiana.— U. S. Express Co. *v.* Rawson, 106 Ind. 215, 6 N. E. 337; Persons *v.* McKibben, 5 Ind. 261, 61 Am. Dec. 85; Elliott *v.* Armstrong, 2 Blackf. 198.

Iowa.— Long *v.* Osborn, 91 Iowa 160, 59 N. W. 14; Lampson *v.* Arnold, 19 Iowa 479.

Kansas.— Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

Louisiana.— Dord *v.* Bonnaffee, 6 La. Ann. 563, 54 Am. Dec. 573; Culliver *v.* Berge, 1 Rob. 427.

Minnesota.— Lowry *v.* Harris, 12 Minn. 255.

Missouri.— Kirkpatrick *v.* Pease, 202 Mo. 471, 101 S. W. 651; Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Alexander *v.* Wade, 106 Mo. App. 141, 80 S. W. 19.

New Hampshire.— Grant *v.* Beard, 50 N. H. 129.

New York.— Commercial Bank *v.* Warren, 15 N. Y. 577 (holding that ratification of the unauthorized act of an agent does not operate as permissive evidence of original authority, but as a confirmation *per se* of the unauthorized act); Merritt *v.* Bissell, 84 Hun 194, 32 N. Y. Suppl. 559 [*reversed* on other grounds in 155 N. Y. 396, 50 N. E. 280]; Conro *v.* Port Henry Iron Co., 12 Barb. 27; Long *v.* Poth, 16 Misc. 85, 37 N. Y. Suppl. 670.

Oregon.— Municipal Security Co. *v.* Baker County, 33 Oreg. 338, 54 Pac. 174.

Pennsylvania.— Bell *v.* Waynesboro Borough, 195 Pa. St. 299, 45 Atl. 930; Kelsey *v.* Crawford County Nat. Bank, 69 Pa. St. 426; Pennsylvania Bank *v.* Reed, 1 Watts & S. 101.

Texas.— Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585.

United States.— Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178; Marsh *v.* Fulton County, 10 Wall. 676, 19 L. ed. 1040; Shuenfeldt *v.* Junkermann, 20 Fed. 357; Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496.

England.— Maclean *v.* Dunn, 4 Bing. 722, 6 L. J. C. P. O. S. 184, 1 M. & P. 761, 29 Rev. Rep. 714, 13 E. C. L. 710; Foster *v.* Bates, 1 D. & L. 400, 7 Jur. 1093, 13 L. J. Exch. 88, 12 M. & W. 226; Bird *v.* Brown, 4 Exch. 786, 14 Jur. 132, 19 L. J. Exch. 154; Ancona *v.* Marks, 7 H. & N. 686, 8 Jur. N. S. 516, 31 L. J. Exch. 163, 5 L. T. Rep. N. S. 753, 10 Wkly. Rep. 251.

Canada.— Dalton *v.* Hamilton, 12 N. Brunsw. 422.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 662–667.

(II) *Exceptions and Limitations.* The rule stated in the preceding section is, however, subject to many exceptions.[39] Thus it is a well settled rule that a ratification will not relate back so as to impair or defeat the rights of third persons which have intervened between the time of the doing of the unauthorized act and its ratification by the principal,[40] particularly where, when knowledge of the unauthorized act was first acquired by the principal, he disaffirmed and repudiated it.[41] So if a third person has a complete cause of action or defense when a suit is commenced, he cannot be deprived thereof by a subsequent ratification of an act without binding force except for such ratification.[42] Nor can ratification subject a third person to loss or damage for non-performance of an obligation or duty which he would not have been obliged to perform in the absence of ratification.[43] Neither can a ratification relate back so as to make valid an act which was utterly void and against the law,[44] or so as to give effect to the act of one who was incapacitated to receive an original appointment as agent,[45] or so as to make void a contract that was valid at the time and place of ratification.[46]

b. Revocability. Although a principal may disaffirm a transaction which he has ratified without having full knowledge of all the facts, and which he has not

A ratification creates the relation of principal and agent in respect to a matter as to which none before existed. Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 428.

39. Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238.

40. *Alabama.*— Norton *v.* Alabama Nat. Bank, 102 Ala. 420, 14 So. 872 (in which it was held that where the president of a corporation makes an unauthorized assignment of the corporate property for the benefit of creditors, the subsequent ratification thereof by the board of directors is insufficient as against creditors levying an attachment in the meantime); Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612.

Arkansas.— Lowenstein *v.* Caruth, 59 Ark. 588, 28 S. W. 421.

California.—Taylor *v.* Robinson, 14 Cal. 396.

Georgia.— Graham *v.* Williams, 114 Ga. 716, 40 S. E. 790.

Louisiana.— Smith *v.* McMicken, 12 Rob. 653; Grove *v.* Harvey, 12 Rob. 221; Burroughs *v.* Jayne, 7 Mart. N. S. 374.

Maine.— Fiske *v.* Holmes, 41 Me. 441.

Minnesota.— Allis *v.* Goldsmith, 22 Minn. 123.

North Dakota.— Clendenning *v.* Hawk, 10 N. D. 90, 86 N. W. 114.

Ohio.— Pollock *v.* Cohen, 32 Ohio St. 514.

Texas.— Conner *v.* Littlefield, 79 Tex. 76, 15 S. W. 217, holding that where on an issue as to the authority of an agent to make a sale, arising between the purchaser and attaching creditors of the principal, the latter testified that he had not authorized the sale, but admitted that after the levy he signed a written ratification in which the agent's authority was acknowledged, the ratification could not take effect by relation so as to defeat the levy.

Wisconsin.—Galloway *v.* Hamilton, 68 Wis. 651, 32 N. W. 636, holding that a subsequent ratification by a corporation of a deed made without authority by its officers cannot bar the claims of a creditor of the corporation who has levied an execution upon the lands.

United States.— Cook *v.* Tullis, 18 Wall. 332, 21 L. ed. 933; Farmers' L. & T. Co. *v.* Memphis, etc., R. Co., 83 Fed. 870; Strain *v.* Gourdin, 23 Fed. Cas. No. 13,521, 2 Woods 380, 11 Nat. Bankr. Reg. 156; *In re* Stoddart, 4 Ct. Cl. 511.

Canada.— Taylor *v.* Ainslie, 19 U. C. C. P. 78.

See 40 Cent. Dig. tit. "Principal and Agent," § 667.

41. Wilkinson *v.* Harwell, 13 Ala. 660; Fiske *v.* Holmes, 41 Me. 441.

42. Dingley *v.* McDonald, 124 Cal. 682, 57 Pac. 574; Graham *v.* Williams, 114 Ga. 716, 40 S. E. 790 (holding that where in an action for trespass defendant has a defense at the time the suit is brought, he cannot be deprived thereof by a third person ratifying a deed which at the time of the commencement of the suit was without binding force for want of such ratification); Fiske *v.* Holmes, 41 Me. 41.

43. Grove *v.* Harvey, 12 Rob. (La.) 221, holding that a ratification by a principal cannot relate back so as to enable the principal to maintain an action of trover for refusal to deliver goods upon an unauthorized demand by an agent.

44. Chapman *v.* Lee, 47 Ala. 143; Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435 (holding that, although a subsequent ratification by the principal will confirm an assumed agency, it will not be so if the agency be in itself illegal); Bird *v.* Brown, 4 Exch. 786, 14 Jur. 132, 19 L. J. Exch. 154. And see *supra*, I, F, 2, a, (II).

45. Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435, holding that a ratification does not have the effect to confirm the act of a sheriff in purchasing at his own sale in the capacity of agent for a third person. See, generally, *supra*, I, B, 2.

46. Shuenfeldt *v.* Junkermann, 20 Fed. 357, so as to invalidate a sale of liquor which was ratified at a place where such sale was not illegal.

intentionally ratified regardless of knowledge,[47] if once he elects to ratify and does so with full knowledge of all the facts, his ratification becomes irrevocable, and he cannot afterward repudiate the agent's acts, nor set up his want of authority,[48] even though the approval was but for a short time; [49] nor can he afterward pursue a remedy, or offer a defense, inconsistent with the ratification or based upon a repudiation of the agent's acts.[50]

c. As Against Agent — (I) *In Contract* — (A) *Between Agent and Third Person.* A valid ratification, being equivalent to prior authority, relieves the agent from any liability to third persons for acting without authority,[51] provided the ratification places the third person in no worse position than he would have occupied had the agent acted under prior authority.[52] And in the absence of facts showing a duty to do so, the agent is not bound to give the third person notice of the ratification.[53]

(B) *Between Agent and Principal.* A valid ratification by the principal also relieves the agent from any liability to the principal otherwise resulting from the fact that the agent acted in an unauthorized way or without authority.[54] After

47. See Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Starbird *v.* Curtis, 43 Me. 352. And see *supra*, I, F, 2, e.

48. *Alabama.*— Whitfield *v.* Riddle, 78 Ala. 99.

California.—Blood *v.* La Serena Land, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Goetz *v.* Goldbaum, (1894) 37 Pac. 646; Blen *v.* Bear River, etc., Water, etc., Co., 20 Cal. 602, 81 Am. Dec. 132.

Iowa.— Harmon *v.* Clayton, 51 Iowa 36, 50 N. W. 541; Bell *v.* Byerson, 11 Iowa 233, 77 Am. Dec. 142.

Louisiana.— Meyers *v.* Simmons, 19 La. Ann. 370; Breedlove *v.* Wamack, 2 Mart. N. S. 181.

Minnesota.— Hunter *v.* Cobe, 84 Minn. 187, 87 N. W. 612.

Mississippi.— Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284.

New York.— Andrews *v.* Aetna L. Ins. Co., 92 N. Y. 596 (holding that a principal upon being informed of an unauthorized act of an agent has a right to elect whether he will adopt it or not, and so long as the condition of the parties is unchanged cannot be prevented from such adoption by the fact that the other party prefers to treat the contract as invalid, but his election to ratify, once made, is irrevocable); Glor *v.* Kelly, 49 N. Y. App. Div. 617, 63 N. Y. Suppl. 339 [*affirmed* in 166 N. Y. 589, 59 N. E. 1123].

North Carolina.— Rowland *v.* Barnes, 81 N. C. 234.

Vermont.— French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

United States.— Sanders *v.* Peck, 87 Fed. 61, 30 C. C. A. 530; Russ *v.* Telfener, 57 Fed. 973.

Canada.— Lucy *v.* Donovan, 16 N. Brunsw. 128.

See 40 Cent. Dig. tit. "Principal and Agent," § 669.

49. Silverman *v.* Bush, 16 Ill. App. 437; Coffin *v.* Gephart, 18 Iowa 256; Brock *v.* Jones, 16 Tex. 461; Russ *v.* Telfener, 57 Fed. 973.

50. *Georgia.*— Perry *v.* Hudson, 10 Ga. 362.

Indiana.— Johnson *v.* Hoover, 72 Ind. 395, holding that a principal who ratifies an unauthorized sale of his property by his agent by bringing assumpsit to recover the agreed price cannot afterward reclaim the property.

Iowa.— Beidman *v.* Goodell, 56 Iowa 592, 9 N. W. 900.

New York.— Avila *v.* Manhattan Chemical Co., 32 Hun 1.

Canada.— Dalton *v.* Hamilton, 12 N. Brunsw. 423.

See 40 Cent. Dig. tit. "Principal and Agent," § 669.

51. *Louisiana.*— Walters *v.* Cruikshank, 24 La. Ann. 341.

Minnesota.— Sheffield *v.* Ladue, 16 Minn. 388, 10 Am. Rep. 145.

Missouri.— Lingenfelder *v.* Leschen, 134 Mo. 55, 34 S. W. 1089.

New York.— Haight *v.* Sahler, 30 Barb. 218. *Compare* Palmer *v.* Stephens, 1 Den. 471; Rossiter *v.* Rossiter, 8 Wend. 494, 24 Am. Dec. 62.

Pennsylvania.— Berger's Appeal, 96 Pa. St. 443.

See 40 Cent. Dig. tit. "Principal and Agent," § 665.

Compare Lazarus *v.* Shearer, 2 Ala. 718.

Liability of agent to third person for acting without authority generally see *infra*, III, C, 1, a, (v).

52. Sheffield *v.* Ladue, 16 Minn. 388, 10 Am. Rep. 145.

53. Sheffield *v.* Ladue, 16 Minn. 388, 10 Am. Rep. 145, holding that the failure of the agent to give notice of the ratification of his unauthorized act will not make him liable unless facts are shown imposing on him a duty to give such notice and damage resulting from his neglect so to do.

54. *Alabama.*— Van Dyke *v.* State, 24 Ala. 81 (holding that where an agent pays his principal's money to a person who is not authorized to receive it, the bringing of an action by the principal against such person is a ratification of the payment, and discharges the agent from all further responsibility); Gaines *v.* Acre, Minor 141.

Arkansas.— Whitehead *v.* Wells, 29 Ark. 99.

ratification, the agent can look to the principal for his commissions and reimbursement in the unauthorized transaction;[55] and the principal can hold the agent accountable for the act as done the same as though the latter had acted under authority previously conferred to do the act in that way;[56] but he cannot hold him accountable for not having done the act in a different manner.[57] But the ratification must of course be made with knowledge of the material facts, and hence is not effective to relieve the agent if the principal in ratifying acted in ignorance or under a misrepresentation by the agent of the facts.[58] If the agent fully informs the principal of his failure to obey instructions, and the principal approves either expressly, by silent acquiescence, or by availing himself of the fruits of the agent's disobedient acts, the agent will be excused for his disobedience,[59] although it has been held that mere inaction or silence after knowledge of the agent's unau-

Georgia.— Bray *v.* Gunn, 53 Ga. 144.
Kansas.— Lowry *v.* Stewart, 5 Kan. 663.
Louisiana.— Breedlove *v.* Wamack, 2 Mart. N. S. 181; Baldwin *v.* Preston, 11 Mart. 32.
Michigan.— Antiseptic Fiber Package Co. *v.* Klein, 119 Mich. 225, 77 N. W. 931.
Minnesota.— Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113.
Missouri.— Beall *v.* January, 62 Mo. 434.
New York.— Towle *v.* Stevenson, 1 Johns. Cas. 110.
Vermont.— Pickett *v.* Pearsons, 17 Vt. 470.
United States.— Ætna Ins. Co. *v.* Sabine, 1 Fed. Cas. No. 97, 6 McLean 393.
Canada.— Pickles *v.* Western Assur. Co., 40 Nova Scotia 327.
See 40 Cent. Dig. tit. "Principal and Agent," §§ 154–156. And see *infra*, III, A, 1–4.

55. See *infra*, III, B, 2, a, (I), (C); III, B, 3, c, (I).

56. *Alabama.*— Gaines *v.* Acre, Minor 141.
California.— Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122.
Illinois.— Pells *v.* Snell, 31 Ill. App. 158 [*reversed* on other grounds in 130 Ill. 379, 23 N. E. 117].
Louisiana.— Stanfield *v.* Tucker, 4 La. Ann. 413.
Maine.— McNear *v.* Atwood, 17 Me. 434.
Michigan.— Rath *v.* Vanderlyn, 44 Mich. 597, 7 N. W. 196, holding that, although the ratification be good, still the agent must fully account to his principal for the fruits of the act as ratified.
Mississippi.— Strickland *v.* Hudson, 55 Miss. 235.
New York.— Schanz *v.* Martin, 37 Misc. 492, 75 N. Y. Suppl. 997.
South Dakota.—Hormann *v.* Sherin, 6 S. D. 82, 60 N. W. 145.
Wisconsin.— See Edminster *v.* Sturges, 67 Wis. 438, 30 N. W. 621.
See 40 Cent. Dig. tit. "Principal and Agent," §§ 154–156. And see *infra*, III, A, 1–4.

57. Menkens *v.* Watson, 27 Mo. 163, holding that where the act of one done in the name of another without authority is adopted by such other, it is adopted as done, and the assumed agent cannot be treated as an authorized agent so as to make him responsible for not doing as he would have been bound to do if authorized.

58. *Illinois.*— Bank of Commerce *v.* Miller, 105 Ill. App. 224.
Indiana.— Gage *v.* Pike, Smith 145.
Iowa.— Robinson Mach. Works *v.* Vorse, 52 Iowa 207, 2 N. W. 1108.
Massachusetts.— Todd *v.* Bishop, 136 Mass. 386.
Minnesota.— Chase *v.* Baskerville, 93 Minn. 402, 101 N. W. 950.
North Carolina.— Hines *v.* Butler, 38 N. C. 307.
South Carolina.— Butler *v.* Haskell, 4 Desauss. Eq. 651.
Tennessee.—Walker *v.* Walker, 5 Heisk. 425.
Texas.— Smith *v.* Mosley, 74 Tex. 631, 12 S. W. 748; Boyd *v.* Jacobs, 6 Tex. Civ. App. 442, 25 S. W. 681.
Virginia.— Howatt *v.* Davis, 5 Munf. 34, 7 Am. Dec. 681.
United States.— McKinley *v.* Williams, 74 Fed. 94, 20 C. C. A. 312.
England.— De Bussche *v.* Alt, 8 Ch. D. 286, 3 Aspin. 384, 47 L. J. Ch. 381, 38 L. T. Rep. N. S. 370.
Canada.— Butterworth *v.* Shannon, 5 Can. L. T. Occ. Notes 282.
See 40 Cent. Dig. tit. "Principal and Agent," § 155. And see *supra*, I, F, 2, e.

59. *Georgia.*— Ingraham *v.* Barber, 72 Ga. 158.
Indiana.— Judah *v.* Vincennes University, 16 Ind. 56.
Louisiana.— Raymond *v.* Palmer, 41 La. Ann. 425, 6 So. 692, 17 Am. St. Rep. 398; Featherston *v.* Graham, 17 La. Ann. 42; Beau *v.* Drew, 15 La. Ann. 461; Reed *v.* Ritchey, 2 La. Ann. 796; Starr *v.* Zacharie, 18 La. 517; Dupre *v.* Splane, 16 La. 51.
Massachusetts.— Metcalf *v.* Williams, 144 Mass. 452, 11 N. E. 700.
Michigan.— Antiseptic Fiber Package Co. *v.* Klein, 119 Mich. 225, 77 N. W. 931; Rath *v.* Vanderlyn, 44 Mich. 597, 7 N. W. 196; Filer *v.* Jenks, 38 Mich. 585.
Minnesota.— Plano Mfg. Co. *v.* Buxton, 36 Minn. 203, 30 N. W. 668.
New York.— New York, etc., R. Co. *v.* Dixon, 114 N. Y. 80, 21 N. E. 110; Hazard *v.* Spears, 2 Abb. Dec. 353, 4 Keyes 469; Seymour *v.* Marvin, 11 Barb. 80; Russell *v.* Wetmore, 3 N. Y. Leg. Obs. 318; Cairns *v.* Bleecker, 12 Johns. 300; Armstrong *v.* Gilchrist, 2 Johns. Cas. 424.
Pennsylvania.— Philadelphia, etc., R. Co. *v.* O'Donnell, 12 Phila. 213.

thorized act, which in favor of third persons might amount to a ratification, is not necessarily as to the agent such a ratification as to relieve him from liability.[60] A principal is not bound, in order to avoid ratification, to give the agent immediate notice of his dissent,[61] although he may be held to have ratified the acts, so as to relieve the agent, if he does not with reasonable promptness after knowledge notify the agent of his repudiation so that the agent may take proper steps to protect himself.[62] The fact that the principal is compelled to carry out a contract made with third persons by an agent acting contrary to his secret instructions cannot be urged by the agent against the principal as a ratification of such unauthorized acts.[63] So acceptance of part of the agent's acts in which he followed directions is no ratification of other separable acts in which he was disobedient to his principal's orders,[64] or negligent in the performance of his duties.[65]

(II) *In Tort.*[66] Whilst the ratification of an agent's tort will fix liability therefor to the third person upon the principal,[67] and will relieve the agent from liability to his principal on account of the tort,[68] it will not relieve the agent from liability to the third person injured thereby,[69] except where the act of the agent is

Vermont.— Pickett *v.* Pearsons, 17 Vt. 470.

United States.— Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549, holding that if the agent disobeys his orders and makes a full and candid statement to his principal of all the facts on which his judgment was exercised, and the latter makes no objection to his conduct or is silent respecting it, this amounts to a recognition of it and will excuse the agent.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 154–156.

60. Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113.

61. Clarke *v.* Meigs, 10 Bosw. (N. Y.) 337, holding that a principal is not necessarily to be deemed to have ratified a wrongful act of his agent so as to exempt the agent from liability to him merely because he does not notify the agent of his dissent at the earliest possible opportunity after being informed of the wrongful act.

62. Oliver *v.* Johnson, 24 La. Ann. 460; Cairnes *v.* Bleecker, 12 Johns. (N. Y.) 100; Prince *v.* Clark, 1 B. & C. 186, 2 D. & R. 266, 1 L. J. K. B. O. S. 69, 25 Rev. Rep. 352, 8 E. C. L. 80. *Compare* Lewin *v.* Dille, 17 Mo. 64, holding that where the instructions of the principal are disobeyed by the agent, the former, in a suit between them, will not be held to have ratified the acts to which he has failed to signify his dissent.

63. Chaffe *v.* Barataria Canning Co., 113 La. 215, 36 So. 943, holding that where defendant's agent, as its manager, was bound not to make purchases on its behalf beyond a certain limit, which limitation was not made known to others, and the agent went beyond the limit and defendant was forced to take the goods and pay the price, defendant's acceptance of the situation was forced upon it and was not a ratification of its agent's acts.

64. Knowlton *v.* Logansport School City, 75 Ind. 103; Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549.

65. Owensboro Bank *v.* Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211.

66. Liability of agent in tort generally see *infra*, III, C, 2.

67. See *infra*, I, F, 4, d; III, E, 2.

68. Bayntun *v.* Cattle, 1 M. & Rob. 265, holding that money deposited with an agent and expended by him in illegal disbursements cannot be recovered from him by the principal if the principal was at the time aware of the illegal disbursements or if he subsequently assented to them. And see *infra*, III, A, 1–4.

Knowledge necessary.—There can be no ratification of an agent's wrongful act so as to excuse the agent if the principal had no knowledge that the agent was guilty of wrong. George N. Pierce Co. *v.* Beers, 190 Mass. 199, 76 N. E. 603. And see *supra*, I, F, 2, e.

The principal may elect to waive the agent's tort by ratifying his act, thus relieving him from tort liability to the principal and holding him accountable for the agency. Judah *v.* Vincennes University, 16 Ind. 56; Motley *v.* Motley, 42 N. C. 211, holding it to be a well-settled principle that, if an agent convert the property confided to him, the principal may at his election ratify the transaction and claim whatever profit is made by it. Where, however, an agent, without the consent of his principal, sells to himself at the price he was authorized to sell to a third person, the waiver by the principal of his right to proceed as for tort founded on the conversion by the agent of his property in purchasing the same himself, and his electing to sue the agent on an implied contract of purchase by the agent, does not constitute a ratification of the original act of the agent in purchasing himself so as to limit the recovery to the price specified; but it is merely a waiver of the element of tort in the transaction. Anderson *v* Grand Forks First Nat. Bank, 5 N. D. 451, 67 N. W. 821.

A mere failure to repudiate the transaction entirely is not necessarily to be construed as a ratification that will relieve the agent of his liability. Bell *v.* Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606.

69. Bird *v.* Brown, 4 Exch. 786, 14 Jur. 132, 19 L. J. Exch. 154 (holding that ratification of a conversion of goods could not make the taking lawful, where third persons had before the ratification secured a valid

a trespass or other tort merely because he acted without authority; in such a case a subsequent ratification relates back and relieves his act of its tortious nature and him from liability therefor.[70]

d. As Against Principal. As against the principal the maxim *omnis ratihabitio*, etc., is operative in all cases; and upon ratification with full knowledge of the facts, or upon an intentional ratification regardless of knowledge, of an act done or contract made by an agent without authority, the principal is bound as fully as if the agent had acted under original authority,[71] especially where the third

lien of the goods); Stephens *v.* Elwall, 4 M. & S. 259. And see *infra*, III, C, 2.

70. Bird *v.* Brown, 4 Exch. 786, 14 Jur. 132, 19 L. J. Exch. 154; Buron *v.* Denman, 2 Exch. 167; Grant *v.* McMillan, 10 U. C. C. P. 536, holding that a distress made by an agent for the benefit of his principal in his own name instead of his principal's and subsequently ratified by the principal is thereby made legal.

71. *Alabama.*— Chapman *v.* Lee, 47 Ala. 143; Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238; Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Blevins *v.* Pope, 7 Ala. 371.

California.— Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156; Market St. R. Co. Hellman, 109 Cal. 571, 42 Pac. 225; Kraft *v.* Wilson, (1894) 37 Pac. 790; Tate *v.* Aitken, 5 Cal. App. 505, 90 Pac. 836.

Connecticut.—Ansonia *v.* Cooper, 64 Conn. 536, 30 Atl. 760.

Delaware.— Bancroft *v.* Wilmington Conference Academy, 5 Houst. 577.

Georgia.— Haney School Furniture Co. *v.* Hightower Baptist Institute, 113 Ga. 289, 38 S. E. 761; Baldwin Fertilizer Co. *v.* Thompson, 106 Ga. 450, 32 S. E. 591; Byrne *v.* Doughty, 13 Ga. 46; Perry *v.* Hudson, 10 Ga. 362.

Illinois.— Taylor *v.* Bailey, 169 Ill. 181, 48 N. E. 200 [*affirming* 68 Ill. App. 622]; Francis *v.* Kerker, 85 Ill. 190; Paul *v.* Berry, 78 Ill. 158.

Indiana.— Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, 49 Am. Rep. 770 (holding that the unauthorized employment of medical assistance by a yardmaster was binding on the railroad corporation when subsequently ratified by it); Moore *v.* Butler University, 83 Ind. 376; Jones *v.* Milton, etc., Turnpike Co., 7 Ind. 547.

Iowa.— Bradford *v.* Smith, 123 Iowa 41, 98 N. W. 377.

Kentucky.— Weist *v.* Yoder, 4 Bibb 529; Barbour *v.* Craig, Litt. Sel. Cas. 213 (holding that a subsequent confirmation of the sale of land made by an agent binds the principal, although he is no party to the contract); Hewling *v.* Wiltshire, 61 S. W. 264, 22 Ky. L. Rep. 1702.

Louisiana.— Sentell *v.* Kennedy, 29 La. Ann. 679; Szymanski *v.* Plassan, 20 La. Ann. 90, 96 Am. Dec. 382; Overby *v.* Overby, 18 La. Ann. 546; Baines *v.* Burbridge, 15 La. Ann. 628; Perrotin *v.* Cucullu, 6 La. 587.

Massachusetts.— Nims *v.* Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 39 Am. St. Rep. 467, 22 L. R. A. 364.

Minnesota.— Hunter *v.* Cobe, 84 Minn. 187, 87 N. W. 612; Woodbury *v.* Larned, 5 Minn. 339.

Mississippi.— Kountz *v.* Price, 40 Miss. 341; Planters' Bank *v.* Sharp, 4 Sm. & M. 75, 43 Am. Dec. 470; Baker *v.* Byrne, 2 Sm. & M. 193.

Missouri.— Matthews *v.* French, 194 Mo. 553, 92 S. W. 634; *In re* Soulard, 141 Mo. 642, 43 S. W. 617; Short *v.* Stephens, 92 Mo. App. 151; Commercial Bank *v.* Bernero, 17 Mo. App. 313.

Nevada.— Adams *v.* Smith, 19 Nev. 259, 9 Pac. 337, 10 Pac. 353; Clarke *v.* Lyon County, 8 Nev. 181.

New Hampshire.— Grant *v.* Beard, 50 N. H. 129.

New Jersey.— Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Lindley *v.* Keim, 54 N. J. Eq. 418, 34 Atl. 1073 [*reversing* (Ch. 1895) 30 Atl. 1063].

New York.— Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Merritt *v.* Bissell, 84 Hun 194, 32 N. Y. Suppl. 559 [*reversed* on other grounds in 155 N. Y. 396, 50 N. E. 280]; Mull *v.* Ingalls, 30 Misc. 80, 62 N. Y. Suppl. 830 (holding that where defendants' agent made a contract which they ratified they are chargeable with the knowledge of their agent that the party contracted with was an agent and not a principal); Hess, etc., Co. *v.* Baar, 14 Misc. 286, 35 N. Y. Suppl. 687 [*affirming* 11 Misc. 619, 32 N. Y. Suppl. 918].

Ohio.— Pollock *v.* Cohen, 32 Ohio St. 514; State *v.* Buttles, 3 Ohio St. 309.

Pennsylvania.— McCulloch *v.* McKee, 16 Pa. St. 289; Pennsylvania Bank *v.* Reed, 1 Watts & S. 101; Vanhorne *v.* Frick, 6 Serg. & R. 90.

Texas.— Brock *v.* Jones, 16 Tex. 461.

Vermont.— Fay *v.* Richmond, 43 Vt. 25.

Virginia.— Richmond Union Pass R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573; Forbes *v.* Hagman, 75 Va. 168.

Wisconsin.— Browne *v.* La Crosse City Gas Light, etc., Co., 21 Wis. 51.

United States.— Townsend *v.* Chappell, 12 Wall. 681, 20 L. ed. 436; Clark *v.* Van Riemsdyk, 9 Cranch 153, 3 L. ed. 688; Farmers' L. & T. Co. *v.* Memphis, etc., R. Co., 33 Fed. 870; Russ *v.* Telfener, 57 Fed. 973 [*affirmed* in 60 Fed. 228, 8 C. C. A. 585]; *In re* Pennsylvania Ins. Co., 22 Fed. 109.

England.— Belshaw *v.* Bush, 11 C. B. 191, 17 Jur. 67, 22 L. J. C. P. 24, 73 E. C. L. 191; Wilson *v.* Tummon, 1 D. & L. 513, 12 L. J. C. P. 306, 6 M. & G. 236, 6 Scott N. R. 894, 46 E. C. L. 235; Ancona *v.* Marks, 7 H. & N. 686, 8 Jur. N. S. 516, 31 L. J. Exch. 163,

person to be affected by the unauthorized act was not privy to the act of the agent;[72] and this rule applies to contracts made in the name of the agent and approved by the principal as well as those made in the name of the principal.[73] By a valid ratification the principal waives the agent's want of authority,[74] and assumes the act or transaction of the agent, not as it was authorized, but as it was done by the agent,[75] with the burdens as well as the benefits resulting;[76] and hence thereby becomes bound by all the instrumentalities used by the agent within the scope of the assumed authority,[77] including his frauds, misrepresentations, and other torts.[78]

5 L. T. Rep. N. S. 753, 10 Wkly. Rep. 251; Secretary of State of India *v.* Kamachee Boye Sahaba, 7 Moore Indian App. 476, 19 Eng. Reprint 388, 13 Moore P. C. 22, 15 Eng. Reprint 9.

Canada.— Scott *v.* New Brunswick Bank, 23 Can. Sup. Ct. 277; Patterson *v.* Fuller, 32 U. C. Q. B. 240.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 662–664. And see *infra*, III, E, 1, a, (II), (A); III, E, 2, c, d.

72. Reynolds *v.* Dothard, 11 Ala. 531.

73. Stansell *v.* Leavitt, 51 Mich. 536, 16 N. W. 892; Little *v.* Stettheimer, 13 Mo. 572, holding that where an agent for the sale of goods purchased other goods in his own name to facilitate the sale, and his principal afterward sanctioned such purchase, he was liable for the price of the additional goods.

74. School Township No. 40 *v.* McCormick, 41 Ill. 323 (holding that by ratification the principal waives any right of action based on the agent's wrongful act); Ohio, etc., R. Co. *v.* Middleton, 20 Ill. 629; Lutjeharms *v.* Smith, 76 Nebr. 260, 107 N. W. 256; Stephens *v.* Ozbourne, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. Rep. 957; Wells *v.* Simpson Nat. Bank, 19 Tex. Civ. App. 636, 47 S. W. 1024.

75. *Iowa.*— St. Louis Refrigerator, etc., Co. *v.* Vinton Washing Mach. Co., 79 Iowa 239, 44 N. W. 370, 18 Am. St. Rep. 366.

Maryland.— Swatara R. Co. *v.* Brune, 6 Gill 41.

Minnesota.— Singer Mfg. Co. *v.* Flynn, 63 Minn. 475, 65 N. W. 923.

Missouri.—Menkens *v.* Watson, 27 Mo. 163; Donovan Real Estate Co. *v.* Clark, 84 Mo. App. 163.

New York.— Rollins *v.* Sidney B. Bowman Cycle Co., 84 N. Y. App. Div. 287, 82 N. Y. Suppl. 781.

Pennsylvania.— Tapper *v.* Sunlight Oil, etc., Co., 192 Pa. St. 620, 44 Atl. 286.

South Dakota.— Nelson *v.* National Drill Mfg. Co., 20 S. D. 299, 105 N. W. 630.

Texas.— Houston, etc., R. Co. *v.* Wright, 15 Tex. Civ. App. 151, 38 S. W. 836.

Wisconsin.— Saveland *v.* Green, 40 Wis. 431.

Wyoming.— Knight *v.* Beckwith Commercial Co., 6 Wyo. 500, 46 Pac. 1094.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 662–667. And see *supra*, I, F, 2, f; *infra*, III, E, 1, a, (II).

Where an agent executed a contract in duplicate, but signed one by his own name alone and the other by the name of the principal, it was held that the ratification of one instrument could not operate as a ratification of the duplicate. To have such effect both instruments must be capable of ratification by the same act and in the same way. Crane *v.* Partland, 9 Mich. 493.

76. Taylor *v.* Robinson, 14 Cal. 396; Ansonia *v.* Cooper, 64 Conn. 536, 30 Atl. 760; Norton *v.* Bull, 43 Mo. 113; Bruen *v.* Kansas City Agricultural, etc., Assoc., 40 Mo. App. 425; Dalton *v.* Hamilton, 12 N. Brunsw. 423.

77. Sokup *v.* Letellier, 123 Mich. 640, 82 N. W. 523; Busch *v.* Wilcox, 82 Mich. 315, 336, 46 N. W. 940, 47 N. W. 328, 21 Am. St. Rep. 563; Brong *v.* Spence, 56 Nebr. 638, 77 N. W. 54; Budd *v.* Howard Thomas Co., 40 Misc. (N. Y.) 52, 81 N. Y. Suppl. 152.

78. *Alabama.*— Street *v.* Sinclair, 71 Ala. 110 (holding that where a principal with full knowledge of an indictable trespass committed by his agent ratifies and adopts the same, he is personally liable therefor); McGowen *v.* Garrard, 2 Stew. 479 (holding that where a principal affirms a contract made by his agent with the full knowledge of circumstances alleged as fraudulent, he cannot afterward avoid the same on the ground of fraud or want of authority in the agent).

Arkansas.— Creson *v.* Ward, 66 Ark. 209, 49 S. W. 827.

California.— Avakian *v.* Noble, 121 Cal. 216, 53 Pac. 559, holding that by accepting the benefits of the agent's torts, defendant ratified and adopted them, and was liable therefor. See Wilder *v.* Beede, 119 Cal. 646, 51 Pac. 1083.

Georgia.— Crockett *v.* Sibley, 3 Ga. App. 554, 60 S. E. 326, holding that, under Civ. Code (1895), §§ 3031, 3820, providing that by ratification of a tort committed for one's benefit the ratifier becomes liable as if he commanded it, a principal is also liable for the wilful trespass of his agent where he ratifies the same.

Illinois.— Dewar *v.* Montreal Bank, 115 Ill. 22, 3 N. E. 746 [*affirming* 6 Ill. App. 294].

Indiana.— Shearer *v.* Evans, 89 Ind. 400, holding that both the principal and agent are liable for conversion where the principal ratifies his agent's act in purchasing wheat from a farm hand who wrongfully took it from his employer, and selling the wheat after mixing it with other wheat.

Iowa.— Clark *v.* Ralls, (1885) 24 N. W. 567.

Kentucky.— Singer Mfg. Co. *v.* Stephens, 53 S. W. 525, 21 Ky. L. Rep. 946.

Massachusetts.—Nims *v.* Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 39 Am. St. Rep. 467, 22 L. R. A. 364 (holding that ratification of an unauthorized act will make the principal liable for an injury resulting

But a ratification does not bind a principal for subsequent acts of the agent which were no part of the act ratified,[79] nor for acts outside the authority approved by the principal's ratification.[80]

e. As Against Third Persons — (1) *In General.* As a general rule if a principal does not deny the power of an agent to act for him, but on the other hand ratifies his unauthorized acts, it does not lie in the mouth of any third person to call in question the agent's authority.[81] Accordingly, as a general rule, a contract or transaction that has been ratified by a principal will bind the other party thereto the same as though it had been previously authorized.[82] But where the third person colludes with the agent to defraud or deceive his principal, the principal does not, by suing to hold the agent accountable for his wrong, release the third person from his liability, nor ratify the contract so as to be liable to the third

from the negligence of the agent in doing the act); Williams *v.* Mitchell, 17 Mass. 98.

Mississippi.— Exum *v.* Brister, 35 Miss. 391.

Missouri.— Judd *v.* Walker, 114 Mo. App. 128, 89 S. W. 558.

North Carolina.— See Moore *v.* Rogers, 51 N. C. 297.

Pennsylvania.— Meyerhoff *v.* Daniels, 173 Pa. St. 555, 34 Atl. 298, 51 Am. St. Rep. 782.

Tennessee.— Stephens *v.* Ozbourne, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. Rep. 957; Stevens *v.* Ozburn, 1 Tenn. Ch. App. 213.

Texas.— American Nat. Bank *v.* Cruger, 91 Tex. 446, 44 S. W. 278.

Virginia.— Forbes *v.* Hagman, 75 Va. 168.

United States.—Doggett *v.* Emerson, 7 Fed. Cas. No. 3,960, 3 Story 700.

England.— Haseler *v.* Lemoyne, 5 C. B. N. S. 530, 28 L. J. C. P. 103, 4 Jur. N. S. 1279, 7 Wkly. Rep. 14, 94 E. C. L. 530; Wilson *v.* Tummon, 1 D. & L. 513, 12 L. J. C. P. 306, 6 M. & G. 236, 6 Scott N. R. 894, 46 E. C. L. 235; Bird *v.* Brown, 4 Exch. 786, 14 Jur. 132, 19 L. J. Exch. 154; Hilbery *v.* Hatton, 2 H. & C. 822, 33 L. J. Exch. 190, 10 L. T. Rep. N. S. 39 (holding that if a principal ratifies the purchase by his agent of a chattel which the seller had no right to sell, he is guilty of a conversion, although at the time of the ratification he had no knowledge that the sale was unlawful); Carter *v.* St. Mary Abbott's Vestry, 64 J. P. 548; Lewis *v.* Read, 14 L. J. Exch. 295, 13 M. & W. 834.

Canada.— Scott *v.* New Brunswick Bank, 23 Can. Sup. Ct. 277.

See 40 Cent. Dig. tit. "Principal and Agent," § 664.

79. Manning *v.* Keenan, 73 N. Y. 45.

80. Todd *v.* Bishop, 136 Mass. 386; Humphrey *v.* Havens, 12 Minn. 298; Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616; Baldwin *v.* Burrows, 47 N. Y. 199, holding that a ratification by a principal of specific unauthorized acts of his agent, although equivalent, as to the act ratified, to a previous authority, is not retroactive to the extent of binding the principal for other acts in excess of the authority of the agent for which the principal might have been bound if they had been done under color of a previous authority actually given. See Hodges *v.* Holderby, 49 N. C. 500.

81. *California.*— Cassin *v.* Marshall, 18 Cal. 689.

Iowa.— Bellinger *v.* Collins, 117 Iowa 173, 90 N. W. 609.

Michigan.— Scott *v.* Detroit Young Men's Soc., 1 Dougl. 119.

Montana.— Lindsley *v.* McGrath, 34 Mont. 564, 87 Pac. 961.

New York.— Rogers *v.* Kneeland, 10 Wend. 218 [*affirmed* in 13 Wend. 114], holding that, although a sale is contrary to instructions, if it is afterward ratified by the principals it is valid, and third persons cannot set up the agent's want of authority.

Pennsylvania.— Daughters of American Revolution *v.* Schenley, 204 Pa. St. 572, 54 Atl. 366.

Tennessee.— Leonard *v.* Mason, 1 Lea 384, holding that third persons cannot attack the execution of a power of attorney on the ground that the one who executed it was not the person to whom the power was given and therefore had no authority to execute it, where the principal himself does not seek to avoid, but acquiesces in, such execution.

See also I, E, 2, c.

82. *Connecticut.*— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356; Johnson *v.* Smith, 21 Conn. 627.

Illinois.— Hills *v.* McMunn, 232 Ill. 488, 83 N. E. 963; Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 454.

Indiana.— Nichols, etc., Co. *v.* Berning, 37 Ind. App. 109, 76 N. E. 776.

Iowa.— Warder, etc., Co. *v.* Cuthbert, 99 Iowa 681, 68 N. W. 917.

Kentucky.— Liggett *v.* Ashley, 5 Litt. 178.

Massachusetts.— Gilmore *v.* Wilbur, 12 Pick. 120, 22 Am. Dec. 410.

New York.— Smith *v.* Savin, 69 Hun 311, 23 N. Y. Suppl. 568, 30 Abb. N. Cas. 192 [*affirmed* in 141 N. Y. 315, 36 N. E. 338]; Universal Beer Keg Co. *v.* Brown, 9 N. Y. St. 91, holding that where a contract was entered into by a representative of a corporation for its benefit but without its knowledge, and it was subsequently adopted by it, the corporation can sue to recover damages for the breach thereof.

Texas.— Waco Bridge Co. *v.* Waco, 85 Tex. 320, 20 S. W. 137.

Wisconsin.— Weiseger *v.* Wheeler, 14 Wis. 101. *Compare* Dodge *v.* Hopkins, 14 Wis. 630.

person thereon.[83] After ratification the property of the principal in the hands of an agent cannot be reached by a creditor of the agent.[84]

(II) *Right of Withdrawal by Other Party.* As to whether or not an unauthorized contract entered into by an agent on behalf of his principal is binding on the third person by the mere fact of ratification without any further action on his part, or whether he has a right to withdraw therefrom, the authorities are conflicting. According to one view, the third person has no right to withdraw his offer made to the agent, and a ratification by the principal, at least if made within a reasonable time, relates back to the time the contract was entered into so as to make it binding on the third person as from that moment, notwithstanding that on learning of the agent's want of authority he repudiated the contract before it had been ratified by the principal,[85] although it has been held that the agent and the third person may by mutual assent release the latter from the unauthorized contract at any time before ratification.[86] According to another view, the ratification of the principal cannot bind the third person unless after such ratification the third person renews his assent.[87] Between these two extremes the better rule, and that supported by the weight of authority, is that until ratification the third person is free to withdraw from the contract, but if he does not do so the principal's ratification cures the defect in authority and the third person becomes thereafter bound as though the authority had been previously conferred.[88]

See 40 Cent. Dig. tit. "Principal and Agent," §§ 662–667. And see *infra*, III, F, 1, a, (I); III, F, 1, b, (I).

83. Barnsdall *v.* O'Day, 134 Fed. 828, 67 C. C. A. 278.

84. Rogers *v.* Hendsley, 2 La. 597, holding that if an agent in collecting a debt take an obligation payable to himself and give up the old one for the benefit of the principal, who ratifies the transaction, a creditor of the agent cannot attach the obligation as the property of the latter.

85. *In re* Tiedeman, [1899] 2 Q. B. 66, 68 L. J. Q. B. 852, 81 L. T. Rep. N. S. 191; *In re* Portuguese Consol. Copper Mines, 45 Ch. D. 16, 63 L. T. Rep. N. S. 423, 2 Meg. 249, 39 Wkly. Rep. 25; Bolton *v.* Lambert, 41 Ch. D. 295, 58 L. J. Ch. 425, 60 L. T. Rep. N. S. 687, 37 Wkly. Rep. 434. See Andrews *v.* Ætna L. Ins. Co., 92 N. Y. 596.

86. Walter *v.* James, L. R. 6 Exch. 124, 40 L. J. Exch. 104, 24 L. T. Rep. N. S. 188, 19 Wkly. Rep. 472.

87. Cowan *v.* Curran, 216 Ill. 598, 75 N. E. 322 (holding that a contract to purchase land, made by an agent who has no authority to act for the purchaser in the premises, is not binding upon the vendor, and cannot be made binding on him without his consent by the act of the purchaser in instituting suit for specific performance and attempting to ratify the contract); Atlee *v.* Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103; Dodge *v.* Hopkins, 14 Wis. 630 (the leading case for this view, holding that where a contract for the sale of land was made by a person who assumed to act as the agent of the owner, and part of the purchase-money was paid to the agent, the owner of the land was at liberty to reject it, and his subsequent acceptance being an act with which the other party was in no way connected, imposed no obligation on the latter until he actually assented to it). *Compare* Mason *v.* Caldwell, 10 Ill. 196, 48 Am. Dec. 330, holding that if a person professing to act on behalf of another, but without authority, enters into a contract which for want of such authority would render the professed agent personally liable, such contract may be adopted by the principal at any time before it is repudiated by the other party.

88. *Alabama.*— Wilkinson *v.* Harwell, 13 Ala. 660, holding that where the principal, on being informed of the unauthorized act, refuses to ratify and confirm, and the other party withdraws, the principal cannot, after ward enforce the transaction by confirming it.

Pennsylvania.— McClintock *v.* South Penn Oil Co., 146 Pa. St. 144, 23 Atl. 211, 28 Am. St. Rep. 785.

South Carolina.— Breithaupt *v.* Thurmond, 3 Rich. 216, in which it was held that if one assuming to be the agent of another, although not so in fact, sells land as such agent, the contract will be binding upon the purchaser after the confirmation by the owner of the land, if he does not recede from it before.

Texas.— Haldeman *v.* Chambers, 19 Tex. 1, holding that where an agent makes an assignment, without any authority, of the property of his principal as consideration for a purchase of land for himself, covenanting that he is authorized to make the assignment and engaging to perfect it by delivery of the property within a specified time, the assignee, on discovering the agent's want of authority, may either rescind the contract at once or allow the principal to assume it, but if the assignee rescinds it, he cannot afterward hold the principal liable on it.

United States.— Farmers' L. & T. Co. *v.* Memphis, etc., R. Co., 83 Fed. 870.

See *infra*, III, F, 1, a, (I).

G. Termination of Relation [89] **— 1. By Act of Parties — a. By Force of Original Agreement** — (i) *Fulfilment of Purpose.* An agency is of course created by the principal for a purpose, and when this purpose is fully accomplished the agency *ipso facto* ends, and the authority of the agent to bind the principal by further action thereupon ceases.[90] Under some circumstances it may be necessary, in order to work a termination of the agency, that the principal should either accept or reject what the agent has done. In this event the agency generally terminates when the principal accepts the agent's acts,[91] and not before acceptance or rejection thereof.[92] Ordinarily, so long as the purpose of the agency has not been fulfilled as originally contemplated, the agent's power continues,[93] unless

89. Termination of relation as affecting: Agent's duty not to act in opposition to principal's interest see *infra*, III, A, 1, k. Agent's right to compensation see *infra*, III, B, 2, b. Agent's right to reimbursement and indemnity see *infra*, III, B, 3, c, (II).

Termination of subagency: By death of primary agent see *infra*, I, G, 2, c, (IV), (B), (4). By expiration of term of primary agent see *infra*, I, G, 1, a, (II). Record of revocation of agent's authority as notice to subagent see *infra*, page 1306, note 51.

Termination of relation of master and servant see MASTER AND SERVANT, 26 Cyc. 980 *et seq.*

90. *California.*— Tuite *v.* Wakelee, 19 Cal. 692.

Georgia.—Atlanta Sav. Bank *v.* Spencer, 107 Ga. 629, 33 S. E. 878, holding that an agency to obtain a loan terminates at any event when the money is received by the borrower and all the papers which the transaction calls for have been executed and delivered to the respective parties.

Illinois.— Short *v.* Millard, 68 Ill. 292.

Indiana.— Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413. And see Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

Iowa.— Moore *v.* Stone, 40 Iowa 259; Tod *v.* Benedict, 15 Iowa 591. See, however, Briggs *v.* Yetzer, 103 Iowa 342, 72 N. W. 647.

Kentucky.— Bemiss *v.* Robertson, 124 Ky. 397, 99 S. W. 291, 30 Ky. L. Rep. 521.

Michigan.— People *v.* Manistee County, 40 Mich. 585, holding that the power delegated to an agent to "fix and determine" a matter in which he has no power of his own outside of the agency is expended when he has once acted.

Missouri.— Grcening *v.* Steele, 122 Mo. 287, 26 S. W. 971; Herd *v.* Buffalo Bank, 66 Mo. App. 643.

New York.— Hermann *v.* Niagara F. Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197, holding that the authority of an agent to procure insurance ends as soon as he has procured it, and hence he has no further power to discharge it.

Pennsylvania.— Philadelphia *v.* Johnson, 208 Pa. St. 645, 57 Atl. 1114; Denny *v.* Lyon, 38 Pa. St. 98, 80 Am. Dec. 463; Yingling *v.* West End Imp. Co., 5 Pa. Dist. 607.

Vermont.— See Soule *v.* Dougherty, 24 Vt. 92.

United States.— Farmers', etc., Bank *v.* Stickney, 8 Fed. Cas. No. 4,657, Brunn. Col. Cas. 543; Walker *v.* Derby, 29 Fed. Cas. No. 17,068, 5 Biss. 134.

England.— Blackburn *v.* Scholes, 2 Campb. 341, 11 Rev. Rep. 723.

Canada.— McGhie *v.* Gilbert, 6 N. Brunsw. 235, holding that the authority of an agent specially authorized to draw a bill of exchange for a particular purpose ceases on the acceptance, and if the drawer is discharged by want of notice of dishonor, the agent cannot without further express authority revive the liability by agreeing to waive the legal discharge.

See 40 Cent. Dig. tit. "Principal and Agent," § 53.

In other words the principal may limit the authority of the agent to the doing of certain specific acts, in which case the power of the agent terminates when he has done those acts. See cases cited *supra*, this note.

Accomplishment of purpose of agency, by principal: In general see *infra*, I, G, 2, a. Disposal of subject-matter of agency see *infra*, I, G, 2, b, (II).

91. Bemiss *v.* Robertson, 124 Ky. 397, 99 S. W. 291, 30 Ky. L. Rep. 521; Ganseford *v.* Dutillet, 1 Mart. N. S. (La.) 284; Obregon *v.* De Mier, 58 How. Pr. (N. Y.) 301.

92. Wallace *v.* Goold, 91 Ill. 15, holding that if an agent is employed to secure a debt of his principal, which he does by obtaining from the debtor notes payable to the debtor with his indorsement on them, his agency does not cease while he still holds the notes and his acts have not been approved by his principal.

93. *Kansas.*— Brockmeyer *v.* Washington Nat. Bank, 40 Kan. 376, 744, 19 Pac. 855, 21 Pac. 300.

Louisiana.— Boykin *v.* Wright, 11 La. Ann. 531, where it was held that when an agent to sell all the principal's lands in a certain parish sells part of them, and it is afterward discovered that the portion intended had not been conveyed, he may remove the obstacle to a perfect sale and correct the description of the land by agreeing to a different location so as to carry out the original intention of the purchaser and himself, since until this be done the sale is not complete and his power not terminated.

Minnesota.— Hillis *v.* Stout, 42 Minn. 410, 44 N. W. 982.

New York.— Matter of Chambers, 17 N. Y. App. Div. 340, 45 N. Y. Suppl. 264. And see Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542.

the agent has definitely and finally failed in his attempt to accomplish that purpose.[94]

(II) *Expiration of Term.*[95] An agent may be appointed for a fixed term, in which case, whether the purpose of the agency has been accomplished or not, the expiration of the term puts an end to the agency; and unless the term is extended the rights and liabilities of the parties are limited to acts done within the term, and no later acts of the agent have any binding force on the principal,[96] although if the terms of the authority were such as to imply a power of the agent to bring to completion matters undertaken before the expiration of the time limit, he will be bound by acts of the agent as to such matters.[97] The duration of the term of the agency may be expressly stated in the power, or, in the absence of such statement, the provisions of the contract of employment or the surrounding circumstances may be such as to imply a definite term.[98] The circumstances may

United States.— Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371. And see Farmers', etc., Bank *v.* Stickney, 8 Fed. Cas. No. 4,657, Brunn. Col. Cas. 543.

See 40 Cent. Dig. tit. "Principal and Agent," § 53.

And see Hynson *v.* Noland, 14 Ark. 710.

Continuation of authority for reasonable time see *infra*, III, B, 2, b, (I), (B), (D).

94. Keegan *v.* Rock, 128 Iowa 39, 102 N. W. 805, where an agent was authorized to effect a loan from a certain person, and the court held that upon his failure to accomplish this, his agency terminated, and he had no further authority to make other loans.

95. Agency at will see *infra*, I, G, 1, b, (II).

96. *Colorado.*— Rundle *v.* Cutting, 18 Colo. 337, 32 Pac 994, holding that where an agency to sell land has expired by express limitation, a subsequent execution thereof is invalid.

Illinois.— Gundlach *v.* Fischer, 59 Ill. 172, where by a written agreement a person was constituted agent to sell machines, and the only provision therein in regard to the duration of the agency was an agreement by the principal to furnish the agent such number of machines as he could sell prior to a certain date, and the court held that as the agency continued only to that date, the sureties on a bond given to secure the faithful performance of his duties by the agent and the payment of all moneys received by him were bound only for a failure by the agent to account for machines received by him prior to that date.

Indiana.— Longworth *v.* Conwell, 2 Blackf. 469.

New York.— Marbury *v.* Barnet, 17 Misc. 386, 40 N. Y. Suppl. 76.

North Dakota.— Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 11 N. D. 280, 91 N. W. 436.

Pennsylvania.— Yingling *v.* West End Imp. Co., 5 Pa. Dist. 607.

England.— Danby *v.* Coutts, 29 Ch. D. 500, 54 L. J. Ch. 577, 52 L. T. Rep. N. S. 401, 33 Wkly. Rep. 559; Arlington *v.* Merricke, 2 Saund. 403, 85 Eng. Reprint 1215.

See 40 Cent. Dig. tit. "Principal and Agent," § 52.

97. Brockmeyer *v.* Washington Nat. Bank, 40 Kan. 376, 744, 19 Pac. 855, 21 Pac. 300; Matter of Chambers, 17 N. Y. App. Div. 340, 45 N. Y. Suppl. 264 (holding that an agency to sell goods on commission continues as to the proceeds of the sale); Clements *v.* Macheboeuf, 92 U. S. 418, 23 L. ed. 504 (in which it was held that where a person holding a patent from the United States for certain lands authorizes his agent "to act upon the application and demand of any person actually owning" town lots within the limits of the lands, and to execute and deliver deeds to such persons who "may apply for the same within three months from" a certain date, the "application and demand" must be made within that time, but the authority of the agent to adjudicate the claims is not so limited).

98. *Illinois.*— Gundlach *v.* Fischer, 59 Ill. 172, in which a person was constituted agent to sell machines, and the only provision in the agreement for his appointment relating to the duration of the agency was an agreement by the principal to furnish the agent such number of machines as he could sell prior to a certain date, and it was held that the agency continued only to that date.

Kentucky.— Smith *v.* Theobald, 86 Ky. 141, 5 S. W. 394, 9 Ky. L. Rep. 449.

Maryland.— Norton *v.* Cowell, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331.

Massachusetts.— Heard *v.* March, 12 Cush. 580.

England.— Danby *v.* Coutts, 29 Ch. D. 500, 54 L. J. Ch. 577, 52 L. T. Rep. N. S. 401, 33 Wkly. Rep. 559; Fawcett *v.* Cash, 5 B. & Ad. 904, 3 L. J. K. B. 113, 3 N. & M. 177, 27 E. C. L. 381; Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21; Rex *v.* Birdbrooke, 4 T. R. 245.

See 40 Cent. Dig. tit. "Principal and Agent," § 52.

Implied limitation to term of principal's absence.— A power of attorney contained a recital that the donor was about to return to South Australia, and was "desirous of appointing an attorney or attorneys to act for him during his absence from England." The operative part of the deed, which gave the attorney large powers of mortgaging the donor's property, contained no mention of the duration of those powers. It was held that the operative part of the deed was con-

be such that an extension of the term of the agency may be implied;[99] but no implication of extension at the expiration of the term arises from the mere fact that the principal continues in the business to which the agency related.[1] The term of authority of a subagent who becomes the agent of the principal, and not the agent of the agent who employed him, is not affected by the termination of the authority of the latter.[2]

b. By Revocation or Repudiation by Principal — (i) *Power of Revocation* — (a) *General Rule.* Save in exceptional cases,[3] a principal has power [4] to revoke the authority of his agent at his pleasure, with or without reason.[5] The principal

trolled by the recital, and consequently that charges effected by the attorney upon the property of the donor while he was in England were invalid as against him. Danby *v.* Coutts, 29 Ch. D. 500, 54 L. J. Ch. 577, 52 L. T. Rep. N. S. 401, 33 Wkly. Rep. 559. So letters of attorney reciting the principal's intended departure from the country, "to remain absent in Europe and elsewhere, for some length of time," are limited by the recital of absence, and cannot be renewed by redelivery without change of terms or date upon the departure of the principal for Europe the second time. Heard *v.* March, 12 Cush. (Mass.) 580. To the contrary see Forbes *v.* Wooderson, 49 Me. 14, holding that where one is constituted an agent for the purchase and sale of goods in the name of the principal, a recital in the power of attorney that the principal "is about to leave upon a voyage to sea" does not limit the duration of the agency to the time when the voyage is completed.

99. Hillis *v.* Stout, 42 Minn. 410, 44 N. W. 982, holding that where plaintiffs appointed defendant their agent for three days to sell land at a named price, and on the last day of the agency defendant represented that he could not sell the land for the sum specified but that he could sell it for a less sum, and plaintiffs authorized defendant to make the sale at the smaller price which he said he could obtain, there was an extension of the agency of defendant.

1. Moore *v.* Stone, 40 Iowa 259; Marbury *v.* Barnet, 17 Misc. (N. Y.) 386, 40 N. Y. Suppl. 76.

2. Northampton Bank *v.* Pepoon, 11 Mass. 288, holding that a power of attorney from a bank will not be invalidated by the expiration of the term of office of the directors who executed it.

3. See *infra*, I, G, 1, b, (I), (B).

4. Right to revoke as distinguished from power to revoke see *infra*, I, G, 1, b, (II).

5. *Alabama.*— Chambers *v.* Seay, 73 Ala. 372; Evans *v.* Fearne, 16 Ala. 689, 50 Am. Dec. 197.

Arizona.— Taylor *v.* Burns, 8 Ariz. 463, 76 Pac. 623 [*affirmed* in 203 U. S. 120, 27 S. Ct. 40, 51 L. ed. 116]; Trickey *v.* Crowe, 8 Ariz. 176, 71 Pac. 965 [*affirmed* in 204 U. S. 228, 27 S. Ct. 275, 51 L. ed. 454].

Arkansas.— Nicks *v.* Rector, 4 Ark. 251.

California.— Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427; Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Brown *v.* Pforr, 38 Cal. 550.

Colorado.— Darrow *v.* St. George, 8 Colo. 592, 9 Pac. 791.

Connecticut.— Mansfield *v.* Mansfield, 6 Conn. 559, 16 Am. Dec. 76, power to sell and convey held a naked power and revocable.

Delaware.— Gibbons *v.* Gibbons, 4 Harr. 105.

Georgia.— Linder *v.* Adams, 95 Ga. 668, 22 S. E. 687; Phillips *v.* Howell, 60 Ga. 411; Wimberly *v.* Bryan, 55 Ga. 198; Howard College *v.* Pace, 15 Ga. 486.

Illinois.— Walker *v.* Denison, 86 Ill. 142; Gilbert *v.* Holmes, 64 Ill. 548; Bonney *v.* Smith, 17 Ill. 531; Nevitt *v.* Woodburn, 82 Ill. App. 649.

Indiana.— Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Pickler *v.* State, 18 Ind. 266.

Iowa.— MacGregor *v.* Gardner, 14 Iowa 326.

Kansas.— Black *v.* Harsha, 7 Kan. App. 794, 54 Pac. 21.

Kentucky.— Parry Mfg. Co. *v.* Lyon, 111 Ky. 613, 64 S. W. 436, 23 Ky. L. Rep. 884; Andrews *v.* Travelers' Ins. Co., 70 S. W. 43, 24 Ky. L. Rep. 844.

Louisiana.— Spear *v.* Gardner, 16 La. Ann. 383.

Maryland.— Smith *v.* Dare, 89 Md. 47, 42 Atl. 909; Attrill *v.* Patterson, 58 Md. 226.

Massachusetts.— Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730; Langdon *v.* Langdon, 4 Gray 186.

Minnesota.— Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575 [*affirmed* in 203 U. S. 582, 27 S. Ct. 780, 51 L. ed. 327].

Mississippi.— Kolb *v.* Bennett Land Co., 74 Miss. 567, 21 So. 233.

Missouri.— Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213; Green *v.* Cole, 103 Mo. 70, 15 S. W. 317; Burke *v.* Priest, 50 Mo. App. 310, 312, where the court said: "The authority of the agent to represent the principal depends upon the will and license of the principal. It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes that it is called into being; and, unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent has no right to insist upon a further execution of the authority if the principal desires it to terminate."

Nebraska.— Woods *v.* Hart, 50 Nebr. 497, 70 N. W. 53.

New Hampshire.— Rochester *v.* Whitehouse, 15 N. H. 468, holding that since authority is conferred by the mere will of the principal, and is to be executed for his benefit and for his own purposes, the agent cannot insist upon acting when the principal has with-

may revoke the agency even where it is expressed to be sole and exclusive,[6] or, in the absence of any consideration for the stipulation,[7] where the power of attorney expressly stipulates that it shall continue for a definite term [8] or that it is irrevocable.[9]

(B) *Exceptions* — (1) In General. The rule that a principal has power to revoke the authority of his agent is generally said to be subject to the three exceptions mentioned in the following sections.[10] In addition to these exceptions it has

drawn his confidence and no longer desires his aid.

New Jersey.— Hartshorne *v.* Thomas, 43 N. J. Eq. 419, 10 Atl. 843.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432; Marbury *v.* Barnet, 17 Misc. 386, 40 N. Y. Suppl. 76; Jackson *v.* Davenport, 18 Johns. 295 [*affirmed* in 20 Johns. 537]. And see Conley *v.* Dazian, 114 N. Y. 161, 21 N. E. 135.

North Carolina.— Wilmington *v.* Bryan, 141 N. C. 666, 54 S. E. 543; Ballard *v.* Travellers' Ins. Co., 119 N. C. 187, 25 S. E. 956; North Carolina State L. Ins. Co. *v.* Williams, 91 N. C. 69, 49 Am. Rep. 637; Brookshire *v.* Voncannon, 28 N. C. 231.

Ohio.— Hitchcock *v.* Kelley, 18 Ohio Cir. Ct. 808, 4 Ohio Cir. Dec. 180.

Oklahoma.— Kimmell *v.* Powers, (1907) 91 Pac. 687.

Pennsylvania.— McMahan *v.* Burns, 216 Pa. St. 448, 65 Atl. 806; Macfarren *v.* Gallinger, 210 Pa. St. 74, 59 Atl. 435; Blackstone *v.* Buttermore, 53 Pa. St. 266; Hartley's Appeal, 53 Pa. St. 212, 91 Am. Dec. 207; Coffin *v.* Landis, 46 Pa. St. 426; Yingling *v.* West End Imp. Co., 5 Pa. Dist. 607.

Rhode Island.— Flaherty *v.* O'Connor, 24 R. I. 587, 54 Atl. 376; Providence Gas Burner Co. *v.* Barney, 14 R. I. 18.

South Carolina.— State *v.* Brownlee, 2 Speers 519.

Texas.— Daugherty *v.* Moon, 59 Tex. 397; Hollingsworth *v.* Young County, 40 Tex. Civ. App. 590, 91 S. W. 1094.

Utah.— Montague *v.* McCarroll, 15 Utah 318, 49 Pac. 418.

United States.— Wilcox, etc., Sewing-Mach. Co. *v.* Ewing, 141 U. S. 627, 12 S. Ct. 94, 35 L. ed. 882; Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342]; Hall *v.* Gambrill, 92 Fed. 32, 34 C. C. A. 190 [*affirming* 88 Fed. 709]; Stier *v.* Imperial L. Ins. Co., 58 Fed. 843; Oregon, etc., Mortg. Sav. Bank *v.* American Mortg. Co., 35 Fed. 22, 13 Sawy. 260; U. S. *v.* Jarvis, 26 Fed. Cas. No. 15,468, 2 Ware 274.

England.— Gibson *v.* Minet, 2 Bing. 7, 9 E. C. L. 457, 1 C. & P. 247, 12 E. C. L. 148, 2 L. J. C. P. O. S. 99, 9 Moore C. P. 31, R. & M. 68, 21 E. C. L. 703; Venning *v.* Bray, 2 B. & S. 502, 8 Jur. N. S. 1039, 31 L. J. Q. B. 181, 6 L. T. Rep. N. S. 327, 10 Wkly. Rep. 561, 110 E. C. L. 502; Smart *v.* Sandars, 5 C. B. 895, 12 Jur. 751, 17 L. J. C. P. 258, 57 E. C. L. 895; Bromley *v.* Holland, Coop. 9, 35 Eng. Reprint 458, 7 Ves. Jr. 3, 28, 6 Rev. Rep. 58, 32 Eng. Reprint 2; De Comas *v.* Prost, 11 Jur. N. S. 417, 12 L. T. Rep. N. S. 682, 3 Moore P. C. N. S. 158, 13 Wkly. Rep. 595, 16 Eng. Reprint 59; Raleigh *v.* Atkinson, 9 L. J. Exch. 206, 6 M. & W. 67.

Canada.— Gailbert *v.* Atteaux, 23 Quebec Super. Ct. 427.

See 40 Cent. Dig. tit. "Principal and Agent," § 54. And see *infra*, I, G, 1, b, (II).

This is so even though the power is expressed in the broadest possible terms, giving the agent the fullest possible authority to act for the principal. Barr *v.* Schroeder, 32 Cal. 609.

Where several tenants in common appoint one of their number their common agent, any one of them may at any time revoke such agency as to his own interests, and third persons having notice of the revocation are bound to account to the principal thereafter. Barrett *v.* Bemelmans, 163 Pa. St. 122, 29 Atl. 756. See, generally, Tenancy in Common.

Partial revocation relieves the principal *pro tanto* from liability for acts subsequently done under the previous authority. Glover *v.* Ames, 8 Fed. 351. See *infra*, II, A, 2.

Compelling specific performance of contract of agency by principal see *infra*, I, G, 1, b, (II).

6. Chambers *v.* Seay, 73 Ala. 372; Kolb *v.* Bennett Land Co., 74 Miss. 567, 21 So. 233; Woods *v.* Hart, 50 Nebr. 497, 70 N. W. 53.

7. McMahan *v.* Burns, 216 Pa. St. 448, 65 Atl. 806; Montague *v.* McCarroll, 15 Utah 318, 49 Pac. 418.

8. Walker *v.* Denison, 86 Ill. 142; McMahan *v.* Burns, 216 Pa. St. 448, 65 Atl. 806.

9. *Alabama.*— Chambers *v.* Seay, 73 Ala. 372.

California.— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Illinois.— Walker *v.* Denison, 86 Ill. 142.

Iowa.— MacGregor *v.* Gardner, 14 Iowa 326.

Minnesota.— Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575 [*affirmed* in 203 U. S. 582, 27 S. Ct. 780, 51 L. ed. 327].

Mississippi.— Kolb *v.* Bennett Land Co., 74 Miss. 567, 21 So. 233.

Pennsylvania.— McMahan *v.* Burns, 216 Pa. St. 448, 65 Atl. 806; Blackstone *v.* Buttermore, 53 Pa. St. 266.

Utah.— Montague *v.* McCarroll, 15 Utah 318, 49 Pac. 418.

See 40 Cent. Dig. tit. "Principal and Agent," § 54.

However, a provision in a power of attorney that it is to be irrevocable, although not conclusive, tends to prove that the parties understood that the attorney had an interest in the subject-matter which would render the power irrevocable. Norton *v.* Whitehead, 84 Cal. 263, 24 Pac. 154, 18 Am. St. Rep. 172.

10. See *infra*, I, G, 1, b, (I), (B), (2)-(4).

been held that an agency is irrevocable by act of the principal alone if the power is expressly declared to be irrevocable and the agent is given an interest in its execution;[11] and also that the principal cannot revoke a power where it is granted as an incident to a complete contract for services to be rendered by the agent on the one side and for compensation to be paid by the principal on the other.[12] However, the mere fact that the agent advances money to the principal in the course of his employment does nor render the power irrevocable.[13]

(2) Authority Conferred For a Consideration. Where an authority or power is given for a valuable consideration, it cannot be revoked by act of the principal alone, in the absence of a stipulation that it shall be revocable.[14] If, however, the consideration for which the agency was conferred fails, the agency is revocable.[15]

(3) Authority Constituting Part of a Security or Necessary to Effectuate a Security. An authority or power cannot be revoked by act of the

11. Bonney *v.* Smith, 17 Ill. 531; Oregon, etc., Mortg. Sav. Bank *v.* American Mortg. Co., 35 Fed. 22, 13 Sawy. 260, holding, however, that both these circumstances must concur, for if the agent has no interest in the execution of the power it may be revoked, although it contains a stipulation to the contrary.

12. Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542. And see Morgan *v.* Gibson, 42 Mo. App. 234.

13. Smith *v.* Dare, 89 Md. 47, 42 Atl. 909, holding that a power of attorney to attend to a farm, collect the rents, apply them to the necessary expenses, and turn the balance over to the principal, and providing that the agent is "not to advance any rents before due except when absolutely convenient," does not impose any obligation on the agent to make advances to his principal, and hence the latter may revoke the power at will, although such advances have in fact been made.

Mere advances made by a factor, whether at the time employed as such or subsequently, do not alter the revocable nature of an authority to sell, unless the advances are accompanied by and made the consideration for an agreement that the authority shall not be revocable. Smart *v.* Sandars, 5 C. B. 895, 12 Jur. 751, 17 L. J. C. P. 258, 57 E. C. L. 895; De Comas *v.* Prost, 11 Jur. N. S. 417, 12 L. T. Rep. N. S. 682, 3 Moore P. C. N. S. 158, 13 Wkly. Rep. 595, 16 Eng. Reprint 59; Raleigh *v.* Atkinson, 9 L. J. Exch. 206, 6 M. & W. 670.

14. *Arkansas.*— Viser *v.* Bertrand, 16 Ark. 296, as where a husband appoints an agent to take charge of property and hire it out and appropriate the proceeds to the use of the principal's wife and child.

California.— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Florida.— See McGrift *v.* Porter, 5 Fla. 373.

Illinois.— Walker *v.* Denison, 86 Ill. 142 (so holding, although the power is not expressed to be irrevocable); Guthrie *v.* Wabash R. Co., 40 Ill. 109 (holding that where a party to a suit buys out his adversary's right, and takes from him a power to control the cause, which, for a valuable consideration, is made irrevocable, the power cannot be revoked); Bonney *v.* Smith, 17 Ill. 531.

Maryland.— Smith *v.* Dare, 89 Md. 47, 42 Atl. 909; Attrill *v.* Patterson, 58 Md. 226.

Minnesota.— Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575 [*affirmed* in 203 U. S. 582, 27 S. Ct. 780, 51 L. ed. 327].

New Jersey.— Miller *v.* Home Ins. Co., 71 N. J. L. 175, 58 Atl. 98.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432, holding that authority to sell personal property and receive the pay therefor may be irrevocable if it was given for a valid consideration within the law applicable to executory contracts. And see Marbury *v.* Barnet, 17 Misc. 386, 40 N. Y. Suppl. 76.

United States.— Oregon, etc., Mortg. Sav. Bank *v.* American Mortg. Co., 35 Fed. 22, 13 Sawy. 260; Stewart *v.* Hilton, 7 Fed. 562, 19 Blatchf. 290.

England.— Metcalfe *v.* Clough, 6 L. J. K. B. O. S. 281, 2 M. & R. 178, 17 E. C. L. 707, holding that a direction to an agent to pay over the proceeds of a sale is not revocable, if founded upon a valuable consideration. And see *In re* Hannan's Empress Gold Min., etc., Co., [1896] 2 Ch. 643, 65 L. J. Ch. 902, 75 L. T. Rep. N. S. 45; Bromley *v.* Holland, Coop. 9, 35 Eng. Reprint 458, 7 Ves. Jr. 3, 28, 6 Rev. Rep. 58, 32 Eng. Reprint 2.

Canada.— Richardson *v.* McClary, 16 Manitoba 74.

See 40 Cent. Dig. tit. "Principal and Agent," § 56.

Power coupled with interest distinguished. —A power conferred for a consideration is in some cases regarded as one form of a power coupled with an interest. See Bonney *v.* Smith, 17 Ill. 531; and cases cited *passim*, I, G, 1, b, (I), (B), (2). But in other cases the two are regarded as separate and distinct conceptions. See Coney *v.* Sanders, 28 Ga. 511 (holding that in order that a power may be a power coupled with an interest, the agent must have an interest in that to which the power relates; it is not enough that he pays a valuable consideration for the power); Guthrie *v.* Wabash R. Co., 40 Ill. 109; and cases cited *passim*, I, G, 1, b, (I), (B), (2).

15. Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730; Dunbar *v.* Foreman, 40 S. C. 490,

principal alone, in the absence of a stipulation of revocability, where it constitutes part of a security for the payment of money or the performance of some other obligation, or is necessary to give effect to such a security.[16] Thus a power of attorney given to secure a debt due from principal to agent is irrevocable by act of the principal alone,[17] where it precedes, accompanies, or follows a transfer of an interest in the subject-matter thereof, as by assignment, deed, mortgage, pledge, etc.,[18] but not otherwise.[19] And a power of attorney running to one person for the better security of a third person to whom an obligation is due from the principal may be given under such circumstances as to render it irrevocable without the beneficiary's consent.[20]

(4) Authority Coupled With Interest in Subject-Matter of Agency. The most important exception to the general rule above stated that an agency is revocable at the pleasure of the principal exists in the case of a power of

19 S. E. 186; *Ex p.* Smithers, 1 Deac. 413, 38 E. C. L. 700.

16. *Alabama.*— Evans *v.* Fearne, 16 Ala. 689, 50 Am. Dec. 197.

California.— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Illinois.— Gilbert *v.* Holmes, 64 Ill. 548.

Minnesota.— Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575 [*affirmed* in 203 U. S. 582, 27 S. Ct. 780, 51 L. ed. 327].

New Jersey.— Miller *v.* Home Ins. Co., 71 N. J. L. 175, 58 Atl. 98.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432.

Pennsylvania.— Blackstone *v.* Buttermore, 53 Pa. St. 226.

South Carolina.— Dunbar *v.* Foreman, 40 S. C. 490, 19 S. E. 186.

United States.— Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342] (so holding where a letter of attorney forms a part of a contract, and is a security for money or for the performance of any act which is deemed valuable); Oregon, etc., Mortg. Sav. Bank *v.* American Mortg. Co., 35 Fed. 22, 13 Sawy. 260.

England.— Walsh *v.* Whitcomb, 2 Esp. 565. And see *In re* Hannan's Empress Gold Min., etc., Co., [1896] 2 Ch. 643, 65 L. J. Ch. 902, 75 L. T. Rep. N. S. 45.

Stipulation as to revocability.— The rule stated in the text is especially true where the power of attorney expressly stipulates that it is irrevocable. Barr *v.* Schroeder, 32 Cal. 609. But such a stipulation is not necessary to render the power irrevocable. Walker *v.* Denison, 86 Ill. 142; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342].

Power coupled with interest distinguished. —A power given as security is frequently treated as an illustration of a power coupled with an interest. See Blackstone *v.* Buttermore, 53 Pa. St. 266; and cases cited *passim*, I, G, 1, b, (I), (B), (3). However, the two powers are sometimes referred to as different and distinct conceptions. See Barr *v.* Schroeder, 32 Cal. 609; and cases cited *passim*, I, G, 1, b, (I), (B), (3).

Power given to indemnity surety.— If a person, in order to induce another to become a surety for him, confers a power on such other as part of a means of indemnifying him against loss, the power is irrevocable. Hynson *v.* Noland, 14 Ark. 710; Hutchins *v.* Hebbard, 34 N. Y. 24. And see Big Four Wilmington Coal Co. *v.* Wren, 115 Ill. App. 331.

17. Marziou *v.* Pioche, 8 Cal. 522; Posten *v.* Rassette, 5 Cal. 467; James *v.* Lane, 33 N. J. Eq. 30; Gaussen *v.* Morton, 10 B. & C. 731, 8 L. J. K. B. O. S. 313, 21 E. C. L. 309. And see McGriff *v.* Porter, 5 Fla. 373.

Revocation of warrant of attorney to confess judgment see Judgments, 23 Cyc. 707.

18. *Arkansas.*—Allen *v.* Davis, 13 Ark. 28.

California.— Norton *v.* Whitehead, 84 Cal. 263, 24 Pac. 154, 18 Am. St. Rep. 172.

Illinois.— See Big Four Wilmington Coal Co. *v.* Wren, 115 Ill. App. 331.

Massachusetts.— Dickinson *v.* Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351.

Michigan.— Kelly *v.* Bowerman, 113 Mich. 446, 71 N. W. 836.

New Jersey.— Miller *v.* Home Ins. Co., 71 N. J. L. 175, 58 Atl. 98.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432; Stephens *v.* Sessa, 50 N. Y. App. Div. 547, 64 N. Y. Suppl. 28; Knapp *v.* Alvord, 10 Paige 205, 40 Am. Dec. 241. And see Raymond *v.* Squire, 11 Johns. 47. *Compare* Comley *v.* Dazian, 114 N. Y. 161, 21 N. E. 135.

Texas.— Threadgill *v.* Butler, 60 Tex. 599; Wells *v.* Littlefield, 59 Tex. 556.

England.— Walsh *v.* Whitcomb, 2 Esp. 565; Abbott *v.* Stratten, 9 Ir. Eq. 233, 3 J. & L. 603. And see McDowell *v.* Reede, 14 Ir. Ch. 190; Lawless *v.* Shaw, Ll. & Gt. S. 154, 11 Eng. Ch. 154; *Re* Parkinson, 13 L. T. Rep. N. S. 26.

Power to sell on condition as equitable mortgage see Mortgages, 27 Cyc. 987 note 44.

Revocability of power of sale accompanying mortgage see Mortgages, 27 Cyc. 1452 *et seq.*

19. Norton *v.* Tuttle, 60 Ill. 130; Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432; State *v.* Brownlee, 2 Speers (S. C.) 519; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342].

20. Stewart *v.* Hilton, 7 Fed. 562, 19 Blatchf. 290 (holding that where a power is

attorney coupled with an interest in the subject-matter thereof. In the absence of a stipulation that the power may be revoked,[21] it is from its nature irrevocable by act of the principal without the agent's consent,[22] whether so expressed or

conferred on one person to secure compensation to become due to a third person for services to be rendered, the principal cannot revoke it without satisfying the obligation secured thereby); Walsh *v.* Whitcomb, 2 Esp. 565. And see Goodwin *v.* Bowden, 54 Me. 424; Pooley *v.* Goodwin, 4 A. & E. 94, 1 Harr. & W. 567, 5 N. & M. 466, 31 E. C. L. 60. See, however, Wimberly *v.* Bryan, 55 Ga. 198; Fisher *v.* Miller, 1 Bing. 150, 7 Moore C. P. 527, 8 E. C. L. 447, both holding that a naked authority to pay money to a third person may be revoked by the principal. See also *In re* Frederick, 52 Pa. St. 338, 91 Am. Dec. 159.

Acceptance of security.— The power may be revoked before the third person has accepted the security (Comley *v.* Dazian, 114 N. Y. 161, 21 N. E. 135), but not after that event (American L. & T. Co. *v.* Billings, 58 Minn. 187, 59 N. W. 998).

Appropriation of property or proceeds.— The power is revocable before appropriation of the subject-matter thereof or its proceeds to the payment of the obligation secured (Gibson *v.* Minet, 2 Bing. 7, 9 E. C. L. 457, 1 C. & P. 247, 12 E. C. L. 148, 2 L. J. C. P. O. S. 99, 9 Moore C. P. 31, R. & M. 68, 21 E. C. L. 703), but not after that event (De Forest *v.* Bates, 1 Edw. (N. Y.) 394, holding that where A, being indebted to B, directs the proceeds of a cargo to be sent to B in order to go in satisfaction of the debt, and this direction is carried out by C, who has promised in writing to facilitate the measure, C becomes B's agent in receiving the property, and A cannot revoke the authority, nor by subsequent assignment deprive B of the benefit of it; Fisher *v.* Miller, 1 Bing. 150, 7 Moore C. P. 527, 8 E. C. L. 447, holding that where advances were made by the third person under an agreement amounting to an appropriation of the proceeds of a specified cargo by a particular ship, which the agent remitted accordingly, he was not responsible for such payment, although his principal had countermanded the order subsequent to the agreement under which the advances were made).

Revocation of warrant of attorney to confess judgment see JUDGMENTS, 23 Cyc. 707.

21. Montague *v.* McCarroll, 15 Utah 318, 49 Pac. 418; Oregon, etc., Mortg. Sav. Bank *v.* American Mortg. Co., 35 Fed. 22, 13 Sawy. 260, both holding that even a power coupled with an interest is revocable if it is so provided by the express terms of the authority.

22. *Alabama.*— Chambers *v.* Seay, 73 Ala. 372; Evans *v.* Fearne, 16 Ala. 689, 50 Am. Dec. 197.

Arkansas.— Viser *v.* Bertrand, 16 Ark. 296; Rapley *v.* Price, 11 Ark. 713; Wassell *v.* Reardon, 11 Ark. 705, 44 Am. Dec. 245.

California.— Norton *v.* Whitehead, 84 Cal. 263, 24 Pac. 154, 18 Am. St. Rep. 172; Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Posten *v.* Rassette, 5 Cal. 467.

Colorado.— Darrow *v.* St. George, 8 Colo. 592, 9 Pac. 791.

Illinois.— Walker *v.* Denison, 86 Ill. 142; Gilbert *v.* Holmes, 64 Ill. 548; Strother *v.* Law, 54 Ill. 413; Bonney *v.* Smith, 17 Ill. 531; Big Four Wilmington Coal Co. *v.* Wren, 115 Ill. App. 331.

Kentucky.— Hancock *v.* Byrne, 5 Dana 513.

Maryland.— Smith *v.* Dare, 89 Md. 47, 42 Atl. 909; Attrill *v.* Patterson, 58 Md. 226.

Massachusetts.— Dickinson *v.* Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351.

Minnesota.— Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575 [*affirmed* in 203 U. S. 582, 27 S. Ct. 780, 51 L. ed. 327]; American L. & T. Co. *v.* Billings, 58 Minn. 187, 59 N. W. 998.

Missouri.— Burke *v.* Priest, 50 Mo. App. 310.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432; Hutchins *v.* Hebbard, 34 N. Y. 24; Jackson *v.* Davenport, 18 Johns. 295.

North Carolina.— North Carolina State L. Ins. Co. *v.* Williams, 91 N. C. 69, 49 Am. Rep. 637.

Pennsylvania.— Lightner's Appeal, 82 Pa. St. 301; Blackstone *v.* Buttermore, 53 Pa. St. 266; Fisher *v.* New York, etc., R., etc., Co., 31 Wkly. Notes Cas. 502.

Texas.— Wells *v.* Littlefield, 59 Tex. 556; Hennessee *v.* Johnson, 13 Tex. Civ. App. 530, 36 S. W. 774.

Utah.— Montague *v.* McCarroll, 15 Utah 318, 49 Pac. 418.

United States.— Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342]; Oregon, etc., Mortg. Sav. Bank *v.* American Mortg. Co., 35 Fed. 22, 13 Sawy. 260; Day *v.* Candee, 7 Fed. Cas. No. 3,676, 3 Fish. Pat. Cas. 9.

England.— *In re* Hannan's Empress Gold Min., etc., Co., [1896] 2 Ch. 643, 65 L. J. Ch. 902, 75 L. T. Rep. N. S. 45; Gaussen *v.* Morton, 10 B. & C. 731, 8 L. J. K. B. O. S. 313, 21 E. C. L. 309.

See 40 Cent. Dig. tit. "Principal and Agent," § 55. And see *infra*, I, G, 2.

Contra.— Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792, *semble*.

Right of agent to execute power in his own name as test.— If the power is coupled with such an interest as precludes termination of the agency either by act of the principal or by his death, disability, etc., the agent may in such case execute the power in his own name. Norton *v.* Whitehead, 84 Cal. 263, 24 Pac. 154, 18 Am. St. Rep. 172 (holding that where an assignment is followed by an irrevocable power of attorney, a provision in the power authorizing action in the name of the principal detracts nothing from the right of the assignee to act in his own name as assignee in receiving moneys accruing either before or after the death of the principal); Gilbert *v.* Holmes, 64 Ill. 548; Bonney *v.* Smith, 17 Ill. 531 (*semble*); Hunt *v.* Rous-

not.[23] To bring a case within the exception it is necessary: (1) That the power and the interest should be coupled or united in point of time; that they should coexist. Hence the interest must exist in the subject-matter of the power, and not merely in that which is produced by an exercise of the power. If the agent's interest exists only in the proceeds arising from an execution of the power, the power and the interest are not coupled in point of time, since the power, in order to produce the interest, must be exercised, and by its exercise it is extinguished. The interest does not come into being until the power is gone.[24] (2) That the power and the interest should be coupled with reference to their subject-matter.

manier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342] (holding that if the interest or estate passes with the power and vests in the person by whom the power is to be exercised, such person acts in his own name; the estate being in him passes from him by a conveyance in his own name; he is no longer a substitute acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate). If, on the other hand, the interest of the agent is not such as to enable him to execute the power in his own name, it is not such an interest as precludes termination of the relation by revocation or by the principal's death, disability, etc. Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Gilbert *v.* Holmes, *supra*; Andrews *v.* Travelers' Ins. Co., 70 S. W. 43, 24 Ky. L. Rep. 844; Hunt *v.* Rousmanier, *supra*; Watson *v.* King, 4 Campb. 272, 1 Stark. 121, 16 Rev. Rep. 790, 2 E. C. L. 54.

A power of attorney which gives to the agent a veto upon the acts of his principal is equivalent to a power coupled with an interest. Day *v.* Candee, 7 Fed. Cas. No. 3,676, 3 Fish. Pat. Cas. 9.

An oral authority is irrevocable if coupled with an interest (Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432 [*citing* Hutchins *v.* Hebbard, 34 N. Y. 24]), unless it is given for the performance of some act which by statute or by the common law the agent cannot perform in the name of his principal unless thereunto authorized in writing (Terwilliger *v.* Ontario, etc., R. Co., *supra*).

In England it is said that an authority which is given for a consideration and by which the agent is to secure a benefit creates an interest precluding revocation. *In re* Hannan's Empress Gold Min., etc., Co., [1896] 2 Ch. 643, 65 L. J. Ch. 902, 75 L. T. Rep. N. S. 45; Smart *v.* Sandars, 5 C. B. 895, 12 Jur. 751, 17 L. J. C. P. 258, 57 E. C. L. 895. While this language is not in terms in strict accord with that used by the American courts, yet the distinction between the English and the American cases is rather in words than in substance. See Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 94, 43 N. E. 432; and cases cited *passim*, I, G, 1, b, (I), (B).

23. Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Walker *v.* Denison, 86 Ill. 142; Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575 [*affirmed* in 203 U. S. 582, 27 S. Ct. 780, 51 L. ed. 327]. And see cases cited *supra*, note 22.

24. *Alabama.*— Chambers *v.* Seay, 73 Ala. 372.

Arizona.— Taylor *v.* Burns, 8 Ariz. 463, 76 Pac. 622 [*affirmed* in 203 U. S. 120, 27 S. Ct. 40, 51 L. ed. 116]; Trickey *v.* Crowe, 8 Ariz. 176, 71 Pac. 965 [*affirmed* in 204 U. S. 228, 27 S. Ct. 275, 51 L. ed. 454].

Arkansas.— Yeates *v.* Pryor, 11 Ark. 58; Nicks *v.* Rector, 4 Ark. 251.

California.— Barr *v.* Schroeder, 32 Cal. 609.

Connecticut.— Mansfield *v.* Mansfield, 6 Conn. 559, 16 Am. Dec. 76.

Delaware.— Gibbons *v.* Gibbons, 4 Harr. 105.

Florida.— McGriff *v.* Porter, 5 Fla. 373.

Georgia.— Miller *v.* McDonald, 72 Ga. 20; Lathrop *v.* Brown, 65 Ga. 312; Coney *v.* Sanders, 28 Ga. 511.

Illinois.— Walker *v.* Denison, 86 Ill. 142; Gilbert *v.* Holmes, 64 Ill. 548; Nevitt *v.* Woodburn, 82 Ill. App. 649.

Kentucky.—Andrews *v.* Travelers Ins. Co. 70 S. W. 43, 24 Ky. L. Rep. 844.

Maryland.— Smith *v.* Dare, 89 Md. 47, 42 Atl. 909; Attrill *v.* Patterson, 58 Md. 226.

Massachusetts.— Langdon *v.* Langdon, 4 Gray 186.

Mississippi.— Kolb *v.* Bennett Land Co., 74 Miss. 567, 21 So. 233.

Missouri.— Burke *v.* Priest, 50 Mo. App. 310.

New York.— Farmers' L. & T. Co. *v.* Wilson, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696 [*affirming* 64 Hun 194, 19 N. Y. Suppl. 142]; Hoffman *v.* Union Dime Sav. Inst., 109 N. Y. App. Div. 24, 95 N. Y. Suppl. 1045; Marbury *v.* Barnet, 17 Misc. 386, 40 N. Y. Suppl. 76.

North Carolina.— Wilmington *v.* Bryan, 141 N. C. 666, 54 S. E. 543; Wainwright *v.* Massenburg, 129 N. C. 46, 39 S. E. 725; Ballard *v.* Travelers' Ins. Co., 119 N. C. 187, 25 S. E. 956; North Carolina State L. Ins. Co. *v.* Williams, 91 N. C. 69, 49 Am. Rep. 637.

Oklahoma.— Kimmell *v.* Powers, (1907) 91 Pac. 687.

Pennsylvania.— Blackstone *v.* Buttermore, 53 Pa. St. 266; Hartley's Appeal, 53 Pa. St. 212, 91 Am. Dec. 207.

South Carolina.— State *v.* Brownlee, 2 Speers 519.

Texas.— Daugherty *v.* Moon, 59 Tex. 397.

Vermont.— Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

United States.— Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [*affirming* 12 Fed. Cas. No. 6,889, 2 Mason 342]; Stier *v.* Imperial L. Ins. Co., 58 Fed. 843 [*distinguished* in Newcomb *v.* Imperial L. Ins. Co., 51 Fed.

They must exist with reference to the same thing.[25] For this reason also it is necessary that the agent's interest should exist in the subject-matter of the power, and not merely in that which is produced by an exercise of the power.[26] (3) That the power and the interest should be coupled with reference to the person in whom they are vested. They must be united in the same person.[27] And (4) That the power and the interest should be coupled with reference to their source. They must be derived by the agent from the same person.[28]

(II) *RIGHT OF REVOCATION.* A distinction is to be noted between a principal's power to revoke his agent's authority and his right to revoke it. Although as has been stated, he has the undoubted power, so far as the agency is executory, to revoke the agent's authority, it by no means follows that he has always a right to do so, since the contract of agency may provide otherwise. Accordingly, if he revokes the agency in violation of the contract, he becomes liable to the agent for the damages caused thereby.[29] However, it should be observed in this con-

725]; Oregon, etc., Mortg. Sav. Bank *v.* American Mortg. Co., 35 Fed. 22, 13 Sawy. 260.

England.— Smart *v.* Sandars, 5 C. B. 895, 12 Jur. 751, 17 L. J. C. P. 258, 57 E. C. L. 895.

See 40 Cent. Dig. tit. "Principal and Agent," § 55.

Under a power to sell, an interest in the proceeds of sale as compensation to the agent for effecting it is not such an interest as will render the power irrevocable. Chambers *v.* Seay, 73 Ala. 372; Taylor *v.* Burns, 8 Ariz. 463, 76 Pac. 623 [*affirmed* in 203 U. S. 120, 27 S. Ct. 40, 51 L. ed. 116]; Trickey *v.* Crowe, 8 Ariz. 176, 71 Pac. 965 [*affirmed* in 204 U. S. 228, 27 S. Ct. 275, 51 L. ed. 454]; Yeates *v.* Pryor, 11 Ark. 58; Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Mansfield *v.* Mansfield, 6 Conn. 559, 16 Am. Dec. 76; Bonney *v.* Smith, 17 Ill. 531; Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Kolb *v.* Bennett Land Co., 74 Miss. 567, 21 So. 233; Green *v.* Cole, 103 Mo. 70, 15 S. W. 317; Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432; Kimmell *v.* Powers, (Okla. 1907) 91 Pac. 687; McMahan *v.* Burns, 216 Pa. St. 448, 65 Atl. 806; Yingling *v.* West End Imp. Co., 5 Pa. Dist. 651; Hollingsworth *v.* Young County, 40 Tex. Civ. App. 590, 91 S. W. 1094; Hall *v.* Gambrill, 92 Fed. 32, 34 C. C. A. 190 [*affirming* 88 Fed. 709]; De Comas *v.* Prost, 11 Jur. N. S. 417, 12 L. T. Rep. N. S. 682, 3 Moore P. C. N. S. 158, 13 Wkly. Rep. 595, 16 Eng. Reprint 59; Raleigh *v.* Atkinson, 9 L. J. Exch. 206, 6 M. & W. 67. Power of sale accompanied by transfer of interest see *supra*, I, G, 1, b, (I), (B), (3).

25. See cases cited *supra*, note 24.

26. See cases cited *supra*, note 24.

27. Nicks *v.* Rector, 4 Ark. 251; North Carolina State L. Ins. Co. *v.* Williams, 91 N. C. 69, 49 Am. Rep. 637; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342].

Power conferred as security for benefit of third person see *supra*, I, G, 1, b, (I), (B), (3).

28. Black *v.* Harsha, 7 Kan. App. 794, 54 Pac. 21, where an agent to sell goods derived his power from a first mortgagee and his interest (as second mortgagee) from the owner.

29. *California.*— Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427.

Iowa.— Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792.

Michigan.— Stone *v.* Fox Mach. Co., 145 Mich. 689, 109 N. W. 659.

Missouri.— Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213.

Pennsylvania.— Blackstone *v.* Buttermore, 53 Pa. St. 266.

Wisconsin.— W. G. Taylor Co. *v.* Bannerman, 120 Wis. 189, 97 N. W. 918.

United States.— Brush-Swan Electric Light Co. *v.* Brush Electric Co., 41 Fed. 163.

England.— Turner *v.* Goldsmith, [1891] 1 Q. B. 544, 60 L. J. Q. B. 297, 64 L. T. Rep. N. S. 301, 39 Wkly. Rep. 547.

Canada.— Gailbert *v.* Atteaux, 23 Quebec Super. Ct. 427.

See 40 Cent. Dig. tit. "Principal and Agent," § 54.

See, however, Spear *v.* Gardner, 16 La. Ann. 383.

Agency for definite term; consideration.— A stipulation that the agency shall continue for a definite term is binding on the principal if based on a sufficient consideration (Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427. See also Turner *v.* Goldsmith, [1891] 1 Q. B. 544, 60 L. J. Q. B. 247, 64 L. T. Rep. N. S. 301, 39 Wkly. Rep. 547); otherwise not (Kolb *v.* Bennett Land Co., 74 Miss. 567, 21 So. 233, holding that a unilateral agreement of a landowner constituting an exclusive agent for the sale of the land within a specified time, which agent is to receive a commission regardless of who effects the sale, and is to be aided by the owner in making a sale, lacks mutuality, and hence is revocable at any time before the agent procures a purchaser; McMahan *v.* Burns, 216 Pa. St. 448, 65 Atl. 806, holding that a provision in an agreement of agency that it shall not be revoked for five years cannot be sustained, where there is no consideration for it independent of the compensation to be rendered for the services to be performed. And see Winslow *v.* Mayo, 123 N. Y. App. Div. 758, 108 N. Y. Suppl. 640). See also *supra*, I, G, 1, b, (I), (A).

Sole or exclusive agency.— The mere fact that the contract of agency expressly declares the agency to be exclusive does not preclude

nection that the agent is limited to his action for damages; the courts will not specifically enforce the contract against the principal.[30] If the contract is expressly made revocable at any time by the principal,[31] or if it contains no terms indicating the creation of an agency for a definite period,[32] it is terminable at will, and the principal by revoking the authority incurs no liability to the agent, unless the agent has entered upon performance of the contract so that a revocation of his authority would work him legal injury.[33] And even where the agency is for a definite term, the principal has a right to revoke it before the expiration of such term because of the agent's failure faithfully to perform his express or implied undertakings as agent.[34]

revocation at the will of the principal. Chambers *v.* Seay, 73 Ala. 372. See also *supra*, I, G, 1, b, (I), (A).

Revocation as affecting right of agent: To compensation see *infra*, III, B, 2, b, (I), (D). To reimbursement see *infra*, III, B, 3, c, (II).

30. Elwell *v.* Coon, (N. J. Ch. 1900) 46 Atl. 580; Mair *v.* Himalaya Tea Co., L. R. 1 Eq. 411, 11 Jur. N. S. 1013, 13 L. T. Rep. N. S. 586, 14 Wkly. Rep. 165; Pickering *v.* Ely, 7 Jur. 479, 12 L. J. Ch. 271, 2 Y. & Coll. 249, 21 Eng. Ch. 249, 63 Eng. Reprint 109; Chinnock *v.* Sainsbury, 6 Jur. N. S. 1318, 30 L. J. Ch. 409, 3 L. T. Rep. N. S. 258, 9 Wkly. Rep. 7. And see, generally, SPECIFIC PERFORMANCE.

31. Deering *v.* Beatty, 107 Iowa 701, 77 N. W. 325; Parry Mfg. Co. *v.* Lyon, 64 S. W. 436, 23 Ky. L. Rep. 844. See, however, Deering Harvester Co. *v.* Hamilton, 80 Minn. 162, 83 N. W. 44.

32. *Alabama.*— Chambers *v.* Seay, 73 Ala. 372.

California.— Brown *v.* Pforr, 38 Cal. 550.

Illinois.— Union Special Sewing Mach. Co. *v.* Lockwood, 110 Ill. App. 387; Orient Ins. Co. *v.* Kemp, 29 Ill. App. 232.

Indiana.— See Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

Iowa.— Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792.

Louisiana.—Jacobs *v.* Warfield, 23 La. Ann. 395. And see Spear *v.* Gardner, 16 La. Ann. 383.

Massachusetts.— Bradlee *v.* Southern Coast Lumber Co., 193 Mass. 378, 79 N. E. 777.

Michigan.— Dodge *v.* Reynolds, 135 Mich. 692, 98 N. W. 737.

Minnesota.— Hoover *v.* Perkins Windmill, etc., Co., 41 Minn. 143, 42 N. W. 866.

Missouri.—Royal Remedy, etc., Co. *v.* Gregory Grocery Co., 90 Mo. App. 53; Burke *v.* Priest, 50 Mo. App. 310.

New York.— Winslow *v.* Mayo, 123 N. Y. App. Div. 758, 108 N. Y. Suppl. 640.

North Carolina.— Thomas *v.* Gwyn, 131 N. C. 460, 42 S. E. 904.

Pennsylvania.— Kelly *v.* Marshall, 172 Pa. St. 396, 33 Atl. 690; Coffin *v.* Landis, 46 Pa. St. 426; Rice *v.* Fidelity, etc., Co., 1 Lack. Leg. N. 111; Fay Gas Fixture Co. *v.* Welsbach Light Co., 41 Wkly. Notes Cas. 478.

Texas.— Hollingsworth *v.* Young County, 40 Tex. Civ. App. 590, 91 S. W. 1094.

United States.—Sheahan *v.* National Steamship Co., 87 Fed. 167, 30 C. C. A. 593; Stier *v.* Imperial L. Ins. Co., 58 Fed. 843.

England.— See Northey *v.* Trevillion, 7 Com. Cas. 201, 18 T. L. R. 648 [*following* Rhodes *v.* Forwood, 1 App. Cas. 256, 47 L. J. Exch. 396, 34 L. T. Rep. N. S. 890, 24 Wkly. Rep. 1078].

Canada.— Morris *v.* Dinnick, 14 Can. L. T. Occ. Notes 394, 25 Ont. 291.

See 40 Cent. Dig. tit. "Principal and Agent," § 54. And see *infra*, III, B, 1.

Agency construed to be one at will see Brown *v.* Pforr, 38 Cal. 550; Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792; Winslow *v.* Mayo, 123 N. Y. App. Div. 758, 108 N. Y. Suppl. 640; Fay Gas Fixture Co. *v.* Welsbach Light Co., 41 Wkly. Notes Cas. (Pa.) 478; Wilcox, etc., Sewing-Mach. Co. *v.* Ewing, 141 U. S. 627, 12 S. Ct. 94, 35 L. ed. 882 (holding that a contract which leaves the agent free to terminate the agency on reasonable notice must be construed to confer the same right upon the principal, unless provisions to the contrary are inserted); Morris *v.* Dinnick, 14 Can. L. T. Occ. Notes 394, 25 Ont. 291. And see Northey *v.* Trevillion, 7 Com. Cas. 201, 18 T. L. R. 648 [*following* Rhodes *v.* Forwood, 1 App. Cas. 256, 47 L. J. Exch. 396, 34 L. T. Rep. N. S. 890, 24 Wkly. Rep. 1078]. See, however, *supra*, note 29.

Effect of specifying grounds for revocation. —A provision in a contract, otherwise terminable upon reasonable notice, that a violation of the spirit of the agreement shall be a sufficient cause for its abrogation does not imply that it can be abrogated only for sufficient cause. Wilcox, etc., Sewing-Mach. Co. *v.* Ewing, 141 U. S. 627, 12 S. Ct. 94, 35 L. ed. 882 [*applying* Stier *v.* Imperial L. Ins. Co., 58 Fed. 843].

Revocation in bad faith or before lapse of reasonable time as affecting right of agent to compensation see *infra*, III, B, 2, b, (I), (D).

33. See *infra*, I, G, 3, b; III, B, 2, b, (I), (D); III, B, 3, c, (II).

34. Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 [*affirming* 108 Ill. App. 203] (holding that an agent's illicit association with a woman may be ground for revocation); Dodge *v.* Reynolds, 135 Mich. 692, 98 N. W. 737 (holding that a contract whereby plaintiff was to sell goods for defendants on commission was violated by his selling them at a less price than that agreed upon, justifying a refusal by defendants to furnish him further goods, where it was understood that defendants would continue to

(III) *Manner of Revocation* — (A) *Form; Express and Implied.* To constitute revocation no particular act is necessary, so long as it is clear that the principal has withdrawn from the agent his power.[35] Although the authority

sell in the same locality, and plaintiff by such underselling induced their customers to buy of him); Gilbert *v.* Quinlan, 13 N. Y. Suppl. 671; Macfarren *v.* Gallinger, 210 Pa. St. 74, 59 Atl. 435 [*affirming* 33 Pittsb. Leg. J. N. S. 273]; Henderson *v.* Hydraulic Works, 9 Phila. (Pa.) 100 (holding that the principal may revoke the agency where the agent wrongfully uses the principal's funds, or is guilty of other infidelity).

Adverse interest.— If an agent, without his principal's consent, engages in any employment or business for himself or another which tends to injure the principal's business, as in one which brings him in direct competition with the principal, he may lawfully be discharged before the expiration of the agreed term of service, even though he so conducts such other business that it does not interfere with the time and attention due the business of his employer. Morrison *v.* Ogdensburgh, etc., R. Co., 52 Barb. (N. Y.) 173; Dieringer *v.* Meyer, 42 Wis. 311, 24 Am. Rep. 415; Boston Deep Sea Fishing, etc., Co. *v.* Ansell, 39 Ch. D. 339, 59 L. T. Rep. N. S. 345. And see *In re* Watkins, 121 Cal. 327, 53 Pac. 702; Stoddart *v.* Key, 62 How. Pr. (N. Y.) 137; Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 343 [*reversing* (Civ. App. 1898) 51 S. W. 55]; Case *v.* Jennings, 17 Tex. 661. See also *infra*, page 1309 note 68, page 1311. The mere fact however, that a corporation which acts as agent is controlled by another company which in turn is controlled by stock-holders in a rival company of the principal will not justify revocation of the agency, no hostile acts appearing. Brush Electric Co. *v.* Brush-Swan Electric Light Co., 49 Fed. 8 [*reversed* on other grounds in 52 Fed. 37, 2 C. C. A. 669].

Failure to deposit or remit funds.— Where a contract of agency stipulates that the agent shall deposit daily all moneys received, a continuous violation of the stipulation affords the principal just grounds for terminating the agency. Macfarren *v.* Gallinger, 210 Pa. St. 74, 59 Atl. 435 [*affirming* 33 Pittsb. Leg. J. N. S. 273]. And the same is true where a selling agent fails to remit the proceeds of the sale at the time when they become due under the contract of agency. Contractors', etc., Supply Co. *v.* Alta Portland Cement Co., 26 Ohio Cir. Ct. 49.

Indulgence in intoxicants or narcotics.—A single act of drunkenness might so offend the public with whom the agent is to deal as to justify the principal in discharging him. Bass Furnace Co. *v.* Glasscock, 82 Ala. 452, 2 So. 315, 60 Am. Rep. 748; Huntington *v.* Claflin, 10 Bosw. (N. Y.) 262 [*affirmed* in 38 N. Y. 182]. But to justify discharge of the agent for the use of narcotics it must appear that the habits complained of were not only injurious to the agent himself, but had a tendency to interfere with his usefulness or effectiveness as an agent. Jakowenko *v.* Des Moines Life Assoc., 21 Ohio Cir. Ct. 199, 11 Ohio Cir. Dec. 576.

Unsatisfying performance.— If the contract of employment provides that the performance shall be satisfactory to the principal, he is by the better rule the sole judge of satisfactory performance, and may revoke the authority at any time that he becomes honestly dissatisfied with the agent's efforts. Tyler *v.* Ames, 6 Lans. (N. Y.) 280; Karsner *v.* Union Cent. L. Ins. Co., 12 Ohio Cir. Ct. 394, 6 Ohio Cir. Dec. 335. And see CONTRACTS, 9 Cyc. 618 *et seq.* See, however, Highland Buggy Co. *v.* Parker, 27 Ohio Cir. Ct. 115, where it was held that the principal's dissatisfaction must depend on such facts as would warrant a reasonable person in concluding that the services were not promoting the interest of the principal.

Violation of instructions is ground for discharge. Highland Buggy Co. *v.* Parker, 27 Ohio Cir. Ct. 115. And see Dodge *v.* Reynolds, 135 Mich. 692, 98 N. W. 737. But it is not a breach of a traveling salesman's contract justifying his discharge for him to go to a place off of his route to spend Sunday with his family, where it does not seriously interfere with his compliance with his contract. Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. 133.

Dissolution of partnership agent.— Where a contract between a corporation and a partnership made the latter selling agents for the former, it being understood that one of the partners, who was known to the corporation, would use his personal efforts, and as incidental to the agency the corporation contracted to sell machines to the partnership, a dissolution of the partnership authorized the corporation to abandon the contract both as to the agency and as to the sales. Wheaton *v.* Cadillac Automobile Co., 143 Mich. 21, 106 N. W. 399.

When one of two joint agents becomes incapacitated, the principal has a right to discontinue the agency. Salisbury *v.* Brisbane, 61 N. Y. 617 [*citing* Robson *v.* Drummond, 2 B. & Ad. 303, 9 L. J. K. B. O. S. 187, 22 E. C. L. 132]. And see Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

Effect of specifying particular grounds for discharge.— A provision that an agency may be terminated on certain specified grounds does not imply an agreement that it shall exist indefinitely, so long as the agent commits none of the specified delicts. Stier *v.* Imperial L. Ins. Co., 58 Fed. 843 [*applied* in Willcox, etc., Sewing-Mach. Co. *v.* Ewing, 141 U. S. 627, 12 S. Ct. 94, 35 L. ed. 882].

Waiver of ground for discharge.— The principal is not bound to dismiss the agent instantaneously upon his misconduct; and by permitting a day to pass before discharging him the principal does not waive the right to revoke the agency because of the misconduct. Huntington *v.* Claflin, 10 Bosw. (N. Y.) 262 [*affirmed* in 38 N. Y. 182].

Grounds for discharge of servant see MASTER AND SERVANT, 26 Cyc. 987 *et seq.*

35. See cases cited *infra*, note 36 *et seq.*

was conferred by written instrument, yet it may be revoked by word of mouth,[36] and a parol revocation is effectual, although the authority was conferred under seal.[37] The authority may be revoked not only in express terms [38] but also by implication from words and conduct of the principal inconsistent with the continuation of the authority.[39] However, revocation is not to be inferred if the

36. See Rochester *v.* Whitehouse, 15 N. H. 468 (holding that where appraisers are appointed under an agreement by a creditor to accept property at an appraised value from his debtor in payment of the debt, their authority may be revoked as in the case of a submission to arbitration, and such revocation may be made orally, although the appointment was in writing); and cases cited *infra*, note 38 *et seq.*

37. Copeland *v.* Mercantile Ins. Co., 6 Pick. (Mass.) 194; Brookshire *v.* Brookshire, 30 N. C. 74, 47 Am. Dec. 341; Glover *v.* Ames, 8 Fed. 351.

38. Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213; Clover Condensed Milk Co. *v.* Cushman Bros. Co., 31 N. Y. App. Div. 108, 52 N. Y. Suppl. 769; Perrine *v.* Jermyn, 163 Pa. St. 497, 30 Atl. 202.

Recall of power of attorney.— The demand by the principal for the return of a written power under which an attorney in fact was acting, and its surrender without any further instructions, is a revocation of the power. Kelly *v.* Brennan, 55 N. J. Eq. 423, 37 Atl. 137. If the authority is in writing, the writing should be recalled so as to avoid liability to third persons subsequently dealing with the agent on the faith of the writing. See *infra*, I, G, 1, b, (III), (B), (2).

Partial withdrawal of territory of exclusive agent held to work a dissolution *in toto* of the contract of agency see White Sewing Mach. Co. *v.* Shaddock, 79 Ark. 220, 95 S. W. 143.

39. *Massachusetts.*— Langdon *v.* Langdon, 4 Gray 186, where the payee of a note, after having authorized an agent to collect it, accepted payment from the maker.

Michigan.— Keith *v.* Sands, etc., Lumber Co., 88 Mich. 172, 50 N. W. 133, holding that where, pending negotiations by wire and mail for the purchase of cedar posts, the seller wrote to the vendee that if certain posts were not sold he could have them at a stated price and that he would know by a certain date if the posts were sold, such letter amounted in law to a withdrawal of said posts from sale until the date named.

Missouri.— Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213; Royal Remedy, etc., Co. *v.* Gregory Grocery Co., 90 Mo. App. 53, where a principal sold goods within an exclusive agent's territory.

Montana.— Billings First Nat. Bank *v.* Hall, 8 Mont. 341, 20 Pac 638, holding that where an agent for defendants in the purchase of wool telegraphed them with regard to the purchase of a certain lot, a reply that he had better not take it revoked any authority to buy it.

Pennsylvania.— Perrine *v.* Jermyn, 163 Pa. St. 497, 30 Atl. 202; Troxell *v.* Lehigh Crane Iron Co., 42 Pa. St. 513, where a principal notified third persons to deal directly with himself in the future and not as before with the agent.

Texas.— Hollingsworth *v.* Young County, 40 Tex. Civ. App. 590, 91 S. W. 1094.

Canada.—Anderson *v.* McBean, 12 Grant Ch. (U. C.) 463.

Revocation by bringing suit.— If a principal sues to set aside a conveyance by the agent on the ground that the power of attorney was obtained by fraud, it constitutes a revocation of the power. Hatch *v.* Ferguson, 66 Fed. 668, 14 C. C. A. 41. So a power to release a claim is revoked by the principal's subsequently suing on the claim. Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730. It has been held, however, that where by a contract of sale the price is to be paid to a third person, the vendor, by bringing a suit to collect the price, does not revoke that person's authority to give a discharge *pendente lite*. Walker *v.* Barrington 28 Vt. 781.

Revocation by grant of inconsistent power. — If other inconsistent power is conferred on the agent the prior authority is revoked. Hamilton *v.* Peace, 2 Desauss. Eq. (S. C.) 79. Thus a power given to one agent may be so inconsistent with a previous power given to another agent as to amount to a revocation thereof. Clark *v.* Mullenix, 11 Ind. 532; Converse *v.* Dillaye, 62 N. Y. 621; Brookshire *v.* Brookshire, 30 N. C. 74, 47 Am. Dec. 341 (*semble*); Aiken *v.* Taylor, (Tenn. Ch. App. 1900) 62 S. W. 200; Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754. So an agent's authority is revoked by the subsequent grant of the same power to him and another jointly (Copeland *v.* Mercantile Ins. Co., 6 Pick. (Mass.) 198), and a power to two persons jointly and severally is revoked by a subsequent power to such two and one other jointly but not severally (Morgan *v.* Stell, 5 Binn. (Pa.) 305). On the other hand the later grant of power may not be inconsistent with the prior grant, and in such case no revocation of the first agency is to be implied merely from the creation of the second. Davol *v.* Quimby, 11 Allen (Mass.) 208 (holding that authority given by a principal to an agent to collect a sum of money is not necessarily revoked by the mere appointment of another agent to collect the same); Enright *v.* Beaumond, 68 Vt. 249, 35 Atl. 57 (holding that an authority given by the first indorsee of a note to continue to deal with the maker as if the payee were still the owner and holder of the note, and to take payments as they became due thereon, is not revoked by the fact that the note was subsequently placed in a bank for collection, since it is not necessary to the exercise of the authority that possession of the note be held); French *v.* Townes, 10 Gratt. (Va.) 513 (holding that a certain deed of trust to an agent did not revoke a power of attorney to him); Hatch *v.* Coddington, 95

principal's conduct is not necessarily inconsistent with a continuance of the agency.[40] A retraction or waiver of revocation by the principal, so as to continue the agency in force, is not lightly to be inferred;[41] but the parties may of course, upon revocation, enter into a new contract of agency.[42]

(B) *Necessity and Sufficiency of Notice* — (1) As Between Principal and Agent. As between principal and agent a revocation of authority does not become effective until it is in some way communicated to the agent. To give it effect the agent must have notice thereof, express or implied, actual or constructive.[43] Accordingly an uncommunicated revocation does not defeat any rights against the principal which may arise in favor of the agent out of subsequent acts done by him in pursuance of his original authority,[44] or subject the agent to any liability as for having done those acts without authority.[45] However, formal notice of revocation need not be given [46] unless the contract requires it.[47]

U. S. 48, 24 L. ed. 339 (in which it was held that a power conferred on an agent to negotiate bonds of the principal, if silent as to a like power previously given by the principal to the agent, does not operate as a revocation of the earlier power).

40. Daniel Forbes Co. *v.* Leonard, 119 Ill. App. 629; Fuller *v.* Brady, 22 Ill. App. 174; Jackson *v.* Porter, 8 Mart. N. S. (La.) 200; Clarke *v.* Laurie, 2 H. & N. 199, 3 Jur. N. S. 647, 26 L. J. Exch. 317, 5 Wkly. Rep. 629; Vardon *v.* Vardon, 6 Ont. 719.

Revocation by grant of inconsistent power see *supra*, note 39.

41. Clark *v.* Mullenix, 11 Ind. 532 (holding that where a principal repudiated a sale made by an agent, and so notified the purchaser, he did not, by leaving the purchase-money notes in the agent's possession, impliedly authorize him to collect them); Clover Condensed Milk Co. *v.* Cushman Bros. Co., 31 N. Y. App. Div. 108, 52 N. Y. Suppl. 769 (holding that where a contract creating a sales agency provides for its termination by either party upon a specified notice, an explicit and unequivocal notice duly given by the principal is not waived or withdrawn by the mere fact that after the specified period has expired he continues to sell through the agent without any new express arrangement); Friederick *v.* Perkinson, 17 N. Y. Suppl. 501 (holding that the mere fact that a former principal personally orders work or goods is not a waiver of a prior notice not to do work or furnish goods for him except on his written order, because such notice contemplates orders made by third persons and not by him); Kelly *v.* Phelps, 57 Wis. 425, 15 N. W. 385 (holding that after revocation of an agent's authority the principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts done by such agent in pursuance of the original authority).

42. White Sewing Mach. Co. *v.* Shaddock, 79 Ark. 220, 95 S. W. 143, holding that where a salesman employed under a contract which gave him exclusive territory and which stipulated that it might be discontinued on notice by either party received a notice of the withdrawal of a part of the territory, but he continued to act as salesman, the notice was in effect a dissolution of the old contract, and, when accepted by the salesman, a new contract was created.

43. *Louisiana.*— Spinks *v.* Georgia Quincy Granite Co., 114 La. 1044, 38 So. 824.

Maine.— Jones *v.* Hodgkins, 61 Me. 480.

Mississippi.— Robertson *v.* Cloud, 47 Miss. 208.

Missouri.— See Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213.

New York.— Williams *v.* Birbeck, Hoffm. 359. And see Gilbert *v.* Quinlan, 59 Hun 508, 13 N. Y. Suppl. 671.

Washington.— Brittain *v.* Pioneer State Bank, 45 Wash. 41, 87 Pac. 1051.

United States.— U. S. *v.* Jarvis, 26 Fed. Cas. No. 15,468, 2 Ware 278, 4 N. Y. Leg. Obs. 298.

England.— Salton *v.* New Beeston Cycle Co., [1900] 1 Ch. 43, 81 L. T. Rep. N. S. 437, 16 T. L. R. 25, 48 Wkly. Rep. 92.

See 40 Cent. Dig. tit. "Principal and Agent," § 60.

Compare Union Special Sewing Mach. Co. *v.* Lockwood, 110 Ill. App. 387.

The same rule applies as between the agent and a third person claiming under the principal. Jones *v.* Hodgkins, 61 Me. 480.

Revocation by letter takes effect only upon its receipt by the agent. Robertson *v.* Cloud, 47 Miss. 208.

44. See cases cited *supra*, note 43. And see *infra*, III, B, 2, b, (I), (D); III, B, 3, c, (II).

45. See cases cited *supra*, note 43. And see *infra*, III, A.

46. Coffin *v.* Landis, 46 Pa. St. 426; Sheahan *v.* National Steamship Co., 87 Fed. 167, 30 C. C. A. 593.

Record as notice see *infra*, note 52.

47. Bates *v.* Sierra Nevada Lake Water, etc., Co., 18 Cal. 171, holding that where plaintiff was employed by a corporation in California under an agreement for notice of any termination of such contract from the corporation, such agreement was not complied with by the giving of a notice by a committee of the London agency of the company.

Estoppel.—Where an agent was entitled under a contract to commission on all orders taken, whether actual sales were made or not, and also to a year's notice of the termination of the contract; and by his conduct he led the seller to believe that he intended to charge commissions on actual shipments

(2) As Between Principal and Third Persons. As a general rule a revocation of authority does not become effective as between the principal and third persons subsequently dealing with the agent as such until they receive notice thereof. By conferring the authority the principal gives third persons who are aware of it the right to deal with the agent according to its terms on the principal's account; and they have a right to assume until they are otherwise informed that the authority continues as it was originally conferred. Accordingly, in the absence of notice of revocation, third persons subsequently dealing with the agent may hold the principal responsible for acts done by the agent within the apparent scope of his previous authority.[48] This rule, however, does not apply in favor

only, and thus prevented the seller's giving the notice earlier or within the year, the agent was not entitled to any commission on deficient shipments, nor to a year's notice. Belgian Glass Co. *v.* Pabst, 101 N. Y. 621, 4 N. E. 519.

48. *California.*— Stockton Ice Co. *v.* Argonaut Land, etc., Co., (1899) 56 Pac. 885; Swinnerton *v.* Argonaut Land, etc., Co., 112 Cal. 375, 44 Pac. 719.

Connecticut.— Fellows *v.* Hartford, etc., Steamboat Co., 38 Conn. 197.

Georgia.— Burch *v.* Americus Grocery Co., 125 Ga. 153, 53 S. E. 1008.

Idaho.— Feldman *v.* Shea, 6 Ida. 717, 59 Pac. 537.

Illinois.— Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Union Special Sewing Mach. Co. *v.* Lockwood, 110 Ill. App. 387.

Indiana.— Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856.

Iowa.— Baudouine *v.* Grimes, 64 Iowa 370, 20 N. W. 476.

Kentucky.— Hancock *v.* Byrne, 5 Dana 513.

Louisiana.— Harris *v.* Cuddy, 21 La. Ann. 388; Caldwell *v.* Neil, 21 La. Ann. 342, 99 Am. Dec. 738 (in which it was said that the rule that the one whose acts have contributed to enable another to do an act causing loss should suffer the loss rather than an innocent third person applies where an agent continued to draw bills after his power was revoked, but no public notice of the revocation was given); Bergerot *v.* Farish, 9 Rob. 346.

Maine.— Jones *v.* Farley, 6 Me. 226.

Massachusetts.— Packer *v.* Hinckley Locomotive Works, 122 Mass. 484.

Michigan.— Keith *v.* Sands, etc., Lumber Co., 88 Mich. 172, 50 N. W. 133.

Missouri.— Lamothe *v.* St. Louis Mar., etc., R. Co., 17 Mo. 204; Waters-Pierce Oil Co. *v.* Jackson Junior Zinc Co., 98 Mo. App. 324, 73 S. W. 272; Fanning *v.* Cobb, 20 Mo. App. 577. And see Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213.

Nebraska.— Cheshire Provident Inst. *v.* Feusner, 63 Nebr. 682, 88 N. W. 849; Webster *v.* Wray, 17 Nebr. 579, 24 N. W. 207.

New York.— Barkley *v.* Rensselaer, etc., R. Co., 71 N. Y. 205; Claflin *v.* Lenheim, 66 N. Y. 301; McNeilly *v.* Continental L. Ins. Co., 66 N. Y. 23; Cosmopolitan Range Co. *v.* Midland R. Terminal Co., 44 N. Y. App. Div. 467, 60 N. Y. Suppl. 973; Stevens *v.* Schroeder, 40 N. Y. App. Div. 590, 58 N. Y. Suppl. 52; Buffalo Mar. Bank *v.* Butler Colliery Co., 1 Silv. Sup. 155, 5 N. Y. Suppl. 291 [*affirmed* in 125 N. Y. 695, 26 N. E. 751]; Doctor *v.* Gilmartin, 14 Daly 206, 6 N. Y. St. 296; Lynch *v.* Rabe, 28 Misc. 215, 59 N. Y. Suppl. 109; Vogel *v.* Weissmann, 23 Misc. 256, 51 N. Y. Suppl. 173; New York Tel. Co. *v.* Barnes, 85 N. Y. Suppl. 327; Knox *v.* Schoenthal, 13 N. Y. Suppl. 7; Riggs *v.* Warner, 12 N. Y. St. 753; —— *v.* Loomis, 19 Wend. 641 (holding that where, after the commencement of a suit and service of papers on the law agent of defendant, the latter appoints another person as agent without notice to the first agent, and plaintiff subsequently serves papers on the first agent, it is binding on defendant); Williams *v.* Birbeck, Hoffm. 359.

Ohio.— Ætna Ins. Co. *v.* Stambaugh-Thompson Co., 76 Ohio St. 138, 81 N. E. 173.

Pennsylvania.— Grasselli Chemical Co. *v.* Biddle Purchasing Co., 22 Pa. Super. Ct. 426.

South Carolina.— Montgomery *v.* Eveleigh, 1 McCord Eq. 267.

South Dakota.— Edinburgh-American Land Mortg. Co. *v.* Noonan, 11 S. D. 141, 76 N. W. 298.

Tennessee.— Murdock *v.* Leath, 10 Heisk. 166.

Texas.— Houston, etc., R. Co. *v.* Hill, 63 Tex. 381, 51 Am. Rep. 642.

Vermont.— Tier *v.* Lampson, 35 Vt. 179, 82 Am. Dec. 634.

Wisconsin.— Johnson *v.* Youngs, 82 Wis. 107, 51 N. W. 1095; Kelly *v.* Phelps, 57 Wis. 425, 15 N. W. 385.

United States.— Johnson *v.* Christian, 128 U. S. 374, 9 S. Ct. 87, 32 L. ed. 412; Southern L. Ins. Co. *v.* McCain, 96 U. S. 84, 24 L. ed. 653; Hatch *v.* Coddington, 95 U. S. 48, 24 L. ed. 339; Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371.

England.— Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645; Dodsley *v.* Varley, 12 A. & E. 632, 5 Jur. 316, 4 P. & D. 448, 40 E. C. L. 316; *Ex p.* Bright, 2 Deac. & C. 8; Curlewis *v.* Birkbeck, 3 F. & F. 894.

Canada.— Kerr *v.* Lefferty, 7 Grant Ch. (U. C.) 412.

See 40 Cent. Dig. tit. "Principal and Agent," § 60.

Failure to recall instrument evidencing authority. — Where an agency constituted by writing is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person, who

of third persons who have not dealt with the agent in reliance on the apparent agency;[49] nor in cases where the agent was originally constituted a special agent to do a particular thing, and not a general agent with continuing authority.[50] Ordinarily no particular form of notice is necessary to give effect to a revocation of authority.[51] As well as actual or express, notice may be implied or constructive.[52]

c. By Renunciation or Abandonment by Agent — (I) *POWER OF RENUNCIATION.* As the principal may in most cases revoke the agency at any time, even in cases when it is wrongful for him so to do,[53] so the agent in all cases has the power at any moment to renounce the agency.[54]

deals with him as agent on the faith of it without notice of the revocation, the act of the agent within the scope of the authority will bind the principal. Beard *v.* Kirk, 11 N. H. 397. And see Williams *v.* Birbeck, Hoffm. (N. Y.) 359.

If the principal is guilty of great negligence in failing to give notice of revocation, he is bound to third persons subsequently dealing with the agent as such in good faith. Morgan *v.* Stell, 5 Binn. (Pa.) 305. And see Williams *v.* Birbeck, Hoffm. (N. Y.) 359.

The principal is not bound by subsequent acts beyond the previous authority. — Groneweg *v.* Kusworm, 75 Iowa 237, 39 N. W. 288; Baudouine *v.* Grimes, 64 Iowa 370, 20 N. W. 476.

49. Illston *v.* Evans, 27 N. Y. App. Div. 447, 50 N. Y. Suppl. 82 (as where the agent of an undisclosed principal afterward embarks in a new enterprise in his own name, the fact that he ever was an agent being unknown to the party with whom he had dealt); Fabian Mfg. Co. *v.* Newman, (Tenn. Ch. App. 1900) 62 S. W. 218 (as where a debtor is induced to make a payment to a discharged agent of a creditor in reliance on a forged letter and telegram purporting to come from the creditor, and not in reliance on the agent's authority). And see Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460, where it was held that notice of termination of the agency is unnecessary so far as a matter of service of process was concerned.

50. Florida Cent., etc., R. Co. *v.* Ashmore, 43 Fla. 272, 32 So. 832; Watts *v.* Kavanagh, 35 Vt. 34. And see Gragg *v.* Home Ins. Co., 107 S. W. 321, 32 Ky. L. Rep. 988.

51. Johnson *v.* Youngs, 82 Wis. 107, 51 N. W. 1095, holding that when the third person with whom the agent has done business for the principal in any way learns that the agent will not in future be allowed so to act he has sufficient notice of the revocation.

Character of notice — *Analogy to dissolution of partnership.* — The same character of notice is required to inform the public of a revocation of an agency as is necessary to give information of the dissolution of a partnership. Gragg *v.* Home Ins. Co., 107 S. W. 321, 32 Ky. L. Rep. 988; Claflin *v.* Lenheim, 66 N. Y. 301. See PARTNERSHIP, 30 Cyc. 670 *et seq.*

As affected by dealings with agent before revocation. — A distinction is made, as to the character of the notice, between persons who dealt with the agent before the revocation and persons dealing with him after the revocation but without sufficient notice thereof. Gragg *v.* Home Ins. Co., 107 S. W. 321, 32 Ky. L. Rep. 988.

52. Keith *v.* Sands, etc., Lumber Co., 88 Mich. 172, 50 N. W. 133; Williams *v.* Birbeck, Hoffm. (N. Y.) 359, holding that if in the exercise of ordinary caution the third person would have been led to knowledge of the revocation, he is chargeable with notice thereof; that whatever is sufficient to put a man on inquiry is equivalent to actual notice.

Dubious or equivocal circumstances, however, will not be substituted for actual notice. Claflin *v.* Lenheim, 66 N. Y. 301; McNeilly *v.* Continental L. Ins. Co., 66 N. Y. 23; Riggs *v.* Warner, 12 N. Y. St. 753, holding that notice is not to be inferred from proof of knowledge of facts not inconsistent with a continuation of the agency.

Notice of revocation may be given by the agent as well as by the principal. Vail *v.* Judson, 4 E. D. Smith (N. Y.) 165.

Notice of the creation of a second agency which is inconsistent with the continuance of the first is sufficient notice of the revocation of the first agency. Clark *v.* Mullenix, 11 Ind. 532; Johnson *v.* Youngs, 82 Wis. 107, 51 N. W. 1095; Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754.

Record as notice. — It has been held that if the revocation of a power of attorney is required by statute to be recorded, the record thereof constitutes notice of the revocation. Bush *v.* Van Ness, 12 Vt. 83. *Contra*, Best *v.* Gunther, 125 Wis. 518, 104 N. W. 82, 918. In any event the record constitutes notice where the statute so provides. Arnold *v.* Stevenson, 2 Nev. 234. If, however, a revocation is not required to be recorded, the record thereof does not constitute notice (Williams *v.* Birbeck, Hoffm. (N. Y.) 359; Bush *v.* Van Ness, *supra*), although it has been held that it may be prudent to record it (Morgan *v.* Stell, 5 Binn. (Pa.) 305), and that if a power is recorded, although unnecessarily, and a third person knows of the record, he is guilty of negligence in failing to search the record office for a subsequent revocation (Williams *v.* Birbeck, *supra*). The revocation of a power of attorney to assign a mortgage of land must be recorded, where recordation is necessary, in the county where the land lies, else the record does not constitute notice. Williams *v.* Birbeck, *supra*.

53. See *supra*, I, G, 1, b, (I), (A).

54. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Hitchcock *v.* Kelly, 18 Ohio Cir. Ct. 808, 4 Ohio Cir. Dec. 180; Duffield *v.* Michaels,

(II) *Right of Renunciation* — (A) *In General.* Because he has the power it by no means follows that the agent has the right to renounce the agency at his pleasure.[55] An agency at will, so far as it is executory, may of course be abandoned or renounced by the agent at any time,[56] unless he has entered upon performance of his undertaking, in which event he cannot withdraw therefrom wantonly and without cause without rendering himself responsible to the principal for any loss that he may sustain therefrom. To avoid this liability the agent must act in good faith, and give the principal reasonable notice of the intended abandonment, so that the latter may attend to the business himself, or appoint a new agent to attend to it, or otherwise avoid loss from the renunciation of the agency.[57] If, on the other hand, an agency is not at will, and the agent renounces it without sufficient cause, he is bound to indemnify the principal for any loss thereby sustained.[58] Whether the agency be one at will or otherwise, however, the agent may renounce it at any time for good cause.[59]

97 Fed. 825, 832 [*reversed* on other grounds in 102 Fed. 820, 42 C. C. A. 649].

Compelling specific performance of contract of agency see *infra*, I, G, 1, c, (II), (B).

55. See cases cited *infra*, note 56 *et seq.*

56. *Colorado.*—Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238, *semble.*

Indiana.— Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377, *semble.*

Minnesota.— Forbes *v.* Bushnell, 47 Minn. 402, 50 N. W. 368, where plaintiff and defendants agreed that the former should devote his time and energy to selling real estate for the latter at specified rates of compensation "for such time as may be mutually agreeable."

New York.— Winslow *v.* Mayo, 123 N. Y. App. Div. 758, 108 N. Y. Suppl. 640, where defendant agreed to give plaintiff the right to sell "any or all" of a stock of goods on a commission on all sales made by him, and plaintiff agreed to devote his entire time to the sale of the goods.

United States.— U. S. *v.* Jarvis, 26 Fed. Cas. No. 15,468, 2 Ware 278, 4 N. Y. Leg. Obs. 298, *semble.*

See 40 Cent. Dig. tit. "Principal and Agent," § 72.

Stipulation as to duration of agency.— While an agency may be terminated at will on reasonable notice where no time is fixed for its duration (Security Trust, etc., Ins. Co. *v.* Ellsworth, 129 Wis. 349, 109 N. W. 125. And see Gibb *v.* McCoy, 19 N. Y. Suppl. 755), yet where a contract of agency provides that the agents shall pay a certain royalty per annum "for the first three years of this license," but that they may terminate the agreement at the end of the first year by giving three months' notice, and further provides for its termination by the principal at the end of three years, the agents cannot terminate the contract before the expiration of the third year, if they fail to terminate it at the end of the first (Gibb *v.* McCoy, *supra*). However, the fact that the agency is specified to be for a definite time is not, it seems, conclusive that it cannot rightfully be terminated at will, and if an agency for a certain period leaves the agent free to act or not as he will, the agency is in effect one at will, and may ordinarily be terminated at any time by the agent. Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238.

Damages.—Where the agent of a coal company abandons the sale of the latter's coal, and the company procures another agent at some cost, and, so far as may be, themselves endeavor to sell the coal at an added expense, this is the principal damage which they are entitled to recover in an action for such breach; and although they may be injured in the matter of the price at which, after the renunciation of the agent's engagement, they are compelled to dispose of their product, such difference does not furnish the true basis of recovery. Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238.

57. Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238; Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377 (*semble*); Berthoud *v.* Gordon, 6 La. 579 (holding that where a mercantile firm is part owner of a steamboat and acts as the agent of a co-proprietor at a distance to insure his interest therein, and afterward discontinues such insurance without any instructions from him, and the boat is lost, the firm is liable for the amount of such interest uninsured; and the circumstances that the firm renders an account current to the co-proprietor before the loss of the boat in which the charge of the premium for insurance is omitted, and that no objection is made, will not be considered as notice of a discontinuance of the agency to insure so as to excuse the agent from his liability); U. S. *v.* Jarvis, 26 Fed. Cas. No. 15,468, 2 Ware 278, 4 N. Y. Leg. Obs. 298 (*semble*).

58. Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238, holding that this is especially true where the agent, before renunciation, had entered on his undertaking. And see Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

59. Conrey *v.* Brandegee, 2 La. Ann. 132, holding that where the conduct of the principal is calculated to interrupt the friendly relations existing between him and his agent, the latter may terminate his agency, under a full reservation of all his rights.

Abusive conduct by the principal toward the agent is good cause for renunciation. Cody *v.* Raynaud, 1 Colo. 272; Bishop *v.* Ranney, 59 Vt. 316, 7 Atl. 820.

(B) *Compelling Specific Performance.* Even though an agent may have no right to abandon the contract of agency, yet the courts will not decree specific enforcement thereof.[60] Such a contract calls for personal services, and the performance of these no court has the power to compel.[61] Moreover it is the policy of the law to allow the principal at any time to require the agent to cease to act in his name, and specific performance should not be available to one party to a contract unless it is open to the other also.[62] But while the courts will not compel an agent to perform his undertaking, they will in a proper case reach out a restraining arm to prevent him, and third persons in collusion with him, from taking advantage of his wrongful repudiation of the agency in such a way as to work injury to the principal.[63] Thus injunction will issue to restrain an agent from using, to the injury of the principal's business, information acquired in the performance of the agency;[64] and in cases where the ability of the agent is so peculiar or unique that he cannot be replaced, the court may by injunction forbid him to enter the employ of any other person than the principal.[65] Injunction, however, is an extraordinary remedy to be resorted to only when legal remedies fail. To justify its use therefore it must appear that an action at law for damages will not afford the principal adequate compensation for his injury.[66]

Breach of the contract of agency by the principal is good cause for renunciation. Duffield *v.* Michaels, 97 Fed. 825 [*reversed* on other grounds in 102 Fed. 820, 42 C. C. A. 649]; Newcomb *v.* Imperial L. Ins. Co., 51 Fed. 725. However, a contract obligating one of the parties to push the sale of the other's coal for one year, and to pay for all he may order at an agreed price, but not requiring him to take any definite amount, is not a contract of purchase and sale, carrying with it an implied warranty of quality, but an agency; and although the principal is bound to furnish merchantable coal, a single failure to do so will not warrant a rescission of the contract, but for this purpose it must appear that the coal was generally unsalable. Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238.

60. See, generally, SPECIFIC PERFORMANCE.

61. *California.*— Grimmer *v.* Carlton, 93 Cal. 189, 28 Pac. 1043, 27 Am. St. Rep. 171.

Georgia.— Willingham *v.* Hooven, 74 Ga. 233, 58 Am. Rep. 435.

Indiana.— *In re* Clark, 1 Blackf. 122, 12 Am. Dec. 213 (holding that specific enforcement of a contract for personal services would result in a state of slavery); Dukes *v.* Bash, 29 Ind. App. 103, 64 N. E. 47.

Kentucky.— Teeter *v.* Williams, 3 B. Mon. 562, 39 Am. Dec. 485.

Michigan.— Bourget *v.* Monroe, 58 Mich. 563, 25 N. W. 514; Roberts *v.* Kelsey, 38 Mich. 602, pointing out that to attempt to enforce a contract demanding personal confidence would make that confidence impossible.

Minnesota.— Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030.

New Jersey.—Mowers *v.* Fogg, 45 N. J. Eq. 120, 17 Atl. 296.

New York.— De Rivafinoli *v.* Corsetti, 4 Paige 264, 25 Am. Dec. 532; Hamblin *v.* Dinneford, 2 Edw. 529. See, however, Standard Fashion Co. *v.* Siegel-Cooper Co., 44 N. Y. App. Div. 121, 60 N. Y. Suppl. 739.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955.

62. Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723; Reid Ice Cream Co. *v.* Stephens, 62 Ill. App. 334; Kennicott *v.* Leavitt, 37 Ill. App. 435; Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030; Standard Fashion Co. *v.* Siegel-Cooper Co., 22 Misc. (N. Y.) 624, 50 N. Y. Suppl. 1056 [*reversed* on other grounds in 30 N. Y. App. Div. 564, 52 N. Y. Suppl. 433 (*affirmed* in 157 N. Y. 60, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854)]; Martin *v.* Platt, 5 N. Y. St. 284.

63. See INJUNCTIONS, 22 Cyc. 857 *et seq.*

64. Stoddart *v.* Key, 62 How. Pr. (N. Y.) 137; Singer Sewing-Mach. Co. *v.* Union Button-Hole, etc., Co., 22 Fed. Cas. No. 12,904, 6 Fish. Pat. Cas. 480, Holmes 253, 4 Off. Gaz. 553.

65. *Connecticut.*—Wm. Rogers Mfg. Co. *v.* Rogers, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779.

New York.— See Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854 [*affirming* 30 N. Y. App. Div. 564, 52 N. Y. Suppl. 433 (*reversing* 22 Misc. 624, 50 N. Y. Suppl. 1056)].

Ohio.— Port Clinton R. Co. *v.* Cleveland, etc., R. Co., 13 Ohio St. 544.

Oregon.— Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653.

Pennsylvania.— Ford *v.* Jermon, 6 Phila. 6.

England.— Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687 [*overruling* Kemble *v.* Kean, 6 Sim. 333, 9 Eng. Ch. 334, 58 Eng. Reprint 619].

66. *Alabama.*— Iron Age Publishing Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758.

Illinois.— Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723.

Indiana.— Dukes *v.* Bash, 29 Ind. App. 103, 64 N. E. 47.

(III) *Manner of Renunciation.*[67] An agency may be abandoned or renounced either expressly or by implication, no particular form being required thus to effect a termination of the relation.[68]

2. By Operation of Law[69] **— a. In General.** An agency is terminated in many cases by operation of law, regardless of the consent or intention of the parties, by changes affecting the subject-matter of the agency[70] or the parties thereto.[71] A contract of agency is likewise terminated by a change in the law which would render performance of the contract illegal.[72] And if, before the agent acts, the principal himself completes the transaction which the agent was employed to negotiate, the agency likewise ceases.[73] However, the loss or accidental destruc-

Iowa.— Wood *v.* Iowa Bldg., etc., Assoc., 126 Iowa 464, 102 N. W. 410.

New York.— Sanquirico *v.* Benedetti, 1 Barb. 315.

Ohio.— Port Clinton R. Co. *v.* Cleveland, etc., R. Co., 13 Ohio St. 544.

Oregon.— Harlow *v.* Oregonian Pub. Co., 45 Oreg. 520, 78 Pac. 737; Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653.

67. Necessity of notice of abandonment of agency at will see *supra*, I, G, 1, c, (II), (A).

68. Stoddart *v.* Key, 62 How. Pr. (N. Y.) 137, holding that where an agent under a contract as a book canvasser wrote to his principal that he had determined to sell out and give up the business, and that if the principal wanted it, to come or send, the principal, after having made a fair attempt to settle, and having reason to suspect the agent's good faith, was justified in treating the agency as abandoned and in appointing another agent, and that a sale of the list of subscribers afterward by the former agent, or an attempt on his part to release them, was invalid.

Where, however, the agent of an insurance company resigned his agency and asked the appointment of his son in his place, saying that the work of the latter would be under his immediate supervision; and another agent through whom this was communicated to the company added that the business would run the same as before, but that the agent resigning "desires his son to learn the business, and have some responsibility, and takes this method"; and the son was thereupon appointed, the court held that the evidence justified a finding that the agent thus resigning still had authority to act for the company. Ganser *v.* Fireman's Fund Ins. Co., 38 Minn. 74, 35 N. W. 584. And where an agent for the care and sale of real estate wrote to the owners complaining that they had been acting with other agents, and that he would not so act any longer, but he continued to act thereafter, receiving propositions from the owners as to price and terms of sale, the contract of agency was not terminated by such letter. Stringfellow *v.* Elsea, (Tex. Civ. App. 1898) 45 S. W. 418.

Communication of renunciation.— In order to relieve an agent from the duties and obligations which he has assumed as such, his renunciation of the agency must not only be positive and unequivocal, but it is essential that it be made known to the principal. An undisclosed purpose to renounce is without effect. As the intelligent assent of the parties is necessary to establish the relation, so its dissolution must rest upon the knowledge of both. Bergner *v.* Bergner, 219 Pa. St. 113, 67 Atl. 999.

Adverse employment or interest.—Where an attorney in fact having power from a creditor of the estate of a deceased person is afterward appointed the administrator of the estate, the operation of the power becomes suspended, if indeed the agency is not thereby entirely renounced. *In re* Watkins, 121 Cal. 327, 53 Pac. 702. So where an agent had authority to sell a slave, and tried to sell but failed, and then attempted to run off, dispose of, and conceal the slave, his conduct was held to be an absolute abandonment and renunciation of his agency. Case *v.* Jennings, 17 Tex. 661. And see Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 34 [*reversing* (Civ. App. 1898) 51 S. W. 55]. See also *supra*, page 1302, note 34; *infra*, I, G, 2, c, (II).

An assertion by the agent of ownership in the subject-matter of the agency is, it seems, a repudiation of the continuance of the agency. Hitchcock *v.* Kelley, 18 Ohio Cir. Ct. 808, 4 Ohio Cir. Dec. 180; Hill *v.* Conrad, 91 Tex. 341, 43 S. W. 789; Case *v.* Jennings, 17 Tex. 661.

69. Termination of agency: By expiration of term of employment see *supra*, I, G, 1, a, (II). By fulfilment of purpose of agency by agent see *supra*, I, G, 1, a, (I).

War as terminating agency see War.

70. See *infra*, I, G, 2, b.

71. See *infra*, I, G, 2, c.

72. Wood *v.* Iowa Bldg., etc., Assoc., 126 Iowa 464, 102 N. W. 410; Hartford *v.* McGillicuddy, 103 Me. 224, 68 Atl. 860, 26 L. R. A. N. S. 431; People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174. And see Contracts, 9 Cyc. 629 *et seq.*

73. Vardon *v.* Vardon, 6 Ont. 719, holding that where each of two adverse principals who desire to enter into a mutual contract appoints an agent to settle the terms of the contract, and subsequently the principals either perfect the contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals; but that if the principals had, between themselves, entered into an agreement, and the agents,

tion of the instrument evidencing the agent's authority does not work a termination thereof.[74]

b. Change Affecting Subject-Matter of Agency — (i) *In General.* The agency may terminate by operation of law because of a change in the subject-matter thereof,[75] as where, in some instances, the subject-matter is destroyed [76] or the principal loses control over it by reason of a legal attachment against it.[77]

(ii) *Disposal of Subject-Matter.* An agency is effectually revoked when the principal disposes of his interest in the subject-matter of the agency by assignment, conveyance, contract for sale, or otherwise; [78] and where the principal

in ignorance of what the principals were doing, had previously concluded a different agreement, the agreement made by the agents would bind, because prior in time. And see Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

Disposal of subject-matter of agency by principal as terminating relation see *infra*, I, G, 2, b, (II).

Fulfilment of purpose of agency by agent as terminating relation see *supra*, I, G, 1, a, (I).

74. Posten *v.* Rassette, 5 Cal. 467. And see Lost Instruments, 25 Cyc. 1608.

75. Hartford *v.* McGillicuddy, 103 Me. 224, 68 Atl. 860, 26 L. R. A. N. S. 431.

76. Hartford *v.* McGillicuddy, 103 Me. 224, 68 Atl. 860, 26 L. R. A. N. S. 431; Ahern *v.* Baker, 34 Minn. 98, 24 N. W. 341. And see Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377. See also *infra*, III, B, 1. *Compare* Contracts, 9 Cyc. 627–631.

Extinguishment of warrant of attorney to confess judgment by running of statute of limitations against debt see Judgments, 23 Cyc. 707.

77. Stevens *v.* Wellington, 1 La. Ann. 72, holding that where property has been put into the hands of an agent for sale, and the principal is subsequently made a garnishee in an action against one of his creditors, and the facts warrant the presumption that the agent must have been aware that his principal had been made a garnishee, his authority to sell must be considered as suspended from the time of the service of notice on the garnishee. And see Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

Loss of control by bankruptcy or insolvency proceedings see *infra*, I, G, 2, c, (III), (A).

78. *Alabama.*— Chambers *v.* Seay, 73 Ala. 372.

Illinois.— Walker *v.* Denison, 86 Ill. 142; Bissell *v.* Terry, 69 Ill. 184; Gilbert *v.* Holmes, 64 Ill. 548, holding that as the power of constituting an agent is founded on the right of the principal to do the business himself, it follows that when that right ceases the right of creating an appointment, or continuing an appointment already made, must cease also; and so where the principal parts with his right in the subject-matter of the agency before the attorney in fact exercises the power, it will be a revocation in law of the power conferred.

Kentucky.— Chenault *v.* Quisenberry, 56 S. W. 410, 57 S. W. 234, 22 Ky. L. Rep. 79.

Louisiana.— Reynolds *v.* Rowley, 3 Rob. 201, 38 Am. Dec. 233.

Minnesota.— Ahern *v.* Baker, 34 Minn. 98, 24 N. W. 341.

Mississippi.— Kolb *v.* Bennett Land Co., 74 Miss. 567, 21 So. 233.

Missouri.— Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213.

New Jersey.— Kelly *v.* Brennan, 55 N. J. Eq. 423, 37 Atl. 137.

New York.— Allen *v.* Clark, 65 Barb. 563.

North Carolina.— See North Carolina State L. Ins. Co. *v.* Williams, 91 N. C. 69, 49 Am. Rep. 637.

Pennsylvania.— See Yingling *v.* West End. Imp. Co., 5 Pa. Dist. 607.

South Carolina.— Chandler *v.* Franklin, 65 S. C. 544, 44 S. E. 70.

Texas.— Donnan *v.* Adams, 30 Tex. Civ. App. 615, 71 S. W. 580.

United States.— Hatch *v.* Coddington, 95 U. S. 48, 24 L. ed. 339; Labaree *v.* Peoria, etc., R. Co., 14 Fed. Cas. No. 7,959, 3 Ban. & A. 180.

England.— Rhodes *v.* Forwood, 1 App. Cas. 256, 47 L. J. Exch. 396, 34 L. T. Rep. N. S. 890, 24 Wkly. Rep. 1078.

See 40 Cent. Dig. tit. "Principal and Agent," § 58.

A sale to the agent operates as a termination of the relation of agency. Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371.

If the principal makes a lease of property which he has authorized another to sell (Hollingsworth *v.* Young County, 40 Tex. Civ. App. 590, 91 S. W. 1094) or to manage (Perkins *v.* Currier, 19 Fed. Cas. No. 10,985, 3 Woodb. & M. 69), it operates to revoke the agency.

Severance of interests of joint principals.— Where two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, a severance of their interests works a termination of the agency. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377. But see Cotton *v.* Rand, (Tex. Civ. App. 1898) 51 S. W. 55 [*reversed* on other grounds in 93 Tex. 7, 51 S. W. 838, 53 S. W. 343].

If the principal disposes of part of the subject-matter of the agency, the agency is terminated as to that part, and that part only. Perkins *v.* Currier, 19 Fed. Cas. No. 10,985, 3 Woodb. & M. 69. And see Copelin *v.* Shuler, (Tex. 1887) 6 S. W. 668.

If the agent's power is coupled with an interest in the subject-matter of the agency, it is not terminated by a sale of the property by the principal. Wells *v.* Littlefield, 59

has appointed several agents, a sale of the property by one is a revocation of the authority of the others.[79] Accordingly no later act of the agent can have any efficacy in favor of persons having proper notice of the revocation.[80] If, however, third persons subsequently dealing with the agent have no notice of the termination of the agency, they will be protected as against the principal, and, in some instances, against those claiming under him.[81]

c. Change Affecting Parties to Relation — (I) *In General.* An agency may terminate by operation of law by reason of a change in the condition or status of either of the parties to the relation before execution of the agency.[82]

(II) *Adverse Interest or Employment.* It has been held that an agency is terminated by operation of law where the agent, before performance of his undertaking and without the principal's consent, becomes adversely interested or accepts adverse employment.[83]

(III) *Bankruptcy or Insolvency* — (A) *Of Principal.* The power of an agent generally ceases by operation of law upon an adjudication of the principal's bankruptcy or insolvency,[84] or upon the making of a general assignment by the

Tex. 556. So a verbal authority given to the purchaser of land to fill in the grantee's name in a deed that is otherwise complete confers a power coupled with an interest, and is not revoked by his subsequent sale to another without having supplied the omission. Threadgill *v.* Butler, 60 Tex. 599.

Assignment for benefit of creditors see *infra*, I, G, 2, c, (III), (A).

79. Ahern *v.* Baker, 34 Minn. 98, 24 N. W. 341; Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213; Hatch *v.* Coddington, 95 U. S. 48, 24 L. ed. 339.

80. See cases cited *supra*, notes 78, 79.

81. Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371; Gratz *v.* Land, etc., Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393 (holding that a recorded power of attorney to convey certain lands remains in force, as to purchasers in good faith, without notice, from the attorney, although the grantor himself in the meantime conveys the same lands by a deed which remains unrecorded); Labaree *v.* Peoria, etc., R. Co., 14 Fed. Cas. No. 7,959, 3 Ban. & A. 180 (holding that while a sale of a patent annuls an existing power of attorney relating thereto, yet if the power is allowed to remain outstanding without objection, persons dealing with the attorney on the faith thereof will be protected as against the principal).

Record of deed as notice.— Under a statute providing that the record of a deed shall be notice to all persons of its existence, the registry of a deed executed by the principal is constructive notice to the agent and persons subsequently dealing with him of the revocation of a previous power of attorney to sell the land conveyed. Donnan *v.* Adams, 30 Tex. Civ. App. 615, 71 S. W. 580. And see Gratz *v.* Land, etc., Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393. But see Loehde *v.* Halsey, 88 Ill. App. 452, in which the court held that the record affected creditors and subsequent purchasers only, and would not defeat the right of a subagent against the agent employing him to commissions earned after the principal sold the property.

82. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Hartford *v.* McGillicuddy, 103 Me. 224, 68 Atl. 860.

Incapacity of one joint agent.— Where two persons are jointly appointed agents to take charge of a particular business for a specified term or purpose, and one of them becomes incapacitated before the term is completed or the purpose is accomplished, the other cannot proceed alone without the consent of the principal, and hence the agency is thereby in effect revoked. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377. And see Salisbury *v.* Brisbane, 61 N. Y. 617 [*citing* Robson *v.* Drummond, 2 B. & Ad. 303, 9 L. J. K. B. O. S. 187, 22 E. C. L. 132].

83. Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 343 [*reversing* (Civ. App. 1898) 51 S. W. 55], so holding, although the agent did not in fact act to the injury of the principal. And see Watkins' Estate, 121 Cal. 327, 53 Pac. 702. See also *supra*, page 1302 note 34, page 1309 note 68. See, however, Jones *v.* Commercial Bank, 78 Ky. 413, holding that a power of attorney executed by heirs empowering the agent to complete a contract made by the intestate is not, it seems, revoked by a subsequent grant of administration to one of the heirs.

84. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Markwick *v.* Hardingham, 15 Ch. D. 339, 43 L. T. Rep. N. S. 647, 29 Wkly. Rep. 361; Dawson *v.* Sexton, 1 L. J. Ch. O. S. 185; Roper *v.* Shannon, 2 Nova Scotia Dec. 146.

However, the statutes sometimes provide that certain transactions before notice of the act of bankruptcy shall be protected, and under such provisions the acts of an agent have sometimes been upheld where they were done after the petition in bankruptcy but before vesting of title in the assignee. Elliott *v.* Turquand, 7 App. Cas. 79, 51 L. J. P. C. 1, 45 L. T. Rep. N. S. 771, 30 Wkly. Rep. 477 [*citing* Naoroji *v.* Chartered Bank of India, L. R. 3 C. P. 444, 37 L. J. C. P. 221, 18 L. T. Rep. N. S. 358, 16 Wkly. Rep. 791; Rose *v.* Hart, 2 Moore C. P. 547, 8 Taunt. 499, 20 Rev. Rep. 533, 4 E. C. L. 248, 2 Smith Lead. Cas. 1565]; *Ex p.* Snowball, L. R. 7 Ch. 534, 41 L. J. Bankr. 49, 26 L. T. Rep. N. S. 894, 20 Wkly. Rep. 786, where

principal for the benefit of his creditors;[85] and hence the agent does not become the agent of the assignee in bankruptcy or insolvency.[86] However, the agent may in such case do such acts as the bankrupt or insolvent himself might do, such as mere formal and ministerial acts to complete a transaction entered into before the bankruptcy or insolvency;[87] and if the agent has a power coupled with an interest the bankruptcy or insolvency of the principal cannot deprive him of his authority.[88] A power of attorney to confess a judgment is not revived after bankruptcy by a new promise which revives the debt, this not being an incident of the debt, but a separate matter creating an agency.[89]

(B) *Of Agent.* The insolvency of the agent will ordinarily put an end to the agency, at least if it is in any way connected with the agent's business which has caused his failure.[90] But the bankruptcy of the agent will not destroy any right he may have under a power coupled with interest.[91]

(IV) *DEATH* — (A) *Of Principal* — (1) GENERAL RULE. Since the agent can and only does act in the name of the principal and executes his will, it therefore follows as a general rule that the death of the principal ordinarily works an immediate revocation of the authority of the agent by operation of law.[92] Accord-

it was held that if, after the act of bankruptcy but before an adjudication, property of the bankrupt is conveyed under the power to a *bona fide* purchaser without notice of the act of bankruptcy, he may hold the property as against the trustee.

85. Barrett *v.* His Creditors, 12 Rob. (La.) 474; Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46; Elwell *v.* Coon, (N. J. Ch. 1900) 46 Atl. 580.

86. Elwell *v.* Coon, (N. J. Ch. 1900) 46 Atl. 580; Markwick *v.* Hardingham, 15 Ch. D. 339, 43 L. T. Rep. N. S. 647, 29 Wkly. Rep. 361. And see Leopuld *v.* Weeks, 96 Md. 280, 53 Atl. 937.

However, the rights of an agent under a contract of employment are not destroyed by the appointment of receivers for the principal, where the receivers affirm the contract and receive the benefits from it, even though they might have discarded the contract, which at the time of their appointment was merely an executory one. Leopuld *v.* Weeks, 96 Md. 280, 53 Atl. 937.

87. Dixon *v.* Ewart, Buck. 94, 3 Meriv. 322, 36 Eng. Reprint 123, holding that a power of attorney to execute the indorsement of sale upon the register of a ship when she returns home is not revoked by the bankruptcy of the principal.

88. Dickinson *v.* Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351; Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46; Elwell *v.* Coon, (N. J. Ch. 1900) 46 Atl. 580. But *compare* Dye *v.* Bertram, 5 Ohio Dec. (Reprint) 508, 6 Am. L. Rec. 355, where it is said that a discharge in bankruptcy terminates an agency to confess judgment, although the latter is a power coupled with an interest.

89. Dye *v.* Bertram, 5 Ohio Dec. (Reprint) 508, 6 Am. L. Rec. 355.

90. Andenried *v.* Bettelcy, 8 Allen (Mass.) 302, holding that an agency to sell merchandise for another is terminated by the agent's insolvency. See, however, Lea *v.* Bringier, 19 La. Ann. 197, holding that one who has failed may act as agent of another, although under the Louisiana code the agency expires if he has failed on a showing that the whole of his property and credits are not equal in amount to his debts.

91. Hudson *v.* Granger, 5 B. & Ald. 27, 24 Rev. Rep. 268, 7 E. C. L. 27.

92. *Alabama.*— Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149; Saltmarsh *v.* Smith, 32 Ala. 404; Scruggs *v.* Driver, 31 Ala. 274.

Arizona.— Trickey *v.* Crowe, 8 Ariz. 176, 71 Pac. 965 [*affirmed* in 204 U. S. 228, 27 S. Ct. 275, 51 L. ed. 454]; Green *v.* Tuttle, 5 Ariz. 179, 48 Pac. 1009.

Arkansas.—Moore *v.* Maxwell, 18 Ark. 469; Yeates *v.* Pryor, 11 Ark. 58.

California.— Krumdick *v.* White, 92 Cal. 143, 28 Pac. 219, 107 Cal. 37, 39 Pac. 1066; Lowrie *v.* Salz, 75 Cal. 349, 17 Pac. 232; Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Ferris *v.* Irving, 28 Cal. 645; Travers *v.* Crane, 15 Cal. 12; *In re* Kilborn, 5 Cal. App. 161, 89 Pac. 985.

Florida.— McGriff *v.* Porter, 5 Fla. 373.

Georgia.—Anderson *v.* Goodwin, 125 Ga. 663, 54 S. E. 679; Griggs *v.* Swift, 82 Ga. 392, 9 S. E. 1062, 14 Am. St. Rep. 176, 5 L. R. A. 405; Miller *v.* McDonald, 72 Ga. 20; Lathrop *v.* Brown, 65 Ga. 312; Jones *v.* Beall, 19 Ga. 171.

Illinois.— Wallace *v.* Bozarth, 223 Ill. 339, 79 N. E. 57 [*affirming* 123 Ill. App. 624]; Home Nat. Bank *v.* Waterman, 134 Ill. 461, 29 N. E. 503 [*affirming* 30 Ill. App. 535]; Citizen's Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Mecartney *v.* Carhine, 108 Ill. App. 282; Garber *v.* Myers, 32 Ill. App. 175.

Iowa.— Condon *v.* Barnum, (1906) 106 N. W. 514; Darr *v.* Darr, 59 Iowa 81, 12 N. W. 765; Vance *v.* Anderson, 39 Iowa 426; Lewis *v.* Kerr, 17 Iowa 73.

Louisiana.— Lanaux's Succession, 46 La. Ann. 1036, 15 So. 708, 25 L. R. A. 577; Shiff *v.* Lesseps' Succession, 22 La. Ann. 185; Copelle *v.* Dalton, 4 Mart. N. S. 123; Musson *v.* U. S. Bank, 6 Mart. 707.

Maine.— Hartford *v.* McGillicuddy, 103 Me. 224, 68 Atl. 860, 16 L. R. A. N. S. 431; Jones *v.* Jones, 101 Me. 447, 64 Atl. 815, 115 Am. St. Rep. 328; Staples *v.* Bradbury, 8

ingly any acts subsequently done or transactions entered into by the agent as such

Me. 181, 23 Am. Dec. 494; Harper *v.* Little, 2 Me. 14, 11 Am. Dec. 25.

Massachusetts.— Mills *v.* Smith, 193 Mass. 11, 78 N. E. 765, 6 L. R. A. N. S. 865; Brown *v.* Cushman, 173 Mass. 368, 53 N. E. 860; Burrill *v.* Smith, 7 Pick. 291.

Michigan.— Weaver *v.* Richards, 144 Mich. 395, 108 N. W. 382, 6 L. R. A. N. S. 855.

Mississippi.— Clayton *v.* Merrett, 52 Miss. 353.

Missouri.— Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213; Lockhart *v.* Forsythe, 49 Mo. App. 654; Keyl *v.* Westerhaus, 42 Mo. App. 49.

Nebraska.— Deweese *v.* Muff, 57 Nebr. 17, 77 N. W. 361, 73 Am. St. Rep. 488, 42 L. R. A. 789.

New Hampshire.— Wilson *v.* Edmonds, 24 N. H. 517.

New Jersey.— Durbrow *v.* Eppens, 65 N. J. L. 10, 46 Atl. 582.

New York.— Farmers' L. & T. Co. *v.* Wilson, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696 [*affirming* 64 Hun 194, 19 N. Y. Suppl. 142]; Weber *v.* Bridgman, 113 N. Y. 600, 21 N. E. 985; Oatman *v.* Watrous, 120 N. Y. App. Div. 66, 105 N. Y. Suppl. 174; Hoffman *v.* Union Dime Sav. Inst., 109 N. Y. App. Div. 24, 95 N. Y. Suppl. 1045; Matter of Mitchell, 36 N. Y. App. Div. 542, 55 N. Y. Suppl. 725 [*affirmed* in 161 N. Y. 654, 57 N. E. 1117]; Helmer *v.* St. John, 8 Hun 166; Houghtaling *v.* Marvin, 7 Barb. 412; Tusch *v.* German Sav. Bank, 20 Misc. 571, 46 N. Y. Suppl. 422 [*reversed* on other grounds in 23 N. Y. App. Div. 279, 48 N. Y. Suppl. 221]; Soltau *v.* Goodyear Vulcanite Co., 12 Misc. 131, 33 N. Y. Suppl. 77; Thompson *v.* Gruber, 21 How. Pr. 433; Jackson *v.* Henderson, 18 Johns. 294; Bergen *v.* Bennett, 1 Cai. Cas. 1.

North Carolina.— Fisher *v.* Southern L. & T. Co., 138 N. C. 90, 50 S. E. 592; Wainwright *v.* Massenburg, 129 N. C. 46, 39 S. E. 725; Duckworth *v.* Orr, 126 N. C. 674, 36 S. E. 150; McNaughton *v.* Moore, 2 N. C. 189.

North Dakota.— Moore *v.* Weston, 13 N. D. 574, 102 N. W. 163; Brown *v.* Skotland, 12 N. D. 445, 97 N. W. 543, 102 Am. St. Rep. 564.

Ohio.— Ish *v.* Crane, 8 Ohio St. 520, 13 Ohio St. 574; McDonald *v.* Black, 20 Ohio 185, 55 Am. Dec. 448; Wallace *v.* Saunders, 7 Ohio 173; Easton *v.* Ellis, 1 Handy 70, 12 Ohio Dec. (Reprint) 32 [*citing* Anderson *v.* Brown, 9 Ohio 151]; Johnson *v.* Johnson, Wright 594.

Oklahoma.— Kimmell *v.* Powers, (1907) 91 Pac. 687.

Pennsylvania.— Kern's Estate, 176 Pa. St. 373, 33 Atl. 231; Yerkes' Appeal, 99 Pa. St. 401; Frederick's Appeal, 52 Pa. St. 338, 91 Am. Dec. 159; Peries *v.* Aycinena, 3 Watts & S. 64; Byrod *v.* Sweigert, 12 Pa. Dist. 565, 20 Lanc. L. Rev. 271, 17 York Leg. Rec. 45; Shisler's Estate, 2 Pa. Dist. 588.

South Carolina.— Brown *v.* Brown, 38 S. C. 173, 17 S. E. 452; Sullivan *v.* Latimer, 38 S. C. 158, 17 S. E. 701.

Tennessee.— Murdock *v.* Leath, 10 Heisk. 166; Rigs *v.* Cage, 2 Humphr. 350, 37 Am. Dec. 559; Jenkins *v.* Atkins, 1 Humphr. 294, 34 Am. Dec. 648.

Texas.— Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274; Primm *v.* Stewart, 7 Tex. 178; Surghenor *v.* Taliaferro, (Civ. App. 1906) 98 S. W. 648; Nehring *v.* McMurrain, (Civ. App. 1898) 45 S. W. 1032; Connor *v.* Parsons, (Civ. App. 1895) 30 S. W. 83; Kent *v.* Cecil, (Civ. App. 1894) 25 S. W. 715, holding that a deed by an attorney in fact executed before, but delivered after, the death of the principal, is inoperative.

Vermont.— Davis *v.* Windsor Sav. Bank, 46 Vt. 728; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

Virginia.— Triplett *v.* Woodward, 98 Va. 187, 35 S. E. 455; Huston *v.* Cantril, 11 Leigh 136.

Wisconsin.— Lenz *v.* Brown, 41 Wis. 172.

United States.— Long *v.* Thayer, 150 U. S. 520, 14 S. Ct. 189, 37 L. ed. 1167; Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396; Galt *v.* Galloway, 4 Pet. 332, 7 L. ed. 876; Pacific Bank *v.* Hannah, 90 Fed. 72, 32 C. C. A. 522; McClaskey *v.* Barr, 50 Fed. 712; Boone *v.* Clarke, 3 Fed. Cas. No. 1,641, 3 Cranch C. C. 389.

England.— *In re* Overweg, [1900] 1 Ch. 209, 69 L. J. Ch. 255, 81 L. T. Rep. N. S. 776, 16 T. L. R. 70; Graham *v.* Jackson, 6 Q. B. 811, 9 Jur. 275, 14 L. J. Q. B. 129, 51 E. C. L. 811; Blades *v.* Free, 9 B. & C. 167, 7 L. J. K. B. O. S. 211, 4 M. & R. 282, 17 E. C. L. 83; Bailey *v.* Collett, 18 Beav. 179, 23 L. J. Ch. 230, 2 Wkly. Rep. 216, 52 Eng. Reprint 71; Watson *v.* King, 4 Campb. 273, 1 Stark. 121, 16 Rev. Rep. 790, 2 E. C. L. 54; Campanari *v.* Woodburn, 15 C. B. 400, 3 C. L. R. 140, 1 Jur. N. S. 17, 24 L. J. C. P. 13, 3 Wkly. Rep. 59, 80 E. C. L. 400; Wallace *v.* Cook, 5 Esp. 117; Goodson *v.* Alexander, 1 Jur. 37; Mitchell *v.* Eades, Prec. Ch. 125, 24 Eng. Reprint 60, 2 Vern. Ch. 391, 23 Eng. Reprint 851; Phillips *v.* Jones, 4 T. L. R. 401; Lepard *v.* Vernon, 2 Ves. & B. 51, 13 Rev. Rep. 13, 35 Eng. Reprint 237; Wynne *v.* Thomas, Willes 565. And see Tasker *v.* Shepherd, 6 H. & N. 575, 30 L. J. Exch. 207, 4 L. T. Rep. N. S. 19, 9 Wkly. Rep. 476.

Canada.— *Ex p.* Welch, 2 N. Brunsw. Eq. 129; Jacques *v.* Worthington, 7 Grant Ch. (U. C.) 192; McQuesten *v.* Thompson, 2 Grant Err. & App. (U. C.) 167.

See 40 Cent. Dig. tit. "Principal and Agent," § 67.

No notice of death is necessary to terminate the authority as between principal and agent. Phillips *v.* Jones, 4 T. L. R. 401.

Stipulations to contrary.— The rule is the same even where the power of attorney provides that it shall be irrevocable (Yeates *v.* Pryor, 11 Ark. 58; Frink *v.* Roe, (Cal. 1885) 7 Pac. 481, 70 Cal. 296, 11 Pac. 820; Weaver *v.* Richards, 144 Mich. 395, 108 N. W. 382; Mitchell *v.* Eades, Prec. Ch. 125, 24 Eng.

are not binding on those claiming under or through the principal,[93] and afford the agent no basis for a claim against the principal's estate;[94] but on the contrary they expose the agent to liability to the representatives of the deceased principal,[95] and to the third persons with whom the subsequent dealings are had,[96] for acting without authority.

(2) Exceptions and Limitations — (a) In General. Where a principal assigns property in possession of his agent to a third person and authorizes the agent to turn it over to the assignee, the death of the principal before delivery to the assignee does not defeat the latter's right and title to the property.[97] And where the power of attorney forms part of a contract, and is security for money or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, and if not so, is deemed irrevocable in law, and the power may be exercised at any time, and is not affected by the death of the person who created it.[98] It has been held that if the authority has been in part actually executed by the agent, the death of the principal does not revoke the unexecuted part as to the other contracting party.[99] The conduct of the administrator of the deceased principal's estate may be such as to estop him from denying the validity of the agent's acts as against persons who have dealt with the agent without notice of the principal's death.[1]

Reprint 60, 2 Vern Ch. 391, 23 Eng. Reprint 851), and shall survive the death of the principal (Weaver *v.* Richards, *supra; Ex p.* Welch, 2 N. Brunsw. Eq. 129), and be binding on the principal's heirs and personal representatives (Fisher *v.* Southern L. & T. Co., 138 N. C. 90, 50 S. E. 592; *Ex p.* Welch, *supra*).

An attempt to create an agency to become effective at the death of the principal is nugatory, since by that death the authority is terminated. Moore *v.* Weston, 13 N. D. 574, 102 N. W. 163, holding that where a memorandum on the back of a note provided that if it was not paid before payee's death the maker should expend the balance due for funeral expenses and monument for the payee, the maker was the agent of the payee to carry out the provisions of the memorandum after his death, but the agency never became operative as the death terminated the authority which purported to create it. *Compare* Ross *v.* Hardin, 79 N. Y. 84.

Death as effecting revocation of warrant of attorney to confess judgment see Judgments, 23 Cyc. 707.

Termination of contract in general by death of party see Contracts, 9 Cyc. 387; Executors and Administrators, 18 Cyc. 239 *et seq.*

93. See cases cited *supra*, note 92.

94. See *infra*, III, B, 2, b, (II); III, B, 3, c, (II).

95. Wallace *v.* Bozarth, 223 Ill. 339, 79 N. E. 57 [*affirming* 123 Ill. App. 624]; *In re* Mitchell, 36 N. Y. App. Div. 542, 55 N. Y. Suppl. 725 [*affirmed* in 161 N. Y. 654, 57 N. E. 1117].

96. See *infra*, III, C, 1, a, (II).

97. Nicolet *v.* Pillot, 24 Wend. (N. Y.) 240.

98. Durbrow *v.* Eppens, 65 N. J. L. 10, 46 Atl. 582.

A contract by which a claimant employs an attorney to prosecute the claim, and the attorney undertakes to prosecute the same, for a contingent fee, is more than a mere contract of agency, and is not terminated by the employer's death. Mecartney *v.* Carbine, 108 Ill. App. 282; Price *v.* Haeberle, 25 Mo. App. 201; Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542 [*affirming* 49 Hun 107, 1 N. Y. Suppl. 823]; Wylie *v.* Coxe, 15 How. (U. S.) 415, 14 L. ed. 753. But see Wainwright *v.* Massenburg, 129 N. C. 46, 39 S. E. 725.

If a contract for the operation of a stock-farm is more than a mere contract of agency, it is not terminated by the death of the employer; and where the contract does not involve the exercise of such a degree of discretion by the employer as to render personal performance by him essential, his personal representatives may carry it out; and in this event the estate is liable to third persons on obligations incurred by the agent in pursuance of the contract. Lockart *v.* Forsythe, 49 Mo. App. 654.

99. Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149, 93 Ala. 173, 9 So. 736, where an agent sent an order by mail on the day before the death of the principal to a non-resident merchant with whom he had a general arrangement for goods to be supplied on orders during the year, and the merchant filled the order within a reasonable time in ignorance of the principal's death, and it was held that the principal's estate was liable for the price, notwithstanding that the order was not received by the merchant until after the principal's death, since the acceptance of the order related back to the time when the order was deposited in the mail by the agent.

1. Meinhardt *v.* Newman, 71 Nebr. 532, 99 N. W. 261, where the administrator of a mortgagee accepted payments made by the mortgagor to the mortgagee's agent after the mortgagee's death and remitted receipts therefor to the agent, who gave them to the mortgagor, and it was held that the administrator was estopped to assert that a subsequent payment thus made to the agent and con-

(b) Where Death Is Unknown. Although, as has been seen, notice of the revocation of an agency is generally necessary,[2] yet when it is revoked by death the revocation takes effect at once, even as to persons ignorant of the principal's death. Accordingly a third person subsequently dealing with the agent as such acquires no rights and incurs no liabilities as against the principal's estate.[3] As to third persons acting in good faith and in ignorance of the death of the principal the civil law makes an exception, and many of the cases and text writers have regarded the common-law rule as harsh and unjust,[4] and in some of the states it has been modified by statute.[5] In other states it has been held that where the death of the principal is unknown acts of the agent are valid, if they need not have been done in the name of the principal.[6] But this distinction is a strained one, since unless the power is coupled with an interest, the agent, whether he uses the principal's name or not, has no right to act except in that name. Accordingly it is a sounder position to justify an exception in favor of parties acting in ignorance of the principal's death on equitable grounds. Why should the principal's distributees, who receive property only by grace of the law, be given by that law a better position as to the property than would have been occupied by their principal himself, and for a purely technical and often inequitable reason? On this principle some courts lay down the broad rule that while death of the principal

verted by him was not a good payment. And see Ish *v.* Crane, 8 Ohio St. 520, 13 Ohio St. 574. See also *infra*, I, G, 2, c, (IV), (A), (2), (b).

2. See *supra*, I, G, 1, b, (III), (B).

3. *California.*— Ferris *v.* Irving, 28 Cal. 645; Travers *v.* Crane, 15 Cal. 12.

Iowa.— Vance *v.* Anderson, 39 Iowa 426; Lewis *v.* Kerr, 17 Iowa 73.

Maine.— Harper *v.* Little, 2 Me. 14, 11 Am. Dec. 25.

Massachusetts.— Burrill *v.* Smith, 7 Pick. 291.

Mississippi.— Clayton *v.* Merrett, 52 Miss. 353.

New York.— Farmers' L. & T. Co. *v.* Wilson, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696 [*affirming* 64 Hun 194, 19 N. Y. Suppl. 142]; Weber *v.* Bridgman, 113 N. Y. 600, 21 N. E. 985; Hoffman *v.* Union Dime Sav. Inst., 109 N. Y. App. Div. 24, 95 N. Y. Suppl. 1045; Soltau *v.* Goodyear Vulcanite Co., 12 Misc. 131, 33 N. Y. Suppl. 77. See, however, New York Bank *v.* Vanderhorst, 32 N. Y. 553.

Tennessee.— Rigs *v.* Cage, 2 Humphr. 350, 37 Am. Dec. 559; Jenkins *v.* Atkins, 1 Humphr. 294, 34 Am. Dec. 648.

Texas.— Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274.

Vermont.— Davis *v.* Windsor Sav. Bank, 46 Vt. 728; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

United States.— Long *v.* Thayer, 150 U. S. 520, 14 S. Ct. 189, 37 L. ed. 1167; Galt *v.* Galloway, 4 Pet. 332, 7 L. ed. 876; McClaskey *v.* Barr, 50 Fed. 712.

England.— Blades *v.* Free, 9 B. & C. 167, 7 L. J. K. B. O. S. 211, 4 M. & R. 282, 17 E. C. L. 83; Wallace *v.* Cook, 5 Esp. 117.

Canada.— Jacques *v.* Worthington, 7 Grant Ch. (U. C.) 192; McQuesten *v.* Thompson, 2 Grant Err. & App. (U. C.) 167.

See 40 Cent. Dig. tit. "Principal and Agent," § 71.

But see Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149, 93 Ala. 173, 9 So. 736.

Liability of agent to third person as for having acted without authority after unknown death of principal see *infra*, III, C, 1, a, (II).

4. *California.*— Travers *v.* Crane, 15 Cal. 12.

Iowa.— Lewis *v.* Kerr, 17 Iowa 73.

Mississippi.— Clayton *v.* Merrett, 52 Miss. 353.

New York.— Farmers' L. & T. Co. *v.* Wilson, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696 [*affirming* 64 Hun 194, 19 N. Y. Suppl. 142, and *following* Weber *v.* Bridgman, 113 N. Y. 600, 21 N. E. 985]; Hoffman *v.* Union Dime Sav. Inst., 109 N. Y. App. Div. 24, 95 N. Y. Suppl. 1045.

Ohio.— Ish *v.* Crane, 8 Ohio St. 520, 13 Ohio St. 574.

Texas.— Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274.

5. See the statutes of the different states. And see Coney *v.* Sanders, 28 Ga. 511 (holding, however, that the statute declaring that sales of land made under powers shall be good if made before the agent has notice of the death of the constituent applies only to powers made outside of the state); Clayton *v.* Merrett, 52 Miss. 353.

6. *Missouri.*— Dick *v.* Page, 17 Mo. 234, 57 Am. Dec. 267. *Compare* Keyl *v.* Westerhaus, 42 Mo. App. 49.

Nebraska.— Deweese *v.* Muff, 57 Nebr. 17, 77 N. W. 361, 73 Am. St. Rep. 448, 42 L. R. A. 789 [*approved* in Meinhardt *v.* Newman, 71 Nebr. 532, 99 N. W. 261].

Ohio.— Ish *v.* Crane, 8 Ohio St. 520, 13 Ohio St. 574 [*overruling* Easton *v.* Ellis, 1 Handy 70, 12 Ohio Dec. (Reprint) 32].

Tennessee.— See Murdock *v.* Leath, 10 Heisk. 166.

Wisconsin.— Lenz *v.* Brown, 41 Wis. 172.

See 40 Cent. Dig. tit. "Principal and Agent," § 71.

And see Moore *v.* Hall, 48 Mich. 143, 11 N. W. 844. *Compare* Vance *v.* Anderson, 39

works a technical revocation of the agency, yet as to third persons dealing with the agent in ignorance of such death, the distributees take the estate with the same burdens that would have rested upon it in the principal's hands, and as to such persons the agency is not terminated by the death of the principal when such result would be inequitable.[7]

(c) Where Authority Is Coupled With Interest. As the principal if alive could not revoke the authority, so the death of the principal does not terminate the authority of the agent when he has a power coupled with an interest. An agent having such a power has an interest of his own in the subject-matter and can act in his own name, even after the death of the principal.[8] To preclude termination of the agency by the principal's death the agent's interest must be engrafted on an estate in the subject-matter of the agency itself. An interest less than this, such as an agency made irrevocable for a consideration or an agency created as part of a security, although it might prevent the principal from revoking the authority during his lifetime, will not enable it to survive his death.[9]

Iowa 426; Lewis *v.* Kerr, 17 Iowa 73 and note page 78.

7. Carriger *v.* Whittington, 26 Mo. 311, 72 Am. Dec. 212; Cassiday *v.* McKenzie, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76. And see Murdock *v.* Leath, 10 Heisk. (Tenn.) 166.

8. *Alabama.*— Saltmarsh *v.* Smith, 32 Ala. 404.

Arkansas.— Moore *v.* Maxwell, 18 Ark. 469; Yeates *v.* Pryor, 11 Ark. 58.

California.— Norton *v.* Whitehead, 84 Cal. 263, 24 Pac. 154, 18 Am. St. Rep. 172 (where the power was in terms declared to be irrevocable); Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Travers *v.* Crane, 15 Cal. 12.

Connecticut.— Kellogg *v.* Williams, Kirby 316.

Georgia.— Roland *v.* Coleman, 76 Ga. 652 [*distinguishing* Miller *v.* McDonald, 72 Ga. 20; Lathrop *v.* Brown, 65 Ga. 312].

Illinois.— Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838.

Maine.— Merry *v.* Lynch, 68 Me. 94; Staples *v.* Bradbury, 8 Me. 181, 23 Am. Dec. 494.

Massachusetts.— Middlesex Bank *v.* Minot, 4 Metc. 325.

Michigan.— Weaver *v.* Richards, 144 Mich. 395, 108 N. W. 382, 6 L. R. A. N. S. 855; Kelly *v.* Bowerman, 113 Mich. 446, 71 N. W. 836; Moore *v.* Hall, 48 Mich. 143, 11 N. W. 844.

Mississippi.— Clayton *v.* Merrett, 52 Miss. 353.

Missouri.— Shepard *v.* McNail, 122 Mo. App. 418, 99 S. W. 494; Lockhart *v.* Forsythe, 49 Mo. App. 654; Morgan *v.* Gibson, 42 Mo. App. 234.

New Jersey.— Durbrow *v.* Eppens, 65 N. J. L. 10, 46 Atl. 582.

New York.— Farmers' L. & T. Co. *v.* Wilson, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696 [*affirming* 64 Hun 194, 19 N. Y. Suppl. 142]; Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542; Stephens *v.* Sessa, 50 N. Y. App. Div. 547, 64 N. Y. Suppl. 28; Hess *v.* Rau, 49 N. Y. Super. Ct. 324 [*affirmed* in 95 N. Y. 359]; Knapp *v.* Alvord, 10 Paige 205, 40 Am. Dec. 241.

Oklahoma.— Kimmell *v.* Powers, (1907) 91 Pac. 687.

Pennsylvania.— Keys' Estate, 137 Pa. St. 565, 20 Atl. 710, 21 Am. St. Rep. 896; Fisher *v.* New York, etc., R., etc., Co., 31 Wkly. Notes Cas. 502; Droste's Estate, 9 Wkly. Notes Cas. 224. And see Wilson *v.* Stewart, 3 Phila. 51. See, however, Frederick's Appeal, 52 Pa. St. 338, 91 Am. Dec. 159, a case in terms to the contrary, but in which the power was not coupled with an interest.

Texas.— Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274; Carleton *v.* Hausler, 20 Tex. Civ. App. 275, 49 S. W. 118; Hennessee *v.* Johnson, 13 Tex. Civ. App. 530, 36 S. W. 774.

United States.— Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [*reversing* 12 Fed. Cas. No. 6,898, 2 Mason 342]; Boone *v.* Clarke, 3 Fed. Cas. No. 1,641, 3 Cranch C. C. 389.

England.— Spooner *v.* Sandilands, 1 Y. & Coll. 390, 20 Eng. Ch. 390, 62 Eng. Reprint 939. See, however, Watson *v.* King, 4 Campb. 272, 1 Stark. 121, 16 Rev. Rep. 790, 2 E. C. L. 54, a case in terms to the contrary, but in which the power was not coupled with an interest in the subject-matter of the agency.

See 40 Cent. Dig. tit. "Principal and Agent," § 68.

What constitutes agency coupled with interest see *supra*, I, G, 1, b, (I), (B), (4).

9. *Arkansas.*— Yeates *v.* Pryor, 11 Ark. 58.

California.— Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427; Frink *v.* Roe, (1885) 7 Pac. 481, 70 Cal. 296, 11 Pac. 820. And see Travers *v.* Crane, 15 Cal. 12.

Florida.— McGriff *v.* Porter, 5 Fla. 373.

Georgia.— Miller *v.* McDonald, 72 Ga. 20; Lathrop *v.* Brown, 65 Ga. 312.

Louisiana.— Gordon *v.* Stubbs, 36 La. Ann. 625.

Montana.— Gardner *v.* Billings First Nat. Bank, 10 Mont. 149, 25 Pac. 29, 10 L. R. A. 45.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432; Farmers' L. & T. Co. *v.* Wilson, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696 [*affirming* 64 Hun 194, 19 N. Y. Suppl. 142]; Hoffman *v.* Union Dime Sav. Inst., 109 N. Y. App. Div. 24, 95 N. Y. Suppl. 1045; Houghtaling *v.* Marvin, 7 Barb. 412.

North Carolina.— Fisher *v.* Southern L.

(3) Death of Joint Principal. The death of one of two or more joint principals generally terminates the agency.[10]

(B) *Of Agent* — (1) General Rule. As agency calls for personal service it is generally revoked by the death of the agent. Ordinarily his duties cannot be performed by his personal representatives.[11]

(2) Exceptions and Limitations. An agency is not terminated by the agent's death where the power is coupled with an interest. Such a power may subsequently be exercised, at least so far as may be necessary to protect the interests of the estate of the agent.[12]

& T. Co., 138 N. C. 90, 50 S. E. 592; Wainwright *v.* Massenburg, 129 N. C. 46, 39 S. E. 725.

Pennsylvania.— Shisler's Estate, 2 Pa. Dist. 588; Fisher *v.* New York, etc., R., etc., Co., 31 Wkly. Notes Cas. 502. And see Frederick's Appeal, 52 Pa. St. 338, 91 Am. Dec. 159.

Vermont.— Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

United States.— Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [*affirming* 12 Fed. Cas. No. 6,898, 2 Mason 342]; Day *v.* Candee, 7 Fed. Cas. No. 3,676, 3 Fish. Pat. Cas. 9.

England.— Lepard *v.* Vernon, 2 Ves. & B. 51, 13 Rev. Rep. 13, 35 Eng. Reprint 237. And see Watson *v.* King, 4 Campb. 272, 1 Stark. 121, 16 Rev. Rep. 790, 2 E. C. L. 54.

See 40 Cent. Dig. tit. "Principal and Agent," § 68.

See, however, Durbrow *v.* Eppens, 65 N. J. L. 10, 46 Atl. 582.

10. Weaver *v.* Richards, 144 Mich. 395, 108 N. W. 382, 6 L. R. A. N. S. 855. And see Long *v.* Thayer, 150 U. S. 520, 14 S. Ct. 189, 37 L. ed. 1167. See, however, Martin *v.* Hunt, 1 Allen (Mass.) 418; Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542 [*affirming* 49 Hun 107, 1 N. Y. Suppl. 823], both holding that a contract whereby an agent was to be employed was not terminated by the death of one of the joint employers.

Husband and wife as principals.— It has been held that a power by husband and wife as to the wife's separate estate is not a joint power so as to be affected by the husband's death; and accordingly a power of attorney duly executed by husband and wife authorizing an attorney to convey the wife's separate estate is not revoked by the death of the husband. Skirvin *v.* O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696. On the contrary it has been held that a power of attorney by husband and wife severally and respectively appointing an attorney to surrender the wife's customary tenement into the lord's hands is revoked by the death of the wife, and a surrender subsequently made by the attorney is inoperative. Graham *v.* Jackson, 6 Q. B. 811, 9 Jur. 275, 14 L. J. Q. B. 129, 51 E. C. L. 811. See, generally, Husband and Wife, 21 Cyc. 1119.

Partnership as principal.— It has been held that an agency for a partnership is terminated by the death of a member of the firm. Griggs *v.* Swift, 82 Ga. 392, 9 S. E. 1062, 14 Am. St. Rep. 176, 5 L. R. A. 405; McNaughton *v.* Moore, 2 N. C. 189; Tasker *v.* Shepherd, 6 H. & N. 575, 30 L. J. Exch. 207, 4 L. T. Rep. N. S. 19, 9 Wkly. Rep. 476. But see Clunas *v.* Gallagher, 6 La. Ann. 757 (in which it was held that an action may be brought in his own name by an agent to whom as such a note is payable, although a member of the partnership whose agent he is has since died, where the partnership is still continued); New York Bank *v.* Vanderhorst, 32 N. Y. 553 (holding that the death of a partner does not absolutely put an end to the firm; and hence where an agent of a firm duly authorized to draw checks on the bank deposits of the firm continued so to draw after the death of one of the partners, both bank and agent being ignorant of such death, the agent's authority continued in a qualified form, and as the surviving partner took no exception to the acts of the agent, no one else could object). See, generally, Partnership, 30 Cyc. 334.

Death of joint agent as terminating subagency see *infra*, I, G, 2, c, (IV), (B), (4).

11. *Alabama.*— Ryder *v.* Johnston, (1907) 45 So. 181.

Connecticut.— Bristol Sav. Bank *v.* Holley, 77 Conn. 225, 58 Atl. 691.

Louisiana.— Shiff *v.* Lesseps, 22 La. Ann. 185; Musson *v.* U. S. Bank, 6 Mart. 707.

Maine.— See Hartford *v.* McGillicuddy, 103 Me. 224, 68 Atl. 860, 16 L. R. A. N. S. 431.

Michigan.— Adriance *v.* Rutherford, 57 Mich. 170, 23 N. W. 718.

Mississippi.— Mills *v.* Union Cent. L. Ins. Co., 77 Miss. 327, 28 So. 954, 78 Am. St. Rep. 522.

Ohio.— Johnson *v.* Johnson, Wright 594.

Oklahoma.— Kimmell *v.* Powers, (1907) 91 Pac. 687.

Pennsylvania.— Merricks' Estate, 8 Watts & S. 402.

South Carolina.— Bacon *v.* Sondley, 3 Strobh. 542, 51 Am. Dec. 646; Gage *v.* Allison, 1 Brev. 495, 2 Am. Dec. 682.

Tennessee.— Jackson Ins. Co. *v.* Partee, 9 Heisk. 296.

United States.— Howe Sewing-Mach. Co. *v.* Rosensteel, 24 Fed. 583.

England.— See Tasker *v.* Shepherd, 6 H. & N. 575, 30 L. J. Exch. 207, 4 L. T. Rep. N. S. 19, 9 Wkly. Rep. 476.

See 40 Cent. Dig. tit. "Principal and Agent," § 74.

Death of agent as rendering principal absentee see Absentees, 1 Cyc. 203 note 2.

Termination of contracts in general by death of party see Contracts, 9 Cyc. 387; Executors and Administrators, 18 Cyc. 239 *et seq.*

12. Collins *v.* Hopkins, 7 Iowa 463; Kim-

(3) Death of Joint Agent. A principal who appoints joint agents is presumed to do so because he desires their joint discretion.[13] The death therefore of one of several joint agents puts an end to the agency of all,[14] unless a prior or subsequent intention of the principal to the contrary appears.[15] However, a joint and several agency is not terminated by the death of one of the agents.[16]

(4) Effect of Primary Agent's Death on Subagency. If the authority of a subagent proceeds from the principal, it is not affected by the death of the agent who appointed him,[17] unless the subagent is a substitute for the agent, in which case the death of the agent in whose right he acts and to whom he is accountable revokes his authority,[18] and where the subagent acts under joint agents the death of one of them ordinarily terminates the authority of the subagent.[19]

(v) *Dissolution of Partnership* — (a) *Partnership Principal.*[20] Dissolution of a partnership ordinarily works a revocation of the authority of an agent of the firm;[21] but the successor to the firm may by its conduct justify the agent in relying on a continuance of the agency relation.[22]

(b) *Partnership Agent.*[23] Where a partnership is acting as agent its dissolution generally revokes the agency.[24]

(vi) *Insanity* — (a) *Of Principal.* Ordinarily if the principal becomes insane or otherwise mentally incapacitated before the agent has performed his undertaking the agency is terminated or suspended by operation of law.[25] An

mell *v.* Powers, (Okla. 1907) 91 Pac. 687; Lightner's Appeal, 82 Pa. St. 301.

What constitutes power coupled with interest see *supra*, I, G, 1, b, (I), (B), (4).

13. See *supra*, II, C, 3.

14. Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180; Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Johnson *v.* Wilcox, 25 Ind. 182; Sample *v.* Lamb, 2 La. 275; Pechaud *v.* Peytavin, 4 Mart. (La.) 73; Gilman *v.* Kibler, 5 Humphr. (Tenn.) 19.

15. Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180; Davidson *v.* Provost, 35 Ill. App. 126. And see Wilson *v.* Stewart, 3 Phila. (Pa.) 51.

16. Davidson *v.* Provost, 35 Ill. App. 126.

17. Smith *v.* White, 5 Dana (Ky.) 376.

18. Lehigh Coal, etc., Co. *v.* Mohr, 83 Pa. St. 228, 24 Am. Rep. 161, holding that where an agent acted under a letter of attorney giving him general power to buy and sell stocks, etc., with a power of substitution under which he substituted his son to act for him, the son's authority to act was revoked by the death of the father.

19. Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180. See, however, Wilson *v.* Stewart, 3 Phila. (Pa.) 51, where one of three trustees died after executing power to sell lands.

Death of joint agent as terminating agency see *supra*, I, G, 2, c, (IV), (B), (3).

Death of joint principal as terminating agency see *supra*, I, G, 2, c, (IV), (A), (3).

20. **Dissolution by death of partner** see *supra*, note 10.

21. Callanan *v.* Van Vleck, 36 Barb. (N. Y.) 324 [*affirmed* in 41 N. Y. 619] (holding that authority given by a firm to an agent to advance money for the purchase of bills and notes will not under ordinary circumstances justify the agent in continuing those appropriations after a change in the firm by the admission of new partners); Schlater *v.* Winpenny, 75 Pa. St. 321; Salton *v.* New Beeston Cycle Co., [1900] 1 Ch. 143, 81 L. T. Rep. N. S. 437, 16 T. L. R. 25, 48 Wkly. Rep. 92.

Agency for fixed term.— This is so even though the agency was expressed to be for a fixed term and the partnership was dissolved during the term. Tasker *v.* Shepherd, 6 H. & N. 575, 30 L. J. Exch. 207, 4 L. T. Rep. N. S. 19, 9 Wkly. Rep. 476; Bovine *v.* Dent, 21 T. L. R. 82.

Implied notice of dissolution see Schlater *v.* Winpenny, 75 Pa. St. 321.

22. Caldwell *v.* Neil, 21 La. Ann. 342, 99 Am. Dec. 738; Callanan *v.* Van Vleck, 36 Barb. (N. Y.) 324 [*affirmed* in 41 N. Y. 619]; Pariente *v.* Lubbock, 8 De G. M. & G. 5, 44 Eng. Reprint 290 [*affirmed* in 20 Beav. 588, 52 Eng. Reprint 731]. And see Schlater *v.* Winpenny, 75 Pa. St. 321.

23. **Dissolution as ground for revocation of agency** see *supra*, page 1302, note 34.

24. Angle *v.* Mississippi, etc., R. Co., 9 Iowa 487 (holding that authority to a firm to receive goods is not extended to a new firm formed after dissolution of the original one from a part of the members thereof); Wheaton *v.* Cadillac Automobile Co., 143 Mich. 21, 106 N. W. 399; Thomas *v.* Gwyn, 131 N. C. 460, 42 S. E. 904.

A mere change in the firm-name, however, does not annul an agency conferred upon the same persons under another name. Billingsley *v.* Dawson, 27 Iowa 210, holding that the confidence had been reposed in the individuals and was not presumed to be withdrawn by the change in the firm-name.

25. *Indiana.*— Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377, *semble.*

Maine.— Hartford *v.* McGillicuddy, 103 Me. 224, 68 Atl. 860, 16 L. R. A. N. S. 431, *semble.*

New Hampshire.— Davis *v.* Lane, 10 N. H. 156.

New Jersey.— Matthiessen, etc., Refining

exception to this rule exists, however, in favor of third persons to whom the agent has been held out as having authority, and who have dealt with him in reliance thereon without notice of the principal's insanity, where their rights would be prejudiced by a denial of the agent's continuing authority,[26] unless there has been a legal adjudication of insanity, upon which all are charged with notice of such incompetency.[27] A second exception to the general rule exists in the case of an agency in which the power is coupled with an interest in the subject-matter thereof so that it can be exercised in the name of the agent himself. Such a power is not terminated by the principal's insanity.[28] The same reason that operates to suspend an agency during insanity effects its revival upon the restoration to sanity of the principal if he manifests no will to terminate the authority, and he may then, if he will, even assent to acts done by the agent during the suspension of the agency.[29]

(B) *Of Agent.* Since a person who is insane or otherwise mentally incompetent is generally incapable in the first instance of becoming an agent,[30] it would seem to follow that the agency of one who was sane when appointed agent would ordinarily terminate or become suspended upon his subsequently becoming insane or otherwise mentally incapacitated.[31]

Co. *v.* McMahon, 38 N. J. L. 536; Hill *v.* Day, 34 N. J. Eq. 150.

New York.— Merritt *v.* Merritt, 27 N. Y. App. Div. 208, 50 N. Y. Suppl. 604 [*overruling* Wallis *v.* Manhattan Co., 2 Hall 532, which holds that the lunacy of a person who has executed a power of attorney does not operate to revoke it before the fact of his lunacy has been properly established by an inquisition].

Texas.— Renfro *v.* Waco, (Civ. App. 1896) 33 S. W. 766.

Vermont.— Motley *v.* Head, 43 Vt. 633.

United States.— Bunce *v.* Gallagher, 4 Fed. Cas. No. 2,133, 5 Blatchf. 481.

England.— Drew *v.* Nunn, 4 Q. B. D. 661, 48 L. J. Q. B. 591, 40 L. T. Rep. N. S. 671, 27 Wkly. Rep. 810.

See 40 Cent. Dig. tit. "Principal and Agent," § 65.

In Louisiana a power of attorney is revoked by the interdiction of the principal, but continues in force until a judgment to that effect. The mandate does not expire by the principal's seclusion or voluntary retirement from social life, or by his confinement for treatment in an insane asylum. Phelps *v.* Reinach, 38 La. Ann. 547.

Insanity as revoking warrant of attorney to confess judgment see JUDGMENTS, 23 Cyc. 707.

Insanity of wife as terminating husband's agency for her see HUSBAND AND WIFE, 21 Cyc. 1424.

26. *Louisiana.*— Phelps *v.* Reinach, 38 La. Ann. 547.

New Hampshire.— Davis *v.* Lane, 10 N. H. 156.

New Jersey.— Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536; Hill *v.* Day, 34 N. J. Eq. 150.

New York.— Merritt *v.* Merritt, 43 N. Y. App. Div. 68, 59 N. Y. Suppl. 357.

Texas.— Renfro *v.* Waco, (Civ. App. 1896) 33 S. W. 766, holding, however, that this rule would not protect those to whom the principal had never held the representative out as agent.

England.— Drew *v.* Nunn, 4 Q. B. D. 661, 48 L. J. Q. B. 591, 40 L. T. Rep. N. S. 671, 27 Wkly. Rep. 810. And see *Ex p.* Bradbury, 4 Deac. 202, 3 Jur. 1108, 9 L. J. Bankr. 7, Mont. & C. 625; Beaufort *v.* Glynn, 1 Jur. N. S. 888, 3 Wkly. Rep. 463 [*affirmed* in 3 Wkly. Rep. 502].

See 40 Cent. Dig. tit. "Principal and Agent," § 65.

27. Phelps *v.* Reinach, 38 La. Ann. 547; Bunce *v.* Gallagher, 4 Fed. Cas. No. 2,133, 5 Blatchf. 481.

A mere application to have a principal adjudged insane does not revoke or in any way affect his power of attorney to an agent. Gernon *v.* Dubois, 23 La. Ann. 26.

Extent of incapacity.—Even when the principal has been adjudged insane, the agency is not terminated unless it appears that the insanity was of such a nature as to disqualify the principal from making a contract of that character. Insanity is of many forms and types, and one may be insane without impairment of judgment as to the business in question. One with such an uncontrollable appetite for drink that he will sacrifice all his property to gratify his appetite may still be capable of contracting. Motley *v.* Head, 43 Vt. 633.

28. Davis *v.* Lane, 10 N. H. 156; Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536; Hill *v.* Day, 34 N. J. Eq. 150.

Whether this exception includes the case of a power which is part of a security, or which is executed for a valuable consideration but not accompanied by an interest in the subject-matter of the agent, *quære?* Davis *v.* Lane, 10 N. H. 156.

29. Davis *v.* Lane, 10 N. H. 156.

30. See *supra*, I, B, 2, b.

31. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Hartford *v.* McGillicuddy, 103 Me. 224, 68 Atl. 860, 16 L. R. A. N. S. 431; Story Agency, § 487.

(VII) *MARRIAGE*[32] — (A) *Of Principal.* The subsequent marriage of a man who has given a power of attorney terminates the agency so far as it may concern homestead interests acquired by the wife.[33] By the common law a married woman can have no agent, and accordingly the marriage of a *feme sole* instantly terminates the authority of her agents.[34]

(B) *Of Agent.* Where a woman has been appointed as agent, her subsequent marriage does not of itself necessarily terminate the agency.[35] And in no event is her agency thus terminated where her power is coupled with an interest in the subject-matter of the agency.[36]

3. OPERATION AND EFFECT — a. Before Execution of Agency, Total or Partial[37] — (I) *AS BETWEEN PRINCIPAL AND AGENT.*[38] If, before the execution of the agent's undertaking either wholly or in part, the principal, acting within his power and right, revokes the authority,[39] or it expires by the terms of the contract of agency[40] or terminates by operation of law,[41] the agent is deprived of power to act in behalf of the principal or his representatives.[42] Accordingly by acting as such after the termination of his authority the agent acquires no rights against the principal or his representatives for compensation or reimbursement.[43] On the contrary by thus acting he subjects himself to liability to the principal or his representatives as for acting without authority.[44] And on termination of the agent's authority he may be required to return any money or property received by him from his principal for the purposes of the agency.[45] If, however, the agency is such that the principal has no power to revoke it,[46] or of such a nature that it does not cease by reason of the various changes affecting the subject-matter

Where one of two joint agents becomes incapacitated, the business cannot be performed by the other alone without the consent of the principal, and the latter has the right to discontinue the agency. Salisbury *v.* Brisbane, 61 N. Y. 617.

32. See, generally, HUSBAND AND WIFE, 21 Cyc. 1119.

Marriage as effecting revocation of warrant of attorney to confess judgment see HUSBAND AND WIFE, 21 Cyc. 1575.

33. Henderson *v.* Ford, 46 Tex. 627.

34. *Dakota.*— Wambole *v.* Foot, 2 Dak. 1, 2 N. W. 239, holding that if a woman gives a power of attorney to convey her land, and then marries, the marriage operates as a revocation of the power, at least as to all persons having knowledge of the marriage.

Kentucky.— Montague *v.* Carneal, 1 A. K. Marsh. 351.

Louisiana.— Reynolds *v.* Rowley, 3 Rob. 201, 38 Am. Dec. 233, holding, however, that although the power of an agent to manage an estate be revoked by the death of one joint owner and the marriage of another, yet if he continue to act for the joint owners without any express disavowal of his authority, or if it be subsequently recognized tacitly or expressly, they are bound by his acts.

Missouri.— Brown *v.* Miller, 46 Mo. App. 1, holding that the marriage of a woman revokes a prior agency of another to lease her lands.

England.— McCan *v.* O'Ferrall, 8 Cl. & F. 30, 8 Eng. Reprint 12, West. 593, 9 Eng. Reprint 611; Charnley *v.* Winstanley, 5 East 266; Anonymous, W. Jones 388, 82 Eng. Reprint 203.

See 40 Cent. Dig. tit. "Principal and Agent," § 66.

Statutory changes.—This rule no longer applies as to matters with reference to which the statutes have removed a married woman's disability to act for herself. Wambole *v.* Foot, 2 Dak. 1, 2 N. W. 239; Reynolds *v.* Rowley, 2 La. Ann. 890, holding that when marriage does not affect the right of the woman to deal with her property, it cannot have the effect to revoke an agency to deal with such property.

35. Story Agency, § 485.

36. Marder *v.* Lee, 3 Burr. 1469; Reignolds *v.* Davis, 12 Mod. 383, 88 Eng. Reprint 1395; Anonymous, 1 Salk. 117, 91 Eng. Reprint 109; Story Agency, § 485.

37. **Liability of agent to third person for acting after termination of agency** see *infra*, III, C, 1, a, (II).

38. **Liability of agent for wrongful renunciation or abandonment of agency** see *supra*, I, G, 1, c, (II), (A).

Liability of principal for wrongful revocation or repudiation of agency see *supra*, I, G, 1, b, (I), (B); I, G, 1, b, (II).

39. See *supra*, I, G, 1, b, (I), (II).

40. See *supra*, I, G, 1, a, (II).

41. See *supra*, I, G, 2.

42. See cross-references *supra*, note 39 *et seq.*

43. See *infra*, III, B, 2, b; III, B, 3, c, (II).

44. McEwen *v.* Kerfoot, 37 Ill. 530. And see Bush *v.* Van Ness, 12 Vt. 83.

Liability of agent to principal's representatives for acting after principal's death see *supra*, I, G, 2, c, (IV), (A), (1).

45. Phillips *v.* Howell, 60 Ga. 411; Hartshorne *v.* Thomas, 43 N. J. Eq. 419, 10 Atl. 843; Flaherty *v.* O'Connor, 24 R. I. 587, 54 Atl. 376.

46. See *supra*, I, G, 1, b, (I), (B).

or the parties which ordinarily terminate an agency by operation of law,[47] an attempted revocation by the principal, or the occurrence of such changes, is ordinarily without effect on the rights and liabilities of the parties.[48]

(II) *As Between Principal and Third Persons.* Where, before the execution of an agency either wholly or in part, the principal, acting within his power and right, revokes the agent's authority,[49] or it expires by the terms of the contract of agency [50] or terminates by operation of law,[51] the agent is deprived of power to act in behalf of the principal or his representatatives.[52] Accordingly subsequent acts of the agent are not as a rule binding on the principal or his representatives, and third persons who subsequently deal with the agent with notice of the cessation of his authority [53] neither acquire any rights against the principal or his representatives, nor subject themselves to contractual liability by reason of such dealings.[54] If, however, the agency is such that the principal has no power to revoke it,[55] or of such a nature that it does not cease by reason of the various changes affecting the subject-matter or the parties which ordinarily terminate an agency by operation of law,[56] an attempted revocation by the principal, or the occurrence of such changes, is ordinarily without effect on the rights and liabilities of the parties.[57]

b. After Execution of Agency, Total or Partial.[58] Although the agency may otherwise be revocable, yet if the agent has entered upon performance of his undertaking, the principal cannot revoke his authority without cause without compensating the agent for services rendered,[59] and reimbursing him for expenses or losses sustained,[60] and indemnifying him against liabilities incurred to third persons,[61] in thus partially executing his authority. In such cases the absolute right of revocation does not exist.[62] As between the principal or his representatives and

47. See *supra*, I, G, 2.

48. See cross-references *supra*, notes 46, 47.

49. See *supra*, I, G, 1, b, (I), (II).

50. See *supra*, I, G, 1, a, (II).

51. See *supra*, I, G, 2.

52. See cross-references *supra*, note 49 *et seq.*

53. Notice of revocation of agency as affecting rights and liabilities of third persons see *supra*, I, G, 1, b, (III), (B), (2).

Notice of termination of agency by operation of law as affecting rights and liabilities of third persons see *supra*, I, G, 2.

54. *Alabama.*— Gunter *v.* Stuart, 87 Ala. 196, 6 So. 266, 13 Am. St. Rep. 21, holding that after the relation of principal and agent has terminated, the agent has no authority to do any act, state any account, or make any admission that would bind the principal.

California.— Van Dusen *v.* Star Quartz Min. Co., 36 Cal. 571, 95 Am. Dec. 209.

Colorado.—Rundle *v.* Cutting, 18 Colo. 337, 32 Pac. 994.

Florida.— Florida Cent., etc., R. Co. *v.* Ashmore, 43 Fla. 272, 32 So. 832.

Indiana.— Clark *v.* Mullenix, 11 Ind. 532; Taylor *v.* Jones, Smith 5, holding that a direction by the maker of a note to the collecting agent to apply a payment to the note after he had ceased to be agent is not a payment of the note, although the money remains in the agent's hands unapplied.

Missouri.— Hill *v.* Seneca Bank, 100 Mo. App. 230, 73 S. W. 307.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432 (holding that an authority once given, if revoked before execution, is as a general rule, except where an element of estoppel intervenes, the same as to third persons as though it had never existed); Vail *v.* Judson, 4 E. D. Smith 165.

Pennsylvania.— Barrett *v.* Bemelmans, 163 Pa. St. 122, 29 Atl. 756; Schlater *v.* Winpenny, 75 Pa. St. 321.

Vermont.— Tucker *v.* Lawrence, 56 Vt. 467.

United States.— Glover *v.* Ames, 8 Fed. 351. See, however, Chapter Calvary Cathedral *v.* U. S., 29 Ct. Cl. 269; Weile *v.* U. S., 7 Ct. Cl. 535.

England.— Bell *v.* Balls, [1897] 1 Ch. 663, 66 L. J. Ch. 397, 76 L. T. Rep. N. S. 254, 45 Wkly. Rep. 378; Venning *v.* Bray, 2 B. & S. 502, 8 Jur. N. S. 1039, 31 L. J. Q. B. 181, 6 L. T. Rep. N. S. 327, 10 Wkly. Rep. 561, 110 E. C. L. 502; Wallace *v.* Cook, 5 Esp. 117.

Canada.— Vardon *v.* Vardon, 6 Ont. 719.

And see cross-references *supra*, note 49 *et seq.*

55. See *supra*, I, G, 1, b, (I), (B).

56. See *supra*, I, G, 2.

57. See cross-references *supra*, notes 55, 56.

58. Implied authority to complete transaction undertaken before expiration of term of agency see *supra*, I, G, 1, a, (II).

Liability of agent to principal for wrongful abandonment or renunciation see *supra*, I, G, 1, c, (II), (A).

Liability of principal to agent for wrongful revocation or repudiation see *supra*, I, G, 1, b, (II).

59. See *infra*, III, B, 2, b, (I), (D).

60. See *infra*, III, B, 3, c, (II).

61. See *infra*, III, B, 3, c, (II).

62. *Arkansas.*— White Sewing Mach. Co. *v.* Shaddock, 79 Ark. 220, 95 S. W. 143.

third persons who have dealt with the agent, the termination of the agent's authority does not affect the rights and liabilities of the parties as to authorized transactions already concluded.[63]

II. THE AUTHORITY.

A. Nature and Extent[64] — **1. General Rule.** It is fundamental in the law of principal and agent that the power of every agent to bind his principal rests upon the authority conferred upon him by that principal. Without this authority for which the principal himself, by act or conduct, has become responsible, the agent can bind only himself.[65] Every person therefore who undertakes to deal with an alleged agent is put upon inquiry, and must discover at his peril that such pretended agent has authority, that it is in its nature and extent sufficient to permit him to do the proposed act, and that its source can be traced to the will of the alleged principal.[66]

Minnesota.— Deering Harvester Co. *v.* Hamilton, 80 Minn. 162, 83 N. W. 44.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432.

United States.— Sanborn *v.* Rodgers, 33 Fed. 851.

England.— Pooley *v.* Godwin, 4 A. & E. 94, 1 Harr. & W. 567, 5 N. & M. 466, 31 E. C. L. 60.

And see cross-references *supra*, note 59 *et seq.*

63. *Indiana.*— Clark *v.* Mullenix, 11 Ind. 532.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432; Gelpcke *v.* Quentell, 74 N. Y. 599.

Ohio.— Wheeler *v.* Knaggs, 8 Ohio 169.

Washington.— Service *v.* Deming Inv. Co., 20 Wash. 668, 56 Pac. 837.

United States.— Smith *v.* Sheeley, 12 Wall. 358, 20 L. ed. 430.

England.— Hodgson *v.* Anderson, 3 B. & C. 842, 5 D. & R. 735, 10 E. C. L. 379; Blasco *v.* Fletcher, 14 C. B. N. S. 147, 9 Jur. N. S. 1105, 32 L. J. C. P. 284, 9 L. T. Rep. N. S. 169, 11 Wkly. Rep. 997, 108 E. C. L. 147.

Canada.— Williams *v.* Cobourg Town Trust, 23 U. C. Q. B. 330.

Partial execution of authority as precluding termination of agency by death of principal see *supra*, I, G, 2, c, (IV), (A), (2), (a).

64. Authority defined see 4 Cyc. 1074.

65. *Alabama.*— Hill *v.* Helton, 80 Ala. 528, 1 So. 340. See also Gimon *v.* Terrell, 38 Ala. 208.

Colorado.— Lester *v.* Snyder, 12 Colo. App. 351, 55 Pac. 613.

Illinois.— Pease *v.* Trench, 197 Ill. 101, 64 N. E. 368 [*affirming* 98 Ill. App. 24]; Boltz *v.* Huston, 23 Ill. App. 579.

Indiana.— Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488.

Minnesota.— Burchard *v.* Hull, 71 Minn. 430, 74 N. W. 163.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9.

Vermont.— Briggs *v.* Taylor, 35 Vt. 57.

England.— Jacobs *v.* Morris, [1901] 1 Ch. 261, 70 L. J. Ch. 183, 84 L. T. Rep. N. S. 112, 49 Wkly. Rep. 365 [*affirmed* in [1902] 1 Ch. 816, 71 L. J. Ch. 363, 86 L. T. Rep. N. S. 275, 18 T. L. R. 384, 50 Wkly. Rep. 371].

And see *supra*, I, D, 1, a.

Binding effect of acts of agent generally see *infra*, III, E.

The consideration or inducement which moves an agent to undertake to bind his principal does not enlarge his authority to bind such principal. Halladay *v.* Underwood, 90 Ill. App. 130.

Powers greater than those of the principal cannot be exercised by the agent as such. Montreal Assur. Co. *v.* McGillivray, 13 Moore P. C. 87, 8 Wkly. Rep. 165, 15 Eng. Reprint 33.

66. *Alabama.*—Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808; Cummins *v.* Beaumont, 68 Ala. 204; Lawrence *v.* Randall, 47 Ala. 240; Powell *v.* Henry, 27 Ala. 612; Van Eppes *v.* Smith, 21 Ala. 317; Fisher *v.* Campbell, 9 Port. 210.

California.—Davis *v.* Trachsler, 3 Cal. App. 554, 86 Pac. 610.

Colorado.— Gates Iron Works *v.* Denver Engineering Works, 17 Colo. App. 15, 67 Pac. 173; Lester *v.* Snyder, 12 Colo. App. 351, 55 Pac. 613.

Illinois.— Fortune *v.* Stockton, 182 Ill. 454, 55 N. E. 367; Davidson *v.* Porter, 57 Ill. 300; Peabody *v.* Hoard, 46 Ill. 242; Schneider *v.* Lebanon Dairy, etc., Co., 73 Ill. App. 612.

Indiana.— Reitz *v.* Martin, 12 Ind. 306, 74 Am. Dec. 215; Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488.

Iowa.— Blanding *v.* Davenport, etc., R. Co., 88 Iowa 225, 55 N. W. 81; Tidrick *v.* Rice, 13 Iowa 214.

Kentucky.— Godshaw *v.* Struck, 109 Ky. 285, 58 S. W. 781, 22 Ky. L. Rep. 820, 51 L. R. A. 668.

Louisiana.— Chaffe *v.* Stubbs, 37 La. Ann. 656.

Michigan.—Hammond *v.* State Bank, Walk. 214.

Minnesota.— Trull *v.* Hammond, 71 Minn. 172, 73 N. W. 642; Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 65 N. W. 635, 56 Am. St. Rep. 481, 30 L. R. A. 346.

Mississippi.— Busby *v.* Yazoo, etc., R. Co., 90 Miss. 13, 43 So. 1; Dozier *v.* Freeman, 47 Miss. 647; Brown *v.* Johnson, 12 Sm. & M. 398, 51 Am. Dec. 118.

Missouri.— See Padley *v.* Neill, 134 Mo. 364, 35 S. W. 997.

Montana.— Moore *v.* Skyles, 33 Mont. 135, 82 Pac. 799, 114 Am. St. Rep. 801, 3 L. R.

No third person can hold the principal if the agent acted without authority,[67] or

A. N. S. 136 [*citing* Helena Nat. Bank *v.* Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628]; Dodge *v.* Birkenfeld, 20 Mont. 115, 49 Pac. 590; Billings First Nat. Bank *v.* Hall, 8 Mont. 341, 20 Pac. 638; Deer Lodge Bank *v.* Hope Min. Co., 3 Mont. 146, 35 Am. Rep. 458.

New Hampshire.— Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

New York.— Commonwealth Trust Co. *v.* Young, 122 N. Y. App. Div. 502, 107 N. Y. Suppl. 555; Molloy *v.* Whitehall Portland Cement Co., 116 N. Y. App. Div. 839, 102 N. Y. Suppl. 363; Schmidt *v.* Garfield Nat. Bank, 64 Hun 298, 19 N. Y. Suppl. 252 [*affirmed* in 138 N. Y. 631, 33 N. E. 1084]; Miner *v.* Edison Electric Illuminating Co., 22 Misc. 543, 50 N. Y. Suppl. 218 [*affirmed* in 26 Misc. 712, 56 N. Y. Suppl. 801]; Buskirk *v.* Talcott, 96 N. Y. Suppl. 714; Sexsmith *v.* Siegel-Cooper Co., 88 N. Y. Suppl. 925; Williams *v.* Birbeck, Hoffm. 359.

North Carolina.— Swindell *v.* Latham, 145 N. C. 144, 58 S. E. 1010, 122 Am. St. Rep. 430; Ferguson *v.* Davis, etc., Bldg., etc., Co., 118 N. C. 946, 24 S. E. 710.

Oregon.— Reid *v.* Alaska Packing Co., 47 Oreg. 215, 83 Pac. 139.

Pennsylvania.— Smith *v.* Ebert, 11 Kulp 63.

South Dakota.— Shull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654; Kirby *v.* Western Wheeled Scraper Co., 9 S. D. 623, 70 N. W. 1052; Ellis *v.* Wait, 4 S. D. 454, 57 N. W. 229.

Texas.— Tompkins' Mach., etc., Co. *v.* Peter, 84 Tex. 627, 19 S. W. 860; Galveston, etc., R. Co. *v.* Allen, (Civ. App. 1906) 94 S. W. 417; Baker, etc., Co. *v.* Kellett-Chatham Mach. Co., (Civ. App. 1905) 84 S. W. 661.

West Virginia.— Cobb *v.* Glenn Boom, etc., Co., 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734; Rosendorf *v.* Poling, 48 W. Va. 621, 37 S. E. 555; Wells *v.* Michigan Mut. L. Ins. Co., 41 W. Va. 131, 23 S. E. 527.

Wyoming.— Brown *v.* Grady, (1907) 92 Pac. 622.

United States.— Jonathan Mills Mfg. Co. *v.* Whitehurst, 72 Fed. 496, 19 C. C. A. 130 (holding that a purchaser who has reason to believe that the party offering a patent for sale holds it as agent for a third person cannot become a *bona fide* purchaser for value by relying on the statements of the suspected agent as to his authority, but inquiry must be made of some other person who will have a motive to tell the truth in the interests of the principal); Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347; Moores *v.* Citizens' Nat. Bank, 15 Fed. 141.

England.— Chapleo *v.* Brunswick Bldg. Soc., 6 Q. B. D. 696, 50 L. J. Q. B. 372, 44 L. T. Rep. N. S. 449, 29 Wkly. Rep. 529; Attwood *v.* Munnings, 7 B. & C. 278, 6 L. J. K. B. O. S. 9, 1 M. & R. 66, 31 Rev. Rep. 194, 14 E. C. L. 130; Stein *v.* Cope, Cab. & E. 63. See also East India Co. *v.* Tritton, 3 B. & C. 280, 5 D. & R. 214, 3 L. J. K. B. O. S. 24, 27 Rev. Rep. 353, 10 E. C. L. 134.

Canada.—Nova Scotia Bank *v.* Richards, 33 N. Brunsw. 412 [*affirmed* in 26 Can. Sup. Ct. 381]; Hickman *v.* Baker, 31 Nova Scotia 208.

See 40 Cent. Dig. tit. "Principal and Agent," § 529.

No person is bound to deal with an agent, and if he chooses to do so he must either learn from the principal the limits of his authority or else at his peril trust the statements of the agent. Mussey *v.* Beecher, 3 Cush. (Mass.) 511; Deffenbaugh *v.* Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197; Clark *v.* Haupt, 109 Mich. 212, 68 N. W. 231; Gordeen *v.* Pearlman, 91 N. Y. Suppl. 420; Hambro *v.* Burnaud, [1903] 2 K. B. 399, 8 Com. Cas. 252, 72 L. J. K. B. 662, 19 T. L. R. 584, 51 Wkly. Rep. 652 [*reversed* on other grounds in [1904] 2 K. B. 10, 9 Com. Cas. 251, 73 L. J. K. B. 669, 90 L. T. Rep. N. S. 803, 20 T. L. R. 398, 52 Wkly. Rep. 583].

Written authority.— When an agent acts under a written authority, parties dealing with him are bound to inform themselves of its extent and inquire into its limitations. Rawson *v.* Curtiss, 19 Ill. 456. See also Weekes *v.* A. F. Shopleigh Hardware Co., 23 Tex. Civ. App. 577, 57 S. W. 67. And where the nature of the transactions with an agent shows that his power must necessarily be contained in a written document, persons dealing with him are charged with the duty of inquiring as to the extent of his authority, and can recover for no loss resulting from their failure to discharge this duty. Thomas Gibson Co. *v.* Carlisle, 3 Ohio S. & C. Pl. Dec. 27, 1 Ohio N. P. 398.

If the third person makes no inquiry, but chooses to rely on the agent's statement, he is charged with knowledge of the agent's authority. Nova Scotia Bank *v.* Richards, 33 N. Brunsw. 412 [*affirmed* in 26 Can. Sup. Ct. 381].

First dealing with agent.— The doctrine that a person dealing with an agent is bound to ascertain the extent of the agent's authority is particularly applicable where the agent is dealt with for the first time. In subsequent dealings it may be assumed that the original authority continues in force and effect unless there is information to the contrary. Lauer Brewing Co. *v.* Schmidt, 24 Pa. Super. Ct. 396.

Estoppel to deny knowledge of want of authority.—Where the owner takes possession of a hired slave, and one makes a demand on him as agent of the hirer for the return of the slave, reasonable evidence of his authority as agent may be required; but if the owner fails to require evidence of such authority and rests his refusal to surrender the slave on the ground of right in himself, he cannot afterward object, in an action on a note given for the hire of the slave, to his want of knowledge of the agent's authority. McNeill *v.* Easley, 24 Ala. 455.

67. *Colorado.*— Sullivan *v.* Leer, 2 Colo. App. 141, 29 Pac. 817.

outside the scope of the authority really or apparently possessed by such agent.[68] And especially will the principal not be bound when the facts and circumstances of the case are such as to put third persons upon inquiry as to the authority and good faith of the agent.[69] It has been held that if the authority of an

Georgia.— Phœnix Ins. Co. *v.* Gray, 107 Ga. 110, 32 S. E. 948.

Louisiana.— Campbell *v.* Nichols, 11 Rob. 16; Allen *v.* Hart, 10 Rob. 55.

Nebraska.— Hartwig *v.* Gordon, 37 Nebr. 657, 56 N. W. 324.

Vermont.— Hurlburt *v.* Kneeland, 32 Vt. 316.

Canada.— Moshier *v.* Keenan, 31 Ont. 658; Hays *v.* O'Connor, 21 U. C. Q. B. 251.

And see *infra*, III, E, 1.

68. *Alabama.*— Patterson *v.* Neal, 135 Ala. 477, 33 So. 39; Cummins *v.* Beaumont, 68 Ala. 204.

Arkansas.— Russell *v.* Cady, 15 Ark. 540, where A delivered a deed of land with a house thereon to the wife of B, which at A's request was not recorded, and B hired labor to be performed upon the house, saying if A did not pay for it he would, and there was no evidence that A assented to the work or that B was his agent, and it was held that, from the terms of the contract, the laborers must have known B had no authority to pledge the credit of A, and as no act had been done from which an agency could be inferred, A could not be held responsible.

California.— Davis *v.* Trachsler, 3 Cal. App. 554, 86 Pac. 610.

Iowa.— Ver Veer *v.* Malone, 134 Iowa 653, 112 N. W. 82.

Kansas.— Bohart *v.* Oberne, 36 Kan. 284, 13 Pac. 388.

Kentucky.— Louisville Foundry, etc., Co. *v.* Patterson, 93 S. W. 22, 29 Ky. L. Rep. 349.

Massachusetts.— Heath *v.* New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 N. E. 215.

New York.— Reis *v.* Drug, etc., Club, 55 Misc. 276, 105 N. Y. Suppl. 285; Sexsmith *v.* Siegel-Cooper Co., 88 N. Y. Suppl. 925.

Texas.— Galveston, etc., R. Co. *v.* Allen, 42 Tex. Civ. App. 576, 94 S. W. 417; Mann *v.* Dublin Cotton-Oil Co., 20 Tex. Civ. App. 678, 50 S. W. 190; Taylor Mfg. Co. *v.* Brown, (App. 1889) 14 S. W. 1071. See also Nash *v.* Noble, (Civ. App. 1907) 102 S. W. 736.

West Virginia.— Bank *v.* Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880; Cobb *v.* Glenn Boom, etc., Co., 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734; Rosendorf *v.* Poling, 48 W. Va. 621, 37 S. E. 555.

United States.— Moores *v.* Citizens' Nat. Bank, 15 Fed. 141.

England.— Daniel *v.* Adams, Ambl. 495, 27 Eng. Reprint 322.

Canada.— Richards *v.* Nova Scotia Bank, 26 Can. Sup. Ct. 381 [*affirming* 33 N. Brunsw. 412].

Thus where the president of a corporation as the attorney in fact for two persons applied to the board of directors for a loan on the joint note of his principals, submitting to the board a separate power of attorney from each principal authorizing the execution of notes by him, the corporation was chargeable with notice that the president as such attorney in fact had no power to execute a joint note on behalf of both his principals. Mechanics' Bank *v.* Schaumburg, 38 Mo. 228.

69. *California.*—Hayes *v.* Campbell, 63 Cal. 143; Van Dusen *v.* Star Quartz Min. Co., 36 Cal. 571, 95 Am. Dec. 209.

Dakota.— See Luke *v.* Grigg, 4 Dak. 287, 30 N. W. 170.

Iowa.— Wolf *v.* Davenport, etc., R. Co., 93 Iowa 218, 61 N. W. 847.

Louisiana.— Allen *v.* Hart, 10 Rob. 55.

Michigan.— Clark *v.* Haupt, 109 Mich. 212, 68 N. W. 231.

Mississippi.— Davis *v.* Henderson, 25 Miss. 549, 59 Am. Dec. 229.

Missouri.— Mechanics' Bank *v.* Schaumburg, 38 Mo. 228.

New Jersey.— Perry *v.* Smith, 29 N. J. L. 74.

New York.— Huie *v.* Allen, 87 Hun 516, 34 N. Y. Suppl. 577; Jacoby *v.* Payson, 85 Hun 367, 32 N. Y. Suppl. 1032 [*affirmed* in 156 N. Y. 658, 50 N. E. 1118]; Schmidt *v.* Garfield Nat. Bank, 64 Hun 298, 19 N. Y. Suppl. 252 [*affirmed* in 138 N. Y. 631, 33 N. E. 1084]; Mull *v.* Ingalls, 30 Misc. 80, 62 N. Y. Suppl. 830.

Ohio.— Thomas Gibson Co. *v.* Carlisle, 3 Ohio S. & C. Pl. Dec. 27, 1 Ohio N. P. 398.

Texas.— Taylor Mfg. Co. *v.* Brown, 4 Tex. App. Civ. Cas. § 3.

Wisconsin.— McKindly *v.* Dunham, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740, holding that the words "agents not authorized to collect," stamped in large legible print on the face of a bill sent to the purchaser of goods, will be presumed to have been observed by such purchaser, and whether he saw them or not were notice to him not to pay to the agent to whom the purchaser gave the order for the goods.

United States.— Thurber *v.* Cecil Nat. Bank, 52 Fed. 513.

England.— Alexander *v.* Mackenzie, 6 C. B. 766, 13 Jur. 346, 18 L. J. C. P. 94, 60 E. C. L. 766; Howard *v.* Braithwaite, 1 Ves. & B. 202, 35 Eng. Reprint 79.

See 40 Cent. Dig. tit. "Principal and Agent," § 535. And see *infra*, III, E, 1, a, (II).

For example, an agent cannot lawfully act for his principal and for himself in matters in which they have adverse interests, and every person dealing with an agent who is acting for himself as well as for his principal in such matters is put upon inquiry as to the authority and good faith of the agent. Moores *v.* Citizens' Nat. Bank, 15 Fed. 141.

Chargeable with knowledge of facts discoverable upon inquiry.— Third persons dealing with an agent are chargeable with a knowledge of such facts as a proper in-

agent is absolute, inquiry as to limitations would be useless, and therefore is not required of the third person.[70] One dealing with an agent need not inquire into the agent's authority in the ordinary course of business,[71] and a person dealing with an agent whose authority is in writing need not look beyond such writing.[72] The necessity of inquiry as to the authority of one with whom it is proposed to deal as agent is illustrated in every sort of transaction. Thus one who makes payment to an agent must at his peril discover whether the agent has authority to receive payment at all,[73] or to receive payment in anything but money;[74] and if a debtor, owing money on a written security, pays it to another as the agent of the holder of the security, he must see that the person so paid is in possession of the security, or that he has authority or has been represented by the creditor to have authority to receive such payment.[75] And the courts are even more insistent that one dealing with an agent shall inquire whether he has sufficient authority, when such agent assumes to make or indorse negotiable paper.[76] When the principal directs that the agent shall contract only in writing it is of course the agent's duty so to do, and the principal will not be bound by oral contracts of the agent,[77] except when the

quiry as to the agent's powers would have revealed to them. Cummins *v.* Beaumont, 68 Ala. 204; Leavens *v.* Thompson, 48 Hun (N. Y.) 389, 1 N. Y. Suppl. 18 [*citing* Ellis *v.* Horrman, 90 N. Y. 466]; Sinker *v.* Lemon, 1 Tex. App. Civ. Cas. § 290; Mills Mfg. Co. *v.* Whitehurst, 72 Fed. 496, 19 C. C. A. 130. See *infra*, II, A, 2, e.

70. Witcher *v.* McPhee, 16 Colo. App. 298, 65 Pac. 806.

71. Landis *v.* Shadle, 23 Pa. Co. Ct. 505.

72. Brown *v.* Frantum, 6 La. 39.

73. Bruen *v.* Kansas City Agricultural, etc., Assoc., 40 Mo. App. 425 (holding that where a principal demands of a third person the beneficial results of a contract made by his agent, a payment thereafter to the agent by such third person will be made at his peril, and he will be liable to pay again on demand of the principal); Bassett *v.* Lederer, 1 Hun (N. Y.) 274, 3 Thomps. & C. 671; Philadelphia Trust, etc., Co. *v.* Roberts, 17 Phila. (Pa.) 9. And see *infra*, II, A, 6, d.

74. Mudgett *v.* Day, 12 Cal. 139; Mathews *v.* Hamilton, 23 Ill. 470 (holding that an agent to collect a bond is not authorized to take notes instead of money; and that it is for the person desiring to pay in notes to ascertain whether the agent is expressly authorized to take notes); McAlpin *v.* Cassidy, 17 Tex. 449. And see *infra*, II, A, 6, d.

75. *Georgia.*— Howard *v.* Rice, 54 Ga. 52.

Missouri.— City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123; Cummings *v.* Hurd, 49 Mo. App. 139.

New Jersey.— Cox *v.* Cutter, 28 N. J. Eq 13.

New York.— Brewster *v.* Carnes, 103 N. Y. 556, 9 N. E. 323, holding that authority to collect interest on a mortgage debt does not authorize the agent to receive the principal debt; and it is incumbent on a debtor who makes a payment on such debt to an agent to see that the securities are in the agent's possession on each occasion that payments are made. See also Crane *v.* Gruenewald, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643.

Oregon.— Rhodes *v.* Belchee, 36 Oreg. 141, 59 Pac. 117, 1119.

Pennsylvania.— Cowden *v.* Bechlar, 6 Pa. Co. Ct. 8.

And see *infra*, II, A, 6, d.

Payment to one known not to have possession.—Where a mortgagor pays the amount of the debt to one whom he knows has not possession of the papers, and who undertakes merely to procure a release from the mortgagee, the mortgagor assumes the risk of the release being procured in that manner. Lane *v.* Duchac, 73 Wis. 646, 41 N. W. 962.

76. *Michigan.*— New York Iron Mine *v.* Negaunee First Nat. Bank, 39 Mich. 644, holding that the fact that an agent makes negotiable paper in the name of his principal payable to himself calls for special caution in one taking it.

Missouri.— Edwards *v.* Thomas, 2 Mo. App. 282.

New York.— Nixon *v.* Palmer, 8 N. Y. 398; Greenwood *v.* Spring, 54 Barb. 375; Beach *v.* Vandewater, 1 Sandf. 265.

North Carolina.— Morganton Bank *v.* Hay, 143 N. C. 326, 55 S. E. 811.

Virginia.— Silliman *v.* Fredericksburg, etc., R. Co., 27 Gratt. 119.

England.— Attwood *v.* Munnings, 7 B. & C. 278, 6 L. J. K. B. O. S. 9, 1 M. & R. 66, 31 Rev. Rep. 194, 14 E. C. L. 130; Fenn *v.* Harrison, 3 T. R. 757, 4 T. R. 177.

Canada.— Union Bank *v.* Eureka Woolen Mfg. Co., 33 Nova Scotia 302.

And see *infra*, II, A, 6, e.

Negotiable paper given for agent's services. — One who takes a note or check purporting to be given by a corporation to its agent for services rendered is not bound to inquire whether the services were rendered, for that is an extrinsic fact peculiarly within the knowledge of the agent, and one dealing with an agent may take his representations as to any extrinsic fact which rests peculiarly within his knowledge and which cannot be ascertained by a comparison of the power with the act done under it. Wilson *v.* Metropolitan El. R. Co., 14 Daly (N. Y.) 171.

77. Baring *v.* Peirce, 5 Watts & S. (Pa.) 548, 40 Am. Dec. 534.

directions were in the nature of secret or private instructions to the agent, in which case the third person cannot be affected thereby.[78] In the case of a public agent, or of one whose authority must by law appear on the public records, all persons are chargeable with notice of his authority, so far as it is public in its nature or publicly recorded;[79] and when the authority is by law required to be in writing third persons are charged with knowledge of that fact, and of the limitations upon the agent's power contained in such writing.[80]

2. Authority Distinguished From Instructions — a. General Distinctions. In legal significance an agent's authority is the sum total of the powers which his principal has caused or permitted him to seem to possess. It is not limited to the powers actually conferred and those to be implied as flowing therefrom, but includes as well the apparent powers which the principal by reason of his acts or conduct is estopped to deny.[81] The instructions to the agent include not only terms of the power which are intended to be made known to those who deal with the agent, and a deviation from which will render ineffectual the act of the agent, but also private instructions or directions to the agent as to the manner in which he shall execute his commission, but which from their nature or the desire of the principal it is manifest he does not expect the agent to disclose to persons with whom he deals.[82] Between these there is a material distinction. The former are part of the agent's authority, the latter, however they may affect the agent, can have no effect to qualify the liability of the principal to third persons to whom they are not, and are not intended to be, communicated.[83] It is proper to receive evidence to establish the former, or to show the knowledge of third persons as to the authority of the agent, and any limitations thereon;[84] but the agent's apparent authority being

78. See *infra*, II, A, 2, b.

79. *Kansas.*— Lewis *v.* Bourbon County Com'rs, 12 Kan. 186, holding that purchasers of negotiable paper issued by an agent, the nature and extent of whose authority must by law appear upon the face of public records, are chargeable with notice of whatever appears upon those records.

New York.— Delafield *v.* Illinois, 2 Hill 159.

Ohio.— Thomas Gibson Co. *v.* Carlisle, 3 Ohio S. & C. Pl. Dec. 27, 1 Ohio N. P. 398.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

England.— Mann *v.* Edinburgh Northern Tramways Co., [1893] A. C. 69, 57 J. P. 245, 62 L. J. P. C. 74, 68 L. T. Rep. N. S. 96, 1 Reports 86.

Canada.— Boyer *v.* Woodstock, 24 N. Brunsw. 521.

80. Davis *v.* Trachsler, 3 Cal. App. 554, 86 Pac. 610; Frahm *v.* Metcalf, 106 Nebr. 227, 106 N. W. 227.

81. *Connecticut.*— Kearns *v.* Nickse, 80 Conn. 23, 66 Atl. 779, 10 L. R. A. N. S. 1118.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 91 Mo. 152, 3 S. W. 486; Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672.

Pennsylvania.— Lauer Brewing Co. *v.* Schmidt, 24 Pa. Super. Ct. 396, in which the court says that as to third persons the liability of the principal for the acts of his agent is measured, not merely by the authority actually given, but by the authority essential to the business of the agency, and the authority held out by the principal as possessed by the agent, or the apparent authority which he permits the agent to assume; that no express terms are required to define the agent's powers; and that the relation of principal and agent implies a grant of the powers necessarily incident to the purposes of the agency, or which by established usage may properly be employed in carrying out those purposes.

South Dakota.— Aldrich *v.* Wilmarth, 3 S. D. 523, 54 N. W. 811.

Texas.— McAlpin *v.* Cassidy, 17 Tex. 449.

Vermont.— Griggs *v.* Selden, 58 Vt. 561, 5 Atl. 504.

See 40 Cent. Dig. tit. "Principal and Agent," § 254. And see *infra*, II, A, 2, e.

82. Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96; Van Santvoord *v.* Smith, 79 Minn. 316, 82 N. W. 642 (holding that instructions to a general contracting agent by the principal "not to make parol contracts with agents," not brought to the notice of the person with whom the agent contracts, are not binding on such person); Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Hatch *v.* Taylor, 10 N. H. 538.

83. Barnes *v.* Downes, 2 Tex. App. Civ. Cas. § 524, holding that where private instructions are given to a special agent respecting the manner of executing the agency, and they are intended to be kept secret and not communicated to those with whom he may deal, they are not to be regarded as limitations on his authority, and notwithstanding he disregards them his acts will be valid. See also Young *v.* Wright, 4 Wis. 144, 65 Am. Dec. 303. And see *infra*, II, A, 2, b.

84. Foss-Schneider Brewing Co. *v.* McLaughlin, 5 Ind. App. 415, 31 N. E. 838; Sage *v.* Haines, 76 Iowa 581, 41 N. W. 366;

proved, it is not proper to admit evidence of instructions unknown to third persons and not intended to be communicated by the agent.[85] The authority of the agent includes not only such instructions as are to be disclosed to third persons, but also, in the absence of special restrictions, the powers implied from the nature of the business,[86] from custom and usage,[87] or the previous course of dealing by the principal,[88] as well as power the exercise of which by the agent the principal is by his conduct estopped to deny,[89] or which he has subsequently approved and ratified.[90]

b. Secret or Private Instructions. Secret or private instructions to an agent, however binding they may be as between the principal and his agent, can have no effect on a third person who deals with the agent in ignorance of the instructions and in reliance on the apparent authority with which the principal has clothed him.[91]

Shaw *v.* Williams, 100 N. C. 272, 6 S. E. 196.

85. Hamill *v.* Ashley, 11 Colo. 180, 17 Pac. 502; Hichhorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592: Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; Oderkirk *v.* Fargo, 61 Hun (N. Y.) 418, 16 N. Y. Suppl. 220; Favill *v.* Perkins, 2 Silv. Sup. (N. Y.) 513, 6 N. Y. Suppl. 169.

86. Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Moore *v.* Tickle, 14 N. C. 244; Lauer Brewing Co. *v.* Schmidt, 24 Pa. Super. Ct. 396. See also *supra*, I, D, 1, c, (II); *infra*, II, A, 2, b; II, A, 3, 4.

87. See *infra*, II, A, 2, d.

88. *California.*— Baker *v.* Brown, 82 Cal. 64, 22 Pac. 879.

Indiana.— Indiana, etc., R. Co. *v.* Adamson, 114 Ind. 282, 15 N. E. 5.

Maine.— Trundy *v.* Farrar, 32 Me. 225.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 91 Mo. 152, 3 S. W. 486; Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672.

New York.— Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Cosmopolitan Range Co. *v.* Midland R. Terminal Co., 44 N. Y. App. Div. 467, 60 N. Y. Suppl. 973; Peche *v.* Sloane, 16 N. Y. App. Div. 458, 45 N. Y. Suppl. 37; New York Cent., etc., R. Co. *v.* Davis, 86 Hun 86, 34 N. Y. Suppl. 206 [*affirmed* in 158 N. Y. 674, 52 N. E. 1125]; Graves *v.* Miami Steamship Co., 29 Misc. 645, 61 N. Y. Suppl. 115; Stiefel *v.* New York Novelty Co., 25 Misc. 221, 55 N. Y. Suppl. 90; Briggs *v.* Kennett, 8 Misc. 264, 28 N. Y. Suppl. 540.

United States.— Stockton *v.* Watson, 101 Fed. 490, 42 C. C. A. 211.

And see *supra*, I, D, 1, c, (II), (C); I, E, 2, a, (II).

Several instances of special agency or of employment do not prove a general agency. Angle *v.* Mississippi, etc., R. Co., 9 Iowa 487.

The fact that a person received rents of land belonging to another, and performed certain acts relating to such land for such other, is insufficient to establish a general agency. Fortescue *v.* Makeley, 92 N. C. 56.

Two previous acts in the presence of the principal do not raise an inference of authority. Fadner *v.* Hibler, 26 Ill. App. 639.

Being allowed to act in a single instance gives no future authority. Jaquins *v.* Gilbert, (Kan. 1898) 53 Pac. 754.

89. See *supra*, I, E, 2, a, (II).

90. See *supra*, I, F.

91. *Alabama.*— Higman *v.* Carmody, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33; Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318; Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34; Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731.

Arkansas.—Liddell *v.* Sahline, 55 Ark. 627, 17 S. W. 705; Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777.

California.—Mabb *v.* Stewart, 147 Cal. 413, 81 Pac. 1073; Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722.

Colorado.— Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232.

Georgia.— Bass Dry Goods Co. *v.* Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980; Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787.

Illinois.— Crain *v.* Jacksonville First Nat. Bank, 114 Ill. 516, 2 N. E. 486; Gray *v.* Merchants' Ins. Co., 113 Ill. App. 537; Swisher *v.* Palmer, 106 Ill. App. 432; Chicago Catholic Bishop *v.* Troup, 61 Ill. App. 641.

Indiana.— Cincinnati, etc., R. Co. *v.* Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503; Robbins *v.* Magee, 76 Ind. 381; Fatman *v.* Leet, 41 Ind. 133.

Iowa.—Chickering-Chase Bros. Co. *v.* Moulton, (1906) 107 N. W. 434; Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58; Kruse *v.* Seiffert, etc., Lumber Co., 108 Iowa 352, 79 N. W. 118; Francis *v.* Litchfield, 82 Iowa 726, 47 N. W. 998.

Kansas.— Aultman Thrashing, etc., Co. *v.* Knoll, 71 Kan. 109, 79 Pac. 1074; Dreyfus *v.* Goss, 67 Kan. 57, 72 Pac. 537; Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437, 57 Pac. 43.

Kentucky.— Givens *v.* Cord, (1898) 44 S. W. 665; Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. 58; Shelbyville *v.* Shelbyville, etc., Turnpike Co., 1 Metc. 54.

Louisiana.— Farrar *v.* Duncan, 29 La. Ann. 126.

Maryland.— Baltimore *v.* Eschbach, 18 Md. 276.

Massachusetts.— Lobdell *v.* Baker, 1 Metc. 193, 35 Am. Dec. 358.

Michigan.— Grand Rapids Electric Co. *v.* Walsh Mfg. Co., 142 Mich. 4, 105 N. W. 1;

As to third persons such secret instructions are no restriction upon the apparent authority of a general agent, for persons dealing with an agent are, in the absence of special proof to the contrary, presumed to know only his general authority,[92]

Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

Missouri.— Cross *v.* Atchison, etc., R. Co., 141 Mo. 132, 42 S. W. 675; Sails *v.* Miller, 98 Mo. 478, 11 S. W. 970; Southwest Missouri Electric R. Co. *v.* Missouri Pac. R. Co., 110 Mo. App. 300, 85 S. W. 966; Flint-Walling Mfg. Co. *v.* Ball, 43 Mo. App. 504; McGinness *v.* Mitchell, 21 Mo. App. 493; Crews *v.* Garneau, 14 Mo. App. 505; Kinealy *v.* Burd, 9 Mo. App. 359.

Nebraska.—Day, etc., Lumber Co. *v.* Rixby, 4 Nebr. (Unoff.) 154, 93 N. W. 688.

New York.— Rathbun *v.* Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; Hill *v.* Miller, 76 N. Y. 32; Price *v.* Keyes, 62 N. Y. 378; Smith *v.* Robinson Bros. Lumber Co., 88 Hun 148, 34 N. Y. Suppl. 518; Clews *v.* Rielly, 53 Hun 636, 6 N. Y. Suppl. 640; Kelly *v.* Fall Brook Coal Co., 4 Hun 261, 67 Barb. 183; Edwards *v.* Schaffer, 49 Barb. 291; Cornell *v.* Masten, 35 Barb. 157; Johnson *v.* Jones, 4 Barb. 369; Weeks *v.* Fox, 3 Thomps. & C. 354; Rourke *v.* Story, 4 E. D. Smith 54, which held that, although by an agent's instructions he is directed to employ men by written agreements, parol engagements made by him will be binding upon the principal, if the employee be ignorant of the agent's instructions.

Ohio.— Thomas Gibson Co. *v.* Carlisle, 3 Ohio S. & C. Pl. Dec. 27, 1 Ohio N. P. 398.

Pennsylvania.— Young *v.* Coray, 167 Pa. St. 617, 31 Atl. 856; Harrington *v.* Bronson, 161 Pa. St. 296, 29 Atl. 30; Adams Express Co. *v.* Schlessinger, 75 Pa. St. 246; Long *v.* Reed, 4 Pa. Dist. 71; Rice *v.* Jackson, 3 Pa. Dist. 829, 16 Pa. Co. Ct. 15.

South Carolina.— Mars *v.* Mars, 27 S. C. 132, 3 S. E. 60.

Tennessee.— Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head 116.

Texas.— Hayward Lumber Co. *v.* Cox, (Civ. App. 1907) 104 S. W. 403.

West Virginia.— Rohrbough *v.* U. S. Express Co., 50 W. Va. 148, 40 S. E. 398, 86 Am. St. Rep. 849.

United States.— Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274; Russ *v.* Telfener, 57 Fed. 973; Foster *v.* Cleveland, etc., R. Co., 56 Fed. 434; Lindroth *v.* Litchfield, 27 Fed. 894; Scarlett *v.* Van Inwagen, 21 Fed. Cas. No. 12,437, 9 Biss. 157, 8 Reporter 673.

England.— Brocklesby *v.* Temperance Permanent Bldg. Soc., [1895] A. C. 173, 59 J. P. 676, 64 L. J. Ch. 433, 72 L. T. Rep. N. S. 477, 11 Reports 159, 43 Wkly. Rep. 606; National Bolivian Nav. Co. *v.* Wilson, 5 App. Cas. 209, 43 L. T. Rep. N. S. 60; Edmunds *v.* Bushell, L. R. 1 Q. B. 97, 12 Jur. N. S. 332, 35 L. J. Q. B. 20; Trickett *v.* Tomlinson, 13 C. B. N. S. 663, 7 L. T. Rep. N. S. 678, 106 E. C. L. 663; Perry Herrick *v.* Attwood, 2 De G. & J. 21, 4 Jur. N. S. 101, 27 L. J. Ch. 121, 6 Wkly. Rep. 204, 59 Eng. Ch. 17, 44 Eng. Reprint 895; Page *v.* Great Northern R. Co., Ir. 2 C. L. 228, 16 Wkly. Rep. 566; Neeld *v.* Beaufort, 5 Jur. 1123 [*affirmed* in 12 Cl. & F. 248, 9 Jur. 813, 8 Eng. Reprint 1399].

Canada.— Murphy *v.* Thompson, 28 U. C. C. P. 233.

See 40 Cent. Dig. tit. "Principal and Agent," § 377.

Subsequent limitations.— Where an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third persons having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third person acting *bona fide*. Sayward *v.* Dunsmuir, 11 Brit. Col. 375.

92. *Alabama.*— Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117; Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808.

Arizona.— California Development Co. *v.* Yuma Valley Union Land, etc., Co., 9 Ariz. 366, 84 Pac. 88.

Colorado.— Saxonia Min., etc., Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Indiana.— Longworth *v.* Conwell, 2 Blackf. 469.

Iowa.— Davenport *v.* Peoria Mar., etc., Ins. Co., 17 Iowa 276.

Kansas.— Banks *v.* Everest, 35 Kan. 687, 12 Pac. 141.

Michigan.— Allis *v.* Voigt, 90 Mich. 125, 51 N. W. 190; Inglish *v.* Ayer, 79 Mich. 516, 44 N. W. 942; Hutchings *v.* Ladd, 16 Mich. 493.

Missouri.— Reynolds *v.* Chicago, etc., R. Co., 114 Mo. App. 670, 90 S. W. 100; Phipps *v.* Mallory Commission Co., 105 Mo. App. 67, 78 S. W. 1097.

Nebraska.— Scales *v.* Paine, 13 Nebr. 521, 14 N. W. 522.

New Hampshire.— Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Hatch *v.* Taylor, 10 N. H. 538.

New York.— Newman *v.* Lee, 87 N. Y. App. Div. 116, 84 N. Y. Suppl. 106 (holding that rules of a stock exchange by which a broker who is a member thereof is prohibited from receiving a certain class of legitimate orders are in the nature of "private instructions" by him to his general agent for the brokerage business, and cannot be received, as against a client who is ignorant thereof, to limit the agent's authority); White *v.* Fuller, 67 Barb. 267; Graves *v.* Marine Steamship Co., 29 Misc. 645, 61 N. Y. Suppl. 115; Munn *v.* Commission Co., 15 Johns. 44.

Pennsylvania.— Anderson *v.* National Surety Co., 196 Pa. St. 288, 46 Atl. 306; De Turck *v.* Matz, 180 Pa. St. 347, 36 Atl. 861; London Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Landis *v.* Shadle, 23 Pa. Co. Ct. 505;

and have a right to assume that the principal intended him to employ the usual and appropriate means, and do the acts that belong to the particular character of employment or that have been previously employed by such agent, irrespective of any private directions the principal may have thought it best to give to the agent.[93] And a special agent who acts within his apparent power will bind his principal, even if he has received private instructions which limit his special authority.[94]

c. Known Limitations. Limitations which are known to a person dealing with an agent are as binding upon such person as they are upon the agent, and he can acquire no rights against the principal by dealing with the agent contrary thereto.[95]

Chouteaux *v.* Leech, 18 Pa. St. 224, 57 Am. Dec. 602.

South Carolina.— Merchants', etc., Nat. Bank *v.* Chilton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

Utah.— Smith *v.* Droubay, 20 Utah 443, 58 Pac. 1112, holding that an agent for the sale of goods, with private limitations and restrictions imposed upon him by his employer, must nevertheless be regarded as a general agent as to third persons with whom he deals and who have no notice of the restrictions on his authority; and when the principal accepts a contract made within the apparent scope of the agent's powers, the principal is bound by all the conditions of such contract, and a failure to comply therewith will render him liable in damages.

Washington.— Hall *v.* Union Cent. L. Ins. Co., 23 Wash. 610, 63 Pac. 505, 83 Am. St. Rep. 844, 51 L. R. A. 88.

See 40 Cent. Dig. tit. "Principal and Agent," § 377.

93. *Alabama.*— Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808.

Indiana.— American Tel., etc., Co. *v.* Green, 164 Ind. 349, 73 N. E. 707.

Missouri.— Harrison *v.* Kansas City, etc., R. Co., 50 Mo. App. 332 (laying down the doctrine thus: Those dealing with an agent have a right to conclude that the principal intends the agent to have and exercise those powers and those only, which necessarily, properly, and legitimately belong to the character of his employment, irrespective of any private instructions or restrictions on his power); Hayner *v.* Churchill, 29 Mo. App. 676.

New York.— Lowenstein *v.* Lombard, 164 N. Y. 324, 58 N. E. 44; Cox *v.* Albany Brewing Co., 56 Hun 489, 10 N. Y. Suppl. 213; Kerslake *v.* Schoonmaker, 1 Hun 436, 3 Thomps. & C. 524; Hildebrant *v.* Crawford, 6 Lans. 502; Kelly *v.* Fall Brook Coal Co., 4 Hun 261, 67 Barb. 183.

North Dakota.—Canham *v.* Plano Mfg. Co., 3 N. D. 229, 55 N. W. 583.

Pennsylvania.— Watts *v.* Devor, 1 Grant 267.

Tennessee.— Ezell *v.* Franklin, 2 Sneed 236.

Wisconsin.— Boothby *v.* Scales, 27 Wis. 626.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

England.— Biggs *v.* Evans, [1894] 1 Q. B. 88, 58 J. P. 84, 69 L. T. Rep. N. S. 723.

Canada.— Macnutt *v.* Shaffner, 34 Nova Scotia 402.

See 40 Cent. Dig. tit. "Principal and Agent," § 377. And see *infra*, II, A, 2, d; II, A, 4, b.

94. *Maine.*— Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96.

Missouri.— Kinealy *v.* Burd, 9 Mo. App. 359.

Nebraska.— Howell *v.* Graff, 25 Nebr. 130, 41 N. W. 142.

New Hampshire.— Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Hatch *v.* Taylor, 10 N. H. 538.

Vermont.— Hurlburt *v.* Kneeland, 32 Vt. 316, holding that where there is an actual want of authority from the principal for the acts of his special agent, the former will not be liable therefor; but *aliter* where there is an authority for such acts, notwithstanding the agent has violated his private instructions as to the mode of execution.

See 40 Cent. Dig. tit. "Principal and Agent," § 377.

95. *Georgia.*— Hutson *v.* Prudential Ins. Co., 122 Ga. 847, 50 S. E. 1000; Whitley *v.* James, 121 Ga. 521, 49 S. E. 600; Brandestein *v.* Douglas, 105 Ga. 845, 32 S. E. 341.

Indiana.— Longworth *v.* Conwell, 2 Blackf. 469; Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488, holding that one who is informed by an agent that the price of property in the agent's hands for sale is to be fixed by the principal cannot claim that the principal has clothed the agent with apparent authority to sell for a certain price.

Iowa.— Fritz *v.* Chicago Grain, etc., Co., 135 Iowa 699, 114 N. W. 193.

Kentucky.— Seven Hills Chautauqua Co. *v.* Chase Bros. Co., 81 S. W. 238, 26 Ky. L. Rep. 334.

Missouri.— Carson *v.* Culver, 78 Mo. App. 597.

Nebraska.— Bradley *v.* Basta, 71 Nebr. 169, 98 N. W. 697; Dietz *v.* Hastings City Nat. Bank, 42 Nebr. 584, 60 N. W. 896.

New Jersey.— Catoir *v.* American L. Ins., etc., Co., 33 N. J. L. 487.

New York.— Gilbert *v.* Deshon, 107 N. Y. 324, 14 N. E. 318; Marvin *v.* Universal L. Ins. Co., 85 N. Y. 278, 39 Am. Rep. 657; Merserau *v.* Phœnix Mut. L. Ins. Co., 66 N. Y. 274; Flower City Plant Food Co. *v.* Roberts, 81 N. Y. App. Div. 249, 80 N. Y. Suppl. 1060.

North Carolina.— Universal Metal Co. *v.*

The principal may make the authority of his agent as broad or as narrow as he will, and any lawful limitations which he chooses to impose upon the agent's powers and which are not in the nature of secret instructions will be as binding upon third persons legally charged with notice of them as upon the agent himself;[96] and if the original authority is a restricted and limited one, then such limitations form part of the power itself, and third persons must know them at their peril.[97] If specific instructions are brought home to the knowledge of a third person dealing with the agent it cannot matter whether he is a general or a special agent; in either case his power to bind his principal will be limited by these known instructions or limitations.[98]

d. Custom and Usage.[99] Custom and usage of the trade or business in which the agent is engaged form part of his authority. To such custom and usage the principal is presumed to consent, provided, however, that the evidence thereof is clear and that such custom or usage is shown to be reasonable, uniform, and notorious;[1] and the third person is equally presumed to understand and be guided

Durham, etc., R. Co., 145 N. C. 293, 59 S. E. 50.

Pennsylvania.— Suffolk Peanut Co. *v.* Luden, 32 Pa. Super. Ct. 603.

South Carolina.— Topham *v.* Roche, 2 Hill 307, 27 Am. Dec. 387.

Texas.— National Guarantee, etc., Co. *v.* Thomas, 28 Tex. Civ. App. 379, 67 S. W. 454.

West Virginia.— Bank *v.* Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880; Rosendorf *v.* Poling, 48 W. Va. 621, 37 S. E. 555.

United States.— Authors, etc., Assoc. *v.* O'Gorman Co., 147 Fed. 616; Modern Woodmen of America *v.* Tevis, 117 Fed. 369, 54 C. C. A. 293; Russ *v.* Telfener, 57 Fed. 973; U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

England.— Jacobs *v.* Morris, [1901] 1 Ch. 261, 70 L. J. Ch. 183, 84 L. T. Rep. N. S. 112, 49 Wkly. Rep. 365 [*affirmed* in [1902] 1 Ch. 816, 71 L. J. Ch. 363, 86 L. T. Rep. N. S. 275, 18 L. T. Rep. N. S. 384, 50 Wkly. Rep. 371].

Canada.— Almon *v.* Foot, Russ. Eq. Cas. (Nova Scotia) 1; Farrell *v.* Hunt, 21 U. C. C. P. 117.

Knowledge acquired after transaction.— Notice by the principal to the other party to an executory contract that the agent in making the contract had disobeyed the principal's instructions will not relieve him from obligations which have become fixed under the contract. Crews *v.* Garneau, 14 Mo. App. 505.

96. American Lead Pencil Co. *v.* Wolfe, 30 Fla. 360, 11 So. 488; Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96; Barnard *v.* Wheeler, 24 Me. 412; Graton, etc., Mfg. Co. *v.* Redelsheimer, 28 Wash. 370, 68 Pac. 879.

97. *Kentucky.*— Seven Hills Chautauqua Co. *v.* Chase Bros. Co., 81 S. W. 238, 26 Ky. L. Rep. 334.

Maine.— Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96.

New Hampshire.— Hatch *v.* Taylor, 10 N. H. 538.

New York.— Waldorf *v.* Simpson, 15 N. Y. App. Div. 297, 44 N. Y. Suppl. 291.

North Carolina.— Ferguson *v.* Davis, etc., Mfg., etc., Co., 118 N. C. 946, 24 S. E. 710.

Texas.— Trammell *v.* Turner, (Civ. App. 1904) 82 S. W. 325.

98. Barnard *v.* Wheeler, 24 Me. 412; Marvin *v.* Universal L. Ins. Co., 85 N. Y. 278, 39 Am. Rep. 657; Sandford *v.* Handy, 23 Wend. (N. Y.) 260; Trammell *v.* Turner, (Tex. Civ. App. 1904) 82 S. W. 325; U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

99. See, generally, CUSTOMS AND USAGES, 12 Cyc. 1028.

1. *Alabama.*— Southern R. Co. *v.* Raney, 117 Ala. 270, 23 So. 29; Cawthon *v.* Lush, 97 Ala. 674, 11 So. 731; Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453.

Arkansas.— Meyer *v.* Stone, 46 Ark. 210, 55 Am. Rep. 577.

Colorado.— Gates Iron Works *v.* Denver Engineering Works, 17 Colo. App. 15, 67 Pac. 173; Savage *v.* Pelton, 1 Colo. App. 148, 27 Pac. 948.

Illinois.— Monson *v.* Kill, 144 Ill. 248, 33 N. E. 43; McIntosh *v.* Ransom, 106 Ill. App. 172.

Indiana.— Cruzan *v.* Smith, 41 Ind. 288.

Iowa.— Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176.

Maryland.— Kraft *v.* Fancher, 44 Md. 204.

Michigan.— Austrian, etc., Co. *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

Minnesota.— Burchard *v.* Hull, 71 Minn. 430, 74 N. W. 163.

New Hampshire.— Knapp *v.* U. S., etc., Express Co., 55 N. H. 348.

New Jersey.— Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

New York.— Lowenstein *v.* Lombard, etc., Co., 164 N. Y. 324, 58 N. E. 44; Trimble *v.* New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 349; Talcott *v.* Wabash R. Co., 159 N. Y. 461, 54 N. E. 1; Isaacson *v.* New York Cent., etc., R. Co., 94 N. Y. 278, 46 Am. Rep. 142; Ellis *v.* Albany City F. Ins. Co., 50 N. Y. 402, 10 Am. Rep. 495; Newman *v.* Lee, 87 N. Y. App. Div. 116, 84 N. Y. Suppl. 106; Brunner *v.* Platt, 50 Misc. 571, 99 N. Y. Suppl. 526.

North Carolina.— Moore *v.* Tickle, 14 N. C. 244.

by such usages restricting or limiting the power of the agent.[2] Proof of such a usage is admitted only when the agency has been first shown, and then, not to enlarge the powers of the agent, but only to show the extent of the powers actually conferred.[3] But an agent is not within his authority in following a usage or custom contrary to the established principles of law [4] or in contravention of the known limitations which the principal has imposed upon the agent's authority.[5]

e. Apparent Scope of Authority. While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions,[6]

Ohio.— Mahler-Wolf Produce Co. *v.* Meyer, 26 Ohio Cir. Ct. 165.

Pennsylvania.— Williams *v.* Getty, 31 Pa. St. 461, 72 Am. Dec. 757. And see Brooke *v.* New York, etc., R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235, holding that an agent pursuing the method in which he usually transacts business for his principal may be considered clothed with the necessary authority.

South Carolina.— Topham *v.* Roche, 2 Hill 307, 27 Am. Dec. 387.

Virginia.— Reese *v.* Bates, 94 Va. 321, 26 S. E. 865.

West Virginia.— Rohrbough *v.* U. S. Express Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849, holding that where an agent is commissioned to do any act, nothing being said as to the mode of performance, he has an implied power to perform his duties in accordance with any recognized usage or mode of dealing.

England.— Forget *v.* Baxter, [1900] A. C. 467, 69 L. J. P. C. 101, 82 L. T. Rep. N. S. 510; Robinson *v.* Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544 [*reversing* L. R. 7 C. P. 84, 41 L. J. C. P. 65, 26 L. T. Rep. N. S. 207, 20 Wkly. Rep. 544] (holding that a person who employs a broker to transact business for him in a market with the usages of which the principal is unacquainted gives him authority to contract upon the footing of such usages, provided they are only such as relate to the mode of performing the contract and do not change its intrinsic character); Duncan *v.* Hill, L. R. 6 Exch. 255, 40 L. J. Exch. 137, 25 L. T. Rep. N. S. 59, 19 Wkly. Rep. 894 [*reversed* on other grounds in L. R. 8 Exch. 242, 42 L. J. Exch. 179, 29 L. T. Rep. N. S. 268, 21 Wkly. Rep. 797]; Dickinson *v.* Lilwall, 4 Campb. 279, 1 Stark. 128, 2 E. C. L. 57; Hodgson *v.* Davies, 2 Campb. 530, 11 Rev. Rep. 789; Heyworth *v.* Knight, 17 C. B. N. S. 298, 10 Jur. N. S. 866, 33 L. J. C. P. 298, 112 E. C. L. 298; Graves *v.* Legg, 2 H. & N. 210, 3 Jur. N. S. 519, 26 L. J. Exch. 316, 5 Wkly. Rep. 597; Harker *v.* Edwards, 57 L. J. Q. B. 147.

Canada.— Ronne *v.* Montreal Ocean Steamship Co., 19 Nova Scotia 312.

When the power is wholly in writing it is not to be enlarged by evidence of usage. Delafield *v.* Illinois, 26 Wend. (N. Y.) 192, 2 Hill 159; Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Henry *v.* Lane, 128 Fed. 243, 62 C. C. A. 625.

In case of special contract usage and custom will not control so far as to protect an agent from liability to his principal for following usage, and thereby breaking his special contract with the principal, although so far as innocent third persons are concerned the contract of the agent will bind the principal. Porter *v.* Heath, 2 Tex. App. Civ. Cas. § 124.

2. White *v.* Fuller, 67 Barb. (N. Y.) 267; Reese *v.* Bates, 94 Va. 321, 26 S. E. 865. And see Jones *v.* Warner, 11 Conn. 40, holding that an agent has no implied authority contrary to the usual course of dealing in the business in which he is employed.

3. Dellecella *v.* Harmonie Club, 34 Mo. App. 179.

4. *Maryland.*— Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

Massachusetts.— Farnsworth *v.* Hemmer, 1 Allen 494, 79 Am. Dec. 756.

North Carolina.— Moore *v.* Tickle, 14 N. C. 244.

Virginia.— Reese *v.* Bates, 94 Va. 321, 26 S. E. 865; Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; Harris *v.* Carson, 7 Leigh 632, 30 Am. Dec. 510.

United States.— Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754, holding that evidence of a custom to receive Confederate money in payment of debts could not be received to justify such action by an agent, since such a custom, if shown, is illegal.

England.— Robinson *v.* Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544.

5. *Florida.*—American Lead Pencil Co. *v.* Wolfe, 30 Fla. 360, 11 So. 488.

Massachusetts.— Day *v.* Holmes, 103 Mass. 306; Parsons *v.* Martin, 11 Gray 111; Clark *v.* Van Northwick, 1 Pick. 343.

Michigan.— Greenstine *v.* Borchard, 50 Mich. 434, 15 N. W. 540, 45 Am. Rep. 51; Hutchings *v.* Ladd, 16 Mich. 493.

South Carolina.— Barksdale *v.* Brown, 1 Nott & M. 517, 9 Am. Dec. 720.

Vermont.— Catlin *v.* Smith, 24 Vt. 85; Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467.

Wisconsin.— Osborne, etc., Co. *v.* Rider, 62 Wis. 235, 22 N. W. 394; Hall *v.* Storrs, 7 Wis. 253.

And see *infra*, III, A, 2, f.

6. *Arkansas.*— Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777.

Kentucky.— Forked Deer Pants Co. *v.* Shipley, 80 S. W. 476, 25 Ky. L. Rep. 2299.

Maryland.— Lister *v.* Allen, 31 Md. 543, 100 Am. Dec. 78.

Mississippi.— Routh *v.* Agricultural Bank, 12 Sm. & M. 161.

such instructions and restrictions do not affect third persons ignorant thereof;[7] and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses and which the principal is estopped to deny.[8] The

Missouri.— New Albany Woolen Mills *v.* Meyers, 43 Mo. App. 124.

New York.— Price *v.* Keyes, 62 N. Y. 378; Edwards *v.* Schaffer, 49 Barb. 291.

Pennsylvania.— De Turck *v.* Matz, 180 Pa. St. 347, 36 Atl. 861; Brooke *v.* New York, etc., R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235.

England.— Neeld *v.* Beaufort, 5 Jur. 1123 [*affirmed* in 12 Cl. & F. 248, 9 Jur. 813, 8 Eng. Reprint 1399].

7. **Known limitations** see *supra*, II, A, 2, c. **Secret instructions and restrictions** see *supra*, II, A, 2, b.

8. *Alabama.*— Golding *v.* Merchant, 43 Ala. 705.

Arkansas.— Liddell *v.* Sahline, 55 Ark. 627, 17 S. W. 705.

California.— Swinnerton *v.* Argonaut Land, etc., Co., 112 Cal. 375, 44 Pac. 719.

Colorado.— Hagerman *v.* Bates, 24 Colo. 71, 49 Pac. 139.

Florida.— Indian River State Bank *v.* Hartford F. Ins. Co., 46 Fla. 283, 35 So. 228.

Georgia.— Louisville, etc., R. Co. *v.* Tift, 100 Ga. 86, 27 S. E. 765, holding that where a corporation holds out to the world a person as its general agent with ostensible authority to act for and bind it as such, other persons dealing with such agent are not bound by private limitations upon his authority, of which they have no notice or knowledge.

Illinois.—Grand Pacific Hotel Co. *v.* Pinkerton, 217 Ill. 61, 75 N. E. 427 [*affirming* 118 Ill. App. 89]; Schmoldt *v.* Langston, 106 Ill. App. 385; St. Louis Southwestern R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619.

Indiana.—Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

Iowa.— Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58.

Kansas.— Banks *v.* Everest, 35 Kan. 687, 12 Pac. 141. See Kane *v.* Barstow, 42 Kan. 465, 22 Pac. 588, 16 Am. St. Rep. 490.

Kentucky.— Forked Deer Pants Co. *v.* Shipley, 80 S. W. 476, 25 Ky. L. Rep. 2299; Blood *v.* Herring, 61 S. W. 273, 22 Ky. L. Rep. 1725; Columbia Land, etc., Co. *v.* Tinsley, 60 S. W. 10, 22 Ky. L. Rep. 1082; Cartmel *v.* Unverzaught, 54 S. W. 965, 21 Ky. L. Rep. 1282.

Maryland.— Lister *v.* Allen, 31 Md. 543, 100 Am. Dec. 78, holding that it matters not whether the agent was general or special if he was held out to the world as having the authority in question.

Massachusetts.— Rice *v.* James, 193 Mass. 458, 79 N. E. 807; Garfield, etc., Coal Co. *v.* Rockland-Rockport Lime Co., 184 Mass. 60, 67 N. E. 863, 100 Am. St. Rep. 543, 61 L. R. A. 946.

Michigan.—Antrim Iron Co. *v.* Anderson, 140 Mich. 702, 104 N. W. 319, 112 Am. St. Rep. 434; Ryerson *v.* Tourcotte, 121 Mich. 78, 79 N. W. 933; Baker *v.* Barnett Produce Co., 113 Mich. 533, 71 N. W. 866; Sorrel *v.* Brewster, 1 Mich. 373.

Mississippi.— Wilcox *v.* Routh, 9 Sm. & M. 476.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 91 Mo. 152, 3 S. W. 486; Reynolds *v.* Chicago, etc., R. Co., 114 Mo. App. 670, 90 S. W. 100; Phipps *v.* Mallory Commission Co., 105 Mo. App. 67, 78 S. W. 1097.

Nebraska.— Plano Mfg. Co. *v.* Nordstrom, 63 Nebr. 123, 88 N. W. 164; Brown *v.* Eno, 48 Nebr. 538, 67 N. W. 434; Creighton *v.* Finlayson, 46 Nebr. 457, 64 N. W. 1103; Oberne *v.* Burke, 30 Nebr. 581, 46 N. W. 838.

New Hampshire.— Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45.

New Jersey.— Strauss *v.* American Talcum Co., 63 N. J. L. 613, 44 Atl. 631; Cranwell *v.* Clinton Realty Co., 67 N. J. Eq. 540, 58 Atl. 1030.

New Mexico.— Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721.

New York.— Waldron *v.* Fargo, 52 N. Y. App. Div. 18, 64 N. Y. Suppl. 798 [*reversed* on other grounds in 170 N. Y. 130, 62 N. E. 1077]; Cox *v.* Albany Brewing Co., 2 Silv. Sup. 590, 6 N. Y. Suppl. 841.

Ohio.— General Cartage, etc., Co. *v.* Cox, 74 Ohio St. 284, 78 N. E. 371, 113 Am. St. Rep. 959; Pullman Co. *v.* Willett, 27 Ohio Cir. Ct. 649, holding that where a person holds out another to the public as agent, he is bound by his acts whether he in fact be such agent or not, and third persons dealing with him are not required to first determine the nature and extent of his authority.

Oregon.— Gardner *v.* Wiley, 46 Oreg. 96, 79 Pac. 341, holding that where defendant permitted an employee to transact the business of selling goods as on his own account under the name of a company, holding him out as such company, it is estopped to deny his authority to take notes in his own name, or in the name of the company, for goods sold, and transfer the same to persons dealing with him without notice.

Pennsylvania.— De Turck *v.* Matz, 180 Pa. St. 347, 36 Atl. 861; Lauer Brewing Co. *v.* Schmidt, 24 Pa. Super. Ct. 396; McCormick Harvesting Mach. Co. *v.* Smith, 9 Kulp 448.

Texas.— Hull *v.* East Line, etc., R. Co., 66 Tex. 619, 2 S. W. 831; McAlpin *v.* Ziller, 17 Tex. 508; Cadenhead *v.* Rogers, (Civ. App. 1906) 96 S. W. 952; Baker *v.* Kellett-Chatham Mach. Co., (Civ. App. 1905) 84 S. W. 661; Osborne *v.* Gatewood, (Civ. App. 1903) 74 S. W. 72 (holding that a principal is equally bound by the authority which he actually gives and by that which by his own act he

apparent authority so far as third persons are concerned is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority.[9] The authority must, however, have been actually apparent to the third person who, in order to avail himself of rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence,[10] in which case the principal will be bound by acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority.[11] An agent cannot, however, enlarge the actual

appears to give); Eastern Mfg. Co. *v.* Brenk, 32 Tex. Civ. App. 97, 73 S. W. 538.

Utah.— Smith Table Co. *v.* Madsen, 30 Utah 297, 84 Pac. 885; Smith *v.* Droubay, 20 Utah 443, 58 Pac. 1112.

Vermont.— Winchell *v.* National Express Co., 64 Vt. 15, 23 Atl. 728.

Wisconsin.— Bentley *v.* Doggett, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; Dodge *v.* McDonnell, 14 Wis. 553, holding that if a principal holds out his agent to the world as having a greater than his real authority, third persons dealing with the agent under this mistaken belief can hold the principal to the extent of the apparent authority.

United States.— Merchants' Nat. Bank *v.* State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Schimmelpennich *v.* Bayard, 1 Pet. 264, 7 L. ed. 138; Schiffer *v.* Anderson, 146 Fed. 457, 76 C. C. A. 667; Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274; Dysart *v.* Missouri, etc., R. Co., 122 Fed. 228, 58 C. C. A. 592; Whiting *v.* Wellington, 10 Fed. 810; Philadelphia Trust, etc., Co. *v.* Philadelphia Seventh Nat. Bank, 6 Fed. 114.

England.— Montaignac *v.* Shitta, 15 App. Cas. 357 (holding that where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs intrusted to him, which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business, the lender was not bound to inquire whether in the particular case the emergency had arisen or not, but that he was entitled to recover from the principal if he lent to the agent *bona fide* and without notice that the agent was exceeding his mandate); Hambro *v.* Burnand, [1904] 2 K. B. 10, 9 Com. Cas. 251, 73 L. J. K. B. 669, 90 L. T. Rep. N. S. 803, 20 T. L. R. 398, 52 Wkly. Rep. 583; Biggs *v.* Evans, [1894] 1 Q. B. 88, 58 J. P. 84, 69 L. T. Rep. N. S. 723; Gillman *v.* Robinson, 1 C. & P. 642, R. & M. 226, 28 Rev. Rep. 795, 12 E. C. L. 364; Trickett *v.* Tomlinson, 13 C. B. N. S. 663, 7 L. T. Rep. N. S. 678, 106 E. C. L. 663; Waller *v.* Drakeford, 1 E. & B. 749, 17 Jur. 853, 22 L. J. Q. B. 274, 72 E. C. L. 749; Neeld *v.* Beaufort, 5 Jur. 1123 [*affirmed* in 12 Cl. & F. 248, 9 Jur. 813, 8 Eng. Reprint 1399]; Brazier *v.* Camp, 63 L. J. Q. B. 257, 9 Reports 852; Todd *v.* Robinson, R. & M. 217, 21 E. C. L. 736.

Canada.— Macnutt *v.* Shaffner, 34 Nova Scotia 402; Almon *v.* Law, 26 Nova Scotia 340. A principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterward, against such third persons, dispute its existence. Sayward *v.* Dunsmuir, 11 Brit. Col. 375.

Apparent authority is the authority which an agent appears to have by reason of the actual authority which he has. Brown *v.* Eno, 48 Nebr. 538, 67 N. W. 434; Creighton *v.* Finlayson, 46 Nebr. 457, 64 N. W. 1103.

Agency by estoppel see *supra*, I, E, 2.

9. Montgomery Furniture Co. *v.* Hardaway, 104 Ala. 100, 16 So. 29; Banks *v.* Everest, 35 Kan. 687, 12 Pac. 141; Bank of Commerce *v.* Cohen, 4 Silv. Sup. (N. Y.) 283, 7 N. Y. Suppl. 186 (holding that where in an action on a note indorsed "C., Agt. for" defendant, it appeared that C was defendant's husband, that he transacted all her business, had full authority to indorse notes for her in her business, and had indorsed notes for the maker of the note in suit, the indorsee of such note is not chargeable with constructive notice that it was an accommodation note which defendant's agent had no authority to indorse); Weeks *v.* Fox, 3 Thomps. & C. (N. Y.) 354; Brooke *v.* New York, etc., R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; Williams *v.* Getty, 31 Pa. St. 461, 72 Am. Dec. 757.

10. *Alabama.*— Patterson *v.* Neal, 135 Ala. 477, 33 So. 39; Singer Mfg. Co. *v.* McLean, 105 Ala. 316, 16 So. 912; Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304.

Missouri.— McGraw *v.* O'Neil, 123 Mo. App. 691, 101 S. W. 132.

Nebraska.— Hastings First Nat. Bank *v.* Farmers', etc., Bank, 56 Nebr. 149, 76 N. W. 430.

New York.— Buskirk *v.* Talcott, 96 N. Y. Suppl. 714.

Texas.— Rail *v.* City Nat. Bank, 3 Tex. Civ. App. 557, 22 S. W. 865.

11. *Arkansas.*— Liddell *v.* Sahline, 55 Ark. 627, 17 S. W. 705; Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777.

Colorado.— Little Pittsburg Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226; Merchants' Ins. Co. *v.* New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174.

Illinois.— Michigan Southern, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278; Chicago Catholic Bishop *v.* Troup, 61 Ill. App. 641.

authority by his own acts without some measure of assent or acquiescence on the part of his principal, whose rights and liabilities as to third persons are not affected by any apparent authority which his agent has conferred upon himself simply by his own representations, express or implied.[12] Although these rules are firmly established, their application to particular cases is extremely difficult.

Indiana.— Cincinnati, etc., R. Co. *v.* Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503; Manning *v.* Gasharic, 27 Ind. 399.

Iowa.— Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58.

Kansas.— Atlantic, etc., R. Co. *v.* Reisner, 18 Kan. 458.

Kentucky.— Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. 58; Shelbyville *v.* Shelbyville, etc., Turnpike Co., 1 Metc. 54.

Louisiana.— Forman *v.* Walker, 4 La. Ann. 409; Bergerot *v.* Farish, 9 Rob. 346; Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286.

Maine.— Greene *v.* Nash, 85 Me. 148, 26 Atl. 1114; Johnson *v.* Wingate, 29 Me. 404.

Maryland.— Kraft *v.* Fancher, 44 Md. 204.

Massachusetts.— Mussey *v.* Beecher, 3 Cush. 511; Lobdell *v.* Baker, 1 Metc. 193, 35 Am. Dec. 358.

Michigan.— Howry *v.* Eppinger, 34 Mich. 29.

Mississippi.— Potter *v.* Springfield Milling Co., 75 Miss. 532, 23 So. 259; Planters' Bank *v.* Cameron, 3 Sm. & M. 609.

Missouri.— Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Edwards *v.* Home Ins. Co., 100 Mo. App. 695, 73 S. W. 881.

Nebraska.— White *v.* Leighton, 15 Nebr. 424, 19 N. W. 478; Day, etc., Lumber Co. *v.* Bixby, 4 Nebr. (Unoff.) 154, 93 N. W. 688.

New Hampshire.— Knapp *v.* U. S., etc., Express Co., 55 N. H. 348; Hatch *v.* Taylor, 10 N. H. 538.

New Mexico.— Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721.

New York.— Lowenstein *v.* Lombard, 164 N. Y. 324, 58 N. E. 44; Rathburn *v.* Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; Newman *v.* Lee, 87 N. Y. App. Div. 116, 84 N. Y. Suppl. 106; Edwards *v.* Schaffer, 49 Barb. 291; Milburn *v.* Belloni, 34 Barb. 607; Benesch *v.* John Hancock Mut. L. Ins. Co., 16 Daly 394, 11 N. Y. Suppl. 714; Sandford *v.* Handy, 23 Wend. 260.

North Dakota.— Dowagiac Mfg. Co. *v.* Hellekson, 13 N. D. 257, 100 N. W. 717.

Oregon.— Pacific Biscuit Co. *v.* Dugger, 40 Oreg. 362, 67 Pac. 32.

Pennsylvania.— De Turck *v.* Matz, 180 Pa. St. 347, 36 Atl. 861; Jackson *v.* Emmens, 119 Pa. St. 356, 13 Atl. 210; Brooke *v.* New York, etc., R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; Williams *v.* Getty, 31 Pa. St. 461, 72 Am. Dec. 757; The Portland *v.* Lewis, 2 Serg. & R. 197, holding that a clerk is an agent, and whatever he does in the line of his business binds his employers.

Tennessee.— Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head 116.

Texas.— Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211, 27 S. W. 110; Clarkson *v.* Reinhartz, (Civ. App. 1902) 70 S. W. 111; Strozier *v.* Lewey, 3 Tex. App. Civ. Cas. § 129; Barnes *v.* Downes, 2 Tex. App. Civ. Cas. § 524.

Utah.— Smith *v.* Droubay, 20 Utah 443, 58 Pac. 1112.

Vermont.— Linsley *v.* Lovely, 26 Vt. 123.

Wisconsin.— Ames *v.* D. J. Murray Mfg. Co., 114 Wis. 85, 89 N. W. 836.

United States.— Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274; U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

Canada.— Manufacturers' Acc. Ins. Co. *v.* Pudsey, 27 Can. Sup. Ct. 374 [*affirming* 29 Nova Scotia 124]; Hutchings *v.* Adams, 12 Manitoba 118; Ronne *v.* Montreal Ocean Steamship Co., 19 Nova Scotia 312.

12. *Alabama.*— Birmingham Mineral R. Co. *v.* Tennessee Coal Iron, etc., R. Co., 127 Ala. 137, 28 So. 679; Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808; Van Eppes *v.* Smith, 21 Ala. 317.

California.— Mitrovitch *v.* Fresno Fruit Packing Co., 123 Cal. 379, 55 Pac. 1064.

Indiana.— Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488.

Minnesota.— See Humphrey *v.* Havens, 12 Minn. 298, holding that persons relying on the previous action of the agent as evidence of his authority must on their own responsibility ascertain the nature and extent of the previous employment.

Missouri.— McGraw *v.* O'Neil, 123 Mo. App. 691, 101 S. W. 132.

New York.— Rathbun *v.* Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827; Bickford *v.* Menier, 107 N. Y. 490, 14 N. E. 438; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Leary *v.* Albany Brewing Co., 77 N. Y. App. Div. 6, 79 N. Y. Suppl. 130; Figueira *v.* Lerner, 52 N. Y. App. Div. 216, 65 N. Y. Suppl. 293; Sage *v.* Shepard, etc., Lumber Co., 4 N. Y. App. Div. 290, 39 N. Y. Suppl. 449 [*affirmed* in 158 N. Y. 679, 52 N. E. 1126]; Joseph *v.* Struller, 25 Misc. 173, 54 N. Y. Suppl. 162.

Texas.— Tompkins Machinery, etc., Co. *v.* Peter, 84 Tex. 627, 19 S. W. 860; Galveston, etc., R. Co. *v.* Allen, 42 Tex. Civ. App. 576, 94 S. W. 417.

West Virginia.— Crawford *v.* Whittaker, 42 W. Va. 430, 26 S. E. 516.

Wisconsin.— Bartlett *v.* L. Bartlett, etc., Co., 116 Wis. 450, 93 N. W. 473, holding that a clerk cannot bind his employer by assuming to have authority.

England.— Hambro *v.* Barnard, [1903] 2 K. B. 399, 8 Com. Cas. 252, 72 L. J. K. B. 662, 89 L. T. Rep. N. S. 180, 19 T. L. R. 584, 51 Wkly. Rep. 652; Wright *v.* Glyn, [1902] 1 K. B. 745, 71 L. J. K. B. 497, 86 L. T. Rep. N. S. 373, 18 T. L. R. 404, 50 Wkly. Rep. 402.

The liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had under the circumstances conferred upon his agent.[13]

3. Express and Implied Authority. In its nature the authority of an agent to act after his appointment, like the original appointment itself,[14] is either express or implied.[15] Even when the appointment of an agent has been expressly made, much of his resulting authority may be left to be implied,[16] and, indeed, an agent acting under the most detailed power of attorney almost invariably has at least a limited implied or incidental authority as to some details inevitably omitted in drawing the power of attorney.[17] Especially in the case of a general agent much must of necessity be left to his discretion and judgment as he is confronted with circumstances not foreseen when he was appointed, but requiring to be met in his best judgment so as to effect the principal's purpose.[18] And extraordinary emergencies may arise in which a person who is an agent may from the very necessities of the case be justified in assuming extraordinary powers.[19] When the authority is expressly conferred in writing the power of the agent is of course confined to the

13. *Illinois.*— Swisher *v.* Palmer, 106 Ill. App. 432.

Indiana.— Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

Iowa.—Grant *v.* Humerick, (1903) 94 N. W. 510.

Michigan.— Scheibeck *v.* Van Derbeck, 122 Mich. 29, 80 N. W. 880.

Missouri.— St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

Nebraska.— Harrison Nat. Bank *v.* Austin, 65 Nebr. 632, 91 N. W. 540, 101 Am. St. Rep. 639, 59 L. R. A. 294; Faulkner *v.* Simms, (1902) 89 N. W. 171; Holt *v.* Schneider, 57 Nebr. 523, 77 N. Y. 1086; Thompson *v.* Shelton, 49 Nebr. 644, 68 N. W. 1055; Johnston *v.* Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 N. W. 1100; Lebanon Sav. Bank *v.* Blanke, 2 Nebr. (Unoff.) 403, 89 N. W. 169; Harrison Nat. Bank *v.* Williams, 2 Nebr. (Unoff.) 400, 89 N. W. 245.

New York.— Johnson *v.* Jones, 4 Barb. 369.

Ohio.— General Cartage, etc., Co. *v.* Cox, 74 Ohio St. 284, 78 N. E. 371, 113 Am. St. Rep. 959; Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 392.

South Carolina.— Welch *v.* Clifton Mfg. Co., 55 S. C. 568, 33 S. E. 739.

South Dakota.— Aldrich *v.* Wilmarth, 3 S. D. 523, 54 N. W. 811.

Texas.— Baker *v.* Kellett-Chatham Mach. Co., (Civ. App. 1905) 84 S. W. 661.

Vermont.— Griggs *v.* Selden, 58 Vt. 561, 5 Atl. 504; Kingsley *v.* Fitts, 51 Vt. 414, holding that the scope of an agency is to be determined not alone from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction.

United States.— Jenkins, etc., Co. *v.* Alpena Portland Cement Co., 147 Fed. 641, 77 C. C. A. 625.

England.— Gillman *v.* Robinson, 1 C. & P. 642, R. & M. 226, 28 Rev. Rep. 795, 12 E. C. L. 364; Smith *v.* McGuire, 3 H. & N. 554, 27 L. J. Exch. 465, 6 Wkly. Rep. 726; Todd *v.* Robinson, R. & M. 217, 21 E. C. L. 736.

14. See *supra*, I, D, 1, c, (II).

15. Luckie *v.* Johnston, 89 Ga. 321, 15 S. E. 459; Miller *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 236; Trundy *v.* Farrar, 32 Me. 225; St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737; Sayward *v.* Dunsmuir, 11 Brit. Col. 375. And see *infra*, II, B, 1.

16. *Alabama.*— Union Refining Co. *v.* Barton, 77 Ala. 148.

Massachusetts.— Hilliard *v.* Weeks, 173 Mass. 304, 53 N. E. 818.

Missouri.— State *v.* Gates, 67 Mo. 139.

Washington.— Holt Mfg. Co. *v.* Dunnigan, 22 Wash. 134, 60 Pac. 128.

England.— Howard *v.* Baillie, 2 H. Bl. 618, 3 Rev. Rep. 531.

17. *California.*— Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911; Hastings *v.* Halleck, 13 Cal. 203.

Louisiana.—Sentell *v.* Kennedy, 29 La. Ann. 679.

Missouri.— State *v.* Gates, 67 Mo. 139.

New York.— Sheffield *v.* Smith, 8 Misc. 43, 28 N. Y. Suppl. 517; Grillenberger *v.* Spencer, 7 Misc. 601, 27 N. Y. Suppl. 864.

Texas.— Sullivan *v.* Miller, 86 Tex. 677, 26 S. W. 935 [*reversing* (Civ. App. 1894) 24 S. W. 819]; Miller *v.* Sullivan, 14 Tex. Civ. App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778; Franklin *v.* Piper, 5 Tex. Civ. App. 253, 23 S. W. 942.

Wisconsin.— Gee *v.* Bolton, 17 Wis. 604.

United States.— Le Roy *v.* Beard, 8 How. 451, 12 L. ed. 1151.

18. Dunwoody *v.* Saunders, 50 Fla. 202, 39 So. 965, holding that it is error to charge that a general agent of the charterer of a barge has no authority to enlarge the usual contract of bailment so as to make his principal an insurer of the barge during the term, if the barge be needed in his principal's business and can be had on no other conditions. And see *infra*, II, A, 4, b.

19. Williams *v.* Shackelford, 16 Ala. 318 [*citing* Story Agency, § 141].

limits thus marked out;[20] and third persons having notice that they are dealing with an agent must inform themselves of the extent and limitations of his authority.[21] The principal too is presumed to have put into the express power all the limitations he cares to have made public, and third persons are not bound to look beyond such power for other restrictions on the agent's authority.[22] But when it is implied, and in so far as it is implied, the power of the agent must be determined from no one fact alone, but from all the facts and circumstances for which the principal is responsible.[23] This is so even when the authority is express and in writing, if it appears that the principal has by his acts or conduct justified third persons in believing that he has given the agent larger powers than those enumerated in the writing.[24] Even as to persons who know that the agent has a written power the principal may orally, or by his acts or conduct, expand the power of the agent beyond the limits specified in the writing.[25] The extent of the agent's authority, like his original appointment, is often to be implied from the previous course of dealing of the principal, or from his conduct under circumstances working against him an equitable estoppel.[26] And whether the agency is implied from the

20. *Massachusetts.*— Mussey *v.* Beecher, 3 Cush. 511.

Pennsylvania.—Getty *v.* Pennsylvania Inst., 194 Pa. St. 571, 45 Atl. 333.

South Carolina.— Stoddard *v.* McIlwain, 7 Rich. 525.

Wisconsin.— Long *v.* Fuller, 21 Wis. 121.

United States.— Henry *v.* Lane, 128 Fed. 243, 62 C. C. A. 625 (holding that where an agency is created by a written instrument, the nature and extent of the agent's authority are measured by the terms of such instrument, and he cannot bind his principal beyond their plain import); Chauche *v.* Pare, 75 Fed. 283, 21 C. C. A. 329.

This is especially true where the authority is required by law to be in writing.— Davis *v.* Trachsler, 3 Cal. App. 554, 86 Pac. 610; Frahm *v.* Metcalf, 75 Nebr. 241, 106 N. W. 227.

Effect of conferring express authority.— The very purpose of a written power is to prescribe and publish the limits within which the agent shall act, so as not to leave him to the uncertainty of memory, and those who deal with him to the risk of misrepresentation or misconception as to the extent of his authority. To confer express is to withhold implied authority. Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721.

21. *Alabama.*— Cummins *v.* Beaumont, 68 Ala. 204.

California.— Quay *v.* Presidio, etc., R. Co., 82 Cal. 1, 22 Pac. 925; Davis *v.* Trachsler, 3 Cal. App. 554, 86 Pac. 610.

Illinois.— Rawson *v.* Curtiss, 19 Ill. 456.

Nebraska.—Frahm *v.* Metcalf, 75 Nebr. 241, 106 N. W. 227.

New York.— Michael *v.* Eley, 61 Hun 180, 15 N. Y. Suppl. 890; Sanford *v.* Handy, 23 Wend. 260.

Texas.— Griffith *v.* Morrison, 58 Tex. 4d (holding that a grantee in a deed executed under a power of attorney is charged with notice that the power of attorney gave no authority to give a deed with covenants); Chaison *v.* Beauchamp, 12 Tex. Civ. App. 109, 34 S. W. 303.

Virginia.— Stainback *v.* Read, 11 Gratt. 281, 62 Am. Dec. 648.

Canada.—Ellis *v.* Halifax, 29 Nova Scotia 90.

22. Brown *v.* Frantum, 6 La. 39; Edwards *v.* Thomas, 66 Mo. 468; Plummer *v.* Buck, 16 Nebr. 322, 20 N. W. 342; Read *v.* Abbott, 45 N. J. L. 303; Lyle *v.* Addicks, 62 N. J. Eq. 123, 49 Atl. 1121.

23. See Merchants' Ins. Co. *v.* New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174; Miller *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 236; Drohan *v.* Merrill, etc., Lumber Co., 75 Minn. 251, 77 N. W. 957; Holt *v.* Schneider, 57 Nebr. 523, 77 N. W. 1086.

24. Rawson *v.* Curtiss, 19 Ill. 456; Cruzan *v.* Smith, 41 Ind. 288 (holding that if a principal puts his agent in a condition to impose upon innocent third persons, the principal will be bound by his dealings with persons ignorant of such limitations); Phipps *v.* Mallory Commission Co., 105 Mo. App. 67, 78 S. W. 1097; Dowagiac Mfg. Co. *v.* Hellekson, 13 N. D. 257, 100 N. W. 717.

25. Dayton *v.* Nell, 43 Minn. 246, 45 N. W. 231; Webster *v.* Harris, 16 Ohio 490; Duncan *v.* Hartman, 143 Pa. St. 595, 22 Atl. 1099, 24 Am. St. Rep. 570, 149 Pa. St. 114, 24 Atl. 190 (holding that the previous course of dealing of the principal may amount to an enlargement of the agent's express power); Brush-Swan Electric Light Co. *v.* Brush Electric Co., 41 Fed. 163; Philadelphia Trust, etc., Co. *v.* Seventh Nat. Bank, 6 Fed. 114. But see Spofford *v.* Hobbs, 29 Me. 148, 48 Am. Dec. 521. *Compare* Allis *v.* Goldsmith, 22 Minn. 123, where verbal directions to convey and sell were held to be insufficient to authorize the conveyance.

26. *Alabama.*— Powell *v.* Henry, 27 Ala. 612; Fisher *v.* Campbell, 9 Port. 210.

Colorado.— Winch *v.* Edmunds, 34 Colo. 359, 83 Pac. 632; Merchants' Ins. Co. *v.* New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174.

Iowa.— Tidrick *v.* Rice, 13 Iowa 214.

Missouri.— Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672.

New York.— Lippitt *v.* St. Louis Dressed Beef, etc., Co., 27 Misc. 222, 57 N. Y. Suppl. 747.

South Carolina.—Welch *v.* Clifton Mfg. Co., 55 S. C. 568, 33 S. E. 739.

silence or acquiescence of the principal, or from his general habits and course of dealing, its scope is deemed to be limited to acts of a like nature; and if the agency is special it is to be limited to that particular business and the particular instructions given.[27] The authority must be implied from the nature and needs of the business or the conduct of the principal, and not from mere argument or the convenience or propriety of the possession of such power by the agent;[28] and an agent has no implied power to do acts that are unusual, extraordinary, or unnecessary, however advantageous to the principal's interests the agent may believe them to be. For such acts he should first secure special authority from the principal.[29] Implied authority is limited to the purposes for which the agency was created and to the acts and duties ordinarily intrusted to such an agent;[30] and it is also limited by the usual course of dealing in the business in which he is employed.[31] An agent

United States.— Stockton *v.* Watson, 101 Fed. 490, 42 C. C. A. 211.

And see *supra*, I, D, 1, c, (II); I, E.

27. *Alabama.*— Moore *v.* Ensley, 112 Ala. 220, 20 So. 744; Singer Mfg. Co. *v.* McLean, 105 Ala. 316, 16 So. 912.

California.— Mitrovich *v.* Fresno Fruit Packing Co., 123 Cal. 379, 55 Pac. 1064.

Illinois.— Cowan *v.* Curran, 216 Ill. 598, 75 N. E. 322.

Iowa.— Elder *v.* Stuart, 85 Iowa 690, 52 N. W. 660.

Michigan.— Hammond *v.* Michigan State Bank, Walk. 214.

Mississippi.— King *v.* Levy, (1892) 13 So. 282; Gilchrist *v.* Pearson, 70 Miss. 351, 12 So. 333.

Missouri.— Barcus *v.* Hannibal, etc., Plank-road Co., 26 Mo. 102; Grand Ave. Hotel Co. *v.* Friedman, 83 Mo. App. 491.

New Jersey.— Slingerland *v.* East Jersey Water Co., 58 N. J. L. 411, 33 Atl. 843; Brockway *v.* Mullin, 46 N. J. L. 448, 50 Am. Rep. 442.

New York.— Kipp *v.* East River Electric Light Co., 19 N. Y. Suppl. 387; Coykendall *v.* Eaton, 40 How. Pr. 266.

Pennsylvania.— Hagerstown Bank *v.* Loudon Sav. Fund Soc., 3 Grant 135 [*reversed* on other grounds in 36 Pa. St. 498, 78 Am. Dec. 390]; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Texas.— Conner *v.* Littlefield, 79 Tex. 76, 15 S. W. 217; McAlpin *v.* Cassidy, 17 Tex. 449.

Utah.— Moyle *v.* Congregational Soc., 16 Utah 69, 50 Pac. 806.

Vermont.— Briggs *v.* Taylor, 35 Vt. 57.

Virginia.— Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234.

United States.— Walrath *v.* Champion Min. Co., 63 Fed. 552; Mercier *v.* Lachenmeyer, 17 Fed. Cas. No. 9,455, 8 Phila. (Pa.) 152.

England.— Forman *v.* The Liddesdale, [1900] A. C. 190, 9 Aspin. 45, 69 L. J. P. C. 44, 82 L. T. Rep. N. S. 331; Graves *v.* Masters, Cab. & E. 73.

28. *Delaware.*— Geylin *v.* De Villeroi, 2 Houst. 311, holding that the measure and scope of an agent's authority when not specifically or expressly defined must be ascertained by the nature, necessity, and requirements of the thing to be done or accomplished by him.

Illinois.— Halladay *v.* Underwood, 90 Ill. App. 130.

New York.— Holloway *v.* Stephens, 2 Thomps. & C. 562; Miner *v.* Edison Electric Illuminating Co., 22 Misc. 543, 50 N. Y. Suppl. 218 [*affirmed* in 26 Misc. 712, 56 N. Y. Suppl. 801].

North Carolina.— Daniel *v.* Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455.

Pennsylvania.— Williams *v.* Getty, 31 Pa. St. 461, 72 Am. Dec. 757; Beal *v.* Adams Express Co., 13 Pa. Super. Ct. 143.

South Carolina.— Peay *v.* Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731.

Texas.— McAlpin *v.* Cassidy, 17 Tex. 449.

Washington.— Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

29. *Illinois.*— Peter Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184.

Louisiana.— Spears *v.* Turpin, 9 Rob. 293; Richard *v.* Bird, 4 La. 305.

Maine.— Hazeltine *v.* Miller, 44 Me. 177.

Mississippi.— King *v.* Levy, (1892) 13 So. 282.

Missouri.— St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

New York.— Hogan *v.* O'Brien, 29 N. Y. App. Div. 59, 51 N. Y. Suppl. 530; Forsberg *v.* Orange Judd Co., 5 N. Y. St. 891.

30. *Alabama.*— Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808.

Georgia.— Wikle *v.* Louisville, etc., R. Co., 116 Ga. 309, 42 S. E. 525.

Maryland.— Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

New York.— Matter of Bauer, 68 N. Y. App. Div. 212, 72 N. Y. Suppl. 439, 74 N. Y. Suppl. 155.

Pennsylvania.— Clark *v.* Lehigh Valley R. Co., 24 Pa. Super. Ct. 609; Patterson *v.* Consolidated Traction Co., 9 Pa. Dist. 362.

South Carolina.— Day *v.* Pickens County, 53 S. C. 46, 30 S. E. 681.

Washington.— Sweeney *v.* Ætna Indemnity Co., 34 Wash. 126, 74 Pac. 1057; Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

United States.— Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347.

England.— Deverell *v.* Bolton, 18 Ves. Jr. 505, 34 Eng. Reprint 409.

Canada.— Boyer *v.* Woodstock, 6 Can. L. T. Occ. Notes 493.

31. Jones *v.* Warner, 11 Conn. 40; Peter Schoenhofen Brewing Co. *v.* Wengler, 57 Ill.

has no implied authority to do what the principal himself is not authorized to do.[32]

4. General and Special Authority — a. In General. While the courts have very often defined and distinguished general and special agents,[33] the great trouble

App. 184, holding that an agent authorized merely to solicit customers and take orders for beer manufactured by his principal and collect bills is without implied authority to fit up saloons for the purchasers of the beer to sell it in.

32. Gambill *v.* Fuqua, 148 Ala. 448, 42 So. 735, as, for example, authority to make an arrest without a warrant.

33. See the following cases:

Alabama.—British, etc., Mortg. Co. *v.* Cody, 135 Ala. 622, 33 So. 832; Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., Co., 127 Ala. 137, 28 So. 679; Singer Mfg. Co. *v.* McLean, 105 Ala. 316, 16 So. 912; Syndicate Ins. Co. *v.* Catchings, 104 Ala. 176, 16 So. 46; Gibson *v.* J. Snow Hardware Co., 94 Ala. 346, 10 So. 304; Johnson *v.* Alabama Gas, etc., Co., 90 Ala. 505, 8 So. 101; Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808; Burks *v.* Hubbard, 69 Ala. 379; Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612.

Arkansas.— Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777.

California.— Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235; Davis *v.* Trachsler, 3 Cal. App. 554, 86 Pac. 610.

Colorado.— Great Western Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232; Little Pittsburg Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226; McIntosh-Huntington Co. *v.* Rice, 13 Colo. App. 393, 58 Pac. 358; Savage *v.* Pelton, 1 Colo. App. 148, 27 Pac. 948.

Georgia.— Columbus Show Case Co. *v.* Brinson, 128 Ga. 487, 57 S. E. 871; Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400.

Illinois.—Union Stockyard, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; Crain *v.* Jacksonville First Nat. Bank, 114 Ill. 516, 2 N. E. 486; Halladay *v.* Underwood, 90 Ill. App. 130; St. Louis Southwestern R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619.

Indiana.— Rich *v.* Johnson, 61 Ind. 246; Berry *v.* Anderson, 22 Ind. 36; Longworth *v.* Conwell, 2 Blackf. 469; Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413; Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856.

Iowa.— Conneautsville First Nat. Bank *v.* Robinson, 105 Iowa 463, 75 N. W. 334; Sawin *v.* Union Bldg., etc., Assoc., 95 Iowa 477, 64 N. W. 401; Siebold *v.* Davis, 67 Iowa 560, 25 N. W. 778.

Kansas.— Bohart *v.* Oberne, 36 Kan. 284, 13 Pac. 388; Atlantic, etc., R. Co. *v.* Reisner, 18 Kan. 458.

Kentucky.— Baldwin *v.* Tucker, 112 Ky. 282, 65 S. W. 841, 23 Ky. L. Rep. 1538, 57 L. R. A. 451; Godshaw *v.* Struck, 109 Ky. 285, 58 S. W. 781, 22 Ky. L. Rep. 820, 51 L. R. A. 668.

Louisiana.— Brown *v.* Frantum, 6 La. 39.

Maine.— Trundy *v.* Farrar, 32 Me. 225; Johnson *v.* Wingate, 29 Me. 404.

Maryland.— Equitable L. Assur. Soc. *v.* Poe, 53 Md. 28.

Massachusetts.— Norton *v.* Nevills, 174 Mass. 243, 54 N. E. 537; Mussey *v.* Beecher, 3 Cush. 511; Lobdell *v.* Baker, 1 Metc. 193, 35 Am. Dec. 358.

Michigan.—Sorrel *v.* Brewster, 1 Mich. 373.

Mississippi.— Planters' Bank *v.* Cameron, 3 Sm. & M. 609.

Missouri.— Edwards *v.* Home Ins. Co., 100 Mo. App. 695, 73 S. W. 881.

New Hampshire.— Hatch *v.* Taylor, 10 N. H. 538.

New Mexico.— Western Homestead, etc., Co. *v.* Albuquerque First Nat. Bank, 9 N. M. 1, 47 Pac. 721; Ruby *v.* Talbott, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 724.

New York.— Lowenstein *v.* Lombard, 164 N. Y. 324, 58 N. E. 44; Merserau *v.* Phœnix Mut. L. Ins. Co., 66 N. Y. 274; Martin *v.* Farnsworth, 49 N. Y. 555; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 632; Scott *v.* McGrath, 7 Barb. 53; Benesch *v.* John Hancock Mut. L. Ins. Co., 16 Daly 394, 11 N. Y. Suppl. 714; Sandford *v.* Handy, 23 Wend. 260; Anderson *v.* Coonley, 21 Wend. 279 (holding that the authority of an agent being limited to a particular business does not make it special; that it may be as general in regard to that as if its range was unlimited); Beals *v.* Allen, 18 Johns. 363, 9 Am. Dec. 221; Munn *v.* Commission Co., 15 Johns. 44, 8 Am. Dec. 219.

North Carolina.— Ferguson *v.* Davis, etc., Bldg., etc., Co., 118 N. C. 946, 24 S. E. 710.

Ohio.— House *v.* Vinton Nat. Bank, 43 Ohio St. 346, 358, 1 N. E. 129, 54 Am. Rep. 813; Ish *v.* Crane, 13 Ohio St. 574, 582; Layet *v.* Gano, 17 Ohio 466.

Oregon.— Pacific Biscuit Co. *v.* Dugger, 40 Oreg. 302, 67 Pac. 32.

Pennsylvania.— Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

South Dakota.— Shull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654.

Tennessee.— Lumpkin *v.* Wilson, 5 Heisk. 555.

Utah.— Smith *v.* Droubay, 20 Utah 443, 58 Pac. 1112.

Virginia.— Fore *v.* Campbell, 82 Va. 808, 1 S. E. 180.

United States.— Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754.

A general agent is: "One who is authorized to transact all the business of his principal, or all his business of some particular

is that they are totally unable to define general and special agents in terms which make the distinction applicable to each particular case.[34] Their powers, when properly analyzed, however, are governed by the same general principle, to wit,

kind, or at some particular place. . . . The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that, as though its range were unlimited." Cruzan *v.* Smith, 41 Ind. 288, 297 [*quoting* 1 Wait L. & Pr. p. 215].

"A person whom a man puts in his place, to transact all his business of a particular kind." Liddell *v.* Sahline, 55 Ark. 627, 629, 17 S. W. 705. To the same effect is Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754.

"One who is empowered to transact all of the business of his principal of a particular kind or in a particular place." Halladay *v.* Underwood, 90 Ill. App. 130; South Bend Toy Mfg. Co. *v.* Dakota F., etc., Ins. Co., 3 S. D. 205, 52 N. W. 866.

"Not merely a person substituted in the place of another, for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind." Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 503, 78 Am. Dec. 390 [*quoting* Paley Agency, p. 199, and *approved* in De Turck *v.* Matz, 180 Pa. St. 347, 36 Atl. 861].

"To be a 'general' agent, or to be clothed with 'general' authority, as that word is used in law, means no more than to have general authority in reference to a particular business or employment." Fishbaugh *v.* Spunaugle, 118 Iowa 337, 341, 92 N. W. 58 [*citing* Story Agency, § 17].

"A person authorized to transact all the business of another at a particular place, and impliedly invested with discretion to determine the proper construction of the contract under which work is being done by a third person for the principal, is a general agent." Cleveland, etc., R. Co. *v.* Moore, (Ind. 1907) 82 N. E. 52, (1908) 84 N. E. 540.

"A general agency is where there is a delegation to do all acts connected with a particular business or employment." Keith *v.* Herschberg Optical Co., 48 Ark. 138, 145, 2 S. W. 777.

A special agent is variously defined as an agent empowered to do a specific act (Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304; Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777; Great Western Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Baldwin *v.* Tucker, 112 Ky. 282, 65 S. W. 841, 23 Ky. L. Rep. 1538, 57 L. R. A. 451; Cooley *v.* Perrine, 41 N. J. L. 322, 32 Am. Rep. 210; South Bend Toy Mfg. Co. *v.* Dakota F., etc., Ins. Co., 3 S. D. 205, 52 N. W. 866), or one or more specific acts (Gibson *v.* Snow Hardware Co., *supra*; Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400; Cruzan *v.* Smith, 41 Ind. 288; Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Anderson *v.* Coonley, 21 Wend. (N. Y.) 279), or for a particular purpose (Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96), as one acting under limited and circumscribed powers, under restrictions imposed by the principal or to be implied from the nature of the act to be done (Gibson *v.* Snow Hardware Co., *supra*; Davis *v.* Talbot, 137 Ind. 235, 36 N. E. 1098; Blackwell *v.* Ketcham, 53 Ind. 184; Cruzan *v.* Smith, *supra*; Berry *v.* Anderson, 22 Ind. 36; Reitz *v.* Martin, 12 Ind. 306, 74 Am. Dec. 215; Pursley *v.* Morrison, 7 Ind. 356, 63 Am. Dec. 424; Godshaw *v.* Struck, 109 Ky. 285, 58 S. W. 781, 22 Ky. L. Rep. 820, 51 L. R. A. 668; Jaques *v.* Todd, 3 Wend. (N. Y.) 83; Pacific Biscuit Co. *v.* Dugger, 40 Oreg. 362, 67 Pac. 32), or as one who is not given entire control over the particular business, but only the right to do specific acts (St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737).

"A special agency exists when there is a delegation of authority to do a single act." Keith *v.* Herschberg Optical Co., 48 Ark. 138, 145, 2 S. W. 777.

A local agent is: "An agent at a given place or within a definite district." Western Cottage Piano, etc., Co. *v.* Anderson, 97 Tex. 432, 435, 79 S. W. 516, where the court said: "An agent for the state is not a local agent within this State."

"An agent residing [in a place] either permanently or temporarily for the purpose of his agency." Moore *v.* Freeman's Nat. Bank, 92 N. C. 590, 596.

As applied to insurance, the term means any person or firm soliciting, contracting for, or receiving premiums for any insurance company, or who delivers policies, and includes a railroad agent or employee who solicits or receives premiums for accident insurance. Eichlitz *v.* State, 39 Tex. Cr. 486, 487, 46 S. W. 643.

As applied to corporations, it means a person who represents it in the business for which it was incorporated. Bay City Iron Works *v.* Reeves, 43 Tex. Civ. App. 254, 257, 95 S. W. 739. See also PROCESS.

A particular agent is an agent authorized to do one or two particular things. Ruby *v.* Talbott, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 724.

Statutory definitions.— In some jurisdictions general and special agents are expressly defined by statute. See the statutes of the several states. And see Quay *v.* Presidio, etc., R. Co., 82 Cal. 1, 22 Pac. 925; Moore *v.* Skyles, 33 Mont. 135, 82 Pac. 799, 114 Am. St. Rep. 801, 3 L. R. A. 136.

"The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power to do individual acts only." Cross *v.* Atchison, etc., R. Co., 141 Mo. 132, 147, 42 S. W. 675 [*quoting* Butler *v.* Maples, 9 Wall. (U. S.) 766, 19 L. ed. 822].

34. Merchants' Ins. Co. *v.* New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174.

they can do anything within the scope of their agency so as to bind the principal, notwithstanding there may be some secret instructions limiting their powers;[35] and whether the authority be general or limited they cannot charge their principals if they exceed it. They are of course more likely to transcend the bounds of a narrow than of an extended power; but the principle in either case is the same.[36] Universal agents are mentioned in a few cases;[37] but it is believed that there is no case in the books in which it has been necessary to a decision to hold any particular person to be a universal agent, nor is one likely to arise.[38]

b. Extent of General Authority. A general agent, unless he acts under a special and limited authority, impliedly has power to do whatever is usual and proper to effect such a purpose as is the subject of his employment. Hence, in the absence of known limitations, third persons dealing with such a general agent have a right to presume that the scope and character of the business he is employed to transact is the extent of his authority.[39] This rule, as already stated, does not

35. Mars *v.* Mars, 27 S. C. 132, 3 S. E. 60.

36. Cross *v.* Atchison, etc., R. Co., 141 Mo. 132, 42 S. W. 675.

37. Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612; Barr *v.* Schroeder, 32 Cal. 609; Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

A universal agent is: "One authorized to transact all of the business of his principal of every kind." Gibson *v.* Snow Hardware Co., 94 Ala. 346, 352, 10 So. 304 [*quoting* Mechem Agency, § 6].

"[One] appointed to do all the acts, which the principal can personally do, and which he may lawfully delegate the power to another to do." Wood *v.* McCain, 7 Ala. 800, 803, 42 Am. Dec. 612.

38. See Wood *v.* McCain, 7 Ala. 800, 803, 42 Am. Dec. 612 [*quoting* Story Agency, §§ 20, 21] (where the court said: "Such an universal agency may potentially exist; but it must be of the very rarest occurrence. And indeed it is difficult to conceive of the existence of such an agency, inasmuch as it would be to make such an agent the complete master, not merely *dux facti*, but *dominus rerum*, the complete disposer of all the rights and property of the principal"); Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

39. *Alabama.*— British, etc., Mortg. Co. *v.* Cody, 135 Ala. 622, 33 So. 832; Robinson *v.* Ætna Ins. Co., 128 Ala. 477, 30 So. 665; Montgomery Furniture Co. *v.* Hardaway, 104 Ala. 100, 16 So. 29 (holding that the authority of a general agent is, as to third persons, what it appears to be, and must be determined by the nature of the business, and is *prima facie* coextensive with its requirements); Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808; Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612.

Arkansas.— Everett *v.* Clements, 9 Ark. 478.

Colorado.— Winch *v.* Edmunds, 34 Colo. 359, 83 Pac. 632.

Illinois.— Young *v.* Mueller Bros. Art, etc., Co., 124 Ill. App. 94.

Indiana.— Crnzan *v.* Smith, 41 Ind. 288.

Iowa.— Sawin *v.* Union Bldg., etc., Assoc., 95 Iowa 477, 64 N. W. 401.

Kansas.— Bobart *v.* Oberne, 36 Kan. 284, 13 Pac. 388.

Kentucky.— E. T. Kenney Co. *v.* Anderson, 81 S. W. 663, 26 Ky. L. Rep. 367; Rankin *v.* McFarlane Carriage Co., 75 S. W. 221, 25 Ky. L. Rep. 258.

Minnesota.— Gillis *v.* Duluth, etc., R. Co., 34 Minn. 301, 25 N. W. 603.

Mississippi.— Wilcox *v.* Routh, 9 Sm. & M. 476.

Missouri.— Cross *v.* Atchison, etc., R. Co., 141 Mo. 132, 42 S. W. 675.

Montana.— Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553, holding that the authority to accomplish a definite end carries with it the right to adopt the usual and legal means to accomplish the object.

Nebraska.— Hall *v.* Hopper, 64 Nebr. 633, 90 N. W. 549.

New Hampshire.— Flint *v.* Boston, etc., R. Co., 73 N. H. 141, 59 Atl. 938.

New York.—Anderson *v.* Coonley, 21 Wend. 279; Munn *v.* Commission Co., 15 Johns. 44, 8 Am. Dec. 219.

Pennsylvania.— Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Williams *v.* Getty, 31 Pa. St. 461, 72 Am. Dec. 757.

Wisconsin.— Roehl *v.* Volckmann, 103 Wis. 484, 79 N. W. 755.

United States.— Allen *v.* Ogden, 1 Fed. Cas. No. 233, 1 Wash. 174.

England.— Collen *v.* Gardner, 21 Beav. 540, 52 Eng. Reprint 968; Smith *v.* McGuire, 3 H. & N. 554, 27 L. J. Exch. 465, 6 Wkly. Rep. 726; *Ex p.* Howell, 12 L. T. Rep. N. S. 785.

See 40 Cent. Dig. tit "Principal and Agent," § 247.

Principal undisclosed.— The ordinary rule that a principal is liable for the acts of his agent which are within the authority usually confided to an agent of that character, notwithstanding secret limitations upon that authority, applies also where the existence of any principal was unknown to the person contracting with and giving credit to the agent alone. Watteau *v.* Fenwick, [1893] 1 Q. B. 346, 56 J. P. 839, 67 L. T. Rep. N. S. 831, 5 Reports 143, 41 Wkly. Rep. 222; Edmunds *v.* Bushell, L. R. 1 Q. B. 97, 12 Jur.

apply when limitations upon the authority of the agent have been brought home to the knowledge of the third person dealing with him,[40] nor when the third person fails to make such inquiry as conditions demand, especially if the facts and circumstances are such as to suggest inquiry.[41] Furthermore, the implied power of any agent, however general, must be limited to such acts as are proper for an agent to do, and cannot extend to acts clearly adverse to the interests of the principal, or for the benefit of the agent personally.[42] And an agent has no implied authority to do acts not usually done by agents in that sort of transaction, nor to do them in other than the customary manner. The most general authority is limited to the business or purpose for which the agency was created.[43]

c. Extent of Special Authority. The authority of a special agent must be

N. S. 332, 35 L. J. Q. B. 20; Pickering *v.* Busk, 15 East 38, 13 Rev. Rep. 364. See also *supra*, II, A, 2, e.

40. See *supra*, II, A, 2, c.

41. See *supra*, II, A, 1.

42. *Alabama.*— Burks *v.* Hubbard, 69 Ala. 379.

Kentucky.— Baldwin *v.* Tucker, 112 Ky. 282, 65 S. W. 841, 23 Ky. L. Rep. 1538, 57 L. R. A. 451.

Louisiana.— Pritchett *v.* Mechanics', etc., Ins. Co., 27 La. Ann. 525.

Missouri.—Mechanics' Bank *v.* Schaumburg, 38 Mo. 228. And see Henley *v.* Clover, 6 Mo. App. 181.

Montana.— Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

New Hampshire.— Rice *v.* Lyndeborough Glass Co., 60 N. H. 195.

New Jersey.— Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.— Gerard *v.* McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234 [*affirming* 16 Daly 40, 8 N. Y. Suppl. 860]; Wright *v.* Cabot, 89 N. Y. 570; Ford *v.* Union Nat. Bank, 88 N. Y. 672; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Jacoby *v.* Payson, 85 Hun 367, 32 N. Y. Suppl. 1032.

South Carolina.— See Sukeley *v.* Tunno, 2 Bay 505.

Texas.— McAlpin *v.* Cassidy, 17 Tex. 449.

West Virginia.—Merchants', etc., Nat. Bank *v.* Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312.

United States.— Central Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Wickham *v.* Morehouse, 16 Fed. 324 (holding that no agent, however general his powers, has implied authority to pledge the credit of his principal for his own private debt, and if he undertakes to do so it is the clear duty of the person dealing with him to make inquiry as to his authority); Moores *v.* Citizens' Nat. Bank, 15 Fed. 141.

Canada.— Hutchings *v.* Adams, 12 Manitoba 118; Hickman *v.* Baker, 31 Nova Scotia 208; Garden *v.* Neily, 31 Nova Scotia 89; Brown *v.* Smart, 1 Grant Err. & App. (U. C.) 148.

And see *infra*, III, A, 1.

"An act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or make the contract." Park Hotel Co. *v.* St. Louis Fourth Nat. Bank, 86 Fed. 742, 30 C. C. A. 409. See also State Nat. Bank *v.* Newton Nat. Bank, 66 Fed. 691, 14 C. C. A. 61; Chrystie *v.* Foster, 61 Fed. 551, 9 C. C. A. 606.

43. *Alabama.*— Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808.

Colorado.— McIntosh-Huntington Co. *v.* Rice, 13 Colo. App. 393. 58 Pac. 358; Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634].

Georgia.— Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400.

Illinois.— Halladay *v.* Underwood, 90 Ill. App. 130.

Indiana.— Rich *v.* Johnson, 61 Ind. 246.

Iowa.— Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575.

Maine.— Gardner *v.* Boston, etc., R. Co., 70 Me. 181.

Massachusetts.— Shaw *v.* Stone, 1 Cush. 228, holding that a general agent cannot without special authority resort to extraordinary means of carrying on the agency.

Michigan.—Holmes *v.* McAllister, 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 396; Deffenbaugh *v.* Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197.

Minnesota.— Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 65 N. W. 635, 56 Am. St. Rep. 481, 30 L. R. A. 346.

New Jersey.— Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.— Decker *v.* Sexton, 19 Misc. 59, 43 N. Y. Suppl. 167; Jaques *v.* Todd, 3 Wend. 83.

North Carolina.— Moore *v.* Tickle, 14 N. C. 244.

Texas.— Weeks *v.* A. F. Shapleigh Hardware Co., 23 Tex. Civ. App. 577, 57 S. W. 67.

United States.— Hodge *v.* Combs, 1 Black 192, 17 L. ed. 157, holding that an appointment "to do and transact all manner of business" gives no authority to sell the principal's property.

England.— Hambro *v.* Burnand, [1903] 2 K. B. 399, 8 Com. Cas. 252, 72 L. J. Q. B. 662, 89 L. T. Rep. N. S. 180, 19 T. L. R. 584, 51 Wkly. Rep. 652 [*reversed* on other grounds in [1904] 2 K. B. 10, 9 Com. Cas. 251, 73

strictly pursued,[44] and those dealing with him must at their peril determine the extent of his authority;[45] for, as in the case of acts and transactions of a general

L. J. K. B. 669, 90 L. T. Rep. N. S. 803, 20 T. L. R. 398, 52 Wkly. Rep. 583]; Cotman *v.* Orton, Cr. & Ph. 304, 10 L. J. Ch. 18, 18 Eng. Ch. 304, 41 Eng. Reprint 506; Atty.-Gen. *v.* Jackson, 5 Hare 355, 26 Eng. Ch. 355, 67 Eng. Reprint 950; *Ex p.* Howell, 12 L. T. Rep. N. S. 785; Truettel *v.* Barandon, 1 Moore C. P. 543, 8 Taunt. 100, 4 E. C. L. 59.

Canada.— Boyer *v.* Woodstock, 6 Can. L. T. Occ. Notes 493, 24 N. Brunsw. 521; Kerr *v.* Lefferty, 7 Grant Ch. (U. C.) 412.

44. *Alabama.*—Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808.

California.— Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235; Bryan *v.* Berry, 6 Cal. 394, holding that where the principal authorized the agent to sign the principal's name as surety to a note and the agent signed the principal's name with his own as a joint and several maker of the note the principal is not liable.

Delaware.— Mears *v.* Waples, 4 Houst. 62, holding that a special agent, authorized to deliver a bill of lading only on payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principal by delivery made without such payment.

Illinois.— Monson *v.* Kill, 144 Ill. 248, 33 N. E. 43; Thornton *v.* Boyden, 31 Ill. 200 (holding that if a special agent is empowered to sell land at public auction, at a particular time, at a particular place, and on certain terms, such terms, place, and time must be strictly observed); Young *v.* Harbor Point Club House Assoc., 99 Ill. App. 290; Monson *v.* Jacques, 44 Ill. App. 306.

Kentucky.— Parks *v.* S. & L. Turnpike Road Co., 4 J. J. Marsh. 456 (holding that where a special agent of a company was authorized to contract for the construction of a road between certain points, payable out of the funds then in the hands of the company, a contract made by him for construction of the road beyond these points at a future day and payable out of funds to be subsequently acquired by the company will not bind the company, since he exceeded his authority); Dehart *v.* Wilson, 6 T. B. Mon. 577.

Mississippi.— Brown *v.* Johnson, 12 Sm. & M. 398, 51 Am. Dec. 118, holding that where a special authority was given in writing by a principal to an agent, directing the agent to purchase for the principal a particular tract of land, and the agent bought a different tract, the sale was void for want of authority in the agent.

New Jersey.— Cooley *v.* Perrine, 41 N. J. L. 322, 32 Am. Rep. 210; Milne *v.* Kleb, 44 N. J. Eq. 378, 14 Atl. 646; Black *v.* Shreve, 13 N. J. Eq. 455.

New York.—Martin *v.* Farnsworth, 49 N. Y. 555; Cohen *v.* Mincoff, 96 N. Y. Suppl. 411; Nixon *v.* Hyserott, 5 Johns. 58; Batty *v.* Carswell, 2 Johns. 48.

Pennsylvania.— Campbell *v.* Foster Home Assoc., 163 Pa. St. 609, 30 Atl. 222, 43 Am. St. Rep. 818, 26 L. R. A. 117; Devinney *v.* Reynolds, 1 Watts & S. 328; MacDonald *v.* O'Neil, 21 Pa. Super. Ct. 364.

South Carolina.— Welsh *v.* Parish, 1 Hill 155.

Tennessee.— Lumpkin *v.* Wilson, 5 Heisk. 555; Gimell *v.* Adams, 11 Humphr. 283; Hoskins *v.* Carroll, 7 Yerg. 505; Gordon *v.* Buchanan, 5 Yerg. 71.

Virginia.— Bowles *v.* Rice, 107 Va. 51, 57 S. E. 575.

United States.— Allen *v.* Ogden, 1 Fed. Cas. No. 233, 1 Wash. 174; U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

See 40 Cent. Dig. tit. "Principal and Agent," § 249.

45. *Alabama.*— Johnson *v.* Alabama Gas, etc., Co., 90 Ala. 505, 8 So. 101; Burks *v.* Hubbard, 69 Ala. 379; Fisher *v.* Campbell, 9 Port. 210.

Arkansas.— Schenck *v.* Griffith, 74 Ark. 557, 86 S. W. 850; Liddell *v.* Sahline, 55 Ark. 627, 17 S. W. 705.

California.—Davis *v.* Trachsler, 3 Cal. App. 554, 86 Pac. 610.

Georgia.— Inman *v.* Crawford, 116 Ga. 63, 42 S. E. 473 (holding that a secret agreement between the third person and a special agent cannot bind the principal); Americus Oil Co. *v.* Gurr, 114 Ga. 624, 40 S. E. 780; Harris Loan Co. *v.* Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 S. E. 1003.

Illinois.— Baxter *v.* Lamont, 60 Ill. 237; Peabody *v.* Hoard, 46 Ill. 242; Kuecks *v.* New Home Sewing Mach. Co., 123 Ill. App. 660; Young *v.* Harbor Point Club House Assoc., 99 Ill. App. 290; Schneider *v.* Lebanon Dairy, etc., Co., 73 Ill. App. 612.

Indiana.— Davis *v.* Talbot, 137 Ind. 235, 36 N. E. 1098; Blackwell *v.* Ketcham, 53 Ind. 184; Berry *v.* Anderson, 22 Ind. 36; Reitz *v.* Martin, 12 Ind. 306, 74 Am. Dec. 215.

Iowa.— Siebold *v.* Davis, 67 Iowa 560, 25 N. W. 778.

Kentucky.— Godshaw *v.* Struck, 109 Ky. 285, 58 S. W. 781, 22 Ky. L. Rep. 820, 51 L. R. A. 668.

Louisiana.— Brown *v.* Frantum, 6 La. 39.

Maryland.— Equitable L. Assur. Soc. *v.* Poe, 53 Md. 28; Tubman *v.* Lowekamp, 43 Md. 318.

Massachusetts.— Lovett, etc., Co. *v.* Sullivan, 189 Mass. 535, 75 N. E. 738; Mussey *v.* Beecher, 3 Cush. 511, holding that where a person selling goods to an agent who was acting under a limited power of attorney had inquired of the agent as to his authority, and had been informed by him that it was not full, he could not recover of the principal for a debt exceeding the authority.

New Hampshire.— Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

New Jersey.—Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941; Black *v.* Shreve, 13 N. J. Eq. 455, holding that one claiming through a special agent takes the risk of his want of a power.

New York.—Martin *v.* Farnsworth, 49 N. Y. 555; Michael *v.* Eley, 61 Hun 180, 15 N. Y.

agent,[46] a special agent cannot bind his principal by acts outside the scope of his authority.[47] A special authority, like a general authority, confers by implication all powers necessary for or incident to its proper execution,[48] and secret instructions or restrictions do not limit the special agent's authority so far as innocent third persons are concerned;[49] and if a principal has permitted a special agent so to act as reasonably to induce others to credit him with broader powers

Suppl. 890; Joseph *v.* Struller, 25 Misc. 173, 54 N. Y. Suppl. 162; Delafield *v.* Illinois, 2 Hill 159.

North Carolina.— Ferguson *v.* Davis, etc., Bldg., etc., Co., 118 N. C. 946, 24 S. E. 710.

Pennsylvania.— Devinney *v.* Reynolds, 1 Watts & S. 328.

South Dakota.— J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. D. 530, 91 N. W. 82.

Texas.— Sinker *v.* Lemon, 1 Tex. App. Civ. Cas. § 290.

Vermont.— White *v.* Langdon, 30 Vt. 599.

Virginia.— Finch *v.* Causey, 107 Va. 124, 57 S. E. 562; Bowles *v.* Rice, 107 Va. 51, 57 S. E. 575.

United States.— Owings *v.* Hull, 9 Pet. 607, 9 L. ed. 246; Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754.

Canada.— Almon *v.* Foot, Russ. Eq. Cas. (Nova Scotia) 1.

46. See *supra*, II, C, 4, b.

47. *Alabama.*— Singer Mfg. Co. *v.* McLean, 105 Ala. 316, 16 So. 912; Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612.

Arkansas.— Little Rock *v.* State Bank, 8 Ark. 227.

Colorado.— Savage *v.* Pelton, 1 Colo. App. 148, 27 Pac. 948.

Florida.— Yates *v.* Yates, 24 Fla. 64, 3 So. 821.

Georgia.— Baldwin Fertilizer Co. *v.* Thompson, 106 Ga. 480, 32 S. E. 591 (holding that a settlement made by a special agent, where not within the scope of his authority, is not binding on the principal); Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400.

Illinois.— Baxter *v.* Lamont, 60 Ill. 237.

Indiana.— Cruzan *v.* Smith, 41 Ind. 288; Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488.

Iowa.— Siebold *v.* Davis, 67 Iowa 560, 25 N. W. 778; Payne *v.* Potter, 9 Iowa 549.

Kentucky.— Campbellsville Lumber Co. *v.* Spotswood, 74 S. W. 235, 24 Ky. L. Rep. 2430.

Maine.— Johnson *v.* Wingate, 29 Me. 404.

Massachusetts.— Norton *v.* Nevills, 174 Mass. 243, 54 N. E. 537.

Mississippi.— Landsdale *v.* Shackleford, Walk. 149.

Missouri.— Tate *v.* Evans, 7 Mo. 419; Ridgeley Nat. Bank *v.* Barse Live Stock Commission Co., 113 Mo. App. 696, 88 S. W. 1124; Bensberg *v.* Harris, 46 Mo. App. 404.

Montana.— Moore *v.* Skyles, 33 Mont. 135, 82 Pac. 799, 114 Am. St. Rep. 801, 3 L. R. A. N. S. 136.

New Hampshire.— Hayes *v.* Colby, 65 N. H. 192, 18 Atl. 251; Hatch *v.* Taylor, 10 N. H. 538.

New York.— Bickford *v.* Menier, 107 N. Y. 490, 14 N. E. 438; Meiggs *v.* Meiggs, 15 Hun 453; Scott *v.* McGrath, 7 Barb. 53; Reese *v.* Drug, etc., Club, 55 Misc. 276, 105 N. Y. Suppl. 285; Rossiter *v.* Rossiter, 8 Wend. 494, 24 Am. Dec. 62; Jaques *v.* Todd, 3 Wend. 83; Beals *v.* Allen, 18 Johns. 363, 9 Am. Dec. 221; Munn *v.* Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Skinner *v.* Dayton, 5 Johns. Ch. 351. See also Deering *v.* Starr, 118 N. Y. 665, 23 N. E. 25, holding that the burden was on one asserting it to show the authority of one empowered to buy realty to assume the claim for compensation of one who had secured the reduction of an assessment against it.

Pennsylvania.— Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Mercier *v.* Lachenmeyer, 1 Leg. Gaz. 279.

Texas.— Mann *v.* Dublin Cotton-Oil Co., 92 Tex. 377, 48 S. W. 567; Trammell *v.* Turner, (Civ. App. 1904) 82 S. W. 325.

Virginia.— Fore *v.* Campbell, 82 Va. 808, 1 S. E. 180.

England.— Collen *v.* Gardner, 21 Beav. 540, 52 Eng. Reprint 968; Cotman *v.* Orton, Cr. & Ph. 304, 10 L. J. Ch. 18, 18 Eng. Ch. 304, 41 Eng. Reprint 506; East India Co. *v.* Hensley, 1 Esp. 112 (holding that a principal is bound by all the acts of his general agent; but where he appoints an agent for a particular purpose he is bound only to the extent of the authority given); Fenn *v.* Harrison, 3 T. R. 757, 4 T. R. 177. And see Attwood *v.* Munnings, 7 B. & C. 278, 6 L. J. K. B. O. S. 9, 1 M. & R. 66, 31 Rev. Rep. 194, 14 E. C. L. 130.

Canada.— Commercial Union Assoc. *v.* Margeson, 29 Can. Sup. Ct. 601 [*reversing* 31 Nova Scotia 337]; Atlas Assur. Co. *v.* Brownell, 29 Can. Sup. Ct. 537 [*reversing* 31 Nova Scotia 348]; Boyer *v.* Woodstock, 6 Can. L. T. Occ. Notes 493, 24 N. Brunsw. 521 (holding that a committee appointed for specific duties is not authorized to order extra work outside such duties); Ross *v.* Sutherland, 32 Nova Scotia 243; Garden *v.* Neily, 31 Nova Scotia 89.

See 40 Cent. Dig. tit. "Principal and Agent," § 248.

48. See *infra*, II, A, 5.

49. Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808; Barber *v.* Britton, 26 Vt. 112, 60 Am. Dec. 301. And see *supra*, II, A, 2, b.

Indorsement of check.— Where a person authorizes his agent to indorse a check, which he does, and the act is within the scope of his authority, such party cannot deny liability for the acts of his agent because the authority was intended only to apply to checks received by the agent in the proper management of his business, and his agent wilfully perverted the power vested in him to do some-

than he actually possesses, he will be estopped to deny the existence of as broad an authority as he permitted the special agent to exercise.[50] The act of a special agent outside of his authority is voidable at the option of the principal.[51]

5. Incidental Authority. In the absence of proof that the principal has withheld such authority, it is a rule of law that every grant of power implies and carries with it incidental authority to use all necessary means and inducements properly to perform it.[52] The means adopted, however, should be such as are most usual,

thing more than was intended. Slaughter *v.* Fay, 80 Ill. App. 105.

50. St. Louis, etc., Packet Co. *v.* Parker, 59 Ill. 23 (holding that, although an agent's authority may be special and limited, yet, if the principal permits him to advertise his name as agent generally without noting such limitation, and he acts outside of his authority, the principal will be bound thereby, unless the party with whom he deals had notice of the limitation); Lister *v.* Allen, 31 Md. 543, 100 Am. Dec. 78. And see *supra*, II, A, 2, e.

51. Payne *v.* Potter, 9 Iowa 549; Mitchell *v.* Sproul, 5 J. J. Marsh. (Ky.) 264; Dehart *v.* Wilson, 6 T. B. Mon. (Ky.) 577; Nixon *v.* Hyserott, 5 Johns. (N. Y.) 58; Allen *v.* Ogden, 1 Fed. Cas. No. 233, 1 Wash. 174.

52. *Alabama.*— Pattison *v.* Moore, 3 Port. 270.

Delaware.— Geylin *v.* De Villeroi, 2 Houst. 311.

Georgia.— Bass Dry Goods Co. *v.* Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980; Barclay *v.* Hopkins, 59 Ga. 562.

Illinois.— Michigan Southern, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278; John Spry Lumber Co. *v.* McMillan, 77 Ill. App. 280.

Indiana.— American Tel., etc., Co. *v.* Green, 164 Ind. 349, 73 N. E. 707; Shackman *v.* Little, 87 Ind. 181.

Iowa.— Massillon Engine, etc., Co. *v.* Shirmer, 122 Iowa 699, 98 N. W. 504, (1903) 93 N. W. 599; Cedar Rapids, etc., R. Co. *v.* Stewart, 25 Iowa 115 (which holds that where an agent is intrusted with the delivery of an instrument it will be presumed that the power to affix and cancel stamps was conferred upon the agent in order to render the instrument perfect when delivered); Payne *v.* Potter, 9 Iowa 549.

Kansas.— Bohart *v.* Oberne, 36 Kan. 284, 13 Pac. 388.

Kentucky.— Hardee *v.* Hall, 12 Bush 327; Vanada *v.* Hopkins, 1 J. J. Marsh. 285, 19 Am. Dec. 92; Taylor *v.* French, 1 Bibb 52.

Louisiana.— Brown *v.* Frantum, 6 La. 39.

Maine.— Richards *v.* Folsom, 11 Me. 70.

Michigan.— Teakle *v.* Moore, 131 Mich. 427, 91 N. W. 636; Tanner *v.* Page, 106 Mich. 155, 63 N. W. 993.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 91 Mo. 152, 3 S. W. 486 (holding that a grant of general power includes within it all the necessary and usual means of executing it with effect and all the mediate powers necessary to the end, as incident to the primary power, although not expressly given); State *v.* Gates, 67 Mo. 139; Dennis *v.* Ashley, 15 Mo. 453; St. Louis Cunning Advertisement Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737; Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Rider *v.* Kirk, 82 Mo. App. 120.

Montana.— Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

New Hampshire.— Backman *v.* Charlestown, 42 N. H. 125; Goodale *v.* Wheeler, 11 N. H. 424.

New Jersey.— Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

New York.— Lowenstein *v.* Lombard, etc., Co., 164 N. Y. 324, 58 N. E. 44 (in which it is said that "where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of the situation"); Robinson *v.* Springfield Iron Co., 39 Hun 634 [*affirmed* in 23 Abb. N. Cas. 263 note]; Sandford *v.* Handy, 23 Wend. 260.

Ohio.— Mahler-Wolf Produce Co. *v.* Meyer, 26 Ohio Cir. Ct. 165. *Compare* Layet *v.* Gano, 17 Ohio 466.

Oregon.— Neppach *v.* Oregon, etc., R. Co., 46 Oreg. 374, 80 Pac. 482; Durkee *v.* Carr, 38 Oreg. 189, 63 Pac. 117.

Pennsylvania.— Bell *v.* Moss, 5 Whart. 189; Peck *v.* Harriott, 6 Serg. & R. 146, 9 Am. Dec. 415, holding that the principal authority includes all mediate powers which are necessary to carry it into effect, and that this applies equally to general and to special agencies.

Texas.— McAlpin *v.* Cassidy, 17 Tex. 449 (holding that every agency includes in it or carries with it as an incident all the powers which are necessary or proper or usual as means to effectuate the purposes for which it was created, and none other; and in this respect there is no distinction whether the authority given to an agent is general or special, express or implied; that in each case it embraces the appropriate means to accomplish the desired end, and is limited to the use of those means); Trammell *v.* Turner, (Civ. App. 1904) 82 S. W. 325; Halff *v.* O'Connor, 14 Tex. Civ. App. 191, 37 S. W. 238.

Vermont.— Thayer *v.* Lyman, 35 Vt. 646; White *v.* Langdon, 30 Vt. 599.

Wisconsin.— Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099; Matteson *v.* Rice, 116 Wis. 328, 92 N. W. 1109.

United States.— New York, etc., Min., etc., Co. *v.* Fraser, 130 U. S. 611, 9 S. Ct. 665, 32 L. ed. 1031; National Bank Republic *v.* Baltimore Old Town Bank, 112 Fed. 726, 50 C. C. A. 443, holding that the implied powers and authority of an agent employed for a particular service depend largely upon the circumstances in each case and upon what is

such means indeed as are ordinarily used by prudent persons in doing similar business.[53]

6. Authority of Agents For Particular Purposes — a. To Buy — (1) *In General.* The general rule is that a principal is responsible for the purchases of his agent only when he authorizes him to make them, or when he permits him to make purchases knowing that the seller parts with his property on the responsibility of the principal, and not on the credit of the agent,[54] although of course he cannot escape responsibility for purchases because the agent has disregarded private instructions.[55] And the principal is not responsible if the agent has not purchased what he was authorized to buy within the limits within which he was

necessary or reasonable to enable him to effect the purpose of his agency.

England.— Collen *v.* Gardner, 21 Beav. 540, 52 Eng. Reprint 968 (holding that when a general authority is given to an agent, this implies a right to do all subordinate acts incident to and necessary for the execution of that authority, and if notice is not given that the authority is specially limited the principal is bound); Howard *v.* Baillie, 2 H. Bl. 618, 3 Rev. Rep. 531.

Canada.— Miller *v.* Cochran Hill Gold Min. Co., 29 Nova Scotia 304.

Thus if an agent is authorized to negotiate agreements he may conclude and accept the contract and receipt for the same; if to make an offer he may receive the response. Conneautsville First Nat. Bank *v.* Robinson, 105 Iowa 463, 75 N. W. 334; Griffith *v.* Fields, 105 Iowa 362, 75 N. W. 325; Holmes *v.* Redhead, 104 Iowa 399, 73 N. W. 878; Western R. Corp. *v.* Babcock, 6 Metc. (Mass.) 346; Damon *v.* Granby, 2 Pick. (Mass.) 345; Ferguson *v.* Hemingway, 38 Mich. 159; Boynton Furnace Co. *v.* Clark, 42 Minn. 335, 44 N. W. 121; Meridian Waterworks Co. *v.* Marks, (Miss. 1895) 17 So. 777; Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 10 S. Ct. 730, 33 L. ed. 934; Merchants Mar. Ins. Co. *v.* Barss, 15 Can. Sup. Ct. 185; Bedson *v.* Smith, 10 Grant Ch. (U. C.) 292.

No right to guarantee executions can be implied from an agency to sell them. Lipscomb *v.* Kitrell, 11 Humphr. (Tenn.) 256.

An agent to solicit consignments of goods to be sold on commission cannot guarantee the price they will net the shipper. Mahler-Wolf Produce Co. *v.* Meyer, 26 Ohio Cir. Ct. 165.

A traveling salesman without express authority cannot bind his principal for his hotel bills — especially is the principal not liable where the credit in the first instance is extended to the agent. Grand Ave. Hotel Co. *v.* Friedman, 83 Mo. App. 491. Nor can he bind his principal for laundry and other items, such as express and telegrams, unless connected with his business. Grand Ave. Hotel Co. *v.* Friedman, *supra*.

53. Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92. And see *infra*, II, B, 1.

54. *Illinois.*— Pomeroy *v.* Roberts, 18 Ill. 294.

Massachusetts.— Stiles *v.* Emerson, 17 Pick. 326.

Minnesota.— Eckart *v.* Roehm, 43 Minn. 271, 45 N. W. 443.

Missouri.— Carson *v.* Culver, 78 Mo. App. 597.

Nebraska.— Young *v.* Chi Psi Cattle Co., (1907) 112 N. W. 560.

Pennsylvania.— White *v.* Cooper, 3 Pa. St. 130.

Texas.— Merriman *v.* Fulton, 29 Tex. 97.

Vermont.— Cochran *v.* Richardson, 33 Vt. 169; Soule *v.* Dougherty, 24 Vt. 92.

Canada.— See Peters *v.* Seaman, 22 Nova Scotia 405.

Where an agent is held out as having power to purchase his principal is responsible. Witcher *v.* McPhee, 16 Colo. App. 298, 65 Pac. 806; Witcher *v.* Gibson, 15 Colo. App. 163, 61 Pac. 192; Union Stockyards, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; Banner Tobacco Co. *v.* Jenison, 48 Mich. 459, 12 N. W. 655; Watteau *v.* Fenwick, [1893] 1 Q. B. 346, 56 J. P. 839, 67 L. T. Rep. N. S. 831, 5 Reports 143, 41 Wkly. Rep. 222; Armstrong *v.* Stokes, L. R. 7 Q. B. 598, 41 L. J. Q. B. 253, 26 L. T. Rep. N. S. 872, 21 Wkly. Rep. 52; Hutchings *v.* Adams, 12 Manitoba 118; Kenny *v.* Harrington, 31 Nova Scotia 290. And see *supra*, II, A, 2, e.

Authority to make purchases on one occasion confers no authority to make subsequent purchases. Town *v.* Hendee, 27 Vt. 258; Heathfield *v.* Van Allen, 7 U. C. C. P. 346.

When the agent makes purchases within the discretion lodged in him by the agency, the principal cannot escape from the contracts he makes. Boulder Inv. Co. *v.* Fries, 2 Colo. App. 373, 31 Pac. 174; Baker *v.* Barnett Produce Co., 113 Mich. 533, 71 N. W. 866; Schley *v.* Fryer, 100 N. Y. 71, 2 N. E. 280 (holding that an agent having general authority to purchase real estate, encumbered or unencumbered, has the power to bind his principal by assuming a mortgage on the estate purchased); Murr *v.* Western Assur. Co., 24 N. Y. App. Div. 390, 48 N. Y. Suppl. 757.

Authority must be exercised.— In case of authority conferred upon an agent to buy, no rights in third persons can arise before the agent has acted on the authority. McCotter *v.* New York, 35 Barb. (N. Y.) 609 [*affirmed* in 37 N. Y. 325].

55. Comer *v.* Granniss, 75 Ga. 277; H. Herrmann Saw Mill Co. *v.* Bailey, 58 S. W. 449, 22 Ky. L. Rep. 552 (where the agent bought more than he was authorized to purchase); Crews *v.* Garneau, 14 Mo. App. 505. And see *supra*, II, A, 2, b.

authorized to act,[56] or, when authorized to buy only of designated persons in a certain place, if he buys of other persons in different localities.[57] An agent has authority, however, to buy for his principal whenever such buying is customary or necessary to enable the agent to accomplish that for which he was employed by his principal;[58] but the principal is not bound when an agent who might appropriately buy certain things buys other things not necessary to effect the purposes of the agency.[59] Even a general manager of his principal's business has no authority to buy if the purchases are not necessary to the performance of the duties incident to his station,[60] and still less is authority to buy to be presumed in the case of an agent acting under restricted authority, or in a special capacity.[61] When

56. Theile *v.* Chicago Brick Co., 60 Ill. App. 559 (holding that a principal who authorizes his agent to buy the best common brick is not bound by a purchase of an inferior quality unless he receives and uses the brick so purchased); Gregg *v.* Wooliscroft, 52 Ill. App. 214 (holding that an agent authorized to buy one grade of oats has no authority to contract for another); Hartwell *v.* Walker, 4 La. Ann. 457, 50 Am. Dec. 577; Hopkins *v.* Blane, 1 Call (Va.) 361; Dick *v.* Gordon, 6 Grant Ch. (U. C.) 394.

Powers of purchasing agents as to price.— Authority conferred upon a person named by an order of the county board to procure specified articles at a specified price does not authorize him to purchase at a higher price than that specified, and if he does so he cannot recover for any excess. Jackson County *v.* Applewhite, 62 Ind. 464; Atlas Min. Co. *v.* Johnston, 23 Mich. 36. Authority to an agent to purchase a certain horse for his principal at a limited price will not justify the agent in sending a third person to buy it and then buying it of him at an advanced price, although it be within the limit prescribed. Armstrong *v.* Elliott, 29 Mich. 485.

57. Robinson Mercantile Co. *v.* Thompson, 74 Miss. 847, 21 So. 794.

58. *California.*— Heald *v.* Hendy, 89 Cal. 632, 27 Pac. 67; Goss *v.* Helbing, 77 Cal. 190, 19 Pac. 277, holding that where one in charge and having the management of waterworks purchases a pump for use in such works the owners of the waterworks are liable for the price.

Massachusetts.— Thompson *v.* Barry, 184 Mass. 429, 68 N. E. 674.

Michigan.— Beecher *v.* Venn, 35 Mich. 466, holding that one employed by the owner and proprietor of a hotel in and about the hotel and in running it and held out as a manager thereof has authority to furnish the usual supplies for the hotel and bind his employer therefor.

Minnesota.— Watts *v.* Howard, 70 Minn. 122, 72 N. W. 840.

Missouri.— Owen *v.* Brockschmidt, 54 Mo. 285; Dellecella *v.* Harmonie Club, 34 Mo. App. 179.

Texas.— Missouri Pac. R. Co. *v.* Turner, 2 Tex. App. Civ. Cas. § 815.

Wisconsin.— Gano *v.* Chicago, etc., R. Co., 66 Wis. 1, 27 N. W. 628, 838.

United States.— Rice *v.* Montgomery, 20 Fed. Cas. No. 11,753, 4 Biss. 75.

See 40 Cent. Dig. tit. "Principal and Agent," § 278.

59. *Arkansas.*—Carter *v.* Burnham, 31 Ark. 212, holding that one who managed a farm for another with authority to purchase mules, implements, and supplies for the farm is not thereby authorized to buy goods for the laborers on the farm, and his representations to that effect are not binding on his principal.

Georgia.— Hood *v.* Hendrickson, 122 Ga. 795, 50 S. E. 994.

Iowa.— Beebe *v.* Equitable Mut. Life, etc., Assoc., 76 Iowa 129, 40 N. W. 122.

Missouri.— Brown *v.* Missouri, etc., R. Co., 67 Mo. 122; Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013.

Texas.— Latham *v.* Pledger, 11 Tex. 439; Ft. Worth, etc., R. Co. *v.* Johnson, 2 Tex. App. Civ. Cas. § 232.

Vermont.— Frisbie *v.* Felton, 65 Vt. 138, 26 Atl. 110.

Canada.— Dick *v.* Gordon, 6 Grant Ch. (U. C.) 394.

60. *Alabama.*— Fisher *v.* Campbell, 9 Port. 210, holding that the overseer of a plantation has no right as such to bind his employer by the purchase of articles which he may suppose necessary, such authority not being necessary to perform the duties incident to his station.

Colorado.— Schollay *v.* Moffitt-West Drug Co., 17 Colo. App. 126, 67 Pac. 182.

Georgia.— Born *v.* Simmons, 111 Ga. 869, 36 S. E. 956.

Louisiana.— Vidal *v.* Russel, 5 Mart. 297.

Michigan.— Cowan *v.* Sargent Mfg. Co., 141 Mich. 87, 104 N. W. 377.

Mississippi.— Meyer *v.* Baldwin, 52 Miss. 263.

Texas.— Lenoir *v.* Rosenthal, 1 Tex. App. Civ. Cas. § 209.

England.— Daun *v.* Simmins, 44 J. P. 264, 41 L. T. Rep. N. S. 783, 28 Wkly. Rep. 129.

Purchase of a rival business.—A general agent has no implied power to buy out for his principal a rival business. This is true even of the agent of a corporation permitted by its charter to make such purchase. Manhattan Liquor Co. *v.* Magnus, 43 Tex. Civ. App. 463, 94 S. W. 1117.

61. Kelly *v.* Tracy, etc., Co., 71 Ohio St. 220, 73 N. E. 455; Wright *v.* Glyn, [1902] 1 K. B. 745, 71 L. J. K. B. 497, 86 L. T. Rep. N. S. 373, 18 T. L. R. 404, 50 Wkly. Rep. 402 (holding that the mere relation of master and coachman does not of itself invest the coachman with ostensible authority to pledge his master's credit for forage); Hutton *v.* Bullock, L. R. 9 Q. B. 572, 30 L. T. Rep. N. S. 648, 22 Wkly. Rep. 956; Vineberg *v.* Anderson, 6 Manitoba 335 (holding that one in

the authority is conferred in writing the writing must determine whether the agent is empowered to buy, and if so the limits within which the authority is to be exercised;[62] and the power to buy is limited to purchases from the persons named in the writing and in the manner, on the terms, and for the purposes therein provided.[63] When the agent buys within the scope of his authority the seller has no concern with the disposition of the goods made by the agent, and the principal will be bound, although the agent misappropriates them.[64] Authority to sell of itself furnishes no authority to buy.[65] An agent who has authority to buy does not derive therefrom authority to settle a contest between his principal and a third person as to the ownership of the goods purchased.[66] As a general rule an agent who is commissioned by his principal to purchase a certain specific amount of property is a special agent, and can no more purchase a smaller than a larger quantity of what he is commissioned to purchase,[67] although under certain circumstances the purchase of a smaller quantity than that ordered may be regarded as valid as an execution of the authority *pro tanto*, as where an express or implied discretion has been committed to the agent in the exercise of his authority.[68]

charge of a store selling goods has no implied authority to purchase goods).

Contracts for extras.— One is not entitled to recover for extras furnished at the instance of defendant's brother, who had authority merely to see that the work was properly done under the original plans and specifications. Maass *v.* Jarvis, 20 Misc. (N. Y.) 687, 46 N. Y. Suppl. 544. To the same effect see Murr *v.* Western Assur. Co., 50 N. Y. App. Div. 4, 64 N. Y. Suppl. 12. An architect superintending the erection of a building has no implied power to order extra work so as to bind the owners. Day *v.* Pickens County, 53 S. C. 46, 30 S. E. 681. But an emergency making extra work necessary to proceed with the undertaking may justify an exception to the rule. Michaud *v.* MacGregor, 61 Minn. 198, 63 N. W. 479. See also Benton *v.* Moss, 47 Misc. (N. Y.) 376, 93 N. Y. Suppl. 1113.

One in temporary charge of property cannot bind his principal for permanent and expensive repairs. Hill *v.* Coates, 34 Misc. (N. Y.) 535, 69 N. Y. Suppl. 964.

62. Holmes *v.* Morse, 50 Me. 102; Burks *v.* Stam, 65 Mo. App. 455; Pollock *v.* Cohen, 32 Ohio St. 514; Dorland *v.* Mulhollan, 10 Ohio St. 192.

63. *Indiana.*— Metzger *v.* Huntington, 139 Ind. 501, 37 N. E. 1084, 39 N. E. 235.

Maine.— Holmes *v.* Morse, 50 Me. 102.

Michigan.— Dennis *v.* Leaton, 72 Mich. 586, 40 N. W. 753; Miller *v.* Frost's Detroit Lumber, etc., Works, 66 Mich. 455, 33 N. W. 406.

Mississippi.— Brown *v.* Johnson, 12 Sm. & M. 398, 51 Am. Dec. 118.

United States.— Peckham *v.* Lyon, 19 Fed. Cas. No. 10,899, 4 McLean 45, holding that authority to buy from a person named in the letter confers no power to buy the same article from another.

64. Waring *v.* Henry, 30 Ala. 721; Southwestern R. Co. *v.* Knott, 48 Ga. 516; Austin *v.* Elk Mercantile Co., 38 Wash. 365, 80 Pac. 525.

Purchase for own use.— An agent authorized to buy cannot charge his principal for goods purchased for his own use not within the scope of his real or apparent authority. Gilbraith *v.* Lineberger, 69 N. C. 145; Lenoir *v.* Rosenthall, 1 Tex. App. Civ. Cas. § 209, holding that where an agent has the management of a plantation for his principal, goods purchased by him for his own use cannot be charged by the seller to the principal unless expressly authorized by him or in the course of the dealings the principal acknowledged that goods had previously been so bought and charged, paid for them, and by so doing induced the seller to believe that the agent had authority to purchase for his individual benefit on the principal's credit.

65. *Colorado.*— Gates Iron Works *v.* Denver Engineering Works Co., 17 Colo. App. 15, 67 Pac. 173; McIntosh-Huntington Co. *v.* Rice, 13 Colo. App. 393, 58 Pac. 358.

Georgia.— Gorham *v.* Felker, 102 Ga. 260, 28 S. E. 1002.

Iowa.— Bentley *v.* Snyder, 101 Iowa 1, 69 N. W. 1023.

Louisiana.— Hyman *v.* Bailey, 15 La. Ann. 560.

Massachusetts.— Hood *v.* Adams, 128 Mass. 207.

Michigan.— Cowan *v.* Sargent Mfg. Co., 141 Mich. 87, 104 N. W. 377.

Minnesota.— Pennsylvania Finance Co. *v.* Old Pittsburgh Coal Co., 65 Minn. 442, 68 N. W. 70.

North Carolina.— Winders *v.* Hill, 141 N. C. 694, 54 S. E. 440.

Ohio.— Kelly *v.* Tracy, etc., Co., 71 Ohio St. 220, 73 N. E. 455.

Vermont.— Town *v.* Hendee, 27 Vt. 258.

66. Lamkin *v.* Rosenthal, 5 N. Y. App. Div. 532, 39 N. Y. Suppl. 483, holding that an agent authorized merely to buy goods had no authority, upon their seizure under replevin, to enter into an agreement with plaintiffs in the replevin suit to release them from all claims on account of the levy in consideration of plaintiffs' surrendering all the goods which their representatives could not identify as theirs.

67. Olyphant *v.* McNair, 41 Barb. (N. Y.) 446 [*affirmed* in 41 N. Y. 619].

68. Olyphant *v.* McNair, 41 Barb. (N. Y.) 446 [*affirmed* in 41 N. Y. 619]. See also Rice *v.* Montgomery, 20 Fed. Cas. No. 11,753, 4 Biss. 75.

(II) *Power to Buy on Credit.* As a general rule if an agent is provided with the cash to pay for his purchases he has no authority to pledge the credit of his principal therefor, as that is not, under such circumstances, either necessary or proper to enable him to make the purchases.[69] A special agent employed to buy in a single transaction or under specific restrictions to buy only for cash,[70] or an agent acting under a written power wherein he is expressly limited to purchases for cash,[71] has no authority to buy on credit. But an agent with general authority to buy has a right to buy for cash or credit at his discretion;[72] and this seems to be true as to a general agent, although he is only authorized to buy for cash.[73] On the other hand, if purchases are reasonably necessary to enable the agent to accomplish the object of the agency, and no funds are provided to pay for such purchases, the agent has implied power to bind the principal by purchases of such goods upon credit.[74] And so he has if the principal by his conduct or course of dealing has

Where the order is divisible, as where the principal orders his agent to purchase a certain quantity of goods, and the purchaser appears to have contemplated that the whole might not be obtainable at once, the agent will be authorized to buy a smaller quantity if the whole is not to be had. Johnston *v.* Kershaw, L. R. 2 Exch. 82, 36 L. J. Exch. 44, 15 L. T. Rep. N. S. 485, 15 Wkly. Rep. 354.

69. *Alabama.*— Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808.

New York.— Saugerties, etc., Steamboat Co. *v.* Miller, 76 N. Y. App. Div. 167, 78 N. Y. Suppl. 451; Brooks *v.* Mortimer, 10 N. Y. App. Div. 518, 42 N. Y. Suppl. 299. See also Jaques *v.* Todd, 3 Wend. 83. But *compare* Morey *v.* Webb, 58 N. Y. 350 [*affirming* 65 Barb. 22] (where it appeared that cash payment was not the usual course of dealing between the parties, and the goods had to be delivered and approved before payment could be made); Goelet *v.* Meares, 13 Daly 30.

North Carolina.— Brittain *v.* Westhall, 137 N. C. 30, 49 S. E. 54, 135 N. C. 492, 47 S. E. 616.

Ohio.— Thomas Gibson Co. *v.* Carlisle, 3 Ohio S. & C. Pl. Dec. 27, 1 Ohio N. P. 398, holding that where an agent is authorized to expend for the principal a certain fund for a particular purpose, and is furnished with the money, he has no authority to bind his principal by transactions on credit in furtherance of such purpose.

Texas.— Greenville First Nat. Bank *v.* Pennington, 75 Tex. 272, 12 S. W. 1114.

Vermont.— Cleveland *v.* Pearl, 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 780.

Wisconsin.— Komorowski *v.* Krumdick, 56 Wis. 23, 13 N. W. 881.

Canada.— Bennett *v.* Atkinson, 10 Manitoba 48; Kenny *v.* Harrington, 31 Nova Scotia 290.

But see Cruzan *v.* Smith, 41 Ind. 288 (where the agency was a general one, and the principal knew that more goods were being purchased than the money furnished would pay for); Adams *v.* Boies, 24 Iowa 96 (holding that the mere fact that an agent is furnished with money to pay for purchases to be made from time to time for his principal, in the case of live stock, does not imply that his authority is restricted to cash purchases or require him to pay on the day of the purchase).

70. Berry *v.* Barnes, 23 Ark. 411 (holding that the employment of a special agent in a single transaction to buy goods does not imply authority to pledge the credit of his principal, even though in making the purchase he represents himself as a partner of his principal in the business); Chapman *v.* Americus Oil Co., 117 Ga. 881, 45 S. E. 268; Americus Oil Co. *v.* Gurr, 114 Ga. 624, 40 S. E. 780; Doan *v.* Duncan, 18 Ill. 96; Cleveland *v.* Pearl, 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 748.

71. Stoddard *v.* McIlwain, 7 Rich. (S. C.) 525.

72. Swindell *v.* Latham, 145 N. C. 144, 58 S. E. 1010, 122 Am. St. Rep. 430; Ruffin *v.* Mebane, 41 N. C. 507. See also Backman *v.* Charlestown, 42 N. H. 125; Miller *v.* McDannell, 1 Tex. Unrep. Cas. 258.

73. Liddell *v.* Sahline, 55 Ark. 627, 17 S. W. 705; Pacific Biscuit Co. *v.* Dugger, 40 Oreg. 362, 67 Pac. 32. See also Cruzan *v.* Smith, 41 Ind. 288.

74. Heald *v.* Hendy, 89 Cal. 632, 27 Pac. 67, holding that when it is necessary to the operation of a mine that provisions be furnished to the keeper of a boarding-house at which the miners live, the superintendent of the mine has authority to order the provisions to be furnished and to bind the operator of the mine to pay for them, but not to bind him to pay for articles not necessary for the use of the boarding-house. See also Brittain *v.* Westhall, 137 N. C. 30, 49 S. E. 54, 135 N. C. 492, 47 S. E. 616; Spear, etc., Supply Co. *v.* Van Riper, 103 Fed. 689.

If a general agent is left in sole charge of a business, and especially if the principal rarely visits the business, or is an undisclosed principal, then it has been held that the agent in charge may bind his principal by purchases on credit in the usual way to replenish the stock. Moffitt-West Drug Co. *v.* Lyneman, 10 Colo. App. 249, 50 Pac. 736; Smith *v.* Holbrook, 99 Ga. 256, 25 S. E. 627; McDowell *v.* McKenzie, 65 Ga. 630; Stapp *v.* Spurlin, 32 Ind. 442; Palmer *v.* Cheney, 35 Iowa 281; Webster *v.* Wray, 17 Nebr. 579, 24 N. W. 207; White *v.* Leighton, 15 Nebr. 424, 19 N. W. 478; Backman *v.* Charleston, 42 N. H. 125; Pacific Biscuit Co. *v.* Dugger, 40 Oreg. 362, 67 Pac. 32.

held the agent out as having authority to make them,[75] or if the custom is well established to buy on credit in such dealings as are intrusted to the agent.[76] In any event the principal will not be bound to third persons who have knowledge, or by making the inquiry necessary under the circumstances would know, of the agent's want of authority to buy upon credit.[77] If the agent is limited to purchases on credit the principal cannot be bound by his contracts to purchase for cash.[78] And when no agency is established there can of course be no implied right in the seller to pledge to third persons the credit of the vendee.[79]

(III) *Power to Make Payment.* In the absence of a showing to the contrary, an agent with authority to buy is presumed to have authority to buy for cash and hence to make payment, for which the principal must indemnify him.[80] He has, however, no implied authority to advance money in payment before the goods are to be delivered under the contract.[81] If the agent exceeds the limits set by his principal and the necessary and proper acts to perform the agency, as by making advances or exchanges or other unusual contracts, his principal is not bound by such acts,[82] nor is he liable if the agent departs from his open instructions as to the manner of making payment; and this is especially true if the third person accepts the check or other paper credit of the agent in payment.[83]

b. To Sell Personal Property — (I) *In General.* The acts of an agent assuming to have authority to sell his principal's personal property will not bind the principal unless he has actually given the agent such authority, or has held him out to the public as clothed with it.[84] Such authority cannot be presumed from the fact that the agent was in a particular instance authorized to negotiate a

75. *California.*— Heald *v.* Hendy, 89 Cal. 632, 27 Pac. 67, where the agent had made previous purchases with the principal's knowledge for which the principal had paid.

Colorado.— Witcher *v.* McPhee, 16 Colo. App. 298, 65 Pac. 806; Witcher *v.* Gibson, 15 Colo. App. 163, 61 Pac. 192.

Massachusetts.— Beston *v.* Amadon, 172 Mass. 84, 51 N. E. 452.

New York.— Marsh *v.* Gilbert, 4 Thomps. & C. 259.

North Carolina.— Brittain *v.* Westhall, 137 N. C. 30, 49 S. E. 54, 135 N. C. 492, 47 S. E. 616.

Ohio.— Darst *v.* Slevins, 2 Disn. 473.

Texas.— Greer *v.* Marble Falls First Nat. Bank, (Civ. App. 1898) 47 S. W. 1045.

England.— Watteau *v.* Fenwick, [1893] 1 Q. B. 346, 56 J. P. 839, 67 L. T. Rep. N. S. 831, 5 Reports 143, 41 Wkly. Rep. 222.

Canada.— Kenny *v.* Harrington, 31 Nova Scotia 290.

76. Morey *v.* Webb, 65 Barb. (N. Y.) 22 [*affirmed* in 58 N. Y. 350]; Darst *v.* Slevins, 2 Disn. (Ohio) 473.

77. American Lead Pencil Co. *v.* Wolfe, 30 Fla. 360, 11 So. 488 (holding that where an agent authorized to buy cedar logs stated at the time of making an arrangement to pay for supplies furnished to the seller out of the money due him that he had no authority to make debts, the principal was not bound, although there was a local custom that agents authorized to buy logs should have authority to make such agreements); Stoddard *v.* McIlwain, 7 Rich. (S. C.) 525.

78. Cochran *v.* Richardson, 33 Vt. 169.

79. Bentley *v.* Snyder, 101 Iowa 1, 69 N. W. 1023; Jaquins *v.* Gilbert, (Kan. 1898) 53 Pac. 754; Woods *v.* Robertson, 31 Mich. 64.

A merchant, although in one sense agent for his foreign correspondents, is not by mercantile usage entitled to pledge their credit as purchasers for what he buys in the home market on their account. Poirier *v.* Morris, 2 E. & B. 89, 17 Jur. 1116, 22 L. J. Q. B. 313, 1 Wkly. Rep. 349, 75 E. C. L. 89.

80. Perin *v.* Parker, 25 Ill. App. 465 [*affirmed* in 126 Ill. 201, 18 N. E. 747, 9 Am. St. Rep. 571, 2 L. R. A. 336], holding that an order to buy grain on the board of trade is impliedly a request to the agent to make the necessary payments.

81. Godman *v.* Meixsel, 53 Ind. 11.

82. Bohart *v.* Oberne, 36 Kan. 284, 13 Pac. 388, holding that authority given to an agent of a commission house to purchase hides, wool, furs, and tallow, and to pay for the same with the funds furnished by his principals, does not authorize him to make advances of the money of his principals, nor to sell and guarantee the payment in his principal's name of unsettled accounts that have been received in satisfaction of such unauthorized advances. *Compare* Harlor *v.* Carpenter, 3 C. B. N. S. 172, 27 L. J. C. P. 1, 91 E. C. L. 172.

83. Littleton *v.* Loan, etc., Assoc., 97 Ga. 172, 25 S. E. 826; Cleveland *v.* Pearl, 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 748; Komorowski *v.* Krumdick, 56 Wis. 23, 13 N. W. 881.

84. Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731; Reitz *v.* Martin, 12 Ind. 306, 74 Am. Dec. 215; Clark *v.* Bouvain, 20 La. Ann. 70; Thatcher *v.* Kaucher, 131 U. S. appendix cxlvi, 24 L. ed. 511.

What will amount to such a holding out admits of no precise definition, but it is certain that the holding out must be by the principal himself, and must rest upon facts

sale,[85] or that he had previous or subsequent authority to solicit orders or to seek a purchaser,[86] or to buy property for his principal;[87] nor will power to sell to one person authorize a sale to another.[88] A general power to act for the principal in his business and to manage his property conveys no implied right to sell such property unless sales are regularly in the line of the business intrusted to the agent.[89] And no power to sell can be inferred from a power to store or ship, or to keep and let, or use, the property.[90] But authority to sell will be inferred whenever the intention to bestow such power is distinct and clear from the whole authority, the established usages and customs, and the surrounding circumstances. The authority need not be express and specific.[91] The property sold must be the property the agent was authorized to sell.. Authority to sell specified property, or property of a given description, conveys no power to sell other property;[92] but it will justify a sale of part of the specified property unless it be

for which he is responsible. Sioux City Nursery, etc., Co. *v.* Magnes, 5 Colo. App. 172, 38 Pac. 330; Clark *v.* Haupt, 109 Mich. 212, 68 N. W. 231; Walsh *v.* Hartford F. Ins. Co., 73 N. Y. 5; Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390; Connell *v.* McLoughlin, 28 Oreg. 730, 42 Pac. 218; Thatcher *v.* Kaucher, 131 U. S. appendix cxlvi, 24 L. ed. 511.

85. McCord, etc., Furniture Co. *v.* Wollpert, 89 Cal. 271, 26 Pac. 969; Graves *v.* Horton, 38 Minn. 66, 35 N. W. 568; Gilbert *v.* Deshorn, 107 N. Y. 324, 14 N. E. 318; Cohen *v.* Mincoff, 96 N. Y. Suppl. 411.

86. *Georgia.*— Brandenstein *v.* Douglas, 105 Ga. 845, 32 S. E. 341.

Illinois.— Abrams *v.* Weiller, 87 Ill. 179; Illinois Moulding Co. *v.* Page, etc., Mfg. Co., 104 Ill. App. 1.

Massachusetts.— Clough *v.* Whitcomb, 105 Mass. 482.

New York.— McKeige *v.* Carroll, 120 N. Y. App. Div. 521, 105 N. Y. Suppl. 342.

United States.— Thurston *v.* The Magnolia, 23 Fed. Cas. No. 14,017, 1 Bond 92, holding that a letter from a part-owner of a steamboat, requesting another to advertise the writer's interest for sale, and thus advertising the other to act as his agent, confers no authority to sell.

Custom and usage may give such agent authority. Thus, an agent employed by a foreign manufacturer to solicit orders for goods must, as to innocent third persons dealing with him, be deemed to have authority to accept the orders, and to enter into contracts of sale binding on his principal, where that is the general usage in the business as conducted by such manufacturers through such agents, and where it is shown that such sales entered into by the agent in question had been repeatedly recognized by his employers. Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350. See also Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731.

When an agent who has solicited orders is put in possession of the property to deliver to the vendee he has authority, not only to complete the sale, but to collect the price. Beckwith *v.* Reid, 4 Ohio Dec. (Reprint) 436. 2 Clev. L. Rec. 162.

87. Moffet *v.* Moffet, 90 Iowa 442, 57 N. W. 954; Tod *v.* Benedict, 15 Iowa 591; Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384; Hogue *v.* Simonson, 94 N. Y. App. Div. 139, 87 N. Y. Suppl. 1065.

88. Niles *v.* Smith, 2 Code Rep. (N. Y.) 31.

89. *Alabama.*— Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., Co., 127 Ala. 137, 28 So. 679.

California.— Quay *v.* Presidio, etc., R. Co., 82 Cal. 1, 22 Pac. 925.

Idaho.— Johnson *v.* Sage, (1896) 44 Pac. 641.

Indiana.— Coquillard *v.* French, 19 Ind. 274.

Iowa.— Smith *v.* Stephenson, 45 Iowa 645.

Louisiana.— Ball *v.* Bender, 22 La. Ann. 493; Smith *v.* McMicken, 12 Rob. 653.

Michigan.— Wells *v.* Martin, 32 Mich. 478. *Compare* Scudder *v.* Anderson, 54 Mich. 122, 19 N. W. 775, holding that the general agent and manager of a mining company is presumably empowered to sell its personal property, of a kind ordinarily bought and sold in running the business.

New Jersey.— Camden F. Ins. Assoc. *v.* Jones, 53 N. J. L. 189, 21 Atl. 458, 23 Atl. 166.

United States.— Union Switch, etc., Co. *v.* Johnson R. Signal Co., 61 Fed. 940, 10 C. C. A. 176.

90. Lyon *v.* Kent, 45 Ala. 656; Cleveland, etc., R. Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480; Powell *v.* Buck, 4 Strobh. (S. C.) 427.

From a power to hire out a slave and receive his wages the jury cannot infer a power to sell him. Daniel *v.* Kincheloe, 7 Fed. Cas. No. 3,561, 2 Cranch C. C. 295.

91. Cuny *v.* Robert, 16 La. 175; Pittsburg Sheet Mfg. Co. *v.* West Penn Sheet Steel Co., 197 Pa. St. 491, 47 Atl. 838; Muir *v.* Westcott, 34 Wash. 463, 75 Pac. 1107; Bute *v.* Mason, 7 Moore P. C. 1, 13 Eng. Reprint 779. And see Blaisdell *v.* Bohr, 77 Ga. 381, holding that a power "to attend to any and all descriptions of business in which I may be interested or concerned in a real or personal manner, and to receive for me any sum or sums of money . . . and to receipt therefor," together with the fact that the principal deposited her certificates of stock in a tin box and gave the key to her daughter, the agent's wife, under all the circumstances gave the agent authority to sell the stock.

92. *California.*— Harvey *v.* Duffey, 99 Cal.

clear from the authority that the property was to be sold as a whole.[93] General authority to sell the product of a mine or factory empowers the agent to sell for future delivery;[94] but an agent authorized to sell the property of his principal when manufactured has no authority to sell before it is manufactured.[95] A commercial traveler or other agent has not usually authority to sell his samples.[96] Authority to sell of course does not apply to property not owned by the principal.[97] A sale must be made in the usual manner.[98] A selling agent presumptively has no power to sell the property in payment of a claim against his principal,[99] and certainly an agent empowered to sell his principal's property has no implied power to dispose of it for his own benefit in payment of his own debt. The transaction must be for the benefit of the principal, and not of the agent, and third persons are charged with knowledge of this fact.[1] An agent

401, 33 Pac. 897; McCord, etc., Furniture Co. *v.* Wollpert, 89 Cal. 271, 26 Pac. 969, holding that where an agent was authorized to sell "new patterns" of furniture, and he sold old patterns, the customer could not recover for a failure to deliver them.

Louisiana.— Angel *v.* Ellis, McGloin 57.

Oregon.— Reid *v.* Alaska Packing Co., 47 Oreg. 215, 83 Pac. 139.

Pennsylvania.— Pennsylvania L. Ins., etc., Co. *v.* Franklin F. Ins. Co., 181 Pa. St. 40, 37 Atl. 191, 37 L. R. A. 780.

Texas.— St. Louis, etc., R. Co. *v.* Bramlette, (Civ. App. 1896) 35 S. W. 25, holding that an agent for the sale of land has no authority to sell posts cut from said land, and cannot recover the value thereof from his vendee, although he intended after payment by the vendee to settle with the owner of said land.

United States.— Forrest *v.* Vanderbilt, 107 Fed. 734, 46 C. C. A. 611, 52 L. R. A. 473; Cable *v.* Paine, 8 Fed. 788, 3 McCrary 169, holding that an agent to sell lumber has no implied power to sell timber in the rough.

Thus a letter of attorney authorizing the sale of mortgages of which the owner is "now seized or possessed" does not confer authority to sell mortgages acquired after the execution of such letter. Union Trust Co. *v.* Means, 201 Pa. St. 374, 50 Atl. 974.

93. Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Ulster County Sav. Inst. *v.* New York Fourth Nat. Bank, 5 Silv. Sup. (N. Y.) 144, 8 N. Y. Suppl. 162, in which a sale of one hundred and forty-four shares of stock was held good under a power to sell one hundred and ninety-four, there being no special directions to the contrary.

94. National Furnace Co. *v.* Keystone Mfg. Co., 110 Ill. 427. See also Albert Cheese Co. *v.* Leeming, 31 U. C. C. P. 272. But *compare* Blackmer *v.* Summit Coal, etc., Co., 88 Ill. App. 636 [*affirmed* in 187 Ill. 32, 58 N. E. 289], holding that an agent "to sell all coal mined" could not sell for future delivery.

95. McCord, etc., Furniture Co. *v.* Wollpert, 89 Cal. 271, 26 Pac. 969; Merriam *v.* De Turk, 66 Cal. 549, 6 Pac. 424.

96. Harris Loan Co. *v.* Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 S. E. 1003; Bailey *v.* Partridge, 134 Ill. 188, 27 N. E. 89; Hibbard *v.* Stein, 45 Oreg. 507, 78 Pac. 665; Kohn *v.* Washer, 64 Tex. 131, 53 Am. Rep. 745.

97. Torre *v.* Thiele, 25 La. Ann. 418 (holding that the sale by an agent after the owner has sold the property confers no title); Blackstone *v.* Buttermore, 53 Pa. St. 266; Murrell *v.* Graham, 1 Brev. (S. C.) 490.

98. Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195 (holding that an agent has no implied power to sell at auction); The G. H. Montague, 10 Fed. Cas. No. 5,377, 4 Blatchf. 461 (holding that a power of attorney authorizing a public sale of property will not authorize a private sale of it).

An agent of two independent and unconnected principals has no authority to bind his principals or either of them by the sale of the goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitrary will of the agent. Cameron *v.* Paxton, 15 Can. Sup. Ct. 622.

99. Lombard *v.* Winslow, 3 N. Brunsw. 327.

1. *Alabama.*— Coleman *v.* Siler, 74 Ala. 435; Burks *v.* Hubbard, 69 Ala. 379; Powell *v.* Henry, 27 Ala. 612.

Arkansas.— Grooms *v.* Neff Harness Co., 79 Ark. 401, 96 S. W. 135; Smith *v.* James, 53 Ark. 135, 13 S. W. 701.

Colorado.— Sioux City Nursery, etc., Co. *v.* Magnes, 5 Colo. App. 172, 38 Pac. 330.

Georgia.— Walton Guano Co. *v.* McCall, 111 Ga. 114, 36 S. E. 469; Kaiser *v.* Hancock, 106 Ga. 217, 32 S. E. 123; Sonneborn *v.* Moore, 105 Ga. 497, 30 S. E. 947; Hodgson *v.* Raphael, 105 Ga. 480, 30 S. E. 416; University Bank *v.* Tuck, 96 Ga. 456, 23 S. E. 467; Mitchell *v.* Printup, 68 Ga. 677; Bostick *v.* Hardy, 30 Ga. 836.

Indian Territory.— Miller *v.* Springfield Wagon Co., 6 Indian Terr. 115, 89 S. W. 1011.

Kansas.— Grubel *v.* Busche, 75 Kan. 820, 91 Pac. 73.

Kentucky.— Baldwin *v.* Tucker, 112 Ky. 282, 65 S. W. 841, 23 Ky. L. Rep. 1538, 57 L. R. A. 451.

Maine.— Hook *v.* Crowe, 100 Me. 399, 61 Atl. 1080.

Michigan.— Hurley *v.* Watson, 92 Mich. 121, 52 N. W. 457.

Minnesota.— Stewart *v.* Cowles, 67 Minn. 184, 69 N. W. 694.

New Hampshire.— Holton *v.* Smith, 7 N. H. 446.

Ohio.— Murdock *v.* National Tube Works

to sell or trade cannot directly or indirectly sell or trade to himself.[2] An agent employed to sell is not thereby authorized to compromise;[3] but if he has authority to fix the price and collect, this has been held sufficient to enable him to make a deduction by way of settlement.[4] An agent to sell goods has authority to agree with a purchaser not to sell to any others in the same town, and such an agreement will bind the principal, the purchaser not knowing of any limitation of the agent's authority.[5]

(II) *Possession as Evidence of Authority.* Simply intrusting to the agent possession of property confers upon him no authority to sell the same,[6] although possession and control of property for a period may be evidence tending to show authority to sell.[7] Nor can third persons acquire any title to such property from the agent unless he have some other evidence of property or authority to sell than bare possession.[8] If an agent be merely given the goods to seek a purchaser and report the offer to the principal, he can give no title to a third person without

Co., 7 Ohio Dec. (Reprint) 465, 3 Cinc. L. Bul. 409.

Pennsylvania.— Wilson *v.* Wilson-Rogers, 181 Pa. St. 80, 37 Atl. 117; Kern's Estate, 176 Pa. St. 373, 35 Atl. 231; Hertzler *v.* Geigley, 22 Lanc. L. Rev. 1.

Tennessee.— Hackney *v.* Jones, 3 Humphr. 612.

Texas.— Low *v.* Moore, 31 Tex. Civ. App. 460, 72 S. W. 421; Chattanooga Foundry, etc., Co. *v.* Gorman, 12 Tex. Civ. App. 75, 34 S. W. 308.

West Virginia.— Merchants', etc., Nat. Bank *v.* Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312.

England.— Beveridge *v.* Beveridge, L. R. 2 H. L. Sc. 183; Bute *v.* Mason, 7 Moore P. C. 1. 13 Eng. Reprint 779.

Canada.— Garden *v.* Neily, 31 Nova Scotia 89.

The principal may expressly authorize the agent to sell and receive the proceeds for his own use, or to settle a claim he holds against the principal. Tyrrell *v.* Rose, 17 Grant Ch. (U. C.) 394.

2. Hodgson *v.* Raphael, 105 Ga. 480, 30 S. E. 416, holding that he cannot acquire title by raffling the property and becoming the winner at the raffle.

3. Kilgour *v.* Ratcliff, 2 Mart. N. S. (La.) 292.

Right of salesman to settle for breach of warranty.—A traveling salesman, engaged in soliciting orders for merchandise and transmitting them to his employer, who had the option to accept or reject them, and not held out as possessing other than the ordinary authority incident to the business of a soliciting agent, although possessing authority, under Cal. Civ. Code, § 2323, to warrant the quality of the goods, has no authority to enter into an agreement for the settlement of a customer's claim for breach of warranty of the quality of goods previously sold by him to the customer. Lindow *v.* Cohn, 5 Cal. App. 388, 90 Pac. 485. Authority to an agent to sell goods does not carry with it authority to compromise differences arising between his principal and those to whom he sells goods by reason of the goods not coming up to the standard represented, and the burden is on the purchaser claiming such authority to prove the same. Scarritt-Comstock Furniture Co. *v.* Hudspeth, (Okla. 1907) 91 Pac. 843.

4. Taylor *v.* Nussbaum, 2 Duer (N. Y.) 302.

5. Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777; Watkins *v.* Morley, 2 Tex. App. Civ. Cas. § 723.

6. *California.*— Kohler *v.* Hayes, 41 Cal. 455.

Illinois.—Wilson *v.* Loeb, 69 Ill. App. 445.

Iowa.— Gilman Linseed Oil Co. *v.* Norton, 89 Iowa 434, 56 N. W. 663, 48 Am. St. Rep. 400.

Maryland.— Johnson *v.* Frisbie, 29 Md. 76, 96 Am. Dec. 568.

Massachusetts.— Coggill *v.* Hartford, etc., R. Co., 3 Gray 545; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545.

Michigan.—Dunlap *v.* Gleason, 16 Mich. 158, 93 Am. Dec. 231.

Minnesota.— Peerless Mach. Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260.

New York.— Barnard *v.* Campbell, 55 N. Y. 456, 14 Am. Rep. 289; McGoldrick *v.* Willits, 52 N. Y. 612; McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Ballard *v.* Burgett, 40 N. Y. 314; Spraights *v.* Hawley, 39 N. Y. 441, 10 Am. Dec. 452; Saunders *v.* Payne, 12 N. Y. Suppl. 735 [*distinguishing* Smith *v.* Clews, 114 N. Y. 190, 21 N. E. 160, 11 Am. St. Rep. 627, 4 L. R. A. 392]; Covill *v.* Hill, 4 Den. 323 [*reversed* on other grounds in 1 N. Y. 522, *semble*]. See also Sage *v.* Shepard, etc., Lumber Co., 158 N. Y. 672, 52 N. E. 1126 [*affirming* 4 N. Y. App. Div. 290, 39 N. Y. Suppl. 449].

North Dakota.— Stewart *v.* Gregory, etc., Co., 9 N. D. 618, 84 N. W. 553.

Ohio.— Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644; Sanders *v.* Keber, 28 Ohio St. 630.

Oregon.— Zorn *v.* Livesley, 44 Oreg. 501, 75 Pac. 1057; Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

South Carolina.— Powell *v.* Buck, 4 Strobh. 427. See also Carmichael *v.* Buck, 12 Rich. 451.

7. Roberts *v.* Francis, 123 Wis. 78, 100 N. W. 1076.

8. Reitz *v.* Martin, 12 Ind. 306, 74 Am. Dec. 215 (holding that one employed to drive stock from one town to another has no author-

the principal's assent.[9] Certainly as between the principal and agent, such act confers no authority upon the agent to make a sale,[10] although property thus left with a regular dealer in such goods may be sold by him so as to bind the principal.[11] The fact that an agent has authority to sell certain property, or a specified interest in property, in his possession, does not warrant a sale by him of other property, or of other interests, which are also in his possession.[12] And an agent authorized to take possession of property and sell it has no power to sell it until it has come into his possession.[13] When, however, the principal not only intrusts to the agent the possession of the property, but also clothes him with apparent ownership or power of sale, then he will not be permitted to deny the agent's authority as against third persons who have dealt with him in good faith and with reasonable prudence.[14]

(III) *Extent of Authority* — (A) *To Make Warranties.* It seems not to be doubted that general authority given by a principal to an agent to sell personal property carries with it by necessary implication the power to warrant the title to the property so as to bind the owner.[15] There is, however, considerable confusion in the decisions as to the implied power of an agent to warrant the quality or condition of personal property sold by him.[16] The rule which is supported by the more numerous and more recent decisions is that if in the sale of that kind or class of goods which the agent is empowered to sell it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority; and that if an agent with express authority to sell has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty.[17] There are cases,

ity to sell any animal that becomes footsore, and his sale passes no title); McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 34; Ballard *v.* Burgett, 40 N. Y. 314; Carmichael *v.* Buck, 12 Rich. (S. C.) 451; Powell *v.* Buck, 4 Strobh. (S. C.) 427.

9. Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332.

10. Saunders *v.* Payne, 12 N. Y. Suppl. 735.

11. Smith *v.* Clews, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502; Pickering *v.* Busk, 15 East 38, 13 Rev. Rep. 364. *Compare* Gilman Linseed Oil Co. *v.* Norton, 89 Iowa 434, 56 N. W. 663, 48 Am. St. Rep. 400; Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332.

12. Wheeler *v.* Northwestern Sleigh Co., 39 Fed. 347, holding that where an owner of stock on which a dividend had been declared but not paid authorized an agent to sell the stock, expressly reserving the right to the dividend, and the agent agreed with the purchaser that the dividend should go with the stock, the purchaser had no right to assume that the agent, because possessor of the stock, was authorized to sell the dividend, which formed no part thereof, and did not pass as an incident thereto, and as to that dealt with the agent at his peril, and that the principal was not bound by the representations.

13. Burckle *v.* Tapperheten, 4 Fed. Cas. No. 2,141.

14. *Maine.*— Heath *v.* Stoddard, 91 Me. 499, 40 Atl. 547.

Massachusetts.— Cairns *v.* Page, 165 Mass. 552, 43 N. E. 503.

Mississippi.— Parry Mfg. Co. *v.* Lowenberg, 88 Miss. 532, 41 So. 65.

New York.— Smith *v.* Clews, 114 N. Y. 190, 21 N. E. 160, 11 Am. St. Rep. 627, 4 L. R. A. 392; McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341 (in which it appeared that the owner of stock delivered to his brokers the certificate of his shares, having indorsed on the certificate an assignment, expressed to be "for value received," and an irrevocable power to make all necessary transfers, the names of the transferee and of the attorney, and the date being left blank, and it was held that the owner, having thus given to his brokers all the *indicia* of title to the stock, and an apparently unlimited power of disposition over it, could not compel the surrender of the securities to himself by persons who, in good faith, advanced money to the brokers or their assigns on a pledge of the shares); Hazewell *v.* Coursen, 45 N. Y. Super. Ct. 22 [*reversed* on other grounds in 81 N. Y. 630]; Commercial Bank *v.* Kortright, 22 Wend. 348, 34 Am. Dec. 317.

South Carolina.— State Bank *v.* Cox, 11 Rich. Eq. 344, 78 Am. Dec. 458.

Wisconsin.— Rochl *v.* Volckmann, 103 Wis. 484, 79 N. W. 755.

United States.— Thatcher *v.* Kaucher, 131 U. S. appendix cxlvi, 24 L. ed. 511; Authors, etc., Assoc. *v.* O'Gorman Co., 147 Fed. 616.

See also *supra*, I, E, 1; I, E, 2, a, (II), (B).

15. Ezell *v.* Franklin, 2 Sneed (Tenn.) 236.

16. See Dennis *v.* Ashley, 15 Mo. 453.

17. *Alabama.*— Troy Grocery Co. *v.* Potter, 139 Ala. 359, 36 So. 12; Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 446; Cocke *v.* Campbell, 13 Ala. 286; Bradford *v.* Bush, 10 Ala. 386; Skinner *v.* Gunn, 9 Port. 305.

Massachusetts.— Upton *v.* Suffolk County Mills, 11 Cush. 586, 59 Am. Dec. 163; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22.

however, which lay down a broader rule and hold that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, unless the contrary appears.[18] A distinction is also sometimes drawn between the power of a general and a special agent in this respect, it being held that a special agent has no implied power to warrant the quality or condition of goods sold by him, while a general agent has, unless the contrary appears.[19] But this distinction has not always been recognized, and there is authority for the proposition that both a general and a special agent may warrant the goods sold by him in this respect.[20] In cases where it is the custom to give such a warranty, an agent undoubtedly has a right to do so. Thus it has frequently been held that one having unrestricted power to sell horses may warrant the age and soundness of the horse.[21] And the same rule has been applied to the sale of

Missouri.— Hayner *v.* Churchill, 29 Mo. App. 676.

New York.— Wait *v.* Borne, 123 N. Y. 592, 25 N. E. 1053; Smith *v.* Tracy, 36 N. Y. 79; Reynolds *v.* Mayor, 39 N. Y. App. Div. 218, 57 N. Y. Suppl. 106; Cafre *v.* Lockwood, 22 N. Y. App. Div. 11, 47 N. Y. Suppl. 916; Ellner *v.* Priestley, 39 Misc. 535, 80 N. Y. Suppl. 371; Pennsylvania, etc., Oil Co. *v.* Spitelnik, 27 Misc. 557, 58 N. Y. Suppl. 311; Bierman *v.* City Mills Co., 10 Misc. 140, 30 N. Y. Suppl. 929 [*reversed* on other grounds in 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 635, 37 L. R. A. 799]. See also Ahern *v.* Goodspeed, 72 N. Y. 108.

Virginia.— Reese *v.* Bates, 94 Va. 321, 26 S. E. 865.

Wisconsin.— Waupaca Electric Light, etc., Co. *v.* Milwaukee Electric R., etc., Co., 112 Wis. 469, 88 N. W. 308; Newell *v.* Clapp, 97 Wis. 104, 72 N. W. 366; Westurn *v.* Page, 94 Wis. 251, 68 N. W. 1003; Larson *v.* Aultman, etc., Co., 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893; Pickert *v.* Marston, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876 [*overruling* in effect Boothby *v.* Scales, 27 Wis. 626].

Custom from which authority implied.— The custom from which authority to make a warranty or representation may be implied must be a usage of sellers of the goods in question so well settled, notorious, and continuous as to raise a fair presumption that it was known to the buyer and seller, and that the sales were made in reference to it. Herring *v.* Skaggs, 73 Ala. 446.

18. *Illinois.*— Woodford *v.* McClenahan, 9 Ill. 85.

Indiana.— Talmage *v.* Bierhause, 103 Ind. 270, 2 N. E. 716.

Missouri.— Dennis *v.* Ashley, 15 Mo. 453.

New York.— Manley *v.* Ackler, 76 Hun 546, 28 N. Y. Suppl. 181; Milburn *v.* Belloni, 34 Barb. 607 [*reversed* on other grounds in 39 N. Y. 53, 100 Am. Dec. 403].

North Carolina.— Alpha Mills *v.* Watertown Steam Engine Co., 116 N. C. 797, 21 S. E. 917; Hunter *v.* Jameson, 28 N. C. 252.

Tennessee.— Ezell *v.* Franklin, 2 Sneed 236.

United States.— Schuchardt *v.* Allens, 1 Wall. 359, 17 L. ed. 642.

19. *Iowa.*— Murray *v.* Brooks, 41 Iowa 45.

New Jersey.— Deeker *v.* Fredericks, 47 N. J. L. 469, 1 Atl. 470; Cooley *v.* Perrine, 41 N. J. L. 322, 32 Am. Rep. 210 [*affirmed* in 42 N. J. L. 623].

New York.— Milburn *v.* Belloni, 34 Barb. 607 [*reversed* on other grounds in 39 N. Y. 53, 100 Am. Dec. 403]; Gibson *v.* Colt, 7 Johns. 390.

England.— Brady *v.* Todd, 9 C. B. N. S. 592, 7 Jur. N. S. 827, 30 L. J. C. P. 223, 4 L. T. Rep. N. S. 212, 9 Wkly. Rep. 483, 99 E. C. L. 592 [*distinguishing* Alexander *v.* Gibson, 2 Campb. 555, 11 Rev. Rep. 797; Helyear *v.* Hawke, 5 Esp. 72; Fenn *v.* Harrison, 3 T. R. 757, 14 T. R. 177].

Canada.— Commercial Bank *v.* Bessett, 7 Manitoba 586.

20. Nelson *v.* Cowing, 6 Hill (N. Y.) 336.

21. *Alabama.*— Bradford *v.* Bush, 10 Ala. 386; Skinner *v.* Gunn, 9 Port. 305.

Delaware.— Ellison *v.* Simmons, (1906) 65 Atl. 591.

Illinois.— Cochran *v.* Chitwood, 59 Ill. 53.

Iowa.— Conneautsville First Nat. Bank *v.* Robinson, 105 Iowa 463, 75 N. W. 334; Murray *v.* Brooks, 41 Iowa 45.

Kentucky.— Belmont *v.* Talbott, 51 S. W. 588, 21 Ky. L. Rep. 453.

Missouri.— Samuel *v.* Bartee, 53 Mo. App. 587.

New York.— Tice *v.* Gallup, 2 Hun 446, 5 Thomps. & C. 51.

Distinction between authority of agent of private individual and of horse dealer.— "If the servant or agent of a private individual entrusted on one occasion to sell a horse, without authority from his master takes upon himself to warrant the soundness of the animal, the master is not bound; but, if the servant of a horse-dealer, or even one who only occasionally assists him in his business, being employed to sell, gives a warranty, the principal is bound, even though the agent or servant was expressly forbidden to warrant." Howard *v.* Sheward, L. R. 2 C. P. 148, 12 Jur. N. S. 1015, 36 L. J. C. P. 42, 15 L. T. Rep. N. S. 183, 15 Wkly. Rep. 45. To the same effect see Decker *v.* Fredericks, 47 N. J. L. 469, 1 Atl. 470; Brady *v.* Todd, 9 C. B. N. S. 592, 7 Jur. N. S. 827, 30 L. J. C. P. 223, 4 L. T. Rep. N. S. 212, 9 Wkly. Rep. 483, 99 E. C. L. 592 [*distinguishing* Alexander *v.* Gibson, 2 Campb. 555, 11 Rev. Rep. 797; Helyear *v.* Hawke, 5 Esp. 72; Fenn *v.* Harrison, 3 T. R. 757, 14 T. R. 177]. But *compare* Baldry *v.* Bates, 52 L. T. Rep. N. S. 620; Brooks *v.* Hassall, 49 L. T. Rep.

slaves.[22] The custom of manufacturers to warrant machinery is so general that an agent authorized to sell a machine has implied power, no restrictions appearing, to warrant it to be suitable for its purpose.[23] And when an agent is empowered to sell by sample there can be no question of his authority to warrant that the goods shall be equal in quality to the sample.[24] An agent may warrant that goods sold as of a particular description shall be of that description.[25] The principal is bound by such warranty even though, unknown to the buyer, the agent has express instructions not to make it;[26] but it is otherwise as to known instructions,[27] unless waived by the principal.[28] An agent who is not empowered to make sales of goods has no implied power to warrant their quality.[29] Whatever the implied power of an agent to warrant the quality of the goods he is then selling, it cannot extend to authorize a warranty by him of goods of a like kind which his principals have previously sold, or may afterward sell to the same persons. His implied power to warrant is exhausted with the sale he then makes.[30] The implied power

N. S. 569; Taylor *v.* Gardiner, 8 Manitoba 310, all criticizing and limiting this rule.

22. Cocke *v.* Campbell, 13 Ala. 286; Gaines *v.* McKinley, 1 Ala. 446; Skinner *v.* Gunn, 9 Port. (Ala.) 305; Dennis *v.* Ashley, 15 Mo. 453; Ezell *v.* Franklin, 2 Sneed (Tenn.) 236; Franklin *v.* Ezell, 1 Sneed (Tenn.) 497.

23. *Iowa.*— Blaess *v.* Nichols, etc., Co., 115 Iowa 373, 88 N. W. 829; Murray *v.* Brooks, 41 Iowa 45.

Kentucky.— Richmond Second Nat. Bank *v.* Adams, 93 S. W. 671, 29 Ky. L. Rep. 566.

Minnesota.— Parsons Band Cutter, etc., Co. *v.* Haub, 83 Minn. 180, 86 N. W. 14; J. I. Case Threshing-Mach. Co. *v.* McKinnon, 82 Minn. 75, 84 N. W. 646; Gaar *v.* Patterson, 65 Minn. 449, 68 N. W. 69; Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253; Flatt *v.* Osborne, 33 Minn. 98, 22 N. W. 440; McCormick *v.* Kelly, 28 Minn. 135, 9 N. W. 675.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Hiatt, 4 Nebr. (Unoff.) 587, 95 N. W. 627.

North Carolina.—See Alpha Mills *v.* Watertown Steam Engine Co., 116 N. C. 797, 21 S. E. 917.

North Dakota.— Canham *v.* Plano Mfg. Co., 3 N. D. 229, 55 N. W. 583.

South Dakota.— Peter *v.* Plano Mfg. Co., 110 N. W. 783.

Canada.— McMullen *v.* Williams, 5 Ont. App. 518, extending the rule to an agent to sell pianos.

24. Dreyfus *v.* Goss, 67 Kan. 57, 72 Pac. 537; Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437, 57 Pac. 43; Cooley *v.* Perrine, 41 N. J. L. 322, 32 Am. Rep. 210; Dayton *v.* Hooglund, 39 Ohio St. 671. And see Hille *v.* Adair, 58 S. W. 697, 22 Ky. L. Rep. 742, holding that an agent seeking to introduce a new fertilizer for his non-resident principal has implied authority to enter into a warranty.

Goods not present and subject to inspection. — Until the contrary is made to appear it will be presumed that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity or article, where the thing sold is not present and subject to the inspection of the purchaser. Talmage *v.* Bierhause, 103 Ind. 270, 2 N. E. 716.

25. H. B. Smith Co. *v.* Williams, 29 Ind. App. 336, 63 N. E. 318; Conneautsville First Nat. Bank *v.* Robinson, 105 Iowa 463, 75 N. W. 334; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13; Reese *v.* Bates, 94 Va. 321, 26 S. E. 865.

26. Hayner *v.* Churchill, 29 Mo. App. 676; Milburn *v.* Belloni, 34 Barb. (N. Y.) 607 [*reversed* on other grounds in 39 N. Y. 53, 100 Am. Dec. 403]; Canham *v.* Plano Mfg. Co., 3 N. D. 229, 55 N. W. 583. And see *supra*, II, A, 2, b.

27. Bragg *v.* Bamberger, 23 Ind. 198; Walter A. Wood Mowing Mach. Co. *v.* Crow, 70 Iowa 340, 30 N. W. 609; Aultman *v.* York, 1 Tex. Civ. App. 484, 20 S. W. 851. And see *supra*, II, A, 2, c.

The condition in a warranty of a thresher that on discovery of any defect written notice should be given the seller cannot be waived by an agreement by a subagent of the seller to give the notice. Nichols *v.* Larkin, 79 Mo. 264.

When the original contract is rescinded and the principal allows the agent to make a new contract, restrictions in the original contract as to warranty are of no effect. Challenge Wind, etc., Mill Co. *v.* Kerr, 93 Mich. 328, 53 N. W. 555. See also Olson *v.* Aultman Co., 81 Minn. 11, 83 N. W. 457.

28. New Hamburg Mfg. Co. *v.* Shields, 16 Manitoba 212, holding that if the vendors accept and fill an order for an engine with a provision specially written by their agent in it that the engine is to be satisfactory to the purchasers, they thereby waive any limitations of the authority of their agent as to giving warranties that may be embodied in the printed part of the order.

29. Richmond Trading, etc., Co. *v.* Farquar, 8 Blackf. (Ind.) 89 (holding that a power given by a seller of wool to an agent to weigh the same and deliver it to the buyer does not authorize a warranty as to its quality); Forcheimer *v.* Stewart, 73 Iowa 216, 32 N. W. 665, 35 N. W. 148 (holding that one employed as a bookkeeper in a mercantile establishment has no implied authority to warrant the quality of goods); Lansing *v.* Coleman, 58 Barb. (N. Y.) 611 (holding that an agent employed to advertise a sale but not to sell has no implied authority to make any warranty).

30. Waite *v.* Borne, 123 N. Y. 592, 25

of an agent to warrant title and quality rests upon the necessity and propriety of such warranties in the sale of goods. It is not therefore to be extended to other warranties of an extraordinary sort, however impossible the agent may find it to make a sale without giving such warranties.[31] Authority to warrant certain qualities conveys no power to give a warranty as to other qualities.[32]

(B) *To Fix Terms of Sale.* It is of course a necessary incident of a sale to fix the price and the terms of payment, and accordingly a selling agent has implied power to agree upon the terms of the sale within the limits openly fixed by the principal or determined by usage and custom.[33] When the principal has bestowed a restricted authority, or has openly fixed the limits of the authority, the agent's sales on terms not warranted by the authority of course cannot bind the principal,[34] unless with notice of the agent's acts he approves and

N. E. 1053 [*reversing* 1 Silv. Sup. 129, 5 N. Y. Suppl. 168]; Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53; Reid *v.* Alaska Packing Co., 47 Oreg. 215, 83 Pac. 139.

31. Anderson *v.* Bruner, 112 Mass. 14 (holding that a letter from a principal to his agent that he proposes "placing" his goods at a certain price does not authorize the agent to warrant to a customer at that price that his principal will not sell for a less price); Palmer *v.* Hatch, 46 Mo. 585 (holding that a naked general power of sale does not carry with it authority to warrant against any seizure of the article sold for violation of the revenue laws prior to sale).

32. Holcombe *v.* Cable Co., 119 Ga. 466, 46 S. E. 671.

33. *Georgia.*— Jesse Freneh Piano, etc., Co. *v.* Cardwell, 114 Ga. 340, 40 S. E. 292.

Iowa.— Wishard *v.* McNeill, 85 Iowa 474, 52 N. W. 484.

Maryland.— Curtis *v.* Gibney, 59 Md. 131.

New Hampshire.— Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45, where it is said that as incident to his general authority an agent authorized to sell has "power to fix the terms of sale, including the time, place, and mode of delivery, and the price of the goods, and the time and mode of payment, and to receive payment of the price, subject of course to be controlled by proof of the mercantile usage in such trade or business."

Utah.— Smith *v.* Dronbay, 20 Utah 443, 58 Pac. 1112, holding that where the power to take an order or make a contract of sale is incident to an agent's employment the power to fix time of delivery is also incident.

Compare Robertson *v.* Ketchum, 11 Barb. (N. Y.) 652.

To fix the price is one of the necessary and proper things in making a sale, and unless the principal has openly limited the price the agent has implied power to agree upon it. Bass Dry Goods Co. *v.* Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980; Seudder-Gale Grocer Co. *v.* Russell, 65 Ill. App. 281; U. S. School Furniture Co. *v.* Owensboro Bd. of Education, 38 S. W. 864, 18 Ky. L. Rep. 948; Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45; Stirn *v.* Hoffman House Co., 7 Misc. (N. Y.) 241, 27 N. Y. Suppl. 271 [*affirmed* in 8 Misc. 246, 28 N. Y. Suppl. 724].

Rebates.—A traveling salesman empowered to take orders for merchandise at a price consistent with current quotations prescribed by his employer cannot bind his employer by a written rebate agreement signed in his own name, in the absence of special authority. Tollerton, etc., Co. *v.* Gilruth, (S. D. 1907) 112 N. W. 842.

Return of goods.—A traveling salesman cannot, without authority so to do or custom of trade in that behalf, obligate his principal on the sale of goods by an agreement that any portion of the goods may be returned before the date of settlement, even though the season for the sale by his principal of such goods to the retail trade has expired for the year at that time. Friedman *v.* Kelly, 126 Mo. App. 279, 102 S. W. 1066.

Custom and usage.— The implied authority of a selling agent is limited to the usages of the business in which he is employed. With reference to such usages, and only such usages, the principal is presumed to confer power on his agent. Leach *v.* Beardslee, 22 Conn. 404; Upton *v.* Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 148; Authors', etc., Assoc. *v.* O'Gorman Co., 147 Fed. 616. And see *supra*, II, A, 2, d. And the custom must be reasonable and general. Carmichael *v.* Buck, 12 Rich. (S. C.) 451.

A solicitor and collector for a gas company has actual if not ostensible authority to make a contract binding on the gas company to furnish gas at a certain price. Gallagher *v.* Equitable Gas Light Co., 141 Cal. 669, 75 Pac. 329, so holding under statutes providing that actual authority of an agent is such as the principal confers or allows the agent to believe he possesses; that ostensible authority is such as a principal allows a third person to believe the agent possesses; and that an agent represents his principal for all purposes in respect to actual or ostensible authority.

34. *Alabama.*— Fulton *v.* Sword Medicine Co., 145 Ala. 331, 40 So. 393; McMillan *v.* Wooten, 80 Ala. 263, holding that authority to exchange does not authorize a trade binding the principal to pay a cash difference in values of the articles exchanged.

Colorado.— Sioux City Nursery, etc., Co. *v.* Magnes, 5 Colo. App. 172, 38 Pac. 330.

Connecticut.— Shoninger *v.* Peabody, 59 Conn. 588, 22 Atl. 437.

Illinois.— Rankin *v.* Taylor, 49 Ill. 451; Forbis *v.* Reeves, 109 Ill. App. 98.

accepts them.[35] However, the principal will be bound if the agent acts within the scope of his authority, although he mistakes or disregards the private instructions of the principal as to some of the terms of the sale,[36] or makes mistakes in judgment in exercising the discretion vested in him by the principal.[37] The fact that the agent imposes terms in addition to those prescribed by the principal will give third persons no claim against the agent under the contract he had authority to make. Third persons cannot complain if the principal does not.[38] As a general rule the sale must be for cash only; mere authority to sell does not give the agent authority to sell on credit.[39] But a sale on credit is good where such is shown to

Kentucky.— Seven Hills Chautauqua Co. *v.* Chase Bros. Co., 81 S. W. 238, 26 Ky. L. Rep. 334.

Maine.— Cowan *v.* Adams, 10 Me. 374, 25 Am. Dec. 242.

Nebraska.— Michael *v.* Hoffsteadt, 5 Nebr. (Unoff.) 453, 98 N. W. 1078.

New York.— Falihee *v.* John Simmons Co., 121 N. Y. App. Div. 839, 106 N. Y. Suppl. 764 (holding that where plaintiff requested defendant's salesman to reduce an estimated price for supplies, and the salesman notified defendant's manager, who told him it would be all right, and then completed the arrangement directly with plaintiff, this did not confer authority on the salesman to bind defendant on a written contract with plaintiff); Waldorf *v.* Simpson, 15 N. Y. App. Div. 297, 44 N. Y. Suppl. 921; Robertson *v.* Ketchum, 11 Barb. 652.

Texas.— Skecters *v.* Slater Milling Co., 4 Tex. Civ. App. 665, 23 S. W. 1000, holding that where cotton is left with an agent to be sold at the highest market price upon approval by the principal, a sale by the agent without the principal's consent conveys no title.

Vermont.— Brown *v.* West, 69 Vt. 440, 38 Atl. 87; White *v.* Langdon, 30 Vt. 599.

35. Gallagher *v.* Equitable Gas Light Co., 141 Cal. 699, 75 Pac. 329; Sioux City Nursery, etc., Co. *v.* Magnes, 5 Colo. App. 172, 38 Pac. 330; Susong *v.* McKenna, 126 Ga. 433, 55 S. E. 236. And see *supra*, I, F.

36. *Alabama.*— Union Refining Co. *v.* Barton, 77 Ala. 148.

Iowa.— Griffith *v.* Fields, 105 Iowa 362, 75 N. W. 325.

Mississippi.— Potter *v.* Springfield Milling Co., 75 Miss. 532, 23 So. 259.

Missouri.— Mabray *v.* Kelly-Goodfellow Shoe Co., 73 Mo. App. 1.

New York.— Reynolds *v.* Mayor, etc., Co., 39 N. Y. App. Div. 218, 57 N. Y. Suppl. 106.

Texas.— Schleicher *v.* Armstrong, (Civ. App. 1895) 32 S. W. 327.

United States.— Loraine *v.* Cartwright, 15 Fed. Cas. No. 8,500, 3 Wash. 151.

37. Merrimac Paper Co. *v.* Illinois Trust, etc., Bank, 30 Ill. App. 268 [*affirmed* in 129 Ill. 296, 21 N. E. 787] (holding that where an agent is authorized to sell goods to a person if he is responsible and in first-class credit, and does so in good faith and on a mistake in judgment, the principal is bound, although such person's credit is not first-class); McDonald *v.* Preston Nat. Bank, 111 Mich. 649, 70 N. W. 143; Peay *v.* Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731.

38. Goodale *v.* Wheeler, 11 N. H. 424 (in which the agent, in addition to the conditions prescribed by the principal, provided that twenty dollars of the purchase-money should be paid at the time of the sale, to be forfeited if the purchaser should not complete his contract); McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

39. *Alabama.*— Union Refining Co. *v.* Barton, 77 Ala. 148; Burks *v.* Hubbard, 69 Ala. 379; Falls *v.* Gaither, 9 Port. 605, holding that an authority to an agent to sell and receive the money does not authorize him to sell without receiving the money.

California.— Harlan *v.* Ely, 68 Cal. 522, 9 Pac. 947.

Iowa.— Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250 (holding that authority to sell property does not authorize a sale on credit, unless such sale is in accord with the usages of trade); Payne *v.* Potter, 9 Iowa 549.

Kentucky.— Baldwin *v.* Tucker, 112 Ky. 282, 65 S. W. 841, 23 Ky. L. Rep. 1538, 57 L. R. A. 451.

Maine.— Moore *v.* Thompson, 32 Me. 497, holding the sale good where other goods were sold with those of the principal and enough cash was received to pay for the principal's goods.

Massachusetts.— Norton *v.* Nevills, 174 Mass. 243, 54 N. E. 537; Brown *v.* Bull, 3 Mass. 211.

Michigan.— Kops Bros. Co. *v.* Smith, 137 Mich. 28, 100 N. W. 169.

New York.— Delafield *v.* Illinois, 2 Hill 159, 26 Wend. 192 [*affirming* 8 Paige 527].

Vermont.— Chapman *v.* Devereux, 32 Vt. 616; Catlin *v.* Smith, 24 Vt. 85; Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 465.

Wisconsin.— Hall *v.* Storrs, 7 Wis. 253, holding that a direction to sell for cash does not allow the agent to take a check payable the day after the sale, even though that be the customary way at the place of sale of making what are there called cash sales.

England.— Wiltshire *v.* Sims, 1 Camph. 258, 10 Rev. Rep. 673; Underwood *v.* Nicholls, 17 C. B. 239, 25 L. J. C. P. 79, 4 Wkly. Rep. 153. *Compare* Catterall *v.* Hindle, L. R. 2 C. P. 368 [*reversing* L. R. 1 C. P. 186, Harr. & R. 267, 12 Jur. N. S. 488, 38 L. J. C. P. 161, 14 L. T. Rep. N. S. 102, 14 Wkly. Rep. 371].

be the usage and custom, well recognized and known to the person dealt with,[39] as well as in cases where the manner in which the business is conducted makes sales on credit necessary.[41] A sale for cash upon the delivery of the goods has been held to be within the power of an agent authorized to sell for cash.[42] An agent may give the purchaser a reasonable time within which to accept or reject the proposition of sale,[43] or to make trial of machinery, or other similar wares, to determine whether it is satisfactory.[44] Again, a sale contemplates a price in money. Hence authority to sell conveys power to sell for cash and not to exchange for other property, or for part property and part cash,[45] unless the terms of the agency clearly empowered him to exchange.[46]

(c) *As to Payment.*[47] Intrusting to the agent possession of the goods he is to sell is clothing him with the *indicia* of authority to receive the price to be paid down, and such payment will bind the principal;[48] and some cases have even gone so far as to lay down the rule that power to sell personal property, if not

But *compare* Swindell *v.* Latham, 145 N. C. 144, 58 S. E. 1010, 122 Am. St. Rep. 430, holding that an agent, with authority to sell, has in the absence of any restriction to the contrary the power to sell for cash or credit.

40. *Alabama.*— Burks *v.* Hubbard, 69 Ala. 379.

Iowa.— See Payne *v.* Potter, 9 Iowa 549.

Missouri.— Wheeler, etc., Mfg. Co. *v.* Givan, 65 Mo. 89.

New York.— Wait *v.* Borne, 7 N. Y. St. 113.

Tennessee.— May *v.* Mitchell, 5 Humphr. 365.

West Virginia.— State *v.* Chilton, 49 W. Va. 453, 39 S. E. 612.

United States.— Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43.

41. Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45; Pittman *v.* The Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385.

42. Bristol *v.* Mente, 79 N. Y. App. Div. 67, 80 N. Y. Suppl. 52 [*affirmed* in 178 N. Y. 599, 70 N. E. 1096].

43. Meister *v.* Cleveland Dryer Co., 11 Ill. App. 227.

44. Marion Mfg. Co. *v.* Harding, 155 Ind. 648, 58 N. E. 194; Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856; Oster *v.* Mickley, 35 Minn. 245, 28 N. W. 710; Deering *v.* Thom, 29 Minn. 120, 12 N. W. 350.

45. *Connecticut.*— Kearns *v.* Nickse, 80 Conn. 23, 66 Atl. 779, 10 L. R. A. N. S. 1118.

Georgia.— Gorham *v.* Felker, 102 Ga. 260, 28 S. E. 1002.

Illinois.— Drury *v.* Barnes, 29 Ill. App. 166.

Iowa.— Holmes *v.* Redhead, 104 Iowa 399, 73 N. W. 878; Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998.

Michigan.— Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795.

Missouri.— Wheeler, etc., Mfg. Co. *v.* Givan, 65 Mo. 89.

New Hampshire.— Taylor, etc., Organ Co. *v.* Starkey, 59 N. H. 142.

New York.— Block *v.* Dundon, 83 N. Y. App. Div. 539, 81 N. Y. Suppl. 1114 (holding that the fact that the agent could make the sale only by accepting goods in payment does not make such terms necessary and proper so as to bind the principal); Jones *v.* Richards, 50 Misc. 645, 98 N. Y. Suppl. 698; Beck *v.* Donohue, 27 Misc. 230, 57 N. Y. Suppl. 741.

North Carolina.— Fay, etc., Co. *v.* Causey, 131 N. C. 350, 42 S. E. 827; Brown *v.* Smith, 67 N. C. 245.

Wisconsin.— Roberts *v.* Francis, 123 Wis. 78, 100 N. W. 1076.

England.— Guerreiro *v.* Peile, 3 B. & Ald. 616, 22 Rev. Rep. 500, 5 E. C. L. 354.

Canada.— Wesbrook *v.* Willoughby, 10 Manitoba 600; Stewart *v.* Rounds, 7 Ont. App. 515.

The principal may be estopped by his course of dealing to deny the agent's authority to take property in payment. Eggleston *v.* Advance Thresher Co., 96 Minn. 241, 104 N. W. 891. *Compare* Stewart *v.* Rounds, 7 Ont. App. 515, holding that a single previous exchange does not warrant an inference of general authority to exchange.

46. Gaus *v.* Hathaway, 66 Ill. App. 149; Lindley *v.* Lupton, 118 Mich. 466, 76 N. W. 1037.

47. See *infra*, II, A, 6, d.

48. *Arkansas.*— Meyer *v.* Stone, 46 Ark. 210, 55 Am. Rep. 577.

Illinois.— Bailey *v.* Pardridge, 134 Ill. 188, 27 N. E. 89 [*affirming* 35 Ill. App. 121].

Massachusetts.— Cairns *v.* Page, 165 Mass. 552, 43 N. E. 503.

Missouri.— John Hutchison Mfg. Co. *v.* Henry, 44 Mo. App. 263.

New York.— Higgins *v.* Moore, 34 N. Y. 417.

Pennsylvania.— Irwin *v.* Sciple, 2 Phila. 208.

England.— Capel *v.* Thornton, 3 C. & P. 352, 14 E. C. L. 605.

Goods furnished agent to fill order.—An agent who is furnished with samples and price lists of goods of his principal, and who is sent out to sell by sample, and afterward furnished with goods to fill his orders, is ostensibly a general agent, and authorized to collect, and payments made to him are binding on the principal. Beckwith *v.* Reid, 4 Ohio Dec. (Reprint) 436, 2 Clev. L. Rep. 162.

restricted, includes power to receive payment therefor;[49] but it is generally held that mere authority to solicit orders or to take contracts to submit to the principal for approval carries no implied power to collect at any time.[50] And the same principle denies to brokers or traveling salesmen not having possession of the goods, but selling for future delivery, to be paid for upon delivery or at any other future time, any authority, upon these facts alone, to collect payment for such goods.[51] And certainly where goods are sold by an agent and there is notice, direct or implied, to pay the price to the principal, payment by the vendee to the agent will not bind the principal, nor protect the vendee.[52] The authority of an agent to collect need

49. Collins *v.* Newton, 7 Baxt. (Tenn.) 269; Hoskins *v.* Johnson, 5 Sneed (Tenn.) 469; Hackney *v.* Jones, 3 Humphr. (Tenn.) 612. And see Sawin *v.* Union Bldg., etc., Assoc., 95 Iowa 477, 64 N. W. 401 (holding that a general agent for selling shares has power to collect the price before or after delivery): Trainer *v.* Morison, 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790 (holding that an agent who has authority to contract for the sale of chattels has authority to collect pay for them at the time, or as a part of the same transaction, in the absence of any prohibition known to the purchaser); Scott *v.* Hopkins, 2 N. Y. St. 324 [*questioned* in Lamb *v.* Hirschberg, 1 N. Y. App. Div. 519, 37 N. Y. Suppl. 283]; Putnam *v.* French, 53 Vt. 402, 38 Am. Rep. 682 (in which case particular stress is laid upon a custom, proved as existing in New England in such transactions, to make payment either to the principal or the agent).

50. *Georgia.*— Johnson *v.* American Freehold Land Mortg. Co. of London, 111 Ga. 490, 36 S. E. 614; Collins *v.* Crews, 3 Ga. App. 238, 59 S. E. 727.

Illinois.— Smith *v.* Hall, 19 Ill. App. 17; Greenhood *v.* Keator, 9 Ill. App. 183. See also Clark *v.* Smith, 88 Ill. 298; Abrahams *v.* Weiller, 87 Ill. 179.

Kentucky.— John Matthews' Apparatus Co. *v.* Renz, 61 S. W. 9, 22 Ky. L. Rep. 1528; Charles Brown Grocery Co. *v.* Becket, 57 S. W. 458, 22 Ky. L. Rep. 393, holding that the power of the agent should certainly be limited to taking a proposal for submission to his principal when the goods offered are not in his line and are offered at a grossly inadequate price.

Massachusetts.— Clark *v.* Murphy, 164 Mass. 490, 41 N. E. 674; Clough *v.* Whitcomb, 105 Mass. 482.

Missouri.— Chambers *v.* Short, 79 Mo. 204; Butler *v.* Dorman, 68 Mo. 298, 30 Am. Rep. 795 [*explaining* Rice *v.* Groffmann, 56 Mo. 434].

New York.— Lamb *v.* Hirschberg, 1 N. Y. App. Div. 519, 37 N. Y. Suppl. 283; Hahnenfeld *v.* Wolff, 15 Misc. 133, 36 N. Y. Suppl. 473.

Oklahoma.— Scarritt-Comstock Furniture Co. *v.* Hudspeth, (1907) 91 Pac. 843.

Tennessee.— Fabian Mfg. Co. *v.* Newman, (Ch. App. 1900) 62 S. W. 218.

Wisconsin.— McKindly *v.* Dunham, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740.

England.— Spooner *v.* Browning, [1898] 1 Q. B. 528, 67 L. J. Q. B. 339, 78 L. T. Rep. N. S. 97, 14 T. L. R. 245, 46 Wkly. Rep. 369.

51. *Alabama.*— Simon *v.* Johnson, 101 Ala. 368, 13 So. 491, 105 Ala. 344, 16 So. 884, 53 Am. St. Rep. 125, 108 Ala. 241, 19 So. 244.

Arkansas.— Meyer *v.* Stone, 46 Ark. 210, 55 Am. Rep. 577.

Florida.— Lakeside Press, etc., Co. *v.* Campbell, 39 Fla. 523, 22 So. 878.

Georgia.— Walton Guano Co. *v.* McCall, 111 Ga. 114, 36 S. E. 469.

Illinois.— Bailey *v.* Partridge, 134 Ill. 183, 27 N. E. 89; Clark *v.* Smith, 88 Ill. 298; Williams *v.* Anderson, 107 Ill. App. 32. *Compare* Harris *v.* Simmerman, 81 Ill. 413.

Kansas.— Dreyfus *v.* Goss, 67 Kan. 57, 72 Pac. 537; Kane *v.* Barstow, 42 Kan. 465, 22 Pac. 588, 16 Am. St. Rep. 490.

Michigan.— Kornemann *v.* Monaghan, 24 Mich. 36.

Minnesota.— Brown *v.* Lally, 79 Minn. 38, 81 N. W. 538.

New Jersey.— Law *v.* Stokes, 32 N. J. L. 249, 90 Am. Dec. 655.

New York.— Higgins *v.* Moore, 34 N. Y. 417 [*reversing* 6 Bosw. 344].

Pennsylvania.— Seiple *v.* Irwin, 30 Pa. St. 513; Giltinan *v.* Bergey, 5 Pa. Dist. 20, 11 Montg. Co. Rep. 162, holding that the payment to an agent selling goods on credit, but not having the goods in his possession to deliver, is not good without evidence of his authority to receive payment.

West Virginia.— Crawford *v.* Whittaker, 42 W. Va. 430, 26 S. E. 516.

But *compare* Collins *v.* Newton, 7 Baxt. (Tenn.) 269; Hoskins *v.* Johnson, 5 Sneed (Tenn.) 469; Hackney *v.* Jones, 3 Humphr. (Tenn.) 612.

Usage.—A payment to such an agent will be good, however, if there be a general and known usage for such agents to make collection. Meyer *v.* Stone, 46 Ark. 210, 55 Am. Rep. 577. *Compare* Higgins *v.* Moore, 34 N. Y. 417 [*reversing* 6 Bosw. 344].

The principal may confer authority on a traveling salesman to collect, and in such case he may collect in the usual way. Howard *v.* Chapman, 4 C. & P. 508, 19 E. C. L. 624.

52. Lamb *v.* Hirschberg, 1 N. Y. App. Div. 519, 37 N. Y. Suppl. 283.

Thus where goods were sold on credit, and a bill was delivered therewith on which was printed the notice, "Pay none but authorized collectors," a payment for the goods thereafter made to the salesman who sold the same, and who was without actual authority to receive payment, or apparent authority other than that he sold the goods, did not

not be express, but may be implied from the fact that the bill for the goods previously sold by him is sent to him by his principal and presented by the agent for payment.[53] An agent who, by the habits and course of dealing of the principal, is permitted to appear to have authority to make collections, or to transact business for his principal generally, may receive payment for goods sold.[54] It seems that if an agent is authorized to sell on credit, he may accept the vendee's note for the purchase-price, or for so much of it as is to be paid at a future date;[55] but it does not follow that by virtue of his authority to sell he has any authority to collect such paper at maturity, or at any time after the sale. By the sale and acceptance of the paper for his principal his authority is presumptively exhausted.[56] And even where an agent is authorized to collect notes after their maturity, he has not the right to take anything save money in the payment of them, without express authority from his principal.[57] If the purchaser of property does not know that he is dealing with an agent of the owner, and has not good reason to know it, he is justified in treating the agent as the owner, and payment of the price to him will be a defense to an action by the owner for the amount.[58] A selling agent has no implied power to release a claim without payment,[59] and if he has general authority to collect, this will not authorize him to reinvest the funds so collected.[60]

(D) *To Rescind or Modify Sale.*[61] A sales agent may be expressly given any authority the principal desires, and the acts and conduct of the principal may be equivalent to the grant of express authority. But ordinarily such an agent is supposed to be employed to contract a sale, and has no implied power, once this is done, either to undo or to modify the contract.[62] The sale completes the transaction, and there is no presumption, from the mere authority to sell, that the agency continues so as to enable the agent to rescind the sale, or to offer the vendee further

discharge the purchaser. Zilberman *v.* Friedman, 54 Misc. (N. Y.) 256, 104 N. Y. Suppl. 363. *Compare* Luckie *v.* Johnston, 89 Ga. 321, 15 S. E. 459 (holding that the fact that the words, "Bills payable at this office only," were printed in small letters on the face of the bills does not necessarily negative the agent's authority to collect such bills, when the debtor had no knowledge of the words at the time of making payment); Kinsman *v.* Kershaw, 119 Mass. 140 (holding that a statement printed on a bill-head in small letters, "All moneys to be paid to the treasurer, and bills to be receipted by him," does not preclude the debtor from showing payment to another who presented it for payment, if the debtor paid it in good faith and without having observed the printed rule).

53. Luckie *v.* Johnston, 89 Ga. 321, 15 S. E. 459; Adams *v.* Humphreys, 54 Ga. 496. See also Kinsman *v.* Kershaw, 119 Mass. 140. *Compare* Duteher *v.* Beekwith, 45 Ill. 460, 92 Am. Dec. 232.

54. Howe Mach. Co. *v.* Ballweg, 89 Ill. 318; Continental Tobacco Co. *v.* Campbell, 76 S. W. 125, 25 Ky. L. Rep. 569; Estey *v.* Snyder, 76 Wis. 624, 45 N. W. 415. See also Harris *v.* Simmerman, 81 Ill. 413.

55. See Howard *v.* Rice, 54 Ga. 52.

56. *Georgia.*— Holland *v.* Van Beil, 89 Ga. 223, 15 S. E. 302; Howard *v.* Rice, 54 Ga. 52.

Indiana.— Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413.

Iowa.— Draper *v.* Rice, 56 Iowa 114, 7 N. W. 524, 8 N. W. 797, 41 Am. Rep. 88.

Kansas.—National Fence-Mach. Co. *v.* Higleyman, 71 Kan. 347, 80 Pac. 568.

Oregon.— Rhodes *v.* Belehee, 36 Oreg. 141, 59 Pac. 117, 1119.

Pennsylvania.— Irwin *v.* Seiple, 2 Phila. 208.

Wisconsin.— Straehan *v.* Muxlow, 24 Wis. 21, holding that the implied authority of an agent for sale of reaping machines to receive payment of notes taken from purchasers and payable to his principal is terminated by the surrender of the notes to his principal, and cannot be extended by an oral agreement that the maker might pay it to him when due.

57. Woodruff *v.* American Road Mach. Co., 65 S. W. 600, 23 Ky. L. Rep. 1551.

58. Tripp, etc., Boot, etc., Co. *v.* Martin, 45 Kan. 765, 26 Pac. 424. *Compare* Sage *v.* Shepard, etc., Lumber Co., 4 N. Y. App. Div. 290, 39 N. Y. Suppl. 449 [*affirmed* in 158 N. Y. 672, 52 N. E. 1126].

59. Deaeon *v.* Greenfield, 141 Pa. St. 467, 21 Atl. 650. And see *infra*, II, A, 6, h, (III).

60. Stoddart *v.* U. S., 4 Ct. Cl. 511.

61. See *infra*, II, A, 6, g.

62. *Missouri.*— White *v.* Massey, 65 Mo. App. 260.

Oregon.— Brigham *v.* Hibbard, 28 Oreg. 386, 43 Pac. 383.

Pennsylvania.— Mange-Wiener Co. *v.* Patton Worsham Drug Co., 27 Pa. Super. Ct. 315.

South Carolina.—Adrian *v.* Lane, 13 S. C. 183.

Texas.— Pillman *v.* Freiberg, 2 Tex. App. Civ. Cas. § 582.

United States.— Berthold *v.* Goldsmith, 24 How. 536, 16 L. ed. 762; Stoddart *v.* Warren, 23 Fed. Cas. No. 13,471, 7 Reporter 517.

inducements to carry out its terms, or to adjust the damages resulting from a breach of its terms.[63] The agency, however, does presumptively continue until the sale is complete,[64] and accordingly if the sale is conditional upon the quality of the goods or chattels, and the principal has not fulfilled the terms of his warranty, the sale is not complete, and the agent may modify the terms of the contract as to the notice of the defects in the chattels, or as to their return.[65] But a general agent with full authority to represent the principal in a given locality, or to manage a particular branch of the principal's business, is more than a mere sales agent, and where the conduct of his agency reasonably requires power to modify the contracts he makes, courts have often held the right so to do to be within his implied powers.[66] Certainly, if the principal asserts the authority of the agent to rescind the sale, third persons will not be heard to deny it.[67] Where the principal has prescribed the limits or terms, an agent has no implied power to modify or extend them.[68]

c. To Sell Real Estate — (1) *In General.* The authority of an agent, not expressly authorized to sell real estate, to exercise such power is not readily inferred. It must be reasonably necessary to enable the agent to execute the agency or it will not be implied,[69] although it will from a general unrestricted power to make

63. Bradford *v.* Bush, 10 Ala. 386; Robinson *v.* Nipp, 20 Ind. App. 156, 50 N. E. 408; Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53; Brigham *v.* Hibbard, 28 Oreg. 386, 43 Pac. 383.

64. Denman *v.* Bloomer, 11 Ill. 177, in which the court recognizes the rule that an agent cannot act after his authority ceases by the completion of the business to transact which he was constituted agent. But until the business has been completed, or the power revoked, the authority continues, and the agent can bind the principal. Hence if the price has not been fully paid the agent may return the part paid and rescind the sale. If this were not so the agent could not protect his principal if he discovered before full payment had been made that the vendee was insolvent.

65. *Indiana.*— Marion Mfg. Co. *v.* Harding, 155 Ind. 648, 58 N. E. 194; Ellinger *v.* Rawlings, 12 Ind. App. 336, 40 N. E. 146 (in which goods purchased were found unlike the sample, and the salesman was held to have implied authority to direct the buyer to retain the unsatisfactory goods until all were in, and then make one reshipment of those defective); Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856.

Iowa.— Webster City First Nat. Bank *v.* Dutcher, 128 Iowa 413, 104 N. W. 497, 111 Am. St. Rep. 209, 1 L. R. A. N. S. 142; Parsons Band-Cutter, etc., Co. *v.* Mallinger, 122 Iowa 703, 98 N. W. 580; Blaess *v.* Nichols, etc., Co., 115 Iowa 373, 88 N. W. 829; McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537; Warder *v.* Robertson, 75 Iowa 585, 39 N. W. 905; Pitsinowsky *v.* Beardsley, 37 Iowa 9.

Minnesota.— Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443; Oster *v.* Mickley, 35 Minn. 245, 28 N. W. 710; Deering *v.* Thom, 29 Minn. 120, 12 N. W. 350.

Missouri.— Heilman Mach. Works *v.* Dollarhide, 32 Mo. App. 178.

Texas.— Eastern Mfg. Co. *v.* Brenk, 32 Tex. Civ. App. 97, 73 S. W. 538.

Wisconsin.— Warder, etc., Co. *v.* Pischer, 110 Wis. 363, 85 N. W. 968.

66. *Indiana.*— Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856, holding that a local agent authorized to sell machines in certain localities is, as to a sale made by him in such territory, a general agent, with authority to waive certain conditions in the contract of sale.

Iowa.— Webster City First Nat. Bank *v.* Dutcher, 128 Iowa 413, 104 N. W. 497, 111 Am. St. Rep. 209, 1 L. R. A. N. S. 142.

Minnesota.— Parsons Band Cutter, etc., Co. *v.* Haub, 83 Minn. 180, 86 N. W. 14.

New York.— Thomas Roberts Stevenson Co. *v.* Fox, 19 Misc. 177, 43 N. Y. Suppl. 253.

Pennsylvania.—See Scott *v.* Wells, 6 Watts & S. 357, 40 Am. Dec. 568.

67. Sturtevant *v.* Orser, 24 N. Y. 538, 82 Am. Dec. 321, holding that the principal may take advantage of the acceptance by his agent of the rescission of a sale by an insolvent vendee.

68. Larned *v.* Wentworth, 114 Ga. 208, 39 S. E. 855 (in which the agent undertook to extend the period of an option); Larson *v.* Minneapolis Threshing Mach. Co., 92 Minn. 62, 99 N. W. 623.

69. *Alabama.*— Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760.

Indiana.— Coquillard *v.* French, 19 Ind. 274.

Pennsylvania.— See Hay *v.* Mayer, 8 Watts 203, 34 Am. Dec. 453.

Texas.— Hammond *v.* Hough, 52 Tex. 63; Berry *v.* Harnage, 39 Tex. 638; Hennessee *v.* Johnson, 13 Tex. Civ. App. 530, 36 S. W. 774; Collins *v.* Durward, 4 Tex. Civ. App. 339, 23 S. W. 561.

Wisconsin.— Jourdain *v.* Fox, 90 Wis. 99, 62 N. W. 936, holding that an agent employed to purchase tax titles, receiving as compensation a percentage of the net profits, has no authority to convey lands purchased for the principal at a tax-sale.

United States.— Union Mut. L. Ins. Co. *v.* Masten, 3 Fed. 881, holding, however, that where property has been purchased of an

sales.[70] The power need not describe the specific tract of land, but a general power to sell all lands owned by the principal in a given locality gives authority as to any particular tract in such locality.[71] Power to sell a particular interest of the principal in lands is good even though there may be an unimportant defect in the description of the interest to be disposed of.[72] But it will not be extended to include other lands, or interests in the same lands derived in other ways, and not referred to in the power, and especially if these interests were unknown at the time of the execution of the power;[73] nor of course interests conveyed away by the principal before the agent acts,[74] or which never belonged to the principal.[75] Power to sell all lands which the principal owns has been held to extend only to lands so owned at the time of the execution of the power;[76] but the surrounding circumstances,

agent in good faith, and the money paid, under the supposition that the agent was duly authorized to make the sale, a court of equity will protect the purchaser if it can do so consistently with principles of law); Bosseau *v.* O'Brien, 3 Fed. Cas. No. 1,667, 4 Biss. 395.

Thus it will not be inferred from a general power to settle, compromise, adjust, or attend to, the business of the principal (Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760; Wilcoxson *v.* Miller, 49 Cal. 193; Blum *v.* Robertson, 24 Cal. 127; Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235; Lord *v.* Sherman, 2 Cal. 498; Coquillard *v.* French, 19 Ind. 274; Matthews *v.* Matthews, 49 Me. 586; Ashley *v.* Bird, 1 Mo. 640, 14 Am. Dec. 313; Ferreira *v.* Depew, 17 How. Pr. (N. Y.) 418; De Cordova *v.* Knowles, 37 Tex. 19; Watson *v.* Hopkins, 27 Tex. 637; Wells *v.* Heddenberg, 11 Tex. Civ. App. 3, 30 S. W. 702; Connor *v.* Parsons, (Tex. Civ. App. 1895) 30 S. W. 83; Scully *v.* Book, 3 Wash. 182, 28 Pac. 556; Hunter *v.* Sacramento Valley Beet Sugar Co., 11 Fed. 15, 7 Sawy. 498), nor from power to locate and acquire for the principal the land in question (Campbell *v.* Lapsley, 2 Bibb (Ky.) 73; Hotchkiss *v.* Middlekauf, 96 Va. 649, 32 S. E. 36, 43 L. R. A. 806), nor from a previous authority to sell, even though the agent is able to sell on the terms then authorized (Sullivan *v.* Leer, 2 Colo. App. 141, 29 Pac. 817; Matthews *v.* Sowle, 12 Nebr. 398, 11 N. W. 857; Wasweyler *v.* Martin, 78 Wis. 59, 46 N. W. 890. See also Hoskins *v.* O'Brien, 132 Wis. 453, 112 N. W. 466), nor from being put in possession of the property (*Ex p.* Davidson, 57 Fed. 883), nor from authority to find a purchaser (Lambert *v.* Gerner, 142 Cal. 399, 76 Pac. 53; Grant *v.* Ede, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237; Armstrong *v.* Lowe, 76 Cal. 616, 18 Pac. 758; Duffy *v.* Hobson, 40 Cal. 240, 6 Am. Rep. 617; Furst *v.* Tweed, 93 Iowa 300, 61 N. W. 857; Burlington, etc., R. Co. *v.* Sherwood, 62 Iowa 309, 17 N. W. 564; Lucas *v.* Barrett, 1 Greene (Iowa) 510; Prentiss *v.* Nelson, 69 Minn. 496, 72 N. W. 831; Milne *v.* Kleb, 44 N. J. Eq. 378, 14 Atl. 646; Simmons *v.* Kramer, 88 Va. 411, 13 S. E. 902; Hall *v.* Gambrill, 88 Fed. 709; Hamer *v.* Sharp, L. R. 19 Eq. 108, 44 L. J. Ch. 53, 31 L. T. Rep. N. S. 643, 23 Wkly. Rep. 158; Godwin *v.* Brind, L. R. 5 C. P. 300, 39 L. J. C. P. 122 note, 17 Wkly. Rep. 29; Wilde *v.* Watson, L. R. 1 Ir. 402; Chadburn *v.* Moore, 61 L. J. Ch. 674, 67 L. T. Rep. N. S. 257, 41 Wkly. Rep. 39; Ryan *v.* Sing, 7 Ont. 266. *Compare* Hornsby *v.* Johnstone, 3 Nova Scotia Dec. 1), or to lease and collect rents (Samson *v.* Beale, 27 Wash. 557, 68 Pac. 180), nor from a particular power to make sales and settle the principal's debts (Alger *v.* Fay, 12 Pick. (Mass.) 322; Bertschy *v.* Sheboygan Bank, 89 Wis. 473, 61 N. W. 1115. See also Kempner *v.* Rosenthal, 81 Tex. 12, 16 S. W. 639).

70. Sullivan *v.* Davis, 4 Cal. 291; Marr *v.* Given, 23 Me. 55, 39 Am. Dec. 600; Gardiner *v.* Griffith, (Tex. Civ. App. 1900) 56 S. W. 558).

A letter to a real estate agent must be specific and certain in order to create an agency to sell real estate. Fay *v.* Sullens, 15 Okla. 171, 81 Pac. 426.

71. Baxter *v.* Yarborough, 46 Tex. 231.

72. Alemany *v.* Daly, 36 Cal. 90 (holding that a power of attorney to sell "the one-half" empowers the agent to sell one half in severalty, exercising his own discretion as to which half); McClaskey *v.* Barr, 50 Fed. 712. And see Dolton *v.* Cain, 14 Wall. (U. S.) 472, 20 L. ed. 830.

73. *Minnesota.*— Carson *v.* Smith, 12 Minn. 546.

New York.— Lord *v.* Underdunck, 1 Sandf. Ch. 46.

Texas.— Blume *v.* Rice, 12 Tex. Civ. App. 1, 32 S. W. 1056; Franklin *v.* Piper, 5 Tex. Civ. App. 253, 23 S. W. 942. *Compare* Wynne *v.* Parke, 89 Tex. 413, 34 S. W. 907 [*reversing* (Civ. App. 1895) 30 S. W. 52].

United States.— McClaskey *v.* Barr, 50 Fed. 712.

England.— *In re* Dowson, [1904] 2 Ch. 219, 73 L. J. Ch. 684, 91 L. T. Rep. N. S. 121.

Canada.— Murray *v.* Jenkins, 28 Can. Sup. Ct. 565.

74. Watson *v.* Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; General Meat Supply Assoc. *v.* Bouffler, 41 L. T. Rep. N. S. 719.

Land sold but not conveyed.— Where a letter of attorney authorizes an agent to sell all the land of the principal which the latter has not previously conveyed, the agent may convey what his principal has previously sold but not conveyed. Mitchell *v.* Maupin, 3 T. B. Mon. (Ky.) 185.

75. Hall *v.* Scott County, 7 Fed. 341, 2 McCrary 356.

76. Weare *v.* Williams, 85 Iowa 253, 52

and the intent as gathered from the whole instrument of appointment, have sometimes led the courts to include after-acquired lands.[77] Power to sell all lands which the principal may own is generally held to include lands acquired during the agency and after the execution of the power.[78] A power to buy and sell real estate has been construed to authorize the agent to sell and convey only such lands as he had first bought, and not land owned by the principal previous to the execution of the power,[79] and authority to claim, recover, and sell lands is restricted to lands held by adverse claimants.[80] Power to sell the realty includes the right to sell everything that is appurtenant thereto, so as to form part of it.[81] If the power describes the lands to be sold, the sale by the agent will be binding if the land conveyed can be ascertained by the description in the power.[82] Where a power of attorney has been given, authorizing the conveyance of land, verbal directions from the maker of the power can confer no new authority, nor enlarge that contained in the power of attorney.[83] A deed from one who has power of attorney to sell passes title, although he does not refer to such power and has no estate in the land conveyed.[84]

(II) *Extent of Authority* — (A) *In General.* The authority to sell land must be strictly pursued and acts outside the authority will not bind the principal.[85]

N. W. 328; Penfold *v.* Warner, 96 Mich. 179, 55 N. W. 680, 35 Am. St. Rep. 591.

77. Fay *v.* Winchester, 4 Metc. (Mass.) 513; Benschoter *v.* Lalk, 24 Nebr. 251, 38 N. W. 746; Wronkow *v.* Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661, 16 L. R. A. 209 [*reversing* 64 Hun 217, 19 N. Y. Suppl. 51]; Garrison *v.* Coffey, (Tex. 1887) 5 S. W. 638.

78. Tuman *v.* Pillsbury, 60 Minn. 520, 63 N. W. 104; Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469; Bigelow *v.* Livingston, 28 Minn. 57, 9 N. W. 31; Berkey *v.* Judd, 22 Minn. 287; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539; Benschoter *v.* Atkins, 25 Nebr. 645, 41 N. W. 639; Benschoter *v.* Lalk, 24 Nebr. 251, 38 N. W. 746.

Land held under defective tax deed.— Land brought in at a tax-sale by the donors for which they have received a deed, although such deed is defective for informality, is included. Alexander *v.* Goodwin, 20 Nebr. 216, 29 N. W. 468.

79. Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229.

80. Hazlett *v.* Harwood, 80 Tex. 508, 16 S. W. 310. *Compare* Meyer *v.* Hale, (Tex. Civ. App. 1893) 23 S. W. 990, in which the power to "investigate and recover" was held to be broad enough to cover any lands discovered by the investigation.

81. McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220, holding that a power to sell a mill and other improvements authorizes a sale of the water rights attached to the mill.

82. McClure *v.* Herring, 70 Mo. 18, 35 Am. Rep. 404; Morris *v.* Linton, 61 Nebr. 537, 85 N. W. 565; Linton *v.* Moorhead, 209 Pa. St. 646, 59 Atl. 264; Dunnegan *v.* Butler, 25 Tex. 501; Kane *v.* Sholars, 41 Tex. Civ. App. 154, 90 S. W. 937; Crimp *v.* Yokely, 20 Tex. Civ. App. 231, 48 S. W. 1116.

83. Spofford *v.* Hobbs, 29 Me. 148, 48 Am. Dec. 521; Coulter *v.* Portland Trust Co., 20 Oreg. 469, 26 Pac. 565, 27 Pac. 266, 23 Oreg. 131, 31 Pac. 280.

84. Hill *v.* Conrad, (Tex. Civ. App. 1897) 41 S. W. 541.

85. *Colorado.*— Guy *v.* Rosewater, 18 Colo. App. 1, 69 Pac. 271, holding that an authority to an agent to enter into possession of, control, and sell, and assign plaintiff's real estate does not empower the agent to enter into a copartnership for plaintiff.

Illinois.— Brillhart *v.* McConnell, 25 Ill. 476, holding that authority to sell upon fulfilment of conditions named does not confer authority to sell without performance of the conditions.

Iowa.— Iowa R. Land Co. *v.* Fehring, 126 Iowa 1, 101 N. W. 120; Mathews *v.* Gilliss, 1 Iowa 242, holding that authority to sell all is no authority to sell a portion separately.

Minnesota.— Dayton *v.* Buford, 18 Minn. 126; Rice *v.* Tavernier, 8 Minn. 214, 83 Am. Dec. 778.

New Jersey.— National Iron Armor Co. *v.* Bruner, 19 N. J. Eq. 331.

Texas.— Skirvin *v.* O'Brien, (Civ. App. 1906) 95 S. W. 696.

United States.— Warren *v.* Tinsley, 53 Fed. 689, 3 C. C. A. 613; Bosseau *v.* O'Brien, 3 Fed. Cas. No. 1,667, 4 Biss. 395.

Canada.—Amyot *v.* Daulnais, 15 Quebec Super. Ct. 311.

Compare Campbell *v.* Beard, 57 W. Va. 501, 50 S. E. 747.

See also *infra*, II, B, 2.

Authority to sell does not imply authority to rent (Hitchens *v.* Ricketts, 17 Ind. 625), to grant easements or licenses (Noftsger *v.* Barkdoll, 148 Ind. 531, 47 N. E. 960; Hubbard *v.* Elmer, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590; McKillip *v.* McIlhenny, 2 Watts (Pa.) 446), to partition (Borel *v.* Rollins, 30 Cal. 408; Gosselin *v.* Chicago, 103 Ill. 623; McQueen *v.* Farquhar, 11 Ves. Jr. 467, 8 Rev. Rep. 212, 32 Eng. Reprint 1168), to alter boundaries (Fore *v.* Campbell, 82 Va. 808, 1 S. E. 180), to dedicate to public use (Mott *v.* Smith, 16 Cal. 533; Dupont *v.* Wertheman, 10 Cal. 354; Gosselin *v.* Owego, 103 Ill. 623; Anderson *v.* Bigelow, 16 Wash. 198, 47 Pac. 426; Campbell *v.* Campbell, 57 Wis. 288, 15 N. W. 138; Meade *v.* Brothers, 28 Wis. 689; Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396; Wirt *v.* McEnery, 21 Fed.

Thus the power merely to sell does not authorize the agent to exchange,[86] to mortgage,[87] to make representations as to quantity, quality, or condition of the real estate,[88] or to convey in payment of a debt or claim.[89] Where the authority to sell is limited as to time the sale to bind the principal must be consummated at or within the time stated.[90] In the absence of a time limit the sale must be made within what is under the circumstances a reasonable time.[91] Authority may, however, be conferred upon the agent broad enough to include other acts than mere sale, in which case of course the agent's power to bind his principal will be as broad as the authority.[92] An agent to sell land has, however, by implication authority to perform all acts necessary to effect a binding sale,[93] for the rule of strict construction will not be allowed to defeat the very purpose of the agency.[94] Where the agent has authority to exercise discretion his exercise thereof will bind the principal;[95] but it must be for the principal's benefit,[96] unless it is clearly the

233. *Compare* State *v.* Atherton, 16 N. H. 203; Van Zandt *v.* Furlong, 18 N. Y. Suppl. 54; Anthony *v.* Providence, 18 R. I. 699, 28 Atl. 766; Bartean *v.* West, 23 Wis. 416), to cut into lots (Gosselin *v.* Chicago, 103 Ill. 623), to revoke or rescind contract of sale (West-End Hotel, etc., Co. *v.* Crawford, 120 N. C. 347, 27 S. E. 31), to reinvest proceeds (Stoddart *v.* U. S., 4 Ct. Cl. 511), or to assign for the benefit of the principal's creditors (Gouldy *v.* Metcalf, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912).

If unauthorized acts cannot be separated from authorized the whole fails. Thomas *v.* Joslin, 30 Minn. 388, 15 N. W. 675.

86. Chapman *v.* Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Hampton *v.* Moorhead, 62 Iowa 91, 17 N. W. 202; Morrill *v.* Cone, 22 How. (U. S.) 75, 16 L. ed. 253; McMichael *v.* Wilkie, 18 Ont. App. 464.

87. *California.*— Hawxhurst *v.* Rathgeb, 119 Cal. 531, 51 Pac. 846, 63 Am. St. Rep. 142; Golinsky *v.* Allison, 114 Cal. 458, 46 Pac. 295.

Illinois.— Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312.

Massachusetts.— Hoyt *v.* Jaques, 129 Mass. 286.

New Jersey.— Ferry *v.* Laible, 31 N. J. Eq. 566.

Pennsylvania.— Campbell *v.* Foster Home Assoc., 163 Pa. St. 609, 30 Atl. 222, 43 Am. St. Rep. 818, 26 L. R. A. 117.

Wisconsin.— Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927

An agent to sell cannot foreclose or discharge mortgage.—Aultman *v.* Jones, 2 Fed. Cas. No. 657, Woolw. 99; Barger *v.* Miller, 2 Fed. Cas. No. 979, 4 Wash. 280.

88. Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac 40; Iowa R. Land Co. *v.* Fehring, 126 Iowa 1, 101 N. W. 120; National Iron Armor Co. *v.* Bruner, 19 N. J. Eq. 331; Samson *v.* Beale, 27 Wash. 557, 68 Pac. 180.

89. Lewis *v.* Lewis, 203 Pa. St. 194, 52 Atl. 203; Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; Folts *v.* Ferguson, (Tex. Civ. App. 1894) 24 S. W. 657.

90. Bliss *v.* Clark, 16 Gray (Mass.) 60; Matthews *v.* Sowle, 12 Nebr. 398, 11 N. W. 857.

91. Matthews *v.* Sowle, 12 Nebr. 398, 11 N. W. 857; Dyer *v.* Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

92. Hitchens *v.* Rieketts, 17 Ind. 625; Kane *v.* Dahlbender, 9 Misc. (N. Y.) 473, 30 N. Y. Suppl. 232 (holding the power broad enough to authorize the agent to rent); Anthony *v.* Providence, 18 R. I. 699, 28 Atl. 766 (holding the power broad enough to authorize the agent to plat the land, and dedicate the streets to the public); Wright *v.* Blackwood, 57 Tex. 644; Martin *v.* Harris, (Tex. Civ. App. 1894) 26 S. W. 91 (holding the power broad enough to authorize partition). See Rovelsky *v.* Scheuer, 114 Ala. 419, 21 So. 785; Frink *v.* Roe, (Cal. 1885) 7 Pac. 481.

93. Smith *v.* Allen, 86 Mo. 178; Judd *v.* Walker, 114 Mo. App. 128, 89 S. W. 558; Green *v.* Worman, 83 Mo. App. 568.

94. Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92 (holding that an agent empowered to sell a large tract of land may break it up into smaller tracts so as to enable him to sell on more favorable terms); Campbell *v.* Beard, 57 W. Va. 501, 50 S. E. 747.

95. Brock *v.* Pearson, 87 Cal. 581, 25 Pac. 963; McNeil *v.* Shirley, 33 Cal. 202; Smith *v.* Allen, 86 Mo. 178.

96. *Illinois.*— Chappell *v.* McKnight, 108 Ill. 570, holding that the principal was not bound by a sale by the agent where both the agent and the purchaser knew that the agent could secure more for the property.

Indiana.— Goss *v.* Meadors, 78 Ind. 528, holding that the agent could not hold the land in opposition to the wishes of the principal.

New York.— Wright *v.* Cabot, 89 N. Y. 570; Kingsland *v.* Chetwood, 39 Hun 602, holding that a power of attorney to sell does not empower the agent to apply the property to his own use.

Pennsylvania.— Finch *v.* Conrade, 154 Pa. St. 326, 26 Atl. 368, holding that where an agent to sell land agrees with the purchaser to take an interest, the principal may refuse to convey.

Texas.— Milan County *v.* Blake, 54 Tex. 169; Hunter *v.* Eastham, (Civ. App. 1904) 81 S. W. 336.

object of the agency that the agent should deal with the real estate for his own benefit.[97] A power of attorney for the sale of lands recorded, and in no manner revoked, may be rightfully regarded by purchasers as continuing.[98]

(B) *To Convey and Warrant.* While a power of attorney to sell land is not of itself a conveyance and does not give the agent any title to the land,[99] yet where an agent is empowered by power of attorney to sell real estate, the authority to execute proper instruments required by law to carry such sale into effect is necessarily incident.[1] And a power without restriction to sell and convey real estate gives authority to the agent to deliver deeds with general warranty binding on the principal, where under the circumstances this is the common and usual mode of assurance.[2] Although authority not under seal to sell land is insufficient to empower an agent to convey it,[3] such authority nevertheless empowers him to execute a contract for such sale binding upon his principal.[4] But the mere employ-

97. Frink *v.* Roe, (Cal. 1885) 7 Pac. 481, holding that under these circumstances the agent may transfer the real estate in payment of his debts.

98. Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539.

99. Wendt *v.* Walsh, 49 N. Y. App. Div. 184, 63 N. Y. Suppl. 62.

1. *Illinois.*— Hemstreet *v.* Burdick, 90 Ill. 444.

Maine.— Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22. See also Stanwood *v.* Laughlin, 73 Me. 112.

Massachusetts.— Valentine *v.* Piper, 22 Pick. 85, 33 Am. Dec. 715. See also Burrill *v.* Nahant Bank, 2 Metc. 163, 35 Am. Dec. 395.

Minnesota.— Farnham *v.* Thompson, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59.

Texas.— Hunter *v.* Eastham, (Civ. App. 1902) 67 S. W. 1080 [*reversed* on other grounds in 95 Tex. 648, 69 S. W. 66].

But *compare* Delano *v.* Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201.

Lands previously sold.—A power which authorizes an attorney to sell and convey land does not authorize him to make a deed for lands previously sold. Johnson *v.* Sukeley, 13 Fed. Cas. No. 7,414, 2 McLean 562.

Deeds without consideration.— The inference of authority is not to be extended to empowering the agent to execute deeds without consideration. Rogers *v.* Tompkins, (Tex. Civ. App. 1905) 87 S. W. 379.

2. Schultz *v.* Griffin, 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825 [*overruling* Nixon *v.* Hyserott, 5 Johns. (N. Y.) 58]; Peters *v.* Farnsworth, 15 Vt. 155, 40 Am. Dec. 671 (agent to execute such contracts, agreements, conveyances, and assurances and perform such acts as might be necessary to perfect the sale); Rucker *v.* Lowther, 6 Leigh (Va.) 259. See also Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Johnson *v.* Sukeley, 13 Fed. Cas. No. 7,414, 2 McLean 562; Taggart *v.* Stanbery, 23 Fed. Cas. No. 13,724, 2 McLean 543. *Contra*, Howe *v.* Harrington, 18 N. J. Eq. 495.

In full and ample manner as principal.— A power of attorney which authorizes a conveyance to be made in as full and ample a manner as the principal could execute authorizes a deed to be made by the attorney, with covenants of general warranty. Le Roy *v.* Beard, 8 How. (U. S.) 451, 12 L. ed. 1151 (covenant of seizin authorized); Taggart *v.* Stanbery, 23 Fed. Cas. No. 13,724, 2 McLean 543. See also Johnson *v.* Knapp, 146 Mass. 70, 15 N. E. 134; Bronson *v.* Coffin, 118 Mass. 156.

Authority to grant discharges.— The authority in a power of attorney "to grant any and all discharges by deed or otherwise, both personal and real," as fully as the principal might do, cannot be fairly construed as enabling the agent to convey by deed of warranty the real estate of his principal. Heath *v.* Nutter, 50 Me. 378.

If the authority of an agent is limited to the execution of a quitclaim, a warranty deed executed by him, although not binding as to the warranties, is effectual to convey title. Kane *v.* Sholars, 41 Tex. Civ. App. 154, 90 S. W. 937; Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454.

Limited warranty.—A deed is not avoided because containing less extensive warranties than were authorized by the principal. McMillan *v.* Hutcheson, 4 Bush (Ky.) 611; Kaempfer *v.* Lindsay, 121 Mich. 425, 80 N. W. 107.

3. McNeil *v.* Shirley, 33 Cal. 202; Jackson *v.* Badger, 35 Minn. 52, 26 N. W. 908; Force *v.* Dutcher, 18 N. J. Eq. 401; Lyon *v.* Pollock, 99 U. S. 668, 25 L. ed. 265.

4. *Illinois.*— Johnson *v.* Dodge, 17 Ill. 433.

Minnesota.— Jackson *v.* Badger, 35 Minn. 52, 26 N. W. 908; Minor *v.* Willoughby, 3 Minn. 225.

New Jersey.— Keim *v.* Lindley, (Ch. 1895) 30 Atl. 1063 [*distinguishing* Milne *v.* Kleb, 44 N. J. Eq. 378, 14 Atl. 646]; Force *v.* Dutcher, 18 N. J. Eq. 401.

New York.— Haydock *v.* Stow, 40 N. Y. 363.

Tennessee.— Matherson *v.* Davis, 2 Coldw. 443.

United States.— Lyon *v.* Pollock, 99 U. S. 668, 25 L. ed. 265.

Mere power to sell lands, without more, will not authorize an agent to bind his principal by a written contract to convey. Duffy *v.* Hobson, 40 Cal. 240, 6 Am. Rep. 617; Tyrrell *v.* O'Connor, 56 N. J. Eq. 448, 41 Atl. 674.

ment of a real estate broker to find a purchaser of land on terms fixed by the owner does not include authority to execute a contract binding upon his principal.[5] A power of attorney to make deeds of conveyance and of partition authorizes a deed of sale as well as a deed of partition.[6] Once the agent has executed the instrument of conveyance he was authorized to make he has no power to issue a second instrument conveying different property, although he had implied power to correct, by a second instrument, errors in the first one.[7]

(c) *To Fix or Modify Terms of Sale.* An agent empowered to sell lands has the undoubted power to do those things that are usually done in making such sales,[8] including the power to fix the price unless that has been determined by the principal.[9] He may also make any reasonable agreements, not contrary to his authority, as to the time and terms of payment.[10] Presumptively a sale is to be made for a price in money or its equivalent.[11] To transfer for anything but money

Authority determined by circumstances.— The extent of the authority conferred by a memorandum in writing merely empowering an agent to sell must be determined by the circumstances under which the power is given, the person to whom it is given, and all facts surrounding the parties at the time of the execution of the writing. If the language of the writing or the circumstances surrounding the parties indicate that it was intended to confer the power on the agent to enter into contracts of sale and bind his principal by written contract, then the naked power to find a purchaser will confer no such authority on the agent. Donnan *v.* Adams, 30 Tex. Civ. App. 615, 71 S. W. 580.

Writing unnecessary.— It is not necessary that the authority of an agent to bind his principal by written agreement to convey should be in writing, such authority may be given by parol. Tyrrell *v.* O'Connor, 56 N. J. Eq. 448, 41 Atl. 674.

5. *California.*— Armstrong *v.* Lowe, 76 Cal. 616, 18 Pac. 758; Rutenberg *v.* Main, 47 Cal. 213.

New Jersey.— Keim *v.* Lindley, (Ch. 1895) 30 Atl. 1063 [*distinguishing* Milne *v.* Kleb, 44 N. J. Eq. 378, 14 Atl. 646].

New York.— Roach *v.* Coe, 1 E. D. Smith 175.

Virginia.— Halsey *v.* Monteiro, 92 Va. 581, 24 S. E. 258.

Washington.— Armstrong *v.* Oakley, 23 Wash. 122, 62 Pac. 499; Carstens *v.* McReavy, 1 Wash. 359, 25 Pac. 471.

6. Jackson *v.* Hodges, 2 Tenn. Ch. 276.

7. Livermore *v.* Morgan, 6 Mart. N. S. (La.) 134.

8. Smith *v.* Allen, 86 Mo. 178; Keim *v.* Lindley, (N. J. Ch. 1895) 30 Atl. 1063.

9. Sprigg *v.* Herman, 6 Mart. N. S. (La.) 510, holding that the fact that the principal stated that the property should bring a certain price did not invalidate a sale for less.

An agent authorized to sell land at a fixed price cannot bind his principal to any other terms. National Iron Armor Co. *v.* Bruner, 19 N. J. Eq. 331. He will not be bound by a sale at a less price. The agent cannot sell for that price and bind the principal to pay taxes. Holbrook *v.* McCarthy, 61 Cal. 216; Wasweyler *v.* Martin, 78 Wis. 59, 46 N. W. 890.

10. See Winders *v.* Hill, 141 N. C. 694, 54 S. E. 440; Morton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94; Campbell *v.* Beard, 57 W. Va. 501, 50 S. E. 747. And see *infra*, II, A, 6, c, (II), (D).

Any variations in the terms of the payment of doubtful effect on the principal will release the principal. Michael *v.* Eley, 61 Hun (N. Y.) 180, 15 N. Y. Suppl. 890.

Unauthorized agreement as to time of payment.— The principal is not bound, if being empowered to contract for payments at certain times, he accepts agreements to pay at other times (De Sollar *v.* Hanscome, 158 U. S. 216, 15 S. Ct. 816, 39 L. ed. 956), even though the times for payment agreed to by the agent may be earlier than those authorized. The law will not presume the principal desired earlier payment. It may be he preferred to leave his money out on interest. Speer *v.* Craig, 16 Colo 478, 27 Pac. 891; Siebold *v.* Davis, 67 Iowa 560, 25 N. W. 778 (holding that a special agent for the sale of real estate to be paid for in certain annual payments exceeds his authority where he enters into a contract providing that such payments may be made at the option of the purchaser before the days fixed therefor); Jackson *v.* Badger, 35 Minn. 52, 26 N. W. 908 (holding that authority to agents to make a contract for the sale of land payable in three years does not empower them to make such a contract providing for payment of the price on or before three years); Dayton *v.* Buford, 18 Minn. 126; Henry *v.* Lane, 128 Fed. 243, 62 C. C. A. 625. *Compare* Witherell *v.* Murphy, 147 Mass. 417, 18 N. E. 215; Deaken *v.* Underwood, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827; McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

11. *California.*— Mora *v.* Murphy, 83 Cal. 12, 23 Pac. 63.

Iowa.— Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724; Hampton *v.* Moorhead, 62 Iowa 91, 17 N. W. 202.

Pennsylvania.— Paul *v.* Grimm, 165 Pa. St. 139, 30 Atl. 721, 44 Am. St. Rep. 648.

Texas.— Turpin *v.* Sansom, 36 Tex. 142; Morton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94.

is to exchange, not to sell, and is not authorized under a power to an agent to sell;[12] and if the authority is to exchange real estate, then it must be an exchange, and not a sale for cash, or part for cash and part in exchange.[13] Generally a power to sell lands or to do some act in connection with their sale conveys no authority thereafter to modify or rescind the contract of sale;[14] and an agent cannot without his principal's consent cancel so as to release the purchaser.[15]

(D) *To Give Credit.* Presumptively the agent should sell for cash and not on credit.[16] His right to sell lands on credit, if not expressly given or justified by the conduct of the principal, arises only when he acts under a power containing no limitations or directions as to whether sales shall be for cash or on credit, and to give credit is shown to be according to the usual custom in such sales.[17] When the agent is authorized to sell upon credit, a reasonable credit is meant.[18]

Canada.— Rodburn *v.* Swinney, 16 Can. Sup. Ct. 297.

12. *Iowa.*— Wilkin *v.* Voss, 120 Iowa 500, 94 N. W. 1123; Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575; Hampton *v.* Moorhead, 62 Iowa 91, 17 N. W. 202, holding that a power to sell land will not authorize a sale partly for money and partly in consideration of the transfer of a patent right.

Pennsylvania.— Paul *v.* Grimm, 165 Pa. St. 139, 30 Atl. 721, 44 Am. St. Rep. 648, holding that an attorney in fact who is only authorized to sell his principal's land for money, and who accepts bonds of the grantee in payment which prove worthless, is liable to his principal for the price.

Tennessee.— Lumpkin *v.* Wilson, 5 Heisk. 555, holding that an agent empowered to "sell" land and make title is not thereby authorized to exchange the land for a stock of merchandise.

Texas.— Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; Griffith *v.* Morrison, 58 Tex. 46; Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Morton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94.

United States.— Morrill *v.* Cone, 22 How. 75, 16 L. ed. 253.

Canada.— McMichael *v.* Wilkie, 18 Ont. App. 464 [*reversing* 19 Ont. 739].

13. Long *v.* Fuller, 21 Wis. 121, holding that a power of attorney authorizing an exchange or conveyance of real estate does not render valid a purchase under a contract, the consideration being, for the most part, money.

14. New England L. & T. Co. *v.* Browne, 157 Mo. 116, 57 S. W. 760 (holding that the agent cannot extend the time for payment); National Iron Armor Co. *v.* Bruner, 19 N. J. Eq. 331; Fullerton *v.* McLaughlin, 70 Hun (N. Y.) 568, 24 N. Y. Suppl. 280; Taylor *v.* Hoey, 36 N. Y. Super. Ct. 402 [*affirmed* in 58 N. Y. 677]; Morrill *v.* Cone, 22 How. (U. S.) 75, 16 L. ed. 253. And see *infra*, II, A, 6, g. *Compare* Ricketson *v.* Richardson, 19 Cal. 330, in which the agent's power to contract in his own name was held by the court to give him the same right to modify or discharge such contract.

Taking new securities.— If the sale was made on credit the agent has no power to take new securities as substitutes for those given at the time of the sale. Hill *v.* Bess, (Tex. Civ. App. 1897) 40 S. W. 202.

15. West-End Hotel, etc., Co. *v.* Crawford, 120 N. C. 347, 27 S. E. 31.

16. *California.*— Mora *v.* Murphy, 83 Cal. 12, 23 Pac. 63; McNeil *v.* Shirley, 33 Cal. 202.

Iowa.— Veeder *v.* McMurray, (1885) 23 N. W. 285, holding that a sale for part cash and part on time was not within the authority.

Maine.— Dresden School District No. 6 *v.* Ætna Ins. Co., 62 Me. 330; Trundy *v.* Farrar, 32 Me. 225.

Minnesota.— Marble *v.* Bang, 54 Minn. 277, 55 N. W. 1131.

Missouri.— Smith *v.* Allen, 86 Mo. 178, holding, however, that a payment of ten dollars earnest money, cash to be paid upon delivery of a deed by the principal, was a cash sale.

Nebraska.— Plummer *v.* Buck, 16 Nebr. 322, 20 N. W. 342, holding it to be a sale for cash, however, where the agent arranged with a third person a loan for the purchaser to make up part of the price.

North Carolina.— Winders *v.* Hill, 141 N. C. 694, 54 S. E. 440.

Oregon.— Coulter *v.* Portland Trust Co., 20 Oreg. 469, 26 Pac. 565, 27 Pac. 266, 23 Oreg. 131, 31 Pac. 280.

Pennsylvania.— Paul *v.* Grimm, 165 Pa. St. 139, 30 Atl. 721, 44 Am. St. Rep. 648.

Texas.— Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; Morton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94.

West Virginia.— Dyer *v.* Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

Canada.— Rodburn *v.* Swinney, 16 Can. Sup. Ct. 297; Amyot *v.* Daulnais, 15 Quebec Super. Ct. 311.

17. Silverman *v.* Bullock, 98 Ill. 11; Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 62 Me. 330. See also Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539; Bowles *v.* Rice, 107 Va. 51, 57 S. E. 575, holding that the terms of a power of attorney to a special agent expressly prescribing a cash sale must be rigidly observed.

18. Brown *v.* Central Land Co., 42 Cal. 257, holding reasonableness to be a question to be determined by the evidence and usage.

(E) *To Receive Payment.*[19] An agent to sell lands, like an agent to sell goods, has no implied authority to collect payments that are to be made after the date of the sale,[20] although authority to sell and convey lands will authorize the agent to receive so much of the price as is to be paid down,[21] and the terms of the power of attorney[22] or the conduct of the principal[23] may justify a payment of deferred payments to the agent.

d. To Collect[24]— (I) *In General.* Authority to collect, like all authority of an agent, must be traced to the principal. Moreover it is not to be inferred from mere employment as agent. To bind the principal the collection must be made by one who is not only his agent but who has been clothed with authority to make such collection.[25] The authority of the agent to collect, like his authority generally, is to be determined in the light of all circumstances surrounding the parties, and

19. See *infra*, II, A, 6, d.

20. Johnson *v.* Craig, 21 Ark. 533; Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389; Mann *v.* Robinson, 19 W. Va. 49, 42 Am. Rep. 771; Greenwood *v.* Commercial Bank, 14 Grant Ch. (U. C.) 40. *Compare* Rodgers *v.* Bass, 46 Tex. 505, holding that the fact that one has authority to sell land and take a note for the purchase-money warrants the inference that he has authority to collect such note.

Payments falling due between sale and conveyance.—An agent with authority to contract to sell and to convey has authority intermediate the contract and the conveyance to receive payments falling due under the contract. Peck *v.* Harriott, 6 Serg. & R. (Pa.) 146, 9 Am. Dec. 415; Mann *v.* Robinson, 19 W. Va. 49, 42 Am. Rep. 771.

21. *Kentucky.*— McCarty *v.* Stanfili, 41 S. W. 278, 19 Ky. L. Rep. 612.

Missouri.— Johnson *v.* McGruder, 15 Mo. 365.

New Hampshire.— Goodale *v.* Wheeler, 11 N. H. 424.

Ohio.— Schippicasse *v.* Church, 29 Ohio Cir. Ct. 678, holding that where an owner of real estate gives to his agent a written agreement to sell, to be delivered by him to a proposed purchaser, the law will imply that the agent was empowered to accept the purchase-money from the purchaser.

United States.— Morrill *v.* Cone, 22 How. 75, 16 L. ed. 253.

Canada.— McClellan *v.* McCaughan, 23 Ont. 679; Farquharson *v.* Williamson, 1 Grant Ch. (U. C.) 93.

An agent authorized to contract for a sale has no authority to receive payment, unless such authority is specially conferred upon him. Peck *v.* Harriott, 6 Serg. & R. (Pa.) 146, 9 Am. Dec. 415; Dyer *v.* Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; Mann *v.* Robinson, 19 W. Va. 49, 42 Am. Rep. 771; Ireland *v.* Thomson, 4 C. B. 149, 17 L. J. C. P. 241, 56 E. C. L. 149; Mynn *v.* Joiffe, 1 M. & Rob. 326; Farquharson *v.* Williamson, 1 Grant Ch. (U. C.) 93. And see Smith *v.* Browne, 132 N. C. 365, 43 S. E. 915. *Compare* Alexander *v.* Jones, 64 Iowa 207, 19 N. W. 913; Yerby *v.* Grigsby, 9 Leigh (Va.) 387.

22. Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539.

23. Little Rock, etc., R. Co. *v.* Wiggins, 65 Ark. 385, 46 S. W. 731.

24. See *supra*, II, A, 6, b, (III), (C); II, A, 6, c, (II), (E).

Authority of agent or attorney to receive mortgage debt see MORTGAGES, 27 Cyc. 1388 *et seq.*

Collection by bank see BANKS AND BANKING, 5 Cyc. 493 *et seq.*

Right of attorney to collect see ATTORNEY AND CLIENT, 4 Cyc. 947 *et seq.*

25. *Alabama.*— Hill *v.* Helton, 80 Ala. 528, 1 So. 340.

Illinois.— Reynolds *v.* Ferree, 86 Ill. 570.

Massachusetts.— Robbins *v.* Horgan, 192 Mass. 443, 78 N. E. 503.

Michigan.—Hirshfield *v.* Waldron, 54 Mich. 649, 20 N. W. 628; Kornemann *v.* Monaghan, 24 Mich. 36.

Missouri.— Miller *v.* Wilson, 126 Mo. 48, 28 S. W. 640.

New York.— Sage *v.* Shepard, etc., Lumber Co., 4 N. Y. App. Div. 290, 39 N. Y. Suppl. 449 [*affirmed* in 158 N. Y. 672, 52 N. E. 1126]; Schneider *v.* Hill, 19 Misc. 56, 42 N. Y. Suppl. 879.

United States.— Fresh *v.* Gilson, 16 Pet. 327, 10 L. ed. 982, holding that where plaintiff, having obtained a contract under defendants for the construction for them of a culvert, made an agreement with an agent for the building of the culvert, defendants were not justified in making payment to the agent, there being no presumption that the agent was authorized to receive payments in the absence of any evidence to that effect.

Thus mere authority to collect certain debts does not justify an inference of general authority to collect, nor of authority in a particular case to collect other money due the principal (Shackleford *v.* M. C. Kiser Co., 131 Ala. 224, 31 So. 77; Butman *v.* Bacon, 8 Allen (Mass.) 25; Greenwood *v.* Commercial Bank, 14 Grant Ch. (U. C.) 40), especially if the collections in question have no connection with the business about which the agent was employed (Gray *v.* Pearson, L. R. 5 C. P. 568, 23 L. T. Rep. N. S. 416. See also Bowen *v.* Rutland School Dist. No. 9, 36 Mich. 149, holding that mere proof that one person is clerk for another does not establish his right to receive for his employer payment of demands not shown to have any connection with the business). Authority to foreclose a chattel mortgage, or to sue, conveys no authority to collect the money due (Kilgour *v.* Ratcliff, 2 Mart. N. S. (La.) 292; Bacon

their business relationship to each other.[26] Payment to an agent clothed by the principal with the *indicia* of ownership of goods or of authority to make collections is a good payment,[27] although the agent's false or erroneous representation of

v. Hooker, 173 Mass. 554, 54 N. E. 253), although authority to make settlement of a claim includes power not only to agree upon the amount to be received, but also to collect and receipt for the same (Superior Mfg. Co. *v.* Russell, 127 Ga. 151, 56 S. E. 296; New York, etc., R. Co. *v.* Bates, 68 Md. 184, 11 Atl. 705). Authority to rent does not include authority to the agent to collect the rent. McGowan *v.* Treacy, 84 N. Y. Suppl. 497; Heflin *v.* Campbell, 5 Tex. Civ. App. 106, 23 S. W. 595. Mere agency to ship the goods of the principal carries with it no implied power to receive payment for them, even though the agent has possession of the goods, and of a bill of lading for their shipment. Hill *v.* Helton, 80 Ala. 528, 1 So. 340. Authority to an agent to receive interest upon a note does not authorize such agent to collect the principal (Garrels *v.* Morton, 26 Ill. App. 433; Klindt *v.* Higgins, 95 Iowa 529, 64 N. W. 414; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311; Bronson *v.* Ashlock, 2 Kan. App. 255, 41 Pac. 1068; Bacon *v.* Pomeroy, 118 Mich. 145, 76 N. W. 324; Hefferman *v.* Boteler, 87 Mo. App. 316; Frey *v.* Curtis, 52 Nebr. 406, 72 N. W. 478; Brewster *v.* Carnes, 103 N. Y. 556, 9 N. E. 323; Doubleday *v.* Kress, 50 N. Y. 410, 10 Am. Rep. 502; Cunningham *v.* McDonald, 98 Tex. 316, 83 S. W. 372 [*reversing* (Civ. App. 1904) 80 S. W. 871, 81 S. W. 52]; Higley *v.* Dennis, 40 Tex. Civ. App. 133, 88 S. W. 400; Wolstenholm *v.* Davies, 2 Freem. 289, 22 Eng. Reprint 1217; Roberts *v.* Matthews, 1 Vern. Ch. 150, 23 Eng. Reprint 379. *Compare* Wilcox *v.* Carr, 37 Fed. 130), particularly when the paper is not yet due (Barstow *v.* Stone, 10 Colo. App. 396, 52 Pac. 48; Walsh *v.* Peterson, 59 Nebr. 645, 81 N. W. 853; Mynick *v.* Bickings, 30 Pa. Super. Ct. 401; Cunningham *v.* McDonald, 98 Tex. 316, 83 S. W. 372 [*reversing* (Civ. App. 1904) 80 S. W. 871, 81 S. W. 52]), or where the owner of the securities does not intrust to his agent possession of the papers, but merely sends upon each interest payment a receipt therefor (Williams *v.* Pelley, 96 Ill. App. 346; Madison *v.* Cabalek, 86 Ill. App. 450; Garrels *v.* Morton, 26 Ill. App. 433 (holding that while the authority of an agent who has made a loan to receive payment may be inferred from the retention of the securities by the agent, neither the collection of other securities for the principal, nor the collection of interest on the particular debt, is sufficient to raise an implied authority in the agent to receive payment of the loan); Trowbridge *v.* Ross, 105 Mich. 598, 63 N. W. 534; Joy *v.* Vance, 104 Mich. 97, 62 N. W. 140 (holding that where a mortgagee, retaining in his own possession the mortgage papers, from time to time, as interest becomes due, forwards the coupon interest notes to a third person for collection, it does not authorize the payment by the mortgagor of future instalments of interest and the principal sum to such person as agent of the mortgagee, he not having the note or mortgage in his possession); City Missionary Soc. *v.* Reams, 51 Nebr. 225, 70 N. W. 972; Richards *v.* Waller, 49 Nebr. 639, 68 N. W. 1053; Dewey *v.* Bradford, 2 Nebr. (Unoff.) 388, 89 N. W. 249; Brewster *v.* Carnes, 103 N. Y. 556, 9 N. E. 323; Hitchcock *v.* Kelley, 18 Ohio Cir. Ct. 808, 4 Ohio Cir. Dec. 180.

Authority to negotiate a loan raises no presumption of authority to collect it. Werth *v.* Ollis, 70 Mo. App. 318.

Payer must know authority.— Where a person makes a payment to a third person on an account due another, he is bound to know that the person to whom he pays is authorized to receive it. Dutcher *v.* Beckwith, 45 Ill. 460, 92 Am. Dec. 232.

A general authority may be broad enough to imply power to collect in a particular case. But the power is a dangerous one, and should never be recognized except in clear cases. The fact that the principal is inaccessible, and has left the agent to act for him under broad powers, is significant. Carr *v.* Eastabrook, 2 Cox Ch. 390, 30 Eng. Reprint 180; De la Viesca *v.* Lubbock, 10 Sim. 629, 16 Eng. Ch. 629, 59 Eng. Reprint 760.

26. Carthage First Nat. Bank *v.* Mutual Ben. L. Ins. Co., 145 Mo. 127, 46 S. W. 615; Miller *v.* Wilson, 126 Mo. 48, 28 S. W. 640; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; Buffalo Bayou, etc., R. Co. *v.* U. S., 16 Ct. Cl. 238; Gardiner *v.* Davis, 2 C. & P. 49, 12 E. C. L. 444; *Ex p.* Winnall, 3 Deac. & C. 22; Barrett *v.* Deere, M. & M. 200, 22 E. C. L. 507 (holding that payment to one found in a counting house ostensibly looking after the business was good, although such person was not employed by the merchant at all); Pritchard *v.* Draper, 1 Russ. & M. 191, 5 Eng. Ch. 191, 39 Eng. Reprint 74, 1 Taml. 332, 12 Eng. Ch. 332, 48 Eng. Reprint 132.

A clerk in a country store, in the absence of his employer, has power to receive pay on the demands left in his care. Davis *v.* Waterman, 10 Vt. 526, 33 Am. Dec. 216.

27. *Illinois.*— Padfield *v.* Green, 85 Ill. 529.

Michigan.— Wilson *v.* La Tour, 108 Mich. 547, 66 N. W. 474; Warren *v.* Halley, 107 Mich. 120, 64 N. W. 1058.

Minnesota.— Lough *v.* Thornton, 17 Minn. 253.

Nebraska.— Faulkner *v.* Simms, 63 Nebr. 295, 89 N. W. 171, 94 N. W. 113; Harrison Nat. Bank *v.* Austin, 65 Nebr. 632, 91 N. W. 540, 101 Am. St. Rep. 639, 59 L. R. A. 294; Cheshire Provident Inst. *v.* Feusner, 63 Nebr. 682, 88 N. W. 849; Lebanon Sav. Bank *v.* Blanke, 2 Nebr. (Unoff.) 403, 89 N. W. 169; Harrison Nat. Bank *v.* Williams, 2 Nebr. (Unoff.) 400, 89 N. W. 245.

New York.— Gross *v.* Owen, 86 N. Y. Suppl. 266.

Tennessee.— King *v.* Fleece, 7 Heisk. 273,

authority cannot of course avail the third person against the principal. The principal must be responsible for the holding out.[28] A third person will be discharged from his debt upon payment to an authorized agent, regardless of what subsequently becomes of the sum paid.[29]

(II) *When Implied From Possession of Notes or Securities.* Where an agent has negotiated the loan or sale for which notes or securities were given, or has been allowed by the principal to receive payments thereon, and the principal has placed the notes or securities in his possession, then in the absence of notice of the agent's want of authority third persons are warranted in inferring that the agent is authorized to collect both interest and principal when they fall due;[30] and on the other hand it is a general rule that an agent with authority to make loans,

holding that payment of a note to an agent to whom it was indorsed for collection is a good payment.

Texas.— Texas Land, etc., Co. *v.* Watson, (Civ. App. 1896) 35 S. W. 827.

28. Kaye *v.* Brett, 5 Exch. 269, 19 L. J. Exch. 346.

29. *Georgia.*— Superior Mfg. Co. *v.* Russell, 127 Ga. 151, 56 S. E. 296.

Indiana.— Indiana Trust Co. *v.* International Bldg., etc., Assoc., 36 Ind. App. 685, 74 N. E. 633.

Iowa.— Griffin *v.* Erskine, 131 Iowa 444, 109 N. W. 13.

Kansas.— Thomas *v.* Arthurs, 8 Kan. App. 126, 54 Pac. 694.

New York.—Thomas Roberts Stevenson Co. *v.* Fox, 19 Misc. 177, 43 N. Y. Suppl. 253.

Pennsylvania.— Kramer *v.* Lehigh Valley Coal Co., 10 Kulp 548.

Canada.—Ætna L. Ins. Co. *v.* Green, 38 U. C. Q. B. 459.

30. *Illinois.*— Meyer *v.* Hehner, 96 Ill. 400; Smith *v.* Landecki, 101 Ill. App. 248; Garrels *v.* Morton, 26 Ill. App. 433.

Indiana.— Hackleman *v.* Moat, 4 Blackf. 164, holding that the possession of a bond by a third person is a strong circumstance to show his authority to collect the amount of it.

Louisiana.— Baker *v.* Elstner, 24 La. Ann. 464; Kenner *v.* His Creditors, 8 Mart. N. S. 54.

Massachusetts.— Doyle *v.* Corey, 170 Mass. 337, 49 N. E. 651.

Michigan.— Donaldson *v.* Wilson, 79 Mich. 181, 44 N. W. 429.

Minnesota.— Dwight *v.* Lenz, 75 Minn. 78, 77 N. W. 546.

Missouri.— Whelan *v.* Reilly, 61 Mo. 565, 578; Dawson *v.* Wombles, 111 Mo. App. 532, 86 S. W. 271.

New Jersey.— Lawson *v.* Carson, 50 N. J. Eq. 370, 25 Atl. 191; Dugan *v.* Lyman, (Ch. 1892) 23 Atl. 657; Haines *v.* Pohlmann, 25 N. J. Eq. 179.

New York.— Central Trust Co. *v.* Folsom, 167 N. Y. 285, 60 N. E. 599 [*reversing* 38 N. Y. App. Div. 295, 57 N. Y. Suppl. 504]; Crane *v.* Gruenewald, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643; O'Loughlin *v.* Billy, 95 N. Y. App. Div. 99, 88 N. Y. Suppl. 567; Schermerhorn *v.* Farley, 58 Hun 66, 11 N. Y. Suppl. 466; Williams *v.* Walker, 2 Sandf. Ch. 325.

Oregon.— McLeod *v.* Despain, 49 Oreg. 536, 90 Pac. 492, 92 Pac. 1088.

United States.— Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207.

England.— Wolstenholm *v.* Davies, 2 Freem. 289, 22 Eng. Reprint 1217; Cleveland *v.* Dashwood, 2 Freem. 249, 22 Eng. Reprint 1189; Penn *v.* Browne, 2 Freem. 214, 22 Eng. Reprint 1168; Martyn *v.* Kingsley, Prec. Ch. 209, 24 Eng. Reprint 102; Whitlock *v.* Waltham, 1 Salk. 157, 91 Eng. Reprint 146; Anonymous, 16 Vin. Abr. 272, payment.

See 40 Cent. Dig. tit. "Principal and Agent," § 300.

Possession not conclusive of authority.— Mere possession by an agent of securities evidencing a debt, although a fact to be considered, does not of itself prove the authority of such agent to collect the debt, particularly if the agent did not negotiate the loan for which the securities were given. Michigan Church Assoc. *v.* Walton, 114 Mich. 677, 72 N. W. 998; Terry *v.* Durand Land Co., 112 Mich. 665, 71 N. W. 525; Doubleday *v.* Kress, 50 N. Y. 410, 10 Am. Rep. 502 [*reversing* 60 Barb. 181] (note not indorsed by payee to whose order it was payable); Union Cent. L. Ins. Co. *v.* Jones, 35 Ohio St. 351; Antioch College *v.* Carroll, 11 Ohio Dec. (Reprint) 220, 25 Cinc. L. Bul. 289.

Authority limited to receiving payment.— It is not to be presumed from the fact that the notes are in the possession of the agent that he has authority to act for the principal in other matters. Nor with reference to the notes themselves except according to the terms of the contract. Padfield *v.* Green, 85 Ill. 529 (holding that possession of notes for collection gives no authority to commute the debt for another thing, or to release it upon composition, or to pledge it, or to sue for his own use); Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575; Streeter *v.* Poor, 4 Kan. 412 (holding that an agent had no authority to employ a third person for the principal); Dexter *v.* Morrow, 76 Minn. 413, 79 N. W. 394 (holding that the receipt by the loan agent of the coupon interest notes for collection, where sent by the payee of the note secured by mortgage, does not of itself give the agent implied authority to foreclose the mortgage); Dugan *v.* Lyman, (N. J. Ch. 1892) 23 Atl. 657 (holding that the agent had no authority to release mortgaged premises so that they could be sold).

The holder of a note constitutes an indorser his agent with authority to collect the note by sending it to such indorser in order that

or to contract for his principal and to take notes or securities in settlement, will not be presumed to have authority to make collections on such notes or securities if they are not left in his possession by the principal.[31] The third person assumes

he may take steps against the maker to secure both himself and the holder. Deweese *v.* Muff, 57 Nebr. 17, 77 N. W. 361, 73 Am. St. Rep. 488, 42 L. R. A. 789; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; Merchant's, etc., Nat. Bank *v.* Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312.

31. *Arkansas.*— Little Rock, etc., R. Co. *v.* Wiggins, 65 Ark. 385, 46 S. W. 731; Bagnell *v.* Walker, 65 Ark. 325, 46 S. W. 126, 53 S. W. 570.

Colorado.— Lester *v.* Snyder, 12 Colo. App. 351, 55 Pac. 613; Barstow *v.* Stone, 10 Colo. App. 396, 52 Pac. 48.

Illinois.— Ortmeier *v.* Ivory, 208 Ill. 577, 70 N. E. 665 [*affirming* 109 Ill. App. 361]; Fortune *v.* Stockton, 182 Ill. 454, 55 N. E. 367 [*affirming* 82 Ill. App. 272]; Thompson *v.* Elliott, 73 Ill. 221; Cooley *v.* Willard, 34 Ill. 68, 85 Am. Dec. 296 (holding that authority to loan money and take securities for its payment implies no authority to collect); Madison *v.* Cabalek, 86 Ill. App. 450.

Iowa.— Artley *v.* Morrison, 73 Iowa 132, 34 N. W. 779; Austin *v.* Thorp, 30 Iowa 376, holding that the power to collect money is not included in the power to loan; nor can it, in the absence of proof of ratification or the like, be inferred therefrom; nor would the case be varied by the fact that the agent took as security for the loan he was authorized to make a deed of trust in which he was constituted the trustee.

Michigan.— Trowbridge *v.* Ross, 105 Mich. 598, 63 N. W. 534; Joy *v.* Vance, 104 Mich. 97, 62 N. W. 140.

Minnesota.— White *v.* Madigan, 78 Minn. 286, 80 N. W. 1125; Schenk *v.* Dexter, 77 Minn. 15, 79 N. W. 526; Thomas *v.* Swanke, 75 Minn. 326, 77 N. W. 981; Budd *v.* Broen, 75 Minn. 316, 77 N. W. 979; Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800; Burchard *v.* Hull, 71 Minn. 430, 74 N. W. 163; Trull *v.* Hammond, 71 Minn. 172, 73 N. W. 642.

Missouri.— Padley *v.* Neill, 134 Mo. 364, 35 S. W. 997; Hefferman *v.* Boteler, 87 Mo. App. 316.

Nebraska.— Campbell *v.* O'Connor, 55 Nebr. 638, 76 N. W. 167; Porter *v.* Ourada, 51 Nebr. 510, 71 N. W. 52; City Missionary Soc. *v.* Reams, 51 Nebr. 225, 70 N. W. 972; Phœnix Ins. Co. *v.* Walter, 51 Nebr. 182, 70 N. W. 938; Richards *v.* Waller, 49 Nebr. 639, 68 N. W. 1053; Bull *v.* Mitchell, 47 Nebr. 647, 66 N. W. 632; Osborne *v.* Kline, 18 Nebr. 344, 25 N. W. 360.

New York.— Brewster *v.* Carnes, 103 N. Y. 556, 9 N. E. 323; Frank *v.* Tuozzo, 26 N. Y. App. Div. 447, 50 N. Y. Suppl. 71; Hatfield *v.* Reynolds, 34 Barb. 612; Williams *v.* Walker, 2 Sandf. Ch. 325.

Ohio.— Antioch College *v.* Carroll, 11 Ohio Dec. (Reprint) 220, 25 Cinc. L. Bul. 289.

Texas.— Evans-Snider-Buel Co. *v.* Holder, 16 Tex. Civ. App. 300, 41 S. W. 404.

Washington.— Western Security Co. *v.* Douglass, 14 Wash. 215, 44 Pac. 257.

Wisconsin.—Bautz *v.* Adams, 131 Wis. 152, 111 N. W. 69; Kohl *v.* Beach, 107 Wis. 409, 83 N. W. 657, 81 Am. St. Rep. 849, 50 L. R. A. 600; Winkelmann *v.* Brickert, 102 Wis. 50, 78 N. W. 164.

England.— Henn *v.* Conisby, 1 Ch. Cas. 93, 22 Eng. Reprint 710; Wolstenholm *v.* Davies, 2 Freem. 289, 22 Eng. Reprint 1217; Curtis *v.* Drought, 1 Molloy 487; Whitlock *v.* Waltham, 1 Salk. 157, 91 Eng. Reprint 146; Roberts *v.* Matthews, 1 Vern. Ch. 150, 23 Eng. Reprint 379.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 299, 300. And see *infra*, IV, E, I.

Sending interest coupons for collection.— Even though the principal sends to the agent for collection the interest coupons each time as they fall due he cannot collect the principal. Barstow *v.* Stone, 10 Colo. App. 396, 52 Pac. 48; Wilson *v.* Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; White *v.* Madigan, 78 Minn. 286, 80 N. W. 1125; Trull *v.* Hammond, 71 Minn. 172, 73 N. W. 642; Chandler *v.* Pyott, 53 Nebr. 786, 74 N. W. 263.

Even though the principal may have been accustomed to permit the agent to make collections the rule applies for the non-possession of the securities raises an implication of a termination of the power, and rebuts the presumption of authority. Walton Guano Co. *v.* McCall, 111 Ga. 114, 36 S. E. 469; Howard *v.* Rice, 54 Ga. 52; Guilford *v.* State, 53 Ga. 618; Bloomer *v.* Dau, 122 Mich. 522, 81 N. W. 331; Van Deusen *v.* Ingraham, 110 Mich. 38, 67 N. W. 914; Dwight *v.* Lenz, 75 Minn. 78, 77 N. W. 546; Thompson *v.* Kyner, 53 Nebr. 625, 74 N. W. 52; Frey *v.* Curtiss, 52 Nebr. 406, 72 N. W. 478; Bull *v.* Mitchell, 47 Nebr. 646, 66 N. W. 632; Omaha First Nat. Bank *v.* Chilson, 45 Nebr. 257, 63 N. W. 362; South Branch Lumber Co. *v.* Littlejohn, 31 Nebr. 606, 48 N. W. 476; Evans-Snider-Buel Co. *v.* Holder, 16 Tex. Civ. App. 300, 41 S. W. 404; Wolstenholm *v.* Davies, 2 Freem. 289, 22 Eng. Reprint 1217; Roberts *v.* Matthews, 1 Vern. Ch. 150.

Acceptance of payment by principal.— The fact that the principal has not left such securities with the agent does not show necessarily that the agent has not authority to make collections, especially when the principal without dissent accepts payment from the third person through the agent who negotiated a loan. Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138 (holding that the fact that a supposed agent of the payee of a note was not in possession of it at the time the maker made payments to him on its account is not conclusive as to his lack of authority to receive the payments, even though, as the maker knew, the note had been transferred to a bank for collection); Union Trust Co. *v.* McKeon, 76 Conn. 508, 57 Atl.

the burden of knowing at his peril that the agent possesses the notes or securities at the time each payment is made, and if as a matter of fact he has parted with such possession, payment to him will not discharge the debtor of liability to the principal unless the money actually reaches the latter.[32] It is not necessary, however, that the third person should demand that he be shown the papers. He will be as fully protected if as a matter of fact they are in the agent's possession, although of course if the debtor does not see them he assumes the risk that the agent may be deceiving him.[33] These rules of course have no application to cases in which the agent has actual or ostensible authority to receive payment for the principal without having possession of the securities. In other words, to give an agent authority to receive payments on a note it is not always essential to leave the note in the agent's possession.[34] And where a principal by his habits and course of dealing has held an agent out as having general authority to make loans for him, and to receive payments on the same, he may be bound by payments to the agent, although the securities are not in the possession of the latter, and although payments are accepted before maturity,[35] or are made to one who has had actual authority

109; Fitzgerald *v.* Beckwith, 182 Mass. 177, 65 N. E. 36; Doyle *v.* Corey, 170 Mass. 337, 49 N. E. 651; Phœnix Ins. Co. *v.* Walter, 51 Nebr. 182, 70 N. W. 938; Thomson *v.* Shelton, 49 Nebr. 644, 68 N. W. 1055.

32. *Georgia.*— Paris *v.* Moe, 60 Ga. 90; Howard *v.* Rice, 54 Ga. 52.

Illinois.— Ortmeier *v.* Ivory, 208 Ill. 577, 70 N. E. 665 [*affirming* 109 Ill. App. 361]; Stiger *v.* Bent, 111 Ill. 328; Madison *v.* Cabolek, 86 Ill. App. 450; Stockton *v.* Fortune, 82 Ill. App. 272; Garrels *v.* Morton, 26 Ill. App. 433.

Iowa.— Wolford *v.* Young, 105 Iowa 512, 75 N. W. 349. See also U. S. Bank *v.* Benson, 90 Iowa 191, 57 N. W. 705; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311; Draper *v.* Rice, 56 Iowa 114, 7 N. W. 524, 8 N. W. 797, 41 Am. St. Rep. 88; Fisher *v.* Schiller Lodge, 50 Iowa 459; Tappan *v.* Morseman, 18 Iowa 499.

Michigan.— Trowbridge *v.* Ross, 105 Mich. 598, 63 N. W. 534; Bromley *v.* Lathrop, 105 Mich. 492, 63 N. W. 516; Joy *v.* Vance, 104 Mich. 97, 62 N. W. 140.

New Jersey.— Haines *v.* Pohlmann, 25 N. J. Eq. 179.

New York.—Crane *v.* Gruenewald, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643; Brewster *v.* Carnes, 103 N. Y. 556, 9 N. E. 323; Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Frank *v.* Tuozzo, 26 N. Y. App. Div. 447, 50 N. Y. Suppl. 71 (where the agent deceived the mortgagor by taking a bundle of papers from his safe when payments were made); Williams *v.* Walker, 2 Sandf. Ch. 325.

North Dakota.— Stolzman *v.* Wyman, 8 N. D. 108, 77 N. W. 285; Hollinshead *v.* Stuart, 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659.

Ohio.— Antioch College *v.* Carroll, 11 Ohio Dec. (Reprint) 220, 25 Cinc. L. Bul. 289.

Virginia.— Wooding *v.* Bradley, 76 Va. 614.

Washington.— Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567; Western Security Co. *v.* Douglass, 14 Wash. 215, 44 Pac. 257.

Wisconsin.—Bartel *v.* Brown, 104 Wis. 493, 80 N. W. 801.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 299, 300.

33. Crane *v.* Gruenewald, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643, in which it appeared that upon making payments the debtor had sometimes seen the securities, at others had been assured by the agent that they were in the latter's possession when such was the fact, but finally had made payments when the agent no longer possessed them, and the court held that the attorney must possess the papers with the consent of the mortgagee, and the mortgagor must have knowledge of this fact.

34. *Iowa.*— Harrison *v.* Legore, 109 Iowa 618, 80 N. W. 670.

Minnesota.— Springfield Sav. Bank *v.* Kjaer, 82 Minn. 180, 84 N. W. 752; Randall *v.* Eichborn, 80 Minn. 344, 83 N. W. 154; Hare *v.* Bailey, 73 Minn. 409, 76 N. W. 213; Congregational Ministers' Gen. Convention *v.* Torkelson, 73 Minn. 401, 76 N. W. 215.

Nebraska.— Harrison Nat. Bank *v.* Austin, 65 Nebr. 632, 91 N. W. 540, 101 Am. St. Rep. 639, 59 L. R. A. 294.

New Jersey.— Haines *v.* Pohlmann, 25 N. J. Eq. 179, holding that where at the time of the execution of a mortgage, the mortgagee told the mortgagors to pay the principal and interest to their attorney, they are afterward estopped to deny the authority of the attorney to receive payment, where the authority was never revoked, although the attorney at the time of the payment did not have the securities in his possession.

New York.— Chamberlain *v.* Hamilton, 8 N. Y. St. 305.

South Dakota.— Reid *v.* Kellogg, 8 S. D. 596, 67 N. W. 687.

Texas.— Hill *v.* Bess, (Civ. App. 1897) 40 S. W. 202.

35. *Illinois.*— Thornton *v.* Lawther, 169 Ill. 228, 48 N. E. 412 [*reversing* 67 Ill. App. 214]; Noble *v.* Nugent, 89 Ill. 522; Thompson *v.* Elliott, 73 Ill. 221; Peterson *v.* Fullerton, 106 Ill. App. 237; McIntosh *v.* Ransom, 106 Ill. App. 172.

Iowa.— Harrison *v.* Legore, 109 Iowa 618, 80 N. W. 670; Dilenbeck *v.* Rehse, 105 Iowa 749, 73 N. W. 1072; Sessions *v.* Kent, 75

which has been revoked, but without notice to the third person.[36] If the debtor knows that the agent has no authority to collect, then his payment to the agent is not validated by the fact that the securities were in the agent's hands.[37] The fact that notes are made payable at the office of the agent negotiating the loan is not conclusive of his authority to receive payments on the notes; nor is the added fact that the notes are in his possession, if it appears that they are known not to have been left there for collection.[38] Payment to one who has had such authority to collect is no payment to the principal after he has properly terminated the agency.[39]

(III) *EXTENT OF AUTHORITY* — (A) *In General.* Where an agent is employed by another to make collections, such agent is presumed to be clothed with such powers as are usual and necessary to insure success in collecting.[40] The

Iowa 601, 39 N. W. 914; Sax *v.* Drake, 69 Iowa 760, 28 N. W. 423.

Kansas.— Meserve *v.* Hansford, (1898) 53 Pac. 835; Shane *v.* Palmer, 43 Kan. 481, 23 Pac. 594.

Massachusetts.— Doyle *v.* Corey, 170 Mass. 337, 49 N. E. 651.

Michigan.— People *v.* Gould, 118 Mich. 75, 76 N. W. 117; Bissell *v.* Dowling, 117 Mich. 646, 76 N. W. 100; Ziegan *v.* Strieker, 110 Mich. 282, 68 N. W. 122. See also Wilson *v.* La Tour, 108 Mich. 547, 66 N. W. 474.

Minnesota.—Springfield Sav. Bank *v.* Kjaer, 82 Minn. 180, 84 N. W. 752; Randall *v.* Eichhorn, 80 Minn. 344, 83 N. W. 154; Dexter *v.* Berge, 76 Minn. 216, 78 N. W. 1111; Hare *v.* Bailey, 73 Minn. 409, 76 N. W. 213; Congregational Ministers' Gen. Convention *v.* Torkelson, 73 Minn. 401, 76 N. W. 215.

Missouri.— Carthage First Nat. Bank *v.* Mutual Ben. L. Ins. Co., 145 Mo. 127, 46 S. W. 615; May *v.* Jarvis-Conklin Mortg. Trust Co., 138 Mo. 275, 39 S. W. 782; Mumford *v.* Knox, 50 Mo. App. 356.

Nebraska.— Poehin *v.* Knoebel, 63 Nebr. 768, 89 N. W. 264; Harrison Nat. Bank *v.* Williams, (1902) 89 N. W. 245; Cheshire Provident Inst. *v.* Feusner, 63 Nebr. 682, 88 N. W. 849; Brown *v.* Eno, 48 Nebr. 538, 67 N. W. 434.

New York.— McConnell *v.* Maekin, 22 N. Y. App. Div. 537, 48 N. Y. Suppl. 18.

United States.— Kent *v.* Congdon, 33 Fed. 228 (holding that where the entire negotiation and collection of mortgage loans is intrusted to an agent, the mortgagors having no intercourse with his principal, payment on demand to the agent discharges the mortgage, although the bond was by its terms payable elsewhere, and at the time of payment the agent had not in his possession the bond and mortgage); Security Co. *v.* Christy, 33 Fed. 22; Security Co. *v.* Richardson, 33 Fed. 16.

Representations by the agent as to his authority will be of no force against the principal in the absence of acts of holding out by the principal himself. Bacon *v.* Pomroy, 118 Mich. 145, 76 N. W. 324.

36. Ulrich *v.* McCormick, 66 Ind. 243; Edinburgh-American Land Mortg. Co. *v.* Noonan, 11 S. D. 141, 76 N. W. 298.

37. Willis *v.* Gorrell, 102 Va. 746, 47 S. E. 826.

38. *Illinois.*— Wood *v.* Merchant's Sav. L. & T. Co., 41 Ill. 267, holding that making a note payable at a particular place is a mere designation of the place where the money is to be paid, and gives no authority to pay the person or bank at that place as agent of the payee of the note.

Indiana.— Glatt *v.* Fortman, 120 Ind. 384, 22 N. E. 300.

Iowa.— Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351; Klindt *v.* Higgins, 95 Iowa 529, 64 N. W. 414. *Compare* Wolford *v.* Young, 105 Iowa 512, 75 N. W. 349.

Kentucky.—Caldwell *v.* Evans, 5 Bush 330, 96 Am. Dec. 358.

Michigan.— Trowbridge *v.* Ross, 105 Mich. 598, 63 N. W. 534; Pease *v.* Warren, 29 Mich. 9, 18 Am. Rep. 58.

Minnesota.— St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

Missouri.— Hefferman *v.* Boteler, 87 Mo. App. 316.

Nebraska.— Bradbury *v.* Kinney, 63 Nebr. 754, 89 N. W. 257; Omaha First Nat. Bank *v.* Chilson, 45 Nebr. 257, 63 N. W. 362.

New Jersey.— Adams *v.* Haekensack Imp. Commission, 44 N. J. L. 638, 43 Am. Rep. 406.

New York.— Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568; Caldwell *v.* Cassidy, 8 Cow. 271.

Pennsylvania.— Williamsport Gas Co. *v.* Finkerton, 95 Pa. St. 62.

Wisconsin.— Bartel *v.* Brown, 104 Wis. 493, 80 N. W. 801.

United States.— Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818; Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207.

39. Converse *v.* Dillaye, 62 N. Y. 621.

40. German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113; Ryan *v.* Tudor, 31 Kan. 366, 2 Pac. 797; Warren *v.* Dennett, 17 Misc. (N. Y.) 86, 39 N. Y. Suppl. 830; Edinburgh American Land Mortg. Co. *v.* Briggs, (Tex. Civ. App. 1897) 41 S. W. 1036, in which an agent of a non-resident loan company negotiated a loan and was named trustee in the deed given to secure the loan; and he continued to be the company's agent for the transaction of all its business where the loan was made and was collecting its money and loaning its funds; and it was held that he had authority, even as against the company,

authority of an agent employed to make collections, however, carries no implied

to declare money secured by said trust deed to be due, and to sell the lands under such deed, and to make deeds to the purchaser, and to receive the money paid by him.

Illustrations.— To bring suit to compel payment is one of the necessary powers of a collecting agent, to be sparingly exercised as a final resort. German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113 (holding that authority to bring necessary suits to collect insurance in case of loss by fire is indispensably incident to the power of a general agent in charge of his principal's business, and essential to an efficient discharge of his duties); Briggs *v.* Yetzer, 103 Iowa 342, 72 N. W. 647; Ryan *v.* Tudor, 31 Kan. 366, 2 Pac. 797; Davis *v.* Waterman, 10 Vt. 526, 33 Am. Dec. 216. *Compare* Soule *v.* Dougherty, 24 Vt. 92. In aid of this power an agent may issue execution upon a judgment obtained (Schock *v.* Lesley, 2 Del. Ch. 304; Joyce *v.* Duplessis, 15 La. Ann. 242, 77 Am. Dec. 185), and pursue the property due the principal on the debt into the hands of third persons who may have acquired it from the debtor (Beck *v.* Minnesota, etc., Grain Co., 131 Iowa 62, 107 N. W. 1032; Sherman *v.* Sherman, etc., Co., 64 N. J. Eq. 77, 53 Atl. 226). He may also agree with the execution debtor to reconvey the property to him upon payment of the judgment debt. Brown *v.* Jackson, (Tex. Civ. App. 1897) 40 S. W. 162. An agent who, under his contract, is constituted a general collection agent, and who, in the performance of his duties, agrees to place with a bank for collection, notes received by him for his principal, as consideration of the sale by him to a third person of machinery belonging to his principal, has the power to bind his principal by a contract with the bank, authorizing it to make advancements for freight on the machinery sold, and to retain the amount so advanced from the first moneys collected on such notes and contracts. Northwest Thresher Co. *v.* Eddyville State Bank, (Nebr. 1907) 114 N. W. 291.

Limitations upon authority.—An agent to collect has no implied authority to assign the debt to a third person to collect (Rigby *v.* Lowe, 125 Cal. 613, 58 Pac. 153; Dingley *v.* McDonald, 124 Cal. 682, 57 Pac. 574), nor does a bare power to collect authorize the agent to foreclose a mortgage securing the debt (White *v.* Madigan, 78 Minn. 286, 80 N. W. 1125; Burchard *v.* Hull, 71 Minn. 430, 74 N. W. 163; Corey *v.* Hunter, 10 N. D. 5, 84 N. W. 570, holding that evidence that an agent had been in the habit of loaning funds of his principal and collecting interest thereon as it became due, and on instructions from his principal reinvesting the same does not warrant a finding that such agent had ostensible authority to foreclose a mortgage running to his principal. *Compare* Standard Brewery *v.* Nudelman, 70 Ill. App. 356; Curtis *v.* Cutler, 76 Fed. 16, 22 C. C. A. 16, 37 L. R. A. 737, both holding that if the debt is secured by mortgage, unrestricted power to collect authorizes the agent in case of need to bring proceedings to foreclose the mortgage upon default in payment at maturity), or to collect the debt before it is due (Little Rock, etc., R. Co. *v.* Wiggins, 65 Ark. 385, 46 S. W. 731; Thompson *v.* Elliott, 73 Ill. 221; Williams *v.* Pelley, 96 Ill. App. 346; Madison *v.* Cahalek, 86 Ill. App. 450; Park *v.* Cross, 76 Minn. 187, 78 N. W. 1107, 77 Am. St. Rep. 630; City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123; Cotman *v.* Orton, Cr. & Ph. 304, 10 L. J. Ch. 18, 18 Eng. Ch. 304, 41 Eng. Reprint 506 [*quoting* Parnther *v.* Gaitskell, 13 East 432], holding that if the debtor pay the agent before maturity he makes such agent his own to pay over the money to the creditor), nor to receive payments except according to the terms of the contract under which they are due (Indiana Natural Gas, etc., Co. *v.* Beales, (Ind. App. 1905) 74 N. E. 551, holding that the act of the agent of the lessor in receiving a payment after the expiration of the term did not bind the lessor), nor to reloan the money he has collected (Haynes *v.* Carpenter, 86 Mo. App. 30, holding that a power of attorney to attend to the business of the grantor, to collect all money and obligations due, adjust all business matters of whatever nature, pay and settle all debts, draw checks, and do all acts in the premises which the attorney may deem proper, does not confer power to reloan money after it has been collected, and such reloaning constitutes a conversion by the attorney), nor generally to do acts not necessary or proper for the collection (Hathaway *v.* Choury, 14 Colo. App. 478, 60 Pac. 574; Sweedlund *v.* Hutchinson, (Kan. App. 1896) where the agent undertook to release part of the land from the mortgage by which the debt was secured; Russell *v.* Newdigate, 44 S. W. 973, 19 Ky. L. Rep. 1965, holding that an agent to collect moneys is not impliedly authorized to make a warranty in consideration of a payment on a former contract; Heath *v.* New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 N. E. 215, holding that the fact that one is an agent for the purpose of depositing his principal's money in bank does not give him authority to check the deposit out; White *v.* Madigan, 78 Minn. 286, 80 N. W. 1125; Dexter *v.* Morrow, 76 Minn. 413, 79 N. W. 394; Deering *v.* Kelso, 74 Minn. 41, 76 N. W. 792, 73 Am. St. Rep. 324, holding that an agent has no authority to indorse checks received in payment; Burchard *v.* Hull, 71 Minn. 430, 74 N. W. 163, holding that by transmitting to an agent for collection an interest coupon of a note secured by a mortgage no implied authority is given the agent to foreclose the mortgage; Case *v.* Hammond Packing Co., 105 Mo. App. 168, 79 S. W. 732, holding that authority to an agent to sell goods for the principal and collect the price thereof does not give him real or apparent authority to open a bank account for the principal, nor to borrow money for it; Lauer Brewing Co. *v.* Schmidt, 24 Pa. Super. Ct.

power to transfer or sell negotiable paper, or other interest-bearing debts,[41] nor to collect such paper before maturity.[42]

(B) *What Received in Payment.*[43] A bare power to collect can be exercised in no manner short of an actual collection of the money.[44] Further there is in the

396; Hussey *v.* Crass, (Tenn. Ch. App. 1899) 53 S. W. 986.

41. *Illinois.*— Ryhiner *v.* Feickert, 92 Ill. 305, 34 Am. Rep. 130, holding that authority given by one joint payee to the other to collect the note when due does not import power to sell or compound it.

Kansas.— Hannon *v.* Houston, 18 Kan. 561.

Louisiana.— Smith *v.* McMicken, 12 Rob. 653 (holding that an agent authorized to settle a partnership, but not expressly to sell its property, cannot transfer a judgment of the partnership unless the transfer be for its benefit, necessary to its liquidation, and duly notified to the debtor); Texada *v.* Beaman, 6 La. 84, 25 Am. Dec. 204; Hickey *v.* Sharp, 4 La. 335 (both holding that a power to collect a debt and to do all acts necessary to effect the collection does not authorize the agent to transfer the claim to a surety of his principal to protect the transferee from his suretyship). But see Sprigg *v.* Beaman, 6 La. 59.

Mississippi.— Holmes *v.* Carman, Freem. 408.

Missouri.— Smith *v.* Johnson, 71 Mo. 382.

New Jersey.— Stonington Sav. Bank *v.* Davis, 14 N. J. Eq. 286.

Pennsylvania.— Hays *v.* Lynn, 7 Watts 524.

Tennessee.— Wright *v.* Ray, 3 Humphr. 68; Hussey *v.* Crass, (Ch. App. 1899) 53 S. W. 986.

42. *Arkansas.*— Little Rock, etc., R. Co. *v.* Wiggins, 65 Ark. 385, 46 S. W. 731.

Colorado.— Frost *v.* Fisher, 13 Colo. App. 322, 58 Pac. 872 (holding that where a company was agent for the collection of a note which matured in five years with a privilege to the maker to pay after three years if he chose, the receiving of payment by the company after three years was not in excess of its authority); Lester *v.* Snyder, 12 Colo. App. 351, 55 Pac. 613.

Illinois.— Thompson *v.* Elliott, 73 Ill. 221; Smith *v.* Hall, 19 Ill. App. 17.

Minnesota.— Schenk *v.* Dexter, 77 Minn. 15, 79 N. W. 526.

Nebraska.— Stark *v.* Olsen, 44 Nebr. 646, 63 N. W. 37.

New York.— Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157 (holding that general authority to receive payment of a mortgage is not authority to receive it before maturity; and payment to such agent before maturity does not protect the payer if the agent fails to pay over); Schermerhorn *v.* Farley, 58 Hun 66, 11 N. Y. Suppl. 466 (authority to collect interest and principal of mortgage debt).

Pennsylvania.— Heffernan *v.* Addams, 7 Watts 116.

West Virginia.— Mann *v.* Robinson, 19 W. Va. 49, 42 Am. Rep. 771.

England.— McGowan *v.* Dyer, L. R. 8 Q. B. 141, 21 Wkly. Rep. 560; Parnther *v.* Gaitskell, 13 East 432; Breming *v.* Mackie, 3 F. & F. 197.

Payments near the date of maturity, although before the very day, are good, but not payments a year in advance. Dilenbeck *v.* Rehse, 105 Iowa 749, 73 N. W. 1072.

Short time drafts bearing no interest are not within this rule. Bliss *v.* Cutter, 19 Barb. (N. Y.) 9.

Authority to receive interest confers no authority to declare a note due before maturity. Wilcox *v.* Eadie, 65 Kan. 459, 70 Pac. 338.

43. See *supra*, II, A, 6, b, (III), (C); II, A, 6, c, (II), (E).

44. Kirk *v.* Hiatt, 2 Ind. 322; Miller *v.* Edmonston, 8 Blackf. (Ind.) 291; De Mets *v.* Dagron, 53 N. Y. 635; Pearson *v.* Scott, 9 Ch. D. 198, 47 L. J. Ch. 705, 38 L. T. Rep. N. S. 747, 26 Wkly. Rep. 796.

Payment subject to a condition is not a good collection. The payment must be absolute and in money, or the principal is not bound. Scotland Bank *v.* Dominion Bank, [1891] A. C. 592.

Agency to collect a particular claim does not authorize the agent to agree to offset the amount due against a debt due by his principal. John Gund Brewing Co. *v.* Peterson, 130 Iowa 301, 106 N. W. 741; Hill *v.* Van Duzer, 111 Ga. 867, 36 S. E. 966; Bigler *v.* Toy, 68 Iowa 687, 28 N. W. 17; Drain *v.* Doggett, 41 Iowa 682; Paisley *v.* Bannatyne, 4 Manitoba 255.

Principal must be benefited.— All persons are charged with knowledge of the fact that an agent acting under the most general powers is presumed to be employed to act for the benefit of the principal alone. He has therefore no implied power to accept in payment of a debt due his principal supplies for himself, or a satisfaction of his own debt. Such credit to the agent is no payment to the principal. Hill *v.* Helton, 80 Ala. 528, 1 So. 340; Coleman *v.* Siler, 74 Ala. 435; Burks *v.* Hubbard, 69 Ala. 379; Childers *v.* Bowen, 68 Ala. 221; Smith *v.* James, 53 Ark. 135, 13 S. W. 701; Arnett *v.* Glenn, 52 Ark. 253, 12 S. W. 497; Stetson *v.* Briggs, 114 Cal. 511, 46 Pac. 603; Mitchell *v.* Printup, 68 Ga. 675; Bostick *v.* Hardy, 30 Ga. 836; Cooney *v.* U. S. Wringer Co., 101 Ill. App. 468 [*affirmed* in 214 Ill. 520, 73 N. E. 803]; Thompson *v.* Barnum, 49 Iowa 392; St. John, etc., Co. *v.* Cornwell, 52 Kan. 712, 35 Pac. 785 (holding that an agent of a non-resident corporation having general charge of its local business has no implied authority to collect debts due his principal by a contract for his own personal board); Deatherage *v.* Howenstein, 43 Kan. 691, 23 Pac. 1054; Deatherage *v.* Henderson, 43 Kan. 684, 23 Pac. 1052; Farmers', etc., Bank *v.* Bennett, 47 S. W. 623, 20 Ky. L. Rep. 852; Hicky *v.* Sharp, 4 La. 335; Nolan *v.* Rogers, 4 Mart. N. S. (La.) 145; Talboys

agent no implied power to receive in payment anything except money;[45] and unless

r. Boston, 46 Minn. 144, 48 N. W. 688; Holmes *v.* Carman, Freem. (Miss.) 408; Wheeler, etc., Mfg. Co. *r.* Givan, 65 Mo. 89; Greenwood *r.* Burns, 50 Mo. 52; Parker *v.* Leech, 76 Nebr. 135, 107 N. W. 217; Western White Bronze Co. *v.* Portrey, 50 Nebr. 801, 70 N. W. 383; McCormick *r.* Keith, 8 Nebr. 142 (holding that the fact that an agent is specially empowered to compromise and accept personal property in satisfaction of money demands will not authorize him to extinguish a debt due the principal by setting off against it his own debt); Holton *r.* Smith, 7 N. H. 446; Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941; Shailer *v.* Morgan, 16 Daly (N. Y.) 166, 9 N. Y. Suppl. 492; Henry *r.* Marvin, 3 E. D. Smith (N. Y.) 71; L'Artiste Pub. Co. *v.* Walker, 11 Misc. (N. Y.) 426, 32 N. Y. Suppl. 151 (holding that an agent who solicits advertisements has no authority to agree to take out payment therefor in clothes to be furnished to him personally); Martin *r.* Matthews, 16 N. Y. Suppl. 751; Williams *r.* Johnston, 92 N. C. 532, 53 Am. Rep. 428; Murdock *v.* National Tube Works Co., 7 Ohio Dec. (Reprint) 465, 3 Cinc. L. Bul. 409; Lewis *v.* Lewis, 203 Pa. St. 194, 52 Atl. 203; Hays *v.* Lynn, 7 Watts (Pa.) 524; Belton Compress Co. *v.* Belton Brick Mfg. Co., 64 Tex. 337; McAlpin *v.* Cassidy, 17 Tex. 449; Maloney Mercantile Co. *v.* Dublin Quarry Co., (Tex. Civ. App. 1908) 107 S. W. 904; Chattanooga Foundry, etc., Works *v.* Gorman, 12 Tex. Civ. App. 75, 34 S. W. 308; Wood *v.* Hubbard, 50 Vt. 82; Pearson *r.* Scott, 9 Ch. D. 198, 47 L. J. Ch. 705, 38 L. T. Rep. N. S. 747, 26 Wkly. Rep. 796 (in which payment was made partly by check and partly by a set-off on the agent's account, and the latter was held not binding on the principal); Kuckein *v.* Wilson, 4 B. & Ald. 443, 6 E. C. L. 553; Todd *r.* Reid, 4 B. & Ald. 210, 6 E. C. L. 455; Bartlett *v.* Pentland, 10 B. & C. 760, 8 L. J. K. B. O. S. 264, 21 E. C. L. 320; Underwood *v.* Nicholls, 17 C. B. 239, 25 L. J. C. P. 79, 4 Wkly. Rep. 153, 84 E. C. L. 239; Donogh *v.* Gillespie, 21 Ont. App. 292.

An agent authorized to collect to his own use is, however, thereby empowered to receive in payment anything he thinks proper. Clark *r.* Shields, 10 N. C. 461; Barker *v.* Greenwood, 1 Jur. 541, 6 L. J. Exch. 54, 2 Y. & C. Exch. 414.

45. *Illinois.*— Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265 [*affirming* 49 Ill. App. 116]; Loehenmeyer *v.* Fogarty, 112 Ill. 572; Padfield *v.* Green, 85 Ill. 529; Mathews *v.* Hamilton, 23 Ill. 470; Nolan *r.* Jackson, 16 Ill. 272; McCormick Harvesting Mach. Co. *v.* Breen, 61 Ill. App. 528.

Indiana.— Robinson *v.* Anderson, 106 Ind. 152, 6 N. E. 12 (holding that an agent to collect a debt will not be presumed to have the right to take as payment the note of the debtor payable to himself); McCormick *v.* Walter A. Wood Mowing, etc., Mach. Co., 72 Ind. 518; O'Conner *v.* Arnold, 53 Ind. 203; Earnhart *v.* Robertson, 10 Ind. 8 (holding that if the agent accepts anything but money he does so at his risk, and cannot set that up for credit against the principal); Kirk *r.* Hiatt, 2 Ind. 322; Corning *v.* Strong, 1 Ind. 329.

Iowa.— Graydon *v.* Patterson, 13 Iowa 256, 81 Am. Dec. 432.

New York.— Sier *r.* Bache, 7 Misc. 165, 27 N. Y. Suppl. 255.

Texas.— McAlpin *v.* Cassidy, 17 Tex. 449; Robson *r.* Watts, 11 Tex. 764; Western Brass Mfg. Co. *r.* Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728.

Virginia.— Willias *v.* Correll, 102 Va. 746, 47 S. E. 826; Smith *v.* Powell, 98 Va. 431, 36 S. E. 522.

Washington.— Wees *r.* Page, 47 Wash. 213, 91 Pac. 766; Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567.

Canada.— Paisley *r.* Bannatyne, 4 Manitoba 255; Frazer *v.* Gore Dist. Mut. F. Ins. Co., 2 Ont. 416.

See 40 Cent. Dig. tit. "Principal and Agent," § 302.

By statute in some of the states the principal is bound if the agent accepts property, although the agent is liable to the principal for a cash accounting. See the statutes of the different states. And see Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251; McLaughlin *r.* Blount, 61 Ga. 168.

Kind of money.— The payment must be in lawful currency which is convertible into money or coin. Shurer *r.* Green, 3 Coldw. (Tenn.) 419. While the principal may demand legal tender (Gilbert *v.* Garber, 62 Nebr. 464, 87 N. W. 179; Moore *v.* Pollock, 50 Nebr. 900, 70 N. W. 541; Rodgers *v.* Bass, 46 Tex. 505; Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207), yet in the absence of special instructions to the agent it is presumed that the latter has authority to accept currency and bills which are in general circulation at par on business transactions (Baird *v.* Hall, 67 N. C. 230, holding that a collecting agent without instructions to the contrary is authorized to receive in payment of such debts as he may have to collect whatever kind of currency is received by prudent business men for similar purposes (Rodgers *v.* Bass, *supra*, holding that in the absence of special instructions to an agent to collect in gold or silver, a payment to the agent in bank bills, or other currency generally taken and used in the payment of debts, and current in business transactions as money, satisfies the debt). In the absence of express authority, or special circumstances justifying such an inference, it is not to be inferred that an agent has any authority to accept payment in depreciated currency of any kind. Fry *r.* Dudley, 20 La. Ann. 368; Purvis *r.* Jackson, 69 N. C. 474; Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207, holding that where a bond was made payable at the "office of discount and deposit" of a certain bank, the bank could not receive in payment of such bond notes that were not current at their par value.

the third person can establish an express authority to accept something other than money, or conduct of the principal from which such authority may fairly be implied,[46] the principal will be bound by payment to his agent only so far as the payment is in cash.[47] Acceptance by the collecting agent of property,[48] or of a note, check, or bill of exchange,[49] does not operate as payment to the principal

As to payment in Confederate money see Leake *v.* Sutherland, 25 Ark. 219; Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283; Westbrook *v.* Davis, 48 Ga. 471; King *v.* King, 37 Ga. 205; Martin *v.* U. S., 2 T. B. Mon. (Ky.) 89, 15 Am. Dec. 129; Waterhouse *v.* Citizens' Bank, 25 La. Ann. 77; Robinson *v.* International L. Assur. Soc., 42 N. Y. 54, 1 Am. Rep. 400; Pope *v.* Chafee, 14 Rich. Eq. (S. C.) 69; Dillard *v.* Clements, 2 Baxt. (Tenn.) 137; Maloney *v.* Stephens, 11 Heisk. (Tenn.) 738; Burford *v.* Memphis Bulletin Co., 9 Heisk. (Tenn.) 691; King *v.* Fleece, 7 Heisk. (Tenn.) 273; Clark *v.* Thomas, 4 Heisk.. (Tenn.) 419; Wood *v.* Cooper, 2 Heisk. (Tenn.) 441; Shurer *v.* Green, 3 Coldw. (Tenn.) 419; Bowles *v.* Glasgow, 36 Tex. 94; Griffin *v.* Walker, 36 Tex. 88; Reed *v.* Nelson, 33 Tex. 471; Burleson *v.* Cleveland, 32 Tex. 397; Ransom *v.* Alexander, 31 Tex. 443; Pilson *v.* Bushong, 29 Gratt. (Va.) 229; Ewart *v.* Saunders, 25 Gratt. (Va.) 203; Hale *v.* Wall, 22 Gratt. (Va.) 424; Pidgeon *v.* Williams, 21 Gratt. (Va.) 251; Alley *v.* Rogers, 19 Gratt. (Va.) 366; Harper *v.* Harvey, 4 W. Va. 539; Glasgow *v.* Lipse, 117 U. S. 327, 6 S. Ct. 757, 29 L. ed. 901; Fretz *v.* Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769; Anderson *v.* Cape Fear Bank, 1 Fed. Cas. No. 354, Chase 535; Kentucky Bank *v.* Adams Express Co., 2 Fed. Cas. No. 889, 1 Flipp. 242; Stoughton *v.* Hill, 23 Fed. Cas. No. 13,501, 3 Woods 404. And see PAYMENT, 30 Cyc. 1215 *et seq.*

46. *North Carolina.*— Purvis *v.* Jackson, 69 N. C. 474.

South Carolina.— Columbia Phosphate Co. *v.* Farmers' Alliance Store, 47 S. C. 358, 25 S. E. 116.

Washington.— Dusenberry *v.* McDole, 42 Wash. 470, 85 Pac. 40.

England.— Ekins *v.* Macklish, Ambl. 184, 27 Eng. Reprint 125; Barker *v.* Greenwood, 1 Jur. 541, 6 L. J. Exch. 54, 2 Y. & C. Exch. 414.

Canada.— Manufacturers Acc. Ins. Co. *v.* Pudsey, 27 Can. Sup. Ct., 374 [*affirming* 29 Nova Scotia 124].

47. Tubman *v.* Lowekamp, 43 Md. 318; Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941; Union School Furniture *v.* Mason, 3 S. D. 147, 52 N. W. 671; Rhine *v.* Blake, 59 Tex. 240. But see John Hutchinson Mfg. Co. *v.* Henry, 44 Mo. App. 263, holding that if an agent solicits and obtains an order for the purchase of goods, and transmits the same to the seller, and the latter delivers the goods to him, and he delivers them to the purchasers, he becomes clothed by virtue of the possession of the goods, with the ostensible authority to collect payment therefor, including power to accept payment in other property than money.

48. *California.*— Rodgers *v.* Peckham, 120 Cal. 238, 52 Pac. 483 (holding that authority given an agent to collect money due on a note and mortgage is not authority to the agent to accept a conveyance of the mortgaged premises in payment thereof); Taylor *v.* Robinson, 14 Cal. 396; Mudgett *v.* Day, 12 Cal. 139.

Colorado.— Sioux City Nursery, etc., Co. *v.* Magnus, 1 Colo. App. 45, 27 Pac. 257.

Kentucky.— Russell *v.* Cox, 38 S. W. 1087, 18 Ky. L. Rep. 1087.

New Hampshire.— Dixon *v.* Guay, 70 N. H. 161, 46 Atl. 456.

New Jersey.—Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941.

Ohio.— Pollock *v.* Cohen, 22 Ohio St. 514.

South Carolina.— Columbia Phosphate Co. *v.* Farmers' Alliance Store, 47 S. C. 358, 25 S. E. 116; Ludden, etc., Southern Music House *v.* Sumter, 45 S. C. 186, 22 S. E. 738, 55 Am. St. Rep. 761.

Texas.— Rhine *v.* Blake, 59 Tex. 240; Harrington *v.* Moore, 21 Tex. 546.

West Virginia.— Mann *v.* Robinson, 19 W. Va. 49, 42 Am. Rep. 771.

England.— Howard *v.* Chapman, 4 C. & P. 508, 19 E. C. L. 624.

Compare Renwick *v.* Wheeler, 48 Fed. 431, holding that a power of attorney expressly authorizing the agent to sell, convey, or mortgage the principal's lands in Iowa, and collect the price thereof, and constituting him "our general attorney, in fact to transact any or all business for us . . . of any kind whatsoever in the state of Iowa; to rent houses . . . and to satisfy any mortgages made or to be made to us," etc., confers power to agree to take certain lands covered by a mortgage in full satisfaction of the debt secured thereby.

49. *California.*— Rodgers *v.* Peckham, 120 Cal. 238, 52 Pac. 483.

Illinois.— Everts *v.* Lowther, 165 Ill. 487, 46 N. E. 233 [*affirming* 63 Ill. App. 432]; Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265; Mathews *v.* Hamilton, 23 Ill. 470. See also Cooney *v.* U. S. Wringer Co., 101 Ill. App. 468.

Indiana.— Robinson *v.* Anderson, 106 Ind. 152, 6 N. E. 12; Corning *v.* Strong, 1 Ind. 329.

Iowa.— Graydon *v.* Patterson, 13 Iowa 256, 81 Am. Dec. 432.

Kansas.— Scully *v.* Dodge, 40 Kan. 395, 19 Pac. 807.

Louisiana.— David *v.* Neveu, 10 La. Ann. 642.

Minnesota.— Trull *v.* Hammond, 71 Minn. 172, 73 N. W. 640.

Missouri.— Buckwalter *v.* Craig, 55 Mo. 71.

Nebraska.— Holt *v.* Schneider, 57 Nebr. 523, 77 N. W. 1086.

New York.— De Mets *v.* Dagron, 53 N. Y. 635.

unless he authorizes or accepts such payment. But general authority to conduct a business involving the acceptance of checks or notes will involve of necessity implied authority to take and indorse such paper in the course of the business intrusted to the agent.[50] Authority to an agent to take in settlement whatever he can get will give him power to accept paper not current, when circumstances make collection of lawful currency impossible or improbable;[51] and extraordinary conditions may justify the agent in making unusual terms of settlement, and in the case of collecting a claim against an insolvent debtor the acceptance of notes or securities less than money may be best and necessary.[52] Failure of the principal

North Carolina.— Goldsborough *v.* Turner, 67 N. C. 403.

Pennsylvania.— Pittsburgh Fifth Nat. Bank *v.* Ashworth, 123 Pa. St. 212, 16 Atl. 596, 2 L. R. A. 491; McCulloch *v.* McKee, 16 Pa. St. 289; Opie *v.* Serrill, 6 Watts & S. 264.

Tennessee.— Glass *v.* Davidson, 1 Baxt. 47.

Texas.— Garner *v.* Butcher, 1 Tex. Unrep. Cas. 430; Western Brass Mfg. Co. *v.* Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728.

West Virginia.— Spence *v.* Rose, 28 W. Va. 333.

England.—Williams *v.* Evans, L. R. 1 Q. B. 352, 35 L. J. Q. B. 111, 13 L. T. Rep. N. S. 753, 14 Wkly. Rep. 330; Hine *v.* Steamship Ins. Syndicate, 7 Aspin. 558, 72 L. T. Rep. N. S. 79, 11 Reports 777.

Canada.— Crane *v.* Boltenhouse, 4 N. Brunsw. 581.

See 40 Cent. Dig. tit. "Principal and Agent," § 304.

Payment by note conditional only.— While an agent may and commonly does accept commercial paper, the payment has been held to be conditional upon its being converted into money, whereupon the payment relates back to the time of the receipt of the paper. Griffin *v.* Erskine, 131 Iowa 444, 109 N. W. 13 (in which it is pointed out that checks, drafts, and other bills of exchange are the means of transferring money in nearly all commercial transactions, and in authorizing an agent to make collections he may be assumed to have authority to transmit funds in the ordinary way, and although such paper will not absolutely cancel the debt, it is conditional payment, good from date of delivery, if the paper is honored, but no payment at all if not honored); Pape *v.* Westacott, [1894] 1 Q. B. 272, 63 L. J. Q. B. 222, 70 L. T. Rep. N. S. 18, 9 Reports 18, 42 Wkly. Rep. 131; Pearson *v.* Scott, 9 Ch. D. 198, 47 L. J. Ch. 705, 38 L. T. Rep. N. S. 747, 26 Wkly. Rep. 796; Bridges *v.* Garrett, L. R. 5 C. P. 451, 39 L. J. C. P. 251, 22 L. T. Rep. N. S. 448, 18 Wkly. Rep. 815; Hine *v.* Steamship Ins. Syndicate, 7 Aspin. 558, 72 L. T. Rep. N. S. 79, 11 Reports 777; Crane *v.* Boltenhouse, 4 N. Brunsw. 581; Ætna L. Ins. Co. *v.* Green, 38 U. C. Q. B. 459.

Agent's note.— Where an agent has authority to collect a note, but is not authorized to receive anything in payment but money, he cannot accept his own note in payment. However, if he supplies out of his own funds the amount of the note received by him, and turns the same over to his principal less his commission for collection, the principal cannot complain. Wilcox, etc., Organ Co. *v.* Lasley, 40 Kan. 521, 20 Pac. 228.

Note payable to agent.— Where an agent for the collection of a debt receives a note, payable to himself at a future day, in payment, this is not a satisfaction of the debt of the principal, nor a bar to an action by him to recover the original debt. Corning *v.* Strong, Smith (Ind.) 197. See also Robinson *v.* Anderson, 106 Ind. 152, 6 N. E. 12; McCulloch *v.* McKee, 16 Pa. St. 289.

Where a note was to be paid in skins, one to whom the holder directed the maker to deliver the skins on a certain day has authority to exercise his judgment as to the quality of the skins and receive them in discharge of the contract. Brown *v.* Berry, 14 N. H. 459.

Personal liability of agent.— Where one accepts a draft where he might have procured money in payment of a check he has for collection, and the draft is dishonored, he is liable for its value, although the bank issuing and the bank on which the draft is drawn are solvent, and the draft is stopped by telegram of the debtor, a collector having no authority to accept anything but money in payment of a claim. Gowling *v.* American Express Co., 102 Mo. App. 366, 76 S. W. 712. Agents who have agreed to collect all notes taken in the course of their agency cannot be held liable for a deficiency on notes which their principals have taken out of their hands and compromised or failed to collect. Tate *v.* Marco, 27 S. C. 493, 4 S. E. 71.

Authority of attorney at law to receive payment in notes see Attorney and Client, 4 Cyc. 889.

50. Hamilton Nat. Bank *v.* Nye, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; Nichols, etc., Co. *v.* Hackney, 78 Minn. 461, 81 N. W. 322; Levy *v.* Hastings First Nat. Bank, 27 Nebr. 557, 43 N. W. 354.

51. Mitchell *v.* Finnell, 101 Cal. 614, 36 Pac. 123; Ruthven *v.* Clarke, 109 Iowa 25, 79 N. W. 454; Steele *v.* Taylor, 4 Dana (Ky.) 445; Oliver *v.* Sterling, 20 Ohio St. 391, in which the debtors were insolvent and on the eve of bankruptcy.

52. Dolan *v.* Van Demark, 35 Kan. 304, 10 Pac. 848, holding that an attorney at law and banker having claims in his hands for collection will, where it is necessary to secure the collection of such claims, presumptively have authority to take as collateral security, and in his own name, a note secured by a

to reject the payment received by the agent may of course become in law an acceptance of it;[53] and if the principal does not reject the settlement it does not lie with third persons to set up the agent's want of authority.[54]

(c) *To Modify Terms of Payment.* It is the duty of the agent to make the collection in the manner prescribed by the principal, and he has no implied power to make it in any other mode. In the absence of express instructions the collection is to be made in the usual way, although the principal is free to require the collection to be made in any legal manner.[55]

chattel mortgage. See also McCormick *v.* Keith, 8 Nebr. 142; Oliver *v.* Sterling, 20 Ohio St. 391, where the debtor was insolvent, and the agent was given "full authority to act for" the creditor.

53. Glass *v.* Davidson, 1 Baxt. (Tenn.) 47, holding that if a debtor having no notice that his creditor's agent is under special instructions to receive nothing but legal tender pays the attorney in current bank-notes subject to the creditor's approval, a failure to return such notes within reasonable time will render the payment binding on the creditor.

54. Dolan *v.* Van Demark, 35 Kan. 304, 10 Pac. 848.

55. Haven *v.* Wentworth, 2 N. H. 93; Stewart *v.* Donelly, 4 Yerg. (Tenn.) 177; Bleser *v.* Stedl, (Wis. 1908) 115 N. W. 337 (holding that where a mortgagor dealt wholly with the mortgagee's agent in making payments, which the agent was authorized to receive, the agent could receive sums paid before and after the due date, to be applied as of that date such payments being within the usual course of dealing in that class of business); Chilton *v.* Willford, 2 Wis. 1, 40 Am. Dec. 399.

Substantial compliance is enough.— Thus where a creditor in the country directed his debtor to pay money into a London banking-house for his account, but he had no account with the house but through a country banker, the court held that such direction to make the payment was complied with by a payment to the credit of his account with the country banker. Breed *v.* Green, Holt N. P. 204, 3 E. C. L. 87.

Responsibility for agent's method.— One who, without giving special instructions, employs a collecting agent whose card announces that he will treat debtors "with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended," is responsible for whatever means the agent adopts. Caswell *v.* Cross, 120 Mass. 545.

Delivery of an account to an agent for collection in one mode confers no authority to settle it in any other way. Powell *v.* Henry, 27 Ala. 612; Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193; Sewell *v.* Hennen, 8 Rob. (La.) 216; Stewart *v.* Donelly, 4 Yerg. (Tenn.) 177.

Unusual settlements.— In the absence of the principal's permission, an agent cannot make unusual settlements, such as to assign or compromise the claim (Malloye *v.* Coubrough, 96 Cal. 649, 31 Pac. 622; Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193; Dupre *v.* Splane, 16 La. 51; Kenner *v.* His Creditors, 8 Mart. N. S. (La.) 54, holding that an agent's possession of bills of exchange does not prove his authority to compromise; Nichols, etc., Co. *v.* Jones, 32 Mo. App. 657; Geiger *v.* Bolles, 1 Thomps. & C. (N. Y.) 129; Garrigue *v.* Loescher, 3 Bosw. (N. Y.) 578; Sier *v.* Bache, 7 Misc. (N. Y.) 165, 27 N. Y. Suppl. 255; Googe *v.* Gaskill, 18 Pa. Super. Ct. 39; Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567), to extend the time for payment (Powell *v.* Henry, 96 Ala. 412, 11 So. 311; Lawrence *v.* Johnson, 64 Ill. 351; Chappel *v.* Raymond, 20 La. Ann. 277; Millaudon *v.* McMicken, 7 Mart. N. S. (La.) 34; Woodbury *v.* Larned, 5 Minn. 339; Hutchings *v.* Munger, 41 N. Y. 155, holding that authority to an agent to collect or receive payment does not include authority, on payment of part of the amount due, to extend the time of payment of the balance; Ritch *v.* Smith, 60 How. Pr. (N. Y.) 13 [*affirmed* in 82 N. Y. 627, 60 How. Pr. 157]; Stewart *v.* Donelly, 4 Yerg. (Tenn.) 177; Behrns *v.* Rogers, (Tex. Civ. App. 1897) 40 S. W. 419. *Compare* Hurd *v.* Marple, 2 Ill. App. 402, 10 Ill. App. 418, holding that the authority may be broad enough to confer the power. Thus, where an agent having money placed in his hands with undisputed power to loan, manage, and collect as he should deem best, makes an agreement for extension of time of payment his principal is bound thereby; Wheeler *v.* Benton, 67 Minn. 293, 69 N. W. 927, holding that such power may be conferred by a long course of dealing), to release some of the parties who are liable upon it, or to substitute other persons in their stead (Torbit *v.* Heath, 11 Colo. App. 492, 53 Pac. 615; Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193; Tennille Bd. of Education *v.* Kelley, 126 Ga. 479, 55 S. E. 238; Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575), to waive his principal's lien or release securities held for the payment of the debt (Johnson *v.* Wilson, 137 Ala. 458, 34 So. 392; Torbit *v.* Heath, 11 Colo. App. 492, 53 Pac. 615; McHany *v.* Schenk, 88 Ill. 357; Garrels *v.* Morton, 26 Ill. App. 433; Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575; Sweedlund *v.* Hutchinson, (Kan. App. 1896) 47 Pac. 163; Sewell *v.* Hennen, 8 Rob. (La.) 216; Knoche *v.* Whiteman, 86 Mo. App. 568; Jones *v.* Vogel, 185 Pa. St. 1, 39 Atl. 546; Deacon *v.* Greenfield, 141 Pa. St. 467, 21 Atl. 650; Corr *v.* Greenfield, 134 Pa. St. 503, 19 Atl. 676. *Compare* Waller *v.* Andrews, 1 H. & H. 87, 7 L. J. Exch. 67, 3 M. & W. 312; Webber *v.* Granville, 7 Jur. N. S. 420, 30 L. J. C. P. 92, both holding that general authority may

(D) *Application of Payment.*[56] Where one makes a person an agent to receive money for him, he is also his agent to receive such declarations as accompany the payment and direct its application.[57] But if no directions as to its application are given then the agent may make application of the payment according to his discretion,[58] although if he is under the same obligations to the several creditors, and the debts stand on an equal footing, his duty is to treat all creditors alike, and distribute the payment *pro rata.*[59] And where payments are made by a debtor upon several debts owed to one creditor, a general agent for the collection of such debts has implied power to apply the payments in his discretion.[60] The general manager of a creditor's business is such an agent as has power to stipulate for the application of the proceeds of particular collaterals received by him to the payment of a given debt, although this may modify a previous contract made by the creditor with the debtor.[61] If a person have two accounts with a person paying money, one due himself and one due a person for whom he is acting as agent, general payments will be applied ratably to the debts due on both accounts.[62] And if an agent blend his own and his principal's accounts in one demand, and receive a general remittance, he must apply it ratably.[63]

(E) *Employment of Subagents.* A collecting agent, like other agents, must in general personally perform his service to the principal. He has no more power than other agents to delegate his authority.[64] Payment to an agent of a collection agent whose employment has not been sanctioned by the principal is accordingly no payment of the debt.[65] Where a principal authorizes one agent to employ another agent to make collections, the former agent is presumed, in the absence of known restrictions, to have power to contract as to the manner and terms of

be broad enough to justify the inference that it is within the discretion vested in the agent to make waivers or releases), or to accept a partial payment of the obligation as full settlement (Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860; Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; Halladay *v.* Underwood, 90 Ill. App. 130; Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. 564; Langdon First Nat. Bank *v.* Prior, 10 N. D. 146, 86 N. W. 362. *Compare* Reed *v.* Northrup, 50 Mich. 442, 15 N. W. 543; Armstrong *v.* Gilchrist, 2 Johns. Cas. (N. Y.) 424), or generally to do anything unusual, which would modify the rights of the creditors or the liability of the debtors (Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193; De Mets *v.* Dagron, 53 N. Y. 635; Chilton *v.* Willford, 2 Wis. 1, 40 Am. Dec. 399, holding that a power of attorney authorizing the appointee to collect a debt arising from certain notes secured by mortgage, and to compromise, settle, and arrange them either in law or otherwise, as to the appointee seems fit, does not authorize him to enter into any speculation by which the value of the security may by chance be enhanced).

Authority to receive the whole of a debt, unless limited to the receipt of the whole amount in one sum, embraces power to receive partial payments to apply upon it (Whelan *v.* Reilly, 61 Mo. 565, 578; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325), and to credit and receipt for payments when collections are made, including payments already made (Scammon *v.* Wells, 84 Cal. 311, 24 Pac. 284; Dubreuil *v.* Rouzan, 1 Mart. N. S. (La.) 158; Sage *v.* Burton, 70 Hun (N. Y.) 600, 24 N. Y. Suppl. 130; Patterson *v.* Ackerson, 2 Edw. (N. Y.) 427; Keating Implement, etc., Co. *v.* Terre Haute Carriage, etc., Co., 11 Tex. Civ. App. 216, 32 S. W. 556.

56. See, generally, PAYMENT, 30 Cyc. 1233 *et seq.*

57. Davis *v.* Amy, 2 Grant (Pa.) 412.

Use as set-off.— Where an agent receives money to be applied to a specific purpose he has no authority to apply it to another and different purpose as by using as a set-off against it a demand due him from his principal. Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33.

58. Carpenter *v.* Goin, 19 N. H. 479; Marshall *v.* Nagel, 1 Bailey (S. C.) 308.

59. Richards *v.* New Hampshire Ins. Co., 43 N. H. 263; Colby *v.* Copp, 35 N. H. 434.

60. McCathern *v.* Bell, 93 Ga. 290, 20 S. E. 315.

61. McCathern *v.* Bell, 93 Ga. 290, 20 S. E. 315.

62. Hardenbergh *v.* Bacon, 33 Cal. 356.

63. Barrett *v.* Lewis, 2 Pick. (Mass.) 123.

64. See *infra*, II, D.

65. State *v.* Cass County, 53 Nebr. 767, 74 N. W. 254.

Thus where a mortgage debtor paid a sum of money to the son of the mortgagee's agent to be applied on the mortgage, and the agent had authority to receive money for the mortgagee, and the son had for a number of years acted as his clerk or servant in the business of the agency, and had sometimes carried money collected to the mortgagees, but had no authority as their agent, the debtor's payment to him was not payment to the mortgagees' agent, and the promise of the agent that he would allow such payment was not

collection, since such power is usual and necessary in one employing a collecting agent.[66]

e. To Give or Receive Commercial Paper — (i) *In General.*[67] Commercial paper passes current to a limited extent like money, and accordingly power to an agent to make or indorse it is to be strictly limited, and will never be lightly inferred.[68] The most comprehensive grant, in general terms, of power to an agent conveys no power to subject the principal to liability upon such paper, unless the exercise of such power is so necessary to the accomplishment of the agency that such intent of the principal must be presumed in order to make the power effectual.[69] However, the rule of strict construction adopted in the case of the execution

binding on the mortgagees. Lewis *v.* Ingersoll, 3 Abb. Dec. (N. Y.) 55, 1 Keyes 347.

66. Barclay *v.* Hopkins, 59 Ga. 562, holding that an agent to procure an attorney to collect a note has power to contract as to the manner of its collection, unless his agency is restricted and the restriction is known to the attorney at the time the contract for collection is made; and it is immaterial that such note is not negotiable on its face.

67. Agent's authority to transfer commercial paper see Commercial Paper, 7 Cyc. 784 *et seq.*

68. Sinclair *v.* Goodell, 93 Ill. App. 592, 112 Ill. App. 594; Deer Lodge Bank *v.* Hope Min. Co., 3 Mont. 146, 35 Am. Rep. 458; Sewanee Min. Co. *v.* McCall, 3 Head (Tenn.) 619.

69. *Alabama.*— Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612; Wallace *v.* Mobile Branch Bank, 1 Ala. 565.

California.— Golinsky *v.* Allison, 114 Cal. 458, 46 Pac. 295; Brown *v.* Rouse, 93 Cal. 237, 28 Pac. 1044; Washburn *v.* Alden, 5 Cal. 463.

Georgia.— Exchange Bank *v.* Thrower, 118 Ga. 433, 45 S. E. 316 (holding that an employee of a state insurance agent who is given the title "cashier" is not thereby impliedly authorized to indorse and discount drafts in the name of his principal); Born *v.* Simmons, 111 Ga. 869, 36 S. E. 956.

Indiana.— Smith *v.* Gibson, 6 Blackf. 369.

Iowa.— Gould *v.* Bowen, 26 Iowa 77.

Louisiana.— *In re* Lafourche Transp. Co., 52 La. Ann. 1517, 27 So. 958; Folger *v.* Peterkin, 39 La. Ann. 815, 2 So. 579; Robertson *v.* Levy, 19 La. Ann. 327; Clay *v.* Bynum, 1 Mart. N. S. 603, 14 Am. Dec. 192, holding that power to sign the constituent's name in any transaction the agent may deem proper does not authorize the indorsement of a note.

Maine.— Perkins *v.* Boothby, 71 Me. 91; Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171.

Massachusetts.— Paige *v.* Stone, 10 Metc. 160, 43 Am. Dec. 420 (holding that to facilitate note-making, and thus affect the interest and estates of third persons to an indefinite amount, is not within the object and intent of the law in regulating the common duties of the agent); Taber *v.* Cannon, 8 Metc. 456.

Mississippi.— Fairly *v.* Nash, 70 Miss. 193, 12 So. 149.

New York.— Jacoby *v.* Payson, 91 Hun 480, 36 N. Y. Suppl. 240. *Compare* Turner *v.* Keller, 66 N. Y. 66.

North Carolina.— Witz *v.* Gray, 116 N. C. 48, 20 S. E. 1019.

Ohio.— Thomas Gibson Co. *v.* Carlisle, 3 Ohio S. & C. Pl. Dec. 27, 1 Ohio N. P. 398. *Compare* Layet *v.* Gano, 17 Ohio 466, holding that a power of attorney conferring authority to transact a particular affair authorizes the agent to execute a note in the name of the principal, if necessary for the performance of the agency.

Oklahoma.— Stock Exch. Bank *v.* Williamson, 6 Okla. 348, 50 Pac. 93.

Oregon.— Connell *v.* McLoughlin, 28 Oreg. 230, 42 Pac. 218.

Tennessee.— Sewanee Mfg. Co. *v.* McCall, 3 Head 619; Bailey *v.* Rawley, 1 Swan 295. But see Newland *v.* Oakley, 6 Yerg. 489, holding that a power of attorney "to transact all the business" of the maker in a certain place, with no limitation, authorizes the attorney to transfer a note of his principal.

Texas.— Weekes *v.* A. F. Shapleigh Hardware Co., 25 Tex. Civ. App. 577, 57 S. W. 67.

Vermont.— Denison *v.* Tyson, 17 Vt. 549.

England.— *In re* Cunningham Co., 36 Ch. D. 532, 57 L. J. Ch. 169, 58 L. T. Rep. N. S. 16; Esdaile *v.* Lanoge, 4 L. J. Exch. 46, 1 Y. & C. Exch. 394.

Canada.— Hechler *v.* Forsyth, 22 Can. Sup. Ct. 489; Heathfield *v.* Van Allen, 7 U. C. C. P. 346.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 318–320.

Compare Stothard *v.* Aull, 7 Mo. 318; Chidsey *v.* Porter, 21 Pa. St. 390.

Thus such power is not to be inferred from authority to adjust all the principal's accounts and concerns as he could do in person (Scarborough *v.* Reynolds, 12 Ala. 252; Hills *v.* Upton, 24 La. Ann. 427; Beach *v.* Vandewater, 1 Sandf. (N. Y.) 265; Rossiter *v.* Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Essick *v.* Buckwalter, (Pa. 1889) 16 Atl. 849), or to exchange, buy, sell, collect, or loan, for the principal (Sinclair *v.* Goodell, 93 Ill. App. 592, 112 Ill. App. 594, holding that the mere fact that a collector has indorsed checks payable to the order of his principal, and has turned the money received therefrom to such principal, does not confer general authority upon him to indorse checks, where such principal did not know and had no means of knowing that such collector had been pursuing such practice; Oliver *v.* Smith, 66 Ill. App. 94; Scott *v.* McLellan, 2 Me. 199; Temple *v.* Pomroy, 4 Gray (Mass.) 128; Taber *v.* Cannon, 8 Metc. (Mass.) 456; Deering *v.* Kelso, 74

by an agent of negotiable instruments is not to be pursued to the extent of defeating, by technical interpretation, the obvious intent of the principal as gathered from a reasonable interpretation of the instrument appointing the agent. Hence, if the agent's act be within such intent it will bind his principal.[70] Much must depend upon the position of the agent and the circumstances of the case, and the agent's authority to execute or indorse commercial paper will be presumed whenever such power is reasonably necessary to effectuate the main object of the agency.[71] In accord with this, it has often been held that power to conduct the principal's business as he might do, includes power to make and indorse negotiable paper when the nature of the business is such as to require it, although such necessity must be clearly shown.[72] In extreme cases an overruling necessity may justify an agent in exercising the power.[73] While the authority may on proper showing

Minn. 41, 76 N. W. 792, 73 Am. St. Rep. 324; Hastings First Nat. Bank *v.* Farmers', etc., Bank, 56 Nebr. 149, 76 N. W. 430; Mills *v.* Carnly, 1 Bosw. (N. Y.) 159; Terry *v.* Fargo, 10 Johns. (N. Y.) 114; Jackson *v.* McMinnville Nat. Bank, 92 Tenn. 154, 20 S. W. 820, 36 Am. St. Rep. 81, 18 L. R. A. 663; Murray *v.* East India Co., 5 B. & Ald. 204, 24 Rev. Rep. 325, 7 E. C. L. 118, holding that a power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means, all moneys, debts, and dues whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal).

The authority of a commercial traveler in general does not extend to the making or indorsing of negotiable paper on the principal's account, even in the case where he has authority to collect and to receive cash or checks in payment. Indorsing checks is no necessary part of the performance of such duty. Jackson Paper Mfg. Co. *v.* Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 93 Am. St. Rep. 113, 59 L. R. A. 657 [*reversing* 99 Ill. App. 108]; Sinclair *v.* Goodell, 93 Ill. App. 592, 112 Ill. App. 594; Hamilton Nat. Bank *v.* Nye, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; Seattle Shoe Co. *v.* Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064; Hogarth *v.* Wherley, L. R. 10 C. P. 630, 44 L. J. C. P. 330, 32 L. T. Rep. N. S. 800.

70. *Arkansas.*— Fayetteville Wagon, etc., Co. *v.* Kenefick Constr. Co., (1905) 88 S. W. 1031.

Colorado.— Rio Grande Extension Co. *v.* Coby, 7 Colo. 299, 3 Pac. 481.

Connecticut.—Hudson *v.* Whiting, 17 Conn. 487.

Illinois.— Tanner *v.* Hastings, 2 Ill. App. 283.

Kentucky.—Barbour *v.* Sykes, 1 S. W. 600, 8 Ky. L. Rep. 345.

Missouri.— Edwards *v.* Thomas, 66 Mo. 468; Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430.

New York.—Rosenthal *v.* Hasberg, 84 N. Y. Suppl. 290.

Tennessee.— Jernegan *v.* Gray, 14 Lea 536.

Texas.— Presnall *v.* McLeary, (Civ. App. 1899) 50 S. W. 1066.

United States.— Exchange Bank *v.* Hubbard, 62 Fed. 112, 10 C. C. A. 295.

Canada.— Bryce *v.* Davidson, 25 U. C. Q. B. 371; Auldjo *v.* McDougall, 3 U. C. Q. B. O. S. 199.

71. *Alabama.*— Lytle *v.* Dothan Bank, 121 Ala. 215, 26 So. 6.

Louisiana.— James *v.* Lewis, 26 La. Ann. 664; Swift *v.* Hare, 1 Rob. 303; Perrotin *v.* Cucullu, 6 La. 587.

Maine.— Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171.

Massachusetts.— Sprague *v.* Gillett, 9 Metc. 91.

New York.— Scofield *v.* Warren, 13 Misc. 209, 34 N. Y. Suppl. 175.

Ohio.— Layet *v.* Gano, 17 Ohio 466.

Texas.— Manhattan Liquor Co. *v.* German Nat. Bank, (Civ. App. 1906) 94 S. W. 1120; Manhattan Liquor Co. *v.* Magnus, 43 Tex. Civ. App. 463, 94 S. W. 1117.

Virginia.— Whitten *v.* Fincastle Bank, 100 Va. 546, 42 S. E. 309.

United States.— National Bank of Republic *v.* Old Town Bank, 112 Fed. 726, 50 C. C. A. 443.

England.— La Banque D'Hochelaga *v.* Jodoin, [1895] A. C. 612, 64 L. J. P. C. 174; Waters *v.* Brogden, 1 Y. & J. 457.

See 40 Cent. Dig. tit. "Principal and Agent," § 318.

72. *Alabama.*— Wimberly *v.* Windham, 104 Ala. 409, 16 So. 23, 53 Am. St. Rep. 70.

Connecticut.— Frost *v.* Wood, 2 Conn. 23.

Iowa.— Gafford *v.* American Mortg., etc., Co., 77 Iowa 736, 42 N. W. 550.

Louisiana.— Wallace *v.* Lamson, 20 La. Ann. 243.

Massachusetts.— Temple *v.* Pomroy, 4 Gray 128; Paige *v.* Stone, 10 Metc. 160, 43 Am. Dec. 420; Odiorne *v.* Maxcy, 13 Mass. 178.

Michigan.— Shipman *v.* Byles, 65 Mich. 690, 32 N. W. 898.

New York.— Feldman *v.* Beier, 78 N. Y. 293.

Tennessee.— Jackson *v.* McMinnville Nat. Bank, 92 Tenn. 154, 20 S. W. 820, 36 Am. St. Rep. 81, 18 L. R. A. 663.

Texas.— Flewellen *v.* Mittenthal, (Civ. App. 1896) 38 S. W. 234.

Washington.— Graton, etc., Mfg. Co. *v.* Redelsheimer, 28 Wash. 370, 68 Pac. 879.

See 40 Cent. Dig. tit. "Principal and Agent." § 318.

73. See Sewanee Min. Co. *v.* McCall, 3 Head (Tenn.) 619, holding that the ac-

be presumed from the conduct of the principal,[74] as, for example, his receiving the proceeds of the indorsed paper,[75] yet an occasional recognition of a note made or indorsed by the agent will not be enough to establish his authority,[76] although it may afford some evidence on the subject.[77] In any case no one can hold a principal liable upon negotiable paper signed or indorsed by one as agent without proving such agent's authority.[78]

(II) *EXTENT OF AUTHORITY.* Even when clearly granted, power to execute commercial paper must be strictly pursued. Power to deal in a certain way with commercial paper is not to be enlarged by construction to permit the doing of other, although somewhat similar, things.[79] Mere authority to receive negotiable

ceptance of bills by an agent to avoid the suspension of work of great importance to the principal does not fall within that class of cases of extraordinary emergency or overruling necessity, in which, from the very necessities of the case, an agent is justified in deviating from the authority conferred on him.

74. *Georgia.*— Exchange Bank *v.* Thrower, 118 Ga. 433, 45 S. E. 316, holding that where there was evidence to show that an agent was in full charge of the business during the frequent absence of his principal, and authorized to indorse checks and drafts other than for deposit only, a verdict finding for a *bona fide* purchaser of drafts so indorsed will not be disturbed.

Indiana.— Smith *v.* Gibson, 6 Blackf. 369.

Louisiana.— Charleston Bank *v.* Hagan, 2 La. Ann. 999.

Maine.— Trundy *v.* Farrar, 32 Me. 225.

Minnesota.— Best *v.* Krey, 83 Minn. 32, 85 N. W. 822.

Missouri.— Edwards *v.* Thomas, 66 Mo. 468.

New York.— Turner *v.* Keller, 66 N. Y. 66; Allen *v.* Corn Exch. Bank, 87 N. Y. App. Div. 335, 84 N. Y. Suppl. 1001.

Oregon.— Connell *v.* McLaughlin, 28 Oreg. 230, 42 Pac. 218.

Canada.— Pratt *v.* Drake, 17 U. C. Q. B. 27.

And see *supra*, I, D, 1, c, (II); I, E, 2, a, (II).

75. Wells *v.* Simpson Nat. Bank, 19 Tex. Civ. App. 636, 47 S. W. 1024; Merchants Bank *v.* Bostwick, 28 U. C. C. P. 450.

76. Paige *v.* Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; Taber *v.* Cannon, 8 Metc. (Mass.) 456; Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Deer Lodge Bank *v.* Hope Min. Co., 3 Mont. 146, 35 Am. Rep. 458; Stock Exch. Bank *v.* Williamson, 6 Okla. 348, 50 Pac. 93; Jackson *v.* McMinnville Nat. Bank, 92 Tenn. 154, 20 S. W. 820, 36 Am. St. Rep. 81, 18 L. R. A. 663.

77. Stothard *v.* Aull, 7 Mo. 318; Turner *v.* Keller, 66 N. Y. 66.

78. Flax, etc., Mfg. Co. *v.* Ballentine, 16 N. J. L. 454; Dixon *v.* Haslett, 2 Treadw. (S. C.) 615.

79. *Illinois.*— Fay *v.* Slaughter, 194 Ill. 157, 62 N. E. 592, 88 Am. St. Rep. 148, 56 L. R. A. 564 [*reversing* 94 Ill. App. 111].

Louisiana.— Callender *v.* Golsan, 27 La. Ann. 311.

Missouri.— Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430, holding that permission to use or sign another's name for the purpose of obtaining money at a bank does not authorize the execution of a non-negotiable note.

Montana.— Deer Lodge Bank *v.* Hope Min. Co., 3 Mont. 146, 35 Am. Rep. 458.

Tennessee.— Sewanee Min. Co. *v.* McCall, 3 Head 619; Nichol *v.* Green, Peck 283.

Texas.— Buzard *v.* Jolly, (1887) 6 S. W. 422; Stone *v.* McGregor, (Civ. App. 1904) 84 S. W. 399 [*reversed* on other grounds in 99 Tex. 51, 87 S. W. 334].

Virginia.— Hortons *v.* Townes, 6 Leigh 47.

Thus if the agent is authorized to use such paper with one person, or at one bank, he derives thereby no implied power to deal with another person, or at another bank (Knapp *v.* McBride, 7 Ala. 19; Morrison *v.* Taylor, 6 T. B. Mon. (Ky.) 82; Citizens' Sav. Bank *v.* Hart, 32 La. Ann. 22; Sims *v.* U. S. Trust Co., 103 N. Y. 472, 9 N. E. 605; Craighead *v.* Peterson, 10 Hun (N. Y.) 596 [*affirmed* in 72 N. Y. 279, 28 Am. Rep. 150], holding that a power of attorney authorizing an agent to draw and indorse any checks or promissory note on any bank in the city of New York in which defendant had an account, and to do any and all matters connected with defendant's account which he might do, did not authorize the execution in the name of defendant of two promissory notes payable at a bank where defendant had no account; Mills *v.* Williams, 16 S. C. 593, holding that a person who intrusts a sealed note, with the name of the payee left blank, to an agent for the purpose of being delivered to one person in exchange for a particular piece of property specified in the note, is not bound by the act of the agent in delivering the note to another person for a different piece of property, although the person to whom the note was delivered had no notice, at the time, of this departure from his instructions on the part of the agent; Stainback *v.* Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648, holding that a power of attorney to draw bills in the name of his principal does not empower an agent to draw one on a person in whose hands the principal has no funds; and the payment of such bill by such person raises no implied obligation of the principal to repay him; Mann *v.* King, 6 Munf. (Va.) 428, holding the principal liable on an indorsement at the bank named in the power, although it was not intended by the principal that the agent should indorse

paper carries with it no power to indorse it. The receipt of the paper accomplishes the purpose of the agency, and hence exhausts the power; [80] and authority to make or indorse for one purpose, or upon one occasion, cannot be exercised for another purpose, or upon a different occasion,[81] although a principal who has held an agent out as having general authority to indorse paper cannot escape the results of such indorsement because of secret limitations on the purposes for which the indorsement may be made, which the agent has disregarded.[82] An agent has

for the purpose he did; Clement *v.* Dickey, 5 Fed. Cas. No. 2,883. 1 Paine 377); if his authority is to make one kind of commercial paper, as to draw checks on his principal's account, there is no inference of authority to make other kinds, as promissory notes in payment of authorized purchases (Hefner *v.* Palmer, 67 Ill. 161; Avery *v.* Lauve, 1 La. Ann. 457; New York Iron Mine *v.* Negaunee First Nat. Bank, 39 Mich. 644; Alder *v.* Buckley, 1 Swan (Tenn.) 69, holding that authority not under seal "to sign any note or other instrument of writing" does not authorize the agent to execute a bill single). Authority to make a restricted indorsement carries no power to make any other indorsement (Exchange Bank *v.* Thrower, 118 Ga. 433, 45 S. E. 316; Schmidt *v.* Garfield Nat. Bank, 64 Hun (N. Y.) 298, 19 N. Y. Suppl. 252 [*affirmed* in 138 N. Y. 631, 33 N. E. 1084]; Gompertz *v.* Cook, 20 T. L. R. 106), nor can authority to indorse or accept bills be inferred from power to draw such bills, especially if such power be special (Sewanee Min. Co. *v.* McCall, 3 Head (Tenn.) 619). If his authority is to make a joint note, he cannot make a joint and several note, except the circumstances make it clear that such was the intent (Metropolis Bank *v.* Moore, 2 Fed. Cas. No. 901, 5 Cranch C. C. 518 [*affirmed* in 13 Pet. 302, 10 L. ed. 172], suggesting, although doubtfully, that under a power of attorney from several persons to sign a joint promissory note the attorney may make a joint and several promissory note, the purpose of the parties being to renew a joint and several note which had been discounted by plaintiff), and if the authority from several principals to an agent is severally given he cannot bind them jointly, nor jointly with himself, by making them joint indorsers of a note, or makers of other paper (Harris *v.* Johnston, 54 Minn. 177, 55 N. W. 970, 40 Am. St. Rep. 312; U. S. Bank *v.* Beirne, 1 Gratt. (Va.) 234, 42 Am. Dec. 551; Odell *v.* Cormack, 19 Q. B. D. 223 [*distinguishing* Kirk *v.* Blurton, 12 L. J. Exch. 117, 9 M. & W. 284]). If the authority is to borrow money on the security of the principal's property, the agent cannot bind the principal personally by giving his note (Mylius *v.* Copes, 23 Kan. 617. But see Taylor *v.* Hudgins, 42 Tex. 244), if the power is to bind the principal in a representative capacity it does not give authority to bind him personally (Gore Bank *v.* Meredith, 26 U. C. Q. B. 237), if the authority is to make notes or bonds he cannot renew them (Ward *v.* Commonwealth Bank, 7 T. B. Mon. (Ky.) 93. See also Stuart *v.* Com., 91 Va. 152, 21 S. E. 246. But see McClure *v.* Corydon Deposit Bank, 106 S. W. 1177, 32 Ky. L. Rep. 772), or, if the authority includes power to renew, it extends only to renewals of the original notes, and not to notes given later for other purposes, or for the same purpose but with changes affecting the liability of the principal (Crutcher *v.* Commonwealth Bank, 4 Litt. (Ky.) 436; State Bank *v.* McWillie, 4 McCord (S. C.) 438; State Bank *v.* Herbert, 4 McCord (S. C.) 89, holding that a power to renew notes payable at sixty or ninety days includes a power to renew a note at eighty-eight days; Hortons *v.* Townes, 6 Leigh (Va.) 47), although the power is continuing as to repeated renewals of the original notes (Washington Bank *v.* Peirson, 2 Fed. Cas. No. 953, 2 Cranch C. C. 685). If the power is to draw upon his principal for property bought and received, there is no authority to draw for property not received. Gray Tie, etc., Co. *v.* Farmers' Bank, 74 S. W. 174, 24 Ky. L. Rep. 2319, 78 S. W. 207, 25 Ky. L. Rep. 1596.

Post-dating.— An agent cannot bring himself within the limits of his authority by post-dating the paper drawn by him. Indeed he has no authority to post-date paper. Thus authority to draw sight and time drafts does not include authority to draw post-dated drafts purporting to be payable at sight. New York Iron Mine *v.* Citizens' Bank, 44 Mich. 344, 6 N. W. 823. And under authority to draw on the principal at four months the principal will not be bound by a draft dated back so as to be payable four months from the time the authority was given. Tate *v.* Evans, 7 Mo. 419; Batty *v.* Carswell, 2 Johns. (N. Y.) 48.

80. *District of Columbia.*— Millard *v.* National Bank of Republic, 3 MacArthur 54.

Louisiana.— Ducongé *v.* Forgay, 15 La. Ann. 37.

Missouri.— Graham *v.* U. S. Savings Inst., 46 Mo. 186.

New York.— Brooklyn Nat. City Bank *v.* Westcott, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771; Filley *v.* Gilman, 34 N. Y. Super. Ct. 339; Holtsinger *v.* National Corn Exch. Bank, 1 Sweeny 64, 6 Abb. Pr. N. S. 292, 37 How. Pr. 203.

North Carolina.— Hines *v.* Butler, 38 N. C. 307.

England.— Hogg *v.* Snath, 1 Taunt. 347.

See 40 Cent. Dig. tit. "Principal and Agent," § 322.

81. Callender *v.* Golsan, 27 La. Ann. 311; Chouteau *v.* Filley, 50 Mo. 174; Seattle Shoe Co. *v.* Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064.

82. Wedge Mines Co. *v.* Denver Nat. Bank, 19 Colo. 182, 73 Pac. 873; Heinz *v.* American Nat. Bank, 9 Colo. App. 31, 47 Pac. 403.

no authority to guarantee payment by his principal, except as his authorized indorsement may make his principal answerable.[83] The broadest possible authority to make and indorse paper presumptively is to be exercised in the principal's interest only, and does not impliedly extend to making or indorsing paper for the accommodation of third persons,[84] and still less for the agent himself. Accordingly, in the absence of very clear showing of such authority, an agent has no power under the broadest terms in the letter of appointment to make or indorse negotiable paper for his own interest, in the name of his principal,[85] or for his own interest and that of the principal.[86] But it has been held that an agent authorized to make negotiable paper may bind his principal as to innocent holders, although he appropriates the avails to his own use, or although he exercises the power to the detriment and not to the benefit of the principal, as by an accommodation indorsement, for the agent has done just what his power authorized him to do.[87] The principal will not, however, be bound if the third person knew, or if the transaction showed upon its face, that the agent made the paper for his own use or for the accommodation of a third person, for these are acts that are not authorized, and on their face carry to the third person knowledge of that fact.[88] An agent

83. Palmer *v.* Yarrington, 1 Ohio St. 253. And see *infra*, II, A, 6, h, (VIII).

84. *Alabama.*— Wallace *v.* Mobile Branch Bank, 1 Ala. 565.

Florida.— Boord *v.* Strauss, 39 Fla. 381, 22 So. 713.

Georgia.— Myers *v.* Walker, 104 Ga. 316, 30 S. E. 842.

Massachusetts.— Odiorne *v.* Maxcy, 13 Mass. 178.

New Jersey.— Camden Safe Deposit, etc., Co. *v.* Abbott, 44 N. J. L. 257; Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

Tennessee.— Kingsley *v.* State Bank, 3 Yerg. 107.

85. *Kentucky.*—Mathis *v.* Taylorsville Bank, 105 S. W. 157, 32 Ky. L. Rep. 200, holding that a power of attorney authorizing the grantor's son to execute checks on a bank and note in its favor does not authorize the son to three years later execute the grantor's notes to the bank to cover overdrafts arising on the son's individual account, opened after the power was executed, although a few months before one of the notes was made the son told the grantor he was yet signing notes under the power, and although the grantor knew of the condition of the son's account, the bank knowing of the son's insolvency when he opened his account.

Louisiana.— Citizens' Sav. Bank *v.* Hart, 32 La. Ann. 22.

New York.— Voltz *v.* Blackmar, 64 N. Y. 440, 646, holding that a power of attorney to an agent authorizing him to sign and indorse checks, notes, etc., gives him no authority to draw the money of his principal from the bank without the principal's knowledge, in payment of a debt due to himself from the principal.

Pennsylvania.— Gill *v.* Hutchinson, 37 Leg. Int. 293.

Tennessee.— Nichol *v.* Green, Peck 283.

Virginia.— Stainback *v.* State Bank, 11 Gratt. 269.

United States.—Park Hotel Co. *v.* St. Louis Fourth Nat. Bank, 86 Fed. 742, 30 C. C. A. 409; Butcher *v.* Tyson, 4 Fed. Cas. No. 2,233.

Canada.— Gore Bank *v.* Crooks, 26 U. C. Q. B. 251.

Paper made payable to the agent himself should put third persons on guard as to the agent's authority and the purposes for which he is using his principal's credit. New York Iron Mine *v.* Negaunee First Nat. Bank, 39 Mich. 644; Eldridge *v.* Husted, 24 Misc. (N. Y.) 197, 52 N. Y. Suppl. 681 [*reversing* 22 Misc. 534, 49 N. Y. Suppl. 1019]. But a cashier's check used by the cashier for his own purposes is no notice, since it is part of his usual employment to draw such checks. Goshen Nat. Bank *v.* State, 141 N. Y. 379, 36 N. E. 316.

86. Stainback *v.* Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648.

87. *Michigan.*— Howry *v.* Eppinger, 34 Mich. 29.

Nebraska.— Harrison Nat. Bank *v.* Austin, 65 Nebr. 632, 91 N. W. 540, 101 Am. St. Rep. 639, 59 L. R. A. 294; Faulkner *v.* Simms, (1902) 89 N. W. 171; Thompson *v.* Shelton, 49 Nebr. 644, 68 N. W. 1055; Johnston *v.* Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 N. W. 1100; Lebanon Sav. Bank *v.* Blanke, 2 Nebr. (Unoff.) 403, 89 N. W. 169; Harrison Nat. Bank *v.* Williams, 2 Nebr. (Unoff.) 400, 89 N. W. 245.

New York.— Westfield Bank *v.* Cornen, 37 N. Y. 320, 93 Am. Dec. 573. See also New York Bank *v.* Ohio Bank, 29 N. Y. 619.

Rhode Island.— Brown *v.* William Clark Co., 22 R. I. 36, 46 Atl. 239.

Vermont.— Cross *v.* Haskins, 13 Vt. 536.

88. *Delaware.*— Maher *v.* Moore, (1898) 42 Atl. 721.

Mississippi.— Planters' Bank *v.* Cameron, 3 Sm. & M. 609.

New Jersey.— Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.— Gerard *v.* McCormick, 130 N. Y. 261, 29 N. E. 115, 4 L. R. A. 234 [*affirming* 16 Daly 40, 8 N. Y. Suppl. 860]; Wright *v.* Cabot, 89 N. Y. 570; Ford *v.* Union Nat. Bank, 88 N. Y. 672.

West Virginia.— Bank *v.* Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880.

United States.—Baltimore Cent. Nat. Bank

cannot, if specially limited as to the amount, obligate his principal by executing an instrument for a greater amount.[89] Mere authority to make or indorse will not empower the agent to receive or waive notice and protest on notes indorsed by the principal.[90] On the other hand, the principal may of course give to an agent whatever authority he will to make, indorse, or accept commercial paper on his account, and when the agent has acted within such limits the principal is bound precisely as he would be in the case of other acts done by an agent;[91] and if an agent issues commercial paper which he was authorized to make, the principal is not released from liability because the agent has, without knowledge of the party dealing with him, misused or abused the power confided in him;[92] nor because he has exercised the power conferred without first complying with all the conditions imposed upon him.[93]

f. To Manage Principal's Business. Agency to manage implies authority to do with the property what has been previously done with it by the owners, or others with their express or implied consent; or further to do with it what is usual and customary to do with property of the same kind in the same locality.[94] But in the absence of a grant of such power in specific terms, no power to do acts beyond the ordinary needs of the principal's business is to be inferred from the use in his authorization of general terms of the broadest import.[95] Thus an agent

v. Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693.

Canada.— Union Bank *v.* Eureka Woolen Mfg. Co., 33 Nova Scotia 302.

But *compare* Hambro *v.* Burnand, [1904] 2 K. B. 10, 9 Com. Cas. 251, 73 L. J. K. B. 669, 90 L. T. Rep. N. S. 803, 20 T. L. R. 398, 52 Wkly. Rep. 583 [*reversing* [1903] 2 K. B. 399, 8 Com. Cas. 252, 72 L. J. K. B. 662, 89 L. T. Rep. N. S. 180, 19 T. L. R. 584, 51 Wkly. Rep. 652]; Bengal Bank *v.* McLeod, 13 Jur. 945, 5 Moore Indian App. 1, 18 Eng. Reprint 795, 7 Moore P. C. 35, 13 Eng. Reprint 792.

89. Union Bank *v.* Mott, 39 Barb. (N. Y.) 180 (holding that an agent authorized to draw and indorse checks for and in the name of his principal is not authorized to overdraw his bank account); Stovall *v.* Com., 84 Va. 246, 4 S. E. 379; Parsons *v.* Arnor, 3 Pet. (U. S.) 413, 7 L. ed. 724.

90. Planters, etc., Bank *v.* King, 9 Ala. 279; Bird *v.* Doyal, 20 La. Ann. 541; Needles' Estate, 4 Pa. Dist. 762, 17 Pa. Co. Ct. 289; Hockaday *v.* Skeggs, 2 Phila. (Pa.) 268. *Compare* Union Bank *v.* Morgan, 2 La. Ann. 418.

91. *Alabama.*— Garrett *v.* Holloway, 24 Ala. 376.

California.—Davidson *v.* Dallas, 8 Cal. 227, holding that if notes taken by an agent for his principal run to the agent, he has a right to cure this error at any time by indorsing to his principal without the latter's consent, so that third persons be not injured by the whole transaction.

Illinois.— Helena First Nat. Bank *v.* Garside, 53 Ill. App. 354, holding that where a person directs his clerk to accept a draft, and by his negligence forgets or does not exactly know just what he ordered the clerk to do, he is bound by the terms of the acceptance as against a bank which parted with its money on the faith of the acceptance.

Indiana.—Yeatman *v.* Cullen, 5 Blackf. 240.

Louisiana.— Charleston Bank *v.* Hagan, 2 La. Ann. 999, holding that an indorsement for the benefit of the agent himself is good if it was included within the power.

Missouri.— German Nat. Bank *v.* Studley, 1 Mo. App. 260.

New York.— Weeks *v.* Fox, 3 Thomps. & C. 354.

United States.— Warren-Scharf Asphalt Paving Co. *v.* Commercial Nat. Bank, 97 Fed. 181, 38 C. C. A. 108.

Procuring indorser.— Where an agency is established and an express authority shown to draw upon the principal for amounts needed to carry on the business, it carries along with it an authority to procure an indorser of the drafts drawn by the agent for the purpose of the agency. Marsh *v.* French, 82 Ill. App. 76.

92. Citizens' Sav. Bank *v.* Hart, 32 La. Ann. 22; Crescent City Bank *v.* Hernandez, 25 La. Ann. 43 (holding that the fact that a sufficient amount to meet the check was not deposited when the check was drawn is not a valid defense and does not authorize the principal to refuse paying it in the hands of a person who had no notice of the prohibition put upon the agent); Weeks *v.* Fox, 3 Thomps. & C. (N. Y.) 354; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367 (holding that the principal is liable upon bills of exchange drawn in his name by his attorney upon persons who had no funds of the principal in their hands); Mann *v.* King, 6 Munf. (Va.) 428.

93. Merchants' Bank of Canada *v.* Griswold, 72 N. Y. 472, 28 Am. Rep. 159; Burquin *v.* Flinn, 1 McCord (S. C.) 316; Great Western Elevator Co. *v.* White, 118 Fed. 406, 56 C. C. A. 388.

94. Duncan *v.* Hartman, 143 Pa. St. 595, 22 Atl. 1099, 24 Am. St. Rep. 570.

95. *Alabama.*— Dearing *v.* Lightfoot, 16 Ala. 28.

Georgia.— Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721.

Maine.— Hazeltine *v.* Miller, 44 Me. 177.

Missouri.— Ridgeley Nat. Bank *v.* Barse

is not authorized to make permanent additions or improvements to the property under his control,[96] or to grant any easements or licenses or impose other burdens upon his principal's property.[97] But it will be sufficient to bind the principal for contracts by the agent that they were reasonably necessary to keep the property in good repair, or the business a going concern, or to protect the interests confided to the management of the agent.[98] And when the principal leaves the agent as his sole representative in doing the business, third persons are justified in relying on his acts as to matters that would naturally devolve on the principal in such a business.[99] One who is put in the place of a general manager is thereby clothed with his powers.[1] Since it is the agent's business to keep the business a going concern he has no implied authority to take steps for its winding-up or to sell it out.[2]

g. To Rescind or Modify Contracts. Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give

Live Stock Commission Co., 113 Mo. App. 696, 88 S. W. 1124.

New Jersey.— Brockway *v.* Mullin, 46 N. J. L. 448, 50 Am. Rep. 442; Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.— Rossiter *v.* Rossiter, 8 Wend. 494, 24 Am. Dec. 62.

Washington.— Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

United States.— Johnson R. Signal Co. *v.* Union Switch, etc., Co., 51 Fed. 85, 59 Fed. 20 [*affirmed* in 61 Fed. 940, 10 C. C. A. 176].

Forming partnership.— An authority to act as an agent confers no authority to form a partnership in the name of the principal with a third person. McIntosh *v.* Kelly, 31 La. Ann. 649; Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319.

Advertising contracts.— One in charge of a hotel and having the management thereof has authority to bind his principal by a contract for advertising for the hotel. Calhoon *v.* Buhre, (N. J. 1907) 67 Atl. 1068.

96. *Alabama.*— Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686.

Arkansas.—Halbut *v.* Forrest City, 34 Ark. 246.

Iowa.— Harvey *v.* Mason City, etc., R. Co., 129 Iowa 465, 105 N. W. 958, 113 Am. St. Rep. 483, 3 L. R. A. N. S. 973.

Kansas.— Peddicord *v.* Berk, 74 Kan. 236, 86 Pac. 465.

Maine.— Holmes *v.* Morse, 50 Me. 102.

New York.— Bowen *v.* Rathbun, 61 N. Y. App. Div. 614, 70 N. Y. Suppl. 614; Hill *v.* Coates, 34 Misc. 535, 69 N. Y. Suppl. 964.

Express authority to make repairs.—A power of attorney, given by a married woman to an agent, authorizing him to take general charge of certain property, to make necessary repairs, and to use such sums out of the rents "as may be necessary to pay off the cost of such repairs," authorizes the making of a contract for repairs, under which a mechanic's lien could be claimed. Wright *v.* Blackwood, 57 Tex. 644.

97. American Tel., etc., Co. *v.* Jones, 78 Ill. App. 372; Lawrence *v.* Springer, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702 (holding that an agent has no authority to impose on the land an easement by granting the right to drain adjoining land by carrying off water through sluices on the same); McKillip *v.* McIlhenny, 2 Watts (Pa.) 466.

98. *Alabama.*— Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318.

Georgia.— Baldwin *v.* Garrett, 111 Ga. 876, 36 S. E. 966.

Kentucky.— Chiles *v.* Stephens, 3 A. K. Marsh. 340.

Massachusetts.— Cummings *v.* Sargent, 9 Metc. 172, holding that one engaged to keep tavern, and to transact all business pertaining to said tavern which in his judgment might promote the owners' interest, is authorized to purchase spirituous liquors, wine, and sugar on the credit of the owners to be used at the bar of the tavern.

Missouri.— Rosenthal *v.* St. Louis, etc., R. Co., 40 Mo. App. 579.

New York.— Wennerstrom *v.* Kelly, 7 Misc. 173, 27 N. Y. Suppl. 326.

England.— Richardson *v.* Cartwright, 1 C. & K. 328, 47 E. C. L. 328.

Authority of hotel manager to advertise see Mullin *v.* Sire, 34 Misc. (N. Y.) 540, 69 N. Y. Suppl. 953; H. W. Kastor, etc., Advertising Co. *v.* Coleman, 11 Ont. L. Rep. 262, 6 Ont. Wkly. Rep. 791.

99. Byxbee *v.* Blake, 74 Conn. 607, 51 Atl. 535, 57 L. R. A. 222; Van Santvoord *v.* Smith, 79 Minn. 316, 82 N. W. 642; New York Tel. Co. *v.* Barnes, 85 N. Y. Suppl. 327; Graton, etc., Mfg. Co. *v.* Redelsheimer, 28 Wash. 370, 68 Pac. 879.

1. Citizens' Trust, etc., Co. *v.* Zane, 113 Fed. 596 [*affirmed* in 117 Fed. 814, 55 C. C. A. 38].

Where a servant was employed to perform the duties of a manager or assistant manager in the conduct of defendant's mill, evidence that he refused to let plaintiff have more than one thousand pounds of meal under the contract with defendant calling for a delivery of a larger amount is not objectionable on the ground that he was not authorized to so act for defendant, and was referred to as a bookkeeper merely. Fitzgerald Cotton Oil Co. *v.* Farmers Supply Co., 3 Ga. App. 212, 59 S. E. 713.

2. Vescelius *v.* Martin, 11 Colo. 391, 18 Pac. 338; Holbrook *v.* Oberne, 56 Iowa 324, 9 N. W. 291; *In re* Briton Medical, etc., Life Assoc., 11 Ont. 478.

them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal,[3] nor to increase his obligations and liabilities for the mere benefit of third persons,[4] unless the principal knew or approved of such modifications by the agent.[5] However, a general agent may act under such broad power to contract in his own name, or to make terms or to settle upon his own discretion, as to overcome this presumption and bind the principal by the modification, rescission, or release of his agent.[6] And a principal cannot object

3. *Alabama.*— Johnson *v.* Wilson, 137 Ala. 468, 34 So. 392, 97 Am. St. Rep. 52.

Arkansas.— Welch *v.* McKenzie, 66 Ark. 251, 50 S. W. 505.

Colorado.— Hathaway *v.* Choury, 14 Colo. App. 478, 60 Pac. 574; Torbit *v.* Heath, 11 Colo. App. 492, 53 Pac. 615.

Connecticut.—Woodruff *v.* Noyes, 15 Conn. 335.

Illinois.— Halladay *v.* Underwood, 90 Ill. App. 130.

Kansas.— Sweedlund *v.* Hutchinson, (App. 1896) 47 Pac. 163.

Louisiana.— Hill *v.* Barlaw, 6 Rob. 142.

Massachusetts.— Paige *v.* Stone, 10 Metc. 160, 43 Am. Dec. 420.

Missouri.— Knoche *v.* Whiteman, 86 Mo. App. 568.

Montana.— Blake *v.* Dick, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

New York.— Lamkin *v.* Rosenthal, 5 N. Y. App. Div. 532, 39 N. Y. Suppl. 483; Mayor *v.* Dean, 54 N. Y. Super. Ct. 315 [*reversed* on other grounds in 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540]; Von Wein *v.* Scottish Union, etc., Ins. Co., 52 N. Y. Super. Ct. 490; Dunham *v.* Pettee, 4 E. D. Smith 500 [*reversed* on other grounds in 8 N. Y. 508].

Pennsylvania.— Johnstown, etc., R. Co. *v.* Egbert, 152 Pa. St. 53, 25 Atl. 151.

South Carolina.— Guess *v.* South Bound R. Co., 40 S. C. 450, 19 S. E. 68.

United States.— Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368, holding that the law will not imply the greater authority from the lesser — the power to abrogate from the power to fulfil or carry out.

Canada.—Atlas Assur. Co. *v.* Brownell, 29 Can. Sup. Ct. 537; Torrop *v.* Imperial F. Ins. Co., 26 Can. Sup. Ct. 585.

A buying agent, like a selling agent, is appointed to make, not to release from, contracts, and hence has no more power in general to release the third person who has contracted to sell than has the selling agent to release the vendee who has contracted to buy (Gilly *v.* Logan, 2 Mart. N. S. (La.) 196, holding that an agent purchasing goods for his principal, which he promises to ship, is liable in damages if he afterward cancels the sale); nor has he implied power to vary or modify the terms of a contract agreed upon by his principal (Day Bros. Lumber Co. *v.* Daniel, 62 S. W. 866, 23 Ky. L. Rep. 285; Burks *v.* Stam, 65 Mo. App. 455).

An agent has no authority to extend the time for the performance of a contract (Powell *v.* Henry, 96 Ala. 412, 11 So. 311; Gerrish *v.* Maher, 70 Ill. 470; Lawrence *v.* Johnson, 64 Ill. 351; Chappel *v.* Raymond, 20 La. Ann. 277; Millaudon *v.* McMicken, 7 Mart. N. S. (La.) 34; Woodbury *v.* Larned, 5 Minn. 339; Hutchings *v.* Munger, 41 N. Y. 155; Creuse *v.* Defiganiere, 10 Bosw. (N. Y.) 122; Ritch *v.* Smith, 60 How. Pr. (N. Y.) 13 [*affirmed* in 82 N. Y. 627, 60 How. Pr. 157]; Karcher *v.* Gans, 13 S. D. 383, 83 N. W. 431, 79 Am. St. Rep. 893; Atlas Assur. Co. *v.* Brownell, 29 Can. Sup. Ct. 537 [*followed* in Commercial Union Assur. Co. *v.* Margeson, 29 Can. Sup. Ct. 601]), except where it is clearly within the scope of his agency (Hurd *v.* Marple, 2 Ill. App. 402, 10 Ill. App. 418; Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874, holding that where a mortgage is placed in the hands of an agent with directions to obtain a chattel mortgage as collateral security, and no restrictions are placed upon his authority, he may bind his principal by an agreement to extend the time for payment if the chattel mortgage is given; and certainly the principal cannot repudiate the agreement to extend after having taken and foreclosed the chattel mortgage; Bannon *v.* Aultman, 80 Wis. 307, 49 N. W. 967, 27 Am. St. Rep. 37, holding that an agent of a threshing-machine company, empowered to sell machines generally in a given territory, has implied authority on the purchaser's refusal to accept a machine under the written contract of sale verbally to extend the time provided in the contract for testing the machine).

Power to rescind or modify sale see *supra*, II, A, 6, b, (III), (D).

4. King *v.* Rogers, 1 Ont. L. Rep. 69.

5. Western Granite, etc., Co. *v.* Souc, 110 Cal. 431, 42 Pac. 913.

6. *California.*— Ricketson *v.* Richardson, 19 Cal. 330.

Iowa.— Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58; Osborne *v.* Backer, 81 Iowa 375, 47 N. W. 70.

Louisiana.— Cockerham *v.* Perot, 48 La. Ann. 209, 19 So. 122.

Massachusetts.— Gross *v.* Milligan, 176 Mass. 566, 58 N. E. 471.

Minnesota.— Van Santvoord *v.* Smith, 79 Minn. 316, 82 N. W. 642; Schumacher *v.* Pabst Brewing Co., 78 Minn. 50, 80 N. W. 838.

Oregon.— Hughes *v.* Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. Rep. 574.

Tennessee.— Kuhlman *v.* E. J. Hart Co., (Ch. App. 1900) 59 S. W. 455.

Vermont.— Sprague *v.* Train, 34 Vt. 150.

The principal may give an agent such complete charge of his business as to enable him to rescind a contract to purchase which he

to a contract made by his agent upon the plea that he has departed from his instructions where the agent has followed the power in all material points, or where his only departure consists in the use of different phrases having the same legal effect, or perhaps providing a contract more favorable to the principal.[7]

h. Miscellaneous — (i) *To Lease or Rent.*[8] From a general authority to manage real estate may be inferred authority to lease in the ordinary form for ordinary terms.[9] But authority to lease is not to be inferred from power to sell or exchange, unless accompanied with further rights or powers in the agent,[10] nor from a mere power to collect rents for the landlord.[11] When the power exists it must be strictly pursued. While the agent may bind his principal by agreements left to his discretion,[12] he cannot bind his principal by other agreements or obligations,[13] nor lease the property for an illegal purpose,[14] nor make a lease beyond, or contrary to, the restrictions openly imposed by the principal, either as to the land to be included in the lease or as to the terms upon which it is to be leased.[15] The power to lease and collect the rents carries with it no power to release, and surrender of the premises to such agent before termination of the lease has no binding force upon the principal.[16] Nor will the principal be bound if the agent

has made. Middle Division Elevator Co. *v.* Vandeventer, 80 Ill. App. 669.

7. Bernard *v.* Torrance, 5 Gill & J. (Md.) 383; Simonds *v.* Clapp, 16 N. H. 222; McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816; Young *v.* Union Sav. Bank, etc., Co., 23 Wash. 360, 63 Pac. 247.

8. See Landlord and Tenant, 24 Cyc. 895 *et seq.*

Authority to give notice to quit in own name see Landlord and Tenant, 24 Cyc. 1332.

9. Duncan *v.* Hartman, 143 Pa. St. 595, 22 Atl. 1099, 24 Am. St. Rep. 570, 149 Pa. St. 114, 24 Atl. 190. *Compare* Owens *v.* Swanton, 25 Wash. 112, 64 Pac. 921, holding that a term lease cannot be executed by one having charge of property, unless he is specially authorized. But see Howard *v.* Carpenter, 11 Md. 259, holding that an attorney either at law or in fact has no authority either to make a lease, or to ratify or confirm an imperfect one, or to perfect an inchoate agreement for a lease of property of his principal, unless authority for such purpose is expressly given.

10. Hitchens *v.* Ricketts, 17 Ind. 625.

11 Dieckman *v.* Weirich, 73 S. W. 1119, 24 Ky. L. Rep. 2340.

12. Indiana Natural Gas, etc., Co. *v.* Beales, (Ind. App. 1905) 74 N. E. 551; Ridgley *v.* De Bough, 83 Iowa 100, 48 N. W. 996; Babin *v.* Enslcy, 14 N. Y. App. Div. 548, 43 N. Y. Suppl. 849 (holding that one held out as having authority to rent premises without limit as to time may bind his principal by a lease for a year); Anonymous, 5 Vin. Abr. 522 pl. 35

13. Durkee *v.* Carr, 38 Oreg. 189, 63 Pac. 117; MacDonald *v.* O'Neil, 21 Pa. Super. Ct. 364. See also Moore *v.* Rankin, 33 Misc. (N. Y.) 749, 67 N. Y. Suppl. 179.

14. Stover *v.* Flower, 120 Iowa 514, 94 N. W. 1100.

15. *California.*— Borderre *v.* Den, 106 Cal. 594, 39 Pac. 946, holding that an agent authorized to let the whole of a tract of land for one year from November for six hundred dollars cannot bind his principal by a lease of a part of the tract for two hundred and twenty-five dollars for a term exceeding one year and commencing in the April preceding November.

Missouri.— Harrington *v.* F. W. Brockman Commission Co., 107 Mo. App. 418, 81 S. W. 629.

New York.— Larkin *v.* Radosta, 119 N. Y. App. Div. 515, 104 N. Y. Suppl. 165, holding that where a landlord restricts his agent to the making of monthly leases only, he is not bound by the act of the agent in making a lease for a term of three years, for power to make leases for years is not necessarily within the agent's authority to lease.

Pennsylvania.— Pittsburg Mfg. Co. *v.* Fidelity Title, etc., Co., 207 Pa. St. 223, 56 Atl. 436.

South Carolina.— Providence Mach. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117.

Vermont.— La Point *v.* Scott, 36 Vt. 603, holding that a general agent cannot lease his principal's farm jointly with his own, so as to make the principal jointly liable with himself upon the stipulations in the lease in reference to the agent's property.

A lease for a longer period than the agent had a right to make has been held valid *pro tanto* to the extent of the agent's authority. Chesebrough *v.* Pingree, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529. And see Landlord and Tenant, 24 Cyc. 896. But see Schumacher *v.* Pabst Brewing Co., 78 Minn. 50, 80 N. W. 838, holding that an agent authorized to negotiate for or make a lease for three years has no authority to make one for three years with the privilege to the lessee of a renewal for two years more, and that such a lease is not binding.

Renewal.—An agent who has power to rent premises has the power to renew the lease. Steuerwald *v.* Jackson, 123 N. Y. App. Div. 569, 108 N. Y. Suppl. 41.

16. *Indiana.*— Woodward *v.* Lindley, 43 Ind. 333.

Iowa.— Faville *v.* Lundvall, 106 Iowa 135, 76 N. W. 512.

substitutes a new tenant for the former one. Authority to contract is no authority to cancel a contract and substitute a new one.[17] On the other hand, the agent may of course release and accept a surrender of the premises where such powers are evidently within his authority.[18] And a general agent in full charge of premises has implied power to make any reasonable and necessary arrangement with the tenant.[19] Authority to collect rents shows no authority to renew a lease,[20] nor to sell the property.[21] An agent has no authority to receipt for the rent upon payment of less than the full amount, nor to accept anything but money in payment of the rent,[22] nor to contract to repay money paid on the rent if the tenant does not remain the full time.[23] He has authority to take all usual and necessary steps to collect such rent,[24] and may take proper steps against the tenant in case of non-payment.[25] A general agent to lease may do so on his own credit and recover from his principal rent payments made by him.[26] One in general charge of a business which requires the use of buildings or premises for the conduct of the business of his principal has implied power to rent them.[27]

(II) *To Mortgage or Pledge.*[28] Authority to mortgage the property of a principal is rarely to be inferred. It is not to be implied from general authority to manage, or even to sell, the principal's property.[29] Where, however, it is clear that such authority is fairly within the power or the purposes of the agency, the

Montana.— Blake *v.* Dick, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

New York.— Baylis *v.* Prentice, 75 N. Y. 604; Earle *v.* Gillies, 92 N. Y. Suppl. 239; Barkley *v.* Holt, 84 N. Y. Suppl. 957.

Pennsylvania.— Johnstown, etc., R. Co. *v.* Egbert, 152 Pa. St. 53, 25 Atl. 151.

17. Wallace *v.* Dinniny, 11 Misc. (N. Y.) 317, 32 N. Y. Suppl. 159.

18. Goldsmith *v.* Schroeder, 93 N. Y. App. 206, 87 N. Y. Suppl. 558.

19. Ireland *v.* Hyde, 34 Misc. (N. Y.) 546, 69 N. Y. Suppl. 889, holding that where a landlord's agent was the general manager of his affairs, and leased premises under a monthly tenancy, he had authority to modify such lease after a fire by agreeing that in consideration of the tenant's remaining in the premises after repairs, no rent should be charged until the premises were restored to their original condition.

20. Noble *v.* Burney, 124 Ga. 960, 53 S. E. 463.

21. Samson *v.* Beale, 27 Wash. 557, 68 Pac. 180.

22. Halladay *v.* Underwood, 90 Ill. App. 130; Hoster *v.* Lange, 80 Mo. App. 234, 2 Mo. App. 638; Rhine *v.* Blake, Tex. App. Civ. Cas. § 1066, holding that the power to rent and collect rent moneys does not authorize such agent to receive merchandise for rents.

23. Stover *v.* Flower, 120 Iowa 514, 94 N. W. 1100.

24. Beck *v.* Minnesota, etc., Grain Co., 131 Iowa 62, 107 N. W. 1032, 7 L. R. A. N. S. 930, holding that the agent might pursue the landlord's share of a crop in the hands of third persons.

25. O'Hare *v.* McCormick, 30 U. C. Q. B. 567.

26. Irions *v.* Cook, 33 N. C. 203.

27. Rhodes Furniture Co. *v.* Weeden, 108 Ala. 252, 19 So. 318; Baldwin *v.* Garrett, 111 Ga. 876, 36 S. E. 966. *Compare* Brown *v.* Salomon, 9 Colo. App. 323, 48 Pac. 278.

An agent may renew the lease of premises rented by him upon its expiration. Phillips, etc., Mfg. Co. *v.* Whitney, 109 Ala. 645, 20 So. 333.

28. **Authority to mortgage realty** see Mortgages, 27 Cyc. 1043 *et seq.*

29. *California.*— Chapman *v.* Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Hawxhurst *v.* Rathgeb, 119 Cal. 531, 51 Pac. 846, 63 Am. St. Rep. 142; Golinsky *v.* Allison, 114 Cal. 458, 46 Pac. 295.

Florida.— Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

Kansas.— Switzer *v.* Wilvers, 24 Kan. 384, 36 Am. Rep. 259.

Missouri.— Henson *v.* Keet, etc., Mercantile Co., 48 Mo. App. 214, holding that a general agent to conduct a retail store has no implied authority to give a chattel mortgage on the stock, the effect of which is to close the business.

South Carolina.— Fraser *v.* McPherson, 3 Desauss. Eq. 393, holding that an agent employed to purchase property with particular funds has no authority to mortgage the property to secure the purchase-money, and such mortgage will not bind the property.

Texas.— Nacogdoches First Nat. Bank *v.* Hicks, 24 Tex. Civ. App. 269, 59 S. W. 842.

Loose methods may estop a principal to deny his agent's authority to mortgage. Poole *v.* West Point Butter, etc., Assoc., 30 Fed. 513.

The power to sell and convey lands as a general rule carries no implied power to charge the principal with the responsibilities and liabilities of a mortgagor. Gaylord *v.* Stebbins, 4 Kan. 42; Jeffery *v.* Hursh, 49 Mich. 31, 12 N. W. 898, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; Morris *v.* Watson, 15 Minn. 212; Morris *v.* Ewing, 8 N. D. 99, 76 N. W. 1047; Campbell *v.* Foster Home Assoc., 2 Pa. Dist. 845 [*affirmed* in 163 Pa. St. 609, 30 Atl. 222, 43 Am. St. Rep. 818, 26 L. R. A. 117]; Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 85 N. W. 1019,

courts will not hesitate to uphold a mortgage executed by an agent, although he was not expressly authorized to give mortgages or the mortgage in question.[30] An agent having authority to mortgage has, as a necessary incident of such authority, the power to insert in the mortgage the usual terms incident to such instruments, including the ordinary warranties and covenants, and a power to sell in case of default,[31] or to give a trust deed, or to make an equivalent conveyance, for the same purposes for which a mortgage was authorized.[32] The agent himself may have such an interest in the property that he has a right in himself to sell it. In such case he has the lesser right to pledge or mortgage it.[33] Presumptively the power to mortgage is limited to property owned by the principal at the time he gave the power, although when the principal's intent, as gathered from the language of the power and the surrounding circumstances, is broader, the courts

84 Am. St. Rep. 927; Devaynes *v.* Robinson, 24 Beav. 86, 3 Jur. N. S. 707, 27 L. J. Ch. 157, 5 Wkly. Rep. 509, 53 Eng. Ch. 289; Page *v.* Cooper, 16 Beav. 396, 1 Wkly. Rep. 136, 51 Eng. Reprint 831; Haldenby *v.* Spofforth, 1 Beav. 390, 3 Jur. 241, 8 L. J. Ch. 238, 17 Eng. Ch. 390, 48 Eng. Reprint 991; Stronghill *v.* Anstey, 1 De G. M. & G. 635, 16 Jur. 671, 22 L. J. Ch. 130, 50 Eng. Ch. 490, 42 Eng. Reprint 700. But see Ball *v.* Harris, 3 Jur. 140, 8 L. J. Ch. 114, 4 Myl. & C. 264, 18 Eng. Ch. 264, 41 Eng. Reprint 103; Mills *v.* Banks, 3 P. Wms. 1, 24 Eng. Reprint 943.

Mortgage of personalty.— The courts show the same reluctance to recognize the power of an agent to mortgage personal chattels, except where it is expressly given, or the circumstances are such that it is necessarily implied in order to carry out the agency. Reed *v.* Kimsey, 98 Ill. App. 364 (holding that a power of attorney to control and sell a horse does not authorize the attorney to mortgage it); Kiefer *v.* Klinsick, 144 Ind. 46, 42 N. E. 447; Reeves *v.* Baldwin, 1 Ind. 216, Smith 170; Wycoff *v.* Davis, 127 Iowa 399, 103 N. W. 349; Edgerly *v.* Cover, 106 Iowa 670, 77 N. W. 328; Switzer *v.* Wilvers, 24 Kan. 384, 36 Am. Rep. 259; Wood *v.* Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Henson *v.* Keet, etc., Mercantile Co., 48 Mo. App. 214; Fraser *v.* McPherson, 3 Desauss. Eq. (S. C.) 393; Lewis *v.* Ramsdale, 55 L. T. Rep. N. S. 179, 35 Wkly. Rep. 8.

Renewal of mortgage.— A power of attorney authorizing the grantee therein to prosecute every kind of business and for and in the name of the grantor execute and deliver agreements, mortgages, notes, etc., empowers the grantee to execute for the grantor an instrument renewing a mortgage executed by the grantor and the note thereby secured. Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616.

30. *California.*— Clute *v.* Loveland, 68 Cal. 254, 9 Pac. 133.

Massachusetts.— Wood *v.* Goodridge, 6 Cush. 117, 52 Am. Dec. 771.

Mississippi.— Burnet *v.* Boyd, 60 Miss. 627.

Missouri.— Lamy *v.* Burr, 36 Mo. 85, 88 Am. Dec. 135; State Bank *v.* McKnight, 2 Mo. 42.

New York.— Cumming *v.* Williamson, 1 Sandf. Ch. 17.

Pennsylvania.— Campbell *v.* Foster Home Assoc., 163 Pa. St. 609, 30 Atl. 222, 43 Am. St. Rep. 818, 26 L. R. A. 117.

Texas.— See Cohen *v.* Oliver, 9 Tex. Civ. App. 35, 29 S. W. 81, holding that verbal authority to give a deed of trust of a stock of goods is not affected by a previous written authority to the same person to sell goods in the general course of trade.

England.— Perry *v.* Holl, 2 Giff. 138, 6 Jur. N. S. 491, 66 Eng. Reprint 59 [*affirmed* in 2 De G. F. & J. 38, 6 Jur. N. S. 661, 29 L. J. Ch. 677, 2 L. T. Rep. N. S. 385, 8 Wkly. Rep. 570, 63 Eng. Ch. 30, 45 Eng. Reprint 536].

If the principal has limited the purposes or extent of the mortgage, the agent has no power to execute a mortgage for any other purpose or to any greater extent, however beneficial it may be thought to be to the principal. Roberts *v.* Mathews, 77 Ga. 458; Skaggs *v.* Murchison, 63 Tex. 348; *Ex p.* Snowball, L. R. 7 Ch. 534, 41 L. J. Bankr. 49, 26 L. T. Rep. N. S. 894, 20 Wkly. Rep. 786; Jones *v.* Stöhwasser, 16 Ch. D. 577, 50 L. J. Ch. 625, 44 L. T. Rep. N. S. 333, 29 Wkly. Rep. 497.

Authority to receive the money advanced on the mortgage is not shown from the fact that an agent has the mortgage in his possession. McMullen *v.* Polley, 7 Can. L. T. Occ. Notes 12, 12 Ont. 702.

31. Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458 [*affirming* 7 Johns. Ch. 25]; Richmond *v.* Voorhees, 10 Wash. 316, 38 Pac. 1014, holding that a power of attorney to borrow money, and secure its payment by a mortgage on land, authorizes the attorney to execute a mortgage with all the usual covenants demanded by those loaning money on such security.

32. Posner *v.* Bayless, 59 Md. 56; Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553; Gimell *v.* Adams, 11 Humphr. (Tenn.) 283, holding that under a power to "mortgage or convey for the payment of debts," the property may be conveyed to a trustee, with authority to sell for the satisfaction of debts.

33. Clute *v.* Loveland, 68 Cal. 254, 9 Pac. 133; Dingwall *v.* McBean, 30 Can. Sup. Ct. 441, holding that a factor has the power to sell the property of his principal in his hand to secure his advances.

will interpret it as extending to after-acquired property.[34] The principal may empower the agent to execute a mortgage for any lawful purpose, including the agent's personal benefit;[35] but in the absence of express terms, or undoubted proof of such power, no general authority can be broad enough to empower the agent to mortgage the lands of his principal to secure the debt of a third person or of the agent himself, or for any purpose except the benefit of the principal.[36] No authority to pledge arises from the possession or management of property by an agent, nor even from a power to sell the same;[37] but it may be inferred whenever it appears that it is reasonably necessary to enable the agent to perform his undertaking.[38] An agent has no right to pledge the chattels of the principal for his own obligations in the absence of express terms or undoubted proof of such power.[39]

(III) *To Prosecute and Settle Claims and Accounts.*[40] An agent having general authority to make settlements of claims or accounts for his principal has implied power to do the usual and necessary things to effect such settlement.[41] Reference of a dispute to arbitration is an extraordinary method of

34. Weare *v.* Williams, 85 Iowa 253, 52 N. W. 328; Willis *v.* Palmer, 7 C. B. N. S. 340, 6 Jur. N. S. 732, 29 L. J. C. P. 194, 2 L. T. Rep. N. S. 626, 8 Wkly. Rep. 295, 97 E. C. L. 340 (in which a general power to mortgage a ship was held to be broad enough to justify a mortgage of the freight); Davy *v.* Waller, 81 L. T. Rep. N. S. 107.

35. Ayres *v.* Palmer, 57 Cal. 309.

36. *California.*— Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156, 8 Pac. 824.

Colorada.—Nippel *v.* Hammond, 4 Colo. 211.

Kansas.— Wolfley *v.* Rising, 8 Kan. 297.

New York.— Greenwood *v.* Spring, 54 Barb. 375, holding that a general power to mortgage property of the principal will not sustain a mortgage for the benefit of a third person.

England.— Jones *v.* Stöhwasser, 16 Ch. D. 577, 50 L. J. Ch. 625, 44 L. T. Rep. N. S. 333, 29 Wkly. Rep. 497; *Re* Bowles, 31 L. T. Rep. N. S. 365 [*affirming* 22 Wkly. Rep. 817].

Partnership debt.— A general agent with authority to mortgage his principal's property may give a trust deed of it to secure a debt of a firm of which he was a member. Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

37. *Alabama.*— Ullman *v.* Myriek, 93 Ala. 532, 8 So. 410.

Massachusetts.— Nash *v.* Drew, 5 Cush. 422, holding that a clerk or salesman has no implied right to pledge his employer's property.

New York.— Zachrisson *v.* Ahman, 2 Sandf. 67; Anderson *v.* McAleenan, 15 Daly 444, 8 N. Y. Suppl. 483, holding that delivery of a chattel to a person with authority to sell it to A, but without a general power of sale, does not confer authority to pledge the chattel.

Pennsylvania.— Newbold *v.* Wright, 4 Rawle 195.

South Carolina.— Ravenel *v.* Lyles, Speers Eq. 281.

United States.—George *v.* Louisville Fourth Nat. Bank, 41 Fed. 257.

England.— Jonmenjoy Coondoo *v.* Watson, 9 App. Cas. 561, 53 L. J. P. C. 80, 50 L. T. Rep. N. S. 411; De Bouchout *v.* Goldsmid, 5 Ves. Jr. 211, 31 Eng. Reprint 551.

Canada.— Jones *v.* Henderson, 3 Manitoba 433.

38. Hayes' Appeal, 195 Pa. St. 177, 45 Atl. 1007.

39. *California.*— Hawxhurst *v.* Rathgeb, 119 Cal. 531, 51 Pac. 846, 63 Am. St. Rep. 142.

Georgia.— Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400.

Illinois.— Morrison First Nat. Bank *v.* Bressler, 38 Ill. App. 499.

Iowa.— Wyckoff *v.* Davis, 127 Iowa 399, 103 N. W. 349.

Maine.— Jones *v.* Farley, 6 Me. 226.

Missouri.— Wheeler, etc., Mfg. Co. *v.* Givan, 65 Mo. 89.

Nebraska.— Ryan *v.* Stowell, 31 Nebr. 121, 47 N. W. 637.

Virginia.— Hewes *v.* Doddridge, 1 Rob. 143 (so holding under a power of attorney authorizing the agent to act in every species of business wherein the principal may be concerned); Skinner *v.* Dodge, 4 Hen. & M. 432.

Wisconsin.— Whitney *v.* State Bank, 7 Wis. 620.

England.— Martini *v.* Coles, 1 M. & S. 140; De Bouchout *v.* Goldsmid, 5 Ves. Jr. 211, 31 Eng. Reprint 551.

40. See, generally, Arbitration and Award, 3 Cyc. 568; Compromise and Settlement, 8 Cyc. 499.

41. *Alabama.*—Searborough *v.* Reynolds, 12 Ala. 252.

Iowa.— Gafford *v.* American Mortg., etc., Co., 77 Iowa 736, 42 N. W. 550.

Mississippi.— German-American Provision Co. *v.* Jones, 87 Miss. 277, 39 So. 521.

Missouri.—Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702.

New York.— Ferreira *v.* Depew, 17 How. Pr. 418.

Limitations upon authority.—However general the authority, no power is to be inferred to make unusual settlements or agreements that impose upon the principal new liabilities, or deprive him of his claims or securities (Johnston *v.* Wright, 6 Cal. 373; Bohanan *v.* Boston, etc., R. Co., 70 N. H. 526,

settlement. It substitutes for the discretion of the agent the judgment of another person, the arbitrator, and the agent therefore has no authority to submit to arbitration claims or accounts for or against his principal unless such submission has been directly or incidentally authorized.[42] *Prima facie* a claim is to be settled by a payment in cash, and an agent has no authority to accept anything else, although of course the nature of the claim or authority of the agent may be such as to justify the acceptance of other payment.[43] An agent is not to be presumed to have authority to release a debtor without any payment, or upon the payment of any sum less than the entire debt,[44] unless the appointment or its surrounding

49 Atl. 103, holding that a general agent of a railroad to settle claims has no authority to promise employment for life; Allen *v.* Brown, 44 N. Y. 228, holding that where an agent having authority merely "to settle or arrange" certain claims received notes in settlement, and without the consent of his principal sold them for less than their face value, he was responsible for the full amounts on evidence that they were collectable; Geiger *v.* Bolles, 1 Thomps. & C. (N. Y.) 129; Pollock *v.* Cohen, 32 Ohio St. 514; Hussey *v.* Crass, (Tenn. Ch. App.) 53 S. W. 986; Mead *v.* Owen, 80 Vt. 273, 67 Atl. 722, 12 L. R. A. N. S. 655, holding that an appointment as arbitrator and agent to settle differences with another, who had been occupying a house on a farm under an agreement whereby he was to carry on the farm on shares, does not carry with it authority to extend the time within which the house may be occupied to the time of settlement; Cougar *v.* Galena, etc., R. Co., 17 Wis. 477, holding that a special authority from the owner to look up property mislaid or lost by a common carrier does not imply any authority to settle for the damages resulting from the carrier's neglect; New York *v.* Du Bois, 86 Fed. 889), such as mortgages or other liens on the debtor's property (Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; Garrels *v.* Morton, 26 Ill. App. 433; Hakes *v.* Myrick, 69 Iowa 189, 28 N. W. 575; Stark *v.* Olsen, 44 Nebr. 646, 63 N. W. 37), nor to adopt means and methods of securing a settlement not authorized in the power, nor in accord with well established custom (Dixon *v.* Ford, 1 Rob. (La.) 253; Wright *v.* Ellison, 1 Wall. (U. S.) 16, 17 L. ed. 555). Mere power to settle is limited to fixing the terms of settlement, and does not include authority to receive or distribute the payment of the sum agreed upon. Churchill *v.* McKay, 20 Can. Sup. Ct. 472.

Sale.— An agent with authority to compromise a debt has no power to sell the evidence thereof. Draughon *v.* Quillen, 23 La. Ann. 237.

42. *Alabama.*—Scarborough *v.* Reynolds, 12 Ala. 252, holding that an authority to an agent stated thus, "If you can honorably and fairly settle with Reynolds for me, out of court, do so, if not, let the court and jury settle," does not authorize a reference to arbitrators; nor will authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice, confer such power.

California.—Talmadge *v.* Arrowhead Reservoir Co., 101 Cal. 367, 35 Pac. 1000.

Illinois.— Trout *v.* Emmons, 29 Ill. 433, 81 Am. Dec. 326.

Nebraska.— Manufacturers', etc., F. Ins. Co. *v.* Mullen, 48 Nebr. 620, 67 N. W. 445.

Canada.— O'Regan *v.* Quebec, etc., Steamship Co., 19 N. Brunsw. 528.

See 40 Cent. Dig. tit. "Principal and Agent," § 332.

Authority to submit to arbitration does not arise from general authority to settle claims, or to demand, or even to sue for, moneys due the principal. Huber *v.* Zimmerman, 21 Ala. 488, 56 Am. Dec. 255; Scarborough *v.* Reynolds, 12 Ala. 252; Allen *v.* Confederate Pub. Co., 121 Ga. 773, 49 S. E. 782; Michigan Cent. R. Co. *v.* Gougar, 55 Ill. 503; King *v.* King, 104 La. 420, 29 So. 205; Lawrence *v.* Emson, 31 N. J. Eq. 67; New York *v.* Du Bois, 86 Fed. 889, holding that the power given to compromise implies the exercise by the agent of his own judgment as to the terms accepted, and cannot be delegated by the agent to any other person or tribunal.

When the authority exists it must be strictly pursued, and the principal will not be bound if the agent departs from his authority, or agrees to unusual terms of arbitration (Macdonald *v.* Bond, 195 Ill. 122, 62 N. E. 881; King *v.* King, 104 La. 420, 29 So. 205; Patterson *v.* La Farge, 5 Mart. N. S. (La.) 669; Bullitt *v.* Musgrave, 3 Gill (Md.) 31, holding that an agent appointed to submit a claim to arbitration is not thereby authorized to ratify and confirm the award when made; Manufacturers', etc., F. Ins. Co. *v.* Mullen, 48 Nebr. 620, 67 N. W. 445; Cox *v.* Fay, 54 Vt. 446), although he, and not the agent, is bound by an award duly authorized and properly made (Callahan *v.* McAlexander, 1 Ala. 366).

Authority of attorney to submit to arbitration see ATTORNEY AND CLIENT, 4 Cyc. 938 *et seq.*

43. Ingersoll *v.* Banister, 41 Ill. 388; Dixon *v.* Ford, 1 Rob. (La.) 253; Craig Silver Co. *v.* Smith, 163 Mass. 262, 39 N. E. 1116. *Compare* Lewis *v.* Lewis, 9 La. 101.

If the agent only had authority to sell, or to negotiate sales, and to collect the price, he has no authority to cancel the debt upon the surrender to him of the property constituting a security for the debt. Robinson *v.* Nipp, 20 Ind. App. 156, 50 N. E. 408.

44. *Alabama.*— Scales *v.* Mount, 93 Ala. 82, 9 So. 513.

Colorado.— Burlock *v.* Cross, 16 Colo. 162, 26 Pac. 142.

circumstances make it clear that the agent was empowered to compromise, or even entirely to release, in his discretion;[45] nor can the agent substitute the liability of some other person so as to release the debtor.[46] Power to settle by means of litigation does not exist unless clearly given and strictly pursued;[47] but it is enough that the instrument creating the agency read as a whole, or the circumstances surrounding the employment make clear the grant of the power,[48] and when so given it justifies the agent in defending or prosecuting the claim before the proper tribunal by suitable proceedings,[49] and empowers him to execute the bonds and other papers that may be usually required or legally demanded of such a litigant,[50]

Georgia.—Holland *v.* Van Beil, 89 Ga. 223, 15 S. E. 302.

Illinois.— McHany *v.* Schenk, 88 Ill. 357.

New Jersey.— Perry *v.* Smith, 29 N. J. L. 74; Wetherbee *v.* Baker, 32 N. J. Eq. 537.

New York.— Harrison *v.* Burlingame, 48 Hun 212; De Witt *v.* Greener, 11 N. Y. Civ. Proc. 327.

North Carolina.— Herring *v.* Hottendorf, 74 N. C. 588.

Pennsylvania.— Corr *v.* Greenfield, 134 Pa. St. 503, 19 Atl. 676; Patterson *v.* Moore, 34 Pa. St. 69.

Texas.— Wheeler, etc., Mfg. Co. *v.* Crossland, 2 Tex. App. Civ. Cas. § 80.

Utah.— Nickles *v.* Wells, 2 Utah 167.

Vermont.— Angel *v.* Pownal, 3 Vt. 461.

United States.— Randon *v.* Toby, 11 How. 493, 13 L. ed. 784.

Canada.— Hamilton *v.* Holcomb, 13 U. C. C. P. 9.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 326, 329.

45. *Alabama.*— Scales *v.* Mount, 93 Ala. 82, 9 So. 513.

Iowa.— Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

Louisiana.— Gruner *v.* Stucken, 39 La. Ann. 1076, 3 So. 338.

Michigan.— Aultman *v.* Dodson, 104 Mich. 507, 62 N. W. 708; Palmer *v.* Roath, 86 Mich. 602, 49 N. W. 590.

New York.— Equity Gaslight Co. *v.* McKeige, 19 N. Y. Suppl. 914 [*affirmed* in 139 N. Y. 237, 34 N. E. 898]; Murray *v.* Toland, 3 Johns. Ch. 569.

South Carolina.— Whaley *v.* Duncan, 47 S. C. 139, 25 S. E. 54, holding that where principals authorized their agent to make a settlement of an indebtedness due them, which the agent did, they are bound by the settlement made, although not in all respects in accordance with their instructions, the debtor having no knowledge of such instructions.

Texas.— Martin *v.* Rotan Grocery Co., (Civ. App. 1902) 68 S. W. 212 [*affirmed* in 95 Tex. 437, 67 S. W. 883]; Wilcoxon *v.* Howard, 26 Tex. Civ. App. 281, 62 S. W. 802, 63 S. W. 938; Smith *v.* Cantrel, (Civ. App. 1899) 50 S. W. 1081; Debney *v.* McFarlin, (Civ. App.) 34 S. W. 142.

Vermont.— Middlebury College *v.* Loomis, 1 Vt. 189.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 326, 329.

46. Ingersoll *v.* Banister, 41 Ill. 388; Batchelder *v.* Libbey, 66 N. H. 175, 19 Atl. 570; Ludwig *v.* Gorsuch, 154 Pa. St. 413, 26 Atl. 434.

47. *California.*—Blum *v.* Robertson, 24 Cal. 127; Davidson *v.* Dallas, 8 Cal. 227.

Delaware.— Lesley *v.* Shock, 3 Houst. 130.

Louisiana.—Dickson *v.* Morgan, 7 La. Ann. 490; Fuselier *v.* Robin, 4 La. Ann. 61.

Maine.— Matthews *v.* Matthews, 49 Me. 586; Woodman *v.* Neal, 48 Me. 266.

New York.— Rogers *v.* Cruger, 7 Johns. 557.

United States.— Wright *v.* Ellison, 1 Wall. 16, 17 L. ed. 555, holding that a power of attorney, drawn up in South America by Portuguese agents, in which throughout there is verbiage and exaggerated expression, authorizing the prosecution of a claim in the Brazilian courts, will not be held to give power to prosecute one before a commissioner of the United States at Washington, notwithstanding the first-named power is given with great generality and strength of language.

48. Carter *v.* Lewis, 15 La. Ann. 574; Warren *v.* Dennett, 17 Misc. (N. Y.) 86, 39 N. Y. Suppl. 830; Woerman *v.* Baas, 12 N. Y. Suppl. 59.

49. *Louisiana.*— Miller *v.* Marmiche, 24 La. Ann. 30.

Maryland.— Giles *v.* Ebsworth, 10 Md. 333.

Montana.— State *v.* Giroux, 15 Mont. 137, 38 Pac. 464.

United States.— Weile *v.* U. S., 7 Ct. Cl. 535.

England.— *Ex p.* Wallace, 14 Q. B. D. 22, 54 L. J. Q. B. 293, 51 L. T. Rep. N. S. 551, 1 Morr. Bankr. Cas. 246, 33 Wkly. Rep. 66; *Ex p.* Hamilton, 2 Deac. & C. 139.

50. *California.*— Davidson *v.* Dallas, 8 Cal. 227, holding that a power of attorney to sue, collect, compromise, etc., with a general power to make all necessary deeds and acquittances, authorizes the agent to execute an indemnity bond to the sheriff, whenever the latter has the right to require it.

Illinois.— Merrick *v.* Wagner, 44 Ill. 266, justifying the execution of a replevin bond by an agent authorized to sue.

Kentucky.— Com. *v.* Perkins, 32 S. W. 134, 17 Ky. L. Rep. 542.

Maryland.— State *v.* Banks, 48 Md. 513.

England.— *Ex p.* Wallace, 14 Q. B. D. 22, 54 L. J. Q. B. 293, 51 L. T. Rep. N. S. 551, 1 Morr. Bankr. Cas. 246, 33 Wkly. Rep. 66; *Ex p.* Crowther, 4 Deac. & C. 31.

If the act is one the principal might easily do himself the agent should not act for him in signing papers. Matter of Sampson, 3 Deac. & C. 198.

to appeal from a judgment in a suit,[51] and presumptively to collect the amount recovered.[52] Authority to bring suit on a claim does not give the agent power to compromise it, unless previously granted or subsequently approved by the principal.[53] The same principles that govern the right of an agent to enforce a settlement by a suit may be extended to bringing suits generally. The authority of an agent to engage in litigation for his principal must depend upon the conditions of the agency. Litigation is liable to be hazardous and expensive. Hence, unless the duties intrusted to the agent are in their nature such that the principal must be supposed to have anticipated that the execution of the commission would be likely to entail litigation, such power is not within the scope of general authority, and the principal cannot be bound by the act of his agent in bringing a suit.[54] But he will be liable for, and, on the other hand, he can take advantage of, authorized acts of his agent either in the litigation or in laying a foundation therefor.[55] The same principles that recognize the prosecution of a suit by an agent apply to defenses to suits through attorneys in fact. Although such matters are for the most part in the hands of attorneys at law, there is no reason why one cannot in litigation do by attorney in fact what he could do personally.[56] One may appear and confess judgment by agent,[57] although the authority must be strictly pursued and exercised within such limits as the principal has imposed.[58]

(iv) *To Lend or Borrow Money.* Power to lend or borrow money, like most other special powers of an agent, is not to be inferred without clear evidence of such a grant. Except the exercise of such power be strictly necessary to the

Power conferred by statute see the statutes of the different states. And see Head *v.* Woods, 92 Ga. 548, 17 S. E. 928; Cook *v.* Buchanan, 86 Ga. 760, 13 S. E. 83.

51. Lowery *v.* Bates, 26 Misc. (N. Y.) 407, 56 N. Y. Suppl. 197.

52. Alexander *v.* Alexander, 8 Kan. App. 571, 54 Pac. 1036; Weile *v.* U. S., 7 Ct. Cl. 535; Churchill *v.* McKay, 20 Can. Sup. Ct. 472, holding that the agent has no such power is as a matter of fact he settles by agreement and not by suit.

53. Head *v.* Woods, 92 Ga. 548, 17 S. E. 928; Cook *v.* Buchanan, 86 Ga. 760, 13 S. E. 83; Allen *v.* Champlin, 32 La. Ann. 511; Bonneau *v.* Poydras, 2 Rob. (La.) 1; Kilgour *v.* Ratcliff, 2 Mart. N. S. (La.) 292; Dupre *v.* Splane, 16 La. 51; Armstrong *v.* Gilchrist, 2 Johns. Cas. (N. Y.) 424.

54. *California.*— Fitch *v.* Brockmon, 2 Cal. 575.

Iowa.— Markham *v.* Burlington Ins. Co., 69 Iowa 515, 29 N. W. 435.

Kentucky.— Robinson *v.* Morgan, Litt. Sel. Cas. 56.

Louisiana.— Prevost *v.* Martel, 10 Rob. 512; Rowland *v.* Pascal, 10 La. 598; Seymour *v.* Cooley, 9 La. 72.

Virginia.— Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

United States.— Pressley *v.* Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569.

Suit for unauthorized purpose.— The principal cannot be held liable on a suit brought by an agent authorized to bring suit, but not for such a purpose. Cleveland Co-operative Stove Co. *v.* Koch, 37 Ill. App. 595.

Express agreements not to sue.—The owner of a note already in judgment, who placed it in the hands of a collection agency with a distinct agreement that no suit is to be brought thereon, is not bound by the unauthorized action of the agent in bringing suit. Satterlee *v.* Columbus First Nat. Bank, (Nebr. 1907) 111 N. W. 591.

Power to dismiss.— Power to bring suit implies no authority to dismiss it without full settlement. Emmons *v.* Myers, 7 How. (Miss.) 375.

55. *Louisiana.*— Materne *v.* Lion, 35 La. Ann. 988; Maguire *v.* Bass, 8 La. Ann. 270.

Massachusetts.— Bayley *v.* Bryant, 24 Pick. 198; Sutton First Parish *v.* Cole, 3 Pick. 232.

New York.— Warren *v.* Dennett, 17 Misc. 86, 39 N. Y. Suppl. 830, in which the principal was held liable, although the agent, acting in the course of his employment, did not follow instructions.

Vermont.—Davis *v.* Waterman, 10 Vt. 526, 33 Am. Dec. 216.

Virginia.— Higginbotham *v.* May, 90 Va. 233, 17 S. E. 941.

56. Lowrey *v.* Bates, 26 Misc. (N. Y.) 407, 56 N. Y. Suppl. 197; Virginia Ins. Co. *v.* Barley, 16 Gratt. (Va.) 363.

57. Brown *v.* Newman, 13 Iowa 546; Dial *v.* Farrow, 1 Speers (S. C.) 114; Virginia Ins. Co. *v.* Barley, 16 Gratt. (Va.) 363. See also North River Bank *v.* Rogers, 22 Wend. (N. Y.) 648, holding that a power of attorney to execute mortgages, bonds, warrants, etc., and to do all things relating to the business of the constituent, confers authority to execute a bond and warrant of attorney to confess judgment for a *bona fide* debt. *Compare* Boykin *v.* O'Hara, 6 La. Ann. 115, holding that a power to give a mortgage on particular property does not authorize the agent to confess judgment.

58. Howell *v.* Gordon, 40 Ga. 302 (holding that where an agent is appointed by a nonresident to look after or to act as agent for

execution of the purpose, it is not to be implied from the mere grant to the agent of general powers of any kind.[59] And when authority is conferred, whether expressly or impliedly, it must be exercised within the limits prescribed, and burdens assumed by the agent but not authorized by the principal cannot bind the latter.[60] However, a general authority is to be reasonably interpreted, and the principal will be bound by a loan fairly within the discretion lodged with his agent.[61] No authority to borrow money is to be implied from a power to lend,[62] nor merely from a power to act for the principal in his business generally or in other specific matters.[63] Nevertheless, even where the power to borrow money is not expressly conferred, it will be implied as an incidental authority whenever it is clearly necessary to enable the agent to execute his authority, but only within the limits of such necessity.[64] It may also be implied as in other cases of implied authority from the course of conduct of the principal in allowing the agent to borrow on his account.[65] Third persons are charged with knowledge that no agent, however general his powers, has implied authority to borrow money for himself on the credit of his principal.[66] While a loan contemplates receipt by the borrower

certain lots of land, with no other or general powers, and an attachment is issued against such non-resident owner and levied upon the lots, the agent is not authorized to confess a general judgment, binding upon defendant in attachment); Rankin *v.* Eakin, 3 Head (Tenn.) 229 (holding that where a party constituted another his agent, and gave him written authority to confess judgment on a note in his name, and limited his authority as to time and place, the agent could not confess judgment at a different time from that authorized in the power).

59. Macdonald *v.* Cool, 134 Cal. 502, 66 Pac. 727; Exchange Bank *v.* Thrower, 118 Ga. 433, 45 S. E. 316 (holding that authority to borrow money, conferred on an agent, must be created by express terms or necessarily implied from the nature of the agency, for authority to borrow money is one of the most dangerous powers a principal can confer upon an agent); Bernheimer *v.* Verdon, 63 N. J. Eq. 312, 49 Atl. 732; Bickford *v.* Menier, 107 N. Y. 490, 14 N. E. 438; Muller *v.* Pondir, 6 Lans. (N. Y.) 472 [*affirmed* in 55 N. Y. 325, 14 Am. Rep. 259]; Sawyer *v.* Wayne, 6 N. Y. St. 745.

Thus such power is not to be implied from the power to manage the principal's business, even though with authority to buy goods on credit (Haynes *v.* Carpenter, 86 Mo. App. 30; Bickford *v.* Menier, 107 N. Y. 490, 14 N. E. 438 [*reversing* 36 Hun 446]; Weekes *v.* A. F. Shapleigh Hardware Co., 23 Tex. Civ. App. 577, 57 S. W. 67; Spooner *v.* Thompson, 48 Vt. 259), or from authority to draw checks to make payments for property bought by the agent (Mordhurst *v.* Boies, 24 Iowa 99).

60. Giltinan *v.* Lehman, 65 N. J. L. 668, 48 Atl. 540.

Authority to make specific loans or loans for a specific purpose is not to be extended by implication to power to make other loans (Bullen *v.* Dawson, 139 Ill. 633, 29 N. E. 1038; Keegan *v.* Rock, 128 Iowa 39, 102 N. W. 805; Shattuck *v.* Wilder, 6 Vt. 334; Jacobs *v.* Morris, [1902] 1 Ch. 816, 71 L. J. Ch. 363, 86 L. T. Rep. N. S. 275, 18 T. L. R. 384, 50 Wkly. Rep. 371), or to use the money for other purposes, particularly for the benefit of other persons than the principal (Silvers *v.* Hess, 47 Mo. App. 507, holding that an agent's authority to loan his principal's money is not authority to buy a note therewith, and such purchase does not make the note the property of the principal unless he ratifies the purchase; Charlotte Iron Works *v.* American Exch. Nat. Bank, 34 Hun (N. Y.) 26; Walker *v.* Manhattan Bank, 25 Fed. 247).

An agent to solicit loans which must be submitted for approval to the principal has no authority to make a contract for a loan. Equitable Mortg. Co. *v.* Thorn, (Tex. Civ. App. 1894) 26 S. W. 276.

61. Davidson *v.* Dallas, 8 Cal. 227; Ladd *v.* Ætna Indemnity Co., 128 Fed. 298. And see Wayne International Bldg., etc., Assoc. *v.* Moats, 149 Ind. 123, 48 N. E. 793, holding that where the agent of a building and loan association, whose duty was to solicit stock and place loans, agreed with a first mortgagee that if he would waive his prior lien on the mortgaged premises in favor of a second mortgage running to the association, he, the agent, would, on behalf of the association, see that the money advanced was used in the improvement of the mortgaged premises, the transaction as a whole related to the act of effecting the loan, and was not beyond the agent's authority.

62. Humphrey *v.* Havens, 12 Minn. 298.

63. Bryant *v.* La Banque du Peuple, [1893] A. C. 170, 62 L. J. P. C. 68, 68 L. T. Rep. N. S. 546, 1 Reports 336, 41 Wkly. Rep. 600.

64. Exchange Bank *v.* Thrower, 118 Ga. 433, 45 S. E. 316; Rider *v.* Kirk, 82 Mo. App. 120 (holding that an agent engaged in buying and shipping horses had authority to borrow money to purchase grain to feed the horses while awaiting shipment, since the exercise of such authority was necessary to the conduct of business); Hearne *v.* Keene, 5 Bosw. (N. Y.) 579; Newell *v.* Clapp, 97 Wis. 104, 72 N. W. 366; McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375.

65. Collins *v.* Cooper, 65 Tex. 460.

66. New York Iron Mine *v.* Negaunee First Nat. Bank, 39 Mich. 644; Wickham *v.* More-

of cash, yet the loan is complete if the agent accepts ordinary exchange, subject to be defeated if the exchange is not paid [67] If a loan is made to the principal, and payment is made by check to the agent authorized to negotiate the loan, there is a good payment to the principal, although the agent, after cashing the check, absconds with the proceeds,[68] and the principal is bound by payment to the agent authorized to borrow, although the formal power given to the agent was invalid.[69] But if the agent had no authority to borrow, proof of a loan to such agent is not evidence of the receipt of the money by the principal.[70] In the absence of restrictions, authority to loan or borrow carries power to contract for a loan within a time reasonably meeting the principal's purposes.[71] Whether the agent negotiating a loan is the agent of the lender or of the borrower depends upon the circumstances of each case. If the lender has given the agent no authority to receive payment for him, and the borrower pays such agent, the debt is not satisfied until the money reaches the lender, for the intermediary is in such case acting as agent of the borrower to receive and transmit the payment.[72] If the borrower has applied to the agent for a loan, *prima facie* such agent is his agent, and the lender is justified in paying him the amount of the loan.[73] The employment of an agent to lend money does not carry with it implied authority to lend the money to himself.[74]

(v) *To Make Contracts of Employment* — (A) *In General.* The general power of an agent to delegate his authority is fully explained elsewhere in this article.[75] It is the purpose in this connection to consider the question of the agent's authority to make for his principal contracts of employment of any kind. Such authority in general is to be implied only when sanctioned by the usages of such an agency as that in question, or by the nature and necessities of the business intrusted to the agent.[76] Authority to make contracts of employ-

house, 16 Fed. 324; Jacobs *v.* Morris, [1901] 1 Ch. 261, 70 L. J. Ch. 183, 84 L. T. Rep. N. S. 112, 49 Wkly. Rep. 365 [*affirmed* in [1902] 1 Ch. 816, 71 L. J. Ch. 363, 86 L. T. Rep. N. S. 275, 18 T. L. R. 384, 50 Wkly. Rep. 371], and *distinguishing* Montaignac *v.* Shitta, 15 App. Cas. 357]; Perry *v.* Parkinson, 6 Jur. N. S. 493, 2 L. T. Rep. N. S. 261.

67. Atwater *v.* Roelofson, 2 Handy (Ohio) 19, 12 Ohio Dec. (Reprint) 308 [*affirmed* in 1 Disn. 346, 12 Ohio Dec. (Reprint) 662].

68. Neal *v.* Wilson, 79 Ga. 736, 5 S. E. 54; Clark *v.* McGraw, 14 Mich. 139; Tottenham *v.* Green, 32 L. J. Ch. 201, 1 New Rep. 466.

69. Denyssen *v.* Botha, 2 L. T. Rep. N. S. 126, 8 Wkly. Rep. 710.

70. Thompson *v.* Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 S. E. 908.

71. Roelofson *v.* Atwater, 1 Disn. (Ohio) 346, 12 Ohio Dec. (Reprint) 662 [*affirming* 2 Handy 19, 12 Ohio Dec. (Reprint) 308].

72. *Arkansas.*— Bagnell *v.* Walker, 65 Ark. 325, 46 S. W. 126, 53 S. W. 570.

California.— Ballard *v.* Nye, 138 Cal. 583, 72 Pac. 156, (1902) 69 Pac. 481.

Iowa.— Klindt *v.* Higgins, 95 Iowa 529, 64 N. W. 414; U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311; Artley *v.* Morrison, 73 Iowa 132, 34 N. W. 779.

Kansas.— Goodyear *v.* Williams, 73 Kan. 192, 85 Pac. 300; Thomas *v.* Arthurs, 8 Kan. App. 126, 54 Pac. 694.

Michigan.— People *v.* Gould, 118 Mich. 75, 76 N. W. 117; Bissell *v.* Dowling, 117 Mich. 646, 76 N. W. 100; Michigan Church Assoc. *v.* Walton, 114 Mich. 667, 72 N. W. 998; Wilson *v.* Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Van Deusen *v.* Ingraham, 110 Mich. 38, 67 N. W. 914; Clark *v.* McGraw, 14 Mich. 139.

73. Land Mortg., etc., Co. *v.* Vinson, 105 Ala. 389, 17 So. 23 (holding that a recital in an application for a loan that the applicant agrees to pay a certain person, as his attorney, a certain fee for taking the application, securing and paying over the money, and all such work in connection with the loan, authorizes the lender to pay the money to such person for the borrower); American Mortg. Co. *v.* King, 105 Ala. 358, 16 So. 889; Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656; Ginn *v.* New England Mortg. Security Co., 92 Ala. 135, 8 So. 388; National Mortg., etc., Co. *v.* Lash, 5 Kan. App. 633, 47 Pac. 548; Clark *v.* McGraw, 14 Mich. 139. See also Murphy *v.* Becker, 101 Minn. 329, 112 N. W. 264.

74. Keyser *v.* Hinkle, 127 Mo. App. 62, 106 S. W. 98.

75. See *infra*, II, D.

76. *Florida.*—Wright *v.* Terry, 23 Fla. 160, 2 So. 6.

Illinois.— Campbell *v.* Day, 90 Ill. 363 (holding that an architect employed to direct and supervise the work to be done on a building by a contractor and subcontractors cannot bind the owner by his own contract employing others to perform work contracted to be performed by the original contractor); Lake Erie, etc., R. Co. *v.* Faught, 31 Ill. App. 110; Crozier *v.* Reins, 4 Ill. App. 564 (holding that it is not within the scope of the

ment may of course be expressly given.[77] Whether the authority be express or implied the power must be exercised strictly within the limits of the grant. Authority to employ is presumed to be special, for the purpose indicated, not general,[78] although it will be construed as extensive enough to empower the agent to make contracts of employment on such terms and within such limits as to enable him to perform the purposes of the agency.[79] A principal cannot deny his liability on contracts of employment made by one whom he has held out as possessing authority to make such contracts.[80] From authority to hire no authority arises to make

authority of persons employed to collect the rents of a building to employ an engineer to take charge of the engine therein).

Maine.— Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111.

Massachusetts.— Cazenove *v.* Cutler, 4 Metc. 246.

Minnesota.— Gillis *v.* Duluth, etc., R. Co., 34 Minn. 301, 25 N. W. 603.

New York.— Wicks *v.* Hatch, 62 N. Y. 535 [*affirming* 38 N. Y. Super. Ct. 95], justifying the employment of a broker by an agent in a business where such employment is usual.

North Carolina.— See King *v.* Seaboard Air Line R. Co., 140 N. C. 433, 53 S. E. 237.

Pennsylvania.— See Breen *v.* Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. Ct. 275.

South Carolina.— Day *v.* Pickens County, 53 S. C. 46, 30 S. E. 681.

Employment authorized by business exigencies.— An agent having no general authority to hire help may from the exigencies of the business intrusted to his care have a right to contract for his principal in a special instance. La Fayette R. Co. *v.* Tucker, 124 Ala. 514, 27 So. 447; Fox *v.* Chicago, etc., R. Co., 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289 (holding that where the only regular brakeman on a train is absent, the conductor has authority to supply his place, and, for the time being, the person so engaged is an employee of the company); Newport News, etc., R. Co. *v.* Carroll, 31 S. W. 132, 17 Ky. L. Rep. 374; Michaud *v.* MacGregor, 61 Minn. 198, 63 N. W. 479.

77. Pasco *v.* Smith, 49 Conn. 576; Alexander *v.* Rutland Bank, 24 Vt. 222. See also Thompson *v.* Mills, (Tex. Civ. App. 1907) 101 S. W. 560.

Direction to an agent to seek help and notify the principal conveys no power to employ such help, nor does authority to an agent to contract for a piece of work with an independent contractor. Matteson *v.* Gillett, 86 Hun (N. Y.) 386, 33 N. Y. Suppl. 471; Mundis *v.* Emig, 171 Pa. St. 417, 32 Atl. 1135.

78. *California.*—Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758.

Connecticut.— Pasco *v.* Smith, 49 Conn. 576.

Maine.— Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111.

New York.— Brisbane *v.* Adams, 3 N. Y. 129; Harnett *v.* Garvey, 36 N. Y. Super. Ct. 326.

United States.— Gowen *v.* Bush, 76 Fed. 349, 22 C. C. A. 196.

Canada.— Taylor *v.* Cobourg, etc., R., etc., Co., 24 U. C. C. P. 200, Hagarty, C. J., delivering the opinion of the court.

Authority to hire for a limited price or term is not to be extended so as to bind the principal for a greater price or a longer term, although it will justify a contract to the full extent of such limits. Pasco *v.* Smith, 49 Conn. 576; World's Columbian Exposition *v.* Richards, 57 Ill. App. 601 (holding that one authorized to hire ticket sellers at the Columbian Exposition had authority to engage employees for six months, since it was a fact of world-wide notoriety that the Exposition was to remain open for that period); Drohan *v.* Merrill, etc., Lumber Co., 75 Minn. 251, 77 N. W. 957 (holding that authority to hire a servant for the principal in the absence of restrictive words as to the length of time of hiring authorizes the agent to hire a servant for such time as is reasonable, considering the nature of the business, the season of the year in which it is prosecuted, and the length of time it is likely to take to complete the work); Decker *v.* Hassel, 26 How. Pr. (N. Y.) 528 (holding that authority given by a father to a son to hire a farm laborer will authorize a contract for a term of two months). *Compare* Ames *v.* D. J. Murphy Mfg. Co., 114 Wis. 85, 89 N. W. 836.

79. Laming *v.* Peters Shoe Co., 71 Mo. App. 646 (holding that the manager of a manufacturing company whose contract gives him full power to employ all necessary workmen and operatives has authority to employ a foreman); Wanamaker *v.* Megraw, 92 N. Y. App. Div. 616, 87 N. Y. Suppl. 331; Benton *v.* Moss, 47 Misc. (N. Y.) 376, 93 N. Y. Suppl. 1113; Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209.

80. Cox *v.* Albany Brewing Co., 56 Hun (N. Y.) 489, 10 N. Y. Suppl. 213 (holding that where pursuant to a written invitation a laborer goes to defendant's office for service, finds there a person assuming to employ hands, is engaged by him for one year, and put to work, and the service continues for several weeks to the knowledge of the firm's general superintendent, such laborer may assume that the person who employed him was authorized to do so); Mook *v.* Parke, 9 Misc. (N. Y.) 90, 29 N. Y. Suppl. 32 (holding that where defendant, to whom plaintiff applied for employment, refers him, with full knowledge of his application, to a third person, defendant is chargeable with the acts of such third person in regard to the application); Sheetram *v.* Trexler Stave, etc., Co., 13 Pa. Super. Ct. 219.

subsequent agreements modifying or adding to the contract of hiring.[81] Authority to employ necessarily implies power to contract with such agents for their compensation;[82] but an agent having no power to employ cannot bind his principal to pay for services.[83] An agent cannot bind his principal to pay for help or supplies furnished to independent contractors who should themselves provide and pay for such services or materials.[84]

(B) *Employment of Attorney.* The employment of an attorney is not one of the ordinary incidents of agency. Ordinarily the principal should be consulted first; and hence authority to contract for such employment on behalf of the principal exists only in particular classes of agencies, or under circumstances making such employment necessary and proper to the performance of the agency.[85] An agent to collect, having authority to collect by suit if necessary, has the resulting power to employ an attorney to conduct such suit;[86] and a principal is liable for payment for services rendered by an attorney employed by a general agent to whom the principal has intrusted business requiring the services of an attorney, either in law suits or in other matters.[87]

(C) *Providing Medical Attendance, Etc.* An employer is not ordinarily bound to provide medical attendance for a sick or injured employee, and hence his agent

81. Prior *v.* Flagler, 10 Misc. (N. Y.) 496, 31 N. Y. Suppl. 193 [*affirmed* in 13 Misc. 115, 34 N. Y. Suppl. 152]; Nielsen *v.* Northeastern Siberian Co., 40 Wash. 194, 82 Pac. 292.

82. *In re* Opinion of Justices, 72 N. H. 601, 54 Atl. 950.

Payment in cash.— An agent cannot bind his principal to pay for such services except in the usual way in cash. Deffenbaugh *v.* Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197 (holding that a general agent authorized to hire an employee at a yearly salary has no special authority to contract to compensate the employee with a share of the profits in the principal's business); Berrien *v.* McLane, Hoffm. (N. Y.) 421 (holding that an agent employed to manage a cause and employ counsel for a land company has no authority to pay the counsel in land).

83. National Cash Register Co. *v.* Hagan, 37 Tex. Civ. App. 281, 83 S. W. 727; Hibbard *v.* Peek, 75 Wis. 619, 44 N. W. 641; Taylor *v.* Cobourg, etc., R., etc., Co., 24 U. C. C. P. 200.

84. Powrie *v.* Kansas Pac. R. Co., 1 Colo. 529; Wolf *v.* Davenport, etc., R. Co., 93 Iowa 218, 61 N. W. 847; Gately *v.* Kniss, 64 Iowa 537, 21 N. W. 21; Watts *v.* Metcalf, 66 S. W. 824, 23 Ky. L. Rep. 2189; Gardner *v.* Boston, etc., R. Co., 70 Me. 181.

85. *Mississippi.*— Bush *v.* Southern Brewing Co., 69 Miss. 200, 13 So. 856.

South Dakota.— Davis *v.* Matthews, 8 S. D. 300, 66 N. W. 456.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330 [*affirming* in part and in part *reversing* (Civ. App. 1899) 48 S. W. 994]; Tabet *v.* Powell, (Civ. App. 1903) 78 S. W. 997.

United States.— Lee *v.* Rogers, 15 Fed. Cas. No. 8,201, 2 Sawy. 549.

England.— *Ex p.* Frampton, 1 De G. F. & J. 263, 62 Eng. Ch. 202, 45 Eng. Reprint 359.

See also ATTORNEY AND CLIENT, 4 Cyc. 968.

Thus incidental benefit promised to his principal will not warrant the employment by an agent of an attorney to appear in a suit to which his principal is not a party (Perry *v.* Jones, 18 Kan. 552), and the ordinary general agent has no authority to employ attorneys to test the claims which he thinks might be established for his principal by a suit (Bush *v.* Southern Brewing Co., 69 Miss. 200, 13 So. 856, holding that the agent should consult the principal in such matters; Cochran *v.* Newton, 5 Den. (N. Y.) 482).

Limitation of authority.— The employment of an attorney by an agent can be binding on the principal only so far as may be necessary and proper in the matters with reference to which the authority was given. If the agent employs counsel as to other matters the principal is not bound. Harnett *v.* Garvey, 36 N. Y. Super. Ct. 326.

86. Hagerman *v.* Bates, 24 Colo. 71, 49 Pac. 139; Strong *v.* West, 110 Ga. 382, 35 S. E. 693; Ryan *v.* Tudor, 31 Kan. 366, 2 Pac. 797; Davis *v.* Waterman, 10 Vt. 526, 33 Am. Dec. 216.

87. *Iowa.*— Barbee *v.* Aultman, 102 Iowa 278, 71 N. W. 235.

Minnesota.— Mason *v.* Taylor, 38 Minn. 32, 35 N. W. 474.

New York.— Prindle *v.* Washington L. Ins. Co., 73 Hun 448, 26 N. Y. Suppl. 474 [*distinguishing* Adriatic F. Ins. Co. *v.* Treadwell, 108 U. S. 361, 2 S. Ct. 772, 27 L. ed. 754]; Harnett *v.* Garvey, 36 N. Y. Super. Ct. 326.

South Dakota.— Kirby *v.* Western Wheeled Scraper Co., 9 S. D. 623, 70 N. W. 1052; Davis *v.* Matthews, 8 S. D. 300, 66 N. W. 456.

Vermont.— Farrington *v.* Hayes, 65 Vt. 153, 25 Atl. 1091.

United States.— Dale *v.* Redfield, 22 Fed. 506, 23 Blatchf. 3.

Canada.— Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 339.

has no implied authority to contract in his name for such attendance.[88] This is true of the ordinary manufacturing or commercial corporation, and any liability of such a corporation for the employment by its agent of a physician or surgeon must rest upon the express authority or active assent of the principal.[89] But because of the peculiar nature of certain occupations the courts upon humanitarian grounds, and for reasons of public policy as well, have held that the agent of persons or corporations engaged in such occupations may provide medical attendance upon the credit of his principal.[90] This rule has been most often applied in the case of corporations engaged in the hazardous business of operating railroads, and it has been held in a number of cases that authority to employ such medical attendance will be regarded as being within the scope of the implied powers of some agent of the company, generally the superintendent of the road.[91] But no such authority ordinarily resides in the subordinate employees and agents of the road, such as yard-masters, station agents, engineers, conductors, and the like. Their contracts of this kind therefore will not bind the company unless specially authorized or ratified,[92] although it has been held that such agents may

Amount of compensation.— Authority to employ attorneys implies a right to agree as to their compensation. Harms *v.* Wolf, 114 Mo. App. 387, 89 S. W. 1037; Cross *v.* Atchison, etc., R. Co., 71 Mo. App. 585; Tabet *v.* Powell, (Tex. Civ. App. 1903) 78 S. W. 997.

88. Sevier *v.* Birmingham, etc., R. Co., 92 Ala. 258, 9 So. 405; Harris *v.* Fitzgerald, 75 Conn. 72, 52 Atl. 315, holding that in an action against a railroad contractor for medical services rendered to one of his laborers under an alleged request from the contractor's son, who was his bookkeeper and timekeeper, it was error to instruct that it was for the jury to determine whether such son had authority to employ plaintiff, but the court should have instructed that he had no implied authority to make such contract. See also CORPORATIONS, 10 Cyc. 926; MASTER AND SERVANT, 26 Cyc. 1050.

89. *Colorado.*— Mt. Wilson Gold, etc., Min. Co. *v.* Burbridge, 11 Colo. App. 487, 53 Pac. 826.

Connecticut.— Swazey *v.* Union Mfg. Co., 42 Conn. 556.

Indiana.— Chaplin *v.* Freeland, 7 Ind. App. 676, 34 N. E. 1007, holding that the general manager of an ordinary manufacturing business has no authority to bind the owner by the employment of a physician or surgeon to attend an injured employee, in the absence of any facts showing an absolute neeessity for such action by the employer.

Kentucky.— Godshaw *v.* Struck, 109 Ky. 825, 58 S. W. 781, 22 Ky. L. Rep. 820, 51 L. R. A. 668.

Mississippi.— Malone *v.* Robinson, (1893) 12 So. 709, applying the rule to the manager of a plantation.

Montana.— Spelman *v.* Gold Coin Min., etc., Co., 26 Mont. 76, 66 Pac. 597, 91 Am. St. Rep. 402, 55 L. R. A. 640.

Pennsylvania.— Shriver *v.* Stevens, 12 Pa. St. 258 (holding that an agent of a stage company who is authorized to obtain surgical aid for a passenger who has been injured by the upsetting of the coach is not therefore authorized to employ a physician to attend to one who had acted as coachman, without the consent or knowledge of the company, and who had been injured by the same accident); Hayes *v.* Lehigh Valley Coal Co., 12 Luz. Leg. Reg. 101.

90. Sevier *v.* Birmingham, etc., R. Co., 92 Ala. 258, 9 So. 405; Chaplin *v.* Freeland, 7 Ind. App. 676, 34 N. E. 1007.

91. *Alabama.*— Sevier *v.* Birmingham, etc., R. Co., 92 Ala. 258, 9 So. 405.

Arkansas.— St. Louis, etc., R. Co. *v.* Hoover, 53 Ark. 377, 13 S. W. 1092.

Florida.— Peninsular R. Co. *v.* Gary, 22 Fla. 356, 1 Am. St. Rep. 194.

Illinois.— Cairo, etc., R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188, 95 Am. Dec. 484.

Indiana.— Cincinnati, etc., R. Co. *v.* Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503.

Kansas.— Pacific R. Co. *v.* Thomas, 19 Kan. 256.

Michigan.— Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289.

Minnesota.— Hanseom *v.* Minneapolis St. R. Co., 53 Minn. 119, 54 N. W. 944, 20 L. R. A. 695.

Texas.— Houston, etc., R. Co. *v.* Watkins, 1 Tex. App. Civ. Cas. § 345.

England.— Walker *v.* Great Western R. Co., L. R. 2 Exch. 228, 36 L. J. Exch. 123, 16 L. T. Rep. N. S. 327, 15 Wkly. Rep. 769.

Canada.— Gaudreau *v.* Canada Atlantic R. Co., 24 Quebec Super. Ct. 337.

A division superintendent has this authority as to accidents resulting in injuries upon his division of the road. Union Pac. R. Co. *v.* Winterbotham, 52 Kan. 433, 34 Pac. 1052; Pacific R. Co. *v.* Thomas, 19 Kan. 256. *Compare* Brown *v.* Missouri, etc., R. Co., 67 Mo. 122.

92. *Alabama.*— Sevier *v.* Birmingham, etc., R. Co., 92 Ala. 258, 9 So. 405.

Florida.— Peninsular R. Co. *v.* Gary, 22 Fla. 356, 1 Am. St. Rep. 194.

Illinois.— Cairo, etc., R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299; St. Louis, etc.,

have authority in exceptional cases and emergencies to employ such medical aid as may be imperative until the superintendent can be communicated with. The means of communication are such that such authority must be infrequent, and very limited as to time.[93] This liability for medical attendance upon an employee, it has been held, does not extend to services to a passenger injured without negligence on the part of the company. Hence there is no implied power in the superintendent to employ a physician for such a passenger.[94] And of course a conductor of a railroad train has no authority to employ a physician to attend a trespasser injured without the fault of the railroad company.[95] Seamen are exposed to hardships and dangers, and are subject to illness and injuries when far from home, to such an extent that the maritime law has always been solicitous for their protection. The master of the vessel is agent of the owners with authority to furnish to all mariners on the ship medical attendance at the cost of the owners.[96] Contracts for boarding and nursing railroad employees injured while in the performance of their duties fall within the rule above stated with reference to contracts for physicians and surgeons, and the superintendent of the road has implied power to make them.[97] But the implied authority to make such contracts of any one inferior to the superintendent will be strictly limited to emergencies that require action before he can be consulted.[98] One having general power to employ and

R. Co. *v.* Wiggins, 47 Ill. App. 474; St. Louis, etc., R. Co. *v.* Olive, 40 Ill. App. 82.

Michigan.— Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289.

Missouri.— Tucker *v.* St. Louis, etc., R. Co., 54 Mo. 177.

New York.— Cooper *v.* New York Cent., etc., R. Co., 6 Hun 276.

Texas.— Houston, etc., R. Co. *v.* Watkins, 1 Tex. App. Civ. Cas. § 345.

England.— Cox *v.* Midland Counties R. Co., 3 Exch. 268, 13 Jur. 65, 18 L. J. Exch. 65.

93. Sevier *v.* Birmingham, etc., R. Co., 92 Ala. 258, 9 So. 405 (where a railroad brakeman was injured while in discharge of his duties, and a physician was called by the conductor to attend him; and the conductor had no express authority to employ physicians in such cases, and it was not shown that the necessity for medical attendance was urgent and immediate, that communication with the chief officers in regard to such employment was impracticable, or delay for that purpose dangerous, or that the general superintendent knew of the employment until after the services had been rendered, and it appeared that there was telegraphic communication with him; and it was held that the company was not liable for such services); Chicago, etc., R. Co. *v.* Davis, 94 Ill. App. 54; Ohio, etc., R. Co. *v.* Early, 141 Ind. 73, 40 N. E. 257, 28 L. R. A. 546; Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358, 49 Am. Rep. 752 (holding that where a railway brakeman is injured in the discharge of his duty at a point distant from the chief offices of the company, and stands in need of immediate surgical attendance, the conductor may bind the company by the employment of a surgeon, if there is no superior agent of the company present); Southern R. Co. *v.* Humphries, 79 Miss. 761, 31 So. 440. *Compare* Louisville, etc., R. Co. *v.* Smith, 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320; Terre Haute, etc., R. Co. *v.* Brown, 107 Ind. 336, 8 N. E. 218; Evansville, etc., R. Co. *v.* Freeland, 4 Ind. App. 207, 30 N. E. 803; Evansville, etc., R. Co. *v.* Spellbring, 1 Ind. App. 167, 27 N. E. 239.

94. Union Pac. R. Co. *v.* Beatty, 35 Kan. 265, 10 Pac. 845, 57 Am. Rep. 160; Columbia, etc., R. Co. *v.* Wiseman, 1 Ohio Cir. Ct. 246, 1 Ohio Cir. Dec. 134; Skirvim *v.* O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696; Cox *v.* Midland Counties R. Co., 3 Exch. 268, 13 Jur. 65, 18 L. J. Exch. 65.

95. Stephenson *v.* New York, etc., R. Co., 2 Duer (N. Y.) 341; Adams *v.* Southern R. Co., 125 N. C. 565, 34 S. E. 642; Wills *v.* International, etc., R. Co., 41 Tex. Civ. App. 58, 92 S. W. 273.

96. Scarff *v.* Metcalf, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807. See also Holt *v.* Cummings, 102 Pa. St. 212, 48 Am. Rep. 199, in which it appeared that the engineer of a tugboat was injured by an explosion on the boat at the home port; that the officer in charge summoned a physician, who attended him on the boat, and at his own house, whither he was carried at his own request, and it was held that the owner was liable for the physician's services.

97. Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, 49 Am. Rep. 770; Atchison, etc., R. Co. *v.* Reecher, 24 Kan. 228; Texas, etc., R. Co. *v.* Myers, 1 Tex. App. Civ. Cas. § 392.

98. Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, 49 Am. Rep. 770; Chicago, etc., R. Co. *v.* Behrens, 9 Ind. App. 575, 37 N. E. 26 (holding that a railroad doctor who is required to do the medical and surgical work of the company in a prescribed territory and care for the patients while under his charge has no implied power to bind the company for board and care of an injured employee whom he has ordered removed from a train to a house in order to care for and treat him); Toledo, etc., R. Co. *v.* Mylott, 6 Ind. App. 438, 33 N. E. 135; Bushnell *v.* Chicago,

discharge men, and whose power is coextensive with the business, may contract for board and nursing for an injured employee.[99]

(VI) *To Contract For Board.*[1] The implied authority of an agent to contract on his principal's account for board involves no peculiar rules. It arises when such contract is necessary and proper to the performance of the duties intrusted to the agent, but not otherwise.[2]

(VII) *To Ship Goods.*[3] When goods are put in the charge of an agent to deliver to a carrier,[4] or when he is employed to accompany the goods in transit, he is presumed to have authority to make the necessary contracts at the point of shipment, or, if arrangements must be made along the way, during the transit.[5] The principal question growing out of authority to ship goods has to do with the agent's implied authority to assent for his principal to contracts affecting the carrier's liability. Such authority includes all the necessary and usual means of carrying it into effect.[6] One of the necessary incidents to a shipment is to arrange with the carrier to receive the goods. Accordingly it is a general rule that the shipping agent must be regarded as having authority to stipulate for and accept the terms of transportation.[7] This includes authority to assent to the usual contracts releasing carriers from their strict common-law liabilities as common carriers of goods,[8] to make agreements and give directions as to the delivery of the

etc., R. Co., 69 Iowa 620, 29 N. W. 753 (holding that the physician of the company has no authority to contract for board of relatives of the injured employee); Mayberry *v.* Chicago, etc., R. Co., 75 Mo. 492.

99. American Quarries Co. *v.* Lay, 37 Ind. App. 386, 73 N. E. 608.

1. **Authority to contract for board of injured employee** see *supra*, II, A, 6, h, (v), (c).

2. Burley *v.* Kitchell, 20 N. J. L. 305, holding that where there is a general agency to carry on the business of the principal during his absence, the principal is liable on contracts made by the agent for the board of the workmen employed, for the principal if present must have made such provision.

A commercial traveler who is a transient patron at plaintiff's hotel does not bind his employer for board furnished him from time to time, through an extended period, where it is the custom for transient patrons to pay cash, and notice is not given the employer of the failure of the traveler to do so. Covington *v.* Newberger, 99 N. C. 523, 6 S. E. 205. See also Cannon *v.* Henry, 78 Wis. 167, 47 N. W. 186, 23 Am. St. Rep. 399.

3. See, generally, CARRIERS, 6 Cyc. 352.

4. California Powder Works *v.* Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648; Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122; Aldridge *v.* Great Western R. Co., 15 C. B. N. S. 582, 33 L. J. C. P. 161, 109 E. C. L. 582. *Compare* Love *v.* Davis, 25 Ala. 335, holding that receiving and forwarding merchant cannot, unless under some special contract, custom, or usage of trade, forward cotton to a port, without instructions from his principal, and direct its delivery on arrival to a commission merchant.

5. *Connecticut.*— Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166.

Massachusetts.— Hill *v.* Boston, etc., R. Co., 144 Mass. 284, 10 N. E. 836.

Minnesota.— Armstrong *v.* Chicago, etc., R. Co., 53 Minn. 183, 54 N. W. 1059.

New York.— Lamb *v.* Camden, etc., Transp. Co., 46 N. Y. 271, 7 Am. Rep. 327.

Pennsylvania.— Camden, etc., R. Co. *v.* Forsyth, 61 Pa. St. 81.

Compare Gulf, etc., R. Co. *v.* White, (Tex. Civ. App. 1895) 32 S. W. 322, holding that employees sent along with a shipment of cattle cannot be assumed to have authority to make a contract with a connecting line to which the cattle are delivered.

6. Michigan Southern, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278; Nelson *v.* Hudson River R. Co., 48 N. Y. 498.

7. Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394; Nelson *v.* Hudson River R. Co., 48 N. Y. 498; Missouri Pac. R. Co. *v.* International Mar. Ins. Co., 84 Tex. 149, 19 S. W. 459; Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589 (holding that the carrier may act upon this presumption in dealing with the agent, and need not inquire as to his authority in the particular case); Gulf, etc., R. Co. *v.* White, (Tex. Civ. App. 1895) 32 S. W. 322.

8. *California.*—California Powder Works *v.* Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648.

Illinois.— Illinois Cent. R. Co. *v.* Jonte, 13 Ill. App. 424.

Indiana.— Adams Express Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

Massachusetts.— Squire *v.* New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162, holding that where a shipper of live stock sends his agent in charge of the property, the agent stands in the position of owner, and a contract made by him limiting the liability of the carrier is binding on the shipper, in the absence of fraud on the carrier's part.

Missouri.— Craycroft *v.* Atchison, etc., R. Co., 18 Mo. App. 487.

New York.— Shelton *v.* Merchants' Dispatch Transp. Co., 59 N. Y. 258 [*reversing* 36 N. Y. Super. Ct. 527]; Jones *v.* New York, etc., R. Co., 3 N. Y. App. Div. 341, 38

goods,[9] and to assent to reasonable regulations as to the shipment, or the time and manner of presenting claims for damages.[10] But when the shipper has made his own contract with the carrier it has been held that the agent has no implied authority to assent to any modification of such contract.[11]

(VIII) *To Make Payments.* The power of a buying agent to pay for the goods purchased by him has been already discussed.[12] The principal may of course expressly authorize his agent to pay obligations which he owes, and such authority may be implied in a particular case from a general power to make collections and from the proceeds to settle the principal's accounts.[13] Power to make payments, and to make them in property instead of in money, may be part of the acts necessary and proper to enable the agent to perform the duties intrusted to him, and in such cases authority to make them is to be inferred;[14] but such authority is not to be lightly implied. The mere fact that an agent has general power to conduct a merchant's retail business in his absence of itself raises no implication that he has authority to pay the merchant's debts,[15] particularly before they are due.[16] And an agent authorized to make payments for his principal has, in the absence of special powers to that end, no authority to make payments in his own notes,[17] or in anything but money;[18] and he has no power to pledge the principal's credit for future payments,[19] or for the debts of other persons who have assumed to buy or otherwise contract, on the principal's credit.[20]

(IX) *To Make Contracts of Guaranty and Suretyship.* A guaranty, like a warranty, is not within the scope of an agent's implied powers except by force of usage or custom, and a usage to guarantee payments is not common. The authority to give a guaranty is not inherent in a general agency of any kind.[21]

N. Y. Suppl. 284; Root *v.* New York, etc., R. Co., 76 Hun 23, 27 N. Y. Suppl. 611; Soumet *v.* National Express Co., 66 Barb. 284; Moriarty *v.* Harnden's Express Co., 1 Daly 227; Meyer *v.* Harnden's Express Co., 24 How. Pr. 290.

A person employed to construct glass cases and superintend their shipment cannot bind the owner by a contract limiting the carrier's liability for loss from breakage. Merriman *v.* The May Queen, 17 Fed. Cas. No. 9,481, Newb. Adm. 464.

9. Michigan Southern, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278.

10. Armstrong *v.* Chicago, etc., R. Co., 53 Minn. 183, 54 N. W. 1059; Nelson *v.* Hudson River R. Co., 48 N. Y. 498.

11. Atchison, etc., R. Co. *v.* Watson, 71 Kan. 696, 81 Pac. 499; Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394 [*affirming* 52 Hun 227, 5 N. Y. Suppl. 140].

12. See *supra*, II, A, 6, a, (III).

13. Tanner *v.* Page, 106 Mich. 155, 63 N. W. 993, holding that one who held certain accounts for collection, and from the proceeds thereof was to pay the assignor's creditors, was justified in paying a tax due from the assignor to the state.

14. Litchfield Bank *v.* Church, 29 Conn. 137; Taylor *v.* Labeaume, 14 Mo. 572, 17 Mo. 338, holding that a person "with full authority to transact any business . . . to employ men, purchase logs, sell lumber, or to perform any other business connected" with his principal, has a general authority and may transfer lumber in payment to men employed by him.

15. Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Lee *v.* Tinges, 7 Md. 215.

16. Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Beals *v.* Allen, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; Hampton *v.* Matthews, 14 Pa. St. 105.

17. English *v.* Rauchfuss, 21 Misc. (N. Y.) 494, 49 N. Y. Suppl. 639.

18. Berrien *v.* McLane, Hoffm. (N. Y.) 421.

He has no power to pay in property.— Lee *v.* Tinges, 7 Md. 215; Beals *v.* Allen, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; Hampton *v.* Matthews, 14 Pa. St. 105; Peshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

Even a statute allowing an agent to take payment in property other than money does not thereby give power to make payment in the same way. Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721.

19. Jaquins *v.* Gilbert, (Kan. 1898) 53 Pac. 754; Wells *v.* Martin, 32 Mich. 478. But *compare In re* Hale, [1899] 2 Ch. 107, 68 L. J. Ch. 517, 80 L. T. Rep. N. S. 827, 15 T. L. R. 389, 47 Wkly. Rep. 579.

20. Baker *v.* Pagaud, 26 La. Ann. 220; Ruppe *v.* Edwards, 52 Mich. 411, 18 N. W. 193 (holding that a bookkeeper has no power, by virtue merely of his position, to bind his employer for the debt of a third person); Reading R. Co. *v.* Johnson, 7 Watts & S. (Pa.) 317 (holding that the authority of an agent to assume the payment of the debt of a third person for his principal should be clearly proved, or no recovery can be had upon such promise against the principal).

21. *Illinois.*— Braun *v.* Hess, 187 Ill. 283, 58 N. E. 371 [*affirming* 86 Ill. App. 544]; Kinser *v.* Calumet Fire-Clay Co., 165 Ill. 505, 46 N. E. 372 [*affirming* 64 Ill. App.

But it is always competent to show that the agent has been clothed with such authority, and in such case the principal will of course be bound thereby.[22] Except in so far as the principal may be bound by an authorized indorsement by the agent, the latter when empowered to give or sell notes cannot give a guaranty of their payment by the principal.[23] While it is entirely competent to empower an agent to bind his principal as a surety,[24] yet such a contract is extraordinary, and does not impliedly come within the powers of the most general agent.[25] Moreover, when the power does exist it must be exercised strictly within the limits prescribed by the principal or he will not be bound at all.[26]

(x) *To Receive and Maintain Possession of Property.* One may be constituted agent with authority to receive the property of the principal, and when such an agent accepts such property, the acceptance is binding on the principal so far as the agent was acting within the scope of his authority.[27] But an

437]; Hess *v.* Heegaard, 54 Ill. App. 227; Lake Erie, etc., R. Co. *v.* Faught, 31 Ill. App. 110.

Nebraska.— Bullard *v.* De Groffe, 59 Nebr. 783, 82 N. W. 4; Oberne *v.* Burke, 30 Nebr. 581, 46 N. W. 838.

New York.— Quinn *v.* Carr, 4 Hun 259, 6 Thomps. & C. 402; English *v.* Rauchfuss, 21 Misc. 494, 47 N. Y. Suppl. 639. But *compare* Lossee *v.* Williams, 6 Lans. 228.

Ohio.— Mahler-Wolf Produce Co. *v.* Meyer, 26 Ohio Cir. Ct. 165.

Pennsylvania.— Stevenson *v.* Hoy, 43 Pa. St. 191.

But *compare* McClure *v.* Corydon Deposit Bank, 106 S. W. 1177, 32 Ky. L. Rep. 772.

22. Lake Erie, etc., R. Co. *v.* Faught, 31 Ill. App. 110; Ludlow-Saylor Wire Co. *v.* Fribley Hardware, etc., Co., 67 Kan. 710, 74 Pac. 237; Porter *v.* Woods, 138 Mo. 539, 39 S. W. 794.

23. Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250 (holding that an agent who is only authorized to sell notes cannot bind his principal by a guaranty of their payment); Humphrey *v.* Havens, 12 Minn. 298 (holding that authority to bind the principal to pay the note and mortgage of a third person cannot be implied from authority to make notes for the principal).

24. Helmer *v.* St. John, 8 Hun (N. Y.) 166.

25. Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612; Gates *v.* Bell, 3 La. Ann. 62 (holding that an express authority is necessary to bind the principal by a contract of suretyship for a stranger); Copley *v.* Flint, 6 Rob. (La.) 56 (holding that an agent having general and special powers "to manage all the business of the constituent, and more especially to draw notes and drafts, and endorse those made by himself or others," cannot bind his principal as surety *in solido* with himself, in a contract relating exclusively to his own interests); Hamburg Bank *v.* Johnson, 3 Rich. (S. C.) 42 (holding that a general agent with authority to transact all the mercantile business of his principal has not, by such general power, authority to bind his principal as surety on mercantile paper, nor on accommodation paper). *Compare In re* American Fidelity Co., 54 Misc. (N. Y.) 357, 104 N. Y. Suppl. 711, holding that a surety company which appoints agents whom it calls "general agents," with authority to solicit business for it as a surety on excise bonds, receive applications, issue bonds, and receive premiums therefor, cannot claim that such agents have not authority to make the agreement with the applicant for a bond, for which an extra premium is paid, that he shall not be liable for any amount the company may become chargeable with on account of the bond.

26. Dugan *v.* Champion Coal, etc., Co., 105 Ky. 821, 49 S. W. 958, 20 Ky. L. Rep. 1641, holding that a power of attorney executed by defendant authorizing another to sign his name as surety to a bond for six thousand dollars in place of a bond for a like amount on which he was already surety and which was then barred by limitations did not authorize the agent to execute a bond for the principal and accrued interest of the existing bond, amounting to eight thousand six hundred and sixty-seven dollars, and a bond for that amount executed by the agent is void as to the surety.

27. Rahm *v.* Deig, 121 Ind. 283, 23 N. E. 141, holding that to bind the principal for the acceptance of corn by the agent the jury must believe that the agent was acting within the scope of his authority, and that if he did undertake to accept the corn as to its quality, he was at the time in full knowledge of all facts with reference thereto, and that he acted in good faith, without fraud or collusion with plaintiff.

Agents are presumed to have authority to receive property to be delivered to the principal, if receiving such goods is in the line of their ordinary duties as agents, or is part of the undertaking they were authorized to contract with third persons. Clydesdale Horse Co. *v.* Bennett, 52 Mo. App. 333 (holding that an agent who sells a horse on the agreement to replace it with another if it does not prove as warranted has power to bind the principal by receiving the horse on its return by the purchaser, and a demand of him to replace it is sufficient); Sacalaris *v.* Eureka, etc., R. Co., 18 Nev. 155, 1 Pac. 835, 51 Am. Rep. 737 (holding that a railroad superintendent may be presumed to have authority to determine an ordinary matter, such as the receipt of fuel for the company);

agent as such has no authority to receive property for the principal if this is not a necessary part of the performance of the duties intrusted to him;[28] nor can he, if authorized to receive the property, accept it at an unusual or unauthorized time or place,[29] although a substantial compliance is all that is required.[30] If an agent is in possession of the principal's property by the authority of the principal, the possession of the agent is the possession of the principal,[31] and will authorize the agent to maintain against third persons possessory actions with reference to the property.[32] Possession as *indicia* of ownership, or of authority to the agent to sell the property intrusted to him, has been elsewhere considered.[33]

B. Construction — 1. In General. That every grant of authority should, if possible, be so construed as to give effect to the intent of the principal in creating the agency is the cardinal rule of construction of the authority of an agent. This is an immediate consequence of the nature of agency, which is a relation founded on the intent of the principal.[34] This rule is to be applied, however, subject to two considerations namely: (1) This intent is to be determined from the legal effect, and not necessarily the effect really supposed by the principal, of the language, conduct, or circumstances constituting the appointment.[35] (2) As a corollary of this, the authority will be so construed as to protect third persons dealing with the agent, provided the latter acted within the real or apparent scope of his authority, although contrary to the intention and privately expressed desires of the principal.[36] It must never be overlooked, however, that in the absence of proof

Purcell *v.* Jaycox, 59 N. Y. 288 [*reversing* 3 Thomps. & C. 406] (holding that the receipt by a cartman who ordinarily received goods for plaintiff was binding, although plaintiff had notified defendant that he would not accept the goods); Callahan *v.* Crow, 91 Hun (N. Y.) 346, 36 N. Y. Suppl. 225 [*affirmed* in 157 N. Y. 695, 51 N. E. 1089] (holding that the delivery of property to the agent who negotiated for its purchase is a delivery to his principal); Gallup *v.* Lederer, 1 Hun (N. Y.) 282, 3 Thomps. & C. 710.

Delivery to an agent having authority to receive it is in law a delivery to the principal himself. Pottinger *v.* Hecksher, 2 Grant (Pa.) 309.

28. Singer Mfg. Co. *v.* McLean, 105 Ala. 316, 16 So. 912 (holding that an agent authorized to take an inventory and report the business of a salesman cannot, by accepting property of his principal, relieve the salesman from liability for it); Weston *v.* Alley, 49 Me. 94 (holding that where the owners of a certain tannery appointed an agent to act for them in "all matters and business relating to the tannery," he was not thereby authorized to bind his principals as receiptors to an officer for horses, etc., used in the tannery, which had been attached as the property of a third person); Dorr *v.* New England Mar. Ins. Co., 4 Mass. 221 (holding that a mere correspondent to whom a shipper has written that the proceeds of a cargo shipped to another port will be remitted to him has no authority, on the ship's being captured and brought into his port, to accept a restoration of the cargo for the shipper).

29. Longworth *v.* Conwell, 2 Blackf. (Ind.) 469; Brown *v.* Berry, 14 N. H. 459.

30. Davis *v.* Reamer, 105 Ind. 318, 4 N. E. 857 (holding that one authorized to receive and take property, to be shipped in a vessel, from the "landing," may take it from a wharfboat, stationed at a wharf, on to which the property was discharged from the carrying vessel); Richardson *v.* Goddard, 23 How. (U. S.) 28, 16 L. ed. 412 [*reversing* 10 Fed. Cas. No. 5,494, Brunn. Col. Cas. 602].

31. Beaumont *v.* Covington, 6 Rob. (La.) 189; Arden *v.* Soileau, 16 La. 28; Merrill *v.* Hilliard, 59 N. H. 481; Bean *v.* Smith, 20 N. H. 461.

32. Beaumont *v.* Covington, 6 Rob. (La.) 189; Arden *v.* Soileau, 16 La. 28.

33. See *supra*, II, A, 6, b, (II); II, A, 6, d, (II).

34. Halladay *v.* Underwood, 90 Ill. App. 130 (holding that every authority of an agent must find its ultimate source in some act or word of the principal indicative of his intention, and where the authority is sought to be implied from the words or conduct of the principal, its extent cannot exceed the necessary and legitimate effect of the words and conduct relied upon); Edwards *v.* Thomas, 66 Mo. 468; Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621. And see *supra*, I, A, 1; I, D, 1, a.

35. Heath *v.* Stoddard, 91 Me. 499, 40 Atl. 547. See also Toohey *v.* Comstock, 45 Mich. 603, 8 N. W. 564. And see *supra*, I, A, 1, 2; I, D, 1, a.

36. *Indiana.*— New Albany, etc., R. Co. *v.* Haskell, 11 Ind. 301; German-American Bldg. Assoc. *v.* Droge, 14 Ind. App. 691, 43 N. E. 475.

Iowa.— Elder *v.* Stuart, 85 Iowa 690, 52 N. W. 660.

Kansas.— Ludlow-Saylor Wire Co. *v.* Fribley Hardware, etc., Co., 67 Kan. 710, 74 Pac. 237.

Louisiana.— Mackey *v.* De Blanc, 12 La. Ann. 377.

Maryland.— Gardner *v.* Lewis, 7 Gill 377.

Massachusetts.—McNeil *v.* Boston Chamber

to the contrary the power is to be exercised for the benefit of the principal about his private business, and presumably is limited to acts of the kind indicated by the appointment.[37] Within these limits the authority is to be fairly and liberally construed so as to effectuate and not defeat its design and object,[38] and if some of the powers conferred seem conflicting or repugnant, a construction should be found to give as nearly as possible full effect to every part of the authority granted.[39] The

of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559.

Michigan.— Havens *v.* Church, 104 Mich. 135, 62 N. W. 149; Hutchings *v.* Ladd, 16 Mich. 493.

Minnesota.— American Graphic Co. *v.* Minneapolis, etc., R. Co., 44 Minn. 93, 46 N. W. 143.

Missouri.— Porter *v.* Woods, 138 Mo. 539, 39 S. W. 794; May *v.* Jarvis-Conklin Mortg. Trust Co., 138 Mo. 275, 39 S. W. 782; Wilson *v.* Missouri Pac. R. Co., 66 Mo. App. 388.

Nebraska.— Harrison Nat. Bank *v.* Austin, 65 Nebr. 632, 91 N. W. 540; Faulkner *v.* Simms, (1902) 89 N. W. 171; Cheshire Provident Inst. *v.* Feusner, 63 Nebr. 682, 88 N. W. 849; Holt *v.* Schneider, 57 Nebr. 523, 77 N. W. 1086; Lebanon Sav. Bank *v.* Blanke, 2 Nebr. (Unoff.) 403, 89 N. W. 169; Harrison Nat. Bank *v.* Williams, 2 Nebr. (Unoff.) 400, 89 N. W. 245.

New York.— West Side Sav. Bank *v.* Newton, 76 N. Y. 616; Goodrich *v.* Thompson, 4 Rob. 75 [*affirmed* in 44 N. Y. 324]; Mullin *v.* Sire, 34 Misc. 540, 69 N. Y. Suppl. 953; Standard Fertilizer Co. *v.* Van Valkenburgh, 21 Misc. 559, 47 N. Y. Suppl. 703.

Oregon.— Connell *v.* McLoughlin, 28 Oreg. 230, 42 Pac. 218.

Tennessee.— Nunnelly *v.* Goodwin, (Ch. App. 1896) 39 S. W. 855.

Texas.— Patton-Worsham Drug Co. *v.* Stark, (Civ. App. 1905) 89 S. W. 799; Porter *v.* Heath, 2 Tex. App. Civ. Cas. § 124.

England.— Davy *v.* Waller, 81 L. T. Rep. N. S. 107.

And see *supra*, II, A, 2, b.

When instructions uncertain.— If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in another sense of which it is equally capable. Ireland *v.* Livingstone, L. R. 5 H. L. 395, 41 L. J. Q. B. 201, 27 L. T. Rep. N. S. 79 [*affirming* L. R. 2 Q. B. 99, 36 L. J. Q. B. 50, 15 L. T. Rep. N. S. 206, 15 Wkly. Rep. 152].

37. *Alabama.*—Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., Co., 127 Ala. 137, 28 So. 679.

Arkansas.— Welch *v.* McKenzie, 66 Ark. 251, 50 S. W. 505.

Colorado.— Gates Iron Works *v.* Denver Engineering Works, 17 Colo. App. 15, 67 Pac. 173.

Illinois.— McClun *v.* McClun, 176 Ill. 376, 52 N. E. 928.

Iowa.— Drake *v.* Chicago, etc., R. Co., 70 Iowa 59, 29 N. W. 804.

Kansas.— Union Pac. Town-Site Co. *v.* Page, 54 Kan. 363, 36 Pac. 992.

Maine.— Millay *v.* Whitney, 63 Me. 522.

Massachusetts.— Fletcher *v.* Sibley, 124 Mass. 220.

Missouri.— Grand Ave. Hotel Co. *v.* Friedman, 83 Mo. App. 491.

Nevada.— Jos. Schlitz Brewing Co. *v.* Grimmon, 28 Nev. 235, 81 Pac. 43.

New York.— Mechanics', etc., Bank *v.* Farmers', etc., Nat. Bank, 60 N. Y. 40.

Oklahoma.— Wilson *v.* Wood, 10 Okla. 279, 61 Pac. 1045.

Pennsylvania.— Thompson *v.* Sproul, 179 Pa. St. 266, 36 Atl. 290; Lauer Brewing Co. *v.* Schmidt, 24 Pa. Super. Ct. 396; John C. Cochran Co. *v.* International Cream Separator Co., 20 Lanc. L. Rev. 12.

South Carolina.— Providence Mach. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117; State *v.* Isaacs, 1 Speers 223.

Utah.— Moyle *v.* Salt Lake City Cong. Soc., 16 Utah 69, 50 Pac. 806.

Virginia.— Engleby *v.* Harvey, 93 Va. 440, 25 S. E. 225.

Washington.— Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

United States.— Thiel Detective Service Co. *v.* McClure, 142 Fed. 952, 74 C. C. A. 122.

England.— *Ex p.* Snowball, L. R. 7 Ch. 534, 41 L. J. Bankr. 49, 26 L. T. Rep. N. S. 894, 20 Wkly. Rep. 786.

Canada.— McDonald *v.* Royal Ins. Co., 15 Nova Scotia 428; King *v.* Rogers, 1 Ont. L. Rep. 69.

And see *supra*, II, A, 3, 4.

38. Long *v.* Jennings, 137 Ala. 190, 33 So. 857; Huntington *v.* Finch, 3 Ohio St. 445; National Bank of Republic *v.* Old Town Bank, 112 Fed. 726, 50 C. C. A. 443. And see *infra*, II, B, 2.

39. *California.*— Alcorn *v.* Buschke, 133 Cal. 655, 66 Pac. 15; Golinsky *v.* Allison, 114 Cal. 458, 46 Pac. 295.

Indiana.— Robinson *v.* Nipp, 20 Ind. App. 156, 50 N. E. 408.

Kansas.— Philadelphia Mortg., etc., Co. *v.* Hardesty, 68 Kan. 683, 75 Pac. 1115.

Maryland.— Hawley Down-Draft Furnace Co. *v.* Hooper, 90 Md. 390, 45 Atl. 456.

Massachusetts.— Lewis *v.* Moore, 14 Gray 184.

Michigan.— Stevenson *v.* Michigan Log Towing Co., 103 Mich. 412, 61 N. W. 536.

Minnesota.— Snell *v.* Weyerhauser, 71 Minn. 57, 73 N. W. 633.

New York.— Doubleday *v.* Kress, 50 N. Y. 410, 10 Am. Rep. 502; Wight *v.* Wood, 57 Barb. 471; Paris Hill Mfg. Co. *v.* Lyman, 13 N. Y. St. 370.

Pennsylvania.— Dusar *v.* Perit, 4 Binn. 361.

language, oral or written, used in clothing an agent with his authority should be given its ordinary and natural meaning in view of the principal's purpose, and not an unreasonable or strained construction, either to enlarge or restrict the agency;[40] and the authority is never to be extended by mere construction beyond that which is expressly given or which is necessary and proper to carry the authority so given into effect.[41]

2. Construction of Letters or Powers of Attorney. A power of attorney is a formal instrument and must be strictly construed according to the natural import of its language.[42] Powers of attorney are not subject to that liberal interpretation,[43] which is given to less formal instruments, as letters of instruction, etc., in commercial transactions,[44] which are interpreted most strongly against the

South Carolina.— Peay *v.* Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731.

Texas.— Halff *v.* O'Connor, 14 Tex. Civ. App. 191, 37 S. W. 238; Miller *v.* Sullivan, 14 Tex. Civ. App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778.

England.— Entwistle *v.* Dent, 1 Exch. 812, 18 L. J. Exch. 138.

40. Geiger *v.* Bolles, 1 Thomps. & C. (N. Y.) 129; Bryant *v.* La Banque du Peuple, [1893] A. C. 170, 62 L. J. P. C. 68, 68 L. T. Rep. N. S. 546, 1 Reports 336, 41 Wkly. Rep. 600; Sturt *v.* Mellish, 2 Atk. 610, 26 Eng. Reprint 765; Spain *v.* Machado, 6 L. J. Ch. O. S. 61, 4 Russ. 225, 28 Rev. Rep. 56, 4 Eng. Ch. 225, 38 Eng. Reprint 790.

41. *Alabama.*—Scarborough *v.* Reynolds, 12 Ala. 252.

California.— Blum *v.* Robertson, 24 Cal. 127; Johnston *v.* Wright, 6 Cal. 373.

Massachusetts.— Wood *v.* Goodridge, 6 Cush. 117, 52 Am. Dec. 771.

Michigan.— Penfold *v.* Warner, 96 Mich. 179, 55 N. W. 680, 35 Am. St. Rep. 591; Hammond *v.* Michigan State Bank, Walk. 214.

Minnesota.— Harris *v.* Johnston, 54 Minn. 177, 55 N. W. 970, 40 Am. St. Rep. 312.

Pennsylvania.— Campbell *v.* Foster Home Assoc., 163 Pa. St. 609, 30 Atl. 222, 43 Am. St. Rep. 818, 26 L. R. A. 117; MacDonald *v.* O'Neil, 21 Pa. Super. Ct. 364; Stokes *v.* Dewees, 11 Kulp 140 [*affirmed* in 24 Pa. Super. Ct. 471].

Texas.— Gouldy *v.* Metcalf, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912; Halff *v.* O'Connor, 14 Tex. Civ. App. 191, 37 S. W. 238; Rhine *v.* Blake, 1 Tex. App. Civ. Cas. § 1066.

England.— Bryant *v.* La Banque du Peuple, [1893] A. C. 170, 62 L. J. P. C. 68, 68 L. T. Rep. N. S. 546, 1 Reports 336, 41 Wkly. Rep. 600 (holding that the instrument must be strictly construed, and it must appear that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication); Jacobs *v.* Morris, [1902] 1 Ch. 816, 71 L. J. Ch. 363, 86 L. T. Rep. N. S. 275, 18 T. L. R. 384, 50 Wkly. Rep. 371 [*affirming* [1901]1 Ch. 261, 70 L. J. Ch. 183, 84 L. T. Rep. N. S. 112, 49 Wkly. Rep. 365]; Howard *v.* Baillie, 2 H. Bl. 618, 3 Rev. Rep. 531.

42. *California.*— Golinsky *v.* Allison, 114 Cal. 458, 46 Pac. 295; Dupont *v.* Wertheman, 10 Cal. 354; Johnston *v.* Wright, 6 Cal. 373.

Georgia.— White *v.* Young, 122 Ga. 830, 51 S. E. 28.

Illinois.— La Favorite Rubber Mfg. Co. *v.* H. Channon Co., 113 Ill. App. 491.

New York.— Ferreira *v.* Depew, 17 How. Pr. 418; Delafield *v.* Illinois, 26 Wend. 192, 2 Hill 159.

Texas.— Skaggs *v.* Murchison, 63 Tex. 348; Teagarden *v.* Patten, (Civ. App. 1908) 107 S. W. 909; Skirvin *v.* O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696.

The natural import of the language used is not to be restricted by ambiguous or uncertain expressions in other parts of the power. Pariente *v.* Lubbock, 8 De G. M. & G. 5, 57 Eng. Ch. 4, 44 Eng. Reprint 290 [*affirming* 20 Beav. 588, 52 Eng. Reprint 731].

If two constructions seem reasonable, one of which would uphold and the other invalidate, the agent's acts, the former construction is if possible to be preferred. Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

Void for uncertainty.— If the language used in a power of attorney is so vague and general that the court is unable to determine the powers conferred, it is void for uncertainty. Stafford *v.* Lick, 13 Cal. 240; Ashley *v.* Bird, 1 Mo. 640, 14 Am. Dec. 313.

43. *Massachusetts.*—Wood *v.* Goodridge, 6 Cush. 117, 52 Am. Dec. 771.

New York.— Craighead *v.* Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Hubbard *v.* Elmer, 7 Wend. 446, 22 Am. Dec. 590.

Pennsylvania.— Stokes *v.* Dewees, 11 Kulp 140 [*affirmed* in 24 Pa. Super. Ct. 471], holding that between two constructions, one of which enlarges the powers, and the other of which restrains them to the language used, the latter is to be followed.

United States.— Hodge *v.* Combs, 1 Black 192, 17 L. ed. 157.

England.—Altwood *v.* Munnings, 7 B. & C. 278, 6 L. J. K. B. O. S. 9, 1 M. & R. 66, 31 Rev. Rep. 194, 14 E. C. L. 130.

44. Miller *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 236; American Bonding Co. *v.* Ensey, 105 Md. 211, 65 Atl. 921; Craighead *v.* Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Merriman *v.* Fulton, 29 Tex. 97; Halff *v.* O'Connor, 14 Tex. Civ. App. 191, 37 S. W. 238.

A power of attorney, and a letter written contemporaneously by the principal to the

writer,[45] especially where they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations.[46] In the case of a power of attorney, as with other written instruments, when the meaning of the terms used is obvious, such meaning is not by implication to be enlarged or restrained beyond what is expressed, as indicated by the natural and ordinary meaning of the language.[47] But if the language of the power is ambiguous as to the particular mode in which an object admitted to be within the power is to be effected, and would with reasonable attention bear the interpretation placed upon it by the agent and a third person, the principal is bound, although upon a more refined and critical examination a court might be of opinion that a different construction would be more correct.[48] While third persons will not be made to suffer for the principal's lack of clearness and precision, yet the authority is to be restricted to that which is given in terms under a reasonable construction of the language used, or which is reasonably necessary to the performance of the powers expressly given.[49] But the rule is not to be narrowly applied, either to extend or to limit the authority. The power should be read, not only with reference to the language used, but in the

agent inclosing the same, are to be considered as constituent parts of the same instrument, and are to receive the same construction as though embodied with one and the same paper; and, where in such case the agent was authorized by the letter to use the power of attorney to make a transfer of property only on certain terms, the power of the agent was strictly limited by such instructions, and he could not convey his principal's interest on other or different terms to one who had knowledge of such limitation. Mexican Nat. Coal, etc., Co. *v.* Frank, 154 Fed. 217.

45. Craighead *v.* Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

46. Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480; Osborne *v.* Ringland, 122 Iowa 329, 98 N. W. 116; Minnesota Linseed Oil Co. *v.* Montague, 65 Iowa 67, 21 N. W. 184 (holding that where instructions as to the manner in which money is to be disbursed by an agent are ambiguous, or fairly admit of more than one construction, that meaning is to be given them in which they were understood by the agent receiving them, and the principal must bear a loss caused by acting on that construction); Hopwood *v.* Corbin, 63 Iowa 218, 18 N. W. 911; Berry *v.* Haldeman, 111 Mich. 667, 70 N. W. 325; Craighead *v.* Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

47. *Indiana.*—White *v.* Furgeson, 29 Ind. App. 144, 64 N. E. 49.

Kentucky.— Indiana Road Mach. Co. *v.* Lebanon Carriage, etc., Co., 78 S. W. 861, 25 Ky. L. Rep. 1763.

Massachusetts.— Butterick Pub. Co. *v.* Boynton, 191 Mass. 175, 77 N. E. 705; Garfield *v.* Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695.

Michigan.— Baker *v.* Baird, 79 Mich. 255, 44 N. W. 604.

Minnesota.— Finnegan *v.* Brown, 90 Minn. 396, 97 N. W. 144.

Montana.— Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

New York.— Hutchinson *v.* Root, 2 N. Y. App. Div. 584, 38 N. Y. Suppl. 16.

United States.— Wright *v.* Ellison, 1 Wall. 16, 17 L. ed. 555; Very *v.* Levy, 13 How. 345, 14 L. ed. 173; Peckham *v.* Lyon, 19 Fed. Cas. No. 10,899, 4 McLean 45.

England.— Bryant *v.* La Banque du Peuple, [1893] A. C. 170, 62 L. J. P. C. 68, 68 L. T. Rep. N. S. 546, 1 Reports 336, 41 Wkly. Rep. 600; Hawksley *v.* Outram, [1892] 3 Ch. 359, 62 L. J. Ch. 215, 67 L. T. Rep. N. S. 804, 2 Reports 60.

Thus a power to act with reference to the interests of the principal will not extend to interests of the principal jointly with others, and *vice versa* a power from joint principals confers on the agent no authority to deal with their separate interests (Johnston *v.* Wright, 6 Cal. 373; Gilbert *v.* How, 45 Minn. 121, 47 N. W. 643, 22 Am. St. Rep. 724; Stainback *v.* Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; Dodge *v.* Hopkins, 14 Wis. 630), although a more liberal rule has sometimes been applied in cases where the power does not forbid a sale of the separate interests, and the circumstances are such as reasonably to justify the inference that the principal intended the power to apply to his separate property (Holladay *v.* Daily, 19 Wall. (U. S.) 606, 22 L. ed. 187; Dolton *v.* Cain, 14 Wall. (U. S.) 472, 20 L. ed. 830). Likewise authority to act for the principal with reference to his own property can carry no power to deal with property held by the principal in a representative capacity. Pipes' Succession, 26 La. Ann. 203.

Alternative powers convey authority to do one or the other, but not both of the acts specified. When one of the acts has been done the power is exhausted and the agent cannot then do the other. Thus a power of attorney reciting among other things, "and my said attorney is hereby empowered to locate any such certificate in my name, or sell and assign the same," does not authorize the agent to locate a government pension certificate and also to sell the land after such location. Mitchell *v.* McLaren, (Tex. Civ. App. 1899) 51 S. W. 269.

48. Very *v.* Levy, 13 How. (U. S.) 345, 14 L. ed. 173; Le Roy *v.* Beard, 8 How. (U. S.) 451, 12 L. ed. 1151.

49. Bissell *v.* Terry, 69 Ill. 184; Craighead *v.* Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

light of all the surrounding circumstances, in order, as nearly as possible, to give effect to the evident intention of the principal.[50] General terms in it are restricted to consistency with the controlling purpose and objects in view;[51] and when

50. *Alabama.* — Brantley *v.* Southern L. Ins. Co., 53 Ala. 554.

California.— Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; De Rutte *v.* Muldrow, 16 Cal. 505.

Colorado.— Hagerman *v.* Bates, 24 Colo. 71, 49 Pac. 139.

Illinois.— Daniel Forbes Co. *v.* Leonard, 119 Ill. App. 629.

Indiana.— White *v.* Furgeson, 29 Ind. App. 144, 64 N. E. 49.

Louisiana.— Gernon *v.* Dubois, 23 La. Ann. 26; Reynolds *v.* Rowley, 2 La. Ann. 890.

Maine.— Mattocks *v.* Young, 66 Me. 459; Marr *v.* Given, 23 Me. 55, 39 Am. Dec. 600.

Maryland.— Posner *v.* Bayless, 59 Md. 56, holding that the rule that the authority conferred by a power of attorney must be strictly pursued does not affect or supersede the general rule that the intention of the party creating the power must prevail in its construction, and that such intention is to be ascertained from the language employed and the object to be accomplished.

Minnesota.— Sutton *v.* Baker, 91 Minn. 12, 97 N. W. 420; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539. See also Michaud *v.* MacGregor, 61 Minn. 198, 63 N. W. 479.

Mississippi.— Routh *v.* Agricultural Bank, 12 Sm. & M. 161.

Montana.— Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

Nevada.—Maynard *v.* Mercer, 10 Nev. 33.

New York.— Taylor *v.* Harlow, 11 Barb. 232.

Oregon.— Curtze *v.* Iron Dyke Copper Min. Co., 46 Oreg. 601, 81 Pac. 815.

South Carolina.— Bryce *v.* Massey, 35 S. C. 127, 14 S. E. 768.

Texas.— Texas Loan Agency *v.* Miller, 94 Tex. 464, 61 S. W. 477; Donnan *v.* Adams, 30 Tex. Civ. App. 615, 617, 71 S. W. 580 (in which it is said: "The authority conferred by [a written power] must be determined by the circumstances under which the power is given, the person to whom it is given, and all facts surrounding the parties at the time of the execution of the writing"); Miller *v.* Sullivan, 14 Tex. Civ. App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778.

West Virginia.— Townshend *v.* Shaffer, 30 W. Va. 176, 3 S. E. 586, holding that a power of attorney by the owner of land appointing the attorney to "protect all his interests in and title to the land" is sufficient authority for the attorney to redeem the land for the owner from the purchaser thereof at a sale for delinquent taxes.

United States.— Runkle *v.* Burnham, 153 U. S. 216, 14 S. Ct. 837, 38 L. ed. 694 [*affirming* 40 Fed. 408]; Lyon *v.* Pollock, 99 U. S. 668, 25 L. ed. 265; Holladay *v.* Daily, 19 Wall. 606, 22 L. ed. 187; Le Roy *v.* Beard, 8 How. 451, 12 L. ed. 1151; Gratz *v.* Land, etc., Imp. Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393.

England.— Jacobs *v.* Morris, [1902] 1 Ch. 816, 71 L. J. Ch. 363, 86 L. T. Rep. N. S. 275, 18 T. L. R. 384, 50 Wkly. Rep. 371; Henley *v.* Soper, 8 B. & C. 16, 6 L. J. K. B. O. S. 210, 1 M. & R. 153, 15 E. C. L. 18; Perry *v.* Holl, 2 De G. F. & J. 38, 6 Jur. N. S. 661, 29 L. J. Ch. 677, 2 L. T. Rep. N. S. 585, 8 Wkly. Rep. 570, 63 Eng. Ch. 30, 45 Eng. Reprint 536; Howard *v.* Baillie, 2 H. Bl. 618, 3 Rev. Rep. 531; Esdaile *v.* Lanoge, 4 L. J. Exch. 46, 1 Y. & C. Exch. 394.

Canada.—Auldjo *v.* McDougall, 3 U. C. Q. B. O. S. 199.

51. Blum *v.* Robertson, 24 Cal. 128; White *v.* Young, 122 Ga. 830, 51 S. E. 28; Wood *v.* Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Very *v.* Levy, 13 How. (U. S.) 345, 14 L. ed. 173.

Restricted to kind of contract named.— General words will not empower an agent to make a contract of a different kind, nor for a different purpose, nor as to different property or business, from that specifically mentioned in the power. Treat *v.* De Celis, 41 Cal. 202; Torrence *v.* Shedd, 112 Ill. 466 (holding that a power of attorney giving the attorney full power and control over lands for the purpose of making leases and collecting rents, particularly the rent already due from a tenant in possession, does not empower the attorney to execute a contract to such tenant in the name of the principal binding him to convey the premises to the tenant by deed or further assurances); Mitchell *v.* Sproul, 5 J. J. Marsh. (Ky.) 264; Dickson *v.* Morgan, 7 La. Ann. 490; Calef *v.* Foster, 32 Me. 92 (holding that a power to execute contracts as to lands already sold does not authorize the attorney to make new contracts for the sale of other lands); Perry *v.* Smith, 29 N. J. L. 74; Miller *v.* Magee, 2 N. Y. Suppl. 156; Williamson *v.* North Pac. Lumber Co., 42 Oreg. 153, 70 Pac. 387, 532; Kirby *v.* Western Wheeled Scraper Co., 9 S. D. 623, 70 N. W. 1052; Brown *v.* Orange County, (Tex. Civ. App. 1905) 88 S. W. 247; Hennessy *v.* Bond, 77 Fed. 403, 23 C. C. A. 203; Johnson *v.* Sukeley, 13 Fed. Cas. No. 7,414, 2 McLean 562.

General terms are restricted to acts in furtherance of the principal's business. Brantley *v.* Southern L. Ins. Co., 53 Ala. 554; Muth *v.* Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553; Williams *v.* Whiting, 92 N. C. 683 (holding that a power to act for another, however general its terms or wide its scope, cannot be enlarged into a power to pervert funds coming into the agent's hands); Kern's Estate, 176 Pa. St. 373, 35 Atl. 231; Hodge *v.* Combs, 1 Black (U. S.) 192, 17 L. ed. 157 (holding power of attorney making A, of Texas, the constituent's "general and special agent to do and transact all manner of business in which I may be interested there," does not, as between the principal and agent, authorize the

special acts are authorized, and general words are also employed, such general words are limited in their application to the particular acts mentioned.[52] A principal may, however, make the power as broad as he will, and when he has used general language giving wide authority and not restricted by special terms, there is no reason why the courts should limit the authority more than the language and general situation would indicate that the principal himself has done.[53] Finally,

latter to sell public stock and use the proceeds); Hambro *v.* Barnard, [1903] 2 K. B. 399, 8 Com. Cas. 252, 72 L. J. Q. B. 662, 89 L. T. Rep. N. S. 180, 19 T. L. R. 584, 51 Wkly. Rep. 652 [*reversed* on other grounds in [1904] 2 K. B. 10, 9 Com. Cas. 251, 73 L. J. K. B. 669, 90 L. T. Rep. N. S. 803, 20 T. L. R. 398, 52 Wkly. Rep. 583]; Attwood *v.* Munnings, 7 B. & C. 278, 6 L. J. K. B. O. S. 9, 1 M. & R. 66, 31 Rev. Rep. 194, 14 E. C. L. 130; Hogg *v.* Snaith, 1 Taunt. 347.

General terms are restricted to necessary acts.— Miller *v.* Sullivan, 14 Tex. Civ. App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778, holding that a power authorizing an attorney to contract for grading a railway between stated points does not authorize a contract for clearing of timber fifty feet on each side of the center line of the road-bed. See also Bryant *v.* La Banque du Peuple, [1893] A. C. 170, 62 L. J. P. C. 68, 68 L. T. Rep. N. S. 546, 1 Reports 336, 41 Wkly. Rep. 600; Jacobs *v.* Morris, [1902] 1 Ch. 816, 71 L. J. Ch. 363, 86 L. T. Rep. N. S. 275, 18 T. L. R. 384, 50 Wkly. Rep. 371.

Not authorized to engage in new business.— A general power of attorney authorizing an agent to represent the principal in all his interests in a given locality does not empower him to embark the principal in a new and different business. Campbell *v.* Hastings, 29 Ark. 512. So a power of attorney given by a member of a firm engaged in real estate transactions to his partner to sign any instrument pertaining to the business will be construed as given to enable the latter to manage the affairs of the partnership, and does not authorize him to admit a new partner or to vary the terms of the partnership; nor can he bind the principal by an agreement that another shall have a share in transactions negotiated by him, the money for which should be furnished by the principal. Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868. And it has been held that a power of attorney "to buy and sell real estate and personal property, and to collect rents, money, and debts, and to do every act and thing necessarily pertaining thereto," and giving full power to do everything "necessary to be done in and about the premises" as fully as the principal, will not justify the attorney in taking possession of a tailoring establishment for a debt due his principal, and continuing to prosecute the business of a merchant tailor in the name of his principal. Mills *v.* Carnly, 1 Bosw. (N. Y.) 159.

52. *Alabama.*— Brantley *v.* Southern L. Ins. Co., 53 Ala. 554.

California.— Quay *v.* Presidio, etc., R. Co., 82 Cal. 1, 22 Pac. 925; De Rutte *v.* Muldrow, 16 Cal. 505; Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235; Washburn *v.* Alden, 5 Cal. 463.

Florida.— St. Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

Georgia.— White *v.* Young, 122 Ga. 830, 51 S. E. 28 (holding that a former power of attorney is subject to strict construction, and general terms therein will not be construed to extend the authority so as to add new and distinct powers different from the special powers expressly delegated); Born *v.* Simmons, 111 Ga. 869, 36 S. E. 956.

Minnesota.—Rice *v.* Tavernier, 8 Minn. 214, 83 Am. Dec. 778.

New York.— Craighead *v.* Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Lahn *v.* Sullivan, 116 N. Y. App. Div. 669, 101 N. Y. Suppl. 920; Taylor *v.* Harlow, 11 Barb. 232; Geiger *v.* Bolles, 1 Thomps. & C. 129.

Texas.— Gouldy *v.* Metcalf, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912.

Wisconsin.— Rountree *v.* Denson, 59 Wis. 522, 18 N. W. 518, holding that where a power of attorney is given for a particular purpose, general words therein are not to be construed at large, but merely as giving general powers for carrying into effect the special purpose for which the power is given.

United States.— Renwick *v.* Wheeler, 48 Fed. 431.

England.— Bryant *v.* La Banque du Peuple, [1893] A. C. 170, 62 L. J. P. C. 68, 68 L. T. Rep. N. S. 546, 1 Reports 336, 41 Wkly. Rep. 600; Harper *v.* Godsell, L. R. 5 Q. B. 422, 39 L. J. Q. B. 185, 18 Wkly. Rep. 954; Danby *v.* Coutts, 29 Ch. D. 500, 54 L. J. Ch. 577, 52 L. T. Rep. N. S. 401, 33 Wkly. Rep. 559; Attwood *v.* Munnings, 7 B. & C. 278, 6 L. J. K. B. O. S. 9, 1 M. & R. 78, 31 Rev. Rep. 194, 14 E. C. L. 130; Perry *v.* Holl, 2 De G. F. & J. 38, 6 Jur. N. S. 661, 29 L. J. Ch. 677, 2 L. T. Rep. N. S. 585, 8 Wkly. Rep. 570, 63 Eng. Ch. 30, 45 Eng. Reprint 536; Esdaile *v.* Lanoge, 4 L. J. Exch. 46, 1 Y. & C. Exch. 394; Lewis *v.* Ramsdale, 55 L. T. Rep. N. S. 179, 35 Wkly. Rep. 8.

If general and particular or limiting clauses in a power seem to be inconsistent, the latter are not to be rejected as repugnant to the general grant of power, but are to be regarded as limitations on such general grant. Alcorn *v.* Buschke, 133 Cal. 655, 66 Pac. 15; Philadelphia Mortg., etc., Co. *v.* Hardesty, 68 Kan. 683, 75 Pac. 1115; Danby *v.* Coutts, 29 Ch. D. 500, 54 L. J. Ch. 577, 52 L. T. Rep. N. S. 401, 33 Wkly. Rep. 559; Prince *v.* Lewis, 21 U. C. C. P. 63.

53. Hawksley *v.* Outram, [1892] 3 Ch. 359, 62 L. J. Ch. 215, 67 L. T. Rep. N. S. 804,

the written power and the authority of the agent are by no means always coextensive, and the agent may have authority resting on the acts and dealings of the principal, but not contained in the written power, even under the most liberal rule of construction. In such case the power of attorney will not be construed as restricting the power of the agent to the matters therein specified, provided it is not exclusive and not inconsistent with the larger powers exercised by the agent.[54]

C. Execution[55] — **1. In General.** It is elementary and fundamental, and involved in the very name, that agency exists only to enable the principal to execute his will through another, the agent. It is therefore the first duty of the agent to execute the will of his principal, and to do so as he has been directed.[56] In doing this, as is elsewhere explained, the agent should act within the scope of the authority conferred upon him,[57] and if he does not, his execution fails of its object, and the agent is liable to the principal for the resulting damages.[58] Where, however, in performing one transaction he does an authorized act and also something more which he was not authorized to do, the authorized portion of the act may be treated as valid and binding and the other rejected, provided the two portions are not so interwoven that they cannot be separated.[59] But it is otherwise where the act which was authorized cannot be separated from the unauthorized excess.[60] The

2 Reports 60; Trickett *v.* Tomlinson, 13 C. B. N. S. 663, 7 L. T. Rep. N. S. 678, 106 E. C. L. 663; Pariente *v.* Lubbock, 8 De G. M. & G. 5, 57 Eng. Ch. 4, 44 Eng. Reprint 290 [*affirming* 20 Beav. 588, 52 Eng. Reprint 731]; Routh *v.* MacMillan, 2 H. & C. 750, 10 Jur. N. S. 158, 33 L. J. Exch. 38, 9 L. T. Rep. N. S. 541, 12 Wkly. Rep. 381.

54. Philadelphia Trust, etc., Co. *v.* Philadelphia Seventh Nat. Bank, 6 Fed. 114, holding that the course of dealing of the principal may justify a bank in taking from an agent negotiable paper as a pledge, although it has in its possession a written power of attorney not conferring upon the agent such authority if the power does not deny it. See also Howard *v.* Baillie, 2 H. Bl. 618, 3 Rev. Rep. 531.

55. Acknowledgment by agent see Acknowledgments, 1 Cyc. 542, 586.

Affidavit made by agent see Affidavits, 2 Cyc. 23; Attachments, 4 Cyc. 496, 499, 500.

Authority of agent to execute power in own name where coupled with interest in subject-matter of agency see *supra*, page 1298, note 22.

56. See *supra*, I, A, 1; I, D, 1; II, A; *infra*, III, A; III, C.

57. See *supra*, II, A.

58. McIntosh-Huntington Co. *v.* Rice, 13 Colo. App. 393, 58 Pac. 358; Marshall *v.* Ferguson, 101 Mo. App. 653, 74 S. W. 393 (holding that where an agent who was directed to loan money to a third person and to take as security a trust deed violated his instructions by including in the trust deed a note owed by the third person to himself, without his principal's knowledge or consent, the agent was liable to the principal for the resulting damages); Urquhart *v.* McIver, 4 Johns. (N. Y.) 103. And see *infra*, III, A.

59. *Georgia.*— Mosely *v.* Gordon, 16 Ga. 384.

Kentucky.— See Poage *v.* Chinn, 4 Dana 50; Vanada *v.* Hopkins, 1 J. J. Marsh. 285, 19 Am. Dec. 92.

Michigan.— Hammond *v.* State Bank, Walk. 214.

Minnesota.— Reed *v.* Seymour, 24 Minn. 273, holding that the exercise of a mere excess of authority in some one particular in the making of a contract by an agent will not make it void as to the residue, which was within his authority.

Mississippi.— Johnson *v.* Blasdale, 1 Sm. & M. 17, 40 Am. Dec. 85, holding that the acts of an agent are binding on his principal to the extent of his authority, but void as to the residue.

Nebraska.— Wilson *v.* Beardsley, 20 Nebr. 449, 30 N. W. 529.

Pennsylvania.— Stokes *v.* Dewees, 24 Pa. Super. Ct. 471.

Tennessee.—Gordon *v.* Buchanan, 5 Yerg. 71.

Virginia.— Yost *v.* Ramey, 103 Va. 117, 48 S. E. 862.

Wisconsin.— Gano *v.* Chicago, etc., R. Co., 49 Wis. 57, 5 N. W. 45; Jesup *v.* Racine City Bank, 14 Wis. 331.

60. *Michigan.*— Hammond *v.* Michigan State Bank, Walk. 214.

Minnesota.— Thomas *v.* Joslin, 30 Minn. 388, 15 N. W. 675.

Missouri.— Chouteau *v.* Allen, 70 Mo. 290, holding that if the officers of a corporation convey a quantity of land in excess of that specified in the resolution of the board of directors therefor, and there is no way to determine what is rightfully conveyed and what wrongfully, the conveyance is fatally defective.

Ohio.— Feike *v.* Cincinnati, etc., R. Co., 3 Ohio Cir. Ct. 72, 2 Ohio Cir. Dec. 41.

South Carolina.— See Dellet *v.* Whitner, Cheves Eq. 213, holding that under a power to sell land without warranty, a sale with warranty is void *in toto*.

Texas.— Hunter *v.* Eastham, 95 Tex. 648, 69 S. W. 66 [*reversing* (Civ. App. 1902) 67 S. W. 1080], holding that a person claiming title to real estate under a conveyance by an agent having power to sell, but who exceeds

power to the agent may be broader than the interest of the principal, and in such case an execution of the power according to its terms will be effective to the extent of the actual interest of the principal.[61] If the principal does not prescribe how the authority shall be executed, he cannot escape liability because the agent did not execute it as he would have preferred or himself have done it.[62] In the absence of instructions the principal is presumed to consent that the agent may execute his authority in accordance with general custom and usage in that trade or business.[63]

2. WHAT LAW GOVERNS. The general rule is that the authority given by a principal to an agent, and the execution of that authority when so given, are to be controlled by the *lex loci contractus*. The principal in sending the agent forth is presumed to consent that he shall be governed by the law of the place where he is to act;[64] and where an instrument is signed by the principal in one state the authority of the agent, as well as the validity of the obligation which the agent as such seeks to impose upon his principal, by delivery in another state, is to be determined by the law of the state in which the instrument was signed.[65] The validity of a power to sell realty and of a conveyance executed by virtue of such power depends upon the *lex situs*.[66]

3. EXECUTION BY JOINT AGENTS AND AGENTS OF JOINT PRINCIPALS.[67] A principal may have more than one agent, each one appointed to act separately in a particular branch of his principal's business or in a particular locality.[68] Such agents are several agents, and are to act severally, and when more than one agent is appointed with reference to the same business, they are still several agents if it appears that it was the intention of the principal that they should act separately.[69] But generally it is presumed that when a principal employs more than one agent to represent him in one matter of business they are joint agents, the exercise of whose joint discretion is desired, and an act performed by one or by any number less than the

his authority, by conveying the property for his own debt, acquires no title unless he is an innocent purchaser.

England.— Clinan *v.* Cooke, 1 Sch. & Lef. 32, 9 Rev. Rep. 3 (holding that where an agent authorized to make agreements for leases for lives or years makes an agreement in which the term of the proposed lease is not mentioned, this is an agreement not pursuant to his authority, and not binding on his principal); Alexander *v.* Alexander, 2 Ves. 640, 28 Eng. Reprint 408. And see Coke Litt. 158.

61. Bowman *v.* Bartlet, 3 A. K. Marsh. (Ky.) 86, holding that where a devisee of a particular estate with remainder over gave a power to dispose of the fee, the conveyance made under such power is valid to the extent of the particular estate.

62. McClung *v.* Spotswood, 19 Ala. 165.

63. Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453 (holding that the law implies that he gives his assent for his agent to act as all similar agents who are honest and diligent are accustomed to do, and it is immaterial as a general rule whether the principal is informed of such customs and usages or not); Dickey *v.* Grant, 6 Cow. (N. Y.) 310. And see *supra*, II, A, 2, d.

64. Condit *v.* Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Owings *v.* Hull, 9 Pet. (U. S.) 607, 630, 9 L. ed. 246; Johnson *v.* Sukely, 13 Fed. Cas. No. 7,414, 2 McLean 562; Nyc *v.* Macdonald, L. R. 3 P. C. 331, 39 L. J. P. C. 34, 23 L. T. Rep. N. S. 220, 18 Wkly. Rep. 1075; Tharsis Sulphur, etc., Co. *v.* La Société des Metaux, 58 L. J. Q. B. 435, 60 L. T. Rep. N. S. 924, 38 Wkly. Rep. 78. And see Martin *v.* Roberts, 36 Fed. 217 (holding that a contract of agency to be performed in the state in which the agency was accepted is governed by the laws of that state); Canadian F. Ins. Co. *v.* Robinson, 31 Can. Sup. Ct. 488. *Compare* Routh *v.* Agricultural Bank, 12 Sm. & M. (Miss.) 161.

65. Freeman's Appeal, 68 Conn. 533, 37 Atl. 420, 57 Am. St. Rep. 112, 37 L. R. A. 452 [*criticizing* Milliken *v.* Pratt, 125 Mass. 374, 28 Am. Rep. 241].

66. Bissell *v.* Terry, 69 Ill. 184; Linton *v.* Moorhead, 209 Pa. St. 646, 59 Atl. 264.

67. Execution of authority by boards or commissioners see OFFICERS, 29 Cyc. 1433 *et seq.*

Execution of authority by corporate directors or committees see CORPORATIONS, 10 Cyc. 774 *et seq.*

68. House *v.* Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813; Butler *v.* Maples, 9 Wall. (U. S.) 766, 19 L. ed. 822.

69. Cushman *v.* Glover, 11 Ill. 600, 52 Am. Dec. 461; Cedar Rapids, etc., R. Co. *v.* Stewart, 25 Iowa 115; Hawley *v.* Keeler, 53 N. Y. 114.

One of two independent agents cannot repudiate the act of the other. Law *v.* Cross, 1 Black (U. S.) 533, 17 L. ed. 185.

An instrument executed by both the independent agents is not a joint instrument, but the several contract of each. They have no

whole is not such an execution of the authority as to bind the principal.[70] Where the authority is joint and several, then, it has been held, all may act or one, but not an intermediate number. This rests on the highly technical ground that an execution by an intermediate number is not joint and not several, and therefore not within the power.[71] If the power is joint or several it may be executed by all or any less number.[72] An agent may execute authority for several joint principals,

power to act jointly. Gaines *v.* Catron, 1 Humphr. (Tenn.) 514.

70. *Alabama.*— Loeb *v.* Drakeford, 75 Ala. 464; Caldwell *v.* Harrison, 11 Ala. 755.

Arkansas.— Pulaski County *v.* Lincoln, 9 Ark. 320.

Colorado.— Rundle *v.* Cutting, 18 Colo. 337, 32 Pac. 994.

Connecticut.— McKinster *v.* Smith, 27 Conn. 627; Patterson *v.* Leavitt, 4 Conn. 50, 10 Am. Dec. 98.

Illinois.— Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180.

Iowa.— Cedar Rapids, etc., R. Co. *v.* Stewart, 25 Iowa 115.

Louisiana.— Penn *v.* Evans, 28 La. Ann. 576; Pechaud *v.* Peytavin, 4 Mart. 73, holding that where the principal authorized one or two to act in the absence or on the death of a third, all must act except in the case of absence or death.

Maryland.— White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699.

Massachusetts.— Robbins *v.* Horgan, 192 Mass. 443, 78 N. E. 503; Copeland *v.* Mercantile Ins. Co., 6 Pick. 198; Sutton First Parish *v.* Cole, 3 Pick. 232; Kupfer *v.* Augusta South Parish, 12 Mass. 185; Towne *v.* Jaquith, 6 Mass. 46, 4 Am. Dec. 84.

Minnesota.— Rollins *v.* Phelps, 5 Minn. 463.

New Hampshire.— Andover *v.* Grafton, 7 N. H. 304; Jewett *v.* Alton, 7 N. H. 253.

New Jersey.— Moore *v.* Ewing, 1 N. J. L. 144, 1 Am. Dec. 195.

New York.— Wilder *v.* Ranney, 95 N. Y. 7; Salisbury *v.* Brisbane, 61 N. Y. 617; Hawley *v.* Keeler, 53 N. Y. 114; Auburn *v.* Draper, 23 Barb. 425; Perry *v.* Tynen, 22 Barb. 137; Holtsinger *v.* National Corn Exch. Bank, 1 Sweeny 64, 6 Abb. Pr. N. S. 292, 37 How. Pr. 203; Rogers *v.* Cruger, 7 Johns. 557; Green *v.* Miller, 6 Johns. 39, 5 Am. Dec. 184; McCoy *v.* Curtice, 9 Wend. 17, 24 Am. Dec. 113.

Vermont.— Low *v.* Perkins, 10 Vt. 532, 33 Am. Dec. 217.

Virginia.— Union Bank *v.* Beirne, 1 Gratt. 226.

United States.— Boone *v.* Clarke, 3 Fed. Cas. No. 1,641, 3 Cranch C. C. 389.

England.— Bell *v.* Nixon, 9 Bing. 393, 2 L. J. M. C. 44, 2 Moore & S. 534, 23 E. C. L. 630; Brown *v.* Andrew, 13 Jur. 938, 18 L. J. Q. B. 153.

See 40 Cent. Dig. tit. "Principal and Agent," § 251.

If one die or refuse to act, the others have no authority under the joint power, and cannot bind the principal. Davidson *v.* Provost, 35 Ill. App. 126; Rollins *v.* Phelps, 5 Minn. 463.

Presumption not conclusive.—The presumption that the principal desires the action of all is of course not conclusive, and a less number may act whenever it is clear from the authority that such was the intent of the principal (Caldwell *v.* Harrison, 11 Ala. 755; Cedar Rapids, etc., R. Co. *v.* Stewart, 25 Iowa 115; Heard *v.* March, 12 Cush. (Mass.) 580; French *v.* Price, 24 Pick. (Mass.) 13; Damon *v.* Granby, 2 Pick. (Mass.) 345; Green *v.* Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Peterson *v.* Ayre, 15 C. B. 724, 2 C. L. R. 722, 23 L. J. C. P. 129, 2 Wkly. Rep. 373, 80 E. C. L. 724, where an arbitration was made under authority of two or three to make an award, and it was held that even if the award was made by two instead of three, they must act jointly and at the same time and place; Berry *v.* Penring, Cro. Jac. 399, 79 Eng. Reprint 341, where four were appointed to make an award, with a proviso that the award be made and delivered by four, or any three of them; Sallows *v.* Girling, Cro. Jac. 278, 79 Eng. Reprint 238), or from his course of dealing or his subsequent approval it appears that he has waived the requirement by allowing a number less than the whole to act for him (Johnson *v.* Smith, 21 Conn. 627, holding that if the principal does not object, third persons cannot; Davidson *v.* Provost, 35 Ill. App. 126; Pechaud *v.* Peytavin, 4 Mart. (La.) 73; French *v.* Price, 24 Pick. (Mass.) 13; Scott *v.* Detroit Young Men's Society, 1 Dougl. (Mich.) 119; Hawley *v.* Keeler, 53 N. Y. 114).

Ministerial acts.— By the weight of authority, an act that involves no discretion, but is ministerial only, may be done by any of several joint agents. St. Paul Div. No. 1 S. T. *v.* Brown, 11 Minn. 356 (holding that where three agents are appointed by a corporation to tender payment and receive a conveyance of certain property in trust for the corporation, any one of the three may make such tender, for the act is merely ministerial); Powell *v.* Tuttle, 3 N. Y. 396. But see Johnston *v.* Bingham, 9 Watts & S. (Pa.) 56, holding that where powers are granted to several persons to transact private business, all must join in the execution of it: and the rule applies in all cases, whether the duty be ministerial or judicial.

Joint liability.—When several agents are employed, they are bound jointly for acts done jointly and money jointly received. Olinde *v.* Saizan, 10 La. Ann. 153; Wolkowich *v.* Mason, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. N. S. 765. See also Percy *v.* Millaudon, 3 La. 568.

71. Caldwell *v.* Harrison, 11 Ala. 755; Purinton *v.* Security L. Ins., etc., Co., 72 Me. 22; Guthrie *v.* Armstrong, 5 B. & Ald. 628, 1 D. & R. 248, 7 E. C. L. 343.

72. U. S. Fidelity, etc., Co. *v.* Ettenheimer,

and in such case all will be bound who authorized the execution.[73] But the agent of such principals has of course no authority to execute contracts to bind one principal in the separate business of another.[74] An agent of two independent and unconnected principals has no right to act for them jointly,[75] unless there be actual consent of the principals, or a custom to lump orders or sales for different principals, each becoming liable for his share of the contract.[76]

4. Execution of Verbal Contracts. A verbal contract is binding on the principal if his name be disclosed and the person making it contract as his agent and on his behalf.[77]

5. Execution of Simple Written Contracts — a. In General. The most approved manner of executing a simple written contract by an agent is to do so entirely in the name of the principal, signing the name of his principal by himself as agent.[78] However, it by no means follows that this is the only form of execution that binds the principal and him alone, and if the body of the instrument expresses the contract to be that of the principal, and the signature is that of the agent acting as agent, it is sufficient.[79] But the mere addition of descriptive words to the name

70 Nebr. 144, 147, 97 N. W. 227, 99 N. W. 652, 113 Am. St. Rep. 783; Guthrie *v.* Armstrong, 5 B. & Ald. 628, 1 D. & R. 248, 7 E. C. L. 343, holding that where a power of attorney was given to fifteen persons therein named, jointly or severally to execute such policies as they or any of them should jointly or severally think proper, an execution of such power by four of the persons named was sufficient.

Even the death of one of two several agents may not terminate the power of the other. Thus it has been held that where a power of attorney to convey, given to a firm of lawyers, authorizes either of them to act, a conveyance by one of them, after the other's death, to a purchaser who is put in possession and who pays the purchase-money and makes improvements is valid, notwithstanding the attorney may have erroneously supposed that he was acting under a subsequent power, which in reality had not been given. Douglas *v.* Baker, 79 Tex. 499, 15 S. W. 801.

73. Wilson *v.* Henderson, 123 Cal. 258, 55 Pac. 986. See also Stewart *v.* Hall, 3 B. Mon. (Ky.) 218, holding that a deed by an attorney under a power purporting to have been given by five but in fact given by only two of the five, passes but two fifths of the property conveyed. *Compare* Cooper *v.* Breckenridge, 11 Minn. 341, holding that the mere fact that one is an agent for several persons interested in a particular enterprise, as the establishment of a town, does not authorize him to conduct the business for them under a common name, so as to make them severally liable, under Minn. Pub. St. c. 60, § 38, providing that any one of such joint associates may be sued for the obligations of all.

74. Citizens' Ins. Co. *v.* Kountz Line, 10 Fed. 768.

75. Cameron *v.* Tate, 15 Can. Sup. Ct. 622, holding that an agent of two independent and unconnected principals has no authority to bind his principals, or either of them, by the sale of the goods of both in one lot, when the articles included in such sale are different in kind, and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitrary will of the agent; and that there can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly or impliedly by conduct, with full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf.

76. Scott *v.* Godfrey, [1901] 2 K. B. 726, 6 Com. Cas. 226, 70 L. J. K. B. 954, 85 L. T. Rep. N. S. 415, 17 T. L. R. 633, 50 Wkly. Rep. 61.

77. Eckhart *v.* Reidel, 16 Tex. 62.

78. *Alabama.*—Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238.

Florida.— Lay *v.* Austin, 25 Fla. 933, 7 So. 143.

Minnesota.— Fowler *v.* Atkinson, 6 Minn. 578; Sencerbox *v.* McGrade, 6 Minn. 484. See also Morton *v.* Stone, 39 Minn. 275, 39 N. W. 496.

New York.— Spencer *v.* Field, 10 Wend. 87.

Oregon.— Dennison *v.* Story, 1 Oreg. 272.

It is not enough that the person executing the instrument have authority to bind his principal thereby; he must in fact make it the obligation of that person in terms in order to bind him. Tiller *v.* Spradley, 39 Ga. 35; Merchants' Bank *v.* Hayes, 7 Hun (N. Y.) 530; Williams *v.* Christie, 4 Duer (N. Y.) 29, 10 How. Pr. 12; Stone *v.* Wood, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529.

In order to bind the principal and make it his contract, the instrument must on its face purport to be the contract of the principal and his name must be inserted in it and signed to it, and not merely the name of the agent, although the latter be described as agent in the instrument. Prather *v.* Ross, 17 Ind. 495.

The agent of a foreign principal is subject to the general rule. Thus a written agreement signed, "A. B., by C. D., agent," does not bind the agent personally, although the principal resides beyond seas. Bray *v.* Kettell, 1 Allen (Mass.) 80.

79. *Alabama.*— Lazarus *v.* Shearer, 2 Ala. 718.

Georgia.— Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665, holding

of a person signing a contract cannot be regarded as a certain *indicium* than it was made on behalf of another. Such addition may be mere *descriptio personæ*,[80] although where the instrument on its face shows that such words are not simply *descriptio personæ* they will be given their proper force and effect.[81] The signature "A, agent for B," has often been held to bind the agent personally, particularly where there is nothing in the body of the instrument to show an intent to bind someone else.[82] But in a number of cases instruments so signed by agents have been held binding upon their principals. In most of them an intent to bind the principal is disclosed by the instrument.[83] It has been decided that a principal

that where it appears from the face of an instrument executed by an agent that the credit was not given to the agent, and the name of the principal is disclosed at the time of the transaction, and the act is within the power of the agent, the principal is bound.

Illinois.— Durham *v.* Stubbings, 111 Ill. App. 10.

Iowa.— Thilmany *v.* Iowa Paper Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259.

Kentucky.— Brondrup *v.* Trueman, 12 Ky. L. Rep. 47.

Louisiana.— Bristow *v.* Erwin, 6 La. Ann. 102.

Maryland.— Bend *v.* Susquehanna Bridge, etc., Co., 6 Harr. & J. 128, 14 Am. Dec. 261.

Massachusetts.— Goodenough *v.* Thayer, 132 Mass. 152.

Missouri.— Thompson *v.* Chouteau, 12 Mo. 488.

Montana.—Largey *v.* Leggat, 30 Mont. 148, 75 Pac. 950.

New York.— Ferris *v.* Kilmer, 48 N. Y. 300.

United States.— Gottfried *v.* Miller, 104 U. S. 521, 26 L. ed. 851 (holding that an assignment of a patent purporting upon its face to be the act of a corporation, signed by A as president of the company, who declared that he signed "as the act of the said company," but not sealed, binds the company, and not A); Smith *v.* Morse, 9 Wall. 76, 19 L. ed. 597.

England.— Mahoney *v.* Kekule, 14 C. B. 390, 2 C. L. R. 343, 18 Jur. 313, 23 L. J. C. P. 54, 2 Wkly. Rep. 155, 78 E. C. L. 390.

The strict rule is applied only to instruments under seal. Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521; Detroit *v.* Jackson, 1 Dougl. (Mich.) 106. And see *infra*, II, C, 7.

80. *Alabama.*— Lazarus *v.* Shearer, 2 Ala. 718.

Indiana.— Prather *v.* Ross, 17 Ind. 495; Crum *v.* Boyd, 9 Ind. 289; Mears *v.* Graham, 8 Blackf. 144; Pitman *v.* Kintner, 5 Blackf. 250, 33 Am. Dec. 461; Deming *v.* Bullitt, 1 Blackf. 241; McClure *v.* Bennett, 1 Blackf. 189, 12 Am. Dec. 223. *Compare* Akron Second Nat. Bank *v.* Midland Steel Co., 155 Ind. 581, 58 N. E. 833; Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680.

Kentucky.— Taul *v.* Winn, 5 J. J. Marsh. 437.

Minnesota.—Pershing *v.* Swenson, 58 Minn. 310, 59 N. W. 1084; Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261; Pratt *v.* Beaupre, 13 Minn. 187; Sencerbox *v.* McGrade, 6 Minn. 484.

Missouri.— Chouteau *v.* Paul, 3 Mo. 260, holding that an agreement purporting to be made by A, which is signed by A, who styles himself the agent of B, is the agreement of A himself, and not the agreement of B.

New Hampshire.— Savage *v.* Rix, 9 N. H. 263.

New York.— Buffalo Catholic Inst. *v.* Bitter, 87 N. Y. 250; De Witt *v.* Walton, 9 N. Y. 571; Campbell *v.* Porter, 46 N. Y. App. Div. 628, 61 N. Y. Suppl. 712; Brockaway *v.* Allen, 17 Wend. 40; Hills *v.* Bannister, 8 Cow. 31.

See 40 Cent. Dig. tit. "Principal and Agent," § 441.

But *compare* Sayre *v.* Nichols, 7 Cal. 535, 68 Am. Dec. 280; Eckhart *v.* Reidel, 16 Tex. 62.

81. Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120; Smith *v.* Morse, 9 Wall. (U. S.) 76, 19 L. ed. 597.

82. *Alabama.*— Crutcher *v.* Memphis, etc., R. Co., 38 Ala. 579.

Colorado.— Tannant *v.* Rocky Mountain Nat. Bank, 1 Colo. 278, 9 Am. Rep. 156.

Kentucky.— Parks *v.* S. & L. Turnpike Road Co., 4 J. J. Marsh. 456; Offutt *v.* Ayres, 7 T. B. Mon. 356.

Minnesota.— Peterson *v.* Homan, 44 Minn. 166, 46 N. W. 303, 20 Am. St. Rep. 564, holding that "agent for" *prima facie* is descriptive merely, and the burden is on the agent to show by parol that he was not binding himself personally.

New York.— Dean *v.* Roesler, 1 Hilt. 420; Spencer *v.* Field, 10 Wend. 87.

South Carolina.—Fash *v.* Ross, 2 Hill 294; Moore *v.* Cooper, 1 Speers 87.

Virginia.—See Early *v.* Wilkinson, 9 Gratt. 68, holding that a note signed "A (for C)," is upon its face the note of A, although but for the brackets it would have been the note of C.

West Virginia.— Virginia Exch. Bank *v.* Lewis County, 28 W. Va. 273.

83. *Alabama.*— Stringfellow *v.* Mariott, 1 Ala. 573.

Georgia.— See Rawlings *v.* Robson, 70 Ga. 595.

Illinois.— King *v.* Handy, 2 Ill. App. 212.

Iowa.— Ford *v.* Stuart Independent Dist., 46 Iowa 294.

Kentucky.— Cook *v.* Sanford, 3 Dana 237

may be charged upon a written simple executory contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the person dealing with the agent supposed that he was acting for himself, and that this rule obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity.[84] It is not essential that the agent's name appear at all, and the only purpose of adding his name is for purposes of evidence, by way of explaining the fact that the principal's undertaking and signature have been made not by himself in person, but through his duly authorized agent.[85]

b. Intent of Parties. In the case of simple instruments the courts are inclined to look through the form, and if possible give effect to the intent of the parties, if this is made clear by an examination of the instrument as a whole.[86]

[*distinguishing* Offut *v.* Ayres, 7 T. B. Mon. 356].

Massachusetts.—Jefts *v.* York, 4 Cush. 371, 10 Cush. 392, 50 Am. Dec. 791; Rice *v.* Gove, 22 Pick. 158, 33 Am. Dec. 724; Ballou *r.* Talbot, 16 Mass. 461, 8 Am. Dec. 146; Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160. *Compare* Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101.

Michigan.— Detroit *v.* Jackson, 1 Dougl. 106.

North Carolina.— McCall *v.* Clayton, 44 N. C. 422.

Pennsylvania.—Campbell *v.* Baker, 2 Watts 83.

Rhode Island.— Bradstreet *v.* Baker, 14 R. I. 546.

South Carolina.— Robertson *v.* Pope, 1 Rich. 501, 44 Am. Dec. 267.

Texas.— Rogers *v.* Bracken, 15 Tex. 564.

Virginia.— Jones *v.* Carter, 4 Hen. & M. 184.

84. Eastern R. Co. *v.* Benediet, 5 Gray (Mass.) 561, 66 Am. Dec. 384; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388; Ford *v.* Williams, 21 How. (U. S.) 287, 16 L. ed. 36; Calder *v.* Dobell, L. R. 6 C. P. 486, 40 L. J. C. P. 224, 25 L. T. Rep. N. S. 129, 19 Wkly. Rep. 978; Trueman *v.* Loder, 11 A. & E. 594, 9 L. J. Q. B. 165, 3 P. & D. 567, 39 E. C. L. 319; Higgins *v.* Senior, 11 L. J. Exch. 199, 8 M. & W. 834.

85. *Maine.*— Forsyth *v.* Day, 41 Me. 382.

Minnesota.— Rock Island First Nat. Bank *v.* Loyhed, 28 Minn. 396, 10 N. W. 421; Berkey *v.* Judd, 22 Minn. 287.

Missouri.— Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430.

New Hampshire.— Morse *v.* Green, 13 N. H 32, 38 Am. Dec. 471.

Pennsylvania.— Devinney *v.* Reynolds, 1 Watts & S. 328.

England.— *In re* Whitley, 32 Ch. D. 337, 55 L. J. Ch. 540, 54 L. T. Rep. N. S. 912, 34 Wkly. Rep. 505.

Contra.— Wood *v.* Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

86. Randall *v.* Snyder, 1 Lans. (N. Y.) 163 (in which the rule is thus stated: If the name of the principal and a relation of ageney be stated in the writing, and the agent really be authorized, the principal is alone bound, unless the language express a clear intention to bind the agent personally. In other words, a written contract not under seal is binding on the prineipal, in whatever form made or executed, if the prineipal's name appear in it and the intention to bind him be apparent); Allen *v.* Bareda, 7 Bosw. (N. Y.) 204; Delius *v.* Cawthorn, 13 N. C. 90; Sun Printing, etc., Assoc. *v.* Moore, 183 U. S. 642, 22 S. Ct. 240, 46 L. ed. 366; Whitney *v.* Wyman, 101 U. S. 392, 25 L. ed. 1050 (holding that while sealed instruments must be treated as the contraets of the parties therein named, in unsealed instruments the question is always one of intent, and the eourt, untrammeled by any other eonsideration, is bound to give it effeet); Stark *v.* Starr, 94 U. S. 477, 24 L. ed. 276; Gill *v.* General Electric Co., 129 Fed. 349, 64 C. C. A. 99 [*affirming* 127 Fed. 241]; Coneordia Chemische Fabrik *v.* Squire, 34 L. T. Rep. N. S. 824.

An unsealed instrument signed in the name of the agent may nevertheless bind the principal, if it appears from the instrument as a whole that sueh was the intent, and the agent acted within his authority. Jones *v.* Morris, 61 Ala. 518; Southern Pae. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650; Burgess *v.* Fairbanks, 83 Cal. 215, 23 Pae. 292, 17 Am. St. Rep. 230; Verzan *v.* McGregor, 23 Cal. 339 (holding that where an agreement refers to the subject-matter of the contract as belonging to a certain corporation, and recites that the corporation "hereby agrees," etc., it sufficiently appears that the eorporation is the party really interested and that the eontraet was its contract, although it was entered into in the name of the directors of the company and signed only by them); McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220; Akron Seeond Nat. Bank *v.* Midland Steel Co., 155 Ind. 581, 58 N. E. 833; Dyer *v.* Burnham, 25 Me. 9; Detroit *v.* Jaekson, 1 Dougl. (Mich.) 106 (holding that where it distinctly appears in the body of a parol agreement, signed by an agent in his own name without the addition of the name of his prineipal, that the principal is the eontraeting party, the agreement will be eonstrued to be that of the principal and not of the agent); State *v.* Cass County, 60 Nebr. 566, 83 N. W. 733; Chase *v.* Savage Silver Min. Co., 2 Nev. 9 (holding that every written eontract made by an agent, in order to be binding upon his

6. Execution of Negotiable Instruments.[87] While a person may obligate himself for a bill or note as effectually by an agent as by his own hand, yet it must appear on the face of the instrument itself in some way or other that it was in fact drawn for him or he is not bound. The particular form of the execution is not material, if it be substantially done in the name of the principal.[88] If this be clear, the instrument, although inartificially drawn and defectively signed, may nevertheless effectuate its purpose as the obligation of the principal.[89]

7. Execution of Sealed Instruments.[90] When the authority is under seal, it authorizes the agent to attach a seal to his principal's signature to contracts he is empowered to make with the third person.[91] The best form for the execution of sealed instruments, as all others, is to put in the body of the instrument the principal's name, and to sign the name of the principal at the end, with the agent's name below, preceded by the preposition "by" and followed by the word "agent."[92]

principal, must purport on its face to be made by the principal, or the intent to bind him must appear in the instrument itself); Kain *v.* Postley, 2 Edm. Sel. Cas. (N. Y.) 132; Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188; Woodwell *v.* Brown, 44 Pa. St. 121; Traynham *v.* Jackson, 15 Tex. 170, 65 Am. Dec. 152 (holding that in the execution by an agent, in the exercise of the powers delegated, of a contract not under seal, the fact that the agency appears at the time is sufficient to bind the principal, although on its face it is the agent's contract); Hersey *v.* Hathaway, 11 N. Brunsw. 237. And see Welsh *v.* Usher, 2 Hill Eq. (S. C.) 167, 29 Am. Dec. 63, holding that equity will execute such an agreement, although it be void in law.

87. See Commercial Paper, 7 Cyc. 549 *et seq.*

88. *Iowa.*— Warder *v.* Pattee, 57 Iowa 515, 10 N. W. 881.

Massachusetts.— Bank of British North America *v.* Hooper, 5 Gray 567, 66 Am. Dec. 390; Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160, holding that a note subscribed, "Pro William Gill — J. S. Colburn," is the promise of William Gill if J. S. Colburn had authority to make it; and if not he would be liable to the promisee thereon. See also New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56.

Minnesota.— Fowler *v.* Atkinson, 6 Minn. 578.

New York.— Pentz *v.* Stanton, 10 Wend. 271, 25 Am. Dec. 558.

South Carolina.— Robertson *v.* Pope, 1 Rich. 501, 44 Am. Dec. 267.

See 40 Cent. Dig. tit. "Principal and Agent," § 442.

The best way for an agent to sign a note for his principal is A B by his agent, C D, or A B by C D. Virginia Exch. Bank *v.* Lewis County, 28 W. Va. 273. See also Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

If the agent should entirely omit his own name it would not in any way affect the legal rights and obligations created by the instrument. The vital thing is that the instrument itself show clearly that it is the undertaking of the principal, although done by the hand of an agent. Bradlee *v.* Boston Glass Mfg. Co., 16 Pick. (Mass.) 347; Fowler *v.* Atkinson, 6 Minn. 578; Western Wheeled Scraper Co. *v.* McMillan, 71 Nebr. 686, 99 N. W. 512; Providence *v.* Miller, 11 R. I. 272, 23 Am. Rep. 453.

89. Alabama Coal Min. Co. *v.* Brainard, 35 Ala. 476, holding that a bill drawn on "steamer C. W. Dorrance and owners," and accepted by "St'r Dorrance, per G. M. McConico, agent," binds the owners, the principals, and they can be sued by their proper names, the bill being properly described.

90. **Bond signed by agent** see Bonds, 5 Cyc. 735.

Form of acknowledgment by agent see Acknowledgments, 1 Cyc. 586.

91. Wickham *v.* Knox, 33 Pa. St. 71.

92. State *v.* Jennings, 10 Ark. 428; Bradstreet *v.* Baker, 14 R. I. 546.

A for B.—While it is better to sign in the principal's name by A, agent, a deed or contract signed A for B will bind B, the principal. Mussey *v.* Scott, 7 Cush. (Mass.) 215, 54 Am. Dec. 719; Grubbs *v.* Wiley, 9 Sm. & M. (Miss.) 29; Wilks *v.* Back, 2 East 142, 6 Rev. Rep. 409; McArdle *v.* Irish Iodine Co., 15 Ir. C. L. 146, holding that a deed executed by A on behalf of B must, in order to bind B, be executed by A in the name of B, or by A in his own name with such words as show that he is acting solely as the agent of B in such execution.

Statutory provisions. — In some jurisdictions the rule as to the execution of sealed instruments by agents has been modified as the result of statutory enactments. See the statutes of the different states. And see Wheeler *v.* Walden, 17 Nebr. 122, 22 N. W. 346 (holding that the strict rule of the common law in regard to contracts under seal, made by an agent for the sale or leasing of real estate, is not in force in Nebraska, private seals being abolished; and that a lease signed with the principal's name and that of the agent is sufficient if, from the terms of the instrument itself or any other matter therein, it appears that the parties intended it as the agreement of the principal, and his name appears therein, however informally it may be signed by the agent); Williams *v.* Paine, 169 U. S. 55, 18 S. Ct. 279, 42 L. ed. 658 (in which a deed was held good under a statute providing that an acknowledgment by an authorized attorney that a deed is his act and deed shall have the same effect as if

And according to the strict common-law rule a deed or contract under seal made by an agent does not bind the principal unless it professes to do so, and to be executed in his name and as his deed or contract; and it is not enough for the agent to declare in the instrument that he makes it as the agent of his principal, and to add to his signature words expressive of the same thing.[93] Many cases, however,

such attorney had acknowledged it to be the deed of his principal, the grantor). But a statute merely dispensing with the necessity of seals, or of executing in the name of the principal, has been held not to affect the common-law rule as to the manner of the execution of a deed by an agent, whenever as matter of fact the agent does make the contract under seal or in his principal's name. Jones *v.* Morris, 61 Ala. 518. Where a statute has abolished distinctions between sealed and unsealed instruments, and provided that any instrument within the authority of an agent will bind the principal if the intent to bind him is plainly inferable therefrom, a contract under seal, signed by the agent, will nevertheless bind the principal if its language as a whole makes such intent clear. Southern Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650; Wheeler *v.* Walden, 17 Nebr. 122, 22 N. W. 346; Post *v.* Pearson, 108 U. S. 418, 2 S. Ct. 799, 27 L. ed. 774. Statutes providing the manner of executing deeds by attorney are presumed to provide an additional method, and not to abrogate the common-law rule. Thus it is held that a deed under a power of attorney is properly executed at common law in the name of the principal by his attorney, and that form is still valid, notwithstanding Md. Acts (1856), c. 154, § 23, providing that the agent shall sign the deed as agent or attorney. Posner *v.* Bayless, 59 Md. 56.

93. *Alabama.* — Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229; Dawson *v.* Cotton, 26 Ala. 591; Carter *v.* Doe, 21 Ala. 72; Skinner *v.* Gunn, 9 Port. 305 [*overruling* Martin *v.* Dortch, 1 Stew. 479].

California.— Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602; Morrison *v.* Bowman, 29 Cal. 337; Echols *v.* Cheney, 28 Cal. 157.

District of Columbia.— Williams *v.* Paine, 7 App. Cas. 116.

Georgia.— Lenney *v.* Finley, 118 Ga. 718, 45 S. E. 593. *Compare* Tenant *v.* Blacker, 27 Ga. 418.

Illinois.— Home Library Assoc. *v.* Witherow, 50 Ill. App. 117.

Iowa.— Arts *v.* Guthrie, 75 Iowa 674, 37 N. W. 395; Vance *v.* Anderson, 39 Iowa 426. *Compare* Harkins *v.* Edwards, 1 Iowa 426.

Kentucky.— Parmers *v.* Respass, 5 T. B. Mon. 562. But *compare* Hunter *v.* Miller, 6 B. Mon. 612.

Maryland.— Stewart *v.* Katz, 30 Md. 334; Harper *v.* Hampton, 1 Harr. & J. 622. But *compare* Herbert *v.* Reu, 72 Md. 307, 20 Atl. 182; McDonough *v.* Templeman, 1 Harr. & J. 156, 2 Am. Dec. 510.

Massachusetts.— Ward *v.* Bartholomew, 6 Pick. 409; Copeland *v.* Mercantile Ins. Co., 6 Pick. 198; Couch *v.* Ingersoll, 2 Pick. 292; Elwell *v.* Shaw, 16 Mass. 42, 8 Am. Dec. 126; Fowler *v.* Shearer, 7 Mass. 14; Tippets *v.* Walker, 4 Mass. 595.

New York.— Kiersted *v.* Orange, etc., R. Co., 69 N. Y. 343, 25 Am. Rep. 199 [*affirming* 1 Hun 151]; Stanton *v.* Camp, 4 Barb. 274; Dean *v.* Roesler, 1 Hilt. 420; Townsend *v.* Hubbard, 4 Hill 351; Townsend *v.* Corning, 23 Wend. 435; Stone *v.* Wood, 7 Cow. 453, 17 Am. Dec. 529. See also Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617 [*affirming* 39 N. Y. Super. Ct. 339]; Farrar *v.* Lee, 10 N. Y. App. Div. 130, 41 N. Y. Suppl. 672; Robbins *v.* Austin, 42 Hun 469; Sherman *v.* New York Cent. R. Co., 22 Barb. 239, holding that a written contract purporting on its face to be made by one of the parties thereto "by their agent," signed and sealed by the agent in his own name merely, is void. But *compare* Rand *v.* Moulton, 72 N. Y. App. Div. 236, 76 N. Y. Suppl. 174 [*distinguishing* Schaefer *v.* Henkel, 75 N. Y. 378].

North Carolina.— Cadell *v.* Allen, 99 N. C. 542, 6 S. E. 399; Locke *v.* Alexander, 8 N. C. 412. *Compare* Redmond *v.* Coffin, 17 N. C. 437.

Pennsylvania.— Bellas *v.* Hays, 5 Serg. & R. 427, 9 Am. Dec. 385.

South Carolina.— Wallace *v.* Langston, 52 S. C. 133, 29 S. E. 552; Pryor *v.* Coulter, 1 Bailey 517. *Compare* State *v.* Spartanburg, etc., R. Co., 8 S. C. 129; Webster *v.* Brown, 2 S. C. 428; Varnum *v.* Evans, 2 McMull. 409.

United States.— Whitney *v.* Wyman, 101 U. S. 392, 25 L. ed. 1050; Clarke *v.* Courtney, 5 Pet. 319, 350, 8 L. ed. 140 (in which it is said, per Story, J.: "The act does not, therefore, purport to be the act of the principals, but of the attorney. It is his deed, and his seal, and not theirs. This may savor of refinement, since it is apparent, that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact, whether that intent has been executed in such a manner as to possess a legal validity"); Machesney *v.* Brown, 29 Fed. 145; Barger *v.* Miller, 1 Fed. Cas. No. 979, 4 Wash. 280. See also Randall *v.* Jaques, 20 Fed. Cas. No. 11,553, holding that a deed executed by an attorney in fact, although he be duly authorized, and although it be manifest on the face of the deed that it was the intention of the grantor to execute the power by conveying the title of the principal, yet will not be the deed of the principal, unless the attorney shall either sign the name of the principal, with a seal annexed, stating it to be done as attorney for the principal, or sign his own name, with a seal annexed, stating it to be for the principal.

England.— Berkeley *v.* Hardy, 5 B. & C.

have announced a more liberal rule, and hold that the meaning of the parties must be had by recourse to the instrument as a whole, the granting part, the covenants, the attestation clause, the sealing and acknowledgment, and the signing, and if the whole instrument shows that it was intended to be that of the principal, it will be so construed, even though it be signed by the agent;[94] and other courts, while maintaining the rigid rule of law, hold that equity will step in and give effect to the contract as a simple contract, provided it be so executed as to be binding on

355, 8 D. & R. 102, 4 L. J. K. B. O. S. 184, 29 Rev. Rep. 261, 11 E. C. L. 495; Combes' Case, 9 Coke 75, 77 Eng. Reprint 843; White *v.* Cuyler, 1 Esp. 200, 6 T. R. 176, 3 Rev. Rep. 147; Frontin *v.* Small, 2 Ld. Raym. 1418; Bacon *v.* Dubarry, 1 Ld. Raym. 246, 91 Eng. Reprint 1060.

Canada.— Ashdown *v.* Manitoba Land Co., 3 Manitoba 444; Dacksteder *v.* Baird, 5 U. C. Q. B. 591.

See 40 Cent. Dig. tit. "Principal and Agent," § 444.

A deed executed by a public agent in his own name as agent and under his own seal is valid. Ward *v.* Bartholomew, 6 Pick. (Mass.) 409. See also Freeman *v.* Otis, 9 Mass. 272, 6 Am. Dec. 66.

Whether the principal is a corporation or a natural person, a deed must be executed in his name. Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

The addition of descriptive words to the signature of an agent who executed a sealed instrument will not operate to bind his principal. Dawson *v.* Cotton, 26 Ala. 591; McColgan *v.* Katz, 29 Misc. (N. Y.) 136, 60 N. Y. Suppl. 291; Wallace *v.* Langston, 52 S. C. 133, 29 S. E. 552; Moos *v.* Johnson, 36 S. C. 551, 15 S. E. 709; McDowall *v.* Reed, 28 S. C. 466, 6 S. E. 300; Edings *v.* Brown, 1 Rich. (S. C.) 255. *Compare* Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680, holding that mere descriptive words in an instrument of writing, such as a lease, are regarded as describing the person; but if the contract itself shows that the words were not used as merely descriptive of the person, they will not be so regarded, but will be assigned their true meaning. Descriptive words following the seal are still less effective to show that the agent acts in a representative capacity than such words immediately following the name. Thus where a bond phrased, "I promise to pay," etc., and not mentioning the obligor's name in the body, is executed by an agent as follows: "Witness my hand and seal. . . . (signed by H. S. Lucas. [seal] For Charles Callender, President of the Chester Mica & Porcelain Co.)," the agent is individually liable thereon. Bryson *v.* Lucas, 84 N. C. 680, 37 Am. Rep. 634. See also Kennerly *v.* Weed, 1 Mo. 672.

94. *Connecticut.*— Magill *v.* Hinsdale, 6 Conn. 464*a*, 16 Am. Dec. 70.

Indiana.— Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; Deming *v.* Bullitt, 1 Blackf. 241.

Maine.— Copeland *v.* Hewett, 96 Me. 525, 52 Atl. 36; Purinton *v.* Security L. Ins., etc., Co., 72 Me. 22; Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22; Decker *v.* Freeman, 3 Me. 338. But see Stinchfield *v.* Little, 1 Me. 231, 10 Am. Dec. 65.

Missouri.— McClure *v.* Herring, 70 Mo. 18, 35 Am. Rep. 404; Martin *v.* Almond, 25 Mo. 313; Ziegler *v.* Fallon, 28 Mo. App. 295. And see Moore *v.* Granby Min., etc., Co., 80 Mo. 86.

New Hampshire.— Hale *v.* Woods, 10 N. H. 470, 34 Am. Dec. 176; Montgomery *v.* Dorion, 7 N. H. 475.

Rhode Island.— See Bradstreet *v.* Baker, 14 R. I. 546; Providence *v.* Miller, 11 R. I. 272, 23 Am. Rep. 453.

Tennessee.— McCreary *v.* McCorkle, (Ch. App. 1899) 54 S. W. 53.

Texas.— Eckhart *v.* Reidel, 16 Tex. 62. See also Rogers *v.* Bracken, 15 Tex. 564; Gidden *v.* Byers, 12 Tex. 75; Elwell *v.* Tatum, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434.

Virginia.— Shanks *v.* Lancaster, 5 Gratt. 110, 50 Am. Dec. 108, holding that it is a sufficient execution of a deed by an attorney in fact for his principal, if he sign the name of the principal, with a seal annexed, stating it to be done by him as attorney for the principal, or if he signs his own name, with a seal annexed, stating it to be for his principal.

See 40 Cent. Dig. tit. "Principal and Agent," § 444.

The fact of agency may appear in the signature only.—A deed signed "A. B. [the name of the grantor], by C. D., his attorney in fact," sufficiently indicates that it was executed on the part of the grantor by an attorney in fact, although there is no recital of the fact in the deed itself. Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497.

The instrument must at least identify the principal.—A deed executed by G as attorney for the "heirs of A" conveys no title, where the names of the heirs do not appear in the deed, unless the deed refers to the power of attorney and the names of the heirs appear therein. McMaster *v.* Childress, 10 Tex. Civ. App. 92, 30 S. W. 843; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155. But where a power of attorney authorized the grantee to sell the lands belonging to the estate of W, of which the grantor was the lawful heir, and there were several heirs of W, and the attorney made a deed wherein he described himself "as attorney in fact for the heirs of W," and executed the deed in the same form, it was held that in equity the deed conveyed whatever interest the grantor in the power had in the land as heir of W. Wynee *v.* Parke, (Tex. Civ. App. 1895) 30 S. W. 52.

the principal except for the fact that it was sealed.[95] And a deed invalid as a deed because of defective execution may nevertheless be good evidence of a contract, and has often been construed in equity as a contract vesting an equitable title or as foundation for an action on the implied obligation;[96] and it has been held that if made in the name of the agent, and inoperative to pass the principal's title, it will nevertheless pass whatever right the agent had, either personally or as agent.[97] It is not necessary, although as matter of evidence it is desirable, to the proper execution of a deed by an attorney in fact that he should sign his name to it at all. The name of the principal is enough.[98] While it is best that a deed by an agent should make reference to the power of the agent, this is not essential, and if the deed be executed by the agent, within his power, and in the name of his principal, it is good, although in it there is no reference to the power of attorney under which the agent acts.[99] The deed and the power must correspond so as to make it clear that the conveyance is executed in behalf of the principal who gave the power, although the validity of the deed cannot be affected by immaterial defects or

95. *California.* — Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602 (holding that an agreement under seal, made by an attorney for his principal, although inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority; and if the instrument so defectively executed be a conveyance of real estate, it will be sustained in equity as an agreement to convey, and will be good against the principal, subsequent lien creditors, and subsequent purchasers with notice); Salmon *v.* Hoffman, 2 Cal. 138, 56 Am. Dec. 322.

District of Columbia.— Williams *v.* Paine, 7 App. Cas. 116.

Illinois.— Hemstreet *v.* Burdick, 90 Ill. 444; Robbins *v.* Butler, 24 Ill. 387.

Kentucky.— Banks *v.* Sharp, 6 J. J. Marsh. 180; Vanada *v.* Hopkins, 1 J. J. Marsh. 285, 19 Am. Dec. 92.

Mississippi.— McCaleb *v.* Pradat, 25 Miss. 257.

North Carolina.— Oliver *v.* Dix, 21 N. C. 158. See Rogerson *v.* Leggett, 145 N. C. 7, 58 S. E. 596, holding that it is a good equitable defense to an action for land that defendant bought it of one having a power of attorney to sell and convey it, and paid him therefor, recorded his deed, and entered and remained in possession thereunder, although the deed was executed in the name of the attorney, as attorney, instead of in the name of the principal, by the agent as attorney.

South Carolina.— Ramage *v.* Ramage, 27 S. C. 39, 2 S. E. 834.

See 40 Cent. Dig. tit. "Principal and Agent," § 444.

But see Henricus *v.* Englert, 137 N. Y. 494, 33 N. E. 550; Schaefer *v.* Henkel, 75 N. Y. 378; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Anderson *v.* Conner, 43 Misc. (N. Y.) 384, 87 N. Y. Suppl. 449.

96. *Alabama.*—Taylor *v.* West Alabama Agricultural, etc., Assoc., 68 Ala. 229; Jones *v.* Morris, 61 Ala. 518, both holding that a deed running in the name of the principal, but executed by the agent in his own name, is not regarded at law as the deed of the principal, but can be enforced as such in equity.

Indiana.— Joseph *v.* Fisher, 122 Ind. 399, 23 N. E. 856.

Missouri.— Moore *v.* Granby Min., etc., Co., 80 Mo. 86.

North Carolina.—Holland *v.* Clark, 67 N. C. 104.

Wisconsin.— Kirschbon *v.* Bonzel, 67 Wis. 178, 29 N. W. 907.

England.— White *v.* Cuyler, 1 Esp. 200, 6 T. R. 176, 3 Rev. Rep. 147.

97. Bennett *v.* Virginia Ranch, etc., Co., 1 Tex. Civ. App. 321, 21 S. W. 126.

98. Berkey *v.* Judd, 22 Minn. 287; Devinney *v.* Reynolds, 1 Watts & S. (Pa.) 328; *In re* Whitley, 32 Ch. D. 337, 55 L. J. Ch. 540, 54 L. T. Rep. N. S. 912, 34 Wkly. Rep. 505. *Contra,* Wood *v.* Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

99. Earle *v.* Earle, 20 N. J. L. 347 (holding that if a deed is silent as to the power under which it is executed, and such a power exists, the law will refer the deed to the power); Taylor *v.* Eatman, 92 N. C. 601 (holding that a deed made in execution of a power of attorney need not refer to the power, where it is apparent that it is made in execution thereof, or where, unless so deemed, it would be a nullity); Robins *v.* Bellas, 4 Watts (Pa.) 256; Allison *v.* Kurtz, 2 Watts (Pa.) 185. See also Henby *v.* Warner, 51 Pa. St. 276. *Compare* Scott *v.* McAlpin, 4 N. C. 587, 7 Am. Dec. 703.

In Texas if an agent has power to convey, a conveyance made by him is binding upon his principal, although executed in the agent's name and without reference to his power of attorney. Hill *v.* Conrad, 91 Tex. 341, 43 S. W. 789; Link *v.* Page, 72 Tex. 592, 10 S. W. 699; Hough *v.* Hill, 47 Tex. 148; Rogers *v.* Bracken, 15 Tex. 564; Rye *v.* J. M. Guffey Petroleum Co., 42 Tex. Civ. App. 185, 95 S. W. 622 (holding that it must appear either from the instrument itself or from the circumstances of the case that the maker did in fact act by virtue of the power); Pool *v.* Unknown Heirs of Foster, (Civ. App. 1899) 49 S. W. 923; Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015. See also Hunter *v.* Easthan, 95 Tex. 648, 69 S. W. 66 [*reversing* (Civ. App. 1902) 67 S. W. 1080].

differences.[1] Presumptively if the agent has an interest of his own in property and a power of attorney from another to convey it, a deed from the agent which does not refer to the power conveys the interest of the agent only, and is not to be regarded as an exercise of the power.[2] In accordance with the principle that the power need not be recited, the validity of a deed executed by an agent will not be affected by a misrecital of the power in the deed; it is sufficient if he had the authority and has pursued it.[3] And it has been held that a deed is good, although it refers to an invalid power when another and a valid one is in existence.[4] However, it must appear that he has pursued his power, and if it appears that he did not intend to execute the power he possessed, the deed will not be held good by referring it to such power.[5] As to an instrument not required to be under seal but so executed by an agent, it has been held that it must be executed in the name of the principal and purport to be sealed with his seal.[6] But in a number of cases it has been decided that when a sealed contract has been executed in such form that it is in law the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of the performance by the other party, and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement.[7] Where a contract not required to be under seal is executed under seal by an agent having authority to execute simple contracts but not sealed contracts it is valid as a simple contract.[8]

8. Effect of Improper Execution or Execution in Name of Agent. A deed or other sealed instrument so executed as not to be binding upon the principal, as where it is made by the agent in his own name or signed and sealed in his name, although he describes himself as agent,[9] is not necessarily void,[10] but may bind the

1. Moore *v.* Allen, 26 Colo. 197, 57 Pac. 698, 77 Am. St. Rep. 255 (holding that under a power of attorney to "Waltimore Arens," a deed executed by "Waldimar Arens" is not *prima facie* the act of the grantors by virtue of the power of attorney); Jackson *v.* Hodges, 2 Tenn. Ch. 276. *Compare* Crimp *v.* Yokeley, 20 Tex. Civ. App. 231, 48 S. W. 1116.

2. Davenport *v.* Parsons, 10 Mich. 42, 81 Am. Dec. 772; Bassett *v.* Hawk, 114 Pa. St. 502, 8 Atl. 18; Hay *v.* Mayer, 8 Watts (Pa.) 203, 34 Am. Dec. 453.

3. Jones *v.* Tarver, 19 Ga. 279; Allison *v.* Kurtz, 2 Watts (Pa.) 185; Glasgow *v.* Smith, 1 Overt. (Tenn.) 144.

4. Link *v.* Page, 72 Tex. 592, 10 S. W. 699. *Compare* Davenport *v.* Parsons, 10 Mich. 42, 81 Am. Dec. 772. But see Earle *v.* Earle, 20 N. J. L. 347.

5. Hill *v.* Conrad, 91 Tex. 341, 43 S. W. 789.

6. Machesney *v.* Brown, 29 Fed. 145. But see Kirschbon *v.* Bonzel, 67 Wis. 178, 29 N. W. 907 [*citing* Stowell *v.* Eldred, 39 Wis. 614], holding that when a person makes a written contract to whose validity a seal is not essential in his own name but in fact as the agent of another, the other contracting party may show the fact of agency, and may enforce the contract against the principal.

7. Damon *v.* Granby, 2 Pick. (Mass.) 345; Haight *v.* Sahler, 30 Barb. (N. Y.) 218; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193. See Cochran *v.* MacRae, 49 Misc. (N. Y.) 529, 98 N. Y. Suppl. 852, holding that where the name of the owner of premises was affixed to a lease thereof by the owner's agent, the owner's name being followed by a seal and that by the signature of the agent, the owner might sue to recover the rents as though he had made the lease personally. See also Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617 [*affirming* 39 N. Y. Super. Ct. 339]; Rand *v.* Moulton, 72 N. Y. App. Div. 236, 76 N. Y. Suppl. 174.

8. Calhoon *v.* Buhre, (N. J. Sup. 1907) 67 Atl. 1068.

9. *Colorado.*— Rice *v.* Bush, 16 Colo. 484, 27 Pac. 720, holding that where the principal is known at the time of making a sealed contract, and is not referred to therein, he is not bound.

Georgia.— Compton *v.* Cassada, 32 Ga. 428.

Massachusetts.— Sharon First Baptist Church *v.* Harper, 191 Mass. 196, 77 N. E. 778; Ellis *v.* Pulsifer, 4 Allen 165; Abbey *v.* Chase, 6 Cush. 54.

Mississippi.— Holmes *v.* Carman, Freem. 408.

Pennsylvania.— Bassett *v.* Hawk, 114 Pa. St. 502, 8 Atl. 18.

Virginia.— Martin *v.* Flowers, 8 Leigh 158.

10. *Alabama.*— Hall *v.* Cockrell, 28 Ala. 507.

Kansas.— Klopp *v.* Moore, 6 Kan. 27

Maryland.— Harper *v.* Hampton, 1 Harr. & J. 622.

Massachusetts.— See Ellis *v.* Pulsifer, 4 Allen 165; Abbey *v.* Chase, 6 Cush. 54.

agent if it contains apt words to bind him personally. But if it is clear from the instrument as a whole that the agent is promising and covenanting, and acting generally, in a representative capacity, it will not bind him.[11] It has been held that a lease in which the lessor styles himself as agent, but which is signed by him individually, cannot be sued on by the principal.[12] If in the execution of a simple written contract the agent uses apt words to bind himself, if he contracts in his own name and makes the promises and undertakings his own, although reciting that he is an agent, he will be personally bound thereby, although the other party knew he was agent, and the principal cannot be held on the contract.[13] An agent will be bound in such case even though he attaches to his signature

Mississippi.— Holmes *v.* Carman, Freem. 408.

Missouri.— Einstein *v.* Holt, 52 Mo. 340. But see Potter *v.* Bassett, 35 Mo. App. 417.

New Jersey.— Dayton *v.* Warne, 43 N. J. L. 659.

Pennsylvania.— Seyfert *v.* Bean, 83 Pa. St. 450.

South Carolina.— McDowall *v.* Reed, 28 S. C. 466, 6 S. E. 300.

South Dakota.— Hardman *v.* Kelley, 19 S. D. 608, 104 N. W. 272.

Wisconsin.— North *v.* Henneberry, 44 Wis. 306.

United States.— Duvall *v.* Craig, 2 Wheat. 45, 4 L. ed. 180.

Canada.— See Saxton *v.* Ridley, 13 U. C. Q. B. 522.

When one acting without authority bound. — When a contract is entered into by an individual or a private corporation through an agent, if the contract is by parol, the agent is liable only where he had no authority to bind his principal; but if the agent covenants under his seal for the act of the principal, although he describes himself as contracting for and on behalf of his principal, he is liable on his express covenant, whether he had the authority of the person he thus professes to bind or not. Williams *v.* Hipple, 17 Pa. Super. Ct. 81, 8 Del. Co. 197.

Where a bond is signed by one as agent for another, and such agent is solvent, it constitutes a good and sufficient bond, although his late principal is not bound thereby. State *v.* Judge Orleans Paris Fifth Dist. Ct. 27 La. Ann. 306.

11. Hunter *v.* Miller, 6 B. Mon. (Ky.) 612 (holding that where an agent contracting for his principals agreed for the relinquishment of a title which he professed not to hold but recited to be in his principals, and which he stipulated that his principals should release on payment of a certain sum, and signed and sealed the contract as agent, the contract was not personally binding on the agent); Ellis *v.* Pulsifer, 4 Allen (Mass.) 165; Abbey *v.* Chase, 6 Cush. (Mass.) 54; Grubbs *v.* Wiley, 9 Sm. & M. (Miss.) 29; Hopkins *v.* Mehaffy, 11 Serg. & R. (Pa.) 126.

12. Sheldon *v.* Dunlap, 16 N. J. L. 245.

13. *California.*— Sayre *v.* Nichols, 5 Cal. 487; Whiting *v.* Heslep, 4 Cal. 327.

Georgia.— Florida Midland, etc., R. Co. *v.* Varnedoe, 81 Ga. 175, 7 S. E. 129.

Illinois.— Macdonald *v.* Bond, 96 Ill. App. 116 [*affirmed* in 195 Ill. 122, 62 N. E. 881].

Indiana.— Wiley *v.* Shank, 4 Blackf. 420.

Kentucky.— Miller *v.* Early, 58 S. W. 789, 22 Ky. L. Rep. 825.

Louisiana.— Mithoff *v.* Byrne, 20 La. Ann. 363.

Massachusetts.— Copeland *v.* Mercantile Ins. Co., 6 Pick. 198; Couch *v.* Ingersoll, 2 Pick. 292; Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420; Arfridson *v.* Ladd, 12 Mass. 173; Mayhew *v.* Prince, 11 Mass. 54; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Michigan.— Detroit *v.* Jackson, 1 Dougl. 106.

Minnesota.— Williams *v.* Journal Printing Co., 43 Minn. 537, 45 N. W. 1133.

Missouri.— Overton *v.* Stevens, 8 Mo. 622.

Nebraska.— Dockarty *v.* Tillotson, 64 Nebr. 432, 89 N. W. 1050; Johnson *v.* McNatt, 4 Nebr. (Unoff.) 55, 93 N. W. 425, holding that an agent failing to disclose his agency, but representing himself as a principal, will be liable to a stranger as a principal.

New York.— Spencer *v.* Field, 10 Wend. 87; Stone *v.* Wood, 7 Cow. 453, 17 Am. Dec. 529.

Ohio.— Post *v.* Kinney, 7 Ohio Dec. (Reprint) 439, 3 Cinc. L. Bul. 118.

Rhode Island.— Bourne *v.* Campbell, 21 R. I. 490, 44 Atl. 806.

South Carolina.— Pryor *v.* Coulter, 1 Bailey 517.

Virginia.— McWilliams *v.* Willis, 1 Wash. 199.

Washington.— Shuey *v.* Adair, 18 Wash. 188, 51 Pac. 388, 63 Am. St. Rep. 879, 39 L. R. A. 473.

England.— Long *v.* Millar, 4 C. P. D. 450, 48 L. J. C. P. 596, 41 L. T. Rep. N. S. 306, 27 Wkly. Rep. 720; Paice *v.* Walker, L. R. 5 Exch. 173, 39 L. J. Exch. 109, 22 L. T. Rep. N. S. 547, 18 Wkly. Rep. 789; Jones *v.* Littledale, 6 A. & E. 486, 6 L. J. K. B. 169, 1 N. & P. 677, 33 E. C. L. 265; Hick *v.* Tweedy, 6 Aspin. 599, 63 L. T. Rep. N. S. 765; Cooke *v.* Wilson, 1 C. B. N. S. 153, 2 Jur. N. S. 1094, 26 L. J. C. P. 15, 5 Wkly. Rep. 24, 37 Eng. L. & Eq. 361, 87 E. C. L. 153; Norton *v.* Herron, 1 C. & P. 646, R. & M. 229, 28 Rev. Rep. 797, 12 E. C. L. 366; Parker *v.* Winlow, 7 E. & B. 942, 4 Jur. N. S. 584, 27 L. J. Q. B. 49, 90 E. C. L. 942; Tanner *v.* Christian, 4 E. & B. 591, 1 Jur. N. S. 519, 24 L. J. Q. B. 91, 3 Wkly. Rep. 204, 29 Eng. L. & Eq. 103, 82 E. C. L. 591; Stewart *v.* Shannessy, 2 F. (Ct. Sess.) 1288; Chadwick *v.* Maden, 9 Hare 188, 21 L. J. Ch. 876, 41 Eng. Ch. 188, 68 Eng. Reprint 469; Magee

words descriptive of his agency;[14] and if in the body of the instrument the alleged agent in terms imposes obligations upon himself and not on his principal, he will not escape liability, although he signs the instrument only as agent or attorney for another.[15] And he will be liable also when he so executes the contract as in terms to bind both himself and the principal.[16] On the other hand the agent is not liable to third persons on a contract unless it contains apt words to bind him personally.[17] One who executes and signs an instrument in the name of another, and adds his own name only as agent for that other, cannot be treated as a party to that instrument;[18] and if, reading the instrument as a whole, it appears that the person signing acted in a representative capacity, or that the obligation is that of his principal, he will not be bound personally on the contract,[19] although

v. Atkinson, 6 L. J. Exch. 115, 2 M. & W. 440.

Canada.— Ballantyne *v.* Watson, 30 U. C. C. P. 529.

14. Partridge *v.* Hollinshead, 105 Ga. 278, 30 S. E. 787; Faw *v.* Meals, 65 Ga. 711 (holding that persons who as the "building committee" of a named "institute" make with another a contract for materials with which to build a school-house are, whether such "institute" has or has not a legal existence, personally liable for a breach of such contract, where they intended to bind themselves individually and were not acting for any principal); Macdonald *v.* Bond, 96 Ill. App. 116 [*affirmed* in 195 Ill. 122, 62 N. E. 881]; Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509; Pratt *v.* Beaupre, 13 Minn. 187; Bingham *v.* Stewart, 13 Minn. 106. See also Hough *v.* Manzanos, 4 Ex. D. 104, 48 L. J. Exch. 398, 27 Wkly. Rep. 536; Adams *v.* Hall, 3 Aspin. 1, 37 L. T. Rep. N. S. 70.

15. *California.*— Murphy *v.* Helmrich, 66 Cal. 69, 4 Pac. 958.

Illinois.— Kerfoot *v.* Cromwell Mound Co., 115 Ill. 502, 25 N. E. 960.

Maine.— Mattocks *v.* Young, 66 Me. 459.

New Hampshire.— Savage *v.* Rix, 9 N. H. 263.

England.— Cooke *v.* Wilson, 1 C. B. N. S. 153, 2 Jur. N. S. 1094, 26 L. J. C. P. 15, 5 Wkly. Rep. 24, 37 Eng. L. & Eq. 361, 87 E. C. L. 153; Lennard *v.* Robinson, 3 C. L. R. 1363, 5 E. & B. 125, 1 Jur. N. S. 853, 24 L. J. Q. B. 275, 32 Eng. L. & Eq. 127, 85 E. C. L. 125; Parker *v.* Winslow, 7 E. & B. 942, 4 Jur. N. S. 584, 27 L. J. Q. B. 49, 90 E. C. L. 942; Tanner *v.* Christian, 4 E. & B. 591, 1 Jur. N. S. 519, 24 L. J. Q. B. 91, 3 Wkly. Rep. 204, 29 Eng. L. & Eq. 103, 82 E. C. L. 591.

16. Nall *v.* Farmers' Warehouse Co., 95 Ga. 770, 22 S. E. 665 (holding that where persons intending to act in behalf of others in the execution of a contract for the rent of a warehouse act for themselves as well as for their principals, and in pursuance of the contract engage in the business of warehousemen, they cannot excuse a non-performance of their duty as such by showing by parol that they were acting only for the principals in the conduct of the business); Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509; Byington *v.* Simpson, 134 Mass. 169, 45 Am. Rep. 314; Calder *v.* Dobell, L. R. 6 C. P. 486, 40 L. J. C. P. 224, 25 L. T. Rep. N. S. 129, 19 Wkly. Rep. 978. *Compare* Frambach *v.* Frank, 33 Colo. 529, 81 Pac. 247, holding that where a contract provided that plaintiff should convey to defendant all his interest in a certain mill, and defendant agreed that if, acting for himself or as agent for a named corporation, he purchased the mill at a receiver's sale to be held in the future he would pay plaintiff a certain sum for his interest in the mill if the purchase was made for the corporation, the obligation was that of the corporation and not that of defendant individually.

17. *Colorado.*—Frambach *v.* Frank, 33 Colo. 529, 81 Pac. 247.

Connecticut.— Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Rep. 429.

Illinois.— Mida *v.* Geissmann, 17 Ill. App. 207.

Maine.— See How *v.* Codman, 4 Me. 79, holding that the common-law rule that an agent acting in the name of his principal does not bind himself is altered by St. (1821) c. 59, § 8, so far as it regards indorsers of writs.

Maryland.— McClernan *v.* Hall, 33 Md. 293.

Massachusetts.— Abbey *v.* Chase, 6 Cush. 54.

Ohio.— Cincinnati Hotel Co. *v.* Marsh, 8 Ohio Dec. Reprint 669, 9 Cinc. L. Bul. 176.

Pennsylvania.— Passmore *v.* Mott, 2 Binn. 201.

West Virginia.— Johnson *v.* Welch, 42 W. Va. 18, 24 S. E. 585.

Wisconsin.— McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

18. Bray *v.* Kettell, 1 Allen (Mass.) 80; Largey *v.* Leggat, 30 Mont. 148, 75 Pac. 950; New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 681.

19. *Illinois.*— King *v.* Handy, 2 Ill. App. 212.

Indiana.— Freese *v.* Crary, 29 Ind. 524.

Iowa.— Baker *v.* Chambles, 4 Greene 428.

Kentucky.— Humber *v.* Crabb Orchard, etc., Turnpike Co., 13 Ky. L. Rep. 327; Brondrup *v.* Tureman, 12 Ky. L. Rep. 47.

Louisiana.— Maury *v.* Ranger, 38 La. Ann. 485, 58 Rep. 197.

Maine.— Winship *v.* Smith, 61 Me. 118; Rogers *v.* March, 33 Me. 106.

Maryland.— Key *v.* Parnham, 6 Harr. & J. 418.

he does thereby represent that he has authority as agent to execute the instrument, and may thereby make himself liable to third persons in damages, if as matter of fact he is acting without or outside of his authority.[20] A contract which because of defective execution is void binds neither agent nor principal.[21] Although an instrument is so defectively executed that it cannot be sued on, it may nevertheless be used as evidence in an action on the money counts in assumpsit against the principal, provided the contract is one on which the principal would have been liable except for the defective execution.[22] When the principal has actually or by his course of dealing authorized the agent to execute contracts or to make and indorse paper in his own name, or has chosen to do business, using the name of the agent as his trade name, the principal cannot escape liability on contracts on the ground that they were executed in the name of the agent.[23]

Massachusetts.— Lyon *v.* Williams, 5 Gray 557.

Missouri.— Coffman *v.* Harrison, 24 Mo. 524.

New York.— Stanton *v.* Camp, 4 Barb. 274; Chase *v.* Pattberg, 12 Daly 171.

North Carolina.— Fowle *v.* Kerchner, 87 N. C. 49.

West Virginia.— McKay *v.* Ripley, etc., Valley R. Co., 42 W. Va. 23, 24 S. E. 685; Smith *v.* Bond, 25 W. Va. 387.

England.— Spittle *v.* Lavender, 2 B. & B. 452, 5 Moore C. P. 270, 23 Rev. Rep. 508, 6 E. C. L. 224; Ogden *v.* Hall, 40 L. T. Rep. N. S. 751.

20. Conant *v.* Alvord, 166 Mass. 311, 44 N. E. 250 (holding that the act of A in writing on an order, "Accepted . . . Cape Ann Savings Bank, by Alvord," is a representation that he has authority to accept the order for C, notwithstanding the addition of the words, "agent for the negotiation of within-mentioned loan," they being mere words of description and not such as to disclose the full scope of A's authority); New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 681.

21. Morrison *v.* Hazzard, (Tex. Civ. App. 1905) 88 S. W. 385, holding that a contract void under the statute of frauds, as it would not be enforceable against the principal, although executed in his name, will not bind the agent.

22. Thurston *v.* Mauro, 1 Greene (Iowa) 231; Benham *v.* Emery, 46 Hun (N. Y.) 156; Pentz *v.* Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; Holland *v.* Clark, 67 N. C. 104; Harper *v.* Tiffin Nat. Bank, 54 Ohio St. 425, 44 N. E. 97.

23. *Kansas.*— Lovejoy *v.* Citizens' Bank, 23 Kan. 331.

Maine.— Forsyth *v.* Day, 46 Me. 176.

Massachusetts.— Brown *v.* Parker, 7 Allen 337; Brigham *v.* Peters, 1 Gray 139; Melledge *v.* Boston Iron Co., 5 Cush. 158, 51 Am. Dec. 59.

New Hampshire.— Chandler *v.* Coe, 54 N. H. 561, holding that where a principal carries on business in the name of his agent as a business name, such principal is liable upon a contract made by his agent for him in the agent's name, whether it is verbal or written, and if written, whether it is negotiable or not, and whether the agent disclosed his agency or not.

New York.—Lake Shore Nat. Bank *v.* Butler Colliery Co., 51 Hun 63, 3 N. Y. Suppl. 771; Marine Bank *v.* Butler Colliery Co., 1 Silv. Sup. 155, 5 N. Y. Suppl. 291 [*affirmed* in 125 N. Y. 695, 26 N. E. 751], holding that indorsements by an agent in his name, followed by the word "agent" and the name of his principal, are within the intent of an authority to indorse notes and are good, especially when that has been the course of dealing to the principal's knowledge); Elwell *v.* Dodge, 33 Barb. 336; Brown *v.* Butchers, etc., Bank, 6 Hill 443, 41 Am. Dec. 755. See also De Witt *v.* Walton, 9 N. Y. 571.

Texas.—Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

United States.— Warren-Scharf Asphalt Pav. Co. *v.* Commercial Nat. Bank, 97 Fed. 181, 38 C. C. A. 108; Lockwood *v.* Coley, 22 Fed. 192.

England.— Trueman *v.* Loder, 11 A. & E. 589, 9 L. J. Q. B. 165, 3 P. & D. 567, 39 E. C. L. 319.

Canada.— Taillifer *v.* Taillifer, 21 Ont. 337.

A bank cashier who signs commercial paper "A, Cashier," binds the bank as much as though he had written the name of the bank by himself as agent. Commercial usage makes such a signature, made in the business of the bank and in the usual course of such business, the signature of the principal, the bank, and not that of the agent. Erwin Lane Paper Co. *v.* Farmers' Nat. Bank, 130 Ind. 367, 30 N. E. 411, 30 Am. St. Rep. 246; Nave *v.* Lebanon First Nat. Bank, 87 Ind. 204; Dutch *v.* Boyd, 81 Ind. 146; State Bank *v.* Wheeler, 21 Ind. 90; Pratt *v.* Topeka Bank, 12 Kan. 570; Farrar *v.* Gilman, 19 Me. 440, 36 Am. Dec. 766; Burnham *v.* Webster, 19 Me. 232; Barlow *v.* Lee Cong. Soc., 8 Allen (Mass.) 460; Barney *v.* Newcomb, 9 Cush. (Mass.) 46; Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Garton *v.* Union City Nat. Bank, 34 Mich. 279; Angelica First Nat. Bank *v.* Hall, 44 N. Y. 395, 4 Am. Rep. 698; Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 35 N. Y. 505; New York Bank *v.* Ohio State Bank, 29 N. Y. 619; Genesee Bank *v.* Patchin Bank, 19 N. Y. 312; Barbour *v.* Litchfield, 4 Abb. Dec. (N. Y.) 665; Robb *v.* Ross County Bank, 41 Barb. (N. Y.) 586; Brenner *v.* Lawrence, 27 Misc.

D. Delegation[24] — **1. General Rule.** The general rule is that an agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not intrust the performance of his duties to another without the consent of his principal; and since nearly all acts of agency involve discretion, and the very selection as agent ordinarily implies personal confidence in the agent chosen, it follows that one clothed with authority to act for a principal must ordinarily perform the act himself.[25]

(N. Y.) 755, 58 N. Y. Suppl. 769; Watervliet Bank *v.* White, 1 Den. (N. Y.) 608; Manchester Bank *v.* Slason, 13 Vt. 334; Houghton *v.* Elkhorn First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 10; Baldwin *v.* Newbury Bank, 1 Wall. (U. S.) 234, 17 L. ed. 534; Chillicothe Branch Ohio State Bank *v.* Fox, 5 Fed. Cas. No. 2,683, 3 Blatchf. 431; Lafayette Bank *v.* Illinois Bank, 14 Fed. Cas. No. 7,987, 4 McLean 208.

24. Delegation of authority by: Attorney at law see Attorney and Client, 4 Cyc. 950. Factors and brokers see Factors and Brokers, 19 Cyc. 119. Insurance agents see Insurance, 22 Cyc. 1431. Public officers see Officers, 29 Cyc. 1433.

Authority to make contracts of employment see *supra*, II, A, 6, h, (v).

25. *Alabama.*— Springfield F., etc., Ins. Co. *v.* De Jarnett, 111 Ala. 248, 19 So. 995; Waldman *v.* North British, etc., Ins. Co., 91 Ala. 170, 8 So. 666, 24 Am. St. Rep. 883; Loeb *v.* Drakeford, 75 Ala. 464; Harralson *v.* Stein, 50 Ala. 347.

Arizona.— King *v.* Hawkins, 2 Ariz. 358, 16 Pac. 434.

Arkansas.— Bromley *v.* Aday, 70 Ark. 351, 68 S. W. 32.

Connecticut.— Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104.

Illinois.— Eldridge *v.* Holway, 18 Ill. 445.

Kentucky.— Lynn *v.* Burgoyne, 13 B. Mon. 400; Jones *v.* Jones, 39 S. W. 251, 19 Ky. L. Rep. 129.

Maryland.— White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699; Wilson *v.* York, etc., R. Co., 11 Gill & J. 58.

Massachusetts.— Appleton Bank *v.* McGilvray, 4 Gray 518, 64 Am. Dec. 92; Dorchester, etc., Bank *v.* New England Bank, 1 Cush. 177; Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Stoughton *v.* Baker, 4 Mass. 522, 3 Am. Dec. 236.

Missouri.— Chouteau Land, etc., Co. *v.* Chrisman, 204 Mo. 371, 102 S. W. 973.

New Hampshire.— Flanders *v.* Lamphear, 9 N. H. 201.

New York.— Cullinan *v.* Bowker, 180 N. Y. 93, 72 N. E. 911 [*affirming* 88 N. Y. App. Div. 170, 84 N. Y. Suppl. 696]; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Merrill *v.* Farmers' L. & T. Co., 24 Hun 297; Daly *v.* Stetson, 54 N. Y. Super. Ct. 202; Bonwell *v.* Howes, 15 Daly 43, 2 N. Y. Suppl. 717 [*reversing* 1 N. Y. Suppl. 435]; Commercial Bank *v.* Norton, 1 Hill 501; Lyon *v.* Jerome, 26 Wend. 485, 37 Am. Dec. 271.

North Carolina.— Planters', etc., Bank *v.* Wilmington First Nat. Bank, 75 N. C. 534.

Pennsylvania.— Peabody Bldg. Assoc. *v.* Houseman, 7 Wkly. Notes Cas. 193.

Texas.— McCormick *v.* Bush, 38 Tex. 314; Smith *v.* Sublett, 28 Tex. 163; Williams *v.* Moore, 24 Tex. Civ. App. 402, 58 S. W. 953; White *v.* San Antonio Waterworks Co., 9 Tex. Civ. App. 465, 29 S. W. 252.

Vermont.— Hunt *v.* Douglass, 22 Vt. 128.

Washington.— Bleecker *v.* Satsop R. Co., 3 Wash. 77, 27 Pac. 1073.

Wisconsin.— McKinnon *v.* Vollmar, 75 Wis. 82, 43 N. W. 800, 17 Am. St. Rep. 178, 6 L. R. A. 121.

United States.— Warner *v.* Martin, 11 How. 209, 13 L. ed. 667; Shankland *v.* Washington, 5 Pet. 390, 8 L. ed. 166; Insurance Co. of North America *v.* Wisconsin Cent. R. Co., 134 Fed. 794, 67 C. C. A. 300; Bancroft *v.* Scribner, 72 Fed. 988, 21 C. C. A. 352; Howe Sewing-Mach. Co. *v.* Rosensteel, 24 Fed. 583.

England.— Bell *v.* Balls, [1897] 1 Ch. 663, 66 L. J. Ch. 397, 76 L. T. Rep. N. S. 254, 45 Wkly. Rep. 378; Catlin *v.* Bell, 4 Campb. 183; Blore *v.* Sutton, 3 Meriv. 237, 17 Rev. Rep. 74, 36 Eng. Reprint 91; Henderson *v.* Barnewall, 1 Y. & J. 387, 30 Rev. Rep. 799.

Canada.—Canadian F. Ins. Co. *v.* Robinson, 31 Can. Sup. Ct. 488; Bank of British North America *v.* Rattenbury, 1 Ch. Chamb. (U. C.) 65; Masecar *v.* Chambers, 4 U. C. Q. B. 171.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 87, 88.

Thus the discretion and personal trust reposed in him forbids delegation of his authority to a subagent in the case of an agent authorized to buy or sell property, real or personal (Bromley *v.* Aday, 70 Ark. 351, 68 S. W. 32; National Cash Register Co. *v.* Ison, 94 Ga. 463, 21 S. E. 228; Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488; Topliff *v.* Shadwell, 64 Kan. 884, 67 Pac. 545; Floyd *v.* Mackey, 112 Ky. 646, 66 S. W. 518, 23 Ky. L. Rep. 2030; Mark *v.* Bowers, 4 Mart. N. S. (La.) 95; Groscup *v.* Downey, 105 Md. 273, 65 Atl. 930; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Bocock *v.* Pavey, 8 Ohio St. 270; Williams *v.* Moore, 24 Tex. Civ. App. 402, 58 S. W. 953; Tynan *v.* Dullnig, (Tex. Civ. App. 1894) 25 S. W. 465, 818; Stinchcomb *v.* Marsh, 15 Gratt. (Va.) 202), to give or receive negotiable paper (Brewster *v.* Hobart, 15 Pick. (Mass.) 302; Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66), to manage or superintend the principal's property or business (Crozier *v.* Reins, 4 Ill. App. 564) unless the extent of the agent's duties makes such assistance necessary, as is frequently the case where there is a general agency (North America Ins. Co. *v.* Thornton, 130 Ala 222, 30 So. 614, 55 L. R. A. 547 [*distinguishing* Springfield F., etc., Ins. Co. *v.* De Jarnett, 111 Ala. 248, 19 So. 995; Waldman *v.* North British, etc., Ins. Co., 91 Ala. 170, 8 So. 666,

2. Application of Rule[26] — a. Collection Agents. The general rule that an agency to collect and receive money is one of personal trust and confidence, and therefore not to be delegated to another without authorization,[27] does not apply to a general agency to take charge of and manage the business of a principal.[28] A collecting agency which undertakes to make collections at all points in the country through local agents and attorneys whom it employs and represents as skilful and reliable is responsible for the negligence of an attorney whom it employs on terms known only to itself.[29] But when the agent employed is not a collection agent, and that is no part of his regular business, it has been held with good reason that impliedly his undertaking is merely to forward the paper to a suitable collecting agent in the place where it is to be collected.[30]

b. Joint Agents. It has been seen that joint agents must act jointly, and the principal will not be bound by the act of less than the whole number.[31] This is but an application of the principle that delegated power cannot be delegated. Several joint agents cannot delegate to one of their number the performance of the duties intrusted to them jointly.[32]

24 Am. St. Rep. 883]; Louisville, etc., R. Co. *v.* Tift, 100 Ga. 86, 27 S. E. 765; Bodine *v.* Exchange F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; McConnell *v.* Mackin, 22 N. Y. App. Div. 537, 48 N. Y. Suppl. 18; Kuney *v.* Amazon Ins. Co., 36 Hun (N. Y.) 66; Krumm *v.* Jefferson F. Ins. Co., 40 Ohio St. 225; Wright *v.* Isaacks, 43 Tex. Civ. App. 223, 95 S. W. 55; Ladonia Dry-Goods Co. *v.* Conyers, (Tex. Civ. App. 1900) 58 S. W. 967; Rohrbough *v.* U. S. Express Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849; Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908; Johnston *v.* Chicago, etc., R. Co., 130 Wis. 492, 110 N. W. 424), and generally to do any acts that are not merely clerical, mechanical, or ministerial in their nature (Fairchild *v.* King, 102 Cal. 320, 36 Pac. 649, holding that one employed to secure a tenant may not delegate his authority; Terre Haute, etc., R. Co. *v.* Brown, 107 Ind. 336, 8 N. E. 218; Bonwell *v.* Howes, 15 Daly (N. Y.) 43, 2 N. Y. Suppl. 717; Fargo *v.* Cravens, 9 S. D. 646, 70 N. W. 1053; Smith *v.* Sublett, 28 Tex. 163, holding that to locate a land certificate involves discretion).

Who may invoke rule.— The prineiple that delegated authority eannot be delegated is one that avails for the advantage of the principal and not of the agent. The latter cannot invoke its aid either to acquire rights or to escape liability to the third person or to the principal. Harralson *v.* Stein, 50 Ala. 347 (in which an agent sued a third person and sought to avoid the effect of the act of the subagent, and the court held that the legal maxim that an agent cannot delegate his authority to a subagent is not of universal application, and can be invoked only by the principal when sought to be charged by the act of the subagent); Peterson *v.* Christensen, 26 Minn. 377, 4 N. W. 623.

Employing persons as instrumentalities to obtain information is not delegating the authority of an agent. Williamson *v.* North Pac. Lumber Co., 43 Oreg. 337, 73 Pac. 7. See also Pattison *v.* Moore, 3 Port. (Ala.) 270.

Authority of agent to employ broker see Pattison *v.* Moore, 3 Port. (Ala.) 270; Whitlock *v.* Hicks, 75 Ill. 460; Northern Cent. R. Co. *v.* Bastian, 15 Md. 494; Darling *v.* Stanwood, 14 Allen (Mass.) 504; Bonwell *v.* Howes, 15 Daly (N. Y.) 43, 2 N. Y. Suppl. 717 [*reversing* 1 N. Y. Suppl. 435]; Gold *v.* Serrell, 6 Misc. (N. Y.) 124, 26 N. Y. Suppl. 5 [*affirming* 2 Misc. 224, 21 N. Y. Suppl. 1078]; Sims *v.* May, 1 N. Y. Suppl. 671. See also Factors and Brokers, 19 Cyc. 192.

26. **Delegation of authority by attorneys at law** see Abbott *v.* Smith, 4 Ind. 452; Pollard *v.* Rowland, 2 Blackf. (Ind.) 22; Cummins *v.* Heald, 24 Kan. 600, 36 Am. Rep. 264. And see Attorney and Client, 4 Cyc. 950.

Employment of subagents by bank see Banks and Banking, 5 Cyc. 502 *et seq.*

27. Fellows *v.* Northrup, 39 N. Y. 117; Lewis *v.* Ingersoll, 3 Abb. Dec. (N. Y.) 55, 1 Keyes 347; McConnell *v.* Mackin, 22 N. Y. App. Div. 537, 48 N. Y. Suppl. 18. But *compare* Grinnell *v.* Buchanan, 1 Daly (N. Y.) 538, holding that the merely clerical act of receiving and paying over money is not one involving a personal trust and confidence, and may be assigned.

Whenever by express agreement between the parties a subagent is to be employed by an agent to receive money, payment to him is good. Wilson *v.* Smith, 3 How. (U. S.) 763, 11 L. ed. 820.

28. McConnell *v.* Mackin, 22 N. Y. App. Div. 537, 48 N. Y. Suppl. 18.

29. Weyerhauser *v.* Dun, 100 N. Y. 150, 2 N. E. 274 [*reversing* 16 N. Y. Wkly. Dig. 412]; Bradstreet *v.* Everson, 72 Pa. St. 124, 13 Am. Rep. 665.

30. Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104; Willison *v.* Smith, 52 Mo. App. 133 (holding that a person authorized to collect a note for the payee, but himself residing at a point far distant from the place of payment, has implied authority to indorse it in the name of the payee to a resident of the place of payment for collection); Wilson *v.* Smith, 3 How. (U. S.) 763, 11 L. ed. 820.

31. See *supra*, II, C, 3.

32. Loeb *v.* Drakeford, 75 Ala. 464; White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699;

3. Exceptions to Rule — a. Express Authority to Delegate. Clearly subagents may be appointed when their appointment has been expressly authorized by the principal,[33] and in such case the agent assumes no liability for the acts of the subagent,[34] who is directly accountable to the principal.[35] The principal's consent to look to the subagent will be presumed when he knowingly assents to the substitution of another in place of the agent he appointed.[36]

b. Authority Implied From Nature of Agency. Express authority to appoint subagents is not always necessary. Such authority is usually to be implied when the agency obviously and from its very nature is such as to make the employment of subagents necessary. In such cases the employment of subagents is presumed to have been contemplated when the power was given, and the agent has implied authority to appoint such subagents within the limits of the necessities of the case.[37]

Cook *v.* Ward, 2 C. P. D. 255, 46 L. J. C. P. 554, 36 L. T. Rep. N. S. 893, 25 Wkly. Rep. 593

33. *California.*— McConnell *v.* McCormick, 12 Cal. 142, holding that where a principal wrote to his general agent, "You will do better by getting new . . . agents," new subagents might be appointed.

Connecticut.—Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104.

Massachusetts.—Appleton Bank *v.* McGilvray, 4 Gray 518, 64 Am. Dec. 92; Brewster *v.* Hobart, 15 Pick. 302.

New York.— National Steamship Co. *v.* Sheahan, 122 N. Y. 461, 25 N. E. 858, 10 L. R. A. 782.

South Carolina.— Blowers *v.* Southern R. Co., 74 S. C. 221, 54 S. E. 368.

Tennessee.— Duluth Nat. Bank *v.* Knoxville F. Ins. Co., 85 Tenn. 76, 1 S. W. 689, 4 Am. St. Rep. 744.

England.— Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. Rep. 167, 32 Eng. Reprint 592.

The subsequent ratification by the principal of the appointment of a subagent is of course equally effective with a prior consent to justify the delegation of the authority and to establish a direct agency relation between the principal and the subagent (Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488; Booth *v.* Majestic Mfg. Co., 105 Mich. 562, 63 N. W. 524; McCormick *v.* Bush, 2 Tex. Unrep. Cas. 412, holding that where an agent without authority constitutes a third person a subagent, and the principals afterward acknowledge and treat him as their agent, he must be considered as such; Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670), but the mere fact that the principal knew of the employment of the subagent and acquiesced therein is not a ratification, if there is nothing to show that he understood that the subagent was employed as his agent and not as the agent of the primary agent (Barnard *v.* Coffin, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443; Tynan *v.* Dullnig, (Tex. Civ. App. 1894) 25 S. W. 465, 818; Skinner *v.* Weguelin, Cab. & E. 12), particularly if it is expressly stipulated that subagents shall be employed as the agents of the general agent, and that the latter shall be responsible for their acts (Union Casualty, etc., Co. *v.* Gray, 114 Fed. 422, 52 C. C. A. 224).

Statutory provisions. — In some jurisdictions the exceptions to the rule have been embodied in statutes. See Dingley *v.* McDonald, 124 Cal. 682, 57 Pac. 574; Bond *v.* Hurd, 31 Mont. 314, 78 Pac. 579; Kuhnert *v.* Angell, 10 N. D. 59, 84 N. W. 579, 88 Am. St. Rep. 675.

34. *Massachusetts.*— Fiske *v.* Fisher, 100 Mass. 97.

Pennsylvania.— Sergeant *v.* Emlen, 141 Pa. St. 580, 21 Atl. 663.

South Carolina.— McCants *v.* Wells, 4 S. C. 381.

Tennessee.—Louisville, etc., R. Co. *v.* Blair, 4 Baxt. 407.

United States.— Dun *v.* City Nat. Bank, 58 Fed. 174, 7 C. C. A. 152, 23 L. R. A. 687 [*reversing* 51 Fed. 160].

England.— Gosling *v.* Gaskell, [1897] A. C. 575, 66 L. J. Q. B. 848, 77 L. T. Rep. N. S. 314, 13 T. L. R. 544, 46 Wkly. Rep. 208.

35. Hoag *v.* Graves, 81 Mich. 628, 46 N. W. 109; Commercial, etc., Bank *v.* Jones, 18 Tex. 811; Wilson *v.* Smith, 3 How. (U. S.) 763, 11 L. ed. 820. See also *infra*, II, D, 4.

36. Dingley *v.* McDonald, 124 Cal. 682, 57 Pac. 574; Albany Land Co. *v.* Rickel, 162 Ind. 222, 70 N. E. 158; Hornbeck *v.* Gilmer, 110 La. 500, 34 So. 651.

37. *California.*—Corcoran *v.* Hinkel, (1893) 34 Pac. 1031; McConnell *v.* McCormick, 12 Cal. 142.

Connecticut.—Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 75; East Haddam Bank *v.* Scovil, 12 Conn. 303.

Illinois.— Delawder *v.* Jones, 99 Ill. App. 301.

Louisiana.— Hum *v.* Union Bank, 4 Rob. 109.

Massachusetts.— Dorchester, etc., Bank *v.* New England Bank, 1 Cush. 177.

Missouri.—Willison *v.* Smith, 52 Mo. App. 133.

Nebraska.— Breck *v.* Meeker, 68 Nebr. 99, 93 N. W. 993.

New York.— McConnell *v.* Mackin, 22 N. Y. App. Div. 537, 48 N. Y. Suppl. 18; Raney *v.* Weed, 3 Sandf. 577.

North Carolina.—Planters', etc., Nat. Bank *v.* Wilmington First Nat. Bank, 75 N. C. 534.

South Carolina.— Blowers *v.* Southern R. Co., 74 S. C. 221, 54 S. E. 368.

Texas.— Barnes *v.* Downes, 2 Tex. App. Civ. Cas. § 524. See also Wright *v.* Isaacks, 43 Tex. Civ. App. 223, 95 S. W. 55.

West Virginia.— Rohrbough *v.* U. S. Ex-

Hence he incurs no liability for the acts of such subagents if chosen with reasonable care,[38] and the principal is bound by the acts of a subagent so employed, even though he has no personal knowledge of him.[39] The converse of the proposition is equally true, and an agent has no implied power to delegate his power to a subagent when such delegation is not necessary, proper, or usual.[40]

c. Performance of Ministerial Acts. Having exercised his discretion and determined upon the propriety of an act, an agent may delegate to a subagent the execution of merely mechanical, clerical, or ministerial acts involving no judgment or discretion;[41] and the acts of such a subagent, to whom such power and authority

press Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849; Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.

Wisconsin.— Shepherd *v.* Milwaukee Gas Light Co., 11 Wis. 234.

United States.—Wilson *v.* Smith, 3 How. 763, 11 L. ed. 820.

England.— Rossiter *v.* Trafalgar L. Assur. Assoc., 27 Beav. 377, 54 Eng. Reprint 148; Quebec, etc., R. Co. *v.* Quinn, 12 Moore P. C. 232, 14 Eng. Reprint 899.

The fact that the employment of subagents is necessary is not conclusive of the principal's consent to rely on them and not his chosen agent. And whenever it is apparent that the principal relies on the skill, judgment, and responsibility of his agent alone, or that he consents that such agent shall employ subagents only on his own account, the principal can continue to hold his agent accountable for the acts of himself and of his agents. St. Louis, etc., R. Co. *v.* Smith, 43 Ark. 317, 3 S. W. 364; Barnard *v.* Coffin, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443; Kohl *v.* Beach, 107 Wis. 409, 83 N. W. 657, 81 Am. St. Rep. 856, 50 L. R. A. 600; Skinner *v.* Weguelin, Cab. & E. 12.

Authority of general agent.— The civil law rule has been held to be that under a general power an agent has a right to substitute. Dubreuil *v.* Rouzan, 1 Mart. N. S. (La.) 158. The common-law doctrine is not so broad, although doubtless an authority might be general enough for such a purpose. Williams *v.* Moore, 24 Tex. Civ. App. 402, 58 S. W. 953; Shepherd *v.* Milwaukee Gas Light Co., 11 Wis. 234, holding that a general manager of a business may be clothed with such large powers as to justify an inference of authority to appoint subagents for purposes within the scope of his employment, and not specially intrusted to his discretion. See also Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1, 13 So. 283. And see *supra*, II, D, 1.

38. Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104; McVeagh *v.* Douglass, 4 Phila. (Pa.) 69; Louisville, etc., R. Co. *v.* Blair, 1 Tenn. Ch. 351.

39. Hewes *v.* Lauve, 10 Mart. (La.) 21; Gum *v.* Equitable Trust Co., 11 Fed. Cas. No. 5,867, 1 McCrary 51.

40. Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758; Barnard *v.* Coffin, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443; Bell *v.* Balls, [1897] 1 Ch. 663, 66 L. J. Ch. 397, 76 L. T. Rep. N. S. 254, 45 Wkly. Rep. 378.

41. *Georgia.*— McCroskey *v.* Hamilton, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79.

Maryland.—Williams *v.* Woods, 16 Md. 220.

Missouri.— Grady *v.* American Cent. Ins. Co., 60 Mo. 116.

New Jersey.— Calhoon *v.* Buhre, (Sup. 1907) 67 Atl. 1068.

New York.— Bodine *v.* New York Exch. F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Grinnell *v.* Buchanan, 1 Daly 538 (which states the rule thus: The rule that an agent cannot delegate the trust or duty applies only where the act to be done involves personal trust and confidence, and calls for the agent's discretion or judgment. A mere ministerial or executive authority may be delegated by an agent to another); Lyon *v.* Jerome, 26 Wend. 485, 37 Am. Dec. 271.

Texas.— Williams *v.* Moore, 24 Tex. Civ. App. 402, 58 S. W. 953.

West Virginia.— Rohrbough *v.* U. S. Express Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849.

Wisconsin.— McKinnon *v.* Vollmar, 75 Wis. 82, 43 N. W. 800, 17 Am. St. Rep. 178, 6 L. R. A. 121; Shepherd *v.* Milwaukee Gas Light Co., 11 Wis. 234.

Canada.— Ovens *v.* Davidson, 10 U. C. C. P. 302, holding that a line run by a subordinate and adopted by the principal surveyor is the work of the latter and must be treated as such.

See 40 Cent. Dig. tit. "Principal and Agent," § 89.

Thus an agent may delegate to another power to sign or countersign a paper which the agent has decided to execute for his principal (Weaver *v.* Carnall, 35 Ark. 198, 37 Am. Rep. 22, holding that where A authorized B to borrow money of C and sign his name to a note for it, and in B's presence D signed A's name to the note thus: "A, by D," this was the act of B, and in legal effect the act of A, and that A was bound; Sayre *v.* Nichols, 7 Cal. 535, 68 Am. Dec. 280; Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395; Grady *v.* American Cent. Ins. Co., 60 Mo. 116; Lingenfelter *v.* Phœnix Ins. Co., 19 Mo. App. 252; Cullinan *v.* Bowker, 180 N. Y. 93, 72 N. E. 911; Lake Erie Commercial Bank *v.* Norton, 1 Hill (N. Y.) 501; Newell *v.* Smith, 49 Vt. 255; Norwich University *v.* Denny, 47 Vt. 13; Rohrbough *v.* U. S. Express Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849; Bennitt *v.* The Guiding Star, 53 Fed. 936); or to act as a messenger, or to perform mere acts of manual delivery (Couthway *v.* Berghaus, 25 Ala. 393, holding that, although an agent appointed

have been delegated by the agent, are regarded as the acts of the agent himself, and are therefore as such binding on the principal.[42]

d. Custom and Usage to Employ Subagents. Every man is supposed to contract with reference to the custom and usage of the business in which he engages. Hence where it is the usual custom of a trade or business to employ subagents, the principal, in the absence of proof to the contrary, is presumed to consent that agents appointed by him shall appoint subagents within the limits of such custom.[43]

4. Effect of Delegation. By an unauthorized delegation of his authority, or by the employment of a subagent on his own account, the agent makes himself personally responsible for the acts of the subagent, who is regarded as his agent and not as the agent of the principal. And this is the rule even where the subagent is employed with the consent of the principal, but not as his agent.[44] On the other hand, when the employment of a subagent is authorized, he becomes the agent of the principal, and the first agent is not responsible for his acts or omissions.[45] The person seeking to hold the subagent liable on his undertaking must be his principal; that is, either the original principal or the primary agent, as the case may be; and when the subagent is the agent of the primary agent there is no privity between him and the original principal upon which any mutual rights and remedies can

to make a tender cannot delegate his authority to another, he may make the tender by letter sent by the hands of another; Eldridge *v.* Holway, 18 Ill. 445, holding that the delivery of a written notice requires no confidence, skill, discretion, or judgment, and may be deputed by the agent to a subagent; Renwick *v.* Bancroft, 56 Iowa 527, 9 N. W. 367; Fiske *v.* Fisher, 100 Mass. 97; McKinnon *v.* Vollmar, 75 Wis. 82, 43 N. W. 800, 17 Am. St. Rep. 178, 6 L. R. A. 121).

42. Rohrbough *v.* U. S. Express Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849 [*citing* Lingenfelter *v.* Phœnix Ins. Co., 19 Mo. App. 252], holding that while an agent has no power to delegate his agency to another or to sublet it, he may employ clerks, whose acts, if done in his name and recognized by him, either specially or according to his usual mode of dealing with them, will be regarded as his acts, and as such binding on the principal.

43. *Maryland.*— Jackson *v.* Union Bank, 6 Harr. & J. 146.

Massachusetts.— Appleton Bank *v.* McGilvray, 4 Gray 518, 64 Am. Dec. 92 (holding that authority "to collect it in the ordinary way" justifies the employment of subagents where that is the custom); Warren Bank *v.* Suffolk Bank, 10 Cush. 582; Dorchester, etc., Bank *v.* New England Bank, 1 Cush. 177.

Texas.— Barnes *v.* Downes, 2 Tex. App. Civ. Cas. § 524.

United States.— Wilson *v.* Smith, 3 How. 763, 11 L. ed. 820; Washington Bank *v.* Triplett, 1 Pet. 25, 7 L. ed. 37.

England.— *Ex p.* Sutton, 2 Cox 84, 30 Eng. Reprint 29.

Usage cannot control in the face of a special agreement not to follow such usage. Fay *v.* Strawn, 32 Ill. 295.

44. *Arkansas.*— St. Louis, etc., R. Co. *v.* Smith, 48 Ark. 317, 3 S. W. 364.

Connecticut.— Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104.

Louisiana.— Reynolds *v.* Kirkman, 8 Mart. N. S. 464, holding that a factor who employs an agent to sell the goods of his principal without authority is responsible for the agent's acts.

Massachusetts.— Barnard *v.* Coffin, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443.

Michigan.— Hoag *v.* Graves, 81 Mich. 628, 46 N. W. 109.

Pennsylvania.— Clark *v.* Wheeling Bank, 17 Pa. St. 322.

Texas.— Smith *v.* Sublett, 28 Tex. 163; Tynan *v.* Dullnig, (Civ. App. 1894) 25 S. W. 465. 818.

England.—Skinner *v.* Weguelin, Cab. & E. 12.

Canada.— Hope *v.* Dixon, 22 Grant Ch. (U. C.) 439; Reg. *v.* Stanton, 2 U. C. C. P. 18.

45. *Connecticut.*— Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104.

Louisiana.— Saul *v.* Lalaurie, 1 La. Ann. 401, holding that where an agent had divested himself of all authority by substituting another in his place with the approbation of the principal, he cannot afterward revive his extinct authority and bind the principal without the consent of the latter.

Massachusetts.— Darling *v.* Stanwood, 14 Allen 504.

Michigan.— Hoag *v.* Graves, 81 Mich. 628, 46 N. W. 109.

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

South Carolina.— Blowers *v.* Southern R. Co., 74 S. C. 221, 54 S. E. 368; Bates *v.* American Mortg. Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340; Burrell *v.* Letson, 1 Strobh. 239.

Tennessee.—Louisville, etc., R. Co. *v.* Blair, 1 Tenn. Ch. 351.

Texas.— Tynan *v.* Dullnig, (Civ. App. 1894) 25 S. W. 465.

England.— Gosling *v.* Gaskell, [1897] A. C. 575, 66 L. J. Q. B. 848, 77 L. T. Rep. N. S. 314, 13 T. L. R. 544, 46 Wkly. Rep. 208.

The liability of the first agent is limited to the exercise of good faith and reasonable care in selecting a suitable and proper subagent. Davis *v.* King, 66 Conn. 465, 34

be based;[46] but he is accountable to the former for his conduct, and for any liability to the principal which his acts may have put upon his employer. As to him the subagent acquires the same rights, owes the same duties, and assumes the same obligations, as any agent toward his principal.[47] A subagent has no authority to bind the agent who employed him by agreements with the original principal.[48] A subagent is liable to the principal, and not to the agent who employed him, when he is the agent of such principal, that is, when the latter expressly or impliedly authorized the delegation of his authority by the primary agent.[49]

III. Effect and Consequences of Relation.

A. Duties and Liabilities of Agent to Principal[50]— **1. Duty to Be Loyal — a. In General.** The relation of an agent to his principal is ordinarily that of a

Atl. 107, 50 Am. St. Rep. 104; Morris *v.* Warlick, 118 Ga. 421, 45 S. E. 407; Hoag *v.* Graves, 81 Mich. 628, 46 N. W. 109; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180; McVeagh *v.* Douglass, 4 Phila. (Pa.) 69; Louisville, etc., R. Co. *v.* Blair, 1 Tenn. Ch. 351.

46. *Arkansas.*— Kellogg *v.* Norris, 10 Ark. 18.

Massachusetts.— Barnard *v.* Coffin, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443; Appleton Bank *v.* McGilvray, 4 Gray 518, 64 Am. Dec. 92.

Missouri.— Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

New York.— Commercial Bank *v.* Union Bank, 11 N. Y. 203; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459.

Tennessee.— Campbell *v.* Reeves, 3 Head 226, holding that whenever the authority to appoint a subagent exists, a privity is created between the principal and the subagent, and the latter will be held directly responsible to the principal; but if no such privity exists, the subagent will be responsible to his immediate employer, and the remedy of the principal will be against his agent.

Texas.— Commercial, etc., Bank *v.* Jones, 18 Tex. 811, in which it is said to be a general rule that an inferior agent is accountable only to his immediate employer; and it is upon this principle that where an agent employs a subagent without the knowledge or consent of his principal, there exists no privity between the principal and subagent.

United States.— Trafton *v.* U. S., 24 Fed. Cas. No. 14,135, 13 Story 646, holding that in general subagents acting *ex contractu* are responsible only to the immediate agent who employed them, and not to the principal of such agent.

The subagent may by express promise make himself liable to the principal, although he had previously promised the first agent to account to him. Chickering *v.* Hosmer, 12 Mass. 183.

A collecting agent is alone liable to the principal, and a subagent for making collections is liable to the collecting agent. See Castle *v.* Corn Exch. Bank, 148 N. Y. 122, 42 N. E. 518 [*affirming* 75 Hun 89, 26 N. Y. Suppl. 1035]; Naser *v.* New York First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077; Kelley *v.* Phenix Nat. Bank, 17 N. Y. App. Div. 496, 45 N. Y. Suppl. 533; Reeves *v.* State Bank, 8 Ohio St. 465. And see Banks and Banking, 5 Cyc. 502 *et seq.*

Revocation of primary agent's authority.— A principal who has employed an agent to collect commercial paper may revoke the agency and proceed against a subagent employed by the primary agent for the paper or its proceeds. Naser *v.* New York First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077. See also Dickerson *v.* Wason, 47 N. Y. 439, 7 Am. Rep. 455; Warner *v.* Lee, 6 N. Y. 144; Commercial Bank *v.* Marine Bank, 1 Abb. Dec. (N. Y.) 405, 3 Keyes 337, 1 Transcr. App. 302, 6 Abb. Pr. N. S. 33, 37 How. Pr. 432; *Ex p.* Norton, 11 Jur. 699.

Misappropriation of collection.— Where the primary agent forwards collections to a subagent and directs the latter to make a use of the funds other than the usual one of their application to the payment of the debt to the principal, and the subagent complies with such direction, he becomes responsible therefor to the principal. Milton *v.* Johnson, 79 Minn. 170, 81 N. W. 842, 47 L. R. A. 529.

47. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291; Hoag *v.* Graves, 81 Mich. 628, 46 N. W. 109; Ledwith *v.* Merritt, 74 N. Y. App. Div. 64, 77 N. Y. Suppl. 341 [*affirmed* in 174 N. Y. 512, 66 N. E. 1111], Pownfall *v.* Bair, 78 Pa. St. 403, holding that where an agent has become responsible to his principal by the misconduct of his own subagent, and has been compelled to pay his principal, he may recover from the subagent.

48. Wass *v.* Atwater, 33 Minn. 83, 22 N. W. 8. *Compare* Havens *v.* Church, 104 Mich. 135, 62 N. W. 149.

49. East Haddam Bank *v.* Scovil, 12 Conn. 303; Lawrence *v.* Stonington Bank, 6 Conn. 521; Lindsborg Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324; Wilson *v.* Smith, 3 How. (U. S.) 763, 11 L. ed. 820.

Whenever privity exists between the principal and the subagent, either by express authority to appoint a subagent or by authority implied by the usage of the trade or the nature of the particular employment or otherwise, the subagent will incur a direct and immediate responsibility to the principal, and not merely to the agent who employed him. Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

50. **Liability on bond given by agent for**

fiduciary, and as such it is his duty to act with entire good faith and loyalty for the furtherance and advancement of the interests of his principal in all dealings concerning or affecting the subject-matter of his agency,[51] and if he fails to do so he is responsible to his principal for any loss resulting therefrom,[52] or the principal may repudiate the acts of the agent and recover back any money or property paid him,[53] less the agent's proper charges and compensation;[54] and an agent who has defrauded his principal cannot set up the negligence of such principal as a defense to an action for an accounting.[55] Where, however, the agent has openly and fairly dealt with the matters of the agency on terms fixed by the principal the transaction will be upheld,[56] as is also the case where the principal with the full knowledge of all the facts fails to dissent, as he alone can take advantage of the rule;[57] nor is the agent liable as for fraud where the principal has not been deceived by his acts, and has suffered no injury therefrom.[58] And the general rule

performance of duties see BONDS, 5 Cyc. 770, 809.

Liability of arbitrator for misconduct as agent see ARBITRATION AND AWARD, 3 Cyc. 810.

Illegality of agreement tending to induce breach of duty by agent see CONTRACTS, 9 Cyc. 470.

51. *California.*— Calmon *v.* Sarraille, 142 Cal. 638, 76 Pac. 486.

Colorado.— Fisher *v.* Seymour, 23 Colo. 542, 49 Pac. 30.

Georgia.— Williams *v.* Moore-Gaunt Co., 3 Ga. App. 756, 60 S. E. 372.

Illinois.— Davis *v.* Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Merryman *v.* David, 31 Ill. 404; Fairman *v.* Bavin, 29 Ill. 75, holding that, when a case is made, the court will go to the extreme length in holding agents and those acting in a fiduciary capacity to the strictest fairness and integrity.

Iowa.— Morey *v.* Laird, 108 Iowa 670, 77 N. W. 835.

Mississippi.— Gillenwaters *v.* Miller, 49 Miss. 150.

Missouri.— Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024.

Nebraska.— Jansen *v.* Williams, 36 Nebr. 869, 55 N. W. 279, 20 L. R. A. 207.

United States.— Hofflin *v.* Moss, 67 Fed. 440, 14 C. C. A. 459.

England.— Burdick *v.* Garrick, L. R. 5 Ch. 233, 39 L. J. Ch. 369, 18 Wkly. Rep. 387; Gray *v.* Haig, 20 Beav. 219, 52 Eng. Reprint 587.

52. *California.*— Hunsaker *v.* Sturgis, 29 Cal. 142.

Illinois.— Dazey *v.* Roleau, 111 Ill. App. 367; Miller *v.* John, 111 Ill. App. 56 [*affirmed* in 208 Ill. 173, 70 N. E. 27].

Iowa.— Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

Kentucky.— Myles *v.* Myles, 6 Bush 237.

Maine.— Comings *v.* Stuart, 22 Me. 110.

Minnesota.— Barnett *v.* Block, 94 Minn. 138, 102 N. W. 390.

Mississippi.— Gillenwaters *v.* Miller, 49 Miss. 150.

New York.— Tuers *v.* Tuers, 100 N. Y. 196, 2 N. E. 922; Palmer *v.* Pirson, 4 Misc. 455, 24 N. Y. Suppl. 333 [*affirmed* in 144 N. Y. 654, 39 N. E. 494].

Pennsylvania.— Hart *v.* Girard, 56 Pa. St. 23.

South Carolina.— Tate *v.* Marco, 27 S. C. 493, 4 S. E. 71.

United States.— Bischoffsheim *v.* Baltzer, 20 Fed. 890.

Canada.— Menard *v.* Jackson, 14 Quebec K. B. 348.

That an agent has exceeded his authority, and that a loss has resulted therefrom, is not alone sufficient to support an action against him by the principal for fraud. Price *v.* Keyes, 62 N. Y. 378.

Indemnity.— If the fraud of the agent has caused the principal to incur liability, he is entitled to indemnity from the agent without waiting to take an account of all the transactions involved to determine the precise final amount of the loss. Dick *v.* Gordon, 6 Grant Ch. (U. C.) 394, holding that a principal standing in the position of a surety in respect of notes wrongfully indorsed by the agent under power of attorney, is entitled to a decree for indemnity in respect of his liability as indorser, against his agent and the subsequent indorser, without waiting to take an account of all the transactions between the parties.

53. *California.*— Ritchey *v.* McMichael, (1893) 35 Pac. 151.

Iowa.— Briggs *v.* Hartman, 10 Iowa 63.

Minnesota.— Friesenhahn *v.* Bushnell, 47 Minn. 443, 50 N. W. 597.

Missouri.— Kelly *v.* Gay, 55 Mo. App. 39.

New York.— Voris *v.* McCredy, 16 How. Pr. 87.

See 40 Cent. Dig. tit. "Principal and Agent," § 147.

54. Briggs *v.* Hartman, 10 Iowa 63.

55. Calkins *v.* Worth, 117 Ill. App. 478 [*affirmed* in 215 Ill. 78, 74 N. E. 81].

56. Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748; Guy *v.* Churchill, 62 L. T. Rep. N. S. 132 [*affirming* 60 L. T. Rep. N. S. 740].

57. Eastern Bank *v.* Taylor, 41 Ala. 93.

58. Baker *v.* Brown, 82 Cal. 64, 22 Pac. 879; Hetzler *v.* Morrell, 82 Iowa 562, 48 N. W. 938; Gotcher *v.* Haefner, 107 Mo. 270, 17 S. W. 967; Price *v.* Keyes, 62 N. Y. 378, holding that where an agent vested with a power to sell the property of his principal makes a sale within the limits of his authority which he believes to be for the best interest of his principal, the fact that in making the sale the impelling motive which

as to loyalty does not apply to cases where no relation of trust or confidence exists between the parties, as where the agent is bound merely as an instrument, more properly as a servant, to perform a service,[59] or where the relation of principal and agent is not shown to exist.[60]

b. Adverse Interests In General.[61] In accordance with the above rule, good faith and loyalty to the principal's interests require that an agent must not, except with his principal's full knowledge and consent, assume any duties or enter into any transaction concerning the subject-matter of the agency in which he has or represents interests adverse to those of his principal.[62] If he does so the principal,

actuated him was the compensation he was to receive, not his duty to his principal, does not give the latter a right of action for fraud in ease the sale proves disadvantageous.

59. *Illinois.*— Brown *v.* Brown, 154 Ill. 35, 39 N. E. 983.

Indiana.— Pomeroy *v.* Wimer, 167 Ind. 440, 78 N. E. 233, 79 N. E. 446.

Kentucky.— Spalding *v.* Mattingly, 89 Ky. 83, 1 S. W. 488.

Missouri.— Grady *v.* O'Reilly, 116 Mo. 346, 22 S. W. 798.

North Carolina.— Deep River Gold Min. Co. *v.* Fox, 39 N. C. 61.

West Virginia.— Curlett *v.* Newman, 30 W. Va. 182, 3 S. E. 578, in which a farm overseer was held not disqualified to buy the farm.

60. *Arkansas.*—Aldrich *v.* McClay, 75 Ark. 387, 87 S. W. 813.

California.— Spinks *v.* Clark, 147 Cal. 439, 82 Pac. 45; Baker *v.* Brown, 82 Cal. 64, 22 Pac. 879.

Georgia.— Brinson *v.* Exley, 122 Ga. 8, 49 S. E. 810, holding that the fact that defendant assumed to act as agent of plaintiff, if in fact there was no agency, would not entitle plaintiff to recover in an action of deceit.

Kentucky.— Carter *v.* Jolly, 22 S. W. 747, 15 Ky. L. Rep. 217.

Minnesota.— Bartleson *v.* Vanderhoff, 96 Minn. 184, 104 N. W. 820.

Montana.— Largey *v.* Leggat, 30 Mont. 148, 75 Pac. 950.

Utah.— Haarstick *v.* Fox, 9 Utah 110, 33 Pac. 251 [*affirmed* in 156 U. S. 674, 15 S. Ct. 457, 39 L. ed. 576].

61. Adverse interests: Of auctioneers see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1047. Of factors and brokers see FACTORS AND BROKERS, 19 Cyc. 206, 227, 228. Of insurance agents see INSURANCE, 22 Cyc. 1435, 1442.

62. *Arkansas.*— Wassell *v.* Reardon, 11 Ark. 705, 44 Am. Dec. 245.

California.— Smith *v.* Goethe, 147 Cal. 725, 82 Pac. 384.

Colorado.— Webb *v.* Marks, 10 Colo. App. 429, 51 Pac. 518.

Connecticut.— Porter's Appeal, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272.

District of Columbia.— Holtzman *v.* Linton, 27 App. Cas. 241.

Georgia.— Sessions *v.* Payne, 113 Ga. 955, 39 S. E. 325.

Illinois.— Davis *v.* Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Cottom *v.* Holliday, 59 Ill. 176; Bouton *v.* Cameron, 99 Ill. App. 600 [*affirmed* in 205 Ill. 50, 68 N. E. 800].

Iowa.— Morey *v.* Laird, 108 Iowa 670, 77 N. W. 835; Smeltzer *v.* Lombard, 57 Iowa 294, 10 N. W. 669.

Louisiana.— Knabe *v.* Ternot, 16 La. Ann. 13; Meeker *v.* York, 13 La. Ann. 18.

Minnesota.— Lum *v.* McEwen, 56 Minn. 278, 57 N. W. 662; Friesenhahn *v.* Bushnell, 47 Minn. 443, 50 N. W. 597.

Mississippi.— Dorrah *v.* Hill, 73 Miss. 787, 19 So. 961, 32 L. R. A. 631; Wildberger *v.* Hartford F. Ins. Co., 72 Miss. 338, 17 So. 282, 48 Am. St. Rep. 558, 28 L. R. A. 220; Murphy *v.* Sloan, 24 Miss. 658.

Missouri.— Atlee *v.* Fink, 75 Mo. 100, 43 Am. Rep. 385; Gaty *v.* Saek, 19 Mo. App. 470.

Nebraska.—Clarke *v.* Kelsey, 41 Nebr. 766, 60 N. W. 138; Englehart *v.* Peoria Plow Co, 21 Nebr. 41, 31 N. W. 391.

New Jersey.— Campbell *v.* Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438; Porter *v.* Woodruff, 36 N. J. Eq. 174.

New York.— Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 8 N. E. 355; Neuendorff *v.* World Mut. L. Ins. Co., 69 N. Y. 389 (holding that an agent cannot bind his principal to the receipt of money due from himself by a mere acknowledgment signed by himself as agent that he has received it); Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293 [*reversing* 36 Barb. 540]; Moore *v.* Moore, 5 N. Y. 256; Barnett *v.* Daw, 55 N. Y. App. Div. 202, 66 N. Y. Suppl. 880; Morrison *v.* Ogdensburg, etc., R. Co., 52 Barb. 173; Cumberland Coal, etc., R. Co. *v.* Sherman, 30 Barb. 553; Parkist *v.* Alexander, 1 Johns. Ch. 394.

North Carolina.— Swindell *v.* Latham, 145 N. C. 144, 58 S. E. 1010, 122 Am. St. Rep. 430; Deep River Gold Min. Co. *v.* Fox, 39 N. C. 61.

Tennessee.— Tynes *v.* Grimstead, 1 Tenn. Ch. 508.

Virginia.— Neilson *v.* Bowman, 29 Gratt. 732.

United States.— Miehoud *v.* Girod, 4 How. 503, 11 L. ed. 1076; Alger *v.* Anderson, 78 Fed. 729; Chrystie *v.* Foster, 61 Fed. 551, 9 C. C. A. 606; Glover *v.* Ames, 8 Fed. 351.

England.— Smith *v.* Sorby, 3 Q. B. D. 552 note; Lamb *v.* Evans, [1893] 1 Ch. 218, 62 L. J. Ch. 404, 68 L. T. Rep. N. S. 131, 2 Reports 189, 41 Wkly. Rep. 405; Henehman *v.* East India Co., 8 Bro. P. C. 85, 3 Eng. Reprint 459, 1 Ves. Jr. 287, 30 Eng. Reprint 347.

See 40 Cent. Dig. tit. "Principal and Agent," § 130.

when he acquires full knowledge of the facts may repudiate the transaction,[63] without regard to whether the agent acted in bad faith, or whether the transaction resulted in a loss to the principal;[64] or the principal may adopt the transaction and compel the agent to account for any profits made thereby.[65] Nothing will defeat this right of the principal except his own confirmation after full knowledge of all the facts,[66] and it does not matter that the agent was a mere volunteer agent, or that he was acting gratuitously.[67] Nor is this rule affected by a custom or usage to the contrary of which the principal had no notice, actual or constructive.[68]

c. Engaging in Rival Business. In the absence of a clear consent of the principal the agency relation denies to the agent the right to engage in any business or dealings on his own account of the same character as the principal's,[69] or of a kind to take the time he has contracted to give to the principal,[70] although where the

The object of the principle is to elevate the agent to a position where he cannot be tempted to betray his trust. To guard against uncertainty, all possible temptation is removed, and the prohibition against the agent's acting in a dual capacity is made broad enough to cover all his transactions. Porter *v.* Woodruff, 36 N. J. Eq. 174.

Mere negligence or unauthorized acts not enough.— Dealings of an agent for the sale of property with the purchaser, in which irregularities and carelessness sufficient to excite suspicion appear, but not amounting to fraud, do not call for the interposition of a court of equity. Jewett *v.* Bowman, 29 N. J. Eq. 174.

63. White *v.* Leech, (Iowa 1903) 96 N. W. 709; Lardner's Estate, 16 Wkly. Notes Cas. (Pa.) 51; Thorne *v.* Brown, (W. Va. 1908) 60 S. E. 614. And see cases cited *supra*, note 62. See also *infra*, III, E, 1, a, (v).

A contract of an agent for his principal made with himself is *prima facie* void. Arnkens *v.* Rouse, 11 Ohio Dec. (Reprint) 380, 26 Cinc. L. Bul. 221.

64. *Michigan.*— McNutt *v.* Dix, 83 Mich. 328, 47 N. W. 212, 10 L. R. A. 660.

Mississippi.—Spinks *v.* Davis, 32 Miss. 152.

Missouri.— De Steiger *v.* Hollington, 17 Mo. App. 382.

New Jersey.— Porter *v.* Woodruff, 36 N. J. Eq. 174.

Pennsylvania.— Everhart *v.* Searle, 71 Pa. St. 256.

Tennessee.— Tynes *v.* Grimstead, 1 Tenn. Ch. 508.

Virginia.— Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234.

United States.— Glover *v.* Ames, 8 Fed. 351.

An agent who invests his principal's money in a corporation of which he is a member, and which is largely indebted, without informing her either of his membership or of the debt, is guilty of fraud, although there may be no actual wrongful intent; and the principal may recover such sum from the agent in the absence of a ratification by her of such investment. Sterling *v.* Smith, 97 Cal. 343, 32 Pac. 320.

65. See *infra*, III, A, 1, d.

66. Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234.

67. Hunsaker *v.* Sturgis, 29 Cal. 142; Kevane *v.* Miller, 4 Cal. App. 598, 88 Pac. 643; Salsbury *v.* Ware, 183 Ill. 505, 56 N. E. 149 [*reversing* 80 Ill. App. 485]; Wright *v.* Smith, 23 N. J. Eq. 106; Conkey *v.* Bond, 36 N. Y. 427.

68. Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. 133; Jacques *v.* Edgell, 40 Mo. 76; Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; Robinson *v.* Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544 [*reversing* 20 Wkly. Rep. 544]; Bartram *v.* Lloyd, 88 L. T. Rep. N. S. 286.

69. Clarke *v.* Kelsey, 41 Nebr. 766, 60 N. W. 138.

The principal may waive his right, as where a contract of agency between a machinery company and a local agent provided that if the agent solicited orders for other houses the company might cancel the contract, and the agent did solicit orders for other houses, but the company knew of it, and did nothing. Davis *v.* Huber Mfg. Co., 119 Iowa 56, 93 N. W. 78.

If there is an agreement that the agent may engage in other business not prejudicial to the principal, he must show that he has acted within the limits fixed, or else account to the principal for the advantages derived. Boston Deep Sea Fishing Co. *v.* Ansell, 39 Ch. D. 339, 59 L. T. Rep. N. S. 345.

70. *Nebraska.*— Clarke *v.* Kelsey, 41 Nebr. 766, 60 N. W. 138.

New York.—Seaburn *v.* Zachmann, 99 N. Y. App. Div. 218, 90 N. Y. Suppl. 1005.

Pennsylvania.— Ewing's Appeal, (1886) 4 Atl. 832, holding that an agent who agrees for an exclusive right in the sale of his principal's machine in certain territory does not devote himself primarily to the latter's interest if he takes an agency for a machine of another maker; and in such case he forfeits his rights under a contract so conditioned.

United States.— St. Louis Electric Light, etc., Co. *v.* Edison Gen. Electric Co., 64 Fed. 997.

England.— Thompson *v.* Havelock, 1 Campb. 527, 10 Rev. Rep. 744, holding that an agent cannot employ himself for a third person when he has agreed to give the whole of his services to his principal.

Custom.— An employer of a traveling salesman is not bound by a custom to allow such salesman to work in a retail store during the holidays where he has no knowledge

agent has not contracted to give his full time to the principal there is nothing to prevent him from engaging in other business or having other interests which do not interfere with or threaten the principal's interests.[71]

d. Duty to Account For Profits of Agency. As a general rule it is a breach of good faith and loyalty to his principal for an agent, while the agency exists, so to deal with the subject-matter thereof, or with information acquired during the course of the agency, as to make a profit out of it for himself in excess of his lawful compensation; and if he does so he may be held as a trustee and be compelled to account to his principal for all profits, advantages, rights, or privileges acquired by him in such dealings, whether in performance or in violation of his duties,[72] and

thereof. Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. 133.

71. Geiger *v.* Harris, 19 Mich. 209 (holding that a traveling commercial agent commits no violation of duty by gratuitously taking orders for goods upon a house in whose service he has formerly been employed, if without prejudice to the interests of his employers); Gaty *v.* Sack, 19 Mo. App. 470; Clarke *v.* Kelsey, 41 Nebr. 766, 60 N. W. 138. *Compare* Hichhorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592, holding that where a jobber of cigars, in consideration of being given the sole agency for a certain cigar, agreed to render his best services in pushing their sale by putting them in the hands of his agent, advertising them, etc., it was not a breach of his contract that at the time he was performing the same he also made efforts to introduce and sell another cigar of the same general character manufactured by himself.

72. *Arkansas.*— Leake *v.* Sutherland, 25 Ark. 219.

California.— *In re* Watkins, 121 Cal. 327, 53 Pac. 702; King *v.* Wise, 43 Cal. 628.

Georgia.— Forlaw *v.* Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898; Williams *v.* Moore-Gaunt Co., 3 Ga. App. 756, 60 S. E. 372.

Illinois.— James T. Hair Co. *v.* Daily, 161 Ill. 379, 43 N. E. 1096 [*reversing* 58 Ill. App. 647]; Glover *v.* Layton, 145 Ill. 92, 34 N. E. 53; Cottom *v.* Holliday, 59 Ill. 176; Dennis *v.* McCagg, 32 Ill. 429; Merryman *v.* David, 31 Ill. 404; Tilden *v.* Blackwell, 94 Ill. App. 605.

Indiana.— Lafferty *v.* Jelley, 22 Ind. 471.

Iowa.— Keyes *v.* Bradley, 73 Iowa 589, 35 N. W. 656; Brown *v.* Collins, 45 Iowa 709. See Blodgett *v.* Brown, (1900) 82 N. W. 482.

Kansas.— Jones *v.* Adair, 76 Kan. 343, 91 Pac. 78; Albright *v.* Phœnix Ins. Co., 72 Kan. 591, 84 Pac. 383; Mulvane *v.* O'Brien, 58 Kan. 463, 49 Pac. 607.

Kentucky.— Taylor *v.* Knox, 1 Dana 391, 5 Dana 466, holding that where an agent received land warrants to locate on shares and sell the land, and he bought up his principal's share of the land for less than its value without informing him of the price for which a part of the land had been sold, he was accountable for the full value at the time he sold it.

Michigan.— Gay *v.* Paige, 150 Mich. 463, 114 N. W. 217.

Minnesota.— Barnett *v.* Block, 94 Minn. 138, 102 N. W. 390; Farmers' Warehouse Assoc. *v.* Montgomery, 92 Minn. 194, 99 N. W. 776; Snell *v.* Goodlander, 90 Minn. 533, 97 N. W. 421; Smitz *v.* Leopold, 51 Minn. 455, 53 N. W. 719; Cock *v.* Van Etten, 12 Minn. 522.

Mississippi.— Gillenwaters *v.* Miller, 49 Miss. 150.

Missouri.— Bent *v.* Priest, 86 Mo. 475; Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304; Jacques *v.* Edgell, 40 Mo. 76; Patterson *v.* Missouri Glass Co., 72 Mo. App. 492.

Nebraska.— State *v.* State Journal Co., 75 Nebr. 275, 106 N. W. 434, 77 Nebr. 752, 110 N. W. 763, 9 L. R. A. N. S. 174; Barber *v.* Martin, 67 Nebr. 445, 93 N. W. 722.

New Jersey.— Vreeland *v.* Van Blarcom, 35 N. J. Eq. 530; Dodd *v.* Wakeman, 26 N. J. Eq. 484.

New York.— Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138; Dutton *v.* Willner, 52 N. Y. 312; Wilson *v.* Wilson, 4 Abb. Dec. 621, 4 Keyes 413; Carruthers *v.* Diefendorf, 66 N. Y. App. Div. 31, 72 N. Y. Suppl. 941 [*affirmed* in 174 N. Y. 549, 67 N. E. 1081]; Bruce *v.* Davenport, 36 Barb. 349 [*reversed* on other grounds in 1 Abb. Dec. 233, 2 Keyes 472, 3 Transcr. App. 82, 5 Abb. Pr. N. S. 185]; Loeb *v.* Hellman, 45 N. Y. Super. Ct. 336 [*affirmed* in 83 N. Y. 601].

Ohio.— Ætna Ins. Co. *v.* Church, 21 Ohio St. 492.

Pennsylvania.— Humbird *v.* Davis, 210 Pa. St. 311, 59 Atl. 1082; Graham *v.* Cummings, 208 Pa. St. 516, 57 Atl. 943; Pennsylvania R. Co. *v.* Flanigan, 112 Pa. St. 558, 4 Atl. 364; Coursin's Appeal, 79 Pa. St. 220; Reeside *v.* Reeside, 6 Phila. 507.

Tennessee.— Moinett *v.* Days, 1 Baxt. 431.

Vermont.— Noyes *v.* Landon, 59 Vt. 569, 10 Atl. 342; Judevine *v.* Hardwick, 49 Vt. 180.

Wisconsin.— Grant *v.* Hardy, 33 Wis. 668.

United States.— Moore *v.* Petty, 135 Fed. 668, 68 C. C. A. 306; McKinley *v.* Williams, 74 Fed. 94, 20 C. C. A. 312 [*affirming* 65 Fed. 4] (holding that an agent of a vendor who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser or as the agent of a purchaser, violates his contract of agency, betrays his trust, and becomes indebted to his principal for the profits he gains by his breach of duty); Northern Pac. R. Co. *v.* Kindred, 14 Fed. 77, 3 McCrary 627; Yates *v.* Arden, 30 Fed. Cas. No. 18,126, 5 Cranch C. C. 526.

England.— Parker *v.* McKenna, L. R. 10 Ch. 96, 44 L. J. Ch. 425, 31 L. T. Rep. N. S.

be required to transfer them to his principal upon being reimbursed for his expenditures for the same,[73] unless the principal has consented to or ratified the transaction with knowledge that a benefit or profit would accrue or had accrued to the agent.[74] The application of this rule is not affected by the fact that the principal did not suffer any injury by reason of the agent's dealing,[75] or that he in fact obtained a better result;[76] nor by the fact that there is a usage or custom to the contrary.[77] Thus if an agent by compromise or otherwise is able to effect a favorable settlement of a claim against the principal, he is accountable to the principal for the amount saved or gained;[78] and if in contracting for his principal he secures a secret commission or any private collateral benefit for himself,[79] or derives profits from

738, 23 Wkly. Rep. 271; Great Western Ins. Co. *v.* Cunliffe, L. R. 9 Ch. 525, 43 L. J. Ch. 741, 30 L. T. Rep. N. S. 661; Kimber *v.* Barber, L. R. 8 Ch. 56, 27 L. T. Rep. N. S. 526, 21 Wkly. Rep. 65; Morison *v.* Thompson, L. R. 9 Q. B. 480, 43 L. J. Q. B. 215, 30 L. T. Rep. N. S. 869, 22 Wkly. Rep. 859; Ward *v.* Carttar, L. R. 1 Eq. 29; London Bank *v.* Tyrell, 27 Beav. 273, 54 Eng. Reprint 107 [*affirmed* in 10 H. L. Cas. 26, 8 Jur. N. S. 849, 31 L. J. Ch. 369, 6 L. T. Rep. N. S. 1, 10 Wkly. Rep. 359, 11 Eng. Reprint 934]; Machen *v.* Stanyon, 1 Bro. P. C. 133, 1 Eng. Reprint 466; Rogers *v.* Boehm, 2 Esp. 702; Turnbull *v.* Garden, 38 L. J. Ch. 331, 20 L. T. Rep. N. S. 218; Brown *v.* Litton, 1 P. Wms. 140, 24 Eng. Reprint 329; Bulfield *v.* Fournier, 15 Reports 176; Massey *v.* Davies, 2 Ves. Jr. 317, 2 Rev. Rep. 218, 30 Eng. Reprint 651; International Tel. Co. *v.* Reuter, 4 Wkly. Rep. 510.

Canada.—Jones *v.* Linde British Refrigeration Co., 32 Ont. 191; Wright *v.* Rankin, 18 Grant. Ch. (U. C.) 625.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 132, 133.

A purchase outside the agency has been held to be subject to the rule. Thus if, at the time it was made, the agent assumed to act for his principal and purchased for his benefit, the transaction as against the agent will inure to the benefit of the principal. Watson *v.* Union Iron, etc., Co., 15 Ill. App. 509.

One employed to procure an option for the purchase of property, and who obtains the same in writing in his own name, with the distinct oral understanding between him and the owner that the option is procured for the person by whom he is employed, is an agent, and his employer is entitled to the benefit of the option, as against an assignee of the agent. Henry *v.* Black, 213 Pa. St. 620, 63 Atl. 250.

73. Forlaw *v.* Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898; Judevine *v.* Hardwick, 49 Vt. 180; Jackson *v.* Pleasanton, 101 Va. 282, 43 S. E. 573; Dana *v.* Duluth Trust Co., 99 Wis. 663, 75 N. W. 429.

Right to reimbursement see *infra*, III, B, 3.

74. Ackenburgh *v.* McCool, 36 Ind. 473; Vreeland *v.* Van Blarcom, 35 N. J. Eq. 530; Wilson *v.* Wilson, 4 Abb. Dec. (N. Y.) 621, 4 Keyes 413; Kramer *v.* Winslow, 154 Pa. St. 637, 25 Atl. 766; Maull's Estate, 11 Pa. Dist. 256. See Holden *v.* Webber, 29 Beav. 117, 54 Eng. Reprint 571.

75. Parker *v.* McKenna, L. R. 10 Ch. 96, 44 L. J. Ch. 425, 31 L. T. Rep. N. S. 738, 23 Wkly. Rep. 271.

76. Dutton *v.* Willner, 52 N. Y. 312, holding that where an agent by departing from instructions obtained a better result than could have been obtained by following them, the principal can claim the advantage thus obtained even though the agent may have contributed his own funds or responsibility in producing the result and no risk or expense was incurred by the principal.

77. Jacques *v.* Edgell, 40 Mo. 76; Mauran *v.* Warren, 16 Fed. Cas. No. 9,310, 2 Lowell 53.

78. Owsley *v.* Woolhopter, 14 Ga. 124; Hitchcock *v.* Watson, 18 Ill. 289 (holding that an agent who satisfies a debt of his principal at less than he has received for that purpose is accountable to his principal for the surplus); Switzer *v.* Skiles, 8 Ill. 529, 44 Am. Dec. 723; Spencer *v.* Towles, 18 Mich. 9.

79. *Massachusetts.*— Smith *v.* Townsend, 109 Mass. 500.

Minnesota.— Lum *v.* McEwen, 56 Minn. 278, 57 N. W. 662.

Missouri.— Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024.

New York.— Densmore *v.* Searle, 7 N. Y. App. Div. 45, 39 N. Y. Suppl. 948; Morrison *v.* Ogdensburgh, etc., R. Co., 52 Barb. 173; Adams *v.* Van Brunt, 11 N. Y. St. 659.

Pennsylvania.— Graham *v.* Cummings, 208 Pa. St. 516, 57 Atl. 943; Yeaney *v.* Keck, 183 Pa. St. 532, 38 Atl. 1041.

Utah.— *In re* Evans, 22 Utah 366, 62 Pac. 913, holding that a person employed to act as agent in securing the services of attorneys cannot contract to receive a portion of the fees himself as assistant attorney.

Virginia.— Segar *v.* Edwards, 11 Leigh 213.

United States.— Alger *v.* Anderson, 78 Fed. 729; Garrow *v.* Davis, 10 Fed. Cas. No. 5,257, 10 N. Y. Leg. Obs. 225 [*affirmed* in 15 How. 272, 14 L. ed. 692]; Mauran *v.* Warren, 16 Fed. Cas. No. 9,310, 2 Lowell 53.

England.— Powell *v.* Jones, [1905] 1 K. B. 11, 10 Com. Cas. 36, 74 L. J. K. B. 115, 92 L. T. Rep. N. S. 430, 53 Wkly. Rep. 277; Morrison *v.* Thompson, L. R. 9 Q. B. 480, 43 L. J. Q. B. 215, 30 L. T. Rep. N. S. 869, 22 Wkly. Rep. 859; Phosphate Sewage Co. *v.* Hartmont, 5 Ch. D. 394, 457, 46 L. J. Ch. 661, 37 L. T. Rep. N. S. 9, 24 Wkly. Rep. 530; Turnbull *v.* Garden, 38 L. J. Ch. 331, 20 L. T. Rep. N. S. 218; Fawcett *v.* Whitehouse, 4 L. J. Ch. O. S. 64 [*affirmed* in 8

investments in his own name of the principal's money or property,[80] he will be deemed to hold them in trust for his principal. So an agent may be compelled to account for profits made by selling his principal's property at a greater price than that which he represents to his principal that he sold it for,[81] or than that which the principal specified it should be sold for,[82] or by purchasing at a less price than that which he charges the principal for the property,[83] unless the principal had full knowledge of such facts and consented thereto,[84] or unless he had expressly agreed

L. J. Ch. O. S. 50, 1 Russ. & M. 132, 27 Rev. Rep. 260, 5 Eng. Ch. 132, 39 Eng. Reprint 51].

Canada.—Wright *v.* Rankin, 18 Grant Ch. (U. C.) 625; Culverwell *v.* Campton, 31 U. C. C. P. 342.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 132, 133.

Incidental benefits.— The principal may recover a secret commission or discount received by the agent in the performance of his undertaking, although it related to an incidental matter not connected with the agent's duty, and the agent acted in good faith. Hippesley *v.* Knee, [1905] 1 K. B. 1, 74 L. J. K. B. 68, 92 L. T. Rep. N. S. 20, 21 T. L. R. 5. But see Ætna Ins. Co. *v.* Church, 21 Ohio St. 492, holding that mere gratuities which are received by an agent for incidental benefits derived from services rendered the principal by the agent, where neither principal nor agent had any claim for the amount so received, are not properly profits which can be recovered of the agent by the principal.

80. *Arkansas.*— White *v.* Ward, 26 Ark. 445.

Connecticut.— Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

Indiana.— National Bank of Rising Sun *v.* Seward, 106 Ind. 264, 6 N. E. 635; Ackenburgh *v.* McCool, 36 Ind. 473.

New York.— Manville *v.* Lawton, 19 N. Y. Suppl. 587.

North Dakota.— Persons *v.* Smith, 12 N. D. 403, 97 N. W. 551.

Pennsylvania.— Rundell *v.* Kalbfus, 125 Pa. St. 123, 17 Atl. 238.

England.—Erskine *v.* Sachs, [1901] 2 K. B. 504, 70 L. J. K. B. 978, 85 L. T. Rep. N. S. 385, 17 T. L. R. 636.

See 40 Cent. Dig. tit. "Principal and Agent," § 133.

81. *Iowa.*— Hewitt *v.* Young, 82 Iowa 224, 47 N. W. 1084; Brown *v.* Collins, 45 Iowa 709.

Kansas.—Mulvane *v.* O'Brien, 58 Kan. 463, 49 Pac. 607.

Michigan.— McNutt *v.* Dix, 83 Mich. 328, 47 N. W. 212, 10 L. R. A. 660.

Minnesota.—Hegenmyer *v.* Marks, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

New York.— Bain *v.* Brown, 56 N. Y. 285 [*affirming* 7 Lans. 506].

82. Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722; Kerfoot *v.* Hyman, 52 Ill. 512 (holding that where an agent who was authorized to sell a tract of land at a given price sold a portion of it for a larger sum, and placed the legal title to the residue in a third person for his benefit, he should account to his principal for the excess received for the portion sold, and the legal title to the residue of the land not sold should be released to the principal); Merryman *v.* David, 31 Ill. 404; Denson *v.* Stewart, 15 La. Ann. 456 (holding that where an agent authorized to sell a thing for a particular price sells it at a higher price, the surplus will belong to the principal, and the agent is entitled only to his stipulated commission); Turnley *v.* Michael, (Tex. Civ. App. 1891) 15 S. W. 912.

83. *California.*— Calmon *v.* Sarraille, 142 Cal. 638, 76 Pac. 486 (holding that an agent who induces his principal to give more than necessary for property, himself fraudulently appropriating the excess, cannot resist a recovery by his principal on the ground that the latter was willing to give the entire amount, and therefore was not injured); Kevane *v.* Miller, 4 Cal. App. 598, 88 Pac. 643.

Illinois.— Salsbury *v.* Ware, 183 Ill. 505, 56 N. E. 149 [*reversing* 80 Ill. App. 485].

Louisiana.— Dwyer *v.* Powell, 18 La. 99, holding that an agent to buy tobacco, who gets it for less than the market price, acts in bad faith if he charges it to his principal for a higher price than that paid.

Maine.— Bunker *v.* Miles, 30 Me. 431, 50 Am. Dec. 632, holding that an agent employed to purchase a horse and intrusted with a limited amount of money for the purpose is liable to his principal for the excess of that amount over the price actually paid by him for the horse, deducting his compensation for services.

Minnesota.— Crump *v.* Ingersoll, 44 Minn. 84, 46 N. W. 141.

Missouri.— Kanada *v.* North, 14 Mo. 615.

New Hampshire.— Parsons *v.* Merrill, 59 N. H. 227.

New York.—Duryea *v.* Vosburgh, 138 N. Y. 621, 33 N. E. 932; McMillan *v.* Arthur, 98 N. Y. 167 [*affirming* 48 N. Y. Super. Ct. 424]; Boyle *v.* Staten Island, etc., Land Co., 17 N. Y. App. Div. 624, 45 N. Y. Suppl. 496; Marvin *v.* Buchanan, 62 Barb. 468; Willink *v.* Vanderveer, 1 Barb. 599.

Pennsylvania.— Yeaney *v.* Keck, 183 Pa. St. 532, 38 Atl. 1041.

Virginia.— Jackson *v.* Pleasanton, 101 Va. 282, 43 S. E. 573.

Washington.—Hindle *v.* Holcomb, 34 Wash. 336, 75 Pac. 873.

Wisconsin.— Collins *v.* Case, 23 Wis. 230.

Canada.— Arthurton *v.* Dalley, 2 Grant Ch. (U. C.) 1; Martel *v.* Pageau, 9 Quebec Super. Ct. 175.

See 40 Cent. Dig. tit. "Principal and Agent," § 133.

84. Kramer *v.* Winslow, 154 Pa. St. 637, 25 Atl. 766.

to sell at a fixed price, the agent to have all he could get above that price,[85] or unless the principal had expressly agreed to pay the agent a certain price for the property regardless of what it cost him.[86]

e. Selling Agent Must Not Sell to Himself. Good faith and loyalty also require that an agent authorized to sell or lease his principal's property must in doing so act solely for his principal's interest; and since if in making the sale or lease he himself is interested as purchaser or lessee there will be an inducement to act adversely to his principal's interest, such an agent must as a general rule sell or lease only to a third person, and must not, without his principal's full knowledge and consent, himself become the purchaser or lessee either directly [87] or through

85. Synnott *v.* Shaughnessy, 2 Ida. (Hasb.) 122, 7 Pac. 82; Hale Elevator Co. *v.* Hale, 201 Ill. 131, 66 N. E. 249 [*affirming* 98 Ill. App. 430]; Ranney *v.* Barlow, 112 U. S. 207, 5 S. Ct. 304, 28 L. ed. 662.

86. Anderson *v.* Weiser, 24 Iowa 428.

87. *Alabama.*— Walker *v.* Palmer, 24 Ala. 358.

Arkansas.— White *v.* Ward, 26 Ark. 445.

California.— Burke *v.* Bours, 92 Cal. 103, 28 Pac. 57, (1891) 26 Pac. 102, 98 Cal. 171, 32 Pac. 980.

Connecticut.— Banks *v.* Judah, 8 Conn. 145.

Georgia.— Hodgson *v.* Raphael, 105 Ga. 480, 30 S. E. 416.

Indiana.— Gage *v.* Pike, Smith 145.

Iowa.— Ingle *v.* Hartman, 37 Iowa 274.

Louisiana.—Allard *v.* Allard, 6 Rob. 320; Scott *v.* Gorton, 14 La. 111, 33 Am. Dec. 576; Shepherd *v.* Percy, 4 Mart. N. S. 267.

Maryland.— Dorsey *v.* Clarke, 4 Harr. & J. 551.

Massachusetts.— Middlesex Bank *v.* Minot, 4 Metc. 325; Copeland *v.* Mercantile Ins. Co., 6 Pick. 198.

Michigan.— People *v.* Overyssel Tp. Bd., 11 Mich. 222; Ingerson *v.* Starkweather, Walk. 346.

Minnesota.— Tilleny *v.* Wolverton, 46 Minn. 256, 48 N. W. 908.

Missouri.— Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304.

Nebraska.— Jansen *v.* Williams, 36 Nebr. 869, 55 N. W. 279, 20 L. R. A. 207 (holding that a real estate agent must disclose to his principal all the information he has concerning sales of the property, and cannot become a purchaser for his own benefit without the full knowledge and acquiescence of his principal); Rockford Watch Co. *v.* Manifold, 36 Nebr. 801, 55 N. W. 236 (holding that an agent for the purpose of selling goods cannot sell to himself, although the sale be public and no actual fraud appear); Englehart *v.* Peoria Plow Co., 21 Nebr. 41, 31 N. W. 391; Stettnische *v.* Lamb, 18 Nebr. 619, 26 N. W. 374.

New Jersey.— Ruckman *v.* Bergholz, 37 N. J. L. 437; Porter *v.* Woodruff, 36 N. J. Eq. 174; Staats *v.* Bergen, 17 N. J. Eq. 554.

New York.— Bain *v.* Brown, 56 N. Y. 285 [*affirming* 7 Lans. 506]; Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. 553.

North Carolina.— Deep River Gold Min. Co. *v.* Fox, 39 N. C. 61.

North Dakota.— Clendenning *v.* Hawk, 10 N. D. 90, 86 N. W. 114 (holding that where an agent is clothed with authority to lease land for his principal, such authority extends only to leasing to third persons, and a lease attempted to be made to himself in reliance on such agency is wholly unauthorized and without force or legal effect as a contract); Anderson *v.* Grand Forks First Nat. Bank, 5 N. D. 451, 67 N. W. 821.

Texas.— McMahan *v.* Alexander, 38 Tex. 135; Scott *v.* Mann, 36 Tex. 157; Shannon *v.* Marmaduke, 14 Tex. 217.

Vermont.— Noyes *v.* Landon, 59 Vt. 569, 10 Atl. 342; Davis *v.* Smith, 43 Vt. 269.

Virginia.—Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246; Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748; Segar *v.* Edwards, 11 Leigh 213.

Wisconsin.— Stewart *v.* Mather, 32 Wis. 344.

United States.— McKinley *v.* Williams, 74 Fed. 94, 20 C. C. A. 312 [*affirming* 65 Fed. 4]; Barker *v.* Marine Ins. Co., 2 Fed. Cas. No. 992, 2 Mason 369.

England.— De Bussche *v.* Alt, 8 Ch. D. 286, 3 Aspin. 384, 47 L. J. Ch. 381, 38 L. T. Rep. N. S. 370; Bentley *v.* Craven, 18 Beav. 75, 52 Eng. Reprint 29; Clarke *v.* Tipping, 9 Beav. 284, 50 Eng. Reprint 352; Reed *v.* Norris, 1 Jur. 233, 6 L. J. Ch. 197, 2 Myl. & C. 361, 14 Eng. Ch. 361, 40 Eng. Reprint 678; *Ex p.* Lacey, 6 Ves. Jr. 625, 6 Rev. Rep. 9, 31 Eng. Reprint 1228.

Canada.— Thompson *v.* Holman, 28 Grant Ch. (U. C.) 35; Sutherland *v.* Whidden, 3 Nova Scotia 410.

See 40 Cent. Dig. tit. "Principal and Agent," § 136.

The reason of the rule is that owing to the selfishness and greed of human nature there must in the great mass of transactions be a strong antagonism between the interests of the seller and buyer, and universal experience shows that the average man, when his interests conflict with his employer's, will not look upon his employer's interests as more important or entitled to more protection than his own. Porter *v.* Woodruff, 36 N. J. Eq. 174.

Principal's right to vendor's lien.—Where an agent employed to sell property fraudulently purchases the same for his own benefit, and thereafter with the profits of such fraudulent purchase pays for land conveyed to him by his principal, since the money so paid belongs to the principal, the price of the land will be considered unpaid, and the

the agency of a third person.[88] He must not, without his principal's knowledge and consent, become a partner or otherwise jointly interested in purchasing the property,[89] and in such case he is bound to disclose to his principal the exact nature of his interest in the purchase and all material facts connected therewith.[90] The mere fact of the purchase by the agent makes the contract *prima facie* voidable;[91] but since such sale is voidable only, it may be approved by the principal, and if he does not dissent no one else can object;[92] and if the agent buys the property

principal will have a lien therefor. Porter *v.* Woodruff, 36 N. J. Eq. 174.

If the agent to sell is surety for the principal, any claim he has on the property sold will continue, to the extent of his liability, when he has become the purchaser of such property. Walker *v.* Palmer, 24 Ala. 358.

The clerk of a broker employed to make a sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that if he becomes a purchaser he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land. Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192.

88. *Arkansas.*— Quertermous *v.* Taylor, 62 Ark. 598, 37 S. W. 229.

Colorado.— Webb *v.* Marks, 10 Colo. App. 429, 51 Pac. 518, holding that an agent who induces his principal by false statements as to value to sell and convey land to a third person for a sum much less than its true value is guilty of actual fraud which vitiates the whole transaction, where the grantee, without the principal's knowledge, holds the title in trust for the agent.

Georgia.— Hodgson *v.* Raphael, 105 Ga. 480, 30 S. E. 416.

Illinois.— Davis *v.* Hamlin, 108 Ill. 39, 48 Am. Rep. 541 (lease by agent held to inure to benefit of principal); Hughes *v.* Washington, 72 Ill. 84; Eldridge *v.* Walker, 60 Ill. 230; Pensonneau *v.* Bleakley, 14 Ill. 15; Off *v.* J. B. Inderrieden Co., 74 Ill. App. 105.

Maryland.— Prichard *v.* Abbott, 104 Md. 560, 65 Atl. 421.

Massachusetts.— George N. Pierce Co. *v.* Beers, 190 Mass. 199, 76 N. E. 603.

Michigan.— Moore *v.* Mandelbaum, 8 Mich. 433.

Missouri.— Euneau *v.* Rieger, 105 Mo. 659, 16 S. W. 854; Smith *v.* Tyler, 57 Mo. App. 668.

Montana.— Davis *v.* Davis, 9 Mont. 267, 23 Pac. 715.

New York.— Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Hinman *v.* Devlin, 31 N. Y. App. Div. 590, 52 N. Y. Suppl. 124.

Pennsylvania.— Rich *v.* Black, 173 Pa. St. 92, 33 Atl. 880.

Tennessee.— Armstrong *v.* Campbell, 3 Yerg. 201, 24 Am. Dec. 556, holding that where an agent authorized to sell lands sells the warrants of survey of such of the lands as cannot be discovered, and takes them back from the vendee and locates them in his own name, he cannot hold them against the principal.

Texas.— McMahan *v.* Alexander, 38 Tex. 135; Shannon *v.* Marmaduke, 14 Tex. 217.

Washington.— Anderson *v.* Lawler, 46 Wash. 543, 90 Pac. 913.

United States.— Moore *v.* Petty, 135 Fed. 668, 68 C. C. A. 306; Glover *v.* Ames, 8 Fed. 351; Cleveland Ins. Co. *v.* Reed, 5 Fed. Cas. No. 2,889, 1 Biss. 180, holding that where an agent, by virtue of a power of attorney, conveys the property of his principal and takes a conveyance to himself, and then mortgages it, such use of the power of attorney will not give him title as against his principal.

England.— Dunne *v.* English, L. R. 18 Eq. 524, 31 L. T. Rep. N. S. 75; Molony *v.* Kernan, 2 Dr. & War. 31; Murphy *v.* O'Shea, 8 Ir. Eq. 329, 2 J. & C. 422; Lowther *v.* Lowther, 13 Ves. Jr. 95, 33 Eng. Reprint 230.

Canada.— Taylor *v.* Wallbridge, 2 Can. Sup. Ct. 616 [*reversing* 1 Ont. App. 245 (*affirming* 23 Grant Ch. (U. C.) 496)]; McMillan *v.* Barton, 12 Can. L. T. Occ. Notes 407, 19 Ont. App. 602 [*affirmed* in 20 Can. Sup. Ct. 404]; Ingalls *v.* McLaurin, 11 Ont. 380; Upper Canada College *v.* Jackson, 3 Grant Ch. (U. C.) 171.

See 40 Cent. Dig. tit. "Principal and Agent," § 137.

89. *Colorado.*— Fisher *v.* Seymour, 23 Colo. 542, 49 Pac. 30.

Georgia.— Whitley *v.* James, 121 Ga. 521, 49 S. E. 600, holding that a conveyance by a selling agent to a corporation of which he is president and a stock-holder may be treated as void by his principal.

Illinois.— Hughes *v.* Washington, 72 Ill. 84; Robbins *v.* Butler, 24 Ill. 387, holding that where one having an interest in land gave his coöwner authority to sell, a sale by the coöwner to an association of which he was a member was void.

Kansas.— Fry *v.* Platt, 32 Kan. 62, 3 Pac. 781.

Massachusetts.— George N. Pierce Co. *v.* Beers, 190 Mass. 199, 76 N. E. 603.

Pennsylvania.— Finch *v.* Conrade, 154 Pa. St. 326, 26 Atl. 368.

England.— *Ex p.* Huth, 4 Deac. 294, Mont. & C. 667; Salomons *v.* Pender, 3 H. & C. 639, 11 Jur. N. S. 432, 39 L. J. Exch. 95, 12 L. T. Rep. N. S. 267, 13 Wkly. Rep. 637.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 136, 137.

90. Audenreid *v.* Walker, 11 Phila. (Pa.) 183.

91. Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203; Tilleny *v.* Wolverton, 46 Minn. 256, 48 N. W. 908.

92. Eastern Bank *v.* Taylor, 41 Ala. 93; Copeland *v.* Mercantile Ins. Co., 6 Pick.

openly and fairly on terms fixed by the principal, or fixed by the agent and accepted by the principal, with knowledge that the agent is the purchaser, the sale may be upheld.[93] But unless the principal consents to the agent becoming a purchaser with full knowledge of all the facts, or subsequently ratifies the transaction,[94] he may have the sale set aside and the property returned or reconveyed to him,[95] although the agent gave a full and valuable consideration for the property,[96] and although he was authorized to sell at a stipulated price and he bought at that price,[97] or if the agent has sold the property the principal may compel him to account for the proceeds,[98] or he may allow the transaction to stand and compel the agent to account for any profits he has made out of it.[99] The above rule, however,

(Mass.) 198; Mealor *v.* Kimble, 6 N. C. 272; Pridgen *v.* Adkins, 25 Tex. 388.

93. *California.*— Burke *v.* Bours, 98 Cal. 171, 32 Pac. 980.

Indiana.— Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203.

Nebraska.— Olson *v.* Lamb, 56 Nebr. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

Virginia.— Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748.

England.— *Ex p.* Lacey, 6 Ves. Jr. 625, 6 Rev. Rep. 9, 31 Eng. Reprint 1228.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 136, 137.

94. Jansen *v.* Williams, 36 Nebr. 869, 55 N. W. 279, 20 L. R. A. 207; Ruckman *v.* Bergholz, 37 N. J. L. 437. And see cases cited *supra*, notes 92, 93.

95. *California.*— Calmon *v.* Sarraille, 142 Cal. 638, 76 Pac. 486; Curry *v.* King, 6 Cal. App. 568, 92 Pac. 662.

Illinois.— Hughes *v.* Washington, 72 Ill. 84.

Indiana.— Sturdevant *v.* Pike, 1 Ind. 277, holding that if an agent appointed to sell and convey lands cause part of them to be conveyed to himself, a court of equity will, upon application within reasonable time by the heirs of the principal, decree reconveyance to them, unless the transaction is shown to have been ratified by the principal.

Iowa.— Ingle *v.* Hartman, 37 Iowa 274.

Missouri.— Euneau *v.* Rieger, 105 Mo. 659, 16 S. W. 854.

New York.— Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. 553.

Pennsylvania.— Rich *v.* Blaek, 173 Pa. St. 92, 33 Atl. 880.

England.— Bentley *v.* Craven, 18 Beav. 75, 52 Eng. Reprint 29; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C. 42, 3 Eng. Reprint 432; Brookman *v.* Rothschild. 7 L. J. Ch. O. S. 163, 3 Sim. 153, 30 Rev. Rep. 147, 6 Eng. Ch. 153, 57 Eng. Reprint 957 [*affirmed* in 5 Bligh N. S. 165, 5 Eng. Reprint 273, 2 Dow. & Cl. 188, 6 Eng. Reprint 699].

See 40 Cent. Dig. tit. "Principal and Agent," §§ 136, 137.

96. Pensonneau *v.* Bleakley, 14 Ill. 15.

97. *Minnesota.*— Tilleny *v.* Wolverton, 46 Minn. 256, 48 N. W. 908, holding that where an agent for the sale of property purchases it at a sale made by himself, the fact that it brought the price at which he was authorized to sell will not make the transaction valid.

New Jersey.— Ruckman *v.* Bergholz, 37 N. J. L. 437.

North Dakota.—Anderson *v.* Grand Forks First Nat. Bank, 5 N. D. 451, 67 N. W. 821, holding that the agent is liable for the value of the property at the time of the conversion irrespective of the price he was authorized to sell to a third person.

Pennsylvania.— Rich *v.* Black, 173 Pa. St. 92, 33 Atl. 880.

Virginia.— Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246.

Washington.— Chezum *v.* Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109, holding that a contract giving a person the exclusive sale of land for sixty days for six thousand dollars, and providing that he must get his commission above that sum, simply confers on such person the exclusive agency for the sale of the property, and does not entitle him to an option authorizing him to demand and receive a deed for himself.

See 40 Cent. Dig. tit. "Prineipal and Agent," §§ 136, 137.

Compare Synnott *v.* Shaughnessy, 2 Ida. (Hasb.) 111, 7 Pac. 82, holding that where an agent is authorized to sell at a fixed price with the understanding that he is to have all he can get above that price, he may purchase himself, and is under no obligation to disclose to his principal anything he may have discovered concerning the property after such arrangement is made.

Where a landowner gives a written option thereon for a given time at an agreed price to certain persons, whom he thereby constitutes his agents to sell on commission, the agents cannot buy for themselves at the priee named, since where such option papers are doubtful the law will not infer that the agent could himself become the purchaser. Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246.

98. Smitz *v.* Leopold, 51 Minn. 455, 53 N. W. 719; Tilleny *v.* Wolverton, 46 Minn. 256, 48 N. W. 908 (holding that if the agent resells at an increased price, the principal may require him to aecount for what he received on the resale); Rockford Watch Co. *v.* Manifold, 36 Nebr. 801, 35 N. W. 236; McMahan *v.* Alexander, 38 Tex. 135; Bentley *v.* Craven, 18 Beav. 75, 52 Eng. Reprint 29.

99. *Massachusetts.*— Pierce Co. *v.* Beers, 190 Mass. 199, 76 N. E. 603; Greenfield Sav. Bank *v.* Simons, 133 Mass. 415.

Michigan.— Moore *v.* Mandlebaum, 8 Mich. 433.

does not prevent an agent employed to sell the property at auction from making a bid for it on behalf of a third person;[1] nor does it prevent a *bona fide* purchaser of the property from afterward in good faith selling the property to the agent,[2] nor incapacitate the agent from becoming the purchaser after the agency has ceased.[3]

f. Purchasing Agent Must Not Purchase From Himself. For the same reason an agent authorized to purchase property for his principal must not, except with the principal's full knowledge and consent, purchase the property from himself either directly or indirectly;[4] and in accordance with this rule, an agent employed to purchase cannot purchase the property for himself and then resell it to the principal at an advance.[5] If the agent is guilty of wrong-doing in this respect the principal, when he acquires knowledge of the facts, may at his election avoid the transaction,[6] whether the agent acted fraudulently or not;[7] or he may compel

Missouri.— Smith *v.* Tyler, 57 Mo. App. 668.

New Jersey.— Porter *v.* Woodruff, 36 N. J. Eq. 174.

Virginia.—Segar *v.* Edwards, 11 Leigh 213.

England.—Dunn *v.* English, L. R. 18 Eq. 524, 31 L. T. Rep. N. S. 75.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 136, 137.

1. Scott *v.* Mann, 36 Tex. 157.

2. Moore *v.* Green, 3 B. Mon. (Ky.) 407; Smith *v.* Tyler, 57 Mo. App. 668.

3. O'Reiley *v.* Bevington, 155 Mass. 72, 29 N. E. 54; *Ex p.* Lacey, 6 Ves. Jr. 625, 6 Rev. Rep. 9, 31 Eng. Reprint 1228. And see *infra*, III, A, 1, h, k.

4. *Louisiana.*— Brownson *v.* Fenwick, 19 La. 431, holding that an agent to buy cannot purchase from himself in his personal capacity or as administrator of another's estate.

New Jersey.— Porter *v.* Woodruff, 36 N. J. Eq. 174.

New York.— Conkey *v.* Bond, 36 N. Y. 427 [*affirming* 34 Barb. 276]; Gould *v.* Gould, 36 Barb. 270.

North Carolina.— Deep River Gold Min. Co. *v.* Fox, 39 N. C. 61.

Texas.— Shannon *v.* Marmaduke, 14 Tex. 217.

United States.— Bischoffsheim *v.* Baltzer, 20 Fed. 890; Marye *v.* Strouse, 5 Fed. 483, 6 Sawy. 204.

England.— Bentley *v.* Craven, 18 Beav. 75, 52 Eng. Reprint 29.

Canada.— Harrison *v.* Harrison, 14 Grant Ch. (U. C.) 586.

See 40 Cent. Dig. tit. "Principal and Agent," § 139.

One having an option on corporate stock is such an owner thereof as to bring him within the rule that an agent to buy cannot purchase of himself. Montgomery *v.* Hundley, 205 Mo. 138, 103 S. W. 527, 11 L. R. A. N. S. 122.

5. *California.*— Kevane *v.* Miller, 4 Cal. App. 598, 88 Pac. 643.

Iowa.— Rorebeck *v.* Van Eaton, 90 Iowa 82, 57 N. W. 694, holding that where a person acting as the agent of another for the purchase of property represents that the owner demands a certain price, and purchases it for a less sum, and conveys the same to the principal for the larger sum, he is liable to the principal for the difference.

Massachusetts.— Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629.

New Jersey.— Wright *v.* Smith, 23 N. J. Eq. 106.

New York.— Willink *v.* Vanderveer, 1 Barb. 599; Manville *v.* Lawton, 19 N. Y. Suppl. 587.

Washington.— Hindle *v.* Holcomb, 34 Wash. 336, 75 Pac. 873.

England.— Bentinck *v.* Fenn, 12 App. Cas. 652, 57 L. J. Ch. 552, 57 L. T. Rep. N. S. 773, 36 Wkly. Rep. 641; Kimber *v.* Barber, L. R. 8 Ch. 56, 27 L. T. Rep. N. S. 526, 21 Wkly. Rep. 65.

Canada.— Earle *v.* Burland, 27 Ont. App. 540.

See 40 Cent. Dig. tit. "Principal and Agent," § 139.

6. *Colorado.*— Whitehead *v.* Lynn, 20 Colo. App. 51, 76 Pac. 1119.

Connecticut.— Disbrow *v.* Secor, 58 Conn. 35, 18 Atl. 981.

Kentucky.— Baird *v.* Ryan, 35 S. W. 132, 17 Ky. L. Rep. 1417.

Minnesota.— Donnelly *v.* Cunningham, 58 Minn. 376, 59 N. W. 1052; Friesenhahn *v.* Bushnell, 47 Minn. 443, 50 N. W. 597, holding that the principal may repudiate the purchase and recover the money furnished if the agents concealed from him the fact that they were owners of the land in which they invested.

Missouri.— Montgomery *v.* Hundley, 205 Mo. 138, 103 S. W. 527, 11 L. R. A. N. S. 122.

New York.— Conkey *v.* Bond, 36 N. Y. 427 [*affirming* 34 Barb. 276]; Darby *v.* Pettee, 2 Duer 139.

England.— Gillett *v.* Peppercorne, 3 Beav. 78, 43 Eng. Ch. 78, 49 Eng. Reprint 31; White *v.* Benekendorff, 29 L. T. Rep. N. S. 475; Tetley *v.* Shand, 25 L. T. Rep. N. S. 658, 20 Wkly. Rep. 206.

Canada.— Harrison *v.* Harrison, 14 Grant Ch. (U. C.) 586.

See 40 Cent. Dig. tit. "Principal and Agent," § 139.

7. *Minnesota.*— Donnelly *v.* Cunningham, 58 Minn. 376, 59 N. W. 1052.

Missouri.— Montgomery *v.* Hundley, 205 Mo. 138, 103 S. W. 527, 11 L. R. A. N. S. 122.

New York.— Conkey *v.* Bond, 36 N. Y. 427 [*affirming* 34 Barb. 276].

the agent to account for any excess he received above the real value of the property.[8] The distinction has been made that if an agent sells to his principal property which he owned or had contracted for before becoming agent, and the principal chooses to keep the property, he cannot compel the agent to refund the advance paid to the agent in excess of what the property cost him;[9] but that if the agent acquires the property for the express purpose of selling it to his principal at an advance, the principal may retain the property and compel the agent to account for the excess, and that it is immaterial to plaintiff's recovery in such case whether the agent contracted for the land before or after the principal agreed to purchase it.[10]

g. Purchasing Agent Must Not Purchase For Himself. Likewise an agent must not, without his principal's full knowledge and consent, purchase for himself property which he is employed to purchase for his principal.[11] If he does so it is a breach of faith and he will be regarded as holding the property so purchased, or its proceeds, in trust for his principal,[12] although he contributes his own funds to the purchase;[13] and he may be compelled to convey the property to his principal,[14] upon being reimbursed,[15] and upon the principal's complying with the terms of the contract of purchase.[16] Or if the agent has sold the property he may be com-

United States.— Marye *v.* Strouse, 5 Fed. 483, 6 Sawy. 204.

Canada.— Harrison *v.* Harrison, 14 Grant Ch. (U. C.) 586.

See 40 Cent. Dig. tit. "Principal and Agent," § 139.

8. Kevane *v.* Miller, 4 Cal. App. 598, 88 Pac. 643; Oliver *v.* Lansing, 48 Nebr. 338, 67 N. W. 195; Kimber *v.* Barber, L. R. 8 Ch. 56, 27 L. T. Rep. N. S. 526, 21 Wkly. Rep. 65; Massey *v.* Davies, 2 Ves. Jr. 317, 2 Rev. Rep. 218, 30 Eng. Reprint 651.

9. Whitehead *v.* Lynn, 20 Colo. App. 51, 76 Pac. 1119; Sunderland *v.* Kilbourn, 3 Mackey (D. C.) 506 [*affirmed* in 130 U. S. 505, 9 S. Ct. 594, 32 L. ed. 1005], holding that where A employed B to purchase land on commission, and B had previously negotiated for a purchase on his own account, and he completed the purchase and sold to A at an advance, not disclosing the fact that he was the owner, A, on discovering this, could not retain the property and recover the advance paid.

10. Hindle *v.* Holcomb, 34 Wash. 336, 75 Pac. 873.

11. McKinley *v.* Irvine, 13 Ala. 681; Rhea *v.* Puryear, 26 Ark. 344. And see cases cited *infra*, note 12 *et seq.*

12. *Alabama.*— McKinley *v.* Irvine, 13 Ala. 681.

Arkansas.— White *v.* Ward, 26 Ark. 445.

Connecticut.— Church *v.* Sterling, 16 Conn. 388, holding that an agent employed to purchase for another, whether he be actually or constructively an agent, cannot purchase for himself, but is a trustee for his employer.

Louisiana.— New Orleans Exch., etc., Co. *v.* Yorke, 4 La. Ann. 138.

Michigan.— Carroll *v.* McKale, 111 Mich. 348, 69 N. W. 644.

New Jersey.— Von Hurter *v.* Spengeman, 17 N. J. Eq. 185.

New York.— Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827, holding that where an agent purchases in his own name, with trust funds, the very property which his principal authorized him to purchase, the title is in the principal as soon as the purchase is made; and such title is not affected by the fact that the agent used the money furnished him for his own use, and purchased the property with money derived from other sources.

Pennsylvania.— Bergner *v.* Bergner, 219 Pa. St. 113, 67 Atl. 999.

United States.— Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475.

England.— Lees *v.* Nuttall, 2 Myl. & K. 819, 31 Rev. Rep. 99, 7 Eng. Ch. 819, 39 Eng. Reprint 1157 [*affirming* 1 Russ. & M. 53, 5 Eng. Ch. 53, 39 Eng. Reprint 21, Taml. 282, 12 Eng. Ch. 282, 48 Eng. Reprint 112].

Canada.— Williams *v.* Jenkins, 18 Grant Ch. (U. C.) 536; Arthurton *v.* Dalley, 2 Grant Ch. (U. C.) 1; *In re* Lemelin, 22 Quebec Super. Ct. 87.

See 40 Cent. Dig. tit. "Principal and Agent," § 140.

The principal must act within a reasonable time; and where he waited ten months the court held that the delay was unreasonable, and the agent had a right to repudiate the agency and hold the property as his own. Wenham *v.* Switzer, 51 Fed. 351 [*affirmed* in 59 Fed. 942, 8 C. C. A. 404].

Application of the statute of frauds to such trusts see FRAUDS, STATUTE OF, 20 Cyc. 234; TRUSTS.

13. Bergner *v.* Bergner, 219 Pa. St. 113, 67 Atl. 999; Oliven *v.* Kastor, (Tex. Civ. App. 1907) 101 S. W. 563.

14. Rhea *v.* Puryear, 26 Ark. 344; Quinn *v.* Le Duc, (N. J. Ch. 1902) 51 Atl. 199; Hutchinson *v.* Hutchinson, 4 Desauss. Eq. (S. C.) 77 (holding also that the fact that the principal failed to pay the purchase-money at the stipulated time will not forfeit his right to a conveyance from the agent); Wellford *v.* Chancellor, 5 Gratt. (Va.) 39 (holding that the property must be conveyed in the same plight and condition in which it was conveyed to the agent).

15. Quinn *v.* Le Duc, (N. J. Ch. 1902) 51 Atl. 199.

Right to reimbursement see *infra*, III, B, 3.

16. Wellford *v.* Chancellor, 5 Gratt. (Va.) 39.

pelled to account for the proceeds;[17] or the principal may, if he prefers, repudiate the transaction and throw the loss if any upon the agent.[18] The above rule is not affected by a custom or usage to the contrary of which the principal had no notice;[19] but it does not apply where the purchase is made in good faith after the agency has been terminated,[20] or where the agent has purchased for himself at a higher price after unsuccessful efforts to purchase for the principal at the price limited by the latter.[21]

h. Transactions Between Principal and Agent. As a general rule an agent is not permitted to enter into any transaction with his principal on his own behalf respecting the subject-matter of the agency, unless he acts with entire good faith and without any undue influence or imposition, and makes a full disclosure of all the facts and circumstances attending the transaction.[22] Since this rule, however, exists to protect the principal, it has no application to cases in which the agent openly and fairly deals with the principal, as in such cases an agent is as competent to deal with the principal as another.[23] However, because of possible abuses of the confidence and trust reposed in the agent, and of his commanding influence over the principal, and of the natural conflict of duty and interest in dealings between the principal and agent, the law views with suspicion, and scrutinizes closely, all dealings between them in the subject-matter of the agency, to see that

17. Wellford *v.* Chancellor, 5 Gratt. (Va.) 39, holding that where the agent had disposed of part of the property so that the principal could not obtain that part, the agent would be held to account for the same at its true value at the time when it should have been conveyed to the principal.

18. Robinson *v.* Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544 [*reversing* 20 Wkly. Rep. 544].

19. Robinson *v.* Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544 [*reversing* 20 Wkly. Rep. 544].

20. Lamb Knit-Goods Co. *v.* Lamb, 119 Mich. 568, 78 N. W. 646; Denver First Nat. Bank *v.* Bissell, 4 Fed. 694, 2 McCrary 273 (holding that an agent for the purchase of property cannot be declared a trustee for his principal where he repudiates the agency and purchases the property with his own funds); Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475 (holding this to be true where the agent has openly and notoriously and with full notice to his principal discharged himself from this agency). And see *infra*, III, A, 1, k.

21. Pearsall *v.* Hirsh, 59 N. Y. Super. Ct. 410, 14 N. Y. Suppl. 305, holding that, where an agent has used all reasonable efforts to obtain the property for his principal at the price limited without success, he has a right to purchase the same for himself at a larger sum, the contract of employment fixing the law of the case without regard to the fiduciary relations of the parties.

22. *California.*— Paige *v.* Akins, 112 Cal. 401, 44 Pac. 666; Burke *v.* Bours, 92 Cal. 108, 28 Pac. 57, (1891) 26 Pac. 102, 98 Cal. 171, 32 Pac. 980; Curry *v.* King, 6 Cal. App. 568, 92 Pac. 662.

District of Columbia.— Holtzman *v.* Linton, 27 App. Cas. 241.

Illinois.— McDonald *v.* Fithian, 6 Ill. 269.

Iowa.— Green *v.* Peeso, 92 Iowa 261, 60 N. W. 531.

Maryland.— Kerby *v.* Kerby, 57 Md. 345; Brooke *v.* Berry, 2 Gill 83, holding that agents are not permitted to deal with their principals in any case except where there is the most entire good faith, a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.

Michigan.— Moore *v.* Mandlebaum, 8 Mich. 433.

Missouri.— Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969.

New York.— Brown *v.* Post, 1 Hun 303 [*affirmed* in 62 N. Y. 651]; Comstock *v.* Comstock, 57 Barb. 453.

Vermont.— Hobart *v.* Vail, 80 Vt. 152, 66 Atl. 820.

Virginia.— Jackson *v.* Pleasanton, 95 Va. 654, 29 S. E. 680; Neilson *v.* Bowman, 29 Gratt. 732.

England.—Williamson *v.* Barbour, 9 Ch. D. 529, 50 L. J. Ch. 147, 37 L. T. Rep. N. S. 698; Selsey *v.* Rhoades, 2 Sim. & St. 41, 25 Rev. Rep. 150, 1 Eng. Ch. 41, 57, Eng. Reprint 260 [*affirmed* in 1 Bligh N. S. 1, 30 Rev. Rep. 1, 4 Eng. Reprint 774].

See 40 Cent. Dig. tit. "Principal and Agent," § 134.

Transactions which would be held unobjectionable between other parties are often declared void, if between persons occupying confidential relations. Comstock *v.* Comstock, 57 Barb. (N. Y.) 453.

23. *California.*— Burke *v.* Bours, 92 Cal. 108, 28 Pac. 57, (1891) 26 Pac. 102, 98 Cal. 171, 32 Pac. 980.

Indiana.— Haynie *v.* Johnson, 71 Ind. 394.

Iowa.— Swan *v.* Davenport, 119 Iowa 46, 93 N. W. 65.

Maryland.— Kerby *v.* Kerby, 57 Md. 345.

Missouri.— Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969.

Pennsylvania.— Aiman *v.* Stout, 42 Pa. St. 114; Fisher's Appeal, 34 Pa. St. 29; Audenreid *v.* Walker, 11 Phila. 183.

the agent has dealt with the utmost good faith and fairness, and that he has given the principal the benefit of all his knowledge and skill, and if it appears that the agent has been guilty of any concealment or unfairness, or if he has taken any advantage of his confidential relation, the transaction will not be allowed to stand.[24] It forms no exception to this rule that the agent had no authority to contract for his principal as to the subject-matter, but that he was merely employed to investigate or seek a person with whom the principal might deal.[25] But the fact that the agent was employed by the principal on one matter will not incapacitate him from dealing with the principal in another matter in which he was not so employed and trusted.[26] In accordance with the above rule all gifts procured by agents and purchases made by them from their principals should be closely scrutinized;[27] and an agent can purchase property from his principal only where he acts in good faith and makes a full disclosure of all facts within his knowledge affecting the value of the property.[28] If he does not make such disclosure or act in good faith, the

Virginia.— Jackson *v.* Pleasanton, 95 Va. 654, 29 S. E. 680; Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748.

See 40 Cent. Dig. tit. "Principal and Agent," § 134.

24. *Alabama.* — Whelan *v.* McCreary, 64 Ala. 319.

California.— Burke *v.* Bours, 92 Cal. 108, 28 Pac. 57, (1891) 26 Pac. 102, 98 Cal. 171, 32 Pac. 980.

Georgia.— Williams *v.* Moore-Gaunt Co., 3 Ga. App. 756, 60 S. E. 372, holding that a contract obtained by an agent from his principal through a violation of the loyalty and good faith imposed by that relation is void.

Illinois.— Prince *v.* Dupuy, 163 Ill. 417, 45 N. E. 298; Uhlich *v.* Muhlke, 61 Ill. 499; McDonald *v.* Fithian, 6 Ill. 269.

Iowa.— Drefahl *v.* Security Sav. Bank, 132 Iowa 563, 107 N. W. 179; Rogers *v.* French, 122 Iowa 18, 96 N. W. 767; Fisher *v.* Lee, 94 Iowa 611, 63 N. W. 442; Green *v.* Peeso, 92 Iowa 261, 60 N. E. 531; Smith *v.* Dell, 30 Iowa 594.

Michigan.— Moore *v.* Mandlebaum, 8 Mich. 433.

Mississippi.— Stokes *v.* Terrell, (1898) 23 So. 371.

Missouri.—Reed *v.* Carroll, 82 Mo. App. 102.

New York.— Comstock *v.* Comstock, 57 Barb. 453; Gould *v.* Gould, 36 Barb. 270, holding that where one holds funds as an agent with duties in the nature of a trust, although not technically a trustee, he falls within the suspected relation; and the law indulges the presumption of fraud against a release obtained by him from the actual owner, although such fraud is not visible to the eye of the court.

North Carolina.— Pegram *v.* Charlotte, etc., R. Co., 84 N. C. 696, 37 Am. Rep. 639.

North Dakota.— Van Dusen *v.* Bigelow, 13 N. D. 277, 100 N. W. 723, 67 L. R. A. 288.

Pennsylvania.— Audenreid *v.* Walker, 11 Phila. 183.

South Carolina.— Neely *v.* Anderson, 2 Strobh. Eq. 262; Poag *v.* Poag, 1 Hill Eq. 285.

Virginia.— Jackson *v.* Pleasanton, 95 Va. 654, 29 S. E. 680; Neilson *v.* Bowman, 29 Gratt. 732; Wellford *v.* Chancellor, 5 Gratt. 39; Moseley *v.* Buck, 3 Munf. 232, 5 Am. Dec. 508.

United States.— Ralston *v.* Turpin, 129 U. S. 663, 9 S. Ct. 420, 32 L. ed. 747 [*affirming* 25 Fed. 7]; McKinley *v.* Williams, 74 Fed. 94, 20 C. C. A. 312; Jeffries *v.* Wiester, 13 Fed. Cas. No. 7,254, 2 Sawy. 135.

Canada.—Disher *v.* Clarris, 14 Can. L. T. Occ. Notes 469, 25 Ont. 493; Walmsley *v.* Griffith, 10 Ont. App. 327.

See 40 Cent. Dig. tit. "Principal and Agent," § 134.

It is a well-settled rule of equity jurisprudence that all gifts, contracts, or benefits from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void. Comstock *v.* Comstock, 57 Barb. (N. Y.) 453.

Modification of contract.—After the agency has commenced and a fiduciary relation has been established, a modification of the contract at the instance of the agent and for his benefit, unless attended by the utmost good faith upon his part, will be invalid; and any misrepresentation made by the agent as to the subject of the agency to induce the principals to modify the contract in his favor is bad faith. Neilson *v.* Bowman, 29 Gratt. (Va.) 732.

Business dealings between a principal and his agent will be keenly scrutinized to prevent such relation being used as an instrument of extortion, speculation, or other unfair advantage. Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969.

Even after the confidential relation has been technically dissolved, dealings shortly thereafter growing out of the old relation are subject to the same scrutiny. Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969.

25. McDonald *v.* Fithian, 6 Ill. 269.

26. British America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147; Brown *v.* Brown, 154 Ill. 35, 39 N. E. 983; Collar *v.* Ford, 45 Iowa 331; Curlett *v.* Newman, 30 W. Va. 182, 3 S. E. 578; Waters *v.* Shaftesbury, 12 Jur. N. S. 311, 14 L. T. Rep. N. S. 184, 14 Wkly. Rep. 572 [*reversed* on other grounds in 15 L. T. Rep. N. S. 489, 15 Wkly. Rep. 289].

27. Comstock *v.* Comstock, 57 Barb. (N. Y.) 453.

28. *Illinois.*— Casey *v.* Casey, 14 Ill. 112.

Iowa.— Ingle *v.* Hartman, 37 Iowa 274.

principal may have the sale set aside,[29] and compel the agent to reconvey the property to him upon repayment of the purchase-money or of so much as has been paid,[30] and to account for the rents and profits received by him,[31] although the principal may allow the conveyance to stand and compel the agent to account to him for such profits as he may have made.[32] And where the consideration given by the agent is very inadequate, or less than the agent can actually procure for the principal,[33] or the agent conceals the fact that he is himself the purchaser,[34] or where the principal is infirm and of doubtful business capacity,[35] very slight circumstances will be enough to cause the court to set aside the dealings between the principal and agent. But where the agent makes a full disclosure of all the facts and acts honestly and in good faith, a purchase by him from his principal will be upheld;[36] and a deed of gift by the principal to the agent will be good, if there is no improper influence or conduct on the part of the agent in procuring it.[37]

i. Acquisition of Adverse Right or Title[38] — (i) *In General.* Good faith and loyalty to his principal's interest also require that an agent shall not use his position or information obtained by him during the course of his agency to acquire for himself, without the principal's knowledge and consent, any adverse right, title,

Michigan.— Moore *v.* Mandlebaum, 8 Mich. 433.

New York.— Brown *v.* Post, 1 Hun 303 [*affirmed* in 62 N. Y. 651].

South Carolina.— Butler *v.* Haskell, 4 Desauss. Eq. 651.

See 40 Cent. Dig. tit. "Principal and Agent," § 135.

Certainty of disclosure.—Where an agent buys land from the principal, and the transaction has remained unchallenged for a number of years, and the value of real estate has fluctuated from time to time, resulting in a final increase, it is sufficient for the agent to show, as regards the original price paid by him, with certainty to a common intent that it was fair and equitable. Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203.

29. Moore *v.* Mandlebaum, 8 Mich. 433; Condit *v.* Blackwell, 22 N. J. Eq. 481; Neely *v.* Anderson, 2 Strobh. Eq. (S. C.) 262; Moseley *v.* Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508.

30. Savage *v.* Savage, 12 Oreg. 459, 8 Pac. 754; Moseley *v.* Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508, upon repayment of the purchase-money or so much as has been paid with interest.

Right to reimbursement see *infra*, III, B, 3.

31. Fisher *v.* Lee, 94 Iowa 611, 63 N. W. 442; Moseley *v.* Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508.

32. Stoner *v.* Weiser, 24 Iowa 434; Kramer *v.* Winslow, 130 Pa. St. 484, 18 Atl. 923, 17 Am. St. Rep. 782; Bell *v.* Bell, 3 W. Va. 183.

33. *Iowa.*— Fisher *v.* Lee, 94 Iowa 611, 63 N. W. 442; Green *v.* Pecso, 92 Iowa 261, 60 N. W. 531; Ingle *v.* Hartman, 37 Iowa 274; Smith *v.* Dell, 30 Iowa 594.

Oregon.— Savage *v.* Savage, 12 Oreg. 459, 8 Pac. 754.

Pennsylvania.— Kramer *v.* Winslow, 130 Pa. St. 484, 18 Atl. 923, 17 Am. St. Rep. 782.

South Carolina.— Neely *v.* Anderson, 2 Strobh. Eq. 262; Butler *v.* Haskell, 4 Desauss. Eq. 651.

Virginia.— Jackson *v.* Pleasanton, 95 Va. 654, 29 S. E. 680; Moseley *v.* Buck, 3 Munf. 232, 5 Am. Dec. 508, holding that where an agent employed to sell land becomes himself the purchaser by bargain directly with his employer, from whom he conceals the fact that a greater price may be gotten from another person, he is guilty of a fraud, and the contract should be vacated.

West Virginia.— Bell *v.* Bell, 3 W. Va. 183.

United States.— Jeffries *v.* Wiester, 13 Fed. Cas. No. 7,254, 2 Sawy. 135.

See 40 Cent. Dig. tit. "Principal and Agent," § 135.

34. Burke *v.* Bours, 92 Cal. 108, 28 Pac. 57, (1891) 26 Pac. 102, 98 Cal. 171, 32 Pac. 980; Schneider *v.* Schneider, 125 Iowa 1, 98 N. W. 159.

35. Brooke *v.* Berry, 2 Gill (Md.) 83; Reed *v.* Carroll, 82 Mo. App. 102; Neely *v.* Anderson, 2 Strobh. Eq. (S. C.) 262; Butler *v.* Haskell, 4 Desauss. Eq. (S. C.) 651.

36. Burke *v.* Bours, 92 Cal. 108, 28 Pac. 57 (1891) 26 Pac. 102, 98 Cal. 171, 32 Pac. 980; Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203; Haynie *v.* Johnson, 71 Ind. 394; Fisher's Appeal, 34 Pa. St. 29.

Where the agent deals with the principal at arm's length and after a full disclosure of all that he knows concerning the property which he is authorized to sell, or where the principal ratifies the purchase by the agent from himself, with full knowledge of all the circumstances connected with the transaction, he can thereafter avoid the sale only upon the same grounds as if the purchase had been made by a stranger. Burke *v.* Bours, 92 Cal. 108, 28 Pac. 57, (1891) 26 Pac. 102, 98 Cal. 171, 32 Pac. 980.

37. Ralston *v.* Turpin, 129 U. S. 663, 9 S. Ct. 420, 32 L. ed. 747 [*affirming* 25 Fed. 7]; Harris *v.* Trenenhecre, 15 Ves. Jr. 34, 10 Rev. Rep. 5, 33 Eng. Reprint 668; Trusts, etc., Co. *v.* Hart, 32 Can. Sup. Ct. 553 [*affirming* 2 Ont. L. Rep. 251 (*reversing* 31 Ont. 414)].

38. **Adverse possession by agent against principal** see ADVERSE POSSESSION, 1 Cyc. 1056.

or interest in the subject-matter of the agency,[39] as that he shall not acquire for himself during the course of his agency in relation thereto any adverse right or title to the principal's property,[40] although he purchases such title at a judicial sale;[41] and that he shall not acquire for himself any outstanding claims or liens against such property.[42] If he does so, all rights, title, or interests thus acquired inure to the benefit of the principal and the agent will be held to hold them as trustee for the latter,[43] and may be compelled to transfer them to the prin-

39. *California.*— Gower *v.* Andrew, 59 Cal. 119, 43 Am. Rep. 242.

Illinois.— Davis *v.* Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Cottom *v.* Holliday, 59 Ill. 176.

Kansas.— Russell *v.* Bradley, 47 Kan. 438, 28 Pac. 176.

Louisiana.—McClendon *v.* Bradford, 42 La. Ann. 160, 7 So. 78, 8 So. 256.

Missouri.— Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304; Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024.

Montana.— Largey *v.* Bartlett, 18 Mont. 265, 44 Pac. 962.

Nebraska.— Morrison *v.* Hunter, 74 Nebr. 559, 105 N. W. 88.

Utah.— Argentine Min. Co. *v.* Benedict, 18 Utah 183, 55 Pac. 559.

Virginia.— Staples *v.* Webster, 5 Call 261.

Canada.— Telfer *v.* Brown, 19 Can. L. T. 232.

See 40 Cent. Dig. tit. "Principal and Agent," § 141.

Where there is no relation of agency the prohibition does not apply. Carter *v.* Jolly, 22 S. W. 747, 15 Ky. L. Rep. 217. And where one purchases property at a judicial sale at which the owner is present, it will not be presumed that he purchased as the owner's agent, without strong testimony. Evans *v.* Rogers, 2 Nott & M. (S. C.) 563.

40. *Arkansas.*— Rogers *v.* Lockett, 28 Ark. 290.

Colorado.—Fisher *v.* Seymour, 23 Colo. 542, 49 Pac. 30.

Idaho.— Lockhart *v.* Rollins, 2 Ida. 540, 21 Pac. 413.

Illinois.— Vallette *v.* Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502; Stewart *v.* Duffy, 116 Ill. 47, 6 N. E. 424 (holding that the agent must secure the consent of the principal before he can buy in an outstanding interest against the principal's property); Dennis *v.* McCagg, 32 Ill. 429.

Michigan.— Moore *v.* Mandlebaum, 8 Mich. 433.

North Carolina.— Blount *v.* Robeson, 56 N. C. 73.

Texas.— Barziza *v.* Story, 39 Tex. 354, holding that if an agent employed to buy up an encumbrance to perfect title to his principal takes a deed in his own name, he takes no title as against his principal.

United States.— Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Ringo *v.* Binns, 10 Pet. 269, 9 L. ed. 420.

See 40 Cent. Dig. tit. "Principal and Agent," § 141.

41. *Alabama.*—Adams *v.* Sayre, 70 Ala. 318, holding that an agent in charge of real estate, renting it, paying taxes and insurance, and having power to sell, cannot himself become the purchaser at a sale under a mortgage, and hold it against his principal.

Illinois.— Hays *v.* Beaird, 59 Ill. App. 529.

Indiana.— Fountain Coal Co. *v.* Phelps, 95 Ind. 271.

Kentucky.— Dodge *v.* Black, 53 S. W. 1039, 21 Ky. L. Rep. 992.

Michigan.— Kimball *v.* Ranney, 122 Mich. 160, 80 N. W. 992, 80 Am. St. Rep. 548, 46 L. R. A. 403.

Mississippi.— Gillenwaters *v.* Miller, 49 Miss. 150.

Missouri.— Jamison *v.* Glascock, 29 Mo. 191, applying the rule to a creditor who had accepted a trust by becoming agent of the debtor to dispose of property to pay the debts.

New York.— Moore *v.* Moore, 5 N. Y. 256.

United States.— Aultman *v.* Jones, 2 Fed. Cas. No. 657, Woolw. 99.

See 40 Cent. Dig. tit. "Principal and Agent," § 143.

A mere formal surrender of the agency is not sufficient to give the agent the right to purchase his principal's property at a sheriff's sale. Fountain Coal Co. *v.* Phelps, 95 Ind. 271.

42. Marshall *v.* Ferguson, 78 Mo. App. 645; James *v.* McKernon, 6 Johns. (N. Y.) 543; Reed *v.* Warner, 5 Paige (N. Y.) 650. *Compare* Low *v.* Graydon, 50 Barb. (N. Y.) 414.

43. *Alabama.*— Houston *v.* Farris, 93 Ala. 587, 11 So. 330.

Idaho.— Lockhart *v.* Rollens, 2 Ida. (Hasb.) 540, 21 Pac. 413.

Illinois.— Vallette *v.* Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502; Davis *v.* Hamlin, 108 Ill. 39, 48 Am. Rep. 541.

Kentucky.— Dodge *v.* Black, 53 S. W. 1039, 21 Ky. L. Rep. 992. *Compare* Craig *v.* Craig, 6 J. J. Marsh. 171, holding that an agent buying property of his principal at a sale under execution does not hold it as pledgee.

Michigan.— Kimball *v.* Ranney, 122 Mich. 760, 80 N. W. 992, 46 L. R. A. 403, holding that the owner's laches in bringing suit did not estop him from making a claim that the agent held as trustee for his benefit.

Missouri.— Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304.

New York.— Parkist *v.* Alexander, 1 Johns. Ch. 394.

United States.— Aultman *v.* Jones, 2 Fed. Cas. No. 657, Woolw. 99.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 141–143.

That the agent gave the principal notice that he would purchase the property at a foreclosure sale thereof to protect his inter-

cipal,[44] and account to him for all profits and benefits gained thereby,[45] although he will be entitled to repayment of so much of the purchase-money as he has paid out of his own funds,[46] and to reimbursement for expenses necessarily incurred in the protection or preservation of the property,[47] and for useful improvements to the extent to which they enhance the value of the property.[48] The principal, however, may permit the agent to hold the property thus purchased and claim from him the value of the principal's interest in money.[49] The above principles apply, although the title asserted by the principal is insufficient, and that purchased by the agent is paramount,[50] and although the rights of the principal were about to expire.[51]

(II) *ACQUISITION OF TAX TITLE.* In accordance with the above rules an agent in charge of his principal's lands for the purpose of paying taxes, etc., cannot acquire a valid title to such lands by becoming a purchaser at a tax-sale thereof,[52]

ests, a prospective commission, does not change this rule. Kimball *v.* Ranney, 122 Mich. 160, 80 N. W. 992, 46 L. R. A. 403.

44. Erwin *v.* Duplessis, 11 La. 543; Schedda *v.* Sawyer, 21 Fed. Cas. No. 12,443, 4 McLean 181.

45. Dodge *v.* Black, 53 S. W. 1039, 21 Ky. L. Rep. 992 (must account for rents); Hobson *v.* Peake, 44 La. Ann. 383, 10 So. 762; Schedda *v.* Sawyer, 21 Fed. Cas. No. 12,443, 4 McLean 181.

46. *Indiana.*— Ridenour *v.* Wherritt, 30 Ind. 485, holding that the principal cannot take the benefit of the purchase without an offer to pay the agent.

Iowa.— Continental L. Ins. Co. *v.* Perry, 65 Iowa 709, 22 N. W. 937, holding, however, that an agent holding a tax certificate for his principal cannot be allowed to take and hold a tax deed as against him, on account of the negligence of the principal in reimbursing him, unless the agent has made a full and fair statement to his principal of the account between them and the amount necessary to reimburse him.

Louisiana.— Erwin *v.* Duplessis, 11 La. 543.

New York.— Reed *v.* Warner, 5 Paige 650, holding, however, that where a debtor employs an agent to effect a compromise with his creditors, such agent cannot purchase a debt against his principal for his own benefit; and that, although the principal neglects to reimburse the agent for the amount paid by him in purchasing the debts of the principal, such agent is entitled to hold the claims so purchased only for the amount paid and a reasonable compensation for his services.

Pennsylvania.— Grant *v.* Seitsinger, 2 Penr. & W. 525, holding, however, that an agent buying his principal's note at a discount is not entitled to charge full price in settling.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 141–143.

The agent may buy claims to protect the principal, and in such case he acquires a right to collect the note secured by the mortgage which he buys and has discharged. Thus where purchasers of land retained part of the consideration to pay off liens reported by their attorney, who subsequently, discovering another lien, purchased the same with his own money, such attorney was not estopped by reason of his confidential relation to deny payment of such claim by the money so retained, but was entitled to recover the same in an action against the vendor. Flick *v.* Stauffer, 97 Va. 649, 34 S. E. 476. So an agent may purchase a lien upon the property of his principal and enforce it for the purpose of securing the repayment of the purchase-money. Spring Garden *v.* Blight, 1 Phila. (Pa.) 553.

Right to reimbursement see *infra*, III, B, 3.

47. Hobson *v.* Peake, 44 La. Ann. 383, 10 So. 762.

Right to reimbursement see *infra*, III, B, 3.

48. Hobson *v.* Peake, 44 La. Ann. 383, 10 So. 762.

Right to reimbursement see *infra*, III, B, 3.

49. Houston *v.* Farris, 93 Ala. 587, 11 So. 330.

50. Hardenbergh *v.* Bacon, 33 Cal. 356 (holding that it is enough that the principal asserts a claim to or interest in the property, without regard to the sufficiency of the title); Lockhart *v.* Rollins, 2 Ida. (Hasb.) 540, 21 Pac. 413; Dennis *v.* McCagg, 32 Ill. 429.

51. Gower *v.* Andrew, 59 Cal. 119, 43 Am. Rep. 242 (holding that an agent who in the course of his agency learns the value of a lease which is about to expire and which the principal seeks to renew will be compelled to transfer to his principal a lease on the same property which he procures for himself); Davis *v.* Hamlin, 108 Ill. 39, 48 Am. Rep. 541 (holding that where the confidential agent of a theater manager uses his position to ascertain the profits of the business and secretly overbids his principal and secures for himself a lease of the theater, equity will regard the lease as taken for the principal's benefit).

52. *Arkansas.*— Collins *v.* Rainey, 42 Ark. 531. But *compare* Pack *v.* Crawford, 29 Ark. 489, holding that the mere fact that a purchaser of land at a tax-sale was, during the life of the deceased owner, his attorney in some suits, does not cast on him the duty of paying the taxes or redeeming the land, or affect his right to purchase.

Florida.— McRae *v.* Preston, 54 Fla. 190, 44 So. 946.

Illinois.— Gonzalia *v.* Bartelsman, 143 Ill.

except where the agency has been first terminated.[53] A title so acquired, however, is voidable only, and the agent is entitled upon being compelled to give up such title to receive from the principal the amount paid therefor,[54] and reimbursement for expenditures necessary to protect the principal's interests in the land, with interest thereon,[55] except that the rule requiring reimbursement does not apply where the agent is in receipt of rents from the property sufficient to pay the taxes,[56] nor in any case unless the agent by a proper showing places the court in a position that it may do complete equity by its decree.[57]

j. Acting For Both Parties. As a general rule an agent cannot act as such for both parties to the same transaction in matters which involve the exercise of discretion, where the interests of the parties are conflicting,[58] unless he does so

634, 32 N. E. 532; Barton *v.* Moss, 32 Ill. 50; Stanley *v.* McConnell, 64 Ill. App. 591.

Iowa.— Ellsworth *v.* Cordrey, 63 Iowa 675, 16 N. W. 211; Bowman *v.* Officer, 53 Iowa 640, 6 N. W. 28 [*distinguishing* Eckrote *v.* Meyers, 41 Iowa 324].

Kansas.— Woodman *v.* Davis, 32 Kan. 344, 4 Pac. 262; Fisher *v.* Krutz, 9 Kan. 501; Krutz *v.* Fisher, 8 Kan. 90.

Kentucky.— Oldhams *v.* Jones, 5 B. Mon. 458; Page *v.* Webb, 7 S. W. 308, 9 Ky. L. Rep. 868.

Maine.— Matthews *v.* Light, 32 Me. 305.

Missouri.— Murdoch *v.* Milner, 84 Mo. 96.

Pennsylvania.— Huzzard *v.* Trego, 35 Pa. St. 9; Myer's Appeal, 2 Pa. St. 463 (holding that if the general agent of heirs purchases the land of their ancestor from the vendee at a tax-sale, instead of redeeming the land, it inures to the benefit of the heirs); Bartholemew *v.* Leech, 7 Watts 472.

South Dakota.— Bush *v.* Froelich, 14 S. D. 62, 84 N. W. 230.

West Virginia.— Siers *v.* Wiseman, 58 W. Va. 340, 52 S. E. 460; Curtis *v.* Borland, 35 W. Va. 124, 12 S. E. 1113 (holding that a purchase of land at a delinquent sale by the agent of the owner, in whom he had confided and whose duty it was to purchase in the land for the owner, operates only as a payment of the taxes, and such purchaser acquires no rights, as against the owner of the land, by neglecting his duty to the owner, and buying the same for himself); Franks *v.* Morris, 9 W. Va. 664.

Wisconsin.— Walworth County Bank *v.* Wis. 663, 75 N. W. 429; Fox *v.* Zimmermann, 77 Wis. 414, 46 N. W. 533, where he has rents in his hands sufficient to pay the taxes.

United States.— Curts *v.* Cisna, 6 Fed. Cas. No. 3,507, 7 Biss. 260.

See 40 Cent. Dig. tit. "Principal and Agent," § 144.

An agent of a mortgagee cannot in his own name, or in the interest of his wife, undermine the security taken, by a purchase of the mortgaged property at tax-sale. Abrams *v.* Wingo, (Kan. App. 1900) 59 Pac. 661. Where an agent is to pay taxes on mortgaged property for the mortgagee, and has money of the latter with which to do it, he cannot acquire a tax title as against the mortgagee. Young *v.* Iowa Toilers' Protective Assoc., 106 Iowa 447, 76 N. W. 822.

An indirect sale through a third person is subject to the same infirmity. Geisinger *v.* Beyl, 80 Wis. 443, 50 N. W. 501.

The presumption is, where a person buys at a tax-sale for himself and also acts in some purchases as the agent of another, that the purchases made in his own name and upon which he takes the certificates are made for himself, not for his principal. Smith *v.* Stephenson, 45 Iowa 645.

53. Bemis *v.* Plato, 119 Iowa 127, 93 N. W. 83; Bartholemew *v.* Leach, 7 Watts (Pa.) 472 (holding that an agent for unseated lands cannot be a purchaser of them at a tax-sale unless he previously and explicitly renounces the agency); McMahon *v.* McGraw, 26 Wis. 614 (holding that an agent in respect to lands cannot acquire a tax title thereto as against his principal, unless he first distinctly notify the principal that he renounces the agency); Fleming *v.* McNabb, 8 Ont. App. 656. And see *infra*, III, A, 1, k.

54. Ellsworth *v.* Cordrey, 63 Iowa 675, 16 N. W. 211.

Right of reimbursement see *infra* III, B, 3.

55. Dana *v.* Duluth Trust Co., 99 Wis. 663, 75 N. W. 429.

Right of reimbursement see *infra* III, B, 3.

56. Dana *v.* Duluth Trust Co., 99 Wis. 663, 75 N. W. 429.

57. Dana *v.* Duluth Trust Co., 99 Wis. 663, 75 N. W. 429.

58. *Colorado.*— British America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147.

Georgia.— Fitzsimmons *v.* Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577.

Iowa.— Morey *v.* Laird, 108 Iowa 670, 77 N. W. 835, holding that an agent who acts for two principals must exercise the utmost good faith to each, and if he cannot do so he should at once end the agency.

Louisiana.—Shepherd *v.* Lanfear, 5 La. 336, 25 Am. Dec. 181 (holding, however, that if the same agent be appointed for two persons whose interests clash he may choose to act for one of them); Florance *v.* Adams, 2 Rob. 556, 38 Am. Dec. 226.

Massachusetts.— Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168.

Michigan.— Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541; Moore *v.* Mandlebaum, 8 Mich. 433.

Mississippi.— Wildberger *v.* Hartford F. Ins. Co., 72 Miss. 338, 17 So. 282, 48 Am. St. Rep. 558, 28 L. R. A. 220.

Missouri.— Atlee *v.* Fink, 75 Mo. 100, 43 Am. Rep. 385; Winter *v.* Carey, 127 Mo. App.

with the knowledge and consent of both;[59] and if he does so he is chargeable as trustee for all the profits of the transaction,[60] and is responsible to his principal for a loss thereby incurred,[61] and can recover no compensation from either party.[62] The above rule applies notwithstanding the agent acts in good faith and no harm comes to the principal objecting;[63] but it does not enable the agent to shield himself from liability to his second principal by setting up his agency for the first.[64] In accordance with the above rule, one cannot act as agent for both buyer and seller in the same transaction, since it is to the interest of the vendor to secure the highest price and the purchaser to pay the least, and the agent thereby puts himself into a conflicting position.[65] But since the reason underlying the rule is the fact of the agent being in a position in which he has a tendency

601, 106 S. W. 539; Carr *v.* Ubsdell 97 Mo. App. 326, 71 S. W. 112; Robinson *v.* Jarvis, 25 Mo. App. 421.

New York.— Empire State Ins. Co. *v.* American Cent. Ins. Co., 138 N. Y. 446, 34 N. E. 200 [*affirming* 64 Hun 485, 19 N. Y. Suppl. 504]; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 14 N. Y. 85; Utica Ins. Co. *v.* Toledo Ins. Co., 17 Barb. 132 (holding that a person cannot act as the agent of both parties in the making of a contract, where he is invested with a discretion by each, and where each is entitled to the benefit of his skill and judgment); Dunlop *v.* Richards, 2 E. D. Smith 181; Vanderpoel *v.* Kearns, 2 E. D. Smith 170.

Pennsylvania.— Everhart *v.* Searle, 71 Pa. St. 256.

Rhode Island.— Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458.

Virginia.— Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 337, 40 L. R. A. 234.

Wisconsin.— Dana *v.* Duluth Trust Co., 99 Farmers' L. & T. Co., 16 Wis. 629.

See 40 Cent. Dig. tit. "Principal and Agent," § 146.

To be secretly in the service of one party, while ostensibly acting solely for the opposite party, is a fraud upon the latter, and a breach of public morals which the law will not permit. Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 337, 40 L. R. A. 234. And see *infra*, 1501 note 74.

59. Ramspeck *v.* Pattillo, 104 Ga. 772, 30 S. E. 962, 69 Am. St. Rep. 197, 42 L. R. A. 197; Meyer *v.* Hanchett, 39 Wis. 419, 43 Wis. 246; and cases cited *supra*, note 58.

60. Smith *v.* Tyler, 57 Mo. App. 668.

If a pledgor makes the pledgee his agent to sell the property pledged, and the pledgee then becomes the agent of the purchaser, he commits a fraud on the pledgor, and is bound to pay him all that he received from the purchaser for acting on his behalf. Hunsaker *v.* Sturgis, 29 Cal. 142.

61. Hunsaker *v.* Sturgis, 29 Cal. 142.

62. See *infra*, III, B, 2, d, (III).

63. *Colorado.*— British America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147, in which it is pointed out that if an agent of two adverse principals is honest, the utmost he can do is to be impartial; but impartiality is exactly the qualification which is inconsistent with agency; the agent is chosen to be a partisan of his principal, not an impartial arbitrator between him and someone else.

Illinois.— Black *v.* Miller, 71 Ill. App. 342 [*reversed* on other grounds in 173 Ill. 489, 50 N. E. 1009].

Missouri.— Winter *v.* Carey, 127 Mo. App. 601, 106 S. W. 539; Harper *v.* Fidler, 105 Mo. App. 680, 78 S. W. 1034; Reese *v.* Garth, 36 Mo. App. 641; De Steiger *v.* Hollington, 17 Mo. App. 382.

New York.— Greenwood *v.* Spring, 54 Barb. 375.

West Virginia.— Truslow *v.* Parkersburg Bridge, etc., R. Co., 61 W. Va. 628, 57 S. E. 51.

64. Pungs *v.* American Brake-Beam Co., 200 Ill. 306, 65 N. E. 645 [*affirming* 102 Ill. App. 76]; Cottom *v.* Holliday, 59 Ill. 176.

65. *Illinois.*— Cottom *v.* Holliday, 59 Ill. 176.

Michigan.— Leathers *v.* Canfield, 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33; Moore *v.* Mandlebaum, 8 Mich. 433.

Minnesota.— Webb *v.* Paxton, 36 Minn. 532, 32 N. W. 749, holding that where real estate is placed in the hands of a person to sell as agent for the owner, although the price and terms of sale are fixed by the owner himself, it is incompatible with the agent's duty to his principal to accept employment as agent also of the purchaser, which would render it to his interest to sell only to one who would give him such double employment to the exclusion of other persons.

Missouri.— Smith *v.* Tyler, 57 Mo. App. 668.

New York.— Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. 553.

Pennsylvania.— Addison *v.* Wanamaker, 185 Pa. St. 536, 39 Atl. 1111; Rice *v.* Davis, 136 Pa. St. 439, 20 Atl. 513, 20 Am. St. Rep. 931; Everhart *v.* Searle, 71 Pa. St. 256; Lightcap *v.* Nicola, 34 Pa. Super. Ct. 189; Wireman's Estate, 7 Pa. Dist. 759.

Rhode Island.— Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458.

Wisconsin.— Shirland *v.* Monitor Iron Works Co., 41 Wis. 162.

United States.— Kilbourn *v.* Sunderland, 130 U. S. 505, 9 S. Ct. 594, 32 L. ed. 1005 [*affirming* 3 Mackey (D. C.) 506]; Donovan *v.* Campion, 85 Fed. 71, 29 C. C. A. 30.

An agent of the vendor may act as agent of the vendee to accept delivery of the property sold. Colwell *v.* Keystone Iron Co., 36 Mich. 51.

One who conducts a sale under a trust deed as agent of the trustee may buy as agent of the purchaser. Union Planters' Bank *v.* Ed-

to act in bad faith toward one or both of his principals,[66] there is no legal objection to such double employment if both principals fully understand the situation and consent thereto.[67] However, the presumption is that inconsistent duties have been assumed by the double agency,[68] and it must appear that both principals are fully informed of every fact material to their interests, and that they freely consent.[69] An exception to the general rule exists, however, where the interests of the two principals are not conflicting and loyalty by the agent to one of them is not a breach of his duty to the other,[70] as where the agent exercises no discretion in the matter, but acts merely to bring the parties together, and they themselves settle the terms of the agreement between them.[71] Furthermore, the rule does not disqualify one who is agent of one party for a certain purpose from acting as agent for an adverse party for an entirely different purpose.[72]

k. Dealings After Termination of Agency. The above rules as to good faith and loyalty do not apply after the agency has been fully terminated. As a general rule, after one has performed his office as agent or has in good faith severed his relation as agent, he is free to take up negotiations for his own interest, and can act adversely to his former principal as fully as any other person.[73] Because of

gell, (Miss. 1903) 33 So. 409; Dunton *v.* Sharpe, 70 Miss. 850, 12 So. 800.

66. Carr *v.* Ubsdell, 97 Mo. App. 326, 71 S. W. 112.

67. *California.*— Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98.

Georgia.— Ramspeck *v.* Patillo, 104 Ga. 772, 30 S. E. 962, 69 Am. St. Rep. 197, 42 L. R. A. 197; Croghan *v.* New York Underwriters' Agency, 53 Ga. 109; Fitzsimmons *v.* Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577.

Michigan.— Adams Min. Co. *v.* Senter, 26 Mich. 73.

Missouri.— Robinson *v.* Jarvis, 25 Mo. App. 421; De Steiger *v.* Hollington, 17 Mo. App. 382.

New York.— Joslin *v.* Cowee, 56 N. Y. 626.

Pennsylvania.— Patterson *v.* Van Loon, 186 Pa. St. 367, 40 Atl. 495.

68. Jones *v.* Draper, 26 Ohio Cir. Ct. 785.

69. Jones *v.* Draper, 26 Ohio Cir. Ct. 785; Marshall *v.* Reed, 32 Pa. Super. Ct. 60, holding that where one acts in a dual capacity as agent for two separate employers, nothing less than clear proof of consent of both employers, not merely to double service but to the double compensation, will suffice to validate an express contract with the second employer.

70. *Georgia.*— Todd *v.* German-American Ins. Co., 2 Ga. App. 789, 59 S. E. 94.

Massachusetts.—Smith *v.* Moore, 134 Mass. 405.

Missouri.— Stone *v.* Slattery, 71 Mo. App. 442; Casey *v.* Donovan, 65 Mo. App. 521.

Ohio.— Nolte *v.* Hulbert, 37 Ohio St. 445.

Vermont.— Williams *v.* Baldwin, 7 Vt. 503.

Wisconsin.— Herman *v.* Martineau, 1 Wis. 151, 60 Am. Dec. 368.

71. *Indiana.*— Alexander *v.* Northwestern Christian University, 57 Ind. 466.

Massachusetts.— Rupp *v.* Sampson, 16 Gray 398, 77 Am. Dec. 416; Bayley *v.* Bryant, 24 Pick. 198.

Michigan.— Ranney *v.* Donovan, 78 Mich. 318, 44 N. W. 276; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541.

New York.— Siegal *v.* Gould, 7 Lans. 177.

Texas.— Blair *v.* Baird, 43 Tex. Civ. App. 134, 94 S. W. 116.

Wisconsin.—Barry *v.* Schmidt, 57 Wis. 172, 15 N. W. 24, 46 Am. Rep. 35; Herman *v.* Martineau, 1 Wis. 151, 60 Am. Dec. 368.

Canada.— White *v.* Curry, 39 U. C. Q. B. 569.

72. Hinckley *v.* Arey, 27 Me. 362 (holding that while, in making a composition of a debt, the same man cannot be the agent of both parties, yet when the composition is agreed upon by the agent of the debtor with the creditor, such agent can act as agent for the creditor for another and a distinct purpose, viz., to receive from the debtor the sum agreed upon); Stoddert *v.* Port Tobacco Parish, 2 Gill & J. (Md.) 227; Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. (Miss.) 340, 41 Am. Dec. 592 (holding that the master and crew of a boat before a loss occurs are agents of the owners of the cargo, but after a loss they are agents of the insurers of the cargo); Williams *v.* Baldwin, 7 Vt. 502.

73. *Alabama.*—McKinley *v.* Irvine, 13 Ala. 681.

Illinois.— Bucher *v.* Bucher, 86 Ill. 377; Walker *v.* Carrington, 74 Ill. 446; New Era Gas Fuel Appliance Co. *v.* Shannon, 44 Ill. App. 477, in which the agent's right is said to justify him in carrying with him into a new employment all the skill and knowledge acquired in previous engagements, and nothing but an express contract will debar him from so doing, and then only under the strict rules established to protect trade secrets.

Indiana.— Fountain Coal Co. *v.* Phelps, 95 Ind. 271.

Iowa.— Rathke *v.* Tyler, 136 Iowa 284, 111 N. W. 436 (holding that where an agent purchased land from his principal, and made a payment thereon, and the next day sold the land at a substantial advance, he is not liable to account for the principal for the profit realized, as the agency was terminated by the sale to the agent); Collar *v.* Ford, 45

the previous trust relations, however, equity will subject such transactions to a rigorous examination to see that the former agent did not abuse his position of trust and influence, or in any way fail in his attitude as agent during the agency; [74] and an agent cannot terminate the agency in order to take advantage of his principal's condition or of information resulting from his agency.[75]

l. Duty to Notify Principal of Material Facts.[76] Loyalty to his principal's interests also requires that an agent should make known to his principal every material fact concerning the subject-matter of his agency that comes to his knowledge or is in his memory in the course of his agency; [77] and if he fails to do so he

Iowa 331 (holding that an agent employed to sell lands may abandon his character of agent and negotiate directly for the purchase of the property himself, and in such case he is not bound to disclose the value thereof and pay full value therefor to his former principal).

Maryland.— Schwartze *v.* Yearly, 31 Md. 270; Peters *v.* Speights, 4 Md. Ch. 375.

Massachusetts.— O'Reily *v.* Bevington, 155 Mass. 72, 29 N. E. 54.

Michigan.— Lamb Knit-Goods Co. *v.* Lamb, 119 Mich. 568, 78 N. W. 646, holding that an agent who has done his full duty in making a purchase for his principal at the lowest possible price cannot be required to deliver to the principal property received from the seller after the termination of the agency.

Missouri.— Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024.

South Carolina.— Foster *v.* Calhoun, Dudley 75.

Texas.— Pridgen *v.* Adkins, 25 Tex. 388.

United States.—Robertson *v.* Chapman, 152 U. S. 673, 14 S. Ct. 741, 38 L. ed. 592; Havana City R. Co. *v.* Ceballos, 131 Fed. 381 [*affirmed* in 139 Fed. 538, 71 C. C. A. 326]; Proctor, etc., Co. *v.* Mahin, 93 Fed. 875 (holding that an agent who has ceased to represent his principal and gone into the same line of business for himself may lawfully solicit the future business of his former principal's customers); Denver First Nat. Bank *v.* Bissell, 4 Fed. 694, 2 McCrary 73; Walker *v.* Derby, 29 Fed. Cas. No. 17,068, 5 Biss. 134 (holding that the agency of a real estate agent and his duty to his principal cease upon delivery of the title papers and payment for the property, and thereafter he may deal with the property as any other person; and the agency is not continued by the fact that notes for the unpaid price and a mortgage securing the same were left with the agent in escrow to await the delivery of a quitclaim deed from a third person which the vendor was to furnish).

England.— Reuter's Telegram Co. *v.* Byron, 43 L. J. Ch. 661; Shaw *v.* Davis, 3 L. T. Rep. N. S. 135, holding that, although it was questionable conduct, the law did not forbid an agent to purchase a house for which his principal had been negotiating the very day the principal ceased his effort. See Nichol *v.* Martyn, 2 Esp. 732, 5 Rev. Rep. 770, holding that a servant, while in his master's service, may solicit business from his customers for himself when his services are at an end and he sets up on his own account, provided the orders he takes at the time are for his master.

Canada.— Fleming *v.* McNabb, 8 Ont. App. 656.

See 40 Cent. Dig. tit. "Principal and Agent," § 145. And see *supra* III, A, 1, e, g, i, (II).

While good faith requires a fiduciary to serve alone the interest of his correlate, as in the case of principal and agent, in the subject of the employment, the termination of such interest ends all duty and leaves him free to serve himself or others, provided he has done nothing during the continuance of such interest to lay a foundation for future advantage to himself at the expense of his principal's rights. Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024.

74. Teakle *v.* Bailey, 23 Fed. Cas. No. 13,811, 2 Brock. 43; Lamb *v.* Evans, [1893] 1 Ch. 218, 62 L. J. Ch. 404, 68 L. T. Rep. N. S. 131, 2 Reports 189, 41 Wkly. Rep. 405; Loog *v.* Bean, 26 Ch. D. 306, 48 J. P. 708, 53 L. J. Ch. 1128, 51 L. T. Rep. N. S. 442, 32 Wkly. Rep. 994, denying an agent's right after his discharge to receive and use information contained in a letter addressed to him about his principal's business. See Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024.

75. Means *v.* Ross, 106 La. 175, 30 So. 300 (holding that, although the principals had failed, the agents could not terminate the agency and become the employees of a third person to the contract between them and their principals); Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024; Blount *v.* Robeson, 56 N. C. 73.

76. **Notice to agent as notice to principal** see *infra*, III, E, 4.

77. *Maine.*—Comings *v.* Stuart, 22 Me. 110.

Minnesota.— Snell *v.* Goodlander, 90 Minn. 533, 97 N. W. 421; Hegenmyer *v.* Marks, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

Nebraska.— Pringle *v.* Modern Woodmen of America, 76 Nebr. 384, 107 N. W. 756, 113 N. W. 231; Modern Woodmen of America *v.* Colman, 68 Nebr. 660, 94 N. W. 814, 96 N. W. 154; Jansen *v.* Williams, 36 Nebr. 869, 55 N. W. 279, 20 L. R. A. 207.

New York.— Edmonstone *v.* Hartshorn, 19 N. Y. 9.

Pennsylvania.— Clark *v.* Wheeling Bank, 17 Pa. St. 322; Devall *v.* Burbridge, 4 Watts & S. 305; Moore *v.* Thompson, 9 Phila. 164.

West Virginia.—Dorr *v.* Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348, holding that neither agents nor subagents can withhold from the principal information acquired

is liable in damages to his principal for any injury incurred or loss suffered in consequence of such failure,[78] although it has been held that by so doing the agent makes the obligation or claim his own on which he is liable to the principal as the third person would have been.[79]

2. Duty To Obey — a. In General. It is the duty of an agent whose authority is limited by instructions to adhere faithfully thereto,[80] regardless of his own opinion as to their propriety or expediency,[81] and if he exceeds, violates, or neglects such instructions he will be liable to the principal for any loss or damage resulting therefrom.[82] In so far as the agent is invested with discretionary powers he is

by them in the exercise of such agency and use the same to extort an increased compensation, or to coerce the principal into a contract he would not enter into on full examination.

Canada.— Machar *v.* Vandewater, 26 Grant Ch. (U. C.) 83, distinguishing between the disclosure necessary by a vendor in selling his own stock, and that required of the same person when he becomes agent of the vendee to procure shares from others.

See 40 Cent. Dig. tit. "Principal and Agent," § 79.

Failure to notify principal evidence of fraud.— The failure of an agent for plaintiff in an exchange of land with M, wherein plaintiff assumed a mortgage on M's land securing a note indorsed by the agent, to inform plaintiff that he was indorser on the note, while evidence of fraud in connection with other matters, does not as matter of law establish it. Beatty *v.* Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893.

78. Norris *v.* Tayloe, 49 Ill. 17, 95 Am. Dec. 568; Clark *v.* Wheeling Bank, 17 Pa. St. 322; Devall *v.* Burbridge, 4 Watts & S. (Pa.) 305; Arrott *v.* Brown, 6 Whart. (Pa.) 9 [*affirming* 1 Miles 137], 6 Watts & S. 402; Moore *v.* Thompson, 9 Phila. (Pa.) 164; Rogers *v.* Bradford, 1 Pinn. (Wis.) 418.

The measure of damages for an agent failing to keep his principal informed of all material facts is to be proportioned to the actual loss sustained by the principal. Arrott *v.* Brown, 6 Whart. (Pa.) 9 [*affirming* 1 Miles 137], 6 Watts & S. 402.

79. Harvey *v.* Turner, 4 Rawle (Pa.) 223, holding that an agent selling goods of his principal on credit, taking a note, giving his principal notice of the sale, and crediting him with the amount, renders himself responsible for the whole amount of the debt by omitting to give his principal notice of the non-payment of the note at maturity; and the principal need not prove that he has sustained any damage thereby. See Arrott *v.* Brown, 6 Whart. (Pa.) 9 [*affirming* 1 Miles 137], 6 Watts & S. 402, holding that where an agent by his information transmitted induced the principal to rely upon an outstanding claim, whereby loss is suffered, the agent adopts the claim as his own.

80. *Georgia.*— Hardeman *v.* Ford, 12 Ga. 205.

Illinois.— Dazey *v.* Roleau, 111 Ill. App. 367.

Massachusetts.— Whitney *v.* Merchants' Union Express Co., 104 Mass. 152, 6 Am. Rep. 207.

Missouri.— Rechtscherd *v.* St. Louis Accommodation Bank, 47 Mo. 181; Switzer *v.* Connett, 11 Mo. 88; Marshall *v.* Ferguson, 94 Mo. App. 175, 67 S. W. 935.

New York.— Minneapolis Trust Co. *v.* Mather, 181 N. Y. 205, 73 N. E. 987 [*reversing* 90 N. Y. App. Div. 361, 85 N. Y. Suppl. 510]; Stone *v.* Hays, 3 Den. 575 [*affirming* 7 Hill 128].

Pennsylvania.— Wilson *v.* Wilson, 26 Pa. St. 393.

Tennessee.— Walker *v.* Walker, 5 Heisk. 425.

Virginia.— Howatt *v.* Davis, 5 Munf. 34, 7 Am. Dec. 681.

Wisconsin.— Hall *v.* Storrs, 7 Wis. 253.

United States.— Brown *v.* McGran, 14 Pet. 479, 10 L. ed. 550; Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549.

England.— Smart *v.* Sandars, 3 C. B. 380, 10 Jur. 841, 16 L. J. C. P. 39, 54 E. C. L. 380.

See 40 Cent. Dig. tit. "Principal and Agent," § 91 *et seq.*

The only exceptions to this rule are said to be cases of extreme necessity arising from an unforeseen emergency, where performance becomes impossible and where the instructions would require a breach of law or morals. Rechtscherd *v.* St. Louis Accommodation Bank, 47 Mo. 181; Wilson *v.* Wilson, 26 Pa. St. 383. See *infra*, III, A, 2, d.

Instructions need not be in the form of a command in order to make it the duty of the agent to obey, but the expression of a wish or request may be sufficient as an order or command. British-American Ins. Co. *v.* Wilson, 77 Conn. 559, 60 Atl. 293; Wilson *v.* Wilson, 26 Pa. St. 393; Brown *v.* McGran, 14 Pet. (U. S.) 479, 10 L. ed. 550.

81. Coker *v.* Ropes, 125 Mass. 577.

82. *Alabama.*—Adams *v.* Robinson, 65 Ala. 586.

Connecticut.— British-American Ins. Co. *v.* Wilson, 77 Conn. 559, 60 Atl. 293.

Florida.— Oxford Lake Line *v.* Pensacola First Nat. Bank, (1898) 24 So. 480.

Georgia.— Hardeman *v.* Ford, 12 Ga. 205.

Illinois.— Dazey *v.* Roleau, 111 Ill. App. 367.

Indiana.—Welsh *v.* Brown, 8 Ind. App. 421, 35 N. E. 921.

Louisiana.— Keane *v.* Branden, 12 La. Ann. 20; Lowe *v.* Bell, 6 La. Ann. 28; Vigers *v.* Kilshaw, 13 La. 438; Passano *v.* Acosta, 4 La. 26, 23 Am. Dec. 470; Madeira *v.* Townsley, 12 Mart. 84.

Massachusetts.— Whitney *v.* Merchant's

only required to act according to the best of his judgment for the interest of his principal, and in the absence of negligence or bad faith he will not be liable;[83] but if the instructions are direct and positive the agent has no discretion,[84] and his motives in departing therefrom are not material,[85] and it will not affect his liability that he did so in good faith for what he believed to be the advantage of the principal.[86] The liability of the agent arises from an omission to perform as

Union Express Co., 104 Mass. 152, 6 Am. Rep. 207.

Minnesota.— Lake City Flouring-Mill Co. *v.* McVean, 32 Minn. 301, 20 N. W. 233.

Missouri.— Butts *v.* Phelps, 79 Mo. 302; Rechtscherd *v.* St. Louis Accommodation Bank, 47 Mo. 181; Switzer *v.* Connett, 11 Mo. 88; Marshall *v.* Ferguson, 94 Mo. App. 175, 67 S. W. 935.

Nebraska.—Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226; Unland *v.* McCormack Harvesting Mach. Co., 54 Nebr. 364, 74 N. W. 629; McCormick Harvesting Mach. Co. *v.* Carpenter, 1 Nebr. (Unoff.) 273, 95 N. W. 617.

New York.— Minneapolis Trust Co. *v.* Mather, 181 N. Y. 205, 73 N. E. 987 [*reversing* 90 N. Y. App. Div. 361, 85 N. Y. Suppl. 510]; Harrison *v.* Glover, 72 N. Y. 451 [*reversing* 9 Hun 196, 4 Hun 121]; Scott *v.* Rogers, 31 N. Y. 676; Blot *v.* Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Bruce *v.* Davenport, 36 Barb. 349 [*reversed* on other grounds in 1 Abb. Dec. 233, 2 Keyes 472, 3 Transcr. App. 82, 5 Abb. Pr. N. S. 185]; Clarke *v.* Meigs, 10 Bosw. 337; Stone *v.* Hayes, 3 Den. 575 [*affirming* 7 Hill 128]; Foster *v.* Preston, 8 Cow. 198; Leverick *v.* Meigs, 1 Cow. 645; Rundle *v.* Moore, 3 Johns. Cas. 36.

Pennsylvania.— Paul *v.* Grimm, 183 Pa. St. 330, 38 Atl. 1006; Wilson *v.* Wilson, 26 Pa. St. 393; Eicholz *v.* Fox, 12 Phila. 382.

South Carolina.— Holmes *v.* Misroon, 1 Treadw. 21.

Tennessee.— Walker *v.* Walker, 5 Heisk. 425.

Texas.—Kerr *v.* Cotton, 23 Tex. 411; Urquhart *v.* Saner, (Civ. App. 1906) 94 S. W. 902, 96 S. W. 939.

Virginia.— Howatt *v.* Davis, 5 Munf. 34, 7 Am. Dec. 681.

Wisconsin.— Hall *v.* Storrs, 7 Wis. 253.

United States.— Bowerman *v.* Rogers, 125 U. S. 585, 8 S. Ct. 986, 31 L. ed. 815; Scanlan *v.* Hodges, 52 Fed. 354, 3 C. C. A. 113; Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549; Short *v.* Skipwith, 22 Fed. Cas. No. 12,809, 1 Brock. 104; Walker *v.* Smith, 28 Fed. Cas. No. 17,086, 4 Dall. (Pa.) 389, 1 L. ed. 878, 1 Wash. 152.

England.—Michael *v.* Hart, [1901] 2 K. B. 867, 70 L. J. K. B. 1000, 85 L. T. Rep. N. S. 548, 17 L. T. R. 761, 50 Wkly. Rep. 154; Pape *v.* Westacott, [1894] 1 Q. B. 272, 63 L. J. Q. B. 222, 70 L. T. Rep. N. S. 18, 9 Reports 55, 42 Wkly. Rep. 131; Lilley *v.* Doubleday, 7 Q. B. D. 510, 46 J. P. 708, 51 L. J. Q. B. 310, 44 L. T. Rep. N. S. 814; Smart *v.* Sanders, 3 C. B. 380, 16 L. J. C. P. 39, 10 Jur. 841; Corlett *v.* Gordon, 3 Campb. 472, 14 Rev. Rep. 813.

Canada.—Sutherland *v.* Cox, 8 Can. L. T. 35; Holmes *v.* Thompson, 38 U. C. Q. B. 292.

See 40 Cent. Dig. tit. "Principal and Agent," § 95.

Where a principal places money in the hands of an agent to pay a debt when ordered, it remains in the hands of the agent subject to the orders of the principal, and if he refuses to obey such orders he becomes liable to an action for the amount remaining in his hands (Henry County *v.* Allen, 50 Mo. 231); and if a principal gives an agent money to invest in certain goods and he invests it in an unauthorized manner, the principal may sue for and recover the amount placed in his hands (Safford *v.* Kinsley, 40 Vt. 506).

An agent to sell who is instructed not to sell for less than a certain price will be liable for the full amount so fixed if he sells for a less price. Reynolds *v.* Rogers, 63 Mo. 17; Guy *v.* Oakley, 13 Johns. (N. Y.) 332.

83. *Alabama.*— McLaughlin *v.* Simpson, 3 Stew. & P. 85.

Connecticut.— Judson *v.* Sturges, 5 Day 556.

Georgia.— Brown *v.* Clayton, 12 Ga. 564.

Michigan.—Kaempfer *v.* Lindsay, 121 Mich. 425, 80 N. W. 107.

South Carolina.— Willson *v.* Imperial Fertilizer Co., 67 S. C. 467, 46 S. E. 279; Nixon *v.* Bogin, 26 S. C. 611, 2 S. E. 302.

England.— Pariente *v.* Lubbock, 20 Beav. 588, 52 Eng. Reprint 731 [*affirmed* in 8 De G. M. & G. 15, 57 Eng. Ch. 5, 44 Eng. Reprint 290]; Bromley *v.* Coxwell, 2 B. & P. 438, 5 Rev. Rep. 648.

Canada.— Markle *v.* Thomas, 13 U. C. Q. B. 321.

Alternative acts.— Where an agent is appointed to do one of several acts in the alternative, and in his opinion it is impossible to perform the first, he may then perform the secondary act (Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71); but where there is an imperative order to purchase goods of one of two different descriptions and the only discretion of the agent is as to their selection, he will be liable if he does not purchase either (Heinemann *v.* Heard, 50 N. Y. 27 [*reversing* 58 Barb. 524]).

Liability for negligence sec *infra*, III, A, 3.

84. Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549.

85. Switzer *v.* Connett, 11 Mo. 88; Walker *v.* Walker, 5 Heisk. (Tenn.) 425; Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549.

Fraud on the part of the agent is not necessary in order to charge him with liability for a failure to obey instructions. Heinemann *v.* Heard, 50 N. Y. 27 [*reversing* 58 Barb. 524].

86. Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480; Hardeman *v.* Ford, 12 Ga. 205; Dazey *v.* Roleau,

well as from a positive departure from instructions,[87] but he will not be liable if his performance was contingent upon the fulfilment of certain conditions on the part of the principal which the latter failed to perform.[88] If the agency is gratuitous the agent will not be liable for a non-feasance if he never entered upon the service expected of him; [89] but if he does undertake the service he must perform it according to the principal's instructions and will be liable for a failure to do so.[90] Deviations from instructions cannot be justified on the ground that they were not material if the principal in giving the instructions regarded them as material; [91] and if there is a clear violation of instructions the principal has a right of action and is entitled to at least nominal damages.[92] Where actual damages have been sustained the measure of damages is compensation for the loss actually sustained by the principal from the agent's violation of instructions,[93] and exemplary damages should not be awarded.[94] A violation of instructions will defeat the agent's right to recover commissions [95] or losses which he may himself have sustained in the transaction in question,[96] and also constitutes a breach of contract for which he may be discharged from his employment by the principal.[97]

b. Disobedience as a Conversion. The most usual remedies of a principal against his agent for a violation of instructions are an action of assumpsit and an action on the case;[98] but the instructions of the principal may be violated in such a manner as to amount to a conversion,[99] and authorize an action of

111 Ill. App. 367; Switzer *v.* Connett, 11 Mo. 88.

87. Magnolia Metal Co. *v.* Sterlingworth Railway-Supply Co., 33 N. Y. App. Div. 633, 53 N. Y. Suppl. 490.

88. Rice *v.* Montgomery, 20 Fed. Cas. No. 11,753, 4 Biss. 75.

89. Thorne *v.* Deas, 4 Johns. (N. Y.) 84. See also Marshall *v.* Ferguson, 94 Mo. App. 175, 67 S. W. 935.

90. *Louisiana.*— Passano *v.* Acosta, 4 La. 26, 23 Am. Dec. 470.

Maryland.— Williams *v.* Higgins, 30 Md. 404.

Missouri.— Marshall *v.* Ferguson, 94 Mo. App. 175, 67 S. W. 935.

Pennsylvania.— Opie *v.* Serrill, 6 Watts & S. 264.

United States.— Walker *v.* Smith, 28 Fed. Cas. No. 17,086, 4 Dall. (Pa.) 389, 1 L. ed. 878, 1 Wash. 152.

Relinquishing a commission to which an agent would have been entitled will not release him from liability for a loss caused by a violation of instructions. Walker *v.* Smith, 28 Fed. Cas. No. 17,086, 4 Dall. (Pa.) 389, 1 L. ed. 878, 1 Wash. 152.

91. Wilson *v.* Wilson, 26 Pa. St. 393.

If an agent undertakes to judge that he may innocently depart from the instructions of his principal, and that the variation would not be material, he does so at his peril. Parkist *v.* Alexander, 1 Johns. Ch. (N. Y.) 394.

92. Adams *v.* Robinson, 65 Ala. 586; Marshall *v.* Ferguson, 94 Mo. App. 175, 67 S. W. 935.

93. Ryder *v.* Thayer, 3 La. Ann. 149; George *v.* McNeill, 7 La. 124, 26 Am. Dec. 498; Birdsell Mfg. Co. *v.* Brown, 96 Mich. 213. 55 N. W. 801; Minneapolis Trust Co. *v.* Mather, 181 N. Y. 205, 73 N. E. 987 [*reversing* 90 N. Y. App. Div. 361, 85 N. Y. Suppl. 510]; Hope *v.* Lawrence, 50 Barb. (N. Y.) 258; Bell *v.* Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606.

94. Ryder *v.* Thayer, 3 La. Ann. 149; Bell *v.* Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606.

95. See *infra*, III, B, 2.

96. See *infra*, III, B, 3.

97. See *supra*, I, G, 1, b, (II).

98. McMorris *v.* Simpson, 21 Wend. (N. Y.) 610.

99. *Kansas.*— Guernsey *v.* Davis, 67 Kan. 378, 73 Pac. 101.

Minnesota.— Chase *v.* Baskerville, 93 Minn. 402, 101 N. W. 950.

Missouri.— Marshall *v.* Ferguson, 94 Mo. App. 175, 67 S. W. 935.

New York.— Comley *v.* Dazian, 114 N. Y. 161, 21 N. E. 135; Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

England.— Syeds *v.* Hay, 4 T. R. 260, 2 Rev. Rep. 377; Tickel *v.* Short, 2 Ves. Sr. 239, 28 Eng. Reprint 154.

See 40 Cent. Dig. tit. "Principal and Agent," § 148.

Violations constituting a conversion.—An agent is liable for a conversion where he is intrusted with property to sell at a price to be approved by his principal, and he sells without such approval (Comley *v.* Dazian, 114 N. Y. 161, 21 N. E. 135); where he is instructed to sell goods at a certain price on a certain day and if not so sold to ship them to a certain place, and he sells them upon the following day (Scott *v.* Rogers, 31 N. Y. 676); where, on being authorized to negotiate a note, he is instructed not to part with the note until he gets the money, and he delivers the note to a third person, and such person discounts it and appropriates the proceeds (Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184); where the owner of goods on a vessel instructs the captain not to land them on the wharf against which the vessel is moored, and the captain disobeys the order and delivers the goods into the possession of the wharfinger (Syeds *v.* Hay, 4 T. R. 260, 2 Rev. Rep. 377); or where an agent is

trover.[1] A wrongful or fraudulent intent on the part of the agent is not a necessary element of a conversion,[2] but it is sufficient if the principal has been deprived of his property by the act of the agent in assuming an unauthorized dominion and control over it.[3] It is not, however, every violation of instructions through which a loss occurs entitling the principal to damages which will amount to a conversion,[4] but ordinarily there must be an entire departure from his authority;[5] and if the agent has done what he was authorized to do but merely violated some instruction, such as in regard to the terms of sale or manner of disposing of the proceeds, it will not amount to a conversion.[6] The distinction between the two classes of cases is technical and in some cases difficult to determine, but it exists,[7] and is important as it affects the nature of the remedy and the measure of the recovery.[8] In cases of violation of instructions not amounting to a conversion, the proper remedy is not trover but an action on the case,[9] and the measure of damages is the loss actually sustained by reason of the agent's misconduct.[10]

c. Where Instructions Are Ambiguous.[11] If the instructions of a principal to his agent are ambiguous or capable of different constructions, the agent is not chargeable with disobedience or its consequences in case he makes an honest mistake and adopts a construction different from that intended by the principal,[12] and in such cases the loss if any must fall upon the principal rather than the

given a horse with instructions to sell it, and he exchanges it for another horse (Ainsworth *v.* Partillo, 13 Ala. 460).

1. Chase *v.* Baskerville, 93 Minn. 402, 101 N. W. 950; Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184; Syeds *v.* Hay, 4 T. R. 260, 2 Rev. Rep. 377.

2. Marshall *v.* Ferguson, 94 Mo. App. 175, 67 S. W. 935; Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

3. Chase *v.* Baskerville, 93 Minn. 402, 101 N. W. 950; Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

4. Knapp *v.* Sioux Falls Nat. Bank, 5 Dak. 378, 40 N. W. 587; Minneapolis Trust Co. *v.* Mather, 181 N. Y. 205, 73 N. E. 987 [*reversing* 90 N. Y. App. Div. 361, 85 N. Y. Suppl. 510]; Wolfe *v.* Brouwer, 5 Rob. (N. Y.) 601; McMorris *v.* Simpson, 21 Wend. (N. Y.) 610; Sarjeant *v.* Blunt, 16 Johns. (N. Y.) 74; Cairnes *v.* Bleecher, 12 Johns. (N. Y.) 300; Palmer *v.* Jarmain, 2 M. & W. 282; Dufresne *v.* Hutchinson, 3 Taunt. 117.

Violations not amounting to conversion.— An agent authorized to sell goods is not guilty of a conversion because he sells them at a price less than that stipulated by the principal (Moore *v.* McKibbin, 33 Barb. (N. Y.) 246; Sarjeant *v.* Blunt, 16 Johns. (N. Y.) 74; Dufresne *v.* Hutchinson, 3 Taunt. 117); nor is an agent who is given a bill of exchange with instructions to have it discounted and apply the proceeds in a particular way, where he has it discounted as authorized but misapplies a portion of the proceeds (Palmer *v.* Jarmain, 2 M. & W. 282); and where an agent was authorized to deliver goods only upon receiving sufficient security, and they were delivered upon an inadequate security, it was held that the agent was not liable for a conversion as the sufficiency of the security was a matter resting within his judgment (Cairnes *v.* Bleecher, 12 Johns. (N. Y.) 300).

5. McMorris *v.* Simpson, 21 Wend. (N. Y.) 610.

6. Minneapolis Trust Co. *v.* Mather, 181 N. Y. 205, 73 N. E. 987 [*reversing* 90 N. Y. App. Div. 361, 85 N. Y. Suppl. 510]; Moore *v.* McKibbin, 33 Barb. (N. Y.) 246; Palmer *v.* Jarmain, 2 M. & W. 282.

7. Minneapolis Trust Co. *v.* Mather, 181 N. Y. 205, 73 N. E. 987 [*reversing* 90 N. Y. App. Div. 361, 85 N. Y. Suppl. 510]; Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

The result of the authorities has been said to be that if the agent parts with the property in a way or for a purpose not authorized he is liable for a conversion, but if he parts with it in accordance with his authority, although at a less price, or misapplies the proceeds or takes an inadequate security, he is not liable for a conversion of the property but only in an action on the case for misconduct. Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

8. Minneapolis Trust Co. *v.* Mather, 181 N. Y. 205, 73 N. E. 987 [*reversing* 90 N. Y. App. Div. 361, 85 N. Y. Suppl. 510].

9. Sarjeant *v.* Blunt, 16 Johns. (N. Y.) 74; Cairnes *v.* Bleecher, 12 Johns. (N. Y.) 300; Dufresne *v.* Hutchinson, 3 Taunt. 117.

10. Minneapolis Trust Co. *v.* Mather, 181 N. Y. 205, 73 N. E. 987 [*reversing* 90 N. Y. App. Div. 361, 85 N. Y. Suppl. 510].

11. **Construction of letters or powers of attorney** see *supra*, II, B, 2.

12. *Iowa.*— Minnesota Linseed Oil Co. *v.* Montague, 65 Iowa 67, 21 N. W. 184.

Nebraska.— Falsken *v.* Falls City State Bank, 71 Nebr. 29, 98 N. W. 425.

North Carolina.— Bessent *v.* Harris, 63 N. C. 542.

North Dakota.—Anderson *v.* Grand Forks First Nat. Bank, 4 N. D. 182, 59 N. W. 1029.

South Carolina.— Holmes *v.* Misroon, 1 Treadw. 21.

Vermont.— Pickett *v.* Pearsons, 17 Vt. 470.

United States.— Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549.

England.— Boden *v.* French, 10 C. B. 886, 70 E. C. L. 886.

agent;[13] but the agent is not under such circumstances at liberty to disregard the instructions entirely and substitute therefor his own judgment, but must follow one of the interpretations reasonably derivable from the terms of the instructions.[14]

d. Cases of Emergency. In cases of necessity arising from a sudden emergency the conditions may be such as not only to justify but to require a deviation by the agent from his previous instructions,[15] or from the customs and usages of the particular agency.[16] In such case if the agent does what he deems best for the interests of the principal in the exercise of a sound discretion he will not be liable,[17] although it may subsequently appear that a course different from that adopted would have been more to the advantage of the principal.[18] Ordinarily where unforeseen conditions arise the agent should notify the principal and procure additional instructions,[19] and the agent so acting in good faith will not be liable in case a loss is occasioned by the delay;[20] but in the case of a sudden emergency the agent may and should do whatever he deems best in the exercise of a sound discretion.[21] The agent is not, however, justified in deviating further from his instructions than the necessities of the case require.[22]

e. Illegal Acts. An agent cannot be held accountable for failure to obey instructions to perform acts which are illegal or immoral,[23] or which if complied with would work a fraud upon others.[24]

f. Custom and Usage. Except as limited by special instructions the known usages and customs of the particular business for which an agent is engaged enter into and form a part of his authority and duty,[25] and he will be liable for losses

See 40 Cent. Dig. tit. "Principal and Agent," § 91 *et seq.*

13. Minnesota Linseed Oil Co. *v.* Montague, 65 Iowa 67, 21 N. W. 184; Anderson *v.* Grand Forks First Nat. Bank, 4 N. D. 182, 59 N. W. 1029; Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549.

14. Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480.

15. *Alabama.*— Williams *v.* Shackelford, 16 Ala. 318.

Massachusetts.— Greenleaf *v.* Moody, 13 Allen 363.

Missouri.— Bartlett *v.* Sparkman, 95 Mo. 136, 18 S. W. 406, 6 Am. St. Rep. 35; Rechtscherd *v.* St. Louis Accommodation Bank, 47 Mo. 181.

New York.— Jervis *v.* Hoyt, 2 Hun 637.

Pennsylvania.—Wilson *v.* Wilson, 26 Pa. St. 393.

Virginia.— Bernard *v.* Maury, 20 Gratt. 434.

United States.— Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43.

See 40 Cent. Dig. tit. "Principal and Agent," § 91 *et seq.*

16. Greenleaf *v.* Moody, 13 Allen (Mass.) 363.

17. *Connecticut.*— Judson *v.* Sturges, 5 Day 556.

Massachusetts.— Greenleaf *v.* Moody, 13 Allen 363.

Pennsylvania.—Dusar *v.* Perit, 4 Binn. 361.

Virginia.— Bernard *v.* Maury, 20 Gratt. 434.

United States.— Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43.

See 40 Cent. Dig. tit. "Principal and Agent," § 91 *et seq.*

18. Greenleaf *v.* Moody, 13 Allen (Mass.) 363.

19. Henry *v.* Buckner, 13 Colo. 18, 21 Pac. 916. See also Greenleaf *v.* Moody, 13 Allen (Mass.) 363.

20. Bernard *v.* Maury, 20 Gratt. (Va.) 434, holding that where a principal instructed an agent to purchase certain bonds, but before the money for their purchase was received by the agent there had been a great and unexpected advance in the price, the agent was justified in not making the purchase but asking for and awaiting further instructions.

21. Greenleaf *v.* Moody, 13 Allen (Mass.) 363.

22. Foster *v.* Smith, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604, holding that where an agent was authorized to purchase and deliver grain to his principal, and a boat loaded with grain sank in three feet of water, the agent would have been justified in employing hands to take the grain out of the water and preserve it to prevent a total loss, but was not justified in selling the grain.

23. *Louisiana.*— Goodhue *v.* McClarty, 3 La. Ann. 56.

Missouri.—Rechtscherd *v.* St. Louis Accommodation Bank, 47 Mo. 181.

New York.— Brown *v.* Howard, 14 Johns. 119.

Pennsylvania.—Wilson *v.* Wilson, 26 Pa. St. 393.

England.— Cohen *v.* Kittell, 22 Q. B. D. 680, 53 J. P. 469, 58 L. J. Q. B. 241, 60 L. T. Rep. N. S. 932, 37 Wkly. Rep. 400.

See 40 Cent. Dig. tit. "Principal and Agent," § 91 *et seq.*

24. Goodhue *v.* McClarty, 3 La. Ann. 56.

25. Harlan *v.* Ely, 68 Cal. 522, 9 Pac. 947; Phillips *v.* Moir, 69 Ill. 155; Switzer *v.* Connett, 11 Mo. 88; Fraser *v.* Tenants, 5 Rich. (S. C.) 375.

due to a failure to act according to such usages and customs,[26] and on the other hand if he does act in accordance therewith he will not, in the absence of any instructions to the contrary, be liable for any loss resulting;[27] but where the instructions given are direct and positive they must be strictly complied with,[28] and no usage or custom will authorize a departure from such instructions or relieve the agent from liability for a resulting loss.[29]

g. Ratification by Principal.[30] Although an agent may have violated his instructions, he will not be liable to the principal if the latter, with knowledge of the facts, ratifies what he has done,[31] and such ratification may be either express or implied;[32] but in order to relieve the agent from liability it must have been with knowledge on the part of the principal of the material facts.[33]

3. Duty to Exercise Care, Skill, and Diligence — a. Extent of Duty and Liability — (i) *In General.* An agent in the performance of his duties as such must exercise ordinary care, skill, and diligence,[34] and for his negligence in failing to do so he will be liable to his principal for any loss or injury occasioned thereby.[35]

The instructions given by a principal to his agent as a general rule constitute the leading outlines of the contract between them, and where the instructions are silent, if there be a known usage of trade or mode of transacting business applicable to the particular agency, the agent is not only permitted but it is his duty to conform to it. Fraser *v.* Tenants, 5 Rich. (S. C.) 375.

26. Harlan *v.* Ely, 68 Cal. 522, 9 Pac. 947.

27. Phillips *v.* Moir, 69 Ill. 155; De Lazardi *v.* Hewitt, 7 B. Mon. (Ky.) 697; Greely *v.* Bartlett, 1 Me. 172, 10 Am. Dec. 54; Fraser *v.* Tenants, 5 Rich. (S. C.) 375.

28. Parsons *v.* Martin, 11 Gray (Mass.) 111; Hall *v.* Storrs, 7 Wis. 253.

29. *Iowa.*— Robinson Mach. Works *v.* Vorse, 52 Iowa 207, 2 N. W. 1108.

Massachusetts.— Day *v.* Holmis, 103 Mass. 306; Parsons *v.* Martin, 11 Gray 111.

South Carolina.— Barksdale *v.* Brown, 1 Nott & M. 517, 9 Am. Dec. 720.

Vermont.— Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467.

Wisconsin.— Osborne, etc., Co. *v.* Rider, 62 Wis. 235, 22 N. W. 394; Hall *v.* Storrs, 7 Wis. 253.

United States.— Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549.

See 40 Cent. Dig. tit. "Principal and Agent," § 93.

30. Ratification generally see *supra*, I, F.

31. *Arkansas.*— Lyon *v.* Tams, 11 Ark. 189.

Indiana.— U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88.

Kansas.— Lowry *v.* Stewart, 5 Kan. 663.

Maryland.—Williams *v.* Higgins, 30 Md. 404.

Nebraska.— Falsken *v.* Falls City State Bank, 71 Nebr. 29, 98 N. W. 425.

New York.— Codwise *v.* Hacker, 1 Cai. 526.

Ohio.—Woodward *v.* Suydam, 11 Ohio 360.

32. Lyon *v.* Tams, 11 Ark. 189; Cairnes *v.* Bleecher, 12 Johns. (N. Y.) 300; Vianna *v.* Barclay, 3 Cow. (N. Y.) 281; Law *v.* Cross, 1 Black (U. S.) 533, 17 L. ed. 185.

33. Oxford Lake Line *v.* Pensacola First Nat. Bank, 40 Fla. 349, 24 So. 480; Hardeman *v.* Ford, 12 Ga. 205; Walker *v.* Walker, 5 Heisk. (Tenn.) 425; Bell *v.* Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606.

34. *California.*— San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410.

Georgia.— Brown *v.* Clayton, 12 Ga. 564.

Louisiana.— Madeira *v.* Townsley, 12 Mart. 84.

Minnesota.— Lake City Flouring-Mill Co. *v.* McVean, 32 Minn. 301, 20 N. W. 233.

New York.—Loeb *v.* Hellman, 83 N. Y. 601; Heinemann *v.* Heard, 50 N. Y. 27 [*reversing* 58 Barb. 524]; Leverick *v.* Meigs, 1 Cow. 645.

See 40 Cent. Dig. tit. "Principal and Agent," § 96.

35. *Alabama.*—Adams *v.* Robinson, 65 Ala. 586.

California.— San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410.

Connecticut.— Geisse *v.* Franklin, 56 Conn. 83, 13 Atl. 148; Redfield *v.* Davis, 6 Conn. 439.

Kansas.— Guernsey *v.* Davis, 67 Kan. 378, 73 Pac. 101.

Kentucky.— Smith *v.* Frost, 1 Bibb 375.

Louisiana.— Imboden *v.* Richardson, 15 La. Ann. 534; Kirkby *v.* Armistead, 11 Rob. 81; Crawford *v.* Louisiana State Bank, 1 Mart. N. S. 706; Madeira *v.* Townsley, 12 Mart. 84; Durnford *v.* Patterson, 7 Mart. 460, 12 Am. Dec. 514.

Massachusetts.— Phœnix Ins. Co. *v.* Frissell, 142 Mass. 513, 8 N. E. 348; Gould *v.* Rich, 7 Metc. 538.

Michigan.— Page *v.* Wells, 37 Mich. 415.

Nebraska.— Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226.

New York.—Vernier *v.* Knauth, 7 N. Y. App. Div. 57, 39 N. Y. Suppl. 784; Leverick *v.* Meigs, 1 Cow. 645.

Ohio.— Victoria First Nat. Bank *v.* Hayes, 64 Ohio St. 100, 59 N. E. 893.

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180; Canfield *v.* Gilmore, 31 Leg. Int. 397.

Washington.— Crawford *v.* Cochran, 2 Wash. Terr. 117, 3 Pac. 837.

West Virginia.—Ruffner *v.* Hewitt, 7 W. Va. 585.

United States.— Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788; Bower-

An agent does not, however, in the absence of express agreement, insure the success of his undertaking,[36] or guarantee the principal against incidental losses,[37] or undertake that he will commit no errors or mistakes,[38] and so will not be liable for losses occurring without any fault or negligence on his part,[39] or, if he has acted in good faith and with due care, for losses due to a mere mistake,[40] or due to an error of judgment in regard to matters with which he is invested with discretionary powers.[41] He is required only to exercise ordinary care, skill, and diligence,[42] and if he does so will not be liable for losses which the principal may sustain.[43] By ordinary care, skill, and diligence is meant such as a person of ordinary prudence would exercise in the conduct of his own affairs of the same nature under similar circumstances,[44] or such as is usually possessed and exercised

man *v.* Rogers, 125 U. S. 585, 8 S. Ct. 986, 31 L. ed. 815.

England.— Reece *v.* Rigley, 4 B. & Ald. 202, 23 Rev. Rep. 251, 6 E. C. L. 451; Story *v.* Richardson, 6 Bing. N. Cas. 123, 4 Jur. 26, 9 L. J. C. P. 43, 8 Scott 291, 37 E. C. L. 541; Heys *v.* Tindall, 1 B. & S. 296, 2 F. & F. 444, 30 L. J. Q. B. 362, 4 L. T. Rep. N. S. 403, 9 Wkly. Rep. 664, 101 E. C. L. 296; Stevenson *v.* Rowand, 2 Dow. & Cl. 104, 6 Eng. Reprint 668.

Canada.— Butterworth *v.* Shannon, 11 Ont. App. 86; Douglass *v.* Woodside, 11 Grant Ch. (U. C.) 375; Bradburne *v.* Shanly, 7 Grant Ch. (U. C.) 569.

See 40 Cent. Dig. tit. "Principal and Agent," § 96.

A contract against liability for errors of judgment will not relieve from liability for negligence. Geisse *v.* Franklin, 56 Conn. 83, 13 Atl. 148.

Competent skill as well as fidelity may be legally demanded of an agent, and for a deficiency in either he is responsible. Redfield *v.* Davis, 6 Conn. 439.

Illegal acts.—An agent is not liable to his principal for damages recovered against the latter on account of the agent's negligence in performing an illegal act under contract with the principal, but if the agent agreed before proceeding to do the act that he would procure the proper license and authority therefor, and then proceeded without it, he will be liable unless the principal subsequently agreed thereto. Baynard *v.* Harrity, 1 Houst. (Del.) 200.

36. Schmidt *v.* Pfau, 114 Ill. 494, 2 N. E. 522; Lake City Flouring-mill Co. *v.* McVean, 32 Minn. 301, 20 N. W. 233.

37. Page *v.* Wells, 37 Mich. 415; Lake City Flouring-mill Co. *v.* McVean, 32 Minn. 301, 20 N. W. 233.

38. Richardson *v.* Taylor, 136 Mass. 143; Page *v.* Wilson, 37 Mich. 415.

39. Furber *v.* Barnes, 32 Minn. 105, 19 N. W. 728.

40. Richardson *v.* Taylor, 136 Mass. 143; Page *v.* Wells, 37 Mich. 415; Briere *v.* Taylor, 126 Wis. 347, 105 N. W. 817.

41. McLaughlin *v.* Simpson, 3 Stew. & P. (Ala.) 85; Schmidt *v.* Pfau, 114 Ill. 494, 2 N. E. 522; Barrett *v.* Zacharie, 5 La. Ann. 253; Lesesne *v.* Cook, 16 La. 58; Forstall *v.* Fowle, 15 La. 299; Stewart *v.* Parnell, 147 Pa. St. 523, 23 Atl. 838.

42. Morrison *v.* Orr, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; Brown *v.* Clayton, 12 Ga. 564; Withers *v.* Thompson, 4 T. B. Mon. (Ky.) 323; Loeb *v.* Hellman, 83 N. Y. 601; Lawler *v.* Keaquick, 1 Johns. Cas. (N. Y.) 174.

43. *Georgia.*— Brown *v.* Clayton, 12 Ga. 564.

Illinois.— Stanberry *v.* Moore, 56 Ill. 472.

Kentucky.—Withers *v.* Thompson, 4 T. B. Mon. 323; Smith *v.* Frost, 1 Bibb 375.

Louisiana.— Clark *v.* Norwood, 19 La. Ann. 116; Gillet *v.* Theall, 16 La. 46.

Massachusetts.— Hurley *v.* Packard, 182 Mass. 216, 65 N. E. 64.

Michigan.— Page *v.* Wells, 37 Mich. 415.

Minnesota.— Lake City Flouring-mill Co. *v.* McVean, 32 Minn. 301, 20 N. W. 233; Burpe *v.* Van Eman, 11 Minn. 327.

New York.— De Bavier *v.* Funke, 21 N. Y. Suppl. 410 [*affirmed* in 142 N. Y. 633, 37 N. E. 566]; Lawler *v.* Keaquick, 1 Johns. Cas. 174.

South Carolina.— Nixon *v.* Bogin, 26 S. C. 611, 2 S. E. 302.

Texas.— Williams *v.* O'Daniels, 35 Tex. 542.

Vermont.— Rich *v.* Austin, 40 Vt. 416.

Virginia.— Betts *v.* Cralle, 1 Munf. 238.

England.—Commonwealth Portland Cement Co. *v.* Weber, [1905] A. C. 66, 10 Aspin. 27, 74 L. J. P. C. 25, 91 L. T. Rep. N. S. 813, 21 T. L. R. 149, 53 Wkly. Rep. 337; Pappa *v.* Rose, L. R. 7 C. P. 32, 41 L. J. C. P. 11, 25 L. T. Rep. N. S. 468, 20 Wkly. Rep. 62 [*affirmed* in L. R. 7 C. P. 525, 41 L. J. C. P. 187, 27 L. T. Rep. N. S. 348, 20 Wkly. Rep. 784]; Zwilchenbart *v.* Alexander, 1 B. & S. 234, 7 Jur. N. S. 1157, 30 L. J. Q. B. 254, 4 L. T. Rep. N. S. 412, 9 Wkly. Rep. 670, 101 E. C. L. 234.

See 40 Cent. Dig. tit. "Principal and Agent," § 96.

But one who fails to do the very thing his agency requires cannot be considered as having used ordinary care and diligence, but on the contrary must be viewed as grossly negligent and liable for all resulting damages. Crawford *v.* Louisiana State Bank, 1 Mart. N. S. (La.) 706.

44. Southern Express Co. *v.* Frink, 67 Ga. 201; Brown *v.* Clayton, 12 Ga. 564; Madeira *v.* Townsley, 12 Mart. (La.) 84; Lake City Flouring-mill Co. *v.* McVean, 32 Minn. 301, 20 N. W. 233; Williams *v.* O'Daniels, 35 Tex. 542.

by persons of ordinary care and capacity engaged in the same business,[45] and what will amount to its exercise will depend upon all the circumstances of the particular case, including the character and subject-matter of the agency,[46] and so is ordinarily a question of fact for the jury.[47] An agent is not chargeable with negligence in failing to do something that he had no authority to do,[48] or in failing to go on and do things connected with or arising out of the agency which are beyond the powers and duties conferred upon him;[49] and where one employs an agent who is employed in the service of another principal with full knowledge of the first employment and of the fact that the second is to be concurrent therewith, the second contract must be construed in the light of the duties imposed by the first, and the agent will not be liable to the second principal for a failure of duty caused solely by the obligation imposed by the first employment.[50] Where one assumes as a mere intruder to act for another without the latter's consent, he will be held to a strict account and liable for as much as could have been made by the best of management.[51]

(II) *Special Undertakings.* The rule of ordinary care, skill, and diligence is that which, in the absence of express agreement, the law attaches to the relation of principal and agent,[52] and it may by special stipulation between the parties be varied and either narrowed or enlarged.[53] In such cases the liability of the agent is to be measured according to the terms of his undertaking,[54] which may be such as to render him liable as an insurer;[55] but an undertaking to keep property intrusted to the agent in good order is not an absolute undertaking to respond in damages for its loss or destruction if it occurs without the fault of the agent.[56]

(III) *Where Agency Is Gratuitous.* If an agent acts gratuitously he cannot be held liable for a mere non-feasance where he has never entered upon the undertaking;[57] but if he does enter upon it he may be held liable for negligence in the performance of the duties which he has undertaken.[58] A gratuitous agent is clearly liable if he is guilty of gross negligence,[59] but except where the undertaking

45. Wheadon *v.* Mead, 72 Minn. 372, 75 N. W. 598.

46. Brown *v.* Clayton, 12 Ga. 564; Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

47. See *infra*, IV, F, 2, a.

48. Brown *v.* Clayton, 12 Ga. 564.

49. Hodge *v.* Durnford, 1 Mart. N. S. (La.) 100; Commonwealth Portland Cement Co. *v.* Weber, [1905] A. C. 66, 10 Aspin. 27, 74 L. J. P. C. 25, 91 L. T. Rep. N. S. 813, 21 T. L. R. 149, 53 Wkly. Rep. 337.

50. Southern Express Co. *v.* Frink, 67 Ga. 201, holding that where an express company employed as messenger a conductor on a railroad, they must have contracted with him with reference to his prior obligations to the railroad company, and that he was not liable to them for a neglect caused by his attending to his duties as conductor.

51. McLaughlin *v.* Simpson, 3 Stew. & P. (Ala.) 85.

52. Loeb *v.* Hellman, 83 N. Y. 601.

53. Norton *v.* Melick, 97 Iowa 564, 66 N. W. 780; Loeb *v.* Hellman, 83 N. Y. 601.

54. *Kansas.*—Avery Planter Co. *v.* Murphy, 6 Kan. App. 29, 49 Pac. 626.

Massachusetts.—Wareham Bank *v.* Burt, 5 Allen 113.

New Jersey. — Vermilye's Case, 43 N. J. Eq. 146, 10 Atl. 605.

Ohio.—Van Camp *v.* Gilbert, 1 Cinc. Super. Ct. 358.

England. — Sheppherd *v.* Maidstone, 10 Mod. 144, 88 Eng. Reprint 666; Morris *v.* Cleasby, 4 M. & S. 566, 16 Rev. Rep. 544.

See 40 Cent. Dig. tit. "Principal and Agent," § 96 *et seq.*

55. Morris *v.* Cleasby, 4 M. & S. 566, 16 Rev. Rep. 544.

Liability of del credere agent see Factors and Brokers, 19 Cyc. 133.

56. Norton *v.* Melick, 97 Iowa 564, 66 N. W. 780.

57. Morrison *v.* Orr, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; Vickery *v.* Lanier, 1 Metc. (Ky.) 133; Thorne *v.* Deas, 4 Johns. (N. Y.) 84.

58. *Arkansas.*— Charlesworth *v.* Whitlow, 74 Ark. 277, 85 S. W. 423.

California. — Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337.

District of Columbia. — Battelle *v.* Cushing, 21 D. C. 59.

Kentucky.—Vickery *v.* Lanier, 1 Metc. 133.

Louisiana. — Montillet *v.* U. S. Bank, 1 Mart. N. S. 365; Durnford *v.* Paterson, 7 Mart. 460, 12 Am. Dec. 514.

Maryland.—Williams *v.* Higgins, 30 Md. 404.

Tennessee.—Anthony *v.* Smith, 9 Humphr. 508.

England.—Wilkinson *v.* Coverdale, 1 Esp. 75.

Canada.— Johnston *v.* Graham, 14 U. C. C. P. 9.

See 40 Cent. Dig. tit. "Principal and Agent," § 97.

59. *Arkansas.*— Charlesworth *v.* Whitlow, 74 Ark. 277, 85 S. W. 423.

is one which implies the exercise of special or professional skill,[60] it is ordinarily held that where he acts gratuitously he will not be liable in the absence of gross negligence.[61] It has been said, however, that to define what will constitute gross negligence on the part of a gratuitous agent is difficult if not impossible,[62] since what would be slight negligence in dealing with one matter or on the part of one person might be gross negligence in dealing with a different matter or on the part of a different person,[63] and that gross negligence is no more than a failure to exercise such care as the situation reasonably demands,[64] and that what will constitute such negligence depends upon all the circumstances of the case, including the subject-matter and objects of the agency and the character, qualifications, and relations of the parties,[65] so that it is ordinarily a question of fact for the determination of the jury.[66] A gratuitous agent will not be liable if he acts in good faith and with ordinary prudence,[67] or exercises such care and diligence as would be exercised by a prudent person in the management of his own affairs; [68] and it is held that he is not chargeable with gross negligence if he has exercised the same care in regard to his principal's property as his own.[69]

(IV) *EMPLOYMENT REQUIRING SPECIAL SKILL.* In case of an employment which requires special or professional skill an agent who professes or holds himself out as possessing such skill will be liable for losses due to his failure to possess or exercise the same,[70] and this notwithstanding the agency is gratuitous.[71]

California. — Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337.

Illinois.—Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769.

Ohio.—Grant *v.* Ludlow, 8 Ohio St. 1.

United States. — Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

See 40 Cent. Dig. tit. "Principal and Agent," § 97.

60. Shiells *v.* Blackburne, 1 H. Bl. 158, 2 Rev. Rep. 750. See also *infra*, III, A, 3, a, (IV).

61. Eddy *v.* Livingston, 35 Mo. 487, 88 Am. Dec. 122; Grant *v.* Ludlow, 8 Ohio St. 1; Burgoyne *v.* Clarkson, 1 Ohio Dec. (Reprint) 119, 2 West. L. Month. 325; Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132; Shiells *v.* Blackburne, 1 H. Bl. 158, 2 Rev. Rep. 750. But see Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337 (where the court, although holding that the evidence showed gross negligence, said that a gratuitous agent is bound to exercise "good faith and ordinary diligence"); Anthony *v.* Smith, 9 Humphr. (Tenn.) 508 (holding without any reference to the different degrees of negligence that an agent, although acting gratuitously, "was bound to have used such diligence as became a prudent man in reference to his own interests; and, if he failed in this, he would be responsible").

An agent acting as a gratuitous bailee of the principal's property is not liable in the absence of gross negligence. Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132. See also BAILMENTS, 5 Cyc. 186.

62. Grant *v.* Ludlow, 8 Ohio St. 1.

63. Grant *v.* Ludlow, 8 Ohio St. 1.

64. Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769; Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

65. Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769; Eddy *v.* Livingston, 35 Mo. 487, 88 Am. Dec. 122; Grant *v.* Ludlow, 8 Ohio St. 1; Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132.

66. See *infra*, IV, F, 2, a.

67. Eddy *v.* Livingston, 35 Mo. 487, 88 Am. Dec. 122.

A mere mistake in performing a gratuitous act at the request of another will not create a liability. Chapman *v.* Clements, 56 S. W. 646, 22 Ky. L. Rep. 17.

68. Pate *v.* McClure, 4 Rand. (Va.) 164.

69. Shiells *v.* Blackburne, 1 H. Bl. 158, 2 Rev. Rep. 750.

70. *Illinois.*— Lasher *v.* Colton, 80 Ill. App. 75.

Indiana.— Tyson *v.* State Bank, 6 Blackf. 225, 38 Am. Dec. 139.

New York.—Isham *v.* Post, 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90 [*reversing* 71 Hun 184, 23 N. Y. Suppl. 211, 1168].

Pennsylvania.—Lawall *v.* Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

Wisconsin. — Shipman *v.* State, 43 Wis. 381; Kuehn *v.* Wilson, 13 Wis. 104.

England.—Willson *v.* Brett, 12 L. J. Exch. 264, 11 M. & W. 113.

Canada.—Hamilton Provident, etc., Soc. *v.* Bell, 1 Can. L. T. 105.

See 40 Cent. Dig. tit. "Principal and Agent," § 96 *et seq.*

Application of rule: To attorneys see ATTORNEY AND CLIENT, 4 Cyc. 964. To architects see BUILDERS AND ARCHITECTS, 6 Cyc. 34. To bailees see BAILMENTS, 5 Cyc. 180. To physicians and surgeons see PHYSICIANS AND SURGEONS, 30 Cyc. 1575.

71. Durnford *v.* Patterson, 7 Mart. (La.) 460, 12 Am. Dec. 514; Isham *v.* Post, 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90 [*reversing* 71 Hun 184,

An agent, although professing special skill, does not, however, insure the success of the undertaking or guarantee against mistakes or errors of judgment; [72] but is only held to the exercise of the care and skill of one ordinarily skilled and competent in the particular business or profession,[73] and judged with reference to the standards and degree of skill and knowledge existing at the time the services are rendered.[74] A principal cannot demand or expect the exercise of special skill if he employs in an undertaking requiring it an agent who does not profess to possess it,[75] or whom he knows does not possess it; [76] and in such cases the agent will not be liable if he acts in good faith and with due care according to such skill as he does possess.[77]

b. Particular Agencies or Undertakings — (i) *AGENT TO BUY OR SELL.* An agent to buy or sell property for his principal will be liable for losses which the latter may sustain by reason of his negligence,[78] as in selling on credit instead of for cash,[79] for an inadequate price,[80] failing to ascertain the financial standing of a purchaser,[81] selling to persons of questionable standing without taking security,[82] negligence in regard to collecting for property sold where it is the duty of the agent to do so [83] or in accepting payment in something other than money,[84] or in case of purchases for his principal, negligence in regard to ascertaining the value or quality of the property bought.[85] If, however, the agent has acted with reasonable skill and ordinary care and diligence he will not be liable,[86] although if he

23 N. Y. Suppl. 211, 1168]; Willson *v.* Brett, 12 L. J. Exch. 264, 11 M. & W. 113.

It is equivalent to gross negligence which will render even a gratuitous agent liable if, in an employment which implies special skill, he fails to possess or exercise such skill. See Eddy *v.* Livingston, 35 Mo. 487, 88 Am. Dec. 122; The New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019; Shiells *v.* Blackburne, 1 H. Bl. 158, 2 Rev. Rep. 750.

72. Coombs *v.* Beede, 89 Me. 187, 36 Atl. 104, 56 Am. St. Rep. 406; Chapel *v.* Clark, 117 Mich. 638, 76 N. W. 62, 72 Am. St. Rep. 587.

73. Chapel *v.* Clark, 117 Mich. 638, 76 N. W. 62, 72 Am. St. Rep. 587; Malone *v.* Gerth, 100 Wis. 166, 75 N. W. 972.

74. Chapel *v.* Clark, 117 Mich. 638, 76 N. W. 62, 72 Am. St. Rep. 587.

75. Nixon *v.* Bogin, 26 S. C. 611, 2 S. E. 302.

76. Morrison *v.* Orr, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; Felt *v.* Rockingham School Dist. No. 2, 24 Vt. 297.

77. Morrison *v.* Orr, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; Felt *v.* Rockingham School Dist No. 2, 24 Vt. 297; Briere *v.* Taylor, 126 Wis. 347, 105 N. W. 817.

78. *California.*— Harlan *v.* Ely, 68 Cal. 522, 9 Pac. 947.

Indiana.— Babcock *v.* Orbison, 25 Ind. 75.

Iowa.—Robinson Mach. Works *v.* Vorse, 52 Iowa 207, 2 N. W. 1108.

Kansas.—Frick *v.* Larned, 50 Kan. 776, 32 Pac. 383.

Louisiana.—Kinney *v.* Crane, 17 La. 417; Chew *v.* Keane, 2 La. 120; Barron *v.* Blanchard, 2 Mart. N. S. 662.

Minnesota.—Rice *v.* Longfellow, 82 Minn. 154, 84 N. W. 660.

Wisconsin.—Kountz *v.* Gates, 78 Wis. 415, 47 N. W. 729.

England.— Solomon *v.* Barker, 2 F. & F. 726, 11 Wkly. Rep. 375; Smith *v.* Barton, 15 L. T. Rep. N. S. 294; Mainwaring *v.* Brandon, 2 Moore C. P. 125, 8 Taunt. 202, 19 Rev. Rep. 497, 48 E. C. L. 109.

Canada.—Deady *v.* Goodenough, 5 U. C. C. P. 163.

See 40 Cent. Dig. tit. "Principal and Agent," § 105 *et seq.*

79. Harlan *v.* Ely, 68 Cal. 522, 9 Pac. 947; Babcock *v.* Orbison, 25 Ind. 75.

80. Solomon *v.* Barker, 2 F. & F. 726, 11 Wkly. Rep. 375.

81. Robinson Mach. Works *v.* Voorse, 52 Iowa 207, 2 N. W. 1108; Frick *v.* Larned, 50 Kan. 776, 32 Pac. 383; Clark *v.* Roberts, 26 Mich. 506.

82. Chew *v.* Keane, 2 La. 120.

83. Kinney *v.* Crane, 17 La. 417.

84. Paul *v.* Grimm, 165 Pa. St. 139, 30 Atl. 721, 44 Am. St. Rep. 648 (holding that where an agent to sell accepts in payment certain bonds instead of money, and the bonds prove to be worthless, he will be liable for the loss); Childs *v.* Boyd, 43 Vt. 532 (holding that where an agent to sell takes a colt in part payment and the colt dies, the agent is liable).

85. Rice *v.* Longfellow Bros. Co., 82 Minn. 154, 84 N. W. 660; Smith *v.* Barton, 15 L. T. Rep. N. S. 294; Mainwaring *v.* Brandon, 2 Moore C. P. 125, 8 Taunt. 202, 19 Rev. Rep. 497, 4 E. C. L. 109.

86. *Kentucky.*— De Lazardi *v.* Hewitt, 7 B. Mon. 697, holding that a general agent to sell is not personally liable for losses arising from sales on credit, where he adheres to the custom of the place of the sales, and the purchasers are good at the date of the sale, and the principal had reasonable notice.

Louisiana.— Bogert *v.* Dorsey, 14 La. 430 (holding that an agent to whom goods are consigned to sell on commission without special instructions as to sale is not liable for losses by deterioration where he has acted with diligence and to the best of his

has expressly agreed to realize a certain price for the property intrusted to him to sell, he will be liable on his contract.[87]

(II) *AGENT TO COLLECT.* An agent to collect a debt or claim must exercise ordinary care, skill, and diligence in the performance of all the duties incident to the undertaking, and will be liable to his principal for any loss which his negligence may occasion;[88] but if the agent has acted in good faith and with ordinary care, skill, and diligence he will not be liable,[89] except in cases where he has guaranteed the collection.[90] What will amount to due care on the part of the

ability for the interest of the principal); Bailey *v.* Baldwin, 8 Mart. N. S. 114 (holding that an agent who receives goods to be shipped to another place and sold is not liable if the person to whom he shipped them was in good standing at the time of the shipment); Bird *v.* Dix, 4 Mart. N. S. 254 (holding that an agent who sells on credit is not liable to the principal until the price is paid unless the sale was made improperly).

Maine.—Washburn *v.* Blake, 47 Me. 316.

Minnesota.— Rice *v.* Longfellow Bros. Co., 82 Minn. 154, 84 N. W. 660.

New York.—Gilchrist *v.* Brooklyn Grocers' Mfg. Assoc., 66 Barb. 390 [*affirmed* in 59 N. Y. 495].

England. — Alsop *v.* Sylvester, 1 C. & P. 107, 12 E. C. L. 72.

See 40 Cent. Dig. tit. "Principal and Agent," § 105 *et seq.*

87. Dunn *v.* Mackey, 80 Cal. 104, 22 Pac. 64.

88. *Kentucky.*— Prentice *v.* Buxton, 3 B. Mon. 35.

Louisiana.— Littlejohn *v.* Ramsay, 4 Mart. N. S. 655, holding that an agent to collect a note who surrenders the note and takes another payable to himself at a later date and fails to collect the same is liable for the amount.

Massachusetts.— Hemenway *v.* Hemenway, 5 Pick. 389.

Minnesota.—Bardwell *v.* American Express Co., 35 Minn. 344, 28 N. W. 925.

Missouri.— Dyas *v.* Hanson, 14 Mo. App. 363.

New Hampshire.— Richards *v.* New Hampshire Ins. Co., 43 N. H. 263.

New York,— Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 [*reversing* 16 Hun 332].

North Dakota.— Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

Pennsylvania. — Wingate *v.* Mechanics' Bank, 10 Pa. St. 104; Miller *v.* Gettysburg Bank, 8 Watts 192, 34 Am. Dec. 449.

Tennessee.— Kirkeys *v.* Crandall, 90 Tenn. 532, 18 S. W. 246; Kinnard *v.* Willmore, 2 Heisk. 619.

West Virginia.— Simmons *v.* Looney, 41 W. Va. 738, 24 S. E. 677.

See 40 Cent. Dig. tit. "Principal and Agent," § 113 *et seq.*

Express companies acting as collecting agents are subject to the same duties and liabilities as other collecting agents, both with regard to their own acts and the acts of subagents employed by them. American Express Co. *v.* Haire, 21 Ind. 4, 83 Am. Dec. 334; Bardwell *v.* American Express Co., 35 Minn. 344, 28 N. W. 925; Knapp *v.* U. S., etc., Express Co., 55 N. H. 348; Palmer *v.* Holland, 51 N. Y. 416, 10 Am. Rep. 616.

An agent who is merely to receive money after it is collected by another is under no duty to exercise any diligence in seeing that it is collected. Miller *v.* Gettysburg Bank, 8 Watts (Pa.) 192, 34 Am. Dec. 449.

Failure to procure proper amount.—An agent to settle and collect a claim against a railroad company, although invested with sufficient discretion to justify taking a promissory note in payment, will in case he sells the note before maturity for less than its face value, be liable to the principal for the full amount thereof (Allen *v.* Brown, 44 N. Y. 228); and where an agent collects both for himself and for his principal, and accepts a part of the amount due and grants indulgence as to the rest, but collects enough to pay the principal, he is bound to pay the principal in full and cannot apportion the amount collected (Simmons *v.* Looney, 41 W. Va. 738, 24 S. E. 677).

89. *Iowa.*— Darr *v.* Darr, 59 Iowa 81, 12 N. W. 765, holding that where the agent of a foreign principal was given notes to collect, and the principal died, thus terminating the agency, the agent was not liable for negligence in failing to get a domestic administrator appointed to collect the notes.

Massachusetts.— Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58.

Michigan.— Reed *v.* Northrup, 50 Mich. 442, 15 N. W. 543.

Minnesota.— Burpe *v.* Van Eman, 11 Minn. 327.

North Carolina.— Bland *v.* Scott, 53 N. C. 100.

Vermont. — Pickett *v.* Pearsons, 17 Vt. 470.

Virginia.— Blosser *v.* Harshbarger, 21 Gratt. 214.

See 40 Cent. Dig. tit. "Principal and Agent," § 113 *et seq.*

In an attempt to charge an agent for negligence in not securing and collecting a debt, the jury may inquire whether he has been guilty of negligence to the prejudice of the principal. An omission to do that which, if done, would have been fruitless and unavailing, cannot properly be denominated negligence. Folsom *v.* Mussey, 10 Me. 297.

Where principal prevents collection.—If the principal takes notes out of the hands of the agent, the latter cannot be held liable for thereafter failing to collect the money due thereon. Tate *v.* Marco, 27 S. C. 493, 4 S. E. 71.

90. *Georgia.*—Simmons *v.* Martin, 54 Ga. 47.

agent will depend upon the nature of the undertaking and all the circumstances in the particular case,[91] and is ordinarily a question of fact for the jury.[92] In the case of commercial paper the agent will be liable for negligence in regard to any of the steps necessary to effect its collection or fasten liability upon accepters or indorsers, whereby a loss or liability is imposed upon his principal,[93] such as negligence in regard to presenting for payment or acceptance,[94] or in protesting or giving notice of dishonor.[95] Ordinarily an agent has no right to accept in pay-

Maryland.— Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190.

Rhode Island.— Balderston *v.* National Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772.

Tennessee.— Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285.

Texas.— Milburn Mfg. Co. *v.* Peak, 89 Tex. 209, 34 S. W. 102.

Wisconsin.—Osborne *v.* Rider, 62 Wis. 235, 22 N. W. 394.

United States.— *Ex p.* Flannagans, 9 Fed. Cas. No. 4,855, 2 Hughes 264, 12 Nat. Bankr. Reg. 230.

England.— *Ex p.* White, L. R. 6 Ch. App. 397, 40 L. J. Bankr. 73, 24 L. T. Rep. N. S. 45, 19 Wkly. Rep. 488.

See 40 Cent. Dig. tit. "Principal and Agent," § 113 *et seq.*

Del credere agent see FACTORS AND BROKERS, 19 Cyc. 133.

91. Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58.

92. See *infra*, IV, F, 2, a.

93. *Indiana.*—American Express Co. *v.* Haire, 21 Ind. 4, 83 Am. Dec. 334; Tyson *v.* State Bank, 6 Blackf. 225, 38 Am. Dec. 139.

Massachusetts.— Fabens *v.* Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59.

Missouri.— Dyas *v.* Hanson, 14 Mo. App. 363.

Nebraska.— Omaha Nat. Bank *v.* Kiper, 60 Nebr. 33, 82 N. W. 102.

New York.— Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 [*reversing* 16 Hun 332]; Coghlan *v.* Dinsmore, 9 Bosw. 453 [*affirmed* in 1 Abb. Dec. 375, 35 How. Pr. 416]; Allen *v.* Suydam, 20 Wend. 321, 32 Am. Dec. 555 [*reversing* 17 Wend. 368].

United States.—Washington Bank *v.* Triplett, 1 Pet. 25, 7 L. ed. 37; Hamilton *v.* Cunningham, 11 Fed. Cas. No. 5,978, 2 Brock. 350.

See 40 Cent. Dig. tit. "Principal and Agent," § 115.

Banks as collecting agents are bound to take the necessary steps to fasten liability upon the parties to commercial paper. Tyson *v.* State Bank, 6 Blackf. (Ind.) 225, 88 Am. Dec. 139. See also BANKS AND BANKING, 5 Cyc. 509.

Loss of note or check by agent.— Where an agent negligently fails to notify the holder of the loss of a check forwarded by mail, and an opportunity to protect himself is thereby lost, the agent will be liable (Shipsey *v.* Bowery Nat. Bank, 59 N. Y. 485); and where an agent who has lost a note promises to pay the same, the promise will be binding on his estate (Sandefur *v.* Mattingley, 16 Ark. 237).

Draft with bill of lading.— Where a bank is sent a bill of lading, together with a draft payable forty-five days after date, the bank is not, in the absence of instructions to the contrary, negligent in giving up the bill of lading to the consignee upon acceptance of the draft, without waiting until the draft is paid. Wisconsin Mar., etc., Ins. Co. Bank *v.* Bank of British North America, 21 U. C. Q. B. 284 [*affirmed* in 2 Grant Err. & App. (U. C.) 282].

Steps to be taken in the collection of commercial paper see COMMERCIAL PAPER, 7 Cyc. 959 *et seq.*

94. *Indiana.*— Tyson *v.* State Bank, 6 Blackf. 225, 38 Am. Dec. 139.

Louisiana.— McAllister *v.* Srodes, 14 La. 442; Miranda *v.* City Bank, 6 La. 740, 26 Am. Dec. 493; Crawford *v.* Louisiana State Bank, 1 Mart. N. S. 214.

Minnesota.—Bidwell *v.* Madison, 10 Minn. 13.

Missouri.— Dyas *v.* Hanson, 14 Mo. App. 363.

New York.— Allen *v.* Suydam, 20 Wend. 321, 32 Am. Dec. 555 [*reversing* 17 Wend. 368].

Tennessee.— Kirkeys *v.* Crandall, 90 Tenn. 532, 18 S. W. 246, holding that an agent is liable for taking an invalid acceptance of a draft from a person not authorized to give the acceptance.

See 40 Cent. Dig. tit. "Principal and Agent," § 115.

If there is not an unreasonable delay in presenting a bill for acceptance, and the agent has acted according to the usual course of the business, he will not be liable, although he might have acted more promptly, and if he had done so the loss would have been avoided. Van Diemen's Land Bank *v.* Victoria Bank, L. R. 3 P. C. 526, 40 L. J. P. C. 28, 19 Wkly. Rep. 857.

95. Miranda *v.* New Orleans City Bank, 6 La. 740, 26 Am. Dec. 493; Liennan *v.* Dinsmore, 10 Abb. Pr. N. S. (N. Y.) 209; Utica Bank *v.* McKinster, 11 Wend. (N. Y.) 473; Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372 [*affirmed* in 3 Cow. 662]; Hamilton *v.* Cunningham, 11 Fed. Cas. No. 5,978, 2 Brock. 350.

To whom notice given.— In the absence of any agreement or commercial usage to the contrary, it has been held that an agent will not be liable for failure to give notice of dishonor to all parties and indorsers, but that it is sufficient if he gives such notice to his principal (Mobile Bank *v.* Huggins, 3 Ala. 206; Troy State Bank *v.* Capital Bank, 41 Barb. (N. Y.) 343); but if it is according

ment anything but money,[96] and will be liable for accepting a different medium of payment whereby a loss is sustained by the principal.[97] The agent may also be liable for accepting payment of a debt in a depreciated currency,[98] particularly if the obligation was in terms payable in another and particular form of currency;[99] but if not in terms so payable the circumstances may be such that the agent will not be liable for taking a depreciated currency,[1] and he will not be liable if it was done with the express consent of the principal,[2] or with his knowledge and acquiescence,[3] or the principal with knowledge of the facts accepted and retained what the agent had collected.[4] If an agent to collect employs a subagent he will ordinarily, in the absence of any stipulation to the contrary, be liable for any negligence or default on the part of the subagent,[5] and the subagent will be liable to the agent who is his immediate principal.[6] If, however, the subagent is employed with the consent of the principal, which may be either express or implied,[7] and may be implied from the usual course of trade or nature of the transaction,[8] the agent will

to the established and understood custom of a bank to give notice to all indorsers, it will be liable for failure to do so (Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372 [*affirmed* in 3 Cow. 662]; Utica Bank *v.* McKinster, 11 Wend. (N. Y.) 473).

96. Pape *v.* Westacott, [1894] 1 Q. B. 272, 63 L. J. Q. B. 222, 70 L. T. Rep. N. S. 18, 9 Reports 55, 42 Wkly. Rep. 131. See also *supra*, II, A, 6, d, (III), (B).

97. Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251; Opie *v.* Scrrill, 6 Watts & S. (Pa.) 264; Pape *v.* Westacott, [1894] 1 Q. B. 272, 63 L. J. Q. B. 222, 70 L. T. Rep. N. S. 18, 9 Reports 55, 42 Wkly. Rep. 131.

The agent will not be liable, although he has no right to receive his own note instead of money in payment of a debt due to his principal, if he supplies out of his own funds the amount of the note received and turns the money over to his principal. Wilcox, etc., Organ Co. *v.* Lasley, 40 Kan. 521, 20 Pac. 228.

98. Webster *v.* Whitworth, 49 Ala. 201; Shuford *v.* Ramsour, 63 N. C. 622; Turner *v.* Turner, 36 Tex. 41; Anderson *v.* Cape Fear Bank, 1 Fed. Cas. No. 354, Chase 535.

99. Fry *v.* Dudley, 20 La. Ann. 368 (holding that where an agent in 1862 received two drafts for collection which upon their face were payable "in currency," the words "in currency" meant current money in the legal sense, and that the agent was liable for receiving payment in Confederate money); Mangum *v.* Ball, 43 Miss. 288, 5 Am. Rep. 488 (holding that if an agent, in the absence of express instructions, receives depreciated Confederate currency in payment of bonds payable in terms in United States currency, he will be liable for the loss); Pilson *v.* Bushong, 29 Gratt. (Va.) 229 (holding that in the absence of express instructions an agent has no right to receive depreciated Confederate currency in payment of bonds payable only in gold coin or currency equivalent thereto).

1. Henry *v.* Northern Bank, 63 Ala. 527; Turner *v.* Beall, 22 La. Ann. 490; Baird *v.* Hall, 67 N. C. 230; Pilson *v.* Bushong, 29 Gratt. (Va.) 229.

2. Baird *v.* Hall, 67 N. C. 230.

3. Turner *v.* Beall, 22 La. Ann. 490.

4. Pickett *v.* Pearsons, 17 Vt. 470.

5. *Alabama.*— Lewis *v.* Peck, 10 Ala. 142.

Indiana.— American Express Co. *v.* Haire, 21 Ind. 4, 83 Am. Dec. 334.

Missouri.— Dyas *v.* Hanson, 14 Mo. App. 363, holding that where a draft is sent to an agent to collect and he places it in a bank to be collected, he will be liable for the negligence of the bank.

New York.— Mandel *v.* Mower, 55 How. Pr. 242.

North Dakota.— Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

Ohio.— Young *v.* Noble, 2 Disn. 485.

Pennsylvania.— Siner *v.* Stearne, 155 Pa. St. 62, 25 Atl. 826; Morgan *v.* Tener, 83 Pa. St. 305 [*reversing* 10 Phila. 412]; Bradstreet *v.* Everson, 72 Pa. St. 124, 13 Am. Rep. 665.

Tennessee.— Harrold *v.* Gillespie, 7 Humphr. 57.

United States.— Tabor *v.* Perrot, 23 Fed. Cas. No. 13,721, 2 Gall. 565.

England.— Mackersy *v.* Ramsays, 9 Cl. & F. 818, 8 Eng. Reprint 628.

See 40 Cent. Dig. tit. "Principal and Agent," § 117.

But see Hawkins *v.* Minor, 5 Call (Va.) 118.

6. Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

The subagent will be liable to the agent for any money collected by him and paid over to any other person than the true owner (Wallace *v.* Peck, 12 Ala. 768); and the principal also may sue for and recover from the subagent money which the latter has collected and failed to pay over either to the first agent or to the principal (Harrison Mach. Works *v.* Coquillard, 26 Ill. App. 513).

7. Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104.

8. Miller *v.* Farmers', etc., Bank, 30 Md. 392; Wilson *v.* Smith, 3 How. (U. S.) 763, 11 L. ed. 820.

Place of payment or acceptance.— Where a bill or note is placed in the hands of a bank for collection which is payable in a different place, or the accepter or promisor resides in a different place, it must be pre-

not be liable for the negligence or default of the subagent if he has exercised due care in selecting a competent and reliable person.[9] It is also competent for the agent expressly to stipulate against liability from the acts of a subagent,[10] in which case he will not be liable in the absence of gross negligence in selecting the subagent;[11] but ordinarily where an agent acts through another he must exercise due care in selecting a competent and reliable person.[12] If an agent is unable to make a collection intrusted to him, it is his duty to notify the principal,[13] and he must return the notes or other obligations intrusted to him or furnish a sufficient excuse for not doing so;[14] and a mere offer to return them after a lapse of time is not sufficient to relieve him from liability without a showing that he has used due care and diligence in an effort to collect them.[15]

(III) *AGENT TO LEND OR INVEST.* Where an agent is authorized to lend or invest money of his principal he must exercise reasonable skill and ordinary care and diligence, and will be liable for losses occasioned by his negligence,[16] as in lending money on the unsecured obligation of the borrower,[17] or an inadequate security,[18] or on property subject to prior mortgages, liens, or other encumbrances.[19] The agent may also become personally liable by a guaranty to the

sumed to be understood that it will be sent there for collection, and if the bank transmits it to another solvent bank in good standing it will not be liable for the negligence of the latter bank. Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59.

9. *Connecticut.*— Davis *v.* King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104.

Illinois.— Fay *v.* Strawn, 32 Ill. 295.

Kentucky.— Ford *v.* Stewart, 4 B. Mon. 326.

Louisiana.— Baldwin *v.* Preston, 11 Mart. 32.

Maryland.— Miller *v.* Farmers', etc., Bank, 30 Md. 392.

New York.—Jacobsohn *v.* Belmont, 7 Bosw. 14.

United States.— Wilson *v.* Smith, 3 How. 763, 11 L. ed. 820.

Canada.— McQuarrie *v.* Fargo, 21 U. C. C. P. 478.

See 40 Cent. Dig. tit. "Principal and Agent," § 117.

Loss of note in transmission.— Where an agent who undertakes to collect a note payable in a distant place makes known to his principal the mode of conveyance by which the note will be sent, and the latter does not disapprove of it, the agent will not be liable if it is lost in transmission without his fault. Delavigne *v.* New Orleans City Bank, 16 La. 471.

10. Fay *v.* Strawn, 32 Ill. 295; Sanger *v.* Dun, 47 Wis. 615, 3 N. W. 388, 32 Am. Rep. 789.

Notice of stipulation.—Where plaintiff sent defendant a claim for collection, and the latter without request sent a receipt, plaintiff, in the absence of any circumstance or intimation to indicate it to be anything other than an ordinary voucher, was justified in so regarding it, and is not bound by a condition printed on its back, of which he had no knowledge, limiting defendant's liability for the acts of his agents. Neuman *v.* National Shoe, etc., Exch., 26 Misc. (N. Y.) 388, 56 N. Y. Suppl. 193 [*affirming* 25 Misc. 412, 54 N. Y. Suppl. 942].

11. Sanger *v.* Dun, 47 Wis. 615, 3 N. W. 388, 32 Am. Rep. 789.

12. Prentice *v.* Buxton, 3 B. Mon. (Ky.) 35; Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372 [*affirmed* in 3 Cow. 662].

13. Wingate *v.* Mechanics' Bank, 10 Pa. St. 104, holding that if an agent is not successful in a reasonable time in collecting a note he should give notice to the principal and return the note.

14. Stancill *v.* Gilmore, 6 La. Ann. 763; Wiley *v.* Logan, 95 N. C. 358; Brumble *v.* Brown, 71 N. C. 513; Scoby *v.* Woods, 3 Baxt. (Tenn.) 66.

15. Livaudais *v.* Denis, 4 La. Ann. 300; Natchitoches Police Jury *v.* Bullit, 8 Mart. N. S. (La.) 323; Brumble *v.* Brown, 71 N. C. 513.

16. *California.*—Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337.

Indiana.— Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203.

Kentucky.— Owensboro Bank *v.* Western Bank, 13 Bush 526, 26 Am. Rep. 211.

Minnesota.— Hardwick *v.* Ickler, 71 Minn. 25, 73 N. W. 519.

New Jersey.— De Hart *v.* De Hart, 70 N. J. Eq. 744, 67 Atl. 1074; Porter *v.* Woodruff, 36 N. J. Eq. 174; Nancrede *v.* Voorhis, 32 N. J. Eq. 524.

New York.—Whitney *v.* Martine, 88 N. Y. 535 [*reversing* 47 N. Y. Super. Ct. 396 (*reversing* 6 Abb. N. Cas. 72)]; Van Cott *v.* Hull, 11 N. Y. App. Div. 89, 42 N. Y. Suppl. 1060; Ehmer *v.* Title Guarantee, etc., Co., 89 Hun 120, 34 N. Y. Suppl. 1132 [*affirmed* in 156 N. Y. 10, 50 N. E. 420].

Canada.— Lowenburg *v.* Wolley, 25 Can. Sup. Ct. 51; Carter *v.* Hatch, 31 U. C. C. P. 293; Holmes *v.* Thompson, 38 U. C. Q. B. 292.

See 40 Cent. Dig. tit. "Principal and Agent," § 101.

17. Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337; Benson *v.* Liggett, 78 Ind. 452.

18. Owensboro Bank *v.* Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211; Bannon *v.* Warfield, 42 Md. 22; Lowenburg *v.* Wolley, 25 Can. Sup. Ct. 51.

19. *Illinois.*— Shipherd *v.* Field, 70 Ill. 438.

principal against loss, in which case he must make good his guaranty;[20] but ordinarily the agent does not insure against losses due to honest mistakes or errors of judgment,[21] and if he has acted in good faith and with reasonable skill and ordinary care and diligence, he will not be liable for losses which the principal may sustain;[22] and if he has invested money strictly in accordance with the terms of his agreement, he will not be liable if the investment results in loss.[23] If an agent lends money upon property which is amply adequate security at the time the loan is made, he will not be liable for a loss due to its subsequent depreciation in value;[24] and if a principal gives an agent money for purposes of speculation according to the latter's discretion, and the agent acts in good faith, he will not be liable for losses due to errors of judgment.[25]

(iv) *Agent to Effect Insurance.* In the absence of any instructions from the principal or any duty implied from established usage or the previous dealings between the parties, an agent will not be liable for failure to insure property of the principal in his possession;[26] but an agent whose duty it is and who undertakes to effect insurance for his principal must exercise due care and skill in so

Kentucky. — Owensboro Bank *v.* Western Bank, 13 Bush 526, 26 Am. Rep. 211.

Minnesota.— Hardwick *v.* Ickler, 71 Minn. 25, 73 N. W. 519.

New Jersey.— De Hart *v.* De Hart, 70 N. J. Eq. 744, 67 Atl. 1074; Nancrede *v.* Voorhis, 32 N. J. Eq. 524.

New York.— King *v.* MacKellar, 94 N. Y. 535 [*reversing* 47 N. Y. Super. Ct. 396 (*reversing* 6 Abb. N. Cas. 72)]; Van Cott *v.* Hull, 11 N. Y. App. Div. 89, 42 N. Y. Suppl. 1060.

Canada.— Butterworth *v.* Shannon, 11 Ont. App. 86; Carter *v.* Hatch, 31 U. C. C. P. 293.

See 40 Cent. Dig. tit. "Principal and Agent," § 101.

Where no loss is occasioned.— An agent should not as a general rule lend money upon property subject to a mortgage and take a second mortgage, and if he does he takes the risk of being personally liable in case a loss occurs; but he is not liable merely because he has made such an investment where no loss has been sustained and there is no evidence that any will be sustained. Porter *v.* Woodruff, 36 N. J. Eq. 174.

20. Ledbetter, etc., Land, etc., Assoc. *v.* Vinten, 108 Ala. 644, 18 So. 692; Simmons *v.* Martin, 54 Ga. 47; Denny *v.* Campbell, 4 S. W. 301, 9 Ky. L. Rep. 367; Vermilye's Case, 43 N. J. Eq. 146, 10 Atl. 605.

21. Myers *v.* Zetelle, 21 Gratt. (Va.) 733.

An agent is only bound in lending or investing money to exercise reasonable skill and ordinary diligence, that is such as is usually exercised by men of ordinary care and capacity engaged in the same business. Wheadon *v.* Mead, 72 Minn. 372, 75 N. W. 598.

22. *Colorado.*— Haines *v.* Christie, 28 Colo. 502, 66 Pac. 883.

Minnesota.—Wheadon *v.* Mead, 72 Minn. 372, 75 N. W. 598.

Mississippi.—Richardson *v.* Futrell, 42 Miss. 525.

New Jersey.— Vermilye's Case, 43 N. J. Eq. 146, 10 Atl. 605; Nancrede *v.* Voorhis, 32 N. J. Eq. 524.

New York.— King *v.* MacKellar, 94 N. Y. 314.

Pennsylvania.— Stewart *v.* Parnell, 147 Pa. St. 523, 23 Atl. 838; Kennedy *v.* McCain, 146 Pa. St. 63, 23 Atl. 322.

South Carolina.— Bellinger *v.* Gervais, 1 Desauss. Eq. 174.

Tennessee.— James *v.* Borgeois, 4 Baxt. 345.

Texas. — Texas Loan Agency *v.* Swayne, (Civ. App. 1894) 27 S. W. 183.

Virginia.— Myers *v.* Zetelle, 21 Gratt. 733.

Wisconsin.— Momsen *v.* Atkins, 105 Wis. 557, 81 N. W. 647.

Canada.— Tempest *v.* Bertrand, 19 Quebec Super. Ct. 365.

See 40 Cent. Dig. tit. "Principal and Agent," § 101.

If the agent is instructed not to invest money previously given him for such purpose, he is only required to exercise ordinary care in keeping it subject to the future orders of the principal, and need not return or offer to return it or keep the specific funds received, provided he has sufficient funds on hand to make return of the amount whenever called on. Richardson *v.* Futrell, 42 Miss. 525.

23. Van Camp *v.* Gilbert, 1 Cinc. Super. Ct. (Ohio) 358, holding that where an agent received money from a principal to be used in the purchase and sale of stocks by the agent in the same manner as he did his own, and he in good faith invested the same amount of his own money in the same stocks and sustained the same loss, he will not be liable for the loss sustained by the principal.

24. Nancrede *v.* Voorhis, 32 N. J. Eq. 524; King *v.* MacKellar, 94 N. Y. 317.

25. Vermilye's Case, 43 N. J. Eq. 146, 10 Atl. 605; Stewart *v.* Parnell, 147 Pa. St. 523, 23 Atl. 838.

26. *Illinois.*— Shoenfeld *v.* Fleisher, 73 Ill. 404; Schaeffer *v.* Kirk, 49 Ill. 251.

Louisiana.— Duncan *v.* Boye, 17 La. Ann. 273.

New York.— Brisban *v.* Boyd, 4 Paige 17.

South Carolina.— Shirtliff *v.* Whitfield, 2 Brev. 71, 3 Am. Dec. 701.

Canada.— Maitland *v.* Tylee, 7 U. C. C. P. 335.

See 40 Cent. Dig. tit. "Principal and Agent," § 104.

doing, and will be held liable for losses resulting from his negligence,[27] such as negligence in failing to effect the insurance,[28] to procure the proper amount,[29] to procure a valid and enforceable policy,[30] to keep it renewed and in force,[31] or to notify companies in which insurance has been taken of other insurance subsequently taken in other companies.[32] If an agent whose duty it is to insure neglects to do so he is himself to be considered as the insurer and liable as such, and entitled to credit for the premium which should have been paid;[33] but an agent instructed to insure has no right without the principal's consent to take the risk himself as insurer, and if he does so cannot recover premiums, and in case of loss will be liable not as an insurer but as an agent who has failed to comply with instructions,[34] although if done with the acquiescence of the principal the agent will be liable as an insurer and entitled to credit for the premium.[35] An agent who neglects his instructions to insure a shipment of goods cannot in case they arrive safely recover for a premium on insurance, although in case of loss he would have been liable.[36] An agent to insure will not be liable if he acted in good faith and with due care and diligence,[37] as where he could not procure insurance upon any more favorable terms than those accepted,[38] or could not procure it at all and notified his principal promptly of his inability to do so.[39] So also an agent will not be

27. *Illinois.*— Shoenfeld *v.* Fleisher, 73 Ill. 404.

Louisiana.— Strong *v.* High, 2 Rob. 103, 38 Am. Dec. 195.

Maine.— Sawyer *v.* Mayhew, 51 Me. 398.

Pennsylvania.— Miner *v.* Tagert, 3 Binn. 204.

United States.— De Taslet *v.* Crousillat, 7 Fed. Cas. No. 3,828, 2 Wash. 132.

England.— Wilkinson *v.* Coverdale, 1 Esp. 75.

Canada.— Baxter *v.* Jones, 4 Ont. L. Rep. 541; McGuffin *v.* Ryall, 2 Grant Err. & App. (U. C.) 415 [*reversing* 13 U. C. C. P. 115]; Johnston *v.* Graham, 14 U. C. C. P. 9.

See 40 Cent. Dig. tit. "Principal and Agent," § 104.

Duty implied from usage or custom.— If it has been the practice or custom of a factor to insure consignments of goods, and this is brought to the knowledge of the consignor by uniform charges for insurance on his accounts rendered, he cannot discontinue the practice without notice, and will be liable for losses due to a failure to insure a subsequent consignment (Area *v.* Milliken, 35 La. Ann. 1150); and where one of two joint owners of a vessel having the possession and control thereof has been in the habit of insuring the interest of the other owner as well as his own, he will be liable to the other if without notice he subsequently insures only his own interest, and a loss occurs (Berthout *v.* Gordon, 6 La. 579; Ralston *v.* Barclay, 6 Mart. (La.) 649, 12 Am. Dec. 483).

28. Shoenfeld *v.* Fleisher, 73 Ill. 404; Miner *v.* Tagert, 3 Binn. (Pa.) 204; Pritchard *v.* Deering Harvester Co., 117 Wis. 97, 93 N. W. 827.

29. Beardsley *v.* Davis, 52 Barb. (N. Y.) 159.

30. Sawyer *v.* Mayhew, 51 Me. 398 (holding that where an agent to effect insurance upon property of the principal takes out a policy not as agent but on his own account and payable to himself, and he has no insurable interest in the property so that the policy under the statutes would be invalid and unenforceable by the principal, the agent is liable for a resulting loss); McGuffin *v.* Ryall, 2 Grant Err. & App. (U. C.) 415 [*reversing* 13 U. C. C. P. 115].

31. Strong *v.* High, 2 Rob. (La.) 103, 38 Am. Dec. 195.

Character of instructions.— Where a manufacturing company sent certain wagons to an agent to sell with instructions to insure the same, but did not specify any period for which the insurance should be taken or maintained, and the wagons remaining unsold at the end of eight months were to be subject to the orders of the company, the agent was only required to effect insurance for a reasonable time not exceeding eight months, and would not be liable, on the ground of negligence in failing to keep the property insured, for a loss occurring three years after the date of the original contract. Milburn Wagon Co. *v.* Evans, 30 Minn. 89, 14 N. W. 271.

32. Baxter *v.* Jones, 4 Ont. L. Rep. 541, opinion of Lount, J.

33. Shoenfeld *v.* Fleisher, 73 Ill. 404; Storer *v.* Eaton, 50 Me. 219, 79 Am. Dec. 611; De Tastett *v.* Crousillat, 7 Fed. Cas. No. 3,828, 2 Wash. 132.

34. Keane *v.* Branden, 12 La. Ann. 20.

35. Miller *v.* Tate, 12 La. Ann. 160.

36. Storer *v.* Eaton, 50 Me. 219, 79 Am. Dec. 611.

37. Williams *v.* Rost, 13 La. Ann. 327; Sanches *v.* Davenport, 6 Mass. 258; De Tastett *v.* Crousillat, 7 Fed. Cas. No. 3,828, 2 Wash. 132; Silverthorne *v.* Gillespie, 9 U. C. Q. B. 414.

38. Silverthorne *v.* Gillespie, 9 U. C. Q. B. 414, holding that an agent to insure a shipment of goods by boat will not be liable for taking a policy not covering losses due to the ignorance, unskilfulness, or negligence of those navigating the vessel, where he could not procure a policy covering losses from such causes.

39. Williams *v.* Rost, 13 La. Ann. 327.

liable, at least not for more than nominal damages, for failing to procure insurance where no loss has resulted,[40] or where the insurance if effected according to the instructions of the principal would have been void.[41]

(v) *Forwarding Agents.* A person acting as a forwarding agent in the shipment of goods or property must conform to any express instructions of his principal,[42] and must exercise ordinary care and diligence in the performance of all the duties involved in his undertaking; [43] but a mere forwarding agent is not an insurer of the safety of the shipment,[44] and will not be liable if he acts with due care and diligence according to the nature of the undertaking.[45]

(vi) *Care and Custody of Property.* An agent who is intrusted with the care and custody of property belonging to his principal becomes a bailee of the property and subject to the ordinary liabilities of such bailees,[46] but this liability does not arise until the actual delivery of the property to the agent or its constructive delivery whereby he accepts its care.[47] The agent will not be liable if the property is lost, destroyed, or injured without any fault or negligence on his part,[48] or if in keeping and protecting it he exercised ordinary care, skill, and diligence,[49] or such as an ordinarily prudent person would exercise in regard to his own property;[50] but what will amount to ordinary care and diligence in this regard will depend upon all the circumstances of the case,[51] and particularly upon the nature and value of the property,[52] and in any case where an agent has property of the principal in his care and custody he will be liable therefor unless he can show that he still has the property or can account for its loss.[53]

(vii) *Custody, Disposition, and Remittance of Funds.* It is the duty of an agent who has received or collected money for his principal to notify

40. Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638.

41. Alsop *v.* Coit, 12 Mass. 40, where the principal's misrepresentations of fact in regard to the property to be insured would have avoided the policy if one had been issued.

42. Wilts *v.* Morrell, 66 Barb. (N. Y.) 511.

Duty to obey generally see *supra*, III, A, 2.

43. Kirkby *v.* Armistead, 11 Rob. (La.) 81 (holding that where an agent negligently delays for an unreasonable time to ship goods which he has undertaken to forward, and they are destroyed while still in his possession, he will be liable therefor); Railey *v.* Porter, 32 Mo. 471, 82 Am. Dec. 141 (holding that it is the duty of a forwarding agent to advise his consignee of a shipment made to his address, and that the fact that the carrier may be liable for failure to deliver the goods shipped in accordance with the bill of lading will not discharge the agent from liability to his principal).

44. Brown *v.* Denison, 2 Wend. (N. Y.) 593.

45. Davis *v.* Larguier, 2 La. Ann. 326 (holding that where a merchant in one town acts as forwarding agent for planters in shipping cotton to market in a different place, and exercises reasonable prudence in selecting the merchant to whom it is consigned for sale, he will not be liable in case of a default by such consignee); Field *v.* Banker, 9 Bosw. (N. Y.) 467 (holding that where an agent was instructed to ship goods by boat at the lowest rate of freight, he was not liable for accepting a bill of lading exempting the carrier from liability from losses by fire, if such contract of shipment was according to the usual course of business and it did not appear that any better contract could have been made at the lowest rate); Brown *v.* Denison, 2 Wend. (N. Y.) 593 (holding that forwarding merchants are discharged from their liability by showing that they used ordinary diligence in sending on property by responsible persons); McCants *v.* Wells, 3 S. C. 569.

46. Charlesworth *v.* Whitlow, 74 Ark. 277, 85 S. W. 423; Williams *v.* Dotterer, 111 La. 822, 35 So. 921; Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

An agent for hire or where the bailment is for the benefit of both parties will be liable if he fails to exercise ordinary care in the custody of the property (Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788); but a gratuitous bailee will be liable only for gross negligence (Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132. See also *supra*, III, A, 3, a, (III); and, generally, Bailments, 5 Cyc. 186).

47. O'Bannon *v.* Southern Express Co., 51 Ala. 481.

48. Norton *v.* Melick, 97 Iowa 564, 66 N. W. 780; Furber *v.* Barnes, 32 Minn. 105, 19 N. W. 728.

49. Stanberry *v.* Moore, 56 Ill. 472; Clark *v.* Norwood, 19 La. Ann. 116; Gillet *v.* Theall, 16 La. 46; Lamoureau *v.* Fowler, 2 La. 174.

50. Williams *v.* O'Daniels, 35 Tex. 542.

51. Wright *v.* Central R., etc., Co., 16 Ga. 38.

52. Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788.

53. Charlesworth *v.* Whitlow, 74 Ark. 277, 85 S. W. 423.

the latter at once,[54] and ordinarily he should pay over such money to the principal as soon as it is received or collected,[55] or apply or dispose of it according to the directions of the principal.[56] In any case he holds the money for the principal and has no right to pay it over to any one else,[57] or return it to the person from whom he received it,[58] unless authorized by the principal to do so,[59] and if paid over to another agent of the same principal it must be paid in cash.[60] While the money is in his custody he must exercise ordinary care or such as a prudent person would exercise under the same circumstances in keeping it safely,[61] and he will be liable if he lends the money without authority to do so and it is lost; [62] but he is not an insurer of its safety,[63] and will not be liable if it is lost or stolen without culpable negligence on his part.[64] In the absence of instructions, either express or implied from the nature of the transaction, it is not the duty of the agent to make remittances of money to his principal, but merely to hold the same subject to instructions; [65] but if instructed to remit he must follow any instructions given as to the mode of remittance or will be liable for any resulting loss;[66] and conversely if he does follow the instructions given the remittance will be at the risk of the principal.[67] In the absence of express instructions he must exercise due care and discretion as to the mode of remittance; [68] but his liability is not absolute; [69] and if he has acted with due care and according to the usual course of business in such case he will not be liable.[70]

c. Ratification by or Negligence of Principal.[71] Although an agent has been guilty of negligence, he will not be liable to the principal if the latter ratifies what he has done,[72] either expressly or impliedly; [73] but such ratification to relieve the

54. McMahan *v.* Franklin, 38 Mo. 548; Lyle *v.* Murray, 4 Sandf. (N. Y.) 590.

55. Merchants' Bank *v.* Rawls, 21 Ga. 289; Bedell *v.* Janney, 9 Ill. 193; Lyle *v.* Murray, 4 Sandf. (N. Y.) 590; Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273.

56. Gray *v.* Barge, 47 Minn. 498, 50 N. W. 1014; Hamilton *v.* Peace, 2 Desauss. Eq. (S. C.) 79; Every *v.* Mould, 1 L. J. Ch. 23; McLean *v.* Grant, 20 Grant Ch. (U. C.) 76.

57. Land Mortg. Inv., etc., Co. *v.* Preston, 119 Ala. 290, 24 So. 707; Ganseford *v.* Dutillet, 1 Mart. N. S. (La.) 284; Crosskey *v.* Mills, 1 C. M. & R. 298, 3 L. J. Exch. 297; McFatridge *v.* Carvill, 16 Nova Scotia 286; Blanchet *v.* Roy, 14 Quebec Super. Ct. 402.

58. Hancock *v.* Gomez, 58 Barb. (N. Y.) 490 [*affirmed* in 50 N. Y. 668].

59. Walkley *v.* Griffith, 4 E. D. Smith (N. Y.) 343.

60. Hanley *v.* Cassan, 11 Jur. 1088, holding that where an agent who receives money for another pays it to another agent of the principal he is bound to pay it in cash, and cannot merely settle it in an account between that agent and himself, unless he can show an authority from the principal and that there was an account between the principal and that agent with a balance in favor of the agent.

61. Robinson *v.* Illinois Cent. R. Co., 30 Iowa 401.

62. Benson *v.* Liggett, 78 Ind. 452.

63. Louisville, etc., R. Co. *v.* Buffington, 131 Ala. 620, 31 So. 592.

64. Louisville, etc., R. Co. *v.* Buffington, 131 Ala. 620, 31 So. 592; Robinson *v.* Illinois Cent. R. Co., 30 Iowa 401.

65. Lyon *v.* Tams, 11 Ark. 189, holding that if an agent remits money to his principal without any instructions, express or implied, he will be liable if it is lost in transit unless the principal ratified his act.

66. Stone *v.* Hayes, 3 Den. (N. Y.) 575 [*affirming* 7 Hill 128]; Foster *v.* Preston, 8 Cow. (N. Y.) 198; Wilson *v.* Wilson, 26 Pa. St. 393; Kerr *v.* Cotton, 23 Tex. 411.

67. Warwicke *v.* Noakes, 1 Peake N. P. 98, 3 Rev. Rep. 653.

68. Rourk *v.* Pegram, 10 La. Ann. 394, holding that an agent who without instructions remits a bill at forty-five days after date on drawees at a place distant from the principal's residence and drawn by a house of inferior and doubtful credit will be liable for a resulting loss.

69. Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58, holding that an agent in remitting money is only required to exercise ordinary and reasonable skill and diligence, and that whether it is negligence to transmit money by mail in the form of bills inclosed in a letter depends upon the circumstances of the case, including the amount sent, expense of different modes of transmission, the time and distance intervening, and the prevailing usage in similar cases.

70. Jones *v.* Lathrop, 44 Ga. 398; Underwriters' Wrecking Co. *v.* Board of Underwriters, 35 La. Ann. 803; Potter *v.* Morland, 3 Cush. (Mass.) 384; Warwicke *v.* Noakes, 1 Peake N. P. 98, 3 Rev. Rep. 653.

71. Ratification generally see *supra*, 1 F.

72. Codwise *v.* Hacker, 1 Cai. (N. Y.) 526; Towle *v.* Stevenson, 1 Johns. Cas. (N. Y.) 110; Wagner *v.* Phillips, 12 S. D. 335, 81 N. W. 632.

73. Vianna *v.* Barclay, 3 Cow. (N. Y.) 281; Cairnes *v.* Bleecker, 12 Johns. (N. Y.) 300.

agent must be with knowledge on the part of the principal of the material facts.[74] So also the agent will not be liable if the loss was due to the fault of the principal himself,[75] or the principal's contributory negligence,[76] or if the principal, notwithstanding the negligence of the agent, could by the exercise of ordinary care have protected himself and avoided any loss therefrom and failed to do so.[77]

d. Damages.[78] An agent is liable on the ground of negligence only for such damages as are the natural and proximate result of his negligence,[79] and the measure of damages is the loss or injury actually sustained by the principal as the result of such negligence,[80] and no further damages can be recovered.[81] If there has been a breach of duty on the part of the agent the principal is entitled to recover at least nominal damages;[82] but if no loss or injury has been sustained as the result of such negligence he is entitled only to nominal damages,[83] and no actual damages can be recovered.[84] So an agent to collect commercial paper does not by his negligence become liable as an indorser, but only for the loss actually sustained.[85] In the case of collecting agents, however, the loss is *prima facie* the amount of the debt or claim;[86] but it is competent for the agent to show that the principal has not been damaged to this extent or has sustained only nominal damages,[87] and if it is shown that the principal has not suffered any

74. Bannon *v.* Warfield, 42 Md. 22; Williams *v.* Higgins, 30 Md. 404; Whitney *v.* Martine, 88 N. Y. 535 [*reversing* 47 N. Y. Super. Ct. 396 (*reversing* 6 Abb. N. Cas. 72)]; Grant *v.* Ludlow, 8 Ohio St. 1; Butterworth *v.* Shannon, 11 Ont. App. 86.

75. Fitz *v.* Hayden, 1 La. 411; Brooks *v.* Lawrence, 1 Edm. Sel. Cas. (N. Y.) 496; Herbert *v.* Lukens, 153 Pa. St. 180, 25 Atl. 1116.

76. Moore *v.* Coler, 114 N. Y. App. Div. 301, 99 N. Y. Suppl. 846.

77. Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638; Sioux City, etc., R. Co. *v.* Walker, 49 Iowa 273.

78. Damages in general see DAMAGES, 13 Cyc. 1.

79. Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec 555; Lowenburg *v.* Wolley, 25 Can. Sup. Ct. 51.

80. *Alabama.*— Mobile Bank *v.* Huggins, 3 Ala. 206.

Illinois.— Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790.

Louisiana.— Durnford *v.* Patterson, 7 Mart. 460, 12 Am. Dec. 514.

New York.— Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Goodwin *v.* O'Brien, 3 Silv. Sup. 96, 6 N. Y. Suppl. 239 [*affirmed* in 127 N. Y. 649, 27 N. E. 856]; Allen *v.* Suydam, 20 Wend. 321, 32 Am. Dec. 555.

Pennsylvania.— Arrott *v.* Brown, 6 Whart. 9.

United States.— Bell *v.* Cunningham, 3 Pet. 69, 7 L. ed. 606; Hamilton *v.* Cunningham, 11 Fed. Cas. No. 5,978, 2 Brock. 350.

England.— Salvesen *v.* Rederi, [1905] A. C. 302, 74 L. J. P. C. 96, 92 L. T. Rep. N. S. 575; Cassaboglou *v.* Gibbs, 9 Q. B. D. 220, 46 J. P. 568, 51 L. J. Q. B. 593, 47 L. T. Rep. N. S. 98 [*affirmed* in 11 Q. B. D. 797, 52 L. J. Q. B. 538, 48 L. T. Rep. N. S. 850, 32 Wkly. Rep. 138].

Canada.— Lowenburg *v.* Wolley, 25 Can. Sup. Ct. 51; Vivian *v.* Scoble, 1 Manitoba 125.

81. Sawyer *v.* Mayhew, 51 Me. 398; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618.

82. Adams *v.* Robinson, 65 Ala. 586; Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638; Van Wart *v.* Wolley, M. & M. 520, 22 E. C. L. 578.

83. Mobile Bank *v.* Huggins, 3 Ala. 206; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618.

84. *Alabama.*— Mobile Bank *v.* Huggins, 3 Ala. 206.

Illinois.— Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638.

Maine.— Washburn *v.* Blake, 47 Me. 316; Folsom *v.* Mussey, 10 Me. 297.

Massachusetts.— Alsop *v.* Coit, 12 Mass. 40.

New Jersey.— Porter *v.* Woodruff, 36 N. J. Eq. 174, holding that an agent should not as a general rule invest in second mortgages, but he will not be held personally liable because he has done so, in the absence of proof that loss has ensued or will probably ensue.

New York.— Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Commercial Bank *v.* Ten Eyck, 48 N. Y. 305; Talcott *v.* Cowdry, 17 Misc. 333, 39 N. Y. Suppl. 1076; Lienan *v.* Dinsmore, 10 Abb. Pr. N. S. 209.

85. Mobile Bank *v.* Huggins, 3 Ala. 206; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 [*reversing* 16 Hun 332]; Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555 [*reversing* 17 Wend. 368]; Hamilton *v.* Cunningham, 11 Fed. Cas. No. 5,978, 2 Brock. 350.

86. Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 [*reversing* 16 Hun 332]; Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. 859.

87. Andrews *v.* Pardee, 5 Day (Conn.) 29; Crawford *v.* Louisiana State Bank, 1 Mart. N. S. (La.) 214; Meadville First Nat. Bank

material damage by the negligence of the collecting agent no more than nominal damages can be recovered.[88]

4. Duty to Account — a. In General.[89] It is the duty of an agent to account to his principal for all funds or property belonging to his principal which come into his hands by virtue of his agency,[90] or which come into the hands of a subagent appointed by the agent to receive them,[91] including all profits resulting from his transactions as agent or on his own account in breach of his duty as agent,[92] and the proceeds of all sales and collections for his principal,[93] although, in the case of a sale, the proceeds amount to more than the price fixed by the

v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 [*reversing* 16 Hun 332].

88. Andrews *v.* Pardee, 5 Day (Conn.) 29; Lienan *v.* Dinsmore, 10 Abb. Pr. N. S. (N. Y.) 209; Brumble *v.* Brown, 73 N. C. 476.

There is no actual damage from failing to present a bill for acceptance where it is shown that it would not have been accepted if presented (Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555 [*reversing* 17 Wend. 368]); or from the release of an indorser of a note by the negligence of the agent if the maker is still bound and is solvent (Mobile Bank *v.* Huggins, 3 Ala. 206); or from the negligence of an agent in failing promptly to present a draft for payment so that by reason of the delay it cannot be collected from the drawee if the maker is still liable thereon and is solvent (Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 [*reversing* 16 Hun 332]).

89. **Agent's liability to arrest for failing to account** see Arrest, 3 Cyc. 909.

Accounting by factors see Factors and Brokers, 19 Cyc. 134 *et seq.*

90. *Georgia.*— Jackson *v.* Gallagher, 128 Ga. 321, 57 S. E. 750.

Indiana.—McClelland *v.* Hubbard, 2 Blackf. 361; Nading *v.* Howe, 23 Ind. App. 690, 55 N. E. 1032.

Iowa.— Gladiator Consol. Gold Mines, etc., Co. *v.* Steele, 132 Iowa 446, 106 N. W. 737.

Louisiana.— Nolan *v.* Shaw, 6 La. Ann. 40 (holding that an agent may become a debtor of the principal, but not until dissolution of the agency and his neglect or refusal to deliver over the property; that while the agency continues, the property or money in his hands belongs to the principal); McDonogh *v.* Delassus, 10 Rob. 481.

Massachusetts.— Cushman *v.* Snow, 186 Mass. 169, 71 N. E. 529.

New Jersey.— Hartshorne *v.* Thomas, 43 N. J. Eq. 419, 10 Atl. 843.

New York.— Auburn *v.* Draper, 23 Barb. 425. See Hay *v.* Hall, 28 Barb. 378.

South Carolina.— Brock *v.* Lewis, 7 Rich. Eq. 77.

Tennessee.— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

Vermont.— Smith *v.* Woods, 4 Vt. 400, holding that where an agent takes notes for his principal's benefit, payable on a certain day at a particular bank, which notes are after the commencement of an action of account against the agent paid by the maker at the time and place appointed, such payment is a payment to the agent and he is accountable to his principal for the amount of the notes.

England.— Lister *v.* Lister, Rep. t. Finch 285, 23 Eng. Reprint 156. See Ehrensperger *v.* Anderson, 3 Exch. 148, 18 L. J. Exch. 132.

Canada.— Vivian *v.* Scoble, 4 Can. L. T. 297; Clayton *v.* Patterson, 32 Ont. 435; Violett *v.* Sexton, 14 Quebec K. B. 360.

Books and papers of correspondence between an agent and his principal are the agent's private property, necessary for his protection, and he cannot be compelled to turn them over. Evans *v.* Van Hall, Clarke (N. Y.) 22.

Agent not liable to account for goods he did not consent to receive.— An agent for the sale of mineral waters, for which he binds himself at a stipulated price, is not liable for such merchandise shipped subject to his order by the principal, unless such agent ordered the consignment. Frank *v.* Hollander, 35 La. Ann. 582.

That an infant agent cannot be made to account see Smally *v.* Smally, 1 Eq. Cas. Abr. 6, 21 Eng. Reprint 831.

91. Matthews *v.* Haydon, 2 Esp. 509.

92. See *supra* III, A, 1, d.

Additional profits.—An agent selling goods and accounting for the proceeds is not obliged to account for profits he may make out of further investments of those proceeds; but is liable to the consignor merely for the proceeds of the sale of his goods. Kirkham *v.* Peel, 44 L. T. Rep. N. S. 195 [*affirming* 28 Wkly. Rep. 941].

93. *Louisiana.*— McClendon *v.* Bradford, 42 La. Ann. 160, 7 So. 78, 8 So. 256.

Minnesota.— Bardwell *v.* American Express Co., 35 Minn. 344, 28 N. W. 925.

New York.— Reed *v.* Hayward, 82 N. Y. App. Div. 416, 81 N. Y. Suppl. 608; Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, 37 N. Y. Suppl. 794 [*affirmed* in 158 N. Y. 693, 53 N. E. 1125]; Clark *v.* Merchants' Bank, 1 Sandf. 498 [*reversed* on other grounds in 2 N. Y. 380]; Dempsey *v.* Zittel, 90 N. Y. Suppl. 1054; Paris Hill Mfg. Co. *v.* Lyman, 13 N. Y. St. 370.

North Carolina.— Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488.

England.— Topham *v.* Braddick, 1 Taunt. 572, 10 Rev. Rep. 610.

Debts.— Where an agency to sell merchandise for another is terminated by the agent's insolvency, debts arising from sales made by the agent on credit in his own name belong to the principal, subject to legal liens,

principal; [94] and if the principal cannot specifically trace such proceeds he becomes a creditor at large of the agent for the amount.[95] It is also the duty of an agent to account for property or funds which he has received to be applied to a specific purpose,[96] and if he fails to apply them to the purposes for which they were received, the principal may recover the same.[97] But where the property received consists of money, the agent need not account for and turn over the identical money received unless it can be identified.[98] If the property is sold or exchanged, or the money invested, the title of the principal at once attaches, and the agent must account for the money or property so received.[99] The agent must deliver

although in pursuance of the agreement between the parties the agent has rendered monthly accounts of all his sales, and given notes or acceptances to the principal for the cost of the merchandise at wholesale prices, taking a receipt containing a promise to account for the same at maturity. Audenried *v.* Betteley, 8 Allen (Mass.) 302.

Where an agent sells on credit without authority, he is liable to account to the principal for all the property so sold (Morrison *v.* Cole, 30 Mich. 102); and if he delivers the property without the price being paid he is personally liable to his principal (Brown *v.* Boorman, 3 Q. B. 511, 11 Cl. & F. 1, 2 G. & D. 793, 11 L. J. Exch. 437, 43 E. C. L. 843, although the amount be more than the price fixed by the principal).

94. Whitehead *v.* Lynn, 20 Colo. App. 51, 76 Pac. 1119; Kellogg *v.* Keeler, 27 Ill. App. 244 (holding that authority to an agent to sell at a stipulated figure does not amount to a contract to give him all he sells for above that sum, and it is still his duty to obtain the highest price for which the property will sell, and account to his principal for the entire proceeds, less a reasonable compensation); Hammond *v.* Olmstead, 10 Fed. 223 (holding that where an agent sells property for his principal on various dates upon a fluctuating market, and accounts to his principal for sales as all of a particular date, he will be liable for the balance between what he accounted for and what he actually received); Dunlevy *v.* Mowry, 8 Fed. Cas. No. 4,165, 2 Bond 214 (holding that where an agent sells bonds at fifty cents on the dollar and accounts to his principal for thirty-seven and one-half cents on the dollar, he is liable to the principal for the difference between the rates, subject to a deduction for reasonable charges).

95. Clark *v.* Merchants' Bank, 1 Sandf. (N. Y.) 498 [*reversed* on other grounds in 2 N. Y. 380].

96. Wells *v.* Collins, 74 Wis. 341, 43 N. W. 160, 5 L. R. A. 531, holding that where an agent is instructed by his principal to pay over certain collections, when made, to a third person, the relation of debtor and creditor does not arise between the agent and his principal on the collection of the money, in the absence of an express agreement, but the property in the very money collected remains in the principal until it is applied to the purpose specified. See Allen *v.* Thompson, 3 Metc. (Ky.) 198, 77 Am. Dec. 169, in which the court denied the right of the principal to call back money paid to the agent for a third person on the ground that the agent would be liable to the third person.

97. Strong *v.* Bliss, 6 Metc. (Mass.) 393; Allen *v.* O'Bryan, 118 N. Y. App. Div. 213, 103 N. Y. Suppl. 125, holding that where plaintiff gave defendant a certain amount of money to be expended for a specific legal purpose, defendant could be required to account for it.

98. Longbottom *v.* Babcock, 9 La. 44.

Where a principal intrusts money to his agent to buy property, their relations are those of debtor and creditor, not depositor and depositary; and the agent is bound to account for but not to restore the money; and if he become insolvent or die, the principal will not be a privileged creditor. Stetson *v.* Gurney, 17 La. 162; Longbottom *v.* Babcock, 9 La. 44; Mason *v.* Man, 3 Desauss. Eq. (S. C.) 116.

99. *Georgia.*— Sibley *v.* Ober, 87 Ga. 55, 13 S. E. 711.

Iowa.— Dows *v.* Morse, 62 Iowa 231, 17 N. W. 495.

Mississippi.— Fairly *v.* Fairly, 38 Miss. 280, holding that if an agent purchases property for his principal and uses it with the latter's knowledge and consent, it is not a circumstance tending to show title in the agent unless it also appears that he claims to do so in his own right and with the knowledge of the principal.

New York.— Childs *v.* Waterloo Wagon Co., 37 N. Y. App. Div. 242, 57 N. Y. Suppl. 520 [*affirmed* in 167 N. Y. 576, 60 N. E. 1108]; Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, 37 N. Y. Suppl. 794 [*affirmed* in 158 N. Y. 693, 53 N. E. 1125]; Anstice *v.* Brown, 6 Paige 448.

Wisconsin.— Kountz *v.* Gates, 78 Wis. 415, 47 N. W. 729; Wells *v.* Collins, 74 Wis. 341, 43 N. W. 160, 5 L. R. A. 531.

England.— Williams *v.* Everett, 14 East 582, 13 Rev. Rep. 315; Wells *v.* Ross, 7 Taunt. 403, 2 E. C. L. 420.

Canada.— Turner *v.* Francis, 14 Can. L. T. 406; Long *v.* Carter, 23 Ont. App. 121 [*affirmed* in 26 Can. Sup. Ct. 430]; *In re* Lemelin, 22 Quebec Super. Ct. 87, holding that goods bought by an agent for his principal, for which he was to be paid a commission, are the property of the principal, even when bought in the name of the agent.

See 40 Cent. Dig. tit. "Principal and Agent," § 100.

The presumption of ownership from possession does not extend to property intrusted to an avowed agent for the special purpose of

the funds or property to his principal upon a proper demand therefor,[1] or at such times as may be fixed by the express or implied terms of the agency,[2] or upon the termination of the agency,[3] or he must satisfactorily explain why he does not do so.[4] If an agent wrongfully disposes of the funds or property, he may be compelled to account to his principal therefor on the basis of conditions existing immediately before such wrongful disposition.[5] In calling an agent to account a principal may

his vocation. Boisblanc's Succession, 32 La. Ann. 109.

A deposit in bank by a depositor as agent is *prima facie* the property of his principal, and is not liable to attachment for the debt of the agent; but in all such cases the name of the principal should be stated on the account. Northern Liberties Bank *v.* Jones, 42 Pa. St. 536.

Right against creditors of agent.— A principal's right to property in the hands of his agent, which is impressed with a trust, is good as against the agent's creditors. Watertown Steam-Engine Co. *v.* Palmer, 84 Ga. 368, 10 S. E. 969, 20 Am. St. Rep. 368; Dexter *v.* Stewart, 7 Johns. Ch. (N. Y.) 52. A merchant's goods in hand of factor are not liable to debts of a superior nature; but otherwise of money. *Ex p.* Dumas, 1 Atk. 232, 26 Eng. Reprint 149, 2 Ves. 582, 28 Eng. Reprint 372; Mace *v.* Cadell, Cowp. 232; Godfrey *v.* Furzo, 3 P. Wms. 186, 24 Eng. Reprint 1022; Whitecomb *v.* Jacob, 1 Salk. 160. Also, if notes and not money be taken for the goods, they shall belong to the principal. *Ex p.* Oursell, Ambl. 297, 27 Eng. Reprint 200.

Where an agent invests a greater amount than was authorized or was deposited with him for such purpose, and refuses to deliver the amount of the property which the sum deposited with him would purchase, the principal may recover the value of the property in an action of account. Bradfield *v.* Patterson, 106 Ala. 397, 17 So. 536.

A purchase in the principal's name with the agent's funds does not vest in the agent, even though made without the principal's knowledge, unless the principal consents to give the agent the benefit. Giannoni *v.* Gunny, 14 La. Ann. 632.

Election of principal.— The principal may elect to hold the agent or claim goods taken by the agent without authority. Thus an agent, although authorized to sell or exchange the property of his principal, does not by any exchange divest his principal of his right of property in the thing received; nor does an agent, by investing his funds in the property of his principal, make the property his own. The principal may claim the property received by his agent in exchange, or sue for the value; and suing for its value is an election of remedy. Lowry *v.* Beckner, 5 B. Mon. (Ky.) 41; Greene *v.* Haskell, 5 R. I. 447. But he cannot both hold the agent and demand the goods. Myers *v.* Walker, 31 Ill. 353; Perkins *v.* Hershey, 77 Mich. 504, 43 N. W. 1021.

1. De Leonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718 (holding that the agent was bound to pay over moneys collected on demand, although he obtained his power of attorney by fraud); Nolan *v.* Shaw, 6 La. Ann. 40; Brumble *v.* Brown, 71 N. C. 513 (holding that one who receives notes for collection is bound, on demand of settlement, either to return them or show sufficient reason for not doing so).

Improper demand.— Under a provision in a contract for the sale of machines by an agent that he should promptly deliver all machines remaining unsold at the end of the season on demand of the principal, such agent cannot be compelled to pay for machines as sold which he refused to deliver on demand, where the demand was coupled with a claim for the value of other machines under another provision of the contract, and compliance with it might have been construed as an admission of the validity of the latter claim, which the agent disputed. Esterly Harvesting Mach. Co. *v.* Veeder, 29 Nebr. 664, 45 N. W. 1103.

Where an agent sells on credit he cannot be called upon to pay the money over to the principal until he has received the whole amount from the purchaser, unless the delay in payment has been occasioned by his neglect. Varden *v.* Parker, 2 Esp. 710.

2. Hemenway *v.* Hemenway, 5 Pick. (Mass.) 389; Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, 37 N. Y. Suppl. 794 [*affirmed* in 158 N. Y. 693, 53 N. E. 1125] (holding that where an agent agrees to sell and remit the proceeds, and he sells and takes notes, he is still bound to remit the proceeds at the time fixed for remittance, whether or not the notes are paid); Morison *v.* Thompson, L. R. 9 Q. B. 480, 43 L. J. Q. B. 215, 30 L. T. Rep. N. S. 869, 22 Wkly. Rep. 859 (holding that where no account remains to be taken between principal and agent, it is the duty of the agent to pay over money as absolutely belonging to the principal).

3. Weaver *v.* Fisher, 110 Ill. 146 (holding that an agent may be compelled to return a certificate of membership in an exchange to his principal on leaving the employment, where it was furnished to him by the principal to enable him to carry on the agency); Duff *v.* Blair, 74 N. Y. App. Div. 364, 77 N. Y. Suppl. 444; Halifax Merchants Bank *v.* Whidden, 19 Can. Sup. Ct. 53.

4. Fidelity Inv. Co. *v.* Carico, 1 Colo. App. 292, 28 Pac. 1131 (holding that evidence of robbery is not a good defense unless the agent shows that he kept the full amount for his principal in his safe); Gladiator Consol. Gold Mines, etc., Co. *v.* Steele, 132 Iowa 446, 106 N. W. 737.

5. Kountz *v.* Gates, 78 Wis. 415, 47 N. W. 729, holding that where an agent disposes of his principal's property according to his authority, and secures a contract for the payment of a valuable consideration therefor,

repudiate any unauthorized acts of the agent and hold him strictly accountable to the agreement between them.[6]

b. To Whom Accountable. An agent's duty to account is ordinarily owing to his principal only,[7] or upon his death to the heirs or personal representatives.[8] In accordance with this rule, a subagent ordinarily is under a duty to account only to the primary agent,[9] unless his employment is such that a privity of contract exists between him and the principal, in which case he may be compelled to account directly to the principal;[10] and in any case he may be compelled to account to the principal if notice of the latter's ownership is given to him before he turns over the funds or property to the primary agent.[11] But having settled with the primary agent a subagent cannot be compelled to account over again to some other person having a beneficial interest but sustaining no legal relation to him.[12] In case of the death of an agent his personal representatives must account wherever it would have been his duty so to do.[13] Where a number of persons constitute one their common agent for a common purpose, he should account to them all together and not to one separately,[14] except where the understanding between

and wrongfully surrenders such contract or releases the purchaser from payment of any part thereof without authority, he must account to his principal on the basis of conditions existing immediately before such surrender. And see Witsell *v.* Riggs, 14 Rich. (S. C.) 186, where an action was brought to recover damages for an alleged breach of duty in not paying over to plaintiff the purchase-money (Confederate treasury notes) of land which defendant had sold for plaintiff, the money having been retained by defendant, without giving notice that he had received it, until it became valueless; and the declaration contained no specific allegation of fraud or collusion, nor of special damages; and it was held that the measure of damages was the value of the currency at the time it was received by defendant, with interest thereon.

6. Chapman *v.* Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

7. Rosaler *v.* Mandeville, 92 N. Y. Suppl. 341; Atty.-Gen. *v.* Chesterfield, 18 Beav. 596, 18 Jur. 686, 2 Wkly. Rep. 499, 52 Eng. Reprint 234, holding also that the case of a charity forms no exception to the rule.

8. Carrau *v.* Chapotel, 47 La. Ann. 408, 16 So. 873, holding, however, that where a principal dispensed with any account by the agent, and none was kept, the heir of the principal cannot compel the agent to account if there are no books or data from which it can be made.

9. Toland *v.* Murray, 18 Johns. (N. Y.) 24; Gooderham *v.* Hyde, 6 U. C. C. P. 341. See Lockwood *v.* Abdy, 9 Jur. 267, 14 Sim. 437, 37 Eng. Ch. 437, 60 Eng. Reprint 428.

10. Miller *v.* Farmers', etc., Bank, 30 Md. 392; Wilson *v.* Smith, 3 How. (U. S.) 763, 11 L. ed. 820, holding that whenever by express agreement of the parties a subagent is to be employed by an agent to receive money for the principal, or where an authority to do so may be implied from the usual course of trade or the nature of the transaction, the principal may treat the subagent as his agent, and when he has received the money may recover it in an action for money had and received. See Crossley *v.* Magniac, [1893] 1 Ch. 594, 67 L. T. Rep. N. S. 598, 3 Reports 202, 41 Wkly. Rep. 598; Beaumont *v.* Boultbee, 7 Ves. Jr. 599, 32 Eng. Reprint 241.

11. Harrison Mach. Works *v.* Coquillard, 26 Ill. App. 513. See Lewis *v.* Peck, 10 Ala. 142, 12 Ala. 768, holding that where money is collected by an agent on a note for persons who are themselves agents, he may discharge himself by paying it over either to those from whom he received the claim or to the true owner, but cannot discharge himself by paying it to the payee of the note, if the payee is not in fact the true owner, and is not the person from whom he received the note for collection.

The privity of the trust relation has been held sufficient to enable a principal to sue a subagent having funds belonging to the principal, which the subagent refuses to pay over. Milton *v.* Johnson, 79 Minn. 170, 81 N. W. 842, 47 L. R. A. 529.

12. Tripler *v.* Olcott, 3 Johns. Ch. (N. Y.) 473 (holding that where an agent has fairly accounted with his immediate and authorized principal, he is not bound to account over again to a person beneficially interested or *cestui que trust* to the principal); New Zealand, etc., Land Co. *v.* Watson, 7 Q. B. D. 374, 50 L. J. Q. B. 433, 44 L. T. Rep. N. S. 675, 29 Wkly. Rep. 694; Clavering's Case, Prec. Ch. 535, 24 Eng. Reprint 240; Potts *v.* Potts, 1 Vern. Ch. 207, 23 Eng. Reprint 418. But see Wagstaffe *v.* Bedford, 1 Vern. Ch. 95, 23 Eng. Reprint 337. *Compare* Pollard *v.* Downes, 2 Ch. Cas. 121, 22 Eng. Reprint 876, in which the court, without offering any reason, held that an agent who had accounted to the trustee who appointed him could be compelled to account again to the *cestui que trust*.

13. Walsham *v.* Stainton, 9 Jur. N. S. 1261, 33 L. J. Ch. 68, 9 L. T. Rep. N. S. 357, 12 Wkly. Rep. 63; Salisbury *v.* Morrice, 11 L. J. Ch. 114; Lee *v.* Bowler, Rep. t. Finch 125, 23 Eng. Reprint 68.

14. Louisiana Bd. of Trustees *v.* Dupuy, 31 La. Ann. 305; Hatsall *v.* Griffith, 2 Cromp. & M. 679, 3 L. J. Exch. 191, 4 Tyrw. 487.

the parties is that he should account to one only,[15] or to each separately.[16] Where a principal has assigned his right to the property or funds, of which fact the agent has notice, he may be compelled to pay it over thereafter to the assignee.[17]

c. Keeping and Rendering Accounts. In accordance with this duty, an agent, where his agency is of such a nature as to require it, must keep true, regular, and accurate accounts of all his transactions as agent, both of receipts and disbursements,[18] and be ready to render to his principal a full and complete statement of his dealings and of the state of the account between them,[19] supported by proper vouchers,[20] whenever an accounting is reasonably requested or demanded,[21] or at reasonable times without demand, especially if to make such demand would be impracticable or very inconvenient,[22] unless there is something in the nature or character of the particular agency that excuses him from doing so,[23] as where the principal's own conduct or carelessness makes it impossible for him to render an

15. Gray *v.* Reardon, 10 Fed. Cas. No. 5,727, 2 Cranch C. C. 219; Maxwell *v.* Gregg, 6 L. J. Ch. O. S. 128, 4 Russ. 285, 28 Rev. Rep. 92, 4 Eng. Ch. 285, 38 Eng. Reprint 813.

Joint interests.—If one sells personal property as the agent and by the authority of another, and agrees to pay him the proceeds, he is liable to such other for the proceeds of the sale, although other persons may be jointly interested in the property. Gray *v.* Reardon, 10 Fed. Cas. No. 5,727, 2 Cranch C. C. 219.

Where notice is given to an agent in a particular adventure that another person is jointly interested with his principal, this *prima facie* imposes upon the agent the necessity of accounting to such other person for his share of the adventure; but this obligation ceases to exist if the transaction shows that it was the intention of such other person and of the party originally interested in the adventure that the agent should account solely to the latter. Maxwell *v.* Gregg, 6 L. J. Ch. O. S. 128, 4 Russ. 285, 28 Rev. Rep. 92, 4 Eng. Ch. 285, 38 Eng. Reprint 813.

16. Lawless *v.* Lawless, 39 Mo. App. 539, holding that where an agent employed by three owners of certain land to sell the land is to account to each separately for his respective interest, he is liable to each separately for what such interest realized at the sale.

17. Dempsey *v.* Tittel, 90 N. Y. Suppl. 1054.

18. *Georgia.*— Dodge *v.* Hatchett, 118 Ga. 883, 45 S. E. 667.

Illinois.— Illinois Linen Co. *v.* Hough, 91 Ill. 63; Chicago Title, etc., Co. *v.* Ward, 113 Ill. App. 327; Moyses *v.* Rosenbaum, 98 Ill. App. 7, holding that it will not do to account for expenses in a round sum, but they must be itemized.

Iowa.— Gladiator Consol. Gold Mines, etc., Co. *v.* Steele, 132 Iowa 446, 106 N. W. 737, holding that one who takes an agency is presumptively capable of keeping accounts sufficient for the conduct of the business, and will in general be held responsible for so doing.

Kentucky.—Peterson *v.* Poignard, 8 B. Mon. 309.

Pennsylvania.— Landis *v.* Scott, 32 Pa. St. 495.

South Carolina.— Riley *v.* Allendale Bank, 57 S. C. 98, 35 S. E. 535.

England.— Gray *v.* Haig, 20 Beav. 219, 52 Eng. Reprint 587 (holding that it is imperative upon an agent to preserve correct accounts of all his dealings and transactions; and the loss, and still more the destruction, of the evidence by such agent falls most heavily upon himself); Clarke *v.* Tipping, 9 Beav. 284, 50 Eng. Reprint 352. See Chedworth *v.* Edwards, 8 Ves. Jr. 46, 6 Rev. Rep. 212, 32 Eng. Reprint 268.

See, however, Rich *v.* Austin, 40 Vt. 416.

See 40 Cent. Dig. tit. "Principal and Agent," § 124.

A traveling salesman who receives his salary and his expenses must keep an account of his expenses, it being an incident of his duty to account to his employer. Wolf *v.* Salem, 33 Ill. App. 614.

19. Chicago Title, etc., Co. *v.* Ward, 113 Ill. App. 327 (holding that an agent must furnish detailed and itemized statements of receipts and expenditures); Campbell *v.* Cook, 193 Mass. 251, 79 N. E. 261 (holding that where, in an action for an accounting by an agent acting as trustee for his principals, it appears that the property was for the most part insured in companies of which the agent was the local representative, the principals are entitled to an itemization of the insurance on the property, so as to show the companies issuing the policies and the rates paid, although such companies are solvent); Finch *v.* Burden, 12 L. T. Rep. N. S. 302; Hardwicke *v.* Vernon, 14 Ves. Jr. 504, 9 Rev. Rep. 329, 33 Eng. Reprint 614.

20. Dodge *v.* Hatchett, 118 Ga. 883, 45 S. E. 667; Riley *v.* Allendale Bank, 57 S. C. 98, 35 S. E. 533.

21. Dodge *v.* Hatchett, 118 Ga. 883, 45 S. E. 667; Nolan *v.* Shaw, 6 La. Ann. 40.

22. Clark *v.* Moody, 17 Mass. 145; Ormond *v.* Hutchinson, 13 Ves. Jr. 47, 33 Eng. Reprint 212 [*affirmed* in 16 Ves. Jr. 94, 33 Eng. Reprint 919].

23. Hamilton *v.* Hamilton, 15 N. Y. App. Div. 47, 44 N. Y. Suppl. 97 (where the court refused to hold a son liable for keeping accounts in the same careless fashion taught him by the father, who put him in charge of his business); Oddy *v.* Secker, 2 Smale & G. 193, 65 Eng. Reprint 361 (holding, however, that it is no objection to a claim or bill filed for an accounting against a confidential agent that he has been also em-

account.[24] An agent who fails to keep an account raises thereby a suspicion of infidelity or neglect, creates a presumption against himself, and brings upon himself the burden of accounting to the utmost for all that has come into his hands; and in such a case every doubt will be resolved against the agent, and in favor of the principal.[25] If the agent renders an untrue account, giving a false balance, he becomes at once liable to his principal;[26] and if he refuses to account when it is his duty to do so, the principal may at once terminate the agency and sue for the balance then due.[27]

d. Set-Off and Counter-Claim. In rendering an account between principal and agent, any lawful claims of the agent by way of compensation, reimbursement, or interest may as a general rule be deducted from the claim of the principal,[28] except that the agent may not deduct or set off a debt due to himself in a

ployed as a solicitor in respect to the same property).

An agent may be excused from keeping an account, where it appears that he had not undertaken the duty of keeping accounts, and that his education and capacity, as well as the course of dealing between him and his employer, were inconsistent with his keeping regular accounts. Tindall *v.* Powell, 4 Jur. N. S. 944, 6 Wkly. Rep. 850.

An agreement as to the amount due an agent will not excuse him from rendering an account to his principal. Jenkins *v.* Gould, 3 Russ. 385, 3 Eng. Ch. 385, 38 Eng. Reprint 620.

24. Macauley *v.* Elrod, 28 S. W. 782, 29 S. W. 734, 16 Ky. L. Rep. 549; Robbins *v.* Robbins, (N. J. Ch. 1885) 3 Atl. 264, holding that if the principal has, by his interference with the management of the property intrusted to the agent, created or contributed to such confusion as to render it impossible to render a satisfactory accounting, the agent will not be held to the most rigid rule.

25. *Illinois.*— Illinois Linen Co. *v.* Hough, 91 Ill. 63.

Kentucky.—Peterson *v.* Poignard, 8 B. Mon. 309.

Oregon.— Salem Traction Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675.

Pennsylvania.— Landis *v.* Scott, 32 Pa. St. 495.

England.— Stainton *v.* Carron Co., 24 Beav. 346, 3 Jur. N. S. 1235, 27 L. J. Ch. 89, 53 Eng. Reprint 391 (holding that where the accounts of an agent acting for a company have been improperly kept or mystified, and not duly rendered and explained when asked for, the court will direct them to be taken through a period of twenty-five years, although accounts sent in had been acted on, and although shareholders who asked for further information and explanation as to such accounts did not persevere to obtain them); Gray *v.* Haig, 20 Beav. 219, 52 Eng. Reprint 587; Middleditch *v.* Sharland, 5 Ves. Jr. 87, 31 Eng. Reprint 485; Hardwicke *v.* Vernon, 4 Ves. Jr. 411, 4 Rev. Rep. 244, 31 Eng. Reprint 209 (in which an account between principal and agent was settled from loose papers, the agent having kept no regular books; and after his death liberty was given to surcharge and falsify upon an allegation of errors since discovered).

An agent cannot complain if he is charged the highest amount that might have been received on the ground that the proof does not show that such amount was actually in his hands; and if he utterly fails to account he may be required to pay the price of the property whether he has disposed of it or not. Strouse *v.* Love, 16 N. Y. Suppl. 933; Landis *v.* Scott, 32 Pa. St. 495.

26. Clark *v.* Moody, 17 Mass. 145.

27. Contractors', etc., Supply Co. *v.* Alta Portland Cement Co., 26 Ohio Cir. Ct. 49.

28. *Indiana.*—English *v.* Devarro, 5 Blackf. 588, holding an agent entitled to a deduction for his commissions and expenses.

Iowa.— Bayliss *v.* Davis, 47 Iowa 340, holding an agent entitled to credit, on his note for the balance due on certain machines, for the value of machines recovered from the person to whom the agent had fraudulently sold them.

Kentucky.— Hoskins *v.* Morton, 85 S. W. 742, 27 Ky. L. Rep. 529; White *v.* Treadway, 52 S. W. 960, 21 Ky. L. Rep. 702; Ford Lumber Co. *v.* Arvine, 38 S. W. 137, 18 Ky. L. Rep. 711.

Louisiana.— Gilly *v.* Roumieu, 11 La. Ann. 746 (holding that where an agent is compelled to render his account, he has the right to retain only a sufficient amount of the property of the principal in his hands to satisfy his expenses and costs, and may retain by way of set-off what the principal owes him if the debt is liquidated); Nolan *v.* Shaw, 6 La. Ann. 40.

Michigan.— Kimball *v.* Ranney, 122 Mich. 160, 80 N. W. 992, 80 Am. St. Rep. 548, 46 L. R. A. 403.

Missouri.— Harms *v.* Wolf, 114 Mo. App. 387, 89 S. W. 1037.

New Jersey.— Hutchinson *v.* Van Voorhis, 54 N. J. Eq. 439, 35 Atl. 371.

New York.— Duff *v.* Blair, 74 N. Y. App. Div. 364, 77 N. Y. Suppl. 444; Picker *v.* Weiss, 39 Misc. 22, 78 N. Y. Suppl. 761.

North Carolina.— Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488.

Pennsylvania.— Shearman *v.* Morrison, 149 Pa. St. 386, 24 Atl. 313; Johnson *v.* Hoosier Dill Co., 99 Pa. St. 216; Evans *v.* Lyon, 33 Pa. Super. Ct. 255, holding that where a suit is brought to recover a balance alleged to be due by defendants to plaintiff for goods of the latter sold by defendants on commission as agents, defendants may show that plaintiff wrongfully terminated the contract

matter not arising out of the agency,[29] nor can he set off a claim where it would be a breach of his duty to the principal,[30] or set off sums wrongfully or unauthorizedly expended or applied by him.[31] Nor can an agent, without the principal's knowledge and consent, apply the principal's funds or property, which he has in his possession, to a debt due to him by the principal[32] or by a third person,[33] particularly where the funds or property are intrusted to him to be applied to a another and specific purpose.[34]

e. Approving, Stating, and Opening Accounts. Questions relative to a stated or settled account between a principal and his agent are ordinarily governed by the rules governing stated or settled accounts generally.[35] Where an account is received by the principal and not objected to within a reasonable time, it is presumed to have been accepted as correct, and ordinarily thereby becomes a settled account; and if the principal acted upon full knowledge the account cannot be

before the time specified therein, and may set off against plaintiff's claim the expenses incurred after the breach in endeavoring to carry out the requirements of the contract as to themselves.

Tennessee.— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899; Glascow *v.* Hood, (Ch. App. 1900) 57 S. W. 162.

United States.— Evans *v.* Lawton, 34 Fed. 233.

England.— Stonehouse *v.* Read, 3 B. & C. 669, 5 D. & R. 603, 10 E. C. L. 304. See Dale *v.* Sollet, 4 Burr. 2133.

Canada.— Hamilton *v.* Street, 8 U. C. Q. B. 124. See Marshall *v.* Matheson, 31 Nova Scotia 238.

See 40 Cent. Dig. tit. "Principal and Agent," § 164. And see, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 351; RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

Interest.— Where the accounts between a principal and agent are closed, and a suit is brought three years later to recover a balance due, and the agent presents no claim for commissions until asserted in the action against him, he is not entitled to interest until the date of filing his answer. Orr *v.* Louisville Tobacco Warehouse Co., 99 S. W. 225, 30 Ky. L. Rep. 457.

29. Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389 (holding that in a suit for an accounting between owners of property and their agents for its sale, a personal indebtedness of one of the owners to one of the agents cannot be considered); Tagg *v.* Bowman, 99 Pa. St. 376, 108 Pa. St. 273, 56 Am. Rep. 204; Simpson *v.* Pinkerton, 10 Wkly. Notes Cas. (Pa.) 423. But see Noble *v.* Leary, 37 Ind. 186.

Subagent.— Where a principal sues a properly constituted subagent for the amount of a bill of exchange received in the course of his employment for the principal, and the subagent has made no advances and given no new credit to the agent on account of the remittance of the bill, the subagent cannot protect himself against suit by passing the amount of the bill to the credit of the agent, although the agent may be his debtor. Wilson *v.* Smith, 3 How. (U. S.) 763, 11 L. ed. 820.

30. See New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569.

31. Middleton, etc., Turnpike Road *v.* Watson, 1 Rawle (Pa.) 330; Jay *v.* Macdonell, 17 Grant Ch. (U. C.) 436.

32. *Iowa.*— Clark *v.* Lee, 14 Iowa 425, holding that where an agent sold real estate of his principal to his wife for his own use and benefit, which he claimed to hold as security for advances made to his principal, a court of equity would set aside the sale.

Louisiana.— Young *v.* Jackson, 37 La. Ann. 810 (holding that an agent cannot retain from funds of the principal in his hands sums to meet anticipated future services and expenses); Palmer *v.* Haynes, 2 La. 370.

Nebraska.— Englehart *v.* Peoria Plow Co., 21 Nebr. 41, 31 N. W. 391, holding that an agent for the sale of agricultural machinery cannot, by virtue of his agency, indorse a note, taken by him for such machinery payable to the order of his principal, to himself in payment for his commissions, and thereby divest his principal of property in such note, even if the agency included the power of indorsing his principal's notes.

New Hampshire.— Morse *v.* Woods, 5 N. H. 297, holding that where an agent is employed to receive money for his principal, he cannot appropriate it to the payment of a debt due to him from the principal without the consent of the latter.

Pennsylvania.— Shearman *v.* Morrison, 149 Pa. St. 386, 24 Atl. 313; Smuller *v.* Union Canal Co., 37 Pa. St. 68.

See 40 Cent. Dig. tit. "Principal and Agent," § 131.

33. Edwards *v.* Powell, 13 N. C. 190, holding that property delivered to an agent under a contract of the principal with a third person cannot, without the consent of the principal, be applied by the agent to the payment of a debt due to himself from that person.

A subagent cannot use funds of the principal in his possession to settle his own accounts with the primary agent. Arnold *v.* Clark, 1 Sandf. (N. Y.) 491.

34. Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33.

35. McLendon *v.* Wilson, 52 Ga. 41 (holding that a settlement of accounts between an agent and his principal, the principal giving his promissory notes for the amount of the agent's demand but at the time protesting against its fairness, is not an estoppel

thereafter impeached,[36] except where the principal can establish some omissions, mistakes, or fraud, in which case the account may be ordered reopened;[37] and where the agent has failed to render accounts or has perpetrated frauds, lapse of

upon the principal, and the fairness and legality of the account is still open to inquiry even though no fraud or mistake or ignorance of fact is shown); Tupper *v.* Rider, 61 Vt. 69, 17 Atl. 47. And see, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 364 *et seq.*

An account of sales rendered by a consignee to his consignor is *prima facie* evidence of its correctness. Mertens *v.* Nottebohms, 4 Gratt. (Va.) 163; Ruffner *v.* Hewitt, 7 W. Va. 585.

Stale demands.— A mandatary who has acted as such continuously for a long period of years without being called upon for an account, and who then renders an account showing a balance in his favor, does not subject his demand to a charge of staleness because the credits giving rise to the balance arose in the first years of the mandate. Borge's Succession, 44 La. Ann. 1, 10 So. 418.

Where a principal signs drafts for his agent with the full knowledge of the state of the accounts and in liquidation or settlement of the same, he is as a general rule *prima facie* bound thereby for the payment of the money expressed therein, and if there are any facts going to show that it was not the intention of the parties that the drafts should be a full and final settlement and compromise of the subject-matter of the accounts for which the drafts were given, the burden of proof to show such facts is on the principal, and he should rebut the presumption of the law against him by clear and satisfactory evidence. McLendon *v.* Wilson, 52 Ga. 41.

36. *Illinois.*— McCord *v.* Manson, 17 Ill. App. 118, holding that the fact that a principal has from time to time received statements from his agent, and has retained them without objection, is *prima facie* evidence of an admission by the principal that such statements are correct.

Iowa.— Minnesota Linseed Oil Co. *v.* Montague, 65 Iowa 67, 21 N. W. 184.

Louisiana.— Mansell *v.* Payne, 18 La. Ann. 124; Rion *v.* Gilly, 6 Mart. 417, 12 Am. Dec. 483.

Massachusetts.— Warren *v.* Para Rubber Shoe Co., 166 Mass. 97, 44 N. E. 112 (holding that where it does not appear that the complainant corporation was ignorant of any of the transactions made in its behalf by its selling agents, and had in its own possession all the means necessary for stating the accounts correctly, a bill cannot be maintained by it to have the accounts of the agents reopened and a new accounting made after a termination of the agency); Farnam *v.* Brooks, 9 Pick. 212.

New York.— Stenton *v.* Jerome, 54 N. Y. 480; Myer *v.* Abbett, 105 N. Y. App. Div. 537, 94 N. Y. Suppl. 238 [*affirmed* in 186 N. Y. 519, 78 N. E. 1107].

South Carolina.— Geddes *v.* Hutchinson, 40 S. C. 402, 19 S. E. 9, holding that where a person purchased land and took title in himself as agent for himself and others, and the parties personally adjusted their accounts, equity will not reopen the account after the death of any of the parties and the accomplishment of the specific object of the agency.

Vermont.— Tharp *v.* Tharp, 15 Vt. 105.

United States.—Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 27 L. ed. 319; Wiggins *v.* Burkham, 10 Wall. 129, 19 L. ed. 884; Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463; Curtis *v.* Newton, 58 Fed. 495; Talcott *v.* Chew, 27 Fed. 273.

England.— Williamson *v.* Barbour, 9 Ch. D. 529, 50 L. J. Ch. 147, 37 L. T. Rep. N. S. 698.

Canada.— Peters *v.* Worrall, 32 Can. Sup. Ct. 52.

See 40 Cent. Dig. tit. "Principal and Agent," § 177. And see *infra*, III, A, 4, h, (I).

Facts peculiarly within knowledge of agent. — The retention by a principal for a number of years of the accounts rendered by an agent without objection thereto, when the accounts contained statements of facts peculiarly within the knowledge of the agent and not known by principal until shortly before action brought, does not constitute an acquiescence which will prevent the principal maintaining an action for a difference in his favor. Gale *v.* New York Hay Co., 54 N. Y. App. Div. 72, 66 N. Y. Suppl. 291.

If the account is merely preliminary and is not accepted by the principal it does not become binding. Smith *v.* Redford, 19 Grant Ch. (U. C.) 274. See also Farquhar *v.* East India Co., 8 Beav. 260, 50 Eng. Reprint 102.

37. Follansbee *v.* Parker, 70 Ill. 11; Philips *v.* Belden, 2 Edw. (N. Y.) 1; Williamson *v.* Barbour, 9 Ch. D. 529, 50 L. J. Ch. 147, 37 L. T. Rep. N. S. 698 (in which it was held that one case of proved fraudulent overcharge is sufficient to open the accounts between the parties); Stainton *v.* Carron Co., 24 Beav. 346, 3 Jur. N. S. 1235, 27 L. J. Ch. 89, 53 Eng. Reprint 391 [*modified* in 30 L. J. Ch. 713, 7 Jur. N. S. 645, 4 L. T. Rep. N. S. 659]; Rothschild *v.* Brookman, 5 Bligh N. S. 165, 5 Eng. Reprint 273, 2 Dow. & Cl. 188, 6 Eng. Reprint 699 [*affirming* 7 L. J. Ch. O. S. 163, 3 Sim. 153, 30 Rev. Rep. 147, 6 Eng. Ch. 153, 57 Eng. Reprint 957]; Broadbent *v.* Barlow, 3 De G. F. & J. 570, 7 Jur. N. S. 479, 30 L. J. Ch. 569, 4 L. T. Rep. N. S. 193, 64 Eng. Ch. 570, 45 Eng. Reprint 999; Beaumont *v.* Boultbee, 7 Ves. Jr. 599, 32 Eng. Reprint 241 [*affirming* 5 Ves. Jr. 485, 31 Eng. Reprint 695]. And see, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 459 *et seq.*

In settling an extended insurance account between an agent and the representatives of his deceased principal, the fact that defendant omitted to credit his principal with interest and the balance due to him from year to year, where there was no express contract

time or the death of the agent will not prevent an opening of the account, although in order that such opening may be ordered the case should be very clear.[38] When the contract of agency provides who shall pass upon the accounts of the agent, the report of such inspector is conclusive in the absence of fraud or mistake.[39]

f. Commingling of Funds or Property.[40] As an important part of his duty to keep clear and regular accounts, it is the duty of an agent to keep separate and distinct from his own property the business and property of his principal; and if he fails to do so, he is put to the necessity of showing clearly which part belongs to his principal and which to himself;[41] and he is personally responsible for any resulting loss,[42] unless he acted in good faith and no detriment resulted to the principal.[43] In such case the whole commingled mass will be treated as trust property except in so far as the agent may be able to distinguish what is his,[44] and every doubt will be resolved in the principal's favor; and if the two sums cannot be distinguished the agent must satisfy to the full every legal or equitable claim of the principal, even to the extent, if that be necessary, of giving the whole to the principal.[45] If the agent deposits his principal's money in a bank in good

to allow interest, is not evidence of fraud; and the fact that certain claims which were then of little or no value, although they afterward became very valuable, were not mentioned in the account, although both parties had full means of knowing the facts, is not proof of fraud on the part of the agent. Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

An agent's account in which he charges himself with sums received is not conclusive against him as to the facts of those receipts; but the account may be opened to let in the fact of the sums not having been received in either of the following cases: If the account on the face of it disclosed that the money has not been actually received; if the principal shows by his conduct that he knows the money has not been actually received; or if the principal does not express his assent to a subsequent correction of the account by the agent, in which correction he relieves himself from the sum with which he had previously charged himself. Shaw *v.* Dartnall, 6 B. & C. 56, 9 D. & R. 55, 5 L. J. K. B. O. S. 35, 30 Rev. Rep. 246, 13 E. C. L. 37.

38. O'Bannon *v.* Vigus, 32 Ill. App. 473; Stainton *v.* Carron Co., 24 Beav. 346, 3 Jur. N. S. 1235, 27 L. J. Ch. 89, 53 Eng. Reprint 391 [*modified* in 7 Jur. N. S. 645, 30 L. J. Ch. 713, 4 L. T. Rep. N. S. 659] (holding that if a company does not discover, and has not the means of discovering, the correctness of entries in a succession of accounts rendered by their agent, they are not, after the decease of the agent, precluded by lapse of time or by certain shareholders omitting against opposition to press for explanations previously asked, from showing that such entries are not only erroneous but fraudulent); Clarke *v.* Tipping, 9 Beav. 284, 50 Eng. Reprint 352 (in which fraudulent accounts between a principal and factor were opened from the beginning, the court holding that the relief ought not under such circumstances to be limited to a right to surcharge and falsify); Holstcomb *v.* Rivers, 1 Ch. Cas. 127, 22 Eng. Reprint 726; Hunter *v.* Belcher, 2 De G. J. & S. 194, 10 Jur. N. S. 663, 10 L. T. Rep. N. S. 548, 12 Wkly. Rep. 782, 67 Eng. Ch. 194, 46 Eng. Reprint 349 [*affirmed* in 9 L. T. Rep. N. S. 501, 12 Wkly. Rep. 121]; Ormond *v.* Hutchinson, 13 Ves. Jr. 47, 33 Eng. Reprint 212 [*affirmed* in 16 Ves. Jr. 94, 33 Eng. Reprint 919].

39. Metropolitan L. Ins. Co. *v.* Long, 65 Ill. App. 295; Stevens *v.* Metropolitan L. Ins. Co., 13 N. Y. App. Div. 16, 43 N. Y. Suppl. 60.

In the absence of agreement the principal cannot insist that the agent shall submit the accounts to an improper person. Dadswell *v.* Jacobs, 34 Ch. D. 278, 56 L. J. Ch. 233, 55 L. T. Rep. N. S. 857, 35 Wkly. Rep. 261.

40. **Right of principal to follow trust funds in hands of third person** see *infra*, III, F, 1, e, (II).

41. Atkinson *v.* Ward, 47 Ark. 533, 2 S. W. 77; Illinois Linen Co. *v.* Hough, 91 Ill. 63; Hooley *v.* Gieve, 9 Abb. N. Cas. (N. Y.) 8 [*affirmed* in 9 Daly 104], holding this burden also to be on the agent's creditors and representatives. See, generally, CONFUSION OF GOODS, 8 Cyc. 570.

42. Webster *v.* Pierce, 35 Ill. 158 (holding that an agent has no right to mix the funds of his principal with his own, and to hold the principal liable for the depreciation of money in his hands); Massachusetts L. Ins. Co. *v.* Carpenter, 2 Sweeny (N. Y.) 734 (holding that the loss must be sustained wholly by the agent).

If goods bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance. Long *v.* Carter, 23 Ont. App. 121 [*affirmed* in 26 Can. Sup. Ct. 430].

43. Wood *v.* Cooper, 2 Heisk. (Tenn.) 441, holding that if an agent acts in good faith in intermingling his own and his principal's funds, and no detriment to his principal results therefrom, no personal responsibility attaches to the act.

44. Central Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693.

45. *Arkansas.*— Atkinson *v.* Ward, 47 Ark. 533, 2 S. W. 77.

standing, either in his principal's name or under some mark to indicate that the deposit is not his own personal account, he will not be liable, although the bank prove insolvent;[46] but if he deposits it in his own name or in any manner other than to indicate that it belongs to his principal, ordinarily he is personally liable for any loss.[47]

g. Liability of Agent For Interest. As a general rule, where an agent is ready at the proper time to account for and turn over funds or property in his hands belonging to his principal, he is not liable for interest thereon before a demand.[48] But where the agent fails or refuses to account, and keeps in his hands funds for which he should have accounted, the principal may collect from him, in addition to such funds, lawful interest on the same from the time when the accounting should have been made.[49] An agent will also be liable for interest

Georgia.— Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721.

Illinois.— Illinois Linen Co. *v.* Hough, 91 Ill. 63.

North Carolina.— Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488, holding that where an agent for the sale of goods mixes such goods with his own stock of goods, the title of his principal will attach to the whole stock of goods until the value of his goods is returned to him or properly accounted for.

Vermont.— Blodgett *v.* Converse, 60 Vt. 410, 15 Atl. 109.

West Virginia.— Simmons *v.* Looney, 41 W. Va. 738, 24 S. E. 677, holding that if an agent sells his own and his principal's goods in common, and collects enough to pay his principal, but not enough to pay both, and as an act of his own indulges the purchaser, he must pay his principal, and cannot apportion what he has collected between himself and his principal.

United States.— Yates *v.* Arden, 30 Fed. Cas. No. 18,126, 5 Cranch C. C. 526, holding that an agent who, without authority, mixes his principal's goods with his own, so that he cannot distinguish them, must lose what he contributed.

England.— Pariente *v.* Lubbock, 20 Beav. 588, 52 Eng. Reprint 731 [*affirmed* in 8 De G. M. & G. 5, 57 Eng. Ch. 5, 44 Eng. Reprint 290]; Clark *v.* Tipping, 9 Beav. 284, 50 Eng. Reprint 352; Broadbent *v.* Barlow, 3 De G. F. & J. 570, 7 Jur. N. S. 479, 30 L. J. Ch. 569, 4 L. T. Rep. N. S. 193, 64 Eng. Ch. 570, 45 Eng. Reprint 999; Lupton *v.* White, 15 Ves. Jr. 432, 10 Rev. Rep. 94, 33 Eng. Reprint 817; Chedworth *v.* Edwards, 8 Ves. Jr. 46, 6 Rev. Rep. 212, 32 Eng. Reprint 268 (granting an injunction to prevent an agent from transferring stock, which the agent had confounded so as to confuse in one mass his own and his principal's property, until the agent shall have satisfactorily distinguished the same).

Canada.— Gore Bank *v.* Hodge, 2 U. C. C. P. 359.

See 40 Cent. Dig. tit. "Principal and Agent," § 103.

46. Beatty *v.* McCleod, 11 La. Ann. 76 (holding that where an agent deposits money in the name of his principal, it is to be presumed that the money so deposited is the identical money which he received from or on account of his principal); Hammon *v.* Cottle, 6 Serg. & R. (Pa.) 290 (holding that an agent who deposits the money of his principal in a solvent house, subject to the draft of his principal, is not liable for the subsequent failure of the house); Massey *v.* Banner, 1 Jac. & W. 241, 21 Rev. Rep. 150, 37 Eng. Reprint 367 [*affirming* 4 Madd. 413, 20 Rev. Rep. 317, 56 Eng. Reprint 757].

A sudden emergency may justify a departure from his orders. Thus a merchant directed by his correspondent to deposit his funds in a certain place may send them to another, if reasonable ground of alarm or danger prevent him from following directions; but he must, if possible, keep them within his reach and under his control, or he will be liable in case of loss. Perez *v.* Miranda, 7 Mart. N. S. (La.) 493.

47. Cartmell *v.* Allard, 7 Bush (Ky.) 482 (holding that if an agent makes an unauthorized deposit of funds in his hands, together with his own money, in a common account with a banker, such disposition will be treated as a conversion of the funds, and devolve on him any loss which may be sustained by the banker's insolvency); Norris *v.* Hero, 22 La. Ann. 605 (holding also that the agent cannot urge the failure of the bank after the deposit was made, as grounds for throwing the loss on the principal). *Compare* Hale *v.* Wall, 22 Gratt. (Va.) 424.

48. Miller *v.* Clark, 5 Lans. (N. Y.) 388 (holding that as a general proposition an agent is not liable to be charged with interest upon moneys received and held by him for the use of the principal, but in order to render him liable for interest some other fact must be shown in addition to the mere receiving and retaining of the money in his hands); Hudson *v.* Hudson, Sheld. (N. Y.) 386; Chase *v.* Union Stone Co., 11 Daly (N. Y.) 107; Williams *v.* Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; Hauxhurst *v.* Hovey, 26 Vt. 544; Bischoffsheim *v.* Baltzer, 21 Fed. 531; Rogers *v.* Boehm, 2 Esp. 702; Chedworth *v.* Edwards, 8 Ves. Jr. 46, 6 Rev. Rep. 212, 32 Eng. Reprint 268.

Interest is sometimes made entirely a matter of statute.— See the statutes of the different states. And see Pettit *v.* Thalheimer, 3 Colo. App. 355, 33 Pac. 277.

49. *Georgia.*— Anderson *v.* State, 2 Ga. 370.

Illinois.— Bedell *v.* Janney, 9 Ill. 193; Miller *v.* McCormick Harvesting Mach. Co., 84 Ill. App. 571.

where he expressly or impliedly agrees to pay it,[50] or where he has made some investment or use of the funds from which he has received interest or profit,[51] or where he fails to apply funds to the purpose for which his principal put them in his charge [52] or uses them himself.[53] If an agent neglects to inform his principal of the receipt of money belonging to him, he is liable for interest from the time when he ought to have given such information.[54] It has been held that an agent is also liable for interest if he fails to invest funds which he cannot safely pay over.[55] As a general rule interest is reckoned from the date of a demand for the funds,[56] or from the date of suit for their recovery;[57] or, if he was to invest the money, then from the date the investment should have been made, and presumptively this is immediately upon receipt of the money.[58] But where the agent has

New York.— Miller *v.* Clark, 5 Lans. 388; People *v.* Gasherie, 9 Johns. 71, 6 Am. Dec. 263 (holding that interest is recoverable against a person intrusted with the collection of money who retains and converts it to his own use from the time when the same ought to have been paid over); Bonn *v.* Steiger 2 N. Y. St. 90; Williams *v.* Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340.

South Carolina.— Kimbrel *v.* Glover, 13 Rich. 191; Wardlaw *v.* Gray, Dudley Eq. 85, holding that an agent who has stipulated to account semiannually is liable to interest on all sums received and not accounted for at the stipulated time.

Vermont.— Thorp *v.* Thorp, 75 Vt. 34, 52 Atl. 1051; Hauxhurst *v.* Hovey, 26 Vt. 544, holding, however, that an agent who receives money for his principal is not liable for interest thereon before demand is made for such money, unless he has received instructions to remit as fast as collected, or is in default by neglecting to render an account.

Virginia.— Hawkins *v.* Minor, 5 Call 118.

United States.— Bischoffsheim *v.* Baltzer, 21 Fed. 531.

England.— Pearse *v.* Green, 1 Jac. & W. 135, 20 Rev. Rep. 258, 37 Eng. Reprint 327; Fry *v.* Fry, 10 Jur. N. S. 983; Harsant *v.* Blaine, 56 L. J. Q. B. 511; Hardwicke *v.* Vernon, 14 Ves. Jr. 504, 9 Rev. Rep. 329, 33 Eng. Reprint 614.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 127, 128.

50. Chase *v.* Union Stone Co., 11 Daly (N. Y.) 107; Browne *v.* Southouse, 3 Bro. Ch. 107, 29 Eng. Reprint 437 (in which the agent of an administrator keeping money of the estate in his hands which he had proposed to his principal to lay out in the funds was ordered to pay interest with annual rests); Barwell *v.* Parker, 2 Ves. 364, 28 Eng. Reprint 233.

51. Bassett *v.* Kinney, 24 Conn. 267, 63 Am Dec. 161; Hudson *v.* Hudson, Sheld. (N. Y.) 386; Williams *v.* Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

Where an agent has possession of interest-bearing securities belonging to his principal, it is presumed in the absence of proof that he receives the interest as it falls due, and hence is chargeable with it. Blodgett *v.* Converse, 60 Vt. 410, 15 Atl. 109.

52. Dodge *v.* Perkins, 9 Pick. (Mass.) 368; Fowler *v.* Shearer, 7 Mass. 14; Schisler *v.* Null, 91 Mich. 321, 51 N. W. 900; Harrison *v.* Long, 4 Desauss. Eq. (S. C.) 110; Browne *v.* Southouse, 3 Bro. Ch. 107, 29 Eng. Reprint 437; Hughes *v.* Kearney, 1 Sch. & Lef. 132, 9 Rev. 30.

53. *Alabama.*— Lewis *v.* Bradford, 8 Ala. 632.

Kentucky.— Taylor *v.* Knox, 1 Dana 391.

Louisiana.— Beugnot *v.* Tremoulet, 52 La. Ann. 454, 27 So. 107, 111 La. 1, 35 So. 362.

New York.— Miller *v.* Clark, 5 Lans. 388; Hudson *v.* Hudson, Sheld. 386.

Vermont.— Blodgett *v.* Converse, 60 Vt. 410, 15 Atl. 109, holding that where a financial agent mixes the money of his principal with his own by depositing it in his general bank-account, and uses it in his own business, it is presumed that he has gained a benefit, and on failure to show how much he has derived from the use he is chargeable with interest.

United States.— Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153, 25 L. ed. 591.

England.— Lonsdale *v.* Church, 3 Bro. Ch. 41, 29 Eng. Reprint 396; Rogers *v.* Boehm, 2 Esp. 702; Craufurd *v.* Atty.-Gen., 7 Price 1.

Canada.— Landman *v.* Crooks, 4 Grant Ch. (U. C.) 353.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 127, 128.

54. Dodge *v.* Perkins, 9 Pick. (Mass.) 368, holding that an agent unreasonably neglecting to inform his principal of the receipt of money is liable for interest, although he acted in good faith.

55. Landis *v.* Scott, 32 Pa. St. 495.

56. *Indiana.*—Hackleman *v.* Moat, 4 Blackf. 164.

Maine.— Wheeler *v.* Haskins, 41 Me. 432.

North Carolina.—Neal *v.* Freeman, 85 N. C. 441; Hyman *v.* Gray, 49 N. C. 155, holding that where an agent has money in his hands, and when it is demanded denies his obligation to pay, there is no principle on which he can be charged with interest further back than the time of such demand.

South Carolina.— Rowland *v.* Martindale, Bailey Eq. 226.

United States.—McCormick *v.* Eliot, 43 Fed. 469.

See 40 Cent. Dig. tit. "Principal and Agent," § 128.

57. Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389.

58. Ward *v.* Grayson, 9 Dana (Ky.) 280; Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510.

wrongfully converted the funds to his own use, interest is reckoned from the date of its conversion.[59] The rate of interest chargeable against an agent is ordinarily the legal rate,[60] except that if the money was to be invested at a given rate and is so invested, he will be chargeable with such rate,[61] and except that if the agent has secured a higher rate, the principal is entitled to all that he has received.[62] Where an agent entitled to a certain per cent on amounts collected by him as compensation is charged with interest on the full amount collected, he is entitled to be credited with interest on his commissions from the time the money was received by him.[63]

h. Estoppel Between Principal and Agent — (i) *In General.* Estoppel between a principal and his agent is ordinarily governed by the rules regulating estoppel generally.[64] Thus as a general rule an agent is estopped to deny the amount shown to be due by his account;[65] and if he has represented to his principal that he has received certain funds or property, he cannot later show that he received nothing at all or something else instead, but must account for the cash or property he acknowledged he had received.[66] The mere fact that an agent has made tentative statements of account to his principal from time to time does not deprive the principal of the right to demand a full and complete account of all the agent's dealings for him;[67] but if the principal has with full knowledge accepted the agent's account he is estopped from later trying to hold the agent liable for his acts,[68] although he is not precluded from suing for a balance due by the account.[69]

(ii) *Estoppel to Deny Principal's Title.* As a general rule an agent's

59. Gordon *v.* Zacharie, 15 La. Ann. 17; New Orleans Draining Co. *v.* De Lizardi, 2 La. Ann. 281; Marr *v.* Hyde, 8 Rob. (La.) 13; Hill *v.* Hunt, 9 Gray (Mass.) 66; People *v.* Gasherie, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263.

60. Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510; Bischoffsheim *v.* Baltzer, 21 Fed. 531.

Compound interest see Sidway *v.* American Mortg. Co., 119 Ill. App. 502 [*affirmed* in 222 Ill. 270, 78 N. E. 561], holding the allowance of compound interest on money collected by an agent and not reported to his principal to be improper.

61. Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510; Dillman *v.* Hastings, 144 U. S. 136, 12 S. Ct. 662, 36 L. ed. 378.

62. Whitehead *v.* Lynn, 20 Colo. App. 51, 76 Pac. 1119; Munson *v.* Plummer, 59 Iowa 136, 12 N. W. 796.

63. Wiley *v.* Logan, 95 N. C. 358.

64. Henekin *v.* Indiana Bridge Co., 36 Ill. App. 166 (holding that the agent of a bridge company who, under his contract, receives from the company the bridges, which are charged to him by the pound and makes no objection to the weight then given, cannot after the bridges are erected claim that he was overcharged in the weights and prove the actual weight as he claims by measurement); Earnhart *v.* Robertson, 10 Ind. 8 (holding that an agent cannot set up, in defense of a suit by the principal, transactions unauthorized and not within the scope of his employment); Penney *v.* Kaldenberg, 56 N. Y. Super. Ct. 178, 3 N. Y. Suppl. 212. And see, generally, Estoppel, 16 Cyc. 722 *et seq.*

One who buys property as attorney is not estopped to show that he bought particularly for himself. Garner's Appeal, 1 Walk. (Pa.) 438.

65. Phelps *v.* Plum, 32 S. W. 753, 17 Ky. L. Rep. 817; Hartmann *v.* Schnugg, 113 N. Y. App. Div. 254, 99 N. Y. Suppl. 33 [*affirmed* in 188 N. Y. 617, 81 N. E. 1165]; Johnston *v.* Thum, 4 Pa. Cas. 433, 7 Atl. 739.

66. Wood *v.* Blaney, 107 Cal. 291, 40 Pac. 428 (holding an agent estopped under Code Civ. Proc. § 1952, subd. 3, from showing that he did not receive a deposit in cash but in a note of the vendee, where he acknowledged that he received a cash deposit on the sale, as provided for in his contract); Perry *v.* Smith, 15 Iowa 202 (holding that if an agent in good faith sets apart a sum of money or chose in action and treats it as the property of the principal, a court of equity will at the option of the principal treat it as the principal's, unless the paramount interest or lien of some third person intervenes); Blandy *v.* Raguet, 14 Minn. 491 (holding that where an agent telegraphed that he had received a certain deposit on machinery, whereupon the machinery was shipped, he could not deny the correctness of the statement or show that such deposit had been made upon another understanding than the original one); Higginson *v.* Fabre, 3 Desauss. Eq. (S. C.) 89 (holding as agent bound by the amount he had reported that he had sold for, although more than he actually received). *Compare* Hall *v.* Edrington, 9 Dana (Ky.) 364.

67. Jordan *v.* Underhill, 91 N. Y. App. Div. 124, 86 N. Y. Suppl. 620. See *supra*, III, A, 4, e.

68. Underwriters' Wrecking Co. *v.* Board of Underwriters, 35 La. Ann. 803, holding that the payee of a bill who has elected to treat it as his own and has received the dividend is estopped from holding responsible his agent, who purchased it under instructions.

Ratification in general see *supra*, I, F.

69. Anderson *v.* Grand Forks First Nat. Bank, 4 N. D. 182, 59 N. W. 1029, holding

duty to his principal forbids him, when called upon to account for property or funds received by him from his principal or on his account, from disputing his principal's right or title thereto.[70] However, an agent does not, by accepting the agency, lose any prior claim he himself may have had to the property with which he deals;[71] nor is he estopped from asserting that money or property in his hands was not received by him as agent for the principal,[72] or that the property has been taken from him by a paramount title,[73] or that the property is in dispute, as by

that where a principal retained the amount sent in by his agent as the proceeds of a sale made under the agency, it does not estop him from suing for a balance claimed to be due thereunder, where he does not seek to repudiate the sale.

70. *Alabama.*— Firestone *v.* Firestone, 49 Ala. 128, holding that an agent who becomes trustee for his principal by taking title to property in his own name will not be allowed to set up the statute of frauds against the enforcement of the trust.

Connecticut.— Collins *v.* Tillou, 26 Conn. 368, 68 Am. Dec. 398.

Georgia.— Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721.

Illinois.— Mason *v.* Hartgrove, 103 Ill. App. 163.

Indiana.— Reed *v.* Dougan, 54 Ind. 306; U. S. Express Co. *v.* Lucas, 36 Ind. 361.

Kansas.— McWhirt *v.* McKee, 6 Kan. 412.

Louisiana.— Canonge *v.* Louisiana State Bank, 3 Mart. N. S. 344; Butler *v.* Kenner, 2 Mart. N. S. 274.

Michigan.— Blanchard *v.* Tyler, 12 Mich. 339, 86 Am. Dec. 57.

Missouri.— Witman *v.* Felton, 28 Mo. 601.

Nevada.—Ah Tone *v.* McGarry, 22 Nev. 310, 39 Pac. 1009.

New Jersey.— Von Hurter *v.* Spengeman, 17 N. J. Eq. 185.

New York.— Hancock *v.* Gomez, 58 Barb. 490; Murray *v.* Vanderbilt, 39 Barb. 140; Hammond *v.* Christie, 5 Rob. 160; Crosbie *v.* Leary, 6 Bosw. 312; King *v.* Kaiser, 3 Misc. 523, 23 N. Y. Suppl. 21; Toland *v.* Murray, 18 Johns. 24.

North Carolina.— Tarkinton *v.* Latham, 33 N. C. 596.

South Carolina.— Charleston City Council *v.* Duncan, 1 Treadw. 436.

Wisconsin.— Day *v.* Southwell, 3 Wis. 657.

England.— Dixon *v.* Hamond, 2 B. & Ald. 310; Zulueta *v.* Vinent, 1 De G. M. & G. 315, 50 Eng. Ch. 242, 42 Eng. Reprint 573; Evans *v.* Nichol, 5 Jur. 1110, 11 L. J. C. P. 6, 3 M. & G. 614, 4 Scott N. R. 43, 42 E. C. L. 321; Roberts *v.* Ogilby, 9 Price 269, 23 Rev. Rep. 671; Eachus *v.* Moss, 14 Wkly. Rep. 327.

Canada.— Turner *v.* Francis, 14 Can. L. T. 406.

See 40 Cent. Dig. tit. "Principal and Agent," § 159.

Limitations and qualifications of rule see Peck *v.* Wallace, 19 Ala. 219 (holding that where a person places a note in the hands of an attorney for collection, and takes a receipt for it in his own name, but does not claim it as his own, nor any lien upon it, and the note itself is payable to a third person and not indorsed, a payment by the attorney of the proceeds of the note to the payee will discharge him from liability to the person who placed the note in his hands); Robinson *v.* Easton, etc., Co., 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167 (holding that an agent authorized to make a contract for the sale of land has a right to refund money to an intending purchaser coextensive with the obligation created by the agreement under which it has been paid, whether the terms of the agreement with the intending purchaser were pursuant to authority given or not; and such refunded money cannot be recovered by the principal from the agent); Needles *v.* Fuson, 68 S. W. 644, 24 Ky. L. Rep. 369 (holding that where money wrongfully collected by an agent was returned to the person of whom it was collected, it furnishes a good defense against the principal); Moss Mercantile Co. *v.* Payette First Nat. Bank, 47 Oreg. 361, 82 Pac. 8, 2 L. R. A. N. S. 657 (holding that an agent to collect and remit the amount due on a judgment is not estopped, by reason of his relationship to his principal, to assert as against the latter that the amount due in fact belonged to another, and that he paid it over to that other on demand prior to the commencement of suit against him by the principal); Robertson *v.* Woodward, 3 Rich. (S. C.) 251 (holding that where an agent refuses to deliver to his principal property received of him in a suit brought by the principal to recover the same, the agent may defend by showing property in another to whom he would be liable if he surrendered the property to the principal); Stevens *v.* Lee, 2 C. L. R. 251, 2 Wkly. Rep. 16 (holding that money had and received by an agent in pursuance of a contract founded on false statements by his principal is money had and received to the use of the person paying the same, and not to the use of the principal, and the agent may show this as a defense against the principal); Murray *v.* Mann, 2 Exch. 538, 12 Jur. 631, 17 L. J. Exch. 256.

71. Davis *v.* Davis, 9 Mont. 267, 23 Pac. 715 (holding that an attorney in fact, by accepting a power of attorney and attempting to convey thereunder land of his principal to himself, is not estopped from asserting an equitable title thereto previously vested in himself); Shaeffer *v.* Blair, 149 U. S. 248, 13 S. Ct. 856, 37 L. ed. 721 [*reversing* 33 Fed. 218].

72. Gillam *v.* Gillam, 8 Rich. Eq. (S. C.) 67.

73. Biddle *v.* Bond, 6 B. & S. 225, 34 L. J. Q. B. 137, 11 Jur. N. S. 425, 12 L. T. Rep. N. S. 178, 13 Wkly. Rep. 561, 118 E. C. L. 225.

reason of an infringement of trade-mark.[74] In the case of an adverse claim the agent is not bound to pay the amount claimed to his principal unless he is protected against the claim;[75] he must interplead the principal and the claimant if he can,[76] and demand indemnity and deliver the property to the party who indemnifies him;[77] and if after proper notice of the claim by a third person he turns over the property or funds to his principal, he becomes liable to the claimant if the latter has a right thereto,[78] although he will not be liable if he turns over the property to his principal with knowledge of a third person's claim but before it has been legally asserted.[79]

i. Illegality of Transaction.[80] An agent cannot be compelled to account for funds or property received by him for his principal in the course of an illegal transaction where the right of recovery and the illegal transaction are so closely connected that the principal cannot enforce his right without showing the illegality.[81] But where the illegal transaction has been completed, and the principal relies for his right to an accounting upon a collateral and independent obligation not connected therewith, the agent may be compelled to account for the funds or property so received, although arising out of the illegal transaction, and will be precluded from setting up the illegality of the transaction as a defense.[82] So

If the title of the third person is not paramount the agent is liable to the principal for the money paid him. Thus where a portion of the price of land is paid to an agent of the owner of the land by the intending purchaser, and the agent, on the representations of the intending purchaser that the owner's title is not perfect, returns it, and the title is afterward shown to be perfect, the agent is liable to his principal for the money so paid to him. Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122.

74. Hunt *v.* Maniere, 34 Beav. 157, 11 Jur. N. S. 28, 73, 34 L. J. Ch. 142, 11 L. T. Rep. N. S. 723, 5 New Rep. 181, 13 Wkly. Rep. 363, 55 Eng. Reprint 594, holding an injunction of a sale of goods for an infringement of a trade-mark justifies an agent in refusing to deliver the goods to his principal.

75. Sims *v.* Brown, 6 Thomps. & C. (N. Y.) 5 [*affirmed* in 64 N. Y. 660]; Peyser *v.* Wilcox, 64 How. Pr. (N. Y.) 525.

76. Sims *v.* Brown, 6 Thomps. & C. (N. Y.) 5 [*affirmed* in 64 N. Y. 660]; Peyser *v.* Wilcox, 64 How. Pr. (N. Y.) 525.

77. Sims *v.* Brown, 6 Thomps. & C. (N. Y.) 5 [*affirmed* in 64 N. Y. 660]; Peyser *v.* Wilcox, 64 How. Pr. (N. Y.) 525.

78. Sims *v.* Brown, 6 Thomps. & C. (N. Y.) 5 [*affirmed* in 64 N. Y. 660]; Peyser *v.* Wilcox, 64 How. Pr. (N. Y.) 525.

79. Wando Phosphate Co. *v.* Parker, 93 Ga. 414, 21 S. E. 53; Sims *v.* Brown, 6 Thomps. & C. (N. Y.) 5 [*affirmed* in 64 N. Y. 660]; McNair *v.* Burns, 9 Watts (Pa.) 130; Green *v.* Maitland, 4 Beav. 524, 49 Eng. Reprint 442.

80. **Effect of illegality of agency** see also CONTRACTS, 9 Cyc. 557; GAMING, 20 Cyc. 950, 951; INTOXICATING LIQUORS, 23 Cyc. 335; LOTTERIES, 25 Cyc. 1653.

81. *California.*— Moore *v.* Moore, 130 Cal. 110, 62 Pac. 294, 80 Am. St. Rep. 78, holding that an action by a father to enforce a trust upon a title acquired by his son necessarily dependent upon the enforcement of an illegal contract cannot be maintained.

Louisiana.— Little *v.* Johnson, 22 La. Ann. 474; Wells *v.* Addison, 20 La. Ann. 295.

Mississippi.— Wooten *v.* Miller, 7 Sm. & M. 380.

New Hampshire.— Udall *v.* Metcalf, 5 N. H. 396.

New York.— Leonard *v.* Poole, 114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 4 L. R. A. 728 [*affirming* 23 Jones & S. 213] (holding that the courts will not aid in adjusting differences arising out of and requiring an investigation of illegal transactions); Negley *v.* Devlin, 12 Abb. Pr. N. S. 210; Le Guen *v.* Gouverneur, 1 Johns. Cas. 436, 1 Am. Dec. 121.

Utah.— Mexican International Banking Co. *v.* Lichtenstein, 10 Utah 338, 37 Pac. 574.

Vermont.— Buck *v.* Albee, 26 Vt. 184, 62 Am. Dec. 564.

Wisconsin.— Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58.

United States.— Lanahan *v.* Pattison, 14 Fed. Cas. No. 8,036, 1 Flipp. 410.

Canada.— See Latraverse *v.* Morgan, 14 Quebec Super. Ct. 511.

See 40 Cent. Dig. tit. "Principal and Agent," § 160.

82. *Georgia.*— Holleman *v.* Bradley Fertilizer Co., 106 Ga. 156, 32 S. E. 83.

Illinois.— Snell *v.* Pells, 113 Ill. 145, holding that an agent who receives money for his principal upon a contract not criminal or immoral in its character, but contrary to public policy only, will be estopped from setting up the illegality of such contract in defense to an action by his principal to recover the money in his hands.

Indiana.— State *v.* Tumey, 81 Ind. 559; Daniels *v.* Barney, 22 Ind. 207; Wilt *v.* Redkey, 29 Ind. App. 199, 64 N. E. 228.

Iowa.— Sternburg *v.* Callanan, 14 Iowa 251, holding that a person acting as agent in the loan of money charged with usurious interest

where the illegal transaction has not been carried out, the principal may rescind the agency and compel a return of unexpended funds or property which he had turned over to the agent in furtherance of the illegal design.[83]

j. Liability of Agent For Conversion.[84] An agent may be liable for a conversion of his principal's funds or property where he refuses to account for and deliver the same on a proper demand therefor,[85] unless he has a sufficient excuse for such

cannot plead the usury in an action by his principal for a balance remaining in his hands, where he is not a privy to the usurious contract.

Louisiana.— Chinn *v.* Chinn, 22 La. Ann. 599.

Mississippi.— Decell *v.* Hazelhurst Oil Mill etc., Co., 83 Miss. 346, 35 So. 761.

New Jersey.— Evans *v.* Trenton, 24 N. J. L. 764, holding that the mere agent of a party to an illegal transaction cannot set up the illegality in a suit by his principal on account of the transaction; that this defense can be set up only by a party to the transaction.

New York.— Murray *v.* Vanderbilt, 39 Barb. 140; Alvord *v.* Latham, 31 Barb. 294; Fogerty *v.* Jordan, 2 Rob. 319; Merritt *v.* Millard, 10 Bosw. 309 [*affirmed* in 3 Abb. Dec. 291, 4 Keyes 208]. See Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

Ohio.— Norton *v.* Blinn, 39 Ohio St. 145.

South Carolina.— Andersons *v.* Moncrieff, 3 Desauss. Eq. 124.

Tennessee.— Pointer *v.* Smith, 7 Heisk. 137.

Texas.— Floyd *v.* Paterson, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787 (holding that the law implies a promise on the part of an agent to pay over to his principal money received for him, and the illegality of the contract by virtue of which the money was collected affords no defense); Taul *v.* Edmondson, 37 Tex. 556; Lovejoy *v.* Kaufman, 16 Tex. Civ. App. 377, 41 S. W. 507.

Vermont.— Baldwin *v.* Potter, 46 Vt. 402.

West Virginia.— Cheuvront *v.* Horner, 62 W. Va. 476, 59 S. E. 964.

Wisconsin.—Kiewert *v.* Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731.

United States.— Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Planters' Bank *v.* Union Bank, 16 Wall. 483, 21 L. ed. 473; Brooks *v.* Martin, 2 Wall. 70, 17 L. ed. 732; McBlair *v.* Gibbes, 17 How. 232, 15 L. ed. 132; Armstrong *v.* Toler, 11 Wheat. 258, 6 L. ed. 468; Chicago Star Brewery *v.* United Breweries Co., 121 Fed. 713, 58 C. C. A. 133; Gilbert *v.* American Surety Co., 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253.

England.— Farmer *v.* Russell, 1 B. & P. 296; Tenant *v.* Elliott, 1 B. & P. 3, 4 Rev. Rep. 526; Williams *v.* Frye, 18 Jur. 442, 23 L. J. Ch. 860, 2 Wkly. Rep. 314; Sharp *v.* Taylor, 2 Phil. 801, 22 Eng. Ch. 801, 41 Eng. Reprint 1153.

See 40 Cent. Dig. tit. "Principal and Agent," § 160.

83. *California.*— Wassermann *v.* Sloss, 117 Cal. 425, 49 Pac. 566, 59 Am. St. Rep. 209, 38 L. R. A. 176, holding that one who deposits money with another to be used in furtherance of an illegal design is entitled to the return of the money so long as such design remains unexecuted.

Iowa.—Munns *v.* Donovan Commission Co., 117 Iowa 516, 91 N. W. 789.

Massachusetts.— Fisher *v.* Hildreth, 117 Mass. 558; Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327; McKee *v.* Manice, 11 Cush. 357.

New Hampshire.— Souhegan Nat. Bank *v.* Wallace, 61 N. H. 24 (holding that an agent cannot keep money belonging to his principal on the ground that it was furnished for an unlawful purpose); Perkins *v.* Eaton, 3 N. H. 152.

Wisconsin.— Kiewert *v.* Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731.

England.— Hastelow *v.* Jackson, 8 B. & C. 221, 6 L. J. K. B. O. S. 318, 2 M. & R. 209, 15 E. C. L. 117; Farmer *v.* Russell, 1 B. & P. 296; Edgar *v.* Fowler, 3 East 222, 7 Rev. Rep. 433; Bone *v.* Eckless, 5 H. & N. 925, 29 L. J. Exch. 438; Bonsfield *v.* Wilson, 16 M. & W. 185.

See 40 Cent. Dig. tit. "Principal and Agent," § 160.

84. Conversion by disobedience see *supra*, III, A, 2, b.

Conversion in general see TROVER AND CONVERSION.

Criminal liability of agent for embezzlement see EMBEZZLEMENT, 15 Cyc. 497.

Measure of damages for conversion see DAMAGES, 13 Cyc. 170 *et seq.*; FACTORS AND BROKERS, 19 Cyc. 149, 214; TROVER AND CONVERSION.

85. *California.*— Wood *v.* Blaney, 107 Cal. 291, 40 Pac. 428.

Indiana.— Nading *v.* Howe, 23 Ind. App. 690, 55 N. E. 1032.

Massachusetts.— Brown *v.* Cushman, 173 Mass. 368, 53 N. E. 860.

New York.— Solomon *v.* Waas, 2 Hilt. 179 (holding that an agent to sell who claims that he has bought the goods from his principal and refuses to account thereby converts them to his own use); Rhinelander *v.* Barrow, 17 Johns. 538 [*reversing* 3 Johns. Ch. 614]. And see Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273, holding that the demand of a note sent to a bank as agent for collection terminates the agency and a refusal to return it may be evidence of a conversion.

Texas.— Jones *v.* Hunt, 74 Tex. 657, 12 S. W. 832.

Virginia.— Jackson *v.* Pleasanton, 101 Va. 282, 43 S. E. 573.

See 40 Cent. Dig. tit. "Principal and Agent," § 148.

Necessity of demand and refusal see *infra*, IV, B, 2.

refusal.[86] An agent may also be liable for conversion where he deals with the funds or property in subversion of the principal's rights therein,[87] as where he sells it as the property of another,[88] or otherwise parts with it in a way or for a purpose not authorized,[89] or where he deals with the property for his own purposes,[90] or otherwise deals with it in fraud of the principal's rights therein.[91] Where an agent is intrusted with money to be invested in the name of his principal, he is guilty of conversion if he invests it in his own name.[92] But an agent is not guilty of conversion if he acts in apparent accord with his authority, although he may have been guilty of a technical departure from his duty, or of negligence in its performance.[93] Where an agent guarantees a sale and is also authorized to sell on credit and does so, he cannot be held liable as for a conversion of the goods which he is unable to collect for; but the principal's remedy is by action on the guaranty.[94]

86. Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113; Fletcher *v.* Fletcher, 7 N. H. 452, 28 Am. Dec. 359.

87. Covell *v.* Hill, 6 N. Y. 374.

88. Covell *v.* Hill, 6 N. Y. 374.

89. Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251; Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184; Michigan Carbon-Works *v.* Schad, 1 N. Y. Suppl. 490.

Where an agent wrongfully disposes of his principal's property he cannot escape liability by applying the proceeds to the payment of the principal's debts without his authority or consent. Price *v.* Keyes, 1 Hun (N. Y.) 177, 3 T. & C. 720 [*reversed* on other grounds in 62 N. Y. 378].

Wrongful intent not necessary.— If an agent intrusted with the property of his principal parts with it in a way or for a purpose not authorized, he is liable for a conversion, although there was no wrongful intent on his part. Kennesaw Guano Co. *v.* Wappoo Mills, 119 Ga. 776, 47 N. E. 205; Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

90. *Alabama.*— Coleman *v.* Siler, 74 Ala. 435 (holding that where an agent sells his principal's property in consideration of a satisfaction of his individual debt both he and the purchaser are guilty of conversion); Firemens' Ins. Co. *v.* Cochran, 27 Ala. 228 (holding that the unauthorized transfer by the secretary of an insurance company of notes and bills of exchange belonging to the company is a conversion for which trover may be maintained).

Georgia.— Wyly *v.* Burnett, 43 Ga. 438.

Maryland.— Barton *v.* White, 1 Harr. & J. 579.

Missouri.— White Sewing Mach. Co. *v.* Betting, 46 Mo. App. 417.

New Hampshire.— Gould *v.* Blodgett, 61 N. H. 115.

New York.— Florence Sewing Mach. Co. *v.* Warford, 1 Sweeny 433; Schanz *v.* Martin, 37 Misc. 492, 75 N. Y. Suppl. 997.

Oregon.— Salem Light, etc., Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675; Nichols *v.* Gage, 10 Oreg. 82.

Pennsylvania.— Persch *v.* Quiggle, 57 Pa. St. 247; Etter *v.* Bailey, 8 Pa. St. 442.

England.—Dantra *v.* Stiebel, 3 F. & F. 951.

See 40 Cent. Dig. tit. "Principal and Agent," § 148.

91. White *v.* Wall, 40 Me. 574 (holding that where a consignee of goods with power to sell, sells with intent to defraud the consignor, which intent is known to the purchaser, such sale and transfer of possession constitutes a joint conversion for which both parties will be liable in trover); King *v.* Mackellar, 109 N. Y. 215, 16 N. E. 201; Ward *v.* Forrest, 20 How. Pr. (N. Y.) 465.

92. Cock *v.* Van Etten, 12 Minn. 522; Farrand *v.* Hurlbut, 7 Minn. 477.

That an agent deposits in a bank a box of specie belonging to his principal on general deposit and takes a certificate of deposit in his own name and subject to his own order is sufficient to authorize a jury to infer a conversion. Ringo *v.* Field, 6 Ark. 43.

93. Walter *v.* Bennett, 16 N. Y. 250 (holding that an agent employed to make a sale and collect the proceeds on receiving from the purchaser a bank draft payable to his own order is not acting in violation of his duty in reducing the draft into money and passing it to his own credit in bank); Bogatcka *v.* Walker, 1 N. Y. City Ct. 447 (holding that an agent "to rent or sell" a piano is not guilty of conversion if he rents it to one who never returns it).

A sudden emergency or an unusual condition may excuse the agent. Thus where an agent who by the circumstances of war was unable to communicate with his principal laid away the money belonging to the latter with his own, and also placed part of the money in his brother's hands, hoping thereby to make it more secure, and exchanged some of the bills for others of larger denominations so as to reduce the bulk of the funds, he was not guilty of a conversion. Wood *v.* Cooper, 2 Heisk. (Tenn.) 441. Insolvency of a principal indebted to the agent will justify a sale by the agent of property of his principal in his hands, but not of more than enough to indemnify himself. Henriques *v.* Franchise, Prec. Ch. 205, 24 Eng. Reprint 100.

That an agent takes a note payable to himself for the debt of his principal is not evidence of a conversion. Kidd *v.* King, 5 Ala. 84; Floyd *v.* Day, 3 Mass. 403, 3 Am. Dec. 171.

94. Standard Fertilizer Co. *v.* Van Valkenburgh, 21 Misc. (N. Y.) 559, 47 N. Y. Suppl. 703.

B. Duties and Liabilities of Principal to Agent — 1. Obligation to Continue in Business and Afford Agent Opportunity, Means, and Facilities For Earning Commission. In the absence of an express or implied stipulation to the contrary in the contract of agency, the principal of a commercial agent is under no obligation to continue in business and afford the agent opportunity, means, and facilities for earning his commissions; and hence his failure to do so affords the agent no ground for the recovery of damages.[95]

95. Parry Mfg. Co. *v.* Lyon, 64 S. W. 436, 23 Ky. L. Rep. 844 (holding that where plaintiffs and defendant entered into a contract designated as "an agency contract for the sale of vehicles," by which it was provided that vehicles shipped to plaintiffs were to remain the property of defendant, and defendant reserved the right to have any of such vehicles returned, and also the right to revoke the agency at will, plaintiffs cannot recover damages for defendant's refusal to deliver vehicles ordered); Rhodes *v.* Forwood, 1 App. Cas. 256, 47 L. J. Exch. 396, 34 L. T. Rep. N. S. 890, 24 Wkly. Rep. 1078 (holding that where two parties agree, for a fixed period, the one to employ the other as his sole agent in a certain business at a certain place, the other that he will act in that business for no other principal at that place, there is no implied contract that the business itself shall continue to be carried on during the term named); *In re* English, etc., Mar. Ins. Co., L. R. 5 Ch. 737, 39 L. J. Ch. 685, 23 L. T. Rep. 685, 18 Wkly. Rep. 1122 (holding that where a person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission on all business transactions, the company violated no obligation by voluntarily winding up before the expiration of the five years); Northey *v.* Treillion, 7 Com. Cas. 201, 18 T. L. R. 648 (holding that where there is a contract to employ another as an agent merely, but with no service or subordination, there is no implied undertaking that the agent is to be supplied with the means of earning his commission; but that if the contract is one of service, then the commission is merely intended to be in the place of salary, and the contract cannot be determined without compensation to the servant); Bovine *v.* Dent, 21 T. L. R. 82 [*distinguishing* Ogdens *v.* Nelson, [1904] 2 K. B. 410, 90 L. T. Rep. N. S. 656, 20 T. L. R. 466, 53 Wkly. Rep. 71 [*affirmed* in 74 L. J. K. B. 433, 92 L. T. Rep. N. S. 478, 21 T. L. R. 359, 53 Wkly. Rep. 497] (where it appeared that plaintiffs entered into a contract with defendants, who carried on business in partnership, whereby the latter were appointed sole buying agents for plaintiffs for a certain district, the intention being that the whole district should be represented by defendants for a period of five years; that plaintiffs agreed that defendants should retain the agency so long as they met their engagements and kept strictly to the terms of the engagement for a period of five years, and in consideration thereof defendants agreed to act as buying agents for the district on the terms stated in the agreement, and to accept delivery and pay for a minimum quantity of plaintiffs' products during each year of the term; and defendants had the option of renewing the agreement at its termination; that within the five years defendants dissolved partnership, and plaintiffs sued for damages for breaches of the contract committed after the dissolution; and it was held that there was no implied term in the contract that defendants should not dissolve partnership within the term and thus disable themselves from carrying out the contract, and that therefore defendants were not liable); Morris *v.* Dinnick, 14 Can. L. T. Occ. Notes 394, 25 Ont. 291 (holding that where, in a written contract of agency, the principal agreed to pay the agent a fixed commission on all sales effected by the latter of goods manufactured by the former, and the contract was made terminable at the end of a year or a month's notice by either party, there was no implied obligation on the part of the principal to manufacture any goods).

Obligation to continue agency.— An obligation of the principal to continue the agency for any period cannot be implied where, in a written contract of agency, the principal agreed to pay the agent a fixed commission on all sales effected by the latter of goods manufactured by the former, and the contract was made terminable at the end of a year or a month's notice by either party. Morris *v.* Dinnick, 14 Can. L. T. Occ. Notes 394, 25 Ont. 291. See, however, Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534.

Obligation to supply agent with goods.— Defendant entered into an agreement in writing with plaintiff whereby defendant agreed to employ plaintiff as agent for five years, and plaintiff agreed to do his utmost to obtain orders for the various goods manufactured or sold by defendant which might be submitted to him, plaintiff to be paid by a commission. After two years defendant ceased to carry on business and discharged plaintiff. In an action for wrongful dismissal it was held that there was an implied agreement to supply plaintiff with goods to a reasonable extent, and that plaintiff was entitled to damages. Turner *v.* Goldsmith, [1891] 1 Q. B. 544, 60 L. J. Q. B. 247, 64 L. T. Rep. N. S. 301, 39 Wkly. Rep. 547. So, where plaintiff had contracted with defendant to act as its sole agent in another state to establish a market for its oils, and was to receive as compensation ten per cent of the amount of his sales, and to be subject to the orders of the company, defendant was bound to furnish the oils necessary to fulfil contracts made by plaintiff. Union Refining Co.

2. Agent's Right to Compensation — a. As Affected by Contract of Employment — (i) *Necessity of Authority* — (a) *In General.* To entitle a person

v. Barton, 77 Ala. 148. Where, however, defendants agreed to furnish plaintiff with goods for sale by him, but not all he could sell, and after goods had been furnished him for a part of the season it developed that defendants could not manufacture more than they themselves could sell at retail, which plaintiff had understood they were to continue to do, they were under no obligation to supply him further with goods. Dodge *v.* Reynolds, 135 Mich. 692, 98 N. W. 737.

Excuses for discontinuing business.—Where a manufacturer obligates himself to his sales agent to continue the business and supply the agent with goods for a definite period, he is not excused from performance by the fact that, before the expiration of the specified period, his manufactory is destroyed by fire. Turner *v.* Goldsmith, [1891] 1 Q. B. 544, 60 L. J. Q. B. 247, 64 L. T. Rep. N. S. 301, 39 Wkly. Rep. 547. So the fact that a foreign insurance company becomes unable, by reason of the insufficiency of its assets, to comply with a statute regulating foreign insurance companies, does not excuse it from carrying out a contract by which it has obligated itself to employ a state agent for a specified period. Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534.

Obligation to supply agent with samples.—A principal may bind himself to furnish his agent with samples of the goods he is hired to sell. Jacquin *v.* Boutard, 89 Hun (N. Y.) 437, 35 N. Y. Suppl. 496 [*affirmed* in 157 N. Y. 686, 51 N. E. 1091] (holding that where a manufacturer hired an agent to sell his goods on commission, and, although he had not agreed in terms to send the agent samples, yet did so until he gave six months' notice to terminate the agency, as allowed by the contract, his obligation to do so while the agency continued was clearly within the intent of the parties and will be enforced); Turner *v.* Goldsmith, [1891] 1 Q. B. 544, 60 L. J. Q. B. 247, 64 L. T. Rep. N. S. 301, 39 Wkly. Rep. 547. However, a contract by which a principal agrees to supply his agent for the sale of a certain article "with sufficient samples" of the said article, "as may be called for" by the agent, means only that the agent shall be furnished with a quantity of samples such as shall be reasonably sufficient for the business actually done, and, in case of disagreement, the question as to what is a reasonable quantity is to be determined by the jury. Jenson *v.* Perry, 126 Pa. St. 495, 17 Atl. 665, 12 Am. St. Rep. 888.

Obligation to make fair prices.—Under an executory contract between a corporation engaged in the business of refining cotton-seed oil in Alabama and an agent employed to introduce and establish a market for the sale of its oils in Georgia, by which it was stipulated that for three years the agent was to have the sole right of selling the company's oils in Georgia through himself and his subagents, was to pay the expenses of himself and his agents, was to receive as compensation ten per cent of the amount of his sales, and was to be subject to the orders of the company, it was held that the company, in regulating the price to be charged for oils, was neither required to sell its oils at a loss, nor authorized to raise the price above a fairly remunerative profit, which would defeat or substantially hinder sales, in order to get rid of the agency. Union Refining Co. *v.* Barton, 77 Ala. 148.

Obligation to supply agent with price lists.—A principal may by the contract of agency obligate himself to supply a sales agent with price lists. Jacquin *v.* Boutard, 89 Hun (N. Y.) 437, 35 N. Y. Suppl. 496 [*affirmed* in 157 N. Y. 686, 51 N. E. 1091].

Obligation to make money advances to agent.—A contract by which plaintiff is to serve defendants as a traveling salesman for a certain term, his compensation to be half the profits made on sales effected through his agency, he to pay his own expenses, and defendants to furnish supplies, and, to enable him to meet expenses until profits are realized, to honor his orders on them for fifty dollars every two weeks during his employment, binds defendant to make such payments, not as compensation, but as loans, the rights of the parties to be adjusted on settlement of the profits; and their refusal to make such payments is a breach of the contract. Beck *v.* West, 87 Ala. 213, 6 So. 70.

Obligations as to agent for sale of corporate stock.—By the contract between plaintiff and defendant building and loan association he became agent for the sale of "shares of its stock" in a certain territory, his compensation being fixed at a certain sum per share, which was to cover all his expenses as well; and he further bound himself to sell five hundred shares at least per month. Shortly afterward defendant changed the nature of its shares, and issued them on a new basis, whereby they became less salable. It was held that this was a breach of the contract, as it contemplated only shares of the character defendant was issuing when the contract was made. Gates *v.* National Bldg., etc., Union, 46 Minn. 419, 49 N. W. 232. An agent was employed by the stock-holders of a corporation to place its stock under a contract that he should receive a commission on all the stock so placed. The contract contained no restrictions as to whether he could sell at par or at the market price, or that the corporation or any of its members should not sell any stock for less than par. The agent placed part of the stock at par, but after members of the company had put their own stock on the market and sold it for less than par, the agent found he could place no more stock at par, and ceased to make further efforts to place additional stock at any price. It was held that he was entitled only to his commission on the amount of stock he had placed, and not on the whole amount of stock to be placed, since the stock-holders,

to compensation for services rendered as the agent of another, he must ordinarily have been employed by that other to render such services.[96]

(B) *Express and Implied Authority.*[97] The contract of agency may be express,[98] or it may be implied from the conduct and words of the parties and the facts and circumstances surrounding the case.[99]

(C) *Ratification.*[1] Although a person assumes to act for another without authority, yet he may recover compensation for his services in an otherwise proper case if the latter ratifies the unauthorized act.[2] So one for whom an agent has been employed by a third person without authority may ratify the unauthorized employment, in which case the agent may, if otherwise entitled, recover compensation of the former.[3]

(II) *Necessity of Contract For Compensation* — (A) *In General.* The right of an agent to recover compensation for his services rests upon contract, express or implied, as affected by custom or usage. Accordingly the principal is not liable for compensation in the absence of any express or implied contract to pay it, or of a custom or usage entitling the agent to compensation.[4]

(B) *Express and Implied Contracts.* The contract for compensation may be

in putting their own stock on the market, violated no term of the contract. Vine *v.* Munson, 5 Ohio Dec. (Reprint) 480, 6 Am. L. Rec. 240, 2 Cinc. L. Bul. 293.

Measure of damages for principal's breach of contract see *infra*, III, B, 2, h, (IV).

Obligations of principal as affecting agent's right to compensation see *infra*, III, B, 2.

96. *Delaware.*— Cranston *v.* Nields, 5 Harr. 372.

Michigan.— McDonald *v.* Boeing, 43 Mich. 394, 5 N. W. 439, 38 Am. Rep. 199.

New York.— Harnickell *v.* Parrot Silver, etc., Min. Co., 117 N. Y. 644, 22 N. E. 1079; David *v.* Rick, 57 N. Y. App. Div. 623, 67 N. Y. Suppl. 1052.

Tennessee.— Yates *v.* Killman, (Ch. App. 1900) 57 S. W. 221.

England.— See Toulmin *v.* Millar, 12 App. Cas. 746, 57 L. J. Q. B. 301, 58 L. T. Rep. N. S. 96.

And see *infra*, III, B, 2, g. See also FACTORS AND BROKERS, 19 Cyc. 217.

Mode of creating agency see *supra*, I, D.

97. Express and implied employment of brokers see FACTORS AND BROKERS, 19 Cyc. 218.

Necessity of written authority see FACTORS AND BROKERS, 19 Cyc. 219; FRAUDS, STATUTE OF, 20 Cyc. 234.

98. See cases cited *passim*, III, B, 2.

99. Ice *v.* Maxwell, 61 W. Va. 9, 55 S. E. 899. See, however, McLiney *v.* Gomprecht, 7 Misc. (N. Y.) 169, 27 N. Y. Suppl. 253, holding that where in an action to recover commissions for renting defendant's building, it appeared that plaintiff, who was then the lessee and wished to surrender the lease, had an interview with defendant concerning it, and defendant told him to "get him a tenant," and he would do "what was right," a contract of hiring could not be inferred, the question in the minds of the parties being a surrender of the existing lease.

1. Ratification of acts done in excess of authority see *infra*, III, B, 2, e, (I), (V).

Ratification of unbinding contract made or procured by agent see *infra*, III, B, 2, e.

What constitutes ratification see *supra*, I, F.

Ratification as to broker see FACTORS AND BROKERS, 19 Cyc. 220.

2. Goss *v.* Stevens, 32 Minn. 472, 21 N. W. 549; Wilson *v.* Dame, 58 N. H. 392; Low *v.* Connecticut, etc., R. Co., 46 N. H. 284; Ice *v.* Maxwell, 61 W. Va. 9, 55 S. E. 899.

3. Mahony *v.* Ungrich, 59 N. Y. Super. Ct. 377, 14 N. Y. Suppl. 375 [*affirmed* in 129 N. Y. 632, 29 N. E. 1030].

Ratification of unauthorized employment of subagent see *infra*, III, B, 2, g, (II).

4. McClure *v.* McMichael, etc., Mfg. Co., 20 Montg. Co. Rep. (Pa.) 137; Lever *v.* Lever, 2 Hill Eq. (S. C.) 158; Poag *v.* Poag, 1 Hill Eq. (S. C.) 285; Muckenfuss *v.* Heath, 1 Hill Eq. (S. C.) 182; Ravenel *v.* Pinckney [*quoted* in 1 Hill Eq. (S. C.) 183, and partially *reported* in 36 Fed. 221 note]; Hubbard *v.* New York, etc., Invest. Co., 14 Fed. 675; Hall *v.* Gurney, 2 C. & K. 644, 61 E. C. L. 644. And see FACTORS AND BROKERS, 19 Cyc. 219.

Compensation not contemplated.—If neither party contemplates that compensation is to be made to the agent, he can recover none. Elkins *v.* Elkins, 11 La. 224; De Coux *v.* Plantevignes, 10 La. 503; Goodwin *v.* O'Brien, 3 Silv. Sup. (N. Y.) 96, 6 N. Y. Suppl. 239 [*affirmed* in 127 N. Y. 649, 27 N. E. 856], holding that where at the time an agent took charge of certain property it was not contemplated by either party that he should receive compensation for his services, and nothing arose by which the relations between the parties were changed, and the owners were not informed of any intent to charge for such services until shortly before the termination of the agency, the agent is not entitled to a recovery on a *quantum meruit*. So if, before accepting the agent's services, the principal expressly refuses to pay therefor, he is not liable to compensate the agent. Coffin *v.* Linxweiler, 34 Minn. 320, 25 N. W. 636. And if the agent renders the services without any intention to charge therefor, he cannot recover compensation. Grandin *v.* Reading, 10 N. J. Eq. 370; Hill *v.* Williams, 59

not only express,[5] but implied from the words and conduct of the parties and the

N. C. 242 (so holding, although he was held to a strict accounting by the principal); Higginson *v.* Fabre, 3 Desauss. Eq. (S. C.) 89 (so holding, although the principal had recognized the agent's right to commissions). However, a person acting under a power of attorney, having revoked a previous renunciation of fixed compensation for his services, is placed in the position he occupied before renunciation in respect to compensation for the services he may perform. Carricarte *v.* Blanco, 1 N. Y. Suppl. 744. *Compare* Bard *v.* Banigan, 39 Fed. 13.

By the civil law the contract of mandate is gratuitous in the absence of a contrary agreement. Merrick Rev. Civ. Code La. § 2991. And see Stewart *v.* Sonbral, 119 La. 211, 43 So. 1009; Fowler's Succession, 7 La. Ann. 207; Elkins *v.* Elkins, 11 La. 224; De Coux *v.* Plantevignes, 10 La. 503.

Contract as to amount of compensation see *infra*, III, B, 2, h.

5. *Louisiana.*— Stewart *v.* Soubral, 119 La. 211, 43 So. 1009.

Massachusetts.— Garfield *v.* Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695, holding that a statement made to plaintiff by defendant's district agent that any man that left his card or admitted that he had had any conversation with plaintiff in regard to a car should be plaintiff's customer, and plaintiff should get a commission, constituted a promise that if plaintiff should introduce defendant's car to one who afterward became a purchaser at defendant's branch office, and who admitted that plaintiff had called the car to his attention, plaintiff should receive a commission.

Nebraska.— Fredericksen *v.* Locomobile Co. of America, (1907) 111 N. W. 845 (holding that where one party requests another to perform services in effecting the sale of an article, agreeing "to protect" him if such sale is made, and the influence of the party so engaged is the efficient cause in effecting the sale, he is entitled to a commission); Singer Mfg. Co. *v.* Doggett, 16 Nebr. 609, 21 N. W. 468 (where plaintiff was employed by defendant as its agent to take charge of its office and business at L, and the contract of employment provided that the company should "place to the credit of the L office" fifteen per cent of the amount of money collected on contracts made by the former agent, and it was held that plaintiff was entitled to such fifteen per cent as his compensation).

Pennsylvania.— Bingaman *v.* Hickman, 115 Pa. St. 420, 8 Atl. 644.

United States.— Bard *v.* Banigan, 39 Fed. 13.

Canada.— Young *v.* Crossland, 18 U. C. C. P. 312.

See 40 Cent. Dig. tit. "Principal and Agent," § 196. And see FACTORS AND BROKERS, 19 Cyc. 219.

Consideration.— The contract for compensation must be based upon a valid and sufficient consideration, else no compensation is recoverable. Fife *v.* Blake, 38 Minn. 426, 38 N. W. 202 (holding that where plaintiff buys property on monthly payments, and surrenders the contract and vacates the property, an action against the vendors on their promise that if he can sell the property he can have all he gets above the amount of their claim cannot be sustained, the promise being without consideration and void); Murray *v.* Beard, 102 N. Y. 505, 7 N. E. 553 (holding that a contract by an agent with several employers separately to obtain a sale of piles for each one of them on commissions, he knowing that proposals are about to be made by a company building a pier for the purchase of the same of the lowest bidder but not disclosing the same to his principals, cannot be enforced by him against one of his employers who is the successful bidder, on account of no consideration); Washburne *v.* Pintsch, 17 Fed. 582 (holding that where the owner of property, induced to believe that another, who has been trying to sell such property on speculation for his own benefit alone, was clearly acting as his agent in the matter, and that he is under a moral obligation to compensate him for his trouble, promises to do so, such promise is without color of consideration and void). However, an agreement to pay an agent a certain sum if he sells a farm, and half that sum if the owner sells it outside his influence, is upon good consideration. Hoskins *v.* Fogg, 60 N. H. 402. And where a sales agent sent a man to see a customer after the principal had said to him that any man that left his card or admitted that he had had any conversation with the agent in regard to the property to be sold should be the agent's customer, and he should get the commission, the agent's efforts to sell the property afforded a consideration for a promise thereafter made by the principal to pay the agent a commission should it later sell to such prospective purchaser. Garfield *v.* Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695.

"Charges" as including commissions.—An agreement that defendant, employed to sell lands purchased by him for plaintiff's benefit, should be reimbursed for any costs and charges he may have been or thereafter might be at by reason of such purchase excludes defendant to any claim to commissions or other compensation for his services. These cannot come under the head of charges; that word includes only expenses paid out in attending to the business. Green *v.* Jones, 78 N. C. 265.

Compensation for retransfer of machines.— Where defendant stored machines with complainant, its agent, to be conveniently delivered to other agents in the state, and the contract between defendant and complainant declared that he should be allowed compensation for the retransfer of such machines, but that he should ship at the order of defendant all unused machines free of charge, and on demand of an agent of defendant all

facts and circumstances of the case;[6] and in general it may be said that when an agent performs services for his principal of such a nature and under such circumstances as to imply that he expects compensation, and there is nothing in the case from which the principal might reasonably assume that the services are rendered gratuitously, a contract to pay the agent a reasonable compensation may be implied.[7]

(c) *Modification of Contract.* Contracts as to compensation may be modified by agreement of the parties, subject to the rules that apply to the modification of contracts generally.[8]

machines were surrendered, and, by such agent's direction, immediately transferred to parties who had been appointed agents instead of complainant, he was not entitled to compensation for the transfer, it not being to other agents, within the meaning of the contract, and being governed by the agreement to deliver to the company free of charge. Brown *v.* McCormick Harvesting Mach. Co., (Tenn. Ch. App. 1900) 59 S. W. 196.

Compensation for selling second-hand machines.— A season contract of agency for the sale of machinery which provides that no commissions shall be paid for the sale of second-hand machinery once before sold by the agent has no reference to commissions for the second sale of machines which had been sold by the agent before the date of the contract and bought in by the principal at foreclosure sale. Shook *v.* Marion Mfg. Co., 138 Mich. 467, 101 N. W. 657. So a provision in a contract between a threshing machine company and their local agents at a certain town that the agents should receive no commission on the sale of second-hand goods referred to second-hand machines taken in part payment for new machines sold by the agents in their territory, and did not preclude them from recovering a commission for selling, at a special request of the company, a second-hand machine taken by it in trade in another locality. Gooch *v.* J. I. Case Threshing Mach. Co., 119 Mo. App. 397, 96 S. W. 431. And where, in a contract of agency, the principal reserved the right to sell second-hand machinery in any territory, and provided that he should not be liable for commissions on such sales, and it was also provided that no commissions should be paid on second-hand goods except when sold by an agent other than the one who sold them in the first instance, it was held that upon the sale by plaintiff of a second-hand engine which had not been sold by plaintiff before and which was represented by the general agent to be a new engine, plaintiff was entitled to a commission. Odum *v.* J. I. Case Threshing Machine Co., (Tenn Ch. App. 1895) 36 S. W. 191.

6. Krekeler's Succession, 44 La. Ann. 726, 11 So. 35; Fowler's Succession, 7 La. Ann. 207; Waterman *v.* Gibson, 5 La. Ann. 672; Martin *v.* Roberts, 36 Fed. 217. See also Lane *v.* Coleman, 8 B. Mon. (Ky.) 569; Harrison *v.* Long, 4 Desauss. Eq. (S. C.) 110, holding that there need be no express contract for commissions in order to entitle the agent thereto.

7. Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303; Mangum *v.* Ball, 43 Miss. 288, 5 Am. Rep. 488; McEwen *v.* Loucheim, 115 N. C. 348, 20 S. E. 519; Harrison *v.* Gotleib, 3 Ohio Cir. Ct. 191, 2 Ohio Cir. Dec. 109.

However, a promise to pay for services may be implied only when they were rendered under such circumstances as authorized the party performing them to entertain a reasonable expectation of payment by the party soliciting performance. McLiney *v.* Gomprecht, 7 Misc. (N. Y.) 169, 27 N. Y. Suppl. 253; Harrison *v.* Gotlieb, 3 Ohio Cir. Ct. 191, 2 Ohio Cir. Dec. 109.

Services rendered for joint benefit of parties.— Where one of several parties interested in a joint enterprise acts for the benefit of all, he is not, in the absence of an express contract, entitled to any compensation. Wilson *v.* Anthony, 19 Ark. 16; Everhart *v.* Camp, 55 Ill. App. 248; Hopkins Mfg. Co. *v.* Ruggles, 51 Mich. 474, 16 N. W. 862. And see Landis *v.* Scott, 32 Pa. St. 495. So an agent who in his character of agent collects a debt due to his principal and retains it under a contract of loan with his principal as debtor, entered into before the debt is collected, is not entitled to commissions on the amount so collected. Short *v.* Skipwith, 22 Fed. Cas. No. 12,809, 1 Brock. 103. And see Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510. And where plaintiff, being desirous of surrendering premises which he held under a lease from defendant, had an interview with defendant in relation thereto, during which defendant told him to get a tenant and he would do what was right, no agreement to pay plaintiff commissions for procuring the tenant could be implied from such remark. McLiney *v.* Gomprecht, 7 Misc. (N. Y.) 169, 27 N. Y. Suppl. 263. See also JOINT ADVENTURES, 23 Cyc. 459; PARTNERSHIP, 30 Cyc. 448, 466; TENANCY IN COMMON. Where, however, a landlord and tenant agree on the expiration of the lease that the tenant shall remain in possession, to care for the premises, and collect the rents in his own behalf, and apply them on the landlord's indebtedness to him for a building erected on the premises, the law will imply a promise to allow the tenant reasonable compensation for his services. Allen *v.* Gates, 73 Vt. 222, 50 Atl. 1092.

8. See Brush-Swan Electric Light Co. *v.* Brush Electric Co., 41 Fed. 163; and cases cited *infra*, this note.

Consideration for modification.— Where a contract appointing plaintiff defendant's ex-

b. As Affected by Termination of Agency [9] — (i) *Termination by Act of Parties* — (a) *In General.* An agent selling goods on commission is ordinarily entitled to a commission on goods sold by him during the continuance of the agency, although the principal does not deliver the goods [10] or collect the price [11] until after the agency has terminated; and the same rule applies to orders for work taken by an agent before termination of the agency and fulfilled by the

clusive agent for the sale of automobiles within a certain territory provided that all inquiries from territory other than his own should be promptly referred to defendant, efforts made by plaintiff to sell a car to a resident of a territory other than his own constituted a violation of the contract, and not an act done thereunder, and hence such efforts constituted a sufficient consideration for defendant's promise to pay plaintiff a commission for a sale resulting therefrom. Garfield *v.* Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695. And where plaintiff and defendants agreed that the former should devote his time and energy to selling real estate for the latter at specified rates of compensation, "for such time as may be mutually agreeable," it was held that as no time was fixed by the agreement, plaintiff was not bound by it except as to what was actually done under it, so that a subsequent agreement that defendants should pay him a different rate if he should sell a particular piece was upon a valid consideration. Forbes *v.* Bushnell, 47 Minn. 402, 50 N. W. 368.

Implied modification.— Where a principal, after appointing an agent to sell property for a certain commission, writes to him reducing its amount, his silence for upwards of three months will be considered an acquiescence. Livaudais *v.* Perret, 11 La. 294. Pending negotiations by plaintiff on behalf of defendants for an exchange of whisky of defendants for a yacht, they wrote to him that if he made a trade on the basis proposed, they should expect him to wait for his commissions until they could realize something on the yacht. Plaintiff received this letter before the sale took place, but did not directly assent to the postponement of payment of commissions. It did not appear that defendants authorized the sale except on that condition. It was held that plaintiff was not entitled to commissions until the yacht was disposed of. Frankel *v.* Wathen, 58 Hun (N. Y.) 543, 12 N. Y. Suppl. 591.

Supersession of original contract.— Defendant entered into a written agreement with plaintiff to pay him a certain commission for selling real estate. Subsequently she entered into an oral contract with him whereby it was agreed that he should enter into her service and manage her general business for a certain compensation per day. It was held that the oral contract did not supersede the original agreement, there being evidence that it was not modified or abrogated. Smith *v.* Lane, 101 Ind. 449. And an oral agreement to pay an agent a commission for selling land is not superseded by subsequent letters raising the price and giving more specific instructions as to the terms to be made with the purchaser, and the letters will control the oral instructions so far only as they are inconsistent therewith. McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

Verbal modification.— A provision in a written contract of agency forbidding its change unless approved in writing by the principal does not invalidate an oral agreement for commissions on sales not within its terms. Shook *v.* Marion Mfg. Co., 138 Mich. 467, 101 N. W. 657.

9. **Termination of agency in general** see *supra*, I, G.

Compensation of broker as affected by termination of employment see Factors and Brokers, 19 Cyc. 221, 254.

10. Dibble *v.* Dimick, 143 N. Y. 549, 38 N. E. 724 [*affirming* 4 Misc. 190, 23 N. Y. Suppl. 680] (so holding, although the commissions were not payable until delivery of the goods); Jacquin *v.* Boutard, 89 Hun (N. Y.) 437, 35 N. Y. Suppl. 496 [*affirmed* in 157 N. Y. 686, 51 N. E. 1091]. See, however, Merriman *v.* McCormick Harvesting Mach. Co., 96 Wis. 600, 71 N. W. 1050, where it appeared that an agency contract for the sale of machines provided that the agents should obtain orders, house the machines, instruct the purchasers, draw notes and remit the same; that they should receive a specified selling commission, to be paid only on machines sold and settled for and not on orders not filled; and that the principal might at any time terminate the contract and take into its possession all orders, notes, moneys, machines, etc.; and that after the agents took orders for machines, but before they were filled, the principal canceled the contract, and afterward delivered machines to persons from whom such orders were obtained; and it was held that the agents were entitled to reasonable compensation for obtaining such orders, but not to the full commission specified in the agreement.

11. Singer Sewing Mach. Co. *v.* Brewer, 78 Ark. 202, 93 S. W. 755, so holding under a contract which stipulated for a fixed weekly compensation, for a commisssion on sales payable as payments on the sales were made, and for a remitting commission on the net amounts collected and remitted to the company, and provided that all claims for compensation should cease on the termination of the contract, which was subject to termination at the pleasure of either party; and holding also that a custom that an agent selling a machine to a buyer who moved out of his territory should forfeit his commission on the balance unpaid at the time of the re-

principal thereafter.[12] However, in the absence of anything in the contract to the contrary,[13] an agent is not entitled to commissions on new orders delivered to the principal after termination of the agency by customers procured by the agent while the agency existed;[14] and agents who manage realty are not entitled on the termination of the agency to retain commissions on rents to accrue in the future from leases made by them.[15] The right to advances of money on account of unearned commissions, as sometimes given by the contract of agency, ceases upon termination of the agency.[16]

(B) *Termination by Force of Contract of Agency; Expiration of Time.* If the contract by which an agent is employed to effect a particular transaction does not fix the term of its duration, the law implies its continuance for a reasonable

moval, and that the account should be transferred to the agent into whose territory the purchaser moved, where future collections were to be made, does not show that the parties intended that the agent on his discharge should forfeit his selling commission on uncollected sales. To the contrary see Wheeler, etc., Mfg. Co. *v.* Gallivan, 10 Nebr. 313, 4 N. W. 1061, where plaintiff and defendant entered into a contract for the sale and leasing by the former of machines furnished by the latter, plaintiff to receive certain commissions "during the continuance of the contract," and the contract ceased by the consent of both parties, after which payments were made to defendant for machines disposed of by plaintiff under the contract, and it was held that plaintiff was not entitled to commissions on payments so subsequently made.

12. Greene *v.* Freund, 150 Fed. 721, 80 C. C. A. 387, where it appeared that plaintiff made a contract with defendant for an indefinite term to act as its agent in procuring orders for the bleaching, printing, and dyeing of cotton goods; that the contract provided that plaintiff should receive a commission, to be paid each month on all the work secured by him and completed by defendant during the preceding month; that his manner of doing business was to interview a prospective customer, and, if favorable, to prepare and send him a writing called a "price memo," which was in the form of a letter, setting forth all the conditions of a contract and was in effect an offer which, if accepted, became a contract binding the customer to send to defendant at least a minimum quantity of work to be done at prices therein specified; and it was held that on plaintiff's discharge he was entitled to recover commissions, not only on the work previously done, but also on all work called for by contracts so secured by him by the acceptance of his offers by customers, either formally or by sending orders thereunder for any part of the work called for. See, however, Hilton *v.* Helliwell, [1894] 2 Ir. 94, holding that the agent was not entitled to commissions under such circumstances where the contract provided that he was to be paid a commission for work done or supplied from the date of the contract at a certain per cent on amount of orders; that the contract should be terminable on notice — neither party to be entitled to compensation, but the agent to receive, on the termination of the contract, such commission as should have been earned and should be or become payable.

13. Ract *v.* Duviard-Dime, 4 N. Y. Suppl. 156. And see Ballard *v.* Travelers' Ins. Co., 119 N. C. 187, 25 S. E. 956. See, however, Gilbert *v.* Quinlan, 59 Hun (N. Y.) 508, 13 N. Y. Suppl. 671, where defendant agreed to pay plaintiff half his commissions on the business of customers whom plaintiff should bring him, and by a subsequent change in the rules of the board of brokers to which defendant belonged the payment by him of such commissions to plaintiff was prohibited, and it was held that the contract might be terminated, after the lapse of a reasonable time, for a good reason, and on proper notice; that such change in the rules of the board was sufficient reason for a termination of the contract; and that, on dealings after such termination with a customer introduced by plaintiff, defendant was not liable to plaintiff for commissions.

14. Gilbert *v.* Quinlan, 59 Hun (N. Y.) 508, 13 N. Y. Suppl. 671; O'Neill *v.* Howe, 16 Daly (N. Y.) 181, 9 N. Y. Suppl. 746 (holding also that the fact that the accounts of such customers were marked in defendant's books with the initials of plaintiff to designate them as his customers does not prove that such later sales were made by him, it further appearing that the marks were originally made on old accounts while plaintiff was in defendant's employ, and were continued in the subsequent accounts by the bookkeepers for their own convenience, and not by order of defendant); Ract *v.* Duviard-Dime, 4 N. Y. Suppl. 156; Nayler *v.* Yearsley, 2 F. & F. 41. And see Toulmin *v.* Millar, 12 App. Cas. 746, 57 L. J. Q. B. 301, 58 L. T. Rep. N. S. 96; Tribe *v.* Taylor, 1 C. P. D. 505; Barrett *v.* Gilmour, 6 Com. Cas. 72, 17 T. L. R. 292; Curtis *v.* Nixon, 24 L. T. Rep. N. S. 706; Lumley *v.* Nicholson, 34 Wkly. Rep. 716.

15. Thomas *v.* Gwyn, 131 N. C. 460, 42 S. E. 964. And see Andrews *v.* Travelers' Ins. Co., 70 S. W. 43, 24 Ky. L. Rep. 844; Ballow *v.* Travelers' Ins. Co., 119 N. C. 187, 25 S. E. 956.

16. Souler *v.* McDowell Garment Mach. Co., 38 Misc. (N. Y.) 786, 78 N. Y. Suppl. 836.

time and that only.[17] If the contract sets a time within which he must perform, he is not as a rule entitled to compensation unless, within the time set, he finds a third person who is able, ready, and willing to enter into a binding contract with the principal.[18] And where a contract of agency running for a definite term and calling for continuing services on the part of the agent has by its terms expired, the agent cannot ordinarily recover for like services subsequently performed,[19] unless at the principal's request;[20] much less can the agent recover as for services which he might have performed under the contract had it been renewed.[21]

(c) *Termination by Mutual Consent.*[22] Where a contract under which an agent is regularly employed on a salary is terminated by mutual consent of the parties, the agent's right to future salary thereupon ceases;[23] and an agent employed to

17. Adamson *v.* Yeager, 10 Ont. App. 477. And see *infra*, III, B, 2, b, (I), (D).

18. McCarthy *v.* Cavers, 66 Iowa 342, 23 N. W. 757 (holding that if a customer found by the agent is not willing to close the deal unconditionally before the specified time expires, the principal is not bound to accept him when, after the expiration of that time, he accepts the terms previously proposed); Wright *v.* Beach, 82 Mich. 469, 46 N. W. 673; La Force *v.* Washington University, 106 Mo. App. 517, 81 S. W. 209 (so holding, although the principal afterward closed a deal with a person found by the agent).

Necessity of completing transaction within specified time.— If, before the day set for negotiating a transaction, the agent finds a customer who is able, ready, and willing to close the deal, the agent has a reasonable time after the contract date within which to bring the customer to the principal, it appearing that the parties lived a considerable distance apart. O'Connor *v.* Semple, 57 Wis. 243, 15 N. W. 136.

Compare Williams *v.* Leslie, 111 Ind. 70, 12 N. E. 102.

Time for performance held not to have been extended see La Force *v.* Washington University, 106 Mo. App. 517, 81 S. W. 209.

19. Anderson *v.* Dickinson, 72 Hun (N. Y.) 556, 25 N. Y. Suppl. 533, where it appeared that a contract between an importer of foreign nursery stock and an agent to make sales provided that losses arising from bad debts should be borne by them equally, and that the contract was to continue in force for one year from Aug. 26, 1886, "or until the business of the season of 1886–87 is wholly closed up," but provided that final settlement between the parties should be made by Aug. 1, 1887, if possible; and that the business season in the nursery business extends from the commencement to the close of the shipping season, beginning in the fall of the year, and continuing until spring; and it was held that the agent was entitled to commissions only on orders secured during the business season of 1886–1887, the contract continuing until Aug. 27, 1887, only to wind up the business of the previous season.

If the contract is extended by agreement of the parties, then of course the agent may recover for services rendered before expiration of the extended time. Schurra *v.* Buffalo-Pitts Co., 44 Wash. 693, 87 Pac. 945.

20. Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303; Dewey *v.* Brown, 59 Hun (N. Y.) 37, 12 N. Y. Suppl. 661, holding that an agent who agrees to sell goods on commission for another during a trip which he then contemplates is entitled to commissions on goods sold on orders received in response to letters written by him at the employer's request after his return. And see Attrill *v.* Patterson, 58 Md. 226.

21. Crum *v.* Murray, 102 Fed. 92, 42 C. C. A. 185, holding that under a contract appointing an agent to solicit applications for shares in a corporation within stated territory, and to collect the monthly dues thereon, for the period of three years, for which service the agent is to receive eighty per cent of the first month's dues collected and five per cent of the succeeding months' "dues collected," he cannot recover the stipulated commissions on dues which he might have collected if the contract had been continued after the three years, where there is no claim that the contract has been renewed, or that the agent is entitled to have it renewed, or that he has been unlawfully discharged, or that any other breach has been committed by the corporation.

22. See also *supra*, III, B, 2, b, (I), (A).

23. Greer *v.* Featherston, 95 Tex. 654, 69 S. W. 69 [*affirming* in effect (Civ. App. 1902) 68 S. W. 48] (where it appeared that a soliciting agent of a live stock commission company whose contract of employment required him to solicit shipments of stock, make and collect loans for the company, and to guarantee such loans, sent his resignation to the company, which was accepted; but before he received the acceptance, although after it was mailed to him, he wrote the company that he would insist on his salary till the loans of which he was a guarantor were paid, unless the company would release him from liability therefor, which the company declined to do; that thereafter there was other correspondence between the parties in which the agent claimed the right to such compensation, which was denied by the company; that the agent continued to look after the payment of the loans, and payment thereof was frequently urged by the company; and it was held that the agent was not entitled to his salary after the acceptance of his resignation, although his liability as guarantor was the more important part of his obligation under the contract of employment); Southmayd *v.* Watertown F. Ins. Co., 47 Wis. 517, 2 N. W. 1137.

effect a particular transaction on a commission cannot recover the commission where by mutual consent the contract is abandoned before performance and a new and different arrangement is entered into by the parties.[24]

(D) *Revocation or Repudiation of Agency by Principal.*[25] Where an agent is employed on commission, and the principal, acting within his rights, terminates the agency before the commission is earned, the agent cannot recover the same;[26] nor is a salaried agent, after his rightful discharge, entitled to unearned salary.[27] However, a revocation of authority will not be allowed to work injury to the agent with reference to what he has already done under the appointment;[28] and accordingly he is entitled to commissions or salary already earned at the time of his discharge,[29] or to the reasonable value of what he has then earned,[30] especially

24. Clear *v.* Fox, 26 Fed. 90, holding that where a tenant of land is promised commissions for the cash sale of the land, but subsequently, with the consent of the tenant, a scheme is made of putting it into the form of shares in a joint-stock company, the tenant to become one of the directors, the contract for commissions expires, and the tenant is entitled to nothing for the incorporation.

25. See also *supra*, III, B, 2, b, (I), (A).

Discharge of servant by master see MASTER AND SERVANT, 26 Cyc. 987 *et seq.*, 1045.

26. *Alabama.*— Chambers *v.* Seay, 73 Ala. 372.

Iowa.— Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792.

North Carolina.—Brookshire *v.* Voncannon, 28 N. C. 231.

Pennsylvania.— Morrow *v.* Tunkhannock Ice Co., 211 Pa. St. 445, 60 Atl. 1004.

England.— Northey *v.* Trevillion, 7 Com. Cas. 201, 18 T. L. R. 648 [*following* Rhodes *v.* Forwood, 1 App. Cas. 256, 47 L. J. Exch. 396, 34 L. T. Rep. N. S. 890, 24 Wkly. Rep. 1078]; Toppin *v.* Healy, 11 Wkly. Rep. 466.

See 40 Cent. Dig. tit. "Principal and Agent," § 201.

Custom and usage.— In England an agent who has the business taken out of his hands before completion is by the custom of merchants entitled to half the commission which he would have earned by completing it. Reg. *v.* Parr, 39 L. J. Ch. 73, 21 L. T. Rep. N. S. 555, 18 Wkly. Rep. 110.

Customer subsequently produced by agent. — After termination of the agency the principal is under no obligation to accept a customer subsequently produced by the agent. Kelly *v.* Phelps, 57 Wis. 425, 15 N. W. 385; Toppin *v.* Healy, 11 Wkly. Rep. 466. Subsequent services at request of principal as entitling agent to compensation see *supra*, III, B, 2, b, (I), (C).

Subsequent completion of transaction by principal.— The rule stated in the text applies, although the principal subsequently enters into the transaction that the agent was employed to negotiate (Chambers *v.* Seay, 73 Ala. 372); and although the party with whom the principal thus deals was originally found by the agent during the continuance of the agency (Lumley *v.* Nicholson, 34 Wkly. Rep. 716), especially where such transaction is completed on different terms from those which such party proposed to the agent (Kelly *v.* Marshall, 172 Pa. St. 396, 33 Atl. 690; Eidson *v.* Saxon, (Tex. Civ. App. 1895) 30 S. W. 957).

27. Galibert *v.* Atteaux, 23 Quebec Super. Ct. 427.

28. White Sewing Mach. Co. *v.* Shaddock, 79 Ark. 220, 95 S. W. 143; Green *v.* Cole, 103 Mo. 70, 15 S. W. 317; Royal Remedy, etc., Co. *v.* Gregory Grocer Co., 90 Mo. App. 53; Sanborn *v.* Rodgers, 33 Fed. 851.

29. Adams-Smith Co. *v.* Hayward, 52 Neb. 79, 71 N. W. 949 (where it appeared that a contract of employment of a traveling salesman required him to sell a certain amount of goods within the year, and gave the employer the option to terminate the contract at any time, and to retain one month's salary of the employee, which should be forfeited in case the contract was terminated; and it was held that the salary so retained was in the nature of a pledge to secure performance by the employee, and that the employer could not arbitrarily terminate the contract and claim the forfeiture); Winslow *v.* Mayo, 123 N. Y. App. Div. 758, 108 N. Y. Suppl. 640; Realty Co. *v.* Gallinger Co., 31 Pittsb. Leg. J. N. S. (Pa.) 396 [*affirmed* in 210 Pa. St. 74, 59 Atl. 435]. See, however, Boston Deep Sea Fishing, etc., Co. *v.* Ansell, 39 Ch. D. 339, 59 L. T. Rep. N. S. 345, holding that where an agent's salary was payable yearly, and he was discharged for cause before the end of the term, he was entitled to nothing.

30. Lanusse *v.* Pimpienella, 4 Mart. N. S. (La.) 439; Martin *v.* Holly, 104 N. C. 36, 10 S. E. 83; Jackel *v.* Caldwell, 156 Pa. St. 266, 26 Atl. 1063; Blackstone *v.* Buttermore, 53 Pa. St. 266; Martin *v.* Roberts, 36 Fed. 217, where an agent for mortgagees of land, valuable principally for its phosphate rock, caused the mortgage to be foreclosed, employed a watchman to look after the property, occasionally visited it during a period of eight years, and often gave advice and information in regard to this and other investments of the mortgagees; and he expected to be remunerated in part for his services from the management of the property or from its sale, but the mortgagees terminated the agency without fault on his part; and it was held that he was entitled to two thousand dollars. See, however, Fish *v.* Hahn, 124 N. Y. App. Div. 173, 108 N. Y. Suppl. 782.

However, this right may be waived by the terms of the contract of agency. Simpson *v.* Lamb, 17 C. B. 603, 2 Jur. N. S. 91, 25 L. J. C. P. 113, 4 Wkly. Rep. 328, 84 E. C. L. 603.

where his discharge was wrongful;[31] and he is entitled to the full compensation specified in the contract where such services result in a subsequent fulfilment of the purpose of the agency, and the contract was terminated by the principal for the purpose of avoiding payment of compensation.[32] If the agent was employed for a definite term, the principal cannot defeat his right to compensation by a premature termination of the agency;[33] but if the contract of agency is silent as to the duration of the agency the principal may revoke it at any time,[34] or at least

31. Baker *v.* Angell, 12 N. Y. St. 406.

Estoppel to set up contract.—Where a company has wrongfully discharged its agent and released him from the obligations imposed on him by the contract of agency, it cannot set up such contract in an action by him for the value of the work done. George O. Richardson Mach. Co. *v.* Swartzel, 70 Kan. 773, 79 Pac. 660.

Necessity of tender of performance.—Where a principal has wrongfully dismissed an agent employed under a contract, it is not necessary for the latter to make any tender of his readiness to perform his part of the contract in order to enable him to recover for services previously rendered. Bull *v.* Schuberth, 2 Md. 38.

32. *Georgia.*— Strong *v.* West, 110 Ga. 382, 35 S. E. 693, holding that where an attorney agreed that as compensation for the recovery of certain property pledged to secure a debt he would accept a specified amount and look for the same to the excess for which he could sell the property over and above the amount necessary to satisfy the debt due to his client, and after making the recovery but before being allowed a fair opportunity to make a sale the client withdrew the property from his hands, he had a right of action against the client for the amount agreed upon in the contract.

Minnesota.— Urquhart *v.* Scottish-American Mortg. Co., 85 Minn. 69, 88 N. W. 264, holding that where an agent is to have a percentage of the gross revenue on loans made for his principal, but is to incur the expense of making and collecting them, with no limit as to the time the agency is to continue, and the contract is terminated by the principal without cause, the agent is entitled to receive his percentage on the gross revenue receipts collected on all loans made by him prior to his discharge, subject to a reasonable deduction for the costs and expenses of making them.

New York.— Warren Chemical, etc., Co. *v.* Holbrook, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788, holding that where the compensation of an agent is dependent on the success of his efforts in procuring a contract for his principal and his subsequent performance of the work, the principal will not be permitted to stimulate his efforts with the promise of reward, and then, when the contract is obtained and the compensation assured after construction, terminate the agency for the sole purpose of securing to himself the agent's profits.

Pennsylvania.— Kelly *v.* Marshall, 172 Pa. St. 396, 33 Atl. 690.

United States.— Mellen *v.* U. S., 13 Ct. Cl. 71, where the principal employed an attorney to collect a debt for a percentage of it, reserving to itself the right to terminate the agreement at any time, and it was held that after the attorney had fully secured the debt, although the payment was to be subsequently made, the principal could not terminate the agreement so as to deprive the attorney of his percentage.

See 40 Cent. Dig. tit. "Principal and Agent," § 201.

Where, however, plaintiff entered into an agreement with defendant whereby plaintiff was to look up defective titles, old judgments, and any such matter as might be profitable, and defendant was to furnish the money with which to purchase the same, and the profits were to be equally divided, plaintiff was entitled to only reasonable compensation for his services in looking up property and informing defendant thereof, when the same was not purchased by defendant until after his business relations with plaintiff had been terminated. Stillman *v.* Lefferts, (Iowa 1900) 82 N. W. 491. And where an agent is to have a percentage of the gross revenues on loans made for his principal, but is to incur the expense of making and collecting them, with no limit as to the time the agency is to continue, and the contract is terminated by the principal on reasonable grounds which justified him in preventing the agent from making further collections on the outstanding loans made by him, the agent can recover no percentage on the gross revenue from the loans subsequently collected. Urquhart *v.* Scottish-American Mortg. Co., 85 Minn. 69, 88 N. W. 264.

An agent employed to sell real estate, and finding a purchaser, and bringing him and his principal into communication, and setting on foot negotiations which result in a sale, cannot be deprived of his right to compensation by a discharge prior to consummation of the sale. Gillett *v.* Corum, 7 Kan. 156; Keener *v.* Harrod, 2 Md. 63, 56 Am. Dec. 706.

33. Baker *v.* Angell, 12 N. Y. St. 406; McKone *v.* Metropolitan L. Ins. Co., 131 Wis. 243, 110 N. W. 472; Turner *v.* Goldsmith, [1891] 1 Q. B. 544, 60 L. J. Q. B. 247, 64 L. T. Rep. N. S. 301, 39 Wkly. Rep. 547. And see Union Refining Co. *v.* Barton, 77 Ala. 148. See also *infra*, note 38. See, however, Brown *v.* Pforr, 38 Cal. 550; Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792; Wright *v.* Beach, 82 Mich. 469, 46 N. W. 673; Green *v.* Cole, 103 Mo. 70, 15 S. W. 317.

34. *Louisiana.*— Jacobs *v.* Warfield, 23 La. Ann. 395.

Missouri.— Royal Remedy, etc., Co. *v.* Gregory Grocery Co., 90 Mo. App. 53.

after the expiration of a reasonable time;[35] and in any event the principal may revoke the agency for good cause.[36] Where the employment is for a specified term on a certain monthly salary, which is subject to diminution in case the total sales for the term do not amount to a fixed sum, the agent, on his premature discharge, is entitled to compensation at the specified monthly rate, without any deduction based on the amount of sales made while he continued in the employment.[37] Where a corporation principal voluntarily enters into liquidation proceedings, it is equivalent to a dismissal of the agent, and the latter's right to compensation is governed accordingly.[38] But the serving of notice by the principal of his intention to terminate the contract at a future date is not equivalent to a present discharge.[39]

(E) *Abandonment or Renunciation of Agency by Agent.*[40] If, as is often the case, the contract of agency contemplates complete performance on the part of the agent in order to entitle him to compensation, he can recover nothing for part performance on abandoning his employment before completion;[1]

Pennsylvania.— Coffin *v.* Landis, 46 Pa. St. 426.

Texas.— See Hollingsworth *v.* Young County, 40 Tex. Civ. App. 590, 91 S. W. 1094.

United States.— Sheahan *v.* National Steamship Co., 87 Fed. 167, 30 C. C. A. 593.

See 40 Cent. Dig. tit. "Principal and Agent," § 201.

Notice of revocation is not necessary (Coffin *v.* Landis, 46 Pa. St. 426; Sheahan *v.* National Steamship Co., 87 Fed. 167, 30 C. C. A. 593. But see Gilbert *v.* Quinlan, 13 N. Y. Suppl. 671), in the absence of a stipulation requiring it (Sheahan *v.* National Steamship Co., *supra*).

35. La Force *v.* Washington University, 106 Mo. App. 517, 81 S. W. 209; Gilbert *v.* Quinlan, 13 N. Y. Suppl. 671; Barrett *v.* Gilmour, 6 Com. Cas. 72, 17 T. L. R. 292.

36. *Louisiana.*— Jacobs *v.* Warfield, 23 La. Ann. 395.

Minnesota.— Urquhart *v.* Scottish-American Mortg. Co., 85 Minn. 69, 88 N. W. 264.

New York.— Huntington *v.* Clafflin, 10 Bosw. 262 [*affirmed* in 38 N. Y. 182]; Gilbert *v.* Quinlan, 13 N. Y. Suppl. 671.

Pennsylvania.— Henderson *v.* Hydraulic Works, 9 Phila. 100; Realty Co. *v.* Gallinger Co., 31 Pittsb. L. J. N. S. 396 [*affirmed* in 210 Pa. St. 74, 59 Atl. 435].

England.— Boston Deep Sea Fishing, etc., Co. *v.* Ansell, 39 Ch. D. 339, 59 L. T. Rep. N. S. 345.

See 40 Cent. Dig. tit. "Principal and Agent," § 201.

37. Earle *v.* Warren Axe, etc., Co., 167 Mass. 41, 44 N. E. 1056. *Contra*, King *v.* Garrett, 18 Phila. (Pa.) 296.

38. *In re* Imperial Wine Co., L. R. 14 Eq. 417, 42 L. J. Ch. 5, 20 Wkly. Rep. 966.

Right to compensation.— Where an agent employed for a certain term is to receive a fixed salary and also a specified commission on profits, and the principal, a company, goes into voluntary proceedings before expiration of the term, the agent is entitled to compensation in respect of his full salary for the residue of the term, but not to additional compensation by way of damages for loss of commissions during the unexpired portion of the term. *In re* English, etc., Mar. Ins. Co., L. R. 5 Ch. 737, 39 L. J. Ch. 685, 23 L. T. Rep. N. S. 685, 18 Wkly. Rep. 1122. Where, however, the compensation of an agent employed for a fixed term consists solely of a commission on orders obtained by him, he is entitled, upon the determination of the agreement by the winding-up of the company, to compensation in respect of the commission which he might otherwise have earned during the unexpired portion of the term. *In re* Patent Floor Cloth Co., 41 L. J. Ch. 476, 26 L. T. Rep. N. S. 467. And where a company employed an agent to dispose of their shares on the terms that he should be paid £100 down, and £400 in addition upon the allotment of the whole of the shares of the company, and he disposed of a considerable number of shares, when the company was voluntarily wound up, he was prevented from earning the £400 by the act of the company, and was therefore entitled to recover a portion of that sum. Inchbald *v.* Western Neilgherry Coffee, etc., Co., 17 C. B. N. S. 733, 10 Jur. N. S. 1128, 34 L. J. C. P. 15, 11 L. T. Rep. N. S. 345, 13 Wkly. Rep. 95, 112 E. C. L. 733.

Involuntary liquidation as terminating agency see *infra*, III, B, 2, b, (II).

39. Smith *v.* Philip B. Hunt Co., 90 Minn. 255, 95 N. W. 907, holding that where the principal, within the first year of a contract of agency, notifies the agent of his intention to terminate the contract at a future date after the expiration of the year, it does not constitute a termination of the contract within the year, within a provision of the contract guaranteeing the agent a specified compensation for the year in case the principal should terminate the contract within that time.

40. See also *supra*, III, B, 2, b, (I), (A).

Abandonment of service by servant see MASTER AND SERVANT, 26 Cyc. 986, 1042.

41. Martin *v.* Schoenberger, 8 Watts & S. (Pa.) 367 (holding that an agent cannot recover, for part performance of an entire contract, where he has failed in the performance on his part); Newcomb *v.* Imperial L. Ins. Co., 51 Fed. 725 (where it is said that if a person agrees to act as agent for an insurance company, for a stated commission

much less can he recover as for complete performance;[42] and this is true, although the principal subsequently enters into the transaction which the agent was employed to negotiate.[43]

(II) *Termination by Operation of Law.*[44] The right to compensation for part performance under a contract of agency is not defeated by the death of either the principal[45] or the agent[46] pending performance; nor by the fact that the principal has become unable to fulfil the contract either by reason of insolvency,[47] or because of the stringency of legislative measures regulating the business which forms the subject-matter of the agency.[48]

to be paid on premiums collected, he cannot abandon the agency at any time without cause, and sue upon a *quantum meruit*).

However, a contract which stipulated that plaintiff should sell defendant's goods throughout the country, paying his own expenses; that defendant should pay him therefor a sum equal to fifteen per cent of the gross amount of the orders accepted; that in case plaintiff's sales exceeded in the aggregate fourteen thousand dollars during the year, one half of the commission should go toward payment of a prior indebtedness due defendant; and that the agreement should remain in force one year, was simply an agreement to pay a certain rate of commission for the sale of goods, and that the commission should be paid and the goods should be sold during the period of one year, and could not be so construed that nothing became due in favor of either party until the expiration of the year. Bair *v.* Hilbert, 84 N. Y. App. Div. 621, 82 N. Y. Suppl. 1010.

42. Sidway *v.* American Mortg. Co., 222 Ill. 270, 78 N. E. 561 [*affirming* 119 Ill. App. 502] (holding that under an agreement whereby agents were to care for and manage loans of their principal's money up to and including their maturity and collection, where they had given up the business of the principal they could not claim commissions on the interest notes not then due and thereafter to be collected); Scoville *v.* School Trustees, 65 Ill. 523 (holding that an agent undertaking to collect a debt for a share of the profits, who finally abandons further efforts as useless, cannot claim the share to which his contract would entitle him if he had secured payment by his own efforts, where the principal subsequently receives payment through new instrumentalities, or from causes with which the agent has no connection).

43. Warren *v.* Rendrock Powder Co., 9 N. Y. Suppl. 842 (where it appeared that defendant agreed to pay plaintiff a commission if he obtained the approval of the United States government to the use in a certain blasting operation of an explosive manufactured by defendant; that plaintiff called the attention of the government to the explosive, and experiments were made which resulted in its being rejected; that nothing further was done by plaintiff to induce the government to use the explosive; that two years later, after plaintiff had left defendant's employ, defendant claiming to have improved its explosive, further experiments were made, with which plaintiff had no connection and which resulted in the government approving the explosive; and that afterward the government invited proposals for explosives for the operation in question, and defendant's bid was accepted; and it was held that plaintiff's claim for his commission could not be maintained); Barkley *v.* Olcott, 52 Hun (N. Y.) 452, 5 N. Y. Suppl. 525. And see Gaar *v.* Brundage, 89 Minn. 412, 94 N. W. 1091.

44. Termination of relation of master and servant by operation of law see Master and Servant, 26 Cyc. 984 *et seq.*

45. Fisher *v.* Southern L. & T. Co., 138 N. C. 90, 50 S. E. 592, holding that an agent who is authorized to improve and sell lands is entitled, after the termination of his authority by the death of the party conferring the same, to be compensated from the proceeds of the property, when sold, for services theretofore rendered by him in reliance thereon.

However, agents, being also appointed executors of the principals, are not entitled to commissions on remittances from abroad by the testator, not received till after his death. Hovey *v.* Blakeman, 4 Ves. Jr. 596, 31 Eng. Reprint 306.

46. Clark *v.* Gilbert, 26 N. Y. 279, 86 Am. Dec. 189, holding that where it was agreed by a contract that an agent should have a certain salary and one third of the profits of certain work, and he died before the completion of the work, his representatives were entitled to compensation at the rate specified in the contract for the time of service, and that in the absence of evidence the profits should be regarded as distributed ratably throughout the work.

47. Vanuxen *v.* Bostwick, (Pa. 1887) 7 Atl. 598; Bard *v.* Banigan, 39 Fed. 13.

Involuntary liquidation of corporation principal.— By the articles of association of a company a manager was appointed, and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct the directors should pay him a certain sum within one month from the time of his removal. The company was ordered to be wound up. It was held that he was entitled to prove in the winding-up for the sum specified by the articles. *In re* London, etc., Bank, L. R. 9 Eq. 149, 21 L. T. Rep. N. S. 742, 18 Wkly. Rep. 273. Voluntary liquidation as affecting right to compensation see *supra*, III, B, 2, b, (I), (D).

48. Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534.

c. As Affected by Illegality of Transaction.[49] An agent who negotiates an illegal transaction in behalf of the principal, or whose services are otherwise tainted with illegality, cannot as a rule recover compensation therefor, if he has knowledge of the illegality at the time of performance.[50]

d. As Affected by Fraud or Misconduct[51] — (i) *In General.* As a general rule an agent who is guilty of fraud upon his principal in the transaction of his agency is not entitled to compensation for his services.[52] Thus he generally forfeits compensation where he is guilty of misrepresentation, concealment, or non-disclosure with reference to facts material to the subject-matter of the agency;[53] and a contract to pay a fixed compensation may likewise be invalidated by the

49. Failure of agent to procure contract binding customer as affecting right to compensation see *infra*, III, B, 2, e.

50. See CONTRACTS, 9 Cyc. 560; FACTORS AND BROKERS, 19 Cyc. 219, 223, 273; FOREIGN CORPORATIONS, 19 Cyc. 1037; GAMING, 20 Cyc. 952; LOTTERIES, 25 Cyc. 1653 *et seq.*; SUNDAY.

51. Deductions and forfeitures not based on fraud or misconduct see *infra*, III, B, 2, h, (II).

Fraud or misconduct as ground for discharge of agent see *supra*, III, B, 2, b, (I), (D).

Right of principal to recover payments made to agent by way of compensation in ignorance of fraud or misconduct see *infra*, III, B, 2, i, (II).

Fraud or misconduct of broker as defeating right to compensation see FACTORS AND BROKERS, 19 Cyc. 225–229, 234.

52. *Illinois.*— Sidway *v.* American Mortg. Co., 119 Ill. App. 502 [*affirmed* in 222 Ill. 270, 78 N. E. 561], so holding where the fraud is intentional.

Indiana.— Porter *v.* Silvers, 35 Ind. 295.

Iowa.— Steele *v.* Crabtree, 130 Iowa 313, 106 N. W. 753; Vennum *v.* Gregory, 21 Iowa 226, so holding where the principals are put to the trouble and expense of litigation to secure their rights.

New York.— Palmer *v.* Pirson, 4 Misc. 455, 24 N. Y. Suppl. 333 [*affirmed* in 144 N. Y. 654, 39 N. E. 494].

Texas.— Eidson *v.* Saxon, (Tex. Civ. App. 1895) 30 S. W. 957.

Washington.—Hindle *v.* Holcomb, 34 Wash. 336, 75 Pac. 873.

United States.—Shaeffer *v.* Blair, 149 U. S. 248, 13 S. Ct. 856, 37 L. ed. 721 [*reversing* 33 Fed. 218].

See 40 Cent. Dig. tit. "Principal and Agent," § 211.

An agent who is guilty of unfaithfulness, treachery, or dishonesty in transacting the agency cannot as a rule recover compensation. Steele *v.* Crabtree, 130 Iowa 313, 106 N. W. 753; Sumner *v.* Reicheniker, 9 Kan. 320; Sea *v.* Carpenter, 16 Ohio 412; Landis *v.* Scott, 32 Pa. St. 495; Hahl *v.* Kellogg, 42 Tex. Civ. App. 636, 94 S. W. 389.

Where, however, the owner of an equitable interest in land becomes the agent of another to procure the legal title for their joint benefit, and to dispose of enough of the land on commission to reimburse the principal for advances made to procure the legal title, the agent's fraud in overstating to the principal the amount of advances required to obtain the legal title, while defeating his right to commissions on subsequent sales of part of the land, does not forfeit his interest in the residue. Shaeffer *v.* Blair, 149 U. S. 248, 13 S. Ct. 856, 37 L. ed. 721 [*reversing* 33 Fed. 218]. And where a broker effects a loan without any agreement as to the amount to be paid for his services, the fact that he afterward presents to the borrower, and the latter promises to pay, a bill for commissions charged at a greater rate than the statute allows will not forfeit his right to legal compensation. Vanderpoel *v.* Kearns, 2 E. D. Smith (N. Y.) 170.

53. Humphrey *v.* Eddy Transp. Co., 107 Mich. 163, 65 N. W. 13; Murray *v.* Beard, 102 N. Y. 505, 7 N. E. 553. And see Johnson *v.* Alexander, 4 Leg. Gaz. (Pa.) 393.

Misrepresentation, concealment, or non-disclosure of the best terms obtainable for the principal ordinarily forfeits the agent's right to compensation, especially where he reaps a secret profit as the result of his fraud (Wright *v.* Smith, 23 N. J. Eq. 106; Shaeffer *v.* Blair, 149 U. S. 248, 13 S. Ct. 856, 37 L. ed. 721 [*reversing* 33 Fed. 218]. See, however, Hale Elevator Co. *v.* Hale, 201 Ill. 131, 66 N. E. 249 [*affirming* 98 Ill. App. 430], where a corporation in the elevator business agreed with an agent that he might retain any sum he could obtain on a contract for the installation of elevators, over a named price, and thereafter the agent represented that he could not obtain such price, whereupon the corporation fixed a lower price, and the agent then secured a contract for a greater price than that originally agreed on, and it was held, even though the agent's representations were fraudulent, and the price was reduced on that account, he might recover the amount obtained over the price first fixed), or where the principal has rejected the adverse party's offer as communicated to him by the agent, and closed a deal with another party before the agent communicated the adverse party's true offer (Wadsworth *v.* Adams, 138 U. S. 380, 11 S. Ct. 303, 34 L. ed. 984). Liability of agent to principal for deceit see *supra*, III, A, 1.

Concealment or non-disclosure: Of agent's individual interest see *infra*, III, B, 2, d, (IV). Of dual agency see *infra*, III, B, 2, d, (III). Of receipt of compensation from adverse party or of adverse party's promise to make compensation see *infra*, III, B, 2, d, (III). Of secret profits obtained by agent see *infra*, III, B, 2, d, (IV).

agent's non-disclosure of material facts.[54] So if an agent in transacting the agency is guilty of gross misconduct,[55] gross mismanagement,[56] gross negligence,[57] or gross unskilfulness,[58] he generally forfeits his compensation. However, the fact that an agent is guilty of fraud, misconduct, etc., with reference to one transaction does not defeat his right to compensation in regard to another transaction negotiated for the same principal, although he is regularly employed by the principal and the transactions are like in nature, where by the contract of agency his compensation is computed separately with reference to each transaction.[59] And it has been held that even where an agent is regularly employed on a salary, yet he

54. Haskell *v.* Smith, 86 N. Y. Suppl. 779, 90 N. Y. Suppl. 353, holding that where plaintiff was retained to obtain a settlement of defendant's claim for damages against a railway company, and plaintiff omitted to disclose to defendant the company's standing offer to settle such claims at a fixed rate, he was not entitled to recover under his contract for services. See, however, Raht *v.* Union Consol. Min. Co., 5 Lea (Tenn.) 1, holding that a principal and agent, in defining the nature of the agency and fixing the amount of compensation, deal with each other as strangers, not only in the original contract, but in a renewal thereof, and the agent is not bound to disclose the true value of his services.

55. *Illinois.*— Sidway *v.* American Mortg. Co., 119 Ill. App. 502 [*affirmed* in 222 Ill. 270, 78 N. E. 561]; Prescott *v.* White, 18 Ill. App. 322, holding that where a traveling salesman, in the course of his employment, filled out fictitious orders, and was guilty of such dishonesty in obtaining orders that customers refused to accept and pay for the goods when delivered, he cannot recover his salary.

Indiana.— Porter *v.* Silvers, 35 Ind. 295.

Kansas.— Sumner *v.* Reicheniker, 9 Kan. 320.

Louisiana.— Hobson *v.* Peake, 44 La. Ann. 383, 10 So. 762.

Ohio.— Set *v.* Carpenter, 16 Ohio 412.

Wisconsin.— Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510, where a loan agent, among other improper acts, accepted bad security for loans.

England.— Palmer *v.* Goodwin, 13 Ir. Ch. 171 (holding that a land agent misconducting himself in the management of property, although receiving and accounting for the rents, may be disallowed his fees on the sum received by him); White *v.* Chapman, 1 Stark. 113, 2 E. C. L. 51.

See 40 Cent. Dig. tit. "Principal and Agent," § 211.

If the agent violates his instructions it may defeat his right to compensation. Dodge *v.* Tileston, 12 Pick. (Mass.) 328; Short *v.* Skipwith, 22 Fed. Cas. No. 12,809, 1 Brock. 104.

Where, however, a landowner authorized an agent to sell his land, but afterward, when he knew the agent was about to complete a sale, expressed unwillingness to have him do so, without, however, forbidding it, and merely adding the additional stipulation that it be for cash, no duty rested on the agent to discourage the purchase on the part of those with whom he had been negotiating, even though it was for the best interests of the owner not to sell at the price stipulated. Millett *v.* Barth, 18 Colo. 112, 31 Pac. 769. Although the principal has repudiated a verbal contract of sale made by the agent in his behalf, yet the agent does not forfeit his right to commissions on the sale by the fact that he afterward executes a written contract of sale to the purchaser. McEwan *v.* Kerfoot, 37 Ill. 530. And it seems that an agent to sell land does not disentitle himself to his commission by accepting a deposit from the purchaser and receipting for it. McKenzie *v.* Champion, 4 Manitoba 158.

56. Smith *v.* Crews, 2 Mo. App. 269. *Compare* Johnson *v.* Alexander, 4 Leg. Gaz. (Pa.) 393.

57. Porter *v.* Silvers, 35 Ind. 295; Sumner *v.* Reicheniker, 9 Kan. 320. See, however, Field *v.* Banker, 9 Bosw. (N. Y.) 467, where a forwarding agent was held to be entitled to compensation, although he accepted a bill of lading exempting the carrier from its common-law liability and yet failed to insure the goods.

58. Porter *v.* Silvers, 35 Ind. 295; Sumner *v.* Reicheniker, 9 Kan. 320.

59. Merriman *v.* McCormick Harvesting Mach. Co., 96 Wis. 600, 71 N. W. 1050 (holding that the fact that selling agents refused, on termination of the agency, to deliver to the principal orders which they had previously taken did not disentitle them to compensation as to such of said orders as were afterward actually filled by the principal); Hand-Stitch Broom Sewing Mach. Co. *v.* Blood, 47 Fed. 361 (holding that where machines were placed on royalties under an agreement that the party so placing them should receive one fourth of the royalties paid thereon as compensation, the fact that the party by his negligence forfeits his right to place other machines under the agreement does not deprive him of his right to share in the royalties on machines placed by him before the forfeiture). See, however, Gibson *v.* Bailey Co., 114 Mo. App. 350, 89 S. W. 597, holding that a general agent for the sale of goods in a certain territory, who entices away from his principal orders in that territory which the principal had previously acquired in order to give them to another company in which he (the agent) is interested, is guilty of such misconduct as to defeat his right to commissions for other goods sold during his agency.

may, notwithstanding fraud or misconduct resulting in a termination of the agency, recover for past services, if they are of a uniform character and the salary may fairly be proportioned by the time of actual service.[60]

(II) *Conversion, Failure to Account, Etc.*[61] If an agent, after purchasing property for his principal, converts it to his own use, he is not as a rule entitled to compensation for his services.[62] So an agent generally forfeits his compensation where he wrongfully refuses or fails to account for funds of the principal in his hands.[63] So ordinarily the right to compensation is lost if the agent has wrongfully failed to keep regular accounts and vouchers in the transaction of the agency.[64]

(III) *Representing Adverse Interest; Commissions From Adverse Party or Both Parties.*[65] An agent is held to the utmost good faith in his dealings with his principal, and if, in the transaction of the agency, he represents persons having interests adverse to those of the principal, he generally loses his

60. Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 34 [*reversing* (Civ. App. 1898) 51 S. W. 55], holding that a contract providing for an agent's compensation by an annual salary, with no other condition than that the principals should not be required to advance same, but that the agent should raise money for its payment by sales of property or borrowing money thereon, did not contemplate performance of his entire work by the agent before receiving compensation, nor call for a forfeiture of his right to partial compensation on termination of the agency by his misconduct. See, however, Prescott *v.* White, 18 Ill. App. 322.

61. Accounting as condition precedent to action for compensation see *infra*, IV, B, 1.

62. Myers *v.* Walker, 31 Ill. 353, holding that where a person purchases grain for another under an agreement that he is to receive a certain commission therefor, he is not entitled to the commission for making the purchase, if he fails to deliver the grain or appropriates it to his own use. And see Gray *v.* Haig, 20 Beav. 219, 52 Eng. Reprint 587. See, however, Hoy *v.* Reade, 1 Sweeny (N. Y.) 626, where it is held that the remedy of the principal is to offset the value of the property against the agent's claim.

A like rule applies to an agent who purchases real estate.— Pleasanton *v.* Jackson, 101 Va. 282, 43 S. E. 573, holding that an agent who agrees to purchase land for his principal and make the necessary advances, and, after taking title in his own name, refuses possession to the principal, on his offering to reimburse him, till after he is compelled by suit to do so, is not entitled to compensation for services, but is liable for the fair rental value.

63. *Illinois.*— Sidway *v.* American Mortg. Co., 222 Ill. 270, 78 N. E. 561 [*affirming* 119 Ill. App. 502], holding that where agents collected money belonging to their principal, but retained it without making report thereof, and represented mortgage loans as outstanding when in fact they had been fully paid to the agents, they are not entitled to commissions.

Kansas.— Summer *v.* Reicheniker, 9 Kan. 320.

New Jersey.— Ridgeway *v.* Ludlam, 7 N. J. Eq. 123.

Pennsylvania.— Landis *v.* Scott, 32 Pa. St. 495.

Virginia.— Segar *v.* Parrish, 20 Gratt. 672, holding that an agent for the sale of property who sells it but fails to pay over the proceeds within a reasonable time forfeits compensation.

Wisconsin.— Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510.

United States.— Quirk *v.* Quirk, 155 Fed. 199.

England.— See Gray *v.* Haig, 20 Beav. 219, 52 Eng. Reprint 587.

See 40 Cent. Dig. tit. "Principal and Agent," § 212.

64. *Missouri.*— Smith *v.* Crews, 2 Mo. App. 269.

New Jersey.— See Ridgeway *v.* Ludlam, 7 N. J. Eq. 123.

North Carolina.— Motley *v.* Motley, 42 N. C. 211.

Tennessee.— Pointer *v.* Smith, 7 Heisk, 137.

United States.— Quirk *v.* Quirk, 155 Fed. 199; Blair *v.* Shaeffer, 33 Fed. 218 [*reversed* on other grounds in 149 U. S. 248, 13 S. Ct. 856, 37 L. ed. 721], holding that an agent who, out of more than ninety thousand dollars supplied him to buy land, from the proceeds of whose sales he is to be paid, can account for only about sixty thousand dollars, forfeits all his rights under the contract.

England.— White *v.* Lincoln, 8 Ves. Jr. 363, 7 Rev. Rep. 71, 32 Eng. Reprint 395. And see Gray *v.* Haig, 20 Beav. 219, 52 Eng. Reprint 587.

See 40 Cent. Dig. tit. "Principal and Agent," § 212.

It has been held, however, that if the agent has acted honestly, and has given a satisfactory explanation of his neglect to keep exact accounts, and such neglect does not amount to gross carelessness, then he may recover compensation. Jones *v.* Hoyt, 25 Conn. 374.

65. Capacity of agent of one party to represent another see *supra*, I, B, 2, d.

Misrepresentation, concealment, or non-disclosure of best terms obtainable as defeating right to compensation see *supra*, page 1498, note 53.

right to compensation,[66] unless the principal, either expressly or by implication from the facts and circumstances of the case, consents to the dual employment,[67] or waives, or estops himself from asserting, any objection based thereon.[68] So, in the absence of estoppel or waiver,[69] an agent loses his right to compensation from the principal, if, without the principal's express or implied consent,[70] he accepts compensation from the adverse party,[71] or even a promise of compensation from

Right of principal to compel agent to account for compensation secretly paid him by adverse party see *supra*, III, A, 1, d.

Representation of adverse interest: By auctioneer see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1047. By broker see FACTORS AND BROKERS, 19 Cyc. 207, 226, 234. By insurance agent see INSURANCE, 22 Cyc. 1436, 1445.

66. *California.*— Berlin *v.* Farwell, (1892) 31 Pac. 527, so holding, although the agent had no agreement with the adverse party for compensation, and was to get his compensation from his principal.

Colorado.— Alta Inv. Co. *v.* Worden, 25 Colo. 215, 53 Pac. 1047.

Illinois.— Hampton *v.* Lackens, 72 Ill. App. 442; Kronenberger *v.* Fricke, 22 Ill. App. 550.

Maryland.— See Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

Massachusetts.— Farnsworth *v.* Hemmer, 1 Allen 494, 79 Am. Dec. 756 [*approved* in Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459].

Michigan.— McDonald *v.* Maltz, 94 Mich. 172, 53 N. W. 1058, 34 Am. St. Rep. 331. And see Humphrey *v.* Eddy Transp. Co., 107 Mich. 163, 65 N. W. 13.

Missouri.— Atterbury *v.* Hopkins, 122 Mo. App. 172, 99 S. W. 11; Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024; Rosenthal *v.* Drake, 82 Mo. App. 358; Chapman *v.* Currie, 51 Mo. App. 40.

New York.— Murray *v.* Beard, 102 N. Y. 505, 7 N. E. 553; Frankel *v.* Wathen, 58 Hun 543, 12 N. Y. Suppl. 591; Pugsley *v.* Murray, 4 E. D. Smith 245.

Ohio.— Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528.

Pennsylvania.— Rice *v.* Davis, 136 Pa. St. 439, 20 Atl. 513, 20 Am. St. Rep. 931 [*citing* Pennsylvania R. Co. *v.* Flanigan, 112 Pa. St. 558, 4 Atl. 364; Everhart *v.* Searle, 71 Pa. St. 256]; Pratt *v.* Patterson, 112 Pa. St. 475, 3 Atl. 858.

Texas.— See Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 343 [*reversing* (Civ. App. 1898) 51 S. W. 55]; Smith *v.* Tripis, 2 Tex. Civ. App. 267, 21 S. W. 722.

United States.— St. Louis Electric Light, etc., Co. *v.* Edison Gen. Electric Co., 64 Fed. 997.

England.— Hurst *v.* Holding, 3 Taunt. 32, 12 Rev. Rep. 587.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 211, 214. See also cases cited *infra*, note 74.

As between agent and subagent.— Where an agent appointed to sell real estate employs a subagent, the latter cannot, as against the former, terminate the subagency while the primary agency continues, and accept independent employment from the principal to sell the property; and by doing so he forfeits his right to the compensation agreed upon between him and the primary agent. Dennison *v.* Aldrich, 114 Mo. App. 700, 91 S. W. 1024.

67. Wright *v.* Welch, 3 McArthur (D. C.) 479; McGeehan *v.* Gaar, 122 Wis. 630, 100 N. W. 1072. And see Jarvis *v.* Schaefer, 105 N. Y. 289, 11 N. E. 634; Barry *v.* Schmidt, 57 Wis. 172, 15 N. W. 24, 46 Am. Rep. 35. See also cases cited *supra*, note 66.

Knowledge on part of principal.— The mere fact that the principal knows that his agent is also representing adverse interests does not entitle the agent to compensation, where the principal does not consent to the dual agency. Law *v.* Billington, 180 Pa. St. 84, 36 Atl. 402.

68. See *infra*, III, B, 2, d, (v).

69. See *infra*, III, B, 2, d, (v).

70. See cases cited *infra*, note 71.

If the principal consents to the agent's receiving a commission from the adverse party, the agent by receiving it does not forfeit his right to compensation from the principal. And such consent may be implied, as well as express. Culverwell *v.* Birney, 11 Ont. 265.

71. *Indiana.*— Cleveland, etc., R. Co. *v.* Pattison, 15 Ind. 70.

Kentucky.— Lloyd *v.* Colston, 5 Bush 587.

Missouri.— See Chapman *v.* Currie, 51 Mo. App. 40.

Nebraska.— Campbell *v.* Baxter, 41 Nebr. 729, 60 N. W. 90.

New York.— Frankel *v.* Wathen, 58 Hun 543, 12 N. Y. Suppl. 591. And see Pugsley *v.* Murray, 4 E. D. Smith 245.

Rhode Island.— Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458.

South Dakota.— Lemon *v.* Little, (1908) 114 N. W. 1001.

Texas.— Tinsley *v.* Penniman, 12 Tex. Civ. App. 591, 34 S. W. 365.

Canada.— Kersteman *v.* King, 15 Can. L. J. 140.

See 40 Cent. Dig. tit. "Principal and Agent," § 214.

And see Hampton *v.* Lackens, 72 Ill. App. 442.

Compensation accepted by subagent from adverse party.— Where the employment of a subagent by the agent is ratified by the principal, the agent does not lose his right to compensation from the principal by the fact that the subagent secretly accepts compensation from the adverse party. Powell *v.* Jones, 9 Com. Cas. 166, 20 T. L. R. 329 [*affirmed* in [1905] 1 K. B. 11, 10 Com. Cas.

him.[72] An agent who represents the adverse party without his principal's consent not only loses his right to compensation from his principal,[73] but he cannot recover compensation from the adverse party, on either an express or an implied promise to pay,[74] unless the principal consented not only to the dual agency but also to the double compensation.[75] Nor can two agents representing adverse parties lawfully agree to share their commissions, so as to render the one liable to the other for his agreed share.[76] These rules apply notwithstanding any custom or usage to the contrary,[77] and notwithstanding that as a matter of fact the agent acted in good faith [78] and the principal was not injured by the breach of duty.[79]

36, 74 L. J. K. B. 115, 92 L. T. Rep. N. S. 430, 21 T. L. R. 55, 43 Wkly. Rep. 277].

72. Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Manitoba, etc., Land Corp. *v.* Davidson, 34 Can. Sup. Ct. 255 [*reversing* 14 Manitoba 232]; Kersteman *v.* King, 15 Can. L. J. 140.

73. See *supra*, this section, text and notes.

74. *Colorado.*—Alta Inv. Co. *v.* Worden, 25 Colo. 215, 53 Pac. 1047.

Illinois.— Kronenberger *v.* Fricke, 22 Ill. App. 550.

Kentucky.— Lloyd *v.* Colston, 5 Bush 587.

Michigan.— Leathers *v.* Canfield, 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33.

Missouri.— Rosenthal *v.* Drake, 82 Mo. App. 358.

New York.—Vanderpoel *v.* Kearns, 2 E. D. Smith 170; Labinsks *v.* Holst, 84 N. Y. Suppl. 991.

Oregon.— Jameson *v.* Coldwell, 25 Oreg. 199, 35 Pac. 245.

Wisconsin.— Meyer *v.* Hanchett, 39 Wis. 419, 43 Wis. 246.

England.— See *In re* Etna Ins. Co., Ir. R. 7 Eq. 235 [*affirmed* in Ir. R. 7 Eq. 424].

Canada.— Jones *v.* Linde British Refrigeration Co., 32 Ont. 191.

See 40 Cent. Dig. tit. "Principal and Agent," § 214.

Illegality.—A secret contract by the adverse party to compensate the agent is illegal as tending to work a fraud upon the principal. Bollman *v.* Loomis, 41 Conn. 581; Hampton *v.* Lackens, 72 Ill. App. 442; Holcomb *v.* Waver, 136 Mass. 265; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Smith *v.* Townsend, 109 Mass. 500; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541; Chapman *v.* Currie, 51 Mo. App. 40; Goodell *v.* Hurlbut, 5 N. Y. App. Div. 77, 38 N. Y. Suppl. 749; Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Cincinnati, etc., R. Co. *v.* Morris, 10 Ohio Cir. Ct. 502, 6 Ohio Cir. Dec. 640; Rice *v.* Davis, 136 Pa. St. 139, 20 Atl. 513, 20 Am. St. Rep. 931; Pennsylvania R. Co. *v.* Flanigan, 112 Pa. St. 558, 4 Atl. 364; Everhart *v.* Searle, 71 Pa. St. 256; Harrington *v.* Victoria Graving Dock Co., 3 Q. B. D. 549, 47 L. J. Q. B. 594, 39 L. T. Rep. N. S. 120, 26 Wkly. Rep. 740. And see CONTRACTS, 9 Cyc. 470 note 82.

Ratification of adverse party.—Where a corporation purchaser rescinds a contract of sale made by its president and secretary because of a secret arrangement by which the seller was to pay those officers a commission, the fact that the seller, in an action against him by the officers for commissions, counter-claims for damages by reason of the officers' unauthorized execution of the contract, does not constitute a ratification of the contract by the seller, making him liable for the commissions. Jameson *v.* Coldwell, 25 Oreg. 199, 35 Pac. 245.

75. Pennsylvania R. Co. *v.* Flanigan, 112 Pa. St. 558, 4 Atl. 364.

If the principal thus consents the adverse party is liable to the agent on his agreement. Leekins *v.* Nordyke, 66 Iowa 471, 24 N. W. 1; Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528. And see cases cited *supra*, note 74. *Contra*, Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

Necessity of promise by adverse party to compensate agent see *infra*, III, B, 2, g, (I).

76. Levy *v.* Spencer, 18 Colo. 532, 33 Pac. 415, 36 Am. St. Rep. 303; Howard *v.* Murphy, 70 N. J. L. 141, 56 Atl. 143, holding that a contract between an agent acting for the vendor and an agent acting for the purchaser to share between them the difference between the price paid by the purchaser and the price received by the vendor, which contract is unknown to the purchaser, is not enforceable. And see *In re* Etna Ins. Co., Ir. R. 7 Eq. 235 [*affirmed* in Ir. R. 7 Eq. 424].

77. *Maryland.*— Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

Massachusetts.— Farnsworth *v.* Hemmer, 1 Allen 494, 79 Am. Dec. 756; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168.

Rhode Island.— Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458.

Wisconsin.— Meyer *v.* Hanchett, 39 Wis. 419, 43 Wis. 246.

England.— Bartram *v.* Lloyd, 88 L. T. Rep. N. S. 286, 19 T. L. R. 293 [*reversed* on other grounds in 90 L. T. Rep. N. S. 357, 20 T. L. R. 281]. *Contra*, Great Western Ins. Co. *v.* Cunliffe, L. R. 9 Ch. 525, 43 L. J. Ch. 741, 30 L. T. Rep. N. S. 661; Holden *v.* Webber, 29 Beav. 117, 54 Eng. Reprint 571.

78. Scribner *v.* Colla, 40 Mich. 375, 29 Am. Rep. 541; Chapman *v.* Currie, 51 Mo. App. 40; Lemon *v.* Little, (S. D. 1908) 114 N. W. 1001; Harrington *v.* Victoria Graving Dock Co., 3 Q. B. D. 549, 47 L. J. Q. B. 594, 39 L. T. Rep. N. S. 120, 26 Wkly. Rep. 740.

79. *Missouri.*— Chapman *v.* Currie, 51 Mo. App. 40.

Pennsylvania.— Everhart *v.* Searle, 71 Pa. St. 256.

South Dakota.— Lemon *v.* Little, (1908) 114 N. W. 1001.

United States.— St. Louis Electric Light,

After the transaction for which the agent was employed has been closed, however, and the agency has terminated, the agent does not forfeit his right to compensation from his principal by representing the adverse party or accepting compensation from him.[80] And it is to be observed that the rules stated in this section do not apply against brokers who act as mere middlemen in bringing the parties together, and have no hand in the negotiations between the parties, and take no part in settling the terms of the transaction between them.[81]

(iv) *Individual Interest of Agent; Secret Profits.*[82] An agent who falsely denies that he has an individual interest in the subject-matter of the agency which is antagonistic to that of the principal, or misstates the nature or extent of his interest, or who conceals or fails to disclose his interest or its nature or extent, thereby deceiving the principal, is guilty of a fraud which generally forfeits his right to compensation for his services as agent.[83] Similarly he loses the right to compensation if in transacting the agency he seeks to advance his own interests at the expense of the principal's,[84] thereby reaping a secret profit.[85]

etc., Co. *v.* Edison General Electric Co., 64 Fed. 997.

England.—See Harrington *v.* Victoria Graving Dock Co., 3 Q. B. D. 549, 47 L. J. Q. B. 594, 39 L. T. Rep. N. S. 120, 26 Wkly. Rep. 740

See 40 Cent. Dig. tit. "Principal and Agent," §§ 211, 214.

80. Green *v.* Robertson, 64 Cal. 75, 28 Pac. 446; Finnerty *v.* Fritz, 5 Colo. 174, holding that where an agent to sell property negotiated such a sale as was evidenced by the delivery of a title bond and deed in escrow, to be delivered upon the payment in full of the price, he may negotiate a sale of the same property for the purchaser without forfeiting his commissions. And see Short *v.* Millard, 68 Ill. 292 See, however, Asher *v.* Beckner, 41 S. W. 35, 19 Ky. L. Rep. 521, holding that an agent who sold land and subsequently accepted employment as attorney for the persons to whom the land was sold to resist the enforcement of the contract for the sale defeats his right to compensation from the vendor, whether he acted as attorney or agent in making the sale, and whether or not he used adversely to the vendor information which he had acquired in relation to the lands.

81 *California.*— Green *v.* Robertson, 64 Cal. 75, 28 Pac 446.

Massachusetts.—Walker *v.* Osgood, 98 Mass. 348, 93 Am Dec 168; Rupp *v.* Sampson, 16 Gray 398, 77 Am. Dec. 416.

Michigan.— Leathers *v.* Canfield, 117 Mich. 277, 75 N. W 612, 45 L. R. A. 33; Montross *v.* Eddy, 94 Mich. 100, 53 N. W. 916, 34 Am. St Rep 323; Ranney *v.* Donovan, 78 Mich. 318, 44 N. W. 276.

Rhode Island.— Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458.

Wisconsin.— Orton *v.* Scofield, 61 Wis. 382, 21 N W. 261; Barry *v.* Schmidt, 57 Wis. 172, 15 N. W 24 46 Am. Rep. 35; Herman *v.* Martineau, 1 Wis. 151, 60 Am. Dec. 368.

See Factors and Brokers, 19 Cyc. 226, 234

Plaintiff held to have acted as agent and not as mere middleman see Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Walker *v.* Osgood, 98 Mass 348, 93 Am. Dec. 168; Leathers *v.* Canfield, 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541.

82. **Capacity of person individually interested to represent another** see *supra*, I, B, 2, d.

Individual interest: Of auctioneer see Auctions and Auctioneers, 4 Cyc. 1047. Of broker see Factors and Brokers, 19 Cyc. 206, 227, 228. Of insurance agent see Insurance, 22 Cyc. 1435, 1442.

83. Humphrey *v.* Eddy Transp. Co., 107 Mich. 163, 65 N. W. 13; Hofflin *v.* Moss, 67 Fed. 440, 14 C. C. A. 459. See also Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 343 [*reversing* (Civ. App. 1898) 51 S. W. 55], and cases cited *passim*, this section.

84. Hobson *v.* Peake, 44 La. Ann. 383, 10 So. 762; Gibson *v.* Bailey Co., 114 Mo. App. 350, 89 S. W. 597; Hofflin *v.* Moss, 67 Fed. 440, 14 C. C. A. 459. See, however, Jackson *v.* Pleasanton, 101 Va. 282, 43 S. E. 573.

85. Williams *v.* Moore-Gaunt Co., 3 Ga. App. 756, 60 S. E. 372; Quinn *v.* Le Duc, (N. J. Ch. 1902) 51 Atl. 199 (where it appeared that the agent had been employed to collect by attachment a debt owing the principal; that the agent knew that the principal expected to attend the attachment sale in order to bid, and that he could have bid at least nine hundred dollars, with no obligation to pay more than eighty dollars in cash; but that owing to the agent's conduct the principal did not attend the sale, and the property was sold for eighty dollars, and shortly afterward conveyed to the agent, he having furnished the money); Williams *v.* McKinley, 65 Fed. 4 (where it appeared that complainant was the owner of a quantity of land on which iron ore had been discovered; that at the request and upon the representation of defendant that it would facilitate negotiations by him with certain capitalists for a lease of the mines to them, complainant executed to defendant a lease of certain lands providing for certain royalties on all ore mined in lieu of rent, and a contract was executed at the same time by both parties by which defendant agreed, in consideration of the receipt by him of one fifth of the net revenues derived by complainant from royal-

And if an agent acquires an individual interest in the subject-matter of the agency without his principal's consent, he likewise forfeits his right to compensation.[86]

(v) *Estoppel and Waiver.* The principal may by his words or conduct waive the fraud, misconduct, etc., of his agent, or estop himself from taking advantage thereof, in which case the agent may recover compensation, if otherwise entitled thereto.[87]

e. As Affected by Sufficiency of Agent's Services[88] — (i) *In General.* If

ties, faithfully to manage said property under complainant's direction, for their mutual interests; that the contract also provided that if defendant, without complainant's consent, used or transferred the lease otherwise than to the capitalists with whom he was negotiating he should thereby forfeit his one-fifth interest; that defendant's negotiations failed, and complainant then at his request consented to his leasing a part of the land to M; that instead of a part, defendant leased to M the whole of the land, and immediately took back a lease to himself of the part as to which no permission to lease had been given by complainant; and that he then proceeded to lease parts of this land to sundry persons for mining purposes, receiving from them large sums in money and stocks, of all which complainant had no knowledge until long afterward). And see Gray *v.* Haig, 20 Beav. 219, 53 Eng. Reprint 587.

Profit of agent as counter-claim against compensation.—A claim on the part of the principal against his agent for profit made by him in the course of his employment may be interposed as a counter-claim in an action by the agent against the principal to recover for services rendered in a transaction other than that in which the profit was made. Schick *v.* Suttle, 94 Minn. 135, 102 N. W. 217.

Secret profits resulting from misrepresentation, concealment, or non-disclosure of best terms obtainable for principal see *supra*, page 1498, note 53.

Right of principal to compel agent to account for secret profits see *supra*, III, A, 1, d.

86. See cases cited *infra*, this note.

Purchase by agent at sale of principal's property.— If an agent employed to sell his principal's property purchases the same, he is entitled to no commissions on the sale (McGar *v.* Adams, 65 Ala. 106; Hobson *v.* Peake, 44 La. Ann. 383, 10 So. 762; Jansen *v.* Williams, 36 Nebr. 869, 55 N. W. 279, 20 L. R. A. 207; Salomons *v.* Pender, 3 H. & C. 639, 11 Jur. N. S. 432, 34 L. J. Exch. 95, 12 L. T. Rep. N. S. 267, 13 Wkly. Rep. 637. And see Finch *v.* Conrade, 154 Pa. St. 326, 26 Atl. 368; Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 34 [*reversing* (Civ. App. 1898) 51 S. W. 55]), unless the principal consents thereto (see cases cited *supra* and *infra*, this paragraph). This rule applies to a purchase through others as a result of which the agent acquires the property or an interest therein. McGar *v.* Adams, *supra*; Reardon *v.* Washburn, 59 Ill. App. 161; Smith *v.* Townsend, 109 Mass. 500; Humphrey *v.* Eddy Transp. Co., 107 Mich. 163, 65 N. W. 13.

Misrepresentations as to necessity of acquiring interest.—A principal employed an agent to sell land at a minimum price of four dollars per acre. The agent found two persons who wanted the land, and, supposing that he was their agent in the premises, took him in as an equal partner in the purchase at four dollars per acre. The agent falsely represented to the principal that his customers would not take the land unless he was admitted as a partner in the purchase. The principal signed a contract to convey the land to the agent and his customers at the minimum price. It was held that the agent was not entitled to recover compensation, since he acted in bad faith and in hostility to the interests of the principal. Smith *v.* Tripis, 2 Tex. Civ. App. 267, 21 S. W. 722.

After termination of the agency, however, the agent may acquire an individual interest in the subject-matter of the agency without forfeiting previously earned compensation. McGar *v.* Adams, 65 Ala. 106.

87. McKenzie *v.* Champion, 4 Manitoba 158, holding that misconduct of an agent in taking a deposit from a customer for the principal's property does not defeat his right to compensation, where the principal accepts the deposit.

By continuing the agent in his employment with knowledge that the agent is not prosecuting his work with diligence, the principal precludes himself from asserting the agent's negligence to defeat the right to compensation earned during the employment. Spinks *v.* Georgia Quincy Granite Co., 114 La. 1044, 38 So. 824; Williams *v.* Gregg, 2 Strobh. Eq. (S. C.) 297.

Where the agent has accepted compensation from the adverse party he cannot recover compensation from the principal unless the latter agreed expressly, with a knowledge of all the circumstances, to waive his right to refuse compensation. Rice *v.* Davis, 136 Pa. St. 439, 20 Atl. 513, 20 Am. St. Rep. 931, holding that where an agent of the owner for the sale of stock receives from a purchaser thereof compensation for his services, the fact that such receipt was with the knowledge and without the objection of the seller will not constitute a waiver of the rule and preserve the right of the agent to be compensated by the seller. To the contrary see Davis *v.* Huber Mfg. Co., 119 Iowa 56, 93 N. W. 78 (where the principal, with knowledge of the agent's breach of duty, continued him in the employment and accepted the benefits of his services); Culverwell *v.* Campton, 31 U. C. C. P. 342 (where an express waiver was not required in order to entitle the agent to recover from his principal).

88. Construction of contract as to com-

an agent performs no service under his contract of employment, he cannot as a rule recover compensation thereunder.[89] So if he otherwise fails to perform his undertaking according to the terms of his contract, he is ordinarily debarred from recovering the compensation specified therein.[90] And generally speaking an agent is not entitled to reasonable compensation on account of unsuccessful efforts to negotiate the transaction which he was employed to negotiate.[91] If, on the other hand, an agent performs the undertaking assumed by him, he is generally entitled to the compensation specified in his contract of employment.[92] In determining whether or not an agent is entitled to compensation under the contract of employment it is of prime importance, therefore, carefully to scrutinize the contract in order to determine precisely the nature and extent of the agent's undertaking.

pensation in general see *supra*, III, B, 2, a, (II), (B).

Illegality of transaction as defeating right to compensation see *supra*, III, B, 2, c.

Termination of agency as affecting right to compensation for past or future services see *supra*, III, B, 2, b.

Time within which transaction must be negotiated see *supra*, III, B, 2, b, (I), (B).

Sufficiency of broker's services as affecting right to compensation see FACTORS AND BROKERS, 19 Cyc. 240 *et seq.*

89. See Landis *v.* Scott, 32 Pa. St. 495 (where an agent was disallowed commissions on rents of his principal's property of which he himself was the tenant); Sanborn *v.* U. S., 135 U. S. 271, 34 L. ed. 112, 10 S. Ct. 812. And see cases cited *passim*, III, B, 2, e.

90. Attrill *v.* Patterson, 58 Md. 226; Warde *v.* Stuart, 1 C. B. N. S. 88, 5 Wkly. Rep. 6, 87 E. C. L. 88.

Substantial performance is generally sufficient, however, to entitle the agent to the contract compensation. Keene *v.* Frick Co., (Iowa 1903) 93 N. W. 582; Rimmer *v.* Knowles, 30 L. T. Rep. N. S. 496, 22 Wkly. Rep. 574.

Ratification of acts done in excess of authority.— Although the agent acts in excess of his authority, yet if the principal ratifies his acts and accepts the benefit of his services, he is entitled to compensation. U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88 (holding that, although the agent of a loan company may have been instructed to foreclose only for the accrued interest, yet if he in good faith believed, from circumstances arising after the suit had been begun according to instructions, that the interests of the company required a foreclosure of all the debt, and did so foreclose for the entire amount, notifying the company within a reasonable time, and the company made no objection, but accepted the benefits thereof, and adopted the receivership established thereunder, such acceptance was a ratification of his acts, and he is entitled to reasonable compensation for his services); Kentucky Bank *v.* Combs, 7 Pa. St. 543 (holding that where an agent employed for a particular purpose acts beyond the extent of his authority without objection from his principal, the assent of the principal will be presumed, and he will be entitled to compensation). And see *infra*, III, B, 2, e, (V).

91. Gilbert *v.* Judson, 85 Cal. 105, 24 Pac. 643; Hamond *v.* Holiday, 1 C. & P. 384, 12 E. C. L. 228; Cousens *v.* Mitcheson, 1 New Rep. 240. And see *infra*, page 1509, note 94, page 1511, note 95, page 1515, note 3, page 1516, note 6. See, however, Attrill *v.* Patterson, 58 Md. 226 (where it appeared that plaintiff was employed to negotiate a compromise between two gas companies, the agreement being that if successful he should receive fifty thousand dollars therefor; that he failed to effect a compromise, and thereupon defendant took legal advice, as the result of which suit was brought, and after judgment had been obtained against the hostile company, they compromised; that plaintiff's services were not entirely dispensed with after the institution of the legal proceedings, but he took at most only a subordinate part in the management of the matter thereafter; and it was held that while he was not entitled to the fee of fifty thousand dollars, he was entitled to a reasonable sum to reimburse him for his services after the failure of the efforts to compromise without suit); McEwen *v.* Loucheim, 115 N. C. 348, 20 S. E. 519; Stewart *v.* Kahle, 3 Stark. 161, 3 E. C. L. 636.

92. Law *v.* Townsend, 11 Gill & J. (Md.) 407 (holding that where a contract was that A should allow B a commission on all business sent by the latter to the former, the title to the commission is complete by sending the business); Saubert *v.* Conley, 10 Oreg. 488 (holding that where payments were made to a principal in consequence of the efforts made by his agent, who had been employed and authorized to collect for ten per cent of the amount collected, the agent was entitled to his commission on the payments). And see cases cited *passim*, III, B, 2, e.

When salary begins and accrues.— In case an agent is hired on a salary, the contract of hiring determines when the salary begins. Louisville Soap Co. *v.* Vance, 58 S. W. 985, 22 Ky. L. Rep. 847, holding that where plaintiff, who was employed by defendant as a traveling salesman for an indefinite time and was to receive both a salary and commissions, must have understood from the circumstances that defendant was acting on the idea that plaintiff's salary would not begin until he was sent out, plaintiff, by remaining silent, acquiesced in that construction of the contract. It determines also when the salary accrues. Bair *v.* Hilbert, 84 N. Y. App. Div. 621, 82 N. Y. Suppl. 1010 (holding that a

(II) *Production of Person Willing to Contract.* If the agent undertakes merely to produce a person who is able, ready, and willing to enter into a specified transaction with the principal on the terms prescribed by the latter, the production of such a person generally entitles the agent to the contract compensation, although the principal fails or refuses to enter into the transaction in question.[93]

contract in writing which stipulated that plaintiff should sell defendant's goods throughout the country, paying his own expenses; that defendant should pay him therefor a sum equal to fifteen per cent of the gross amount of the orders accepted; that in case plaintiff's sales exceeded in the aggregate fourteen thousand dollars during the year, one half of the commission should go toward payment of a prior indebtedness due defendant; that the agreement should remain in force one year — was simply an agreement to pay a certain rate of commission for the sale of goods, and that the commissions should be paid and the goods should be sold during the period of one year, and could not be so construed that nothing became due in favor of either party until the expiration of the year); Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 34 (holding that a stipulation in an agreement that an agent was not to look to his principal for payment, but that his salary, a fixed amount per year, would be paid from sales of, or by borrowing money upon, the property which he was to manage, controlled the manner and source of payment, but not the time when the salary fell due, which was at the end of each year).

93. *Colorado.*— Squires *v.* King, 15 Colo. 416, 25 Pac. 26.

Iowa.— Van Gorder *v.* Sherman, 81 Iowa 403, 46 N. W. 1087.

Missouri.— See Gooch *v.* J. I. Case Threshing Mach. Co., 119 Mo. App. 397, 96 S. W. 431.

New York.— Taylor *v.* Enoch Morgan's Sons Co., 124 N. Y. 184, 26 N. E. 314 [*affirming* 48 Hun 483, 1 N. Y. Suppl. 293]. And see Jacquin *v.* Boutard, 89 Hun 437, 35 N. Y. Suppl. 496 [*affirmed* in 157 N. Y. 686, 51 N. E. 1091].

North Carolina.—See Atkinson *v.* Pack, 114 N. C. 597, 19 S. E. 628.

Utah.— Lawson *v.* Thompson, 10 Utah 462, 37 Pac. 732.

Vermont.—Durkee *v.* Vermont Cent. R. Co., 29 Vt. 127, holding that where the principal declines to complete the negotiations, the agent is entitled to his commission, unless there is a custom or usage giving those that deal with the agent the right to recede to the last moment.

Wisconsin.— Kelly *v.* Phelps, 57 Wis. 425, 15 N. W. 385; O'Connor *v.* Semple, 57 Wis. 243, 15 N. W. 136. And see Oliver *v.* Morawetz, 97 Wis. 332, 72 N. W. 877.

United States.— Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587.

Canada.— Mackenzie *v.* Champion, 12 Can. Sup. Ct. 649 [*affirming* 4 Manitoba 158].

See 40 Cent. Dig. tit. "Principal and Agent," § 206.

Estoppel.— The agent may by his conduct estop himself to assert a claim to commissions on orders not actually filled by the principal. Belgian Glass Co. *v.* Pabst, 101 N. Y. 621, 4 N. E. 519.

If the agent procures a contract from the third person binding him to accept the principal's offer, he is all the more entitled to the stipulated compensation. Goss *v.* Stevens, 32 Minn. 472, 21 N. W. 549; Goss *v.* Broom, 31 Minn. 484, 18 N. W. 290, although such person pays down no cash. And see Wheeler *v.* Knaggs, 8 Ohio 169.

Necessity of binding contract.— The test of the agent's right to commission for finding a purchaser is not whether his contract with the purchaser is specifically enforceable, but whether he has found a purchaser able, ready, and willing to take the property on the terms prescribed by his principal. McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816; Kelly *v.* Phelps, 57 Wis. 425, 15 N. W. 385; McKenzie *v.* Champion, 4 Manitoba 158 [*affirmed* in 12 Can. Sup. Ct. 649], holding that the owner cannot refuse to pay the commission because no agreement in writing actually was entered into; at all events, when the reason was that he refused to sign it unless some unusual term was inserted, and he had accepted the purchaser and by various acts showed that he considered that there was a valid verbal contract. So where an agent employed to sell lands finds a purchaser who is able, ready, and willing to purchase it on the terms given the agent by the landowner, the contract of sale need not be in writing, as a condition precedent to the agent's right to recover for his services. Vaughan *v.* McCarthy, 59 Minn. 199, 60 N. W. 1075; Lawson *v.* Thompson, 10 Utah 462, 37 Pac. 732; Boughton *v.* Hamilton Provident Soc., 10 Manitoba 683, holding, however, that the agent is not entitled to full commissions in such case.

Although commissions are payable only on net sales, yet if, through the principal's fault, orders procured by the agent are not filled, the agent is entitled to commissions thereon. Abel *v.* Nelson, 104 N. Y. Suppl. 362. And see Lafferty *v.* Lorimer, 86 Mich. 591, 49 N. W. 586; Stone *v.* Argersinger, 32 N. Y. App. Div. 208, 53 N. Y. Suppl. 63. See also *infra*, note 95.

Contract as conferring right to reject orders.— A contract between principal and agent provided that the principal should furnish the agent with machines to fill orders, and that the agent should deliver no machines until the orders therefor were accepted by the principal, and that the agent should receive a commission on machines sold, settled for, and delivered, but that no commission should be paid on any order not filled. It was held that the principal did not have an absolute right to reject an order, and thus defeat the

(III) *Procuring Parties to Enter Into Contract* — (A) *In General.* If the agent assumes not merely to find a person who is able, ready, and willing to

agent's right to compensation. Sherman *v.* Port Huron Engine, etc., Co., 13 S. D. 95, 82 N. W. 413. So a clause in a contract obliging a manufacturing company to furnish engines if the exigencies of their business permit, when ordered by its agent selling on commission, who has made large expenditures in building up a trade, gives it no arbitrary right to refuse. Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587. However, under a contract with an agent that no commissions are to be paid on orders not shipped, and that the acceptance of orders is at the discretion of the principal, the agent cannot collect compensation for orders not accepted. Temby *v.* William Brunt Pottery Co., 229 Ill. 540, 82 N. E. 336 [*affirming* 127 Ill. App. 441].

Inability of the principal to comply with his offer does not relieve him from liability to compensate the agent for finding a person who is able, ready, and willing to accept that offer. Fox *v.* Rouse, 47 Mich. 558, 11 N. W. 384; Stone *v.* Argersinger, 32 N. Y. App. Div. 208, 53 N. Y. Suppl. 63. And see McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816; Nosotti *v.* Auerbach, 79 L. T. Rep. N. S. 413, 15 T. L. R. 41 [*affirmed* in 15 T. L. R. 140].

Sale by agent defeated by sale by principal or outside agent.— Where an agent to sell land is not authorized to execute a conveyance, but merely to obtain a purchaser, he is entitled to compensation on finding a person ready and willing to make the purchase, although, owing to the owner's subsequently selling the land to another, the sale is not consummated. Ford *v.* Easley, 88 Iowa 603, 55 N. W. 336. So where a party is by contract to receive a certain commission for finding a purchaser for real estate, he becomes entitled to such commission on procuring a person ready, willing, and in a situation to purchase, although, before the principal accepts him, another agent, acting within his authority, binds the principal to sell to another person. Fox *v.* Rouse, 47 Mich. 558, 11 N. W. 384. If, however, the principal himself sells the property before he learns that the agent has found a customer, the agent is not as a rule entitled to the contract compensation. Darrow *v.* Harlow, 21 Wis. 302, 94 Am. Dec. 541.

The principal must stand by the terms of his offer.— After the agent has produced a person who is able, ready, and willing to enter into a contract on the terms originally proposed by the principal, the latter cannot defeat the agent's right to compensation by refusing to enter into the contract except on different terms. Squires *v.* King, 15 Colo. 416, 25 Pac. 26; Hannan *v.* Moran, 71 Mich. 261, 38 N. W. 909. And see McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816; Nosotti *v.* Auerbach, 79 L. T. Rep. N. S. 413, 15 T. L. R. 41 [*affirmed* in 15 T. L. R. 140].

Implied terms of principal's offer.— Where a principal employs an agent to find a purchaser for real estate, and nothing is said or understood between them as to the title, the implication of the law is, between principal and agent as between owner and purchaser, and that the owner has and intends to convey a good title; and it is no defense to the agent's claim for commission that the agent's agreement provided that the purchaser should get a good title, either in general terms or that certain particular encumbrances should be removed. McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816. So where all the terms of an offer are stated except the term as to the time when it is to be carried out, and there is no express stipulation as to the time, then it is an implied term that the agreement is to be performed within a reasonable time. Thus where plaintiff was instructed by defendant to find a purchaser for his house for a certain sum, and on January 16, he found a person ready and willing to pay that sum who required possession by March 15, defendant could not refuse the offer on the ground that he could not give up possession on March 15, the jury having found that from January 16 to March 15 was a reasonable time, and plaintiff was entitled to his commission. Nosotti *v.* Auerbach, 79 L. T. Rep. N. S. 413, 15 T. L. R. 41 [*affirmed* in 15 T. L. R. 140].

The principal must make good his representations concerning the subject-matter of the agency. Thus he is liable to the agent for compensation for finding a person willing to purchase property where such person failed to buy by reason of the non-existence of advantages which the principal had represented as existing. Hannan *v.* Moran, 71 Mich. 261, 38 N. W. 909. So where an agent employed to borrow money on leasehold security finds a person able and willing to lend, but the negotiations go off by reason of such person discovering unusual covenants in the lease which the agent was not informed of, the principal having represented that the lease contained only the usual covenants, the agent is entitled to the whole of the agreed commission for procuring the loan. Green *v.* Lucas, 33 L. T. Rep. N. S. 584.

Countermand of order by buyer.— Where defendant promised to pay plaintiff a certain compensation for taking orders for goods, the fact that orders are countermanded by purchasers does not affect plaintiff's right to compensation. Dougan *v.* Turner, 51 Minn. 330, 53 N. W. 650. See, however, Lafferty *v.* Lorimer, 86 Mich. 591, 49 N. W. 586. *Compare In re* Ladue Tate Mfg. Co., 135 Fed. 910.

Ability, readiness, and willingness.— The person procured by the agent must be able, ready, and willing to contract with the principal on the terms originally proposed by the latter, else the agent is not entitled to compensation where the transaction fails through. Acme Harvester Co. *v.* Madden, 4 Kan. App. 598, 46 Pac. 319; Wright *v.* Beach, 82 Mich. 469, 46 N. W. 673; Aikins *v.* Thackara Mfg. Co., 15 Pa. Super. Ct. 250; Darrow

enter into a particular transaction with the principal, but to effectuate the transaction itself, then unless the parties actually enter into that transaction the agent is not entitled to the compensation specified in his contract of employment.[94]

v. Harlow, 21 Wis. 302, 94 Am. Dec. 541; Mackenzie *v.* Champion, 12 Can. Sup. Ct. 649 [*affirming* 4 Manitoba 158]; Culverwell *v.* Birney, 14 Ont. App. 266. And see Smith *v.* Patrick, (Tex. Civ. App. 1896) 36 S. W. 762. See also *infra*, III, B, 2, e, (v). So an agent employed to find a purchaser for land cannot recover compensation therefor without showing that the purchaser found was financially responsible, although the principal may have sold the land to another in the interim between the time the agent was employed and the time he found the purchaser. Iselin *v.* Griffith, 62 Iowa 668, 18 N. W. 302.

The agent must of course notify the principal that he has secured a person able, ready, and willing to enter into the transaction that he was authorized to negotiate; otherwise the principal is not liable for commissions where the transaction is not entered into. Wright *v.* Beach, 82 Mich. 469, 46 N. W. 673. And see cases cited this note, preceding paragraph.

If the principal deems a proposed buyer to be financially irresponsible, relying on the reports of the well-known commercial agencies, and he acts in good faith, he may refuse to fill the proposed buyer's order without rendering himself liable to the agent who took the orders. Stone *v.* Argersinger, 32 N. Y. App. Div. 208, 53 N. Y. Suppl. 63; Allhouse *v.* Baum, 11 Ohio Dec. (Reprint) 205, 25 Cinc. L. Bul. 250. Thus where a principal contracted that an agent should have a commission on all orders taken by him which the manufacturer should "accept and ship," and letters from the principal to the agent stated that orders from persons with rating over five hundred dollars would be promptly filled, and others as soon as information of a satisfactory nature could be obtained, it was held in an action by the agent for commissions, in which he claimed bad faith on the part of the principal in refusing to fill orders, that this rating of customers must have been one known to and in use by defendant, and not some private rating of financial standing, procured by and only known to plaintiff; that private information obtained by the agent as to the responsibility of customers of which defendant had no notice could not be considered as evidence of bad faith on the part of defendant in failing to ship orders to such customers; nor could the fact that certain parties to whom goods were sold might have been entitled to credit for the amount of their orders. Wolfson *v.* Allen Bros. Co., 120 Iowa 455, 94 N. W. 910.

If a person offering to exchange lands with the principal has no title to the land offered by him, the agent is not entitled to compensation for finding him. Culverwell *v.* Birney, 14 Ont. App. 266. And if in the course of the negotiations the principal discovers an undisclosed encumbrance on the land offered him, he may break off the negotiations without assigning any reasons therefor and without notice, and the agent who found the person who offered the land will be entitled to nothing, although such person failed to mention the encumbrance solely through inadvertence and was able and prepared to remove it. Rockwell *v.* Newton, 44 Conn. 333.

Submission of offer from one already in negotiation with principal.— Where one authorized to sell certain property within a specified time for a given sum, he to have a certain amount for procuring a purchaser or making sale, notifies the owners within the time that he has a proposition on certain terms at the price fixed, and the proposition is not accepted, he cannot recover the agreed compensation, the customer being one with whom the owners had themselves been in treaty for the property for several months prior thereto, and who had that very day made them an offer of the same amount. Hartley *v.* Anderson, 150 Pa. St. 391, 24 Atl. 675.

The agent himself cannot accept the principal's offer and thus become entitled to commissions, where the principal refuses to deal with the agent as a customer. Tower *v.* O'Neil, 66 Pa. St. 332. So where an agent employed to sell land agreed with the proposed buyer to take an interest therein and apply his compensation toward payment for his interest, the owner is justified in refusing to convey, and the agent cannot recover compensation as for a sale. Finch *v.* Courade, 154 Pa. St. 326, 26 Atl. 368.

Good faith of principal.— It has been held that if an offer procured by the agent is rejected by the principal in good faith and not merely to defeat the agent's right to commissions, he is not liable to the agent. Taylor *v.* Cox, (Tex. 1887) 7 S. W. 69. *Compare* Gooch *v.* J. I. Case Threshing Mach. Co., 119 Mo. App. 397, 96 S. W. 431; Jacquin *v.* Bontard, 89 Hun (N. Y.) 437, 35 N. Y. Suppl. 496 [*affirmed* in 157 N. Y. 686, 51 N. E. 1091].

Commissions not recoverable eo nomine.— It has been held that where the principal wrongfully rejects an offer procured by the agent, the latter cannot recover commissions *eo nomine* (Stevenson *v.* Morris Mach. Works, 69 Miss. 232, 13 So. 834; Adamson *v.* Yeager, 10 Ont. App. 477), but is entitled only to reasonable compensation for his services (Stevenson *v.* Morris Mach. Works, *supra*, holding that the agreed commissions afford a measure of damages; Adamson *v.* Yeager, *supra*; Prickett *v.* Badger, 1 C. B. N. S. 296, 3 Jur. N. S. 66, 26 L. J. C. P. 33, 5 Wkly. Rep. 117, 87 E. C. L. 296). If, however, the negotiations come to nothing because the person produced by the agent is unable or unwilling to comply with the principal's terms, the agent cannot as a rule recover on a *quantum meruit*. Mason *v.* Clifton, 3 F. & F. 899; Culverwell *v.* Birney, 14 Ont. App. 266.

94. *Illinois.*— Garnhart *v.* Rentchler, 72 Ill. 535, holding that a contract by a principal to pay his agent a commission on sales does

(B) *Effect of Failure to Carry Out Contract.* The terms of the employment may be such that the right to compensation is dependent, not merely upon the agent's finding a person who enters into a specified contract with the principal, but also upon the carrying out of that contract by the parties thereto according to its terms,[95] although as to this it is to be observed that as a rule the failure,

not authorize the agent to recover commissions upon contracts to sell.

Iowa.— Wolfson *v.* Allen Bros. Co., 120 Iowa 455, 94 N. W. 910, holding that a contract which provides that an agent is not to receive any commission on orders taken by him unless his principal "accept and ship" the goods is valid in the absence of a showing of fraud or bad faith on the part of the principal.

United States.—See *In re* Ladue Tate Mfg. Co., 135 Fed. 910.

England.—Broad *v.* Thomas, 7 Bing. 99, 20 E. C. L. 53, 4 C. & P. 338, 19 E. C. L. 543, 9 L. J. C. P. O. S. 32, 4 M. & P. 732; Dalton *v.* Irwin, 4 C. & P. 289, 19 E. C. L. 519; Hamond *v.* Holiday, 1 C. & P. 384, 12 E. C. L. 228; Mestear *v.* Atkins, 1 Marsh. 76, 5 Taunt. 381, 1 E. C. L. 199; Cousens *v.* Mitcheson, 1 New Rep. 240. And see Bull *v.* Price, 7 Bing. 237, 9 L. J. C. P. O. S. 78, 5 M. & P. 2, 20 E. C. L. 112; Alder *v.* Boyle, 4 C. B. 635, 11 Jur. 591, 16 L. J. C. P. 232, 56 E. C. L. 635.

Canada.— Mackenzie *v.* Champion, 12 Can. Sup. Ct. 649 [*affirming* 4 Manitoba 158].

See 40 Cent. Dig. tit. "Principal and Agent," § 203 *et seq.*

The agent cannot recover the reasonable value of his services in attempting to negotiate the transaction in such a case. Broad *v.* Thomas, 7 Bing. 99, 20 E. C. L. 53, 4 C. & P. 338, 19 E. C. L. 543, 9 L. J. C. P. O. S. 32, 4 M. & P. 732. See *infra*, III, B, 2, e.

If the parties enter into the transaction the agent is entitled to his compensation. Ward *v.* Cobb, 148 Mass. 518, 20 N. E. 174, 12 Am. St. Rep. 587; Newhall *v.* Appleton, 61 N. Y. Super. Ct. 251, 19 N. Y. Suppl. 701 [*affirmed* in 136 N. Y. 666, 33 N. E. 335]; McKenzie *v.* Champion, 12 Can. Sup. Ct. 649 [*affirming* 4 Manitoba 158]. And see *In re* Ladue Tate Mfg. Co., 135 Fed. 910. Thus a sales agent is entitled to compensation where orders taken by him are filled by the principal, although the principal, for reasons of his own, saw fit to have the customers execute new written orders. Merriman *v.* McCormick Harvesting Mach. Co., 101 Wis. 619, 77 N. W. 880. And see Gooch *v.* J. I. Case Threshing Mach. Co., 119 Mo. App. 397, 96 S. W. 431. And a salesman is entitled to commissions on goods sold, where the customer has no right to reject them, although the orders provide for future delivery of the goods. Ross *v.* Portland Coffee, etc., Co., 30 Wash. 647, 71 Pac. 184.

Validity of transaction.— Plaintiff contracted with defendant to act as its agent in selling school furniture on commission, and bound himself to sell to such persons only as were legally qualified to enter into contracts, which contracts were to be subject to defendant's acceptance. Plaintiff sold on contracts that were not binding on the districts they purported to obligate, and such contracts were accepted by defendant, both plaintiff and defendant acting in good faith, believing them to be legal. It was held that defendant was not estopped by its acceptance of the contracts to plead their invalidity in defense to a claim for compensation. Cleveland School Furniture Co. *v.* Hotchkiss, 89 Tex. 117, 33 S. W. 855.

95. White *v.* Turnbull, 8 Aspin. 406, 3 Com. Cas. 183, 78 L. T. Rep. N. S. 726, 14 T. L. R. 401.

By custom and usage in England in certain lines of trade an agent is not allowed a commission unless the transaction is carried out. Read *v.* Rann, 10 B. & C. 438, 8 L. J. K. B. O. S. 144, 21 E. C. L. 189; Bower *v.* Jones, 8 Bing. 65, 1 L. J. C. P. 31, 1 Moore & S. 140, 21 E. C. L. 447. But the parties may contract to the contrary. Bower *v.* Jones, *supra.*

Default of customer as defeating compensation.— The rule stated in the text is especially true where it is not the principal, but the agent's customer, who defaults in carrying out the contract negotiated by the agent. Beale *v.* Bond, 84 L. T. Rep. N. S. 313, 17 T. L. R. 280. Thus where the owner of personalty agreed to pay an agent a commission in case he should succeed "in disposing of" the property on acceptable terms, and the agent procured a purchaser who made a written contract with the owner to buy goods, and to pay for the same partly with a deed to certain land, and such purchaser was unable to perform his contract for want of title to such land, the agent was not entitled to commissions, Greusel *v.* Dean, 98 Iowa 405, 67 N. W. 275. So a contract by which a manufacturer employs a person as a "selling agent" at a commission "on all sales" contemplates actual sales, and not mere contracts of purchase and sale, and hence if an accepted order procured by the agent is filled only in part because of the buyer's inability to pay for more, the agent is not entitled to commissions on the unfilled part. Creveling *v.* Wood, 95 Pa. St. 152. See, however, Lockwood *v.* Levick, 8 C. B. N. S. 603, 7 Jur. N. S. 102, 29 L. J. C. P. 340, 2 L. T. Rep. N. S. 357, 8 Wkly. Rep. 583, 98 E. C. L. 603. Justifiable refusal of customer see this note, following paragraph.

Default of principal as defeating compensation.— If it is due to the fault of the principal that the contract negotiated by the agent is not carried out, the agent is entitled to compensation. Fisher *v.* Drewett, 48 L. J. Exch. 32, 39 L. T. Rep. N. S. 253, 27 Wkly. Rep. 12, holding that if the principal, having accepted an offer of a loan procured by

refusal, or inability of either the principal or the third person to carry out the contract entered into by them does not defeat the agent's right to compensation

the agent, afterward refuses to complete the transaction, the agent is entitled to his commission even though it was payable only "on any money received" by the principal. Thus if a vendor promises the agent who effected the sale a sum for his services if the purchaser should fulfil his agreement, the agent is entitled to recover of the vendor if the purchaser is ready to fulfil, but through the default of the vendor does not. Shinn *v.* Haines, 21 N. J. L. 340. So it is not ground for withholding commissions earned under a contract providing that commissions should be due out of all sums collected from sales made by the employee that it was not possible for the employer to fill the orders in the usual course of business. Stone *v.* Argersinger, 32 N. Y. App. Div. 208, 53 N. Y. Suppl. 63. So also where a person was employed to sell goods on a written contract for a commission on all net sales which he procured, to be paid only after the goods were paid for, he could recover his commissions, not only on goods sold by him and paid for, but on goods the orders for which were not filled through the fault of the employer. Abel *v.* Nelson, 104 N. Y. Suppl. 362. And see Lafferty *v.* Lorimer, 86 Mich. 591, 49 N. W. 586. And where a salesman is to receive commissions on the delivery of goods sold, his employer cannot arbitrarily refuse to deliver the goods, and so deprive him of compensation for his labor. Aikins *v.* Thackara Mfg. Co., 15 Pa. Super. Ct. 250. Where an agent is authorized to sell machines and to make certain representations relative to them, and is to receive as compensation a percentage of the proceeds of sales made by him, and the machines sold do not prove to be as represented, and are returned, he is entitled to recover his compensation on the sales of such machines. Garnhart *v.* Rentchler, 72 Ill. 535. And if a buyer refuses to accept the goods on the ground that they were not properly made, the agent is entitled to his commission notwithstanding a provision that it was not to be paid till the goods were delivered and paid for. Restein *v.* McCadden, 166 Pa. St. 340, 31 Atl. 99.

Construction of contract.—Defendants agreed with plaintiff to remunerate him "in the event of their taking into partnership" one M, introduced by plaintiff, and afterward entered into a written agreement with M by which it was agreed that they should enter into partnership as and from a specified future day, when a formal deed of partnership should be executed carrying out the terms of the agreement. This agreement recognized and adopted the agreement between plaintiff and defendants, but no partnership deed was ever executed, nor did M ever in fact act as a partner of defendants. It was held that there was evidence of a "taking into partnership" within the meaning of the agreement between plaintiff and defendants, so as to entitle plaintiff to his commission. Harris *v.* Petherick, 39 L. T. Rep. N. S. 543. Plaintiff, a commission agent, proposed to do business with defendant, a manufacturer, on terms as follows: "We expect to receive our commission on all goods bought by houses whose accounts are opened through us." Plaintiff introduced a customer who gave defendant an order for goods which he accepted but did not execute. It was held that plaintiff was entitled to a commission, since the words "goods bought," applied to all goods ordered by customers introduced by plaintiff, whether the order was executed by defendant or not. Lockwood *v.* Levick, 8 C. B. N. S. 603, 7 Jur. N. S. 102, 29 L. J. C. P. 340, 2 L. T. Rep. N. S. 357, 8 Wkly. Rep. 583, 98 E. C. L. 603. See, however, Creveling *v.* Wood, 95 Pa. St. 152.

Payment of price as condition precedent to right to selling commission.—The terms of the contract of employment are frequently such that the agent's right to a commission for negotiating a sale does not accrue until and unless the purchaser pays the price. Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303; Evans *v.* Hughey, 76 Ill. 115; McCay Engineering Co. *v.* Crocker-Wheeler Electric Co., 100 Md. 530, 60 Atl. 443; Westinghouse Co. *v.* Tilden, 56 Nebr. 129, 76 N. W. 416; Stone *v.* Argersinger, 32 N. Y. App. Div. 208, 53 N. Y. Suppl. 63; Gresham *v.* Galveston County, (Tex. Civ. App. 1896) 36 S. W. 796; Thompson-Houston Electric Co. *v.* Berg, 10 Tex. Civ. App. 200, 30 S. W. 454; Park *v.* Mighell, 3 Wash. 737, 29 Pac. 556. And see Bull *v.* Price, 7 Bing. 237, 9 L. J. C. P. O. S. 78, 5 M. & P. 2, 20 E. C. L. 112. See, however, Fuller *v.* Brady, 22 Ill. App. 174; Bills *v.* A. W. Stevens Co., 146 Mich. 515, 109 N. W. 1059 (holding that where a contract employing an agent for the sale of the employer's machinery stipulated that commission on machinery sales should be payable as the notes, securities, or other proceeds of sale were paid in money, and the agent sold machinery, and received as part payment second-hand machinery, which the employer sold, accepting in payment an engine, valued at a specified amount, and cash and securities, the agent was entitled to recover commissions on the price for which the employer sold the second-hand machinery as fixed by the value of the engine and securities and the amount of the cash, without waiting until the securities had been paid and the engine had been sold); Strong *v.* Prentice Brown Stone Co., 10 Misc. (N. Y.) 380, 31 N. Y. Suppl. 144 [*affirming* 6 Misc. 57, 26 N. Y. Suppl. 85] (holding that the mere fact that a person wrote to his sales agent, whose commissions were to be the excess above a certain amount, that he would want him to take his pay from the sale of the goods, does not prevent the principal from being personally liable for the commissions, in the absence of an acceptance of such proposition by the agent); Sherman *v.* Consolidated Dental

for negotiating that contract;[96] nor is such right defeated by the fact that the

Mfg. Co., 202 Pa. St. 451, 52 Atl. 2 (holding that under a contract by which defendant appoints plaintiff its manager for the sale of its goods, and he agrees to use his best endeavors to promote the sale, it agreeing to give him for selling them a sum equal to the difference between the list and trade prices of the articles, and he agreeing that in making sales they shall be made only to such persons as are responsible, he is entitled to compensation on sales on credits, although the purchase-price has not been collected). Thus an agent for the sale of land who makes a sale payable in instalments is not entitled to his entire commission out of the first instalment paid. Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389; Peters *v.* Anderson, 88 Va. 1051, 14 S. E. 974. So where a contract between a principal and a sales agent stipulates that the agent shall not be entitled to commissions on a sale of machinery "taken back" by the principal, the agent is not entitled to commissions on a sale of machinery which is not paid for by the purchaser, and which the principal is obliged to take back in a worn condition on foreclosure of a mortgage given by the purchaser to secure the price. Reeves *v.* Watkins, 89 S. W. 266, 28 Ky. L. Rep. 401, 622. To the contrary see Clark *v.* Gaar, 78 Minn. 492, 81 N. W. 530. And *compare* Taylor Mfg. Co. *v.* Key, *supra*; Baskerville *v.* Gaar, 15 S. D. 211, 88 N. W. 103; Odum *v.* J. I. Case Threshing-Mach. Co., (Tenn. Ch. App. 1895) 36 S. W. 191. However, in case the purchaser pays in part, the agent is entitled to his commissions on the part payment. Melvin *v.* Aldridge, *supra*; Clark *v.* Gaar, *supra*; Baskerville *v.* Gaar, *supra*; Odum *v.* J. I. Case Threshing Mach. Co., *supra*; Gresham *v.* Galveston County, *supra*; Peters *v.* Anderson, *supra*. And if the price is not paid through the act of the principal (Taylor Mfg. Co. *v.* Key, *supra*; Aultman *v.* Ritter, 81 Wis. 395, 51 N. W. 569), or through an unreasonable delay on his part in seeking to enforce collection (Evans *v.* Hughey, *supra*; Westinghouse *v.* Tilden, *supra*. And see Taylor Mfg. Co. *v.* Key, *supra*; Aultman *v.* Ritter, *supra*; Bull *v.* Price, *supra*), the agent is entitled to commissions on the entire price. Right to compensation: Where commission is dependent on profits see *infra*, III, B, 2, e, (IV). Where selling agent is to receive as compensation the excess above a certain price see *infra*, III, B, 2, e, (IV).

Right of agent to retain forfeited instalments.— An agent for the sale of land is not entitled to instalments paid to him by the purchaser and subsequently forfeited by the purchaser's abandoning his contract. Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389.

Disposal by principal of right to receive fund under contract negotiated by agent.— A principal who agrees that his agent shall receive a percentage of money to be paid on a contract secured through such agent cannot dispose of his own right to receive the fund, and thus deprive the agent of the reward for his services. Hix *v.* Edison Electric Light Co., 10 N. Y. App. Div. 75, 41 N. Y. Suppl. 680; Reed *v.* Union Cent. L. Ins. Co., 21 Utah 295, 61 Pac. 21. *Compare* Blassingame *v.* Keating Implement, etc., Co., (Tex. Civ. App. 1903) 74 S. W. 344, where it appeared that a principal gave his agent notes for commissions on a sale of machinery made by him, it being understood that such notes should be paid as the purchase-money notes given the principal were paid; and that another party became the owner of the purchase-money notes, and subsequently, by arrangement with the purchaser of the machinery, took the machinery and returned the purchase-money notes to the purchaser, and it was held that if the principal had received the full amount of the purchase-money notes on a sale thereof which terminated his liability on such notes, he was liable to the agent on the notes given to him, but if the principal remained liable on the purchase-money notes, he was not liable to the agent.

Right of agent to opportunity to resell on purchaser's default.— Under a contract by which complainant was to sell shares in an association, he to receive a certain amount per share for selling the same, to be paid in instalments as the instalments of the purchase-price were paid, with a provision that if any purchasers failed to make payments their shares should be forfeited and complainant's compensation for such sales should cease, but he should receive notice of the forfeiture, and be given thirty days in which to resell the forfeited shares, for which he should receive full compensation, shares having been forfeited, and complainant not having been given any notice thereof for two years, and it appearing that at the time of the forfeiture there was a ready sale for them, and that if complainant had been promptly notified he might have sold them, defendant cannot complain that it is required to account on the basis of complainant having resold them, and full payment therefor having thereafter been made. Miller *v.* Russell, 224 Ill. 68, 79 N. E. 434.

Reasonable compensation.— An agent is not entitled to the reasonable value of his services in negotiating a contract which is not carried out by the parties thereto, where it was contemplated that the stipulated commission should not be payable in such an event. Read *v.* Rann, 10 B. & C. 438, 8 L. J. K. B. O. S. 144, 21 E. C. L. 189. See *supra*, page 1505, note 91.

96. Boland *v.* Kistle, 92 Iowa 369, 60 N. W. 632; Gravely *v.* Southern Ice Mach. Co., 47 La. Ann. 389, 16 So. 866; Aikens *v.* Thackara Mfg. Co., 15 Pa. Super. Ct. 250; Lockwood *v.* Levick, 8 C. B. N. S. 603, 7 Jur. N. S. 102, 29 L. J. C. P. 340, 2 L. T. Rep. N. S. 357, 8 Wkly. Rep. 583, 98 E. C. L. 603.

Default of principal —*In general.*—The rule stated in the text is especially true where

principal and the third person subsequently modify, rescind, or cancel the contract by mutual consent.[97]

(iv) *Other Conditions of Employment Affecting Right to Compensation.* The right of an agent to compensation, whether by way of commissions or salary, is not infrequently made to depend upon various con-

the contract negotiated by the agent is not carried out through the principal's default. Searing *v.* Butler, 69 Ill. 575; Brown *v.* Wilson, 98 Iowa 316, 67 N. W. 251; Witherell *v.* Murphy, 147 Mass. 417, 18 N. E. 215; Lawson *v.* Thompson, 10 Utah 462, 37 Pac. 732; Fisher *v.* Drewett, 48 L. J. Exch. 32, 39 L. T. Rep. N. S. 253, 27 Wkly. Rep. 12. And it does not defeat the agent's right to commission for taking an order which is accepted by the principal that the latter becomes unable to execute the order, and derives no benefit from it. Lockwood *v.* Levick, 8 C. B. N. S. 603, 7 Jur. N. S. 102, 29 L. J. C. P. 340, 2 L. T. Rep. N. S. 357, 8 Wkly. Rep. 583, 98 E. C. L. 603. And see *supra*, note 93.

Grounds of default: customer's title to land offered principal.— However, the agent of a contract purchaser of land who refuses to carry out the purchase is not entitled to a commission on the sale where by the terms of the employment the vendor's title was to be approved by the purchaser's solicitor, and it does not appear either that the title was so approved or that it was such a title as could not reasonably be disapproved. Clack *v.* Wood, 9 Q. B. D. 276, 47 L. T. Rep. N. S. 144, 30 Wkly. Rep. 931. And see *supra*, note 93.

Default of customer — *In general.*— Even though the failure to carry out the contract negotiated by the agent is due to the default of the customer, yet the agent is ordinarily entitled to his commission for negotiating the contract. Ward *v.* Cobb, 148 Mass. 518, 20 N. E. 174, 12 Am. St. Rep. 587; Lara *v.* Hill, 15 C. B. N. S. 45, 109 E. C. L. 45. But see *supra*, note 95.

Grounds of default in general.—A contract buyer of goods may lawfully refuse to carry out the contract because of the seller's delay in manufacturing the goods, in which case the seller's agent is entitled to a commission for negotiating the contract of sale. Tyler *v.* E. G. Bernard Co., (Tenn. Ch. App. 1899) 57 S. W. 179. And see *supra*, note 95.

Defect in principal's title.— So a vendor's agent is entitled to a commission for negotiating the contract of purchase and sale where the sale falls through because the vendor's title is defective or encumbered. Stange *v.* Gosse, 110 Mich. 153, 67 N. W. 1108; Roberts *v.* Kimmons, 65 Miss. 232, 3 So. 736 (where the principal represented that he had a good title); Hart *v.* Hopson, 52 Mo. App. 177 (holding that a person employed to procure a contract for the sale of a leasehold interest for a fixed compensation, to be paid so soon as the contract was obtained, is entitled to the stipulated compensation on procuring the contract, although the sale, owing to the fact that the leasehold title was encumbered for its full value and valueless, was not consummated, if he acted in ignorance of the defect in the title); Sweeney *v.* Ten Mile Oil, etc., Co., 130 Pa. St. 193, 18 Atl. 612; Mackenzie *v.* Champion, 12 Can. Sup. Ct. 649 [*affirming* 4 Manitoba 158]. And see *supra*, note 95.

Construction of contract as to right to compensation where contract negotiated by agent is not carried out see *supra*, note 95.

Custom and usage to contrary of rule stated in text see *supra*, note 95.

97. Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303 (holding that where a contract of employment to sell machinery on specified commissions provides that "no commissions shall be allowed or paid on any article taken back, or on any order taken and not filled, on machinery not settled for, or any sale to irresponsible persons. the agent, on making a sale to a responsible person, becomes entitled to his commissions, and cannot be deprived of them because the principal, after extending the indebtedness at maturity, finally releases a part of the security and takes back the machinery in settlement of the debt); Leopuld *v.* Weeks, 96 Md. 280, 53 Atl. 937 (where it appeared that a corporation appointed an agent to sell patent rights, and agreed to pay him ten per cent of the price received from sales made by him; that the agent procured a buyer, with whom a contract was entered into, which was modified through the efforts of a third person in behalf of the corporation; that the last agreement professed on its face to be a modification of the original contract, and the changes, although numerous, were stated in detail by reference to the numbered paragraphs of the former contract; and it was held that the agent was entitled to the ten per cent commission on the price received pursuant to the last agreement); Howland *v.* Coffin, 47 Barb. (N. Y.) 653 (where it appeared that the owners of a steamship signed a contract with a ship broker, "on account of his obtaining a charter from the government" for their ship, to pay him "five per cent on amount of charter, say two hundred dollars *per diem*, more or less, so long as she remains in government service"; that the broker obtained the charter, and under it the government paid the owners two hundred dollars *per diem* until March 25, when, by agreement between the government and the owners indorsed on the charter, no other provisions of which were changed, the compensation was reduced to one hundred and twenty dollars *per diem*; that the owners refused to pay the broker any commission after that time, on the ground that the charter obtained by the broker had ceased to exist; and it was held that the identity of the instrument or trans-

tingencies and conditions independent of those just mentioned.[98] Principals sometimes agree to make advances of money to their agents on account of com-

action was not affected by the indorsement, and that the broker was entitled to his commission upon one hundred and twenty dollars per day, until the charter was given up). And see Lafferty *v.* Lorimer, 86 Mich. 591, 49 N. W. 586.

98. McCay Engineering Co. *v.* Crocker-Wheeler Electric Co., 100 Md. 530, 60 Atl. 443 (where it was agreed that a sales agent should receive only such commissions as the net proceeds of the sales should warrant); Johnson *v.* Sinnett, 153 N. Y. 51, 46 N. E. 1035 [*reversing* 83 Hun 317, 31 N. Y. Suppl. 917] (holding that a contract by the joint purchasers of a tract of land, conveyed to them in undivided equal parts, to pay the broker who negotiated the transaction a certain sum per acre whenever a resale of the land should be effected, and a proportionate part in case the land should be resold in parcels, contemplates a joint conveyance of the whole or a part of the land, and does not apply to a transfer by one of the joint purchasers of his undivided interest); Idler *v.* Borgmeyer, 65 Fed. 910, 13 C. C. A. 198 (holding that an agreement to pay a commission of ten per cent on the amount of a claim against a foreign government, in consideration of services in obtaining judgment against such government, "as soon as the payment or satisfaction is realized," is contingent on satisfaction of the judgment; and when, after failure to collect it, payment of the claim is obtained through the award of a mixed commission established by treaty, no right to recover the ten per cent exists); Ebert *v.* U. S., 29 Ct. Cl. 183 (where the right to salary was held to be dependent, not merely upon the rendition of services, but also upon personal attendance at the principal's office).

Compensation as dependent on amount of current sales.— Where plaintiff was employed by defendants as traveling salesman for a year, traveling expenses to be paid by them, he agreeing to devote all his time to the business, for which they agreed "to pay him $600, payable monthly, $50 per month, and six per cent. commission on all his sales above $10,000, provided said salary and traveling expense does not exceed ten per cent. of his net sales," the salary of six hundred dollars was not dependent on the amount of sales. Atkins *v.* Keener, 109 Ala. 143, 19 So. 402. However, a contract with an agent that he should have six dollars salary a week, with a guaranty of at least one good sale a week; "if there is no sale there is no salary to be paid," does not mean that salary was to be paid if, on an average through the whole time, there was one sale a week, but the right construction is that during weeks where there was no sale there was to be no salary. Austin *v.* Smith, 12 Ohio Cir. Ct. 757. And where a contract for the establishment of a sales agency provided a salary and additional commission on all the sales during the continuance of the contract; and that the average sales should amount to five hundred dollars a month, which should be the minimum amount to constitute a fulfilment of the contract, it was held that if the agent's monthly sales were less than five hundred dollars, he was not entitled to either salary or commission. Haas *v.* Malto-Grape Co., 148 Mich. 358, 111 N. W. 1059.

Compensation as dependent on profits.— Defendant engaged plaintiff as general manager, and in addition to a stated salary agreed to pay plaintiff ten per cent commission on all contracts personally secured by him on which the usual profits accrued, and five per cent on all on which one half of the usual profits were secured, and special orders for greater or smaller profits were to be arranged at the time the orders were taken. It was held that plaintiff was not entitled to commissions on orders which had been taken and accepted by defendant, but on which nothing was payable or had been paid at the time suit was brought, since the profits cannot be said to have accrued until the work secured by the orders was paid for, or until the right to enforce present payment existed. Allen *v.* Armstrong, 58 N. Y. App. Div. 427, 68 N. Y. Suppl. 1079. So under a contract by defendant to give plaintiff half the profits above the purchase-price on a resale of property purchased by defendant through the intermediation of plaintiff, there can be no recovery till defendant has reduced the proceeds of the sale to money, or so appropriated them to his own use as to constitute a complete equivalent for reception of their money value. Rogers-Ruger Co. *v.* McCord, 115 Wis. 261, 91 N. W. 685.

Sales commission consisting of excess of price over a fixed sum.— Where the compensation of an agent for negotiating a sale is to consist of the excess of the price over a fixed sum, the agent is entitled to nothing unless the price exceeds that sum. Indiana Road Mach. Co. *v.* Lebanon Carriage, etc., Co., 78 S. W. 861, 25 Ky. L. Rep. 1763; Bradford *v.* Menard, 35 Minn. 197, 28 N. W. 248; La Force *v.* Washington University, 106 Mo. App. 517, 81 S. W. 209. And see Gregory *v.* Mack, 3 Hill (N. Y.) 380. The fact that the agent took an unenforceable contract from a third person to purchase at a price in excess of the fixed sum does not entitle him to recover the excess, where the purchaser did not tender performance and the sale was not effected. Bradford *v.* Menard, *supra*. Nor is the agent entitled to compensation where the purchaser defaults in carrying out a valid contract of purchase at a price in excess of the sum so fixed, it being one of the terms of the employment that the principal was "to receive the full sum" so fixed "without deduction." Beale *v.* Bond, 84 L. T. Rep. N. S. 313, 17 T. L. R. 280. And even though the agent sells for a greater sum than that so fixed, yet if he

missions to be earned on subsequent sales, and in this event the agent is entitled to the advances without reference to the amount of sales already made by him.[99]

(v) *Procuring Contract Differing From That Which Agent Was Authorized to Negotiate.* If the principal and a third person enter into a contract as a result of the agent's intervention, the agent is not deprived of his right to compensation by the fact that the contract so concluded differs in terms from the one which he was employed to negotiate.[1] However, an agent employed to negotiate a contract on particular terms is not entitled to compensation under the terms of his employment for producing a person who is willing to enter into the contract on different terms,[2] unless the principal ratifies what the agent has

sells on credit he is not entitled to the excess until the price has been paid (Evans *v.* Hughey, 76 Ill. 115), or at least until after the price had fallen due and the lapse of a reasonable time for collection thereof (Evans *v.* Hughey, *supra*). It seems, however, that this latter rule does not apply, where the principal authorizes the agent thus to sell on credit. Fuller *v.* Brady, 22 Ill. App. 174. Nor can the principal refuse to sell where the agent finds a person who is willing to pay the fixed sum in cash, and the excess to the agent on time, if credit for the excess is to be granted by the agent (Van Gorder *v.* Sherman, 81 Iowa 403, 46 N. W. 1087); but if credit for the excess is to be granted by the principal, and there is no agreement that the agent's compensation is to come out of the deferred payment, the principal may refuse to sell (Marble *v.* Bang, 54 Minn. 277, 55 N. W. 1131. *Contra*, Wheeler *v.* Knaggs, 8 Ohio 169).

99. Isaacsen *v.* Andrews, 64 N. Y. App. Div. 408, 72 N. Y. Suppl. 177; Weinberg *v.* Blum, 13 Daly (N. Y.) 399.

1. *Minnesota.*— Scovell *v.* Upham, 55 Minn. 267, 96 N. W. 812, where a lender agreed to pay an agent a commission if the lender loaned the agent's customer a certain sum at a certain rate, and the lender loaned the customer a less sum at a higher rate.

Missouri.— Gooch *v.* J. I. Case Threshing Mach. Co., 119 Mo. App. 397, 96 S. W. 431, where a contract of sale concluded by agents was altered by the principal in some immaterial respects, and a new contract executed for the purpose of depriving the agents of their commissions.

Pennsylvania.— McClure *v.* McMichael, etc., Mfg. Co., 20 Montg. Co. Rep. 137, where an agent negotiated a sale, and the principal accepted property in part payment.

West Virginia.— Reynolds *v.* Tompkins, 23 W. Va. 229.

England.— Rimmer *v.* Knowles, 30 L. T. Rep. N. S. 496, 22 Wkly. Rep. 574.

See 40 Cent. Dig. tit. "Principal and Agent," § 207. And see cases cited *infra*, note 3.

Sale at lower price.— One employed to find a customer for property at a certain price is entitled to his commission, although the principal sells to the customer found at a lower price, the agent having nothing to do with the reduction. Dexter *v.* Campbell, 137 Mass. 198; Dailey *v.* Young, 13 N. Y. Suppl. 435; Mansell *v.* Clements, L. R. 9 C. P. 139. And see *infra*, note 3. See however, Stephens *v.* Janes, 2 N. Y. St. 659 (holding that where an agent to lease certain premises for a stated sum, who merely makes an offer to lease them to a firm, which offer is not accepted before the death of a partner, does not earn any commission, where after such death the agent makes an unsuccessful effort to renew the negotiations, and the owner transfers the premises to her husband, who leases them to the successors of said firm for a less amount); Culverwell *v.* Birney, 14 Ont. App. 266; Glines *v.* Cross, 12 Manitoba 442.

Conclusion of contract differing in substance.— If the contract so concluded differs from the one which the agent was employed to negotiate, not only in terms but also in substance, so as to render it an entirely new and altogether different transaction, then the agent cannot recover as for negotiating the contract contemplated by the terms of his employment. Starr *v.* Royal Electric Co., 30 Can. Sup. Ct. 384 [*affirming* 33 Nova Scotia 156]. See, however, Rimmer *v.* Knowles, 30 L. T. Rep. N. S. 496, 22 Wkly. Rep. 574, where an agent employed to sell realty was held entitled to a commission for effecting a lease with option to buy.

Sale of part of property.—A contract by defendant to pay plaintiff a specified commission after six months from the delivery to defendant of a deed for a one-half interest in a ranch owned by a third person is indivisible, and plaintiff cannot, upon defendant's purchase of a one-third interest in such ranch, recover a proportionate commission. Witte *v.* Taylor, 110 Cal. 224, 42 Pac. 807. And see Eidson *v.* Saxon, (Tex. Civ. App. 1895) 30 S. W. 957; Culverwell *v.* Birney, 14 Ont. App. 266. See, however, Welsh *v.* Lemert, 92 Iowa 116, 60 N. W. 230, holding that where an owner writes his agent, who is negotiating a sale of his farm, that he wishes to sell with the farm his horses, implements, etc., and that if the stock is not sold it will be necessary to retain a portion of the farm, the sale of the stock, implements, and farm together is not a condition on which the sale must be made to entitle the agent to his commissions.

Effect of termination of agency before conclusion of contract between principal and third person see *supra*, III, B, 2, b.

Right to reasonable compensation see *infra*, note 3.

2. Marble *v.* Bang, 54 Minn. 277, 55 N. W.

done, or waives the right to object to the agent's non-fulfilment of the terms of his employment, or estops himself from asserting that right.[3] So if an agent authorized to negotiate a contract merely procures a third person to enter into a conditional or optional agreement, instead of procuring the absolute and final contract which he was employed to procure, he is not entitled to compensation,[4]

1131 (holding that authority to an agent to sell land, unless otherwise expressly provided, is authority only to sell for cash on delivery of the deed; and the agent is not entitled to a commission for procuring a person who is willing to buy on time); Hamlin *v.* Schulte, 31 Minn. 486, 18 N. W. 415; Schultz *v.* Griffin, 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825 (holding that where defendant agreed to pay plaintiff certain compensation to sell his farm for twenty thousand dollars to be paid as follows: "1st mortgage, $5,000; 2d mortgage, . . . $2,500; the balance" to defendant in cash, the mortgages having been made to secure bonds of defendant, plaintiff did not earn the compensation by the tender of a contract whereby the purchaser agreed to pay that portion of the price represented by the mortgages "by assuming" the mortgages, in the absence of evidence that the mortgages were not due and could not be paid); Fraser *v.* Wyckoff, 63 N. Y. 445 [*affirming* 2 Hun 545] (where defendant agreed to pay plaintiff one thousand five hundred dollars, provided he effected a sale of a certain patent, or obtained a customer who should pay seventeen thousand five hundred dollars for such patent, or ten per cent on any less sum defendant might agree to take, and in pursuance of the agreement plaintiff entered into copartnership with two others for selling rights under the patent, and the firm were to pay defendant fifteen thousand dollars as follows: twenty-five per cent of the net profits to be realized from the sale of rights secured, and twenty per cent of the net profits to be realized from the construction of waterworks under the patent, until the whole amount was paid; and it was held that the agreement did not constitute such a sale as was contemplated by the contract of agency, and plaintiff was not entitled to the commissions agreed to be paid); Stone *v.* Argersinger, 32 N. Y. App. Div. 208, 53 N. Y. Suppl. 63 (holding that where a sales agent takes orders for goods differing from the samples furnished him by the principal, the latter is not bound to accept the orders); Eidson *v.* Saxon, (Tex. Civ. App. 1895) 30 S. W. 957; Mason *v.* Clifton, 3 F. & F. 899; Toppin *v.* Healey, 11 Wkly. Rep. 466. And see *supra*, III, B, 2, e, (II).

Right to reasonable compensation see *supra*, page 1505, note 91.

3. *California.*—Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122; Blood *v.* Shannon, 29 Cal. 393, where an agent authorized to sell for gold coin took the purchaser's check for the price, and the principal refused to convey solely on the ground that he had already sold to another.

Illinois.— Searing *v.* Butler, 69 Ill. 575.

Michigan.— Shepherd *v.* Gibbs, 85 Mich. 85, 48 N. W. 179.

Ohio.— Winpenny *v.* French, 18 Ohio St. 469, holding that one who employs an agent to negotiate a contract, and afterward, as toward the other contracting party, ratifies the contract which the agent obtains, cannot be heard, in a subsequent action by the agent for the compensation promised for his services, to dispute that the latter succeeded in negotiating the contract as desired.

Oregon.— Heywood Bros., etc., Co. *v.* Doernbecher Mfg. Co., 48 Oreg. 359, 86 Pac. 357, 87 Pac. 530.

England.— Sentance *v.* Hawley, 13 C. B. N. S. 458, 7 L. T. Rep. N. S. 745, 11 Wkly. Rep. 311, 106 E. C. L. 458; Mason *v.* Clifton, 3 F. & F. 899; Rimmer *v.* Knowles, 30 L. T. Rep. N. S. 496, 22 Wkly. Rep. 574.

See 40 Cent. Dig. tit. "Principal and Agent," § 207. And see cases cited *supra*, note 1.

Ratification of sale as made by agent.— If the principal ratifies a sale on the terms made by the agent, the latter is generally entitled to compensation under the contract of employment, although the sale is not made on the terms on which the agent was employed to make it. Goss *v.* Stevens, 32 Minn. 472, 21 N. W. 549; Gelatt *v.* Ridge, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683; Wolf *v.* Tait, 4 Manitoba 59. See, however, Gregory *v.* Mack, 3 Hill (N. Y.) 380; Eidson *v.* Saxon, (Tex. Civ. App. 1895) 30 S. W. 957. This rule applies where the agent negotiates a sale at a lower price than that which he was authorized to accept. Austin *v.* Burroughs, 62 Mich. 181, 28 N. W. 862; Doty *v.* Case, etc., Thresher Co., 50 Hun (N. Y.) 595, 3 N. Y. Suppl. 510. See, however, Blackwell *v.* Adams, 28 Mo. App. 61. And see cases cited *supra*, note 1.

Reasonable compensation.— Although an agent negotiates a contract on different terms from those on which he was authorized to negotiate it, yet if the principal enters into the contract as negotiated, the agent may recover reasonable compensation for his services. Wycott *v.* Campbell, 31 U. C. Q. B. 584. *Compare* Diltz *v.* Spahr, (Ind. App. 1896) 42 N. E. 823; Blackwell *v.* Adams, 28 Mo. App. 61. See, however, Culverwell *v.* Birney, 14 Ont. App. 266.

4. See Smith *v.* Tate, 82 Va. 657 (where an agent employed to sell land made a sale on consideration that the tract on a survey should contain a certain number of acres, and he failed to have the land surveyed as he had authority to do, as a result of which the sale was not made); and cases cited *infra*, this note. *Compare* Curtis *v.* Nixon, 24 L. T. Rep. N. S. 706.

unless and until the condition is fulfilled or the option is exercised and the absolute and final contract is made.[5]

(VI) *Agent as Procuring Cause of Transaction.* An agent is not entitled to compensation as for negotiating a transaction which has been entered into by the principal and a third person unless he was the procuring cause thereof.[6] If, on the other hand, the agent was the procuring cause of the transaction, he is entitled to compensation for effecting it.[7] Thus an agent employed to negotiate a particular transaction is ordinarily entitled to compensation if he brings the principal and a third person into communication, and as a result they enter into the transaction.[8]

A sale on approval does not entitle an agent to compensation as for making a sale, where the buyer has not accepted or does not accept the property. Thomas *v.* Lincoln, 71 Ind. 41; Sanderson *v.* Tinkham Smoke-Consumer Co., 83 Iowa 446, 49 N. W. 1034; McCarthy *v.* Cavers, 66 Iowa 342, 23 N. W. 757; Ross *v.* Portland Coffee, etc., Co., 30 Wash. 647, 71 Pac. 134.

Option to forfeit deposit and abandon purchase.— Although a prospective purchaser deposits part of the price, yet if he does not bind himself to complete the purchase, but may forfeit the deposit and abandon the purchase, the agent is not entitled to compensation as for effecting a sale. Yeager *v.* Kelsey, 46 Minn. 402, 49 N. W. 199; Ives *v.* Davenport, 3 Hill (N. Y.) 373. See, however, Ward *v.* Cobb, 148 Mass. 518, 20 N. E. 174, 12 Am. St. Rep. 587.

5. Morson *v.* Burnside, 31 Ont. 438. And see cases cited *supra*, note 3. See, however, Taylor *v.* Cobourg, etc., R., etc., Co., 24 U. C. C. P. 200.

6. Attrill *v.* Patterson, 58 Md. 226; Burkholder *v.* Fonner, 34 Nebr. 1, 51 N. W. 293 (holding that a person to whom the owner of land has agreed to pay a certain sum if he should sell the land or procure a purchaser therefor is not entitled to recover the sum if the person to whom the land is subsequently sold received the information which led to the purchase from other sources and did not purchase from or through him); David *v.* Rick, 57 N. Y. App. Div. 623, 67 N. Y. Suppl. 1052; Antrobus *v.* Wickens, 4 F. & F. 291.

Contributory services.— The fact that an agent's efforts contributed remotely to the consummation of a sale does not entitle him to a commission as for selling. Commercial Nat. Bank *v.* Hawkins, 35 Ill. App. 463. And see Flack *v.* Condict, 66 N. J. L. 351, 49 Atl. 508.

Previous negotiations with customer.— The fact that the agent had negotiated with the person from whom the principal subsequently purchased property does not entitle the agent to a commission as for negotiating the purchase, where he was not the procuring cause thereof. Boydell *v.* Snarr, 6 U. C. C. P. 94.

Subsequent transactions between principal and person produced by agent.—An agent who has negotiated a transaction between the principal and a third person, and who has been paid therefor, is not entitled to a commission on a subsequent, although similar, transaction entered into by the principal and the same person without his further intervention. Toulmin *v.* Millar, 12 App. Cas. 746, 57 L. J. K. B. 301, 58 L. T. Rep. N. S. 96 (where an agent procured a tenant, and the tenant afterward bought the premises); Tribe *v.* Taylor, 1 C. P. D. 505 (where an agent procured a loan, and the lender made subsequent advances to the principal); Curtis *v.* Nixon, 24 L. T. Rep. N. S. 706 (where an agent negotiated a lease with option to renew, and the tenancy was afterward continued on different terms); Lumley *v.* Nicholson, 34 Wkly. Rep. 716 (where an agent sold part of the property he was employed to sell, and the purchaser afterward bought the residue). However, a provision in a contract to pay commissions on all sales of defendants' goods made "directly" by plaintiff, and a certain other commission on such other sales as should be "considered" by defendants as the result of plaintiff's original sales, does not give defendants the right arbitrarily to determine the question. Ransom *v.* Wheelwright, 17 Misc. (N. Y.) 141, 39 N. Y. Suppl. 342.

Reasonable value of services.— If the agent is not the procuring cause of the transaction, he is not entitled to reasonable compensation for his efforts to procure it. Culverwell *v.* Birney, 14 Ont. App. 266.

7. Wasmer *v.* Lean, 32 Nebr. 519, 49 N. W. 463; Sinclair *v.* Galland, 8 Daly (N. Y.) 508. And see Saubert *v.* Conley, 10 Oreg. 488.

This rule applies even though the agent had no personal intercourse with the third person. Gemunder *v.* Hauser, 7 Misc. (N. Y.) 487, 27 N. Y. Suppl. 977 [*affirming* 6 Misc. 210, 26 N. Y. Suppl. 529]; Wilkinson *v.* Alston, 4 Aspin. 191, 44 J. P. 35, 48 L. J. Q. B. 733, 41 L. T. Rep. N. S. 394. And see Bayley *v.* Chadwick, 39 L. T. Rep. N. S. 429. See, however, Antrobus *v.* Wickens, 4 F. & F. 291.

8. See cases cited *infra*, this note. See, however, White *v.* Baxter, Cab. & E. 199; Green *v.* Mules, 30 L. J. C. P. 343; Culverwell *v.* Birney, 14 Ont. App. 266.

This is so, although the agent is not personally present when the transaction is finally entered into. Keener *v.* Harrod, 2 Md. 63, 56 Am. Dec. 706; Morton *v.* J. I. Case Threshing Mach. Co., (Mo. App. 1903) 74 S. W. 434; Nicholas *v.* Jones, 23 Nebr. 813, 37 N. W. 679; Odum *v.* J. I. Case Threshing Mach. Co., (Tenn. Ch. App. 1895) 36 S. W. 191; Green *v.* Bartlett, 14 C. B. N. S.

(VII) *Transactions Negotiated by Principal or Outside Agent.* As a rule the employment of an agent to negotiate a transaction does not preclude the principal himself from negotiating the transaction.[9] Accordingly, unless the parties otherwise agree,[10] the agent is not entitled to compensation where the principal himself negotiates the transaction without the agent's aid and without deriving any advantage from the agent's efforts.[11] After the agent has commenced negotiations with a possible customer, however, neither the principal nor the customer can defeat the right to compensation by breaking off negotiations with the agent and concluding the transaction without his further aid.[12] If an agent is the procuring cause of the transaction which he is authorized to negotiate, he is not deprived of the right to compensation by the fact that another agent similarly employed by the principal intervened in the negotiations.[13] If, however, the intervening agent and not the original agent is the procuring cause of the transaction, the latter is generally entitled to nothing.[14]

f. As Affected by Agreement Creating Exclusive or Sole Agency. By their contract of employment agents for the continuous sale of goods are frequently given the sole or exclusive agency, especially in a certain territory, and persons employed to sell a particular piece of property are likewise not infrequently made sole or exclusive agents for that purpose.[15] As a rule these contracts are not so

681, 32 L. J. C. P. 261, 8 L. T. Rep. N. S. 503, 11 Wkly. Rep. 834, 108 E. C. L. 681. And see Williams *v.* Leslie, 111 Ind. 70, 12 N. E. 102; Davis *v.* Huber Mfg. Co., 119 Iowa 56, 93 N. W. 78; Brodhead *v.* Pullman Ventilator Co., 29 Pa. Super. Ct. 19; *In re* Beale, 5 Morr. Bankr. Cas. 37.

9. Hungerford *v.* Hicks, 39 Conn. 259; Darrow *v.* Harlow, 21 Wis. 302, 94 Am. Dec. 541.

Sole and exclusive agents see *infra*, III, B, 2, f.

10. Crane *v.* McCormick, 92 Cal. 176, 28 Pac. 222 (holding that where defendants authorized plaintiff to sell certain real estate for them at any time within a year, and agreed for a valuable consideration to pay a commission if the sale should be effected in any way during that time, and the land was sold by defendants within the year, plaintiff, to recover the commission, need not show that he had produced or could produce a purchaser); Campbell *v.* Thomas, 87 Cal. 428, 25 Pac. 545; Taylor *v.* Enoch Morgan's Sons Co., 124 N. Y. 184, 26 N. E. 314 [*affirming* 48 Hun 483, 1 N. Y. Suppl. 293]; Petrie *v.* Machan, 28 Ont. 642. *Compare* Winslow *v.* Mayo, 123 N. Y. App. Div. 758, 108 N. Y. Suppl. 640.

11. *Connecticut.*— Hungerford *v.* Hicks, 39 Conn. 259.

New York.— Winslow *v.* Mayo, 123 N. Y. App. Div. 758, 108 N. Y. Suppl. 640.

Texas.— Burns *v.* Hill, 2 Tex. App. Civ. Cas. § 523, where both principal and agent tried to sell to the same person, and the principal himself was eventually successful.

United States.—Sanborn *v.* U. S., 135 U. S. 271, 10 S. Ct. 812, 34 L. ed. 112.

Canada.— See Wolf *v.* Tait, 4 Manitoba 59.

See 40 Cent. Dig. tit. "Principal and Agent," § 202.

12. *Colorado.*— Howe *v.* Werner, 7 Colo. App. 530, 44 Pac. 511.

Georgia.— Gresham *v.* Connally, 114 Ga. 906, 41 S. E. 42.

Pennsylvania.— Keys *v.* Johnson, 68 Pa. St. 42.

South Dakota.— Baskerville *v.* Gaar, etc., Co., 14 S. D. 1, 84 N. W. 204.

Canada.— See Boughton *v.* Hamilton Provident Soc., 10 Manitoba 683.

See 40 Cent. Dig. tit. "Principal and Agent," § 202.

13. Livezy *v.* Miller, 31 Md. 336; Dowling *v.* Morrill, 165 Mass. 491, 43 N. E. 295. And see Davis *v.* Huber Mfg. Co., 119 Iowa 56, 93 N. W. 78; Bray *v.* Chandler, 18 C. B. 718, 4 Wkly. Rep. 518, 86 E. C. L. 718; Murray *v.* Currie, 7 C. & P. 584, 32 E. C. L. 771; Kynaston *v.* Nicholson, 8 L. T. Rep. N. S. 671.

14. *Iowa.*— Goin *v.* Hess, 102 Iowa 140, 71 N. W. 218.

New York.—Halperin *v.* Callender, 17 Misc. 362, 39 N. Y. Suppl. 1044.

Texas.—Wilson *v.* Alexander, (1892) 18 S. W. 1057.

England.— Curtis *v.* Nixon, 24 L. T. Rep. N. S. 706.

Canada.— See Glines *v.* Cross, 12 Manitoba 442.

See 40 Cent. Dig. tit. "Principal and Agent," § 202.

Contract for division of commission.— An agent appointed to procure a loan within a time limited employed a subagent to assist him on an agreement to divide the commission. Upon the expiration of the time limit the principal refused to proceed in the matter, but subsequently employed the subagent to procure the loan. It was held that the agreement for division of the commission terminated with the primary agency, and the subagent, upon his subsequent success, was entitled to the whole commission. Halperin *v.* Callender, 17 Misc. (N. Y.) 362, 39 N. Y. Suppl. 1044.

15. See for example Garfield *v.* Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695 (holding that where a manufacturer's contract appointed plaintiff exclusive agent for the sale of automobiles for a certain vicinity,

worded as to entitle the agent to compensation when the principal himself, acting independently of the agent, sells the particular piece of property in question or sells his goods in the agent's territory;[16] but they generally preclude the principal from appointing other agents to sell the same and thus deprive the exclusive agent of compensation on account of independent sales made by such others.[17]

and expressly provided that, if the agent should receive inquiries from territory other than his own, he should promptly refer them to defendant, the agent was entitled to commissions on a sale made outside of his territory to a resident thereof temporarily residing elsewhere); Thompson-Houston Electric Co. *v.* Berg, 10 Tex. Civ. App. 200, 30 S. W. 454 (holding that where the contract between a manufacturer and his agent provides that the agent shall receive a percentage on all products to be used in a certain territory, the fact that a contract for the sale of goods to be used in such territory is made by the principal outside of the territory is immaterial). And see Hutchinson *v.* Root, 158 N. Y. 681, 52 N. E. 1124 [*affirming* 2 N. Y. App. Div. 584, 38 N. Y. Suppl. 16]. *Compare* Stone *v.* Fox Mach. Co., 145 Mich. 689, 109 N. W. 659 (where a manufacturer employed an agent under a contract stipulating that he should be the sole agent for the manufacturer for the sale of its product throughout Europe, and declaring that it was understood that the manufacturer should do no advertising "in European papers without including his name and address [of]" the agent as its sole European agent, "the intention being to bring before the public . . . the fact that" the agent was "the sole agent for the manufacturer," and it was held that the contract provided that the manufacturer should not advertise in European papers without including the name and address of the agent as sole European agent; but the manufacturer might advertise in American papers without doing so); Wyckoff *v.* Bishop, 115 Mich. 414, 73 N. W. 392 (holding that where one contracts with a firm to sell typewriter machines in certain territory, in which no sale is to be made without his receiving a benefit, he cannot claim a commission on a machine sold and delivered by the firm to a party residing outside, but having a branch office within, said territory, even though the machine is shipped to and used in the branch office); Hubbard *v.* New York, etc., Inv. Co., 119 U. S. 696, 7 S. Ct. 353, 30 L. ed. 548 (where it was held that certain business done by the principal did not originate in the agent's district, so as to entitle him to compensation).

An exclusive agency is not to be implied from an unnatural construction of the terms of the contract. Indiana Road Mach. Co. *v.* Lebanon Carriage, etc., Co., 78 S. W. 861, 25 Ky. L. Rep. 1763. Thus an agreement to appoint a firm as agent "for receiving, keeping, and selling in their behalf" the first parties harvesting machinery and parts and binding twine "on commission, for the following territory, J. County, for the entire season of 1891," with a power of revocation reserved, does not confer an exclusive selling agency. Deering *v.* Beatty, 107 Iowa 701, 77 N. W. 325. And the fact that plaintiff for three years preceding a written contract of employment as salesman had solicited orders for defendant in a certain territory would not entitle him to an exclusive privilege to sell in such territory when it was not given by the contract. Wiley *v.* California Hosiery Co., (Cal. 1893) 32 Pac. 522.

16. Golden Gate Packing Co. *v.* Farmers' Union, 55 Cal. 606; Gilbert *v.* Coons, 37 Ill. App. 448; Dole *v.* Sherwood, 41 Minn. 535, 43 N. W. 569, 16 Am. St. Rep. 731, 5 L. R. A. 720. And see McCay Engineering Co. *v.* Crocker-Wheeler Electric Co., 100 Md. 530, 60 Atl. 443.

The contract may, however, be so framed as to entitle the agent to compensation on sales made by the principal himself. Keene *v.* Frick Co., (Iowa 1903) 93 N. W. 582; Taylor Co. *v.* Bannerman, 120 Wis. 189, 97 N. W. 918; Snelgrove *v.* Ellringham Colliery Co., 45 J. P. 408. And see La Favorite Rubber Mfg. Co. *v.* H. Channon Co., 113 Ill. App. 491; McCay Engineering Co. *v.* Crocker-Wheeler Electric Co., 100 Md. 530, 60 Atl. 443. So if the general agent of the principal, coming within the exclusive territory of the local agent, there makes a sale with his consent, agreeing to pay him a fixed sum less than his commissions would have been, the local agent may recover this sum from the principal, it appearing that the general agent had authority to make such special agreement. Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303.

If the agent is the procuring cause of the sale, however, he is entitled to compensation. Baskerville *v.* Gaar, etc., Co., 14 S. D. 1, 84 N. W. 204. And see Gilbert *v.* Coons, 37 Ill. App. 448; Dole *v.* Sherwood, 41 Minn. 535, 43 N. W. 569, 16 Am. St. Rep. 731, 5 L. R. A. 720. See also *supra*, III, B, 2, e, (VI).

17. Perkins Electric Lamp Co. *v.* Hood, 44 Ill. App. 449; Snelgrove *v.* Ellringham Colliery Co., 45 J. P. 408. And see Dole *v.* Sherwood, 41 Minn. 535, 43 N. W. 569, 16 Am. St. Rep. 731, 5 L. R. A. 720.

Conditions of recovery.— An agent who has an exclusive contract for the sale of machinery in a given territory cannot recover his commission from his principal for a sale made by another in such territory till he has shown that he himself would have made the sale, or that he performed, in connection therewith, the requirements imposed upon him by the contract. Roberts *v.* Minneapolis Threshing Mach. Co., 8 S. D. 579, 67 N. W. 607, 59 Am. St. Rep. 777. And he must also show that the new agent has actually sold machines within his territory. Brush-Swan Electric Light Co. *v.* Brush Electric Co., 49 Fed. 5.

Other agents authorized by contract; notice of appointment.—A contract binding an agent

g. Persons Liable For Compensation — (i) *In General.* In the absence of an agreement to the contrary,[18] the person who employs an agent is the person liable for his compensation.[19]

(ii) *Liability to Subagent.* If it is within the scope of the real or apparent authority of an agent to employ a subagent to act for the principal in reference to the subject-matter of the agency, the principal is generally liable to the subagent for his compensation;[20] but in the absence of such authority the principal is

to canvass certain territory for the sale of the principal's machines, and stipulating that if he fails to canvass the territory or to conduct the business in a satisfactory manner, the principal may terminate the agency, or place other canvassers in the territory and deprive the agent of commissions on sale made by other canvassers, does not authorize the principal to employ other canvassers in the agent's territory and deprive him of the commissions on sales made by them without first giving the agent notice of an intention to employ other canvassers. Hilliker *v.* Allen, 128 Iowa 607, 105 N. W. 120.

18. Browne *v.* Gault, 19 Quebec Super. Ct. 523.

An agreement by vendor and purchaser that the latter shall pay the commissions agreed upon between the vendor and plaintiff for the services of the latter in negotiating the sale does not relieve the vendor of liability to plaintiff, in the absence of an agreement on plaintiff's part to release the vendor. Burnett *v.* Casteel, (Tex. Civ. App. 1896) 36 S. W. 782.

19. Stone *v.* Fox Mach. Co., 145 Mich. 689, 109 N. W. 659 (where a manufacturer employed an agent to sell his product and subsequently a corporation to carry on the business was formed, and it continued dealing with the agent, and the transactions between the manufacturer and the agent were settled at the time the relations between the corporation and the agent began, and it was held that the agent had no claim against the manufacturer); Sinclair *v.* Galland, 8 Daly (N. Y.) 508; Burnett *v.* Casteel, (Tex. Civ. App. 1896) 36 S. W. 782; Gunn *v.* Showell's Brewery Co., 18 T. L. R. 659, 50 Wkly. Rep. 659 [*affirmed* in 17 T. L. R. 563] (where defendant brewery desired to acquire some public-houses in a particular district, and agreed to pay plaintiff a commission on all licensed property it might purchase through his introduction, and subsequently defendant abandoned that idea, and instead promoted a new company, which ultimately acquired certain licensed property originally brought to the notice of defendants by plaintiff, and it was held that, as the new company was merely ancillary to the old, the commission was payable by defendant). And see Blassingame *v.* Keating Implement, etc., Co., (Tex. Civ. App. 1903) 74 S. W. 344. See also *supra*, III, B, 2, a, (I), (A).

Liability as between principal and adverse party.—The seller's agent cannot recover commissions from the buyer. Lorimer *v.* Boylan, 98 Mich. 18, 56 N. W. 1043; Browne *v.* Gault, 19 Quebec Super. Ct. 523, holding that an agent acting for and representing the vendor of real estate is not entitled, in the absence of an agreement to that effect, to recover from the purchaser a commission on the value of a property belonging to the latter, which was accepted by and transferred to the vendor in part payment of the price. Nor can the buyer's agent recover a commission from the seller. Lorimer *v.* Boylan, *supra*; Harnickell *v.* Parrot Silver, etc., Co., 117 N. Y. 644, 22 N. E. 1079; Yates *v.* Killman, (Tenn. Ch. App. 1900) 57 S. W. 221. So the agent of a money lender cannot charge a borrower commissions, unless employed by him to procure the loan. Cranston *v.* Nields, 5 Harr. (Del.) 372. And a person appointed by a number of subscribers for stock in a proposed joint stock company, to receive and remit their subscriptions to the head office of the company, is not the agent of the latter, and has no claim against the company for his services. Quebec, etc., Steam Nav. Co. *v.* Cunard, 2 N. Brunsw. 90. See also *supra*, III, B, 2, d, (III). Where, however, a debtor, by a compromise with his creditors, gives one of them claims to collect and with the proceeds pay his debts, the creditor thus chosen is the joint mandatary of both parties, but the debtor is liable for a commission to the agent. Clamagaran *v.* Sacerdotte, 8 Mart. N. S. (La.) 533. And see Cash *v.* Kennion, 11 Ves. Jr. 314, 32 Eng. Reprint 1109.

20. *Georgia.*— Cotton States L. Ins. Co. *v.* Mallard, 57 Ga. 64.

Iowa.— See Barnes *v.* Hogate, 103 Iowa 743, 72 N. W. 688.

Louisiana.— Hornbeck *v.* Gilmer, 110 La. 500, 34 So. 651. See, however, Brown, etc., Co. *v.* Haigh, 113 La. 563, 37 So. 478.

Nebraska.— Furnas *v.* Frankman, 6 Nebr. 429.

Texas.— Eastland *v.* Maney, 36 Tex. Civ. App. 147, 81 S. W. 574.

See 40 Cent. Dig. tit. "Principal and Agent," § 215.

A private agreement between principal and agent by which the latter is to pay the subagent does not preclude the subagent from recovering from the principal, if the agreement was not brought to his notice. Furnas *v.* Frankman, 6 Nebr. 429. Secret or private instructions in general see *supra*, II, A, 2, b.

If an agent employs a subagent in his own behalf and not as agent, the principal is not liable to the subagent. Dale *v.* Hepburn, 11 Misc. (N. Y.) 286, 32 N. Y. Suppl. 259 [*affirmed* in 154 N. Y. 763, 49 N. E. 1095]; Houston County Oil Mill, etc., Co. *v.* Bibby, 43 Tex. Civ. App. 100, 95 S. W. 562.

Amount of subagent's compensation see *infra*, III, B, 2, h, (I).

ordinarily not liable to the subagent.[21] If an agent in employing a subagent acts for himself and not for his principal, he is liable to the subagent for compensation;[22] and the same is true where the agent has no authority to employ a subagent,[23] and where, although he has such authority, he fails to disclose his principal.[24] If, on the other hand, an agent in employing a subagent acts for a disclosed principal and within the scope of his authority, he is not liable to the subagent;[25] and much less is he liable where he does not in fact employ the subagent or agree to compensate him.[26] Agents acting for a common principal may agree to share the

Payment to agent as payment to subagent see *infra*, III, B, 2, i, (I).

Validity of agreement between principal and subagent for extra compensation see *supra*, III, B, 2, d, (IV).

21. *Illinois.*— Fudge *v.* Seckner Contracting Co., 80 Ill. App. 35.

Kansas.— Hanback *v.* Corrigan, 7 Kan. App. 479, 54 Pac. 129.

Kentucky.— Burger *v.* Allen, 71 S. W. 641, 24 Ky. L. Rep. 1418.

Missouri.— Atlee *v.* Fink, 75 Mo. 100, 43 Am. Rep. 385.

New York.— Rice *v.* Poost, 78 Hun 547, 29 N. Y. Suppl. 553. And see Dale *v.* Hepburn, 11 Misc. 286, 32 N. Y. Suppl. 269 [*affirmed* in 154 N. Y. 763, 49 N. E. 1095].

Pennsylvania.— De Baril *v.* Campoy, 17 Phila. 383.

Texas.— Williams *v.* Moore, 24 Tex. Civ. App. 402, 58 S. W. 953.

United States.— Union Casualty, etc., Co. *v.* Gray, 114 Fed. 422, 52 C. C. A. 224; Jenkins *v.* Funk, 33 Fed. 915.

England.— Schmaling *v.* Thomlinson, 1 Marsh. 500, 6 Taunt. 147, 1 E. C. L. 549.

See 40 Cent. Dig. tit. "Principal and Agent," § 215.

An agent to sell has no authority to agree in behalf of his principal to pay a third person a commission on sales made by the latter. Atlee *v.* Fink, 75 Mo. 100, 43 Am. Rep. 385; Rice *v.* Post, 78 Hun (N. Y.) 547, 29 N. Y. Suppl. 553; De Baril *v.* Campoy, 17 Phila. (Pa.) 383; Jenkins *v.* Funk, 33 Fed. 915.

By recognizing the subagent and accepting the benefit of his services, the principal does not necessarily become bound to pay his compensation. Hanback *v.* Corrigan, 7 Kan. App. 479, 54 Pac. 129; Homan *v.* Brooklyn L. Ins. Co., 7 Mo. App. 22; Carroll *v.* Tucker, 2 Misc. (N. Y.) 397, 21 N. Y. Suppl. 952; Williams *v.* Moore, 24 Tex. Civ. App. 402, 58 S. W. 953. And see Brown *v.* Scott, 91 Wis. 674, 65 N. W. 499. See, however, Hornbeck *v.* Gilmer, 110 La. 500, 34 So. 651; Clark *v.* Lillie, 39 Vt. 405; Mason *v.* Clifton, 3 F. & F. 899.

22. *Iowa.*— Triplett *v.* Jackson, 130 Iowa 408, 106 N. W. 954.

Minnesota.— Scovell *v.* Upham, 55 Minn. 267, 56 N. W. 812, so holding, although the agent himself receives nothing from the principal.

New York.— Dale *v.* Hepburn, 11 Misc. 286, 32 N. Y. Suppl. 269 [*affirmed* in 154 N. Y. 763, 49 N. E. 1095]. And see Campbell *v.* Porter, 46 N. Y. App. Div. 628, 61 N. Y. Suppl. 712.

Texas.— Houston County Oil Mill, etc., Co. *v.* Bibby, 43 Tex. Civ. App. 100, 95 S. W. 562.

Wisconsin.— Russell *v.* Andrae, 79 Wis. 108, 48 N. W. 117, where it appeared that an agent to sell lands employed a subagent, and they gave an option thereon, which the holder surrendered before its expiration; that the subagent secured another customer, who desired an option, and, on reporting the fact to the agent, stated that he had forgotten his name; that thereupon the subagent's name was substituted in the surrendered option for that of the original option holder in the first two places where it occurred, but by inadvertence was not substituted in two other places; that the agent then gave him the instrument, saying that it would do until they could procure an extension of the option from the owner; that both understood that it was only for use with the customer; and that the subagent made no use of it, and afterward the customer purchased directly from the owner, whereupon the latter paid the agent the agreed commission; and it was held that the taking of the option by the subagent did not change his position from that of an agent to sell to that of an intending purchaser, and he was not estopped thereby from claiming his share of the commission.

See 40 Cent. Dig. tit. "Principal and Agent," § 215.

And see Wyman *v.* Snyder, 112 Ill. 99, 1 N. E. 469.

23. Hanback *v.* Corrigan, 7 Kan. App. 479, 54 Pac. 129. And see Campbell *v.* Porter, 46 N. Y. App. Div. 628, 61 N. Y. Suppl. 712.

24. Keener *v.* Harrod, 2 Md. 63, 56 Am. Dec. 706.

Liability of agent generally where principal is undisclosed see *infra*, III, C, 1, b, (II).

25. Cotton States L. Ins. Co. *v.* Mallard, 57 Ga. 64; Hoyt *v.* Hoyt, 73 N. H. 549, 64 Atl. 18, where plaintiff applied to a motor company for an agency to sell automobiles, and was referred to defendant, who was then the motor company's agent in the locality in question; and plaintiff was informed by defendant that he would have to purchase or sell a machine in order to be appointed an agent, together with the time and terms on which such sales might be made, and it was held that defendant acted as agent of the motor company, and not for himself, and hence was not liable to plaintiff for commissions on sales made.

26. Hubbard *v.* New York, etc., Inv. Co., 14 Fed. 675.

commission to become due, in which event whichever one receives the commission is liable to the other for his share.[27]

h. Nature and Amount of Compensation[28] — (i) *In General.* The nature and the amount of an agent's compensation are generally determined by the contract of agency.[29] The compensation quite commonly takes the form of a commission to be computed on the amount of business done — sales or purchases effected, loans made or procured, moneys collected or disbursed, etc.[30] Less frequently compensation takes the form of a share in the profits of the business done

27. Loan *v.* Gillmor, 165 Pa. St. 643, 30 Atl. 989.

Validity of agreements by agents of adverse parties for division of commission see *supra*, III, B, 2, d, (III).

28. Amount of compensation as affected by termination of agency before full performance see *supra*, III, B, 2, b.

Express and implied contracts for compensation see *supra*, III, B, 2, a, (II), (B).

29. See cases cited *infra*, note 30 *et seq.*

30. See cases cited *infra*, this note.

Commission is an allowance to one who manages the affairs of others for his services therein, and is usually ascertained by a percentage on the value of the property sold, or amount of business done. It is not limited to a compensation or percentage on the receipt, payment, or transmission of money or its equivalent. Stevenson *v.* Maxwell, 2 Sandf. Ch. (N. Y.) 273 [*reversed* on other grounds in 2 N. Y. 408].

Implied acceptance by agent of principal's terms.— Where the principal offers the agent a specified commission if he will perform a certain service, and the agent proceeds to perform, he thereby accepts the offer, although, before commencing performance, he rejected it in terms. Moore *v.* Maxwell, 2 C. & K. 554, 61 E. C. L. 554.

Construction of contract as to amount of commission see Northwestern Imp. Co. *v.* Rowell, 52 Minn. 326, 54 N. W. 186 (where plaintiff corporation agreed to act as agent for defendant, selling goods and making settlements with purchasers, and for these services it was to receive ten per cent of the net amount of settlements, one third to be paid on gross amount of sales on acceptance of orders, one third on shipment of goods, and balance on the making of settlements; and it was held that, on termination of the agency by mutual consent, plaintiff was entitled to ten per cent on all settlements previously made, six and two-thirds per cent on the goods shipped, and not settled for, and three and one-third per cent on orders accepted, and not yet filled); Buffington *v.* Brand Stove Co., 86 Mo. App. 160; Ashley *v.* Wrought-Iron Bridge Co., 54 Hun (N. Y.) 634, 7 N. Y. Suppl. 361; Doty *v.* Case, etc., Thresher Co., 50 Hun (N. Y.) 595, 3 N. Y. Suppl. 510 (where after expiration of a written contract by which plaintiff sold machines for defendant, plaintiff was orally employed to sell machines under an agreement that plaintiff should have "the commissions," but nothing was said as to their amount, and it was held that, defendant having accepted an order for a machine procured by plaintiff under this agreement, plaintiff's commission should be the same per cent as that provided for in the written contract); Ransom *v.* Wheelwright, 17 Misc. (N. Y.) 141, 39 N. Y. Suppl. 342; Brown *v.* McCaul, 6 S. D. 16, 60 N. W. 151; Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227 (holding that where a contract describing a tract of land which plaintiff therein agreed to purchase from defendant for other parties stipulated that when the sale was completed defendant was to pay plaintiff five hundred and thirty dollars, it evidenced an agreement to pay the amount named as a commission to plaintiff); Biggs *v.* Gordon, 8 C. B. N. S. 638, 98 E. C. L. 638.

Commission on value of land sold; deduction of encumbrances.— It has been held that in the absence of an agreement to the contrary a commission for selling land will be estimated on the whole value of the land without regard to encumbrances. Culverwell *v.* Birney, 11 Ont. 265.

Computation of commission for sale on part credit.— An agent is usually entitled to commission upon the whole amount of the purchase-money whether paid in cash or secured by mortgage; but where the owner himself conducts a part of the negotiations, a verdict calculated upon the cash payment will not be disturbed. Wolf *v.* Tait, 4 Manitoba 59.

Computation of commission for sale where property is accepted in payment.— Where an agent effects a sale of his principal's land as for a specified sum in cash, but the principal accepts property in payment, the agent is entitled to a commission based on the real price, not a fictitious price or a price so regarded by the parties to the exchange. But if the parties to the exchange, or the principal and his agent, judge the property taken in payment to be worth the price named, that price is not fictitious, even though in fact the property is of less value. Wakefield *v.* Merrick, 38 Vt. 82.

Partial commission where principal or outside agent intervenes.— It has been held that an agent who finds a purchaser for his principal's land is not entitled to the full commission, where an outside agent intervenes and closes the sale. Murray *v.* Curry, 7 C. & P. 584, 32 E. C. L. 771; Glines *v.* Cross, 12 Manitoba 442. In any event an arrangement by which two agents have authority to sell the same land, and one is to receive one per cent commission in case of a sale by the other, cannot be construed as giving the other the right to sue for two per cent commission on finding a customer who was wrongfully rejected by the principal. Lorimer *v.* Boylan, 98 Mich. 18, 56 N. W. 1043. So it has been

by the agent,[31] or a share in the land acquired by him for the principal.[32] Sales agents are sometimes allowed to retain all that they can obtain for the property

held that an agent who procures a purchaser but who fails to obtain a binding contract from him is not entitled to full commissions, although the principal and the purchaser subsequently carry out the purchase. Boughton *v.* Hamilton Provident Soc., 10 Manitoba 683. But a verdict for less than the full commission has been sustained where the principal conducted part of the negotiations. Wolf *v.* Tait, 4 Manitoba 59.

Proportionate commission.—Where an agent is employed to procure the loan of a specified sum for a certain commission, and a less sum is loaned, he is not entitled to a lesser commission in proportion, unless it appears that his services were reasonably worth the lesser commission. Diltz *v.* Spahr, (Ind. App. 1896) 42 N. E. 823. And the same rule applies where an agent is employed to sell land for a specified price for a certain commission, and the land is sold for a less price. Blackwell *v.* Adams, 28 Mo. App. 61.

Commissions on collections.—A bank holding a judgment agreed to pay plaintiff one half of anything she could collect thereon, and after suit brought and attachments levied the bank caused the same to be dismissed, and settled with the judgment debtor for an amount much less than the face of the judgment. In a suit to recover plaintiff's proportion of the amount due on such judgment there was no testimony tending to show that the debtor owned any particular property or credits which would be covered by the attachment liens except the mere opinion of plaintiff's father that the debtor had inherited from his father's estate more than sufficient to pay the judgment. It was held that plaintiff was only entitled to recover one-half of the amount for which the claim was settled by the bank. Sowles *v.* Plattsburg First Nat. Bank, 130 Fed. 1009. So, under an agreement for collecting a claim, which, after describing the claim, stated that the "collection charges upon above will be 25 per cent.," the collector is not entitled to the stipulated percentage on the face of the claim, but only on the sum actually collected. Shead *v.* Hinman, 122 Cal. 70, 54 Pac. 388. A real estate agent employed to collect the rents on a lease taken in his name for the owners, but not negotiated by him, is not entitled to a commission for the whole life of the lease, but only to commissions for collecting the rent while employed for that purpose by the owners. Lucas *v.* Jackson, 140 Pa. St. 122, 21 Atl. 310.

Commissions on disbursements.—Where one takes charge of a farm under a contract which provides that he "is to receive 5 per cent. of the money used or collected," the contract will be construed as allowing him five per cent of all disbursements made in accordance with the terms of the contract, as well as five per cent of all moneys collected. Whitmore *v.* Nelson, (Tex. Civ. App. 1895) 29 S. W. 521.

Commissions on gross sales are frequently provided for by the contract of agency. See Graver's Appeal, 1 Lanc. L. Rev. (Pa.) 227. Where a contract provides for the payment as royalties to sellers of a certain article of "a sum equal to 20 per cent. of the amount of the gross sales made by them," the amount to be allowed is twenty per cent of the actual gross sales after deducting discounts allowed to customers. Seven Sutherland Sisters *v.* McInnerney, 24 Misc. (N. Y.) 720, 53 N. Y. Suppl. 771. Under a contract for commissions to be paid a general manager of sales of a bicycle department, which provides that the commissions should be computed on the gross sales, after deducting "all wheels returned or taken back, either in exchange for new wheels or for any other reason," it was held that the words "wheels returned or taken back" referred to wheels which had once belonged to the employer and had been sold by it, and were returned to or taken back by the employer; and that those words do not authorize any deduction from the gross sales for wheels made by others, which never before belonged to the employer, but are by the general manager, by consent of his employer, taken as part payment for new machines sold. Wheelock *v.* Fisher, 93 Ill. App. 491.

Commissions on net income see Grinton *v.* Strong, 148 Ill. 587, 36 N. E. 559.

31. See for example Marks *v.* Davis, 72 Mo. App. 557 (holding that where a portion of a salesman's compensation depended on the profits on his sales, slips made out monthly by an employee of the firm in accordance with a custom of the firm, and sent to the salesman, purporting to show the profits on his sales, were binding on the firm); Paine *v.* Howells, 90 N. Y. 660 (holding that under a contract by which a salesman is to receive for his services a share of the "net profits" of the business, the interest on capital invested by the principal in the business is not an expense to be deducted in ascertaining the net profits); Bergen *v.* Hitchings, 22 N. Y. App. Div. 395, 48 N. Y. Suppl. 96 (where plaintiffs, wholesale grocers, employed defendant as traveling salesman, and agreed to pay him one third of the profits of his sales, and it was held that, in computing profits, defendant was entitled to share the benefit of any discounts obtained by plaintiffs on cash purchases); Heidenheimer *v.* Walthew, 2 Tex. Civ. App. 501, 21 S. W. 981 (where defendant employed plaintiff to charter a ship for him, agreeing to pay him therefor one fourth of the profits of the voyage, and defendant associated a third person with him in the enterprise of loading the vessel, and divided the profits with him, and it was held that this arrangement did not prevent plaintiff from recovering from defendant one fourth of the entire profits).

32. See cases cited *infra*, this note.

in excess of a fixed price;[33] and purchasing agents are sometimes allowed to retain the difference between a specified sum and a less sum for which they may be able to buy the property.[34] Compensation is sometimes fixed at a sum certain, in which event the agent, on performance of his undertaking, is entitled to that amount,[35] although it is more than his services are reasonably worth;[36] and he is entitled to no more, although his services were worth more.[37] In the absence of any stipulation in the contract fixing the amount of compensation or a method for determining it, the law allows the agent a reasonable compensation;[38] and in determining this the courts will generally give controlling effect to such custom or usage as may prevail in the trade or profession to which the particular agent

Rights of locator of public lands.—A locator is not entitled to a "locative interest" in the land located, as compensation for his services, unless he shows a contract to that effect with the owner of the certificate. Sypert *v.* McCowen, 28 Tex. 635; Branch *v.* Jones, 2 Tex. Civ. App. 550, 22 S. W. 245. To give a lien on lands to the locator, there must be a contract with the owner or his agent. The locator is not entitled to a part of the land by custom for his services. Steele *v.* Payne, 2 A. K. Marsh. (Ky.) 187. A contract between the owner of a land certificate and a locator for the location of the land, the latter to have a portion thereof when titled, is a contract for its joint acquisition, and the owner of the certificate holds the title in trust for the locator to the extent of the interest of the latter. Doss *v.* Slaughter, 53 Tex. 235. Where the owner of a right to locate public land executed a power of attorney, authorizing the grantee therein named to make such location, and to receive for his services one third of the land thus located, such grantee becomes the equitable owner of an undivided one third of the land, wherever located, and in such cases the attorney in fact occupies the position of the vendee in a land contract after full payment of the contract price, and can maintain partition or compel specific performance. Stieler *v.* Hooper, 66 Tex. 353, 1 S. W. 317. If the certificate be located on separate tracts of land, the interest of the locator attaches to each; if but a portion of the certificate is located and titled, the locator *prima facie* is entitled to a *pro rata* interest in such portion. Doss *v.* Slaughter, *supra*. Where a locator of land contracted to receive in payment one third, the second choice of a division into three parts, the division should be made into an equal number of acres, regardless of its value. Withers *v.* Thompson, 4 T. B. Mon. (Ky.) 323.

However, a contract that if land is sold at a specified price, the owner will allow to his agent in the purchase and sale of the lands a certain portion of the net profits, is only a personal contract, and gives the agent no interest in the land. Le Moyne *v.* Quimby, 70 Ill. 399. So where A contracted with B that with A's money B should purchase and sell lands in the name of A, and for his services should have half the profits, B had no title to or interest in the land, but only an interest in the profits. Porter *v.* Ewing, 24 Ill. 617.

33. Rosenfield *v.* Fortier, 94 Mich. 29, 53 N. W. 930, holding, however, that where a dealer in tobacco furnished plaintiff, his salesman, a list of prices for which sales were to be made, agreeing to pay plaintiff a certain commission and "whatever above these prices" he could get, the fact that plaintiff was afterward allowed to make sales for less than the list price did not entitle him to claim all he received in excess of such reduced price. See *supra*, III, B, 2, e, (IV).

Where, however, a principal agreed to pay his agent a certain commission on the amount for which land was sold, if the agent furnished a buyer at not less than a certain price, and the agent furnished a purchaser at more than that price, the agent was not entitled to any surplus above the fixed price. Blanchard *v.* Jones, 101 Ind. 542.

34. Smythe *v.* O'Brien, 198 Pa. St. 223, 47 Atl. 1102, holding that plaintiff having authorized defendant to negotiate for and purchase certain stock for him for certain land and eight thousand dollars in cash, they to have as compensation any amount they could save out of the eight thousand dollars, and such agreement being without deception or misrepresentation, they, having obtained the stock for the land only, are entitled to retain the eight thousand dollars, although that is much more than their services were worth.

35. Wells *v.* Parrott, 43 Ill. App. 656.

36. Adam *v.* Oteri, 36 La. Ann. 386.

37. Carruthers *v.* Diefendorf, 66 N. Y. App. Div. 31, 72 N. Y. Suppl. 941 [*affirmed* in 174 N. Y. 549, 67 N. E. 1081], so holding, although he based his fixed charge on the mistaken supposition that he would be allowed to make an individual profit in carrying out the agency.

38. Triplett *v.* Jackson, 130 Iowa 408, 106 N. W. 954; Erben *v.* Lorillard, 2 Keyes (N. Y.) 567.

What constitutes reasonable compensation see Cone *v.* Newkirk, 24 Ill. 508 (where A, acting as agent of B with the understanding that he was to be reasonably compensated for his services, procured a contract for the sale of certain lands from the owner, and assigned it to B, the assignment expressing a certain consideration, and it was held that such consideration must be taken as fixing the amount of his compensation in the absence of evidence to the contrary); Cowgill *v.* Pickerell, 98 Iowa 465, 67 N. W. 384 (holding that for acting as defendant's agent

belongs.[39] The principal sometimes guarantees that the agent's contemplated commissions shall amount to a minimum sum in a given period;[40] but an agreement by the principal to advance to the agent, at regular intervals during the term of service, certain sums on account of commissions to be earned does not constitute such a guaranty.[41] It has been held that a subagent appointed for the principal by his general agent is not bound by secret limitations on the power of the latter to fix the salaries of subagents;[42] but that where an agent employs a subagent in his own behalf, the amount of the subagent's compensation cannot, as between him and the principal, exceed the amount fixed in the contract existing between the principal and the agent.[43] It has been held that interest on the amount of the agent's claim may be allowed in a proper case.[44]

(II) *Deductions and Forfeitures.*[45] By the terms of the contract of

in the cultivation and lease of a farm for a number of years, and the sale thereof, two hundred dollars was not excessive compensation); Parrish *v.* Bradley, 73 Mich. 610, 41 N. W. 818 (where it appeared, in an action for services in going to L, and looking after defendant's business there, that defendant had informed plaintiff that he was going to L himself in a few days, but nothing was said as to the precise time when plaintiff should go to L, and he had no instructions as to his manner of procedure, and it was held that, while he might recover for a few days spent at L, he was not justified in remaining there thirty days, waiting for defendant, and could not recover therefor); McClellan *v.* Duncombe, 52 N. Y. App. Div. 189, 65 N. Y. Suppl. 19 (holding that where plaintiff had acted as defendant's agent in renting property valued at one hundred and eighty thousand dollars, and had previously made memorandum relating to the same, it was error to allow plaintiff one per cent as compensation for valuing the property after having been discharged, since the appraisement was made from information acquired while acting as defendant's agent for the renting of the property); West New Jersey Soc. *v.* Morris, 6 Fed. Cas. No. 3,065, Pet. C. C. 59 (holding that an agent for the sale and management of the estates of absent proprietors was entitled to ten per cent on all collections made by him and remitted, and to a *per diem* allowance for the days spent by him in the management of the estates); *Ex p.* Jones, 1 Rose 29, 17 Ves. Jr. 332, 34 Eng. Reprint 128.

39. See cases cited *infra*, this note.

Compensation for selling land.— If no rate of compensation is fixed by the contract of employment, an agent who effects a sale of land for his principal may be awarded the commissions customarily paid for that service to real estate brokers, although he is not such. Stewart *v.* Soubral, 119 La. 211, 43 So. 1009; Ruckman *v.* Bergholz, 38 N. J. L. 531. And see Murray *v.* Curry, 7 C. & P. 584, 32 E. C. L. 771. However, he is not entitled to that amount if his services are not reasonably worth it; and if his services are worth more than the customary commissions he is entitled to more. Erben *v.* Lorillard, 2 Keyes (N. Y.) 567. See, however, Stewart *v.* Soubral, *supra*. And commissions, although a proper basis of compensation for brokers and agents of that character, do not furnish a correct measure of damages for a case where a person not engaged in that kind of business has merely introduced the seller to the purchaser, although the seller promised to pay for finding a customer for the estate. Lyon *v.* Valentine, 33 Barb. (N. Y.) 271.

40. Jones *v.* Dunn, 3 Watts & S. (Pa.) 109, where plaintiffs proposed to defendant to act as their agent at Canton for a term of years, engaging to make consignments to an amount that would insure his commissions to amount to twenty-five thousand dollars per annum, at least; and subsequently they bound themselves to the fulfilment of it by the payment of the above sum annually, although from unforeseen events they should not ship the amount that would produce that sum; and one of the stipulations also was that defendant's commissions should be invested in return cargoes, as his separate property, at Canton; and defendant agreed to the proposal for a term of two years; and in the first year the commissions did not equal twenty-five thousand dollars, and the next year they considerably exceeded it, so that together they exceeded fifty thousand dollars; and it was held that the commissions were to be charged separately for each year, and that defendant was entitled to have his commissions the first year made up to twenty-five thousand dollars, and to retain all he received the second year. *Compare* Callaway *v.* Boroughs, (Tex. 1892) 19 S. W. 611.

41. Menage *v.* Rosenthal, 187 Mass. 470, 73 N. E. 537; Wilcox *v.* Baer, 85 Mo. App. 587; Souler *v.* McDowell Garment Mach. Co., 38 Misc. (N. Y.) 786, 78 N. Y. Suppl. 836.

The rule seems to be otherwise in some lines of trade. Christopher *v.* Hechheimer, 127 Mich. 451, 86 N. W. 959.

42. Cotton States L. Ins. Co. *v.* Mallard, 57 Ga. 64.

43. Brown *v.* Haigh, 113 La. 563, 37 So. 478.

44. Ridley *v.* Sexton, 18 Grant Ch. (U. C.) 580 [*affirmed* in 19 Grant Ch. (U. C.) 146].

Necessity of written demand.—Interest will not be allowed upon a commission until after a demand in writing. McKenzie *v.* Champion, 4 Manitoba 158.

45. **Deductions and forfeitures on account of fraud or misconduct** see *supra*, III, B, 2, d.

agency or otherwise, the amount otherwise due an agent may be subject to forfeiture or deduction for various reasons independent of his fraud or misconduct,[46] as for instance where the principal has incurred losses on account of the default of the customers procured by the agent,[47] or where the principal has made money

46. *Illinois.*— McEwen *v.* Kerfoot, 37 Ill. 530, where an agent sold land, which sale his principal repudiated, and the agent thereafter gave a contract of sale to the purchaser, and it was held that, although the agent was entitled to his commissions, the principal could recoup any expense in removing from his title the cloud put thereon by the improper act of the agent. See, however, Wheelock *v.* Fisher, 93 Ill. App. 491, holding, under a contract for commissions to be paid the general manager of a bicycle department, which provided that the commissions should be computed on the gross sales after deducting "all wheels returned or taken back, either in exchange for new wheels or for any other reason," that when wheels, either returned and taken back or exchanged, were sold again, the general manager was entitled to commissions on said sales, although the contract also provided that the general manager should bear half the losses and have half the profits on all sales of wheels, either returned or taken in exchange.

Kentucky.— Huber Mfg. Co. *v.* Watson, 42 S. W. 110, 19 Ky. L. Rep. 864, holding that where a contract for the payment of commissions to a selling agent provides that no commission is to be allowed or paid "on sale of goods where foreclosure proceedings at any time might become necessary," the agent is not entitled to commissions on the proceeds of a foreclosure sale, but only on payments made before the foreclosure proceedings took place.

Montana.— McCormick *v.* Johnson, 31 Mont. 266, 78 Pac. 500, where the agent failed to pay a debt due the principal from another as he agreed to do in consideration of obtaining the agency.

New York.— Field *v.* Banker, 9 Bosw. 467, holding that while the fact that an agent employed to purchase goods and ship them accepted a bill of lading for the goods exempting the carriers from their common-law liability, and failed to procure insurance, did not forfeit their right to commissions, where the goods were not wholly lost, the principal had a remedy for injury to the goods by way of recoupment or counter-claim to an action by the agent for his commissions.

England.— *In re* Imperial Wine Co., L. R. 14 Eq. 417, 42 L. J. Ch. 5, 20 Wkly. Rep. 966, where the agent of a corporation was appointed its liquidator, and the amount he received as such was deducted from what the corporation owed him as agent.

Canada.— See Culverwell *v.* Birney, 11 Ont. 265, where an amount which the agent had received from the adverse party was deducted from his contract commission.

See 40 Cent. Dig. tit. "Principal and Agent," § 221.

Selling below list price.— Where an employer agrees to pay an employee a commission on orders obtained by him of fifteen per cent, etc., and only a commission of five per cent on all orders which he sells at a lower price than fifty and ten per cent off list of a certain catalogue, such employee was to have fifteen per cent for selling goods at a certain price, or if the employer should do so for him, but if the employee in order to make a sale, or if the employer in dealing directly with his customers, was compelled to cut the price below that mentioned, such employee was only entitled to five per cent commissions. Buffington *v.* Brand Stove Co., 86 Mo. App. 160. Where, however, a contract between a company and a local agent provided that the agent should have commissions on all sales secured by his efforts, but that he should stand all cuts made by him below the list price, and sales brought about by the efforts of the local agent were consummated by the general agent at a cut price, the local agent need not stand the cut. Davis *v.* Huber Mfg. Co., 119 Iowa 56, 93 N. W. 78.

Waiver and estoppel.— A technical violation of a contract causing a forfeiture of the agent's commission will be held to have been waived, where no damage resulted to the principal, and he apparently acquiesced in the agent's conduct for some time. Nichols *v.* Bachant, 45 Ill. App. 497. Thus where a contract with a traveling salesman provided that he should give the employer daily reports by post of his location on pain of forfeiture of his salary, and the agent failed to report as required almost from the beginning, but the employer made no complaint, and after the first month of service sent the agent out again under the same contract with the clause as to daily reports eliminated, the employer was estopped to defend an action for the first month's salary on the ground of the failure to give daily reports. Clegg *v.* Gee, 2 Tex. App. Civ. Cas. § 543.

47. Morrison Mfg. Co. *v.* Bryson, 129 Iowa 645, 103 N. W. 1016, 106 N. W. 153 (where it appeared that a contract with a salesman employed to cover certain territory provided that on such orders as the employer should lose the account or take back the goods, any commissions paid were to be charged back; and that subsequently another contract was made whereby the agent was assigned new territory, and it recited that it superseded the other contract; and it was held that the new contract did not release the salesman from liability to refund commissions paid under the first contract, which, under the terms thereof, it became the salesman's duty to refund); Raynor *v.* Buttlar, 87 N. Y. Suppl. 119 (where it appeared that plaintiff was employed by defendant under a contract that plaintiff should stand a third of all loss on customers procured by him; that

advances to the agent during the course of the employment which have not been repaid.[48]

(III) *Additional or Extra Compensation.*[49] Compensation in addition to that specified in the contract of employment cannot be recovered by the agent on account of services which were performed as a mere incident to the fulfilment of his undertaking, and the performance of which, although not expressly called for by the contract of agency, may fairly be regarded as having been within the contemplation of the parties when the contract was made.[50] And in the absence of

a customer procured by plaintiff went into bankruptcy while indebted to defendant, and in an action by plaintiff, he claimed that he should not stand a third of that loss for the reason that he had, after leaving defendant's employ, sought permission to collect the claim, which was refused; that defendant showed that he had used diligence to collect it, and there was no evidence that plaintiff could have obtained any better results than defendant did; and it was held that it was proper to charge plaintiff with one third of the loss); International Harvester Co. *v.* McKeever, (S. D. 1906) 109 N. W. 642 (holding that a harvester machine company, on settlement with its agent, was entitled to reject doubtful or worthless notes taken by the agent on the sale of certain machines where the contract of agency provided that in case sales were made by the agent to parties who were adjudged by the company to have been doubtful or worthless at the time of the sale, the notes taken for such sales should be applied to payment of commissions due the agent upon sales approved by the company, and also that, in case the company should, within three months, find that any notes taken and passed upon at settlement were doubtful or worthless at the time of the sale, then the agent should take such notes and replace them with cash or notes secured by good and responsible parties acceptable to the company). See, however, Hayner *v.* Trott, 4 Kan. App. 679, 46 Pac. 37, holding that where a contract of agency for the sale of machines provided that sales should be for cash, the commission then being payable in cash; on credit, commission payable in notes; or on part credit and part cash, commission payable in part cash and part notes, and stipulated that the agent should "refund any commissions allowed on notes that may afterward prove to be worthless, or otherwise uncollectible," the principal was entitled to recover back only such commissions as the agent had received in cash primarily, or through collecting notes taken by him for commissions, in sales in which the notes taken for the balance of the price proved worthless.

Otherwise in absence of contract.— Where the contract under which an agent undertook to manage the business of his principal at a certain city for a fixed salary and percentage of the net profits contained no guaranty that the agent would make good any loss from failure of customers to pay their accounts, losses accruing from such source cannot be deducted from his fixed salary, but considered only in determining the net profits. A. R. Frank Co. *v.* Waldrup, (Tex. Civ. App. 1902) 71 S. W. 298. And when a traveling salesman employed by a committee of creditors of an assigned estate to make sales on commissions takes an order from a responsible party, he is not liable to a deduction for the expenses of collecting the proceeds of sale from such party, in the absence of any provision in the agreement to that effect. Manley *v.* Hickman, 1 Chest. Co. Rep. (Pa.) 557.

48. Johnston *v.* U. S. Life Ins. Co., (Mass. 1891) 27 N. E. 882; Wilcox *v.* Baer, 85 Mo. App. 587. And see Wrought Iron Range Co. *v.* Young, 76 Ark. 18, 88 S. W. 586. See, however, Luce *v.* Consolidated Ubero Plantations Co., 195 Mass. 84, 80 N. E. 793 (holding that where defendant owed plaintiff commissions for selling its bonds, and they made a written agreement whereby plaintiff relinquished certain claims for commissions and retained others and his employment was ended, and immediately thereafter he was reëmployed under a new agreement whereby plaintiff should receive a commission for the sale of bonds and defendant should make advances against his commission account, the advances were chargeable against commissions to be earned under the new contract and not on bonds sold under the old contract); Christopher *v.* Hechheimer, 127 Mich. 451, 86 N. W. 959 (where plaintiff was employed by defendants as a traveling salesman under a contract providing that he should be paid a sum equal to seven per cent commission on all sales accepted, and that a drawing account of one hundred dollars a month should be allowed him, traveling expenses and drawings to be deducted before payment of commissions, and it was held that the term "drawing account" meant a guaranty of commissions, so that there was no obligation on the part of the salesman to repay the amount so drawn). As to this last holding, however, see *supra*, III, B, 2, e, (IV); III, B, 2, h, (I).

49. Right of agent to retain profit earned in course of agency see *supra*, III, A, 1, d.

Validity of agreement between principal and subagent for extra compensation see *supra*, III, B, 2, d, (IV).

50. Colton *v.* Dunham, 2 Paige (N. Y.) 267 (holding that where a loan was effected by an agent who charged a commission for the service and for becoming security for the repayment, a further commission was not chargeable for paying over the money to his principal, or on his orders); Marshall

an express or implied promise to pay him therefor, an agent cannot recover extra compensation on account of services which are not within the scope of the original contract of agency, and which are not merely incidental to the performance of his undertaking.[51]

v. Parsons, 9 C. & P. 656, 38 E. C. L. 382 (where it appeared that A acted under a written agreement as the commission agent of B in the sale of goods and was paid a commission; that B was a contractor with the admiralty for the supply of a variety of articles, on the sale of which A was paid his commission, and A attended on a number of occasions at Somerset house, where the patterns of these articles were inspected by the government officers; that A sought to charge B for these attendances in addition to his commission; and it was held that if in giving these attendances A was only acting in the discharge of his business as an agent he was not entitled to charge for the attendances). And see Warwick *v.* North American Inv. Co., 112 Mo. App. 633, 87 S. W. 78; Carruthers *v.* Diefendorf, 66 N. Y. App. Div. 31, 72 N. Y. Suppl. 941 [*affirmed* in 174 N. Y. 549, 67 N. E. 1081]; Fish *v.* Hodsdon, 16 N. Y. Suppl. 92. *Compare* Blanchard *v.* Jones, 101 Ind. 542; McClellan *v.* Duncombe, 52 N. Y. App. Div. 189, 65 N. Y. Suppl. 19.

Compensation for selling another's property with principal's.—Where an agent agreed to sell a farm on commission, he was not entitled to commissions on the value of part of the crop which he knew belonged to another and which was deducted from the gross amount received. Barrett *v.* Johnson, 64 Pa. St. 223. So an agent employed to sell machines on commission cannot claim commissions from his employer on sales of attachments used with the machines, not a necessary part thereof, and made by another company, in the absence of evidence of a contract that such commissions would be allowed. McClure *v.* McMichael, etc., Mfg. Co., 20 Montg. Co. Rep. (Pa.) 137.

51. Moreau *v.* Dumagene, 20 La. Ann. 230, so holding where the principal, having an agent in his employ, confers upon him additional powers, which involve greater duties, with no stipulation, express or implied, for additional compensation. And see Warwick *v.* North American Inv. Co., 112 Mo. App. 633, 87 S. W. 78; McClure *v.* McMichael, etc., Mfg. Co., 20 Montg. Co. Rep. (Pa.) 137.

Express contract.—The agent may recover for extra services on an express promise of the principal to pay therefor. Triplett *v.* Jackson, 130 Iowa 408, 106 N. W. 954; Gray *v.* Josselyn, 117 Mich. 23, 75 N. W. 96, holding that an insurance company's contract to allow a state agent whatever it allowed any other state agent of the company, under similar circumstances, in excess of the amount expressed in the written agreement, entitled him to an allowance equal to that of any other state agent, although their services were not precisely identical. And see Taylor *v.* Pullman Automatic Ventilating Co., 87 N. Y. Suppl. 404. However, a gratuity payable to an insurance agent subject to "his accounts being in a condition entirely satisfactory to the company" cannot be recovered where an inspection of the agent's accounts, which he agreed should be conclusive, showed him to be indebted to the company in excess of the gratuity claimed. Metropolitan L. Ins. Co. *v.* Strohmberg, 65 Ill. App. 288. A contract provided that a traveling salesman should receive on sales sixty-five per cent of the profits, and that he was to receive two hundred and seventy-five dollars per month, although his percentage of profits fell below that sum. By a subsequent agreement he was to receive a commission of ten per cent on sales of cigars. The percentage of profits not amounting to the guaranteed monthly salary, he sued for the balance, and also for commissions on cigars. It was held that the commission on cigars was not in addition to his monthly salary, but was to form a part of it. Callaway *v.* Boroughs, (Tex. 1892) 19 S. W. 611.

Implied contract.—Additional compensation for extra services may be recovered on an implied contract to pay therefor. U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88 (holding that the fact that an attorney is employed as an agent to negotiate loans and collect them does not preclude him from rendering and receiving compensation for services of a different character, such as legal services, looking after repairs, and renting property bought in by the principal on foreclosure sales, looking after taxes and insurance on such property, and on other property mortgaged to the principal to secure loans, and the like); Gilchrist *v.* Brooklyn Grocers Mfg. Assoc., 66 Barb. (N. Y.) 390 [*affirmed* in 59 N. Y. 495] (where defendant employed plaintiff to purchase potatoes and ship them to defendant, plaintiff to buy at market value, to furnish a certain number of pounds to the bushel, and to receive a stated commission for buying and storing, and it was held that if plaintiff was to perform other duties or incur other liabilities than shipping and guaranteeing safe delivery, beyond the terms of the agreement, he would be entitled to compensation therefor); Marshall *v.* Parsons, 9 C. & P. 656, 38 E. C. L. 382; Ridley *v.* Sexton, 18 Grant Ch. (U. C.) 580 [*affirmed* in 19 Grant Ch. (U. C.) 146] (where it appeared that R, who was engaged in the lumber business, employed S as his agent, and by letter agreed to pay him ten dollars per one thousand cubic feet on all timber which S manufactured for him, which rate "includes purchasing, superintending the making, and attending to the shipping of the same," R paying all traveling expenses; that S bought a quantity of timber for R, which was not manufactured under the superintendence of S, and it was held that he was entitled to a

(IV) *Damages in Lieu of Compensation.* The general rules of law governing the measure of damages for breach of contract[52] are applied in determining the measure of damages for breach of contract to appoint an agent;[53] also in determining the measure of damages where the principal violates the contract of agency,[54] as where he wrongfully terminates the agency,[55] or wrongfully prevents

reasonable compensation for this service). And see Taylor *v.* Pullman Automatic Ventilating Co., 87 N. Y. Suppl. 404. Where, however, plaintiff sold goods for defendants on commission for more than five years, during which frequent settlements were had and receipts given, and when going among his customers plaintiff was in the habit of making collections from them on account of past sales, and in a few instances rendered a bill and received pay therefor from defendants, and after leaving defendants' employ, he brought an action to recover for such collections, no contract to pay therefor should be implied on defendants' part. Lyons *v.* Jube, 17 N. Y. Suppl. 664. Defendant was employed as general agent within a certain territory by a written contract by which he agreed to devote his entire time to the service of the company, to conduct its business as directed, and was to receive as compensation stipulated commissions on the business done. For more than a year and until his discharge, he rendered a monthly account as required, in which he credited himself with the commissions specified in the contract, and no more. It was held that the fact that he was directed by the company to designate himself on his stationery as "general manager," which he did, or that he performed some services as general manager different from those usually performed by a general agent, did not, under the circumstances and course of dealing, establish an implied promise on the part of the company to pay him for his services as general manager in addition to the commissions fixed by the contract. Montgomery *v.* Ætna L. Ins. Co., 97 Fed. 913, 38 C. C. A. 553.

52. See Damages, 13 Cyc. 155 *et seq.*

53. Courier-Journal Co. *v.* Miller, 50 S. W. 46, 20 Ky. L. Rep. 1811 (holding that where the time of the beginning of plaintiff's agency for defendant, which was to continue as long as satisfactory to defendant, was postponed indefinitely, plaintiff can recover as damages for breach of the contract only compensation for actual outlay of time or money in preparing for the employment prior to notice that defendant would not comply with the contract); American Bldg., etc., Assoc. *v.* Hart, 2 Wash. 594, 27 Pac. 468 (holding in an action for breach of contract to give plaintiff's sole authority to solicit members and collect admission fees for a building association in a certain territory, that plaintiffs, in order to recover more than nominal damages, must show approximately the profit derivable from admission fees, after deducting the cost of collection, and the number of shares they would have sold if other agents had not sold in violation of their contract; and that plaintiffs could not assume that, because other agents sold a certain number of shares, plaintiffs themselves would have sold the same number).

54. See cases cited *infra,* note 55 *et seq.*

55. Norddeutschen Feuer-Versicherungs Gesellschaft *v.* Berthcau, 79 Cal. 495, 21 Pac. 975 (holding that the consideration paid by the agent for his appointment is not necessarily his measure of damages); Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427 (holding that the damages recoverable are such as result naturally, that is in usual course of things, and proximately from the breach); Menage *v.* Rosenthal, 187 Mass. 470, 73 N. E. 537 (holding that the amount of an agent's weekly drawing account does not furnish the measure of damages for his wrongful discharge); Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534 (holding that in a suit by an agent for damages resulting from his discharge during the term of his engagement, his measure of damages is the amount he has lost in consequence); Fish *v.* Hahn, 124 N. Y. App. Div. 173, 108 N. Y. Suppl. 782 (holding that where plaintiff declared on a contract of employment by defendant by which plaintiff was to purchase a lot for defendant, to secure a loan of five thousand dollars thereon, and to superintend the erection of the building on the lot for a compensation equal to ten per cent of the actual cost of the building, and plaintiff was discharged after the contract for the erection had been let, he could not recover, in the absence of proof of the actual cost of the building erected).

Profits; probable sales.— On the revocation of an appointment of an agent for the sale of land, the measure of damages is the profit which would have resulted to the agent had he been allowed to complete the contract, when the recovery thereunder is not greater than the agent's compensation would be, treating a sale by the owner as though made by the agent. Green *v.* Cole, (Mo. 1894) 24 S. W. 1058. Where plaintiff was sole agent for the sale of defendant's mineral water for one year, and before the year expired the agency was transferred to another, plaintiff's measure of damage was the profits he might have realized if defendant had performed its contract. Hence where the agency was transferred to another before the end of the year, proof of the actual sales of water by the new agent during plaintiff's unexpired term is not speculative. Mueller *v.* Bethesda Mineral Spring Co., 88 Mich. 390, 50 N. W. 319. So a machine company employing a salesman under a contract giving him exclusive territory is liable to the salesman for loss of profits on sales which he was deprived of making by reason of the company's violation of the contract in putting other salesmen into

the agent from earning his commission,[56] as by refusing or failing to supply the agent with goods or to fill his orders.[57] The measure of damages to which an exclusive agent is entitled where the principal, in violation of his contract, sells

the territory allotted to him, and for damages resulting from sales made by other salesmen put into the territory after the date of notice to the salesman taking from him a part of the territory, in so far as he was deprived of profits on machines which he had already purchased when the notice was given. But where there was nothing to show that the salesman failed to make sales of all the machines which he had purchased from the company, and no proof of any loss or profit on them except the general statement of the salesman that he had to sell the machines in the best way he could by taking cattle and second-hand machines in exchange, he did not show that he had sustained any damages. White Sewing Mach. Co. *v.* Shaddock, 79 Ark. 220, 95 S. W. 143. Where plaintiff was to receive a fixed annual salary, to be paid in monthly instalments, a portion of which he would be compelled to refund unless at the end of the year his sales reached thirty thousand dollars, and he was not permitted to complete the contract through the wrongful act of defendant, his damages for the unexpired time ought to be based on the amount which it is supposed he would earn during the year. Wilcox *v.* Baer, 85 Mo. App. 587. Defendants employed plaintiff as a traveling salesman, agreeing to supply him with samples, to allow him as compensation one half of the profits on sales effected by him, and to advance to him, by paying his drafts at the commencement of his work, fifty dollars at the end of every two weeks, to be repaid out of his share of the profits, while he was to furnish his own outfit. It was held that, on a breach of defendants by refusing to pay plaintiff's drafts and instructing him to quit work before the expiration of the stipulated term, plaintiff was entitled to recover as damages, not only his share of the profits on sales consummated, but also on sales negotiated so far that it could be ascertained with certainty that they would be completed, and the amount or extent thereof; but that mere expectation, doubtful offers, or other vague assurances of intention to purchase, without expression of quantity or value, are speculative merely and not recoverable; that opinions as to what sales he could or probably would have made are also speculative and contingent; and that he could not recover for the loss of his horse and buggy, the value of his services per month, or the damages to his credit by being thus thrown out of employment. Beck *v.* West, 87 Ala. 213, 6 So. 70. So in an action for breach of a contract to continue plaintiff as defendant's sale agent, and allow him commissions on sales, estimates of probable sales furnish no criterion for fixing damages, and evidence of the amount of profits which might have been made during the term of the contract, based upon the calculation of the probable amount of sales during such term, is inadmissible. Washburn *v.* Hubbard, 6 Lans. (N. Y.) 11.

Measure of damages for wrongful discharge of employee in general see MASTER AND SERVANT, 26 Cyc. 1009 *et seq.*

56. Roberts *v.* Barnard, Cab. & E. 336, holding that in an action for damages by a commission agent for wrongfully preventing him from earning his commission, the damages recoverable where nothing remained to be done by the commission agent to entitle him to his commission if the transaction had gone through are the full amount of the commission which he would have earned.

Refusal to convey to purchaser found by agent.— Where the owner of land agrees with agents to convey the same to a purchaser who was to pay the agents' commission, and afterward refuses to convey, the agents can recover from the owner the amount they would have received as commission from the purchaser had the owner complied with his contract. Atkinson *v.* Pack, 114 N. C. 597, 19 S. E. 628. However, where defendant employed plaintiff to negotiate the sale of a number of lots, and defendant's wife thereafter refused to sign the deeds so that defendant could conclude the sale, plaintiff's measure of damages is his expenses in the transaction, and he cannot recover commissions on the lots not sold. Hill *v.* Jones, 152 Pa. St. 433, 25 Atl. 834.

Sale by principal before expiration of agency.— In an action by agents employed to sell lands, against the owner, who has, in violation of their contract, sold the lands himself within the time allowed the agents for such sale, the proper measure of damages is the profit, if any, which would have resulted to plaintiffs had they been allowed to complete their contract with defendant and the land been sold by them under the contract. Green *v.* Cole, 127 Mo. 587, 30 S. W. 135.

57. *Alabama.*— Union Refining Co. *v.* Barton, 77 Ala. 148, holding that where the principal wrongfully fails to supply the agent with goods, the agent cannot recover as damages the supposed profits which he would or might have realized from sales during the entire period stipulated for the continuance of the contract; that such damages are entirely speculative, and no rule can be laid down by which they can be accurately ascertained or measured.

Iowa.— Howe Mach. Co. *v.* Bryson, 44 Iowa 159, 24 Am. Rep. 735, where a person made a contract with the general agents of a sewing-machine company, by the terms of which he was to rent a room, provide himself with a team, and furnish other necessary means for the sale of machines, and devote his time thereto; and the agents were to furnish him with all the machines he could sell, at a price twenty five per centum below the retail rate, and he performed his undertaking, but the machines were not supplied as agreed; and it was held that the measure of damages was the value of the time lost as the result of the breach, without reference to the profits

his goods in the agent's territory, is the actual loss suffered by the latter.[58] If a

which might have been realized if the contract had been performed.

Kansas.— Osborne *v.* Stassen, 25 Kan. 736, where it appeared that an agent for the sale of machines was to receive a commission of sixty dollars on each machine sold, and he was to set up the machines and put them in operation, which cost him about twenty dollars, and that he was entitled to receive five machines which the principal failed to deliver, and it was held that his measure of damages was the actual loss he sustained, and not necessarily sixty dollars on each machine.

Kentucky.— Smith *v.* Perry, 13 Ky. L. Rep. 683, holding that, defendants having appointed plaintiff their agent for the sale of pianos of a certain kind, and afterward refused to deliver the pianos, plaintiff was entitled to recover his share of the profits upon the number of pianos which he could have sold by reasonable efforts at the price agreed upon.

New York.— Meylert *v.* Gas Consumers' Ben. Co., 26 Abb. N. Cas. 262, 14 N. Y. Suppl. 148, holding that a sole agent for the sale of a patented article within a specified territory, who has abandoned his profession as a physician, and devoted his entire time to the business of the agency, in reliance on his contract with the manufacturers, is entitled to recover from them for their total breach of the contract to furnish him with the articles, not only the amounts which he actually expended in the business of the agency, but also the earnings which the evidence reasonably establishes he otherwise would have made from his profession.

Pennsylvania.— Rightmire *v.* Hirner, 188 Pa. St. 325, 41 Atl. 538, holding, in an action for breach of a contract to sell machines on commission, that where it appears that at the time of the breach the contract had three years to run, but defendants were not bound to furnish any definite number of machines, and could practically terminate the contract at any time by ceasing to manufacture them, the measure of damages is not the profit which plaintiff would have made on his contract, but the value of the contract at the time of breach; and that in considering the value the jury must bear in mind that defendants were not obliged to furnish any specified number of machines, or even to continue their manufacture; that plaintiff's rights under his contract were subject to the contingencies of business and depression of trade, which might tend to reduce the sales, and that in estimating the damages consequent on the loss of the contract, the jury must take into consideration what plaintiff probably could earn in some other employment or occupation during the time which the contract had to run.

Texas.—Kirby Lumber Co. *v.* Cummings, 39 Tex. Civ. App. 220, 87 S. W. 231, holding that a sales agent who has made contracts of sale in his own name, his principal being undisclosed, cannot, as the vendees might do, recover the difference between the contract and the market prices, in the absence of evidence that he has paid the vendees' claims.

Wisconsin.— Taylor Co. *v.* Bannerman, 120 Wis. 189, 97 N. W. 918, where it appeared that defendants rejected an order by which plaintiffs were deprived of a profit; that defendants could not have produced from their quarry sufficient stone to fill this order of plaintiffs, and in addition thereto fill those orders for which they had damages assessed against them for breach of the same contract in the case at bar; and it was held that it was error to allow damages to plaintiffs for the rejection of the order, since it would result in a duplication of damages.

United States.— Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587, holding that where a company manufacturing agricultural steam engines agrees to furnish an agent, who sells on commission, the engines necessary to supply the season's demand, and the agent makes large expenses in advertising, canvassing, and otherwise building up the trade, and proves a heavy demand on him for these particular engines largely in excess of his order to the company, the company, refusing without sufficient cause to furnish the engines ordered, will be held liable for the sum of commissions on the engines ordered, and for the reasonable expenses of the agent in their undertaking.

See 40 Cent. Dig. tit. "Principal and Agent," § 219.

58. LaFavorite Rubber Mfg. Co. *v.* H. Channon Co., 113 Ill. App. 491 (holding that where a party has by contract the exclusive sale rights of particular goods for a specified period within certain territory, and the party granting such rights sells goods within such territory and refuses to allow such sales agent anything on account thereof, such agent can only recover the actual damages which he has suffered, and cannot recover any particular percentage of profit, without proof that he could or would have made the sales in question at a price which would have netted him such percentage of profit); W. G. Taylor Co. *v.* Bannerman, 120 Wis. 189, 97 N. W. 918 (holding that in an action for breach of contract appointing plaintiffs the exclusive agents in a certain territory for the sale of stone from defendant's quarry at a certain price, by which defendants bound themselves to quote no prices and make no sales in plaintiffs' territory, that where it appeared that defendants sold to a customer in plaintiffs' territory stone which plaintiffs had offered to sell to the same customer at the same price plaintiffs would have to pay defendants for the stone under the contract, it was error to award damages to plaintiff therefor, although breach of the contract was established; but that where defendants sold to a customer in plaintiffs' territory stone which otherwise plaintiffs could have sold at an established market price so as to yield a profit, the profit the sale would have yielded plaintiffs was properly allowed as damages). And see

sales agent's commissions are payable in purchase-money notes executed by his customers to the principal, the latter to have the right of selection, the measure of damages to which the agent is entitled on account of the principal's refusal to deliver notes which the principal has selected for him is the actual value of the notes, not their face value.[59]

i. Accounting and Settlement; Payment; Release — (i) *In General.* An accounting and settlement between principal and agent is generally conclusive on the agent,[60] in the absence of mistake.[61] On the other hand if an account is stated between the parties the agent may recover the amount thereby appearing to be due him.[62] The agent may waive compensation;[63] but the fact that an agent informally declares to the principal that a certain amount is due him as compensation does not estop him from subsequently claiming compensation for the same services in a greater sum.[64] Payment to one agent of a commission due to another does not discharge the debt as to the latter.[65] If the agent accepts from a purchaser, in lieu of the cash payment, a conveyance of a tract of land to himself, and the transaction is ratified by his principal, he cannot retain the land and claim commissions to the amount of the agreed value.[66] Title to bonds may be

Mueller *v.* Bethesda Mineral Spring Co., 88 Mich. 390, 50 N. W. 319; American Bldg., etc., Assoc. *v.* Hart, 2 Wash. 594, 27 Pac. 468.

Probable profits see *supra*, note 55.

59. Brown *v.* McCaul, 6 S. D. 16, 60 N. W. 151.

60. Brownson *v.* Fenwick, 19 La. 431, holding that an agent who, after settling his account with his principal, is sued by the latter for money fraudulently retained, cannot claim for services prior to the settlement, which he does not show to be erroneous; they are presumed gratuitous.

61. Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. 564, where it appeared that defendant authorized plaintiff to sell his brewery to an English corporation, the consideration to be paid part in cash and part in debentures, and agreed to give complainant all the price above seven hundred and fifty thousand dollars; that in pursuance of complainant's efforts the sale was effected between defendant and an English agent for seven hundred and ninety thousand dollars, the bonds to be counted at four dollars and eighty-eight and one-fourth cents to the pound sterling; that in a statement made by defendant to complainant's agents, he counted the bonds at four dollars and eighty-four cents to the pound, the current rate of exchange, and the agent settled on that basis, receiving £800 less than if the contract rate of exchange had been used, and gave a receipt in full; and it was held that relief should be granted against the mistake.

62. Werckmann *v.* Taylor, 112 Mo. App. 365, 87 S. W. 44, holding that where an agent called on his principal for the purpose of settling the account between them, and submitted the account, and they went over it, and the principal agreed that all the charges were satisfactory and the account correct, the agent was entitled to recover the balance in his favor shown by the account. See, however, Smith *v.* Redford, 19 Grant Ch. (U. C.) 274, where accounts were delivered in 1862 and 1865 by a trustee and agent to his principal, and the confidential relationship existed for upwards of two years after the latter account had been rendered, and it was held that the accounts were not binding on the principal as stated accounts.

63. Flack *v.* Condict, 66 N. J. L. 351, 49 Atl. 508, where a sales agent had disobeyed instructions in taking a contract for less than the price fixed, and the contract was accepted by the principal on the condition that the agent would waive his commission, and it was held that the evidence was sufficient to show an unconditional waiver and that such waiver was not void for want of consideration.

64. Alliance Ins. Co. *v.* McKnight, 97 Ill. 80.

65. Odum *v.* J. I. Case Threshing Mach. Co., (Tenn. Ch. App. 1895) 36 S. W. 191, holding that the failure of an agent for the sale of property to notify his principal that he claimed commissions on a certain sale until after the principal paid the commission to another who claimed the same does not bar his right to a recovery of the commissions, where the general agent of the principal superintended the making of the sale and was cognizant of the special agent's rights therein); Douglas *v.* Cross, 12 Manitoba 534 (holding that the fact of the recovery by another plaintiff of a commission in respect of the same sale is *res inter alios acta*, and is not in itself material). And see Brodhead *v.* Pullman Ventilator Co., 29 Pa. Super. Ct. 19.

Payment to agent as discharging claim of subagent.— Where a principal notified a subagent that, on the sale of the principal's land, he would be fully protected in the matter of his commission, a payment of the whole commission to the agent, without reserving anything for the subagent, does not release the claim of such subagent against the principal. Hornbeck *v.* Gilmer, 110 La. 500, 34 So. 651. And see Clark *v.* Lillie, 39 Vt. 405.

66. Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303.

Double payment as by allowing additional compensation see *supra*, III, B, 2, h, (III).

transferred to an agent in payment of his commissions, although he has not performed his undertaking.[67]

(II) *Recovery Back of Payments by Principal.*[68] If a principal has paid commissions in ignorance of fraud on the part of the agent forfeiting his right to compensation,[69] they may be recovered back;[70] and commissions paid and received under a mutual mistake are likewise recoverable by the principal.[71]

3. Agent's Right to Reimbursement and Indemnity[72] — **a. Reimbursement.** In the absence of a contrary or inconsistent provision in the contract of employment,[73]

67. American L. & T. Co. *v.* Toledo, etc., R. Co., 47 Fed. 343, where a finance company agreed to negotiate the sale of eight hundred thousand dollars of railroad bonds for a commission of ten per cent payable in the bonds, and afterward the parties to this agreement entered into an agreement with a third person, in which the latter agreed to make a loan, to be secured by pledge of part of these bonds, and it was provided that eighty thousand dollars of the bonds should be appropriated to the finance company in payment of its claims for commission; and it was held that the second agreement passed title to the eighty thousand dollars of bonds to the finance company, although it had not then negotiated a sale of the eight hundred thousand dollars of bonds.

68. Duty of agent to refund commissions overdrawn see *supra*, III, B, 2, h, (II).

69. See *supra*, III, B, 2, d.

70. *Alabama.*— McGar *v.* Adams, 65 Ala. 106.

Nebraska.— Campbell *v.* Baxter, 41 Nebr. 729, 60 N. W. 90.

New York.— Palmer *v.* Pirson, 4 Misc. 425, 24 N. Y. Suppl. 333 [*affirmed* in 144 N. Y. 654, 39 N. E. 494].

Pennsylvania.— Johnson *v.* Alexander, 4 Leg. Gaz. 393.

Washington.—Hindle *v.* Holcomb, 34 Wash. 336, 75 Pac. 873.

United States.— See Sanborn *v.* U. S., 135 U. S. 271, 10 S. Ct. 812, 34 L. ed. 112, where it appeared that defendant notified the secretary of the treasury that a legacy tax was due the United States, and made a contract to collect it, under the act of Cong. of May 8, 1872, authorizing the secretary to employ persons to assist in collecting money due the United States; that the revenue officers knew of the tax before; that when it was due the executor, without any knowledge of defendant, wrote the secretary of the treasury about it, and afterward paid it over to the proper officer; that the latter handed the money to defendant, who had previously called upon him to assist in the collection; that defendant forwarded it to the secretary, with the representation that he had collected it, and received his commission; and it was held that defendant, having performed no service, was not entitled to the commission, and the United States could recover it.

England.— Andrews *v.* Ramsay, [1903] 2 K. B. 635, 72 L. J. K. B. 865, 89 L. T. Rep. N. S. 450, 19 T. L. R. 620, 52 Wkly. Rep. 126, holding that where an agent in effecting a sale of property for his principal has taken a secret commission from the purchaser, the principal, notwithstanding that he has recovered from the agent the amount of the secret commission, is further entitled to recover back the commission which he himself has paid to the agent. See, however, Hippisley *v.* Knee, [1905] 1 K. B. 1, 74 L. J. K. B. 68, 92 L. T. Rep. N. S. 20, 21 T. L. R. 5, holding that where an agent, in effecting a sale of property for his principal, has without fraud received a secret commission or discount in an incidental matter which is not connected with his duty to sell, the principal, while entitled to recover from the agent the secret commission or discount, cannot recover the commission which has been paid by him to the agent for effecting the sale.

See 40 Cent. Dig. tit. "Principal and Agent," § 223.

71. Frick, etc., Co. *v.* Larned, 50 Kan. 776, 32 Pac. 383 (where commissions on credit sales were payable only where the buyers were responsible, and they were paid on the mistaken assumption of the buyers' responsibility); Cleveland School-Furniture Co. *v.* Hotchkiss, 89 Tex. 117, 33 S. W. 855 (where the parties erroneously supposed that the transaction on which commission were paid was valid).

72. Broker's right to reimbursement and indemnity see Factors and Brokers, 19 Cyc. 229.

Factor's right to reimbursement and indemnity see Factors and Brokers, 19 Cyc. 153.

Subrogation of agent to rights of principal on payment of debt due from latter see Subrogation.

73. *California.*— Clyne *v.* Easton, etc., Co., 148 Cal. 287, 83 Pac. 36, 113 Am. St. Rep. 197, holding that where a subsequent agreement creating an agency for the sale of land superseded a former agreement under which defendant had incurred all items of expense charged in the account to that date, and provided that all excess received over a named sum and all crop returns then in hand, or due on account of crops growing on the land for the year, should belong to defendant as compensation, no expenses incurred by defendant, nor any payment to or on account of the vendors prior to the second agreement, can be charged as a credit against its indebtedness arising on the subsequent sale of the land.

Missouri.— Artz *v.* Metropolitan L. Ins. Co., 90 Mo. App. 539, holding that where an insurance agent's contract requires him to pay all the usual and necessary expenses of every kind incident to his agency, and a manual book by which such agent is bound

an agent is generally entitled to reimbursement in respect of moneys advanced to or for account of the principal.[74] The principal is of course liable to the agent for money advanced directly to the principal by the agent in the course of the employment.[75] So if an agent, acting within the scope of his authority and in good faith, expends money for the benefit and account of the principal in the course of the agency, he is entitled to reimbursement.[76] Accordingly the agent

prohibits agents from incurring any expense to the company unless authorized by writing, the company is not liable for expenses incurred for office rent and for lighting and cleaning the office, in the absence of written authority from the company to rent the offices.

Nebraska.— Aultman, etc., Co. *v.* Martin, 37 Nebr. 826, 56 N. W. 622, holding that a stipulation in a contract between a manufacturer of machines and a dealer retailing them on commission that the latter shall pay the freight on machines ordered is material to a settlement of accounts between them, and the retailer cannot be credited with any freight charges paid.

New York.— See Ract *v.* Duviard-Dime, 4 N. Y. Suppl. 156.

Oregon.— Bartholomew *v.* Aumack, 25 Oreg. 78, 34 Pac. 817, holding that under an agreement by a real estate agent to clear certain land, survey and plat it into lots, and advertise and sell it, for a commission of ten dollars on each lot sold, providing that in case of eviction as the result of a pending action the owner shall pay him a designated sum for clearing the land, after which the contract is to become void, the agent cannot recover the expenses of surveying when the action results in eviction.

Texas.— Champion Mach. Co. *v.* Ervay, (App. 1890) 16 S. W. 172, holding that where a written contract of agency for the sale of goods provided that the agents should pay freight charge, store the goods, and keep them insured, and that on a settlement they should hold the unsold goods subject to the principal's order and free of expense, the agents were not entitled to be reimbursed for freight charge paid by them, and evidence of a custom to that effect was not competent.

United States.— Montgomery *v.* Ætna L. Ins. Co., 97 Fed. 913, 38 C. C. A. 553, where a contract of employment of a general agent obligated the agent to employ subagents in his territory, and provided that commissions allowed him on the business done should be in full compensation for his own services and those of his subagents; and also provided that the contract might be terminated at the option of either party, and that in case of its termination before five years the company should be under no obligation to pay the agent anything beyond the commissions earned up to the time of its termination; and it was held that on the termination of the contract by the company within the five years, it could not be held liable to the agent for advances made by him to subagents, and which had never been charged by him to the company in his monthly reports.

England.— See Gray *v.* Haig, 20 Beav. 219, 52 Eng. Reprint 587.

See 40 Cent. Dig. tit. "Principal and Agent," § 224 *et seq.*

However, an agreement by agents not to charge a party for whom they loan money anything for making loans and collecting the interest thereon will not prevent their recovering the cash disbursements necessarily made in foreclosing by advertisement a mortgage taken by them to secure a loan, and the fee paid an attorney for the use of his name in making such statutory foreclosure. Lyon *v.* Sweeny, 91 Mich. 478, 51 N. W. 1106. And a contract by which defendant appointed plaintiff manager of its branch office and agreed to consign goods to him, to remain its property, it to pay him for selling them a sum equal to the difference between the list and trade prices of the articles, and he to send it monthly statements of sales and remit therewith the trade price of goods sold during the preceding month as shown by the statement, is practically construed by the parties as not requiring him to pay the expenses of the business, he having, during the two years the arrangement lasted, sent it monthly accounts of cash receipts and cash payments on blanks furnished by it therefor, in which, under the latter head, appeared items for expenses for salaries, rent, lighting, etc., and having made remittances of balances after deducting such items, which were received without objection. Sherman *v.* Consolidated Dental Mfg. Co., 202 Pa. St. 466, 52 Atl. 1.

74. See cases cited *infra*, note 75 *et seq.*

75. Betts *v.* Planters', etc., Bank, 3 Stew. (Ala.) 18; Welsh *v.* Gossler, 89 N. Y. 540, 11 Abb. N. Cas. 452 [*reversing* 47 N. Y. Super. Ct. 104]; *In re* Patent Felted Fabric Co., 1 Ch. D. 631, 45 L. J. Ch. 318, 24 Wkly. Rep. 507; Zulueta *v.* Vinent, 13 Beav. 215, 51 Eng. Reprint 83; Gooderham *v.* Marlatt, 14 U. C. Q. B. 228; Young *v.* Crossland, 18 U. C. C. P. 312; Hyde *v.* Gooderham, 6 U. C. C. P. 21.

Conclusiveness of accounts.— Where the agent of an investor renders accounts in which he charges himself with interest as having been received, and pays over the balance thereby appearing to be due the investor, he will not, after the investor's death, be heard to say that he did not receive the interest, but merely advanced the amount thereof to the investor by way of accommodation. He may, however, be permitted to recover the interest in the investor's name from the person owing it. Owens *v.* Kirby, 30 Beav. 31, 54 Eng. Reprint 799.

76. *Georgia.*— Thompson *v.* Cummings, 68 Ga. 124.

is entitled to reimbursement on account of reasonable and proper expenses incurred by him in transacting the agency,[77] and also on account of losses or damages

Massachusetts.— Shearman *v.* Akins, 4 Pick. 283, holding that where an agent pays his principal's debts, relying on funds that are withdrawn, or that become unavailable by mistake or accident or by the act of the principal without the agent's fault, an action lies against the principal for money paid to his use.

Minnesota.— Veltum *v.* Koehler, 85 Minn. 125, 88 N. W. 432.

North Carolina.— Irions *v.* Cook, 33 N. C. 203.

Pennsylvania.— Bingaman *v.* Hickman, 115 Pa. St. 420, 8 Atl. 644.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585.

United States.— Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 388.

England.— Warr *v.* Præd, Colles 57, 1 Eng. Reprint 178.

See 40 Cent. Dig. tit. "Principal and Agent," § 224 *et seq.*

Payment of price of property bought for principal.— An agent who buys property for the principal and pays the price pursuant to his authority is entitled to reimbursement on that account. Clifton *v.* Ross, 60 Ark. 97, 28 S. W. 1085 (holding that where a principal requests his agent to purchase for him a certain machine without stating the price to be paid therefor, the agent is authorized to pay the market price therefor, and recover the same from the principal, although the machine does not prove to be what the principal expected); Wyeth *v.* Walzl, 43 Md. 426 (holding that where defendant had, in writing, authorized plaintiff to purchase the property, part to be paid in cash, any payments made by plaintiff imposed an obligation on defendant to repay him without any further request on defendant's part); Spinney *v.* Thurber, 33 Hun (N. Y.) 448 [*affirmed* in 102 N. Y. 652] (holding that where commercial correspondents on the order of a principal make a purchase of property ultimately for him but on their own credit and with their own funds, and such course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed); Mohawk, etc., R. Co. *v.* Costigan, 2 Sandf. Ch. (N. Y.) 306 (so holding where an agent purchased land in his own name on the request and for the benefit of his principal, and paid part of the consideration); Wynkopp *v.* Seal, 64 Pa. St. 361 (holding that where an agent bought and paid for stock at the request of his principal and notified him of the purchase, the principal could not relieve himself from liability for the price paid by showing that the agent did not have the stock at all times for delivery, he having made no demand or offer of payment); Johnston *v.* Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; Green *v.* Feil, 41 Wis. 620 (holding that one who, being duly authorized thereto, orders in his own name but for the use of another as the latter's agent, a chattel from a distant market, which is so forwarded as to make the agent liable therefor to the vendor, has the right to pay for the chattel, and on delivering it to the principal may recover from him the amount so paid, although the chattel on its arrival is not in good condition, and he paid for it after receiving notice of that fact from the principal, who refused to accept it).

Payment of taxes on principal's property.— An agent who, by his principal's direction, took the title to land in his own name in payment of a debt due his principal, is entitled to receive the money advanced by him to pay taxes before being divested of title Warren *v.* Adams, 19 Colo. 515, 36 Pac. 604. So a *negotiorum gestor* has the right to be refunded the taxes assessed on the property and paid by him during the continuance of his possession, although no privilege exists therefor. Erwin's Succession, 16 La. Ann. 132. And where a loan company acted as the agent of plaintiff, to whom it had assigned a mortgage loan, in collecting interest, etc., and after foreclosure proceedings had been brought, paid taxes due, which were a lien on the land, the company was entitled to be reimbursed by plaintiff for the amount so paid. Bush *v.* Froelich, 14 S. D. 62, 84 N. W. 230.

77. *Illinois.*— Selz *v.* Guthman, 62 Ill. App. 624.

Missouri.— Carson *v.* Ely, 28 Mo. 378, where an agent for a transportation line, transacting business as a general commission and forwarding merchant, as agent for the transportation line agreed to forward goods without St. Louis charges; and when the goods reached St. Louis they were not in a condition to be forwarded, and such agent as the general consignee incurred expense in preparing the goods for further transportation; and it was held that, the charges being reasonable and necessary to prepare the goods for shipping, he was entitled to recover such expenses as such general consignee.

Texas.— A. R. Frank Co. *v.* Waldrup, (Civ. App. 1902) 71 S. W. 298, where it appeared that an agent who was employed to manage the business of the principal at a certain city for a fixed compensation and percentage of the net profits employed necessary assistants and paid their salary with his own funds, and it was held that he might recover the amount so paid from his principal.

Vermont.— Allen *v.* Gates, 73 Vt. 222, 50 Atl. 1092, holding that where a landlord and tenant agree on the expiration of the lease that the tenant shall remain in possession, caring for the premises, and collect the rents in his own behalf, and apply them on the landlord's indebtedness to him for a building erected on the premises, the law will imply a promise to allow the tenant for his neces-

sustained by him without his fault in the proper conduct of the agency.[78] If an agent has not been authorized to discharge his principal's liabilities and he is not individually liable therefor, he acts as a mere volunteer in paying them, and is not

sary disbursements in caring for the property.

West Virginia.— Ruffner *v.* Hewitt, 7 W. Va. 585.

See 40 Cent. Dig. tit. "Principal and Agent," § 224 *et seq.*

A traveling salesman is ordinarily entitled to his reasonable expenses. McEwan *v.* Loucheim, 115 N. C. 348, 20 S. E. 519. So where a contract for the employment of a traveling salesman provided that he should receive his expenses in addition to his salary, but that the expenses should not exceed an average of seven dollars per working day, and the employee was required on several occasions to travel and work on Sunday, expenses incurred on such Sundays, actually made in the service, should be included in calculating the average expense per working day under the contract. Ornstein *v.* Yahr, etc., Drug Co., 119 Wis. 429, 96 N. W. 826. However, a contract of employment of a traveling salesman at a salary and an allowance for expenses does not include his board while not on the road. Dowd *v.* Krall, 32 Misc. (N. Y.) 252, 65 N. Y. Suppl. 797.

Counsel fees, costs, etc., incurred by an agent who prosecutes or defends a suit or other legal proceeding in behalf of the principal or in his interest are a proper subject of reimbursement. Selz *v.* Guthman, 62 Ill. App. 624; Chicago First Nat. Bank *v.* Tenney, 43 Ill. App. 544 (both holding that when an agent is sued for an act done in pursuance of his employment, he is not obliged to let judgment go against him, but may defend the suit, and recover from his principal the expenses of such defense, made in good faith); Whitehead *v.* Darling, 5 S. W. 356, 9 Ky. L. Rep. 340; Clamagaran *v.* Sacerdotte, 8 Mart. N. S. (La.) 533; Lyon *v.* Sweeney, 91 Mich. 478, 51 N. W. 1106; Monnet *v.* Merz, 127 N. Y. 451, 27 N. E. 827; Woerz *v.* Schumacher, 37 N. Y. App. Div. 374, 56 N. Y. Suppl. 8 [*affirmed* in 161 N. Y. 530, 56 N. E. 72]; Hunter *v.* Jameson, 28 N. C. 252; Clark *v.* Jones, 16 Lea (Tenn.) 351; Curtis *v.* Barclay, 5 B. & C. 141, 7 D. & R. 539, 4 L. J. K. B. O. S. 82, 11 E. C. L. 402; *Re* Wells, 72 L. T. Rep. N. S. 359, 2 Mason, 41, 15 Reports 169; Talbot *v.* Montmagny Assur. Co., 12 Quebec Super. Ct. 64.

Necessity of actual expenditure.— Defendants agreed to divide the profits of sales made by plaintiff and to pay him two hundred dollars per month, one hundred dollars for his own use and one hundred dollars to be expended for his traveling expenses, and in case plaintiff's share of the net profits should amount to more than the money advanced, such money to apply as part of his share of the profits, and in case his share of the profits did not amount to such sum, the money advanced not to be charged to him. It was held that plaintiff was not entitled to the one hundred dollars for his expenses unless he expended that sum. Weiss *v.* Farrington, 100 N. Y. 619, 3 N. E. 90. It has been held, however, that an agent entitled to charge for expenses may recover the fair worth of his board, even though he actually paid nothing for it in money. Moore *v.* Remington, 34 Barb. (N. Y.) 427.

Unjustifiable expenses.— Defendant, an attorney, was employed to devote part of his time to the benefit of plaintiff corporation, looking to the sale of its stock. Plaintiff rented an office next to that occupied by defendant, it being agreed that the latter should make use of both offices. On some occasions plaintiff's employees occupied defendant's office for not more than two days at a time, during which defendant was compelled to borrow the use of a neighboring office two or three times, but it did not appear that any expense was incurred in so doing. It was held that such facts did not justify defendant in paying sixteen dollars rent for his office out of the company's funds. Gladiator Consol. Gold Mines, etc., Co. *v.* Steele, 132 Iowa 446, 106 N. W. 737. See Armstrong *v.* Pease, 66 Ga. 70.

78. Haskin *v.* Haskin, 41 Ill. 197; Selz *v.* Guthman, 62 Ill. App. 624; Denney *v.* Wheelwright, 60 Miss. 733; Ruffner *v.* Hewitt, 7 W. Va. 585.

Compulsory payments to third persons.— The rule stated in the text is especially true where the agent, without fault, is compelled by legal proceedings to pay out money to third persons on account of responsibilities incurred as agent. Yeatman *v.* Corder, 38 Mo. 337 (holding that if an agent, in consequence of a deception practised on him by his principal, innocently incurs a risk or responsibility, and is compelled to pay damages to a purchaser on account thereof, he will be entitled to remuneration from his principal); Knapp *v.* Simon, 86 N. Y. 311; Hunter *v.* Jameson, 28 N. C. 252 (holding that where an agent appointed to sell articles of personal property sells the articles with a warranty which binds him personally, and judgment is recovered against him for a breach, he is entitled to recover the amount); Elliott *v.* Walker, 1 Rawle (Pa.) 126. And see Leavitt *v.* Parks, 7 N. Brunsw. 282. And he is entitled to reimbursement in such cases notwithstanding error in the judgment against him. Howe *v.* Buffalo, etc., R. Co., 38 Barb. (N. Y.) 124 [*affirmed* in 37 N. Y. 297]; D'Arcy *v.* Lyle, 5 Binn. (Pa.) 441; Clark *v.* Jones, 16 Lea (Tenn.) 351; Frixione *v.* Tagliaferro, 4 Wkly. Rep. 373. So an agent is entitled to reimbursement where the money is paid out pursuant to a rule of an exchange of which he is a member, a breach of which rule would subject him to certain disqualifications as such member. Read *v.* Anderson, 13 Q. B. D. 779, 49 J. P.

entitled to reimbursement;[79] but if he is individually liable he may discharge the liability and recover of the principal.[80] No right of reimbursement arises where

4, 53 L. J. Q. B. 532, 51 L. T. Rep. N. S. 55, 32 Wkly. Rep. 950. And see Ulster County Sav. Inst. *v.* New York Fourth Nat. Bank, 5 Silv. Sup. (N. Y.) 144, 8 N. Y. Suppl. 162.

Refunding money collected for principal.— Where a mortgagee's attorney accepted a note from the redemptioner for the full amount bid on foreclosure, including excessive attorney's fees, and after remitting the amount to the mortgagee excepting attorney's fees, and selling the note, was compelled to refund to the purchaser of the note the excessive attorney's fees, the note having been held invalid as to them, the mortgagee was bound to make good to the attorney the amount so refunded, since the taking of the excessive attorney's fee was for his benefit, and he was primarily liable therefor. Owen *v.* Baxter, 97 Mich. 539, 56 N. W. 930. So where plaintiffs as agents received a draft and forwarded it for collection, not disclosing the agency, and on its being paid at maturity paid over the amount to defendant, who had become entitled thereto by purchase, and the draft proved to be a forgery, and plaintiffs were compelled to refund to the drawee, they were entitled to receive back from defendant the money so paid him. Little *v.* Derby, 7 Mich. 325. Where, however, an attorney collected money on a judgment confessed by a debtor in favor of his client, and paid the same over to defendant, another creditor of the debtor, under direction of his client, in satisfaction of a claim against the debtor on which his client was security, and subsequently, the confessed judgment having been set aside as fraudulent, the attorney, under the decree, paid to the receiver appointed for the debtor the amount collected and paid to defendant, it was held that defendant, not having employed the attorney to collect the judgment, was not bound to repay to him the amount so paid. Flower *v.* Beveridge, 161 Ill. 53, 43 N. E. 722 [*affirming* 58 Ill. App. 431].

Remission of price to principal before collection.— If an agent, in anticipation of the receipt of the amount of sales for his principal, remit such amount, and the purchasers fail to pay, it is not the loss of the agent, but of the principal, unless the agent sells on a *del credere* commission. McLarty *v.* Middleton, 6 Wkly. Rep. 379, 853. *Del credere* agents see FACTORS AND BROKERS, 19 Cyc. 133, 152.

Reduction of damages.— It seems that an agent who, as a result of incurring responsibilities in the transaction of the agency, is arrested on civil process, is not entitled to recover damages for the imprisonment from his principal, where he, the agent, had the means of paying the claim. Leavitt *v.* Parks, 7 N. Brunsw. 282.

79. Whitley *v.* Murray, 34 Ala. 155; Meadows *v.* Smith, 34 N. C. 18 (holding that if an agent, contracting for his principal, discloses the name of his principal, he is not legally responsible to the person with whom he contracts; and if, therefore, he pays any damages arising from the breach of the contract, he cannot recover the amount so paid from the principal, under the count for money paid, unless it was paid at the principal's special instance and request); Wemys *v.* Greenwood, 5 L. J. K. B. O. S. 257 (holding that in general an agent is not warranted in paying a debt due from his principal without a previous authority or a subsequent assent; but where a person fills the character of agent to two parties and receives from one a sum on account of the other, which sum he carries to the account, it seems that he may make any deductions afterward from that sum which the person who paid it would have had a right to make in the form of set-off.

80. *Illinois.*— Searing *v.* Butler, 69 Ill. 575, where a commission merchant, by direction of his principal, sold wheat for the latter, to be delivered at any time during the current year at the seller's option, and after an advance in the price the principal refused to stand to the contract, and the merchant settled with the buyer by paying him the difference between the contract price and the market value, the principal being unknown to the purchaser.

Iowa.— Nixon *v.* Downey, 49 Iowa 166, holding that an agent's right to reimbursement from his principal of moneys paid by him under a contract made for the principal under authority from him is not affected by the fact that he made the contract in his own name, the principal not having instructed him to contract otherwise.

Kentucky.—Thomas *v.* Beckman, 1 B. Mon. 29, holding that where an agent made himself liable as surety of his principal in a bill of sale of a slave, the agent was entitled to recover from his principal the amount paid by him to the vendee on failure of title to the slave.

New York.— Ulster County Sav. Inst. *v.* New York Fourth Nat. Bank, 5 Silv. Sup. 144, 8 N. Y. Suppl. 162, where the agent of a New York principal, pursuant to instructions, sold stock on the New Orleans Exchange for delivery the next day, and delivery being impossible because of the corporation's refusal to transfer the stock, he paid the purchaser the damages awarded him by the exchange, and it was held that he was entitled to reimbursement, although he did not give the principal notice so as to afford the latter an opportunity to compel the corporation to transfer the stock.

Vermont.— Dow *v.* Worthen, 37 Vt. 108, where, in assumpsit for not receiving a lot of poultry purchased by plaintiff as defendant's agent, it was held that the fact that plaintiff became personally responsible for the price of the poultry, the seller being unwilling to trust defendant, did not change the relation of the parties as between themselves.

the agent makes advances, not on the principal's account, but for his own individual benefit.[81]

b. Indemnity.[82] An agent who has incurred an individual liability in the proper conduct of his agency may sue the principal in equity for indemnity, although nothing has been paid in discharge of the liability.[83] It has been held, however, that the principal is not liable at law for the amount in which the agent is liable, where that liability has not been discharged by the agent.[84] At any rate the implied agreement of a principal to indemnify his agent against loss incurred in the performance of his duties does not entitle the agent to recover more than nominal damages for a liability incurred, but from which he has not suffered actual loss.[85]

c. Conditions Affecting Right — (i) *Want of Authority.* An agent who advances money for account of his principal or incurs expenses or losses in transacting the agency is not entitled to reimbursement and indemnity, where the money was paid out or the loss incurred with respect to a matter as to which the agent acted in excess of his authority, or in violation of his instructions.[86]

Wisconsin.— Saveland *v.* Green, 36 Wis. 612, holding that where an agent contracts in his own name for the benefit of the principal, who fails to fulfil the contract, the agent may pay the damage at once without waiting to be sued.

See 40 Cent. Dig. tit. "Principal and Agent," § 224 *et seq.*

81. Woodlief *v.* Moncure, 17 La. Ann. 241, where an agreement for the sale of a plantation provided that fifty thousand dollars should be paid in cash, to be made up in a certain way, and in arranging this matter, a small balance of account between the parties, required to complete the cash payment, was disputed, and the agent who effected the sale paid it to the vendee to prevent the transaction from failing and the consequent loss of his large commission, and it was held, in an action against the vendor to recover this balance, that the suit could not be maintained, as it was clear that plaintiff did not act in making the payment as *negotiorum gestor* for defendant, but for his own advantage. And see Talbot *v.* Montmagny Assur. Co., 12 Quebec Super. Ct. 64. See, however, Bartholomew *v.* Aumack, 25 Oreg. 78, 34 Pac. 817, holding that under a contract by an agent for the sale of lands, providing that when the owner has received a designated amount in actual cash from the sale of the property, if realized during the existence of the contract, he will convey to the agent all the unsold lots and all the notes wholly or partly unpaid, the agent may recover from the owner an amount advanced to prevent a forfeiture of the contract after the latter has received in actual cash the full sum contracted for within the time agreed upon, where a total failure of the title after full performance of the agreement precludes the agent from selecting any property in repayment of the amount advanced.

82. See, generally, Indemnity, 22 Cyc. 78.

83. Mohawk, etc., R. Co. *v.* Costigan, 2 Sandf. Ch. (N. Y.) 306 (holding that where an agent purchases land in his own name, on request and for the benefit of his principal, pays part of the consideration, and gives his mortgage for the residue, with a bond in which his principal joins, the agent is a surety in respect of such bond, and equity will decree that he be indemnified against the bond and mortgage on his conveying the title to his principal); Lacey *v.* Hill, L. R. 18 Eq. 182, 43 L. J. Ch. 551, 30 L. T. Rep. N. S. 484, 22 Wkly. Rep. 586 (holding that in equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent incurred on behalf of the principal); Smith *v.* Belleville School Trustees, 16 Grant Ch. (U. C.) 130. And see Bastable *v.* Denegre, 22 La. Ann. 124.

84. Brand *v.* Henderson, 107 Ill. 141 (holding that an agent who contracts for the purchase of wheat, and tenders the warehouse receipts therefor to his principal within the stipulated time, cannot recover the difference between the purchase-price and market price on the day of tender, save upon proof that he had actually paid for the wheat); Otter Creek Lumber Co. *v.* McElwee, 37 Ill. App. 285 (holding that an action will not lie by an agent to recover of his principal damages from the failure of the principal to supply goods which were sold to purchasers on the agent's responsibility, unless it appears that the agent has actually parted with money or other value in settlement of the damages to the purchaser; and an action brought before such payment is premature, and will be dismissed). *Contra*, Flower *v.* Jones, 7 Mart. N. S. (La.) 140; Leavitt *v.* Parks, 7 N. Brunsw. 282, *semble*.

85. Brown *v.* Mechanics', etc., Bank, 16 N. Y. App. Div. 207, 44 N. Y. Suppl. 645.

86. *California.*— Beckman *v.* Wilson, 61 Cal. 335, holding that if one employed to manage property for its owner is empowered to make such repairs only as are necessary to preserve and protect the property from ordinary wear and tear, he cannot charge the owner with the expense of permanent improvements, or of rebuilding after a fire.

Colorado.— Ross *v.* Clark, 18 Colo. 90, 31 Pac. 497, holding that where an agent is authorized to make a certain contract for the

(II) *Termination of Agency.* The termination of the agency before full performance thereof does not defeat the agent's right to reimbursement and indemnity on account of moneys expended or liabilities incurred by him before his authority closed; [87] but he is not entitled to reimbursement or indemnity on account

purchase of a property, and makes a contract differing from the one authorized, in that it requires a larger cash payment and a larger instalment the first year, such contract is not enforceable against the principal, even though the purchase-money be smaller, and the agent cannot recover from his principal a deposit made by him on the unauthorized contract.

Georgia.— Hardeman *v.* Ford, 12 Ga. 205, holding that where a factor has made advances to his principal and sells the goods intrusted to him in an unauthorized manner for less than the amount of the advance, he cannot recover the difference.

Illinois.— St. Louis, etc., R. Co. *v.* Thomas, 85 Ill. 464.

Indiana.— Godman *v.* Meixsel, 65 Ind. 32, where it appeared that a sale of corn was made by A for B, the same to be delivered at a certain price per bushel, during a certain month; that about the middle of the month the price of corn had advanced, and B thereupon telegraphed to A to buy enough to fill the balance of the sale; that instead of so doing, A paid the purchaser, as upon a forfeited contract, the difference between the agreed price and the then market price, and before the end of the month the price fell to very nearly that agreed upon; and it was held that this payment by A was unauthorized, and that B was not liable to him therefor.

Louisiana.— Jackson *v.* Morse, 3 La. 555; Pelletier *v.* Roumage, 2 La. 528.

Massachusetts.— Keyes *v.* Westford, 17 Pick. 273.

New York.— Olyphant *v.* McNair, 41 Barb. 446 [*affirmed* in 41 N. Y. 619] (holding that where N authorized M to buy for him five hundred shares of the stock of a mining company, and M bought only one hundred shares, N was not liable for the money so advanced by M); Burby *v.* Roome, 7 Misc. 167, 27 N. Y. Suppl. 250 (holding that where the owner of a building informs his agent who has charge of the building that he has contracted with a certain person to make repairs for the ensuing year, and the agent employs another person to make repairs, he is not entitled to the amount thereof as a disbursement).

Pennsylvania.— Shrack *v.* McKnight, 84 Pa. St. 26, holding that where an agent employed to subscribe for stock in a railroad company for his principal and in his principal's name, subscribed and paid calls in his own name, and afterward procured a certificate and tendered a transfer to the principal, who refused to take and pay for them, the agent could not recover.

Texas.— Ranger *v.* Harwood, 39 Tex. 139, holding that an agent cannot withdraw goods from a prescribed route of transportation, and retain charges thereon additional to the charges which would properly have been made upon the route prescribed by the contract by which he received the goods for shipment.

Vermont.— Fuller *v.* Ellis, 39 Vt. 345, 94 Am. Dec. 327.

England.— Johnston *v.* Usborne, 11 A. & E. 549, 1 Jur. 943, 3 P. & D. 236, 39 E. C. L. 299 (where commission agents were authorized by principals to sell on their account certain oats; and the agents sold the same with a warranty, but without disclosing the names of their principals; and the oats not answering the warranty, the agents were compelled to make a reduction in the price; and it was held that they could not recover the damage they thus sustained from their principals, as they had chosen to sell in their own names, and as there was no privity of contract between them and their principals which would create a guarantee that the oats were of a specific quality); Frixione *v.* Tagliaferro, 4 Wkly. Rep. 373.

See 40 Cent. Dig. tit. "Principal and Agent," § 224 *et seq.*

Unauthorized warranty.— Where an agent pays a judgment recovered against him on an unauthorized warranty he cannot recover the same of his principal. Croom *v.* Swann, 1 Fla. 246; J. I. Case Threshing Mach. Co. *v.* Gardner, 67 S. W. 367, 24 Ky. L. Rep. 63. And see Johnston *v.* Usborne, 11 A. & E. 549, 1 Jur. 943, 3 P. & D. 236, 29 E. C. L. 299.

Ratification.— The principal is liable for reimbursement if he ratifies the agent's acts. Cornwall *v.* Wilson, 1 Ves. 509, 27 Eng. Reprint 1173 (where plaintiff, a factor abroad, exceeded the price limited for the purchase of hemp, and defendant, who objected to the contract but afterward reshipped and disposed of some of it on a risk, was ordered to account for the cost price); Frixione *v.* Tagliaferro, 4 Wkly. Rep. 373.

87. *Minnesota.*— Deering Harvester Co. *v.* Hamilton, 80 Minn. 162, 83 N. W. 44.

Missouri.— Royal Remedy, etc., Co. *v.* Gregory Grocer Co., 90 Mo. App. 53, holding that while a contract for an agency for an indefinite time and not coupled with an interest is revocable at any time, yet if the agent has incurred expense in the matter, the principal cannot appropriate the results without compensation.

New York.— Terwilliger *v.* Ontario, etc., R. Co., 149 N. Y. 86, 43 N. E. 432 [*reversing* 73 Hun 335, 26 N. Y. Suppl. 268]; Baker *v.* Angell, 12 N. Y. St. 406, where it appeared that defendant employed plaintiff to sell his farm on commission, and at once commenced work and expended moneys in an honest endeavor to sell the farm; that by the contract of employment plaintiff had a year in which to procure a purchaser, he alone to bear the risk of failure and to receive compensation only in the event of success; that at the end of a month, and before plaintiff had found a purchaser, defendant revoked his authority to act as agent; and it was held that plain-

of moneys expended or liabilities incurred with reference to acts subsequently done by him under his expired authority.[88]

(III) *Illegality of Transaction.* An agent who knowingly engages in an illegal transaction for his principal cannot recover of the latter for advances made on his account or for losses incurred in conducting the agency.[89]

(IV) *Fraud and Misconduct* — (A) *In General.* An agent is not as a rule

tiff was entitled to recover his reasonable and necessary expenses.

North Carolina.—Fisher *v.* Southern L. & T. Co., 138 N. C. 90, 50 S. E. 592, holding that one authorized to improve and sell lands and reimburse himself for his expenses out of the proceeds of the sale is entitled, after the termination of his authority by the death of the principal, to be repaid from the proceeds of the property, when sold, expenses incurred by him under the contract.

Pennsylvania.— Jaekel *v.* Caldwell, 156 Pa. St. 266, 26 Atl. 1063 (holding that where one employed to sell mining land, he to receive all over a certain amount, incurs large expenses in seeking to effect the sale, and is permitted to do so for a period of years, he is entitled to recover his expenses, if his authority is revoked); Blackstone *v.* Buttermore, 53 Pa. St. 266 (holding that if the agent has expended money upon the business, the principal, on revocation, becomes liable to him on an implied assumpsit).

United States.— U. S. *v.* Jarvis, 26 Fed. Cas. No. 15,468, 2 Ware 274, 4 N. Y. Leg. Obs. 298. See, however, Montgomery *v.* Ætna L. Ins. Co., 97 Fed. 913, 38 C. C. A. 553.

England.— Hodgson *v.* Anderson, 3 B. & C. 842, 5 D. & R. 735, 10 E. C. L. 379.

Canada.— See Hyde *v.* Gooderham, 6 U. C. C. P. 21.

Advances made after revocation of the agency are a proper subject of reimbursement, where the money is paid in discharge of liabilities previously incurred in pursuance of authority. Gelpcke *v.* Quentell, 74 N. Y. 599; U. S. *v.* Jarvis, 26 Fed. Cas. No. 15,468, 2 Ware 274, 4 N. Y. Leg. Obs. 298.

These rules apply in favor of public agents. U. S. *v.* Jarvis, 26 Fed. Cas. No. 15,468, 2 Ware 274, 4 N. Y. Leg. Obs. 298.

88. Soule *v.* Dougherty, 24 Vt. 92 (holding that where the agency has terminated except for the purpose of rendering an account to the principal, and the agent, without any necessity to justify an extension of his powers by implication and without the knowledge or consent of the principal, commences suits in the name of the principal upon demands taken by him in the principal's name, he exceeds his power, and the principal is not liable for the costs that accrue in the suits); *In re* Overweg, [1900] 1 Ch. 209, 69 L. J. Ch. 255, 81 L. T. Rep. N. S. 776, 16 T. L. R. 70; Phillips *v.* Jones, 4 T. L. R. 401 (both holding that a stock-broker is not entitled to reimbursement for losses resulting from stock operations carried on by him after the principal's death).

89. *Georgia.*— National Bank *v.* Cunningham, 75 Ga. 366.

Illinois.— Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499, holding that an agent who knowingly aids his principal in effecting an unlawful combination to raise the price of wheat cannot recover for advances made for such purpose.

United States.— Kirkpatrick *v.* Adams, 20 Fed. 287; Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 388.

England.— Bailey *v.* Rawlins, 7 L. J. K. B. O. S. 208.

Canada.— Leavitt *v.* Parks, 7 N. Brunsw. 282.

See 40 Cent. Dig. tit. "Principal and Agent," § 225. And see Contracts, 9 Cyc. 560; Gaming, 20 Cyc. 952.

An express promise by the principal to reimburse the agent is illegal and void under such circumstances. Bailey *v.* Rawlins, 7 L. J. K. B. O. S. 208; Leavitt *v.* Parks, 7 N. Brunsw. 282.

A ratification of a tort will not enable the agent to recover indemnity from his principal, since there can be no contribution between joint tort-feasors. Leavitt *v.* Parks, 7 N. Brunsw. 282. And see *supra*, I, F, 2, a, (III).

Secret intention of principal.— There is no principle of general law upon which a principal can avoid liability to his agent for advances made in good faith on his request, because the contract on which they were made was rendered illegal by the secret intention of the principal not to perform the same in accordance with its terms. Parker *v.* Moore, 115 Fed. 799, 53 C. C. A. 369 [*reversing* 111 Fed. 470].

Transactions held not to be illegal so as to preclude reimbursement see Owen *v.* Baxter, 97 Mich. 539, 56 N. W. 930; Howe *v.* Buffalo, etc., R. Co., 37 N. Y. 297 [*affirming* 38 Barb. 124]; Moore *v.* Remington, 34 Barb. (N. Y.) 427.

Where an agent commits a trespass with full notice that it is such, and in consequence he is compelled to pay damages, he is not entitled to look to the principal for reimbursement and indemnity. Young's Estate, 15 Pittsb. Leg. J. N. S. (Pa.) 403. But if the agent acts innocently and without notice of the wrong, the law will imply a promise on the part of the principal to indemnify him. Moore *v.* Appleton, 26 Ala. 633; Drummond *v.* Humphreys, 39 Me. 347; Gower *v.* Emery, 18 Me. 79; Young's Estate, *supra*; Hoggan *v.* Cahoon, 26 Utah 444, 73 Pac. 512, 99 Am. St. Rep. 837. *Contra*, Pierson *v.* Thompson, 1 Edw. (N. Y.) 212, holding that an agent has no claim against his principal for indemnity against the consequences of a trespass, although he commits the act in good faith, supposing himself authorized, in the absence of an express promise of indemnity.

entitled to reimbursement and indemnity on account of advances made, expenses incurred, or losses sustained in reference to transactions as to which he has been guilty of fraud, negligence, or other misconduct.[90]

90. *Kentucky.*— Chamberlain *v.* Chamberlain, 41 S. W. 312, 19 Ky. L. Rep. 572.

Louisiana.— Fisk *v.* Offit, 3 Mart. N. S. 553 (holding that if an agent in New Orleans sells his principal's property for a bill on New York in his own favor, with the proceeds of which when discounted he credits the principal in an account current without informing him of the circumstances, he cannot claim for a loss from the dishonor of the bill); Beal *v.* McKiernan, 6 La. 407 (where an agent to buy sold his own property to the principal without informing the latter of the facts).

New York.— Moore *v.* Moore, 21 How. Pr. 211, holding that an agent who procured property sold under foreclosure by him to be bought in for him by a friend at an inadequate price was not to be entitled to interest on the sum as an advance. See, however, Monnet *v.* Merz, 127 N. Y. 151, 27 N. E. 827 (where a principal authorized his agent to employ counsel in a suit brought against the agent, and the agent did so, and afterward compromised the suit without the principal's authority, and upon an accounting, the lower court allowed the agent credit for half the attorney's fees and half the amount paid in settlement of the suit, and it was held that the agent should be allowed credit for the entire amount of the attorney's fees); Hoy *v.* Reade, 1 Sweeny 626 (holding that where, before an action brought by an agent for expenses, he has wrongfully converted the goods, such conversion does not constitute a defense to the action, but the principal, if he still remains the owner of the property, may offset the value of the property so converted).

Oregon.— Williamson *v.* North Pac. Lumber Co., 43 Oreg. 337, 73 Pac. 7, where defendant sold lumber to plaintiff, to be shipped to plaintiff's customers in another country, the contract providing that if a dispute arose at the port of discharge as to the quality of the lumber, defendant should appoint an agent on the spot to settle it, and a dispute arose, and defendant appointed plaintiff its agent to settle, and plaintiff appointed other persons to examine the lumber and report what allowance should be made to the buyers, and such persons recommended a certain reduction, and plaintiff settled with the buyers on such basis, and it was held that if plaintiff acted fraudulently in making the settlement defendant would not be liable for the cost thereof.

Vermont.— Fuller *v.* Ellis, 39 Vt. 345, 94 Am. Dec. 327.

See 40 Cent. Dig. tit. "Principal and Agent," § 224 *et seq.*

See, however, Betts *v.* Planters', etc., Bank, 3 Stew. (Ala.) 18 (where A received cotton of B, made an advance, and agreed to ship it to New Orleans or New York, and have it sold for the best price it would bring, A to have the entire control of it, and the proceeds to be applied to refund the advance, and when in New Orleans it would have produced enough to pay the advance, and A did not sell it there, but reshipped it for New York, where it sold for less, and it was held that A, having acted fairly, was not holden for the loss); Poole *v.* Poindexter, 72 Kan. 654, 83 Pac. 126 (holding that a transaction by which a member of an association furnished funds to a corporation which was conducting experiments under a contract with the association, and accepted stock for the funds so furnished, did not, in the absence of anything inconsistent with actual good faith and fair dealing, preclude the member from recovering from the association for expenses incurred in looking after operations under the contract with the corporation).

Negligence.— If the agent neglects his duty in reference to the matter out of which his loss arises, to the injury of his principal, such neglect will, to the extent of the injury, reduce or discharge the liability of the principal to indemnify the agent. Haskin *v.* Haskin, 41 Ill. 197. And see Jackson *v.* Morse, 3 La. 555; Veltum *v.* Koehler, 85 Minn. 125, 88 N. W. 432 (holding that an agent cannot claim reimbursement where the advances and expenditures made by him were rendered necessary by his own failure to exercise reasonable care and diligence in the conduct of the business of the agency); Frixione *v.* Tagliaferro, 4 Wkly. Rep. 373. If, however, such neglect does not result in injury to the principal, the rights of the agent will not be affected thereby. Haskin *v.* Haskin, *supra*. *Compare* Armstrong *v.* Pease, 66 Ga. 70; Gossler *v.* Lau, 59 N. Y. Super. Ct. 365, 14 N. Y. Suppl. 289; Field *v.* Banker, 9 Bosw. (N. Y.) 467; Gooderham *v.* Marlatt, 14 U. C. Q. B. 228.

Representing adverse party.—A broker purchased goods on commission at a month's credit, and paid duties on them, and sent them to the place of the purchaser's abode, consigned to his own order. The seller, being fearful of the purchaser's credit, procured the broker to delay the arrival of the goods till the month's credit expired, and to tender them to the buyer on payment of the price, whereupon they were refused. It was held that the broker could recover neither the price nor duties. Hurst *v.* Holding, 3 Taunt. 32, 12 Rev. Rep. 587. So an agent is not entitled to recover a loss sustained on a shipment of cotton purchased for his principal, where, without the principal's knowledge, he filled the order of purchase with cotton consigned to him by another for sale. Beal *v.* McKiernan, 6 La. 407. And if the agent of one party secretly becomes the agent of the adverse party, and pays out money for him in transacting the agency, he cannot compel the adverse party to reimburse him. Cincinnati, etc., R. Co. *v.* Morris, 10 Ohio Cir. Ct. 502, 6 Ohio Cir. Dec. 640. However, a general confidential business agent who

(B) *Failure to Keep and Render Accounts.*[91] It is the duty of an agent to keep and render an account of advances made and expenses incurred in the course of the agency, and his failure to do so may, under some circumstances, bar him from reimbursement.[92]

(V) *Failure to Effect Transaction.* Ordinarily an agent who is employed to negotiate a particular transaction is not entitled to expenses incurred in unsuccessful efforts to effect the transaction.[93]

d. Enforcement of Right.[94] An agent who has bought goods for the principal with his own funds may, in case the principal refuses to accept them, sell the same for the purpose of reimbursing himself.[95] Although an agent may have a lien for advances on property of the principal in his hands, yet he is not bound to resort to the property in the first instance, but may demand reimbursement immediately.[96]

4. Agent's Lien[97] **— a. In General.** Where an agent is entitled to compensation, or to reimbursement and indemnity on account of advances, expenses, and losses, and the money or property of the principal with reference to which his services were rendered, or the advances were made, or the expenses or losses incurred, is in his hands, he has a lien thereon which entitles him to retain the property until his claim is satisfied.[98] In the absence of an express or implied

pays insurance premiums on the principal's property is entitled to credit therefor from his principal, although he may also have been the agent of the insurance company, provided he informed the company that the property was in his control, and they permitted the policies to stand without attempting to avoid them, as in such a case the policies at the most were merely voidable, and it will not be presumed that the insurance companies would elect to avoid. Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203. And in an action to recover money paid by plaintiff at defendant's request to bind a contract for the sale of land to defendant, the fact that plaintiff was to receive commissions from the vendor does not affect plaintiff's right to recover. Bang *v.* Dovey, 11 Misc. (N. Y.) 350, 32 N. Y. Suppl. 154.

91. Accounting as condition precedent to action for reimbursement see *infra*, IV, B, 1.

92. Moyses *v.* Rosenbaum, 98 Ill. App. 7 (holding that the duty of an agent who is employed at an annual salary and his expenses is not fulfilled by reporting that he has spent a round sum of money in prosecuting his employment); Dillman *v.* Hastings, 144 U. S. 136, 12 S. Ct. 662, 36 L. ed. 378; Quirk *v.* Quirk, 155 Fed. 199 (holding that an agent on an accounting for money collected for his principal will not be allowed for disbursements claimed to have been made by him where he failed to keep proper accounts, and the testimony in support of his claim is vague and unsatisfactory); Eddy *v.* Eddy, 7 Quebec Q. B. 300 [*affirmed* in (1900) A. C. 299]. And see Motley *v.* Motley, 42 N. C. 211, holding that an agent is not entitled to charge for payments made for his principal without showing that upon a settlement of the transactions of his agency such an amount was due to him. See, however, Jones *v.* Hoyt, 25 Conn. 374 (holding that if an agent has conducted fairly in the sale of certain lumber, obtaining the best prices that by reasonable diligence could be obtained, and accounting honestly according to his best means, and has explained to the satisfaction of the jury his neglect to keep exact accounts, and such neglect involved no gross carelessness or dishonesty on his part, he ought to be allowed out of the proceeds of the lumber all the necessary expenses of managing and disposing of the same); Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081 (holding that it is necessary for an agent only to introduce substantial testimony by which the jury can estimate his expenses); Gallup *v.* Merrill, 40 Vt. 133 (holding that an agent who refuses to render a specific account to his principal when required is not thereby barred from maintaining an action for a balance due from the principal, but such refusal only affects the agent unfavorably as a matter of evidence).

93. Dalton *v.* Irvin, 4 C. & P. 289, 19 E. C. L. 519, unless such expenses are unusual and have been incurred in consequence of the principal's having urged him to extraordinary expedition in the matter. See, however, Stewart *v.* Kahle, 3 Stark. 161, 3 E. C. L. 636.

Termination of agency as affecting right to reimbursement and indemnity see *supra*, III, B, 3, c, (II).

94. Enforcement by suit see *infra*, IV.

95. Zoit *v.* Millaudon, 4 Mart. N. S. (La.) 470; De Bavier *v.* Funke, 21 N. Y. Suppl. 410 [*affirmed* in 142 N. Y. 633, 37 N. E. 566].

96. Beckwith *v.* Sibley, 11 Pick. (Mass.) 482; Hoy *v.* Reade, 1 Sweeny (N. Y.) 626.

97. Liens in general see LIENS, 25 Cyc. 655.

Factors' and brokers' liens see FACTORS AND BROKERS, 19 Cyc. 156 *et seq.*, 288.

98. *Alabama.*— White *v.* Sheffield, etc., R. Co., 90 Ala. 254.

Arkansas.— Byers *v.* Danley, 27 Ark. 77.

Indiana.— Vinton *v.* Baldwin, 95 Ind. 433.

Kentucky.— Grauman *v.* Reese, 13 Ky. L. Rep. 683.

Louisiana.— Bastable *v.* Denegre, 22 La. Ann. 124 (holding that a party acting as agent for heirs in the prosecution of a land claim under an agreement may withhold

agreement creating a general lien, the lien exists only on the particular property with reference to which the agent's services were rendered, or the advances were

the payment of so much of the proceeds of the sale of the land, which he has received for them, as will be necessary to cover possible liabilities on account of suits brought by settlers for improvements made on the land, unless the heirs give satisfactory security against loss resulting from such suits); Hereford *v.* Leverich, 16 La. Ann. 397; King *v.* Osborne, 2 Mart. N. S. 247 (holding that one receiving indorsed notes to collect, the proceeds to be applied to his advances, may retain them until indemnified).

Maine.— Newhall *v.* Dunlap, 14 Me. 180, 31 Am. Dec. 45, holding that where an agent has a lien on property for his security, the general owner cannot maintain replevin against him for it until the lien be discharged.

New York.— Cooper *v.* Hong Kong, etc., Banking Corp., 107 N. Y. 282, 14 N. E. 277 [*reversing* 13 Daly 183]; Nagle *v.* McFeeters, 97 N. Y. 196; Underhill *v.* Jordan, 72 N. Y. App. Div. 71, 76 N. Y. Suppl. 266, holding that an agent acting in a fiduciary capacity in the management of a quasi-trust fund which, if paid over by him to his principals, will be removed from the jurisdiction of the court so as to prevent him from collecting a claim for services and expenses and disbursements paid out in its management, has an equitable lien on such fund, at least to the extent of his claim for expenses and disbursements.

Pennsylvania.— Cranston *v.* Philadelphia Ins. Co., 5 Binn. 538 (holding that an agent who effects insurance for his principal and becomes answerable for the premium has a lien on the policy so long as he retains it); Com. *v.* Evans, 2 Leg. Op. 3 (holding that an agent has a lien on the papers or property of his principal to secure payment of his compensation); Devereux *v.* Philadelphia Bank, 1 Phila. 477 (holding that a principal cannot countermand the payment of a bill in the possession of his agent, where the agent has a lien for a debt growing out of his agency).

South Carolina.— State Bank *v.* Levy, 1 McMull. 431, holding that where an agent for a commission negotiates exchanges for a firm, buys bills for them, and to raise the funds for that purpose draws and sells bills on such firm for corresponding amounts, some of which the firm accepts and others are protested, such agent, on the failure of the firm, has a lien on any funds which came to his hands for his principals to secure himself against the outstanding liabilities, although in fact he may not have paid any of the bills.

Tennessee.— Wade *v.* Roberts, 6 Humphr. 124, holding that where a distributee brought his bill against his agent for property which had come to his hands under an agreement to collect the distributive share, the agent was entitled to a decree to subject the estate in his hands to preëxisting claims and advances made in the execution of his agency.

Texas.— Gresham *v.* Galveston County, (Civ. App. 1896) 36 S. W. 796, holding that under an order of the commissioners' court appointing defendant agent for the sale of school lands, and providing that he should be paid a commission on the "amount received" by him for the sale of such lands, defendant has a lien for his commission upon notes given for such deferred payments entitling him to the possession of the notes for the purpose of collection.

United States.—Dowell *v.* Cardwell, 7 Fed. Cas. No. 4,039, 4 Sawy. 217, holding that an agent employed to collect a claim against the United States for a certain per cent of the amount realized has a lien upon the fund for his compensation.

England.— *In re* Fawcus, 3 Ch. D. 795, 34 L. T. Rep. N. S. 807; Hammonds *v.* Barclay, 2 East 227; Foxcraft *v.* Wood, 4 Russ. 487, 28 Rev. Rep. 161, 48 Eng. Ch. 487, 38 Eng. Reprint 888.

Canada.— Eddy *v.* Eddy, 7 Quebec Q. B. 300 [*affirmed* in [1900] A. C. 299].

See 40 Cent. Dig. tit. "Principal and Agent," § 240.

A mere forwarding agent has no lien upon goods sent to him to be shipped to a consignee resident in another city. Farwell *v.* Price, 30 Mo. 587.

A purchasing agent has a lien on the property purchased for reimbursement and indemnity where he purchased on his own credit, or with his own funds, or where he incurred expenses in the purchase, and the property is in his possession. Stevens *v.* Robins, 12 Mass. 180; Johnston *v.* Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503 (holding that one who, under an agreement to attempt to procure title to a tract of land for another, expends money in his endeavors, and finally obtains a title in his own name and takes possession of the land, is entitled, on judgment for possession being rendered against him at suit of the person for whom he rendered the services, to be reimbursed for his expenditures in obtaining the title, and to have the amount of such expenditures made a lien on the premises); Merrill *v.* Rokes, 54 Fed. 450, 4 C. C. A. 433; Matthews *v.* Menedger, 16 Fed. Cas. No. 9,289, 2 McLean 145 (holding that this is especially the rule where the principal is insolvent, and the liability of the agent to pay is about to be enforced).

A selling agent has a lien on the property for reimbursement where it is in his possession. *In re* Pavy's Patent Felted Fabric Co., 1 Ch. D. 631, 45 L. J. Ch. 318, 24 Wkly. Rep. 507. See, however, Blight *v.* Ewing, 1 Pittsb. (Pa.) 275, holding that where a person agreed to become the agent of a landowner to sell, rent, and dispose of a certain lot of land, upon the terms that said property was to be charged with

made, or the expenses or losses incurred.[99] To entitle the agent to a lien the funds or property against which it is asserted must be in the actual or constructive possession of the agent;[1] and he must have acquired that possession lawfully,[2]

its cost, interest, and necessary expenses, such person to contribute his services, etc., and the net profits to be divided between the parties, such agent had no lien on the land for his services.

Subagents.— An agent for an attorney in fact must look to the attorney for compensation; he has no lien on lands which were the subject of his agency. Clay *v.* Hopkins, 3 A. K. Marsh. (Ky.) 485. So where goods are delivered by A to B to sell, and B delivers them to a third person to sell, such third person has no lien upon the goods as against the principal. Phelps *v.* Sinclair, 2 N. H. 554. Thus where A, a merchant, consigned goods to the master of a vessel bound to Havana for sale, and the master upon his arrival at Havana delivered the goods to B, a commission merchant, for sale, the master having no authority to pledge the goods for his own account, B by receiving the goods with knowledge that they belonged to A became substituted as agent or factor in place of the master, and was accountable to A, and could not retain them for any advances made to the master or for a balance of account arising from transactions between him and the master. Buckley *v.* Packard, 20 Johns. (N. Y.) 421.

Capacity as agent.— If in rendering services or making advances a person does not act in the capacity of an agent for the owner of property in his possession, he is not entitled as such to a lien thereon. Jones *v.* Evans, 62 Mo. 375; Mack *v.* Schuylkill Trust Co., 33 Pa. Super. Ct. 128 (holding that where a title insurance company, after having performed its duties as a conveyancer and title insurer, as such further assumes the duty specifically intrusted to it of accepting a deed, and delivering the consideration therefor, and placing the deed on record, it cannot retain possession of the deed and refuse to place it on record until its bill as a conveyancer and title insurer has been paid); Merrill *v.* Rokes, 54 Fed. 450, 4 C. C. A. 433.

An agent has no lien on a judgment for moneys expended in obtaining it in a suit prosecuted for his principal. Martinez *v.* Perez, 8 Mart. N. S. (La.) 668.

Priorities.— Where a principal indebted to his agent fails, a creditor cannot take funds of the principal out of the agent's hands. The agent's equity as creditor is equal to the creditor's, and he must be allowed to keep possession until his demand is satisfied. Paul *v.* Rogers, 5 T. B. Mon. (Ky.) 164. An agent acting under a power of attorney which provided for the payment of the costs of the litigation arising in the transaction of the business, being entitled to a compensation for his services, his claim is superior to that of one to whom the principal has assigned the fruits of the litigation. Lane *v.* Coleman, 8 B. Mon. (Ky.) 569. Where agents abroad have expended money for their principal, and, upon being doubtful of his circumstances, make bills of lading to their own order indorsed in blank, notwithstanding these bills of lading come to the principal's hands, yet, if the agents' partner in London writes them word that their principal is become bankrupt and desires them to send the bills of lading and an order to the captain to deliver the goods to him, he may retain them for himself and company against the assignees under the commission till paid and reimbursed so much as the partnership is in advance. Snee *v.* Prescot, 1 Atk. 245, 26 Eng. Reprint 156. An agent with unrestricted management of a general trading business carried on in his name with the right to buy, sell, or exchange, has a lien on all the property accumulated in such business for advances made and expenses incurred, which is superior to any lien placed on the property by the reputed owner thereof. Dewing *v.* Hutton, 40 W. Va. 521, 21 S. E. 780. A clerk has a general privilege over all the property of his employer which cannot be defeated by attachment. Tiernan *v.* Murrah, 1 Rob. (La.) 443. However, a verbal understanding between a principal and his agent that the proceeds of lands, when sold by the agent, should be applied to the liquidation of a debt due him from his principal, and for which he was bound as surety, raises no equity in favor of the agent as against creditors of the principal who have sought legal remedies, and acquired liens by attachment of the property. Graves *v.* Ward, 2 Duv. (Ky.) 301.

99. McIntyre *v.* Carver, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519; Houghton *v.* Matthews, 3 B. & P. 494; Bock *v.* Gorrisen, 2 De G. F. & J. 434, 7 Jur. N. S. 81, 30 L. J. Ch. 39, 3 L. T. Rep. N. S. 424, 9 Wkly. Rep. 209, 63 Eng. Ch. 434, 45 Eng. Reprint 689; Quebec, etc., Nav. Co. *v.* Cunard, 2 N. Brunsw. 90.

1. *Alabama.*— Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431.

Indiana.—Tucker *v.* Taylor, 53 Ind. 93.

Iowa.— Nevan *v.* Roup, 8 Iowa 207.

Maine.— Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379.

Massachusetts.—Hall *v.* Jackson, 20 Pick. 194.

New York.— Winter *v.* Coit, 7 N. Y. 288, 57 Am. Dec. 522.

United States.—*Ex p.* Foster, 9 Fed. Cas. No. 4,960, 2 Story 131.

England.— Taylor *v.* Robinson, 2 Moore C. P. 730, 8 Taunt. 648, 4 E. C. L. 317.

See 40 Cent. Dig. tit. "Principal and Agent," § 240.

Loss of lien by surrender of property see *infra*, III, B, 4, b.

2. Randel *v.* Brown, 2 How. (U. S.) 406,

and in his capacity as agent.[3] When commercial correspondents on the order of a principal make a purchase of property ultimately for him, but on their own credit or with funds furnished by them, and such course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed.[4]

b. Extinguishment. The lien may be lost by waiver, express or implied.[5] Thus if the agent surrenders possession of the property voluntarily and unconditionally, he loses his lien;[6] and he loses it also by a tortious pledge of the property.[7] The lien is not affected by the bankruptcy or insolvency of the principal,[8] nor by his death;[9] and it has been held that the lien continues notwithstanding the agent's claim becomes barred by limitations.[10]

c. Enforcement. At common law the agent's particular lien cannot be directly enforced by legal proceedings; it is a mere right of retention;[11] but where the

11 L. ed. 318; Madden *v.* Kempster, 1 Campb. 12; Burn *v.* Brown, 2 Stark. 272, 19 Rev. Rep. 719, 3 E. C. L. 406.

3. Scott *v.* Jester, 13 Ark. 437; Thacher *v.* Hannahs, 4 Rob. (N. Y.) 407; McIntyre *v.* Carver, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519.

4. Moors *v.* Kidder, 106 N. Y. 32, 12 N. E. 818; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568 [*affirming* 42 N. Y. Super. Ct. 522] (holding that this may be done by taking the bill of sale in their own names, and, when the property is shipped, by taking from the carrier a bill of lading in such terms as to show that they retain the power to control the property); Spinney *v.* Thurber, 33 Hun (N. Y.) 448 [*affirmed* in 102 N. Y. 652]; Jenkyns *v.* Brown, 14 Q. B. 496, 14 Jur. 505, 19 L. J. Q. B. 286, 68 E. C. L. 496.

5. *Alabama.*— Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165.

Indiana.— Hanna *v.* Phelps, 7 Ind. 21, 63 Am. Dec. 410.

Maine.— Danforth *v.* Pratt, 42 Me. 50.

Michigan.— Au Sable River Boom Co. *v.* Sanborn, 36 Mich. 358.

New Hampshire.—Stoddard Woolen Manufactory *v.* Huntley, 8 N. H. 441, 31 Am. Dec. 198.

New York.— Dows *v.* Morewood, 10 Barb. 183; Chandler *v.* Belden, 18 Johns. 157, 9 Am. Dec. 193.

England.— *In re* Taylor, [1891] 1 Ch. 590, 60 L. J. Ch. 525, 64 L. T. Rep. N. S. 605, 39 Wkly. Rep. 417.

See 40 Cent. Dig. tit. "Principal and Agent," § 242.

6. *Indiana.*— Tucker *v.* Taylor, 53 Ind. 93.

Maine.— Spaulding *v.* Adams, 32 Me. 211.

New York.— McFarland *v.* Wheeler, 26 Wend. 467.

Pennsylvania.— Cranston *v.* Philadelphia Ins. Co., 5 Binn. 538.

England.— Watson *v.* Lyon, 7 De G. M. & G. 288, 24 L. J. Ch. 754, 3 Wkly. Rep. 543, 56 Eng. Ch. 288, 44 Eng. Reprint 113.

See 40 Cent. Dig. tit. "Principal and Agent," § 242.

However, an agent's lien on his principal's goods for expenses relative thereto is not lost by their deposit with a third person for sale. Ganseford *v.* Dutillet, 1 Mart. N. S. (La.) 284.

7. Keutgen *v.* Parks, 2 Sandf. (N. Y.) 60, where an agent to negotiate a note for the owner gave to him his own checks, post-dated, for the amount, and pledged the note to secure a usurious loan to himself, and the checks were not paid at maturity, and the owner brought suit against the pledgee to recover the note, and subsequently the agent paid money to plaintiff on account of the note, and it was held that the agent had no lien on the note for his advance, his lien thereon having been extinguished by his tortious pledge of the note, and that no lien passed to the pledgee which he could set up against a recovery by the owner.

8. Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259 (holding that if an agent incurs liability on the faith of the solvency of his principal, and the latter becomes insolvent before the fruit and proceeds of such liability have come into his actual possession, and while they are yet within the reach of the agent, the latter has a lien upon them for his protection and indemnity); *In re* Pavy's Patent Felted Fabric Co., 1 Ch. D. 631, 45 L. J. Ch. 318, 24 Wkly. Rep. 507; General Share Trust Co. *v.* Chapman, 1 C. P. D. 771, 46 L. J. C. P. 79, 36 L. T. Rep. N. S. 179; Ogle *v.* Story, 4 B. & Ad. 735, 2 L. J. K. B. 110, 1 N. & M. 474, 24 E. C. L. 321.

9. Newhall *v.* Dunlap, 14 Me. 180, 31 Am. Dec. 45; Hammonds *v.* Barclay, 2 East 227.

10. Curwen *v.* Milburn, 42 Ch. D. 424, 62 L. T. Rep. N. S. 278, 38 Wkly. Rep. 49; Spears *v.* Hartly, 3 Esp. 81, 6 Rev. Rep. 814. *Contra*, Byers *v.* Danley, 27 Ark. 77.

11. *Arkansas.*— Crumbacker *v.* Tucker, 9 Ark. 365.

Maine.— Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387.

Massachusetts.— Briggs *v.* Boston, etc., R. Co., 6 Allen 246, 83 Am. Dec. 626.

New Hampshire.— Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

New York.— Fox *v.* McGregor, 11 Barb. 41. See, however, Mount *v.* Suydam, 4 Sandf. Ch. 399.

See 40 Cent. Dig. tit. "Principal and Agent," § 243.

transaction amounts to a pledge the agent may sell the property on notice to satisfy his claim.[12]

5. Agent's Right of Stoppage In Transitu.[13] An agent who buys goods in his own name or on his own credit and ships them to the principal may exercise the right of stoppage *in transitu*;[14] but where one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods *in transitu* because his principal owes him on account of money advanced in the purchase of the goods.[15]

C. Liability of Agent to Third Person — 1. On Contract — a. Unauthorized Contracts — (I) *In General.* A person who assumes to act as agent for another impliedly warrants that he has authority to do so.[16] If, therefore, he in fact lacks authority he renders himself personally liable to one who deals with him in good faith in reliance on the warranty,[17] whether the agent knows that he lacks

12. Parker *v.* Brancker, 22 Pick. (Mass.) 40; Wicks *v.* Hatch, 38 N. Y. Super. Ct. 95 [*affirmed* in 62 N. Y. 535] (holding that where a power of attorney is given to buy, sell, and assign stocks and bonds, etc., and the attorney purchases on his own credit for the account of the principal, the attorney possessed the right of a pledgee to sell on demand and reasonable notice); Potter *v.* Thompson, 10 R. I. 1.

Sale by pledgee see Pledges, *ante*, p. 779.

13. Stoppage in transitu in general see Sales.

14. Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489; Seymour *v.* Newton, 105 Mass. 272; Ilsley *v.* Stubbs, 9 Mass. 65, 6 Am. Dec. 29; Tucker *v.* Humphrey, 4 Bing. 516, 6 L. J. C. P. O. S. 92, 1 M. & P. 378 note, 13 E. C. L. 614; Hawkes *v.* Dunn, 1 Cromp. & J. 519, 9 L. J. Exch. O. S. 184, 1 Tyrw. 413; Feise *v.* Wray, 3 East 93, 6 Rev. Rep. 551; Turner *v.* Liverpool Docks, 6 Exch. 543, 20 L. J. Exch. 393. And see *Ex p.* Banner, 2 Ch. Div. 278, 34 L. T. Rep. N. S. 199, 24 Wkly. Rep. 476; D'Aquila *v.* Lambert, Ambl. 399, 27 Eng. Reprint 266, 2 Eden 75, 28 Eng. Reprint 824.

15. Gwyn *v.* Richmond, etc., R. Co., 85 N. C. 429, 39 Am. Rep. 708.

16. *Alabama.*— Ware *v.* Morgan, 67 Ala. 461.

Illinois.— Rice *v.* Western Fuse, etc., Co., 64 Ill. App. 603.

Indiana.— Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

Massachusetts.— May *v.* Western Union Tel. Co., 112 Mass. 90; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Jefts *v.* York, 4 Cush. 371, 50 Am. Dec. 791.

New York.— Baltzen *v.* Nicolay, 53 N. Y. 467; White *v.* Madison, 26 N. Y. 117; Noe *v.* Gregory, 7 Daly 283; Lord *v.* Van Gelder, 16 Misc. 22, 37 N. Y. Suppl. 668; Nelligan *v.* Campbell, 20 N. Y. Suppl. 234; Bartholomae *v.* Kaufman, 16 N. Y. Wkly. Dig. 127.

Ohio.— Farmers' Co-operative Trust Co. *v.* Lloyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346.

Oregon.— Cochran *v.* Baker, 34 Oreg. 555, 52 Pac. 520, 56 Pac. 641.

Pennsylvania.— Kroeger *v.* Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718.

South Carolina.—Hamburg Bank *v.* Wray, 4 Strobh. 87, 51 Am. Dec. 659.

Wisconsin.— McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

England.—Cherry *v.* Colonial Bank, L. R. 3 P. C. 24, 38 L. J. P. C. 49, 21 L. T. Rep. N. S. 356, 6 Moore P. C. N. S. 235, 17 Wkly. Rep. 1031, 16 Eng. Reprint 714; Richardson *v.* Williamson, L. R. 6 Q. B. 276, 40 L. J. Q. B. 145; Randell *v.* Trimen, 18 C. B. 786, 25 L. J. C. P. 307, 86 E. C. L. 786; Collen *v.* Wright, 8 E. & B. 647, 657, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647 [*affirming* 7 E. & B. 301, 26 L. J. Q. B. 147, 5 Wkly. Rep. 265, 90 E. C. L. 301] (in which the court says: "The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such a contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist"); Oliver *v.* Bank of England, [1902] 1 Ch. 610, 7 Com. Cas. 89, 71 L. J. Ch. 388, 86 L. T. Rep. N. S. 248, 18 T. L. R. 341, 5 Wkly. Rep. 340 [*affirming* [1901] 1 Ch. 652, 65 J. P. 294, 70 L. J. Ch. 377, 84 L. T. Rep. N. S. 253, 17 T. L. R. 286, 49 Wkly. Rep. 391].

Implied warranty of same effect as if express.— The warranty which the law implies in the case of an assumed agent depends on the position of the parties and on the nature and effect of the representation; but when ascertained as a matter of fact, the legal effect is the same as if the warranty had been express. Cherry *v.* Colonial Bank, L. R. 3 P. C. 24, 38 L. J. P. C. 49, 21 L. T. Rep. N. S. 356, 6 Moore P. C. N. S. 235, 17 Wkly. Rep. 1031, 16 Eng. Reprint 714.

Breach of warranty of authority is not shown by proving that the principal, for whose benefit a purchase was made, is an infant, such contract being voidable and not void. Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. 506.

17. *Alabama.*— Gillaspie *v.* Wesson, 7 Port. 454, 31 Am. Dec. 715.

California.— Wallace *v.* Bentley, 77 Cal. 19, 18 Pac. 788, 11 Am. St. Rep. 231; Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64.

authority and nevertheless assumes to act as if he possessed it,[18] or whether he

Illinois.—Chicago Chronicle Co. *v.* Franklin, 119 Ill. App. 384; McCormick *v.* Sceberger, 73 Ill. App. 87.

Indiana.—Terwilliger *v.* Murphy, 104 Ind. 32, 3 N. E. 404.

Iowa.— Klay *v.* Dallas Centre Bank, 122 Iowa 506, 98 N. W. 315; Andrews *v.* Tedford, 37 Iowa 314.

Louisiana.— Dodd *v.* Bishop, 30 La. Ann. 1178; Clay *v.* Oakley, 5 Mart. N. S. 137.

Massachusetts.— Conant *v.* Alvord, 166 Mass. 311, 44 N. E. 250.

Minnesota.— Skaaraas *v.* Finnegan, 32 Minn. 107, 19 S. W. 729; Pratt *v.* Beaupre, 13 Minn. 187.

Missouri.— Byars *v.* Dooers, 20 Mo. 284.

New York.— Dung *v.* Parker, 52 N. Y. 494; Bloodgood *v.* Short, 50 Misc. 286, 98 N. Y. Suppl. 775; Palmer *v.* Stephens, 1 Den. 471; Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; White *v.* Skinner, 13 Johns. 307, 7 Am. Dec. 381; Dusenbury *v.* Ellis, 3 Johns. Cas. 70, 2 Am. Dec. 144.

England.— Cherry *v.* Colonial Bank, L. R. 3 P. C. 24, 38 L. J. P. C. 49, 21 L. T. Rep. N. S. 356, 6 Moore P. C. N. S. 235, 17 Wkly. Rep. 1031, 16 Eng. Reprint 714; Halbot *v.* Lens, [1901] 1 Ch. 344, 70 L. J. Ch. 125, 83 L. T. Rep. N. S. 702, 49 Wkly. Rep. 214; Eastwood *v.* Bain, 3 H. & N. 738, 28 L. J. Exch. 74, 7 Wkly. Rep. 90; Hughes *v.* Graeme, 33 L. J. Q. B. 335, 12 Wkly. Rep. 857.

Canada.—Eckstein *v.* Whitehead, 10 U. C. C. P. 65.

See 40 Cent. Dig. tit. "Principal and Agent," § 579.

When cause of action accrues.— The third person may repudiate the contract on learning of the assumed agent's lack of authority and immediately hold him responsible without waiting for the time when an action might be instituted on the contract itself. White *v.* Madison, 26 N. Y. 117.

The cases in which agents have been adjudged personally liable are sometimes classified as follows, namely: (1) Where the agent makes a false representation of his authority with intent to deceive; (2) where, with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and (3) where he undertakes to act, honestly believing he has authority when in fact he has none. Weare *v.* Gove, 44 N. H. 196; Kroeger *v.* Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718; Wolff *v.* Wilson, 28 Pa. Super. Ct. 511; Smout *v.* Ilbery, 12 L. J. Exch. 357, 10 M. & W. 1.

18. *Alabama.*— Ware *v.* Morgan, 67 Ala. 461.

Arkansas.— Dale *v.* Donaldson Lumber Co., 48 Ark. 188, 2 S. W. 703, 3 Am. St. Rep. 224.

California.— Tuite *v.* Wakelee, 19 Cal. 692.

Colorado.— Charles *v.* Eshleman, 5 Colo. 107.

Illinois.— Frankland *v.* Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234; Duncan *v.* Niles, 32 Ill. 532, 83 Am. Dec. 293; Kadish *v.* Bullen, 10 Ill. App. 566.

Iowa.— Funk *v.* Church, 132 Iowa 1, 109 N. W. 286.

Louisiana.— Levy *v.* Lane, 38 La. Ann. 252; Hewitt *v.* Roudebush, 24 La. Ann. 254; Richie *v.* Bass, 15 La. Ann. 668.

Maryland.— Keener *v.* Harrod, 2 Md. 63, 56 Am. Dec. 706.

Massachusetts.— Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Jefts *v.* York, 10 Cush. 392.

Michigan.— Solomon *v.* Penoyar, 89 Mich. 11, 50 N. W. 644.

Missouri.— Wright *v.* Baldwin, 51 Mo. 269; Duffy *v.* Mallinkrodt, 81 Mo. App. 449.

New Hampshire.— Weare *v.* Gove, 44 N. H. 196; Woodes *v.* Dennett, 9 N. H. 55; Grafton Bank *v.* Flanders, 4 N. H. 239.

New York.— White *v.* Madison, 26 N. Y. 117; New York Bank-Note Co. *v.* McKeige, 31 N. Y. App. Div. 188, 52 N. Y. Suppl. 597; Parker *v.* Knox, 60 Hun 550, 15 N. Y. Suppl. 256; Noe *v.* Gregory, 7 Daly 283; Campbell *v.* Muller, 19 Misc. 189, 43 N. Y. Suppl. 233; Lord *v.* Van Gelder, 16 Misc. 22, 37 N. Y. Suppl. 668; Kip *v.* Howes, 39 How. Pr. 139; Smith *v.* Teets, 1 N. Y. City Ct. 457; Sinclair *v.* Jackson, 8 Cow. 543.

North Dakota.— Kennedy *v.* Stonehouse, 13 N. D. 232, 100 N. W. 258.

Ohio.— Farmers' Co-Operative Trust Co. *v.* Floyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346.

Pennsylvania.— Lane *v.* Corr, 156 Pa. St. 250, 25 Atl. 830; Lasher *v.* Stinson, 145 Pa. St. 30, 23 Atl. 552; Kroeger *v.* Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718; Layng *v.* Stewart, 1 Watts & S. 222; Wolff *v.* Wilson, 28 Pa. Super. Ct. 511.

South Carolina.— Hamburg Bank *v.* Wray, 4 Strobh. 87, 51 Am. Dec. 659.

Tennessee.— Luttrell *v.* White, (Ch. App. 1896) 42 S. W. 61.

Vermont.— Clark *v.* Foster, 8 Vt. 98.

Washington.— McReavy *v.* Eshelman, 4 Wash. 757, 31 Pac. 35.

Wisconsin.— Oliver *v.* Morawetz, 97 Wis. 332, 72 N. W. 877.

United States.— Patrick *v.* Bowman, 149 U. S. 411, 13 S. Ct. 81, 37 L. ed. 790.

England.—Jenkins *v.* Hutchinson, 13 Q. B. 744, 13 Jur. 763, 18 L. J. Q. B. 274, 66 E. C. L. 744; Beattie *v.* Ebury, L. R. 7 Ch. 777, 41 L. J. Ch. 804, 27 L. T. Rep. N. S. 398, 20 Wkly. Rep. 994 [*affirmed* in L. R. 7 H. L. 102, 44 L. J. Ch. 20, 30 L. T. Rep. N. S. 581, 22 Wkly. Rep. 897]; Polhill *v.* Walter, 3 B. & Ad. 114, 1 L. J. K. B. 92, 23 E. C. L. 59; Randell *v.* Trimen, 18 C. B. 786, 25 L. J. C. P. 307, 86 E. C. L. 786; Collen *v.* Wright, 8 E. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647; Smout *v.* Ilbery, 12 L. J. Exch. 357, 10 M. & W. 1.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 579, 580.

honestly believes that he had authority when in fact he has none.[19] The warranty of authority embraces not only the existence of the authority but also its sufficiency to cover the contract which the agent attempts to make, and if therefore the agent, whether in good faith or otherwise, acts in excess of an authority actually possessed he renders himself personally liable to the third person.[20]

19. *Alabama.*— Ware *v.* Morgan, 67 Ala. 461.

Illinois.— Rice *v.* Western Fuse, etc., Co., 64 Ill. App. 603.

Indiana.— Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

Iowa.— Groeltz, *v.* Armstrong, 125 Iowa 39, 99 N. W. 128, holding that the liability of the assumed agent does not depend on whether the representations were intentionally false, but is absolute in every case where the third person was not chargeable with notice of the want of authority.

Massachusetts.— May *v.* Western Union Tel. Co., 112 Mass. 90; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Jefts *v.* York, 10 Cush. 392.

New Hampshire.— Weare *v.* Gove, 44 N. H. 196; Woodes *v.* Dennett, 9 N. H. 55.

New York.— Simmons *v.* More, 100 N. Y. 140, 2 N. E. 640; White *v.* Madison, 26 N. Y. 117; Nelligan *v.* Campbell, 20 N. Y. Suppl. 234; Rossiter *v.* Rossiter, 8 Wend. 494, 24 Am. Dec. 62.

Ohio.— Farmers' Co-Operative Trust Co. *v.* Floyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346.

Oregon.— Cochran *v.* Baker, 34 Oreg. 555, 52 Pac. 520, 56 Pac. 641.

Pennsylvania.— Kroeger *v.* Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718.

South Carolina.— Hamburg Bank *v.* Wray, 4 Strobh. 87, 51 Am. Dec. 659.

Wisconsin.— McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

England.— Starkey *v.* Bank of England, [1903] A. C. 114, 8 Com. Cas. 142, 72 L. J. Ch. 402, 88 L. T. Rep. N. S. 244, 19 T. L. R. 312, 51 Wkly. Rep. 513; Fairbank *v.* Humphreys, 18 Q. B. D. 54, 56 L. J. Q. B. 57, 56 L. T. Rep. N. S. 36, 35 Wkly. Rep. 92; Richardson *v.* Williamson, L. R. 6 Q. B. 276, 40 L. J. Q. B. 145; Lewis *v.* Nicholson, 18 Q. B. 503, 16 Jur. 1041, 21 L. J. Q. B. 311, 83 E. C. L. 503; Oliver *v.* Bank of England, [1902] 1 Ch. 610, 7 Com. Cas. 89, 71 L. J. Ch. 388, 86 L. T. Rep. N. S. 248, 18 T. L. R. 341, 50 Wkly. Rep. 340 [*affirming* [1901] 1 Ch. 652, 65 J. P. 294, 70 L. J. Ch. 377, 84 L. T. Rep. N. S. 253, 17 T. L. R. 286, 49 Wkly. Rep. 391]; Collen *v.* Wright, 8 E. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647 [*affirming* 7 E. & B. 301, 26 L. J. Q. B. 147, 5 Wkly. Rep. 265, 90 E. C. L. 301]; Smout *v.* Ilbery, 12 L. J. Exch. 357, 10 M. & W. 1. At first reading Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33, appears to be inconsistent with the doctrine stated in the text, but what was actually decided in that case was that in the form of action there brought, which was an action for deceit, recovery could not be had without proof of fraud. As was said in Oliver *v.* Bank of England, *supra*, the principle laid down in Collen *v.* Wright, *supra*, is not affected by the decision in Derry *v.* Peek, *supra*.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 579, 580.

Liability of agent acting under forged power of attorney.— While the liability of an agent acting upon a forged power of attorney which he supposed to be genuine has sometimes been doubted in *dicta* in cases involving a different state of facts (Kroeger *v.* Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718; Polhill *v.* Walter, 3 B. & Ad. 114, 1 L. J. K. B. 92, 23 E. C. L. 59), it has been held in cases directly involving the point that the agent is liable although he acted in good faith and in entire ignorance of the forgery (Starkey *v.* Bank of England, [1903] A. C. 114, 8 Com. Cas. 142, 72 L. J. Ch. 402, 88 L. T. Rep. N. S. 244, 19 T. L. R. 312, 51 Wkly. Rep. 513; Oliver *v.* Bank of England, [1902] 1 Ch. 610, 7 Com. Cas. 89, 71 L. J. Ch. 388, 86 L. T. Rep. N. S. 248, 18 T. L. R. 341, 50 Wkly. Rep. 340 [*affirming* [1901] 1 Ch. 652, 65 J. P. 294, 70 L. J. Ch. 377, 84 L. T. Rep. N. S. 253, 17 T. L. R. 286, 49 Wkly. Rep. 391]).

Absence of moral fraud does not relieve agent, nor does the absence of intentional wrong-doing affect his liability. Groeltz *v.* Armstrong, 125 Iowa 39, 99 N. W. 128; Conant *v.* Alvord, 166 Mass. 311, 44 N. E. 250; Campbell *v.* Muller, 19 Misc. (N. Y.) 189, 43 N. Y. Suppl. 233; Yagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290; Hamburg Bank *v.* Wray, 4 Strobh. (S. C.) 87, 5 Am Dec. 659. See Benjamin *v.* Mattler, 3 Colo. App. 227, 32 Pac. 837. "The fact that the professed agent honestly thinks that he had authority affects the moral character of his Act; but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which such person sustains. If one of the two in such case is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion believed and acted upon as he intended it should be, and touching a subject within his peculiar knowledge and as to which he gave the other party no opportunity of judging for himself, has brought about the damage." Polhill *v.* Walter, 3 B. & Ad. 114, 1 L. J. K. B. 92, 23 E. C. L. 59; Collen *v.* Wright, 8 E. & B. 647, 6 Wkly. Rep. 123, 124 [*affirming* 7 E. & B. 301, 26 L. J. Q. B. 147, 5 Wkly. Rep. 265].

20. *Alabama.*— Crawford *v.* Barkley, 18 Ala. 270; Lazarus *v.* Shearer, 2 Ala. 718.

Arkansas.—Dale *v.* Donaldson Lumber Co.,

(II) *Non-Existing or Incompetent Principal.* A person who assumes to act as agent for a non-existing [21] or a legally incompetent or irresponsible [22]

48 Ark. 188, 2 S. W. 703, 3 Am. St. Rep. 224.

Illinois.— Walker *v.* Haughey, 25 Ill. App. 135; Clay *v.* Clay, 23 Ill. App. 109.

Indiana.— Lewis *v.* Reed, 11 Ind. 239; Pitman *v.* Kintner, 5 Blackf. 250, 33 Am. Dec. 461; Deming *v.* Bullitt, 1 Blackf. 241.

Iowa.— Groeltz *v.* Armstrong, 125 Iowa 39, 99 N. W. 128; Thilmany *v.* Iowa Paper Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259.

Kentucky.— Sanford *v.* McArthur, 18 B. Mon. 411.

Louisiana.— Merritt *v.* Wright, 19 La. Ann. 91; Richie *v.* Bass, 15 La. Ann. 668.

Maryland.— Keener *v.* Harrod, 2 Md. 63, 56 Am. Dec. 706.

Michigan.— Knickerbocker, *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

Mississippi.— Brown *v.* Johnson, 12 Sm. & M. 398, 51 Am. Dec. 118.

Missouri.— McClenticks *v.* Bryant, 1 Mo. 598, 14 Am. Dec. 310; Myers Tailoring Co. *v.* Keeley, 58 Mo. App. 491.

New Jersey.— Timken *v.* Tallmadge, 54 N. J. L. 117, 22 Atl. 996.

New York.— Taylor *v.* Nostrand, 134 N. Y. 108, 31 N. E. 246; Baltzen *v.* Nicolay, 53 N. Y. 467; Van Valkenburgh *v.* Thomasville, etc., R. Co., 4 N. Y. Suppl. 782; Feeter *v.* Heath, 11 Wend. 477; Meech *v.* Smith, 7 Wend. 315.

Oregon.—Anderson *v.* Adams, 43 Oreg. 621, 74 Pac. 215; Cochran *v.* Baker, 34 Oreg. 555, 52 Pac. 520, 56 Pac. 641.

Pennsylvania.— Hopkins *v.* Everly, 150 Pa. St. 117, 24 Atl. 624; Kroeger *v.* Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718; Layng *v.* Stewart, 1 Watts & S. 222; Hampton *v.* Speckenagle, 9 Serg. & R. 212, 11 Am. Dec. 704; Wolff *v.* Wilson, 28 Pa. Super. Ct. 511; *In re* Dripps, 6 Pa. L. J. 563, 4 Pa. L. J. Rep. 87.

South Carolina.— Danforth *v.* Timmerman, 65 S. C. 259, 43 S. E. 678.

Vermont.— Roberts *v.* Button, 14 Vt. 195.

Wisconsin.— McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

England.— Jones *v.* Dowman, 4 Q. B. 235, 45 E. C. L. 235; Weeks *v.* Propert, L. R. 8 C. P. 427, 42 L. J. C. P. 129, 21 Wkly. Rep. 676; East India Co. *v.* Hensley, 1 Esp. 112; Reid *v.* Dreaper, 6 H. & N. 813, 30 L. J. Exch. 268, 4 L. T. Rep. N. S. 650; Parrot *v.* Wells, 2 Vern. Ch. 127, 23 Eng. Reprint 691.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 579, 580.

21. *Iowa.*— Allen *v.* Pegram, 16 Iowa 163.

Louisiana.— Washburn *v.* Frank, 31 La. Ann. 427.

Missouri.— Fay *v.* Richmond, 18 Mo. App. 355.

Nebraska.— Learn *v.* Upstill, 52 Nebr. 271, 72 N. W. 213.

New Jersey.— Wonderly *v.* Booth, 36 N. J. L. 250.

New York.— Rowland *v.* Hall, 121 N. Y. App. Div. 459, 106 N. Y. Suppl. 55; Thistle *v.* Jones, 45 Misc. 215, 92 N. Y. Suppl. 113; Schenkberg *v.* Treadwell, 94 N. Y. Suppl. 418; Hub. Pub. Co. *v.* Richardson, 13 N. Y. Suppl. 665; Bartholomae *v.* Kaufman, 16 N. Y. Wkly. Dig. 127.

Pennsylvania.— O'Rorke *v.* Geary, 33 Pittsb. L. J. N. S. 431, 17 York Leg. Rec. 51.

South Carolina.— Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290.

Wisconsin.— Fredendall *v.* Taylor, 23 Wis. 538, 99 Am. Dec. 203.

England.— Kelner *v.* Baxter, L. R. 2 C. P. 174, 12 Jur. N. S. 1016, 36 L. J. C. P. 94, 15 L. T. Rep. N. S. 313, 15 Wkly. Rep. 278.

See 40 Cent. Dig. tit. "Principal and Agent," § 486.

An agent who is the real principal is liable, although he assumes to contract as agent, there being no other existing principal. Washburn *v.* Frank, 31 La. Ann. 427; Adams *v.* Hall, 3 Aspin. 1, 37 L. T. Rep. N. S. 70.

Liability of promoter of corporation for contracts entered into prior to incorporation see CORPORATIONS, 10 Cyc. 269 *et seq.*

22. *California.*— Murphy *v.* Helmrich, 66 Cal. 69, 4 Pac. 958.

Iowa.— Comfort *v.* Graham, 87 Iowa 295, 54 N. W. 242; Lewis *v.* Tilton, 64 Iowa 220, 19 N. W. 911, 52 Am. Rep. 436.

Massachusetts.— Jefts *v.* York, 12 Cush. 196; Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420.

Missouri.— Blakely *v.* Bennecke, 59 Mo. 193; Anderson *v.* Stapel, 80 Mo. App. 115.

Nebraska.— Codding *v.* Munson, 52 Nebr. 580, 72 N. W. 846, 66 Am. St. Rep. 524.

New York.— Fulton *v.* Sewall, 116 N. Y. App. Div. 744, 102 N. Y. Suppl. 109; McCartee *v.* Chambers, 6 Wend. 649, 22 Am. Dec. 556.

Pennsylvania.—Eichbaum *v.* Irons, 6 Watts & S. 67, 40 Am. Dec. 540.

Vermont.— Button *v.* Winslow, 53 Vt. 430.

England.— Drew *v.* Munn, 4 Q. B. D. 661, 48 L. J. Q. B. 591, 40 L. T. Rep. N. S. 671, 27 Wkly. Rep. 810.

See 40 Cent. Dig. tit. "Principal and Agent," § 484.

An agent who renders his principal inaccessible or irresponsible is himself liable. Bridges *v.* Bidwell, 20 Nebr. 185, 29 N. W. 302.

Unincorporated associations, clubs, and committees are generally held to be such irresponsible principals that persons attempting to contract for them as agents render themselves personally liable. Comfort *v.* Graham, 87 Iowa 295, 54 N. W. 242; Lewis *v.* Tilton, 64 Iowa 220, 19 N. W. 911, 52 Am. Rep. 436; Blakeley *v.* Bennecke, 59 Mo. 193; Codding *v.* Munson, 52 Nebr. 580, 72 N. W. 846, 66 Am. St. Rep. 524; Thistle *v.* Jones, 45 Misc. (N. Y.) 215, 92 N. Y. Suppl. 113; Eichbaum *v.* Irons, 6 Watts & S. (Pa.) 67,

principal renders himself personally liable to the person with whom he deals,[23] unless it is expressly understood either that the agent shall not be held, and the contractee with knowledge of the facts extends credit to the supposed principal,[24] or that the agent's liability shall be limited to a fund held by him for the purpose of his agency.[25] An exception to the rule of personal liability of an agent for a non-existing principal exists where an agent's authority has been revoked by the death of the principal, and the agent acts in ignorance thereof.[26]

(III) *Third Person's Knowledge of Lack of Authority.* The rule of personal liability of an agent acting without authority or in excess thereof is based upon the supposition that the want of authority is unknown to the person with whom he deals.[27] If therefore the agent fully discloses to the third person the facts concerning his authority, so that the latter may have the same opportunity of judging of the sufficiency thereof as the agent himself,[28] or if the third person

40 Am. Dec. 540; Winona Lumber Co. *v.* Church, 6 S. D. 498, 62 N. W. 107; Steele *v.* McElroy, 1 Sneed (Tenn.) 341; Button *v.* Winslow, 53 Vt. 430; Cullen *v.* Queensberry, 1 Bro. Ch. 101, 28 Eng. Reprint 1011; Steele *v.* Gourley, 3 T. L. R. 772; Jones *v.* Hope, 3 T. L. R. 247; Overton *v.* Hewett, 3 T. L. R. 246. And see Associations, and Cross-References Thereunder.

Where marriage disables a woman from contracting she is considered an irresponsible principal, and a person acting as her agent is himself liable. Edings *v.* Brown, 1 Rich. (S. C.) 255. See Hoppe *v.* Laylor, 53 Mo. App. 4. Power of married woman to appoint agent see Husband and Wife, 21 Cyc. 1304.

If the principal has general capacity to enter into contracts, however, the agent is not personally liable where he makes, in his principal's behalf, a contract which the principal in the particular case has no power in law to enter into. Thilmany *v.* Iowa Paper Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259. And see *infra*, III, C, 1, a, (IV).

Infancy of principal as breach of implied warranty of authority see *supra*, note 16.

23. See cases cited *supra*, notes 21, 22.

The reason for the rule is sometimes said to be that the parties must have intended that someone should be bound in order that the contract should have validity, and that therefore if the principal is not bound the agent should be. Heath *v.* Goslin, 80 Mo. 310, 50 Am. Rep. 505; Codding *v.* Munson, 52 Nebr. 580, 72 N. W. 846, 66 Am. St. Rep. 524; Timken *v.* Tallmadge, 54 N. J. L. 117, 22 Atl. 996; Wonderly *v.* Booth, 36 N. J. L. 250; Eichbaum *v.* Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540. The rule, however, may be based upon a broader principle, for one who assumes to act as agent impliedly warrants his authority (see *supra*, III, C, 1, a, (I)), but if there is no principal then the agent cannot have authority, and therefore he should be held liable for a breach of his implied warranty (see Bartholomae *v.* Kaufman, 16 N. Y. Wkly. Dig. 127).

24. Codding *v.* Munson, 52 Nebr. 580, 72 N. W. 846, 66 Am. St. Rep. 524; Jones *v.* Hope, 3 T. L. R. 247. And see cases cited *infra*, note 25.

25. Heath *v.* Goslin, 80 Mo. 310, 50 Am. Rep. 505; Codding *v.* Munson, 52 Nebr. 580, 72 N. W. 846, 66 Am. St. Rep. 524; Steele *v.* Gourley, 3 T. L. R. 772; Jones *v.* Hope, 3 T. L. R. 247. See Learn *v.* Upstill, 52 Nebr. 271, 72 N. W. 213.

26. *Missouri.*— Carriger *v.* Whittington, 26 Mo. 311, 72 Am. Dec. 212.

New York.— Ginochio *v.* Porcella, 3 Bradf. Surr. 277.

Pennsylvania.— Cassiday *v.* McKenzie, 4 Watts & S. 282, 39 Am. Dec. 76.

Tennessee.— See Jenkins *v.* Atkins, 1 Humphr. 294, 34 Am. Dec. 648.

England.— Hollman *v.* Pullin, Cab. & E. 254; Smout *v.* Ilbery, 12 L. J. Exch. 357, 10 M. & W. 1. In Halbot *v.* Lens, [1901] 1 Ch. 344, 70 L. J. Ch. 125, 83 L. T. Rep. N. S. 702, 49 Wkly. Rep. 214, the court say that Collen *v.* Wright, 8 E. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647 [*affirming* 7 E. & B. 301, 26 L. J. Q. B. 147, 5 Wkly. Rep. 265, 90 E. C. L. 301], must be considered as having overruled Smout *v.* Ilberry, *supra*; but the facts in the two cases were entirely dissimilar, and the rule of liability upon death of the principal is as has been stated.

See 40 Cent. Dig. tit. "Principal and Agent," § 476 *et seq.*

The reason for the rule seems to be based on the fact that the revocation is by the act of God and equally within the knowledge of both parties. Smout *v.* Ilbery, 12 L. J. Exch. 357, 10 M. & W. 1.

If the agent knows of his principal's death he may of course be held personally liable. Ziegler *v.* Fallon, 28 Mo. App. 295.

Revocation of authority by death of principal see *supra*, I, G, 2, c, (IV), (A).

27. *Alabama.*— Ware *v.* Morgan, 67 Ala. 461.

California.— See Senter *v.* Monroe, 77 Cal. 347, 19 Pac. 580.

Indiana.— Newman *v.* Sylvester, 42 Ind. 106.

Kentucky.— Sanford *v.* McArthur, 18 B. Mon. 411.

Minnesota.— Newport *v.* Smith, 61 Minn. 277, 63 N. W. 734; Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

Missouri.— Western Cement Co. *v.* Jones, 8 Mo. App. 373.

And see cases cited *infra*, notes 28, 29.

28. *Alabama.*— Ware *v.* Morgan, 67 Ala. 461.

himself has actual or presumptive knowledge of those facts,[29] the agent cannot be held personally liable, even though the principal be not bound. Thus where all the facts touching the agent's authority or its source are equally within the knowledge of both parties, who act thereupon under a mutual mistake of law as to the liability of the principal, the agent cannot be held.[30]

(iv) *Contracts Such as Would Not Bind Principal if Authorized.* In order to render an agent personally liable for making an unauthorized contract, the contract must be one which would have been enforceable against the principal if he had in fact authorized it.[31]

(v) *Ratification by Principal.* Ratification by the principal of a contract made by one assuming to act as agent without authority or in excess of

Connecticut.— Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429.

Indiana.— Newman *v.* Sylvester, 42 Ind. 106.

Iowa.— Klay *v.* Dallas Center Bank, 122 Iowa 506, 98 N. W. 315; Thilmany *v.* Iowa Paper-Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259.

Minnesota.— Newport *v.* Smith, 61 Minn. 277, 63 N. W. 734.

New York.— Sinclair *v.* Jackson, 8 Cow. 543.

Vermont.— Snow *v.* Hix, 54 Vt. 478.

29. *Illinois.*— Chase *v.* Debolt, 7 Ill. 371.

Kentucky.— Murray *v.* Carothers, 1 Metc. 71; McCarty *v.* Stanfili, 41 S. W. 278, 19 Ky. L. Rep. 612.

Louisiana.— Barry *v.* Pike, 21 La. Ann. 221.

New Jersey.— Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178.

New York.— Hall *v.* Lauderdale, 46 N. Y. 70; Title Guarantee, etc., Co. *v.* Levitt, 121 N. Y. App. Div. 485, 106 N. Y. Suppl. 147; Aspinwall *v.* Torrance, 1 Lans. 381 [*affirmed* in 57 N. Y. 331].

Wisconsin.— McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

United States.—New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 681 [*reversed* on other grounds in 16 Fed. 688, 21 Blatchf. 332].

Canada.— Outram *v.* Doyle, 13 Nova Scotia 1.

See 40 Cent. Dig. tit. "Principal and Agent," § 537.

Presumption of knowledge.— Where knowledge on the part of the third person is legally presumed, the effect in relieving the agent from personal liability is the same as in the case of actual knowledge. Perry *v.* Hyde, 10 Conn. 329; McCormick *v.* Seeberger, 73 Ill. App. 87; Newman *v.* Sylvester, 42 Ind. 106; Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194; Murray *v.* Carothers, 1 Metc. (Ky.) 71; Sandford *v.* McArthur, 18 B. Mon. (Ky.) 411; McReavy *v.* Eshelman, 4 Wash. 757, 31 Pac. 35; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 681 [*reversed* on other grounds in 16 Fed. 688, 21 Blatchf. 332]; McDonald *v.* McMillan, 17 U. C. Q. B. 377. See Smout *v.* Ilbery, 12 L. J. Exch. 357, 10 M. & W. 1.

30. *Connecticut.*— Perry *v.* Hyde, 10 Conn. 329.

Kansas.— Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194.

Massachusetts.— Jefts *v.* York, 10 Cush. 392.

Missouri.— Michael *v.* Jones, 84 Mo. 578; Humphrey *v.* Jones, 71 Mo. 62; Western Cement Co. *v.* Jones, 8 Mo. App. 373.

New York.— Walker *v.* State Bank, 9 N. Y. 582.

England.— Beattie *v.* Ebury, L. R. 7 Ch. 777, 41 L. J. Ch. 804, 27 L. T. Rep. N. S. 398, 20 Wkly. Rep. 994 [*affirmed* in L. R. 7 H. L. 102, 44 L. J. Ch. 20, 30 L. T. Rep. N. S. 581, 22 Wkly. Rep. 897]; Rashdall *v.* Ford, L. R. 2 Eq. 750, 35 L. J. Ch. 769, 14 L. T. Rep. N. S. 790, 14 Wkly. Rep. 950.

See 40 Cent. Dig. tit. "Principal and Agent," § 537.

31. Thilmany *v.* Iowa Paper-Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259; Baltzen *v.* Nicolay, 53 N. Y. 467; Dung *v.* Parker, 52 N. Y. 494; Kent *v.* Addicks, 126 Fed. 112, 60 C. C. A. 660. See, however, Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595, which, although apparently contrary to the rule stated in the text was really decided upon the theory that the agent knew that his principal could not authorize such a contract as the agent attempted to make, and that from this fact and from the face of the document itself the agent might as well have intended to bind himself as principal as to act merely as agent.

If the contract is void under the statute of frauds the agent, although not authorized to make it by the alleged principal, is not liable to the third person. Baltzen *v.* Nicolay, 53 N. Y. 467; Dung *v.* Parker, 52 N. Y. 494; Bloodgood *v.* Short, 50 Misc. (N. Y.) 286, 98 N. Y. Suppl. 775; Morrison *v.* Hazzard, (Tex. Civ. App. 1905) 88 S. W. 385; Snow *v.* Hix, 54 Vt. 478; Pow *v.* Davis, 1 B. & S. 220, 7 Jur. N. S. 1010, 30 L. J. Q. B. 257, 4 L. T. Rep. N. S. 399, 9 Wkly. Rep. 611, 101 E. C. L. 220; Warr *v.* Jones, 24 Wkly. Rep. 695. See Simmons *v.* More, 100 N. Y. 140, 2 N. E. 640.

The reason for the rule has been said to be that without it "the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract, when a breach of the contract itself, if it had been authorized, would have furnished no ground of action." Thilmany *v.* Iowa Paper-Bag Co.,

authority operates as an antecedent authorization, and the third person having received all the security for which he originally contracted, the agent is relieved from personal liability for breach of his warranty of authority.[32]

(VI) *DAMAGES.* In an action by the third person against one who assumed without authority to enter into a contract as agent for another, or against an agent for acting in excess of his authority, the measure of damages is the loss which has accrued to the third person as a natural and probable consequence of the want of authority, and is not limited by the contract but embraces all injuries resulting from the wrongful assumption.[33] Thus the agent is liable for the costs incurred by the third person in an unsuccessful action against the alleged principal to enforce the unauthorized contract.[34]

108 Iowa 357, 362, 79 N. W 261, 75 Am. St. Rep. 259; Baltzen *v.* Nicolay, 53 N. Y. 467.

32. *Connecticut.*— Hewitt *v.* Wheeler, 22 Conn. 557.

Louisiana.—Merritt *v.* Wright, 19 La. Ann. 91.

Massachusetts.— Ballou *v.* Talbot, 16 Mass. 461, 8 Am. Dec. 146.

Minnesota.— Sheffield *v.* Ladue, 16 Minn. 388, 10 Am. Rep. 145, holding, however, that the ratification must be before action is brought and before the other party is placed in any worse position than he would otherwise have occupied.

Pennsylvania.— Hopkins *v.* Everly, 150 Pa. St. 117, 24 Atl. 624.

Wisconsin.— Moody *v.* Port Washington M. E. Church, 99 Wis. 49, 74 N. W. 572.

And see *supra*, I, F, 4, c, (I), (A).

Where agent is held liable on the contract instead of on the theory of breach of an implied warranty of authority (see *infra*, IV. A, 3), it is held that his authorization must have existed at the time of making the contract, and that subsequent ratification, although it may bind the principal (see *supra*, I, F, 4, d), will not relieve the agent from several liability. Lazarus *v.* Shearer, 2 Ala. 718; Arfridson *v.* Ladd, 12 Mass. 173; Palmer *v.* Stephens, 1 Den. (N. Y.) 472; Rossiter *v.* Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62. And see Ballou *v.* Talbot, 16 Mass. 461, 8 Am. Dec. 146.

Failure to give notice of ratification to the third person will not make the assumed agent liable. Sheffield *v.* Ladue, 16 Minn. 388, 10 Am. Rep. 145.

33. *California.*—Wallace *v.* Bentley, 77 Cal. 19, 18 Pac. 788, 11 Am. St. Rep. 231, holding that while the assumed agent is liable to an action to recover money paid or for labor performed under the unauthorized contract, or for special damages sustained by reason of the wrong in assuming to act without authority, he is not liable for special damages by reason of false representations of authority, on account of which plaintiff failed to negotiate with the owner or his authorized agent in respect of the value of the contract.

Iowa.— Groeltz *v.* Armstrong, 125 Iowa 39, 99 N. W. 128.

Minnesota.— Skaaraas *v.* Finnegan, 32 Minn. 107, 19 N. W. 729, holding that the third person may recover for the loss of improvements made on real estate in good faith in pursuance of an unauthorized contract of purchase, in addition to his damages for the loss of his bargain.

Missouri.— Wright *v.* Baldwin, 51 Mo. 269; Duffy *v.* Mallinkrodt, 81 Mo. App. 449; Myers Tailoring Co. *v.* Keeley, 58 Mo. App. 491.

New York.— Taylor *v.* Nostrand, 134 N. Y. 108, 31 N. E. 246; Simmons *v.* More, 109 N. Y. 140, 2 N. E. 640; White *v.* Madison, 26 N. Y. 117; Parker *v.* Knox, 60 Hun 550, 15 N. Y. Suppl. 256 (holding that in an action for making an unauthorized contract of sale for future delivery the measure of damages is the difference between the contract price and what the goods were worth at the time when they should by the terms of the contract have been delivered); Feeter *v.* Heath, 11 Wend. 477 (holding also that the third person is not bound to look to the principal for so much of the contract as the agent was authorized to make, but may hold the agent responsible to the full amount of the contract).

North Carolina.— Le Roy *v.* Jacobsky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977.

North Dakota.— Kennedy *v.* Stonehouse, 13 N. D. 232, 100 N. W. 258, construing Rev. Codes (1899), § 4995.

Ohio.— Farmers Co-Operative Trust Co. *v.* Floyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346, holding that the measure of damages, where the agent acted in good faith, is the loss sustained by plaintiff through not having the valid contract which defendant assumed to make.

England.— Meek *v.* Wendt, 21 Q. B. D. 126, 6 Aspin. 331, 59 L. T. Rep. N. S. 558; Firbank *v.* Humphreys, 18 Q. B. D. 54, 56 L. J. Q. B. 57, 56 L. T. Rep. N. S. 36, 35 Wkly. Rep. 92 (holding the damages to be the difference between the position in which the third person would have been if the alleged agent's assertion were true and his actual position by reason of the assertion being false); *In re* National Coffee Palace Co., 24 Ch. D. 367, 53 L. J. Ch. 57, 50 L. T. Rep. N. S. 38, 32 Wkly. Rep. 236; Weeks *v.* Propert, L. R. 8 C. P. 427, 42 L. J. C. P. 129, 21 Wkly. Rep. 676; Spedding *v.* Nevell, L. R. 4 C. P. 212, 38 L. J. C. P. 133; Randell *v.* Trimen, 18 C. B. 786, 25 L. J. C. P. 307, 86 E. C. L. 786; Simons *v.* Patchett, 7 E. & B. 568, 3 Jur. N. S. 742, 26 L. J. Q. B. 195, 5 Wkly. Rep. 500, 90 E. C. L. 568; Hughes *v.* Graeme, 33 L. J. Q. B. 335, 12 Wkly. Rep. 857.

34. *Missouri.*— Wright *v.* Baldwin, 51 Mo. 269; Duffy *v.* Mallinkrodt, 81 Mo. App. 449.

b. Authorized Contracts — (i) *Where Principal Is Disclosed* — (a) *In General.* An agent who, acting within the scope of his authority, enters into contractual relations for a disclosed principal does not bind himself in the absence of an express agreement to do so.[35]

New York.— Wright *v.* Madison, 26 N. Y. 117.

North Dakota.— Kennedy *v.* Stonehouse, 13 N. D. 232, 100 N. W. 258, construing Rev. Codes (1899), § 4995.

England.— Spedding *v.* Nevell, L. R. 4 C. P. 212, 38 L. J. C. P. 133 (holding, however, that the agent was not liable for costs of an action brought against the third person in consequence of an assignment of the contract by the latter, which was not in the contemplation of the parties); Randell *v.* Trimen, 18 C. B. 786, 25 L. J. C. P. 307, 86 E. C. L. 786; Collen *v.* Wright, 8 E. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647 [*affirming* 7 E. & B. 301, 26 L. J. Q. B. 147, 5 Wkly. Rep. 265, 90 E. C. L. 301]; Hughes *v.* Graeme, 33 L. J. Q. B. 335, 12 Wkly. Rep. 857. But see Pow *v.* Davis, 1 B. & S. 220, 7 Jur. N. S. 1010, 30 L. J. Q. B. 257, 4 L. T. Rep. N. S. 399, 9 Wkly. Rep. 611, 101 E. C. L. 220, holding that the third person could not recover the costs of an unsuccessful defense to an ejectment by the principal, it appearing that the third person would have been unsuccessful, by reason of the lease being void by the statute of frauds, even though the agent had had the authority which he assumed.

Canada.— Eckstein *v.* Whitehead, 10 U. C. C. P. 65.

35. *Alabama.*— Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950; Humes *v.* Decatur Land Imp., etc., Co., 98 Ala. 461, 13 So. 368 [*approved* in Anderson *v.* Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105] (holding that if credit is given exclusively to the agent, he must be informed of that fact); Comer *v.* Bankhead, 70 Ala. 493; Ware *v.* Morgan, 67 Ala. 461; Roney *v.* Winter, 37 Ala. 277; Steele *v.* Dart, 6 Ala. 798; Gillaspie *v.* Wesson, 7 Port. 454, 31 Am. Dec. 715.

California.— Schindler *v.* Green, (1905) 82 Pac. 341; Tevis *v.* Savage, 130 Cal. 411, 62 Pac. 611; Merrill *v.* Williams, 63 Cal. 70; Engels *v.* Heatly, 5 Cal. 135.

Colorado.— Hewes *v.* Andrews, 12 Colo. 161, 20 Pac. 338.

Connecticut.— Taylor *v.* Shelton, 30 Conn. 122; Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; Johnson *v.* Smith, 21 Conn. 627; Magill *v.* Hinsdale, 6 Conn. 464*a*, 16 Am. Dec. 70; Hovey *v.* Magill, 2 Conn. 680.

Delaware.— Sharp *v.* Swayne, 1 Pennew. 210, 40 Atl. 113.

Georgia.— Cureton *v.* Wright, 73 Ga. 8; Tiller *v.* Spradley, 39 Ga. 35.

Illinois.— Stevenson *v.* Mathers, 67 Ill. 123; Wheeler *v.* Reed, 36 Ill. 81; Seery *v.* Socks, 29 Ill. 313; Marckle *v.* Haskins, 27 Ill. 382; Warren *v.* Dickson, 27 Ill. 115; Chase *v.* Debolt, 7 Ill. 371; Scaling *v.* Knollin, 94 Ill. App. 443; Wheeler *v.* Cannon, 84 Ill. App. 591; Fisk *v.* Carbonized Stone Co., 67 Ill. App. 327; Brainard *v.* Turner, 4 Ill. App. 61; Dunton *v.* Chamberlain, 1 Ill. App. 361.

Indiana.— Newman *v.* Sylvester, 42 Ind. 106; Robeson *v.* Chapman, 6 Ind. 352; Pitman *v.* Kintner, 5 Blackf. 250, 33 Am. Dec. 461.

Iowa.— Doolittle *v.* Murray, 134 Iowa 536, 111 N. W. 999; Klay *v.* Dallas Center Bank, 122 Iowa 506, 98 N. W. 315; Thilmany *v.* Iowa Paper-Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259; Guest *v.* Burlington Opera-House Co., 74 Iowa 457, 38 N. W. 158; Baker *v.* Chambles, 4 Greene 428.

Kansas.— Irwin *v.* Thompson, 27 Kan. 643; McCubbin *v.* Graham, 4 Kan. 397.

Kentucky.— Lewis *v.* Harris, 4 Metc. 353.

Louisiana.— Maury *v.* Ranger, 38 La. Ann. 485, 58 Am. Rep. 197; Rosenthal *v.* Myers, 25 La. Ann. 463; Barry *v.* Pike, 21 La. Ann. 221; Trastour *v.* Fallon, 12 La. Ann. 25; Spotts *v.* Cowan, 9 La. Ann. 520; Hazard *v.* Lambeth, 3 Rob. 378; Zacharie *v.* Nash, 13 La. 20; Lincoln *v.* Smith, 11 La. 11; Wolfe *v.* Jewett, 10 La. 383; Boimare *v.* Toby, 5 La. 333; Waring *v.* Cox, 1 La. 198; Lafarge *v.* Ripley, 4 Mart. N. S. 303; Honore *v.* White, 1 Mart. N. S. 219; Krumbhaar *v.* Ludeling, 3 Mart. 640.

Maine.— Teele *v.* Otis, 66 Me. 329; Rogers *v.* March, 33 Me. 106.

Maryland.— McClernan *v.* Hall, 33 Md. 293; Key *v.* Parnham, 6 Harr. & J. 418.

Massachusetts.— Goodenough *v.* Thayer, 132 Mass. 152; Southard *v.* Sturtevant, 109 Mass. 390; Bray *v.* Kettell, 1 Allen 80; Lyon *v.* Williams, 5 Gray 557; Raymond *v.* Crown, etc., Mills, 2 Metc. 319; Simonds *v.* Heard, 23 Pick. 120, 34 Am. Dec. 41.

Missouri.— Michael *v.* Jones, 84 Mo. 578; Humphrey *v.* Jones, 71 Mo. 62; Hearne *v.* Chillicothe, etc., R. Co., 53 Mo. 324; Thompson *v.* Irwin, 76 Mo. App. 418; Newland Hotel Co. *v.* Lowe Furniture Co., 73 Mo. App. 135; Ziegler *v.* Fallon, 28 Mo. App. 295.

Nebraska.— Meade Plumbing, etc., Co. *v.* Irwin, 77 Nebr. 385, 109 N. W. 391; Huffman *v.* Newman, 55 Nebr. 713, 76 N. W. 409; Wheeler *v.* Walden, 17 Nebr. 122, 22 N. W. 346.

New Hampshire.— Sleeper *v.* Weymouth, 26 N. H. 34; Brown *v.* Rundlett, 15 N. H. 360; Hanover *v.* Eaton, 3 N. H. 38.

New Jersey.— Calloty *v.* Schuman, 73 N. J. L. 92, 62 Atl. 186; Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; Kean *v.* Davis, 20 N. J. L. 425; Burley *v.* Kitchell, 20 N. J. L. 305; Shotwell *v.* McKown, 5 N. J. L. 828; Tuttle *v.* Ayres, 3 N. J. L. 682.

New York.— American Nat. Bank *v.* Wheelock, 82 N. Y. 118; Bonynge *v.* Field, 81 N. Y. 159; Jones *v.* Gould, 123 N. Y. App. Div. 236, 108 N. Y. Suppl. 31; Crandall *v.* Rollins, 83 N. Y. App. Div. 618, 82 N. Y. Suppl. 317; Baer *v.* Bonynge, 72 Hun 33, 25 N. Y. Suppl. 666 [*affirmed* in 147 N. Y. 393,

(B) *Intention as Governing Liability.* Whether the agent of a disclosed principal binds himself depends upon the intention of the parties, which must be gathered from the facts and circumstances of each particular case.[36] It is, however, the disclosed intention which governs, not any intention hidden in the mind of the agent, and accordingly the agent may render himself personally liable, although

42 N. E. 31]; Durston *v.* Butterfield, 66 Barb. 601; Plumb *v.* Milk, 19 Barb. 74; Stanton *v.* Camp, 4 Barb. 274; Underhill *v.* Smith, 52 Misc. 349, 102 N. Y. Suppl. 142; Collier *v.* Myers, 52 Misc. 116, 101 N. Y. Suppl. 659; Whiting *v.* Saunders, 23 Misc. 332, 51 N. Y. Suppl. 211; Iserman *v.* Conklin, 21 Misc. 194, 47 N. Y. Suppl. 107; T. E. Hayman Co. *v.* Knepper, 88 N. Y. Suppl. 930; Buck *v.* Amidon, 41 How. Pr. 370; Kirkpatrick *v.* Stainer, 22 Wend. 244; Pentz *v.* Stanton, 10 Wend. 271, 25 Am. Dec. 558; Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; Rathbon *v.* Budlong, 15 Johns. 1. See Durston *v.* Butterfield, 66 Barb. 601.

North Carolina.— McCall *v.* Clayton, 44 N. C. 422; Meadows *v.* Smith, 34 N. C. 18. See Davis *v.* Burnett, 49 N. C. 71, 67 Am. Dec. 263.

Oregon.— Stewart *v.* Perkins, 3 Oreg. 508.

Pennsylvania.—Roberts *v.* Austin, 5 Whart. 313; Campbell *v.* Baker, 2 Watts 83; Joyce *v.* Sims, 2 Dall. 223, 1 L. ed. 358; Schaetzel *v.* Christman, 16 Pa. Super. Ct. 294; Rosenberg *v.* Clyde, 2 Pa. Super. Ct. 572.

Rhode Island.— Pease *v.* Francis, 25 R. I. 226, 55 Atl. 686.

South Carolina.— Waddell *v.* Mordecai, 3 Hill 22; James *v.* Attaway, Harp. 438.

Tennessee.— Powell *v.* Finch, 5 Yerg. 446.

Texas.— Scottish-American Mortg. Co. *v.* Davis, (1902) 72 S. W. 217.

Vermont.— Johnson *v.* Cate, 77 Vt. 218, 59 Atl. 830; Abbott *v.* Cobb, 17 Vt. 593; Hall *v.* Huntoon, 17 Vt. 244, 44 Am. Dec. 332; Peters *v.* Farnsworth, 15 Vt. 155, 40 Am. Dec. 671; Roberts *v.* Button, 14 Vt. 195.

West Virginia.— Johnson *v.* Welch, 42 W. Va. 18, 24 S. E. 585; Piercy *v.* Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

United States.— Baldwin *v.* Black, 119 U. S. 643, 7 S. Ct. 326, 30 L. ed. 530; Whitney *v.* Wyman, 101 U. S. 392, 25 L. ed. 1050; Great Lakes Towing Co. *v.* Worthington, 147 Fed. 926; Lehman *v.* Field, 31 Fed. 852; Bradford *v.* Eastburn, 3 Fed. Cas. No. 1,767, 2 Wash. 219; U. S. *v.* Bevan, 24 Fed. Cas. No. 14,588, Crabbe 324.

England.— Downman *v.* Williams, 7 Q. B. 103, 53 E. C. L. 103; Elkington *v.* Hurter, [1892] 2 Ch. 452, 61 L. J. Ch. 514, 66 L. T. Rep. N. S. 764; Clark *v.* Rivers, L. R. 5 Eq. 91, 37 L. J. Ch. 70, 17 L. T. Rep. N. S. 166, 16 Wkly. Rep. 123; Green *v.* Kopke, 18 C. B. 549, 2 Jur. N. S. 1049, 25 L. J. C. P. 297, 4 Wkly. Rep. 598, 86 E. C. L. 549; Lennard *v.* Robinson, 3 C. L. R. 1363, 5 E. & B. 125, 1 Jur. N. S. 853, 24 L. J. Q. B. 275, 85 E. C. L. 125; Dixon *v.* Parker, 2 Ves. 219, 28 Eng. Reprint 142; Le Texier *v.* Arspache, 15 Ves. Jr. 159, 33 Eng. Reprint 714; *Ex p.* Hartop, 12 Ves. Jr. 349, 33 Eng. Reprint 132.

Canada.— Blair *v.* Robinson, 5 N. Brunsw. 487; Armstrong *v.* Lye, 24 Ont. App. 543 [*reversing* 27 Ont. 511].

See 40 Cent. Dig. tit. "Principal and Agent," §§ 476–478.

An agent jointly interested with his principal in a contract which he makes in the latter's behalf is personally bound thereby. Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

Although the agent appropriates the proceeds of the contract to his own use, yet if he originally acted within his authority and bound his principal he is not liable to the third person. Shelton *v.* Darling, 2 Conn. 435.

36. *Alabama.*—Anderson *v.* Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105.

Connecticut.— Hewitt *v.* Wheeler, 22 Conn. 557; Perry *v.* Hyde, 10 Conn. 329; Hovey *v.* Magill, 2 Conn. 680.

Georgia.— Fleming *v.* Hill, 62 Ga. 751.

Illinois.— Wheeler *v.* Reed, 36 Ill. 81.

Massachusetts.— Steamship Bulgarian Co. *v.* Merchants Despatch Transp. Co., 135 Mass. 421; Worthington *v.* Cowles, 112 Mass. 30; Wilder *v.* Cowles, 100 Mass. 487; Bray *v.* Kettell, 1 Allen 80.

Missouri.— Hovey *v.* Pitcher, 13 Mo. 191.

New Hampshire.— Brown *v.* Rundlett, 15 N. H. 360.

New Jersey.— Kean *v.* Davis, 20 N. J. L. 425.

New York.— Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Jones *v.* Gould, 123 N. Y. App. Div. 236, 108 N. Y. Suppl. 31; Maryland Coal Co. *v.* Edwards, 4 Hun 432; Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213. See Balmford *v.* Peffer, 31 Misc. 715, 65 N. Y. Suppl. 271.

Wisconsin.— See McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468, holding that to make the agent personally liable where he does not so intend, and the credit is not given to him, there must be some wrong or omission of right on his part.

United States.— Whitney *v.* Wyman, 101 U. S. 392, 25 L. ed. 1050.

England.— Green *v.* Kopke, 18 C. B. 549, 2 Jur. N. S. 1049, 25 L. J. C. P. 297, 4 Wkly. Rep. 598, 86 E. C. L. 549; Lennard *v.* Robinson, 3 C. L. R. 1363, 5 E. & B. 125, 1 Jur. N. S. 853, 24 L. J. Q. B. 275, 85 E. C. L. 125.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 477, 478.

When intention must be gathered from contract alone.— If the contract is in writing, and is clear and unambiguous in its terms, the intention of the parties must be gathered from it alone without resorting to other facts and circumstances to vary its construction and legal effect. Bray *v.* Kettell, 1 Allen (Mass.) 80.

Presumption as to intention of parties see *infra*, IV, E, 1, a, (IX).

this be contrary to his actual intention, if he has in fact bound himself according to the terms of the contract.[37]

(c) *Pledges of Individual Credit by Agent.* An agent may, although apparently acting as such, exclusively pledge his own credit or superadd it to that of the principal, in which event he will of course be personally liable to the extent to which credit has been extended to him.[38] And although a person in making a contract describes himself as an agent or affixes to his signature words descriptive of agency, these terms may be treated as mere *descriptio personæ*, and if the alleged agent has otherwise assumed a personal obligation or pledged his own credit he may still be held upon the contract.[39]

(d) *Failure to Bind Principal.* An agent who, while entering into an authorized contract, fails to bind his principal does not necessarily bind himself, and where there are no apt words used to bind either the principal or the agent the contract is absolutely void and thus imposes obligations on neither.[40]

37. *Alabama.*— Humes *v.* De Catur Land Imp., etc., Co., 98 Ala. 461, 13 So. 368; Bell *v.* Teague, 85 Ala. 211, 3 So. 861.

Kentucky.— Scott *v.* Messick, 4 T. B. Mon. 535; McAlexander *v.* Lee, 3 A. K. Marsh. 483.

Maine.— Stinchfield *v.* Little, 1 Me. 231, 10 Am. Dec. 65.

Massachusetts.—Taber *v.* Cannon, 8 Mete. 46; Simonds *v.* Heard, 23 Pick. 120, 34 Am. Dec. 41; Mayhew *v.* Prince, 11 Mass. 54.

Michigan.— Landyskowski *v.* Lark, 108 Mich. 500, 66 N. W. 371.

Mississippi.—Garland *v.* Stewart, 31 Miss. 314.

New Hampshire.— Brown *v.* Rundlett, 15 N. H. 360; Savage *v.* Rix, 9 N. H. 263.

New York.— McBratney *v.* Heydecker, 8 Misc. 309, 28 N. Y. Suppl. 730; Mills *v.* Hunt, 20 Wend. 431.

Pennsylvania.— Meyer *v.* Barker, 6 Binn. 228.

Tennessee.— Cruse *v.* Jones, 3 Lea 66; Ahrens *v.* Cobb, 9 Humphr. 643.

England.— Norton *v.* Herron, 1 C. & P. 648, 12 E. C. L. 366, R. & M. 229, 21 E. C. L. 739, 28 Rev. Rep. 797.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 482, 483.

38. *Alabama.*— Humes *v.* Decatur Land Inmp., etc., Co., 98 Ala. 461, 13 So. 368; Bell *v.* Teague, 85 Ala. 211, 3 So. 861. See Clealand *v.* Walker, 11 Ala. 1059, 46 Am. Dec. 238.

Connecticut.—Johnson *v.* Smith, 21 Conn. 627.

Delaware.— Sharp *v.* Swayne, 1 Pennew. 210, 40 Atl. 113.

Georgia.— Phinizy *v.* Bush, 129 Ga. 479, 59 S. E. 259; Holcomb *v.* Cable Co., 119 Ga. 466, 46 S. E. 671.

Illinois.—Fisher *v.* Haggerty, 36 Ill. 128.

Indiana.— Shordan *v.* Kyler, 87 Ind. 38.

Iowa.— Nixon *v.* Downey, 49 Iowa 166.

Louisiana.—Thompson *v.* Moulton, 20 La. Ann. 535; Campbell *v.* Nicholson, 12 Rob. 428; Linton *v.* Walsh, 16 La. 113; Hopkins *v.* Lacouture, 4 La. 64.

Massachusetts.— Wilder *v.* Cowles, 100 Mass. 487. And see Worthington *v.* Cowles, 112 Mass. 30, holding the agent liable unless the third person understood, or ought as a reasonable man to have understood, that he was dealing with the principal.

Mississippi.—Garland *v.* Stewart, 31 Miss. 314.

Missouri.— Hovey *v.* Pitcher, 13 Mo. 191; Ross *v.* McAnaw, 72 Mo. App. 99.

Nebraska.— Sholes *v.* Kreamer, 26 Nebr. 556, 42 N. W. 724.

New York.— McBratney *v.* Heydecker, 8 Misc. 309, 28 N. Y. Suppl. 730; Stone *v.* Wood, 7 Cow. 453, 17 Am. Dec. 529. See Rathbone *v.* Budlong, 15 Johns. 1.

South Carolina.— Danforth *v.* Timmerman, 65 S. C. 259, 43 S. E. 678.

Tennessee.— See Cruse *v.* Jones, 3 Lea 66.

Vermont.— Button *v.* Winslow, 53 Vt. 430; Hinsdale *v.* Partridge, 14 Vt. 547.

Virginia.— Strider *v.* Winchester, etc., R. Co., 21 Gratt. 440; Richmond First Presb. Church *v.* Manson, 4 Rand. 197.

Wisconsin.— Fredendall *v.* Taylor, 26 Wis. 286; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

England.— Owen *v.* Gooch, 2 Esp. 567; Turrel *v.* Collet, 1 Esp. 321.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 482, 483.

Although the consideration inures to the principal, yet if the agent binds himself personally to pay, he will be liable. Shordan *v.* Kyler, 87 Ind. 38 (so holding, although the agent's want of interest in the transaction, except as agent, be known to the other contracting party); Ahrens *v.* Cobb, 9 Humphr. (Tenn.) 643.

39. See *supra*, 11, C.

40. Taylor *v.* Shelton, 30 Conn. 122; Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; Stetson *v.* Patten, 2 Me. 358, 11 Am. Dec. 111; Newland Hotel Co. *v.* Lowe Furniture Co., 73 Mo. App. 135; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468. See, however, Le Roy *v.* Jacobosky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977, holding that where an agent fails to bind his principal, whereby another is misled and parts with some thing of value or acquires legal rights, the agent, although not liable on the contract as made, may be held liable in a special action on the case under the common-law procedure, or, under the code, in an action upon an implied assumpsit,

(E) *Liability of Agent of Foreign Principal.* According to a line of earlier decisions an agent acting for a disclosed foreign principal was presumed, in the absence of an express or implied agreement to the contrary, to have pledged his own credit and to have intended to bind himself personally.[41] By the great weight of more recent authority, however, this rule is no longer in force, and the liability of the agent of a foreign principal is the same as that of any other agent, and governed by the same principles.[42]

(II) *Where Principal Is Undisclosed.* An agent who enters into a contract in his own name without disclosing the identity of his principal renders himself personally liable even though the third person knows that he is acting as agent, unless it affirmatively appears that it was the mutual intention of the parties to the contract that the agent should not be bound.[43] With stronger

where he has received the consideration, or for damages.

41. *Indiana.*— Vawter *v.* Baker, 23 Ind. 63.

Louisiana.—Thorne *v.* Tait, 8 La. Ann. 8; New Castle Mfg. Co. *v.* Red River R. Co., 1 Rob. 145, 36 Am. Dec. 686.

Maine.— Rogers *v.* March, 33 Me. 106; McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291.

New York.— Hochster *v.* Baruch, 5 Daly 440. But see Kirkpatrick *v.* Stainer, 22 Wend. 244.

Pennsylvania.— *In re* Merrick, 5 Watts & S. 9.

England.— Gonzales *v.* Sladen, Buller N. P. 130; Peterson *v.* Ayre, 13 C. B. 353, 76 E. C. L. 353; Heald *v.* Kenworthy, 3 C. L. R. 612, 10 Exch. 739, 1 Jur. N. S. 70, 24 L. J. Exch. 76, 3 Wkly. Rep. 176. See Thomson *v.* Davenport, 9 B. & C. 78, 4 M. & R. 110, 17 E. C. L. 45.

Canada.— Jack *v.* Clews, 5 N. Brunsw. 637.

See 40 Cent. Dig. tit. "Principal and Agent," § 485.

An agent who expressly contracts not to be liable cannot of course be held, even though acting for a foreign principal. Milvain *v.* Perez, 3 E. & E. 495, 7 Jur. N. S. 336, 30 L. J. Q. B. 90, 3 L. T. Rep. N. S. 736, 9 Wkly. Rep. 269, 107 E. C. L. 495.

Reasons for rule.— This rule seems to be based upon "the consideration, that a merchant abroad and his ability to discharge his obligations may be unknown to those, who assume pecuniary responsibility or make advances or perform services on his account; . . . and that the party dealing with the agent intends to trust one, who is known to him and resides in the same country and subject to the same laws, as himself, rather than trust to one, who if known cannot from his residence in a foreign country, be amenable to those laws, and whose ability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his remedies." McKenzie *v.* Nevius, 22 Me. 138, 143, 38 Am. Dec. 291; Story Agency, § 290.

This presumption might be rebutted by proof that credit was given to both principal and agent or to the agent alone (Vawter *v.* Baker, 23 Ind. 63; Newcastle Mfg. Co. *v.* Red River R. Co., 1 Rob. (La.) 145, 36 Am. Dec. 686), or by proof that the usage of trade did not embrace the case in question (Vawter *v.* Baker, *supra*).

Limitations to rule.— It has been held that the rule of personal liability of an agent for a disclosed foreign principal did not extend to a contract, made in one of the United States by one resident there, for personal services to be rendered in a foreign country (Rogers *v.* March, 33 Me. 106), nor to a contract made by parties resident in different states of the United States, which are held to be not foreign in the sense of the term necessary to make the rule operative (Vawter *v.* Baker, 23 Ind. 63; Taintor *v.* Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Kirkpatrick *v.* Stainer, 22 Wend. (N. Y.) 244; Barham *v.* Bell, 112 N. C. 131, 16 S. E. 903); and in Thomson *v.* Davenport, 9 B. & C. 78, 4 M. & R. 110, 17 E. C. L. 45, it was strongly intimated that, in the absence of a trade usage to the contrary, the rule would not be extended to contracts between residents of Scotland and England.

42. *Louisiana.*— Maury *v.* Ranger, 38 La. Ann. 485, 58 Am. Rep. 197.

Massachusetts.— Goldsmith *v.* Manheim, 109 Mass. 187; Bray *v.* Kettell, 1 Allen 80; Alcock *v.* Hopkins, 6 Cush. 484. See Barry *v.* Page, 10 Gray 398.

New Hampshire.— Kaulback *v.* Churchill, 59 N. H. 296.

United States.—Oelricks *v.* Ford, 23 How. 49, 16 L. ed. 534; Berwind *v.* Schultz, 25 Fed. 912.

England.— Hutton *v.* Bulloch, L. R. 9 Q. B. 572, 30 L. T. Rep. N. S. 648, 22 Wkly. Rep. 956; Armstrong *v.* Stokes, L. R. 7 Q. B. 598, 41 L. J. Q. B. 253, 26 L. T. Rep. N. S. 872, 21 Wkly. Rep. 52; Wilson *v.* Zulueta, 14 Q. B. 405, 14 Jur. 366, 19 L. J. Q. B. 49, 68 E. C. L. 405; Green *v.* Kopke, 18 C. B. 549, 2 Jur. N. S. 1049, 25 L. J. C. P. 297, 4 Wkly. Rep. 598, 86 E. C. L. 549; Gadd *v.* Houghton, 1 E. & D. 357, 46 L. J. Exch. 71, 35 L. T. Rep. N. S. 222, 24 Wkly. Rep. 975; Ogden *v.* Hall, 40 L. T. Rep. N. S. 751.

See 40 Cent. Dig. tit. "Principal and Agent," § 485.

43. *Arkansas.*— Neely *v.* State, 60 Ark. 66, 28 S. W. 800, 27 L. R. A. 503, 46 Am. St. Rep. 148.

reason an agent who, without disclosing his agency, enters into contractual relations in his own name with one who is unaware of the agency binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in like manner as if he were the real principal, although in contracting he may have intended to act solely for his principal.[44] If the agent would

Illinois.—Macdonald *v.* Bond, 96 Ill. App. 116 [*affirmed* in 195 Ill. 122, 62 N. E. 881]; Scaling *v.* Knollin, 94 Ill. App. 443.

Indian Territory.— Lowrey *v.* Scargill, (1907) 104 S. W. 813.

Iowa.— Lull *v.* Anamosa Nat. Bank, 110 Iowa 537, 81 N. W. 784.

Louisiana.— Pugh *v.* Mone, 44 La. Ann. 209, 10 So. 710.

Massachusetts.— Welch *v.* Goodwin, 123 Mass. 71, 25 Am. Rep. 24; Winsor *v.* Griggs, 5 Cush. 210. See Lyon *v.* Williams, 5 Gray 557.

Michigan.— Lewis *v.* Weidenfeld, 114 Mich. 581, 72 N. W. 604.

Minnesota.— Brown *v.* Ames, 59 Minn. 476, 61 N. W. 448; Rollins *v.* Phelps, 5 Minn. 463.

Missouri.— Porter *v.* Merrill, 138 Mo. 555, 39 S. W. 798.

Nebraska.— Dockarty *v.* Tillotson, 64 Nebr. 432, 89 N. W. 1050; Bridges *v.* Bidwell, 20 Nebr. 185, 29 N. W. 302.

New York.— De Remer *v.* Brown, 165 N. Y. 410, 59 N. E. 129; McClure *v.* Central Trust Co., 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153; Meriden Nat. Bank *v.* Gallaudet, 120 N. Y. 298, 24 N. E. 994; Argersinger *v.* MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687; Knapp *v.* Simon, 96 N. Y. 284; Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Good *v.* Rumsey, 50 N. Y. App. Div. 280, 63 N. Y. Suppl. 981; Petrolia Mfg. Co. *v.* Jenkins, 29 N. Y. App. Div. 403, 51 N. Y. Suppl. 1028; Powers *v.* McLean, 14 N. Y. App. Div. 92, 43 N. Y. Suppl. 477 [*affirmed* in 164 N. Y. 588, 58 N. E. 1091]; Morrison *v.* Currie, 4 Duer 79 (holding also that the agent is liable, although he was not particularly requested to disclose his principal); Mason *v.* Cockroft, 3 Duer 366 (holding also that the agent is not released by a subsequent agreement between his principal and the third person to submit the matter in dispute to arbitration); Nichols *v.* Weil, 30 Misc. 441, 62 N. Y. Suppl. 477; Nelson *v.* Andrews, 19 Misc. 623, 44 N. Y. Suppl. 384; Waring *v.* Mason, 18 Wend. 425; McComb *v.* Wright, 4 Johns. Ch. 659.

Ohio.— Soutter *v.* Stoeckle, 6 Ohio Dec. (Reprint) 1054, 10 Am. L. Rec. 23.

Pennsylvania.— Meyer *v.* Barker, 6 Binn. 228; Manley *v.* Hickman, 1 Chest. Co. Rep. 557.

South Carolina.— Long *v.* McKissick, 50 S. C. 218, 27 S. E. 636; Conyers *v.* Magrath, 4 McCord 392.

Tennessee.— Steele *v.* McElroy, 1 Sneed 341.

Vermont.— Arnold *v.* Sprague, 34 Vt. 402.

Virginia.— Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291, construing Code (1887), § 2877.

West Virginia.— Morris *v.* Clifton Forge Grocery Co., 46 W. Va. 197, 32 S. E. 997.

United States.— Horan *v.* Hughes, 129 Fed. 248; Armstrong *v.* Brolaski, 46 Fed. 903; Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 521–523. And see cases cited *infra*, note 45.

In England and Canada a custom exists in various trades rendering the agent liable when he fails to disclose the name of his principal. Pike *v.* Ongley, 18 Q. B. D. 708, 56 L. J. Q. B. 373, 35 Wkly. Rep. 534; Hutcheson *v.* Eaton, 13 Q. B. D. 861, 51 L. T. Rep. N. S. 846; Barrow *v.* Dyster, 13 Q. B. D. 635, 51 L. T. Rep. N. S. 573, 33 Wkly. Rep. 199; Fleet *v.* Murton, L. R. 7 Q. B. 126, 41 L. J. Q. B. 49, 26 L. T. Rep. N. S. 181, 20 Wkly. Rep. 97; Imperial Bank *v.* London, etc., Docks Co., 5 Ch. D. 195, 46 L. J. Ch. 335, 36 L. T. Rep. N. S. 233; Hutchinson *v.* Tatham, L. R. 8 C. P. 482, 42 L. J. C. P. 260, 29 L. T. Rep. N. S. 103, 22 Wkly. Rep. 18; Bacmeister *v.* Levy, Cab. & E. 121; Boultbee *v.* Gzowski, 29 Can. Sup. Ct. 54. See Wildy *v.* Stephenson, Cab. & E. 3.

44. *Alabama.*— Armour Packing Co. *v.* Vietch-Young Produce Co., (1903) 39 So. 680; Brent *v.* Miller, 81 Ala. 309, 8 So. 219; Wood *v.* Brewer, 73 Ala. 259.

California.— Bradford *v.* Woodworth, 108 Cal. 684, 41 Pac. 797; Murphy *v.* Helmrich, 66 Cal. 69, 4 Pac. 958.

Colorado.—Haviland *v.* Mayfield, 38 Colo. 185, 88 Pac. 148; Mackey *v.* Briggs, 16 Colo. 143, 26 Pac. 554; Hewes *v.* Andrews, 12 Colo. 161, 20 Pac. 338.

Connecticut.—Pierce *v.* Johnson, 34 Conn. 274.

Delaware.— Sharp *v.* Swayne, 1 Pennew. 210, 40 Atl. 113.

Georgia.— Burkhalter *v.* Perry, 127 Ga. 438, 56 S. E. 631; Garrard *v.* Moody, 48 Ga. 96.

Illinois.— Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Wheeler *v.* Reed, 36 Ill. 81; Scaling *v.* Knollin, 94 Ill. App. 443; Loehde *v.* Halsey, 88 Ill. App. 452; John Spry Lumber Co. *v.* McMillan, 77 Ill. App. 280; Trench *v.* Hardin County Canning Co., 67 Ill. App. 269; Weil *v.* Defenbaugh, 65 Ill. App. 489; Corrigan *v.* Reilly, 64 Ill. App. 531; Porter *v.* Day, 44 Ill. App. 256.

Indiana.— Wilson *v.* Nicholson, 61 Ind. 241; Merrill *v.* Wilson, 6 Ind. 426.

Iowa.— Temple *v.* Pennell, 123 Iowa 729, 99 N. W. 567; Fritz *v.* Kennedy, 119 Iowa 628, 93 N. W. 603; Thompson *v.* People's

avoid personal liability on a contract entered into by him in behalf of his principal he must disclose not only the facts that he is acting in a representative capacity,

Building, etc., Co., 114 Iowa 481, 87 N. W. 438; Blackmore *v.* Fairbanks, etc., Co., 79 Iowa 282, 44 N. W. 548; Nixon *v.* Downey, 49 Iowa 166; Baker *v.* Chambles, 4 Greene 428.

Kentucky.— Jones *v.* Johnson, 86 Ky. 530, 6 S. W. 582, 29 Ky. L. Rep. 789; Chiles *v.* Nelson, 7 Dana 281; Tutt *v.* Brown, 5 Litt. 1, 15 Am. Dec. 33.

Louisiana.— Mithoff *v.* Byrne, 20 La. Ann. 363; Nott *v.* Papet, 15 La. 306; Bedford *v.* Jacobs, 4 Mart. N. S. 528. See Lochte *v.* Gélé, McGloin 52.

Maryland.— York County Bank *v.* Stein, 24 Md. 447.

Massachusetts.— Brigham *v.* Herrick, 173 Mass. 460, 53 N. E. 906; Bartlett *v.* Raymond. 139 Mass. 275, 30 N. E. 91; Welch *v.* Goodwin, 123 Mass. 71, 25 Am. Rep. 24; Worthington *v.* Cowles, 112 Mass. 30; Hutchinson *v.* Wheeler, 3 Allen 577; Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420.

Michigan.— Rathburn *v.* Allen, 135 Mich. 699, 98 N. W. 135; Banks *v.* Cramer, 109 Mich. 168, 66 N. W. 946; Mitchell *v.* Beck, 88 Mich. 342, 50 N. W. 305. See Lewis *v.* Weidenfeld, 114 Mich. 581, 72 N. W. 604.

Minnesota.— Amans *v.* Campbell, 70 Minn. 493, 73 N. W. 506, 68 Am. St. Rep. 547; Pratt *v.* Beaupre, 13 Minn. 187.

Missouri.— Porter *v.* Merrill, 138 Mo. 555, 39 S. W. 798; Heath *v.* Goslin, 80 Mo. 310, 50 Am. Rep. 505; Schell *v.* Stephens, 50 Mo. 375; Lapsley *v.* McKinstry, 38 Mo. 245; McClellan *v.* Parker, 27 Mo. 162; Leckie *v.* Rothenbarger, 82 Mo. App. 615; Dodd *v.* Butler, 7 Mo. App. 583. See Greene *v.* Chickering, 10 Mo. 109.

Nebraska.— Bridges *v.* Bidwell, 20 Nebr. 185, 29 N. W. 302; Jackson *v.* McNatt, 4 Nebr. (Unoff.) 55, 93 N. W. 425.

New Hampshire.—Batchelder *v.* Libbey, 66 N. H. 175, 19 Atl. 570.

New Jersey.— Yates *v.* Repetto, 65 N. J. L. 294, 47 Atl. 632; Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

New Mexico.— Luna *v.* Mohr, 3 N. M. 56, 1 Pac. 860.

New York.— Argersinger *v.* MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687; Knapp *v.* Simon, 96 N. Y. 284; Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51 [*affirming* 42 N. Y. Super. Ct. 91]; Holt *v.* Ross, 54 N. Y. 472, 13 Am. Rep. 615 [*affirming* 59 Barb. 554]; Baltzen *v.* Nicolay, 53 N. Y. 467; Booth *v.* Barron, 29 N. Y. App. Div. 66, 51 N. Y. Suppl. 391; Jemison *v.* Citizens Sav. Bank, 44 Hun 412; Morrison *v.* Currie, 4 Duer 79; Beidleman *v.* Kelly, 51 Misc. 51, 99 N. Y. Suppl. 907; Forrest *v.* McCarthy, 30 Misc. 125, 61 N. Y. Suppl. 853; McDonald *v.* Wesendonck, 29 Misc. 776, 61 N. Y. Suppl. 491 [*reversed* on other grounds in 30 Misc. 601, 62 N. Y. Suppl. 764]; Dulon *v.* Camp, 28 Misc. 548, 59 N. Y. Suppl. 508; Arfman *v.* Hare, 27 Misc. 777, 52 N. Y. Suppl. 759; Ashner *v.* Abenheim, 19 Misc. 282, 43 N. Y. Suppl. 69 [*affirmed* in 31 N. Y. App. Div. 623, 52 N. Y. Suppl. 270]; Boyd *v.* L. H. Quinn Co., 17 Misc. 278, 40 N. Y. Suppl. 370 [*affirmed* in 18 Misc. 169, 41 N. Y. Suppl. 391]; Whitman *v.* Johnson, 10 Misc. 725, 31 N. Y. Suppl. 1009; Kahn *v.* Weill, 9 Misc. 150, 29 N. Y. Suppl. 53; Mahoney *v.* Kent, 7 Misc. 726, 28 N. Y. Suppl. 19; Blakeman *v.* Mackay, 1 Hilt. 266; Cabre *v.* Sturges, 1 Hilt. 160; Kneeland *v.* Coatsworth, 9 N. Y. Suppl. 416; Roosevelt *v.* Strohkoefer, 3 N. Y. St. 578; Rochester Bank *v.* Monteith, 1 Den. 402, 43 Am. Dec. 681; Mills *v.* Hunt, 20 Wend. 431; Waring *v.* Mason, 18 Wend. 425; Brockway *v.* Allen, 17 Wend. 40; Mauri *v.* Hefferman, 13 Johns. 58; National F. Ins. Co. *v.* Loomis, 11 Paige 431; McComb *v.* Wright, 4 Johns. Ch. 659. See Meriden Nat. Bank *v.* Gallaudet, 120 N. Y. 298, 24 N. E. 994.

North Carolina.— Forney *v.* Shipp, 49 N. C. 527. See Stamps *v.* Cooley, 91 N. C. 316.

Ohio.— Lee *v.* Fraternal Mut. Ins. Co., 1 Handy 217, 12 Ohio Dec. (Reprint) 109. See Miller *v.* Sullivan, 39 Ohio St. 79.

Pennsylvania.— Beymer *v.* Bonsall, 79 Pa. St. 298; Manley *v.* Hickman, 1 Chest. Co. Rep. 557.

South Carolina.— Danforth *v.* Timmerman, 65 S. C. 259, 43 S. E. 678; Bacon *v.* Sondley, 3 Strobh. 542, 51 Am. Dec. 646; Davenport *v.* Riley, 2 McCord 198.

South Dakota.— Lindsay *v.* Pettigrew, 5 S. D. 500, 59 N. W. 726.

Texas.— Johnson *v.* Armstrong, 83 Tex. 325, 18 S. W. 594, 29 Am. St. Rep. 648; Sydnor *v.* Hurd, 8 Tex. 98; Hatchett *v.* Sunset Brick, etc., Co., (Civ. App. 1907) 99 S. W. 174; Book *v.* Jones, (Civ. App. 1906) 98 S. W. 891; Ash *v.* Beck, (Civ. App. 1902) 68 S. W. 53; Williams *v.* Leon, etc., Land Co., (Civ. App. 1900) 55 S. W. 374.

Vermont.— Johnson *v.* Porter, 63 Vt. 653, 21 Atl. 608; Button *v.* Winslow, 53 Vt. 430; Baldwin *v.* Leonard, 39 Vt. 260, 94 Am. Dec. 324; Coverly *v.* Braynard, 28 Vt. 738; Royce *v.* Allen, 28 Vt. 234.

West Virginia.—Poole *v.* Rice, 9 W. Va. 73.

Wisconsin.—Alexander, etc., Lumber Co. *v.* McGeehan, 124 Wis. 325, 102 N. W. 571.

United States.— Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368; Allen *v.* Schuchardt, 1 Fed. Cas. No. 236 [*affirmed* in 1 Wall. 359, 17 L. ed. 642]; Farrell *v.* Campbell, 8 Fed. Cas. No. 4,681, 3 Ben. 8. See White *v.* Boyce, 21 Fed. 228.

England.— Simon *v.* Motivos, 3 Burr. 1921; Gurney *v.* Womersley, 3 C. L. R. 3, 4 E. & B. 133, 1 Jur. N. S. 328, 24 L. J. Q. B. 46, 3 Wkly. Rep. 61, 82 E. C. L. 133; Rabone *v.* Williams, 7 T. R. 360 note, 4 Rev. Rep. 463 note.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 521–523.

The reason for the rule has been said to be that "in such case it may be supposed

but also the identity of his principal,[45] although if the other party has actual knowledge of the principal's identity it will have the same effect to relieve the agent as a disclosure by the latter.[46] The disclosure of the principal's identity need not be made at the inception of the transaction; it is sufficient if it is made

that [the other contracting party] relies upon the responsibility of the person with whom he deals for the performance of the contract, and that he is not required to look elsewhere to obtain it. When there is, in fact, a principal the agent may ordinarily relieve himself from personal liability, upon a contract made in his behalf, by disclosing his name at the time of making it. Upon such disclosure, however, the party proceeding to deal with the agent may or may not, as he pleases, enter into contract upon the responsibility of the named principal, but to permit an agent to turn over to his customer an undisclosed and, to the latter, unknown principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contract. The rule is no less salutary than reasonable." Argersinger *v.* MacNaughton, 114 N. Y. 535, 539, 21 N. E. 1022, 11 Am. St. Rep. 687.

45. *Alabama.*— Armour Packing Co. *v.* Vietch-Young Produce Co., (1903) 39 So. 680.

California.— Murphy *v.* Helmrich, 66 Cal. 69, 4 Pac. 958.

Missouri.— Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516; Heath *v.* Goslin, 80 Mo. 310, 50 Am. Rep. 505; Lapsley *v.* McKinstry, 38 Mo. 245.

New York.— Morrison *v.* Currie, 4 Duer 79; Cabre *v.* Sturges, 1 Hilt. 160; Brockway *v.* Allen, 17 Wend. 40.

Tennessee.— Cruse *v.* Jones, 3 Lea 66; Kahn *v.* Hulmes, 5 Sneed 610.

Vermont.— Baldwin *v.* Leonard, 39 Vt. 260, 94 Am. Dec. 324.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 528, 529. And see cases cited *supra*, note 43.

An agent who does not disclaim liability upon being treated with as a principal by the third person is personally bound. Porter *v.* Merrill, 138 Mo. 555, 39 S. W. 798.

Disclosure by the agent to his subagent is insufficient to notify a third person of the agency. Porter *v.* Merrill, 138 Mo. 555, 39 S. W. 798.

Disclosure to one partner as disclosure to firm.— Where an agent, a considerable time previous to a purchase from a partnership and as no part of the negotiation therefor, disclosed his principal to one partner, and subsequently purchased from another partner to whom no disclosure was made, the disclosure was not sufficient as to the partnership, and the agent was personally liable. Baldwin *v.* Leonard, 39 Vt. 260, 94 Am. Dec. 324, distinguishing the transaction from one commenced with one partner to whom the principal is disclosed, and completed with another partner to whom it is not disclosed.

46. *Illinois.*— Warren *v.* Dickson, 27 Ill. 115; Chase *v.* Debolt, 7 Ill. 371; Scaling *v.* Knollin, 94 Ill. App. 443.

New York.— Fulton *v.* Sewall, 116 N. Y. App. Div. 744, 102 N. Y. Suppl. 109; Forrest *v.* McCarthy, 30 Misc. 125, 61 N. Y. Suppl. 853.

Pennsylvania.— Schaetzle *v.* Christman, 16 Pa. Super. Ct. 294.

Vermont.— Johnson *v.* Cate, 77 Vt. 218, 59 Atl. 830.

England.— Seaber *v.* Hawkes, 9 L. J. C. P. O. S. 217.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 521, 523.

Implied or constructive notice.— Knowledge by the third person of facts and circumstances which would, if reasonably followed by inquiry, have disclosed the identity of the principal does not operate to relieve the agent from personal liability, but the third person must have actual knowledge of the principal's identity. Rollins *v.* Phelps, 5 Minn. 463; Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Mahoney *v.* Kent, 7 Misc. (N. Y.) 726, 28 N. Y. Suppl. 19; Kneeland *v.* Coatsworth, 9 N. Y. Suppl. 416; Book *v.* Jones, (Tex. Civ. App. 1907) 98 S. W. 891. And see Manley *v.* Hickman, 1 Chest. Co. Rep. (Pa.) 557. *Contra*, Johnson *v.* Armstrong, 83 Tex. 325, 18 S. W. 594, 29 Am. St. Rep. 648. And see Worthington *v.* Cowles, 112 Mass. 30. *Compare* Philips *v.* Hine, 61 N. Y. App. Div. 428, 70 N. Y. Suppl. 593.

That a person usually acts as agent is not notice that he acts in that capacity in any particular transaction, and will not relieve him from personal liability if he fails to disclose his agency. The fact that the agent is known to be a broker, commission merchant, auctioneer, or other professional agent makes no difference. Brent *v.* Miller, 81 Ala. 309, 8 So. 219; Wood *v.* Brewer, 73 Ala. 259; Wheeler *v.* Reed, 36 Ill. 81; Scaling *v.* Knollin, 94 Ill. App. 443; Hastings *v.* Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516; Schell *v.* Stephens, 50 Mo. 375 (holding also that the joint signature of a bill of sale by an auctioneer with the principal raises a presumption that the auctioneer acted also as principal); Meriden Nat. Bank *v.* Gallaudet, 120 N. Y. 298, 24 N. E. 994; Holt *v.* Ross, 54 N. Y. 472, 13 Am. Rep. 615; Mills *v.* Hunt, 20 Wend. (N. Y.) 431; Franklyn *v.* Lamond, 4 C. B. 637, 11 Jur. 780, 16 L. J. C. P. 221, 56 E. C. L. 637; Magee *v.* Atkinson, 6 L. J. Exch. 115, 2 M. & W. 440. But see Falk *v.* Wolfsohn, 7 Misc. (N. Y.) 313, 27 N. Y. Suppl. 903, holding that a person who in past similar transactions has always treated another as an agent must, in order to hold him personally liable in a subsequent transaction, show that something was said or done by the alleged agent which would warrant the infer-

before liability is incurred on either side;[47] but a disclosure made after liability is incurred comes too late to relieve the agent from liability.[48]

2. In Tort — a. In General. An agent is liable to third persons for his own torts in like manner as other persons, his liability being neither increased nor decreased by the fact of his agency.[49] A distinction exists, however, between the liability of an agent to third persons for non-feasance, or the breach of a duty owed only to his principal,[50] and his liability for misfeasance or malfeasance, or the breach of a duty owed to third persons.[51]

b. Non-Feasance. An agent is not responsible to a third person for injury resulting from non-feasance, meaning by that term the omission of the agent to perform a duty owed solely to his principal by reason of his agency.[52]

ence that he dealt otherwise than as formerly, or that he interposed his personal liability.

47. Baer *v.* Bonynge, 72 Hun (N. Y.) 33, 25 N. Y. Suppl. 666; Blakeman *v.* Mackay, 1 Hilt. (N. Y.) 266; Cabre *v.* Sturges, 1 Hilt. (N. Y.) 160; Mills *v.* Hunt, 20 Wend. (N. Y.) 431; Brackenridge *v.* Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593 [*reversing* (Civ. App. 1897) 42 S. W. 1005]; Sydnor *v.* Hurd, 8 Tex. 98; Scottish-American Mortg. Co. *v.* Davis, (Tex. Civ. App. 1902) 72 S. W. 217; Franklyn *v.* Lamond, 4 C. B. 637, 11 Jur. 780, 16 L. J. C. P. 221, 56 E. C. L. 637; Pratt *v.* Willey, 2 C. & P. 350, 12 E. C. L. 611; Haight *v.* Howard, 11 U. C. C. P. 437.

48. *Iowa.*— Lull *v.* Anamosa Nat. Bank, 110 Iowa 537, 81 N. W. 784.

Massachusetts.— Hutchinson *v.* Wheeler, 3 Allen 577; Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420.

New Hampshire.— Batchelder *v.* Libbey, 66 N. H. 175, 19 Atl. 570.

New York.—Jemison *v.* Citizens' Sav. Bank, 44 Hun 412.

North Carolina.—Forney *v.* Shipp, 49 N. C. 527.

South Carolina.— Long *v.* McKissick, 50 S. C. 218, 27 S. E. 636.

Texas.— See Hatchett *v.* Sunset Brick, etc., Co., (Civ. App. 1907) 99 S. W. 174.

England.— Franklyn *v.* Lamond, 4 C. B. 637, 11 Jur. 780, 16 L. J. C. P. 221, 56 E. C. L. 637.

49. *Connecticut.*—Bennett *v.* Ives, 30 Conn. 329.

Illinois.— Baird *v.* Shipman, 132 Ill. 16, 23 N. E. 384, 22 Am. St. Rep. 504, 7 L. R. A. 128.

Indiana.— Berghoff *v.* McDonald, 87 Ind. 549; Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Louisiana.— Delaney *v.* Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Carmouche *v.* Bouis, 6 La. Ann. 95, 54 Am. Dec. 558.

Maine.— Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Richardson *v.* Kimball, 28 Me. 463.

Maryland.—Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560.

Massachusetts.— Osborne *v.* Morgan, 130 Mass. 102, 39 Am. Rep. 437; Hawkesworth *v.* Thompson, 98 Mass. 77, 93 Am. Dec. 137.

Michigan.— Ellis *v.* McNaughton, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308.

Missouri.— Lottman *v.* Barnett, 62 Mo. 159; Harriman *v.* Stowe, 57 Mo. 93; Martin *v.* Benoist, 20 Mo. App. 262.

New Jersey.— Horner *v.* Lawrence, 37 N. J. L. 46.

New York.— Crane *v.* Onderdonk, 67 Barb. 47; Suydam *v.* Moore, 8 Barb. 358.

Wisconsin.— Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439.

United States.— Carey *v.* Rochereau, 16 Fed. 87.

England.— Parry *v.* Smith, 4 C. P. D. 325, 48 L. J. C. P. 731, 41 L. T. Rep. N. S. 93, 27 Wkly. Rep. 801.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 606-608.

A public agent is liable for torts in like manner as a private agent. Rogers *v.* Dutt, 13 Moore P. C. 209, 3 L. T. Rep. N. S. 160, 9 Wkly. Rep. 149, 15 Eng. Reprint 78; Baker *v.* Ranney, 12 Grant Ch. (U. C.) 228.

50. See *infra*, III, C, 2, b.

51. See *infra*, III, C, 2, c.

52. *Georgia.*— Kimbrough *v.* Boswell, 119 Ga. 201, 45 S. E. 971; Reid *v.* Humber, 49 Ga. 207.

Indiana.—Dean *v.* Brock, 11 Ind. App. 507, 38 N. E. 829.

Louisiana.— Delaney *v.* Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456 (where the court states that "no man increases or diminishes his obligations to strangers by becoming an agent"); Poydras *v.* Delamare, 13 La. 98.

Massachusetts.— Brown Paper Co. *v.* Dean, 123 Mass. 267; Albro *v.* Jaquith, 4 Gray 99, 64 Am. Dec. 56. And see Osborne *v.* Morgan, 130 Mass. 102, 39 Am. Rep. 437.

Mississippi.— Feltus *v.* Swan, 62 Miss. 415.

Missouri.— Carson *v.* Quinn, 127 Mo. App. 525, 105 S. W. 1088.

New York.— Van Antwerp *v.* Linton, 89 Hun 417, 35 N. Y. Suppl. 318 [*affirmed* in 157 N. Y. 716, 53 N. E. 1133]; Burns *v.* Pethcal, 75 Hun 437, 27 N. Y. Suppl. 499; Denny *v.* Manhattan Co., 5 Den. 639 [*affirming* 2 Den. 115].

Ohio.— Henshaw *v.* Noble, 7 Ohio St. 226.

Tennessee.— Drake *v.* Hagan, 108 Tenn. 265, 67 S. W. 470. And see Deaderick *v.* Bank of Commerce, 100 Tenn. 457, 45 S. W. 786; Erwin *v.* Davenport, 9 Heisk. 44.

Texas.— Labadie *v.* Hawley, 61 Tex. 177, 48 Am. Rep. 278; Morrison *v.* Ashburn, (Civ. App. 1893) 21 S. W. 993.

Vermont.— Crandall *v.* Loomis, 56 Vt. 664.

United States.— Carey *v.* Rochereau, 16

c. Misfeasance and Malfeasance. While an agent is not liable to third persons for injury resulting from his omission to perform a duty owed to the principal alone,[53] he is liable to them for injury resulting from his misfeasance or malfeasance, meaning by those terms the breach of a duty owed to third persons generally, independent of the particular duties imposed by his agency.[54] Accordingly an agent

Fed. 87, in which the court adds that "it is very doubtful if an agent *per se* is liable to third persons on any account."

England.— See Lane *v.* Cotton, 12 Mod. 472, 488, 4 Taunt. 628, 88 Eng. Reprint 1458, per Holt, C. J., dissenting, a case in which however, the liability of the agent was neither involved nor passed upon by the majority.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 606–608.

With stronger reason an agent is not liable for neglect to perform an act where he owes performance neither to third persons nor to his principal. Kuhnert *v.* Angell, 10 N. D. 59, 84 N. W. 579, 88 Am. St. Rep. 675, holding that where an agent's authority was limited to leasing and collecting rent for certain premises of his principal, but did not extend to making improvements, such authority was not broad enough to render him liable for injuries sustained by reason of the unsafe condition of the premises. And see Crandall *v.* Loomis, 56 Vt. 664.

Non-feasance "is the omission of an act which a person ought to do." Bell *v.* Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741 [*cited* in Southern R. Co. *v.* Rowe, 2 Ga. App. 557, 59 S. E. 462]. It "is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do" (Southern R. Co. *v.* Grizzle, 124 Ga. 735, 737, 53 S. E. 244, 110 Am. St. Rep. 191), or "the failure to do that which one, by reason of his undertaking, and not because imposed upon him as a legal duty, agrees to do for another; that which is imposed upon him merely by virtue of his relation to his principal" (Dean *v.* Brock, 11 Ind. App. 507, 38 N. E. 829). Misfeasance distinguished see *infra*, note 54.

The agent is not liable, although the non-feasance be the result of his malice.—Feltus *v.* Swan, 62 Miss. 415.

53. See *supra*, III, C, 2, b.

54. *Illinois.*— Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890.

Iowa.— Carraher *v.* Allen, 112 Iowa 168, 83 N. W. 902, wrongful attachment.

New Jersey.—Bocchino *v.* Cook, 67 N. J. L. 467, 51 Atl. 487, extortion.

New York.— See Burns *v.* Pethcal, 75 Hun 437, 27 N. Y. Suppl. 499.

Tennessee.— Erwin *v.* Davenport, 9 Heisk. 44. And see Drake *v.* Hagan, 108 Tenn. 265, 67 S. W. 470.

Texas.— See Labadie *v.* Hawley, 61 Tex. 177, 48 Am. Rep. 278.

United States.— See Carey *v.* Rochereau, 16 Fed. 87.

See 40 Cent. Dig. tit. "Principal and Agent," § 606 *et seq.*; and cases cited *infra*, this note *et seq.*

Misfeasance "is the improper doing of an act which a person might lawfully do" (Bell *v.* Josselyn, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741 [*cited* in Southern R. Co. *v.* Rowe, 2 Ga. App. 557, 59 S. E. 462]), or "the performance of an act, which might lawfully be done, in an improper manner, by which another person receives an injury" (Bouvier L. Dict. [*quoted* in Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 69, 60 N. E. 890]); "or, in other words, it is the performing [by the agent] of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons" (Southern R. Co. *v.* Grizzle, 124 Ga. 735, 737, 53 S. E. 244, 110 Am. St. Rep. 191). And see Dean *v.* Brock, 11 Ind. App. 507, 38 N. E. 829. It consists in omitting to do a proper act as it should be done, and may thus include wrongs of omission as well as commission. Southern R. Co. *v.* Grizzle, *supra*; Southern R. Co. *v.* Rowe, *supra*; Dean *v.* Brock, *supra*; Burns *v.* Pethcal, 75 Hun (N. Y.) 437, 443, 27 N. Y. Suppl. 499 (holding that "if the duty rests upon [the agent] in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable" for an omission thereof); Osborne *v.* Morgan, 130 Mass. 102, 103, 39 Am. Rep. 437 (where the court says: "It is often said in the books, that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly"); Ellis *v.* McNaughton, 76 Mich. 237, 242, 42 N. W. 1113, 15 Am. St. Rep. 308 (where it is said: "Misfeasance may involve to some extent the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances; as, for instance, when he does not exercise that care which a due regard for the rights of others would require. This is not doing, but it is the not doing of that which is not imposed upon the agent merely by his relation

may be held liable in damages to third persons for conversion,[55] fraud and deceit,[56]

to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable"); Lough *v.* Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 802. And see cases cited *infra*, note 57.

Malfeasance "is the doing of an act which a person ought not to do at all." Bell *v.* Josselyn, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741.

Assault and battery by an agent renders him liable to the person injured. Peck *v.* Cooper, 112 Ill. 192, 54 Am. Rep. 231; Carmouche *v.* Bouis, 6 La. Ann. 95, 54 Am. Dec. 558; Hewett *v.* Swift, 3 Allen (Mass.) 420.

Nuisance.— It has been held, although the case is of doutbful authority, that an agent in charge of a plantation is not liable to an adjoining owner for damage resulting from the agent's malicious neglect and refusal to keep open a drain which it was his duty to keep open, he being liable only to his principal. Feltus *v.* Swan, 62 Miss. 415. However this may be, an agent merely operating a mill for his owner's benefit is not liable for damages caused by the too great weight of the dam, a permanent structure, whereby the water is set back to another's injury, the agent having no authority to change or remove the dam, which existed prior to the creation of his agency. Brown Paper Co. *v.* Dean, 123 Mass. 267. And if an agent does not promote an unlawful act which constitutes a nuisance he is not liable for injuries resulting therefrom. Crandall *v.* Loomis, 56 Vt. 664.

Trespass by an agent renders him liable in damages. Marshall *v.* Eggleston, 82 Ill. App. 52. However, an agent is not liable as for trespass in committing an act by authority or direction of his principal unless the act is such that it would have amounted to a trespass had the principal himself committed it. Strong *v.* Colter, 13 Minn. 82.

55. *Alabama.*— Perminter *v.* Kelly, 18 Ala. 716, 54 Am. Dec. 177; Lee *v.* Matthews, 10 Ala. 682, 44 Am. Dec. 498.

Connecticut.— Bennett *v.* Ives, 30 Conn. 329.

Illinois.—Allen *v.* Hartfield, 76 Ill. 358.

Indiana.— Berghoff *v.* McDonald, 87 Ind. 549.

Maine.— McPheters *v.* Page, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772; Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581; Richardson *v.* Kimball, 28 Me. 463.

Massachusetts.—Wamesit Power Co. *v.* Allen, 120 Mass. 352; McPartland *v.* Read, 11 Allen 231; Coles *v.* Clark, 3 Cush. 399; Dench *v.* Walker, 14 Mass. 500; Higginson *v.* York, 5 Mass. 341.

Missouri.— Sheffler *v.* Mudd, 71 Mo. App. 78 (holding the agent of a tenant in common liable for the conversion of the common property on behalf of his principal); Lafayette County Bank *v.* Metcalf, 40 Mo. App. 494.

New Hampshire.— Gage *v.* Whittier, 17 N. H. 312.

New York.— Spraights *v.* Dudley, 39 N. Y. 441, 100 Am. Dec. 452; Crane *v.* Onderdonk, 67 Barb. 47; Thompson *v.* McLean, 10 N. Y. Suppl. 411; Farrar *v.* Chauffetete, 5 Den. 527; Hoffman *v.* Carow, 22 Wend. 285; Thorp *v.* Burling, 11 Johns. 285; Ripley *v.* Gelston, 9 Johns. 201, 6 Am. Dec. 271.

Pennsylvania.— Rice *v.* Yocum, 155 Pa. St. 538, 26 Atl. 698; Berry *v.* Vantries, 12 Serg. & R. 89.

Rhode Island.— Singer Mfg. Co. *v.* King, 14 R. I. 511.

Tennessee.— Elmore *v.* Brooks, 6 Heisk. 45.

Texas.— Kauffman *v.* Beasley, 54 Tex. 563.

England.— Fowler *v.* Hollins, L. R. 7 Q. B. 616, 41 L. J. Q. B. 277, 27 L. T. Rep. N. S. 168, 20 Wkly. Rep. 868 [*affirmed* in L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73]; Lee *v.* Bayes, 18 C. B. 599, 2 Jur. N. S. 1093, 25 L. J. C. P. 249, 86 E. C. L. 599; Greenway *v.* Fisher, 1 C. & P. 190, 12 E. C. L. 118; Stephens *v.* Elwall, 4 M. & S. 259; Perkins *v.* Smith, 1 Wils. C. P. 328. And see Lane *v.* Cotton, 12 Mod. 472, 488, 4 Taunt. 628, 88 Eng. Reprint 1458, per Holt, C. J., dissenting, a case in which, however, the agent's liability was neither involved nor passed on by the majority. But see Rex *v.* Parr, 39 L. J. Ch. 73, 21 L. T. Rep. N. S. 555, 18 Wkly. Rep. 110, holding that an agent is justified in refusing to give up goods until he has communicated with his principal.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 608, 609.

Agent acting innocently and by direction of principal.— It is sometimes held that an agent who, acting solely for his principal and by his direction, and without knowing of any wrong, or without being guilty of gross negligence in not knowing of it, assists his principal in acts with respect to the property of another which amount to conversion on the part of the principal, is not thereby rendered liable for the conversion. Rogers *v.* Huie, 2 Cal. 571, 56 Am. Dec. 363; Spooner *v.* Holmes, 102 Mass. 503, 3 Am. Rep. 491; Leuthold *v.* Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; Gage *v.* Whittier, 17 N. H. 312; Ledwith *v.* Merritt, 74 N. Y. App. Div. 64, 77 N. Y. Suppl. 341 [*affirmed* in 174 N. Y. 512, 66 N. E. 1111]; Berry *v.* Vantries, 12 Serg. & R. (Pa.) 89; Roach *v.* Turk, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360; Travis *v.* Claiborne, 1 Munf. (Va.) 435; Wilson *v.* Rogers, 1 Wyo. 51; Greenway *v.* Fisk, 1 C. & P. 190, 12 E. C. L. 118; Mires *v.* Solebay, 2 Mod. 242, 86 Eng. Reprint 1050. See Lafayette County Bank *v.* Metcalf, 40 Mo. App. 494; Carey *v.* Bright, 58 Pa. St. 70.

An agent is not liable for a conversion by his principal in which he does not actually participate.— McLennan *v.* Minneapolis, etc., Elevator Co., 57 Minn. 317, 59 N. W. 628.

56. *California.*— Wilder *v.* Beede, 119 Cal. 646, 51 Pac. 1083.

Colorado.— Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40.

and even for negligence.[57] In an action against an agent by a third person for misfeasance or malfeasance it is no defense that he acted as agent or by the authority or direction of another, for no one can lawfully authorize the commission of a tort;[58] nor is it a defense that the agent himself received no

Florida.—Wheeler *v.* Baars, 33 Fla. 696, 15 So. 584.

Georgia.— McDonald *v.* Napier, 14 Ga. 89.

Illinois.— Reed *v.* Peterson, 91 Ill. 288; Shiperd *v.* Underwood, 55 Ill. 475.

Iowa.— Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170.

Kentucky.— Campbell *v.* Hillman, 15 B. Mon. 508, 61 Am. Dec. 195.

Massachusetts.—White *v.* Sawyer, 16 Gray 586. See also Fay *v.* Winchester, 45 Mass. 513.

Michigan.—Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389; Whitman *v.* Johnston, 35 Mich. 406; Starkweather *v.* Benjamin, 32 Mich. 305; Burchard *v.* Frazer, 23 Mich. 224.

Minnesota.—Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417; Clark *v.* Lovering, 37 Minn. 120, 33 N. W. 776.

Missouri.— Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516; Thompson *v.* Irwin, 76 Mo. App. 418.

New York.—Warren *v.* Banning, 140 N. Y. 227, 35 N. E. 428 [*affirming* 21 N. Y. Suppl. 883] (holding an agent liable for misrepresentations and concealments in making a sale of land for his principal); Gutchess *v.* Whiting, 46 Barb. 139; Hecker *v.* De Groot, 15 How. Pr. 314. And see Butler *v.* Livermore, 52 Barb. 570.

Pennsylvania.—White *v.* Cooper, 3 Pa. St. 130; Seidel *v.* Peckworth, 10 Serg. & R. 442.

Texas.— Poole *v.* Houston, etc., R. Co., 58 Tex. 134.

West Virginia.— Mann *v.* McVey, 3 W. Va. 232.

England.— Swift *v.* Jewsbury, L. R. 9 Q. B. 301, 43 L. J. Q. B. 56, 30 L. T. Rep. N. S. 31, 22 Wkly. Rep. 319; Bulkeley *v.* Dunbar, 1 Anstr. 37; Wright *v.* Self, 1 F. & F. 704; Cullen *v.* Thomson, 9 Jur. N. S. 85, 6 L. T. Rep. N. S. 870, 4 Macq. H. L. 441; Arnot *v.* Biscoe, 1 Ves. 95, 27 Eng. Reprint 914. See Cargill *v.* Bower, 10 Ch. D. 502, 47 L. J. Ch. 649, 38 L. T. Rep. N. S. 779, 26 Wkly. Rep. 716.

See 40 Cent. Dig. tit. "Principal and Agent," § 597.

An agent is not liable for the fraud of his principal.— Huston *v.* Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795. Thus an agent acting in good faith in making false representations authorized by his principal is not liable for the fraud. Lipscomb *v.* Kitrell, 11 Humphr. (Tenn.) 256.

Facts held not to constitute fraudulent concealment by agent see Johnson *v.* Bank of North America, 5 Rob. (N. Y.) 554.

On a bill to follow assets fraudulently removed, one who acted as a mere agent in selling the property and paid over the proceeds to his principal is not liable, the bill not proceeding on the idea of punishing for a tort. Delta Bank *v.* Oliver-Finnie Grocery Co., 70 Miss. 868, 13 So. 239; Barnawell *v.* Threadgill, 56 N. C. 50.

57. See cases cited *infra*, this note.

Agent held liable for negligence causing death or personal injury see Mayer *v.* Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433; Stiewel *v.* Borman, 63 Ark. 30, 37 S. W. 404; Southern R. Co. *v.* Grizzle, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191; Southern R. Co. *v.* Rowe, 2 Ga. App. 557, 59 S. E. 462; Baird *v.* Shipman, 132 Ill. 16, 23 N. E. 384, 22 Am. St. Rep. 504, 7 L. R. A. 128; Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Osborne *v.* Morgan, 130 Mass. 102, 39 Am. Rep. 437; Hawkesworth *v.* Thompson, 98 Mass. 77, 93 Am. Dec. 137; Ellis *v.* McNaughton, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308; Lottman *v.* Barnett, 62 Mo. 159; Harriman *v.* Stowe, 57 Mo. 93; Carson *v.* Quinn, 127 Mo. App. 525, 105 S. W. 1088; Lough *v.* Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 102; Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 443.

Agent held liable for negligence causing injury to property see Miller *v.* Staple, 3 Colo. App. 93, 32 Pac. 81; Kimbrough *v.* Boswell, 119 Ga. 201, 45 S. E. 977; Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937; Bell *v.* Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741 [*cited* in Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312]; Martin *v.* Benoist, 20 Mo. App. 262; Horner *v.* Lawrence, 37 N. J. L. 46; Suydam *v.* Moore, 8 Barb. (N. Y) 358.

To render the agent liable for neglect to perform a given act, however, the performance thereof must be a duty which he owes to the person injured, independent of the agency. Dean *v.* Brock, 11 Ind. App. 507, 38 N. E. 829; Delaney *v.* Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Albro *v.* Jaquith, 4 Gray (Mass.) 99, 64 Am. Dec. 56; Felton *v.* Swan, 62 Miss. 415; Henshaw *v.* Noble, 7 Ohio St. 226; Drake *v.* Hagan, 108 Tenn. 265, 67 S. W. 470; Lane *v.* Cotton, 12 Mod. 472, 488, 4 Taunt. 628, 88 Eng. Reprint 1458, per Holt, C. J., dissenting, a case in which, however, the agent's liability was neither involved nor passed on by the majority. And see *supra*, III, C, 2, b.

58. *Alabama.*— Mayer *v.* Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433; Lee *v.* Matthews, 10 Ala. 682, 44 Am. Dec. 498.

Connecticut.— Bennett *v.* Ives, 30 Conn. 329.

Illinois.— Baird *v.* Shipman, 132 Ill. 16, 23 N. E. 384, 22 Am. St. Rep. 504, 7 L. R. A. 128; Peek *v.* Cooper, 112 Ill. 192, 54 Am. Rep. 231; Reed *v.* Peterson, 91 Ill. 288; Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416.

Indiana.— Blue *v.* Briggs, 12 Ind. App. 105, 39 N. E. 885.

benefit from his wrong,[59] or that he has paid over the proceeds of his wrong to his principal,[60] or is liable to the latter therefor.[61]

d. Liability of Agent For Misfeasance or Malfeasance of Subagent. An agent is not in general liable to third persons for the misfeasance or malfeasance of subagents employed by him in the service of his principal;[62] but if he directs or authorizes the particular wrongful act of the subagent he will be liable to third persons therefor.[63]

D. Liability of Third Person to Agent[64] — 1. On Contract — a. Where Principal Is Disclosed. The general rule is that when an agent makes a contract

Kentucky.— Pool *v.* Adkisson, 1 Dana 110; Campbell *v.* Hillman, 15 B. Mon. 508, 61 Am. Dec. 195.

Louisiana.— Delaney *v.* Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Carmouche *v.* Bouis, 6 La. Ann. 95, 54 Am. Dec. 558.

Maine.—Wing *v.* Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; McPheters *v.* Page, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772; Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581; Norton *v.* Kidder, 54 Me. 189; Richardson *v.* Kimball, 28 Me. 463.

Michigan.—Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389; Josselyn *v.* McAllister, 22 Mich. 300.

Minnesota.—Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 150, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417.

Mississippi.—O'Connor *v.* Clopton, 60 Miss. 349.

Missouri.— Huston *v.* Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; Martin *v.* Benoist, 20 Mo. App. 262.

New Hampshire.— Gage *v.* Whittier, 17 N. H. 312.

New Jersey. — Horner *v.* Lawrence, 37 N. J. L. 46.

New York.— Brown *v.* Howard, 14 Johns. 119; Hecker *v.* De Groot, 15 How. Pr. 314.

Rhode Island.— Singer Mfg. Co. *v.* King, 14 R. I. 511.

Tennessee.— Elmore *v.* Brooks, 6 Heisk. 45.

Texas.— Poole *v.* Houston, etc., R. Co., 58 Tex. 134; Baker *v.* Wasson, 53 Tex. 150; Diamond *v.* Smith, 27 Tex. Civ. App. 558, 66 S. W. 141.

Wisconsin.—Wright *v.* Eaton, 7 Wis. 595.

England.— Mill *v.* Hawker, L. R. 10 Exch. 92, 44 L. J. Exch. 49, 33 L. T. Rep. N. S. 177, 23 Wkly. Rep. 348; Stephens *v.* Elwall, 4 M. & S. 259; Perkins *v.* Smith, 1 Wils. C. P. 328; Heugh *v.* Abergavenny, 23 Wkly. Rep. 40.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 606–609. See, however, *supra*, note 55.

The fact that the principal is liable is no defense. Baird *v.* Shipman, 132 Ill. 16, 23 N. E. 384, 22 Am. St. Rep. 504, 7 L. R. A. 128; O'Connor *v.* Clopton, 60 Miss. 349.

59. Wilder *v.* Beede, 119 Cal. 646, 51 Pac. 1083; Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389.

60. Bocchino *v.* Cook, 67 N. J. L. 467, 51 Atl. 487; Wright *v.* Eaton, 7 Wis. 595. And see Butler *v.* Livermore, 52 Barb. (N. Y.) 570.

61. Osborne *v.* Morgan, 130 Mass. 102, 39 Am. Rep. 437.

62. *Michigan.*— Miller *v.* Seeley, 90 Mich. 218, 51 N. W. 366.

Missouri.— Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

Pennsylvania.— Hidson *v.* Markle, 171 Pa. St. 138, 33 Atl. 74.

Tennessee.— Johnson *v.* Memphis, 9 Lea 125.

Vermont.— Brown *v.* Lent, 20 Vt. 529.

England.— Cargill *v.* Bower, 10 Ch. D. 502, 47 L. J. Ch. 649, 8 L. T. Rep. N. S. 779, 26 Wkly. Rep. 716 (holding that an agent is not liable for the fraud of a subagent, unless he does something which makes him a principal in the fraud); Randleson *v.* Murray, 8 A. & E. 109, 2 Jur. 324, 7 L. J. Q. B. 132, 3 N. & P. 239, 1 W. W. & H. 149, 35 E. C. L. 324; Bush *v.* Steinman, 1 B. & P. 404; Rapson *v.* Cubitt, C. & M. 64, 6 Jur. 606, 11 L. J. Exch. 271, 9 M. & W. 710, 41 E. C. L. 41; Lonsdale *v.* Littledale, 2 H. Bl. 267; Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 499; Bear *v.* Stevenson, 30 L. T. Rep. N. S. 177; Stone *v.* Cartwright, 6 T. R. 411, 3 Rev. Rep. 220.

See 40 Cent. Dig. tit. "Principal and Agent," § 612.

63. *Illinois.*— Peck *v.* Cooper, 112 Ill. 192, 54 Am. Rep. 231 [*affirming* 8 Ill. App. 403].

Maryland.— Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560.

Missouri.— Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

Vermont.— Brown *v.* Lent, 20 Vt. 529.

United States.— Hills *v.* Ross, 3 Dall. 331, 1 L. ed. 623.

England.— Bear *v.* Stevenson, 30 L. T. Rep. N. S. 177; Stone *v.* Cartwright, 6 T. R. 411, 3 Rev. Rep. 220. And see Swire *v.* Francis, 3 App. Cas. 106, 47 L. J. P. C. 181, 37 L.T. Rep. N. S. 554, holding that where an agent gave a subagent authority to draw on third persons for certain amounts advanced them on the latter's account, and the subagent drew for amount not advanced and converted the proceeds, the agent was liable.

See 40 Cent. Dig. tit. "Principal and Agent," § 612.

Liability of trustee.— The fact that a person is trustee of an estate does not place him in the position of an intermediate agent between his principal and an employee committing a tort so as to relieve the trustee of personal responsibility therefor. Baker *v.* Tibbetts, 162 Mass. 468, 39 N. E. 350.

Liability of master of vessel for negligence of subofficer see Shipping.

64. **Subrogation of agent to principal's rights** see Subrogation.

with a third person, naming his principal, the contract is made with the principal and not with the agent, and no cause of action for its breach subsists in favor of the agent against the other party thereto.[65] But even where the principal is known, a contract may be made by an agent with a third person in such terms that he, the agent, is personally liable for the fulfilment of it, and he may therefore enforce the same;[66] and the authorities are practically uniform that where the nominal promisee is an agent, and he has a beneficial interest in the performance of the contract or a special property in the subject-matter of the agreement, the legal interest and right of action is in him.[67]

b. Where Principal Is Undisclosed. Since the law is that where an agent acts for an undisclosed principal he becomes personally bound on the contract,[68] where a contract is made in the agent's name, and he is individually liable thereon, the liability is reciprocal, and the party with whom the contract is made is bound to him for its performance,[69] unless the principal asserts his rights.[70] However, an

65. *California.*— Pinson *v.* Schmalz, 94 Cal. 651, 30 Pac. 3; Lineker *v.* Ayeshford, 1 Cal. 75.

Maine.— Garland *v.* Reynolds, 20 Me. 45, holding that a suit cannot be maintained in the name of an agent who has no interest in the contract.

United States.— The A. Cheesebrough, 1 Fed. Cas. No. 25, 3 Blatchf. 305; Thatcher *v.* Winslow, 23 Fed. Cas. No. 13,863, 5 Mason 58.

England.— Sharman *v.* Brandt, L. R. 6 Q. B. 720, 40 L. J. Q. B. 312, 19 Wkly. Rep. 936; Sargent *v.* Morris, 3 B. & Ald. 277, 22 Rev. Rep. 382, 5 E. C. L. 166; Piggott *v.* Thomas, 3 B. & P. 147; Fisher *v.* Morse, 6 B. & S. 411, 11 Jur. N. S. 795, 34 L. J. Q. B. 177, 12 L. T. Rep. N. S. 604, 13 Wkly. Rep. 834, 118 E. C. L. 411; Bramwell *v.* Spiller, 21 L. T. Rep. N. S. 672, 18 Wkly. Rep. 316; Leigh *v.* Thomas, 2 Ves. 313, 28 Eng. Reprint 201. And see Rex *v.* Machado, 6 L. J. Ch. O. S. 61, 4 Russ. 225, 28 Rev. Rep. 56, 4 Eng. Ch. 225, 38 Eng. Reprint 790.

Canada.— Wurzburg *v.* Webb, 19 Nova Scotia 414.

See also *infra*, IV, C, 1, b.

66. Fisher *v.* Marsh, 6 B. & S. 411, 11 Jur. N. S. 795, 34 L. J. Q. B. 177, 12 L. T. Rep. N. S. 604, 13 Wkly. Rep. 834, 118 E. C. L. 411.

67. *Alabama.*— Beyer *v.* Bush, 50 Ala. 19.

Arkansas.— Beller *v.* Block, 19 Ark. 566.

Connecticut.— Treat *v.* Stanton, 14 Conn. 445; Potter *v.* Yale College, 8 Conn. 52.

Kentucky.— Graham *v.* Duckwall, 8 Bush 12.

Massachusetts.— Thompson *v.* Kelly, 101 Mass. 291, 3 Am. Rep. 353; Cobb *v.* New England Mut. Mar. Ins. Co., 6 Gray 192.

New Hampshire.— Porter *v.* Raymond, 53 N. H. 519; Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21.

North Carolina.— Whitehead *v.* Potter, 26 N. C. 257, holding that the consent of the principal is not necessary to enable an agent who has a beneficial interest in a contract to bring an action thereon in his own name.

Pennsylvania.— Baltimore, etc., Steamboat Co. *v.* Atkins, 22 Pa. St. 522.

England.— Williams *v.* Millington, 1 H. Bl. 81, 2 Rev. Rep. 724.

68. See *supra*, III, C, 1, b, (II).

69. *California.*— Crosby *v.* Watkins, 12 Cal. 85.

Georgia.— Georgia, etc., R. Co. *v.* Marchman, 121 Ga. 235, 48 S. E. 961.

Illinois.— Saladin *v.* Mitchell, 45 Ill. 79; Stockbarger *v.* Sain, 69 Ill. App. 436.

Massachusetts.— Colburn *v.* Phillips, 13 Gray 64.

Mississippi.— Ackerman *v.* Cook, 34 Miss. 262.

Missouri.— Keown *v.* Vogel, 25 Mo. App. 35.

New Jersey.— Hughes *v.* Young, 31 N. J. Eq. 60, holding therefore that where one purchases lands as an agent only, it is no defense to an action by him for specific performance that he did not disclose his agency or his principal.

New York.— Ludwig *v.* Gillespie, 105 N. Y. 653, 11 N. E. 835 [*affirming* 51 N. Y. Super. Ct. 310]; Considerant *v.* Brisbane, 22 N. Y. 389.

North Dakota.— Stewart *v.* Gregory, etc., Co., 9 N. D. 618, 84 N. W. 553.

Texas.— Neal *v.* Andrews, (Civ. App. 1900) 60 S. W. 459; Edwards *v.* Ezell, 2 Tex. App. Civ. Cas. § 276.

United States.— Albany, etc., Iron, etc., Co. *v.* Lundberg, 121 U. S. 451, 7 S. Ct. 958, 30 L. ed. 982.

England.— Schmaltz *v.* Avery, 16 Q. B. 655, 15 Jur. 291, 20 L. J. Q. B. 228, 71 E. C. L. 655; Sims *v.* Bond, 5 B. & Ad. 389, 393, 2 N. & M. 608, 27 E. C. L. 168, where the court said: "It is a well-established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it."

Canada.— Lister *v.* Burnham, 1 U. C. Q. B. 419.

Contract under seal.— Where an agent makes a contract in his own name, and under his own seal, he alone can maintain an action thereon, since the contract is his alone. See *infra*, IV, C, 1, b, (III).

Estoppel of tenant to deny title of agent of undisclosed principal signing as lessor see LANDLORD AND TENANT, 24 Cyc. 941 note 83.

70. Saladin *v.* Mitchell, 45 Ill. 79; Stockbarger *v.* Sain, 69 Ill. App. 436; Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

agent who, in selling property of his principal, binds himself personally, acquires no greater rights against the purchaser than if he contracted for the sale of his own property.[71]

c. Money Paid Under Mistake of Fact or on Illegal Contract. The general rule is that where an agent pays money to a third person for his principal under a mistake of fact, a cause of action subsists in his favor for its recovery.[72] Likewise, where money is paid by an agent on behalf of his principal on an illegal contract, the illegality of which was unknown to the agent at the time, a cause of action subsists in his favor for the recovery of such money.[73] Where, however, such mistake occurs through the fault or negligence of the agent alone, and no fault or fraud can be imputed to the third person, the agent has no cause of action by reason thereof.[74]

d. Defenses — (i) *In General.* In an action by an agent for an undisclosed principal on a contract made by the agent in his own name, any defense good against the principal is available against the agent.[75]

(ii) *Counter-Claim Against Principal.* In an action on a contract by an agent, defendant cannot set off a claim for unliquidated damages which he has against a third person on another transaction, although such person happens to be plaintiff's principal.[76]

2. In Tort — a. In General. The general rule is that an action will lie in favor of an agent against a third person for any injury or trespass committed by such third person against the agent personally while acting in the course of his employment.[77]

b. For Procuring Agent's Discharge. An employee may maintain an action against a third person who maliciously procures his employer to discharge him from employment under a legal contract, whether the term of service is for a fixed period or not, and although his employer has the right to discharge him at any time.[78] However, where a third person commits an act which is legal in

71. Taintor *v.* Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Evrit *v.* Bancroft, 22 Ohio St. 172, holding that the liability of the third person to the agent is to be ascertained from their own agreement, irrespective of the agreement between the agent and his principal; and that the rule of damages is the same whether the suit is brought in the name of the principal or in the name of the agent as one of the contracting parties. And see *infra*, III, D, 1, d.

72. Newall *v.* Tomlinson, L. R. 6 C. P. 405, 25 L. T. Rep. N. S. 382; Stevenson *v.* Mortimer, Cowp. 805; Holt *v.* Ely, 1 E. & B. 795, 17 Jur. 892, 72 E. C. L. 795.

73. Kent *v.* Bornstein, 12 Allen (Mass.) 342; Oom *v.* Bruce, 12 East 225, 11 Rev. Rep. 367.

74. Yetter *v.* Van Patten, 103 Ill. App. 59; Hungerford *v.* Scott, 37 Wis. 341. And see Winkley *v.* Foye, 28 N. H. 513, holding that money paid to a creditor by an agent of the debtor on his account passes to the creditor as money of the principal, and cannot be reclaimed by the agent, although in fact it was his money.

75. McVickar *v.* Wolcott, 4 Johns. (N. Y.) 510; Holden *v.* Rutland R. Co., 73 Vt. 317, 50 Atl. 1096. And see Carr *v.* U. S., 13 Ct. Cl. 136, where it appeared that A orally agreed to furnish military transportation for certain articles, and sent B, his agent, to perform the service; that some negotiations took place between B, acting as A's agent, and the officers of the government, but nothing appeared to have been done; that after the lapse of a month or more the quartermaster's department entered into a contract with B in his own name for the transportation of the same articles at a much higher rate, the agency being unknown to the quartermaster; and that B brought suit on this contract; and it was held that he was entitled to recover only at the rate specified in A's contract. See also *supra*, III, D, 1, b.

76. Tagart *v.* Marcus, 36 Wkly. Rep. 469.

77. Weiss *v.* Whittemore, 28 Mich. 366, which was an action of libel by an agent against a third person who had published a libel in reference to the subject-matter of the agency, whereby plaintiff had lost business and his normal profits had decreased.

78. See Master and Servant, 26 Cyc. 1583. And see Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367; Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; Lucke *v.* Clothing Cutters', etc., Assembly No. 7507 K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408; Moran *v.* Dunphy, 177 Mass. 485, 487, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115 (where the court said: "We cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort"); Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am.

itself, and violates no right of the agent, the fact that the act is done with malice or other bad motive toward the agent, and thereby causes him to lose his employment, does not give the latter a right of action against the former.[79]

c. For Injury to Principal's Property. Although a mere servant has not such a special property as will enable him to maintain an action for the recovery of the principal's property taken from his possession,[80] yet a bailee or trustee, or any other person who is responsible to his principal for the property, may maintain an action against a third person who disturbs his possession or injures the property, since he has a special property or interest therein.[81]

E. Liability of Principal to Third Person — 1. On Contract — a. Disclosed Principal — (I) *Authorized Contract.* A principal is generally bound by the contracts made for him by his agent, and acts of the agent in connection therewith, while acting in the course of his employment and within the scope of his actual or apparent authority.[82]

St. Rep. 496, 37 L. R. A. 802; Bowen *v.* Hall, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367. See also Labor Unions, 24 Cyc. 822.

79. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367; Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225.

80. Faulkner *v.* Brown, 13 Wend. (N. Y.) 63; Tuthill *v.* Wheeler, 6 Barb. (N. Y.) 362. And see Galveston, etc., R. Co. *v.* Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647, holding that one suing in his own name for the burning of grass upon land of which he has possession only as agent cannot recover, where it does not appear that he had in himself any right to the grass.

81. *Alabama.*— Beyer *v.* Bush, 50 Ala. 19.
Connecticut.—White *v.* Webb, 15 Conn. 302.
Maine.— Little *v.* Fossett, 34 Me. 545, 56 Am. Dec. 671.
Massachusetts.— Pomeroy *v.* Smith, 17 Pick. 85.
New York.— Fitzhugh *v.* Wiman, 9 N. Y. 559; Bass *v.* Pierce, 16 Barb. 595; Faulkner *v.* Brown, 13 Wend. 63.
Pennsylvania.— Lyle *v.* Barker, 5 Binn. 457.
Texas.— Triplett *v.* Morris, 18 Tex. Civ. App. 50, 44 S. W. 684.
Vermont.— Taylor *v.* Hayes, 63 Vt. 475, 21 Atl. 610.
England.— Rooth *v.* Wilson, 1 B. & Ald. 59, 18 Rev. Rep. 431; Burton *v.* Hughes, 2 Bing. 173, 9 E. C. L. 533; Nicolls *v.* Bastard, 2 C. M. & R. 659, 1 Gale 295, 5 L. J. Exch. 7, Tyrw. & G. 156; Sutton *v.* Buck, 2 Taunt. 302, 11 Rev. Rep. 585.
See, generally, Bailments, 5 Cyc. 210; Trusts.
Thus one having possession of the goods of another to sell on commission can maintain an action for any damage done to them while so in his possession. Robinson *v.* Webb, 11 Bush (Ky.) 464; Gorum *v.* Carey, 1 Abb. Pr. (N. Y.) 285.

82. *Alabama.*— Alfred Shrimpton *v.* Brice, 102 Ala. 655, 15 So. 452; Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656; Renard *v.* Turner, 42 Ala. 117; Waring *v.* Henry, 30 Ala. 721; Edwards *v.* Benham, 2 Stew. & P. 147. See Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Boykin *v.* McLaughlin, 35 Ala. 286.
California.— Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616; Schultz *v.* McLean, 93 Cal. 329, 28 Pac. 1053; Hellmann *v.* Potter, 6 Cal. 13. See Salmon *v.* Hoffman, 2 Cal. 138, 56 Am. Dec. 322.
Colorado.—Hagerman *v.* Bates, 24 Colo. 71, 49 Pac. 139. See Diebold Safe, etc., Co. *v.* Luqueer, 4 Colo. App. 430, 36 Pac. 65.
Connecticut.—Hudson *v.* Whiting, 17 Conn. 487; Frost *v.* Wood, 2 Conn. 23.
Dakota.— Rea *v.* Steamboat Eclipse, 4 Dak. 218, 30 N. W. 159.
Delaware.— Darby *v.* Hall, 3 Pennew. 25, 50 Atl. 64; Geylin *v.* De Villeroi, 2 Houst. 311.
District of Columbia.— Main *v.* Aukam, 12 App. Cas. 375.
Florida.—Indian River State Bank *v.* Hartford F. Ins. Co., 46 Fla. 283, 35 So. 228.
Georgia.— Phinizy *v.* Bush, 129 Ga. 479, 59 S. E. 259; Hodnett *v.* Tatum, 9 Ga. 70. See Verdell *v.* Ketchum, 52 Ga. 134.
Illinois.—Dewar *v.* Montreal Bank, 115 Ill. 22, 3 N. E. 746 [*affirming* 6 Ill. App. 294]; Pardridge *v.* La Pries, 84 Ill. 51; Goodrich *v.* Hanson, 33 Ill. 498; Marckle *v.* Haskins, 27 Ill. 382; Taylor *v.* Taylor, 20 Ill. 650; Bloomer *v.* Denman, 12 Ill. 240; Denman *v.* Bloomer, 11 Ill. 177; Danky *v.* Parker, 108 Ill. App. 527; Terre Haute, etc., R. Co. *v.* Crews, 53 Ill. App. 50; Wider *v.* Branch, 12 Ill. App. 358.
Indiana.—Wolfe *v.* Pugh, 101 Ind. 293; Rend *v.* Boord, 75 Ind. 307; Croy *v.* Busenbank, 72 Ind. 48. See Blackwell *v.* Ketchum, 53 Ind. 184.
Iowa.— John Gund Brewing Co. *v.* Peterson, 130 Iowa 301, 106 N. W. 741; Cook *v.* Boyd, (1904) 99 N. W. 1063; Barbee *v.* Aultman, 102 Iowa 278, 71 N. W. 235; Mankin *v.* Mankin, 91 Iowa 406, 59 N. W. 292; Hopkins *v.* Hawkeye Ins. Co., 57 Iowa 203, 10 N. W. 605, 42 Am. Rep. 41; Whiting *v.* Western Stage Co., 20 Iowa 554. See Hawke *v.* Manning, 39 Iowa 707.
Kansas.— Lewis *v.* Bourbon County Com'rs, 12 Kan. 186.
Louisiana.— Destrehan *v.* Louisiana Cypress Lumber Co., 45 La. Ann. 920, 13 So. 230, 40 Am. St. Rep. 265; Broadway Sav.

(II) *UNAUTHORIZED CONTRACT* — (A) *General Rule.* Conversely a person is not as a rule bound by the contracts of one who assumes without authority to represent him as agent, nor by contracts made by his agent beyond the scope of

Bank *v.* Vorster, 30 La. Ann. 587; Wallace *v.* Lamson, 20 La. Ann. 243; Mackey *v.* De Blanc, 12 La. Ann. 377; Carlisle *v.* The Eudora, 5 La. Ann. 15; Pellerin *v.* Dungan, 2 La. Ann. 383; Marsh *v.* Laforest, 1 La. Ann. 7; Hivert *v.* Lacaze, 3 Rob. 357; Williams *v.* Winchester, 7 Mart. N. S. 22; Honore *v.* White, 1 Mart. N. S. 219.

Maine.— Forsyth *v.* Day, 46 Me. 176; Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96.

Massachusetts.— Northampton Bank *v.* Pepoon, 11 Mass. 288. See Antoni *v.* Belknap, 102 Mass. 193.

Mississippi.— Carter *v.* Taylor, 6 Sm. & M. 367.

Missouri.— Bank of Commerce *v.* Hoeber, 88 Mo. 37, 57 Am. Rep. 359; McCrary *v.* Ashbaugh, 44 Mo. 410; King *v.* Pearce, 40 Mo. 222; Heath *v.* Schroer, 119 Mo. App. 93, 96 S. W. 313; Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453; Greeley-Burnham Grocer Co. *v.* Capen, 23 Mo. App. 301 (holding that a contract made by an agent who had full authority is not affected by his inaccurate report of its terms to his principal); Stotesburg *v.* Massengale, 13 Mo. App. 221.

Nebraska.— Pochin *v.* Knoebel, 63 Nebr. 768, 89 N. W. 264.

New Hampshire.—Taylor *v.* Jones, 42 N. H. 25; Webster *v.* Clark, 30 N. H. 245.

New Jersey.—Lambert *v.* Metropolitan Sav., etc., Assoc., 65 N. J. L. 79, 46 Atl. 766; Law *v.* Stokes, 32 N. J. L. 249, 90 Am. Dec. 655; National Iron Armor Co. *v.* Bruner, 19 N. J. Eq. 331.

New York.— Birkett *v.* Postal Tel.-Cable Co., 186 N. Y. 591, 79 N. E. 1101; Phillips *v.* Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 37 Am. St. Rep. 596, 23 L. R. A. 584; Schley *v.* Fryer, 100 N. Y. 71, 2 N. E. 280; Westfield Bank *v.* Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; Jones *v.* Gould, 123 N. Y. App. Div. 236, 108 N. Y. Suppl. 31; Cunningham *v.* Wathen, 14 N. Y. App. Div. 553, 43 N. Y. Suppl. 886; Tucker *v.* Woolsey, 64 Barb. 142; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. 493; Thurman *v.* Wells, 18 Barb. 500; Hazewell *v.* Coursen, 45 N. Y. Super. Ct. 22 [*reversed* on other grounds in 81 N. Y. 630]; Hearne *v.* Keene, 5 Bosw. 579; Adams *v.* Cole, 1 Daly 147; Davis *v.* Lynch, 31 Misc. 724, 65 N. Y. Suppl. 225; Brenner *v.* Lawrence, 27 Misc. 755, 58 N. Y. Suppl. 769; Forster *v.* Wilshusen, 14 Misc. 520, 35 N. Y. Suppl. 1083; Cooper *v.* Townsend, 13 N. Y. Suppl. 760; Dawson *v.* Chisholm, 1 N. Y. Suppl. 171; Dollfus *v.* Frosch, 1 Den. 367; North River Bank *v.* Aymar, 3 Hill 262; Sandford *v.* Handy, 23 Wend. 260; Tradesmen's Bank *v.* Astor, 11 Wend. 87; Lincoln *v.* Battelle, 6 Wend. 475, holding that where a person is employed by an agent, he may call upon the principal for payment for the services rendered, although he knows that the agent has charged the demand to the principal, and received the amount, unless he has agreed to discharge the principal and rely upon the responsibility of the agent.

North Carolina.— Hanover Nat. Bank *v.* Cocke, 127 N. C. 467, 37 S. E. 507; Forsyth *v.* Lash, 89 N. C. 159; Lane *v.* Dudley, 6 N. C. 119, 5 Am. Dec. 523.

Ohio.— Aetna Ins. Co. *v.* Stambaugh-Thompson Co., 76 Ohio St. 138, 81 N. E. 173; Maple *v.* Cincinnati, etc., R. Co., 40 Ohio St. 313, 48 Am. Rep. 685; Aetna Ins. Co. *v.* Church, 21 Ohio St. 492; Darst *v.* Slevins, 2 Disn. 574; Lambert *v.* Carroll, Wright 108; Crane *v.* Halford, Wright 72.

Oregon.— McLeod *v.* Despain, (1907) 92 Pac. 1088.

Pennsylvania.— Douglas *v.* Hustead, 216 Pa. St. 292, 65 Atl. 670; Mundorff *v.* Wickersham, 63 Pa. St. 87, 3 Am. Rep. 531; Butler's Appeal, 26 Pa. St. 63; U. S. Life Ins. Co. *v.* Guarantee Trust, etc., Co., 2 Walk. 433; McDonald *v.* Todd, 1 Grant 17; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180. See Hagerstown Bank *v.* Loudon Sav. Fund Soc., 3 Grant 135.

South Carolina.—Walker *v.* Crittenden, 3 Strobh. 229.

Tennessee.— Kuhlman *v.* E. J. Hart Co., (1900) 59 S. W. 455 (holding that where a contract reported by defendant's agent to him was not the one actually made, a clause as to the manner of settlement being omitted, the contract may be enforced if plaintiff does not insist on the feature omitted); Ezell *v.* Franklin, 2 Sneed 236.

Texas.— Calhoun *v.* Wright, 23 Tex. 522, 19 Tex. 412; Horter *v.* Herndon, 12 Tex. Civ. App. 637, 35 S. W. 80; Halsell *v.* Musgrave, 5 Tex. Civ. App. 476, 24 S. W. 358. See Morgan *v.* Darragh, 39 Tex. 171.

Vermont.— Barker *v.* Troy, etc., R. Co., 27 Vt. 766; Alexander *v.* Rutland Bank, 24 Vt. 222; Fitzsimmons *v.* Joslin, 21 Vt. 129, 52 Am. Dec. 46.

Wisconsin.— Matteson *v.* Rice, 116 Wis. 328, 92 N. W. 1109; McKinnon *v.* Vollmar, 75 Wis. 82, 43 N. W. 800, 17 Am. St. Rep. 178, 6 L. R. A. 121; Saveland *v.* Green, 40 Wis. 431; Emmons *v.* Dowe, 2 Wis. 322. See Dodge *v.* McDonnell, 14 Wis. 553.

United States.— Merchants' Nat. Bank *v.* Boston State Bank, 10 Wall. 604, 19 L. ed. 1008; Alexandria Mechanics' Bank *v.* Columbia Bank, 5 Wheat. 326, 5 L. ed. 100; Rainey *v.* Potter, 120 Fed. 651, 57 C. C. A. 113; Warren-Scharf Asphalt Paving Co. *v.* Commercial Nat. Bank, 97 Fed. 181, 38 C. C. A. 108; Einstein *v.* Schnebly, 89 Fed. 540; Alger *v.* Anderson, 78 Fed. 729; *In re* Troy Woolen Co., 24 Fed. Cas. No. 14,203, 8 Nat. Bankr. Reg. 412.

England.— *In re* Hale, [1899] 2 Ch. 107, 68 L. J. Ch. 517, 80 L. T. Rep. N. S. 827, 15 T. L. R. 389, 47 Wkly. Rep. 579; Shaw *v.* Port Philip Gold Min. Co., 13 Q. B. D. 103, 53 L. J. Q. B. 369, 50 L. T. Rep. N. S. 685,

his actual or apparent authority, nor by acts done in connection therewith without authority or in excess of authority.[83]

32 Wkly. Rep. 771; Glyn *v.* Baker, 13 East 509, 12 Rev. Rep. 414; Dyas *v.* Cruise, 8 Ir. Eq. 407, 2 J. & L. 460; Flinn *v.* Hoyle, 63 L. J. Q. B. 1; Doe *v.* Martin, 4 T. R. 39, 2 Rev. Rep. 324; *Re* Japanese Curtains, etc., Co., 28 Wkly. Rep. 339.

Canada.— Pope *v.* Pictou Steamboat Co., 6 Nova Scotia 18; Molsons' Bank *v.* Brockville, 31 U. C. C. P. 174.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 458–463.

The reason for the rule is expressed in the familiar maxim, *qui facit per alium facit per se.* The agent being the *alter ego* of the principal for the purpose of the agency, his act or contract is in effect that of the principal, who is bound thereby exactly as if he in fact executed it himself. See cases cited *supra*, this note.

That one appointing an agent lacked authority to appoint does not relieve him from liability for the agent's acts and contracts. Forsyth *v.* Lash, 89 N. C. 159.

Delay in notifying the principal of the agent's default in payment for goods purchased does not relieve the principal from liability therefor, although the principal has in the meantime settled with the agent. Strapp *v.* Spurlin, 32 Ind. 442.

Election to hold agent.— Where a borrower who has sustained loss through the embezzlement of funds paid by the lender to the lender's agent attaches the property of the agent, alleging that the money embezzled was received for plaintiff's use and benefit, he waives the right to recover of the lender. McLean *v.* Ficke, 94 Iowa 283, 62 N. W. 753.

Cancellation of contract made by agent.— The agent cannot control the principal; and hence the principal may cancel a contract made in his behalf by the agent, the other party not objecting, and enter into a new contract which will supersede the contract made by the agent. Palfrey *v.* Stinson, 11 La. 77.

Apparent scope of authority see *supra*, II, A, 2, e.

Estoppel to deny agency see *supra*, I, E, 2, a, (II).

Liability of carrier where agent fraudulently issues fictitious bill of lading see CARRIERS, 6 Cyc. 419.

Liability of corporation where agent fraudulently issues stock see CORPORATIONS, 10 Cyc. 444 *et seq.*

83. *Alabama.*— Moore *v.* Robinson, 62 Ala. 537.

Arkansas.— See Dyer *v.* Bean, 15 Ark. 519.

California.— Alcorn *v.* Buschke, 133 Cal. 655, 66 Pac. 15. See Savings, etc., Soc. *v.* Gerichten, 64 Cal. 520, 2 Pac. 405.

Colorado.— Consolidated Gregory Co. *v.* Raber, 1 Colo. 511. See Ohio Creek Anthracite Coal Co. *v.* Hinds, 15 Colo. 173, 25 Pac. 502.

Georgia.— Gorham *v.* Telker, 102 Ga. 260, 28 S. E. 1002; Wynn *v.* Smith, 40 Ga. 457.

Illinois.— Las Vegas First Nat. Bank *v.* Oberne, 121 Ill. 25, 7 N. E. 85; Fudge *v.* Seckner Contracting Co., 80 Ill. App. 35.

Iowa.— Fritz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193; National Imp., etc., Co. *v.* Maiken, 103 Iowa 118, 72 N. W. 431; Forcheimer *v.* Stewart, 73 Iowa 216, 32 N. W. 665, 35 N. W. 148; Gage *v.* Parry, 69 Iowa 605, 29 N. W. 822.

Kansas.— Trustees' Executors', etc., Corp. *v.* Bowling, 2 Kan. App. 770, 44 Pac. 42.

Kentucky.— Barret *v.* Rhem, 6 Bush 466, holding that an unauthorized sale by a person who assumes to represent an agent is not the act of the agent, and therefore does not bind the principal.

Louisiana.— Warren *v.* Goodwyn, 110 La. 198, 34 So. 411; Campbell *v.* Nichols, 11 Rob. 16; Allen *v.* Hart, 10 Rob. 55; Menefee *v.* Johnson, 2 Rob. 274. See Scottish-American Mortg. Co. *v.* Ogden, 49 La. Ann. 8, 21 So. 116.

Maine.— Newhall *v.* Dunlap, 14 Me. 180, 31 Am. Dec. 45.

Maryland.— Keener *v.* Harrod, 2 Md. 63, 56 Am. Dec. 706.

Massachusetts.— Heath *v.* New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 N. E. 215; Rogers *v.* Holden, 142 Mass. 196, 7 N. E. 768; Washington Bank *v.* Lewis, 22 Pick. 24; Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17, holding that if an agent be authorized to contract a debt by parol for his principal, and he give his own bond for the debt, the obligee cannot maintain assumpsit against the principal to recover the debt.

Michigan.— Butler *v.* Michigan Cent. R. Co., 60 Mich. 83, 26 N. W. 841; Atlas Min. Co. *v.* Johnston, 23 Mich. 36; Chamberlin *v.* Darragh, Walk. 149.

Minnesota.— Barton-Parker Mfg. Co. *v.* Wilson, 96 Minn. 334, 104 N. W. 968; Olson *v.* Great Northern R. Co., 81 Minn. 402, 84 N. W. 219; Anderson *v.* Johnson, 74 Minn. 171, 77 N. W. 26; Humphrey *v.* Havens, 12 Minn. 298.

Mississippi.— Fox *v.* Fisk, 6 How. 328, holding that if an agent having authority to collect a debt of his principal receives claims on third persons in liquidation from the debtor, with an agreement to collect and refund the overplus, and the debtor has notice of the extent of the agent's authority, the principal is not bound for such overplus, nor for diligence in collecting it. See Dick *v.* Mawry, 9 Sm. & M. 448.

Missouri.— Tate *v.* Evans, 7 Mo. 419; Citizen's Sav. Bank *v.* Marr, 129 Mo. App. 26, 107 S. W. 1009; Waters-Pierce Oil Co. *v.* Jackson Junior Zinc Co., 98 Mo. App. 324, 73 S. W. 272; Carter *v.* Ætna Loan Co., 61 Mo. App. 218; Bensberg *v.* Harris, 46 Mo. App. 404.

Montana.— Ming *v.* Pratt, 22 Mont. 262, 56 Pac. 279.

Nebraska.— Spies *v.* Stein, 70 Nebr. 641, 97 N. W. 752; Bullard *v.* De Groff, 59 Nebr.

(B) *Acts in Emergencies.* An exception to the general rule that a principal is not liable for the unauthorized contracts of his agent is held to exist in cases

783, 82 N. W. 4. See McCormick *v.* Peters, 24 Nebr. 70, 37 N. W. 927.

Nevada.— Rankin *v.* New England, etc., Min. Co., 4 Nev. 78.

New Jersey.— Standard Oil Co. *v.* Linol Co., (Sup. 1907) 68 Atl. 174; Kirkpatrick *v.* Winans, 16 N. J. Eq. 407.

New York.— Walsh *v.* Hartford F. Ins. Co., 73 N. Y. 5; Conklin *v.* Mitchell, 57 N. Y. 650; McGoldrick *v.* Willits, 52 N. Y. 612; Marvin *v.* Wilber, 52 N. Y. 270 (holding that where the agent of a firm represents himself to be agent of an individual member thereof, the partner for whom he assumes to act is not individually bound by his acts, for an agent cannot bind a person for whom he is not an agent, no matter how much he assumes, nor can he create an agency by representations); Henry *v.* Wilkes, 37 N. Y. 562; Gould *v.* Sterling, 23 N. Y. 439; Nixon *v.* Palmer, 8 N. Y. 398; Burlingame *v.* Ætna Ins. Co., 36 N. Y. App. Div. 358, 55 N. Y. Suppl. 287; Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369; Downer *v.* Carpenter, 1 Hun 591, 4 Thomps. & C. 59; Durando *v.* New York, etc., Steamboat Co., 4 N. Y. Suppl. 386, 23 Abb. N. Cas. 56 [*affirmed* in 12 N. Y. Suppl. 958]. See Berrien *v.* McLane, Hoffm. 421, holding that where an agent employed to manage a cause for a land company changed the compensation of counsel employed in the cause from a sum of money to a tract of land, which he agreed to convey for the company, those members of the company who refused to accept the commutation were bound to pay their part of the amount.

North Carolina.— Ruffin *v.* Mebane, 41 N. C. 507, holding that where an agent authorized by his principal generally to buy and sell for him bought with a view of carrying out his agency, and gave a note under seal in the name of his principal, and the principal repudiated the note because it was under seal, the seller was remitted to his original right to proceed against the principal for the price.

North Dakota.— Reeves *v.* Corrigan, 3 N. D. 415, 57 N. W. 80, holding that a stipulation in a contract of sale "that no one has authority to add to or abridge or change it in any manner" is valid, and an oral agreement by a purchaser with a seller's agent, inconsistent therewith, is void, being beyond the agent's authority. And see Deering *v.* Russell, 5 N. D. 319, 65 N. W. 691, holding that parol statements of the agent of a party to a contract which were not incorporated into the contract were not binding on the principal, where the contract recited that the principal was not to be bound by the contract until it approved the same.

Oklahoma.— Stock Exch. Bank *v.* Williamson, 6 Okla. 348, 50 Pac. 93, holding that a principal is not bound by the unauthorized acts of his agent in making promissory notes, although the money derived from the execution of the notes may be due the agent for moneys advanced to pay the expenses of the business he was conducting for his principal, and for salary.

Pennsylvania.— Rafferty *v.* Haldron, 81* Pa. St. 438; Reaney *v.* Culbertson, 21 Pa. St. 507; Thrall *v.* Wilson, 17 Pa. Super. Ct. 376; Goodrich *v.* Strawbridge, 5 Pa. Co. Ct. 427. See Com. *v.* Kreager, 78 Pa. St. 477.

South Dakota.— Quale *v.* Hazel, 19 S. D. 483, 104 N. W. 215.

Tennessee.— Jones *v.* Harris, 10 Heisk. 98.

Texas.— Swayne *v.* Union Mut. L. Ins. Co., 92 Tex. 575, 50 S. W. 566; Thompson *v.* Fitzgerald, (Civ. App. 1907) 105 S. W. 334; Morton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94; Ft. Worth, etc., R. Co. *v.* Johnson, 2 Tex. App. Civ. Cas. § 232. See Friedlander *v.* Hillcoat, (1890) 14 S. W. 786.

Vermont.— Follett *v.* Stanton, 16 Vt. 35. See Equitable Mfg. Co. *v.* Allen, 76 Vt. 22, 56 Atl. 87, 104 Am. St. Rep. 915.

West Virginia.— Rohrbough *v.* U. S. Express Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849; Rosendorf *v.* Poling, 48 W. Va. 621, 37 S. E. 555.

Wisconsin.— Price *v.* Wisconsin M. F. Ins. Co., 43 Wis. 267; McDonell *v.* Dodge, 10 Wis. 106; Emmons *v.* Dowe, 2 Wis. 322.

Wyoming.— Brown *v.* Grady, (1907) 92 Pac. 622.

United States.— Curtis *v.* Innerarity, 6 How. 146, 12 L. ed. 380; Oshkosh Nat. Bank *v.* Munger, 95 Fed. 87, 36 C. C. A. 659; Young Reversible Lock-Nut Co. *v.* Young Lock-Nut Co., 72 Fed. 62; Harper *v.* National L. Ins. Co., 56 Fed. 281, 5 C. C. A. 505; Johnson R. Signal Co. *v.* Union Switch, etc., Co., 51 Fed. 85 (holding that an agent acting beyond his authority in selling a chattel does not pass title as against a subsequent transferee of the principal); Pioneer Gold Min. Co. *v.* Baker, 20 Fed. 4. See Merrick *v.* Bernard, 17 Fed. Cas. No. 9,464, 1 Wash. 479.

England.—Button *v.* Bulloch, L. R. 9 Q. B. 572, 30 L. T. Rep. N. S. 648, 22 Wkly. Rep. 956; *Ex p.* Blain, 12 Ch. D. 522, 41 L. T. Rep. N. S. 46, 28 Wkly. Rep. 334; Burnell *v.* Brown, 1 Jac. & W. 168, 21 Rev. Rep. 136, 37 Eng. Reprint 339; Atty.-Gen. *v.* Briggs, 1 Jur. N. S. 1084; Howard *v.* Braithwaite, 1 Ves. & B. 202, 35 Eng. Reprint 79. See also Lucas *v.* Wilkinson, 1 H. & N. 420, 26 L. J. Exch. 13, 5 Wkly. Rep. 197.

Canada.— Commercial Union Assur. Co. *v.* Margeson, 29 Can. Sup. Ct. 601; Atlas Assur. Co. *v.* Brownell, 29 Can. Sup. Ct. 537; McDonald *v.* Royal Ins. Co., 15 Nova Scotia 428; *Re* Hall, 14 Ont. 557; Nelson *v.* Wigle, 8 Ont. 82; West *v.* MacInnes, 23 U. C. Q. B. 357. See McConnell *v.* Wilkins, 13 Ont. App. 438; Garneau *v.* North American Transportation Co., 12 Quebec Super. Ct. 77.

See 40 Cent. Dig. tit. "Principal and Agent" §§ 574, 575.

Intention to benefit principal.— The fact

of necessity arising from sudden or unexpected emergencies, and if the agent acts in good faith, although in excess of his authority, the principal may be bound.[84]

(III) *Illegal Contract.* A principal is not bound by an illegal executory contract made in his behalf by his agent,[85] especially where the agent had no authority to make it.[86]

(IV) *Where Credit Is Given Exclusively to Agent.* A person who, upon entering into contractual relations with an agent, has full knowledge of the principal, but extends credit to the agent exclusively, cannot thereafter resort to the principal, and the latter is not bound, although the agent acted in the course of his employment and for the principal's benefit.[87]

that an agent in acting in excess of his authority intends to benefit the principal does not alter the rule stated in the text. Ure *v.* Currell, 4 Mart. N. S. (La.) 502; Keith *v.* Purvis, 4 Desauss. Eq. (S. C.) 114.

A stranger cannot disaffirm an agreement made with an agent on the ground that he exceeded his authority. Jackson *v.* Van Dalfsen, 5 Johns. (N. Y.) 43.

Apparent scope of authority see *supra*, II, A, 2, e.

Estoppel to deny agency see *supra*, I, E, 2, a, (II).

Ratification by principal see *supra*, I, F.

84. Bartlett *v.* Sparkman, 95 Mo. 136, 8 S. W. 406, 6 Am. St. Rep. 35 (where the principal sent the agent for a particular doctor, fourteen miles distant, and the agent, not finding the doctor at home, engaged another); Jervis *v.* Hoyt, 2 Hun (N. Y.) 637 (where an agent exceeded his authority in disposing of a cargo of grain which had begun to spoil); Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43 (where an agent to sell a cargo of flour at a certain port for cash, found the market glutted, and, the property being in danger of decaying and becoming worthless, sold at another port on credit). And see *supra*, II, A, 6, h, (v), (c).

This exceptions must, however, be narrowly confined, and unless the unauthorized conduct of the agent is clearly necessary and limited to the exigencies of the case the principal will not be bound. Foster *v.* Smith, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604, where an agent to buy wheat for and ship it to his principal, but not authorized to sell, bought wheat, and the vessel on which he shipped it sank, and the agent sold the wheat, and it was held that, although the exigencies might have warranted the agent engaging help to take the wheat out of the water and preserve it, they did not warrant a sale.

85. See Arnot *v.* Pittston, etc., Coal Co., 2 Hun (N. Y.) 591 [*reversed* on other grounds in 68 N. Y. 558, 23 Am. Rep. 190]; and Contracts, 9 Cyc. 546 *et seq.* And see *supra*, I, C, 2.

86. Stover *v.* Flower, 120 Iowa 514, 94 N. W. 1100 (holding that where the agent of the owner of premises has no authority to lease them for an illegal purpose, a payment of rent to the agent by one renting the premises for an illegal purpose cannot be made the basis of any recovery from the owner on his failure to make a lease); Arnot *v.* Pittston, etc., Coal Co., 2 Hun (N. Y.) 591 [*reversed* on other grounds in 68 N. Y. 558, 23 Am. Rep. 190]. And see *supra*, I, F, 2, a, (II).

However, a principal cannot repudiate, as beyond the agent's authority, a contract made and completely executed by the agent on Sunday in violation of the Sunday law, the contract itself being within the agent's authority. Rickards *v.* Rickards, 98 Md. 136, 56 Atl. 397, 103 Am. St. Rep. 393, 63 L. R. A. 724.

87. *Alabama.*— Merrell *v.* Witherby, 120 Ala. 418, 23 So. 994, 26 So. 974, 74 Am. St. Rep. 39.

Delaware.— Bush *v.* Devine, 5 Harr. 375; Bate *v.* Burr, 4 Harr. 130.

Georgia.—Andrews Co. *v.* Columbus Nat. Bank, 129 Ga. 53, 58 S. E. 633, 121 Am. St. Rep. 186; Fleming *v.* Hill, 62 Ga. 751 (holding that under Code, § 2211, making the agent not personally responsible upon the contract if the agency was known and the credit not expressly given to him, the question is, "To whom was the credit knowingly given, according to the understanding of the parties?"); Fontaine *v.* Eagle, etc., Mfg. Co., 52 Ga. 31.

Illinois.— Watte *v.* Thayer, 56 Ill. App. 282.

Louisiana.— Stehn *v.* Fasnacht, 20 La. Ann. 83; Rankin *v.* Stewart, 5 La. Ann. 357. See Amory *v.* Grieve, 4 Mart. 632.

Maryland.— Henderson *v.* Mayhew, 2 Gill 393, 41 Am. Dec. 434.

Massachusetts.—Silver *v.* Jordan, 136 Mass. 319; Mussey *v.* Beecher, 3 Cush. 511 (holding that in an action against a principal for the price of goods sold to an agent who had a power of attorney, plaintiff must show that the goods were sold under the power of the agent as such, and not on his personal credit); Paige *v.* Stone, 10 Metc. 160, 43 Am. Dec. 420; French *v.* Price, 24 Pick. 13; James *v.* Bixby, 11 Mass. 34.

Michigan.— Sullivan *v.* Ross, 39 Mich. 511.

Nevada.— Rankin *v.* New England, etc., Min. Co., 4 Nev. 78.

New York.— Mecker *v.* Claghorn, 44 N. Y. 349; McMonnies *v.* Mackay, 39 Barb. 561; Ranken *v.* Deforest, 18 Barb. 143; Hyde *v.* Paige, 9 Barb. 150; Matter of Bateman, 7 Misc. 633, 28 N. Y. Suppl. 36 [*affirmed* in 145 N. Y. 623, 40 N. E. 10]. And see Maryland Coal Co. *v.* Edwards, 4 Hun 432; Buck *v.* Amidon, 4 Daly 126, holding that upon the question as to whom plaintiff gives credit, where one person orders him to do work for

(v) *Agent Having or Representing Adverse Interest* — (A) *Individual Interest of Agent.*[88] A principal is not bound by a contract made in his behalf if, without his knowledge and consent,[89] the agent acted in furtherance of his individual interests, and the other party to the contract had notice of the agent's breach of trust.[90]

another, the circumstance as to whom plaintiff charges the work on his books, and to whom he makes out his bill, is most material, and, unexplained, is controlling.

Ohio.— Post *v.* Kinney, 7 Ohio Dec. (Reprint) 439, 3 Cinc. L. Bul. 118.

Tennessee.— Davis *v.* McKinney, 6 Coldw. 15; Ahrens *v.* Cobb, 9 Humphr. 643, holding that where a person sells property to the agent of a known principal, and gives credit exclusively to the agent, the principal is not bound for the purchase-money, although he receives the property.

United States.— Pope *v.* Meadow Spring Distilling Co., 20 Fed. 35; *In re* Troy Woolen Co., 24 Fed. Cas. No. 14,403, 8 Nat. Bankr. Reg. 412. See Berwind *v.* Schultz, 25 Fed. 912.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 472–475.

Where an agent gives his own note to a third person who has full knowledge of the principal, its acceptance generally constitutes an election to extend credit exclusively to the agent, and relieves the principal from liability. Merrell *v.* Witherby, 120 Ala. 418, 23 So. 994, 26 So. 974, 74 Am. St. Rep. 39; Paige *v.* Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420 (holding also that after the giving of the note the contract cannot be rescinded and a new one be made by which the principal will be bound, unless he consents); French *v.* Price, 24 Pick. (Mass.) 13 (holding that where an agent purchased goods and gave therefor his own negotiable note, the seller knowing at the time when the goods were delivered and the note taken, but not at the time of the sale, that other persons were interested in the purchase, the note was a payment, and so the others were discharged from their liability); Schepflin *v.* Dessar, 20 Mo. App. 569; McMonnies *v.* Mackay, 39 Barb. (N. Y.) 561; Ranken *v.* Deforest, 18 Barb. (N. Y.) 143; Hyde *v.* Paige, 9 Barb. (N. Y.) 150. See, however, Keller *v.* Singleton, 69 Ga. 703 (holding that if a person sells goods to an agent for his principal, and takes the promissory note of the agent for the price, this without more will not operate as payment of the debt of the principal; and on failure of payment by the agent the principal will be liable to an action founded on the original consideration); Rathbone *v.* Tucker, 15 Wend. (N. Y.) 498 [*affirmed* in 18 Wend. 175] (holding that the taking of the note of an agent at an extended credit for goods furnished for the benefit of the principal does not discharge the principal, unless it is affirmatively shown on his part that on the supposition that the debt was paid or the personal responsibility of the agent accepted for it, he dealt differently with the agent than he would have done had the note not been taken and the extended credit given); Calder *v.* Dobell, L. R. 6 C. P. 486, 40 L. J. C. P. 224, 25 L. T. Rep. N. S. 129, 19 Wkly. Rep. 409, 978.

Constructive notice of principal by third person.— The rule which prevents a seller who has given credit to an agent from afterward resorting to the principal for payment does not apply to a case in which the seller, at the time of sale, merely has the means of knowing the principal, but is confined to cases in which he has actual knowledge. Raymond *v.* Crown, etc., Mills, 2 Metc. (Mass.) 317 [*approved* in Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51].

Personal liability of agent to whom credit is extended see *supra*, III, C, 1, b, (I), (C).

88. **Indirect purchases or sales by selling or purchasing agent from, for, or to himself** see *supra*, III, A, 1, e, f, g.

89. Tyler *v.* Sanborn, 128 Ill. 136, 21 N. E. 193, 15 Am. St. Rep. 97, 4 L. R. A. 218.

90. *Alabama.*— Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722.

Illinois.— Tyler *v.* Sanborn, 128 Ill. 136, 21 N. E. 193, 15 Am. St. Rep. 97, 4 L. R. A. 218, holding also that the mere fact that the principal received full consideration for property sold by his agent does not preclude him from avoiding the sale.

Louisiana.— Florance *v.* Adams, 2 Rob. 556, 38 Am. Dec. 226.

New Jersey.— Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941, holding also that where a transaction between an agent and another person is entire, and known to such other person to be a breach of trust on the part of the agent, the principal is not bound at all, although some portions of the transaction might, if standing alone, have been within the agent's power and duty.

United States.— Glover *v.* Ames, 8 Fed. 351.

See 40 Cent. Dig. tit. "Principal and Agent," § 465.

Good faith of third person.— Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted *bona fide*, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests, and not in those of the principal. Hambro *v.* Burnand, [1904] 2 K. B. 10, 9 Com. Cas. 251, 73 L. J. K. B. 669, 90 L. T. Rep. N. S. 803, 20 T. L. R. 398, 52 Wkly. Rep. 583 [*reversing* [1903] 2 K. B. 399, 8 Com. Cas. 252, 72 L. J. K. B. 662, 89 L. T. Rep. N. S. 180, 19 T. L. R. 284, 51 Wkly. Rep. 652]. So the mere fact that a purchasing agent secretly intends to make a

(B) *Agent Acting For Both Parties* — (1) IN GENERAL. An agent may with their full knowledge and consent represent both parties to a contract, and his contracts under these circumstances bind each within the scope of his authority.[91] But where an agent without the full knowledge and consent of his principal represents the adverse party in a transaction, his contracts relating thereto are voidable at the option of the principal.[92]

profit out of a resale of the goods bought does not relieve the principal from liability to pay for the goods. Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149.

91. *Arkansas.*— Wassel *v.* Reardon, 11 Ark. 705, 54 Am. Dec. 245.

Georgia.— Ranespeck *v.* Patillo, 104 Ga. 772, 30 S. E. 962, 69 Am. St. Rep. 197, 42 L. R. A. 197; Fitzsimmons *v.* Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577, holding that two persons may always by mutual consent, no matter how adverse their interest, make a third their agent.

Louisiana.— Metcalfe *v.* Alter, 31 La. Ann. 389; Draughon *v.* Quillen, 23 La. Ann. 237; Florance *v.* Adams, 2 Rob. 556, 38 Am. Dec. 226.

Michigan.— Colwell *v.* Keystone Iron Co., 36 Mich. 51 (holding that an agent for the seller could, with the consent of all parties, accept as agent of the vendee the delivery of the property sold); Adams Min. Co. *v.* Senter, 26 Mich. 73 (holding that where the same person is made agent of two mines in the same vicinity, and it becomes necessary for one to deal with the other, he must be presumed to have the same power to act for both that would be possessed if there were two agents acting separately, and may dispose of property in the same way; and such a double authority dispenses with such formalities as could not be complied with where one man acts for both companies).

Missouri.— Robinson *v.* Jarvis, 25 Mo. App. 421; De Steiger *v.* Hollington, 17 Mo. App. 352.

Wisconsin.— Meyer *v.* Hanchett, 43 Wis. 246.

Failure of a mutual agent to perform the mutual agreement according to its terms cannot be imputed to one party to the agreement so as to render him liable to the other party as for a breach of the agreement. Crippen *v.* Hope, 34 Mich. 55.

Change in commission of agent for both parties as fraud.— Where an agent was representing both the parties in the sale of land, and the commission which he was to receive was changed by one party, the failure to disclose the change was a fraud in law on the other party. Jones *v.* Draper, 26 Ohio Cir. Ct. 785.

92. *Colorado.*— British American Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147.

Georgia.— Ranespeck *v.* Patillo, 104 Ga. 772, 30 S. E. 962, 69 Am. St. Rep. 197, 42 L. R. A. 197; English *v.* Georgia Bank, 76 Ga. 537; Fitzsimmons *v.* Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577.

Illinois.— Smythe *v.* Evans, 209 Ill. 376, 70 N. E. 906 [*reversing* 108 Ill. App. 145].

Kentucky.— McDoel *v.* Ohio Valley Imp., etc., Co., 36 S. W. 175, 18 Ky. L. Rep. 294.

Maine.— Hinckley *v.* Arey, 27 Me. 362, holding, however, that while, in making a contract for the composition of a debt, the same man cannot be the agent of both parties, yet when the composition is agreed upon with the creditor by the agent of the debtor, such agent can become the agent of the creditor to receive the payment of the amount agreed upon.

Mississippi.— Spinks *v.* Davis, 32 Miss. 152.

Missouri.— McClure *v.* Ullman, 102 Mo. App. 697, 77 S. W. 325; Huggins Cracker, etc., Co. *v.* People's Ins. Co., 41 Mo. App. 530; Robinson *v.* Jarvis, 25 Mo. App. 421; De Steiger *v.* Hollington, 17 Mo. App. 382; Mercantile Mut. Ins. Co. *v.* Hope Ins. Co., 8 Mo. App. 408.

New York.— Palmer *v.* Gould, 144 N. Y. 671, 39 N. E. 378; Empire State Ins. Co. *v.* American Cent. Ins. Co., 138 N. Y. 446, 34 N. E. 200 [*affirming* 64 Hun 485, 19 N. Y. Suppl. 504]; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 14 N. Y. 85 [*reversing* 20 Barb. 468]; Greenwood *v.* Spring, 54 Barb. 375, holding that it is not necessary for a party seeking to avoid such contract to show that any improper advantage has been gained over him; it is at his option to repudiate or confirm the contract irrespective of any proof of actual fraud.

Ohio.— U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380.

Virginia.— Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 337, 48 L. R. A. 234.

West Virginia.— Truslow *v.* Parkersburg Bridge, etc., Co., 61 W. Va. 628, 57 S. E. 51, holding that it is immaterial that the principal was not in fact injured by the agent's wrong-doing.

Wisconsin.— Walworth County Bank *v.* Farmers' Loan, etc., Co., 16 Wis. 629.

United States.— Findlay *v.* Pertz, 66 Fed. 427, 13 C. C. A. 559 [*affirmed* in 74 Fed. 681, 20 C. C. A. 662].

England.— Salford *v.* Lever, [1891] 1 Q. B. 168, 55 J. P. 244, 60 L. J. Q. B. 39, 63 L. T. Rep. N. S. 658, 39 Wkly. Rep. 85; Smith *v.* Sorby, 3 Q. B. D. 552 note.

Canada.— See Cameron *v.* Tate, 15 Can. Sup. Ct. 622.

See, however, Sunderland *v.* Kilbourn, 3 Mackey (D. C.) 506, holding that where an agent represents a principal in several transactions, each must be considered separate, and although in some the agent acted for both parties, the principal may be bound by others in which he did not so act.

A custom or usage to the contrary does not alter the rule where the principal has no

(2) Collusion Between Agent and Third Party. *A fortiori* the principal may avoid contracts made by the agent as the result of fraud or collusion between the agent and the third party;[93] and the payment of a secret commission, bribe, or gratuity to the agent by the third party as an inducement for entering into contractual relations on behalf of his principal, or an agreement to pay such commission, is such collusion as entitles the principal to avoid the contract.[94]

knowledge of it. Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 337, 40 L. R. A. 234; Bartram *v.* Lloyd, 88 L. T. Rep. N. S. 286, 19 T. L. R. 293.

Transactions admitting of double agency.— An agent for the owner in the construction of a building may act as agent for an insurance company in effecting insurance on the building (British America Assoc. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147), and one employed as a mere watchman or guard of certain property is not by such employment incapacitated to issue a valid policy on the property in behalf of an insurance company of which he is the agent (Northrup *v.* Germania F. Ins. Co., 48 Wis. 420, 4 N. W. 350, 33 Am. Rep. 815); and where a school-board by a vote authorizes its president to enter into a contract of insurance through an insurance agent who is also a member of the board, the policy is binding on the company, as the agent's interest as a school director in the property insured is nominal and no greater than that of any resident of the school-district (German Ins. Co. *v.* Independent School Dist., 80 Fed. 366, 25 C. C. A. 492). So a payee of a note secured by a mortgage may, after the transfer of the note and mortgage, act as agent of the maker to renew the note and mortgage, even though the renewal may result in the payee's release as an indorser or guarantor, since under Cal. Civ. Code, § 3116, the maker is bound to pay the debt, and the payee is liable only to a subsequent holder. Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616.

If the principal ratifies the transaction with full knowledge of the facts he is bound. British American Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147; Truslow *v.* Parkersburg Bridge, etc., R. Co., 61 W. Va. 628, 57 S. E. 51.

93. *Arizona.*— Jacobs *v.* George, (1886) 11 Pac. 110.

Iowa.— Stover *v.* Flower, 120 Iowa 514, 94 N. W. 1100; Seymour *v.* Shea, 62 Iowa 708, 16 N. W. 196. And see White *v.* Leech, (1903) 96 N. W. 709.

Louisiana.— Beal *v.* McKiernan, 6 La. 407; Shepherd *v.* Lanfear, 5 La. 336, 25 Am. Dec. 181.

New York.— Smith *v.* Seattle, etc., R. Co., 72 Hun 202, 25 N. Y. Suppl. 368; Union Bank *v.* Mott, 39 Barb. 180.

Pennsylvania.— McNair *v.* McLennan, 24 Pa. St. 384; Lloyd *v.* Greenfield, 32 Pittsb. Leg. J. N. S. 119.

Vermont.— Holden *v.* Durant, 29 Vt. 184.

United States.— Pacific Lumber Co. *v.* Moffat, 134 Fed. 836, 67 C. C. A. 442; Findlay *v.* Pertz, 66 Fed. 427, 13 C. C. A. 559 [*affirmed* in 74 Fed. 681].

England.— Salford *v.* Lever, [1891] 1 Q. B. 168, 55 J. P. 244, 60 L. J. Q. B. 39, 63 L. T. Rep. N. S. 658, 39 Wkly. Rep. 85; Smith *v.* Sorby, 3 Q. B. D. 552 note.

See 40 Cent. Dig. tit. "Principal and Agent," § 465.

94. Findlay *v.* Pertz, 66 Fed. 427, 13 C. C. A. 559 [*affirmed* in 74 Fed. 681, 20 C. C. A. 662]; Smith *v.* Sorby, 3 Q. B. D. 552 note (holding that where a secret gratuity is given to an agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option); Panama, etc., Tel. Co. *v.* India Rubber, etc., Works Co., L. R. 10 Ch. 515, 45 L. J. Ch. 121, 32 L. T. Rep. N. S. 517, 23 Wkly. Rep. 583; Salford *v.* Lever, [1891] 1 Q. B. 168, 55 J. P. 244, 60 L. J. Q. B. 39, 63 L. T. Rep. N. S. 658, 39 Wkly. Rep. 85; Bartram *v.* Lloyd, 88 L. T. Rep. N. S. 286, 19 T. L. R. 293; Cohen *v.* Kuschke, 83 L. T. Rep. N. S. 102. See, however, Smith *v.* Tyler, 57 Mo. App. 668 (holding that a *bona fide* sale to a third person will not be set aside because such person afterward in good faith sells the same property to the agent); Brewster *v.* Hatch, 13 Daly (N. Y.) 65, 18 Abb. N. Cas. 205 (holding that where an agent is induced by bribery to make a contract on behalf of his principal, such fact is not of itself, after the contract has been performed and the principal has derived benefit therefrom, and there can be no rescission, a defense to an action against the principal on the contract, without evidence that his interests were prejudiced thereby); Yellow Poplar Lumber Co. *v.* Daniel, 109 Fed. 39, 48 C. C. A. 204 (holding that a contract of sale to a company is not voidable at the instance of the company after it has been fully performed by the seller, so as to preclude him from maintaining a suit in equity to enforce a lien given thereby, by the fact that after the contract was made an agreement was made between the seller and the manager of the company, who acted in its behalf in making the purchase, for a division of the profits of the sale, where such agreement was not contemplated at the time of the sale, but was subsequently exacted by the manager, and acceded to by the seller, under threat of a repudiation of the contract by the company, and no damage is shown to have resulted to the company from the agreement).

b. Undisclosed Principal — (i) *Simple Contract.* As has been seen in another connection, an agent who enters into contractual relations on behalf of an undisclosed principal may be held liable by the person with whom he deals, as though he himself were in fact the principal.[95] The liability of the agent is not, however, exclusive, for, although the third person extended credit to the agent in ignorance of the fact that the latter was acting in a representative capacity, he may elect to hold the undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal is bound by executory simple contracts made by the agent, and acts done by the agent in relation thereto, within the scope of his authority and in the course of his employment.[96] The converse

It is immaterial that the agent was not in fact biased by the secret profit. Shipway *v.* Broadwood, [1899] 1 Q. B. 369, 68 L. J. Q. B. 360, 80 L. T. Rep. N. S. 11, 15 T. L. R. 145; Hovenden *v.* Millhoff, 83 L. T. Rep. N. S. 41, 16 T. L. R. 506.

95. See *supra*, III, C, 1, b, (II).

96. *Alabama.*— Sellers *v.* Malone-Pilcher Co., 151 Ala. 426, 44 So. 414.

California.— Dashaway Assoc. *v.* Rogers, 79 Cal. 211, 21 Pac. 742; Thomas *v.* Moody, 57 Cal. 215; McKee *v.* Cunningham, 2 Cal. App. 684, 84 Pac. 260. See Glidden *v.* Lucas, 7 Cal. 26.

Colorado.—Bice *v.* Hover, 2 Colo. App. 172, 29 Pac. 1042.

Connecticut.— National Shoe, etc., Bank's Appeal, 55 Conn. 469, 12 Atl. 646; Merrill *v.* Kenyon, 48 Conn. 314, 40 Am. Rep. 174; Jones *v.* Ætna Ins. Co., 14 Conn. 501.

Delaware.— Connally *v.* McConnell, 1 Pennew. 133, 39 Atl. 773; Coxe *v.* Devine, 5 Harr. 375; Smith *v.* Jessup, 5 Harr. 121, holding that a general agency will charge the principal, although unknown, and although he furnishes his agent moneys to pay all dues for him incurred, which moneys the agent has misapplied.

Georgia.— Baldwin *v.* Garrett, 111 Ga. 876, 36 S. E. 966 (construing Civ. Code, § 3024, and holding that where one dealt with an agent who failed to disclose his principal, his right to proceed against the principal was not dependent on the diligence used in discovering the fact of the concealed agency); Simpson *v.* Patapsco Guano Co., 99 Ga. 168, 25 S. E. 94; Allison *v.* Sutlive, 99 Ga. 151, 25 S. E. 11. See Mickleberry *v.* O'Neal, 98 Ga. 42, 25 S. E. 933, holding that the value of goods sold an agent on his own credit may not be recovered of the principal unless the latter actually received the benefit of the goods.

Illinois.— West Chicago St. R. Co. *v.* Morrison, 160 Ill. 288, 43 N. E. 393; Barker *v.* Garvey, 83 Ill. 184; Koch *v.* Willi, 63 Ill. 144; Fishback *v.* Brown, 16 Ill. 74; Heywood *v.* Andrews, 89 Ill. App. 195.

Indiana.— Woodford *v.* Hamilton, 139 Ind. 481, 39 N. E. 47.

Iowa.— Calnan Constr. Co. *v.* Brown, 110 Iowa 37, 81 N. W. 163; Steele-Smith Grocery Co. *v.* Potthast, 109 Iowa 413, 80 N. W. 517; Glick *v.* Bramer, 78 Iowa 568, 43 N. W. 531. See Harrison *v.* Schoff, 101 Iowa 463, 70 N. W. 689.

Kansas.— Freund *v.* Hixon, (App. 1897) 49 Pac. 640.

Kentucky.— Wilson *v.* Thompson, 1 Metc. 123; Violett *v.* Powell, 10 B. Mon. 347, 52 Am. Dec. 548; Tutt *v.* Brown, 5 Litt. 1, 15 Am. Dec. 33.

Louisiana.— Ballister *v.* Hamilton, 3 La. Ann. 401 (holding that mere knowledge on the part of the third person that there is a principal will not destroy the right of a person dealing with an agent to look to the principal when afterward discovered, if from the state of his accounts with the agent no hardship follows); Hyde *v.* Wolf, 4 La. 234, 23 Am. Dec. 484; Buckingham *v.* Williams, 4 La. 62; Williams *v.* Winchester, 7 Mart. N. S. 22.

Maine.— Maxcy Mfg. Co. *v.* Burnham, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436; Upton *v.* Gray, 2 Me. 373.

Maryland.— York County Bank *v.* Stein, 24 Md. 447; Mayhew *v.* Graham, 4 Gill 339; Henderson *v.* Mayhew, 2 Gill 393, 41 Am. Dec. 434.

Massachusetts.—Tobin *v.* Larkin, 183 Mass. 389, 67 N. E. 340; Schendel *v.* Stevenson, 153 Mass. 351, 26 N. E. 689; Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860; Silver *v.* Jordan, 136 Mass. 319; Lovell *v.* Williams, 125 Mass. 439; National L. Ins. Co. *v.* Allen, 116 Mass. 398; Kingsley *v.* Davis, 104 Mass. 178; Lerned *v.* Johns, 9 Allen 419; Raymond *v.* Crown, etc., Mills, 2 Metc. 319 (holding that a seller charging the price of goods to an agent may thereafter recover of the principal, if he had no actual knowledge as to who the principal was when the sale was made, although he had means of obtaining such knowledge); French *v.* Price, 24 Pick. 13.

Michigan.— Hillman *v.* Hulett, 149 Mich. 289, 112 N. W. 918.

Minnesota.—William Lindeke Land Co. *v.* Levy, 76 Minn. 364, 79 N. W. 314.

Mississippi.— Simmons Hardware Co. *v.* Todd, 79 Miss. 163, 29 So. 851.

Missouri.— Richardson *v.* Farmer, 36 Mo. 35, 88 Am. Dec. 129; Higgins *v.* Dellinger, 22 Mo. 397 (holding that if an agent borrows money for his principal, and procures another to become surety, without disclosing his relation as agent, the principal is answerable to the surety if he pays the debt); Provenchere *v.* Reifess, 62 Mo. App. 50.

Nebraska.— Cheshire Provident Inst. *v.* Feusner, 63 Nebr. 682, 88 N. W. 849; Lamb *v.* Thompson, 31 Nebr. 448, 48 N. W. 58. See Moline, etc., Co. *v.* Neville, 38 Nebr. 433, 56 N. W. 983, holding that principal is not liable for an individual contract of the agent

of this proposition is also true. Accordingly it is the rule that, in the absence of

which had no reference to principal's business.

New Hampshire.— Chandler *v.* Coe, 54 N. H. 561.

New Jersey.— Greenberg *v.* Palmieri, 71 N. J. L. 83, 58 Atl. 297; Yates *v.* Repetto, 65 N. J. L. 294, 47 Atl. 632 (holding, in an action to recover for goods sold, that the fact that the goods were charged and billed to a person other than defendant was not *per se* conclusive proof that the debt was not the debt of defendant, and did not preclude plaintiff from showing that defendant was an undisclosed principal); Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038; Perth Amboy Mfg. Co. *v.* Condit, 21 N. J. L. 659; Bocherling *v.* Katz, 37 N. J. Eq. 150.

New York.— Jessup *v.* Steurer, 75 N. Y. 613; Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388; Meeker *v.* Claghorn, 44 N. Y. 349; Wasserman *v.* Bacon, 80 N. Y. App. Div. 505, 81 N. Y. Suppl. 193; City Trust, etc., Co. *v.* American Brewing Co., 70 N. Y. App. Div. 511, 75 N. Y. Suppl. 140 [*affirmed* in 174 N. Y. 486, 67 N. E. 62]; Jennings *v.* Davies, 29 N. Y. App. Div. 227, 51 N. Y. Suppl. 437; New York Cent., etc., R. Co. *v.* Davis, 86 Hun 86, 34 N. Y. Suppl. 206 [*affirmed* in 158 N. Y. 674, 52 N. E. 1125]; Laing *v.* Butler, 37 Hun 144 [*affirmed* in 108 N. Y. 637, 15 N. E. 442] (holding that in order to hold the principal under such circumstances, it must be clearly shown that the agent acted according to his authority, or that his acts had been subsequently ratified and confirmed); Inglehart *v.* Thousand Island Hotel Co., 7 Hun 547; Pulver *v.* Burke, 56 Barb. 390; Bonnell *v.* Briggs, 45 Barb. 470 (holding that where one employs an agent to purchase goods, and he purchases in his own name without disclosing the name of his principal, and delivers the property to his principal, and the latter without further inquiry pays the agent, who keeps the money, the seller may recover the price of the principal); McMonnies *v.* Mackay, 39 Barb. 561; Conro *v.* Port Henry Iron Co., 12 Barb. 27; Nicoll *v.* Burke, 45 N. Y. Super. Ct. 75; Keller *v.* Haug, 96 N. Y. Suppl. 1058; Ernst *v.* Harrison, 86 N. Y. Suppl. 247; Frank *v.* Olin, 15 N. Y. St. 161; McGraw *v.* Godfrey, 14 Abb. Pr. N. S. 397 [*affirmed* in 56 N. Y. 610, 16 Abb. Pr. N. S. 358]; Beebee *v.* Robert, 12 Wend. 413, 27 Am. Dec. 132. See Ward *v.* Work, 65 N. Y. App. Div. 84, 72 N. Y. Suppl. 736 [*affirmed* in 175 N. Y. 519, 67 N. E. 1091]; Yenni *v.* Ocean Nat. Bank, 5 Daly 421, holding that the rule is never enforced for the advantage of a third person if it would work injustice to the principal.

North Dakota.— Patrick *v.* Grand Forks Mercantile Co., 13 N. D. 12, 99 N. W. 55.

Oregon.— Du Bois *v.* Perkins, 21 Oreg. 189, 27 Pac. 1044.

Pennsylvania.—Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 34 Atl. 335 (holding that the rule does not apply where the relation of principal and agent does not exist in fact); Hubbard *v.* Ten Brook, 124 Pa. St. 291, 16 Atl. 817, 10 Am. St. Rep. 585, 2 L. R. A. 823; Beymer *v.* Bonsall, 79 Pa. St. 298; Youghiogheny Iron, etc., Co. *v.* Smith, 66 Pa. St. 340; Pennsylania Ins. Co. *v.* Smith, 3 Whart. 520; Phillips *v.* International Text-Book Co., 26 Pa. Super. Ct. 230 (holding an undisclosed principal bound, although the person with whom the contract was made may have known the principal under some other name); Fees *v.* Shadel, 20 Pa. Super. Ct. 193; McKinney *v.* Stephens, 17 Pa. Super. Ct. 125.

South Carolina.— Bacon *v.* Sondley, 3 Strobh. 542, 51 Am. Dec. 646; Macon Episcopal Church *v.* Wiley, 2 Hill Eq. 584, 30 Am. Dec. 386.

South Dakota.— Garvin *v.* Pettee, 15 S. D. 266, 88 N. W. 573.

Tennessee.—See Hughes *v.* Settle, (Ch. App. 1895) 36 S. W. 577.

Texas.— Strauss *v.* Jones, 37 Tex. 313. See Sanger *v.* Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913, holding that the rule does not apply to a conveyance of real estate, whether the instrument is sealed or not.

Vermont.—Coverly *v.* Braynard, 28 Vt. 738 (holding that one who purchases goods for his own benefit is liable for them, although he purchased them upon the credit of another with his consent and without disclosing his own interest in them); Carney *v.* Dennison, 15 Va. 400.

Virginia.— Waddill *v.* Sebree, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766.

Washington.— Jones *v.* Western Mfg. Co., 32 Wash. 375, 73 Pac. 359; Belt *v.* Washington Water-Power Co., 24 Wash. 387, 64 Pac. 525. See Harper *v.* Sinclair, 7 Wash. 372, 35 Pac. 61.

West Virginia.— Poole *v.* Rice, 9 W. Va. 73; Detwiler *v.* Green, 1 W. Va. 109.

Wyoming.— See Marshall *v.* Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679.

United States.— Calais Steamboat Co. *v.* Scudder, 2 Black 372, 17 L. ed. 282; Berry *v.* Chase, 146 Fed. 625; Moore *v.* Sun Printing, etc., Assoc., 101 Fed. 591, 41 C. C. A. 506 [*affirmed* in 183 U. S. 642, 22 S. Ct. 240, 46 L. ed. 366]; Pope *v.* Meadow Spring Distilling Co., 20 Fed. 35. See W. K. Niver Coal Co. *v.* Piedmont, etc., Coal Co., 136 Fed. 179, 69 C. C. A. 195.

England.— Watteau *v.* Fenwick, [1893] 1 Q. B. 346, 56 J. P. 839, 67 L. T. Rep. N. S. 831, 5 Reports 143, 41 Wkly. Rep. 222; Trueman *v.* Loder, 11 A. & E. 589, 9 L. J. Q. B. 165, 3 P. & D. 567, 39 E. C. L. 319; Thomson *v.* Davenport, 9 B. & C. 78, 4 M. & R. 110, 17 E. C. L. 45; Smyth *v.* Anderson, 7 C. B. 21, 13 Jur. 211, 18 L. J. C. P. 109, 62 E. C. L. 21; Paterson *v.* Gaudasequi, 15 East 62, 13 Rev. Rep. 68; Smethurst *v.* Mitchell, 1 E. & E. 622, 5 Jur. N. S. 978, 28 L. J. Q. B. 241, 7 Wkly. Rep. 226, 102 E. C. L. 622; Higgins *v.* Senior, 11 L. J. Exch. 199, 8 M. & W. 834. See Beckhuson *v.* Hamblet, [1901] 2 K. B. 73, 6 Com. Cas. 141, 70 L. J.

estoppel[97] or ratification,[98] an undisclosed principal is not liable on the contracts of one assuming without authority to act for him,[99] or on contracts made by his agent in excess of his authority or not in the course of his employment.[1] The rule of liability of an undisclosed principal applies as well to a simple contract in writing as to an oral contract,[2] and although the written contract is such that it is required to be in writing by the statute of frauds.[3]

(II) *CONTRACTS UNDER SEAL.* The general rule is that an undisclosed principal cannot be held liable upon a contract under seal executed by an agent in his own name. It is the firmly established common-law doctrine that action can be brought upon a sealed contract only against those whose names appear therein.[4]

K. B. 600, 84 L. T. Rep. N. S. 617, 17 T. L. R. 429, 49 Wkly. Rep. 481.

Canada.— Hutchings *v.* Adams, 12 Manitoba 118; Sanderson *v.* Burdett, 18 Grant Ch. (U. C.) 417.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 513–515.

Even though the third person had previously refused to enter into contractual relations with the principal or to extend him credit, yet he may hold the principal liable on a contract made in his behalf by an agent who does not disclose him. Kayton *v.* Barnett, 116 N. Y. 625, 23 N. E. 24 [*reversing* 54 N. Y. Super. Ct. 78].

A foreign principal may be sued upon a contract made by his resident agent, although the name of the principal was not disclosed by the agent at the time of making the contract. Hardy *v.* Fairbanks, 2 Nova Scotia 432. To the contrary see Hutton *v.* Bulloch, L. R. 9 Q. B. 572, 30 L. T. Rep. N. S. 648, 22 Wkly. Rep. 956.

Liability on executed contracts.— If the agent of an undisclosed principal buys property and executes notes therefor in his own name, and the vendor accepts the notes in payment of the price and conveys the property to the agent, the contract of sale is fully executed, and the principal is not liable thereon for the price upon the agent's failure to pay the notes so given by him. Ranger *v.* Thalmann, 84 N. Y. App. Div. 341, 82 N. Y. Suppl. 846 [*affirmed* in 178 N. Y. 574, 70 N. E. 1108]. In any event the principal is not liable for the price where the vendor subsequently by way of compromise accepts money and securities from the agent in full payment and discharge of the notes. McMonnies *v.* Mackay, 39 Barb. (N. Y.) 561.

Liability of dormant partner see PARTNERSHIP, 30 Cyc. 532.

Parol evidence of undisclosed principal see *infra*, IV, E, 2, a, (I), (J), (2), (b).

97. See *supra*, I, E, 2, a, (II); II, A, 2, e.

98. See *supra*, I, F.

99. Hillier *v.* Eldred, 91 Mich. 54, 51 N. W. 705; Perkins *v.* Huntington, 19 N. Y. Suppl. 71; Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 34 Atl. 355; Murphy *v.* Clarkson, 25 Wash. 585, 66 Pac. 51.

1. Moline *v.* Neville, 38 Nebr. 433, 56 N. W. 983; Laing *v.* Butler, 37 Hun (N. Y.) 144 [*affirmed* in 107 N. Y. 637, 15 N. E. 442]; Fradley *v.* Hyland, 37 Fed. 49, 2 L. R. A. 749; Becherer *v.* Asher, 23 Ont. App. 202. See Mickleberry *v.* O'Neal, 98 Ga. 42, 25 S. E. 933.

2. *Illinois.*—Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71; McConnell *v.* Brillhart, 17 Ill. 354, 65 Am. Dec. 661.

Kansas.—Edwards *v.* Gildemeister, 61 Kan. 141, 59 Pac. 259; Butler *v.* Kaulback, 8 Kan. 668.

Kentucky.— Violett *v.* Powell, 10 B. Mon. 347, 52 Am. Dec. 548.

Massachusetts.— Byington *v.* Simpson, 134 Mass. 169, 45 Am. Rep. 314; Eastern R. Co. *v.* Benedict, 5 Gray 561, 66 Am. Dec. 384; Huntington *v.* Knox, 7 Cush. 371.

Missouri.— Mantz *v.* Maguire, 52 Mo. App. 136.

New Hampshire.— Chandler *v.* Coe, 54 N. H. 561.

New Jersey.— Borcherling *v.* Katz, 37 N. J. Eq. 150.

New York.— Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547 [*reversing* 8 Misc. 9, 28 N. Y. Suppl. 64]; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617 [*affirming* 39 N. Y. Super. Ct. 339], *semble*.

Pennsylvania.— Hubbert *v.* Borden, 6 Whart. 79.

Virginia.— Waddill *v.* Sebree, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766.

United States.— Ford *v.* Williams, 21 How. 287, 16 L. ed. 36; Darrow *v.* H. R. Horne Produce Co., 57 Fed. 463.

England.— Truman *v.* Loder, 11 A. & E. 589, 9 L. J. Q. B. 165, 3 P. & D. 567, 39 E. C. L. 319; Higgins *v.* Senior, 11 L. J. Exch. 199, 8 M. & W. 834; Beckham *v.* Drake, 9 M. & W. 79 [*affirmed* in 7 Jur. 204, 12 L. J. Exch. 486, 11 M. & W. 315].

See 40 Cent. Dig. tit. "Principal and Agent," § 516.

3. See FRAUDS, STATUTE OF, 20 Cyc. 275. And see cases cited *supra*, note 2.

4. *Alabama.*— Jones *v.* Morris, 61 Ala. 518.

Georgia.— Van Dyke *v.* Van Dyke, 123 Ga. 686, 51 S. E. 582 (holding that the rule that an undisclosed principal shall stand liable for the contract of his agent, as provided by Civ. Code (1895), § 3024, does not apply where the contract is under seal); Lenney *v.* Finley, 118 Ga. 718, 45 S. E. 593.

Missouri.— Kelly *v.* Thuey, 102 Mo. 522, 15 S. W. 62.

New Jersey.— Borcherling *v.* Katz, 37 N. J. Eq. 150.

New York.— Tuthill *v.* Wilson, 90 N. Y. 423; Kiersted *v.* Orange, etc., R. Co., 69 N. Y. 343, 25 Am. Rep. 199; Briggs *v.*

A qualification of this rule exists, however, where the seal affixed to the contract by the agent was not necessary to the validity of the instrument at common law, and in this case the seal may be disregarded as surplusage and action be brought against the principal as upon a simple contract.[5]

(III) *Negotiable Instruments.* To the general rule of liability of an undisclosed principal on simple contracts a well defined exception exists in the case of negotiable instruments, and it is very generally held that an undisclosed principal is not liable upon a bill or note drawn, accepted, signed, or indorsed by the agent in his own name, although the agent was acting in course of his employment and within the scope of his authority.[6] Where, however, the undisclosed

Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Farrar *v.* Lee, 10 N. Y. App. Div. 130, 41 N. Y. Suppl. 672; Evans *v.* Wells, 22 Wend. 324. See Henricus *v.* Englert, 137 N. Y. 488, 33 N. E. 550.

Texas.— Sanger *v.* Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913.

United States.— Clarke *v.* Courtney, 5 Pet. 319, 8 L. ed. 140; Badger Silver Min. Co. *v.* Drake, 88 Fed. 48, 31 C. C. A. 378.

England.— Beckham *v.* Drake, 9 M. & W. 79 [*affirmed* in 7 Jur. 204, 12 L. J. Exch. 486, 11 M. & W. 315].

See 40 Cent. Dig. tit. "Principal and Agent," §§ 513–516.

5. Moore *v.* Granby Min., etc., Co., 80 Mo. 86 (holding that such a contract will create an implied obligation on the part of the principal arising from the facts in the case); Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617 (holding that when a sealed contract has been executed in such form that it is in law the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement); Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Evans *v.* Wells, 22 Wend. (N. Y.) 324; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Lancaster *v.* Knickerbocker Ice Co., 153 Pa. St. 427, 26 Atl. 251; Kirschbon *v.* Bonzel, 67 Wis. 178, 29 N. W. 907; Stowell *v.* Eldred, 39 Wis. 614 (holding that where the instrument would be valid without a seal, it is to be treated, although in fact under seal, as mere evidence of a simple contract).

Statutes dispensing with seals upon instruments required to be under seal at common law do not alter the rule that an undisclosed principal cannot be sued thereon, for "the instrument . . . though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law." Jones *v.* Morris, 61 Ala. 518. Such a statute does not undertake to give a deed a different status from what it would have had before if executed with a seal. Sanger *v.* Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913.

6. *Colorado.*— Heaton *v.* Myers, 4 Colo. 59.

Connecticut.— Pease *v.* Pease, 35 Conn. 131, 95 Am. Dec. 225. See National Shoe, etc., Bank's Appeal, 55 Conn. 469, 12 Atl. 646.

Georgia.— Graham *v.* Campbell, 56 Ga. 258.

Iowa.— Thurston *v.* Mauro, 1 Greene 231.

Maine.— Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409.

Massachusetts.— Brown *v.* Parker, 7 Allen 337; Williams *v.* Robbins, 16 Gray 77, 77 Am. Dec. 396; Fuller *v.* Hooper, 3 Gray 334; Taber *v.* Cannon, 8 Metc. 456; Bedford Commercial Ins. Co. *v.* Corell, 8 Metc. 442; Bradlee *v.* Boston Glass Mfg. Co., 16 Pick. 347 (holding a corporation not bound on a note made by an agent thereof, where the agency did not appear, although the note was entered on its books as a corporate debt and it paid interest thereon); Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Mississippi.— See Edwards *v.* Simmons, 27 Miss. 302.

Missouri.— Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714.

Nebraska.— Webster *v.* Wray, 19 Nebr. 558, 27 N. W. 644, 56 Am. Rep. 754, 17 Nebr. 579, 24 N. W. 207.

New York.— Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Ranger *v.* Thalmann, 84 N. Y. App. Div. 341, 82 N. Y. Suppl. 846 [*affirmed* in 178 N. Y. 574, 70 N. E. 1108]; New York State Banking Co. *v.* Van Antwerp, 23 Misc. 38, 51 N. Y. Suppl. 653; Rochester Bank *v.* Monteath, 1 Den. 402, 43 Am. Dec. 681; Pentz *v.* Stanton, 10 Wend. 271, 25 Am. Dec. 558.

Vermont.— Arnold *v.* Sprague, 34 Vt. 402.

Virginia.— Lyons *v.* Miller, 6 Gratt. 427, 52 Am. Dec. 129.

United States.— Cragin *v.* Lovell, 109 U. S. 194, 3 S. Ct. 132, 27 L. ed. 903; Dessau *v.* Bours, 7 Fed. Cas. No. 3,825, McAllister 20.

England.—*In re* Adansonia Fibre Co., L. R. 9 Ch. 635, 43 L. J. Ch. 732, 31 L. T. Rep. N. S. 9, 22 Wkly. Rep. 889; Siffkin *v.* Walker, 2 Campb. 308, 11 Rev. Rep. 715; Ducarry *v.* Gill, 4 C. & P. 121, 19 E. C. L. 436.

See 40 Cent. Dig. tit. "Principal and Agent," § 516. And see Commercial Paper, 7 Cyc. 549 *et seq.*

Exceptions and qualifications.— The rule absolving an undisclosed principal from liability on negotiable instruments does not ap-

principal has obtained the benefits of the transaction in which the note was given by the agent, which in equity he ought not to retain, the third person may reject the note and recover from the principal on the common counts or on the original consideration for the contract.[7]

(IV) *Election to Hold Agent or Principal*[8]— (A) *In General.* While a person who has dealt with the agent of an undisclosed principal may elect to hold either the agent[9] or, upon discovery, the principal,[10] he cannot hold both, and if with full knowledge of the facts material to his rights he elects to hold the agent he thereby discharges the liability of the principal, and conversely.[11]

ply where clerks in banking houses receive moneys or securities over the bank counter and issue drafts, bills, or negotiable certificates of deposit therefor; the banking house is liable, although such instrument be signed by the clerk without disclosing the name of the bank. Webster *v.* Wray, 19 Nebr. 558, 27 N. W. 644, 56 Am. Rep. 754; Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681. See, generally, BANKS AND BANKING, 5 Cyc. 419. Another qualification is held to arise where the principal transacts business in the agent's name as a business name; the principal is liable on negotiable instruments executed by the agent in that name, whether or not he disclosed his agency. Chandler *v.* Coe, 54 N. H. 561. A third exception seems to exist in some jurisdictions in regard to negotiable instruments executed in her own name by a wife for her husband; it has been held that the husband will be bound if he authorized the act of the wife. Fredd *v.* Eves, 4 Harr. (Del.) 385; Hancock Bank *v.* Joy, 41 Me. 568; Reakert *v.* Sanford, 5 Watts & S. (Pa.) 164; Lindus *v.* Bradwell, 5 C. B. 583, 12 Jur. 230, 17 L. J. C. P. 121, 57 E. C. L. 583. See Leeds *v.* Vail, 15 Pa. St. 185. And see, generally, HUSBAND AND WIFE, 21 Cyc. 1119.

If, however, there be an ambiguity upon the face of the instrument as to whom it was intended to bind, parol evidence is admissible to explain the ambiguity, and if such is found to have been the intention of the parties, the principal may be held. See *supra*, II, C, 6; *infra*, IV, E, 2, a, (I), (J), (2), (b).

7. *Illinois.*— Chemical Nat. Bank *v.* City Bank, 156 Ill. 149, 40 N. E. 328, holding the third person may surrender the note in court and recover in assumpsit.

Indiana.— Kenyon *v.* Williams, 19 Ind. 44.

Iowa.— Thurston *v.* Mauro, 1 Greene 231, holding the principal liable for the value of goods for which the agent gave the note.

Massachusetts.— Lovell *v.* Williams, 125 Mass. 439 (holding that where a person sells goods to the agent of an undisclosed principal and takes the note of the purchaser in ignorance of the agency, the presumption that the note was taken in payment is rebutted, and the seller may resort to the undisclosed principal); French *v.* Price, 24 Pick. 13.

New York.— Kayton *v.* Barnett, 116 N. Y. 625, 23 N. E. 24; Allen *v.* Coits, 6 Hill 318 (allowing recovery as for money paid to principal's use); Pentz *v.* Stanton, 10 Wend. 271, 25 Am. Dec. 558 (holding that, although an agent's note for goods sold does not bind the principal, yet if the goods were actually used for the latter's benefit, and the credit was not given exclusively to the agent, the principal will be liable in an action for goods sold).

Ohio.— Harper *v.* Tiffin Nat. Bank, 54 Ohio St. 425, 432, 44 N. E. 97, holding that in such a case the "action is not on the note, but against an undisclosed principal upon the special facts of the case, making it inequitable and unjust for him to retain the money, or, in other words, not to pay the note he procured to be made, and on which he got the money."

United States.— Clark *v.* Van Riemsdyk, 9 Cranch 153, 3 L. ed. 688. See Cragin *v.* Lovell, 109 U. S. 194, 3 S. Ct. 132, 27 L. ed. 903.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 515, 516.

8. **Election to extend credit to agent or to disclosed principal** see *supra*, III, E, 1, a, (IV).

9. See *supra*, III, C, 1, b, (II).

Election to hold principal, when discovered, as relieving agent from liability see *supra*, III, C, 1, b, (II).

10. See *supra*, III, E, 1, b, (I).

11. *Alabama.*—Eufaula Grocery Co. *v.* Missouri Nat. Bank, 118 Ala. 408, 24 So. 389.

Connecticut.— Jones *v.* Ætna Ins. Co., 14 Conn. 501.

Illinois.— Ferry *v.* Moore, 18 Ill. App. 135.

Iowa.— Steele-Smith Grocery Co. *v.* Potthast, 109 Iowa 413, 80 N. W. 517.

Kentucky.— Hoffman *v.* Anderson, 112 Ky. 893, 67 S. W. 49, 24 Ky. L. Rep. 44.

Louisiana.— Hyde *v.* Wolf, 4 La. 234, 23 Am. Dec. 484.

Maryland.— York County Bank *v.* Stein, 24 Md. 447.

Massachusetts.— Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860; Kingsley *v.* Davis, 104 Mass. 178; Paige *v.* Stone, 10 Metc. 160, 43 Am. Dec. 420; Raymond *v.* Crown, etc., Mills, 2 Metc. 319; French *v.* Price, 24 Pick. 13.

Minnesota.— Lindquist *v.* Dickson, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. N. S. 729.

Missouri.— Provenchere *v.* Reifess, 62 Mo. App. 50; Sessions *v.* Block, 40 Mo. App. 569; Henry Ames Packing, etc., Co. *v.* Tucker, 8 Mo. App. 95.

(B) *What Constitutes Election.* An election is shown by any words or acts on the part of the third person evidencing an unequivocal and final determination to depend solely upon the liability of the agent and to abandon the right to proceed against the principal, or conversely.[12] In order, however, to render an elec-

New Jersey.— Greenberg *v.* Palmieri, 71 N. J. L. 83, 58 Atl. 297.

New York.— Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388; Ranger *v.* Thalmann, 84 N. Y. App. Div. 341, 82 N. Y. Suppl. 846 [*affirmed* in 178 N. Y. 574, 70 N. E. 1108]; Brown *v.* Reiman, 48 N. Y. App. Div. 295, 62 N. Y. Suppl. 663; Remmel *v.* Townsend, 83 Hun 353, 31 N. Y. Suppl. 985; Rathbone *v.* Tucker, 15 Wend. 498 [*affirmed* in 18 Wend. 175].

Pennsylvania.— Beymer *v.* Bonsall, 79 Pa. St. 298. See Pennsylvania Ins. Co. *v.* Smith, 3 Whart. 520.

Vermont.— Daggett *v.* Champlain Mfg. Co., 71 Vt. 370, 45 Atl. 755.

United States.— Berry *v.* Chase, 146 Fed. 625, 77 C. C. A. 161; Barrell *v.* Newby, 127 Fed. 656, 62 C. C. A. 382; Atlas Steamship Co. *v.* Columbian Land Co., 102 Fed. 358, 42 C. C. A. 398.

England.— Thomson *v.* Davenport, 9 B. & C. 78, 4 M. & R. 110, 17 E. C. L. 45; Paterson *v.* Gandasequi, 15 East 62, 13 Rev. Rep. 68; Thornton *v.* Meux, M. & M. 43, 31 Rev. Rep. 711, 22 E. C. L. 467; Addison *v.* Gandassequi, 4 Taunt. 574, 13 Rev. Rep. 689; MacClure *v.* Schemeil, 20 Wkly. Rep. 168.

See 40 Cent. Dig. tit. "Principal and Agent," § 499.

Time of election.— The third person must make an election within a reasonable time after discovery of the undisclosed principal; otherwise his right to hold the latter may be lost. New Castle Mfg. Co. *v.* Red River R. Co. 1 Rob. (La.) 145, 36 Am. Dec. 686; Smethurst *v.* Mitchell, 1 E. & E. 622, 5 Jur. N. S. 978, 28 L. J. Q. B. 241, 7 Wkly. Rep. 226, 102 E. C. L. 622. But see Campbell *v.* Hicks, 28 L. J. Exch. 70, holding that the sellers' right to resort to the undisclosed principal on a contract made by an agent in his own name is not affected by their delaying to do so until persons to whom the agent has resold have become insolvent, the principal not having paid the agent in the meantime or otherwise altered his position. On the other hand the third person, on discovering the principal, may take a reasonable time to investigate and compare the standings of principal and agent. Barrell *v.* Newby, 127 Fed. 656, 62 C. C. A. 382.

12. *Illinois.*— Ferry *v.* Moore, 18 Ill. 135.

Iowa.— Steele-Smith Grocery Co. *v.* Potthast, 109 Iowa 413, 80 N. W. 517.

Ohio.— Smart *v.* N. C. Lodge No. 2, 27 Ohio Cir. Ct. 273, holding that where a business office was alleged to have been occupied by the agent of defendant, the fact that plaintiff took possession of the furniture left in the office by the agent was not an election to proceed against the agent for the rent, so as to bar suit against the principal.

United States.— Atlas Steamship Co. *v.* Colombian Land Co., 102 Fed. 358, 42 C. C. A. 398, holding that the election must show a deliberate intention — a definite purpose.

England.— Thornton *v.* Meux, M. & M. 43, 31 Rev. Rep. 711, 22 E. C. L. 467; MacClure *v.* Schemeil, 20 Wkly. Rep. 168.

See 40 Cent. Dig. tit. "Principal and Agent," § 499.

Accepting the note of the agent of an undisclosed principal after discovery of the principal is generally held to constitute an election to hold the agent and to relieve the principal from liability. Paige *v.* Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; French *v.* Price, 24 Pick. (Mass.) 13; Henry Ames Paeking, etc., Co. *v.* Tucker, 8 Mo. App. 95; Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388. But taking the agent's note without knowledge of the principal's existence or identity does not eonstitute an election. Merrill *v.* Kenyon, 48 Conn. 314, 40 Am. Rep. 174.

Negotiating with the agent after discovery of the agency does not eonstitute an election by the third person to hold him rather than his principal. Sanger *v.* Warren, (Tex. Civ. App. 1897) 40 S. W. 840.

Commencing an action against the agent of an undisclosed principal subsequent to discovery of the facts, although evidence of an election, is generally held not to be conclusive evidence thereof, and does not of itself operate to discharge the principal. Ferry *v.* Moore, 18 Ill. App. 135; Hoffman *v.* Anderson, 112 Ky. 893, 67 S. W. 49, 24 Ky. L. Rep. 44; Raymond *v.* Proprietors Crown, etc., Mills, 2 Metc. (Mass.) 319; Curtis *v.* Williamson, L. R. 10 Q. B. 57, 44 L. J. Q. B. 27, 31 L. T. Rep. N. S. 678, 23 Wkly. Rep. 236. It is sometimes held, however, that eommencing an action under these eircumstances will constitute an election. Greenberg *v.* Palmieri, 71 N. J. L. 83, 58 Atl. 297; Barrell *v.* Newby, 127 Fed. 656, 62 C. C. A. 382, holding that where plaintiffs, having made a contract with one known to be acting as agent for an undisclosed principal, after knowledge of the identity of the principal brought two actions against the agent on the contract, in each of which they proeured attachments and garnished persons who owed money to the agent, this constituted an election to hold the agent which precluded them from subsequently maintaining an action against the principal.

Filing a claim in bankruptcy against the estate of the insolvent agent of an undisclosed principal is not a conclusive election of the creditor to hold the agent. Curtis *v.* Williamson, L. R. 10 Q. B. 57, 44 L. J. Q. B. 27, 31 L. T. Rep. N. S. 678, 23 Wkly. Rep. 236; Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38, 43 L. J. C. P. 3, 29 L. T.

tion binding upon the third person he must at the time of electing have full knowledge of all facts material to his rights and to the liability of the several parties,[13] including not only the fact of agency but the name of the principal.[14]

(v) *Effect of Changed State of Accounts Between Principal and Agent.* An undisclosed principal may be relieved from liability by reason of a changed state of accounts between him and the agent, the rule being formerly laid down in England and now very generally followed in the United States that where the principal, acting in good faith, has settled with the agent so that he would be subjected to loss were he compelled to pay the third person, he is relieved of liability to the latter.[15] This doctrine is now held in England and in a few cases

Rep. N. S. 689, 22 Wkly. Rep. 92; Taylor *v.* Sheppard, 1 Y. & C. Exch. 271

An unsatisfied judgment against the agent in favor of the third person has been held to be conclusive evidence of an election to hold the agent and to discharge the principal. Hoffman *v.* Anderson, 112 Ky. 893, 67 S. W. 49, 24 Ky. L. Rep. 44; E. J. Codd Co. *v.* Parker, 97 Md. 319, 55 Atl. 623; Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860; Kingsley *v.* Davis, 104 Mass. 178; Sessions *v.* Block, 40 Mo. App. 569; Lage *v.* Weinstein, 35 Misc. (N. Y.) 298, 71 N. Y. Suppl. 744 (*semble*); Ahrens *v.* Cobb, 9 Humphr. (Tenn.) 643; Barrell *v.* Newby, 127 Fed. 656, 62 C. C. A. 382; Kendall *v.* Hamilton, 4 App. Cas. 504, 48 L. J. C. P. 705, 41 L. T. Rep. N. S. 418, 28 Wkly. Rep. 97; Priestly *v.* Fernie, 3 H. & C. 977, 11 Jur. N. S. 813, 34 L. J. Exch. 172, 13 L. T. Rep. N. S. 208, 13 Wkly. Rep. 1089. Other equally well considered cases, however, take an opposite ground, and hold that the principal is not discharged short of satisfaction of the judgment against the agent. Maple *v.* Cincinnati, etc., R. Co., 40 Ohio St. 313, 48 Am. Rep. 685; Beymer *v.* Bonsall, 79 Pa. St. 298 [*approved* in Cobb. *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51]. See Partington *v.* Hawthorne, 52 J. P. 807, holding that if the judgment against the agent is subsequently set aside, action may thereupon be brought against the principal.

What constitutes election to hold principal, when disclosed, so as to relieve agent from liability see *supra*, III, C, 1, b, (II).

13. *Connecticut.* — Merrill *v.* Kenyon, 48 Conn. 314, 40 Am. Rep. 174.

Kentucky.— Hoffman *v.* Anderson, 112 Ky. 893, 67 S. W. 49, 24 Ky. L. Rep. 44.

Maryland.— Henderson *v.* Mayhew, 2 Gill 393, 41 Am. Dec. 434.

Massachusetts.— Kingsley *v.* Davis, 104 Mass. 178; Paige *v.* Stone, 10 Metc. 160, 43 Am. Dec. 420; French *v.* Price, 24 Pick. 13.

Minnesota.— Linquist *v.* Dickson, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. N. S. 729.

Missouri.— Henry Ames Packing, etc., Co. *v.* Tucker, 8 Mo. App. 95.

New York.— Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388; Remmel *v.* Townsend, 83 Hun 353, 31 N. Y. Suppl. 985 (holding that the act of electing between two remedies presupposes such knowledge on the part of the one performing the act that he has an opportunity of choosing which of two or more courses he will pursue; and if he understands that there is but one course he can take, he cannot be said to have made a choice by taking such course); Ranger *v.* Thalmann, 84 N. Y. App. Div. 341, 82 N. Y. Suppl. 846; Brown *v.* Reiman, 48 N. Y. App. Div. 295, 62 N. Y. Suppl. 663 (holding that "it is a well-settled rule that a creditor cannot make an election either of remedies or parties without first realizing that the opportunity of exercising his preference is afforded him").

United States.— Pope *v.* Meadow Spring Dist. Co., 20 Fed. 35.

England.— Curtis *v.* Williamson, L. R. 10 Q. B. 57, 44 L. J. Q. B. 27, 31 L. T. Rep. N. S. 678, 23 Wkly. Rep. 236; Dunn *v.* Newton, Cab. & E. 278, holding that the knowledge of the real facts required as the foundation of an election to charge the agent or the undisclosed principal must be actual personal knowledge; knowledge of a foreman would not defeat the employer's right.

See 40 Cent. Dig. tit. "Principal and Agent," § 499.

14. *Alabama.*—Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238.

Connecticut.— Merrill *v.* Kenyon, 48 Conn. 314, 40 Am. Rep. 174, holding that where one sells goods to another, who informs him that he is an agent, but does not disclose his principal's name, and the seller does not inquire as to the name, and does not know who the principal is, but takes the agent's note for the price, he may still elect to hold the principal.

Iowa.— Steele-Smith Grocery Co. *v.* Potthast, 109 Iowa 413, 80 N. W. 517.

Maryland.— York County Bank *v.* Stein, 24 Md. 447; Henderson *v.* Mayhew, 2 Gill 393, 41 Am. Dec. 434.

New Jersey.— Greenburg *v.* Palmieri, 71 N. J. Eq. 83, 58 Atl. 297.

New York.— McGraw *v.* Godfrey, 14 Abb. Pr. N. S. 397 [*affirmed* in 56 N. Y. 610, 16 Abb. Pr. N. S. 358], holding that a creditor is not presumed to elect to hold either an undisclosed principal or his agent as debtor until the name and credit of both are before him.

See 40 Cent. Dig. tit. "Principal and Agent," § 499.

15. *Alabama.*—Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238.

Delaware.— Bush *v.* Devine, 5 Harr. 375.

in the United States to be too broad, and in these jurisdictions the better rule is stated to be that the principal is discharged only where he has been induced to settle with the agent by conduct on the part of the third person leading him to believe that such person has settled with the agent or has elected to hold the latter.[16] In any event the principal is relieved from liability where he has been induced by the conduct of the third person to settle with the agent.[17]

2. In Tort — a. Torts Specially Authorized. Upon the principle that he who does an act by another does it himself, a principal is liable to third persons for the torts which he has expressly authorized or specially directed his agent to commit.[18]

Illinois.— Fowler *v.* Pearce, 49 Ill. 59.

Indiana.— Thomas *v.* Atkinson, 38 Ind. 248.

Massachusetts.— Emerson *v.* Patch, 123 Mass. 541, holding, however, that the principal is relieved only when it is ascertained as a fact that a *bona fide* settlement with the agent has actually been effected.

New York.— Knapp *v.* Simon, 96 N. Y. 284; Laing *v.* Butler, 37 Hun 144 [*affirmed* in 108 N. Y. 637, 15 N. E. 442]; McCullough *v.* Thompson, 45 N. Y. Super. Ct. 449; Fish *v.* Wood, 4 E. D. Smith 327; Daly *v.* Monroe, 2 N. Y. City Ct. 160. See Jaques *v.* Todd, 3 Wend. 83.

United States.— Fradley *v.* Hyland, 37 Fed. 40, 2 L. R. A. 749.

England.— Thomson *v.* Davenport, 9 B. & C. 78, 4 M. & R. 110, 17 E. C. L. 45. And see Nelson *v.* Powel, 3 Dougl. 410, 26 E. C. L. 269.

Canada.—Almon *v.* Tremlet, 1 Nova Scotia 89.

See 40 Cent. Dig. tit. "Principal and Agent," § 519.

Settlement with the agent must be bona fide.— Emerson *v.* Patch, 123 Mass. 541; Powell *v.* Nelson, 15 East 65.

16. Hyde *v.* Wolf, 4 La. 234, 23 Am. Dec. 484 (holding the principal liable unless the third person furnishes the agent with some document by which he obtains a settlement from the principal); Brown *v.* Bankers', etc., Tel. Co., 30 Md. 39; York County Bank *v.* Stein, 24 Md. 447; Armstrong *v.* Stokes, L. R. 7 Q. B. 598, 41 L. J. Q. B. 253, 26 L. T. Rep. N. S. 872, 21 Wkly. Rep. 52; Davison *v.* Donaldson, 9 Q. B. D. 623, 4 Aspin. 601, 47 L. T. Rep. N. S. 564, 31 Wkly. Rep. 277; Irvine *v.* Watson, 5 Q. B. D. 102, 49 L. J. Q. B. 239, 42 L. T. Rep. N. S. 51, 28 Wkly. Rep. 353 [*affirmed* in 5 Q. B. D. 414, 49 L. J. Q. B. 531, 42 L. T. Rep. N. S. 810]; Smyth *v.* Anderson, 7 C. B. 21, 13 Jur. 211, 18 L. J. C. P. 109, 62 E. C. L. 21; Heald *v.* Kenworthy, 3 C. L. R. 612, 10 Exch. 739, 1 Jur. N. S. 70, 24 L. J. Exch. 76, 3 Wkly Rep. 176; Wyatt *v.* Hertford, 3 East 147; MacClure *v.* Schemeil, 20 Wkly. Rep. 168; Arbuthnot *v.* Dupas, 15 Manitoba 634.

Delay in obtaining payment from the agent may operate to relieve the principal if he is induced thereby to settle in the belief that settlement has been consummated between the agent and the third person. Kymer *v.* Suwercropp, 1 Campb. 109, 10 Rev. Rep. 664 (holding that the principal may be discharged by the third person's allowing the date of payment to elapse); MacClure *v.* Schemeil, 20 Wkly. Rep. 168. See Davison *v.* Donaldson, 9 Q. B. D. 623, 4 Aspin. 601, 47 L. T. Rep. N. S. 564, 31 Wkly. Rep. 277.

Origin, development, and qualification of the rule.— The leading English case in which the rule was first laid down and which has been almost universally followed in the United States was Thomson *v.* Davenport, 9 B. & C. 78, 4 M. & R. 110, 17 E. C. L. 45, in which the court said by way of *dictum*, that the liability of an undisclosed principal was subject to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. A later English case, Heald *v.* Kenworthy, 3 C. L. R. 612, 10 Exch. 739, 1 Jur. N. S. 70, 24 L. J. Exch. 76, 3 Wkly. Rep. 176, declared that this *dictum* was too broad, and that the principal was relieved only when he had been induced to settle with the agent by acts of the third person. A still later case, Armstrong *v.* Stokes, L. R. 7 Q. B. 598, 41 L. J. Q. B. 253, 26 L. T. Rep. N. S. 872, 21 Wkly. Rep. 52, attempted to establish a distinction between cases in which the agency was undisclosed and those in which the agency was disclosed, but the identity of the principal was undisclosed, holding the rule in Thompson *v.* Davenport, *supra*, applicable to the former state of facts, and the rule of Heald *v.* Kenworthy, *supra*, applicable to the latter state of facts. This distinction, however, is characterized by Lord Bramwell in Irvine *v.* Watson, 5 Q. B. D. 414, 417, 19 L. J. Q. B. 531, 42 L. T. Rep. N. S. 810, as "very remarkable" and "difficult to understand," and he held further that the better rule is that of Heald *v.* Kenworthy, *supra*, which is applicable alike to cases of undisclosed ageucy and undisclosed identity of principal. And this is now the well-settled law in England.

17. Schepflin *v.* Dessar, 20 Mo. App. 569; English *v.* Rauchfuss, 21 Misc. (N. Y.) 494, 47 N. Y. Suppl. 639; Horsfall *v.* Fauntleroy, 10 B. & C. 755, 8 L. J. K. B. O. S. 259, 21 E. C. L. 318; Kymer *v.* Suwercropp, 1 Campb. 109, 10 Rev. Rep. 664; Wyatt *v.* Hertford, 3 East 147. And see cases cited *supra*, notes 16, 17. *Contra*, Willard *v.* Buckingham, 36 Conn. 395.

18. *Alabama.*—Raisler *v.* Springer, 38 Ala. 703, 82 Am. Dec. 736.

Delaware.— Harrington *v.* Hall, (1906) 63 Atl. 875.

Illinois.— Moir *v.* Hopkins, 16 Ill. 313.

b. Torts Within Course of Employment. The liability of the principal for torts committed by his agent is not limited to torts which he has expressly authorized or directed; he is liable for all the torts which his agent commits in the actual or apparent course of his employment;[19] and if the agent commits a tort in the apparent course of his employment the principal is liable therefor even though

Indiana.— Ogle *v.* Hudson, 30 Ind. App. 539, 66 N. E. 702.

Kansas.— Hynes *v.* Jungren, 8 Kan. 391.

Maine.— State *v.* Smith, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802; Bacheller *v.* Pinkham, 68 Me. 253; Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430.

New York.— Herring *v.* Hoppeck, 15 N. Y. 409; Wall *v.* Osborn, 12 Wend. 39; Morgan *v.* Varick, 8 Wend. 587.

Tennessee.—Wilkins *v.* Gilmore, 2 Humphr. 140.

United States.— Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129.

England.— Robinson *v.* Vaughton, 8 C. & P. 252, 34 E. C. L. 718; Sutton *v.* Clarke, 1 Marsh. 429, 6 Taunt. 29, 16 Rev. Rep. 563, 1 E. C. L. 493.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 599, 600.

The reason for the rule is that, although the tort is not the work of the principal's hands, yet it is the result of his will and his purposes, which are the efficient cause of the agent's operations. State *v.* Smith, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802.

19. *Alabama.*— Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692.

Arkansas.— St. Louis, etc., R. Co., *v.* Ryan, 56 Ark. 245, 19 S. W. 839.

California.— Donnelly *v.* San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559 (holding that Civ. Code, § 2334, providing that a principal is bound by the acts of his ostensible agent "to those persons only" who have incurred a liability or parted with value on the faith of such agency, deals solely with contract obligations, and does not exonerate a principal from liability for torts of an ostensible agent); Mitchell *v.* Finnell, 101 Cal. 614, 36 Pac. 123; Fogel *v.* Schmalz, 92 Cal. 412, 28 Pac. 444.

Connecticut.— Dunn *v.* Hartford, etc., R. Co., 43 Conn. 434.

Delaware.— Harrington *v.* Hall, (1906) 63 Atl. 875.

Georgia.— Southern R. Co. *v.* Chambers, 126 Ga. 404, 55 S. E. 37, 7 L. R. A. N. S. 926; Century Bldg. Co. *v.* Lewkowitz, 1 Ga. App. 636, 57 S. E. 1036; Williams *v.* Inman, 1 Ga. App. 321, 57 S. E. 1009.

Illinois.— Reed *v.* Peterson, 91 Ill. 288; Moir *v.* Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416; Slaughter *v.* Fay, 80 Ill. App. 105.

Indiana.— Ogle *v.* Hudson, 30 Ind. App. 539, 66 N. E. 702.

Kentucky.— Pennsylvania Iron Works Co. *v.* Henry Vogt Mach. Co., 96 S. W. 551, 29 Ky. L. Rep. 861.

Louisiana.— Lutz *v.* Forbes, 13 La. Ann. 609; Weeks *v.* McMicken, 7 Mart. 54.

Massachusetts.—Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111, holding, however, that the liability of a principal for the torts of his agent extends only to the direct effects of such torts.

Missouri.— Commerce Bank *v.* Hoeber, 88 Mo. 37, 57 Am. Rep. 359 [*affirming* 11 Mo. App. 475].

Nebraska.— Bianki *v.* Greater American Exposition Co., 3 Nebr. (Unoff.) 656, 92 N. W. 615.

New York.— Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136 [*affirming* 14 N. Y. Suppl. 468]; Wilmerding *v.* Postal-Tel. Cable Co., 118 N. Y. App. Div. 685, 103 N. Y. Suppl. 594 [*affirmed* in 192 N. Y. 580, 85 N. E. 1118]; Birkett *v.* Postal Tel. Cable Co., 107 N. Y. App. Div. 115, 94 N. Y. Suppl. 918; Dupre *v.* Childs, 52 N. Y. App. Div. 306, 65 N. Y. Suppl. 179; Davis *v.* Chautauqua Lake Sunday School Assembly, 2 N. Y. St. 365; Jeffrey *v.* Bigelow, 13 Wend. 518, 28 Am. Dec. 476.

North Carolina.—Huntley *v.* Mathias, 90 N. C. 101, 47 Am. Rep. 516.

Pennsylvania.— Reformed Presb. Church *v.* Livingston, 210 Pa. St. 536, 60 Atl. 154; Hill *v.* Canfield, 63 Pa. St. 77; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Vermont.— Barber *v.* Britton, 26 Vt. 112, 60 Am. Dec. 601.

United States.—Blumenthal *v.* Shaw, 77 Fed. 954, 23 C. C. A. 590; Pressley *v.* Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569; Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodb. & M. 529; U. S. *v.* Haberstadt, 26 Fed. Cas. No. 15,276, Gilp. 262.

England.—Citizens' L. Assur. Co. *v.* Brown, [1904] A. C. 423, 73 L. J. P. C. 102, 90 L. T. Rep. N. S. 739, 20 T. L. R. 497, 53 Wkly. Rep. 176; Penny *v.* Wimbledon Urban Dist. Council, [1899] 2 Q. B. 72, 63 J. P. 406, 68 L. J. Q. B. 704, 80 L. T. Rep. N. S. 615, 15 T. L. R. 348, 47 Wkly. Rep. 565; Mackay *v.* Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. 31, 30 L. T. Rep. N. S. 180, 22 Wkly. Rep. 473; Hill *v.* Tottenham Urban Dist Council, 79 L. T. Rep. N. S. 495, 15 T. L. R. 3.

Canada.— Ontario Industrial Loan, etc., Co. *v.* Lindsey, 4 Ont. 473; Maclennan *v.* Royal Ins. Co., 39 U. C. Q. B. 515; Lamarre *v.* Woods, 13 Quebec Super. Ct. 466.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 599, 601.

Liability for: Libel and slander see LIBEL AND SLANDER, 25 Cyc. 427. Malicious prosecution see MALICIOUS PROSECUTION, 26 Cyc. 18 *et seq.* Wrongful arrest or false imprisonment see FALSE IMPRISONMENT, 327 *et seq.* Wrongful levy see ATTACHMENT, 4 Cyc. 840; EXECUTIONS, 17 Cyc. 1572; LANDLORD AND TENANT, 24 Cyc. 1329.

he was ignorant thereof and the agent in committing it exceeded his actual authority or disobeyed the express instructions of his principal.[20] Thus a principal is civilly liable to third persons where his agent, while acting within the scope of his real or apparent authority, is guilty of assault and battery,[21] conversion,[22] fraud,[23]

Liability of married woman for torts of her agent see HUSBAND AND WIFE, 21 Cyc. 1424, 1491.

20. *Illinois.*— Moir *v.* Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416.

Massachusetts.— George *v.* Gobey, 128 Mass. 289, 35 Am. Rep. 376.

Minnesota.— Smith *v.* Munch, 65 Minn. 256, 68 N. W. 19.

Missouri.— Barree *v.* Cape Girardeau, 197 Mo. 382, 95 S. W. 330, 114 Am. St. Rep. 763, 6 L. R. A. N. S. 1090; Garritzen *v.* Duenckel, 50 Mo. 104, 11 Am. Rep. 405.

Nevada.— Dougherty *v.* Wells, 7 Nev. 368.

New York.— Dupre *v.* Childs, 52 N. Y. App. Div. 306, 65 N. Y. Suppl. 179 [*affirmed* in 169 N. Y. 585, 62 N. E. 1095].

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

South Carolina.— Williams *v.* Tolbert, 76 S. C. 211, 56 S. E. 908.

Tennessee.— Luttrell *v.* Hazen, 3 Sneed 19.

Texas.— Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.

Vermont.— Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680; May *v.* Bliss, 22 Vt. 477.

United States.— Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. ed. 502. But see Dun *v.* Birmingham City Nat. Bank, 58 Fed. 174 [*reversing* 51 Fed. 160].

England.— Black *v.* Christchurch Finance Co., [1894] A. C. 48, 58 J. P. 332, 63 L. J. P. C. 32, 70 L. T. Rep. N. S. 77, 6 Reports 394; Fuller *v.* Wilson, 3 Q. B. 58, 2 G. & D. 460, 11 L. J. Q. B. 251, 43 E. C. L. 629; Udell *v.* Atherton, 7 H. & N. 172, 7 Jur. N. S. 777, 30 L. J. Exch. 337, 4 L. T. Rep. N. S. 797.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 599, 601.

21. *Georgia.*— Century Bldg. Co. *v.* Lewkowitz, 1 Ga. App. 636, 57 S. E. 1036, holding the principal liable for assault committed by the agent in protecting the principal's property.

Illinois.— Field *v.* Kane, 99 Ill. App. 1.

Kansas.— Hynes *v.* Jungren, 8 Kan. 391.

New York.— Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293.

Canada.— Kinver *v.* Phœnix Lodge I. O. O. F., 7 Ont. 377, holding a lodge liable for personal injuries received on occasion of initiation into a secret society.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 599, 601. And see ASSAULT AND BATTERY, 3 Cyc. 1069.

22. *Alabama.*— Land Mortg. Inv. Agency Co. *v.* Preston, 119 Ala. 290, 24 So. 707.

California.— Hoskins *v.* Swain, 61 Cal. 338.

Iowa.— Rhomberg *v.* Avenarius, 135 Iowa 176, 112 N. W. 548.

Kansas.— Thomas *v.* Arthurs, 8 Kan. App. 126, 54 Pac. 694.

Missouri.— Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Pacific Express Co. *v.* Carroll County Bank, 66 Mo. App. 275; Hyre *v.* Kansas City Cent. Bank, 48 Mo. App. 434.

New Hampshire.— Burnham *v.* Holt, 14 N. H. 367.

New Jersey.— Chetwood *v.* Berrian, 39 N. J. Eq. 203.

New York.— Johnson *v.* Donnell, 90 N. Y. 1; Briggs *v.* Jones, 8 Misc. 261, 28 N. Y. Suppl. 709 [*affirmed* in 149 N. Y. 577, 43 N. E. 986]; Shotwell *v.* Few, 7 Johns. 302.

North Carolina.— Lamb *v.* Trogden, 22 N. C. 190.

South Carolina.— Reynolds *v.* Witte, 13 S. C. 5, 36 Am. Rep. 678; Miller *v.* Reigne, 2 Hill 592.

England.— Thompson *v.* Bell, 2 C. L. R. 1213, 10 Exch. 10, 23 L. J. Exch. 321, 2 Wkly. Rep. 559; *Re* Mutual Aid Permanent Ben. Bldg. Soc., 48 J. P. 54, 49 L. T. Rep. N. S. 530; Duncan *v.* Surrey Canal Co., 3 Stark. 50, 3 E. C. L. 589.

Canada.— Gilpin *v.* Royal Canadian Bank, 26 U. C. Q. B. 445.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 593, 609. And see, generally, TROVER AND CONVERSION.

23. *Arkansas.*— Morton *v.* Scull, 23 Ark. 289.

Illinois.— See Wachsmuth *v.* Martini, 154 Ill. 515, 39 N. E. 129.

Indiana.— Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459; Beem *v.* Lockhart, 1 Ind. App. 202, 27 N. E. 239.

Louisiana.— Lutz *v.* Forbes, 13 La. Ann. 609.

Maine.— Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354.

Massachusetts.— Haskell *v.* Starbird, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809; White *v.* Sawyer, 16 Gray 586.

Minnesota.— McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143.

Missouri.— Phipps *v.* Mallory Commission Co., 105 Mo. App. 67, 78 S. W. 1097.

New York.— Durst *v.* Burton, 47 N. Y. 167, 7 Am. Rep. 428 [*affirming* 2 Lans. 137]; Sharp *v.* New York, 40 Barb. 256, 25 How. Pr. 389; Jeffrey *v.* Bigelow, 13 Wend. 518, 28 Am. Dec. 476.

North Carolina.— Peebles *v.* Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447.

Texas.— Western Cottage Piano, etc., Co. *v.* Anderson, (Civ. App. 1907) 101 S. W. 1061.

Wisconsin.— Matteson *v.* Rice, 116 Wis. 328, 92 N. W. 1109.

United States.— Kell *v.* Trenchard, 142 Fed. 16, 73 C. C. A. 202 [*modifying* 127 Fed. 596]; Palo Alto Bank *v.* Pacific Postal Tel. Cable Co., 103 Fed. 841; Lynch *v.* Mercan-

or trespass;[24] and he is also liable for the negligence of his agent resulting in injury to person or property.[25]

c. Torts Outside Course of Employment. A principal is not liable for the torts which his agent commits when not acting in the course of the employment,[26]

tile Trust Co., 18 Fed. 486, 5 McCrary 623. But see Dun *v.* Birmingham City Nat. Bank, 58 Fed. 174 [*reversing* 51 Fed. 160].

England.— Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147, 16 L. T. Rep. N. S. 461, 15 Wkly. Rep. 877; Udell *v.* Atherton, 7 H. & N. 172, 7 Jur. N. S. 777, 30 L. J. Exch. 337, 4 L. T. Rep. N. S. 797.

See 40 Cent. Dig. tit. "Principal and Agent," § 589 *et seq.* And see FRAUD, 20 Cyc. 85 *et seq.*

In New Jersey and Pennsylvania the courts seem to restrict the liability of the principal in an action for deceit to cases in which he had actual knowledge of the agent's fraud, or where he specially authorized or participated in it. White *v.* New York, etc., R. Co., 68 N. J. L. 123, 52 Atl. 216; Decker *v.* Fredericks, 47 N. J. L. 469, 1 Atl. 470 (holding that an innocent vendor is not liable in an action for deceit brought for the fraudulent representation of his agent); Kennedy *v.* McKay, 43 N. J. L. 288, 39 Am. Rep. 581; Keefe *v.* Sholl, 181 Pa. St. 90, 37 Atl. 116; Freyer *v.* McCord, 165 Pa. St. 539, 30 Atl. 1024 (holding that an action of deceit for fraud in the sale of land to plaintiff by defendant's agent cannot be maintained where the evidence fails to show that the principal participated in or knew or ought to have known of such fraud).

24. Raisler *v.* Springer, 38 Ala. 703, 82 Am. Dec. 736; Williams *v.* Inman, 1 Ga. App. 321, 57 S. E. 1009 (holding that where an agent commits an active trespass on behalf of his principal, such principal is a joint trespasser with the agent); Ogle *v.* Hudson, 30 Ind. App. 539, 66 N. E. 702; Freeman *v.* Rosher, 13 Q. B. 780, 13 Jur. 881, 18 L. J. Q. B. 340, 66 E. C. L. 780. And see, generally, TRESPASS.

25. *Alabama.*— Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692.

California.— Paige *v.* Roeding, 96 Cal. 388, 31 Pac. 264.

Illinois.— Schwartz *v.* Gilmore, 45 Ill. 455, 92 Am. Dec. 227 (holding that an architect who is the superintendent of the owner for the erection of a building, and who has control of the work and knows the walls are unsafe from want of bracing, cannot relieve the owner from responsibility for an injury, resulting therefrom, by merely directing the bracing to be done); Moir *v.* Hopkins, 16 Ill. 313, 63 Am. Dec. 312.

Louisiana.— Taylor *v.* Mexican Gulf R. Co., 2 La. Ann. 654 (holding also that the agent's assumption of the risk of safely transporting a raft belonging to the principal does not relieve the principal from liability for the agent's negligence in transporting it); Weeks *v.* McMicken, 7 Mart. 54.

Missouri.— Orentt *v.* Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. N. S. 929.

Nebraska.— Bianki *v.* Greater American Exposition, 3 Nebr. (Unoff.) 656, 92 N. W. 615.

New York.— Weyerhauser *v.* Dun, 100 N. Y. 150, 2 N. E. 274 (holding that where a mercantile agency undertakes the collection of a note, it becomes responsible for the negligence of attorneys whom it employs); Stroher *v.* Elting, 97 N. Y. 102, 49 Am. Rep. 515.

United States.— Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodb. & M. 529.

England.—Hughes *v.* Percival, 8 App. Cas. 443, 47 J. P. 772, 52 L. J. Q. B. 719, 49 L. T. Rep. N. S. 189, 31 Wkly. Rep. 725; Dalton *v.* Angus, 6 App. Cas. 740, 46 J. P. 132, 50 L. J. Q. B. 689, 44 L. T. Rep. N. S. 844, 30 Wkly. Rep. 191; Holliday *v.* National Tel. Co., [1899] 2 Q. B. 392, 68 L. J. Q. B. 1016, 81 L. T. Rep. N. S. 252, 47 Wkly. Rep. 658; Penny *v.* Wumbledon Urban Dist. Council, [1899] 2 Q. B. 72, 63 J. P. 406, 69 L. J. Q. B. 704, 80 L. T. Rep. N. S. 615, 15 T. L. R. 348, 47 Wkly. Rep. 565; Lemaitre *v.* Davis, 19 Ch. D. 281, 46 J. P. 324, 51 L. J. Ch. 173, 46 L. T. Rep. N. S. 407, 30 Wkly. Rep. 360; The Rhosina, 10 P. D. 131, 5 Aspin. 460, 54 L. J. P. & M. 72, 53 L. T. Rep. N. S. 30, 33 Wkly. Rep. 794; Duke *v.* Courage, 46 J. P. 453; *In re* Mitchell, 54 L. J. Ch. 342, 52 L. T. Rep. N. S. 178; Hill *v.* Tottenham Urban Dist. Council, 79 L. T. Rep. N. S. 495, 15 T. L. R. 3.

See 40 Cent. Dig. tit. "Principal and Agent," § 602. And see, generally, NEGLIGENCE, 29 Cyc. 477.

26. *Alabama.*— Singer Mfg. Co. *v.* Taylor, 150 Ala. 574, 43 So. 210, 9 L. R. A. N. S. 929; Hardeman *v.* Williams, 150 Ala. 415, 43 So. 726, 10 L. R. A. N. S. 653.

Arkansas.— St. Louis, etc., R. Co. *v.* Grant, 75 Ark. 579, 88 S. W. 580, 1133.

California.— Thiele *v.* Newman, 116 Cal. 571, 48 Pac. 713; Fogel *v.* Schmalz, 92 Cal. 412, 28 Pac. 444.

Connecticut.—Maisenbacker *v.* Concordia Soc., 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213.

Georgia.— Wikle *v.* Louisville, etc., R. Co., 116 Ga. 309, 42 S. E. 525; Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322 (holding that Code, § 2201, declaring that the principal shall be bound for the care, diligence, and fidelity of his agent, and section 2961, declaring that every person shall be liable for torts committed by his servant by his command or in the prosecution and within the scope of his business, do not render a bank liable for the theft by its cashier of a deposit gratuitously received, the defalcation not being

unless he subsequently ratifies them.[27] Nor is a person liable for the torts of one who does not bear to him the relation of agent,[28] unless he has so acted in permitting the alleged agent to represent him that he is estopped to deny the agency.[29]

d. Meaning of "Course of Employment." While the term "course of employment" is impossible of precise definition, it may be said broadly that the act of an agent is within the course of his employment when the agent in performing it is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose.[30]

in the line of his duty); Lewis *v.* Amorous, 3 Ga. App. 50, 59 S. E. 338.

Illinois.— Hancock *v.* Singer Mfg. Co., 174 Ill. 503, 51 N. E. 820; Singer Mfg. Co. *v.* Hancock, 74 Ill. App. 556; Callahan *v.* Hyland, 59 Ill. App. 347; Fraser *v.* Hollenberg, 30 Ill. App. 163; Goldstein *v.* Goldstein, 11 Ill. App. 530.

Kansas.— Laird *v.* Farwell, 60 Kan. 512, 57 Pac. 98.

Kentucky.— Ferguson *v.* Terry, 1 B. Mon. 96; Ayer, etc., Tie Co. *v.* Davenport, 82 S. W. 177, 26 Ky. L. Rep. 115.

Louisiana.— Richoux *v.* Mayer, 29 La. Ann. 828; Henderson *v.* Western M. & F. Ins. Co., 10 Rob. 164, 43 Am. Dec. 176.

Maine.— Stickney *v.* Munroe, 44 Me. 195.

Maryland.—Baltimore, etc., Turnpike Road *v.* Green, 86 Md. 161, 37 Atl. 642; Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Massachusetts.— Stimpson *v.* Achorn, 158 Mass. 342, 33 N. E. 518; Com. *v.* Reading Sav. Bank, 137 Mass. 431.

Minnesota.— Commonwealth Title Ins., etc., Co. *v.* Dakko, 89 Minn. 386, 94 N. W. 1088; Larson *v.* Fidelity Mut. Life Assoc., 71 Minn. 101, 73 N. W. 711.

New Jersey.— Kennedy *v.* Parke, 17 N. J. Eq. 415.

New York.— Mulligan *v.* New York, etc., R. Co., 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791; Baird *v.* New York, 96 N. Y. 567; Welsh *v.* German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Flinn *v.* World's Dispensary Medical Assoc., 64 N. Y. App. Div. 490, 72 N. Y. Suppl. 243; Schmidt *v.* Garfield Nat. Bank, 64 Hun 298, 19 N. Y. Suppl. 252 [*affirmed* in 138 N. Y. 631, 33 N. E. 1084]; Fellows *v.* U. S. Loaning Com'rs, 36 Barb. 655; Ryan *v.* Hudson River R. Co., 33 N. Y. Super. Ct. 137; Kutner *v.* Fargo, 20 Misc. 207, 45 N. Y. Suppl. 753 [*affirmed* in 34 N. Y. App. Div. 317, 54 N. Y. Suppl. 332].

Ohio.— Kilfoyl *v.* Hull, 4 Ohio Dec. (Reprint) 552, 2 Clev. L. Rep. 370.

Pennsylvania.— Comly *v.* Wanamaker, 14 Montg. Co. Rep. 30.

Tennessee.— Horrigan *v.* First Nat. Bank, 9 Baxt. 137.

Texas.— Donovan *v.* Texas, etc., R. Co., 64 Tex. 519; O'Neil *v.* Davis, 1 Tex. App. Civ. Cas. § 415.

Washington.— Hart *v.* Maney, 12 Wash. 266, 40 Pac. 987.

Wisconsin.— Hoyer *v.* Ludington, 100 Wis. 441, 76 N. W. 348.

United States.— Pressley *v.* Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569; U. S. *v.* Halberstadt, 26 Fed. Cas. No. 15,276, Gilp. 262.

England.— British Mut. Banking Co. *v.* Charnwood Forest R. Co., 18 Q. B. D. 714, 52 J. P. 150, 56 L. J. Q. B. 449, 57 L. T. Rep. N. S. 833, 35 Wkly. Rep. 590; Duncan *v.* Luntley, 2 Hall & T. 78, 47 Eng. Reprint 1604, 14 Jur. 318, 2 Macn. & G. 30, 48 Eng. Ch. 30, 42 Eng. Reprint 12.

Canada.— Emerson *v.* Niagara Nav. Co., 2 Ont. 528.

See 40 Cent. Dig. tit. "Principal and Agent," § 600 *et seq.*

27. See *supra*, I, F, 2, a, (III).

28. *Illinois.*—Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147.

Indiana.— Ft. Wayne, etc., Turnpike Co. *v.* Deam, 10 Ind. 563.

Louisiana.— Brooking *v.* Wade, 3 Mart. N. S. 513.

Missouri.— Cupples *v.* Whelan, 61 Mo. 583.

Tennessee.— Collier *v.* Struby, (1897) 47 S. W. 90.

Vermont.— Ross *v.* Fuller, 12 Vt. 265, 36 Am. Dec. 342.

United States.— See Exchange Nat. Bank *v.* Little Rock Bank, 58 Fed. 140, 7 C. C. A. 111, 22 L. R. A. 686.

England.— Flood *v.* Jackson, [1895] 2 Q. B. 21, 59 J. P. 388, 64 L. J. Q. B. 665, 73 L. T. Rep. N. S. 161, 14 Reports 397, 43 Wkly. Rep. 453 [*affirming* 72 L. T. Rep. N. S. 589].

29. See *supra*, III, E, 2, b.

Estoppel to deny agency in general see *supra*, I, E, 2, a, (II).

30. See cases cited *infra*, this note.

Torts held to be within course of employment see Mitchell *v.* Finnell, 101 Cal. 614, 36 Pac. 123 (where agent to settle with debtor threatened unlawful imprisonment); Dunn *v.* Hartford, etc., Horse R. Co., 43 Conn. 434 (where agent received third person's property from principal's debtor and sold it to pay the debt); Field *v.* Kane, 99 Ill. App. 1 (where a floor-walker followed a customer suspected of theft to the street and forcibly compelled her to reënter store); Pennsylvania Iron Works *v.* Voght Mach. Co., 96 S. W. 551, 29 Ky. L. Rep. 861, 8 L. R. A. N. S. 1023 (where agent managing a business office wrote a libelous letter concerning another's credit in order to obtain a contract); Commerce Bank *v.* Hoeber, 88 Mo. 37, 57 Am. Rep. 359 (where agent to effect composition with creditors gave a secret preference to a creditor); Dupre *v.* Childs, 52 N. Y. App. Div. 306, 62 N. Y. Suppl. 179 [*affirmed* in 169 N. Y. 585, 62 N. E. 1095] (where agent managing a restaurant followed an alleged diner to the street and caused his arrest);

e. Effect of Malice of Agent. A principal is not liable for the wilful or malicious torts committed by his agent while acting outside of the scope of his employment.[31] Indeed it has been held that a principal is not liable for the malicious or wilful

Blumenthal *v.* Shaw, 77 Fed. 954, 23 C. C. A. 590 (where a factory superintendent reclaimed as a runaway apprentice one who was not legally an apprentice).

Torts held to be outside of course of employment see Hardeman *v.* Williams, 150 Ala. 415, 43 So. 726, 10 L. R. A. N. S. 653 (where agent assisting a constable in taking property under writ of detinue for the principal assaulted the debtor); Thiele *v.* Newman, 116 Cal. 571, 48 Pac. 713 (where agent ordered to set fire to part of principal's land set fire also to his own land, thereby damaging a third person); Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. W. 831, 17 L. R. A. 322 (where cashier of a bank stole a deposit gratuitously received); Callahan *v.* Hyland, 59 Ill. App. 347 (where agent in endeavoring to collect a disputed account made a wilful and malicious assault on a bystander); Goldstein *v.* Goldstein, 11 Ill. App. 530 (where a guardian put his ward's money into his principal's business and immediately withdrew it again); Laird *v.* Farwell, 60 Kan. 512, 57 Pac. 98 (where agent to foreclose chattel mortgage caused arrest of a person for perjury in attachment affidavit covering goods in the mortgage); Baltimore, etc., Turnpike Road *v.* Green, 86 Md. 161, 37 Atl. 642 (where a toll-gate keeper caused an arrest on a charge of defrauding the company of tolls); Larson *v.* Fidelity Mut. L. Assoc., 71 Minn. 101, 73 N. W. 711 (where agent to solicit life insurance maliciously caused the arrest of a subagent for embezzlement); Welsh *v.* German American Bank, 73 N. Y. 424, 29 Am. Rep. 175 (where a bookkeeper made fictitious accounts, drew checks therefor for his own benefit, and circulated them); Schmidt *v.* Garfield Nat. Bank, 64 Hun (N. Y.) 298, 19 N. Y. Suppl. 252 [*affirmed* in 138 N. Y. 631, 33 N. E. 1084] (where agent authorized to indorse the prineipal's commercial paper with a stamp indorsed without stamp and deposited to his own account); Kutner *v.* Fargo, 20 Misc. (N. Y.) 207, 45 N. Y. Suppl. 753 (where the clerk of a criminal prosecutor maliciously testified in the prosecution); Kilfoyl *v.* Hull, 4 Ohio Dec. (Reprint) 552, 2 Clev. L. Rep. 369 (where agent ordered to paint a sign on another's house after obtaining proper authority painted it without obtaining proper authority); Ralph *v.* Fon Dersmith, 3 Pa. Super. Ct. 618, 40 Wkly. Notes Cas. 116 (where purchasing agent made false representations as to the financial standing of his employer); Comly *v.* Wanamaker, 14 Montg. Co. Rep. (Pa.) 30 (where a farm foreman procured the arrest for larceny of one removing property from the farm); Horrigan *v.* First Nat. Bank, 9 Baxt. (Tenn.) 137 (where a bank clerk made false representations as to a firm's financial standing); Emerson *v.* Niagara Nav. Co., 2 Ont. 528 (where the purser of a steamer assaulted a passenger in attempting to seize his baggage for alleged non-payment of fare).

Torts by real estate agent held to be within course of employment see Ogle *v.* Hudson, 30 Ind. App. 539, 66 N. E. 702, where agent to manage farm discharged surface water onto adjoining land. Torts by real estate agent held to be outside course of employment see Ayer, etc., Tie Co. *v.* Davenport, 82 S. W. 177, 26 Ky. L. Rep. 115 (where agent to sell land went thereon subsequent to selling and appropriated timber growing thereon); Hoyer *v.* Ludington, 100 Wis. 441, 76 N. W. 348 (where agent to sell land induced, by false representation, the purchase of stock in a corporation organized to buy the land); Pressly *v.* Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569 (where agent to manage real estate caused the arrest of a person on a charge of larceny of timber therefrom).

Torts by sales agent held to be within course of employment see Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692 (where traveling agent hired horse which he negligently killed); Huntley *v.* Mathias, 90 N. C. 101, 47 Am. Rep. 516 (where traveling salesman injured a hired horse by over-driving). Torts by sales agent held to be outside course of employment see Singer Mfg. Co. *v.* Taylor, 150 Ala. 574, 43 So. 210, 9 L. R. A. N. S. 929 (where sewing machine agent slandered a customer); Singer Mfg. Co. *v.* Hancock, 74 Ill. App. 556 (where sewing machine agent caused arrest of a person who maliciously injured a machine); Baird *v.* New York, 96 N. Y. 567 (where agent to sell to a city offered bribes to city officials); Adams *v.* Cole, 1 Daly (N. Y.) 147 (where agent employed to sell made false bills and obtained payment thereof by fraud).

Torts by ticket agent held to be within course of employment see St. Louis, etc., R. Co. *v.* Ryan, 56 Ark. 245, 19 S. W. 839 (where ticket agent made a penal overcharge); Southern R. Co. *v.* Chambers, 126 Ga. 404, 55 S. E. 37, 7 L. R. A. N. S. 926 (where station agent wilfully refused to deliver goods to drayman); Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136 (where ticket agent detained and insulted a passenger for giving an alleged bad coin for a ticket). Torts by ticket agent held to be outside course of employment see Wikle *v.* Louisville, etc., R. Co., 116 Ga. 309, 42 S. E. 525 (where ticket agent caused arrest of loiterer whom he suspected of pilfering the cash drawer); Mulligan *v.* New York, etc., R. Co., 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791 (where ticket agent acting under a notice issued by police officials caused arrest of a person offering an alleged counterfeit bill in payment for ticket); Donovan *v.* Texas, etc., R. Co., 64 Tex. 519 (where freight agent used actionable language in giving reasons for the regulations of the carrier by whom he was employed). See, generally, CARRIERS, 6 Cyc. 352.

31. See *supra*, III, E, 2, c.

torts of his agent, even though committed in the course of his employment.[32] The weight of recent authority, however, disregards the intent of the agent in committing the tort, and holds that the principal is as liable for torts prompted by malice as for other torts, if they are committed in the course of the agent's employment.[33]

f. Torts by Agent For Both Parties. Neither party is liable to the other for the tortious acts of an agent acting for both parties with their consent.[34]

g. Torts of Subagent. The liability of the principal for the torts of a subagent depends upon the question whether the primary agent was authorized expressly or impliedly to appoint the subagent.[35] If the primary agent was authorized to appoint a subagent the principal is liable for the torts of the latter in like manner as for the torts of an agent appointed directly by the principal;[36] but he is not as a rule liable for the torts of a subagent appointed without authority.[37]

3. For Declarations, Statements, and Admissions of Agent. The declarations, statements, and admissions of an agent made while acting in the course of his employment and within the scope of his authority are binding on the principal.[38]

4. Notice to Agent as Affecting Principal — a. General Rule. The duty of an agent to inform his principal of all material facts[39] is a duty which the law conclusively presumes that the agent has performed, and a principal is therefore affected with knowledge of all material facts of which the agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, although the agent does not in fact inform his principal thereof.[40] Conversely a principal is not affected with knowledge which the agent

32. De Camp *v.* Mississippi, etc., R. Co., 12 Iowa 348; Puryear *v.* Thompson, 5 Humphr. (Tenn.) 397; McManus *v.* Crickett, 1 East 106, 5 Rev. Rep. 518. See Blumenthal *v.* Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 410, 7 Cinc. L. Bul. 327.

33. *Arkansas.*—Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560.

Indiana.— Evansville, etc., R. Co. *v.* McKee, 99 Ind. 519, 50 Am. Rep. 102; Grand Rapids, etc., R. Co. *v.* King, (App. 1908) 83 N. E. 778.

Kansas.— Hynes *v.* Jungren, 8 Kan. 391.

Kentucky.— Sherley *v.* Billings, 8 Bush 147, 8 Am. Rep. 451.

Ohio.— Blumenthal *v.* Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 410, 7 Cinc. L. Bul. 327, holding the principal liable for a malicious injury committed by his agent, if the business in which the agent is engaged requires the exercise of good faith and sound discretion.

Wisconsin.— Milwaukee, ets., R. Co. *v.* Finney 10 Wis. 388.

See 40 Cent. Dig. tit. "Principal and Agent," § 599.

34. Brown *v.* St. John Trust Co., 71 Kan. 134, 80 Pac. 37; Western R. Co. *v.* Roberts, 4 Phila. (Pa.) 110; Willson *v.* Huron, 10 U. C. C. P. 498; Gore Bank *v.* Middlesex County, 16 U. C. Q. B. 595. See, however, Paige *v.* Roeding, 96 Cal. 388, 31 Pac. 264, holding that the fact that a packing company designates, in a contract with certain persons to manufacture and ship to them certain goods, the particular person whom it intends putting in charge of its business as superintendent does not relieve it from liability for the neglect or incompetency of such person on the theory that he has thus become the agent of both parties.

35. **Delegation of authority** see *supra*, II, D.

Power to appoint subagent see *supra*, II, A, 6, d, (III), (E); II, A, 6, h, (V).

36. State Bank *v.* Western Union Tel. Co., 52 Cal. 280; Louisville, etc., R. Co. *v.* Blair, 4 Baxt. (Tenn.) 407; Stone *v.* Cartwright, 6 T. R. 411, 3 Rev. Rep. 220.

37. Lindsay *v.* Singer Mfg. Co., 4 Mo. App. 571. But see State Bank *v.* Western Union Tel. Co., 52 Cal. 280, holding the principal liable on the ground of public policy for the fraud and negligence of a subagent who was appointed by the primary agent without authority, and who was at the time of the commission of the tort transacting the principal's business.

38. See Evidence, 16 Cyc. 1003 *et seq.*

39. See *supra*, III, A, 1, l.

40. *Alabama.*— McCleskey *v.* Howell Cotton Co., 147 Ala. 573, 42 So. 67; Kelly *v.* Burke, 132 Ala. 235, 31 So. 512; Harris *v.* American Bldg., etc., Assoc., 122 Ala. 545, 25 So. 200; Farmer *v.* American Mortg. Co., 116 Ala. 410, 22 So. 426; Smith *v.* Southern Express Co., 104 Ala. 387, 16 So. 62; Sheffield Land, etc., Co. *v.* Neill, 87 Ala. 158, 6 So. 1; Stewart *v.* Sonneborn, 49 Ala. 178; Smyth *v.* Oliver, 31 Ala. 39; Wiley *v.* Knight, 27 Ala. 336. See Russell *v.* Peavy, 131 Ala. 563, 32 So. 492.

Arkansas.— Whitehead *v.* Wells, 29 Ark. 99; Miller *v.* Fraley, 21 Ark. 22.

California.— Gallagher *v.* Equitable Gas Light Co., 141 Cal. 699, 75 Pac. 329; Chapman *v.* Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974; Bierce *v.* Red Bluff Hotel Co., 31 Cal. 160 (holding that where others than the principal and agent are concerned, the presumption that the agent has discharged his duty to his principal in communicating facts

acquires while not acting in the course of his employment, or which relates to

of which he has notice is as conclusive as the presumption that the principal remembers the facts brought home to him personally); Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Stanley *v.* Green, 12 Cal. 148; Pacific Lumber Co. *v.* Wilson, 6 Cal. App. 561, 92 Pac. 654.

Colorado.— Little Pittsburgh Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226; Schollay *v.* Moffitt-West Drug Co., 17 Colo. App. 126, 67 Pac. 182.

Connecticut.— Indiana Bicycle Co. *v.* Tuttle, 74 Conn. 489, 51 Atl. 538; Smith *v.* Norwich Water Com'rs, 38 Conn. 208; Watson *v.* Wells, 5 Conn. 468.

District of Columbia.— Johnson *v.* Tribby, 27 App. Cas. 281.

Georgia.— People's Sav. Bank *v.* Smith, 114 Ga. 185, 39 S. E. 920; Strickland *v.* Vance, 99 Ga. 531, 27 S. E. 152, 59 Am. St. Rep. 241; North America Guarantee Co. *v.* East Rome Town Co., 96 Ga. 511, 23 S. E. 503, 51 Am. St. Rep. 150; Lewis *v.* Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224; Thompson *v.* Overstreet, 80 Ga. 767, 6 S. E. 690; Broughton *v.* Foster, 69 Ga. 712; Prater *v.* Cox, 64 Ga. 706; Saulsbury *v.* Wimberly, 60 Ga. 78; Bryant *v.* Booze, 55 Ga. 438 (holding that notice to an agent will be notice to the principal even where the latter comes forward before the agent has concluded the negotiations and completes the transaction in person, the agent not participating in the final stages of the transaction); Scofield Rolling Mill Co. *v.* State, 54 Ga. 635; Whitten *v.* Jenkins, 34 Ga. 297; Mounce *v.* Byars, 11 Ga. 180.

Illinois.— Hayes *v.* Wagner, 220 Ill. 256, 77 N. E. 211; Bouton *v.* Cameron, 205 Ill. 50, 68 N. E. 800; Roderick *v.* McMeekin, 204 Ill. 625, 68 N. E. 473; Fischer *v.* Tuohy, 186 Ill. 143, 57 N. E. 801; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Booth *v.* Smith, 117 Ill. 370, 7 N. E. 610; Ventres *v.* Cobb, 105 Ill. 33; Quincy Coal Co. *v.* Hood, 77 Ill. 68; Sterling Bridge Co. *v.* Baker, 75 Ill. 139; Worden *v.* William, 24 Ill. 67; Page *v.* Brant, 18 Ill. 37; McChesney *v* Davis, 86 Ill. App. 380; Sheppard *v.* Wood, 78 Ill. App. 428; Germania L. Ins. Co. *v.* Koehler, 63 Ill. App. 188; Ryan *v.* Potwin, 62 Ill. App. 134.

Indiana.— Field *v.* Campbell, 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301; Marion Mfg. Co. *v.* Harding, 155 Ind. 648, 58 N. E. 194; Vawter *v.* Bacon, 89 Ind. 565; Brannon *v.* May, 42 Ind. 92; Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111; Blair *v.* Whittaker, 31 Ind. App. 664, 69 N. E. 182.

Indian Territory.— Noyes *v.* Tootle, 2 Indian Terr. 144, 48 S. W. 1031.

Iowa.— Merrit *v.* Huber, (1908) 114 N. W. 627; Ware *v.* Heiss, 133 Iowa 285, 110 N. W. 594; Condon *v.* Barnum, (1906) 106 N. W. 514; Campbell *v.* Park, 128 Iowa 181, 101 N. W. 861; Manson *v.* Simplot, 119 Iowa 94, 93 N. W. 75; McClelland *v.* Saul, 113 Iowa 208, 84 N. W. 1034; Young *v.* Iowa Toilers Protective Assoc., 106 Iowa 447, 76 N. W. 822; Deering *v.* Grundy County Nat. Bank, 81 Iowa 222, 46 N. W. 1117; Baldwin *v.* St. Louis, etc., R. Co., 75 Iowa 297, 39 N. W. 507, 9 Am. St. Rep. 479; Gardner *v.* Early, 72 Iowa 518, 34 N. W. 311; Thompson *v.* Merrill, 58 Iowa 419, 10 N. W. 796; Crumb *v.* Davis, 54 Iowa 25, 6 N. W. 53; Smith *v.* Dunton, 42 Iowa 48; Slater *v.* Irwin, 38 Iowa 261; Thornburgh *v.* Madren, 33 Iowa 380; Jones *v.* Bamford, 21 Iowa 217; Keenan *v.* Missouri State Mut. Ins. Co., 12 Iowa 126 (holding that a principal will be charged with notice of facts known to one whom he has held out to third persons as a general agent, and which it would have been his duty as such general agent to communicate, although in fact such agency was only a special one); Warburton *v.* Lauman, 2 Greene 420.

Kansas.— Memphis, etc., R. Co. *v.* Koch, 28 Kan. 565; Roach *v.* Karr, 18 Kan. 529, 26 Am. Rep. 788; Hawley *v.* Smeiding, 3 Kan. App. 159, 42 Pac. 841.

Kentucky.— Day *v.* Exchange Bank, 117 Ky. 357, 78 S. W. 132, 25 Ky. L. Rep. 1449; Com. *v.* Roark, 116 Ky. 396, 76 S. W. 140, 25 Ky. L. Rep. 603; America Bank *v.* McNeil, 10 Bush 54; Bright *v.* Wagle, 3 Dana 252; Miller *v.* Jones, 107 S. W. 783, 32 Ky. L. Rep. 1078; Connolly *v.* Beckett, 105 S. W. 446, 32 Ky. L. Rep. 356; Holzhauer *v.* Sheeny, 104 S. W. 1034, 31 Ky. L. Rep. 1238; Mutual L. Ins. Co. *v.* Chosen Friends Lodge No. 2 I. O. O. F., 93 S. W. 1044, 29 Ky. L. Rep. 394; Helfrech Lumber, etc., Co. *v.* Honaker, 76 S. W. 342, 25 Ky. L. Rep. 717; Bramblett *v.* Henderson, 41 S. W. 575, 19 Ky. L. Rep. 692.

Louisiana.— Bloom *v.* Beebe, 15 La. Ann. 65; Cummings *v.* Harsabrauch, 14 La. Ann. 711; Kemp *v.* Rowly, 2 La. Ann. 316; Pontchartrain R. Co. *v.* Heirne, 2 La. Ann. 129; Fetter *v.* Field, 1 La. Ann. 80; Wolf *v.* Rogers, 6 Rob. 97; Lafarge *v.* Ripley, 4 Mart. N. S. 303.

Maryland.— Schwind *v.* Boyce, 94 Md. 510, 51 Atl. 45; Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646.

Massachusetts.— Jaquith *v.* Davenport, 191 Mass. 415, 78 N. E. 93; Clement *v.* Western Union Tel. Co., 137 Mass. 463; National Security Bank *v.* Cushman, 121 Mass. 490; Suit *v.* Woodhall, 113 Mass. 391.

Michigan.— Davis *v.* Kneale, 97 Mich. 72, 56 N. W. 220; Macomb *v.* Wilkinson, 83 Mich. 486, 47 N. W. 336; Johnston Harvester Co. *v.* Miller, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536; Morgan *v.* Michigan Air-Line R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865; Taylor *v.* Young, 56 Mich. 285, 22 N. W. 799; Advertiser, etc., Co. *v.* Detroit, 43 Mich. 116, 5 N. W. 72; Henkel *v.* Welsh, 41 Mich. 664, 3 N. W. 171; Campau *v.* Konan, 39 Mich. 362; Hoyt *v.* Jeffers, 30 Mich. 181; Peoria Mar., etc., Ins. Co. *v.* Hall, 12 Mich. 202; Emerson *v.* Atwater, 7 Mich. 12.

Minnesota.— Jefferson *v.* Leithauser, 60 Minn. 251, 62 N. W. 277.

Mississippi.— Illinois. Cent. R. Co. *v.* Bryant, 70 Miss. 665, 12 So. 592; Allen *v.* Poole, 54 Miss. 323; Ross *v.* Houston, 25

matters not within the scope of his authority, unless the agent actually com-

Miss. 591, 59 Am. Dec. 231; Doe *v.* Ingersoll, 11 Sm. & M. 249, 49 Am. Dec. 57.

Missouri.— Hickman *v.* Green, 123 Mo. 165, 22 S. W. 455, 29 L. R. A. 39; Hedrick *v.* Beeler, 110 Mo. 91, 19 S. W. 492; Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77, 15 S. W. 992; Meier *v.* Blume, 80 Mo. 179; Columbus City Bank *v.* Phillips, 22 Mo. 85. 64 Am. Dec. 254; Atterbury *v.* Hopkins, 122 Mo. App. 172, 99 S. W. 11; Babbitt *v.* Kelley, 96 Mo. App. 529, 70 S. W. 384; O'Neill *v.* Blase, 94 Mo. App. 648. 68 S. W. 764; Mayer *v.* Old, 57 Mo. App. 639.

Montana.— Coombs *v.* Barker, 31 Mont. 526, 79 Pac. 1.

Nebraska.— Pringle *v* Modern Woodmen of America, 76 Nebr. 384, 107 N. W. 756, 113 N. W. 231; Modern Woodmen of America *v.* Colman, 68 Nebr. 660, 94 N. W. 814, 96 N. W. 154; Farmers, etc., Ins. Co. *v.* Wiard, 59 Nebr. 451, 81 N. W. 312; American Bldg., etc., Assoc. *v.* Rainbolt, 48 Nebr. 434, 67 N. W. 493; Merriam *v.* Calhoun, 15 Nebr. 569, 19 N. W. 708; Kellogg *v.* Lavender, 9 Nebr. 418, 2 N. W. 748; Cheney *v.* Eberhardt, 8 Nebr. 423, 1 N. W. 197.

New Hampshire.— Patten *v.* Merchants', etc., Ins. Co., 40 N. H. 375; Hovey *v.* Blanchard, 13 N. H. 145.

New York.— Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318; Bennett *v.* Buchan, 76 N. Y. 386; Ingalls *v.* Morgan, 10 N. Y. 178; Weisser *v.* Denison, 10 N. Y. 68, 61 Am. Dec. 731; Consolidated Fruit Jar Co. *v.* Wisner, 103 N. Y. App. Div. 453, 93 N. Y. Suppl. 128; People *v.* Woodruff, 75 N. Y. App. Div. 90, 77 N. Y. Suppl. 722; Stephens *v.* Humphryes, 73 Hun 190, 25 N. Y. Suppl. 946 [*affirmed* in 141 N. Y. 586, 36 N. E. 739]; Hier *v.* Odell, 18 Hun 314; Black *v.* Camden, etc., Transp. Co., 45 Barb. 40; Sutton *v.* Dillaye, 3 Barb. 529; Constant *v.* Rochester University, 60 N. Y. Super. Ct. 181, 17 N. Y. Suppl. 363; Constant *v.* American Baptist Home Mission Soc., 53 N. Y. Super. Ct. 170; Kendall *v.* Niebuhr, 45 N. Y. Super. Ct. 542, 58 How. Pr. 156 [*affirmed* in 46 N. Y. Super. Ct. 544 (*affirmed* in 87 N. Y. 1)]; Leszynsky *v.* Ross, 35 Misc. 652, 72 N. Y. Suppl. 352; Mull *v.* Ingalls, 30 Misc. 80, 62 N. Y. Suppl. 830 [*affirmed* in 71 N. Y. Suppl. 1142]; Canada *v.* Casey, 14 Misc. 322, 35 N. Y. Suppl. 1054; Peters *v.* Stuart, 2 Misc. 357, 21 N. Y. Suppl. 993; Jackson *v.* Sharp, 9 Johns. 163, 6 Am. Dec. 267; Griffith *v.* Griffith, 9 Paige 315.

North Carolina.— Neal *v.* Pender-Hyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697; Cowan *v.* Withrow, 111 N. C. 306, 16 S. E. 397; Follette *v.* Mutual Acc. Assoc., 110 N. C. 377, 14 S. E. 923; 28 Am. St. Rep. 693, 15 L. R. A. 668; Farmer *v.* Willard, 71 N. C. 284; Merril *v.* Sloan, 5 N. C. 121.

Ohio.— Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; Conant *v.* Reed, 1 Ohio St. 298; Worthington *v.* Cleveland City R. Co., 29 Ohio Cir. Ct. 321 [*affirmed* in 75 Ohio St. 626, 80 N. E. 1135]; Mehner *v.* Schmidlapp, 9 Ohio Dec. (Reprint) 87, 10 Cinc. L. Bul. 390; Stone *v.* Davenport, 7 Ohio Dec. (Reprint) 83, 1 Cinc. L. Bul. 102; West *v.* Gibson, 6 Ohio Dec. (Reprint) 1034, 9 Am. L. Rec. 689.

Pennsylvania.— Ward's Appeal, 172 Pa. St. 185, 33 Atl. 552; Reed's Appeal, 34 Pa. St. 207; Grove *v.* Donaldson, 15 Pa. St. 128; Nutting *v.* Lynn, 18 Pa. Super. Ct. 59; Moulton *v.* O'Bryan, 17 Pa. Super. Ct. 1593; George Peabody Bldg. Assoc. *v.* Houseman, 34 Leg. Int. 5.

South Carolina.—Gibbs Mach. Co. *v.* Roper, 77 S. C. 39, 57 S. E. 667; Blowers *v.* Southern R. Co., 74 S. C. 221, 54 S. E. 368; Sparkman *v.* Supreme Council American L. H., 57 S. C. 16, 35 S. E. 391; Salinas *v.* Turner, 33 S. C. 231, 11 S. E. 702; Pritchett *v.* Sessions, 10 Rich. 293.

South Dakota.— Black Hills Nat. Bank *v.* Kellogg, 4 S. D. 312, 56 N. W. 1071.

Tennessee.— Myers *v.* Ross, 3 Head 59; Woodfolk *v.* Blount, 3 Hayw. 147, 9 Am. Dec. 736; Kuhlman *v.* E. J. Hart Co., (Ch. App. 1900) 59 S. W. 455; Renner *v.* Marshall, (Ch. App. 1900) 58 S. W. 863.

Texas.— Morrison *v.* Insurance Co. of North America, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63; Aultman, etc., Co. *v.* Hefner, 67 Tex. 54, 2 S. W. 861; Missouri, etc., R. Co. *v.* Raney, 44 Tex. Civ. App. 517, 99 S. W. 589; Flynt *v.* Taylor, (Civ. App. 1905) 91 S. W. 864; Morrill *v.* Bosley, 40 Tex. Civ. App. 7, 88 S. W. 519; June *v.* Doke, 35 Tex. Civ. App. 240, 80 S. W. 402; Bexar Bldg., etc., Assoc. *v.* Lockwood, (Civ. App. 1899) 54 S. W. 253; Ferguson *v.* McCrary, 20 Tex. Civ. App. 529, 50 S. W. 472; Pughe *v.* Coleman, (Civ. App. 1898) 44 S. W. 576; Wright *v.* U. S. Mortgage Co., (Civ. App. 1897) 42 S. W. 1026; Rand *v.* Davis, (Civ. App. 1894) 27 S. W. 939; Smith *v.* Adams, 4 Tex. Civ. App. 5, 23 S. W. 49.

Vermont.— Drake *v.* Barker, 54 Vt. 372; Hill *v.* North, 34 Vt. 604; Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179.

Virginia.— Mack Mfg. Co. *v.* Smoot, 102 Va. 724, 47 S. E. 859; Schreckhise *v.* Wiseman, 102 Va. 9, 45 S. E. 745. But see Easley *v.* Barksdale, 75 Va. 274, holding that under Code (1873), c. 182, § 5, requiring "actual notice" to a purchaser in order to charge him with knowledge of certain facts, notice to the purchaser's agent is not sufficient.

Washington.— Allen *v.* Treat, 48 Wash. 552, 94 Pac. 102; Haynes *v.* Gay, 37 Wash. 230, 79 Pac. 794; Lynch *v.* Kineth, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958; Curtis *v.* Janzen, 7 Wash. 58, 34 Pac. 131.

West Virginia.— Hart *v.* Sandy, 39 W. Va. 644, 20 S. E. 665.

Wisconsin.— Weeks *v.* Robert A. Johnson Co., 116 Wis. 105, 92 N. W. 794; Andrews *v.* Robertson, 111 Wis. 354, 87 N. W. 190, 87 Am. St. Rep. 870, 54 L. R. A. 673; Knott *v.* Tidyman, 86 Wis. 164, 56 N. W. 632;

municates his information to the principal.[41] Furthermore the relation of prin-

Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772; Owens *v.* Roberts, 36 Wis. 258.

United States.— Armstrong *v.* Ashley, 204 U. S. 272, 27 S. Ct. 270, 51 L. ed. 482; Astor *v.* Wells, 4 Wheat. 466, 4 L. ed. 616; The Hiram, 1 Wheat. 440, 4 L. ed. 131; Citizens' Trust, etc., Co. *v.* Zane, 113 Fed. 596 [*affirmed* in 117 Fed. 814, 55 C. C. A. 38]; La Dow *v.* North American Trust Co., 113 Fed. 13; Hoffmann *v.* Mayaud, 93 Fed. 171, 35 C. C. A. 256; Chicago, etc., R. Co. *v.* Belliwith, 83 Fed. 437, 28 C. C. A. 358; Blaine First Nat. Bank *v.* Blake, 60 Fed. 78; Dickerson *v.* Matheson, 50 Fed. 73 [*affirmed* in 57 Fed. 524, 6 C. C. A. 466]; New England Mortg. Security Co. *v.* Gay, 33 Fed. 636; Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231; Carter *v.* Ottawa, 24 Fed. 546; Sias *v.* Roger Williams Ins. Co., 8 Fed. 183; U. S. *v.* Arkansas Bank, 24 Fed. Cas. No. 14,515, Hempst. 460; Varnum *v.* Milford, 28 Fed. Cas. No. 16,891, 4 McLean 93.

England.— Bawden *v.* London, etc., Assur. Co., [1892] 2 Q. B. 534, 57 J. P. 116, 61 L. J. Q. B. 792; Blackburn *v.* Haslam, 21 Q. B. D. 144, 6 Aspin. 326, 57 L. J. Q. B. 479, 59 L. T. Rep. N. S. 407, 36 Wkly. Rep. 855; Le Neve *v.* Le Neve, Ambl. 436, 27 Eng. Reprint 291; Downes *v.* Power, 2 Ball & B. 491; Coote *v.* Mammon, 5 Bro. P. C. 355, 2 Eng. Reprint 727; Merry *v.* Abney, 1 Ch. Cas. 38, 22 Eng. Reprint 682; Butler *v.* Portarlington, 1 C. & L. 1, 1 Dr. & War. 20, 4 Ir. Eq. 1; Nixon *v.* Hamilton, 2 Dr. & Wal. 364, 1 Ir. Ch. 46; Sheldon *v.* Cox, 2 Eden 224, 28 Eng. Reprint 884; Lanehan *v.* M'Cabe, 2 Ir. Eq. 342; Dryden *v.* Frost, 1 Jur. 330; Jennings *v.* Moore, 2 Vern. Ch. 609, 23 Eng. Reprint 998; Ashley *v.* Baillie, 2 Ves. 368, 28 Eng. Reprint 236; Maddox *v.* Maddox, 1 Ves. 61, 27 Eng. Reprint 892.

Canada.— Richards *v.* Nova Scotia Bank, 26 Can. Sup. Ct. 381; Graham *v.* British Canadian Loan, etc., Co., 12 Manitoba 244.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 670–679.

In **New Jersey** a broader rule seems to be followed, and it has been held in that state that the knowledge of the agent is chargeable upon the principal whenever the principal if acting for himself, or if a corporation when acting through some agent, would have acquired the knowledge or have been put upon such inquiry as was equivalent to notice. Vulcan Detinning Co. *v.* American Can Co., (1907) 67 Atl. 339, 12 L. R. A. N. S. 102; Boice *v.* Conover, (1906) 65 Atl. 191; Sooy *v.* State, 41 N. J. L. 394. See Law *v.* Stokes, 32 N. J. L. 249, 90 Am. Dec. 655; Camden Safe Deposit, etc., Co. *v.* Lad, 67 N. J. Eq. 489, 58 Atl. 607; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117. But see Willard *v.* Denise, 50 N. J. Eq. 48, 26 Atl. 29, 35 Am. St. Rep. 788, holding that the knowledge must be of facts pertinent to the subject of the agent's employment, the rule stated in the text.

A legal imputation of actual notice cannot be based upon this rule. Reisan *v.* Mott, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489.

Effect of constructive notice to agent.— It has been held that constructive notice to an agent cannot operate as constructive notice to the principal, and that the notice to an agent to be notice to his principal must be actual notice. Wheatland *v.* Pryor, 133 N. Y. 97, 30 N. E. 652. But see Furry *v.* Ferguson, 105 Iowa 231, 74 N. W. 903; Vulcan Detinning Co. *v.* American Can Co., (N. J. 1907) 67 Atl. 339, 12 L. R. A. N. S. 102; Neal *v.* Pender-Hyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697; Ferguson *v.* McCrary, 20 Tex. Civ. App. 529, 50 S. W. 472, holding that a principal is chargeable with notice of all facts which would be disclosed by an inquiry following the discovery of other facts by the agent while acting within the scope of his employment.

Notice to joint agent.— Notice to one of two or more joint agents in the course of his employment and within the scope of his authority is notice to the principal (Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; National Security Bank *v.* Cushman, 121 Mass. 490; U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451); but notice to one agent in a transaction which he does not conduct to a termination, and which is completed by another agent, does not affect the principal (Irvine *v.* Grady, 85 Tex. 120, 19 S. W. 1028; Blackburn *v.* Vigors, 12 App. Cas. 531, 6 Aspin. 216, 57 L. J. Q. B. 114, 57 L. T. Rep. N. S. 730, 36 Wkly. Rep. 449). And see Allen *v.* Rostain, 11 Serg. & R. (Pa.) 362, holding that one agent's knowledge does not bind another agent at a distance, although both acted for the same firm.

Notice to agent of dishonor of commercial paper see COMMERCIAL PAPER, 7 Cyc. 1077.

Notice to particular agents see ATTORNEY AND CLIENT, 4 Cyc. 933; BANKS AND BANKING, 5 Cyc. 46 *et seq.*; CORPORATIONS, 10 Cyc. 1054; FACTORS AND BROKERS, 19 Cyc. 301; PARTNERSHIP, 30 Cyc. 530.

41. *Alabama.*— Frenkel *v.* Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736; Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488; Graham *v.* Tankersley, 15 Ala. 634; Grant *v.* Cole, 8 Ala. 519; Magee *v.* Billingsley, 3 Ala. 679.

California.— Renton *v.* Monnier, 77 Cal. 449, 19 Pac. 820.

Connecticut.— Hill *v.* Hays, 38 Conn. 532.

Georgia.— Camp *v.* Southern Banking, etc., Co., 97 Ga. 582, 25 S. E. 362; Lewis *v.* Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224; Freeman *v.* Mutual Bldg., etc., Assoc., 90 Ga. 190, 15 S. E. 758; Mims *v.* Brook, 3 Ga. App. 247, 59 S. E. 711; Collins *v.* Crews, 3 Ga. App. 238, 59 S. E. 727.

Illinois.—Roderick *v.* McMeckin, 204 Ill.

cipal and agent must exist in order to charge one person with another's knowledge, and the knowledge of a person who is not in fact the agent of another cannot be imputed to the latter.[42]

625, 68 N. E. 473; Mackay-Nisbet Co. *v.* Kuhlman, 119 Ill. App. 144; Seaverns *v.* Presbyterian Hospital, 64 Ill. App. 463; Wright *v.* Bruschke, 62 Ill. App. 358; St. Louis Consolidated Coal Co. *v.* Block, etc., Smelting Co., 53 Ill. App. 565.

Iowa.— Thomas *v.* Desney, 57 Iowa 58, 10 N. W. 315.

Kansas.— Topliff *v.* Shadwell, 68 Kan. 317, 74 Pac. 1120; Roach *v.* Karr, 18 Kan. 529, 26 Am. Rep. 788.

Kentucky.— German Ins. Co. *v.* Goodfriend, 97 S. W. 1098, 30 Ky. L. Rep. 218.

Louisiana.— Carlin *v.* Dumartrait, 8 Mart. N. S. 212.

Maryland.— Gemmell *v.* Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. Rep. 412.

Michigan.— Weaver *v.* Richards, 150 Mich. 20, 113 N. W. 867.

Minnesota.— Strauch *v.* May, 80 Minn. 343, 83 N. W. 156; Sandberg *v.* Palm, 53 Minn. 252, 54 N. W. 1109 (holding that knowledge by an agent, authorized only to sell land, that a house is building on it is not knowledge by the owner, for the purpose of creating a mechanic's lien under Laws (1889), c. 200, § 5); Trenton *v.* Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225.

Mississippi.— Goodloe *v.* Godley, 13 Sm. & M. 233, 51 Am. Dec. 150.

Missouri.— Donham *v.* Hahn, 127 Mo. 439, 30 S. W. 134; Hickman *v.* Green. 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; Benton *v.* German-American Nat. Bank, 122 Mo. 332, 26 S. W. 975; Walker *v.* Hannibal, etc., R. Co., 121 Mo. 575, 26 S. W. 360, 42 Am. St. Rep. 547, 24 L. R. A. 363; King *v.* Rowlett, 120 Mo. App. 120, 96 S. W. 493; Kyle *v.* Gaff, 105 Mo. App. 672, 78 S. W. 1047.

New Hampshire.— Warren *v.* Hayes, 74 N. H. 355, 68 Atl. 193; Bohanan *v.* Boston, etc., R. Co., 70 N. H. 526, 49 Atl. 103.

New Jersey.— Hightstown First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Force *v.* Dutcher, 18 N. J. Eq. 401.

New York.— New York *v.* New York Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618; Ritch *v.* Smith, 82 N. Y. 627, 60 How. Pr. 157 [*affirming* 60 How. Pr. 13]; Atlantic State Bank *v.* Savery, 82 N. Y. 291; Matter of Bauer, 68 N. Y. App. Div. 212, 74 N. Y. Suppl. 155 [*affirming* 36 Misc. 33, 72 N. Y. Suppl. 439]; Graves *v.* Mumford, 26 Barb. 94; Spadone *v.* Manvel, 2 Daly 263; Goldenson *v.* Lawrence, 16 Misc. 570, 38 N. Y. Suppl. 991; Casco Nat. Bank *v.* Clark, 18 N. Y. Suppl. 887; Slattery *v.* Schwannecke, 7 N. Y. St. 430.

North Carolina.— Commercial Bank *v.* Burgwyn, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326.

Oregon.— Pennoyer *v.* Willis, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594.

Pennsylvania.— Meehan *v.* Williams, 48 Pa. St. 238; Huhn *v.* Long, 2 Whart. 200; Wilson *v.* Second Nat. Bank, 4 Pa. Cas. 68, 7 Atl. 145.

Tennessee.— Lambreth *v.* Clarke, 10 Heisk. 32.

Texas.— Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 32 S. W. 518; Texas Loan Agency *v.* Taylor, 88 Tex. 47, 29 S. W. 1057; Labbe *v.* Corbett, 69 Tex. 503, 6 S. W. 808, (1888) 6 S. W. 812; Kauffman *v.* Robey, 60 Tex. 308, 48 Am. Rep. 264; Lane *v.* De Bode, 29 Tex. Civ. App. 602, 69 S. W. 437; Cooper *v.* Ford, 29 Tex. Civ. App. 253, 69 S. W. 487; Rand *v.* Davis, (Civ. App. 1894) 27 S. W. 939.

Vermont.— Hall *v.* Dewey, 10 Vt. 593.

Virginia.— Finch *v.* Causey, 107 Va. 124, 57 S. E. 562.

Washington.— Moon Bros. Carriage Co. *v.* Devenish, 42 Wash. 415, 85 Pac. 17; Washington Nat. Bank *v.* Pierce, 6 Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174.

West Virginia.— Thompson *v.* Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 S. E. 908.

Wisconsin.— Wells *v.* American Express Co., 44 Wis. 342.

United States.— Holm *v.* Atlas Nat. Bank, 84 Fed. 119, 28 C. C. A. 297; Satterfield *v.* Malone, 35 Fed. 445, 1 L. R. A. 35.

England.— *In re* Cousins, 31 Ch. D. 671, 55 L. J. Ch. 662, 54 L. T. Rep. N. S. 376, 34 Wkly. Rep. 393; Arden *v.* Arden, 29 Ch. D. 702, 54 L. J. Ch. 655, 52 L. T. Rep. N. S. 610, 33 Wkly. Rep. 593.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 680–684.

Notice to or the knowledge of a mere ministerial agent or servant will not be imputed to the principal. Booker *v.* Booker, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250; Mercier *v.* Canonge, 8 La. Ann. 37; Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319; Rogers *v.* Dutton, 182 Mass. 187, 65 N. E. 56; Wheeler *v.* St. Joseph Stock-Yards, etc., Co., 66 Mo. App. 260; Aetna Indemnity Co. *v.* Schroeder, 12 N. D. 110, 95 N. W. 436; Hicks *v.* Southern R. Co., 63 S. C. 559, 41 S. E. 753; Storms *v.* Mundy, (Tex. Civ. App. 1907) 101 S. W. 258; Wyllie *v.* Pollen, 3 De G. J. & S. 596, 32 L. J. Ch. 782, 9 L. T. Rep. N. S. 71, 2 New Rep. 500, 11 Wkly. Rep. 1081, 68 Eng. Ch. 596, 46 Eng. Reprint 767.

42. *Alabama.*— Allen *v.* McCullough, 99 Ala. 612, 12 So. 810.

California.— Mabb *v.* Stewart, 133 Cal. 556, 65 Pac. 1085.

Colorado.— Kinkel *v.* Harper, 7 Colo. App. 45, 42 Pac. 173.

Connecticut.— Platt *v.* Birmingham Axle Co., 41 Conn. 255; Hill *v.* Hayes, 38 Conn. 532, holding that, although a person is a general agent of another, the latter is not af-

b. Character of Notice as Regards Materiality and Source. Notice to an agent in order to be notice to the principal must relate to facts so material to the purpose of the agency as to make it the agent's duty to communicate the notice to his principal.[43] Furthermore the information must come from a source so apparently reliable that a man of ordinary prudence would be influenced thereby; mere rumor or idle talk will not constitute notice.[44]

c. Time of Receiving Notice — (1) *DURING AGENCY.* While the general rule is that notice received by an agent during his agency is notice to the principal,[45] its operation is sometimes held to be narrowed by the condition that not only must notice be received during the existence of the agency, but that notice to bind the principal must be received by the agent while engaged in the particular transaction to which the information relates, and that notice to the agent in a prior disconnected transaction, although for the same principal, will not charge the latter.[46] If, however, the agency is continuous as distinguished from an

fected by the former's knowledge relating to a transaction between the principal and a third person in which the agent was acting for the third person.

Georgia.— Godwynne *v.* Bellerby, 116 Ga. 901, 43 S. E. 275; McNamara *v.* McNamara, 62 Ga. 200.

Indiana.— International Bldg., etc., Assoc. *v.* Watson, 158 Ind. 508, 64 N. E. 23; Craig School Tp. *v.* Scott, 124 Ind. 72, 24 N. E. 585 (holding that the knowledge of a member of a masonic lodge is not the knowledge of the lodge); Jones *v.* Ranson, 3 Ind. 327; Wheeler *v.* Barr, 7 Ind. App. 381, 34 N. E. 591.

Iowa.— Chicago Lumber, etc., Co. *v.* Garmer, 132 Iowa 282, 109 N. W. 780; Polk *v.* Foster, 71 Iowa 26, 32 N. W. 7; Thomas *v.* Desney, 57 Iowa 58, 10 N. W. 315.

Kentucky.— Barnes *v.* F. Weikel Chair Co., 89 S. W. 222, 28 Ky. L. Rep. 315; Hardin *v.* Chenault, 77 S. W. 192, 25 Ky. L. Rep. 1083.

New Jersey.— Dodge *v.* Romain, (1889) 18 Atl. 114; Clement *v.* Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 Atl. 82.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9.

North Dakota.— Aetna Indemnity Co. *v.* Schroeder, 12 N. D. 110, 95 N. W. 436.

Texas.—Marx *v.* Luling Co-operative Assoc., 17 Tex. Civ. App. 408, 43 S. W. 596.

United States.— Craig *v.* Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. ed. 886; Johnston *v.* Laflin, 103 U. S. 800, 26 L. ed. 532.

See 40 Cent. Dig. tit. "Principal and Agent," § 670 *et seq.*

43. Day *v.* Wamsley, 33 Ind. 145; Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319; Trentor *v.* Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225; Wood *v.* Rayburn, 18 Oreg. 3, 22 Pac. 521.

44. *Illinois.*— Pittman *v.* Sofley, 64 Ill. 155.

Indiana.— Day *v.* Wamsley, 33 Ind. 145.

Pennsylvania — Mulliken *v.* Graham, 72 Pa. St. 484; Wilson *v.* McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Jaques *v.* Weeks, 7 Watts 261; Kerns *v.* Swope, 2 Watts 75.

Wisconsin.— Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381.

United States.— Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960 [*reversing* 87 Tex. 604, 30 S. W. 435 (*affirming* 8 Tex. Civ. App. 679, 29 S. W. 90)]; Satterfield *v.* Malone, 35 Fed. 445, 1 L. R. A. 35.

45. See *supra*, III, E, 4, a.

46. *Iowa.*— Louisville Second Nat. Bank *v.* Curren, 36 Iowa 555, holding that the rule that knowledge of the agent is knowledge of the principal cannot be extended beyond the particular transaction in which the agent is authorized to act.

Kentucky.— Day *v.* Exchange Bank, 117 Ky. 357, 78 S. W. 132, 25 Ky. L. Rep. 1449, holding that while knowledge acquired by an agent, in purchasing bank stock from a bank, of the institution's impaired condition, will be imputed to his principal, so as to start limitations against an action for false representations inducing the purchase, similar knowledge acquired some years later, where the same person became agent to effect the stock's sale to third persons, will not be so imputed, the transactions being separate and distinct.

New York.— Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Flanagan *v.* Shaw, 74 N. Y. App. Div. 508, 77 N. Y. Suppl. 1070 [*affirmed* in 174 N. Y. 530, 66 N. E. 1108]; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468 [*reversed* on other grounds in 14 N. Y. 85].

Pennsylvania.—Bracken *v.* Miller, 4 Watts & S. 102; Lightcap *v.* Nicola, 34 Pa. Super. Ct. 189; Chester *v.* Schaffer, 24 Pa. Super. Ct. 162; Arthurs *v.* Bascom, 28 Leg. Int. 284.

United States.— Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371, holding that notice of facts to an agent is constructive notice to his principal only when it comes to the agent while concerned for his principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it.

England.— Mountford *v.* Scott, 3 Madd. 34, 18 Rev. Rep. 189, 56 Eng. Reprint 422 [*affirmed* in Turn. & R. 274, 24 Rev. Rep. 55, 12 Eng. Ch. 274, 37 Eng. Reprint 1105]; Hiern *v.* Mill, 13 Ves. Jr. 114, 9 Rev. Rep. 149, 33 Eng. Reprint 287.

See 40 Cent. Dig. tit. "Principal and Agent," § 685.

Notice to agent in prior transaction for same principal.— Since it is now generally

agency involving distinct transactions separated by considerable periods of time, knowledge acquired by the agent at one period of the agency will charge the principal in a subsequent transaction by the same agent in which the knowledge is material.[47] Knowledge acquired by an agent in a prior transaction will not affect the principal in a subsequent transaction in which the agent does not represent him.[48]

(II) *Prior to Agency.* On the question whether a principal is chargeable with knowledge acquired by an agent prior to the existence of his agency the authorities differ widely, some holding that in order to charge the principal the knowledge must be acquired by the agent during the agency, and that knowledge acquired prior thereto will not affect the principal.[49] The more logical rule, however, and that which is supported by the great weight of recent authority, is that knowledge of an agent acquired prior to the existence of the agency will be chargeable to the principal if it be clearly shown that the agent, while acting for the principal in a transaction to which the information is material, has the information

held that knowledge acquired by an agent in a prior transaction for a different principal may charge a subsequent principal, if present in the agent's mind while he is acting for the latter (see *infra* III, E, 4, c, (II)), it would seem to follow that under the same conditions knowledge acquired by an agent in a prior transaction for the same principal should be imputed to the latter in a subsequent, although disconnected, transaction for him by the agent, to which that knowledge was pertinent. Great Western R. Co. *v.* Wheeler, 20 Mich. 419; Major-banks *v.* Hovenden, Drury 11, 6 Ir. Eq. 238. See Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167; Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371.

47. Cox *v.* Pearce, 112 N. Y. 637, 20 N. E. 566, 3 L. R. A. 563; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Holden *v.* New York, etc., Bank, 72 N. Y. 286, 292 (holding that where the agency is "concerned with a business made up of a long series of transactions of a like nature, of the same general character . . . knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice . . . to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material"); Foote *v.* Utah Commercial, etc., Bank, 17 Utah 283, 54 Pac. 104.

48. Ross *v.* Houston, 25 Miss. 591, 59 Am. Dec. 231; Ehrgott *v.* George Weber Brewing Co., Ohio Prob. 260; Irvine *v.* Grady, 85 Tex. 120, 19 S. W. 1028; Blackburn *v.* Vigors, 12 App. Cas. 531, 6 Aspin. 216, 57 L. J. Q. B. 114, 57 L. T. Rep. N. S. 730, 36 Wkly. Rep. 449.

49. *Alabama.*— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808; McCormick *v.* Joseph, 83 Ala. 401, 3 So. 796; Pepper *v.* George, 51 Ala. 190; Mundine *v.* Pitts, 14 Ala. 84.

Indiana.— Day *v.* Wamsley, 33 Ind. 145.

Kentucky.— Willis *v.* Vallette, 4 Metc. 186; Miller *v.* Jones, 107 S. W. 783, 32 Ky. L. Rep. 1078.

Louisiana.— Plympton *v.* Preston, 4 La. Ann. 356.

Mississippi.— Ross *v.* Houston, 25 Miss. 591, 59 Am. Dec. 231.

Missouri.— Kyle *v.* Gaff, 105 Mo. App. 672, 78 S. W. 1047.

Pennsylvania.— Mencke *v.* Rosenberg, 202 Pa. St. 131, 51 Atl. 767, 90 Am. St. Rep. 618; Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256; Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Bracken *v.* Miller, 4 Watts & S. 102; Hood *v.* Fahnestock, 8 Watts 489, 34 Am. Dec. 489.

South Carolina.— Pritchett *v.* Sessions, 10 Rich. 293.

Tennessee.— Feder *v.* Ervin, (Ch. App. 1896) 38 S. W. 446, 36 L. R. A. 335.

Texas.— Texas Loan Agency *v.* Taylor, 88 Tex. 47, 29 S. W. 1057; Kauffmann *v.* Robey, 60 Tex. 308, 48 Am. Rep. 264; Dawson *v.* Sparks, 1 Tex. Unrep. Cas. 735; Merrill *v.* Southwestern Tel., etc., Co., 31 Tex. Civ. App. 614, 73 S. W. 422.

Canada.— McLachlan *v.* Ætna Ins. Co., 9 N. Brunsw. 173.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 686, 688.

The basis of the rule is the fiction of the legal identity of the principal and the agent. As was said in Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256, 262, "the true reason of the limitation is a technical one, that it is only during the agency that the agent represents, and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be." Another reason for the rule is said to be that no man can be supposed always to carry in his mind the recollection of former occurrences. Snyder *v.* Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130; Hood *v.* Fahnestock, 8 Watts (Pa.) 489, 34 Am. Dec. 489; Satterfield *v.* Malone, 35 Fed. 445, 1 L. R. A. 35. This, however, is held in Houseman *v.*

present in his mind,[50] and if the information was not obtained under such cir-

Girard Mut. Bldg,, etc., Assoc., *supra*, not to be the real reason.

50. *California.*—Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197 (holding that "the rule has, in many instances, and by eminent jurists, been extended so as to deem the principal to have constructive notice of information acquired by the agent prior to, and independent of, the scope of the agency," but adding that "this enlargement . . . which, in a few cases, may prove a salutary one, but which needs to be closely guarded to prevent injustice from the difficulty and uncertainty which must attend its application"); Bierce *v.* Red Bluff Hotel Co., 31 Cal. 160.

Georgia.— Whitten *v.* Jenkins, 34 Ga. 297.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60 (holding, however, that the principal is not charged unless it is clear from the evidence that the information obtained by the agent in the former transaction is so precise and definite that it is or must be present in his mind and memory while engaged in the second transaction); Snyder *v.* Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130.

Iowa.— McClelland *v.* Saul, 113 Iowa 208, 84 N. W. 1034 (holding also that it will be presumed that an agent retains for a reasonable time knowledge obtained prior to the agency); Stennett *v.* Pennsylvania F. Ins. Co., 68 Iowa 674, 28 N. W. 12 (holding, however, that where an agent, in transacting business not connected with his agency, acquires knowledge which might affect a policy subsequently issued by him as agent, evidence of such knowledge cannot be given against the company, where it was acquired so long before the issuance of the policy as not to justify an inference that he had it in mind and acted upon it in issuing the policy); Yerger *v.* Barz, 56 Iowa 77, 8 N. W. 769.

Kansas.— Westerman *v.* Evans, 1 Kan. App. 1, 41 Pac. 675.

Maine.— Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319, holding, however, that to charge the principal the knowledge must be so fully in the agent's mind when transacting the principal's business that it could not have been forgotten by him.

Maryland.— Schwind *v.* Boyce, 94 Md. 510, 51 Atl. 45.

Massachusetts.— Suit *v.* Woodhall, 113 Mass. 391.

Minnesota.— Wilson *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659; Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145.

Mississippi.— Equitable Securities Co. *v.* Sheppard, 78 Miss. 217, 28 So. 842.

Missouri.— Choutcau *v.* Allen, 70 Mo. 290 (holding that the rule that the knowledge of the agent affects the principal may apply to knowledge acquired so shortly before the agency began as necessarily to cause the inference that it remained fixed in the mind of the agent during his employment); Richardson *v.* Palmer, 24 Mo. App. 480 (holding, however, that the knowledge possessed by the agent, to affect the principal, must have come to the agent during his agency, or, if before, it must be so recent that it will be presumed to have been in his mind at the time of the act done by him which is to bind the principal). See George *v.* Wabash Western R. Co., 40 Mo. App. 433.

New Hampshire.— Hovey *v.* Blanchard, 13 N. H. 145.

New Jersey.— Willard *v.* Denise, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788, holding that where information is casually obtained by an agent the principal is not charged with notice from the mere fact of the agent's knowledge, but if the principal acts through the agent in a matter where the information possessed by him is pertinent the knowledge of the agent will be imputed to the principal.

New York.— Slattery *v.* Schwannecke, 118 N. Y. 543, 23 N. E. 922; Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734 (holding, however, that it must very clearly appear that the information was in the agent's mind); Badger *v.* Cook, 117 N. Y. App. Div. 328, 101 N. Y. Suppl. 1067. But see U. S. Bank *v.* Davis, 2 Hill 451.

North Dakota.— Gregg *v.* Baldwin, 9 N. D. 515, 84 N. W. 373.

Tennessee.— Tagg *v.* Tennessee Nat. Bank, 9 Heisk. 479; Union Bank *v.* Campbell, 4 Humphr. 394.

Vermont.— Mullin *v.* Vermont Mut. F. Ins. Co., 58 Vt. 113, 4 Atl. 817; Abell *v.* Howe, 43 Vt. 403; Hart *v.* Farmers', etc., Bank, 33 Vt. 252.

Washington.— Deering *v.* Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

Wisconsin.— Brothers *v.* Kaukauna Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932 (holding that if the agent acquires his information so recently as to make it incredible that he should have forgotten it, his principal will be bound); Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381.

United States.— Harrington *v.* U. S., 11 Wall. 356, 20 L. ed. 167; Brown *v.* Cranberry Iron, etc., Co., 72 Fed. 96, 18 C. C. A. 444; Curts *v.* Cisna, 6 Fed. Cas. No. 3,507, 7 Biss. 260.

England.— Rolland *v.* Hart, L. R. 6 Ch. 678, 40 L. J. Ch. 701, 25 L. T. Rep. N. S. 191, 19 Wkly. Rep. 962; Dresser *v.* Norwood, 17 C. B. N. S. 466, 10 Jur. N. S. 851, 34 L. J. C. P. 48, 11 L. T. Rep. N. S. 111, 12 Wkly. Rep. 1030, 112 E. C. L. 466. But see Le Neve *v.* Le Neve, 3 Atk. 646, 26 Eng. Reprint 1172.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 686, 688.

The basis of this rule is the duty of the agent to inform his principal of any knowledge which he may have material to the transaction in which he represents the latter (see *supra*, III, A, 1, c), the authorities

cumstances as to make it the legal duty of the agent not to divulge it to the principal.[51]

(III) *After Termination of Agency.* A principal is never charged with notice received by an agent after the termination of his agency.[52]

d. Where Presumption Is That Agent Will Not Inform His Principal — (I) *General Rule.* The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal the rule fails when the circumstances are such as to raise a clear presumption that the agent will not perform this duty,[53] and accordingly where the agent is engaged in a transaction in which he is interested adversely to his principal or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein.[54]

which support this rule holding that it is the duty of the agent to inform his principal of all facts of which he has actual knowledge, whether acquired during or prior to the agency (Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167. And see cases cited *supra*, this note).

51. Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; Snyder *v.* Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130; Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167.

Knowledge acquired by an attorney in a prior transaction for another client is held to come within this rule when the knowledge is such that its divulgence is proscribed by the doctrine of privileged communications. Pepper *v.* George, 51 Ala. 190; Mundine *v.* Pitts, 14 Ala. 84; McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Templeman *v.* Hamilton, 37 La. Ann. 754; Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319; Schwind *v.* Boyce, 94 Md. 510, 51 Atl. 45; Littauer *v.* Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572; Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; Union Square Bank *v.* Hellerson, 90 Hun (N Y.) 262, 35 N. Y. Suppl. 871; Akers *v.* Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705; Worsley *v.* Scarborough, 3 Atk. 392, 26 Eng. Reprint 1025 (in which the court said that "it would be very mischievous" if an attorney's previously acquired knowledge could be imparted to his client, "for the man of most practice and greatest eminence would then be the most dangerous to employ"); Warrick *v.* Warrick, 3 Atk. 291, 26 Eng. Reprint 970. But see Haven *v.* Snow, 14 Pick. (Mass.) 28, holding that where the same attorney commenced two actions in favor of two different creditors against the same debtor, and directed the order of the attachments of certain real estate thereon, notice to him of the first attachment was notice to the second attaching creditor. Notice to attorney as notice to client in general see Attorney and Client, 4 Cyc. 933.

52. *Georgia.*— Boardman *v.* Taylor, 66 Ga. 638.

Kentucky.— Miller *v.* Jones, 107 S. W. 783, 32 Ky. L. Rep. 1078.

Missouri.— Anderson *v.* Volmer, 83 Mo. 403; Richardson *v.* Palmer, 24 Mo. App. 480.

Pennsylania.— Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256; Lightcap *v.* Nicola, 34 Pa. Super. Ct. 189.

United States.— Alger *v.* Keith, 105 Fed. 105, 44 C. C. A. 371.

See 40 Cent. Dig. tit. "Principal and Agent," § 687.

53. *Illinois.*— Merchants' Nat. Bank *v.* Nichols, etc., Co., 223 Ill. 41, 79 N. E. 38, 7 L. R. A. N. S. 752; Cowan *v.* Curran, 216 Ill. 598, 75 N. E. 322; Booker *v.* Booker, 208 Ill. 529, 70 N. E. 709, 10 Am. St. Rep. 250.

Iowa.— Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998; Hummel *v.* Monroe Bank, 75 Iowa 689, 37 N. W. 954.

Minnesota.— Benton *v.* Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 N. W. 265.

New Jersey.— Camden Safe Deposit, etc., Co. *v.* Lord, 67 N. J. Eq. 489, 58 Atl. 607.

England.— Cave *v.* Cave, 15 Ch. D. 639.

54. *Alabama.*— Frenkel *v.* Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736; Reid *v.* Mobile Bank, 70 Ala. 199. But see Birmingham First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335, 46 Am. St. Rep. 80, 27 L. R. A. 426, holding that it is the duty of a depositor to examine vouchers returned with his bank-book, and to denounce any check that has been forged; and where such examination is left to a clerk, his knowledge will be the knowledge of the depositor, and it is then his duty to make it known, and the fact that such clerk was the forger is immaterial.

Connecticut.—Willimantic First Nat. Bank *v.* Bevin, 72 Conn. 666, 45 Atl. 954.

Georgia.— Pursley *v.* Stahley, 122 Ga. 362, 50 S. E. 139 (holding that where an agent is guilty of an independent fraud for his own benefit, and to communicate the same would prevent the accomplishment of his fraudulent design, the principal is not charged with notice of his misconduct); English-American L. & T. Co. *v.* Hiers, 112 Ga. 823, 38 S. E. 103.

Illinois.— Cowan *v.* Curran, 216 Ill. 598, 75 N. E. 322; Booker *v.* Booker, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250; Seaverns *v.* Presbyterian Hospital, 173 Ill. 414, 50 N. E. 1079, 64 Am. St. Rep. 125; Merchants' Nat. Bank *v.* Nichols, etc., Co., 123 Ill. App. 430 [*affirmed* in 223 Ill. 41, 79 N. E. 38, 7 L. R. A. N. S. 752]; Jummel *v.* Mann, 80 Ill. App. 288.

Indiana.— Peckham *v.* Hendren, 76 Ind. 47.

Iowa.— Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998; Hummel *v.* Monroe Bank, 75 Iowa

(II) *Collusion Between Agent and Third Person.* The rule charging the principal with his agent's knowledge is established for the protection of those who deal with the agent in good faith.[55] If, therefore, the third person acts in collusion with the agent to defraud the principal, the latter will not be chargeable with any information which the agent receives to the transaction;[56] and this applies

689, 37 N. W. 954; Davenport First Nat. Bank *v.* Gifford, 47 Iowa 575.

Kentucky.— Lyne *v.* Kentucky Bank, 5 J. J. Marsh. 545; Sebald *v.* Citizens Deposit Bank, 105 S. W. 130, 31 Ky. L. Rep. 1244, 14 L. R. A. N. S. 376. But see Mutual L. Ins. Co. *v.* Chosen Friends Lodge No. 2 I. O. O. F., 93 S. W. 1044, 29 Ky. L. Rep. 394.

Louisiana.— Seixas *v.* Citizens' Bank, 38 La. Ann. 424.

Maryland.— Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Chappell *v.* Wysham, 4 Harr. & J. 560.

Massachusetts.— Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577, 58 N. E. 162; Shepard, etc., Lumber Co. *v.* Eldridge, 171 Mass. 516, 51 N. E. 9, 68 Am. St. Rep. 446, 41 L. R. A. 617; Allen *v.* South Boston, etc., R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716 (holding that the real reason for the rule is that a fraud committed by an agent for his own benefit is beyond the scope of his employment); Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; Dillaway *v.* Butler, 135 Mass. 479.

Michigan.—Brown *v.* Harris, 139 Mich. 372, 102 N. W. 960; Ionia State Sav. Bank *v.* Montgomery, 126 Mich. 327, 85 N. W. 879.

Minnesota.— Benton *v.* Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 N. W. 265; Bang *v.* Brett, 62 Minn. 4, 63 N. W. 1067.

Missouri.— Smith *v.* Boyd, 162 Mo. 146, 62 S. W. 439; Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145; Merchants' Nat. Bank *v.* Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770; Johnston *v.* Shortridge, 93 Mo. 227, 6 S. W. 64; Kenneth Inv. Co. *v.* National Bank of Republic, 96 Mo. App. 125, 70 S. W. 173; Butler *v.* Montgomery Grain Co., 85 Mo. App. 50.

Nebraska.— Houghton *v.* Todd, 58 Nebr. 360, 78 N. W. 634 (holding that the knowledge of an agent engaged in an independent fraudulent scheme without the scope of his agency is not the knowledge of his principal); Koehler *v.* Dodge, 31 Nebr. 328, 47 N. W. 913, 28 Am. St. Rep. 518.

New Jersey.— Clement *v.* Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 Atl. 82; Camden Safe Deposit, etc., Co. *v.* Lord, 67 N. J. Eq. 489, 58 Atl. 607; Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33.

New York.— Bienenstok *v.* Ammidown, 155 N. Y. 47, 49 N. E. 321; Benedict *v.* Arnoux, 154 N. Y. 715, 49 N. E. 326; Henry *v.* Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658 [*reversing* 77 Hun 49, 28 N. Y. Suppl. 242]; New York *v.* Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618; Welsh *v.* German-American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Critten *v.* Chemical Nat. Bank, 60 N. Y. App. Div. 241, 70 N. Y. Suppl. 246; City Bank *v.* Barnard, 1 Hall 70; English *v.* Rauchfuss, 21 Misc. 494, 47 N. Y. Suppl. 639.

North Dakota.— Ætna Indemnity Co. *v.* Schroeder, 12 N. D. 110, 95 N. W. 436.

Ohio.— Cincinnati, etc., R. Co. *v.* Urbana Third Nat. Bank, 1 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 109.

Pennsylvania.— United Security L. Ins., etc., Co. *v.* Central Nat. Bank, 185 Pa. St. 586, 40 Atl. 97; Gunster *v.* Scranton Illuminating, etc., Power Co., 181 Pa. St. 327, 37 Atl. 550, 59 Am. St. Rep. 650; Musser *v.* Hyde, 2 Watts & S. 314.

South Carolina.— Knobelock *v.* Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962, holding that knowledge of the agent while engaged in a fraud for his own benefit cannot be imputed to the principal, unless the principal also is benefited by the fraud.

Texas.— Harrington *v.* McFarland, 1 Tex. Civ. App. 289, 21 S. W. 116.

Utah.— Jungk *v.* Reed, 12 Utah 196, 42 Pac. 292.

United States.— American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977; Union Cent. L. Ins. Co. *v.* Robinson, 148 Fed. 358, 78 C. C. A. 268, 8 L. R. A. N. S. 863; Central Coal, etc., Co. *v.* Good, 120 Fed. 793, 57 C. C. A. 161; Overton Bank *v.* Thompson, 118 Fed. 798, 56 C. C. A. 554; Levy, etc., Mule Co. *v.* Kaufman, 114 Fed. 170, 52 C. C. A. 126; Waite *v.* Santa Cruz, 89 Fed. 619; Whittle *v.* Vanderbilt Min., etc., Co., 83 Fed. 48; Louisville Trust Co. *v.* Louisville, etc., R. Co., 75 Fed. 433, 22 C. C. A. 378; Hart *v.* Bier, 74 Fed. 592; Thomson-Houston Electric Co. *v.* Capitol Electric Co., 65 Fed. 341, 12 C. C. A. 643; Lindsey *v.* Lambert Bldg., etc., Assoc., 4 Fed. 48.

England.— Rolland *v.* Hart, L. R. 6 Ch. 678, 40 L. J. Ch. 701, 25 L. T. Rep. N. S. 191, 19 Wkly. Rep. 962; *In re* Europeau Bank, L. R. 5 Ch. App. 358, 39 L. J. Ch. 588, 22 L. T. Rep. N. S. 422, 18 Wkly. Rep. 474; Cave *v.* Cave, 15 Ch. D. 639, 49 L. J. Ch. 656, 43 L. T. Rep. N. S. 158; Thompson *v.* Carthwright, 33 Beav. 178, 55 Eng. Reprint 335 [*affirmed* in 2 De G. J. & S. 10, 9 Jur. N. S. 1215, 33 L. J. Ch. 234, 9 L. T. Rep. N. S. 431, 3 New Rep. 144, 12 Wkly. Rep. 116, 67 Eng. Ch. 10, 46 Eng. Reprint 277]; Kennedy *v.* Green, 3 Myl. & K. 699, 10 Eng. Ch. 699, 40 Eng. Reprint 266.

Canada.— Commercial Bank *v.* Morrison, 32 Can. Sup. Ct. 98; Commercial Bank *v.* Smith, 34 Nova Scotia 426.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 689–690.

55. National L. Ins. Co. *v.* Minch, 53 N. Y. 144; Pennoyer *v.* Willis, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594.

56. *Illinois.*— Cowan *v.* Curran, 216 Ill. 598, 75 N. E. 322.

with greater force where the third person instructs the agent or enters into an agreement with him not to communicate his knowledge to the principal.[57]

e. Notice to Subagent. Whether a principal is chargeable with notice to or knowledge of a subagent depends upon the authority of the primary agent to appoint the subagent. Where the primary agent has such authority under contract or by custom the principal will be charged with the subagent's knowledge;[58] if he has not such authority the principal will not be charged.[59]

f. Notice to Agent For Both Parties. Notice to an agent who with their knowledge and consent represents both parties to a transaction is notice to either of them to whom it would be notice if the agent represented him alone, and if each would be charged the notice to the agent is notice to both.[60] If, however, either party does not know that the agent is acting for the other, the agent's knowledge will not affect him who is ignorant thereof.[61]

F. Liability of Third Person to Principal — 1. On Contract — a. Disclosed Principal — (i) *In General.* The rule is well recognized that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, a person so contracting with the agent is responsible to the principal for any breach of the contract;[62] and the fact that such principal is a foreigner does not alter this rule.[63]

Iowa.— Van Buren County *v.* American Surety Co., (1908) 115 N. W. 24.

Missouri.— Hickman *v.* Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39.

Nebraska.— Pringle *v.* Modern Woodmen of America, 76 Nebr. 384, 107 N. W. 756, 113 N. W. 231.

Texas.— Cooper *v.* Ford, 29 Tex. Civ. App. 253, 69 S. W. 487; Campbell *v.* Crowley, (Civ. App. 1900) 56 S. W. 373; Scripture *v.* Scottish-American Mortg. Co., 20 Tex. Civ. App. 153, 49 S. W. 644; People's Bldg., etc., Assoc. *v.* Dailey, 17 Tex. Civ. App. 38, 42 S. W. 364.

Wisconsin.— Cole *v.* Getzinger, 96 Wis. 559, 71 N. W. 75.

United States.— Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705; McCourt *v.* Singers-Bigger, 145 Fed. 103, 76 C. C. A. 73; Hudson *v.* Randolph, 66 Fed. 216, 13 C. C. A. 402; Western Mortg., etc., Co. *v.* Ganzer, 63 Fed. 647, 11 C. C. A. 371.

See 40 Cent. Dig. tit. "Principal and Agent," § 690.

57. Lenhart *v.* St. Louis, etc., R. Co., 62 Mo. App. 90; Pennoyer *v.* Willis, 26 Oreg. 1, 36 Pac. 568, 46 Am. St. Rep. 594.

58. Carpenter *v.* German American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Arff *v.* Star F. Ins. Co., 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. Rep. 721, 10 L. R. A. 609; Chase *v.* People's F. Ins. Co., 14 Hun (N. Y.) 456; Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273; Bates *v.* American Mortg. Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340; Hoover *v.* Wise, 91 U. S. 308, 23 L. ed. 392, holding also that a principal is not chargeable with knowledge of an agent employed by an intermediate independent employer.

59. Peabody Bldg. Assoc. *v.* Houseman, 7 Wkly. Notes Cas. (Pa.) 193; Smith *v.* Boatman Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119.

60. *Minnesota.*— William Bergenthal Co. *v.* Monticello Security State Bank, 102 Minn. 138, 112 N. W. 892.

Missouri.— Smith *v.* Farrell, 66 Mo. App. 8.

New Jersey.— Losey *v.* Simpson, 11 N. J. Eq. 246.

United States.— Pine Mountain Iron, etc., Co. *v.* Bailey, 94 Fed. 258, 36 C. C. A. 229.

England.— Hewitt *v.* Loosemore, 9 Hare 449, 15 Jur. 1097, 21 L. J. Ch. 69, 41 Eng. Ch. 449, 68 Eng. Reprint 586; Toulmin *v.* Steere, 3 Meriv. 210, 17 Rev. Rep. 67, 36 Eng. Reprint 81; Kennedy *v.* Green, 3 Myl. & K. 699, 10 Eng. Ch. 699, 40 Eng. Reprint 266. See Dryden *v.* Frost, 2 Jur. 1030, 8 L. J. Ch. 235, 3 Myl. & C. 670, 14 Eng. Ch. 670, 40 Eng. Reprint 1084.

61. De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 158; Bunton *v.* Palmer, (Tex. 1888) 9 S. W. 182.

Effect of collusion between agent and third person see *supra*, III, E, 4, d, (II).

62. *Indiana.*— Sharp *v.* Jones, 18 Ind. 314, 81 Am. Dec. 359.

New York.— Rand *v.* Moulton, 72 N. Y. App. Div. 236, 76 N. Y. Suppl. 174; Waldorf *v.* Simpson, 15 N. Y. App. Div. 297, 44 N. Y. Suppl. 921.

Vermont.—Arlington *v.* Hinds, 1 D. Chipm. 431, 12 Am. Dec. 704.

United States.— Moline Malleable Iron Co. *v.* York Iron Co., 83 Fed. 66, 27 C. C. A. 442.

England.— Fairlie *v.* Fenton, L. R. 5 Exch. 169, 39 L. J. Exch. 107, 22 L. T. Rep. N. S. 373, 18 Wkly. Rep. 700; Pratt *v.* Willey, 2 C. & P. 350, 12 E. C. L. 611.

Loss or waiver of right.— An entry on the books of the principal of an account and settlement between himself and his agent, made in ignorance of the actual dealings of the agent with a third person, cannot bind the principal or defeat him from recovering the amount actually due on a contract made by the agent for his principal's benefit. Rogers *v.* Holden, 142 Mass. 196, 7 N. E. 768.

63. *Massachusetts.*—Barry *v.* Page, 10 Gray 398.

(II) *Defenses and Equities.*[64] Equities arising between the third person and a known agent cannot as a rule be set up against the principal when he sues on the contract made by the agent as such with the third person.[65] Where, however, an agent takes a promissory note for his principal, payable to himself, and then transfers it to his principal, the principal stands in the position of the original holder, and the note in his hands is subject to whatever defenses might have been made to it in the hands of the agent.[66] And where a principal accepts a contract made by the agent, he takes it as the agent made it, and subject to all equities and defenses arising out of the conditions thereof, and the means and instrumentalities by which the agent procured it, even though the agent acted without authority or in excess of his powers.[67]

b. Undisclosed Principal — (I) *In General.* As a corollary to the well-recognized principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal,[68] the rule is elementary that an undisclosed principal may appear and hold the other party to the contract made with the agent.[69] However, a person has a right to determine with whom

New Hampshire.— Kaulback *v.* Churchill, 59 N. H. 296.

New York.— Taintor *v.* Prendergast, 3 Hill 72, 38 Am. Dec. 618; Kirkpatrick *v.* Stainer, 22 Wend. 244.

North Carolina.— Barham *v.* Bell, 112 N. C. 131, 16 S. E. 903.

United States.— Oelricks *v.* Ford, 23 How. 49, 16 L. ed. 534.

Canada.— Webb *v.* Sharman, 34 U. C. Q. B. 410.

In England, by usage of trade, the foreign principal cannot hold the other party to the contract made with the agent, unless there is something in the bargain showing the intention to be otherwise. Elbinger Actien-Gesellschaft *v.* Claye, L. R. 8 Q. B. 313, 42 L. J. Q. B. 151, 28 L. T. Rep. N. S. 405.

64. Fraud of agent as a defense see *infra*, III, F, 1, c.

Illegality of agency as a defense see Contracts, 9 Cyc. 546 *et seq.*; Gaming, 20 Cyc. 741 *et seq.*

Payment to agent as a defense see *infra*, III, F, 1, d, (I).

65. Wright *v.* Cabot, 89 N. Y. 570 [*affirming* 47 N. Y. Super. Ct. 229].

66. Hutchinson *v.* Hutchinson, 46 Me. 154. And see McCormick Harvesting Mach. Co. *v.* Taylor, 5 N. D. 53, 63 N. W. 890, 57 Am. St. Rep. 538, holding that if an agent for the sale of machinery sells machinery of his own and takes in payment therefor a horse, which he afterward sells with a warranty, taking in payment therefor a note made payable to his principal, and the latter, being ignorant of the transaction and supposing that the note was taken in payment for his own machinery, receives the note upon a settlement of the agency account and gives his agent a credit for the full amount thereof, the maker of the note may, in an action upon it by the payee, set up a breach of warranty of the horse, and defeat a recovery.

67. *Iowa.*— Davis *v.* Danforth, 65 Iowa 601, 22 N. W. 889, where plaintiffs' agent, who was authorized to take orders for wagons and carriages and transmit them to plaintiffs, took defendants' order, but defendants, not being content with plaintiffs' printed and published warranty, demanded a further warranty, whereupon a warranty was written out by the agent in duplicate, one copy of which was left with defendants and the other of which the agent agreed to forward with the order to his principals for their acceptance or rejection; and he sent the order to the principals but failed to send the warranty, and plaintiffs forwarded the wagons and carriages without any knowledge of the written warranty, and the goods did not fulfil the conditions thereof; and it was held that plaintiffs were liable to the same extent as if the goods had been sold by them upon that warranty.

Louisiana.— Findley *v.* Breedlove, 4 Mart. N. S. 105.

Massachusetts.— Brigham *v.* Palmer, 3 Allen 450.

Michigan.— Davis *v.* Kneale, 97 Mich. 72, 56 N. W. 220, holding that the fact that agents canvassing for subscriptions to a manufacturing plant to be put in by their principals had no authority to accept signatures on condition is no reply to the defense of one so signing that the condition had not been complied with.

Mississippi.— Bowers *v.* Johnson, 10 Sm. & M. 169.

New York.— Elwell *v.* Chamberlin, 31 N. Y. 611.

South Dakota.— Union Trust Co. *v.* Phillips, 7 S. D. 225, 63 N. W. 903.

And see *infra*, III, F, 1, b, (V), (A).

Ratification of authorized contract as ratification of unauthorized conditions see *supra*, I, F, 2, f.

68. See *supra*, III, E, 1, b.

69. *Alabama.*— Sellers, etc., Co. *v.* Malone-Pilcher Co., 151 Ala. 426, 44 So. 414; Western Union Tel. Co. *v.* Manker, (1906) 41 So. 850; Manker *v.* Western Union Tel. Co., 137 Ala. 292, 34 So. 839; Bell *v.* Reynolds, 78 Ala. 511, 56 Am. Rep. 52.

Connecticut.—Sullivan *v.* Shailor, 70 Conn. 733, 40 Atl. 1054.

Georgia.— Propeller Tow-Boat Co. *v.* Western Union Tel. Co., 124 Ga. 478, 52 S. E. 766; Woodruff *v.* McGehee, 30 Ga. 158.

Illinois.— Delaware, etc., R. Co. *v.* Thayer,

he will contract, and he cannot have another person thrust upon him against his expressed will.[70] Accordingly if a person, in contracting with an agent whose agency is unknown, gives exclusive credit to the agent, as where he imposes personal trust or confidence in the agent or relies on his solvency or his special knowledge or skill, the principal cannot come forward and hold the other party to the contract.[71]

(II) *Contracts of Sale.* An undisclosed principal may claim the benefit of a contract of sale of his property by his agent, and may maintain an action thereon, and enforce any remedies which might have been pursued by the agent himself.[72]

41 Ill. App. 192; Warder *v.* White, 14 Ill. App. 50.

Iowa.— Young *v.* Lohr, 118 Iowa 624, 92 N. W. 684.

Massachusetts.— Foster *v.* Graham, 166 Mass. 202, 44 N. E. 129; Merrill *v.* Norfolk Bank, 19 Pick. 32; Kelley *v.* Munson, 7 Mass. 319, 5 Am. Dec. 47.

Minnesota.— Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412.

Missouri.— Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300 [*overruling* 102 Mo. 522, 15 S. W. 62].

New York.— Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; Wiehle *v.* Saffold, 27 Misc. 562, 58 N. Y. Suppl. 298; Johnson *v.* Doll, 11 Misc. 345, 32 N. Y. Suppl. 132; Gubner *v.* Vick, 6 N. Y. St. 4; Taintor *v.* Prendergast, 3 Hill 72, 38 Am. Dec. 618; Beebee *v.* Robert, 12 Wend. 413, 27 Am. Dec. 132.

Ohio.— Marine Ins. Co. *v.* Walsh-Upstill Coal Co., 23 Ohio Cir. Ct. 191.

Oregon.— Kitchen *v.* Holmes, 42 Oreg. 252, 70 Pac. 830.

Pennsylvania.— Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720.

Tennessee.— Foster *v.* Smith, 2 Coldw. 474, 88 Am. Dec. 604.

Vermont.— Culver *v.* Bigelow, 43 Vt. 249; Wait *v.* Johnson, 24 Vt. 112.

Virginia.— National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

West Virginia.— Coulter *v.* Blatchley, 51 W. Va. 163, 41 S. E. 133.

Wisconsin.— Wilson *v.* Groelle, 83 Wis. 530, 53 N. W. 900; McNair *v.* Rewey, 62 Wis. 167, 22 N. W. 339.

United States.— Ford *v.* Williams, 21 How. 287, 16 L. ed. 36; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. 344, 12 L. ed. 465; Rea *v.* Barker, 135 Fed. 890.

England.—North Western Bank *v.* Poynter, [1895] A. C. 56, 64 L. J. C. P. 27, 72 L. T. Rep. N. S. 93, 11 Reports 125; Langton *v.* Waite, L. R. 6 Eq. 165, 37 L. J. Ch. 345, 18 L. T. Rep. N. S. 80, 16 Wkly. Rep. 508; Lisset *v.* Reave, 2 Atk. 394, 26 Eng. Reprint 638; McCaul *v.* Strauss, Cab. & E. 106; Phelps *v.* Prothero, 16 C. B. 370, 3 C. L. R. 906, 1 Jur. N. S. 1170, 24 L. J. C. P. 225, 81 E. C. L. 370; Humphrey *v.* Lucas, 2 C. & K. 152, 61 E. C. L. 152 (holding that if a broker enters into a contract for an undisclosed principal, the latter may sue on the contract in his own name; and a rule of the exchange on which the contract was made which declares that a contract made by a broker for an undisclosed principal shall be regarded as the contract of the broker only does not control this right, even though the principal was cognizant of the rule); Cooke *v.* Seeley, 2 Exch. 746, 17 L. J. Exch. 286; Grojan *v.* Wade, 2 Stark. 443, 3 E. C. L. 481.

Canada.— Crawford *v.* Fraser, 21 U. C. Q. B. 518; Mair *v.* Holton, 4 U. C. Q. B. 505.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 502, 503.

Election to hold agent.— Where an agent sold goods without disclosing his principal, and the principal understood from the buyers' statement that they had paid the agent therefor, the bringing of suit by the principal against the agent was no defense to a subsequent action by the principal against the buyers. Bertoli *v.* Smith, 69 Vt. 425, 38 Atl. 76.

Right of undisclosed principal to avail himself of guaranty addressed to agent see Guaranty, 20 Cyc. 1428 *et seq.*

70. See Contracts, 9 Cyc. 386.

71. *Alabama.*— Birmingham Matinée Club *v.* McCarty, (1907) 44 So. 642.

Illinois.— Cowan *v.* Curran, 216 Ill. 598, 75 N. E. 322. To the contrary see Warder *v.* White, 14 Ill. App. 50 [*citing* Grojan *v.* Wade, 2 Stark. 443, where it appeared that the other contracting party would not be prejudiced by allowing the principal to sue on the contract].

Maryland.— See Whiting *v.* William H. Crawford Co., 93 Md. 390, 49 Atl. 615, holding that where a manufacturer refuses to sell goods to a broker on account of the broker's principal, but offers to sell the goods to the broker individually, who purchases the same, representations by the broker to his principal that the goods have been purchased for the latter do not render the manufacturer liable to the latter.

Massachusetts.— Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93.

New York.— Moore *v.* Vulcanite Portland Cement Co., 121 N. Y. App. Div. 667, 106 N. Y. Suppl. 393. See, however, Wiehle *v.* Safford, 27 Misc. 562, 58 N. Y. Suppl. 298, where the facts were held not to bring the case within the exception to the general rule.

To the contrary see Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300 [*overruling* 102 Mo. 522, 15 S. W. 62].

72. *Colorado.*—Parker *v.* Cochrane, 11 Colo. 363, 18 Pac. 209.

Illinois.— Rice, etc., Malting Co. *v.* Inter-

(III) *Contracts For Transportation.* Where an agent contracts in his own name for the transportation of goods without disclosing the name of his principal, the principal has a right of action against the carrier for failure to comply with the contract, or for loss of or injury to the property.[73]

(IV) *Written Contracts; Sealed Contracts; Negotiable Instruments.* The rule that an undisclosed principal may maintain an action on a contract made by his agent in his name alone, on proof that in making the contract the agent was acting for the principal, is not varied by the fact that such contract was in writing.[74] There are, however, exceptions to the rule. In jurisdictions where the distinction between sealed and unsealed instruments is still recognized, a contract under seal made by an agent in his own name cannot be sued upon by the principal; [75] and in the case of a negotiable instrument, made payable to the agent, the principal cannot maintain an action thereon, unless he obtains the right to sue by indorsement or transfer.[76]

national Bank, 86 Ill. App. 136 [*affirmed* in 185 Ill. 422, 56 N. E. 1062]; Havanna, etc., R. Co. *v.* Walsh, 85 Ill. 58.

Indiana.— Johnson *v.* Hoover, 72 Ind. 395. See also Summers *v.* Hutson, 48 Ind. 228.

Maine.— Cushing *v.* Rice, 46 Me. 303, 71 Am. Dec. 577.

Maryland.— Noel Constr. Co. *v.* Atlas Portland Cement Co., 103 Md. 209, 63 Atl. 384; Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417; Oelrichs *v.* Ford, 21 Md. 489.

Michigan.— Jenness *v.* Shaw, 35 Mich. 20.

Minnesota.— Haines *v.* Starkey, 82 Minn. 230, 84 N. W. 910.

Missouri.— Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300 [*overruling* 102 Mo. 522, 15 S. W. 62].

North Carolina.— Nicholson *v.* Dover, 145 N. C. 18, 58 S. E. 444, 13 L. R. A. N. S. 167; Cowan *v.* Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829.

Vermont.— Bertoli *v.* Smith, 69 Vt. 425, 38 Atl. 76; Edwards *v.* Golding, 20 Vt. 30.

England.— Layton *v.* Smith, 17 Nova Scotia 331. See also Norfolk *v.* Worthy, 1 Campb. 337, 10 Rev. Rep. 749.

Canada.— Hudon Cotton Co. *v.* Canada Shipping Co., 13 Can. Sup. Ct. 401; McCarthy *v.* Cooper, 8 Ont. 316 [*affirmed* in 12 Ont. App. 284].

See 40 Cent. Dig. tit. "Principal and Agent," § 504.

73. *Minnesota.*— Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412.

New Hampshire.— Elkins *v.* Boston, etc., R. Co., 19 N. H. 337, 51 Am. Dec. 184.

New York.— Talcott *v.* Wabash R. Co., 159 N. Y. 461, 54 N. E. 1 [*modifying* 89 Hun 492, 35 N. Y. Suppl. 574]; Trimble *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 403, 57 N. Y. Suppl. 437 [*affirmed* in 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115]. See Talcott *v.* Wabash R. Co., 109 N. Y. App. Div. 491, 96 N. Y. Suppl. 548 [*affirming* 39 Misc. 443, 80 N. Y. Suppl. 149].

Pennsylvania.— Cumberland Valley R. Co. *v.* Hughes, 11 Pa. St. 141, 51 Am. Dec. 513.

Texas.— Pacific Express Co. *v.* Redman, (Civ. App. 1901) 60 S. W. 677.

United States.— New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 12 L. ed. 465.

74. *Alabama.*— Powell *v.* Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915.

Maine.— Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

Maryland.— Oelrichs *v.* Ford, 21 Md. 489.

Massachusetts.— Huntington *v.* Knox, 7 Cush. 371.

New Hampshire.— Bryant *v.* Wells, 56 N. H. 152.

New York.— Sherman *v.* New York Cent. R. Co., 22 Barb. 239; Nicoll *v.* Burke, 8 Abb. N. Cas. 213.

North Carolina.— Barham *v.* Bell, 112 N. C. 131, 16 S. E. 903.

Pennsylvania.— Messier *v.* Amery, 1 Yeates 533, 1 Am. Dec. 316.

Texas.— Edwards *v.* Ezell, 2 Tex. App. Civ. Cas. § 276.

United States.— Darrow *v.* H. R. Horne Produce Co., 57 Fed. 463.

See 40 Cent. Dig. tit. "Principal and Agent," § 506.

Parol evidence showing that in the making of the contract the agent was acting for the principal does not contradict the writing; it only explains the transaction. See *infra*, IV, E, 2, a. (I), (J), 2, b.

75. *Illinois.*— Stockbarger *v.* Sain, 69 Ill. App. 436; Equitable L. Assur. Co. *v.* Smith, 25 Ill. App. 471.

Kentucky.— Violett *v.* Powell, 10 B. Mon. 347, 52 Am. Dec. 548.

Missouri.— State *v.* O'Neill, 74 Mo. App. 134.

New York.— Henricus *v.* Englert, 137 N. Y. 488, 33 N. E. 550; Schaefer *v.* Henkel, 75 N. Y. 378; Briggs *v.* Patridge, 64 N. Y. 357, 21 Am. St. Rep. 517; Spencer *v.* Field, 10 Wend. 87.

Tennessee.— Cocke *v.* Dickens, 4 Yerg. 35, 26 Am. Dec. 214.

United States.— Clarke *v.* Courtney, 5 Pet. 319, 8 L. ed. 140.

England.— Sims *v.* Bond, 5 B. & Ad. 389, 2 N. & M. 608, 27 E. C. L. 168.

76. *Alabama.*— Moore *v.* Penn, 5 Ala. 135.

Massachusetts.— Fuller *v.* Hooper, 3 Gray 334.

New Hampshire.— Chandler *v.* Coe, 54 N. H. 561.

North Carolina.— Grist *v.* Backhouse, 20 N. C. 496.

United States.— U. S. Bank *v.* Lyman, 2

(v) *Defenses and Equities*[77] — (a) *In General.* Where a third person who has entered into a contract with an agent in ignorance of the fact that he was not the real principal, as he assumed to be, is sued upon the contract by the principal, he may avail himself of every defense which existed in his favor against the agent at the time the principal first demanded fulfilment of the contract.[78]

(b) *Set-Off and Counter-Claim* — (1) General Rule. The general rule is that a person contracting with an agent in his own name without notice of the agency may set off a debt due to him from the agent personally in an action by the principal;[79] and this right is not affected by the fact that the agent in contract-

Fed. Cas. No. 924, 1 Blatchf. 297, 20 Vt. 666.

See Commercial Paper, 8 Cyc. 66; and *infra*, IV, C, 1, b, (v).

77. **Fraud of agent as a defense** see *infra*, III, F, 1, c.

Illegality of agency as a defense see Contracts, 9 Cyc. 546 *et seq.*; Gaming, 20 Cyc. 741 *et seq.*

Payment to agent as a defense see *infra*, III, F, 1, d, (II).

78. *California.*— Amann *v.* Lowell, 66 Cal. 306, 5 Pac. 363; Ruiz *v.* Norton, 4 Cal. 355, 20 Am. Dec. 618.

Georgia.— McConnell *v.* East Point Land Co., 100 Ga. 129, 28 S. E. 80; Peel *v.* Shepherd, 58 Ga. 365; Woodruff *v.* McGehee, 30 Ga. 158.

Illinois.— Wiser *v.* Springside Coal Min. Co., 94 Ill. App. 471.

Kentucky.— Tutt *v.* Brown, 5 Litt. 1, 15 Am. Dec. 33.

Maine.— Hook *v.* Crowe, 100 Me. 399, 61 Atl. 1080.

Maryland.— Baltimore Coal Tar, etc., Co. *v.* Fletcher, 61 Md. 288; Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417; York County Bank *v.* Stein, 24 Md. 447.

Massachusetts.— Huntington *v.* Knox, 7 Cush. 371; Ilsley *v.* Merriam, 7 Cush. 242, 54 Am. Dec. 721.

Minnesota.— Lough *v.* Thornton, 17 Minn. 253.

Missouri.— Henderson *v.* Botts, 56 Mo. App. 141.

New Jersey.— Bernshouse *v.* Abbott, 45 N. J. L. 531, 46 Am. Rep. 789.

New York.— Van Lien *v.* Byrnes, 1 Hilt. 133; Bliss *v.* Sherrill, 42 N. Y. Suppl. 432; Taintor *v.* Prendergast, 3 Hill 72, 38 Am. Dec. 618.

Ohio.— Miller *v.* Sullivan, 39 Ohio St. 79; Hitchcock *v.* Kelley, 18 Ohio Cir. Ct. 808, 4 Ohio Cir. Dec. 180.

Pennsylvania.—Matter of Merrick, 2 Ashm. 485 [*reversed* on another point in 5 Watts & S. 9].

Tennessee.— Foster *v.* Smith, 2 Coldw. 474, 88 Am. Dec. 604.

England.— Mildred *v.* Maspous, 8 App. Cas. 874, 5 Aspin. 182, 53 L. J. Q. B. 33, 49 L. T. Rep. N. S. 685, 32 Wkly. Rep. 125; *Ex p.* Dixon, 4 Ch. D. 133, 46 L. J. Bankr. 20, 35 L. T. Rep. N. S. 644, 25 Wkly. Rep. 105; Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38, 43 L. J. C. P. 3, 29 L. T. Rep. N. S. 689, 22 Wkly. Rep. 92; Semenza *v.* Brinsley, 18 C. B. N. S. 467, 11 Jur. N. S. 409, 34 L. J. C. P. 161, 12 L. T. Rep. N. S. 265, 13 Wkly. Rep. 634, 114 E. C. L. 467; George *v.* Claggett, 2 Esp. 557, Peake Add. Cas. 131, 7 T. R. 355, 4 Rev. Rep. 462.

See 40 Cent. Dig. tit. "Principal and Agent," § 508.

Notice of agency.— If the third person, at the time he contracts with the agent, knows of the agency or has sufficient information fairly to infer its existence, he cannot, as against the principal, set up equities arising between him and the agent (Pratt *v.* Willey, 2 C. & P. 350, 12 E. C. L. 611), although the principal's name is not disclosed (Wright *v.* Cabot, 89 N. Y. 570 [*affirming* 47 N. Y. Super. Ct. 229]).

The contract which an unknown principal may claim the benefit of is the entire contract as made by the agent, and not a part of it. Delaware, etc., R. Co. *v.* Thayer, 41 Ill. App. 192. And see Roosevelt *v.* Doherty, 129 Mass. 301, 37 Am. Rep. 356; and *supra*, III, F, 1, a, (II). Ratification of authorized contract as ratification of unauthorized conditions see *supra*, I, F, 2, f.

79. *Alabama.*— Gardner *v.* Allen, 6 Ala. 187, 41 Am. Dec. 45.

Arkansas.— Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33.

Georgia.— Ruan *v.* Gunn, 77 Ga. 53; Durant Lumber Co. *v.* Sinclair, etc., Lumber Co., 2 Ga. App. 209, 58 S. E. 485.

Illinois.— Stinson *v.* Gould, 74 Ill. 80.

Kentucky.— Violett *v.* Powell, 10 B. Mon. 347, 52 Am. Dec. 548; Tutt *v.* Brown, 5 Litt. 1, 15 Am. Dec. 33.

Maryland.— Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417.

Missouri.— Greene *v.* Chickering, 10 Mo. 109.

New York.— Burnham *v.* Eyre, 123 N. Y. App. Div. 777, 108 N. Y. Suppl. 452; Pollacek *v.* Scholl, 51 N. Y. App. Div. 319, 64 N. Y. Suppl. 979; Pratt *v.* Collins, 20 Hun 126; Tannebaum *v.* Marsellus, 3 Misc. 351, 22 N. Y. Suppl. 928; Hogan *v.* Shorb, 24 Wend. 458.

Pennsylvania.— Belfield *v.* National Supply Co., 189 Pa. St. 189, 42 Atl. 131, 69 Am. St. Rep. 799; Frame *v.* William Penn Coal Co., 97 Pa. St. 309; Finn-Vipond Constr. Co. *v.* Wolf, 12 Pa. Super. Ct. 317.

England.— *Ex p.* Dixon, 4 Ch. D. 133, 46 L. J. Bankr. 20, 35 L. T. Rep. N. S. 644, 25 Wkly. Rep. 105.

See 40 Cent. Dig. tit. "Principal and Agent," § 509.

See, however, Stevenson *v.* Kyle, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854, holding that if an agent sells the principal's

ing in his own name without disclosing the agency is acting in contravention of the express directions of his principal.[80]

(2) Limitation of Rule.[81] The general rule stated in the preceding section does not apply where the third person has notice, actual or constructive, that the agent is not the principal.[82] Accordingly a person purchasing from an agent who has neither the possession nor other *indicia* of property in himself is not entitled to set off a debt due to him from the agent when sued by the undisclosed principal, since the absence of such apparent title or authority is sufficient to put the purchaser upon inquiry as to the agent's true position in the transaction.[83] Thus the English rule, followed by many American cases, is that purchasers from a broker who does not disclose his principal cannot set off a debt due them by the broker against the owner, since the broker is employed without being put into possession of the goods; but that it is otherwise as to factors, who are intrusted with the possession as well as the disposition of the property.[84] And if the character of one of the contracting parties is equivocal — if he is known to be in the habit of contracting sometimes as principal and sometimes as agent, a purchaser who buys with a view of covering his own debt and availing himself of a set-off is bound to inquire in what character he is acting in the particular transaction; and if the purchaser chooses to make no inquiry, and it should appear that he has contracted with an undisclosed principal, he will be denied the benefit of his set-off.[85] If an

property and takes in payment an order on a third person in his own name, the principal may compel payment of the order free from any set-off as between the agent and the third person, although the latter knew nothing of the agency.

Right of bank to set off agent's debt against deposit made for principal see Banks and Banking, 5 Cyc. 551 note 57.

80. *Georgia.*— Peel *v.* Shepherd, 58 Ga. 365.
Iowa.— Eclipse Wind Mill Co. *v.* Thorson, 46 Iowa 181.
Vermont.— Squires *v.* Barber, 37 Vt. 558.
England.— Stevens *v.* Biller, 25 Ch. D. 31, 53 L. J. Ch. 249, 50 L. T. Rep. N. S. 36, 32 Wkly. Rep. 419; *Ex p.* Dixon, 4 Ch. D. 133, 46 L. J. Bankr. 20, 35 L. T. Rep. N. S. 644, 25 Wkly. Rep. 105.
Canada.— Bowmanville Mach. Co. *v.* Dempster, 2 Can. Sup. Ct. 21 [*affirming* 11 Nova Scotia 273]; Smith *v.* Grouette, 2 Manitoba 314; Baird *v.* Anderson, 3 Nova Scotia Dec. 181.

81. Estoppel of third person to deny agency or authority see *supra*, I, E, 2, c.

82. Rhea *v.* Buckley Custom Shirt Mfg. Co., 81 Mo. App. 400; McLachlin *v.* Brett, 105 N. Y. 394, 12 N. E. 17; Moline Malleable Iron Co. *v.* York Iron Co., 83 Fed. 66, 27 C. C. A. 442; Semenza *v.* Brinsley, 18 C. B. N. S. 467, 11 Jur. N. S. 409, 34 L. J. C. P. 161, 12 L. T. Rep. N. S. 265, 13 Wkly. Rep. 634, 114 E. C. L. 467; Dresser *v.* Norwood, 17 C. B. N. S. 466, 10 Jur. N. S. 851, 34 L. J. C. P. 48, 11 L. T. Rep. N. S. 111, 12 Wkly. Rep. 1030, 112 E. C. L. 466.

83. *Arkansas.*— Frazier *v.* Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33.
Georgia.— Rosser *v.* Darden, 82 Ga. 219, 7 So. 919, 14 Am. St. Rep. 152.
Illinois.— Clark *v.* Smith, 88 Ill. 298; Stinson *v.* Gould, 74 Ill. 80.
Maine.— Traub *v.* Milliken, 57 Me. 63, 2 Am. Rep. 14.
Michigan.— Kornemann *v.* Monaghan, 24 Mich. 36.
New Jersey.— Bersnhouse *v.* Abbott, 45 N. J. L. 531, 46 Am. Rep. 789.
New York.—Pratt *v.* Collins, 20 Hun 126; Harrison *v.* Ross, 44 N. Y. Super. Ct. 230 [*affirmed* in 80 N. Y. 646]. See also Mull *v.* Ingalls, 30 Misc. 80, 62 N. Y. Suppl. 830 [*affirmed* in 62 N. Y. App. Div. 631, 71 N. Y. Suppl. 1142].
North Carolina.— See Brown *v.* Morris, 83 N. C. 251.
Ohio.— Crosby *v.* Hill, 39 Ohio St. 100.
Vermont.— Bertoli *v.* Smith, 69 Vt. 425, 28 Atl. 76.
England.— Pearson *v.* Scott, 9 Ch. D. 198, 47 L. J. Ch. 705, 38 L. T. Rep. N. S. 747, 26 Wkly. Rep. 796; Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38, 43 L. J. C. P. 3, 29 L. T. Rep. N. S. 689, 22 Wkly. Rep. 92; Semenza *v.* Brinsley, 18 C. B. N. S. 467, 11 Jur. N. S. 409, 34 L. J. C. P. 161, 12 L. T. Rep. N. S. 265, 13 Wkly. Rep. 634, 114 E. C. L. 467; Rabone *v.* Williams, 7 T. R. 360 note, 4 Rev. Rep. 463 note.

84. Butler *v.* Dorman, 68 Mo. 298, 30 Am. Rep. 795; Bliss *v.* Bliss, 7 Bosw. (N. Y.) 339; Hogan *v.* Shorb, 24 Wend. (N. Y.) 458; *Ex p.* Dixon, 4 Ch. D. 133, 46 L. J. Bankr. 20, 35 L. T. Rep. N. S. 644, 25 Wkly. Rep. 105; Baring *v.* Corrie, 2 B. & Ald. 137, 20 Rev. Rep. 383; Semenza *v.* Brinsley, 18 C. B. N. S. 467, 11 Jur. N. S. 409, 34 L. J. C. P. 161, 12 L. T. Rep. N. S. 265, 13 Wkly. Rep. 634, 114 E. C. L. 467. *Contra*, as to factors, see Dortic *v.* Jeffers, 10 Rich. (S. C.) 83.

85. Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417; Baxter *v.* Sherman, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631; Judson *v.* Stilwell, 26 How. Pr. (N. Y.) 513; Browne *v.* Robinson, 2 Cai. Cas. (N. Y.) 341; Baring *v.* Corrie, 2 B. & Ald. 137, 20 Rev. Rep. 383; Fish *v.* Kempton, 7 C. B. 687, 13 Jur. 750, 18 L. J. C. P. 206, 62 E. C. L. 687; Semenza

agent makes a contract in behalf of an undisclosed principal and deposits money of the principal with the other party as security for performance, the other party cannot set off a debt due him from the agent personally when the principal, after performance of the contract, sues to recover the deposit.[86] It is essential that the set-off, in order to be available, should be due and payable at the time when the right to offset equities is claimed.[87]

c. Fraud of Agent as Defeating Liability. A contract induced by the fraud or misrepresentation of an agent while acting within the real or apparent scope of his authority cannot be enforced by the principal against the party misled even though the principal did not authorize the agent to act fraudulently or to misrepresent.[88] But where the fraudulent acts or misrepresentations of the agent were not within the scope of his authority, they cannot be set up as a defense to an action on the contract by the principal.[89] If an agent is guilty of a breach of trust in acting for both parties to a transaction without their consent to the dual agency, his primary principal is not bound,[90] and the adverse party also may repudiate the transaction.[91]

d. Payment to Agent as Discharging Liability — (i) *WHERE AGENCY IS DISCLOSED.* Payment to one whose agency is known but whose authority to receive payment is not shown will not preclude the principal from recovering from the debtor where the agent has failed to account to the principal.[92] Nor is a principal

v. Brinsley, 18 C. B. (N. S.) 467, 11 Jur. N. S. 409, 34 L. J. C. P. 161, 12 L. T. Rep. N. S. 265, 13 Wkly. Rep. 634, 114 E. C. L. 467; Ramazotti *v.* Bowring, 7 C. B. N. S. 851, 6 Jur. N. S. 172, 29 L. J. C. P. 30, 8 Wkly. Rep. 114, 97 E. C. L. 851.

86. White *v.* Jaudon, 9 Bosw. (N. Y.) 415.

87. McCobb *v.* Lindsay, 15 Fed. Cas. No. 8,704, 2 Cranch C. C. 215; Kennedy *v.* Turnbull, 15 N. Brunsw. 378, holding that the right to set-off must accrue before the third person acquires knowledge of the principal.

88. *Georgia.*—Barrie *v.* Miller, 104 Ga. 312, 30 S. E. 840, 69 Am. St. Rep. 171.

Illinois.— O'Donnell, etc., Brewing Co. *v.* Farrar, 163 Ill. 471, 45 N. E. 283 [*affirming* 62 Ill. App. 471]; Rockford, etc., R. Co. *v.* Shunick, 65 Ill. 223.

Indiana.— Haskit *v.* Elliott, 58 Ind. 493.

Maine.— Pitcher *v.* Webber, 103 Me. 101, 68 Atl. 593.

Maryland.— Wilson *v.* Pritchett, 99 Md. 583, 58 Atl. 360.

Michigan.— Shrimpton *v.* Netzorg, 104 Mich. 225, 62 N. W. 343.

Minnesota.— Aultman *v.* Olson, 34 Minn. 450, 26 N. W. 451.

Mississippi.— Lawrence *v.* Hand, 23 Miss. 103. But see Chicago Bldg. etc., Co. *v.* Higginbotham, (1901) 29 So. 79, holding that where the third person does not rely on the false representation of the agent, but sends a representative to investigate, he cannot avoid the contract because of the fraud.

Missouri.— Barcus *v.* Hannibal, etc., Plank Road Co., 26 Mo. 102; Millard *v.* Smith, 119 Mo. App. 701, 95 S. W. 940.

New Hampshire.— Concord Bank *v.* Gregg, 14 N. H. 331.

New York.—Bennett *v.* Judson, 21 N. Y. 238; Cassard *v.* Hinman, 6 Bosw. 8; Sandford *v.* Handy, 23 Wend. 260.

Pennsylvania.— McNeile *v.* Cridland, 168 Pa. St. 16, 31 Atl. 939; Keough *v.* Leslie, 92 Pa. St. 424; Vanderslice *v.* Royal Ins. Co., 13 Pa. Super. Ct. 455.

Virginia.— Crump *v.* U. S. Min. Co., 7 Gratt. 352, 56 Am. Dec. 116.

Wisconsin.—Kickland *v.* Menasha Wooden-Ware Co., 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831; Law *v.* Grant, 37 Wis. 548.

England.— Mullens *v.* Miller, 22 Ch. D. 194, 52 L. J. Ch. 380, 48 L. T. Rep. N. S. 103, 31 Wkly. Rep. 559; Foster *v.* Green, 7 H. & N. 881, 31 L. J. Exch. 158, 6 L. T. Rep. N. S. 390.

89. Roome *v.* Nicholson, 8 Abb. Pr. N. S. (N. Y.) 343; Hackney *v.* Alleghany County Mut. Ins. Co., 4 Pa. St. 185; Pennsylvania Cent. Ins. Co. *v.* Kniley, 2 Pearson (Pa.) 229; Delaware Mercantile Co. *v.* Knight, 20 Lanc. L. Rev. (Pa.) 141.

90. See *supra*, III, E, 1, a, (v), (B).

91. British-America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147; Empire State Ins. Co. *v.* American Cent. Ins. Co., 138 N. Y. 446, 34 N. E. 200 [*affirming* 64 Hun 485, 19 N. Y. Suppl. 504]; Truslow *v.* Parkersburg Bridge, etc., R. Co., 61 W. Va. 628, 57 S. E. 51.

92. *Colorado.*— Lester *v.* Snyder, 12 Colo. App. 351, 55 Pac. 613.

Indiana.— O'Conner *v.* Arnold, 53 Ind. 203.

Maine.— Stanwood *v.* Trefethen, 84 Me. 295, 24 Atl. 855; Pitts *v.* Mower, 18 Me. 361, 36 Am. Dec. 727.

Missouri.— Butler *v.* Dorman, 68 Mo. 298, 30 Am. Rep. 795.

New Jersey.— Law *v.* Stokes, 32 N. J. L. 249, 90 Am. Dec. 655.

New York.— Coyle *v.* Brooklyn, 53 Barb. 41 [*affirmed* in 41 N. Y. 619].

Pennsylvania.— Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; Farmers', etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215; Seiple *v.* Irwin, 30 Pa. St. 513.

Forged order.— If a purchaser of goods

bound by the receipt in full of his agent, where it is shown that the agent was deceived by false representations of the debtor,[93] or where it is not shown that the agent had authority to compromise the debt;[94] but the principal may recover from the debtor the balance remaining due after deducting the amount paid to the agent. Where a debtor has knowledge or notice that his creditor's agent has authority to receive nothing but legal tender in payment of the debt, payment to the agent in anything other than legal tender will not bind the creditor.[95]

(II) *Where Agency Is Undisclosed.* The general rule is that where a person contracts with the agent of an undisclosed principal who has the *indicia* of ownership of the property involved in the transaction, payment to such agent prior to notice of his agency is a good defense to an action thereafter brought by the principal on the contract.[96] Payment after notice of the agency, however, is at the debtor's risk.[97]

from an agent was notified by the seller not to pay any account without the seller's written authority, he remains liable to the seller notwithstanding a payment to the agent on a forged order directing payment to him. Gerard *v.* Beauchemin, 18 Can. Sup. Ct. 111.

93. Bayly *v.* Bayly, 22 La. Ann. 17.

94. Brown *v.* Berry, 14 N. H. 459; Johnson *v.* Baugh, etc., Co., 58 Fed. 424; *In re* Pate, 4 Ct. Cl. 523. And see Hammons *v.* Bigelow, 115 Ind. 363, 17 N. E. 192, holding that where plaintiff, at the request of defendant, who was liable on bonds, sent the bonds to a bank for collection with instructions to receive a sum less than their face if paid at a certain time, and defendant at a later date paid an amount less than the bank was authorized to accept, for which the bank gave a release, defendant was liable for the balance, it appearing that he knew the extent of the bank's authority.

95. Aultman *v.* Lee, 43 Iowa 404 (where payment was made to the agent in wheat); Glass *v.* Davidson, 1 Baxt. (Tenn.) 47 (where payment was made in current bank notes, and it was held that the creditor was not bound thereby). And see Blackburn *v.* Schoes, 2 Campb. 341, 11 Rev. Rep. 723.

96. *Alabama.*— Copeland *v.* Touchstone, 16 Ala. 333, 50 Am. Dec. 381.

California.— Lumley *v.* Corbett, 18 Cal. 494; Argenti *v.* Brannan, 5 Cal. 351.

Delaware.— Connally *v.* McConnell, 1 Pennew. 133, 39 Atl. 773.

Georgia.— Rosser *v.* Darden, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152; Peel *v.* Shepherd, 58 Ga. 365.

Illinois.— Shine *v.* Kennealy, 102 Ill. App. 473.

Iowa.— Eclipse Wind Mill Co. *v.* Thorson, 46 Iowa 181.

Maine.— Traub *v.* Milliken, 57 Me. 63, 2 Am. Rep. 14.

Maryland.— Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417.

Nebraska.— Cheshire Provident Inst. *v.* Gibson, 2 Nebr. (Unoff.) 392, 89 N. W. 243.

New York.— Maxfield *v.* Carpenter, 84 Hun 450, 32 N. Y. Suppl. 381.

Oregon.— Du Bois *v.* Perkins, 21 Oreg. 189, 27 Pac. 1044.

Tennessee.— See Roach *v.* Turk, 9 Heisk. 708, 24 Am. Rep. 360.

England.— Coates *v.* Lewes, 1 Campb. 444; Townsend *v.* Inglis, Holt N. P. 278, 3 E. C. L. 116; Campbell *v.* Hassell, 1 Stark. 233, 2 E. C. L. 94, holding that a payment to a broker is good, where the name of the principal is not disclosed, although the purchaser knows that the broker sold for some unknown principal, and *del credere* commission makes no difference. And see Catterall *v.* Kindle, L. R. 2 C. P. 368 [*reversing* 1 Harr. & R. 267, 12 Jur. N. S. 488, 35 L. J. C. P. 161, 14 L. T. Rep. N. S. 102, 14 Wkly. Rep. 371]; Favenc *v.* Bennett, 11 East 36 (holding that goods sold by a broker for a principal not named, upon the terms as specified in the usual bought and sold notes, which were delivered over to the respective parties by the broker, of "payment in one month, money," may be paid for by the buyer to the broker within the month, and that by a bill of exchange accepted by the buyer and discounted by the broker within the month, although having to run a longer time before it was due; but that where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker generally, which was larger than the amount of either demand but less than the two together, and afterward the broker stopped payment, such payment ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer); Thornton *v.* Meux, M. & M. 43, 31 Rev. Rep. 711, 22 E. C. L. 467. *Compare* Drakeford *v.* Piercy, 7 B. & S. 515, 14 L. T. Rep. N. S. 403.

See 40 Cent. Dig. tit. "Principal and Agent," § 510.

Payment varying from terms of contract see Blackburn *v.* Scholes, 2 Campb. 341, 343, 11 Rev. Rep. 723 (where such payment was held to be good); Campbell *v.* Hassell, 1 Stark. 233, 2 E. C. L. 94 (where such payment was held to be bad).

97. Rice, etc., Malting Co. *v.* International Bank, 86 Ill. App. 136 [*affirmed* in 185 Ill. 422, 56 N. E. 1062]; Warder *v.* White, 14 Ill. App. 50; Henderson, etc., Co. *v.* McNally, 48 N. Y. App. Div. 134, 62 N. Y. Suppl. 582 [*affirmed* in 168 N. Y. 646, 61 N. E. 1130]; Lancaster *v.* Knickerbocker Ice Co., 153 Pa. St. 427, 26 Atl. 251; Tuttle *v.* Green, 10 Vt.

e. Money or Property Wrongfully Disposed of by Agent — (I) *In General.* The general rule is that the principal may recover his property or its value from a third person, where it has been wrongfully transferred by his agent contrary to instructions or in excess of authority.[98] Unauthorized payments of money made by an agent may as a rule be recovered by the principal as money had and received;[99] and where an agent without apparent authority uses property of his principal to liquidate his own indebtedness to a third person, or otherwise disposes of it, such property or its value may ordinarily be recovered by the principal by an action of replevin or other appropriate action.[1]

(II) *Right to Follow Trust Funds or Property.* Money or property intrusted to an agent for a particular purpose is impressed by the law with a trust in favor of the principal until it has been devoted to such purpose; and where it has been wrongfully diverted by the agent, such trust generally follows the fund

62. And see Mitchell *v.* Bristol, 10 Wend. (N. Y.) 492, holding that if goods be sold by an agent without disclosing his agency, and a promissory note payable to himself or bearer be taken and transferred to his principal before maturity, a payment by the maker of the note to the agent after the transfer will not prevent the principal from bringing an action for the amount.

98. *Arkansas.*— Hill *v.* Coolidge, 33 Ark. 626.

Colorado.—Thatcher *v.* Kaucher, 2 Colo. 698.

Illinois.— Bertholf *v.* Quinlan, 68 Ill. 297.

New York.— Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827 [*affirming* 13 N. Y. St. 596]; Barnard *v.* Campbell, 55 N. Y. 456, 14 Am. Rep. 289.

Pennsylvania.— McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601.

United States.—Warner *v.* Martin, 11 How. 209, 13 L. ed. 667.

Canada.—Moshier *v.* Keenan, 31 Ont. 658; Morton *v.* Stone, 30 U. C. Q. B. 158.

99. *California.*— California Steam Nav. Co. *v.* Wright, 8 Cal. 585.

Illinois.— Leigh *v.* American Brake-Beam Co., 205 Ill. 147, 68 N. E. 713; Schools of Tp. No. 40 *v.* McCormick, 41 Ill. 323; Rusk *v.* Newell, 25 Ill. 226.

New Jersey.— Demarest *v.* New Barbadoes Tp., 40 N. J. L. 604.

New York.— Gerard *v.* McCormick, 16 Daly 40, 8 N. Y. Suppl. 860 [*affirmed* in 130 N. Y. 261, 29 N. E. 115] (where the third person was put on inquiry as to the agent's authority); Amidon *v.* Wheeler, 3 Hill 137.

Pennsylvania.— Frazier *v.* Erie Bank, 8 Watts & S. 18. See Farmers', etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215, holding that where a principal can show that his money has been placed in the hands of another by his agent, it is no objection to his claim that that other has promised to pay it to the agent.

See, however, Perry *v.* Oerman, (W. Va. 1908) 60 S. E. 604, holding that to make one liable by reason of having participated in a misuse of money of the principal by an agent, on the ground that it was used to pay the private debt of the agent, it is necessary, not only to show that the person sought to be charged was aware that the money belonged to the principal, but also that he was aware that the debt paid by it was a private debt of the agent, or such a debt that payment thereof could not be lawfully made out of the principal's money.

1. *Maryland.*— Baltimore First Nat. Bank *v.* Taliaferro, 72 Md. 164, 19 Atl. 364.

Missouri.— Benoist *v.* Siter, 9 Mo. 657; Worthington *v.* Vette, 77 Mo. App. 445, where an agent was authorized to transport goods to a storage house and take a receipt therefor in the principal's name; and after the goods were thus stored the agent retook the goods and pledged them to a third person, exhibiting to the latter, as evidence of title on the part of the agent, a receipt from the depositary; and it was held that the third person had no right to the goods as against the principal.

New Jersey.—Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941.

New York.— Larbig *v.* Peck, 174 N. Y. 513, 66 N. E. 1111 [*affirming* 69 N. Y. App. Div. 170, 74 N. Y. Suppl. 602]; Talmage *v.* New York Third Nat. Bank, 91 N. Y. 531 (where a bank lent money to M, H's agent, for H, knowing that the stocks pledged as collateral belonged to H; and the bank afterward claimed the right to hold the collateral as security for further loans made to M; and it was held that H was entitled to her collateral on repayment of the amount loaned to her, as the bank was chargeable with notice of M's want of authority to borrow more money for himself); Mikles *v.* Hawkins, 59 N. Y. App. Div. 253, 69 N. Y. Suppl. 557.

England.— Bouzi *v.* Stewart, 11 L. J. C. P. 228, 4 M. & G. 295, 5 Scott N. R. 1, 43 E. C. L. 158.

Canada.— Garden *v.* Neily, 31 Nova Scotia 89. See also Hickman *v.* Baker, 31 Nova Scotia 208.

And see Reeves *v.* Smith, 1 La. Ann. 379, holding that one who lends to an agent money for his private use, and receives from him as security for its repayment a pledge of a claim against a third person, known by the lender to belong to his principal, will be bound to account to the principal for the amount received on the claim.

Liability of bank for diversion of principal's money by agent see Banks and Banking, 5 Cyc. 530.

or property in the hands of a third person, and the principal is ordinarily entitled to pursue and recover it as long as it can be identified.[2] But the burden of identification is on the principal. As money has no "ear-marks," he must, as against an innocent holder, be able to show that the money is his identical fund and impressed with some notice of that fact.[3] However, car-marks are only indices enabling the beneficial owner to follow his property. They are not indispensable to enable him to assert his right to the property, its product or substitute. Evidence of substantial identity may be attached to the thing itself, or it may be extraneous.[4] Property which he can identify, the principal can retake even in the hands of an innocent holder, since the agent can give no title when he has none; and this applies whether it be the identical property put into the hands of the agent or other property purchased by the agent with the proceeds, and even when it has been mixed with the mass of other property, if not so as to be incapable of being distinguished.[5]

2. *Illinois.*— Fifth Nat. Bank *v.* Hyde Park, 101 Ill. 595, 40 Am. Rep. 218.

Indiana.— Pearce *v.* Dill, 149 Ind. 136, 48 N. E. 788; Riehl *v.* Evansville Foundry Assoc., 104 Ind. 70, 3 N. E. 633; Pugh *v.* Pugh, 9 Ind. 132; Robards *v.* Hamrick, 39 Ind. App. 134, 79 N. E. 386.

Kentucky.— Fahnestock *v.* Bailey, 3 Metc. 48, 77 Am. Dec. 161.

New York.— Roca *v.* Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599 [*affirming* 68 Hun 502, 22 N. Y. Suppl. 1039]; Baker *v.* New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150; Van Allen *v.* American Nat. Bank, 52 N. Y. 1; Phelan *v.* Downs, 31 Misc. 518, 64 N. Y. Suppl. 737 [*affirmed* in 59 N. Y. App Div. 282, 69 N. Y. Suppl. 375 (*affirmed* in 173 N. Y. 619, 66 N. E. 1115)]; Dexter *v.* Stewart, 7 Johns. Ch. 52; Bank of America *v.* Pollock, 4 Edw. 215. See also American Preserves Co. *v.* Columbia Inv. Co., 11 Misc. 126, 31 N. Y. Suppl. 1025 [*reversing* 7 Misc. 509, 28 N. Y. Suppl. 782].

North Carolina.— Virginia-Carolina Chemical Co. *v.* McNair, 139 N. C. 326, 51 S. E. 949; Whitley *v.* Foy, 59 N. C. 34, 78 Am. Dec. 236.

Pennsylvania.— Farmers', etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215.

United States.— Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 11 S. Ct. 118, 34 L. ed. 724; Baltimore Cent. Nat. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Central Stock, etc., Exch. *v.* Bendinger, 109 Fed. 926, 48 C. C. A. 726, 56 L. R. A. 875; German Sav. Inst. *v.* Adae, 8 Fed. 106, 1 McCrary 501; Jaudan *v.* National City Bank, 13 Fed. Cas. No. 7,230, 8 Blatchf. 430; Thompson *v.* Perkins, 23 Fed. Cas. No. 13,972, 3 Mason 232; Veil *v.* Mitchel, 28 Fed. Cas. No. 16,908, 14 Wash. 105; Yates *v.* Curtis, 30 Fed. Cas. No. 18,127, 5 Mason 80.

England.— *Ex p.* Oursell, Ambl. 297, 27 Eng. Reprint 200; *Ex p.* Dumas, 1 Atk. 232, 26 Eng. Reprint 149, 2 Ves. 582, 28 Eng. Reprint 372; Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 457, 16 Rev. Rep. 361; Godfrey *v.* Furzo, 3 P. Wms. 185, 24 Eng. Reprint 1022; Scott *v.* Surman, Willes 400.

3. *Alabama.*— Mobile, etc., R. Co. *v.* Felrath, 67 Ala. 189.

Georgia.— Watertown Steam-Engine Co. *v.* Palmer, 84 Ga. 386, 10 S. E. 969, 20 Am. St. Rep. 368.

Illinois.— Fifth Nat. Bank *v.* Hyde Park, 101 Ill. 595, 40 Am. Rep. 218; Kirby *v.* Wilson, 98 Ill. 240; Montgomery County *v.* Robinson, 85 Ill. 174.

Indiana.— Pearce *v.* Dill, 149 Ind. 136, 48 N. E. 788.

Louisiana.— Boisblanc's Succession, 32 La. Ann. 109; Whatley *v.* Austin, 1 Rob. 21.

New York.— Baker *v.* New York Nat. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150.

North Carolina.— Whitley *v.* Foy, 59 N. C. 34, 78 Am. Dec. 236.

Pennsylvania.— Farmers, etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215; Northern Liberties Bank *v.* Jones, 42 Pa. St. 536.

Tennessee.—Arbuckle *v.* Kirkpatrick, 93 Tenn. 221, 39 S. W. 3, 60 Am. St. Rep. 854, 36 L. R. A. 285.

West Virginia.— Perry *v.* Oerman, (1908) 60 S. E. 604, holding that the doctrine that an agent disposing of the property of his principal without authority transfers no title as against the principal does not apply to currency or negotiable instruments without restrictive indorsement, where they have come into the hands of a *bona fide* purchaser for value without notice.

United States.— Central Stock, etc., Exch. *v.* Bendinger, 109 Fed. 926, 48 C. C. A. 726, 56 L. R. A. 875; Thurber *v.* Cecil Nat. Bank, 52 Fed. 513.

England.— Scott *v.* Surman, Willes 400.

Negotiable paper in the hands of innocent holders is like money. It cannot be followed. Clark *v.* Merchants' Bank, 2 N. Y. 380 [*reversing* 1 Sandf. 498]; Perry *v.* Oerman, (W. Va. 1908) 60 S. E. 604; *Ex p.* Watson, 4 Dear. & C. 45, 1 Mont. & A. 685.

4. Roca *v.* Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599 [*affirming* 68 Hun 502, 22 N. Y. Suppl. 1039]; Farmers, etc., Nat. Bank *v.* King, 57 Pa. St. 202, 98 Am. Dec. 215. And see Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 457, 16 Rev. Rep. 361.

5. *California.*— Wells *v.* Robinson, 13 Cal. 133.

(III) *Indicia of Authority or Ownership.* Where the principal has fraudulently or negligently intrusted property to an agent with all the *indicia* of authority or ownership, a third person purchasing from such agent in entire good faith will be protected from any claims of the principal, although the agent may have been given possession of the property for a special purpose and without authority to dispose of same.[6]

2. In Tort — a. Generally. The general rule is that the principal may recover for injuries to his property or interests in the hands of his agent committed by a third person, whether by fraud or deceit,[7] negligence,[8] or trespass,[9] in the same manner and to the same extent as though such agency did not exist, and as if he had dealt with such third person in person. Likewise the principal has a cause of action against a third person for detaining his property, where it has been improperly diverted by his agent, whether the third person knew or was charged with knowledge that the agent was without authority to so act in the premises, or

Kentucky.— Fahnestock *v.* Bailey, 3 Metc. 48, 77 Am. Dec. 161.

Louisiana.— Boisblanc's Succession, 32 La. Ann. 109.

New York.— Edwards *v.* Schoharie County Nat. Bank, 47 Hun 469; Clark *v.* Merchants' Bank, 1 Sandf. 498.

North Dakota.— Gussner *v.* Hawks, 13 N. D. 453, 101 N. W. 898.

United States.— German Sav. Inst. *v.* Adae, 8 Fed. 106, 1 McCrary 501; Veil *v.* Mitchel, 28 Fed. Cas. No. 16,908, 4 Wash. 105.

England.— See Harris *v.* Truman, 9 Q. B. D. 264, 51 L. J. Q. B. 338, 46 L. T. Rep. N. S. 844, 30 Wkly. Rep. 533.

6. *Arkansas.*— Winship *v.* Merchants' Nat. Bank, 42 Ark. 22.

California.—Brewster *v.* Sime, 42 Cal. 139.

Louisiana.— Fullerton *v.* Kennedy, 6 La. Ann. 312. See also Loeb *v.* Selig, 120 La. 192, 45 So. 100.

Massachusetts.— Dean *v.* Plunkett, 136 Mass. 195, holding that if a partnership so intrusts goods belonging to it to an agent as to enable him to deal with them as his own, a person who, in ignorance of his agency, buys such goods of him under an agreement by which they are to be paid for by accounting to a third person, is not liable to an action by the partnership for the price of the goods. See also Lime Rock Bank *v.* Plimpton, 17 Pick. 159, 28 Am. Dec. 286, holding that where an agent lends money of his principal as his own to a third person to whom he is indebted, the latter may apply it to the debt and retain it as against the principal, even after notice that it belongs to him.

New Hampshire.— Nixon *v.* Brown, 57 N. H. 34.

New York.— Smith *v.* Savin, 141 N. Y. 315, 36 N. E. 338 [*affirming* 69 Hun 311, 23 N. Y. Suppl. 568, 30 Abb. N. Cas. 192]; Arnold *v.* Hallenbake, 5 Wend. 434.

Ohio.— Curtiss *v.* Hutchinson, 4 Ohio Dec. (Reprint) 19, 1 Clev. L. Rep. 19.

Pennsylvania.— Fees *v.* Shadel, 20 Pa. Super. Ct. 193.

South Carolina.— Carmichael *v.* Buck, 10 Rich. 332, 70 Am. Dec. 226.

United States.— Calais Steamboat Co. *v.* Scudder, 2 Black 372, 17 L. ed. 282.

England.— Boyson *v.* Coles, 6 M. & S. 14, 18 Rev. Rep. 284.

And see *supra*, III, F, 1, b, (v), (B), (2); III, F, 1, d, (II).

7. *Indiana.*— Pattison *v.* Barnes, 26 Ind. 209; Cramer *v.* Wright, 15 Ind. 278.

Iowa.— See Perkins *v.* Evans, 61 Iowa 35, 15 N. W. 584.

Massachusetts.— Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629.

Missouri.— See U. S. Mortgage, etc., Co. *v.* Crutcher, 169 Mo. 444, 69 S. W. 380.

New York.— Robinson *v.* Ketchum, 11 Barb. 652; Culliford *v.* Gadd, 60 N. Y. Super. Ct. 343, 17 N. Y. Suppl. 457 [*affirmed* in 139 N. Y. 618, 35 N. E. 205]; Raymond *v.* Howland, 12 Wend. 176.

Wisconsin.— Ward *v.* Borkenhagen, 50 Wis. 459, 7 N. W. 340.

United States.— Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 474.

England.—Grant *v.* Gold Exploration, etc., Syndicate, [1900] 1 Q. B. 233, 69 L. J. Q. B. 150, 82 L. T. Rep. N. S. 5, 16 T. L. R. 86, 48 Wkly. Rep. 280; Salford *v.* Lever, [1891] 1 Q. B. 168, 55 J. P. 244, 60 L. J. Q. B. 39, 63 L. T. Rep. N. S. 658, 39 Wkly. Rep. 85.

8. Central Georgia R. Co. *v.* James, 117 Ga. 832, 45 S. E. 223 (holding that in an action for tort, brought against a railway company to recover damages for failure to safely transport live stock, plaintiff can show that the delivery was made to the carrier by him through an agent, although such agent made the shipment in his own name, without disclosing the fact that he was acting in behalf of plaintiff); New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Feaver *v.* Montreal Tel. Co., 24 U. C. C. P. 258.

9. *Illinois.*— Loomis *v.* Barker, 69 Ill. 360.

Massachusetts.— Holly *v.* Huggeford, 8 Pick. 73, 19 Am. Dec. 303, holding that trespass by the owner of goods consigned to a factor who has a lien thereon for a balance due him from the owner will lie against the officer who attaches the goods as the property of the factor.

New York.— Thorp *v.* Burling, 11 Johns. 285.

Vermont.— Waldo *v.* Peck, 7 Vt. 434.

whether he took the property in good faith and for value, and in such action may recover the property or its value.[10]

b. For Causing Loss of Agent's Service. A third person who wilfully and wrongfully interferes with an agent and entices and induces him to abandon the performance of his duty to his principal is liable in damages in an action by the principal.[11] Likewise, the principal has a right of action against a third person for personal injuries to his agent inflicted by such person, where some loss of service or capacity to fulfil the contract of agency results therefrom.[12] The principal also has a cause of action against a third person for wrongfully interfering with his agent, and thereby preventing him from performing his duty to his principal according to the terms of the contract, whereby the principal is damaged.[13]

IV. ACTIONS.[14]

A. Form of Action; Remedies — 1. Actions by Principal Against Agent — a. In General. Where an agent is guilty of conversion of money or property of his principal the latter may maintain an action of trover against him in like manner as against a third person,[15] or, waiving the tort, he may sue the agent in assumpsit

England.— Manders *v.* Williams, 4 Exch. 339, 18 L. J. Exch. 437.

10. *Colorado.*— Thatcher *v.* Kaucher, 2 Colo. 698.

Illinois.— Bertholf *v.* Quinlan, 68 Ill. 297, holding that where an agent exchanges the property of his principal without authority, the fact of his liability to the principal will afford no ground for defeating an action of trover brought by the principal against the party receiving the same from the agent, or release his liability to the owner after his refusal to deliver the same on demand.

Iowa.—Thompson *v.* Barnum, 49 Iowa 392.

Kansas.— Guernsey *v.* Davis, 67 Kan. 378, 73 Pac. 101.

Maine.— Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258.

Maryland.— Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332.

Massachusetts.— Gilmore *v.* Newton, 9 Allen 171, 85 Am. Dec. 749; Peters *v.* Ballistier, 3 Pick. 495; Kingman *v.* Pierce, 17 Mass. 247.

Missouri.— White Sewing Mach. Co. *v.* Betting, 46 Mo. App. 417.

New Hampshire.— Holton *v.* Smith, 7 N. H. 446.

New York.— Robertson *v.* Ketchum, 11 Barb. 652; Armstrong *v.* Tufts, 1 Edm. Sel. Cas. 367, holding that where goods in the hands of an agent are fraudulently obtained from him under pretense of a purchase, and he is induced after knowledge of the fraud to take notes for the amount, the owner may rescind the contract and sue for the tort.

Oregon.— Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

Pennsylvania.— Quinn *v.* Davis, 78 Pa. St. 15; Sheffer *v.* Montgomery, 65 Pa. St. 329; McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601.

Tennessee.—Foster *v.* Smith, 2 Coldw. 474, 88 Am. Dec. 604.

England.— Cole *v.* North Western Bank, L. R. 10 C. P. 354, 44 L. J. C. P. 233, 32 L. T. Rep. N. S. 733; Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 457, 16 Rev. Rep. 361.

11. See MASTER AND SERVANT, 26 Cyc. 1580.

12. Ames *v.* Union R. Co., 117 Mass. 541, 19 Am. Rep. 426. See also MASTER AND SERVANT, 26 Cyc. 1580.

13. Woodward *v.* Washburn, 3 Den. (N. Y.) 369; St. Johnsbury, etc., R. Co. *v.* Hunt, 55 Vt. 570, 45 Am. Rep. 639, holding that maliciously causing the arrest of a railroad company's engineer while running a train of cars, to delay the train and thereby damage the company, is actionable.

14. Abatement of action see ABATEMENT AND REVIVAL, 1 Cyc. 3, and Cross-References Thereunder.

Appearance see APPEARANCES, 3 Cyc. 500.

Discovery and inspection see DISCOVERY, 14 Cyc. 301.

Joinder of causes of action see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 376, and Cross-References Thereunder.

Jurisdiction of courts in general see COURTS, 11 Cyc. 633.

Laches see EQUITY, 16 Cyc. 150 *et seq.*, and Cross-References Thereunder.

Limitation of action see LIMITATIONS OF ACTIONS, 25 Cyc. 963, and Cross-References Thereunder.

Process see PROCESS, and Cross-References Thereunder.

Set-off and counter-claim: Generally see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM. Right of agent against principal see *supra*, III, A. Right of principal against agent see *supra*, III, B. Right of agent against third person see *supra*, III, C. Right of third person against agent see *supra*, III, D. Right of principal against third person see *supra*, III, E. Right of third person against principal see *supra*, III, F.

Venue see VENUE.

15. *Georgia.*— Loveless *v.* Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407.

Indiana.— Rosenzweig *v.* Frazer, 82 Ind. 342; Lindley *v.* Downing, 2 Ind. 418; Nading *v.* Howe, 23 Ind. App. 690, 55 N. E. 1032.

Iowa.— Haas *v.* Damon, 9 Iowa 589.

for the value of the property or for money had and received;[16] and it has been held that if the property is still in the agent's hands replevin will lie to recover possession thereof.[17] If an agent holds money or property belonging to his principal, the latter may bring an action of special assumpsit for the recovery thereof, if there is an express contract by the agent to pay; otherwise an action of implied assumpsit will lie.[18] For breach or omission of a duty which the agent owes the principal, he may be sued by the latter in assumpsit for breach of the agency contract, or in a special action on the case for the tort.[19]

b. Accounting — (i) *In Equity.* It is a well established rule that the bare relation of principal and agent is not sufficient to entitle the principal to go into equity for an accounting from the agent, where there is complete and adequate redress at law.[20] But a suit in equity for an accounting may be maintained by a

Maine.— McNear *v.* Atwood, 17 Me. 434.
Massachusetts.— Ashley *v.* Root, 4 Allen 504.
New York.— McMorris *v.* Simpson, 21 Wend. 610; Murray *v.* Burling, 10 Johns. 172. See Bogatcka *v.* Walker, 1 N. Y. City Ct. 447.
North Carolina.— Rowland *v.* Barnes, 81 N. C. 234.
Ohio.— Isaac Harter Co. *v.* Pearson, 26 Ohio Cir. Ct. 601.
Oregon.— Salem Traction Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675.
Pennsylvania.— Etter *v.* Bailey, 8 Pa. St. 442.
Vermont.— McCrillis *v.* Allen, 57 Vt. 505.
Wisconsin.— Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.
England.— Lyeds *v.* Hay, 47 Rev. Rep. 260.
Trover generally see TROVER AND CONVERSION.

16. *Alabama.*— Strickland *v.* Burns, 14 Ala. 511.
Kansas.— Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438.
Minnesota.—Schick *v.* Suttle, 94 Minn. 135, 102 N. W. 217.
New Jersey.— Seidel *v.* Peschkaw, 27 N. J. L. 427.
New York.— Coit *v.* Stewart, 50 N. Y. 17; Ridder *v.* Whitlock, 12 How. Pr. 208.
Ohio.— Isaac Harter Co. *v.* Pearson, 26 Ohio Cir. Ct. 601.
Pennsylvania.— Reeside *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503.
Assumpsit generally see ASSUMPSIT, ACTION OF, 4 Cyc. 317.

17. Terwilliger *v.* Beals, 6 Lans. (N. Y.) 403. See, generally, REPLEVIN.

18. *Delaware.*— Guthrie *v.* Hyatt, 1 Harr. 446.
Indiana.— English *v.* Devarro, 5 Blackf. 588.
Massachusetts.—Floyd *v.* Day, 3 Mass. 403, 3 Am. Dec. 171.
Michigan.— Tanner *v.* Page, 106 Mich. 155, 63 N. W. 993.
Missouri.— Houx *v.* Russell, 10 Mo. 246.
New York.— Wright *v.* Duffie, 23 Misc. 338, 51 N. Y. Suppl. 255.
North Carolina.— McNair *v.* McKay, 33 N. C. 602.
Pennsylvania.— Paton *v.* Clark, 156 Pa. St. 49, 27 Atl. 116; Campbell *v.* Boggs, 48 Pa. St. 524; Glenn *v.* Cuttle, 2 Grant 273.
Vermont.— Kellogg *v.* Griswold, 12 Vt. 291, holding that assumpsit may be maintained against an agent when he promises to render an account.

19. *Georgia.*— Loveless *v.* Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407.
Illinois.— Larrabee *v.* Badger, 45 Ill. 440.
Michigan.— Schmemann *v.* Rothfuss, 46 Mich. 453, 9 N. W. 489.
Mississippi.— Mangum *v.* Ball, 43 Miss. 288, 5 Am. Rep. 488, where the agent received depreciated currency contrary to instruction, in payment of a debt.
Missouri.— Houx *v.* Russell, 10 Mo. 246.
New York.— Allen *v.* Brown, 44 N. Y. 228; McMorris *v.* Simpson, 21 Wend. 610; McNeilly *v.* Richardson, 4 Cow. 607; Beardsley *v.* Root, 11 Johns. 406.
Pennsylvania.— Paul *v.* Grimm, 165 Pa. St. 139, 30 Atl. 721, 44 Am. St. Rep. 648; Reeside *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503.
West Virginia.— Maloney *v.* Barr, 27 W. Va. 381.

20. *Alabama.*— Knotts *v.* Tarver, 8 Ala. 743; Kirkman *v.* Vanlier, 7 Ala. 217.
Georgia.— Powers *v.* Gray, 7 Ga. 206, where the bill was dismissed, no discovery being sought, and no allegation in the bill going to show that the peculiar remedial process or functions of a court of equity were necessary; and further where there was an adequate and effective remedy at law.
New York.— Marvin *v.* Brooks, 94 N. Y. 71 (where the court says that if the existence of a bare agency were sufficient it would draw into equity every case of bailment in which an account existed); Underhill *v.* Jordan, 72 N. Y. App. Div. 71, 76 N. Y. Suppl. 266.
Tennessee.— Taylor *v.* Tompkins, 2 Heisk. 89.
Virginia.— Goddin *v.* Bland, 87 Va. 706, 13 S. E. 145, 24 Am. St. Rep. 678 (holding that where there is no trust or fiduciary element in the agency the relation is rather that of employer and employee, that is, master and servant, and the bill will be dismissed); Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449; Coffman *v.* Sangston, 21 Gratt. 263; Segar *v.* Parrish, 20 Gratt. 672.
England.— Moxon *v.* Bright, L. R. 4 Ch. 292, 20 L. T. Rep. N. S. 961; Smith *v.* Leveaux, 2 De G. J. & S. 1, 9 Jur. N. S. 1140, 32 L. J. Ch. 167, 9 L. T. Rep. N. S. 313, 3 New Rep. 18, 12 Wkly. Rep. 31, 67 Eng.

principal against his agent, where the agency is so fiduciary in its nature as to constitute the agent a trustee or quasi-trustee for the principal,[21] or where equitable

Ch. 1, 46 Eng. Reprint 274; Foley *v.* Hill, 8 Jur. 347, 13 L. J. Ch. 182, 1 Phil. 399, 19 Eng. Ch. 399, 41 Eng. Reprint 683 [*affirmed* in 2 H. L. Cas. 28, 9 Eng. Reprint 1002] (where the court dismissed a bill because the transaction in question was simple, and there was a simpler and less expensive remedy at law); Barry *v.* Stevens, 31 Beav. 258, 31 L. J. Ch. 785, 788, 6 L. T. Rep. N. S. 568, 10 Wkly. Rep. 822, 54 Eng. Reprint 1137 (where the court says: "The general right of a principal to bring such a suit against his agent I should be sorry to impeach; but that principle does not apply to a case like the present, where the subject-matter is confined within certain specified limits, and the accounts shew that it is a mere money demand which may perfectly well be tried at law, where the account will be taken before the Master in the same way that it would be taken here"); King *v.* Rossett, 2 Y. & J. 33. See Mackenzie *v.* Johnston, 4 Madd. 373, 56 Eng. Reprint 742, where defendants were agents for the sale of property of plaintiff, and the court held that wherever such relation exists a bill will lie for an account. The circumstances of this case, however, were such that the principal could learn only from the discovery of defendants how the latter had acted in the execution of the agency; and the court held that it would be most unreasonable that the principal should pay them for that discovery, if it turned out that they had abused his confidence, and that that would be the case if a bill for relief would not lie. The necessity of a discovery, however, is itself enough to bring this case within the jurisdiction of equity, and the case, in so far as it intimates that the mere fact of agency warrants equitable interference, is against the great weight of authority.

21. *California.*— San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588, 44 Pac. 309.

Illinois.— Weaver *v.* Fisher, 110 Ill. 146.

Minnesota.— Coffin *v.* Craig, 89 Minn. 226, 94 N. W. 680.

New York.— Marvin *v.* Brooks, 94 N. Y. 71 (holding that the bill in such a case proceeds upon the ground that defendant stands in the attitude of dealing to some extent with the money or property of the principal, intrusted in a confidential relation with an interest which makes him a quasi-trustee, and by reason of that relation knowing what the other party cannot know, and bound to reveal to him the entire truth); Jordan *v.* Underhill, 91 N. Y. App. Div. 124, 86 N. Y. Suppl. 620 (holding that where a fiduciary relation existed the fact that the agent from time to time had rendered accounts of his proceedings to the principal, and had transferred all the property and money in his hands belonging to the principal, except an amount which the agent retained to reimburse himself for his services, and had also rendered to the principal's agent subsequently appointed a complete account of all his acts, did not prevent the principal from maintaining a suit against the original agent for an accounting on the ground that a further account would be vexatious); Rogers *v.* Wheeler, 89 N. Y. App. Div. 435, 85 N. Y. Suppl. 981; Underhill *v.* Jordan, 72 N. Y. App. Div. 71, 76 N. Y. Suppl. 266; Rose *v.* Durant, 44 N. Y. App. Div. 381, 61 N. Y. Suppl. 15; Frethey *v.* Durant, 24 N. Y. App. Div. 58, 48 N. Y. Suppl. 839; West *v.* Brewster, 1 Duer 647.

Pennsylvania.— Coursin's Appeal, 79 Pa. St. 220.

Tennessee.— Hale *v.* Hale, 4 Humphr. 183.

Vermont.— Pickett *v.* Pearsons, 17 Vt. 470.

Virginia.— Simmons *v.* Simmons, 33 Gratt. 451; Zetelle *v.* Myers, 19 Gratt. 62.

Wisconsin.— Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645; Merrill *v.* Merrill, 53 Wis. 522, 10 N. W. 684.

United States.— Colonial, etc., Mortg. Co. *v.* Hutchinson Mortg. Co., 44 Fed. 219.

England.— Moxon *v.* Bright, L. R. 4 Ch. 292, 20 L. T. Rep. N. S. 961; Hemings *v.* Pugh, 4 Giffard 456, 9 Jur. N. S. 1124, 9 L. T. Rep. N. S. 283, 12 Wkly. Rep. 44, 66 Eng. Reprint 785; Makepeace *v.* Rogers, 11 Jur. N. S. 215 (holding that wherever the relation between the person who seeks an account, and the person against whom he seeks it, partakes of a fiduciary character, a trust is reposed by plaintiff in defendant, and that that trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman).

Illustrations of agencies not of fiduciary character, such as of themselves to justify a bill in equity against the agent on equitable accounting, see *supra*, note 20.

Illustrations of agencies of fiduciary character, such as to justify a bill in equity for accounting see San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588, 44 Pac. 309 (agency to manage manufactory business, hire, pay, and discharge employees, collect and pay accounts); Weaver *v.* Fisher, 110 Ill. 146 (agency to manage, and to conduct the banking and financial business of a mill); Rogers *v.* Wheeler, 89 N. Y. App. Div. 435, 85 N. Y. Suppl. 981 (agency to invest the principal's money in lands sold for taxes, transact all business connected therewith, pay over semi-annually a part of the interest, and retain the balance as commission); Underhill *v.* Jordan, 72 N. Y. App. Div. 71, 76 N. Y. Suppl. 266 (agency to manage a business, and to receive and disburse funds therein); Rose *v.* Durant, 44 N. Y. App. Div. 381, 61 N. Y. Suppl. 15; Frethey *v.* Durant, 24 N. Y. App. Div. 58, 48 N. Y. Suppl. 839 (agency by a brother appointed by his sister to manage her portion of an estate left to both by the father); Hale *v.* Hale, 4 Humphr. (Tenn.) 183 (agency to pay off encumbrance on land and to receive and disburse in regard

discovery is asked and is material to and inseparably connected with the relief sought, the facts relating to the execution of the agency being peculiarly within the knowledge of the agent, and not at the command of the principal,[22] or where

thereto); Pickett *v.* Parsons, 17 Vt. 470 (agency to collect accounts); Simmons *v.* Simmons, 33 Gratt. (Va.) 451 (general agency to manage personal affairs and collect rents); Zetelle *v.* Myers, 19 Gratt. (Va.) 62 (agency to manage, lease, and sell property, and pay expenses upon it, to collect debts, and pay over the moneys received to the principal); Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645 (agency to loan funds on mortgage); Merrill *v.* Merrill, 53 Wis. 522, 10 N. W. 684 (agency to manufacture timber into lumber and to sell enough thereof to satisfy a note originally given by the principal to the agent in payment of the timber); Colonial, etc., Mortg. Co. *v.* Hutchinson Mortg. Co., 44 Fed. 219 (agency to receive and to dispose of by loan or otherwise large sums of money); Makepeace *v.* Rogers, 11 Jur. N. S. 215 (agency to manage extensive estates).

Equity will entertain a suit by a private unchartered company, associated for the purpose of carrying on business as a bank, against its cashier, for an account of his agency, although such associations are contrary to law. Berkshire *v.* Evans, 4 Leigh (Va.) 223.

It is not necessary to show that something will be found due on the accounting, for that fact can never be known with certainty until the account has been taken. Rose *v.* Durant, 44 N. Y. App. Div. 381, 61 N. Y. Suppl. 15; Frethey *v.* Durant, 24 N. Y. App. Div. 58, 48 N. Y. Suppl. 839.

Concurrent jurisdiction of law and equity. — The mere fact that there is a remedy at law is not sufficient to deprive the court of equity of jurisdiction of an account between a principal and agent, for the jurisdiction may be concurrent, and although there is a remedy at law, if it is not as adequate or complete as at equity, or if other circumstances exist bringing the matter within the cognizance of the equity court, the suit may still be maintained. Walker *v.* Spencer, 45 N. Y. Super. Ct. 71 (holding that the mere fact that the principal has a remedy at law is no ground of demurrer); Ellas *v.* Lockwood, Clarke (N. Y.) 311 (holding that when the accounts between the principal and the agent are complicated — when they are mutual — and when a discovery is sought and is material to relief, the jurisdiction of a court of chancery is undoubted, even though it be conceded that courts of law have jurisdiction of the same matters); Kirkeys *v.* Crandall, 90 Tenn. 532, 18 S. W. 246; Williams *v.* Trye, 18 Beav. 866, 2 Eq. Rep. 766, 18 Jur. 442, 23 L. J. Ch. 860, 2 Wkly. Rep. 314, 52 Eng. Reprint 145; Padwick *v.* Stanley, 9 Hare 627, 16 Jur. 586, 41 Eng. Ch. 627, 68 Eng. Reprint 664 (holding that there may be cases of complicated accounts which would give concurrent jurisdiction, but all such cases must depend on their own particular circumstances). See Warren *v.* Para Rubber Shoe Co., 166 Mass. 97, 44 N. E. 112.

Equity having acquired jurisdiction will adjudicate in one suit all matters involving the discharge of a quasi-trust by an agent, including matters relating to the account, and to the agent's transactions. Clark *v.* Lee, 21 Iowa 274; Segar *v.* Parrish, 20 Gratt. (Va.) 672; Brewer *v.* Caldwell, 4 Fed. Cas. No. 1,849, 7 Reporter 389.

Where an agent executes his agency for his personal benefit to the detriment of the principal, a bill by his principal will lie to make him account therefor as for a trust. Weaver *v.* Fisher, 110 Ill. 146; Thompson *v.* Hallet, 26 Me. 141; Thornton *v.* Thornton, 31 Gratt. (Va.) 212; Neis *v.* Farquharson, 9 Wash. 508, 37 Pac. 697; Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645; Delano *v.* Winsor, 7 Fed. Cas. No. 3,754, 1 Cliff. 501; Williams *v.* Trye, 18 Beav. 366, 2 Eq. Rep. 766, 18 Jur. 442, 23 L. J. Ch. 860, 2 Wkly. Rep. 314, 52 Eng. Reprint 145; Hewart *v.* Semple, 5 Ves. Jr. 86, 31 Eng. Reprint 485; Hardwicke *v.* Vernon, 4 Ves. Jr. 411, 4 Rev. Rep. 244, 31 Eng. Reprint 209; Massey *v.* Davies, 2 Ves. Jr. 317, 2 Rev. Rep. 218, 30 Eng. Reprint 651.

After decease of principal his legal representatives may maintain a suit in equity for an accounting against an agent. Webb *v.* Fuller, 77 Me. 568, 1 Atl. 737; Ellas *v.* Lockwood, Clarke (N. Y.) 311; Schwickerath *v.* Lohen, 48 Wis. 599, 4 N. W. 805.

22. *California.*— San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588, 44 Pac. 309.

Minnesota.— Coffin *v.* Craig, 89 Minn. 226, 94 N. W. 680.

New York.— Marvin *v.* Brooks, 94 N. Y. 71; West *v.* Brewster, 1 Duer 647; Ellas *v.* Lockwood, Clarke 311.

Tennessee.— Taylor *v.* Tompkins, 2 Heisk. 89.

Virginia.— Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449; Coffman *v.* Sangston, 21 Gratt. 263; Segar *v.* Parrish, 20 Gratt. 672. See Goddin *v.* Bland, 87 Va. 706, 13 S. E. 145, 24 Am. St. Rep. 678.

Wisconsin.— Merrill *v.* Merrill, 53 Wis. 522, 10 N. W. 684; Schwickerath *v.* Loper, 48 Wis. 599, 4 N. W. 805, holding that Rev. St. (1858), c. 137, § 55, Rev. St. (1878) § 4096, providing that no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, does not affect the question of the jurisdiction of a court of equity in any proper case for an accounting between principal and agent where a discovery is a necessary part of the accounting.

But see Moxon *v.* Bright, L. R. 4, Ch. 292, 20 L. T. Rep. N. S. 961; Smith *v.* Leveaux, 2 De G. J. & S. 1, 9 Jur. N. S. 1140, 33 L. J. Ch. 167, 9 L. T. Rep. N. S. 313, 3 New Rep. 18, 12 Wkly. Rep. 31, 67 Eng. Ch. 1, 46 Eng. Reprint 274, both holding that the mere

the account is so involved, complicated, and confused that it could not be accurately, expediently, or adequately settled at law.[23] That equity will not entertain a suit for accounting against an agent by the principal where all the items are on one side has been held in some cases, and is to be implied from the language used in others.[24] By the weight of opinion, however, although the account is not

fact that the principal sought discovery would not empower the court of equity to act, if an adequate discovery could be had at law, and the agency was not of a fiduciary nature.

Where a principal asks discovery only as ancillary to relief, if the ground for the relief fails, he is not entitled to the discovery, and must file another bill for that purpose. King *v.* Rossett, 2 Y. & J. 33.

A bill will lie by an administrator of a principal against the general agent of his intestate for a discovery and an account of the transactions of the latter with his principal. Simmons *v.* Simmons, 33 Gratt. (Va.) 451; Brewer *v.* Caldwell, 4 Fed. Cas. No. 1,849, 7 Reporter 389.

23. *Alabama.*— Knotts *v.* Tarver, 8 Ala. 743.

Indiana.— Coquillard *v.* Suydam, 8 Blackf. 24, holding that in mereantile agencies and perhaps others where the nature of the business requires the agent to keep various accounts of purchases and sales or of receipts and expenditures with his principal, he may be called upon by his principal in chancery for an account.

New York.— Rogers *v.* Wheeler, 89 N. Y. App. Div. 435, 85 N. Y. Suppl. 981 (where a bill in equity was allowed, there being divers purchases, redemptions from mortgage at different times, tax payments, reinvestments and other turning over of money in different amounts, with varying profits, at uncertain periods); Walker *v.* Spencer, 45 N. Y. Super. Ct. 71.

South Carolina.— Kerr *v.* Camden Steamboat Co., Cheves Eq. 189.

Tennessee.— Hale *v.* Hale, 4 Humphr. 183; Taylor *v.* Tompkins, 2 Heisk. 89, holding that a bill in equity lies for an account of goods sold on commission, if complicated, or if there be embarrassment in making proof.

Vermont.— Kellogg *v.* Griswold, 12 Vt. 291.

Virginia.— Goddin *v.* Bland, 87 Va. 706, 13 S. E. 145, 24 Am. St. Rep. 678 (holding that the mere fact that the figures were large and the account long did not give equity jurisdiction as of a complicated account, the only issue being the quantity of merchandise purchased for and delivered to the principal by his agent); Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449 (holding that where, owing to the intricacy of the account the remedy at law is not plain, simple, and free from difficulty, the equitable jurisdiction attaches); Thornton *v.* Thornton, 31 Gratt. 212 (holding that equity has jurisdiction where the account could not be conveniently and safely adjusted and settled in a court of law).

Wisconsin.— Merrill *v.* Merrill, 53 Wis. 522, 10 N. W. 684.

England.— Fluker *v.* Taylor, 3 Drew. 183, 61 Eng. Reprint 873, holding that the jurisdiction of equity depends on whether the account is in its own nature, not merely from the number of items, so complicated that it could not fairly be taken in a court of law.

Illustrations of accounts so simple as not to justify equity jurisdiction see Crothers *v.* Lee, 29 Ala. 337 (where the account consisted of a single item on one side, to which defendant had offsets or credits); Fluker *v.* Taylor, 3 Drew. 183, 61 Eng. Reprint 873 (where the only question was a claim for remuneration which could be determined at law); Foley *v.* Hill, 8 Jur. 347, 13 L. J. Ch. 182, 1 Phil. 399, 19 Eng. Ch. 399, 41 Eng. Reprint 683 [*affirmed* in 2 H. L. Cas. 28, 9 Eng. Reprint 1002] (where the account consisted of three items only one on one side and two on the other, and it was held that such an account was not a proper subject for a bill in equity but was a case for assumpsit for money had and received, in which justice could be administered in a more simple way and at less expense).

In agencies involving a single transaction where a suit at law would be maintainable it is generally held that a bill in equity by the principal for an accounting will not lie. Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24; Porter *v.* Speneer, 2 Johns. Ch. (N. Y.) 169 (holding that there must be a series of transactions); Kerr *v.* Camden Steamboat Co., Cheves Eq. (S. C.) 189; Moxon *v.* Bright, L. R. 4 Ch. 292, 20 L. T. Rep. N. S. 961; Navulshaw *v.* Brownrigg, 15 Jur. 985, 21 L. J. Ch. 57, 1 Sim. N. S. 573, 40 Eng. Ch. 573, 61 Reprint 221 [*affirmed* in 2 De G. M. & G. 241, 16 Jur. 979, 21 L. J. Ch. 908, 51 Eng. Ch. 345, 42 Eng. Reprint 943] (holding that a bill for an account is not sustainable where it relates to a single transaction not tainted with fraud, and the principal has a remedy at law); O'Brien *v.* Brodeur, 10 Quebec Super. Ct. 155, unless a ground for equitable jurisdiction is laid by reason of a discovery being wanted); Halsted *v.* Rabb, 8 Port. (Ala.) 63 (holding that in agencies of a single transaction, such as a single consignment, or the delivery of money, to be laid out in the purchase of any particular thing, or to be paid over to a third person, by reason of a discovery being wanted, it is perhaps the better opinion that such a case would be cognizable alone at law).

24. Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342 (holding that an account supposes something mutual); Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169 (holding that there must be mutual demands and not merely payments by way of set-off, and that there must be a series of transactions on one side and of

mutual, and although the items are all on one side, equity will still take jurisdiction if the account is so complicated that a bill would lie if it were a mutual account.[25]

(II) *AT LAW.* It was formerly held that the ancient common-law action of account render[26] could be brought by a principal against his agent for an accounting; but this action has fallen generally into disuse, or has been materially altered by statute and is now rarely if ever brought in the common-law form.[27]

2. ACTIONS BY AGENT AGAINST PRINCIPAL — a. In General. When the compensation of the agent is fixed by an express contract his proper remedy for the recovery thereof is an action upon the contract.[28] Where, however, the compensation is not so fixed the proper action is upon the implied contract for the value of his services.[29] Where the agent sues for an indemnity for loss incurred by him in committing a tort at the direction of the principal under such circumstances as do not deprive him of the right of indemnity,[30] either assumpsit or a special action on the case will lie.[31]

b. Suits For Accounting. Ordinarily an agent cannot maintain a suit in equity against his principal for an accounting to recover commissions even though he seeks a discovery of facts upon which to base his claim,[32] the mere relation of

payments on the other); Ellas *v.* Lockwood, Clarke (N. Y.) 311; Kerr *v.* Camden Steamboat Co., Cheves Eq. (S. C.) 189; Goddin *v.* Bland, 87 Va. 706, 13 S. E. 145, 24 Am. St. Rep. 678; Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449; Smith *v.* Leveaux, 2 De G. J. & S. 1, 9 Jur. N. S. 1140, 33 L. J. Ch. 167, 9 L. T. Rep. N. S. 313, 3 New Rep. 18, 12 Wkly. Rep. 31, 67 Eng. Ch. 1; Padwick *v.* Stanley, 9 Hare 627, 16 Jur. 586, 587, 41 Eng. Ch. 627, 68 Eng. Reprint 664; Phillips *v.* Phillips, 9 Hare 471, 41 Eng. Ch. 471, 68 Eng. Reprint 596; Dinwiddie *v.* Bailey, 6 Ves. Jr. 136, 31 Eng. Reprint 979.

25. *California.*— San Pedro Lumber Co. *v.* Reynolds, 111 Cal. 588, 44 Pac. 309, holding that where the accounts are all on one side, but there are circumstances of great complications, or difficulties in the way of adequate relief at law, equity will take jurisdiction.

Minnesota.— Coffin *v.* Craig, 89 Minn. 226, 94 N. W. 680.

South Carolina.— Kerr *v.* Camden Steamboat Co., Cheves Eq. 189, 194.

Tennessee.— Taylor *v.* Tompkins, 2 Heisk. 89.

Wisconsin.— Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645 (holding that where a fiduciary relation exists it is immaterial that there are no mutual accounts); Schwickerath *v.* Lohen, 48 Wis. 599, 4 N. W. 805.

England.— Fluker *v.* Taylor, 3 Drew. 183, 191, 61 Eng. Reprint 873 (where the court said: "It is difficult to lay down any fixed rule which goes to mark out the line between those cases when an account must be taken in equity, and when it need not. An attempt has been made to lay down such a rule, by saying the accounts must be mutual, that there must be receipts and payments on both sides. . . . But it really appears to me that it would be dangerous to lay down the rule in any such terms"); Carlisle *v.* Wilson, 13 Ves. Jr. 276, 33 Eng. Reprint 297 (where the demands were all on one side and all admitted to be of a legal nature yet the bill was held to lie); Hemings *v.* Pugh, 4 Giffard 456, 9 Jur. N. S. 1124, 9 L. T. Rep. N. S. 283, 12 Wkly. Rep. 44, 66 Eng. Reprint 785.

26. See ACCOUNTS AND ACCOUNTING, 1 Cyc. 401.

27. Persch *v.* Quiggle, 57 Pa. St. 247 (holding that where a person was a general agent for another for the custody and management of stock delivered to him, and for collection of its dividends, etc., an action of account render might be maintained against him at common law as bailiff, and the act of Oct. 13, 1840, makes it a case for chancery jurisdiction); McLean *v.* Wade, 53 Pa. St. 146 (holding that the action of account render is a proper one between principal and trustee or bailiff and receiver, and may be resorted to as between the representatives of the agent and his principal); Reeside *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503; Pickett *v.* Pearsons, 17 Vt. 470.

28. Bower *v.* Jones, 8 Bing. 65, 1 L. J. C. P. 31, 1 Moore & S. 140, 21 E. C. L. 447, special assumpsit. See, generally, CONTRACTS, 9 Cyc. 685 *et seq.*

29. *Arkansas.*— Spearman *v.* Texarkana, 58 Ark. 348, 24 S. W. 883, 22 L. R. A. 855.

Indiana.— Lockwood *v.* Robbins, 125 Ind. 398, 25 N. E. 455.

Iowa.— Wadleigh *v.* McDowell, 102 Iowa 480, 71 N. W. 336.

New Jersey.— Ruckman *v.* Bergholz, 38 N. J. L. 531.

Pennsylvania.— Masterson *v.* Masterson, 121 Pa. St. 605, 15 Atl. 652.

United States.— Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819.

England.— Solly *v.* Weiss, 2 Moore C. P. 420, 8 Taunt. 371, 4 E. C. L. 189.

Quantum valebant for wrongful discharge see Newcomb *v.* Imperial L. Ins. Co., 51 Fed. 725.

30. See *supra*, III, B, 3.

31. Moore *v.* Appleton, 26 Ala. 633.

32. Arnold *v.* Angell, 62 N. Y. 508; Gee *v.* Pendas, 66 N. Y. App. Div. 566, 73 N. Y. Suppl. 247; Skilton *v.* Payne, 18 Misc.

principal and agent being, as in the case of a bill by the principal against the agent,[33] insufficient to entitle him to this relief;[34] but where the agency is of a fiduciary nature, and a discovery is necessary and the account is sufficiently complicated to justify equitable accounting, a bill therefor is sometimes entertained.[35]

3. Actions by Third Party Against Agent. As to the ground upon which the liability of an agent contracting for another without authority rests, the authorities in the several states differ widely, nor is it easy to reconcile the various decisions in the same state. In some jurisdictions, particularly in the earlier cases, it is held that an action may be maintained against the agent as principal upon the contract itself, although it contains no apt words to bind him personally,

(N. Y.) 332, 42 N. Y. Suppl. 111 (where a sales agent was dismissed); Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342; Padwick *v.* Hurst, 18 Beav. 575, 18 Jur. 763, 23 L. J. Ch. 657, 2 Wkly. Rep. 501, 53 Eng. Reprint 225; Smith *v.* Leveaux, 2 De G. J. & S. 1, 9 Jur. N. S. 1140, 33 L. J. Ch. 167, 9 L. T. Rep. N. S. 313, 3 New Rep. 18, 12 Wkly. Rep. 31, 67 Eng. Ch. 1, 46 Eng. Reprint 274 (holding that where a trading firm agreed to give to an agent a commission on orders obtained by himself, and a commission at a different rate on orders not obtained by him, but given by persons first introduced by him, the fact that the agent must in general be ignorant of the latter class of orders did not entitle him to file a bill against his principals for an account of what was due to him for commission, but that his remedy was at law, it not appearing that there was such complication as to justify equitable interference); Blyth *v.* Whiffin, 27 L. T. Rep. N. S. 330; Dinwiddie *v.* Bailey, 6 Ves. Jr. 136, 31 Eng. Reprint 979 (where a bill by an insurance agent for a discovery and account of money paid and received by him in that capacity on account of defendants, and money due to him for commissions, etc., and for promissory notes indorsed to him was dismissed); James *v.* Snarr, 15 Grant Ch. (U. C.) 229.

Suit in equity by principal against agent see *supra*, IV, A, 1, b.

33. See *supra*, IV, A, 1, b.

34. Chaurant *v.* Maillard, 56 N. Y. App. Div. 11, 67 N. Y. Suppl. 345; Johnston *v.* Berlin, 35 Misc. (N. Y.) 146, 71 N. Y. Suppl 454.

35. Underhill *v.* Jordan, 72 N. Y. App. Div. 71, 76 N. Y. Suppl. 266 (holding that where the facts are such that an equitable action against the agent for an accounting could be maintained by the principal, then it must follow that the agent also has the reciprocal right to maintain an action for the same purpose, as it would clearly be obnoxious to every principle of equity to hold that one party might invoke the aid of equity and that the other could not, although the rights and liabilities of each were governed by and arose out of the same transaction); Kerr *v.* Camden Steamboat Co., Cheves Eq. (S. C.) 189 (holding that equity has jurisdiction in the case of an agent intrusted with funds of his principal, and having received other funds in the course of the agency, for which he is accountable, and who comes to render his account and asks to have it allowed and himself discharged from his trust, and if any balance be due to have it decreed him although it appear that the party is not without a remedy at law); Hapgood *v.* Berry, 157 Fed. 807, 85 C. C. A. 171 (holding that a suit to recover on a contract by which complainant was to render services to defendant in buying, renting, and selling lands, and was to receive as part compensation a share of the profits made, in which it was necessary to state an account between the parties covering the transactions during several years, was properly cognizable by a court of equity); Shepard *v.* Brown, 9 Jur. N. S. 195, 7 L. T. Rep. N. S. 499, 11 Wkly. Rep. 162 (allowing a bill for an accounting where it appeared that the agent was employed to obtain orders for sale of goods on commission, that orders were obtained, the evidence whereof was entirely in the possession of the principal, and the account was long and conplicated); Harrington *v.* Churchward, 6 Jur. N. S. 576, 29 L. J. Ch. 521, 2 L. T. Rep. N. S. 114, 8 Wkly. Rep. 302 (holding that where a salary is payable to an agent in proportion to the profits of his employers, the question whether the agent has a right to come into equity for an account and payment, in lieu of suing at law, depends upon whether the accounts are of a too complicated nature to be gone into by a jury). But see Padwick *v.* Stanley, 9 Hare 627, 16 Jur. 586, 41 Eng. Ch. 627, 68 Eng. Reprint 664 (holding that, although the principal might file a bill against the agent, the agent could not against the principal, that there is no such mutuality in the relation of principal and agent, the right of the principal resting upon the trust imposed in the agent, and the agent reposing no such trust in the principal. See also James *v.* Snarr, 15 Grant Ch. (U. C.) 229, dismissing a bill for an accounting on the ground that there is no duty on the part of the principal, as there is on the part of the agent, to keep an account of the dealings between them, and there is no confidence reposed by the agent in the principal, as there is by the principal in the agent; and holding that the existence of such duty and such confidence are grounds for a bill lying for an account by a principal against his agent, and their absence in the converse relation are reasons for a bill in such a case as this, not lying, the proper remedy of the agent being a bill for discovery in aid of an action at law. See also *supra*, IV, A, 1, b.

but only to bind the principal, upon the theory that the contract must have been intended to bind someone, if not the principal, then the agent.[36] By the great weight of recent authority, however, this theory has been emphatically repudiated, and it is now generally held, more logically, that the agent cannot be held upon the contract unless it contains apt words to bind him personally, in the absence of which the only remedy is by an action for the breach of his implied warranty or an action for deceit if the circumstances warrant the latter remedy.[37]

36. *Alabama.*— Gillaspie *v.* Wesson, 7 Port. 454, 31 Am. Dec. 715.

Indiana.— Terwilliger *v.* Murphy, 104 Ind. 32, 3 N. E. 404; Pitman *v.* Kintner, 5 Blackf. 250, 33 Am. Dec. 461; McClure *v.* Bennett, 1 Blackf. 189, 12 Am. Dec. 223. But see McHenry *v.* Duffield, 7 Blackf. 41, 42, in which the court said: "No suit on the instrument before us can be sustained against the defendants, because it does not contain any acknowledgment by them individually. If they were authorized by the trustees to execute it, the suit should be against the trustee. If they were not so authorized, they are liable in case for acting in the matter without authority."

Louisiana.— Levy *v.* Lane, 38 La. Ann. 252; Hewitt *v.* Roudebush, 24 La. Ann. 254; Richie *v.* Bass, 15 La. Ann. 668.

North Dakota.— Kennedy *v.* Stonehouse, 13 N. D. 232, 100 N. W. 258, in which the court says that it holds the agent upon the contract only because constrained by its construction of Rev. Code (1899), §§ 4342, 4343, but that it considers this ground of liability "illogical and absurd," and it indicates clearly that in the absence of statutory provision the decision would be otherwise.

Vermont.— Roberts *v.* Button, 14 Vt. 195; Clark *v.* Foster, 8 Vt. 98.

See also cases cited *contra*, in the following note.

The fallacy of this rule.— Those cases which hold the agent upon the contract, although it contains no apt words to bind him, base their conclusion upon the fallacious argument that the contract was intended to bind someone, and if the principal is not bound the contract must be that of the agent. Thilmany *v.* Iowa Paper Bag Co., 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259. And see cases cited *supra*, this note. But such a contract is not the contract of the principal, for the pretended agent had no power to bind him, and it is not the contract of the agent, for in making it the agent did not bind and did not attempt to bind himself. Noyes *v.* Loring, 55 Me. 408, 412. The contract may be therefore absolutely void, and thus bind nobody. As was said by the court in Noyes *v.* Loring, *supra*, the "inconsistency" of holding the agent upon the contract, "to use no stronger term, will be apparent by supposing that instead of a promise to pay money, the pretended agent had signed a promise that his principal should marry plaintiff within a given time, or do some other act which it was perfectly competent for the principal to perform, but which the agent could not. What would be thought of a declaration charging the pretended agent as a principal in such a case?"

37. *Arkansas.*— Dale *v.* Donaldson Lumber Co., 48 Ark. 188, 2 S. W. 703, 3 Am. St. Rep. 224.

California.— Senter *v.* Monroe, 77 Cal. 347, 19 Pac. 580; Lander *v.* Castro, 43 Cal. 497; Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64; Sayre *v.* Nichols, 7 Cal. 535, 68 Am. Dec. 280.

Connecticut.— Taylor *v.* Shelton, 30 Conn. 122; Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; Johnson *v.* Smith, 21 Conn. 627.

Illinois.— Hancock *v.* Yunker, 83 Ill. 208; Duncan *v.* Niles, 32 Ill. 532, 83 Am. Dec. 293; McCormick *v.* Seeberger, 73 Ill. App. 87; Rice *v.* Western Fuse, etc., Co., 64 Ill. App. 603; Neufeld *v.* Beidler, 37 Ill. App. 34. *Contra*, Frankland *v.* Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234 holding the agent liable although there were no apt words to bind him. This case, however, was decided upon the authority of Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550, which has since been repudiated in New York (see New York cases cited *infra*, this note), and upon the authority of Wheeler *v.* Reed, 36 Ill. 81, concerning which case the court in Hancock *v.* Yunker, 83 Ill. 208, 214, said: "The question under consideration was not before the court in Wheeler *v.* Reed, and what was there said affecting it was by way of argument merely, and, so far as intended to announce a principal, must be understood as restricted to cases where there are apt words in the instrument to charge the agent personally, by rejecting the words descriptive of his agency as surplusage."

Iowa.— Groeltz *v.* Armstrong, 125 Iowa 39, 99 N. W. 128; Thilmany *v.* Iowa Paper-Bag Co., 108 Iowa 357, 79 N. W. 261; Burlington First Nat. Bank *v.* Owen, 52 Iowa 107, 2 N. W. 980. See Andrews *v.* Tedford, 37 Iowa 314, holding that an agent who, acting without authority, makes a contract not binding on his principal is himself bound. The instrument upon which defendant was sued in this case, however, contained apt words to bind him personally, and furthermore the question of the nature of the liability was not before the court, whose holding was manifestly intended to be merely a general statement of the rule of liability of the agent.

Maine.— Noyes *v.* Loring, 55 Me. 408; Stetson *v.* Patten, 2 Me. 358, 11 Am. Dec. 111; Harper *v.* Little, 2 Me 14, 11 Am. Dec. 25.

Massachusetts.— Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Draper *v.* Massachusetts Steam Heating Co., 5 Allen 338;

B. Conditions Precedent — 1. In General. In the absence of contract [38]

Abbey *v.* Chase, 6 Cush. 54; Jefts *v.* York, 4 Cush. 371, 50 Am. Dec. 791; Ballou *v.* Talbot, 16 Mass. 461, 8 Am. Dec. 146; Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160; Hatch *v.* Smith, 5 Mass. 42; Tippets *v.* Walker, 4 Mass. 595.

Michigan.— Solomon *v.* Penoyar, 89 Mich. 11, 50 N. W. 644.

Minnesota.—Skaaras *v.* Finnegan, 32 Minn. 107, 19 N. W. 729; Sheffield *v.* Ladue, 16 Minn. 388, 10 Am. Rep. 145; Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502. In Rollins *v.* Phelps, 5 Minn. 463, apparently *contra*, and asserting that the liability of the agent rests on the contract, the contract sued on did contain apt words to bind the agent. The decision therefore comes well within the rule stated.

Missouri.—Wright *v.* Baldwin, 51 Mo. 269; Coffman *v.* Harrison, 24 Mo. 524; Byars *v.* Dooers, 20 Mo. 283. In Myers Tailoring Co. *v.* Keeley, 58 Mo. App. 491, the court lays down the broad rule that an agent who fails to bind his principal binds himself. The agent in that case, however, contracted in his own name, which brings the decision in line with the better rule followed in the other Missouri cases.

Nebraska.— Brong *v.* Spence, 56 Nebr. 638, 77 N. W. 54; Cole *v.* O'Brien, 34 Nebr. 68, 51 N. W. 316, 33 Am. St. Rep. 616.

New Hampshire.— Weare *v.* Gove, 44 N. H. 196; Moor *v.* Wilson, 26 N. H. 332; Pettingill *v.* McGregor, 12 N. H. 179; Savage *v.* Rix, 9 N. H. 263; Woodes *v.* Dennett, 9 N. H. 55. *Contra*, Moor *v.* Wilson, 26 N. H. 332; Grafton Bank *v.* Flanders, 4 N. H. 239 (holding a person who forged another's name to an instrument liable upon the instrument itself, although it contained no apt words to bind him, the decision seeming to be based upon the theory that one doing business under an assumed name should be held as if he had contracted in his own proper name); Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82 (holding that where an agent contracts in writing without authority he is liable on the writing itself. In this case, however, there were no words used proper to bind the principal, but only the agent himself). If either of these cases assumes to hold an agent liable on the contract, there being no apt words to bind him, their effect is absolutely nullified by the later New Hampshire case cited *supra*.

New Jersey.— Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178 [*overruling* in effect Bay *v.* Cook, 22 N. J. L. 343, which held the agent directly upon the contract, an oral one, and which followed Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550. The doctrine of Mott *v.* Hicks, however, has been repudiated in New York. See New York cases cited, *infra*, this note].

North Carolina.— Delins *v.* Cawthorn, 13 N. C. 90.

Ohio.—Farmers' Co-Op. Trust Co. *v.* Floyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346.

Oregon.— Cochran *v.* Baker, 34 Oreg. 555, 52 Pac. 520, 56 Pac. 641.

Pennsylvania.— Hopkins *v.* Mehaffy, 11 Serg. & R. 126. *Contra*, McConn *v.* Lady, 10 Wkly. Notes Cas. 493, holding the agent liable upon a contract wholly made in the name of the principal, upon which the name of the agent did not appear. And see Hampton *v.* Speckenagle, 9 Serg. & R. 212, 11 Am. Dec. 704.

Washington.— McReavy *v.* Eshelman, 4 Wash. 757, 31 Pac. 35.

Wisconsin.— McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

United States.— Kent *v.* Addicks, 126 Fed. 112, 60 C. C. A. 660; New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 681.

England.— Richardson *v.* Williamson, L. R. 6 Q. B. 276, 40 L. J. Q. B. 145; Lewis *v.* Nicholson, 18 Q. B. 503, 16 Jur. 1041, 21 L. J. Q. B. 311, 83 E. C. L. 503; Jenkins *v.* Hutchinson, 13 Q. B. 744, 13 Jur. 763, 18 L. J. Q. B. 274, 66 E. C. L. 744; Jones *v.* Downman, 4 Q. B. 235 note, 45 E. C. L. 235; Polhill *v.* Walter, 3 B. & Ad. 114, 1 L. J. K. B. 92, 23 E. C. L. 59; Thomas *v.* Hewes, 2 Cromp. & M. 519, 4 Tyrw. 335; Downman *v.* Jones, 9 Jur. 454; Wilson *v.* Barthrop, 1 Jur. 949, 6 L. J. Exch. 251, M. & H. 81, 2 M. & W. 863. See Smout *v.* Ilbery, 12 L. J. Exch. 357, 10 M. & W. 1.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 476–478.

In New York, where the theory of liability upon the contract itself seems to have originated (see Kennedy *v.* Stonehouse, 13 N. D. 232, 100 N. W. 258), the earlier decisions all hold the agent upon this ground even though the contract contains no apt words to bind him (Plumb *v.* Milk, 19 Barb. 74; Palmer *v.* Stephens, 1 Den. 471; Feeter *v.* Heath, 11 Wend. 477; Rossiter *v.* Rossiter, 8 Wend. 494, 24 Am. Dec. 62; Meech *v.* Smith, 7 Wend. 315; Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550, a leading case often followed in other states; White *v.* Skinner, 13 Johns. 307, 7 Am. Dec. 381; Taft *v.* Brewster, 9 Johns. 334, 6 Am. Dec. 280; Dusenbury *v.* Ellis, 3 Johns. Cas. 70, 2 Am. Dec. 144). As stated in White *v.* Madison, 26 N. Y. 117, the authority of these cases was first somewhat shaken by the remarks of the judges who delivered the opinion in Walker *v.* State Bank, 9 N. Y. 582, and in the later cases this doctrine has been repudiated and the agent held liable only when there are words apt to bind him personally, that is when the contract can be construed as his own; otherwise the remedy is by action for breach of warranty or for deceit. Taylor *v.* Nostrand, 134 N. Y. 108, 31 N. E. 246; Simmons *v.* More, 100 N. Y. 140, 2 N. E. 640; Baltzen *v.* Nicolay, 53 N. Y. 467; Dung *v.* Parker, 52 N. Y. 494; White *v.* Madison, 26 N. Y. 117; Hegeman *v.* Johnson, 35 Barb. 200; Noe *v.* Gregory, 7 Daly 283; Campbell *v.* Muller, 19 Misc. 189, 43 N. Y. Suppl. 233.

38. McCormick Harvesting Mach. Co. *v.*

or statutory provisions [39] the necessity of the performance of particular acts as conditions precedent to the bringing of actions against the agent depends on the facts and circumstances of each case.[40]

2. Demand.[41] A principal cannot as a general rule commence an action against his agent for an accounting or for money or property received by the agent for the principal's benefit until he has made a demand therefor against the agent which has not been complied with.[42] Failure of the agent to comply is equivalent to

Haug, 88 Ill. App. 674, holding that where an agency contract provided that if the agent should take worthless notes in the course of his agency, he should, upon settlement with the principal, replace these notes with money or good commercial paper, the principal could not recover from the agent the value of a worthless note taken by the latter without first tendering him the note.

39. See the statutes of the different states.

40. See cases cited *infra*, this note.

Tender to the agent by the principal of money or property was held not to be condition precedent to an action by the principal against the agent in the following cases: Shipherd *v.* Field, 70 Ill. 438 (holding that a principal whose money is lost owing to his agent's loaning it on inadequate security is excused for not making an earlier offer to return the securities before bringing an action against the agent to recover such loss, where the latter induced the principal to wait nearly a year in the hope of being able to collect the money); Moore *v.* Mandlebaum, 8 Mich. 433 (holding that where an agent induces his principal by fraud to convey land to a third person for much less than its value and really for the benefit of the agent, and such third person conveys to a *bona fide* purchaser for an advanced price, the principal need not, in an action to recover from the agent the difference between the amount paid to the principal and such advanced price, tender back what he had received, before bringing suit); Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188 (holding that a forwarding merchant's peremptory refusal to deliver goods to the holder of the bill of lading dispenses with the necessity of making a formal tender of charges thereon before bringing suit for such refusal).

Accounting.— An agent who is bound to render an account to his principal, it has been held, must do so as a condition precedent to an action for wages or salary. Violett *v.* Sexton, 14 Quebec K. B. 360; Eddy *v.* Eddy, 7 Quebec Q. B. 300 [*affirmed* in [1900] A. C. 299].

Exhausting other remedies as a condition precedent. To an action by a third person against the agent see Merchants', etc., Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406, holding that where an agent sells property of his principal which is subject to a mortgage, the mortgagee is not bound to exhaust all other remedies before proceeding against the agent. To an action by the principal against the agent see Mechanics' Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 13, holding that where the indorser of a note is discharged by want of due demand on the maker, or of notice of the default of the maker, the legal presumption is that he will avail himself of such discharge; and the holder therefore is not bound to prosecute a fruitless suit against the indorser before he can maintain an action against his own agent for neglecting to make due demand on the maker, or to give due notice of his default.

41. Demand as affecting computation of statutory period of limitation see Limitations of Actions, 25 Cyc. 1201 *et seq.*

Demand as affecting right to costs see Costs, 11 Cyc. 82.

42. *Alabama.*— Sally *v.* Capps, 1 Ala. 121.

Arkansas.— Jett *v.* Hempstead, 25 Ark. 462; Lyon *v.* Tams, 11 Ark. 189; Warner *v.* Bridges, 6 Ark. 385; Taylor *v.* Spears, 6 Ark. 381, 44 Am. Dec. 519.

California.— Bushnell *v.* McCauley, 7 Cal. 421.

Illinois.— Tinkham *v.* Heyworth, 31 Ill. 519; Bedell *v.* Janney, 9 Ill. 193.

Indiana.— Jones *v.* Gregg, 17 Ind. 84; Philips *v.* Wills, 2 Ind. 325; English *v.* Devarro, 5 Blackf. 588; Judah *v.* Dyott, 3 Blackf. 324, 25 Am. Dec. 112; Armstrong *v.* Smith, 3 Blackf. 251.

Massachusetts.— Clark *v.* Moody, 17 Mass. 145.

Missouri.— Cockrill *v.* Kirkpatrick, 9 Mo. 697.

Montana.— Anderson *v.* Hulme, 5 Mont. 295, 5 Pac. 865.

North Carolina.— Wiley *v.* Logan, 95 N. C. 358; Potter *v.* Sturges, 12 N. C. 79.

Pennsylvania.— Drexel *v.* Raimond, 23 Pa. St. 21.

England.— Topham *v.* Broddick, 1 Taunt. 572, 10 Rev. Rep. 610.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 700, 703.

No particular words are necessary to a demand, and any declaration of the agent to the principal which shows a denial of his right puts him in the wrong and gives the principal a right of action. Moore *v.* Hyman, 34 N. C. 38.

Time of demand.— The demand must be made after the agent has received the money. Taylor *v.* Spears, 6 Ark. 381, 44 Am. Dec. 519.

Demandant must be authorized.— To constitute a legal demand on an agent who has received money for his principal which he has failed to turn over, it must appear that the person making the demand was authorized to do so by the principal. Taylor *v.* Spears, 6 Ark. 381, 44 Am. Dec. 519.

Where ground of action is the agent's breach of duty, by reason of which less money came to his hands for the principal than

refusal.[43] But no demand is necessary where the agent has denied the agency or the liability,[44] or has converted the money or property to his own use,[45] or if to make demand would be impracticable or highly inconvenient.[46] Unreasonable delay in rendering an account raises a presumption that the agent has converted the funds to his own use, and the principal may sue without previous demand.[47] And when the agent is under an agreement to make payments at fixed times, the arrival of the time itself operates under the agreement as sufficient demand.[48]

C. Parties[49] **— 1. Right of Action by Principal or Agent or Both — a. In General.** According to the well-settled common-law rule that an action upon a contract must be brought in the name of the party in whom the legal interest in the contract is vested,[50] an agent cannot sue in his own name, where the legal interest is vested in his principal.[51] To enable an agent to sue in his own name,

otherwise would, and also for the failure of the agent to pay over the money actually received no demand is necessary. Dever *v.* Branch, 18 Tex. 615.

Where agent exceeds his authority it has been held that no demand is necessary. Brazier *v.* Fortune, 10 Ala. 516, where an agent who received notes to be deposited with an attorney for collection collected the money himself.

Where goods are to be sold at certain prices or returned on demand, and are sold and the money received, no special demand is necessary to an action against the agent for such money; but otherwise where the action is for a failure to return the goods. Wyman *v.* Fowler, 30 Fed. Cas. No. 18,114, 3 McLean 467.

Petition against agent's executor for discovery and settlement of the accounts of the agent can be filed without previous affidavit and demand. Fox *v.* Apperson, 6 Bush (Ky.) 653.

43. Hays *v.* Smith, 26 N. C. 254. See Moore *v.* Hyman, 34 N. C. 38.

44. *Alabama.*— Hammett *v.* Brown, 60 Ala. 498.

California.— Cox *v.* Delmas, 99 Cal. 104, 33 Pac. 836; Allsopp *v.* Joshua Hendy Mach. Works, 5 Cal. App. 228, 90 Pac. 39.

Kansas.— Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. 857.

Massachusetts.— Hill *v.* Hunt, 9 Gray 66; Clark *v.* Moody, 17 Mass. 145.

Missouri.— Bartels *v.* Kinnenger, 144 Mo. 370, 46 S. W. 163.

Montana.— Judith Inland Transp. Co. *v.* Williams, 36 Mont. 25, 91 Pac. 1061.

North Carolina.— Wiley *v.* Logan, 95 N. C. 358; Waddell *v.* Swann, 91 N. C. 108; Moore *v.* Hyman, 34 N. C. 38.

Oregon.— Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

Pennsylvania.— Irwin *v.* Harris, 199 Pa. St. 405, 49 Atl. 218.

Vermont.— Tillotson *v.* McCrillis, 11 Vt. 477.

Wisconsin.— Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 700, 703.

45. *Alabama.*— Ainsworth *v.* Partillo, 13 Ala. 460; Brazier *v.* Fortune, 10 Ala. 516.

California.— Wooster *v.* Nevills, 73 Cal. 58, 14 Pac. 390 (where the agent was guilty of both fraud and conversion); Allsopp *v.* Joshua Hendy Mach. Works, 5 Cal. App. 228, 90 Pac. 39.

Illinois.— Chapman *v.* Burt, 77 Ill. 377; Bedell *v.* Janney, 9 Ill. 193.

Indiana.— Terrell *v.* Butterfield, 92 Ind. 1; Bunger *v.* Roddy, 70 Ind. 26.

Missouri.— Bartels *v.* Kinnenger, 144 Mo. 370, 46 S. W. 163.

Pennsylvania.— Etter *v.* Bailey, 8 Pa. St. 442.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 700, 703.

46. Dodge *v.* Perkins, 9 Pick. (Mass.) 368; Clark *v.* Moody, 17 Mass. 145; Eaton *v.* Welton, 32 N. H. 352.

47. *Illinois.*— Bedell *v.* Janney, 9 Ill. 193, 201, holding that as a general rule in cases of delay it may be presumed that payment has been delayed for some good and sufficient cause, and that the agent will pay upon demand. "But, where so long a time has elapsed since the collection of the money, as to rebut any such presumption in favor of the collector, he may well be considered as having appropriated it to his own use, and then, neither law nor reason requires that before he can be sued for his non-feasance, he should be requested to do what his conduct sufficiently indicates his determination not to do."

Iowa.— Haas *v.* Damon, 9 Iowa 589.

Massachusetts.— Dodge *v.* Perkins, 9 Pick. 368; Clark *v.* Moody, 17 Mass. 145.

New York.— Hickok *v.* Hickok, 13 Barb. 632; Lillie *v.* Hoyt, 5 Hill 395, 40 Am. Dec. 360.

Pennsylvania.— Drexel *v.* Raimond, 23 Pa. St. 21.

England.— Hardwicke *v.* Vernon, 14 Ves. Jr. 504, 9 Rev. Rep. 329, 33 Eng. Reprint 614; Lady Ormond *v.* Hutchinson, 13 Ves. Jr. 53, 33 Eng. Reprint 212 [*affirmed* in 16 Ves. Jr. 94, 33 Eng. Reprint 919].

See 40 Cent. Dig. tit. "Principal and Agent," §§ 700, 703.

48. Castleman *v.* Southern Mut. L. Ins. Co., 14 Bush (Ky.) 197; Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, 37 N. Y. Suppl. 794 [*affirmed* in 158 N. Y. 693, 53 N. E. 1125]; Brown *v.* Arrott, 6 Watts & S. (Pa.) 402.

49. See, generally, Parties, 30 Cyc. 52–58.

50. See Contracts, 9 Cyc. 702.

51. *Alabama.*— Nabors *v.* Shippey, 15 Ala. 293.

there must be something more than the mere powers of a naked agent.[52] However, where an agent is clothed with the necessary power, he may bring suit in his own name.[53]

b. Actions on Agent's Contracts — (i) *General Rule.* An agent may maintain an action in his own name on a contract in which his principal is interested: (1) Where the contract is made in writing expressly with the agent, and imports to be a contract personally with him, although he may be known to act as an agent.[54] (2) Where he is the only known or ostensible principal, and therefore

California.— Chin Kem You *v.* Ah Joan, 75 Cal. 124, 16 Pac. 705; Phillips *v.* Henshaw, 5 Cal. 509.

Indiana.— Sharp *v.* Jones, 18 Ind. 314, 81 Am. Dec. 359.

Kentucky.—Tharp *v.* Farquar, 6 B. Mon. 3.

Massachusetts.— Fay *v.* Walsh, 190 Mass. 374, 77 N. E. 44; Bainbridge *v.* Downie, 6 Mass. 253; Gilmore *v.* Pope, 5 Mass. 491.

Michigan.— Weston *v.* Card, 96 Mich. 373, 56 N. W. 26, holding that in order to recover in his own name on a contract made by him as agent for another, plaintiff must aver and prove an assignment thereof to himself.

Minnesota.—Morton *v.* Hagerman, 39 Minn. 277, 39 N. W. 497; Morton *v.* Stone, 39 Minn. 275, 39 N. W. 496.

Mississippi.— Denver Produce, etc., Co. *v.* Taylor, 73 Miss. 702, 19 So. 489.

Missouri.— Coggburn *v.* Simpson, 22 Mo. 351; Devers *v.* Becknell, 1 Mo. 333; White *v.* Bennett, 1 Mo. 102.

New Jersey.— Ward *v.* Wilkie, 3 N. J. L. 411; Kinsey *v.* Hollinshead, 2 N. J. L. 380; Brackney *v.* Shreve, 1 N. J. L. 33.

New York.— McColl *v.* Fraser, 40 Hun 111 (holding that an action to enforce an equitable lien on funds misappropriated by an agent cannot be brought by the agent in his individual capacity); Rose *v.* U. S. Telegraph Co., 6 Rob. 305, 34 How. Pr. 308, 3 Abb. Pr. N. S. 408; Redfield *v.* Middleton, 7 Bosw. 649; Toland *v.* Murray, 18 Johns. 24; Gunn *v.* Cantine, 10 Johns. 387; Bogart *v.* De Bussy, 6 Johns. 94. *Contra*, Newcomb *v.* Clark, 1 Den. 226, holding that an action on an express contract must, except in the case of negotiable paper, be brought in the name of the agent with whom it was made.

North Carolina.— Nixon *v.* Bagby, 52 N. C. 4; Whitehead *v.* Potter, 26 N. C. 257; Cox *v.* Skeen, 24 N. C. 220, 38 Am. Dec. 691; Peck *v.* Gilman, 20 N. C. 391.

Pennsylvania.— Gillett *v.* Ball, 9 Pa. St. 13; Root *v.* Muhr, 19 Wkly. Notes Cas. 403.

South Carolina.— Coggeshall *v.* Coggeshall, 2 Strobh. 51.

Texas.— Tinsley *v.* Anderson, (Civ. App. 1895) 33 S. W. 266 [*following* Tinsley *v.* Dowell, 87 Tex. 23, 26 S. W. 946].

Virginia.— Jones *v.* Hart, 1 Hen. & M. 470, holding that a suit cannot be maintained in the name of the attorney in fact, even in a court of equity.

United States.— Neely *v.* Robinson, 17 Fed. Cas. No. 10,082*a*, Hempst. 9.

England.— Piggott *v.* Thompson, 3 B. & P. 147.

See 40 Cent. Dig. tit. "Principal and Agent," § 691.

Subagent.— Where an assignee of an agent, who had no power to delegate his authority for the collection of a claim, sues thereon, a contention by plaintiff that defendant cannot suffer injury from a judgment, as it will protect him from a second action by the principal, is unavailable to enable him to continue the suit, since, until the principal ratifies the agent's act, defendant continues liable. Dingley *v.* McDonald, 124 Cal. 682, 57 Pac. 574.

52. Bell *v.* Tilden, 16 Hun (N. Y.) 346; Barkley *v.* Wolfskehl, 25 Misc. (N. Y.) 420, 54 N. Y. Suppl. 934. See also Hays *v.* Hathorn, 74 N. Y. 486.

53. Frazier *v.* Willcox, 4 Rob. (La.) 517; Eggleston *v.* Colfax, 4 Mart. N. S. (La.) 481 (holding that where, under a power of attorney, a plaintiff is appointed for the special purpose of recovering the shares of his principal, of the succession of whom defendant was curator, the action may be maintained in his own name for the use and benefit of those he represents); Varney *v.* Hawes, 68 Me. 442; Kendall *v.* Calder, 2 Tex. Unrep. Cas. 732 (where money was raised by a committee for the purpose of building a church, and at their request the money was placed in the hands of defendant's testator for safekeeping, and it was held that a person subsequently selected by the committee as their depository was entitled to sue the executor therefor as the committee's representative and agent).

In admiralty proceedings an agent may libel in his own name, or in the name of his principal, in the absence of the owner. Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Thompson *v.* Jacpin, 23 Fed. Cas. No. 13,959. See Admiralty, 1 Cyc. 851.

54. *Alabama.*— Dawson *v.* Burrus, 73 Ala. 111; Bryan *v.* Wilson, 27 Ala. 208; Nabors *v.* Shippey, 15 Ala. 293.

California.— Tustin Fruit Assoc. *v.* Eagle Fruit Co., (1898) 53 Pac. 693.

District of Columbia.—Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. 66.

Georgia.— Spence *v.* Wilson, 102 Ga. 762, 29 N. E. 713.

Illinois.— Mills *v.* Jensen, 75 Ill. App. 644.

Indiana.— Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Sharp *v.* Jones, 18 Ind. 314, 81 Am. Dec. 359.

Iowa.— Fear *v.* Jones, 6 Iowa 169.

Kansas.— See Ward *v.* Ryba, 58 Kan. 741, 51 Pac. 223.

Kentucky.—Tharp *v.* Farquar, 6 B. Mon. 3.

Maryland.— Willson *v.* Sands, 36 Md. 38.

is, in contemplation of law, the real contracting party.[55] (3) Where, by the usage of trade or in the general course of business, he is authorized to act as the owner, or as a principal contracting party, although his character as agent is known.[56] But this right of an agent to bring an action in certain cases in his own name is subordinate to the rights of the principal, who may, unless in particular cases where the agent has a lien or some other vested right, bring suit himself, and thus suspend or extinguish the right of the agent.[57] By code provision in many of the

Massachusetts.— Colburn *v.* Phillips, 13 Gray 64; Buffum *v.* Chadwick, 8 Mass. 103.

Minnesota.— Cremer *v.* Wimmer, 40 Minn. 511, 42 N. W. 467.

New Hampshire.— Doe *v.* Thompson, 22 N. H. 217.

New York.— Considerant *v.* Brisbane, 22 N. Y. 389; Ludwig *v.* Gillespie, 51 N. Y. Super. Ct. 310 [*affirmed* in 105 N. Y. 653, 11 N. E. 835]; Wheelwright *v.* Beers, 2 Hall 422; Morgan *v.* Reid, 7 Abb. Pr. 215.

Ohio.— Marine Ins. Co. *v.* Walsh-Upstill Coal Co., 23 Ohio Cir. Ct. 191.

South Carolina.— Depeau *v.* Hyams, 2 McCord 146.

Texas.— Neal *v.* Andrews, (Civ. App. 1900) 60 S. W. 459.

Virginia.— Hartshorne *v.* Whittles, 3 Munf. 357.

United States.— Albany, etc., Iron, etc., Co. *v.* Lundberg, 121 U. S. 451, 7 S. Ct. 958, 30 L. ed. 982.

England.— Hodgens *v.* Keon, [1894] 2 Ir. 657; Schoit *v.* Spackman, 2 B. & Ad. 962, 22 E. C. L. 402; Robertson *v.* Wait, 8 Exch. 299, 22 L. J. Exch. 209, 1 Wkly. Rep. 132; Rayner *v.* Grote, 16 L. J. Exch. 79, 15 M. & W. 359.

Canada.— McDonald *v.* Smaill, 25 Nova Scotia 440; Allnutt *v.* Ryland, 11 U. C. C. P. 300; Coquillard *v.* Hunter, 36 U. C. Q. B. 316; Saxton *v.* Ridley, 13 U. C. Q. B. 522.

55. *Alabama.*— Nabors *v.* Shippey, 15 Ala. 293.

Georgia.— Carter *v.* Southern R. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354.

Illinois.— Hewitt *v.* Torson, 124 Ill. App. 375.

Indiana.— Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

Kentucky.— Atcherson *v.* Talbot, 5 Dana 324.

Missouri.— Kelly *v.* Thuey, 102 Mo. 522, 15 S. W. 62; Coggburn *v.* Simpson, 22 Mo. 351; Simons *v.* Wittman, 113 Mo. App. 357, 88 S. W. 791.

West Virginia.— Conlter *v.* Blatchley, 51 W. Va. 163, 41 S. E. 133.

Subagent.—Where a subagent made a contract in the name of the agent, without disclosing the principal, the agent might maintain an action in his own name against the other party to the contract for a breach thereof. Shelby *v.* Burrow, 76 Ark. 558, 89 S. W. 464, 1 L. R. A. N. S. 303.

56. *Alabama.*— Nabors *v.* Shippey, 15 Ala. 293; Newbold *v.* Wilson, Minor 12.

Indiana.— Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

Kansas.— Douglas *v.* Wolf, 6 Kan. 88, holding that a person buying bonds for another, but in his own name, may maintain an action in his own name for the recovery of the possession of them.

Minnesota.— Close *v.* Hodges, 44 Minn. 204, 46 N. W. 335, holding that an agent, having taken in his own name a mortgage upon chattels, may sue therefor in trover as the trustee of an express trust.

New York.— Meyer *v.* Fiegel, 7 Rob. 122; Alsop *v.* Caines, 10 Johns. 396 [*affirmed* in 13 Johns. 9].

England.— Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 142, 22 Wkly. Rep. 929. See also Drinkwater *v.* Goodwin, Cowp. 251.

Canada.— Ross *v.* Tyson, 19 U. C. C. P. 294.

57. *Alabama.*— Southern R. Co. *v.* Jones, 132 Ala. 437, 31 So. 501; McFadden *v.* Henderson, 128 Ala. 221, 29 So. 640.

Arkansas.— Hearshy *v.* Hichox, 12 Ark. 125.

Dakota.— Lloyd *v.* Powers, 4 Dak. 62, 22 N. W. 492.

Illinois.— Warder *v.* White, 14 Ill. App. 50.

Indiana.— Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

Iowa.— Darling *v.* Noyes, 32 Iowa 96.

Kentucky.— Ironton Rolling Mills Co. *v.* Ross, 6 Bush 103; Davies *v.* Graham, 2 A. K. Marsh. 540.

Louisiana.— Braden *v.* Louisiana State Ins. Co., 1 La. 220, 20 Am. Dec. 277. See also McNair *v.* Thompson, 5 Mart. 525.

Maine.— Pitts *v.* Mower, 18 Me. 361, 36 Am. Dec. 727. See also Machias Hotel Co. *v.* Coyle, 35 Me. 405, 58 Am. Dec. 712.

Maryland.— Baltimore Coal Tar, etc., Co. *v.* Fletcher, 61 Md. 288.

Massachusetts.— National L. Ins. Co. *v.* Allen, 116 Mass. 398; Borrowscale *v.* Bosworth, 99 Mass. 378; Eastern R. Co. *v.* Benedict, 5 Gray 561, 61 Am. Dec. 384; Huntington *v.* Knox, 7 Cush. 371; Tuckwell *v.* Lambert, 5 Cush. 23; Kelley *v.* Munson, 7 Mass. 319, 5 Am. Dec. 47.

Missouri.— Griffin *v.* Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015; Odessa Bank *v.* Jennings, 18 Mo. App. 651; Turnbull *v.* Watkins, 2 Mo. App. 235.

New York.— Ludwig *v.* Gillespie, 105 N. Y. 653, 11 N. E. 835; Nicoll *v.* Burke, 78 N. Y. 580; Schaefer *v.* Henkel, 75 N. Y. 378; McKay *v.* Draper, 27 N. Y. 256; Considerant *v.* Brisbane, 22 N. Y. 389; Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith 364; Yates *v.* Foot, 12 Johns. 1; Visscher *v.* Yates, 11 Johns. 23; Corlies *v.* Cummings, 6 Cow. 181.

North Carolina.— Hayes Woolen Co. *v.* McKinnon, 114 N. C. 661, 19 S. E. 761.

Ohio.— Hall *v.* Plaine, 14 Ohio St. 417.

states, where a contract is made by an agent for the benefit of his principal, the principal may sue on the contract, even though the agent may also have the right to sue, and even where the contract is made in the name of the agent, and the principal's name is not disclosed.[58]

(II) *Agent Having Lien or Beneficial Interest.* The general rule is that when an agent has any beneficial interest in the performance of the contract, as for commissions, etc., or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract.[59]

(III) *Contracts Under Seal.* Applying the well-established principle of the common law that only such persons as are parties thereto can sue upon an instrument under seal, where an agent makes a contract in his own name, and under his own seal, he alone can maintain an action thereon, since the contract is his alone.[60]

Oregon.— Kitchen *v.* Holmes, 42 Oreg. 252, 70 Pac. 830.

Pennsylvania.— Lancaster *v.* Knickerbocker Ice Co., 153 Pa. St. 427, 26 Atl. 251 (where plaintiff's husband bought ice as agent for his wife, and sold it to defendant through the agency of C, giving a contract of sale in his own name, and it was held that the fact that the contract made in the name of the husband was in duplicate, and defendant's copy contained a scroll seal after the husband's name, while plaintiff's copy was without a seal, did not affect plaintiff's right to sue in her own name, and introduce her copy in evidence, the seal being an unauthorized and unnecessary addition, which could be treated as surplusage); Hubbert *v.* Borden, 6 Whart. 79.

South Carolina.— Allen *v.* Brazier, 2 Bailey 55.

Tennessee.— Brice *v.* King, 1 Head 152; Darden *v.* Oneal, (Ch. App. 1896) 35 S. W. 1095.

Vermont.— Edwards *v.* Golding, 20 Vt. 30; White *v.* Owen, 12 Vt. 361.

West Virginia.— Coulter *v.* Blatchley, 51 W. Va. 163, 41 S. E. 133.

United States.— Ford *v.* Williams, 21 How. 287, 16 L. ed. 36; Buchanan *v.* Cleveland Linseed-Oil Co., 91 Fed. 88, 33 C. C. A. 351; Ramsdell *v.* U. S., 2 Ct. Cl. 508. And see Oelrichs *v.* Ford, 23 How. 49, 16 L. ed. 534.

England.— Hudson *v.* Granger, 5 B. & Ald. 27, 24 Rev. Rep. 268, 7 E. C. L. 27; Sadler *v.* Leigh, 4 Campb. 195, 2 Rose 286; Rogers *v.* Hadley, 2 H. & C. 227, 9 Jur. N. S. 898, 32 L. J. Exch. 241, 9 L. T. Rep. N. S. 292, 11 Wkly. Rep. 1074; Bickerton *v.* Burrell, 5 M. & S. 383; Morris *v.* Cleasby, 1 M. & S. 576, 14 Rev. Rep. 531.

Canada.— Wurzburg *v.* Webb, 19 Nova Scotia 414.

58. *Arkansas.*— Hearshy *v.* Hichox, 12 Ark. 125.

California.— Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618; Brooks *v.* Minturn, 1 Cal. 481.

Colorado.— Best *v.* Rocky Mt. Nat. Bank, 37 Colo. 149, 85 Pac. 1124, 7 L. R. A. N. S. 1035.

Florida.— Little *v.* Brady, 43 Fla. 402, 31 So. 342.

Kansas.— St. Louis, etc., R. Co. *v.* Thacher, 13 Kan. 564, holding that the principal in every case is "the real party in interest," and under the Kansas code the rule is that "every action must be prosecuted in the name of the real party in interest," and every action allowed to be prosecuted in any other manner constitutes an exception to the general rule.

New York.— Morgan *v.* Reid, 7 Abb. Pr. 215; Erickson *v.* Compton, 6 How. Pr. 471.

59. *Alabama.*— Bryan *v.* Wilson, 27 Ala. 208.

Arkansas.—Hearshy *v.* Hichox, 12 Ark. 125.

Connecticut.— Treat *v.* Stanton, 14 Conn. 445.

Georgia.— Field *v.* Price, 50 Ga. 135. And see Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 591, 15 S. E. 676, holding that when an agent has made a contract on which he can maintain an action in his own name, he may sue for the use of his principal.

Illinois.— Hills *v.* McMunn, 232 Ill. 488, 83 N. E. 963; Warder *v.* White, 14 Ill. App. 50.

Iowa.— Fear *v.* Jones, 6 Iowa 169; Farwell *v.* Tyler, 5 Iowa 535.

Kentucky.— Atcherson *v.* Talbot, 5 Dana 324.

Louisiana.— Lacoste *v.* De Armas, 2 La. 263.

Massachusetts.— Borrowscale *v.* Bosworth, 99 Mass. 378; Kent *v.* Bornstein, 12 Allen 342; Colburn *v.* Phillips, 13 Gray 64.

Missouri.— Johnston *v.* O'Shea, 118 Mo. App. 287, 94 S. W. 783; Morrell *v.* Koerner-Parker Lumber Co., 51 Mo. App. 592.

New Hampshire.— Pinkham *v.* Benton, 62 N. H. 687; Porter *v.* Raymond, 53 N. H. 519; Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21; Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82.

New York.— Noe *v.* Christie, 51 N. Y. 270; Butts *v.* Collins, 13 Wend. 139; Nelson *v.* Nixon, 13 Abb. Pr. 104.

North Carolina.— Whitehead *v.* Potter, 26 N. C. 257.

Pennsylvania.— Baltimore, etc., Steamboat Co. *v.* Atkins, 22 Pa. St. 522; Girard *v.* Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327.

Texas.— Triplett *v.* Morris, (Civ. App. 1898) 44 S. W. 684.

Wisconsin.— Palmer *v.* Banfield, 86 Wis. 441, 56 N. W. 1090.

England.— Hudson *v.* Granger, 5 B. & Ald. 27, 24 Rev. Rep. 268, 7 E. C. L. 27; Williams *v.* Millington, 1 H. Bl. 81, 2 Rev. Rep. 724.

60. *Arkansas.*— Hearshy *v.* Hichox, 12 Ark. 125.

(iv) *Contracts by Agents of Government.* According to the better doctrine, a state,[61] or the federal government,[62] may maintain an action in its own name on a contract made by its agent for its benefit.

(v) *Negotiable Instruments.* The rule is well settled that an agent holding the legal title to a negotiable instrument may bring suit upon the same in his own name, although he is liable to account to his principal for the proceeds thereof.[63]

c. Actions Relating to Real Estate. The general rule is that a mere agent, having only the care and oversight of real estate, cannot maintain an action in his own name relating to such property.[64]

d. Actions After Termination of Agency. An agent cannot maintain an action in his own name to recover the property of his principal after the termination of the agency.[65]

2. Joinder of Plaintiffs — a. In General. The general rule is that when a contract is entered into with an agent in his own name, the promise being made directly to him, he may maintain an action on such contract in his own name, without joining the person beneficially interested.[66] Where several agents

Illinois.— Equitable L. Assur. Soc. *v.* Smith, 25 Ill. App. 471.

New Jersey.— Loeb *v.* Barris, 50 N. J. L. 382, 13 Atl. 602.

New York.— Schaefer *v.* Henkel, 75 N. Y. 378, 7 Abb. N. Cas. 1; Spencer *v.* Field, 10 Wend. 87.

Pennsylvania.— Lancaster *v.* Knickerbocker Ice Co., 153 Pa. St. 427, 26 Atl. 251.

Tennessee.— Cocke *v.* Dickens, 4 Yerg. 29, 26 Am. Dec. 214; Rutherford *v.* Mitchell, Mart. & Y. 261.

United States.— Clarke *v.* Courtney, 5 Pet. 319, 8 L. ed. 140.

England.— Berkeley *v.* Hardy, 5 B. & C. 355, 8 D. & R. 102, 4 L. J. K. B. O. S. 184, 29 Rev. Rep. 261, 11 E. C. L. 495; Schack *v.* Anthony, 1 M. & S. 573.

But see Bay County *v.* Brock, 44 Mich. 45, 6 N. W. 101.

An undisclosed principal cannot sue on a sealed contract executed by the agent as such, although the seal was not essential to its validity. Smith *v.* Pierce, 60 N. Y. Suppl. 1011.

61. Bay County *v.* Brock, 44 Mich. 45, 6 N. W. 101.

62. U. S. *v.* Blount, 4 N. C. 181; Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; U. S. *v.* Boice, 24 Fed. Cas. No. 14,619, 2 McLean 352. But see Calvary Cathedral Chapter *v.* U. S., 29 Ct. Cl. 269. *Contra*, U. S. *v.* Parmele, 27 Fed. Cas. No. 15,997, 1 Paine 252, holding that no action will lie in the name of a principal on a written contract made by his agent in his own name, although defendant may have known the agent's character; and a demurrer in such a case to the declaration, where the United States is plaintiff, will be sustained.

63. See Commercial Paper, 8 Cyc. 79.

64. King *v.* Gwynn, 14 Fla. 32 (holding that a mere agent of the owner of land cannot maintain in his own name a suit to enjoin the collection of taxes alleged to be illegally imposed upon the land); Chatfield *v.* Clark, 123 Ga. 867, 51 S. E. 743; Cunningham *v.* Elliott, 92 Ga. 159, 18 S. E. 365 (holding that while an agent, by virtue of the code (Ga. Code, § 2207), may commence and carry on proceedings in the name of his principal to remove an obstruction from a private way, yet, under Code, § 738, he cannot institute a proceeding for that purpose in his own name, either individually or as agent); Laning *v.* Wilkes-Barre Gas Co., 6 Kulp (Pa.) 328; Holloway *v.* Holloway, 30 Tex. 164; Galveston, etc., R. Co. *v.* Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647. See State *v.* Banks, 48 Md. 513, where the agent's power of attorney was held to be sufficiently plenary to authorize him to institute suit to prevent trespass upon his principal's real estate.

One holding legal title to land as agent for a principal is a trustee of an express trust, and he may, under the express provisions of Ky. Civ. Code Pr. § 21, maintain a suit in his own name to restrain a third person from cutting timber on the land, and for the value of timber previously cut thereon. Goff *v.* Boland, 92 S. W. 575, 29 Ky. L. Rep. 172.

A power to sell lands will not authorize an agent to maintain in his own name an action to disembarrass the title of his principal of clouds and encumbrances which may have supervened to impair their value or prevent their sale, although occasioned by the improvident act of the agent. Robson *v.* Tait, 13 Tex. 272.

Right of agent to maintain action of forcible entry and detainer see Forcible Entry and Detainer, 19 Cyc. 1108.

65. Miller *v.* Duluth State Bank, 57 Minn. 319, 59 N. W. 309; Hutchins *v.* Gilman, 9 N. H. 359, where an attorney to sell lands, with the power of substitution, appointed a substitute who made sale accordingly; and it was held that the former could not recover the money in an action in his own name.

Abatement of action after death of principal or agent see Abatement and Revival, 1 Cyc. 10.

66. Dawson *v.* Burrus, 73 Ala. 111 (hold-

employed by a principal pay out money separately in furtherance of the object of the agency, and not out of a joint fund, each agent may sue separately for his proportion of the sum expended, and they are not required to bring a joint action therefor.[67]

b. Under Code Provisions. Under some statutes, every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted; and a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of the statute.[68] However, an agent who makes a contract for his principal in the principal's name is not a person with whom the contract is made within the purview of an act providing that a person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted.[69]

c. Accounts and Accounting.[70] In a suit against an agent for an account of his agency, all the principals in the contract should be joined in the action, since an agent cannot be held to render as many accounts of his agency as there are principals in a joint contract.[71]

ing that where an agent is intrusted with the exclusive control of money of his principal, for the purpose of lending it on interest, the principal, while he may be a proper party, is not a necessary party to an action to foreclose a mortgage negotiated by the agent in his own name, without disclosing his principal); Sill *v.* Ketchum, Harr. (Mich.) 423; Stoll *v.* Sheldon, 13 Nebr. 207, 13 N. W. 201. See also Whitney *v.* Kirtland, 27 N. J. Eq. 333.

A subagent employed by an agent to assist him in the work of his agency is not a necessary party to a suit brought by the agent against the principal to recover commissions. Flournoy *v.* Williams, 68 Ga. 707.

Suits to enforce mechanics' liens see MECHANICS' LIENS, 27 Cyc. 345.

67. Finney *v.* Brant, 19 Mo. 42. See also Conner *v.* Hutchinson, 12 Cal. 126, holding that where two persons are employed as agents to procure from the United States confirmation of a Mexican grant, the employment is not joint, and they can maintain separate suits for their pay.

Actions for money advanced jointly.— Where agents for obtaining the laying out of a highway advanced money jointly, and took receipts as for money disbursed by them jointly, they rightly joined in a suit for reimbursement. Jewett *v.* Cornforth, 3 Me. 107.

Joinder of causes of action see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 376.

68. *California.*— West *v.* Crawford, 80 Cal. 19, 21 Pac. 1123; Winters *v.* Rush, 34 Cal. 136.

Indiana.— Landwerlen *v.* Wheeler, 106 Ind. 523, 5 N. E. 888; Holmes *v.* Boyd, 90 Ind. 332; Sharp *v.* Jones, 18 Ind. 314, 81 Am. Dec. 359.

Iowa.— Rice *v.* Savery, 22 Iowa 470; Cottle *v.* Cole, 20 Iowa 481.

Kansas.— Scantlin *v.* Allison, 12 Kan. 85.

Minnesota.— Close *v.* Hodges, 44 Minn. 204, 46 N. W. 335; Cremer *v.* Wimmer, 40 Minn. 511, 42 N. W. 467.

Missouri.— Wolfe *v.* Missouri Pac. R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539; Snider *v.* Adams Express Co., 77 Mo. 523.

New York.— Considerant *v.* Brisbane, 22 N. Y. 389, 396 (where the court, in construing the New York statute, said: "It is intended, manifestly, to embrace, not only formal trusts, declared by deed *inter partes*, but all cases in which a person, acting in behalf of a third party, enters into a written, express contract with another, either in his individual name, without description, or in his own name, expressly in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes, not only a person with whom, but one in whose name, a contract is made for the benefit of another"); Brown *v.* Cherry, 56 Barb. 635; Rowland *v.* Phalen, 1 Bosw. 43.

Ohio.— Marine Ins. Co. *v.* Walsh-Upstill Coal Co., 23 Ohio Cir. Ct. 191.

United States.— Albany, etc., Iron, etc., Co. *v.* Lundberg, 121 U. S. 451, 7 S. Ct. 958, 30 L. ed. 982.

69. Ferguson *v.* McMahon, 52 Ark. 433, 12 S. W. 1070, holding that an agent who makes a contract for his principal in the principal's name is not in any legal sense a person with whom the contract is made; the contract in such a case is with the principal only, and he alone is authorized to enforce it. See Ramsdell *v.* U. S., 2 Ct. Cl. 508, holding that where a contract is made in the name of the principal, and the principal sues thereon, the joining of the agent as a party plaintiff, although he have no legal interest, will not defeat the action.

70. See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 433.

71. Louisiana Bd. of Trustees, etc. *v.* Dupuy, 31 La. Ann. 305 (holding that where a number of persons constitute a common

3. JOINDER OF DEFENDANTS. The general rule is that where a contract is made by an agent within the scope of his employment, both the agent and his undisclosed principal, when discovered, are liable on the contract, and may be joined as defendants in an action thereon,[72] although it has been held that in such case the principal is not a necessary party defendant.[73] However, it has been broadly laid down in some cases that an action will not lie against an agent executing a contract for a disclosed principal, and that it is therefore error to join him in an action against such principal.[74] Likewise, where an agent and his principal are both liable for the same act of negligence, they may be joined as parties defendant in an action to recover damages for the injuries caused thereby.[75] As a general rule, an agent against whom no relief is sought, and who has been guilty of no fraud in connection with the transaction concerning which the suit is brought, is not a necessary or proper party thereto.[76] Thus it is erroneous to make a mere agent a party to a suit for the specific performance of a contract.[77] The rule, however, is otherwise where the agent is charged with fraud in the transaction.[78]

agent for a common purpose, no one of them has a right to compel the agent to render a separate account to himself. There should be but one proceeding to which all persons in interest should be made parties, and their rights determined *in concursu*); Nicholson *v.* Hennen, 16 La. Ann. 33.

72. Rushing *v.* Sebree, 12 Bush (Ky.) 198; Tew *v.* Wolfsohn, 77 N. Y. App. Div. 454, 79 N. Y. Suppl. 286 [*affirming* 38 Misc. 54, 76 N. Y. Suppl. 919]; McLean *v.* Sexton, 44 N. Y. App. Div. 520, 60 N. Y. Suppl. 871; Mattlage *v.* Poole, 15 Hun (N. Y.) 556; Nason *v.* Cockroft, 3 Duer (N. Y.) 366; American Trading Co. *v.* Wilson, 37 Misc. (N. Y.) 76, 74 N. Y. Suppl. 718; Wilson *v.* Oswego Tp., 151 U. S. 56, 14 S. Ct. 259, 38 L. ed. 70; Scontt *v.* Keck, 73 Fed. 900, 20 C. C. A. 103. See also Mathonican *v.* Scott, 87 Tex. 396, 28 S. W. 1063. See Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

73. Ash *v.* Beck, (Tex. Civ. App. 1902) 68 S. W. 53. And see Danforth *v.* Timmerman, 65 S. C. 259, 43 S. E. 678.

An action on a sealed instrument for a breach thereof cannot be maintained against a person not a party thereto on the ground that the person who executed the instrument acted as agent for defendant, where the agency does not appear on the face of the instrument. Mahoney *v.* McLean, 26 Minn. 415, 4 N. W. 764.

74. Fitzsimmons *v.* Baxter, 3 Daly (N. Y.) 81; Oxford First Nat. Bank *v.* Turner, 24 N. Y. Suppl. 793; Potts *v.* Lazarus, 4 N. C. 180; Martin *v.* Sauder, 18 Lanc. L. Rev. (Pa.) 357; Priestly *v.* Fernie, 3 H. & C. 977, 11 Jur. N. S. 813, 34 L. J. Exch. 172, 13 L. T. Rep. N. S. 208, 13 Wkly. Rep. 1089.

75. Mayer *v.* Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433; Hawkesworth *v.* Thompson, 98 Mass. 77, 93 Am. Dec. 137; Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.) 465, 64 Am. Dec. 83 (holding that a corporation and its agent may be sued jointly for an assault by the agent acting under its authority); Phelps *v.* Wait, 30 N. Y. 78; Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439. See also Harriman *v.* Stowe, 57 Mo. 93. But see Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503.

76. *Arkansas.*—Shaver *v.* Lawrence County, 44 Ark. 225.

Iowa.— Paton *v.* Lancaster, 38 Iowa 494; Lyon *v.* Tevis, 8 Iowa 79.

Kentucky.— See Davis *v.* Peake, 2 A. K. Marsh. 543, holding that a person whose lands are sold by an agent is a necessary party to a bill for relief against the sale, although the bond for the consideration be payable to the agent.

North Carolina.— Ayers *v.* Wright, 43 N. C. 229.

Rhode Island.— Coggeshall *v.* Griswold, 13 R. I. 642.

Washington.— Belt *v.* Washington Water Power Co., 24 Wash. 387, 64 Pac. 525.

United States.— Donovan *v.* Campion, 85 Fed. 71, 29 C. C. A. 30.

England.— Attwood *v.* Small, 6 Cl. & F. 232, 2 Jur. 200, 226, 246, 7 Eng. Reprint 684; Marshall *v.* Sladden, 4 De G. & Sm. 468, 64 Eng. Reprint 916, 7 Hare 428, 27 Eng. Ch. 428, 68 Eng. Reprint 177, 14 Jur. 106, 19 L. J. Ch. 57.

77. Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273; Tavenner *v.* Barrett, 21 W. Va. 656; McNamara *v.* Williams, 6 Ves. Jr. 143, 31 Eng. Reprint 982. See, generally, SPECIFIC PERFORMANCE. See, however, Scoutt *v.* Keck, 73 Fed. 900, 20 C. C. A. 103.

78. *Arkansas.*—Shaver *v.* Lawrence County, 44 Ark. 225; Gartland *v.* Nunn, 11 Ark. 720, holding that, although, as a general rule, a mere agent, who has no interest in the suit, ought not to be made a party, yet if, in such a case, there be any charge of fraud connected with the transaction in which the agent participated, and it is so charged in the bill, then he may properly be made a party, for he might be decreed to pay the costs of the suit, if his principal should happen to be, or become, insolvent.

Indiana.— Roy *v.* Haviland, 12 Ind. 364.

Iowa.— Springfield *v.* Graff, 22 Iowa 438.

Massachusetts.— White *v.* Sawyer, 16 Gray 586.

4. AMENDMENT. In many jurisdictions the rule is that if an action is brought in the name of an agent, or the agent is made sole defendant in such action, where his principal is the only necessary or proper party to the suit, no amendment can be allowed substituting such principal as the party plaintiff[79] or defendant.[80] In some jurisdictions, however, such substitution by amendment of principals as parties plaintiff,[81] or defendant,[82] is allowed.

D. Pleading[83]—1. COMPLAINT OR BILL—a. In General. In an action involving the relation of principal and agent, the form and sufficiency of the complaint[84] or

Michigan.— Krolik *v.* Curry, 148 Mich. 214, 111 N. W. 761, holding that in such case both principal and agent may be joined in the same action, or each may be separately sued. See Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389, holding that an agent, when liable for a fraud committed in behalf of his principal, may as well be sued separately as any joint wrong-doer sued alone in an action of tort.

New Jersey.— See Whitney *v.* Kirtland, 27 N. J. Eq. 333, holding that a party who, although not a principal, but an agent merely, holds a deed to a purchaser at a sheriff's sale, and also money equitably belonging to the purchaser under agreement made at the time of the sale, and applicable under that agreement to the payment of the purchase-money, is a proper, if not a necessary, party to a suit by the purchaser to compel the delivery of the deed.

Ohio.— See Lee *v.* Fraternal Mut. Ins. Co., 1 Handy 217.

United States.— See Smith *v.* Green, 37 Fed. 424.

England.— Le Texier *v.* Anspach, 15 Ves. Jr. 159, 33 Eng. Reprint 714.

Case for deceit in the nature of a conspiracy cannot be sustained against a principal and his agent jointly, for the unauthorized fraudulent acts and representations of the agent alone. Page *v.* Parker, 40 N. H. 47.

79. Crescent Furniture, etc., Co. *v.* Raddatz, 28 Mo. App. 210. And see Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 591, 15 S. E. 676 (holding that an amendment to the declaration which shows that the legal right of action is not in the nominal plaintiffs, but in the persons for whose use they sue, should not be allowed, without a further amendment striking from the declaration the names of the nominal plaintiffs); Wurzburg *v.* Webb, 19 Nova Scotia 414 (holding that the principal cannot by amendment be joined with the agent as a party plaintiff, in the absence of the written consent of such principal).

80. Gill *v.* Tison, 61 Ga. 161; Tiller *v.* Spradley, 39 Ga. 35, holding that under an act providing that no amendment, adding a new and distinct cause of action, or new and distinct parties, shall be allowed, unless expressly provided for by law, a principal cannot, on motion, be made a party defendant to an action against his agent alone, although he may have filed a plea in bar in his own name. See also Bonta *v.* Clay, 5 Litt. (Ky.) 129. And see Burns *v.* Campbell, 71 Ala. 271, holding that in an action against an unauthorized agent for trespass, the principal cannot be made a party by amendment, where his ratification of the agent's act was after the commencement of the action.

81. Boudreau *v.* Eastman, 59 N. H. 467; Adams *v.* Edwards, 115 Pa. St. 211, 8 Atl. 425; Price *v.* Wiley, 19 Tex. 142, 70 Am. Dec. 323. See, however, Campbell *v.* Wasserman, 9 Pa. Co. Ct. 381, holding that where plaintiff claimed in a sheriff's interpleader to be the owner of a stock of goods levied on under defendant's execution, he cannot amend by substituting his principals plaintiffs, it appearing that he took possession under a bill of sale to them.

82. Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23.

83. Annexation of power of attorney to execute note to complaint see COMMERCIAL PAPER, 8 Cyc. 101 note 45.

Denial of execution of negotiable instrument by agent see COMMERCIAL PAPER, 8 Cyc. 156.

Pleading negligence: In general see NEGLIGENCE, 29 Cyc. 565. Negligence of servant, see MASTER AND SERVANT, 26 Cyc. 941.

Verification of pleas denying agency see PLEADING, *ante*, p. 1.

84. See, generally, PLEADING, *ante*, p. 1.

Denial of authority.— Ratification by a principal of an unauthorized act of an agent has a retroactive efficacy, and is equivalent to an original authority; and hence an allegation that there was no authorization is an allegation of absence of authorization in any form, whether previously or subsequently given. Mutual L. Ins. Co. *v.* Granniss, 57 Misc. (N. Y.) 174, 107 N. Y. Suppl. 926.

In an action to set aside a sale made by an agent to a corporation of which he was president, if there are reasons why the principal did not know of the sale or facts excusing the delay in bringing the suit, the same should be specially pleaded. Whitely *v.* James, 121 Ga. 521, 49 S. E. 600, where it is said that the special reasons why the principal did not know of the sale, or the facts excusing the delay in bringing the suit, should be specially pleaded, so as to prevent defendant from taking advantage by demurrer of the acquiescence implied from non-action for a long lapse of time.

Action against agent to rescind sale.—An action cannot be maintained by a third person against defendant acting as agent in procuring the sale of personalty, to rescind the sale and recover back the purchase-price, where there is no averment in the complaint

bill [85] are in general governed by the rules of pleading applicable to other civil actions.

b. Actions by Third Persons Against Principal — (i) *AVERMENTS AS TO AGENCY.* It is a rule of pleading that, where a third party seeks to charge a principal with the act of his agent, the complaint may plead the act of the agent as such, or plead it as the act of his principal,[86] and, unless otherwise provided by the codes or practice acts,[87] it is not necessary, in pleading the act, to aver the fact of agency, it being sufficient to charge the act as that of the principal, without disclosing the fact of agency.[88] And the rule that it is sufficient to allege

that the moneys remained in the hands or under the control of defendant. Cohen *v.* Ellis, 4 N. Y. St. 721, holding further that, in the absence of such averment, the presumption is that the moneys are not in defendant's hands.

Action by agent against principal.— In an action by an agent against his principal for breach of a contract of agency, where it was provided that he was to have the sole right of selling his principal's goods in a certain locality, an allegation that, after plaintiff had begun to sell in that locality, defendant sent another agent there for that purpose, without the knowledge or consent of plaintiff, is not a sufficient assignment of the breach, without an additional averment that plaintiff was still performing his duties under the contract. Union Refining Co. *v.* Barton, 77 Ala. 148. So too, in such an action, an averment in the complaint as a breach of the contract that defendant has failed and refused to pay plaintiff a stipulated compensation is not a sufficient assignment, without an additional averment of the sales made and their amount. Union Refining Co. *v.* Barton, *supra*. An agent cannot maintain an action for breach of a contract made by him for his principal, under Code, § 2209, where he does not allege that he was a factor, and contracted on his own credit, or that the contract was made in his individual name, or that his agency was coupled with an interest known to the carrier. Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 591, 15 S. E. 676.

Surplusage.— If the complaint discloses a cause of action in favor of plaintiff (Owsley *v.* Woolhopter, 14 Ga. 124), or against defendant (Burkhalter *v.* Perry, 127 Ga. 438, 56 S. E. 631) personally, superadded the words importing agency will be regarded as *descriptio personæ* merely, and the complaint will be sustained. But under N. Y. Code Civ. Proc. § 549, subd. 2, providing that defendant may be arrested, where the complaint alleges that the money sued for was received or fraudulently misapplied by an agent or other person in a fiduciary capacity, and that, where such allegation is made, plaintiff cannot recover unless he proves the same on the trial, such an allegation, when made in an action for the conversion of rents collected and received by defendant as plaintiff's agent, cannot be rejected as surplusage. Frick *v.* Freudenthal, 45 Misc. (N. Y.) 348, 90 N. Y. Suppl. 344.

Waiver and cure of defects.— The failure of one suing as agent on a contract for services, to be paid for from the proceeds of the sale of land after deducting the expenses of its care, to allege that there would be any surplus after payment of expenses, is cured by defendant's plea of reconvention, alleging that the contract of plaintiff had long since terminated, and offering to pay what should appear to be due. Cotton *v.* Rand, (Tex. Civ. App. 1898) 51 S. W. 55.

85. See, generally, EQUITY, 16 Cyc. 216.

86. Childress *v.* Miller, 4 Ala. 447; Ohio, etc., R. Co. *v.* Middleton, 20 Ill. 629; Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705; Nicholson *v.* Croft, 2 Burr. 1188. See also Cochran *v.* Goodman, 3 Cal. 244. *Compare* Wells *v.* Pacific R. Co., 35 Mo. 164, holding that in an action against a corporation for the value of medical services rendered its employees, an allegation that the services were rendered at the instance and request of the agent of defendant does not amount to an averment that they were rendered at the instance and request of defendant.

87. See the codes and statutes of the several states. And see Porter *v.* Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353 (holding that under the rules established by the practice act, it is necessary, when a plaintiff intends to prove that the acts charged against defendant were committed by his agent, that the complaint should aver the agency); Atlanta, etc., R. Co. *v.* Texas Grate Co., 81 Ga. 602, 9 S. E. 600 (holding that under the code system of pleading in force in Georgia, which requires plaintiff to fully and distinctly set forth his cause of action, the act of an agent must be pleaded as such); Lewis *v.* Amorous, 3 Ga. App. 50, 59 S. E. 338.

88. *Arizona.*— Root *v.* Fay, 5 Ariz. 19, 43 Pac. 527.

California.— Goetz *v.* Goldbaum, (1894) 37 Pac. 646.

Colorado.— See McDermott *v.* Grimm, 4 Colo. App. 39, 34 Pac. 909.

Florida.— St. Andrews Bay Land Co. *v.* Mitchell, 4 Fla. 192, 51 Am. Dec. 340.

Illinois.— Meers *v.* Stevens, 106 Ill. 549; Harding *v.* Parshall, 56 Ill. 219.

Indiana.— Day *v.* Henry, 104 Ind. 324, 4 N. E. 44; Crowder *v.* Reed, 80 Ind. 1.

Iowa.— Poole *v.* Hintrage, 60 Iowa 180, 14 N. W. 223.

Minnesota.— Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241.

New York.— Sherman *v.* New York Cent. R. Co., 22 Barb. 239. See also Dollner *v.* Gibson, 2 Edm. Sel. Cas. 253. But see St. John *v.* Griffin, 1 Abb. Pr. 39, holding that under the code provisions governing pleading

the act of the agent as the act of the principal, without disclosing the fact of agency, is held to be applicable to actions *ex delicto*,[89] as well as actions *ex contractu*.[90] In case agency is to be alleged an express averment is not necessary, if the facts constituting the agency are set forth,[91] yet the facts averred must be of such nature and character that agency follows as a conclusion of law.[92] Where it is regarded as only necessary to aver the act of an agent as the act of his principal, without alluding to the fact of agency, a general allegation that the act was done by defendant is held to be in effect, among other things, an allegation that the agent had authority to act in the premises.[93] Likewise, where agency is alleged, a general allegation is sufficient,[94] without averring that the agent had

the act of an agent should be pleaded as such, and not as the act of the principal.

South Carolina.— Boulware *v.* McComb, Harp. 416.

United States.— Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335.

Fraud of agent.—In an action by a third person against a principal, fraud committed through the latter's agent is well pleaded in the complaint as that of the principal. Bennett *v.* Judson, 21 N. Y. 238; Curtis *v.* Fay, 37 Barb. (N. Y.) 64. See also King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432.

The agent by whom defendant was represented in the transaction pleaded need not be alleged. Todd *v.* Minneapolis, etc., R. Co., 37 Minn. 358, 35 N. W. 5; Lee *v.* Minneapolis, etc., R. Co., 34 Minn. 225, 25 N. W. 399; Texas, etc., R. Co. *v.* Ross, 62 Tex. 447; Ft. Worth, etc., R. Co. *v.* Lindsay, 11 Tex. Civ. App. 244, 32 S. W. 714.

The complaint should charge that the act was done by defendant whether it was done by himself or by his agent. Slevin *v.* Reppy, 46 Mo. 606.

An allegation in the complaint that plaintiff bought of one B, acting as defendant's agent, is sufficient without an averment that B was defendant's agent. Cochran *v.* Goodman, 3 Cal. 244.

89. Meers *v.* Stevens, 106 Ill. 549; Day *v.* Henry, 104 Ind. 324, 4 N. E. 44; King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432. See also Bennett *v.* Judson, 21 N. Y. 238. *Contra*, Peyton *v.* Cook, (Tex. Civ. App. 1895) 32 S. W. 781, holding that where a wrong is done by an agent it must be alleged that the act was done by him, a mere allegation that it was done by his principal not being sufficient.

In an action by a principal against his agent charging him with an abuse of his powers, it is essential to allege that he acted as agent. Ætna L. Ins. Co. *v.* Sabine, 1 Fed. Cas. No. 97, 6 McLean 393.

90. *California.*—Goetz *v.* Goldbaum, (1894) 37 Pac. 646.

Florida.— St. Andrews Land Co. *v.* Mitchell, 4 Fla. 192, 54 Am. Dec. 340.

Iowa.— Call *v.* Hamilton County, 62 Iowa 448, 17 N. W. 667.

Michigan.— Regents University *v.* Detroit Young Men's Assoc., 12 Mich. 138.

Minnesota.— Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241; Weide *v.* Porter, 22 Minn. 429.

West Virginia.— Black Lick Lumber Co. *v.* Camp Constr. Co., (1908) 60 S. E. 409.

United States.— Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335.

Canada.— Bisaillon *v.* Elliott, 13 Quebec Super. Ct. 289.

Words importing an agency held to be superfluous.—An allegation in the complaint that defendant made and executed a promissory note, where the note appears to have been in fact signed by another party, is sufficient, and an averment that the note was made by defendant's agent is unnecessary and superfluous. Moore *v.* McClure, 8 Hun (N. Y.) 557.

Manner of constituting agency need not be alleged.— When the instrument set forth in the complaint asserts the agency, an allegation in the complaint that it is the act of the agent is sufficient, without alleging the particular manner of constituting the agency. Regents University *v.* Detroit Young Men's Soc., 12 Mich. 138.

91. Brown *v.* Commercial F. Ins. Co., 86 Ala. 189, 5 So. 500.

92. Brown *v.* Commercial F. Ins. Co., 86 Ala. 189, 5 So. 500; Everett *v.* Drew, 129 Mass. 150, holding that where there is a general averment of agency, and also an averment of the specific facts which show that there was no agency, the general allegation of agency must be regarded as a mere conclusion of law not sustained by the facts.

93. Gallatin Nat. Bank *v.* Nashville, etc., R. Co., 4 N. Y. St. 714.

An allegation that defendant made and delivered his promissory note, where it appears in fact to have been executed by another party, necessarily includes the allegation that such other party was duly authorized to make the note in his behalf. Moore *v.* McClure, 8 Hun (N. Y.) 557.

94. Call *v.* Hamilton County, 62 Iowa 448, 17 N. W. 667; Partridge *v.* Badger, 25 Barb. (N. Y.) 146; Lewis *v.* Alexander, 51 Tex. 578; Jackson-Foxworth Lumber Co. *v.* Hutchinson County, (Tex. Civ. App. 1905) 88 S. W. 412; Sherman *v.* Comstock, 21 Fed. Cas. No. 12,764, 2 McLean 19.

Illustrations.— An averment in the complaint that the instrument sued on was made for defendant by another, as and representing himself to be defendant's agent, is sufficient to charge defendant. Opper *v.* Hirsh, 33 Misc. (N. Y.) 560, 68 N. Y. Suppl. 879. A petition alleging that a contract of a corporation was made, executed, and delivered by its officer and agent, naming him, is not demurrable on the ground that authority by

authority to act in the premises,[95] that being regarded as an averment of a conclusion of law, or at best an unnecessary repetition of a fact already stated.[96] But one who seeks to hold a principal for the acts of a subagent must expressly set up and prove the power of the agent to make such a delegation of his authority.[97]

(II) *Charging Notice or Knowledge Obtained by Agent.* To charge defendant with his agent's notice or knowledge of matters affecting his principal's business, it is sufficient, in an action by a third person against the principal, to allege in the complaint notice or knowledge obtained by defendant, without averring the fact of agency.[98]

(III) *Alleging Ratification of Agent's Unauthorized Acts.* Ratification by a principal of an unauthorized act of his agent, being equivalent to prior authority, a third party relying on proof of ratification to maintain his cause of action against the principal, need not allege it in his complaint.[99]

c. In Action by Principal Against Agent — (I) *Equitable Suit For Accounting* — (A) *In General.* The general rule that a bill for an accounting must show upon its face that complainant is entitled to the relief demanded, and that he is the proper party and vested with the right to maintain the suit, applies to an action by a principal against his agent for an accounting of money or property received by the latter in his capacity of agent.[1] So in order to maintain

the agent does not sufficiently appear. Johnson County *v.* Chamberlain Packing House, 74 Nebr. 549, 104 N. W. 1061. A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P. "then and there acting as agent of defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. Cochran *v.* Goodman, 3 Cal. 244. A complaint in an action to enforce a mechanic's lien, alleging that the sum claimed to be due was for materials furnished, etc., in pursuance of the contract between the plaintiff and defendant, through and by her husband, sufficiently alleges that defendant's husband was her authorized agent. McGeever *v.* Harris, (Ala. 1906) 41 So. 930.

95. Call *v.* Hamilton County, 62 Iowa 448, 17 N. W. 667; Partridge *v.* Badger, 25 Barb. (N. Y.) 146; Lewis *v.* Alexander, 51 Tex. 578; Sherman *v.* Comstock, 21 Fed. Cas. No. 12,764, 2 McLean 19.

Although it may be technically more accurate to aver that the principal by his agent, in that behalf duly authorized, committed the act pleaded, yet such an averment is not indispensable. Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

96. Partridge *v.* Badger, 25 Barb. (N. Y.) 146.

97. Johnson *v.* Cunningham, 1 Ala. 249; Kellogg *v.* Norris, 10 Ark. 18; Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488; McCormick *v.* Bush, 38 Tex. 314.

98. McDermott *v.* Grimm, 4 Colo. App. 39, 34 Pac. 909; Marshall *v.* Gilman, 52 Minn. 88, 53 N. W. 811.

99. Goetz *v.* Goldbaum, (Cal. 1894) 37 Pac. 646; Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634]; Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998; Smith *v.* Des Moines Nat. Bank, 107 Iowa 620, 78 N. W. 238; Long *v.* Osborn, 91 Iowa 160, 59 N. W. 14; Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255.

In trespass to try title, where plaintiff claims under a deed executed by an agent, he may show ratification by the principal of the agent's act, without pleading such ratification. Kirkpatrick *v.* Tarlton, 29 Tex. Civ. App. 276, 69 S. W. 179.

Sufficient averment of ratification.— In averring that a principal ratified a contract of sale made by his agent, it is not necessary to allege that he did so by the receipt of a portion of the purchase-money under the contract; it is enough to aver that he did ratify. Harding *v.* Parshall, 56 Ill. 219.

1. See Accounts and Accounting, 1 Cyc. 435. And see Christy *v.* Libby, 2 Daly (N. Y.) 418, 5 Abb. Pr. N. S. 192.

Specific loss occasioned by negligence.— To render an agent liable to his principal in an action of accounting, for any specific loss occasioned by his misconduct or neglect, it must be alleged in the complaint and substantiated. Williams *v.* Gregg, 2 Strobh. Eq. (S. C.) 297.

Instances of bills held to state facts for relief.—A bill showing a relation of agency of a fiduciary nature and mutual accounts, and distinctly specifying the items of agency, states facts for equitable relief, and the mere omission to state the date of the creation of the agency, although it may be a defect in stating the case, will not justify the dismissal of the bill on motion. Henderson *v.* Mathews, 1 Lea (Tenn.) 34. A complaint which alleges that defendants, as agents of plaintiff, received certain goods for sale, for a part of which they had failed to pay and refused to account, and praying that plaintiff might recover the value of the goods not accounted for, states a good cause of action. Robson *v.* Sanders, 25 S. C. 116. Where complainant alleges in its bill that defendant became its agent and as such surreptitiously

a suit in equity, on the ground that the account is so complicated that it cannot be taken in an action at law, facts showing the existence of this ground must be alleged in the bill;[2] and the bill must aver that a discovery is indispensable to complainant's recovery against defendant,[3] or facts showing that the relationship of principal and agent existing between the parties was of a fiduciary nature,[4] in case such are the grounds relied on to establish equity jurisdiction.

(B) *Prior Demand For an Accounting.* In an ordinary action by a principal against his agent for an accounting of money or property received by the latter in his capacity as agent, a demand for an accounting before suit must be alleged in the bill.[5]

(C) *Property or Money in Hands of Defendant.* Conceding that the relationship of principal and agent existed between the parties, a complaint which does not charge that defendant ever had money or property in his possession belonging to plaintiff, upon which a demand to account could have been predicated, does not state a cause of action for an accounting.[6] It must be made to appear in the bill, by appropriate averments, that the moneys received by defendant, for which an accounting is sought, are more than sufficient to offset defendant's just claims against plaintiff.[7]

(II) *ACTIONS AT LAW* — (A) *Averring Prior Demand of Payment.* In an action by a principal against his agent to recover money collected by the latter

overissued certificates of complainant's stock, and that the funds derived therefrom are in defendant's possession, and praying that defendant may account to and satisfy complainant for all liabilities which those issues may have occasioned it, a case for equitable relief is disclosed. Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. A petition alleging that defendants were the agents of plaintiff to ship certain goods; that it was their duty to ship in the name of complainant to a commission merchant for immediate sale, but that they made the shipment in their own name, not for immediate sale, but to be stored, and concealed such action from the plaintiff for a period of fourteen months, states a cause of action. Buck *v.* Reed, 27 Nebr. 67, 42 N. W. 894. A bill brought to compel an agent to account, and which joins those charged to be his confederates in a scheme of fraud, claiming relief against them, and denying the agent's ability to respond in full, states a cause for equitable relief. Illges *v.* Dexter, 73 Ga. 362.

Form of bill held sufficient see Christy *v.* Libby, 2 Daly (N. Y.) 418, 5 Abb. Pr. N. S. 192.

2. Halsted *v.* Rabb, 8 Port. (Ala.) 63.

Complaint held to state single cause of action.—A petition which alleges that one of defendants, plaintiff's agent in the collection of a debt secured by mortgage, wrongfully procured the mortgaged premises to be conveyed to another defendant, took possession thereof, collected rent, etc., and negligently permitted the premises to be sold for delinquent taxes to a third defendant, and failed to account for rents received, praying for the recovery of the legal title and for an accounting, states but a single cause of action. Ross *v.* Noble, 6 Kan. App. 361, 51 Pac. 792.

3. Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24.

4. Conger *v.* Judson, 69 N. Y. App. Div. 121, 74 N. Y. Suppl. 504; New York L. Ins. Co. *v.* Hamilton, 52 Misc. (N. Y.) 189, 102 N. Y. Suppl. 771. See also Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645; Hemings *v.* Pugh, 4 Giffard 456, 9 Jur. N. S. 1124, 9 L. T. Rep. N. S. 283, 12 Wkly. Rep. 44, 66 Eng. Reprint 785.

When agency may not have been fiduciary. — And if, so far as may be gathered from what is alleged, an agency existed which might or might not have been of a fiduciary nature, according to the surrounding circumstances, the relation of the agent toward the principal, in the absence of a statement of those circumstances, will be deemed to have been other than fiduciary for the purposes of demurrer. New York L. Ins. Co. *v.* Hamilton, 52 Misc. (N. Y.) 189, 102 N. Y. Suppl. 771. See also Conger *v.* Judson, 69 N. Y. App. Div. 121, 74 N. Y. Suppl. 504.

Failure to allege facts showing that moneys, for which an accounting is asked, were received by defendant in a fiduciary capacity, is not cured by an allegation that defendant gave receipts for such moneys by the terms of which the moneys were to be accounted for, without an allegation that defendant had failed to render an accounting. New York L. Ins. Co. *v.* Hamilton, 52 Misc. (N. Y.) 189, 102 N. Y. Suppl. 771.

5. Bushnell *v.* McCauley, 7 Cal. 421.

In a suit for the enforcement of an agreement for an accounting, brought by the principal against his agent, a breach of the agreement and the necessity for a judicial direction that it be performed must be averred in the bill. New York L. Ins. Co. *v.* Hamilton, 52 Misc. (N. Y.) 189, 102 N. Y. Suppl. 771.

6. Runyan *v.* Russell, 3 Wash. 665, 29 Pac. 348.

7. Peeler *v.* Lathrop, 48 Fed. 780, 1 C. C. A. 93.

in his capacity of agent and not paid over, the complaint must aver the fact of a demand having been made on defendant before suit,[8] or set forth circumstances which excuse demand;[9] and such demand will not be presumed.[10]

(B) *Allegation That Contract Was in Writing.* An action to recover from defendant money received by him on a sale of plaintiff's land, in which he acted as plaintiff's agent, is not an action on a contract for the sale of land, and a complaint therein need not allege a contract in writing.[11]

(C) *Charging Agent With Personal Liability For Advances in Excess of Commissions Earned.* In an action by a principal against his agent to recover a certain sum as advances in excess of commissions earned, made under a contract of employment to advance a given sum per week on account of commissions to be earned, and a further sum for expenses, a complaint is fatally defective for failing to show how much was advanced on account of commissions and how much for expenses.[12]

(D) *Charging Agent With Value of Goods Sold in Violation of Instructions.* To charge defendant as agent with the value of goods sold on credit to insolvent persons contrary to positive instructions, it is sufficient for the principal to allege in his complaint that the sale was made in violation of the agent's instructions, whereby the value of the goods was lost to his principal.[13]

(E) *Charging Agent With Negligence and Consequent Injury.* Although a complaint does not contain an express averment of agency,[14] yet it contains all the essential elements of a complaint by a principal against his agent for negligence, if it sets forth facts constituting an agency, a negligent failure of defendant to perform the duties thereof, and the consequent damages to plaintiff.[15] In an action based on the negligence of defendant in loaning moneys deposited with him to be loaned on good security for plaintiff, the failure to allege that plaintiff was injured by defendant's negligence in making the loan is of no consequence, when the complaint alleges that the loan was made to an insolvent party and that it is utterly worthless.[16]

2. Plea or Answer — a. In General. As a general rule affirmative defenses

8. Heddens *v.* Younglove, 46 Ind. 212; Black *v.* Hersch, 18 Ind. 342, 81 Am. Dec. 362; Jones *v.* Gregg, 17 Ind. 84; Phillips *v.* Wills, 2 Ind. 325; English *v.* Devarro, 5 Blackf. (Ind.) 588; Judah *v.* Dyott, 3 Blackf. (Ind.) 324, 25 Am. Dec. 112; Armstrong *v.* Smith, 3 Blackf. (Ind.) 251; Judith Inland Transp. Co. *v.* Williams, 36 Mont. 25, 91 Pac. 1061; Anderson *v.* Hulme, 5 Mont. 295, 5 Pac. 865; Lamb *v.* Ward, 114 N. C. 255, 19 S. E. 230, holding, however, that a demurrer, on the ground that the complaint does not allege a demand and refusal, will not lie, when in the answer which contains the demurrer, there is a general denial of indebtedness, and the statute of limitations is pleaded. See also Waddell *v.* Swann, 91 N. C. 108.

9. Black *v.* Hersch, 18 Ind. 342, 81 Am. Dec. 362.

10. Anderson *v.* Hulme, 5 Mont. 295, 5 Pac. 865.

11. Ferguson *v.* Ramsey, 41 Ind. 511.

12. Tausix *v.* Drucker, 88 N. Y. Suppl. 391.

13. Maloney *v.* Barr, 27 W. Va. 381, holding further that it was not necessary to aver that there was an express contract between the parties that the agent should not sell on credit.

14. Shaffer *v.* Corson, 141 Pa. St. 256, 21 Atl. 647.

15. Pennoyer *v.* Willis, (Oreg. 1893) 32 Pac. 57; Shaffer *v.* Corson, 141 Pa. St. 256, 21 Atl. 647.

Alleging agreement to be personally responsible.— Where the gist of the action is the negligence of defendant in making a loan as the agent of plaintiff, the complaint need not allege that defendant agreed to be responsible personally for the loan. Bronnenburg *v.* Rinker, 2 Ind. App. 391, 28 N. E. 568.

Alleging demand.— Where the complaint, in an action for the negligence of defendant in making a loan as agent of plaintiff, avers that the borrower was and is entirely insolvent, and that the loan is entirely worthless, it need not aver a demand of the money either from the borrower or from defendant. Bronnenberg *v.* Rinker, 2 Ind. App. 391, 28 N. E. 568.

Alleging knowledge of falsity of representations.— In an action for negligence of defendant in making a loan as the agent of plaintiff, where the complaint alleges that defendant falsely represented that the loan was secured by mortgage, it need not allege that defendant knew such representations to be false. Bronnenberg *v.* Rinker, 2 Ind. App. 391, 28 N. E. 568.

16. Bronnenburg *v.* Rinker, 2 Ind. App. 391, 28 N. E. 568.

must be specially pleaded [17] in accordance with the usual rules governing the use of the general issue or general denial.[18] In pleading an act of an agent as a defense to an action, it is sufficient to charge, in the answer, the act as that of the principal, without naming the agent.[19] A principal is responsible for the negligent and improvident acts of his agent in the execution of his trust,[20] and in order to relieve himself from responsibility he must deny the whole agency.[21]

17. Quick *v.* Sachsse, 31 Nebr. 312, 47 N. W. 935, holding that in an action for commissions on a sale that defendant employed plaintiff to make and then refused to consummate, the defense that defendant had only an option on the land, as plaintiff knew, and was not the owner, is matter of confession and avoidance which must be pleaded. See also cases cited *infra*, this note.

Estoppel of principal to deny agent's authority.— The claim that a principal is estopped to deny the authority of his agent, after having clothed him with apparent authority, must be pleaded to be available as a defense to an action by the principal against a third person. Tres Palacios Rice, etc., Co. *v.* Eidman, 41 Tex. Civ. App. 542, 93 S. W. 698; Swayne *v.* Union Mut. L. Ins. Co., (Tex. Civ. App. 1899) 49 S. W. 518; Rail *v.* City Nat. Bank, 3 Tex. Civ. App. 557, 22 S. W. 865. An answer of estoppel to the conduct of plaintiff's agent, which fails to show the scope of the agent's authority, is insufficient. Porter Lumber Co. *v.* Hill, 72 Ark. 62, 77 S. W. 905.

That defendant acted as agent merely.— Where defendant, in an action brought against him personally, relies on the affirmative defense that he was acting in the transaction as agent for another, he must aver his authority to act in the premises (White *v.* Skinner, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381), and a mere averment that defendant acted in the transaction in the capacity of agent, and not otherwise, is not sufficient (White *v.* Skinner, *supra*); nor will a mere traverse of the averment of the complaint suffice (Martin *v.* Kennedy, 90 S. W. 975, 28 Ky. L. Rep. 966).

Illegality of contract of agency.— Where a contract of agency is one affecting the interest of the general public, a defense that it is void as against public policy need not be affirmatively pleaded to be available. Drake *v.* Lauer, 93 N. Y. App. Div. 86, 86 N. Y. Suppl. 986 [*affirmed* in 182 N. Y. 533, 75 N. E. 1129]; Dunham *v.* Hastings Pavement Co., 56 N. Y. App. Div. 244, 67 N. Y. Suppl. 632; Pape *v.* Standard Oil Co., 27 Ohio Cir. Ct. 111; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539. See also Lyon *v.* Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Russell *v.* Burton, 66 Barb. (N. Y.) 539.

Double employment of agent.—A defense that a plaintiff, suing for his services as defendant's agent in a transaction, was employed by both parties to such transaction, must be affirmatively pleaded to be available. Reese *v.* Garth, 36 Mo. App. 641; Childs *v.* Ptomey, 17 Mont. 502, 43 Pac. 714; Smith *v.* Soosen, 24 Misc. (N. Y.) 706, 53 N. Y. Suppl. 806; Bonwell *v.* Auld, 9 Misc. (N. Y.) 65, 29 N. Y. Suppl. 15. See also Duryee *v.* Lester, 75 N. Y. 442.

Payment to agent.—A defense that the agency was not disclosed to defendant and that he in good faith treated and paid the agent as plaintiff, must be pleaded specially to be available. Hutchinson Mfg. Co. *v.* Henry, 44 Mo. App. 263. A plea in an action on a note, alleging payment to an agent of plaintiff authorized to receive payment of such note, is not insufficient for failure to aver that the alleged agent had the note in his hands at the time of payment. Athens Nat. Bank *v.* Burt, 98 Ga. 380, 25 S. E. 502.

Payment of debt by agent to principal by notes of former purchased by latter.— In an action by the assignee of the principal against an agent, if defendant alleges that he paid his indebtedness by notes of the principal purchased by him, he must aver how and for what price he obtained the notes. Farnum *v.* Farrell, 2 Phila. (Pa.) 368.

Bona fide distribution of property by assignee of agent before notice of principal's claim.—An answer by an assignee of an agent claiming protection from the claim of the principal, on the ground of having made a *bona fide* distribution of the proceeds of the property under directions of a trust, must aver that the assignee paid out all the proceeds before he had notice of the claim of the principal. Fahnestock *v.* Bailey, 3 Metc. (Ky.) 48, 77 Am. Dec. 161.

Breach of contract as counter-claim.— Where, in an action by a principal against his agent for moneys converted, defendant pleads as a counter-claim a breach of the contract of agency, a general allegation that plaintiff did not keep his promise and guaranty does not sufficiently plead the breach, when not accompanied by the facts supporting such allegation. Picker *v.* Weiss, 39 Misc. (N. Y.) 22, 78 N. Y. Suppl. 761.

18. See PLEADING, *ante*, p. 1.

19. Crowder *v.* Reed, 80 Ind. 1; Higbee *v.* Trumbauer, 112 Iowa 74, 83 N. W. 812; Davenport *v.* Ladd, 38 Minn. 545, 38 N. W. 622, so holding in conformity with the rule that the answer must aver the facts constituting the defense sought to be pleaded, and holding further that in an action to recover money alleged to have been collected by defendant for plaintiff, an answer by defendant that he had received the claim from a third person, who told him he could retain all moneys collected above a certain sum, cannot be accepted in lieu of an averment that such third person was the agent of plaintiff or authorized to act in his behalf.

20. See *supra*, III, E, 2.

21. Joyce *v.* Duplessis, 15 La. Ann. 242, 77 Am. Dec. 185.

b. Admissions. An answer alleging that defendant, by his agent, demanded that plaintiff should pay the reasonable value of the storage of certain goods, admits the agency of the person making the demand.[22] So an allegation in an answer that plaintiff by his legally authorized agent made a new contract clearly admits the agent's authority to make a new contract, although the old contract which was set out in the answer provides that no agent is authorized to add to, abridge, or change the same.[23] Likewise an averment in an answer that an agent had no authority to employ an attorney except in case of vacancy is an admission of authority to employ in case a vacancy occurred.[24] Again, in an action on a contract, the authority of the agent to make the contract is admitted, where the answer admits the making of the contract but avers it was upon a different compensation from that alleged in the complaint;[25] or where the answer admits the contract but alleges terms materially different from the contract set out in the complaint.[26] But where the complaint, in its substantive averments, is for money had and received, defendant, by denying in his answer an allegation in the complaint that he received the money through a certain person, his agent, does not thereby admit that such person was his agent.[27]

c. Cross Bill. Where the object of a bill in equity is to secure an accounting of a terminated agency, the agreement for which agency contemplated that the agent should be paid for his services, it is proper for defendant agent, by cross bill, to demand payment for his services, and have such demand adjusted with the accounting, so that by its decree the court may give complete relief between the parties in respect of the agency.[28]

d. Affidavit of Defense.[29] Where suit is brought against one designated as agent, without naming any one as principal, defendant will be answerable in his personal capacity alone, and if he relies on the defense that his agency was disclosed to plaintiff, his affidavit of defense, in order to prevent a judgment, must aver that he made known his agency at the time of the transaction forming the cause of action sued on,[30] or that plaintiff had knowledge of the fact from some other source.[31] Where special authority of an agent to do a given act,[32] or subsequent ratification of such act by his principal,[33] is regarded as matter of affirmative defense, such authorization or ratification should be averred in the affidavit of defense with all particularity required in plaintiff's statement. And an affidavit of defense is fatally defective which merely states the conclusion that an agent had authority to do a certain act, instead of averring facts from which the authority is supposed to flow.[34]

In an action on an official bond an answer alleging that a part payment thereof had been made without defendant's knowledge or consent does not deny the authority of the agent who made the payment. York County School Dist. No. 27 *v.* Holmes, 16 Nebr. 486, 20 N. W. 721.

22. Murry *v.* Webber, 103 Iowa 477, 72 N. W. 759.

23. Esterly Harvesting Mach. Co. *v.* Bemis, 93 Iowa 398, 61 N. W. 980.

24. Horn *v.* Western Land Assoc., 22 Minn. 233.

25. Cross *v.* Atchison, etc., R. Co., 71 Mo. App. 585.

26. Hamill *v.* Baumhover, 110 Iowa 369, 81 N. W. 600.

27. Willard *v.* Williams, 7 Gray (Mass.) 184, where it is said that the averment setting out the mode of the receipt of the money through an agent was not a substantive fact necessary to constitute the cause of action, but a mere statement of the evidence by which plaintiff proposed to prove his cause of action, and therefore something which defendant was not compelled to deny.

28. Hutchinson *v.* Van Voorhis, 54 N. J. Eq. 439, 35 Atl. 371.

29. See, generally, PLEADING, *ante*, p. 1.

30. Paine *v.* Berg, 23 Pa. Super. Ct. 577; Root *v.* Kase, 2 Wkly. Notes Cas. (Pa.) 446. See also Horstman *v.* Fox, 2 Wkly. Notes Cas. (Pa.) 381.

There must be an averment, unequivocal and positive, that defendant disclosed his agency to plaintiff. Gibbons *v.* Dabney, 2 Wkly. Notes Cas. (Pa.) 490.

An affidavit of defense, in such an action, disclosing a principal, but alleging an individual liability will not prevent judgment. Nugent *v.* Schracgan, 4 Pa. Co. Ct. 297.

31. Paine *v.* Berg, 23 Pa. Super. Ct. 577.

32. Hannis Distillery Co. *v.* Rosenbluth, 12 Luz. Leg. Reg. (Pa.) 112.

33. Hannis Distillery Co. *v.* Rosenbluth, 12 Luz. Leg. Reg. (Pa.) 112.

34. Hannis Distillery Co. *v.* Rosenbluth, 12 Luz. Leg. Reg. (Pa.) 112.

3. DEMURRER OR EXCEPTION.[35] Equity has jurisdiction of a bill by the principal to compel his agent to account for money or property received by him, and a demurrer on the ground that there is a complete remedy at law will not lie.[36] Where it appears on the face of the complaint, by a principal to set aside a sale of property by his agent, that there was an unreasonable delay in bringing suit, advantage of such defect may be taken by demurrer.[37] A bill for an accounting which contains an averment of agency, and a statement that moneys were received by defendant, is demurrable on the ground that it contains no averment that the agency is fiduciary in its nature.[38] Where an allegation in the answer states that a certain act was done by a legally authorized agent of plaintiff is demurred to, the demurrer admits that the agent had such authority.[39]

4. AMENDMENT OF PLEADINGS. The court may allow a plaintiff suing as an agent to amend his complaint so as to maintain the suit in his own right,[40] the descriptive words of agency being regarded as surplusage,[41] and the amendments striking them from the complaint not being objectionable as introductive of a new and different cause of action.[42] Likewise it is held that a complaint alleging that a contract was made by defendant as agent is amendable by striking from the complaint the words importing agency.[43] And, conversely, it has been held that in a suit by an agent of an undisclosed principal, the writ may be amended by the substitution of the principal, even after the trial, if not changing the result.[44]

5. BILLS OF PARTICULARS. In conformity with the rule that defendant cannot have a bill of discovery in the shape of an order for particulars,[45] it is held that, in an action by an agent against his principal for services, the latter cannot insist upon particulars giving credit for moneys received for him; he is only entitled to ask for what balance the action is brought.[46]

6. ISSUES, PROOF, AND VARIANCE — a. Issues. An issue of fact arises as to the extent of an agent's authority, where there is an averment that the agent acted for his principal in a given transaction and an express denial of such averment.[47] And where the agency of a certain person is put in issue by the answer, it is proper for the court to submit such issue to the jury, if warranted by the evidence, notwithstanding the absence of a specific presentation of such state of case in the complaint.[48]

For instance, where one seeks to defend an action on a book-account on the ground of payment by giving a note therefor to a collection agency, his affidavit of defense is defective in merely averring that the agent had authority to accept a note as payment in lieu of cash, instead of stating whether the authority of the agent so to do was in writing, and if so, appending a copy thereof or stating why it cannot be done. Hannis Distillery Co. *v.* Rosenbluth, 12 Luz. Leg. Reg. (Pa.) 112.

35. See, generally, PLEADING, *ante*, p. 1.

36. Decell *v.* Hazlehurst Oil Mill, etc., Co., 83 Miss. 346, 35 So. 761.

37. Whitley *v.* James, 121 Ga. 521, 49 S. E. 600.

38. Hemings *v.* Pugh, 4 Giffard 456, 9 Jur. N. S. 1124, 9 L. T. Rep. N. S. 283, 12 Wkly. Rep. 44, 66 Eng. Reprint 785.

39. Esterly Harvesting Mach. Co. *v.* Bemis, 93 Iowa 398, 61 N. W. 980.

40. Messenger *v.* Northcutt, 26 Colo. 527, 58 Pac. 1090; Cirwithin *v.* Mills, 2 Marv. (Del.) 232, 43 Atl. 151; McDuffie *v.* Irvine, 91 Ga. 748, 17 S. E. 1028. See also Triplett *v.* Morris, 18 Tex. Civ. App. 50, 44 S. W. 684.

41. McDuffie *v.* Irvine, 91 Ga. 748, 17 S. E. 1028.

42. Messenger *v.* Northcutt, 26 Colo. 527, 58 Pac. 1090; Cirwithin *v.* Mills, 2 Marv. (Del.) 232, 43 Atl. 151.

43. Hearn *v.* Gower, 1 Ga. App. 265, 57 S. E. 916.

44. Boudreau *v.* Eastman, 59 N. H. 467.

45. Penprase *v.* Crease, 4 Dowl. P. C. 711, 5 L. J. Exch. 105, 1 M. & W. 36, 4 Tyrw. & G. 468. See, generally, PLEADING, *ante*, p. 1.

46. Penprase *v.* Crease, 4 Dowl. P. C. 711, 5 L. J. Exch. 105, 1 M. & W. 36, Tyrw. & G. 468.

Filing account.—Where a demand is made on an agent to account for the rents and revenues of property under his administration, the judgment prayed for being only for the amount as shown by the account, the proper course to pursue, when the answer of defendant denies that he owes an accounting to plaintiff, is to ascertain the fact whether an account is due, and, if so, to order defendant to file an account within a fixed time, to which plaintiff may, if he chooses to do so, file an opposition. Lillie *v.* Lillie, 48 La. Ann. 726, 19 So. 738.

47. Nicholson *v.* Pease, 61 Vt. 534, 17 Atl. 720.

48. McCabe *v.* Farrell, 34 Tex. Civ. App. 36, 77 S. W. 1049.

b. Matters to Be Proved — (i) *Agency.* Whenever it is sought to charge a principal with a wrongful act committed by his agent, it is essential and indispensable to prove the agency, upon the trial, if the fact is denied by the answer.[49] And where plaintiff alleges an agency, the liability of the agent, and a demand upon him to account and pay over, and defendant denies the alleged agency, plaintiff must prove the agency;[50] otherwise of course as to proving the fiduciary nature of the agency, if that relationship stands admitted by the answer.[51] And where an instrument sued on purports to have been executed by an agent for his principal, plaintiff need not prove the authority of the agent, where defendant has answered generally without specifically denying the agency.[52] In case the agent sues in his own name on such a contract he must prove an assignment.[53]

(ii) *Demand Before Suit Brought.* Where plaintiff sues defendant as his agent, defendant by denying the agency makes it unnecessary for plaintiff to prove a demand, before suit, for the money sued for;[54] otherwise, it seems, where the agency is admitted.[55]

c. Evidence Admissible Under Pleadings — (i) *In General.* The general rule that evidence in a case will not be considered on an issue not presented by the pleadings and is not admissible if not pertinent to the issues presented by the pleadings is applicable to actions by and against a principal or agent.[56]

(ii) *Bill or Complaint* — (a) *In General.* The general rule that a plaintiff, in his complaint, must state the facts constituting his cause of action, and is not at liberty to make out his case by giving in evidence facts which he has not stated in his complaint, applies to actions by or against a principal or agent.[57]

49. Curtis *v.* Fay, 37 Barb. (N. Y.) 64.

50. Waddell *v.* Swann, 91 N. C. 108.

51. McQueen *v.* Lockwood, 79 Hun (N. Y.) 612, 29 N. Y. Suppl. 370.

52. Reid *v.* Reid, 11 Tex. 585.

Admission in answer as dispensing with proof.— Where plaintiff alleged that defendant owed him a certain sum as a yearly salary agreed upon, for services rendered, and defendant admitted that his agent employed plaintiff on its own behalf to perform such services, but denied the contract to pay a yearly salary, it was not necessary for plaintiff to show that such agent had authority to make the contract as alleged. Cross *v.* Atchison, etc., R. Co., 141 Mo. 132, 42 S. W. 675.

53. Bullock *v.* Ueberroth, 121 Mich. 293, 80 N. W. 39, holding that where B sues upon a contract, wherein he appears as agent, under which money is payable to B & Co., he cannot recover without proving that he was doing business under the name of B & Co., or that B & Co. assigned the contract to him.

54. Waddell *v.* Swann, 91 N. C. 108.

55. Waddell *v.* Swann, 91 N. C. 108.

56. Green *v.* Macy, 36 Ind. App. 560, 76 N. E. 264; Greenfield *v.* Monaghan, 85 Iowa 211, 52 N. W. 193; Dillon *v.* Pinch, 110 Mich. 149, 67 N. W. 1113; McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74; Coolican *v.* Milwaukee, etc., Imp. Co., 79 Wis. 471, 48 N. W. 717. See Fish *v.* Hahn, 124 N. Y. App. Div. 173, 108 N. Y. Suppl. 782.

Illustrations.— In an action by an agent against his principal to recover commissions earned, evidence as to the reasonableness of the commissions is inadmissible, where the action is on an express contract therefor. McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74. In an action for agents' commissions, where the defense was that the sale was agreed to on condition that plaintiffs' commissions should be taken out of second-hand machinery, which was accepted in part payment of the purchase-price, evidence as to what was done with the second-hand machinery after the sale was properly admitted. Irwin *v.* Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849. In an action on a contract made by defendant's agent, evidence as to what communications passed between the agent and his superior officers, as to the contract, is inadmissible, there being no plea of ratification or estoppel. American Tel., etc., Co. *v.* Green, 164 Ind. 349, 73 N. E. 707. Where, in an action for services under an alleged express contract to pay ten per cent of the price of certain sales of machinery made by plaintiff, defendant denied the contract as alleged, and averred that the agreement provided for a much smaller compensation, evidence as to the reasonable value of plaintiff's services was admissible as bearing on the question as to which agreement was made. Standard Plunger Elevator Co. *v.* Brumley, 149 Fed. 184, 79 C. C. A. 132.

57. Green *v.* Macy, 36 Ind. App. 560, 76 N. E. 264; McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74; Coolican *v.* Milwaukee, etc., Imp. Co., 79 Wis. 471, 48 N. W. 717. See Wrought Iron Range Co. *v.* Young, 85 Ark. 217, 107 S. W. 674; Westinghouse Co. *v.* Tilden, 56 Nebr. 129, 76 N. W. 416; Seeber *v.* People's Building L., etc., Assoc., 36 N. Y. App. Div. 312, 55 N. Y. Suppl. 364.

Showing that in pretended payment to agent individual debt of agent was settled as part thereof.— Where goods are purchased from a salesman of a wholesale house, and

(B) *Fact of Agency.* Although the agency be not pleaded, evidence is admissible, under an averment in the complaint that an act was done by defendant, to show that such act was done by his authorized agent.[58]

(C) *Ratification of Agent's Authority.* Proof of ratification includes proof of agency and authority,[59] and may be made under a complaint charging the ratified act to be that of the principal,[60] or under an averment in the pleading that an agent acted by due authority.[61]

(III) *PLEA OR ANSWER* — (A) *In General.* In actions by or against a principal or agent the general rule that one cannot establish by evidence a defense not pleaded is applicable.[62]

(B) *As to Act of Agent.* Under an allegation in the answer that an act was done by plaintiff, evidence is admissible to show that the act was done by his authorized agent.[63]

(C) *Evidence Admissible Under General Denial.* Under a general denial evidence is admissible to prove agency on the part of defendant, in order to dis-

it is alleged by the purchasers that the goods were received from, and the price thereof paid to, such agent, without knowledge that he represented such house, plaintiff can show that in the pretended payment an individual debt of the agent was settled as part of the payment. Smith *v.* Morrill, 39 Kan. 665, 18 Pac. 915.

58. *Iowa.*— Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223.

Minnesota.— Weide *v.* Porter, 22 Minn. 429.

New York.— Sherman *v.* New York Cent. R. Co., 22 Barb. 239.

Texas.— Guffey *v.* Mosely, 21 Tex. 408.

Canada.— Bisaillon *v.* Elliott, 13 Quebec Super. Ct. 289.

Compare Harris *v.* Richmond, etc., R. Co., 31 S. C. 87, 9 S. E. 690.

Illustrations.— Under an allegation of a purchase of goods by a party, evidence of the purchase by his agent is admissible. Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223. Where a contract alleged as that of a party is in issue, it is proper to show that the same was executed by a duly authorized agent, although execution by an agent was not averred. Weide *v.* Porter, 22 Minn. 429. Evidence of fraudulent representations of an agent is admissible under an allegation in the complaint of fraudulent representations by the principal. King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432.

Under an allegation that a note, appearing on its face to have been made by another party, was made and executed by defendant, evidence is admissible to establish that it was in fact the note of defendant, by proving the authority of the person signing to make and deliver it in behalf of defendant. Moore *v.* McClure, 8 Hun (N. Y.) 557.

Evidence of either express or ostensible agency.— Where in an action for breach of contract the complaint states that "the parties hereto entered into a contract," etc., and that "defendant agreed with said plaintiffs to pay them the prices stated," etc., evidence of either an express or ostensible agency in the person who made the contract with plaintiff is admissible. Bibb *v.* Bancroft, (Cal. 1889) 22 Pac. 484.

59. Aultman Thrashing, etc., Co. *v.* Knoll, 71 Kan. 109, 79 Pac. 1074.

60. Long *v.* Osborn, 91 Iowa 160, 59 N. W. 14; Aultman Thrashing, etc., Co. *v.* Knoll, 71 Kan. 109, 79 Pac. 1074.

Under a complaint alleging due execution and delivery of the bond sued on, it must be shown that the party whose name had been affixed to the bond as surety by another without authority ratified the signature. Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670.

Ratification of agent's extension of time of payment of mortgage, subsequent to institution of suit.— Where, after an agent without authority from the mortgagee had extended the time of payment of a mortgage, the mortgagee brings detinue to recover the mortgaged property, a plea that the suit is premature, and that the mortgagee had no right of action at the institution thereof on account of the agent's extension of time, is not sustainable by proof of the ratification of such extension subsequent to the institution of the suit. Powell *v.* Henry, 96 Ala. 412, 11 So. 311.

61. *Colorado.*— Hoosac Min., etc., Co. *v.* Donat, 10 Colo. 529, 16 Pac. 157.

Minnesota.— Janney *v.* Boyd, 30 Minn. 319, 15 N. W. 308.

Nebraska.— Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255.

New York.— Hoyt *v.* Thompson, 19 N. Y. 207.

Washington.— Seal *v.* Puget Sound Loan, etc., Co., 5 Wash. 422, 32 Pac. 214.

Wisconsin.— Hubbard *v.* Williamstown, 61 Wis. 397, 21 N. W. 295.

Compare Lafourche Transp. Co. *v.* Pugh, 52 La. Ann. 1517, 27 So. 958.

Proof of ratification of a payment made to an agent who had no authority to receive it is admissible under an allegation in the pleading of authority of such agent to receive the payment. Janney *v.* Boyd, 30 Minn. 319, 15 N. W. 308.

62. Dillon *v.* Pinch, 110 Mich. 149, 67 N. W. 1113. See Irwin *v.* Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849.

63. Hare *v.* Winterer, 1 Nebr. (Unoff.) 854, 96 N. W. 179.

prove his individual liability; [64] to show the terms of the alleged agency,[65] or that the contract laid in the complaint is not the contract of the parties; [66] to prove ratification of an alleged agent's act, and thus fix the liability of his principal,[67] in order to relieve defendant from liability to plaintiff, his principal; to disprove the authority of an alleged agent; [68] or to show revocation of an alleged agency and notice thereof,[69] so as to relieve defendant from liability as principal; or to show gross misconduct, fraud, negligence, and unskilfulness on the part of plaintiff in the performance of his duties as agent, and thus defeat his right to compensation; [70] or to show, in an action by a principal against his agent to recover the proceeds of a note paid to the latter in settlement of a note after suit brought by him thereon, the expense necessarily incurred by defendant in collecting the note, for the purpose of having the same deducted from the amount collected, in fixing the extent of his liability.[71]

d. Variance — (i) *In General.* The general rule of pleading that plaintiff must recover *secundum allegata et probata*, or not at all,[72] is applicable to actions by or against a principal or agent.[73] Hence any substantial variance between the averments and proof is fatal to a recovery.[74] But the fact that

64. Gray *v.* Taylor, 2 Ind. App. 155, 28 N. E. 220; Scone *v.* Amos, 38 Minn. 79, 35 N. W. 575; Koehler *v.* Adler, 91 N. Y. 657.

To prove that the contract sued on was made with plaintiff as agent, and not in his individual capacity, and that the liability on the contract, if any, is to plaintiff's principal, evidence is admissible under a general denial. Stark *v.* McCoskey, 2 N. Y. Suppl. 737.

65. Phœnix L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151, holding that, where the complaint charges plaintiff with the conversion of money received as defendant's agent, a general denial lets in evidence of the terms of the agency for the purpose of showing that defendant was not bound to pay over the money in question.

66. Acme Harvester Co. *v.* Curlee, 77 Nebr. 666, 110 N. W. 660.

67. Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.

68. Merritt *v.* Briggs, 57 N. Y. 651.

Under a denial of every allegation but the execution, evidence is admissible under a general denial, in an action on an instrument made by the person apparently clothed with agency, to prove that the apparent agent was without authority. Chambers County *v.* Clews, 21 Wall. (U. S.) 317, 22 L. ed. 517.

Illustrations.— Where the complaint for a balance due for building material furnished by plaintiff to defendant alleges that the purchase of the material was by defendant, defendant may, under a general denial, introduce evidence tending to show that plaintiff furnished the material to defendant, who was the assignee of a building contract made with defendant, containing a provision that the contractor should furnish all material to be used in the construction of certain houses. Hallock-Sayre-Newton Lumber Co. *v.* Blake, 4 Colo. App. 486, 36 Pac. 554.

69. Hier *v.* Grant, 47 N. Y. 278.

70. Harvey *v.* Cook, 24 Ill. App. 134.

71. Dennis *v.* Graf, 31 Wis. 105.

Variance as to description of principal and agent see Commercial Paper, 8 Cyc. 209.

72. See Pleading, *ante*, p. 1.

73. *Alabama.*— Chambers *v.* Seay, 73 Ala. 372.

Illinois.— Webster *v.* Webster, 55 Ill. 325.

Indiana.— Hasselman *v.* Carroll, 102 Ind. 153, 26 N. E. 202.

Kansas.— Davis *v.* Lawrence, 52 Kan. 383, 34 Pac. 1051.

Kentucky.— Robinson *v.* Morgan, Litt. Sel. Cas. 56.

Massachusetts.— Durgin *v.* Somers, 117 Mass. 55; Gillespie *v.* Wilder, 99 Mass. 170.

Missouri.— Trimble *v.* Stewart, 35 Mo. App. 537; Bailey *v.* McCully, 28 Mo. App. 572.

New York.— King *v.* MacKeller, 94 N. Y. 317; Campbell *v.* Sloane, 67 Hun 652, 22 N. Y. Suppl. 81; Bunn *v.* Bartlett, 54 Hun 639, 8 N. Y. Suppl. 160; Field *v.* Syms, 2 Rob. 35; Poirer *v.* Fisher, 8 Bosw. 258; Taylor *v.* Pullman Automatic Ventilating Co., 87 N. Y. Suppl. 404.

North Carolina.— Wills *v.* Fisher, 112 N. C. 529, 17 S. E. 73.

Texas.— Thornton *v.* Stevenson, (Civ. App. 1895) 31 S. W. 232.

Wisconsin.— Engel *v.* Hardt, 56 Wis. 456, 14 N. W. 625.

United States.— Merrill *v.* Rokes, 54 Fed. 450, 4 C. C. A. 433.

74. *Illinois.*— Webster *v.* Webster, 55 Ill. 325.

Massachusetts.— Parsons *v.* Phelan, 134 Mass. 109; Gillespie *v.* Wilder, 99 Mass. 170.

Michigan.— Peppler *v.* Ratz, 38 Mich. 96.

Missouri.— Trimble *v.* Stewart, 35 Mo. App. 537; Bailey *v.* McCully, 28 Mo. App. 572.

New York.— King *v.* MacKellar, 94 N. Y. 317; Field *v.* Syms, 2 Rob. 35; Taylor *v.* Pullman Automatic Ventilating Co., 87 N. Y. Suppl. 404; Douglass *v.* Leland, 1 Wend. 490.

Texas.— Thornton *v.* Stevenson, (Civ. App. 1895) 31 S. W. 232.

United States.— Merrill *v.* Rokes, 54 Fed. 450, 4 C. C. A. 433.

Instances of fatal variance.— When the complaint alleges that under a contract of

plaintiff's proof is more narrow than his complaint does not necessarily constitute a fatal variance if what he does prove is comprehended by the allegations of the complaint.[75]

(II) *As to Acts Done or Knowledge Obtained by Principal.* Where the allegation in the complaint is that certain acts were done [76] or knowledge

agency defendant was to sell certain cattle for a reasonable price and account for and pay over the proceeds, and the proof shows that defendant as agent was instructed to sell for cash only, there is a fatal variance between the proof and the complaint, entitling defendant to a nonsuit. Douglass *v.* Leland, 1 Wend. (N. Y.) 490. Where plaintiff sues in his own right on a contract of insurance, and it appears that the policy was issued to him as agent of an undisclosed principal, the variance is fatal. Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66. If the complaint charges defendant with receiving lumber as plaintiff's agent to sell, and with collecting and not paying over the proceeds, and the proof is of a sale of the lumber to defendant and a partial non-payment of the price by him as original purchaser, there is a fatal variance. Peppler *v.* Ratz, 38 Mich. 96. Where the complaint alleges that plaintiff intrusted defendant with a sum of money on his promise to invest the same for the former, but that he converted it to his own use and refused to pay the same, and the proof is that defendant did in good faith invest the money, but negligently took insufficient security, there is a fatal variance. King *v.* MacKellar, 94 N. Y. 317. If a declaration alleges that defendant agreed to bid for a parcel of land at a sale by auction, and buy one undivided half of the land in behalf of, and as agent for, plaintiff, and the evidence is that defendant agreed to buy the land on their joint account, there is a variance fatal to a recovery. Parsons *v.* Phelan, 134 Mass. 109. Where an agent in an action for commissions on the sale and exchange of property alleges a specific contract of employment, he cannot recover by proving that the owners of the different properties, after the negotiations which he was conducting had fallen through, effected between themselves a sale and exchange on different terms from those he was authorized to make. Thornton *v.* Stevenson, (Tex. Civ. App. 1895) 31 S. W. 232. Where an agent sues for commissions earned in effecting a sale of his principal's property, he cannot recover on proof that defendant wrongfully caused the sale to be effected through a third person. Bailey *v.* McCully, 28 Mo. App. 572.

Instances of variance held not material.— Where, in an action by a principal against his agent to recover the difference between what the agent paid for certain stock and the amount which he claimed to have paid, which was repaid to him by the principal, the complaint alleges that the agent purchased the shares of stock, and the proof shows that he purchased certain agreements of a syndicate to furnish the shares of stock, the variance is immaterial. Sommer *v.* Smith, 90 Cal. 260, 27 Pac. 208. There is no material variance between an allegation of a return of property to defendant because not as warranted and a demand on him to replace it as agreed, and evidence of a return to and a demand on his agent who had full charge of his business. Clydesdale Horse Co. *v.* Bennett, 52 Mo. App. 333. In an action on contract for the recovery of money alleged to have been received by defendant as the agent of plaintiff and not accounted for and paid over, proof that defendant is indebted on a joint adventure is not a fatal variance, and it is immaterial that defendant was arrested in the action on the ground of the alleged agency. Poirer *v.* Fisher, 8 Bosw. (N. Y.) 258. In an action by an agent to recover commissions earned in effecting a sale of realty, where the original contract which was set out in the petition recited that a part of the consideration for the land was to be paid in cash, the admission of evidence that the principal subsequently agreed to accept as cash a secured note offered by the proposed purchaser does not constitute a material variance. Davis *v.* Lawrence, 52 Kan. 383, 44 Pac. 1051. Under a declaration alleging that plaintiff was employed to procure a purchaser for land which a third person had given bond to convey to defendant, proof that plaintiff was also to procure a deed of the land from such third person to the purchaser is not a material variance. Durgin *v.* Somers, 117 Mass. 55.

75. Gibson *v.* Bailey Co., 114 Mo. App. 350, 89 S. W. 597.

Illustrations.— Where, in an action by an agent against his principal for commissions on goods sold by him, the complaint alleges that plaintiff was employed to sell defendant's goods, generally, on commission, and the proof is that his contract was to sell a particular line of defendant's goods, the variance is not fatal. Gibson *v.* Bailey Co., 114 Mo. App. 350, 89 S. W. 597.

76. *Arizona.*— Root *v.* Fay, 5 Ariz. 19, 43 Pac. 527.

Colorado.— See McDermott *v.* Grimm, 4 Colo. App. 39, 34 Pac. 909.

Iowa.— Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223.

Missouri.— Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977; Slevin *v.* Reppy, 46 Mo. 606; Draper *v.* Fitzgerald, 30 Mo. App. 518.

New York.— Sherman *v.* New York Cent. R. Co., 22 Barb. 239.

South Carolina.— Boulware *v.* McComb, Harp. 416.

England.— Brucker *v.* Fromont, 6 T. R. 659, 3 Rev. Rep. 303. See also Helmsley *v.* Loader, 2 Campb. 450.

Where there is no question as to the agency of a person and his authority to act for defendant, proof of the acts of such person

obtained [77] by the principal, and the proof is that such acts were done or knowledge obtained by his authorized agent, there is no variance.

(III) *FAILURE OF PROOF.* A rule of code pleading that if the allegation to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, but a failure of proof, is applicable to actions by or against a principal or agent.[78]

E. Evidence [79]— **1. PRESUMPTIONS AND BURDEN OF PROOF — a. Presumptions** — (I) *FACT OF AGENCY* — (A) *In General.* Excepting where a known agent acts in a given transaction, in which case there is of course a presumption, in the absence of evidence, that the relationship of principal and agent exists,[80] the law indulges in no naked presumption that an agency exists;[81] but, instead thereof, presumes that a person is acting for himself, and not as agent for another.[82] If

within the scope of his agency supports an allegation that the acts were those of defendant. Baldwin *v.* Polti, (Tex. Civ. App. 1907) 101 S. W. 543.

Illustrations.— In an action by the indorsee of certain notes executed to a partnership and indorsed by one of the partners as agent for the partnership, evidence that the note was indorsed by such partner for himself and as an agent for the partnership will support an averment that the partnership indorsed the note, their own proper hands being to such indorsement subscribed. Rice *v.* Goodenow, Tapp. (Ohio) 126.

77. McDermott *v.* Grimm, 4 Colo. App. 39, 34 Pac. 909; Marshall *v.* Gilman, 52 Minn. 88, 53 N. W. 811.

78. See PLEADING, *ante*, p. 1. And see Carson *v.* Quinn, 127 Mo. App. 525, 105 S. W. 1088; Hall *v.* Morrison, 3 Bosw. (N. Y.) 520; Strauss *v.* Russell, 24 Misc. (N. Y.) 386, 53 N. Y. Suppl. 401.

Rule applied.— Under an allegation in a counter-claim that defendant delivered notes to plaintiff for collection, and for the return of one half of the proceeds to defendant, proof that defendant delivered notes to plaintiff to pay an insurance premium, and that plaintiff agreed to return to defendant one half of the amount represented by the notes constitutes, not a variance, but a complete failure of proof. Strauss *v.* Russell, 24 Misc. (N. Y.) 386, 53 N. Y. Suppl. 401.

No failure of proof.— Where a plaintiff alleged in his complaint that he left with defendant twenty shares of stock on Sept. 27, 1854, for sale at not less than forty-six per cent, and that plaintiff sold the stock at that rate and refused to pay over the proceeds and plaintiff prayed judgment therefor; and it appeared by the proofs that the proceeds of such sale were, by plaintiff's direction, invested in other twenty shares of stock which by like direction were sold and the proceeds invested in other twenty shares, which by plaintiff's authority were sold and the proceeds received on March 20, 1855, it was held that plaintiff was entitled to recover such last-named proceeds, and that the discrepancy between the allegations and the proofs was not a failure to prove the allegations of the complaint in their entire scope and meaning. Hall *v.* Morrison, 3 Bosw. (N. Y.) 520.

79. See, generally, EVIDENCE, 16 Cyc. 821.

80. Brett *v.* Bassett, 63 Iowa 340, 19 N. W. 210; McCarthy *v.* Missouri R. Co., 15 Mo. App. 385; Meeker *v.* Claghorn, 44 N. Y. 349; Stanton *v.* Camp, 4 Barb. (N. Y.) 274.

Where a commercial firm puts a notice in a newspaper that a certain person will act as its agent, and such person advertises for the purchase of cotton in the name of the firm, it will be presumed that its purchases are made for the firm. Hamilton *v.* Eimer, 29 La. Ann. 391.

An agent authorized to indorse notes in the name of his principal and for his use, having indorsed a note in his own name, is presumed to have done so for the use of the principal. Kock *v.* Bringier, 19 La. Ann. 183.

81. Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460 (holding that the fact that one is "transacting business for" another raises no presumption of agency until it is shown that it was done upon his authority and for his account); Gore *v.* Canada L. Assur. Co., 119 Mich. 136, 77 N. W. 650; Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570; Dixon *v.* Haslett, 3 Brev. (S. C.) 475. See also Eastman *v.* Burleigh, 2 N. H. 484.

82. Vawter *v.* Baker, 23 Ind. 63; Wheeler *v.* Miller, 2 Handy (Ohio) 149, 12 Ohio Dec. (Reprint) 375; Soutter *v.* Stoeckle, 6 Ohio Dec. (Reprint) 1054, 10 Am. L. Rec. 23; Parker *v.* Winlow, 7 E. & B. 942, 4 Jur. N. S. 584, 27 L. J. Q. B. 49, 90 E. C. L. 942.

The legal presumption that a party binds himself by a contract, and does not act as agent, should turn the scale in an evenly balanced case. Curtis *v.* Scoles, 1 Iowa 471.

When legal presumption of personal liability exists.— The legal presumption, in the absence of evidence, is that the agent is liable only where the principal is not known or where the agent undertakes in his own name or exceeds his power; it is presumed otherwise that he intended to bind his principal since an agent should not be regarded as personally bound unless such intention is expressed in the contract. Laguna Valley Co. *v.* Fitch, 121 Ill. 607. When an act of an agent is within the scope of his authority, the presumption is that he intends to bind the principal, and not himself. Hall *v.* Lauderdale, 46 N. Y. 70.

any presumption of agency be indulged, it must be indulged from the facts and circumstances of the case.[83]

(B) *Arising From Former Agency.* Unless there is proof either that the agency is a general continuing agency to endure until revoked,[84] or that the agent fills some character from which such a general agency may be presumed,[85] the fact that there has been a separate former agency for a different [86] or even a similar [87] purpose, does not raise a presumption of agency as to any subsequent transaction.

(II) *Character of Agency.* If an agency be proved, without showing its extent, it is presumed to be general and not special; [88] not in respect to everything, but only in respect to the business with which the agency is concerned.[89] And third persons dealing with an agent have the right to presume that his agency is general, in the absence of notice to the contrary,[90] even though, as between principal and agent, there may be only a special agency.[91]

(III) *Continuance of Authority of Agent* — (A) *In Cases of General Agency.* If a general agency for any purpose be shown the presumption as to third persons previously dealing with the agent is that it continues until notice of revocation.[92]

(B) *In Cases of Special Agency.* In cases of special agency, limited to a particular transaction, where it appears that at the inception of the transaction an agent is authorized with respect thereto, a *prima facie* presumption arises that such authority continued throughout the stages of the transaction; [93] but, in the absence of competent evidence of its continuance, the presumption is that the

83. Gore *v.* Canada L. Assur. Co., 119 Mich. 136, 77 N. W. 650.

84. Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

85. Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

86. Humphrey *v.* Havens, 12 Minn. 298; Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645. See also Rodgers *v.* Peckham, 120 Cal. 238, 52 Pac. 483; Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111.

That one has acted as agent of another in the ordinary transactions of life is not even presumptive evidence of a power in the former to accept a donation for the latter. Reed *v.* Baggott, 5 Ill. App. 257; Bush *v.* Decuir, 11 La. Ann. 503.

87. Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

88. Maher *v.* Moore, (Del. 1898) 42 Atl. 721; Methuen Co. *v.* Hayes, 33 Me. 169; Shark *v.* Knox, 48 Mo. App. 169; Pullman Palace Car Co. *v.* Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624; Missouri Pac. R. Co. *v.* Simons, 6 Tex. Civ. App. 621, 25 S. W. 996. See also Lyons *v.* Donkin, 23 Nova Scotia 258. *Contra*, Dickinson *v.* Mississippi Valley Ins. Co., 41 Iowa 286, holding that an instruction to the jury which in effect announces the doctrine that, when one is shown to be the agent of another, the law will presume him to be a general agent, is erroneous, for the law does not presume him to be either a limited or a general agent.

89. Maher *v.* Moore, (Del. 1898) 42 Atl. 721.

90. *Arkansas.*— Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777.

Maine.— Wood *v.* Finson, 89 Me. 459, 36 Atl. 911; Trainor *v.* Morison, 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790.

Michigan.— Austrian, etc., Co. *v.* Springer, 93 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

New York.— Graves *v.* Miami Steamship Co., 29 Misc. 645, 61 N. Y. Suppl. 115.

Utah.— Smith *v.* Droubay, 20 Utah 443, 58 Pac. 1112.

91. Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777; Graves *v.* Miami Steamship Co., 29 Misc. (N. Y.) 645, 61 N. Y. Suppl. 115.

92. Whiting *v.* Western Stage Co., 20 Iowa 554; Smith *v.* De Leon, 39 La. Ann. 70, 1 So. 304; Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645. See also Columbus County *v.* Hurford, 1 Nebr. 146 (holding that when the relation of principal and agent has once been established, it will be presumed to continue until shown to have been dissolved); Bergner *v.* Bergner, 219 Pa. St. 113, 67 Atl. 999 (holding that where an agency has been once entered upon the law will presume, in the absence of evidence to the contrary, that whatever was done in furtherance of the original scheme which the agency was created to effect was done under and through the agency).

93. Parker *v.* Crilly, 113 Ill. App. 309; Hensel *v.* Maas, 94 Mich. 563, 54 N. W. 381.

Renewal of authority.— Where the agency was for a special occasion, and the act authorized has been performed, and the agency apparently terminated thereby, there is no presumption as to a renewal of authority. Green *v.* Hinkley, 52 Iowa 633, 3 N. W. 688.

agency ceased at the completion of the particular transaction to which it was limited.[94] It is held, however, that if the authority of an agent be special, but unlimited as to time, the presumption, as to third persons previously dealing with him, is that it continues until notice of revocation.[95]

(IV) *EXTENT OF AUTHORITY* — (A) *In General.* The presumption is that one known to be an agent is acting within the scope of his authority,[96] at least in the absence of proof as to the purpose or extent of the agency.[97] The rule does not apply, however, where the act in question is an illegal one, the presumption in such case being that the agent was without authority.[98]

(B) *Authority to Convey Land.* Undisturbed possession of land for many years under a deed made by an agent raises a presumption of authority on the part of the agent to make the conveyance.[99]

(C) *Authority to Receive Payment For Principal* — (1) IN GENERAL. There is no legal presumption that a third party, not having possession of the written evidence of or the security for, a debt, has, as to the creditor, authority as his agent to receive payment of the debt;[1] but if such person is in the possession of the security for or evidence of the debt at maturity, his authority to receive both principal and interest is presumed,[2] there being no suspicious circumstances surrounding such possession.[3] Such presumption ceases, however, when the security is withdrawn by the creditor,[4] even though the debt has been contracted through the agent.[5]

(2) IN PROPERTY INSTEAD OF MONEY. There is no legal presumption that an agent to collect a debt has authority to accept property as payment therefor in lieu of money.[6]

(V) *PERFORMANCE OF DUTY.* The presumption of law is that an agent has done his duty until the contrary appears;[7] misconduct and negligence will

94. Reed *v.* Baggott, 5 Ill. App. 257; Fullerton *v.* McLaughlin, 70 Hun (N. Y.) 568, 24 N. Y. Suppl. 280. See also McLeod *v.* Despain, 49 Oreg. 536, 90 Pac. 492, 92 Pac. 1088.

95. Whiting *v.* Western Stage Co., 20 Iowa 554.

96. Brett *v.* Bassett, 63 Iowa 340, 19 N. W. 210; Austrian, etc., Co. *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; Inglish *v.* Ayer, 79 Mich. 516, 44 N. W. 942; Kilborn *v.* Prudential Ins. Co., 99 Minn. 176, 108 N. W. 861.

When no complaint has been made in regard to the manner in which an agent's duties have been performed, he is presumed to have acted within the scope of his authority. Ford *v.* Danks, 16 La. Ann. 119.

If the principal does not question the authority of a known agent to do a thing on behalf of his principal, such authority will be presumed until the contrary is made to appear. Strayhorn *v.* McCall, 78 Ark. 209, 95 S. W. 455.

Authority commensurate with duties.—It is presumed that a given agent has deputed to him all the powers and authority necessary to a proper discharge of the duties imposed upon him; in other words, it is presumed that his authority is commensurate with his duties. Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17.

97. Leake *v.* Sutherland, 25 Ark. 219; Nebraska Bridge Supply, etc., Co. *v.* Conway, 127 Iowa 237, 103 N. W. 122; Balmford *v.* Peffer, 31 Misc. (N. Y.) 715, 65 N. Y. Suppl. 271. See also Pittsburg Plate Glass Co. *v.* Kerlin, 122 Fed. 414, 58 C. C. A. 648.

98. Stover *v.* Flower, 120 Iowa 514, 94 N. W. 1100.

99. *Kentucky.*—Jarboe *v.* McAtee, 7 B. Mon. 279 (fifty years); Tarvin *v.* Walkers Creek Coal, etc., Co., 80 S. W. 504, 25 Ky. L. Rep. 246 (sixty years).

Louisiana.—Bedford *v.* Urquhart, 8 La. 234, 28 Am. Dec. 137 (twenty years); Buhols *v.* Boudousquie, 6 Mart. N. S. 153 (twenty years).

Massachusetts.—Stockbridge *v.* West Stockbridge, 14 Mass. 257, thirty years.

Texas.— Folto *v.* Ferguson, (Civ. App. 1894) 24 S. W. 657, thirty years.

Virginia.— Goodwin *v.* McCluer, 3 Gratt. 291.

See 40 Cent. Dig. tit. "Principal and Agent," § 392.

1. Dixon *v.* Haslett, 2 Treadw. (S. C.) 615.

2. Guilford *v.* Stacer, 53 Ga. 618; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325.

3. Dwight *v.* Lenz, 75 Minn. 78, 77 N. W. 546.

4. Guilford *v.* Stacer, 53 Ga. 618; Dwight *v.* Lenz, 75 Minn. 78, 77 N. W. 546; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325.

5. Guilford *v.* Stacer, 53 Ga. 618.

6. Equitable L. Assur. Soc. *v.* Cole, 13 Tex. Civ. App. 486, 35 S. W. 720.

7. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316; Breed *v.* Breed, 55 N. Y. App. Div. 121, 67 N. Y. Suppl. 162; Beattie *v.* Beattie,

not, in the absence of proof, be presumed.[8] Thus the legal presumption, in the absence of proof, is that the agent has performed his duty and paid over and accounted to his principal for moneys received by him in his capacity of agent.[9]

(VI) *RATIFICATION* — (A) *In General.* Ratification of the unauthorized act of an agent is not presumed,[10] the presumption being against ratification of such an act, in the absence of proof of intent to ratify.[11] But in conformity with the rule that the acts of a principal are to be liberally construed in favor of an adoption of the acts of his agent,[12] it is held that when an unauthorized act of an agent is capable of ratification, evidence of acts or conduct of the principal in apparent approval of such act suffices, in the absence of evidence to the contrary, to raise a presumption of ratification,[13] with all the circumstances which follow;[14] as where, with knowledge of the unauthorized act of the agent, there is a silence or acquiescence for an unreasonable time, without objection, on the part of the principal,[15] or where the principal receives and holds the fruits of the agent's

83 Hun (N. Y.) 295, 31 N. Y. Suppl. 936 [*affirmed* in 153 N. Y. 652, 47 N. E. 1105].

Obedience to instructions on the part of an agent will be presumed (Bangs *v.* Hornick, 30 Fed. 97), and if the contrary be allaged it must be proved (Merchants' Bank *v.* Griswold, 72 N. Y. 472, 28 Am. Rep. 159; Bangs *v.* Hornick, *supra*).

8. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec 316; Beattie *v.* Beattie, 83 Hun (N. Y.) 295, 31 N. Y. Suppl. 936 [*affirmed* in 153 N. Y. 652, 47 N. E. 1105].

9. Breed *v.* Breed, 55 N. Y. App. Div. 121, 67 N. Y. Suppl. 162; Beattie *v.* Beattie, 83 Hun (N. Y.) 295, 31 N. Y. Suppl. 936 [*affirmed* in 153 N. Y. 652, 47 N. E. 1105]. *Contra*, Shipherd *v.* Underwood, 55 Ill. 475 (holding that in an action against an agent by one who has paid money to him on behalf of his principal, where it was shown that the money was paid to the agent, it will not be presumed, in the absence of proof, that the agent has paid the money over to the principal); Carder *v.* Primm, 52 Mo. App. 102 (holding that an indebtedness once shown to exist is presumed to exist until the contrary is shown, and that accordingly when a collection of money by an agent for a principal is established, there is no presumption that he has paid or accounted for it to his principal).

10. Moore *v.* Ensley, 112 Ala. 228, 20 So. 744; Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 59 N. W. 283.

11. Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 59 N. W. 283.

12. Silverman *v.* Bush, 16 Ill. App. 437; Codwise *v.* Hacker, 1 Cai. (N. Y.) 526.

13. *Colorado.*— Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Georgia.— Macon City Bank *v.* Kent, 57 Ga. 283.

Illinois.— Ernst *v.* McChesney, 186 Ill. 617, 58 N. E. 399; Silverman *v.* Bush, 16 Ill. App. 437.

Kansas.— Pacific R. Co. *v.* Thomas, 19 Kan. 256.

Louisiana.— James *v.* Lewis, 26 La. Ann. 664; New Orleans *v.* Hunter, 12 Mart. 3.

Maryland.— Maddux *v.* Bevan, 39 Md. 485; Reynolds *v.* Davison, 34 Md. 662.

Massachusetts.— Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073; Foster *v.* Rockwell, 104 Mass. 167; Brigham *v.* Peters, 1 Gray 139; Thayer *v.* White, 12 Metc. 343; Amory *v.* Hamilton, 17 Mass. 103.

Minnesota.— Wright *v.* Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015.

Missouri.— Christopher *v.* National Brewery Co., 72 Mo. App. 121.

Nebraska.— Oberne *v.* Burke, 50 Nebr. 764, 70 N. W. 387.

New York.— Meehan *v.* Forrester, 52 N. Y. 277; Allen *v.* Corn Exch. Bank, 87 N. Y. App. Div. 335, 84 N. Y. Suppl. 1001; Codwise *v.* Hacker, 1 Cai. 526; Armstrong *v.* Gilchrist, 2 Johns. Cas. 424.

Pennsylvania.— McCully *v.* Pittsburg, etc., R. Co., 32 Pa. St. 25; Sword *v.* Reformed Congregation Keneseth Israel, 29 Pa. Super. Ct. 626; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tennessee.— Southern Oil Works *v.* Jefferson, 2 Lea 581.

Washington.— Owens *v.* Swanton, 25 Wash. 112, 64 Pac. 921.

United States.— Long *v.* Thayer, 150 U. S. 520, 14 S. Ct. 189, 37 L. ed. 1167; Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43; Kingston *v.* Kincaid, 14 Fed. Cas. No. 7,822, 1 Wash. 454.

England.— Jackson *v.* Jacob, 3 Bing. N. Cas. 869, 3 Hodges 219, 6 L. J. C. P. 315, 5 Scott 79, 32 E. C. L. 399.

Slight circumstances and small matters will sometimes suffice to raise a presumption of ratification. Cairo, etc., R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Silverman *v.* Bush, 16 Ill. App. 437; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

14. Foster *v.* Rockwell, 104 Mass. 167.

15. *Colorado.*— Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Kansas.— Pacific R. Co. *v.* Thomas, 19 Kan. 256.

Maryland.— Maddux *v.* Bevan, 39 Md. 485.

Massachusetts.— Foster *v.* Rockwell, 104 Mass. 167; Brigham *v.* Peters, 1 Gray 139; Thayer *v.* White, 12 Metc. 343.

New York.— Armstrong *v.* Gilchrist, 2 Johns. Cas. 424.

act.[16] However, the presumption of ratification, raised by evidence of conduct of the principal in apparent approval of the unauthorized act of the agent, is not necessarily conclusive, and may be rebutted by proof,[17] unless the conduct shown on the part of the principal is inconsistent with any hypothesis other than that he intended to adopt such act as his own,[18] or the silence or acquiescence of the principal, after knowledge of the unauthorized act of the agent, is contrary to his duty [19] or has a tendency to mislead the agent,[20] or other party affected thereby,[21] and proof of express and seasonable repudiation by the principal will of course overcome any presumption of ratification arising from acts or conduct of his own in apparent approval of the unauthorized act of the agent.[22]

(B) *When Act in Excess or Misuse of Authority.* When the unauthorized act of the agent is done in the execution of a power conferred, but in excess or misuse of the authority given, a presumption of ratification more readily arises from slight acts of confirmation,[23] or from mere silence or acquiescence.[24] And the presumption arising from acquiescence in the unauthorized act of an agent who has exceeded his authority is much stronger than if the act had been that of a mere stranger.[25]

(VII) *Estoppel of Principal to Deny Authority of Agent.* There is no presumption of estoppel on the part of the principal to deny the agency.[26]

(VIII) *Time of Execution of Power of Attorney.* The presumption is, in the absence of evidence to the contrary, that a power of attorney was executed on the day of its date.[27]

(IX) *As to Whom Credit Is Extended.* Where an agent enters into an authorized contract for a disclosed principal, it is presumed, in the absence of evidence to the contrary, that the credit was extended by the third person to the principal rather than to the agent, and that therefore the intention was to bind the former and not the latter.[28]

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

United States.— Kingston *v.* Kincaid, 14 Fed. Cas. No. 7,822, 1 Wash. 454.

16. Silverman *v.* Bush, 16 Ill. App. 437; Southern Oil Works *v.* Jefferson, 2 Lea (Tenn.) 581; Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43. See also Maddux *v.* Bevan, 39 Md. 485.

Ground of presumption.— That the principal had an election, either to disavow the unauthorized act of his agent and tender a return of the goods or to keep the goods and pay for them, is the ground on which a presumption of ratification is indulged from the retention of goods bought by an agent in excess of his authority. Thrall *v.* Wilson, 17 Pa. Super. Ct. 376.

17. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634; Amory *v.* Hamilton, 17 Mass. 103; Allen *v.* Corn Exch. Bank, 87 N. Y. App. Div. 335, 84 N. Y. Suppl. 1001; Kingston *v.* Kincaid, 14 Fed. Cas. No. 7,822, 1 Wash. 454.

18. *Illinois.*— Ernst *v.* McChesney, 186 Ill. 617, 58 N. E. 399.

Maryland.— Maddux *v.* Bevan, 39 Md. 485.

Minnesota.— Wright *v.* Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015.

Missouri.— Christopher *v.* National Brewery Co., 72 Mo. App. 121.

Nebraska.— Oberne *v.* Burke, 50 Nebr. 764, 70 N. W. 387.

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tennessee.— See Southern Oil Works *v.* Jefferson, 2 Lea 581.

Long acquiescence, without objection, will amount to a conclusive presumption of the ratification of an unauthorized act, when such acquiescence is not otherwise accounted for. Maddux *v.* Bevan, 39 Md. 485; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

19. Maddux *v.* Bevan, 39 Md. 485; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. See also Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634.

20. Maddux *v.* Bevan, 39 Md. 485; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

21. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634.

22. New Orleans *v.* Hunter, 12 Mart. (La.) 3; Owens *v.* Swanton, 25 Wash. 112, 64 Pac. 921. See also Reynolds *v.* Davison, 34 Md. 662; Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073.

23. Reynolds *v.* Davison, 34 Md. 662; Harrod *v.* McDaniels, 126 Mass. 413.

24. Foster *v.* Rockwell, 104 Mass. 167. See also Brigham *v.* Peters, 1 Gray (Mass.) 139.

25. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

26. Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570.

27. Mager *v.* Hutchinson, 7 Ill. 265; Springer *v.* Orr, 82 Ill. App. 558.

28. *Alabama.*— Anderson *v.* Timberlake, 114 Ala. 377, 22 So. 431, 66 Am. St. Rep. 105.

b. Burden of Proof [29]— (I) *In General* — (A) *Fact of Agency.* Agency is a fact the burden of proving which rests upon the party affirming its existence;[30] and the rule is equally applicable to one who would relieve himself from personal liability on the ground of agency,[31] and to one who would charge another as principal with the act of an alleged agent.[32]

California.— Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64.

Connecticut.— Johnson *v.* Smith, 21 Conn. 627. See, however, *dictum* in Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429, to the effect that there is no presumption for or against liability, and that the agent is or is not liable, according to the language used.

Illinois.— Laguna Valley Co. *v.* Fitch, 121 Ill. App. 607; John Spry Lumber Co. *v.* McMillan, 77 Ill. App. 280.

Iowa.— Baker *v.* Chambles, 4 Greene 428.

Maryland.— Key *v.* Parnham, 6 Harr. & J. 418.

Massachusetts.— Steamship Bulgarian Co. *v.* Merchants Despatch Transp. Co., 135 Mass. 421.

Missouri.— Michael *v.* Jones, 84 Mo. 578.

New York.— Foster *v.* Persch, 68 N. Y. 400; Butler *v.* Evening Mail Assoc., 61 N. Y. 634; Ferris *v.* Kilmer, 48 N. Y. 300; Hall *v.* Lauderdale, 46 N. Y. 70; Meeker *v.* Claghorn, 44 N. Y. 349; Genesee Bank *v.* Patchin Bank, 19 N. Y. 312; Stanton *v.* Camp, 4 Barb. 274.

England.— Higgins *v.* Senior, 11 L. J. Exch. 199, 8 M. & W. 834. See Magee *v.* Atkinson, 6 L. J. Exch. 115, 2 M. & W. 440.

Presumption that agent of foreign principal pledged his own credit see *supra*, III, C, 1, b, (I), (E).

29. **As to authority of agent to execute commercial paper** see COMMERCIAL PAPER, 8 Cyc. 218 notes 65, 66.

30. *Alabama.*— Ebersole *v.* Southern Bldg., etc., Assoc., 147 Ala. 177, 40 So. 150; Phillips, etc., Mfg. Co. *v.* Wild, 144 Ala. 545, 39 So. 359; George *v.* Ross, 128 Ala. 666, 29 So. 651; Sellers *v.* Commercial F. Ins. Co., 105 Ala. 282, 16 So. 798; Spratt *v.* Wilson, 94 Ala. 608, 10 So. 209; Gillaspie *v.* Wesson, 7 Port. 454, 31 Am. Dec. 715.

California.— Nofsinger *v.* Goldman, 122 Cal. 609, 55 Pac. 425.

Illinois.— Schmidt *v.* Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250; Proudfoot *v.* Wightman, 78 Ill. 553; O'dell Typewriting Co. *v.* Sears, 86 Ill. App. 621; Hawley *v.* Curry, 74 Ill. App. 309; Martins *v.* Green, 3 Ill. App. 626.

Iowa.— Moffet *v.* Moffet, 90 Iowa 442, 57 N. W. 954; Pray *v.* Farmers' Incorporated Co-operative Creamery, 89 Iowa 741, 56 N. W. 443.

Kentucky.— Morgan *v.* Marshall, 7 J. J. Marsh. 316; Lucille Min. Co. *v.* Fairbank, etc., Co., 87 S. W. 1121, 27 Ky. L. Rep. 1100; O'Day *v.* Bennett, 82 S. W. 442, 26 Ky. L. Rep. 702.

Louisiana.— St. Landry State Bank *v.* Meyers, 52 La. Ann. 1769, 28 So. 136.

Massachusetts.— Bacon *v.* Hooper, 173 Mass. 554, 54 N. E. 253; Price *v.* Moore, 158 Mass. 524, 33 N. E. 927; Beals *v.* Merrian, 11 Metc. 470.

Michigan.— Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570.

Missouri.— Knoche *v.* Whiteman, 86 Mo. App. 568.

New York.— Deering *v.* Starr, 118 N. Y. 665, 23 N. E. 125; Booth *v.* Newton, 46 N. Y. App. Div. 175, 61 N. Y. Suppl. 727 (which holds that where the seller of goods seeks to show that the purchaser acted as the agent of another it is not enough to show that such an agency existed at some other time but it must be shown that the agency existed at the time of the sale); Wood-Barker Co. *v.* Van Clief, 107 N. Y. Suppl. 88.

Ohio.— Soutter *v.* Stoeckle, 6 Ohio Dec. (Reprint) 1054, 9 Am. L. Rec. 23.

Pennsylvania.— Moore *v.* Patterson, 28 Pa. St. 505; Hays *v.* Lynn, 7 Watts 524; Beal *v.* Adams Express Co., 13 Pa. Super. Ct. 143.

Rhode Island.— Principe *v.* White Star Line, (1907) 68 Atl. 476; Ward *v.* New England Southern Conference M. E. Church, 27 R. I. 262, 61 Atl. 651.

United States.— Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705; Russ *v.* Telfener, 57 Fed. 973.

England.— Byrne *v.* White, 16 Wkly. Rep. 255.

See 40 Cent. Dig. tit. "Principal and Agent," § 36.

The authority of an agent must be proved by the party asserting it; there is nothing in the mercantile usage to do away with the necessity of such proof. Dixon *v.* Haslett, 3 Brev. (S. C.) 475.

Persons dealing with an assumed agent, whether general or special, have the burden of proving the fact of agency. Baker *v.* Kellett-Chatham Mach. Co., (Tex. Civ. App. 1905) 84 S. W. 661.

31. Gillaspie *v.* Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715; Wheeler *v.* Reed, 36 Ill. 81; Soutter *v.* Stoeckle, 6 Ohio Dec. (Reprint) 1054, 10 Am. L. Rec. 23; McCall *v.* Elliott, 3 Oreg. 138.

Disclosing principal.— Since the mere fact of agency is not sufficient to relieve one from personal liability, he must not only prove the fact of agency, but that his principal was disclosed at the time of the act or transaction in question. Soutter *v.* Stoeckle, 6 Ohio Dec. (Reprint) 1054, 10 Am. L. Rec. 23; McCall *v.* Elliott, 3 Oreg. 138. See also Wheeler *v.* Miller, 2 Handy (Ohio) 149, 12 Ohio Dec. (Reprint) 375.

32. *Alabama.*— Ebersole *v.* Southern Bldg., etc., Assoc., 147 Ala. 177, 41 So. 150; Philips, etc., Mfg. Co. *v.* Wild, 144 Ala. 545, 39 So. 359; George *v.* Ross, 128 Ala. 666, 39 So. 651; Sellers *v.* Commercial F. Ins. Co., 105

(B) *Termination of Relation.* The burden of showing that a general agency, shown to have been established for a given purpose, was terminated before [33] or during [34] the transaction in question, is on the party asserting it. To meet the burden of proving the termination of the agency the principal asserting it, as against a third person previously dealing with the agent, must show that, before or during the transaction in question, notice,[35] express or implied,[36] of the revocation of the agency had been conveyed to such person.

(C) *Continuance of Authority.* In cases of special agency, limited to a particular transaction, the agency is deemed to have ceased at the completion of the transaction, and the burden rests with the one asserting it to prove continuance of authority.[37]

(D) *Extent of Authority* — (I) IN GENERAL. Not only does the burden of proof as to the fact of agency rest with one who seeks to charge another as principal with the acts of an alleged agent, but the burden also rests with him to prove the extent of the agency; [38] in other words, the burden is upon him to show that the act or acts of the agent were within the scope of his authority.[39] But where

Ala. 282, 16 So. 798; Spratt *v.* Wilson, 94 Ala. 608, 10 So. 209.

California.— Nofsinger *v.* Goldman, 122 Cal. 609, 55 Pac. 425.

Illinois.— Schmidt *v.* Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250; Proudfoot *v.* Wightman, 78 Ill. 553.

Iowa.— Moffet *v.* Moffet, 90 Iowa 442, 57 N. W. 954.

Kentucky.— Morgan *v.* Marshall, 7 J. J. Marsh. 316; O'Day *v.* Bennett, 82 S. W. 442, 26 Ky. L. Rep. 702.

Massachusetts.— Bacon *v.* Hooker, 173 Mass. 554, 54 N. E. 253.

Michigan.— Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570.

Missouri.— Knoche *v.* Whiteman, 86 Mo. App. 568.

Texas.— Wills *v.* International, etc., R. Co., 41 Tex. Civ. App. 58, 92 S. W. 273.

United States.— Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705.

England.— Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645; Byrne *v.* White, 16 Wkly. Rep. 255.

See 40 Cent. Dig. tit. "Principal and Agent," § 36.

Some proof of agency must be made, in order to charge one as principal with the act of an alleged agent. Rio Grande Extension Co. *v.* Coby, 7 Colo. 299, 3 Pac. 481.

In order to bind a person named as agent in a contract showing on its face that it was executed by an agent, the authority of the agent to act for his principal must be shown. Swaine *v.* Maryott, 28 N. J. Eq. 589.

Subagency.— Where one desires to avail himself of the acts of an alleged subagent, as against the principal, he must prove the appointment of such subagent by an agent, and the authority of the agent to make such appointment. American Underwriters' Assoc. *v.* George, 97 Pa. St. 238.

33. *Indiana.*— Pursely *v.* Morrison, 7 Ind. 356, 63 Am. Dec. 424.

Louisiana.— Smith *v.* De Leon, 39 La. Ann. 70, 1 So. 304.

Massachusetts.— Whitaker *v.* Ballard, 178 Mass. 584, 60 N. E. 379.

Missouri.— Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213.

New York.— See McMurray *v.* Gage, 19 N. Y. App. Div. 505, 46 N. Y. Suppl. 608.

Pennsylvania.— Bergner *v.* Bergner, 219 Pa. St. 113, 67 Atl. 999.

England.— Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

One asserting that the power of attorney has been revoked by mutual agreement has the burden of proving such fact. Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23.

34. Bergner *v.* Bergner, 219 Pa. St. 113, 67 Atl. 999.

35. Perrine *v.* Jermyn, 163 Pa. St. 497, 30 Atl. 202.

36. Burch *v.* Americus Grocery Co., 125 Ga. 153, 53 S. E. 1008.

37. Fullerton *v.* McLaughlin, 70 Hun (N. Y.) 568, 24 N. Y. Suppl. 280.

38. Wallis Tobacco Co. *v.* Jackson, 99 Ala. 460, 13 So. 120; McAtee *v.* Perrine, 48 Ill. App. 548; Moore *v.* Patterson, 28 Pa. St. 505; Hays *v.* Lynn, 7 Watts (Pa.) 524; Beal *v.* Adams Express Co., 13 Pa. Super. Ct. 143.

Persons dealing with an assumed agent, whether general or special, have the burden of showing the extent of his authority. Baker *v.* Kellett-Chatham Mach. Co., (Tex. Civ. App. 1905) 84 S. W. 661.

39. *Alabama.*— Ebersole *v.* Southern Bldg., etc., Assoc., 147 Ala. 177, 41 So. 150; Phillips, etc., Mfg. Co. *v.* Wild Bros., 144 Ala. 545, 39 So. 359; George *v.* Ross, 128 Ala. 666, 29 So. 651.

Illinois.—Matthews *v.* People's F. Ins. Co., 64 Ill. App. 280; Martins *v.* Green, 3 Ill. App. 626.

Iowa.— Pray *v.* Farmers' Incorporated Cooperative Creamery Co., 89 Iowa 741, 56 N. W. 443; Richmond *v.* Greeley, 38 Iowa 666.

Kentucky.— Lucille Min. Co. *v.* Fairbanks, 87 S. W. 1121, 27 Ky. L. Rep. 1100.

Louisiana.— McCarty *v.* Straus, 21 La. Ann. 592.

Maine.— Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111.

general authority is established, and the act of the agent is not shown to be of an unusual or extraordinary character, the presumption is that the agent had authority to do such act,[40] and the burden of proof is upon the principal to show that he had not such authority.[41] So a principal who asserts knowledge by third persons of limitations upon the power of an agent shown to be acting under a general authority assumes the burden of showing such knowledge.[42]

(2) Authority to Sell and Convey Land. Where a deed purports to be made by an agent, one claiming under such deed must prove that the agent had authority,[43] in writing,[44] or else show facts serving as an excuse for the absence of written authority.[45] If the power under which the agent acted was limited or contingent, the happening of the contingency must be shown.[46] If the lands intended to be conveyed by the power are not definitely designated, it must be shown by evidence extrinsic of the power that the lands actually conveyed by the agent were those so intended.[47]

(3) Authority to Make Lease. Authority on the part of an agent to make a lease must be shown by the party claiming thereunder.[48]

(4) Authority to Receive Payment — (a) In General. A party making payment of a debt to an agent assumes the burden of proving the latter's authority to receive such payment,[49] or that he paid it in good faith, relying on a previous existence of the authority and believing that it remained unrevoked.[50] And notwithstanding it be proved that at one time the agent had authority to receive

Michigan.— Hurley *v.* Watson, 68 Mich. 531, 36 N. W. 726.

New York.— Brigger *v.* Mutual Fund Life Assoc., 75 N. Y. App. Div. 149, 77 N. Y. Suppl. 362.

Wisconsin.— Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

United States.— Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705.

If the agency be special, plaintiff must show the transaction to be within the scope of the agency. Davis *v.* Robb, 7 Fed. Cas. No. 3,649, 2 Cranch C. C. 458.

An agent must be proved to have power to do the act in question. Grafton, etc., R. Co. *v.* Davisson, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

In case it is out of the usual course of the business of an agent to do a certain act, it is incumbent upon the one seeking to make his principal liable for such act to prove that it was within the scope of his authority. Williard *v.* Mellor, 19 Colo. 534, 36 Pac. 148.

A defendant who pleads a discharge or settlement with an agent must prove that such act was within the scope of the agent's powers. Chaffe *v.* Stubbs, 37 La. Ann. 656.

Where plaintiff admits an agent had certain authority, but denies that he had authority to do the act in question, the burden is on defendant to show that the agent had authority to do such act. Nicholson *v.* Pease, 61 Vt. 534, 17 Atl. 720.

Waiver by agent.— Where a contract for the sale of sewing machines provides against the validity of parol agreement with agents, the burden is on a dealer claiming a waiver of such provision to show that the agent making the same had authority to do so. White Sewing Mach. Co. *v.* Hill, 136 N. C. 128, 48 S. E. 575.

40. See *supra*, IV, E, 1, a, (IV), (A).

41. Planters', etc., Bank *v.* King, 9 Ala. 279; Brett *v.* Bassett, 63 Iowa 340, 19 N. W. 210; Nichols *v.* Oregon Short Line R. Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. Rep. 778.

42. Routh *v.* Mississippi Agricultural Bank, 12 Sm. & M. (Miss.) 161; Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318.

43. *Kentucky.*—Herndon *v.* Bascom, 8 Dana 113; Logan *v.* Steele, 4 T. B. Mon. 430; Waggener *v.* Waggener, 3 T. B. Mon. 542; Pope *v.* Melone, 2 A. K. Marsh. 239.

Michigan.—Davenport *v.* Parsons, 10 Mich. 42, 81 Am. Dec. 772.

North Carolina.— Yarborough *v.* Beard, 1 N. C. 19.

Washington.— Territory *v.* Klee, 1 Wash. 183, 23 Pac. 417.

West Virginia.—Clark *v.* Gordon, 35 W. Va. 735, 14 S. E. 255.

See 40 Cent. Dig. tit. "Principal and Agent," § 392.

The statute of conveyances does not dispense with proof of an agent's power to convey land. Telford *v.* Barney, 1 Greene (Iowa) 575.

44. Videau *v.* Griffin, 21 Cal. 389.

45. Videau *v.* Griffin, 21 Cal. 389, execution by attorney in presence of principal.

46. McConnell *v.* Bowdry, 4 T. B. Mon. (Ky.) 392; Deputron *v.* Young, 134 U. S. 241, 10 S. Ct. 539, 33 L. ed. 923 [*affirming* 37 Fed. 46].

47. Dunnegan *v.* Butler, 25 Tex. 501; Blume *v.* Rice, 12 Tex. Civ. App. 1, 32 S. W. 1056.

48. Humphreys *v.* Browne, 19 La. Ann. 158.

49. University Bank *v.* Tuck, 101 Ga. 104, 28 S. E. 168; Whitaker *v.* Ballard, 178 Mass. 584, 60 N. E. 379.

50. Whitaker *v.* Ballard, 178 Mass. 584, 60 N. E. 379.

such payments, the burden is still on the person making the payment to show that the authority remained unrevoked at the time of payment.[51] While authority in an agent to receive payment for his principal may be inferred from his possession of the securities that evidence the debt, yet it is incumbent upon the debtor who makes payment to the agent to show that such securities were in the latter's hands at the time payment was made;[52] and if the debtor pays an agent not in possession of the securities evidencing the debt it is incumbent upon him to show that the person receiving the payment has express authority so to do,[53] or has been represented by the creditor to have such authority.[54]

(b) In Anything Other Than Money. The burden is upon one seeking to establish authority in an agent for the collection of a debt to bind his principal by receiving anything other than money in payment of a debt, to show that the receipt was expressly authorized by the principal,[55] or that the latter has done acts from which such authority may be fairly implied.[56]

(5) Authority to Compromise Claim. The burden of proving the authority of a mere agent for the collection of a claim of money to make a compromise agreement to accept less than the amount thereof is upon the party asserting it.[57]

(6) Authority to Employ. Before a principal can be charged with the services of a person hired by his agent it must be shown that the employment was within the agent's authority, [8] except in some cases of employment by officers of a corporation, where the authority of such officers to employ may be presumed.[59]

(7) Authority to Purchase. When a sale is made to an agent, the burden of proof, in an action to recover the purchase-price from the principal, is upon the seller to show that the agent had authority to bind the principal;[60] and if the

51. Whitaker *v.* Ballard, 178 Mass. 584, 60 N. E. 379.

52. Garrels *v.* Morton, 26 Ill. App. 433; Cornish *v.* Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325.

53. *Georgia.*—University Bank *v.* Tuck, 101 Ga. 104, 28 S. E. 168; Paris *v.* Moe, 60 Ga. 90; Guilford *v.* Stacer, 53 Ga. 618.

Iowa.— Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311; Tappan *v.* Morseman, 18 Iowa 499.

Michigan.—See Terry *v.* Durand Land Co., 112 Mich. 665, 71 N. W. 525.

Minnesota.— Budd *v.* Broen, 75 Minn. 316, 77 N. W. 979. See also Thomas *v.* Swanke, 75 Minn. 326, 77 N. W. 981.

Missouri.— City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123; Hefferman *v.* Boteler, 87 Mo. App. 316; Cummings *v.* Hurd, 49 Mo. App. 139.

Nebraska.— Chandler *v.* Pyott, 53 Nebr. 786, 74 N. W. 263; City Missionary Soc. *v.* Reams, 51 Nebr. 225, 70 N. W. 972; Richards *v.* Waller, 49 Nebr. 639, 68 N. W. 1053; Bull *v.* Mitchell, 47 Nebr. 647, 66 N. W. 632; Omaha First Nat. Bank *v.* Chilson, 45 Nebr. 257, 63 N. W. 362; South Branch Lumber Co. *v.* Littlejohn, 31 Nebr. 606, 48 N. W. 476.

Oregon.— Rhodes *v.* Belchee, 36 Oreg. 141, 59 Pac. 117, 1119; Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366.

Virginia.— Wooding *v.* Bradley, 76 Va. 614.

And see *supra*, II, A, 6, d, (II).

In such case the debtor must show that the person receiving payment has authority, express or implied, so to do, although for some reason not in possession of the security.

Harrison *v.* Le Gore, 109 Iowa 618, 80 N. W. 670; Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366.

54. Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497; Tappan *v.* Morseman, 18 Iowa 499; City Nat. Bank *v.* Goodloe-McClelland Commission Co., 93 Mo. App. 123; Hefferman *v.* Boteler, 87 Mo. App. 316; Cummings *v.* Hurd, 49 Mo. App. 139.

55. Rush *v.* Rush, 170 Ill. 623, 48 N. E. 990 (merchandise); Equitable L. Assur. Soc. *v.* Cole, 13 Tex. Civ. App. 486, 35 S. W. 720 (merchandise); Columbia Phosphate Co. *v.* Farmers' Alliance Store, 47 S. C. 358, 25 S. E. 116 (mortgage); Nicholson *v.* Pease, 61 Vt. 534, 17 Atl. 720 (board and horse hire).

Depreciated currency.— The burden of proving authority of an agent for the collection of a debt to accept depreciated currency in payment is upon the party making the payment. Purvis *v.* Jackson, 69 N. C. 474.

56. Equitable L. Assur. Soc. *v.* Cole, 13 Tex. Civ. App. 486, 35 S. W. 720 (merchandise); Nicholson *v.* Pease, 61 Vt. 534, 17 Atl. 720 (board and horse hire).

57. Hunt *v.* Johnson, etc., Dry Goods Co., (Indian Terr. 1907) 104 S. W. 841; Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567. See also Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534.

58. Schlapbach *v.* Richmond, etc., R. Co., 35 S. C. 517, 15 S. E. 241; Stinson *v.* Sachs, 8 Wash. 391, 36 Pac. 287.

59. Cincinnati, etc., R. Co. *v.* Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503.

60. Odell Typewriter Co. *v.* Sears, 86 Ill. App. 621. See also Cassidy *v.* Aldhous, 3 Misc. (N. Y.) 627, 23 N. Y. Suppl. 318 [*affirmed* in 7 Misc. 543, 27 N. Y. Suppl. 991].

sale is made to an agent who is conducting a certain business for his principal, and authorized to purchase supplies on credit, the burden is upon the seller to show that the goods sold are of such a character as the nature of the business authorizes the agent to buy.[61]

(8) Authority to Sell on Credit. Where an agent authorized to sell goods, sells on credit, the vendee has the burden of showing, as against the principal, that the sale was in accordance with the usages of trade, and that the credit was not unreasonable.[62]

(9) Authority to Make Guaranty or Warranty. Whenever it is out of the usual course of an agent's business to make a guaranty, the party seeking to hold his principal liable thereon has the burden of showing the agent's authority to make the guaranty, or that the principal subsequently ratified his act.[63] In the absence of proof of express authority to make a warrant as to the quality of certain goods, the burden of proving a usage or custom in the sale of such goods to warrant them as to quality, must be assumed by the third person who seeks to hold the principal for a breach of the warranty.[64]

(E) *Ratification.*[65] A party relying on a ratification of the unauthorized act of an agent has the burden of proving it.[66] To meet the burden it is necessary to show that the ratification was made under such circumstances as to be binding on the principal,[67] especially to see to it that all material facts were made known to him,[68] or, as is sometimes stated, to see to it that there was an adoption of the act by the principal with full knowledge of what had been done in his name and on his behalf;[69] and it does not suffice to show that the principal omitted to make inquiries, and that the facts might have been learned by diligence on his part, if it appears that he misapprehended or was mistaken as to material facts.[70] But in sustaining the burden of proof cast on one seeking to enforce a liability

61. Wallis Tobacco Co. *v.* Jackson, 99 Ala. 460, 13 So. 120. *Compare* Thurber *v.* Anderson, 88 Ill. 167.

62. Payne *v.* Potter, 9 Iowa 549.

Sufficiency of evidence as to custom and usage see *supra*, II, A, 2, d.

63. Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148; Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Lake Erie, etc., R. Co. *v.* Faught, 31 Ill. App. 110.

64. Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4.

Sufficiency of evidence as to custom and usage see *supra*, II, A, 2, d.

Authority to vary terms of printed warranty.— Where an agent was authorized to sell machines, which were sold with a written warranty, a party seeking to hold his principal on a contract made by the agent, varying the terms of the printed warranty, has the burden of showing the latter's authority in that regard. Richmond *v.* Greeley, 38 Iowa 666.

65. **As to ratification of commercial paper executed by agent** see Commercial Paper, 8 Cyc. 219 note 67.

66. *Alabama.*— Moore *v.* Ensley, 112 Ala. 228, 20 So. 744.

Arizona.— Phœnix Valley Bank *v.* Brown, 9 Ariz. 311, 83 Pac. 362..

Arkansas.— Chicago Cottage Organ Co. *v.* Stone, (1903) 73 S. W. 392.

Colorado.— Dean *v.* Hipp, 16 Colo. App. 537, 66 Pac. 804; Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634].

Illinois.— Matthews *v.* People's F. Ins. Co., 64 Ill. App. 280.

Louisiana.— McCarty *v.* Straus, 21 La. Ann. 592.

Massachusetts.—Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073; Price *v.* Moore, 158 Mass. 524, 33 N. E. 927; Combs *v.* Scott, 12 Allen 493.

Minnesota.— Allis *v.* Goldsmith, 22 Minn. 123.

Missouri.— Minter *v.* Cupp, 98 Mo. 26, 10 S. W. 862.

Oregon.— Sears *v.* Daly, 43 Oreg. 346, 73 Pac. 5.

Tennessee.— Hatton *v.* Stewart, 2 Lea 233.

Texas.— Skirvin *v.* O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696.

The ratification must be proved in some way by the party relying on it. Seymour *v.* Wyckoff, 10 N. Y. 213.

67. Phœnix Valley Bank *v.* Brown, 9 Ariz. 311, 83 Pac. 362; Combs *v.* Scott, 12 Allen (Mass.) 493.

68. Moore *v.* Ensley, 112 Ala. 228, 20 So. 744; Phœnix Valley Bank *v.* Brown, 9 Ariz. 311, 83 Pac. 362; Combs *v.* Scott, 12 Allen (Miss.) 493.

69. Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670 [*reversed* on other grounds in 25 Colo. 103, 54 Pac. 634]; Skirvin *v.* O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696.

70. Phœnix Valley Bank *v.* Brown, 9 Ariz. 311, 83 Pac. 362; Combs *v.* Scott, 12 Allen (Mass.) 493; Henderhen *v.* Cook, 66 Barb. (N. Y.) 21.

by ratification, arising from silence or a failure to repudiate an unauthorized act after knowledge thereof, it is not necessary for him to show that by such silence he has been misled to his prejudice.[71]

(F) *Estoppel.* The burden of proving facts working an estoppel to deny the agency is on the person asserting it as against the principal.[72] To meet the burden of proof cast on a party asserting an estoppel, he must show that the alleged principal's conduct, whether it was so intended or not, did mislead him into believing that the apparent authority was real, and so believing, to rely on it.[73]

(G) *To Charge Principal With Knowledge Obtained by Agent Before Agency Existed.* The burden is on a party seeking to charge a principal with knowledge of his agent acquired in a different transaction but before the agency existed, to show by clear and satisfactory evidence that the knowledge was present in the agent's mind at the time of the transaction under the agency.[74]

(H) *To Charge Agent Personally.* When one who has professedly acted as an agent is sued, touching the contract so made, the burden lies upon plaintiff to show want of authority in the agent, rather than upon the latter to show the existence of the authority.[75] But if one sued on an alleged warranty seeks to avoid personal liability, on the ground that he was acting as agent in making the warranty, the burden is upon him to show that he had authority to bind his principal in that regard.[76]

(I) *To Enable Undisclosed Principal to Sue on Contract Made by Agent.* In an action by an undisclosed principal on a contract made by an agent in his own name, the burden of proof lies on the principal to show the agency, and that in making the contract the agent was acting for him.[77]

(J) *To Exonerate Principal From Liability.* A principal who seeks exemption from liability for goods sold to his agent, on the ground that credit was exclusively given to the latter, has the burden of proving it.[78]

(K) *To Exonerate Agent From Liability.* Where one has entered into a contract solely in his individual capacity,[79] or has appended words to his signature

71. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634.

72. *California.*— Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758.

Michigan.— Clark *v.* Dillman, 108 Mich. 624, 66 N. W. 570.

Missouri.— Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013.

Nebraska.— See Hastings First Nat. Bank *v.* Farmers', etc., Bank, 56 Nebr. 149, 76 N. W. 430.

England.— Pole *v.* Leask, 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.

Canada.—Almon *v.* Law, 26 Nova Scotia 340.

73. Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013.

74. Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 7 Am. St. Rep. 769, 2 L. R. A. 734; Badger *v.* Cook, 117 N. Y. App. Div. 328, 101 N. Y. Suppl. 1067. See also McCutcheon *v.* Dittman, 164 N. Y. 355, 58 N. E. 97; Slatterly *v.* Schwannecke, 118 N. Y. 543, 23 N. E. 922.

A party seeking to avail himself of the benefit of such knowledge must show all the facts and circumstances, whatever they may be, that are necessary to make it binding upon the principal. Denton *v.* Ontario County Nat. Bank, 150 N. Y. 126, 44 N. E. 781.

75. Trastour *v.* Fallon, 12 La. Ann. 25; Plumb *v.* Milk, 19 Barb. (N. Y.) 74.

In an action against an agent for breach of an implied warranty of authority, after it appears that defendant assumed to act as agent for a third person, the burden of proof is not thereby cast on defendant to show that he had actual authority to so act, but the burden is upon plaintiff to show that defendant did not have such authority. Noe *v.* Gregory, 7 Daly (N. Y.) 283.

76. Wheeler *v.* Reed, 36 Ill. 81.

77. Powell *v.* Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915.

78. John Spry Lumber Co. *v.* McMillan, 77 Ill. App. 280; Butler *v.* Evening Mail Assoc., 61 N. Y. 634; Meeker *v.* Claghorn, 44 N. Y. 349.

79. Vawter *v.* Baker, 23 Ind. 63; Cullers *v.* More, 1 Tex. App. Civ. Cas. § 197, holding that where a defendant seeks to defend on the ground that he made the contract sued on as agent, and is not liable thereon, the burden is on him to show, not only that he was acting as such agent, but that at the time of the making of the contract he informed the other party that he was so acting, and disclosed to him the name of the principal for whom he was acting.

Where in making an oral contract language was used by one of the parties which in its ordinary sense would amount to an undertaking to be personally bound, the burden of proof rests on him to show that he meant to be bound as agent for another. Brant *v.* Gallup, 5 Ill. App. 262.

which may be either descriptive of the person or indicative of the character in which he contracts, so as to be *prima facie* liable on the contract,[80] the burden is on him, if sued on the contract, to establish the defense that the contract was made by him as agent.

(L) *To Show Fairness of Transaction Between Principal and Agent.* In all transactions between principal and agent the burden of proof is upon the latter to show the most entire good faith on his part, a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.[81]

(II) *In Particular Actions* — (A) *Actions For Accounting* — (1) In General. Where a principal sues his agent for an accounting, he has the burden of proof to show the amount received and not accounted for.[82] But it is not incumbent upon him to go further and show that the agent has not accounted for it or paid it over.[83] On the contrary the burden of proof is upon the agent to show either that he has accounted,[84] or some sufficient reason why he has failed to do so.[85]

(2) Disbursements on Account of Principal. In a suit of a principal against an agent for a settlement of accounts, and the recovery of the balance found to be due, in which defendant claims reimbursement for certain expenditures, the *onus probandi* is on the latter, and he must show that such disbursements were made for the account of the principal, and that the same were authorized or accepted by the principal.[86]

(B) *Actions For Negligence or Misconduct of Agent.* Whenever a principal seeks to charge his agent with neglect,[87] or misconduct,[88] in the performance of

80. Pratt *v.* Beaupre, 13 Minn. 187.

81. *California.*— Paige *v.* Akins, 112 Cal. 401, 44 Pac. 666; Rubidoex *v.* Parks, 48 Cal. 215.

Colorado.— Webb *v.* Marks, 10 Colo. App. 429, 51 Pac. 518.

Indiana.— Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203.

Iowa.— Drefahl *v.* Security Sav. Bank, 132 Iowa 563, 107 N. W. 179; Green *v.* Peeso, 92 Iowa 261, 60 N. W. 531.

Kentucky.— Nelms *v.* Dougherty, 45 S. W. 870, 20 Ky. L. Rep. 657.

Maryland.— Kerby *v.* Kerby, 57 Md. 345.

Missouri.— Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969.

Nebraska.— Duesman *v.* Hale, 55 Nebr. 577, 76 N. W. 205.

New Jersey.— Porter *v.* Woodruff, 36 N. J. Eq. 174; Condit *v.* Blackwell, 22 N. J. Eq. 481.

South Carolina.— Poag *v.* Poag, 1 Hill Eq. 285; Butler *v.* Haskell, 4 Desauss. Eq. 651.

Vermont.— Taylor *v.* Vail, (1907) 66 Atl. 820.

Virginia.— Jackson *v.* Pleasanton, 95 Va. 654, 29 S. E. 680.

England.— Dunne *v.* English, L. R. 18 Eq. 524, 21 L. T. Rep. N. S. 75.

Family relationships.— The mere existence of fiduciary relations as in the case of parent and child and some others of a similar nature does not shift the burden of proof to the superior party to show the validity of the transaction. Holtzman *v.* Linton, 27 App. Cas. (D. C.) 241.

82. Green *v.* Macy, 36 Ind. App. 560, 76 N. E. 264; Anderson *v.* Grand Forks First Nat. Bank, 4 N. D. 182, 59 N. W. 1029.

Deposit of money in agent's name.— The burden of proving that moneys collected by an agent were deposited in his individual name and belong to the principal is on the party asserting the trust. Trought's Estate, 12 Pa. Dist. 137, 28 Pa. Co. Ct. 302.

If the principal alleges that the agent sold goods sent to him for sale on commission, but did not account to him, he must prove that a sale actually took place; and it will not be presumed, even at a distance of twelve months after the delivery of the goods. Elbourn *v.* Upjohn, 1 C. & P. 572, 12 E. C. L. 326.

83. Merchants' Bank *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394.

84. Dodge *v.* Hatchett, 118 Ga. 883, 45 S. E. 667; Laporte *v.* Laporte, 109 La. 958, 34 So. 38; Young *v.* Powell, 87 Mo. 128; Anderson *v.* Grand Forks First Nat. Bank, 4 N. D. 182, 59 N. W. 1029. See also Marvin *v.* Brooks, 94 N. Y. 71.

85. Dodge *v.* Hatchett, 118 Ga. 883, 45 S. E. 667; Delpeuch *v.* Dufart, 7 La. 533, failure to collect anything without his fault.

Money retained as commissions.— Where, in an action by a principal against an agent for money he has collected and improperly retained, the answer admits the facts, but claims the money as commissions, the burden of proof is on defendant to establish his right to the commissions. Thomas *v.* Gwyn, 131 N. C. 460, 42 S. E. 904.

86. Western Assur. Co. *v.* Uhlhorn, 41 La. Ann. 385, 6 So. 485.

87. Heinemann *v.* Heard, 62 N. Y. 448 [*reversing* 2 Hun 324, 4 Thomps. & C. 666]; Rand *v.* Johns, (Tex. App. 1891) 15 S. W. 200. See also Burpe *v.* Van Eman, 11 Minn. 327.

88. Lahr *v.* Kraemer, 91 Minn. 26, 97 N. W.

duties pertaining to the agency, the burden of proving such neglect or misconduct is on the principal; but when a *prima facie* case of negligence has been established it is on the agent to show facts relieving him from liability.[89]

(c) *Actions For Compensation.* In an action by an agent for commissions, the burden is upon him to prove an agreement for the commissions sought to be recovered,[90] and that such commissions are due.[91] The burden of proving matters of defense to such an action is upon the principal.[92]

2. Admissibility — a. In General — (i) *To Prove Agency or Authority* — (a) *In General.* Any evidence which is otherwise competent that has a tendency to prove agency is admissible, even though it be not full and satisfactory, as it is the province of the jury to pass upon it.[93] But evidence is not admissible, either to prove or disprove an agency, which is entirely consistent with the contention thereby sought to be controverted. Such evidence is immaterial, and should be rejected.[94]

418; R. C. Stone Milling Co. *v.* McWilliams, 121 Mo. App. 319, 98 S. W. 828; Panama R. Co. *v.* Johnson, 58 Hun (N. Y.) 557, 12 N. Y. Suppl. 499.

89. Collins *v.* Andrews, 6 Mart. N. S. (La.) 190; Darling *v.* Younker, 37 Ohio St. 487, 41 Am. Rep. 532; Lamb *v.* Fairbanks, 48 Vt. 519, permission from principal to do as he did.

Defense of loss by theft.— If an agent intermingles money belonging to his principal either with his own or with that of other persons, and defends a suit for the amount on the ground of its loss by theft without fault on his part, the burden is upon him to show that the identical money stolen belonged to the principal. Bartlett *v.* Hamilton, 46 Me. 435.

Fact that principal sustained no loss.— In an action by the holder of a bill or note against the bank, to which he gave it to present for acceptance and to collect, for neglect to give notice to other parties, the burden of proof is on the bank to show that the payee sustained no damage by the neglect. Miranda *v.* New Orleans City Bank, 6 La. 740, 26 Am. Dec. 493; Crawford *v.* Louisiana State Bank, 1 Mart. N. S. (La.) 214.

When a collection agent fails to give notice to indorsers of non-payment the burden is on the agent to show the ability of the maker to pay or any other facts showing that plaintiff has sustained no damage. Coghlan *v.* Dinsmore, 9 Bosw. (N. Y.) 453 [*affirmed* in 1 Abb. Dec. 375, 4 Transcr. App. 386, 35 How. Pr. 416].

90. Warwick *v.* North American Inv. Co., 112 Mo. App. 633, 87 S. W. 78.

91. Wolfson *v.* Aller Bros. Co., 120 Iowa 455, 94 N. W. 910; Chaurant *v.* Maillard, 56 N. Y. App. Div. 11, 67 N. Y. Suppl. 345; Barkley *v.* Olcott, 52 Hun (N. Y.) 452, 5 N. Y. Suppl. 525.

Bad faith in rejecting orders.— Where a contract provided that an agent should be entitled to certain commissions on orders which were accepted and shipped, the burden is on the agent to show bad faith on the principal's part in rejecting orders. Wolfson *v.* Allen Bros. Co., 120 Iowa 455, 94 N. W. 910.

Bad faith in terminating employment.— In an action against a county for breach of a contract which employed plaintiff to survey and sell lands but did not specify any definite term for the continuance of the employment, the burden was upon plaintiff to show that the county acted unfairly in terminating his employment without giving him a reasonable opportunity to earn compensation for what he had done under the employment. Hollingsworth *v.* Young County, 40 Tex. Civ. App. 590, 91 S. W. 1094.

92. Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381; Singer Mfg. Co. *v.* Wood, 1 Tex. App. Civ. Cas. § 1177.

Conversion of agent.— The burden of proving misconduct by an agent and a failure to account for the funds of his principal is to the extent of showing the amount of money or value of property received by the agent on the principal. Lahr *v.* Kraemer, 91 Minn. 26, 97 N. W. 418. But a general showing of the amount of property delivered to the agent and a failure to return or account for it on demand is *prima facie* sufficient, and shifts the burden upon the agent to make a specific accounting. Lahr *v.* Kraemer, 91 Minn. 26, 97 N. W. 418.

93. Robinson *v.* Greene, 148 Ala. 434, 43 So. 797; Sellers *v.* Commercial F. Ins. Co., 105 Ala. 282, 16 So. 798; South, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Hyman *v.* Waas, 79 Conn. 251, 64 Atl. 354; Stastney *v.* Marschall, 37 Ill. App. 137; Dickinson *v.* Salmon, 36 Misc. (N. Y.) 169, 73 N. Y. Suppl. 196 [*affirming* 35 Misc. 838, 72 N. Y. Suppl. 1099]; Tebbetts *v.* Levy, 11 N. Y. Suppl. 684.

Any one having personal knowledge of the relation of principal and agent may testify thereto. Ruthven *v.* Clarke, 109 Iowa 25, 79 N. W. 454; Blowers *v.* Southern R. Co., 74 S. C. 221, 54 S. E. 368.

Another agent having knowledge of the fact may testify as to an agency. Rice, etc., Malting Co. *v.* International Bank, 185 Ill. 422, 56 N. E. 1062 [*affirming* 86 Ill. App. 136].

94. Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304; Rives *v.* Jordan, 93 Ga. 323, 20 S. E. 318 (where evidence of general agency in another person was held inadmissible to disprove that plaintiff was at the

(B) *Testimony of Agent*[95] — (1) As to Fact of Agency. The testimony of the agent is competent to establish the fact of his agency,[96] at least where the authority was verbally conferred;[97] and to refuse to allow him to testify and be cross-examined is reversible error.[98] It is held likewise that the testimony of the alleged agent is competent to negative the existence of the agency.[99]

same time a special agent of the same principal since there is no inconsistency in the coexistence of the two agencies); Huzzard *v.* Trego, 35 Pa. St. 9.

95. Competency of agent as witness to prove agency see Witnesses.

96. *Alabama.*— Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117; Parker *v.* Bond, 121 Ala. 529, 25 So. 898.

Arkansas.— Beekman Lumber Co. *v.* Kittrell, 80 Ark. 228, 96 S. W. 988.

California.—McRae *v.* Argonaut Land, etc., Co., (1898) 54 Pac. 743.

Georgia.— See Abel *v.* Jarratt, 100 Ga. 732, 28 S. E. 453.

Illinois.— Thayer *v.* Meeker, 86 Ill. 470; Phillips *v.* Poulter, 111 Ill. App. 330; St. Louis Southwestern R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619.

Iowa.— Fritz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193; O'Neill *v.* Wilcox, 115 Iowa 15, 87 N. W. 742; Van Sickle *v.* Keith, 88 Iowa 9, 55 N. W. 42.

Kansas.— Jahren *v.* Palmer, 71 Kan. 841, 79 Pac. 1081; Aultman Thrashing, etc., Co. *v.* Knoll, 71 Kan. 109, 79 Pac. 1074; French *v.* Wade, 35 Kan. 391, 11 Pac. 138.

Massachusetts.— Gould *v.* Norfolk Lead Co., 9 Cush. 338, 57 Am. Dec. 50; Rice *v.* Gove, 22 Pick. 158, 33 Am. Dec. 724.

Michigan.— See Cleveland Co-operative Stove Co. *v.* Mallery, 111 Mich. 43, 69 N. W. 75.

Minnesota.— Barnesville First Nat. Bank *v.* St. Anthony, etc., Elevator Co., 103 Minn. 82, 114 N. W. 265.

Missouri.— State *v.* Henderson, 86 Mo. App. 482; Christian *v.* Smith, 85 Mo. App. 117; Cape Girardeau *v.* Fisher, 61 Mo. App. 509.

Montana.—Nyhart *v.* Pennington, 20 Mont. 158, 50 Pac. 413.

Nebraska.— Nostrum *v.* Halliday, 39 Nebr. 828, 58 N. W. 429.

New Hampshire.— Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384.

New Jersey.— Colloty *v.* Schuman, (Sup. 1907) 66 Atl. 933.

New York.— Steuerwald *v.* Jackson, 123 N. Y. App. Div. 569, 108 N. Y. Suppl. 41; Norden *v.* Duke, 106 N. Y. App. Div. 514, 94 N. Y. Suppl. 878; Brown *v.* Cone, 80 N. Y. App. Div. 413, 81 N. Y. Suppl. 89. See Rider-Ericsson Engine Co. *v.* Fowler, 37 Misc. 810, 76 N. Y. Suppl. 903.

North Carolina.—New Home Sewing Mach. Co. *v.* Seago, 128 N. C. 158, 38 S. E. 805.

Ohio.— Cox *v.* Hill, 3 Ohio 411.

Pennsylvania.— Lawall *v.* Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

South Carolina.— Chiles *v.* Southern R. Co., 69 S. C. 327, 48 S. E. 252; Covington *v.* Bussey, 4 McCord 412; Black *v.* Goodman, 1 Bailey 201.

Texas.—Pittsburg Plate Glass Co. *v.* Roquemore, (Civ. App. 1905) 88 S. W. 449; American Tel., etc., Co. *v.* Kersh, 27 Tex. Civ. App. 127, 66 S. W. 74; Jones *v.* Hess, (Civ. App. 1898) 48 S. W. 46.

Virginia.— See Poore *v.* Magruder, 24 Gratt. 197.

United States.— Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274.

England.— Snee *v.* Prescott, 1 Atk. 245, 26 Eng. Reprint 157; Ilderton *v.* Atkinson, 7 T. R. 480.

See 40 Cent. Dig. tit. "Principal and Agent," § 39.

By the rules of the common law the testimony of an assumed agent is competent to prove the fact of his being such agent. St. John *v.* McConnell, 19 Mo. 38.

97. *Georgia.*— Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787.

Iowa.— O'Leary *v.* German American Ins. Co., 100 Iowa 390, 69 N. W. 686; Moffitt *v.* Cressler, 8 Iowa 122.

Kansas.— Ream *v.* McElhone, 50 Kan. 409, 31 Pac. 1075; Howe Mach. Co. *v.* Clark, 15 Kan. 492.

Massachusetts.— Gould *v.* Norfolk Lead Co., 9 Cush. 338, 57 Am. Dec. 50.

New York.— Joseph *v.* Struller, 25 Misc. 173, 54 N. Y. Suppl. 162.

Pennsylvania.— Miles *v.* Cook, 1 Grant 58; McGunnagle *v.* Thornton, 10 Serg. & R. 251.

South Carolina.— Kean *v.* Landrum, 72 S. C. 556, 52 S. E. 421; Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240.

Utah.— McCornick *v.* Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 Pac. 820.

West Virginia.— Piercy *v.* Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

United States.— Livingston *v.* Swanwick, 15 Fed. Cas. No. 8,419, 2 Dall. (Pa.) 300, 1 L. ed. 389.

See 40 Cent. Dig. tit. "Principal and Agent," § 39.

Every person who makes a contract for another is an agent within the meaning of the rule. McGunnagle *v.* Thornton, 10 Serg. & R. (Pa.) 251.

98. Stone *v.* Cronin, 72 N. Y. App. Div. 565, 76 N. Y. Suppl. 605.

99. McFarland *v.* Lowry, 40 Iowa 467; St. John *v.* McConnell, 19 Mo. 38; Rope *v.* Hess, 118 N. Y. 668, 23 N. E. 128; Cox *v.* Hill, 3 Ohio 411.

To prove for whom the assumed agent acted.— Where it is sought to bind the principal by the acts of a person alleged to be his agent, the principal has the right to prove by the alleged agent for whom he acted, as tending to show that the principal was not responsible for his acts. Dowell *v.* Williams, 33 Kan. 310, 6 Pac. 600.

(2) As to Extent of Authority. Where the powers and duties of the agent are not reduced to writing, his testimony is competent to prove the extent of his authority,[1] and also the fact that he had no authority to do the act in question,[2] except where the evidence shows that the agent had been held out as possessing such authority.[3]

(3) Testimony Must Be as to Facts and Not Conclusions. In receiving the testimony of the alleged agent to prove or disprove the fact of agency, the general rule that a witness must testify to facts and not to conclusions, is applicable, and hence it is not competent for the agent to give his opinion or state his conclusion as to the fact of agency;[4] but he may state the facts and circumstances concerning the various transactions between him and the alleged principal,[5] leaving the court and the jury to determine, under the facts disclosed, whether or not he was such agent.[6]

(c) *Declarations of Agent* — (1) As Against Principal — (a) General Rule. The declarations of an alleged agent are not admissible against the alleged principal to prove the fact of his agency.[7] Neither are the declarations of an agent

1. Liddell *v.* Sahline, 55 Ark. 627, 17 S. W. 705; O'Leary *v.* German American Ins. Co., 100 Iowa 390, 69 N. W. 686; Cowles *v.* Burns, 28 Kan. 32; Flomerfelt *v.* Dillon, 88 N. Y. Suppl. 132; Reeves *v.* Bruening, 13 N. D. 157, 100 N. W. 241.

2. Gilliland *v.* Dunn, 136 Ala. 327, 34 So. 25; Robinson *v.* Ætna F. Ins. Co., 135 Ala. 650, 34 So. 18.

In an action on the case against a principal for the deceit of an agent, the question of intent being material, the agent may testify that in making the alleged false statement he disobeyed instructions. Wachsmuth *v.* Martini, 45 Ill. App. 244 [*affirmed* in 154 Ill. 515, 39 N. E. 129].

3. Knap *v.* Sacket, 1 Root (Conn.) 501; Owings *v.* Nicholson, 4 Harr. & J. (Md.) 66.

4. See Evidence, 17 Cyc. 219 note 90, 220 note 96.

5. McCornick *v.* Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 Pac. 820.

6. McCornick *v.* Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 Pac. 820.

7. *Alabama.*— Gambill *v.* Fuqua, 148 Ala. 448, 42 So. 735; Smiley *v.* Hooper, 147 Ala. 646, 41 So. 660; Gould *v.* Cates Chair Co., 147 Ala. 629, 41 So. 675; Eagle Iron Co. *v.* Baugh, 147 Ala. 613, 41 So. 663; Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; Learned-Letcher Lumber Co. *v.* Ohatchie Lumber Co., 111 Ala. 453, 17 So. 934; Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336; Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304; Tanner, etc., Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 384; Wailes *v.* Neal, 65 Ala. 59; Galbreath *v.* Cole, 61 Ala. 139; Holman *v.* Norfolk Bank, 12 Ala. 369; Strawbridge *v.* Spann, 8 Ala. 820.

Arkansas.— Turner *v.* Huff, 46 Ark. 222, 55 Am. Rep. 580; Howcott *v.* Kilbourn, 44 Ark. 213; Holland *v.* Rogers, 33 Ark. 251.

California.— Petterson *v.* Stockton, etc., R. Co., 134 Cal. 244, 66 Pac. 304; Ferris *v.* Baker, 127 Cal. 520, 59 Pac. 937; Smith *v.* 540; Liverpool, etc., Ins. Co., 107 Cal. 432, 40 Pac. 540; Pease *v.* Fink, 3 Cal. App. 371, 85 Pac. 657.

Colorado.— Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440; Union Coal Co. *v.* Edman, 16 Colo. 438, 27 Pac. 1060; Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; Burson *v.* Bogart, 18 Colo. App. 449, 72 Pac. 605; Murphy *v.* Garnan, 12 Colo. App. 472, 55 Pac. 951.

Connecticut.— Builders' Supply Co. *v.* Cox, 68 Conn. 380, 36 Atl. 797; Fitch *v.* Chapman, 10 Conn. 8; Plant *v.* McEwan, 4 Conn. 544.

Florida.— Martin *v.* Johnson, 54 Fla. 487, 44 So. 949; Griffin *v.* Societe Anonyme la Floridienne, 53 Fla. 801, 44 So. 342; Orange Belt R. Co. *v.* Cox, 44 Fla. 645, 33 So. 403.

Georgia.— Indiana Fruit Co. *v.* Sandlin, 125 Ga. 222, 54 S. E. 65; Hood *v.* Hendrickson, 122 Ga. 795, 50 S. E. 994; Almand *v.* Equitable Mortg. Co., 113 Ga. 983, 39 S. E. 421; Amicalola Marble, etc., Co. *v.* Coker, 111 Ga. 872, 36 S. E. 950; Massillon Engine, etc., Co. *v.* Akerman, 110 Ga. 570, 35 S. E. 635; Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690; Grand Rapids School-Furniture Co. *v.* Morel, 110 Ga. 321, 35 S. E. 312; Harris Loan Co. *v.* Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 S. E. 1003; Alger *v.* Turner, 105 Ga. 178, 31 S. E. 423; Abel *v.* Jarratt, 100 Ga. 732, 28 S. E. 453; Bernstein *v.* Koken Barber's Supply Co., 1 Ga. App. 445, 57 S. E. 1017.

Illinois.— Mallanphy Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Proctor *v.* Tows, 115 Ill. 138, 3 N. E. 569; Whiteside *v.* Margarel, 51 Ill. 507; Maxey *v.* Heckertow, 44 Ill. 437; Ranson *v.* Curtiss, 19 Ill. 456; Currie *v.* Syndicate des Cultivators des Oignons a'Fleur, 104 Ill. App. 165; Marsh *v.* French, 82 Ill. App. 76; Cleveland, etc., R. Co. *v.* Jenkins, 75 Ill. App. 17; Mann *v.* Sodakat, 66 Ill. App. 393; Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184; Miller *v.* Carithers, 52 Ill. 86; Boyd *v.* Jennings, 46 Ill. App. 290; Osgood *v.* Paccy, 23 Ill. App. 116.

Indiana.— Johnston Harvester Co. *v.* Bartley, 81 Ind. 406; Broadstreet *v.* Hall, 32 Ind. App. 122, 69 N. E. 415.

Iowa.— Grant *v.* Humerick, 123 Iowa 571,

admissible against the principal to show the extent of his authority as such

94 N. W. 510; Kelley *v.* Andrews, 102 Iowa 119, 71 N. W. 251; Whitan *v.* Dubuque, etc., R. Co., 96 Iowa 737, 65 N. W. 403; Butler *v.* Chicago, etc., R. Co., 87 Iowa 206, 54 N. W. 208; Sax *v.* Davis, 71 Iowa 406, 32 N. W. 403; Wood Mowing Mach. Co. *v.* Crow, 70 Iowa 340, 30 N. W. 609; Bigler *v.* Fay, 68 Iowa 687, 28 N. W. 17; Clanton *v.* Des-Moines, etc., R. Co., 67 Iowa 350, 25 N. W. 277; Philip *v.* Covenant Mut. Ben. Assoc., 62 Iowa 633, 17 N. W. 903; Renwick *v.* Bancroft, 56 Iowa 527, 9 N. W. 367; Graul *v.* Stuetzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250; Moffitt *v.* Cressler, 8 Iowa 122.

Kansas.—Goodyear *v.* Williams, 73 Kan. 192, 85 Pac. 300; Hutchinson Wholesale Grocery Co. *v.* McDonald, 71 Kan. 861, 80 Pac. 950; Wichita Fourth Nat. Bank *v.* Frost, 70 Kan. 480, 78 Pac. 825; Richards *v.* Newstifter, 70 Kan. 350, 78 Pac. 824; Missouri Pac. R. Co. *v.* Johnson, 55 Kan. 344, 40 Pac. 641; Leu *v.* Mayer 52 Kan. 419, 34 Pac. 969; Donaldson *v.* Everhardt, 50 Kan. 718, 32 Pac. 405; Ream *v.* McElhone, 50 Kan. 409, 31 Pac. 1075; St. Louis, etc., R. Co. *v.* Kinnan, 49 Kan. 627, 31 Pac. 126; French *v.* Wade, 35 Kan. 391, 11 Pac. 138; Missouri Pac. R. Co. *v.* Stults, 31 Kan. 752, 3 Pac. 522; Howe Mach. Co. *v.* Clark, 15 Kan. 492; Streeter *v.* Poor, 4 Kan. 412; Swofford Bros. Dry Goods Co. *v.* Berkowitz, 7 Kan. App. 24, 51 Pac. 796; St. Louis, etc., R. Co. *v.* Brown, 3 Kan. App. 260, 45 Pac. 118.

Kentucky.— Gragg *v.* Home Ins. Co., 107 S. W. 321, 32 Ky. L. Rep. 988; Edmiston *v.* Hurley, 99 S. W. 259, 30 Ky. L. Rep. 557; Payton *v.* Old Woolen Mills Co., 91 S. W. 719, 28 Ky. L. Rep. 1303; Dieckman *v.* Weirich, 73 S. W. 1119, 24 Ky. L. Rep. 2340.

Louisiana.— Lafourche Transp. Co. *v.* Pugh, 52 La. Ann. 1517, 27 So. 958; State *v.* Harris, 51 La. Ann. 1105, 26 So. 64.

Maine.—Eaton *v.* Granite State Provident Assoc., 89 Me. 58, 35 Atl. 1015.

Michigan.— Superior Drill Co. *v.* Carpenter, 150 Mich. 262, 114 N. W. 67; McPherson *v.* Pinch, 119 Mich. 36, 77 N. W. 321; Fontaine Crossing, etc., Co. *v.* Rauch, 117 Mich. 401, 75 S. W. 1063; Ironwood Store Co. *v.* Harrison, 75 Mich. 197, 42 N. W. 808; Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276.

Minnesota.— Halverson *v.* Chicago, etc., R. Co., 57 Minn. 142, 58 N. W. 871; Larson *v.* Lombard Inv. Co., 51 Minn. 141, 53 N. W. 179.

Mississippi.— Memphis, etc., R. Co. *v.* Cocke, 64 Miss. 713, 2 So. 495; Kinnare *v.* Gregory, 55 Miss. 612.

Missouri.— Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Peck *v.* Ritchey, 66 Mo. 114; Craighead *v.* Wells, 21 Mo. 404; Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Waters-Pierce Oil Co. *v.* Jackson Junior Zinc Co., 98 Mo. App. 324, 73 S. W. 272; Murphy *v.* Mechanics', etc., Co., 83 Mo. App. 481; Lowry *v.* Farmington Prospecting, etc., Co., 65 Mo. App. 266; Lindsay *v.* Singer Mfg. Co., 4 Mo. App. 571.

Nebraska.— Fitzgerald *v.* Kimball Bros. Co., 76 Nebr. 236, 107 N. W. 227; Spies *v.* Stein, 70 Nebr. 641, 97 N. W. 752; C. F. Blanke Tea, etc., Co. *v.* Rees Printing Co., 70 Nebr. 510, 97 N. W. 627; Norberg *v.* Plummer, 58 Nebr. 410, 78 N. W. 708; Anheuser-Busch Brewing Assoc. *v.* Murray, 47 Nebr. 627, 66 N. W. 635; Richardson *v.* Nuckolls County School Dist. No. 11, 45 Nebr. 777, 64 N. W. 218; Burke *v.* Frye, 44 Nebr. 223, 62 N. W. 476; Nostrum *v.* Halliday, 39 Nebr. 828, 58 N. W. 429; Stoll *v.* Sheldon, 13 Nebr. 207, 13 N. W. 201.

New Jersey.— Ryle *v.* Manchester Bldg., etc., Assoc., (1907) 67 Atl. 87; Standard Oil Co. *v.* Linol Co., (Sup. 1907) 68 Atl. 174; Brounfield *v.* Denton, 72 N. J. L. 235, 61 Atl. 378; Pederson *v.* Kiensel, 71 N. J. L. 525, 58 Atl. 1088; Smith *v.* Delaware, etc., Tel. etc., Co., 63 N. J. Eq. 93, 51 Atl. 464 [*affirmed* in 64 N. J. Eq. 770, 53 Atl. 818]; Gifford *v.* Landrine, 37 N. J. Eq. 127.

New York.— Snook *v.* Lord, 56 N. Y. 605; Marvin *v.* Wilber, 52 N. Y. 270; Weltman *v.* Kotlar, 124 N. Y. App. Div. 494, 108 N. Y. Suppl. 952; Shesler *v.* Patton, 114 N. Y. App. Div. 846, 100 N. Y. Suppl. 286; Leary *v.* Albany Brewing Co., 77 N. Y. App. Div. 6, 79 N. Y. Suppl. 130; Le Valley *v.* Overacker, 64 N. Y. App. Div. 612, 72 N. Y. Suppl. 12; Booth *v.* Newton, 46 N. Y. App. Div. 175, 61 N. Y. Suppl. 727; Patten *v.* Climax Quick Tanning Co., 40 N. Y. App. Div. 607, 57 N. Y. Suppl. 758; Lyon *v.* Brown, 31 N. Y. App. Div. 67, 52 N. Y. Suppl. 531; Bowen *v.* Powell, 1 Lans. 1; Howard *v.* Norton, 65 Barb. 161; Sanford *v.* Fountain, 49 Misc. 301, 99 N. Y. Suppl. 234; American Box Mach. Co. *v.* Bolnick, 36 Misc. 765, 74 N. Y. Suppl. 846; Moore *v.* Rankin, 33 Misc. 749, 67 N. Y. Suppl. 179; Reid *v.* Horn, 25 Misc. 523, 54 N. Y. Suppl. 1042; Roberg *v.* Monheimer, 21 Misc. 491, 47 N. Y. Suppl. 655; Buskirk *v.* Talcott, 96 N. Y. Suppl. 714; Excelsior Consumers' Cigar Co. *v.* Stracherjan, 87 N. Y. Suppl. 489; Ellis *v.* Messervie, 11 Paige 467 [*affirmed* in 5 Den. 640].

North Carolina.— Daniel *v.* Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455; Brittain *v.* Westhall, 135 N. C. 492, 47 S. E. 616; Smith *v.* Browne, 132 N. C. 365, 43 S. E. 915; Parker *v.* Brown, 131 N. C. 264, 42 S. E. 605; Summerrow *v.* Baruch, 128 N. C. 202, 38 S. E. 861; Gates *v.* Max, 125 N. C. 139, 34 S. E. 266; Taylor *v.* Hunt, 118 N. C. 168, 24 S. E. 359.

North Dakota.— Loverin-Browne Co. *v.* Buffalo Bank, 7 N. D. 569, 75 N. W. 923; Gordon *v.* Vermont L. & T. Co., 6 N. D. 454, 71 N. W. 556; Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

Ohio.— Day *v.* Forest City R. Co., 27 Ohio Cir. Ct. 60.

Oregon.— Sloan *v.* Sloan, 46 Oreg. 36, 78 Pac. 893.

agent.[8] The agency must be proved by other evidence before his acts and statements can be shown against the principal. At best such declarations are mere hearsay.[9] The rule applies equally to oral statements of the agent and to written

Pennsylvania.— Central Pennsylvania Tel., etc., Co. *v.* Thompson, 112 Pa. St. 118, 3 Atl 439; Writing *v.* Lake, 91 Pa. St. 349; Evans *v.* Owens, 3 Pennyp. 228; Chambers *v.* Davis, 3 Whart. 40; Slease *v.* Naysmith, 14 Pa. Super. Ct. 134; Creighton *v.* Keith, 16 Phila. 130.

South Carolina.— Ehrhardt *v.* Breeland, 57 S. C. 142, 35 S. E. 537; New England Mortg. Security Co. *v.* Baxley, 44 S. C. 81, 21 S. E. 444, 885; Martin *v.* Suber, 39 S. C. 525, 18 S. E. 125; Renneker *v.* Warren, 17 S. C. 139; Smith *v.* Asbell, 2 Strobh. 141.

Texas.— Noel *v.* Denman, 76 Tex. 306, 13 S. W. 318; Coleman *v.* Colgate, 69 Tex. 88, 6 S. W. 553; Latham *v.* Pledger, 11 Tex. 439; Higley *v.* Dennis, 40 Tex. Civ. App. 133, 88 S. W. 400; Aultman, etc., Mach. Co. *v.* Cappleman, 36 Tex. Civ. App. 523, 81 S. W. 1243; Eastland *v.* Maney, 36 Tex. Civ. App. 147, 81 S. W. 574; Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227; Ft. Worth Live-Stock Commission Co. *v.* Hitson, (Civ. App. 1898) 46 S. W. 915; Owen *v.* New York, etc., Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189; Page *v.* Cortez, (Civ. App. 1895) 31 S. W. 1071; Western Industrial Co. *v.* Chandler, (Civ. App. 1895) 31 S. W. 314; Brady *v.* Nagle, (Civ. App. 1895) 29 S. W. 943; Mills *v.* Berla, (Civ. App. 1893) 23 S. W. 910; Ft. Worth, etc., R. Co. *v.* Johnson, 2 Tex. App. Civ. Cas. § 232; Conrad *v.* Walsh, 1 Tex. App. Civ. Cas. § 229.

Vermont.— Dickerman *v.* Quiney Mut. F. Ins. Co., 67 Vt. 609, 32 Atl. 489.

Virginia.— Fisher *v.* White, 94 Va. 236, 26 S. E. 573; Poore *v.* Magruder, 24 Gratt. 197.

Washington.— Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33; Comegys *v.* American Lumber Co., 8 Wash. 661, 36 Pac. 1087.

West Virginia.— Thompson *v.* Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 S. E. 908; Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917.

Wisconsin.— McCune *v.* Badger, 126 Wis. 186, 105 N. W. 667; Davis *v.* Henderson, 20 Wis. 520; McDonell *v.* Dodge, 10 Wis. 106.

United States.— W. K. Niver Coal Co. *v.* Piedmont, etc., Coal Co., 136 Fed. 179, 69 C. C. A. 195; Union Guaranty, etc., Co. *v.* Robinson, 79 Fed. 420, 24 C. C. A. 650; Empire State Nail Co. *v.* Faulkner, 55 Fed. 819.

England.— Fairlie *v.* Hastings, 10 Ves. Jr. 123, 32 Eng. Reprint 791, holding that as a general rule what one man has said, not upon oath, cannot be evidence against another man.

See 40 Cent. Dig. tit. "Principal and Agent," § 40.

Rule extends to subagents.— One assuming to act as a subagent cannot establish his right to represent the principal by his own testimony. Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488.

8. *California.*— Pease *v.* Fink, 3 Cal. App. 371, 85 Pac. 657.

Colorado.— Burson *v.* Bogart, 18 Colo. App. 449, 72 Pac. 605.

Georgia.— Mapp *v.* Phillips, 32 Ga. 72.

Illinois.— Rawson *v.* Curtiss, 19 Ill. 456; Currie *v.* Syndicate des Cultivators des Oignons a'Fleur, 104 Ill. App. 165; Chicago, etc., R. Co. *v.* Willard, 68 Ill. App. 315.

Indiana.— Blair-Baker Horse Co. *v.* Columbus First Nat. Bank, 164 Ind. 77, 72 N. E. 1027.

Iowa.— Fritz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193; Philip *v.* Covenant Mut. Ben. Assoc., 62 Iowa 633, 17 N. W. 903; Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250.

Kansas.— Missouri Pac. R. Co. *v.* Stults, 31 Kan. 752, 3 Pac. 522.

Kentucky.— Payton *v.* Old Woolen Mills Co., 122 Ky. 361, 91 S. W. 719, 28 Ky. L. Rep. 1303.

Massachusetts.— Westheimer *v.* State Loan Co., 195 Mass. 510, 81 N. E. 289; Brigham *v.* Peters, 1 Gray 139.

Michigan.— Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276; McDonough *v.* Heyman, 38 Mich. 334.

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

Missouri.— Girard L. Ins., etc., Co. *v.* Mangold, 94 Mo. App. 125, 67 S. W. 955; Alt *v.* Groselose, 61 Mo. App. 409.

Nebraska.— Fitzgerald *v.* Kimball Bros. Co., 76 Nebr. 236, 107 N. W. 227; Wilber First Nat. Bank *v.* Ridpath, 47 Nebr. 96, 66 N. W. 37.

New Hampshire.— Bohanan *v.* Boston, etc., R. Co., 70 N. H. 526, 49 Atl. 103.

New Jersey.— Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941.

New York.— Stringham *v.* St. Nicholas Ins. Co., 4 Abb. Dec. 315, 3 Keyes 280, 5 Abb. Pr. N. S. 80, 37 How. Pr. 365; Duffus *v.* Schwinger, 79 Hun 541, 29 N. Y. Suppl. 930 [*reversing* 7 Misc. 499, 27 N. Y. Suppl. 949]; Fullerton *v.* McLaughlin, 70 Hun 568, 24 N. Y. Suppl. 280; Fleming *v.* Ryan, 9 Misc. 496, 30 N. Y. Suppl. 224; Sier *v.* Bache, 7 Misc. 165, 27 N. Y. Suppl. 255; Wolfe *v.* Benediet, 20 N. Y. Suppl. 585; Fulton *v.* Lydecker, 19 N. Y. Suppl. 374.

North Carolina.— West *v.* A. F. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565.

North Dakota.— Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

Pennsylvania.— Whiting *v.* Lake, 91 Pa. St. 349; Creighton *v.* Keith, 16 Phila. 130.

Texas.— Fine *v.* Freeman, 83 Tex. 529, 17 S. W. 783, 18 S. W. 963.

Washington.— Merrill *v.* O'Bryan, 48 Wash. 415, 93 Pac. 917.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

United States.— Walmsley *v.* Quigley, 129 Fed. 583, 64 C. C. A. 151.

See 40 Cent. Dig. tit. "Principal and Agent," § 416.

9. See EVIDENCE, 16 Cyc. 1005 note 31.

statements, contained in letters, letter heads, receipts, or other documents, implying, admitting, or claiming authority to act as agent in the negotiations with the third person.[10]

(b) In Support of Other Evidence. While the declarations of an alleged agent are inadmissible to prove agency, if the agency be otherwise *prima facie* proved, they become admissible in corroboration.[11]

(c) To Prove Belief and Holding Out by Agent. Although the acts and declarations of the agent are incompetent to establish the agency, they are admissible to prove that the agent believed himself to be the agent of a particular principal, and so held himself out, and that the third person dealt with him as such in good faith.[12]

10. *California.*— Pease *v.* Fink, 3 Cal. App. 371, 85 Pac. 657.

Georgia.— National Bldg. Assoc. *v.* Quin, 120 Ga. 358, 47 S. E. 962; Doonan *v.* Mitchell, 26 Ga. 472.

Illinois.— Gaynor *v.* Pease Furnace Co., 51 Ill. App. 292, in which the fact that the heading of the paper on which a contract was written stated that H was plaintiff's "general Western agent," the contract being signed by H in his own name, was held not sufficient evidence to show that H was acting as plaintiff's agent.

Iowa.— Joseph Schlitz Brewing Co. *v.* Barlow, 107 Iowa 252, 77 N. W. 1031; Sax *v.* Davis, 81 Iowa 692, 47 N. W. 990.

Kansas.— Goodyear *v.* Williams, 73 Kan. 192, 85 Pac. 300.

Maine.— Coburn *v.* Paine, 36 Me. 105.

Massachusetts.— Rice *v.* James, 193 Mass. 458, 79 N. E. 807, ruling out statements of the agent over the telephone.

Michigan.— Ironwood Store Co. *v.* Harrison, 75 Mich. 197, 42 N. W. 808.

Missouri.— Peninsular Stove Co. *v.* Adams Hardware, etc., Co., 93 Mo. App. 237.

Nebraska.— Blanke Tea, etc., Co. *v.* Rees Printing Co., 70 Nebr. 510, 97 N. W. 627.

Nevada.—Jos. Schlitz Brewing Co. *v.* Grimmon, 28 Nev. 235, 81 Pac. 43.

New Hampshire.— Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372, holding that where individuals, as assignees of another, attempt to assign a deed for him, a recital in the deed of their authority to act is insufficient. Their authority as assignees must be shown.

New Jersey.— Saxton *v.* Fuller, 20 N. J. L. 61.

New York.— Thiry *v.* Taylor Brewing, etc., Co., 37 N. Y. App. Div. 391, 56 N. Y. Suppl. 85; Howard *v.* Norton, 65 Barb. 161; Bowen *v.* Powell, 1 Lans. 1; Klumpp *v.* American Hardware Mfg. Co., 50 Misc. 662, 99 N. Y. Suppl. 326; Heimerdinger *v.* Lehigh Valley R. Co., 26 Misc. 374, 56 N. Y. Suppl. 188 [*reversing* 25 Misc. 425, 54 N. Y. Suppl. 1103].

South Dakota.— Farrell *v.* Edwards, 8 S. D. 425, 66 N. W. 812.

Texas.— Texas Land, etc., Co. *v.* Watson, 3 Tex. Civ. App. 233, 22 S. W. 873.

Wisconsin.— Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

England.— Bauerman *v.* Radenius, 2 Esp. 653, 7 T. R. 663; Maesters *v.* Abraham, 1 Esp. 375; Fairlie *v.* Hastings, 10 Ves. Jr. 123, 32 Eng. Reprint 791.

11. *Alabama.*— Eagle Iron Co. *v.* Baugh, 147 Ala. 613, 41 So. 663; Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., R. Co., 127 Ala. 137, 28 So. 679; Gibson *v.* Snow Hardware Co., 94 Ala. 346, 10 So. 304; McClung *v.* Spotswood, 19 Ala. 165.

California.— Kelly *v.* Ning Yung Benev. Assoc., 2 Cal. App. 460, 84 Pac. 321.

Georgia.— Ham *v.* Brown, 2 Ga. App. 71, 58 S. E. 316.

Illinois.— Singer, etc., Stone Co. *v.* Hutchinson, 184 Ill. 169, 56 N. E. 353 [*affirming* 83 Ill. App. 668]; Kelly *v.* Shumway, 51 Ill. App. 634.

New York.— Harrington *v.* Keteltas, 92 N. Y. 40; Wanamaker *v.* Mcgraw, 48 N. Y. App. Div. 54, 62 N. Y. Suppl. 692 [*reversed* on other grounds in 168 N. Y. 125, 61 N. E. 112]; Smith *v.* Martin Anti-Fire Car Heater Co., 19 N. Y. Suppl. 285; Smith *v.* Dodge, 3 N. Y. Suppl. 866.

Oregon.— Foste *v.* Standard Ins. Co., 34 Oreg. 125, 54 Pac. 811.

South Carolina.— Robert Buist Co. *v.* Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789.

Texas.— Wheeler, etc., Mfg. Co. *v.* Crossland, 2 Tex. App. Civ. Cas. § 80.

Washington.— Graton, etc., Mfg. Co. *v.* Redelsheimer, 28 Wash. 370, 68 Pac. 879.

12. *Alabama.*— Parker *v.* Bond, 121 Ala. 529, 25 So. 898.

California.—Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738.

Iowa.— White *v.* Elgin Creamery Co., 108 Iowa 522, 79 N. W. 283; Le Grand Quarry Co. *v.* Reichard, 40 Iowa 161.

Louisiana.— Labat's Succession, 110 La. 986, 35 So. 257.

Massachusetts.— Nowell *v.* Chipman, 170 Mass. 340, 49 N. E. 631.

Michigan.— Gore *v.* Canada L. Assur. Co., 119 Mich. 136, 77 N. W. 650.

New York.— Howard *v.* Norton, 65 Barb. 161; Delmage *v.* Crow, 23 Misc. 326, 51 N. Y. Suppl. 240 [*reversing* 22 Misc. 511, 49 N. Y. Suppl. 1004].

South Dakota.— Christ *v.* Garretson State Bank, 13 S. D. 23, 82 N. W. 89.

England.— Fagan *v.* Howard, Wallis 33.

Declarations to show for what principal the agent acted.— While the fact of agency cannot be shown by the declarations of an agent, evidence is competent to show that, in what

(2) As Against Agent. The rule that agency cannot be proved by the acts or declarations of the agent does not apply to an action by the principal against the agent, but only where it is sought to hold the principal for the acts of an alleged agent.[13]

(3) As Against Principal Suing Upon Contract. Declarations of a party assuming to act as agent for another are admissible to establish agency where the principal is suing on a contract made by such agent, and thereby ratifying the same.[14]

(D) *Declarations and Admissions of Principal.* Any declaration or admission of the principal which in any way tends to establish the fact of agency, or the extent of authority, is admissible in evidence,[15] although not known to the person dealing with the agent.[16] Thus letters written by the principal expressly or impliedly admitting that a certain person was his agent, or the extent of his authority, are competent evidence against the principal,[17] although not written to the adverse party.[18]

(E) *Declarations of Other Persons* — (1) In General. Declarations of strangers to the suit, tending to prove the alleged agency, are inadmissible, for they have no right to speak for the principal, and facts of which they are cognizant should be proved by their testimony on the witness stand, and not by their statements, oral or written, made outside the court.[19]

(2) Other Agents. The scope of authority of an agent, as to a past transaction at least, cannot be proved by the unsworn declarations of another agent.[20] But declarations of a general agent may be admissible for the purpose of showing the authority of an inferior agent.[21]

(F) *Communications Between Principal and Agent.* Communications between

the agent said and did, he purported to act for defendant, and not for someone else. Nowell *v.* Chipman, 170 Mass. 340, 49 N. E. 631.

13. *California.*— Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122.

Connecticut.— Plant *v.* McEwen, 4 Conn. 544.

Georgia.— Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

Nebraska.— Columbus Co. *v.* Hurford, 1 Nebr. 146.

North Carolina.—New Home Sewing Mach. Co. *v.* Seago, 128 N. C. 158, 38 S. E. 805.

West Virginia.— Siers *v.* Wiseman, 58 W. Va. 340, 52 S. E. 460.

The fact that a person acted for himself and not as agent for another may, as against his claims, be established by his declarations. Bradley *v.* Poole, 98 Mass. 169, 93 Am. Dec. 144.

14. Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336.

15. *Iowa.*— Frank *v.* Levi, 110 Iowa 267, 81 N. W. 459.

Maryland.— Horner *v.* Beasley, 105 Md. 193, 65 Atl. 820.

Michigan.— Haughton *v.* Maurer, 55 Mich. 323, 21 N. W. 426.

New York.— Wallace *v.* Arkell, 28 Misc. 502, 59 N. Y. Suppl. 597 [*affirming* 27 Misc. 819, 57 N. Y. Suppl. 655].

Washington.— McDonald *v.* Freed, 3 Wash. 468, 28 Pac. 915.

16. Moffet *v.* Moffet, 90 Iowa 442, 57 N. W. 954 (limiting the rule to proof of the fact of agency and holding such evidence inadmissible to establish an agency by holding out); McDonald *v.* Freed, 3 Wash. 468, 28 Pac. 915.

17. *Illinois.*— Crain *v.* Jacksonville First Nat. Bank, 114 Ill. 516, 2 N. E. 486; Case *v.* Lyman, 66 Ill. 229.

Iowa.— Jenkins *v.* Dewey, 122 Iowa 530, 98 N. W. 313; Wood *v.* Whitton, 66 Iowa 295, 19 N. W. 907, 23 N. W. 675.

Missouri.— Morse *v.* Diebold, 2 Mo. App. 163.

New York.— Thiry *v.* Taylor Brewing, etc., Co., 37 N. Y. App. Div. 391, 56 N. Y. Suppl. 85.

Oregon.— Foste *v.* Standard Ins. Co., 34 Oreg. 125, 54 Pac. 811.

South Dakota.— Elfring *v.* New Birdsall Co., 16 S. D. 252, 92 N. W. 29.

Washington.— American Copper, etc., Works *v.* Galland-Burke Brewing, etc., Co., 30 Wash. 178, 70 Pac. 236.

United States.— Bingham *v.* Cabbot, 3 Dall. 19, 1 L. ed. 491, admitting correspondence with the government to establish that one was a public agent.

18. Morse *v.* Diebold, 2 Mo. App. 163.

19. Erie, etc., Despatch *v.* Cecil, 112 Ill. 180; Beattyville Coal Co. *v.* Hoskins, 44 S. W. 363, 19 Ky. L. Rep. 1759; Clark *v.* Peabody, 22 Me. 500; Huzzard *v.* Trego, 35 Pa. St. 9.

20. Rumbough *v.* Southern Imp. Co., 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528.

21. Bickford *v.* Menier, 36 Hun (N. Y.) 446 [*reversed* on other grounds in 107 N. Y. 490, 14 N. E. 438]; Elfring *v.* New Birdsall Co., 16 S. D. 252, 92 N. W. 29.

principal and agent in which the authority of the latter is expressly or impliedly admitted are admissible in evidence.[22] Thus a letter from the principal to the agent, bearing upon the fact or scope of his agency, is admissible.[23] So evidence of conversations between the principal and agent is admissible to show the authority of the latter.[24] But such conversations are not admissible to deny an authority actually conferred upon the agent.[25] Nor are they admissible when had before the agency arose and not shown to relate thereto.[26]

(G) *Communications Between Third Person and Agent.* A conversation between an agent and the party dealing with him, while not evidence of the agent's authority, is admissible to show the understanding of such party on the subject,[27] his good faith,[28] and that he was justified in treating the agent as such.[29]

(H) *Instructions to Agent* — (1) By Principal. Since the scope of an agent's authority depends in whole or in part upon the instructions of the principal, such instructions may be given in evidence,[30] although they are opposed to the apparent authority of the agent.[31] Furthermore the principal should be permitted to disavow the giving of instructions testified to by the opposite party.[32] But instructions to an agent, not communicated to the third person, cannot be received, on the principal's behalf, to substantiate the agent's story as to what a contract entered into by him actual y was.[33]

22. Arthur *v.* Gard, 3 Colo. App. 133, 32 Pac. 343.

23. *California.*— Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738.

Connecticut.— Rowland *v.* Huggins, 28 Conn. 122.

Iowa.— Thurston *v.* Mauro, 1 Greene 231.

Kansas.— Bell *v.* Rankin, 1 Kan. App. 209, 40 Pac. 1094.

Kentucky.— Limestone Min., etc., Co. *v.* Lehman, 76 S. W. 328, 25 Ky. L. Rep. 703.

Massachusetts.— Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Nebraska.— Peycke *v.* Shinn, 76 Nebr. 364, 107 N. W. 386; Barber *v.* Martin, 67 Nebr. 445, 93 N. W. 722.

New York.— Ettlinger *v.* Weil, 94 N. Y. App. Div. 291, 87 N. Y. Suppl. 1049 [*reversed* on other grounds in 184 N. Y. 179, 77 N. E. 31].

Pennsylvania.— Slonecker *v.* Garrett, 48 Pa. St. 415.

South Dakota.—Farrell *v.* Edwards, 8 S. D. 425, 66 N. W. 812.

A letter is admissible to prove agency to sell real estate.—Whelage *v.* Lotz, 44 La. Ann. 600, 10 So. 933.

A letter inconsistent with an agency has been held admissible to show that there was no agency between two parties. Zoebisch *v.* Rauch, 133 Pa. St. 532, 19 Atl. 415.

24. Schilling *v.* Rosenheim, 30 Ill. App. 81; Anderson *v.* McAleenan, 15 Daly (N. Y.) 444, 8 N. Y. Suppl. 483; Ryerson *v.* Ryerson, 8 N. Y. Suppl. 738.

25. Manley *v.* Ackler, 76 Hun (N. Y.) 546, 28 N. Y. Suppl. 181, holding that in an action for breach of warranty of goods sold by defendant's agent, a conversation between defendant and the agent is not admissible to show that defendant did not authorize the agent to warrant the goods, since authority to sell includes an authority to warrant.

26. Irving *v.* Shethar, 71 Conn. 434, 42 Atl. 258.

27. Gore *v.* Canada L. Assur. Co., 119 Mich. 136, 77 N. W. 650.

28. Christ *v.* Garretson State Bank, 13 S. D. 23, 82 N. W. 89.

29. Curtin *v.* Ingle, 137 Cal. 95, 69 Pac. 836, 1013.

30. *Colorado.*—Thatcher *v.* Kaucher, 2 Colo. 698.

Minnesota.— Nininger *v.* Knox, 8 Minn. 140, applying the rule to a special agent because the extent of his authority is supposed to depend entirely on his instructions.

Missouri.— Gestring *v.* Fisher, 46 Mo. App. 603.

New Hampshire.— Hall *v.* Brown, 58 N. H. 93.

Ohio.— Wellington First Nat. Bank *v.* Mansfield Sav. Bank, 10 Ohio Cir. Ct. 233, 6 Ohio Cir. Dec. 452, in which it is said that where an agent has had definite instructions not to act for his principal in a matter outside of his duties as an agent, the principal may show such instructions, where he is sought to be held for the act of his agent contrary to such instructions.

Pennsylvania.— Brown *v.* Kirk, 26 Pa. Super. Ct. 157.

South Dakota.— J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. D. 530, 91 N. W. 82.

Virginia.— Lunsford *v.* Smith, 12 Gratt. 554.

See 40 Cent. Dig. tit. "Principal and Agent," § 411.

31. Mt. Morris Bank *v.* Gorham, 169 Mass. 519, 48 N. E. 341; Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570; Wimp *v.* Early, 104 Mo. App. 85, 78 S. W. 343; Gestring *v.* Fisher, 46 Mo. App. 603. But see Continental Tobacco Co. *v.* Campbell, 76 S. W. 125, 25 Ky. L. Rep. 569; Oderkirk *v.* Fargo, 61 Hun (N. Y.) 418, 16 N. Y. Suppl. 220; Van Dyke *v.* Wilder, 66 Vt. 579, 29 Atl. 1016.

32. Delmage *v.* Crow, 23 Misc. (N. Y.) 326, 51 N. Y. Suppl. 240 [*reversing* 22 Misc. 511, 49 N. Y. Suppl. 1004].

33. Meinhold *v.* Bradley Salt Co., 20 Misc. (N. Y.) 608, 46 N. Y. Suppl. 346.

(2) By Other Persons. Evidence that a certain person gave an agent directions is not admissible in favor of the principal and against a third person with whom the agent has dealt, in the absence of evidence that the person who gave the instructions was connected with the principal.[34]

(I) *Documentary Evidence.*[35] In determining the scope of an agent's authority, contracts executed, and documents used, by the agent within his real or ostensible authority, may be introduced to establish its limits.[36]

(J) *Parol Evidence* — (1) In General. Except in special cases,[37] the fact of agency or the extent of authority may be established by parol.[38]

(2) To Vary or Explain Contract Made by Agent [39] — (a) Contracts Under Seal. Parol evidence is inadmissible to show that the nominal party to a contract under seal was acting as agent for another,[40] either for the purpose of exonerating him from liability [41] or for the purpose of charging his principal,[42] or, as otherwise expressed, a contract under seal may not be turned into a simp e contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *dehors* the instrument that the nominal party was acting as agent of another,[43] either for the purpose of charg ng the principal [44] or to enable him to sue.[45]

(b) Simple Contracts — aa. *To Charge Principal.* It is a well settled rule of evidence that where a reading of a simple contract discloses that it is executed for or on behalf of a principal,[46] or discloses an intention to bind such principal,[47]

34. Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

35. **Letters from principal to agent** see *supra*, IV, E, 2, a, (I), (F).

Letters from principal to other persons see *supra*, IV, E, 2, a, (I), (D).

36. *Alabama.*— Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4, descriptive pamphlet.

Iowa.— Deane *v.* Everett, 90 Iowa 242, 57 N. W. 874, order blank.

Montana.— Mahoney *v.* Butte Hardware Co., 19 Mont. 377, 48 Pac. 545, articles of incorporation of company admissible for purpose of showing what business it was authorized to transact, as affecting its agent's authority.

Nebraska.— Davis *v.* Benedict, 49 Nebr. 119, 68 N. W. 398, lease.

New Jersey.— Scull *v.* Skillton, 70 N. J. L. 792, 59 Atl. 457, lease.

Pennsylvania.— Bates *v.* Short, 3 Pennyp. 495.

South Dakota.— Quale *v.* Hazel, 19 S. D. 483, 104 N. W. 215, contract.

Utah.— McCornick *v.* Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 Pac. 820, reports and statements of agent.

37. See Evidence, 17 Cyc. 489, 490. See also *supra*, I, D, 1, c.

38. *California.*— Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738.

Indiana.— Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460.

Iowa.— Lyons *v.* Thompson, 16 Iowa 62; Powesheik County *v.* Stanley, 9 Iowa 511.

Kansas.— Kansas L. & T. Co. *v.* Love, 45 Kan. 127, 25 Pac. 191.

Maine.— Bryer *v.* Weston, 16 Me. 261.

New York.— Bank of North America *v.* Embury, 33 Barb. 323; Tebbetts *v.* Levy, 11 N. Y. Suppl. 684.

Texas.— Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434.

Virginia.— Lunsford *v.* Smith, 12 Gratt. 554.

39. **Evidence of customs and usages** to explain written contract made by agent see Customs and Usages, 12 Cyc. 1087.

Parol evidence to establish resulting trust where agent has taken deed in his own name see Trusts.

40. Stierle *v.* Kaiser, 45 La. Ann. 580, 12 So. 839; Borecherling *v.* Katz, 37 N. J. Eq. 150; Tuthill *v.* Wilson, 90 N. Y. 423; Lincoln *v.* Crandell, 21 Wend. (N. Y.) 101; Providence *v.* Miller, 11 R. I. 272, 23 Am. Rep. 453.

41. Stierle *v.* Kaiser, 45 La. Ann. 580, 12 So. 839; Lincoln *v.* Crandell, 21 Wend. (N. Y.) 101.

In the absence of fraud, parol evidence is inadmissible to exonerate from liability, on the ground of agency, one signing an instrument under seal and using therein apt words to bind himself. Wallace *v.* Langston, 52 S. C. 133, 29 S. E. 552.

42. Borecherling *v.* Katz, 37 N. J. Eq. 150; Tuthill *v.* Wilson, 90 N. Y. 423; Providence *v.* Miller, 11 R. I. 272, 23 Am. Rep. 453.

43. Schaefer *v.* Henkel, 75 N. Y. 378, 7 Abb. N. Cas. 1; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Anderson *v.* Connor, 43 Misc. (N. Y.) 384, 87 N. Y. Suppl. 449.

Instrument not required to be under seal.— The rule is none the less applicable because it may appear that the instrument was one not requiring a seal in order to be valid. Anderson *v.* Connor, 43 Misc. (N. Y.) 384, 87 N. Y. Suppl. 449.

44. Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Whitehouse *v.* Drisler, 37 N. Y. App. Div. 525, 56 N. Y. Suppl. 95.

45. Schaefer *v.* Henkel, 75 N. Y. 378, 7 Abb. N. Cas. 1.

46. Southern Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650.

47. Southern Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650; Burgess *v.* Fairbanks, 83 Cal. 215, 23 Pac. 292, 17 Am. St. Rep. 230; Bean *v.* Pioneer Min.

or is so uncertain in its terms as to leave the whole matter in doubt whether the principal or the agent is to be held bound,[48] parol evidence is admissible to show that the principal is the real party in interest and is therefore liable on the contract. Indeed the courts in a great majority of the jurisdictions go to the further extent of holding that parol evidence is admissible to charge the principal on a simple contract wherein the agent appears as principal,[49] at least an unknown

Co., 66 Cal. 451, 6 Pac. 86, 68 Am. Dec. 106; Gilbert *v.* Nottingham First Presby. Church, 4 Ohio Dec. (Reprint) 312, 1 Clev. L. Rep. 275.

If a written contract executed by a third person contains allusions to defendant tending to show his interest in the contract, parol evidence may be given to charge him thereon as principal. Somers *v.* Tayloe, 22 Fed. Cas. No. 13,170, 2 Cranch C. C. 138.

48. Southern Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650; Keeley Brewing Co. *v.* Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923; Ohio, etc., R. Co. *v.* Middleton, 20 Ill. 629; Hartzell *v.* Crumb, 90 Mo. 629, 3 S. W. 59; Klostermann *v.* Loos, 58 Mo. 290. See also Vail *v.* Northwestern Mut. L. Ins. Co., 192 Ill. 567, 61 N. E. 651; Kelly *v.* Thuey, 102 Mo. 522, 15 S. W. 62; Smith *v.* Alexander, 31 Mo. 193; Richmond, etc., R. Co. *v.* Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

The rule as to varying or contradicting a written contract is in no wise contravened by the admission of such evidence explaining a patent ambiguity. Klostermann *v.* Loos, 58 Mo. 290.

49. *Georgia.*— Harriman *v.* First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117.

Illinois.— Barker *v.* Garvey, 83 Ill. 184; Heywood Bros., etc., Co. *v.* Andrews, 89 Ill. App. 195.

Kansas.—Edwards *v.* Gildemeister, 61 Kan. 141, 39 Pac. 259; Nutt *v.* Humphrey, 32 Kan. 100, 3 Pac. 787; Wolfley *v.* Rising, 12 Kan. 535; Butler *v.* Kaulback, 8 Kan. 668.

Maryland.— Oelrichs *v.* Ford, 21 Md. 489.

Massachusetts.— Crawford *v.* Moran, 168 Mass. 446, 47 N. E. 132; Byington *v.* Simpson, 134 Mass. 169, 45 Am. Rep. 314, holding that whatever the original merits of the rule it cannot be reopened "for it is as well settled as any part of the law of agency"); Lerned *v.* Johns, 9 Allen 419; Huntington *v.* Knox, 7 Cush. 371.

Missouri.— Weber *v.* Collins, 139 Mo. 501, 41 S. W. 249; Higgins *v.* Dellinger, 22 Mo. 397.

New Hampshire.— Chandler *v.* Coe, 54 N. H. 561.

New Jersey.— Kean *v.* Davis, 20 N. J. L. 425; Borcherling *v.* Katz, 37 N. J. Eq. 150. *Compare* Schenck *v.* Spring Lake Beach Imp. Co., 47 N. J. Eq. 44, 19 Atl. 881, holding that in a suit for specific performance of a contract to sell land, made by L, president of defendant company, parol evidence is inadmissible to show that the land company was the real vendor, and hence liable on the contract, no fraud or mistake being alleged.

New York.— Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547 [*reversing* 8 Misc. 9, 28 N. Y. Suppl. 64]; Pierson *v.* Atlantic Nat. Bank, 77 N. Y. 304; Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388; Masterson *v.* Boyce, 29 Hun 456; Stewart *v.* Fenly, 10 N. Y. Leg. Obs. 40. See also Meeker *v.* Claghorn, 44 N. Y. 349. *Contra,* Williams *v.* Christie, 4 Duer 29; Fendy *v.* Stewart, 5 Sandf. 101.

Oregon.—Anderson *v.* Portland Flouring Mills Co., 37 Oreg. 483, 60 Pac. 839, 82 Am. St. Rep. 771, 50 L. R. A. 235.

Vermont.— U. S. Bank *v.* Lyman, 2 Fed. Cas. No. 924, 1 Blatchf. 297, 20 Vt. 666.

Virginia.— Waddill *v.* Sebree, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766.

Washington.— Belt *v.* Washington Water Power Co., 24 Wash. 387, 64 Pac. 525. See also Shuey *v.* Adair, 18 Wash. 188, 51 Pac. 388, 63 Am. St. Rep. 879, 39 L. R. A. 473.

Wisconsin.— Weston *v.* McMillan, 42 Wis. 567.

United States.— Boland *v.* Northwest Fuel Co., 34 Fed. 523; New York, etc., Steam-Ship Co. *v.* Harbison, 16 Fed. 688, 21 Blatchf. 332. See also Ford *v.* Williams, 21 How. 287, 16 L. ed. 36; Mechanics Bank *v.* Columbia Bank, 5 Wheat. 326, 5 L. ed. 100; Prichard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504.

England.— Higgins *v.* Senior, 11 L. J. Exch. 199, 201, 8 M. & W. 834 (holding that "this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shews that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal"); Beckman *v.* Drake, 9 M. & W. 78.

Such evidence is admissible on the ground that parol evidence for the purpose of introducing a new party to a simple contract in no wise contradicts it. Kean *v.* Davis, 20 N. J. L. 425.

Although it involves proof of the ownership of a vessel, parol evidence is admissible to show for whom an agent failing to disclose his principal acted in making a simple contract. Harriman *v.* First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117.

That the contract is required by the statute of frauds to be in writing is immaterial. Stewart *v.* Fenly, 10 N. Y. Leg. Obs. 40.

The rule in regard to written contracts not negotiable is that parol evidence is admissible to show that they were executed in the business of the principal, and with intent to bind him, although signed in the name of the agent alone. Texas Land, etc., Co. *v.* Carroll, 63 Tex. 48; Butler *v.* Merchant, (Tex. Civ. App. 1894) 27 S. W. 193.

In the case of negotiable paper executed by an agent in his own name, parol evidence

principal.[50] This advanced doctrine is repudiated, however, in a few jurisdictions, it being held that if a contract purports to be executed by one in his own behalf,[51] or shows without ambiguity that the one so executing, although an agent, binds himself as principal,[52] parol evidence is inadmissible to show that the agent acted for his principal in making the contract, and that the latter is therefore liable.

bb. *To Enable Principal to Sue.* Where there is nothing to define the character of the contracting party to a simple contract, he may be shown by parol to be agent merely, so as to cast the right of suing on the real principal;[53] such evidence not contradicting the writing, but merely explaining the transaction.[54] But when the contracting party expressly states himself to be "owner," it is not competent to show by parol that he acted not as owner but as agent for the real owner.[55]

cc. *To Charge Agent Personally.* Where a contract on its face is unequivocally that of a principal by the hand of his agent, parol evidence is inadmissible to contradict the plain terms of such contract by showing that it was intended to bind the agent personally.[56]

dd. *To Exonerate Agent From Liability.* If a simple contract, on its face, is the undertaking of the agent only, no reference being made on its face to representa-

is not admissible to charge the principal (Heaton *v.* Myers, 4 Colo. 59); but where there is anything on the face of the bill or note showing that the party signing is acting for another and not for himself, the rule is otherwise (Gillig *v.* Lake Bigler Road Co., 2 Nev. 214).

Parol evidence is not admissible to show that a contract which is not a negotiable instrument, and not required to be under seal, although so in fact, executed by and in the name of an agent, is a contract of the principal, although the principal is known to the other contracting party at the time of the execution of the contract. Barbre *v.* Goodale, 28 Oreg. 465, 38 Pac. 67, 43 Pac. 378.

50 Chanler *v.* Coe, 54 N. H. 561, where it is held that parol evidence is admissible for the purpose of charging an unknown principal on a simple contract, but not for the purpose of charging a known principal, the court placing its ruling on the ground that if plaintiff knew when the contract was entered into that it was made for the benefit of a third party, the writing shows that he elected to look to the agent for its performance and parol evidence is not admissible to vary the writing by showing that he looked to the principal and not the agent.

When a principal is known to the party dealing with the agent and such party accepts a written contract of the agent, which in no way purports to bind or to be in behalf of the principal, but on behalf of the agent alone, such party is bound to look to the agent, and cannot maintain an action against the principal on such contract; and parol evidence is not admissible to change the legal effect of such contract so as to make it a contract of the principal. Post *v.* Kinney, 7 Ohio Dec. (Reprint) 439, 2 Cinc. L. Bul. 118.

51. Davison *v.* Davenport Gaslight, etc., Co., 24 Iowa 419; Harkins *v.* Edwards, 1 Iowa 426; Williams *v.* Journal Printing Co., 43 Minn. 537, 45 N. W. 1133; Rowell *v.* Olcson, 32 Minn. 288, 20 N. W. 227.

52. Vail *v.* Northwestern Mut. L. Ins. Co., 192 Ill. 567, 61 N. E. 651.

53. Powell *v.* Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 913; Briggs *v.* Munchon, 56 Mo. 467; Smith *v.* Felter, 63 N. J. L. 30, 42 Atl. 1053; Weston *v.* McMillan, 42 Wis. 567; Ford *v.* Williams, 21 How. (U. S.) 287, 16 L. ed. 36; Prichard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504; Darrow *v.* H. R. Horn Produce Co., 57 Fed. 463. See also Nash *v.* Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527. *Compare* Kelly *v.* Thuey, 102 Mo. 522, 15 S. W. 62, where it is said that the principle that if the contract is so uncertain in its terms as to leave it in doubt whether the principal or agent is to be bound, such uncertainty may be obviated by the production of parol evidence, cannot aid plaintiff suing on a contract executed by another as principal, and bearing nothing on its face to denote his agency for any person.

54. Powell *v.* Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915; Ford *v.* Williams, 21 How. (U. S.) 287, 6 L. ed. 36.

Such proof does not vary or contradict the writing, but merely establishes a separate collateral fact, namely, the relation existing between the party contracting and for whose benefit the contract is made; or, in other words, the authority under which the agent acts out of which grow the rights and obligations of the principal under the contract. Oelrichs *v.* Ford, 21 Md. 489.

One not a party to a simple contract may show by parol evidence that he has rights under it because it was entered into for his benefit by an agent, and admission of such evidence in no wise contradicts or varies the writing. Stowell *v.* Eldred, 39 Wis. 614.

55. Humble *v.* Hunter, 12 Q. B. 310, 12 Jur. 1021, 17 L. J. Q. B. 350, 64 E. C. L. 310; Lucas *v.* De la Cour, 1 M. & S. 249, 14 Rev. Rep. 426.

56. McClernan *v.* Hall, 33 Md. 293; Key *v.* Parnham, 6 Harr. & J. (Md.) 418; Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

tive capacity, parol evidence will not be received to exonerate the agent,[57] whether the principal was known or unknown at the time the contract was executed.[58] But if the paper bears on its face some reference to a principal,[59] or some appellation indicating representative capacity,[60] thereby suggesting doubt as to the character in which defendant acted, parol evidence is admissible to show that the contract was in fact that of defendant's principal and that it was so understood between defendant and the other contracting party. So too the agent may show by parol, in order to relieve himself from liability on an apparent written agreement which if real would bind him on its face, that it was agreed when it was signed that it should not take effect as a contract, but that the real contract was an unwritten one which bound only his principal.[61]

(K) *Circumstantial Evidence* — (1) In General. Circumstantial evidence is competent to establish the fact or extent of an agency.[62] Where such evidence is

It seems that if the written contract is colorable only and intended to obscure the real connection of defendant with it, parol evidence is admissible to charge him thereon as principal. Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

57. *Illinois.*— Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71.

Indiana.— Hiatt *v.* Simpson, 8 Ind. 256.

Kentucky.— Megibben *v.* Shawhan, 10 Ky. L. Rep. 407.

Massachusetts.— Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Missouri.— Schell *v.* Stephens, 50 Mo. 375.

New Hampshire.— Chandler *v.* Coe, 54 N. H. 561.

New Jersey.— Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182. See also Borcherling *v.* Katz, 37 N. J. Eq. 150.

New York.— Babbett *v.* Young, 51 N. Y. 238; Squier *v.* Norris, 1 Lans. 282; Mills *v.* Hunt, 20 Wend. 431. See also Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388.

Ohio.— Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612.

Rhode Island.—Anthony *v.* Comstock, 1 R. I. 454.

Texas.— See Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

Wisconsin.— Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 54 N. W. 28, 36 Am. St. Rep. 895, 21 L. R. A. 135; Stowell *v.* Eldred, 39 Wis. 614.

United States.— Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527; Prichard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504.

England.— Jones *v.* Littledale, 6 A. & E. 486, 6 L. J. K. B. 169, 1 N. & P. 677, 33 E. C. L. 265; Thomson *v.* Davenport, 9 B. & C. 78, 4 M. & R. 110, 17 E. C. L. 45, 3 Smith Lead. Cas. 1648; Higgins *v.* Senior, 11 L. J. Exch. 199, 8 M. & W. 834; Magee *v.* Atkinson, 6 L. J. Exch. 115, 2 M. & W. 440.

No error or mistake in executing the contract, being alleged in the answer, parol evidence by defendant to exonerate himself from liability on the ground of agency is inadmissible. Flunker *v.* Kent, 27 La. Ann. 37.

58. *Illinois.*— Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71.

New Hampshire.— Chandler *v.* Coe, 54 N. H. 561.

New Jersey.— Kean *v.* Davis, 20 N. J. L. 425.

Wisconsin.— Cream City Glass Co. *v.* Friedland, 84 Wis. 53, 54 N. W. 28, 36 Am. Rep. 895, 21 L. R. A. 135. See also Stowell *v.* Eldred, 39 Wis. 614.

United States.— Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527.

England.— Jones *v.* Littledale, 6 A. & E. 486, 6 L. J. K. B. 169, 1 N. & P. 677, 33 E. C. L. 265; Thomson *v.* Davenport, 9 B. & C. 78, 4 M. & R. 110, 3 Smith Lead. Cas. 1648, 17 E. C. L. 45; Higgins *v.* Senior, 11 L. J. Exch. 199, 8 M. & W. 834.

59. Armstrong *v.* Andrews, 109 Mich. 537, 67 N. W. 567.

60. Deering *v.* Thom, 29 Minn. 120, 12 N. W. 350; Smith *v.* Alexander, 31 Mo. 193; Schaefer *v.* Bidwell, 9 Nev. 209; Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182. See also Traynham *v.* Jackson, 15 Tex. 170, 65 Am. Dec. 152.

The evidence is received to prove that in fact the agent never incurred a personal liability, not to discharge him from a personal liability which he has assumed; to prove who is the real party to the instrument, not to aid in its construction. Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182.

In a suit by the payee against the maker of a promissory note, who affixed the word "agent" to his signature, defendant may show by parol evidence that the paper is really that of his principal, who was the real party to the transaction, to the knowledge of the payee. Keidan *v.* Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705.

61. Rogers *v.* Hadley, 2 H. & C. 227, 9 Jur. N. S. 898, 32 L. J. Exch. 241, 9 L. T. Rep. N. S. 292, 11 Wkly. Rep. 1074. See also Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

62. *California.*— Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738.

Delaware.— Hansell *v.* Levy, 5 Houst. 407; Geylin *v.* Villeroi, 2 Houst. 311.

Indiana.— Indiana, etc., R. Co. *v.* Adamson, 114 Ind. 282, 15 N. E. 5; Broadstreet *v.* McKamey, (App. 1908) 83 N. E. 773; Fruchy *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

Iowa.— Fritz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193.

Minnesota.— Stewart *v.* Cowles, 67 Minn. 184, 69 N. W. 694.

resorted to for the purpose of establishing agency, all the facts and circumstances showing the relation of the parties, and throwing light upon the character of such relation, are admissible in evidence.[63]

(2) Acts of Agent — (a) In General. As a general rule the fact of agency cannot be established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them.[64] Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them, and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency.[65]

Wisconsin.— Bautz *v.* Adams, 131 Wis. 152, 111 N. W. 69.

63. *California.*— Jones *v.* Waterman, (App. 1906) 87 Pac. 469; Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738.

Connecticut.— Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998.

Nebraska.— Johnston *v.* Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 N. W. 1100.

New York.— New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503, 7 Abb. N. Cas. 334; Matter of Zinke, 90 Hun 127, 35 N. Y. Suppl. 645.

Texas.— Slaughter *v.* Coke County, 34 Tex. Civ. App. 598, 79 S. W. 863.

Washington.— Fox *v.* Burlington Mfg. Co., 7 Wash. 391, 35 Pac. 126.

Great latitude allowed.—The evidence necessary to establish an implied agency is very different from that required to prove an express agency. In the former case greater latitude must necessarily be allowed in the admission of testimony tending to prove facts and circumstances from which the existence of an agency may be legitimately inferred. Patterson *v.* Van Loon, 186 Pa. St. 367, 40 Atl. 495. From the nature of the case, evidence that would tend to prove an implied agency would be admissible as proof of an express agency. Patterson *v.* Van Loon, *supra*.

Evidence of the motives or conditions of the parties is immaterial, except it be shown that such motives or conditions explain appearances that seem to contradict the actual fact as to the agency, as such fact has been proved by other evidence. It is the fact of agency, not the motives or conditions of the parties, that is in question. Fitzgerald *v.* Pendergast, 114 Mass. 368. Thus evidence that the agent was insolvent is inadmissible to prove that he did have authority to do as he did. Hare *v.* Bailey, 73 Minn. 409, 76 N. W. 213. See also National Shoe, etc., Bank's Appeal, 55 Conn. 469, 12 Atl. 646.

64. *Alabama.*— Gimon *v.* Terrell, 38 Ala. 208; McDonnell *v.* Branch Bank, 20 Ala. 313.

Arkansas.— Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381.

Connecticut.— Scott *v.* Crane, 1 Conn. 255.

Georgia.— Americus Oil Co. *v.* Gurr, 114 Ga. 624, 40 S. E. 780; Doonan *v.* Mitchell, 26 Ga. 472.

Illinois.— Peter Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184.

Iowa.— John Gund Brewing Co. *v.* Peterson, 130 Iowa 301, 106 N. W. 741.

Kansas.— Richards *v.* Newstifter, 70 Kan. 350, 78 Pac. 824; Leu *v.* Mayer, 52 Kan. 419, 34 Pac. 969; Streeter *v.* Poor, 4 Kan. 412; St. Louis, etc., R. Co. *v.* Brown, 3 Kan. App. 260, 45 Pac. 118.

Maine.— Eaton *v.* Granite State Provident Assoc., 89 Me. 58, 35 Atl. 1015.

Michigan.— Davis *v.* Kneale, 97 Mich. 72, 56 N. W. 220; North *v.* Metz, 57 Mich. 612, 24 N. W. 759, acts expressly repudiated.

Minnesota.— Fowlds *v.* Evans, 52 Minn. 551, 54 N. W. 743; Walsh *v.* St. Paul Trust Co., 39 Minn. 23, 38 N. W. 631; Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130; Sencerbox *v.* McGrade, 6 Minn. 484.

Mississippi.— Therrell *v.* Ellis, 83 Miss. 494, 35 So. 826.

Missouri.—McGraw *v.* O'Neil, 123 Mo. App. 691, 101 S. W. 132; Lowry *v.* Farmington Prospecting, etc., Co., 65 Mo. App. 266; Alt *v.* Grosclose, 61 Mo. App. 409.

Nebraska.— Blanke Tea, etc., Co. *v.* Rees Printing Co., 70 Nebr. 510, 97 N. W. 627.

New York.— Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827, which holds that where a principal does nothing himself to lead others to believe that the agent has authority to act outside of his agency, his rights are not affected by acts of the agent which misled third persons as to his relations.

North Dakota.—Q. W. Loverin-Browne Co. *v.* Buffalo Bank, 7 N. D. 569, 75 N. W. 923.

Oregon.— Sloan *v.* Sloan, 46 Oreg. 36, 78 Pac. 893.

Pennsylvania.— Whiting *v.* Lake, 91 Pa. St. 349; Kaufman *v.* National Transit Co., 2 Mona. 36; Slease *v.* Naysmith, 14 Pa. Super. Ct. 134.

South Carolina.— Martin *v.* Suber, 39 S. C. 525, 18 S. E. 125.

Texas.— International, etc., R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; Cooper *v.* Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992.

Vermont.— Dickerman *v.* Quincy Mut. F. Ins. Co., 67 Vt. 609, 32 Atl. 489.

Virginia.— Poore *v.* Magruder, 24 Gratt. 197.

Washington.— Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

West Virginia.— Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222; Rosendorf *v.* Poling, 48 W. Va. 621, 37 S. E. 555.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 40, 416.

65. *Alabama.*— Lytle *v.* Dothan Bank, 121 Ala. 215, 26 So. 6; Hill *v.* Helton, 80 Ala.

(b) For Another Principal. Acts done by one as the agent of another principal are not admissible to prove agency in the particular case, in the absence of other evidence tending to establish such agency.[66]

(3) Recognition of Similar Transactions — (a) In General. Among the several ways of showing the existence and scope of an agency, circumstances tending to show the exercise of authority on the part of the agent, and its recognition by the principal, are admissible, although they may have no direct connection with the issues tried.[67] But in order to be relevant, the alleged principal

528, 1 So. 340; Reynolds *v.* Collins, 78 Ala. 94; Gimon *v.* Terrell, 38 Ala. 208; McDonnell *v.* Branch Bank, 20 Ala. 313.

Arkansas.— Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54.

Illinois.— Doan *v.* Duncan, 17 Ill. 272.

Indiana.— Indiana, etc., R. Co. *v.* Adamson, 114 Ind. 282, 15 N. E. 5.

Kansas.— Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445.

Massachusetts.— Bragg *v.* Boston, etc., R. Corp., 9 Allen 54.

Minnesota.—Best *v.* Krey, 83 Minn. 32, 85 N. W. 822; Fowlds *v.* Evans, 52 Minn. 551, 54 N. W. 743.

New Hampshire.— Kent *v.* Tyson, 20 N. H. 121.

Pennsylvania.— Woodwell *v.* Brown, 44 Pa. St. 121; Bellman *v.* Pittsburgh, etc., R. Co., 31 Pa. Super. Ct. 389; *In re* Embree, 18 Lanc. L. Rev. 57.

South Carolina.— Welch *v.* Clifton Mfg. Co., 55 S. C. 568, 33 S. E. 739.

Texas.— International Harvester Co. *v.* Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93.

Vermont.—Daggett *v.* Champlain Mfg. Co., 71 Vt. 370, 45 Atl. 755.

Virginia.— Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291.

United States.— White *v.* German Alliance Ins. Co., 103 Fed. 260, 43 C. C. A. 216.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 40, 416.

66. Hill *v.* Helton, 80 Ala. 528, 1 So. 340; Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951.

67. *Alabama.*— Lytle *v.* Dothan Bank, 121 Ala. 215, 26 So. 6; Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1, 13 So. 283; Gibson *v.* J. Snow Hardware Co., 94 Ala. 346, 10 So. 304.

Illinois.—Marsh *v.* French, 82 Ill. App. 76; McGillis *v.* Anderson, 44 Ill. App. 601; Stastney *v.* Marschall, 37 Ill. App. 137.

Indiana.— Jewett *v.* Lawrenceburgh, etc., R. Co., 10 Ind. 539; Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927.

Iowa.— Fishbaugh *v.* Spunaugle, 118 Iowa 337, 92 N. W. 58.

Kansas.— Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445.

Maine.— Forsyth *v.* Day, 46 Me. 176.

Massachusetts.— Williams *v.* Mitchell, 17 Mass. 98; Odiorne *v.* Maxcy, 15 Mass. 39.

Michigan.— Haughton *v.* Maurer, 55 Mich. 323, 21 N. W. 426; McDonough *v.* Heyman, 38 Mich. 334. But see Wierman *v.* Bay City-Michigan Sugar Co., 142 Mich. 422, 106 N. W. 75; Davis *v.* Kneale, 97 Mich. 72, 56 N. W. 220.

Nebraska.— Wilber First Nat. Bank *v.* Ridpath, 47 Nebr. 96, 66 N. W. 37.

New York.— Beattie *v.* Delaware, etc., R. Co., 90 N. Y. 643; American Encaustic Tiling Co. *v.* Reich, 12 N. Y. Suppl. 927, 11 N. Y. Suppl. 776.

Pennsylvania.— Stevenson *v.* Hoy, 43 Pa. St. 191.

South Carolina.— Thomson *v.* Dillinger, (1892) 14 S. E. 776.

Texas.— International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515; Pecos River R. Co. *v.* Latham, 40 Tex. Civ. App. 78, 88 S. W. 392; Clarkson *v.* Reinhartz, (Civ. App. 1902) 70 S. W. 111; People's Bldg., etc., Assoc. *v.* Keller, 20 Tex. Civ. App. 616, 50 S. W. 183; Mills *v.* Berla, (Civ. App. 1893) 23 S. W. 910; Texas Land, etc., Co. *v.* Watson, 3 Tex. Civ. App. 233, 22 S. W. 873.

Vermont.— Walsh *v.* Pierce, 12 Vt. 130.

Washington.— Lough *v.* Davis, 35 Wash. 449, 77 Pac. 732; H. C. Mahrt Co. *v.* Hyman-Hall Co., 17 Wash. 415, 49 Pac. 1063.

Wisconsin.— Gallinger *v.* Lake Shore Traffic Co., 67 Wis. 529, 30 N. W. 790.

United States.— Kent *v.* Addicks, 126 Fed. 112, 60 C. C. A. 660.

England.— Campbell *v.* Hicks, 28 L. J. Exch. 70.

Canada.— O'Brien *v.* Credit Valley R. Co., 25 U. C. C. P. 275.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 38, 309, 410.

Materiality of such evidence.— Where the authority of an agent is in issue, proof of the exercise by him, with the knowledge of the principal, of similar authority in past transactions, may be material in two respects: In the first place, where notice is brought home to the person with whom a contract is made, such evidence tends to show that the agent was acting within the scope of his apparent authority, and so tends to bind the principal, even though actual authority in the particular instance be disproved. In the second place, the exercise of such authority in past transactions, known to the principal, tends to prove that in the particular transaction in question the agent possessed actual authority, there being no special instructions; because, where an agent, under certain circumstances, had been permitted to exercise a certain authority, the principal knowing the facts, and a similar transaction is intrusted to him under the same circumstances as before, and without special instructions, the presumption is, his author-

must, in some way, directly or indirectly, be connected with the circumstances,[68] and it must be shown that the person dealing with the agent had knowledge at the time of such dealing of such previous acts and relied upon them.[69]

(b) Necessity of Similarity of Acts. But the acts from which authority to do a specific act can be implied must be of the same general character and effect.[70] The fact that the principal had allowed one to act as agent in matters of one kind, or at one place, ordinarily raises no presumption of authority to act in matters of a different kind, or at a different place, and accordingly is inadmissible for that purpose.[71]

(4) Course of Dealing. As proof of agency a previous course of dealing, sanctioned or ratified by the principal, is competent, as having a tendency to prove agency in the given case, although the jury must determine its weight for such purpose.[72]

(5) Special Authority For Single Act. A special authority to make a particular, or single, contract is no ground for inferring an implied authority to make other contracts generally of the same kind with other persons, and evidence thereof is not admissible.[73]

(6) Authority of Similar Agents. Evidence that a previous agent in the same position had a certain authority is admissible as tending to prove that the agent in question had the same authority.[74]

ity is the same. Wilber First Nat. Bank *v.* Ridpath, 47 Nebr. 96, 66 N. W. 37.

Evidence of previous but not of subsequent similar acts is admissible. Mills *v.* Berla, (Tex. Civ. App. 1893) 23 S. W. 910. But see Blowers *v.* Southern R. Co., 74 S. C. 221, 54 S. E. 368.

Evidence that an agent did all the principal's business is competent to show agency in a certain transaction, if the period to which such testimony related covered the time of the transaction. Dows *v.* Greene, 32 Barb. (N. Y.) 490 [*affirmed* in 24 N. Y. 638]; Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

Effect of inquiry by third person.— Prior circumstances are not admissible to prove an agency when it appears that the third person made inquiry of the principal as to the authority. The principal's answer destroys the effect of previous circumstances and they are then admissible only to explain the import of his answer. Norton *v.* Richmond, 93 Ill. 367.

68. Hill *v.* Helton, 80 Ala. 528, 1 So. 340; Morse *v.* Diebold, 2 Mo. App. 163; Howard *v.* Norton, 65 Barb. (N. Y.) 161.

69. Pease *v.* Fink, 3 Cal. App. 371, 85 Pac. 657; Peter Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184. *Contra*, Sharp *v.* Knox, 48 Mo. App. 169.

70. See *supra*, I, D, 1, c, (II), (C).

71. *Alabama.*— Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1, 13 So. 283.

Colorado.— Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951.

Iowa.— Keegan *v.* Rock, 128 Iowa 39, 102 N. W. 805.

Maryland.— Lee *v.* Tinges, 7 Md. 215.

Missouri.— Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Watson *v.* Race, 46 Mo. App. 546.

New Jersey.— Scull *v.* Skillton, 70 N. J. L. 792, 59 Atl. 457.

New York.—Duryea *v.* Vosburgh, 121 N. Y. 57, 24 N. E. 308 [*reversing* 1 N. Y. Suppl. 833].

Pennsylvania.— Meredith *v.* Macoss, 1 Yeates 200.

72. *Colorado.*— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565.

Connecticut.— National Shoe, etc., Bank's Appeal, 55 Conn. 469, 12 Atl. 646.

Illinois.— Doan *v.* Duncan, 17 Ill. 272.

Iowa.— McCormick Harvesting Mach. Co. *v.* Lambert, 120 Iowa 181, 94 N. W. 497.

Kentucky.— Continental Tobacco Co. *v.* Campbell, 76 S. W. 125, 25 Ky. L. Rep. 569.

Maine.— Forsyth *v.* Day, 46 Me. 176; Cobb *v.* Lunt, 4 Me. 503.

Massachusetts.— Bucknam *v.* Chaplin, 1 Allen 70.

Minnesota.—Dexter *v.* Berge, 76 Minn. 216, 78 N. W. 1111.

Missouri.—Brooks *v.* Jameson, 55 Mo. 505; Franklin *v.* Globe Mut. L. Ins. Co., 52 Mo. 461.

Nebraska.— Standley *v.* Clay, 68 Nebr. 332, 94 N. W. 140.

South Carolina.— Blowers *v.* Southern R. Co., 74 S. C. 221, 54 S. E. 368; Welch *v.* Clifton Mfg. Co., 55 S. C. 568, 33 S. E. 739.

Texas.— Brennan *v.* Dansby, 43 Tex. Civ. App. 7, 95 S. W. 700; Missouri Pac. R. Co. *v.* Simons, 6 Tex. Civ. App. 621, 25 S. W. 996.

Vermont.— Walsh *v.* Pierce, 12 Vt. 130.

West Virginia.— Fielder *v.* Camp Constr. Co., (1908) 60 S. E. 402.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 38, 409, 410.

73. Stanley *v.* Sheffield Land, etc., Co., 83 Ala. 260, 4 So. 34.

An isolated transaction, occurring a year subsequent to the one in controversy, unaccompanied by evidence of similar acts in the meantime, is too remote, and should be excluded. Bartley *v.* Rhodes, (Tex. Civ. App. 1895) 33 S. W. 604.

74. Texas, etc., R. Co. *v.* Reed, 88 Tex. 439,

(7) Custom of Agent in Transacting Business.[75] Evidence is admissible to show that one dealt with an agent in the customary way;[76] but when an action is brought under claim of authority in an agent to do a specific act, evidence of the general custom of the agent is immaterial and should be excluded.[77]

(8) Character of Business. Where an agent is given authority to perform every act requisite to be done in the transaction of the principal's business, evidence of the character of such business is admissible in order to determine the scope of the agency.[78]

(9) General Reputation. Agency cannot be established by general reputation.[79]

(10) Opinion of Witnesses. Testimony that one acted as agent for another is a conclusion of law, and a witness is not competent to express an opinion on that subject.[80] But when it is sought to prove that no authority was given, the objection that facts and not conclusions must be testified to does not apply.[81]

(11) *To Prove Ratification.* The acts and declarations of the principal tending to prove ratification of an agent's acts are admissible for that purpose,[82] but evidence of ratification of previous acts of an agent in no way connected with the act in question is not competent.[83]

b. In Particular Actions — (1) *Actions For Accounting.* In an action by a principal against his agent for an accounting any competent evidence tending to show the receipt of money by the agent and failure to account therefor is admissible.[84] The agent is entitled to the benefit of his own testimony as to the completeness of the accounting, and may be asked whether he has accounted for all moneys collected by him for plaintiff.[85] His books, if the entries are made in the usual course of business, are admissible against the principal;[86] but unless such books purport to contain all the charges and payments to and for his principal, he will not be restricted from proving them in any other way.[87] By way of set-off, the agent may introduce in evidence receipts from persons to whom he has paid money on account of his principal.[88] Immaterial and irrelevant testimony is of

31 S. W. 1058; White *v.* San Antonio Waterworks Co., 9 Tex. Civ. App. 465, 29 S. W. 252.

75. Customs and usages as establishing authority of agent see Customs and Usages, 12 Cyc. 1071 *et seq.*

76. Clarkson *v.* Reinhartz, (Tex. Civ. App. 1902) 70 S. W. 111.

77. Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412.

78. Brantley *v.* Southern L. Ins. Co., 53 Ala. 554.

79. See Evidence, 16 Cyc. 1213 note 79.

80. See Evidence, 17 Cyc. 220 note 96.

81. Jos. Schlitz Brewing Co. *v.* Grimmon, 28 Nev. 235, 81 Pac. 43, which holds that, although the word "authority" is too much in the nature of conclusion to use in a question to a witness as to whether an alleged agent had been authorized, empowered, or instructed to do certain things, he may at least testify that there was no instruction or nothing said or written in regard to the matter by the alleged principal to the alleged agent.

82. *Alabama.*— Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221.

Illinois.— Erie, etc., Despatch *v.* Cecil, 112 Ill. 180.

Iowa.— A. A. Cooper Wagon, etc., Co. *v.* Barnt, 123 Iowa 32, 98 N. W. 356.

Kentucky.— Bates *v.* Best, 13 B. Mon. 215.

Maine.— Forsyth *v.* Day, 41 Me. 382.

Massachusetts.—Pratt *v.* Putnam, 13 Mass. 361.

Michigan.— Dousman *v.* Peters, 85 Mich. 488, 48 N. W. 697; Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490.

Pennsylvania.— Duncan *v.* Hartman, 143 Pa. St. 595, 22 Atl. 1099, 24 Am. St. Rep. 570, 149 Pa. St. 114, 24 Atl. 190.

Texas.— Grande *v.* Chaves, 15 Tex. 550; Central Texas Grocery Co. *v.* Globe Tobacco Co., (Civ. App. 1907) 99 S. W. 1144; Harmon *v.* Leberman, 39 Tex. Civ. App. 251, 87 S. W. 203; Kirkpatrick *v.* Tarlton, 29 Tex. Civ. App. 276, 69 S. W. 179; McCullock County Land, etc., Co. *v.* Whitefort, 21 Tex. Civ. App. 314, 50 S. W. 1042.

England.— Benham *v.* Batty, 12 L. T. Rep. N. S. 266, 13 Wkly. Rep. 636.

Evidence of acquiescence is admissible to show ratification. Hall *v.* Vanness, 49 Pa. St. 457.

Declarations of principal are admissible to negative express ratification.—Burns *v.* Campbell, 71 Ala. 271; Reid *v.* Alaska Packing Assoc., 43 Oreg. 429, 73 Pac. 337.

83. Forsyth *v.* Day, 41 Me. 382.

84. Helm *v.* Jones, 3 Dana (Ky.) 86, deeds showing the sale and conveyance of several tracts of land.

85. France *v.* McElhone, 1 Lans. (N. Y.) 7.

86. Lever *v.* Lever, 2 Hill Eq. (S. C.) 158.

87. Lever *v.* Lever, 2 Hill Eq. (S. C.) 158.

88. Given *v.* Gould, 39 Me. 410.

course inadmissible in an action for an accounting the same as in other actions.[89]

(II) *Actions For Negligence or Wrongful Acts of Agent.* In an action by a principal against his agent for negligence or misconduct, all the facts and circumstances surrounding the transaction are admissible.[90] Evidence of what another agent would have done under the circumstances is inadmissible on the issue whether an agent was negligent.[91] Nor can the bad reputation of a person whom the agent trusted be shown for this purpose.[92] Where the cause of action is for misconduct, evidence tending only to show negligence is inadmissible.[93]

(III) *Actions For Compensation* — (A) *Employment and Performance.* In an action by an agent for his commissions, evidence is admissible to show employment, or non-employment,[94] and also the nature and extent,[95] object,[96] and conditions [97] of such employment. Furthermore evidence of what the agent had done under the employment is admissible.[98]

(B) *Value of Services.* In an action on an express contract for commissions,

89. Holt *v.* Tennent-Stribbling Shoe Co., 69 Ill. App. 332; Kaffer *v.* Walters, 9 Kan. App. 291, 61 Pac. 323 (holding that in an action for the alleged failure of an employee to account for goods sold and profits arising from the sale of goods, it is incompetent for one to testify to the usual profits arising from the sale of similar goods in another store in another city); Beasley *v.* Downey, 32 N. C. 284 (where it was sought to charge one as agent after a certain period, and the agent offered to prove that prior to that period another person had acted as agent, such evidence was held to be irrelevant).

90. Barbar *v.* Martin, 67 Nebr. 445, 93 N. W. 722; Norwood *v.* Alamo F. Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717.

Custom of trade.— Where an agent is permitted to testify to a custom of the trade to sell on credit, the principal may show, in rebuttal, sales for cash to be the custom, and sales on credit the exception. Tyler *v.* O'Reilly, 13 N. Y. Suppl. 201.

The intent with which an agent commits a breach of trust is immaterial, but where he is permitted to testify that he did not intend to defraud his principal, evidence of other breaches of trust, which the court limited strictly to the question of intent, is harmless. Boykin *v.* Maddrey, 114 N. C. 89, 19 S. E. 106.

91. Norwood *v.* Alamo F. Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717.

92. Rand *v.* Johns, (Tex. App. 1891) 15 S. W. 200.

93. Crane Co. *v.* Columbus State Bank, 3 Nebr. (Unoff.) 339, 91 N. W. 532.

94. Miller *v.* Irish, 63 N. Y. 652 [*affirming* 67 Barb. 256].

Declarations of an agent to prove his own agency are not admissible. Ehrenworth *v.* Putnam, (Tex. Civ. App. 1900) 55 S. W. 190.

Evidence that the agent was acting for the other party alone is admissible on behalf of the principal to show that such agent was not in his employ. Morehouse *v.* Remson, 59 Conn. 392, 22 Atl. 427; Miller *v.* Irish, 63 N. Y. 652 [*affirming* 67 Barb. 256]. So it is competent for the principal to show that the agent was acting for both parties. Lemon *v.* Little, (S. D. 1908) 114 N. W. 1001. But where the agent's undertaking is performed, and his commission earned, by the production of a purchaser, evidence of his subsequent conduct in the matter is inadmissible. Miller *v.* Irish, *supra*.

95. Sullivan *v.* Crave, 193 Mass. 435, 79 N. E. 792.

Upon the question whether the agency is general, the agent having the exclusive right to make sales of the principal's wares within certain territory, so as to entitle him to compensation for sales within the territory made by himself or the principal, or a limited agency, the agent to make such sales as he could, and receive pay for such as he made, where the direct evidence is conflicting, the acts of the agent known to and acted on by the principal may be shown. Turnbull *v.* Northwestern Terra Cotta Co., 46 Minn. 513, 49 N. W. 229.

Evidence of a previous general employment for a particular purpose is admissible on the question of the employment in a particular instance. Phillips *v.* Roberts, 90 Ill. 492.

96. Huntoon *v.* Lloyd, 8 Mont. 283, 20 Pac. 693.

97. Wolfson *v.* Allen Bros. Co., 120 Iowa 455, 94 N. W. 910; Coughlin *v.* Randall, 153 Mass. 549, 27 N. E. 767; O'Sullivan *v.* Roberts, 42 N. Y. Super. Ct. 282.

98. Boland *v.* Kistle, 92 Iowa 369, 60 N. W. 632; Welsh *v.* Lemert, 92 Iowa 116, 60 N. W. 230.

Methods employed by agent.— In an action by an agent against his principal for breach of a contract by which the agent agreed to use his "best reasonable endeavors to introduce and sell" the principal's medicines throughout the country, the latter may show that the methods employed by the agent were not the best. Perry *v.* Jensen, 142 Pa. St. 125, 21 Atl. 866, 12 L. R. A. 393.

Evidence that a principal had other agents in plaintiff's territory is inadmissible to show non-performance by plaintiff. De Loach Mills Mfg. Co. *v.* Middlebrooks, 95 Ala. 459, 10 So. 917.

evidence of the reasonableness thereof is inadmissible.[99] Where the rate of compensation has not been fixed, evidence of the customary commissions for such services as were rendered is admissible,[1] and whether or not the agent employed was a regular broker does not affect the competency of such evidence.[2] So where the evidence is conflicting as to what commissions the agent was to receive, it is competent to show the compensation allowed by other parties to their agents engaged in the same business.[3]

(c) *Time of Payment.* Where the contract sued on does not provide as to the time when the amount claimed shall be payable, evidence as to the time usually fixed for the payment of similar commissions is admissible.[4]

3. Weight and Sufficiency. The weight and sufficiency of the evidence in actions arising out of the relation of principal and agent is governed by the rules applicable to the weight and sufficiency of evidence in civil actions in general.[5] A preponderance of evidence is sufficient to establish matters in issue,[6] and the facts need not be established with such definite certainty as to leave no reasonable doubt in the minds of the jury. Thus a preponderance of evidence is sufficient to establish the existence of the agency.[7] Likewise the nature and extent of the

99. McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74.

1. Elting *v.* Sturtevant, 41 Conn. 176; Hollis *v.* Weston, 156 Mass. 357, 31 N. E. 483; Levitt *v.* Miller, 64 Mo. App. 147; Ruckman *v.* Bergholz, 38 N. J. L. 531.

2. Hollis *v.* Weston, 156 Mass. 357, 31 N. E. 483; Levitt *v.* Miller, 64 Mo. App. 147.

3. Glenn *v.* Salter, 50 Ga. 170; Rubino *v.* Scott, 118 N. Y. 662, 22 N. E. 1103; Kelly *v.* Phelps, 57 Wis. 425, 15 N. W. 385.

4. Standard Plunger Elevator Co. *v.* Brumley, 149 Fed. 184, 79 C. C. A. 132.

5. See Evidence, 17 Cyc. 753 *et seq.*

6. *Arkansas.*— Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334, 21 S. W. 652.

Iowa.— Harper *v.* Buder, 88 Iowa 701, 54 N. W. 203; Klemme *v.* McLay, 68 Iowa 158, 26 N. W. 53.

Louisiana.— Gardes *v.* Schroeder, 17 La. Ann. 142.

New Hampshire.— Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

New York.— David *v.* Rick, 57 N. Y. App. Div. 623, 67 N. Y. Suppl. 1052.

Oregon.— Barbre *v.* Goodale, 28 Oreg. 465, 38 Pac. 67, 43 Pac. 378.

South Carolina.— Caughman *v.* Smith, 28 S. C. 605, 5 S. E. 362.

See 40 Cent. Dig. tit. "Principal and Agent," § 720.

Agency to pay the debts of a principal with the resources of the agent must be clear and convincing, and such an undertaking cannot be established on doubtful and conflicting evidence. Angle *v.* Manchester, 3 Nebr. (Unoff.) 252, 91 N. W. 501.

Sufficiency of evidence to establish agent's right to compensation.— For cases in which the evidence was held sufficient see Farmer *v.* Phelps, 18 Colo. 126, 31 Pac. 768; Albin Co. *v.* Kuttner, 77 S. W. 181, 25 Ky. L. Rep. 1100; Bornstein *v.* Lans, 104 Mass. 214; Tompkins *v.* Hitchcock, 69 Mich. 123, 41 N. W. 822; Ashworth *v.* Frost, 43 Minn. 259, 45 N. W. 431; Bacon *v.* Rupert, 39 Minn. 512, 40 N. W. 832; Wasmer *v.* Lean, 32 Nebr. 519, 49 N. W. 463; Flack *v.* Condict, 66 N. J. L. 351, 49 Atl. 508; Yates *v.* Appleton, 61 Hun (N. Y.) 228, 16 N. Y. Suppl. 4; Mahony *v.* Ungrich, 59 N. Y. Super. Ct. 377, 14 N. Y. Suppl. 375 [*affirmed* in 129 N. Y. 632, 29 N. E. 1030]; Sharpless *v.* Warren, (Tenn. Ch. App. 1899) 58 S. W. 407; Steinbach *v.* Montpelier Carriage Co., 37 Fed. 760. In the following cases the evidence was held insufficient: La Crosse Gold Min. Co. *v.* Scudder, 4 Colo. 44; Acme Harvester Co. *v.* Madden, 4 Kan. App. 598, 46 Pac. 319; Pepper *v.* Pepper, 74 S. W. 739, 25 Ky. L. Rep. 155; Mears *v.* Adreon, 31 Md. 229; Kennerly *v.* Sommerville, 64 Mo. App. 75; Gale *v.* Roll, 75 Hun (N. Y.) 14, 26 N. Y. Suppl. 1095.

Sufficiency of evidence to establish principal's rights to accounting.— For evidence held sufficient see St. Louis, etc., Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Charlesworth *v.* Whitlow, 74 Ark. 277, 85 S. W. 423; Farmers' Warehouse Assoc. *v.* Montgomery, 92 Minn. 194, 99 N. W. 776; Rose *v.* Durant, 86 N. Y. App. Div. 623, 83 N. Y. Suppl. 503. In the following cases the evidence was held insufficient: Pratt *v.* Grimes, 48 Ill. 376; Hubbard *v.* Cook, 153 Fed. 554, 82 C. C. A. 508; Peeler *v.* Lathrop, 48 Fed. 780, 1 C. C. A. 93.

7. *Alabama.*— Lytle *v.* Dothan Bank, 121 Ala. 215, 26 So. 6; Rovelsky *v.* Scheuer, 114 Ala. 419, 21 So. 785.

Arkansas.—St. Louis, etc., R. Co. *v.* Hoover, 53 Ark. 377, 13 S. W. 1092.

California.— Durfee *v.* Seale, 139 Cal. 603, 73 Pac. 435; Union Paving, etc., Co. *v.* Mowry, (1902) 70 Pac. 81.

Colorado.— Witcher *v.* Gibson, 15 Colo. App. 163, 61 Pac. 192; Gambrill *v.* Brown Hotel Co., 11 Colo. App. 529, 54 Pac. 1025.

Connecticut.— C. & C. Electric Motor Co. *v.* Frisbie, 66 Conn. 67, 33 Atl. 604.

Delaware.— Geylin *v.* De Villeroi, 2 Houst. 311.

Florida.— International Harvester Co. *v.* Smith, 51 Fla. 220, 40 So. 840.

Georgia.—Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787.

authority of the agent may be established by a preponderance of the evidence in all

Illinois.— Proudfoot *v.* Wightman, 78 Ill. 553; Hawley *v.* Curry, 74 Ill. App. 309.

Indiana.— Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

Iowa.— McCormick Harvester Mach. Co. *v.* Lambert, 120 Iowa 181, 94 N. W. 497; Townsend *v.* Studer, 109 Iowa 103, 80 N. W. 210; Pray *v.* Farmer's Incorporated Co-operative Creamery, 89 Iowa 741, 56 N. W. 443.

Kansas.— Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445; Gregg *v.* Berkshire, (App. 1900) 62 Pac. 550.

Kentucky.— Talbot *v.* Sebree, 1 Dana 56; Columbia Land, etc., Co. *v.* Tinsley, 60 S. W. 10, 22 Ky. L. Rep. 1082.

Louisiana.— Mather *v.* Harrison, 10 La. Ann. 793.

Maryland.— Darrin *v.* Whittingham, (1907) 68 Atl. 269.

Massachusetts.—Allen *v.* Fuller, 182 Mass. 202, 65 N. E. 31; Carberry *v.* Farnsworth, 177 Mass. 398, 59 N. E. 61; Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Odiorne *v.* Maxcy, 15 Mass. 39.

Michigan.— Dodge *v.* Tullock, 110 Mich. 480, 68 N. W. 239; Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570; Wilson *v.* La Tour, 108 Mich. 547, 66 N. W. 474; Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912.

Minnesota.— Payne *v.* Hackney, 84 Minn. 195, 87 N. W. 608; Neibles *v.* Minneapolis, etc., R. Co., 37 Minn. 151, 33 N. W. 332.

Missouri.— Weber *v.* Collins, 139 Mo. 501, 41 S. W. 249; Crosno *v.* Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275.

New York.— Dodge *v.* Weill, 158 N. Y. 346, 53 N. E. 33 [*affirming* 8 N. Y. App. Div. 621, 40 N. Y. Suppl. 1141]; Warburton *v.* Camp, 112 N. Y. 683, 20 N. E. 592; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17; Krasnow *v.* Singer Mfg. Co., 115 N. Y. App. Div. 59, 100 N. Y. Suppl. 591; Norden *v.* Duke, 113 N. Y. App. Div. 99, 99 N. Y. Suppl. 30; Allen *v.* Henry, 81 Hun, 241, 30 N. Y. Suppl. 773; Dows *v.* Greene, 16 Barb. 72 [*affirmed* in 24 N. Y. 638]; Davis *v.* Valley Electric Light Co., 61 N. Y. Suppl. 580.

North Carolina.— Brittain *v.* Westhall, 135 N. C. 492, 47 S. E. 616.

Pennsylvania.— Bay State Shoe Co. *v.* Leeser, 196 Pa. St. 76, 46 Atl. 259; Hayes' Appeal, 195 Pa. St. 177, 45 Atl. 1007.

Texas.— Osborne *v.* Gatewood, (Civ. App. 1903) 74 S. W. 72; Reddell *v.* J. B. Watkins Land Mortg. Co., (Civ. App. 1896) 37 S. W. 608.

Washington.— Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

United States.— Townsend *v.* Chappell, 12 Wall. 681, 20 L. ed. 436.

Canada.— Passmore *v.* Nicolls, 1 Grant Ch. (U. C.) 130.

See 40 Cent. Dig. tit. Principal and Agent," § 720.

Evidence held sufficient to establish agency see Fairbanks *v.* Cawthorn, 93 Ala. 287, 9 So. 282; Montgomery Brewing Co. *v.* Caffee, 93 Ala. 132, 9 So. 573; St. Louis, etc., R. Co. *v.* Bennett, 53 Ark. 208, 13 S. W. 742, 22 Am. St. Rep. 187; Callaway *v.* Wilson, 141 Cal. 421, 74 Pac. 1035; Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911; Brady *v.* Ranch Min. Co., (Cal. App. 1908) 94 Pac. 85; Arthur *v.* Card, 3 Colo. App. 133, 32 Pac. 343; Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37; Iowa Loan, etc., Co. *v.* McMurray, 129 Iowa 65, 105 N. W. 361; Frankel *v.* Hites, 112 Iowa 631, 84 N. W. 706; Lindt *v.* Uihlein, 109 Iowa 591, 79 N. W. 73; Hillebrant *v.* Green, 93 Iowa 661, 62 N. W. 32; Hopwood *v.* Corbin, 63 Iowa 218, 18 N. W. 911; Hogg *v.* Jackson, etc., Co., (Md. 1893) 26 Atl. 869; Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Barnes *v.* Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; Ayer *v.* R. W. Bell Mfg. Co., 147 Mass. 46, 16 N. E. 754; Ely *v.* James, 123 Mass. 36; Kelley *v.* Lindsey, 7 Gray 287; People *v.* Lappin, 129 Mich. 172, 88 N. W. 388; Leffel *v.* Piatt, 126 Mich. 443, 86 N. W. 65; Booth *v.* Majestic Mfg. Co., 105 Mich. 562, 63 N. W. 524; Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912; Beecher *v.* Venn, 35 Mich. 466; Winter *v.* Atlantic Elevator Co., 88 Minn. 196, 92 N. W. 955; Stewart *v.* Cowles, 67 Minn. 184, 69 N. W. 694; Planters' Compress, etc., Co. *v.* Ireys, (Miss. 1894) 16 So. 386; Montgomery *v.* Hundley, 205 Mo. 138, 103 S. W. 527, 11 L. R. A. N. S. 122; Padley *v.* Catterlin, 64 Mo. App. 629; Hoppe *v.* Saylor, 53 Mo. App. 4; Starr *v.* Gregory Consol. Min. Co., 6 Mont. 485, 13 Pac. 195; Howard *v.* Omaha Wholesale Grocery Co., 77 Nebr. 116, 108 N. W. 158; Pine *v.* Mangus, 76 Nebr. 83, 107 N. W. 222; Allsman *v.* Richmond, 55 Nebr. 540, 75 N. W. 1094; Creighton *v.* Finlayson, 46 Nebr. 457, 64 N. W. 1103; Gathercole *v.* Peck, 3 Nebr. (Unoff.) 226, 91 N. W. 513; Boyd *v.* Pape, 2 Nebr. (Unoff.) 859, 90 N. W. 646; Cheshire Provident Inst. *v.* Vandergrift, 1 Nebr. (Unoff.) 339, 95 N. W. 615; Smilie *v.* Hobbs, 64 N. H. 75, 5 Atl. 711; Grannis *v.* Hobby, 137 N. Y. 559, 33 N. E. 486 [*affirming* 17 N. Y. Suppl. 618]; Warburton *v.* Camp, 112 N. Y. 683, 20 N. E. 592; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17; Jacob *v.* Oyster Bay, 109 N. Y. App. Div. 630, 96 N. Y. Suppl. 626; Thomas Roberts Stevenson Co. *v.* Tucker, 14 Misc. (N. Y.) 297, 35 N. Y. Suppl. 682; Tebbetts *v.* Levy, 11 N. Y. Suppl. 684; Currie *v.* Swindall, 33 N. C. 361; Millar *v.* St. Louis State Sav. Assoc., 3 Wkly. Notes Cas. (Pa.) 480; Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290; Gulf, etc., R. Co. *v.* Jones, 82 Tex. 156, 17 S. W. 534; Harris *v.* Nations, 79 Tex. 409, 15 S. W. 262; Bowman *v.* Texas Brewing Co., 17 Tex. Civ. App. 446, 43 S. W. 808; Guyette *v.* Bolton, 46 Vt. 228; Seattle Brewing, etc., Co. *v.* Donofrio, 34 Wash. 18, 74 Pac. 823; Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121; Roche *v.* Pennington, 90 Wis. 107, 62 N. W. 946; Cameron *v.* White, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493; Barton *v.* McMillan, 20 Can. Sup. Ct. 404 [*affirming* 19 Ont. App. 602]; Kitchen *v.* Dolan, 9 Ont. 432; Ross *v.* Scott, 22 Grant

civil actions.[8] And a preponderance is sufficient to prove any other disputed fact.[9]

Ch. (U. C.) 29, 21 Grant Ch. 391; Rosenberger *v.* Thomas, 4 Grant Ch. (U. C.) 473; Green *v.* Lewis, 26 U. C. Q. B. 618; Thayer *v.* Street, 23 U. C. Q. B. 189.

Evidence held insufficient to establish agency see Manly *v.* Sperry, 115 Ala. 524, 22 So. 870; Kelley, etc., Milling Co. *v.* Adams, (Ark. 1903) 78 S. W. 49; Chicago Cottage Organ Co. *v.* Stone, (Ark. 1903) 73 S. W. 392; Tiger *v.* Lincoln, 1 Colo. 394; Schmidt *v.* Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250; Fadner *v.* Hibler, 26 Ill. App. 639; Hayes *v.* Burkam, 94 Ind. 311; Darr *v.* Darrow, 120 Iowa 29, 94 N. W. 245; Steele *v.* Watson, 86 Iowa 629, 53 N. W. 420; Holbrook *v.* Oberne, 56 Iowa 324, 9 N. W. 291; Maynard *v.* Weeks, 181 Mass. 368, 64 N. E. 78; Shaw *v.* Hall, 134 Mass. 103; Hornsky *v.* Hause, 35 Minn. 369, 29 N. W. 119; Leavenworth First Nat. Bank *v.* Wright, 104 Mo. App. 242, 78 S. W. 686; Carpenter *v.* Parker, 64 Mo. App. 60; Courtney *v.* Continental Land, etc., Co., 17 Mont. 394, 43 Pac. 185; Parker *v.* Leech, 76 Nebr. 135, 107 N. W. 217; Seeley *v.* Smith, 29 Nebr. 545, 45 N. W. 922; Stiefel *v.* New York Novelty Co., 25 Misc. (N. Y.) 321, 55 N. Y. Suppl. 90; Rowan *v.* Kemp, 103 N. Y. Suppl. 775; Tarpy *v.* Bernheimer, 16 N. Y. Suppl. 870; Page *v.* Boyd, 11 How. Pr. (N. Y.) 415; Parker *v.* Brown, 131 N. C. 264, 42 S. E. 605; Wootiers *v.* Kaufman, 73 Tex. 395, 11 S. W. 390; Garner *v.* A. Fisher Brewing Co., 6 Utah 332, 23 Pac. 755; Callahan *v.* Ætna Indemnity Co., 33 Wash. 583, 74 Pac. 693; *In re* Baxter, 152 Fed. 141, 81 C. C. A. 359; Anderson *v.* Cameron, 6 Grant Ch. (U. C.) 285; Hope *v.* Ferris, 30 U. C. C. P. 520; Wood *v.* Ontario, etc., R. Co., 24 U. C. C. P. 334; Macklem *v.* Thorne, 30 U. C. Q. B. 464.

Sufficiency of evidence to show termination of agency see Cripple Creek Tunnel, etc., Co. *v.* Marshall, 41 Colo. 126, 91 Pac. 1108.

8. McAtee *v.* Perrine, 48 Ill. App. 548; Russ *v.* Telfender, 57 Fed. 973.

Sufficiency of evidence to establish extent of authority.— The evidence in the following cases was held sufficient to prove that the agent's authority extended to the acts in question. Tate *v.* Aitken, 5 Cal. App. 505, 90 Pac. 836 (acts of wife as agent of husband with regard to sale of land); Fritz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193 (sale of realty); Hopwood *v.* Corbin, 63 Iowa 218, 18 N. W. 911 (binding principal by letters authorizing sale of land); Ryerson *v.* Tourcotte, 121 Mich. 78, 79 N. W. 933 (authority to sign orders for payment of money); Phillips *v.* Geiser Mfg. Co., 129 Mo. App. 396, 107 S. W. 471 (employment of subagents); Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17 (receipt of goods); Droste *v.* Metropolitan Hotel Supply Co., 69 N. Y. App. Div. 611, 74 N. Y. Suppl. 613 (purchase of personal property); W. W. Kimball Co. *v.* First Nat. Bank, 1 Tenn. Ch. App. 505; Osborne *v.* Gatewood, (Tex. Civ. App. 1903) 74 S. W. 72 (receipt of payment of judgment in form of principal); Bleser *v.* Stedl, (Wis. 1908) 115 N. W. 337 (receipt of payments on a mortgage to principal). Evidence in the following cases was held insufficient to prove that the agent's authority extended to the acts in question. Martin *v.* Johnson, 54 Fla. 487, 44 So. 949; Loy *v.* McClure, 124 Mo. App. 689, 101 S. W. 1148 (taking back consideration for a note in settlement of the note); *In re* James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 771 [*affirmed* in 78 Hun 121, 28 N. Y. Suppl. 992] (cashing of checks and deposit of proceeds); MacLatchy *v.* Hannan, 104 N. Y. App. Div. 70, 93 N. Y. Suppl. 282 (receipt of rejection of claim against an estate); Taylor *v.* Bowen, 52 N. Y. App. Div. 126, 65 N. Y. Suppl. 36 (transfer of insurance policy); J. B. Watkins Land Mortg. Co. *v.* Campbell, (Tex. 1907) 101 S. W. 1078 (contract for sale of land); Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567 (compromise and settlement of claim); Heath *v.* Paul, 81 Wis. 532, 51 N. W. 876 (loan of money); Gordon *v.* Leary, 17 Manitoba 383 (purchase of goods on credit).

Authority to employ subagent see Fritz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193; Bigham *v.* Chicago, etc., R. Co., 79 Iowa 534, 44 N. W. 805; Bissell *v.* Moore, 119 Mich. 222, 77 N. W. 931; Raike *v.* Manhattan Rubber Mfg. Co., 127 Mo. App. 480, 105 S. W. 1100; C. F. Blanke Tea, etc., Co. *v.* Graham, 5 Nebr. (Unoff.) 534, 99 N. W. 257.

9. Melvin *v.* Pennsylvania Steel Co., 180 Mass. 196, 62 N. E. 379; Perry *v.* Smith, 156 Mass. 340, 31 N. E. 9; Klages *v.* Gillette-Herzog Mfg. Co., 86 Minn. 458, 90 N. W. 1116.

Notice to agent see Travelers' Ins. Co. *v.* Thornton, 119 Ga. 455, 46 S. E. 678; Hoskins *v.* O'Brien, 132 Wis. 453, 112 N. W. 466.

Notice to principal.— Where defendant placed an agent in charge of a stock of goods under an agreement that, when its debt due from the agent was paid, it would transfer the goods to him, and the agent executed a note to plaintiffs in defendant's name, the testimony of defendant that he was never notified by plaintiffs of the note, and never had any intimation of it until long after the stock was taken from the agent and sold to other parties, supports a finding that defendant did not know at the time he took back the stock that the agent had borrowed any money from plaintiffs on defendant's responsibility. Weeks *v.* A. F. Shapeleigh Hardware Co., 23 Tex. Civ. App. 577, 57 S. W. 67.

Notice to third person see Hook *v.* Crowe, 100 Me. 399, 61 Atl. 1080; Warder-Bushnell, etc., Co. *v.* Rublec, 42 Minn. 23, 43 N. W. 569; Carpenter *v.* Parker, 64 Mo. App. 60; Meinhardt *v.* Newman, 71 Nebr. 532, 99 N. W. 261.

Ratification see Ladenberg *v.* Beal-Doyle Dry Goods Co., 83 Ark. 440, 104 S. W. 145;

It has been held that the disputed testimony of an alleged agent alone is insufficient to prove the agency.[10]

F. Trial — 1. In General. The course and conduct of trials in actions arising out of the relation of principal and agent are governed by the rules of trial applicable to civil actions in general.[11] Where the liability of the principal is sought to be established through the acts of an alleged authorized agent, the order of proof is in the discretion of the court, which may allow proof of the execution of the acts in question before proof of the authority.[12]

2. Province of Court and of Jury — a. General Rules. Questions of law in actions relating to principal and agent are, as in other civil actions, for the determination of the court and it is error to submit them to the jury.[13] Issues of fact

Tate *v.* Aitken, 5 Cal. App. 505, 90 Pac. 836; Blakely *v.* Cochran, 117 Mich. 394, 75 N. W. 940; Johnson *v.* Ogren, 102 Minn. 8, 112 N. W. 894; Finkelstein *v.* Fabyik, 107 N. Y. Suppl. 67; Schull *v.* New Birdsall Co., 17 S. D. 39, 95 N. W. 276; Hatton *v.* Stewart, 2 Lea (Tenn.) 233; Teagarden *v.* Patten, (Tex. Civ. App. 1908) 107 S. W. 909; Platt *v.* Schmitt, 117 Wis. 489, 94 N. W. 345.

Sufficiency of evidence to prove particular facts: Consignment for sale and not absolute sale. Ellerbee *v.* Cleveland, 93 Ala. 591, 9 So. 619; La Societe Anonyme de L'Union des Papeteries *v.* Markes, 21 N. Y. Suppl. 706. Counter-claim by agent against principal. New Orleans Coffee Co. *v.* Cady, 69 Nebr. 412, 95 N. W. 1017, counter-claims by the agent in action by principal to recover moneys due under agency. Credit extended to principal. Engel-Heller Co. *v.* Dineen, 46 Misc. (N. Y.) 111, 91 N. Y. Suppl. 336; Snyder *v.* Gibbons, 3 Phila. (Pa.) 126; Cannon *v.* Henry, 78 Wis. 167, 47 N. W. 186, 23 Am. St. Rep. 399. Credit extended to agent. Lowrey *v.* Scargill, (Indian Terr. 1907) 104 S. W. 813; McKeen *v.* Providence County Sav. Bank, 24 R. I. 542, 54 Atl. 49. Disclosure of agency. Steele-Smith Grocery Co. *v.* Potthast, 109 Iowa 413, 80 N. W. 517; Drew *v.* Caffall, 116 La. 990, 41 So. 233; Johnston *v.* Parrott, 92 Mo. App. 199; Forrest *v.* McCarthy, 30 Misc. (N. Y.) 125, 61 N. Y. Suppl. 853. Payment to agent by third person. Russ *v.* Hansen, 119 Iowa 375, 93 N. W. 502; J. A. Fay, etc., Co. *v.* Causey, 131 N. C. 350, 42 S. E. 827; Fabian Mfg. Co. *v.* Newman, (Tenn. Ch. App. 1900) 62 S. W. 218. Payment by agent of advance from principal. Orr *v.* Louisville Tobacco Warehouse Co., 99 S. W. 225, 30 Ky. L. Rep. 457. Sale by purchasing agent of his own property to principal. Montgomery *v.* Hundley, 205 Mo. 138, 103 S. W. 527, 11 L. R. A. N. S. 122. That agent acted in course of employment. St. Louis, etc., R. Co. *v.* Grant, 75 Ark. 579, 88 S. W. 580, 1133. That agent acted or contracted as agent. Curry *v.* King, 6 Cal. App. 568, 92 Pac. 662; Kruse *v.* Seiffert, etc., Lumber Co., 108 Iowa 352, 79 N. W. 118; Deering *v.* Thom, 29 Minn. 120, 12 N. W. 350; Goetz *v.* Flanders, 118 Mo. 342, 22 S. W. 945; Brolaski *v.* Aal, 55 Mo. App. 196; Jackson *v.* McNatt, 4 Nebr. (Unoff.) 55, 93 N. W. 425; Jones *v.* Gould, 123 N. Y. App. Div. 236, 108 N. Y. Suppl. 31; Falk *v.* Wolfsohn, 7 Misc. (N. Y.) 313, 27 N. Y. Suppl. 903; Morgan *v.* Wilson, 6 Kulp (Pa.) 358.

10. Dennis *v.* Young, 85 Ark. 252, 107 S. W. 994.

11. See Trial.

Where the basis of an agent's commissions is in issue, in an equitable action between him and the principal, and the facts of a fiduciary relation and an obligation to account and that a balance owing the agent are all admitted, a trial of the main issue should first be had before the court, and then, if an accounting is necessary, it may be provided for in the interlocutory decree. Prince Line *v.* John C. Seager Co., 118 N. Y. App. Div. 697, 103 N. Y. Suppl. 677.

12. Firtz *v.* Chicago Grain, etc., Co., 136 Iowa 699, 114 N. W. 193 (holding that where, in an action for broker's commissions, the main question is the authority of defendant's agent to employ plaintiff, plaintiff's testimony regarding the contract with the agent, and what was done thereunder, is admissible, although the authority of the agent to hire plaintiff has not yet been shown — the order of testimony being in the discretion of the court); Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66 (holding, however, that before a sealed instrument executed by an agent can be submitted to the jury, the authority of the agent must be shown); American Car, etc., Co., *v.* Alexandria Water Co., 218 Pa. St. 542, 67 Atl. 861 (holding that on an issue as to whether notes delivered to plaintiff's manager were taken in payment of plaintiff's claim, it was in the discretion of the court to permit proof of the execution and delivery of the notes and matters incidental thereto before proving the agency and scope of the authority of plaintiff's manager to receive them); Beal *v.* Adams Express Co., 13 Pa. Super Ct. 143. But see People *v.* Courson, 87 Ill. App. 254, holding that where the acts of an agent are relied upon to make a case, proof of his authority should be made before evidence of his acts is admissible.

13. Milwaukee Harvester Co. *v.* Tymich, 68 Ark. 225, 58 S. W. 252 (holding that in an action to recover from an agent for sales made in violation of a contract, where such violation was undisputed, it was not error to direct a verdict for the principal for any amount the jury might find due, since whether there was an undisputed liability was a question for the court in the construc-

are ordinarily for the determination of the jury under proper instructions from the court.[14] And where either party presents evidence which, although slight, would

tion of the contract); Coe *v.* Johnson, 6 Houst. (Del.) 9 (holding that what will constitute agency is a question of law for the court, and, if in its opinion the evidence is insufficient to establish it, it is in its power to instruct the jury to return a verdict for defendant); Asher *v.* Beckner, 41 S. W. 35, 19 Ky. L. Rep. 521 (holding that where defendant resists plaintiff's claim to compensation for services as agent on the ground that plaintiff subsequently accepted inconsistent employment, it is for the court to determine as matter of law what were the objects of the subsequent employment); Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366.

14. *Georgia.*— Cotton States L. Ins. Co. *v.* Mallard, 57 Ga. 64, question whether a subagent faithfully discharged his duties.

Illinois.— Williams *v.* Chicago Coal Co., 60 Ill. 149 (question whether plaintiff should should recover interest, in an action by a principal against an agent to recover money retained by the agent to recoup damages sustained by reason of having been discharged from his employment); Schneider *v.* Seely, 40 Ill. 257 (question whether goods were delivered to an agent in such a manner as to render the principal liable); Jones *v.* Consolidated Portrait, etc., Co., 100 Ill. App. 89 (question whether principal delayed an unreasonable time before disaffirming agent's acts).

Iowa.— Minnesota Linseed Oil Co. *v.* Montague, 65 Iowa 67, 21 N. W. 184, holding that what constitutes a reasonable time within which to examine and approve or disapprove the agent's account is ordinarily a question for the jury.

Michigan.— Haas *v.* Malto-Grapo Co., 148 Mich. 358, 111 N. W. 1059 (question whether goods shipped to a sales agent pursuant to a contract of agency were inferior and were overcharged for); Lorimer *v.* Boylan, 98 Mich. 18, 56 N. W. 1043 (question whether an agent sold within a reasonable time, his directions being to sell "right away").

Minnesota.— Dayton *v.* Buford, 18 Minn. 126, question of the nature, effect, and interpretation of correspondence between the owner of land and his agent in relation to the sale of the land.

Missouri.— St. Louis Gunning Advertising Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737, question whether advertising contracted for by agent was necessary.

New Hampshire.— Lamoreaux *v.* Rolfe, 36 N. H. 33, question whether an agreement was signed by an agent before or after the delivery of the power authorizing its execution.

New York.— Colgan *v.* Aymar, Lalor 27 (question whether agents for a principal who had become insane were personally liable for wages of employees whose employment they had directed); Cape Fear Bank *v.* Gomez, 6 Cow. 435 (question whether a note described in a power and those actually seized were the same).

Pennsylvania.— Perry *v.* Jensen, 142 Pa. St. 125, 21 Atl. 866, 12 L. R. A. 393, question whether an agent used "his best reasonable endeavors" as agreed.

South Carolina.— Robert Buist Co. *v.* Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789, question whether a salesman sold goods under an agreement that his principal should pay the freight.

See 40 Cent. Dig. tit. "Principal and Agent," § 721½.

Custom and usage of trade.— The existence and applicability of a custom or usage of trade is a question for the jury. Hickborn *v.* Bradley, 117 Iowa 130, 90 N. W. 592 (question of existence of a custom as to length of time during which a jobber should endeavor to introduce a brand of goods); Forrester *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43 (question whether the usage of trade allows an agent to sell on credit). Thus it is for the jury to determine the existence or non-existence of a custom that selling agents may warrant the quality of what they sell. Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4 (warranty of a safe); Hayner *v.* Churchill, 29 Mo. App. 676 (warranty of a reaper); Reese *v.* Bates, 94 Va. 321, 26 S. E. 865 (warranty of fertilizer); Westurn *v.* Page, 94 Wis. 251, 68 N. W. 1003 (warranty of a horse); Pickert *v.* Marston, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876 (warranty of foodstuffs). But it has been held that in some instances, such as the sale of a slave or a horse, power given to sell carries with it, as a matter of law, power to warrant soundness. Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Cocke *v.* Campbell, 13 Ala. 286; Skinner *v.* Gunn, 9 Port. (Ala.) 305. But see Westurn *v.* Page, 94 Wis. 251, 68 N. W. 1003. It has been suggested, as a reason for this distinction, that "perhaps the custom of such warranties is so general, and has prevailed so long, that it has come to be treated as judicial knowledge." Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4.

Negligence, diligence, and reasonable care are questions for the jury. Brown *v.* Clayton, 12 Ga. 564 (whether agent was guilty of negligence in not instituting a suit for the benefit of his principal); Munford *v.* Miller, 7 Ill. App. 63 (whether principal was guilty of contributory negligence in not discovering a mistake, which was patent upon the face of a mortgage procured in his favor by his agent, in which the land was wrongly described); Heinemann *v.* Heard, 50 N. Y. 27 (whether agent guilty of negligence in delaying to purchase goods ordered by principal); Darling *v.* Younker, 37 Ohio St. 487, 41 Am. Rep. 532 (negligence of collection agent in dealing with funds of principal); Milwaukee Nat. Bank *v.* City Bank, 103 U. S. 668, 26 L. ed. 417 (whether selling

justify the jury in finding in his favor, the question should be submitted to the jury and it is error to withdraw the case from them by nonsuit, direction of verdict, instructions, or by sustaining a demurrer to the evidence.[15] But if there is no evidence on an issue of fact,[16] or if the facts are not in dispute,[17] the question becomes one of law for the court.

b. Particular Questions — (i) *As to Existence of Agency.* When any evidence is adduced tending to prove the existence of a disputed agency its existence or non-existence is as a general rule a question of fact for the jury, aided by

agent used reasonable diligence in discharging his duties to his principal).

Right of agent to compensation; amount; procuring cause.— The right of an agent to compensation and the amount thereof are usually questions for the jury. Mattingly *v.* Roach, 84 Cal. 207, 23 Pac. 1117; Miles *v.* Mays, 15 Colo. 133, 25 Pac. 312 (whether agent personally liable to subagent for commisssion upon sale of land); Ferguson *v.* Glaspie, 38 Minn. 418, 38 N. W. 352 (whether agent had procured purchaser under such circumstances as to entitle him to commission); Ruckman *v.* Bergholz, 38 N. J. L. 531 (measure of compensation for selling land, no rate being fixed between principal and agent); Darling *v.* Howe, 14 N. Y. Suppl. 561 (whether services were gratuitous or rendered in expectation of compensation); Sherman *v.* Port Huron Engine, etc., Co., 8 S. D. 343, 66 N. W. 1077 (whether order obtained by agent was rejected for such cause as to deprive agent of right to commission); Coolican *v.* Milwaukee, etc., Imp. Co., 79 Wis. 471, 48 N. W. 717 (whether contract for commission on sales of real estate included both auction and private sales); Best *v.* Sinz, 73 Wis. 243, 41 N. W. 169 (holding that where the contract of employment was silent as to the compensation the agent should receive, he is entitled to a reasonable compensation, which is for the jury to fix, and, the jury having been told several times that they were to fix the amount, a hypothetical allusion by the court to ten per cent is not erroneous). So it is for the jury to determine whether an agent was the procuring cause of a sale or purchase so as to entitle him to a commission thereon. Huntington *v.* Wolcott, 5 Day (Conn.) 390; Kelso *v.* Woodruff, 88 Mich. 299, 50 N. W. 249; Merton *v.* J. I. Case Threshing Mach. Co., 99 Mo. App. 630, 74 S. W. 434; Ransom *v.* Wheelwright, 17 Misc. (N. Y.) 141, 39 N. Y. Suppl. 342; Brodhead *v.* Pullman Ventilator Co., 29 Pa. Super. Ct. 19; Coolican *v.* Milwaukee, etc., Imp. Co., 79 Wis. 471, 48 N. W. 717; Bayley *v.* Chadwick, 39 L. T. Rep. N. S. 429; Kynaston *v.* Nicholson, 8 L. T. Rep. N. S. 671.

Whether a transaction was a sale or a consignment for sale is a question for the jury. Rauber *v.* Sundback, 1 S. D. 238, 46 N. W. 927; Conrad *v.* Kelley, 106 Wis. 252, 82 N. W. 141.

Whether the third party has elected to hold either principal or agent, where the latter has entered into an unauthorized contract, is usually a question of fact for the jury. Ferry *v.* Moore, 18 Ill. App. 135; Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Calder *v.* Dobell, L. R. 6 C. P. 486, 40 L. J. C. P. 224, 25 L. T. Rep. N. S. 129, 19 Wkly. Rep. 978. But see Curtis *v.* Williamson, L. R. 10 Q. B. 57, 59, 44 L. J. Q. B. 27, 31 L. T. Rep. N. S. 678, 23 Wkly. Rep. 236, holding that although "in general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge . . there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal."

15. *Alabama.*— Montgomery Bank *v.* Plannett, 37 Ala. 222.

Michigan.— Lesher *v.* Loudon, 85 Mich. 52, 48 N. W. 278; Saginaw, etc., R. Co. *v.* Chappell, 56 Mich. 190, 22 N. W. 278.

Missouri.— Smith *v.* Stokes, 76 Mo. 178.

New York.— Bostwick *v.* Mutual Redemption Bank, 25 How. Pr. 314.

North Carolina.— Sneed *v.* Smith, 61 N. C. 595.

Texas.— Campbell *v.* Crowley, (Civ. App. 1900) 56 S. W. 373.

United States.— Stoll *v.* Loving, 112 Fed. 885, 50 C. C. A. 173.

See 40 Cent. Dig. tit. "Principal and Agent," § 721–724.

If there is more than a mere scintilla of evidence the question should be submitted to the jury. Gates *v.* Max, 125 N. C. 139, 34 S. E. 266; Bellman *v.* Pittsburg, etc., R. Co., 31 Pa. Super. Ct. 389.

Taking case from jury see, generally, TRIAL.

16. Covington *v.* Newberger, 99 N. C. 523, 6 S. E. 205, holding that in an action by an innkeeper against a merchant for his traveler's board, in the absence of evidence to justify an inference that plaintiff notified defendant of the traveler's failure to pay cash, according to custom, or that the case is an exception to such general custom, the issue should not be submitted to the jury, but verdict directed against plaintiff.

17. Ripley *v.* Case, 86 Mich. 261, 49 N. W. 46 (holding that where it was admitted that plaintiff purchased a bond in reliance on the false representations of defendant's agent, and that defendant had received the amount paid for the bond, the court should direct a verdict for plaintiff for that amount); Claflin *v.* Lenheim, 66 N. Y. 301 (holding that the facts bearing upon a question of constructive notice being undisputed, that question was one of law for the court).

proper instructions from the court,[18] even though the evidence be not full and

18. *Alabama.*—Thomasville First Nat. Bank *v.* Gobey, (1907) 44 So. 535; Robinson *v.* Green, (1906) 43 So. 797; Shields *v.* Sheffield, 79 Ala. 91; South Alabama, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Gimon *v.* Terrell, 38 Ala. 208; Montgomery Bank *v.* Plannett, 37 Ala. 222; McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313; McClurg *v.* Spottswood, 19 Ala. 165.

Colorado.— Schoelkopf *v.* Leonard, 8 Colo. 159, 6 Pac. 209.

Connecticut.— Bloch *v.* De Lucia, 80 Conn. 716, 66 Atl. 769.

Georgia.— Palmour *v.* Roper, 119 Ga. 10, 45 S. E. 790.

Idaho.— Morgan *v.* Neal, 7 Ida. 629, 65 Pac. 66, 97 Am. St. Rep. 264.

Illinois.— Hankinson *v.* Lombard, 25 Ill. 572, 79 Am. Dec. 348; Iroquois Furnace Co. *v.* Ross, 76 Ill. App. 549; Cook *v.* Smith, 73 Ill. App. 483.

Iowa.— Gough *v.* Loomis, 123 Iowa 642, 99 N. W. 295; Jewell *v.* Posey, 119 Iowa 412, 93 N. W. 379; Hughbanks *v.* Boston Inv. Co., 92 Iowa 267, 60 N. W. 640; Patton *v.* Bond, 50 Iowa 508.

Maryland.—Darrin *v.* Whittingham, (1907) 68 Atl. 269; Fifer *v.* Clearfield, etc., Coal, etc., Co., 103 Md. 1, 62 Atl. 1122; Rogers *v.* Severson, 2 Gill 385.

Massachusetts.— Whittier *v.* Child, 174 Mass. 36, 54 N. E. 344; Ayer *v.* R. W. Bell Mfg. Co., 147 Mass. 46, 16 N. E. 754.

Michigan.— Mail, etc., Co. *v.* Wood, 140 Mich. 505, 103 N. W. 864; Fontaine Crossing, etc., Co. *v.* Rauch, 117 Mich. 401, 75 N. W. 1063 (holding that the question whether certain correspondence and subsequent dealings show agency is for the jury where reasonable minds might differ in regard thereto); Shaw *v.* Gilmore, 76 Mich. 127, 42 N. W. 1082; Saginaw, etc., R. Co. *v.* Chappell, 56 Mich. 190, 22 N. W. 278.

Minnesota.— Bartleson *v.* Vanderhoff, 96 Minn. 184, 104 N. W. 820; Jensen *v.* Weide, 42 Minn. 59, 43 N. W. 688.

Missouri— Berkson *v.* Kansas City Cable R. Co., 144 Mo. 211, 45 S. W. 1119; Trimble *v.* Keer, etc., Mercantile Co., 56 Mo. App. 683.

Nebraska.— Walsh *v.* Peterson, 59 Nebr. 645, 81 N. W. 853; Southern Pine Lumber Co. *v.* Fries, 1 Nebr. (Unoff.) 691, 96 N. W. 71.

New Jersey.— Seull *v.* Skillton, 70 N. J. L. 792, 59 Atl. 457; Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.— Franklin Bank Note Co. *v.* Mackey, 83 Hun 511, 31 N. Y. Suppl. 1057 [*reversed* on ground of insufficiency of evidence to go to jury in 158 N. Y. 140, 52 N. E. 737]; De Bavier *v.* Funk, 21 N. Y. Suppl. 410 [*affirmed* in 142 N. Y. 633, 37 N. E. 566]; Tebbetts *v.* Levy, 11 N. Y. Suppl. 684; Conklin *v.* Tuthill, 10 N. Y. St. 624; Bruce *v.* Welch, 6 N. Y. St. 617.

Oregon.— Neppach *v.* Oregon, etc., R. Co., 46 Oreg. 374, 80 Pac. 482; Glenn *v.* Savage, 14 Oreg. 567, 13 Pac. 442.

Pennsylvania.— Union Refining, etc., Co. *v.* Bushnell, 88 Pa. St. 89; Bellman *v.* Pittsburg, etc., R. Co., 31 Pa. Super. Ct. 389; Spanogle *v.* Doane, 15 Wkly. Notes Cas. 156.

South Carolina.—Campbell *v.* Chiles, 2 Mill 251.

Texas.— Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405; Majors *v.* Goodrich, (Civ. App. 1900) 54 S. W. 919; Western Union Tel. Co. *v.* McLeod, (Civ. App. 1894) 25 S. W. 721.

Canada.— Macaulay *v.* Proctor, 2 Grant Ch. (U. C.) 390; Waddell *v.* Gildersleeve, 16 U. C. C. P. 565; De Blaquiere *v.* Becker, 8 U. C. C. P. 167.

See 40 Cent. Dig. tit. "Principal and Agent," § 722.

Whether an agency by estoppel has been created is usually a question for the jury. Union Trust Co. *v.* McKeon, 76 Conn. 508, 57 Atl. 109; Morgan *v.* Neal, 7 Ida. 629, 65 Pac. 66, 97 Am. St. Rep. 264; McClure *v.* Murphey, 126 Mich. 134, 85 N. W. 462; Ferneau *v.* Whitford, 39 Mo. App. 311; Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 11 N. D. 280, 91 N. W. 436 (holding that under Rev. Codes, § 4308, which provides that an agency is ostensible where the principal intentionally or by want of ordinary care caused a third person to believe another party his agent who was not really employed by him, where an agent had for some years represented the interest of a mortgagee in crops raised on a certain farm, the question whether in a subsequent year the same person was the ostensible agent of the mortgagee in reference to the crop grown, no notice of an interruption in the old arrangement having been given, was properly submitted to the jury); Fisher *v.* O'Donnell, 153 Pa. St. 619, 26 Atl. 293; Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099 (holding that whether a shop superintendent had apparent authority in a particular case by reason of the way in which the business of the corporation was conducted is a question for the jury unless all the facts are undisputed and the inferences of fact therefrom are such that but one conclusion can be drawn).

Revocation of agency.— Where the facts as to revocation of agency are in dispute, the question whether the agency was revoked is for the jury. Clamp *v.* Cutler, 39 Colo. 117, 88 Pac. 854; Johnson *v.* Doon, 131 Mich. 452, 91 N. W. 742; Lamothe *v.* St. Louis Marine R., etc., Co., 17 Mo. 204; Beard *v.* Kirk, 11 N. H. 397. And where notice of revocation is disputed it is for the jury to say whether sufficient notice was given. Claflin *v.* Lenheim, 66 N. Y. 301 [*reversing* 5 Hun 629]; McNeilly *v.* Continental L. Ins. Co., 66 N. Y. 23; Perrine *v.* Jermyn, 163 Pa. St. 497, 30 Atl. 202; Deford *v.* Reynolds, 36 Pa. St. 325. But where the facts are undisputed it is for the court to determine, as matter of law, whether they constitute sufficient notice. Clark *v.* Mullenix, 11

satisfactory;[19] and it is error for the court to take the question from the jury by directing a verdict, by instruction, by nonsuit, or by sustaining a demurrer to the evidence.[20] But whether or not there is any evidence tending to prove the existence of an agency is for the court to determine, and if there is none, or if it is so slight that a finding thereon of the existence of the agency would not be sustained, the question should not be submitted to the jury,[21] nor should the question be submitted to them where the facts relating to the existence of the agency are undisputed and are such that only one reasonable conclusion could be drawn therefrom.[22] But even where the facts are undisputed, if different conclusions could reasonably be drawn therefrom, the question should be submitted to the jury.[23]

(II) *As to Nature and Extent of Authority.* Upon a conflict or evidence as to the nature or extent of authority orally conferred upon an agent of to be implied from facts and circumstances the question is generally one of fact for the jury, guided by proper instructions from the court,[24] and it is error to take

Ind. 532; Claflin *v.* Lenheim, *supra*, question of constructive notice.

19. *Alabama.*— Martin *v.* Brown, 75 Ala. 442.

Maine.— Trundy *v.* Farrar, 32 Me. 225.

Maryland.— National Mechanies' Bank *v.* Baltimore Nat. Bank, 36 Md. 5.

New York.— Western Transp. Co. *v.* Hawley, 1 Daly 327, holding that very slight evidenee that a person assuming to aet as defendant's agent was his agent should suffice to earry the question to the jury.

Oregon.— Glenn *v.* Savage, 14 Oreg. 567, 13 Pae. 442.

See 40 Cent. Dig. tit. "Prineipal and Agent," § 722.

20. Jewell *v.* Posey, 119 Iowa 412, 93 N. W. 379 (direetion of verdiet); Glenn *v.* Savage, 14 Oreg. 567, 13 Pae. 442 (instruetion); Bellman *v.* Pittsburg, ete., R. Co., 31 Pa. Super. Ct. 389 (nonsuit); Waddell *v.* Gildersleeve, 16 U. C. C. P. 565 (demurrer to evidenee). See, generally, TRIAL.

21. *Alabama.*— McClung *v.* Spotswood, 19 Ala. 165.

Colorado.— Lester *v.* Snyder, 12 Colo. App. 351, 55 Pae. 613.

Delaware.— Coe *v.* Johnson, 6 Houst. 9.

Maryland.— National Mechanics' Bank *v.* Baltimore Nat. Bank, 36 Md. 5.

Missouri.— Trimble *v.* Keer, ete., Merean-tile Co., 56 Mo. App. 683, 686, holding that "while the question of ageney is usually a question of fact for the jury, that has referenee merely to the suffieiency of the evidenee. The question, whether there is any evidenee tending to show agency for a eertain purpose, is always a question of law for the court."

New Jersey.— See Guliek *v.* Grover, 33 N. J. L. 463, 97 Am. Dee. 728.

Pennsylvania.— Lamb *v.* Irwin, 69 Pa. St. 436.

See 40 Cent. Dig. tit. "Prineipal and Agent," § 722.

22. *Alabama.*— McClung *v.* Spotswood, 19 Ala. 165.

Colorado.— Lester *v.* Snyder, 12 Colo. App. 351, 55 Pae. 613.

Tennessee.— Wilcox *v.* Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761.

Utah.— McCornick *v.* Queen of Sheba Gold Min., ete., Co., 23 Utah 71, 63 Pae. 820.

Canada.— Dominion Coal Co. *v.* Kingswell Steamship Co., 33 Nova Scotia 499.

See 40 Cent. Dig. tit. "Prineipal and Agent," § 722.

23. South Bend Toy Mfg. Co. *v.* Dakota F. & M. Ins. Co., 3 S. D. 205, 52 N. W. 866.

24. *Alabama.*— Birmingham Mineral R. Co. *v.* Tennessee Coal, ete., Co., 127 Ala. 137, 28 So. 679; La Fayette R. Co. *v.* Tueker, 124 Ala. 514, 27 So. 447; Carew *v.* Lillienthal, 50 Ala. 44; Montgomery Bank *v.* Plannett, 37 Ala. 222; McClung *v.* Spotswood, 19 Ala. 165; Foster *v.* Johnson, 13 Ala. 379.

Arkansas.— Broekman Commission, etc., Co. *v.* Pound, 77 Ark. 364, 91 S. W. 183; Jaeobson *v.* Poindexter, 42 Ark. 97.

Connecticut.— Hyman *v.* Waas. 79 Conn. 251, 64 Atl. 354; Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581.

District of Columbia.—Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. 306.

Georgia.— Luekie *v.* Johnston, 89 Ga. 321, 15 S. E. 459; Century Bldg. Co. *v.* Lewkowitz, 1 Ga. App. 636, 57 S. E. 1036.

Illinois.— Hale Elevator Co. *v.* Hale, 201 Ill. 131, 66 N. E. 249; Sehmoldt *v.* Langston, 106 Ill. App. 385.

Indiana.— Grand Rapids, ete., R. Co. *v.* King, (App. 1908) 83 N. E. 778.

Iowa.— C. Shenkberg Co. *v.* Porter, (1908) 114 N. W. 890; D. M. Osborne *v.* Ringland, 122 Iowa 329, 98 N. W. 116; Holsten *v.* Wheeler, (1899) 78 N. W. 845; Hughbanks *v.* Boston Inv. Co., 92 Iowa 267, 60 N. W. 640; Keenan *v.* Missouri State Mut. Ins. Co., 12 Iowa 126.

Kansas.— Cain Bros. Co. *v.* Wallaee, 46 Kan. 138, 26 Pac. 445.

Kentucky.— Meagher *v.* Bowling, 107 Ky. 412, 54 S. W. 170, 21 Ky. L. Rep. 1149; Booth *v.* Bethel, 78 S. W. 868, 25 Ky. L. Rep. 1747; Cartmel *v.* Unverzaught, 54 S. W. 965, 21 Ky. L. Rep. 1282.

Maine.— Davies *v.* Eastern Steamboat Co., 94 Me. 379, 47 Atl. 896, 53 L. R. A. 239.

Maryland.— Groseup *v.* Downey, 105 Md. 273, 65 Atl. 930.

Massachusetts.— Hawks *v.* Davis, 185 Mass. 119, 69 N. E. 1072; Heath *v.* New Bedford

the case from them by nonsuit, instruction, or by direction of verdict.[25] But

Safe Deposit, etc., Co., 184 Mass. 481, 69 N. E. 215; Baker *v.* Tibbetts, 162 Mass. 468, 39 N. E. 350; Sturtevant *v.* Wallack, 141 Mass. 119, 4 N. E. 615; Thomas *v.* Wells, 140 Mass. 517, 5 N. E. 485; Twombly *v.* Monroe, 136 Mass. 464; Lawrence *v.* Lewis, 133 Mass. 561; Lovejoy *v.* Middlesex R. Co., 128 Mass. 480.

Michigan.— Superior Drill Co. *v.* Carpenter, 150 Mich. 262, 114 N. W. 67; Schaub *v.* Welded-Barrel Co., 125 Mich. 591, 84 N. W. 1095; Flattery *v.* Cunningham, 125 Mich. 467, 84 N. W. 625; Griffin *v.* McKnight, 116 Mich. 468, 74 N. W. 650; Hurley *v.* Watson, 92 Mich. 121, 52 N. W. 457; White *v.* King, 87 Mich. 107, 49 N. W. 518; Partridge *v.* Sterling, 79 Mich. 302, 44 N. W. 614; Van Vranken *v.* Union News Co., 78 Mich. 217, 44 N. W. 337; O'Connor *v.* Le Roux, 78 Mich. 48, 43 N. W. 1084; Shaw *v.* Gilmore, 76 Mich. 127, 42 N. W. 1082; Tunison *v.* Detroit, etc., Copper Co., 73 Mich. 452, 41 N. W. 502; Buhl *v.* Smith, 69 Mich. 552, 37 N. W. 554.

Missouri.— Corder *v.* O'Neill, 176 Mo. 401, 75 S. W. 764; St. Louis State Bank *v.* Frame, 112 Mo. 502, 20 S. W. 620; Hoffman Heading, etc., Co. *v.* St. Louis, etc., R. Co., 119 Mo. App. 495, 94 S. W. 597; Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Nicholson *v.* Golden, 27 Mo. App. 132.

Nebraska.—New Orleans Coffee Co. *v.* Cady, 69 Nebr. 412, 95 N. W. 1017; Walsh *v.* Peterson, 59 Nebr. 645, 81 N. W. 853; Holt *v.* Schneider, 57 Nebr. 523, 77 N. W. 1086; Johnston *v.* Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 N. W. 1100.

New Hampshire.— Great Falls Co. *v.* Worster, 15 N. H. 412.

New Jersey.— Crossley *v.* Kenny, 71 N. J. L. 124, 58 Atl. 395.

New York.— Lilienthal *v.* German American Brewing Co., 121 N. Y. App. Div. 628, 106 N. Y. Suppl. 402; Merkel *v.* Lazard, 114 N. Y. App. Div. 25, 99 N. Y. Suppl. 686; Williams *v.* Brandt, 90 N. Y. App. Div. 607, 86 N. Y. Suppl. 389; Fitch *v.* Metropolitan Hotel Supply Co., 69 N. Y. App. Div. 611, 74 N. Y. Suppl. 616; Wanamaker *v.* Mcgraw, 48 N. Y. App. Div. 54, 62 N. Y. Suppl. 692 [*reversed* on other grounds in 168 N. Y. 125, 61 N. E. 112]; Allen *v.* Tarrant, 7 N. Y. App. Div. 172, 40 N. Y. Suppl. 114; Bickford *v.* Menier, 36 Hun 446 [*reversed* on other grounds in 107 N. Y. 490, 14 N. E. 438]; Bingham *v.* Harris, 10 Daly 522 [*affirmed* in 97 N. Y. 626]; Walton *v.* Mather, 4 Misc. 261, 24 N. Y. Suppl. 307 [*affirmed* in 15 Misc. 453, 37 N. Y. Suppl. 26 (*affirmed* in 16 Misc. 546, 38 N. Y. Suppl. 782)]; De Bautte *v.* Curiel, 2 Misc. 170, 21 N. Y. Suppl. 617 [*affirmed* in 142 N. Y. 635, 37 N. E. 566]; Lamb *v.* Hirschberg, 1 Misc. 108, 20 N. Y. Suppl. 678; Murgatroyd *v.* Hempstead Gas, etc., Co., 66 N. Y. Suppl. 56; Commercial Bank *v.* Norton, 1 Hill 501; McMorris *v.* Simpson, 21 Wend. 610.

North Dakota.— Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 11 N. D. 289, 91 N. W. 436.

Oregon.— Neppach *v.* Oregon, etc., R. Co., 46 Oreg. 374, 80 Pac. 482; Glenn *v.* Savage, 14 Oreg. 567, 13 Pac. 442.

Pennsylvania.— American Car, etc., Co. *v.* Alexandria Water Co., 218 Pa. St. 542, 67 Atl. 861; Singer Mfg. Co. *v.* Christian, 211 Pa. St. 534, 60 Atl. 1087; Lininger *v.* Latshaw, 169 Pa. St. 398, 32 Atl. 440; Louchheim *v.* Davies, 148 Pa. St. 499, 24 Atl. 72; Union Refining, etc., Co. *v.* Bushnell, 88 Pa. St. 89; Klingensmith *v.* Klingensmith, 31 Pa. St. 460; Allegheny Valley R. Co. *v.* Steele, 1 Pennyp. 312, 11 Wkly. Notes Cas. 113; Swing *v.* Bates Mach. Co., 32 Pa. Super. Ct. 403; Stockwell *v.* Loecher, 9 Pa. Super. Ct. 241; Kollock *v.* Ridley Park Assoc., 2 Wkly. Notes Cas. 408.

South Dakota.— McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

Texas.— International Harvester Co. *v.* Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93; Majors *v.* Goodrich, (Civ. App. 1900) 54 S. W. 919.

Washington.— Harvey *v.* Sparks, 45 Wash. 578, 88 Pac. 1108; Lough *v.* Davis, 35 Wash. 449, 77 Pac. 732.

Wisconsin.— Domasek *v.* Kluck, 113 Wis. 336, 89 N. W. 139.

United States.— Ladd *v.* Ætna Indemnity Co., 128 Fed. 298.

Canada.— De Blaquire *v.* Becker, 8 U. C. C. P. 167; Workman *v.* McKinstry, 21 U. C. Q. B. 623.

See 40 Cent. Dig. tit. "Principal and Agent," § 724.

Whether an agency was general or special is a question of fact for the jury. Dickinson County *v.* Mississippi Valley Ins. Co., 41 Iowa 286; Lough *v.* Davis, 35 Wash. 449, 77 Pac. 732.

Legality of agency contract.— If the contract of agency is doubtful and the evidence conflicting as to its legality, it is for the jury to determine whether the employment was improper. Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063 (holding, however, that where the contract is in writing the legality or illegality of the employment is a question for the court); Boehmer *v.* Foval, 55 Ill. App. 71; Lebus *v.* Dunlap, 80 S. W. 803, 26 Ky. L. Rep. 147; Chesebrough *v.* Conover, 140 N. Y. 382, 35 N. E. 633; Dunham *v.* Hastings Pavement Co., 56 N. Y. App. Div. 244, 67 N. Y. Suppl. 632; Brown *v.* Brown, 34 Barb. (N. Y.) 533. If, however, the opening statement of counsel for plaintiff makes it clear that the contract relied upon is illegal the court will direct a verdict. Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539; Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899.

25. *District of Columbia.*— Held *v.* Walker, 25 App. Cas. 486.

Iowa.— Kaufman *v.* Farley Mfg. Co., 78 Iowa 679, 43 N. W. 612, 16 Am. St. Rep. 462.

whether there is any competent evidence to establish the extent of the authority is a question of law for the court, and it has been held that the question of the extent of the authority should not be submitted to the jury where there is no competent evidence, or where it is manifestly insufficient to prove the authority,[26] nor where undisputed facts relating to the authority are such that reasonable minds could draw only one conclusion therefrom;[27] but even where the facts are not in dispute the question should be given to the jury if reasonable minds could draw different conclusions therefrom.[28] Where the authority is conferred in writing the nature and extent thereof are questions of law for the court and should not be submitted to the jury.[29] It has been held, however, not to be prejudicial error

Kansas.— Leu *v.* Mayer, 52 Kan. 419, 34 Pac. 969.

Maine.— Cloran *v.* Houlehan, 88 Me. 221, 33 Atl. 986.

Massachusetts.— Beston *v.* Amadon, 172 Mass. 84, 51 N. E. 452.

Missouri.— Bartlett *v.* Sparkman, 95 Mo. 136, 8 S. W. 406, 6 Am. St. Rep. 35.

New York.— Waters' Patent Heater Co. *v.* Tompkins, 14 Hun 219; Hannon *v.* Moore, 3 Misc. 358, 23 N. Y. Suppl. 120; Schneider *v.* Finkelstein, 107 N. Y. Suppl. 126.

Pennsylvania.— Slonecker *v.* Garrett, 48 Pa. St. 415.

South Carolina.— Robert Buist Co. *v.* Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789.

Wisconsin.— Ames *v.* D. J. Murray Mfg. Co., 114 Wis. 85, 89 N. W. 836; Conroe *v.* Case, 74 Wis. 85, 41 N. W. 1064.

See 40 Cent. Dig. tit. "Principal and Agent," § 724.

26. *Idaho.*— Wilson *v.* Vogeler, 10 Ida. 599, 79 Pac. 508.

Illinois.— Illinois Moulding Co. *v.* Page, etc., Mfg. Co., 104 Ill. App. 1.

Indian Territory.— Hunt *v.* Johnson, etc., Dry Goods Co., (1907) 104 S. W. 841; Gentry *v.* Singleton, 4 Indian Terr. 346, 69 S. W. 898.

Michigan.— Wierman *v.* Bay City-Michigan Sugar Co., 142 Mich. 422, 106 N. W. 75; Bond *v.* Pontiac, etc., R. Co., 62 Mich. 643, 29 N. W. 482, 4 Am. St. Rep. 885.

New Jersey.— Ryle *v.* Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 Atl. 87; Belcher *v.* Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 Atl. 399; Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.— Franklin Bank Note Co. *v.* Mackey, 158 N. Y. 140, 52 N. E. 737; Dows *v.* Perrin, 16 N. Y. 325.

South Dakota.— Quale *v.* Hazel, 19 S. D. 483, 104 N. W. 215.

Wisconsin.— Heath *v.* Paul, 81 Wis. 532, 51 N. W. 876.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 722–724.

27. *Illinois.*— Halladay *v.* Underwood, 90 Ill. App. 130.

Montana.— Herbert *v.* King, 1 Mont. 475.

New York.— Arbesfeld *v.* Tanenbaum, 96 N. Y. Suppl. 424.

Oregon.— See Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366.

Pennsylvania.— Elliott *v.* Wanamaker, 155 Pa. St. 67, 25 Atl. 826; Langenheim *v.* Anschutz-Bradberry Co., 2 Pa. Super. Ct. 285, 38 Wkly. Notes Cas. 505.

South Dakota.— South Bend Toy Mfg. Co. *v.* Dakota F. & M. Ins. Co., 3 S. D. 205, 52 N. W. 866, holding, however, that the power to take the case from the jury under these circumstances should be exercised only in a very clear case.

See 40 Cent. Dig. tit. "Principal and Agent," § 724.

28. Reid *v.* Kellogg, 8 S. D. 596, 67 N. W. 687; Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

29. *Georgia.*— Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Dobbins *v.* Etowa Mfg., etc., Co., 75 Ga. 238.

Kansas.— Philadelphia Mortg., etc., Co. *v.* Hardesty, 68 Kan. 683, 75 Pac. 1115; Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445.

Maryland.— Groscup *v.* Downey, 105 Md. 273, 65 Atl. 930; Equitable Life Assur. Soc. *v.* Poe, 53 Md. 28.

Missouri.— Nofsinger *v.* Ring, 4 Mo. App. 576 [*reversed* on other grounds in 71 Mo. 149, 36 Am. Rep. 456].

Ohio.— Pollock *v.* Cohen, 32 Ohio St. 514.

Oregon.—Anderson *v.* Adams, 43 Oreg. 621, 74 Pac. 215; Williamson *v.* North Pac. Lumber Co., 38 Oreg. 560, 63 Pac. 16, 64 Pac. 854, holding that where a conversation between the parties, so far as it related to the authority of plaintiffs to act for defendant in settling a controversy, was merged in a letter from defendant to plaintiffs, so that the authority must be determined therefrom, its construction is for the court, although it is to be construed in connection not only with a prior letter, but with defendant's testimony as to how a clause happened to be added to the letter, and with the surrounding circumstances.

Pennsylvania.— American Car, etc., Co. *v.* Alexandria Water Co., 218 Pa. St. 542, 67 Atl. 861; Loudon Sav. Fund Assoc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Fisher *v.* Moyer, 17 Wkly. Notes Cas. 500.

Texas.— De Cordova *v.* Knowles, 37 Tex. 19.

England.— Berwick *v.* Horsfall, 4 C. B. N. S. 450, 4 Jur. N. S. 615, 27 L. J. C. P. 193, 6 Wkly. Rep. 471, 93 E. C. L. 450, where the court construed a power of attorney which was lost, upon oral proof of its contents.

to submit the question of the extent of the authority to the jury where the writing creating the agency was obscure and ambiguous,[30] or where the authority rested partly in parol and partly in writing.[31]

(III) *As to Whom Agent Acted For.* Where the facts are in dispute the question as to which of two parties to a transaction an agent represented is a question of fact for the jury,[32] as is also the question whether a person acted in a transaction as principal or as agent for another.[33] But where the evidence is such that the only inference that can be drawn therefrom is that he acted as agent and not as principal it is error to submit the question to the jury.[34]

(IV) *As to Ratification.* Where competent evidence adduced is such that reasonable men could draw different conclusions as to whether or not there has been a ratification of unauthorized acts or contracts the question is one of fact to be determined by the jury under proper instructions from the court,[35] and it is

Canada.— Churchill *v.* McKay, 20 Can. Sup. Ct. 472.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 722–724.

30. Berry *v.* Haldeman, 111 Mich. 667, 70 N. W. 325.

31. McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816, holding that where an agent's authority rests partly in parol and partly in writing, if the parol evidence is conflicting, or the written instructions ambiguous, it is for the jury to find the scope and extent of his authority.

32. State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141; Schlesinger *v.* Texas, etc., R. Co., 87 Mo. 146 [*affirming* 13 Mo. App. 471]; New England Mortg. Security Co. *v.* Gay, 33 Fed. 636.

33. *Arkansas.*— Boyington *v.* Van Etten, 62 Ark. 63, 35 S. W. 622, holding that where there was conflicting evidence on this question it was error to instruct a verdict.

Illinois.— Morris *v.* Dixon Nat. Bank, 55 Ill. App. 298.

Massachusetts.— Shattuck *v.* Eastman, 12 Allen 369; Delano *v.* Curtis, 7 Allen 470.

Nebraska.— Equitable L. Assur. Co. *v.* Brobst, 18 Nebr. 526, 26 N. W. 204.

New Jersey.— Stewart *v.* Johnson, 1 N. J. L. 27.

New York.— Badger *v.* Cook, 117 N. Y. App. Div. 328, 101 N. Y. Suppl. 1067; De Bavier *v.* Funke, 21 N. Y. Suppl. 410 [*affirmed* in 142 N. Y. 633, 37 N. E. 566]; Cunningham *v.* Soules, 7 Wend. 106.

Pennsylvania.— Dunlap *v.* Potts, 1 Lanc. L. Rev. 171.

Washington.— Heinzerling *v.* Agen, 46 Wash. 390, 90 Pac. 262.

Wisconsin.— Conroe *v.* Case, 79 Wis. 338, 48 N. W. 480; Northern Nat. Bank *v.* Lewis, 78 Wis. 475, 47 N. W. 834.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 722–724.

To whom credit was given upon the making of an oral contract is generally a question for the jury. Anderson *v.* Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105; Hovey *v.* Pitcher, 13 Mo. 191; Brown *v.* Rundlett, 15 N. H. 360; Kean *v.* Davis, 20 N. J. L. 425; Wasserman *v.* Bacon, 80 N. Y. App. Div. 505, 81 N. Y. Suppl. 193; Pentz *v.* Stanton, 10 Wend (N. Y.) 271, 25 Am. Dec. 558; Miller *v.* Ford, 4 Strobh. (S. C.) 213; Edwards *v.* Smith, 5 L. J. C. P. O. S. 11. But where the question depends upon the terms of a written contract the question is one of law for the court. Kean *v.* Davis, 20 N. J. L. 425.

34. New Orleans Coffee Co. *v.* Cady, 69 Nebr. 412, 95 N. W. 1017; La Societe Anonyme De L'Union Des Papeteries *v.* Marks, 21 N. Y. Suppl. 706; Johnson *v.* Cate, 77 Vt. 218, 59 Atl. 830.

35. *Georgia.*— Noble *v.* Burney, 124 Ga. 960, 53 S. E. 463; Burr *v.* Howard, 58 Ga. 564.

Illinois.— Fisher *v.* Stevens, 16 Ill. 397; Iroquois Furnace Co. *v.* Ross, 76 Ill. App. 549; Pohl *v.* Davenport Malt, etc., Co., 46 Ill. App. 513.

Massachusetts.— Fogg *v.* Boston, etc., R. Corp., 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; Lawrence *v.* Lewis, 133 Mass. 561.

Michigan.—Heffron *v.* Armsby, 61 Mich. 505, 28 N. W. 672.

Missouri.— Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013.

New York.— Lilienthal *v.* German American Brewing Co., 121 N. Y. App. Div. 628, 106 N. Y. Suppl. 402; Allen *v.* Corn Exch. Bank, 87 N. Y. App. Div. 335, 84 N. Y. Suppl. 1001; Krauss *v.* J. H. Mohlman Co., 17 Misc. 288, 40 N. Y. Suppl. 367 [*affirmed* in 18 Misc. 430, 42 N. Y. Suppl. 23].

Pennsylvania.— Fenn *v.* Dickey, 178 Pa. St. 258, 35 Atl. 1108; Garrett *v.* Gonter, 42 Pa. St. 143.

South Dakota.— Quale *v.* Hazel, 19 S. D. 843, 104 N. W. 215.

Texas.— San Antonio Fifth Nat. Bank *v.* Iron City Nat Bank, 92 Tex. 436, 49 S. W. 368; Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

Vermont.— Corliss *v.* Smith, 53 Vt. 532.

Virginia.— Hortons *v.* Townes, 6 Leigh 47.

Wisconsin.— Mygatt *v.* Tarbell, 78 Wis. 351, 47 N. W. 618.

United States.— Bell *v.* Cunningham, 3 Pet. 69, 7 L. ed. 606; Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274; Findlay *v.* Pertz, 74 Fed. 681, 20 C. C. A. 662.

See 40 Cent. Dig. tit. "Principal and Agent," § 725.

error to withdraw the case from them by instruction or by direction of verdict.[36] But if there is no evidence of ratification or if the evidence is such that only one conclusion could be drawn therefrom by reasonable men, the question becomes one of law for the court and should not be submitted to the jury.[37]

3. INSTRUCTIONS. The rules applying to instructions in civil actions in general [38] apply to actions arising out of the relation of principal and agent.[39] Thus parties are on request entitled to full instructions correctly stating the law.[40] The instructions must be applicable to the issues,[41] and to the facts which there is evidence

What is a reasonable time in which a principal must object to the acts of his agent or be held to have satisfied them is a question of fact for the jury. Minnesota Linseed Oil Co. *v.* Montague, 59 Iowa 448, 13 N. W. 438.

36. Hutchinson *v.* Smith, 86 Mich. 145, 49 N. W. 1090; Palmer *v.* Seligman, 77 Mich. 305, 43 N. W. 974; Stokes *v.* Mackay, 140 N. Y. 640, 35 N. E. 786; Schull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654; Gano *v.* Chicago, etc., R. Co., 49 Wis. 57, 5 N. W. 45, 60 Wis. 12, 17 N. W. 15; Cooper *v.* Schwartz, 40 Wis. 54.

37. *Alabama.*—Simon *v.* Johnson, 105 Ala. 344, 16 So. 884, 53 Am. St. Rep. 125.

Michigan.—Leonardson *v.* Troy Tp. School Dist. No. 3, 125 Mich. 209, 84 N. W. 63; Rapid Hook, etc., Co. *v.* De Ruyter, 117 Mich. 547, 76 N. W. 76; Wells *v.* Martin, 32 Mich. 478.

Minnesota.—Wright *v.* Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015.

New York.—Kane *v.* Belknap, 70 Hun 211, 24 N. Y. Suppl. 167 [*affirmed* in 144 N. Y. 702, 39 N. E. 857]; Piper *v.* Herrick, 26 Misc. 649, 56 N. Y. Suppl. 386.

Pennsylvania.—Moore *v.* Patterson, 28 Pa. St. 505; Sword *v.* Reformed Congregation Keneseth Israel, 29 Pa. Super. Ct. 626.

South Dakota.—Elfring *v.* New Birdsall Co., 16 S. D. 252, 92 N. W. 29; Larpenteur *v.* Williams, 12 S. D. 373, 81 N. W. 625.

See 40 Cent. Dig. tit. "Principal and Agent," § 725.

38. See TRIAL.

39. *Alabama.*—Powell *v.* Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915; Vaughan *v.* Williamson, 78 Ala. 194.

Illinois.—Alexander *v.* Emmett, 169 Ill. 523, 48 N. E. 427; Stewart *v.* Butts, 45 Ill. App. 512.

Maryland.—Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

Michigan.—Rathbun *v.* Allen, 135 Mich. 699, 98 N. W. 735; Ockenfells *v.* Moeller, 79 Mich. 314, 44 N. W. 790.

Minnesota.—Lahr *v.* Kraemer, 91 Minn. 26, 97 N. W. 418.

Nebraska.—Walker *v.* Haggerty, 30 Nebr. 120, 46 N. W. 221.

North Carolina.—Taylor *v.* Albemarle Steam Nav. Co., 105 N. C. 484, 10 S. E. 897.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 727–729.

40. *Alabama.*—Lawrence *v.* Randall, 47 Ala. 240.

Georgia.—Florida, etc., R. Co. *v.* Varnedoe, 81 Ga. 175, 7 S. E. 129.

Iowa.—Steele *v.* Crabtree, 130 Iowa 313, 106 N. W. 753; Bigham *v.* Chicago, etc., R. Co., 79 Iowa 534, 44 N. W. 805.

Kentucky.—Hutcheson *v.* Blakeman, 3 Metc. 80.

Nebraska.—Norberg *v.* Plummer, 58 Nebr. 410, 78 N. W. 708.

North Carolina.—Brittain *v.* Westall, 137 N. C. 30, 49 S. E. 54.

Texas.—Prather *v.* Wilkens, 68 Tex. 187, 4 S. W. 252.

Vermont.—Johnson *v.* Cate, 77 Vt. 218, 59 Atl. 830.

Wisconsin.—Lachner *v.* Salomon, 9 Wis. 129.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 727–729.

Instructions as to existence of agency see Tutwiler *v.* McCarty, 121 Ala. 356, 25 So. 828; Brinson *v.* Exley, 122 Ga. 8, 49 S. E. 810; Southard *v.* Sturtevant, 109 Mass. 390; Coggburn *v.* Simpson, 22 Mo. 351; Kliegel *v.* Aitken, 94 Wis. 432, 69 N. W. 67, 59 Am. St. Rep. 901, 35 L. R. A. 249.

Instructions as to the disputed authority of an agent see Davis *v.* Davis, 93 Ala. 173, 9 So. 736; Knapp *v.* McBride, 7 Ala. 19; Watson *v.* Roth, 191 Ill. 382, 61 N. E. 65; Daley *v.* Boston, etc., R. Co., 147 Mass. 101, 16 N. E. 690; Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912; Harris *v.* Wolf, 114 Mo. 387, 89 S. W. 1037; Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384; Root *v.* Baldwin, (Tex. Civ. App. 1899) 52 S. W. 586.

41. *Alabama.*—Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336.

Florida.—Fridenberg *v.* Robinson, 14 Fla. 130.

Georgia.—Irby *v.* Lawshe, 62 Ga. 216.

Illinois.—Booksellers', etc., Assoc. *v.* Swartwout, 83 Ill. App. 504.

Iowa.—Lozier *v.* Graves, 91 Iowa 482, 59 N. W. 285.

Missouri.—Minter *v.* Cupp, 98 Mo. 26, 10 S. W. 862.

Nebraska.—Marshall *v.* Goble, 32 Nebr. 9, 48 N. W. 898; Harrison *v.* Baker, 15 Nebr. 43, 14 N. W. 541.

Texas.—Bernheim *v.* Lyon, 5 Tex. Civ. App. 716, 25 S. W. 57.

Utah.—Shafer *v.* Russell, 28 Utah 444, 79 Pac. 559.

Wisconsin.—West *v.* Wells, 54 Wis. 525, 11 N. W. 677.

United States.—Great Western Elevator Co. *v.* White, 118 Fed. 406, 56 C. C. A. 388.

See 40 Cent. Dig. tit. "Principal and Agent," § 727 *et seq.*

tending to prove;[42] and competent evidence which has been introduced must not be disregarded or ignored.[43] Instructions must not be misleading or ambiguous,[44] nor inconsistent and contradictory.[45] Instructions must be considered as a whole,[46] and hence it is not error to refuse an instruction adequately covered by other instructions.[47]

4. Verdict and Findings. The rules governing verdicts and findings in actions arising out of the relation of principal and agent are the same as those that apply to civil actions in general.[48]

G. Judgment.[49] The rules applicable to judgments in civil actions generally[50] apply to judgments in act ons arising out of the relation of principal and

42. *Alabama.*— De Loach Mills Mfg. Co. *v.* Middlebrooks, 95 Ala. 459, 10 So. 917; Knowles *v.* Street, 87 Ala. 357, 6 So. 273.

California.— Earl Fruit Co. *v.* Curtis, 116 Cal. 632, 48 Pac. 793; Bibb *v.* Bancroft, (1889) 22 Pac. 484.

Connecticut.— Morehouse *v.* Remson, 59 Conn. 392, 22 Atl. 427.

Georgia.— Thompson *v.* Douglass, 64 Ga. 57.

Illinois.— Bensley *v.* Brockway, 27 Ill. App. 410.

Iowa.— Wendel *v.* Mallory Commission Co., 122 Iowa 712, 98 N. W. 612.

Massachusetts.— Taft *v.* Baker, 100 Mass. 68.

Michigan.— Scribner *v.* Hazeltine, 79 Mich. 370, 44 N. W. 618.

Pennsylvania.— Perry *v.* Jensen, 142 Pa. St. 125, 21 Atl. 866, 12 L. R. A. 393; Heffner *v.* Chambers, 121 Pa. St. 84, 15 Atl. 492.

Texas.— Phelps *v.* Miller. (Civ. App. 1904) 83 S. W. 218; San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542; Mayer Bros. Drug Co. *v.* Tucker, (Civ. App. 1896) 34 S. W. 786; Bowie Lumber Co. *v.* Lyon, 2 Tex. Civ. App. 659, 21 S. W. 778.

See 40 Cent. Dig. tit. "Principal and Agent," §§ 727–728.

43. *Alabama.*— Holloway *v.* Harper, 108 Ala. 647, 18 So. 663.

Colorado.— Hewes *v.* Andrews, 12 Colo. 161, 20 Pac. 338.

District of Columbia.— Tyler *v.* Mutual Dist. Messenger Co., 17 App. Cas. 85.

Minnesota.— Rice *v.* Longfellow Bros. Co., 82 Minn. 154, 84 N. W. 660.

Missouri.— Veitinger *v.* Winkler, 6 Mo. App. 12.

Montana.— Nixon *v.* Cutting Fruit Packing Co., 17 Mont. 90, 42 Pac. 108.

New York.— Fulton *v.* Sewall, 116 App. Div. 744, 102 N. Y. Suppl. 109. See Ludlow *v.* Dole, 1 Hun 715, 4 Thomp. & C. 655 [*affirmed* in 62 N. Y. 617].

Pennsylvania.— Plucker *v.* Miller, 26 Pa. Super. Ct. 495.

Texas.— Gulf, etc., R. Co. *v.* Jacobs, 3 Tex. Civ. App. 485, 23 S. W. 145.

See 40 Cent. Dig. tit. "Principal and Agent," § 727 *et seq.*

44. *Alabama.*— Birmingham Mineral R. Co. *v.* Tennessee Coal, etc., R. Co., 127 Ala. 137, 28 So. 679; Singer Mfg. Co. *v.* Belgart, 84 Ala. 519, 4 So. 400.

Arkansas.— Quinn *v.* Sewell, 50 Ark. 380, 8 S. W. 132.

California.— Mitrovich *v.* Fresno Fruit Packing Co., 123 Cal. 379, 55 Pac. 1064.

Colorado.— Fisk *v.* Greeley Electric Light Co., 3 Colo. App. 319, 33 Pac. 70.

Michigan.— Hensel *v.* Maas, 94 Mich. 563, 54 N. W. 381.

New Mexico.— Kirchner *v.* Laughlin, 6 N. M. 300, 28 Pac. 505.

North Dakota.—Linton *v.* Minneapolis, etc., Elevator Co., 2 N. D. 232, 50 N. W. 357.

Pennsylvania.— Perry *v.* Jensen, 142 Pa. St. 125, 21 Atl. 866, 12 L. R. A. 393.

Wisconsin.— Chase *v.* Dodge, 111 Wis. 70, 86 N. W. 548; Bouck *v.* Enos, 61 Wis. 660, 21 N. W. 825; McDonell *v.* Dodge, 10 Wis. 106.

United States.— Ætna Indemnity Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274.

See 40 Cent. Dig. tit. "Principal and Agent," § 727 *et seq.*

45. Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430; Smith *v.* Chicago, etc., R. Co., 104 Iowa 147, 73 N. W. 581; Hensel *v.* Maas, 94 Mich. 563, 54 N. W. 381; Burnett *v.* Lambach, (Tex. Civ. App. 1897) 39 S. W. 1015.

46. Brooks *v.* Perry, 23 Ark. 32; Hewes *v.* Andrews, 12 Colo. 161, 20 Pac. 338; Haskell *v.* Starbird, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809; Cushman *v.* Somers, 62 Vt. 132, 20 Atl. 320, 22 Am. St. Rep. 92.

47. Rice *v.* James, 193 Mass. 458, 79 N. E. 807; Hume *v.* George C. Flint Co., 16 Daly (N. Y.) 360, 11 N. Y. Suppl. 431 [*affirmed* in 132 N. Y. 588, 30 N. E. 686]; Waters-Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453.

48. See Trial.

A special verdict controls a general verdict which is inconsistent with it. Stewart *v.* Perkins, 3 Oreg. 508.

Construction of verdict see Baker *v.* Byerly, 40 Minn. 489, 42 N. W. 395; Ritchie *v.* Albion Mfg. Co., 173 Pa. St. 447, 34 Atl. 450; Brown *v.* Griswold, 109 Wis. 275, 85 N. W. 363; Young *v.* De Putron, 37 Fed. 46 [*affirmed* in 134 U. S. 241, 10 S. Ct. 539, 33 L. ed. 923].

49. Costs in suit by or against principal or agent see Costs, 11 Cyc. 1.

Exemptions see Exemptions, 18 Cyc. 1369; Homesteads, 21 Cyc. 448.

Res judicata see Judgments, 23 Cyc. 1106 *et seq.*, 1215 *et seq.*

50. See Judgments, 23 Cyc. 623.

agent.[51] The judgment must conform to and be warranted by the pleadings and proof.[52] The judgment in an action against an agent to compel an accounting may include sums received by him subsequent to the commencement of the action.[53]

H. Review.[54] Questions not urged in the lower court and not properly preserved for review will not be noticed on appeal.[55] Errors in the trial, to work a reversal upon review must have been prejudicial to the complaining party.[56]

51. Hoskins *v.* Morton, 77 S. W. 195, 25 Ky. L. Rep. 1089 (holding that in an action against an agent based on his wrongful act in taking to himself a conveyance of land which he had sold for his principal, on nonpayment by the vendee of the notes given for the purchase-price, where the agent conceded in his answer his principal's right to the land, and prayed merely for an accounting with his principal, judgment for a specific sum claimed against the principal, and a lien on the lands for that sum, it was not error to direct a conveyance of the land to the principal, and retain the questions of settlement of accounts and liens for further adjudication); Greenleaf *v.* Egan, 30 Minn. 316, 15 N. W. 254; Brown *v.* Mechanics', etc., Bank, 43 N. Y. App. Div. 173, 59 N. Y. Suppl. 354; Gilman *v.* Gilby Tp., 8 N. D. 627, 80 N. W. 889, 73 Am. St. Rep. 791; Vivian *v.* Scoble, 1 Manitoba 192.

Where an agent binds himself individually, a decree may be made against both agent and principal. McAlexander *v.* Lee, 3 A. K. Marsh. (Ky.) 483.

Decree in supplemental suit must conform to decree in original suit. Connor *v.* Reeves, 16 Ir. Ch. 398.

Where suit is brought against the agent of an undisclosed principal, and the agent discloses his principal, who is thereupon brought in as a party, and plaintiff establishes a case both against the agent and against the principal, he must elect which of the two he will ask judgment against. Pittsburg Plate Glass Co. *v.* Roquemore, (Tex. Civ. App. 1905) 88 S. W. 449.

52. *Iowa.*—Pneumatic Weigher Co. *v.* Burnquist, 128 Iowa 709, 105 N. W. 336, holding that where the petition in an action to recover the price of goods declared solely on a written contract of agency, and charged that defendant, in violation of the conditions of the contract, failed to procure a proper settlement from the purchaser before the goods were delivered, and failed to return the goods upon demand therefor by plaintiff, and neglected to properly store and care for them after their return by the purchaser, it did not authorize a judgment for the conversion of the goods.

Nebraska.— Westinghouse *v.* Tilden, 56 Nebr. 129, 76 N. W. 416, holding that where a contract between a manufacturer and a selling agent provided that on deferred payments commission should be paid only on payment of the notes representing such deferred payments, and in proportion as payment should be made, in an action for commissions, wherein the agent declared solely on the contract, and alleged no breach, except failure to pay, he could not recover judgment for commissions on unpaid notes, on the theory that the principal had been negligent in their collection.

New York.— Butler *v.* Livermore, 52 Barb. 570.

North Carolina.— Le Roy *v.* Jacobsky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977, holding that where an action against an agent proceeds in its pleadings and evidence on the theory that the agent, not having bound his principal, is personally liable on the contract, there can be no judgment on the theory of damages for a false assertion of authority.

Pennsylvania.— Ferrell *v.* Reed, 14 Pa. Super. Ct. 27, holding that where an issue was whether an express contract provided that defendant should pay plaintiff a certain commission on a sale, or a certain per cent of such sums as defendant might receive in payment at the times he received them, there was nothing to justify the recovery of a judgment on mutual account on a *quantum meruit*.

England.— Jolliffe *v.* Hector, 12 Sim. 398, 35 Eng. Ch. 337, 59 Eng. Reprint 1185.

53. Crosbie *v.* Leary, 6 Bosw. (N. Y.) 312.

54. See, generally, APPEAL AND ERROR, 2 Cyc. 474 *et seq.*

55. Ruppel *v.* Adrian Mfg. Co., 96 Mich. 455, 55 N. W. 995 (holding that where defendant, in trover, claimed on the trial that it had a lien on the property for lumber and machine work, and that plaintiff agreed that it might remain until the bill was paid, it cannot be heard to say, on appeal, that the detention of the property by its agent was without its authority); Rawls *v.* Wall, 5 Rich. Eq. (S. C.) 143. See Monnet *v.* Merz, 127 N. Y. 151, 27 N. E. 827.

Waiver of plea.— In an action on a contract made by an agent, against both the agent and his principal, the principal does not, by failure to object to the admission of the contract in evidence, waive a plea of *non est factum* based on the ground that the agent exceeded his authority in making the contract, the contract being admissible as against the agent. Tabet *v.* Powell, (Tex. Civ. App. 1903) 78 S. W. 997.

56. Swinnerton *v.* Argonaut Land, etc., Co., 112 Cal. 375, 41 Pac. 719 (holding that in an action by an agent for compensation, a finding of an express promise to pay for services rendered, unsupported by the evidence, is without prejudice where there is an implied promise to pay, and the value of the services is shown); Miller *v.* Root, 77 Iowa 545, 42 N. W. 502 (holding that where, in an action on notes, defendant alleged that the time of payment had been extended by an agreement entered into by him with a third

Ordinarily, upon a question as to the existence of an agency or as to the scope of an authority conferred, where there is any evidence which, if believed, is legally sufficient, or might reasonably tend to support the verdict or findings of fact, the appellate court will not in the absence of constitutional or statutory provisions disturb such verdict or findings,[57] and the same rule applies to a verdict or finding based upon evidence of ratification.[58]

person as agent of plaintiff, the payee, "with her knowledge and consent," while it was error, under the pleadings, to submit to the jury the question whether plaintiff had ratified the agreement after it was made, such error was not prejudicial to defendant, where there was some evidence of ratification); New York Smelting, etc., Co. *v.* Lieb, 56 N. Y. Super. Ct. 308, 4 N. Y. Suppl. 545 [*affirmed* in 121 N. Y. 674, 24 N. E. 1095]; Petteway *v.* McIntyre, 131 N. C. 432, 42 S. E. 851.

Harmless error as to submitting case to jury see *supra*, IV, F, 2, b, (II).

Error cured.— Error in the admission of evidence of an agent in proof of his authority is cured by proof of statements of his principal that he had such authority. Chase *v.* Nichols, 9 N. Y. Suppl. 878.

57. See APPEAL AND ERROR, 1 Cyc. 345–383. And see the following cases:

California.— Robinson *v.* Nevada Bank, 81 Cal. 106, 22 Pac. 478.

Connecticut.— National Shoe, etc., Bank's Appeal, 55 Conn. 469, 12 Atl. 646.

Illinois.— Stastney *v.* Marschall, 37 Ill. App. 137.

Indiana.—Horen *v.* Western Refrigerating Co., 16 Ind. App. 695, 43 N. E. 571, holding that the fact that there was evidence in the record, in an action for goods sold, supporting defendant's theory that he did not buy said goods on his individual credit, but that they were sold by plaintiff to defendant's alleged principal, and that defendant was acting as the manager of said principal, will not of itself justify the appellate court in reversing a judgment for plaintiff.

Iowa.— Renkin *v.* Frank, 88 Iowa 719, 54 N. W. 467.

Massachusetts.—James *v.* Lewis, 189 Mass. 134, 75 N. E. 217; America Tube Works *v.* Tucker, 185 Mass. 236, 70 N. E. 59; Ayer *v.* R. W. Bell Mfg. Co., 147 Mass. 46, 16 N. E. 754.

Michigan.— Wilhelm *v.* Voss, 118 Mich. 106, 76 N. W. 308; Booth *v.* Majestic Mfg. Co., 105 Mich. 562, 63 N. W. 524; Aultman, etc., Co. *v.* Dodson, 104 Mich. 507, 62 N. W. 708; Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912.

Minnesota.— Dennis *v.* Knight, 39 Minn. 149, 39 N. W. 304.

Missouri.— White City State Bank *v.* St. Joseph Stock Yards Bank, 90 Mo. App. 395; Poplar Wave Ice Co. *v.* Missouri Edison Electric Co., 86 Mo. App. 232.

New Jersey.— Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

New York.— New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503, 7 Abb. N. Cas. 334; Badger *v.* Cook, 117 N. Y. App. Div. 328, 101 N. Y. Suppl. 1067; Horowitz *v.* Hines, 47 Misc. 158, 93 N. Y. Suppl. 469; Coles *v.* International Bank Note Co., 100 N. Y. Suppl. 1060; Bank of North America *v.* Embury, 21 How. Pr. 14.

Pennsylvania.— Martin *v.* Zahnizer, 10 Pa. Super. Ct. 582; Still *v.* Bowers, 5 Phila. 363.

Texas.— McCabe *v.* Farrell, 34 Tex. Civ. App. 36, 77 S. W. 1049.

Utah.— Garner *v.* A. Fisher Brewing Co., 6 Utah 332, 23 Pac. 755.

Washington.— Sherlock *v.* Van Asselt, 34 Wash. 141, 75 Pac. 639.

Wisconsin.— Abrahams *v.* Freres, 129 Wis. 235, 107 N. W. 656; Cameron *v.* White, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493.

Canada.— McDermott *v.* Ireson, 38 U. C. Q. B. 1.

Findings of fact by a trial court are entitled to the same weight and presumption of correctness as the verdict of a jury, and when reasonable minds might differ as to whether an agency had been established, the higher court is not justified in disturbing the finding below even though it might think a different conclusion more proper. Booth *v.* Kessler, 62 Nebr. 704, 87 N. W. 532.

On accounting with an agent, where it appears that he acted in good faith, and that his reports to his principal were approved by the principal, a judgment allowing him the amount claimed therein for his services and advancements will not be disturbed. Warner *v.* Cuckow, 90 Wis. 291, 63 N. W. 238.

58. *Illinois.*— Erie, etc., Dispatch Co. *v.* Cecil, 112 Ill. 180; Cairo, etc., R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Goodell *v.* Woodruff, 20 Ill. 191; Burns *v.* Lane, 23 Ill. App. 504.

Maryland.— Reynolds *v.* Davison, 34 Md. 662.

Massachusetts.—American Minn., etc., Co. *v.* Converse, 175 Mass. 449, 56 N. E. 594.

Missouri.— Hesse *v.* Travelers' Protective Assoc., 72 Mo. App. 598.

New Jersey.—Strauss *v.* American Talcum Co., 63 N. J. L. 613, 44 Atl. 631.

New York.— Thomas Roberts Stevenson Co. *v.* Tucker, 14 Misc. 297, 35 N. Y. Suppl. 682; Meyers *v.* Brown-Cochran Co., 91 N. Y. Suppl. 72.

Texas.— Bexar Bldg., etc., Assoc. *v.* Newman, (Civ. App. 1893) 25 S. W. 461.

United States.— Oshkosh Nat. Bank *v.* Munger, 95 Fed. 87, 36 C. C. A. 659.

Where there is no statement of facts, a finding of the trial court as to whether there has been a ratification of an agent's acts is conclusive. Greer *v.* Marble Falls First Nat. Bank, (Tex. Civ. App. 1898) 47 S. W. 1045.